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A REPRIEVE FOR DEMOCRACY: Reading *Allen v. Milligan* on the Sixtieth Anniversary of the Voting Rights Act

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INTRODUCTION

Voting is an act of faith. Faith that your vote will matter. Faith that your vote will make a difference. Faith in our democracy. In the years surrounding the 1965 passage of the Voting Rights Act (VRA), Black Americans had little reason to have such faith. Our streets and campuses were filled with protests in support of racial justice and opposition to faraway wars.¹ An unpopular president had declined to seek reelection. He was replaced on the ticket by his vice president who went on to face both a “law and order” candidate² and a populist promising to make America “stand up” again.³ All while Black people lagged far behind whites in voter registration, voter turnout, and elected representation in government.⁴ In response to the “cries of pain and the hymns and protests” of Black people, Congress enacted the VRA to offer the country a “cause for hope and for faith in our democracy.”⁵ As enacted, the VRA contained a “complex scheme of stringent remedies” that included Section 2, which barred racial discrimination in voting nationwide, and Section 5, which required states or other places with a history of discrimination to seek “preclearance” from the federal government before changing any laws or rules related to voting.⁶

The eve of the VRA’s sixtieth anniversary in 2025 reflects a troubling dichotomy. In too many ways, our country is facing trials that mirror the darkest days of the 1960s.⁷ And yet, the VRA has dramatically changed

¹ See generally Eric Ginsburg, *The Greensboro Sit-In Protests, Explained*, TEEN VOGUE (Feb. 1, 2019), <https://www.teenvogue.com/story/the-greensboro-sit-in-protests> [<https://perma.cc/4RUA-Q8JW>]; Wesley Lowery & Jacob Bogage, *Fifty Years After the ‘Black 14’ Were Banished, Wyoming Football Reckons With the Past*, WASH. POST (Nov. 30, 2019), https://www.washingtonpost.com/national/fifty-years-after-the-black-14-were-banished-wyoming-football-reckons-with-the-past/2019/11/30/fb7e9286-e93d-11e9-9c6d-436a0df4f31d_story.html; Daniel S. Levy, *Behind the Anti-War Protests That Swept America in 1968*, TIME (Jan. 19, 2018), <https://time.com/5106608/protest-1968/> [<https://perma.cc/G3PM-8KHU>]; Robert D. McFadden, *Remembering Columbia, 1968*, N.Y. TIMES (Apr. 25, 2008, 2:06 PM), <https://archive.nytimes.com/cityroom.blogs.nytimes.com/2008/04/25/remembering-columbia-1968/> [<https://perma.cc/ZE2Z-TBCH>].

² *The ‘Law and Order’ Campaign That Won Richard Nixon the White House 50 Years Ago*, WASH. POST (Nov. 5, 2018), <https://www.washingtonpost.com/history/2018/11/05/law-order-campaign-that-won-richard-nixon-white-house-years-ago/>.

³ See Brian Lyman, *George Wallace: A Segregationist Stand for America*, USA TODAY, <https://www.usatoday.com/story/news/nation-now/1968-project/2018/08/16/stand-up-america-george-wallaces-chaotic-prophetic-campaign/961043002/> [<https://perma.cc/B69Z-LL3A>] (last visited Nov. 18, 2024).

⁴ See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966) (noting that, in 1964, Black voter registration in Alabama, Louisiana, and Mississippi was only 19.4%, 31.8%, and 6.4%, respectively); *Shelby Cnty. v. Holder*, 679 F.3d 848, 862 (D.C. Cir. 2012) (noting that, in the six fully covered states in the South, the number of Black elected officials rose from 345 in 1965 to over 3,700 in 2006), *rev’d on other grounds*, 570 U.S. 529 (2013).

⁵ *President Lyndon Johnson’s Speech to Congress on Voting Rights, March 15, 1965*, NAT’L ARCHIVES, <https://www.archives.gov/legislative/features/voting-rights-1965/johnson.html> [<https://perma.cc/7BG4-EEYH>] (last updated Sept. 29, 2020).

⁶ *Katzenbach*, 383 U.S. at 315-16.

⁷ Keith Naughton, *Echoes of 1968: What Can We Learn About Harris-Trump From Humphrey-Nixon?*, THE HILL (July 26, 2024, 8:00 AM), <https://thehill.com/opinion/>

America, such that the 118th Congress is the most racially diverse ever.⁸ Still, *both* the VRA itself and public faith in American democracy are at low points. The exact causes of our waning faith in democratic institutions are hard to pinpoint. The VRA's woes are easier to identify. Its decline was triggered by the Supreme Court's 2013 decision in *Shelby County v. Holder*, which cut the heart out of the VRA by ending the Section 5 preclearance regime.⁹ For half a century, Section 5 had successfully protected the right to vote.¹⁰ By ending Section 5 preclearance, *Shelby County* opened the floodgates. The decision permitted old and new forms of racial discrimination to proliferate nationwide, but particularly in those southern states that had formerly been subject to preclearance review.¹¹ These states returned to both overt actions—like selective voter purges, cancelled elections, and restrictions on voter assistance that can act as *de facto* literacy tests¹²—and more subtle tactics—like gerrymandering and at-large elections¹³—that mirror

campaign/4792567-trump-harris-nixon-humphrey-2024-1968-compare/ [https://perma.cc/AD5D-H6NJ].

⁸ In the 2023-2024 Congress, 133 people of color served in the House of Representatives and the Senate, including the highest number of Senators of color: four Black, six Latino, and two Asian Americans. Following Senator Menendez's resignation, the number of Latino Senators dropped to five. JENNIFER E. MANNING, CONG. RSCH. SERV., R47470, MEMBERSHIP OF THE 118TH CONGRESS: A PROFILE 7-8 (2024), <https://crsreports.congress.gov/product/pdf/R/R47470> [https://perma.cc/J6GQ-GJF8].

⁹ *Shelby Cnty.*, 570 U.S. at 529.

¹⁰ *Id.* at 534-45.

¹¹ See, e.g., *N.C. NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (describing how North Carolina passed laws targeting Black voters with “almost surgical precision” on the day after the *Shelby County* decision); *Veasey v. Abbott*, 830 F.3d 216, 227, 264-65 (5th Cir. 2016) (finding that Texas reinstated a discriminatory voter ID law a day after *Shelby County*).

¹² See, e.g., *League of Women Voters of Fla. Inc. v. Fla. Sec’y of State*, 66 F.4th 905, 947 (11th Cir. 2023) (enjoining a state law that criminalized certain forms of voter assistance); *OCA-Greater Houston v. Texas*, 867 F.3d 604, 607 (5th Cir. 2017) (enjoining a state law that prevented certain low literacy or non-English speaking voters from receiving assistance); *Ala. NAACP v. Marshall*, No. 2:24-CV-00420, 2024 WL 4282082-RDP, at *6 (N.D. Ala. Sept. 24, 2024) (enjoining a state law that prevented voters who are disabled or illiterate from receiving the necessary assistance to vote absentee); *Braxton v. Town of Newbern*, No. 2:23-CV-00127, 2024 WL 3519193 (S.D. Ala. July 23, 2024) (enjoining a town that had refused to seat its first Black mayor who was elected after the town had refused to hold elections for decades); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 700 F. Supp. 3d 1136, 1270-75 (N.D. Ga. 2023) (cataloguing discriminatory state laws, voter purges, and polling place closures employed by state and local officials after *Shelby County*); *Rivera Madera v. Detzner*, 325 F. Supp. 3d 1269, 1275-78 (N.D. Fla. 2018) (enjoining state policies that violated the VRA's ban on English literacy tests for Puerto Rican voters); *N.C. NAACP v. Bipartisan Bd. of Elections & Ethics Enf't*, No. 1:16CV1274, 2018 WL 3748172, at *12 (M.D.N.C. Aug. 7, 2018) (enjoining a state from carrying out voter purges before an election).

¹³ See, e.g., *Wright v. Sumter Cnty. Bd. of Elections & Registration*, 301 F. Supp. 3d 1297, 1305 (M.D. Ga. 2018) (noting that discriminatory state laws adopting at-large county election seats went into effect after *Shelby County*), *aff'd*, 979 F.3d 1282 (11th Cir. 2020); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 681 (S.D. Tex. 2017) (finding that a city council enacted intentionally discriminatory at-large elections “two days” after *Shelby County*); *Ga. NAACP v. Fayette Cnty. Bd. of Comm’rs*, 118 F. Supp. 3d 1338, 1351 (N.D. Ga. 2015) (preventing a county from reverting from single-member districts to a racially discriminatory at-large election scheme ahead of a special election).

the discrimination that led Congress to enact, and repeatedly reenact, the VRA.¹⁴

Unfortunately, since *Shelby County*, the Supreme Court has largely declined to intervene on behalf of voters of color and has often issued decisions that further limit the reach of the VRA.¹⁵ For example, in 2021, the Court interpreted Section 2 in a way that gave States broad leeway to enact potentially discriminatory laws related to the “time, place, and manner” of holding elections.¹⁶

So, when in 2022, on the eve of the VRA’s sixtieth anniversary and *Shelby County*’s tenth anniversary, the Supreme Court chose to hear *Allen v. Milligan*, many feared the worst.¹⁷ The *Milligan* case began in November 2021. Black voters—including Evan Milligan, Shalela Dowdy, Letitia Jackson, and Khadidah Stone as well as the state NAACP and Greater Birmingham Ministries—alleged that Alabama’s newest seven-district congressional map discriminatorily “diluted” the votes of Black people in violation of the Constitution and Section 2 of the VRA.

Section 2 applies nationwide and prohibits any government actions that, under the “totality of circumstances,” may “result” in racial discrimination in voting.¹⁸ Since the 1960s, the Court has interpreted both Sections 2 and 5 of the VRA to forbid States from “diluting” the voting power of communities of color.¹⁹ “Vote dilution” occurs when a challenged plan or method of election “operate[s] to minimize or cancel out the voting strength of racial minorities” in a way that prevents minorities from electing their preferred candidates.²⁰

¹⁴ See, e.g., *South Carolina v. Katzenbach*, 383 U.S. 301, 313 (1966) (explaining that literacy tests had required Black voters to complete registration forms “without any outside assistance and without the slightest error”); *United States v. Mississippi*, 380 U.S. 128, 134 (1965) (describing a Jim Crow law that, among other things, required “that application forms . . . be filled out ‘properly and responsively’ by the applicant without any assistance”); *Gomillion v. Lightfoot*, 364 U.S. 339, 341 (1960) (addressing redistricting that removed nearly all Black voters from the city limits); *Sims v. Baggett*, 247 F. Supp. 96, 108-109 (M.D. Ala. 1965) (three-judge court) (enjoining discriminatory at-large multi-member redistricting plan); *United States v. Ass’n of Citizens Councils of La., Inc.*, 196 F. Supp. 908, 912 (W.D. La. 1961) (three-judge court) (enjoining a racially discriminatory voter purge program); *United States v. McElveen*, 180 F. Supp. 10, 14 (E.D. La. 1960) (three-judge court), *aff’d in part sub nom. United States v. Thomas*, 362 U.S. 58 (1960) (similar).

¹⁵ Compare *Abbott v. Veasey*, 580 U.S. 1104 (2018) (declining to grant cert in a challenge to a discriminatory state voting law), and *North Carolina v. N.C. NAACP*, 581 U.S. 985 (2017) (similar), with *Robinson v. Callais*, 144 S. Ct. 1171 (2024) (staying an injunction against a discriminatory voting law), and *Merrill v. People First of Ala.*, 141 S. Ct. 25 (2020) (same).

¹⁶ *Brnovich v. Democratic Nat’l Comm.*, 594 U.S. 647, 659-60 (2021).

¹⁷ See, e.g., James Romoser, *The Court Is Poised to Set Jurisprudence on Race for Generations—And Not Just in Affirmative Action*, SCOTUSBLOG (Oct. 30, 2022, 7:00 PM), <https://www.scotusblog.com/2022/10/the-court-is-poised-to-set-jurisprudence-on-race-for-generations-and-not-just-in-affirmative-action/> [https://perma.cc/U99J-2XP6].

¹⁸ 52 U.S.C. § 10301.

¹⁹ *Allen v. State Bd. of Elections*, 393 U.S. 544, 569 (1969); see also *Connor v. Finch*, 431 U.S. 407, 421-26 (1977); *White v. Regester*, 412 U.S. 755, 767 (1973); *Fortson v. Dorsey*, 379 U.S. 433, 439 (1965).

²⁰ *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986) (internal citation omitted).

In 1982, Congress amended Section 2 to make clear that plaintiffs need only prove that a challenged plan results in discrimination.²¹ The 1982 amendments made clear that a successful Section 2 claim does not require proof that a decisionmaker acted with discriminatory intent.²² In 1986, the Court further clarified in *Thornburg v. Gingles* the vote dilution standard under the amended Section 2.²³

Based on this well-hewn precedent, the *Milligan* plaintiffs alleged that Alabama's plan "cracked" the "Black Belt" community of eighteen majority-Black (or nearly-so) counties that run through the middle of the State.²⁴ The plaintiffs alleged that Alabama's cracking of the Black Belt submerged the Black voters there into a majority-white district where that majority would consistently as a bloc vote against the candidates preferred by nearly all Black voters.²⁵ According to the plaintiffs, Alabama's cracking of the Black Belt, racialized politics in the State, and Alabama's history of discrimination served to deny Black voters an equal opportunity to elect their preferred representatives to Congress.²⁶

In January 2022, a three-judge federal court unanimously agreed with the *Milligan* plaintiffs. The Court ruled, in an exhaustive 197-page preliminary injunction ruling, that Alabama's plan likely violated Section 2.²⁷ Alabama was ordered to add a second district in which Black voters in the Black Belt could elect candidates of their choice.²⁸ But the plaintiffs' victory was short lived. In February, Alabama successfully petitioned the Supreme Court to "stay" the decision (i.e., put it on hold) for the 2022 elections.²⁹ Chief Justice John Roberts voted with Justices Breyer, Sotomayor, and Kagan *not* to grant the stay.³⁰ The Court then set the case for argument in October 2022. In the months leading up to that argument, many legal commentators assumed that the question was not *whether* the Court would reverse the plaintiffs' victory, but *how* it would do so.³¹ The extreme positions taken by Alabama in its briefs only heightened this concern. Alabama argued that

²¹ *Id.* at 43-44.

²² *See id.* at 70-73.

²³ *Id.* at 50-51.

²⁴ *Singleton v. Merrill (Milligan I)*, 582 F. Supp. 3d 924, 952 (N.D. Ala. 2022). This case is also known as *Milligan v. Merrill*.

²⁵ *See id.* at 952-53.

²⁶ *See id.* at 953.

²⁷ *Id.* at 1026.

²⁸ *Id.* at 1033.

²⁹ *See Merrill v. Milligan*, 142 S. Ct. 879 (2022).

³⁰ *Id.* at 882-89.

³¹ *See, e.g.,* Ian Millhiser, *The Supreme Court's Astonishing, Inexplicable Blow to Voting Rights*, Vox (Feb. 8, 2022, 12:20 PM), <https://www.vox.com/2022/2/8/22922774/supreme-court-merrill-milligan-alabama-brett-kavanaugh-racial-gerrymandering-voting-rights-act> [<https://perma.cc/M5FU-GYKJ>]; Rick Hasen, *Breaking: Supreme Court, 5-4, Reinstates Alabama's Discriminatory Congressional Map Pending Appeal in Merrill v. Milligan*, ELECTION LAW BLOG (Feb. 7, 2022, 3:38 PM), <https://electionlawblog.org/?p=127501> [<https://perma.cc/U5U2-TGND>].

either Section 2 could only be violated where the plaintiffs showed (through computer simulated maps or other evidence) that the State's plan was unexplainable on grounds other than race, or that Section 2 itself was unconstitutional because it required governments to be conscious of race in drawing majority-minority or any other districts.³² The plaintiffs, however, aided by decades of precedent, argued that the three-judge trial court had faithfully applied existing law in striking down Alabama's map.³³ For example, the Court had long recognized that the use of race to cure violations of federal civil rights laws, like Section 2, is indisputably remedial and hence permissible.³⁴ Alabama sought to overturn this accepted interpretation. Similarly, the plaintiffs argued that Section 2 had long been understood as *not* requiring proof of discriminatory intent.³⁵ Yet, Alabama's "unexplainable-other-than-race" rule sought to reinstate an intent requirement.

