No. 15-1262

IN THE

Supreme Court of the United States

PATRICK MCCRORY, IN HIS CAPACITY AS GOVERNOR OF NORTH CAROLINA, *et al.*,
Appellants,

v.

DAVID HARRIS AND CHRISTINE BOWSER,
Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE MIDDLE DISTRICT OF NORTH CAROLINA

BRIEF FOR AMICUS CURIAE THE BRENNAN CENTER FOR JUSTICE AT NYU SCHOOL OF LAW IN SUPPORT OF APPELLEES

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INTEREST OF AMICUS CURIAE[1]

Amicus curiae the Brennan Center for Justice at New York University School of Law ("the Brennan Center") is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice. It was founded in 1995

[1] 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 and its counsel made a monetary contribution to its preparation or submission. The parties' letters consenting to the filing of amicus curiae briefs have been filed with the Clerk's office. This brief does not purport to convey the position of New York University School of Law.

to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society. Through its Democracy Program, the Brennan Center seeks to bring the idea of representative self-government closer to reality, including through work to protect the right to vote and to ensure fair redistricting practices. The Brennan Center conducts empirical, qualitative, historical, and legal research on redistricting and electoral practices, monitors racial gerrymandering, partisan gerrymandering, and other redistricting suits in the nation's courts, and regularly participates in redistricting and voting rights cases before the Court.

The Brennan Center takes an interest in this case because Appellants ask this Court to reverse the opinion of a lower court invalidating a map on racial gerrymandering grounds. Through this brief, the Brennan Center seeks to explain how this Court's bedrock Fourteenth Amendment precedents counsel in favor of affirmance. The Brennan Center hopes that this perspective will help the Court resolve this case in a manner that fully protects against improper racial discrimination while reinforcing the consistency of the Court's broader constitutional jurisprudence.

INTRODUCTION AND SUMMARY OF ARGUMENT

Appellees' brief marshals significant direct and circumstantial evidence demonstrating that improper racial considerations were the "predominant factor" in North Carolina's 2011 congressional redistricting, *Miller* v. *Johnson*, 515 U.S. 900, 916 (1995). But there is more. In this case and others, contextual evidence about the broader circumstances under which redistricting took place can and does inform the predominant factor inquiry by clarifying any questions about legislative moti-

vations and providing insight into the nature of the challenged redistricting.

Under this Court's established Fourteenth and Fifteenth Amendment jurisprudence, courts search a law's broader context—including the larger legislative environment and the political dynamics in effect at the time—for evidence of impermissible uses of race. *See, e.g.*, *Village of Arlington Heights* v. *Metropolitan Housing Dev. Corp.*, 429 U.S. 252, 266-268 (1977). Examining this context allows courts to smoke out improper motivations for state action, and aids courts in balancing between deference to legitimate state policymaking, on the one hand, and scrutiny for enactments that disadvantage members of a particular racial minority or undermine the protections of the political process, on the other. *See, e.g.*, *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982); *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938). Particularly in redistricting cases, contextual evidence can help courts resolve potential ambiguities in district-specific evidence by providing insight into the overall legislative climate, as well as the incentive structures and other purposes that ultimately drive decisions "to place a significant amount of voters within or without a particular district," *Miller*, 515 U.S. at 916.

A broad view of the evidence pays particular dividends in this case. *First*, the political dynamics and incentive structures in North Carolina during its 2011 redistricting "reveal … powerful undercurrents" that point to impermissible racial considerations in the redistricting process. *North Carolina State Conference of NAACP* v. *McCrory*, 831 F.3d 204, 226 (4th Cir. 2016). The 2011 plan was not the result of "the innocuous back-and-forth of routine partisan struggle," *id.* at 226, or the "pull, haul, and trade" of ordinary politics, *Johnson* v. *De*

Grandy, 512 U.S. 997, 1020 (1994). Instead, redistricting took place amidst a potent combination of demographic change, electoral volatility, single-party control of the legislative process, and strong identification by African-American voters with the party out of power. In combination, these dynamics created both the motive and the opportunity to disadvantage African Americans in order to consolidate partisan advantage. This is not to say that the General Assembly was motivated by racial animus *per se*, or that this Court's racial gerrymandering precedents require as much. An improper use of race in districting, done in response to partisan imperatives, is still unconstitutional. Nor is it to say that one political party is always more or less prone to make improper use of race in the enactment of political rules. Here, though, the specific political dynamics and the incentive structures they created are probative of whether race was the predominant consideration in the creation of the 2011 plan.

Second, the legislation produced by the political dynamics of North Carolina in the early years of this decade is also probative of improper racial motivations influencing the political process. Most prominently, only two years after the 2011 redistricting, the General Assembly passed the notorious 2013 "omnibus election law," which the Fourth Circuit later struck down in substantial part for "target[ing] African Americans with almost surgical precision," *N.C. State Conf.*, 831 F.3d at 215. The most egregious among a number of examples, the omnibus bill involved legislators' poring over racial data to ensure that the myriad of proposed new election rules would each disproportionately undercut African Americans' ability to participate in the political process. *Id.* at 230. It is stark evidence from the broader context that election rules based on impermissible racial motiva-

tions were taking hold during the same period as the redistricting at issue here. Other legislation and official acts evidence North Carolina's broader political climate, including, most recently, localized attempts to roll back early voting opportunities disproportionately relied upon by African-American voters—even after the Fourth Circuit had characterized such a rollback as racial discrimination. Such state actions came at a moment when African Americans were particularly vulnerable in the political process.

This additional evidence confirms that neutral considerations were subordinated to impermissible ones in the creation of the 2011 congressional plan. In light of the strong contextual evidence of a political process that allowed election laws based on impermissible racial considerations, this Court should affirm the panel's conclusion that improper discriminatory motivations predominated in North Carolina's 2011 congressional redistricting.

