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

MOTION TO AFFIRM

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QUESTIONS PRESENTED

1. Whether this Court should affirm the unanimous finding of the district court that South Carolina Congressional District 1 violates the Equal Protection Clause of the Fourteenth Amendment because it is an unlawful racial gerrymander?

2. Whether this Court should affirm the unanimous finding of the district court that South Carolina Congressional District 1 violates the Fourteenth and Fifteenth Amendments because it was designed with a racially discriminatory purpose?

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INTRODUCTION

After an eight-day trial, the three-judge panel unanimously found that one of South Carolina's 2022 congressional districts was a racial gerrymander and designed with a discriminatory purpose. The record supports both findings.

The 2022 South Carolina congressional map ("Enacted Plan") imposes a racial gerrymander in Congressional District ("CD") 1. The panel correctly found that mapmakers adopted a racial target of 17% Black voting-age-population ("BVAP") for CD1, and achieved it by unnecessarily moving tens of thousands of Black voters and departing from traditional districting principles.

The Enacted Plan moves 62% of Black Charlestonians (almost 30,000 people) from CD1 into CD6. It wrenches the whole Charleston peninsula—which Defendants' expert described as CD1's historical "anchor"—out of CD1 and into CD6, causing the latter to stretch 125 miles from the Charleston Battery to the Columbia midlands. CD1 is non-contiguous: it is not possible to drive from one end of the district to the other without crossing CD6. It is a textbook example of unlawfully "plac[ing] a significant number of voters within or without a particular district" predominantly on the basis of race. *Ala. Legis. Black Caucus v. Alabama* (*ALBC*), 575 U.S. 254, 260, 267, 272 (2015).

The panel correctly applied this Court's precedent. Much as in *Cooper v. Harris*, 581 U.S. 285 (2017), Defendants removed Black Charlestonians from CD1 in stark and disproportionate numbers to cap its BVAP at 17%. Ultimately, the Enacted Plan moved almost 200,000 people in and out of CD1—more than double the number needed to satisfy one-person, one-vote. Defendants *added* over 50,000 people to CD1, the most *overpopulated*

district, only to then move thousands of Black residents out of the district. They made these dramatic changes to lock CD1's BVAP percentage in place, even though its Black voting age population *increased* over the last 10 years.

The evidence also supports the finding that the Legislature subordinated traditional redistricting principles —like respect for political boundaries and communities of interest—in CD1's design, and that race predominated instead. The State's key mapmaker admitted that he abandoned traditional principles to move over 30,000 Black Charleston County voters from CD1 to CD6. And the panel correctly found that the "racial composition of a [precinct] was a stronger predictor of whether it was removed from [CD1] than its partisan composition." App.32a.

Defendants' claim that they did not gerrymander CD1, J.S.4, or alternatively, that they did so for political gain, J.S.9-11, does not merit plenary consideration. Whether partisanship was the Legislature's ultimate goal (though Defendants disclaimed it at the time) or a *post-hoc* rationale, the panel correctly found that race was the gerrymander's primary vehicle. That predominant reliance on race is impermissible even if mapmakers used race as a proxy for politics. *See Cooper*, 581 U.S. at 308 n.7.

Defendants mischaracterize the record and distort precedent to manufacture errors, all while ignoring key cases like *ALBC* and *Shaw v. Reno*, 509 U.S. 630 (1993). Their core assertion is that the panel miscredited Plaintiffs' witnesses over theirs. But they have shown no error, let alone reversible clear error. This Court gives "singular deference to a trial court's judgments about the credibility of witnesses" with good reason. *Cooper*, 581 U.S. at 309. The "various cues that 'bear so heavily on the listener's understanding of and belief in what is said' are

lost" on appeal, "sifting through a paper record." *Id.* (quoting *Anderson v. Bessemer City*, 470 U.S. 564, 575 (1985)).

Defendants also claim that the panel failed to presume the Legislature's good faith. But applying the same standards it did for CD1, the panel ruled *for* Defendants on two of the three challenged districts, finding that Plaintiffs' evidence failed to overcome the same presumption. App.36a-41a.

Because the panel correctly applied settled standards, the Court should summarily affirm. The panel had ample evidence to support its findings and conclusions. That includes direct and circumstantial proof of race-based intent by the Enacted Plan's legislative architect and mapmaker—the same kind this Court has repeatedly relied on in the past. *E.g.*, *Miller v. Johnson*, 515 U.S. 900, 917 (1995); *Cooper*, 581 U.S. at 315-16, 322. In similar circumstances, this Court routinely summarily affirms three-judge panel decisions. *E.g.*, *Backus v. South Carolina*, 568 U.S. 801 (2012); *Fletcher v. Lamone*, 567 U.S. 930 (2012); *Silver v. Diaz*, 522 U.S. 801 (1997); *Meadows v. Moon*, 521 U.S. 1113 (1997). It should do so again here.[1]

The panel also correctly ruled that CD1 was enacted with a racially discriminatory purpose. The Enacted Plan intentionally discriminates against thousands of Black Charlestonians, attempting to dilute their voting power by "bleaching" them out of CD1 and unnecessarily separating them from their neighbors based on their race. App.27a. This provides an independent basis to affirm. But the Court need not reach that ruling given the clear racial gerrymandering violation.

[1] If the Court notes probable jurisdiction, Plaintiffs join Defendants' request for expedited consideration. J.S.5.

STATEMENT OF THE CASE

A. Proceedings Below

The decision below followed an eight-day trial, during which the panel heard testimony from 24 witnesses, including six experts, and received 652 exhibits into evidence. Plaintiffs challenged three of South Carolina's seven congressional districts—CD1, CD2, and CD5, which all border CD6—both as racial gerrymanders and because they were adopted with racially discriminatory intent.

The panel held that Plaintiffs failed to prove violations of the Equal Protection Clause with respect to CD2 and CD5. App.42a-43a.

But the panel unanimously found that race was "the predominant motivating factor in the General Assembly's design of [CD1] and that traditional districting principles were subordinated to race." App.33a-34a. This conclusion rests on detailed factual findings, including:

- Defendants established a racial "target of 17% African American population for [CD1]." App.22a-25a. This racial target was influenced by legislators' assumptions about racial voting patterns.[2]
- In a departure from the 2011 map, Defendants decided to include all of Berkeley and Beaufort counties, as well as much of Dorchester County, in CD1. Collectively, these populations had a BVAP of 20.3% and would have increased CD1's BVAP beyond 17%. App.22a,24a-25a.
- To maintain the 17% target, and notwithstanding their publicly professed commitment to retaining CD1's core from the 2011 map, App.23a, the Legislature decided "to reduce the African American

[2] As explained *infra*, however, key legislators specifically disclaimed engaging in partisan gerrymandering.

population of the Charleston County portion of the district." App.22a-25a.

- Charleston County has a countywide BVAP of 23.17%.[3] Reducing CD1's Black resident population in Charleston to meet the 17% BVAP target "was no easy task" and "impossible without the gerrymandering of the African American population." App.24a-26a. Based on demographic changes, CD1's BVAP would be expected to increase in any plan that did not consider race to meet a specific target. App.25a; *cf.* App.532a.
- After the 2020 census, CD1 had a "population excess of 87,669," but "rather than simply shed the excess population, the [Enacted Plan] moved more than 140,000 residents out of [CD1]." App.29a. "[D]espite all of those changes, [the Enacted Plan] produced an identical" CD1 BVAP as in the 2011 plan—17%. *Id.* The panel found that "was more than a coincidence and was accomplished only by [a] stark racial gerrymander." *Id.*
- While the State's lead mapmaker testified that he generally sought to create a "least change" plan that closely hewed to the State's 2011 map, he "abandoned" this approach in CD1, and instead made "dramatic changes" in Charleston County. App.25a. This "made a mockery of the traditional redistricting principle of constituent consistency." App.26a-28a.
- To hit the 17% target, fully "79% of Charleston County's African American population was placed into [CD6]." *Id.* This cut "the percentage of African Americans in Charleston County in [CD1]" nearly in half, "from 19.8% … to 10.3%." *Id.*

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[3] Charleston County has the second highest BVAP of any county in the entire state, second only to Richland County. ECF 499 ¶81 & tbl.

