No. 25-13007

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

ALABAMA STATE CONFERENCE OF THE NAACP, et al.,
Plaintiffs-Appellees,

v.

WES ALLEN, in his official capacity as the Alabama Secretary of State,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Alabama
Case No. 2:21-cv-1531-AMM

SECRETARY OF STATE'S TIME-SENSITIVE MOTION FOR STAY OF INJUNCTION PENDING APPEAL

Michael P. Taunton
Riley Kate Lancaster
BALCH & BINGHAM LLP
1901 Sixth Avenue North
Suite 1500
Birmingham, Alabama 35203
Telephone (205) 251-8100
MTaunton@Balch.com

Steve Marshall
Attorney General
Edmund G. LaCour Jr.
Solicitor General
James W. Davis
Deputy Attorney General
Richard D. Mink
Misty S. Fairbanks Messick
Scott Woodard
Brenton M. Smith
Benjamin M. Seiss
Matthew R. Duggan
Assistant Attorneys General
OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
501 Washington Avenue
Montgomery, AL 36130
(334) 242-7300
Edmund.LaCour@AlabamaAG.gov

Counsel for Secretary of State Wes Allen

AMENDED CERTIFICATE OF INTERESTED PERSONS

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rule 26.1-1(a)(3) and 26.1-2(b), the undersigned counsel certifies that the following listed persons and parties may have an interest in the outcome of this case. Additions from the Secretary's first filed CIP are marked by an asterisk.

1. ACLU of Alabama
2. Aden, Leah C.
3. Alabama Attorney General's Office
4. Alabama State Conference of the NAACP
5. Allen, Amanda N.
6. Allen, Hon. Wes
7. American Civil Liberties Union
8. American Civil Liberties Union Foundation
9. Ashton, Anthony
10. Balch & Bingham LLP
11. Barnes, Anna-Kathryn
12. Bowdre, A. Barrett
13. Burke, Colin
14. Burrell, Ashley
15. Campbell-Harris, Dayton

16. Carter, Brittany
17. Chandler, Laquisha
18. Davis, James W.
19. Douglas, Scott*
20. Duggan, Matthew R.
21. Dunn, David
22. Ebenstein, Julie A.
23. Ellsworth, Jessica L.
24. Ettinger, James W.
25. Faulks, LaTisha Gotell
26. Gbe, Harmony R.
27. Geiger, Soren A.
28. Genberg, Jack
29. Greater Birmingham Ministries
30. Harris, A. Reid
31. Hattix, Laurel Ann
32. Heard, Bradley E.
33. Hogan Lovells US LLP
34. Jackson, Sidney
35. LaCour Jr., Edmund G.

36. Lakin, Sophia Lin

37. Lancaster, Riley K.

38. Lawsen, Nicki

39. Lee, Theresa J.

40. Livingston, Sen. Steve

41. Manasco, Hon. Anna M.

42. Marshall, Hon. Steve

43. Mauldin, Dylan L.

44. Maze, Hon. Corey L.

45. McClendon, (former) Sen. Jim

46. McKay, Charles A.

47. Merrill, Hon. John H.

48. Messick, Misty S. Fairbanks

49. Milligan, Evan

50. Mink, Richard D.

51. Mollman, Alison

52. NAACP Legal Defense and Educational Fund, Inc.

53. NAACP Legal Defense Fund

54. Naifeh, Stuart

55. National Association for the Advancement of Colored People

56. Newsom, Hon. Kevin C.

57. Overing, Robert M.

58. Pringle, Rep. Chris

59. Rosborough, Davin

60. Ross, Deuel

61. Sadasivan, Kathryn

62. Seiss, Benjamin M.

63. Shapiro, Avner

64. Short, Caren E.

65. Simelton, Benard*

66. Smith, Brenton M.

67. Southern Poverty Law Center

68. Stewart, Shelita M.

69. Stone, Khadidah

70. Taunton, Michael P.

71. Thomas, James

72. Thompson, Blayne R.

73. Turrill, Michael

74. Unger, Jess

75. van Leer, Jacob

76. Walker, J. Dorman

77. Wallace, Janette McCarthy

78. Weisberg, Liza

79. Welborn, Kaitlin

80. Wiggins, Childs, Pantazis, Fisher & Goldfarb, LLC

81. Wilson, Thomas A.

82. Woodard, J. Scott

No publicly traded company or corporation has an interest in the outcome of the case or appeal.

