Nos. 25-13007, 25-14131

UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT

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

v.

SECRETARY OF STATE FOR THE STATE OF ALABAMA,
Defendant-Appellant.

On Appeal from the United States District Court
for the Northern District of Alabama
Case No. 2:21-cv-01531-AMM

PLAINTIFFS' OPPOSITION TO SECRETARY OF STATE'S RENEWED EMERGENCY MOTION FOR STAY

RETRIEVED FROM DEMOCRACYDOCKET.COM

Deuel Ross
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th St. N.W. Ste. 600
Washington, DC 20005

Stuart Naifeh
Kathryn Sadasivan
Brittany Carter
Colin Burke
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector St., 5th Fl.,
New York, NY 10006

Alison Mollman
AMERICAN CIVIL LIBERTIES UNION OF ALABAMA
P.O. Box 6179, Montgomery, AL 36106

David Dunn
HOGAN LOVELLS LLP
390 Madison Avenue, New York, NY 10017

Davin M. Rosborough
Dayton Campbell-Harris
Theresa J. Lee
Sophia Lin Lakin
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St., New York, NY 10004

Jacob van Leer
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th St. NW
Washington, DC 20005

Bradley E. Heard
Jack Genberg
SOUTHERN POVERTY LAW CENTER
1101 17th Street NW, Suite 550
Washington, DC 20036

Jessica L. Ellsworth
Jo-Ann Tamila Sagar
Amanda NeCole Allen
HOGAN LOVELLS LLP
555 Thirteenth Street, NW
Washington, DC 20004

CERTIFICATE OF INTERESTED PERSONS AND CORPORATE DISCLOSURE STATEMENT

Pursuant to Federal Rule of Appellate Procedure 26.1 and Eleventh Circuit Rules 26.1–1 through 26.1–5, the undersigned counsel certifies that the following listed persons and parties may have an interest in the outcome of this case:

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 Foundation
8. Ashton, Anthony
9. Balch & Bingham LLP
10. Barnes, Anna-Kathryn
11. Bowdre, A. Barrett
12. Burke, Colin
13. Burrell, Ashley
14. Campbell-Harris, Dayton

RETRIEVED FROM DEMOCRACYDOCKET.COM

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

RETRIEVED FROM DEMOCRACYDOCKET.COM

34. LaCour Jr., Hon. Edmund G.
35. Lakin, Sophia Lin
36. Lancaster, Riley Kate
37. Lawsen, Nicki
38. Lee, Theresa J.
39. Livingston, Sen. Steve
40. Manasco, Hon. Anna M.
41. Marshall, Hon. Steve
42. Mauldin, Dylan L.
43. Maze, Hon. Corey L.
44. McClendon, (former) Sen. Jim
45. McKay, Charles A.
46. Merrill, Hon. John H.
47. Messick, Misty S. Fairbanks
48. Milligan, Evan
49. Mink, Richard D.
50. Mollman, Alison
51. NAACP Legal Defense and Educational Fund, Inc.

RETRIEVED FROM DEMOCRACYDOCKET.COM

52. Naifeh, Stuart

53. National Association for the Advancement of Colored People

54. Newsom, Hon. Kevin C.

55. Olofin, Victor

56. Overing, Robert M.

57. Pringle, Rep. Chris

58. Rand, Paul

59. Rosborough, Davin

60. Ross, Deuel

61. Sadasivan, Kathryn

62. Sagar, Jo-Ann

63. Seiss, Benjamin M.

64. Shapiro, Avner

65. Short, Caren E.

66. Simelton, Benard

67. Smith, Brenton M.

68. Southern Poverty Law Center

69. Stewart, Shelita M.

70. Stone, Khadidah

RETRIEVED FROM DEMOCRACYDOCKET.COM

71. Taunton, Michael P.

72. Thomas, James

73. Thompson, Blayne R.

74. Turrill, Michael

75. Unger, Jess

76. van Leer, Jacob

77. Walker, J. Dorman

78. Wallace, Janette McCarthy

79. Weisberg, Liza

80. Welborn, Kaitlin

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

82. Wilson, Thomas A.

83. Woodard, J. Scott

RETRIEVED FROM DEMOCRACYDOCKET.COM

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

Respectfully submitted this 26th day of May 2026.