In June 2023, the Chief Justice wrote for a five-justice majority (joined by Justices Sotomayor, Kagan, Kavanaugh, and Jackson) that Alabama had violated Section 2.³⁶ For the first time, the Court ruled in a written opinion that Section 2 is constitutional.³⁷ It also rejected Alabama's proposed changes to the Section 2 standard,³⁸ and eliminated several defenses that defendants have recently used to defeat Section 2 claims.³⁹ Stunningly, the Chief Justice's opinion in *Milligan* at times mirrored his *Shelby County* opinion—relying on similar language, structure, and reasoning to reach a different result.⁴⁰ Justice Kavanaugh largely joined the majority, but wrote a separate concurrence.⁴¹ Justice Thomas wrote a dissent that Justice Gorsuch joined in full, and Justices Alito and Barrett joined in part.⁴² Justice Alito, with Justice Gorsuch, wrote a separate dissent.⁴³

Although initially dismissed by some legal academics as merely "preserv[ing] the status quo,"⁴⁴ *Milligan* has already had a significant

³² Brief for Appellants at 22, 26, 29-31, 70-71, *Allen v. Milligan*, 599 U.S. 1 (2023) (Nos. 21-1086, 21-1087).

³³ Brief for *Milligan* Appellees at 24-26, *Allen v. Milligan*, 599 U.S. 1 (2023) (Nos. 21-1086, 21-1087); Brief for Caster Respondents at 24-26, 40-45, *Allen v. Milligan*, 599 U.S. 1 (2023) (Nos. 21-1086, 21-1087).

³⁴ See *Shaw v. Reno*, 509 U.S. 630, 653-57 (1993); *United Jewish Orgs., Inc. v. Carey*, 430 U.S. 144, 160-65, 168 (1977).

³⁵ *Thornburg v. Gingles*, 478 U.S. 30, 44 (1986).

³⁶ See *Allen v. Milligan (Milligan II)*, 599 U.S. 1, 9 (2023).

³⁷ *Id.* at 42.

³⁸ *Id.* at 30.

³⁹ *Id.* at 40.

⁴⁰ Compare *Milligan II*, 599 U.S. at 40 ("But history did not stop in 1960."), with *Shelby Cnty. v. Holder*, 570 U.S. 529, 532 (2013) ("But history did not end in 1965.").

⁴¹ See *Milligan II*, 599 U.S. at 42-45 (Kavanaugh, J., concurring).

⁴² *Id.* at 45-91 (Thomas, J., dissenting).

⁴³ *Id.* at 94-109 (Alito, J., dissenting).

⁴⁴ Melissa Murray & Steve Vladeck, *The Supreme Court's Voting Rights Act Ruling Is No Victory for Democracy*, WASH. POST (June 8, 2023), <https://www.washingtonpost.com/opinions/2023/06/08/supreme-court-alabama-redistricting-voting-rights-act/>.

impact on minority electoral representation. Relying on *Milligan*, courts have ordered the creation of new minority opportunity districts in Alabama, Louisiana, Georgia, Mississippi, North Dakota, and Washington.⁴⁵ This essay explains the significance of *Milligan* to Black representation in Alabama, specifically, and to representative democracy in America, generally.

In Part I, this essay briefly summarizes the Chief Justice's opinion and Justice Brett Kavanaugh's concurrence. Part II responds to commentators and explains how *Milligan* changed the landscape for voting rights advocates—leading to a succession of recent wins and serving as a rebuke to *Shelby County*. *Milligan* recognizes Congress's broad authority to enact anti-discrimination laws, which offers Congress a viable path to amending and strengthening the VRA. Part III addresses concerns raised since *Milligan*. For example, while Justice Kavanaugh's concurrence raises the possibility that Section 2 could “sunset” and become unconstitutional at some point in the future, this essay reads his concurrence, in conjunction with later developments in this case and others, as indications that Section 2 remains safe. Part IV similarly rejects as misguided concerns that the Court's more recent opinions in *Alexander v. South Carolina State Conference of the NAACP* and *Students for Fair Admissions v. Harvard College* signal any backpedaling on the Court's view of the VRA. Neither opinion involves the claims at issue in *Milligan*. Although both are problematic for other reasons, both *Students for Fair Admission* and *Alexander* reaffirmed the most important aspects of *Milligan* in helpful ways. Part V then considers the issues that *Milligan* failed to resolve. Finally, this essay concludes by explaining how *Milligan* offers a bright spot for litigators, activists, and legislators who wish to celebrate and strengthen the VRA ahead of its next sixty years.

This article is not Pollyannaish. In response to *Milligan*, states are exploring new defenses, some of which have been successful. Even after *Milligan*, several federal courts of appeals have dismissed Section 2 lawsuits based on the tired and recycled defenses that Section 2 lacks a private right of action, that Section 2 does not permit coalition claims, and that partisanship (not race) best explains racially polarized voting in certain places. While *Milligan* implicitly addressed some of these defenses, the Court's opinion still provides the States with opportunities for new mischief.

⁴⁵ See, e.g., *Robinson v. Ardoin*, 86 F.4th 574, 586 (5th Cir. 2023); see generally *Miss. NAACP v. State Bd. of Election Comm'rs*, No. 3:22-CV-734, 2024 WL 3275965 (S.D. Miss. July 2, 2024); *Nairne v. Ardoin*, No. CV 22-178, 2024 WL 492688 (M.D. La. Feb. 8, 2024); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 700 F. Supp. 3d 1136 (N.D. Ga. 2023); *Singleton v. Allen*, No. 2:21-CV-1291, 2023 WL 6567895, at *18 (N.D. Ala. Oct. 5, 2023); *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-CV-22, 2023 WL 8004576, at *17 (D.N.D. Nov. 17, 2023); *Soto Palmer v. Hobbs*, 686 F. Supp. 3d 1213, 1236 (W.D. Wash. 2023), cert. denied before judgment sub nom. *Trevino v. Palmer*, 144 S. Ct. 873 (2024).

I. THE *MILLIGAN* LITIGATION

In one sense, the VRA is a national story of how ordinary people, activists, politicians, and lawyers joined together to force America to live up to our ideals. But the VRA's story is also about the very specific experiences of Black people living in the Alabama Black Belt. Black Alabamians were at the forefront of the war to win the vote. Too many of them died in that battle.⁴⁶ In the early 1900s, it was Black Alabamians who brought some of the first Supreme Court cases against racist voting laws.⁴⁷ It was Black Alabamians who won the first successful Supreme Court challenges to racist literacy tests and racial gerrymanders.⁴⁸ Black Alabamians were also the first plaintiffs ever to win vote dilution cases anywhere.⁴⁹ In the 1950s, Black Alabamians launched the Montgomery bus boycott and the modern Civil Rights Movement.⁵⁰ It was the national broadcasts of state police beating Black Alabamians in Selma that inspired Congress to pass the VRA.⁵¹ Black Alabamians' loss in *City of Mobile v. Bolden* in 1980 spurred Congress to amend the VRA in 1982.⁵² And it was a case out of Alabama that led the Court to end the VRA's preclearance regime in 2013.⁵³

The *Milligan* litigation arises out of this tradition.

A. *The District Court Proceedings*

Milligan began as three separate lawsuits brought by Black voters challenging Alabama's redistricting of its congressional map after the 2020 census.⁵⁴ Redistricting is the process whereby, after each decennial census,

⁴⁶ See *Civil Rights Martyrs*, S. POVERTY L. CTR., <https://www.splcenter.org/what-we-do/civil-rights-memorial/civil-rights-martyrs> [<https://perma.cc/CU77-V9UT>] (last visited Oct. 27, 2024).

⁴⁷ See, e.g., *Giles v. Harris*, 189 U.S. 475 (1903); *Giles v. Teasley*, 193 U.S. 146 (1904).

⁴⁸ See, e.g., *Gomillion v. Lightfoot*, 364 U.S. 339 (1960) (racial gerrymandering); *Davis v. Schnell*, 81 F. Supp. 872 (S.D. Ala. 1949), *aff'd per curiam*, 336 U.S. 933 (1949) (literacy tests).

⁴⁹ See *Smith v. Paris*, 257 F. Supp. 901, 904 (M.D. Ala. 1966), *modified and aff'd*, 386 F.2d 979 (5th Cir. 1967); *United States v. Democratic Exec. Comm. of Barbour Cnty.*, 288 F. Supp. 943, 947-48 (M.D. Ala. 1968); *Sims v. Baggett*, 247 F. Supp. 96, 108-09 (M.D. Ala. 1965) (three-judge court).

⁵⁰ See Stewart Burns, *Montgomery Bus Boycott*, *ENCYCLOPEDIA OF ALA.* <https://encyclopediaofalabama.org/article/montgomery-bus-boycott/> [<https://perma.cc/XSH8-WACN>] (last updated Mar. 27, 2023).

⁵¹ See Lyndon B. Johnson, Remarks in the Capitol Rotunda at the Signing of the Voting Rights Act (Aug. 6, 1965); *The Senate Passes the Voting Rights Act*, U.S. SENATE, https://www.senate.gov/artandhistory/history/minute/Senate_Passes_Voting_Rights_Act.htm [<https://perma.cc/B6FR-4F67>] (last visited Oct. 26, 2024).

⁵² *Thornburg v. Gingles*, 478 U.S. 30, 35 (1986) (citing *City of Mobile v. Bolden*, 446 U.S. 55 (1980)).

⁵³ See *Shelby Cnty. v. Holder*, 570 U.S. 529, 530 (2013).

⁵⁴ The lawsuits are *Singleton v. Merrill*, No. 2:21-cv-1291-AMM (challenging the congressional map on constitutional grounds only), *Milligan v. Merrill*, No. 2:21-cv-1530-AMM (challenging the congressional map on constitutional and VRA statutory grounds), and *Caster v. Merrill*,

states redraw their district lines. The primary goal of redistricting is to ensure that each legislative district has roughly the same number of people in it.⁵⁵ Unfortunately, states often manipulate district lines to stop certain disfavored voters—such as racial groups or political opponents—from electing their candidates.⁵⁶ In certain circumstances, however, the VRA forbids states from drawing districts that deny racial minorities an opportunity to elect their preferred candidates.⁵⁷

After the 2020 census, Alabama was allocated seven congressional districts. In 1992, a court order required Alabama to draw at least one majority-Black district.⁵⁸ Since then, the legislature has consistently chosen to connect the City of Birmingham and the western Black Belt together to maintain a single majority-Black congressional district.⁵⁹ No Black person in Alabama has ever been elected to Congress from a majority-white district.⁶⁰ And, despite Black people making up about 47% of Alabama's population in 1870⁶¹ and 27% in 2020,⁶² Alabama has never had more than one Black person representing the State in Congress.⁶³ Despite the Black population growing from about 25% of the population in 1990⁶⁴ to about 27% in 2020 and the white population shrinking from 74% to 63% in that period,⁶⁵ Alabama has refused to draw a second majority-Black district.

No. 2:21-cv-1536-AMM (challenging the congressional map on VRA statutory grounds only). All three cases were brought in the United States District Court for the Northern District of Alabama.

⁵⁵ See *Reynolds v. Sims*, 377 U.S. 533, 554-60 (1964).

⁵⁶ See, e.g., *Clerveaux v. E. Ramapo Cent. Sch. Dist.*, 984 F.3d 213, 219, 228 (2d Cir. 2021) (affirming the conclusion that a school board had “lied” to minority leaders and shown “bad faith in wanting to maintain” a discriminatory system); *Pope v. Cnty. of Albany*, 94 F. Supp. 3d 302, 348 (N.D.N.Y. 2015) (concluding that a county “plainly ignored current concerns” of minority leaders in the redistricting process); *Black Political Task Force v. Galvin*, 300 F. Supp. 2d 291, 314-15 (D. Mass. 2004) (three-judge court) (finding that a state had “sacrificed racial fairness to the voters on the altar of incumbency protection” and used race to “manipulat[e] district lines to benefit two white incumbents”); *Larios v. Cox*, 300 F. Supp. 2d 1320, 1339-53 (N.D. Ga. 2004) (three-judge court) (per curiam) (invalidating plan where Democrats intentionally underpopulated Republican districts), *summarily aff’d*, 542 U.S. 947 (2004).

⁵⁷ See *Gingles*, 478 U.S. at 48-52.

⁵⁸ *Wesch v. Hunt*, 785 F. Supp. 1491, 1497-1500 (S.D. Ala. 1992), *aff’d sub nom. Camp v. Wesch*, 504 U.S. 902 (1992), and *aff’d sub nom. Figures v. Hunt*, 507 U.S. 901 (1993).

⁵⁹ *Singleton v. Merrill (Milligan I)*, 582 F. Supp. 3d 924, 1011 (N.D. Ala. 2022) (noting that the state had drawn “a ‘finger’ that reaches into Jefferson County for the apparent purpose of capturing Black population from the Birmingham area . . . (in some form, and basically the same form) in every congressional map since *Wesch*” in 1992).

⁶⁰ *Id.* at 970.

⁶¹ Dewey W. English, Jr., *Alabama’s Population: 1800 to the Modern Era*, AL.COM (Dec. 28, 2019, 10:00 AM), <https://www.al.com/news/2019/12/alabamas-population-1800-to-the-modern-era.html> [<https://perma.cc/KB6D-K4FV>].

⁶² *Milligan I*, 582 F. Supp. 3d at 936.

⁶³ Letter from Kathryn Sadasivan, NAACP Legal Def. Fund, et al., to Legislative Reapportionment Committee Members (Oct. 19, 2021), <https://www.naacpldf.org/wp-content/uploads/Letter-to-AL-Reapportionment-Committee-20211019-1-1.pdf> [<https://perma.cc/R6SQ-3L6T>].

⁶⁴ *Wesch v. Hunt*, 785 F. Supp. 1491, 1508 (S.D. Ala. 1992).

⁶⁵ *Milligan I*, 582 F. Supp. 3d at 977.

In 2021, the legislature enacted House Bill 1 (the 2021 plan), which again drew only one majority-Black district.⁶⁶ Three sets of plaintiffs sued: the *Singleton* plaintiffs who alleged that the plan was intentionally discriminatory and a racial gerrymander in violation of the Fourteenth Amendment; the *Caster* plaintiffs who alleged only that the plan violated Section 2; and the *Milligan* plaintiffs who alleged both that the plan both violated Section 2 and the Constitution.⁶⁷ Both *Singleton* and *Milligan* were consolidated for the preliminary injunction before the same three-judge district court.⁶⁸ Senior Eleventh Circuit Court Judge Stanley Marcus and District Court Judges Anna Manasco and Terry Mooror sat on the panel.⁶⁹ The defendants and intervenors in the three cases were Alabama Secretary of State John Merrill and the chairs of the state legislature's redistricting commission, State Senator Jim McClendon and State Representative Chris Pringle.⁷⁰

The court proceeded rapidly from discovery to an evidentiary hearing in early January 2022. With incredible speed, the Court then issued its preliminary injunction at the end of January.⁷¹ As the Court noted, the "transcript of the preliminary injunction hearing span[ned] nearly 2,000 pages."⁷² The record included "more than 400 pages of prehearing briefing and 600 pages of post-hearing briefing; reports and rebuttal reports from every expert witness; more than 350 hearing exhibits; joint stipulations of fact that span seventy-five pages; and able argument by the forty-three lawyers who have appeared in the litigation."⁷³

The opinion focused on Section 2 claims of the *Milligan* and *Caster* plaintiffs (hereinafter the "VRA Plaintiffs"). The Court declined to rule on the constitutional claims of the *Singleton* or *Milligan* plaintiffs.⁷⁴ Under *Gingles*, a Section 2 plaintiff "must prove three threshold conditions" to win: "first, that the minority group is sufficiently large and geographically compact to constitute a majority in a . . . district; second, that [the minority group] is politically cohesive; and third, that the white majority votes

⁶⁶ H.B. 1, 2021 Leg., 2d Spec. Sess. (Ala. 2021).

⁶⁷ See generally *Milligan I*, 582 F. Supp. 3d at 934-37.

