

DISENTANGLING RACE AND POLITICS: RACIAL GERRYMANDERING IN SOUTH CAROLINA’S FIRST CONGRESSIONAL DISTRICT

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INTRODUCTION

In November 2018, South Carolina’s First Congressional District (“CD-1”) elected a Democratic representative for the first time since 1980 in a “major political upset.”¹ The district then became a significant target of the National Republican Congressional Committee’s campaigning efforts to reclaim seats lost in 2018.² In 2020, the Republican candidate prevailed, setting the stage for a new cycle of redistricting initiated by the decennial census.³ The boundaries of CD-1 would become contentious in the Republican-controlled South Carolina state legislature’s subsequent redistricting process.⁴ The state legislature’s plan shored up Republican support in the district by adjusting the lines and shifting nearly two-hundred thousand people between CD-1 and nearby CD-6.⁵ The South Carolina State Conference of the NAACP noted that thirty thousand of the residents moved from CD-1 to CD-6 were Black, and it filed suit on the grounds that the new plan for CD-1 was unconstitutional under the Fourteenth

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1. S.C. State Conf. of NAACP v. Alexander, 649 F. Supp. 3d 177, 187 (D.S.C. 2023) (on appeal, Alexander as appellant and S.C. State Conference of NAACP as appellee) (hereinafter *Alexander* in short form).

2. Jason Pramuk, *Republicans look to reclaim dozens of House seats in 2020 after midterm ‘blue wave’ wipeout*, CNBC (Feb. 8, 2019 12:58 PM), <https://www.cnbc.com/2019/02/08/nrcc-releases-2020-election-house-targets-after-democrats-win-majority.html>.

3. *Alexander*, 649 F. Supp. 3d at 182, 187.

4. *Id.* at 187–88.

5. Brief for Appellants at 15, *Alexander v. S.C. State Conf. of NAACP*, 143 S. Ct. 2456 (No. 22-807).

and Fifteenth Amendments’ Equal Protection Clauses.⁶ This commentary analyzes the issues and implications of the Supreme Court’s review of the lower court’s finding that race was the predominant factor in CD-1’s design, constituting an illegal racial gerrymander.⁷ It concludes that the Court should affirm the district court’s findings based on the deferential clear error standard of review and discusses how a reversal may negatively impact future plaintiffs’ ability to bring racial gerrymandering cases.

FACTS

CD-1 covers much of the South Carolina coastline and has historically been anchored in Charleston County.⁸ The district—one of seven in South Carolina—was targeted for redistricting after the 2020 Census. Although the number of South Carolina’s congressional districts remained at seven, the population needed for each district to have equal representation in Congress had shifted to 731,203 people;⁹ CD-1, having grown over the previous decade, held a population excess of twelve percent (or 87,689 people).¹⁰ The Republican majorities in both the South Carolina House and Senate, according to the district court, “sought to create a stronger Republican tilt to Congressional District No. 1.”¹¹ One Republican state legislator from Charleston County, George “Chip” Campsen, sponsored the redistricting plan that would ultimately be approved by the state legislature.¹² An experienced cartographer, Will Roberts, was the principal architect of the new map, and he “was intimately familiar with South Carolina’s demographic and geographic data, including its racial data.”¹³ Departing from CD-1’s design in the 2010 census, Senator Campsen sought to add the whole of Berkeley and Beaufort Counties, alongside a portion of Dorchester

6. *Alexander*, 649 F. Supp. 3d at 182. Plaintiffs also unsuccessfully claimed that the state legislature’s designs for CD-2 and CD-5 were unconstitutional. This commentary primarily focuses on CD-1 because CD-1 is the principal district at issue on appeal.

7. Other issues on appeal include whether the district court failed to apply the presumption of good faith to the state legislature and whether the court erred by upholding the plaintiffs’ intentional discrimination claim. *Alexander v. South Carolina State Conference of the NAACP*, SCOTUSBLOG, <https://www.scotusblog.com/case-files/cases/alexander-v-south-carolina-state-conference-of-the-naacp/>. This commentary will primarily focus on the legal issue and implications of how plaintiffs may prove that race predominated in reapportionment decisions.

8. *Alexander*, 649 F. Supp. 3d at 187.

9. *Id.* at 185.

10. *Id.*

11. *Id.* at 187–88.

12. *Id.* at 188.

13. *Id.*

County, to an already oversized district based on Charleston County.¹⁴ With these areas added, the new CD-1 was approximately 20.3 percent Black.¹⁵ To remedy the population imbalance and achieve Senator Campsen's partisan goals, Will Roberts moved several areas of Charleston County (formerly in CD-1) into the underpopulated CD-6.¹⁶ The new CD-1 now had a Black population of 17.8 percent.¹⁷ While Roberts was working on these maps, he used political data from a single presidential race (2020)¹⁸ and had access to racial data on his cartography software.¹⁹

14. *Alexander*, 649 F. Supp. 3d at 188.

