

# Supreme Court Agrees to Hear Voting Rights Act Challenge to Congressional Redistricting Map and Stays Lower Court Ruling: Implications for Congress

February 22, 2022

The Supreme Court has agreed to consider a significant case challenging an Alabama congressional redistricting map under the Voting Rights Act (VRA). On February 7, in the [consolidated case \*Merrill v. Milligan\*](#), the Court stayed lower court preliminary injunctions that would have required, among other things, Alabama to revise its congressional redistricting map to create a second majority-Black district. As the Court is not expected to hear oral argument in this case until the October 2022 term, the 2022 congressional elections in Alabama will likely occur under the existing map. This Legal Sidebar discusses Section 2 of the VRA in the context of redistricting; the lower court rulings, and the Supreme Court stay; and concludes with an analysis of possible implications of this case for Congress.

## Section 2 of the VRA

Congressional district boundaries in every state are required to comply with Section 2 of the VRA, codified at [52 U.S.C. § 10301](#). Section 2 authorizes the federal government and private citizens to challenge discriminatory voting practices or procedures, including the diminishing or weakening of minority voting power, known as minority [vote dilution](#). Section 2 prohibits any voting qualification or practice applied or imposed by any state or political subdivision (e.g., a city or county) that results in the denial or abridgement of the right to vote based on race, color, or membership in a language minority. This prohibition includes congressional redistricting maps. Section 2 further provides that a violation is established if, based on the totality of circumstances, electoral processes are not equally open to participation by members of a racial or language minority group in that the group's members have less opportunity than other members of the electorate to elect representatives of their choice.

In the landmark 1986 decision [Thornburg v. Gingles](#), the Supreme Court established a three-pronged test for proving vote dilution under Section 2 of the VRA. Under this test, (1) the minority group must be able to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-

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member district; (2) the minority group must be able to show that it is politically cohesive; and (3) the minority group must be able to demonstrate that the majority group votes sufficiently as a bloc to defeat the minority group's preferred candidates. The *Gingles* Court further opined that a violation of Section 2 is established if, based on the "totality of the circumstances" and "as a result of the challenged practice or structure, plaintiffs do not have an equal opportunity to participate in the political processes and to elect candidates of their choice." To assess the totality of the circumstances, the Court listed the following factors, which originated in the legislative history accompanying the enactment of Section 2, as relevant:

1. the extent of any history of official discrimination in the state or political subdivision that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process;
2. the extent to which voting in the elections of the state or political subdivisions is racially polarized;
3. the extent to which the state or political subdivision has used unusually large election districts, majority vote requirements, anti-single shot provisions, or other voting practices or procedures that may enhance the opportunity for discrimination against the minority group;
4. if there is a candidate slating process, whether the members of the minority group have been denied access to that process;
5. the extent to which members of the minority group in the state or political subdivision bear the effects of discrimination in such areas as education, employment and health, which hinder their ability to participate effectively in the political process;
6. whether political campaigns have been characterized by overt or subtle racial appeals; [and]
7. the extent to which members of the minority group have been elected to public office in the jurisdiction.

Under certain circumstances, as discussed by the Supreme Court in *Bartlett v. Strickland*, Section 2 may require the creation of one or more "majority-minority" districts in a congressional redistricting map in order to prevent the denial or abridgement of the right to vote based on race, color, or membership in a language minority. A majority-minority district is one in which a racial or language minority group comprises a voting majority. The creation of such districts can avoid minority vote dilution by helping ensure that racial or language minority groups are not submerged into the majority and, thereby, denied an equal opportunity to elect candidates of choice.

## Lower Court Rulings

On January 24, 2022, in *Milligan v. Merrill*, a three-judge federal district court panel issued a preliminary injunction in a consolidated case challenging the Alabama congressional redistricting map under the Fourteenth Amendment and Section 2 of the VRA. The congressional redistricting map created by the State of Alabama contains one majority-minority district out of a total of seven districts. The court ordered the State of Alabama to revise its congressional redistricting map to establish an additional majority-minority congressional district before the state could conduct the 2022 congressional elections.

