No. 22-807

In The Supreme Court of the United States

THOMAS C. ALEXANDER, *et al.*,
Appellants,

v.

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

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

BRIEF OF *AMICUS CURIAE* THE NATIONAL REPUBLICAN REDISTRICTING TRUST IN SUPPORT OF APPELLANTS

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BRIEF OF *AMICUS CURIAE* THE NATIONAL REPUBLICAN REDISTRICTING TRUST IN SUPPORT OF APPELLANTS

IDENTITY AND INTEREST OF AMICUS CURIAE[1]

The National Republican Redistricting Trust, or NRRT, is the central Republican organization tasked with coordinating and collaborating with national, state, and local groups on a fifty-state congressional and state legislative redistricting effort.

NRRT's mission is threefold. First, it aims to ensure that redistricting faithfully follows all federal constitutional and statutory mandates. Under Article I, Section 4 of the Constitution, it is the State legislatures that are primarily entrusted with the responsibility of redrawing the States' congressional districts. Every citizen should have an equal voice, and laws must be followed in a way that protects the constitutional rights of individual voters.

Second, NRRT believes redistricting should result in districts that are sufficiently compact and preserve communities by respecting municipal and

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[1] Pursuant to Supreme Court Rule 37.6, no counsel for any party authored this brief in whole or in part and no entity or person, other than *amicus curiae*, its members, or its counsel made any monetary contribution intended to fund the preparation or submission of this brief.

Counsel for Amicus Curiae inadvertently failed to notify all counsel of record at least 10 days before filing as required by Rule 37.2. Counsel for Amicus Curiae acted to rectify this omission immediately upon discovering it by notifying counsel for all parties. Should the Court desire to construe this as a motion for leave to file, Counsel for Amicus Curiae sought the position of the parties as to that question. Appellants consent. Appellees take no position.

county boundaries, avoiding the forced combination of disparate populations to the extent possible. Such districts are consistent with the principle that legislators represent individuals living within identifiable communities and not the political parties themselves.

Third, NRRT believes redistricting should make sense to voters. Each American should be able to look at their district and understand why it was drawn the way it was.

SUMMARY OF THE ARGUMENT

The three-judge district court below ignored this Court's prior precedent and conflated race with politics to impose a nonretrogression standard upon South Carolina despite a complete lack of authorization from Congress to do so. Appellants, the South Carolina Legislature ("Legislature"), attempted to create a Congressional District No. 1 (hereinafter referred to as "CD 1") that, as permitted by the Constitution, contained more Republican than Democratic voters. The three-judge district court held that the Legislature attempted a racial gerrymander based on simple, yet flawed, reasoning. The district court reasoned that: Attempting to reduce the population of Democratic voters within a district is the same thing as an intentional racial gerrymander because there currently exists a strong correlation in this area of South Carolina between Black population and Democratic Party membership.[2] But the natural conclusion to what the

[2] As noted in prior amicus briefs at this Court, the partisan preferences of voters and voting blocs have constantly changed over time. See, *e. g.*, Brief for the Republican National

three-judge district court did is obvious: Shoehorning in a policy preference for a new nonretrogression Voting Rights Act ("VRA") standard via flawed Fourteenth Amendment reasoning without the Article I inconvenience of waiting for Congress to act, should it so choose. Amicus believes its perspective will be of considerable help to this Court by exposing the three-judge district court's transparent end run around this Court's rulings in *Shelby County* v. *Holder*, 570 U. S. 529 (2013), *Rucho* v. *Common Cause*, 139 S. Ct. 2484 (2019), and *Bartlett* v. *Strickland*, 556 U. S. 1 (2009).