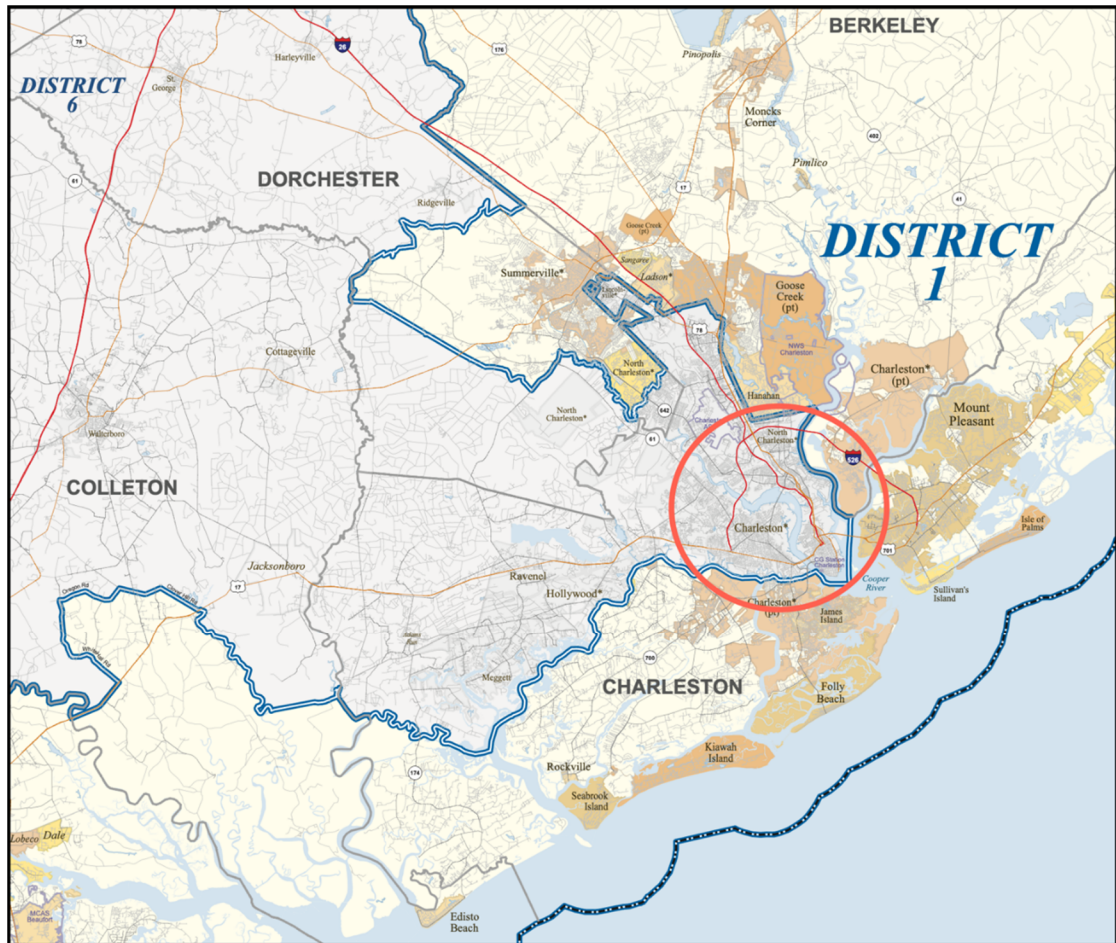
15. *Id.* at 189. CD-1 at the time of enactment of the 2011 plan, by contrast, had a Black voting age population of approximately 17%. Appellees' Brief at 30, *Alexander*, 143 S. Ct. 2456 (No. 22-807).

16. Neither party disputes this fact, though the question of whether race predominated in the act of moving portions of Charleston County into CD-6 remains the primary issue in the case. See Brief for Appellants, *supra* note 5, at 15 ("The Enacted Plan achieves the General Assembly's political goal by moving 'strong Republican performing' VTDs in Beaufort, Berkeley, and Dorchester Counties from District 6 to District 1 and strong Democratic VTDs in Charleston County from District 1 to District 6."). See also Appellees' Brief at 30, *Alexander*, 143 S. Ct. 2456 (No. 22-807) ("Defendants imposed a 17% racial target with the goal of ensuring a partisan advantage in CD-1.").

17. *Alexander*, 649 F. Supp. 3d at 190.

18. See *id.* at 192 ("Race was measured using the number of African American voters in the VTD and the partisanship of the VTD was measured based on the number of votes for Joe Biden or Donald Trump in the 2020 general election.").

19. See *id.* at 188 ("From [preparing reapportionment plans for South Carolina counties, cities, and school boards], Roberts was intimately familiar with South Carolina's demographic and geographic data, including its racial data.").



The area circled in red shows the densely populated city of Charleston and immediately surrounding areas having swapped from CD-1 (light yellow) to CD-6 (light blue), with portions of adjacent counties added to CD-1.²⁰ The Black residents who were moved out of CD-1, the focus of the plaintiffs' claims, live in the sections of Charleston County that were transferred to CD-6.

The significant changes in the composition of CD-1 prompted resident and NAACP member Taiwan Scott to file suit, alleging a racial gerrymander had occurred. The plaintiffs cited the legislature's initial

20. U.S. Census Bureau, *118th Congress of the United States: South Carolina – Congressional District 1*, https://www2.census.gov/geo/maps/cong_dist/cd118/cd_based/ST45/CD118_SC01.pdf (annotation added).

overcrowding of CD-1, followed by the transfer of thirty-thousand Black residents into CD-6,²¹ South Carolina's only near-majority-Black district.²² Plaintiffs simultaneously alleged racial gerrymanders in two other congressional districts: CD-2 and CD-5.²³ The defendants in the case include Thomas Alexander, the President of South Carolina's Senate, alongside other representatives in the state government. In response to the suit, the defendants claim that Will Roberts and the legislature only ever utilized political data and "traditional criteria—never race."²⁴

LEGAL BACKGROUND

The South is no stranger to racial gerrymandering cases in the federal courts. The first in a line of racial gerrymandering cases before the Supreme Court was *Shaw v. Reno* (1993),²⁵ arising from a claim in North Carolina. Residents of Durham County made the novel allegation that the state's General Assembly had "created two Congressional Districts in which a majority of black voters was concentrated arbitrarily . . . with the purpose to create Congressional Districts along racial lines."²⁶ The Court upheld the validity of the claim on equal protection grounds, explaining, that "state legislation that expressly distinguishes among citizens because of their race [must] be narrowly tailored to further a compelling governmental interest."²⁷ With the plaintiffs' racial gerrymandering claim intact, the case went back down to a district court panel.²⁸ Upon second review, the Court conclusively struck the design of North Carolina's CD-12 on the grounds that it was deliberately drawn to create a majority of Black voters, and because it was neither narrowly tailored nor did it serve a

21. See Appellees' Brief, *supra* note 15 at 1 ("Defendants could have equalized population across congressional districts after the 2020 Census by simply shifting approximately 85,000 people from CD1 to CD6. Instead, they moved almost 53,000 people into the already overpopulated CD1, and then another 140,000 people out. In doing so, Defendants 'bleached' Charleston County of 62% of its Black residents, more than 30,000 people, removing every precinct but one with more than 1,000 Black voters.").

22. Congressional District 6 is approximately 47.5% Black. See U.S. Census Bureau, *My Congressional District: South Carolina, Congressional District 6*, <https://www.census.gov/mycd/?st=45&cd=06>.

23. *Alexander*, 649 F. Supp. 3d at 182.

24. Brief for Appellants, *supra* note 5, at 10.

25. 509 U.S. 630 (1993) (*Shaw I*).

