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

BRIEF OPPOSING MOTIONS TO AFFIRM

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INTRODUCTION

The district court concluded that virtually any Democrat in North Carolina has standing to challenge the State's entire 2016 congressional redistricting plan ("2016 Plan"), and that *four* different constitutional provisions provide judicially administrable limits on partisan gerrymandering. The notion that such a novel and revolutionary decision should be summarily affirmed beggars belief. Indeed, plaintiffs do not dispute that this Court should hold this case pending *Gill v. Whitford*, No. 16-1161 (U.S.), and *Benisek v. Lamone*, No. 17-333 (U.S.), both of which involve whether partisan gerrymandering claims are justiciable. If the answer is no, then the decision below must be reversed, not affirmed. But even if the Court takes a more incremental approach—*viz.*, plaintiffs may not bring *statewide* partisan gerrymandering challenges, and *some* consideration of partisan advantage is permissible—the decision below still cannot stand, for it squarely conflicts with both principles.

Plaintiffs insist they may attack the 2016 Plan *in toto*, even though that gambit is precluded in every other districting context. But the *Common Cause* plaintiffs support that assertion only through *ipse dixit*, and the *League* plaintiffs do so only by distorting precedent. Tellingly, the *Common Cause* plaintiffs quickly shift to arguing they have always asserted "district-specific standing." But whatever they may have alleged in their complaint, they pressed, and the district court adjudicated, only statewide theories. That is unsurprising, as any district-level allegations were conclusory at best, and the evidence confirms

that plaintiffs could not plausibly claim district-specific injury in many districts.

As for the merits, plaintiffs do not fully defend the district court's entire grab-bag of partisan gerrymandering tests, all of which make *any* intent to district for partisan advantage constitutionally suspect. Plaintiffs understandably attempt to soften that extreme position, promising that partisan considerations are still permitted so long as legislators do not act with "invidious" intent. But simply labeling a certain degree of partisan advantage "invidious" does nothing to answer the $64,000 question of how much partisan advantage is too much (or "invidious," if you prefer). And if this Court's gerrymandering cases teach anything, it is that *some* degree of districting for partisan advantage is both inevitable and permissible under a Constitution that explicitly contemplates that districts will be drawn by legislatures.

If there is a justiciable standard for partisan gerrymandering, it is almost certain to come in a case where parties have focused on and developed a single constitutional theory with district-specific injuries tailored to the particular injury alleged. This statewide challenge based on four different constitutional theories, each less plausible and less forgiving than the last, is the very antithesis of such a case. Accordingly, no matter what the result of this Court's decisions in *Gill* and *Benisek*, the decision below should be reversed or vacated.

I. Plaintiffs' Statewide Standing Theory Is Wrong.

Even assuming there is some justiciable way to adjudicate partisan gerrymandering claims, it is not the statewide approach plaintiffs took here. Plaintiffs pressed only statewide arguments, and the district court indiscriminately analyzed the 2016 Plan as a whole, focusing on the legislature's generic "intent" to district for partisan advantage statewide, not how that intent manifested itself in any particular district or injured any particular plaintiff. That methodology is inconsistent with how this Court has approached districting challenges in every other context.

For example, "[a] racial gerrymandering claim … applies district-by-district," and "does not apply to a State considered as an undifferentiated 'whole.'" *Ala. Legislative Black Caucus v. Alabama* (*ALBC*), 135 S. Ct. 1257, 1265 (2015). Accordingly, while "a voter who lives in the *district* attacked" has standing to challenge that district, courts may not assess whether "race improperly motivated the drawing of boundary lines of the State *considered as a whole*." *Id.* Likewise, the "right to an undiluted vote" does not "belong[] to the minority as a group," but instead "to its individual members." *Shaw v. Hunt*, 517 U.S. 899, 917 (1996). Courts considering vote-dilution claims thus must conduct an "'intensely local appraisal' of the challenged district" to determine whether the plaintiff is part of a politically cohesive and geographically compact community whose ability to elect its candidate of choice has been burdened. *League of United Latin Am. Citizens v. Perry* (*LULAC*), 548 U.S. 399, 437 (2006).

Malapportionment cases are the same: Plaintiffs may bring them only to allege injuries in the districts "in which they reside." *Baker v. Carr*, 369 U.S. 186, 207 (1962); *see Reynolds v. Sims*, 377 U.S. 533, 537 (1964); *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964); *Gray v. Sanders*, 372 U.S. 368 (1963).

