No. 22-807

In the Supreme Court of the United States

THOMAS C. ALEXANDER, in His Official Capacity as President of the South Carolina Senate, *et al.*,
Appellants,

v.

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

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

BRIEF OF *AMICUS CURIAE* GOVERNOR HENRY MCMASTER IN SUPPORT OF APPELLANTS

Thomas A. Limehouse, Jr.
Chief Legal Counsel
Wm. Grayson Lambert
Senior Litigation Counsel
Counsel of Record
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, SC 29201
(803) 734-2100
glambert@governor.sc.gov

July 14, 2023

TABLE OF CONTENTS

TABLE OF AUTHORITIES ii

STATEMENT OF INTEREST 1

SUMMARY OF ARGUMENT 2

ARGUMENT 4

I. The district court's conclusion that the First District is racially gerrymandered is illogical ... 4

A. South Carolina had no incentive or need to use race in redistricting 4

B. Appellees' failure to produce an alternative map should be dispositive 6

II. The Court should put an end to abusive redistricting litigation 9

A. Appellees had no legitimate reason to name the Governor as a defendant 10

B. This case is not an outlier 19

CONCLUSION 23

TABLE OF AUTHORITIES

CASES

Allen v. Milligan,
143 S. Ct. 1487 (2023) 9

Allied World Surplus Lines Ins. Co. v. Blue Cross & Blue Shield of S.C.,
No. 3:17-cv-903-RMG, 2017 WL 3328230 (D.S.C. Aug. 3, 2017) 12

Andino v. Middleton,
141 S. Ct. 9 (2020) 22

Bagley v. Blagojevich,
646 F.3d 378 (7th Cir. 2011) 17

Berger v. N.C. State Conf. of the NAACP,
142 S. Ct. 2191 (2022) 19

Blue v. U.S. Dep't of Army,
914 F.2d 525 (4th Cir. 1990) 7

Bogan v. Scott-Harris,
523 U.S. 44 (1998) 17

Brnovich v. Democratic Nat'l Comm.,
141 S. Ct. 2321 (2021) 7

Brown v. Bd. of Educ.,
347 U.S. 483 (1954) 5

Buchanan v. Warley,
245 U.S. 60 (1917) 5

California v. Texas,
141 S. Ct. 2104 (2021) 18

City of Richmond v. J.A. Croson Co.,
488 U.S. 469 (1989) 4

Cooper v. Harris,
581 U.S. 285 (2017) 2, 4, 7, 9

DaimlerChrysler Corp. v. Cuno,
547 U.S. 332 (2006) 12

Disability Rts. S.C. v. McMaster,
24 F.4th 893 (4th Cir. 2022) 17

Easley v. Cromartie,
532 U.S. 234 (2001) 7

Ex parte Young,
209 U.S. 123 (1908) 17, 20

Karcher v. Daggett,
462 U.S. 725 (1983) 5

Marbury v. Madison,
5 U.S. (1 Cranch) 137 (1803).................................23

McConnell v. Haley,
711 S.E.2d 886 (S.C. 2011)....................................19

Middleton v. Andino,
488 F. Supp. 3d 261 (D.S.C. 2020)........................22

Miller v. Johnson,
515 U.S. 900 (1995) 4, 6

Order, *Common Cause Fla. v. Lee*,
No. 5:22-cv-59 (N.D. Fla. Nov. 8, 2022), ECF No. 115...20

Palmore v. Sidoti,
466 U.S. 429 (1984) 5

Plessy v. Ferguson,
163 U.S. 537 (1896) 4

Rose v. Mitchell,
443 U.S. 545 (1979) 4

Rucho v. Common Cause,
139 S. Ct. 2484 (2019) 5

Sansotta v. Town of Nags Head,
724 F.3d 533 (4th Cir. 2013).................................12

Simpson v. Hutchinson,
___ F. Supp. 3d ___, No. 4:22-CV-213, 2022 WL 14068633 (E.D. Ark. Oct. 24, 2022).......................20

Smiley v. Holm,
285 U.S. 355 (1932) 17

Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.,
No. 20-1199, 2023 WL 4239254 (U.S. June 29, 2023) 4

Torres Rivera v. Calderon Serra,
412 F.3d 205 (1st Cir. 2005)....................................17

TransUnion LLC v. Ramirez,
141 S. Ct. 2190 (2021) 18

Wainwright v. Goode,
464 U.S. 78 (1983) 19

Wesch v. Hunt,
785 F. Supp. 1491 (S.D. Ala. 1992)........................21

White v. Weiser,
412 U.S. 783 (1973) 21

Whole Women's Health v. Jackson,
142 S. Ct. 522 (2021) 17

Wisc. Legislature v. Wisc. Elections Comm'n,
142 S. Ct. 1245 (2022) 4

Women's Emergency Network v. Bush,
323 F.3d 937 (11th Cir. 2003) 17

Wygant v. Jackson Bd. of Educ.,
476 U.S. 267 (1986) 5

CONSTITUTIONAL PROVISIONS

S.C. Const. art. IV, §15..1

S.C. Const. art. IV, §19..19

S.C. Const. art. IV, §21...8, 15

S.C. Const. art. VI, §5 1

STATUTES

Ala. Code §17-14-70 21

S.C. Code Ann. §24-21-10(B) 2

S.C. Code Ann. §40-47-10(A)(1) 1

S.C. Code Ann. §57-1-310(A) 1

OTHER AUTHORITIES

Civil Rights Groups File Amended Complaint in South Carolina Redistricting Case, NAACP Legal Defense Fund (Feb. 2, 2022) 14

