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

REPLY BRIEF FOR APPELLANTS

WILLIAM W. WILKINS
ANDREW A. MATHIAS
MAYNARD NEXSEN PC
104 S. Main Street, Suite 900
Greenville, SC 29601

MARK C. MOORE
HAMILTON B. BARBER
MICHAEL A. PARENTE
MAYNARD NEXSEN PC
1230 Main Street, Suite 700
Columbia, SC 29201

Counsel for House Appellants

JOHN M. GORE
Counsel of Record
JOSEPH P. FALVEY
RYAN M. PROCTOR
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
jmgore@jonesday.com

ROBERT E. TYSON, JR.
VORDMAN CARLISLE TRAYWICK, III
ROBINSON GRAY STEPP & LAFFITTE, LLC
Post Office Box 11449 (29211)
Columbia, SC 29201

Counsel for Senate Appellants

(counsel continued on inside cover)

(continued from front cover)

M. ELIZABETH CRUM
MICHAEL R. BURCHSTEAD
BURR & FORMAN LLP
Post Office Box 11390
Columbia, SC 29211

Counsel for State Election Commission Appellants

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Page(s)

CASES

OTHER AUTHORITIES

INTRODUCTION

Appellees never argued at trial that the General Assembly used a racial target as a political proxy to draw District 1. Appellants' Br. ("Br.") 19; NAACP.Br.46. Even when vaguely suggesting a racial target in one of their many proposed post-trial findings, Appellees firmly denied that the General Assembly harbored any political objective. NAACP.Br.46; *see* Dkt.499 ¶615. The panel rejected Appellees' theories of the case in favor of its own—that the General Assembly needed to use a legally risky racial target as a proxy for politics even though it could (and did) use political data directly for politics. Appellees now attempt to backfill the panel's erroneous reasoning, but their efforts misconstrue the governing law, misrepresent the record, and universally fail.

The Court should end this game of whack-a-mole. Appellees do not deny the untenable implications of the panel's reasoning. Br.5-7, 54-55. If left uncorrected, the decision below will serve as a roadmap to invalidate commonplace districts designed with a political goal: just ignore obvious political explanations, extract a racial target from the correlation between race and politics, note the effect on a racial group, rely on the clear-error standard to avoid reversal, and proceed with redrawing the State's districts. That is not enough to justify such a "serious intrusion on the most vital of local functions," *Miller v. Johnson*, 515 U.S. 900, 915 (1995), nor the "grave accusation" of racial gerrymandering, *Cooper v. Harris*, 581 U.S. 285, 334 (2017) (Alito, J., concurring in judgment in part and dissenting in part). The Court should reverse.

ARGUMENT

The panel invalidated District 1 only by disregarding settled precedent. Perhaps recognizing as much, Appellees resort to theories, experts, and evidence that the panel "did not rely upon." *Easley v. Cromartie*, 532 U.S. 234, 250 (2001) (*Cromartie II*). These efforts "cannot help" Appellees at this stage. *Id.*; *see* U.S.Br.23n.9, *Cromartie II*, No. 99-1864 (Sept. 2000). Regardless, Appellees fail to salvage the panel's decision.

I. THE PANEL LEGALLY ERRED IN DETERMINING THAT RACE PREDOMINANTLY MOTIVATED DISTRICT 1.

A. The Panel Erroneously Disregarded The General Assembly's Politics Defense.

1. The Panel Failed To Enforce The Alternative-Map Requirement.

None of Appellees' alternatives satisfied the alternative-map requirement. Br.28-29. Yet the panel declined to enforce the requirement for a string of muddled reasons even Appellees do not defend. Br.29-30; *see* NAACP.Br.53-55; U.S.Br.27-28. Appellees identify no other basis to rehabilitate the panel's decision.

First, their contention that *Cromartie II* never established the requirement, NAACP.Br.54; U.S.Br.28, conflicts with that decision's plain language, 532 U.S. at 258.

Second, *Cooper* did not "reject[]" the requirement. NAACP.Br.53-54; U.S.Br.27. The *Cooper* Court unanimously agreed that in cases "like *Cromartie II*," where "plaintiffs ha[ve] meager direct evidence of a

racial gerrymander," "only" an alternative map "c[an] carry the day." 581 U.S. at 322; Br.28-29. The majority's recitation of this requirement tracked the United States' position. U.S.Br.32, *Cooper*, No. 15-1262 (Oct. 2016) ("a plaintiff seeking to prove racial predominance primarily through circumstantial evidence 'must'" satisfy the requirement). And *Cooper* did not, and could not, "interpret[] *Cromartie II*" to establish the circular proposition that an alternative map is "necessary" only when it is "'needed.'" NAACP.Br.55 (quoting *Cooper*, 581 U.S. at 322).

Rather, *Cooper* held the requirement was not triggered because the record rendered the case "most unlike *Cromartie II*." 581 U.S. at 322. Any suggestion in *Cooper* that an alternative map is "merely an evidentiary tool," *id.* at 319; *see* NAACP.Br.53-54; U.S.Br.27-28, addressed cases involving significant "direct evidence of a racial gerrymander," 581 U.S. at 317-22. Even if such language could be read more "broad[ly]," it cannot override *Cooper*'s "state[d]" preservation of the alternative-map requirement in circumstantial cases. *Arizona v. Gant*, 556 U.S. 332, 343 (2009); *see June Med. Servs. LLC. v. Russo*, 140 S. Ct. 2103, 2138-39 (2020) (Roberts, C.J., concurring in judgment).

