

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 LEAGUE OF WOMEN
VOTERS OF NORTH CAROLINA, *ET AL.***

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**CORPORATE DISCLOSURE
STATEMENT**

Pursuant to Rule 29.6, the League of Women Voters of North Carolina states that it is a non-profit corporation that has no parent corporation and issues no stock.

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INTRODUCTION

In *Gill v. Whitford*, No. 16-1161 (U.S. June 18, 2018), this Court clarified the standing requirements that apply to plaintiffs bringing partisan gerrymandering claims on a vote dilution theory. Such plaintiffs, the Court ruled, must prove that they live in “cracked” or “packed” districts, and thus that their electoral influence has been diminished compared to some alternative district configuration. In its decision, the Court limited its analysis to standing; it did not address the law applicable to the liability or remedy stages of vote dilution litigation.

Whitford postdates the Motion to Affirm that the League of Women Voters of North Carolina (“League”) filed on April 27, 2018. The League therefore submits this supplemental brief pursuant to Supreme Court Rule 18.10 in order to highlight *Whitford*’s relevant holdings and to show that the plaintiffs satisfy its standing requirements.

There is no need to remand this case in light of *Whitford*. Record evidence and the district court’s findings of fact make clear that the plaintiffs meet *Whitford*’s standing requirements. The plaintiffs live in all thirteen of the districts in North Carolina’s current congressional plan (“2016 Plan”). These districts also *were*—but did not *have* to be—cracked and packed by the 2016 Plan. Both the drafts of the Plan’s own author and the thousands of alternative maps generated by the League’s expert prove there was nothing inevitable about the rampant cracking and packing to which the plaintiffs were subjected. The Court should therefore hold that the plaintiffs have standing and proceed to the merits of their claims.

ARGUMENT

I. *Whitford* Held That Vote Dilution Plaintiffs Must Show That They Live in Cracked or Packed Districts.

Prior to *Whitford*, it was uncertain how standing should be determined in partisan gerrymandering suits proceeding on a vote dilution theory. The *Whitford* plaintiffs, for example, argued that *all* backers of the party victimized by gerrymandering have standing by virtue of their support for that party. *See Whitford*, slip op. at 16. The Court unanimously rejected this view, holding instead that only plaintiffs living in cracked or packed districts, relative to some alternative district configuration, have standing. As the Court put it, a vote dilution plaintiff must “prove that he or she lives in a cracked or packed district.” *Id.* at 17. This cracking or packing “causes his vote . . . to carry less weight than it would carry in another, hypothetical district.” *Id.* at 15-16; *see also id.* at 17, 21 (noting that four of the *Whitford* plaintiffs did “plead[] a particularized burden along such lines” through their “allegations that [they] live in districts where Democrats like them have been packed or cracked”).

Importantly, the *Whitford* Court did not address any aspect of a vote dilution theory of gerrymandering other than standing. The Court observed that the theory’s “contours and justiciability . . . are unresolved.” *Id.* at 21. The Court also “express[ed] no view on the merits of the plaintiffs’ case.” *Id.* And the Court confirmed that its decision “rests on the understanding that [it] lack[s] jurisdiction to decide this case, much less to draw speculative and advisory conclusions regarding others.” *Id.* at 17.

Accordingly, *Whitford* does not hold (or hint) that the liability or remedy stages of a vote dilution case must be confined to individual districts. To the contrary, the Court acknowledged that in another kind of vote dilution proceeding—a malapportionment suit—the appropriate relief is statewide in nature. “[T]he only way to vindicate an individual plaintiff’s right to an equally weighted vote [is] through a wholesale ‘restructuring of the geographical distribution of seats in a state legislature.’” *Id.* at 15 (quoting *Reynolds v. Sims*, 377 U.S. 533, 561 (1964)).

The standard for liability in a malapportionment suit, of course, is also statewide, not district-specific. It is whether a district plan in its entirety has a total population deviation, between its most and least populous districts, that is large and unjustified. *See, e.g., Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) (state legislative maps); *Karcher v. Daggett*, 462 U.S. 725, 730-31 (1983) (congressional maps). The standard for liability in a racial vote dilution case under Section 2 of the Voting Rights Act similarly extends beyond particular districts’ boundaries. Racial polarization in voting is typically evaluated across a multidistrict region, *see, e.g., Thornburg v. Gingles*, 478 U.S. 30, 35, 52 (1986) (measuring polarization in multimember districts totaling thirty seats), and the proportionality of minority representation is usually analyzed statewide, *see, e.g., League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 438 (2006) (noting that “it makes sense to use the entire State in assessing proportionality”).