Civil Rights Groups File Federal Lawsuit Over South Carolina Redistricting Failures, NAACP Legal Defense Fund (Oct. 12, 2021) 11

Federal Judge Says You Won't Need a Witness Signature for Your Absentee Ballot This November, WIS-TV (Sept. 21, 2020) 22

Joshua Chaffin, *New York's Democrats Rue Losses that Cost Their Party the House*, Financial Times (Nov. 16, 2022) 9

Meeting Information, S.C. Redistricting 2021, Senate Judiciary Comm. 10

LEGISLATIVE ACTS

2021 S.C. Acts No. 117 12

2022 S.C. Acts No. 118 14

2022 S.C. Acts No. 226 15

Alabama Act 2021-555 21

STATEMENT OF INTEREST

Henry McMaster is Governor of the State of South Carolina.[1] He has at least three distinct interests in this case. *First*, he has sworn to "preserve, protect, and defend" both the South Carolina Constitution and the United States Constitution, S.C. Const. art. VI, §5, and to "take care that the laws be faithfully executed," *id.* art. IV, §15. He therefore has a strong interest in ensuring that all of South Carolina's laws are constitutional and duly enforced.

Second, Governor McMaster was originally named as the lead defendant in this litigation, before Appellees dropped him as a party without ever having to respond to the merits of his arguments or answer for why they named him as a defendant in the first place. The Governor's unnecessarily frustrating experience in this case provides him valuable insight to share with the Court regarding abuses in reapportionment litigation.

Third, Governor McMaster appoints members of 40 state boards and commissions based on congressional districts. As just a few examples, these boards include the State Board of Medical Examiners, S.C. Code Ann. §40-47-10(A)(1), the Commission of the Department of Transportation, *id.* §57-1-310(A), and the

---

[1] Pursuant to Supreme Court Rule 37.6, *amicus curiae* states that no counsel for any party authored this brief in whole or in part, and no entity or person, aside from *amicus curiae* and his counsel, made any monetary contribution toward the preparation or submission of this brief.

Board of Probation, Parole and Pardon Services, *id.* §24-21-10(B).

SUMMARY OF ARGUMENT

This case is yet another lawsuit brought by the "losers in the redistricting process" who seek to "transform[]" the courts "into weapons of political warfare" and "obtain in court what they could not achieve in the political arena." *Cooper v. Harris*, 581 U.S. 285, 335 (2017) (Alito, J., dissenting in part). The district court unfortunately obliged, holding that South Carolina's First Congressional District is racially gerrymandered.

That conclusion is illogical. South Carolina legislators openly acknowledged their goal of making the First District more Republican, and they had detailed data (down to the block-by-block level) about partisanship. They therefore had no need to use race as a proxy for party, nor was there any incentive to do so, particularly in light of this Court's repeated admonitions to the contrary. Moreover, Appellees' failure to offer an alternative map showing how the General Assembly could have achieved its goal in a different way undermines not only the district court's conclusion that the First District is racially gerrymandered but also demonstrates why such a map must be offered as evidence in a case like this one.

Beyond these flaws in the district court's order, this case is a posterchild for abusive redistricting litigation. Presumably hoping to make a splash with their lawsuit, Appellees named the Governor as their lead defendant. Yet beyond deciding whether to sign or veto the legislation that reapportions the State's

congressional and legislative districts, the Governor does not have a role in South Carolina's redistricting or map-drawing process. Of course, it's black-letter law that a governor enjoys legislative immunity for his decision to sign or veto legislation. That left Appellees with a standing problem and an *Ex parte Young* problem: There was nothing the district court could mandate the Governor to do or prohibit him from doing that would remedy anything about which Appellees complained or have any impact on the redistricting process.

The Governor pointed this out to the district court. And pointed it out again. And again. But Appellees never had to justify their decision to sue the Governor. Instead, after making headlines, the district court let them quietly drop the Governor as a defendant when they amended their complaint the second time, despite the fact that Appellants had refused to disclaim that the Governor might, in their view, be necessary later in the litigation.

Sadly, such groundless litigation tactics and illogical claims aren't unique to this case. Redistricting cases across the country (indeed, voting cases generally) see plaintiffs assert flimsy arguments and take baseless positions that, in other, more run-of-the-mill cases, would never escape the threshold jurisdictional evaluation without judicial condemnation. But when the stakes are as high as they are in redistricting cases, the ultimate focus of the case often allows plaintiffs to evade having to account for their actions. This Court should make sure that lower courts do not let these shenanigans continue unchecked.

