No. 22-807

In the
Supreme Court of the United States

THOMAS C. ALEXANDER, IN HIS OFFICIAL CAPACITY AS PRESIDENT OF THE SOUTH CAROLINA SENATE, ET AL.,

*Appellants*,

v.

THE SOUTH CAROLINA STATE CONFERENCE OF THE NAACP, ET AL.,

*Appellees*.

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

**BRIEF OF ALABAMA AND 15 OTHER STATES AS *AMICI CURIAE* IN SUPPORT OF APPELLANTS**


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## QUESTION PRESENTED

The district court found that the South Carolina General Assembly sought to alter the partisan tilt of District 1 in the State's congressional redistricting plan and had the partisan data needed to do so. The General Assembly thus had no reason to use race to achieve that partisan goal. Did the district court err in ignoring the presumption of legislative good faith and concluding that the General Assembly used race to draw District 1?

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

**Cases**

**Other Authorities**

## INTEREST OF *AMICI CURIAE*[1]

The States of Alabama, Alaska, Arkansas, Florida, Georgia, Indiana, Iowa, Louisiana, Mississippi, Montana, Nebraska, South Carolina, Tennessee, Texas, Utah, and West Virginia respectfully submit this brief as *amici curiae* in support of the South Carolina Appellants. *Amici* are States seeking to ensure that "the good faith of a state legislature" continues to be "presumed." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). Federal courts should never be eager to find a hidden, unlawful purpose lurking behind a facially valid state law. As Chief Justice Marshall declared, "it is not on slight implication and vague conjecture that the legislature is to be pronounced to have transcended its powers, and its acts to be considered as void." *Fletcher v. Peck*, 10 U.S. 87, 128 (1810). Instead, "[t]he opposition between the constitution and the law" must be "clear." *Id.* And in the redistricting context, courts should be especially sure to tread lightly, as "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. Thus, when there are "legitimate reasons" for a legislature to enact a particular law, courts should "not infer a discriminatory purpose on the part of the State." *McCleskey v. Kemp*, 481 U.S. 279, 298-99 (1987).

The district court tossed all that aside. It not only ignored the presumption of legislative good faith but flipped it on its head. The court recognized that the

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[1] More than 10 days before this brief was due, Alabama ensured that counsel of record for all parties received notice of Alabama's intent to file this brief. *See* S. Ct. R. 37.2.

General Assembly sought to change the partisan tilt of District 1 and that partisan legislators had the partisan data needed to accomplish their partisan goal. Yet the court concluded, without any direct evidence, that the racial *effect* of the resulting map was proof of a racial *target*. By creating this racial target out of thin air, the court effectively imposed a disparate impact regime for redistricting.

This presumption of bad faith represents a serious threat to self-government and our federalist system. *Amici* States have a strong interest in ensuring that this Court emphatically rejects the district court's approach and makes clear that applying the presumption of legislative good faith is not optional. The Court should reverse the district court's order.

## SUMMARY OF ARGUMENT

"Redistricting is primarily the duty and responsibility of the State," *Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018) (cleaned up), and federal courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race," *Miller*, 515 U.S. at 916. Thus, until plaintiffs can meet their high burden to show that a legislature "acted with invidious intent," "the good faith of the state legislature must be presumed." *Abbott*, 138 S. Ct. at 2324 (cleaned up). But the district court did precisely what the Court in *Abbott* prohibited: It "reversed the burden of proof," holding that the General Assembly had a racial intent simply because its partisan goal had a racial effect. *Id.* at 2325. The court declined to mention, much less apply, a presumption of good faith.

The district court instead presumed bad faith, creating a racial target from whole cloth and then using that target to impute racial intent to the South Carolina General Assembly. The court accepted that "[w]hen the South Carolina House and Senate began considering congressional reapportionment in 2021, the Republican majorities in both bodies sought to create a stronger Republican tilt to Congressional District No. 1." App.21a. The court then cited an expert report and a closing statement demonstrative when noting that "[a]nalyses of partisan voting patterns within Congressional District No. 1 provided by both Plaintiffs and Defendants indicated that a district in the range of 17% African American produced a Republican tilt, a district in the range of 20% produced a

'toss up district,' and a plan in the 21-24% range produced a Democratic tilt." App.22a-23a.

