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 FAIR LINES AMERICA FOUNDATION AS *AMICUS CURIAE* IN SUPPORT OF APPELLANTS

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INTEREST OF THE *AMICUS CURIAE*

Fair Lines America Foundation (FLAF) is a nonprofit, nonpartisan organization that educates the public on fair and legal redistricting through comprehensive data gathering, processing, and deployment; dissemination of relevant news and information; and strategic investments in academic research and litigation.

FLAF advocates concerning the proper institutions for making redistricting policy. In particular, it regards legislative organs of government as uniquely well-suited to set redistricting policy and judicial organs as generally ill-suited for that task. FLAF therefore has an interest in preserving legislative bodies' primary role in creating redistricting plans and otherwise establishing redistricting criteria. As explained in this brief, this appeal directly addresses that interest because the legal theory adopted below recasts the racial-gerrymandering cause of action into a claim for political power and influence, which federal courts are neither responsible nor equipped to apportion. FLAF has an interest in articulating for the Court how the claim before it is infused with political and policy implications and how a ruling affirming the decision below could make federal courts primarily responsible to make redistricting policy judgments.[1]

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[1] No counsel for a party authored this brief in whole or in part, and no person other than the *amicus curiae* and its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

INTRODUCTION AND SUMMARY OF THE ARGUMENT

In *Rucho v. Common Cause*, 139 S. Ct. 2484 (2019), this Court held "that partisan gerrymandering claims present political questions beyond the reach of the federal courts." *Id.* at 2506–07. Since then, litigants have sought to bypass that ruling by repurposing other redistricting causes of action into vehicles "for vindicating [the] generalized partisan preferences" that *Rucho* held are political, not legal, claims. *Id.* at 2501 (citation omitted). This should come as no surprise. "Apportionment is so important to legislators and political parties" that any redistricting cause of action will result in "the routine lodging of . . . complaints," *Davis v. Bandemer*, 478 U.S. 109, 147 (2019) (O'Connor, J., concurring in the judgment), unless it is cabined by "limited and precise standards that are clear, manageable, and politically neutral," *Rucho*, 139 S. Ct. at 2500.

The plaintiffs in this case brought a racial-gerrymandering claim, but they seek—like political-gerrymandering plaintiffs—"a fair share of political power and influence, with all the justiciability conundrums that entails." *Id.* at 2502. At issue is South Carolina's Congressional District No. 1 (District 1), which is majority white and performed as a politically competitive district last decade. J.S.App.21a, 28a. In the 2021 redistricting, "the Republican majorities in both bodies" of the South Carolina legislature "sought to create a stronger Republican tilt" in District 1, and they achieved that goal. *Id.* Having no legal basis to challenge that political goal *as* a political goal, the plain-

tiffs recast it as a *racial* goal and brought a racial-gerrymandering challenge seeking a new configuration of District 1. The district court accepted their theory, enjoined District 1, and commanded that the legislature redraw it to cure the supposed violation.

All the court did, however, was translate the plaintiffs' political grievances into findings of racial predominance. The district court acknowledged the legislature's political goals concerning District 1 but characterized them as racial on the bewildering view that the legislature applied an "African American population target of 17%." J.S.App.42a. No evidence supports that finding. Both the sponsoring legislator and the map-drawing consultant denied employing any racial target, and there is no reason to disbelieve them when they needed only political data for their political goals. The district court concluded that District 1 had to be "17% African American" to become more Republican-leaning and thus deduced that the racial outcome must have been intended. That *non-sequitur* conflates purpose and effect, and it stands condemned in precedent, which demands proof "that race *rather than* politics *predominantly* explains" the challenged district boundaries. *Easley v. Cromartie*, 532 U.S. 234, 243 (2001) (*Cromartie II*). That a given racial outcome may follow—even ineluctably—from a given political goal proves nothing about racial intent.

The district court also deemed the racial-gerrymandering claim a proper vehicle to determine what redistricting goals might be "justifiable," J.S.App.27a, but did not properly inquire whether "race was the predominant factor motivating" the configuration of District 1. *Miller v. Johnson*, 515 U.S. 900, 916 (1995).

The law holds that "race-neutral districting principles . . . can defeat a claim that a district has been gerrymandered on racial lines," *id.* (citation and quotation marks omitted), but the district court considered itself free to ignore some neutral principles the legislature employed, disagree with others, and deem others racial in character with no basis in evidence. Under that approach, courts could gerrymander the gerrymandering analysis to incorporate only (non-existent) racial considerations and no countervailing race-neutral principles.

Both holdings, if affirmed, "would commit federal and state courts to unprecedented intervention in the American political process." *Rucho*, 139 S. Ct. at 2498 (citation omitted). The decision below charts a course for a new-generation racial-gerrymandering claim that would be a partisan-gerrymandering claim in all but name. Any court could as easily as the court below identify a racial outcome correlated with a political goal, recast policy decisions as racial decisions, and quarrel with redistricting choices. Thus, any court could as easily find racial gerrymandering on any given redistricting record. In this case, the plaintiffs desire that District 1 be anchored in Charleston County rather than Berkeley and Beaufort Counties and that it be configured as a minority crossover district that enables a coalition of white and Black Democratic constituents to elect a white Democrat. Federal law entitles the plaintiffs to none of those things. But the three-judge court below created a *de facto* legal right to them all by reframing the plaintiffs' policy criticisms of South Carolina's congressional plan as circumstantial evidence of racial predominance. The

Equal Protection Clause supports neither that result nor the reasoning that produced it, and this Court should reverse.