Plaintiffs do not dispute that they challenged the 2016 Plan on a statewide basis. Yet the *Common Cause* plaintiffs attempt to justify that tactic only through the bald assertion that the statewide approach is "correct[]." CC.Mot.15. The *League* plaintiffs say more, but to no avail. According to them, an "unbroken wall of precedent" supports statewide partisan gerrymandering claims, from *Davis v. Bandember*, 478 U.S. 109 (1986), to *LULAC*, to various district court cases. LWV.Mot.19-20. But an "unbroken wall" of precedents agreeing on no justiciable theory for partisan gerrymandering claims hardly helps plaintiffs on standing. Moreover, neither *Bandemer* nor *LULAC* even addressed the statewide approach, and the district court cases only "assumed" its validity. LWV.Mot.20. And even some of the Justices who would have found some claims justiciable have questioned the validity of statewide claims. *See, e.g.*, *Vieth v. Jubelirer*, 541 U.S. 267, 353 (2004) (Souter, J., dissenting).

Nor do the *League* plaintiffs successfully distinguish racial gerrymandering, vote-dilution, and malapportionment cases. They suggest that the Court should silo district-specific analysis to the racial gerrymandering context because such cases "do not contain claims … that either minority or nonminority voters are underrepresented in the legislature."

LWV.Mot.26. But that is only because this Court has *rejected* such claims as too generalized to satisfy Article III. *See United States v. Hays*, 515 U.S. 737 (1995). Plaintiffs cannot explain why the result should be different here.

As for vote dilution, the *League* plaintiffs contend that statewide vote-dilution claims are permissible because "vote dilution may be accomplished by cracking *or* by packing minority voters." LWV.Mot.24-25. That is only half right. While a vote-dilution claim certainly may be brought based on cracking *or* packing, it must still be brought by a plaintiff who actually lives in and is challenging the allegedly cracked or packed district. *See Thornburg v. Gingles*, 478 U.S. 30, 49-51 (1986). Here, plaintiffs never even tried to prove that any particular district was "cracked" or "packed"—indeed, the *League* plaintiffs alleged "cracking" and "packing" in only a handful of districts, *almost all of which no League plaintiff lives in*, LWV.Mot.21 n.2.[1]

Finally, as for the one-person, one-vote cases, the very authority the *League* plaintiffs cite confirms that standing extends only to "'voters whose votes were diluted'"—*i.e.*, voters injured in their own districts. LWV.Mot.24 (quoting *Evenwel v. Abbott*, 136 S. Ct. 1120, 1131 n.12 (2016)). And as the *League* plaintiffs' counsel explained at the *Gill* argument, plaintiffs filing malapportionment suits "have to live in an overpopulated district rather than an underpopulated district," which necessarily means malapportionment

[1] The *League* plaintiffs reside in only six of the thirteen districts. *League* Dkt.41 at ¶¶18-29.

suits *cannot* be filed by plaintiffs living in any given legislative district. *Gill* Tr.36. Yet that is precisely the unprecedented standing theory that the district court adopted here. Plaintiffs offer no reason whatsoever why partisan-gerrymandering claims, if they can be brought at all, would be immune from the otherwise-uniform rule that redistricting challenges must be brought on a district-specific basis.

The *Common Cause* plaintiffs recognize the flaws in their counterparts' approach, but insist that their challenge is different. CC.Mot.15 ("While the *League of Women Voters* plaintiffs 'proceed[ed] only on a 'statewide' … theory,' the *Common Cause* plaintiffs did not.'"). They accuse appellants of "flagrantly mischaracteriz[ing]" their case as relying on only a statewide theory, CC.Mot.15, even though appellants expressly acknowledged the *Common Cause* plaintiffs "'claim[ed] they have standing to assert … district-by-district challenges' to the 2016 Plan as a whole," JS.7. The more fundamental problem, as appellants also pointed out, is that whatever the *Common Clause* plaintiffs may have alleged in their complaint, they made absolutely no attempt to *litigate* their claims on a district-by-district basis. And understandably so, as many of them did not suffer any district-specific *injury*. For example, the plaintiffs from Congressional District 3 testified that they *voted for* the *Republican* candidate who prevailed in the 2016 elections held under the 2016 Plan, begging the question how any purported pro-Republican gerrymandering could have deprived them of their district-specific

representational rights. *Rucho* Dkt.101-10 at 18; Dkt.101-11 at 15.[2]

Even the *Common Cause* plaintiffs' motion to affirm reinforces the statewide nature of the challenge. It references a handful of specific districts in passing while discussing "the 2016 Plan" nearly 40 times. And the district court, for its part, made zero findings that the General Assembly gerrymandered any particular district, let alone did so in a way that actually injured any particular plaintiff. Instead, the court just faulted the legislature for drawing "the 2016 Plan," JS.App.27-28, to provide advantages to Republican candidates through the state. "This is not a technical, linguistic point. … [T]he District Court's terminology mattered." *ALBC*, 135 S. Ct. at 1265. Accordingly, if statewide partisan gerrymandering claims fail for lack of standing or are otherwise nonjusticiable, then the decision below cannot stand.

