



THE COURT DRAWS THE LINE

THE FIGHT FOR
MORE EQUITABLE
LEGISLATIVE DISTRICTS

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and **TODD RUGER**

PA 07

CONGRESSIONAL MAPS IN KEY battleground states such as Pennsylvania have shifted the political balance of Congress toward Republicans — but that could soon change.

President Barack Obama and other leading Democrats are making their first moves this month on a push to change how states draw congressional districts.

Obama has kept a low profile since leaving the White House, but returned to politics as the headliner of a July 13 fundraiser for a Democratic group that plans to fight for

more equitable congressional and state legislative districts after the 2020 census.

Democrats and election experts point to the Keystone State as an example of how partisan-drawn districts can skew a state's congressional delegation in Washington. Democratic candidates in Pennsylvania garnered as much as 51 percent of the votes in the past three elections.

Yet each time they won only five of 18 seats — or about half the number they might expect if the districts were drawn in a way that did not give either party an advantage.

Voter rights groups have seized on such statistics and aren't waiting for 2020.

They have launched legal challenges to strike down congressional maps in Pennsylvania, North Carolina and Maryland ahead of the 2018 elections. Some of the lawsuits champion a new, mathematical approach to proving partisan gerrymandering that will be tested at the Supreme Court this fall in a case about Wisconsin's state Assembly districts.

The Supreme Court could give energy to the political and legal efforts if it decides — for the first time — to require that states account for political balance when drawing congressional maps and to give federal courts a way to decide if the maps are fair.

The change would make a significant difference in Congress, potentially affecting who has control of the House in the next decade and by what margin. Republicans now hold 240 seats to 194 for Democrats, with one vacant seat previously held by a Republican.

Eight Republican-held seats would be poised to flip to Democrats if legal challenges lead to more balanced congressional maps in five states where the GOP benefited the most from partisan gerrymandering, according to a CQ analysis that used the election formula referenced in the Supreme Court case.

While not enough to give Democrats control of the House, a shift in the partisan makeup of delegations from Pennsylvania, Texas, New York, Michigan and North Carolina could alter the outcome of close votes on legislation, such as the 217-213 tally on May 4 in the House's contentious effort to repeal and replace



Bill Clark/CQ Roll Call

“If it turns out well in the Supreme Court, that can only help our case.”

— **Mimi McKenzie**, Public Interest Law Center in Philadelphia

Obamacare.

The Supreme Court will be circumspect in potentially upending the way congressional maps are drawn — partisan gerrymandering is almost an American political tradition. The Supreme Court hasn't weighed in on the issue in more than a decade and could be sharply divided.

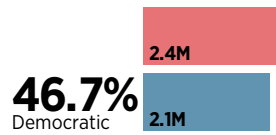
Until the Supreme Court decides, a federal judge has paused a challenge to North Carolina's congressional map — where Republicans dominate the delegation 10-3 despite 47 percent of voters choosing Democratic candidates in 2016.

A partisan gerrymandering case in Maryland also might pause until the justices rule. The director of The Public Interest Law Center in Philadelphia, which is challenging Pennsylvania's map, says the right decision from the high court could spark challenges

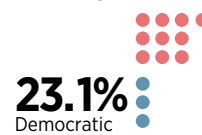
Stacking the Deck

As in dozens of states, North Carolina Republicans have drawn congressional districts to their benefit. The result is that Democratic voters have half the representation than if there were no gerrymandered advantage.