ARGUMENT

Because "the States must have discretion to exercise the political judgment necessary to balance competing interests," this Court's precedents command "courts, in assessing the sufficiency of a challenge to a districting plan," to "be sensitive to the complex interplay of forces that enter a legislature's redistricting calculus." *Miller*, 515 U.S. at 915–16. In that analysis, courts must attend to what a racial-gerrymandering claim is, and what it is not: "Unlike partisan gerrymandering claims, a racial gerrymandering claim does not ask for a fair share of political power and influence, with all the justiciability conundrums that entails. It asks instead for the elimination of a racial classification." *Rucho*, 139 S. Ct. at 2502.

Accordingly, the question in this case is whether a racial classification predominantly drove the line drawing in District 1, not whether the legislature's redistricting goals were sound or fair. The court below misconstrued these principles and impermissibly transformed the plaintiffs' equal-protection claim into a claim for political power.

I. The District Court Erroneously Conflated Political Goals Having an Incidental Racial Outcome With Racial Predominance.

The district court's findings make clear that the South Carolina legislature's predominant purpose concerning District 1 was political. After competitive

elections in District 1 in the 2011 decade, "the Republican majorities in both bodies sought" to give it "a stronger Republican tilt." J.S.App.21a. Because "a jurisdiction may engage in constitutional political gerrymandering," *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (*Cromartie I*), that political goal should have been deemed a defense to the charge of racial gerrymandering, *Cromartie II*, 532 U.S. at 243–44. Politics, not race, predominated, so the judgment should have been entered for the defense. *See id.*

The district court avoided that outcome by characterizing the South Carolina legislature's political goals as racial goals. The court determined that "the range of 17% African American produced a Republican tilt" in District 1 and inferred from this a "need to limit the African American population to a certain level to produce the desired partisan tilt," from which it found "a target of 17% African American population in Congressional District No. 1." J.S.App.23a, 33a. That set of *non-sequiturs* ignores that the 17% racial outcome could as easily have resulted incidentally from the legislature's political motive, not from racial intent.[2]

That focus on outcomes, not intent, stands rejected in this Court's precedent, which has for decades made

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[2] Minority population percentages in redistricting are generally expressed in terms of "voting-age population" (VAP), such as "black voting-age population (BVAP)." *See Bethune-Hill v. Virginia State Bd. of Elections*, 580 U.S. 178, 182 (2017). The district court's ambiguous references to "17% African American population" are among many oddities of its decision. J.S.App.33a. District 1, in fact, appears to have a BVAP of 16.72%. *See* Joint Appendix 83.

clear that no particular "percentage of black residents" in a district creates "an inference of racial gerrymandering." *Lawyer v. Dep't of Just.*, 521 U.S. 567, 582 (1997); *see also United States v. Hays*, 515 U.S. 737, 746 (1995) ("We have never held that the racial composition of a particular voting district, without more, can violate the Constitution."). That is because "a reapportionment plan that concentrates members of the group in one district and excludes them from others may reflect wholly legitimate purposes." *Shaw v. Reno*, 509 U.S. 630, 646 (1993) (*Shaw I*). The "racial predominance inquiry concerns the actual considerations" behind District 1, not considerations "the legislature in theory could have used but in reality did not." *Bethune-Hill*, 580 U.S. at 189. Under that rule, it was not enough for the district court to find that a political goal necessarily produced what it termed a "17% African American population." J.S.App.33a. To rule for the plaintiffs, the district court had to find that the target was selected "for its own sake" and was not achieved incidentally as the result of "other districting principles." *Miller*, 515 U.S. at 913. Under the correct standard, judgment for the plaintiffs is untenable.

A. The District Court Cited No Competent Evidence of a Racial Target.

This case does not involve "an express racial target." *Bethune-Hill*, 580 U.S. at 192. In prior cases, a racial target was either directly admitted at trial, *see id.* at 184–85; *Cooper v. Harris*, 581 U.S. 285, 300 (2017), or else readily inferred from the circumstances, *Miller*, 515 U.S. at 919; *Shaw v. Hunt*, 517 U.S. 899, 906 (1996) (*Shaw II*). For example, in both

Miller and *Shaw II*, the challenged congressional districts were a response to the U.S. Department of Justice's insistence that new majority-minority districts be created as a precondition for Voting Rights Act (VRA) preclearance, which this Court regarded as "direct evidence" of a racial target. *Shaw II*, 517 U.S. at 906; *see also Miller*, 515 U.S. at 918 ("[T]he General Assembly acquiesced and as a consequence was driven by its overriding desire to comply with the Department's maximization demands."). In the closest racial-gerrymandering case to date, this Court found that "the role of the VRA in altering" the challenged district's lines made the evidentiary difference. *See Cooper*, 581 U.S. at 311.