Respectfully submitted this 7th day of October, 2025.

s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Counsel for Secretary of State Wes Allen

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Rules

INTRODUCTION

This Court should grant a stay of the district court's injunction and further remedial proceedings pending appeal because (1) this Court is likely to hold that Alabama's 2021 Plan for its senate districts does not violate §2 of the Voting Rights Act, and (2) the equities favor leaving in place the State's plan rather than either forcing the Legislature to engage in "racial sorting" or subjecting the State and its voters to a court-drawn plan that will admittedly engage in such sorting. DE302:6.[1]

Alabama's 2012 Senate plan had eight majority-black districts and was challenged under §2. The district court rejected that claim in part because "black voters in Alabama are highly politically active." *ALBC v. Alabama*, 989 F. Supp. 2d 1227, 1286 (M.D. Ala. 2013) (W. Pryor, J.) (*ALBC I*).[2] Alabama's 2021 Plan also has eight majority-black districts. But it was enjoined as dilutive in part because the district court "refuse[d] to give punitive effect to the political participation of Black Alabamians." Op.210. But the Secretary did not suggest any kind of "punitive effect" for political participation, and the district court's holding misunderstands the purposes of §2. The question §2 poses is whether Plaintiffs have proven lack of access "to participate in the political process." 52 U.S.C. §10301(b). A court does

[1] "DE" cites refer to the district court docket number and ECF-stamped pagination. "Op." cites refer to the district court's Injunction and Order, DE274, with citations to ECF-stamped pagination.

[2] *See ALBC v. Alabama*, 231 F. Supp. 3d 1026, 1033 (M.D. Ala. 2017) (*ALBC II*) (readopting conclusion on remand).

not "punish" a racial group by noting its members are, in fact, able to participate in the political process and haven't carried their burden of proving a §2 violation.

Other errors also mar the district court's decision. While the *ALBC II* court held that §2 could not justify Alabama using race to draw a district that was below 50% black voting age population (BVAP), 231 F. Supp. 3d at 1320, the district court's approach to *Gingles* 3 would make such districts permissible and maybe even required, Op.176-77. That cannot be squared with *ALBC II* or Supreme Court precedent. The court also missed the mark in finding that Democratic Senator Doug Jones's racial appeals to black voters were proof that the Republican Legislature needs to draw another majority-Democratic district. Op.218. Alabama showed that its political processes today are as open as they were when Alabama prevailed in §2 cases in the 2010s. The district court's contrary holding misconstrues §2.

That reading of §2 runs afoul of the Supreme Court's landmark decision in *SFFA v. Harvard*, 600 U.S. 181 (2023). A test as malleable as the one applied below is "not sufficiently coherent for purposes of strict scrutiny" and has no "logical end point." *Id.* at 214, 221.

The equities further support a stay. As demonstrated by *Louisiana v. Callais*—set for re-argument before the Supreme Court next week—requiring a State to enact a remedial districting plan with a racial target places the State in a near impossible situation with high constitutional stakes. States must perfectly balance the

"competing hazards of liability" between what §2 requires and the Constitution forbids. *Abbott v. Perez*, 585 U.S. 579, 587 (2018). That is the "lose-lose situation"[3] Alabama now faces. Either enact a remedial plan that includes a clear racial target—a Montgomery-area district "in which Black voters either comprise a voting-age majority or something quite close to it," Op.5—or allow the court to engage in the "racial sorting," DE302:6.

Neither choice is fair, as the Governor of Alabama recently recognized in declining to call a special session to re-draw Alabama's Senate map. *See* DE299:2. This is particularly true in light of the upcoming *Callais* decision, which will settle: "Whether the State's intentional creation of a second majority-minority … district violates the Fourteenth or Fifteenth Amendments to the U.S. Constitution." *Callais*, No. 24-109, 2025 WL 2180226, at *1 (U.S. Aug. 1, 2025) (Mem.). Whatever the answer, there is little doubt that *Callais* will provide critical guidance to mapdrawers—whether legislative or court-appointed—as to what constitutes "improper racial sorting." DE302:6. The State cannot rely on the "assum[ption] that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed," *Abbott*, 585 U.S. at 587, when that assumption is under review. And federal courts should refrain from a practice that "bears an

[3] *Alexander v. S.C. NAACP*, 602 U.S. 1, 65 (2024) (Thomas, J., concurring).

uncomfortable resemblance to political apartheid," *Alexander*, 602 U.S. at 11, until assured the racial sorting is constitutional.