26. *Id.* at 637 (internal quotation marks omitted).

27. *Id.* at 630, 643.

28. *Shaw v. Hunt*, 517 U.S. 899, 901 (1996) (*Shaw II*).

compelling state interest.²⁹

This application of the Fourteenth Amendment represents an example of the “colorblindness” approach to enforcement of the Equal Protection Clause.³⁰ Any racial distinctions made in the state reapportionment process, even if neither malicious nor discriminatory, will be subject to strict scrutiny. As the *Alexander* district court panel concluded in its discussion of the *Shaw* cases: “The Supreme Court made it clear that legislative districting plans which placed or excluded voters by race from a particular district were constitutionally suspect and ‘b[ore] an uncomfortable resemblance to political apartheid.’”³¹

In-between *Shaw I* and *Shaw II*, the Court clarified the plaintiffs’ burden to prove the existence of distinction based on race in reapportionment in *Miller v. Johnson*, a case from Georgia.³² The key legal test at issue in *Alexander* emerged here: plaintiffs 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.”³³ The *Alexander* district court interpreted this to mean that, for plaintiffs to prevail, race may not simply be “a motivating factor,” but rather must be *the* predominant factor.³⁴ In order to accomplish this, “a plaintiff must prove that the legislature subordinated traditional race neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations.”³⁵ Only then would defendants have the opportunity to show that their race-based decision survives strict scrutiny review by serving a “compelling state interest” and being “‘narrowly tailored’ to that end.”³⁶

Neither party disputes that the legal standard derived from *Shaw* and *Miller* governs in this case. However, both parties heavily rely on the *Cromartie* series of cases as well as *Cooper v. Harris*, more recent cases—again from North Carolina—that added significant detail to the

29. *Id.* at 899–900.

30. See James B. Zouras, *Shaw v. Reno: A Color-Blind Court in a Race Conscious Society*, 44 DEPAUL L. REV. 917, 946–48 (1995) (discussing the distinction between discriminatory impact and discriminatory intent to shut Black voters out of the political process).

31. *Alexander*, 649 F. Supp. 3d at 183 (citing *Shaw I*, 509 U.S. at 645, 647).

32. *Id.* (citing *Miller v. Johnson*, 515 U.S. 900 (1995)).

33. *Id.* (citing *Miller*, 515 U.S. at 916) (italics omitted).

34. *Id.* at 198.

35. *Miller*, 515 U.S. at 901.

36. *Id.* at 183–84 (citing *Cooper v. Harris*, 581 U.S. 285 (2017)).

methods and extent to which plaintiffs must prove that race predominated over other traditional race-neutral factors.³⁷ *Cromartie I*, for example, affirmed that a district court's inquiry into any racial gerrymandering claim was a "sensitive" one that must look to all "circumstantial and direct evidence of intent."³⁸ In addition, the district court must apply a presumption of good faith on behalf of the state legislature.³⁹

The circumstantial and direct evidence of intent has varied widely in this line of cases. In *Shaw*, the shockingly irregular design of North Carolina's "I-85 District" (CD-12), which "stretched across much of North Carolina and connected African American portions of various communities in some instances only by the narrow sliver of an interstate highway,"⁴⁰ was integral to the district court's determination that race had predominated in its design.⁴¹ The visually irregular shape served as compelling evidence that other traditional criteria, like "compactness, contiguity, and respect for political subdivisions," had been subordinated.⁴²

In contrast, in *Cromartie I*, where the shape of the district was less dramatically irregular, the plaintiffs utilized other forms of circumstantial evidence, including statistical and demographic evidence.⁴³ Here, the Court looked at North Carolina's CD-12 once again after the state legislature created a new map in response to the *Shaw* decision.⁴⁴ By that point, "blacks no longer constitute[d] a majority of District 12" and the new map better respected traditional reapportionment criteria by splitting fewer counties and shortening the distance between its farthest points.⁴⁵ However, "while District 12 [was] wider and shorter than it was before, it retain[ed] its basic 'snakelike'

37. See *Hunt v. Cromartie*, 526 U.S. 541, 546 (1999) (*Cromartie I*) (citing *Miller*, 515 U.S. at 916) (plaintiffs must prove that "the legislature subordinated traditional race-neutral districting principles, including but not limited to compactness, contiguity, and respect for political subdivisions or communities defined by actual shared interests, to racial considerations"); *Cooper*, 581 U.S. at 288 (citing the same burden as in *Cromartie I*).

38. *Cooper*, 581 U.S. at 288 (quoting *Cromartie I*, 526 U.S. at 546).

39. *Cromartie I*, 526 U.S. at 553 (citing *Miller*, 515 U.S. at 916).

40. *Alexander*, 649 F. Supp. 3d at 183 (citing *Shaw v. Reno*, 509 U.S. 630, 635–36 (1993)).

41. See *Shaw*, 509 U.S. at 647 (noting that "appearances do matter" in reapportionment).

42. See *id.* ("[A] reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to 'segregat[e] . . . voters' on the basis of race.").

43. *Cromartie I*, 526 U.S. at 541.

44. *Id.* at 543–44.

45. *Id.* at 544.

shape and continue[d] to track Interstate 85.”⁴⁶ In addition to the irregular map, the plaintiffs attempted to bolster their claim with “evidence of the district court’s low scores with respect to traditional measures of compactness and expert affidavit testimony explaining that this statistical evidence proved the State had ignored traditional districting criteria.”⁴⁷

For example, the plaintiffs explained to the panel that for six of the counties that partially formed the district in question, “the proportion of black residents was higher in the portion of the county within [the district in question] than the portion of the county in a neighboring district.”⁴⁸ Essentially, the plaintiffs leaned on data that showed that Black residents were being pooled into a specific district, while white residents in their same counties (and therefore common communities) were placed in adjacent districts. They also presented evidence that tended to show that “the State had excluded precincts that had a lower percentage of black population but were as Democratic (in terms of registered voters) as the precinct inside District 12.”⁴⁹ Despite these showings, the *Cromartie I* Court reversed the district court’s grant of summary judgment in favor of the plaintiffs. Among its concerns was the problem that the statistical data, in the court’s view, tended to support both a political explanation and a racial explanation for the map design,⁵⁰ thereby failing to disentangle race from politics and leaving the door open to a dispute of material fact.

