No. 22-807

In the Supreme Court of the United States

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

v.

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

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF SOUTH CAROLINA

BRIEF FOR THE UNITED STATES AS AMICUS CURIAE IN SUPPORT OF NEITHER PARTY

ELIZABETH B. PRELOGAR
Solicitor General
Counsel of Record
KRISTEN CLARKE
Assistant Attorney General
BRIAN H. FLETCHER
Deputy Solicitor General
CAROLINE A. FLYNN
Assistant to the Solicitor General
NICOLAS Y. RILEY
ANNA M. BALDWIN
Attorneys

Department of Justice
Washington, D.C. 20530-0001
SupremeCtBriefs@usdoj.gov
(202) 514-2217

QUESTIONS PRESENTED

1. Whether the district court committed clear error or applied an improper legal standard in finding that South Carolina's Congressional District 1 is a racial gerrymander that violates the Equal Protection Clause.

2. Whether the district court applied the proper legal standards in holding, in the alternative, that Congressional District 1 is unconstitutional because it was intentionally designed to dilute minority voting power.

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INTEREST OF THE UNITED STATES

This case involves claims of unconstitutional racial gerrymandering and intentional vote dilution. The Department of Justice enforces Section 2 of the Voting Rights Act of 1965 (VRA), 52 U.S.C. 10301, which also prohibits racial discrimination in districting. See 52 U.S.C. 10308(d). Because the VRA prohibits conduct that may also violate the Constitution, and because States may invoke VRA compliance to justify their reliance on race in districting, the United States has a substantial interest in the proper interpretation of the relevant constitutional provisions.

STATEMENT

A. Legal Background

When drawing legislative districts, States must balance an array of competing considerations while adhering to constitutional and statutory requirements. See *Miller* v. *Johnson*, 515 U.S. 900, 915-916 (1995). This case concerns two constitutional restrictions on the use of race in districting.

First, the Equal Protection Clause of the Fourteenth Amendment prohibits racial gerrymandering—that is, the unjustified, predominant use of race in drawing voting districts. See *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993). Given the "sensitive nature of redistricting and the presumption of good faith that must be accorded legislative enactments," courts must "exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race." *Miller*, 515 U.S. at 916. But if race "was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," that use of race is subject to strict scrutiny. *Cooper* v. *Harris*, 581 U.S. 285, 291-292 (2017) (citation omitted).

Second, the Fourteenth Amendment "also prohibits intentional 'vote dilution'" in districting—that is, "'invidiously minimizing or canceling out the voting potential of racial or ethnic minorities.'" *Abbott* v. *Perez*, 138 S. Ct. 2305, 2314 (2018) (brackets, citation, and ellipsis omitted). Vote dilution may involve either "the dispersal of [minority voters] into districts in which they constitute an ineffective minority of voters" or "the concentration of [minority voters] into districts where they

constitute an excessive majority." *Voinovich* v. *Quilter*, 507 U.S. 146, 154 (1993) (citation omitted).[1]

B. South Carolina's 2020 Redistricting Process

This case arose from South Carolina's 2020 redistricting process. The issues on appeal focus on the State's changes to Congressional District 1 (CD1).

1. After the 2020 census, South Carolina had to redraw its seven congressional districts to comply with the Fourteenth Amendment's one-person, one-vote mandate. J.S. App. 16a-17a. Five districts had only small deviations from the ideal population of roughly 730,000. *Ibid.* But CD1 was overpopulated by about 88,000 persons and neighboring CD6 was underpopulated by about 85,000 persons. *Id.* at 17a.

CD1, located along the State's southeastern coast, "has long been anchored in Charleston County." J.S. App. 21a. From 1980 until 2016, CD1 consistently elected Republicans. *Ibid.* In 2018, a Democrat was elected in a "political upset"; in 2020, a Republican retook the seat. *Ibid.* Both elections were decided by less than one percent of the vote. *Ibid.*

CD6 borders CD1 to the northwest and has included part of Charleston County since 1992, when it was made a majority-Black district. J.S. App. 17a. CD6 has long been represented by James Clyburn, a Democrat. *Ibid.*

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[1] This Court has not decided whether vote dilution violates the Fifteenth Amendment as well as the Fourteenth. See *Reno* v. *Bossier Parish Sch. Bd.*, 528 U.S. 320, 334 n.3 (2000). Section 2 of the VRA prohibits both intentional vote dilution and, in some circumstances, district lines that have "discriminatory effects" even absent "discriminatory intent." *Allen* v. *Milligan*, 143 S. Ct. 1487, 1507 (2023); see *Chisom* v. *Roemer*, 501 U.S. 380, 394 & n.21 (1991).

2. At the outset of the 2020 redistricting process, the South Carolina House and Senate adopted similar reapportionment guidelines. J.S. App. 20a. The Senate's guidelines included mandatory federal requirements, such as complying with the VRA and avoiding racial gerrymandering, as well as "'additional considerations'" such as "communities of interest, constituent consistency, district compactness, and minimizing divisions of counties, cities, and towns." *Id.* at 20a-21a (citation and footnote omitted).

The congressional districting plan ultimately signed into law in January 2022 was sponsored by Republican Senator George "Chip" Campsen. J.S. App. 21a-22a. The plan was drawn by an experienced cartographer on the Senate staff, Will Roberts. *Id.* at 23a. Roberts worked with and under the direction of a team that included the Chief of Staff of the Senate Judiciary Committee and outside counsel to the Senate Redistricting Subcommittee. *Id.* at 83a-84a, 86a-87a, 203a-204a.

Roberts testified that he first applied 2020 census data to the State's 2011 plan (creating a "benchmark plan") and then generally attempted to effect the "least change" to the 2011 plan. J.S. App. 23a, 104a-106a; see *id.* at 258a. In CD1, however, the mapmakers departed from the least-change approach. *Id.* at 25a. Although the district was overpopulated by roughly 88,000, the plan did not simply move most of those excess residents into the underpopulated CD6. *Id.* at 29a. Instead, the plan moved over 53,000 residents *into* CD1 from CD6, which then required moving more than 140,000 other residents out of CD1 to CD6. J.S. Supp. App. 368a.

Those moves were the result of several substantial changes to CD1's boundaries. The mapmakers fulfilled Senator Campsen's stated desire to move all of Beaufort

and Berkeley Counties and more of Dorchester County into CD1. J.S. App. 22a, 146a, 188a-189a. Roberts testified that the mapmakers also incorporated some suggestions reflected in a map they received from Congressman Clyburn's staff. *Id.* at 23a-24a. In addition, Roberts stated that he was instructed to make CD1 "more Republican leaning," because "[w]e've got a Republican-controlled legislature, and we knew there would be no way that we would pass a plan that did otherwise." *Id.* at 145a; see *id.* at 130a-131a, 200a-201a. The mapmakers sought to achieve that goal by significantly changing the allocation of Charleston County precincts between CD1 and CD6. *Id.* at 258a-261a.

