

# ***Allen v. Milligan*: Supreme Court Holds That Alabama Redistricting Map Likely Violated Section 2 of the Voting Rights Act**

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On June 8, 2023, the Supreme Court in [\*Allen v. Milligan\*](#) affirmed two federal district court rulings that preliminarily enjoined the State of Alabama from holding elections under its congressional redistricting map because the map likely violated Section 2 of the Voting Rights Act (VRA). The Court also reaffirmed the constitutionality of Section 2, as construed by its 1986 decision in [\*Thornburg v. Gingles\*](#), establishing three preconditions for challenging a redistricting map under Section 2.

[Section 2](#) of the VRA generally prohibits any voting law or practice, including a redistricting map, that results in the denial or abridgment of the right to vote based on race, color, or membership in a language minority group. In accordance with *Gingles*, Section 2 may require the creation of one or more majority-minority districts—in which a racial or language minority group comprises a voting majority—to avoid minority vote dilution. In this case, the district courts preliminarily [enjoined](#) Alabama election officials from conducting congressional elections using the challenged map after finding that the challengers were substantially likely to prove that the map violated Section 2 of the VRA, and [ordered](#) Alabama to revise the map to contain a second majority-Black district to comport with Section 2.

This Legal Sidebar discusses the Court’s ruling in *Milligan* and subsequent litigation in that case, and concludes with an analysis of considerations for Congress. An earlier CRS product, [Supreme Court Agrees to Hear Voting Rights Act Challenge to Congressional Redistricting Map and Stays Lower Court Ruling: Implications for Congress](#), provides background on Section 2 of the VRA and related Supreme Court precedent, as well as the lower courts’ procedural history and decisions.

## **Supreme Court Ruling in *Allen v. Milligan***

By a 5-4 vote, the Supreme Court in *Allen v. Milligan* affirmed a decision by a three-judge federal district court panel, along with a related federal district court ruling in [\*Allen v. Caster\*](#), that preliminarily enjoined Alabama election officials from holding elections under the state’s 2021 congressional redistricting plan because the plan likely violated Section 2 of the VRA. (This Sidebar, like the Court in *Milligan*, collectively refers to the two lower courts as “the district court.”) Chief Justice Roberts wrote the majority

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opinion, which was joined by Justices Jackson, Kagan, and Sotomayor in full and Justice Kavanaugh in part. (As discussed below, Justice Kavanaugh did not join [Part III-B-1](#) of the opinion, which addressed Alabama's proposed change to the first *Gingles* precondition.) The Court held that the district court, in finding that Alabama's redistricting plan violated Section 2 of the VRA, had "faithfully applied" the Court's 1986 precedent in *Thornburg v. Gingles* and that it could not identify a reason to alter the district court's "careful and factual findings" nor a basis to disturb the court's conclusions of law.

As stated by the Court in *Milligan*, *Gingles* has governed Section 2 cases since 1986 and establishes three "preconditions" that challengers must satisfy to prove a Section 2 violation:

1. "the minority group must be sufficiently large and [geographically] compact to constitute a majority in a reasonably configured 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 white majority votes sufficiently as a bloc to enable it ... to defeat the minority group's preferred candidate."

After meeting the three preconditions, according to the Court in *Milligan*, a challenger must then show, "under the 'totality of circumstances,' that the political process is not 'equally open' to minority voters," as evidenced by several relevant factors. In considering the totality of circumstances, a relevant factor includes "the extent of any history of official discrimination in the state ... that touched the right of the members of the minority group to register, to vote, or otherwise to participate in the democratic process."

Agreeing with the district court, the Supreme Court concluded that the challengers' claim against the Alabama map would likely prevail under the *Gingles* preconditions. Specifically, the Court [observed](#) that the challengers had presented 11 examples of redistricting maps that each contained two majority-Black districts and that the evidence indicated that Black voters could constitute a majority in a second district that was reasonably configured. Further, the Court agreed with the district court's conclusion "that there was 'no serious dispute that Black voters are politically cohesive, nor that the challenged districts' white majority votes sufficiently as a bloc to usually defeat Black voters' preferred candidate.'" Regarding the totality of circumstances analysis, the Court likewise observed that the district court had correctly determined that Black Alabamians are rarely elected to statewide office, that political campaigns are "characterized by overt or subtle racial appeals," and that Alabama's "extensive history of repugnant racial and voting-related discrimination is undeniable and well documented."

