Election Law in the Trump Supreme Court
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“It is a core principle of our republican form of government ‘that voters should choose their representatives, not the other way around.’”


Justice Debra McCloskey Todd

Critically important election law cases involving partisan gerrymandering and voter purge laws have been argued before the Supreme Court during the October 2017 term. Several more involving voter identification laws, Section 2 vote dilution and intentional discrimination have been added to the docket and are teeing up for oral argument later in this term. Most will likely be decided before the end of the current term by the full Court, including Justice Neil Gorsuch, its long-awaited Justice confirmed on April 7, 2017.

This presentation offers some insight into how the Supreme Court during the Trump Administration will address these issues that go to the core of electoral access, democratic participation in the political process, and mobilization of voters in elections at the federal, state and local level.
Gerrymandering

Gerrymandering is a wrong in search of a remedy. For decades, the Supreme Court has recognized that gerrymandering dilutes the electoral influence of voters who are targeted by legislators and, in the words of Justice Douglas, “defeat[s] or circumvent[s] the sentiments of the community.” Whitcomb v. Chavis, 403 U.S. 124, 176 (1971). Non-competitive elections also decrease voter turnout and undermine voters’ faith in our democratic institutions. The judicial branch of our government has a vital stake in assuring that ours is a vibrant democracy. Failure of the judicial branch to act on gerrymandering will likely lead to further declines in voter turnout and political engagement. Judicial oversight of gerrymandering is thus essential to securing a basic tenet of democracy – that eligible voters will vote and have an unimpeded opportunity to exercise an effective right to vote in an open, fair, and free election.

Broadly speaking, there are two types of gerrymandering:

►Racial gerrymandering is the deliberate placement of voters into specific districts on the basis of race or ethnicity. Racial gerrymandering can take the form of “racial vote dilution” (districting so that an identifiable racial or ethnic group has an insufficient chance to elect a representative of its choice) or “racial sorting” (districting where race is the “predominant consideration” or “essential basis” upon which voters are placed into districts).

►Partisan gerrymandering is the deliberate placement of voters into districts based on their political affiliations and/or voting histories in order to diminish the representation and electoral influence of those voters disfavored by the mapmaker (usually referring to districting by the majority party that effectively mutes the voices of voters of the minority party).

Given developments before the Supreme Court this term, this presentation focuses on the latter.

Partisan Gerrymandering

Advances in technology, including the use of algorithms and other digitally-based techniques, have made the problem of partisan gerrymandering much more acute than when the Court first addressed it in Davis v. Bandemer, 478 U.S. 109 (1986) and Vieth v. Jubelirer, 541 U.S. 267 (2004). Partisan intent can now be factored into a districting map much more easily, and with greater effect. As Justice Kennedy said in addressing the justiciability of partisan gerrymandering claims in Vieth, 541 U.S. at 312-13,
If courts refuse to entertain any claims of partisan gerrymandering, the temptation to use partisan favoritism in districting in an unconstitutional manner will grow.

After thirty years of wandering through the judicial wilderness, partisan gerrymandering claims are squarely before the Court, and the same technological advances that have enabled mapmakers to squeeze more advantage out of maps are also enabling courts to better analyze these legal challenges to partisan gerrymandering. These cases could very well reshape the way elections are conducted in America. The pivotal vote on partisan gerrymandering is Justice Anthony M. Kennedy, who in earlier cases left open a path to legal challenges while opining that partisan gerrymandering might be viewed as a form of retaliation against voters for their past support of a party’s candidates, which he indicated could violate the First Amendment.

Gill v. Whitford

Gill v. Whitford, 218 F. Supp. 3d 837 (W.D. Wis. 2016), No. 16-1161 (oral argument Oct. 3, 2017), is a statewide partisan gerrymandering challenge to Wisconsin’s 2011 state legislative redistricting plan on Equal Protection and First Amendment grounds. This was a challenge to voting districts for Wisconsin’s State Assembly, dominated by Republicans notwithstanding very close statewide vote totals. In their challenge to the legislative redistricting plan drawn by the state’s Republican leaders, Wisconsin Democrats persuaded the trial court to find that the redistricting plan was an unconstitutional partisan gerrymander in violation of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment. When Gill v. Whitford was argued in October, a majority of the Court appeared open to the idea that some kinds of partisan gerrymandering are unconstitutional.

