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 OPPOSING MOTION TO AFFIRM

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TABLE OF CONTENTS

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTRODUCTION

Appellees' motion only confirms that this Court should note probable jurisdiction and reverse by January 1, 2024.[1]

In 2012, a three-judge panel upheld the Benchmark Plan against racial gerrymandering challenges *not* based on compliance with the Voting Rights Act, but because the General Assembly affirmatively "disprove[d] that race was the predominant factor" and "demonstrat[ed] that [its] decisions adhered to traditional race-neutral principles." *Backus v. South Carolina*, 857 F. Supp. 2d 553, 560 (D.S.C. 2012). This Court summarily affirmed. 568 U.S. 801 (2012). Thus, Appellees—like the panel—falter at the outset by claiming that the Benchmark Plan "intentionally concentrated Black voters … to comply with … Section 5." Mot.33; *see* App.19a-20a, 27a.

In 2022, the General Assembly "start[ed] with the [Benchmark Plan]" and "chang[ed]" district lines "only as needed to comply with the one-person, one-vote mandate and to achieve other desired ends." *Cooper v. Harris*, 581 U.S. 285, 338 (2017) (Alito, J., concurring in judgment in part and dissenting in part). Those ends included "creat[ing] a stronger Republican tilt" in District 1. App.21a. The resulting Enacted Plan preserves more of the cores of every district (including 92.78% of District 1's core) than every other plan presented at trial; retains the Charleston County split; increases District 1's Republican vote share by 1.36 percentage points (from

[1] Appellees agree that expedited consideration is warranted. Mot.3 n.1.

53.03% to 54.39%); and results in a 0.16 percentage-point increase in District 1's black voting-age population (BVAP) (from 16.56% to 16.72%). J.S.3-4, 25, 28-29. These facts alone demonstrate that the panel legally erred in concluding that District 1 is a racial gerrymander.

Appellees never mention these facts or explain away the panel's myriad legal errors. Appellees also never explain *why* the General Assembly would use a (nonexistent) racial target as a *proxy* for politics when it could and did use election data *directly* for politics. J.S.5, 32; *see* States Br.4-5, 10-13. Neither do they justify the panel's view that purported racial *effects* prove a racial *target*. J.S.3-5, 14; *see* States Br.17-21. Rather than defending the reasoning below, Appellees resort to smoke-and-mirrors, demanding deference to nonexistent credibility determinations, misconstruing the record, citing defective analyses by putative experts who admittedly did not opine on the General Assembly's intent, and invoking evidence that even the panel "did not rely upon." *Easley v. Cromartie* (*Cromartie II*), 532 U.S. 234, 250 (2001).

The Court should deny Appellees' request for summary affirmance. Appellees have not made the demanding showing that the panel's decision is so "clearly correct" that "oral argument and further briefing would be a waste of time." Stern & Gressman, *Supreme Court Practice* chs. 4.27(A), 5.18 (11th ed. 2019); *see Cox v. Larios*, 542 U.S. 947, 951 (2004) (Scalia, J., dissenting). Appellees identify *no case in the past quarter century* that summarily affirmed a predominance finding, *see Backus*, 568 U.S. 801 (affirming in state's favor); *Fletcher v. Lamone*, 567 U.S. 930 (2012) (same), and *no case at all* that did

so absent extensive "direct" evidence of racial predominance, *Meadows v. Moon*, 952 F. Supp. 1141, 1146-47 (E.D. Va.), *aff'd*, 521 U.S. 1113 (1997); *Diaz v. Silver*, 978 F. Supp. 96, 117-19 (E.D.N.Y.), *aff'd*, 522 U.S. 801 (1997). *See* Mot.3. If anything, the panel's obvious errors warrant summary reversal. J.S.13-37. At minimum, the Court should note probable jurisdiction, set this case for argument, and reverse.

