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

APPELLANTS' SUPPLEMENTAL BRIEF

PHILLIP J. STRACH
MICHAEL D. MCKNIGHT
OGLETREE, DEAKINS, NASH, SMOAK & STEWART, P.C.
4208 Six Forks Road
Suite 1100
Raleigh, NC 27609

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Appellants Robert A. Rucho, David R. Lewis, Timothy K. Moore, and Philip E. Berger

June 20, 2018

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

SUPPLEMENTAL BRIEF

One of the threshold questions in this case is whether the plaintiffs have proven that they have standing to press their partisan gerrymandering challenges to North Carolina's 2016 congressional districting map ("2016 Plan"). *See* JS.i. This Court's decision in *Gill v. Whitford*, No. 11-1161 (June 18, 2018), emphatically answers that question in the negative. Indeed, just as *Gill*, the district court based its decision entirely on statewide theories of harm, and "f[ou]nd it appropriate to view the 2016 Plan as inflicting a statewide partisan injury," JS.App.40, without making any effort to tie any purported gerrymandering to any particular plaintiff or the district in which she lives. This case therefore merits the same fate as *Gill*—namely, vacatur and remand for those plaintiffs who alleged individualized, district-specific injuries to attempt "to prove concrete and particularized injuries using evidence—unlike the bulk of the evidence presented thus far—that would tend to demonstrate a burden on their individual votes." *Gill*, slip op. 21.

I. In *Gill*, this Court vacated the district court's decision holding that Wisconsin's state legislative districting map constituted an unlawful partisan gerrymander. The Court concluded that the plaintiffs failed to demonstrate Article III standing because they challenged the districting map only as an undifferentiated whole, rather than attempting to prove that they suffered individualized injuries in their own districts. As the Court explained, vote-dilution is a "district specific" claim, so a voter who claims to have suffered it may challenge only "the

boundaries of the particular district in which he resides," not the districting map as a whole. *Id.* at 14.

In reaching that conclusion, the Court drew a parallel to racial gerrymandering claims, which likewise require plaintiffs to proceed on a "district-by-district" basis. *Id.* at 14-15. And the Court squarely rejected the argument that its one-person, one-vote cases, such as *Baker v. Carr*, 369 U.S. 186 (1962), and *Reynolds v. Sims*, 377 U.S. 533 (1964), permit statewide standing, explaining that the plaintiffs' "mistaken insistence" otherwise "rests on a failure to distinguish injury from remedy." *Id.* at 15.

The Court also made clear that "[t]he facts necessary to establish standing … must not only be alleged at the pleading stage, but also proved at trial." *Id.* at 17. Accordingly, it was not enough that some of plaintiffs "pleaded a particularized burden," as "not a single plaintiff sought to prove that he or she lives in a cracked or packed district." *Id.* Instead, the plaintiffs relied on testimony about "their shared interest in the composition of 'the legislature as a whole,'" "mapmakers' deliberations as they drew district lines," and "partisan symmetry" metrics." *Id.* at 17-18. As the Court explained, that kind of statewide evidence fails to "address the effect that a gerrymander has on the votes of citizens." *Id.* at 18.

II. The arguments and evidence that the Court rejected in *Gill* mirror the arguments and evidence that the plaintiffs have presented in this case. *See* JS.15-22; Reply.3-7. Just like the plaintiffs in *Gill*, the plaintiffs here claimed statewide standing to press statewide challenges on a vote-dilution theory. *See, e.g.*, JS.App.29-30 (noting that all plaintiffs asserted

"statewide" challenges to the 2016 Plan); LWV.Mot.21 n.2 ("The statewide dilution of Democratic votes was accomplished through the systematic cracking and packing of Democratic voters."); CC.Mot.9 (arguing that "North Carolina Democrats *statewide*" were "disempower[ed]" by "the 2016 Plan's packing and cracking of Democratic voters"). And just like the district court in *Gill*, the district court below wholeheartedly embraced that standing theory. JS.App.40 ("Plaintiffs may rely on statewide standing in pursuing their gerrymandering claims"); *see also* JS.App.37-38.

