

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-1531

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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), undersigned counsel certifies that the following listed persons and parties may have an interest in the outcome of this case.

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After the Secretary’s May 7, 2026 filing, the CIP was amended to include additional entries and describe roles, to the extent known, and to delete the National Association for the Advancement of Colored People. For this filing, asterisks have been added to reflect the new entries that were not included in the May 7 filing. Additionally, the National Association for the Advancement of Colored People has been added back to the list.

Ala. State Conf. of NAACP v. Sec'y of State of Ala., Nos. 25-13007 & 25-14131

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

Respectfully submitted this 2nd day of June, 2026.

s/ A. Barrett Bowdre

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INTRODUCTION

The 2021 Plan is lawful, and it should not have been enjoined. Plaintiffs contend they can meet *Callais* on this record and with these findings, Resp.19, but missing is the required conclusion: that “the evidence supports a strong inference that the State intentionally drew its districts to afford minority voters less opportunity because of their race.” *Louisiana v. Callais*, 146 S.Ct. 1131, 1157 (2026). Plaintiffs did not prove it, and the district court did not find it. But that is what a §2 claim is: the statute can constitutionally impose liability *only* when the evidence supports a strong inference of discriminatory intent. No such evidence is present here, particularly given that Plaintiffs do not dispute that the 2021 Plan was a “least changes” plan that used as its starting point the 2017 remedial map that was blessed by a three-judge court in *Alabama Legislative Black Caucus v. Alabama*, No. 2:12-cv-691, 2017 WL 4563868, at *1 (M.D. Ala. Oct. 12, 2017) (“*ALBC*”). See DE274 (“Op.”) at 21.

Plaintiffs relied heavily on evidence with only a “remote bearing” on the ultimate inquiry and failed to meet the updated test. *Callais*, 146 S.Ct. at 1160. At *Gingles* I, their map-drawer admittedly used race and failed to meet the State’s districting objectives like protecting incumbents. *Contra id.* at 1159. At *Gingles* II and III, Plaintiffs failed to disentangle racial bloc voting from partisan bloc voting. The district court affirmatively found that it “cannot separate voters’ racial

considerations from their party affiliations,” although it improperly held this finding against the Secretary. Op.201. *Contra Callais*, 146 S.Ct. at 1159-60. And on the totality of the circumstances, Plaintiffs focused on distant history and disparate facts that do not prove “present-day intentional racial discrimination regarding voting” committed “by the State.” *Contra id.* at 1160, 1162. *Callais* significantly updated the *Gingles* framework and rejected the interpretations of §2 (and its constitutional guardrails) embraced by both Plaintiffs and the district court, and the district court’s factual determinations make it clear that it reversibly erred.

This Court has options as to how to remedy the district court’s errant rulings. One is to set oral argument and decide the merits. Plaintiffs contend that “the Court is capable of evaluating the case on the merits” without remand. Resp.57-58. As they put it, “the Secretary made arguments similar (or more extreme) to the ones adopted in *Callais*, so Plaintiffs assembled evidence to meet even those farther-reaching standards.” Resp.29. In other words, Plaintiffs say there’s no need to supplement the record and nothing more to do below even if this Court were to remand. This Court instead need only “review any altered legal analysis required to address [their] entitlement to the injunctions below under *Callais* with the benefit of the parties’ briefing.” Resp.58. The Secretary agrees that this Court has everything it needs to address the merits on the record before it.

True, the Secretary *had* previously “prefer[red]” vacatur over merits review because “it [could] be done quickly, and absent swift action, Alabama [would have been] forced to conduct the 2026 elections under an injunction.” Resp.57 (quoting Br.21-22). But given this Court’s subsequent order entering a stay, swift action is no longer needed to avoid that otherwise irreparable harm. The Court now has ample time to consider and rule upon the merits, and the Court can do so by judging the district court’s factual findings against the correct legal standard. That’s similar to what the Supreme Court itself did in *Callais* when it considered the record from *Robinson*. See *Callais*, 146 S.Ct. at 1161-62; see also *Manning v. Sch. Bd. of Hillsborough Cnty.*, 244 F.3d 927, 943-47 (11th Cir. 2001) (reversing and remanding with instruction to enter judgment for appellant and holding that factual findings based “on an incorrect legal standard” were not entitled to deference). Given Plaintiffs’ position that this Court can resolve the case without remand and the removal of the exigencies surrounding the State’s ability to use its own lawful map, this Court should hear the case on the merits.

