

No. 22-807

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IN THE  
**Supreme Court of the United States**

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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.*

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

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**BRIEF OF UNITED STATES CONGRESSMAN  
JAMES E. CLYBURN AS *AMICUS CURIAE* IN  
SUPPORT OF APPELLEES**

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August 18, 2023

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**INTEREST OF *AMICUS CURIAE*<sup>1</sup>**

Congressman James E. Clyburn respectfully submits this amicus brief in support of Appellees. A native of South Carolina, Congressman Clyburn has represented the State's Sixth Congressional District ("CD") since 1993. He currently serves as the Assistant Democratic Leader in the United States House of Representatives and Chairman of the Democratic Faith Working Group. He previously served as Majority Whip (2007–2011 and 2019–2023) and was the highest-ranking African American in congressional leadership.

As a duly elected member of Congress and representative of citizens of South Carolina, Congressman Clyburn has representational interests in the law of congressional redistricting and in ensuring that the boundaries of districts in his state do not violate the Constitution. Moreover, Congressman Clyburn has a specific interest in highlighting portions of the record that accurately refute Appellants' erroneous allegations at trial and in this Court about his purported involvement in the 2022 Reapportionment Plan.

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<sup>1</sup> Pursuant to Rule 37.6, *amicus* affirms that no counsel for a party authored this brief in whole or in part and that no person other than *amicus*, his staff, or his counsel made any monetary contributions intended to fund the preparation or submission of this brief.

## INTRODUCTION AND SUMMARY OF THE ARGUMENT

Following each decennial census, states delineate the boundaries of congressional districts in a process called redistricting. In the wake of the 2020 census, the South Carolina General Assembly began the process of redesigning its seven congressional districts to comply with the Equal Protection Clause’s one-person-one-vote mandate. *See* JSA.15a.<sup>2</sup> The Governor signed the congressional districting plan (“Enacted Plan”) into law on January 26, 2022. A district-court panel of three judges found that the Enacted Plan’s design of Congressional District 1 (“CD1”) was an unconstitutional racial gerrymander intentionally designed to dilute minority voting power. JSA.42a–47a.

In defense of their unconstitutional Enacted Plan, Appellants allege that Congressman Clyburn engaged in meaningful participation during the 2022 congressional redistricting process. *See* Appellants’ Br. 10–11. Appellants, however, point to no evidence in the record that shows Congressman Clyburn or any member of his staff substantively impacted what would become the Enacted Plan. Appellants contend that a one-page draft map of *one congressional district*—given by a member of Congressman Clyburn’s staff to the Senate’s cartographer at the

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<sup>2</sup> This brief refers to appendices as follows: Jurisdictional Statement Appendix (Feb. 17, 2023) (“JSA”), Supplement to the JSA (Mar. 29, 2023) (“JSA.Supp.”), and Supplement to the Joint Appendix (Aug. 11, 2023) (“JA.Supp.”).

outset of the redistricting process—proves that Congressman Clyburn meaningfully affected the *statewide* redistricting plan. The record reflects that is not so.

Unlike other proposed maps that the Senate cartographer received during the redistricting process, the one-page draft map (“Draft CD6 Map”) was not a complete “plan.” Indeed, it lacked the necessary information to even create one. Tr. 1411:2–4.<sup>3</sup> The Senate’s cartographer himself acknowledged that the Enacted Plan significantly deviated from the Draft CD6 Map. Tr. 1555–59.

After carefully weighing the evidence, the three-judge, district-court panel found that the Enacted Plan was a “stark racial gerrymander.” JSA.26a, 29a, 34a. The panel further determined that the Enacted Plan was “inconsistent” with the one-page draft map that “the [cartographer] claimed to be faithfully following.” JSA.29a. The panel’s findings are based on the fundamental differences between the Draft CD6 Map and the Enacted Plan. And they reflect the indisputable fact that a redistricting *plan* must include analytical and quantitative data—such as county or municipal splits, the preservation of the core of prior districts, census data, GIS (geographic-information system) files, geopolitical precinct-boundary lines, voter and constituent data, and more—all of which are absent from the one-page

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<sup>3</sup> ECF No. 508, Trial Tr. vol. VI (Oct. 11, 2023) [hereinafter Tr.].

sketch of Congressman Clyburn's congressional district.

