Supreme Court Allows Alabama Districting Plan to Stay in Effect

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In a 5-4 vote in *Merrill v. Milligan* the U.S. Supreme Court allowed Alabama's districting plan, which a three-judge panel concluded violates Section 2 of the Voting Rights Act (VRA), to go into effect during the upcoming primary, while litigation continues in this case.

Alabama's congressional redistricting plan following the 2020 census contains one district (out of seven) where black voters may elect their preferred candidate, even though the state's population is 27 percent black. The challengers claim this plan unlawfully diluted the votes of the state's black population in violation of Section 2 of the VRA and should contain a second majority-black district. The three-judge panel agreed.

Justice Kagan, joined by Justices Breyer and Sotomayor, concluded in her dissent the lower court's decision was correct. She noted the challengers came up with 11 alternative plans containing a second majority-black district which "complied with traditional districting criteria as well as or better than Alabama's enacted plan."

What Alabama wants, Justice Kagan concluded, is for the challengers to "demonstrate that modern map-drawing software, designed to give no attention at all to race, would produce maps with two majority-Black districts." She responded: "[W]hatever the pros and cons of that method, this Court has never

demanded its use; we have not so much as floated the idea, let alone considered how it would work."

The Court froze the three-judge panel's decision requiring the legislature to redraw the districts. Justice Kavanaugh filed a concurring opinion which Justice Alito joined. Citing to *Purcell v. Gonzalez* (2006) Justice Kavanaugh noted that the Supreme Court has "repeatedly stated that federal courts ordinarily should not enjoin a state's election laws in the period close to an election." While the *Purcell* principle can be overcome if four factors are present, according to Justice Kavanaugh, in this case the challengers can't meet two of the factors.

That a second majority-minority congressional district is required by the Voting Rights Act is not "entirely clear cut" in favor of the challengers, Justice Kavanaugh opined because "the Court's case law in this area is notoriously unclear and confusing." Moreover, Justice Kavanagh concluded the challengers have not established that the maps can be changed without "significant cost, confusion, or hardship." "The District Court's order would require heroic efforts by those state and local authorities in the next few weeks—and even heroic efforts likely would not be enough to avoid chaos and confusion."

In her dissent, Justice Kagan opined not only that the lower court's decision was correct on the merits, but also that Alabama could change its plan quickly. The primary is still about four months away, and Alabama drew its current plan in less than a week. "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."

Chief Justice Roberts wrote a brief, solo dissent. While acknowledging the law regarding vote dilution has "engendered considerable disagreement and uncertainty" he opined that the lower court "properly applied existing law in an extensive opinion with no apparent errors for our correction."

Instead of granting a stay of the three-judge panel decision the Chief Justice would have set this case for Supreme Court review next term. "The practical effect of this approach would be that the 2022 election would take place in accord with the judgment of the [three-judge panel], but subsequent elections would be governed by this Court's decision on review."

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