After the case had made its way back up as *Cromartie II*, the Court rejected the claim outright.⁵¹ Overturning the lower court’s findings, the justices highlighted the insufficiency of the plaintiffs’ statistical evidence in proving that race predominated.⁵² For example, they noted that the plaintiffs’ expert, Dr. Weber, summarily concluded that CD-12’s design was driven by race because it contained nearly all the voter

46. *Id.*

47. *Id.* at 547.

48. *Cromartie I*, 526 U.S. at 548.

49. *Id.*

50. *See id.* at 550–51. In this conclusion, the Court relied on the state’s expert testimony, which explained that “in precincts with high black representation, there is a correspondingly high tendency for voters to favor the Democratic Party” (internal quotation marks omitted), thereby making it plausible that the legislature could have solely been using political data to isolate voters without knowledge of their race.

51. *See Easley v. Cromartie*, 532 U.S. 234, 234–35 (2001) (*Cromartie II*) (holding that the district court erred in finding that the North Carolina legislature’s 1997 maps violated the Equal Protection Clause).

52. *See id.* at 246–51 (refuting the conclusions from all six of Dr. Weber’s findings that were cited by the district court panel).

precincts that were at least forty percent Black within the six counties that CD-12 sat in, but contained a smaller number of precincts that were at least forty percent reliably Democratic.⁵³ However, his statistics also showed that “virtually all the African-American precincts included in District 12 were *more* than 40 percent reliably Democratic” and that “*none* of the excluded white precincts were *as* reliably Democratic as the African-American precincts that were included in the district.”⁵⁴ Thus, the Court saw a plausible explanation for the overinclusion of African-Americans based solely on their reliably Democratic voting behavior, and believed Dr. Weber’s analysis provided “little insight into the legislature’s true motive.”⁵⁵ Here, neither the still-irregular shape of the map nor the presented statistical inferences convinced the Court that race was *the* predominant factor in CD-12’s design.

The *Cromartie* cases are highly relevant in *Alexander* because they represent an instance where the use of circumstantial, statistical evidence was held as insufficient in proving racial predominance. They also highlight the difficulty of disentangling race from politics in locations where the two are highly correlated. Although the South Carolina legislature leans on the *Cromartie* cases as governing precedent,⁵⁶ the plaintiffs seek to clarify their methods of proof as set forth in *Cromartie II*.⁵⁷ Notably, North Carolina’s CD-12 was disputed because plaintiffs believed the legislature moved too many Black voters into a single district (creating a “majority-minority district”), whereas the *Alexander* plaintiffs allege the state deliberately moved Black voters *out* of South Carolina’s CD-1.

Furthermore, the Court’s more recent holding in *Cooper v. Harris*⁵⁸ also remains relevant. North Carolina’s CD-1 and CD-12 made it to the Supreme Court yet again, this time after the 2010 reapportionment.⁵⁹ Like the claimants in the *Shaw* and *Cromartie* cases, these plaintiffs also argued that Black voters had been impermissibly sorted by race.⁶⁰

53. *Id.* at 247.

54. *Id.*

55. *Id.* at 248.

56. See Brief for Appellants, *supra* note 5, at 40–41 (noting that the Supreme Court had reversed racial gerrymandering findings in both *Cromartie* cases).

57. See Appellees’ Brief, *supra* note 15, at 54 (“[*Cromartie II*] stands merely for the proposition that

when defendants credibly claim they moved voters because of party affiliation and plaintiffs do not meaningfully rebut that claim, an alternative map may be useful evidence.”).

58. 581 U.S. 285 (2017).

59. *Id.* at 295–96.

60. See *id.* at 295, 297 (Noting that the defendants, in ensuring that new congressional

However, unlike *Cromartie*, a majority here affirmed the district court panel's finding in favor of the challengers.⁶¹ In-depth statistical analysis proved to be unnecessary: state legislators in charge of reapportionment made multiple statements on-the-record calling for specific Black voter target populations for the districts in question.⁶² While less relevant for the legal use of circumstantial evidence in racial gerrymandering cases, *Cooper* drove home favorable precedent for future plaintiffs. The Court confirmed that a lower court's findings—"most notably, as to whether racial considerations predominated in drawing district lines—are subject to review only for clear error."⁶³

Lastly, tangential to racial gerrymandering but highly relevant to this case is the 2019 decision in *Rucho v. Common Cause*.⁶⁴ Here, the Court concluded that claims on the basis of partisan gerrymandering in violation of the Fourteenth Amendment (among other constitutional provisions) were non-justiciable questions.⁶⁵ While this case did not focus on a *racial* claim, it nonetheless distinguished racial gerrymandering from partisan gerrymandering⁶⁶ and upheld the open use of partisan intent in the design of congressional districts.⁶⁷ Appellants rely on *Rucho* in their central argument that they utilized only political data for partisan goals in the design of South Carolina's First District.⁶⁸

districts would have nearly equal populations, "chose to take most of those people from heavily black areas of Durham, requiring a finger-like extension of the district's western line" and that residents filed suit complaining of impermissible racial gerrymanders).

61. *Id.* at 286.

62. *See id.* at 299–300 ("Senator Rucho and Representative Lewis were not coy in expressing that goal. They repeatedly told their colleagues that District 1 had to be majority-minority, so as to comply with the VRA. During a Senate debate, for example, Rucho explained that District 1 'must include a sufficient number of African-Americans' to make it a 'majority black district' Similarly, Lewis informed the House and Senate redistricting committees that the district must have 'a majority black voting age population.'").

63. *Id.* at 293.

64. 139 S. Ct. 2484 (2019).

65. *Id.* at 2487.

66. *Id.* at 2502.

67. *See id.* at 2502–03 (holding that a court's finding "that lines were drawn on the basis of partisanship does not indicate that the districting was improper.").

68. *See* Brief for Appellants, *supra* note 5, at 35 ("Whereas using race incurs serious legal risk, as the General Assembly well knew . . . a legislature is 'free' to use 'political data' to draw lines for political goals 'regardless of its awareness of its racial implications.'") (first citing *Bush v. Vera*, 517 U.S. 952, 968 (1996), then citing *Rucho*, 139 S. Ct. 2484)).

