



## WISCONSIN LEGISLATIVE COUNCIL INFORMATION MEMORANDUM

### Wisconsin Redistricting Case: *Whitford v. Gill* (2016)

On November 21, 2016, in *Whitford v. Gill*, the U.S. District Court for the Western District of Wisconsin held that the Assembly districts created by 2011 Wisconsin Act 43 are “partisan gerrymanders” that violate the U.S. Constitution. The court found that the Act: (1) is intended to severely impede the effectiveness of votes based on voters’ political affiliation; (2) has that effect; and (3) is not justified by a legitimate state interest. As a result, the court prohibited future use of the Assembly districts created by the Act and ordered the state to draw a new redistricting plan by November 1, 2017.

The State of Wisconsin appealed the decision to the U.S. Supreme Court. On June 19, 2017, the Supreme Court agreed to hear the case and stayed the district court’s order to redraw the plan. Oral arguments in the Supreme Court are scheduled for October 3, 2017.

#### **BACKGROUND**

##### **2011 WISCONSIN ACT 43**

The Wisconsin Constitution directs the Legislature to reapportion Senate and Assembly districts in its first session after each U.S. Census according to the number of inhabitants. It requires districts to adhere to county, precinct, town, or ward lines and to be contiguous and compact.<sup>1</sup> In addition, it forbids dividing Assembly districts to create Senate districts. Thus, under state statutes, the state is divided into 33 Senate districts, each composed of three Assembly districts. [Wis. Const. art. IV, ss. 3, 4, and 5; and s. 4.001, Stats.]

2011 Wisconsin Act 43 is the current legislative redistricting plan for Wisconsin. Enacted in 2011, the Act establishes the boundaries of Wisconsin’s Senate and Assembly districts to accommodate population changes over the preceding decade. The Act uses data from the U.S.

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<sup>1</sup> According to the U.S. District Court for the Eastern District of Wisconsin, “[a]lthough avoiding the division of counties is no longer an inviolable principle, respect for the prerogatives of the Wisconsin Constitution dictate that wards and municipalities be kept whole where possible.” [*Baumgart v. Wendelberger*, Case No. 01-C-0121, 2002 WL 34127471 (E.D. Wis. 2002).]

Census to create the districts. The content of the Act designates the geographic location of the Senate and Assembly districts.

### ***PARTISAN GERRYMANDERING***

The U.S. Supreme Court has defined “partisan gerrymandering” (or “political gerrymandering”) as “the drawing of legislative district lines to subordinate adherents of one political party and entrench a rival party in power.” [*Arizona State Legislature v. Arizona Independent Redistricting Commission*, 135 S. Ct. 2652, 2658 (2015).] Generally, in a partisan gerrymandering case, one political group alleges that a redistricting plan discriminates or dilutes its group’s rights in violation of the U.S. Constitution.

Although the U.S. Supreme Court has addressed partisan gerrymandering in several decisions, it has not: (1) resolved the question of whether partisan gerrymandering claims are always justiciable<sup>2</sup>; and (2) if such claims are justiciable, agreed on a test for partisan gerrymandering. Below are summaries of three such decisions:

- In *Gaffney v. Cummings*, the Court recognized that a partisan gerrymandering claim may be justiciable if a redistricting plan involves invidious discrimination that is intended to dilute the voting strength of a political group or party. In the case, the Court found no invidious discrimination in Connecticut’s legislative redistricting plan because the plan was designed to distribute seats to the Republicans and Democrats in proportion to the statewide vote for each political party. [412 U.S. 735 (1973).]
- In *Davis v. Bandemer*, the Court concluded that partisan gerrymandering claims are justiciable, and a majority of the Court agreed that proving such claims requires a showing of “intentional discrimination against an identifiable political group and an actual discriminatory effect on that group.” However, a majority of the Court did not reach agreement on a standard for discriminatory effect. In the case, although the Court found that Indiana’s legislative redistricting plan intentionally discriminated against Democrats, a majority of the Court did not find a discriminatory effect. [478 U.S. 109 (1986).]
- In *Vieth v. Jubelirer*, a plurality of the Court concluded that partisan gerrymandering claims are not justiciable, thus rejecting the conclusion in *Bandemer* that such claims are justiciable. The other justices, who concluded that such claims are justiciable, did not agree on a test for partisan gerrymandering. Thus, in the case, the Court rejected the challenge to Pennsylvania’s congressional redistricting plan. [541 U.S. 267 (2004).]<sup>3</sup>

