TAKE BACK THE COURT

The Supreme Court is Set to Gut The Voting Rights Act — Again

The Supreme Court is poised to gut voting rights yet again in an upcoming case, *Merrill v. Milligan*. The case centers around Alabama's congressional map updated after the 2020 census, which lower courts have ruled impermissibly discriminates against Black voters. The Voting Rights Act (VRA) was put in place precisely to ensure that politicians can not create racially discriminatory voting practices — such as gerrymandered districts that dilute the voting power of people of color.

This Case Is The Latest Installment in the Court's Attacks on Voting Rights

The conservative Court has been steadily and systematically dismantling democracy, from a ruling allowing nearly unfettered corporate money in political campaigns to handing the presidency to the Court's preferred candidate. The Court's unrelenting, anti-democratic jackhammer has done some of its most destructive work to the Voting Rights Act. In its rulings, the Roberts Court has stripped the VRA of its teeth and denied millions of Black and Latinx voters access to the ballot box along the way:

- 2013: In the partisan 5-4 decision in *Shelby County v. Holder*, the Court attacked Section 4(b) of the VRA and removed the coverage formula to determine which jurisdictions — those with histories of racist voting laws — needed to meet Section 5 preclearance requirements. The decision sparked a wave of new laws aimed at making it harder for people of color to vote. Notably, in his opinion, Roberts assured the country that "[o]ur decision in no way affects the permanent, nationwide ban on racial discrimination in voting found in §2."[1]
- 2018: In the partisan 5-4 decision in *Abbott v. Perez*, the Court reversed the lower courts' findings that Texas had intentionally discriminated against Black and Latinx voters in its congressional maps, allowing the state to blatantly violate the VRA. The ruling raised the burden of proof for plaintiffs challenging racist voting laws in VRA claims — making it far easier for lawmakers to violate the VRA and prevail in legal challenges.
- 2021: In the partisan 6-3 decision in *Brnovich v. Democratic National Committee*, the Court took a direct swing at Section 2 of the VRA less than a decade after Roberts assured us that Section 2 was the permanent law of the land. By classifying racist voting practices in Arizona as "[m]ere inconvenience,"[2] the Court slashed the scope of Section 2. The Court took it upon itself to rewrite the Voting Rights Act to make it easier for states to strip Black and Brown people of their right to vote.
- 2022: In two separate shadow docket decisions, the conservatives on the Court put racist maps back in place in Alabama and Louisiana for the 2022 midterm elections after lower courts struck them down for violating Section 2 of the VRA. The Alabama case is now being heard on the merits in *Merrill v. Milligan*.

1 *Shelby Cty. v. Holder,* 570 U.S. 529, 557 (2013).

2 *Brnovich v. Democratic Nat'l Comm.,* 141 S. Ct. 2321, 2338 (2021).

The Court May Effectively Eliminate Challenges to Racial Gerrymandering in *Merrill v. Milligan*

At issue in this case is whether Alabama's congressional redistricting plan racially gerrymanders and discriminates against Black people in violation of Section 2 of the VRA. Almost exactly two of every seven Alabamans of voting age is Black — yet the current state map has only one Black-majority district[3] out of its seven congressional seats. The lower court, comprised of a circuit judge and two district court judges, ruled that Alabama must create a second Black-majority district — rather than "crack" the rest of the state's Black population across four majority-white districts — in order to comply with VRA. To reach this conclusion, the lower court compiled an extensive record that included testimony from seventeen witnesses, a seven-day preliminary injunction hearing, more than 1,000 pages of briefing, and more than 350 hearing exhibits.[4] **But the Supreme Court blocked the lower court's orders and allowed Alabama to keep the blatantly racist map for the 2022 elections. The Supreme Court will now decide whether to allow Alabama to keep the map in perpetuity.**

The decision in this case will affect the entire country. Alabama is proposing that the Court adopt a new race-blind algorithmic test[5] for Section 2 that would undermine the core purpose of the VRA. The test would require plaintiffs challenging racial gerrymanders to meet an impossible standard: plaintiffs would need to show that a proposed map produced fewer minority-majority districts than a sampling algorithm that includes no racial data. Essentially, Alabama is asking that the Court adopt a test for racial gerrymandering that would be entirely devoid of the context and history of racism in voting — and devoid of race data entirely. The proposed test reeks of "colorblindness" — a noxious theory that conservatives on the Court have appealed to time and time again to dismantle systems put in place to combact active racial discrimination and anti-Black bias.[6]

As the lower court noted in rejecting Alabama's argument, it is "obvious" that adopting such a test would "preclude any plaintiff from ever stating a Section Two claim."[7] If the Court sides with Alabama, lets the state keep these racist maps, and institutes the proposed test, it will effectively mark the end of Section 2 of the VRA and leave people with no ability to challenge racial gerrymanders. The conservative movement will have succeeded in a near-total dismantling of the crowning achievement of the Civil Rights Era. The Court will have enabled conservative lawmakers to strip Black and Brown people of their fundamental right to vote with very little hope of judicial recourse.

Only Court Expansion Meets the Urgency of the Moment

The Court has been steadily repealing the VRA from the bench for more than eight years, piece after piece and case after case. Section 2 is functionally the final battle, and this case is the ultimate culmination of the conservative justices' insidious campaign to end challenges to racial gerrymandering. **Our voting rights and the cornerstone of our democracy are on the line.** The only way to protect our democratic system from extremist justices who are dead set on dismantling it is to expand and rebalance the Court.

3 The district court ruled that "the appropriate remedy is a congressional redistricting plan that includes either an additional majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice." *Singleton v. Merrill*, No. 2:21-cv-1291-AMM consolidated with *Milligan v. Merrill*, No. 2:21-cv-1530-AMM (N.D. Ala. Jan 24, 2022) at 5.

4 *Id.* at 4.

5 Brief of Computational Redistricting Experts as Amici Curiae in Support of Appellees and Respondents, *Merrill v. Milligan* No. 21-1086, *Merrill v. Caster* No. 21-1087 at 29-30.

6 For more information on colorblindness, see our September 2022 report with Equal Justice Society, "The Supreme Court Could Strike Deathblow to Affirmative Action," p. 2-3.

7 *Singleton v. Merrill* and *Milligan v. Merill* (N.D. Ala. Jan 24, 2022) at 205.