/s/ Davin Rosborough
Counsel for Plaintiffs-Appellees

INTRODUCTION

Alabama's May 19, 2026 State Senate election concluded a week ago. Voters cast their ballots, and candidates' fates have been decided.[1] Despite informing the District Court last year that Alabama needed a State Senate map by November 2025 to avoid election administration problems and voter confusion, the Secretary sought twice to change the legislative maps in the midst of voting. Twice he failed. Now, he returns *after the results of the election are known*, asking this Court to bless a do-over election under different maps. This extraordinary request—the nullification of thousands of lawfully cast and counted ballots—must be denied.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Just this morning, a three-judge district court concluded in Alabama's congressional districting case "at the end of the fresh analysis . . . that the Plaintiffs are likely to establish a Section Two violation under *Callais*." Ex. A, Order ("*Milligan* 3rd PI"), *Milligan v. Allen*, No. 2:21-cv-01530-AMM, Dkt. No. 537 at 3 (N.D. Ala. May 26, 2026). The court rejected the Secretary's similar merits arguments and held—after testimony from Alabama's Director of Elections Jeff Elrod—that "requiring the Secretary to continue using [the remedial] race-blind

[1] *See Unofficial Election Night Results*, Ala. Sec. of State (last visited May 22, 2026), https://www2.alabamavotes.gov/electionNight/statewideResultsByContest.aspx?ecode=1001290 [https://perma.cc/88FH-DQSB].

map" that is the practical status quo "will not disrupt Alabama's elections" but instead "will forestall an expensive, aggressive, and perhaps logistically impossible voter reassignment effort." *Id.* at 5. The Secretary's arguments even weaker here, where the Remedial Plan is not just the "practical status quo" but also the "legal status quo." *Id.* at 7.

The Supreme Court has repeatedly rejected state requests for judicial intervention to reinstate an enjoined plan when an election is underway. *See Moore v. Harper*, 142 S. Ct. 1089 (2022); *Frank v. Walker*, 574 U.S. 929 (2014). While it is "improper[]" for a Court to "insert[] itself into an active primary campaign," *Abbott v. League of United Latin Am. Citizens*, 146 S. Ct. 418, 419 (2025), it is even worse for a court to belatedly override a recently completed, lawful primary. It is "hard to envision a more 'severe restriction' than retroactive invalidation of one's vote." *Griffin v. N.C. State Bd. of Elections*, 781 F. Supp. 3d 411, 449 (E.D.N.C. 2025) (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Electoral chaos and vote nullification aside, the Secretary offers no basis for a stay on the merits. In *Louisiana v. Callais*, 146 S. Ct. 1131 (2026), the Supreme Court confirmed that its "interpretation of § 2 [of the Voting Rights Act of 1965] does not require abandonment of the *Gingles* framework," rather, it only sought to "update the framework." *Id*. at 1157. Under the current record, as explained more

fully in their stay opposition of May 6 (ECF No. 67), district court opposition (ECF No. 75-3), forthcoming merits brief, *and* this morning's reasoning from *Milligan*, *see Milligan* 3rd PI, Plaintiffs satisfy those "updates." Plaintiffs' illustrative plan met all the "state's legitimate districting objectives" and "specified political goals," *id*. at 1159, which did not include partisanship. It also did not "use race as a districting criterion" in the drawing process. *Id*. Unlike in *Callais*, the district court found that racial voting patterns could not be seen "as mere party politics," *Ala. State Conf. of the NAACP v. Allen* ("*Ala. NAACP I*"), 796 F. Supp. 3d 759, 864–65 (N.D. Ala. 2025), but found "substantial evidence suggesting that race is a driving factor" in Alabama's voting patterns, *id*. at 863. Finally, the district court found ample evidence of "official discrimination in voting rights in Alabama," *id*. at 869, as *Callais* requires, *see* 146 S. Ct. at 1160.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The Secretary could not show a single stay factor counseled in his favor when he first asked this Court for exceptional relief. As more time has passed and the primary election has concluded, his arguments are even less compelling. As it has done twice before, the Court should decline to stay the injunction.

ARGUMENT

Granting a stay is an "exceptional" occurrence, and happens "only upon a showing of four factors: 1) that the movant is likely to prevail on the merits on

appeal; 2) that absent a stay the movant will suffer irreparable damage; 3) that the adverse party will suffer no substantial harm from the issuance of the stay; and 4) that the public interest will be served by issuing the stay." *Garcia-Mir v. Meese*, 781 F.2d 1450, 1453 (11th Cir. 1986).

I. The Stay Should Be Denied Because Granting It Would Irreparably Harm Plaintiffs and the Public Interest and Equities Weigh Strongly Against It.

The irreparable injuries to voters—but not the Secretary—the equities, and the public interest strongly favor denial of the motion. "There is no convincing evidence that it is necessary for [this Court] to allow Alabama to pivot to the [2021] Plan in the middle of an election, and substantial evidence that it is not." *Milligan* 3rd PI at 74. The equities and public interest favor "allow[ing] voters to participate in [the electoral] process under a race-blind plan that satisfies all applicable constitutional and statutory requirements while hewing as closely as possible to the State's legislatively enacted plan." *Id.* at 72.