Due to impending election deadlines, the State requests a ruling on this motion by **October 31, 2025.** To that end, the State proposes that Plaintiffs' response be due October 14, 2025, and the State's reply be due October 17, 2025.

PROCEDURAL BACKGROUND

In 2024, the district court held a trial to determine whether Alabama's 2021 Plan violates §2 for failing to have additional majority-black districts in the Huntsville and Montgomery areas. On August 22, 2025, the court held that Plaintiffs: (1) failed to establish a §2 violation near Huntsville; but (2) established that the 2021 Plan violates §2 near Montgomery.

The court recounted how, since the 1990s, the State's Senate plan has had eight majority-black districts, Op.10, and how a three-judge court found that the plan enacted after the 2010 census did not violate §2, Op.10-11.

Even so, the court held that the State's failure to draw a second majority-black district in the Montgomery area violated §2. For the third precondition under *Thornburg v. Gingles*, 478 U.S. 30, 51 (1986), the State produced unrebutted evidence that while SD25 did not currently elect the candidate preferred by most black voters, there was sufficiently high black turnout and white crossover voting that a crossover district could be drawn in the area. Op.181. The State argued that

this showed that white bloc voting was not legally significant, but the court rejected that argument because Alabama had *not* drawn that crossover district. Op.182.

On the totality of the circumstances, the State noted that Plaintiffs' expert, Dr. Tracy Burch, found that, in 2022, in Montgomery County "the Black voter registration rate was 1.3 percentage points higher than the White registration rate." DE206-11:5. And the State noted that each of Plaintiffs' witnesses had long been able to participate in the political process in Alabama. Op.210. But the district court rendered such evidence irrelevant, lest it be seen as "giv[ing] punitive effect to the political participation of Black Alabamians who have personally suffered the ill effects of official discrimination and responded with civic engagement in the democracy that discriminated against them." Op.210.

The court permanently enjoined the Secretary of State from conducting future elections under the 2021 Plan and ordered remedial proceedings regarding a new Senate plan. Op.4-5. The court set a soft racial target for fixing the problem: a plan that "include[s] an additional district in the Montgomery area in which Black voters either comprise a voting-age majority or something quite close to it." Op.5.

The Secretary appealed the court's ruling regarding Montgomery, and for the reasons presented below, asked the district court to stay its injunction pending *Callais* and pending appeal. *See* DE278:8-14 & DE287:7 n.2. While the district court stated that the Secretary did not seek a stay pending appeal, the court recognized that

the Secretary argued "that he has satisfied the test for a stay pending appeal," and the court analyzed the factors for a stay pending appeal when denying the Secretary's request for a stay from the district court pending the Supreme Court's decision in *Callais* or pending this Court's decision on appeal. DE302:4. The court rejected the argument that "improper racial sorting" would flow from its injunction. DE302:6.

Governor Ivey was not as confident that the State could walk the perilous line between "proper" and "improper racial sorting." She issued a press release explaining that she does not presently intend to call a special session to draw a new Senate map because, "[a]s the law currently stands, states like Alabama are put to the virtually impossible task of protecting some voters based on race without discriminating against any other voters based on race." DE299:2. She "call[ed] on the U.S. Supreme Court to clarify the law in this area as soon as possible and relieve states like Alabama from this no-win situation." *Id.*

After declining to afford the Secretary the relief he now seeks here, *see* Fed. R. App. P. 8(a)(2)(ii), the district court began remedial proceedings, directing a special master to prepare remedial maps that "include an additional district in the Montgomery area in which Black voters either comprise a voting-age majority or something quite close to it." DE302:11 (quoting Op.5). Those proceedings are ongoing.

LEGAL STANDARD

When analyzing whether to stay an injunction pending appeal, this Court considers "(1) whether the stay applicant has made a strong showing that he is likely to succeed on the merits; (2) whether the applicant will be irreparably injured absent a stay; (3) whether issuance of the stay will substantially injure the other parties interested in the proceeding; and (4) where the public interest lies." *Swain v. Junior*, 958 F.3d 1081, 1088 (11th Cir. 2020).

