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Back At It Again: The Supreme Court's Latest Attack on the Voting Rights Act and Its Effect on Black Louisianians

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Overturning *Thornburg v. Gingles* will take the teeth out of the Voting Rights Act of 1965 to the detriment of Black voters in Louisiana. Without a holding that reinforces the power of Section 2 of the VRA, many states, particularly those in the South with a long, persistent history of racial discrimination will revert back to old practices and disenfranchise citizens who do not fall within the White majority, however narrow that majority becomes. While the Black voter suppression leading up to the Civil Rights Movement was more overt and violent, the Black voter suppression today is just as serious and moves in secret. Just because this threat to democracy and equality is no longer as loud and as visible as years before, does not mean that it has gone away. These discriminatory practices can only result in furthering White supremacy and harming minority interests.

Louisiana's History of Black Disenfranchisement and The Voting Rights Act

The Voting Rights Act of 1965 is the most important and successful piece of legislation Congress has ever passed in regard to fixing the United States' serious and persistent legacy of disenfranchising those outside the White majority. Though Black men were granted the right to vote in 1870, the ability to register and maintain registration proved to be a struggle. By 1986 130,344 Black men in Louisiana had registered to vote,[1] making up approximately 45% of all of Louisiana's registered voters.[2] This created a strong voting bloc for Black Louisianians, resulting in the group gaining political relevance and power for the very time. In response, the state passed a Grandfather Clause in 1898 requiring registrants to meet education and property ownership requirements if their fathers or grandfathers had not been registered to vote before

[1] U.S. Commission on Civil Rights, *Political Participation* (Washington, D.C.: U.S. Government Printing Office, 1968), pp. 8.
[2] Archote, Josh. "Nearly All Strides in Equal Voting Access in Louisiana Have Come from Federal Intervention." Louisiana's long struggle with equal voting rights continues. Lafayette Daily Advertiser, August 23, 2022.

1867, the year before Black men were granted to right to vote.[3] As a result, Black voter registration dropped from 45% to 4% in two years.[4] The Fifteenth Amendment prohibited states from denying or abridging a citizen's right to vote on the bases of race, color, or previous condition of servitude,[5] which prohibited states from passing laws that were racist on their face. The Amendment also authorized Congress to create legislation to enforce this mandate.[6] However, officials made no secret of their intent regarding passing laws designed to circumvent this requirement. When he passed the Grandfather Clause, the president of the Louisiana Constitutional Convention, Ernest Kruttschmidt said, "Doesn't it let the White man vote, and doesn't it stop the negro from voting, and isn't that what we came here for?"[7]

The Supreme Court eventually struck down the Grandfather Clause in 1915 in the Oklahoma case *Guinn v. United States*,[8] but this did not stop Louisiana state officials from continuing their crusade to keep Black people out of the political process.[9] These new tactics took many forms. In 1921, the state promoted interpretation tests in which registrants had to "give a reasonable interpretation" of any clause in the state or U.S. Constitution,[10] but the administrator had full discretion as to what demonstrated adequate understanding.[11] The state gave political parties the power to require additional qualifications of registrants seeking to vote in primary elections. This allowed the then-dominant Democratic Party to hold White-only primaries, effectively barring Black voters from meaningfully participating in the election

[3] Archote, "Nearly All Strides in Equal Voting Access in Louisiana Have Come from Federal Intervention."
[4] C. Vann Woodward, *The Strange Career of Jim Crow* (2d rev. ed. 1966) , 85.
[5] USCS Const. Amend. 15.
[6] USCS Const. Amend. 15.
[7] Archote, "Nearly All Strides in Equal Voting Access in Louisiana Have Come from Federal Intervention."
[8] *Guinn v. United States*, 238 U.S. 347 (1915)
[9] Archote, "Nearly All Strides in Equal Voting Access in Louisiana Have Come from Federal Intervention."
[10] United States v. State of Louisiana, 225 F.Supp. 353, 354 (E.D. La. 1963).
[11] *Id*., at 356.

process since the Republican party had virtually no chance of winning the regular election.[12] These tactics were so successful that Black Louisianians did not make up more than 1% of registered voters in the state from 1921 to 1941[13], when the Supreme Court held that White-only primaries were unconstitutional.[14] After this barrier was removed, Black voter registration increased to 13% of the registered voters in the state by 1964.[15] It is noteworthy, however, that the progress was not evenly spread. The obstacles to voting were much more prevalent in locations where the Black population was sufficiently large enough to have influence politics.[16] The larger the Black population was in an area, the lower the Black registration was. The inverse was also true. Tensas Parish had a high concentration of Black residents of which only 1% were registered to vote, while Evangeline Parish had a predominantly White population and more than 90% of the Black residents were registered to vote.[17] In 1966 in Talullah, Louisiana, the state provided only a single polling place in the parish's only Black-majority precinct. When voting began at 6 a.m., there were six hundred voters waiting in line, the majority were black, and many tired of the lines and went home before they cast their ballot.[18] Louisiana and other southern states' relentless, creative, and continuous methods of suppressing the Black vote pushed Congress to finally intervene.

During the Civil Rights Movement, Congress commenced a study analyzing the states' voting policies to see if there were discriminatory voting practices and to examine their effect, if so. Several states were found to have severe voting restrictions that resulted in a

[12] *United States v. State of Louisiana*, 225 F.Supp. 353, 377 (E.D. La. 1963)
[13] *Id*.
[14] *Smith v. Allwright*, 321 U.S. 649 (1944).
[15] Wright, Frederick D. "The Voting Rights Act and Louisiana: Twenty Years of Enforcement." Publius 16, no. 4 (1986): 97. http://www.jstor.org/stable/3330161.
[16] Archote, "Nearly All Strides in Equal Voting Access in Louisiana Have Come from Federal Intervention."
[17] U.S. Commission on Civil Rights, *Political Participation* (Washington, D.C.: U.S. Government Printing Office, 1968), pp. 240.
[18] *Id*., at 67.

disproportionate number of White citizens registered to vote compared to the Black citizens of those states. This led Congress to conclude that voting restrictions of many states were entrenched in racial discrimination. Accordingly, Congress passed the Voting Rights Act of 1965. Section 2 of the VRA prohibits any "voting qualification or prerequisite to voting or standard, practice, or procedure" by the state "which results in a denial or abridgement of the right of any citizen of the United States to vote on account of race or color."[19] Plaintiffs may establish a violation of Section 2 if, based on the totality of circumstances, they show that the process is not equally open to participation on account of race or color. To show this they must show that the members of the class "have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice."[20] Using a formula set out in Section 4(b), Section 5 required certain states using severely discriminatory voting restrictions to obtain preapproval from the Attorney General of a three judge panel in Washington, D.C. for any changes in their voting procedure. In order to obtain preclearance, the jurisdiction had to show that the change in voting procedure had neither "the purpose [nor] the effect of denying or abridging the right to vote on account of race or color."[21] Section 5 was set to expire in five years, but Congress renewed it repeatedly, with the last reauthorization occurring in 2006 for an additional twenty-five years.[22] Congress found that "discrimination today is more subtle than the visible methods used in 1965," yet it still produces "the same [effects], namely a diminishing of the minority community's ability to fully participate in the

[19] Voting Rights Act of 1965, 52 USCS § 10301(a).
[20] Voting Rights Act of 1965, 52 USCS § 10301(b).
[21] 52 USC § 10303(a)(1)(A).
[22] *Shelby County v. Holder*, 570 U.S. 529, 539 (2013).

electoral process."[23] The VRA's impact in combatting Black voter suppression cannot be overstated.

