INTERNATIONAL ASSOCIATION OF DEFENSE COUNSEL
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FEDERAL AND STATE GERRYMANDERING LITIGATION UPDATE

I. LEGAL BACKGROUND

A. The Federal Constitutional Context – Equal Protection and Voting Districts.

1. The constitutionality of legislative apportionments is governed by the Equal Protection Clause of the Fourteenth Amendment, which requires that, in electing state representatives, the votes of citizens must be weighted equally. If an apportionment scheme violates the principle of one-person, one-vote, it must be justified on the basis of other, permissible, legislative considerations. *Reynolds v. Sims*, 377 U.S. 533 (1964).

    a) The right to vote "is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, any alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized." *Id*. at 561–62.

b) "Most citizens" exercise their "inalienable right to full and effective participation in the political process" by voting for their elected representatives. *Id*. at 565. "Full and effective participation by all citizens in state government requires, therefore, that each citizen have an equally effective voice in the election of members of his state legislature." *Id*.

c) "Since the achieving of fair and effective representation for all citizens is concededly the basic aim of legislative apportionment, ... the Equal Protection Clause guarantees the opportunity for equal participation by all voters in the election of state legislators. Diluting the weight of votes because of place of residence impairs basic constitutional rights under the Fourteenth Amendment just as much as invidious discriminations based upon factors such as race or economic status." *Id*. at 565–66 (citations omitted).

d) Court requires "that a State make an honest and good faith effort to construct districts ... as nearly of equal population as is practicable." *Id.* at 577.

(1) Later cases set a 10% threshold: an apportionment plan with a maximum population deviation between the largest and smallest district of 10% is presumptively constitutional; larger disparities create a prima facie case of discrimination, and the State must justify its plan. *See Evenwel v. Abbott*, 136 S. Ct. 1120, 1124 (2016).

B. The Federal Legal Context – Partisan Gerrymandering Case Precedent.

1. In *Gaffney v. Cummings*, 412 U.S. 735 (1973), the Supreme Court held that "[s]tate legislative districts may be equal or substantially equal in population and still be vulnerable under the Fourteenth Amendment," commenting that a districting plan may create multimember districts acceptable under equal population standards, but that may nevertheless be invidiously discriminatory because they are employed "to minimize or cancel out the voting strength of racial ***or political*** elements of the voting population." *Id*. at 751–52 (emphasis added).

a) The Court was "unconvinced" that the Connecticut plan at issue violated the Fourteenth Amendment, observing that Connecticut's Apportionment Board had sought to "achieve a rough approximation

of the statewide political strengths of the Democratic and Republican parties" by implementing a "political fairness" plan. The Court saw no constitutional impediment to the State's considering partisan interests in this way. *Id*. at 752–53.

b) But the Court made clear that drawing legislative districts along political lines "is not wholly exempt from judicial scrutiny under the Fourteenth Amendment." *Id*. at 754. Relying on its vote-dilution cases, it gave as an example "multimember districts [that] may be vulnerable" to constitutional challenges "if racial or political groups have been fenced out of the political process and their voting strength invidiously minimized." *Id*.

c) "Beyond this," the Court continued, it had "not ventured far or attempted the impossible task of extirpating politics from what are the essentially political processes of the sovereign States." *Id*.

2. *Davis v. Bandemer*, 478 U.S. 109 (1986).

a) Indiana Democrats challenged the 1981 state reapportionment plan passed by a Republican-controlled legislature, alleging that the plan was intended to disadvantage Democrats in electing representatives of their choosing, in violation of the Equal Protection Clause. In November 1982, before the case went to trial, elections were held under the new plan.

b) The district court "sustained an equal protection challenge to Indiana's 1981 state apportionment on the basis that the law unconstitutionally diluted the votes of Indiana Democrats." *Id*. at 113 (plurality opinion).

c) The Supreme Court reversed. A majority of the Court first concluded that the issue before the Court, like those in the one-person, one-vote cases and in the vote-dilution cases, "is one of representation" and "decline[d] to hold that such claims [we]re never justiciable." *Id*. at 124.

d) Turning to the standard to be applied, a majority of the Court agreed that the "plaintiffs were required to prove both intentional discrimination against an identifiable political group and an actual discriminatory effect on that group." *Id*. at 127. A majority of the Court also believed that the first requirement—intentional

discrimination against an identifiable group—had been met, observing that, "[a]s long as redistricting is done by a legislature, it should not be very difficult to prove that the likely political consequences of the reapportionment were intended." *Id*. at 129.