- There was "striking evidence that voters were 'sort[ed] … on the basis of race' within Charleston County," including moving "62% (30,243 out of the 48,706) of the African American residents formerly assigned to [CD1] to [CD6]." App.25a-26a,29a-30a.
- The Enacted Plan moved "over 11,300 African Americans from North Charleston and nearly 17,000 from the St. Andrews area,"[4] creating, as the State's mapmaker acknowledged, "tremendous disparity" in the allocation of Black and White residents. App.25a.
- In Charleston, Defendants eschewed the redistricting principle of making counties whole (as mapmakers emphasized elsewhere, particularly in areas with significant White populations). App.25a-26a. Defendants did not just keep Charleston County split, they redrew lines to follow the migration of Black residents from the city of Charleston. App.19a-20a,26a-27a; Tr.1554:18-1559:8. While the 2011 plan split Black Charleston County residents approximately 50/50 between CD6 and CD1, the Enacted Plan deepened the racial divide, turning the 50/50 split into an 80/20 split, all to maintain CD1's 17% racial target. App.26a-27a.[5]
- Plaintiffs' experts offered "further support [to] find[] that race predominated over all other factors in the design of [CD1]," including partisanship. App.30a-32a. They showed that for Charleston voters, "the racial composition of a [precinct] was a stronger predictor of whether it was removed from [CD1] than its partisan composition." *Id.* By contrast, the panel

[4] The City of North Charleston and West Ashley community in Charleston County have significant Black populations. *See, e.g.*, Tr.1551:18-21, 1552:16-1553:3, 1553:16-25, 1558:20-1559:2; App.26a.

[5] Outside of Charleston County, the panel found race did not predominate in the movement of nine precincts in Jasper and Dorchester counties. App.34a-36a.

found Defendants' only expert "unpersuasive." App.33a.

On the voluminous record that included evidence that the cracking of Black communities in CD1 reduced their electoral opportunity, the panel also found that CD1 was designed with racially discriminatory intent, finding that the Legislature intended to injure Black voters by sorting them across districts based on their race. App.45a-46a.

B. Evidence Presented at Trial

The panel's findings were well supported by the trial record.

1. The Legislative Defendants and Their Staff Extensively Considered Race When Drawing and Evaluating the Enacted Plan.

While Defendants contend that CD1 was drawn without considering race, the panel properly found their evidence on this point not credible. App.23a-24a,29a-30a. The record supports those findings.

Both the Enacted Plan's primary sponsor, Senator George Campsen, and lead mapmaker Will Roberts, admitted that they considered race. Roberts testified that he "definitely" was cognizant of BVAP data on mapping software "as [he was] moving district lines in real time." Tr.1502:23-1503:9. And Campsen testified that he looked at racial data before advocating and voting for the Enacted Plan. Tr.1892:5-12. Campsen also referred to BVAP numbers during Senate debate. Supp.App.261a-62a.

These admissions were corroborated by eight additional key legislators and staff involved in drawing the Enacted Plan, all of whom acknowledged considering racial data in drawing and evaluating maps, including:

- Charles Terreni, Senate outside counsel: "[W]e look at the racial impact of different permutations or different plans when we draw …." Supp.App.429a-30a.

- Terreni: Mapmakers "were certainly aware of [BVAP] as [the reports generated] would have produced it." They "monitored the BVAP of different plans." Supp.App.431a-432a.
- Paula Benson, Senate counsel: BVAP "certainly was considered in looking at" draft maps. Supp.App.391a.
- Breeden John, Senate counsel and mapmaker: Campsen "asked us to take a closer look at … who was actually being moved in the Charleston area … in terms of race." Supp.App.398a-99a.[6]

Campsen acknowledged that staff had access to racial data and testified he "assume[d]" [they] would be "looking at and having discussions about BVAP." Tr.1892:5-7. Indeed, staff prepared racial demographic data for every map considered.[7]

At trial, Campsen and Roberts demonstrated extraordinary familiarity with Charleston's racial demographics—in Roberts' case, down to the precinct level. Roberts has over 20 years of South Carolina mapping experience and testified that he was "extremely familiar" with the State's demography; had "always looked at race data" in his career; and "always looked at BVAP data after maps were prepared." Tr.1359:1-4, 1499:20-23, 1501:15-23, 1528:1-7, 1550:12-1552:25, 1553:16-20. He admitted that the "dramatic changes" in Charleston County included drawing the CD1/6 line to "follow the migration of African Americans from the city of Charleston." Tr.1554:18-1559:8.[8]

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[6] Five additional witnesses similarly acknowledged that race was considered and relied upon. Supp.App.402a,404a,407a,410a-413a,427a.

[7] App.428a-30a,450a-52a; Supp.App.303a-05a,307a-10a,312a-14a,316a-344a.

[8] Roberts' testimony that he also relied on privately sourced political data from the 2020 presidential general election, Tr.1380:2-7,

Campsen, a lifelong Charlestonian, knew Charleston County's "racial makeup," and "where the concentrations of Black voters are." Tr.1816:15-1817:6, 1883:19-22, 1884:3-6.

Defendants offered no legitimate justification for reliance on race. Defendants disclaimed conducting any Voting Rights Act ("VRA") analysis, and did "not assert[] at trial, a defense that alleged use of race … was 'reasonably necessary' to comply with the [VRA]." ECF 371 at 1; Tr.1356:21-1357:2.

2. The Enacted Plan Racially Gerrymandered CD1.

The evidence likewise showed that Defendants extensively considered race in drawing the 2022 map to avoid increasing CD1's BVAP. They disregarded traditional redistricting principles to meet that goal.

2020 census data revealed only minor population deviations in most of the State's congressional districts, but CD1 was overpopulated by 87,689 people. Supp.App.303a. Meanwhile, CD6 was *under*populated by 84,741 residents. *Id.* To correct this population imbalance, Defendants could have just moved about 80,000 voters from CD1 to CD6. Supp.App.280a. Instead, Defendants removed an *additional* 80,469 voters from the already-*under*populated CD6—53,799 of whom were moved to the *over*populated CD1, with the rest dispersed between CD2, CD5, and CD7. Supp.App.368a. They then

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does not negate that he more heavily relied on racial data. Plaintiffs' experts testified that results from one high-turnout presidential election do not reliably predict future performance in congressional districts. Tr.567:20-568:11, 349:2-11, 446:1-3, 568:2-18. Roberts acknowledged the data was limited and conflicted with South Carolina Election Commission data, Tr.1537:3-20, and witnesses criticized Roberts' private data as "badly skewed and almost worthless." Supp.App.414a-22a.

moved 140,489 voters from CD1 to CD6, disproportionately moving Black voters. App.439a-45a.

Defendants' effort to put all of largely White, Republican Beaufort and Berkeley counties in CD1 meant that the Enacted Plan's reconfiguring of Dorchester and Charleston counties in CD1 occurred in "scattered chunks and shards" that were "not aimed at healing key splits of cities and communities," Supp.App.155a, but at surgically removing Black Charlestonians from CD1 to keep its BVAP percentage stable. Depicted below, blue areas were moved from CD6 to CD1. Purple areas are those moved into CD6.

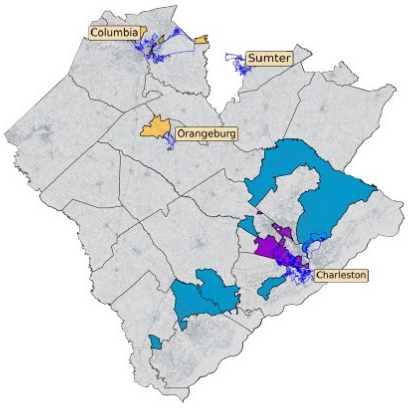


Figure 3: Terrain moved in and out of CD 6. Areas are colored in terms of their district reassignment. Yellow areas were moved from CD 6 to CD 2; blue was moved from CD 6 to CD 1, and purple areas were moved into CD 6 from the neighboring districts.