After the Voting Rights Act was signed into law by President Johnson, Black voter registration soared. In Louisiana, Black voter registration was at only 13% in 1964 but increased by 84% in the two years after the VRA's enactment.[24] By 1990, two-thirds of Black Louisianians were registered to vote.[25] While the act has had tremendous success in battling racial voting discrimination, the states subjected to these restrictions have fought back. Seemingly due to the VRA's success, the Supreme Court in recent history has become more and more amenable to these attacks by those who wish to be free of the act's restrictions. These threats to the VRA threaten the strides our country has made in remedying voter discrimination and could lead us right back to where we started.

Supreme Court Attacks on the VRA

The first major successful attack on the VRA came from the Supreme Court decision in *Shelby County v. Holder*. In 2010 after the Attorney General denied its proposed voting law changes, Shelby County in Alabama sued for a declaratory judgment that Sections 4(b) and 5 of the VRA were facially unconstitutional and for a permanent injunction against their enforcement.[26] The plaintiff and other proponents of striking down these sections of the VRA supported their argument with the fact that by 2004 the discrepancy between White and Black voter registration had nearly vanished, essentially making the VRA obsolete. The crux of their argument was even if the VRA had been put in place for a constitutional reason, its purpose had been fulfilled and it should be repealed. While the Court of Appeals held for the Attorney

[23] H. R. Rep. No. 109-478, p.6 (2006).
[24] Archote, "Nearly All Strides in Equal Voting Access in Louisiana Have Come from Federal Intervention."
[25] *Id*.
[26] *Shelby County v. Holder*, 570 U.S. at 540.

General, Judge Williams in his dissent noted that there was "no positive correlation between inclusion in Section 4(b)'s coverage formula and low Black registration or turnout."[27] In fact, he argued that "condemnation under Section 4b is a marker of *higher* Black registration and turnout" and that "covered jurisdictions have *far more* Black officeholders as a proportion of the Black population than do uncovered ones."[28] In a 5-4 decision, the Supreme Court held for Shelby County and declared Section 4(b) of the Voting Rights act unconstitutional, essentially removing the teeth from Section 5 and rendering it ineffective unless Congress drafted a new coverage formula.[29]

Chief Justice Roberts was joined by Justices Scalia, Kennedy, Thomas, and Alito to form the majority for the Supreme Court's decision and held that departing from traditional principles of federalism, here dictating how states may hold their elections, must be justified by current needs.[30] The majority found that the provisions of the VRA were warranted in 1965 but no longer reflected reality, because voter registration and turnout among White and Black citizens was no longer in stark contrast.[31] The evidence of improved Black voter registration to near equal levels with White voters supported the plaintiff's claim that these restrictions, justified by past racial discrimination, were no longer valid.[32] Additionally, the majority found that the restrictions departed from the principal of equal sovereignty amongst the states, because Congress only imposed them on the sovereignty of a selection of states.[33] The four other Justices making up the minority opinion were not convinced that Congress had overstepped its authority.

[27] *Shelby County v. Holder*, 679 F.3d 848, 891 (D.C. 2012)
[28] *Id*., at 892.
[29] *Shelby County v. Holder*, 570 U.S. at 557.
[30] *Id*., at 542.
[31] *Id*., at 553.
[32] *Id*., at 548.
[33] *Id*., at 535.

In Justice Ginsburg's dissent, she called out the majority for using the success of Section 5 of the Voting Rights Act as the justification for deeming the formula underlying it unconstitutional.[34] Justices Ginsburg, Breyer, Sotomayor, and Kagan would have applied the rational basis test, requiring that the government's actions be rationally related to a legitimate government interest, to determine the constitutionality of the act and held it to be constitutional.[35] The Fifteenth Amendment authorizes Congress to create legislation to ensure equal voting rights. Under this authority, Congress determined Section 4(b) and Section 5 of the VRA were still necessary for the continued perseverance of equal voting rights. Furthermore, the VRA was reviewed on a periodic-basis, which meant that Congress had repeatedly found the restrictions to still be necessary according to the data available at that time, not just according to the numbers shown in 1965.[36] Without Section 4(b) and Section 5 of the VRA working together, there would be no guarantee of continued progress and states could return to their discriminatory voting schemes.

Since this case, the Supreme Court through its conservative majority has continually made it more difficult for plaintiffs to bring challenges against their state legislatures for discriminatory voting practices. In the past, plaintiffs alleging a Section 2 violation could prevail if they either proved that an election law resulted in the right to vote being denied for people of color (the "results" test) or that the law was enacted with racist intent (the "intent" test).[37] However, the conservative majority has made it increasingly difficult to prove intent before finally throwing out the intent test altogether. In 2018, the five conservative Justices held in

[34] *Shelby County v. Holder*, 570 U.S. at 559 (Ginsburg, J., dissenting).
[35] *Id*., at 568-69 (Ginsburg, J., dissenting).
[36] *Id*., at 570 (Ginsburg, J., dissenting).
[37] Millhiser, Ian. "Chief Justice Roberts's Lifelong Crusade against Voting Rights, Explained." Vox. Vox, September 18, 2020. https://www.vox.com/21211880/supreme-court-chief-justice-john-roberts-voting-rights-act-election-2020.

Abbott v. Perez that the burden of proof was on the plaintiff challenging the law, so the state did not have to show that they had "purged the taint attributed to" an earlier discriminatory congressional districting plan.[38] Even though the plaintiffs had made a showing of past discrimination, the majority held that such a showing was not enough to change the "allocation of the burden of proof and the presumption of legislative good faith."[39]

In 2019 in the case *Rucho v. Common Cause*, the five conservative Justices held that they did not have the authority to resolve a partisan gerrymandering complaint, because it was a nonjusticiable political question.[40] In this particular case, the Republicans drew the congressional districts to result in ten Republican delegates and three Democrat delegates, despite the fact that the statewide votes for Democratic congressional candidates exceeded that of Republican candidates.[41] In addition, the chair of the redistricting committee said on record, "I think electing Republicans is better than electing Democrats. So I drew this map to help foster what I think is better for the country."[42] Even with a record so blatantly showing intentional gerrymandering with the goal of entrenching minority power, the conservative majority of the Supreme Court still did not find occasion to act. This extreme case shows how far the conservative Justices' unwillingness to intervene in any state action regarding voting rights goes. While both of these cases were decided along the conservative-liberal 5-4 split, the Court now holds six conservative Justices and only three liberal Justices.