ARGUMENT

I. The Panel Failed To Apply The Presumption Of Good Faith.

Each of the panel's failures to apply the presumption of "good faith," *Miller v. Johnson*, 515 U.S. 900, 915 (1995), analyze District 1 "as a whole," *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 192 (2017), and examine the intent of the General Assembly "as a whole," *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349-50 (2021), independently warrants reversal, *Abbott v. Perez*, 138 S. Ct. 2305, 2326 (2018); J.S.14-17.

Appellees acknowledge "the panel did not use the term 'good faith,'" but nonetheless contend that it must have presumed good faith because it "rejected [their] racial gerrymandering challenges outside of Charleston County." Mot.32-33. But those rejections reflect the weakness of Appellees' case, not any adherence to the presumption. Indeed, Appellees relied on the same inadequate putative expert evidence to support *all* their claims. This Court should not affirm just because a broken clock is right twice a day.

Moreover, Appellees are wrong that the presumption "only forbids flipping the evidentiary

burden," Mot.33 (cleaned up), because *any* lowering of a plaintiff's burden is legal error, *see Abbott,* 138 S. Ct. at 2324-25. Regardless, the panel *did* flip the burden by disregarding direct evidence of partisan motivation and equating the purported racial effect of partisan line-drawing with racial predominance. J.S.13-35; States Br.9-10. That was not a failure to use "magic words," Mot.32, but to follow the Court's precedents, J.S.14-17.

Appellees next argue that the panel analyzed District 1 holistically because it rejected challenges in Jasper and Dorchester Counties. Mot.30-31. But upholding two of the three challenged counties in District 1 underscores that District 1 "as a whole" was not gerrymandered. *Bethune-Hill*, 580 U.S. at 192. And the panel nowhere mentioned other facts demonstrating that politics more readily explains District 1 as a whole than race, such as that the change in District 1's political composition dwarfs the change in its BVAP. J.S.17-25, 31-35.

Finally, Appellees suggest that, instead of analyzing the intent of a legislature holistically, a factfinder can just consider the intent of some subset of legislators and staff. Mot.31. But plaintiffs must "prove that the … *Legislature* acted in bad faith and engaged in intentional discrimination," *Abbott*, 138 S. Ct. at 2327 (emphasis added), "as a whole," *Brnovich*, 141 S. Ct. at 2349-50. And courts avoid invalidating a statute "on the basis of what fewer than a handful of [legislators] said about it." *Hunter v. Underwood*, 471 U.S. 222, 228 (1985).

Anyway, both cases Appellees cite—*Cooper* and *Alabama Legislature Black Caucus v. Alabama*, 575

U.S. 254 (2015)—involved direct evidence, such as legislator admissions, that race predominated. No such direct evidence exists here. Rather, "[t]he only direct evidence" demonstrated that the General Assembly's "intent was" partisan and "legitimate." *Abbott*, 138 S. Ct. at 2327; J.S.9-11, 21. The panel ignored that evidence, and the Court should reverse.

II. The Panel Disregarded The Alternative-Map Requirement.

The panel further erred by relieving Appellees of the alternative-map requirement. J.S.17-20.

Appellees contend that *Cooper* disposed of that requirement. Mot.33-34. Not so. The *Cooper* majority did not require an alternative map because that case was "most unlike *Cromartie II*." 581 U.S. at 322. Indeed, unlike *Cromartie II* and this case, *Cooper* involved direct evidence of racial predominance: two legislators "publicly stated that racial considerations lay behind District 12's augmented BVAP." *Id.* at 310. But the *Cooper* majority reiterated that, in cases like this one with "meager direct evidence of a racial gerrymander," "only" an alternative plan can "carry the day" and satisfy the plaintiff's burden. *Id.* at 322. And the *Cooper* dissenters (correctly) stated that the alternative-map requirement abides in all but the most "exceptional" cases. *Id.* at 335 (Alito, J., concurring in judgment in part and dissenting in part).

