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June 6, 2017

By Hand Delivery

Scott Harris
Clerk of Court
United States Supreme Court
One First Street, N.E.
Washington, D.C. 20543

Re: *Harris v. Cooper*, No. 16-166

Dear Mr. Harris:

Appellees respectfully respond to the Court's Order of May 26, 2017, requesting supplemental letter briefs addressing whether Appellants have standing and whether they have appealed an appealable order. The answer to both of the Court's questions is no. First, Appellants lack standing to challenge the Contingent Congressional Plan as a partisan gerrymander, both because they never amended their complaint to allege the relevant injury and because their challenge is to the Plan as a whole, rather than focused on the districts in which they live. Second, the district court's order is not appealable under 28 U.S.C. §1253 because it is not an order granting or denying injunctive relief.

I. Factual Background

This partisan gerrymandering appeal began as a racial gerrymandering lawsuit. In 2013, Appellants David Harris and Christine Bowser filed suit against several North Carolina officials ("North Carolina" or "the State"), alleging that the congressional districts in which they resided (District 1 and District 12, respectively) were impermissible racial gerrymanders. *See Cooper v. Harris*, No. 15-1262, slip op. at 6 (May 22, 2017). After a bench trial, the three-judge district court held both districts unconstitutional, enjoined the State from using its districting plan in future elections, and ordered the State to "redraw a new congressional

district plan." Final Judgment, Dkt.143. The State filed an appeal to this Court pursuant to 28 U.S.C. §1253 and requested an emergency stay of the district court's orders pending the appeal. This Court denied the emergency stay, JS.App.2a, and ultimately affirmed the district court's judgment, *Cooper*, slip op. 34.

Meanwhile, the General Assembly complied with the district court's injunction by enacting and ratifying a new districting plan, entitled the "2016 Contingent Congressional Plan." *See* 2016-1 N.C. Sess. Laws (enacting districting plan); 2016-2 N.C. Sess. Laws (setting election procedures under new plan). The Contingent Congressional Plan makes substantial changes to Districts 1 and 12, among others. In particular, District 1 retains only about two-thirds of its previous population, while District 12 retains only about half. *See* Pls.' Objs. And Mem. Of Law ("Objections") 14, Dkt.157. The district court's injunction did not require the State to submit the Contingent Congressional Plan for approval, and the State did not do so (although it did notify the district court of the enactment).[1]

After the General Assembly enacted the Contingent Congressional Plan, Appellants asked the district court to "establish a briefing schedule to determine the validity" of the Plan. Pls.' Mot. To Establish Remedial Plan Briefing Schedule 1, Dkt.150. After the district court granted that motion in relevant part, Appellants filed two "objections" to the Contingent Congressional Plan and asked the district court to "reject" the plan and adopt a "lawful" plan "that fully and fairly remedies the constitutional violation." Objections 39-40, Dkt.157. Appellants did not move for an injunction or otherwise request injunctive relief.

The district court denied Appellants' objections on June 2, 2016. It denied the first objection because Appellants "failed to state with specificity the factual and legal basis for the objection." JS.App.4a. It denied the second objection—"that the Contingent Congressional Plan should be rejected as an unconstitutional partisan gerrymander"—because Appellants did not propose a "clear and manageable [standard] to evaluate the partisan-gerrymander claim." JS.App.6a. The district court did not grant or deny any injunctive relief; it simply entered an order rejecting

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[1] The plan was labeled "contingent" not because it depended on court approval, but because it would have been superseded by operation of law if this Court had reversed in *Cooper*. *See* 2016-1 N.C. Sess. Laws §2.

Appellants' objections. *Id.* In fact, the district court made clear that its order did not constitute a final ruling on the constitutionality of the Plan: "[T]he denial of the plaintiffs' objections *does not* … foreclose any additional challenges to … the Contingent Congressional Plan." *Id.*

Appellants filed a notice of appeal from that order on July 5, 2016. JS.App.91a. One month later, the North Carolina Democratic Party, Common Cause, and 15 individual plaintiffs initiated a lawsuit in the U.S. District Court for the Middle District of North Carolina alleging that the Contingent Congressional Plan is an unconstitutional partisan gerrymander. That case is set for trial before a three-judge district court on June 26, 2017. *See Common Cause v. Rucho*, 16-cv-1026 (M.D.N.C.).