Thus, while the Court has rejected *other* evidentiary requirements as "irreconcilable" with precedent, *Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 188-89 (2017); *see* NAACP.Br.53; U.S.Br.28, the alternative-map requirement is *compelled* by precedent, flowing "logical[ly]" from the burden to disentangle race and politics in circumstantial cases, *Miller*, 515 U.S. at 914.

At minimum, the requirement applies when challengers elect to "offer[]" alternatives. *Cooper*, 581 U.S. at 321-22. Even now, Appellees ask the Court selectively to embrace their alternatives on factors like "[c]ompactness," NAACP.Br.35, but to ignore that their alternatives "harm[]" the General Assembly's political objective, Br.28. Appellees cannot have it both ways: their alternatives confirm that their challenge fails.

Third, it was hardly "impossible" for Appellees to identify the applicable "'political objectives'" here. NAACP.Br.55. The panel faced no difficulty concluding that the Republican-controlled General Assembly sought "to create a stronger Republican tilt" in District 1, JSA.21a—a discernible goal that "wasn't a secret" during the districting process, Br.10-17, let alone "denied" by "key legislators," NAACP.Br.48-49n.7, 55; *see* Br.Opposing.Mot.Affirm.7.

Finally, Appellees contend that the alternative-map requirement was inapplicable because they presented "*direct* evidence that racial data was considered." NAACP.Br.55. But there is a difference between *considering* race and race *predominating*, as Appellees have agreed. Mot.Affirm.29. The alternative-map requirement abides absent sufficient "direct evidence *of a racial gerrymander*." *Cooper*, 581 U.S. at 322 (emphasis added). Appellees cite no such evidence. NAACP.Br.55; *see infra* pp.5-6, 17-18. None exists.

2. The Panel Failed To Disentangle Race And Politics.

The panel also failed to conduct the "sensitive inquiry into all circumstantial and direct evidence of

intent" required to "disentangle race from politics." Br.30-32.

Appellees do not dispute that the panel ignored the testimony of Senator Campsen, Senator Massey, and Representative Jordan explaining Enacted District 1 on political grounds. Br.30-32; NAACP.Br.48. They even acknowledge Campsen was a "critical witness[]." NAACP.Br.48-49n.7. Their assertions that the panel rejected Campsen's testimony based on "credibility determinations," NAACP.Br.19-20, 24, 26, 36-38, are false: the page they cite *says nothing* about Campsen, JSA.29a; *see* NAACP.Br.19. Nor did the panel make any credibility determination elsewhere in its opinion.

Appellees also misrepresent these legislators' testimony. Massey and Jordan testified that race was *not* a "*means* used" to draw lines. NAACP.Br.48; *see* JSA.280; Tr.1781. Campsen did not consider race or "look[] at BVAP" during the map-drawing process. JSA.345a-346a, 374a-375a, 384a; *compare* NAACP.Br.19, 43. He explained that he looked up BVAP numbers only *after* the Enacted Plan and those numbers were released publicly; he recited those numbers during the floor debate because he had been "accused of drawing" the map "on a racial basis" and "needed the numbers to defend the plan." JSA.335a, 375a-376a, 384a-385a; *accord* JSA.Supp.398a-399a; Dkt.462-4 at 230:6-11, 247:11-20 (B. John).

Appellees also fail to justify the panel's conclusory dismissal of Mr. Roberts's political explanation for the changes to District 1 and Charleston County. Br.31. Instead, like the panel, Appellees never mention the 1.36-percentage-point increase in District 1's Republican vote share or examine the political impact

of the changes in Charleston. And—again like the panel—Appellees say nothing about the race-neutral reasons for moving majority-Democratic, predominantly white West Ashley (located in Charleston County), which involved more than half the population moved from District 1 and is more consistent with politics than race. Br.31-32.

Even if the panel "did not need to itemize each piece of evidence," NAACP.Br.48, its "formidable task" required engaging *this* evidence forming the crux of the General Assembly's defense, *Cooper*, 581 U.S. at 308. The testimony of the legislative leaders and staffers is the *only* "direct evidence of intent" in the record—and the evidence of political effects was significant "circumstantial" evidence—yet the panel ignored it all. *Id.*

B. The Panel's Racial-Target Theory Is Legally Erroneous.

Appellees fail to rehabilitate the panel's triply erroneous racial-target theory.

First, Appellees do not even *address* the showing that the panel improperly "shift[ed] the burden" to Appellants. Br.36-37. They instead propose this Court, for the first time, uphold a racial-target finding without direct evidence—and thus impose liability based on *Appellants'* (alleged) failure to disprove a racial-target theory never pursued (or proven) at trial. *Id.*

Second, Appellees fail to unwind the panel's hyperentanglement of race and politics. Br.33-34. Appellees concede the "[c]harts" the panel invoked for its racial-target theory do not appear in the Duchin report it cited. NAACP.Br.8n.2. They now speculate

it meant to cite charts in a *different* report. *Id.* But those charts cannot salvage the racial-target theory: they recount the political performance of various plans and say nothing about race. JSA.525a-526a. Moreover, the demonstrative the panel cited is neither evidence nor an "analys[i]s considered during the legislative process," NAACP.Br.31, but a description of Appellees' claims in litigation that undisputedly reflects only a "connect[ion]"—*i.e.*, correlation—between race and politics, NAACP.Br.8, 31. Appellees thus confirm that the panel erroneously rested its racial-target finding on such correlation. Br.33-34.