ARGUMENT

I. The Secretary is Likely to Succeed on the Merits.

A stay under Federal Rule of Appellate Procedure 8(a) is appropriate where the moving party is likely to succeed on the merits. *Id.* An applicant can satisfy this test by making the "lesser showing of a substantial case on the merits when the balance of equities . . . weigh heavily in favor of granting the stay." *Garcia-Mir. v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986) (quotations omitted). The Secretary is likely to succeed on the merits, and at a minimum, can make the lesser showing of a substantial case on the merits given the weight of the equities.

A. Black voters in Montgomery enjoy equal opportunity to participate in the political process.

The Secretary is likely to prevail on the merits because black voters in the Montgomery area have, in the words of §2, an equal "opportunity … to participate in the political process." *See ALBC I*, 989 F. Supp. 2d at 1286; *Whitcomb v. Chavis*,

403 U.S. 124, 149-50 (1971). This case is not the first §2 challenge to Senate districts. Rather, just last decade, a group of plaintiffs challenged the 2012 Senate plan as dilutive under §2 and the Constitution. *ALBC I*, 989 F. Supp. 2d at 1236. There, the court "conclude[d] that the totality of the circumstances does not support the conclusion that the" 2012 plan "would deny black voters an equal opportunity to participate in the political process." *Id*. at 1286. Among other factors, the court noted that "black voters in Alabama are highly politically active" and "have successfully elected the candidates of their choice in the majority-black districts," and "the majority-black districts are roughly proportional to the black voting-age population in Alabama." *Id*.

This finding is consistent with §2, which requires Plaintiffs to show that black voters in the Montgomery area have less opportunity not only to elect the candidates of their choice, but also to participate in the political process. *See* 52 U.S.C. §10301(b). Proving only less opportunity to elect "is not sufficient to establish a violation unless … it can also be said that the members of the protected class have less opportunity to participate in the political process." *Chisom v. Roemer*, 501 U.S. 380, 397 (1991). The 1982 amendments to "§ 2 [were] intended to 'codify' the results test employed in *Whitcomb*, 403 U.S. 124 and *White v. Regester*, 412 U.S. 755 (1973)." *Chisom*, 501 U.S. at 394 n.21. The plaintiffs in *Whitcomb* lost because they did not show that they "were not allowed [1] to register or vote, [2] to choose

the political party they desired to support, [3] to participate in its affairs or [4] to be equally represented on those occasions when legislative candidates were chosen." *Whitcomb*, 403 U.S. at 149-50. And in the words of the Middle District from last decade, black voters are "politically active and registered to vote in high numbers." *ALBC I*, 989 F. Supp. 2d at 1286.

That is still true today. Plaintiffs' own expert, Dr. Tracy Burch, found that in 2022,"the Black voter registration rate was 1.3 percentage points higher than the White registration rate" in Montgomery County. DE206-11:5 The Secretary's expert, Dr. M.V. Hood also testified to registration rates, and found that "in 1965, 23.5 percent of eligible Black voters were registered to vote, and the number of eligible Black voters who were registered to vote increased to 95.2 percent in 2024." Op.133-34. This comports with what the Middle District found in 2013, that "voter turnout and registration rates now approach parity," *ALBC I*, 989 F. Supp. 2d at 1286 (cleaned up), and again in 2020, that "[v]oter registration and turnout rates among African-Americans and whites have reached parity," *Ala. St. Conf. of the NAACP v. Alabama*, 612 F. Supp. 3d 1232, 1290 (M.D. Ala. 2020).

The district court did not dispute this evidence, but instead sidelined it. To do otherwise would cripple Plaintiffs' case. The court "emphatically … refuse[d] to give punitive effect to the political participation of Black Alabamians," Op.210, in a case about whether they have the "opportunity … to participate in the political

process," 52 U.S.C. §10301(b). That makes little sense. Recognizing that black voters in Alabama, who previously experienced discrimination, are nonetheless now able to participate in the political process today is not "punitive." The point of the VRA was not to ensure that VRA plaintiffs win all their VRA lawsuits—it was to secure opportunities for political participation. The district court's holding misunderstands the purposes of §2 and is at war with its text.