This Court should affirm the district-court panel's careful and detailed findings, including its determinations that the 2022 Enacted Plan constitutes a "stark racial gerrymander," and the Legislature designed the boundaries of CD1 with a "racially discriminatory intent." JSA.26a, 29a, 34a, 45a.



## ARGUMENT

### **I. Congressman Clyburn Was Not Substantively Involved in the 2022 Congressional Reapportionment Plan.**

It has become routine for parties concerned with congressional redistricting and its impact on campaigns and elections to provide input on the redistricting process. The 2022 South Carolina redistricting process was no different in that regard. *See* JSA.15a (noting that “[a] number of citizens appeared at the public hearings advocating specific designs for the 2022 congressional plan”); Tr. 1394:4–6 (Roberts, South Carolina Senate chief cartographer) (affirming that “members of the Senate . . . ma[de] requests or recommendations for how the maps would be drawn”); Tr. 1255:7–18, 1259:14–23 (Brenda Murphy, South Carolina NAACP President) (expressing “concerns” about the “[p]acking and cracking” of Black voters and the “dilution of the Black vote”); Tr. 641:7–642:2 (John King, South Carolina State Representative) (same).

During the South Carolina redistricting process, the “nonpartisan staff,” ECF No. 462-3, Fiffick Dep. 26:4–9 (July 21, 2022), that assisted the Senate Judiciary Committee and the Senate Judiciary Redistricting Subcommittee (“Senate Redistricting Subcommittee”) in redrawing the congressional map solicited “input from the public, [S]enate members, as well as congressional members on how they would like to see the plan,” Tr. 1393:23–24 (Roberts). The “core” Senate redistricting staff, Tr. 1373:20–25 (Roberts), included William Roberts, chief cartographer for the

Senate, *see* Tr. 1354:16–17 (Roberts), Andrew Fiffick, Director of Research and Chief of Staff to the Senate Judiciary Committee, *see* Fiffick Dep. 51:4–7, and Charles Terreni, outside counsel to the Senate, *see id.*; Fiffick Dep. 20:3–10.

Despite Appellants’ efforts to assign specific accountability for the Enacted Plan to Congressman Clyburn, *see* Appellants’ Br. 10–12, Congressman Clyburn’s involvement in the redistricting process was routine and circumscribed. Moreover, as the district-court panel correctly found, Roberts “subordinat[ed] . . . traditional districting principles” in a manner “inconsistent with the Clyburn staff plan . . . that [Roberts] claimed to be faithfully following,” JSA.29a; *see also* U.S. Br. 20 (“Nor can the [Enacted] [P]lan’s irregularities be explained by the proposed plan submitted by Congressman Clyburn’s staff.”). In any event, Appellants’ unsupported claim that Congressman Clyburn participated in the 2022 congressional redistricting process is legally irrelevant to this appeal, which specifically concerns whether (1) South Carolina CD1 is an unconstitutional racial gerrymander, and (2) the Legislature engaged in intentional racial discrimination.

As part of the redistricting process, Republican lawmakers submitted “requests and recommendations” to the Senate staff for how to design the Enacted Plan. Tr. 1402:9–12. United States Congressman Joe Wilson, for example, personally requested that his district, CD2, “keep Fort Jackson” but exclude “Beaufort County,” Tr. 1403–04 (Roberts). State Senator Luke Rankin, who chaired

the Senate Judiciary Committee and Senate Redistricting Subcommittee and directed the Senate redistricting staff, Tr. 1498:6–9, 1575:6–13, requested that Roberts not “touch” CD7, Tr. 1402:13–16, 1516:10–13. Roberts honored both requests in what would become the Enacted Plan. Tr. 1516:10–1517:1.

