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Supreme Court hears case alleging unconstitutional 6th District gerrymander

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U.S. Supreme Court justices expressed frustration with partisan gerrymandering on Wednesday as they heard arguments in a case challenging Maryland's 6th Congressional District.

The case, which alleges a Democratic gerrymander in Maryland at the same time justices are considering the constitutionality of an alleged Republican gerrymander in Wisconsin, has some legal experts wondering whether the justices might be on the verge of establishing a standard that would allow judicial intervention in partisan gerrymandering cases for the first time in the court's history.

The 6th District challenge was brought by seven Maryland residents, including three from Frederick County, who argue that the district — which includes southwestern parts of Frederick County and the city of Frederick — was unconstitutionally gerrymandered to favor Democrats and punish Republicans during the reapportionment process after the 2010 census.

The justices heard arguments in the Wisconsin political gerrymandering case in October, but have not yet released an opinion.

The Maryland and Wisconsin cases both focus on unconstitutional partisan gerrymandering, but there are some important differences. The Maryland case challenges the redrawing of a single federal district to favor Democrats, while the Wisconsin case is based on the statewide redrawing of Wisconsin State Assembly districts to favor Republicans.

The two cases also allege different violations of voters' rights: The Maryland case claims retaliation against Republican voters under a First Amendment framework, while the Wisconsin plaintiffs are alleging a violation of the equal protection clause under the 14th Amendment.

A challenge from North Carolina is also pending.

Finding a test

Courts — including the Supreme Court — have long held that it is impossible for them to decide cases of political, rather than racial, gerrymandering without judicially manageable standards.

Michael Kimberly, who represents the Maryland voters challenging the map, has proposed a test that would require plaintiffs to first prove that politics was the substantial motivating factor in drawing biased district lines; then the state would have to prove that the map would have been

the same as the result of other factors — such as geographic or other considerations — without the political intent.

Steven Marshall Sullivan, defending the state, said such a test fails to answer the perennial question before the court: “How much is too much politics in a redistricting process that this Court has called inherently political?”

But Justice Elena Kagan said that wasn’t so much the question “because, however much you think is too much, this case is too much,” she said.

Kagan said lawmakers were "very upfront" about their intentions as they shuffled hundreds of thousands of voters in and out of the 6th District, when only a fraction of that number needed to be moved as the result of the decennial census.

“The result of that is that the district went from 47 percent Republican and 36 percent Democratic to exactly the opposite, 45 percent Democratic and 34 percent Republican,” Kagan said. “I mean, how much more evidence of partisan intent could we need?”

Sullivan responded that creating competitive districts is also a goal of good-government, anti-gerrymandering groups and argued that the 6th District had become a competitive district as a result of the reapportionment rather than a deeply Democratic one.

In briefs, the state noted that Sen. Ben Cardin (D) received 50 percent of the 6th District vote in 2012, compared with 56 percent in the state as a whole; that Republican Dan Bongino nearly unseated Rep. John Delaney (D) in 2014; and that Gov. Larry Hogan (R) won 56 percent of the vote in the 6th District in 2014.

Sullivan said there were also factors other than politics involved in the state’s map-making process, including to remove a jump over the Chesapeake Bay that used to be a part of the 1st District that required the shuffling of 125,000 voters alone.

“If you move one line, it affects the whole map,” Sullivan said.

Justice Samuel Alito asked how, under Kimberly’s proposed test, any map drawn by inherently political legislatures would pass muster.

“I really don't see how any legislature will ever be able to redistrict,” Alito said.

Justice Ruth Bader Ginsburg asked Sullivan about a parallel in racial gerrymandering, where the court has established standards for testing constitutionality of districts.

“In the racial gerrymandering case, there was a period when ‘max-black’ was the effort. And it seems to me that what we have here is ‘max-Democratic,’” Ginsburg said. “And if ‘max-black’ was no good, why should ‘max-Democratic’ be OK?”

Sullivan responded that the Maryland map is not “max-Democratic” because lawmakers could have easily made an eight-Democrat map based on the party’s edge in voter registration, but did not. He added that there is also a difference because racial gerrymandering standards are “drawn from a history of exclusion of African-Americans from our political process.” That's something

Sullivan said "Republicans can hardly claim" when they control the federal government and the Maryland governor's mansion.

The right time?

Justice Stephen Breyer expressed his desire for the court to finally answer the question of whether a workable standard for partisan gerrymandering could be set.

"It seems like a pretty clear violation of the Constitution in some form to have deliberate, extreme gerrymandering. ... But is there a practical remedy that won't get judges involved in every — or dozens and dozens and dozens of — very important political decisions?" Breyer said.

Breyer suggested even wheeling in a blackboard to post the different theories in political gerrymandering cases, complete with lists of pros and cons.

"We'd have all three variations in front of us and we would enable people who have an interest in this subject generally to file briefs, and we'd see them all together and they could attack each other's standards or they could support each other's standards or they could attack any standard," Breyer said.

Kimberly said the plaintiffs' goal to get relief before the 2018 election is a stumbling block to that approach.

"I do think it makes sense to think about them all together," he said.

He added that the Maryland map likely would fail under the test proposed in the North Carolina case and the Wisconsin map would likely fail under the test proposed in the Maryland case, so the issues are related.

Later, Breyer said now may be the only time the court will have such a broad record before them.

"I mean, the people who do the gerrymandering are not stupid. ... So what do we do? Just say goodbye? Forget it? ... If you think what's happened now is something, wait until you see those computers really working," Breyer said.

Ginsburg asked whether it was too late for the court to be hearing the arguments; one of the issues before the justices is whether the U.S. District Court in Maryland erred in denying a preliminary injunction that would have redrawn the congressional district map before the 2018 election, with primaries scheduled in June.

Kimberly said his clients wouldn't concede that it's too late for the court to order some relief before the election.

But Chief Justice John Roberts asked how there could be "irreparable harm" to the plaintiffs if the 2018 election moves forward under the current map.

"That you've been willing to let go the elections in 2012, 2014, and 2016, suggests that maybe [in] 2018, you're not going to be irreparably harmed in a broader sense," Roberts said.

"Obviously, you argue you would be in this particular election, but if you've been willing to

accept that harm in three different cycles, I don't know if we should get concerned about irreparable harm for one more.”

Kimberly noted that the lawsuit was first filed and litigated in 2013 under a different case caption: *Shapiro v. McManus*, a case that was also heard in the Supreme Court.

Hearing attracts a crowd

New Market resident Walter Olson, who was co-chairman of Gov. Larry Hogan’s (R) redistricting reform commission, spoke at a rally held by the Tame the Gerrymander Coalition at the base of the courthouse steps.

There are tough issues in this country that rightfully seem impossible to solve, but gerrymandering is not one of them, he said.

“There are good, practical solutions that have been tried out in states across the country,” Olson said. He said Hogan is on a “crusade” to pursue redistricting reform in Maryland, and the rest of the country. Hogan filed a friend-of-the-court brief opposing the state’s official stance before the Supreme Court and supporting the plaintiffs.

The Tame the Gerrymander Coalition — which includes the League of Women Voters, Common Cause Maryland, and Represent Maryland — has also pushed for redistricting reform in the Maryland General Assembly.

On Wednesday, House lawmakers voted down all of the redistricting bills filed this year.

Earlier in the day, Cristi Demnowicz, Maryland chapter leader of [Represent.Us](#), said the failure of lawmakers to pass reform was a “cop-out.”

“They have the power. They don’t want to use the power they have,” to pursue reform, Demnowicz said. “They don’t want to lose the power they have.”