Another option, if the Court is not inclined to decide the merits, is to vacate and order a limited remand or a remand with instructions. Any remand should be limited to *reconsidering* the extant record through *Callais*’s prism, rather than *retrying* or giving Plaintiffs a second bite at the apple to prove their case. See, e.g., *Utah v. Su*, 109 F.4th 313, 321-22 & n.26 (5th Cir. 2024) (limited remand for purpose

of reconsidering in light of intervening precedent) (citing *United States v. Rodriguez-Pena*, 957 F.3d 514, 519 (5th Cir. 2020) (Oldham, J., concurring) (discussing the costs saved by a limited remand in the sentencing context)).

If the Court vacates and remands, it should be cognizant of the equitable considerations concerning timing. After this Court issued the stay, the Governor set a Special Primary Election for August 11, 2026 for the affected districts, with a candidate certification deadline of June 2.¹ The candidates have since been certified by the parties, and it appears no primary election will be needed because neither major party had two or more candidates qualify for Senate Districts 25 or 26.² The election machinery in Alabama has thus shifted to hold the General Election using the State’s enacted Plan, and the *Purcell* principle counsels that the Election should not now be disturbed—as the Supreme Court just held earlier today in staying an

¹ Proclamation by the Governor, *Senate Districts 25 & 26 Special Primary Election Proclamation* (May 29, 2026), governor.alabama.gov/newsroom/2026/05/senate-districts-25-and-26-special-primary-election-proclamation/; *Writ of Election to Set Special Primary Election For Alabama State Senate Districts 25 & 26* (May 29, 2026), governor.alabama.gov/newsroom/2026/05/writ-of-election-senate-districts-25-26/.

² See Certification of Republican Candidates, District 25, Ala. Sec’y of State (June 2, 2026), <https://www.sos.alabama.gov/sites/default/files/election-2026/RepublicanCertificationofCandidates-SD25.pdf>; Certification of Democratic Candidates, Districts 25 & 26, Ala. Sec’y of State (June 2, 2026), <https://www.sos.alabama.gov/sites/default/files/election-2026/DemocratCertificationofCandidates-SD25and26.pdf>

injunction concerning Alabama’s congressional elections. *See Allen v. Milligan*, No. 25A1316 (U.S. June 2, 2026).

ARGUMENT

I. The Injunctions Should Be Reversed Or Vacated With Instructions In Light Of *Callais*.

Callais “update[d]” the *Gingles* framework to align it “with the statutory text and reflect[] important developments since [the Court] decided *Gingles* 40 years ago.” 146 S.Ct. at 1157. Under the first *Gingles* precondition, *Callais* says an illustrative plan (1) “cannot use race as a districting criterion” and (2) must meet all the State’s legitimate districting objectives as well as the State’s plan. *Id.* at 1159. But the district court said an illustrative plan (1) can use race so long as it did not predominate and (2) need not compete with the State’s plan. Op.30-32. Under the second and third *Gingles* preconditions, *Callais* says Plaintiffs must disentangle race and politics and specifically offer a racially polarized voting analysis that controls for party affiliation. 146 S.Ct. at 1159-60. But the district court said that the second and third preconditions “do not require that the Court disentangle party and race.” Op.183. Last, *Callais* says that the totality-of-the-circumstances inquiry must focus on present-day intentional racial discrimination regarding voting by the State and give “much less weight” to history and the “ongoing ‘effects of societal discrimination[.]’” 146 S.Ct. at 1160. But the district court placed great weight on historical discrimination and the ongoing effects of societal discrimination while

rejecting germane evidence of black Alabamians’ present-day equal access to the political process. Op.192-216. Accordingly, reversal (or at least vacatur with instructions) is required because the district court’s analysis and the trial record cannot be squared with §2, as *Callais* makes clear.

A. First *Gingles* Precondition

Callais updated the first *Gingles* precondition in two significant ways. First, “in drawing illustrative maps, plaintiffs cannot use race as a districting criterion.” *Callais*, 146 S.Ct at 1159. “If a plaintiff can produce an additional majority-minority district only by using race,” then “that illustrative map sheds no light on whether the State acted unconstitutionally by *not* adopting such a map.” *Id.* Second, “illustrative maps must meet all the State’s legitimate districting objectives, including traditional districting criteria and the State’s specific political goals.” *Id.* “Only by meeting all of the State’s legitimate objectives can the illustrative maps help to ‘disentangle race’ from politics and other constitutionally permissible considerations.” *Id.* (citation omitted). In finding that Plaintiffs’ illustrative maps passed muster, the district court necessarily applied a very different standard. Under the proper standard, their maps fail to meet both requirements.