The Wisconsin legislature began the process of redistricting shortly after the results of the 2010 Decennial Census became available. With a Republican Governor, Republicans enjoyed a majority in the House and Senate. Using redistricting software and 2010 census data from the Legislative Technology Services Bureau, Republican legislators enlisted the services of a political science professor to produce a regression model and several maps, one of which was approved by the senate and house, then signed into law by the Governor. The subject map projected that Republicans would win 59 state assembly seats, 38 of which were safe Republican seats and 14 of which were Republican leaning, in contrast to 33 safe Democratic seats and 4 Democratic leaning. Plaintiffs, registered voters and supporters of the Democratic Party and of Democratic candidates, filed a statewide claim against state government officials in charge of the redistricting process, alleging that this partisan gerrymander discriminated against Democratic voters by diminishing their voting strength in comparison to their Republican counterparts.
As proof of their injury, the plaintiffs applied a measure of wasted votes known as the “efficiency gap” to the challenged redistricting plan. Developed by University of Chicago Law School Professor Nicholas Stephanopoulos, and Eric McGhee, Research Fellow at the Public Policy Institute of California, the efficiency gap purports to provide a method to determine when either political party has gained a durable, systematic advantage in turning votes into seats through a new redistricting plan. According to the plaintiffs, an efficiency gap of 7% or greater in the first election after a challenged plan is implemented reflects an impermissible partisan gerrymander.

The lower court concluded the districts were unconstitutionally drawn and set forth a three-prong test to evaluate partisan gerrymandering claims, employing the efficiency gap to measure the degree and durability of the partisan effect:

1. Did the mapmakers draw the challenged plan with discriminatory intent?
2. Did their map show a large and durable discriminatory effect?
3. Was there any justification for the plan’s asymmetry other than the pursuit of partisan advantage?

The dissenting judge in the lower court deemed the efficiency gap lacking in credibility, while labeling the process behind the challenged plan secretive and one-sided. The dissent also refused to accept proof of intent to act for political purposes as a significant part of any test for determining whether a task entrusted to the political branches of government was constitutional. Finally, the dissent deemed the efficiency gap a euphemism for defeat at the polls and criticized the efficiency gap for designating lost votes as “wasted,” reasoning that those votes helped shape the larger political debate.

Among the complex issues for the Supreme Court to address following oral argument on October 3, 2017, are: (1) Whether the plaintiffs have standing to bring a statewide challenge. (Specifically, since a district-by-district analysis was not followed and since the plaintiffs did not represent every district in the state, the argument goes, how could the plaintiffs claim the requisite concrete harm with respect to a district in which they do not live and cannot vote?) (2) How could the lower court find the challenged plan to be an impermissible partisan gerrymander when it conformed to traditional districting principles? (3) Was the intent-plus-effects standard similar to the one rejected in Davis v. Bandemer, 478 U.S. 109 (1986)? And finally, (4) are partisan gerrymandering claims even justiciable? As to the first question, Justice Kennedy suggested during oral argument that lack of standing was a strong argument favoring the Defendants; namely, that federal courts might have no jurisdiction to hear statewide political gerrymandering challenges, and plaintiffs cannot suffer a cognizable injury by a statewide gerrymander, but only by a gerrymander that is specific to their district.

may provide some hints as to the Court’s thinking in *Gill*. In *Alabama Legislative Black Caucus*, the Supreme Court limited standing to challenge racial gerrymandering to the plaintiff’s own district boundary, since the harms caused by gerrymandering are personal to that district’s voters. In *LULAC v. Perry*, the Supreme Court disallowed a statewide partisan gerrymandering claim on the ground that partisan aims did not guide every line drawn under the challenged plan, but in that same case, Justice Stevens in a concurring opinion by Justice Breyer emphasized that “the First Amendment’s protection of citizens from official retaliation based on their political affiliation” necessarily limited the power of the State “to rely exclusively on partisan preferences in drawing district lines.” And in *Bethune-Hill*, the Supreme Court did not require the plaintiff to show that the redistricting plan challenged under the Equal Protection Clause conflicted with traditional redistricting criteria. Although partisan gerrymandering claims are analytically distinct from racial gerrymandering claims, these cases provide guideposts that the Court may rely upon (or feel the need to distinguish) in setting out a partisan gerrymandering claim.

*Gill v. Whitford* is seen by some as a natural companion to *Benisek v. Lamone*. Both are constitutional challenges to partisan gerrymandering, and both present issues and complementary theories that seem to dovetail.