DISTRICT COURT'S FINDINGS

As had occurred in prior racial gerrymandering cases at the district court level,⁶⁹ a three-judge panel served as the factfinder in *Alexander*.⁷⁰ After an eight-day trial, the panel found that race was the predominant factor in the state legislature's decision to shift thirty-thousand Black Charleston County residents out of CD-1 in order to achieve a seventeen percent Black voting age population (BVAP) in CD-1.⁷¹ The panel inferred this racial target from other statistical evidence that showed that the maintenance of Charleston County's population in CD-1 from the old 2011 map would "produce a district that was approximately 20% African American."⁷² Due to the very high correlation between race and politics in South Carolina, maintaining this racial composition in CD-1 would make it a "toss-up" in future elections.⁷³ In contrast, the panel relied on "analyses of voting patterns . . . provided by both Plaintiffs and Defendants" to conclude that there was a degree of awareness that a seventeen percent BVAP in the district would establish the desired Republican tilt.⁷⁴ The panel therefore concluded that the legislature recognized it had "[become] necessary to reduce the African American population of the Charleston County portion of the district in the range of 10% to meet the 17% target."⁷⁵

As part of its theory of the seventeen-percent racial target, the panel cited testimony by Will Roberts as evidence that traditional reapportionment principles had been subordinated. "Roberts admitted he abandoned his 'least change' approach . . . and made 'dramatic changes' that 'created tremendous disparity' within Charleston County."⁷⁶ The panel noted that he failed to provide a compelling explanation for how the Black residents of Charleston County share any common community of interest with other residents of CD-6, such as those in the Columbia area. "Roberts could only think of their common proximity to Interstate I-26, albeit over 100 miles apart."⁷⁷

69. See, e.g., *Cooper v. Harris*, 581 U.S. 285, 291 (noting that a three-judge panel convened as the factfinder).

70. S.C. State Conf. of NAACP v. *Alexander*, 649 F. Supp. 3d 177, 183 (D.S.C. 2023).

71. *Id.* at 197.

72. *Id.* at 189.

73. *Id.*

74. *Id.* at 188.

75. *Id.* at 189.

76. *Alexander*, 649 F. Supp. 3d at 190.

77. *Id.* at 190

Roberts' population movements, the panel concluded, "made a mockery of the traditional districting principle of constituent consistency."⁷⁸ The panel also rejected Roberts' claim that he never consulted racial data, finding that he had "in-depth knowledge of the racial demographics of South Carolina"⁷⁹ and admitted to having access to and viewing racial data during the map-drawing process.⁸⁰

The panel also cited the findings of the plaintiffs' experts, including those of Dr. Jordan Ragusa, an expert qualified in congressional elections and South Carolina politics.⁸¹ During trial, Dr. Ragusa described his analysis that looked at the movement of voting tabulation districts (VTDs), small units representing voter precincts that compose the larger congressional districts.⁸² Dr. Ragusa's analysis demonstrated that VTDs with a thousand or more Black voters had a forty percent chance of being moved out of CD-1, and those with fifteen hundred or more Black voters had a sixty percent chance of being moved out.⁸³ Dr. Ragusa's analysis informed the panel that race was a stronger predictor than voting behavior in the movement of residents from CD-1 to CD-6, especially in light of the fact that the only voting pattern data that Will Roberts had access to was a singular presidential election that described the number of votes for either Donald Trump or Joe Biden.⁸⁴

Statistical analyses and testimony from the cartographer proving that he had access to racial data and that he deprioritized traditional principles all convinced the panel that the state legislature had deliberately sorted by race in its design of CD-1. Because race was found to be the predominant factor in the decision to move thirty-thousand Black Charleston residents out of CD-1, the panel concluded that the district as a whole was unlawfully racially gerrymandered in violation of the Equal Protection Clause.⁸⁵ Addressing separate claims, the panel, however, rejected the plaintiffs' allegations that CD-2 and CD-5 were racially gerrymandered,⁸⁶ but found in favor of the plaintiffs on the separate count that their Fourteenth Amendment rights were also violated due to the reapportioners' racially discriminatory intent.⁸⁷

78. *Id.* at 189.

79. *Id.* at 191.

80. *Id.* at 188.

81. *Alexander*, 649 F. Supp. 3d at 192.

82. *Id.*

83. *Id.*

84. *Alexander*, 649 F. Supp. 3d at 192.

85. *Id.* at 197. Defendants made no attempt to show their design could survive strict scrutiny.

86. *Id.* at 198.

87. *Id.*

The remedy for the latter finding was the same as the remedy for the finding that CD-1 was an unconstitutional racial gerrymander: the panel permanently enjoined the conduction of an election in CD-1 until it approved a new, valid map.⁸⁸

ORAL ARGUMENTS

On October 11, 2023, the Supreme Court heard oral arguments from the parties. Mr. John Gore represented the South Carolina legislators and Ms. Leah Aden represented the South Carolina NAACP as a member of the national organization's Legal Defense Fund. Assistant Solicitor General Caroline Flynn also presented an argument on behalf of the United States after the appellees. Argumentation and judicial questions touched on many issues that often accompany racial gerrymandering claims.

Justice Thomas initially oriented the questioning toward the clear error standard of review, an issue that arose throughout the arguments.⁸⁹ Justice Sotomayor later added to this conversation by emphasizing the distinction between legal errors and factual errors (which carry different standards of review) in this case.⁹⁰ Justice Kagan subsequently critiqued Mr. Gore's identification of the district court's failure to correctly conduct its inquiry as a legal error, and instead indicated that she believed that claim to be a factual error, subject to the clear error standard.⁹¹ While the State of South Carolina did not argue the clear error standard was irrelevant, the justices remained concerned about which standard of review applied to the appellants' claims. Justice Alito emphasized the "very demanding" nature of the clear error standard, but noted it should not function merely as a "rubber-stamp" for district court findings, and indicated a willingness to dive deeper into expert methodology as part of the court's review for clear error.⁹² Throughout these colloquies, Mr. Gore pointed to his claim that the district court unfairly and erroneously credited the plaintiffs' flawed expert methodology over the defendants' alleged direct evidence as a decisive clear error that mandates reversal.⁹³ At the

88. *Id.* at 199.

89. Transcript of Oral Argument at 6, *Alexander v. S.C. State Conf. of NAACP*, 143 S. Ct. 2456 (2023) (No. 22-807).

90. *See id.* at 9–10 (asking the appellants list out both the clear and legal errors that they found).