ARGUMENT

I. The district court's conclusion that the First District is racially gerrymandered is illogical.

A. South Carolina had no incentive or need to use race in redistricting.

This Court has strictly limited the use of race in redistricting. *See, e.g.*, *Wisc. Legislature v. Wisc. Elections Comm'n*, 142 S. Ct. 1245, 1248 (2022) (per curiam) ("Under the Equal Protection Clause, districting maps that sort voters on the basis of race are by their very nature odious." (cleaned up)); *Cooper*, 581 U.S. at 291 (majority op.) ("The Equal Protection Clause of the Fourteenth Amendment limits racial gerrymanders in legislative districting plans.").

For good reason. After all, "[o]ur constitution is color-blind," *Plessy v. Ferguson*, 163 U.S. 537, 559 (1896) (Harlan, J., dissenting), and "[d]iscrimination on the basis of race" is "odious in all aspects," *Rose v. Mitchell*, 443 U.S. 545, 555 (1979). That is why the Equal Protection Clause's "central mandate is racial neutrality in governmental decisionmaking." *Miller v. Johnson*, 515 U.S. 900, 904 (1995). And that is why this Court has consistently rejected government attempts to use race to advance various policy goals. *See, e.g.*, *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, No. 20-1199, 2023 WL 4239254, at *23 (U.S. June 29, 2023) (in college admissions, "the student must be treated based on his or her experiences as an individual—not on the basis of race"); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 476–77 (1989) ("minority set-aside program" for

city contracts "to ameliorate the effects of past discrimination"); *Wygant v. Jackson Bd. of Educ.*, 476 U.S. 267, 272 (1986) ("providing 'role models' for minority schoolchildren"); *Palmore v. Sidoti*, 466 U.S. 429, 432–34 (1984) (best interest of the child in child-custody decisions); *Brown v. Bd. of Educ.*, 347 U.S. 483, 493 (1954) (public schools); *Buchanan v. Warley*, 245 U.S. 60, 70 (1917) (ordinance preventing minorities from living on majority-white blocks "to prevent conflict and ill-feeling between the white and colored races in the city of Louisville").

Although *racial* gerrymandering is unconstitutional, *partisan* gerrymandering does not give rise to a cognizable legal claim. Partisan gerrymandering claims "present political questions beyond the reach of the federal courts," so this Court has "*never* struck down a partisan gerrymander as unconstitutional." *Rucho v. Common Cause*, 139 S. Ct. 2484, 2506–07 (2019) (emphasis added); *cf. Karcher v. Daggett*, 462 U.S. 725, 753 (1983) (Stevens, J., concurring) ("it is unrealistic to attempt to proscribe all political considerations in the essentially political process of redistricting").

Against this legal backdrop, legislators acknowledged that one of their goals in this reapportionment cycle, along with employing other traditional districting principles, was to make the First District more Republican. *See, e.g.*, Juris. Stat. App. ("JSA").21a–22a. To achieve this goal, the General Assembly had ample data about partisanship, broken down all the way to the level of individual street blocks for both the 2016 and 2020 elections. *See, e.g.*, JSA.93a–94a.

Armed with this data, the General Assembly had no incentive to use race when redrawing the State's seven congressional districts. Nor would it have made sense for the General Assembly to do so. One, the Constitution prohibits the "use of race as a proxy." *Miller*, 515 U.S. at 914. Using race to draw districts would have only invited a justified finding (unlike the finding in this case) of racial gerrymandering.

Two, using race was unnecessary because the partisanship data provided *exactly* what the General Assembly needed to advance any of its political goals. There was, in other words, no need for a proxy. And every witness who was asked about whether there was a "racial target" specifically denied there was any such metric. *E.g.*, JSA.93a, 130a, 144a, 346a. That lack of evidence is fatal to the district court's conclusion that there was "a target of 17% African American population" for the First District. JSA.23a.

Put simply, why would the General Assembly have used race as a proxy for party when (1) party was what the General Assembly admittedly considered and (2) the General Assembly had detailed partisanship data? The district court's conclusion that the First District is racially gerrymandered is illogical.

B. Appellees' failure to produce an alternative map should be dispositive.

Based its reading of *Cooper*, the district court did not require Appellees to provide "an alternative map that provides a remedy" to the supposed racial gerrymandering. JSA.46a.