But there are important distinctions: While a statewide claim is at issue in *Gill*, *Benisek* is a single-district case. While *Gill* is grounded on a combination of the First Amendment and the Equal Protection Clause of the Fourteenth Amendment, *Benisek* is based exclusively on the First Amendment retaliation doctrine. In *Gill*, the plaintiffs’ challenge is based on the statewide concept of partisan asymmetry, while *Benisek* does not necessarily rest upon statistical measures of partisan imbalance or seek adoption of any new doctrinal framework or new legal standards; instead, *Benisek* relies upon an established body of constitutional law for which there already exists a legal framework.

**Benisek v. Lamone**

*Benisek v. Lamone*, 2017 U.S. Dist. LEXIS 136208 (D. Md. Aug. 24, 2017), No. 17-333 (U.S. Dec. 8, 2017) (consideration of jurisdiction postponed to merits hearing), is a partisan gerrymandering challenge to a single district under Maryland’s congressional districting plan on First Amendment grounds. Maryland Republicans claim the state’s dominant Democrats drew a congressional district that violated their First Amendment rights. Their challenge centers on the 6th Congressional District in Western Maryland, redrawn after the 2010 census to include parts of heavily Democratic Montgomery County and allegedly dilute the influence of Republican voters in the district. Specifically, the plaintiffs charged that the state legislature, faced with a mere 10,000-person imbalance in the district’s population, “reshuffled fully half of the district’s 720,000 residents,” resulting in a more than 90,000-voter swing in favor of Democrats and a drop in the share of registered Republicans from 47% to 33%.
In their Jurisdictional Statement, the plaintiffs in *Benisek* described how devastatingly effective the 2011 gerrymander was, entailing a massive swap of Republican voters for Democratic voters that turned the table 180 degrees, from a map under which there was a 99.7% or greater chance that a Republican incumbent would win reelection in 2010 to a map under which it was 92.5% to 94% likely that a Democrat would win in 2012.

The Democratic mapdrawers, according to the plaintiffs, drew the Sixth District with the goal of flipping the district to Democratic control. The record was replete with admissions by Maryland lawmakers, and the Governor (a Democrat) testified that those responsible for the 2011 redistricting expressly intended to create a map that would result in a district that would be more likely to elect a Democrat than a Republican.

The plaintiffs argued that the dilution of Republican votes in 2011 had palpably depressed political participation in the district and that voters when canvassed for the Republican candidate in 2014 reported that it was not worth voting anymore and that they felt disenfranchised. The plaintiffs’ expert opined that the vote dilution visited upon Republican voters in this district had a concrete impact on electoral outcomes because Republican voters in the district consequently had been unable to elect a candidate of their choice.

**Majority Opinion – The “Whiskey Speech” Revisited**

The lower court majority in *Benisek*, while bemoaning the noxious and destructive practice of political gerrymandering and affirming that it “will not shrink from its responsibility to adjudicate any viable claim that such segregation has occurred in Maryland,” nonetheless declined to charge ahead with further proceedings and stayed the litigation to await guidance from the Supreme Court, ostensibly to ensure that “in measuring the legality and constitutionality of any redistricting plan in Maryland” the court would measure that plan according to the proper legal standard.

The cynic is reminded of the “Whiskey Speech” by the late Noah S. “Soggy” Sweat, in which the former Mississippi legislator, law professor, and later judge gave his considered opinion on whether or not he was in favor of repealing the state’s then existing ban on alcoholic liquor.

*I will take a stand on any issue at any time, regardless of how fraught with controversy it might be. You have asked me how I feel about whiskey. All right, here is how I feel about whiskey:*

*If when you say whiskey you mean the devil’s brew, the poison scourge, the bloody monster, that defiles innocence, dethrones reason, destroys the home, creates misery and poverty, yea, literally takes the bread from the mouths of little children; if you mean the evil drink that topples the Christian man and woman from the pinnacle of righteous, gracious living into the bottomless pit of degradation, and despair, and shame and helplessness, and hopelessness, then certainly I am against it.*

*But, if when you say whiskey you mean the oil of conversation, the philosophic wine, the ale that is consumed when good fellows get together, that puts a song in their hearts and laughter on*
their lips, and the warm glow of contentment in their eyes; if you mean Christmas cheer; if you mean the stimulating drink that puts the spring in the old gentleman's step on a frosty, crispy morning; if you mean the drink which enables a man to magnify his joy, and his happiness, and to forget, if only for a little while, life's great tragedies, and heartaches, and sorrows; if you mean that drink, the sale of which pours into our treasuries untold millions of dollars, which are used to provide tender care for our little crippled children, our blind, our deaf, our dumb, our pitiful aged and infirm; to build highways and hospitals and schools, then certainly I am for it.