II. The District Court's Four Novel Partisan Gerrymandering Tests Are Neither Limited Nor Precise.

In a context where this Court has struggled for decades to come up with even *one* test for adjudicating partisan gerrymandering claims, the district court purported to identify *four*—one grounded in the Equal Protection Clause; one in the First Amendment; and two in the Elections Clauses. With all due respect, those four tests reflect not multiple flashes of insight, but the basic incoherence of the district court's approach, which treats any partisan motivation as

[2] The plaintiffs do not dispute that the organizational plaintiffs lack standing if the individual plaintiffs lack standing. JS.21 n.5

verboten in an area where the whole problem is identifying how much is too much. It is thus telling, though not surprising, that the *League* plaintiffs defend only the first test.[3] And not one of the four is "limited and precise." *Vieth*, 541 U.S. at 306 (Kennedy, J., concurring).

Equal Protection Clause. The district court first concluded that a redistricting plan violates the Equal Protection Clause if it is enacted with "discriminatory intent" and produces "discriminatory effects" that are not attributable to a "legitimate redistricting objective." JS.App.88. Remarkably, *any* intent to district for partisan advantage is constitutionally suspect under that test, JS.App.93-94, even though it is well-established "that a jurisdiction may engage in constitutional political gerrymandering," *Hunt v. Cromartie*, 526 U.S. 541, 551 (1999), and even though *racial* gerrymandering claims require "predominant" intent, JS.24-25. The notion that the Equal Protection Clause—the "central purpose" of which was to "eliminate racial discrimination," *Pena-Rodriguez v. Colorado*, 137 S. Ct. 855, 867 (2017)—is more tolerant of race-based districting than partisan districting is a complete non-starter.

Plaintiffs try to soften the district court's unforgiving intent standard, claiming that it prohibits only "invidious" intent to discriminate—*i.e.*,

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[3] The *League* plaintiffs never even mention the Elections Clauses. And while they endorse First Amendment claims, they do not defend the district court's First Amendment test, but rather suggest that the *equal protection* test should somehow establish a First Amendment violation too. LWV.Mot.4 & n.1.

legislators cannot "entrench" their own party and "subordinate" its rival. CC.Mot.25; LWV.Mot.29. Plaintiffs then claim this reimagined standard is actually *more* stringent than a "predominant intent" standard. CC.Mot.26-28; LWV.Mot.30-32. But new labels cannot solve the basic justiciability problem. In reality, all plaintiffs mean by intent to "subordinate" or "entrench" is intent to district for partisan advantage. As Judge Osteen thus correctly explained: "It is difficult to conceive of any political issue, including redistricting, where opposing sides would not possess … some form of discriminatory intent as that term is used in this case." JS.App.214. And while "entrenching" and "subordinating" certainly sound worse than simply pursuing legitimate partisan advantage, those labels do nothing to give courts meaningful guidance to "draw[] the line between good politics and bad politics." *Vieth*, 541 U.S. at 299 (plurality op.).

The effects prong of the district court's test—which measures "bias" towards a "favored party," JS.App.130—is just as amorphous, as it never purports to explain how much "bias" is too much or what evidence suffices to prove it. Plaintiffs view that uncertainty as a virtue, CC.Mot.28-32; LWV.Mot.34-36, but when the exercise is to develop a "limited *and precise*" test, imprecision is fatal. *Vieth*, 541 U.S. at 267 (plurality op.) ("No test … can possibly be successful unless one knows what he is testing *for*.").

Finally, once the diluted intent and effects prongs are satisfied, the districting map is all but doomed. There must be a "legitimate redistricting objective" that explains the "impermissible" effects, but in the

words of the district court, there is "never … *any* legitimate constitutional, democratic, or public interest advanced" by partisan gerrymandering, App.92 n.16, rendering the outcome of applying the third prong a foregone conclusion.