As more than just a remedial matter, the *Cooper* dissent made the more compelling argument about alternative maps, and this Court should now recognize as much. Requiring a plaintiff to produce an alternative map is the only realistic way to prove that race, rather than politics, drove a decision "when race and political party preference closely correlate." *Cooper*, 581 U.S. at 334 (Alito, J., dissenting in part); *see also Easley v. Cromartie*, 532 U.S. 234, 242 (2001) ("Caution is especially appropriate in this case, where the State has articulated a legitimate political explanation for its districting decision, and the voting population is one in which race and political affiliation are highly correlated."). An alternative map is a critical piece of evidence that can distinguish between race and party. Indeed, without such a map and in light of the fact that a "'smoking gun' is often not to be found in a discrimination suit," *Blue v. U.S. Dep't of Army*, 914 F.2d 525, 544 (4th Cir. 1990) (Wilkinson, J.), a claim of racial gerrymandering amounts to little more than "we think legislators had improper motives, even though the map they adopted could have been based on party instead of race," *cf. Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2349 (2021) ("partisan motives are not the same as racial motives").

Requiring a map in every racial gerrymandering case would also avoid entangling courts in the task of attempting to answer questions regarding the strength of a plaintiff's speculative racial-gerrymandering evidence. The Court in *Cooper* observed that a map would be necessary when a plaintiff had only "meager direct evidence of a racial gerrymander." *Cooper*, 581 U.S. at 322 (majority op.). That standard merely invites debate over whether the evidence was

meager or plentiful and forces courts to try to distinguish why the evidence in one case did demand an alternative map but the evidence in another case did not—all on already difficult question "of distinguishing between racial and political motivations in the redistricting context." *Id.* at 331 (Alito, J., dissenting in part).

Applying these principles to this case, consider the inference that can be drawn from the fact that Appellees didn't offer an alternative map as evidence, especially if, as the district court put it, that map could be drawn "without undue difficulty." JSA.46a; *see also* JSA.5a (reemphasizing this point in denying Appellants' motion to stay).[2] If that's the case, Appellees surely would have made that map their first exhibit at trial. Appellees' failure to produce an alternative map strongly undermines not only the district court's conclusion that such a map is easy to draw but also the district court's conclusion that race, not politics, drove the General Assembly to adopt the map it did.

Moreover, this Court implicitly made the value of alternative maps clear just a month ago in *Allen v.*

---

[2] In denying the motion to stay, the district court explained in more detail its intention that "the legislature should be given a reasonable opportunity to recommend for consideration a remedial plan that meets constitutional standards." JSA.2a–3a. It is unclear whether the district court envisioned the Governor having any role, but the South Carolina Constitution is clear: All legislation must be "presented to the Governor" for his signature or veto. S.C. Const. art. IV, §21. Any attempt by the district court to redline S.C. Code Ann. §7-19-45 (which establishes the congressional districts following the 2020 census) without having legislation presented to the Governor would be an afront to South Carolina's sovereignty and the Governor's authority under the State's Constitution.

Milligan, 143 S. Ct. 1487 (2023). After explaining the *Gingles* framework, the first place the Court looked to analyze whether the plaintiffs there had met their burden was to the "eleven illustrative maps" that included "two majority-black districts" and "comported with traditional districting criteria." *Id.* at 1504.

* * *

Between the detailed partisanship data available now and this Court's clear instruction not to racially gerrymander, it is unlikely (to put it mildly) that legislators would use race as a proxy, rather than party itself, when redrawing districts. Imposing an alternative-map requirement would serve to protect federal courts from being "transformed into weapons of political warfare" by minority parties who were "losers in the redistricting process" merely "seek[ing] to obtain in court what they could not achieve in the political arena." *Cooper*, 581 U.S. at 335 (Alito, J., dissenting in part). In this case, that means Appellees should not be permitted to use the courts as a forum simply to air grievances and invite federal judges to redraw the First District in a way that would suit their political preferences, which was always their underlying goal in bringing this case.

II. The Court should put an end to abusive redistricting litigation.

The stakes in redistricting litigation are high. Control of Congress may turn on which congressional map a single State adopts. *See, e.g.*, Joshua Chaffin, *New York's Democrats Rue Losses that Cost Their Party the House*, Financial Times (Nov. 16, 2022), https://tinyurl.com/ycyt647u (calling a "bungled

redistricting effort" one of the "culprits" for Republican gains in New York in the 2022 midterm election). With so much on the line, litigants have every incentive to pull out all the proverbial stops when bringing redistricting cases.

Too often, litigants go too far in framing their challenges and litigating these cases, doing things that black-letter law does not permit. They frequently attempt to proceed against improper defendants in an effort to score political points without making legal ones.

A. Appellees had no legitimate reason to name the Governor as a defendant.

This case is a textbook example of abusive redistricting litigation. To understand why, it's necessary to review the case's early procedural history in some detail.

The 2020 census data was released later than usual due to delays associated with COVID-19, so, in turn, redistricting began later than usual. South Carolina began its redistricting process in July 2021. *See Meeting Information*, S.C. Redistricting 2021, Senate Judiciary Comm. (last visited May 16, 2023), https://tinyurl.com/5dedpv7u (providing information about the timing of the redistricting process).