Most recently in 2021, the six conservative Justices formed the majority opinion in a Section 2 challenge to voting restrictions in Arizona. The Democratic National Committee

[38] *Abbott v. Perez*, 138 S.Ct. 2305 (2018).
[39] *Id*. at 2324.
[40] *Rucho v. Common Cause*, 139 S.Ct. 2484, 2507 (2019).
[41] *Id*. at 249.
[42] *Common Cause v. Rucho*, 318 F.Supp.3d 777, 807-808 (M.D.N.C. 2018).

challenged rules (1) requiring in-person election day voters to vote in their assigned precincts in order for their ballots to be counted and (2) prohibiting mail-in ballots from being collected by anyone other than "an election official, a mail carrier, or a voter's family member, household member, or caregiver."[43] They argued that the restrictions violated Section 2 of the VRA, because it "adversely and disparately affect[ed] Arizona's American Indian, Hispanic, and African American citizens" and was enacted with discriminatory intent.[44] The majority held that neither of these restrictions violated Section 2, because it did not exceed the usual burdens of voting and the racial disparity resulting from the provision was small enough as to not render the system unequally open.[45] Justice Kagan, writing for the dissent, lambasted the majority for again attacking Section 2's guarantee of the right to an equal opportunity to vote by writing their own set of rules to restrict the broad language that Congress used in the VRA.[46] Justice Kagan points out the error in the majority's opinion in that they seem to be satisfied that state legislatures have moved from vote denial to vote dilution.[47] She critiqued the majority's downplaying of the extent to which Arizona's low disparately impacted minority voters, stating that both of the rules, considering the totality of the circumstances, result in members of particular races "having less opportunity than other members of the electorate to participate in the political process and to elect a representative of their choice."[48] Arizona's first rule, discarding out-of-precinct ballots, resulted in nearly 11,000 votes being discarded – the most in the nation. The Court of Appeals found that the state was doing this at a rate eleven times higher than the state discarding the second highest amount of ballots.[49] And this policy did disproportionately effect certain

[43] *Brnovich v. Democratic Nat'l Comm.*, 141 S.Ct. 2321, 2330 (2021).
[44] *Democratic Nat. Comm. v. Hobbs*, 948 F.3d 989, 998 (CA9 2020) (en banc).
[45] *Brnovich v. Democratic Nat'l Comm.*, at 2344-45.
[46] *Id.*, at 2351 (Kagan, J., dissenting).
[47] *Id.*., at 2354 (Kagan, J., dissenting).
[48] *Id.*, at 2354 (2021) (Kagan, J., dissenting) (quoting §10301(b)).
[49] *Id.*., at 2367 (Kagan, J., dissenting).

communities. In the 2016 election, African Americans, Hispanics, and Native Americans all had approximately twice the likelihood of having their ballots discarded in comparison to White voters.[50] Arizona's second rule, banning third-party ballot collection, while seemingly neutral targets the large Native American population in the state. A large concentration of Native Americans live in rural communities of which only 18% have access to home mail delivery and "often must travel 45 minutes to 2 hours just to get to a mailbox."[51] Accordingly, clan members collecting other community member's ballots to be turned in is a community practice that "would be a huge devastation" if prohibited.[52] Legislatures know the nuances of their states well and they know how to exploit them to their advantage in order to disenfranchise those who oppose them. Congress gave the VRA such broad authority to remedy voting discrimination in recognition that states would use new and more nuanced strategies to restrict the vote of non-White citizens. The Act needed to be flexible enough to address these new methods, even if they were facially neutral.[53] Section 2 of the VRA if applied correctly should stop such blatant attempts to suppress the minority vote, yet the Court decided to turn a blind eye to the evidence. This turn of the tide against the VRA should come as no surprise to those who know the long history of Chief Justice Roberts' disdain for the Act.

Working as an aid to the Attorney General after completing a clerkship with the staunchly conservative Justice Rehnquist, young John Roberts was assigned with making a case against the Voting Rights Act, which had been extended by the House of Representatives and was being co-sponsored by a filibuster-proof majority of the Senate.[54] Roberts wrote a memo

[50] *Brnovich v. Democratic Nat'l Comm.*, at 2368 (Kagan, J., dissenting).
[51] *Democratic National Convention v. Hobbs*, 948 F.3d at 1006.
[52] Brief for Navajo Nation as *Amicus Curiae* 19-20.
[53] *Brnovich v. Democratic Nat'l Comm.*, at 2354 (Kagan, J., dissenting).
[54] Millhiser, "Chief Justice Roberts's Lifelong Crusade against Voting Rights, Explained."

encouraging President Ronald Reagan to veto the 1982 reauthorization of the VRA, and argued that the act was "not only constitutionally suspect, but also contrary to the most fundamental tenants of the legislative process on which the laws of this country are based."[55] He wrote twenty-five memos in opposition to the "results" test interpretation of Section 2 that essentially banned any voting practice that resulted in a denial or abridgment of a citizen's right to vote on the basis of race or color. Instead he argued that the results test was unnecessary, because it is fairly easy to prove racist intent for racially discriminatory election laws since it can be proved with circumstantial evidence.[56] Against Roberts' protests, President Reagan succumbed to political pressure and signed off on the VRA. Despite Roberts' initial failure to nip the VRA in the bud, the increasing dysfunction in Congress has pushed more controversies to the Supreme Court, thereby giving him more opportunities to right this perceived injustice. Chief Justice Roberts has frequently been the swing vote on the court and while the majority of his voting record is conservative, he seems to be less extreme than his fellow conservative Justices. He voted to save the Affordable Care Act twice. Though he most recently sided with the conservative Justices to uphold Mississippi's 15-week abortion law, he joined the Court's liberal Justices in the minority opinion opposing the overturning of Roe v. Wade.[57] While it may be at times difficult to predict how he will vote, there is no such mystery when it comes to issues of voting rights, as the Chief Justice has joined the conservative majority in all the aforementioned cases that now make it more difficult for plaintiffs to prove their claims of voter discrimination.[58] How interesting it is that young Roberts argued against the results test because of how easy it

[55] Millhiser, "Chief Justice Roberts's Lifelong Crusade against Voting Rights, Explained."
[56] *Id*.
[57] Willmer, Sabrina. "The Chief Stands Alone: Roberts, Roe and a Divided Supreme Court." Bloomberg Law, June 25, 2022. https://news.bloomberglaw.com/us-law-week/the-chief-stands-alone-roberts-roe-and-a-divided-supreme-court.
[58] Millhiser, "Chief Justice Roberts's Lifelong Crusade against Voting Rights, Explained."

was to prove invidious intent, and then, as a Chief Justice presiding over *Abbott v. Perez*, he eroded the intent test as well by granting a strong presumption of racial innocence for lawmakers enacting these election laws.[59] The rationale underlying his decisions seem to be that the courts should be deferential to the states in matters of voting rights, since Article 1, Section 4 of the Constitution authorizes the states prescribe the times, places and manners of holding elections for senators and representatives. However, this reasoning ignores the fact that the next part of the clause authorizes Congress to make or alter such regulations.[60] Curbing the Congress's ability to regulate state elections by narrowly construing and throwing out portions of the Voting Rights Act undercuts Congress's constitutional duty to uphold citizens' rights to vote. If we take a look at our history, too much congressional and judicial deference to state and local officials can result in allowing the worst actors to prevail. Jim Crow laws were viable, because federal officials and court were deferential to the judgment of White supremacist state officials.[61]

Since the Court shot down Section 4(b) and Section 5 in Shelby County v. Holder, Section 2 of the VRA is the last standing bastion of the Act to fight against voter discrimination. An additional result of the holding in *Shelby County* is that for many states are now enacting new congressional districts and voting laws without the supervision of the Department of Justice for the first time in fifty years.

