The Supreme Court is Set to Dilute Black Voting Power — Again.

The Supreme Court is once again set to weigh in on whether Black voters deserve meaningful representation in Congress. After more than a decade of anti-democratic, discriminatory decisions, the Supreme Court may now allow South Carolina to gerrymander its districts so that Republicans consistently sweep 6 of its 7 congressional House seats. By taking up *Alexander v. South Carolina State Conference of the NAACP*, the Court indicated its blatant intention to further cosign racial gerrymandering and further dilute the voting power of Black and Brown voters throughout the country.

The Supreme Court Should Not Be Taking This Case Up In The First Place

After the 2020 census, partisan actors in South Carolina drew a congressional map that would dilute the voting power of Black voters across the state. They used traditional "packing and cracking" methods to craft the district boundaries and set racial targets for each district. Black-majority cities and neighborhoods were cracked across multiple districts to reduce the electoral influence of those voters.[1] In six of South Carolina's seven districts, South Carolina denied Black voters a meaningful opportunity to elect their preferred candidates.

The South Carolina State Conference of the NAACP, along with NAACP Legal Defense Fund and the ACLU, challenged the constitutionality of the gerrymander. A three-judge panel unanimously found in favor of the NAACP in regards to Congressional District 1. After a two-week trial, the panel found that the redrawn district violated voters' constitutional rights under the Equal Protection Clause of the Fourteenth Amendment because of racial gerrymandering and that the district was adopted with racially discriminatory intent in violation of voters' Fourteenth and Fifteenth Amendment rights.[2] Crucially, the panel found that the apportionment process amounted to "effective bleaching of African American voters out of… Congressional District No. 1" with an intended target of 17.8% Black voters in the district.[3]

The South Carolina legislature had until March 31, 2023 to present the panel with a remedial map. But instead, the Supreme Court took up South Carolina's appeal — despite overwhelming evidence that the state illegally gerrymandered its congressional maps. Taking up the case affords the Supreme Court an opportunity to effectively block racial gerrymandering claims across the country in the future.

An Adverse Ruling Could Kick Nearly Every Single Gerrymandering Claim Out of Federal Court

In 2019's *Rucho v. Common Cause*, the Supreme Court ruled 5-4 on partisan lines that partisan gerrymandering claims could no longer be brought in federal court, and that partisan gerrymandering itself was not unconstitutional.[4] The consequences to the principle of one person, one vote have been profound; the Court handed enormous power to states to decide for

[1] "Alexander v. South State Carolina Conference of NAACP," *ACLU* (May 10, 2023).
[2] *See South Carolina State Conference of NAACP v. Alexander*, No.: 3:21-cv-03302-MGL-TJH-RMG, (D.S.C., 2023) (Findings of Fact and Conclusions of Law).
[3] *Id.* at 15.
[4] *Rucho v. Common Cause*, 588 U.S.___ (2019).

themselves how much gerrymandering the party in power is allowed to impose on voters. In her dissent, Justice Kagan noted that the conservative justices "deprived citizens of the most fundamental of their constitutional rights: the rights to participate equally in the political process, to join with others to advance political beliefs, and to choose their political representatives."[5]

Now, the Court has given itself the opportunity to effectively kick racial gerrymandering claims out of federal court as well. The state of South Carolina is essentially hoping that the Court applies *Rucho* to a wider swath of cases: the state openly admits to gerrymandering, but argues that its motives were partisan — rather than racist — and therefore cannot be heard in federal court.

Yes, the state of South Carolina's defense essentially boils down to "we're not racist, we just don't want Black people to have representation for *partisan* reasons, not because they're Black." Here, the Court could decide whether or not "race and politics are highly correlated" and whether the lower court "erred when it failed to disentangle race from politics."[6] South Carolina claims that it gerrymandered "to create a stronger Republican tilt" and that the legislature "never would have enacted, for obvious political reasons, any plan that turned District 1 into a majority-Democratic district."[7] **The game plan could not be clearer: Republicans want to block nearly all victims of racial gerrymandering from being able to bring claims in federal court.** And they'll resort to claiming "racism and partisanship are just too closely tied" in order to get their way.

A neutral arbiter of the law wouldn't have granted cert in a case that can only further erode our democracy and signal that voters of color don't have a right to fair representation. But the Supreme Court has shown us once again that it now functions as a partisan policy shop masquerading as a legal institution. **An adverse ruling in this case will likely end one of the last means available to challenging racial gerrymandering in this country** and will enable extremist politicians to choose their own voters unfettered by the Constitution. It will mean that any state can evade a racial gerrymandering claim simply by asserting that they gerrymandered for partisan rather than racist reasons.