Appellees newly claim they presented alternative plans that "maintained CD1's Republican advantage without artificially freezing its BVAP at 17%." Mot.34; *id.* at 17 n.11. Even if true, that would demonstrate the panel's clear error in concluding that

the General Assembly "need[ed]" to limit District 1's BVAP to 17% to achieve its partisan objective. App.23a; States Br.4 n.2. Anyway, none of these belatedly identified plans satisfies the *Cromartie II/Cooper* standard.

First, Appellees vaguely reference "four" plans that allegedly yield Republican-leaning District 1s "with BVAPs above 21.1%" (apparently the Senate Amendment 2a, League of Women Voters, Harrison, and Roberts plans). Mot.17 n.11 (citing Supp.App.141a-143a; App.526a-527a). But Appellees misstate these plans' political effects by citing 2018 state-office-election results. App.526a-527a. *All* of these plans make District 1 majority-*Democratic* on the 2020 presidential election results, which are what Mr. Roberts and the General Assembly considered. App.525a; App.94a. And these plans fail to preserve district cores, maintain communities of interest, or protect incumbents as well as the Enacted Plan. App.453a-459a, 479a-485a; Supp.App.141a-143a.

Second, Appellees point to a different map drawn by Mr. Roberts, Mot.17 n.11, that made *all 7* districts majority-Republican, Supp.App.302a. That map dismantled District 6 and drew Congressman Clyburn out of office, in contravention of Senator Campsen's goal to protect all incumbents and keep "a Democrat and a Republican" representing Charleston County. App.371a.

These plans do not "achieve[]" the General Assembly's "political objectives" nor are as "consistent with" traditional principles as the Enacted Plan. *Cromartie II*, 532 U.S. at 258. They cannot insulate the panel's erroneous decision from reversal.

III. The Panel Failed To Disentangle Race From Politics.

The panel also reversibly erred by shirking its "formidable task" and never "disentangl[ing] race from politics." *Cooper*, 581 U.S. at 308; J.S.20-25.

Appellees bizarrely suggest the General Assembly lacked a partisan objective in the Enacted Plan. Mot.16-17, 26. But even the panel acknowledged the General Assembly "sought to create a stronger Republican tilt" in District 1, App.21a, a finding Appellees elsewhere embrace, *see* Mot.26.

Moreover, Appellees misrepresent the record on partisan motivation. True, Senator Campsen denied that the Enacted Plan violates any legal proscription against "partisan gerrymandering," Mot.17, but he confirmed that "[p]olitics" were at play in District 1 and Charleston County, App.342a-343a. Senator Rankin, meanwhile, was never present when the maps were drawn, App.87a, 208a; he said only that maintaining the 6-1 partisan split was not a consideration "for [him]" but that otherwise "politics is a consideration," Supp.App.424a. Nor are Appellees' citations to staffers' testimony convincing, since the staffers confirmed that politics drove the Enacted Plan and District 1 in testimony Appellees omit. *See* Dkt.462-3 at 139:2-140:17 (Fiffick); Dkt.462-4 at 142:17-147:12, 148:21-149:11, 193:13-25, 212:6-214:23, 266:11-19 (John); Dkt.462-9 at 339:16-340:3, 392:10-393:3, 399:21-23 (Terreni); Dkt.462-10 at 203:13-204:9, 231:13-232:14 (Benson).

Appellees never address the fatal flaws Appellants identified in the analyses of the two putative experts the panel invoked—Drs. Imai and Ragusa. Mot.15-19,

22, 27. Appellees thus concede that Dr. Imai did not even *consider* politics, that both witnesses did not control for several important traditional principles, and that Dr. Ragusa committed the same error as the expert this Court rejected in *Cromartie II*. J.S.23-24; *see* App.409a-410a; States Br.14-17, 20-21. The Court should reverse.

IV. The Panel Misconstrued The Predominance Standard.

The panel also improperly lowered Appellees' demanding burden to prove the General Assembly subordinated traditional criteria to race. J.S.25-31. Appellees' various assertions that the Enacted Plan violates traditional principles are wrong.

