SpencerFane

The U.S. Supreme Court Paves the Way for District Courts to Become Active Participants in Redistricting and Increases the Importance of Communities of Interest

The U.S. Supreme Court, through an unusual coalition, has waded into the political thicket in *Allen v. Milligan* once again. The majority opinion, mostly written by Justice John Roberts and signed onto by the liberal bloc and Justice Brett Kavanaugh, held that Alabama's 2022 congressional map likely violates Section 2 of the Voting Rights Act (VRA) that protects minority groups. For the second time, Alabama (my home state) has run afoul of the VRA. Its current map, with a strangely shaped 7th district, is a product of Alabama's first run-in with the VRA. That case, *Wesch v. Hunt*[1], caused the creation of generally what remains the shape of the 7th district today – a strange shape that reaches around two other districts to connect areas of Montgomery and Birmingham that are predominantly Black. But, as Alabama's population has shifted and grown, its congressional map has also remained largely the same in the past 30 years.

So, when this redistricting cycle came around, several groups sued. This caused a three-judge panel – Circuit Judge Stanley Marcus (Clinton), District Judge Anna Manasco (Trump), and District Judge Terry Moorer (Trump) – to eventually issue a preliminary injunction against Alabama's use of the map. In reaching this conclusion, the panel concluded that the decision that the 2022 map violated the VRA was not "a close one."

The framework that Section 2 operates in largely stems from *Thornburg v. Gingles*[2]. *Gingles* give three preconditions that must be met for a Section 2 violation the minority group must be:

- Large and geographically compact enough to form a majority in a reasonably shaped district;
- Politically cohesive; and
- Able to show that a majority group votes as a bloc enough to routinely defeat the minority preferred candidate.

After these preconditions are met, a plaintiff must show that under "the totality of the circumstances," the political process is not open to minority voters. A rather hazy test.

Largely based on maps submitted by the plaintiffs, the Court concluded that each of these preconditions were met. While some time was spent on the compactness of the maps. Justice Roberts spent a surprising amount of time responding to Alabama's community-of-interest argument. Alabama argued that by splitting the Gulf Coast region of the state into two districts, the plaintiff's maps did not respect communities of interest. But Roberts expressed skepticism that the Gulf Coast is even a community of interest. And he also contended that the Black Belt (named after a strip of extremely fertile soil in Alabama) is a competing community of interest. Not shockingly, the majority found polarized voting in Alabama with Black voters supporting their preferred candidate by 92.3% while white votes only voted the same 15.4% of the time.

But little ink was spilled over the totality of the circumstances test. In just 56 words, the Court declines to interject into the panel's factual findings, which were mostly based on Alabama's history of racial tragedy. This opens the door for a more laissez-faire approach to District Court rulings regarding the VRA.

Alabama asked the Court to adopt a "race-neutral benchmark." Where, using AI, computers can generate congressional districts without taking race into account. In doing so, Alabama argued that *Gingles* wrongly interjects race into something that can be solved in a race-neutral way. But Roberts held that this view is incompatible with the VRA, which was created with race in mind. And that Section 2 targets discriminatory effect and not solely discriminatory intent.

It is clear where Justice Clarence Thomas stands. Thomas writes to say that this decision relies on a proportionality standard based on race. And that the proper standard is a race-neutral standard. Justice Thomas calls up precedent to apply the

classic "strict scrutiny" test as this applies to what he considers sorting voters on the basis of race. More pointedly, Justice Thomas is upset about splitting Mobile, Alabama into two separate districts. Centering his time on the community of interest factor, Justice Thomas argues that to give Alabama two majority-minor districts requires racial gerrymandering. In doing so, he points to a simulation of two million districts that never produced two majority-minority districts.

What is interesting and might give an opening for future litigants is part III-B-1 of the opinion that Justice Kavanaugh did not join. Which mean that this part of Justice Robert's opinion does not have a majority and is not law. This part deals with the nuance between racial predominance and racial consciousness. Justice Roberts argues that maps that form two majority-minor districts here were not driven by racial predominance but were only racially consciousness. And it is true that race played a big role in the plaintiff's maps. The plaintiffs' expert used a computer program to generate 30,000 maps, not one had two majority-minority districts. But Justice Roberts did not think this rose to the level of racial predominance. For an unknown reason, Justice Kavanaugh did not join Justice Robert's logic on the matter. Although, he does hint at the temporal appropriateness of the VRA in his view. Future litigants will likely target Justice Kavanaugh as the new "swing-vote" on future redistricting cases.

So, what's next? A very similar case is pending before a three-judge-panel in Georgia – *Georgia State Conf. of the NAACP v. Georgia*. Parties there have just wrapped up briefing the defendant's motion for summary judgment, which most certainly have to be supplemented in light of *Allen*. It will interesting to see if the Georgia panel follows the Alabama panel with their newfound freedom.

This post was drafted by Will Stout, an attorney in the Nashville, Tennessee, office of Spencer Fane. For more information, please visit www.spencerfane.com.

[1] *785 F. Supp. 1491, 1493 (SD Ala.)*

[2] *478 U.S. 30 (1986)*