1. Impermissible uses of race.

The district court blessed an illustrative map that, by its own admission, was the product of a process that “was not race-blind.” Doc. 312 at 7. Plaintiffs’ expert,

Mr. Fairfax, impermissibly used race: (1) at the beginning of the map-drawing process, (2) during the process, (3) as part of his aim to preserve existing majority-minority districts, and (4) in his own words: as a “factor.” *Every one* of these uses of race renders his maps worthless for *Gingles* purposes.

First, all agree that Mr. Fairfax “reviewed race at the beginning of the process to see ‘where the minority community exists.’” Op.173. Plaintiffs respond that being “aware[] of the State’s racial demographics” is “not[] nefarious.” Resp.35. But there is a difference between being passively aware of one’s own State’s demographics—as a state legislature or local government “always is,” *Shaw v. Reno*, 509 U.S. 630, 646 (1993)—and actively looking for black voters to sort by their race in preparation to draw districts that hit a racial target. Mr. Fairfax began with racial demographics and considered other factors “only after.” *See Shaw v. Hunt*, 517 U.S. 899, 907 (1996).

Second, Mr. Fairfax used race “periodically” during mapmaking. Op.173; DE254:63 (testifying he sometimes checked racial data “every few minutes” while drawing maps). This “process ... would be unconstitutional if a State engaged in such mapmaking.” *Callais*, 146 S.Ct. at 1159; *cf. Bush v. Vera*, 517 U.S. 952, 969-70 (1996) (plurality) (faulting use of race “[t]hroughout the course of the ... process”). If “periodic” use “every few minutes” were an exception to *Callais*’s blanket ban on the use of race, this would be “the kind of ‘exception’ that goes pretty

far toward swallowing the rule.” *Cf. Cooper v. Harris*, 581 U.S. 285, 314 (2017). To permit Mr. Fairfax’s use of race, the Court would need to draw a line between “periodic” use and something more, but there are no “legal standards to limit and direct [the Court’s] decision[]” on that question—any more than for political gerrymandering, which is nonjusticiable. *Cf. Callais*, 146 S.Ct. at 1156. But this Court need not answer the “unanswerable” question, “How much is too much?” *Rucho v. Common Cause*, 588 U.S. 684, 707, 716 (2019), because *Callais* held that a “map in which race was *used* has no value,” 146 S.Ct. at 1159 (emphasis added).³

Third, Mr. Fairfax expressly aimed to draw a new majority-minority district without compromising existing race-based districts, which injected *another* racial criterion into his process. In his report, he argued that his map complied with federal law because “it includes two additional majority Black Senate Districts that adhere to traditional redistricting criteria without eliminating any of the eight existing majority Black Senate Districts.” DE206-6:33. That’s almost exactly what gave rise to gerrymandering liability in *ALBC v. Alabama*, where the State sought “to maintain roughly the same black population percentage in existing majority-minority districts” to comply with §5 of the VRA, as the State understood it. 575 U.S. 254, 259-60 (2015). Although the State had aimed to balance nonracial factors as well—

³ Plaintiffs have no defense, so they accuse “Alabama’s cartographer [of] us[ing] a similar process to draw the Enacted Plan,” Resp.36, which is both irrelevant to their burden and false. Mr. Hinaman testified that he “drew the map ‘race blind.’” Op.21.

like equal population, core retention, and county lines—race could still predominate, *id.* at 274-75. Mr. Fairfax’s non-retrogression rationale fares even worse today, as *ALBC* clarified the §5 standard, which is no longer available here in any event, and the standard for using race is much stricter.

Mr. Fairfax thus used race not only in an effort to prove vote dilution in the Montgomery area through a *Gingles* I map but as a criterion that “could not be compromised” *elsewhere* in his map, which is an “express acknowledgment that race played a role in the drawing of district lines.” *Alexander v. S.C. State Conf. of the NAACP*, 602 U.S. 1, 8 (2024); *accord Malliotakis v. Williams*, 146 S.Ct. 809 (2026) (Mem.) (Alito, J., concurring) (order “to draw a new congressional district for the express purpose of ensuring that ‘minority voters’ are able to elect the candidate of their choice” was “unadorned, racial discrimination, an inherently odious activity”); *Callais*, 146 S. Ct. at 1161.