Supp.App.155a.

After moving nearly 130,000 people more than necessary to equalize population between the districts, CD1's BVAP remained virtually unchanged—inching from 17.3% to 17.4% despite "pronounced BCVAP growth" in Charleston County over the past decade.[9] App.532a; Supp.App.206a; *see also* App.25a (noting Charleston

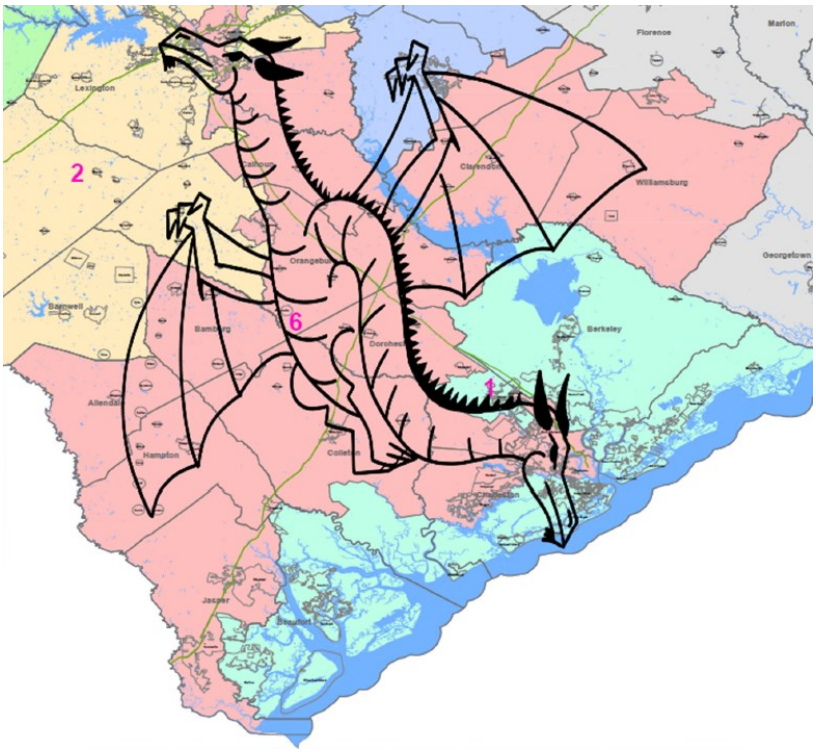
[9] BCVAP refers to "Black citizen voting-age population," as compared to BVAP.

County BVAP in the 2020 census was 23.17%). The only way for BVAP to remain this constant—given demographic changes and the mapmakers' effort to fit Beaufort and Berkeley counties into CD1—was to intentionally and disproportionately move Black Charleston County residents out of CD1. App.24a-25a.

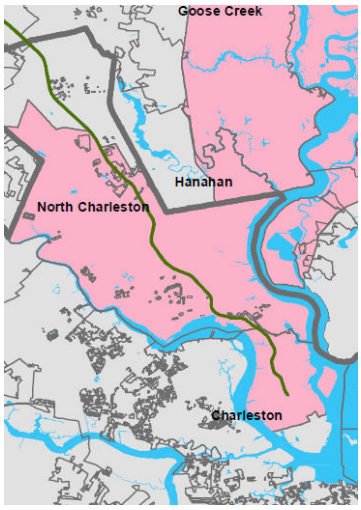
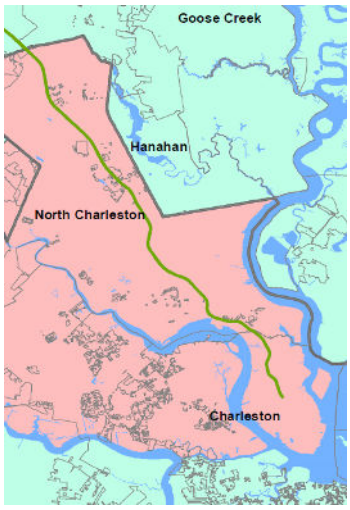
In moving so many Black Charlestonians from CD1 to CD6, mapmakers disregarded traditional redistricting principles followed elsewhere in the State. Eight of the Enacted Plan's 10 county splits follow the CD6 line where many Black communities are located. Tr.972:23-973:8, 976:1-6, 1689:18-1690:6. Similarly, 14 of the 20 municipal splits and 11 of the 13 precinct splits are on CD6's border. Supp.App.291a-93a,295a-96a; Tr.988:14-989:4. These splits were concentrated in communities with significant Black populations, with CD1's precincts split in a "clear" and "particularly striking" "pattern," with "the higher Black population [portion] … ending up in CD6." Supp.App.115a-16a; Tr.310:6-311:13, 975:2-976:6, 986:6-17.

Nor does the Enacted Plan respect important communities of interest. Legislators heard overwhelming public testimony that Charleston County should be made whole as part of CD1. Supp.App.138a-40a,155a-57a,212a-13a; Tr.255:5-256:25, 690:20-691:12, 757:12, 758:21, 790:13-24.

Yet the mapmakers did nothing of the sort. Trial witnesses described the new lines around Charleston County as resembling a "funky boot print" and a two-headed dragon. Tr.969:12-15, 972:9-20.



ECF 458-1 at 13. While mapmakers redrew lines all along the CD1/6 border, the most dramatic reconfigurations came in the Charleston area.

ECF 323-1 at 2 (2011 Congressional Map) (Gray = CD1; Pink = CD6)	Supp.App.306a (Sen. Am. 1, which became the Enacted Plan) (Green = CD1; Pink = CD6)
	

Roberts admitted that in addressing Charleston County, he departed from the approach of making minimal changes to the 2011 map that he applied elsewhere and instead made "dramatic" ones. Tr.1556:6-1557:16. CD6 no longer approaches the Charleston peninsula from the northeast through Berkeley County; the reconfigured CD6 sweeps in from the west, picking up much larger Black communities, such as in St. Andrews and West Ashley. ECF 500-1; App.26a.

The mapmakers also departed from maintaining contiguity. For the first time in South Carolina's history, the Enacted Plan excised the entire Charleston Peninsula from CD1. CD1 is a non-contiguous district; the district line severs all four bridges to the peninsula such that one

cannot travel from one end of Charleston County to the other without driving through CD6:

ECF 458-1 at 10; Tr.878:23-879:12, 969:16-970:6, 972:5-9.

The CD1/6 boundary "cut through Charleston and North Charleston, and it does so especially" through an area of Charleston that is "heavily Black." Tr.312:11-17; *see also* Supp.App.197a-98a.

In total, the Enacted Plan moved 62% of CD1's Black Charleston County residents to CD6, dramatically changing the racial composition of each district in Charleston County in the process. App.25a-26a; ECF 500-1. While Charleston County's Black population had been previously split evenly between CD1 and CD6, the Enacted Plan placed 80% of Charleston's Black population in CD6 and only 20% in CD1, even though the Black population is spread throughout the County. Tr.280:1-2, 1051:24-1053:7, 1556:1-16, 1557:17-23.