Indeed, the district court expressly rejected a "district-by-district" approach to standing, instead concluding that this Court's one-person, one-vote cases allow for statewide standing. *See* JS.App.34 ("[P]artisan gerrymandering plaintiffs endure the same dilutionary harms that permit voters … to lodge statewide challenges in one-person, one-vote cases"). Moreover, the court concluded that the General Assembly's "intent" to district for partisan advantage on a statewide basis confirmed that the plaintiffs had statewide standing. *See* JS.App.40 ("[I]n drawing the 2016 Plan, the General Assembly sought to achieve a statewide partisan effect. In such circumstances, we find it appropriate to view the 2016 Plan as inflicting a statewide partisan injury."). That is precisely the reasoning that this Court rejected in *Gill*.

To be sure, the district court concluded in the alternative that "Plaintiffs have standing to challenge the 2016 Plan as a whole … [e]ven absent statewide standing, because Plaintiffs reside in each of the state's thirteen districts and have all suffered injuries-

in-fact." JS.App.45; *see also* JS.App.40-41 n.9. But just like the plaintiffs in *Gill*, the plaintiffs here did not "meaningfully pursue their allegations of individual harm"; instead, they "rested their case … on their theory of statewide injury." *Gill*, slip op. 18. Indeed, the *League* plaintiffs have never suggested that they had an individualized theory; they have just adamantly defended their statewide theory, insisting that "it would be incongruous to force challenges to the Plan to proceed district-by-district." LWV.Mot.27; *see also* CC.Mot.15 ("the *League of Women Voters* plaintiffs proceeded only on a statewide theory" (alteration omitted)).

As for the *Common Cause* plaintiffs, while they correctly note that they "*brought* 'district-by-district' claims," CC.Mot.3 (emphasis added), they did not "meaningfully pursue their allegations of individual harm." *Gill*, slip op. 18. Indeed, there was no need to do so given the district court's firm conviction that partisan gerrymandering claims can and should be pursued on a statewide basis. Although the plaintiffs pointed to "cracking" and "packing" as part of their efforts to demonstrate that the defects of the statewide plan, they made no effort to connect such cracking or packing to individual plaintiffs or injuries. And the handful of pages of the district court's opinion to which the *Common Cause* plaintiffs pointed—in both their motion to affirm and second supplemental brief—in attempting to convince this Court that they proved that at least a couple of plaintiffs suffered district-specific injuries conspicuously fail to mention even a single plaintiff, let alone make any findings about how the purported cracking or packing harmed them. *See*

CC.Mot.9-10 (citing JS.App.97, 123, 125, 159); CC.Supp.Br.5 (citing JS.App.8-9, 41, 159-60).

In fact, the *only* plaintiff testimony on which the district court relied in the entirety of its 191-page opinion was testimony emphasizing various *statewide* harms that the plaintiffs alleged. JS.App.36-37 n.8, 41-43. That is unsurprising, as the plaintiffs not only did not focus on individualized, district-specific injuries, but in some instances expressly disclaimed them. For example, one plaintiff admitted that he was "[n]ot aware … of" "any new problems with [his] particular district." Dkt.101-21 at 25.[1] Another stated that her vote-dilution injury arose only upon seeing the "disparity" between Republican and Democrats at the statewide level. Dkt.101-11 at 29. Another plaintiff stated that his vote-dilution injury was based on his "intuition." Dkt.101-27 at 30. And numerous other plaintiffs live in districts that, even assuming they were cracked or packed to some extent, still would favor one party over the other "under any plausible circumstances." *Gill*, slip op. 5; *see, e.g.* JS.20 n.4.