Roberts testified that, in making those changes, he relied "one hundred percent" on "the partisan lean of the district," as measured using a dataset of 2020 presidential election results the mapmakers received from a political consultant. J.S. App. 24a (citation omitted). That dataset provided the total population for each precinct (also referred to as a voter tabulation district, or VTD) and the precinct-level vote percentages for President Trump and President Biden. *Id.* at 93a-95a.

Roberts testified that he did not consider race at all while drawing district lines. J.S. App. 130a, 145a, 199a. But he acknowledged that he examined racial data after drafting each version of the map, and that the Black voting age population (BVAP) of each district would have been visible on a screen that could be viewed by everyone in the room while he was drafting. *Id.* at 24a, 207a-208a, 232a. Roberts also testified that when he presented a draft map to a legislator, a "racial breakdown" would be included. *Id.* at 102a. And despite the extensive changes to CD1, including the addition of a substantial number of Black residents in Beaufort,

Berkeley, and Dorchester Counties, the district's final BVAP (17.4%) almost precisely matched the BVAP in the benchmark plan (17.3%). J.S. Supp. App. 16a; see J.S. App. 29a (noting that CD1's total Black population stayed at exactly 17.8%).[2]

C. Proceedings Below

Plaintiffs are the South Carolina State Conference of the NAACP and a Black voter who resides in CD1; defendants are South Carolina legislators and members and the director of the South Carolina Election Commission. J.A. 11-15. Plaintiffs alleged that CD1 and two other districts (CD2 and CD5) were unconstitutional racial gerrymanders and were drawn to intentionally dilute Black voting strength. J.S. App. 10a. Those claims were tried before a three-judge court in an eight-day trial. *Id.* at 11a. The court rejected plaintiffs' claims as to CD2 and CD5, and those aspects of its decision are not at issue here. *Id.* at 36a-41a. But the court granted judgment to plaintiffs on both of their constitutional challenges to CD1. *Id.* at 33a-34a, 45a.

1. As to the racial-gerrymandering claim, the district court found that race was "the predominant motivating factor in the General Assembly's design of [CD1]." J.S. App. 33a-34a. The court credited defendants' contention that the mapmakers wanted to create "a stronger Republican tilt" in CD1. *Id.* at 21a. The evidence showed, however, that any BVAP substantially over 17% in CD1 would have produced a toss-up or even a Democratic-leaning district. *Id.* at 22a-23a. The court found that this

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[2] Defendants' expert presented slightly different BVAP figures for CD1 showing the same marginal shift (16.6% in the benchmark plan to 16.7% in the enacted plan). J.S. Supp. App. 373a.

reality "resulted in a target of 17% [BVAP]" for the district. *Id.* at 23a.

Given that target, Senator Campsen's desire to include all of Berkeley and Beaufort Counties and more of Dorchester County in CD1 "presented a challenging problem," because adding those counties to the Black population already in Charleston County would have increased CD1's BVAP to 20%. J.S. App. 22a-25a. It thus "became necessary," the district court found, for the mapmakers "to reduce the African American population of the Charleston County portion of [CD1]" to get the district-wide BVAP back down to around 17%. *Id.* at 25a.

The district court found that this imperative was accomplished by the "effective bleaching of African American voters out of the Charleston County portion of [CD1]." J.S. App. 27a. The court determined that the enacted plan moved "62% (30,243 out of the 48,706) of the African American residents formerly assigned to [CD1] to [CD6]." *Id.* at 25a-27a, 29a-30a. And the court stated that the plan moved "ten of the eleven VTDs with an African American population of 1,000 persons or greater out of [CD1]," creating a "'tremendous disparity'" in the allocation of Black and white residents. *Id.* at 25a-26a (citation omitted).

The district court noted Roberts's admission that these changes in Charleston County were "dramatic." J.S. App. 34a (citation omitted). And the court emphasized that Roberts failed to provide "any plausible explanation for the abandonment of his 'least change' approach" in drawing this portion of the map, or for his abandonment of the redistricting principles of "maintenance of constituencies" and "minimizing divisions of counties." *Id.* at 29a. Thus, although the court acknowledged Roberts's testimony that he did not rely on race, it concluded that

his denials were not credible in light of the "striking" evidence that voters were sorted along racial lines. *Id.* at 29a-30a.

The district court found that plaintiffs' expert evidence further supported "a finding that race predominated over all other factors in the design of [CD1]." J.S. App. 30a. For example, Dr. Jordan Ragusa (a political-science professor at the College of Charleston) found that "the decision to move a VTD out of" CD1 "was highly correlated to the number of African American voters within the VTD." *Id.* at 31a-32a. Dr. Ragusa also found that "the racial composition of a VTD was a stronger predictor of whether it was removed from [CD1] than its partisan composition." *Id.* at 32a.

The district court accordingly concluded that the mapmakers' maintenance of a 17% Black-population cap in CD1—even after moving more than 193,000 people into and out of the district—was "more than a coincidence," and could only be explained as a "stark racial gerrymander." J.S. App. 29a. The court stressed that legislators are free to consider politics in drawing districts. *Id.* at 33a. But it recognized that the predominant use of race in districting triggers strict scrutiny even if race is used to achieve partisan ends. *Ibid.* (citing *Cooper*, 581 U.S. at 307-308). And because defendants had not attempted to argue that the use of race in drawing CD1 could satisfy strict scrutiny, the court held that CD1's design violated the Fourteenth Amendment. *Id.* at 42a-43a.

2. The district court also entered judgment for plaintiffs on their alternative vote-dilution claim. J.S. App. 43a-46a. Plaintiffs had argued that their claim was governed by the framework for identifying intentional discrimination set forth in *Village of Arlington Heights*

v. *Metropolitan Housing Development Corp.*, 429 U.S. 252 (1977). J.S. App. 43a. But the court believed that the predominance standard applies to all constitutional redistricting challenges, not just racial-gerrymandering claims. *Id.* at 43a-45a. And the court held that its conclusions that race predominated in the drawing of CD1 and that the use of race did not satisfy strict scrutiny meant that plaintiffs were "entitled to judgment as a matter of law regarding their claim of racially discriminatory intent" as well. *Id.* at 45a.

