

Supreme Court

Partisan Gerrymandering Decisions Delayed

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A citizen's interest in the overall composition of the legislature is embodied in his right to vote for his representative. And the citizen's abstract interest in policies adopted by the legislature on the facts here is a nonjusticiable 'general interest common to all members of the public.'

~Chief Justice John Roberts *in Gill v. Whitford (June 18, 2018)*

Decades of partisan gerrymandering have contributed to an unprecedented gridlock and lack of political accountability in our nation's electoral process. *Gill v. Whitford* and *Benisek v. Lamone* initially gave hope that the Court may finally decide the issue of partisan gerrymandering's constitutionality on the merits, and provide guidance for the electoral process at the federal, state and local levels.

Near the end of the term ending in June 2018, the United States Supreme Court delayed decisions on the merits in two partisan gerrymandering challenges originating in Wisconsin and Maryland. Although the Court has struggled for over three decades to develop a judicially manageable standing for deciding such claims, its punt in *Gill* and *Benisek* made it clear that a majority of the Court is not ready to address the justiciability and merits of partisan gerrymandering claims. At the very least, the Court's procedural decisions in both cases have moved the ball closer to the goal line, but a final resolution of this constitutional issue remains beyond reach for now as the lower courts grapple with the Court's remand instructions in both cases.

Gill v. Whitford

Chief Justice Roberts wrote the 9-0 opinion for the Court in *Gill* on June 18, 2018, vacating the three-judge district court's decision invalidating the Wisconsin legislative redistricting plan as an unconstitutional political gerrymander based on a theory of vote dilution. The Court held that the plaintiffs had not made the requisite showing for Article III standing, and remanded the case to provide the plaintiffs an opportunity to prove concrete and particularized injuries using evidence demonstrating a burden on their individual votes. *Gill v. Whitford*, 585 U.S.___ (2018), https://www.supremecourt.gov/opinions/17pdf/16-1161_dc8f.pdf

Key issues before the Court in *Gill* were (1) whether the lower court erred in holding that it had the authority to entertain a statewide challenge to Wisconsin's redistricting plan, rather than a district-by-district analysis; (2) whether the lower court erroneously held the state's redistricting plan was an impermissible partisan gerrymander despite complying with traditional redistricting principles; (3) whether the lower court erroneously adopted an incorrect standard for assessing partisan gerrymanders; (4) whether the proponents of the challenged plan should have been allowed to present additional evidence that they would have prevailed under that test; and (5) whether the challengers' partisan-gerrymandering claims were justiciable.

Oral argument provided some measure of insight into the Court's ultimate ruling on standing.

The Court declined to direct the dismissal of the plaintiffs' claims, noting that in the "usual case" where a plaintiff fails to demonstrate Article III standing it usually directs dismissal of those claims. Chief Justice Roberts reasoned that "This is not the usual case. It concerns an unsettled kind of claim this Court has not agreed upon, the contours and justiciability of which are unresolved. Under the circumstances, and in light of the plaintiffs' allegations that [specific plaintiffs] live in districts where Democrats like them have been packed or cracked, we decline to direct dismissal."

In her concurring opinion, Justice Kagan characterized the Court's holding, stating that "a plaintiff asserting a partisan gerrymandering claim based on a theory of vote dilution must prove that she lives in a packed or cracked district in order to establish standing, ... and that none of the plaintiffs here have yet made that required showing."

Benisek v. Lamone

The Court also handed down an unsigned per curiam order that same day in *Benisek v. Lamone*, 585 U. S. ____ (2018), at https://www.supremecourt.gov/opinions/17pdf/17-333_b97c.pdf. The order contained no recorded dissents.

The challengers in *Benisek* had sought to invalidate the partisan gerrymandered 6th Congressional District of Maryland on the ground that the state gerrymandered this district in 2011 in retaliation for the challengers' support for Republican candidates. They argued in the lower court that even though election officials only had to adjust the district by approximately 11,000 votes to account for the most recent census results, what they created was "more than a 90,000-voter swing in favor of registered Democrats." When the elections were held under the new 6th Congressional District map in 2012, the incumbent Republican who two years earlier had been re-elected by a margin of nearly 30 percent lost to a Democrat by over 20 percent. In the summer of 2017, the challengers in *Benisek* sought and were denied a preliminary injunction by the lower court to block state officials from holding congressional elections under the 2011 map. The Supreme Court had before it an appeal by the *Benisek* challengers from the lower court's denial of that motion for preliminary injunction.

In a per curiam ruling, the Court upheld the lower court's denial of injunctive relief and remanded to the lower court for further proceedings. While their constitutional challenge to the congressional district can and will go forward in the lower court, Maryland's 2018 elections, including primaries scheduled for late June 2018, will use the current map. The Supreme Court explained in its per curiam ruling that the lower court's denial of a preliminary injunction was not an abuse of discretion, reasoning that the challengers had waited six years after the map

was adopted to raise their First Amendment retaliation claim, and that granting their request would have been disruptive to the 2018 elections. The Court also noted that the lower court's order denying injunctive relief had been issued after the Supreme Court announced that it would review *Gill v. Whitford*, and that the lower court could have believed that it might be better off waiting for guidance from the Supreme Court, rather than "charging ahead."