But, in this case, the district court cited no evidence that race predominated, and it did not even identify a plausible motive for the legislature to consider race.

1. The district court found that the legislature's map-drawing consultant, Will Roberts, "denied considering racial data while drawing his plan," J.S.App.24a, and the sponsor of the bill, Senator Campsen, likewise denied reviewing racial data or employing "racial targets," J.S.App.345a–346a. That testimony went unrebutted, and it should have been credited under "the presumption of good faith that must be accorded legislative enactments." *Miller*, 515 U.S. at 916. The court found that these denials "ring[] 'hollow,'" but only because it viewed a precise racial outcome as the necessary result of the legislature's avowed political goals. *See id.* at 29a–31a.

But, as explained, there is no legal problem with the legislature's goal of a "stronger Republican tilt" in District 1, J.S.App.21a; *Cromartie I*, 526 U.S. at 551, and it constituted a defense to the charge of racial gerrymandering, *Cromartie II*, 532 U.S. at 243–44. "If the State's goal is otherwise constitutional political gerrymandering, it is free to use . . . political data . . . to achieve that goal regardless of its awareness of its racial implications." *Bush v. Vera*, 517 U.S. 952, 968 (1996) (plurality opinion). There was, in turn, no basis for the district court to convert a finding of political motive into a finding of racial motive without proof "that race *rather than* politics" predominated. *Cromartie II*, 532 U.S. at 243. This Court's precedent rightly requires "the party attacking the legislatively drawn boundaries" as racially motivated to "show at the least that the legislature could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles." *Id.* at 258. Without such a requirement, a trial court has no way to determine whether the challengers are truly seeking "the elimination of a racial classification" rather than "political power and influence." *Rucho*, 139 S. Ct. at 2502.

In this case, the district court excused the plaintiffs from this requirement, J.S.App.46a, but its findings show the standard could not have been met. Because the legislature desired to make District 1 more Republican, and because a more Republican district would necessarily have a "17% African American population," purely partisan motives would produce that racial outcome in an incidental way, with no racial motive. As a result, the plaintiffs would have no way

to prove that the legislature's political goals could have been achieved with a different racial outcome, as *Cromartie II* demands.

2. Even without an alternative-mapping requirement, the district court's findings fall well short of the discriminatory-intent standard. The evidence the district court cited does not so much as suggest that anyone involved in the redistricting understood that "the range of 17% African American" was the right range to "produce[] a Republican tilt." J.S.App.23a. The court cited trial evidence, including an expert report sponsored by the plaintiffs, which merely demonstrated a correlation with the BVAP of a district and its partisan performance. *Id.* (citing PX-0067, Expert Report of Moon Duchin at 3 (Charts 2.1, 2.2) and Dkt. No. 491-1 at 21). But those exhibits do not indicate that anyone involved in the map-drawing was conscious that 17% was a magic number.

Even assuming such "awareness" existed, it falls short of the legal mark. *See Personnel Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). This Court held 30 years ago "that the legislature always is *aware* of race when it draws district lines" and that this "sort of race consciousness does not lead inevitably to impermissible race discrimination." *Shaw I*, 509 U.S. at 646. The reason this Court fashioned the "predominance" test for racial-gerrymandering claims, rather than applied a more lenient substantial-factor test, *see Mt. Healthy City Sch. Dist. Bd. of Educ. v. Doyle*, 429 U.S. 274, 287 (1977), is that "[t]he distinction between being aware of racial considerations and being motivated by them may be difficult to make." *Miller*, 515 U.S. at 916. "This evidentiary difficulty," as well

as "the presumption of good faith," cut against the plaintiffs in racial-gerrymandering cases, *id.*, and forbid district courts from presuming racial intent where political intent just as easily explains the racial outcome, *Cromartie II*, 532 U.S. at 257. As a result, even if there were reason to assume awareness that a "17% African American" composition would achieve a given political outcome, and even if that outcome were properly found to be both desired and actually achieved, the evidence the district court cited would at best show state action taken "'in spite of,'" not "'because of,'" its racial "'effects.'" *Miller* 515 U.S. at 916 (quoting *Feeney*, 442 U.S. at 279).

3. The district court's findings are so deficient that they fail even to identify a plausible motive for the South Carolina legislature to employ a 17% minority-percentage target. A racial target at that level appears never to have been at issue in any redistricting case, most targets alleged in precedent approach or exceed the majority-minority mark as a consequence of the VRA, and it is difficult to understand why a redistricting authority would ever use something so low. A theory that is not psychologically coherent does not satisfy the "demanding" predominance standard. *Cromartie II*, 532 U.S. at 241 (citation omitted).

