

*Whitford v. Nichol*  
**UNITED STATES DISTRICT COURT  
WESTERN DISTRICT OF WISCONSIN  
Case No. 15-cv-421-bbc**

**I. CASE BACKGROUND**

The Plaintiffs are Democratic voters who live in districts that have allegedly been packed or cracked and who allege that they have been harmed by the dilution of Democratic voting strength and, as a result, do not have the same opportunity to elect representatives of their choice to the Assembly. The Plaintiff's lead counsel is Attorney Peter Earle.

The Defendants are various members of the soon-to-be defunct Government Accountability Board in their official capacity and are represented by the state Department of Justice.

The lawsuit was filed in the U.S. District Court for the Western District of Wisconsin. The Plaintiffs requested that the case be reviewed by a three judge panel which includes U.S. District Judge Barbara Crabb, federal Circuit Judge Kenneth Ripple and Chief Judge William Griesbach, of the U.S. District Court in Milwaukee.

**II. CASE OVERVIEW**

Plaintiffs seek (1) a declaratory judgment that 2011 Act 43 (the "Redistricting Map") diluted the impact of certain voters' voting power based on their political beliefs and restricted their rights to free speech and equal protection in violation of the First and Fourteenth Amendments of the United States Constitution; and, (2) a permanent injunction of the implementation of the Redistricting Map in the 2016 election.

The Plaintiffs allege that the Redistricting Map has been gerrymandered to make Republican voters' votes more efficient than those of their Democratic counterparts. They allege that the "efficiency gap" is produced by *packing* Democrats into a small number of districts and *cracking* them apart into minorities in districts that have vast majorities of Republican voters. The efficiency gap measures a political party's *undeserved* seat share, or the proportion of seats a party receives that it would *not* have received under a balanced plan in which both sides had approximately equal wasted votes.

Between 1972 and 2014, the distribution of state house plans' efficiency gaps has been normal and has had a median of almost exactly zero. *See* Expert Report of Prof. Simon D. Jackman (July 7, 2015). In their complaint, the Plaintiffs suggest that the Redistricting Map has resulted in an efficiency gap of 13% and 10% in the 2012 and 2014 partisan elections respectively. This makes the Redistricting Map the 28<sup>th</sup> worst efficiency gap out of 800 plans developed in American history. *See* Complaint ¶ 56.

According to the Plaintiffs, cracking and packing are the two fundamental ways in which unconstitutional partisan gerrymanders are differentiated from permissible political line-drawing. Gerrymandering results in a breakdown of the democratic process, wherein the advantaged party retains the advantage because the disadvantaged party is unable to change it through the political

process. As a result, the Plaintiff's argue, Wisconsin's Redistricting Map should be held presumptively unconstitutional.

In addition, the Plaintiffs argue that the Redistricting Map is additionally unconstitutional because (1) the Redistricting Map was drawn in private and not through the ordinary political process or in consultation with rank-and-file members of either party; (2) the partisan bias (the difference in the share of legislative seats that each party would win if they tied statewide, each receiving 50% of the vote) of the Redistricting Map favored Republicans by a 63-37 Assembly seat margin in 2012; and, (3) it is possible to draw a fair map free from bias (Republican or Democratic) and is in compliance with the Voting Rights Act.

The Plaintiffs allege that the drafters intentionally drafted the Redistricting Map to maximize the number of districts that would elect a Republican and minimize the number of districts that would elect a Democrat. They allegedly did so with the assistance of the Michael Best & Friedrich law firm and a professor of political science at the University of Oklahoma who developed a model that would create a 12% efficiency gap in favor of Republicans. For instance, the drafters of the Redistricting Map allegedly packed Democratic voters by creating seven districts where the Democrat would be expected to win by a margin of 80%-20% and cracked Democratic voters by putting higher percentages of such voters in districts where the Republican would almost always win.

In *Baldus v. Wisconsin*, another case involving the constitutionality of the state's Redistricting Map, the Court called the claims of the Redistricting Map's drafters that they had not been influenced by partisan factors "almost laughable" and concluded that "partisan motivation...clearly lay behind Act 43." *Baldus v. Wisconsin Government Accountability Board*, 849 F.Supp.2d 840, 851 (E.D. Wis. 2012). This partisan favoritism is in apparent contradiction to recent U.S. Supreme Court dicta in which a majority of the Justices expressed support for a test based on the concept of partisan symmetry, "a require[ment] that the electoral system treat similarly-situated parties equally." *LULAC v. Perry*, 548 U.S. 399.

