No. 20-1092

IN THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

NORTH CAROLINA STATE CONFERENCE OF THE NAACP; CHAPEL-HILL-CARRBORO NAACP; GREENSBORO NAACP; MOORE COUNTY NAACP; STOKES COUNTY BRANCH OF THE NAACP; WINSTON SALEM-FORSYTH COUNTY NAACP,

Plaintiffs-Appellees,

v.

KEN RAYMOND, in his official capacity as a member of the North Carolina State Board of Elections; STELLA ANDERSON, in her official capacity as a member of the North Carolina State Board of Elections; DAMON CIRCOSTA, in his official capacity as a member of the North Carolina State Board of Elections; JEFFERSON CARMON, in his official capacity as a member of the North Carolina State Board of Elections; DAVID C. BLACK, in his official capacity as a member of the North Carolina State Board of Elections,

Defendants-Appellants,

&

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives

On Appeal from the United States District Court
for the Middle District of North Carolina at Winston-Salem

BRIEF OF THE NATIONAL REDISTRICTING FOUNDATION AS AMICI CURIAE IN SUPPORT OF PLAINTIFFS-APPELLANTS AND AFFIRMANCE

(counsel listed on following page)

Marc E. Elias
Aria C. Branch
Perkins Coie LLP
600 13th Street, N.W., Suite 800
Washington, D.C. 20005
(202) 654-6200
melias@perkinscoie.com
abranch@perkinscoie.com

Abha Khanna
Perkins Coie LLP
1201 3rd Avenue, Suite 4900
Seattle, WA 98101
(206) 359-8000
akhanna@perkinscoie.com

Counsel for Amicus Curiae National Redistricting Foundation

CORPORATE DISCLOSURE STATEMENT

The undersigned counsel for *amici curiae* certifies that the National Redistricting Foundation has no parent corporation, and that no publicly held corporation holds 10% or more its stock.

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RULE 29 STATEMENT

This brief is submitted on behalf of the National Redistricting Foundation ("NRF") as *amicus curiae* in support of Plaintiffs-Appellees. NRF is a non-profit organization whose core mission includes advancing and defending fair congressional and state legislative redistricting processes, including maps that are representative of the voting strength of racial minorities. In support of this mission, NRF regularly engages in non-partisan advocacy and litigation to protect the voting rights of racial minorities and their opportunity to participate equally in the political process. NRF has supported a variety of litigation alleging racial gerrymandering in violation of the U.S. Constitution; vote dilution in violation of Section 2 of the Voting Rights Act of 1965 ("VRA"); and partisan gerrymandering in violation of state constitutions and the U.S. Constitution. Through its work, NRF aims to restore the public's faith in a true representative democracy, in which voting districts accurately reflect the composition of the electorate, not a state legislature's intentional maneuvering of district lines in ways that dilute the voting strength of racial minorities in service of partisan aims.

NRF is exceptionally familiar with the history of redistricting litigation in North Carolina and the relevance of that history as it relates to the enactment of Senate Bill 824, the photo ID law that was invalidated by the district court in this case. In particular, NRF has either directly supported or closely analyzed several

lawsuits that were brought following the 2011 redistricting of North Carolina's congressional and state legislative districts, including: *Harris v. McCrory*, 159 F. Supp. 3d 600 (M.D.N.C. 2016), *aff'd* 137 S. Ct. 1455 (2017), which resulted in the invalidation of two Congressional districts as racial gerrymanders; *Common Cause v. Rucho*, 318 F. Supp. 3d 777 (M.D.N.C. 2018), *vacated and remanded* 139 S. Ct. 2484 (2019), in which the district court's ruling invalidating the re-drawn congressional map as a partisan gerrymander was vacated by the Supreme Court on the basis that partisan gerrymandering claims present political questions beyond the reach of federal courts; *Harper v. Lewis*, 19 CVS 012667 (Wake Cty. Super. Ct. Oct. 28, 2019), which resulted in the invalidation of the re-drawn congressional map as a partisan gerrymander in violation of the North Carolina Constitution; *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd* 137 S. Ct. 2211 (2017), which resulted in the invalidation of 9 state senate districts and 19 state house districts as racial gerrymanders; and *Common Cause v. Lewis*, 18 CVD 014001, 2019 WL 4569584 (Wake Cty. Super. Ct. Sept. 3, 2019), which resulted in the invalidation of the re-drawn state legislative maps on partisan gerrymandering grounds.

