Jason Gordon

4. Using predominantly class material, along with the case briefs, evaluate Merrill v. Milligan. How should the court rule? Explain and defend your position.

INTRODUCTION

Merrill v. Milligan (2022) is the latest entry in a string of Supreme Court cases regarding redistricting. In response to the 2020 census, Alabama redrew its seven congressional districts and included one majority-minority district in its map entitled HB1 (Appendix 1).[1] The plaintiffs sued Alabama over this map and argued that there should be a second majority-minority district in the state to reflect the growing share of African Americans in Alabama. In addition, the plaintiffs argue that the state has routinely been splitting the "Black Belt"[2], cracking those voters and withholding their equal opportunity to vote.[3] In response, the state of Alabama argued that drawing a second majority-minority district would divide the Gulf Coast racially and change the historical cores of the districts.[4] *Thornburg v. Gingles* is the case on which both the plaintiffs and defendants base their arguments, which provides three conditions paired with a circumstantial argument to determine if a map violated Section 2 of the Voting Rights Act of 1965. Those conditions are that the minority group must be able to form a majority in a geographically compact district, that the minority group must be politically cohesive, and that the majority must be currently voting as a bloc, enabling it to consistently defeat the minority.[5] Moreover, there must be sufficient historical evidence of minority discrimination. The District Court agreed with the plaintiffs that there was a §2 violation, a decision Alabama appealed to the Supreme Court. From my perspective, the Supreme Court should uphold the District Court's ruling. HB1 cracks the Black Belt into multiple districts and dilutes its vote share, and the plaintiffs adequately satisfy all requirements under *Gingles*, fulfilling the current requirements of a §2 violation under the past Supreme Court precedent.

---

[1] John Merrill, et al. *Brief for Appellants* (Nos. 21-1086, 21-1087), i.
[2] The Black Belt is defined as a largely rural area in Southern Alabama encompassing Montgomery and 17 other counties named for the region's "fertile black soil". All counties in the Black Belt are majority-African American. Evan Milligan, et al. *Brief for Milligan Appellees* (No. 21-1086), 5-6.
[3] Milligan, *Brief for Milligan Appellees*, 6-7.
[4] Merrill, *Brief for Appellants*, 1.
[5] Merrill, *Brief for Appellants*, 8.

INFORMATION AND PRECEDENT

One of Alabama's arguments is that §2 of the Voting Rights Act (1965) conflicts with the Equal Protection Clause of the Fifteenth Amendment if it requires Alabama to change its map.[6] Simply, Amendment XV states that the right to vote cannot be denied on the basis of "race, color, or previous condition of servitude"[7]. The defendants argue that forming districts to include a second majority-minority district robs white groups of equal protection in voting. They generalize the argument to argue that the Court's interpretation of §2 is incorrect and that the current understanding conflicts with Amendment XV. Section 2 of the Voting Rights Act argues that a state or subdivision cannot deny or abridge the right to vote on account of race or color through qualifications, practices, or procedures.[8] The Voting Rights Act is much more forceful in its language than the Fifteenth Amendment, for it was made to specifically address issues with voter discrimination in 1965. Section 2 can be interpreted to include drawing districts to exclude the minority vote, and in turn requiring some districts to have a majority of minority citizens, known as majority-minority districts.

Merrill v. Milligan follows a line of cases addressing the conflict between §2 and the Equal Protection Clause of Amendment XV. Both the plaintiffs and defendants base much of their arguments on the 1986 case *Thornburg v. Gingles*. *Gingles* sets out some criteria to argue a section 2 violation: the minority must be geographically compact, there must be voter cohesion in which the majority blocks the minority's preferred candidates, and the totality of circumstances must show that the minority has less opportunity.[9] This checklist of terms is a simple way to discuss whether there is a violation of Section 2.