e) The plurality rejected "the District Court's legal and factual bases for concluding that the 1981 Act visited a sufficiently adverse effect on the appellees' constitutionally protected rights to make out a violation of the Equal Protection Clause." *Id*. at 129. The Court rejected "any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be." *Id*. at 130.

f) The plurality held "that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice" also did "not render that scheme constitutionally infirm." *Id*. at 131. Instead, the Court held that "an equal protection violation may be found only where the electoral system substantially disadvantages certain voters in their opportunity to influence the political process effectively. In this context, such a finding of unconstitutionality must be supported by evidence of continued frustration of the will of a majority of the voters or effective denial to a minority of voters of a fair chance to influence the political process." *Id*. at 132–33.

g) Applying this standard, the plurality concluded that "this threshold condition" had not been met. *Id*. at 134. It observed that the district court had relied "primarily on the results of the 1982 elections" in which Democratic candidates had garnered "51.9% of the votes cast statewide," but secured only 43 seats. *Id*. Republicans, however, had received only "48.1% ... yet, of the 100 seats to be filled, Republican candidates won 57." *Id*. The plurality held that "[r]elying on a single election to prove unconstitutional discrimination" was "unsatisfactory," citing a lack of evidence that (1) the 1981 Act prevented the Democrats from "secur[ing] ... sufficient vote[s] to take control of the assembly"; (2) "the 1981 reapportionment would consign the Democrats to a minority status in the Assembly throughout the 1980's"; or (3) "the Democrats would have no hope of doing any better in the reapportionment that would occur after the 1990 census." *Id*. at 135–36.

3. *Vieth v. Jubelirer*, 541 U.S. 267 (2004).

a) In *Vieth*, the Court addressed an action filed by Democratic voters in Pennsylvania challenging the state legislature's new congressional districting plan.

b) Justice Scalia, writing for a plurality, reviewed the Court's opinion in *Bandemer*: "Over the dissent of three Justices, the Court held in *Davis v. Bandemer* that, since it was "not persuaded that there are no judicially discernible and manageable standards by which political gerrymander cases are to be decided," 478 U.S., at 123, such cases were justiciable. ..." There was no majority on that point. Four of the Justices finding justiciability believed that the standard was one thing ... [and] two believed it was something else .... The lower courts have lived with that assurance of a standard (or more precisely, lack of assurance that there is no standard), coupled with that inability to specify a standard, for the past 18 years. *Id*. at 278–79. In the plurality's view, "[e]ighteen years of judicial effort with virtually nothing to show for it justif[ied] ... revisiting the question whether the standard promised by *Bandemer* exists," leading them to conclude that "no judicially discernible and manageable standards for adjudicating political gerrymandering claims have emerged," and, therefore, that "political gerrymandering claims are nonjusticiable." *Id*.

c) Justice Kennedy concurred in the judgment, "agreeing with the plurality that the complaint the appellants filed in the District Court must be dismissed," but "not foreclos[ing] 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." *Id*. Justice Kennedy believed that "[a] determination that a gerrymander violates the law must rest on something more than the conclusion that political classifications were applied. It must rest instead on a conclusion that the classifications, though generally permissible, were applied in an invidious manner or in a way unrelated to any legitimate legislative objective." *Id*. at 307. Moreover, he noted specifically that the First Amendment, not the Equal Protection Clause, would provide the framework within which political gerrymandering claims should be analyzed. *See id.* at 314.

d) Justices Stevens, Souter, Breyer, and Ginsberg dissented, and would hold partisan gerrymandering claims justiciable.

4. *League of United Latin American Citizens v. Perry* ("*LULAC*"), 548 U.S. 399 (2006).

   a) In 2002, Republicans gained control of both houses of the Texas legislature and enacted legislation that re-drew congressional districting lines, resulting in the Republicans securing 21 seats with 58% of the vote in statewide races, compared to the Democrats' 11 seats with 41% of the vote. Shortly after the plan was enacted, some Texas voters mounted both statutory and constitutional challenges to it. In the constitutional challenge, the plaintiffs claimed that a decision to enact a new redistricting plan mid-decade, "when solely motivated by partisan objectives, violates equal protection and the First Amendment because it serves no legitimate public purpose and burdens one group because of its political opinions and affiliation." *Id*. at 416–17.