Appellees' efforts to cure that error fail not only because they are *post hoc*, *supra* p.2, but also because they suffer from the same flaw as the panel's racial-target finding: the evidence Appellees invoke does not disentangle race from politics either, *see* NAACP.Br.30-33, 56-57; U.S. Br.16-18; *infra* pp.21-25; Br.16-17.

Third, Appellees fail to justify the panel's departure from the presumption of good faith. Br.34-36. They suggest the panel was not required to identify *who* it believed was responsible for the racial target or testified falsely at trial—or to impute that individual's intent to the General Assembly as a whole—because *Brnovich v. Democratic National Committee* was not a "racial gerrymandering" case. NAACP.Br.58; U.S.Br.26. But the presumption of good faith at minimum requires courts to sufficiently justify the grave conclusion that a duly elected legislature "as a whole" harbored unconstitutional racial intent. *Brnovich*, 141 S. Ct. 2321, 2350 (2021); Br. 34-36.

The presumption of good faith thus required more than "quot[ing]" precedent, U.S.Br.24, using "magic words," NAACP.Br.57, or reciting "that the 'challenger' bears the 'burden of proof,'" NAACP.Br.56. It required the panel to apply the correct "mode of analysis," *Abbott v. Perez*, 138 S. Ct. 2305, 2326 (2018), including by presuming the General Assembly is rational and does not pursue legitimate objectives via legally risky race-based methods when superior options are readily available, Br.34-35; *United States v. Hansen*, 143 S. Ct. 1932, 1944 (2023) (refusing to hold a legislature took a "circuitous" and "constitutionally dubious" "route" rather than a "simpl[er]" approach).

Yet Appellees fail to square the presumption with the panel's conclusion that the General Assembly used a risky and ineffective racial target to *approximate* politics when it could and did use political data *directly* for the job. To the contrary, the United States acknowledges that the General Assembly relied on politics, not race, to bring "Republican-leaning" areas into District 1. U.S.Br.23n.6.

Moreover, Appellees implicitly concede that the panel's racial-target theory makes no sense. Br.35-36. Appellees acknowledge that "[w]hite voters in CD 1 … were divided between Trump and Biden in 2020." NAACP.Br.10. Appellees thus recognize that race *does not* predict voting behavior for the overwhelming majority of voters (71% in District 1). *Id.*; U.S.Br.22; *see* JSA.451a. The 2018 election bears this out: that year, District 1 elected a Democratic representative at a 17%-BVAP level. JSA.21a, 29a. Thus, a 17%-BVAP target *contravened* the General Assembly's political

goal because it would not have guaranteed "a stronger Republican tilt" in District 1. JSA.21a. The *only* way to guarantee that outcome was to utilize *political* data capturing "Trump and Biden" vote shares. NAACP.Br.10.

Appellees nevertheless argue, for the first time in this case, that the General Assembly *had* to rely on racial data to achieve its political goal, contending it was "known" that racial data "reliably" predicts election outcomes but the General Assembly's election data does not. NAACP.Br.8-10, 31-32, 43-44, 47; U.S.Br.22-23.

This argument borders on the absurd—and fails on multiple levels. To start, the panel never questioned the reliability of the General Assembly's election data. *Supra* p.2. Quite the opposite: the very documents Appellees say the panel relied on—the Duchin charts and the demonstrative—*use 2020 presidential election data*. JSA.525a; JA.83a. If that data is unreliable, it cannot support a finding that a 17%-BVAP target establishes a Republican lean. Appellees would thus substantiate the panel's racial-target theory at the price of making it incoherent.

Moreover, merely to state the proposition that race is a better political proxy than politics is to expose its absurdity. Racial data measures a VTD's demographics but *not* voting or turnout; election data measures *only* voting and turnout. That is presumably why Appellees *never directly argue* that the former predicts election outcomes *better* than the latter. NAACP.Br.8-10; U.S.Br.22-23.

In all events, Appellees never show that racial data "reliably predict[s] electoral outcomes."

NAACP.Br.10; U.S.Br.22-23. In fact, they concede it does not for the overwhelming majority of District 1 voters. *Supra* p.8. And as Duchin testified, although voting is racially polarized, "BVAP does not tell the whole story" regarding "electoral performance" because "[y]ou need to know more about voting patterns, turnout matters, crossover matters." JA.104-05.

Nor did "legislators and staff confirm[] that … racial data can reliably predict electoral outcomes." NAACP.Br.10. At most, they did not dispute "racial[] polariz[ation]" or the "correlat[ion]" between race and politics. *Id.*; JSA.233a, 381a. And the allegation that "very slight changes in CD 1's BVAP *could* change electoral outcomes," U.S.Br.22 (emphasis added), only highlights the panel's error because very slight changes in *political* composition *would* change electoral outcomes in such a politically competitive district, *see* JSA.21a.

Appellees further fail to show that the General Assembly's election data was unreliable. There is no evidence that anyone involved in the map-drawing process thought, much less "knew," the data had "flaws." NAACP.Br.8, 31. Rather, the map-drawing team was "satisfied" the data "was accurate." Dkt.462-5 at 71:21-72:7. Roberts did not "acknowledge[]" the data was "inaccurate" or "conflicted with" the Election Commission's data (by allegedly "missing" 14,000 out of 2.5 million votes). NAACP.Br.9; JSA.241a, 431a. Instead, he was "not aware" of any such conflict. JSA.241a-42a.