<u>The Supreme Court Has An Extreme, Anti-Democratic Record</u>

The Supreme Court's right-wing majority has spent more than a decade showing us exactly what it is: an enemy to democracy and fair representation. The Court's rulings this century have demonstrated a clear pattern of steadily and systematically dismantling democratic institutions. The Court has made clear that one-party rule is its ultimate design, and that it can and should determine *who votes and who rules*. Here are some examples of the Court's unrelenting, anti-democratic jackhammer:

[5] *Id.* (Kagan, J. dissenting).
[6] *Alexander v. South Carolina State Conference of NAACP*, No. 22-807 (Questions Presented).
[7] Ian Milhhiser, "A new Supreme Court case threatens to make gerrymandering even worse," *Vox* (May 15, 2023).

- 2000: The Court stopped the vote count in Florida as the presidential Democratic candidate gained ground. In a 5-4 partisan decision in *Bush v. Gore*, it functionally handed the election to George W. Bush.[8] It was such an openly horrific decision that the Court itself acknowledged the case should not be used as precedent moving forward.[9]
- 2010: In *Citizens United v. Federal Elections Commission,* the Court allowed nearly unfettered corporate money in political campaigns and struck down key parts of a bipartisan campaign finance reform bill.[10]
- 2013: In the partisan 5-4 decision in *Shelby County v. Holder*, the Court attacked Section 4(b) of the Voting Rights Act (VRA) and removed the coverage formula to determine which jurisdictions — those with histories of racist voting laws — needed to meet Section 5 preclearance requirements. In his opinion, Chief Justice Roberts stated that "the conditions that originally justified [the coverage formula] no longer characterize voting in the covered jurisdictions" — ignoring continued blatant voting discrimination in Shelby County, Alabama and in other jurisdictions.[11] The decision sparked a wave of new laws that aimed to make it harder for people of color to vote. The impact of the decision was immediate and profound, with some states implementing regressive voting laws starting mere hours after the decision. The federal Commission on Civil Rights found that 23 states enacted newly restrictive statewide voter laws in the five years after the *Shelby* decision.
- 2018: In the partisan 5-4 decision in *Abbott v. Perez,* the Court reversed the lower courts' findings that Texas had intentionally discriminated against Black and Latinx voters in its congressional maps, allowing the state to blatantly violate the VRA.[12] The ruling raised the burden of proof for plaintiffs challenging racist voting laws in VRA claims — making it far easier for lawmakers to violate the VRA and prevail in legal challenges.
- 2019: In the partisan 5-4 decision in *Rucho v. Common Cause*, the Supreme Court ruled that partisan gerrymandering did not violate the U.S. Constitution. The case made it impossible to bring partisan gerrymandering claims in federal court.
- 2021: In the partisan 6-3 decision in *Brnovich v. Democratic National Committee*, the Court took a direct swing at Section 2 of the VRA, which bans racial discrimination in voting practices. By classifying racist voting practices in Arizona as "[m]ere inconvenience,"[13] the Court made it easier for states to strip Black and Brown people of their right to vote. That same year, 19 states enacted voting restrictions, including voter purge laws, stricter ID laws, and omnibus election restriction bills.
- 2022: In two separate partisan 6-3 shadow docket decisions, the Court put racist maps back in place in Alabama and Louisiana for the 2022 midterm elections, even after lower courts struck them down for violating Section 2 of the VRA. By suspending Section 2 of the VRA in its shadow docket decision, *Merrill v. Milligan,* in February 2022, the Supreme Court effectively seized control of the House of Representatives. By conservative

[8] *Bush v. Gore*, 531 U.S. 98 (2000).
[9] Mark S. Brodin, "*Bush v. Gore*: The Worst (or at least second-to-the-worst) Supreme Court Decision Ever," 12 Nev. L.J. 563 (2012).
[10] *Citizens United v. Federal Election Comm'n*, 558 U.S. 310 (2010).
[11] *Shelby Cty. v. Holder,* 570 U.S. 529, 557 (2013).
[12] *Abbott v. Perez,* 585 U.S. __ (2018).
[13] *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2338 (2021).

estimates, the Court cost Democrats seven House seats in the 2022 midterms, but the number is likely closer to 8-10 seats; Republicans now control the House by a five-seat razor-thin majority. In addition to the devastating impacts on communities of color, the Court has demonstrated it can shift power in other branches of government to its preferred party through anti-democratic decisions.

Only Court Expansion Can Save Our Democracy from the Court And Stop Illicit One-Party Rule

The Court has been steadily attacking democracy from the bench for decades, piece after piece and case after case**.** Taking up this case shows us that the Court will not rest until it has functionally seized control over the democratic process by choosing who it deems worthy of voting and deciding election outcomes before they take place. Taking this case is an affront to our rights to self-govern and poses particular threats to Black voters and other voters of color. **Our voting rights and the cornerstone of our democracy are on the line**. The only way to protect our democracy from extremist justices dead set on dismantling it is to expand and rebalance the Court.