RETRIEVED FROM DEMOCRACYDOCKET.COM

A. Granting the Requested Relief Would Irreparably Harm Plaintiffs and the Public Interest by Creating Confusion and Violating the Due Process Rights of Alabama Voters in Senate Districts 25 and 26.

1. *Purcell applies and weighs heavily against the relief requested.*

The Secretary has "not established that the changes" he requests from this Court "are feasible without significant cost, confusion, or hardship." *Merrill v. Milligan*, 142 S. Ct. 879, 881–82 (2022) (Kavanaugh, J., concurring). The Remedial

Plan "is the status quo in Alabama" and "has been since [the district c]ourt and the Circuit declined to stay it." Order, *Ala. State Conf. of the NAACP v. Allen*, No. 2:21-cv-1531, Dkt. No. 347 at 6 (N.D. Ala., May 18, 2026). Preserving that status quo is essential. Changing the maps after voting has concluded will undoubtedly "caus[e] much confusion." *Abbott*, 146 S. Ct. at 419. If implementing a new map four months before a primary amounted to an impermissible "disruption" and "unanticipated and unfair consequences for candidates, political parties, and voters," *Merrill*, 142 S. Ct. at 881 (Kavanaugh, J., concurring), then voiding a valid election days later to install different maps and attempt a non-administrable do-over election would wreak chaos. *See Milligan* 3rd PI at 8–13 (detailing cost, confusion, and hardship that would follow from mid-election changes to Alabama's maps).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Moreover, administering a do-over election on such short notice—August 11 is less than three months away—is "perhaps logistically impossible." *Milligan* 3rd PI at 5; *see infra* Section I.B (describing prior inconsistent statements). It would take a "chaotic, decentralized, and Herculean effort for officials . . . to reassign voters" now to new districts, leading to an "unmeasurable risk of error." *Milligan* 3rd PI at 8, 72. Per Director Elrod, because "Alabama's voter records . . . will remain locked until May 27," and "the voter reassignment process must conclude by June 2, when the voter records will lock again, *id.*, officials would have "a maximum of seven

days to complete a process that, on previous occasions, has taken several months." *Milligan* 3rd PI at 9; *see id.* at 71–74; *see also* Ex. B, Sec'y of State 30(b)(6) Dep. (*Milligan v. Allen*) at 164:18–22 (prior testimony that reassigning voters in Montgomery County alone would take "about three months").

Granting this stay would unleash further chaos, as the special session bill violates the Alabama Constitution, ensuring additional litigation—and uncertainty—in the event of a stay. In 2022, voters amended the Alabama Constitution to provide that any bill enacted in general election year "relating to the conduct of the general election" must be implemented "at least six months" before the election. Ala. Const. art. IV, § 111.08. Here, SB 1 "permits the reinstatement of the last legislatively enacted State Senate districts . . . in the 2026 General Election," and was effective May 8, 2026,[2] less than "six months before the general election" on November 3, 2026. *Id.*

RETRIEVED FROM DEMOCRACYDOCKET.COM

State constitution aside, *Purcell* applies for two reasons. *First*, the Supreme Court has declined multiple times to reinstate a state's map or election law when primaries were already ongoing and ballots had gone out. Concerns are even higher when it comes to voiding the results of such an election. In *Frank*, 574 U.S. at 929,

[2] S.B. 1, § 1(b)(i).

the Supreme Court vacated an appellate court's stay and reinstated a district court's injunction against a state election law when ballots had already been printed and mailed under that injunction. Recently, in *Moore*, 142 S. Ct. 1089, the Supreme Court left in place a court-ordered map and declined to reinstate North Carolina's map even though it granted certiorari. It was "too late for federal courts to order that the district lines be changed" . . . "for the [] primary and general elections, just as it was too late for the federal courts to do so in the Alabama redistricting case last month." *Id*. at 1089 (Kavanaugh, J., concurring in denial of stay).

RETRIEVED FROM DEMOCRACYDOCKET.COM

On other occasions, the Supreme Court has denied stays that would have reinstated a state's previously enacted maps in the face of ongoing elections. *See, e.g.*, *Bethune-Hill v. Va. State Bd. of Elections*, No. 3:14-cv-852, 2018 WL 11393922 (E.D. Va. Aug. 30, 2018), *stay denied*, *Va. House of Delegates v. Bethune-Hill*, 586 U.S. 1112 (2019); *Covington v. North Carolina*, No. 1:15-cv-399, 2018 WL 604732 (M.D.N.C. Jan. 26, 2018), *stay denied in part, granted in part*, *North Carolina v. Covington*, 583 U.S. 1109 (2018); *Personhuballah v. Alcorn*, 155 F. Supp. 3d 552 (E.D. Va. 2016), *stay denied sub nom.*, *Wittman v. Personhuballah*, 577 U.S. 1125 (2016); *Harris v. McCrory*, No. 1:13-cv-949, 2016 WL 6920368 (M.D.N.C. Feb. 9, 2016), *stay denied*, *McCrory v. Harris*, 577 U.S. 1129 (2016); *Perez v. Texas*, 891 F. Supp. 2d 808 (W.D. Tex. 2012), *stay denied sub nom.*, *League*

of United Latin Am. Citizens v. Perry, 567 U.S. 966 (2012).

