IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF SOUTH CAROLINA
COLUMBIA DIVISION

THE SOUTH CAROLINA STATE CONFERENCE OF THE NAACP, *et al.*,

Plaintiffs,

v.

THOMAS C. ALEXANDER, *et al.*,

Defendants.

Case No. 3:21-cv-03302-MGL-TJH-RMG

SENATE DEFENDANTS' AND HOUSE DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

Because redistricting "is primarily the duty and responsibility of the State," "[f]ederal-court review of districting legislation represents a serious intrusion on the most vital of local functions." *Miller v. Johnson*, 515 U.S. 900, 915 (1995). "Electoral districting is a most difficult subject for legislatures, and so the States must have discretion to exercise the political judgment necessary to balance competing interests," and "the good faith of a state legislature must be presumed." *Id.* Accordingly, federal courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Id.* at 915–16; *see also Abbott v. Perez*, 138 S. Ct. 2305, 2324 (2018). Such caution is "especially appropriate" in cases like this one, "where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated." *Easley v. Cromartie*, 532 U.S. 234, 242 (2001) (*Cromartie II*).

Plaintiffs therefore face a "demanding" burden of proof on their challenges to the Congressional Plan the General Assembly enacted earlier this year. *Id.* at 241. Although Plaintiffs initiated this suit with sweeping and offensive allegations that the General Assembly "used its redistricting power to … discriminate against [b]lack voters," Dkt. No. 267 ¶ 1, this Court was

quick to note that the evidence "may tell a different story," Dkt. No. 291 at 6. The evidence does just that. Indeed, *every* legislator and staffer who Plaintiffs have deposed—including an African-American legislator—has confirmed that race was not used to draw lines in the Congressional Plan, that race did not predominate in the Plan, and that the General Assembly did not intentionally discriminate in enacting the Plan.

Thus, it is unsurprising that Plaintiffs cannot prove their extraordinary allegations that the General Assembly unconstitutionally used race in drawing the Congressional Plan. In particular, Plaintiffs' racial gerrymandering claim requires a sufficient showing that race was the General Assembly's "dominant and controlling consideration," *Shaw v. Hunt*, 517 U.S. 899, 905 (1996) (*Shaw II*), such that it "subordinated traditional race-neutral districting principles . . . to racial considerations" in the Congressional Plan, *Miller*, 515 U.S. at 916. But far from satisfying this exacting burden, Plaintiffs *acknowledge* that the Congressional Plan is largely a continuation of the Benchmark Plan that this Court and the Supreme Court upheld against racial gerrymandering and other challenges in *Backus v. South Carolina*, 857 F. Supp. 2d 553, 557 (D.S.C.), *aff'd*, 568 U.S. 801 (2012). Moreover, undisputed record evidence confirms that traditional districting principles, rather than race, are "the basis for" the Congressional Plan. *Miller*, 515 U.S. at 916.

If that were not enough, Plaintiffs cannot carry their heavy burden to show that race predominates in the Congressional Plan for at least three more independent reasons. *First*—like the putative expert this Court rejected in *Backus*—each of Plaintiffs' putative experts "failed to consider all the traditional race-neutral principles that guide redistricting in South Carolina." *Backus*, 857 F. Supp. 2d at 562. Thus, Plaintiffs' putative expert analysis is "incomplete" and "unconvincing" and cannot carry Plaintiffs' burden. *Id.* at 562–63. *Second*, Plaintiffs offer no evidence, such as alternative maps, that the General Assembly "could have achieved its legitimate

political objectives in alternative ways that are comparably consistent with traditional districting principles." *Cromartie II*, 532 U.S. at 258. *Third*, at bottom, Plaintiffs ask this Court to engage in the race-conscious exercise of prioritizing African-Americans' ability to influence congressional elections over traditional districting principles—a "textbook" racial gerrymander that this Court may not impose. *Cooper v. Harris,* 137 S. Ct. 1455, 1469 (2017).

Plaintiffs fare no better on their intentional discrimination claim. That claim requires them to set forth specific facts showing that the Congressional Plan has "disproportionately adverse" effects upon African-American voters and that the General Assembly enacted the Congressional Plan "because of, not merely in spite of," those effects. *Pers. Adm'r of Mass. v. Feeney*, 442 U.S. 256, 279 (1979). Plaintiffs do not allege that the General Assembly should have created a majority-African-American district in the Congressional Plan, which is presumably why they have not brought a claim under Section 2 of the Voting Rights Act.

Rather, Plaintiffs' theory of discriminatory effect posits that the General Assembly should have increased the black voting-age population (BVAP) in Districts 1, 2, or 5 in order to enhance African-American voters' ability to form coalitions with white Democrats, to "elect" their preferred candidates, and to exercise political "influence" in those districts. Dkt. No. 267 ¶ 171. But there is no "right to form political coalitions," *Bartlett v. Strickland*, 556 U.S. 1, 15 (2009), so the General Assembly's decision not to adopt such districts does not inflict an "adverse effect" on African-American voters as a matter of law, *see, e.g.*, *Feeney*, 442 U.S. at 279; *see also Nixon v. Kent Cnty.*, 76 F.3d 1381, 1392 (6th Cir. 1996) (en banc); *Hall v. Virginia*, 385 F.3d 421, 431 (4th Cir. 2004). The Congressional Plan illustrates why. The Congressional Plan treats all African-American Democrats and "similarly situated" white Democrats in Districts 1, 2, and 5 exactly the same, *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 439–40 (1985): it has the *same effect*

on *all* Democrats to form winning coalitions, regardless of their race, so it does not impose an "adverse effect" on any voters "because of" race, *Feeney*, 442 U.S. at 279.

Plaintiffs' intentional discrimination claim also fails because Plaintiffs have no direct evidence of discriminatory intent by *any* legislator, let alone the General Assembly "as a whole," *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2339 (2021), and their scattered circumstantial evidence is insufficient to carry their heavy burden. The Court should grant summary judgment.[1]

BACKGROUND

A. Congressional Redistricting Following The 2000 Census

In 1994, the General Assembly enacted into law a redistricting plan for South Carolina's congressional delegation. *Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 664 (D.S.C. 2002) (three-judge court). Under the 1994 plan, District 6 was a majority-BVAP district, and Charleston County was split into two districts. *See id.* at 665–66 & n.29.

Following an impasse between the General Assembly and then-Governor Hodges, a three-judge panel of this Court drew a new Congressional districting plan in 2002 to account for population shifts revealed by the 2000 Census results. *See id.* at 663–68. Among other things, the 2000 Census revealed that District 6 was "severely underpopulated" by nearly 10%. *Id.* at 663. In drawing the remedial plan, the three-judge panel "generally sought to maintain the cores of the existing congressional districts" and to make other changes "as individual district requirements dictated to correct the population deviations." *Id.* at 664. The 2002 court-drawn plan maintained a split of Charleston County. *See id.* at 666 n.29.

[1] Pursuant to Local Civil Rule 7.04 (D.S.C.), a separate memorandum is not submitted because this motion contains a full explanation and, thus, one "would serve no useful purpose."

B. Congressional Redistricting Following The 2010 Census

In 2011, the General Assembly enacted a new Congressional redistricting plan that reflected population shifts revealed by the 2010 Census results and the apportionment of a seventh Congressional district to South Carolina. *See Backus*, 857 F. Supp. 2d at 557. The 2011 plan ("Benchmark Plan") maintained a split of Charleston County between District 1 and District 6. *See* Benchmark Plan Map (Ex. 1). Benchmark District 6 had a BVAP of 55.18% under the 2010 Census results. *See* Benchmark Plan Statistics 2010 (Ex. 2).

The Obama Department of Justice precleared the Benchmark Plan, and a three-judge panel of this Court upheld it against racial gerrymandering, intentional discrimination, and Section 2 claims. *See Backus*, 857 F. Supp. 2d at 558–70.[2] The racial gerrymandering claim failed in part because the challengers' putative expert "failed to consider all the traditional race-neutral principles that guide redistricting in South Carolina" and, thus, this Court rejected the putative expert's analysis as "problematic," "incomplete," and "unconvincing." *Id.* at 562–63. The Supreme Court summarily affirmed this Court's decision. *See Backus*, 857 F. Supp. 2d 553, *aff'd*, 568 U.S. 801.

The *Backus* plaintiffs moved to set aside the Court's judgment following the Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013). *See Backus v. South Carolina*, No. 3:11-cv-03120 (D.S.C. Aug. 29, 2013) (Dkt. No. 223). The Court denied the motion, *see id.* (Dkt. No. 239), and the Supreme Court dismissed the appeal, *see id.* (Dkt. Nos. 243, 244).