So far, so good. But then things took a bizarre turn. The court purported to "find[] that this data demonstrating the need to limit the African American population to a certain level to produce the desired partisan tilt resulted in a target of 17% African American population for Congressional District No. 1." App.23a. This leap in logic—from a "desired partisan tilt" to "a target of 17% African American population," *id.*—is as inexplicable as it was unexplained. The court never assessed whether the General Assembly, when pursuing its "desired partisan tilt," *id.*, acted "because of, not merely in spite of," the racial impact. *Miller*, 515 U.S. at 916 (cleaned up). Indeed, the direct evidence consistently showed that the General Assembly was motivated by a partisan target rather than a racial one and that it had the partisan data needed to accomplish its non-racial goal.[2]

After inventing a racial target and projecting it onto South Carolina, the court proceeded to conflate awareness of race with intentional racial sorting,

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[2] Moreover, the data relied on by the district court cannot "demonstrat[e] the *need* to limit the African American population to a certain level." App.23a (emphasis added). The data show only that a handful of proposed plans featuring different percentages of African American voters in District 1 would have produced different partisan tilts. Those limited data points do not rule out other potential iterations of District 1 with both a higher percentage of African American voters and a Republican tilt. The court thus clearly erred in finding that District 1 could not lean Republican unless the percentage of African American voters in the district was "in the range of 17%." App.22a-23a.

reject partisan actors' partisan goals as implausible explanations for partisan actions, and presume that any ostensible oddities in the plan were explainable only by racial discrimination. The court even strangely suggested that the General Assembly used "partisanship as a proxy for race," App.33a, never explaining why partisans would do that in a case where it was unnecessary to use race to accomplish partisan goals.

The district court's standard stacks the deck against the States. Redistricting in particular is a difficult subject for legislatures, with a "complex interplay of forces that enter a legislature's redistricting calculus." *Miller*, 515 U.S. at 915-16. But for the district court, the math here was simple—District 1 ended up with a black population of 17%, so the General Assembly must have set "a target of 17%" from the start. App.23a. The district court thus not only failed to apply a presumption of good faith but did the opposite, equating the racial effects of a partisan decision with intentional racial discrimination.

The district court's approach is essentially a disparate-impact regime for redistricting, which would lead to a flood of new lawsuits for state and local governments. This Court should note probable jurisdiction and reverse the decision below.

## ARGUMENT

### I. The District Court Ignored The Presumption Of Legislative Good Faith.

**A.** The presumption of legislative good faith requires courts to presume that a legislature acted for

legitimate reasons unless there is unmistakable evidence to the contrary. The presumption reflects the different roles that legislatures and courts occupy in our federal system. Every time legislatures act, they must "exercise the political judgment necessary to balance competing interests." *Miller*, 515 U.S. at 915. Disputes about whether laws are "undemocratic and unwise" should remain in the statehouse, not the courthouse. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 280 (1979). Moreover, "discerning the subjective motivation of those enacting [a] statute is … almost always an impossible task." *Edwards v. Aguillard*, 482 U.S. 578, 636 (1987) (Scalia, J., dissenting). The presumption of legislative good faith thus safeguards the separation of powers between the States and the federal government, recognizes the near-impossibility of divining the intent of a multi-member legislative body, and steers federal courts away from the temptation to ascribe bad motives whenever a judge views a legislature's work as bad policy.

The presumption "takes on special significance in districting cases," where "federal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Abbott*, 138 S. Ct. at 2324 (cleaned up). Courts "must be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller*, 515 U.S. at 915-16. Any other approach would "invite losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena." *Cooper v. Harris*, 581 U.S. 285, 335 (2017) (Alito, J., concurring in part).