As noted, the paradigmatic racial-gerrymandering claim arises where a redistricting authority seeks to hit a racial target to avoid VRA liability. *Bethune-Hill*, 580 U.S. at 192–93; *Cooper*, 581 U.S. at 300–01; *Miller*, 515 U.S. at 919; *Shaw II*, 517 U.S. at 906; *Alabama Legislative Black Caucus v. Alabama*, 575 U.S. 254, 278 (2015). That motive is not only plausible but

entirely sympathetic. *See, e.g.*, *Bethune-Hill*, 580 U.S. at 196 (finding that "the State did have good reasons under these circumstances" to create a district for racially predominant reasons and that "[h]olding otherwise would afford state legislatures too little breathing room . . . ."). Because "this Court and the lower federal courts have repeatedly . . . authorized race-based redistricting as a remedy for state districting maps that violate § 2" of the VRA, *Allen v. Milligan*, 143 S. Ct. 1487, 1516–17 (2023), a plaintiff's allegations that a redistricting authority used race to avoid VRA liability can ring true in many or most cases, *see Cooper*, 581 U.S. at 301. Sometimes, a redistricting authority may target certain racial percentages simply at the prompting of civil-rights organizations. *See Abbott v. Perez*, 138 S. Ct. 2305, 2334 (2018). But a racial target in such cases is necessarily higher than 17%, given the state's need to create districts affording equal minority electoral opportunity. *See id.* (50% Hispanic citizens voting-age population); *Cooper*, 581 U.S. at 300–01 (50% BVAP); *Bethune-Hill*, 580 U.S. at 794 (55% BVAP); *Alabama Legislative Black Caucus*, 575 U.S. at 276 (goal of maintaining existing minority percentages). The VRA did not plausibly motivate the South Carolina legislature to utilize a 17% African-American target.

The district court, however, posited that the legislature's political motives provide a plausible race-based motive. Setting aside the court's unfounded leaps of logic in transforming political motive into racial motive, its ultimate theory does not even make practical sense. It does not explain why a legislature

with political goals would use racial data, rather than political data, to achieve them.

To be sure, this Court has found that redistricting authorities might sometimes use race "as a proxy for political characteristics," *Bush*, 517 U.S. at 968 (plurality opinion), but it has also identified plausible reasons *why* a legislature would use racial data for a political goal, *id.* at 970–71. In *Bush*, for example, the Court found a district "split[] voter tabulation districts [VTDs] and even individual streets in many places." *Id.* at 970. The Texas legislature did not have political data (from precinct returns) at that low level of geography, so only racial data (from the census) could guide such precise splits. *Id.* at 970–71. It was plausible to infer from its refined choices, which were "tailored perfectly to maximize minority population," that it had consulted and relied upon racial data. *Id.* at 971; *see also Bethune-Hill v. Virginia State Bd. of Elections*, 326 F. Supp. 3d 128, 160 (E.D. Va. 2018) (three-judge court) (similar holding).

But this Court's precedents do not permit federal courts to apply the label "race as a proxy for politics" merely because such a proxy was possible; in *Bush*, it was the only credible explanation. But the district court in this case did not find that the South Carolina legislature resorted to racial data when political data proved inadequate, and the court recounted moves of *entire* VTDs, not of *split* VTDs. *See* J.S.App.25a–26a. That left the court with no coherent theory as to why the map-makers would consult racial data at all and no basis to reject their assertions that they in fact did not.

4. To confuse matters further, the court asserted that the legislature "use[d] partisanship as a proxy for race," J.S.App.33a, which was the inverse of the formulation in *Bush*: "race . . . as a proxy for political characteristics." 517 U.S. at 968; *see also Cooper*, 581 U.S. at 291 n.1. It is unclear what the district court's rendition even means. While using political data as a proxy for racial data might well trigger strict scrutiny, the court did not find that this occurred, and it is unclear why it would ever occur. The court did not, after all, identify any ultimate *racial* goal that might have motivated the legislature to employ *political* data. In an area this "sensitive" and "complex," *Miller*, 515 U.S. at 915, it should not be this difficult to figure out what a trial court found the legislative motive to be or why a legislature would ever have such a motive.

B. The District Court's Remaining Findings Concerning Racial Intent Fall Short of the Legal Mark.

The district court's remaining findings concerning predominance all depend on its flawed conclusion that the legislature employed a 17% racial target. Because that finding cannot stand, the court's remaining findings are circular or otherwise deficient.

First, the court expressed amazement that the senate's redistricting consultant, Mr. Roberts, in testifying at trial could provide racial "figures off the top of his head" with "accurate numbers," and it apparently regarded this as evidence of racial motive. *See* J.S.App.28a n.12. It should not have been so easily impressed. As noted, this Court's first racial-gerrymandering decision recognized "that 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." *Shaw I*, 509 U.S. at 646. It has stated this in practically all the *Shaw* progeny. *See Miller*, 515 U.S. at 916 ("Redistricting legislatures will, for example, almost always be aware of racial demographics; but it does not follow that race predominates in the redistricting process."); *Bethune-Hill*, 580 U.S. at 187 (same); *Cromartie II*, 532 U.S. at 254 (same). There was no basis for the court to afford so much evidentiary significance to a fact present in every case.