First, Appellees note that District 1 is "non-contiguous by land." Mot.24. But contiguity by water is permissible in South Carolina. App.425a, 541a; *Sonoco Prod. Co. v. S.C. Dep't of Revenue*, 378 S.C. 385, 392-94 (2008). In fact, Charleston County contains islands—so *every* version of District 1, including Appellees' versions unifying Charleston County, are "non-contiguous by land."

Second, Appellees claim that the Enacted Plan "fails to respect communities of interest." Mot.24. Thus, like the panel, Appellees ignore that preserving district cores is "the clearest expression" possible of respect for "communities of interest" and that the Plan outperforms all alternatives on this principle. *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 649 (D.S.C. 2002); J.S.25-26.

Third, Appellees contend the Enacted Plan "splits 10 counties," including "some" with relatively high BVAPs. Mot.24. Six of those splits do not involve

District 1. App.447a-448a. Moreover, nine of those counties were split in the constitutional Benchmark Plan, App.432a-433a—and the split of the tenth, Jasper, does not evince racial predominance, App.34a-35a.

Finally, Appellees criticize the Enacted Plan for "mov[ing] more than double the number of people necessary to address CD1's population imbalance." Mot.25. Appellees' proposed plans, however, move even *more* people in and out of District 1 than the Enacted Plan. *Compare* 439a-446a, *with* 453a-459a, 461a-467a, 468a-477a, 479a-485a. The Court should reverse.

V. The Panel Clearly Erred In Finding Racial Predominance.

The aforementioned legal errors aside, the record—reviewed "extensive[ly]" or otherwise—leaves "the definite and firm conviction" that the panel erred in finding predominance. *Cromartie II*, 532 U.S. at 243; J.S.31-35.

A. Leaning heavily on the standard of review, Appellees argue that any error was not sufficiently clear to warrant reversal. Mot.19-29. But a "clear error" is shown by "a degree of certainty" that Appellees failed to prove predominance "under the applicable standard of proof"—here, an undeniably demanding measure. *Concrete Pipe & Prod. of Cal. v. Constr. Laborers Pension Tr. for S. Cal.*, 508 U.S. 602, 622-23 (1993); *see Baumgartner v. United States*, 322 U.S. 665, 671 (1944).

Indeed, "extensive" review applies here because this Court is "the only court of review" and the "key evidence consisted primarily of documents and expert

testimony," with credibility evaluations playing no "role." *Cromartie II*, 532 U.S. at 243; *see infra* at 10-11. Even a cursory review of the record exposes the clear error in the panel's regrettable impugning of the experienced, non-partisan Mr. Roberts and the General Assembly. J.S.31-35.

B. Unable to defend the panel's decision on its own terms, *see supra* Parts I-IV, Appellees point to an array of evidence the panel "did not rely upon," *Cromartie II*, 532 U.S. at 250. Such evidence "cannot help" Appellees because the decision below must stand or fall on the reasoning the panel actually employed, *id.*, not post hoc efforts to "search the record" and "supply findings which the trial court failed to make," *Kelley v. Everglades Drainage Dist.*, 319 U.S. 415, 421-22 (1943); *see City of Austin v. Reagan Nat'l Advert. of Austin*, 142 S. Ct. 1464, 1476 (2022).

Anyway, those efforts fail. *First*, Appellees note that the General Assembly and staff considered race. Mot.7-9, 23. But even Appellees concede there is a difference between "*consider[ing]*" race and race "*predominat[ing]*." *Id.* at 29 (emphasis original).

Yet they ignore that concession when it suits their purposes, repeatedly deploying evidence that individuals were *aware* of race to assert that they predominantly *used* race to draw lines. *Id.* at 7-9, 23. Appellees' toggling between terms like "considered," "relied on," and "aware of" is a shell game with no ball. *See* J.S.35.