A member of Congressman Clyburn’s staff likewise submitted recommendations for the configuration of Congressman Clyburn’s Congressional District, CD6. Roberts and Fiffick received a one-page printout of a draft map depicting the approximate outer bounds of CD6. Tr. 1405:15–19, 1411:4–5. Roberts and Fiffick received the Draft CD6 Map within hours of having received other proposed maps from the National Republican Redistricting Trust. *See* Tr. 1410:16–20 (Roberts); *see also* ECF No. 462-5, Terreni Dep. 123:13–15 (Aug. 16, 2021) (noting that the submission of a redistricting map by a “member of [a] congressional delegation” “wouldn’t have been unusual”).

The Draft CD6 Map was, as Roberts characterized it during trial, “just [an] eight-and-a-half-by-11 piece of paper.” Tr. 1411:1–5, 20 (Roberts). Fiffick likewise testified that he considered the map “very rudimentary” and “unremarkable.” Fiffick Dep. 88:5, 85:13–14. Unlike the “other maps” Roberts was “used to receiving” that “were full plans,” Tr. 1521:16–20 (Roberts), the submission from Congressman Clyburn’s staff was “just a hard copy,” Fiffick Dep. 84:20, without “any GIS files” “from which [Roberts] could recreate th[e] map,” Tr. 1411:2–4 (Roberts).

In contrast to the other proposed maps that Roberts made an effort to “tweak” and understand, Tr. 1521:25–1522:2, Roberts did not clarify Congressman Clyburn’s interests for CD6, *see* Tr. 1519:6–10. A member of Congressman Clyburn’s staff informed Roberts that the Congressman wanted “minimal change” in his district. Tr. 1407:18–19, 1408:11–13 (Roberts). Yet Roberts never “asked him what he meant by least changed,” even though Roberts knew that “it would have been impossible for CD6 to be a least-changed map,” Tr. 1519:8–14, because CD6 was 11.59% *underpopulated*, JSA.17a, and needed to gain “a lot of population” in order to reach the one-person-one-vote target following the 2020 census. Tr. 1519:12–14 (Roberts). Nor did Roberts request GIS files with which he could recreate the Draft CD6 Map, despite acknowledging that he “could have.” Tr. 1522:8–10 (Roberts). Congressman Clyburn’s staff had also communicated the Congressman’s request for “more of Sumter to be placed in” CD6. Tr. 1518:7 (Roberts). Roberts testified that he did not “know if that meant the city or the county” and did not seek clarification. Tr. 1518:7–8, 1519:6 (Roberts).

Congressman Clyburn’s staff had no further contact with Roberts or Fiffick before the Governor signed the Enacted Plan into law on January 26, 2022. *See* Fiffick Dep. 86:19–20; Tr. 1547:6–9 (Roberts). Roberts “never followed up with [Congressman Clyburn’s staff] to share [Roberts’s Milk Plan] to see if it was accurate,” even though such plan was, according to Roberts, “the original basis for” the Senate Staff Plan, “which then became the basis for Senate Amendment 1,” namely, the Enacted Plan. Tr. 1515:8–9, 1520:8–9. Moreover, on direction from

Fiffick and Terreni, Roberts did not share the Draft CD6 Map with the Senate Redistricting Subcommittee members participating in the November 29, 2021 hearing regarding the Senate Staff Plan. Tr. 1520:20–23, 1521:2–13.

Testimony and statements from Fiffick, Terreni, and Roberts corroborate the limited involvement and impact of Congressman Clyburn or his staff on the 2022 redistricting efforts. Fiffick testified that the Draft CD6 Map was “never used.” Fiffick Dep. 85:2–4. And because “no member of the Senate came and asked [Roberts or Fiffick] to do anything with” the Draft CD6 Map, “[they] didn’t.” Fiffick Dep. 86:14–15. Terreni did not identify Congressman Clyburn or his staff as having played any substantive role in the redistricting process. *See* Terreni Dep. 123:16–124:6. Further, Roberts himself stated during the November 29, 2021 Senate Redistricting Subcommittee hearing that Congressman Clyburn and other members of Congress had “very little” input in the “formulation of” the Senate Staff plan then under consideration. S.C. Senate Redistricting Subcomm. Hr’g Tr. 26:25–27:21, 28:6–13 (Nov. 29, 2021).