NRF urges the affirmance of the district court's decision below in favor of the Plaintiff-Appellees. Based on its knowledge of the background history of Senate Bill 824, NRF concludes that the district court gave proper weight to the North Carolina

legislature's recent pattern and practice of intentionally creating structural barriers to suppress the voting strength of Black voters, both in the form of racial gerrymandering and in the passage of a restrictive photo ID law.

No party or party's counsel authored this brief in whole or in part or contributed money that was intended to fund preparing or submitting this brief. No person other than NRF or its counsel contributed money that was intended to fund preparing or submitting this brief.

Because all parties have granted consent, the filing of this brief is authorized under Fed. R. App. P. 29(a).

INTRODUCTION AND SUMMARY OF ARGUMENT

In finding that the Plaintiffs-Appellees are likely to succeed on their claim that the North Carolina legislature was motivated by discriminatory intent when it enacted Senate Bill 824 (hereinafter, the "2018 Photo ID Law"), the district court correctly placed the law in the historical context of the legislature's pattern and practice of intentionally targeting Black voters to suppress their voting power in service of partisan aims. This strategy has manifested itself in recent years in a series of racially discriminatory laws that have all been invalidated by federal courts: racially gerrymandered congressional and state legislative district maps enacted in 2011 that were replaced by partisan gerrymandered maps in which legislators used race to achieve their partisan aims; a 2013 photo ID law that—along with the other intentionally suppressive voting measures comprising the omnibus House Bill 589—targeted Black voters with "surgical precision"; and the most recent 2018 Photo ID Law that is simply a repackaged version of its 2013 predecessor. Indeed, the entire political strategy of the North Carolina legislature in recent years has been anchored in the impermissible racial stereotyping of Black voters, because as Dr. Thomas Hofeller—the architect of the state's racially gerrymandered maps and chief defender of the state's 2013 photo ID law—stated, "in North Carolina, . . . race is a better predictor for voting Democratic than party registration." *N.C. State Conference of the NAACP v. McCrory*, 831 F.3d 204, 225 (4th Cir. 2016).

The historical background of the 2018 Photo ID Law is inextricably linked to the North Carolina legislature's continued use of invidious racial classifications in redistricting. In this case, the district court recognized that "[a]lthough a Democratic governor was elected in November 2016, Republicans retained their supermajorities in both chambers, *thanks, in part, to unconstitutionally [racially] gerrymandered legislative maps*." *N.C. State Conference of the NAACP v. Cooper*, 430 F. Supp. 3d 15, 26-27 (M.D.N.C. Dec. 31, 2019) (emphasis added). Without those supermajorities, Republican legislators could not have placed the 2018 Photo ID Law on the ballot in the first place, much less garnered the votes necessary to override the governor's veto. *Id.* at 27. Indeed, the only reason Republican lawmakers were able to garner the necessary votes to pass and protect the 2018 Photo ID Law is because, after the racially gerrymandered maps under which they were elected were held unconstitutional, they misled a federal court to delay holding a special election in 2017 under remedial, constitutional maps. *Common Cause v. Lewis*, No. 18 CVS 014001, 2019 WL 4569584, at *101-05 (Wake Cty. Super. Ct. Sept. 3, 2019). In the lame-duck legislative session held in the period between the court's invalidation of the maps and the November 2018 elections (when Republicans lost their supermajorities in both chambers), the legislature enacted the 2018 Photo ID Law and overrode the gubernatorial veto.

In this way, the historical background of the 2018 Photo ID Law and the events leading up to its enactment demonstrate how voter suppression in one context—the intentional concentration of Black voters into a handful of districts in order to suppress their voting strength in other districts—perpetuated voter suppression in another context—a racially discriminatory photo ID law. The district court properly considered redistricting as part of the historical background of the 2018 Photo ID Law, and the court's finding of intentional discrimination should be affirmed.

