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

REPLY IN SUPPORT OF SECRETARY'S TIME-SENSITIVE MOTION FOR STAY OF INJUNCTION PENDING APPEAL
(Relief Requested by October 31, 2025)

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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 persons and parties listed in the Secretary's Time-Sensitive Motion for Stay of Injunction Pending Appeal is complete.

Respectfully submitted this 21st day of October, 2025.

s/ Edmund G. LaCour Jr.
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I. The State is Likely to Succeed on the Merits.

A. The District Court's Approach to §2 Ignores Its Text and Renders It Unconstitutional in Redistricting.

Section 2 plaintiffs must prove that a minority group has "less opportunity than other members of the electorate [1] to participate in the political process and [2] to elect representatives of their choice." 52 U.S.C. §10301(b). Satisfying the *Gingles* preconditions is "not sufficient to establish a violation"; rather, plaintiffs must prove that "under the totality of the circumstances," "members of the protected class have less opportunity to participate in the political process." *Chisom v. Roemer*, 501 U.S. 380, 397 (1991). Otherwise, vote dilution becomes a "euphemism for political defeat at the polls." *Whitcomb v. Chavis,* 403 U.S. 124, 153 (1971).

The opinion below deploys that euphemism. In Alabama and other "ruby red state[s]" it is "virtually impossible for Democrats—of any race—to win statewide," *Ala. NAACP v. Alabama*, 612 F.Supp.3d 1232, 1291 (M.D. Ala. 2020), and black voters tend to vote Democrat, Op.179. So, the *Gingles* preconditions—as interpreted below—prove only the banal observation that a minority of voters tends to lose elections but could win with a map that makes "trade-offs" with traditional districting principles. Op.171. More is required.

The relevant circumstances bear directly on unequal participation in the political process. Those circumstances are drawn from *Whitcomb*, 403 U.S. 124, and

White v. Regester, 412 U.S. 755 (1973), which Congress "borrowed" from to craft §2. *See Allen v. Milligan*, 599 U.S. 1, 13 (2023); *accord Chisom*, 501 U.S. at 394 n.21. Thus, "it is to *Whitcomb* and *White* that [courts] should look in the first instance." *Thornburg v. Gingles*, 478 U.S. 30, 97 (1986) (O'Connor, J., concurring in the judgment). Interpreting the text—"participate in the political process"—in light of *Whitcomb* and *White*, this Court will likely reverse because Plaintiffs failed to prove that black Alabamians are "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.

Indeed, "over a decade ago" (Resp.18), the Middle District found that there was "overwhelming evidence" that "black voters in Alabama are highly politically active," "registered to vote in high numbers," and thus "have an equal opportunity to participate in the political process the same as everyone else." *ALBC v. Alabama*, 989 F.Supp.2d 1227, 1286-87 (M.D. Ala. 2013) (W. Pryor, J.). That court considered "racial socioeconomic disparities" and the "history of official discrimination," Resp.17, but rightly explained that a "history of discrimination alone cannot establish that these particular [districting plans] would deny minority voters equal political opportunity today." 989 F.Supp.2d at 1286.

Plaintiffs assert that, since *ALBC* in 2013, there have been "numerous decisions finding that Alabama has violated the VRA or the constitutional rights of Black voters." Resp.8. But the district court relied on cases dating back to the 1960s and even findings about discrimination "from the late 1800s." Op.206-07. Further, Plaintiffs' more recent history relies on the district court's citation to cases *against local municipalities*, not the State, at least some of which were resolved by stipulation and involved conduct that predated *ALBC*.[1] This is not probative of whether the current Senate map creates a barrier to political participation on account of race. Plaintiffs' only post-2013 evidence to distinguish *ALBC* is *Singleton v. Allen*, 782 F.Supp.3d 1092 (N.D. Ala. 2025). But that case remains on appeal, and the alleged constitutional violation relies on the extraordinary finding that Alabama considered race *too little* when it enacted the 2023 congressional plan. *Id.* at 1338-39. Plaintiffs did not prove that elections have become less equally open to participation.