Appellees point to the testimony of Dale Oldham, NAACP.Br.8, but he "did not participate" in the

drawing of "the congressional map," Dkt.462-6 at 38:8-15, 95:23-98:24, 170:4-25, and never testified that racial data better predicts election outcomes than election data. Any critique he offered of the General Assembly's election data was part of a sales pitch: he wanted to promote *different* political data in which he had an interest. JSA.Supp.415a, 417a, 421a-422a; Dkt.462-6 at 156:10-21.

Appellees disclose none of this. Worse, they mischaracterize Oldham's testimony. They cite testimony that election data can be "almost worthless" and "badly skewed," NAACP.Br.8-9, but omit his condition: "*if*" it does not allocate absentee votes "back to the individual precincts" or disaggregate votes "down to the block level," JSA.Supp.416a-417a (emphasis added). These criticisms are inapplicable to the General Assembly's election data, which allocated and disaggregated votes just so. JSA.93a-94a. And although Oldham asserted that the General Assembly used an "inferior" "less accurate" block-level-disaggregation method than his data, *see* NAACP.Br.8, he did not actually know "what method [the General Assembly] used," JSA.Supp.421. Oldham thus did not identify *any* "flaws," NAACP.Br.8, in the General Assembly's data.

Nor did any experts demonstrate that "results from a single presidential election are an unreliable basis for predicting future congressional election performance." U.S.Br.22 (citing JA.112, 135); *see* NAACP.Br.9. Duchin opined on the predictive reliability of racial data, not election data. JA.111-12 (being "White" is "not a stable identifier" for political affiliation "in the same way that being Black is"). Liu also said nothing in favor of political data drawn from

"multiple cycles," NAACP.Br.9; he merely deemed one set of single-election data (2020 general) less reliable than another (2018 gubernatorial primary) for his analysis, JA.134-36. Even that view was unjustified: the gubernatorial primary, unlike the 2020 general, was not a congressional election, and Liu did not know whether his preferred data allocated absentee votes to precincts, JA.144-45, as required to avoid being "almost worthless" under the Oldham testimony Appellees credit, JSA.Supp.416a-417a.

C. The Panel Misapplied The Subordination Rule.

The panel further erred when it concluded that the Enacted Plan subordinates traditional principles to race. Br.37-42.

1. The panel erroneously invoked only two traditional principles—"maintenance of constituencies" and "minimizing divisions of counties"—and limited its analysis to Charleston County. Br.37-38.

Appellees' response begs the question. Appellees note the panel found a "districtwide" target and that facts in part of a district can establish a racial gerrymander. NAACP.Br.59-61; U.S.Br.25. But a court cannot find a districtwide target or gerrymander based on a "portion of the lines" "divorce[d]" from "the rest of the district," as the panel did here. *Bethune-Hill*, 580 U.S. at 192. When District 1 is considered "as a whole," *id.*, the panel's racial-target theory collapses, *see* Br.37-42.

This case bears no resemblance to the cases Appellees invoke. NAACP.Br.30, 59. Both *Cooper* and *Alabama Legislative Black Caucus v. Alabama*

(*ALBC*) involved express admissions of districtwide racial targets, not, as here, an inference of a target from a single county. 581 U.S. at 299-301; 575 U.S. 254, 267 (2015). And in both cases, the Court's subordination analysis examined the entire district. *Cooper* deemed significant "a net increase of more than 25,000 black voters in Guilford County, *relative to a net gain of fewer than 35,000 across the district*," and the resulting spike in districtwide BVAP. 581 U.S. at 314 (emphasis added). And *ALBC* found that "[o]f the 15,785 individuals … added to … *District 26*, just 36 were white—a remarkable feat given the local demographics." 575 U.S. at 274 (emphasis added).

These cases thus underscore both the panel's error and that the various figures recited by Appellees—including the movement of approximately "30,000 Black Charleston[ians]," U.S.Br.25; NAACP.Br.33-34—are inadequate to prove racial predominance, Br.37-42. Those figures are unilluminating in a district that shed more than 140,000 people—including far more white people and Democrats than African Americans—without changing the BVAP. *See id.* Moreover, the resulting distribution of African-American Charlestonians in Districts 1 and 6 did not result from an admitted subordination of traditional principles, as in *Cooper*, 581 U.S. at 300, but comported with politics and traditional principles, Br.38-41.

Nor did the Enacted Plan "redistribute[]" District 6's BVAP. NAACP.Br.12, 32. The Plan on net *added* African-American voters to District 6. JSA.439a-445a. Its BVAP percentage fell only because Benchmark District 6 was underpopulated, JSA.17a, and the Enacted Plan equalized its population.