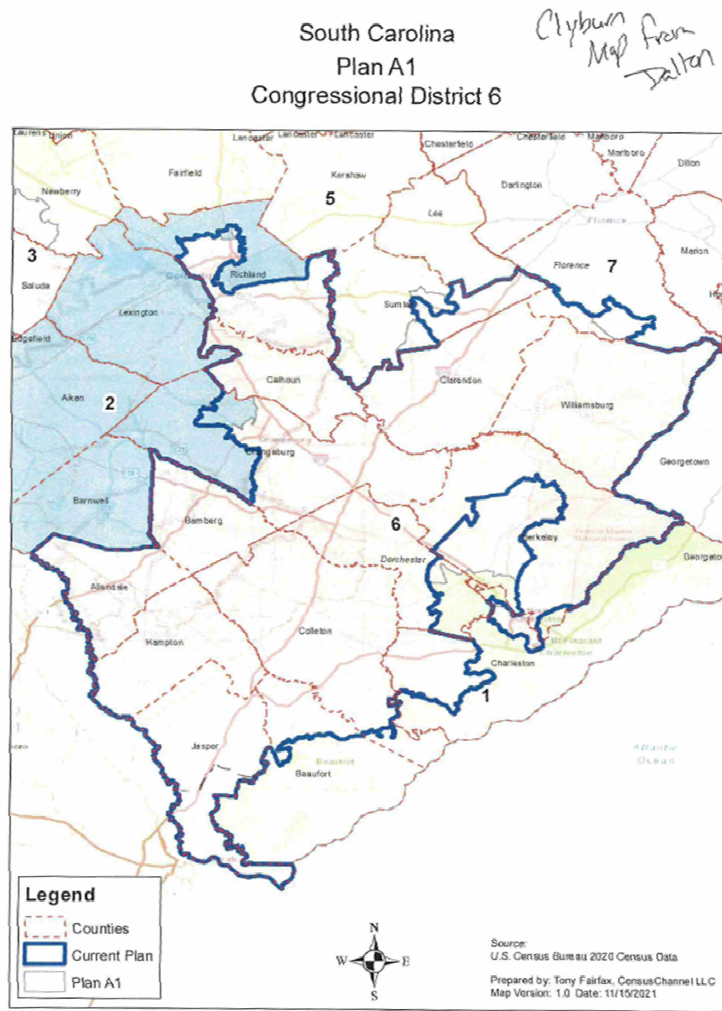
Finally, and as explained in Section II, despite Roberts’s uncorroborated testimony that he drew “[h]eavily” from the Draft CD6 Map in drawing the Enacted Plan, Tr. 1419:18–1420:4, the district-court panel determined that the Enacted Plan substantially departed from the Draft CD6 Map, particularly with respect to Charleston County. *See* JSA.29a (“Roberts . . . admitted that his movement of nearly 17,000 African Americans from St. Andrews was inconsistent with the [Draft CD6 Map] for Charleston County that

he claimed to be faithfully following.”); Tr. 1556:13–15, 1558:13–15, 1559:3–5 (noting Roberts’s testimony).

## **II. The Enacted Plan for Statewide Reapportionment and the Single-Page, Draft CD6 Map are Fundamentally Different.**

The record is crystal clear about the differences between the Draft CD6 Map and the Enacted Plan. First, the Draft CD6 Map is not, by any objective measure, a redistricting “plan.” Appellant’s Br. 54. As shown in Figure 1 below, the single-page, Draft CD6 Map focuses on Congressman Clyburn’s district; it is not a detailed redistricting plan for the entire state of South Carolina. Rather, it merely represents a rough outline of Congressman Clyburn’s preferred CD6 boundaries that would result in the least change to his district.

Unlike a formal redistricting plan, there is nothing in the Draft CD6 Map that shows analytical or quantitative data concerning county or municipal splits, the preservation of the core of prior districts, the decennial census data, GIS files, geopolitical precinct-boundary lines, or even voter and constituent data—such as voting-age population, race, and ethnicity—for CD6 or any other adjacent congressional district.



