AMERICAN CONSTITUTIONALISM

VOLUME II: RIGHTS AND LIBERTIES

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Supplementary Material

Chapter 12: The Contemporary Era – Democratic Rights. Voting/The Voting Rights Act

**Merrill v. Milligan, \_\_\_ U.S. \_\_\_** (2022)

*Evan Milligan was an Alabama citizen who believed that the way Alabama apportioned congressional election districts violated the Voting Rights Act by failing to create a second black majority district. He filed a lawsuit against John Merrill, the Alabama Secretary of State, asking federal courts to compel Alabama to create a second black majority district. Marcus Caster filed a similar suit. A three-judge District panel agreed and ordered the Alabama legislature to immediately redraw congressional districts. Merrill/Alabama) appealed to the Supreme Court of the United States. He asked the Court to both issue a stay of the lower federal court order and for a ruling overturning that decision.*

 *The Supreme Court by a 5-4 vote stayed the lower federal court order. Justice Brett Kavanaugh’s statement pointed out that precedent limited judicial power to change election rules close to an election and that the precise circumstances in which the Voting Rights Act required black majority districts was not clear. Chief Justice Roberts disagreed, maintaining that the lower federal courts had followed clear precedent. Justice Kagan’s dissent criticized the majority for making new law without the benefit of briefing or oral argument. Why does Kagan think the majority for all practical purposes made new law? Is she correct? Was this simply a case in which the court thought election officials could not adjust to a change in the law? Why does Kavanaugh make that claim? Why does Kagan disagree? Who has the better of the argument? What is the Roberts Court likely to do with this case in the long run?*

The application for a stay or injunctive relief presented to Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)&analyticGuid=I361f7b8e43b011ec9f24ec7b211d8087) and by him referred to the Court . . . is treated as a jurisdictional statement, and probable jurisdiction is noted. The application for a stay or injunctive relief presented to Justice [THOMAS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0216654601&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)&analyticGuid=I361f7b8e43b011ec9f24ec7b211d8087) and by him referred to the Court is treated as a petition for a writ of certiorari before judgment. . . . [T]he petition is granted. The district court's January 24, 2022 preliminary injunctions . . . are stayed pending further order of the Court.

Justice [KAVANAUGH](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0364335801&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)&analyticGuid=I361f7b8e43b011ec9f24ec7b211d8087), with whom Justice [ALITO](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0153052401&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)&analyticGuid=I361f7b8e43b011ec9f24ec7b211d8087) joins, concurring in grant of applications for stays.

. . . .

To begin with, the principal dissent is wrong to claim that the Court's stay order makes any new law regarding the Voting Rights Act. The stay order does not make or signal any change to voting rights law. The stay order is not a ruling on the merits, but instead simply stays the District Court's injunction *pending a ruling on the merits.* The stay order follows this Court's election-law precedents, which establish (i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle. *Purcell v. Gonzalez* (2006).

The principal dissent's catchy but worn-out rhetoric about the “shadow docket” is similarly off target. The stay will allow this Court to decide the merits in an orderly fashion—after full briefing, oral argument, and our usual extensive internal deliberations—and ensure that we do *not* have to decide the merits on the emergency docket. To reiterate: The Court's stay order is not a decision on the merits.

. . . . [T]the State argues that the District Court's injunction is a prescription for chaos for candidates, campaign organizations, independent groups, political parties, and voters, among others. The State says that those individuals and entities now do not know who will be running against whom in the primaries next month. Filing deadlines need to be met, but candidates cannot be sure what district they need to file for. Indeed, at this point, some potential candidates do not even know which district they live in. Nor do incumbents know if they now might be running against other incumbents in the upcoming primaries.

On top of that, state and local election officials need substantial time to plan for elections. Running elections state-wide is extraordinarily complicated and difficult. Those elections require enormous advance preparations by state and local officials, and pose significant logistical challenges. The District Court's order would require heroic efforts by those state and local authorities in the next few weeks—and even heroic efforts likely would not be enough to avoid chaos and confusion.

For those and other reasons, the State says that any judicial order requiring the State to redraw its congressional district lines should not apply to the imminent 2022 elections that begin next month.

Under our precedents, a party asking this Court for a stay of a lower court's judgment pending appeal or certiorari ordinarily must show (i) a reasonable probability that this Court would eventually grant review and a fair prospect that the Court would reverse, and (ii) that the applicant would likely suffer irreparable harm absent the stay.  In deciding whether to grant a stay pending appeal or certiorari, the Court also considers the equities (including the likely harm to both parties) and the public interest.