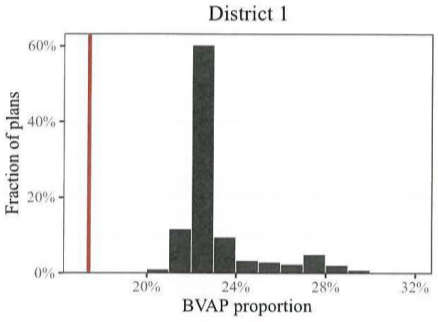
District	Percentage of Charleston County BVAP in 2011 Plan	Percentage of Charleston County BVAP in Enacted Plan
1	47.3% (36,814 voters)	20.6% (15,410 voters)
6	52.7% (41,064 voters)	79.4% (59,222 voters)

ECF 473. Defendants achieved that racial split, in part, "by moving ten of the eleven VTDs with an African American population of 1,000 persons or greater out of [CD1], which included a move of over 11,300 African Americans from North Charleston and nearly 17,000 from the St. Andrews area" in Charleston County. ECF 473; App.28a. Charleston County precincts moved out of CD1 had a BVAP of 22.9%—more than double the precincts left in CD1 (10.7%). ECF 500-1; ECF 473, 473-1. In total, 24.5% of CD1's Black population was moved from CD1 to CD6. *See* Tr.1052:9-1052:22, 1701:2-8; Supp.App.6a-11a.

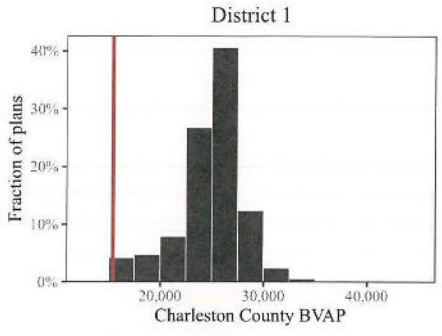
The panel correctly found that Defendants' configuration of CD1 and Charleston County cannot be explained by traditional redistricting principles. To test Defendants' assertion that race played no role in its congressional redistricting, Harvard Professor Dr. Kosuke Imai presented simulated maps that excluded race as a redistricting factor.[10] Dr. Imai focused exclusively on redrawing the CD1/6 border and, in a separate analysis, focused on redrawing the CD1/6 border in Charleston County. *See* App.30a-31a (relying on Dr. Imai). All other boundaries in the map were "frozen" in place. Those simulations were designed to determine "whether and to what extent the inclusion or exclusion of Black voters" in those two districts "played a role in determining [their] boundary …

[10] Race can be one factor among many in redistricting. *See Shaw*, 509 U.S. at 646. Where necessary to comply with the VRA, it may even predominate. *See Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189 (2017). But as noted, Defendants have disclaimed any reliance of race in the drawing of the Enacted Plan, and the simulations are relevant to test that assertion.

beyond the purpose of adhering to the traditional redistricting criteria." Supp.App.21a-22a. The result: the Enacted Plan's treatment of CD1 (reflected in the redline in the figures below) produced a BVAP 5.8 percentage points lower than what could result from a map drawn where race was not a significant factor in the line-drawing.



Supp.App.36a. The Enacted Plan also assigned almost 10,000 fewer Black Charleston County voters to CD1 than the average simulated plan. Supp.App.38a.



3. Defendants' Post-Hoc Partisan Gerrymander Rationale Contradicts the Trial Evidence.

In their Statement, Defendants justify their changes as based on partisan, not racial, considerations. But key legislators and staff denied that the Enacted Plan sought to achieve a partisan result. Defendant Rankin, Senate

Judiciary Committee Chair, denied under oath that the Enacted Plan was designed to "shor[e] up a six/one republican majority" or make CD1 "more reliably republican going forward." Supp.App.424a-25a. Staff testified they were not instructed that the map promote Republican advantage. Supp.App.391-93a,395a-97a,405a. Campsen himself asserted in floor debate that it was "really not the case" that the Legislature engaged in "partisan gerrymandering." Supp.App.286a.

Other trial evidence confirmed what Senators Rankin and Campsen said, and showed partisanship alone could not explain the use of race in the map. Multiple maps presented to the General Assembly produced a Republican-leaning CD1 with significantly higher BVAP.[11] And at trial, Plaintiffs' experts disaggregated partisan impact from race, showing that race predominated over partisanship in the drawing of CD1.

Dr. Jordan Ragusa, an expert on South Carolina politics at the College of Charleston, analyzed precincts kept in, moved into, and moved out of CD1.[12] Dr. Ragusa's analysis showed that, even controlling for party strength, Black voters were "significantly more likely to be moved out of [CD1]" and "significantly less likely to be moved into [CD1]," and those trends "cannot be explained away as a proxy effect of partisanship." App.508a-10a,514a; Tr.1043:6-18.

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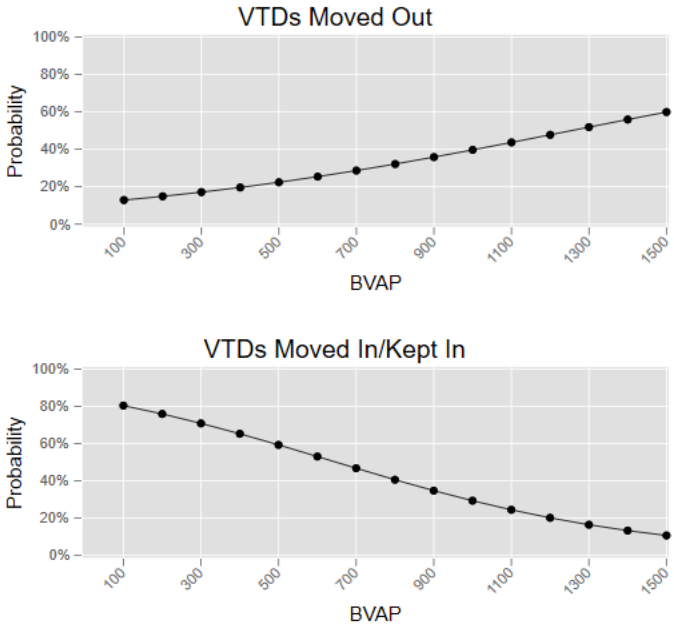
[11] *See, e.g.*, Supp.App.141a-43a; App.526a-27a (four Republican leaning districts with BVAPs above 21.1%); Supp.App.302a (Roberts map with Republican leaning CD1 and BVAP of 19.94%).

[12] This Court discussed a similar analysis of North Carolina in *Cooper*. *See* 581 U.S. at 314-16.



Controlling for partisanship (*i.e.*, 2020 Biden vote share), "VTDs with 100 Black voters had only a 13% chance of being moved out of [CD1], compared to 60% for VTDs with 1500 Black voters." App.508a-10a,514a. To similar effect, "VTDs with 100 Black voters had an 80% chance of being moved into or kept in [CD1], which compares to just 11% for VTDs with 1500 Black voters." *Id.*; Tr.1038-45.

Dr. Ragusa also analyzed the relationship between party affiliation and race, showing that precincts with higher BVAPs were more likely to be moved out of CD1 (62%) than precincts with higher numbers of Democratic voters (41%). Supp.App.14a; Tr.1053:25-1056:17.

Dr. Baodong Liu, a political scientist at the University of Utah, presented two analyses assessing the relative importance of partisanship and race. Using a similar methodology to Dr. Ragusa, Dr. Liu found that White Democrats (69%) were far more likely to be assigned to

CD1 than Black Democrats (51%). Tr.576:13-17; Supp.App.100a & tbl.9.

Table 9: Enacted CD 1 and Assignments of Voters—race v. party

Party Primary	Number of Voters in Envelope	Number of Voters in District	(% of Group That is in District)
White_DEM	24,083	16,614	68.99
Black_DEM	25,397	12,864	50.65
White_REP	85,108	68,716	80.74
Black_REP	2,053	1,697	82.67

Dr. Liu also looked at each precinct moved into, retained in, or moved out of CD1 and found that the movement of Black Democrats differed significantly from the movement of White Democrats under the Enacted Plan. Supp.App.93a-96a; Tr.570:11-572:3.

ARGUMENT

I. THIS COURT SHOULD SUMMARILY AFFIRM BECAUSE CD1 WAS AN IMPERMISSIBLE RACIAL GERRYMANDER

At trial, Plaintiffs' burden was to prove that race predominated in CD1's design by a preponderance of the evidence. *Cooper*, 581 U.S. at 319 n.15.