Most telling, Mr. Fairfax exposed his use of race when he “testified that he ‘tends to not consider race as much as the other redistricting criteria,’” Op.173 (alterations accepted), which concedes that race was indeed one criterion in the mix. *Contra Callais*, 146 S.Ct. at 1159 (“[P]laintiffs cannot use race as a districting criterion.”). Likewise, the finding that Mr. Fairfax “did not prioritize race over other factors” implies that he used race as a factor. Op.173; DE206-6:33 (Fairfax Report) (asserting same). Even before *Callais*, a mapmaker would violate the Constitution

for using “race as opposed to other, ‘traditional’ factors” regardless of whether race “takes ultimate priority.” *ALBC*, 575 U.S. at 273; *see SFFA v. Harvard*, 600 U.S. 181 (2023). If the government cannot use race as a “tip” or a “plus,” *id.* at 294 (Gorsuch, J., concurring), neither can Mr. Fairfax, *Callais*, 146 S.Ct. at 1159.

Plaintiffs do not seriously challenge that Mr. Fairfax used race as a factor. They do accuse the Secretary of taking “statements out of context,” Resp.36, but the Secretary’s opening brief block quoted the district court (Br.44) and ascribed Mr. Fairfax’s statements the exact same meaning as the district court did. Op.173. Nevertheless, to be sure, here is the testimony in “context”:

- Q. How do you attempt to draw reasonable configured districts?
- A. You use what’s called traditional redistricting criteria.
- Q. And how do those criteria factor into your map drawing?
- A. I use them.
- Q. Do you consider race when drawing these maps?
- A. Race can be considered. When I draw, I tend to not consider race as much as the other criteria, although I’m allowed to, but I tend to not.
- Q. When do you have racial data toggled on or off in your map drawing process?
- A. Usually what I do is -- and other map drawers, they have to have some sense of where the minority community is in a particular jurisdiction. If they don’t, then you end up just drawing in areas that you can’t meet that Gingles 1. So you have to have some idea.
So usually in the beginning, I will look at where the minority community exists. And then I turn it off and won’t turn it on, but maybe periodically. But I always use the other criteria labels more than race.

DE254:23-24.⁴ Mr. Fairfax admitted using race as a criterion. That is now dispositive under *Callais* and warrants reversal, not simply vacatur. The difference between the court’s holding and the Secretary’s position is not a factual dispute about how to read the record. The district court erred in applying a relaxed predominance standard despite what §2 and the Constitution require, as *Callais* makes clear.

To all this, Plaintiffs insist their expert “did not use race as an *improper* criterion,” Resp.33 (emphasis added), but the district court’s faulty “predominance” reasoning cannot be saved with new labels. Op.172; *accord id.* at 174 (finding that Mr. Fairfax “was race-aware to the degree the law allows”). Yes, “existing case law” allowed the use of race in a non-predominant way, *Callais*, 146 S.Ct. at 1143, but *Callais* observed that standard was an outlier, *id.* at 1146-48 (citing *SFFA*, 500 U.S. at 206), and dramatically restricted the use of race in redistricting. *Contra* Resp. 34-35.

Because Mr. Fairfax’s maps cannot be used to satisfy *Gingles*, Plaintiffs’ §2 claim cannot succeed, and the Court should reverse.⁵

⁴ While they accuse the Secretary of lifting the admission out of context, it is Plaintiffs who (Resp.36) stitch together snippets of testimony from *forty pages* later to try to rehabilitate their mapmaker.

⁵ Plaintiffs fixate on whether the *remedial* map was drawn “without any reference to race.” Resp.26-27. But that map played no role in the district court’s liability finding. And the Secretary did *not* concede that it was drawn race-blind. *Contra* Resp.26-27; *see* Doc. 322 at 25-26. The then-anonymous drawer was never examined, and the fact that he claimed not to “display” race does not preclude drawing an

2. Failure to meet all the State’s objectives.

Further, the district court blessed an illustrative map that did not achieve the State’s districting objectives “just as well” as the State’s plan. *Callais*, 146 S.Ct. at 1159. Instead, it allowed Mr. Fairfax to make “tradeoffs” and “balance” the State’s districting goals, Op.172-73, including against his use of race (*supra* §I.A.1). But “[o]nly by meeting all the State’s legitimate objectives can the illustrative maps help ‘disentangle race’ from politics and other constitutionally permissible considerations.” *Callais*, 146 S.Ct. at 1159.