Fundamentally, this case is about whether a federal court, in evaluating the constitutionality of a State's exercise of its delegated redistricting authority under Article I, § 4 of the U. S. Constitution, has the power to strike down a map under a judicially created Fourteenth Amendment nonretrogression standard that has never before been approved or authorized by Congress or this Court.[3] This mishandling of the Fourteenth

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Committee and the National Republican Congressional Committee as *Amici Curiae* Supporting Appellants, *Rucho* v. *Common Cause*, No. 18-422, 6–33 (*filed* Feb. 12, 2019), *available at* https://www.supremecourt.gov/DocketPDF/18/18-422/88089/20190212154326236_No.%2018.422%20Brief%20of%20Amicus%20Republican%20National%20Committee%20et%20al..pdf.

[3] It is important to note that this case has nothing to do with Section 3(c) of the Voting Rights Act, where Congress did, under certain conditions, give authority to the federal courts to judicially "bail-in" jurisdictions into something akin to preclearance. The important distinction here is that the provisions of Section 3(c) are entirely remedial. That is, there must first be a Fourteenth or Fifteenth Amendment violation for a court to assume continuing jurisdiction and Section 3(c) is

Amendment—the purpose of which is in part to *decrease* balkanization in the American voting populace, not increase it—gave no regard for this Court's prior precedent and no regard for traditional separation of powers principles. Arriving at the conclusion reached by the three-judge district court requires ignoring a reality that was abundantly clear at every step in this process: Politics, not race, was the point for all of the Defendants involved.

ARGUMENT

I. The three-judge district court's order is an attempt to circumvent this Court's precedent in *Shelby County* v. *Holder* and the U. S. Constitution.

The court below simultaneously (1) ignored this Court's precedent; and (2) ignored the language of the Elections Clause in violation of traditional separation of powers principles. U. S. Const., Art. I, § 4, cl. 1. Evidently displeased with this Court's current precedent concerning the Voting Rights Act and Congress' perceived inaction, and unable to identify a statutory basis for a nonretrogression standard, the three-judge district court reimposed that standard via the Fourteenth Amendment of the U. S. Constitution. This Court should note probable jurisdiction and correct the three-judge district court's erroneous ruling.

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not a mechanism to find a Fourteenth or Fifteenth Amendment violation in the first instance. See 52 U. S. C. § 10302(c). The court below did not cite to or invoke Section 3(c).

A. *Shelby County* made clear there is no nonretrogression standard applicable to States in redistricting absent further Congressional action.

Ever since the Court in *Shelby County* struck down Section 4(b) of the Voting Rights Act, there is no nonretrogression standard to be applied to the states. The three-judge district court ignored the proper Fourteenth Amendment analysis in an attempt to revive the standard unilaterally outside of the Section 5 context. Therefore, this Court should note probable jurisdiction and reiterate to the lower courts that racial *predominance* remains the standard for deciding redistricting cases under the Fourteenth Amendment. See *Cooper* v. *Harris*, 581 U. S. 285, 291 (2017) ("[T]he plaintiff must prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'") (quoting *Miller* v. *Johnson*, 515 U. S. 900, 916 (1995)).

In *Shelby County* v. *Holder*, the Supreme Court struck down the Voting Rights Act's coverage formula set forth in Section 4(b) because the formula was obsolete. 570 U. S., at 556. "The Voting Rights Act of 1965 employed extraordinary measures to address an extraordinary problem." *Id.*, at 534. Section 5 required federal preclearance before a State could enact any law related to voting. *Id.*, at 534–35. Congress reauthorized that requirement for 25 more years in 2006. *Id.*, at 539. Congress also amended Section 5, forbidding "voting changes with any discriminatory purpose as well as voting changes that diminish the ability of citizens, on

account of race, color, or language minority status, to elect their preferred candidates of choice." *Id.* (citation omitted).

The preclearance requirements were "stringent" and "potent" but justified because of the "blight of racial discrimination in voting" that had "infected the electoral process in parts of our country for nearly a century." *Id.*, at 545 (citing *South Carolina* v. *Katzenbach*, 383 U. S. 301, 308 (1966)). Recognizing, however, that times had changed, the Court reasoned that "'current burdens' must be justified by 'current needs'" and that the coverage formula in Section 5 no longer was so justified; it was based on "decades-old data and eradicated practices." *Id.*, at 550–51. The Court, therefore, struck down the coverage formula in Section 5, stating: "Our country has changed, and while any racial discrimination in voting is too much, Congress must ensure that the legislation it passes to remedy that problem speaks to current conditions." *Id.*, at 557.