This is my stand. I will not retreat from it. I will not compromise. [Accessible online at https://academyatthelakes.org/wp-content/uploads/2016/02/NoahSSweatTheWhiskeySpeech.pdf]

To provide a little extra support for its own 'principled stand,' the lower court also suggested that the plaintiffs were unlikely to prevail in proving causation, contending that plaintiffs needed to satisfy the onerous and virtually impossible burden of proving that the outcomes of every election between 2012 and 2020 were and necessarily would be “attributable to gerrymandering.” As plaintiffs have pointed out on appeal, such a “decide-every-election” standard seems unwarranted in light of the Mt. Healthy standard applicable to First Amendment retaliation and should not be allowed to stand.

Niemeyer Dissent

To understand what is at stake in Benisek v. Lamone and get a view into what might be in store ahead, one need only read the dissenting opinion of Fourth Circuit Chief Judge Niemeyer, a highly regarded conservative “feeder” judge likely to have an impact on the Justices' own thinking:

Building on the Supreme Court's previous holdings that ensure "one person, one vote" and that prevent racially motivated gerrymanders, we held earlier in this case that when district mapdrawers target voters based on their prior, constitutionally protected expression in voting and dilute their votes, the conduct violates the First Amendment, effectively punishing voters for the content of their voting practices. . . . This First Amendment test focuses on the motive for manipulating district lines, and the effect the manipulation has on voters, not on the result of the vote. It is therefore sufficient in proving a violation under this standard to show that a voter was targeted because of the way he voted in the past and that the action put the voter at a concrete disadvantage. The harm is not found in any particular election statistic, nor even in the outcome of an election, but instead on the intentional and targeted burdening of the effective exercise of a First Amendment representational right. Recent comments of Supreme Court Justices made both in this case and in Vieth have suggested that this standard is available for assessing the constitutionality of a gerrymander. And under this standard, I respectfully conclude, the plaintiffs have succeeded in carrying their burden.
Chief Judge Niemeyer considered it obvious that the Democrats’ gerrymandering plan was a successful effort to flip the congressional district at issue by making “massive shifts in voter population based on registration and voting records to accomplish their goal” in violation of the plaintiffs’ First Amendment rights. Nor did he share the majority’s doubts that this “earthquake upheaval in the political landscape” of the congressional district might have been due to voting preferences or other demographics. Chief Judge Niemeyer described the problem of partisan gerrymandering as “cancerous, undermining the fundamental tenets of our form of democracy,” and spread the blame on both major political parties: “Indeed, both Democrats and Republicans have decried it when wielded by their opponents but nonetheless continue to gerrymander in their own self-interest when given the opportunity.”

The majority of the three-judge panel nonetheless ruled against the challengers, holding they failed to prove the election results occurred just because of those redistricting changes. As the Maryland Attorney General stated following the panel decision, candidates make a difference in election outcomes, and “if an electoral loss is not attributable to ‘constitutionally suspect activity,’ but ‘is instead a consequence of voter choice, that is not an injury. It is democracy.’” The plaintiffs argued that the lower court would have required them to show that “each and every outcome is (and will continue to be) singularly attributable to gerrymandering,” while their burden was only to show that they have suffered some injury.


The issues to be addressed include:

(1) Whether the majority of the three-judge district court erred in holding that, to establish an actual, concrete injury in a First Amendment retaliation challenge to a partisan gerrymander, a plaintiff must prove that the gerrymander has dictated and will continue to dictate the outcome of every election held in the district under the gerrymandered map:

(2) whether the majority erred in holding that the Mt. Healthy City Board of Education v. Doyle burden-shifting framework is inapplicable to First Amendment retaliation challenges to partisan gerrymanders; and

(3) whether, regardless of the applicable legal standards, the majority erred in holding that the present record does not permit a finding that the 2011 gerrymander was a but-for cause of the Democratic victories in the district in 2012, 2014, or 2016.
Benisek is considered by some election law experts to be a strong candidate for the Supreme Court to create a judicially manageable, coherent standard for adjudicating partisan gerrymandering claims. Unlike the statewide challenge asserted in Gill, Benisek is a single-district partisan gerrymandering claim, and single district analyses have been successful in a number of racial gerrymandering cases while statewide challenges have been rejected. The discriminatory effect highlighted in Benisek, moreover, is both durable and large when subjected to application of the efficiency gap.