   b) The Supreme Court disagreed. Justice Kennedy, joined by Justices Souter and Ginsburg, opined that "a successful claim attempting to identify unconstitutional acts of partisan gerrymandering must do what appellants' sole-motivation theory explicitly disavows: show a burden, as measured by a reliable standard, on the complainants' representational rights." *Id*. at 418. Justice Kennedy further noted that although there is no constitutional requirement of proportional representation, and equating a party's statewide share of the vote with its portion of the congressional delegation is a rough measure at best. Nevertheless, a congressional plan that more closely reflects the distribution of state party power seems a less likely vehicle for partisan discrimination than one that entrenches an electoral minority." *Id*. at 419.

   c) Justice Stevens, in a separate opinion, reiterated the view of impartiality that he had articulated in *Vieth*. He observed that "the Fourteenth Amendment's prohibition against invidious discrimination[] and the First Amendment's protection of citizens from official retaliation based on their political affiliation" "limit the State's power to rely exclusively on partisan preference in drawing district lines." *Id*. at 461. He explained: "The equal protection component of the Fourteenth Amendment requires actions taken by the sovereign to be supported by some legitimate interest, and further establishes that a bare desire to harm a politically disfavored group is not a legitimate interest. Similarly, the freedom of political belief and

association guaranteed by the First Amendment prevents the State, absent a compelling interest, from 'penalizing citizens because of their participation in the electoral process, ... their association with a political party, or their expression of political views.' These protections embodied in the First and Fourteenth Amendments reflect the fundamental duty of the sovereign to govern impartially." *Id*. at 461–62.

d) Justice Breyer also wrote separately to describe why he believed that the plan violated the Equal Protection Clause: "[B]ecause the plan entrenches the Republican Party, the State cannot successfully defend it as an effort simply to neutralize the Democratic Party's previous political gerrymander. Nor has the State tried to justify the plan on nonpartisan grounds, either as an effort to achieve legislative stability by avoiding legislative exaggeration of small shifts in party preferences or in any other way. In sum, "the risk of entrenchment is demonstrated," "partisan considerations [have] render[ed] the traditional district-drawing compromises irrelevant," and "no justification other than party advantage can be found." *Id*. at 492.

e) Justices Souter and Ginsburg adhered to their view, set forth in *Vieth*, as to the proper test for political gerrymandering, but concluded that there was "nothing to be gained by working through these cases on th[at] standard" because, like in *Vieth*, the Court "ha[d] no majority for any single criterion of impermissible gerrymander." *Id*. at 483.

f) Chief Justice Roberts, joined by Justice Alito, agreed with Justice Kennedy "that appellants ha[d] not provided a reliable standard for identifying unconstitutional political gerrymanders," but took no position as to "whether appellants ha[d] failed to state a claim on which relief can be granted, or ha[d] failed to present a justiciable controversy." *Id*. at 492–93.

g) Justices Scalia and Thomas reiterated their view that the voters' political gerrymandering claims were nonjusticiable. *See id.* at 511.

5. *Gill v. Whitford*, 138 S. Ct. 1916 (2018).

a) In July 2015, twelve Wisconsin voters brought an action claiming that 2011 Wisconsin Act 43 (the statute adopting legislative districts) violated their First Amendment rights of association and Fourteenth

Amendment rights to equal protection as regular Democratic voters by enacting a districting plan that systematically dilutes the voting strength of Democratic voters statewide—*i.e.*, by "packing" Democratic voters into single districts (so the Democratic candidates win by huge margins) or "cracking" Democratic voters across multiple districts (so the Democratic candidates inevitably lose).

b) The case was tried in May 2016. On November 21, 2016, in a 2-1 opinion, the three-judge panel held that Act 43 "was intended to burden the representational rights of Democratic voters throughout the decennial period by impeding their ability to translate their votes into legislative seats" and "had its intended effect," and struck down the plan as unconstitutional. 218 F. Supp. 3d 837 (W.D. Wis. 2016). Regarding Article III standing, the court held that the plaintiffs had a "cognizable equal protection right against state-imposed barriers on [their] ability to vote effectively for the party of [their] choice." *Id.* at 928. It concluded that Act 43 "prevent[ed] Wisconsin Democrats from being able to translate their votes into seats as effectively as Wisconsin Republicans," and that "Wisconsin Democrats, therefore, have suffered a personal injury to their Equal Protection rights." *Id.*