Current Application of Section 2 of the VRA

The current rule for analyzing complaints made under Section 2 of the VRA comes from the 1986 Supreme Court case *Thornburg v. Gingles*. In this case, the Supreme Court held that intent and causation are not a factor in determining the existence of racially polarized vote

[59] Millhiser, "Chief Justice Roberts's Lifelong Crusade against Voting Rights, Explained."
[60] Artl.S4.C1.
[61] Millhiser, "Chief Justice Roberts's Lifelong Crusade against Voting Rights, Explained.".

dilution.[62] This ended the intent test – now leaving the results test as the only viable avenue for a plaintiff to make a successful Section 2 claim. In addition, the Court held that there are three preconditions for a vote dilution claim: (1) "the minority group must be able to demonstrate that is sufficiently large and geographically compact to constitute a majority in a single-member district," (2) "the minority group must be able to show that it is politically cohesive," and (3) "the minority must be able to demonstrate the White majority votes sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate."[63] After these three preconditions are established, the court must consider based on the totality of the circumstances "whether the political process is equally open to minority voters."[64] Provided by the Senate, the factors to consider include:

> (1) the history of official voting-related discrimination in the state or political subdivision; (2) the extent to which voting in the elections of the state or political subdivision is racially polarized; (3) the extent to which the state or political subdivision has used voting practices or procedures that tend to enhance the opportunity for discrimination against the minority group, such as unusually large election districts, majority-vote requirements, and prohibitions against bullet-voting; (4) the exclusion of members of the minority group from candidate slating processes; (5) the extent to which minority group members bear the effects of discrimination in areas such as education, employment, and health, which hinder their ability to participate effectively in the political process; (6) the use of overt of subtle racial appeals in political campaigns; and (7) the extent to which members of the minority group have been elected to public office in the jurisdiction.[65]

With this framework protecting Section 2 claims, African American representation nearly doubled until 2006 when Shelby County v. Holder was decided. [66] Now this framework is under attack in a Supreme Court case coming from a Section 2 challenge to a congressional

[62] *Thornburg v. Gingles*, 478 U.S. 30, 74 (1986).
[63] *Id*., at 50-51.
[64] *Id*., at 79.
[65] *Id*., at 36.
[66] Archote, "Nearly All Strides in Equal Voting Access in Louisiana Have Come from Federal Intervention."

redistricting plan coming out of Alabama in a group of consolidated cases called *Allen v. Milligan*.

Black registered voters in Alabama sued under Section 2 to challenge their Republican-led state legislature's congressional redistricting plan, House Bill 1 ("HB 1"), in which the Black population was given a majority in only one of the state's seven congressional districts. In their complaint the plaintiffs accused the legislature of strategically cracking Black voters between the First, Second, and Third congressional districts and packing Black voters into the Seventh district in order to dilute their voting strength and confine their voting power to a single majority Black district.[67] This is despite the fact that each district represents 14% of the population and African Americans make up roughly 27% of the total population.[68] They alleged that this scheme is unconstitutional in violation of Section 2 of the Voting Rights Act, because race was the predominant motive for structuring the districts this way. [69] Due to the enslavement of Black people in the South prior to the Civil War, the majority of the Black population resides in the "Black Belt." This area had a high concentration of plantations with slave owners and a large number of the previously enslaved population chose to remain their once they were freed. The concentration of Black Alabamians along this belt makes it quite easy to create two Black-majority districts that comport with traditional districting criteria, such as compactness and contiguity. Due to this natural and geographically expansive concentration it seems that the Legislature would have had to work to avoid making a second minority-majority district.[70]

[67] Complaint at 2, *Caster v. Merrill,* 2022 U.S. Dist. LEXIS 16996, (M.D. Ala. 2021) (No. 2:21-cv-751-WKW-JTA).
[68] Ian Millhiser, "Alabama's High-Stakes Supreme Court Fight over Racial Gerrymandering, Explained," Vox (Vox, October 2, 2022), https://www.vox.com/policy-and-politics/2022/10/2/23377432/supreme-court-alabama-merrill-milligan-racial-gerrymandering-voting-rights-act.
[69] Complaint at 2, *Milligan v. Merrill*, (N.D. Ala. 2020) (No. 2:21-cv-1530-AMM).
[70] Archote, "Nearly All Strides in Equal Voting Access in Louisiana Have Come from Federal Intervention."

Turning to the Legislature's process of enacting HB 1, members of the Alabama Legislative Committee on Reapportionment were not sent the proposed map until the night before the hearing in which they were to vote on whether to bring it to the full Legislature. When members voiced confused over why the districts were drawn the way they were and who drafted them, the committee chair told them that the plan was drawn by committee staff and the committee's attorney rather than by or in conjunction with committee members. HB 1 was also not subjected to functional or racial polarization analyses, which are vital in determining whether the congressional districts comply with Section 2 of the VRA.[71] When committee members protested against the rushed vote and asked for more time to consider proposals and examine whether HB 1 complied with the Constitution and the VRA, the Republican majority overruled them and approved the map which they had only had less than twenty-four hours to consider.[72] Many legislators in the House and Senate expressed concern about the flawed process used to create and push the map through, the lack of transparency into what data was used to create these new districts, and the plan's failure to form a second majority-Black congressional district. These members stressed that this plan continued Alabama's historical practice of obstructing Black representation within the state.[73] Despite these members protests, HB 1 passed in the house and senate and was signed into law by the governor in November 4, 2021.

The relief the plaintiffs sought was an order declaring HB 1 unconstitutional in violation of the Fourteenth Amendment and in violation of Section 2 of the VRA, a preliminary and permanent injunction to prevent the Secretary of State from conducting elections under this plan, an order for expedited hearings and briefing to order a congressional redistricting plan in

[71] Complaint at 8, *Caster v. Merrill.*
[72] *Id.*, at 10.
[73] *Id*., at 11.

compliance with the VRA, and an immediate and reasonable deadline for Alabama to adopt a plan that includes two majority-minority districts in compliance with the VRA and Constitution.