3. The district court enjoined the holding of elections under the current CD1 and ordered the legislature to submit a remedial plan. J.S. App. 46a. The court declined to stay its judgment pending appeal, but revised its order to delay the deadline for a remedial plan until 30 days after a decision from this Court. *Id.* at 1a-8a.

SUMMARY OF ARGUMENT

I. This Court should affirm the district court's judgment based on plaintiffs' racial-gerrymandering claim. The court's finding that race predominated in the construction of CD1 was neither clearly erroneous nor infected by legal error, and defendants have not argued that CD1 satisfies strict scrutiny.

A. A plaintiff alleging an unconstitutional racial gerrymander bears the burden of proving that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without" the district. *Cooper* v. *Harris*, 581 U.S. 285, 291 (2017) (citation omitted). That is a demanding standard, and a trial court must conduct an especially careful inquiry when a legislature argues that its decisions were driven by politics rather than race. On appeal, however, the deferential clear-error standard governs: So long as the district court's finding on

predominance is "'plausible' in light of the full record," it must be affirmed. *Id.* at 293 (citation omitted).

B. Considering the totality of the record and affording appropriate deference to the district court's firsthand assessment of trial testimony, the court permissibly found that race predominated in the drawing of CD1. The court credited defendants' testimony that CD1's lines were drawn to produce a more Republican district. But the court found that, given changes the mapmakers had made to other parts of the district, achieving that partisan goal became "impossible" without reducing the number of Black voters in the Charleston County portion CD1. J.S. App. 25a. And that reduction was accomplished, the court found, through "dramatic changes" that targeted Black voters with precision and removed more than 30,000 of those voters from the district. *Id.* at 25a-26a (citation omitted).

In reaching that conclusion, the district court found that defendants subordinated traditional redistricting principles—including constituent consistency and respect for communities of interest—to their racial target. The court also considered and rejected the possibility that the racial disparities it observed reflected politics rather than race. Among other things, the court relied on expert testimony showing that, even controlling for partisanship, Black voters were significantly more likely to be moved out of CD1.

C. Defendants assert that the district court's predominance finding was tainted by various legal errors. But many of those criticisms simply reprise the factual arguments defendants presented below, which the district court permissibly rejected. And defendants' remaining claims of error lack merit. The court adhered to the presumption of legislative good faith and

required plaintiffs to carry the demanding burden of proving predominance. The court focused on the dramatic changes to CD1 in Charleston County, but it also properly evaluated CD1 as a whole. This Court's decision in *Cooper* forecloses defendants' assertion that plaintiffs were required to prove their case by producing an alternative map rather than relying on other evidence of racial predominance. See 581 U.S. at 318-319. And defendants seriously err in suggesting that affirming the district court's case-specific findings would require other legislatures to reconfigure districts previously drawn to comply with Section 5 of the VRA.

II. If this Court affirms the judgment based on the racial-gerrymandering claim, it need not reach plaintiffs' alternative vote-dilution claim. But if the Court does reach that claim, it should vacate and remand because the district court applied the wrong legal standards.

This Court has emphasized that intentional vote-dilution claims are "analytically distinct" from racial-gerrymandering claims. *Shaw* v. *Reno*, 509 U.S. 630, 650-652 (1993). A vote-dilution plaintiff must prove that the legislature sought "to minimize or cancel out the voting potential of [a] racial or ethnic minorit[y]," *Miller* v. *Johnson*, 515 U.S. 900, 911 (1995), and that this intent was a "motivating factor" (but not necessarily the predominant factor) in the challenged decision, *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-266 (1977). In addition, a vote-dilution claim requires a showing of dilutive effect. See *Shaw*, 509 U.S. at 649.

Here, the district court erroneously conflated the two types of claim by treating its findings and conclusions on plaintiffs' racial-gerrymandering claim as

dispositive of their distinct vote-dilution claim. The court thus failed to determine whether the legislature intentionally sought to diminish Black voting strength in CD1, an inquiry that should have been governed by the multi-factor *Arlington Heights* framework rather than the predominance standard. The court also failed to determine whether CD1's construction had the requisite dilutive effect. Accordingly, if the Court reaches the vote-dilution claim, it should correct the district court's legal errors, vacate the relevant aspect of the court's judgment, and remand with instructions to make the necessary findings under the correct standards.

ARGUMENT

I. THE DISTRICT COURT'S FACTUAL FINDING OF RACIAL PREDOMINANCE WAS NEITHER CLEARLY ERRONEOUS NOR INFECTED BY LEGAL ERROR

This Court has instructed that predominance is a demanding standard and that courts must exercise great caution before concluding that legislators drew district lines based on race. But it has also emphasized that racial predominance is a finding of fact that can be disturbed on appeal only if the district court clearly erred or applied the wrong legal standard. Here, the district court correctly articulated the predominance standard set forth in this Court's precedents. And although the trial record could have also supported a different conclusion, the court's finding that race predominated in the drawing of CD1 was based upon a permissible view of the evidence.

A. Racial Predominance Is A Demanding Standard, But A District Court's Finding Of Predominance Is Reviewable Only For Clear Error

1. "The Constitution entrusts States with the job of designing congressional districts" but imposes "an important constraint: A State may not use race as the predominant factor in drawing district lines unless it has a compelling reason." *Cooper* v. *Harris*, 581 U.S. 285, 291 (2017). This Court has accordingly held that a plaintiff alleging an unconstitutional racial gerrymander must prove that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without" the district. *Ibid.* (quoting *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995)).

In defining that predominance standard, this Court has emphasized that, "in the context of districting," there is "a difference 'between being aware of racial considerations and being motivated by them.'" *Allen* v. *Milligan*, 143 S. Ct. 1487, 1510 (2023) (plurality opinion) (citation omitted). Because "legislatures will almost always be aware of racial demographics," mere race consciousness does not establish predominance. *Ibid.* (citation and ellipsis omitted). Indeed, even the intentional creation of a majority-minority district to comply with Section 2 of the VRA does not necessarily establish predominance; such a goal is "one factor among others" that must be considered "as part of 'a holistic analysis.'" *Id.* at 1511 (brackets and citation omitted). The ultimate question is whether "race" rather than "other districting principles" was "the legislature's dominant and controlling rationale in drawing its district lines." *Miller*, 515 U.S. at 913; see, *e.g.*, *Cooper*, 581 U.S. at 291.