c) The Supreme Court vacated and remanded. In a unanimous opinion by Chief Justice Roberts, the Court concluded that the plaintiffs lacked standing to pursue their statewide claims. The Court explained that the plaintiffs' claims "turn on allegations that their votes have been diluted," and "[t]hat harm arises from the particular composition of the voter's own district." 138 S. Ct. 1916, 1930–31 (2018). "Remedying the individual voter's harm," the Court continued, "does not necessarily require restructuring all of the State's legislative districts," but instead "requires revising only such districts as are necessary to reshape the voter's district—so that the voter may be unpacked or uncracked, as the case may be." *Id.* at 1931. Responding to the plaintiffs' contention that they suffered a "statewide harm to their interest 'in their collective representation in the legislature,' and in influencing the legislature's overall 'composition and policymaking,'" the Court concluded that such injuries amounted to nonjusticiable generalized grievances. *Id.*

d) The Court further concluded that four plaintiffs had pleaded a particularized burden on their individual votes through placement in a cracked or packed district. *Id.* But it held that those plaintiffs had not

"meaningfully pursue[d] their allegations of individual harm" as the case progressed to trial, but instead "rested their case … on their theory of statewide injury to Wisconsin Democrats." *Id.* at 1931–32. Although the Court acknowledged that plaintiffs' claims are usually dismissed if they fail to establish standing, the Court instead elected to remand the case to the district because it "concern[ed] an unsettled kind of claim th[e] Court has not agreed upon, the contours and justiciability of which are unresolved." *Id.* at 1934. It therefore offered the plaintiffs an opportunity to prove concrete and particularized injuries that would satisfy Article III.

Justice Kagan, joined by Justices Breyer, Ginsburg, and Sotomayor, issued a concurring opinion that purported "to address in more detail what kind of evidence the present plaintiffs (or any additional ones) must offer to support th[eir] allegation" of vote dilution," and to discuss how "the plaintiffs may have wanted to do more than present a vote dilution theory." *Id.* As for vote dilution, Justice Kagan explained, a plaintiff need only prove "that the value of her own vote has been 'contract[ed].'" *Id.* at 1935. "For example, a Democratic plaintiff living in a 75%-Democratic district could prove she was packed by presenting a different map, drawn without a focus on partisan advantage, that would place her in a 60%-Democratic district." *Id.* at 1936. Justice Kagan also noted that that partisan gerrymandering might give rise to distinct "associational harm[s]" under the First Amendment. *Id.* at 1938. Those harms—*e.g.*, "difficulties fundraising, registering voters, attracting volunteers, generating support from independents, and recruiting candidates to run for office"—may not be district-specific like vote dilution harms, but rather may be statewide in nature. *Id.* at 1938–39.

6. *Benisek v. Lamone*, 138 S. Ct. 1942 (2018)

a) Republican voters in Maryland alleged that Maryland's partisan gerrymander of the Sixth Congressional District violated their First Amendment rights because it purposefully and effectively eliminated their voting power as Republican voters and therefore unconstitutionally retaliated against them for their political expression. The plaintiffs characterized their claim as a First Amendment retaliation claim, requiring them to prove:

(1) That the officials responsible for creating the challenged district had a specific intent to retaliate against them based on political views. This would require the plaintiffs to prove that the responsible officials were motivated by a desire to retaliate against them because of their speech or other conduct protected by the First Amendment, and that they redrew the lines of the challenged district with the specific intent to impose a burden on the plaintiffs and similarly situated citizens because of how they voted or the political party with which they were affiliated.

(2) That they suffered an injury in the form of non-de minimis vote dilution, i.e., that the challenged map diluted the votes of the targeted citizens to such a degree that it resulted in a demonstrable and concrete adverse effect on their right to have an equally effective voice in the election of a representative. (Notably, the *Benisek* plaintiffs' effects test is based on the intent of the responsible officials to flip the district from Republican control to Democratic control, as contrasted with the *Gill* plaintiffs' effects test, which is based on the concept of partisan asymmetry.)

b) On August 24, 2017, the district court denied the plaintiffs' motion for a preliminary injunction, and stayed the proceedings further pending the US Supreme Court's ruling in *Gill v. Whitford*.

c) On August 25, 2017, the plaintiffs filed a notice of appeal to the US Supreme Court. The Court postponed further consideration of jurisdiction until hearing oral argument. The plaintiffs/appellants raised the following questions for consideration by the US Supreme Court:

(1) Is plaintiffs' First Amendment retaliation challenge to the 2011 partisan gerrymander of Maryland's Sixth Congressional district justiciable?