To be sure, the presumption of good faith can be overcome in certain circumstances, such as when the

State's conceded "aim" is to "disenfranchis[e] practically all of" one racial group, *Hunter v. Underwood*, 471 U.S. 222, 230 (1985), or when the State asserts an explicit desire to target a racial percentage in a district, *Cooper*, 581 U.S. at 311. There have also been a few "rare cases in which a statistical pattern of discriminatory impact demonstrated a constitutional violation," but those cases involved "statistical disparities" so stark that they were "'tantamount for all practical purposes to a mathematical demonstration' that the State acted with a discriminatory purpose." *McCleskey v. Kemp*, 481 U.S. 279, 294 n.12 (1987) (quoting *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960)). In all other cases, where there are nonracial, "legitimate reasons" for a law, courts are not to "infer a discriminatory purpose." *Id.* at 299.

Proving an illicit purpose is thus no mean feat even where the decisionmaker is a single government official. *See Ashcroft v. Iqbal*, 556 U.S. 662, 680-83 (2009). And plaintiffs face even greater "difficulties" where the decisionmaker is a legislative body as large as a state legislature. *Hunter*, 471 U.S. at 228. These difficulties are further compounded for plaintiffs alleging a racial gerrymander when "political and racial reasons are capable of yielding similar oddities in a district's boundaries." *Cooper*, 581 U.S. at 308. Plaintiffs must "disentangle race from politics and prove that the former drove a district's lines," *id.* (citing *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (*Cromartie I*)), which requires proof that "political considerations were subordinated to racial classification," *Bush v. Vera*, 517 U.S. 952, 970-71 (1996).

Because of the strength of the good-faith presumption, weak circumstantial evidence is "plainly insufficient to prove … intentional discrimination" when a legislature's stated purpose is "reasonable" and "legitimate" on its face. *Abbott*, 138 S. Ct. at 2327. Indeed, where "racial identification is highly correlated with political affiliation," even evidence of "the district's shape, its splitting of towns and counties, and its high African-American voting population" is insufficient, "*as a matter of law*," to justify a finding of racial intent. *Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (*Cromartie II*) (emphasis added). In *Abbott*, for example, the Court faulted the lower court for imputing bad faith to the legislature based on wholly circumstantial evidence, such as recent discriminatory intent in prior redistricting and the "willful ignorance" of the legislature toward deficiencies in the new plan. *Abbott*, 138 S. Ct. at 2327-29 (cleaned up). Rejecting this reliance on circumstantial evidence, the Court emphasized that "[t]he only direct evidence … suggest[ed] that the 2013 Legislature's intent was legitimate" and that the district court improperly "discounted this direct evidence." *Id.* at 2327. After all, the legislature's expressed intent was "entirely reasonable and certainly legitimate," so the circumstantial evidence was "plainly insufficient to prove that the 2013 Legislature acted in bad faith and engaged in intentional discrimination." *Id.*

**B.** Yet despite Defendants' repeated references to *Abbott* and its required good-faith presumption, *see, e.g.*, Doc. 323 at 1, 29, 33, the district court here didn't even mention, much less apply, the presumption of legislative good faith. That unexplained failure to

apply the correct legal standard is grounds enough to reverse. *See Abbott*, 138 S. Ct. at 2326 ("[W]hen a finding of fact is based on the application of an incorrect burden of proof, the finding cannot stand."); *see also League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1373 (11th Cir. 2022) (per curiam) (staying district court injunction pending appeal because "it does not appear to us that the district court here meaningfully accounted for the presumption" of legislative good faith).

Worse, the court applied the very analysis denounced in *Abbott* by cross-examining the legislative aide who drew the map, ascribing racial motivations to his actions, and then assigning those motivations to the State itself. In doing so, the district court improperly shifted the burden of proof to the State, holding that the mapdrawer "failed to provide the Court with any plausible explanation for the abandonment of his 'least change' approach' … or the subordination of traditional districting principles." App.29a. The court did not attempt to explain why the mapdrawer's testimony that he targeted a "partisan lean" was not a "plausible explanation." App.24a. This was not a credibility determination between conflicting testimony, *cf. Cooper*, 581 U.S. at 309-10, but instead a complete rejection of the idea that a good-faith partisan explanation could be plausible.

