



Supreme Court To Hear Partisan Gerrymandering Case On October 3

October 2, 2017

On October 3, 2017, the U.S. Supreme Court will hear oral arguments in *Gill v. Whitford*, a case that could significantly impact how congressional and state legislative redistricting maps are drawn. In *Gill*, the Court has been asked to establish a standard for determining whether a redistricting map is an unconstitutional partisan gerrymander under the Equal Protection Clause of the [Fourteenth Amendment and the First Amendment](#). The [Court](#) has defined partisan gerrymandering as “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.” A decision in this case is anticipated by June 2018.

Although the Supreme Court has invalidated redistricting maps as unconstitutional [racial gerrymanders](#), the Court has not overturned a map because of *partisan* gerrymandering. In prior cases presenting a claim of unconstitutional partisan gerrymandering, the Court has left open the possibility that such claims could be judicially reviewable, but has been unable to determine a manageable standard for adjudicating such claims. For example, in a 2004 decision, *Vieth v. Jubelirer*, a plurality of four Justices determined that a claim of unconstitutional partisan gerrymandering presented a nonjusticiable political question, while four other Justices concluded that such claims are justiciable, but could not agree upon a standard for courts to use in assessing such claims. The deciding vote in *Vieth*, Justice Kennedy, concluded that the claims presented in *Vieth* were not justiciable because neither comprehensive, neutral principles for drawing electoral boundaries, nor rules limiting judicial intervention, exist. Nonetheless, he “would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases.”

Gill is an [appeal](#) from a federal district court panel [decision](#) holding, by a 2-to-1 vote, that a Wisconsin state legislative redistricting map is an unconstitutional partisan gerrymander. (A provision of federal law provides for [direct appeals](#) to the Supreme Court in cases involving constitutional challenges to redistricting maps.) According to the district court, the Equal Protection Clause of the Fourteenth Amendment and the guarantees of free speech and association under the First Amendment prohibit a redistricting map that is drawn with the purpose, and has the effect, of placing a “severe impediment” on the effectiveness of a citizen’s vote that is based on political affiliation and cannot be justified on other, legitimate legislative grounds. Although the redistricting map complied with [traditional redistricting principles](#)—which include contiguity and compactness—based on the record in the case, the court held that the map nonetheless had a purpose and effect of entrenching one party in its control of the legislature

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without justification. Shortly after agreeing to hear this dispute, by a vote of 5 to 4, the Supreme Court issued a [stay](#) of the lower court's decision.

Under the challenged map, the majority noted that a disparity existed between the share of a party's vote and the power that party wielded. For example, in the 2012 election, "the Republican Party received 48.6% of the two-party statewide vote share for Assembly candidates and won 60 of the 99 seats in the Wisconsin Assembly," and in the 2014 election, "the Republican Party received 52% of the two-party statewide vote share and won 63 assembly seats." In assessing the asymmetry among districts, the court utilized a new measure, which had been proposed by the plaintiffs, termed the "efficiency gap" or "EG." As described by its [creators](#), the EG "represents the difference between the parties' respective wasted votes in an election—where a vote is wasted if it is cast (1) for a losing candidate, or (2) for a winning candidate but in excess of what she needed to prevail."

In contrast, the dissent criticized the "entrenchment test" that had been adopted by the majority, arguing that it offers no improvement over other tests that the Supreme Court has already rejected. Further, the dissent denounced the EG—or any measure that is a simple comparison of statewide votes to seats won—as the "enshrinement of a phantom constitutional right" that voters for one party are entitled to representation proportional to the number of votes won by each party's candidate in every district throughout the state.

In the Supreme Court, the parties have submitted briefs proffering arguments on both procedural grounds and the merits of the case. As a threshold matter, the appellants—members of the [Wisconsin Elections Commission](#)—[argue](#) that the district court lacked jurisdiction because statewide claims of partisan gerrymandering are nonjusticiable. The Elections Commission further asserts that the appellees have failed to state a claim upon which relief can be granted by not articulating a limited and precise legal standard. Finally, the Election Commission argues that the challenged map should be upheld because it comports with traditional redistricting principles, emphasizing that Justice Kennedy stated in *Vieth* that any standard for adjudicating partisan gerrymandering claims would need to establish that the legislature drew districts "in a way *unrelated* to any legitimate legislative objective." In contrast, the appellees—registered voters in Wisconsin—[argue](#) that they have standing to bring a statewide challenge to the redistricting map because, unlike racial gerrymandering claims that are district-specific, partisan gerrymandering claims involve the "completely different harms" of subjecting voters to vote dilution and viewpoint discrimination on a statewide basis. Furthermore, they maintain that partisan gerrymandering claims are justiciable under the test articulated by the lower court requiring a finding of discriminatory intent and effect, lacking any legitimate justification by the legislature. Among other arguments, these voters assert that the test is judicially discernible because it is based on the "comprehensive and neutral principle" of partisan symmetry, as determined by measures such as the EG, whereby maps treat parties symmetrically by enabling them to translate their support into legislative representation. In addition, they maintain that the test is judicially manageable because, among other things, it is neutral and limited, with an effect prong that is easily administered. The appellee voters also counter the argument from the Elections Commission that compliance with traditional redistricting principles serves to protect a redistricting map from a claim of unconstitutional partisan gerrymandering, arguing that Court precedent belies such a contention.

The Supreme Court's ruling in *Gill v. Whitford* could have [major consequences](#) for pending and future claims of partisan gerrymandering. The Court could rule in a variety of ways. As a threshold matter, the Court could find that the challengers to the redistricting plan lack standing, dismissing the case for procedural reasons. Similarly, invoking other procedural grounds for dismissal, the Court could reject the standards that the lower court applied in this case and hold that claims of unconstitutional partisan gerrymandering present a nonjusticiable political question, thereby foreclosing all such claims in the future. Notably, the issuance of a stay in this case might indicate a greater likelihood that the Court will rule in favor of the Elections Commission because a key [factor](#) a court will consider in deciding to issue a

stay is whether there is a strong showing of likely success on the merits. On the other end of the spectrum, and perhaps of greatest significance, the Court might agree with the standards that the lower court applied or identify different standards for courts to use in evaluating future claims of partisan gerrymandering. Such a change to Court precedent would likely result in additional challenges to congressional and state legislative maps nationwide, and impact how maps are drawn during the next round of redistricting that follows the 2020 census.

For additional reading, see *Congressional Redistricting Law: Background and Recent Court Rulings* and *Supreme Court October Term 2017: A Preview of Select Cases*.

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