Turning to the arguments proffered by the State of Alabama in support of the map, the Supreme Court [criticized](#) the state for "attempt[ing] to remake" the Court's Section 2 case law "anew." According to the Court, the state had proposed that the Court adopt a "race-neutral benchmark" standard that would be ascertained by using computer technology to generate millions of possible redistricting maps in accordance with "traditional districting criteria but to not consider race." After determining "how many majority-minority districts exist in each map," among the millions of possible maps generated, the mapmaker would calculate the median or average number of such districts, which would be considered "the race-neutral benchmark." As the Court explained, Alabama had argued for this benchmark to serve as a point of comparison in Section 2 challenges because the maps generated to reach the benchmark did not take race into consideration. That is, Alabama had maintained that in Section 2 cases, courts should compare the number of majority-minority districts in a challenged map with the benchmark and, "[i]f those numbers are similar," then the challenged map "cannot have 'deni[ed] or abridge[d]' anyone's right to vote 'on account of race'" because race was not taken into "account" in creating the benchmark. As the Court observed, Alabama had proffered that the Section 2 requirement that political processes be "equally open" was tantamount to prohibiting burdens on voting that were based on race, and, ergo, a redistricting map that is similar to one that was created without racial considerations does not impose such burdens in violation of Section 2.

The Court majority identified several flaws with Alabama’s proposed standard, both in theory and in practice. For example, the Court [denounced](#) the proposed standard for “run[ning] headlong into [the Court’s] precedent” because compliance with Section 2 would be determined by whether a map “resembles a sufficient number of race-neutral alternatives.” Instead, the Court instructed courts to evaluate the “illustrative” redistricting maps that challengers are able to adduce under the first *Gingles* precondition, which may indicate a possibility that the challenged map “has a disparate effect on account of race.” The remainder of the *Gingles* factors will then help determine “whether that possibility is reality,” the Court explained, by examining the existence of any polarized voting and the extent to which the state has taken “racially discriminatory actions.” Further, the Court criticized the state for failing to present a standard whereby Section 2 violations are ascertained “based on the totality of circumstances,” as commanded by the statutory text. In contrast, the Court determined that the state’s proposed standard would result in *only one* circumstance being considered, i.e., how the number of majority-minority districts in the challenged map compares with the benchmark.

The Court majority also [critiqued](#) the state’s argument that the “race-neutral benchmark” standard was necessary because the *Gingles* precedent “inevitably demands racial proportionality” in a redistricting map and, therefore, conflicts with the express language of Section 2. (The last sentence of Section 2 provides “[t]hat nothing in this section establishes a right to have members of a protected class elected in numbers equal to their proportion in the population.”) Rejecting Alabama’s reasoning, the Court said that the *Gingles* precedent, “properly applied,” establishes significant constraints on proportionality, as evidenced by the Court’s case law. To illustrate, the Court noted that Section 2 lawsuits “ha[ve] rarely been successful” in recent years because racial segregation in housing has been decreasing across the country, thereby impeding compliance with the first *Gingles* precondition of compactness.