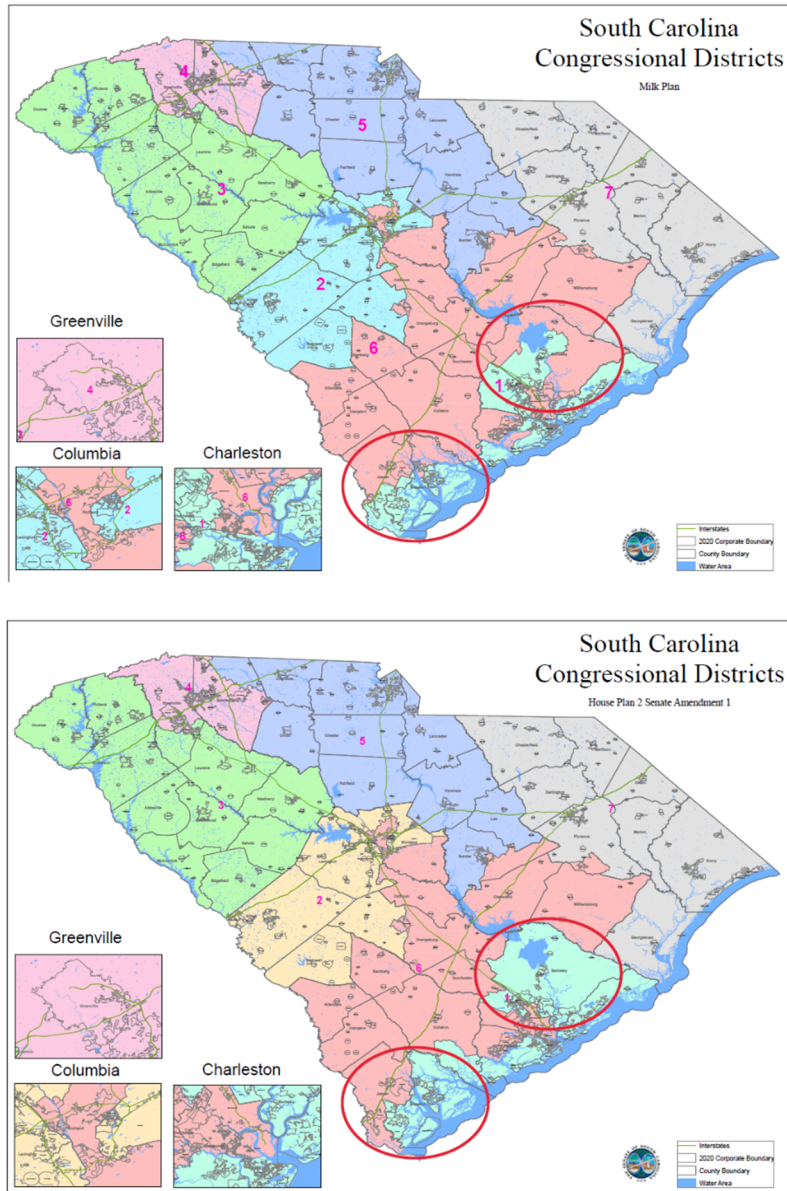
**Figure 1. Draft CD6 Map.**  
JA.Supp.155a.

Appellants mischaracterize the single-page, Draft CD6 Map as Congressman Clyburn’s “preferred plan,” *id.*, Congressman Clyburn’s “preferred configuration,” *id.* at 11, the “Clyburn staff model,” *id.* at 48, and the

“Clyburn proposal,” *id.* at 17. This strategy is no coincidence. Appellants seek to blur the distinctions between the single-page, Draft CD6 Map, which Roberts received from Congressman Clyburn’s staff on Friday, November 19, 2021, and the “Milk Plan,” a redistricting plan Roberts created and issued on Tuesday, November 23, 2021 and which, according to Roberts’s uncorroborated testimony, was the “original basis” for the Enacted Plan. Tr. 1515:8. Appellants’ suggestion that the Draft CD6 Map formed the basis for the Enacted Plan is simply false. The notion that Roberts could have taken a partial, one-page sketch of one district in South Carolina to create a comprehensive, one-person-one-vote, statewide reapportionment plan over a weekend defies logic.