2. Regardless, Appellees cannot salvage the panel's cursory subordination analysis. Br.38-42.

First, the Enacted Plan hardly "make[s] a mockery of" core preservation, JSA.27a, when it *outperforms* all alternatives. Appellees dispute Appellants' 92.78% core-preservation figure, preferring an 82.84% figure. NAACP.Br.59. As the United States acknowledges, Appellants' figure reflects the percentage of Enacted District 1 residents who also fell within Benchmark District 1. U.S.Br.19n.5. And even under Appellees' alternative method—which measures the percentage of Benchmark District 1 residents who fell within Enacted District 1, JSA.Supp.367a-68a; JSA.125a—the Enacted Plan outperforms Appellees' alternatives, whose core-retention rates range from 46.63% to 67.90%. JSA.453a, 461a, 468a, 479a.[1]

Second, as to county splits, Appellees do not dispute that the Enacted Plan *improves upon* the Benchmark by uniting Beaufort and Berkeley. NAACP.Br.11; U.S.Br.4-5. Still, they complain that the District 1 line splits four counties—Dorchester, Jasper, Colleton, and Charleston. NAACP.Br.2, 17, 26, 35. But the panel rejected Appellees' challenges to the Dorchester and Jasper splits, JSA.34a-36a, and Appellees never challenged the Colleton split.

That leaves only Charleston. The General Assembly's guidelines did not "prioritize" undoing "the split of Charleston." NAACP.Br.16. And

[1] To obtain the core-retention rate under Appellees' method, divide the number of people in the plan's District 1 retained from Benchmark District 1 by 818,893—Benchmark District 1's total population. JSA.428a.

Appellees do not rebut that the one-person, one-vote principle, public input, Congressman Clyburn's proposal, politics, and race-neutral criteria supported maintaining the longstanding Charleston split while unifying Beaufort and Berkeley. Br.13, 41.

Finally, Appellees, like the panel, imply the Enacted Plan disrespects communities of interest, because Charlestonians moved to District 6 have little in common with individuals in Columbia. NAACP.Br.35; U.S.Br.19. But it is common for communities on opposite ends of a district not to share other interests. Moreover—as Roberts explained in testimony Appellees ignore—shifting these portions of Charleston made whole communities of interest in the Charleston Peninsula and coastal Charleston and conformed the district line to the Charleston-Dorchester boundary. Br.19.

3. Appellees also invoke districting principles the panel never discussed. *Supra* p.2. These arguments fail.

First, Appellees complain District 1 is not contiguous by land. NAACP.Br.2, 15, 26, 35; U.S.Br.20. But its contiguity by water, JSA.Supp.306a, is permitted in South Carolina, JSA.425a, 541a; *Sonoco Prod. Co. v. S.C. Dep't of Revenue*, 378 S.C. 385, 392-94 (2008); *see Law. v. Dep't of Just.*, 521 U.S. 567, 581-82 & n.9 (1997) (recognizing contiguity by water as a traditional principle).

Second, quoting Duchin's testimony, Appellees claim District 1 reconfigured the district line around "scattered chunks and shards" instead of "healing key splits of cities and communities." NAACP.Br.15. As

Duchin's color-coded map shows, however, the blue "chunks and shards" are areas moved to reunite Beaufort and Berkeley and conform district lines to county boundaries. NAACP.Br.15-16. Duchin also admitted that her preferred communities of interest "definitely" were not "the only [ones] identified by the public testimony" or reasonably considered by the General Assembly. JA.122-24.

Third, Appellees note that District 1 is marginally less compact than their alternatives under certain "statistical measures." NAACP.Br.16. But the General Assembly's guidelines require only "reasonabl[e] compact[ness]" and eschew "mathematical, statistical, or formula-based calculation[s]." JSA.541a-42a; *cf. Allen v. Milligan*, 143 S. Ct. 1487, 1513 (2023). Moreover, the difference in the statistical measurements is slight. JSA.Supp.147a. The General Assembly reasonably traded any slight inferiority in compactness for the Enacted Plan's substantial superiority in core preservation, political performance, and other criteria.

D. The Panel Misinterpreted *Shelby County*.

Appellees agree with the panel that, after *Shelby County*, "the legal justification for splitting Charleston County under the [Benchmark] map no longer exists." NAACP.Br.61. But they ignore all the flaws with this conclusion, including that federal courts upheld the Charleston split preserved in the Benchmark Plan not under Section 5, but as consistent with traditional principles. Br.42-45; *Backus v. South Carolina*, 857 F. Supp. 2d 553, 560-65 (D.S.C.), *aff'd*, 568 U.S. 801 (2012).

Appellees alternatively argue the panel's reliance on *Shelby County* was mere "*dicta*." NAACP.61-62; U.S.Br.26-27. Not so. Per the panel, *Shelby County* altered the benchmark from which the General Assembly should have drawn new lines. Ordinarily, the "basic shape" of an existing district may "legitimately" be "taken as given." *Cooper*, 581 U.S. at 338 (Alito, J., concurring in judgment in part and dissenting in part). But, the panel concluded, because of *Shelby County*, the General Assembly could *not* presume that "the continued … division of Charleston County … was legally justifiable." JSA.27a. Thus, the panel reasoned, the Enacted Plan "went in exactly the opposite direction" of what was "legally justifiable." *Id.* Far from a mere aside, the panel's erroneous view of *Shelby County* was a key premise of its decision.

II. THE PANEL COMMITTED CLEAR ERROR IN FINDING THAT RACE PREDOMINATED.

The panel also clearly erred in finding race predominated. Br.45-52.

A. The Panel's Attempt To Impugn Nonpartisan Staff Fails.

Appellees parrot the panel's implication that Roberts used a racial target, NAACP.Br.36-37, 47-48, which is regrettable and wrong, Br.47-50. They also make several unconvincing assertions that even the panel did not credit. *Supra* p.2.