2. To establish racial predominance, a plaintiff may rely on "circumstantial evidence of a district's shape

and demographics or more direct evidence going to legislative purpose." *Miller*, 515 U.S. at 916. This Court has examined a variety of evidence in reviewing such findings, including statements by the "principal draftsman" of the challenged map, *Shaw* v. *Hunt*, 517 U.S. 899, 906 (1996); deviations from traditional districting criteria, such as compactness and respect for political subdivisions, *e.g.*, *id.* at 905-906; racial disparities in the movement of persons into and out of the district, *e.g.*, *Cooper*, 581 U.S. at 310; *Alabama Legislative Black Caucus* v. *Alabama*, 575 U.S. 254, 274 (2015); a legislature's access to racial data and its lack of access to other usable data, *e.g.*, *Bush* v. *Vera*, 517 U.S. 952, 961-962 (1996) (plurality opinion); and whether alternative explanations for the district's configuration are implausible or incomplete, *e.g.*, *Cooper*, 581 U.S. at 314-315.

3. Racial predominance is a factual finding subject to review only for clear error. *Cooper*, 581 U.S. at 293. This Court has emphasized that a district court's assessment of the motivations underlying a redistricting plan "warrants significant deference on appeal" so long as the court has not committed an error of law. *Ibid.* The Court has accordingly made clear that it will not reverse a finding of racial predominance even if it "would have decided the [matter] differently" had it evaluated the evidence in the first instance. *Ibid.* (quoting *Anderson* v. *City of Bessemer City*, 470 U.S. 564, 573 (1985)) (brackets in original). Instead, reversal is appropriate only if the Court is "left with the definite and firm conviction that a mistake has been committed." *Id.* at 309 (citation omitted). The clear-error standard is particularly deferential when the district court's findings depend on credibility determinations. See *ibid.*

B. The District Court's Finding That Race Predominated In The Drawing Of CD1 Was Not Clearly Erroneous

1. In some racial-gerrymandering cases, the State acknowledges that it considered race in drawing district lines—for example, to comply with the VRA. In such cases, the dispute centers on whether the acknowledged consideration of race predominated over other factors and, if so, whether the State can satisfy strict scrutiny by showing that it had a sufficient basis for concluding that its actions were necessary to comply with the VRA. See, *e.g.*, *Cooper*, 581 U.S. at 299-306; *Bethune-Hill* v. *Virginia State Bd. of Elections*, 580 U.S. 178, 182-183 (2017). Here, by contrast, defendants did not invoke the VRA, and they disclaimed *any* use of race in constructing CD1. Instead, defendants have maintained that CD1's design was the result of traditional districting principles combined with the desire to create a more Republican-leaning district, and that the racial impact of the chosen district lines was an unintended consequence of decisions made for purely partisan reasons. J.S. App. 21a-24a.

"Getting to the bottom of a dispute like this one poses special challenges for a trial court" because "'racial identification'" can be "'highly correlated with political affiliation.'" *Cooper*, 581 U.S. at 308 (citation omitted). On the one hand, that correlation means that "political and racial reasons are capable of yielding similar oddities in a district's boundaries," so departures from traditional districting principles by themselves do not necessarily reflect racial predominance. *Ibid.* On the other hand, a durable correlation between race and politics may tempt mapmakers to allow race to predominate because it is an effective "proxy" for political affiliation. *Id.* at 308 n.7. A district court thus must conduct a

"'sensitive inquiry' into all 'circumstantial and direct evidence of intent' to assess whether the plaintiffs have managed to disentangle race from politics and prove that the former drove a district's lines." *Id.* at 308 (citation omitted).

On appeal, however, the deferential clear-error standard means that this Court's task is "generally easier." *Cooper*, 581 U.S. at 309. So long as the district court's finding on predominance is "'plausible' in light of the full record," that finding "must govern" even if a different finding would have been "equally or more" plausible. *Id.* at 293 (quoting *Anderson*, 470 U.S. at 574); cf. *Brnovich* v. *Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021) (same).

2. Considering the totality of the evidence and affording appropriate deference to the district court's firsthand assessment of trial testimony, the court permissibly found that race predominated in the drawing of CD1 because mapmakers relied on race to achieve their partisan goals.

a. The district court began with the undisputed premise that producing a Republican lean in CD1 required a district-wide BVAP "in the range of 17%." J.S. App. 22a-23a.[3] But once Senator Campsen decided to bring all or most of Beaufort, Berkeley, and Dorchester Counties into CD1—counties that were predominantly white, but still added sizable numbers of Black voters to CD1's rolls—the district's overall BVAP was pushed to 20%. *Id.* at 24a-25a. Defendants acknowledged that a

[3] That relationship between BVAP and partisan outcomes was reflected in analyses that mapmakers prepared for various plans under consideration. See J.S. App. 102a; see also, *e.g.*, J.S. Supp. App. 305a, 312a, 316a (population analyses); J.S. App. 446a, 460a; J.A. 292 (corresponding partisan analyses).

BVAP of that level would have produced a toss-up district, violating their acknowledged goal of achieving a Republican tilt. *Id.* at 22a-23a. It accordingly "became necessary to reduce the African American population of the Charleston County portion of the district to the range of 10% to meet the 17% target." *Id.* at 25a. And hitting that target, the court found, was "effectively impossible without the gerrymandering of the African American population of Charleston County." *Ibid.*

Objective "facts and figures," *Cooper*, 581 U.S. at 310, supported the district court's finding that mapmakers split communities in Charleston County along racial lines to maintain a 17% BVAP. Under "close questioning" from the court, the State's mapmaker, Roberts, admitted that he had "abandoned his 'least change' approach" to CD1's borders and that there was "'tremendous disparity'" in the treatment of Charleston County voters. J.S. App. 25a (citation omitted). In particular, the court found that the enacted plan moved "62% (30,243 out of the 48,706) of the African American residents formerly assigned to [CD1] to [CD6], leaving only 18,463 African Americans in the Charleston portion of [CD1]." *Ibid.* Indeed, the court found the enacted map identified Charleston County VTDs with large Black populations with precision, moving "ten of the eleven VTDs with an African American population of 1,000 persons or greater" out of CD1. *Id.* at 26a & n.7.[4]

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[4] Defendants do not support their assertion (Br. 51) that the district court was "clearly wrong" about this figure. If anything, the court appears to have understated it. Although the court was arguably mistaken in including one VTD in its footnote 7 list (Deer Park 3, which was previously split between CD1 and CD6), it omitted two others (St. Andrews 20 and St. Andrews 28). See D. Ct. Doc. 500-1

Accordingly, although a State's use of a racial target does not by itself establish predominance, *Allen*, 143 S. Ct. at 1511 (plurality opinion), the district court found that the 17% goal "had a direct and significant impact on the drawing of at least some of [the challenged district's] boundaries," *Alabama*, 575 U.S. at 274; see J.S. App. 25a, 33a. And the court specifically declined to credit Roberts's claim that mapmakers did not consider race at all, finding that this denial "rings 'hollow'" given the "striking evidence" that voters were sorted on the basis of race. J.S. App. 29a-30a (quoting *Cooper*, 581 U.S. at 315).