Plaintiffs’ map did not do that. Mr. Fairfax did not “achieve” or “meet” the State’s goals, *Callais*, 146 S.Ct. at 1159, because the district court found he only “attempted to follow other criteria found in the Legislature’s redistricting guidelines,” Op.172-73. That the Legislature required a map to satisfy population equality before respecting communities of interest did not give Mr. Fairfax license to “dare[]” sacrifice the Legislature’s other legitimate districting objectives. *Contra* Resp.39. What Plaintiffs derogate as second-tier goals, Resp.38, the Legislature classified as objectives “embedded in the political values, traditions, customs, and usages of the State of Alabama,” Op.256.

unconstitutional gerrymander, especially where the Special Master was ordered to submit maps that hit a racial target. Doc. 317 at 1. *See Callais*, 146 S.Ct. at 1162 (“intentional compliance with the court’s demands constituted an ‘express acknowledgment that race played a role in the drawing of district lines’”).

Plaintiffs cling to a hyperliteral interpretation of the guidelines. Resp.38-40. But that misses how the Legislature and its map-drawer understood the State's objectives. For example, Plaintiffs say (Resp.39-40) it was fine for Mr. Fairfax to place SD25's Republican Senator in an unfavorable district (and SD26's Democratic Senator in a less favorable district) because the guidelines say that "[c]ontests between incumbents will be avoided whenever possible." Op.256.

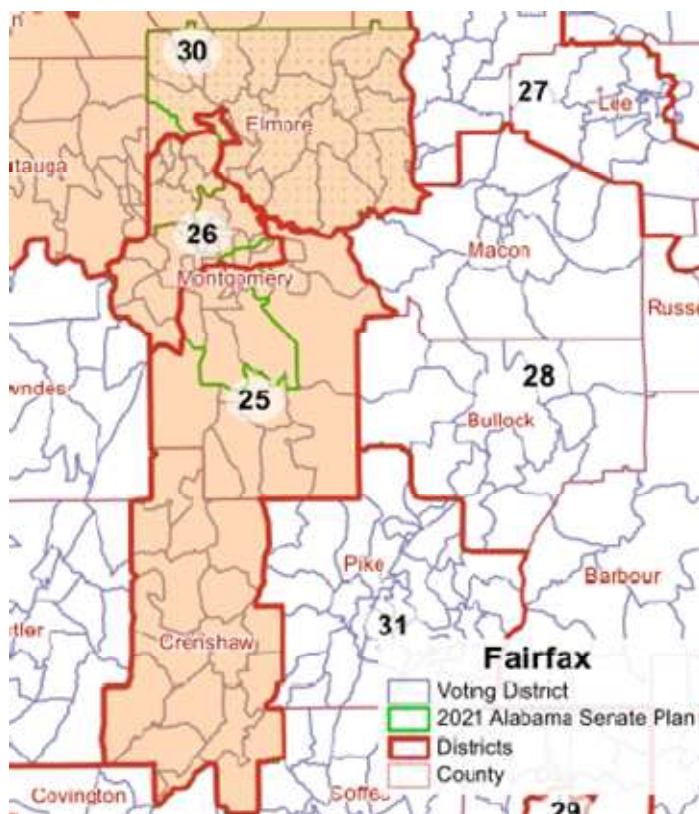
That ignores the purpose of the objective. As the Senate Reapportionment Committee Chair testified: voters "being familiar" with officeholders and vice versa is mutually "helpful." *See* DE235-1:35. He said that "getting the Senators, the incumbents, happy with what they had to deal with," Op.100 (quoting DE235-1:69), was a factor. Under *Callais*, the State is perfectly entitled to object to a map that imperils its incumbents; indeed, that was *dispositive* of the Supreme Court's §2 analysis: "An incumbent is not protected if he or she will lose re-election." 146 S.Ct. at 1161.

Plaintiffs say SD25's Republican Senator should take comfort in being able to "win the new District 26 on average by 1.8 percentage points," Resp.40, but a State may seek a better or "specific margin of victory for certain incumbents," *Callais*, 146 S. Ct. at 1159. That also misses the more crucial point that *District 26 is not Senator Barfoot's district*. The remedial plan—which is irrelevant for *Gingles* I purposes—so completely failed at protecting both Senators Barfoot and Hatcher

that they originally qualified as candidates in each other's districts under the remedial plan; they had to *switch districts*.⁶ *Contra* DE235-1:23 (Sen. McClendon: "We didn't want to draw them out of their district."); *id.* at 31-32.