91. *Id.* at 17.

92. *Id.* at 34.

93. *See, e.g., id.* at 42 (stating that the three-judge panel failed to mention defendants' direct

end of Mr. Gore’s presentation, Justice Jackson reiterated several of the other justices’ concerns regarding the proper standard of review:

“[W]hat I’m concerned about is that I . . . hear you wanting us to do a de novo review, as opposed to clear error review because, to the extent that you’re now asking us to look at the flaws in [Dr.] Ragusa’s testimony and I guess disagree with the district court’s crediting . . . that report, that sounds to me like de novo.”⁹⁴

Justice Jackson mentioned *Cooper* again, explaining that the standard derived from this case means that “[a] finding that is plausible in light of the full record, even if another is equally or more so, must govern.”⁹⁵

Another major topic of the oral arguments was whether an alternative map requirement exists for racial gerrymandering cases. Despite the appellants’ claim that plaintiffs in racial gerrymandering cases *must* provide evidence of an alternative map that helps prove that race predominated over other factors, Justice Kagan decisively rejected this point, stating that “there is no alternative map requirement.”⁹⁶ There are no areas of equal protection enforcement, Justice Kagan explained, that require a particular form of proof that plaintiffs must employ.⁹⁷ Despite this, Justice Thomas later pressed the NAACP’s counsel on the issue, explaining that alternative maps are frequently presented and asked how one should go about disentangling race and politics without them.⁹⁸ Ms. Aden cited the NAACP’s use of expert testimony—particularly from Dr. Ragusa—that used statistical analysis to isolate and identify BVAP as significant.⁹⁹

Finally, the overarching problem of properly identifying racial predominance in legislative decision-making was discussed throughout. Justices Sotomayor and Jackson emphasized the significance of the racial disparities during Mr. Gore’s presentation.¹⁰⁰ Mr. Gore explained

evidence and critiquing plaintiffs’ methodology for inapt political numbers and inappropriate data sets).

94. Transcript of Oral Argument at 50, *Alexander*, 143 S. Ct. 2456.

95. *Id.*

96. *Id.* at 11.

97. *Id.*

98. *See id.* at 58 (stating that “we normally have an alternate map in these redistricting cases” and asking how to “constitutionally disentangle” race and political affiliation).

99. *See* Transcript of Oral Argument at 59, *Alexander*, 143 S. Ct. 2456 (arguing that Dr. Ragusa’s rebuttal report is akin to an alternative map in its disentanglement of race and political affiliation).

100. *See id.* at 26–27 (questioning Mr. Gore on the “incredible” racial disparities and racialized intent).

in response the state's position that "mere racial effects do not prove racial predominance."¹⁰¹ However, Justice Jackson's questions posed to Mr. Gore tied in the issue of identifying racial predominance with the clear error standard of review. Justice Jackson asked, "[D]on't those effects say something about the intent and whether . . . it was plausible for the district court to believe or disbelieve the 'we're not looking at race' statement?"¹⁰² Justice Jackson's questioning demonstrated a degree of sympathy toward the plaintiffs' position that racial effects may be used to at least help show that race predominated.¹⁰³ Chief Justice Roberts, on the other hand, proved more skeptical toward the sole use of circumstantial evidence in order to show racial predominance, noting that "we've never had a case where there's been no direct evidence, no map, no strangely configured districts, a very large amount of political evidence..."¹⁰⁴ Roberts, in his questioning, mentioned that while circumstantial evidence may not necessarily be precluded in this use, it would however "be breaking new ground in our voting rights jurisprudence."¹⁰⁵ The Chief Justice's comments may be construed as dubious of this proposed expansion of methods of proof in racial gerrymandering claims.

ANALYSIS

How the Court Should Rule

The central issue in this case revolves around the methods and extent to which plaintiffs may prove their claims in racial gerrymandering cases. Since the Court's effective validation of partisan gerrymandering in *Rucho*, questions about the scope of racial gerrymandering have taken center stage. The current law has proven ineffective to support racial gerrymandering claims in an increasingly partisan atmosphere across the country, especially in states like South Carolina where race and politics are highly correlated. The Court should affirm the district court's decision that race predominated over other factors in the state legislature's plan for CD-1 and uphold the use

101. *Id.*

102. *Id.* at 27.

103. *See id.* at 56 (NAACP arguing that "the panel properly concluded that race predominated over partisanship in CD1's design based on strong factual findings, including that after map-drawers moved more than 193,000 people in and out of CD1, its BVAP remained identical as in the 2011 map.").

104. Transcript of Oral Argument at 61, *Alexander*, 143 S. Ct. 2456.

105. *Id.* at 61–62.

of circumstantial evidence (including expert statistical analysis) as a viable method of proof.

There is ample evidence that the district court did not clearly err in its conclusion that the defendants pursued a “racial target.” As the Solicitor General’s office (which generally supports affirmation but did not officially side with either party¹⁰⁶) argued, “[r]acial predominance is a factual finding subject to clear error review even when there’s a politics defense.”¹⁰⁷ The battle over the application of clear error review was among the more frequent issues that arose during oral arguments, and the plaintiffs as well as the United States presented compelling evidence that the “deferential” clear error standard is applicable here.¹⁰⁸ *Cooper* holds that any plausible decision in light of the entire record must govern.¹⁰⁹ The United States, as a third party with a proven federal interest,¹¹⁰ presents the most compelling argument for affirmation. Simply put, even if the district court had found in favor of the defendants, it would still be entitled to deference under the clear error standard if their determination was plausible based on the entire record.¹¹¹ In racial gerrymandering cases, district courts are obligated to weigh an immense amount of direct and circumstantial evidence; the Supreme Court has recognized this challenge and correctly promised deference to the factfinders.

And, as the United States argues, to overcome the high barrier of the clear error standard, the defendants simply recast the district court’s decision as a “legal error” that would not require such deference to the district court. However, the district court’s determination that race predominated in the decision to move thirty-thousand Black

106. Brief for the U.S. as Amicus Curiae in Support of Neither Party at 1–8, 29, *Alexander v. S.C. State Conf. of NAACP*, 143 S. Ct. 2456 (2023) (No. 22-807) (explaining that the U.S. agrees with appellees that the district court correctly found that race predominated, but believes the court “failed to apply the correct legal standards” in the plaintiffs’ separate vote dilution claim not discussed in this Commentary).