[2] Plaintiffs' national counsel has repeatedly misrepresented *Backus* to witnesses in this case. Contrary to these misleading assertions, *Backus* had nothing to do with Section 5. Further, it is worth noting the *Backus* plaintiffs did not simply fail to meet their burden; this Court expressly held that "Defendants were able to disprove that race was the predominant factor." *Backus*, 857 F. Supp. 2d at 560.

C. Congressional Redistricting Following The 2020 Census

The belatedly released 2020 Census results revealed that the Benchmark Plan had become malapportioned and needed to be redrawn to comply with the Constitution's one-person, one-vote mandate. *Karcher v. Daggett*, 462 U.S. 725 (1983); 2021 Senate Redistricting Guidelines (Ex. 3). In particular, the Census results revealed massive population shifts away from predominantly African-American areas and toward coastal areas. Thus, under the 2020 Census results, Benchmark District 6 was underpopulated by 11.59% and neighboring Benchmark District 1 was overpopulated by 11.99%. *See* Benchmark Plan Statistics 2020 (Ex. 4). The remaining districts were between 3.34% underpopulated and 3.97% overpopulated. *See id.*

The General Assembly adopted the Congressional Plan ("Senate Amendment 1") as S. 865 in January 2022. The Senate's Redistricting Guidelines specifically identified "[p]reserving the cores of existing districts" as a traditional criterion. 2021 Senate Redistricting Guidelines III.B (Ex. 3); *Karcher*, 462 U.S. at 740; *Colleton Cnty. Council*, 201 F. Supp. 2d at 630, 647, 664. The Congressional Plan thus preserves high percentages of the cores of each of the seven districts. *See infra* p. 13.

The Congressional Plan maintains a split of Charleston County—which has been split for three decades—and splits a total of only 10 counties and 13 voting districts. *See* Congressional Plan Splits Report (Ex. 5). The Congressional Plan also maintains the partisan composition of six majority-Republican districts and one majority-Democratic district (District 6). *See* Congressional Plan Partisan Report (Ex. 6). According to 2020 presidential election results, District 1 is 54.39% Republican in the Congressional Plan. *See id.*

The 2020 Census results revealed changes in the BVAP levels in the Benchmark Plan, and those levels changed in the Congressional Plan. In particular, under the 2020 Census results:

- District 1's Benchmark BVAP was 16.56% and Enacted BVAP is 16.72%;

- District 2's Benchmark BVAP was 23.06% and Enacted BVAP is 24.49%;
- District 5's Benchmark BVAP was 25.06% and Enacted BVAP is 24.03%; and
- Benchmark District 6 was underpopulated by nearly 12% and had a 51.04% BVAP, and Enacted District 6 has a 45.90% BVAP.

See Benchmark Plan Statistics 2020 (Ex. 4); Congressional Plan Statistics (Ex. 7).

D. Plaintiffs' and Senator Harpootlian's Alternative Plans

Plaintiff South Carolina NAACP proposed two plans as alternatives to the Congressional Plan. Dkt. No. 267 ¶ 154. The first such proposal, NAACP Plan 1, significantly redraws South Carolina's congressional map compared to the Benchmark Plan and the Congressional Plan. *See* NAACP Plan 1 Map (Ex. 8). NAACP Plan 1 thus preserves a significantly smaller percentage of the cores of districts than the Congressional Plan. *See infra* p. 13.

NAACP Plan 1 also splits 14 counties affecting population and 24 voting districts (precincts) affecting population, both more than the Congressional Plan. *See* NAACP Plan 1 Splits Report (Ex. 9). By dramatically redrawing South Carolina's congressional districts, NAACP Plan 1 also increases District 1's BVAP to 34.02%, more than double the level in either the Benchmark Plan or the Congressional Plan. *See* NAACP Plan 1 Statistics (Ex. 10).

The NAACP's second proposal, NAACP Plan 2, likewise preserves less of the cores of the Benchmark Districts than the Congressional Plan. *See* NAACP Plan 2 Map (Ex. 11); *see also infra* p. 13. NAACP Plan 2 splits 11 counties affecting population and 53 voting districts affecting population, both more than the Congressional Plan. *See* NAACP Plan 2 Splits Report (Ex. 12). NAACP Plan 2 increases District 1's BVAP to 23.26%, which is at least 5% higher than the Benchmark Plan or the Congressional Plan at any time. *See* NAACP Plan 2 Statistics (Ex. 13).

Democrat Senator Richard Harpootlian also proposed an alternative plan to the General Assembly ("Senate Amendment 2" or the "Harpootlian Plan"). *See* Harpootlian Plan Map (Ex. 14). Like the NAACP's submissions, the Harpootlian Plan preserves much less of the cores of the Benchmark Plan than the Congressional Plan. *See infra* p. 13.

The Harpootlian Plan also splits 6 counties affecting population and 17 voting districts affecting population. *See* Harpootlian Plan Splits Report (Ex. 15). Compared to the Congressional Plan, the Harpootlian Plan increases District 1's BVAP to 21.76%, District 5's BVAP to 34.23%, and District 6's BVAP to 50.27%. *See* Harpootlian Plan Statistics (Ex. 16).

Both the NAACP's plans and the Harpootlian Plan fail to maintain six majority-Republican districts and one majority-Democratic district. In addition to keeping District 6 as a Democratic district, the NAACP plans make District 1 "reliably effective" for Democrats, Duchin Tr. 152:9–154:4, 159:8–9 (Ex. 17); *see also* Duchin Rep. 25 (Ex. 18); Liu Rep. 12–13 tbl. 4 (Ex. 19); Liu Tr. 46:16–47:6 (Ex. 20), and the Harpootlian Plan makes District 1 a 51.83% Democratic district, *see* Harpootlian Plan Partisan Report (Ex. 21).

E. Plaintiffs' Challenges To The Congressional Plan

Plaintiffs bring racial gerrymandering and intentional discrimination claims against Districts 1, 2, and 5. *See* Dkt. No. 267 ¶¶ 160–73. Plaintiffs posit that the changes the Congressional Plan made to District 6, on the one hand, and Districts 1, 2, and 5, on the other, evince racial predominance and intentional discrimination. *See id.* Plaintiffs, however, have not challenged District 6 or explained why they did not do so. *See id.*

To date, Plaintiffs have deposed numerous legislators and staffers involved in the enactment of the Congressional Plan, including several House members, Senator George Campsen (the lead sponsor of the Plan), Senator Shane Massey, William Roberts (the Senate's nonpartisan mapdrawer), and Andrew Fiffick (the nonpartisan Chief of Staff and Director of Research for the

Senate Judiciary Committee, and the Senate staffer in charge of redistricting). Every legislator and staffer deposed in this case has confirmed that no lines in the Congressional Plan were drawn based upon race, that race did not predominate in the Plan, and that the General Assembly did not intentionally discriminate in adopting it. *See* Roberts Tr. 73:25–76:5; 170:1–180:24; 258:6–11 (Ex. 22); Fiffick Tr. 123:16–125:22 (Ex. 23); Campsen Tr. 83:4–88:11, 216:2–20 (Ex. 24); Massey Tr. 134:12–136:23, 143:17–146:25, 163:10–163:18, 173:19–175:4, 196:19–197:10 (Ex. 25). This includes Democratic Representative Justin Bamberg, an African-American legislator, testified that the Plan is not tainted by racial predominance or intentional discrimination. *See* Bamberg Tr. 52:4–59:18, 122:6–130:20 (Ex. 26).

Plaintiffs have adduced no direct evidence of racial predominance or intentional discrimination in the Congressional Plan despite volumes of discovery data and the contents of both the Senate and House Map Rooms. Instead, Plaintiffs have proffered five putative expert witnesses to support their claims. But like the expert this Court rejected in *Backus*—and by their own admission—each of Plaintiffs' putative experts failed to consider "all the traditional race-neutral principles that guide redistricting in South Carolina." 857 F. Supp. 2d at 562.

- Dr. Moon Duchin conducted an ensemble analysis in an attempt to isolate the role that race played in the Congressional Plan, but she did not consider core preservation, voting district splits, incumbency protection, partisan performance, and communities of interest other than the few that she deemed important. *See* Duchin Rep. 22 (Ex. 18); Duchin Tr. 67:13–14, 67:25–68:1, 68:5, 134:15–21, 135:15–16, 24, 136:5–6 (Ex. 17).
- Dr. Kosuke Imai conducted a simulation analysis but failed to consider core preservation, voting district splits, communities of interest, keeping incumbents with their core constituents, partisan performance, and the legality of his simulated plans.