Further, the Court majority [disagreed](#) with Alabama’s contentions that Section 2 does not apply to single-member redistricting maps and is unconstitutional under the Fifteenth Amendment as applied to redistricting. According to the Court, a holding that Section 2 does not apply to single-member redistricting maps would be unreconcilable with over four decades of its precedents, which the Court was unwilling to overturn. Observing that Congress is aware that judicial precedent has construed Section 2 to apply to redistricting challenges, the Court emphasized that Congress could change the law should it wish. However, the Court stated that “statutory *stare decisis*” informs the Court to follow precedent. (The doctrine of *stare decisis* generally counsels that courts should adhere to precedent.) Similarly, the Court determined that the text of Section 2, which expressly applies to any “prerequisite to voting,” supports application of the law to single-member redistricting maps because “[i]t is hard to imagine many more fundamental ‘prerequisites’ to voting than determining where to cast your ballot or who you are eligible to vote for.” Finally, the Court rejected Alabama’s argument that the application of Section 2 to redistricting exceeds Congress’s power to legislate under the Fifteenth Amendment because it applies only to intentional discrimination. Dismissing that claim, the Court cited its 1980 ruling in *City of Rome v. U.S.*, holding that its prior cases “foreclose any argument” that Congress does not have the power under the Fifteenth Amendment to prohibit voting laws and practices that have a discriminatory effect.

As noted, Chief Justice Roberts wrote the opinion of the Court and [Part III-B-1](#), which Justice Kavanaugh [declined](#) to join. Therefore, three other Justices—Jackson, Kagan, and Sotomayor—joined Chief Justice Roberts’s opinion in Part III-B-1 that addressed Alabama’s proposed change to the *Gingles* first precondition. According to the Chief Justice in Part III-B-1, when evaluating a redistricting map under the first *Gingles* precondition, a court must distinguish between evidence indicating that a map was created with an *awareness* of racial considerations versus a *motivation* of racial considerations, emphasizing that the former is permitted while the latter typically is not. Further, Chief Justice Roberts’s opinion emphasizes that determining whether a majority-minority district can be created is a “quintessentially race-conscious calculus” because “Section 2 itself ‘demands consideration of race.’” However, the opinion cautions that race cannot be “the predominant factor” in creating a redistricting map absent “a compelling reason” and concludes that, in the illustrative maps submitted by the challengers in this case,

race did not predominate. Addressing Justice Thomas's dissent, Chief Justice Roberts disputed the contention that because they were drawn "with an express [racial] target in mind," racial predominance exists in all illustrative maps that challengers adduced under the first *Gingles* precondition. Instead, Part III-B-1 concludes that, in accordance with the Court's long-standing precedents, the argument that map creators need to "be entirely 'blind' to race has no footing in our §2 case law."

**Concurring** in all but Part III-B-1, Justice Kavanaugh emphasized, among other things, that the *stare decisis* standard for overturning a statutory precedent such as *Gingles*, as compared with a **constitutional precedent**, "is comparatively strict" because Congress and the President have the power to alter such precedent through legislation. Therefore, even though "statutory *stare decisis* is not absolute," Justice Kavanaugh wrote that the legislative process, not the courts, should "updat[e] or correct[] ... erroneous statutory precedents." Justice Kavanaugh also referenced a portion of Justice Thomas's dissenting opinion that argued that, even if Congress had the constitutional authority to enact Section 2 in 1982, the time period for that authority has a limit. In response, Justice Kavanaugh opined that the State of Alabama did not raise this argument, and therefore, he "would not consider it at this time." **Some** have **posited** that this aspect of Justice Kavanaugh's concurrence **might** signal future challenges to Section 2 based on a "**temporal argument**," similar to the basis of the Supreme Court's 2013 ruling in *Shelby County v. Holder*. In *Shelby County*, the Court invalidated **Section 4 of the VRA**, determining that while the law was constitutional at one time, "things have changed dramatically" in the nearly 50 years since its enactment.

In a **dissent**, Justice Thomas, joined by Justices Gorsuch, Barrett, in part, and Alito, in part, maintained that the Court's ruling in *Milligan* misconstrued Section 2 of the VRA and that the Court interpreted the law in an unconstitutional manner. Among other things, Justice Thomas argued that the Court's reliance on *stare decisis* in support of Section 2, in the context of single-member redistricting maps, is overstated because the Court has invalidated only one such map under Section 2. Further, Justice Thomas maintained that *stare decisis* should not be invoked to prevent reconsideration of Court precedent that was "based on a flawed method of statutory construction from its inception." Justice Thomas also contended that even if Section 2 applied in this case, the Alabama congressional redistricting map should be upheld because in applying a "race-neutral benchmark," which he maintained is the appropriate benchmark in Section 2 cases, the challengers cannot justify the creation of two majority-Black districts.