For years, Section 5 preclearance was premised on whether a change in voting procedure, including redistricting, "would lead to a retrogression in the position of racial minorities with respect to their effective exercise of the electoral franchise." *Georgia* v. *Ashcroft*, 539 U. S. 461, 466 (2003) (quoting *Beer* v. *United States*, 425 U. S. 130, 141 (1976)). The court below correctly noted that *Shelby County* "effectively eliminated the non-retrogression requirements of Section 5 of the Voting Rights Act." *South Carolina State Conference of the NAACP* v. *Alexander*, 2023 U. S. Dist. LEXIS 4040, *12 (D.S.C. Jan. 6, 2023). This Court's precedent in *Shelby County* makes clear that, as of now, there is no current nonretrogression standard.

B. Ignoring precedent, the three-judge district court engaged in an analysis based on an invented nonretrogression standard instead of the proper racial predominance standard.

Notwithstanding its recognition of the effect of *Shelby County*, the three-judge district court then proceeded to analyze this case as if a nonretrogression standard were still required under the Fourteenth Amendment of the U. S. Constitution. But the proper analysis of a Fourteenth Amendment claim in this context is fundamentally different from the nonretrogression analysis and has been fleshed out in numerous cases before this Court. "The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans." *Cooper*, 581 U. S., at 291. When state officials are sued for allegedly drawing race-based lines, the Court utilizes a two-step analysis: "First, the plaintiff must prove that 'race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district.'" *Id*. (quoting *Miller*, 515 U. S., at 916). "That entails demonstrating that the legislature 'subordinated' other factors—compactness, respect for political subdivisions, *partisan advantage*, what have you—to 'racial considerations.'" *Id.* (emphasis added). Second, if racial considerations did in fact predominate over others, the design of the district must withstand strict scrutiny. *Id*., at 292 (citing *Bethune-Hill* v. *Virginia State Bd. of Elections*, 580 U. S. 178, 193 (2017)). And, as always, the "good faith of [the] state

legislature must be presumed." See *Abbott* v. *Perez*, 138 S. Ct. 2305, 2324 (2018) (quoting *Miller*, 515 U. S., at 915).

The burden of proving the legislature's motive was predominantly racial and not political is a "*demanding* one." *Easley* v. *Cromartie*, 532 U. S. 234, 241 (2001) (emphasis added) (citing *Miller*, 515 U. S., at 928 (O'Connor, J., concurring)) (hereinafter *Cromartie II*). Race cannot simply be *a* factor motivating the legislature's districting decision, but must be the *predominant* one. *Id.* (citations omitted); see, *e. g.*, *Bush* v. *Vera*, 517 U. S. 952, 968 (1996) ("If district lines merely correlate with race because they are drawn on the basis of political affiliation, which correlates with race, there is no racial classification to justify[.]"); *Hunt* v. *Cromartie*, 526 U. S. 541, 551 (1999) ("[A] jurisdiction may engage in constitutional political gerrymandering, even if it so happens that the most loyal Democrats happen to be black Democrats and even if the state were *conscious* of that fact.") (hereinafter *Cromartie I*). At base, "[p]laintiffs must show that a facially neutral law is unexplainable on grounds other than race." *Cromartie II*, 532 U. S., at 241–42 (cleaned up).

The court below ignored this Court's clear precedent, neglected to engage in the proper analysis of an Equal Protection claim, and attempted a judicial run-around of what is fundamentally a policy choice to reimpose the nonretrogression standard. Neither this Court, nor any other federal court, has the power to enact its own policy preferences. See *Vieth* v. *Jubelirer*, 541 U. S. 267, 278 (2004) ("The judicial Power created by Article III, § 1, of the Constitution is not *whatever* judges choose to do….") (internal quotations and citations

omitted). The three-judge district court's reasoning much more resembles an analysis based on a nonretrogression standard than a racial predominance standard.