Second, Appellees contend the panel's decision rests on "credibility" determinations that deserve "deference." Mot.29. But the panel never made *any*

witness-credibility determinations. It did not, for example, determine that Mr. Roberts was a non-"credible" witness based on "cues" picked up while "listen[ing]" to his testimony, *Cooper*, 581 U.S. at 309; it simply (and baselessly) deemed his explanation "[im]plausible" because it thought other evidence showed he "consider[ed] race." App.29a-30a. Weighing evidence and rejecting Defendants' "contention[s]" in that way, Mot.7, 23, is not a witness-credibility determination "to which [this] [C]ourt must defer," *Brumfield v. Cain*, 576 U.S. 305, 323 (2015).

Third, Appellees cite two putative experts' analyses that even the panel did not credit. Appellees point to Dr. Liu's analysis but overlook that his dataset was flawed. *See* Mot.18-19, 27; Tr.601:11-603:17. For example, he opined the Enacted Plan split 91 VTDs, Supp.App.90a, when it actually split only 13, App.447a. He also failed to control for *nearly every* traditional districting principle. Tr.606:11-614:1.

Appellees also invoke Dr. Duchin's testimony, Mot.10, 22, 26, without mentioning her admitted failure to control for politics or numerous traditional criteria, Tr.334:6-24, 405:22-07:20-411:2, 412:17-19. It is no surprise that the panel declined to rely on her assertion that the Enacted Plan reconfigured Districts 1 and 6 in "scattered chunks and shards" that did not "heal[] key splits." Mot.10. As her own color-coded map shows, the blue "chunks and shards" represent areas moved to *reunite* Beaufort and Berkeley Counties, *id.*, and other changes she criticized conformed district lines to county boundaries, *id.* at 12-13. She even admitted considering only a few cherry-picked communities of interest that "definitely" were not "the only [ones] identified by the

public testimony" or considered by the General Assembly. Tr.412:17-19, 414:1-415:2. The permissible legislative decision to unify certain political subdivisions and communities rather than Dr. Duchin's handpicked ones was not racial gerrymandering.

Finally, the record is so deficient that Appellees invoke "facts" that are incorrect or irrelevant. Mr. Roberts never conceded that he drew the line between Districts 1 and 6 to "follow the migration of African Americans from the city of Charleston." Mot.8. The presiding judge made that assertion, to which Mr. Roberts responded: "I haven't studied the migration." App.258a. Nor did Mr. Roberts testify that map-drawing software displayed BVAP data on the screen at all times. Mot.23. He instead explained that users could see BVAP data only by scrolling "down" or "over"; "otherwise, it's not displayed on the screen." App.208a. And Appellees' repeated references to District 6, including their cartoon of a "two-headed dragon," *e.g.*, Mot.11-13, are irrelevant because Appellees do not challenge District 6, J.S.12; Mot.4. The Court should reverse the panel's clearly erroneous decision.

VI. The Panel Failed To Enforce The Discriminatory Effect Element.

Appellees do not cure the panel's failure to enforce the discriminatory effect element of their intentional discrimination claim. J.S.35-37.

Trying to cobble together the required finding, Appellees cite the panel's observations that the Enacted Plan moved some African-American voters out of District 1 and avoided making it a "toss up

district." Mot.37. Those observations, however, do not assess how the Plan affected similarly situated *white* Democratic voters and thus are insufficient. J.S.35-36. Appellees also gesture to various "record evidence" the panel did not rely on, Mot.37-38, once again misguidedly seeking to make the panel's findings for it, *supra* at 10.

In all events, Appellees at most contend that "the Enacted Plan treated Black voters differently than … White voters … of the same political party." Mot.38. Not true. The Plan treated all Democratic voters the same and all Republican voters the same—regardless of race. J.S.35-37. Anyway, Appellees must show that the Plan *dilutes the votes* of African-American Democrats compared to white Democrats. J.S.36-37. Appellees do not even try, nor could they, because it is undisputed that the Plan likely disadvantages *just as many or more* white Democrats as African-American Democrats in District 1. J.S.37.

CONCLUSION

The Court should note probable jurisdiction and reverse.

April 2023

Respectfully submitted,

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