First, Appellees suggest Roberts "acknowledged" he "considered race" when drawing lines. NAACP.Br.43. But *considering* race is not tantamount to *using* race to draw lines. Mot.Affirm.29; Br.49-50. And Appellees misstate Roberts's testimony: the map-drawing software did not display BVAP data at all

times. NAACP.Br.19. Instead, Roberts explained, users could see BVAP data only by scrolling "down" or "over"; "otherwise, it's not displayed on the screen," and more importantly, he "didn't look at that information to make a judgment on moving a district one way or another." JSA.208a; Br.12. Roberts "look[ed] at strictly political data," not race, "when making modifications." JSA.135; *see* JSA.24a.

To be sure, *after* drawing maps, Roberts had the mapmaking software generate a report showing racial data so that, as he and others testified, the Senate's outside counsel could conduct "legal review of [the] plans." JSA.84a, 91a-92a; *see* JSA.Supp.431a (Terreni). Appellees concede such review is "legitimate." NAACP.Br.43. Roberts himself "look[ed] at the racial makeup" only to investigate former Congressman Cunningham's allegations of racial gerrymandering. JSA.135a-136a; Br.11-12.

As for Appellees' drive-by citations to other witnesses, NAACP.Br.19-20, 43, 55, those witnesses said only that they were aware of race—which is constitutionally unobjectionable. Br.50; *see* JSA.Supp.391a (Benson), 402a (Dennis), 404a (Fiffick), 407a (Hauger), 410a-412a (Newton), 427a (Talley). None testified to—and several specifically denied—using race to draw lines. Dkt.462-3 at 123:5-128:8 (Fiffick); Dkt.451-11 at 71:21-22, 123:2-3 (Hauger); JSA.Supp.411a (Newton). But even if they had relied on race, that would say nothing about the intent of the General Assembly "as a whole." *Brnovich*, 141 S. Ct. at 2350.

Second, Appellees assert the panel's finding that Roberts used a racial target is a "credibility

determination[]" meriting special deference. NAACP.Br.46-48. But such "deference" applies only when a finding turns on you-had-to-be-there circumstances like "the variations in [the witness's] demeanor and tone of voice." *Anderson v. City of Bessemer City*, 470 U.S. 564, 575 (1985); *accord Cooper*, 581 U.S. at 309. When a factfinder rejects "the witness' story" based on contrary "[d]ocuments or objective evidence," the appellate court may "find clear error even in a finding purportedly based on a credibility determination." *Anderson*, 470 U.S. at 575. Otherwise, a "trial judge" could "insulate" findings from review "by denominating them credibility determinations." *Id.*

The panel here disregarded Roberts's denials of using race not because of his demeanor, but because of its view of the supposed "considerable circumstantial evidence" of gerrymandering. JSA.14a; *see* JSA.29a-30a. It never made a credibility finding, and its refusal to credit Roberts's denials carries no independent weight.

Third, Appellees imply it is suspect that the Enacted Plan moved more people than necessary to equalize population. NAACP.Br.18, 42; U.S.Br.17. But the General Assembly undisputedly sought "to achieve other desired ends" too. NAACP.Br.42. Moreover, the Enacted Plan moved fewer people in and out of District 1 than each of Appellees' alternatives. Br.18.

Appellees likewise fault Roberts for not hewing more closely to Congressman Clyburn's proposal. NAACP.Br.18. But beyond disregarding the legislature's "other desired ends," Appellees overlook

that Roberts's departures on net *increased* District 1's BVAP. Br.11. The Milk Plan followed Clyburn's proposed line for the District 1/District 6 border. JA.Supp.155a-156a; JSA.124a, 225a. And even with the changes to Charleston County, the Berkeley and Dorchester County additions made Enacted District 1's BVAP higher than the Milk Plan's. Br.11; JSA.24a.

B. The Panel Relied Upon Flawed Putative Expert Analyses.

1. Appellees' defense of the panel relies heavily on the Imai and Duchin analyses—even though the panel itself never meaningfully invoked Duchin's, JSA.30a-32a; *supra* p.2. As in *Allen*, any reliance on Imai and Duchin "is misplaced," since their simulations "ignored certain traditional districting criteria," including politics. 143 S. Ct. at 1512; Br.20.

Appellees tout Imai's belief that Enacted District 1's BVAP was "astronomically" unlikely to occur. NAACP.Br.32. Appellees neglect to mention this belief rested on Imai's statewide simulations—which in addition to ignoring several traditional criteria, *predominantly used a racial target to draw lines*, as Imai admitted. JA.Supp.54a-55a; Tr.2012-14. That the Enacted Plan does not resemble Imai's race-based simulations only underscores that it did *not* involve a racial target or predominance.

Appellees also note Imai's local simulations "replicated" the Enacted Plan "*everywhere other than*" the District 1/District 6 border or the line in Charleston County. NAACP.Br.51 (emphasis added). That proves the point. Imai's local simulations "ignored" certain traditional criteria *where they*

mattered: at the lines Appellees challenge. *Allen*, 143 S. Ct. at 1512.

Appellees further argue that *Allen*'s criticism of Imai's and Duchin's simulations was limited to their use in "discriminatory *results* claims." NAACP.Br.50-51. Not so. *Allen* held both that: (1) Imai's and Duchin's maps were not "adequate comparators" because they "ignored certain traditional districting criteria"; *and* (2) even adequate comparators are not appropriate for results claims. 143 S. Ct. at 1512-13. The first holding fully applies here. If anything, the formidable task of discerning a legislature's intent heightens the need for adequate comparators informed by all relevant factors. *See* Stephanopoulos.Br.30 ("practitioners of algorithms … must follow a jurisdiction's lead, using its (nonracial) criteria operationalized as it happens to prefer").