Ultimately, then, the *Common Cause* plaintiffs cannot claim that they proved that identifiable plaintiffs suffered individualized vote-dilution harms in each and every district in the state. *See Gill*, slip op. 21 ("A plaintiff's remedy must be tailored to redress the plaintiff's particular injury."). But they nevertheless insist that they are entitled to a statewide remedy because they suffered "district-

[1] "Dkt." refers to docket entries in *Common Cause v. Rucho*, No. 1:16-cv-1026 (M.D.N.C.).

specific harms of a 'non-dilutionary' nature—including 'decreased ability to mobilize their party's base, to attract volunteers, and to recruit strong candidates' and a feeling of being 'frozen out of the democratic process.'" CC.Mot.17 (quoting JS.App.42-43); *see also* CC.Supp.Br.6-7. Those are precisely "'the kind[s] of undifferentiated, generalized grievance[s] about the conduct of government that [this Court] ha[s] refused to countenance in the past.'" *Gill*, slip op. 16 (quoting *Lance v. Coffman*, 549 U.S. 437, 439 (2007) (per curiam)).

All of that "confirms the fundamental problem with the plaintiffs' case as presented on this record." *Gill*, slip op. 21. Whatever the plaintiffs may have alleged at the pleading stage, the case they presented was "about group political interests." *Id.* And that is the case on which the district court focused in finding a statewide partisan gerrymander based on statewide standing. Just as in *Gill*, then, the plaintiffs are asking this Court to affirm a decision that sought to "vindicate generalized partisan preferences," not "individual legal rights." *Id.* This Court should reject that invitation and dispose of this case the same way it disposed of *Gill*: by vacating and remanding for those plaintiffs who actually alleged individualized injuries to attempt "to prove concrete and particularized injuries using evidence—unlike the bulk of the evidence presented thus far—that would tend to demonstrate a burden on their individual votes." *Id.*[2]

---

[2] If the Court is not inclined to remand, it should set this case for full briefing and argument, as *Gill* certainly provides no basis for affirming the district court's extraordinary conclusion that the

III. This Court's decision in *Benisek v. Lamone*, No. 17-333 (June 18, 2018) (per curiam), confirms that, even if the district court were right about standing and the merits (and it is not), it was wrong about the remedy, as the court attempted to displace the 2016 Plan on the eve of the commencement of the 2018 election cycle. As *Benisek* explained, "a due regard for the public interest in orderly elections" counsels against altering maps on the eve of elections, particularly in the partisan gerrymandering context, where so much "legal uncertainty" remains. Slip op. 1-2 (citing *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006) (per curiam)). The Court thus unanimously concluded that the district court in *Benisek* acted well within its discretion by declining to impose preliminary relief in late August 2017—well over a year before the 2018 congressional elections. Slip op. 4.

A fortiori, the public interest in orderly elections plainly did *not* support the district court's decision in this case to deny a stay and order the General Assembly draw a new districting map *in January*—in a compressed two-week period, no less. Nothing has happened since January that would alter that conclusion. Just the opposite. After the district court denied a stay, this Court promptly granted one, and in the intervening months since, the 2018 elections have gotten underway. The filing period for the primary elections opened on February 12; the State held its

---

State's map violates four separate constitutional provisions, on four theories that this Court has never embraced. That said, a remand for retrial will better ensure that if and when this Court is forced to review this case on the merits, it can review a record and a decision that conforms to the principles set forth in *Gill*.

primaries on May 8; and campaigning for the November elections is in full swing. Although it should be obvious that altering district lines at this late juncture is bound to "result in voter confusion and consequent incentive to remain away from the polls," *Purcell*, 549 U.S. at 4-5, this Court should make that understanding explicit, lest it be forced to confront yet another emergency stay application from the Middle District of North Carolina this summer (or, worse yet, this fall).

CONCLUSION

The Court should vacate the decision below, remand for reconsideration in light of *Gill*, and make clear that the 2016 Plan should remain in place for the 2018 elections.

Respectfully submitted,

PHILLIP J. STRACH
MICHAEL D. MCKNIGHT
OGLETREE, DEAKINS, NASH SMOAK & STEWART, P.C.
4208 Six Forks Road
Suite 1100
Raleigh, NC 27609

PAUL D. CLEMENT
Counsel of Record
ERIN E. MURPHY
ANDREW C. LAWRENCE
KIRKLAND & ELLIS LLP
655 Fifteenth Street, NW
Washington, DC 20005
(202) 879-5000
paul.clement@kirkland.com

Counsel for Appellants Robert A. Rucho, David R. Lewis, Timothy K. Moore, and Philip E. Berger

June 20, 2018