However, *Gingles* is not the sole case that discusses racial gerrymandering; there are two other notable cases discussing the inclusion of more majority-minority districts. In *Shaw v. Reno* (1993), North Carolina's map was struck down. Justice O'Connor argues that North Carolina's districts are racially

---

[6] Merrill, *Brief for Appellants*, 31.
[7] Corey Brettschneider, *Civil Rights and Liberties* (New York: Wolters Kluwer Law & Business, 2013), lv.
[8] "Voting Rights Act (1965)," National Archives, October 6, 2021, https://www.archives.gov/milestone-documents/voting-rights-act.
[9] Marcus Caster, et al. *Brief for Caster Respondents* (Nos. 21-1086, 21-1087), 7-8.

gerrymandered, for they are not compact and do not represent people in the same geographic area.[10] Thus, the Equal Protection Clause applies due to the severity of the gerrymander, as having an incredibly thin and barely contiguous district stretch across hundreds of miles cannot reasonably represent the same people. Likewise, Georgia's 11th district was also struck down in the 1995 case *Miller v. Johnson* with similar circumstances.[11] Here, Justice Kennedy argues that borders are not the sole thing to consider and that the challengers of the map must also show that race is a predominant factor in districting. Both cases specifically point out that while it is important to have majority-minority districts, they must not be so egregious that it discriminates against other races. Thus, one of the questions in *Merrill v. Milligan* is whether or not an edited map to include two majority-minority districts is excessively racially gerrymandered.

Prior to the current case, the District Court found Alabama's new map (HB1) to violate the Voting Rights Act; it denies African Americans equal opportunity.[12] The central legal dispute in the case is whether or not the plaintiffs fulfilled *Gingles*' first requirement — that there can be a geographically compact district that is majority-minority.[13] Simply, the maps that were made to add a second majority-minority district (Appendix 2) were valid and not a racial gerrymander, and thus, all conditions of *Gingles* were satisfied. The District Court found expressly that race was not the deciding factor, and argued that Alabama's experts failed to consider factors like non-racial data and respect for the Black Belt in their redistricting schemes.[14] From this decision, the District Court called for an injunction in the usage of the 2020 map in the 2022 midterm elections. However, the state of Alabama disagreed with the court's decision and appealed the case to the Supreme Court.

[10] Brettschneider, *CRAL*, 775-79.
[11] Brettschneider, *CRAL*, 779-83.
[12] Caster, *Brief for Caster Respondents*, 20-21.
[13] Caster, *Brief for Caster Respondents*, 18-20.
[14] Milligan, *Brief for Milligan Appellees*, 17.

CASE BRIEFS

Merrill defends HB1 by arguing that not only would creating a second majority-minority district be a racial gerrymander, but also that the interpretation §2 of the Voting Rights Act given by the defendants conflicts with the Equal Protection Clause.[15] Race was not the core issue in Alabama's redistricting; the core issue instead was preserving the existing boundaries of the districts and updating them as the population changes. Merrill argues that the cores of the districts all have their own histories; splitting those cores would cause people with similar interests to be divided among multiple districts.[16] Simply put, Merrill's stance is that because the current map is not very different from the approved 2000 or 2010 maps (Appendix 3), it should be accepted, and the proposed replacement maps differ significantly from the historical boundaries of the districts, making them a racial gerrymander.[17] Because the districts have been relatively consistent previously, Merrill argues, they must remain consistent, only shifting to allow the population to be even across all seven districts. The simple counterargument to Merrill is that a historical cores basis for districting allows the racially discriminatory districts of the past to continue their practices. Alabama disagrees with the plaintiffs that *Gingles*' first argument applies here; the plaintiffs did not respect the historical cores of the congressional districts. Since the proposed districts vary significantly from the current districts, they are not geographically compact. Merrill continues by arguing that the only way the plaintiffs could create two majority-minority districts was to intentionally sort by race, for a redistricting system told to disregard race in its districting never produced two majority-minority districts throughout 30,000 attempts.[18]

From this data, Merrill's argument is that Section 2 of the Voting Rights Act does not require Alabama to intentionally create a second majority-minority district. Just because a majority-minority district can be drawn does not mean that it must be implemented, and to Alabama, the districts are already equally open.[19] *Gingles* has its three points, but the plaintiffs fail on the first point because race cannot be

[15] Merrill, *Brief for Appellants*, 1-2.
[16] Merrill, *Brief for Appellants*, 21.
[17] Merrill, *Brief for Appellants*, 12-17, 21.
[18] Merrill, *Brief for Appellants*, 22-23.
[19] Merrill, *Brief for Appellants*, 28-30.

the decider in districting. Thus, the *Gingles* test fails, for redistricting to create a second majority-minority district would be a racial gerrymander, invalidating thousands of race-neutral redistricting plans.[20] If Alabama is forced to redistrict to include the second majority-minority district, it will be unable to be race-neutral and unable to satisfy the Equal Protection Clause, the defendants argue. Therefore, Merrill disagrees that HB1 is an invalid map, and further disagrees with the District Court's injunction to halt the usage of the map.