Second, the Secretary argues that *Purcell* does not apply to last-minute state changes; only to "federal intrusion." Yet that is exactly what he requests from this Court: judicial action to change the map that was just used to conduct elections.

2. *Granting the relief requested would irreparably harm Plaintiffs, retroactively depriving Alabamians of their legally cast votes.*

Purcell aside, the relief the Secretary's requests would also negate lawfully cast ballots after an election. This would violate Plaintiffs' and other Alabamians' "right to be free from the purposeful decision of state officials to deny the citizens of a state the right to vote in an election mandated by law," which "jeopardize[s] the integrity of the electoral process." *Duncan v. Poythress*, 657 F.2d 691, 702, 705 (5th Cir. 1981); *see also Roe v. Ala. ex rel. Evans*, 43 F.3d 574, 580 (11th Cir. 1995). For the Alabamians who have already voted in primaries, it is "hard to envision a more 'severe restriction' than retroactive invalidation of one's vote." *Griffin*, 781 F. Supp. 3d at 449 (quoting *Norman*, 502 U.S. at 289).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Voters are also denied due process where "election officials refuse to tally . . . ballots that they have deliberately . . . sent to voters." *Hoblock v. Albany Cnty. Bd. of Elections*, 422 F.3d 77, 98 (2d Cir. 2005). Accordingly, where "fundamental, constitutionally protected liberties are adversely affected," applying a new rule "to

nullify previously acceptable" ones is "unfair and violate[s] due process." *Briscoe v. Kusper*, 435 F.2d 1046, 1055 (7th Cir. 1970); *see also Griffin v. Burns*, 570 F.2d 1065, 1078–79 (1st Cir. 1978) (due process violation where ballots were invalidated "after the results of the election were in"); *Roe*, 43 F.3d at 580 (due process violation where plaintiffs "demonstrated fundamental unfairness" due to ruling that occurred after voting).

RETRIEVED FROM DEMOCRACYDOCKET.COM

Conversely, Alabama cannot show it would suffer the irreparable harm necessary to warrant emergency equitable relief. The Secretary suffers no harm from accepting the results of the election he just administered under the status-quo map. His own motion confirms the speculative nature of the alleged harm. S.B. 1 is conditional—it authorizes a special primary only if a court changes the district lines—and even then, only if the Governor determines a new election is feasible. *See Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc) ("irreparable injury must . . . actual and imminent." (citation omitted)).

Before the Secretary invalidates thousands of votes, Plaintiffs deserve the chance to fully "address the impact of *Callais*" as this Court envisioned. *See* Order, ECF No. 72-2 at 4. That should preclude granting this renewed stay request.

Moreover, the Secretary overreads (at 3–4) the Supreme Court's remand of *Milligan*. The Supreme Court did not "necessarily reject[] the plaintiffs' arguments

that it was too late to act" under the "*Purcell* principle" or other doctrines in *Milligan*. The *Milligan* three-judge court correctly "reject[ed] the State's argument" on this ground because the "summary vacatur did not analyze the merits of any arguments." *Milligan* 3rd PI at 71–72.

Unlike a stay or another equitable remedy at the Supreme Court's disposal, 28 U.S.C. § 2106 confers the broad ability to grant, vacate, and remand ("GVR") even where eventual reversal is not probable. GVR "assists the court below by flagging a particular issue that it does not appear to have fully considered, [and] assists [the Supreme] Court by procuring the *benefit* of the lower court's insight *before* [the Supreme Court] rule[s] on the merits." *Lawrence ex rel. Lawrence v. Chater*, 516 U.S. 163, 167 (1996) (emphasis added). "As with all vacaturs of this kind from [the Supreme] Court, the District Court remains free on remand to decide for itself whether *Callais* has any bearing . . . ." *Allen v. Caster*, No. 25-243, 2026 WL 1282800, at *3 (U.S. May 11, 2026) (Sotomayor, J., dissenting). And upon "fully revisit[ing] the merits of each claim" and "the equities," "about which the summary vacatur expressed no view," *Milligan* 3rd PI at 28, 71, the *Milligan* district court rejected the Secretary's arguments wholesale.

RETRIEVED FROM DEMOCRACYDOCKET.COM

It is one thing to say that a point requires further thought, with the benefit of a germane Supreme Court opinion, and quite another to suggest a presumption that

a different result should obtain given that opinion. Here, if Plaintiffs had little chance of success in the eyes of the Supreme Court, then the Court would have had no need to remand and solicit the insight of this Court on the impact of *Callais*.