See Imai Rep. 4–5, 9–10 (Ex. 27); Imai Tr. 67:20–68:5, 103:20–106:22, 180:17–183:15 (Ex. 28).

- Dr. Jordan Ragusa used an "envelope" approach that attempted to evaluate whether higher-BVAP voting districts were more or less likely to be moved into or out of a district as part of the Congressional Plan, but he did not consider core preservation, voting district splits, contiguity, compactness, political subdivisions, partisan performance, and communities of interest at a granular level. *See* Ragusa Rep. 1–4 (Ex. 29); Ragusa Tr. 306:11–12, 306:3–6, 307:7–16 (Ex. 30).
- Dr. Baodong Liu analyzed racial and voting data in an effort to assess whether race determined whether voters were moved into our out of various districts under the Congressional Plan, but he failed to consider core preservation, voting district splits, contiguity, compactness, incumbency protection, and communities of interest. Liu Tr. 90:10–23; 126:7–127:24, 143:25–144:2, 144:5–7 (Ex. 20).
- Dr. Joseph Bagley opined on the "historical and contemporaneous context" surrounding the enactment of the Congressional Plan, but he did not purport to analyze the Plan's compliance with traditional districting principles. Bagley Rep. 3 (Ex. 31).

Senate Defendants and House Defendants have proffered redistricting expert and elections analyst Sean Trende as an expert. *See* Trende Rep. (Ex. 32); Trende Rebuttal Rep. (Ex. 33).

LEGAL STANDARD

"Summary judgment is appropriate 'if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law.'" *United States ex rel. Gugenheim v. Meridian Senior Living, LLC*, 36 F.4th 173, 178 (4th Cir. 2022) (quoting Fed. R. Civ. P. 56(a)). "[A] party opposing a properly supported motion for summary judgment may

not rest upon mere allegation" or even a "scintilla of evidence" supporting its position. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 256 (1986). Rather, the nonmoving party "must set forth specific facts showing that there is a genuine issue for trial"—an "obligation [that] is particularly strong when the nonmoving party bears the burden of proof." *Pachaly v. City of Lynchburg*, 897 F.2d 723, 725 (4th Cir. 1990). Indeed, Rule 56 "mandates" the entry of summary judgment against "a party who fails to make a showing sufficient to establish the existence of an element essential to that party's case." *Cray Commc'ns, Inc. v. Novatel Computer Sys., Inc.*, 33 F.3d 390, 393 (4th Cir. 1994) (quoting *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986)).

ARGUMENT

I. SENATE DEFENDANTS AND HOUSE DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE RACIAL GERRYMANDERING CLAIM

Plaintiffs' evidence is doubly insufficient to carry their "demanding" burden on their racial gerrymandering claim, *Cromartie II*, 532 U.S. at 241: the record evidence fails to show *both* that the General Assembly "subordinated traditional race-neutral districting principles . . . to racial considerations," *Miller*, 515 U.S. at 916; *see infra* Part I.A, *and* that the General Assembly "could have achieved its legitimate political objectives in alternative ways that are comparably consistent with traditional districting principles, " *Cromartie II*, 532 U.S. at 258; *see infra* Part I.B. And if those two failures were not enough, Plaintiffs in fact ask this Court to *impose* a racial gerrymander on South Carolina's voters. *See infra* Part I.C. The Court should grant summary judgment.

A. Plaintiffs Cannot Show That The General Assembly Subordinated Traditional Districting Principles To Race

Plaintiffs' demanding burden on count one requires a showing that race was the General Assembly's "dominant and controlling consideration," *Shaw II*, 517 U.S. at 905, such that it "subordinated traditional race-neutral districting principles . . . to racial considerations" in drawing the Congressional Plan, *Miller*, 515 U.S. at 916. Far from satisfying this burden, the record

evidence—much of which is undisputed—shows that traditional districting principles, rather than race, are "the basis for" the Congressional Plan. *Id.* And although Plaintiffs trotted out a stable of putative experts to perform various data analyses that purportedly demonstrate that race played an allegedly "significant" role in the Congressional Plan, these putative experts committed the same fatal error as the "problematic" expert this Court rejected in *Backus*. By their own admission, each "failed to consider all the traditional race-neutral principles that guide redistricting in South Carolina" and, thus, their analysis "is incomplete and unconvincing." 857 F. Supp. 2d at 562–63.

1. Undisputed Record Evidence Confirms That The Congressional Plan Was Based on Traditional Districting Principles, Not Race

"[T]raditional race-neutral principles that guide redistricting in South Carolina" include, among others, (a) core retention, (b) the preservation of political subdivisions, voting districts, and communities of interest, (c) compactness and contiguity, and (d) the protection of incumbents and preservation of political advantage. *Backus*, 857 F. Supp. 2d at 562–63; *Miller*, 515 U.S. at 916; *Raleigh Wake Citizens Ass'n v. Wake Cnty. Bd. of Elections*, 827 F.3d 333, 352 (4th Cir. 2016). The undisputed record evidence below confirms that the General Assembly adhered to these principles rather than subordinating them to race.

a. The Congressional Plan Undisputedly Preserves The Cores Of Districts

This Court long has recognized that "preserving the cores of existing districts" is a traditional districting principle in South Carolina—and, in fact, that compliance with this principle also fosters compliance with other race-neutral principles, such as maintaining communities of interest and respecting political boundaries. *Backus*, 857 F. Supp. 2d at 560; *see Colleton Cnty. Council v. McConnell*, 201 F. Supp. 2d 618, 647, 649 (D.S.C. 2002) (three-judge court). In particular, when drawing South Carolina's redistricting plans in 2002, this Court observed:

> Generally speaking, however, we find that the cores in existing districts are the clearest expression of the legislature's intent to

> group persons on a "community of interest" basis, and because the cores are drawn with other traditional districting principles in mind, they will necessarily incorporate the state's other recognized interests in maintaining political boundaries, such as county and municipal lines, as well as other natural and historical communities of interest.

Colleton Cnty. Council, 201 F. Supp. 2d at 649.

There is no dispute that the Congressional Plan preserves the cores of district and, indeed, dramatically outperforms the NAACP's and Senator Harpootlian's proposed plans on this metric in every district, including the districts Plaintiffs challenge. Six of the seven districts under the Congressional Plan have high core retention rates that exceed 92%. The rate for the remaining district, District 6, is not quite as high at 77%, but that is unsurprising because the district's severe underpopulation required the General Assembly to add thousands of voters and, in any event, the rate still outstrips the 45–54.34% rates achieved by the NAACP's and Senator Harpootlian's plans.

Preservation Of Cores Of Existing Districts

District	Congressional Plan	NAACP 1	NAACP 2	Harpootlian
1	92.78%	52.23%	72.46%	73.39%
2	96.75%	71.69%	51.52%	65.71%
3	94.75%	75.30%	86.34%	70.38%
4	98.09%	83.00%	87.51%	74.35%
5	95.04%	57.15%	79.85%	55.23%
6	77.41%	45.53%	46.35%	54.34%
7	99.51%	59.77%	99.30%	55.83%

See Congressional Plan Core Preservation Report (Ex. 34); NAACP Plan 1 Core Preservation Report (Ex. 35); NAACP Plan 2 Core Preservation Report (Ex. 36); Harpootlian Plan Core Preservation Report (Ex. 37).

Thus, rather than "subordinat[ing]" this "traditional race-neutral consideration[]" to race, the Congressional Plan carefully adheres to it. *Miller*, 515 U.S. at 916.

b. The Congressional Plan Preserves Political Subdivisions, Voting Districts, And Communities Of Interest

The Congressional Plan also preserves political subdivisions, voting districts, and communities of interest. In fact, Plaintiffs do not dispute that the Congressional Plan surpasses the Court-endorsed Benchmark Plan and the NAACP's plans in preserving counties and voting districts. The Congressional Plan splits only 10 counties and 13 voting districts affecting population, *see supra* p. 6, compared to 12 split counties and 65 split voting districts in the Benchmark Plan, Benchmark Plan Splits Report (Ex. 38). NAACP Plan 1 splits 14 counties and 24 voting districts affecting population, *see supra* p. 7, and NAACP Plan 2 splits 11 counties and 53 voting districts affecting population, *see supra* p. 7. The Harpootlian Plan performs slightly better than the Congressional Plan on county splits (6), but worse on voting district splits (17). *See supra* p. 8. The General Assembly therefore chose a redistricting plan that complies with, rather than subordinates, these "race-neutral districting principle[]." *Miller*, 515 U.S. at 916.