As the Court has often indicated, however, that traditional test for a stay does not apply (at least not in the same way) in election cases when a lower court has issued an injunction of a state's election law in the period close to an election. This Court has repeatedly stated that federal courts ordinarily should not enjoin a state's election laws in the period close to an election, and this Court in turn has often stayed lower federal court injunctions that contravened that principle.

That principle—known as the [*Purcell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010490743&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)) principle—reflects a bedrock tenet of election law: When an election is close at hand, the rules of the road must be clear and settled. Late judicial tinkering with election laws can lead to disruption and to unanticipated and unfair consequences for candidates, political parties, and voters, among others. It is one thing for a State on its own to toy with its election laws close to a State's elections. But it is quite another thing for a federal court to swoop in and re-do a State's election laws in the period close to an election.

Some of this Court's opinions, including [*Purcell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010490743&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)) itself, could be read to imply that the principle is absolute and that a district court may *never*enjoin a State's election laws in the period close to an election. As I see it, however, the [*Purcell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010490743&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)) principle is probably best understood as a sensible refinement of ordinary stay principles for the election context—a principle that is not absolute but instead simply heightens the showing necessary for a plaintiff to overcome the State's extraordinarily strong interest in avoiding late, judicially imposed changes to its election laws and procedures. Although the Court has not yet had occasion to fully spell out all of its contours, I would think that the [*Purcell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010490743&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)) principle thus might be overcome even with respect to an injunction issued close to an election if a plaintiff establishes at least the following: (i) the underlying merits are entirely clearcut in favor of the plaintiff; (ii) the plaintiff would suffer irreparable harm absent the injunction; (iii) the plaintiff has not unduly delayed bringing the complaint to court; and (iv) the changes in question are at least feasible before the election without significant cost, confusion, or hardship.

Here, however, even such a relaxed version of the [*Purcell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010490743&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)) principle would not permit the District Court's late-breaking injunction. That is because the plaintiffs could not satisfy at least two of those four prerequisites—namely, that the merits be clearcut in favor of the plaintiff, and that the changes be feasible without significant cost, confusion, or hardship.

As to the merits, the underlying question here is whether a second majority-minority congressional district (out of seven total districts in Alabama) is required by the Voting Rights Act and not prohibited by the Equal Protection Clause. But the Court's case law in this area is notoriously unclear and confusing. As THE CHIEF JUSTICE rightly notes, there is “considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim.” . . . At this preliminary juncture, the underlying merits appear to be close and, at a minimum, not clearcut in favor of the plaintiffs. And in any event, the plaintiffs have not established that the changes are feasible without significant cost, confusion, or hardship. Therefore, the plaintiffs cannot overcome even a more relaxed version of the [*Purcell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010490743&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)) principle.

In short, the [*Purcell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010490743&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search))principle requires that we stay the District Court's injunction with respect to the 2022 elections. The Court has recognized that “practical considerations sometimes require courts to allow elections to proceed despite pending legal challenges.”

 So it is here. If the District Court's judgment is eventually affirmed after appellate review, the injunction can take effect for congressional elections that occur after 2022.[3](https://1.next.westlaw.com/Document/I361f7b8e43b011ec9f24ec7b211d8087/View/FullText.html?navigationPath=Search%2Fv1%2Fresults%2Fnavigation%2Fi0ad7401400000181bede23a3ab3a4787%3Fppcid%3D7ff86a59e45e47c38cfdfc52fc1a7b76%26Nav%3DCASE%26fragmentIdentifier%3DI361f7b8e43b011ec9f24ec7b211d8087%26parentRank%3D0%26startIndex%3D1%26contextData%3D%2528sc.Search%2529%26transitionType%3DSearchItem&listSource=Search&listPageSource=84715918dc1e112f5d63d4b26de3f14c&list=CASE&rank=2&sessionScopeId=d95f547451a115754f81c691bd327a92ea843b6ec4dc8910cfac3f37251c7b19&ppcid=7ff86a59e45e47c38cfdfc52fc1a7b76&originationContext=Search%20Result&transitionType=SearchItem&contextData=%28sc.Search%29#co_footnote_B00032055521615)

The principal dissent disagrees and emphasizes the thoroughness of the District Court's opinion. But if careful District Court consideration sufficed for an appellate court to deny a stay, then appellate courts could usually end the stay inquiry right there. That is not how stay analysis works. Contrary to the dissent's implication, the fact that the District Court here issued a lengthy opinion after considering a substantial record is the starting point, not the ending point, for our analysis of whether to grant a stay.