The district court's test looked not to whether voting rights are being exercised, but whether they are being "hamper[ed]" "by racial disparities in family poverty, internet access, and access to transportation" that made it harder "to learn about candidates, absentee vote, locate voting information, and travel to polls." Op.214-15. But the "hampering" test is not §2's test, for "[t]he concepts of 'open[ness]' and 'opportunity' connote the absence of obstacles and burdens that *block* or *seriously hinder* ***voting***." *Brnovich v. DNC*, 594 U.S. 647, 669 (2021) (emphases added). There was no finding that lack of internet access or a car "block[ed] or seriously hinder[ed] voting" in Alabama. Data from Plaintiffs' expert regarding voter registration data for Montgomery showed the opposite. A finding of VRA liability by plaintiffs who enjoy equal access to the fundamental forms of political participation "would spawn endless litigation," *Whitcomb*, 403 U.S. at 157, and lacks any "logical end point," *SFFA*, 600 U.S. at 221.

B. A new district in Montgomery below 50% BVAP would likely elect the candidate preferred by most black voters.

The Secretary is also likely to prevail because legally significant racially polarized voting is not present in the Montgomery area. While most white voters vote Republican and most black voters vote Democrat, black turnout and white crossover voting are high enough that another district in the Montgomery area could be drawn below 50% BVAP and still elect Democrats. That fact must defeat Plaintiffs' claims or there is no sensible way forward for the State.

Consider that in 2017, the Middle District held that HD85 was a gerrymander that could not justified by VRA compliance "[b]ecause the black voting-age population percentage in District 85 is 47.23 percent," which meant that under the 50% VAP rule of *Bartlett v. Strickland*, 556 U.S. 1 (2009), Alabama could not "claim that its district is narrowly tailored to achieve compliance with section 2." *ALBC II*, 231 F. Supp. 3d at 1320. The underlying facts and the district court's ordered remedy here cannot be reconciled with this earlier holding because a new district in the Montgomery area with a BVAP less than 50% is likely to elect the candidate preferred by most black voters, and a district that is below 50% BVAP would not be narrowly tailored to comply with §2.

The Fourth Circuit has recognized this problem and relied on *Bartlett* to opine that if "a 'minority voting-age population level' below 50% … provides 'a realistic opportunity for … voters of that minority group to elect candidates of their choice,'"

then "legally significant racially polarized voting does not exist" in the challenged area. *Pierce v. N.C. State Bd. of Elections*, 97 F.4th 194, 232 (4th Cir. 2024) (quoting *Covington v. North Carolina*, 316 F.R.D. 117, 168 n.46 (M.D.N.C. 2016)). That is true whether the challenged plan includes a race-based crossover district or merely could have included one, because §2 does not justify drawing such a district.

Here, the unrebutted evidence is that a new district in the Montgomery area below 50% BVAP would likely elect the candidate preferred by most black voters. Op.181-82. That must defeat a §2 claim because if Alabama had engaged in race-based districting to draw a new SD25 that was below 50% BVAP, the State likely would have violated the Fourteenth Amendment. Because "§ 2 does not require crossover districts," it cannot excuse drawing them either. *Bartlett*, 556 U.S. at 23 (plurality). But if the State used race *more* to boost the district up to 50% BVAP or higher, the State might be liable under *Cooper v. Harris*, 581 U.S. 285, 302 (2017), for aiming at a 50% target when a lower BVAP would do. This Court is likely to read *Gingles* 3 in line with *Pierce*, 97 F.4th 194, to solve this problem.

C. The district court's interpretation of §2 raises serious constitutional concerns.

Even if the district court's reading of §2 is plausible, it is likely to be rejected to avoid constitutional concerns. As the principal dissent in *SFFA* recognized, "racial diversity in higher education requires consideration of race" that is "[j]ust like drawing district lines that comply with the Voting Rights Act." 600 U.S. at 361

n.34 (Sotomayor, J., dissenting). But both types of government action must comply with the Equal Protection Clause. And the district court's approach to §2 suffers from the same flaws that doomed Harvard's admissions process.