Evaluating the plaintiffs' request for a preliminary injunction, the district court concluded that the challengers to the redistricting map were substantially likely to prevail in their argument that the map impermissibly dilutes the votes of Black Alabamans in violation of Section 2 of the VRA. Applying the first prong of the *Gingles* test, the court determined that Alabama Black voters "are sufficiently numerous to constitute a voting-age majority in a second congressional district," observing that Black voters constitute approximately 27% of the population in the state, but a majority in only one of the seven

congressional districts. In reaching this conclusion, the court rejected the state's argument that in ascertaining the Black voting age population, only those voters who identified in the 2020 census as "single-race Black" should be counted. Moreover, the court determined that the minority population in the challenged districts "is sufficiently compact to constitute a voting-age majority" in a second congressional district.

Applying the second and third prongs of the *Gingles* test, the court in *Milligan* ascertained that "there is no serious dispute" that minority voters in the challenged districts are politically cohesive and that the majority votes sufficiently as a bloc to defeat the minority group's preferred candidates. Next, the court assessed the "totality of the circumstances," considering the factors outlined in *Gingles*. Specifically, the court observed that racially polarized voting occurs in the challenged districts and that, among other things, "[n]o Black person has won statewide office in Alabama since 1996" and "[t]here are currently no African-American statewide officials in Alabama." Hence, the court concluded that Black voters in Alabama "have less opportunity" than other voters "to elect candidates of their choice to Congress." In view of deciding this case on a statutory basis, under the VRA, the court declined to consider the constitutional claims under the Fourteenth Amendment that were raised by the challengers.

Likewise, also on January 24, in *Caster v. Merrill*, a federal district court issued a preliminary injunction in a case challenging the Alabama congressional redistricting map under Section 2 of the VRA. The court in *Caster* adopted the description of the evidence, fact finding, legal analysis, and conclusions of law from the preliminary injunction order issued by the three-judge court in *Milligan v. Merrill*, discussed above.

On January 28, the State of Alabama [filed](#) an emergency application for an administrative stay pending appeal to the Supreme Court. Under federal law, constitutional challenges to redistricting maps are heard by [three-judge federal district courts](#), and parties may [directly appeal](#) orders issued by such courts to the Supreme Court. In contrast to petitions for certiorari, in cases where federal law provides for direct appeals, the Supreme Court notes "[probable jurisdiction](#)" to indicate jurisdiction over the case.

## Supreme Court Stay

In *Merrill v. Milligan*, the Supreme Court issued a brief order staying the lower courts' preliminary injunctions. By issuing a stay, the Court, in effect, reinstated Alabama's congressional redistricting map that contains one majority-minority district. The Court also agreed to consider the cases on the merits, and on February 22, [consolidated](#) *Milligan* and *Caster*, allotting one hour for oral argument.

In a concurrence, Justice Kavanaugh, joined by Justice Alito, responded to the Justice Kagan's dissent, discussed below, and emphasized that the stay order neither changes the status quo of voting rights law nor signals that such a change is forthcoming. The concurrence observed that the underlying Supreme Court precedent relevant to this case—*Gingles* and its progeny—which involves the intersection between the VRA and the Equal Protection Clause of the Fourteenth Amendment, "is notoriously unclear and confusing."

The stay order was necessary, the concurrence further reasoned, to comply with election law precedent establishing that federal district courts generally should avoid enjoining state election laws close to an election, citing *Purcell v. Gonzalez*. Should a lower court violate that principle—known as the *Purcell* principle—a federal appellate court should stay such an injunction, the concurrence announced. Moreover, the concurrence observed that federal court changes to election laws shortly before an election "can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others." Congressional primaries in Alabama are scheduled to begin, by absentee voting, on March 30, 2022. In addition, according to the concurrence, the stay will permit the Court to consider the merits of this case "in an orderly fashion—after full briefing, oral argument, and our usual extensive

internal deliberations,” thereby ensuring that the Court does not have to decide the merits on an emergency basis.