Plaintiffs also claim credit for Mr. Fairfax "deferr[ing] to the Legislature's priorities of avoiding city and county splits." Resp.41 (quoting Op.174). One way they say he did so was by removing a county split in Elmore County. Resp.39. But Elmore County remains split between Districts 25 and 26 in Mr. Fairfax's plan versus between Districts 25 and 30 in the 2021 Plan:

⁶ See Unofficial Election Night Results: 2026 Primary Election Statewide Results, Ala. Sec'y of State, <https://www2.alabamavotes.gov/electionNight/statewideResultsByContest.aspx?ecode=1001290> (visited May 28, 2026) (listing Senator Hatcher, formerly of District 26, as winning District 25). *Contra* Resp.27 ("including the Democratic primary in remedial Senate District 26").



DE312-5.⁷ Mr. Fairfax didn’t defer; he overrode the Legislature’s judgment about which districts should include Elmore County.

Plaintiffs next suggest “deference” in Mr. Fairfax’s decision to split the City of Prattville in exchange for unifying the already-mostly-whole Town of Pike Road.⁸ “[T]hat the *state itself* split” Pike Road is the point. Resp.41. “[I]t is up to each State to decide” how to weigh traditional districting factors. *Callais*, 146 S.Ct. at 1156.

⁷ Mr. Fairfax’s report—what the district court relied on to reach the same incorrect conclusion, Op.174—says only that “SD25 removes all area in Elmore County” without discussing where that area went: to SD26. *See* DE206-6:36.

⁸ The 2021 Plan’s “split” of Pike Road—a municipality with highly irregular boundaries—had 92.6% of the town in District 25 and the rest (695 residents) in District 26. DE195-24:22.

Even college mapmaker who drew what became the court-ordered plan appreciated that “the Legislature determined to split western Elmore County [including eastern Prattville] into District 30.” 2:25-mc-01682 DE8-1:3; *accord id.* DE12 (public comment that “the 30th District should remain as unchanged as feasibly possible”). But not Mr. Fairfax, who meanwhile deepened the existing split of Montgomery to achieve his racial target. *Compare* DE195-24:18 (70.9% of Montgomery in SD26, 29.1% in SD25), *with* Op.48 (49.69% in SD25).

The Secretary’s position is not that “*every* line-drawing decision ... cannot be changed.” *Contra* Resp.41. But it’s “nonsensical,” *id.*, to make the committee *guidelines* be the sum total of the State’s legitimate districting decisions. The Legislature need not list every community of interest it wants to protect in legislative findings; it need not have legislative findings at all. *See Vera*, 517 U.S. at 966-67 (“[W]e do not ... require States engaged in redistricting to compile ‘a comprehensive administrative record’” or “explicitly mention[]” every relevant factor “in the redistricting plan’s legislative history.”). What “*actually* govern[s] the Legislature’s map-making process,” Resp.40, are “the actual considerations that provided the essential basis for the lines drawn,” Resp.40-41 (quoting *Bethune-Hill v. Va. State Bd. of Elections*, 580 U.S. 178, 189-90 (2017)). Here, that would include Senators telling the Senate Chair and the map-drawer “about communities of interest that they preferred to preserve in their respective districts.” Op.100. Legislative intent is

“discerned primarily from the statutory text,” *CTS Corp. v. Waldburger*, 573 U.S. 1, 12 (2014), and the “text” here is the map—the 2021 Plan. *Cf. Cooper*, 581 U.S. at 291 (What “motivate[e]d the legislature[]” may be proven by “a district’s shape.”).

Last, Plaintiffs do not dispute that core retention was a top goal. Op.21.⁹ The Legislature recognized “preserv[ing] the cores of existing districts” as one of its “embedded” redistricting objectives. DE274:256-57. Not only did that goal help protect incumbents, but making the 2021 Plan a “least-change” map was necessary due to six-month-late census data creating “tight” timelines. Op.99. The Secretary objected to certain remedial plans that did not “leave[] the greatest portion of the Legislature’s plan in place.” DE317:5. Again, Mr. Fairfax only weakly “attempted to follow” this criterion, Op.45, “accord[ing] it lower priority,” DE206-6:14. His plan preserved only 45.63% of District 25, 53.88% of District 26, and 62.27% of District 30. DE164-8:113, 114.

In sum, Plaintiffs proved no §2 violation because Mr. Fairfax’s plan was drawn using race as a districting criterion, failed to protect incumbents, traded the

⁹ Their main argument is that *Callais* did not overrule *Allen v. Milligan*’s statement that core retention could not “defeat a §2 claim.” Resp.43 (quoting 599 U.S. 1, 22 (2023)). But to the extent this statement was more than dicta, *Callais* abrogated it: “Properly understood, §2 thus does not intrude on States’ prerogative to draw districts based on nonracial factors”—including “preserving the core of existing districts.” 146 S.Ct. at 1156.