House vote in 2016

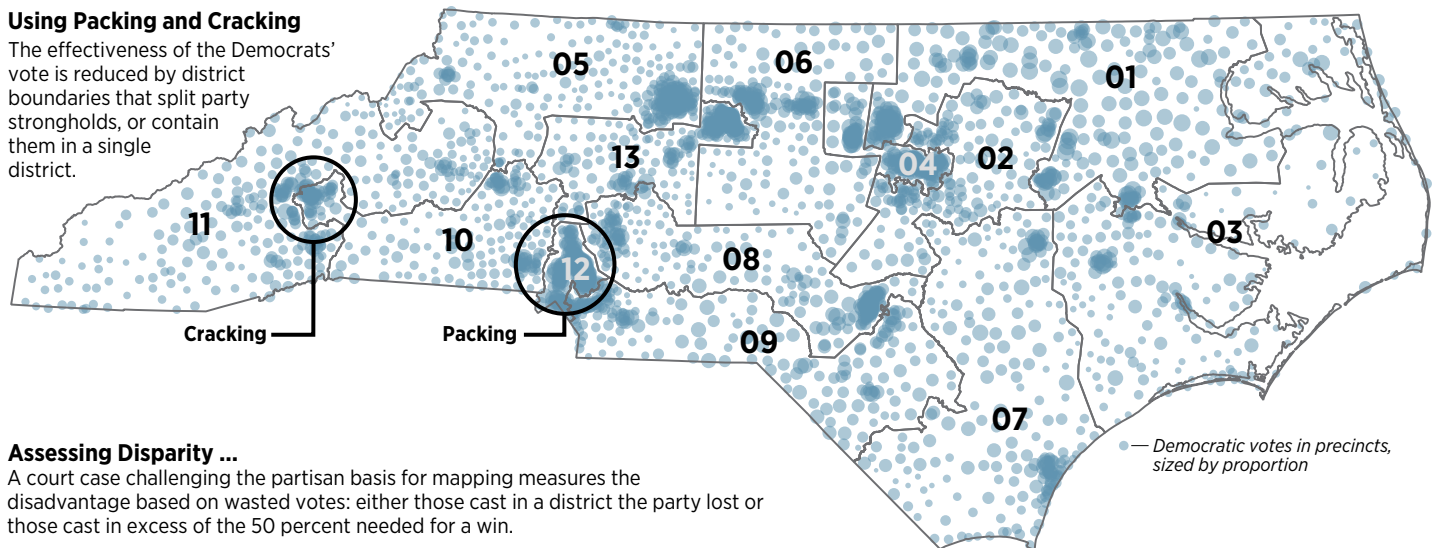


House representation



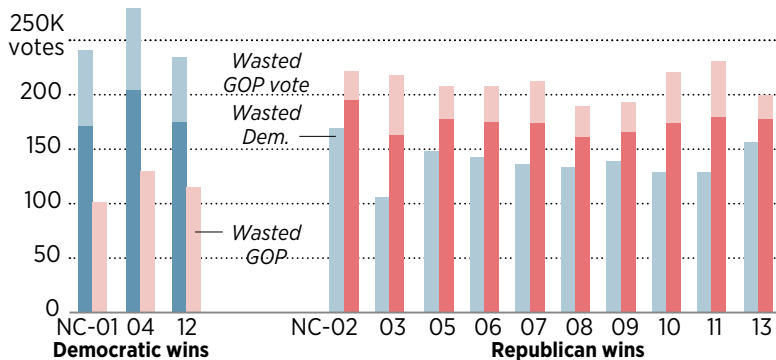
Using Packing and Cracking

The effectiveness of the Democrats' vote is reduced by district boundaries that split party strongholds, or contain them in a single district.



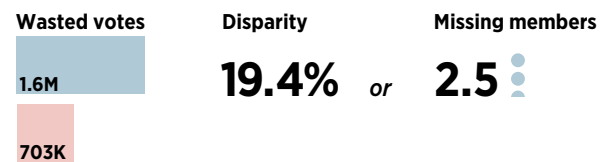
Assessing Disparity ...

A court case challenging the partisan basis for mapping measures the disadvantage based on wasted votes: either those cast in a district the party lost or those cast in excess of the 50 percent needed for a win.



... Using the Efficiency Gap

The result is a measure known as the "Efficiency Gap," calculated from the wasted votes to assess the imbalance in terms of a percentage or extra representatives.



Source: CQ analysis of North Carolina Election Board data

Graphics by Randy Leonard/CQ Roll Call

in other states.

"If it turns out well in the Supreme Court, that can only help our case," the law center's Mimi McKenzie says. "We're hoping a lot of these advocacy groups, who are advocating for a better way to draw our congressional maps, will sort of use this lawsuit as a springboard or a tool to really push for a better solution going forward."

AN OPENING

Until now, Democrats and voter rights groups couldn't do much about partisan gerrymandering because the Supreme

Court has never said the states can't do it. While the Supreme Court expressed concerns in previous cases, the justices haven't given a clear solution for when courts could tell when a state had crossed the line and essentially stripped voters of their constitutional right to choose their representative.