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Chief Justice [ROBERTS](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0258116001&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)&analyticGuid=I361f7b8e43b011ec9f24ec7b211d8087), dissenting from grant of applications for stays.

I respectfully dissent from the stays granted in these cases because, in my view, the District Court properly applied existing law in an extensive opinion with no apparent errors for our correction. The governing standard for vote dilution claims under section 2 of the Voting Rights Act is set forth in *Thornburg v. Gingles* (1986), which requires “the minority group ... to demonstrate that it is sufficiently large and geographically compact to constitute a majority in a single-member district.”  The District Court reviewed the submissions of the plaintiffs’ experts and explained at length the factbound bases for its conclusion that the plaintiffs had made that showing.

But while the District Court cannot be faulted for its application of [*Gingles*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986133438&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)), it is fair to say that [*Gingles*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986133438&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)) and its progeny have engendered considerable disagreement and uncertainty regarding the nature and contours of a vote dilution claim. In order to resolve the wide range of uncertainties arising under [*Gingles*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986133438&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)), I would note probable jurisdiction in *Milligan* and grant certiorari before judgment in [a related case], setting the cases for argument next Term. But I would not grant a stay. As noted, the analysis below seems correct as [*Gingles*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986133438&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)) is presently applied, and in my view the District Court's analysis should therefore control the upcoming election. The practical effect of this approach would be that the 2022 election would take place in accord with the judgment of the District Court, but subsequent elections would be governed by this Court's decision on review.

Justice [KAGAN](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0301239401&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)&analyticGuid=I361f7b8e43b011ec9f24ec7b211d8087), with whom Justice [BREYER](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0254766801&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)&analyticGuid=I361f7b8e43b011ec9f24ec7b211d8087) and Justice [SOTOMAYOR](https://1.next.westlaw.com/Link/Document/FullText?findType=h&pubNum=176284&cite=0145172701&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RQ&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search)&analyticGuid=I361f7b8e43b011ec9f24ec7b211d8087) join, dissenting from grant of applications for stays.

After considering a massive factual record, developed over seven days of testimony, and reviewing more than 1,000 pages of briefing, a three-judge District Court held that Alabama's redistricting plan violated Section 2 of the Voting Rights Act (VRA).The District Court (including two judges from the State) found that the plan unlawfully diluted the votes of the State's Black population, and ordered the State to devise a new plan for the 2022 elections. Alabama now seeks a stay of that ruling. Usually, when a litigant applies to this Court for a stay, it argues that the lower court erred under current law. But Alabama's application cannot be understood in that way. Accepting Alabama's contentions would rewrite decades of this Court's precedent about Section 2 of the VRA. For that reason, this Court goes badly wrong in granting a stay. There may—or may not—be a basis for revising our VRA precedent in light of the modern districting technology that Alabama's application highlights. But such a change can properly happen only after full briefing and argument—not based on the scanty review this Court gives matters on its shadow docket. The District Court here did everything right under the law existing today. Staying its decision forces Black Alabamians to suffer what under that law is clear vote dilution. With respect, I again dissent from a ruling that “undermines Section 2 and the right it provides.”

Following the 2020 census, the plaintiffs here challenged Alabama's newly enacted redistricting plan under Section 2. Alabama's population is 27% Black, but under the plan, Black voters have the power to elect their preferred candidate in only one of the State's seven congressional districts. That alone does not demonstrate vote dilution. What raises the prospect of a Section 2 claim is that Alabama's Black population is heavily “concentrated” in the urban population centers and an area of the State known as the Black Belt, “named for the region's fertile black soil,” where many enslaved people were taken during the antebellum period.

Because “Black voters in Alabama are relatively geographically compact,” the plaintiffs argued that the State could have drawn a second congressional district, meeting traditional districting criteria, in which Black Alabamians would constitute a majority. But the State had instead “pack[ed]” much of the Black population into a single district, and “crack[ed]” the remainder over three others. *Id.*, at 36–41. That action, the plaintiffs contended, diluted their voting power.