Rather than look to something measurable—like whether "black voters in Alabama are highly politically active," *ALBC I*, 989 F. Supp. 2d at 1286—the district court looked to socioeconomic "hamperings," a test that is not "sufficiently coherent" to support race-based remedies. *SFFA*, 600 U.S. at 214. Similarly, the court's approach to racially polarized voting does not explain how a State can avoid the fate of Alabama's HB85 without running afoul of *Bartlett*'s holding that §2 does not require crossover districts, 556 U.S. at 23, and *Cooper*'s holding that using race to draw a 50% BVAP district is not supported by §2 when a crossover district can be drawn, 581 U.S. at 302.

Because the district court's decision turns on "qualitative standards" that "are difficult to measure," there is no "end point" to the statute's racial preferences. *SFFA*, 600 U.S. at 224 (cleaned up). Indeed, even racial appeals by *Democrat* Doug Jones ***to*** black voters was counted as evidence that the *Republican* Legislature's 2021 Plan was racially dilutive and needed to include another *Democrat*-leaning district. Op.217-18. Such a test perversely *encourages* the very activity the law claims to be designed to combat. It creates "incentives for those who support or oppose certain policies to cast the debate in terms of racial advantage or

disadvantage," *Schuette v. BAMN*, 572 U.S. 291, 309 (2014) (plurality), and ensures that race-based districting will not end "any time soon." *SFFA*, 600 U.S. at 225. This Court is thus likely to follow the text of §2 and reject the district court's approach.

II. The Balance of Equities Weigh in Favor of Granting a Stay.

A. It is in the State's and the public's best interest to stay the case.

"[W]here the government is the party opposing the … injunction, its interest and harm merge with the public interest." *Swain*, 958 F.3d at 1091. Absent a stay, the State faces one of two options, neither of which are equitable.

The first would be for the State to redistrict itself. But at this precise moment in redistricting jurisprudence history, no one can say with any reasonable certainty how to enact a lawful plan. States have long faced "competing hazards of liability" when trying to enact a plan. *Abbott*, 585 U.S. at 587. But for a time, they could "assume[] that compliance with the VRA may justify the consideration of race in a way that would not otherwise be allowed." *Id.* No longer. Next week, the Supreme Court will hear arguments for the second time in a case about Louisiana's 2024 congressional plan, which was enacted to remedy a likely §2 violation by drawing an additional majority-minority district. The question is: "Whether the State's intentional creation of a second majority-minority … district violates the Fourteenth or Fifteenth Amendments to the U.S. Constitution." *Louisiana v. Callais*, No. 24-

109, 2025 WL 2180226 (U.S. Aug. 1, 2025). If the State enacted a plan pre-*Callais*, it would be merely guessing as to how to comply with §2 and Constitution.

A wrong guess has the potential to subject the public to the "odious" and unconstitutional practice of racial sorting and the disruption to the election process. *Shaw v. Reno*, 509 U.S. 630, 643 (1993). And a wrong guess could also draw claims of discrimination, subjecting the State to downstream consequences such as preclearance and threatening its sovereignty. *See Miller v. Johnson*, 515 U.S. 900, 915 (1995). Indeed, Plaintiffs from this case have argued in Alabama's congressional redistricting case that even a single constitutional violation for using race too little or too much warrants the extraordinary remedy of preclearance bail-in under §3 of the VRA.[4] It would be deeply inequitable to force the State to gamble with its sovereignty when *Callais* is likely to soon provide a way forward.

These concerns—both now and into the future—are well founded. Just last month in *McClure v. Jefferson County Commission*, No. 2:23-CV-00443-MHH, 2025 WL 2682401, at *1 (N.D. Ala. Sept. 16, 2025), the *McClure* plaintiffs[5] successfully argued that the districts in the 2021 Jefferson County Commission redistricting plan are unconstitutional racial gerrymanders. *Id*. at *1. Critical to the

[4] *See* Milligan Pls.' Resp. in Support of their Request for Section 3(c) Relief, *Milligan v. Allen*, Case No. 2:21-cv-01530-AMM (N.D. Ala. June 25, 2025), ECF 502.