Second, the court below found it significant that Mr. Roberts moved "over 60% of Charleston County's African American population from Congressional District No. 1," but acknowledged "that a majority of those moved from Congressional District No. 1 were white." J.S.App.28a. While "stark splits in the racial composition of populations moved into and out of disparate parts of the district" can certainly evidence racial predominance, *Bethune-Hill*, 580 U.S. at 192, it is difficult to see how removing more white than Black voters from District 1 can qualify as either "stark" or "racial." It is far more likely that Mr. Roberts was attempting to remove Democratic voters—both white and Black—from the district. Undeterred, the district court proposed "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." J.S.App.28a. Perhaps. But, if there was *not* a 17% objective, the inclusion of a 35% African-American VTD would mean nothing at all.

Third, the district court identified various redistricting options it believed were not available because of the legislature's political goals and concluded that Mr. Roberts's choice against them was somehow evidence of racial predominance. For example, the court found that to include "the racial percentages of Charleston County utilized in the 2011 plan (19.8%) or the overall population of Charleston County based on the 2020 census (23.17%)" in District 1 "would produce a 'toss up' district" and not "produce the desired partisan tilt." J.S.App.25a. But that finding tends to show that political motive, not racial motive, produced that outcome.

Without citation, the court concluded that "it became necessary to reduce the African American population of the Charleston County portion of the district in the range of 10%" to meet a supposedly racial goal. *Id.* But the goal of a safe Republican seat was a political goal, not a racial goal, and the district court again did not cite evidence bridging that gap. Even if it was necessary "to meet [a] 17% [racial] target," *id.*, this finding (and all others like it), are an elaborate way of describing (at most) awareness of race, not racial motivation. *Miller*, 515 U.S. at 916; *Cromartie II*, 532 U.S. at 257.

II. The District Court's Quarrels With the Legislature's Other Race-Neutral Goals Were Improper and Unrelated to the Predominance Inquiry.

Partisan objectives are not the only race-neutral goals that may refute an assertion of racial gerrymandering. Any "race-neutral considerations" can equally

"defeat a claim that a district has been gerrymandered on racial lines." *Miller*, 515 U.S. at 916 (citation omitted). The defense below cited such objectives, and the district court's opinion identified them. But the district court improperly regarded itself as free to disagree with them, ignore them in the predominance matrix, or recast them as racial without evidence. This was erroneous.

The racial-gerrymandering question is not merely whether race was considered, but whether it "was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Bethune-Hill*, 580 U.S. at 187 (citation omitted); *see also Allen*, 143 S. Ct. at 1510–11 (plurality opinion). This inquiry necessarily involves a comparison. The trial court must identify the "race-neutral districting principles," compare them with the racial goals, and make "a holistic analysis of each district" to determine which goals had greater "weight" on its configuration. *Bethune-Hill*, 580 U.S. at 187, 191 (citation omitted). While that inquiry requires a trial court to consider whether "the legislature subordinated traditional race-neutral districting principles . . . to racial considerations," *Miller*, 515 U.S. at 916, it does not entitle the court to pick and choose among the legislature's race-neutral considerations, disagree with them, or recast them as race-based without evidence. "The Constitution does not mandate regularity of district shape," *Bush*, 517 U.S. at 962 (plurality opinion), so the "inquiry concerns the actual considerations" of the legislature, not the considerations a trial court believes *should* have

motivated it. *Bethune-Hill*, 580 U.S. at 799. By substituting its normative opinions for a proper inquiry into legislative motive, the district court applied the wrong standard.

A. Partisan considerations aside, the district court's opinion indicates that the legislature's predominant purpose was to "make whole" in District 1 "two previously split counties, Beaufort and Berkeley." J.S.App.22a. The court found that Senator Campsen was "seeking to include these counties," *id.* at 22a, and that he achieved this goal, *id.* at 24a–25a. "[R]espect for political subdivisions or communities defined by actual shared interests" is a paradigmatic race-neutral redistricting goal. *Miller*, 515 U.S. at 916.

But when it came time to weigh the competing goals in the predominance matrix, the district court disregarded that goal. The court explained "that when Roberts was presented as a given that Beaufort and Berkeley Counties . . . would be included in Congressional District No. 1 . . . , there was no practical way for him to achieve the African American population target of 17% through the use of traditional districting principles." J.S.App.33a. This finding is flawed, even assuming a 17% racial target was employed. The goal of maintaining Beaufort and Berkeley Counties in District 1 was itself a race-neutral districting principle, so the court should have counted it in favor of the defense, not taken it "as a given" to otherwise be ignored. *Id.*

In fact, the court's findings show on their face that race did not predominate. Race predominates only

when it "was the criterion that, in the State's view, could not be compromised" and other goals "came into play only after the race-based decision had been made." *Shaw II*, 517 U.S. at 907; *see also Bethune-Hill*, 580 U.S. at 189. The findings here show the opposite. The legislature first decided "that Beaufort and Berkeley Counties . . . would be included in Congressional District No. 1," it took that goal "as a given," and only then (if ever) sought to achieve a 17% racial target. J.S.App.33a. At most, this is a case where racial considerations were achieved but, at the same time, the legislature "took several other factors into account," and race was not predominant among them. *Allen*, 143 S. Ct. at 1511 (plurality opinion).