Legislature's preferred municipality split for his own, and did not preserve district cores despite the State's "least changes" goal.

B. Second and Third *Gingles* Preconditions

For the second and third *Gingles* preconditions, a plaintiff must establish that the majority group "votes sufficiently as a bloc" to defeat the "politically cohesive" minority group's preferred candidate. *Gingles*, 478 U.S. at 51. *Callais* further clarifies that a plaintiff must establish racial bloc voting that "cannot be explained by partisan affiliation." 146 S.Ct. at 1159. It is Plaintiffs' burden to demonstrate that their rights are "den[ied] or abridge[d] ... on account of race or color," 52 U.S.C. §10301(a), "not just because of partisan affiliation," *Callais*, 146 S.Ct. at 1159. At a minimum, controlling for party is "critical for disentangling race and politics." *Id.* (cleaned up). Or, as the Supreme Court put it in staying the injunction entered in Alabama's congressional cases, "the mere fact that voters of different races vote for different parties is not relevant to proving racially polarized voting patterns." *Allen*, No. 25A1314, slip op. 3.

The district court erred when it found that Plaintiffs satisfied *Gingles* II and III without controlling for party. And, after finding that it "*cannot* separate voters' racial considerations from their party affiliations," the court erred in holding this finding against the Secretary rather than Plaintiffs. Op.201 (emphasis added).

1. Plaintiffs allege that this finding is “take[n] out of context” because the Secretary “omits the district court’s accompanying findings that ‘it cannot understand the patterns it sees as mere party politics.’” Resp.49. But, if anything, the broader context reinforces the point. The district court weighed the relevant evidence and reached a conclusion that is dispositive of claims under *Callais*—yet then incorrectly applied it to favor Plaintiffs. The court spent considerable time explaining its belief that “race plays a key role in party attachments” and that it (and Plaintiffs) did not need to—and indeed *could not*—“separate voters’ racial considerations from their party affiliations.” Op.201. The district court was crystal clear: it “acknowledges the well-known reality that party affiliations drive voting patterns, but it understands this evidentiary record as indicating that the Court cannot separate voters’ racial considerations from their party affiliations, and that it must not ignore the role that voters’ race plays in their partisan attachments.” *Id.*

Callais rejected similar findings: “the [district] court observed that black voters have been aligned with the Democratic party for decades and that issues discussed by that party appealed to black voters. Those observations should have undercut, not strengthened, any showing of intentional racial discrimination because race and politics are so intertwined.” *Callais*, 146 S.Ct. at 1162. *Callais* does not require the *Secretary* to show patterns of “mere party politics,” Op.201; it requires a

§2 *plaintiff* to fully “control for partisan preferences,” *Callais*, 146 S.Ct. at 1162. If the two are “intertwined,” that precludes §2 liability. *Id.*

2. Plaintiffs also did not come close to carrying their burden to disentangle race and politics. *Callais* indicates that a plaintiff must control for party, all but requiring systematic evidence of *intra-party* racial-bloc voting. 146 S.Ct. at 1159. But Plaintiffs’ expert analyzed only biracial *general* elections in his primary report, so all he found was that black voters in Alabama generally supported Democrats and white voters in Alabama generally supported Republicans. Doc. 189-9 at 4-5; *accord Callais*, 146 S.Ct. at 1162.

Plaintiffs pivot to focus on a handful of anecdotes that their expert raised in rebuttal to the Secretary’s expert, Dr. Christopher Bonneau. Resp.45-48. This approach fails because (1) the cited evidence “controls for partisanship” in name only, (2) isolated anecdotal evidence cannot carry a plaintiff’s systematic burden, and (3) the Secretary’s expert provided contrary, systematic evidence.