Enter a mechanism known as the "efficiency gap," a way to express in a single tidy number the systematic advantage a congressional map gives one political party.

First proposed in a 2014 law review article by Nicholas O. Stephanopoulos, an assistant professor at the University of Chicago Law School, and Eric M. McGhee, a research fellow at the Public Policy Institute of California, it became a key part of a his-

toric federal court decision in November.

A three-judge panel, on a 2-1 vote, leaned on the efficiency gap to strike down Wisconsin's 2011 state assembly map as a partisan gerrymander—the first time that happened in more than 30 years.

The test is relatively simple. Partisan gerrymandering works by reducing the effectiveness of one party's vote, either by consolidating as many of their votes into a single district, known as packing, or by breaking party strongholds in a way that dilutes the votes, known as cracking.

The gap measures the degree of packing and cracking by counting wasted votes by a party in a state: all votes cast in a district where the party loses and those cast above the 50 percent level needed in a district that the party wins.

The difference between the total wasted votes for each party divided by the total votes yields the state's efficiency gap, which is represented by a percentage.

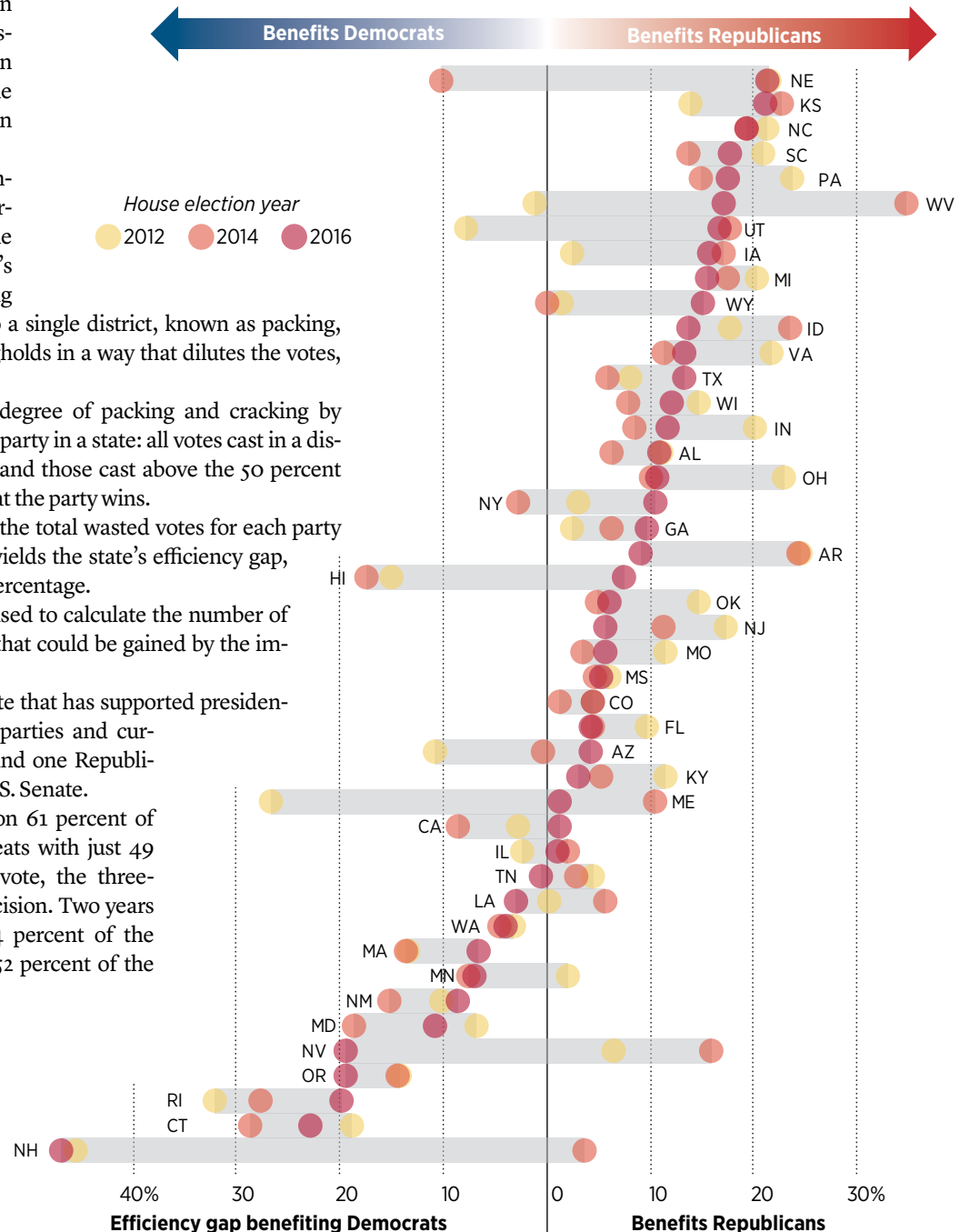
The result can then be used to calculate the number of additional representatives that could be gained by the imbalance.