[5] Plaintiffs there include Greater Birmingham Ministries and the Alabama State Conference of the NAACP, who are Plaintiffs here.

court's ruling was the fact that the 2021 plan closely resembled the 1985 plan which was entered as part of a consent decree in *Taylor v. Jefferson County Commission et al*., No. CA-84-C-1730-S, to settle §2 and constitutional challenges. *Id.* at *4. The *McClure* court held, "[u]nder the *Taylor* consent decree, to comply with the VRA, the Commission purposefully created majority Black populations in Districts 1 and 2." *Id.* at *40. Thus, the Commission could not "characteriz[e] race as incidental to its line drawing." *Id.* According to the court, this—along with later letters submitted to the Department of Justice to show compliance with §5 of the VRA, *id.* at *39—"provide[d] powerful circumstantial evidence of racial gerrymandering *in 2021*." *Id.* at *36 (emphasis added). In fact, when the Commission noted that core retention could explain the demographics of the 2021 districts, the court responded, "core retention in this case does not represent a race-neutral redistricting criterion given the history of the 2013 map." *Id.* at *45 n.44. Purposeful creation of majority-black districts *in 1985*, and compliance with §5 in later decades, was "powerful circumstantial evidence" of unconstitutionality *in 2025*.

Thus, even if the purposeful creation of a majority-minority district survives challenges for the rest of *this* cycle, it will create potential constitutional problems for *future* Legislatures—perhaps from these very Plaintiffs—that core retention is suspect wherever race was once considered.

As the law currently stands, the State's only escape from this dangerous wager is to cede its sovereign prerogative to the district court, which "represents a serious intrusion on the most vital of local functions." *Miller*, 515 U.S. at 915. The Supreme "Court has repeatedly emphasized that legislative apportionment plans created by the legislature are to be preferred to judicially constructed plans." *Karcher v. Daggett*, 455 U.S. 1303, 1307 (1982) (Brennan, J., in chambers). But here, thanks in part to Plaintiffs successfully advancing conflicting positions in different cases and to conflicting decisions that render a Senate plan with eight majority-black districts §2-compliant one year and "dilutive" shortly thereafter, the State cannot realistically adopt a plan before it knows the rules of the game from either this Court or *Callais*. The State will thus "plainly suffer irreparable harm" if the Court does not grant a stay of the injunction below under which "the legislature must either adopt an alternative redistricting plan … or face the prospect that the District Court will implement its own redistricting plan." *Id.* at 1306. Forcing the State to take that drastic step at this time is inequitable when the parties are likely to soon know how to weigh and navigate the operative legal parameters when *Callais* is decided.

Courts facing this same *Callais* conundrum have recently stayed §2 litigation. *See LULAC v. Abbott*, No. 3:21-cv-00259 (W.D. Tx. Aug. 11, 2025) (three-judge court), ECF 1126; *Clark v. Landry*, No. 86-435 (M.D. La. July 17, 2025), ECF 752; *Nairne v. Ardoin*, 3:22-cv-00178 (M.D. La. Aug. 6, 2025), ECF 345. The three-judge

court in Texas found it was "prudent to suspend" further §2 proceedings "until the law in this area becomes more settled." *LULAC*, No. 3:21-cv-00259, ECF 1126 at 2. In *Clark*, the district court stayed §2 litigation because,

> *even if Plaintiffs had shown a likelihood of success on the merits*, any prejudice they suffer from a stay will be *substantially outweighed* by (1) the prejudice suffered by Defendants in having a decision rendered using a standard that has a *significant potential to change* following a decision in *Callais*; and (2) the fact that the public interest would be better served by conserving judicial and party resources in rendering a decision *only once rather than potentially having to relitigate all of these issues again* after *Callais* is decided.

Clark, No. 86-435 (M.D. La. July 17, 2025), ECF 752 (emphases added). In *Nairne*, after the court found a §2 violation but before the parties entered into the remedial proceedings (i.e., the same procedural posture in this case), the court cancelled the remedial hearing "pending resolution by the United States Supreme Court." *Nairne*, 3:22-cv-00178 (M.D. La. Aug. 6, 2025), ECF 345. Similar prudence is warranted here, where the caselaw is uniquely in flux and the potential costs to the State and voters are uniquely high.