II. Appellants Do Not Have Standing To Challenge The Contingent Congressional Plan As A Partisan Gerrymander.

The "irreducible constitutional minimum of standing" contains three requirements, the first of which is "injury in fact." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560 (1992). To establish injury in fact, "a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized.'" *Spokeo, Inc. v. Robins*, 136 S. Ct. 1540, 1548 (2016) (quoting *Lujan*, 504 U.S. at 560). As *Spokeo* emphasized, the injury must be both concrete and particularized. To be "concrete," the injury must be *de facto*, not merely *de jure*—"that is, it must actually exist." *Id.* To be "particularized," the injury must affect the plaintiff "in a personal and individual way;" generalized grievances will not suffice. *Id.* The parties invoking federal jurisdiction—here, Appellants—bear the burden of establishing standing. *Lujan*, 504 U.S. at 561.

In applying the injury-in-fact requirement, including in the voting context, this Court has "repeatedly refused to recognize a generalized grievance against allegedly illegal governmental conduct." *United States v. Hays*, 515 U.S. 737, 743 (1995). To invoke the federal judicial power, the plaintiff "must allege facts showing that he is himself adversely affected," not just that the defendant is violating the law. *Sierra Club v. Morton*, 405 U.S. 727, 740 (1972). In *Morton*, for example, this Court held that the plaintiff organization lacked standing to challenge the Forest Service's approval of a ski resort in the Mineral King Valley because the organization "failed to allege that it or its members … use Mineral King for any purpose." *Id.* at 735.

Accordingly, the organization failed to allege that it or its members would be among those *personally* injured by the challenged action. *Id.*

A. Appellants Lack Standing Because They Have Not Alleged Or Proved Injury Resulting From A Partisan Gerrymander.

Even assuming *arguendo* that partisan gerrymandering ever inflicts an injury sufficiently concrete to create Article III standing, Appellants here lack standing to pursue their claim. Because this case was pleaded and litigated as a *racial* gerrymandering challenge to the *original* districting plan and plaintiffs declined to amend or replead, plaintiffs have not alleged or proved any of the facts necessary to support a *partisan* gerrymandering challenge to the *current* districting plan. For example, even assuming *arguendo* that a districting plan designed to benefit Republicans could inflict cognizable harm on members of other cohesive political groups, *but see infra*, Appellants did not allege *anything* about their own partisan affiliation. *See* Complaint, Dkt.1. From their complaint, no one can say whether Appellants are members of any particular political party, whether they historically have voted for candidates from any particular political party, or whether they intend to vote for candidates from any particular political party in the future.

Appellants likewise have not alleged or proved the several other facts required to demonstrate concrete and particularized injury sufficient to challenge the Contingent Congressional Plan as a partisan gerrymander. They have not identified the districts in which they live in the Contingent Congressional Plan; have not alleged or averred that they were assigned or re-assigned to those districts because of their political affiliation; have not suggested that their ability to elect their preferred candidates has been diluted; and have not even attempted to describe the mechanism by which the Contingent Congressional Plan inflicts particularized harm upon them. The district court, moreover, "made no factual findings with respect to the New Plan," JS6, much less any findings that Appellants are harmed by that plan. And even if one could perhaps surmise some of these missing facts from the surrounding circumstances, "standing cannot be inferred argumentatively from averments in the pleadings, but rather must affirmatively appear in the record." *FW/PBS, Inc. v. City of Dallas*, 493 U.S. 215, 231 (1990) (citation omitted). Because Appellants have not alleged or proved any of the facts necessary to demonstrate that their constitutional rights could be or have been harmed by the partisan gerrymander they describe in their jurisdictional

statement, they have not carried their burden to demonstrate that they are proper parties "to invoke judicial resolution of the dispute." *Hays*, 515 U.S. at 743.

None of this is to suggest that Appellants were foreclosed from challenging the Contingent Congressional Plan (assuming, of course, that partisan gerrymandering claims are justiciable at all). But to do so, they should either have amended their complaint to allege the requisite facts or filed a new complaint doing the same. The former course was taken under similar circumstances by the plaintiffs in *Hays*. There, the state legislature enacted a new districting plan after the district court invalidated the one that the plaintiffs originally challenged. *See id.* at 742. Instead of just filing "objections" to the new plan, the plaintiffs amended their complaint to allege new facts related to that plan. *Id.* The latter course—*i.e.*, filing a new complaint—has been taken by the North Carolina Democratic Party, which is now less than a month away from a trial on the question of whether the Contingent Congressional Plan is an impermissible partisan gerrymander. *See Common Cause v. Rucho*, 16-cv-1026 (M.D.N.C.).

Plaintiffs could have tried to pursue either course here, but instead, they simply asserted a brand new constitutional challenge to a brand new districting map without amending any of the relevant pleadings to allege facts necessary to support their standing (or anything else) for that new claim. Absent any allegations or evidence demonstrating that Appellants are among those who would be injured by the partisan gerrymander that they allege, Appellants have not demonstrated that they have standing to challenge the Contingent Congressional Plan on partisan gerrymandering grounds.