Indeed, the district court recognized yet then "discounted … direct evidence" that universally indicated legitimate political motives. *Abbott*, 138 S. Ct. at 2327. First, "Republican majorities in both" the House and Senate "sought to create a stronger Republican tilt to Congressional District No. 1." App.21a. Second, "the

lead proponent of what would become the enacted congressional district plan … explained at trial that he was seeking to include" particular "counties in the reconfigured Congressional District No. 1 to give the district a stronger Republican lean." App.22a. Third, the mapdrawer "testified that he relied 'one hundred percent' on data regarding 'the partisan lean of the district.'" App.24a (quoting Roberts Tr. 1558:13-19). And fourth, the State admitted its goal to preserve "the 6-1 Republican-to-Democratic split in House seats." Doc. 323 at 16. Yet, citing even less evidence than the lower court in *Abbott*—which could at least point to the Texas Legislature's recent history of discriminatory map drawing—the district court inexplicably "discounted this direct evidence" and assumed a secret racial motivation. *Abbott*, 138 S. Ct. at 2327. When "[t]he only direct evidence brought to [the Court's] attention suggests that the … Legislature's intent was legitimate," the district court's contrary finding cannot stand. *Id.* The facts relied on by the district court "cannot, as a matter of law, support the District Court's judgment." *Cromartie II*, 532 U.S. at 243.

## II. The District Court Invented And Ascribed To The General Assembly An Irrational Racial Intent.

The district court didn't just assume that Republican majorities in the General Assembly were discriminatory; the court deemed them to be dimwitted too. How else to explain the court's conclusion that these partisan actors with partisan data on hand decided to imperil their plan by needlessly injecting race into the redistricting process? Occam's razor suggests that a

rational, partisan legislature would simply use partisan data to alter the partisan lean of District 1. But the district court found that legislators instead constructed and aimed first at a racial "target of 17% African American population for Congressional District No. 1" (App.23a) as a bank shot means of hitting the partisan target they formed when they "began considering congressional reapportionment in 2021." App.21a. That makes no sense.

And this lack of any plausible racial motive sets this case apart from the racial gerrymandering cases the Court has considered over the last several decades. This case, for example, does not involve a State relying on the Voting Rights Act to try to justify race-based lines. *See, e.g.*, *Abbott*, 138 S. Ct. at 2334 ("Texas does not dispute that race was the predominant factor in the design of HD90, but it argues that this was permissible because it had '*good reasons* to believe' that this was necessary to satisfy § 2 of the Voting Rights Act."); *Cooper*, 581 U.S. at 299 (legislators advocated drawing a district "to be majority-minority, so as to comply with the VRA"); *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 275 (2015) (attempts to comply with VRA led to racial gerrymander); *Bush*, 517 U.S. at 979 (State relying on VRA to defend "bizarrely shaped" districts). Nor did the district court suggest that "legislators use[d] race as" cover for partisanship, "thinking that a proposed district is more 'sellable' as a race-based VRA compliance measure than as a political gerrymander." *Cooper*, 581 U.S. at 308 n.7.

Neither is this a situation like that faced by the mapdrawers in the early 1990s in *Bush v. Vera*, who

had access to racial data that was more detailed than then-available partisan data, which created an incentive to use race as a proxy for partisanship. 517 U.S. at 961-62. As the Court recounted, mapdrawers had access to "unprecedented" "block-by-block racial data," and this "uniquely detailed racial data … enabled districters to make more intricate refinements on the basis of race than on the basis of other demographic information." *Id.* The result was unmistakable. Districts' borders "change[d] from block to block" in a "nearly perfect" emulation of "racial data at the block-by-block level." *Id.* at 961-62. Notably, "other data, such as party registration and past voting statistics, were only available at the level of voter tabulation districts." *Id.* at 961. Thus, because *only* racial data were available with such granularity, only race could explain the district's "change from block to block, from one side of the street to the other, … in seemingly arbitrary fashion." *Id.* at 962.

Unlike thirty years ago, today's mapdrawers have no need to use race as a proxy for partisanship because they "now have access to more granular data about party preference and voting behavior than ever before," including "city-block-level data." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2513 (2019) (Kagan, J., dissenting). Thus, even if the district court wasn't willing to presume the South Carolina General Assembly's good faith, it should have at least assumed that the General Assembly would not needlessly (and recklessly) sort voters based on race instead of partisanship when trying to "create a stronger Republican tilt to Congressional District No. 1." App.21a. "A legislature trying to secure a safe [Republican] seat is

interested in [Republican] voting behavior." *Cromartie II*, 532 U.S. at 245. Because that admitted partisan aim explains this legislature's actions, Plaintiffs failed "to disentangle race from politics and prove that the former drove a district's lines." *Cooper*, 581 U.S. at 308.