ARGUMENT

I. THE "PREDOMINANT FACTOR" INQUIRY IS INFORMED BY THE FULL LEGISLATIVE AND POLITICAL CONTEXT OF THE CHALLENGED MAP

This Court has long looked to the broader context of challenged state action in order to determine whether it violates the Constitution's Equal Protection guarantee. That longstanding approach makes particular sense in racial gerrymandering cases, where this Court established the "predominant factor" inquiry precisely because assessing the motivations that influence redistricting can be difficult. Examining political context allows courts to consider whether there are indicia of improper racial considerations in the political process in a given moment and a given jurisdiction, and can help

courts better strike the careful balance, demanded in Equal Protection cases, between deference to the political process, and intervention where that process fails to safeguard minority rights.

A. The "Predominant Factor" Inquiry Seeks To Identify Impermissible Racial Motives That Violate The Equal Protection Clause

The Equal Protection Clause provides that "[n]o State shall … deny to any person within its jurisdiction the equal protection of the laws." U.S. Const. amend. XIV, § 1. "Its central purpose is to prevent the States from purposefully discriminating on the basis of race." *Shaw* v. *Reno*, 509 U.S. 630, 642 (1993) (citing *Washington* v. *Davis*, 426 U.S. 229, 239 (1976)).

Whether challenged state action constitutes impermissible discrimination is not always obvious, and thorough review may be critical to "'smoke out' illegitimate uses of race." *City of Richmond* v. *J.A. Croson Co.*, 488 U.S. 469, 493 (1989) (plurality op.). Equal Protection analysis thus promotes the "searching judicial inquiry" necessary to determine, based on complex facts, whether state action was motivated by impermissible racial considerations or instead by some proper purpose. *Id.*; *see Village of Arlington Heights* v. *Metropolitan Hous. Dev. Corp.*, 429 U.S. 252, 265-266 (1977).

These principles apply to the redistricting process, where discrimination against racial minorities has long been held unconstitutional. *See, e.g.*, *Alabama Legis. Black Caucus* v. *Alabama*, 135 S. Ct. 1257, 1263 (2015); *Miller* v. *Johnson*, 515 U.S. 900, 911-912 (1995); *Shaw*, 509 U.S. at 657; *see also Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 470 (1982) (state action that makes "it more difficult for certain racial … minorities to achieve legislation that is in their interest … is no more

permissible than denying them the vote." (citing *Hunter* v. *Erickson*, 393 U.S. 385, 391 (1969) (Harlan, J. concurring)). Racial gerrymandering violates the Fourteenth and Fifteenth Amendments of the Constitution. *Shaw*, 509 U.S. at 645 (quoting *Gomillion* v. *Lightfoot*, 364 U.S. 339, 349 (1960) (Whittaker, J., concurring) and citing subsequent cases); *see also Gomillion*, 364 U.S. at 341-342. Moreover, racial gerrymanders are subject to strict scrutiny. *E.g.*, *Miller*, 515 U.S. at 904-905; *Hunt* v. *Cromartie*, 526 U.S. 541, 546 (1999).

But merely considering race in the districting process is not unlawful, and courts must distinguish "between being aware of racial considerations"—which is lawful—and being "motivated by them" to accomplish discriminatory ends—which is not. *Miller*, 515 U.S. at 916; *see also, e.g.*, *Shaw*, 509 U.S. at 646. They must try to see past "ostensibly neutral" rationales for redistricting decisions that are really a "pretext" for improper uses of race. *Shaw*, 509 U.S. at 644 (citations omitted). And they must ensure that race is not improperly "used as a proxy for political characteristics" in redistricting decisions. *Bush* v. *Vera*, 517 U.S. 952, 968 (1996) (plurality op.) (citing *Powers* v. *Ohio*, 499 U.S. 400, 410 (1991)); *accord Miller*, 515 U.S. at 914.

Identifying impermissible racial motives in the often complex gerrymandering context thus poses particular challenges. This Court developed the "predominant factor" test to guide the inquiry into whether ostensibly neutral decisions "to place a significant number of voters within or without a particular district" were driven by impermissible racial motivations in violation of the Equal Protection Clause. *Miller*, 515 U.S. at 916. But while redistricting cases can be sensitive and complex, this Court's racial gerrymandering decisions "d[o] not erect an artificial rule barring accepted [E]qual [P]rotection

analysis." *Miller*, 515 U.S. at 913-914; *see also Rogers* v. *Lodge*, 458 U.S. 613, 617 (1982). Rather, they draw on Equal Protection precedent from many contexts. *See, e.g.*, *Shaw*, 509 U.S. at 644-645 (citing, *inter alia*, *Arlington Heights*, 429 U.S. at 266). Under the "accepted … analysis" applicable in such cases, *Miller*, 515 U.S. at 913-914, courts look to a variety of contextual factors to determine if there is impermissible discriminatory intent.

B. Under This Court's Precedents, The Political Context Of Challenged State Action May Be Probative Of Impermissible Racial Intent

In gerrymandering cases and in Equal Protection decisions more generally, this Court has long made clear that contextual evidence surrounding the challenged government action can be critical for detecting improper racial considerations.

Well over a century ago, this Court held that improper racial discrimination can be inferred from context even in the absence of express racial qualifications or criteria. *See Yick Wo* v. *Hopkins*, 118 U.S. 356, 376 (1886). Over half a century ago, it applied similar reasoning to ostensibly race-neutral redistricting, concluding that the only possible inference was that the map drawers intended to exclude African Americans from participating in Tuskegee city politics. *Gomillion*, 364 U.S. at 341-342.