These liability and remedy principles apply equally to a vote dilution theory of partisan gerrymandering. As to liability, use of a statewide

measure of partisan asymmetry is necessary to prevent two undesirable outcomes. Without such a metric, first, plaintiffs could successfully claim vote dilution even when the plan as a whole is not biased against them. Second, plaintiffs could nullify so many districts on vote dilution grounds that the map becomes tilted in their favor (rather than neutral). And as to relief, multiple districts must always be redrawn to correct the cracking and packing that are established at the standing stage of the litigation. In the Court’s words, “[r]emedying the individual voter’s harm . . . requires revising . . . such districts as are necessary to reshape the voter’s district—so that the voter may be unpacked or uncracked, as the case may be.” *Whitford*, slip op. at 16; *see also id.* (observing that this revision may “require restructuring all of the State’s legislative districts”).

The Court therefore should not remand this case on the basis that *Whitford* somehow changed the law applicable to vote dilution liability or relief. *Whitford* did no such thing, and indeed, under well-established doctrine in closely related fields, it is impossible either to find vote dilution or to cure it without considering districts beyond those in which the plaintiffs live.

II. The Plaintiffs in This Case Have Standing Under *Whitford*’s Requirements.

The Court also should not remand on standing grounds. Both the litigants and the district court anticipated the Court’s standing holding. That is why the plaintiffs here, unlike in *Whitford*, reside in every district in the 2016 Plan. *See* Dkt.12:4-9 (describing individual voter-plaintiffs living in all of the Plan’s districts); Ex.4080:1 (stipulating that “plaintiff League of Women Voters of North Carolina has

individual members who are registered Democrats living in each of North Carolina's thirteen congressional districts"). That is also why the litigants presented evidence, and the district court found, that all of the Plan's districts are cracked or packed and that all of them *could* have been drawn without diluting the plaintiffs' votes to the same extent. The below discussion summarizes, but does not exhaust, all of the relevant material in the record.

District 1:

District 1 is located in northeastern North Carolina and contains most of the region's Democratic voters. Ex.4007; Ex.4071; Ex.4073. Individual plaintiffs William Collins, Carol Faulkner Fox, Larry Hall, Annette Love, Gunther Peck, Elizabeth Torres-Evans, and Willis Williams live in District 1.¹ Dkt.12:4-5; Dkt.41:8-10. The 2016 Plan's author, Dr. Thomas Hofeller, predicted that District 1 would be a packed Democratic district with a Democratic vote share of 69%. Ex.5116:9. As expected, District 1 was won by the Democratic candidate in 2016 with 69% of the vote. Ex.1018. For these reasons, the district court found that District 1 was one of the districts into which "Dr. Hofeller 'concentrat[ed]' Democratic voters." App.117.

The district court also found that District 1 was significantly more packed (or heavily Democratic) than the analogous district in more than 20,000 simulated district maps. App.102-03; Ex.3040:27. Dr. Hofeller, further, created two draft maps prior to finalizing the 2016 Plan (maps 17A and ST-B) in

¹ League and Common Cause plaintiffs are referred to interchangeably throughout the brief.

which District 1's voters were distributed among three districts. All three of these districts were predicted to be Democratic (*e.g.*, 51%, 52%, and 53% in map 17A). Ex.4023; Ex.4024. And the League's expert, Professor Jowei Chen, produced many maps that unpacked District 1's voters. His map 3-2, for example, contained two moderately Democratic districts (52% and 53%) in place of the overwhelmingly Democratic District 1. Ex.2010:12; Ex.4032.

District 2:

District 2 is located in central North Carolina, just south of District 1. It carefully avoids the large concentrations of Democratic voters in Raleigh-Durham and northeastern North Carolina. Ex.4007; Ex.4069; Ex.4072. Individual plaintiffs Douglas Berger and Ersila Phelps live in District 2. Dkt.12:5; Dkt.41:9. Dr. Hofeller predicted that District 2 would be a cracked Republican district with a Republican vote share of 56%. Ex.5116:9. As expected, District 2 was won by the Republican candidate in 2016 with 57% of the vote. Ex.1018.

The district court found that District 2 was significantly more cracked (or efficiently Republican) than the analogous district in more than 20,000 simulated district maps. App.102-03; Ex.3040:27. In Dr. Hofeller's two draft maps, many of District 2's voters were distributed between two slightly Democratic districts (*e.g.*, 52% and 53% in map 17A) as opposed to one moderately Republican district. Ex.4023; Ex.4024. And in Professor Chen's map 1-1, many of District 2's voters were placed in a single slightly Democratic district (51%). Ex.2010:12; Ex.4025.

