No. 17-1295

IN THE

Supreme Court of the United States

ROBERT A. RUCHO, *et al.*,

Appellants,

—v.—

COMMON CAUSE, *et al.*,

Appellees.

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

SUPPLEMENTAL BRIEF OF THE *COMMON CAUSE* APPELLEES

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SUPPLEMENTAL BRIEF

Pursuant to Sup. Ct. R. 18.10, the *Common Cause* Appellees file this supplemental brief to address yesterday's decisions in *Gill v. Whitford*, No. 16-1161, and *Benisek v. Lamone*, No. 17-333.

After *Gill* and *Benisek*, this case is even more clearly suited for summary affirmance or, in the alternative, plenary consideration in the upcoming Term. In particular, it would be inappropriate to vacate and remand for further consideration in light of these decisions. The *Common Cause* Appellees prevailed on four distinct causes of action, only one of which—the Equal Protection claim premised on vote dilution—was addressed by the Court's opinion in *Gill*. On that claim, moreover, both the evidence presented below and the District Court's findings and conclusions anticipate *Gill*'s holding that vote-dilution standing is district-specific. *Benisek*, meanwhile, was decided entirely on grounds relating to preliminary injunctive relief that are inapplicable to this post-judgment appeal.

Not only would remand therefore be pointless; it would also prolong the ongoing irreparable harm suffered by the voters of North Carolina and deprive the multiple lower courts now considering similar cases of this Court's much-needed guidance.

I. *Gill v. Whitford*

In *Gill*, the plaintiffs—twelve Wisconsin voters—brought Equal Protection claims, alleging harm in the form of vote dilution. The Court held that they had not established a "personal stake in the outcome"

sufficient to satisfy the standing requirement of Article III. Opinion of the Court at 1-2. Four plaintiffs had "*alleged* that they lived in … districts where Democrats ha[d] been cracked or packed." *Id.* at 3 (emphasis added). Had these plaintiffs "followed up with … *proof*" that they had been "place[d] in a 'cracked or 'packed' district," the Court explained, they would indeed have demonstrated injury-in-fact in the form of vote dilution. *Id.* at 12, 17 (emphasis added). But "not a single plaintiff' had in fact "sought to prove that he or she live[d] in a cracked or packed district." *Id.* at 17. The Court "remand[ed] the case," affording the plaintiffs "an opportunity to prove," *inter alia*, that they "live in districts where Democrats … have been packed or cracked," and thereby, to establish vote-dilution injury. *Id.* at 21.

Writing separately, four Justices observed that vote dilution is not the only form of injury wrought by partisan gerrymandering. As a separate matter, they noted, such gerrymanders may inflict "associational" harms cognizable under the First Amendment. For example, "[m]embers of the 'disfavored party' … may face difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office." Concurrence at 9 (citing *Anderson v. Celebrezze*, 460 U.S. 780, 791-92 & n.12 (1983)). "And what is true for party members may be … triply true for the party itself," since partisan gerrymandering "weakens" a political party's "capacity to perform all its functions." *Ibid.* Such harms, these Justices noted, are "not district specific," as they "ha[ve] nothing to do with the [drawing] of any single district's lines." *Id.* at 9-10. As such, "the proof needed for standing" under such a

theory "should not be district specific either." *Ibid.*; *cf.* App-38-40. Nonetheless, the concurring Justices observed, the *Gill* plaintiffs had not sufficiently shown associational harms. Notably, those plaintiffs "d[id] not include the State Democratic Party," and they had not adduced evidence of "the ways the gerrymander had debilitated their party or weakened its ability to carry out its core functions…." Concurrence at 11.

By contrast, the record in *this* case contains precisely the evidence that *Gill* found necessary to demonstrate standing under a vote-dilution theory—and the District Court expressly concluded as much. The *Common Cause* Appellees include voters who live in every congressional district in the challenged 2016 Plan, and the evidence demonstrated the precise packing and cracking in specific districts throughout the State that *Gill* requires. *See* App-45 ("Even absent statewide standing, because Plaintiffs reside in each of the state's thirteen districts and have all suffered injuries-in-fact, Plaintiffs, as a group, have standing to lodge district-by-district challenges to the entire 2016 Plan."). In addition, the *Common Cause* Appellees fully litigated, and developed a clear record on, the First Amendment theory of harm discussed in the *Gill* concurrence. Moreover, the *Common Cause* Appellees also fully litigated, and developed a clear record on, claims that the 2016 Plan violates Art. I, §§ 2 and 4. All of these theories were accepted by the District Court, and any one of them is sufficient to warrant affirmance. Finally, the state Democratic Party is one of the plaintiffs here—unlike in *Gill*, where the plaintiffs were all individual voters without an organizational interest to ground standing.