Three more partisan gerrymandering cases, Agre v. Wolf, League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania, and Common Cause v. Rucho, the first two originating in Pennsylvania and the third in North Carolina, respectively, also are rocketing to the Supreme Court and offer alternative approaches to adjudicating such claims.

Agre v. Wolf

Plaintiffs challenged the 2011 Pennsylvania congressional plan drawn by the Republican-controlled legislature after the 2010 census, alleging it was a partisan gerrymander that placed citizens into congressional districts based on their likely voting preferences. They alleged that the congressional plan sought to influence the political identity of Pennsylvania’s congressional representatives in violation of the Elections Clause of the U.S. Constitution and the First and Fourteenth Amendments.

After dismissing the First and Fourteenth Amendment claims in November 2017, the district court rejected the plaintiffs’ remaining Article I Elections Clause claim in a January 10, 2018 ruling accompanied by three separate opinions. Third Circuit Judge Patty Shwartz noted that the plaintiffs lacked standing to bring a statewide challenge because they had not presented plaintiffs from each congressional district with a concrete injury. Judge Shwartz also wrote that the plaintiffs’ claim failed on the merits “because the legal test they propose for an Elections Clause claim is inconsistent with established law.” Judge Shwartz did note, however, that “[a]lthough there may be a case in which a political gerrymandering claim may successfully be brought under the Elections Clause, this is not such a case.” Judge Shwartz would recognize an Elections Clause standard “that requires a plaintiff to prove that the challenged regulation was plainly designed to favor or disfavor a candidate or dictate electoral outcomes and which provides the defendant with an opportunity to pursue a defense that justifies its districting decisions.”

Third Circuit Chief Judge D. Brooks Smith concluded in a separate opinion that “[t]he structural change plaintiffs seek must come from the political process itself, not the courts,” while District Judge Baylson would have held that plaintiffs prevailed in proving an Elections Clause violation. Plaintiffs filed a notice of appeal

*League of Women Voters of Pennsylvania v. Commonwealth of Pennsylvania*

Unlike *Agre v. Wolf*, which is a federal-court challenge to Pennsylvania’s congressional map based on the federal constitution, *LWVPA* is a state-court challenge to the same map based on the state constitution.

Following the 2010 census, Pennsylvania’s Republican-controlled legislature created the current congressional map in 2011. The original map drawn by the Republican majority was the butt of national jokes based on the strange, sprawling shapes it relied on to create a balance of electoral power tilted toward the Republican Party. While Democratic candidates for the state’s 18 House seats tended to win about half of the popular vote statewide, they won just five of the 18 seats in each election held since 2011. Indeed, the map has been criticized by some experts as one of the most extreme examples of gerrymandering, with bizarrely shaped districts such as the one below (nicknamed “Goofy kicking Donald Duck”).

Judge it for yourself:

![Map of Pennsylvania congressional district](image)

On January 22, 2018, the Supreme Court of Pennsylvania, Middle District, in *LWVPA* struck down Pennsylvania’s Congressional Redistricting Act as violative of the Pennsylvania Constitution, ruling that Republican legislators unlawfully sought partisan advantage, and enjoined its further use in elections for Pennsylvania seats in the U.S. House of Representatives.
In a 5-2 decision by the Pennsylvania Supreme Court, over the dissent of the court’s two Republican justices, the court directed the Pennsylvania General Assembly, should it choose to submit a congressional districting plan that satisfies the requirements of the state constitution, to submit such plan to Democratic Governor Tom Wolf, for consideration by February 9, 2018, and if accepted by the Governor, to submit it to the court by February 15, 2018. In the absence of either submission, the court “shall proceed expeditiously to adopt a plan based on the evidentiary record developed” in the trial court, with all parties and intervenors to have the opportunity to submit proposed remedial redistricting plans by February 15, 2018.

Further, the court mandated that any congressional districting plan “shall consist of congressional districts composed of compact and contiguous territory; as nearly equal in population as practicable; and which to not divide any county, city, incorporated town, borough, township, or ward, except where necessary to ensure equality of population.”