B. The district court's treatment of the legislature's county-boundary goals went beyond ignoring them. At times, it disagreed with them. Among other things, the court appeared to believe that most or all of Charleston County should have been drawn into District 1 rather than neighboring District 6. "That is just a political-gerrymandering claim by another name." *Banerian v. Benson*, 589 F. Supp. 3d 735, 738 (W.D. Mich. 2022) (three-judge court) (Kethledge, J.).

The court declared that District 1 "has long been anchored in Charleston County," J.S.App.21a, and criticized the legislature from moving portions of Charleston County from District 1 into District 6, *see id.* at 23a–28a. But it disregarded trial testimony articulating the reasons for this choice and confirming that they were race-neutral. Most importantly, the legislature could not combine Beaufort, Berkeley, and Charleston Counties into District 1 without offending the equal-population rule. J.S.App.356a. It was well

within its discretion to maintain Beaufort and Berkeley Counties whole and split Charleston County. The Equal Protection Clause did not dictate a different choice. *See Rucho*, 139 S. Ct. at 2501 (holding that courts cannot "rank the relative importance of those traditional criteria and weigh how much deviation from each to allow").

And, even if it needed them, the legislature had overriding reasons to choose as it did. Though one would never guess it from the district court's opinion, Charleston County had not "been whole" in any district since 1992, and to make it whole in District 1 would make that district a "majority Democratic district," J.S.App.337a, which the Republican-controlled legislature would not have adopted, *id.* at 276a–279a.

Doing that would also harm the performance of District 6, a Democratic-leaning district represented by Democratic Representative Jim Clyburn, a senior African-American congressman with enormous "influence with the Biden Administration." *Id.* at 338a. Rep. Clyburn is the dean of the South Carolina congressional delegation and the House assistant Democratic leader. The legislature believed it was "beneficial . . . to have Jim Clyburn representing Charleston County," *id.* at 339a, and this Court's precedent recognizes that goal as both legitimate and salutary, *see White v. Weiser*, 412 U.S. 783, 791 (1973) (acknowledging a state's interest in "preserving the seniority the members of the State's delegation have achieved in the United States House of Representatives"). Moving Republican-leaning territory into District 6 was no more a plausible redistricting choice in 2021 than was moving Democratic-leaning territory into District

1. It is hardly a surprise that the legislature transferred Republican-leaning VTDs from District 6 to District 1 and Democratic-leaning VTDs from District 1 to District 6. *See* J.S.App.22a, 198a. There is no reason to believe Rep. Clyburn desired new Republican voters in his district, and, in fact, a map submitted by Rep. Clyburn's office also split Charleston County and also generated a high Republican vote share in District 1—and it achieved an even *lower* BVAP in District 1 (15.48%) than the district has under the enacted plan. J.S.App.120a, 123a, 492a–493a. That is proof if there ever was any that political considerations predominated.

The district court was hardly reticent in announcing its view that no "community of interest" united "the residents of North Charleston . . . with the residents of Congressional District No. 6." J.S.App.26a. But that was not the district court's choice to make. "Defining such communities is no business of the courts." *Banerian*, 589 F. Supp. 3d at 738. What matters is that the legislature made its choices for "race-neutral" reasons. *Miller*, 515 U.S. at 916. As shown, the district court's discussion of the racial effect of the Charleston County split proves nothing of motive, and all competent evidence shows a mix of political goals present in virtually every redistricting.

C. Similar problems pervade the district court's discussion of district continuity. The court found that the legislature "sought to create a 'least change' plan," J.S.App.23a, but did not weigh that purpose against any racial goal in the predominance test. Instead, the court at times disagreed with the legislature's core-

retention goals. *See id.* at 27a. At other times, it appeared to believe its core-retention goals were not achieved. *See id.* at 29a. Neither contention is sound.

To begin, the legislature did not need to show that maintaining prior district configurations as much as possible "was legally justifiable," as the court below erroneously suggested. *Id.* at 27a. This Court's precedent deems "preserving the cores of prior districts" to be a legitimate legislative policy, *Karcher v. Daggett*, 462 U.S. 725, 740 (1983), and, more importantly, it is not invariably (or even likely) a race-based goal. *See Miller*, 515 U.S. at 906 (characterizing "preserving the core of existing districts" as a race-neutral goal).

To be sure, this Court recently held that "core retention" is not a sufficiently weighty state interest to "defeat" a VRA "§ 2 claim." *Allen*, 143 S. Ct. at 1505. But that reasoning does not apply in this case because the Section 2 and racial-gerrymandering inquiries "embrace[] different considerations." *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 433 (2006) (plurality opinion). Whereas the Section 2 injury being probed "is vote dilution," the racial-gerrymandering question is "whether race was the predominant factor in drawing those lines." *Id.* Accordingly, *Allen*'s holding that a state interest in core retention does not "immunize" a plan from the contention that it dilutes votes, 143 S. Ct. at 1505, carries no force where the question is legislative "motive," *Bethune-Hill*, 580 U.S. at 191. A redistricting authority that prioritizes maintaining prior districts is not, without more, engaging in race-based redistricting.