As to vote dilution, the record below is replete with evidence that the North Carolina legislature packed and cracked Democrats in specific, identified districts. *See, e.g.*, *Common Cause* Pltfs.' Post-Trial Findings of Fact and Conclusions of Law ("FOF/COL"), *Common Cause v. Rucho*, No. 1:16-cv-1026 (M.D.N.C.), Dkt. No. 117, at ¶¶ 65-67 (describing vote dilution in CD 10 and CD 11 resulting from cracking of Asheville Democratic cluster), ¶¶ 68-70 (same for CD 6 and CD 13, resulting from cracking of Greensboro Democratic cluster), ¶¶ 71-73 (same for CD 8 and CD 9, resulting from cracking of Cumberland/Hoke/Robeson Democratic cluster), ¶ 117 (describing dilution of votes in CD 2), ¶¶ 121-22 (same as to CD 9), ¶ 125 (same as to CD 13), ¶ 133 (same as to CD 7), ¶¶ 138-40 (same as to CD 11), ¶¶ 168-69 (describing vote dilution suffered by "the 12 individual Democratic plaintiffs residing in the 10 districts where the deck was stacked in favor of Republicans"), ¶ 170 (describing vote dilution suffered by the "Republican plaintiff Morton Lurie, who resides in CD 4"). The *Common Cause* Appellees' Motion to Affirm depicts several examples of this "cracking" in full color. Mot. to Affirm 9-11. Expert witness Dr. Jonathan Mattingly also demonstrated—by generating more than 24,000 alternative maps—that specific, identified districts were "either packed … or [cracked]." *Id.* at 13-14; *cf. Gill* Concurrence at 4-5 ("alternative maps," including those generated by "computer simulation techniques," can "prov[e] packing or cracking").

Given this wealth of evidence, Appellants' assertion that the *Common Cause* Appellees "made absolutely no attempt to *litigate* their claims on a district-by-district basis," Opp. to Mot. to Affirm 6, is plainly

incorrect. The District Court accepted this evidence and concluded that the plaintiffs had proved their claims of district-specific packing and cracking. *See, e.g.*, App-8-9 (describing district-specific packing and cracking of predecessor 2011 Plan, which the 2016 Plan sought to preserve to the greatest extent possible); App-41 ("[T]he 2016 Plan diluted the votes of those Plaintiffs who supported non-Republican candidates and reside *in the ten [specific] districts* that the General Assembly drew to elect Republican candidates." (emphasis added)); App-159-60 (describing "cracking" of specific "naturally occurring Democratic clusters" to "make it easier for Republican candidates to prevail"). Appellants do not challenge these factual findings in this Court—let alone maintain that they are clearly erroneous.

Moreover, unlike in *Gill*, where the voter-plaintiffs "resided in a small minority of the districts established by the [challenged] plan," App-38, the *Common Cause* voter-plaintiffs hail from *every single district* in the 2016 Plan. Specifically, they include 15 registered Democrats (from all 13 districts of the Plan) and one registered Republican (from CD 4, which was packed with Democrats). FOF/COL ¶¶ 157-59. Appellants candidly admitted these facts in their answer. *See Common Cause v. Rucho*, No. 1:16-cv-1026 (M.D.N.C.), Dkt. No. 49, at ¶¶ 2(d)-2(q). Thus, for each of the districts where packing and cracking undisputedly occurred, there undisputedly exists at least one voter-plaintiff who lives in that district—and who, therefore, has standing to bring a vote-dilution claim under *Gill*.