In a dissent, Chief Justice Roberts argued that the district court issued a lengthy opinion that properly applied existing law “with no apparent errors for [the Court’s] correction.” According to the Chief Justice, the appropriate standard for ascertaining vote dilution claims under Section 2 of the VRA is the first prong of *Gingles*, which the district court properly applied and then determined that the challengers had met after “review[ing] the submissions of the plaintiffs’ experts.” Similar to the concurrence, the Chief Justice criticized *Gingles* and its progeny for prompting “considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim.” The Chief Justice, “[i]n order to resolve the wide range of uncertainties arising under *Gingles*,” noted probable jurisdiction in *Milligan* and would have granted certiorari before judgement in *Caster*. The Chief Justice would not have granted a stay because the lower court properly applied Supreme Court precedent in this case. In contrast to the concurrence, the Chief Justice’s dissent did not address whether the lower court had violated the *Purcell* principle.

Joined by Justices Breyer and Sotomayor, Justice Kagan also dissented, maintaining that the district court in this case properly applied Supreme Court precedent regarding the VRA and criticizing the Court for issuing a stay after a “scanty review.” Observing that the lower court amassed a significant factual record created after hearing over seven days of testimony and assessing over 1,000 pages of briefing, Justice Kagan argued that the lower court did not err under current law. While conceding that there may be a reason to revise the Court’s VRA precedent in the future because of the advent of modern redistricting software technology, the dissent warned that revising Court precedent can only occur after the parties submit full briefings and arguments. In particular, the dissent characterized the standard proffered by the State of Alabama as adding “a new requirement” to the VRA. This requirement, the dissent argued, would require challengers to show that the use of modern redistricting software would result in the creation of two majority-minority districts, instead of one, even though the technology is designed not to take race into account. As the first prong of the *Gingles* test necessarily requires considering race to determine whether an additional majority-minority district needs to be drawn to comport with the VRA, the dissent argued that the standard proffered by the state is premised on a new, unfounded interpretation of *Gingles*. The dissent reasoned that “[a]ccepting Alabama’s contentions would rewrite decades of [the] Court’s precedent about Section 2 of the VRA.” Finally, the dissent disagreed that the *Purcell* principle should apply in this case because the general election is scheduled to occur in approximately nine months; the primary in approximately four months; and the absentee primary voting, which the state has the ability to modify, in more than two months after the district court issued the preliminary injunctions. According to the dissent, the Supreme Court has denied stays in redistricting cases within similar time frames.

Supreme Court oral argument in this case is expected to occur during the October 2022 term, with a decision issued by summer 2023.

## Implications for Congress

Looking ahead, depending on how the Supreme Court rules on the merits in *Merrill v. Milligan*, the decision may affect standards that reviewing courts apply in determining when the creation of a majority-minority district in a congressional redistricting map is required under Section 2 of the VRA. For example, if a majority of the Justices agree that current Court precedent is unclear and uncertain—as espoused by the concurrence and the Chief Justice’s dissent—the Court may decide to clarify the law. In addition, the current, widespread use of [modern redistricting software](#) might also prompt the Court to revise its redistricting precedent, as *Gingles* was decided long before the advent of such technology. In response to the Court’s decision, and in accordance with the Constitution, Congress might choose to amend Section 2 of the VRA to either adjust, endorse, or reject the standard adopted by the Court in

*Merrill*. By way of historical example, following the Court’s 1980 decision in *City of Mobile v. Bolden*, Congress [amended Section 2 in 1982](#) to overturn the effects of that ruling.

In the nearer term, the Supreme Court’s grant of a stay in *Merrill* could signal that additional challenges to congressional redistricting maps close to the 2022 congressional midterm elections may not be successful. That is, if courts agree with Justice Kavanaugh’s concurrence in this case that the stay was necessary to comply with the *Purcell* principle, federal courts may deny future challenges to redistricting maps as the [congressional primary](#) and general elections draw near.

*Merrill* is the second VRA case that the Court has agreed to consider recently. In [July 2021](#), the Court decided *Brnovich v. Democratic National Committee (DNC)*, determining the applicability of Section 2 to state voting rules, known as a [vote denial](#) case. Some legal commentators have [predicted](#) that *Brnovich* [will result in less successful claims](#) in such Section 2 cases. In response to the decision, [legislation](#) has been [introduced](#) in Congress that would amend Section 2, including H.R. 4 (117<sup>th</sup> Congress), the John R. Lewis Voting Rights Advancement Act of 2021, which passed the House on August 24, 2021.

## Author Information

L. Paige Whitaker  
Legislative Attorney

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