The panel's racial predominance finding is a factual issue subject to clear-error review. The Court affirms "so long as [the finding] is plausible." *Id.* at 309. It reverses only if "the entire evidence … [leaves] the definite and firm conviction that a mistake has been committed." *Easley v. Cromartie* (*Cromartie II*), 532 U.S. 234, 242 (2001).

A. The Panel's Findings That Race Was the Predominant Factor in Drawing CD1 Were Not Clearly Erroneous.

1. The Record Supports the Panel's Finding that Defendants Racially Gerrymandered CD1 to Cap BVAP at 17%.

The panel correctly found that Defendants used a racial target of 17% BVAP in drawing CD1. That finding rested on: Defendants' movement of 130,000 more people than necessary for rebalancing to maintain CD1's prior BVAP; direct evidence of the mapmakers' use of race in the CD1/6 line; and Defendants' selective jettisoning of traditional districting principles to achieve their racial target for CD1.

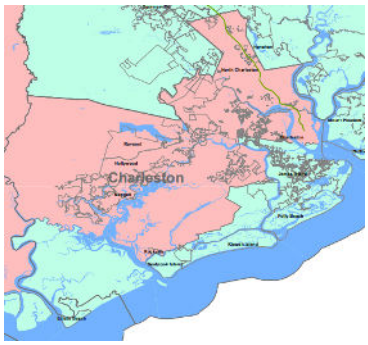
a. Defendants moved 62% of Black Charleston County residents from CD1 to CD6. App.27a. The panel concluded that they did so because they viewed their party's political dominance as tied to capping CD1's BVAP at about 17%. App.23a. To achieve that racial target, they made "dramatic" changes to CD1, shuttling nearly 130,000 residents more than necessary across district lines. Supp.App.206a,368a; App.439a-45a. Those population movements entailed over 25% of a district's population, yet the BVAP percentage in CD1 changed by only 0.1% when it was expected to increase significantly. App.25a; Supp.App.15a-16a,359a,368a.

The panel found that CD1's static BVAP "was more than a coincidence and was accomplished only by [a] stark racial gerrymander." App.29a. The record supports that finding. Roberts could not maintain the racial target by adhering to traditional redistricting principles. Roberts therefore had to, among other findings, abandon his "least change" approach, make a mockery of the constituent consistency principle, and use race-conscious line drawing to sort voters. App.22a-26a,29a-30a.

The government may not use "race as a basis for separating voters into districts" without a compelling state interest. *Miller*, 515 U.S. at 911-12. Uncanny consistency in a district's racial composition despite major demographic shifts strongly suggests a racial target. In *Cooper*, this Court credited evidence that defendants moved substantially more voters than necessary to equalize population and did so on the basis of race as demonstrative of a racial gerrymander. 581 U.S. at 295, 310. Similarly, in *ALBC*, this Court noted "remarkable" efforts to "maintain existing racial percentages." 575 U.S. at 273-74.

The same thing occurred here. As the panel found, Defendants undertook a herculean effort to offset every Black voter added to CD1 (from the additions of portions of majority-White and Republican-leaning Berkeley, Beaufort, and Dorchester counties) by removing disproportionate numbers of Black Charlestonians. App.24a-26a. Maintaining the racial target—while Defendants publicly disclaimed a commitment to having three "strong Republican performing counties" in CD1—demanded moving a disproportionate number of Black Charlestonians out of CD1. App.22a,24a-25a.

Defendants' process confirms that CD1's 17% BVAP target was the primary goal. CD1's BVAP implausibly remained around 17% throughout the evolution of Defendants' proposed maps from the initial November 2021 draft through final passage, despite reconfiguring the district lines in Charleston County, *compare* Supp.App.318a (Nov. 23, 2021 initial Staff draft) *with* App.450a-52a (Enacted Plan).

Initial Draft (Supp.App.315a)	Enacted Plan (Supp.App.306a)
	

CD1's 17% BVAP also remained fixed in place even as Defendants reduced adjacent CD6's BVAP by 5.6%. Supp.App.141a-43a. And although House mapmakers initially proposed a plan with a CD1 BVAP over 20%, they quickly abandoned that plan for a map that lowered CD1's BVAP to the 17% target. Supp.App.319a; SDX 33H. House staff admitted they relied on racial data in real time as revisions were made. Supp.App.401a,407a.

The predominance of race in Defendants' line-drawing is further confirmed when comparing the Enacted Plan to simulations that comply with traditional redistricting principles. Dr. Moon Duchin, a Tufts University mathematician specializing in redistricting analysis, and Dr. Imai both compared the Enacted Plan to computer-simulated maps that excluded race as a redistricting factor, and found that race played a significant role in CD1's construction. Dr. Imai's simulations showed that the Enacted Plan assigned fewer Black voters to CD1 than over 99.8% of computer-generated maps. Supp.App.36a-38a. Similarly, Dr. Duchin found the Enacted Plan significantly reduced the BVAP of CD6 without increasing BVAP meaningfully in CD1 or any other district—a "characteristic" pattern of cracking. Supp.App.164a-67a; Tr.291:1-292:24.

b. The panel correctly found Defendants' contention that race was not considered in drawing the Enacted Plan not credible. App.24a-30a. After reviewing evidence of machinations in Charleston County and noting that Roberts "failed to provide the Court with any plausible explanation for [] abandon[ing] [] his 'least change' approach in drawing the Charleston County portions of [CD1 and CD6], or the subordination of traditional districting principles," the panel discredited his "claim that he did not consider race in drawing [CD1]." App.29a-30a.

These findings are well-supported by the trial record:

- Eight other participants in the mapmaking process testified that they considered, examined, and/or produced racial data when generating, assessing and reviewing draft maps, *see generally* Statement of Case §B.3;
- BVAP data was "actually displayed … at the bottom of the screen the entire time [Roberts was] drawing" maps, Tr.1502:2-6, 1501:24-1502:18, 1503:5-13;
- Roberts generated dozens of BVAP analyses for plans, *e.g.*, *supra* n.7; App.428a-30a,450a-52a; Supp.App.303a-05a,307a-10a,312a-14a,316a-44a; and
- Roberts displayed "in-depth knowledge of the racial demographics of South Carolina," App.29a-30a; Tr.1892:5-12; *see generally* Statement of Case §B.3.

This evidence, on top of evidence that mapmakers adopted a racial target and made "dramatic" changes to hit that target—coupled with Defendants' non-credible denials—reinforces the soundness of the panel's racial predominance finding.

2. The Record Supports the Panel's Finding that the Enacted Plan Abandoned Traditional Districting Principles to Racially Gerrymander CD1.

The panel did not err in finding that the Enacted Plan "subordinat[ed] [] traditional districting principles … [to] racial gerrymandering," and split Charleston County along stark racial lines. App.27a,29a. The record established that mapmakers jettisoned traditional principles—including contiguity, respect for communities of interest, and minimizing jurisdictional splits—in crafting a racially gerrymandered map.

The Enacted Plan made CD1 non-contiguous by land. It is completely severed by CD6. Tr.971:17-972:12. Defendants' expert, Sean Trende, conceded that one cannot drive from Sullivan's Island in the northeast part of the district to James Island in the southwest without going through CD6. Tr.1708:5-15.

The Enacted Plan also fails to respect communities of interest. Roberts conceded that Black residents living in the city of Charleston have a close community of interest with other Charleston County residents and have far more in common with them than residents of Columbia, an inland community 125 miles away. Tr.1558:5-2. Roberts testified that the only "community of interest" the residents of North Charleston would have with residents of Columbia was their proximity to Interstate I-26. Tr.1552:4-15; *see* App.26a & n.8 (citing *Shaw*, 509 U.S. at 636). Nonetheless, the Enacted Plan excised the city of Charleston from CD1, where Defendants' expert admitted it had anchored the district for over 120 years. *See* Tr.1637:12-18, 1679:11-1680:1.