Next, the district court intimated that retaining the split of Charleston County was problematic because the split was racial in character. *See* J.S.App.26a–27a. But that is both factually and legally wrong. It was misleading for the district court to assert that the past decade's line between District 1 and District 6 was the product of "race conscious line drawing" to "satisfy the then existing non-retrogression requirements of Section 5 of the Voting Rights Act." J.S.App.26a–27a. A trial was held on that exact question, a three-judge court held that the challengers "failed to establish that race was the predominant factor," *Backus v. South Carolina*, 857 F. Supp. 2d 553, 560 (D.S.C. 2012), and this Court summarily affirmed that ruling, *Backus v. South Carolina*, 568 U.S. 801 (2012).

Moreover, even if the past line had been drawn for predominantly racial reasons, it would not follow that the legislature in 2021 carried that line forward for predominantly racial reasons. A legislature can have race-neutral reasons for retaining district cores, even if they were originally drawn for racial reasons, and it has no "duty to purge its predecessor's allegedly discriminatory intent." *Abbott*, 138 S. Ct. at 2326. A legislature faced with the legal obligation to redistrict will likely desire minimal changes with prior plans simply because it wants to change as little as possible.

Then, the district court flipped the proverbial script and accused the legislature of not doing *enough* to retain district cores. It claimed that Mr. Roberts "abandoned the principles of 'least change' that he followed in other parts of the state and treated Charleston County in a fundamentally different way than the

rest of the state." *See* J.S.App.34a. This assertion has no apparent connection to the evidentiary record. In the enacted plan, District 1 maintained nearly 93% of its core constituents. J.S.App.439a. To focus on the 7% of new residents myopically ignores that the racial-gerrymandering analysis concerns "the design of the district as a whole." *Bethune-Hill*, 580 U.S. at 192. And the district court identified no alternative configuration that scored better on this criterion. If the legislature had acted as the district court suggested and dismantled the "division of Charleston County," *id.* at 27a, the retention level in District 1 would have been much lower. The alternative plans on the record retain a much smaller share of District 1's residents in that district. J.S.App.453a (73.39%); *id.* at 461a (52.23%); *id.* at 468a (72.46%); *id.* at 479a (76.04%). In other words, the district court wanted the legislature to keep whole one county at the expense of core retention, rather than dividing that county and maintaining core retention. But the Constitution does not vest those choices with federal judges.

What matters here is that there is no apparent racial motive behind the legislature's choices. The court found it significant that Mr. Roberts moved 30,243 African American residents from District 1, *id.* at 25a, but it moved far more white voters into District 1, *id.* at 28a, and it retained 18,463 Black voters, *id.* at 25a. That is hardly evidence of "bleaching" District 1. *Id.* at 27a.

D. The district court also expressed dissatisfaction with District 6, and its findings are especially perplexing because the court suggested that the legislature should have employed specific *racial* choices as

to that district where racial predominance is not even alleged. Specifically, the court opined that, after this Court disabled the VRA Section 5 coverage formula in *Shelby County v. Holder*, 570 U.S. 529 (2013), the "present-day validity of" District 6 came into "doubt." J.S.App.19a. The court also asserted that the African-American population of District 6 "exceeded any reasonable percentage necessary to allow African Americans to elect a candidate of their choice." *Id.* at 19a–20a. None of this reflects sound legal reasoning.

As an initial matter, the district court lacked jurisdiction to determine whether District 6 was somehow infirm because of its supposedly high African-American population. It was not challenged, and no plaintiff was shown to have standing to challenge it. While "it may be true that the racial composition of District [1] would have been different if the legislature had drawn District [6] in another way," a plaintiff's challenge is to the district where that plaintiff resides, not neighboring districts. *Hays*, 515 U.S. at 746. Here, the district court found the plaintiffs have standing to challenge Districts 1, 2, and 5, but not District 6. *See* J.S.App.42a.

Moreover, even if racial considerations for District 6 were germane to District 1, the district court did not find any such considerations. The court found the "57.8% African American population" of District 6 in the prior plan to be excessive, J.S.App.19a, but it did not find that the legislature purposefully maintained or increased its minority percentage. Quite the opposite, it found that the legislature "recognized the impact of *Shelby County* and *Cooper* . . . by reducing the African American population of [District 6] to 47.8%."

Id. at 20a n.5. There is, then, no basis even to suspect that the legislature improperly "packed" Black voters into District 6 or otherwise relied on race in reconfiguring it. If anything, the drop in District 6's minority population confirms that the maneuvers between District 1 and District 6—which improved the partisan composition for the incumbents in each—were motivated by considerations other than race.

Ultimately, the district court seemed to suggest that the legislature was under an affirmative obligation after *Shelby County* to purposefully reduce the African-American population in District 6, beyond what occurred incidentally. *See id.* at 19a, 27a. But it is a mystery why that would be so or why such a supposed failure would bear on racial motive by the legislature in District 1. In short, it was improper for the district court to insinuate some error in the *absence* of race-based maneuvers on the legislature's part.

III. The District Court's Errors, if Left Uncorrected, Will Open New Avenues for Federal Courts To Police Legislative Policy in Redistricting.