Second, Appellants contend that that the Enacted Plan “originated from” and “relied [h]eavily” on” Roberts’s Milk Plan, which they claim had already “incorporat[ed]” the Draft CD6 Map. Appellants’ Br. 11; *compare* Tr. 1515 (noting Roberts’s testimony that the Milk Plan was based on a sketch of CD6 that Congressman Clyburn’s staff provided), *with* Terreni Dep. 123:16–124:6 ([W]e didn’t think [the Draft CD6 Map] was useful . . . so basically, you know, we . . . put it aside.”). Even if that contention—which is unsupported in the record—were true, Roberts’s Milk Plan and the Enacted Plan still bear fundamental differences. For example:





**Figure 2.** Roberts’s Milk Plan (top) and the 2022 Enacted Plan (bottom). The red ovals

represent racially gerrymandered areas along the CD1–CD6 border where tens of thousands of African American voters were removed from their home districts. JA.Supp.156a; JSA.Supp.306a.

- The Milk Plan proposed 27 precinct splits, while the Enacted Plan includes 10 precinct splits. *Compare* JSA.122a, *with* JSA.154a, 447a.
- The Enacted Plan retains significantly less of the core of CD6 than the Milk Plan. *Compare* JSA.126a (83.15%) *with* JSA.153a (77.41%). Indeed, the three-judge, district-court panel determined that Roberts’s changes in Charleston County in the Enacted Plan “doubl[ed] down on the racial division of [the] County by the movement of 62% of the African American residents of [CD1] into [CD6].” JSA.27a. The panel found that those changes were unlawful and “made a mockery of the traditional districting principle of constituent consistency.” *Id.*
- Under Roberts’s Milk Plan, CD1 had the fourth highest core retention of any district. Under the Enacted Plan, in contrast, CD1 had the second lowest core retention of any district. *Compare* JSA.124a–126a (97.34%), *with* JSA.153a (92.78%). The Milk Plan, therefore, proposed fewer population exchanges between districts and constituted more of a “least-changed” plan when compared to the Enacted Plan.
- Unlike the Enacted Plan, the Milk Plan retained the City of Charleston in CD1, as well as the

majority of Charleston County. *Compare* JA.Supp.156a, *with* JSA.Supp.306a, *and* JSA.447a.

- Under the Milk Plan, CD6 approached the City of Charleston peninsula from the northeast, JA.Supp.156a. The 2022 Enacted Plan, however, incorporates a western approach through Dorchester County and West Ashley/St. Andrews. *Compare* JA.Supp.156a, *with* JSA.Supp.306a. The panel identified these as areas in which a significant population of African American voters had been moved from CD1 to CD6. *See* JSA.24a–26a, 29a.
- The Milk Plan split Beaufort and Berkeley counties along the CD1–CD6 border, whereas the Enacted Plan did not split the counties. *Compare* JA.Supp.156a, *with* JSA.Supp.306a, *and* JSA.447a.

Taken in its totality, the record unequivocally reflects that the Draft CD6 Map was not, as Roberts’s uncorroborated testimony put it, “the original basis” for a series of plans that “evolved into Senate Amendment 1.” Tr. 1515:3–10. Nor can Appellants point to any evidence in the record to show that Congressman Clyburn or any members of his staff played any substantive role in drafting either Roberts’s Milk Plan or the Enacted Plan.

\* \* \*

Not only are the differences between the single-page, Draft CD6 Map and the Enacted Plan clear on

their face, Roberts acknowledged several differences during his testimony. As discussed in Section I, Roberts testified that he only received a printed, one-page, Draft CD6 Map that he then attempted to “approximate” with his mapmaking software. Tr. 1411:12–13. But he never followed up with Congressman Clyburn or his staff to ensure that his approximated map accurately depicted Congressman Clyburn’s wishes. Tr. 1519:6–7, 1520:7–9.