Indeed, the Supreme Court granted, vacated and remanded every other case arising under Section 2 of the Voting Rights Act for further consideration in light of *Callais* in short order, even where the relevant States did not indicate an intent to redistrict and where the issues presented only involved the existence of a private right of action unaffected by *Callais*. *See Bd. of Election Comm'rs v. NAACP,* No. 25-234, 2026 WL 1377105 (U.S. May 18, 2026); *Turtle Mountain Band of Chippewa Indians v. Howe*, No. 25-253, 608 U.S. ___ (2026).

RETRIEVED FROM DEMOCRACYDOCKET.COM

B. Defendants are Barred by Judicial Estoppel from Requesting this Stay.

The Secretary's emphatic warnings about the disastrous implications of changing a districting map even months before an election also belie his position today. Under the doctrine of judicial estoppel, the Secretary's deliberately inconsistent statements to this Court and others preclude his requested relief.

Judicial estoppel is an "equitable doctrine," "prohibiting parties from deliberately changing positions according to the exigencies of the moment." *Slater v. U.S. Steel Corp.*, 871 F.3d 1174, 1180 (11th Cir. 2017) (en banc) (quoting *New Hampshire v. Maine*, 532 U.S. 742, 749–50 (2021)). Namely, "a party should not be

allowed to gain an advantage by litigation on one theory," and then seek an "advantage by pursuing an incompatible theory." *Id.* at 1180–81. "[J]udicial estoppel prevents parties from playing fast and loose with the courts." *New Hampshire*, 532 U.S. at 750 (citation modified).

When applying judicial estoppel, courts "typically" consider: first, whether "a party's later position" is "clearly inconsistent with its earlier position"; second, "whether the party has succeeded in persuading a court to accept that party's earlier position," such that accepting the later inconsistent position would create "the perception" that one of the courts "was misled"; and third, "whether the party seeking to assert an inconsistent position would derive an unfair advantage . . . if not estopped." *Id.* at 750–51 (citation modified). Judicial estoppel applies here.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The Secretary's prior representations in this matter conflict with his present ones. At the start of the remedial phase, he represented to the district court that any map needed to be in place more than *six months* prior to the May 19 primary election to avoid calamitous effects on election administration. *See* Joint Status Rep., No. 2:21-cv-1531, Dkt. No. 275 (N.D. Ala. Aug. 27, 2025). The Secretary said it was "not possible to provide a date and say with confidence that Alabama can implement a remedial map entered by that date without disruption and confusion." *Id.* at 4. But due to factors like counties being "required to reassign" voters to new districts, he

"believe[d] that a remedial map for the [May 19,] 2026 election would need to be in place on or before November 17, 2025 to mitigate these concerns." *Id*.

The Secretary now asks for "clearly inconsistent" relief, *New Hampshire*, 532 U.S. at 750—an order from this Court voiding the status-quo map and reinstating a *different* map *in between the concluded primary and the general election*. He previously "succeeded in persuading [the district] court to accept [his] earlier position . . . ." *Id*. The court, the special master, and Plaintiffs expended substantial resources to facilitate an order for a remedial map issued precisely on the date urged by the Secretary. *See* Inj., Order, and Court-Ordered Remedial Map, No. 2:21-cv-1531, Dkt. No. 322 (N.D. Ala. Nov. 17, 2025). Accepting Defendant's "inconsistent position . . . would create the perception that . . . [the] court was misled." *New Hampshire*, 532 U.S. at 743. It cannot be true that a new map is not administrable within six months of the primary *and* that a new map can be imposed halfway through the election cycle, after the conclusion of the primary. The Secretary "would derive an unfair advantage" by being permitted to reverse course. *Id*. at 743.

RETRIEVED FROM DEMOCRACYDOCKET.COM

The Secretary's inconsistencies extend to *Milligan*, as well, where these plaintiffs and the Secretary are also parties. When a three-judge court preliminarily enjoined the use of Alabama's 2021 Congressional map and began looking toward a remedial map, the Secretary found it beneficial to oppose late-breaking judicial

intervention to change Alabama's congressional districts. He insisted that an order resulting in changed districts "roughly two months before absentee voting begins . . . will cause irreparable harm to Alabama, its aspiring congressional representatives, and the voters they seek to represent." Defs.' Emergency Mot. for Stay Pending Appeal, *Milligan v. Allen*, No. 2:21-cv-1530, Dkt. No. 110 at 23 (N.D. Ala. Jan. 25, 2022). The Secretary warned that "[e]njoining the State from using the 2021 Map throws the current election into chaos and leaves almost no time for maps to be redrawn," and noted specific difficulties—district reassignments, the impossibility of sending out UOCAVA ballots with only three months' notice, candidates signature gathering, and "all sorts of activities" that must occur before voting began. *See id.* at 18–22. For those reasons, the Secretary argued, the Court should not have entered an order that changed districts "where an election was imminent and the election process had already begun." *Id.* at 22 (internal quotation marks omitted).