B. Appellants Do Not Have Standing Because They Challenge The Statewide Districting Plan As An Undifferentiated Whole.

Appellants also lack standing for the independent reason that they are challenging the Contingent Congressional Plan as a whole, not the specific districts in which they reside. In the racial gerrymandering context, this Court has held that plaintiffs have standing only if they live in a gerrymandered district; they may not challenge other districts or the districting plan "as an undifferentiated 'whole.'" *Ala. Legislative Black Caucus v. Alabama* ("*ALBC*"), 135 S. Ct. 1257, 1265 (2015). That is because only a voter who lives in a racially gerrymandered district personally suffers "the special representational harms racial classifications can cause in the voting context." *Hays*, 515 U.S. at 745. In particular, he is (1)

subjected to an odious racial classification and (2) "represented by a legislator who believes his primary obligation is to represent only the members of a particular racial group." *ALBC*, 135 S. Ct. at 1265. A voter who lives in a non-gerrymandered district, on the other hand, would be asserting only "a generalized grievance against governmental conduct," not that he has "*personally* been denied equal treatment." *Hays*, 515 U.S. at 745-46.

Here, Appellants challenge the Contingent Congressional Plan only "as an undifferentiated whole." *ALBC*, 135 S. Ct. at 1265. They do not even identify the districts in which they live in the Contingent Congressional Plan, much less contend that they were included in those districts because of their political affiliation. Instead, they focus solely on the statewide impact of the plan, repeatedly referring to the "10-3 partisan advantage" the legislature allegedly sought to guarantee. JS19; *see also, e.g.*, JS16 ("[T]he New Plan … was required to ensure Republicans would maintain a 10-3 advantage."); JS17 ("[T]he New Plan attempts to lock in the existing 10-3 Republican-to-Democrat composition."). Indeed, apart from a single sentence referencing three districts—a sentence that was included only as an "example of the lengths to which the New Plan's architects had to go to achieve the preordained goal of 10-3 partisan advantage," JS19—Appellants do not describe the design or the demographics of any particular district. Because Appellants never allege that their *own* districts have been gerrymandered, they have not alleged any particularized harm and thus do not have standing to pursue their claims. *Hays*, 515 U.S. at 746.

To be sure, this Court has not yet squarely held that the standing requirements in racial gerrymandering cases are the same as in partisan gerrymandering cases. But the basic requirements of Article III remain the same, and the injuries inflicted by gerrymandering must be personal and particularized in both contexts. Only voters who live in gerrymandered districts could possibly suffer the "representational harm" that purportedly results when a representative regards the "object of her fealty" as the "architect of [her] district" and not the district's constituents. *Vieth v. Jubelirer*, 541 U.S. 267, 328-30 (2004) (Stevens, J., dissenting). And only voters who live in gerrymandered districts could even theoretically have their voting power diluted by being placed in districts with foreordained results. *See id.* at 309-10 (Kennedy, J., concurring in the judgment). Because those harms befall only voters who live in gerrymandered districts, only those voters have standing to pursue partisan gerrymandering claims. *Id.*

Moreover, a plaintiff's grievance is no less generalized when he alleges that a statewide districting map was drawn for partisan reasons, rather than racial ones. In either case, the plaintiff does nothing to differentiate himself from every other voter in the State with the same beef. This is a case in point: Appellants never contend that their own representational rights are especially burdened or that voters in their districts are uniquely disabled from participating in the political process. Instead, they argue only that the Contingent Congressional Plan "disadvantag[es] Democrats" across the entire State. JS24. That allegation does not suffice: Even if *some* district lines in the Plan disadvantage Democrats, "that does not prove anything" about Appellants' *own* districts or about whether Appellants have "*personally* been denied equal treatment." *Hays*, 515 U.S. at 746. Accordingly, just like racial gerrymandering claims, partisan gerrymandering claims must proceed "district-by-district." *ALBC*, 135 S. Ct. at 1265. Because Appellants failed to allege a district-specific injury, they lack standing to pursue their generalized challenge to the statewide Plan.

III. The District Court's Order Is Not Appealable Under 28 U.S.C. §1253.

The district court's order is not appealable because it is not an order granting or denying injunctive relief, as required by 28 U.S.C. §1253. Under that provision, parties may appeal directly to this Court only "from an order granting or denying, after notice and hearing, *an interlocutory or permanent injunction* in any civil action, suit or proceeding required by any Act of Congress to be heard and determined by a district court of three judges." 28 U.S.C. §1253 (emphasis added). This Court has repeatedly explained that §1253 "is to be narrowly construed" because "any loose construction … would defeat the purposes of Congress to keep within narrow confines our appellate docket." *Goldstein v. Cox*, 396 U.S. 471, 478 (1970) (alteration omitted). Here, the same informality that led Appellants not to amend their complaint to allege particularized injuries from the partisan gerrymandering they identified in the Contingent Congressional Plan had them filing only "objections" to the Plan, not specific requests for injunctive relief, and produced only a denial of those objections, rather than an appealable order granting or denying injunctive relief.