The district court's predominance finding was also based on the expert testimony of Dr. Ragusa, who analyzed the movement of VTDs in and out of CD1. J.S. App. 31a. Based on Dr. Ragusa's analysis, the court found that "the decision to move a VTD out of the district was highly correlated to the number of African American voters within the VTD." *Id.* at 31a-32a. Where a VTD had 100-500 such voters, the chance of being moved out was no greater than 20%. *Id.* at 32a. But as the number of Black voters rose, so did the likelihood of being removed. *Ibid.* Dr. Ragusa's analysis also demonstrated that, even controlling for partisanship, Black voters were "significantly more likely to be moved out of [CD1]" and "significantly less likely to be moved into [CD1]." *Id.* at 508a. The disproportionate effect on Black voters thus "cannot be explained away as a proxy effect of partisanship." *Id.* at 506a; see *id.* at 32a.

(Feb. 5, 2023) (reproduced at J.S. App. 545a-564a); D. Ct. Doc. 473, 473-1 (Oct. 27, 2022). It thus appears that eleven out of twelve Charleston County VTDs in CD1 with Black populations of 1000 or more were moved to CD6. See *ibid.*

b. The district court also did not clearly err in finding that the State "subordinat[ed] * * * traditional redistricting principles" in drawing race-based lines. J.S. App. 29a, 33a; see *Miller*, 515 U.S. at 916. The court found that Roberts "abandon[ed]" "his 'least change' approach in drawing the Charleston County portions of" CD1, J.S. App. 29a—even though Charleston County had historically been CD1's "anchor[]," *id.* at 21a; see J.S. Supp. App. 360a, and even though most of the county's population had previously been located in CD1, J.S. App. 258a-259a; see J.A. 411. Mapmakers instead made "'dramatic changes'" that resulted in most Charleston County residents being placed in CD6, J.S. App. 25a (citation omitted); see J.A. 412, and "over 30,000 African Americans [being] removed from their home district," J.S. App. 33a. The court found that this "made a mockery of the traditional districting principle of constituent consistency." *Id.* at 27a.[5]

The district court additionally found that the enacted plan failed to respect communities of interest. As the court emphasized, when asked what community of interest coastal residents of North Charleston (excluded from CD1) would have with voters in Columbia in CD6—over 100 miles inland—"Roberts could only think of their common proximity to Interstate I-26." J.S. App. 26a.

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[5] Defendants state (Br. 18) that the enacted plan "preserves 92.78% of District 1's core." That figure appears to be the percentage of current CD1 residents who were in CD1 under the 2011 plan. Tr. 1645-1646. But that statistic does not account for the 140,000 residents who were moved *out* of CD1, and it thus does not undermine the district court's finding that the mapmakers predominantly relied on race in deciding which voters to exclude.

The enacted plan also exacerbates CD1's contiguity issues. The Charleston peninsula now completely severs the eastern and western portions of CD1; there is no way to drive from one end of the district to the other without crossing well into CD6. Tr. 886; J.A. 162, 164. Nor can the plan's irregularities be explained by the proposed plan submitted by Congressman Clyburn's staff. Cf. Defendants Br. 10-11. Roberts admitted, for example, that "his movement of nearly 17,000 African Americans from St. Andrews [in Charleston County] was inconsistent with" the Clyburn staff plan he claimed "to be faithfully following." J.S. App. 29a.

3. Defendants criticize the district court's predominance finding on various grounds, reprising the factual arguments they presented at trial (Br. 30-42, 45-52). Those arguments fail to show that the court clearly erred in adopting a different view of the record.

Defendants first assert (Br. 30-31) that the district court ignored evidence of their partisan aims. But the court credited defendants' evidence that the mapmakers' ultimate goal was partisan advantage. J.S. App. 21a. The court simply found that mapmakers adopted a 17% BVAP target as the means to achieve that goal. *Id.* at 25a, 33a. The finding rested not on the mere "correlation between race and politics" (Defendants Br. 3, 33), but on the expert testimony and circumstantial evidence showing that mapmakers maintained a 17% BVAP by drawing race-based lines. And as the court recognized, the predominance standard is satisfied where, as here, "legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests." *Cooper*, 581 U.S. at 308 n.7; see J.S. App. 13a-14a.

Defendants emphasize (*e.g.*, Br. 2, 30, 37) that Roberts and other mapmakers denied using race as a proxy for

politics. But "[o]utright admissions of impermissible racial motivation are infrequent." *Hunt* v. *Cromartie*, 526 U.S. 541, 553 (1999) (*Cromartie I*). And as this Court explained in rejecting a similar argument, "defendants' insistence that the [mapmakers] did not look at racial data * * * does little to undermine the District Court's conclusion—based on evidence concerning the shape and demographics of [the challenged district]—that the district[] unconstitutionally sort[s] voters on the basis of race." *North Carolina* v. *Covington*, 138 S. Ct. 2548, 2553 (2018) (per curiam).

Defendants further contend that the district court failed to "disentangle race and politics" by determining whether politics alone could explain why portions of Charleston County were moved out of CD1. Br. 30-32 (capitalization omitted). But the court relied on Dr. Ragusa's regression analysis for that very purpose, crediting his conclusion that "the racial composition of a VTD was a stronger predictor of whether it was removed from [CD1] than its partisan composition." J.S. App. 31a-32a.

Defendants criticize (Br. 50-51) Dr. Ragusa's county-envelope methodology. But in *Cooper*, this Court relied on a study that used essentially the same methodology to conclude "that 'race, and not party,' was 'the dominant factor' in [a district's] design." 581 U.S. at 315 (citation omitted). More fundamentally, evaluating the reliability of expert methodology and assessing the credibility of an expert's conclusions in a bench trial are tasks uniquely within the purview of the district court. Cf. *Kumho Tire Co.* v. *Carmichael*, 526 U.S. 137, 152 (1999). Here, defendants did not offer any competing expert analysis comparing the effects of race and partisanship. And Dr. Ragusa's findings were reinforced by the testimony of another of plaintiffs' experts, Dr. Baodong Liu (a political scientist at

the University of Utah), who concluded that "white Democratic voters (68.99%) [were] much more likely to be assigned to CD1 * * * than Black Democratic voters (50.65%)." J.S. Supp. App. 100a; see Tr. 573-576.