The Enacted Plan splits 10 counties (including Charleston), constituting some of the highest total BVAP counties in South Carolina, while counties with more predominately White populations (like Beaufort) were kept or made whole. ECF 499 at 33 ¶81 & tbl.; Supp.App.201a-

205a. The Enacted Plan splits more counties, county subdivisions, cities, and towns compared to plans Defendants rejected. Tr.30:3-32:14; Supp.App.149a-151a. And—belying the claimed predominant interest in electoral results—it splits CD1's precincts in a "particularly striking" and "clear" "pattern," cleaving each precinct "into a part that's higher Black population and a part that's mostly white," "with the higher Black population … ending up in CD6." Tr.310:6-311:13. As the panel found, 79% of the BVAP from Charleston County is placed in CD6 while less than 21% is placed in CD1. App.27a; Tr.307:21-308:10, 1052:9-1052:22.

CD1 also has a bizarre shape, and Defendants' expert admitted that CD1 and CD6 are less compact using most statistical measures of compactness than any other districts in the Enacted Plan. Supp.App.370a, tbl.5; Tr.1686:2-13, 1708:23-1709:14. The Enacted Plan is also less compact than other plans proposed to the South Carolina Legislature. Tr.293:3-9; Supp.App.146a-47a & tbl.3.

The panel also found that Defendants set aside their general practice of adopting a "least change" map in CD1 in favor of "racial gerrymandering." App.25a-26a,29a. Roberts admitted he "abandoned his least change approach" when it came to Charleston County. Tr.1554:23-1555:25. Indeed, Defendants moved more than double the number of people necessary to address CD1's population imbalance. App.428a-30a,439-45a; Supp.App.393a; Tr.1683:16-1684:5.

The finding that Defendants split Charleston County along racial lines and by disregarding traditional redistricting principles is well-supported. In splitting Charleston County, the panel found Defendants removed from CD1 almost every Charleston County precinct with 1,000 or more Black residents and assigned them *all* to CD6. App.25a-26a & n.7. Roberts acknowledged that Charleston's redrawn lines "followed the migration of African

Americans from the city of Charleston to the city of North Charleston," sweeping Black neighborhoods and almost all Black Charlestonians out of CD1. Tr.1554:8-22. And Roberts conceded that the map "created tremendous disparity" in how it placed Black Charlestonians within districts, including moving 62% of Black Charleston County residents from CD1 to CD6. App.25a-26a,34a.

Moreover, Plaintiffs' expert Dr. Duchin demonstrated how the Enacted Plan is "generally inferior to alternatives" that Defendants rejected in terms of compactness, respect for county and municipal boundaries, and communities of interest. Supp.App.203a-05a.

3. The Panel Properly Relied on the Record Evidence to Disentangle Race from Partisanship as the Predominant Means for Drawing CD1.

Defendants claim that the Enacted Plan "complies with … traditional [redistricting] criteria" and is not gerrymandered, J.S.4, or if it is gerrymandered, that the gerrymander was motivated by partisanship. J.S.9-11. The latter assertion ignores disavowals from key legislators and staff that the Enacted Plan sought to achieve a partisan result, as well as the rejection of maps with Republican-leaning CD1s and significantly higher BVAPs. *See supra* Statement of the Case §B.3 & n.11. *Cf. Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 190 (2017) (partisanship is, at best, a *post-hoc* justification belied by the evidence); *see also Shaw v. Hunt* (*Shaw II*), 517 U.S. 899, 908 n.4 (1996).

Regardless, the panel correctly concluded that Defendants used "race as their predominant districting criterion" even if they did so to further an "end goal of advancing their partisan interests." App.13a (citing *Cooper*, 581 U.S. at 381); *see also Shaw II*, 517 U.S. at 907 ("partisan politicking" can be "actively at work in the districting

process" while "race [remains] the legislature's predominant consideration").

Defendants claim that the panel "never" disentangled race from partisanship in CD1's design. J.S.20. Not so. Relying on Plaintiffs' experts, the panel expressly found that "the racial composition of a [precinct] was a stronger predictor of whether it was removed from [CD1] than its partisan composition." App.29a-32a. Defendants presented *no* contrary expert evidence, offering only conclusory (and discredited) denials. App.32a.

For example, using multivariate regression that controlled for partisanship and precinct size, Dr. Ragusa's analysis confirmed that race, not partisanship, best predicted how Defendants allocated precincts in and out of CD1. Supp.App.14a, fig.1; Tr.1055:15-21. These findings, the panel found, were "particularly probative" in explaining the changes in Charleston County. App. 32a.

Dr. Liu presented two analyses on the relative importance of race and partisanship in CD1's creation. Tr.570:11-572:3; Supp.App.90a-91a. Both showed that Black voters were "disproportionately the target of movement in CD1, regardless of party affiliation." Tr.570:11-572:3; Supp.App.90a-91a.

In short, the panel relied on evidence refuting the proposition that racial effects were merely the incidental effects of partisanship and instead found race rather than party better accounted for the Enacted Plan's dramatic movements of voters. App.31a-32a; *see also* App.503a-08a. By capping CD1's BVAP at 17% while treating thousands of Black voters as interchangeable, Defendants operated under an assumption "that members of [a] racial group must think alike" and therefore vote alike to achieve their political goals. *See ALBC*, 575 U.S. at 298 (Thomas, J., dissenting). That effort to sort "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 (citing *Bush v. Vera*, 517 U.S. 952, 968-70 (1996) (plurality opinion)); *Miller*, 515 U.S. at 914.

4. Defendants' Criticism of the Panel's Findings Establish No Clear Error.

Defendants' criticisms of the panel's factfinding are baseless and certainly do not establish that any finding was implausible, as is needed to show clear error.

Most broadly, Defendants charge that the panel "abandoned all pretext of extraordinary caution" and "prejudged" the case. J.S.1,13. But the panel found *in Defendants' favor* on two of three challenged districts. App.36a-41a. That the panel featured judges with close knowledge of South Carolina politics, geography, and demography only aided their ability to perform the "intensely local appraisal" that three-judge courts are required to make in redistricting cases. *White v. Regester*, 412 U.S. 755, 769-70 (1973).

Defendants' other claims are equally unfounded. Their oft-repeated charges that the panel disregarded evidence that mapmakers set out to create a more Republican CD1, or that Campsen and Roberts both denied drawing lines based on race, *see, e.g.*, J.S.3,4,9,10,14,18, simply mischaracterize both the decision and record.[13] As Defendants acknowledge elsewhere, J.S.2,18, the panel accepted their argument that "Republican majorities in both bodies sought to create a stronger Republican tilt to

[13] For example, Defendants chide the panel for not mentioning Senator A. Shane Massey's testimony and a text message between House members. J.S.21-23. But this evidence was both cumulative and not particularly relevant, as these individuals had "very limited involvement" in the Enacted Plan. App.272a, 278a; Tr.1569:17-1570:3, 1585:10-1586:6, 1597:4-6,16-18, 1812:22-1813:4. A trial court is "not obliged to recite and analyze individually each and every piece of evidence presented by the parties." *Holton v. City of Thomasville Sch. Dist.*, 425 F.3d 1325, 1353 (11th Cir. 2005).

[CD1]." App.21a-24a. But critically, the panel went on to find that decision-makers adopted a racial target of 17% BVAP and racially gerrymandered Charleston County to achieve that "tilt." App.24a-26a. On the extensive facts laid out above, the panel concluded that race was a stronger explanation for the lines drawn in Charleston County than partisanship. The evidence fully supports that conclusion. It does not allow a "definite and firm conviction" that the panel "made a mistake." *Cooper*, 581 U.S. at 317.

Nor did the panel ignore the mapmakers' denials that they considered race. J.S.9,21. Instead, the panel acknowledged and discredited those disavowals. *See* App.23a-24a. It found that Roberts' "claim that he did not consider race in drawing CD1 r[a]ng[] 'hollow,'" App.28a-30a, a conclusion the evidence of racial gerrymandering outlined above supports. Moreover, the panel did not find merely that the mapmakers *considered* race, but that race *predominated* over traditional redistricting principles. App.23a-30a.

