



Supreme Court Considering Second Partisan Gerrymandering Case This Term

April 2, 2018

For a second time during the current term, the U.S. Supreme Court is considering a claim of unconstitutional partisan gerrymandering. On March 28, 2018, the Court heard oral [argument](#) in *Benisek v. Lamone*, involving a challenge to a Maryland [congressional district](#). In October 2017, the Court heard oral [argument](#) in *Gill v. Whitford*, involving a similar challenge to a Wisconsin state legislative redistricting plan. While the Court has invalidated redistricting maps because of unconstitutional [racial gerrymandering](#), it has not overturned a map because of *partisan* gerrymandering. As defined by the Court, [partisan gerrymandering](#) is “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.” A decision in these cases is expected by June 2018.

Supreme Court Precedent

In prior cases presenting a claim of unconstitutional partisan gerrymandering, the Supreme 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.”

Case Background Summary

Benisek arises from a group of Maryland voters challenging the state’s 2011 congressional redistricting map as a violation of the [First Amendment](#) and Article I, [Sections 2](#) and [4](#) of the U.S. Constitution. The voters, registered Republicans, argue that Maryland’s Sixth Congressional District was drawn both with the specific intent to retaliate against them because of their political party affiliation, and in such a manner as to dilute their vote and burden their political expression. In August 2016, a federal district court,

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LSB10110

denying Maryland's request to dismiss the case for failure to state a justiciable claim, [set forth](#) a legal standard for ascertaining unconstitutional partisan gerrymandering under the First Amendment retaliation doctrine. According to the court, this fundamental principle—that the government may not penalize citizens for exercising their First Amendment rights—provides a discernable and manageable standard for claims of unconstitutional partisan gerrymandering. Generally, the court held that in order to prevail in a claim of unconstitutional partisan gerrymandering under this doctrine, a plaintiff must allege that a redistricting map was drawn with the specific intent to impose a burden on the voter and those similarly situated because of how they voted or their political party affiliation, and that the gerrymander has and will continue to dictate the outcome of every election.

In August 2017, a divided three-judge federal district court panel [denied](#) the voters' request for a preliminary injunction, barring enforcement of the 2011 redistricting map and requiring the State of Maryland to implement a new map prior to the 2018 congressional elections. The majority concluded that the voters had not demonstrated that they were likely to prevail upon their First Amendment claim because they had failed to show that the alleged gerrymander caused them a real and actionable injury. The court also stayed any further proceedings pending the Supreme Court's decision in *Gill v. Whitford*. The voters appealed to the Supreme Court.

Arguments in the Supreme Court

In the Supreme Court, [among other things](#), the voters [argued](#) that their case differed from any previous challenge to partisan gerrymandering in that it does not invoke the Equal Protection Clause; rest upon statistical measures of partisan imbalance; or ask the Court to adopt any new doctrinal framework. Instead, the voters asserted that their claim is based on the established and manageable standard of the First Amendment retaliation doctrine applied in the context of partisan gerrymandering. In this context, they contended, the doctrine asks whether the challenged redistricting plan has imposed a real and practical burden, which is more than de minimis, in retaliation for prior support for the opposing political party. They further maintained that the August 2016 lower court decision, requiring that a First Amendment retaliation challenge to a redistricting map demonstrate that the partisan gerrymander has and will continue to dictate the outcome of every election, contradicts Court precedent. In contrast, the voters argued that for challengers to a redistricting map to prevail in this context, all they must show is that they have suffered some injury from the gerrymander.

In response, the State of Maryland [argued](#) that adopting the First Amendment retaliation test proffered by the appellants in this case would not resolve a central problem identified in *Vieth*: how can a court determine when partisan considerations in the redistricting process have gone “too far”? Although the voters maintained that their proposed standard leaves room for a small amount of permissible partisanship, the State argued that the lack of a definition in the test leaves it for courts to ascertain on some indeterminate basis. Therefore, the State maintained that the appellants' “proposed standard threatens to render any partisan motive fatal” in a redistricting map, “a result that the Supreme Court has already rejected.”

Possible Implications of Court Considering *Benisek*

Along with *Gill v. Whitford*, a ruling by the Supreme Court in *Benisek* could have [major consequences](#) for pending and future claims of partisan gerrymandering. If the Court adopts a standard for adjudicating claims of unconstitutional partisan gerrymandering, it is possible that additional challenges to congressional and state legislative maps nationwide would result and further, that such a ruling may impact how maps are drawn during the next round of redistricting that follows the 2020 census.

While both cases advance claims of unconstitutional partisan gerrymandering, the challenge in *Benisek* presents different issues, perhaps explaining why the Court agreed to hear *Benisek* after already hearing

oral argument in *Gill*. First, unlike *Gill*, where the challenge is being made to a redistricting map in its entirety, in *Benisek*, the challenge is being made to a particular district. One of the arguments proffered by the State of Wisconsin in defending the map in *Gill* is that statewide claims of unconstitutional partisan gerrymandering are nonjusticiable, an argument that would not apply to the single district at issue in *Benisek*. Furthermore, the challengers in *Gill* have asked the Court 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. In contrast, the challengers in *Benisek* have solely based and more fully developed their arguments under the First Amendment. It is worth noting that Justice Kennedy, who was the swing vote in *Vieth*, has suggested that the First Amendment may be a more relevant constitutional provision than the Equal Protection Clause for developing a standard for adjudicating unconstitutional partisan gerrymandering. Finally, perhaps indicating an interest in considering claims of unconstitutional partisan gerrymandering by challengers from both major political parties, the Court may have decided that in addition to *Gill*, which was brought by voters who identify as Democratic, it would also consider *Benisek*, in which the plaintiffs identify as Republican.

Potential Impact on 2018 Midterm Congressional Elections

During the March 28 oral argument, according to a media report, some Justices indicated that the Court's rulings in *Gill* and *Benisek* would likely be issued too late in the election cycle to alter the redistricting maps for the upcoming midterm congressional elections. As a consequence, several Justices opined that *Benisek* should be returned to the lower court for a full trial. Furthermore, the report indicates, Justice Breyer raised the possibility of reconsidering *Gill* and *Benisek* during the Court's next term, in addition to a pending case regarding the North Carolina congressional redistricting map (discussed below).

North Carolina and Pennsylvania Litigation

While the Wisconsin and Maryland cases have been pending in the Supreme Court, two other courts have invalidated redistricting maps as unconstitutional partisan gerrymanders. In January 2018, a federal district court invalidated the North Carolina congressional redistricting map as an unconstitutional partisan gerrymander under various provisions of the U.S. Constitution and required that a new map be drawn for the 2018 congressional midterm elections. Later that month, the Supreme Court stayed the ruling and, in February, denied a motion to expedite consideration of the case. It seems likely that the Court will hold the North Carolina case until it issues its rulings in *Gill* and *Benisek*.

In another notable ruling, in January, the Pennsylvania Supreme Court invalidated that state's congressional redistricting map as an unconstitutional partisan gerrymander under the Pennsylvania Constitution and in February, ordered the implementation of a new, court-drawn congressional redistricting map for the 2018 elections. (This ruling is similar to a 2015 Florida Supreme Court decision overturning Florida's congressional redistricting map as a partisan gerrymander in violation of that state's constitution.) On March 19, the Supreme Court denied an application for a stay of the Pennsylvania's court's ruling. Although the stay application presented the federal question as to the circumstances under which a state court improperly intrudes on authority provided to the legislature by the Elections Clause, as at least one commentator observed, the Court may have decided against hearing this case in order to avoid redistricting disputes involving alleged violations of state constitutional provisions.

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