In a 225 page order, a panel of three federal judges, which included two conservative judges appointed by President Trump, held for the plaintiffs. The court came to this decision by applying the *Gingles* framework to Alabama's redistricting plan.[74] The judges stated that the question of whether or not the scheme violated the VRA was not "a close one" and ordered a preliminary injunction barring the Secretary of State of Alabama from holding the 2022 congressional elections according to HB 1.[75] Applying Gingles, the federal judges concluded that the plaintiffs were substantially likely to establish each part of the Gingles framework:

> 1) that Black Alabamians are sufficiently numerous to constitute a voting-age majority in a second congressional district (Black Alabamians comprise approximately 27% of the State's population, and Alabama has seven congressional seats); (2) that Alabama's Black population in the challenged districts is sufficiently geographically compact to constitute a voting-age majority in a second reasonably configured district (the Milligan plaintiffs and the Caster plaintiffs submitted many illustrative plans that include a second majority-Black district and respect Alabama's traditional redistricting principles); 3) that voting in the challenged districts is intensely racially polarized (this is not genuinely in dispute); and (4) that under the totality of the circumstances, including the factors that the Supreme Court has instructed the court to consider, Black voters have less opportunity than other Alabamians to elect candidates of their choice to Congress. [76]

Because the plaintiffs were substantially likely to prevail on their claim that HB1 violates Section 2 of the Voting Rights Act, the court held that the appropriate remedy was for the Alabama Legislature to create a new redistricting plan that either created an additional majority-Black congressional district or an additional district in which Black voters have the opportunity to elect a representative of their choice.[77] If the Legislature failed to pass a remedial plan in fourteen days, then the court would retain a qualified expert to draw the new congressional maps

[74]Millhiser, "Alabama's High-Stakes Supreme Court Fight over Racial Gerrymandering, Explained," Vox
[75] *Caster v. Merrill*, 2022 U.S. Dist. LEXIS 16996, 38 (N.D. Ala. 2022).
[76] *Id*., at 6.
[77] *Id.*, at 7.

in compliance with federal law at the expense of the defendants to be used for Alabama's 2022 congressional elections.[78]

Supreme Court Intervention Against Section 2 Claim in Alabama

The Alabama State Secretary applied for a stay of injunctive relief to the Supreme Court, which Justice Thomas accepted as a petition for a writ of certiorari before judgment and stayed the lower courts' preliminary injunctions.[79] The result of the Supreme Court granting certiorari and staying the lower courts' preliminary injunctions is that it allowed HB1 to be in effect for the 2022 congressional elections. The Supreme Court heard oral arguments in October 2022 but will not issue a permanent decision regarding HB 1's constitutionality until the summer of 2023. In *Hollingsworth v. Perry*, the Supreme Court held that a party petitioning for stay of a lower court's judgment pending appeal or certiorari must show: "(1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from denial of a stay."[80] The Court must also consider the relative harm to both parties and public interest.[81] This decision to grant certiorari in spite of the judges in both the district and appellate courts all being in accord that this was a straightforward application of *Gingles*, signals that the Supreme Court intends to rewrite the standard used to evaluate these claims. Without this "fair prospect" of reversal of the lower court's decision, the Court would not have taken this case at all. It is also worth noting that the irreparable harm the Court is seeking to address by ordering a stay of the injunction is not the disenfranchisement of Black Alabamians. Instead, it is the harm to the state resulting from potential confusion as a

[78] *Caster v. Merrill*, at 7.
[79] *Merrill v. Milligan*, 142 S. Ct. 879 (2022) (Kavanaugh, J., concurring).
[80] *Hollingsworth v. Perry*, 558 U.S. 183, 190 (2010).
[81] *Id*.

result of having to redraw their plan before the approaching election. Due to the conservative makeup of the Court and the opinions issued by these Justices, it is highly likely that the ruling coming out of this case will completely change the Section 2 analysis in favor of the states and against the interest of minority voters. In order to see what direction the court is likely to rule, an examination of the Justices opinions in Alabama's application for stay and the Justices legislative history is necessary.

Justice Kavanaugh, joined by Justice Alito, concurred in Justice Thomas's grant of stay on the lower court's preliminary injunction. Justice Kavanaugh began not with his own justification but rather by attacking the dissent's opinion that this stay creates a new law regarding the Voting Rights Act.[82] He contended that this stay follows the Supreme Court's precedent set out in *Purcell v Gonzalez*, which holds that "1) federal district courts ordinarily should not enjoin state election laws in the period close to an election, and 2) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle."[83] This holding will become the crux of his argument for granting stay. He then refuted the dissent's assertion that this decision is an attempt to decide this case in the Court's "shadow docket," because it will be decided on the merits after the Court has time to given it a full hearing and deliberation process. Rather than being a case decided on the merits, which tend to be the most numerous cases heard by the Court, a shadow docket case occurs when the Supreme Court rules on procedural matters that have far less extensive hearings than those typical of merit cases and the opinions issued by the Justices typically offer far less insight into their reasoning. This can make these decisions seem cloaked in shadow and mystery. While these procedural cases may seem to be only of importance to the litigants in the matter, they can

[82] *Merrill v. Milligan*, 142 S.Ct. 879 (Kavanaugh, J., concurring).
[83] *Id.*

have high stakes. As is shown in this case, this can occur when the Court stays the decision of a lower court who has ruled that a law passed by the Legislation is unconstitutional, thereby allowing the violation to continue in the meantime.[84]

Finally turning to the merits of the case, Justice Kavanaugh generously accepted Alabama's assertion that it adopted HB 1 according to the same framework that they have used for the past several decades.[85] His opinion appears to ignore the fact that the plaintiff's brief clearly states the unordinary manner in which the plan was adopted as it was not created by committee members, not subjected to Alabama's customary functional and racial polarization analyses, and pushed through with only one day for the members to review it.[86] Justice Kavanaugh continued sympathizing with the plight of the legislators having to create a new map before the election. His language throughout his opinion is continually grandiose when describing the plight of the legislators claiming the injunction causes "chaos and confusion"[87] that the legislation would have to make "heroic efforts"[88] to overcome. Similarly, he describes the interference of the federal courts accusing them of "swooping in"[89] and forcing the legislature to "completely redraw"[90] the districts, despite the fact that numerous acceptable maps have already been drawn. He ultimately says that he thinks the *Purcell* principle would be overcome regardless of the proximity of an injunction to an election if the plaintiff establishes: "(1) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing

[84] Black, Harry Isaiah, and Alicia Bannon. "The Supreme Court 'Shadow Docket.'" Brennan Center for Justice, July 19, 2022. https://www.brennancenter.org/our-work/research-reports/supreme-court-shadow-docket.
[85] *Merrill v. Milligan*, at 879 (Kavanaugh, J., concurring).
[86] Complaint at 8, 10, *Caster v. Merrill*.
[87] *Merrill v. Milligan*, at 880 (Kavanaugh, J., concurring).
[88] *Id.*
[89] *Id*., at 881.
[90] *Id.*, at 879.

the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion or hardship."[91] He says that even using this relaxed standard, the plaintiffs could not satisfy the requirements, because the merits are not clearly in their favor and the changes are not feasible without significant cost, confusion, or hardship.[92] How can the underlying merits of a plaintiffs claim be more clear cut in their favor than when each of four judges from two lower courts and four Supreme Court Justices state that their claim of impermissible racial gerrymandering clearly satisfies the current federal standard? The argument about the feasibility and costliness of the implementing the plan has much more merit than claiming that this case is anything other than clear. The only issue more clear is that these Justices simply want to rewrite the federal rule governing how Section 2 claims are evaluated.

Turning to Justice Kavanaugh's last proposed standard involving feasibility, significant cost, confusion, or hardship, this will prove to be a hard hurdle to clear for most plaintiffs seeking relief from discriminatory election laws. The plaintiffs and amici here found many feasible maps that could meet the lower courts' orders at no cost to the defendants and gave them these plans at least nine months before the first primary election.