ARGUMENT

This Court observed in *McCrory* that "North Carolina has a long history of race discrimination generally and race-based vote suppression in particular." *McCrory*, 831 F.3d at 223. That history dates back to slavery, stretches through the Jim Crow era, and continues to the present day. *Id*. In their opening brief (St. Br. at 46), Defendants-Appellants state that they "do not dispute this history," and acknowledge, as they must, that a relevant part of the history is House Bill 589, the predecessor to the 2018 Photo ID law, which this Court held targeted Black voters with "almost surgical precision" because it permitted only those forms of identification which minority voters disproportionately lacked. *McCrory*, 831 F.3d at 214. In acknowledging North Carolina's more recent history of racial discrimination in voting, however, Defendants make only passing mention of the

fact that "unconstitutional considerations of race have also recently predominated in North Carolina's redistricting process," St. Br. at 46, and then pivot to minimize the significance of this important background. *Id*. ("Numerous precedents require that this troubling history be viewed in light of a variety of other factors, however.").

But the "historical background of a decision" is an important evidentiary source, "*particularly if it reveals a series of official actions taken for invidious purposes*." *Vill. of Arlington Heights v. Metro. Housing Dev. Corp.*, 429 U.S. 252, 267 (1977) (citations omitted) (emphasis added). Indeed, "[a] historical pattern of laws producing discriminatory results provides important context for determining whether the same decisionmaking body has also enacted a law with discriminatory purpose." *McCrory*, 831 F.3d at 223-24. Given the North Carolina legislature's repeated use of racial gerrymandering as a tactic to suppress the political power of Black voters, redistricting cannot be given short shrift in this analysis. The district court's analysis of the 2018 Photo ID Law would have been wholly incomplete without a thorough examination of the suite of tools used by the legislature to suppress the voting strength of Black voters, with racial gerrymandering being at the root of them all.

A. The legislature has repeatedly engaged in racial gerrymandering to suppress the voting strength of Black voters.

The North Carolina legislature's enactment of H.B. 589 is undoubtedly the single most important recent event in the historical background of the 2018 Photo

ID Law. Just as Black voters were increasing their political power, as demonstrated by higher rates of registration and turnout, the legislature passed H.B. 589 *the day after* the Supreme Court's decision in *Shelby County v. Holder*, 570 U.S. 529 (2013). The *Shelby County* decision meant that North Carolina could enact new voting laws without complying with the preclearance requirements that had previously been mandated by Section 5 of the VRA—requirements that had, until then, effectively restricted the most suppressive voting laws. *McCrory*, 831 F.3d at 214. H.B. 589 was an "omnibus" voter suppression law that restricted voting and registration in five different racially discriminatory ways, including by requiring voters to present certain types of photo ID at the polls. *Id*. The record in this case is clear that, despite this Court's invalidation of H.B. 589 as intentionally discriminatory, Republican legislative leaders remained "a hundred percent committed to the idea of voter ID" and thought they "passed a good law before." *NAACP v. Cooper*, 430 F. Supp. 3d at 33.

In many ways, though, H.B. 589 was a symptom of a larger structural problem in North Carolina: the state's racial gerrymandering of congressional, state House, and state Senate districts to suppress Black voting strength in electing the state's legislature and congressional delegation. Over the course of this decade, federal courts have invalidated *all three* racially gerrymandered maps enacted by the North Carolina legislature immediately following the 2010 Census as in violation of the

Equal Protection Clause. *See Harris v. McCrory*, 159 F. Supp. 3d 600, 607 (M.D.N.C. 2016), *aff'd* 137 S. Ct. 1455 (2017) (congressional maps); *Covington v. North Carolina*, 316 F.R.D. 117 (M.D.N.C. 2016), *aff'd* 137 S. Ct. 2211 (2017) (state legislative maps).

In order to determine whether a voting district is a racial gerrymander that violates the Equal Protection Clause, a court must first analyze whether "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). A court's analysis of whether race predominated entails reviewing direct and circumstantial evidence to determine whether the legislature's primary *intent* was to create the district based on race. *See id*. at 1464 (a plaintiff may prove that race predominated through "direct evidence of legislative intent, circumstantial evidence of a district's shape and demographics, or a mix of both) (internal citation omitted). If a court determines that race was the predominant factor in the construction of a district, then the burden shifts to the state to prove that "its race-based sorting of voters services a 'compelling interest' and is 'narrowly tailored' to that end." *Id*. (citation omitted). Remarkably, the Supreme Court has held that the North Carolina legislature failed that test with respect to each district map it enacted in 2011.