First Amendment. The First Amendment test is equally incoherent. As Judge Osteen explained, just as with the equal protection test, its intent prong "would in effect foreclose all partisan considerations in the redistricting process," JS.App.219, even though this Court has "said time and again you can't take all consideration of partisan advantage out of districting," *Benisek* Tr.16 (Alito, J.). Yet again, the *Common Cause* plaintiffs profess confidence that courts can separate "invidious and non-invidious use of partisan classifications." CC.Mot.34. But once again, "invidious" is a label, not a test that provides meaningful assistance in the illusive task of determining how much partisan consideration is too much.

The *Common Cause* plaintiffs embrace the startling notion that anything more than a *de minimis* First Amendment injury resulting from any intent to district for partisan advantage triggers strict scrutiny, and that injuries are cognizable even where plaintiffs remain free to "'field candidates for office, participate in campaigns, vote for their preferred candidate, or … associate with others.'" CC.Mot.32-33, 35 & n.6.[4] That hair-trigger application of strict scrutiny troubled many Justices during the *Benisek* argument. *Benisek*

[4] Plaintiffs do not dispute appellants' argument that promoting partisan advantage is not state action that violates the First Amendment. JS.30.

Tr.19 (Roberts, C.J.) ("how would you ever satisfy strict scrutiny in … a case like this?"); *id.* at 14 (Alito, J.) ("I really don't see how any legislature will ever be able to redistrict."); *id.* at 18 (Kagan, J.) ("even when the state … wants to achieve balanced districts or wants to undo a former gerrymander … you would still put the state through a very strict scrutiny test …?"; *id.* at 17-18 (Kennedy, J.). And understandably so, as not even *racial* gerrymandering claims categorically face strict scrutiny. *Bush v. Vera*, 517 U.S. 952, 964 (1996).

Ultimately, the restrictive First Amendment test here would transfer mapmaking authority from state legislatures to the federal judiciary without meaningful guidance, despite the "longstanding recognition of the importance in our federal system of each State's sovereign interest in implementing its redistricting plan." *Id.* at 978.

Elections Clauses. The *League* plaintiffs wisely abandon the district court's novel Elections Clause holdings, and the *Common Cause* plaintiffs' half-hearted efforts to defend them are unavailing. No other court in history has agreed that districting for partisan advantage "exceeds" the State's districting powers or deprives "the People" of their right to elect Representatives under Sections 2 and 4 of Article I. JS.App.195, 199. With good reason, as it strains credulity to claim that the very same constitutional text that "clearly contemplates districting by political entities" is the font of an administrable partisan gerrymandering test. *Vieth*, 541 U.S. at 285-86 (plurality op.).

Plaintiffs boldly claim (at 38) that their contrary contention "follows *a fortiori*" from *Cook v. Gralike*, 531 U.S. 510 (2001). In *Gralike*, the Court concluded that States could not print pejorative labels next to the names of congressional candidates who did not support term-limit legislation, *id.* at 525-26, as that constituted an impermissible "attempt to control the actions of the State's congressional delegation," *id.* at 527 (Kennedy, J., concurring). While *Gralike* might have been instructive had the General Assembly passed legislation that branded opposing candidates as "tax-and-spend-liberals," rather than Democrats, on election ballots, *id.* at 525, it is difficult to imagine how *Gralike*, a case that says literally nothing about partisan gerrymandering, is even relevant here, let alone makes this case "a pushover." CC.Mot.39. That is especially true considering that the *Vieth* plaintiffs raised an Elections Clauses argument just a few Terms after *Gralike*, and the *Vieth* plurality dismissed that argument, while no other Justice deemed it worthy of mention. JS.33.

The *Vieth* Court's skepticism was well-founded. The Elections Clauses delegate to state legislatures the power to draw districts for federal elections and authorize Congress to alter those districts as it sees fit. *Vieth*, 541 U.S. at 275 (plurality op.). This whole enterprise is "root-and-branch a matter of politics," *id.* at 285-86, and any effort to remove political considerations from it would work a "substantial intrusion into the Nation's political life," *id.* at 306 (Kennedy, J., concurring). Thus, even assuming there is an administrable partisan gerrymandering test out there, it is not lurking in the Elections Clauses. To the contrary, such a test, if it emerges at all, is likely to be

the product of a challenge focused on a single constitutional provision brought by voters suffering the precise injury protected by that constitutional provision in the district in which they engaged in the relevant constitutionally protected conduct. The challenge here was the polar opposite, and the district court's acceptance of four different theories for statewide challenges "goes a long way to establishing that there is no constitutionally discernible standard" to police partisan gerrymandering. *Id.* at 292 (plurality op.).

CONCLUSION

The Court should hold this case pending *Gill* and *Benisek*, then reverse, vacate, or note probable jurisdiction.

Respectfully submitted,

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