Wisconsin is a swing state that has supported presidential candidates from both parties and currently has one Democrat and one Republican representing it in the U.S. Senate.

In 2012, Republicans won 61 percent of the state's 99 Assembly seats with just 49 percent of the statewide vote, the three-judge panel noted in its decision. Two years later, Republicans won 64 percent of the Assembly seats with only 52 percent of the statewide vote.

Parsing the Partisan Advantage

The efficiency gap, a measure of how gerrymandering benefits a party, shows the degree to which partisan districts favor Republicans: with the GOP getting a boost in 70 percent of cases in the last three House elections.

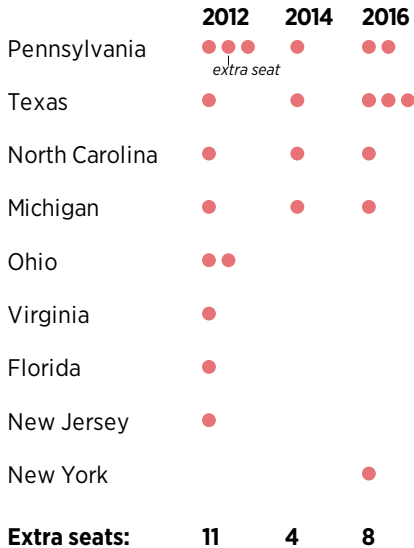


Unopposed races calculated with 25/75% split. Votes for unopposed and unlisted Florida candidates calculated from state average.

Source: CQ analysis of CQ election data, House Clerk, state secretaries

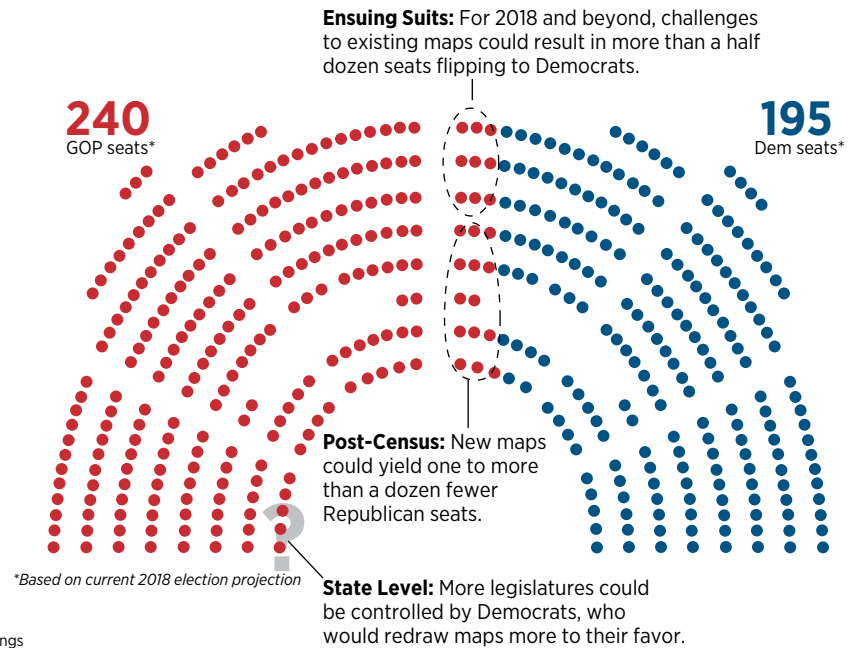
Getting Extra Seats

In states where it had big advantages, the GOP won one to three seats more than permitted under an efficiency gap standard.



Moving the Majority?