Merrill v. Milligan is two cases; it has been combined with *Merrill v. Caster* as they are similar arguments with the same background, and District Courts issued identical decisions for both cases. Thus, they are merged for the Supreme Court case, and both Milligan and Caster submitted case briefs as the plaintiffs.

Caster's arguments are that not only do the plaintiffs satisfy the *Gingles* conditions, but also African-Americans will not be represented if not in a majority-minority district.[21] Caster disagrees with Merrill, arguing that while race is a factor in the remedial map, it is not the sole decider. To satisfy *Gingles*, the plaintiffs argue that the minority group is large and compact enough to be a district; it was repeatedly shown how there can be two majority-minority districts in Alabama, which also allow for compactness (Appendix 2).[22] The Black Belt, including Mobile and Montgomery, are a cohesive bloc and share cultural and historical ties; many African Americans moved to both cities from the Black Belt, and thus both cities are deeply entwined with the region culturally.[23] There is an inequality of opportunity in Alabama's districts because the Black vote is split among multiple districts (Appendix 4). The new districts are compact enough and satisfy the general requirements for redistricting, and the people in the district are similar, which satisfies the first point of the *Gingles* test. Moreover, the second and third parts of the *Gingles* test are satisfied because the vote is racially divided, and in the Black Belt, the white vote

[20] Merrill, *Brief for Appellants*, 31.
[21] Caster, *Brief for Caster Respondents*, 1-3.
[22] Caster, *Brief for Caster Respondents*, 18.
[23] Caster, *Brief for Caster Respondents*, 11, 22-23.

elects candidates Black Alabamians do not want.[24] Thus, the plaintiffs argue that the three explicit components of *Gingles* are satisfied. There are proposed maps that incorporate a second majority-minority district that are geographically compact and both races vote as a bloc. *Gingles* requires a totality of circumstances to prove discrimination; the plaintiffs prove this with a detailed history if discrimination in the Black Belt.

Alabama has a past of discriminating racially by denying African Americans representation, and not responding to Black Alabamians' needs or representing them.[25] The Black Belt has a history of minority voter disenfranchisement and discrimination, which still exists today. It has poor living conditions with improper utility coverage, and a racialized political system where white Alabamians work expressly to suppress the African American vote.[26] Caster argues that the Black Belt has been neglected for centuries, and the white majority does not attend to the needs for adequate living conditions, or even to their right to vote. Moreover, voter behavior is divided, and Black Alabamians do not get their candidates into office. This is because the current maps have been based off of the 1970 map, which was made to split the Black vote as a means to diminish its power.[27] Alabama was forced to redraw its map to include a majority-minority district in 1990, which allowed for some more representation for African Americans. Because of demographic shifts, it is only rational to make a second of these districts, and the Black Belt has previously been neglected, so the second majority-minority district should be there.

Thus, Caster's argument is simple. He argues that the plaintiffs satisfy *Gingles*' first argument with the eleven maps they have presented. In response to Merrill, the plaintiffs point out that the models Alabama uses have an incomplete criteria, and its implicit argument that the Supreme Court should reinstate the test of discriminatory intent simply allows states to explain discrimination by race neutrality.[28] If Alabama is allowed to use its cores argument, then states are allowed to argue that because the districts have existed, they must continue to exist, regardless of how discriminatory they may be.

---

[24] Caster, *Brief for Caster Respondents*, 19.
[25] Caster, *Brief for Caster Respondents*, 8.
[26] Caster, *Brief for Caster Respondents*, 9-10, 12-13.
[27] Caster, *Brief for Caster Respondents*, 15-16.
[28] Caster, *Brief for Caster Respondents*, 23-25.

Arguing that the districts have historically been the same and that keeping districts the same is the deciding factor rather than race only allows further discrimination if the districts were previously unequal. Moreover, Alabama's argument that making new maps to include two majority-minority districts violates equal protection is simply incorrect; the plaintiffs — not the state — are creating the districts to prove that a majority-minority district can exist within the general rules of redistricting.[29] The plaintiffs are simply showing how there can be two majority-minority districts, which is a private action that the Fifteenth Amendment has no jurisdiction over. Thus, Caster's argument is strong; the *Gingles* conditions are satisfied, so Alabama must redistrict.