But obvious cases like *Yick Wo* or *Gomillion*, where "[t]he evidentiary inquiry is … relatively easy," are "rare." *Arlington Heights*, 429 U.S. at 266; *accord Miller*, 515 U.S. at 914. Thus, in the absence of such stark evidence, and where "'impact alone is not determinative, … the Court must look to other evidence' of race-based decisionmaking." *Miller*, 515 U.S. at 914 (quoting *Arlington Heights*, 429 U.S. at 266); *cf. Gomillion*, 364 U.S. at

342 ("The [Fifteenth] Amendment nullifies sophisticated as well as simple-minded modes of discrimination." (quoting *Lane* v. *Wilson*, 307 U.S. 268, 275 (1915)).

Arlington Heights—which this Court cited repeatedly in its *Miller* decision announcing the "predominant factor" analysis, *see, e.g.*, 515 U.S. at 913-914—describes the nature of the contextual evidence that may be probative of improper racial motivations. As the Court explained, "[d]etermining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available." *Arlington Heights*, 429 U.S. at 266. Potentially probative evidence includes "[t]he historical background of the decision … particularly if it reveals a series of official actions taken for invidious purposes," "[t]he specific sequence of events leading up to the challenged decision," and procedural or substantive "departures" from the "normal" decisionmaking process, as well as "[t]he legislative or administrative history … especially where there are contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports." *Id.* at 267-268.

This Court considers a wide variety of evidence—relating to history, political context and dynamics, and other factors probative of governmental motive—in evaluating improper racial considerations in redistricting. For example, in *League of United Latin American Citizens* v. *Perry*, this Court examined the shifting political dynamics and demographics at play in Texas' congressional redistricting—as well as the "long, well-documented" history of discrimination against Latinos in the area—in coming to its clear-eyed conclusion that "the State took away the Latinos' opportunity because Latinos were about to exercise it. This bears the mark of intentional discrimination …." 548 U.S. 399, 440

(2006); *see also Alabama*, 135 S. Ct. at 1267 (explaining that "statewide evidence …. is perfectly relevant" in the predominant factor analysis).

Longstanding Equal Protection decisions are in accord. In *White* v. *Regester*, for example, this Court affirmed a finding of discriminatory redistricting based not only on racial impact, but also on local political dynamics, approving of lower court fact-finding that was "a blend of history and an intensely local appraisal of the design and impact of [the challenged redistricting] in the light of past and present reality, political and otherwise." 412 U.S. 755, 765-770 (1973). In *Rogers* v. *Lodge*, this Court considered racial bloc voting patterns, legislators' present and historical representation of, and responsiveness to, minority voters, practical barriers to participation, and numerous "lingering effects of past discrimination" in affirming the invalidation of a county elections system in Georgia. 458 U.S. at 623-627. In *Easley* v. *Cromartie*, even as this Court ultimately found that there was insufficient record evidence of improper racial considerations in the districting process, it considered and weighed the probative value of complex evidence relating to voting patterns, racial cross-over voting, and political dynamics, in addition to map-based data and district boundaries. 532 U.S. 234, 245 (2001); *see also, e.g.*, *Bethune-Hill* v. *Va. State Bd. of Elections*, 141 F. Supp. 3d 505 (E.D. Va. 2015). And of course, this Court also looks to the legislative process surrounding the passage of the challenged redistricting plan as potentially probative of the presence (or absence) of racial intent. *See, e.g.*, *Miller*, 515 U.S. at 906-909, 917-919.

What all these decisions share is the recognition that courts must examine all relevant evidence to make the often nuanced determination of the role of race in a challenged redistricting process. Indeed, considering

any and all probative evidence is all the more important where a court's task is to make the occasionally fine distinction between redistricting based on impermissible racial considerations, including redistricting that uses race "as a proxy for political characteristics," *Bush*, 517 U.S. at 968, and redistricting motivated by other concerns (which themselves might or might not be constitutional under this Court's precedents). This Court's willingness to scrutinize all relevant evidence, including from the broader political context, is consistent with the "caution" required in "sensitive" cases such as this one. *Miller*, 515 U.S. at 916.

C. Political Dynamics And The Presence Of Racial Discrimination In Other Legislation And Official Acts May Be Especially Probative Of Improper Race-Based Redistricting

Arlington Heights identified a broad range of contextual evidence as potentially probative of improper uses of race. In the gerrymandering context, two overarching types of contextual evidence may be particularly useful for assessing the presence (or absence) of improper racial considerations.

1. Structural evidence regarding political dynamics and the political process: Examining structural evidence relating to the political process and the dynamics that produced the challenged redistricting can help courts interpret potentially ambiguous evidence by revealing the presence (or absence) of incentives to use race in an impermissible way. Courts should be particularly alert for factors that suggest a state of "political breakdown" where political and procedural safeguards that allow racial minorities to protect their interests in the "pull, haul, and trade" of ordinary politics, *Johnson* v. *De Grandy*, 512 U.S. 997, 1020 (1994), have degraded

or gone missing. *See, e.g.*, *Washington* v. *Seattle Sch. Dist. No. 1*, 458 U.S. 457, 486 (1982) (judiciary has a "special role in safeguarding the interests of those groups that are 'relegated to such a position of political powerlessness as to command extraordinary protection from the majoritarian political process.'" (quoting *San Antonio Indep. Sch. Dist.* v. *Rodriguez*, 411 U.S. 1, 28 (1973))); *Reynolds* v. *Sims*, 377 U.S. 533, 553-554 (1964) (identifying need for judicial review of malapportionment because "[n]o effective political remedy to obtain relief … appears to have been available").