2. Appellees also invoke Ragusa's analyses. Neither the panel nor Appellees make clear that Ragusa performed two analyses: a county-envelope analysis in his initial report and a rebuttal analysis. JSA.31a-32a; NAACP.Br.21-22; U.S.Br.8.

Both are fatally flawed. Both ignored certain traditional criteria, did not control for VTDs' or racial groups' location or proximity to district lines, and used total numbers instead of percentages for VTDs' racial and political composition. Br.21, 50-52; JSA.Supp.12a (assuming all VTDs had an identical "baseline probability" of being removed from District 1); *Allen*, 143 S. Ct. at 1512; *compare Hunt v. Cromartie*, 526 U.S. 541, 549 (1999) (summary judgment reversal involving VTDs *at the border* of the challenged district) (quoted at NAACP.Br.41).

Thus, instead of controlling for all relevant factors and comparing similarly situated VTDs, Ragusa's county-envelope analysis compared dissimilar VTDs of different sizes (*i.e.*, 100 vs. 1,500 African-American voters). JSA.508a-509a, 514a; NACCP.Br.21-22; Br.21, 50-51. Appellees nonetheless contend that the analysis resembles an "analysis credited in *Cooper*." NAACP.Br.49-50; U.S.Br.21. Even if true, Ragusa's analysis would not discharge Appellees' demanding burden: *Cooper* merely found that the expert analysis lent "circumstantial support" to the voluminous direct evidence of racial predominance. 581 U.S. at 315.

Moreover, it is not true. The expert in *Cooper* examined total populations moved across or kept in the challenged district, not an apples-to-oranges comparison of dissimilar VTDs. *Id.* And he concluded that "race, and not party" was the "dominant factor" in the challenged district's design. *Id.* Ragusa's analysis reached the *opposite* conclusion: it showed *politics was a stronger predictor than race* of whether a VTD was moved out of District 1. JSA.514a (0.39 coefficient for Biden vote share and 0.18 coefficient for BVAP); JSA.Supp.12a ("the Biden vote variable is also statistically significant and positive").

It thus fell far short of showing racial predominance, suggesting instead (unreliably) that race was "significant" in five districts. JSA.508a-509a; Br.21. Accordingly, the central premise of the panel's opinion—that race predominated over politics in the movement of VTDs out of District 1, *see* JSA.24a-34a—is *contradicted* by Ragusa's county-envelope analysis.

Ragusa's rebuttal analysis offered a second jerry-rigged assessment of dissimilar VTDs. This time, he supported Appellees' preferred conclusion that "racial composition … was a stronger predictor of whether [a VTD] was removed from the 1st district than its partisan composition." JSA.Supp.13a; JSA.32a; *see* NAACP.Br.39-40; U.S.Br.8.

This mulligan does not hold together. In addition to the flaws noted above, Ragusa again lumped all VTDs together in overbroad categories: those with fewer than 1,000 African-American voting-age residents or Biden votes and those with more than 1,000. JSA.Supp.13a. But, of course, moving (or keeping) a VTD with 10 (or 1,001) African-American residents would have a much different effect on a district's racial composition than moving (or keeping) a VTD with 999 (or 2,000) Biden votes would have on its political composition. Yet Ragusa equated moving the St. Andrews 9 VTD, with an all-parts BVAP of 957, JSA.562a, with keeping the Daufuskie VTD (Beaufort County) and its 125 Biden votes, JSA.495a. He also equated moving the Deer Park 2B VTD, with an all-parts BVAP of 1,005, JSA.561a, 566a, and moving the St. Andrews 37 VTD with its 1,751 Biden votes, JSA.566a; *see* JSA.Supp.12a-13a.

The panel did not engage Ragusa's rebuttal analysis, other than to mention its conclusion. JSA.32a. Instead, it focused on ten Charleston County VTDs with more than 1,000 African-American residents that were moved to District 6. *See* JSA.26a n.7, 31a-32a. Appellees suggest the panel erroneously included one such VTD but omitted two others. NAACP.Br.50-51 & n.8; U.S.Br.17n.4. Even if there were 11 such VTDs, the General Assembly's

movement of them comes nowhere close to proving racial predominance.

Indeed, the Enacted Plan moved 55 Charleston County VTDs out of District 1 and a total of 103 VTDs or partial VTDs between Districts 1 and 6. JSA.565a-567a; *compare* Dkt.473 *with* Dkt.473-1. When examined "as a whole," these moves are better explained by politics and traditional principles than race. *Bethune-Hill*, 580 U.S. at 192; *see* Br.16-19, 30-32, 45-52; JSA.514a.

Even as to the VTDs Appellees identify, neither Ragusa, the panel, nor Appellees account for the obvious race-neutral explanations for moving them. Br.52. Moving the VTDs in Deer Park, Lincolnville, and Ladson is more consistent with politics and traditional principles than race. Br.11, 16-19, 32.

The remaining five VTDs are in St. Andrews. JSA.26a n.7; NAACP.Br.50-51 & n.8; U.S.Br.17n.4. The Enacted Plan moved *all 37* St. Andrews VTDs—constituting majority-Democratic, predominantly white West Ashley—from District 1 to District 6. *Compare* Dkt.473 *with* Dkt.473-1; *see* JSA.565a-566a. This move, involving more than half the population moved from District 1 to District 6, was based on politics and traditional principles, not race. Br.14-16. Despite its prominence in the Enacted Plan's changes to District 1 and Charleston County, the panel and Appellees never even *mention* the race-neutral explanation for this move.