Further, what Plaintiffs demean as "a single statistic" (Resp.12) is critically important: recent voter registration data (again) confirming that all Alabamians (still) have access to the political process. That this core measure shows equal

[1] In *Jones v. Jefferson Cnty. Bd. of Educ.,* 2019 WL 7500528, *1-3 (N.D. Ala. Dec. 16, 2019), the court focused on the legislature's intent in 1975, but, in 2019, the "parties share[d] the goal" of leaving the discriminatory scheme behind. The decision followed a joint motion for consent order. *See id.* at *1. *Allen v. City of Evergreen,* 2014 WL 12607819 (S.D. Ala. Jan. 13, 2014), concerned city council maps enacted in 2012 and 2001, and likewise followed a joint proposal. *Id.* at *1.

opportunity to participate in the political process is alone enough to reverse. But worse, the district court held *the opposite*—that considering the "political participation of Black Alabamians" and their "civic engagement in the democracy" would be "punitive." Op.210. This argument doesn't just shift the goalposts; it tears them down. No matter how far "Alabama has come," Op.204, Alabama's past will apparently *always* outweigh its progress because anything else would "punish" minorities based on the State's progress. Plaintiffs don't try to defend this blatant error.[2]

Likewise, the purported "evidence on racial appeals or a lack of responsiveness" does not move the needle. Resp.19. How do a white Democrat's appeals *to* black voters prove that they do not enjoy the equal right to vote? Op.217. Plaintiffs never say. And the only example of "a significant lack of responsiveness" offered by the court—the recent injunction against Alabama's congressional map—was tried after this case was tried, is still being litigated, and rests on the novel view that attempting to avoid liability for discrimination is itself discrimination. *See Allen v. Milligan*, No. 25-274 (docketed Sept. 10, 2025).

Plaintiffs cite nothing in the text of §2 to support the amorphous approach applied below. But as this Court has recognized, plaintiffs cannot ignore "the plain

[2] Plaintiffs cite a turnout gap in two counties in one election, Resp.10, but the court didn't cite that gap, which was almost nonexistent two years earlier in statewide numbers, DE164-20:9, and thus can't show that black voters are "not allowed to register or vote," *Whitcomb*, 403 U.S. at 149.

language of § 2 itself. To the contrary, the Supreme Court has stated time and again that courts must presume that a legislature says in a statute what it means and means in a statute what it says there." *Johnson v. DeSoto Cnty. Bd.*, 72 F.3d 1556, 1563 (11th Cir. 1996) (quotations omitted).

Plaintiffs' atextual take on §2 raises constitutional questions that they avoid. Section 2's authorization for "race-based redistricting cannot extend indefinitely into the future," *Allen*, 599 U.S. at 45 (Kavanaugh, J., concurring), but must have a "logical end point," *SFFA v. Harvard*, 600 U.S. 181, 221 (2023). To be amenable to judicial review under strict scrutiny, this use of race must remedy "specific, identified instances of past discrimination." *Id.* at 207. But as the court construed §2, the judiciary will "pick[] winners and losers based on the color of their skin" indefinitely, *id.* at 229, until a State has "come far enough," Op.204.

How far is far enough? Plaintiffs have no answer. They do not address *SFFA* once. And what they do say conflicts with it: If any racial disparities in health, car ownership, diplomas, and the like (Resp.21)—which exist in every State examined—can prove that a redistricting plan discriminates on account of race, then "race will always be relevant," *SFFA*, 600 U.S. at 224. A State can even succeed in reducing one racial gap—as the Secretary proved, for example, with respect to incarceration (nationwide, Alabama has the second-lowest racial gap)—yet a court can hang its hat on disparities in internet access or infant mortality instead. Op.212-14. These

"near-obvious" racial "dynamics" ensure perpetual liability. Op.215. And pointing to "linger[ing]" effects of discrimination, Resp.20, makes the inquiry "ageless in its reach into the past," *Regents v. Bakke*, 438 U.S. 265, 307 (1978) (Powell, J.).