And this is not a context where "close counts." Applying a narrow construction of §1253, this Court has dismissed numerous appeals from orders that are similar to—but are not—interlocutory or permanent injunctions. In *Carey v. Wynn*, 439 U.S. 8 (1978) (per curiam), for example, a three-judge district court entered a

declaratory judgment holding certain sections of an Illinois law unconstitutional. This Court dismissed an appeal from that judgment, holding that §1253 "does not authorize an appeal from the grant or denial of declaratory relief alone." *Id.* at 8; *accord Gerstein v. Coe*, 417 U.S. 279 (1974); *Mitchell v. Donovan*, 398 U.S. 427, 430 (1970).

Similarly, in *Goldstein v. Cox*, this Court dismissed an appeal from an order denying the plaintiffs summary judgment on their facial constitutional challenge. 396 U.S. at 475. Even though the plaintiffs had requested injunctive relief in their original complaint, "[t]hey filed no separate application for a preliminary injunction," and "[t]he District Court in its opinion in no way adverted to the possibility of such relief being granted." *Id.* at 478-79. This Court even has dismissed an appeal where the three-judge district court expressly ruled that the plaintiffs were "entitled to … injunctive relief," but simply failed to enter a formal order enjoining the challenged law. *Gunn v. Univ. Comm. to End War in Viet Nam*, 399 U.S. 383, 386-88 (1970).

Here, the order denying Appellants' objections is not an order "granting or denying … an interlocutory or permanent injunction." 28 U.S.C. §1253. Just like the plaintiffs in *Goldstein*, Appellants did not apply for an injunction or formally request injunctive relief; they merely filed "objections" and asked the court to "reject the New Plan." Objections at 39-40. The district court, in rejecting those objections, never adverted to the possibility of injunctive relief; it merely entered an order rejecting Appellants' objections "as presented." JS.App.6a. Indeed, the district court disavowed any definitive ruling on the constitutionality of the plan: "[T]he denial of the plaintiffs' objections does not constitute or imply an endorsement of, or foreclose any additional challenges to, the Contingent Congressional Plan." *Id*. The district court's order is most akin to a declaratory judgment—it "states the existing legal rights in a controversy, but does not, in itself, coerce any party or enjoin any future action." *Ulstein Mar., Ltd. v. United States*, 833 F.2d 1052, 1055 (1st Cir. 1987); *see Carey*, 439 U.S. at 8 (declaratory judgments non-appealable under §1253). But in all events, whatever it is, it is not an order granting or denying an injunction.

The limitation on this Court's jurisdiction under §1253 is "no mere technicality." *Gunn*, 399 U.S. at 387. A primary reason for that limitation "is that until a district court issues an injunction, or enters an order denying one, it is simply not possible to know with any certainty what the court has decided." *Id.* at

388. That state of affairs "is conspicuously evident here." *Id.* The district court's order uses so much qualifying language that it is not at all clear where the district court believed the order left the parties: "Therefore, *it does not seem*, *at this stage*, that the Court can resolve this question *based on the record before it*. For these reasons, the Court rejects the plaintiffs' second objection *as presented*." JS.App.6a (emphasis added). That order neither approved the Plan nor rejected it; neither held partisan gerrymandering claims nonjusticiable nor purported to adopt a suitable standard for adjudicating them; and neither invited Appellants to supplement the record nor foreclosed them from doing so. Given that lack of clarity, the prudent course is to apply §1253 as written and dismiss this appeal for lack of jurisdiction.

IV. Conclusion

For the foregoing reasons, and for the reasons stated in Appellees' previously filed Motion to Dismiss, this Court should dismiss the appeal.

Sincerely,

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Counsel for Appellee North Carolina State Board of Elections[2]
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cc: Counsel for Appellants

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[2] Appellee Roy Cooper, in his capacity as Governor of North Carolina, has informed us that he does not join this brief and does not object to the plaintiffs' position on standing or their ability to appeal as outlined in their letter brief.

IN THE
SUPREME COURT OF THE UNITED STATES

No. 16-166

DAVID HARRIS, et al.,
Appellants,

v.

ROY COOPER, GOVERNOR OF NORTH CAROLINA, et al.,
Appellees.

CERTIFICATE OF SERVICE

I, Paul D. Clement, a member of the Supreme Court Bar, hereby certify that three copies of the attached Letter Brief were served on:

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