The decision is seen by some as boosting Democratic chances of retaking the U.S. House of Representatives. Democrats in Pennsylvania hold five of the state’s 18 congressional districts even though it is an electoral swing state, and a new congressional map could give Democratic candidates as many as half a dozen Republican seats in that state alone, where national polls show voters favoring Democrats in 2018.

The Republican State Senate president and Republican majority leader quickly labelled the court’s deadline “impossible” and said they would seek a stay from the U.S. Supreme Court. This request was rejected soon after it was received by Justice Alito without being referred to the full court—a sign that the U.S. Supreme Court is unlikely to intervene in disturbing (or at least delaying) decisions made by state supreme courts interpreting their own state constitutions to preclude partisan gerrymandering.

On February 7, 2018, the Pennsylvania Supreme Court finally released its majority opinion explaining why the Republicans’ gerrymander of Pennsylvania’s congressional districts violates the state constitution. This followed the earlier January 22 order in which the court had directed the Legislature to redraw the illegal districts without fully explaining its reasoning. Justice Debra McCloskey Todd’s 139-page opinion for the court is interesting for two reasons. First, the opinion focuses largely on the map’s deviation from traditional redistricting principles, while describing the harm largely in terms of dilution. This, perhaps, leaves room for an even more aggressive interpretation of the state constitutional provisions in future rulings. Second, the reasoning and impact of the opinion isn’t entirely limited to Pennsylvania. Instead, Todd discusses how dozens of other state constitutions may be interpreted to protect voting rights more robustly than the
U.S. Constitution does. Her decision will arm activists in many states with a powerful new tool in the fight against partisan gerrymandering.

True, the U.S. Supreme Court may well decide whether partisan gerrymandering runs afoul of the First and/or Fourteenth Amendments. But, as Justice Todd explained, the Pennsylvania Supreme Court had no obligation to wait for the U.S. Supreme Court’s decision in *Gill v. Whitford* or *Benisek v. Lamone*, because the Pennsylvania Constitution provides rights independent from the U.S. Constitution. Specifically, the state constitution—which actually predates its federal counterpart—declares that all elections “shall be free and equal.”

Following the expiration of the Pennsylvania Supreme Court’s deadline, it adopted a remedial map of the state’s congressional districts, resulting in a new map that more closely reflected the partisan composition of Pennsylvania and adhered to the state constitution’s guarantee that voters would have the ability to participate in “free and equal” elections. It also introduced several new competitive seats (making it likely that Democrats pick up additional seats in the U.S. House of Representatives in the 2018 elections), provided a map that was more compact than the Republicans’ original map, and split fewer counties and municipalities. Over 1100 miles of district borders were erased along with the images of Goofy and Donald Duck.

The new map brought on a flurry of challenges by Pennsylvania Republicans. On February 22nd, Republicans asked the Pennsylvania Supreme Court to stay its ruling and filed a freestanding Elections Clause challenge to the new map (<i>Corman v. Torres</i>) in federal district court. After the state supreme court denied the stay application, legislators filed a second application at the U.S. Supreme Court. On March 19th, the district court in <i>Corman</i> dismissed the case with prejudice for lack of standing. Mere hours later, the U.S. Supreme Court denied the legislators’ second stay application as well.
On January 9, 2018, a three-judge court in Common Cause v. Rucho upheld a partisan gerrymandering challenge to North Carolina’s congressional districting plan. Drawing a parallel to the one-person one-vote cases, the court found that standing could be established for a statewide challenge or a district-specific challenge. Interestingly, the district court also recognized the validity of several different partisan gerrymandering claims grounded in multiple constitutional provisions, including the Fourteenth Amendment, the First Amendment, and Article I of the U.S. Constitution. The court also relied upon a variety of evidentiary showings—including three measures of asymmetry, a statistical showing that the map was an “extreme outlier,” and the election results themselves—in finding the presence of discriminatory effect.

Relying upon language from Arizona State Legislature, the court held that, to meet the discriminatory effects requirement of the Equal Protection Clause, plaintiffs must show that the challenged districting plan “subordinate[s the interests] of one political party and entrench[es] a rival party in power.” 135 S. Ct. at 2658. The court stated that a plan “subordinates” when it is biased against the supporters of a disfavored candidate’s party and “entrenches” when that bias “is likely to persist in subsequent elections such that an elected representative from the favored party will not feel a need to be responsive to constituents who support the disfavored party.”