The General Assembly's pursuit of the goal of minimizing voting district splits is even more evident in the specific changes between Districts 1 and 6, Districts 2 and 6, and Districts 5 and 6 that Plaintiffs challenge. *See* Dkt. No. 267 ¶¶ 150–54, 163. The changes between Districts 1 and 6 in Charleston County eliminated all 5 voting district splits that existed in Charleston County under the Benchmark Plan; the changes between Districts 2 and 6 repaired 19 of the 21 voting district splits that existed in Richland County and all 3 of the voting district splits that

existed in Orangeburg County under the Benchmark Plan; and the changes between Districts 5 and 6 eliminated 5 of the 6 voting district splits that existed in Sumter County under the Benchmark Plan. *Compare* Benchmark Plan Splits Report (Ex. 38), *with* Congressional Plan Splits Report (Ex. 5). Thus, these changes to Districts 1, 2, and 5 challenged by Plaintiffs reflect the "race-neutral consideration[]" of minimizing divisions of voting districts. *Miller*, 515 U.S. at 916.

The General Assembly also preserved communities of interest. As noted, the General Assembly's preservation of district cores was "the clearest expression of [its] intent to group persons on a 'community of interest' basis." *Colleton Cnty. Council*, 201 F. Supp. 2d at 649. And consistent with its broad definition of "[c]ommunities of interest," 2021 Senate Redistricting Guidelines III.A (Ex. 3), the General Assembly maintained other communities of interest:

- In Richland County, the General Assembly kept the community of interest around Fort Jackson in District 2, which is represented by Representative Joe Wilson, a member of the House Armed Services Committee. *See* Campsen Tr. 95:18–96:1 (Ex. 24); *Colleton Cnty. Council*, 201 F. Supp. 2d at 668.
- The General Assembly maintained the Republican "political" community of interest in District 1 at a 54.39% level. 2021 Senate Redistricting Guidelines III.A (Ex. 3); *see* Congressional Plan Partisan Report (Ex. 6); Massey Tr. 134:12–136:23 (Ex. 25).
- The General Assembly included two precincts in Jasper County in District 1 in order to place the entire Sun City community of interest in a single district. *See* Roberts Tr. 206:5–14 (Ex. 22); Nov. 29, 2021 Tr. 6, 21–22 (Ex. 39).
- The General Assembly also included the Limestone precincts from Orangeburg County in District 2 based on testimony that the area forms a community of interest with neighboring areas in District 2. Nov. 29, 2021 Tr. 6 (Ex. 39).

Neither of the NAACP's plans nor the Harpootlian Plan maintains any of those communities of interest. Thus, on these metrics too, the General Assembly complied with, rather than subordinated, traditional redistricting principles. *See Miller*, 515 U.S. at 916.

c. The Congressional Plan Is Contiguous and Compact

There is also no dispute that the Congressional Plan is contiguous, as each district is "composed of contiguous geography." 2021 Senate Redistricting Guidelines II (Ex. 3). Moreover, while Plaintiffs' experts dispute the *degree* of the Congressional Plan's compactness compared to various alternatives, none disputes that the Congressional Plan is compact. *See* Trende Rep. 19–20 & tbl. 6 (Ex. 32). The General Assembly did not subordinate contiguity or compactness to race. *See Miller*, 515 U.S. at 916.

d. The Congressional Plan Undisputedly Protects Incumbents and Preserves Political Advantage

Finally, the Congressional Plan undisputedly promotes both "incumbency protection" and "political advantage"—two more "'[t]raditional race-neutral districting principles.'" *Raleigh Wake Citizens Ass'n*, 827 F.3d at 352 (quoting *Miller*, 515 U.S. at 916); *see also* 2021 Senate Redistricting Guidelines III.A, III.B (Ex. 3). As to the former, the Congressional Plan "avoid[s] contests between incumbent[s]." *Bush v. Vera*, 517 U.S. 952, 964 (1996) (plurality opinion); *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 412 (2006) (plurality opinion) (similar); *see* Duchin Rep. 13 (Ex. 18). The Congressional Plan also preserves Republican political advantage, namely the 6-1 Republican-to-Democratic split in House seats. As discussed further below, this political consideration animated the General Assembly's line-drawing decisions and is embodied in the map that was ultimately enacted, which maintains the pro-Republican composition of six districts. *See infra* Part I.B.1. Both NAACP plans and the Harpootlian Plan would have eliminated that political advantage. *See supra* p. 8.

2. Plaintiffs Have Not Come Close To Satisfying Their Burden To Show That Race Predominated in the Congressional Plan

The undisputed evidence of compliance with traditional districting principles alone demonstrates that the Congressional Plan did not "subordinate[] traditional race-neutral districting principles . . . to racial considerations" and, thus, that the Court should grant summary judgment. *Miller*, 515 U.S. at 916. But it is not the only undisputed evidence showing that race did not predominate in the Congressional Plan: as explained, *every* legislator or staffer who Plaintiffs have deposed has confirmed that race did not predominate and that the General Assembly did not intentionally discriminate in enacting the Plan. *See supra* pp. 8–9.

In the face of all this undisputed evidence, Plaintiffs have offered nothing that could carry their burden to show that race was actually the General Assembly's "dominant and controlling consideration," *Shaw II*, 517 U.S. at 905, such that it "subordinated traditional race-neutral districting principles . . . to racial considerations," *Miller*, 515 U.S. at 916. Rather than identifying any direct evidence that race drove the General Assembly's decisions, Plaintiffs attempt to carry their burden by relying on various putative experts' data analyses purporting to assess the role of race in the Congressional Plan. But each of these putative experts—Duchin, Imai, Ragusa, and Liu—committed the same fatal error as the expert this Court rejected in *Backus*: by their own admission, each "failed to consider all the traditional race-neutral principles that guide redistricting in South Carolina." 857 F. Supp. 2d at 562. Thus, each putative expert's analysis "is incomplete and unconvincing" and cannot carry Plaintiffs' burden. *Id.* at 561–63.

First, Duchin "found that racial factors predominated" in the Congressional Plan based on an algorithmic "ensemble method" that "construct[ed] large numbers of sample plans that vary district lines while holding the rules and geography constant." Duchin Rep. 22, 27 (Ex. 18). In generating the ensembles, Duchin "enforced" population balance and contiguity, "implemented …

a preference for compactness and for the preservation of counties and municipalities," and "performed runs which attempt[ed] to prioritize the preservation of certain communities of interest identified in public testimony." *Id.* But Duchin admitted that she did not control for—or even consider—numerous other traditional districting principles, particularly core preservation, avoiding VTD splits, incumbency protection, partisan performance, and communities of interest other than the few that she deemed important. Duchin Tr. 67:13–14, 67:25–68:1, 68:5, 135:15–16, 24, 136:5–6 (Ex. 17); *see also* Duchin Rep. 22 (Ex. 18). Duchin did not consider these principles even though she *acknowledged* that all or some of them may have been *more* significant to the General Assembly than her preferred criteria and were identified in the Senate Guidelines. Duchin Tr. 134:15–21 (Ex. 17); *see id.* at 70:9–11, 73:12–13, 73:18, 76:2–3, 14–15. Having failed to consider these principles, Duchin's analysis is "incomplete and unconvincing" and "unable" to show that the General Assembly subordinated them to race. *Backus*, 857 F. Supp. 2d at 562–63.[3]

Second, like Duchin, Imai relied on an ensemble of simulated plans to conclude that "race played a significant role" in the Congressional Plan "beyond the purpose of adhering to the traditional redistricting criteria, including those specified in the South Carolina guidelines." Imai

[3] Even with respect to the traditional districting principles that Duchin *did* consider, her analysis was inadequate. For example, she considered only mathematical measures of compactness, *see* Duchin Rep. 8, 11 (Ex. 18), even though she acknowledged that the House Redistricting Guidelines "express[ly]" state that compactness "should not be judged based upon any mathematical, statistical, or formula-based calculation or determination," *id.* at 8 (quoting House Redistricting Guidelines); *see also* House Redistricting Guidelines VI (Ex. 43). Duchin also admitted that to the extent she considered compactness and preservation of political subdivisions, her report did not analyze how the Congressional Plan compares to the ensemble plans on those metrics. Duchin Tr. 149:19 (Ex. 17). Finally, Duchin considered only four communities of interest despite acknowledging that more "certainly" exist, *id.* at 81:16, and she hand-picked those four communities of interest based only on her reading of the public hearing transcripts—an approach that she conceded lacks support in the academic literature and "certainly" does not yield a representative sample of the views of South Carolina voters, *id.* at 84:22–23, 86:20; *see id.* at 86:22–25, 87:5–6; 88:22.