⁶⁸ *Id.*

⁶⁹ *Id.*

⁷⁰ *Id.*

⁷¹ Preliminary relief is rare in Section 2 cases. As of 2013, preliminary injunctions were issued in fewer than one-quarter of the ultimately successful Section 2 suits. Transcript of Oral Argument at 38:12-17, *Shelby Cnty. v. Holder*, 570 U.S. 529 (2013) (No. 12-96) (statement of Attorney General Verrilli). On average, it takes two to five years to litigate a Section 2 case to judgment. See *Voting Rights Act: Section 5 of the Act—History, Scope, and Purpose: Hearing Before the Subcomm. on the Constitution of the H. Comm. on the Judiciary*, 109th Cong. 92 (2005).

⁷² *Milligan I*, 582 F. Supp. 3d at 936.

⁷³ *Id.*

⁷⁴ *Id.* at 1035 ("This restraint is consistent with the longstanding canon of constitutional avoidance, which has particular salience when a court considers (as we do here) a request for equitable relief, and which is commonly applied by three-judge courts in redistricting cases that involve both constitutional and statutory claims.") (internal citations omitted).

sufficiently as a bloc to enable it usually to defeat the minority's preferred candidate."⁷⁵

The State focused its Section 2 defense on the *Gingles* preconditions, particularly, the first *Gingles* precondition. With respect to the first *Gingles* threshold, Alabama claimed that all eleven of the plaintiffs' illustrative maps with two majority-Black congressional districts were illegal racial gerrymanders.⁷⁶

Alabama's arguments about "racial gerrymandering" were based on a series of Supreme Court decisions from the 1990s. Since its 1993 decision in *Shaw v. Reno*, the Supreme Court has allowed voters who have been placed in majority-minority districts to challenge those districts under the Fourteenth Amendment as illegal "racial gerrymanders."⁷⁷ These racial gerrymandering cases have eroded the ability of voters to win Section 2 cases. The Court's racial gerrymandering decisions are premised on the notion that placing voters into majority-minority districts in which "individuals who belong to the same race, but who are otherwise widely separated by geographical and political boundaries, and who may have little in common with one another but the color of their skin, bears an uncomfortable resemblance to political apartheid."⁷⁸ According to the Court, such "racially gerrymandered" majority-minority districts "reinforce[] the perception that members of the same racial group—regardless of their age, education, economic status, or the community in which they live—think alike, share the same political interests, and will prefer the same candidates at the polls."⁷⁹ Thus, a plaintiff can succeed on a racial gerrymandering claim only where the plaintiff can show that race was the "predominant" factor motivating the design of a district.⁸⁰ A racially gerrymandered district is unconstitutional unless it is justified by a compelling interest, like a state's good faith effort to remedy a violation of the VRA.⁸¹ In the 1990s, states began to rely on *Shaw* and its progeny as a basis for refusing to draw new majority-minority districts and, too often, courts also cited the *Shaw* cases in rejecting Section 2 claims.⁸²

In the 1990s and 2000s, the *Shaw* cases wreaked havoc on representation for people of color in Congress, state legislatures, and other elected

⁷⁵ *Grove v. Emison*, 507 U.S. 25, 40 (1993).

⁷⁶ *Milligan I*, 582 F. Supp. 3d at 1029-30.

⁷⁷ *Shaw v. Reno*, 509 U.S. 630, 641 (1993).

⁷⁸ *Id.* at 647.

⁷⁹ *Id.*

⁸⁰ *Miller v. Johnson*, 515 U.S. 900, 915-16 (1995).

⁸¹ *Id.* at 920-21.

⁸² *See, e.g., Abrams v. Johnson*, 521 U.S. 74, 90-95 (1997) (holding that a court-ordered plan with only one majority-minority district did not violate Section 2, and that the court "acted well within its discretion in deciding it could not draw two majority-black districts without itself engaging in racial gerrymandering"); *Stabler v. Cnty. of Thurston*, 129 F.3d 1015, 1025 (8th Cir. 1997) (rejecting a Section 2 claim due to the "bizarre shape of the [plaintiffs'] proposed districts").

bodies. For example, in the years after *Gingles*, Black voters won 175 Section 2 cases.⁸³ That number dipped to 80 wins in 1995, then nosedived to only six wins in 2001.⁸⁴ Courts spent more time striking down majority-minority districts than creating new ones.⁸⁵ For example, in Georgia, Texas, and North Carolina, the Supreme Court struck down new majority-minority congressional districts, which states had drawn to remedy violations of Section 5 of the VRA.⁸⁶ The Supreme Court upheld only a handful of remedial minority opportunity districts in Florida, Illinois, and California.⁸⁷ Courts in Louisiana, South Carolina, New York, and elsewhere struck down even more majority-minority districts.⁸⁸

In *Milligan*, Alabama relied on *Shaw* to argue that the plaintiffs' map-drawers were predominately motivated by race. Alabama alleged that the plaintiffs had disregarded traditional districting criteria like compactness, contiguity, and respect for county and municipal lines and communities of interest.⁸⁹ To demonstrate this point, Alabama argued that race alone had driven the VRA plaintiffs' decision to connect the City of Mobile with the Black Belt, which split Mobile County and separated it from neighboring Baldwin County.⁹⁰ Next, Alabama argued that, in contrast, the Legislature had relied on the race-neutral standard of "core preservation" in drawing the 2021 plan.⁹¹ That is, Alabama had simply drawn the 2021 plan as closely as possible to its past plans. For example, the State simply kept the existing majority-Black district—drawing no more and no less. Finally, the State asserted that the thousands of computer simulated maps generated by the plaintiffs' experts had, in fact, shown that race illegally drove the design of the plaintiffs' plans.⁹² The experts had used powerful computer programs to draw these simulations, which ignored race to draw maps based on some (but not all) of the State's redistricting criteria. The plaintiffs' expert had

⁸³ Morgan Kousser, *Do the Facts of Voting Rights Support Chief Justice Roberts's Opinion in Shelby County?*, *TRANSATLANTICA* 1, 10 fig.3 (2015). <https://gould.usc.edu/assets/docs/workshops-and-conferences/downloads/1000120.pdf> [https://perma.cc/3NTA-GLTW].

⁸⁴ *Id.*

⁸⁵ See Michael J. Pitts, *What Has Twenty-Five Years of Racial Gerrymandering Doctrine Achieved?*, 9 U.C. IRVINE L. REV. 229, 256-57 (2019) (discussing how "racial gerrymandering doctrine limited increases in descriptive representation" in the 1990s).

⁸⁶ *Bush v. Vera*, 517 U.S. 952 (1996); *Shaw v. Hunt*, 517 U.S. 899 (1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

⁸⁷ *Lawyer v. Dep't of Justice*, 521 U.S. 567, 580-83 (1997); *King v. Ill. Bd. of Elections*, 979 F. Supp. 619 (N.D. Ill. 1997), *aff'd*, 522 U.S. 1087 (1998); *DeWitt v. Wilson*, 856 F. Supp. 1409 (E.D. Cal. 1994) (three-judge court), *aff'd*, 515 U.S. 1170 (1995).

⁸⁸ *Clark v. Putnam County*, 293 F.3d 1261, 1278-79 (11th Cir. 2002); *Diaz v. Silver*, 978 F. Supp. 96, 131 (E.D.N.Y. 1997) (three-judge court); *Hays v. Louisiana*, 936 F. Supp. 360, 363 (W.D. La. 1996) (three-judge court); *Smith v. Beasley*, 946 F. Supp. 1174, 1210-11 (D.S.C. 1996) (three-judge court).

⁸⁹ *Singleton v. Merrill (Milligan I)*, 582 F. Supp. 3d 924, 955, 999 (N.D. Ala. 2022).

⁹⁰ *Id.* at 958-87.

⁹¹ *Id.* at 991.

⁹² *Id.* at 999.

sought to use the simulations to show that Alabama was lying in asserting that race had played no role in the design of the 2021 plan.⁹³ But, because none of the simulated maps included two majority-Black districts, Alabama tried to turn the evidence against the plaintiffs. It argued that the simulations showed that race predominated in the plaintiffs' plans. According to Alabama, Section 2 either required the plaintiffs to draw their maps in a race-blind manner or, at least, required the plaintiffs to show that race had not predominated in their plans.⁹⁴

The district court found three glaring problems with Alabama's arguments. First, the Court found that the plaintiffs' experts had drawn maps that respected traditional districting criteria at least as well as and, at times, better than Alabama's 2021 plan.⁹⁵ For example, the plaintiffs' plans had split the same or fewer counties and cities than the Alabama plan, and the plans scored similarly on measures of compactness.⁹⁶ The plaintiffs' plans also better respected communities of interest, particularly the Alabama Black Belt. The Court found that the Black Belt had a "shared history and common economy."⁹⁷ All expert and fact witnesses consistently testified to the region's shared "demographic, cultural, historical, and political issues, about how the Black Belt became the Black Belt, how it has changed over time, and what shared experiences and concerns there make it unique today."⁹⁸ The Court heard similar testimony about how City of Mobile residents "have more in common with the Black Belt region . . . than they do with Baldwin County," and what "Mobile has in common with the Black Belt."⁹⁹ In contrast, Alabama offered only one credible witness—a former congressman—to testify as to the alleged relationship between Mobile and Baldwin Counties. The former congressman "simply explained the political advantages that likely would accrue for those areas if they are able to be kept together."¹⁰⁰ As the district court found, however, Alabama itself had split Mobile and Baldwin Counties in the 2021 and 2011 state board of education districts as well as in congressional plans for decades until the 1970s.¹⁰¹

Second, the district court rejected Alabama's core retention defense.¹⁰² It found that the Legislature's own redistricting guidelines did not prioritize core preservation. It concluded that "a significant level of core disruption" is to "be expected" in drawing an illustrative plan because "the entire reason

⁹³ *Id.* at 999.

⁹⁴ *Id.*

⁹⁵ *Milligan I*, 582 F. Supp. 3d at 1009, 1012.

⁹⁶ *Id.*

⁹⁷ *Id.* at 1014.

⁹⁸ *Id.*

⁹⁹ *Id.* at 980, 996.

¹⁰⁰ *Id.* at 1015.

¹⁰¹ *Id.*

¹⁰² *Id.* at 1016.

for the remedial map is to draw a second majority-minority district that was not there before.”¹⁰³ The judges found that allowing core preservation to trump a valid Section 2 claim would “turn the law upside-down, immunizing states from liability under Section 2 so long as they have a longstanding, well-established map, even in the face of a significant demographic shift.”¹⁰⁴ Alabama was faced with just such a demographic shift. In 1992, the year the State was first ordered to adopt a plan with a majority-Black district, Alabama’s population was about 74% white and 26% Black.¹⁰⁵ In 2020, whites had shrunk to 63% of the population¹⁰⁶ and Black Alabamians had grown to 27% of the population.¹⁰⁷ Yet, under Alabama’s 2021 plan, white voters controlled 86% of the seven congressional districts and were substantially overrepresented in Congress as compared to Black voters who held a majority in only 14% of districts. Indeed, even with a second Black district, white voters would still be overrepresented in Congress with control over 71.5% of districts.¹⁰⁸

Third, the district court declined to credit Alabama’s misreading of *Gingles*. Instead, it credited the plaintiffs’ expert testimony that their plans considered race “only to the extent necessary” to comply with Section 2.¹⁰⁹ The judges again noted that the plaintiffs’ plans performed better than the State’s plan on traditional redistricting criteria.¹¹⁰ In denying Alabama’s request for a stay, the district court went further to reject Alabama’s assertions about the relevance of the simulations.¹¹¹ It found that Alabama’s argument that the simulations required a finding that race predominated in the plaintiffs’ plans was “a bridge too far.”¹¹² It explained that, at best, the simulations merely “suggest that some awareness of race likely is required to draw two majority-Black districts.”¹¹³ The district court then enjoined Alabama’s plan ahead of the 2022 elections and ordered Alabama to adopt a remedial plan with “two districts in which Black voters either comprise a voting-age majority or something quite close to it.”¹¹⁴

Unfortunately, shortly after the issuance of the district court opinion, Alabama sought a stay from the Supreme Court. The Supreme Court voted 5-4 to grant that stay request, which put the injunction on hold for the 2022

¹⁰³ *Id.*

¹⁰⁴ *Id.*

¹⁰⁵ *Id.* at 977.

¹⁰⁶ *Id.*

¹⁰⁷ *Id.* at 936.

¹⁰⁸ *Id.* at 982.

¹⁰⁹ *Id.* at 962.

¹¹⁰ *Id.* at 962, 1016.

¹¹¹ *Singleton v. Merrill*, No. 2:21-CV-1291, 2022 WL 272636, at *5 (N.D. Ala. Jan. 27, 2022).

¹¹² *Id.*

¹¹³ *Id.*

¹¹⁴ *Milligan I*, 582 F. Supp. 3d at 936.

elections.¹¹⁵ Justice Kavanaugh voted with Justices Thomas, Alito, Gorsuch, and Barrett to grant the stay.¹¹⁶ He wrote a concurrence, joined by Justice Alito, in which he said that the merits of the case played no role in his vote.¹¹⁷ Rather, Justice Kavanaugh focused primarily on the fact that absentee voting for the May primary elections was scheduled to begin “just seven weeks from now, on March 30.”¹¹⁸ Justice Kavanaugh also found that the merits of the case were not “clearcut in favor of the plaintiff”; rather, he believed that both the State and the plaintiffs had “at least a fair prospect of success.”¹¹⁹ In contrast, the Chief Justice voted with Justices Breyer, Sotomayor, and Kagan to deny the stay.¹²⁰ Chief Justice Roberts concluded that “the District Court properly applied existing law in an extensive opinion with no apparent errors for our correction.”¹²¹ Justice Kagan, joined by Justices Breyer and Sotomayor, also dissented, and criticized the Court’s grant of a stay when the primary election was still four months away.¹²²

B. *The Supreme Court Opinions*

In June 2023, the Court issued its 5-4 decision affirming the district court.¹²³ Chief Justice Roberts wrote the majority opinion. He began by describing the history of the VRA, including the compromise struck by Congress in amending Section 2 in 1982.¹²⁴ The Court then considered the extensive and largely undisputed evidence of a Section 2 violation in the case. The Supreme Court affirmed the district court’s findings that racially polarized voting in Alabama is “‘intens[e],’ ‘very strong,’ and ‘very clear’”; that white bloc voting regularly defeated Black candidates; and that, under the totality of circumstances, “political campaigns in Alabama had been ‘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.’”¹²⁵ The Court saw “no reason to disturb the District Court’s careful factual findings, which are subject to clear error review.”¹²⁶

¹¹⁵ *Milligan I*, 582 F. Supp. 3d at 924 (N.D. Ala. 2022), *cert. granted sub nom. Merrill v. Milligan*, 142 S. Ct. 879, 879 (2022).

¹¹⁶ *Id.*

¹¹⁷ *Id.* at 879. (Kavanaugh, J., concurring in the grant of applications for stays)

¹¹⁸ *Id.*

¹¹⁹ *Id.* at 881 & n.2.

¹²⁰ *Id.* at 882-883 (Roberts, C.J., dissenting); *id.* at 883-889 (Kagan, J., dissenting).

¹²¹ *Id.* at 882 (Roberts, C.J., dissenting).

¹²² *Id.* at 883-889 (Kagan, J., dissenting).

¹²³ *Allen v. Milligan (Milligan II)*, 599 U.S. 1, 1 (2023).

¹²⁴ *Id.* at 9-16.

¹²⁵ *Id.* at 22.

¹²⁶ *Id.* at 23.

Next, the Chief Justice turned to the core issues in the case. In its briefs, Alabama advanced several radical arguments. First, Alabama argued that the district court clearly erred in finding that the VRA plaintiffs' plans satisfied the first *Gingles* precondition (*Gingles* I).¹²⁷ According to Alabama, the plaintiffs' plans were not "reasonably configured" because they split the alleged community of interest in Mobile and Baldwin Counties and ignored the State's purported goal of "core preservation."¹²⁸ The Court made short work of these arguments. It affirmed that the evidence about Mobile and Baldwin was "insufficient to sustain Alabama's overdrawn argument."¹²⁹ The Court also recognized that any illustrative plan will "naturally fare worse" than a state plan on core retention metrics.¹³⁰ It rejected the defense of core preservation. The Court did so because it recognized that permitting states to rely on core retention as a Section 2 defense would permit a State to "immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan."¹³¹ Thus, the Court held that the plaintiffs satisfied *Gingles* I.