Democrats could gain House seats following successfully challenged maps, 2020 census-triggered redistricting and statehouse shifts. A change in control is possible.



Source: CQ Analysis, Inside Elections with Nathan Gonzales/Roll Call ratings

Even boosting Democratic turnout wouldn't have changed the results much. Combined with other evidence, the majority of the three-judge panel found the Republican-controlled Legislature enacted a state Assembly map that dilutes the voting strength of Democratic voters in Wisconsin based on where they live with the intent to "entrench the Republican party in power" for the remainder of the decade.

Wisconsin has a litany of arguments against using the efficiency gap. The districts were congruent, compact and fairly equal in population. Democrats in Wisconsin tend to live in cities so the political geography favored Republicans, which explains the efficiency gap's findings, but also illustrates the formula's unreliability.

All of those are sure to come up before the Supreme Court.

UNCERTAIN LANDING

The Supreme Court has agreed to review the case, known as *Gill v. Whitford*, in the term starting in October, giving the court the chance to weigh in definitively on partisan gerrymanders. A decision would likely come down in the first half of 2018, as congressional races heat up. It's unclear whether a ruling from the justices will spark maps to be redrawn before the Nov. 6, 2018 elections.

In the last major case about partisan gerrymandering, in 2004, five justices rejected an argument that Pennsylvania Republicans had unconstitutionally drawn congressional districts. But the court left open the possibility that with the right mechanism in place, the justices might be inclined to allow challenges to legislative maps based on partisan concerns.

The makeup of the court has changed with new justices since then: Chief Justice John G. Roberts Jr. and Justices Samuel A. Alito, Sonia Sotomayor, Elena Kagan and Neil Gorsuch.

Like many of the most divisive cases, the sides will seek to win over Justice Anthony M. Kennedy, the conservative known to sometimes side with the liberal wing to deliver 5-4 decisions. Kennedy agreed with the decision in the 2004 case, but declined to shut the door on finding a standard that judges could use to rule on partisan gerrymandering cases.

Justice Stephen G. Breyer wrote in a dissent in the case that the "use of purely political boundary-drawing factors" may be impermissible when it amounts to "the unjustified use of political factors to entrench a minority in power."

Not only will the efficiency gap be part of the case, but election experts expect a raft of briefs from outside groups pitching their own formulas to the Supreme Court.

John Ryder, former general counsel to the Republican National Committee and an election law veteran, says a Supreme Court decision that allows judges to strike down maps based on partisan gerrymandering would essentially be allowing proportional representation. And if the country goes that way, he says, a member of Congress would represent a partisan ideology more than a local community.

“What it means is whatever political party comes up on the short end of an election is going to immediately file a challenge because, ‘It’s not fair, we didn’t get the number of seats we think we should have,’” Ryder says. “Then some court somewhere is going to have to determine if they should have had 51 seats, or 53 seats, or 47, and determine how many Democrats and Republicans are properly seated in the legislature.”

That would make courts heavily involved in the redistricting business, since a remedy for a perceived imbalance would be a court-ordered gerrymander itself that might ignore other redistricting principles such as keeping districts compact, Ryder says.

“I think if they rule in the plaintiffs’ favor in the Wisconsin case you will see a landslide of litigation,” Ryder says. “It makes every redistricting plan ripe for challenge.”

EXISTING IMBALANCE

Partisan gerrymandering has long been seen as a regrettable but integral part of our representational system utilized by whichever party was in power. With the GOP’s expanding hold of the mapping process through its control of state legislatures and governorships — and with the advent of advanced computer simulations — the advantages gained by gerrymandering have increased in recent elections. That benefit has gone largely to Republicans.

The Public Interest Law Center in Philadelphia says the party’s

focus on influencing the redistricting process after the 2010 census is a big reason why Republicans dominate the state’s congressional delegation.

The process in the Keystone State produced one of the most infamous districts, the 7th District outside Philadelphia. All that keeps the 7th District contiguous at one point is a narrow neck that runs through a medical endoscopy center. The District was represented by a Democrat in 2006 and 2008; Republican Rep. Pat Meehan has won re-election in the last three contests with around 60 percent of the vote.

In the past three elections, Republicans were more than twice as likely to benefit from skewed congressional districts, according to a CQ analysis of states with more than one district using the efficiency gap methodology.