For example, in lieu of grappling with the "demanding" burden required by this Court's precedents, the three-judge district court makes much out of the number of African-American voters who were moved out of CD1. See *Alexander*, 3:21-cv-03302 at 11 (ECF No. 493 at 11) ("Roberts ultimately removed 62% of the African American residents formerly assigned to District No. 1 to District No. 6."). Particularly, the district court concluded that there was a racial "target" number.[4] See *Alexander*, 3:21-cv-03302 at 11–12 (ECF No. 493 at 11–12). This conclusion was based on the Court's post-hoc analysis of the data presented to the Court by Plaintiffs' expert, which the Court said showed "a

[4] The racial target language is a clear reference to *Cooper* v. *Harris*, 581 U. S. 285 (2017). There are few similarities between this case and the facts in *Cooper*. In *Cooper*, the Court found that the State's mapmakers had established a racial target and that target subordinated other redistricting criteria. *Id.*, at 300. However, the *Cooper* Court relied on testimony from the legislators' redistricting consultant that he was instructed to draw the district in a way that would reach a racial target and he stated he sometimes could not respect traditional redistricting criteria because the racial target was "the more important thing." See *id.* There is no such testimony here; the record does not establish that the South Carolina Legislature ever set out to reach a target percentage of African-American voters or residents. The three-judge district court assumed there was a target because certain percentages would result in different partisan leans. See *Alexander*, 3:21-cv-03302 at 11 (ECF No. 493 at 11). This further indicates that it was partisanship, rather than race, that motivated the Legislature's decision making process.

district in the range of 17% African American produced a Republican tilt, a district in the range of 20% produced a 'toss up district,' and a plan in the 21-24% range produced a Democratic tilt."[5] Much is also made out of the fact that Roberts under questioning provided an accurate "racial breakdown" of the district, presumably proving he was conscious of race when drafting the maps. See *Alexander*, 3:21-cv-03302 at 16, n. 12 (ECF No. 493 at 16, n. 12).

Under a nonretrogression standard, this is relevant information; under the racial predominance standard, not so much. Had the three-judge district court analyzed this under the correct standard, the statistics above would be utterly meaningless absent a clear showing that these actions were "unexplainable on grounds other than race." *Cromartie II*, 532 U. S., at 241–42 (cleaned up). It does not matter if Roberts were conscious of race and its correlation with political leanings in the area. In fact, it has long been assumed that legislators (and presumably those who report to them) will have a working knowledge of the demographics of a state in any event. See *Shaw* v. *Reno*, 509 U. S. 630, 646 (1993) ("[R]edistricting differs from other kinds of state decisionmaking in 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, and a variety of other

[5] In many ways, the panel decision below also seeks to act as an end-run around this Court's decision in *Bartlett* v. *Strickland*, which held that in the Section 2 context, a majority of minority citizens was required before any party could invoke the protections of Section 2. Here, the three-judge court is attempting to establish a threshold well below a majority-minority requirement to impose racial requirements in district composition.

demographic factors. That sort of race consciousness does not lead inevitably to impermissible race discrimination."). What matters is whether race was the predominant factor. See *supra*. The three-judge district court's focus on the issues above instead of disentangling race from politics is puzzling unless viewed, not as a racial predominance analysis, but as a nonretrogression analysis.

Therefore, the Court should note probable jurisdiction, correct the three-judge district court's erroneous ruling, and make clear that the applicable standard remains racial predominance. See *Cooper*, 581 U. S., at 291.

C. The district court's attempt to bypass Article I by resurrecting the non-retrogression standard through the Fourteenth Amendment turns the goals of the Reconstruction Amendments on their head.