Appellees originally filed this lawsuit in October 2021, before South Carolina had even enacted new maps for state legislative or congressional districts. *See* ECF No. 1.[3] The NAACP issued a press release

[3] ECF citations are to the district court's record, when those

trumpeting its lawsuit the same day the lawsuit was filed. *See Civil Rights Groups File Federal Lawsuit Over South Carolina Redistricting Failures*, NAACP Legal Defense Fund (Oct. 12, 2021), https://tinyurl.com/272vpvax (last visited May 16, 2023).

In that original complaint, Governor McMaster was the lead defendant. ECF No. 1, at 1. The complaint alleged that the Governor was a "proper defendant" based on his "authority to sign or veto any redistricting plan passed by the Legislature" and his authority "to convene the General Assembly for extra sessions." *Id.* at 11. Appellees asserted claims that the State's districts were malapportioned in light of the 2020 census. *Id.* at 24–27. After inexplicably waiting four weeks, Appellees eventually moved for a preliminary injunction, asking the district court to impose a deadline by which the State must enact new maps. *See* ECF No. 59. (Never mind that the General Assembly was already in the midst of the redistricting process and had even taken public testimony by that point.)

The same day that preliminary injunction motion was filed, Governor McMaster moved to dismiss. *See* ECF No. 61. Among other arguments directed at the complaint generally, the Governor explained that Appellees lacked standing to sue him based on his authority to sign or veto legislation. *See id.* at 7.

Just three days after the Governor moved to dismiss the complaint, before Appellees responded to the motion, and without ruling on that motion, the district court stayed the case for about two months "to give the Legislature the opportunity to timely perform its

---

documents do not appear in an appendix filed with this Court.

redistricting duties."[4] ECF No. 63, at 9. About a month into this stay, the General Assembly adopted new state legislative districts. *See* 2021 S.C. Acts No. 117.

This prompted an amended complaint from Appellees. *See* ECF No. 84. Governor McMaster remained the lead defendant. *Id.* at 1. The only allegations related to the Governor in the amended complaint were that he signed Act No. 117 into law, *id.* at 2, 11, 29, had the authority to sign or veto redistricting legislation for the congressional districts, *id.* at 9, and had the authority to call the legislature into special session, *id.* at 20. Appellees asserted racial gerrymandering, intentional discrimination, and First Amendment claims. *Id.* at 51–54.

Governor McMaster again moved to dismiss. *See* ECF No. 94. He pointed out that being the State's chief executive is not a sufficient basis to sue him, *id.* at 9, the South Carolina Constitution gives him sole discretion to determine whether to call the legislature

---

[4] This move by the district court was all the more puzzling—and inappropriate—because the district court actually "conclude[d] that [Appellees'] claims are not yet ripe," ECF No. 63, at 9; *see also id.* at 12, yet stayed the case anyway. Federal courts may not "park" an unripe case via a stay to see if it eventually becomes ripe. *See Allied World Surplus Lines Ins. Co. v. Blue Cross & Blue Shield of S.C.*, No. 3:17-cv-903-RMG, 2017 WL 3328230, at *2 (D.S.C. Aug. 3, 2017) ("Because ripeness is a question of subject matter jurisdiction, an action that is not ripe for judicial review must be dismissed. The Court cannot stay . . . an action that is not ripe." (citing *Sansotta v. Town of Nags Head*, 724 F.3d 533, 548 (4th Cir. 2013))); *cf. DaimlerChrysler Corp. v. Cuno*, 547 U.S. 332, 341 (2006) ("no principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies" (cleaned up)).

into an extra session, *id.* at 9–10, he enjoys legislative immunity for the decision to sign or veto any legislation, *id.* at 11–12, and Appellees could not meet the traceability and redressability prongs of standing to assert any claims against him, *id.* at 12–14.

Shortly after moving to dismiss, Governor McMaster served five targeted interrogatories to confirm that Appellees had no basis for suing him. *See* ECF No. 115-1. The first interrogatory asked what "facts related to Governor McMaster" other than those in the amended complaint were relevant to the lawsuit. *Id.* at 5–6. Appellees, largely drawing from the amended complaint, stated only that the Governor signed into law the legislation creating the new state legislative districts, had a duty to take care that the laws be faithfully executed, did not call the General Assembly back into session during the fall of 2021, "would likely be involved in the compliance with and enforcement of any remedial map," and had "the authority under the South Carolina Constitution to sign or veto" the new congressional map. *Id.* at 6–7.

The second and third interrogatories asked Appellees to identify what provisions of state and federal law they contended imposed a duty on the Governor "regarding the holding and conduct of elections" for state legislative and congressional seats. *Id.* at 7, 8. Appellees proffered boilerplate objections and refused to answer. *Id.* at 7–9.