RETRIEVED FROM DEMOCRACYDOCKET.COM

The Secretary pressed these claims all the way to the Supreme Court and argued, in an emergency application, that equitable factors should bar any court order that modifies electoral districts within months of an election. *See* Emergency App. for Admin. Stay at 38–40, *Merrill v. Milligan*, No. 21A375 (U.S., Jan. 28, 2022) ("*Milligan* Stay App."); *see* Reply in Supp. of *Milligan* Stay App. at 24–26, *Merrill v. Milligan*, No. 21A375 (U.S. Feb. 2, 2022). "[F]ederal courts ordinarily

don't change election rules at the eleventh hour," he argued, and the district court's order imposing "new districts days before the candidate qualifying deadline and less than two months before absentee voting is to begin" would "result in voter confusion and consequent incentive to remain away from the polls." *Milligan* Stay App. at 39; *see* Reply in Supp. of *Milligan* Stay App. at 25–26 (rolling out parade of horribles).

Again, the Secretary's *Milligan* arguments are "clearly inconsistent" with his current position. *New Hampshire*, 532 U.S. at 750. The Secretary argues that *Purcell* does not apply when a *state* tries to make last-minute election changes, as opposed to a court. But as discussed *supra* § I.A, that misses that it is the Secretary who is asking *the Court* to affect a change in the maps, and the Supreme Court has repeatedly stepped in under similar circumstances.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Ultimately, the Secretary "succeeded in persuading [the Supreme Court] to accept [his] earlier position." *New Hampshire*, 532 U.S. at 750. It intervened to prevent any change in maps for the 2022 elections. *See Merrill v. Milligan*, 142 S. Ct. 879 (2022). And the Secretary "would derive an unfair advantage" from succeeding under these inconsistent positions. *New Hampshire*, 532 U.S. at 751. Based on Defendant's prior arguments, these same Plaintiffs were harmed in *Milligan* by a stay of a later-affirmed injunction granting them their requested relief. *See Allen v. Milligan*, 599 U.S. 1, 10 (2023). It would be unfair to deal Plaintiffs

further harm in this matter based on contradictory arguments.

As the Secretary warned this Court, "'the election machinery wheels [are] in full rotation,' and can't be stopped without grave damage to the public." Defs.' Emergency Mot. for Stay Pending Appeal at 23, *Milligan*, Dkt. No. 110 (citation omitted). Alabama voters have now selected their general election candidates—the electoral wheels could not be more in motion. For these reasons, the Secretary should be estopped from receiving emergency relief now.

II. The Record is Sufficient to Sustain the Court's Ruling that the 2021 State Senate Plan Violates Section 2 of the VRA in the Montgomery Region under the *Callais* Standard.

RETRIEVED FROM DEMOCRACYDOCKET.COM

As the *Milligan* court did just hours ago, *see Milligan* 3rd PI at 49–70, this Court is likely to, and should, reaffirm the district court's thorough decision. Plaintiffs have now briefed the Secretary's lack of likelihood of success on the merits before this Court and the district court and are in the process of responding to briefing from the Secretary on these same merits. *See* Sec'y. of State's Opening Br., ECF No. 74. Plaintiffs therefore refer to their prior arguments on the likelihood of success to this Court, *see* Pls.' Opp. to Sec'y. of State's Mot. to Stay, ECF No. 67 at 9–16 (hereinafter "11th Cir. Opp."), to the district court, *see* Pls.' Br. in Opp. to Mot. to Stay, ECF No. 75-3 at 17–28 (hereinafter, "Dist. Ct. Opp."), their forthcoming

merits briefing to be filed later today, and the *Milligan* decision from earlier today. Plaintiffs summarize their arguments briefly here.

In *Callais*, the Court updated the first *Gingles* precondition to confirm that (1) "plaintiffs cannot use race as a districting criterion"; and (2) the "illustrative maps must meet all the State's legitimate districting objectives, including traditional districting criteria and the State's specified political goals." 146 S. Ct. at 1159. Plaintiffs satisfy these requirements. Based on the record, the district court correctly found that it is possible to draw an additional majority-Black district that satisfies the State's 2021 redistricting guidelines without considering race as a criterion in the drawing process. *See* 11th Cir. Opp. at 10–12; Dist. Ct. Opp. at 18–22; *see also* *Milligan* 3rd PI at 49–55. The district court properly concluded that Plaintiffs' expert did not use race as an improper criterion in redistricting, and Alabama's own expert never alleged that Plaintiffs' expert improperly used race in drawing illustrative District 25. *Ala. NAACP I*, 796 F. Supp. 3d at 770, 854. While he knew "where the minority community exist[ed]"—as any mapmaker familiar with Alabama would—he did not display or rely on race in drawing illustrative District 25. *Id*. at 791.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Moreover, the Secretary's "sole argument about the configuration of Proposed District 25 [was] that the illustrative district is not reasonably configured because it 'subordinates traditional districting principles to racial considerations.'"