Where there are political dynamics that allow for legislation motivated by impermissible racial considerations, judicial intervention may be warranted because of the increased risk of state action against vulnerable minorities. The entire concept of "strict scrutiny" is based on this Court's acknowledgment that, while the political process ordinarily deserves a wide berth, "searching judicial inquiry" into state action is particularly justified where "political processes ordinarily relied upon to protect minorities" have broken down. *United States* v. *Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938); *see also, e.g.*, Ely, *Democracy and Distrust* 77 (1980) ("[B]oth *Carolene Products* themes … ask us to focus … on whether the opportunity to participate either in the political process by which values are appropriately identified or accommodated, or in the accommodation those processes have reached, has been unduly constricted."); *see also, e.g.*, Issacharoff, *Political Judgments*, 68 U. Chi. L. Rev. 637 (2001) ("The premise of both *Carolene Products* and the political process theories … is that intervention is required because an electoral lock on power has made the system unresponsive ...."). Such dynamics in the political process are useful for flagging the possible misuse of race because they incentivize improp-

er racial considerations in the structuring of political rules and indeed, often closely correlate with discriminatory laws.

Various kinds of evidence may point to (or negate) a political dynamic that creates the risk of improper discrimination. Racially polarized voting or, alternatively, a close alignment between minority voters and a single political party, may give a party that does not receive minority voter support a powerful incentive to impede or diminish the political strength of those voters—to use race "as a proxy for political characteristics." *Bush*, 517 U.S. at 968; *cf. North Carolina State Conf. of NAACP* v. *McCrory*, 831 F.3d 204, 214 (2016) (when "the race of voters correlates with the selection of a certain candidate or candidates," "minority voters [are] uniquely vulnerable to the inevitable tendency of elected officials to entrench themselves by targeting groups unlikely to vote for them."). The greater the degree of polarization or single-party alignment, the more relevant it might be.

The risk of incentives to discriminate may be further heightened when redistricting occurs in the midst of rapid shifts in the demographics of a jurisdiction that threaten to destabilize the balance of power between political parties or between factions of a political party—for example, where control of government swings based on small margins, or where a minority group with strong partisan alignment is on the cusp of exercising newly developed power. *Cf. LULAC*, 548 U.S. at 440.

To be sure, such alignments may be offset by countervailing dynamics. But they can also be amplified. For example: Single-party control of the legislative process enhances the risk that legislative checks and balances that normally protect racial minorities in the lawmaking process—including at a minimum the presence

of minority legislators or allies at the bargaining table—may not, in fact, exist. And when a single party controls both the legislature and the governorship—or where the governor lacks veto power entirely—one more check is likely to go unexercised. The absence of these structural checks on discriminatory election laws, in tandem with signs that members of the minority community were shut out of the redistricting process, provide signals that discrimination could have taken place. Conversely, these risks may be lessened where government is divided between the parties.

The analysis is necessarily nuanced and holistic. Where some aspects of a jurisdiction's political dynamics incentivize racial discrimination but other aspects mitigate or check such incentives, the risk of discrimination is lower. Where the political dynamics in a jurisdiction indicate that race does not correlate strongly with political identity, or that political safeguards for racial minorities are robust, or show a broadly inclusive redistricting process, such evidence may negate an inference of discriminatory intent and militate against judicial intervention. *See, e.g.*, *Fletcher* v. *Lamone*, 831 F. Supp. 2d 887, 901-902 (D. Md. 2011) (holding that the *Miller* predominant factor test was unmet and noting that the map at issue drew the support of prominent African-American state leaders), *aff'd*, 133 S. Ct. 29 (2012).

On the other hand, evidence of multiple structural factors all reinforcing the same dynamic—strong overlaps between racial identity and partisan identity; single-party control of the political process and a secretive, locked-out redistricting process; rapid demographic shifts and correspondingly increased political stakes; and diminished internal and external processes for reviewing election laws—increases the likelihood that discriminatory motivations are at work. This is because

where these factors appear in combination, using race as a proxy for politics in the redistricting process is both effective (due to overlaps in racial and political identity) and low cost (due to the comparatively low political power of some minority communities within the existing structures). Such political conditions, evincing both the means and the motive, are probative of impermissible racial intent. *Cf. In re Burlington Coat Factory Sec. Litig.*, 114 F.3d 1410, 1422 (3d Cir. 1997) (Alito, J.) (noting that, in the securities fraud context, facts establishing "motive and opportunity" can support scienter).

2. Substantive evidence of discriminatory acts: Evidence of improper racial considerations in other areas—especially contemporaneous evidence of discrimination in the electoral context—may also be probative of impermissible racial motivations in the challenged redistricting. If structural indicia help courts identify instances where political process breakdowns produce a higher risk of discriminatory legislation, substantive indicia can show whether those risks have, in fact, materialized.

Parties and politicians pursue agendas across time and across different pieces of legislation. *See, e.g.*, *Terry* v. *Adams*, 345 U.S. 461, 476 (1953) (recognizing that ostensibly private primary election was part of continued effort, struck down in prior cases, to discriminate against black voters). Contemporary evidence of discriminatory state action, *other than* the challenged conduct, therefore can be highly probative of an environment in which discrimination can flourish. Of course, "a consistent pattern of official racial discrimination" is not "a necessary predicate to a violation of the Equal Protection Clause," *Arlington Heights*, 429 U.S. at 266 n.14, and courts should not hesitate to strike down a law as discriminatory even where it is unprecedented. But patterns of discrimination may serve as a window into

the legislative climate. Where, for example, legislators have pursued discriminatory restrictions on the right to vote, there are strong reasons to suspect that they are using improper racial considerations when redistricting. *N.C. State Conf.*, 831 F.3d at 220 ("[T]hat a legislature impermissibly relied on race certainly provides relevant evidence as to whether race motivated other election legislation passed by the same legislature.").