At bottom, Defendants simply disagree with the panel's determinations that Defendants' denials lacked credibility and were contradicted by the totality of the evidence. What Defendants ask of the Court contravenes its recent command in *Brnovich v. Democratic National Committee* that "[i]f the district court's view of evidence is plausible in light of the entire record, an appellate court may not reverse even if it … would have weighted the evidence differently." 141 S. Ct. 2321, 2349 (2021). And despite *Cooper*, Defendants ask the Court to abandon the "singular deference" it gives "to a trial court's judgments about the credibility of witnesses." *Cooper*, 581 U.S. at 309. There is no reason to do so.

B. The Panel Properly Applied This Court's Precedents.

Perhaps because their case for clear error is so weak, Defendants dress their disagreements with the panel's factual findings as legal error. But the panel's careful application of this Court's precedent likewise supports summary affirmance. No legal issue warrants this Court's plenary review.

1. Racial gerrymandering is an effort to "separate *voters* into different districts on the basis of race." *Shaw*, 509 U.S. at 649 (emphasis added). This can occur even if reapportionment statutes formally "classif[y] tracts of land, or addresses," *id.* at 646, because "it is the segregation of the plaintiffs … that gives rise to their claims." *North Carolina v. Covington*, 138 S. Ct. 2548, 2553 (2018).

The panel did not "erroneously equat[e] the purported racial effect of a single line in Charleston County with racial predominance across [CD1]." J.S.1,14. Its approach was consistent with *Bethune-Hill*, where the Court considered districtwide evidence (of significant racial disparities and a target) in tandem with evidence concerning particular lines. 580 U.S. at 192. "[R]ace-based decisionmaking may be evident in a notable way in a particular part of a district." *Id.*

The proper "holistic" analysis of racial predominance concerns whether the State "placed a significant number of voters within or without" the district based on their race. *Miller*, 515 U.S. at 916. The panel examined each portion of CD1,[14] and found that the racially predominant movement of tens of thousands of Black voters in Charleston out of CD1 constituted a racial gerrymander. App.24a-34a. There is simply no other explanation for the removal of "62% (30,243 out of the 48,706) of the African

[14] Indeed, as Defendants acknowledge, the panel elsewhere "rejected challenges … [in CD1] in Jasper and Dorchester counties." J.S.12.

American residents formerly assigned to [CD1]," App.25a, as Defendants' changes far exceeded what was necessary to balance population, dramatically departed from the mapmakers' "least change" goal, required subordinating traditional districting principles, and cannot be explained as a mere byproduct of partisan movements.

Defendants' argument that racial predominance in one part of CD1 cannot be attributed to the entire district is misplaced. J.S.1. First, Defendants ignore the panel's factual finding that racial considerations—namely the 17% BVAP target—predominated with respect to the design of the district as a whole. App.25a. Second, *Bethune-Hill* supports the panel using localized evidence as proof of the broader role that race played. 508 U.S. at 192. Finally, crediting Defendants' argument would permit express racial gerrymanders so long as they happen in only part of a district. A legislature cannot reallocate tens of thousands of voters based on race, dismantling the district's historic core, just because it redrew lines in other, less populated and less racially diverse parts of the district without taking race impermissibly into account there, too. That view would nullify this Court's foundational focus on the "personal" nature of the harm in racial gerrymandering. *ALBC*, 575 U.S. at 263.

2. Although not a fully developed argument, Defendants appear to suggest that a racially gerrymandered map is constitutional so long as the improper motivation that animates it is not shown to be the motive shared by each legislator. J.S.32. But statements by, or reliance on, key legislative decisionmakers and mapdrawing staff have long been considered evidence of legislative intent. In *Cooper*, the trial court relied on evidence involving the "State's mapmakers," including redistricting committee chairs, and the "hired mapmaker." 581 U.S. at 295, 300, 307, 311, 313, 316; *see also Covington v. North Carolina*, 283 F. Supp. 3d 410, 415 (M.D.N.C.) (same), *aff'd in part, rev'd in part*, 138 S. Ct. at 2548. Similarly in *ALBC*, this

Court focused on the actions and beliefs of the specific "legislators in charge of creating the redistricting plan," not every single legislator. 575 U.S. at 273. The single sentence from *Brnovich* on which Defendants rely, J.S.1,13-14,32, does not address redistricting at all, and certainly does not suggest that mapmakers can use race as the predominant factor to draw a map so long as Plaintiffs fail to prove that the whole Legislature elevated race above all else. 141 S. Ct. at 2350.

The panel followed the approach approved in *Cooper* and *ALBC* when it assessed the trial record. Consistent with Defendants' emphasis at trial, the panel found, as a matter of fact, that Campsen was the primary author and sponsor of the Enacted Plan and Roberts was its principal creator. *See, e.g.*, App.23a,25a,29a-30a; Tr.1818:13-15, 1839:19-1840:4. Defendants themselves proffered these witnesses at trial to explain the Enacted Plan, App.23a, and introduced evidence that the General Assembly deferred to them, Tr.1372:11-20, fully justifying the panel's focus on the Enacted Plan's architects.

3. The panel properly presumed the Legislature's good faith. Its respect for that presumption is reflected in its finding that, as to CD2 and CD5, Plaintiffs' evidence did not meet the "demanding" and "formidable" burden of proof required by this Court's precedents. App.13a (quoting *Cromartie II*, 532 U.S. at 241, and *Cooper*, 581 U.S. at 307), 36a-41a. Defendants object that the panel did not use the term "good faith," but "a district court, writing after a bench trial, is not required to use 'magic words.'" *Burrell v. Bd. of Tr. of Ga. Mil. Coll.*, 125 F.3d 1390, 1395 (11th Cir. 1997).

The good faith presumption means that the "challenger" bears the "burden of proof." *Abbott v. Perez*, 138 S. Ct. 2305, 2324-25 (2018) (citing *Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 481 (1997)). The presumption yields when "a claimant makes a showing sufficient to

support" allegations of racial discrimination, "either through circumstantial evidence of a district's shape and demographics or more direct evidence going to legislative purpose." *Miller*, 515 U.S. at 915-16. The "ultimate question" is whether "discriminatory intent has been proved in a given case." *Abbott*, 138 S. Ct. at 2324-25. The presumption only forbids "flip[ping] the evidentiary burden"—that is, presuming bad faith—for example, on the basis of a finding of "past discrimination." *Id.*

The panel rigorously adhered to these rules. It held Plaintiffs to their burden, and rejected Plaintiffs' racial gerrymandering challenges outside of Charleston County. But it found racial gerrymandering in CD1 on the basis of overwhelming evidence. *See supra* Part I.A.

Contrary to Defendants' assertion, J.S.15-17, the panel did not impute the 2011 plan's intent to the Enacted Plan. It merely observed that "a fair question existed" as to whether the 2011 plan, which intentionally concentrated Black voters in CD6 to comply with the non-retrogression principle in Section 5 of the VRA, "was legally justifiable" in light of *Shelby County*. App.26a-27a. The panel accordingly found that even though there was no longer a requirement to preserve CD6 as a majority-minority district, *id.*, the mapmakers moved 62% of CD1's Black population in Charleston County into CD6, exacerbating the racial split. App.27a. That is exactly the kind of evidence that overcomes the presumption of good faith and establishes racial predominance.

4. Defendants' contention that the panel failed to apply an "alternative-map requirement" misstates the law. J.S.13,17. *Cooper* holds the opposite: plaintiffs challenging a redistricting map as a racial gerrymander need not produce alternative plans to prove that race predominated, including where, as here, race and politics are highly correlated. 581 U.S. at 319 (quoting *Cromartie II*, 532 U.S. at 241). Rather, an alternative plan is "an

evidentiary tool." *Id.* at 319. Where the evidence has "satisfied plaintiffs' burden of debunking" defendants' claims that politics, not race, drove line drawing, "there [is] no need for an alternative map to do the same job." *Id.* at 322. "[N]either its presence nor its absence can itself resolve [the] claim." *Id.* at 319.[15]

So, while an alternative map "can serve as key evidence in a race-versus-politics dispute," plaintiffs can (and here did) offer other evidence to resolve the question. *Id.* at 317-18. Consistent with *Cooper*, courts have not required an alternative map where the evidence makes clear that race, "although generally highly correlative with politics, did indeed predominate in the redistricting process." *Harris v. McCrory*, 159 F. Supp. 3d 600, 621 (M.D.N.C. 2016), *aff'd sub nom. Cooper*, 581 U.S. at 285.