Rep. 4–5 (Ex. 27). Imai controlled for the basic districting principles of population balance, contiguity, mathematical compactness, municipal and county splits, and avoiding incumbent pairing. *See id.* at 8–10. Imai conceded, however, that he did not account for any other traditional districting principles identified in the Senate Guidelines, including core preservation, voting district splits, communities of interest, and keeping incumbents with their core constituents. *See* Imai Tr. 103:20–106:22 (Ex. 28). Imai did not even consider whether his simulated plans were legal. *Id.* at 36:6–22, 67:20–68:5. And Imai conceded that he did not control for partisan performance. *See* Imai Rep. 9–10 (Ex. 27); Imai Tr. 155:9–10, 181:16–18, 182:25–183:15 (Ex. 28). By ignoring all of these considerations, Imai necessarily failed to achieve his stated goal of "isolat[ing] the role of race" in the Congressional Plan. Imai Tr. 105:25 (Ex. 28).

Third, Ragusa's analysis is similarly flawed. By comparing the Benchmark Plan and the Congressional Plan using his "envelope" approach, he purported to assess whether precincts with higher BVAPs within a given county were more or less likely to be moved into or out of a district as part of the Congressional Plan. *See* Ragusa Rep. 1–4 (Ex. 29). But Ragusa failed to control for myriad traditional districting principles, including core preservation, VTD splits, compactness, political subdivisions, and communities of interest at a granular level. *See* Ragusa Tr. 306:11–12, 306:3–6, 307:7–16 (Ex. 30). Ragusa even failed to control for contiguity—one of the most "fundamental" districting principles. *Johnson v. Miller*, 864 F. Supp. 1354, 1384 (S.D. Ga. 1994), *aff'd*, 515 U.S. 900 (1995); *see* Trende Rebuttal Rep. 9–11 (Ex. 33).

Finally, Liu concluded that race was the "driving factor" in whether voters were moved into or out of challenged districts based on his analysis of race and voting data. Liu Rep. 6, 21; *see id.* at 17–20 (Ex. 19). But Liu conceded that he "doesn't control for any" factors other than race and politics. Liu Tr. 143:25–144:2 (Ex. 20). He therefore failed to control for almost every

traditional principle, including core preservation, avoiding VTD splits, compactness, incumbency protection, communities of interest, and even contiguity. *Id.* 90:10–23; 126:7–127:24, 144:5–7.

In sum, Plaintiffs' putative experts' failure "to consider all the traditional race-neutral principles that guide redistricting in South Carolina" alone warrants summary judgment on their racial gerrymandering claim in count one. *Backus*, 857 F. Supp. 2d at 562–63.

B. Plaintiffs Cannot Satisfy Their Burden To Show That Race Rather Than Politics Predominated

Plaintiffs' failure to demonstrate racial predominance alone warrants summary judgment. *See supra* Part I.A. Plaintiffs, moreover, cannot show racial predominance for another reason. In South Carolina, as elsewhere, race "is highly correlated with political affiliation." *Cromartie II*, 532 U.S. at 243; *see also, e.g.*, Liu Tr. 170:4–8 (Ex. 20); Duchin Tr. 153:15–154:4 (Ex. 17). Accordingly, as part of their demanding burden to establish a racial gerrymandering claim, Plaintiffs must decouple race from politics and demonstrate that "race *rather than* politics *predominantly* motivated" the Congressional Plan. *Cromartie II*, 532 U.S. at 243. That is because "a jurisdiction may engage in constitutional political [line-drawing], even if it so happens that the most loyal Democrats happen to be black Democrats and even if the State were *conscious* of that fact." *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999) (emphasis original). Thus, Plaintiffs "must 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"—and "that those districting alternatives would have brought about significantly greater racial balance"—compared to the Congressional Plan. *Cromartie II*, 532 U.S. at 258.

The General Assembly engaged in a "legitimate political objective," *id.*, when it pursued the goal of preserving and strengthening the 6-1 Republican-Democratic composition that existed under the Benchmark Plan. This unsurprising political goal is evident from the record, which

confirms that "politics really drove the decisions that were made on the map." Roberts Tr. 252:22–23 (Ex. 22); *see* Fiffick Tr. 256:24–257:4 (Ex. 23); Campsen Tr. 88:4–5, 148:11–12, 185:23–186–1 (Ex. 24); Massey Tr. 134:12–136:23 (Ex. 25). The Senate Guidelines authorized the General Assembly to maintain "political" communities of interest and to use "political" data to draw the Congressional Plan. 2021 Senate Guidelines III.A, IV (Ex. 3). Throughout the redistricting process, legislative staff generated and made public—and the members of the General Assembly requested—extensive data on the political make-up of districts under potential plans. Roberts Tr. 109:25, 255:11 (Ex. 22); *see id.* at 109:8–20, 110:7–8, 112:12–113:7; Fiffick Tr. 40:2 (Ex. 23); Campsen Tr. 103:22–104:1, 186:4–5 (Ex. 24); *see also, e.g.*, Congressional Plan Partisan Report (Ex. 6); Harpootlian Plan Partisan Report (Ex. 21).

The General Assembly's ultimate line-drawing decisions aimed to reinforce the 6-1 Republican-Democratic split, particularly by increasing District 1's Republican percentage (or "Trump number" in the 2020 election) to make the district more Republican-leaning as compared to the Benchmark Plan. Roberts Tr. 113:4–7 (Ex. 22); *see id.* at 112:12–113:7, 170:10–17, 172:19, 252:25–253:15; Fiffick Tr. 256:24–257:4 (Ex. 23); Massey Tr. 134:12–136:23 (Ex. 25). As the lead sponsor explained, District 1 had become "basically a swing district," having narrowly elected Democrat Joe Cunningham in 2018 and Republican Nancy Mace in 2020, which prompted concerns (including from Mace herself) that Republicans could lose the district in future elections. Campsen Tr. 185:23–187:1 (Ex. 24); *see id.* at 94:13–95:11, 99:7–9. Based on these "political numbers," the General Assembly selected a map that equalized population while moving District 1 "to the Republican side." *Id.* at 185:23–187:1; *see also* Roberts Tr. 172:1–7, 180:18–19 (Ex. 22). In addition, Representative Bamberg, an African-American legislator, agreed that politics rather than race explains the Plan. *See* Bamberg Tr. 52:4–59:18, 122:6–130:20 (Ex. 26).

Faced with evidence that the General Assembly pursued this "legitimate political objective," Plaintiffs are required to prove that the General Assembly "could have achieved [its] objectives in alternative ways that are comparably consistent with traditional districting principles." *Cromartie II*, 532 U.S. at 258. To be sure, the majority in *Cooper v. Harris* opined that an "alternative map" is not always necessary to satisfy this requirement, but it recognized that a challenger may "need an alternative map, as a practical matter, to make his case," and *must* provide an alternative map in cases like this one, where "the plaintiffs ha[ve] meager direct evidence of a racial gerrymander and need[] to rely on evidence of forgone alternatives." 137 S. Ct. at 1481; *see also id.* at 1488–91 (Alito, J., dissenting) (dissenting justices concluding that an alternative map is always required). Yet Plaintiffs have failed to present an alternative map or any other evidence showing that the General Assembly could have achieved its political objectives in alternative ways. *See Cromartie II*, 532 U.S. at 258. In fact, Plaintiffs' own experts have acknowledged that the NAACP plans and the Harpootlian Plan *do not* maintain the 6-1 Republican-Democratic composition that the Congressional Plan maintains. *See* Duchin Tr. 152:9–154:4, 159:8–9 (Ex. 17); Duchin Rep. 25 (Ex. 18); Liu Rep. 12–13 tbl. 4 (Ex. 19); Liu Tr. 46:16–47:6 (Ex. 20).

Moreover, none of Plaintiffs' putative experts even attempted to present an alternative, much less to show that any alternative achieved the General Assembly's political goals in a manner that is "comparably consistent with traditional districting principles," *Cromartie II*, 532 U.S. at 258. Nor could they have done so, since every one of Plaintiffs' putative experts—including those who purport to analyze race and politics in the Congressional Plan—ignored myriad traditional districting principles. *See supra* Part I.A.2.