Second, the Court addressed the "heart" of the case—"Alabama's attempt to remake our § 2 jurisprudence anew."¹³² Alabama had asked the Court to adopt a standard whereby the illustrative plan that plaintiffs produced to satisfy *Gingles* I could not have been "based" on race.¹³³ Alabama would require plaintiffs to prove a violation with illustrative plans that resemble a "race blind" benchmark. Thereafter, according to Alabama, a plaintiff would need to demonstrate that the State's plan also diverges from this race-blind benchmark, and that any identified deviation between a State's plan and that benchmark is explainable "only" by race—not by "the State's naturally occurring geography and demography."¹³⁴ The Court, however, rejected Alabama's proposal for "run[ning] headlong into [the Court's] precedent."¹³⁵ The Court noted that the purpose of *Gingles* I is to show the possibility of a remedy, and that Alabama's standard would reduce the "totality of circumstances" analysis to just one "circumstance"—the extent to which the plaintiffs' illustrative plans match up with "race-blind" alternative plans.¹³⁶ The Court also found that a standard premised on race-blind benchmarks would "fare[] poorly" in practice.¹³⁷ This is because the

¹²⁷ Brief for Appellants, *supra* note 32, at 64.

¹²⁸ *Milligan II*, 599 U.S. at 20.

¹²⁹ *Id.* at 21.

¹³⁰ *Id.* at 22.

¹³¹ *Id.*

¹³² *Id.* at 23.

¹³³ *Id.* at 24.

¹³⁴ *Milligan II*, 599 U.S. at 24.

¹³⁵ *Id.* at 25.

¹³⁶ *Id.* at 26.

¹³⁷ *Id.* at 30.

simulations Alabama sought to rely on as a benchmark offered inadequate comparators. The *Milligan* experts' simulations, among other things, failed to account for all the State's redistricting guidelines.¹³⁸ The Court also found the test inconsistent with Section 2's text and impracticable.¹³⁹ Computerized simulations did not exist when Congress amended Section 2 in 1982, and so Congress could not have intended them as a benchmark.¹⁴⁰ Moreover, the Court recognized that these "computer simulations . . . are technically complicated, expensive to produce, and available to [o]nly a small cadre of university researchers"¹⁴¹ Even if it were practicable to require the use of simulations in every Section 2 case (and it is not), the Court noted the scientific consensus that a "comprehensive survey of [all plans within a State] is impossible" because the "number of possible districting maps in Alabama is at least in the trillion trillions."¹⁴² Regarding Alabama's claim that Section 2 plaintiffs must prove that a State's plan deviates from a race-blind benchmark for reasons that "can be explained *only* by racial discrimination," the Court noted that such a rule would gut the 1982 amendments, whereby Congress eliminated any intent requirement.¹⁴³

Finally, the Court rejected Alabama's textual and constitutional arguments that Section 2 does not apply to redistricting cases.¹⁴⁴ The Court noted that it had "applied [Section] 2 to States' districting maps in an unbroken line of decisions stretching four decades."¹⁴⁵ Even Alabama's own reading of the text supported the Court's view that Section 2 applied to redistricting schemes.¹⁴⁶ With respect to Alabama's attack on the constitutionality of Section 2 and court-ordered remedies thereunder, the Chief Justice found that Congress had acted within its authority under the Fifteenth Amendment in enacting the Section 2 results test, and that, "under certain circumstances," the Constitution permits the use of "race-based redistricting as a remedy" in Section 2 litigation.¹⁴⁷

In a concurrence, Justice Kavanaugh agreed with the majority that Alabama's proposed standard conflicted with existing precedent.¹⁴⁸ He emphasized that, in cases involving challenges to existing interpretations of federal statutes, the Court should defer to "statutory *stare decisis*."¹⁴⁹ Given that Congress had left the *Gingles* standard undisturbed for nearly

¹³⁸ *Id.* at 34.

¹³⁹ *Id.* at 24.

¹⁴⁰ *Milligan II*, 599 U.S. at 35-36.

¹⁴¹ *Id.* at 36 (internal quotation omitted) (alteration in original).

¹⁴² *Id.* at 36-37.

¹⁴³ *Id.* (internal quotation omitted) (emphasis in original).

¹⁴⁴ *Id.* at 38.

¹⁴⁵ *Id.*

¹⁴⁶ *Milligan II*, 599 U.S. at 39.

¹⁴⁷ *Id.* at 41.

¹⁴⁸ *Id.* at 42 (Kavanaugh, J., concurring).

¹⁴⁹ *Id.*

four decades, Justice Kavanaugh explained that the Court should leave “the updating or correction of erroneous statutory precedents to the legislative process.”¹⁵⁰ Justice Kavanaugh did not join a short portion of the Chief Justice’s opinion wherein a plurality of the Court credited the plaintiffs’ expert’s testimony and affirmed a finding that race had not predominated in the plaintiffs’ illustrative plan.¹⁵¹ But he did join a separate part of the majority opinion, in which the Court recognized that the “very reason a plaintiff adduces a map at the first step of *Gingles* is precisely *because of its racial composition*—that is, because it creates an additional majority-minority district that does not then exist.”¹⁵² Justice Kavanaugh also agreed that computer simulations are unhelpful benchmarks.¹⁵³ He acknowledged that the plaintiffs’ plans had satisfied *Gingles* I, at least in part, because their plans performed as well as the State’s on the traditional criteria.¹⁵⁴ Finally, he agreed with the majority that Section 2 is constitutional, and that race-based remedial redistricting can be constitutional.¹⁵⁵

Nevertheless, Justice Kavanaugh left open the possibility that “even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future”—an issue raised by Justice Thomas in his dissent, but not raised by Alabama in its appellate briefs.¹⁵⁶ Justice Thomas filed a dissent, which the other three dissenters joined in part.¹⁵⁷ Justice Thomas agreed with Alabama that Section 2 is inapplicable to redistricting claims.¹⁵⁸ He questioned the wisdom of the *Gingles* standard and, more broadly, chastised the Court for continuing to intervene in the States’ redistricting processes.¹⁵⁹ Justice Alito also filed a separate dissent, explaining why he would have abandoned *Gingles* for Alabama’s race-blind test.¹⁶⁰

C. *Proceedings on Remand from the Supreme Court*

On remand from the Supreme Court, the Alabama Legislature enacted a new redistricting plan (the 2023 plan).¹⁶¹ Under the 2023 plan, Alabama drew one majority-Black district and a second district with a Black voting-age

¹⁵⁰ *Id.*

¹⁵¹ *Id.*; see also *id.* at 30.

¹⁵² *Milligan II*, 599 U.S. at 34 n.7 (majority opinion) (emphasis in original).

¹⁵³ *Id.* at 44 (Kavanaugh, J., concurring).

¹⁵⁴ *Id.* at 43.

¹⁵⁵ *Id.* at 45.

¹⁵⁶ *Id.*

¹⁵⁷ *Milligan II*, 599 U.S. at 45 (Thomas, J., dissenting).

¹⁵⁸ *Id.* at 53-54.

¹⁵⁹ *Id.* at 67-73.

¹⁶⁰ *Id.* at 94 (Alito, J., dissenting).

¹⁶¹ *Singleton v. Allen (Milligan III)*, 690 F. Supp. 3d 1226, 1238 (N.D. Ala. 2023).

population of about 39%.¹⁶² This plan spilt the Black Belt between two districts, but kept Mobile and Baldwin Counties together in one district.¹⁶³

Faced with this plan and objections from the *Milligan*, *Caster*, and *Singleton* plaintiffs, the district court enjoined the 2023 plan as well.¹⁶⁴ Incredulous, the district court noted that it was “not aware of any other case in which a state legislature—faced with a federal court order declaring that its electoral plan unlawfully dilutes minority votes and requiring a plan that provides an additional opportunity district—responded with a plan that the state concedes does not provide that district.”¹⁶⁵ Indeed, Alabama was candid in admitting that, in general elections in the 39% Black district, white candidates “always defeated Black candidates.”¹⁶⁶ The court thus enjoined the 2023 plan and appointed a special master to draw a map with two Black opportunity districts.¹⁶⁷

Alabama again appealed this ruling and sought a stay from the Supreme Court. In its stay brief, among other defenses, Alabama raised the argument flagged in Justice Kavanaugh’s concurrence and Justice Thomas’s dissent. The State asserted that, “[i]f left undisturbed, the District Court’s understanding of §2 will require the intentional creation of race-based districts to ‘extend indefinitely into the future.’”¹⁶⁸ In response, the plaintiffs explained that “the *Gingles* standard itself incorporates a host of safeguards that account for *current conditions*, which function as a ‘de facto sunset date’ for [Section 2].”¹⁶⁹ In fact, *Milligan* itself recognized that “as residential segregation decreases” it will continue to “become[] more difficult” for Section 2 plaintiffs to “satisfy[] traditional districting criteria such as the compactness requirement.”¹⁷⁰

This time, the Supreme Court denied Alabama’s stay with no noted dissents.¹⁷¹ The district court then proceeded with adopting the special master plan with two Black opportunity districts for the 2024 elections.¹⁷² Alabama, however, continues to defend the 2023 plan. The case will go to trial in early 2025.¹⁷³

¹⁶² *Id.* at 1243-45.

¹⁶³ *Id.*

¹⁶⁴ *Id.* at 1296-1320.

¹⁶⁵ *Id.* at 1239.

¹⁶⁶ *Id.* at 1274-76.

¹⁶⁷ *Id.* at 1320-21.

¹⁶⁸ Emergency Application for Stay Pending Appeal to the Supreme Court of the United States at 34, *Allen v. Milligan*, 144 S. Ct. 476 (2023) (No. 23A231).

¹⁶⁹ *Milligan* Respondents’ Opposition to Emergency Application for Stay Pending Resolution of Direct Appeal to this Court at 39, *Allen v. Milligan*, 144 S. Ct. 476 (2023) (No. 23A231).

¹⁷⁰ *Allen v. Milligan (Milligan II)*, 599 U.S. 1, 28-29 (2023).

¹⁷¹ *Allen v. Milligan*, 144 S. Ct. 476 (2023) (denying application for stay).

¹⁷² *Singleton v. Allen*, No. 2:21-CV-1291, 2023 WL 6567895 (N.D. Ala. Oct. 5, 2023).

¹⁷³ *Allen v. Milligan*, AM. C.L. UNION, <https://www.aclu.org/cases/thomas-v-allen-and-milligan-v-merrill> [https://perma.cc/TE69-FQL2] (last updated Oct. 5, 2023) (“Despite these

II. THE MEANING OF *MILLIGAN*

Days after the *Milligan* ruling, prominent left-leaning legal academics rushed to publicly question its relevance. In an op-ed, Professors Melissa Murray and Steve Vladeck boldly called the decision “no victory for democracy,” bluntly asserting that it “does not strengthen the act” and instead “merely preserves the status quo.”¹⁷⁴ Election law Professor Rick Hasen agreed, saying that “*Milligan* is not a ruling that expands minority voting rights” because it only “preserv[ed] the status quo.”¹⁷⁵ Professor Hasen did admit, however, that *Milligan* had successfully “put the brakes on the judicial assault on Section 2” and had “reaffirm[ed] the constitutionality of Section 2.”¹⁷⁶

These critiques of *Milligan* are both deeply disappointing and obviously wrong. Such criticisms ignore both the practical and doctrinal meaning of *Milligan* to voting rights practitioners, the courts, and millions of voters of color—particularly Black and Latinx voters. Like voting itself, civil rights litigation is also an act of faith. Faith in one’s clients and in the evidence. Faith in the skills of the lawyers. And faith that, in a democracy, the courts should be fair and should apply the law objectively, in a way that protects rights. For Black Alabamians, *Milligan* preserved and renewed that faith in our courts and democracy, which prior decisions had eroded. As explained below, by leaving in place decades of voting rights jurisprudence, by rejecting new defenses that have previously been used to foreclose attempts to draw new majority-minority districts, and by holding, for the first time, that Section 2 is constitutional, the Supreme Court in *Milligan* unquestionably went beyond “preserving the status quo.” But even if the Court had only protected the status quo, the herculean efforts of the activists and advocates behind the case, and the tangible victories that *Milligan* has produced for voters, demand our celebration, not dismissal.

A. *A Substantive Success: Increased Representation for Communities of Color*

Milligan both protects existing majority-minority districts and, where appropriate, gives people of color the tools to fight for more representation

orders, Alabama insists on taking the case to trial, which is set for February 2025 and which will determine the fate of Alabama’s congressional map for the rest of the decade.”).

¹⁷⁴ Melissa Murray & Steve Vladeck, *The Supreme Court’s Voting Rights Act Ruling Is No Victory For Democracy*, WASH. POST (June 8, 2023), <https://www.washingtonpost.com/opinions/2023/06/08/supreme-court-alabama-redistricting-voting-rights-act/>.

¹⁷⁵ Richard L. Hasen, *John Roberts Throws a Curveball*, N.Y. TIMES (June 8, 2023), <https://www.nytimes.com/2023/06/08/opinion/milligan-roberts-court-voting-right-act.html>.

¹⁷⁶ *Id.*

in school boards, city councils, county commissions, state legislatures, and Congress. In contrast, if the Court had upended the status quo and adopted Alabama's radical test, the legality of thousands of majority-minority districts nationwide would have been thrown into doubt. Indeed, as Professors Jowei Chen and Nick Stephanopoulos have demonstrated, the adoption of Alabama's proposal of "race-blind" computer simulations as a benchmark in Section 2 cases would have significantly reduced minority representation in elected offices nationwide.¹⁷⁷ For example, the number of minority districts in the state houses would have dropped from 27 to 21 in Alabama and from 21 to 19 in Illinois.¹⁷⁸

This potential damage to Black representation matters. Indeed, the most immediate (and profound) impact of *Milligan* is the assurance that, for the first time ever, Black Alabamians will have the power to elect two members of Congress. This alone is a significant win. While Black Alabamians comprised as much as 47% of the population in the 1870s, Alabama has never had two majority-Black districts.¹⁷⁹ But, beyond Alabama, courts have relied on *Milligan* to order the creation of new minority opportunity districts in the congressional and state legislative maps in Louisiana, Mississippi, Georgia, Washington, and North Dakota.¹⁸⁰ These wins are likely to continue. After similar Supreme Court successes in the past, Section 2 plaintiffs also saw an uptick in wins.¹⁸¹

While the elected officials in these new districts will likely be people of color, these wins in Alabama and elsewhere go beyond merely "descriptive" representation.¹⁸² For example, Evan Milligan and Shalela Dowdy, plaintiffs in *Milligan*, described how their congressmembers—who, under the state's plan, represented the Black Belt, Mobile, and Montgomery—were unresponsive to their communities. Despite representing the Black Belt and Mobile, these congressmembers had voted against bipartisan federal laws

¹⁷⁷ Jowei Chen & Nicholas O. Stephanopoulos, *The Race-Blind Future of Voting Rights*, 130 YALE L.J. 778, 906-10 (2021).

¹⁷⁸ *Id.*

¹⁷⁹ *Allen v. Milligan (Milligan II)*, 599 U.S. 1, 14 (2023).

¹⁸⁰ See, e.g., *Robinson v. Ardoin*, 86 F.4th 574 (5th Cir. 2023) (Louisiana congressional districts); *Miss. NAACP v. State Bd. of Election Comm'rs*, No. 3:22-CV-734, 2024 WL 3275965 (S.D. Miss. July 2, 2024) (three-judge court) (Mississippi state legislature); *Nairne v. Ardoin*, 715 F. Supp. 3d 808 (M.D. La. 2024) (Louisiana state legislature); *Soto Palmer v. Hobbs*, 686 F. Supp. 3d 1213 (W.D. Wash. 2023) (Washington state legislature), *cert. denied before judgment sub nom. Trevino v. Palmer*, 144 S. Ct. 873 (2024); *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-CV-22, 2023 WL 8004576 (D.N.D. Nov. 17, 2023) (North Dakota Legislative districts); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 700 F. Supp. 3d 1136 (N.D. Ga. 2023) (Georgia congressional districts).