District 3:

District 3 is located in eastern North Carolina, east of District 1 and its many Democratic voters. Ex.4007; Ex.4071. Individual plaintiffs Cheryl Taft and Richard Taft live in District 3. Dkt.12:5. Dr. Hofeller predicted that District 3 would be a cracked Republican district with a Republican vote share of 55%. Ex.5116:9. As expected, District 3 was won by the Republican candidate in 2016 with 67% of the vote. Ex.1018.

In Dr. Hofeller's two draft maps, many of District 3's voters were placed in a slightly Democratic district (e.g., 51% in map 17A) instead of a moderately Republican district. Ex.4023; Ex.4024. In Professor Chen's map 1-3 as well, many of District 3's voters were placed in a moderately Democratic district (55%). Ex.2010:12; Ex.4027.

District 4:

District 4 comprises most of Raleigh-Durham. Ex.4007; Ex.4072. As the district court found, "Dr. Hofeller drew" District 4 "to be 'predominantly Democratic'" by "concentrating—or 'packing'—Democratic voters in Durham . . . and Wake Counties." App.97-98. Individual plaintiffs Alice Bordsen and Maria Palmer live in District 4. Dkt.12:5-6; Dkt.41:8-9. Dr. Hofeller predicted that District 4 would be a packed Democratic district with a Democratic vote share of 63%. Ex.5116:9. As expected, District 4 was won by the Democratic candidate in 2016 with 68% of the vote. Ex.1018.

The district court found that District 4 was significantly more packed than the analogous district in more than 20,000 simulated district maps.

App.102-03; Ex.3040:27. In Professor Chen’s map 1-1 as well, many of District 4’s voters were distributed between two slightly Democratic districts (51% and 53%), not crammed into one overwhelmingly Democratic district. Ex.2010:12; Ex.4025.

District 5:

District 5 is located in northwestern North Carolina and submerges highly Democratic Winston-Salem within a larger mass of rural Republican voters. Ex.4007. Individual plaintiff William Freeman lives in District 5. Dkt.12:6. Dr. Hofeller predicted that District 5 would be a cracked Republican district with a Republican vote share of 56%. Ex.5116:9. As expected, District 5 was won by the Republican candidate in 2016 with 58% of the vote. Ex.1018.

The district court found that District 5 was significantly more cracked than the analogous district in more than 20,000 simulated district maps. App.102-03; Ex.3040:27. In Professor Chen’s map 3-3 as well, many of District 5’s voters were placed in a moderately Democratic district (53%) rather than a moderately Republican district. Ex.2010:12; Ex.4033.

District 6:

District 6 is located in central North Carolina. It both avoids the large Democratic concentration in Raleigh-Durham and slices through the smaller Democratic cluster in Greensboro. Ex.4007; Ex.4068; Ex.4072. As the district court found, “Dr. Hofeller split—or, in redistricting parlance, ‘cracked’—the Democratic city of . . . Greensboro between Republican Districts 6 and 13.” App.97. Individual plaintiff Melzer Morgan lives in District 6. Dkt.12:6-7. Dr. Hofeller predicted that District 6 would be a cracked

Republican district with a Republican vote share of 54%. Ex.5116:9. As expected, District 6 was won by the Republican candidate in 2016 with 59% of the vote. Ex.1018.

In Dr. Hofeller's draft map 17A, many of District 6's voters were distributed between two slightly Democratic districts (50.03% and 52%) as opposed to one moderately Republican district. Ex.4023. In Professor Chen's map 1-1 as well, many of District 6's voters were dispersed among *three* Democratic districts (50.2%, 56%, and 61%). Ex.2010:12; Ex.4025.

District 7:

District 7 is located in southeastern North Carolina and submerges highly Democratic Wilmington within a larger mass of Republican voters. Ex.4007. Individual plaintiff Cynthia Boylan lives in District 7. Dkt.12:7. Dr. Hofeller predicted that District 7 would be a cracked Republican district with a Republican vote share of 54%. Ex.5116:9. As expected, District 7 was won by the Republican candidate in 2016 with 61% of the vote. Ex. 1018.

In Dr. Hofeller's two draft maps, many of District 7's voters were placed in a slightly Democratic district (e.g., 51% in map 17A) instead of a moderately Republican district. Ex.4023; Ex.4024. In Professor Chen's map 1-3 as well, many of District 7's voters were placed in a slightly Democratic district (51%). Ex.2010:12; Ex.4027.

District 8:

District 8 is located in central North Carolina. It both avoids the large Democratic concentration in Charlotte-Mecklenburg and engulfs most of the smaller Democratic cluster in Fayetteville. Ex.4007;

Ex.4067; Ex.4070. Individual plaintiff Coy Brewer lives in District 8. Dkt.12:7. Dr. Hofeller predicted that District 8 would be a cracked Republican district with a Republican vote share of 55%. Ex.5116:9. As expected, District 8 was won by the Republican candidate in 2016 with 59% of the vote. Ex.1018.