(2) Did the majority below err in holding that, to establish an actionable 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?

(3) Did the majority below err in holding that the Mt. Healthy burden-shifting framework is inapplicable to First Amendment retaliation challenges to partisan gerrymanders?

(4) Regardless of the applicable legal standards, did the majority below err 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?

d) The Supreme Court ultimately affirmed on narrow grounds, concluding that the district court did not abuse its discretion by denying a preliminary injunction.

II. STATUS OF CURRENT CASES

A. Recent Federal District Court Rulings.

1. *Whitford v. Gill* (W.D. Wis.)

Following the Supreme Court's remand, the plaintiffs filed an amended complaint again alleging that Act 43 violates the First and Fourteenth Amendments. The Wisconsin State Assembly has intervened in the litigation, and the district court has set a four-day trial for April 23–26, 2019.

2. *Common Cause, et al. v. Rucho, et al.* (M.D.N.C.)

a) Two groups of plaintiffs (Common Cause and the League of Women Voters of North Carolina) brought partisan gerrymandering claims alleging that the state-wide Congressional districting plan in North Carolina was a pro-Republican gerrymander that violated the First Amendment, Fourteenth Amendment (Equal Protection Clause), and Article I, Sections 2 and 4 of the US Constitution.

b) The case was tried in a one-week trial in October 2017. The district court issued an opinion on January 9, 2018, holding "that the 2016 Plan violates the Equal Protection Clause because the General Assembly enacted the plan with the intent of discriminating against voters who favored non-Republican candidates, the plan has had and likely will continue to have that effect, and no legitimate state interest justifies the 2016 Plan's discriminatory partisan effect. We also conclude that the 2016 Plan violates the First Amendment by unjustifiably discriminating against voters based on their previous

political expression and affiliation. Finally, we hold that the 2016 Plan violates Article I by exceeding the scope of the General Assembly's delegated authority to enact congressional election regulations and interfering with the right of "the People" to choose their Representatives." 279 F. Supp. 3d 587, 608 (M.D.N.C. Jan. 9, 2018)

c) The district court ordered the State to submit a remedial district plan no later than January 29, 2018, along with specific materials relating to the drafting of the new plans. *Id.* at 691. The district court further held that it would appoint a Special Master to assist with drafting a remedial district plan, if the State did not submit a new plan by January 29, or if its new plan did not satisfy Constitutional requirements. *Id.*

d) On January 18, 2018, the Chief Justice granted the application for a stay of the district court's ruling. 138 S. Ct. 923. On June 25, 2018, the Court vacated and remanded the case to the district court in light of *Gill v. Whitford*.

e) Two months after *Gill*, on August 27, 2018, the district court issued a 321-page divided decision (with a partial dissent from Judge Osteen), which again concluded that the 2016 Plan violates the Equal Protection Clause, First Amendment, and Sections 2 and 4 of Article I. 318 F. Supp. 3d 777 (M.D.N.C. Aug. 27, 2018).

f) The majority concluded that "Plaintiffs who reside and vote in each of the thirteen challenged congressional districts" have standing to press vote-dilution claims under the Equal Protection Clause," and it further concluded that the plaintiffs could challenge the 2016 Plan as a whole under the First Amendment and Article I. *Id.* at 820, 836. The majority also rejected the idea that partisan gerrymandering claims are nonjusticiable, finding that the claims are judicially manageable in part because "the Constitution does not authorize state redistricting bodies to engage in ... partisan gerrymandering" at all. *Id.* at 851. The majority then outlined four different tests for adjudicating partisan gerrymandering claims and found that the 2016 Plan violated each of them. *Id.* at 860–941. Accordingly, the majority enjoined the State from using the map in future elections after November 2018, *id.* at 942, but ultimately stayed its decision pending the disposition of a jurisdictional statement.

g) The State filed a jurisdictional statement on October 1, 2018. After full briefing at the jurisdictional stage, the Supreme Court had scheduled the case for consideration at its conference on December 7, 2018. On December 10, the Court indicated it had "rescheduled" the case to a later conference. It is still possible the Court will set the case for plenary consideration during the current Term.