Finally, if anything, Plaintiffs' putative expert analyses underscore that politics better explains the Congressional Plan than any alleged use of race. In particular, Liu offers an "empirical test of race vs. party" and a "verification study of race vs. politics," Liu Rep. 14, 19 (Ex. 19), but neither controls for traditional districting principles, *see* Liu Tr. 90:10–23; 126:7–127:24, 143:25–144:7 (Ex. 20). Moreover, Liu's "empirical test" shows that, on net, the Congressional Plan moves far more Democratic voters than black voters across the two districts he examines. Specifically, according to Liu's own charts:

- The Plan moves a net of 1,213 black voters out of District 1,[4] but a net of 4,591 Democratic voters—*nearly four times as many*—out of District 1.[5]
- The Plan moves a net of 441 black voters into District 2,[6] but a net of 1,153 Democratic voters[7]—*more than two-and-a-half times as many*—out of District 2.[8]

Thus, even under Liu's own approach, the political effect of the Congressional Plan's changes to Districts 1 and 2 was far more pronounced than any racial effect. Plaintiffs cannot prove that "race *rather than* politics *predominantly* explains" the Congressional Plan. *Cromartie II*, 532 U.S. at 243 (emphasis original). The Court should grant summary judgment.

---

[4] 3,640 Black Democrats + 164 Black Republicans "out" minus 2,176 Black Democrats + 415 Black Republicans "into." Liu Rep. 16 tbl. 6 (Ex. _).

[5] 3,651 White Democrats + 3,640 Black Democrats "out" minus 524 White Democrats + 2,176 Black Democrats "into." *Id.*

[6] 930 Black Democrats + 17 Black Republicans "into" minus 496 Black Democrats + 10 Black Republicans "out." *Id.* at 18 tbl. 7.

[7] 1,682 White Democrats + 496 Black Democrats "out" minus 95 White Democrats + 930 Black Democrats "in." *Id.*

[8] Tellingly, Dr. Liu did not include any analysis of District 5 in his report because the analysis he conducted did not support Plaintiffs' preferred conclusion regarding District 5. *See* Liu Tr. 138:20–139:8.

C. Plaintiffs Ask The Court To Impose A Racial Gerrymander

The Court should reject the racial gerrymandering claim for a final reason: Plaintiffs ask the Court to impose a racial gerrymander. In particular, Plaintiffs ask the Court to engage in the race-conscious exercise of increasing African-American voters' ability to form coalitions to "influence" congressional elections. *See* Dkt. No. 267 ¶¶ 148, 152, 153. Plaintiffs even go so far as to request that the Court redraw District 1 to increase its BVAP to "34%"—or *more than double* its level in either the Benchmark Plan or the Congressional Plan under the 2020 Census results. *Id.* ¶ 154. Plaintiffs' own expert maintains that the ultimate map should "prioritize minority electoral opportunity" *even if* that goal "conflict[s]" with traditional districting principles like core preservation and compactness. Duchin Tr. 210:5–212:12 (Ex. 17); *see* Duchin Rep. 7 (Ex. 18); Such subordination of traditional principles to race is the essence of a racial gerrymander. *See, e.g.*, *Cooper*, 137 S. Ct. at 1469.

Indeed, intentionally increasing or maximizing African-American voting strength is unlawful when, as now, such action would subordinate traditional principles to race and fail to satisfy strict scrutiny. *See, e.g.*, *Miller*, 515 U.S. 917–27. Here, *both* NAACP plans and the Harpootlian Plan are far more race-conscious than the Congressional Plan and perform demonstrably worse on traditional criteria than the Congressional Plan. *See, e.g.*, *supra* Part I.A.

Moreover, Plaintiffs have not attempted to show that any of the proposed alternatives satisfies "strict scrutiny." *Miller*, 515 U.S. at 920. Nor could they: Section 2 does not require or justify creating a district or any other district where the minority group does not form a majority—which is presumably why Plaintiffs have not brought a Section 2 claim. *Bartlett*, 556 U.S. 1; *Thornburg v. Gingles*, 478 U.S. 30 (1986). Moreover, no other compelling interest can justify intentionally increasing African-American voting strength or "influence" in a district where African-Americans do not constitute a majority but seek to form a coalition with white crossover

voters to elect Democratic candidates. *See, e.g.*, *Bartlett*, 556 U.S. 1; *Miller*, 515 U.S. 917–27. The Court should grant summary judgment.

II. SENATE DEFENDANTS AND HOUSE DEFENDANTS ARE ENTITLED TO SUMMARY JUDGMENT ON THE INTENTIONAL DISCRIMINATION CLAIM

Like their racial gerrymandering claim, Plaintiffs' intentional discrimination claim fails at the threshold. Plaintiffs simply cannot show that the General Assembly subjected African-American voters to "differential treatment" compared to "similarly situated" voters of another race. *City of Cleburne*, 473 U.S. at 439–40. Indeed, as explained above, the General Assembly adhered to the same race-neutral traditional criteria across the Congressional Plan, in all of the challenged districts, for all South Carolina voters—and Plaintiffs' intentional discrimination claim rests on proposed alternative plans that are *less* compliant with race-neutral principles than the Congressional Plan. *See supra* Part I. There is no intentional discrimination when, as now, a legislature applies the same race-neutral criteria to all voters *regardless* of their race. *See Feeney*, 442 U.S. at 279. For this reason alone, Plaintiffs' intentional discrimination claim is a nonstarter.

Plaintiffs nonetheless contend that the General Assembly engaged in "intentional vote dilution" in the challenged districts. Dkt. No. 267 ¶ 3. "The essence of a vote dilution claim under the Fourteenth Amendment is 'that the State has enacted a particular voting scheme as a purposeful device to minimize or cancel out the voting potential of racial or ethnic minorities.'" *Backus*, 857 F. Supp. 2d at 567 (quoting *Miller*, 515 U.S. at 911).[9] "Viable vote dilution claims require proof that the districting scheme has a discriminatory effect and the legislature acted with a discriminatory purpose." *Id.* (citing *Washington v. Finlay*, 664 F.2d 913, 919 (4th Cir. 1981)).

[9] It is an open question whether a vote-dilution claim is cognizable under the Fifteenth Amendment, but, even if it were, such a claim is "essentially congruent with vote-dilution claims under the Fourteenth Amendment." *Backus*, 857 F. Supp. 2d at 569.

Because Plaintiffs cannot prove either of these essential elements, *see Cray Commc'ns, Inc.*, 33 F.3d at 393, the Court should enter summary judgment on the intentional discrimination claim.

A. Plaintiffs Cannot Show That The Congressional Plan Has A Discriminatory Effect

Plaintiffs cannot prove that the Congressional Plan has "disproportionately adverse" effects upon African-American voters, *Feeney*, 442 U.S. at 279, compared to "similarly situated" white voters, *City of Cleburne*, 473 U.S. at 439–40. As explained, Plaintiffs ask the Court to draw a district where black voters can form a coalition with white crossover voters to "elect" their preferred candidates or "influence" the outcome of elections. Dkt. No. 267 ¶ 171. Plaintiffs' own putative experts assert that race and party are "highly correlated" in South Carolina, with black voters preferring Democratic candidates in general elections. *See* Liu Tr. 170:4–8 (Ex. 20); Duchin Tr. 153:15–154:4 (Ex. 17). Thus, Plaintiffs' alleged discriminatory effect in this case is that black voters are placed in districts without a sufficient number of white Democratic voters to elect Democratic candidates in general elections. *See* Dkt. No. 267 ¶ 171.

This theory of discriminatory effect fails as a matter of law. There is no "right to form political coalitions," *Bartlett*, 556 U.S. at 15, and "[a] redistricting plan that does not adversely affect a minority group's potential to form a majority in a district, but rather diminishes its ability to form a political coalition with other racial or ethnic groups, does not result in vote dilution on account of race," *Hall*, 385 F.3d at 431; *see Baten v. McMaster*, 967 F.3d 345, 360–61 (4th Cir. 2020) (similar). "The Equal Protection Clause [and] the Fifteenth Amendment … are aimed only at ensuring equal political opportunity: that every person's chance to form a majority is the same, regardless of race or ethnic origin. Coalition suits provide minority groups with a political advantage not recognized by our form of government, and not authorized by the constitutional and statutory underpinnings of that structure." *Nixon*, 76 F.3d at 1392 (citations omitted); *see Hall*,

385 F.3d at 431; *see also Bartlett*, 556 U.S. at 15 ("[M]inority voters are not immune from the obligation to pull, haul, and trade to find common political ground.").