Justice Kavanaugh believes the underlying question on the merits of the plaintiff's claim is "whether a second majority-minority congressional district (out of seven total districts in Alabama) is required by the Voting Rights Act and not prohibited by the Equal Protection Clause."[93] He stated that the case law on this matter is "notoriously unclear and confusing" and wrapped up his opinion sympathizing with states filing amicus briefs asking for clarity on the rules governing majority-minority districts.[94]

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[91] *Merrill v. Milligan*, at 881 (Kavanaugh, J., concurring).
[92] *Id.*.
[93] *Id.*
[94] *Id.*

In what may be a surprising turn of events, Chief Justice Roberts dissented from granting the stay on the lower courts' injunctions on the basis that the district court applied without error the *Gingles* standard[95] requiring the minority group "to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district."[96] He wrote that the district court considered the plaintiffs submissions of expert testimony and explained at length their conclusion that the plaintiffs had made a showing sufficient to satisfy *Gingles*. Rather than granting the stay, he would have granted certiorari to hear the case during the next term. He would have let the district court's ruling apply to the 2022 election, since it was correctly decided under current precedent.[97] However, he joins Justice Kavanaugh's opinion that Gingles and its progeny have garnered considerable disagreement and confusion as to the contour of a vote dilution claim.[98] Essentially, Chief Justice Roberts would have disallowed HB 1 for the upcoming year, but he joined the conservative Justices in their opinion that the standard for evaluating Section 2 claims must be rewritten to create a more consistent standard.

The three liberal Justices on the Court at the time, Justices Kagan, Breyer, and Sotomayer, dissented from the grant of stay and would not have granted certiorari. The Justices point out that applications for stay usually argue that the lower court's judgment erred under current law, but Alabama's petition makes no such argument and instead argues that the Supreme Court should undo decades of Section 2 precedent.[99] They disagreed with allowing what is a clear violation of vote dilution laws under current precedent to proceed using the Court's "shadow docket."[100] Even if there was a basis for making changes to current precedent,

[95] *Merrill v. Milligan*, at 882 (Roberts, C.J., dissenting).
[96] *Thornburg v. Gingles*, at 50.
[97] *Merrill v. Milligan*, at 883 (Roberts, C.J., dissenting).
[98] *Id.*
[99] *Id.*, at 883 (Kagan, J., dissenting).
[100] *Id.*

these changes should be made after full briefing and argument. Any violation of current law should not be allowed to stand. Accordingly, they would not have disturbed the district court's decision.

In Alabama's brief, they do not claim that the lower court erred in their findings, nor did it claim that HB 1 performs better than the plaintiffs' plans in regard to traditional districting criteria. Instead Alabama argues that the plaintiffs' plans do not satisfy *Gingles*' first condition, because the experts did not create them using only race-neutral criteria.[101] They contend that maps must be drawn without regard to race and would effectively require that the plaintiffs show that modern districting software, created to give no attention to race whatsoever, would create maps with two majority-Black districts.[102] The dissenting justices rejected this argument, as it has no foundation in any precedent of the Court. The justices pointed out that the first condition asks if a minority group is "sufficiently large and geographically compact to constitute a majority" in an additional district.[103] To answer this question, the plaintiffs followed the customary approach of litigants pursuing a Section 2 claim and hired experts to draw congressional districts with an additional reasonably configured majority-Black district.[104] Nowhere in the Court's history has it held that plaintiffs must satisfy this first condition without any awareness of race, nor would it have been possible to answer in such a manner until recent times. Still, Alabama argues that the creation of computerized districting software should change that process and require plaintiffs to use the technology to create millions of possible plans that do not factor in race. It proposes that from those millions of plans generated, some threshold number of them must contain an additional majority-Black district in order to satisfy

[101] *Merrill v. Milligan*, at 886 (Kagan, J., dissenting).
[102] *Id.*
[103] *Id.* (quoting *Growe v. Emison*, 507 U.S. 25, 40 (1993).
[104] *Id*., at 887 (Kagan, J., dissenting).

Gingles' first condition. Regardless of the advantages and disadvantages of this approach, the Supreme Court has never considered this requirement, so Alabama's request is not based on any precedent but solely on their belief in what Section 2 law should be.[105] Accordingly, the dissenters point out that the only way Alabama's claim could succeed is if the Court adopted a completely new rule. This rule would have potentially substantial consequences, and such large consequences should be given considerable thought. The dissent criticized the majority for staying the lower courts current application of current law "based on hastily made and wholly unexplained prejudgment that it is ready to change the law." The dissent is right to point out the fact that the Court is not considering a legally viable and thought provoking argument by a litigant in order to decide whether to accept their position and change the law.[106] Instead these Justices, some of whom have documented personal animus towards the Voting Rights Act, have decided to use this poorly constructed petition as an avenue and excuse to change the law to their liking.

Lastly, the dissent addressed potential hardship and feasibility of requiring Alabama to redraw its congressional districts in advance of the election; a factor that Justice Kavanaugh found so devastating to the plaintiff's cause. The justices pointed out that the Legislature passed HB 1 in less than a week and had access to an qualified cartographer as well as at least eleven corrective plans that complied with the injunction.[107] As to the matter of timing, Alabama has been on notice since at least 2018 that these plaintiffs or others with similar interests were likely to challenge the Legislature's 2021 congressional redistricting plan if it did not include a second majority-Black district or a second district in which Black voters have a meaningful opportunity

[105] *Merrill v. Milligan*, at 887 (Kagan, J., dissenting).
[106] *Id.*
[107] *Id.*, at 888.

to elect a representative of their choice.[108] The dissent summarized their opinion on the matter by saying that Alabama "has known for quite some time that the VRA may require it to draw a different map; it has all it needs to do so; and it has shown just how quickly it can act when it wants to."[109]

Continuing on to address the matter of timing, the dissent rejected the invocation of the *Purcell* rule under these circumstances. Alabama argues that the injunction was ordered to close to their election and that changing the maps now would result in voter confusion over which precinct they reside in and cause harm to "non-major-party candidates" who will have to clamber to acquire new signatures.[110] While some voters' districts will change and some candidates may have to hustle to get signatures in their new district, the dissent would not apply *Purcell* because this is not in case in which the election is merely weeks away. At the time of the Supreme Court's grant of stay, the election was nine months away and the three judge panels' injunction confirming the ruling in the district court was issued two weeks prior. The plaintiffs did not delay in bringing this suit, commencing their action "within hours or days of the enactment" of HB 1.[111] The district court expedited the proceeding and the only delay was at Alabama's request.[112] Holding that the *Purcell* principle applies here could set the precedent that no election law related injunction can be handed down even within the first month of an election year, even though current precedents establish otherwise. The Supreme Court has denied a motion for stay of an injunction on the use of a map enacted in February of an election year, even though the primary was in mid-March.[113] The Court has also denied a motion for stay of an

[108] *Merrill v. Milligan*, at 888.
[109] *Id.*
[110] *Id.*
[111] *Id.*
[112] *Id.*
[113] *Harris v. McCrory*, 557 U.S. 1129 (2016).

injunction requiring a remedial map in January of an election year, even though the primary was in mid-June.[114]