Defendants next fault the district court (Br. 35) for failing to explain "*why* anyone would use a racial target" as a "*proxy* for politics" when they could "use election data *directly* for politics." But under this Court's precedents, the district court's task was to determine *whether* the State relied on race rather than politics—not why it chose to do so. In any event, the trial record provides an explanation: The mapmakers' direct evidence of partisanship was limited and imperfect. In attempting to gauge the partisan tilt of relevant precincts, Roberts used data from just one election: privately sourced data from the 2020 presidential general election. J.S. App. 90a, 93a-94a. Plaintiffs' expert testified without contradiction that results from a single presidential election are an unreliable basis for predicting future congressional election performance. J.A. 135. Among other things, turnout is typically much higher in presidential elections, and some voters more readily cross party lines in presidential elections than in congressional elections. *Ibid.*; see J.A. 112 ("The white voters who cast their votes for a Democrat might turn out in one election and not another. They might vote for a Democrat in one election and for a Republican in another.").

In contrast, undisputed evidence established that voting in South Carolina is racially polarized, such that race is a reliable and durable proxy for congressional voting. See J.A. 105, 112; J.S. App. 61a, 233a, 505a; J.S. Supp. App. 73a; Tr. 1888. Given that polarization and the political geography of CD1, the evidence showed that very slight changes in CD1's BVAP could change electoral outcomes. J.S. App. 22a-23a. That evidence, combined with

the limits of the available direct evidence of partisanship, further confirms that the district court did not clearly err in concluding that mapmakers opted to rely on race to produce their desired partisan tilt.[6]

C. The District Court's Predominance Finding Was Not Affected By Any Legal Error

Defendants assert that the district court's factual finding of racial predominance was tainted by several legal errors. Those arguments lack merit. As already discussed, the court analyzed the ways in which CD1 departed from the State's stated redistricting principles and took care to evaluate whether CD1's lines could be explained by political affiliation alone. See pp. 19-22, *supra*. In addition, the court properly adhered to the presumption that the legislature acted in good faith. It appropriately evaluated mapmakers' intent with respect to CD1 as a whole. And it did not err by failing to require plaintiffs to offer an alternative map.

1. This Court has instructed that, given the sensitive and difficult nature of districting, "the good faith of a state legislature must be presumed" unless and "until a claimant makes a showing sufficient to support" an allegation that race predominated in drawing district lines. *Miller*, 515 U.S. at 915; see *Abbott* v. *Perez*, 138 S. Ct. 2305, 2324 (2018). The district court adhered to

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[6] Defendants assert (Br. 36) that if the mapmakers had "used race as a proxy for politics, [they] would not have aimed to *replicate*" CD1's 17% BVAP "but to *lower* it," because a Democrat won CD1 in 2018. But the district court was not required to credit that theory. Among other things, the mapmakers had made other changes that made CD1 more Republican-leaning, including bringing more of three "strong Republican performing counties" into the district. J.S. App. 22a.

that principle here. It correctly articulated the predominance standard and placed the burden to prove racial predominance on plaintiffs. J.S. App. 13a, 42a. In fact, the court found that plaintiffs failed to carry that "demanding" burden, *id.* at 13a (quoting *Easley* v. *Cromartie*, 532 U.S. 234, 241 (2001) (*Cromartie II*)), with respect to two of the three districts they challenged. *Id.* at 36a-41a.

Defendants nonetheless fault the district court (Br. 26) for failing to recite the words "presumption of good faith." But in emphasizing that courts must "'exercise extraordinary caution in adjudicating claims that a State has drawn district lines on the basis of race,'" the court cited and quoted the sentence in *Miller* that sets forth the presumption. J.S. App. 44a (quoting *Miller*, 515 U.S. at 916). No more was required. Indeed, this Court has likewise articulated the relevant standard without explicit reference to a good-faith presumption. See, *e.g.*, *Bethune-Hill*, 580 U.S. at 187-188; *Alabama*, 575 U.S. at 260-261, 271-272.

Defendants also argue (Br. 33-34) that the district court abandoned the presumption and committed legal error when it found that mapmakers adopted a racial target to achieve a partisan objective. But that is merely a repackaged version of defendants' central factual contention that politics rather than race predominated in CD1's design. As this Court has explained, the presumption of good faith—while crucial to the adjudication of racial-gerrymandering claims at trial—is not the equivalent of a "super-charged, pro-State presumption on appeal, trumping clear-error review." *Cooper*, 581 U.S. at 309 n.8. That is true even when the State claims partisanship as its true motive. See *id.* at 313.

2. Throughout their brief, defendants assert that the district court failed to analyze CD1 "'as a whole'" because the court's finding of racial predominance focused on the lines drawn in Charleston County. Br. 25 (quoting *Bethune-Hill*, 580 U.S. at 192); see Br. 26, 31-32, 39, 41. But the court's determination that mapmakers adopted a 17% BVAP target for the entire district necessarily analyzed their intent with respect to CD1 "as a whole." See J.S. App. 25a. That mapmakers achieved that district-wide target through "dramatic changes" in Charleston County, *ibid.*, does not foreclose a finding of racial predominance. This Court has emphasized that courts may "consider evidence pertaining to an area that is * * * smaller than the district at issue," because "a legislature's race-based decisionmaking may be evident in a notable way in a particular part of a district." *Bethune-Hill*, 580 U.S. at 192. A plaintiff must show that "race was the predominant factor motivating the legislature's decision to place *a significant number of voters* within or without a particular district," *Miller*, 515 U.S. at 916 (emphasis added)—not that race infected every aspect of a district's shape. And here, the court found that race predominated in the decision to move more than 30,000 Black Charleston County residents out of CD1. J.S. App. 25a.

Nor is there merit to defendants' suggestion that the district court did not assess "the intent of the General Assembly 'as a whole.'" Br. 3 (quoting *Brnovich*, 141 S. Ct. at 2349-2350). Racial-gerrymandering cases turn on a careful examination of the reasons why a district's lines were drawn in a particular way, and that inquiry naturally focuses on the mapmakers and key legislators who drew or directed the challenged lines. See *Cooper*, 581 U.S. at 299-301, 310-316 (focusing on evidence of

intent of the plan's legislative "architects" and mapmaker); *Alabama*, 575 U.S. at 273-274 (examining evidence of intent of "[t]he legislators in charge of creating" the plan). It was particularly appropriate for the court to focus on Roberts and the core mapdrawing team here, because "Roberts was offered by Defendants at trial to explain the design and details of the [enacted] plan." J.S. App. 23a.