3. *Benisek v. Lamone* (D. Md.)

a) Following the Supreme Court's decision, on November 7, 2018, the district court concluded that the Sixth Congressional District is a partisan gerrymander that violates the plaintiffs' First Amendment rights. The court then enjoined further use of the map and ordered new maps drawn for the 2020 elections.

b) On December 3, 2018, the State filed a jurisdictional statement with the Supreme Court arguing that plaintiffs failed to articulate a justiciable standard for resolving their partisan gerrymandering claim, that the district court erred in invaliding the district, and that the district court erred in enjoining future use of the map.

c) On December 11, 2018, the plaintiffs filed a motion asking the Supreme Court to affirm. The case thus is likely to be fully briefed by the time the Court holds its next conference on *Common Cause*.

B. Recent US Supreme Court Arguments.

1. *Gill v. Whitford* (Oct. 3, 2017)

a) Transcript: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/16-1161_bpm1.pdf

b) Audio: https://www.oyez.org/cases/2017/16-1161

2. *Benisek v. Lamone* (March 28, 2018)

a) Transcript: https://www.supremecourt.gov/oral_arguments/argument_transcripts/2017/17-333_3e04.pdf

b) Audio: https://www.oyez.org/cases/2017/17-333

C. Other Federal Court Cases.

1. *League of Women Voters of Michigan v. Johnson* (E.D. Mich.)

   a) On December 22, 2017, the League of Women Voters of Michigan and eleven Democratic voters filed a complaint alleging that Michigan's 2011 state legislative and congressional maps are unconstitutional partisan gerrymanders in violation of the First and Fourteenth Amendments. The plaintiffs argued that the legislature unconstitutionally marginalized Democratic constituencies by cracking and packing Democratic voters while efficiently spreading Republican voters across safe Republican districts.

   b) On January 23, 2018, Defendant Secretary of State Ruth Johnson filed a motion to stay further proceedings pending the US Supreme Court's resolution of *Gill v. Whitford* and *Benisek v. Lamone*, and a motion to dismiss for a lack of standing. On March 14, the court denied the defendant's motion to stay. The court held oral argument on the defendant's motion to dismiss on March 19, and a decision on that motion is now pending.

D. State Court Cases.

1. *League of Women Voters, et al. v. Commonwealth of Pennsylvania, et al.* 178 A.3d 737 (Pa. 2018) (Opinion Issued Feb. 7, 2018).

   a) On December 29, 2017, after a one-week trial, a Pennsylvania Commonwealth Court judge held that the state's congressional districting plan, the Congressional Redistricting Act of 2011, 25 P.S. §§ 3596.101, did ***not*** violate the Pennsylvania Constitution. In so holding, the Commonwealth Court judge relied upon *Erfer v. Commonwealth,* 794 A.2d 325 (Pa. 2002), which had rejected a partisan gerrymander challenge to Pennsylvania's 2000 Census redistricting under Pennsylvania's equal protection clause.

      (1) At trial, Petitioners presented four expert witnesses, who used computer modeling to demonstrate that partisan gerrymandering considerations predominated over any other rational concerns involved with redistricting. The legislature provided two expert rebuttal witnesses, but never affirmatively justified the 2011 redistricting plan. The Commonwealth Court judge made an express determination of fact that the

challengers' experts were credible, while the legislature's experts were not credible. Despite that determination, the Commonwealth Court judge found that the Pennsylvania Supreme Court *Erfer* precedent precluded him from granting relief.

b) The Pennsylvania Supreme Court expedited briefing and oral argument, which it heard on January 19, 2018.

c) On January 22, 2018, the Pennsylvania's Supreme Court struck down the state's congressional map as an extreme partisan gerrymander that violated the state's Constitution. *League of Women Voters v. Commonwealth*, 175 A.3d 282 (Pa. Jan. 22, 2018). The state Supreme Court found that politicians had drawn the map with precision to favor the Republican Party and disfavor Democratic Party voters. This, the Court held, violated the Pennsylvania Constitution's guarantee that "Elections shall be free and equal," since maps designed to favor one party over another are inherently unequal. The Court invited the state legislature to submit a new congressional districting plan for approval by the Governor.

d) On January 26, the defendants and proposed intervenors filed an application to US Supreme Court Associate Justice Alito to stay the Pennsylvania action, arguing, in part, that the Court's rulings in *Whitford* and *Benisek* could impact the proceedings in Pennsylvania. On February 5, Justice Alito denied the application for a stay.

e) On February 7, 2018, the Pennsylvania Supreme Court issued its opinion, providing its legal analysis supporting its January 22 order. *League of Women Voters v. Commonwealth*, 178 A.3d 737 (Pa. Feb. 7, 2018). Although significant, the Pennsylvania court's opinion is unlikely to impact partisan gerrymandering cases brought under the Federal Constitution, such as *Whitford*.