3. Appellees further claim that Liu's analyses, on which the panel did not rely, *supra* p.2, bolster Ragusa's. NAACP.Br.8, 22-23, 40, 49; U.S.Br.21-22. They ignore that Liu relied on an inaccurate VTD

dataset supplied by Appellees' counsel that he never verified. Br.21. For instance, he opined the Enacted Plan split 91 VTDs, JSA.Supp.90a, when it split only 13, JSA.447a. And Liu's analyses failed to control for many traditional principles and racial groups' proximity to district lines. Br.21-22.

4. Finally, the panel's *Daubert* ruling, NAACP.Br.49, 52; U.S.Br.21, has no significance. The panel simply deferred making evidentiary rulings to trial. Dkt.393 at 5-6.

The Court should reverse on Count I.

III. THE PANEL'S DETERMINATION THAT DISTRICT 1 IS INTENTIONALLY DISCRIMINATORY CANNOT STAND.

The United States agrees that the Court cannot affirm the panel's holding on Count II. U.S.Br.29-34. There is also no need for a remand because Appellees' intentional-discrimination claim fails under both the panel's approach and Appellees' framework. Br.52-55.

First, Appellees fail to show an "invidious discriminatory purpose" behind the Enacted Plan. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266-68 (1977). They identify no "direct evidence," "contemporary statements" by legislators, or "historical background" establishing such intent; although they note the Enacted Plan's effect on African-American Charlestonians, such "impact alone is not determinative." *Id.*; *see* Br.53; NAACP.Br.63-64.

That leaves only Appellees' scattershot—and unfounded—criticisms of the "legislative process." NAACP.Br.63-64. The NRRT maps not posted online

were emailed after the deadline for public submissions and were never "accepted" by the Senate committee. Dkt.462-5 at 400:8-403:7; Dkt.462-6 at 171:2-7. Both African-American *and* white legislators could not review Senate Amendment 1 before it was released publicly. JA.49. The General Assembly did not "selectively jettison" "redistricting guidelines" or ignore "public input," NAACP.Br.63-64; it made tradeoffs amongst competing criteria and input, *Allen*, 143 S. Ct. at 1513; *e.g.*, Br.41; JSA.319a, 325a, 370a, 392a.

Anyway, "[p]olitics ain't bean bag," *Pignanelli v. Pueblo Sch. Dist. No. 60*, 540 F.3d 1213, 1219 (10th Cir. 2008), and even "procedural violations"—let alone isolated "norm[]" "depart[ures]," NAACP.Br.63-64—"do not demonstrate invidious intent of their own accord," *Rollerson v. Brazos River Harbor Navigation Dist.*, 6 F.4th 633, 640 (5th Cir. 2021).

Second, as the United States confirms, the panel failed to address the discriminatory-effect element, another open-and-shut reversible error. U.S.Br.31-33; Br.53.

Appellees fail, moreover, to show any discriminatory effect. Br.54-55. They note that the Enacted Plan moved some African-American Charlestonians out of District 1 and did not create a 20%-BVAP "toss up" district. NAACP.Br.64. Those observations, however, do not assess how it affected similarly situated *white* Democrats. Br.54-55. When Appellees turn to that undisputedly critical issue, they invoke Duchin's and Ragusa's analyses, NAACP.Br.63-64, but those analyses are fundamentally flawed, *supra* pp.20-25. Appellees also

cite no legal authority that failing to turn a 17%-BVAP slightly-majority Republican district into a Democratic crossover district is intentional vote dilution. *See* U.S.Br.33. Nor can they establish that proposition here, since it is undisputed that the Plan likely disadvantages *just as many or more* white Democrats as African-American Democrats in District 1. Br.55; JA.112; NAACP.Br.64-65.

CONCLUSION

The Court should reverse.

September 11, 2023

Respectfully submitted,

WILLIAM W. WILKINS
ANDREW A. MATHIAS
MAYNARD NEXSEN PC
104 S. Main Street, Suite 900
Greenville, SC 29601

MARK C. MOORE
HAMILTON B. BARBER
MICHAEL A. PARENTE
MAYNARD NEXSEN PC
1230 Main Street, Suite 700
Columbia, SC 29201

Counsel for House Appellants G. Murrell Smith, Jr., Chris Murphy, and Wallace H. Jordan

M. Elizabeth Crum
Michael R. Burchstead
BURR & FORMAN LLP
Post Office Box 11390
Columbia, SC 29211

Counsel for State Election Commission Appellants Howard Knapp, John Wells, Joanne Day, Clifford J. Edler, Linda McCall, and Scott Moseley

JOHN M. GORE
Counsel of Record
JOSEPH P. FALVEY
RYAN M. PROCTOR
JONES DAY
51 Louisiana Ave., N.W.
Washington, DC 20001
(202) 879-3939
jmgore@jonesday.com

ROBERT E. TYSON, JR.
VORDMAN CARLISLE TRAYWICK, III
ROBINSON GRAY STEPP & LAFFITTE, LLC
Post Office Box 11449 (29211)
Columbia, SC 29201

Counsel for Senate Appellants Thomas C. Alexander and Luke A. Rankin