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<sup>2</sup> “Justiciability” is the ability of a court to decide a question in a case. If a question is a “political question,” or “nonjusticiable,” the court will not decide it. In *Vieth v. Jubelirer*, the U.S. Supreme Court described such a question as one that “is entrusted to one of the political branches or involves no judicially enforceable rights.” [541 U.S. 267, 277 (2004).]

<sup>3</sup> Two years later, in *League of United Latin American Citizens v. Perry*, the Court decided a case involving a partisan gerrymandering claim against Texas’s congressional redistricting map. However, a majority of the Court

## **WHITFORD V. GILL**

In *Whitford v. Gill*, 218 F.Supp.3d 837 (2016), the U.S. District Court for the Western District of Wisconsin<sup>4</sup> held that the Assembly districts created by Act 43 are unconstitutional partisan gerrymanders.

The plaintiffs in *Whitford* argued that the redistricting plan in Act 43 “systematically dilutes the voting strength of Democratic voters statewide.” They argued that the plan treats voters unequally, in violation of the Equal Protection Clause, and burdens First Amendment free speech and association rights. The plaintiffs alleged that the Legislature achieved this by “cracking” and “packing” districts to dilute Democratic votes. “Cracking” is splitting a party’s voters among multiple districts so they cannot achieve a majority in the districts. “Packing” is concentrating a party’s voters in a few districts so they achieve an overwhelming majority in the districts. [*Whitford*, at 843 and 854 to 855.]

The *Whitford* court held that partisan gerrymandering claims are justiciable. To assess when a redistricting plan violates the U.S. Constitution, the court adopted a three-part test. Under the test, a redistricting plan violates the First Amendment and the Equal Protection Clause when the plan: “(1) is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation, (2) has that effect, and (3) cannot be justified on other, legitimate legislative grounds.” [*Whitford*, at 884.] In other words, the test is whether a plan has a discriminatory intent, whether it has a discriminatory effect, and whether it can be justified on other grounds.

### ***DISCRIMINATORY INTENT***

Under the district court’s test, the first part asks whether a redistricting plan “is intended to place a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation.” [*Whitford*, at 884.] The court held that the Act 43 redistricting plan has a discriminatory intent.

The court found that a showing of “an intent to entrench a political party in power” satisfies the discriminatory intent requirement. In the case, the court required the plaintiffs to show that there was an “intent to entrench the Republican Party in power” that was a motivating factor in the plan. To determine whether such purpose was a motivating factor, the court stated:

Determining whether invidious discriminatory purpose was a motivating factor demands a sensitive inquiry into such circumstantial and direct evidence of intent as may be available, including (1) [t]he impact of the official action as an important starting point; (2) the historical background of the decision; (3) [t]he specific sequence of events leading up to the challenged decision; (4) [d]epartures from the

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did not revisit the issue of justiciability and did not agree on a test for partisan gerrymandering. [548 U.S. 399 (2006).]

<sup>4</sup> The case was heard by a three-judge panel. Under federal law, a district court of three judges is required for an action that challenges the constitutionality of congressional or state apportionment plans. A party may appeal a three-judge decision directly to the U.S. Supreme Court. [28 U.S.C. ss. 1253 and 2284 (a).]

normal procedural sequence; (5) legislative or administrative history ... , especially ... contemporary statements by members of the decisionmaking body, minutes of its meetings, or reports.

[*Whitford*, at 887 to 890 (internal quotations and citations omitted).]