(1) The Pennsylvania court's ruling is based solely on a Pennsylvania Constitutional provision—the Free and Equal Elections Clause—that the court recognized "has no federal counterpart." By contrast, the *Whitford* plaintiffs' claims, and the district court's ruling finding 2011 Wisconsin Act 43 to be an unconstitutional partisan gerrymander, are based on the State of Wisconsin's violation of the Federal Constitution,

specifically, the First Amendment and the Fourteenth Amendment's Equal Protection Clause.

(a) The Petitioners in *LOWV* challenged the map under three distinct constitutional guarantees: (1) the aforementioned Free and Equal Elections Clause (art. I, sec. 5); (2) the Pennsylvania Freedom of Speech and Freedom of Expression Clauses (which had been previously held to be more expansive than First Amendment protections under the U.S. Constitution) (art. I, secs. 7, 20); and (3) the equal protection clauses (which had been previously held to be coterminous with the Fifth and Fourteenth Amendments to the United States Constitution) (art. I, secs. 1, 26).

(b) 26 of the 50 states have some form of "free and equal" provision within their state constitutions. Further, 49 state constitutions provide a constitutional right to vote. Joshua A. Douglas, *The Right to Vote Under State Constitutions*, 67 VAND. L. REV. 89, Appx. A (2014).

(2) The standard that the Pennsylvania court enunciated under the Pennsylvania Constitution is one that the district court rejected in *Whitford*. The Pennsylvania court held that compliance with Pennsylvania's Free and Equal Elections Clause requires a court to determine whether in drawing congressional district lines, traditional redistricting criteria (such as compactness, contiguity, population equality, and respecting municipal and county boundaries) were subordinated to extraneous considerations such as conferring an unfair partisan advantage on one political party. The court identified compliance with these criteria as a "floor" for measuring compliance with the Pennsylvania Constitution; however, it did not further identify just how a plaintiff might go about proving "subordination" of these criteria to other considerations such as partisan gerrymandering. In *Whitford*, the State of Wisconsin argued to the district court that compliance with Wisconsin's Constitutional and traditional redistricting criteria should be sufficient to satisfy Federal Constitutional requirements. The district court, however, rejected that assertion, instead adopting the plaintiffs' three-part test.

(a) Compactness, contiguity, population equality, and respect for municipal and county boundaries are requirements that the Pennsylvania Constitution expressly identifies for state legislative redistricting purposes (art. II, secs. 16-17). The *LOWV* decision applied these factors to congressional redistricting purposes, based on prior judicial decisions, although the Pennsylvania Constitution does not specifically set out redistricting criteria for congressional maps.

(3) The Pennsylvania Supreme Court's standard does not rely on formulaic principles; rather it considers the traditional geographic criteria for evaluating partisan gerrymandering. The Pennsylvania Supreme Court recognized "the possibility that advances in map drawing technology and analytical software can potentially allow mapmakers, in the future, to engineer congressional districting maps, which, although minimally comporting with these neutral 'floor' criteria, nevertheless operate to unfairly dilute the power of a particular group's vote for a congressional representative." The Court did not address that situation as the legislative respondents had failed to offer any justification for the map other than the right to do so and the safeguarding of incumbency.

f) In its opinion, the Pennsylvania Supreme Court noted that the legislature had failed to submit a new proposed districting plan to the Governor, and ruled that as a remedy, it would turn to a nationally recognized redistricting expert to assist in developing a redistricting plan that would comply with State and Federal Constitutional Standards. The court adopted the expert's plan on February 19. *League of Women Voters v. Commonwealth*, No. 159 MM 2017 2018 WL 936941 (Pa. Feb. 19, 2018).

g) On February 21, the legislature filed a second application to US Supreme Court Associate Justice Alito for a stay, arguing that the Pennsylvania Supreme Court's actions had violated the Elections Clause of the US Constitution. Justice Alito denied the application on March 19. 138 S.Ct. 1323.

h) On June 21, 2018, the legislative leaders filed a Petition for Writ of Certiorari to the US Supreme Court, seeking to reverse the decision of the Pennsylvania Supreme Court in time to use the original map for the 2020 congressional elections. On October 29, 2018 the US Supreme Court denied the Petition without further comment.

i) On November 6, 2018, Pennsylvania voters elected a 9 Democratic and 9 Republican congressional delegation, breaking the 13 R – 5D outcome of the previous three elections.