The fourth and fifth interrogatories focused on the "precise" declaratory and injunctive relief Appellees sought "against Governor McMaster specifically." *Id.* at 9, 10. After more boilerplate objections,

Appellees did little more than point back to their amended complaint. *Id.*

Both before and after serving these interrogatory responses, Appellees received an extension of time to respond to the Governor's motion to dismiss the amended complaint. *See* ECF Nos. 107, 112. While this motion to dismiss was pending, the General Assembly enacted a new congressional map. *See* 2022 S.C. Acts No. 118. This prompted Appellees to seek leave to file another amended complaint, but in this one, they wanted to drop the Governor as a defendant, without ever having to answer for why they named him as a defendant in the first two complaints.[5] *See* ECF No. 116.

After Appellees needlessly named the Governor for publicity purposes, the Governor opposed their effort to strategically, and unilaterally, sideline him to avoid having to respond to the merits of his arguments. *See* ECF No. 117. Appellees tried to characterize the Governor's opposition to being silently dropped as a defendant as "obstructionist." ECF No. 116, at 3. They were—and remain—wrong. The Governor wanted a definitive answer on the issues raised in his motion to dismiss for two reasons. One, Appellees had

[5] When Appellees sought leave to file the second amended complaint, a press release was (of course) issued about the new filing. *See Civil Rights Groups File Amended Complaint in South Carolina Redistricting Case*, NAACP Legal Defense Fund (Feb. 2, 2022), https://tinyurl.com/3pjxcn6n (last visited May 16, 2023). But nowhere in that release did Appellees mention they wanted to drop the Governor as a defendant. In fact, the press release still called the case *South Carolina Conference of the NAACP v. McMaster*.

consistently taken the position that the Governor was necessary for them to obtain the relief they sought.[6] *Id.* at 2–4. And two, the condensed schedule of the case ahead of the 2022 elections warranted resolving any questions related to the Governor sooner rather than later, as Appellees had steadfastly refused to disavow any intention to try to add the Governor back as a defendant in this litigation. *Id.* at 4–6.

To try to force Appellees to address the fact that they had named the Governor as the lead defendant, the Governor moved for summary judgment shortly before Appellees sought leave to amend the second time. *See* ECF No. 115. That motion raised three arguments specific to the Governor as a defendant, in light of the threadbare allegations against him in the amended complaint. First, he was protected by legislative immunity. *Id.* at 8–10. Second, he could not be sued simply because he was the Governor. *Id.* at 10–11. Third, Appellees lacked standing to sue him. *Id.* at 11–13.

Before the district court ruled on Appellees' request for leave to amend their complaint a second time, the district court's local rules forced Appellees to respond to both the motion to dismiss and the motion for summary judgment. *See* ECF Nos. 125, 142. On the

---

[6] The Governor's concern here was prescient. When Appellees agreed to settle their claims over the new map for the South Carolina House of Representatives, the district court initially rejected the settlement because Appellants had not presented any evidence that the Governor—by then a nonparty—had consented to the settlement. *See* ECF No. 236. Eventually, this settlement was achieved by enacting legislation to amend these maps, *see* 2022 S.C. Acts No. 226, which the Governor signed into law, *see* S.C. Const. art. IV, §21.

motion to dismiss, Appellees tried to avoid responding to the Governor's arguments directly by contending the motion to dismiss was "prudentially moot." ECF No. 125, at 2. They doubled down on this strategy in responding to the motion for summary judgment, although they still wouldn't disclaim "again seek[ing] to name Governor McMaster as a defendant." ECF No. 142, at 4. (To that end, they never even sought to amend their interrogatory response that they had sued the Governor because he "would likely be involved in the compliance with and enforcement of any remedial map." ECF No. 115-1, at 7.)

Governor McMaster replied promptly to both of Appellees' attempts to avoid responding to the substance of his argument. *See* ECF Nos. 127, 146. He detailed how this Court's cases make clear that mootness is an Article III doctrine, so the old Fourth Circuit cases on which Appellees relied were inapposite. ECF No. 127, at 2–4. He went on to show how, even if the doctrine was still viable, it did not apply here. *Id.* at 4–7.

Ultimately, the district court did not force Appellees to address the merits of the Governor's arguments. Instead, the district court granted them leave to amend their complaint and drop the Governor as a defendant. ECF No. 152, at 3.

Appellees therefore *never* had to answer why they named the Governor as the lead defendant in this case. For example, they sued the Governor because he had "the authority to sign . . . or veto any redistricting plan." ECF No. 84, at 9. But this Court has explained that a governor's signing or vetoing of a bill constitutes part of the legislative process, *see Smiley v.*

Holm, 285 U.S. 355, 372–73 (1932), and "[a]bsolute legislative immunity attaches to all actions taken in the sphere of legitimate legislative activity," *Bogan v. Scott-Harris*, 523 U.S. 44, 54 (1998) (cleaned up); *see also, e.g.*, *Bagley v. Blagojevich*, 646 F.3d 378, 393 (7th Cir. 2011) ("Without a doubt, the act of vetoing a line item in a bill constitutes an integral step in Illinois's legislative process." (cleaned up)); *Torres Rivera v. Calderon Serra*, 412 F.3d 205, 213 (1st Cir. 2005) ("a governor who signs into law or vetoes legislation passed by the legislature is also entitled to absolute immunity for that act"); *Women's Emergency Network v. Bush*, 323 F.3d 937, 950 (11th Cir. 2003) ("Under the doctrine of absolute legislative immunity, a governor cannot be sued for signing a bill into law.").