In other words, the Congressional Plan does not have "disproportionately adverse" effects upon African-American voters, *Feeney*, 442 U.S. at 279, because it affects African-American Democrats and "similarly situated" white Democrats *in exactly the same way*. *City of Cleburne*, 473 U.S. at 439–40; *see United States v. Mason*, 774 F.3d 824, 830 (4th Cir. 2014). African Americans form a distinct minority in all three districts Plaintiffs challenge—Districts 1, 2, and 5—under the Benchmark Plan and the Congressional Plan, *see supra* pp. 6–7, and each district contains just as many or more white Democrats as African-American Democrats. For example, in the 2020 election, when Benchmark District 1's BVAP was 16.56%, *id.*, Joe Biden received approximately 47% of the vote in that district—which indicates that District 1 contains even more white Democrats than African-American Democrats, *see* Benchmark Plan Partisan Report (Ex. 40). That same year, District 2's BVAP was 23.06% and Joe Biden received 44.22% of the vote, while District 5's BVAP was 25.06% and Joe Biden received 41.55% of the vote. *See supra* pp. 6–7; Benchmark Plan Partisan Report (Ex. 40).

These figures make clear that the Congressional Plan does not have a discriminatory effect on African Americans. It has an effect on Democrats: it limits the ability of *all* Democrats in Districts 1, 2, and 5—black *and* white—to form a winning political coalition, and conversely improves the ability of *all* Republicans—black *and* white—to do the same. As Plaintiffs' own putative expert put it, "[a]ny voter who voted for a Democrat is not seeing their preferred candidate elected in a district that always elects Republicans." Duchin Tr. 170:20–171:2 (Ex. 17). This political effect, however, "has nothing to do with the race of the voter," *id.*, but instead reflects the

partisan composition of the district. It also is not cognizable under an intentional discrimination claim. *See, e.g.*, *Nixon*, 76 F.3d at 1392; *Hall*, 385 F.3d at 431; *Bartlett*, 556 U.S. at 15, 20.

If more were needed, the NAACP's plans and the Harpootlian Plan confirm the Congressional Plan's effects are political rather than racial. In addition to keeping District 6 as a Democratic district, the NAACP plans make District 1 "reliably effective" for Democrats, Duchin Tr. 152:9–154:4, 159:8–9 (Ex. 17); *see also* Duchin Rep. 25 (Ex. 18); Liu Rep. 12–13 tbl. 4 (Ex. 19); Liu Tr. 46:16–47:6 (Ex. 20), and the Harpootlian Plan makes District 1 a 51.83% Democratic district, *see* Harpootlian Plan Partisan Report (Ex. 21). But black voters form minorities in each of those versions of District 1: 34.02% in NAACP Plan 1, 23.26% in NAACP Plan 2, and 20.57% in the Harpootlian Plan. *See supra* pp. 7–8. Thus, those districts are "coalition" districts that include not only African-American Democrats, but also significant numbers of white Democrats. *See, e.g.*, Duchin Tr. 162:9–163:1 (conceding that "[w]hite crossover voting" would "certainly" be a "significant factor" in "wins for [b]lack preferred candidates" under the Harpootlian Plan) (Ex. 17). The General Assembly's decision not to adopt those proposed districts is not discrimination against black Democrats, as it has the exact same effect on white Democrats. *See Nixon*, 76 F.3d at 1392; *Hall*, 385 F.3d at 431; *see also Bartlett*, 556 U.S. at 15; *Feeney*, 442 U.S. at 279. The Court should grant summary judgment.[10]

[10] Plaintiffs cannot show that the Congressional Plan has a discriminatory effect on black voters for another reason as well. Neither of the NAACP plans nor the Harpootlian Plan is "a reasonable alternative voting practice [that can] serve as the benchmark 'undiluted' voting practice." *Reno I*, 520 U.S. at 480; *see Backus*, 857 F. Supp. 2d at 568. None of those plans is mandatory under Section 2 because none forms a district outside of District 6 where black voters constitute a majority, *see Reno v. Bossier Parish Sch. Bd.*, 520 U.S. 471, 480 (1997); *Backus*, 857 F. Supp. 2d at 568, and all perform worse than the Congressional Plan on traditional districting principles, *see supra* __; *see also Reno*, 520 U.S. at 480; *League of United Latin Amer. Citizens v. Perry*, 548 U.S. 399, 433–34 (2006); *Abrams v. Johnson*, 521 U.S. 74, 92 (1997).

B. Plaintiffs Cannot Show That The General Assembly Enacted The Congressional Plan For A Discriminatory Purpose

Plaintiffs' failure to show discriminatory effect alone is fatal to their intentional discrimination claims. *See Feeney*, 442 U.S. at 279. But that claim fails for another reason as well: Plaintiffs have failed to "overcome the presumption of legislative good faith" and to demonstrate that the General Assembly "acted with invidious [discriminatory] intent." *Abbott*, 138 S. Ct. at 2325. As a member of this Court recently emphasized, the Supreme Court has "specifically held" that "'awareness of consequences' is not enough to show discriminatory intent." *Coal. for TJ v. Fairfax Cnty. Sch. Bd.*, No. 22-1280, 2022 WL 986994, at *4 (4th Cir. Mar. 31, 2022) (Heytens, J., concurring) (quoting *Feeney*, 442 U.S. at 279). Rather, at this stage, Plaintiffs must set forth specific facts showing that the General Assembly "as a whole," *Brnovich*, 141 S. Ct. at 2350, enacted the Congressional Plan "*because of*, not merely *in spite of*," (non-existent) "adverse effects upon an identifiable group," *Feeney*, 442 U.S. at 279 (emphasis added). This requirement "operates as a critical limitation on the potential to lodge constitutional challenges to facially neutral laws of all stripes," *Coal. for TJ*, 2022 WL 986994, at *4 (Heytens, J., concurring), and Plaintiffs cannot satisfy it here.

Indeed, *every* legislator and staffer Plaintiffs have deposed in this case—regardless of race or party affiliation—has confirmed that the General Assembly did not act with discriminatory intent in adopting the Congressional Plan. *See supra* pp. 8–9. Unsurprisingly, then—despite reviewing thousands of internal legislative emails, texts, and other documents concerning the Congressional Plan and deposing numerous legislators and staffers—Plaintiffs have no "direct evidence" that the General Assembly enacted the Congressional Plan for a discriminatory purpose. *Vill. of Arlington Heights v. Metro. Hous. Dev. Corp.*, 429 U.S. 252, 268 (1977). Plaintiffs also have not "identif[ied] [racist] statements" made by any legislator who voted for the Congressional

Plan, let alone by the entire General Assembly. *DHS v. Regents of Univ. of Calif.*, 140 S. Ct. 1891, 1916 (2020). Indeed, Plaintiffs have not presented any evidence that legislators "harbor[ed] racist motives," Bagley Tr. 42:8–15 (Ex. 41), or otherwise were "motivated" to enact the Congressional Plan specifically "'because of'" its alleged "'adverse effect'" on African-American voters, *Coal. for TJ*, 2022 WL 986994, at *4 (Heytens, J., concurring) (quoting *Feeney*, 442 U.S. at 279).

Instead, Plaintiffs attempt to show discriminatory intent using only "circumstantial evidence," *Arlington Heights*, 429 U.S. at 268, specifically (1) Bagley's report and testimony regarding South Carolina's historical treatment of African-American voters and (2) the sequence of events surrounding the enactment of the Congressional Plan. Both attempts fail.

First, Bagley discussed a "broad mosaic" of historical events, ranging from the Civil War and Reconstruction to the Civil Rights movement and past redistricting cycles in South Carolina. Bagley Tr. 97:5 (Ex. 41); *see* Bagley Rep. 4–24 (Ex. 31). These historical events, however, are simply too remote in time to "condemn" today's Congressional Plan. *Abbott*, 138 S. Ct. at 2324. Courts "cannot accept official actions taken long ago as evidence of current intent," *McCleskey v. Kemp*, 481 U.S. 279, 298 n.20 (1987), and "[p]ast discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful." *Id.* at 2324 (quoting *City of Mobile v. Bolden*, 446 U.S. 55, 74 (1980) (plurality opinion)); *see Bishop of Charleston v. Adams*, 538 F. Supp. 3d 608, 615 (D.S.C. 2021) (rejecting "efforts to draw a straight line through the unconscionable discrimination of the past to the judicial and administrative decisions of the present"); *see also Greater Birmingham Ministries v. Sec'y of State for State of Alabama*, 992 F.3d 1299, 1325 (11th Cir. 2021) ("*GBM*") ("outdated intentions of previous generations" do not "taint" "legislative action forevermore on certain topics"). At bottom, "what matters" is "the intent of the [current] legislature," *Abbott*, 138 S. Ct. at 2325, in "the precise circumstances surrounding the

passing of the [challenged] law," *GBM*, 992 F.3d at 1325–26; *accord Brnovich*, 141 S. Ct. at 2349, and Bagley's dated historical analysis does not demonstrate that the General Assembly enacted the Congressional Plan with a discriminatory intent in 2022.