This Court is likely to reverse for the same reason the *Whitcomb* Court did in 1971: there is "nothing in the record or in the court's findings indicating that" black Alabamians are "not allowed" to participate equally in the political process. 403 U.S. at 149. It is not "punitive" to recognize that, Op.210, and it is unconstitutional to ignore it.[3]

B. Plaintiffs Did Not Prove Legally Significant Polarized Voting.

Statistically significant polarized voting and *legally* significant polarized voting are not the same. *Gingles*, 478 U.S. at 57-58. If 50% BVAP is not necessary for a district to perform, (*i.e.*, to elect a Democrat), then polarized voting is not legally significant. Put differently, if a State can draw a district below 50% BVAP that consistently performs, then the State does not have a compelling interest in drawing a district *above* 50% BVAP. *See Cooper v. Harris*, 581 U.S. 285 (2017). And race-based crossover districts are likewise unconstitutional. *See ALBC v. Alabama*, 231 F.Supp.3d 1026, 1320 (M.D. Ala. 2017) ("Because the black voting-age population percentage in [a House District] is 47.23 percent," Alabama could not "claim that its

[3] The State complied with Rule 8. *See* Mot.15-16. It argued it satisfied the stay-pending-appeal standard, Dct.Doc.278:8, and it pressed the same merits arguments that are before this Court, *see id.* at 10-14. *Contra* Resp.30-32.

district is narrowly tailored to achieve compliance with section 2" and so was not a "justifiable" gerrymander.). States don't violate §2 when they decline to draw a district barred by the Constitution. *See* Mot.21-22. And here, the unrebutted evidence is that a new majority-minority district is *not* necessary for a Democrat to win. Op.118 (chart predicting Democrat victories at BVAPs below 40%); Mot.22.[4]

Plaintiffs claim that polarized voting is significant when minority-preferred candidates "regularly" lose. Resp.23 (quoting *Wright v. Sumter Cnty. Bd.*, 979 F.3d 1282, 1304 (11th Cir. 2020)). But plaintiffs must also prove "that whites vote as a bloc." *Wright*, 979 F. 3d at 1304. The issue here is *the meaning* of bloc voting. In *Wright*, the remedial districts needed around 60% BVAP to perform, *id.* at 1300, so there was no occasion to decide whether the Equal Protection Clause requires a finding that 50% BVAP is necessary.

The Secretary is likely to prove that when 50% BVAP is not necessary, then the political process is equally open to black voters, no §2 violation exists, and so the Constitution forbids intentionally using race to create *either* a crossover district or a 50% BVAP district. To use race, a State needs "'a strong basis in evidence' for concluding that the statute required its action." *Cooper*, 581 U.S. at 292. Alabama would lack a basis to use race to draw SD25 as a crossover district because §2 "does

[4] Plaintiffs' remedial submissions agree. *See In Re Redistricting,* No. 2:25-mc-1682-AMM (N.D. Ala.), DE7-3:16 & 7-6:2-4.

not require crossover districts," *Bartlett v. Strickland*, 556 U.S. 1, 23 (2009) (plurality). And using race to create a 50% BVAP district might violate the Constitution as insufficiently tailored for having sorted too many voters based on race. *See, e.g.*, *Pierce v. N. C. State Bd. of Elections*, 97 F.4th 194, 217 (4th Cir. 2024).

Rather than contest that either the VRA wouldn't require a remedial district or that a remedial district would not be narrowly tailored, Plaintiffs try to minimize *Pierce*. *See* Resp.23-24. To be sure, *Pierce* held that a determination of "the BVAP at which a district provides a realistic opportunity for black voters to elect their candidates of choice" is not required "in every Section 2 case." 97 F.4th at 217-18. But here, the evidence that a district with less than 50% BVAP could perform is unrebutted. That is a problem for Plaintiffs because "Section 2 does not 'require the creation of crossover districts in the first instance'" and "courts have repeatedly rejected arguments that Section 2 require[s]" a State "to draw majority-minority districts when the State lacked evidence that such districts were necessary for black-preferred candidates to win." *Id.* at 217.