It is important to note that while Justice Jackson was present for oral arguments in October 2022, she was not nominated to the Court until two weeks after the Court granted this motion and was not sworn in until June 2022. So while Justice Jackson was unable to join any opinion at the outset of this case, she will be a part of the Court's final vote. Most likely Justice Jackson will join the three liberal Justices in upholding *Gingles*. During oral arguments, she questioned the Alabama Solicitor General on his stance that race being taken into account necessarily creates an equal protection problem. She also stated that her analysis of the equal protection clause, the Fourteenth and Fifteenth Amendments led her to the conclusion that the framers adopted these laws in a race-conscious manner. Supporting this, she quoted the man who introduced the Fourteenth Amendment who said in regard to its purpose, "Unless the Constitution should restrain them, those states all, I fear, keep up this discrimination and crust to death the hated freedmen."[115] Justice Jackson's likely alliance with the three other liberal justices will most likely bring the vote on this case to a 5:4 split in an eerily similar fashion to many of the other Supreme Court decisions regarding the Voting Rights Act. The outcome of this case will have effects on generations to come, the most immediate effect being upon the African American voters in Louisiana.

Impact on the Voting Rights on Black Louisianians

Ardoin v. Robinson is a voter discrimination case coming out of Louisiana that is currently being held by the Supreme Court until it issues its final decision in *Allen v. Milligan*.

[114] *Personhuballah v. Alcorn*, 577 U.S. 1125 (2016).
[115] Geidner, Chris. "Ketanji Brown Jackson Rebukes the Supreme Court's Conservatives." MSNBC, October 5, 2022. https://www.msnbc.com/opinion/msnbc-opinion/ketanji-brown-jackson-rebukes-supreme-court-s-conservatives-n1299315.

Accordingly, Louisiana will be among one of the first states to enact a congressional redistricting plan for the first time since being freed from the restrictions of Section 4(b) and Section 5 of the VRA which will be analyzed under whichever post-*Gingles* standard the Supreme Court sets out in *Allen v. Milligan*. In this case, eleven African-American Louisiana voters are challenging the 2022 congressional districts. The Louisiana legislature created a new congressional redistricting plan, which would have a White-majority in five out of six districts and only one Black-majority district.[116] This is in spite of the fact that according to the 2020 census, Black Louisianians make up 33.1% of the total population, while White Louisianians narrowly make up the majority at 55.8%.[117] The ratio of Black Louisianians to White Louisianians is 3 to 5, yet their corresponding representation in the congressional districts 1 to 6. This plan was vetoed by Democratic Governor Jon Bel Edwards, who found the scheme to by in clear violation of Section 2 of the VRA. He sent the plan back to the Legislature with instructions to create another minority-majority district, however, the Republican legislature overturned the governor's veto.[118] In response, Black Louisiana voters brought suit challenging the constitutionality of the voting scheme, because it impermissibly discriminates on the basis of race in violation of Section 2 of the VRA.[119] Their complaint detailed specific issues with the plan, as well as the long history of entrenched discriminatory practices in the state.

The district court held that the plaintiffs easily satisfied the *Gingles* standard to prove vote dilution on the basis of race in violation of Section 2 of the VRA. The judge ordered a preliminary injunction to stop the proposed districting plan from being used for the 2022 congressional election and ordered the defendants to create a new plan creating a second

[116] *Robinson v. Ardoin*, 605 F.Supp.3d 759, 768 (M.D. La. 2022).
[117] *Id.* at 778.
[118] *Id.*, at 768.
[119] Complaint at 5, *Robinson v. Ardoin*, 605 F.Supp.3d 759 (M.D. La. 2022) (No. 3 :22-cv-00211-SDD-SDJ).

majority-Black district.[120] The Fifth Circuit Court of Appeals upheld the district court's ruling, and it stated that the *Purcell* rule should not apply here because the legislature was given notice of the deficiency of their scheme sufficiently before the congressional election.[121]

In an unsigned order, the Supreme Court conservative majority granted the application for stay on the district court's preliminary injunction and treated it as a petition for certiorari, which it granted. The Court now holds this case in abeyance pending their decision in *Allen v. Milligan*.[122] The three liberal Justices Breyer, Sotomayer, and Kagan would have denied the application for stay and dissented from the majority's decision to treat the application as a petition for certiorari. In addition, the minority Justices would have allowed the district court's order to stand, thereby requiring the redrawing of Louisiana's congressional districts to include a second Black-majority district for the 2022 congressional election.[123]

This case has facts even more extreme than that of the *Milligan* suit, due to the fact that the Black population in Louisiana accounts for 33.1% of the total population while the White population makes up only 55.8%.[124] This appears to be a cut and dry example of impermissible vote dilution on the premise of race in violation of Section 2 of the VRA, (both lower courts easily concluded as much) yet the Supreme Court has decided to tie this case's fate to that of Alabama Voters. Just as it did in the Alabama case, this decision to stay the lower court's injunction allowed this unconstitutional voting scheme to go into effect for the 2022 congressional elections, making it the first congressional redistricting plan enacted by the state without the requirements of Voting Rights Act in more than fifty years. As predicted in Justice

[120] *Robinson v. Ardoin*, 605 F.Supp.3d at 858.
[121] *Robinson v. Ardoin*, 37 F.4th 208, 215 (5th Cir. 2022).
[122] *Ardoin, v. Robinson*, 142 S.Ct. 2892 (2022).
[123] *Id.*
[124] LeBoeuf, Sabrina. "NELA Census Data Shows Decreasing Populations, Increasing Diversity." News Star, August 21, 2021. https://www.thenewsstar.com/story/news/2021/08/21/census-data-finds-nela-less-residents-more-diversity/8129743002/.

Ginsburg's dissent in *Shelby Count*, once the Louisiana legislators were no longer stopped by the VRA from discriminating against minority voters, they did just that.

Without a meaningful opportunity to elect the candidate of their choice, Black Louisianians will continue to be underrepresented and marginalized in the state. It is no secret that racism and racially polarized voting still plague many southern states, including Alabama and Louisiana. Louisiana has never had a Black representative in any other district than Congressional District 2. The state hasn't had a Black governor since the Reconstruction era. The state has never had a Black U.S. Senator, Secretary of State, or Attorney General.[125] There is a long history of institutionalized White supremacy and disenfranchisement of Black Louisianians, leading to poor and unjust outcomes for those citizens. The Voting Rights Act was meant to fight back against these unconstitutional violations.

After the enactment of the VRA but before Shelby County v. Holder invalidated the preclearance requirement on these certain states under the act, the Department of Justice blocked or demanded alternations to almost 150 new voting regulations in Louisiana, with redistricting being the most frequent subject.[126] This shows that despite the plaintiffs argument against the necessity of the VRA in *Shelby v. Holder* since voting representation had evened out, this is in spite of state's like Louisiana's actions and solely due to the strong hand of the federal government. Now that the preclearance requirement of the VRA is gone, *Gingles* is the only law stopping theses states from reverting back to their racist voting policies and schemes. Overturning Section 4(b) of the Voting Rights Act was a mistake, and if the Supreme Court decides to overturn the holding in *Gingles* and weaken the framework used to evaluate Section 2 violations as it is expected to, then the Voting Rights Act will lose its teeth almost entirely. This

[125] Complaint at 6, *Robinson v. Ardoin*, 605 F.Supp.3d 759 (M.D. La 2022) (No. 3 :22-cv-00211-SDD-SDJ).
[126] *Id*., at 8.

will result in discriminatory voting laws and procedures being enacted and we will see a decline in minority voter registration and turnout.