Historical evidence of discriminatory legislation may also be probative. Such evidence not only makes contemporary discrimination more plausible, but also means that there may be "lingering effects" of past discrimination that may impair officials from blocking discrimination through the political process. *See, e.g.*, *Regester*, 412 U.S. at 769-770. Of course, the political culture of states can evolve over time, and a deep history of racial discrimination alone should not generally be dispositive of the need for strict scrutiny. Nonetheless, historical patterns can provide additional contextual evidence in sensitive, multiple-motive gerrymandering cases.

These structural and substantive indicia are not exhaustive. *See Arlington Heights*, 429 U.S. at 266-267; *see also generally* Fed. R. Evid. 401. Nor are any of these factors—taken singly or in combination—*necessary* for triggering strict scrutiny. Rather, they provide guideposts for the nuanced, context-sensitive review of legislative motives that this Court's racial gerrymandering and broader Fourteenth Amendment precedents demand. *See, e.g.*, *Alabama*, 135 S. Ct. at 1265, 1267; *Miller*, 515 U.S. at 916; *Arlington Heights*, 429 U.S. at 266. Because multiple motives can inform the redistricting and legislative processes, the predominant factor inquiry delivers the sharpest results when it accounts for the full range of probative contextual evidence.

II. CONTEXTUAL EVIDENCE FROM NORTH CAROLINA IS PROBATIVE OF IMPROPER RACIAL MOTIVATIONS IN THE 2011 REDISTRICTING

Here, both structural and substantive aspects of North Carolina's political environment—as well as the redistricting process itself—are probative of impermissible racial considerations in the drafting and adoption of the 2011 congressional map, and thus support the decision below. Indeed, the redistricting process took place in a climate where political safeguards against racial discrimination had broken down, and at a moment when those holding power had strong incentives to use race to achieve partisan ends. And this dynamic, in turn, produced substantive results that are highly probative of improper motivations in the redistricting process. Indeed, as its context makes clear, the 2011 congressional redistricting was merely one piece in a set of contemporaneous laws and other official acts that intentionally diminished African-American political power, including the 2013 omnibus election law that systematically discriminated against African-American voters. While redistricting always occurs in a particular political context, the "contextual facts" from the period at issue here "reveal … powerful undercurrents influencing North Carolina politics" that indicate impermissible motivations. *N.C. State Conf.*, 831 F.3d at 215. These facts support the application of strict scrutiny in this case under the "predominant factor" standard.

To be clear, though: Political parties are not inherently fair or unfair. While this case concerns state action by Republicans in North Carolina, no party can properly be painted with a broad brush when it comes to racial discrimination. *Cf. Comm. for a Fair & Balanced Map* v. *Ill. State Bd. of Elections*, 835 F. Supp. 2d 563, 588-592 (N.D. Ill. 2011) (considering allegations of racial

gerrymander by Democrats who controlled the districting process). Parties are political institutions that respond to the dynamics of a particular jurisdiction and moment. But where a party exploits its political dominance by making concerted efforts to recast the structure of the political process, through redistricting and other means, the Constitution does not shield state action that is taken with a discriminatory purpose simply because it has a partisan valence. *Cf. LULAC*, 548 U.S. at 441-442 ("The State chose to break apart a Latino opportunity district to protect the incumbent congressman from the growing dissatisfaction of the cohesive and politically active Latino community …. [T]he State must be held accountable for the effect of these choices in denying equal opportunity to Latino voters.").

A. Statewide Political Dynamics Are Probative Of Impermissible Racial Considerations In The 2011 Redistricting

The political dynamics of North Carolina around the time of the 2011 redistricting are probative of improper racial motivations. These dynamics created strong incentives for those in power to use the political process to disadvantage African-American voters and include several mutually reinforcing trends. Intense partisan competition over thin margins and an increasingly large and mobilized African-American population made African Americans a more potent political force in North Carolina precisely at a juncture when control of legislative power and congressional seats hung in the balance. At the same time, African Americans in North Carolina had a uniquely strong identification with the Democratic Party, which had experienced historic setbacks in the 2010 elections that immediately preceded the 2011 redistricting, losing both chambers of the Assembly for the

first time since Reconstruction. This meant that those who suddenly found themselves in control of the 2011 redistricting process had strong partisan motivations to discriminate on the basis of race to gain partisan advantage, and few if any political barriers preventing them from doing so. *Cf. LULAC*, 548 U.S. at 440.

1. Single-party control of a hotly contested two-party state: Over the last decade, partisan competition in North Carolina has been particularly volatile, with statewide results, as well as control of a number of congressional and state-legislative seats, turning on narrow margins at the ballot box.

In 2008, defying a widespread belief that North Carolina was fundamentally Republican-controlled for purposes of statewide races, Sen. Barack Obama secured a narrow victory in the presidential election, and Democrat Beverly Perdue won the governorship. *See* Kromm, *Election 2008: How Did Obama Win NC?*, Facing South (Nov. 7, 2008). The race featured the highest voter turnout in North Carolina's modern history, including historic levels of turnout among registered African-American voters. *See* Democracy North Carolina, *Republicans, African Americans, Women and Seniors Post Highest Turnout Rates in North Carolina* (Dec. 19, 2012).

However, just two years later, the tables turned dramatically as the Republican Party claimed majorities in both houses of the state's General Assembly for the first time since Reconstruction and on the eve of the state's post-census congressional redistricting. *See* Balz, *The GOP Takeover in the States*, Wash. Post, Nov. 13, 2010. Single-party control over the legislative process meant that there would be fewer checks and balances when it came to redistricting and election legislation. Moreover, under North Carolina law, there is no guber-

natorial veto over redistricting bills—a rare structural provision that removed a key potential check from the political process.[2] *See* N.C. Const. art. II, § 22(5). The redistricting at issue here took place in the wake of the elections of 2008 and 2010, which featured high turnout and numerous close races. The rapid shifts in power amidst hotly contested elections raised the political stakes of changes to electoral ground rules—including redistricting—in advance of the next election.