With respect to each of those maps, Senator Rucho, Representative Lewis, and their consultant Dr. Hofeller strategized to raise the Black Voting Age Populations ("BVAPs") of performing minority-opportunity districts, in which Black voters had been electing their preferred candidates for decades prior to the 2011 redistricting, to achieve their goal of suppressing Black voting power outside of those districts to maximize partisan gains for Republicans. Even worse, Senator Rucho and Representative Lewis did so under the guise of complying with the VRA, flouting the Supreme Court's admonition that "[i]t takes a shortsighted and unauthorized view of the [VRA] to invoke that statute, which has played a decisive role in redressing some of our worst forms of discrimination, to demand the very racial stereotyping the Fourteenth Amendment forbids." *Miller*, 515 U.S. at 927-28. Because VRA considerations did not and could not justify their racial gerrymanders, every single district map they created immediately following the 2010 Census was invalidated under the Equal Protection Clause.

1. Congressional Map

The 2011 congressional map was invalidated when a three-judge panel of the Middle District of North Carolina held that the two majority-minority congressional districts—Congressional District 1 ("CD 1") and Congressional District 12 ("CD 12")—were unconstitutional racial gerrymanders. *Harris*, 159 F. Supp. 3d 600. The

Supreme Court summarily affirmed the district court's decision in 2017. 137 S. Ct. 1455.

With respect to CD 1, Senator Rucho and Representative Lewis "were not coy" in announcing an express racial target for the district: by their edict, Black voters needed to comprise a majority of the voting-age population. *Cooper*, 137 S. Ct. at 1468. They repeatedly expressed this view to their colleagues in the legislature, "[a]nd that objective was communicated in no uncertain terms to the legislators' consultant [Dr. Hofeller]." *Id*. The Supreme Court observed that Dr. Hofeller "testified multiple times at trial that Rucho and Lewis instructed him 'to draw [District 1] with a [BVAP] in excess of 50%.'" *Id*. at 1468-69. Dr. Hofeller also made clear that race overrode all other considerations in constructing the district: "'[S]ometimes it wasn't possible to adhere to some of the traditional redistricting criteria in the creation of [CD 1]' because '*the most important thing* was to . . . follow the instructions that I ha[d] been given by the two chairmen [to draw the district as majority-BVAP].'" *Harris*, 159 F. Supp. 3d at 612. The result was a severely misshapen congressional district that strung together disparate Black communities from far-flung parts of the state in order to tamp down the growing political power of Black voters.

When the burden shifted to the map-drawers to justify their race-based actions, they contended that they drew CD 1 as a majority-minority district to avoid

liability for vote dilution under the VRA. *Id*. at 612. But this justification could not and did not withstand scrutiny. In *Thornburg v. Gingles*, the Supreme Court identified three conditions for proving a vote-dilution claim under the VRA, one of which is that a district's white majority must "vote[] sufficiently as a bloc" to usually "defeat the minority's preferred candidate." 478 U.S. 30, 50-51 (1986). Here, the evidence showed that for *nearly 20 years* before the 2011 map was enacted, although Black voters made up less than a majority of CD 1's voters, their preferred candidates were consistently elected. *Harris*, 159 F. Supp. 3d at 624-25. "So experience gave the State no reason to think that the VRA required it to ramp up District 1's BVAP." *Cooper*, 137 S. Ct. at 1460.

In fact, the legislature never engaged in any real inquiry under the VRA to determine whether CD 1 needed to be drawn as a majority-minority district. *See id.* at 1471 ("And even more important, North Carolina can point to no meaningful legislative inquiry into what it now rightly identifies as the key issue: whether a new, enlarged District 1 . . . could lead to § 2 liability."). The State's failure to conduct any VRA analysis only further demonstrated that their purported VRA justification was a ruse intended to cloak their insidious racially suppressive goals.

Race also drove the configuration of CD 12. Though the mapdrawers denied that racial considerations accounted for CD 12's design, neither the district court nor the Supreme Court bought that argument. And for good reason: the record was

overrun with evidence that CD 12 was similarly driven by an effort to use race to achieve the legislature's partisan aims. "Perhaps the most dramatic testimony in the trial came when Congressman Mel Watt (who had represented District 12 for some 20 years) recounted a conversation he had with Senator Rucho in 2011 about the district's future make-up," in which Senator Rucho said that "'his leadership had told him that he had to ramp the minority percentage in [District 12] up to over 50 percent to comply with the Voting Rights Law'" and that it would be "Rucho's 'job to go and convince the African-American community' that such a racial target 'made sense' under the Act." *Id.* at 1476. Congressman Watt further recalled that "he laughed in response because the VRA required no such target" and "explained to Rucho: 'I'm getting 65 percent of the vote in a 40 percent black district. If you ramp my [BVAP] to over 50 percent, I'll probably get 80 percent of the vote, and[ ] that's not what the Voting Rights Act was designed to do.'" *Id.* at 1476 n.10. "In the court's view, Watt's account was of a piece with all the other evidence—including the redistricters' on-the-nose attainment of a 50% BVAP—indicating that the General Assembly, in the name of VRA compliance, deliberately redrew District 12 as a majority-minority district." *Id.* at 1476.