Because ample direct and circumstantial evidence showed that race, not party, explained CD1's design, the panel did not clearly err in finding it "not necessary" for Plaintiffs to submit an alternative map. App.46a.

In any event, while no alternative map is needed, the Legislature had before it multiple alternative maps from other legislators and members of the public that maintained CD1's Republican advantage without artificially freezing its BVAP at 17%. *See supra* n.11. These maps further buttressed the panel's conclusion that race, not politics, predominated in the design of CD1.

C. Defendants Do Not Dispute That the Enacted Plan Cannot Survive Strict Scrutiny.

Because Plaintiffs met their burden to prove race predominated in CD1's design, the panel rightly shifted

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[15] This makes sense. Racial gerrymandering claims are about the unconstitutional process of moving voters based on race. They are not about minority voters' inability to elect their preferred candidates—the issue in dilution cases where an alternative remedial map is needed to show liability. *See Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986).

the burden to Defendants and examined whether "'race-based sorting of voters serve[d] a 'compelling [state] interest' … 'narrowly tailored' to that end.'" App.42a (quoting *Cooper*, 581 U.S. at 292). As noted, it is well-settled that using race as a "proxy" for "political" traits triggers strict scrutiny. *E.g.*, *Cooper*, 581 U.S. at 308 n.7. The panel correctly applied that standard, too: as it found, Defendants made no attempt to satisfy strict scrutiny. App.42a-43a. Defendants' continued silence on this point in this Court dovetails with their pretrial stipulation disclaiming VRA compliance as a possible defense to the use of race in the Enacted Plan. ECF 371 at 1.

II. THIS COURT SHOULD SUMMARILY AFFIRM BECAUSE CD1 INTENTIONALLY DILUTES BLACK VOTING POWER

The panel also correctly ruled that CD1 was motivated by intentional discrimination against Black voters that diluted their voting power. Although this ruling is an independent ground for invaliding CD1, the Court need not reach it. The racial gerrymandering violation is enough for summary affirmance.

Racial gerrymandering claims do not consider electoral results or group voting strength. Rather, they focus on racial predominance in the way districts are constructed "regardless of the motivations" for considering race. *Shaw*, 509 U.S. at 645. By contrast, intentional racial vote dilution claims focus on 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.'" *Miller*, 515 U.S. at 911 (quoting *City of Mobile v. Bolden,* 446 U.S. 55, 66 (1986)). Thus, a racial gerrymandering claim is "'analytically distinct' from a vote dilution claim." *Id.* (quoting *Shaw*, 509 U.S. at 652). This makes sense: the Constitution prohibits both excessive and unjustified consideration of race in drawing district lines (the *Shaw* racial gerrymandering line of cases)

and intentional *dilution* of Black voting strength (forbidden by both the Fourteenth and, in some cases, the Fifteenth Amendments).

The discriminatory purpose prong of intentional vote dilution claims is governed by the *Arlington Heights* framework, under which challengers must show that racial discrimination was "*a* motivating factor," not the "sole[]" or even a "primary" motive for the government's decision. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 265-66 (1977) (emphasis added). This Court underscored the distinction in *Rogers v. Lodge*, where it explained that cases charging that a voting scheme unconstitutionally dilutes "the voting strength of racial minorities are thus subject to the standard of proof generally applicable to Equal Protection Clause cases." 458 U.S. 613, 617 (1982) (citing *Arlington Heights*, 429 U.S. at 252, and *Washington v. Davis*, 426 U.S. 229 (1976)); *see also Bossier Parish Sch. Bd.*, 520 U.S. at 481-82, 488-90 (*Arlington Heights* applies to intentional vote dilution challenges).

In this case, the panel correctly found a racially discriminatory purpose. Indeed, it did so while applying a more demanding standard than *Arlington Heights*—requiring Plaintiffs to show that racial discrimination was "the" predominant factor behind the legislative action. *See supra* Point I; App.45a (citing *Shaw*, 509 U.S. 630, and *Miller*, 515 U.S. 900).

The panel understood that Plaintiffs' burden of proof was "demanding," App.13a, and carried out the requisite, sensitive inquiry into the totality of circumstantial and direct evidence of intent. *Id.* As detailed *supra*, the evidence showed that Defendants applied a 17%-BVAP target in CD1, which the panel found was "impossible" to meet without racially gerrymandering Charleston County. App.24a-25a. The panel also found that the mapmakers "made a mockery of the traditional districting

principle of constituent consistency" and "bleach[ed]" Black voters out of the Charleston County portion of CD1. App.27a. And this evidence of contemporary discrimination was buttressed by South Carolina's history of struggles with the Department of Justice and federal courts involving reapportionment plans from the 1970s through the early 2000s. App.18a.

The intent finding is also supported by the trial record illuminating departures from procedural norms, and a rushed and non-transparent legislative process before the Enacted Plan's passage. *See Arlington Heights*, 429 U.S. at 267. For example, Senator Campsen and Senate staff sprung maps on legislators and the public with little time for them to review them before public hearings, provided limited opportunities for public input on proposed maps, and hid criteria they were relying on to draw maps from members of the public and other legislators. *See, e.g.*, ECF 323-31 at 24, 33; ECF 323-39 at 23:23-24:6; Tr.64:20-22, 1478:10-12, 1522:20-23, 1523:11-14, 1528:24-1529:4.

Defendants' claim that the panel ignored the discriminatory effect element of the intentional racial vote dilution inquiry is self-evidently false. J.S.35-37. The panel found "over 30,000 African Americans were removed from their home district." App.33a. It noted that CD1 elections "were close, with less than one percent separating the candidates," and therefore not removing Black Charlestonians "would produce a 'toss up district.'" App.21a,25a,33a. The record evidence also showed that the Enacted Plan reduced Black electoral opportunity. Tr.552:25-553:5, 563:5-15; Supp.App.88a-89a, tbl.4 & 170a-71a. Dr. Duchin's "effectiveness" analysis comparing the Enacted Plan to computer generated plans that excluded race as a redistricting factor found that the Enacted Plan suppressed electoral opportunity to a greater extent when a Black Democrat was on the ballot than when a White Democrat was. Tr.360:22-362:18, 363:15-23, 365:25-366:7;

Supp.App.172a-73a. Indeed, that analysis found the Enacted Plan is "unusually extreme in denying opportunity" for Black voters in the elections with Black candidates on the ballot (as compared to White candidates of either party), which cannot be explained by partisan advantage. Tr.362:7-18.

In short, the record showed substantial discriminatory impact, even though any amount of racially discriminatory impact is sufficient to support a finding of intent. *See, e.g.*, *City of Pleasant Grove v. United States*, 479 U.S. 462, 471-72 n.11 (1987); *City of Port Arthur v. United States*, 459 U.S. 159, 168 (1982). The notion that there must be a threshold minimum of affected voters or a specific degree of impact "is unquestionably wrong." *Chisom v. Roemer*, 501 U.S. 380, 409 (1991) (Scalia, J. dissenting).

Defendants argue that the Enacted Plan affects Black and White Democrats "in exactly the same way." J.S.37. But as described *supra*, the panel found to the contrary. *See, e.g.*, App.29a-32a. Indeed, the record demonstrated that the Enacted Plan treated Black voters differently than it treated White voters, even when those voters were members of the same political party. *Id.*

CONCLUSION

Plaintiffs' motion to affirm should be granted.

Respectfully submitted.

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