2. Shifting demographics: While North Carolina's volatile two-party system resulted in single-party control of the General Assembly in 2010, the parties' struggle for control around the time of redistricting occurred against the backdrop of substantial demographic changes. The absolute numbers and the relative vote share of key constituencies for the Democratic Party—African Americans, transplants, and urbanites—dramatically increased in the years leading up to the redistricting period. *See* Hood & McKee, *What Made North Carolina Blue? In-Migration and the 2008 North Carolina Presidential Vote*, 38 Am. Pol. Research 266, 267-268 (2010). Over the course of the 1990s and 2000s, North Carolina grew larger, more urban, and more racially and ethnically diverse, with the white share of its population declining from 75% to 65%. *See* CensusScope, *North Carolina*: *Analysis of U.S. Decennial Census Data through 2010*; Rural Policy Research Institute, *Demographic and Economic Profile: North Carolina* (updated June 2006). Especially given the competitive state of the two-party system and substantial volatility in election results, Republicans at the time of the

[2] By the time of the omnibus election law was passed in 2013, *see infra* Part II.C.1, Governor Patrick McCrory had replaced former Governor Beverly Purdue, extending single-party control to North Carolina's executive branch.

redistricting had an urgent incentive to address these larger demographic shifts, either by appealing to growing, traditionally Democratic constituencies, or by some other means, in order to make their new majority position sustainable.

3. Overlapping racial and partisan identities: African Americans in North Carolina identify overwhelmingly with the Democratic Party. *See, e.g.*, *Harris* v. *McCrory*, 159 F. Supp. 3d 600, 637 n.8 (M.D.N.C. 2016) (assuming "the high correlation between the Democratic vote and the African-American vote"). Indeed, "'in North Carolina, African-American race is a better predictor for voting Democratic than party registration.'" *N.C. State Conf.*, 831 F.3d at 218.[3]

More importantly, by 2011 African Americans were not only a large and loyal demographic constituency, but also an increasingly organized and mobilized one, registering and turning out in unprecedented numbers to drive a Democratic wave in 2008, and buoying Democratic candidates in subsequent years despite declines in participation from other key Democratic constituencies. *Cf.* Kromm, *Election 2008*, *supra*. With statewide races such as the 2008 and 2012 presidential elections decided by narrow margins, the increasingly organized African-American vote was becoming more important than ever in deciding numerous elections. Even a small decline in

[3] Eighty-four percent of African-American voters in North Carolina are registered as Democrats. Democratic presidential candidates won 85 percent of the black vote in North Carolina in 2004, 95 percent in 2008, and 96 percent in 2012. *See Election 2004*, CNN; *President Exit Polls – President 2012*, N.Y. Times. In the 2014 mid-term elections, 96 percent of African Americans voted for Democratic Senate incumbent Kay Hagan. *North Carolina Senate Results—2014 Election Center*, CNN (Nov. 5, 2014).

the African-American vote portended potentially large swings in election results.

But African-American voters' uniquely strong identification with the Democratic Party also left them vulnerable. Under the one-party partisan dynamic that prevailed during the 2011 redistricting period, there was no structural political incentive for Republican legislators who controlled the process to take African-American voters' interests into account when making decisions—let alone scrutinize those decisions for racially discriminatory intent or effects—because those legislators' election and re-election did not depend on the African-American vote. At the same time, African Americans were, more than any other group, perceived as Democratic voters with the ability to swing tight races. Furthermore, because white voters in urban North Carolina had split partisan allegiances, legislators would struggle to target Democrats without resorting to the tool of discrimination against African Americans.

Under this combination of demographics and specific partisan dynamics, targeting an identifiable and singularly Democratic-leaning racial group for political suppression—using race "as a proxy for political characteristics" in redistricting, *Bush*, 517 U.S. at 968—would have made tactical sense for those in power. Indeed, the Fourth Circuit recognized that precise incentive structure at work two years later in the passage of North Carolina's 2013 omnibus election law by a similarly composed state legislature:

> [T]he General Assembly … certainly knew that … , in recent years, African Americans had begun registering and voting in unprecedented numbers. Indeed, much of the recent success of Democratic candidates in North Carolina re-

> sulted from African American voters overcoming historical barriers and making their voices heard to a degree unmatched in modern history.

N.C. State Conf., 831 F.3d at 225-226.

Of course, this highly particular dynamic alone might not be enough to raise the specter of discrimination. But the fact that those with control over North Carolina's 2011 redistricting process had both the motive and the opportunity to target African-American voters just as their political power was on the increase, and faced few obstacles from within the political process to doing so, is plainly probative of the ultimate question of discriminatory intent, particularly when taken together with other evidence.

B. The Redistricting Process Shows The Influence Of Impermissible Racial Considerations

The probative value of the contextual evidence discussed thus far is only heightened by evidence of how the redistricting process itself worked in actuality. Appellees discussed much of this evidence in their brief. *See* Br. at 7-31. The viewpoints of the African-American community, its representatives, and their allies were minimized at every stage, even after they protested the racially discriminatory nature of the redistricting plans. These procedural flaws ultimately resulted in district maps, including both the one at issue here and the state's House and Senate map, that were struck down as unconstitutional racial gerrymanders. *See Harris* v. *McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), *juris. stmt. filed*, No. 16-166 (U.S. Aug. 5, 2016); *Covington* v. *North Carolina*, --- F.R.D. ----, 2016 WL 4257351 (M.D.N.C. Aug. 11, 2016). These circumstances—particularly in connection to the structural factors dis-

cussed above and the additional substantive features discussed below—are further probative of the predominant motive behind North Carolina's 2011 redistricting and further confirm the conclusions of the court below.