107. Transcript of Oral Argument at 101, *Alexander*, 143 S. Ct. 2456.

108. See Brief for the U.S. as Amicus Curiae, *supra* note 107 at 14, (arguing that “racial predominance is a factual finding subject to review only for clear error”) (citing *Cooper v. Harris*, 581 U.S. 285, 293 (2017)).

109. See *id.* (noting that the “deferential clear-error standard” means that the “district court’s finding on predominance must govern so long as it was ‘plausible in light of the full record.’”) (citing *Cooper v. Harris*, 581 U.S. 285, 293 (2017)).

110. See Motion of the U.S. for Leave to Participate in Oral Argument as Amicus Curiae and for Divided Argument, 2–3, *Alexander*, 143 S. Ct. 2456 (No. 22-807) (“The United States has a substantial interest in the proper interpretation of constitutional provisions.”).

111. See *Cooper v. Harris*, 581 U.S. 285, 297 (2017) (“A finding that is ‘plausible’ in light of the full record – even if another is equally or more so – must govern.”) (citing *Anderson v. Bessemer City*, 470 U.S. 564, 574 (1985)).

residents out of Charleston County was clearly a factual determination, not a legal one.¹¹² This sentiment was echoed by justices during oral arguments.¹¹³

While the arguments in support of affirmation are indeed more compelling in light of the high bar for reversal, this commentary need not simply reiterate all arguments of the parties. Rather, an exploration into the heart of the dispute is more informative. As the justices touched on during oral arguments, the actual dispute lies in the methods and extent to which race and politics must be disentangled.

Dr. Ragusa's analysis serves as a compelling foundation for a "plausible" district court decision that race predominated. Basic statistical significance might prove a strong correlation but may not alone establish direct causation. This was not disputed during the trial.¹¹⁴ His findings show a statistically significance likelihood that VTDs with a large amount of Black residents were likely to be moved out of CD-1; these, however, lay a strong basis for the conclusion that race predominated in light of other evidence. Similar analyses should continue to serve as probative circumstantial evidence, as they disregard partisan labeling by the reapportioners and instead look to the numbers. Ultimately, statistical analysis has emerged as a useful tool in this case for the plaintiffs and will likely continue to function as such if the Court upholds its use here. In the absence of the rare smoking gun admission of racial motivation, statistical effect may serve as a compelling indicator of intent.

Dr. Ragusa's analysis alone would be insufficient to meet the plaintiffs' high burden of proving racial predominance. The district court's findings that other traditional criteria fell by the wayside also helps make it plausible that race predominated. As mentioned above, the design of CD-1 in this plan began with a dramatic addition of territory and population via the inclusion of Berkeley, Beaufort, and parts of Dorchester Counties.¹¹⁵ The influx and then outflow of nearly

112. See Brief for the U.S. as Amicus Curiae, *supra* note 107, at 25 (noting the court's decision that "race predominated in the decision to move more than 30,000 Black Charleston Country Residents out of CD1.").

113. See *supra* note 92.

114. See Joint Appendix at 177, *Alexander v. S.C. State Conf. of NAACP*, 143 S. Ct. 2456 (2023) (No. 22-807) (noting that social scientists use a 95% confidence threshold in which they "can be 95 percent certain that the results arose due to something systematic, not random chance.").

115. See *supra* note 14.

200,000 people¹¹⁶ to alter a district with a target population of around 760,000 shows that the “least change” criterion discussed in prior case law was abandoned. The district court also correctly focused heavily on the disregard of common communities of interest in this plan in the exclusion of Charleston County residents from the district they had historically been a part of.¹¹⁷ Lastly, the district court panel did not focus heavily on the issue of contiguity, but the plaintiffs’ evidence also helps to prove that the contiguity criterion suffered in CD-1’s new design. The city of Charleston lies on a peninsula, much of which was moved to CD-6. As a result, CD-1 became geographically bisected; one must either sail or cross through CD-6 to reach one side of the new CD-1 from the other.¹¹⁸ This represents a complete abandonment of the contiguity requirement acknowledged by the state Senate.¹¹⁹

These factors, combined with the cartographer’s inability to explain the subordination of traditional principles during trial, all support the theory that racial predomination was plausible. Defendants, who have focused exclusively on refuting this theory, have not proposed any argument that their decision serves a narrowly tailored, legitimate state interest.¹²⁰ In accord with the clear error standard of review, the district court’s plausible finding should be upheld in the absence of any defense under strict scrutiny.

There are also compelling policy reasons for the Court to uphold the plaintiffs’ use of circumstantial evidence in this case. *Rucho* has made it far easier for state legislatures to avoid directly stating on the record that they intend to sort and redraw lines based on race. Due to the authorization of explicitly stated partisan intentions for gerrymandering, legislatures may easily cloak any actual racial motivations in blanket statements regarding their partisan goals. This partially explains why direct evidence in racial gerrymandering claims has become less relevant—those responsible for the redistricting process have the incentive to describe their efforts strictly in terms of partisan goals on the basis of *Rucho*. Evidence on the record is much more likely to take this form, making it less likely that plaintiffs may rely on comments about racial motivation for their claims. As the

116. Appellees’ Brief, *supra* note 15, at 1.

117. See *Alexander*, 649 F. Supp. 3d at 190 (noting that the only community of interest between the residents of North Charleston and those of Congressional District No. 6 was their proximity to Interstate I-26 despite being over 100 miles removed from each other).

118. Appellees’ Brief, *supra* note 15, at 15.

119. S.C. Senate 2021 Redistricting Guidelines §2 (S.C. Senate Judiciary Committee 2021).

120. See generally Brief for Appellants, *supra* note 5.

United States indicated, notwithstanding the explicit racial target in *Cooper*,¹²¹ “outright admissions of impermissible racial motivation are infrequent.”¹²² For these reasons, the Court has an opportunity in this case to preserve plaintiffs’ ability to pursue racial gerrymandering claims by allowing district courts to make conclusions about racial predominance using circumstantial evidence including racial effects and robust statistical analysis. If the Court strikes down the district court’s decision on the grounds that the plaintiffs’ circumstantial evidence is not enough, it will drastically weaken plaintiffs’ ability to successfully pursue gerrymandering claims, as defendant redistricting committees may cloak their decisions in ostensibly legitimate partisan goals.