The State's justification for the configuration of CD 12—that politics alone drove the decision-making—was also not credible. The district court "disbelieved Hofeller's asserted indifference to the new district's racial composition," in

significant part because of his own contradictory testimony. *Id.* at 1477 ("Whether the racial make-up of the county was displayed on his computer screen or just fixed in his head, the court thought, Hofeller's denial of race-based districting 'r[ang] hollow.'"). The Supreme Court affirmed the district court's decision. In so doing, the Court recognized the legislature's cynical use of the VRA to achieve their partisan agenda of suppressing the Black vote:

> [I]f legislators use race as their predominant districting criterion with the end goal of advancing their partisan interests—perhaps thinking that a proposed district is more 'sellable' as a race-based VRA compliance measure than as a political gerrymander and will accomplish much the same thing—their action still triggers strict scrutiny. In other words, *the sorting of voters on the grounds of their race remains suspect even if race is meant to function as a proxy for other (including political) characteristics*.

Id. at 1473 n.7 (emphasis added).

2. State Legislative Maps

Senator Rucho and Representative Lewis similarly instructed Dr. Hofeller to increase the BVAP of all state House and Senate districts above 50% everywhere there was a minority population large enough to do so, regardless of whether it was required to avoid minority vote dilution under Section 2. *Covington*, 316 F.R.D. at 130. As a result, the number of "50%-plus-one BVAP" state house districts rose from nine to twenty-three, while the number of "50%-plus-one BVAP" state senate districts rose from zero to nine. *Id*. at 134. At trial, plaintiffs put forward testimony

from numerous elected officials who explained that the challenged racial gerrymanders divided existing communities along racial lines, disrupting their efforts to build coalitions of voters of all races. *See* Mem. Op., *Covington, et al. v. North Carolina, et al.*, No. 1:15CV399, (M.D.N.C. Sept. 19, 2017) ECF No. 191 at 26 (testimony of Sen. Dan Blue, explaining that the challenged districting scheme suggested that "only black people will vote for black candidates and whites will vote for white candidates"); *id*. (testimony of Sen. Angela Bryant, explaining that the challenged scheme harmed the interests of multiracial communities by disrupting existing multiracial coalitions in favor of districts that paired minority communities with no such existing ties). Although the map-drawers claimed that these districts were drawn in service of the VRA, once again data readily available at the time of redistricting showed that Black voters had been able to elect their preferred candidates without concentrating them into "50%-plus one BVAP" districts across the state.

As a result of the State's illegal gerrymandering, existing minority-opportunity districts were unnecessarily packed with Black voters, thereby reducing their voting strength in surrounding districts. After redistricting, just as Black registration and turnout rates were on the brink of reaching near-parity with white registration and turnout rates and Black voters "were poised to act as a major electoral force," *McCrory*, 831 F.3d at 214, the General Assembly's unlawful racial

gerrymanders in 2011 allowed North Carolina Republicans to transform their majorities in the State legislature into supermajorities that freed them of any accountability to Black voters. Republicans maintained their supermajorities in both houses in all three elections that took place with the gerrymandered maps: 2012, 2014, and 2016. Republicans only lost their supermajorities in 2018, when elections took place under the remedial maps for the racial gerrymanders.

B. The legislative defendants in Covington intentionally misled the court in their effort to preserve racially gerrymandered state legislative districts even after they had been declared unconstitutional.

Republican legislators were hardly chastened by these extensive findings of impermissible race-based redistricting by two separate federal courts. On the contrary, just as legislators were undeterred by this Court's invalidation of H.B. 589 when they enacted a new photo ID law in 2018 that was strikingly similar to its predecessor, they similarly pressed on in their attempts to suppress minority voting strength through unlawful districts. And, as discussed below, they went to questionable lengths to preserve those maps for use in future elections for as long as they could.