The district court found that District 8 was significantly more cracked than the analogous district in more than 20,000 simulated district maps. App.102-03; Ex.3040:27. In Professor Chen's map 1-2 as well, many of District 8's voters were placed in a moderately Democratic district (54%) rather than a moderately Republican district. Ex.2010:12; Ex.4026.

District 9:

District 9 is located in southern North Carolina. Like District 8, it meticulously avoids Charlotte-Mecklenburg and incorporates part of Fayetteville. Ex.4007; Ex.4067; Ex.4070. Individual plaintiff John McNeill lives in District 9. Dkt.12:7-8. Dr. Hofeller predicted that District 9 would be a cracked Republican district with a Republican vote share of 56%. Ex.5116:9. As expected, District 9 was won by the Republican candidate in 2016 with 58% of the vote. Ex.1018.

The district court found that District 9 was significantly more cracked than the analogous district in more than 20,000 simulated district maps. App.102-03; Ex.3040:27. In Dr. Hofeller's draft map ST-B, many of District 9's voters were placed in two Democratic districts (51% and 72%) as opposed to one moderately Republican district. Ex.4024. And in Professor Chen's map 1-2, many of District 9's voters

were placed in a moderately Democratic district (54%). Ex.2010:12; Ex.4026.

District 10:

District 10 is located in western North Carolina. It too shuns Charlotte-Mecklenburg while, as the district court found, “split[ting] . . . the Democratic city of Asheville.” App.97; Ex.4007; Ex.4066; Ex.4070. Individual plaintiffs John Quinn and Robert Wolf live in District 10. Dkt.12:8; Dkt.41:9. Dr. Hofeller predicted that District 10 would be a cracked Republican district with a Republican vote share of 58%. Ex.5116:9. As expected, District 10 was won by the Republican candidate in 2016 with 63% of the vote. Ex.1018.

In Professor Chen’s map 3-2, many of District 10’s voters were placed in a moderately Democratic district (54%) instead of a moderately Republican district. Ex.2010:12; Ex.4032.

District 11:

District 11 is located in far western North Carolina. Like District 10, in the district court’s words, District 11 “crack[s]’ the naturally occurring Democratic cluster in the City of Asheville.” App.159; Ex.4007; Ex.4066. Individual plaintiffs Jones Byrd and Aaron Sarver live in District 11. Dkt.12:8; Dkt.41:9. Dr. Hofeller predicted that District 11 would be a cracked Republican district with a Republican vote share of 57%. Ex.5116:9. As expected, District 11 was won by the Republican candidate in 2016 with 64% of the vote. Ex.1018.

District 12:

District 12 comprises most of Charlotte-Mecklenburg. Ex.4007; Ex.4070. As the district court found, “Dr. Hofeller drew [District] 12 to be ‘predominantly Democratic’” by “concentrating—or ‘packing’—Democratic voters in . . . Mecklenburg [County].” App.97-98. Individual plaintiffs Elliott Feldman, John Gresham, and Janie Sumpter live in District 12. Dkt.12:9; Dkt. 41:8-10. Dr. Hofeller predicted that District 12 would be a packed Democratic district with a Democratic vote share of 64%. Ex.5116:9. As expected, District 12 was won by the Democratic candidate in 2016 with 67% of the vote. Ex.1018.

The district court found that District 12 was significantly more packed than the analogous district in more than 20,000 simulated district maps. App.102-03; Ex.3040:27. In Professor Chen’s map 1-133 as well, many of District 12’s voters were placed in two Democratic districts (50.2% and 54%) rather than one overwhelmingly Democratic district. Ex.2010:12.

District 13:

District 13 is located in west-central North Carolina. Like several other districts, it refrains from entering Charlotte-Mecklenburg while, as the district court found, dividing Greensboro in half. App.97; Ex.4007; Ex.4068; Ex.4070. Individual plaintiff Russell Walker lives in District 13. Dkt.12:9. Dr. Hofeller predicted that District 13 would be a cracked Republican district with a Republican vote share of 54%. Ex.5116:9. As expected, District 13 was won by

the Republican candidate in 2016 with 56% of the vote. Ex.1018.

The district court found that District 13 was significantly more cracked than the analogous district in more than 20,000 simulated district maps. App.102-03; Ex.3040:27. In Professor Chen's map 2-1 as well, many of District 13's voters were placed in a moderately Democratic district (54%) instead of a moderately Republican district. Ex.2010:12; Ex.4028.

CONCLUSION

For the foregoing reasons, this Court should hold that the plaintiffs in this action satisfy *Whitford's* standing requirements. The Court therefore should not vacate and remand the decision below for reconsideration in light of *Whitford*.

June 20, 2018

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