The initial redistricting plans were developed in secret: The Assembly's redistricting consultant "never received instructions from any legislator other than" the Assembly's two leaders, both of whom were Republicans, "never conferred" with Democratic Congressmen who represented the two majority-minority districts in the state, "and never conferred with the Legislative Black Caucus (or any of its individual members) with respect to the preparation of the congressional maps." *Harris*, 159 F. Supp. 3d at 607.

Once the first draft congressional map went public, a mere three weeks before the final map's passage, JA1042, the Assembly's work was subject to consistent criticism for its perceived racialized biases and other procedural shortcomings. Democratic members of the Assembly—including several prominent African-American Democrats—and members of Congress condemned the draft map for drawing district lines solely on the basis of race, diluting African-American votes, or cramming African-Americans into "racial ghettos." JA643-644, 707-710, 724-725, 843-844, 1061. Assembly leaders ignored these objections. JA732-733, 843-844; *cf.* JA625-626.[4]

[4] The Republican legislative leaders who oversaw the redistricting process stated that elements of their plans were based on the privately stated preferences of the two Democratic Congressman whose districts are at issue in this appeal. *See, e.g.*, JA1045. But the congressmen quickly and repeatedly contested these statements. JA709, 1064, 1193.

Legislators raised similar concerns during the debates surrounding the draft map for the State Senate. *E.g.*, JA747-759, 788-789, 798, 834. One senator urged legislators not to "resegregate our state." JA756-757. Another told his colleagues, "I've heard the NAACP, I've heard voters from all over this state, I have heard all of the minority members of this Senate, speaking with one voice about the … map, and it is falling on deaf ears." JA798. Both maps were passed anyway, and were subsequently declared unconstitutional, in whole or in part, because of infirmities stemming from race. A three-judge panel ruled that North Carolina's 2011 legislative redistricting plan was unconstitutional, on the ground that 28 different districts were improper racial gerrymanders. *Covington*, 2016 WL 4257351, at *1.

The process of creating these maps, and the fact that the 2011 congressional map's state counterpart was *also* held unconstitutional due to racial gerrymandering, support the panel's conclusion in this case. The political and legislative context surrounding North Carolina's 2011 redistricting make it clearer still that the assembly was motivated by impermissible discriminatory intent.

C. Racially Discriminatory Laws And State Action From The Same Period As The 2011 Redistricting, Are Also Probative Of Discriminatory Intent

Other discriminatory official acts during the same time period—especially the 2013 "omnibus" voting law, which was subsequently held unconstitutional based on evidence that it methodically and intentionally disadvantaged African-American voters—are also highly probative of improper racial intent in North Carolina's 2011 redistricting. Indeed, in the space of only a few years, the North Carolina General Assembly passed

several pivotal, statewide voting laws targeting African-American voters. This legislation and other contemporaneous state actions are evidence of a political climate in which racial discrimination, incentivized by the underlying political dynamics, flourished.

1. The omnibus bill: North Carolina's 2013 "omnibus" voting law, which followed only two years after the redistricting plan at issue here, was the most restrictive voting law enacted in North Carolina since 1965, when the Voting Rights Act was passed to stamp out such abuses. *N.C. State Conf.*, 831 F.3d at 227. The omnibus bill instituted a strict voter identification requirement and restricted early voting, same-day voter registration, out-of-precinct voting, and preregistration—systematically rolling back reforms that legislative data showed increased African-American voting power, and instituting restrictions that curtailed it. *Id.* at 216-218. The Fourth Circuit struck down the omnibus law this past July for intentional racial discrimination in a decision noting that the law targeted African-American voters "with almost surgical precision." *Id.* at 214.

Numerous aspects of the omnibus law indicated a calculated discriminatory purpose. The Assembly's leadership announced their intention to enact the law the day after this Court freed North Carolina from the Voting Rights Act's longstanding preclearance requirements in *Shelby County* v. *Holder*, 133 S. Ct. 2612 (2013). *See N.C. State Conf.*, 831 F.3d at 214.[5] More

[5] Between 1980 and 2013, "the Department of Justice issued over fifty objection letters to proposed election law changes in North Carolina—including several since 2000—because the State had failed to prove the proposed changes would have no discriminatory purpose or effect." *N.C. State Conf.*, 831 F.3d at 224 (internal citations omitted). The General Assembly played a significant role in the passage of the majority of laws to which the Department of

brazenly, before passing the bill, the General Assembly requested data—disaggregated by race—on many of the restrictions it was considering implementing. The Assembly only included in the bill measures that would disproportionately impair African Americans' voting rights—and where the data showed that one of the proposed measures would have disproportionately affected white voters, the General Assembly scrapped it. *N.C. State Conf.*, 831 F.3d 230. The Assembly passed the bill in a "hurried" process "strongly suggest[ive] of an attempt to avoid in-depth scrutiny," and on "strict party-line votes." *Id.* at 228. African-American legislators, who did not support the bill, were not included in negotiations, and complaints from the African-American community were ignored. *See* Wan, *Inside the Republican Creation of the North Carolina Voting Bill Dubbed the "Monster" Law*, Wash. Post, Sept. 2, 2016. Unsurprisingly, the omnibus law had a significant impact on African Americans' ability to vote in the 2014 election and the 2016 primaries. *See* The Thurgood Marshall Institute at LDF, *Democracy Diminished: State and Local Threats to Voting Post-*Shelby County *v.* Holder 24-25 (2016).