¹⁸¹ Kousser, *supra* note 83, at 10 fig.3.

¹⁸² See Lani Guinier, *Groups, Representation, and Race-Conscious Districting: A Case of the Emperor's Clothes*, 71 TEX. L. REV. 1589, 1642 (1993) ("Descriptive representation defines representation as based solely on representative physical characteristics or representative identity.").

aimed at helping their communities.¹⁸³ The congressmembers all opposed the 2021 bipartisan infrastructure law that has now funded efforts to ameliorate environmental pollution, improve roads, and expand broadband access in the Black Belt.¹⁸⁴

Given the shared challenges facing Mobile and Black Belt residents, a member of Congress focused on their particularized needs and joint interests is significant. For instance, the only member of the Alabama delegation to support the bipartisan infrastructure law was Representative Terri Sewell, the only Black person or woman in the delegation who is elected from the existing majority-Black district.¹⁸⁵ All of her Alabama colleagues from white districts opposed this bipartisan law. In contrast, she worked to win special grants and funding for projects in the Black Belt and Mobile.¹⁸⁶

A representative elected from the Black Belt and Mobile, regardless of political party, will be forced to confront the issues facing this community. Research confirms this reality. Elected officials from majority-minority districts tend to be more attuned to the issues facing minorities. In Congress, for example, one study found that a legislator's support for civil rights bills tended to increase in districts with Black populations above 40%.¹⁸⁷ Relatedly, similar studies have shown that legislators in jurisdictions that are covered by preclearance were more likely to support civil rights laws,¹⁸⁸ and that a jurisdiction's coverage (which usually increased the number of minority elected officials in the state and local governments) led to lower minority infant mortality rates.¹⁸⁹

¹⁸³ *Milligan Plaintiffs' Proposed Findings of Fact and Conclusions of Law* at ¶ 340, *Singleton v. Merrill*, 582 F. Supp. 3d 924 (N.D. Ala. 2022) (No. 21-cv-1291) (citing Jan. 11 Tr. 1631:15-1633:1; Jan. 10 Tr. 1350:8-1351:5; Jan. 5 Tr. 389:1-9).

¹⁸⁴ For information on the infrastructure law, see, for example, Press Release, Terri Sewell, Rep. Sewell Announces \$1.6 Million in Public Infrastructure and Workforce Investments from the Delta Regional Authority for Black Belt Communities (Oct. 24, 2024), <https://sewell.house.gov/2023/10/rep-sewell-announces-1-6-million-in-public-infrastructure-and-workforce-investments-from-the-delta-regional-authority-for-black-belt-communities> [<https://perma.cc/TY6F-G378>]; Press Release, EPA, Biden-Harris Administration Announces \$25,945,000 for Clean Water Infrastructure Upgrades Through the Bipartisan Infrastructure Law in Alabama (Feb. 24, 2023), <https://www.epa.gov/newsreleases/biden-harris-administration-announces-25945000-clean-water-infrastructure-upgrades> [<https://perma.cc/5US2-JAGB>]; Press Release, Terri Sewell, Rep. Sewell Announces \$23.8 Million from the Bipartisan Infrastructure Law to Address Blocked Crossings and Improve Rail Infrastructure and Safety in Alabama's 7th District (Sept. 25, 2023), <https://sewell.house.gov/2023/9/rep-sewell-announces-23-8-million-from-the-bipartisan-infrastructure-law-to-address-blocked-crossings-and-improve-rail-infrastructure-and-safety-in-alabama-s-7th-district> [<https://perma.cc/J6GH-5KQA>].

¹⁸⁵ *Biography*, U.S. CONGRESSWOMAN TERRI SEWELL, <https://sewell.house.gov/biography> [<https://perma.cc/4C4S-ETWP>] (last visited Dec. 4, 2024).

¹⁸⁶ *See id.*

¹⁸⁷ Sophie Schuit & Jon C. Rogowski, *Race, Representation, and the Voting Rights Act*, 61 AM. J. POL. SCI. 513, 520 n.16 (2017).

¹⁸⁸ *Id.*

¹⁸⁹ Tamara Rushovich, Rachel C. Nethery, Ariel White & Nancy Krieger, *1965 US Voting Rights Act Impact on Black and Black Versus White Infant Death Rates in Jim Crow States, 1959–1980 and 2017–2021*, 114 AM. J. OF PUB. HEALTH 300, 300 (2024).

B. A Doctrinal Success: Clarifying Voting Rights Litigation

Aside from these representational benefits, *Milligan* also significantly advanced and helpfully refined voting rights doctrine. Contrary to the critiques, *Milligan* did not merely maintain the status quo. Rather, the Court used the landmark decision to resolve longstanding doctrinal questions in ways that help communities of color and minority voters.

Most significantly, the *Milligan* Court explicitly ruled, for the first time, that Section 2 is constitutional, and that the Constitution permits race-based redistricting remedies.¹⁹⁰ Like the expansion of minority representation in the wake of *Milligan*, this aspect of the ruling is also extraordinary. In the decades before *Milligan*, the Court had left many questions unanswered. For example, *Shaw* had led courts to strike down many remedial districts drawn to comply with the VRA as illegal racial gerrymanders,¹⁹¹ potentially leaving Section 2 as a “paper tiger”—a right without a remedy. The *Shaw* cases had raised the possibility that Section 2 itself was unconstitutional because it, at times, compelled states to draw race-based districts.¹⁹² Before *Milligan*, in 1985, the Court had summarily affirmed a ruling that Section 2 was constitutional.¹⁹³ But the Court has long emphasized that a summary affirmance is “a ‘rather slender reed’ on which to rest future decisions.”¹⁹⁴ Similarly, in a 1996 opinion, Justice O’Connor had written a concurrence (joined in part by four other justices who wrote separately) to try to assure voters and Congress that Section 2 remained constitutional.¹⁹⁵ But her retirement and the reality that the Court had never explicitly ruled on the issue had renewed concerns. Indeed, after *Shelby County* in 2013, states began to raise the possibility that, like Section 4, Section 2 had outlived its usefulness. Moreover, in racial gerrymandering cases, the Court had declined for decades to say whether a government’s interest in complying with Section 2 was “compelling” enough to justify racial remedies. The Court merely “assumed, without deciding, that compliance with § 2 can be a compelling state interest.”¹⁹⁶ No court had struck down Section 2 outright. But, based

¹⁹⁰ *Allen v. Milligan (Milligan II)*, 599 U.S. 1, 38 (2023); *see also id.* at 42–45 (Kavanaugh, J., concurring).

¹⁹¹ *See, e.g., Clark v. Putnam Cnty.*, 293 F.3d 1261 (11th Cir. 2002); *Bush v. Vera*, 517 U.S. 952 (1996); *Hays v. Louisiana*, 936 F. Supp. 360 (W.D. La. 1996); *Smith v. Beasley*, 946 F. Supp. 1174 (D.S.C. 1996); *Miller v. Johnson*, 515 U.S. 900 (1995).

¹⁹² *See, e.g., United States v. Blaine Cnty.*, 363 F.3d 897, 904–05 (9th Cir. 2004) (addressing the constitutionality of Section 2 following the racial gerrymandering decisions); *Johnson v. Hamrick*, 196 F.3d 1216, 1219 n.3 (11th Cir. 1999) (reaffirming the constitutionality of Section 2).

¹⁹³ *Miss. Republican Exec. Comm. v. Brooks*, 469 U.S. 1002, 1002 (1984).

¹⁹⁴ *Morse v. Republican Party of Va.*, 517 U.S. 186, 203 n.21 (1996) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 784 n.5 (1983)).

¹⁹⁵ *See Bush*, 517 U.S. at 990–92 (O’Connor, J., concurring) (seeking to reassure lawmakers that it should be assumed that Section 2 is constitutional).

¹⁹⁶ *Abrams v. Johnson*, 521 U.S. 74, 91 (1997); *see also Cooper v. Harris*, 581 U.S. 285, 292–93 (2017); *Ala. Legis. Black Caucus v. Alabama*, 575 U.S. 254, 258, 262 (2015); *Miller v. Johnson*, 515 U.S. 900, 921 (1995).

on the concerns or ambiguities raised in *Shaw* and *Shelby County*, numerous courts had rejected Section 2 claims¹⁹⁷ or dismantled districts that had previously been created to remedy VRA violations.¹⁹⁸

In *Milligan*, the Court resolved these ambiguities in favor of civil rights plaintiffs. The Court made explicit what had been implicit—a map drawer does not per se engage in racial gerrymandering where she draws a plan with the goals of *both* respecting traditional redistricting rules *and* creating a new majority-minority district.¹⁹⁹ It also explicitly recognized what had been implicit in its racial gerrymandering doctrine—that the Fifteenth Amendment authorizes race-based districting as a remedy to Section 2 violations.²⁰⁰ Given the now-confirmed constitutionality of such remedies, it follows that states unquestionably have a compelling interest in complying with Section 2.²⁰¹ *Milligan* confirms the careful balance struck by allowing states to draw majority-minority districts to remedy identified instances of discrimination without running afoul of the Constitution or inviting racial gerrymandering lawsuits.²⁰²

Of course, this ruling on Section 2's constitutionality has implications beyond the VRA. Various other federal and state civil rights laws permit liability based on proof of a challenged practice's disparate impact without requiring proof of discriminatory intent. The Supreme Court, however, has become increasingly hostile to such laws and, at times, has questioned their constitutionality.²⁰³ In affirming Section 2's constitutionality, the Court

¹⁹⁷ *League of Women Voters of Fla. Inc. v. Fla. Sec'y of State*, 66 F.4th 905, 923 (11th Cir. 2023); *Greater Birmingham Ministries v. Sec'y of State of Ala.*, 992 F.3d 1299, 1325 (11th Cir. 2021); *Fusilier v. Landry*, 963 F.3d 447, 460 n.9 (5th Cir. 2020); *Stabler v. Thurston Cnty.*, 129 F.3d 1015, 1025 (8th Cir. 1997); cf. *Abbott v. Perez*, 585 U.S. 579, 603 (2018).

¹⁹⁸ *See, e.g., Perez*, 585 U.S. at 620-22; *Clark v. Putnam Cnty.*, 293 F.3d 1261, 1273-74 (11th Cir. 2002); *Diaz v. Silver*, 978 F. Supp. 96, 128-30 (E.D.N.Y. 1997).

¹⁹⁹ *Allen v. Milligan (Milligan II)*, 599 U.S. 1, 30-34 (2023) (plurality opinion); *see also id.* at 34 n.7 (majority opinion); *id.* at 45 (Kavanaugh, J., concurring).

²⁰⁰ *Id.* at 40-42 (majority opinion).

²⁰¹ *Accord Harris v. Arizona Indep. Redistricting Comm'n*, 578 U.S. 253, 258 (2016) ("Members of the Court expressed the view that compliance with § 5 of the Voting Rights Act is also a legitimate state consideration."); cf. *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 518 (2006) (Scalia, J., concurring in judgment in part and dissenting in part, joined in relevant part by Roberts, C.J., Thomas & Alito, JJ.) (relying on similar reasoning to conclude that Section 5 provided states with a compelling interest in race-based redistricting); *see also id.* at 475 n.12 (Stevens, J., concurring in part and dissenting in part, joined in relevant part by Breyer, J.); *id.* at 485 n.2 (Souter, J., concurring in part and dissenting in part, joined by Ginsburg, J.).

²⁰² The Court will have the opportunity to more directly confront this issue in *Louisiana v. Callias*, No. 24-109. But the lower courts appear to agree with this reading of *Milligan*. *See, e.g., Robinson v. Ardoin*, 86 F.4th 574, 593 (5th Cir. 2023) (recognizing that, based on *Milligan*, the "Supreme Court allows race-based redistricting in certain circumstances as a remedy for state redistricting maps that violate Section 2"); *Mississippi NAACP v. State Bd. of Election Comm'rs*, No. 3:22-CV-734, 2024 WL 3275965, at *5 (S.D. Miss. July 2, 2024) (concluding, after *Milligan*, that the "Supreme Court recognizes compliance with the Voting Rights Act—including Section 2—as a compelling interest").

²⁰³ *See, e.g., Texas Dep't of Hous. & Cmty. Affs. v. Inclusive Cmty. Project, Inc.*, 576 U.S. 519, 542 (2015); *see id.* at 589 (Alito, J., dissenting); *Ricci v. DeStefano*, 557 U.S. 557, 557 (2009).

bolsters the argument that other disparate impact laws also remain constitutional. For example, in recent years, the states of California, Connecticut, Illinois, Minnesota, New York, Oregon, Virginia, and Washington have all enacted state Voting Rights Acts. The Court has declined to take up constitutional challenges to these state laws,²⁰⁴ and litigants are citing *Milligan* to defend these laws' constitutionality.²⁰⁵

Next, the *Milligan* Court again, and importantly, went beyond the *status quo ante* by eliminating several defenses that States had successfully asserted to defeat Section 2 claims. In the three decades between *Shaw* in 1993 and *Milligan* in 2023, many courts accepted the argument that maps drawn by government defendants for purportedly "race neutral" reasons complied with Section 2 even if such maps fragmented or packed communities of color.²⁰⁶ For example, several district courts had accepted the claim that a plaintiff's illustrative plan that relied "too much" on race could itself run afoul of *Shaw*'s prohibition on unconstitutional racial gerrymandering or discrimination.²⁰⁷ The Seventh Circuit took a more academic approach. Judge Frank Easterbrook suggested that, rather than rely on the maps drawn by the parties, courts might someday employ computers to find race neutral maps.²⁰⁸ Building on this suggestion, in a pre-*Milligan* case, Louisiana presented expert testimony that purportedly showed that its map was closer to computer drawn "race-blind" maps than plaintiffs' maps.²⁰⁹ Similarly, the Fifth Circuit had rejected Section 2 claims where a defendant showed that a challenged plan had been drawn in pursuit of "nonracial" goals, like retaining the "core" of prior districts, avoiding county or municipal splits, or protecting particular communities.²¹⁰ Other courts similarly performed "beauty contests," scoring a government's plan against a plaintiff's plan to

²⁰⁴ See, e.g., *Portugal v. Franklin Cnty.*, 530 P.3d 994, 999 (Wash. 2023) (rejecting the argument that the Washington State Voting Rights Act is "facially unconstitutional because it requires local governments to implement electoral systems that favor protected voters and disfavor others on the basis of race"), *cert. denied sub nom. Gimenez v. Franklin Cnty.*, 144 S. Ct. 1343 (2024); *Higginson v. Becerra*, 786 F. App'x 705, 706 (9th Cir. 2019), *cert. denied*, 140 S. Ct. 2807 (2020).

²⁰⁵ See generally *Pico Neighborhood Ass'n v. City of Santa Monica*, 534 P.3d 54 (Cal. 2023).

²⁰⁶ See, e.g., *Stabler v. Thurston Cnty.*, 129 F.3d 1015, 1025 (8th Cir. 1997); *Jeffers v. Tucker*, 847 F. Supp. 655, 661-62 (E.D. Ark. 1994) (criticizing proffered district maps' bizarre shapes and performing a "beauty contest"); *Milwaukee Branch of NAACP v. Thompson*, 935 F. Supp. 1419, 1425 (E.D. Wis. 1996); *France v. Pataki*, 71 F. Supp. 2d 317, 324-26 (S.D.N.Y. 1999) (worrying about maximization of black districts and expert's race focus).

²⁰⁷ See, e.g., *Dillard v. City of Greensboro*, 74 F.3d 230, 234-35 (11th Cir. 1996) (expressing concern about maximization of black districts and expert's race focus); *Reed v. Town of Babylon*, 914 F. Supp. 843, 871-74 (E.D.N.Y. 1996) (rejecting Plaintiff Expert's map drawn solely based on race without looking at traditional criteria).

²⁰⁸ *Gonzalez v. City of Aurora*, 535 F.3d 594, 599 (7th Cir. 2008).

²⁰⁹ *Robinson v. Ardoin*, 37 F.4th 208, 220 (5th Cir. 2022).

