Conservative Justices Appear Inclined to Further Narrowing of Voting Rights Act

October 4, 2022 **by Dan McCue**

Black voters from Alabama address the press outside the Supreme Court building shortly after the conclusion of two hours of oral arguments on Tuesday. (Photo by Dan McCue)

WASHINGTON — After nearly two hours of oral arguments on Tuesday, a number of conservative justices on the Supreme Court appeared to be sympathetic to Alabama's request that key provisions of the Voting Rights Act be narrowed when it comes to the lawfulness of electoral maps.

But attorneys for the Black plaintiffs in the case, the U.S. solicitor general and the court's three liberals all seemed to agree that accepting the state's argument that a map it claims is "race

neutral" fulfills the act's anti-discrimination goals would be a disaster.

Not only would it upend more than 50 years of civil rights law and jurisprudence, they said, but it could lead to the dismantling of minority-majority electoral districts across the country and bury the nation's courts in lawsuits.

In the end, the outcome of the case may come down to Justice Neil Gorsuch, who was notably the only member of the so-called conservative wing of the court not to ask a single question during the hearing.

The case revolves around an electoral map adopted by Alabama lawmakers in November 2021 that has seven congressional districts based on the 2020 census. The map, also called HB 1, included just one district with a majority of Black voters, despite the fact Black Alabamians constitute 27% of the state's voting-age population.

More than the number of "minority-majority" districts contained in the map, the controversy centers on what was done with the state's "Black Belt region."

According to a handout from the Supreme Court, the region is so named because of its fertile black soil. It also happens to contain a large portion of the state's Black population.

This high concentration allows Black voters in District 7 to elect a candidate of their choice. But at the same time, HB 1 "cracks" or divides the rest of the Black Belt region across three other districts with a majority of White voters.

A group of Black voters challenged the validity of the map in federal court. As part of their arguments they offered examples of 11 different maps that created a second minority-majority

district while also supposedly comporting with Alabama's districting guidelines at least as well as the state's map did.

Deuel Ross, who made his Supreme Court debut Tuesday representing Black voters in a high-stakes Alabama redistricting case, talks to reporters after oral arguments. (Photo by Dan McCue)

After an evidentiary hearing, a three-judge panel of federal judges ruled Alabama's map likely violated Section 2 of the Voting Rights Act.

But the Supreme Court, in a 5-4 decision in February, let Alabama use the map for the Nov. 8 U.S. congressional elections in which Republicans are trying to regain control of Congress.

Chief Justice John Roberts joined the court's three liberals in a dissent to that ruling.

Section 2 originally prohibited government voting practices and procedures that "deny or abridge the right of any citizen … to vote on account of race or color."

In 1980, the Supreme Court interpreted Section 2 to prohibit only "purposefully discriminatory" government actions. But Congress said the justices had misunderstood its intent, and amended Section 2 to prohibit government practices that produced a discriminatory result.

In addition, Congress specified how to determine when a discriminatory result violated Section 2. Under the amendment, a voting practice violated Section 2, "If, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in [a] state or political subdivision are not equally open to participation by members of a class of citizens protected by" the section.

Congress added that while "the extent to which members of a protected class have been elected to office" is "one circumstance which may be considered," Section 2 does not "establish a right to" proportional representation by race.

The Supreme Court first applied the new framework in 1986 in the case *Thornburg v. Gingles*, in which it ruled that a Section 2 plaintiff must establish three preconditions to claim a valid Section 2 violation.

First, the minority group must be able to show that it is sufficiently large and geographically compact to constitute a majority in a single-member district. Secondly, it must show that it is "politically cohesive."

Finally, the minority group must be able to demonstrate that the White majority votes "sufficiently as a bloc" to allow it to "usually defeat the minority's preferred candidate."

If and only if a plaintiff satisfies all three *Gingles* preconditions must a court determine whether "in the totality of circumstances," a districting scheme leaves racial minority voters with less of an opportunity than White voters to elect representatives of their choice.

During oral arguments, Alabama Solicitor General Edmund LaCour asserted that the state made several attempts through "computer simulations" to create a map with a second minority-majority district and just couldn't come up with one.

"The only way to add such a district is to make race a nonnegotiable criteria" in redistricting, he said.

Later, he referred to such an outcome as creating a "flawed control" that ultimately would benefit some voters at the expense of others.

That prompted the court's conservatives, led by Justice Samuel Alito Jr., to probe for some kind of legal test that could be used to determine when the mismatch between Alabama's Black population and its representation in Congress is the result of discrimination and when it isn't.

To Alito, it seemed from the press gallery at the side of the courtroom, the justices who decided *Thornburg v. Gingles* four decades ago had set the bar too low.

"As a practical matter, in every place in the south and maybe in other places, if the first *Gingles* condition can be satisfied, will not the plaintiffs always run the table?" Alito asked Solicitor General Elizabeth Prelogar last in the hearing.

"Where can [the defendants] win?" he asked.

But Justice Elena Kagan was having none of that line of questioning.

"What you are asking this court is to require that there be a race neutral benchmark," she said to LaCour.

"And it seems that what you are really saying — and it is your right to do so — is why don't we simply change how we look at Section 2 in its entirety."

Justice Ketanji Brown Jackson was particularly animated and vocal during the hearing, picking up where Kagan left off and asking Alabama's solicitor general whether he was really asking the court to change *Gingles* in some fundamental way to achieve a "race blind" outcome.

Justice Sonia Sotomayor questioned LaCour about why the Republican-drawn map split up key Black communities among House districts but not key White communities.

But it was Kagan who scored the soundbite of the day when she said, "This is an important statute. It's one of the great achievements of American democracy to achieve equal political opportunities, regardless of race, to ensure that African Americans could have as much political power as White Americans could. That's a pretty big deal.

"What you're asking is that we cut back on 40 years of precedent and make it extremely hard for challengers [in these cases] to prevail. So what's left?" she asked.

Deuel Ross, arguing for the appellees in the case, opened by saying, "there is nothing race neutral about Alabama's map, it 'cracks' the Black Belt."

"Cracking" is splitting up a cluster of voters, whether that cluster is defined by race or political affiliation, among several districts where their votes are unlikely to sway the outcome of a race.

A crowd of prospective spectators waits for a chance to be let into the Supreme Court to hear the year's first high-profile voting rights case. (Photo by Dan McCue)

"Nothing in Section 2 allows Alabama to produce such a map," he said. "Section 2 is about ensuring equal opportunity."

But Alito continued to raise questions about the compactness of districts and the concept of communities of interest being respected in district maps.

"As a practical matter, a majority in a district may vote as a bloc based on ideology, their actions having nothing to do with race," he said.

But Jackson said the law doesn't leave room for such hypotheticals.

"What it is saying is you need to identify people in this community who have less opportunity and less ability to participate — and ensure that that's remedied. It's a race-conscious effort," she said.

The court is expected to hand down its decision in the case before the end of June.

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