If the majority of the Justices in *Allen v. Milligan* hold that challenging a map ten months before an election renders the challenge dead on the spot due to Purcell principles, then this will only encourage the majority to pass their plans closer and closer to the deadline. It is the legislation that creates these maps, therefore they are in control of when these maps are revealed before an election. These parties should not, as Justice Kavanaugh would have it, be able to use their own procedural inefficiencies to justify their case for why their plan should be allowed to stand for another election cycle. If ten months before an election is too soon, then what stops legislators from passing their racially gerrymandered even later and claiming that it would bring impossible hardship upon the state to change the unconstitutional map, which Justice Kavanaugh even in his "relaxed *Purcell"* standard says would defeat a claim. If you created passed your current map in a week, have an experienced cartographer of your own, and are provided with nearly a dozen plans that comply with the court order, how can it infeasible due to significant hardship to draw or pick a map in two weeks? And if it is, shouldn't the party aware of the complaint beforehand who dictated the timeline bear some responsibility? Could being held accountable for creating their own emergency, make a party more responsible in the future? Allowing the sort of highly racially motivated gerrymandering found in *Milligan* and *Ardoin* will only result in more officials being elected the legislature that will pass more of these untenable, unconstitutional congressional district maps that benefit only them. With each election cycle that is allowed to operate this way, White supremacy will become further entrenched to the detriment of Black voters and their interests.

Representation matters, and the congressional map proposed by the Louisiana Legislature denies the Black population at a meaningful opportunity to elect candidates that represent their interests. Louisiana has the second highest percentage of Black residents of all the states, making up a third of its population, yet even in this state there is enough entrenched White supremacy in the legislative body that they have been able to reduce their proportional representation to merely 17%.[127] In contrast, the legislature has somehow stretched the White population narrowly making up half of the population into a majority in the remaining 5 congressional districts, giving them 83% of Louisiana's congressional representation.[128] This imbalance is likely even greater, considering the fact that the Census Bureau admitted that in the 2020 census, which these maps are based on, they incorrectly missed counting 3.3 of every 100 African Americans and wrongly added 1.64 non-Hispanic Whites for every 100 residents counted.[129] While the Constitution does not entitle people of any race or ethnicity proportional representation in each legislative body, Congress and many Justices, past and present, have found that it does require a meaningful opportunity to participate in the political process. This includes creating a meaningful opportunity to elect a representative of their choice. Creating laws that allow a slender majority of White citizens to control nearly the entirety of a state's political power regardless of how large other minority groups become, denies minorities any real chance at representation. Representation does not just matter because of the numbers; it has real life consequences. There is a third of Louisiana's population whose interests are being suppressed. When the John Lewis Voting Rights Advancement Act that would have expanded

[127] Complaint at 1, *Robinson v. Ardoin*, 605 F.Supp.3d 759 (M.D. La 2022) (No. 3 :22-cv-00211-SDD-SDJ).
[128] *Id*.
[129] Wines, Michael, and Maria Cramer. "2020 Census Undercounted Hispanic, Black and Native American Residents." The New York Times, March 10, 2022. https://www.nytimes.com/2022/03/10/us/census-undercounted-population.html.

and restored key provisions of the VRA was brough to the House of Representatives, the only Louisiana Congressman to vote in favor of the bill came from Congressional District 2, the single Black-majority district.[130] Similarly, when the George Floyd Justice in Policing Act was brought before the House, the only Louisiana Congressman who voted in favor of the bill was from the Black-majority district, Congressional District 2.[131] When President Biden introduced his Infrastructure Investment and Jobs Act, which pledged to reconnect a historically Black neighborhood torn apart by a highway[132] and to give nearly $500 million dollars to improve public transportation in Louisiana (noting that non-White households are 4.3 times more likely to use public rather than private transportation),[133] once again the only Louisiana Congressman to vote in favor of the bill came from the state's only Black-majority district, Congressional District 2.[134] The health and prosperity of Black Louisianians is necessarily tied to their ability to be represented and concerns voiced. If the Supreme Court removes the results test as it did the intent test, it will prove nearly impossible for Black Louisianians to legally fight for their right for representation against facially neutral, discriminatory voting laws.

With the direction that the conservative Supreme Court Justices have ruled in recent history, there is little doubt that in the Summer of 2023 the Court will construct an entirely new framework for evaluating VRA Section 2 claims that will give states considerably more freedom to dilute minority votes. If the majority of the Court adopts Justice Kavanaugh's "relaxed

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[130] "John R. Lewis Voting Rights Advancement Act: Roll Vote No. 260." *Congressional Record* 117: (August 24, 2021) H.R. 4.
[131] Stevens, Allison. "House Democrats and 3 Republicans Pass George Floyd Justice in Policing Act." Louisiana Illuminator, June 27, 2020. https://lailluminator.com/2020/06/27/house-democrats-and-3-republicans-pass-george-floyd-justice-in-policing-act-with/.
[132] Burch, Audra D. S. "One Historic Black Neighborhood's Stake in the Infrastructure Bill." The New York Times, November 20, 2021. https://www.nytimes.com/2021/11/20/us/claiborne-expressway-new-orleans-infrastructure.html.
[133] "President Biden's Bipartisan Infrastructure Law Is Delivering in Louisiana." The White House, February 2023. https://www.whitehouse.gov/wp-content/uploads/2023/02/Louisiana-Fact-Sheet-E3.pdf.
[134] "INVEST in America Act: Roll Vote No. 208." *Congressional Record* 117:70 (July 1, 2021) p. H.R. 3684.

Purcell" standard, it will be nearly impossible for Black Louisianians to successfully challenge even the most unconstitutional district maps if they are passed during an election year. As for the *Gingles* standard currently used by courts to evaluate Section 2 claims, it is unlikely to survive. The conservative Justices largely held their cards close to their chest in the grant for stay, not giving a strong indication of what criteria they would use as a substitute for *Gingles*. Justices Thomas and Gorsuch were also notably quiet at the oral arguments, leaving the majority of the talking to Chief Justice Roberts and Justices Kavanaugh and Barrett.[135] However, it is highly likely that the conservative justices will attack the results test and essentially, if not explicitly, throw out Section 2 claims unless they can show overtly racist discrimination in election laws. This will detrimental to the strides civil rights activists have made, and we will see voter suppression unlike we have seen in this country in fifty years. The future of voting rights in the United States depends on the Supreme Court Justices coming together to find a workable standard that allows our country to move forward, not back.

[135] Millhiser, Ian. "The Supreme Court Is Likely to Weaken, but Not Destroy, the Ban on Racial Gerrymandering." Vox. Vox, October 4, 2022. https://www.vox.com/policy-and-politics/2022/10/4/23387283/supreme-court-merrill-milligan-alabama-racial-gerrymandering-voting-rights-act.