The Court's longstanding precedent imposes strict requirements for proving a vote-dilution claim. To start, plaintiffs must satisfy three conditions, often referred to as the [*Gingles*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986133438&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search))conditions. Those conditions are: (1) that the “minority group is sufficiently large and geographically compact to constitute a majority” in a district, (2) that the minority group “is politically cohesive,” and (3) that the “white majority votes sufficiently as a bloc to enable it ... usually to defeat the minority's preferred candidate.”  If plaintiffs satisfy those conditions, they must then show that a Section 2 “violation has occurred based on the totality of the circumstances.”  Those circumstances include the history of race-based discrimination in the State (especially as to voting rights), the extent to which voting is racially polarized, and the extent to which minority candidates have struggled to get elected to public office.

Under our precedent, plaintiffs have long satisfied the first [*Gingles*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986133438&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search))condition—the only condition at issue in Alabama's stay application—by showing that another “reasonably compact” majority-minority district can be drawn, consistent with “traditional districting principles.”. Those principles include—in addition to compactness—contiguity, respect for existing political subdivisions, and the desire to keep together existing communities of interest. To make the requisite showing, plaintiffs typically submit one or more illustrative, alternative maps complying with traditional districting criteria while also adding a majority-minority district.

The plaintiffs here did just that. In a seven-day preliminary injunction hearing with live testimony from 17 witnesses, they built an extensive factual record, including substantial evidence going to the ease of creating a second majority-Black district. Based on that record, the District Court found that the plaintiffs’ 11 illustrative plans (each with a second majority-Black district) complied with traditional districting criteria as well as or better than Alabama's enacted plan. As the court explained, the plaintiffs’ proposed plans “have nearly zero population deviation, include only contiguous districts, include districts that are at least as geographically compact as those in [Alabama's] Plan, respect traditional boundaries and subdivisions at least as much as [Alabama's] Plan, protect important communities of interest, [and] protect incumbents where possible.”. . . Faced with that mountain of evidence, the District Court found the first [*Gingles*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986133438&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search))condition met. Indeed, the court noted that just eyeballing the map of Alabama's Black population (as printed below) shows how “eas[y]” it is—given the shape of the Black Belt and the nearby locations of Birmingham and Mobile—to “draw two reasonably configured majority-Black districts.”

The District Court also found that the plaintiffs made the required showings on the other [*Gingles*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986133438&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search))conditions and the totality of the circumstances. The court stated that “there is no serious dispute that Black voters [in Alabama] are ‘politically cohesive,’ nor that the challenged districts’ white majority votes ‘sufficiently as a bloc to usually defeat [Black voters’] preferred candidate[s].’ ” Too, the court found that the vast majority of factors considered in the totality-of-circumstances inquiry favored the plaintiffs, including the “extent to which voting ... is racially polarized” (very), the “extent to which members of the minority group have been elected to public office” (rarely), and the history of voting-rights discrimination in the State (significant). The court noted that recent political campaigns in Alabama had included “obvious and overt appeals to race.”  After all this, the court considered whether, under Alabama's plan, “the number of districts in which the minority group forms an effective majority is roughly proportional to its share of the population.”  The court found it was not, noting that Black Alabamians are 27% of the population but have meaningful influence over just 14% of congressional seats. . . .

In light of that “extremely robust body of evidence,” the District Court held that the record “compels” the conclusion that Alabama's redistricting plan “substantially likely violates Section Two.”  Indeed, the District Court did “not regard the question” whether the plaintiffs were “substantially likely to prevail on the merits of their Section Two claim as a close one.”

. . . . Alabama argues that the proposed plans do not satisfy the first [*Gingles*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986133438&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search))condition because the plaintiffs’ experts did not draw them with race wholly out of mind—“using only race-neutral criteria.” . . . But in making that claim, the State seeks to graft onto the VRA a new requirement, lacking any foundation in our precedent. The first [*Gingles*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986133438&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search))condition (recall only the initial step in a much larger analysis) asks a question specifically about race: Is a minority group “sufficiently large and geographically compact to constitute a majority” in an additional district, consistent with traditional districting criteria?  Consistent with the nature of that question, the plaintiffs here did what plaintiffs in a Section 2 case have always done: They hired experts and charged them with the task of drawing maps with another reasonably configured majority-Black district.. . . At no time has this Court held that plaintiffs must answer the race-infused question of the first [*Gingles*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986133438&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search))condition without any awareness of race; indeed, until recently, that would have been well-nigh impossible. In Alabama's view, though, the advent of computerized districting should change the way the first [*Gingles*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986133438&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search))condition operates. Plaintiffs can now use technology to generate millions of possible plans, without any attention to race. Alabama claims that some number of those plans (what number is unclear) must contain an additional majority-Black district for Section 2 plaintiffs to satisfy the first [*Gingles*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=1986133438&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search))condition. But whatever the pros and cons of that method, this Court has never demanded its use; we have not so much as floated the idea, let alone considered how it would work. Alabama's stay request, then, is premised on an entirely new view of what the law requires.