Nor did Appellees have to justify naming the Governor as a defendant in light of *Ex parte Young*, 209 U.S. 123 (1908). Under that century-old rule, only when an official has "some connection with the enforcement of the act" is there an exception to sovereign immunity that permits a federal court to enjoin that state official. *Id.* at 157. This Court just reaffirmed this principle. *See Whole Women's Health v. Jackson*, 142 S. Ct. 522, 534–35 (2021) (refusing to permit injunctive relief against the state attorney general who was not charged with enforcing Texas's new abortion statute). And, if that were (somehow) not enough, so has the Fourth Circuit—in a case involving the Governor, no less. *See Disability Rts. S.C. v. McMaster*, 24 F.4th 893, 901 (4th Cir. 2022) ("As we have made clear in the Eleventh Amendment context, however, the mere fact that a governor is under a general duty to enforce state laws does not make him a proper defendant in every action attacking the constitutionality of a

state statute." (cleaned up)). Despite this law, Appellees never attempted (or were required) to explain what unique "connection" Governor McMaster has to redistricting or conducting elections that would have permitted a federal court to enjoin him in any way. *Cf.* ECF No. 115-1, at 7–9 (Appellees' interrogatory responses refusing to identify what obligations state or federal law imposed specifically on the Governor regarding "holding and conducting elections").

In the same way, Appellees avoided having to explain how they had standing to sue Governor McMaster. Standing requires a plaintiff to show "(i) that he suffered an injury in fact that is concrete, particularized, and actual or imminent; (ii) that the injury was likely caused by the defendant; and (iii) that the injury would likely be redressed by judicial relief." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2203 (2021). This last prong "consider[s] the relationship between 'the judicial relief requested' and the 'injury' suffered." *California v. Texas*, 141 S. Ct. 2104, 2115 (2021). Yet Appellees never offered (and couldn't have offered) any retort for what relief they could have obtained specifically against the Governor. They pointed to nothing in Title 7 of the South Carolina Code or in federal law that the Governor could have been ordered to do or not to do that would have provided them any relief on their claims about the state legislative and congressional maps. Because "[r]emedies . . . ordinarily operate with respect to specific parties," *id.*, the failure to identify any relief against the Governor in particular should have been fatal to Appellees' attempt to assert claims against him.

The fact that the General Assembly returned to pass new state legislative and congressional maps saved Appellees from having to respond to yet another reason they say that they named the Governor as a defendant: his authority "to convene the General Assembly for extra sessions." ECF No. 1, at 11; *see also* ECF No. 84, at 20. The South Carolina Supreme Court has held that, because "what constitutes an 'extraordinary occasion'" is not defined by the constitution, deciding what is an "extraordinary occasion" "must be left to the discretion of the Governor," free from any judicial review. *McConnell v. Haley*, 711 S.E.2d 886, 887 (S.C. 2011) (discussing S.C. Const. art. IV, §19). Of course, the South Carolina Supreme Court's decision on this question of state law is "binding on the federal courts." *Wainwright v. Goode*, 464 U.S. 78, 84 (1983).

For at least these four reasons, Appellees had no justification whatsoever for naming Governor McMaster as the lead defendant in this lawsuit. Yet they did. And they happily broadcasted that they did to anyone who would listen. Put another way, Appellees were allowed to make bigger headlines by having the Governor be the first name on the right side of the "*v.*" in their press release, but they never had to account for their sandy foundation for haling the Governor into federal court. The Court should not condone this legally lacking "strategic choice[]" about which state official to name as a defendant. *Berger v. N.C. State Conf. of the NAACP*, 142 S. Ct. 2191, 2201 (2022).

B. This case is not an outlier.

To be sure, litigation games are not limited to this particular case. Plaintiffs unhappy with

Arkansas's new maps pulled the same stunt of trying to sue the governor there, making him (like Governor McMaster) the lead defendant. *See* Compl., *Simpson v. Hutchinson*, No. 4:22-cv-213 (E.D. Ark. Mar. 7, 2022), ECF No. 1. At least the district court there didn't let those plaintiffs quietly drop Governor Hutchinson. That court granted a motion to dismiss him, declaring the court could not "allow Governor Hutchinson to remain in the case based on little more than a general duty to enforce the law" when he lacked "any 'special' role in elections." *Simpson v. Hutchinson*, ___ F. Supp. 3d ___, No. 4:22-CV-213, 2022 WL 14068633, at *7 (E.D. Ark. Oct. 24, 2022) (quoting *Ex parte Young*, 209 U.S. at 157).