Following the U.S. Supreme Court's June 2017 decision affirming the district court, the *Covington* district court ordered briefing on whether to conduct special elections under remedial state legislative plans in 2017 or instead wait until the 2018 elections to implement remedial plans. *See Covington*, ECF No. 153. In a brief

submitted to the *Covington* court on July 6, 2017, the Republican legislators defending the maps (the "Legislative Defendants") argued that they would not have enough time to formulate and enact remedial maps in time for a 2017 special election, repeatedly stating that no work on remedial plans had yet begun. *Covington*, ECF No. 161 ("Statement of Legislative Defendants' Position") at 28 (the General Assembly had not "start[ed] the laborious process of redistricting" earlier than July 2017); *id*. at 29 (it had not been "necessary to begin the process" of drawing new districts "until at, the earliest, the end of the current Supreme Court term" on June 30, 2017); *id*. at 28-29 ("[T]he General Assembly could begin the process of compiling a record in July 2017 with a goal of enacting new plans by the end of the year."); *id*. at 28 (in the "interim" between the Supreme Court's stay of the district court's judgment on January 10, 2017 and the end of the Supreme Court term on June 30, 2017, rather than engage in "drawing remedial legislative districts," "the North Carolina General Assembly did just what the Supreme Court allowed it to do – enact policies and legislation that benefit the State as a whole"). Relying on Legislative Defendants' representations that they had not drawn any remedial maps by July 2017 and that it would take time for them to do so, the court denied the plaintiffs' request for a special election. *Covington*, ECF No. 191 at 13-14.

When Legislative Defendants finally did enact remedial maps, they vociferously asserted that they had stripped the re-drawn districts of racial

considerations altogether. Legislative Defendants formally adopted a criterion prohibiting use of racial data for the 2017 Plans, providing that "[d]ata identifying the race of individuals or voters *shall not be used* in the drawing of legislative districts in the 2017 House and Senate plans." *Id.* ECF No. 184-37 at 2 (emphasis added). Legislative Defendants repeatedly stated to the court and the public that there were no racial data in the map-drawing software or other databases, and that they and Dr. Hofeller accordingly did not know the racial composition of the new districts. *See, e.g.*, *Id.* ECF No. 192 at 28 ("[D]ata regarding the race of voters was not used in the drawing of the districts, and in fact, was not even loaded into the computer used by the map drawer to construct the districts."); *Id.* ECF No. 184-18 at 20 (Representative Lewis stating "[t]here was no racial data reviewed in the preparation of this map"); *Id.* ECF No. 184-17 at 66 (Senator Hise stating "we have not had and do not have racial data on any of these districts"); *id*. at 102 ("Race was not part of the database. It could not be calculated on the system.").[1]

Two years later, however, it was revealed that Legislative Defendants' assertions on both the timing and racial underpinnings of their proposed remedial

[1] Despite these assertions, the legislature's proposed remedial maps were set aside by the *Covington* court, which expressed "serious concerns" that certain proposed remedial districts "failed to remedy [the] constitutional [racial gerrymandering] violation." *Covington v. North Carolina*, No. 1:15-cv-399, 2017 WL 11049096, at *1 (Nov. 11, 2017 M.D.N.C.). The court ultimately ordered a special master to redraw a subset of districts in the remedial maps drawn by the legislature. *Id*.

maps were plainly false. Evidence adduced in *Common Cause v. Lewis*—subsequent litigation challenging the remedial legislative plans as partisan gerrymanders under the North Carolina Constitution—made clear that Dr. Hofeller had not only created numerous iterations of draft maps before July 2017, but that he had substantially *completed* the 2017 Plans *by the end of June 2017*. *Common Cause*, 2019 WL 4569584 at *103. Specifically, Dr. Hofeller's own files showed that he had already completed *over 97%* of the new Senate plan and *over 90%* of the new House plan by June 2017. *Id*. The *Common Cause* court was "troubled by representations made by Legislative Defendants, or attorneys working on their behalf, in briefs and arguments to the *Covington* Court and to General Assembly colleagues at committee meetings that affirmatively stated that no draft maps had been prepared even as late as August 4, 2017." *Id*. at *105.