Gill v. Whitford has now been remanded to the three-judge district court in Wisconsin and *Benisek v. Lamone* is going back to the lower court for further proceedings following its denial of injunctive relief. But there is still another case on the Court's docket that may address partisan gerrymandering.

League of Women Voters v. Rucho

Rucho is a partisan gerrymandering challenge to the First and Twelfth Congressional Districts under North Carolina's 2016 congressional map. Admittedly drawn by a Republican-dominated legislature to reflect a pro-Republican tilt and give Republicans a large majority, the N.C. map was struck down by the lower court as an unconstitutional partisan gerrymander.

The lower court ordered the state legislature to draft and submit a new plan before the end of January 2018, but the Supreme Court stayed the lower court's order on January 18, 2018. That stay order in *Rucho* placed the N.C. Republicans' appeal on hold for several months, presumably waiting for the Court to rule in *Gill* and *Benisek*, both of which were remanded on June 18, 2018 for further proceedings, *Gill* for lack of Article III standing and *Benisek* because the lower court had not erred when it decided not to require the state to redraw the challenged Maryland Congressional District map in time for the 2018 election.

On June 25, 2018, the Court vacated the judgment in the consolidated *Rucho* cases and remanded to the United States District Court for the Middle District of North Carolina for further consideration in light of *Gill*.

The core issue of whether, when and under what judicially manageable standard, if any, the Court can or will decide any of these partisan gerrymandering cases has yet to be resolved, but the machinery is in place to push toward a resolution possibly during the October 2018 term. The ball is in the challengers' court, and the stakes can potentially be as high as which party ultimately commands even a razor-thin majority in the U.S. House of Representatives. ML

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of his opinion. Justice Breyer wrote separately to explain that he dissented as to the majority's severability analysis. Interestingly, although Justice Ginsburg, joined by Justice Sotomayor, dissented in full, she provided no analysis in her dissent as to the anti-commandeering argument and instead noted even assuming arguendo that the challenged portion of PASPA was unconstitutional, she also disagreed with the Court's severability analysis.

3. IMLA joined an amicus brief filed by the State and Local Legal Center in this case, arguing that PASPA not only violates the Tenth Amendment, but the issue in the case implicates a host of other critically important state and local laws. Specifically, to allow Congress to "freeze" into place state gambling laws through PASPA, would also allow Congress to do the same thing in areas like state authorization of medical marijuana, autonomous vehicles, physician assisted suicide, etc.

4. Chicago filed a brief in *City of Chicago v. Sessions,* No. 1:17-cv-05720, the State of California filed a brief in *United States v. State of California,* No. 2:18-cv-00490, and Philadelphia cited to *Murphy* in its post-trial briefing in *City of Philadelphia v. Sessions,* No. 17-3894.

5. While Philadelphia was not directly challenging the constitutionality of Section 1373 in its lawsuit, the court nonetheless held that the statute was unconstitutional because the DOJ had placed a certification condition on the Byrne JAG Grant and was thus requiring the City to certify compliance with an unconstitutional statute. *See City of Philadelphia v. Sessions*, No. 17-3894, 2018 U.S. Dist. LEXIS 94709, at *95-96 (E.D. Pa. June 6, 2018).

6. The primary basis of Judge Leinenweber's decision was *City of New York v. United States,* 179 F.3d 29 (2d Cir. 1999), decided by the only circuit court to assess the constitutionality of Section 1373 so far. In that case, the Second Circuit found that the Tenth Amendment, normally a shield from federal power, could not be turned into "a sword allowing states and localities to engage in passive resistance that frustrates federal programs." The Second Circuit concluded that Section 1373 was constitutional on its face and did not run afoul of the Tenth Amendment. That ruling is now highly suspect in light of *Murphy*. ML

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County Council Expropriation Satisfies Reasonableness Standard

Woodward v Cardston (County), 2018 ABQB 460 (CanLII) http://canlii.ca/t/hshzv

The Applicant, a resident of Cardston County (County) owned a private road that he used to access his property. The County decided to expropriate the private road lands to create a public road and provided appropriate notice to the Applicant. The Applicant objected, and the matter was sent before a hearing officer. The hearing officer held that the County's intention to expropriate was to further a municipal purpose and it was within its authority under the *Municipal Government Act,* RSA 2000, c M-26 (MGA). The Applicant did not challenge the hearing officer's decision. As a result, County Council approved the expropriation. The Applicant sought judicial review of the decision by Council's decision.

HELD: Application dismissed.

DISCUSSION: To determine the standard of review, the Court relied on *Dunsmuir v. New Brunswick,* 2008 SCC 9 and noted that deference to elected officials is well established law. When the Court is faced with judicial review of a decision made by any elected officials, including Council it must determine first if the Council acted legally. If the court can determine that Council has, then the Court can review its decision with the standard of reasonableness. (*Northland Material Handling Inc. v. Parkland (County)* 2012 ABQB 407). The Court applied the first requirement to the issue before it, finding that s.14 of the MGA authorized the County to acquire lands within its jurisdiction by expropriation for a municipal purpose. The Court proceeded to review Council's decision on a reasonableness standard. Section 3 of the MGA outlines the municipal purposes for expropriation. The County relied on s.3(b): to provide services, facilities or other things that, in the opinion of council, are necessary or desirable for all or a part of the municipality. The Court held that the County's decision was reasonable and was made for a proper municipal purpose and dismissed the Applicant's application. ML