In addition to the district court's apparent theory that the General Assembly used racial data as a proxy for partisanship data it already possessed, the district court appears to have also found that the General Assembly "use[d] partisanship as a proxy for race." App.33a. It is not clear exactly what the district court meant by that. Why would a legislature ever use partisanship as a proxy for race, when detailed racial data could be used instead? Even Plaintiffs never claimed in their complaint that partisanship was used as a proxy for race. *See* Doc. 267. And more to the point, why would a legislature set on "creat[ing] a stronger Republican tilt to Congressional District No. 1," App.21a, limit its options for doing so by incorporating a racial target? The decision below underscores the dangers of abandoning the presumption of legislative good faith and the need for the Court to reaffirm the presumption.

## III. The District Court Effectively Created A Disparate-Impact Regime For Redistricting.

**A.** As this Court has repeatedly recognized, nearly every policy has the potential for some disparate racial impact. A legislative decision cannot be held discriminatory simply because "in practice it benefits or burdens one race more than another"; such a rule "would be far-reaching and would raise serious

questions about, and perhaps invalidate, a whole range of tax, welfare, public service, regulatory, and licensing statutes that may be more burdensome to" some racial groups than to others. *Washington v. Davis*, 426 U.S. 229, 248 (1976).

This observation rings particularly true in redistricting, where "racial identification is highly correlated with political affiliation." *Cromartie II*, 532 U.S. at 243. "If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify, just as racial disproportions in the level of prosecutions for a particular crime may be unobjectionable if they merely reflect racial disproportions in the commission of that crime." *Bush*, 517 U.S. at 968. At the same time, this correlation means that courts must "'exercise extraordinary caution' in distinguishing race-based redistricting from politics-based redistricting," lest "the federal courts … be transformed into weapons of political warfare." *Cooper*, 581 U.S. at 335 (Alito, J., concurring in part) (quoting *Miller*, 515 U.S. at 916). Thus, plaintiffs bringing racial gerrymandering claims must prove "more than intent as volition or intent as awareness of consequences." *Miller*, 515 U.S. at 916 (quoting *Feeney*, 442 U.S. at 279). When courts fail to hold plaintiffs to this high burden, "they … invite the losers in the redistricting process to seek to obtain in court what they could not achieve in the political arena." *Cooper*, 581 U.S. at 335 (Alito, J., concurring in part).

Conflating racial correlation with racial motives is particularly dangerous because plaintiffs can almost always find a suspicious-looking statistical

correlation. As scientists have routinely emphasized, "statistical significance can obviously be obtained even from pure noise by the simple means of repeatedly performing comparisons, excluding data in different ways, examining different interactions, controlling for different predictors, and so forth." Andrew Gelman & Eric Loken, *The Statistical Crisis in Science*, 102 AMERICAN SCIENTIST 460, 460-65 (2014). Thus, if "a highly unscrupulous researcher … perform[ed] test after test in a search for statistical significance," a statistically significant result "could almost certainly be found." *Id.* As one study explains, "[w]hen rolling one die, the chance of a six is 1/6, or 17%. When ten dice are rolled, the chance of at least one landing on six is 84%. Similarly, when multiple hypotheses are tested, each at a significance level of 0.05, the chance of obtaining at least one false positive rises precipitously with the number of hypotheses tested." Erin M. Kirkham & Edward M. Weaver, *A Review of Multiple Hypothesis Testing in Otolaryngology Literature*, 125 LARYNGOSCOPE 599, 599-603 (2015); *see also* Denes Szucs & John P.A. Ioannidis, *When Null Hypothesis Significance Testing Is Unsuitable for Research: A Reassessment*, FRONTIERS HUM. NEUROSCIENCE, Aug. 3, 2017, at 1, 11 (discussing the many ways in which this phenomenon makes "unjustified inference too easy"). Thus, if one metric for a redistricting plan does not suit the plaintiffs' needs, they can always try another. And if controlling for certain traditional redistricting criteria explains the racial breakdown of a district, an expert can simply ignore those criteria and pin the distribution instead on race.