The Plaintiffs urge the Court to use the same two-part test when analyzing the constitutionality of the efficiency gap as it has previously applied to state legislative reapportionment claims. In a reapportionment challenge, the first issue to be considered is whether a district plan's total population deviation exceeds 10%. If so, the plan is presumptively unconstitutional, and if not, it is presumptively valid. The second issue to be considered, which is only reached if the total population deviation is greater than 10%, is whether the malapportionment is necessary to achieve a legitimate state goal. The state bears the burden at this stage of rebutting the presumption of unconstitutionality. See *Voinovich v. Quilter*, 507 U.S. 146, 161-62 (1993); *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983); *Connor v. Finch*, 431 U.S. 407, 418 (1977). Under this test, the Plaintiffs argue that the Redistricting Map would be "plainly unlawful."

### **III. PROCEDURAL HISTORY**

The Plaintiff's filed the lawsuit on July 8, 2015, and on August 8, 2015 the state Department of Justice, on behalf of the Defendants, filed a motion to dismiss. In the order denying the motion to dismiss, the panel considered three issues: (1) whether challenges to a partisan gerrymander were justiciable; (2) whether Plaintiffs had standing to sue; and (3) whether Plaintiffs stated a plausible claim for relief.

In support of their motion to dismiss, the Defendants asserted that since no standard exists for measuring the burden a gerrymander places on the right to legislative representation the controversies alleged are political in nature and, therefore, outside the jurisdiction of the court; and, that the Plaintiffs lacked standing because the Plaintiffs alleged a statewide injury, but did not represent a party from each of the state's 99 Assembly districts.

In its December 17, 2015 order dismissing the Defendant's motion to dismiss, the three judge panel appointed to reviewing the case said "[a]lthough we believe that Plaintiffs face significant challenges in prevailing on their claims, we conclude that Plaintiffs' complaint is sufficient to state a claim upon which relief may be granted." The panel also rejected the DOJ's arguments that the Plaintiffs lacked standing because they did not include a Democrat from each of the state's 99 Assembly districts, saying instead that because Plaintiffs' alleged injury in this case relates to their statewide representation, it follows that they should be permitted to bring a statewide claim.

On January 4, 2016, the Defendants filed a motion for summary judgment, which requires that the Plaintiffs show that issues of material fact remain in order to defeat the motion. To show discriminatory effect, the Plaintiffs propose using the efficiency gap as a measurement of partisan discrimination. In response, the Plaintiffs articulated a new test which requires that if Plaintiffs can prove both discriminatory intent and discriminatory effect, the burden shifts to Defendants. Rather than challenge Plaintiffs' ability to meet the proposed standard articulated in the lawsuit, Defendants challenged the standard itself.

After reviewing Defendants' objections, there were fact issues identified that the panel determined needed to be resolved at trial. In its April 7, 2016 order denying summary judgment, the panel said "[i]t may be that one or more of these objections carries the day in the end. However, we believe that deciding the case now as a matter of law would be premature because there are factual disputes regarding the validity of Plaintiffs' proposed measurement for determining the existence of a constitutional violation."

The panel acknowledged that a majority of the U.S. Supreme Court agreed that partisan gerrymander claims are justiciable under the equal protection clause and that the Plaintiffs must prove a discriminatory intent and a discriminatory effect; however, the panel acknowledged that the Court has failed to clearly articulate an appropriate test for gerrymanders based on political affiliation, unlike in cases of race or equal population where it has. Moreover, the panel stated, there is no clear standard regarding whether partisan gerrymander cases are actually political questions that the Court may not adjudicate. However, the panel acknowledged the importance that a preference for a level of parity between votes and representation sufficient to ensure that significant minority voices are heard and those majorities are not consigned to minority status. The panel concluded that it "is hardly an illegitimate extrapolation from our general majoritarian ethic and the objective of fair and adequate representation recognized in [prior Supreme Court holdings]."

#### **IV. TRIAL**

The court held a four day trial from May 24-27, 2016. The parties submitted a joint 129 page pre-trial report in which they stipulated to the 2011 redistricting process that led to the filing of this lawsuit; the qualifications of their expert witnesses; comparison of the Redistricting Map with prior plans; the accuracy of the effects of a proposed non-partisan map; and the history of

elections in Wisconsin. The parties each proposed a separate list of proposed questions to be answered by the Court, which, among others, included: (1) whether the proposed test for determining partisan gerrymandering is judicially discernible or judicially manageable; (2) a determination of the constitutionality of the Redistricting Map; (3) whether partisan gerrymandering questions are justiciable; and (4) whether the Plaintiffs have standing to bring the lawsuit.

The Plaintiffs and Defendants each presented one expert witness at trial. Each witness submitted expert reports and rebuttal reports. In addition to their expert, the Defendants also called two additional experts, one from RealClearPolitics and the other a professor at Virginia Tech.

During closing arguments, the Plaintiffs argued that the districts marginalize Democrats and asked that the Redistricting Map be declared unconstitutional and redrawn by either the Legislature or the court. By contrast, Defendants' counsel argued that drawing districts for partisan advantage isn't unconstitutional and is actually democracy in action since duly elected lawmakers are doing the work.

The parties filed post-trial briefs on June 10, 2016. It is unlikely that the panel will issue a decision before the end of June.