²¹⁰ See, e.g., *Fairley v. Hattiesburg*, 584 F.3d 660, 671-72 (5th Cir. 2009) (concluding that any illustrative plan that might split a college community into "multiple wards . . . would be highly suspect on its face"); *Sensley v. Albritton*, 385 F.3d 591, 598 (5th Cir. 2004) (rejecting an illustrative plan that split a town in half and "disrupt[ed] the core of the preexisting electoral district").

decide which plan performed “better” overall with respect to nonracial traditional redistricting criteria, like compactness and respect for communities of interest.²¹¹

Importantly, however, many of the purportedly “race neutral” criteria that states (or computers) rely on often have explicit or implicit racial components. For example, Alabama’s justification for keeping Baldwin and Mobile Counties together was *explicitly* premised on the white ethno-racial makeup of the “French and Spanish” people there.²¹² Less obviously, county and municipal lines are not drawn in a vacuum. Governments have long drawn or manipulated such lines based on race.²¹³ And, of course, state and private policies have also led to one-race communities.²¹⁴ Thus, even state-enacted plans derived from facially “race-neutral” criteria, like avoiding city splits, are often directly and indirectly infused with racial implications.

Milligan, therefore, correctly rejected the notion that a state’s purportedly race-neutral justifications for enacting a challenged plan always trump a plaintiff’s showing of a Section 2 violation. *Milligan* ruled that plaintiffs are not required to prove that a state-drawn map was the product of intentional discrimination,²¹⁵ nor are plaintiff’s maps required to beat “race-blind” computer simulations.²¹⁶ *Milligan* also acknowledged that the “very reason a plaintiff adduces a map at the first step of *Gingles* is precisely *because of its racial composition*.”²¹⁷ For this reason, a plaintiff’s plan is not

²¹¹ See, e.g., *Jeffers*, 847 F. Supp. at 661-62 (criticizing proffered district maps’ bizarre shapes and performing a “beauty contest”); *Fletcher v. Lamone*, 831 F. Supp. 2d 887, 899, 909 (D. Md. 2011) (analyzing compactness and lack of shared community of interest); *Little Rock Sch. Dist. v. Pulaski Cnty. Special Sch. Dist.*, 56 F.3d 904, 912 (8th Cir. 1995) (“[A]lthough the plaintiffs’ proposed zone boundaries are nowhere nearly so bizarre as the ones held presumptively unconstitutional by the Supreme Court in *Shaw*, they are markedly less regular and compact than those in LRSD’s adopted plan.”); *NAACP v. Alabama*, 612 F. Supp. 3d 1232, 1265-70 (M.D. Ala. 2020).

²¹² See Brief for Appellants, *supra* note 32, at 21 (discussing the purported “French and Spanish colonial heritage” of the Gulf Coast community).

²¹³ See, e.g., *Pleasant Grove v. United States*, 479 U.S. 462, 466-72 (1987) (enjoining the Alabama legislature and local officials from allowing a city to discriminatorily annex only areas with white populations, but not areas with Black ones); *Gomillion v. Lightfoot*, 364 U.S. 339, 340-41 (1960) (addressing allegations that the Alabama Legislature had redrawn a city’s municipal lines to eliminate nearly all its Black population); *Stout v. Jefferson Cnty. Bd. of Educ.*, 882 F.3d 988, 1006-13 (11th Cir. 2018) (enjoining a predominately white municipal school system’s intentionally discriminatory attempt to separate from a more diverse county school system); *United States v. City of Calera*, No. 08-1982, 2008 WL 11512029, at *1 (N.D. Ala. Oct. 29, 2008) (three-judge court) (enjoining a districting plan that relied on the selective annexations of areas with mostly white populations); *Dillard v. City of Foley*, 926 F. Supp. 1053, 1059 (M.D. Ala. 1995) (settling case related to a city’s racially-selective annexations).

²¹⁴ Compare *Ayers v. Fordice*, 111 F.3d 1183, 1193 (5th Cir. 1997) (noting that discriminatory admissions and recruitment policies led the University of Southern Mississippi to be a “historically white institution”), with *Fairley*, 584 F.3d at 671-72 (faulting the plaintiffs in a Section 2 lawsuit for proposing a remedial plan that divided the University of Southern Mississippi).

²¹⁵ *Allen v. Milligan (Milligan II)*, 599 U.S. 1, 37 (2023).

²¹⁶ *Id.* at 33.

²¹⁷ *Id.* at 34 n.7.

per se constitutionally suspect merely because it was drawn with the goal of creating more majority-minority districts.

Milligan also held that courts do “not have to conduct a ‘beauty contest’ between plaintiffs’ maps and the State’s.”²¹⁸ The Court recognized that the plaintiffs had satisfied *Gingles* I by offering maps that were “roughly as compact as the existing plan.”²¹⁹ While *Milligan* noted that “some of plaintiffs’ proposed maps split the same number of county lines as (or even fewer county lines than) the State’s map,” this was not dispositive.²²⁰ Rather, the Court repeatedly emphasized that the plaintiffs’ illustrative plans need only be “reasonably” configured.²²¹ Addressing this issue on remand, the *Milligan* district court explained that:

This [reasonableness] standard does not require that an illustrative plan outperform [a challenged plan] by a prescribed distance on a prescribed number of prescribed metrics. An illustrative plan may be reasonably configured even if it does not outperform [a challenged plan] on every (or any particular) metric. The standard does not require the Plaintiffs to offer the *best* map; it requires them to offer a reasonable one. Indeed, requiring a plaintiff to meet or beat an enacted plan on every redistricting principle a State selects would allow the State to immunize from challenge a racially discriminatory redistricting plan simply by claiming that it best satisfied a particular principle the State defined as non-negotiable.²²²

Applying the “reasonably configured” standard, the Supreme Court rejected Alabama’s defenses that the enacted plan performed better than plaintiffs’ plans on core retention and communities of interest. Regarding core retention, Alabama had argued that its nonracial goal of ensuring that its latest plan “largely mirror[s]” past plans should defeat Section 2 claims.²²³ But the Supreme Court rejected this argument out of hand since plaintiffs’ plans would always “naturally fare worse” on this metric.²²⁴ As the Court explained, “a State could immunize from challenge a new racially discriminatory redistricting plan simply by claiming that it resembled an old racially discriminatory plan.”²²⁵ The Court held that Section 2 “does not permit a State to provide some voters less opportunity to participate in the political process just because the State has done it before.”²²⁶ On commu-

²¹⁸ *Id.* at 21 (internal citations and alterations omitted).

²¹⁹ *Id.* at 19-20.

²²⁰ *Id.* at 20.

²²¹ *See id.* at 18-21.

²²² *Singleton v. Allen (Milligan III)*, 690 F. Supp. 3d 1226, 1301 (N.D. Ala. 2023).

²²³ *Milligan II*, 599 U.S. at 21.

²²⁴ *Id.* at 22.

²²⁵ *Id.*

²²⁶ *Id.* at 21.

nities of interest, Alabama had argued that plaintiffs' maps split the alleged "Gulf Coast" community in Baldwin and Mobile Counties.²²⁷ But Alabama admittedly split the Black Belt community.²²⁸ The Court thus found that plaintiffs' plans were reasonable insofar as "there would be a split community of interest in both" the State's plan and the plaintiffs' plans.²²⁹

Relying on *Milligan*'s reasoning, the lower courts have likewise rejected these once viable Section 2 defenses. In Louisiana, the Fifth Circuit and a district court rejected expert testimony on computer simulations in two separate Section 2 cases challenging congressional and state legislative districts.²³⁰ In Georgia²³¹ and Mississippi,²³² district courts cited *Milligan* to reject the argument that the plaintiffs' illustrative plans relied too much on race. As the Mississippi three-judge court explained, "[r]ace can . . . be considered in drawing illustrative districts to satisfy the first *Gingles* precondition."²³³ And, on remand in *Milligan*, the district court rejected Alabama's argument that its 2023 plan should be upheld because it performed "better" than the plaintiffs' plans on splits of counties and purported communities of interest.²³⁴ In North Dakota, a district similarly rejected the argument that the state's plan "better reflects traditional redistricting criteria than [the plaintiff's] proposed districts."²³⁵ *Milligan* is likely to continue to impact pending Section 2 litigation and voting rights enforcement²³⁶ in Alabama, Texas, and elsewhere.²³⁷

C. A Vindication: *Milligan* as a Response to Shelby County

Shelby County reshaped the voting rights landscape and hampered litigation like a dead weight. Before *Shelby County*, Section 5 prevented

²²⁷ *Id.*

²²⁸ *Id.*

²²⁹ *Id.* at 21. While the Supreme Court does not mention it, in 2021, Alabama drew both the challenged congressional plan and an eight-district state school board map with two majority-Black districts, which split Mobile and Baldwin Counties in the same way that the plaintiffs' maps did. See *Singleton v. Merrill (Milligan I)*, 582 F. Supp. 3d 924, 1015 (N.D. Ala. 2022).

²³⁰ *Robinson v. Ardoin*, 86 F.4th 574, 599 (5th Cir. 2023) ("Most of the arguments [Louisiana] made here were addressed and rejected by the Supreme Court in *Milligan*"); *Nairne v. Ardoin*, 715 F. Supp. 3d 808, 854 (M.D. La. 2024).

²³¹ *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 700 F. Supp. 3d 1136, 1261-62 (N.D. Ga. 2023).

²³² See, e.g., *Miss. NAACP v. State Bd. of Election Comm'rs*, No. 3:22-CV-734, 2024 WL 3275965, at *19-21 (S.D. Miss. July 2, 2024).

²³³ *Id.* at *14.

²³⁴ *Singleton v. Allen (Milligan III)*, 690 F. Supp. 3d 1226, 1301 (N.D. Ala. 2023).

²³⁵ *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 3:22-CV-22, 2023 WL 8004576, at *9 (D.N.D. Nov. 17, 2023) ("Section 2 claim is not a competition between which version of district 9 better respects traditional redistricting criteria.").

²³⁶ See, e.g., Kousser, *supra* note 83, at 10-11 (noting that Section 2 wins in the Supreme Court often beget additional wins in the lower courts).

²³⁷ See, e.g., *League of United Latin Am. Citizens v. Abbott*, No. 321-cv-259, 2023 WL 4055392, at *1 (W.D. Tex. June 16, 2023); *Stone v. Allen*, 717 F. Supp. 3d 1161 (N.D. Ala. 2024).

covered states from engaging in discriminatory tactics by acting as a “back-stop.” Covered states were obligated to notify the public in advance of potentially discriminatory changes, and states bore the burden of proving that a change lacked any discriminatory purpose or effect. This meant that advocates did not need to hunt down or litigate every new restriction on voting. If a covered jurisdiction eliminated a majority-minority district,²³⁸ restricted necessary assistance for voters,²³⁹ or shuttered polling places,²⁴⁰ advocates would know and had a low-cost avenue for opposing it. After *Shelby County*, however, advocates are required to have “eyes and ears” across the country and must be prepared to litigate every issue—no matter how big²⁴¹ or small.²⁴² This precarious situation has forced advocates to make strategic decisions about litigation. Should voting rights advocates focus on defending the status quo? For example, should litigation efforts focus on ensuring that states keep the same number of majority-minority districts or the same hours for early voting?²⁴³ Or, should advocates instead fight to expand access by litigating to establish new majority-minority districts or expand the options for voting?²⁴⁴

Milligan answered these questions and more. In *Milligan*, Chief Justice Roberts wrote a vigorous defense of existing VRA precedent that, in certain circumstances, permitted advocates to expand minority voting strength. *Shelby County* tore down the nation’s strongest defense against discrimination in voting. But the Chief Justice in *Milligan* gave force to the statement in *Shelby County* that “voting discrimination still exists”²⁴⁵ and emphasized that Section 2 remains a viable tool for addressing that discrimination.

²³⁸ See, e.g., Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Just., to James E. Trainor III, Esq., Beirne, Maynard & Parsons (Mar. 5, 2012), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_120305.pdf [<https://perma.cc/URT9-GPD4>].

²³⁹ See, e.g., Letter from Thomas E. Perez, Assistant Att’y Gen., U.S. Dep’t of Just., to Elesä Ocker, Cnty. Clerk (June 28, 2010), https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/l_100628.pdf [<https://perma.cc/KD7G-PBWL>].

²⁴⁰ See, e.g., Letter from Wan J. Kim, Assistant Att’y Gen., U.S. Dep’t of Just., to Renee Smith Byas, Vice Chancellor & Gen. Couns., N. Harris Montgomery Cnty. Coll. Dist. (May 5, 2006), <https://www.justice.gov/sites/default/files/crt/legacy/2014/05/30/TX-2960.pdf> [<https://perma.cc/K4F9-4HVN>].

²⁴¹ See, e.g., *OCA-Greater Houston v. Texas*, 867 F.3d 604, 607 (5th Cir. 2017) (striking down statewide restriction on voter assistance); *Veasey v. Abbott*, 830 F.3d 216, 264-65 (5th Cir. 2016) (en banc) (enjoining Texas statewide voter photo identification law as discriminatory); *Patino v. City of Pasadena*, 230 F. Supp. 3d 667, 729-30 (S.D. Tex. 2017) (invalidating city’s elimination of majority-Latino districts).

²⁴² See, e.g., *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 700 F. Supp. 3d 1136, 1271 (N.D. Ga. 2023) (discussing the closure of “dozens of polling places” in Georgia in the wake of the *Shelby County* decision).

²⁴³ See, e.g., *N.C. NAACP v. McCrory*, 831 F.3d 204, 214 (4th Cir. 2016) (enjoining new state voting laws that eliminated several methods of voting and “target[ed] African Americans with almost surgical precision”).

²⁴⁴ See, e.g., *Madera v. Detzner*, 325 F. Supp. 3d 1269, 1273 (N.D. Fla. 2018) (requiring a state to expand access to bilingual election materials).

²⁴⁵ *Shelby County v. Holder*, 570 U.S. 529, 536 (2013).

Moreover, *Milligan* also offered a broad reading of Congress's authority to enact anti-discrimination laws. This suggests that the Chief Justice and a five-justice majority remain open to a new preclearance coverage formula. *Shelby County*, notably, did not strike down preclearance; it merely found that the formula used to identify covered states was unconstitutional because it relied on decades-old data.²⁴⁶ In *Shelby County*, the Chief Justice emphasized that Congress remained free to "draft another formula based on current conditions."²⁴⁷

In the decade since *Shelby County*, a bipartisan group of legislators have been working to pass an amended version of the Voting Rights Act, which would restore preclearance coverage to states with a recent history of discrimination.²⁴⁸ Alabama, for example, could be covered because in the last decade the state and the political subdivisions therein have violated the VRA at least eight times.²⁴⁹ Alabama's stubborn refusal to comply with the Supreme Court's mandate—alongside its decision to continue defending a revised map that obviously continues the likely Section 2 violation—only strengthens the case for preclearance. *Milligan* reaffirmed Congress's authority to address discrimination. And, because of the case's multiple trips to the Court, *Milligan* has also given the Court a closeup view of the kind of overt defiance of federal law that continues to exist.

III. WHAT TO MAKE OF JUSTICE KAVANAUGH'S CONCURRENCE

Justice Kavanaugh wrote a short concurrence in *Milligan*, which immediately led to some handwringing about another challenge to the constitutionality of Section 2.²⁵⁰ But, in the two years since *Milligan*, no court has read his concurrence so broadly.

²⁴⁶ *Id.* at 556-57.

²⁴⁷ *Id.* at 557.

²⁴⁸ Michael Li, *Preclearance Under the Voting Rights Act*, BRENNAN CTR. FOR JUST. (Mar. 11, 2024), <https://www.brennancenter.org/our-work/research-reports/preclearance-under-voting-rights-act> [<https://perma.cc/W6UC-TJVU>].