The court enjoined the state from using the plan for future elections, directed the state legislature to adopt a remedial plan by January 24, 2018, and ordered the parties to propose special masters to redraw the congressional map in the event the court rejected any legislatively enacted remedial map. The legislative defendants filed an emergency motion in the lower court to stay the remedial map drawing process pending the Supreme Court’s decisions in Gill v. Whitford and Benisek v. Lamone, and then filed an emergency application with the Supreme Court seeking to stay proceedings in the district court pending appeal. The Supreme Court granted the defendants’ stay request (including the remedial process) on January 18, 2018, and denied the plaintiffs’ motion for expedited briefing on February 6, 2018. The defendants’ Jurisdictional Statement was filed with the U.S. Supreme Court on March 12, 2018.

Racial Gerrymandering, Vote Dilution, and Intentional Discrimination:

Abbott v. Perez (17-586) and Abbott v. Perez (17-626)

The two consolidated Abbott v. Perez appeals pertain to the congressional and state legislative redistricting plans for the State of Texas. Plaintiffs have deployed the full array of redistricting claims, including vote dilution under § 2 of the VRA,
intentional vote dilution under the Fourteenth Amendment, racial sorting under the Shaw-Miller line of cases, and Larios-style one-person, one-vote claims.

Individual voters in Texas, alongside organizations representing African-Americans and Latinos, argue that when the state redrew its congressional and legislative plans, it did not act in good faith to achieve population equality, and instead, intentionally diluted Latino and African-American voting strength. Some of the plaintiffs further argued that Texas failed in both plans to create all of the majority-minority districts required by Section 2 of the VRA.

On March 10, 2017, the panel issued a ruling on challenges to the 2011 congressional map, holding that four districts in the plan were unconstitutional racial gerrymanders and that the creation of one of the districts could not be justified by a need to comply with Section 2 of the VRA. The panel also ruled that Texas had unconstitutionally and intentionally packed and cracked minority voters in the Dallas-Fort Worth area and in creating the configuration of one of the districts in the 2011 congressional plan, but the panel rejected intentional vote dilution claims related to the greater Houston area.

On April 20, the panel ruled that a number of districts in the 2011 state house plan resulted in intentional vote dilution in violation of the Constitution and the VRA, that several districts violated one-person, one-vote requirements and that one district had been drawn as a racial gerrymander. The court deferred ruling on requests that Texas be placed under preclearance coverage through Section 3 of the VRA.

Following a trial on the 2013 state house and congressional plans on July 10-15, 2017, the court held that two congressional districts created under the 2013 congressional map violated the Constitution and the VRA, and that enactment of the 2013 congressional plan was intentionally discriminatory.

On August 24, 2017, the panel held that the 2013 state house plan violated the Constitution and VRA and purposefully maintained discriminatory features from the 2011 plan.

On August 25, 2017, Texas filed an appeal to the Supreme Court asking the Court to halt the redrawing of the congressional map, and on August 28, 2017, Justice Alito temporarily stayed remedial proceedings in connection with the congressional map pending further order of the Court and directed plaintiffs to file a response to the request for a stay. On August 31, 2017, Justice Alito temporarily stayed remedial proceedings in connection with the state house map pending further order of the Court.

On September 12, 2017, the Supreme Court entered orders granting the stays requested by Texas and halting the redrawing of maps pending appeal.
Following consideration of the appeals at the Justices' January 12, 2018 conference, the Supreme Court agreed to hear the State of Texas' appeals of rulings on the congressional and state house plans. Oral argument in the appeals is set for April 24, 2018. If the Court decides to craft a partisan gerrymandering claim in *Gill* and/or *Benisek*, one can expect (or at least hope) to see the interplay between the Court’s racial gerrymandering case law and political gerrymandering case law clarified via *Abbott v. Perez*.

**Voter Roll Purges: *A. Philip Randolph Institute v. Husted***

Ohio is considered by some to be the most aggressive of fewer than 10 states that use nonvoting as a trigger for beginning the process of removal from the voting rolls. In a case originating in this political battleground state, the Supreme Court heard oral argument on January 10, 2018 in a challenge to Ohio’s statutory procedures for purging voter registration rolls based on a voter’s failure to respond to a request to confirm registration followed by a failure to vote in two federal elections.