Not only did the three-judge district court misuse the Fourteenth Amendment as a mechanism by which to revive a dead statutory standard, it misunderstood the Amendment's main thrust of moving Americans *away* from racial balkanization, not towards it. In this way the district court went beyond merely supplanting South Carolina's constitutional role in violation of Article I, Section 4 as explained above, but also supplanted Congress's role in violation of separation of powers and precedent to ignore the warnings of this Court not to allow racial line-drawing to move Americans away from a race-impartial system of political participation.

1. The Constitution specifically reserved the power to make or alter State law or regulations pertaining to federal elections to Congress; that power was not reserved to the federal courts.

The three-judge district court had no rightful role in reimplementing a nonretrogression standard. The U. S. Constitution explicitly reserves the authority to make or alter state election laws with respect to federal elections to the Congress. See U. S. Const., Art. I, § 4, cl. 1 ("The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each state by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations[.]"). Congress has stated there are rare scenarios where the Fourteenth or Fifteenth Amendments have been violated that federal courts can retain jurisdiction as a remedial matter to ensure a state does not abridge the right to vote based on race. See 52 U. S. C. § 10302(c). Nowhere has Congress (or the Constitution for that matter) manifested an intent to allow federal courts to exercise this substantial power liberally as did the court in this case. As a result, the three-judge district court has issued an erroneous ruling that unnecessarily offends the sovereignty of the State of South Carolina and supplants the constitutional role of the duly elected South Carolina Legislature. See *Shelby County*, 570 U. S., at 543 (the "allocation of powers in our federal system preserves the integrity, dignity, and residual sovereignty of the states") (citation omitted). "[F]ederalism secures to citizens the liberties that

derive from the diffusion of sovereign power." *Id.* (quoting *Bond* v. *United States*, 564 U. S. 211, 221 (2011)).

Should Congress determine a nonretrogression standard is required, it is perfectly capable of drafting another coverage formula based on current conditions and current needs. *Shelby County*, 570 U. S., at 557; see also *id.*, at 542 ("In *Northwest Austin*, we stated that 'the Act imposed current burdens and must be justified by current needs.'") (quoting *Northwest Austin Mun. Util. Dist. No. One* v. *Holder*, 557 U. S. 193, 203 (2009)). In the decade since this Court's decision in *Shelby County*, Congress has not adopted a replacement coverage formula. And perhaps the reason is that the parade of "horribles" predicted by critics of *Shelby County* has not come to pass. See generally Nicholas Stephanopoulos, Eric McGhee, & Christopher Warshaw, *Non-Retrogression Without Law*, U. Chi. Leg. Forum (2023) (forthcoming) ("Our primary finding is that there was little retrogression in formerly covered states in the 2020 redistricting cycle.").

2. The three-judge district court, already ill-equipped to re-implement the nonretrogression standard, misunderstood the purposes and implications of the Fourteenth Amendment.

The Voting Rights Act has, since its enactment and amendment, imposed on States requirements beyond what the Fourteenth Amendment itself requires. These VRA requirements have, in the past, sometimes called for or allowed racial classifications

(the nonretrogression principle itself being a prime example). So, if the Voting Rights Act does not now require a nonretrogression standard, the U. S. Constitution, which abhors racial classifications, certainly does not. See *Bethune-Hill*, 580 U. S., at 204–05 ("The Constitution abhors classifications based on race, not only because those classifications can harm favored races or are based on illegitimate motives, but also because every time the government places citizens on racial registers . . ., it demeans us all.") (internal quotations omitted) (Thomas, J., concurring in part and dissenting in part).