In Florida, Governor DeSantis avoided being named as the lead defendant, but he was still sued in Florida's redistricting litigation. *See* Compl., *Common Cause Fla. v. Lee*, No. 5:22-cv-59 (N.D. Fla. Mar. 11, 2022), ECF No. 1. The district court in that case reached the same conclusion as the Arkansas court. It dismissed Governor DeSantis because "the plaintiffs have not pointed to any provision of Florida law which gives the Governor authority to carry out, or direct the carrying out, of elections," as *Ex parte Young* requires. Order 8, *Common Cause Fla. v. Lee*, No. 5:22-cv-59 (N.D. Fla. Nov. 8, 2022), ECF No. 115.

Plaintiffs are doing more than just naming governors as defendants in search of headlines. Take, for example, an Alabama case from this redistricting cycle. One of the redistricting guidelines Alabama adopted was that the legislature "shall try to preserve the cores of existing districts." Reapportionment Committee Redistricting Guidelines, II(j)(v), *available at*

Singleton v. Merrill, No. 2:21-cv-1291 (N.D. Ala.), ECF No. 57-4, at 4. That guideline is unsurprising in light of this Court's explanation that "maintaining existing relationships between incumbent congressmen and their constituents" "promote[s] 'constituency-representative relations.'" *White v. Weiser*, 412 U.S. 783, 791 (1973). As a member of the reapportionment committee, Senator Singleton in the Alabama legislature voted to approve these guidelines. *See* Permanent Legislative Committee on Reapportionment, *Motion to Adopt Guidelines* (May 5, 2021), *available at Singleton v. Merrill*, No. 2:21-cv-1291 (N.D. Ala.), ECF No. 68-8, at 2.

District 7 in Alabama was first drawn as a majority-minority district in 1992. *See Wesch v. Hunt*, 785 F. Supp. 1491, 1498–99 (S.D. Ala. 1992) (discussing the creation of this district). It has been a majority-minority district in western Alabama ever since. It remains that way under Alabama's most recently enacted congressional districts. *See* Ala. Code §17-14-70 (as amended by Alabama Act 2021-555, §2).

Yet in *Singleton v. Merrill*, Senator Singleton, as a plaintiff, alleged that Alabama's District 7 violated the Fourteenth Amendment because it "has been expressly designed to perpetuate the racial gerrymander first created in 1992." Compl. ¶57, No. 2:21-cv-1291 (N.D. Ala.). In other words, the Senator and his coplaintiffs complain that the Alabama map *follows* the very criteria that the Senator voted to adopt.

Such litigation shenanigans are not exclusive to redistricting cases. They appear in myriad voting-related matters. The Court need look no further than *Andino v. Middleton*, in which the District of South

Carolina "defied . . . this Court's precedents" by enjoining South Carolina's absentee-ballot witness-signature requirement on the eve of the 2020 general election. 141 S. Ct. 9, 10 (2020) (Kavanaugh, J., concurring). In that litigation, one plaintiff challenged the witness-signature requirement as imposing a burden on her right to vote because she "live[d] alone" and would have "to unnecessarily risk exposure to COVID-19" to have someone witness her absentee ballot. Am. Compl. ¶17, *Middleton v. Andino*, No. 3:20-cv-1730 (D.S.C. July 21, 2020), ECF No. 69. Yet just three days after the district court enjoined the witness-signature requirement, *see Middleton v. Andino*, 488 F. Supp. 3d 261 (D.S.C. 2020), this plaintiff did a television interview about the case, while sitting (unmasked, no less) on a sofa next to her son, *see Federal Judge Says You Won't Need a Witness Signature for Your Absentee Ballot This November*, WIS-TV (Sept. 21, 2020), https://tinyurl.com/52ys2u25 (clips in video between 0:30 and 1:45). As state officials pointed out to this Court in that litigation, if this plaintiff could sit beside her son for a television interview, could she also not sit beside him while he witnessed her absentee ballot? Implausible claims like this challenge to the witness-signature requirement are littered across voting litigation.

* * *

All of these cases show the lengths to which plaintiffs in redistricting cases (and voting cases generally) will go to achieve their desired result. Given the stakes, perhaps such efforts shouldn't be a surprise. Nevertheless, they cannot be justified or condoned. This Court should use this case as an

opportunity to rein in these efforts. Litigants should be held to account for their litigation decisions, and the same rules that apply in every case should apply in redistricting cases. A "government of laws" demands no less. *Marbury v. Madison*, 5 U.S. (1 Cranch) 137, 163 (1803).

CONCLUSION

For these reasons, the Court should reverse the judgment of the district court.

Respectfully submitted,

Thomas A. Limehouse, Jr.
Chief Legal Counsel
Wm. Grayson Lambert
Senior Litigation Counsel
Counsel of Record
OFFICE OF THE GOVERNOR
South Carolina State House
1100 Gervais Street
Columbia, SC 29201
(803) 734-2100
glambert@governor.sc.gov

Counsel for
Governor McMaster