However, the court stated that the discriminatory intent need not be the only or dominant factor in the creation of the redistricting plan. In addition, the court held that a plan can violate the Equal Protection Clause even where it adheres to traditional districting principles, such as compactness and contiguity. [*Whitford*, at 887 to 889.]

Based on evidence, the court found that the drafters “sought to understand the partisan effects of the maps”; designed and used measures of partisanship to evaluate different proposed maps; favored maps that advantaged Republicans; and were concerned with the “durability” of their maps. These findings led the court to conclude that a purpose of the Act 43 redistricting plan was to “secure Republican control of the Assembly under any likely future electoral scenario for the remainder of the decade, in other words to entrench the Republican party in power.” Thus, the court held that discriminatory intent was a motivating factor in the creation of the redistricting plan. [*Whitford*, at 895 to 896.]

### ***DISCRIMINATORY EFFECT***

Under the district court’s test, the second part asks whether a redistricting plan has the effect of “[placing] a severe impediment on the effectiveness of the votes of individual citizens on the basis of their political affiliation.” [*Whitford*, at 884.] The court held that the Act 43 redistricting plan has a discriminatory effect.

The court found that a showing of a burden on representational rights, as measured by the following evidence, satisfies the discriminatory effect requirement: (1) swing analyses; (2) results from the 2012 and 2014 elections; and (3) the efficiency gap. Based on the evidence, the court found that the Act 43 redistricting plan has the effect of securing an Assembly majority for Republicans because the plan “[made] it more difficult for Democrats, compared to Republicans, to translate their votes into seats.” [*Whitford*, at 898.]

### ***Swing Analyses***

A swing analysis uses statistics to predict electoral outcomes under different conditions. In the case, the court reviewed swing analyses prepared by two expert witnesses and found that Democrats would consistently need a higher share of the votes than Republicans to hold a competitive number of Assembly seats. The court found that predicted inequalities supported the conclusion that the Act 43 redistricting plan has a discriminatory effect.

For example, one analysis found that Republicans could hold 54 Assembly seats with a 48% statewide vote, whereas Democrats would need more than a 54% statewide vote to hold the same number of seats. The other analysis found that if Democrats had a 46% statewide vote (5% less than in the 2012 election), the number of legislative seats that each party had following the 2012 election would not change – 60 seats for the Republicans and 39 seats for the Democrats. If the

Democrats won a 54% statewide vote (3% more than in the 2012 election), the Democrats would hold 45 seats. [*Whitford*, at 898 to 901.]

### ***2012 and 2014 Election Results***

Based on the 2012 and 2014 election results, the court found that actual electoral differences between votes received and seats won supported a finding of discriminatory effect. Under the Act 43 redistricting plan, in the 2012 election, Democrats received 51.4% of the vote and 39 Assembly seats, and Republicans received 48.6% of the vote and 60 seats. In the 2014 election, Democrats received 48% of the vote and 36 seats, and Republicans received 52% of the vote and 63 seats.

The court further observed that when Republicans and Democrats achieved roughly equivalent vote percentages in different election years, the result was a 24-seat disparity between the parties. Specifically, the court pointed again to the 2012 and 2014 election results: (1) the Democrats received 51.4% of the vote in the 2012 election, which resulted in 39 seats, and when the Republicans received a similar percentage (52% of the vote) in the 2014 election, that resulted in 63 seats; and (2) the Democrats received 48% of the vote in the 2014 election, which resulted in 36 seats, and when the Republicans received a similar percentage (48.6% of the vote) in the 2012 election, that resulted in 60 seats. [*Whitford*, at 901 to 903.]