As discussed above, the three-judge district court took the task of reimplementing the previous policy choice of a nonretrogression standard upon itself, which was a task it was ill-equipped to perform. See *Bartlett*, 556 U. S., at 17–18. The result was fundamentally in opposition to the Equal Protection Clause of the Fourteenth Amendment. The three-judge district court would require the South Carolina Legislature to consider race in redistricting to avoid retrogression and effectively guarantee a minority group's ability to form political coalitions and maintain crossover districts. See *id.*, at 15. By conflating race with politics, the three-judge district court has effectively disallowed the South Carolina Legislature from drawing its maps based on its desire to give CD1 a stronger Republican tilt. The South Carolina Legislature would now be forced to consider how many African-American residents were removed from the district, as the three-judge district court focuses on. See *supra*, at 7. To ask state legislatures to take account of race in redistricting, make classifications based on race, and draw districts based on racial impact or voting power

when not absolutely required by the VRA "threatens to carry us further" from the goal of the Fourteenth Amendment—a "political system in which race no longer matters."[6] See *Bartlett*, 556 U. S., at 21 (quoting *Shaw*, 509 U. S., at 657). In *Bartlett*, this Court repeated the prescient warning from *Shaw*: "Racial gerrymandering, even for remedial purposes, may balkanize us into competing racial factions." *Id.* Good intentions by policymakers and judges aside, such racial gerrymandering has the perilous potential to undermine the Reconstruction Amendments and the aspirations they embody. See *id.*

In the same way they do not require non-retrogression, neither the Voting Rights Act nor the Fourteenth Amendment guarantee crossover districts. "[I]n a crossover district, the minority population, at least potentially, is large enough to elect the candidate of its choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett*, 556 U. S., at 13. The Voting Rights Act "requires a showing that minorities 'have less opportunity than other members of the electorate to . . . elect representatives of their choice.'" *Id.*, at 14 (quoting 42 U. S. C. § 1973(b)). The protection is not applicable when minority voters cannot elect their preferred "candidate based on their own votes and

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[6] As this Court has long noted, it is an open question as to whether the Voting Rights Act can serve as a compelling interest sufficient to meet strict scrutiny. See *Shaw* v. *Hunt*, 517 U. S. 899, 911 (1996) ("In *Miller*, we expressly left open the question whether under the proper circumstances compliance with the Voting Rights Act, on its own, could be a compelling interest.").

without assistance from others." See *id.* "Nothing in § 2 grants special protection to a minority group's right to form political coalitions." *Id.*, at 15.

The Fourteenth Amendment as originally understood was not designed to guarantee crossover districts; rather, it abhors racial classifications regardless of intent. See *Adarand Constructors* v. *Pena*, 515 U. S. 200, 240 (1995) (Thomas, J., concurring) ("[U]nder our Constitution, the government may not make distinctions on the basis of race. As far as the Constitution is concerned, it is irrelevant whether a government's racial classifications are drawn by those who wish to oppress a race or by those who have a sincere desire to help those thought to be disadvantaged."). "Government cannot make us equal; it can only recognize, respect, and protect us as equal before the law." *Id.* (Thomas, J., concurring).

Therefore, this Court should note probable jurisdiction and correct the three-judge district court's erroneous ruling based on non-existent power that runs afoul of clear congressional intent.

3. Politics was the point for all parties involved, but only Appellees—ratified by the three-judge district court—used race in drawing lines.

The Court need look no further than this very case for an example of how race can be used by political actors for political ends.

For its part, the South Carolina Legislature has not attempted to hide the ball on legislators' motivations for redrafting CD 1; they wanted the

district to have a stronger Republican tilt. *Alexander*, 3:21-cv-03302 at 10 (ECF No. 493 at 10). To avoid this fact, Appellees attempted to conflate the issues of race and politics, effectively arguing the South Carolina Legislature cannot engage in partisan gerrymandering if it results in a reduced percentage of a minority group (even where such a minority group comes nowhere near a majority of the contested district). The three-judge court adopted this line of thinking, essentially reasoning that politically motivated adjustments that also impact race are *per se* constitutional violations. And that a "crossover" district where black voters and white voters combined will most likely guarantee the election of a Democratic Party candidate was essentially required under the Fourteenth Amendment.