The Milligan Appellees have many similar points to the Caster Respondents, but add further information to the argument, mostly through historical context. In alignment with Caster, Milligan adds that the Court rejected the intent test in 1982 for being "unnecessarily divisive" and placing "an 'inordinately difficult' burden of proof on the plaintiffs"[30]. Keeping the intent test is needlessly restrictive and can be easily argued around by the defendants; they can simply find a different way to argue why the map is the way it is. In fact, Alabama did this already through its historical cores argument. Alabama has also consistently cracked the Black Belt into multiple districts, cracking it into four districts for a century and then splitting the region further into five districts after it lost a seat, only changing the map to allow for a majority-minority district when it was forced to by the courts.[31] The Black Belt is still split across multiple districts, and it was originally split to suppress the Black vote (Appendix 4). Thus, it is not logical that because this dilution of a minority group's vote occurred in the past, that it must continue.

Milligan's core argument reiterates Caster's argument. The plaintiffs have drawn an illustrative map with two majority-minority districts consistent with redistricting principles, and they have shown that racial voting has denied minority voters an equal opportunity.[32] HB1 continues to fragment the Black Belt and Montgomery for the purpose of diluting the African American vote, and thus it falls under §2

[29] Caster, *Brief for Caster Respondents*, 26.
[30] Milligan, *Brief for Milligan Appellees*, 4.
[31] Milligan, *Brief for Milligan Appellees*, 7-12.
[32] Milligan, *Brief for Milligan Appellees*, 19-20.

violations. Furthermore, Alabama's argument is contrary to Section 2's text and purpose. Making the maps to prove the standard is not state action, and the proposed districts are not bound by race either, so it does not violate Amendment XV. Milligan also argues that one of the simulations Alabama relies on shows thousands of maps with two majority-minority districts, and HB1 is an outlier for including only one.[33] Thus, it is nonsensical for the Supreme Court to reverse the District Court's decision; Alabama's argument just does not hold up.

The Supreme Court has already discussed *Merrill v. Milligan* and issued a stay on the District Court's injunction, which makes HB1 valid for the 2022 elections.[34] Justice Kavanaugh argues that forcing a change in the district maps is simply too close to the 2022 elections, and does not provide enough time for the necessary adjustments to be made. Kavanaugh — and the majority — argue that they need time, and changing maps too close to the election is not possible. Both Chief Justice Roberts and Justice Kagan wrote dissents to this stay; Roberts argues that the District Court applied existing law with no errors, and Kagan agrees with the Chief Justice.[35] Moreover, Kagan argues as if the case has already been decided, pointing that even though it is just a stay, it rewrites decades of precedent; the Plaintiffs meet the *Gingles* test — Alabama's argument of being unable to comply is incorrect.[36] Moreover, redrawing in advance of elections is possible; HB1 was enacted in less than a week, and Alabama has the resources to do that again.[37] Simply, the current position of the Supreme Court seems to have made the decision to keep HB1, and Kagan strongly dissents, arguing that the plaintiffs are correct in their judgment.

---

[33] Milligan, *Brief for Milligan Appellees*, 21-23.
[34] J. Kavanaugh (Concurring). *Merrill v. Milligan* (595 U.S. ____ (2022), Nos. 21-1086, 21-1087), 1-3.
[35] C. J. Roberts (Dissenting). *Merrill v. Milligan* (595 U.S. ____ (2022), Nos. 21-1086, 21-1087), 1-2.
[36] J. Kagan (Dissenting). *Merrill v. Milligan* (595 U.S. ____ (2022), Nos. 21-1086, 21-1087), 1-9.
[37] Kagan, *Merrill v. Milligan*, 9-11.

CONCLUSION

After reading the case briefs, it seems unfathomable that the Supreme Court should not agree with the plaintiffs and strike down HB1. It is evident that the District Court is correct — the plaintiffs easily satisfy the *Gingles* test, making it a Section 2 violation. There are provided maps that prove a second majority-minority district, keeping compactness along with the general rules of redistricting. Voting patterns show consistently that Black Alabamians vote one way, and white Alabamians vote a different way and suppress the minority's preferred candidates. Furthermore, the plaintiffs give overwhelming historical evidence of past discriminatory practices by Alabama that is reflected in HB1.