At issue is whether this procedure violates the National Voter Registration Act ("NVRA") and deprives eligible citizens of the right to vote. Interestingly, when the case was before the Sixth Circuit Court of Appeals, the United States supported the challengers, and (at that time) the Sixth Circuit held that Ohio’s voter purge statute could not be enforced in the November 2016 elections, in which an estimated 7,500 voters participated who might otherwise have been ineligible.

When the Supreme Court heard oral argument in the case on January 10, 2018, President Trump’s Solicitor General, Noel J. Francisco, argued—in response to intensive questioning by Justice Sotomayor—in support of Ohio’s voter purge statute despite a 24-year history of solicitor generals of both political parties under presidents of both political parties taking a contrary position. Addressing the political implications of the Ohio voter purge law, Justice Sotomayor noted that the essence of this case is whether the state’s process is “disenfranchising disproportionately certain cities where large groups of minorities live, where large groups of homeless people live, and across the country they’re the group that votes the least.”

During oral argument, Justice Kennedy, a pivotal justice in voting cases, said the reason Ohio is purging is “to protect the voter roll from people . . . that have moved and they’re not voting in the wrong district,” and that “[w]hat we’re talking about are the best tools to implement . . . that purpose.” Justice Breyer pointed out that Ohio and other states want precise voter rolls to make sure voters are in the correct districts and to avoid voter fraud and impersonation. Chief Justice Roberts pressed counsel for the challengers to the Ohio law to concede that voting could be a starting point in some cases, as evidence that a person has moved if a non-forwardable
notice came back to the state, providing a reason to believe the person no longer lived at that address, although that is not the state’s process.

**Conclusion**

The time is ripe for the Supreme Court to address and provide a remedy for the injuries caused by partisan gerrymandering. Gerrymandering depresses voter turnout and political participation, allows lawmakers to tilt the electoral odds in their favor contrary to basic democratic values, and involves the targeting of persons based on their political opinions and beliefs for state-sanctioned disfavor in a manner that strikes at the heart of core constitutional principles of impartiality and equal treatment under the law as well as free expression and association.

As Justice Kennedy once wrote, “Abdication of responsibility is not part of the constitutional design.” Courts have an important role to play when constitutional rights are violated. Although the Court—and Justice Kennedy in particular—have expressed reservations about the institutional implications of striking down partisan gerrymanders, “[b]y mistaking inaction for neutrality and avoidance for deference, the Court [has] fail[ed] to fulfill its own role in the constitutional scheme and [has] destabilize[d] the institutions it seeks to protect.” See G. Michael Parsons, *The Institutional Case for Partisan Gerrymandering Claims*, 2017 Cardozo L. Rev. de novo 155, 156 (Oct. 2017).

In the face of increasingly undisputed evidence of a specific and express intent to dilute the electoral opportunities of voters based on past voter behavior and voting history, and an admitted map-drawing rationale by government officials designed to achieve partisan advantage (such as in Maryland and North Carolina), the Supreme Court has the opportunity to reaffirm the protection that the Constitution accords core activities. As the district court in *Common Cause v. Rucho* noted, mapmakers may draw district because they think it is better to elect candidates from one party rather than another, but “that is not a choice the Constitutional allows . . . mapmakers to make.” *Rucho*, 2018 U.S. Dist. LEXIS 5191, at *6. That choice belongs to the voters. So holding “could end the ‘legal arbitrage’ between racial and political redistricting law; harmonize the treatment of racial and political ‘advantage’ arguments across equal-population, dilution, and sorting case law; and bring redistricting law into closer alignment with the Court’s broader equal-protection and First Amendment jurisprudence.” *Id.* at 157.

The Court also has the opportunity to provide a sharper focus and definition for what is and is not vote dilution in the context of electoral processes ancillary to the actual casting of a ballot, as presented in the voter purge case of *A. Philip Randolph Institute v. Husted*. It also has the opportunity to clarify the law surrounding racial gerrymandering claims and delineate the standard of proof for intentional vote
dilution violative of the Fourteenth Amendment and of Section 2 of the VRA, as presented in Abbott v. Perez.

The right to vote is a precious fundamental right, but it cannot thrive in an atmosphere of political dissension, divisiveness and deadlock. It may seem at times that this fundamental right is in the crosshairs of those who would prefer a more autocratic - or chaotic - government that runs on a top-down basis. As long as the rule of law and an independent judiciary are able to thrive in our open democracy, preservation and strengthening of the right to vote and full access and meaningful participation of the electorate will flow as a natural and desirable consequence.

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