Those same files demonstrate that, contrary to Legislative Defendants' assertions to the court and the public, Dr. Hofeller *did* have "data identifying the race of individuals or voters" "loaded into the computer" he used to "construct the districts" in the 2017 state House and state Senate maps. *See id*. at *101. Indeed, Dr. Hofeller's computer appeared to have had data regarding the racial composition of the proposed districts for each and every iteration of his draft maps. Furthermore, Legislative Defendants' purported concern that "'unpacking' heavily-Democratic districts could dilute the voting power of African-Americans" was laid bare as a

"pretext for partisan gerrymandering," because the "Legislative Defendants themselves created districts with artificially low BVAPs [in rural and semi-rural parts of the state] when it was politically advantageous." *Id*. In other words, the remedial process that followed the invalidation of the state House and Senate district maps in *Covington* was simply another instance of the legislature using Black voters as pawns in their political power grab.

This background, and in particular the Legislative Defendants' blatant lies about their ability to enact a remedial map in time for a special election to be held in 2017, is critical to understanding how the 2018 Photo ID Law came to be. Because Legislative Defendants lied to delay special elections, they were able to maintain their supermajorities in the state House and Senate until the 2018 elections. And it was during this time frame, between the court's invalidation of the maps and the court's implementation of remedial maps, that they pushed the 2018 Photo ID Law through the racially gerrymandered House and Senate on essentially party-line votes *and* garnered the votes necessary to override Governor Cooper's veto. Thus, the legislature's race-based redistricting tactics are not only informative of their race-based motives in enacting the 2018 Photo ID Law, they were the but-for cause of the legislature's ability to usher in the law in the first place. In this way, voter suppression in redistricting enabled the voter suppression embodied in the 2018 Photo ID Law.

C. The legislature's impermissible use of race in redistricting is relevant evidence as to whether race motivated the enactment of the 2018 Photo ID Law.

This Court criticized the district court in *McCrory* for failing to adequately consider the North Carolina legislature's history of racial discrimination in voting leading up to the enactment of H.B. 589, stating that "a holding that a legislature impermissibly relied on race certainly provides relevant evidence as to whether race motivated other election legislation passed by the same legislature." *McCrory*, 831 F.3d at 225. The district court in this case did not make the same mistake; it properly considered the legislature's invidious use of race in redistricting as relevant historical background of the passage of the 2018 Photo ID Law.

The North Carolina Legislature's enactment of *three* redistricting maps in 2011 with impermissible and unjustified race-based intent provides important context for their pattern and practice of discriminatory legislation. While it is true that "past discrimination cannot, in the manner of original sin, condemn governmental action that is not itself unlawful," *Abbott v. Perez*, 138 S. Ct. 2305, 2324-25 (2018) (internal quotation omitted), this Court should view the passage of the 2018 Photo ID Law as just the most recent legislation in a long and sordid history of voter suppressive tactics employed by the North Carolina legislature.

Furthermore, that Republican legislators in North Carolina were willing to make false statements to a federal court to maintain control under the racially

gerrymandered maps as long as possible is highly relevant to a court's inquiry as to whether race motivated the passage of the 2018 Photo ID Law. Indeed, the extent to which those same legislators capitalized on their race-based redistricting tactics to enact the very legislation at issue in this litigation is not just relevant backdrop, but comprises "[t]he specific sequence of events leading up to the" passage of the 2018 Photo ID law that must be weighed when determining discriminatory intent. *Vill. of Arlington Heights*, 429 U.S. at 267. Here, there is no doubt that the legislature knew that as soon as remedial maps were put in place after *Covington*, Republicans would lose significant power in the legislature and their efforts to replace the earlier photo ID law could be stifled by the Democratic governor's veto. Thus, they held off drawing remedial maps for as long as they could, and used the power afforded by their gerrymandered districts to make their final concerted effort to suppress Black voting power this decade.

North Carolina Republican legislators have engaged in an *agenda* of using suppressive tactics and laws targeted at racial minorities to squelch Black voting power in the state. It is no coincidence that many of the same legislators have been involved in ushering in nearly all of this decade's racially discriminatory voting laws. For example, Representative Lewis was (1) the Chair of the House Elections Committee when H.B. 589 was passed, *N.C. State Conf. of NAACP v. McCrory*, 182 F. Supp. 3d 320, 337 (M.D.N.C. 2016); (2) one of two legislators who instructed Dr.