Politics was the point not only for the South Carolina Legislature but also for the Appellees. But they hid the goal of partisan gain—adding a Democrat-leaning seat in the U. S. House of Representatives—inside the trojan horse of race. The reason for doing so is obvious: A State may balance population, irrespective of its racial composition, incidentally for a political aim as covered in *Rucho* v. *Common Cause*, 139 S. Ct. 2484 (2019). That is, *politically driven* decisions that incidentally result in the reduced percentage of a minority group are not cognizable as legal violations under the Constitution. Federal courts are now vested with the responsibility not to confuse partisan gerrymandering with racial gerrymandering—in other words, to ensure that plaintiffs do not use claims about race to get into federal court for political gain. The three-judge district court failed to acknowledge this and ignored

the proper analysis that would have illustrated the point clearly. See *supra*, at 4.

One particularly useful asset in the judicial toolbox in the absence of other evidence supporting the existence of race-based redistricting could have been requiring Plaintiffs to present a constitutional alternative map that served the political interest stated above—to give CD1 a more Republican tilt. "We have no doubt that an alternative districting plan . . . can serve as key evidence in a race-versus-politics dispute." *Cooper*, 581 U. S., at 317. In *Cooper*, the Court did not require an alternative map, reasoning that a finding of race-based redistricting was already sufficiently supported. See *id.*, at 318; see also *supra*, at 5. However, because the burden of proof is so daunting in these cases, "a plaintiff will sometimes need an alternative map, as a practical matter, to make his case." *Id.*, at 319.

The three-judge district court reasoned that a constitutionally compliant plan for CD1 could "be designed without undue difficulty," rendering it unnecessary for Appellees to present an acceptable alternative map. Assuming "acceptable alternative" means a constitutional map that serves the South Carolina Legislature's stated goal of giving CD1 a more Republican tilt, it is unclear that doing so would be as easy as the three-judge district court implies. If it were so easy, everyone would do it and thereby (apparently) avoid litigation. In this case, no one has done it.

Appellees have offered alternative maps, but each would have the opposite effect the South Carolina Legislature hoped to achieve: The maps would make CD1 a Democrat-leaning seat. See *Alexander*, 3:21-cv-03302 at 11 (ECF No. 493 at 11).

The percentage of African-American residents in Senator Harpootlian's plan is 21 percent and in the two plans offered by the League of Women Voters the African-American percentages are 23 percent and 24 percent respectively. The change in the percentage of African-American voters in CD1 is miniscule, topping out at a 7 percent difference, but there is a substantial political gain: Democrats could form a political coalition "crossover district" and most likely gain a seat in the U. S. House of Representatives.

Appellees' invocation of race to draw favorable lines for political gain moves the nation in the opposite direction from the "goal that the Fourteenth and Fifteenth Amendments embody"—a political system in which race no longer matters. *Bartlett*, 556 U. S., at 21 (quoting *Shaw*, 509 U. S., at 657). The three-judge district court endorsed this use of the judicial system, resurrecting nonretrogression against South Carolina, no doubt in the mind of the court "for remedial purposes." See *id.* The court, having no basis in the Voting Rights Act, bent the Fourteenth Amendment backwards to support its goals of imposing an affirmative duty of nonretrogression and guaranteeing the creation of Democratic crossover districts.

This Court needs to correct this errant approach now because, if other federal courts see that the three-judge district court's approach has been summarily affirmed, they may likewise choose to impose nonretrogression and conflate race and politics in the same way, further balkanizing into racial factions not just South Carolina voters but populations in other states. This Court should reinforce to the whole federal judicial system its

words and holdings in *Shelby County*, *Bartlett*, and *Rucho*—that racial predominance, not non-retrogression, is the standard for Fourteenth Amendment racial gerrymandering claims; that race and politics are different, even when they are highly correlated; and that the point of the Reconstruction Amendments is to move us further *toward*, not away from, a system where race doesn't matter anymore.

CONCLUSION

For the foregoing reasons, this Court should grant probable jurisdiction and correct the three-judge district court's erroneous ruling.

Respectfully submitted,

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