The Court's decision in *Brnovich*—which did not involve a racial-gerrymandering claim—does not suggest otherwise. There, the Court rejected the application of the "cat's paw" theory to attribute one legislator's discriminatory purpose to the rest of the legislature. *Brnovich*, 141 S. Ct. at 2349-2350. But the question in a racial-gerrymandering case is different; it focuses not on whether the plan was enacted with a discriminatory purpose, but on whether it relied on "race as a basis for separating voters into districts." *Miller*, 515 U.S. at 911. And nothing in *Brnovich* suggests that where, as here, a legislature is shown to have delegated the task of drawing district lines to legislators and staff who predominantly relied on race, the plaintiff must present evidence illuminating the motivation of every legislator who voted for the gerrymandered map.

3. Defendants err in asserting (Br. 42-45) that the district court rested its predominance finding on a conclusion about the validity of CD6 or interpreted *Shelby County* v. *Holder*, 570 U.S. 529 (2013), to require States to reconfigure districts previously drawn to comply with Section 5 of the VRA. The court simply stated, as part of a "review of the history in this case," that South Carolina had previously included part of Charleston County in CD6 to preserve a majority-minority district and "satisfy the then-existing Section 5 non-retrogression

requirements." J.S. App. 19a-20a. The court then suggested that the legislature might have had reason to revisit the Charleston County divide after *Shelby County* effectively eliminated the non-retrogression requirement, but that mapmakers instead "went in exactly the opposite direction, doubling down on the racial division of Charleston County by the movement of 62% of the African American residents of [CD1] into [CD6]." *Id.* at 27a. The court's finding of predominance rested on those 2022 changes to CD1; the court did not find that the current CD6 is unlawful, much less that States have an affirmative obligation to "single out and overhaul districts originally drawn to comply with the VRA." Defendants Br. 43.

4. Finally, there is no merit to defendants' assertion (Br. 28-30) that plaintiffs were required to put forth an alternative map that accomplished the legislature's partisan objectives while complying with traditional districting principles. J.S. App. 5a n.2, 46a. This Court's decision in *Cooper* squarely rejected any such requirement. The Court emphasized that the plaintiff's task in a racial-gerrymandering case "is simply to persuade the trial court—without any special evidentiary prerequisite—that race (not politics) was the 'predominant consideration in deciding to place a significant number of voters within or without a particular district.'" *Cooper*, 581 U.S. at 318 (citation omitted). And although the Court explained that a plaintiff "will *sometimes* need an alternative map, as a practical matter, to make his case," *id.* at 319 (emphasis added), it did not suggest that an alternative map is *required* in any class of cases, even circumstantial ones. Quite the opposite: the Court flatly rejected the idea that the substance of the equal-protection guarantee could be tied to any particular

"evidentiary tool." *Ibid.* And *Cooper* is just one of this Court's precedents rejecting attempts to impose unique evidentiary requirements on redistricting plaintiffs. See *Bethune-Hill*, 580 U.S. at 188, 190; *Allen*, 143 S. Ct. at 1506-1510, 1512-1514; see also 143, S. Ct. at 1510-1512 (plurality opinion).

Nor did this Court's decision in *Cromartie II* impose the categorial alternative-map requirement that defendants favor (Br. 28). As *Cooper* explained in rejecting essentially the same reading of *Cromartie II*, that "opinion nowhere attempts to explicate or justify the categorical rule that the State claims to find there"—which one would otherwise expect to find, given the "strangeness" of "treat[ing] a mere form of evidence as the very substance of a constitutional claim." *Cooper*, 581 U.S. at 321. Instead, *Cromartie II* made a narrow point about the insufficiency of the plaintiffs' evidentiary showing in the context of that particular case—which, unlike plaintiffs' showing here, relied on alternative maps that unsuccessfully sought to prove that the legislature could have achieved its partisan goals without the same racial effects. *Id.* at 321-322; see *Cromartie II*, 532 U.S. at 254-258.

Accordingly, although the predominance standard is "demanding," *Cromartie II*, 532 U.S. at 241 (citation omitted), it does not require one particular form of proof rather than another. Instead, the question in every case is whether the district court's finding of predominance is plausible in light of the whole record.[7]

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[7] Defendants assert (Br. 29-30) that the district court misconstrued their argument about the need for an alternative map. In *Cooper* and *Cromartie II*, the contemplated map might have served as evidence that race rather than politics predominated. *Cooper*,

* * *

Defendants have failed to establish that the district court's finding of racial predominance was clearly erroneous or infected by any legal error. And defendants have not attempted to show that their reliance on race in constructing CD1 satisfies strict scrutiny. J.S. App. 42a-43a. Accordingly, this Court should affirm the court's judgment that CD1 is an unconstitutional racial gerrymander.

II. THE DISTRICT COURT FAILED TO APPLY THE CORRECT LEGAL STANDARDS IN HOLDING THAT CD1'S LINES REFLECT INTENTIONAL VOTE DILUTION

The district court's racial-gerrymandering holding fully supports the judgment below: That violation requires that CD1 be redrawn, which is the same remedy that plaintiffs would obtain for their vote-dilution claim. See J.S. App. 46a-48a. This Court thus can and should affirm the district court's judgment based on the racial-gerrymandering claim without reaching plaintiffs' alternative vote-dilution claim. But if the Court does reach that claim, it should vacate and remand because the district court applied the wrong legal standards.

A. The district court treated plaintiffs' vote-dilution claim as equivalent to their racial-gerrymandering claim. It held that plaintiffs were required to satisfy the racial-predominance standard from *Miller*, and further

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581 U.S. at 317. Here, the district court appears to have understood defendants to have argued that an alternative map was required to demonstrate that it was possible to draw "a constitutionally compliant plan" as a remedy. J.S. App. 46a. But even if the court misunderstood defendants' point, any error was harmless: The court's predominance finding was based on a permissible view of the record, and *Cooper* forecloses defendants' assertion that the court should have required plaintiffs to produce an alternative map.

held that satisfying that standard, without more, was sufficient to trigger strict scrutiny. J.S. App. 43a-45a. Indeed, the court stated that plaintiffs' vote-dilution claim was controlled by the "same findings of fact and reasoning" that controlled their racial-gerrymandering claim. *Id.* at 45a. That was error.