Hofeller to draw the 2011 racially gerrymandered congressional and state legislative district maps, *Cooper*, 137 S. Ct. at 1462, *Covington*, 316 F.R.D. at 126; (3) Senior Chair of the House Select Committee on Redistricting in 2017, once again hiring Dr. Hofeller, who used racial data to draw racially gerrymandered *remedial* maps despite public statements to the contrary, *Common Cause*, 2019 WL 4569584 at *102; and (4) Chair of the House Committee on Elections and Ethics Law in 2018 when the 2018 Photo ID Law was passed, *NAACP v. Cooper*, 430 F. Supp. 3d at 33. Similarly, Senator Rucho was one of H.B. 589's lead sponsors, *McCrory*, 182 F. Supp. 3d at 341, and as discussed throughout this brief, he and Representative Lewis led the charge to enact all three racially gerrymandered maps that were drawn in 2011 and later invalidated, *Cooper*, 137 S. Ct. at 1462, *Covington*, 316 F.R.D. at 126. Representative Moore was the primary sponsor of H.B. 589 and speaker of the House when the 2018 voter ID law was enacted. *NAACP v. Cooper*, 430 F. Supp. 3d at 31 n.8. And the list goes on. *Id*. Most relevant here, no legislator who had voted for H.B. 589 and was still in office in 2018 voted against the 2018 Photo ID Law.

Dr. Hofeller was also an integral component of this concerted agenda. He defended H.B. 589 when it was challenged in *McCrory*; he drew and defended the state's racially discriminatory maps multiple times, both before and after courts invalidated them as either partisan or racial gerrymanders; and he was responsible for one of the "largest racial gerrymanders ever encountered by a federal court."

Covington v. North Carolina, 270 F. Supp. 3d 881, 884 (M.D.N.C. 2017). Indeed, as one reporter noted upon review of Dr. Hofeller's files, he collected data on the residence halls and race of thousands of students in Greensboro, where the nation's largest historically Black college, North Carolina A&T State University, is located. He also compiled a spreadsheet identifying over 5,000 students who appeared to lack the necessary ID required to cast a ballot. Presumably that data gave Dr. Hoffeller the information he needed to re-draw the state's congressional map after it was invalidated in *Cooper v. Harris* so that it split North Carolina A&T in half and "all but guaranteed" that the campus would be represented by two Republican members of Congress for years to come. *See* David Daley, *The Secret Files of the Master of Modern Republican Gerrymandering*, The New Yorker (Sept. 6, 2019), https://www.newyorker.com/news/news-desk/the-secret-files-of-the-master-of-modern-republican-gerrymandering.

The *Arlington Heights* analysis required the district court to take into account certain background facts—that the same legislators who championed and maintained racially gerrymandered maps were also intimately involved in the passage of the 2018 Photo ID Law and its predecessor—when determining whether the 2018 Photo ID law was passed with racially discriminatory intent. The court properly weighed these points in its analysis, striking down what will hopefully be the legislature's last attempt to intentionally discriminate against Black voters this decade.

CONCLUSION

The North Carolina legislature's history of engaging in racial gerrymandering in order to suppress the voting power of Black voters is important historical background of the 2018 Photo ID Law, and the district court was correct to consider it and gave it proper weight. Given that historical background, and the other findings made by the district court, this Court should affirm the district court's decision to grant a preliminary injunction in favor of the Plaintiffs-Appellees.

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Respectfully Submitted,

/s/ *Aria C. Branch*

Marc E. Elias
Aria C. Branch
Perkins Coie LLP
600 13th Street, N.W., Suite 800
Washington, D.C. 20005
(202) 654-6200
melias@perkinscoie.com
abranch@perkinscoie.com

Abha Khanna
Perkins Coie LLP
1201 3rd Avenue, Suite 4900
Seattle, WA 98101
(206) 359-8000
akhanna@perkinscoie.com

Counsel for Amicus Curiae

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing amicus brief complies with the requirements of Federal Rules of Appellate Procedure 29(a) and 32(a). The brief is prepared in Times New Roman, a proportionally spaced font, has a typeface of 14 points, is double-spaced, and contains 5,818 words (exclusive of items listed in Rule 32(f)), as measured by Microsoft Word.

/s/ *Aria C. Branch*
Aria C. Branch

CERTIFICATE OF SERVICE

I hereby certify that on this 20th day of July 2020, I electronically filed the foregoing with the Court's CM/ECF system. All participants in this case are registered CM/ECF users and will be served via the CM/ECF system.

July 20, 2020

/s/ *Aria C. Branch*
Aria C. Branch