Plaintiffs in redistricting cases generally know this phenomenon to be true, which is why they sometimes disavow their own statistical analyses. For example, in the ongoing litigation over Alabama's congressional districts, the plaintiffs—represented by many of the same counsel representing Plaintiffs in this case—used Dr. Kosuke Imai to perform a "race-blind simulation analysis" that would purportedly reveal the challenged map to be race predominant. *See* App.30a; *Allen v. Milligan*, No. 21-1086 (filed Jan. 28, 2022), Supp. Jt. App. 52. They argued that his race-neutral analysis "alone show[ed] that [Alabama's] HB1 used race as a predominant factor to crowd Black voters into District 7" because of the statistical differences between his simulations and the enacted plan. Mot. for Prelim. Inj., *Milligan v. Merrill*, Case No. 2:21-cv-1530-AMM (N.D. Ala. filed Dec. 15, 2021) (ECF No. 69); *Milligan*, No. 21-1086, Supp. Jt. App. 62. The problem with this analysis was obvious from the start: Alabama's enacted plan, as in many States, followed existing district lines; Dr. Imai's simulations did not. He drew on a blank slate. His analysis thus could not reveal that race predominated. But when Alabama noted that Dr. Imai's analysis *could* be a race-neutral benchmark to show that race predominated in other plans offered by plaintiffs in that litigation—allowing an apples-to-apples comparison because all plaintiffs' plans were drawn on a blank slate—plaintiffs tossed their expert to the curb. In their words, "[s]imulations that do not match what states actually do in redistricting are neither useful nor relevant." Appellees' Br. at 50, *Milligan*, No. 21-1086 (filed July 11, 2022). In other words, simulations are good so long as they are faulting the State, but they can't vindicate it. Yet

plaintiffs keep offering courts cherrypicked correlations, and too often, courts mistake these for causation.

**B.** The decision below illustrates this problem well. The district court based its finding of racial motivation almost entirely on correlations it found suspicious. Indeed, by focusing on the statistical *effects* of the new map, the district court appeared to define "discriminatory purpose" as mere volition or awareness of consequences—the very analysis this Court has repeatedly warned against. *See, e.g.*, *Miller*, 515 U.S. at 916; *Feeney*, 442 U.S. at 279. According to the district court, the General Assembly chose a map with a partisan tilt (volition), knowing that the partisan tilt would result in "a district in the range of 17% African American" (awareness of consequences). App.23a. From this alone, the court reasoned that the General Assembly had a predetermined *purpose* to achieve "a target of 17% African American population" in the district. *Id.* The district court never considered that the General Assembly may have acted "in spite of," not "because of," racial effects. *Miller*, 515 U.S. at 916 (quoting *Feeney*, 442 U.S. at 279). Indeed, none of the evidence cited by the court was incompatible with the State's asserted purpose of creating a partisan tilt in District 1. Yet without any evidence showing that the General Assembly chose the map *because* of its effects on race, the court was left with a singular focus on the General Assembly's decision to choose a map while aware of its racial effects. This is materially indistinguishable from a disparate-impact regime for redistricting.

Other elements of the opinion bear this out. The district court emphasized the mapdrawer's awareness of race, reasoning that his "in-depth knowledge of the racial demographics of South Carolina" belied "his claim that he did not consider race in drawing Congressional District No. 1." App.29a-30a. There are at least two problems here. First, the mapdrawer is not the General Assembly, so his purported consideration of race (conscious or otherwise) cannot be imputed to it. *See Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2350 (2021) ("The 'cat's paw' theory has no application to legislative bodies."). Second, "the legislature always is *aware* of race when it draws district lines, just as it is aware of age, economic status, religious and political persuasion, and a variety of other demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination." *Shaw v. Reno*, 509 U.S. 630, 646 (1993). Thus, "a jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if those responsible for drawing the district are *conscious* of that fact." *Cromartie I*, 526 U.S. at 542. "If the State's goal is otherwise constitutional political gerrymandering, it is free … to achieve that goal regardless of its awareness of its racial implications." *Bush*, 517 U.S. at 968.