The district court's errors cannot easily be cabined to this case. Although the plaintiffs characterize this dispute as concerning only "a factual issue" relegated to the 2021 South Carolina redistricting, Appellees' Motion to Affirm 19, the facts in dispute here are not idiosyncratic. The district court's finding of predominance could easily be replicated in any future case. The result would be that plaintiffs could bring and win claims for "reallocating power and influence between political parties" that *Rucho* held are improper,

139 S. Ct. at 2502, so long as they are cleverly dressed up as racial-gerrymandering claims.

A. Begin with the district court's finding of a racial target. As described above, the court cited no evidence of a 17% African-American population target, but rather inferred it by deducing that it must have been intended because only that racial percentage would achieve the legislature's desired political outcome. J.S.App. 23a, 33a. That reasoning is legally wrong, and the same error could be achieved in any case. Where "race and political affiliation are highly correlated," as they are across the United States, a political goal will always deliver a given racial outcome. *Cromartie II*, 532 U.S. at 242. By consequence, the district court's logic will ordinarily apply.

In turn, that approach, if affirmed, will impact more than liability; it will also control remedies and render them highly partisan. Redistricting remedies are governed by two competing principles. On the one hand, a remedy must not "incorporate . . . legal defects" of the invalidated plan. *Perry v. Perez*, 565 U.S. 388, 394 (2012) (per curiam). On the other hand, a remedy must not "displac[e] legitimate state policy judgments with the court's own preferences." *Id.* In a racial-gerrymandering case, a remedy requires "elimination of a racial classification," but not elimination of the legislature's non-racial goals. *Rucho*, 139 S. Ct. at 2502. But if a supposed racial classification is inseparable from the non-racial political goals, a legislature or court remedying this species of violation will have no choice but to revise the political goals as well.

In this case, the district court's finding that a "17% African American" population is synonymous with a "Republican tilt," J.S.App.23a, implies that, to remedy the supposed 17% racial target, the legislature will have to reconfigure District 1 so that it does *not* have a Republican tilt. That is because, according to the district court's finding, any version of District 1 with a Republican tilt will have a 17% African-American population. The same would be true in most any other case, and the remedy in all such cases would be elimination of the legislature's political goals. The result, then, will be a revamped racial-gerrymandering claim that *does* "ask for a fair share of political power and influence." *Rucho*, 139 S. Ct. at 2502.

B. That is only the beginning. The district court's many quarrels with the South Carolina legislature also involve quotidian redistricting choices that many litigants have the incentive and funding to challenge.

As described, the South Carolina legislature chose to make Beaufort and Berkeley Counties whole and to continue to split Charleston County. Any number of South Carolina citizens might have preferred the opposite choice. After all, any redistricting authority's "decisions would unavoidably leave some commenters disappointed." *Banerian v. Benson*, 597 F. Supp. 3d 1163, 1169 (W.D. Mich.) (three-judge court), *appeal dismissed*, 143 S. Ct. 400 (2022). By characterizing the split of Charleston County as racial and finding that rendering Beaufort and Berkeley Counties whole compelled that split, the district court created a right to a different set of county groupings and apparent relief in the form of more (if not all) of Charleston County in District 1. The same logic, and the same

result, would seem to follow with respect to the district court's core-retention findings and its other community-of-interest quarrels with the legislature. But the Equal Protection Clause has nothing to say about any of these decisions.

C. Perhaps the most problematic implication of the decision below is that it might, if taken to its logical conclusion, command racial predominance to avoid the district configurations the district court disliked. The district court's insinuation of criticisms concerning the African-American population of District 6 into a challenge to District 1 suggest the seeds of a potentially far-reaching and destructive remedial theory. If this Court abandons the principle "that the racial composition of a particular voting district" cannot, "without more," "violate the Constitution," *Hays*, 515 U.S. at 746, the result will be more race in redistricting, not less.

In *Bartlett v. Strickland*, 556 U.S. 1 (2009), this Court held that VRA Section 2 does not require "crossover" districts composed of less than 50% minority voting-age population. *Id.* at 25. It held this, in part, because a crossover-district requirement "would unnecessarily infuse race into virtually every redistricting," *id.* at 21 (citation omitted), and that concern "would be of particular concern with respect to consideration of party registration or party influence," *id.* at 22. "More troubling still is the inquiry's fusion of race and party affiliation as a determinant when partisan considerations themselves may be suspect in the drawing of district lines." *Id.*

The district court here appropriated the very doctrines rejected in *Bartlett*, just without expressly announcing a requirement of crossover districts. The court was critical of what it regarded as a high minority population in District 6—which still falls short of a majority-minority district, J.S.App.20a n.5—and the comparatively low minority population of District 1, *see* J.S.App.34a. If there were compelling evidence that these racial outcomes were predominantly the result of racial intent, this concern might be justified. But, on the current record, the district court's criticism boils down to a disagreement with racial outcomes, and the only remedy would be a somewhat higher minority population in District 1 and a somewhat lower minority population in District 6. It would be, in short, two minority crossover districts. But if the VRA cannot compel that result without avoiding constitutional doubt under the Equal Protection Clause, the Equal Protection Clause itself cannot plausibly be construed to compel that result. The district court's contrary view, like the remainder of its findings, is erroneous.

CONCLUSION

The Court should reverse the decision below.

Respectfully submitted,

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