Ala. NAACP I, 796 F. Supp. 3d at 852. That is, Defendant never contested that Mr. Fairfax's plan satisfied every other state guideline. *Id.*; *see also id*. at 845; *Milligan* 3rd PI at 55–57.

Critically, as in *Milligan*, "the State did not defend its map on the ground that it was drawn to achieve a political objective," *Callais*, 146 S. Ct. at 1162, and the record does not reflect partisanship as a goal of the Plan. In fact, the Senator in charge of the Plan testified that it was drawn without looking at political data. *See* 11th Cir. Opp. at 11–12; Dist. Ct. Opp. at 23–24; McClendon Dep., *Ala. State Conf. of the NAACP*, No. 2:21-cv-1531, Dkt. No. 235-1 at 28–29 (N.D. Ala., May 15, 2026). *Callais* requires Plaintiffs to present an alternative map based on the guidelines that *actually* governed the Legislature's map-making process. 146 S. Ct. at 1157. Yet no member of the Legislature asserted any partisan objectives as motivating the district lines in the 2021 Plan, and the legislative redistricting guidelines did not reference to partisanship. *Ala. NAACP I*, 796 F. Supp. 3d. at 776–78. Nevertheless, while Alabama never asserted a partisan goal, the Remedial Plan is still more likely than not to maintain the partisan makeup of the Senate and protect incumbents. Under the Remedial Plan, a Republican candidate is more likely than a Democratic one to win elections in the new District 26. *See id*. at 1375

RETRIEVED FROM DEMOCRACYDOCKET.COM

For the second and third *Gingles* preconditions, *Callais* instructs plaintiffs to "disentangle" race and political affiliation in analyzing voting patterns. 146 S. Ct. at 1159. Here, the record demonstrates—and the Court found—that Plaintiffs showed that race, more than partisan politics, drives polarization in Alabama. *See* 11th Cir. Opp. at 13–14; Dist. Ct. Opp. at 24–26; *see also Milligan* 3rd PI at 57–61. It did so by crediting record evidence of primary races in both parties, nonpartisan races, and other evidence and testimony. For example, the Court declined to find that White Republican voters were willing to support Black Republicans, particularly in Montgomery. *Ala. NAACP I*, 796 F. Supp. 3d at 863. For instance, in examining two 2024 Republican primary races in the Montgomery area, the Court found that White voters overwhelmingly supported White Republicans over Black Republicans. *Id.* As another example, the Court found that the political parties' positions on key issues like abortion and same-sex marriage did not explain the voting patterns of Black voters. *See id.* at 863–64. Thus, unlike in *Callais*, 146 S. Ct. at 1161, the evidence here showed that even with party held constant, racial polarization persisted between Black and White voters in the Montgomery area.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Turning to the totality of the circumstances, the *Callais* Court faulted the district court in *Robinson* (the Louisiana Section 2 case) for failing to consider that none of the evidence it cited "showed even a plausible likelihood of intentional

discrimination," *Callais*, 146 S. Ct. at 1161, and for relying on much older evidence of intentional discrimination by Louisiana officials rather than current conditions. *Id*. at 1160. Here, Plaintiffs' evidence provides much "more than a remote bearing" on "present-day intentional racial discrimination regarding voting." *Id*.; *see also Milligan* 3rd PI at 61–70 (citing much of the same evidence). Instead, the record contains ample evidence of recent, official intentional discrimination related to voting and elections in Alabama that is more than sufficient to sustain Plaintiffs' burden after *Callais*. *See* 11th Cir. Opp. at 14–16; *Milligan* 3rd PI at 69 ("We further find that every piece of this intensely local corpus of evidence tells us the same thing: things are still different here in Alabama."). For example, the Court relied upon the fact that in the past twelve years, multiple political subdivisions in Alabama were bailed back into preclearance review under Section 3(c) of the Voting Rights Act based on intentionally discriminatory voting practices. *See Ala. NAACP I*, 796 F. Supp. 3d at 868. It also pointed to a recent "federal court [finding] that Alabama State Senators conspired to depress Black voter turnout." *Id*. at 869 (citing *United States v. McGregor*, 824 F. Supp. 2d 1339, 1345–47 (M.D. Ala. 2011)). And it noted recent, successful challenges to state legislative districts as unconstitutional racial gerrymanders. *Ala. NAACP I*, 796 F. Supp. 3d at 869. Thus, the "pervasive and

RETRIEVED FROM DEMOCRACYDOCKET.COM

protracted history of official discrimination in voting rights in Alabama" is a pattern that "has run well into the present era . . . ." *Id.*

This contemporary pattern of racial discrimination in voting was well illustrated *this morning* when a court "reject[ed] in the strongest possible terms [Alabama's] attempt to finish its intentional decision to dilute minority votes with a veneer of legislative regularity." *Milligan* 3rd PI at 4.