In response to this overwhelming demonstration of district-specific vote-dilution harm, Appellants offer the casual and conclusory rejoinder that "many" of the *Common Cause* voter-plaintiffs "did not suffer any district-specific injury." Opp. to Mot. to Affirm 6. This claim is false. The only support that Appellants muster for it is the fact that *two* voter-plaintiffs from CD 3 "voted for the Republican candidate who prevailed in the 2016 elections." *Ibid.* In Appellants' view, this means that these two voters cannot have been injured by the "pro-Republican gerrymandering" of their district. *Id.* at 6-7. However, both of these voters, who are registered Democrats, testified that they voted for the Republican candidate *only* because the gerrymandering of their district resulted in the lack of a "strong Democratic candidate[]" for whom they could vote. *Common Cause v. Rucho*, No. 1:16-cv-1026 (M.D.N.C.), Dkt. No. 101-10 at 18; *id.*, Dkt. No. 101-11 at 17. Thus, Appellants' sole "example" of an instance where district-specific injury is lacking is fallacious. In any event, Appellants' unsupported assertion that "many" voter-plaintiffs did not suffer district-specific harm is a tacit concession that at least *some did*—and that is enough to satisfy Article III. *See Bowsher v. Synar*, 478 U.S. 714, 721 (1986).

But that is not all. Unlike the *Gill* plaintiffs, the *Common Cause* Appellees, including the North Carolina Democratic Party, brought and litigated full-fledged First Amendment claims and developed a clear record of First Amendment harms. For starters, the legislature's proclamation that the 2016 Plan embodies the notion that "electing Republicans is better than electing Democrats" inflicts First Amendment harm on all North Carolina Democrats on its face.

App-19. In addition, the voter-plaintiffs adduced evidence of harm in their districts stemming from the indifference of entrenched elected representatives to their constituents' concerns. FOF/COL ¶¶ 171-73. The voter-plaintiffs who are registered Democrats also showed that the 2016 Plan "ma[de] it more difficult for [their] party to recruit and elect candidates"; more difficult to "fund[raise]"; and more difficult to "[bring voters] together to develop policies and practices for their common good." *Id.* ¶¶ 164-67. For these same reasons, the state Democratic Party showed that the 2016 Plan "thwarted [its] capacity to achieve the very purposes for which it exists." *Ibid.* Here, too, the District Court accepted these findings. *See* App-42 (plaintiffs suffered "decreased ability to mobilize their party's base, to attract volunteers, and to recruit strong candidates"); *ibid.* (plaintiffs "fe[lt] frozen out of the democratic process because 'their vote never counts,' which in turn affects voter mobilization and educational opportunities and the ability to attract strong candidates"); App-43-45 (2016 Plan "made it more difficult" for North Carolina Democratic Party "to raise resources and to recruit candidates"). Once again, Appellants do not challenge these findings—let alone maintain that they are clearly erroneous. Whether the First Amendment harms wrought by partisan gerrymandering must be shown on a district-by-district basis or may be shown statewide, this record supports both.

Finally, unlike in *Gill*, the *Common Cause* Appellees also asserted and prevailed on claims under Art. I, §§ 2 and 4. These claims allege structural harms distinct from the vote-dilution harm at issue in *Gill* and the First Amendment harms discussed by the

Gill concurrence. *See* Mot. to Affirm 36-40; *cf. Gill* Concurrence at 12 ("Partisan gerrymandering jeopardizes '[t]he ordered working of our Republic, and of the democratic process.'" (quoting *Vieth v. Jubelirer*, 541 U.S. 267, 316 (2004) (opinion of Kennedy, J.))). The Court's opinion in *Gill* does not address this adequate and independent ground for the District Court's judgment.

In sum, the existing record and the District Court's findings of fact and conclusions of law amply demonstrate Article III standing under the vote-dilution theory of the *Gill* majority; the First Amendment theory of the *Gill* concurrence; and a separate structural theory cognizable under Article I. The Court, therefore, can and should proceed to the merits of this case without delay.

II. *Benisek v. Lamone*

In *Benisek*, the plaintiffs appealed the District Court's denial of a preliminary injunction in a district-specific partisan-gerrymandering challenge. Noting that preliminary injunctions are "an extraordinary remedy" whose denial is reviewed only "for an abuse of discretion," this Court affirmed. Opinion of the Court at 2. Assuming, without deciding, that the plaintiffs were likely to succeed on the merits of their claims, the Court held that their six-year delay in seeking a preliminary injunction undercut the professed urgency of such a remedy. *Id.* at 3-4. The Court also found that the denial of a preliminary injunction was "within the sound discretion of the District Court" given the pendency of *Gill* at the time that decision was made. *Id.* at 5.

The reasoning of *Benisek* has no bearing on this case, which comes before this Court as an appeal of a final judgment after a full trial. Accordingly, *Benisek* presents no obstacle to the Court's prompt consideration of the merits here.

Respectfully submitted,

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