. . .

The question whether to accept Alabama's position demands serious and sustained consideration—the kind of consideration impossible to give “on a short fuse without benefit of full briefing and oral argument.”  Alabama's challenge to the District Court's decision cannot succeed unless this Court adopts a novel legal rule. And more—a novel legal rule of potentially large consequence. Substantial questions merit substantial thought. Here, the District Court carefully and correctly applied the now-existing law and concluded that Alabama has unlawfully diluted the voting power of Black Alabamians. This Court is wrong to stay that decision based on a hastily made and wholly unexplained prejudgment that it is ready to change the law.

As to the equities, Alabama does not—because it cannot—contend that redrawing its map in advance of this year's elections would be impossible. The State's legislature enacted its current plan in less than a week. And the legislature has all the tools necessary to draw another, including “access to an experienced cartographer” and “not just one or two, but at least eleven illustrative remedial plans” complying with the District Court's injunction.  For that matter, nothing about the court's injunction could have come as a surprise. The State has been on notice “since at least 2018” that these or similar plaintiffs (after receiving new census data) “would likely assert a Section Two challenge to any 2021 congressional redistricting plan that did not include two majority-Black districts or districts in which Black voters otherwise have an opportunity to elect a representative of their choice.”  And indeed, the legislature in this current election cycle considered at least one alternative map containing two majority-Black districts.  Simply put, Alabama has known for quite some time that the VRA may require it to draw a different map; it has all it needs to do so; and it has shown just how quickly it can act when it wants to.

And Alabama cannot here invoke the so-called [*Purcell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010490743&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search))principle, which disfavors changing election rules at the eleventh hour. Alabama contends that the District Court's order comes too late because changing the map now may confuse voters who are moved to new precincts, and may hurt “non-major-party candidates” who “have to scramble to obtain” new signatures. But the District Court was right to say that “this case is not like [*Purcell*](https://1.next.westlaw.com/Link/Document/FullText?findType=Y&serNum=2010490743&pubNum=0000780&originatingDoc=I361f7b8e43b011ec9f24ec7b211d8087&refType=RP&originationContext=document&transitionType=DocumentItem&ppcid=213424cd25614534a549a0363cc89a8f&contextData=(sc.Search))because we are not ‘just weeks before an election.’ ” The general election is around nine months away; the primary date is in late May, about four months from now. Even the first day of absentee primary voting (which Alabama has leeway to modify) is March 30, more than two months after the court issued its order. This Court has previously denied stays of districting orders issued at similar times. I see no reason to do otherwise here. The plaintiffs “commenced their lawsuits within hours or days of the enactment” of Alabama's plan in November 2021. App. 203. And the District Court immediately expedited its proceedings; indeed, consistent with everything else the court did right, it moved with astonishing speed. The only delay (of a few weeks) came “at the request” of the State.  Alabama is not entitled to keep violating Black Alabamians’ voting rights just because the court's order came down in the first month of an election year.

Today's decision is one more in a disconcertingly long line of cases in which this Court uses its shadow docket to signal or make changes in the law, without anything approaching full briefing and argument. Here, the District Court applied established legal principles to an extensive evidentiary record. Its reasoning was careful—indeed, exhaustive—and justified in every respect. To reverse that decision requires upsetting the way Section 2 plaintiffs have for decades—and in line with our caselaw—proved vote-dilution claims. That is a serious matter, which cannot properly occur without thorough consideration. Yet today the Court skips that step, staying the District Court's order based on the untested and unexplained view that the law needs to change. That decision does a disservice to our own appellate processes, which serve both to constrain and to legitimate the Court's authority. It does a disservice to the District Court, which meticulously applied this Court's longstanding voting-rights precedent. And most of all, it does a disservice to Black Alabamians who under that precedent have had their electoral power diminished—in violation of a law this Court once knew to buttress all of American democracy.