### ***Efficiency Gap***

The court found that a standard called the “efficiency gap” supported a finding of discriminatory effect. The efficiency gap (EG) measures “wasted votes” for each party and was described by the court in the following manner:

First, it requires totaling, for each party, statewide, (1) the number of votes cast for the losing candidates in district races (as a measure of cracked voters), along with (2) the number of votes cast for the winning candidates in excess of the 50% plus one votes necessary to secure the candidate’s victory (as a measure of packed voters). The resulting figure is the total number of “wasted” votes for each party. ... The EG is the difference between the wasted votes cast for each party, divided by the overall number of votes cast in the election. When the two parties waste votes at an identical rate, the plan’s EG is equal to zero. An EG in favor of one party (Party A), however, means that Party A wasted votes at a lower rate than the opposing party (Party B). It is in this sense that the EG is a measure of efficiency: because Party A wasted fewer votes than Party B, Party A was able to translate, with greater ease, its share of the total votes cast in the election into legislative seats. Put simply, an EG in Party A’s favor means it carried less electoral dead weight; its votes were, statistically, more necessary to the victories of its candidates, and, consequently, it secured a greater proportion of the legislative seats than it would have secured had Party A and Party B wasted votes at the same rate. [*Whitford*, at 903 to 904.]

According to one expert witness, an EG that is higher than seven percent in the first election following the creation of a redistricting plan suggests that the plan will continue to favor the

same party for the remainder of the decade.<sup>5</sup> The witness opined that the Act 43 redistricting plan would have an average EG of 9.5% in favor of the Republicans for the decennial period. In the 2012 and 2014 elections, Wisconsin had an EG of 13% and 10%, respectively. [*Whitford*, at 903 to 906.]

The court concluded “that the plaintiffs have established, by a preponderance of the evidence, that Act 43 burdens the representational rights of Democratic voters in Wisconsin by impeding their ability to translate their votes into legislative seats, not simply for one election but throughout the life of Act 43.” [*Whitford*, at 910.]

### ***LEGITIMATE LEGISLATIVE GROUNDS***

Under the district court’s test, the third part asks whether a redistricting plan “cannot be justified on other, legitimate legislative grounds.” [*Whitford*, at 884.] The court found that the partisan effect of the Act 43 redistricting plan “cannot be justified by the legitimate state concerns and neutral factors that traditionally bear on the reapportionment process.” [*Whitford*, at 912.]

The state argued that the political geography of Wisconsin favors Republicans, which explains why the redistricting plan favors Republicans. The court acknowledged that the state’s political geography, particularly the concentration of Democratic voters in urban areas of the state, provides a modest advantage for Republicans. [*Whitford*, at 912 to 921.]

However, the court found that the political geography does not explain the redistricting plan’s partisan effect because of “the magnitude of Act 43’s partisan effect” and evidence of alternative redistricting plans that would have been less burdensome on Democratic voters. Specifically, the court pointed to evidence that the drafters of the Act 43 plan produced multiple, alternative plans that would have generated a smaller partisan advantage. The court also noted that, as the drafting process progressed, the partisan advantage of the maps increased. Lastly, the court pointed to a demonstration plan created by an expert witness that resulted in a lower EG. [*Whitford*, at 921 to 927.]

### ***REMEDY***

The district court’s November 2016 decision held that the Act 43 redistricting plan is an unconstitutional partisan gerrymander, but did not decide on a remedy. Instead, the court ordered the parties to file briefs on appropriate remedial measures.

On January 27, 2017, the court issued an order regarding remedies. The order enjoined the state from using the Act 43 redistricting plan in any future elections and required the state to have a remedial redistricting plan in place by November 1, 2017.

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<sup>5</sup> The court rejected the plaintiff’s argument that if the EG for a redistricting plan exceeds seven percent (or another particular measure), then the plan is presumed unconstitutional. The court viewed the EG as evidence that could be used to corroborate a discriminatory intent and effect for alleged partisan gerrymandering. [*Whitford*, at 910.]

## **U.S. SUPREME COURT**

The State of Wisconsin appealed the district court's decision to the U.S. Supreme Court. On June 19, 2017, the Supreme Court agreed to hear the case. The Supreme Court also stayed the district court's order to redraw the districts by November 1, 2017. Oral arguments in the case are scheduled for October 3, 2017. Currently, Wisconsin may continue to use the Assembly districts created by Act 43.

This memorandum is not a policy statement of the Joint Legislative Council or its staff.

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