Apart from awareness of race, the court's only other "striking evidence" of racial intent was the mapdrawer's purported "subordination of traditional districting principles" and "abandonment of his 'least

change' approach."[3] App.29a. But each of these pieces of evidence is more readily explained by the State's declared partisan motivations. The State never hid the ball: It wanted to preserve "the 6-1 Republican-to-Democratic split in House seats," a target that "animated the General Assembly's line-drawing decisions" and ultimately manifested in the final plan. Doc. 323 at 16. The court never explained why this could not be a plausible explanation for any of the evidence it found suspicious. Because political motivations could explain all the "oddities in [the] district's boundaries," *Cooper*, 581 U.S. at 308, the State's express political motivation—which was "entirely reasonable and certainly legitimate"—should have received a presumption of good faith, not cursory dismissal. *Abbott*, 138 S. Ct. at 2327. Indeed, "the legitimate noninvidious purposes of [the] law cannot be missed." *Feeney*, 442 U.S. at 275.

The district court's other observations similarly go only to the effect, not the intent, of the law. For example, the court noted that the mapdrawer "acknowledged … that *if* there was a target for the district of 17%, the inclusion of a VTD that was 35% African American would adversely impact the 17% objective." App.28a (emphasis added). But this unremarkable

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[3] The court also discussed "South Carolina's legal and political history" but did not state whether that history supported a finding of discriminatory intent. App.18a-20a. In any case, "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful," and "[t]he allocation of the burden of proof and the presumption of legislative good faith are not changed by a finding of past discrimination." *Abbott*, 138 S. Ct. at 2324.

(and question-begging) tautology merely acknowledged the racial effect of the selected map.

The district court next noted that 2020 census data applied to the 2011 lines for District 1 resulted in an African-American percentage of 17.8%, the same percentage in District 1 under the 2022 plan enacted by the General Assembly. App.29a. In the court's view, this "was more than a coincidence and was accomplished only by the stark racial gerrymander." *Id.* Not only was this an odd statement (normally, a lack of change would be the *least* suspicious outcome), but the court was again merely observing an effect of the plan and ascribing to it a racial intent. Neither numerology nor speculation are bases for invalidating a facially neutral law.

The district court also relied on the analysis of Dr. Jordan Ragusa, who concluded that the racial composition of a voter tabulation district (VTD) was a better predictor than political composition of whether the VTD would be moved from the prior version District 1 to another district. App.31a-32a. But Dr. Ragusa's analysis suffered the very flaw this Court criticized in *Cromartie II*: It failed to "specify whether the excluded white-reliably-Democratic precincts were located near enough to [the district's] boundaries or each other for the legislature as a practical matter to have drawn [the district's] boundaries to have included them, without sacrificing other important political goals." 532 U.S. at 247; *see* Doc. 323-29. Indeed, Dr. Ragusa did not consider compactness at all. Doc. 323-30 at 3. An analysis that suffers this fundamental flaw "offers little insight into the legislature's true motive," *Cromartie II*, 532 U.S. at 248, because it cannot show

"that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles," *id.* at 258. And it certainly cannot show that a plan is "unexplainable in terms other than race." *Bush*, 517 U.S. at 972.

Finally, the court cited the testimony of Dr. Imai, who concluded that the 2022 plan "splits Charleston County by placing a disproportionately large number of black voters into District 6, while assigning relatively few voters to District 1." App.30a (quoting PX-0032, Expert Report of Kosuke Imai at 13). But Dr. Imai admitted that he never considered partisan information in his analysis, much less controlled for it. Doc. 386-3 at 12.

In sum, the district court's observations about the effect of the plan fall far short of showing that the State acted "because of, not merely in spite of," racial impact. *Miller*, 515 U.S. at 916 (cleaned up). "Absent a pattern as stark as that in *Gomillion* or *Yick Wo*, impact alone is not determinative, and the Court must look to other evidence." *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 266 (1977). Because the record lacked such additional evidence, and this case is no *Gomillion*, the presumption of legislative good faith must carry the day.

## CONCLUSION

The Court should note probable jurisdiction and reverse the decision below.

Respectfully submitted,

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