²⁴⁹ See, e.g., *Ala. NAACP v. Marshall*, No. 2:24-cv-00420, 2024 WL 4282082 (N.D. Ala. 2024); *Braxton v. Town of Newbern*, No. 2:23-CV-00127, 2024 WL 3519193 (S.D. Ala. 2024); *Singleton v. Allen*, 690 F. Supp. 3d 1226, 1238 (N.D. Ala. 2023); *Singleton v. Merrill*, 582 F. Supp. 3d 924, 1026 (N.D. Ala. 2022), *aff'd sub nom.* 599 U.S. 1 (2023); *People First of Ala. v. Merrill*, 491 F. Supp. 3d 1076, 1176 (N.D. Ala. 2020); *Jones v. Jefferson Cnty. Bd. of Educ.*, No. 2:19-CV-01821, 2019 WL 7500528 (N.D. Ala. Dec. 16, 2019); *Ala. NAACP v. City of Pleasant Grove*, No. 2:18-CV-02056, 2019 WL 5172371 (N.D. Ala. Oct. 11, 2019); *Allen v. City of Evergreen*, No. CV 13-0107, 2014 WL 12607819 (S.D. Ala. Jan. 13, 2014).

²⁵⁰ See John S. Baker, *Justice Kavanaugh's Allen v. Milligan Concurrence Invites Further Challenges to Section 2*, FORDHAM L. VOTING R. & DEMOCRACY PROJECT (Oct. 9, 2023), <https://fordhamdemocracyproject.com/2023/10/09/justice-kavanaughs-allen-v-milligan-concurrence-invites-further-challenges-to-section-2/> [<https://perma.cc/Z3EJ-9BJL>]; Ian Millhiser, *How Alabama Could Get Away With Defying the Supreme Court*, VOX MEDIA (July 26, 2023, 6:00 AM), <https://www.vox.com/scotus/2023/7/26/23806856/supreme-court-voting-rights-act-allen-milligan-defiance-brett-kavanaugh> [<https://perma.cc/JL87-5SPT>]; *Allen v. Milligan*, 137 HARV. L. REV. 480, 488-89 (2023).

Rather, Courts have largely declined to overread the concurrence. This is because, as summarized above in Part I, Justice Kavanaugh substantively agrees with the majority's most significant points. He agrees that (1) statutory *stare decisis* prevents the Court from overturning *Gingles*;²⁵¹ (2) only “reasonably configured” illustrative districts that “respect[] compactness principles and other traditional districting criteria” may satisfy *Gingles*;²⁵² (3) neither computer simulations nor proof of discriminatory intent are necessary to show a Section 2 violation;²⁵³ and (4) “race-based redistricting in certain circumstances” is permissible.²⁵⁴

His concurrence departs from the majority in only two substantive ways. First, Justice Kavanaugh declined to join part III-B-1 of the majority opinion where a plurality of Justices determined that race did not predominate in the drawing of the plaintiffs’ illustrative plans.²⁵⁵ Second, Justice Kavanaugh noted Justice Thomas’s suggestion that, perhaps “even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to conduct race-based redistricting cannot extend indefinitely into the future.”²⁵⁶ Despite this acknowledgement, Justice Kavanaugh still declined to consider whether Section 2 has a sunset because “Alabama did not raise that temporal argument in this Court.”²⁵⁷

Neither aspect of Justice Kavanaugh’s concurrence has raised concerns for courts or litigators or otherwise gained traction as a basis for limiting *Milligan*’s impact. Rather, courts have rejected states’ attempts to overstate the concurrence’s meaning. For example, a three-judge court in Mississippi rejected the notion that Justice Kavanaugh’s concurrence added a new “precondition to the [*Gingles* I] precondition”—namely, that “a court must first find that the districts as legislatively drawn combined or divided the [B]lack population.”²⁵⁸ Like the *Milligan* district court, the Mississippi court found it “difficult to interpret anything else Justice Kavanaugh wrote

²⁵¹ Compare *Allen v. Milligan (Milligan II)*, 599 U.S. 1, 42 (2023) (Kavanaugh, J., concurring), with *id.* at 39 (majority opinion) (“[S]tatutory *stare decisis* counsels our staying the course.”).

²⁵² Compare *id.* at 43 (Kavanaugh, J., concurring), with *id.* at 19-20 (majority opinion) (concluding that the plaintiffs’ maps were “reasonably configured” and respected county and community boundaries).

²⁵³ Compare *id.* at 44-45 (Kavanaugh, J., concurring), with *id.* at 35-36 (majority opinion) (“[N]either the text of § 2 nor the fraught debate that produced it suggests that ‘equal access’ to the fundamental right of voting turns on computer simulations . . .”).

²⁵⁴ Compare *id.* at 45 (Kavanaugh, J., concurring), with *id.* at 41 (majority opinion) (recognizing that, “under certain circumstances,” the Constitution “authorize[s] race-based redistricting as a remedy for state districting maps that violate § 2”).

²⁵⁵ *Id.* at 42 (Kavanaugh, J., concurring).

²⁵⁶ *Id.* at 45.

²⁵⁷ *Id.*

²⁵⁸ *Miss. NAACP v. State Bd. of Election Comm’rs*, No. 3:22-CV-734, 2024 WL 3275965, at *13 (S.D. Miss. July 2, 2024).

as being an alteration of what he accepted as the majority's understanding of precondition one."²⁵⁹

Similarly, on remand in *Milligan*, Alabama defended its newly enacted 2023 plan (which still contained only one Black opportunity district) as consistent with Justice Kavanaugh's concurrence. According to Alabama, the fact that Justice Kavanaugh declined to join part III-B-1 of the opinion left "open for relitigation the question whether the Plaintiffs submitted at least one illustrative remedial plan in which race did not play an improper role."²⁶⁰ The district court dismissed Alabama's arguments as "overread[ing]" this aspect of the decision. As it correctly explained:

The affirmance tells us that a majority of the Supreme Court concluded that the Plaintiffs satisfied their burden under *Gingles* I. This necessarily reflects a conclusion that the Plaintiffs submitted at least one illustrative map in which race did not play an improper role. Justice Kavanaugh's concurrence is to the same effect—Justice Kavanaugh did not suggest, let alone say, that he "vote[d] to affirm" despite finding that the Plaintiffs submitted no illustrative map that properly considered race. *What Part III-B-1 tells us—and no more—is that only four Justices agreed with every statement in that Part.*²⁶¹

In stay applications to the Supreme Court, states themselves, as well as other litigants, challenged remedial orders or plans in Alabama, Louisiana, and Washington that allegedly relied "too much" on race in purported defiance of *Milligan*.²⁶² Tellingly, in two of the cases, the Court denied a stay without any dissent on the merits.²⁶³

With respect to Justice Kavanaugh's declination to consider the argument that Section 2 might have a "temporal" limit, Alabama, Georgia, and a Texas city have made this argument to no avail. In its 2023 stay application, Alabama directly argued that Section 2's remedies, while permissible in 1982, are no longer constitutional and cannot be allowed indefinitely.²⁶⁴ In

²⁵⁹ *Id.*; cf. *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 700 F. Supp. 3d 1136, 1288 (N.D. Ga. 2023) (noting that Justice Kavanaugh's concurrence rejected the notion that *Gingles* required proportionality or forcing together "geographically dispersed" communities); *Singleton v. Allen (Milligan III)*, 690 F. Supp. 3d 1226, 1317 (N.D. Ala. 2023) (similar).

²⁶⁰ *Milligan III*, 690 F. Supp. 3d at 1264.

²⁶¹ *Id.* (emphasis added).

²⁶² Emergency Application for Stay Pending Appeal to the Supreme Court of the United States, *supra* note 168, at 25-28; Emergency Application to the Honorable Elena Kagan, Associate Justice of the Supreme Court of the United States and Circuit Justice for the Ninth Circuit, for a Stay of Judgment and Injunction at 30, *Trevino v. Palmer*, 144 S. Ct. 1133 (2024) (No. 23A862).

²⁶³ See *Trevino v. Palmer*, 144 S. Ct. 1133 (2024); *Allen v. Milligan*, 144 S. Ct. 476 (2023); cf. *Robinson v. Callais*, 144 S. Ct. 1171 (2024) (denying stay); *Robinson*, 144 S. Ct. at 1171-72 n.1 (Jackson, J., dissenting) (dissenting only to the use of *Purcell*).

²⁶⁴ See, e.g., Emergency Application for Stay Pending Appeal to the Supreme Court of the United States, *supra* note 168, at 34-38 (arguing that "even if Congress in 1982 could constitutionally authorize race-based redistricting under § 2 for some period of time, the authority to

response, the *Milligan* plaintiffs explained that this temporal argument is meritless because the *Gingles* standard itself contains built-in “sunset” provisions:

For example, *Gingles* 1 is assessed using decennial census data that reflect current population demographics and requires a plaintiff to adduce illustrative plans that reasonably comply with traditional districting criteria. *Milligan*, 599 U.S. at 27. But as “residential segregation decreases—as it has ‘sharply’ done since the 1970s—satisfying traditional districting criteria such as the compactness requirement ‘becomes more difficult.’” *Id.* at 28–29 (quoting Crum, 70 Duke L.J. at 279 & n.105). “[Section] 2 litigation in recent years has rarely been successful for just that reason.” *Milligan*, 599 U.S. at 29 (noting that the paucity of § 2 successes nationwide due to minorities’ failure to satisfy the *Gingles* 1 test). Similarly, the “genius” of *Gingles* 2 and 3 requirements . . . is that “[e]lection practices are vulnerable to section 2 only if a jurisdiction’s politics is characterized by racial polarization.” Pamela S. Karlan, *Two Section Twos and Two Section Fives: Voting Rights and Remedies After Flores*, 39 Wm. & Mary L. Rev. 725, 741 (1998). As “minorities become physically and politically integrated into the dominant society, their ability and need to bring claims under section 2 will subside[,]” *id.*, and “section 2 will become a paper tiger.” Heather K. Gerken, *A Third Way for the Voting Rights Act: Section 5 and the Opt-in Approach*, 106 Colum. L. Rev. 708, 745 (2006) As discrimination becomes more infrequent, the Senate Factors may also become harder to prove. See Karlan, 39 Wm. & Mary L. Rev. at 741.²⁶⁵

Rather than take up Alabama’s invitation to address Section 2’s constitutionally based on its alleged temporal limitation, the Supreme Court denied the stay without any noted dissents.²⁶⁶ When asked to consider this argument, Georgia and Texas district courts also summarily rejected it as “unavailing.”²⁶⁷

This makes sense. Taken to its logical extreme, a temporal limit on Section 2 would require similar limits on every civil rights law, including

conduct race-based redistricting cannot extend indefinitely into the future”) (quoting Allen v. Milligan, 599 U.S. 1, 45 (2023) (Kavanaugh, J., concurring)).

²⁶⁵ *Milligan* Respondents’ Opposition to Emergency Application for Stay Pending Resolution of Direct Appeal to this Court, *supra* note 169, at 39–40. I was the lead author on this brief.

²⁶⁶ Allen v. Milligan, 144 S. Ct. 476, 476 (2023) (stay denied).

²⁶⁷ Alpha Phi Alpha Fraternity, Inc. v. Raffensperger, No. 21-CV-5337, 2023 WL 5674599, at *20 (N.D. Ga. July 17, 2023) (summarily rejecting an argument about the temporal constitutionality of Section 2 as “unavailing” and noting that, although the two dissents “raised arguments about the constitutionality of the *Gingles* framework, none of them stated that Section 2 of the Voting Rights Act should be deemed unconstitutional”); Petteway v. Galveston Cnty., 698 F. Supp. 3d 952, 1015 (S.D. Tex. 2023), *rev’d and remanded on different grounds*, 111 F.4th 596 (5th Cir. 2024) (en banc) (similar).

Title VII. Given the nation's experience with racial apartheid in the centuries before it enacted the Civil Rights Act and the hundreds of meritorious civil rights cases brought every year, is it really necessary for Congress to periodically reexamine this history and this national reality to determine that discrimination still exists? Indeed, the Court's own specific experience of Alabama in *Milligan*, where it struck down one discriminatory map only for the state to enact a fundamentally similar map, points to the clear fact that "discrimination still exists."²⁶⁸ Thus, despite concerns that Justice Kavanaugh's concurrence might invite new constitutional challenges to Section 2, no court has read it that way (yet).

IV. READING *MILLIGAN* ALONGSIDE *STUDENTS FOR FAIR ADMISSION* AND *ALEXANDER*

As with Justice Kavanaugh's concurrence, courts also have not identified any conflict between *Milligan* and the Court's more recent decisions in *Alexander v. South Carolina State Conference of the NAACP* (2024) and *Students for Fair Admissions v. Harvard College* ("*SFFA*") (2023). This makes sense given that neither *SFFA* nor *Alexander* involved the VRA, nor the use of race to remedy identified civil rights violations. In *SFFA*, Asian-American students challenged the legality of Harvard and the University of North Carolina's affirmative action policies, which consider a student's race as one factor among many in admissions.²⁶⁹ Neither university claimed that their use of race was necessary to remedy an identified civil rights violation.²⁷⁰ Rather, the universities' goals were, among other things, to prepare students for "an increasingly pluralistic society" and "enhancing appreciation, respect, and empathy, cross-racial understanding, and breaking down stereotypes."²⁷¹ Chief Justice Roberts wrote *SFFA*. And *SFFA* was issued a month after *Milligan*. He almost certainly wrote these decisions simultaneously. It is unsurprising then that the decisions are easily read as consistent with one another. *Milligan* recognized that the Court had "authorized race-based redistricting as a remedy for state districting maps that violate § 2."²⁷² *SFFA* explicitly reaffirms this holding. The Court in *SFFA* permits "race-based state action" to "remediat[e] specific, identified instances of past discrimination that violated the Constitution or a statute."²⁷³ *SFFA* rests on dubious reasoning that ignores the nation's interest in remedying

²⁶⁸ *Shelby Cnty. v. Holder*, 570 U.S. 529, 536 (2013).

²⁶⁹ *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181 (2023).

²⁷⁰ *Id.* at 214.

²⁷¹ *Id.*

²⁷² *Allen v. Milligan* (*Milligan II*), 599 U.S. 1, 41 (2023); *see also* *Milligan v. Allen*, 691 F. Supp. 3d 1343, 1354 (N.D. Ala. 2023) (rejecting the argument that *SFFA* has any relevance to Section 2 litigation).

²⁷³ *Students for Fair Admissions*, 600 U.S. at 207.

centuries of racial discrimination in education.²⁷⁴ But *SFFA* and *Milligan* are consistent.²⁷⁵

Similarly, although a disappointing result for the civil rights groups and lawyers who litigated the case, *Alexander* itself reaffirms some of the most helpful aspects of the *Milligan* decision. In *Alexander*, the plaintiffs—Black voters and a civil rights organization—alleged that South Carolina’s congressional plan was a racial gerrymander and the result of intentional racial vote dilution in violation of the Constitution.²⁷⁶ The plaintiffs challenged a majority-white district and alleged that the state relied predominately on race in further splitting the City of Charleston, moving thousands of voters, and maintaining the district’s 17% Black population.²⁷⁷ The plaintiffs did not bring a Section 2 claim and did not rely on the *Gingles* standard at all. Rather, the *Alexander* plaintiffs relied on circumstantial evidence, including computer simulations and legislative staffers’ admissions that they had looked at racial data.²⁷⁸ In some ways, the *Alexander* plaintiffs’ assertion that South Carolina engaged in racial gerrymandering mirrored Alabama’s arguments that the *Milligan* plaintiffs’ illustrative plans were racial gerrymanders. Not surprisingly then, the *Alexander* majority freely quotes from *Milligan* in rejecting the plaintiffs’ claims.²⁷⁹

Most notably, the *Alexander* Court gave no weight to the argument that the fact that legislative staffers “viewed racial data at some point during the redistricting process” was proof of unconstitutional racial gerrymandering.²⁸⁰ Rather, consistent with the *Milligan* plurality, the majority in *Alexander* reaffirmed that it “expect[s] that redistricting legislatures will almost always be aware of racial demographics.”²⁸¹ The Court specifically recognized that a mapmaker is permitted to review and rely on racial data for the “lawful purpose” of “check[ing] that the maps he produced complied with our Voting

²⁷⁴ See *id.* at 326–31 (Jackson, J., dissenting) (“The Court’s recharacterization of *Brown* is nothing but revisionist history and an affront to the legendary life of Justice Marshall, a great jurist who was a champion of true equal opportunity, not rhetorical flourishes about colorblindness.”). As Justice Jackson notes, my LDF colleagues filed an amicus in *SFFA* in support of affirmative action on behalf of a multiracial group of university student and alumni organizations. *Id.*

²⁷⁵ Like in *Milligan*, Justice Kavanaugh in *SFFA* writes a concurrence. Though this time, he explicitly rejects the notion that “race-based affirmative action in higher education may extend indefinitely into the future.” *Id.* at 316.