For all of these reasons—the timing of the bill's introduction and its rushed passage, the legislature's specific knowledge of the racially disproportionate impact the restrictions would have, North Carolina's history of

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Justice objected. *See id.* In addition, during that same period, "private plaintiffs brought fifty-five successful cases under § 2 of the Voting Rights Act," of which ten resulted in opinions "finding that electoral schemes in counties and municipalities across the state had the effect of discriminating against minority voters." *Id.* The other forty-five cases were "settled favorably for plaintiffs out of court or through consent decrees that altered the challenged voting laws." *Id.* This extensive history of discriminatory voting laws is also probative of racial intent with respect to the 2011 redistricting.

racial discrimination in voting, as well as the structural incentives discussed above, *supra* Part II.A—the Fourth Circuit held that the Assembly had "enacted the challenged provisions of the law with discriminatory intent." *N.C. State Conf.*, 831 F.3d at 214-215. The history of the 2013 omnibus bill is highly probative of racial intent with respect to the 2011 redistricting, which was passed during the same period, by the same legislative leaders, and in response to the same underlying partisan dynamics. *Cf. LULAC*, 548 U.S. at 440.[6]

2. Targeting African Americans for voting-related state action: In addition to Assembly legislation, African-American voters in North Carolina have been subjected to other forms of discriminatory official action aimed at suppressing their ability to vote. These discriminatory practices manifested at many levels of the government, from local election boards to state-level bureaucracies. This widespread course of official conduct is further evidence of discrimination by state actors. As such, this evidence is also probative of the Assembly's intent with respect to the 2011 redistricting.

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[6] In addition to voting and election laws that have since been struck down as unconstitutional, the Assembly enacted other legislation during the same period that disadvantaged African Americans. One example is the repeal of North Carolina's Racial Justice Act, which was designed and successfully used by a number of predominantly African-American criminal defendants to combat racial discrimination in criminal sentencing. *See* Severson, *North Carolina Repeals Law Allowing Racial Bias Claim in Death Penalty Challenges*, N.Y. Times, June 5, 2013. The Assembly also reduced public benefits disproportionately relied upon by African Americans, including unemployment and Medicaid. *See* Rogers, *North Carolina's Unemployment Experiment is a Failure*, Charlotte Observer, Feb. 23, 2016; Porter-Rockwell, *Minorities More Likely to Fall into ACA Coverage Gap*, North Carolina Health News (Apr. 21, 2014).

Three examples are particularly relevant here. *First*, in the run-up to this year's general election, numerous county election boards attempted to reinstate early-voting restrictions that the Fourth Circuit had struck down as intentional racial discrimination only two months prior. Nine of the twenty-one counties that offered Sunday voting in 2012 proposed eliminating it for 2016. *See* Campbell, *Early Voting Reduced in 23 NC Counties; 9 Drop Sunday Voting After NCGOP Memo*, Raleigh News & Observer, Sept. 6, 2016. Similarly, 23 counties, including "the three counties with the highest percentages of black residents," proposed reducing early-voting hours from 2012 levels. *Id.*; Wilson, *North Carolina Early-Voting Cuts Could Dampen Black Vote*, The Hill (Sept. 7, 2016).

Only after a contentious eleven-hour special session involving the review of 33 contested plans—and under threat of further litigation by civil rights organizations—did the State Board of Elections reverse many of the county plans. *See* Wines, *North Carolina Elections Board Settles Fight Over Voting Guidelines*, N.Y. Times, Sept. 9, 2016; Tomsic, *State Board Settles Early Voting Fights in Mecklenburg, Other Counties*, WFAE (Sept. 9, 2016); Whisenant, *Board of Elections Expands Early Voting in Wake County*, WNCN (Sept. 8, 2016).

Second, in the spring of 2014, the Executive Director of the North Carolina State Board of Elections announced plans to investigate hundreds—and potentially tens of thousands—of voters for potential criminal prosecution after they had been flagged as "double voters" by an interstate data-gathering project. *See* Gannon, *NC Election Officials Identify Hundreds of Cases of Potential Voter Fraud*, Charlotte Observer, Apr. 2, 2014. Critics have condemned the program's basic methodology as inherently biased against "black, Hispanic, and Asian-

American voters," given the commonality of surnames within those groups. *See* Flanagin, *Is It Voter Fraud Or Voter Suppression In 2014*, N.Y. Times, Oct. 31, 2014.

Third, North Carolina also has been criticized—indeed, sued—for alleged failures to comply with the National Voter Registration Act, 42 U.S.C. §§ 1973gg *et seq.*, which requires certain state agencies to provide voter registration services. *See* Compl., *Action NC* v. *Strach*, No. 1:15-cv-1063 (M.D.N.C. Dec. 15, 2015), Dkt. 1. The NVRA is a disproportionately important source of registration opportunities for African-American voters, nationally and specifically in North Carolina. *See* U.S. Comm'n on Civil Rights, *Increasing Compliance with Section 7 of the National Voter Registration Act* 15 (Aug. 2016). These agencies' alleged failure to follow the NVRA raises strong concerns that African-American registration is being disproportionately depressed.

All of these official acts demonstrate the continuing power of the political dynamics that influenced the 2011 redistricting and are further probative of a political environment in which African-American political rights are treated as less worthy of protection by the State.

* * * *

As this Court has long acknowledged, the predominant factor inquiry in racial gerrymandering cases is a sensitive one—and context can be particularly important in distinguishing between improper racial considerations, and other possible motives. Evidence regarding political dynamics and the broader legislative environment might support searching judicial review in one case, and deference to the political process in another.

Here, the broader context is highly probative of an intent to discriminate in the redistricting process on the basis of race, and to exploit the breakdown of political

safeguards against discrimination in order to curtail growing African-American political power in North Carolina. This context reinforces the panel's conclusion that the 2011 congressional map warranted strict scrutiny, and provides additional reasons for this Court to affirm.

CONCLUSION

The judgment of the District Court should be affirmed.

Respectfully submitted.

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