However, the Supreme Court will likely ignore these decades of precedent due to its conservative makeup. Providing a stay on the injunction instead of giving a decision is a clear indicator that they do not plan on forcing Alabama to edit its map, especially considering that Alabama can quickly and easily implement a new map. The justices on the Court are political actors, and upholding HB1 furthers the current conservative supermajority's goals. This Court has previously broken precedent for its interests, and will continue to do so. Validating Alabama's argument allows other states to racially gerrymander as well, using history to instead exclude minorities instead of other more blatant practices. It weakens §2 of the Voting Rights Act significantly, robbing it of the power to control maps if a state changes it based on past historical makeup. Thus, the decision to make a stay on this case is incredibly worrying, albeit unsurprising considering the recent history of the court.

WORKS CITED

Brettschneider, Corey. *Civil Rights and Liberties*. New York: Wolters Kluwer Law & Business, 2013.

Caster. Marcus, et al. *Brief for Caster Respondents* (Nos. 21-1086, 21-1087).

Kagan, J. (Dissenting). *Merrill v. Milligan* (595 U.S. ____ (2022), Nos. 21-1086, 21-1087).

Kavanaugh, J. (Concurring). *Merrill v. Milligan* (595 U.S. ____ (2022), Nos. 21-1086, 21-1087).

Merrill, John, et al. *Brief for Appellants* (Nos. 21-1086, 21-1087).

Milligan, Evan, et al. *Brief for Milligan Appellees* (No. 21-1086).

National Archives. "Voting Rights Act (1965)," October 6, 2021.

https://www.archives.gov/milestone-documents/voting-rights-act

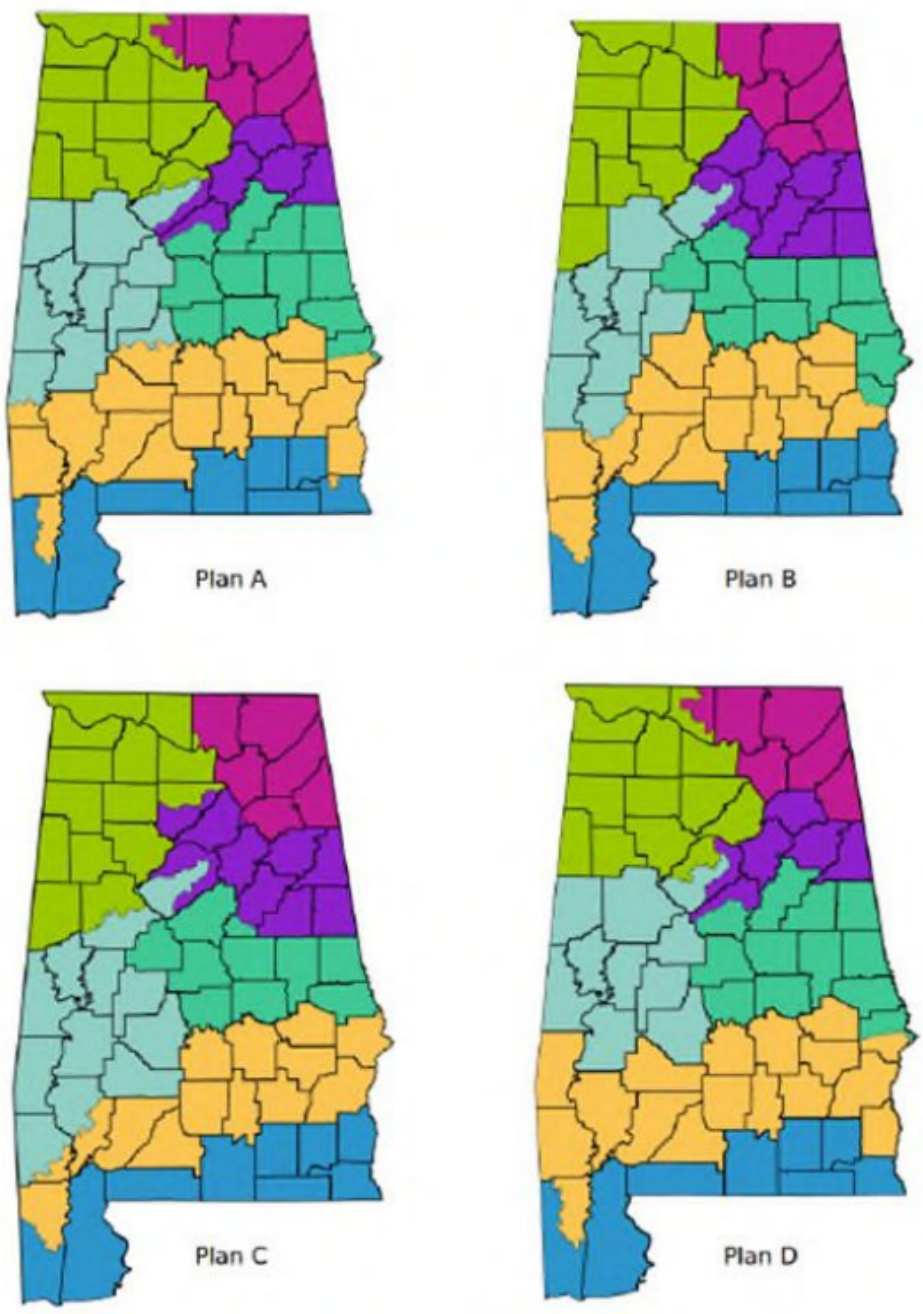
Roberts, C.J. (Dissenting). *Merrill v. Milligan* (595 U.S. ____ (2022), Nos. 21-1086, 21-1087).