Although Roberts initially testified that he relied “[h]eavily” on the Draft CD6 Map, Tr. 1419:18–20, he acknowledged under questioning from the district-court panel that in Charleston County he abandoned the “least-changed” principle that he had applied in other parts of the state. Tr. 1555:23–1557:16. And although Roberts testified that “minimal change” in CD6 was central to Congressman Clyburn’s request, *see* Tr. 1517:5–1519:14, he acknowledged that he treated the CD6 boundary in Charleston County in a fundamentally different way than he did the rest of the state. Tr. 1555:5–1559:5. Indeed, Roberts confirmed that, contrary to Congressman Clyburn’s request, the changes implemented in Charleston County were “dramatic.” Tr. 1556:13–15. When pressed by the court, Roberts conceded that his movement of thousands of African Americans in St. Andrews from CD1 to CD6 was inconsistent with the Draft CD6 Map and “created tremendous disparity” in the placement of African Americans within CD1 and CD6 in Charleston County. Tr. 1559:3–5.

Other witnesses at trial also confirmed that the Enacted Plan did not follow the Draft CD6 Map. For instance, Fiffick testified that after meeting with the

member of Congressman Clyburn’s staff who submitted the Draft CD6 Map, he had the impression that the staffer “just wanted to see what the maps looked like,” and “didn’t seem like he had any sort of message.” Fiffick Dep. 84:9–11. Indeed, when asked whether the Draft CD6 Map “informed anything that . . . Roberts did in terms of drawing up a congressional map,” Fiffick reiterated, “It did not because we operated on instructions of members and I never received any instructions that I can remember, obviously remember about that map.” Fiffick Dep. 86:21–87:2. Nor did Terreni identify Congressman Clyburn or his staff as having supplied a starting point or played any kind of substantive role in the drafting of the Enacted Plan. Terreni testified that “[i]f we had somehow used these maps [from members of Congress] as the basis for something we proposed to the South Carolina Senate for its consideration with the subcommittee, I believe we literally said, hey, we got this map . . . we didn’t think it was useful . . . so basically, you know, we . . . put it aside.” Terreni Dep. 123:16–124:6.

Finally, Appellants’ repeated admonitions that CD1 had a higher Black voting-age population (“BVAP”) percentage in the Enacted Plan than in the Draft CD6 Map, *see* Appellants’ Br. 17, 48, 54, have no basis in the record.<sup>4</sup> The record is abundantly clear:

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<sup>4</sup> Appellants’ BVAP argument is misleading. Appellants presumably refer to the BVAP of CD1 in Roberts’s “Milk Plan,” not the Draft CD6 Map, which is an imprecise, one-page sketch of CD6 that lacks a calculable BVAP percentage for any district. As

the Draft CD6 Map was a printed, single-page sketch that only suggested the outer bounds of CD6. *See* JA.Supp.155a. The Draft CD6 Map did not contain the street-by-street level of detail required to accurately calculate a BVAP percentage. *See* Tr. 1411:12–13 (noting that Roberts had to use software to “approximate” the Draft CD6 Map). More importantly, the BVAP percentage of CD1 could not be ascertained from the Draft CD6 Map because that draft map focused on CD6 and did not prescribe the outer bounds of CD1 or any other district.

As the Supreme Court recognized in *Allen v. Milligan*, 143 S. Ct. 1487, 1514 (2023), there are a “trillion trillion[]” possible ways to draw Congressional maps. And although portions of CD1 and CD6 share a border, CD1 also shares a border with CD7. Because the Draft CD6 Map did not focus on the CD1–CD7 border, it is mathematically impossible to calculate the BVAP of CD1 in the Draft CD6 Map. The Legislature could have chosen any one of a “trillion trillion[]” ways to redraw districting lines in the Enacted Plan. *Id.* at 1514. The Legislature’s choice of an unconstitutional racial gerrymander cannot be absolved by the existence of an imprecise draft map Roberts received from a member of Congressman Clyburn’s staff, which does not support Appellants’ BVAP claims and, regardless, was never incorporated into the Enacted Plan.

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shown earlier in this Section, the record is clear that Roberts’s Milk Plan and the Draft CD6 Map are not the same. *Compare* JA.Supp.155a, *with* JA.Supp.156a.

**CONCLUSION**

For the foregoing reasons, as well as the reasons set forth in the briefs of Appellees and Respondents supporting Appellees, this Court should affirm the decision of the three-judge, district-court panel.

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