While any district map may give slight benefit to one party or another, the creators of the efficiency gap have argued for outlawing any maps skewed to the point that they regularly result in two or more extra representatives in Congress.

The analysis shows 10 states had gaps that exceeded the two-member advantage in at least one of the past three elections: Pennsylvania, Texas, North Carolina, Michigan, Ohio, Virginia, Florida, California, New Jersey and New York.

Republicans got the advantage in all of those elections except California in 2014. The largest, in Texas in 2016, resulted in more than four extra GOP representatives under the efficiency gap methodology.

If the maps had been redrawn so that no party had an extra two representatives in Congress, at least four to 11 GOP seats would have instead gone to Democrats in each of these recent elections.

That means if the court endorses the standard proposed by the efficiency gap model, successful challenges to these maps could result in a half dozen or more seats going to Democrats in each of



Willfredo Lee/AP

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the next several elections.

Such results wouldn't be automatic since those states would still get to defend their maps in court. But coupled with other factors — such as President Donald Trump's unpopularity, the appeal of the candidates and other factors — any redistricting change could help Democratic efforts to retake control of the House.

BEYOND 2020

Even if challenges in those states don't quickly tip the balance in the House, a ruling that blocks partisan gerrymandering would also factor heavily into how states draw maps after the 2020 census.

The National Democratic Redistricting Committee says that process in 2021 will be “the most important turning point for the future of the Democratic Party.”

The chairman of that group, former Attorney General Eric H. Holder Jr., spoke on the topic July 15 at a Democratic Party fundraiser in North Carolina, where legal challenges to congressional maps haven't stopped since 2011. He has said his role is to “make redistricting sexy.”

If the high court endorses the efficiency gap method, states that have come close but not exceeded the two-seat threshold will most likely feel pressure to draw new maps in a way that avoids legal challenges.

In addition to changes in states that exceeded the two-seat measure, 25 states had disparities that were a net benefit to Republicans over the last three elections, the CQ analysis found.

The 10 states with the most disparity without crossing that two-seat threshold were South Carolina, Indiana, Wisconsin, Georgia, Arkansas, Kansas, Alabama, Missouri, West Virginia and Iowa.

Less advantageous maps drawn in those 10 states after the 2020 census could result in even fewer GOP representatives, on the order of one to more than a dozen seats.

There are legislative efforts to end partisan gerrymandering as well. Rep. Brian Fitzpatrick, R-Pa., a former FBI agent, introduced legislation (HR 145) that would, among other changes, require that redistricting be done by independent, nonpartisan citizen commissions.

On the House floor, Fitzpatrick said there are real-life impacts of a broken system: “soft and hard corruption that tilts the legislative agenda towards special interests; electoral complacency that causes lawmakers to focus on accumulating power rather than serving constituents; and entrenched partisanship that grinds the gears of government to a halt.”

A bill (HR 1102) co-sponsored by dozens of Democrats would require each state to form an independent redistricting commission, which would be forbidden from considering political party affiliation or the voting history of district voters. These commis-



Bill Clark/CQ Roll Call

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— Rep. **Zoe Lofgren**, D-Calif.

sions would also not be allowed to consider where any House member or candidate lives, so their residence could be drawn into a district.

“The issue of redistricting reform is one that is central to our democracy,” says Rep. Zoe Lofgren, D-Calif., who helped lead the effort to introduce the bill. “Too often, politicians choose their voters instead of voters picking their elected officials.”

The chances of such legislation appear dim, with little energy from Republicans on the issue and major fights under way on health care, a tax overhaul and funding for the federal government.

Election experts say the Supreme Court case is the best chance to reduce partisan gerrymandering. Paul Smith, a veteran Supreme Court advocate who joined the Campaign Legal Center for redistricting challenges, will argue the Wisconsin case before the Supreme Court.

“The moment is huge,” says Edward Foley, a constitutional law professor and director of Ohio State University’s election law program. “I think we’re at an inflection point in this area of law.”

A major reason: Kennedy could soon retire from the court and be replaced with a justice who could shut the door on such challenges. Is the Wisconsin case the last moment to convince Kennedy to have that legacy of saying partisan gerrymandering is unconstitutional?

“One question that’s going to be on the mind of any justice is, can they set a precedent that withstands the test of time, not just decides that case?” Foley says. ■