As this Court has explained, racial-gerrymandering claims are "analytically distinct" from vote-dilution claims and require a "different analysis." *Shaw* v. *Reno*, 509 U.S. 630, 650, 652 (1993); see *Miller*, 515 U.S. at 911. Racial-gerrymandering claims ask whether race predominated in the drawing of a district "regardless of the motivations" for the use of race. *Shaw*, 509 U.S. at 645. In contrast, intentional vote-dilution claims ask whether the State intentionally sought "to minimize or cancel out the voting potential of racial or ethnic minorities." *Miller*, 515 U.S. at 911 (citation omitted); see *White* v. *Regester*, 412 U.S. 755, 765 (1973) (vote dilution occurs when a districting decision is used to "cancel out or minimize the voting strength of racial groups").

Consistent with that analytic distinction, this Court's precedents make clear that vote-dilution claims are not governed by the predominance standard developed in the Court's racial-gerrymandering cases. As the Court has long held and recently reaffirmed, "[d]emonstrating discriminatory intent" in an equal-protection case generally "'does not require a plaintiff to prove that the challenged action rested *solely* on racially discriminatory purpose.'" *Allen*, 143 S. Ct. at 1514 (quoting *Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265 (1977)) (brackets omitted). A plaintiff ordinarily must show only that discriminatory intent was a "motivating factor" in the challenged decision, *Arlington Heights*, 429 U.S. at 265-266—not that

it was the predominant factor. See *Rogers* v. *Lodge*, 458 U.S. 613, 617-618 (1982). And this Court has recognized that "the *Arlington Heights* framework" should "be used in evaluating vote dilution claims brought under the Equal Protection Clause." *Cromartie I*, 526 U.S. at 546 n.2; see, *e.g.*, *Abbott*, 138 S. Ct. at 2324-2326.

In applying the *Arlington Heights* framework, courts consider a non-exhaustive list of factors including: (1) discriminatory impact, (2) historical background, (3) the sequence of events leading up to the decision, (4) procedural or substantive deviations from the normal decisionmaking process, and (5) contemporaneous statements by the decisionmakers. 429 U.S. at 266-268. Where plaintiffs succeed in proving a discriminatory purpose, the burden shifts to defendants to demonstrate that the same law would have been enacted without such intent. *Id.* at 270 n.21.

In this case, therefore, the district court should have asked whether the legislature intentionally sought to dilute the voting strength of Black voters, not simply whether it used race to assign voters among districts. And in asking that question, the court should have applied the *Arlington Heights* framework rather than the racial-predominance standard that governs gerrymandering claims.

B. The district court also overlooked a second difference between racial-gerrymandering and vote-dilution claims: the latter, but not the former, require a showing of dilutive effect. This Court has held that challengers who demonstrate racial predominance in districting need not show that the gerrymander "dilutes a racial group's voting strength"; the racial classification is itself the relevant harm. *Shaw*, 509 U.S. at 650. Claims of intentional vote dilution, by contrast, require

proof that "the challenged practice has the purpose and effect of diluting a racial group's voting strength." *Id.* at 649. The challenged lines thus must be shown to "minimiz[e], cancel[] out or dilut[e] the voting strength of racial elements in the voting population." *Rogers*, 458 U.S. at 617.

The requirement to establish dilutive harm could be understood as a substantive element of a violation of the right to equal electoral opportunities or alternatively as a component of Article III standing. Cf. *Gill* v. *Whitford*, 138 S. Ct. 1916, 1935 (2018) (Kagan, J., concurring) ("To have standing to bring a partisan gerrymandering claim based on vote dilution * * * a plaintiff must prove that the value of her own vote has been 'contracted.'") (brackets and citation omitted). But regardless of the requirement's exact doctrinal source, both sides in this case appear to recognize that this Court's precedents obligate a plaintiff to make some showing of a dilutive effect to prevail on an intentional vote-dilution claim. Defendants Br. 53; Mot. to Affirm 37.

In litigating their vote-dilution claim, plaintiffs argued that the State purposefully drew CD1 to prevent it from functioning as a "crossover" district. D. Ct. Doc. 499, at 316-319 (Feb. 3, 2023). A crossover district is one "in which minority voters make up less than a majority of the voting-age population" but are sufficiently numerous "to elect the candidate of [their] choice with help from voters who are members of the majority and who cross over to support the minority's preferred candidate." *Bartlett* v. *Strickland*, 556 U.S. 1, 13 (2009) (plurality opinion).

In *Bartlett*, a plurality of this Court explained that "if there were a showing that a State intentionally drew district lines in order to destroy otherwise effective

crossover districts, that would raise serious questions under both the Fourteenth and Fifteenth Amendments." 556 U.S. at 24. Consistent with that observation, the United States has long taken the position that an intentional vote-dilution claim can be based on the destruction of, or failure to create, a crossover district that is less than majority-minority. See U.S. Amicus Br. at 13-14, *Bartlett*, *supra* (No. 07-689); U.S. Amicus Br. at 12 n.6, *Growe* v. *Emison*, 507 U.S. 25 (1993) (No. 91-1420); see also *Garza* v. *County of Los Angeles*, 918 F.2d 763, 770-771 (9th Cir. 1990), cert. denied, 498 U.S. 1028 (1991); U.S. Br. in Opp. at 21-23, *Garza*, *supra* (No. 90-849). But the United States has not previously taken a position on whether a district with the potential BVAP at issue here (in the range of 20%-25%, see D. Ct. Doc. 499, at 260-261) could form the basis for such a claim.

The district court neither addressed that issue nor made the findings that would be necessary to determine whether the enacted map had the effect of destroying a crossover district. Instead, the court appeared to believe that no showing of dilutive effect was required; it concluded that because plaintiffs had shown racial predominance, they were "entitled to judgment as a matter of law" on their vote-dilution claim. J.S. App. 45a.

C. If this Court reaches the vote-dilution claim, it should not analyze these issues in the first instance and without the benefit of relevant factual findings. The Court should instead follow its usual practice by correcting the district court's legal errors, vacating the relevant aspect of its judgment, and remanding with instructions to (i) apply the *Arlington Heights* framework to determine whether the legislature acted with dilutive intent and (ii) make the required findings regarding dilutive effect. See, *e.g.*, *Bethune-Hill*, 580 U.S. at 193

(remanding for application of correct legal standard); *Alabama*, 575 U.S. at 275 (same); *Shaw*, 509 U.S. at 658 (same).

CONCLUSION

The judgment of the district court should be affirmed.

Respectfully submitted.

ELIZABETH B. PRELOGAR
Solicitor General
KRISTEN CLARKE
Assistant Attorney General
BRIAN H. FLETCHER
Deputy Solicitor General
CAROLINE A. FLYNN
Assistant to the Solicitor General
NICOLAS Y. RILEY
ANNA M. BALDWIN
Attorneys

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