Finally, although the Secretary had separately appealed the remedy imposed by the district court, *see* Notice of Appeal, *Ala. State Conf. of the NAACP v. Sec'y of State*, No. 25-14131, Dkt. No. 1-2 (11th Cir. Nov. 21, 2025), he has now abandoned any such arguments by failing to raise them in his just-filed merits brief, *see* ECF No. 74. *See, e.g.*, *In re Blue Cross Blue Shield Antitrust Litig. MDL 2406*, 85 F.4th 1070, 1092 (11th Cir. 2023) ("If a party makes only passing references to an issue in its statement of the case or its summary of the argument in the opening brief, the issue is considered abandoned."); *Davis v. Coca-Cola Bottling Co. Consol.*, 516 F.3d 955, 972 (11th Cir. 2008) ("It is well settled in this circuit that an argument not included in the appellant's opening brief is deemed abandoned.").

RETRIEVED FROM DEMOCRACYDOCKET.COM

Because the Secretary has not made a strong showing that he would now prevail on the merits under *Callais*, a stay would be improper.

CONCLUSION

The Court should deny the Secretary's extraordinary emergency motion.

DATED this 26th day of May 2026.

Respectfully submitted,

/s/ Davin M. Rosborough

Davin M. Rosborough
Dayton Campbell-Harris
Theresa J. Lee
Sophia Lin Lakin
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
125 Broad St.
New York, NY 10004
(212) 549-2500
drosborough@aclu.org
dcampbell-harris@aclu.org
tlee@aclu.org
slakin@aclu.org

Jacob van Leer
AMERICAN CIVIL LIBERTIES UNION FOUNDATION
915 15th St. NW
Washington, DC 20005
jvanleer@aclu.org

Bradley E. Heard
Jack Genberg
SOUTHERN POVERTY LAW CENTER
1101 17th Street NW, Suite 550
Washington, DC 20036
(240) 890-1735
bradley.heard@splcenter.org
jack.genberg@splcenter.org

Deuel Ross
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
700 14th Street N.W. Ste. 600
Washington, DC 20005
(202) 682-1300
dross@naacpldf.org

Stuart Naifeh
Kathryn Sadasivan
Brittany Carter
Colin Burke
NAACP LEGAL DEFENSE & EDUCATIONAL FUND, INC.
40 Rector Street, 5th Floor
New York, NY 10006
(212) 965-2200
snaifeh@naacpldf.org
ksadasivan@naacpldf.org
bcarter@naacpldf.org
cburke@naacpldf.org

Alison Mollman
AMERICAN CIVIL LIBERTIES UNION OF ALABAMA
P.O. Box 6179
Montgomery, AL 36106-0179
(334) 265-2754
amollman@aclualabama.org

RETRIEVED FROM DEMOCRACYDOCKET.COM

David Dunn
Hogan Lovells LLP
390 Madison Avenue
New York, NY 10017
(212) 918-3000
david.dunn@hoganlovells.com

Jessica L. Ellsworth
Jo-Ann Tamila Sagar
Amanda NeCole Allen
Hogan Lovells LLP
555 Thirteenth Street, NW
Washington, DC 20004
(202) 637-5600
jessica.ellsworth@hoganlovells.com

Attorneys for Plaintiffs-Appellees

RETRIEVED FROM DEMOCRACYDOCKET.COM

CERTIFICATE OF COMPLIANCE

This document complies with the word limit of Fed. R. App. P. 32, because, excluding the parts of the document exempted by Fed. R. App. P. 32(f), this document contains 5,060 words including all headings, footnotes, and quotations, and excluding the parts of the brief exempted under Fed. R. App. P. 32(f). This document 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.

RETRIEVED FROM DEMOCRACYDOCKET.COM

Dated: May 26, 2026

Respectfully submitted,

/s/ *Davin M. Rosborough*
Davin M. Rosborough
Counsel for Plaintiffs-Appellees

CERTIFICATE OF SERVICE

I hereby certify that on May 26, 2026, I filed the foregoing Opposition using the Court's CM/ECF system, which will serve counsel for all parties.

/s/ *Davin M. Rosborough*
Davin M. Rosborough
Counsel for Plaintiffs-Appellees