In a separate **dissent**, Justice Alito, joined by Justice Gorsuch, argued, among other things, that while *Gingles* is the appropriate precedent to apply in a Section 2 claim of vote dilution, the first precondition (i.e., that the challenger must produce an additional illustrative majority-minority district that is reasonably configured) applied by the Court in *Milligan* was erroneous. In the view of Justice Alito, a successful claim of vote dilution under Section 2 must demonstrate that a majority-minority district can be established without race as the predominant factor in its creation and that, in this case, "there is strong evidence that race played a predominant role in the production of the plaintiff's illustrative maps."

## Subsequent Litigation

On September 5, 2023, a three-judge federal district panel **preliminarily enjoined** a revised congressional redistricting map submitted by the State of Alabama. The district court determined that the revised map, which does not contain a "a second district in which Black voters have an opportunity to elect a candidate of their choice," likely violates the VRA. On September 7, the district court **ordered** a special master and cartographer to submit three proposed redistricting maps by September 25. On September 11, Alabama state officials **sought** a temporary stay of the district court ruling by the Supreme Court, and on September 26, the Court **denied** the stay.

The special master **submitted** the proposed redistricting maps on September 25, creating a second district where Black voters comprise a majority of the voting population. A **hearing** on the proposed maps has been tentatively scheduled for October 3.

## Implications and Considerations for Congress

The key takeaway from *Allen v. Milligan* is that Section 2, as interpreted by *Gingles*, “is an appropriate method of promoting the purposes of the Fifteenth Amendment.” Beyond Alabama, pending Section 2 challenges to redistricting maps—including congressional, state legislative, and local maps across the country—will most likely move forward in accordance with the *Milligan* decision. For example, litigation in *Ardoin v. Robinson*, involving a Section 2 challenge to Louisiana’s congressional redistricting map, resumed after the Supreme Court in June 2022 had held the case in abeyance until *Milligan* was decided. On June 26, 2023, the Supreme Court dismissed *Ardoin* and vacated the stay it had issued in 2022 so that the U.S. Court of Appeals for the Fifth Circuit can consider the case in the ordinary course prior to the 2024 Louisiana congressional elections. Furthermore, as a long-term consequence, future Section 2 challenges to redistricting maps under *Milligan* may be brought.

Should Congress consider legislation to amend the VRA, the Court’s decision in *Milligan* might increase the likelihood of a court upholding the constitutionality of a legislative remedy to a redistricting map that has a racially discriminatory effect. For example, in rejecting the State of Alabama’s argument that Section 2, as construed by *Gingles*, exceeds Congress’s authority under the Fifteenth Amendment, the Court stated,

[F]or the last four decades, this Court and the lower federal courts have repeatedly applied the effects test of §2 as interpreted in *Gingles* and, under certain circumstances, have authorized race-based redistricting as a remedy for state districting maps that violate §2.

Still, *Milligan* may not be the final word from the Supreme Court on this issue. For example, as discussed, Justice Kavanaugh referenced an argument that “the authority to conduct race-based redistricting cannot extend indefinitely,” although he declined to consider that argument in this case. Therefore, future Court rulings may add clarity to Congress’s authority to fashion such legislative remedies for redistricting maps under Section 2.

Looking ahead, cases that involve issues related to those in *Milligan* are percolating in the federal courts. As discussed in CRS product, *Recent Developments in the Rights of Private Individuals to Enforce Section 2 of the Voting Rights Act*, a case is pending in the U.S. Court of Appeals for the Eighth Circuit regarding *who* can sue to enforce Section 2 of the VRA. That case could ultimately be considered by the Supreme Court. In addition, the Supreme Court has agreed to hear another redistricting dispute, *Alexander v. South Carolina State Conference of the NAACP*, during its October 2023 Term.

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