APPENDICES

Appendix 1: HB1

Source: John Merrill, et al. *Brief for Appellants* (Nos. 21-1086, 21-1087), 18.

Appendix 2: A sample of the Plaintiffs' proposed maps



Source: Evan Milligan, et al. *Brief for Milligan Appellees* (No. 21-1086), 15.

Appendix 3: Alabama's 2000 and 2010 Congressional Maps

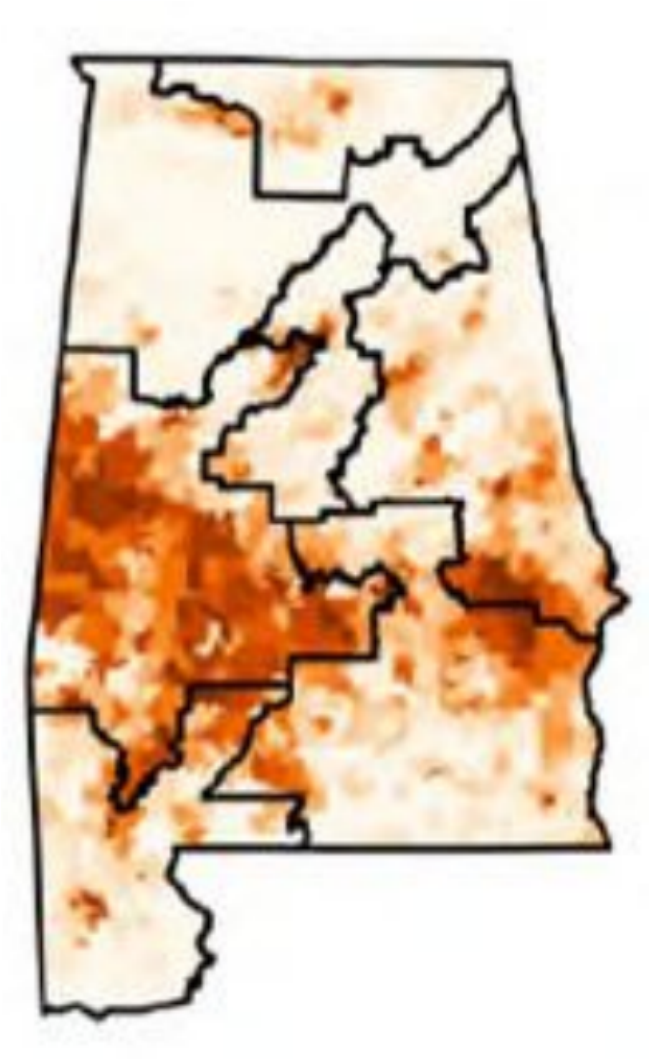
2002 Congressional Map

2011 Congressional Map

Source: John Merrill, et al. *Brief for Appellants* (Nos. 21-1086, 21-1087), 12.

Appendix 4: HB1 overlaying a map of the % of Black voters

A darker color means a higher Black voter share.



Source: Evan Milligan, et al. *Brief for Milligan Appellees* (No. 21-1086), 12.