Case in Context

While there are ample reasons to affirm, the question of how the Court is likely to come out on the issue of disentangling race from politics is less clear. The surprise outcome in *Allen v. Milligan* last year, where the Court backed the plaintiffs’ claim of racially discriminatory gerrymandering in the context of the Voting Rights Act,¹²³ has little bearing on the outcome of this case. While racial gerrymandering claims in the lineage of *Shaw* require the factfinder to identify *intent*, claims under the Voting Rights Act, like those in *Allen*, focus on *effect*.¹²⁴ The identification of discriminatory impact in Alabama likely does not help predict how the Court will assess the use of circumstantial evidence in this specific context in South Carolina.

The *Shaw* lineage of cases, on the other hand, helps illuminate *Alexander’s* place in the racial gerrymandering context. But unlike *Shaw*, *Alexander* does not feature a particularly irregularly shaped district.¹²⁵ In terms of plaintiffs’ form of proof, it is far more similar to the *Cromartie* cases. *Cromartie* also contained significant discussion over whether mapmakers relied on partisan or racial data.¹²⁶ There,

121. See *supra* note 63.

122. Brief for the U.S. as Amicus Curiae, *supra* note 107, at 21.

123. *Allen v. Milligan*, 143 S. Ct. 1487, 1492 (2023).

124. Jeff Neal, *Supreme Court to decide South Carolina racial gerrymander case*, HARV. L. TODAY, Oct. 3, 2023, <https://hls.harvard.edu/today/supreme-court-preview-alexander-v-south-carolina-conference-of-the-naacp/>.

125. See *Shaw v. Reno*, 509 U.S. 630, 647 (1993) (noting that “in some exceptional cases, a reapportionment plan may be so highly irregular that, on its face, it rationally cannot be understood as anything other than an effort to ‘segregat[e]...voters’ on the basis of race.”) (citing *Gomillion v. Lightfoot* 364 U.S. 339, 340 (1960)).

126. See *Easley v. Cromartie*, 532 U.S. 234, 234–35 (2001) (*Cromartie II*) (discussing whether

while evidence pointed toward race as one of several considerations, it was insufficient to prove that “race played a predominant role.”¹²⁷ One of the plaintiffs’ experts, Dr. Weber, described an alternative map and performed a degree of statistical analysis that the Court found unconvincing in light of compliance with traditional reapportionment criteria.¹²⁸ The *Alexander* plaintiffs, however, seek to distinguish their claim from that of *Cromartie* by emphasizing that (1) an alternative map is not necessary¹²⁹ and (2) *Cromartie* featured significant evidence that use of voting data played a predominant role.¹³⁰ One significant difference between the expert testimony in *Alexander* versus *Cromartie* was that in the latter, the expert admitted he “was under the mistaken impression that the legislature’s computer program provided only racial, not political, data” the first time he came to the conclusion that race predominated.¹³¹ This likely crippled the expert’s credibility. Furthermore, Dr. Weber’s analysis in *Cromartie* was arguably not as robust as that of Dr. Ragusa. Of the statistical findings that the panel relied on (and which were rejected by the Supreme Court), none espoused a high percentage correlation between predominantly single-race voter precincts and their likelihood to be moved in or out of the district in question.¹³² Whichever way the Court comes out in *Alexander*, *Cromartie* is likely to play a major role in the opinion. Placing *Alexander* in the context of the *Shaw* lineage demonstrates that the case is novel in some ways but contains similar methods of proof that the Court has reviewed and rejected before.

Aside from a case comparison with *Cromartie*, the oral arguments proved that the justices are conscious of and potentially concerned about the plaintiffs’ reliance on circumstantial evidence, especially in the absence of a proposed alternative map. Chief Justice Roberts signaled apprehension about reliance on this form of proof¹³³—potentially pointing toward a majority in favor of reversal. In this case, it is likely that the Court will still apply the clear error standard and

there is adequate support for a finding that race rather than politics determined the legislature’s redistricting).

127. *Id.* at 236.

128. *Id.* at 250.

129. Appellees’ Brief, *supra* note 15, at 55.

130. *Id.* at 41.

131. *Cromartie II*, 532 U.S. at 267 n.5.

132. *See id.* (summarizing Dr. Weber’s findings but mentioning no study or result that suggests a strong correlation between precincts with high percentages of a single race and their disposition in reapportionment).

133. *See supra* note 105.

simply rule that the weak circumstantial evidence ensured that the panel's racial target theory was implausible and thus constituted a clear error.

Consequences

Alexander remains a case narrowed to a specific set of facts in a specific congressional district. The Court's decision is highly unlikely to buck the existing law derived from *Shaw* and its successor cases. Neither party has expressed desire in this case to alter the general principle that race may not be the predominant factor in redistricting decisions unless it survives strict scrutiny.¹³⁴ The decision, however, would be deeply consequential for similar claims going forward. If the Court applies the clear error standard and still reverses the district court on the grounds that the circumstantial evidence in this case was insufficient to support even a plausible finding in favor of the plaintiffs, the bar to prove the predomination of race in future claims will be extraordinarily high. Advanced technological tools, like those employed by Dr. Ragusa on behalf of the plaintiffs, would be sidelined despite their clear usefulness in these cases. A reversal would further heighten an already "demanding"¹³⁵ burden for plaintiffs.

On the other hand, an affirmation would help guarantee that future plaintiffs retain the necessary tools to prevail on these claims, without having to cite a rare admission of use of race by those redistricting. The Court has an opportunity in *Alexander* to clarify the law by adding detail to the methods and extent to which race must be disentangled from politics. One example would be the clear rejection of an alternative map requirement, an idea to which several justices were sympathetic during oral arguments. A more crucial example includes upholding the use of in-depth computer modeling that helps determine if people of a certain race are being sifted under the label of "partisan" sorting.

Ultimately, the voters of South Carolina's First and Sixth Congressional Districts are the most important stakeholders in this case. A reversal would represent a blow to the protection of their voting rights and further dilution of their choice of representation.

134. See generally Brief for Appellants, *supra* note 5; Appellees' Brief, *supra* note 15.

135. *Cromartie II*, 532 U.S. at 241.