Indeed, this Court rejected similar evidence in *Backus*. South Carolina's historical treatment of African-American voters was squarely before the three-judge panel in *Backus*, but the panel nonetheless rejected the *Backus* plaintiffs' intentional discrimination challenge to the Benchmark Plan in an opinion summarily affirmed by the Supreme Court. *See Backus*, 857 F. Supp. 2d 553, *aff'd*, 568 U.S. 801. And while Bagley also cited the history of Department of Justice objections to various primarily *local* voting practices under Section 5 of the Voting Rights Act, *see* Bagley Rep. 20–24 (Ex. 31), the Department of Justice precleared the Benchmark Plan challenged in *Backus*, *see Backus*, 857 F. Supp. 2d at 557, and its most recent objection Bagley cited was more than a decade ago—much too "remote in time" to be probative here. *Regents*, 140 S. Ct. at 1916; *see* Bagley Tr. 99:8–16 (Ex. 41); Bagley Rep. 22 (Ex. 31). As the Court has already reaffirmed in this case, evidence from past redistricting cycles does not bear on "the intent of any legislator [or] the South Carolina General Assembly as a whole[]" in voting for plans this cycle. Dkt. No. 153 at 13.

Second, Bagley questioned the sequence of events surrounding enactment of the Congressional Plan, *see* Bagley Rep. 24–49 (Ex. 31), but he ultimately conceded that the General Assembly engaged in robust process around the Plan. He admitted that the redistricting process was "generally analogous" to—and "consisten[t]" with—the process in previous cycles, Bagley Tr. 74:10–15, 77:16–17, 78:19–22, 85:14–86:4 (Ex. 41), and that the General Assembly adhered to regular procedures in holding public hearings and receiving public input, *id.* at 85:15–21.

Nonetheless, Bagley pointed to alleged "procedural irregularities" in the legislative process leading up to enactment of the Congressional Plan because, in his view, the General Assembly was not sufficiently transparent or receptive to public input, did not afford adequate time to review proposals, and departed from the usual process in certain ways. *See, e.g.*, Bagley Rep. 24, 32, 38, 48 (Ex. 31). But Bagley did not show that the General Assembly's actions deviated from any actual rules or procedures; he simply noted that some legislators "thought" violations occurred and that a different approach would have been preferable as a matter of "best practices and good government." Bagley Tr. 143:11–12, 67:13–14 (Ex. 41). Moreover, Bagley acknowledged "there was wide opportunity for the submission of [public] input or feedback" on the Congressional Plan. *Id.* at 79:11–12. And there was no procedural irregularity merely because the General Assembly did not agree with or incorporate certain pieces of public input or feedback: after all, the General Assembly could not have incorporated all public input into the Congressional Plan because it received *conflicting* input on a variety of matters, including whether to maintain a split in Charleston County or to make that county whole. *See* Public Comment Emails (Ex. 42).

In all events, even if a critique of transparency and a failure to incorporate some public input could be procedural irregularities, they are not the kind of "radical departures from normal procedures," that could support a finding of discriminatory intent. *Veasey v. Abbott*, 830 F.3d 216, 237 (5th Cir. 2016) (en banc). Indeed, "procedural irregularities are not themselves proof of discriminatory intent." *Coal. for TJ*, 2022 WL 986994, at *5 (Heytens, J., concurring); *Rollerson v. Brazos River Harbor Navigation Dist. of Brazoria Cnty.*, 6 F.4th 633, 640 (5th Cir. 2021) ("procedural violations do not demonstrate invidious intent of their own accord"); *GBM*, 992 F.3d at 1326 (truncated debate, use of cloture, party-line vote, and lack of support from black legislators were not indicative of discriminatory intent). Rather, procedural irregularities are "relevant" only

"to the extent they 'afford evidence that improper purposes are playing a role.'" *Coal. for TJ*, 2022 WL 986994, at *5 (Heytens, J., concurring) (quoting *Arlington Heights*, 429 U.S. at 267).

In other words, the violations "must have occurred in a context that suggests the decision-makers were willing to deviate from established procedures *in order to accomplish a discriminatory goal*." *Rollerson*, 6 F.4th at 640 (emphasis added). Thus, "fail[ure] to follow the proper procedures against all individuals," when such conduct is not "targeted to any identifiable minority group," is not indicative of discriminatory intent. *Rollerson v. Port Freeport*, No. 18-cv-0235, 2019 WL 4394584, at *8 (S.D. Tex. Sept. 13, 2019), *aff'd*, 6 F.4th 633; *see also League of United Latin Am. Citizens v. Abbott*, No. 1:21-cv-0991, 2022 WL 1410729, at *26–28 (W.D. Tex. May 4, 2022) ("[T]he presumption of good faith is overcome only when there is a showing that a legislature acted with an ulterior *racial* motive.").

Bagley failed to show that the General Assembly deviated from established procedures at all, much less to accomplish a "discriminatory goal" or in a way that targeted African-Americans. *Rollerson*, 6 F.4th at 640; *see also Coal. for TJ*, 2022 WL 986994, at *5 (Heytens, J., concurring). To the contrary, he expressly declined to testify that any legislators "harbor[ed] racist motives," Bagley Tr. 42:8–15 (Ex. 41), and the irregularities he alleged are "readily explainable" by non-discriminatory considerations, *City of Mobile*, 446 U.S. at 70, such as the short timeline under which the General Assembly was compelled to enact the Congressional Plan (which resulted from the delayed release of Census result and Plaintiffs' premature lawsuit) and the conflicting nature of the public input the General Assembly received. *See* Dkt. No. 63 at 13 ("[T]he court stays the case and gives the Legislature until . . . Tuesday, January 18, 2022, to enact new district maps."). Because any alleged procedural irregularities are explainable on "alternative" non-discriminatory grounds, they do not support any "nefarious inference." *League of United Latin Am. Citizens*,

2022 WL 1410729, at *20–21; *see City of Mobile*, 446 U.S. at 70; *GBM*, 992 F.3d at 1326; *see also Regents*, 140 S. Ct. at 1916 (a process is not "irregular" where it is a "natural response" to the circumstances).

CONCLUSION

The Court should grant summary judgement and dismiss Plaintiffs' suit.

August 19, 2022

Respectfully submitted,

*/s/*Robert E. Tyson Jr.
Robert E. Tyson, Jr. (7815)
Vordman Carlisle Traywick, III (12483)
La'Jessica Stringfellow (13006)
ROBINSON GRAY STEPP & LAFFITTE, LLC
1310 Gadsden Street
Post Office Box 11449 (29211)
Columbia, South Carolina 29201
(803) 929-1400
rtyson@robinsongray.com
ltraywick@robinsongray.com
lstringfellow@robinsongray.com

John M. Gore (admitted *pro hac vice*)
Stephen J. Kenny (admitted *pro hac vice*)
JONES DAY
51 Louisiana Avenue, N.W.
Washington, D.C. 20001
Phone: (202) 879-3939
Fax: (202) 626-1700
jmgore@jonesday.com
skenny@jonesday.com

Counsel for Senate Defendants

s/ Mark C. Moore
Mark C. Moore (Fed. ID No. 4956)
Jennifer J. Hollingsworth (Fed. ID No. 11704)
Hamilton B. Barber (Fed. ID No. 13306)
Michael A. Parente (Fed. ID No. 13358)
NEXSEN PRUET, LLC
1230 Main Street, Suite 700

Columbia, SC 29201
Telephone: 803.771.8900
MMoore@nexsenpruet.com
JHollingsworth@nexsenpruet.com
HBarber@nexsenpruet.com
MParente@nexsenpruet.com

William W. Wilkins (Fed. ID No. 4662)
Andrew A. Mathias (Fed. ID No. 10166)
Konstantine P. Diamaduros (Fed. ID No. 12368)
NEXSEN PRUET, LLC
104 S. Main Street, Suite 900
Greenville, SC 29601
Telephone: 864.370.2211
BWilkins@nexsenpruet.com
AMathias@nexsenpruet.com
KDiamaduros@nexsenpruet.com

Rhett D. Ricard (Fed. ID No. 13549)
NEXSEN PRUET, LLC
205 King Street, Suite 400
Charleston, SC 29401
Telephone: 843.720.1707
RRicard@nexsenpruet.com

Counsel for House Defendants