Plaintiffs have no response. If a district in the region could perform without a majority BVAP, the political process is equally open, and there is neither a need for nor an available remedy. Thus, at the level of polarization and participation identified by Plaintiffs, any district that uses race will violate the Constitution. To avoid

this result, the Court is likely to hold that Plaintiffs did not prove legally significant polarized voting here.

II. The Harm from Assigning Electoral Power Based on Race Outweighs the Harm from Conducting Another Election Under the 2021 Plan.

As the Alabama and Louisiana cases illustrate, the competing hazards of liability that punish States for using race too much or too little, *see, e.g.*, *Abbott v. Perez*, 585 U.S. 579, 587 (2018), have reached a breaking point. And on the other side of this remedial phase are these very Plaintiffs who argue that a single constitutional violation *requires* federal courts to bail Alabama into preclearance if Alabama accidentally missteps. Mot.25.

But the path forward should soon be clear. The Supreme Court has assumed, but never decided, that §2 permits otherwise unlawful considerations of race, *Abbott*, 585 U.S. at 587. Nor has it decided whether, like "all [other] governmental use of race," §2's "must be limited in time." *SFFA*, 600 U.S. at 314 (Kavanaugh, J., concurring). In *Callais*, it confronts those questions. What it decides will control here.

Plaintiffs dispute the obvious, but the court's order plainly requires "racial sorting." *Contra* Resp.27. Strict scrutiny applies when "racial considerations predominate[] in drawing district lines," *Cooper*, 581 U.S. at 293, *i.e.*, when race is the "predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district," *Alexander v. S.C. NAACP*, 602 U.S. 1, 7 (2024).

Race predominates here because "any remedial plan will need to include 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 key criterion for a district is whether it will perform for black voters. Black voters must be moved in and white voters out. This is racial sorting. Just as public colleges cannot use race to seek "diversity" through a plus factor any more than they can with a quota, the State cannot enact make "[r]ace … the criterion that … could not be compromised" without triggering constitutional scrutiny, *Alexander*, 602 U.S. at 7.

It's no answer to say that the mapdrawer will avoid using race. Resp.26. The court will impose the map because of its racial results. Whatever map is chosen, the reason will be that it makes black-preferred candidates win, a fact that everyone will "acknowledg[e]." *Alexander*, 602 U.S. at 8.

Though a stay likely requires another election under the challenged district, Resp.26, that is the status quo. Alabama has had the same number of majority-black districts for three decades, a materially identical plan passed muster last decade, and Plaintiffs did not seek a preliminary injunction this cycle. *See* Mot.14, 27, 29.

The risk that the State will violate constitutional rights absent a stay outweighs the risk that the State will violate statutory rights with a stay. A new map will "impose[] disadvantages upon persons … who bear no responsibility" for the alleged harm—right before the Supreme Court is to decide whether §2 can continue

"tell[ing] state actors when they have picked the right races to benefit," *SFFA*, 600 U.S. at 226, 229. That use of race is "odious to a free people" and impermissible unless it "survive[s] a daunting" standard. *Id.* at 206, 08. There is a serious risk that it does not.

CONCLUSION

The Court should stay the district court's injunction and remedial proceedings pending disposition of this appeal or until the Supreme Court decides *Callais*.

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CERTIFICATE OF COMPLIANCE

1. I certify that this motion complies with FED. R. APP. P. 27(d)(2)(C) because it contains 2,600 words, including all heading, 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 requirements of FED. R. APP. P. 32(a)(5) and the type style requirements of FED. R. APP. P. 32(a)(6) because it has been prepared in a proportionally spaced typeface using Microsoft Word for Office 365 in 14-point Times New Roman font.

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CERTIFICATE OF SERVICE

I hereby certify that on October 21, 2025, I electronically filed the foregoing with the Clerk of the Court using CM/ECF system, which will serve counsel for all parties.

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