²⁷⁶ *Alexander v. S.C. NAACP*, 602 U.S. 1, 15 (2024). Although I was not directly involved in the *Alexander* litigation, my colleagues at LDF represented the plaintiffs in *Alexander*.

²⁷⁷ *Id.* at 19–24.

²⁷⁸ *Id.* at 22–27.

²⁷⁹ See, e.g., *id.* at 24.

²⁸⁰ *Id.* at 22.

²⁸¹ Compare *Alexander*, 602 U.S. at 22 (internal citations and quotation marks omitted), with *Allen v. Milligan* (*Milligan II*), 599 U.S. 1, 30 (2023) (plurality) (“[R]edistricting legislatures will . . . almost always be aware of racial demographics, but such race consciousness does not lead inevitably to impermissible race discrimination.”) (internal citations and quotation marks omitted).

Rights Act precedent.”²⁸² It also reaffirmed *Milligan*’s holding that computer simulations are not helpful in identifying discriminatory maps because such simulations too often “ignore[] certain traditional districting criteria” and “do not replicate the ‘myriad considerations’ that a legislature must balance as part of its redistricting efforts.”²⁸³ Finally, the *Alexander* Court’s holding that a state’s partisan motive may justify racial gerrymandering²⁸⁴ restated prior precedent.²⁸⁵ Because Section 2 claims are premised on discriminatory results, rather than a state’s intent or motive, partisan motives remain irrelevant in that context.²⁸⁶ Moreover, despite accepting that a partisan motive can justify a racial gerrymander, the Court remanded the case to the district court to reexamine the “analytically distinct” intentional vote dilution claim.²⁸⁷ And so, after *Alexander*, it remains true that partisan motives cannot justify intentional racial discrimination.²⁸⁸

In short, neither *SFFA* nor *Alexander* addressed the Court’s substantive rulings in *Milligan*. Rather, to the extent either decision addressed remedial actions based on race or the use of race in redistricting, both decisions explicitly reaffirmed *Milligan*’s core holdings that such practices remain permissible.

V. NEW (AND NOT-SO-NEW) POST-MILLIGAN CHALLENGES TO THE VRA

So far, *Milligan* has allowed voters of color to succeed in a series of Section 2 cases. But, of course, it is possible to overread that interim success.

²⁸² *Alexander*, 602 U.S. at 22; cf. *Milligan II*, 599 U.S. at 30-31 (plurality) (declining to fault the plaintiffs’ mapmaker for considering race in the drawing of illustrative districts).

²⁸³ *Alexander*, 602 U.S. at 24.

²⁸⁴ *Id.* at 2.

²⁸⁵ See, e.g., *Easley v. Cromartie*, 532 U.S. 234, 258 (2002).

²⁸⁶ See Miss. NAACP v. State Bd. of Election Comm’rs, No. 3:22-CV-734, 2024 WL 3275965, at *40 n.8 (S.D. Miss. July 2, 2024) (“The *Alexander* plaintiffs did ‘not rely on the Voting Rights Act of 1965,’ nor did the defendants.”) (citing *Alexander*, 602 U.S. at 1252 (Thomas, J., concurring in part)). “Though the *Alexander* Court considered a similar issue to the one before us, its decision is inapplicable to effects-based review under Section 2 of the Voting Rights Act.” *Id.*; see also *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 440 (2006) (holding that a map drawn for “primarily political, not racial reasons” still violated Section 2 because it denied Latinos equal electoral opportunities).

²⁸⁷ *Alexander*, 602 U.S. at 38 (citation omitted). Indeed, the Court found that the district court erred in applying the racial gerrymandering framework, which requires proof of a racially predominate motive, to the plaintiffs’ vote dilution claim. *Id.* Such a claim requires proof that a state sought to “minimize or cancel out the voting potential of racial or ethnic minorities.” *Id.* (internal citation omitted). Traditionally, intentional racial vote dilution claims are governed by the same *Gingles* standard as Section 2 claims. See *Rogers v. Lodge*, 458 U.S. 613, 620-28 (1982) (applying factors generally reflective of *Gingles* and the Senate factors). However, courts tend to relax the *Gingles* preconditions in intentional discrimination cases. For example, rather than the majority-minority districts required by *Gingles*, plaintiffs may offer maps with majority-white crossover districts where minorities and some whites can together elect their preferred candidates. Cf. *Bartlett v. Strickland*, 556 U.S. 1, 20 (2009) (plurality); *League of United Latin Am. Citizens v. Abbott*, 601 F. Supp. 3d 147, 163 (W.D. Tex. 2022), appeal dismissed *sub nom.* *Brooks v. Abbott*, 143 S. Ct. 441 (2022).

²⁸⁸ See, e.g., *Hunter v. Underwood*, 471 U.S. 222, 230-31 (1985) (rejecting the notion that a partisan motive precluded the plaintiffs from succeeding in an intentional discrimination case).

Despite this article's generally positive reading of current law, there is no question that Section 2 remains under vigorous and constant attack. Indeed, within a year of *Milligan*, Arkansas successfully convinced the Eighth Circuit that Section 2 contained no private right of action.²⁸⁹ This first-of-its-kind decision raises the possibility that Section 2 will largely go unenforced in Arkansas, Iowa, Minnesota, Missouri, Nebraska, and North and South Dakota. North Carolina defeated a Section 2 claim in part by asserting that partisan voting patterns, rather than racial ones, better explained racial polarization in the state's elections.²⁹⁰ And the en banc Fifth Circuit reversed decades-old precedent to conclude that Section 2 does not permit coalition claims even where, for example, white bloc voting and the cracking of cohesive Black and Latinx communities prevents them from electing candidates of their choice.²⁹¹

Although *Milligan* does not speak to coalition claims, *Milligan* at least suggests a path forward for lower courts asked to decide whether Section 2 provides a private right of action or when partisanship may trump race. The district court in *Milligan* thoroughly rejected both arguments.

As the district court explained, “[s]ince the passage of the Voting Rights Act, federal courts across the country, including both the Supreme Court and the Eleventh Circuit, have considered numerous Section 2 cases brought by private plaintiffs”; and yet, at the time, “no federal court anywhere ever ha[d] held that Section Two does not provide a private right of action.”²⁹² Further, the district court noted that, in *Morse v. Republican Party of Virginia*,²⁹³ the Supreme Court had “decided a close cousin” of the issue of Section 2’s private right of action.²⁹⁴ In *Morse*, the Court held that Section 10 of the VRA—the poll tax ban—contained a private right of action, with five justices reasoning it “would be anomalous” to continue to recognize that Section 2 is “enforceable by private action but § 10 is not.”²⁹⁵ As the district court in *Milligan* correctly concluded, a “ruling that Section Two does not provide a private right of action would badly undermine the rationale offered by the Court in *Morse*.”²⁹⁶

A divided Eighth Circuit panel, however, concluded that *Morse* was nonbinding dicta and declined to read much into the fact that the Supreme Court had long entertained Section 2 claims.²⁹⁷ The panel found that Section 2 lacked an implied private right of action, but left open the possibility that

²⁸⁹ Ark. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204, 1210 (8th Cir. 2023).

²⁹⁰ Pierce v. N.C. State Bd. of Elections, 97 F.4th 194, 222-24 (4th Cir. 2024).

²⁹¹ Petteway v. Galveston Cnty., 111 F.4th 596, 599 (5th Cir. 2024) (en banc).

²⁹² Singleton v. Merrill (*Milligan I*), 582 F. Supp. 3d 924, 1031 (N.D. Ala. 2022).

²⁹³ 517 U.S. 186 (1996).

²⁹⁴ *Milligan I*, 582 F. Supp. 3d at 1031.

²⁹⁵ *Morse*, 517 U.S. at 232 (opinion of Stevens, J., with one justice joining) (internal citations omitted); accord *id.* at 240 (opinion of Breyer, J., with two justices joining).

²⁹⁶ *Milligan I*, 582 F. Supp. 3d at 1031.

²⁹⁷ Ark. NAACP v. Ark. Bd. of Apportionment, 86 F.4th 1204 (8th Cir. 2023).

it was enforceable under 42 U.S.C. § 1983.²⁹⁸ In contrast, every other court asked to address the private right of action issue has found both *Morse* and the fact that the Court affirmed the *Milligan* district court's ruling (in a case involving only private litigants) persuasive.²⁹⁹ Indeed, in *Turtle Mountain Band of Chippewa Indians v. Jaeger*,³⁰⁰ a district court in the Eighth Circuit cited *Milligan* and *Morse* to conclude that Section 1983 permits private VRA enforcement.³⁰¹ North Dakota sought a stay in the Eighth Circuit, arguing that the prior decision foreclosed this result. But a panel summarily denied the stay.³⁰² Thus, although *Turtle Mountain Band* is on appeal, it is likely that Section 2 will remain privately enforced across the country.

Regarding the partisanship defense, states (and some courts) have long argued that Section 2 claims must fail where voters' partisan preferences (and not race) better explain the cause of racially polarized voting.³⁰³ For example, in *League of United Latin American Citizens v. Clements*, the en banc Fifth Circuit in 1993 rejected a Section 2 claim where "partisan affiliation, not race, best explain[ed] the divergent voting patterns among minority and white citizens in the contested counties."³⁰⁴ The court found several factors relevant to reach this conclusion, including that white voters constituted the majorities of both the Republican and Democratic Parties, that both parties "aggressively" nominated minority candidates who were then supported "without fail" by white voters, and that white elected officials were responsive to minority constituents.³⁰⁵ After *Milligan*, the Fourth Circuit relied on similar evidence to reject a Section 2 claim against North Carolina.³⁰⁶ The Fourth Circuit affirmed the finding that Black voters supported Black

²⁹⁸ *Id.* at 1212-13, *reh'g en banc denied*, 91 F.4th 967, 967-68 (8th Cir. 2024) (en banc) (Stras, J., concurring) (discussing Section 1983 enforcement).

²⁹⁹ See, e.g., *Robinson v. Ardoin*, 86 F.4th 574, 587-88 (5th Cir. 2023); *Miss. NAACP v. State Bd. of Election Comm'rs*, No. 3:22-CV-734, 2024 WL 3275965, at *11 (S.D. Miss. July 2, 2024) ("If a court now holds, after almost 60 years, that cases filed by private individuals were never properly brought, it should be the Supreme Court, which has the controlling word on so momentous a change."); *Nairne v. Ardoin*, 715 F. Supp. 3d 808, 830-34 (M.D. La. 2024); *Stone v. Allen*, 717 F. Supp. 3d 1161, 1172-73 (N.D. Ala. 2024); *Coca v. City of Dodge City*, 669 F. Supp. 3d 1131, 1138-41 (D. Kan. 2023); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 700 F. Supp. 3d 1136, 1251 (N.D. Ga. 2023).

³⁰⁰ No. 3:22-cv-22, 2022 WL 2528256 (D.N.D. July 7, 2022).

³⁰¹ *Turtle Mountain Band*, 2022 WL 2528256, at *4-6.

³⁰² *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 23-3655, 2023 WL 9116675, at *1 (8th Cir. Dec. 15, 2023).

³⁰³ See, e.g., *Thornburg v. Gingles*, 478 U.S. 30, 100-101 (O'Connor, J., concurring in judgment) (explaining that causation evidence should be part of "the overall vote dilution inquiry"); *Lewis v. Alamance County*, 99 F.3d 600, 615 n.12 (4th Cir. 1996) (concluding that "causation . . . [is] relevant in the totality of circumstances inquiry"); *League of United Latin Am. Citizens v. Clements*, 999 F.2d 831, 861 (5th Cir. 1993) (en banc) (concluding that plaintiffs failed to establish a Section 2 claim where the evidence "unmistakably shows that divergent voting patterns among white and minority voters are best explained by partisan affiliation").

³⁰⁴ *League of United Latin Am. Citizens*, 999 F.2d at 850 (emphasis added).

³⁰⁵ *Id.* at 861.

³⁰⁶ *Pierce v. N. Carolina State Bd. of Elections*, 97 F.4th 194, 222-24 (4th Cir. 2024).

and white Democrats “at essentially identical rates” in North Carolina and that “white voters were not more likely to oppose a black Democrat than a white Democrat.”³⁰⁷ Similarly, one Black Republican “received no more black voter support and no less white voter support than the average white Republican candidate.”³⁰⁸

Again, the district court in *Milligan* confronted Alabama’s argument that party better explained polarization than race but came to a different result. This is likely because, unlike in North Carolina, the plaintiffs offered evidence that voting was racially polarized in both Democratic and Republican primaries.³⁰⁹ Unlike in North Carolina, no Black Alabamian, regardless of party, had won statewide office in decades, and the only Black Republican in the legislature had only recently won a special election with only 5% voter turnout.³¹⁰ In Georgia and Mississippi, district courts have cited similar evidence and the Supreme Court’s affirmance of the *Milligan* district court’s treatment of racial polarization to reject the partisanship defense.³¹¹ A district court in Washington went even further, citing *Milligan* as proof that Section 2 *never* permits a partisanship defense.³¹²

Most courts are unlikely to go as far as to read *Milligan* as requiring them to hold that Section 2 is privately enforceable or as wholly eliminating the partisanship defense. Still, the legal analysis and facts underlying the *Milligan* decisions do offer litigants a guide to resolving these defenses.

CONCLUSION

Milligan was a success. Rather than ending Section 2, it strengthened it and batted away many of the most aggressive attacks on it for the immediate future.

But, of course, the more things change, the more they stay the same. On remand two years later, the litigation continues. Despite multiple favorable rulings for the plaintiffs, Alabama simply switched one discriminatory map for another, refusing to draw a second opportunity district for Black voters. Alabama continues to prolong final relief by recycling arguments about partisanship, racial gerrymanders, and the private enforceability and constitutionality of Section 2. Although unsuccessful in Alabama, these same arguments have found more fertile ground elsewhere. In some ways though, this intransigence is comforting. It mirrors states’ responses to voting rights litigation in the 1950s and 1960s. This resistance to change led

³⁰⁷ *Id.* at 224.

³⁰⁸ *Id.*

³⁰⁹ *Milligan v. Merrill*, 582 F. Supp. 3d 924, 967-68 (N.D. Ala. 2022).

³¹⁰ *Id.* at 1018-19.

³¹¹ *Miss. NAACP v. State Bd. of Election Comm’rs*, No. 3:22-CV-734, 2024 WL 3275965, at *41-42 (S.D. Miss. July 2, 2024); *Alpha Phi Alpha Fraternity Inc. v. Raffensperger*, 700 F. Supp. 3d 1136, 1275-78 (N.D. Ga. 2023).

³¹² *Soto Palmer v. Hobbs*, 686 F. Supp. 3d 1213, 1234-36 (W.D. Wash. 2023).

to the passage of the VRA. And, today, this resistance helps to prove that the VRA (sadly) remains necessary. Sixty years later, case-by-case litigation remains “exceedingly slow, in part because of the ample opportunities for delay.”³¹³ Further, states still seek favorable decisions by “merely switch[ing]” to other methods to prolong existing discrimination with some officials simply “def[ying] and evad[ing] court orders.”³¹⁴

This response makes it easier to answer some big picture questions. Where do advocates go after *Milligan*? Continue to use *Milligan* and other tools to push for fair and equitable voting systems. What can Congress do? Pass the new Voting Rights Amendment Act, and return states, like Alabama, with the worst histories of discrimination in voting to preclearance coverage. What can individuals do? Vote. Vote for your city council, county commission, and school board. Your mayor, sheriff, prosecutor, superintendent, and police chief. Vote in State House races. Congress. Senate. President. Then go out and help other people to vote.

People can use the ballot to improve their lives. *Milligan* made that work easier. But, as always, it is up to all Americans to have a little faith that their vote will make a difference.

³¹³ *South Carolina v. Katzenbach*, 383 U.S. 301, 314 (1966).

³¹⁴ *Id.*