2. *Corman, et al. v. Torres, et al.* (M.D. Pa.)

a) On February 21, 2018, Republican state legislators and members of Congress filed a complaint in federal court claiming that the Elections Clause of the Federal Constitution (Art. I, § 4, cl. 1), which provides that "[t]he Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof," does not allow Pennsylvania's Supreme Court to enforce the state Constitution, and that the Pennsylvania Supreme Court's new map is a partisan gerrymander in favor of Democrats. The plaintiffs sought immediate injunctive relief: (A) prohibiting the defendants from implementing the Congressional districting plan crafted by the Pennsylvania Supreme Court; and (B) directing the Pennsylvania Department of State to conduct the 2018 May congressional primary and subsequent general election in accordance with the boundaries contained within the 2011 Plan.

b) The district court saw things differently: "The Plaintiffs seek an extraordinary remedy: they ask us to enjoin the Executive Defendants from conducting the 2018 election cycle in accordance with the Pennsylvania Supreme Court's congressional redistricting map and to order the Executive Defendants to conduct the cycle using the map deemed by the Pennsylvania Supreme Court to be violative of the Commonwealth's constitution. In short, the Plaintiffs invite us to opine on the appropriate balance of power between the Commonwealth's legislature and judiciary in redistricting matters, and then to pass judgment on the propriety of the Pennsylvania Supreme Court's actions under the United States Constitution."

c) On March 19, the same day as Justice Alito denied the emergency stay application, the district court dismissed the plaintiffs' complaint on standing grounds. 287 F. Supp. 3d 558 (M.D. Pa. 2018).

E. 2018 State Constitutional Amendments

1. The *Arizona* Decision

a) In 2015, the US Supreme Court held that where state constitutions provide for citizen-initiated referenda, such referenda can be utilized to remove the redistricting power from state legislatures to other bodies. *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 135 S. Ct. 2652, 2661–62 & n.6 (2015).

b) State legislatures may also affirmatively refer constitutional changes to redistricting to statewide referendum. *See, e.g.*, Ohio Issue 1 (2018).

c) Prior to 2018, certain states already utilized redistricting commissions:

(1) Arizona, Hawaii, Idaho, Montana, New Jersey, and Washington State utilize bipartisan redistricting commissions that draw both state legislative and congressional maps. Bipartisan systems often give an advantage to one party in commission membership. California utilizes an explicitly non-partisan redistricting commission system.

(2) Alaska, Arkansas, Colorado, and Pennsylvania have bipartisan redistricting commissions for state legislative maps. Again, one party may predominate over the other in commission membership in these systems.

(3) In Iowa, non-partisan legislative staff develop state legislative and congressional maps which are then presented to the Iowa Legislature for a straight up-or-down vote. If the Iowa Legislature rejects 3 plans in a row, the Iowa Supreme Court intervenes.

2. 2018 Election Results

a) In the 2018 Midterm Elections, voters in Colorado, Michigan, Missouri, Ohio, and Utah all passed some form of redistricting reform through statewide referenda.

b) Specifically:

(1) Colorado, Michigan, and Utah created independent redistricting commissions to redraw congressional and state legislative districts. These systems follow the California model.

(2) Missouri created the position of a non-partisan "state demographer" to promulgate state legislative district maps. A commission comprised of various state majority and minority legislative and executive officials can modify the state demographer's map, provided that 70% of that commission supports the change.

(3) Ohio modified its complex redistricting plan. The Ohio Constitution now requires 60% of both chambers of the Ohio Legislature to support the redistricting plan, with at least 50% support from each of the two largest party delegations in both chambers. If agreement is not possible, however, eventually a simple majority may pass redistricting plans. In such circumstances, the Ohio Constitution now states that such a plan shall not "unduly favor[] or disfavor[] a political party or its incumbents."