B. The irreparable harm to the State absent a stay outweighs any prejudice to the Plaintiffs.

By contrast, Plaintiffs will not suffer "substantial injury" by waiting until *Callais* clarifies how to balance the long-simmering conflict between §2 and the Constitution. *Cf. Wreal, LLC v. Amazon.com, Inc.*, 840 F.3d 1244, 1248 (11th Cir.) (holding that plaintiffs' delay "of even only a few months" weighs against their

claims of injury for preliminary injunction purposes). First, while a stay may subject the voters in the Montgomery area to proceed in the 2026 election under the plan invalidated by the district court, this alone is not reason for denying a stay.[6] Second, whatever "dilution" is present in the 2021 Plan must be (at worst) minimal because a materially identical plan drawn in 2012 was found to *not* be dilutive, remedial districts drawn in 2017 in the Montgomery area were upheld, and plans stretching back to the 1990s have had only eight majority-minority districts without being deemed VRA violations. Op.15-16. Third, it is worth noting that prior to the 2022 election, Plaintiffs did not seek preliminary injunctive relief to avoid an election under the 2021 Plan. *Fourth*, Plaintiffs still have the option of appealing the district court's denial of their §2 claim as to the Huntsville area. *See* DE290:4. If Plaintiffs were to prevail in that appeal, the Legislature might need to either draw or wait for a special master to draw yet another plan.

Thus, like the plaintiffs in *Clark*, any prejudice the Plaintiffs here may suffer from a stay will be "substantially outweighed" by (1) the prejudice suffered by the

[6] *E.g.*, *White v. Weiser*, 412 U.S. 783, 789 (1973) (staying the district court's order, which enjoined the use of Texas's congressional plan, resulting in subsequent elections proceeding under the enjoined plan); *Gaffney v. Cummings*, 412 U.S. 735, 740 (1973) (granting a stay under similar facts); *Whitcomb*, 403 U.S. at 140 ("the State's motion for stay of judgment was granted pending our final action on this case, thus permitting the 1970 elections to be held under the existing apportionment statutes declared unconstitutional by the District Court.") (internal citation omitted); *Davis v. Mann*, 377 U.S. 678, 684 (1964).

Secretary in having a remedial map imposed "using a standard that has a significant potential to change following a decision in *Callais*"; and (2) "the fact that the public interest would be better served by conserving judicial and party resources in rendering a decision only once rather than potentially having to relitigate" this issue again after *Callais*, *Clark*, No. 86-435 (M.D. La. July 17, 2025), ECF 752, and after any other issues resolved in this appeal.

CONCLUSION

For the foregoing reasons this Court should grant a stay of the district court's injunction and remedial proceedings pending the determination of this appeal—but at a minimum, until the Supreme Court resolves critical constitutional questions presented by *Louisiana v. Callais*.

Respectfully submitted,

Steve Marshall
Alabama Attorney General

s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Solicitor General

Richard D. Mink
Misty S. Fairbanks Messick
Brenton M. Smith
Benjamin M. Seiss
Scott Woodard
Matthew R. Duggan
Assistant Attorneys General

OFFICE OF THE ATTORNEY GENERAL
STATE OF ALABAMA
501 Washington Avenue
P.O. Box 300152
Montgomery, Alabama 36130-0152
Telephone: (334) 242-7300
Fax: (334) 353-8400
Edmund.LaCour@AlabamaAG.gov

Michael P. Taunton
Riley Kate Lancaster
BALCH & BINGHAM LLP
1901 Sixth Avenue North, Suite 1500
Birmingham, Alabama 35203
Telephone (205) 251-8100
MTaunton@Balch.com

Counsel for Secretary of State Allen

OCTOBER 7, 2025

CERTIFICATE OF COMPLIANCE WITH TYPE-VOLUME LIMIT, TYPEFACE REQUIREMENTS, AND TYPE-STYLE REQUIREMENTS

1. I certify that this motion complies with the type-volume limitations set forth in Fed. R. App. P. 27(d)(2)(A). This motion contains 4,936 words, including all headings, footnotes, and quotations, and excluding the parts of the motion exempted under Fed. R. App. P. 32(f).

2. In addition, this motion complies with the typeface and type style requirements of Fed. R. App. P. 32(a)(5) and (6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Counsel for Secretary of State Allen

CERTIFICATE OF SERVICE

I hereby certify that on October 7, 2025, I filed the foregoing motion using the Court's CM/ECF system, which will serve counsel for all parties.

s/ Edmund G. LaCour Jr.
Edmund G. LaCour Jr.
Counsel for Secretary of State Allen