First, Plaintiffs point to two mayoral races and the 2008 Democratic Primary. But the mayoral elections are not adequate controls for partisanship, *contra* Resp.45-48, because, as the Secretary’s expert Dr. Bonneau testified (credibly, Op.188-89), nonpartisan elections often feature many of the same characteristics as partisan elections, DE259:1469:14-17. Voters were likely aware that Steven Reed (the same black candidate in both mayoral races) is a Democrat. *Id.* at 1457:20-1458:2,

1458:15-17. And Plaintiffs’ reliance on the 2008 Democratic Primary is inaccurate, insufficient, and far stretched: Dr. Hood did not perform any racial analysis on this election, *contra* Resp.46, but merely reported exit polling, *see* Doc. 198-5, and—regardless—the election was from nearly 20 years ago. *Id.*

Second, isolated anecdotes and small effect sizes fall short of the systematic *bloc* voting that *Callais* requires. *See United States v. Charleston Cnty.*, 365 F.3d 341, 352-53 (4th Cir. 2004) (finding a county’s “present[ation] of anecdotal evidence” concerning race and partisanship unpersuasive as a matter of “systematic proof”). If the anecdotal evidence Plaintiffs now offer were sufficient, *any* biracial primary election where the partisan majority failed to vote for the racial minority would be sufficient. Indeed, anecdotal information about even a single racist voter might be sufficient (or at least probative). Section 2 demands more. *Callais*, 146 S.Ct. at 1159 (describing facts of *Gingles*).

Third, systematic evidence controlling for partisan affiliation *was* presented to the district court—by the Secretary. That evidence showed that partisanship, not race, was controlling. *See, e.g.*, DE189-1:¶¶18-19; DE189-5:20; DE259:1420-21.

C. Totality of the Circumstances

At the totality-of-circumstances stage, Plaintiffs again try to refocus on evidence with only “a remote bearing” on the inquiry. *Contra Callais*, 146 S.Ct. at 1160. But *Callais* requires that the “inquiry must focus” on “present-day intentional

racial discrimination regarding voting” “by the State.” *Id.* at 1160, 1162. Simply cataloguing every possible instance of discrimination (intentional or not) by entities other than the Legislature in any context for the last century is not a strong basis to infer that “intentional discrimination occurred” when the Legislature enacted the 2021 Senate Plan. Plaintiffs attempt to downplay this burden, Resp.50-51, but cannot “c[o]me close to showing an objective likelihood that the State’s challenged map was the result of intentional racial discrimination” as *Callais* demands, *id.* at 1162.

The district court gave short shrift to evidence that the current-day political process is equally open to black Alabamians. Even worse than the district court in *Callais*—which had downplayed “the lack of evidence that black voters had faced intentional discrimination in recent years,” *id.* at 1162—the district court here “refuse[d]” to credit evidence of equal access on the logic that it would somehow “give punitive effect to the political participation of Black Alabamians,” Op.210. *Callais* rejected that line of reasoning. Strides in “eliminating racial discrimination in voting”—including those attributable to the Voting Rights Act itself—shed significant light “on current intentional discrimination.” 146 S.Ct. at 1160. The fact that “as a result of this progress, it is hard to find pertinent evidence relating to intentional present-day discrimination” is “cause for celebration,” *id.*—not evidence to be flatly rejected.

Unable to rebut Alabama’s 95.2% black voter registration rate, Op.133, Plaintiffs instead focus on asserted turnout gaps, Resp.54. But they make no effort to show that turnout disparities result from present-day intentional racial discrimination (they don’t). Plaintiffs’ own expert conceded that a study on which she relied found that race does *not* have a statistically significant effect on turnout, and any disparities are better explained by non-racial variables like age, education, and political engagement (among others). DE256:761. Plaintiffs also attempt to minimize evidence regarding the roughly proportional number of black legislators as only “due to litigation,” Resp.55, which must be credited rather than condemned, *Callais*, 146 S.Ct. at 1160. And that black *Democratic* candidates have not found success in Alabama elections outside majority-*Democratic* districts “proves nothing,” *id.*; *contra* Resp.55.

The district court’s refusal to credit such evidence is all the more puzzling given the proper weight that a three-judge district court had given it in just the previous redistricting cycle. *ALBC v. Alabama*, 989 F. Supp. 2d 1227, 1280-87 (M.D. Ala. 2013), *rev’d on other grounds*, 575 U.S. 254 (2015).¹⁰ *ALBC* got it right. Its finding that black voters “have an equal opportunity to participate in the political

¹⁰ The *ALBC* district court readopted that holding upon remand along with all other conclusions of law and findings of fact except those addressed by the Supreme Court in adjudicating the racial gerrymandering claim. *ALBC v. Alabama*, 231 F. Supp. 3d 1026, 1043 (M.D. Ala. 2017); *see also* Opening.Br.22 n.6.

process as everyone else,” based on present-day conditions such as (for example) black voters being “politically active” and “registered to vote in high numbers,” is just the sort of inquiry that *Callais* demands. *See* 989 F. Supp. 2d at 1286. *ALBC* also correctly held that historic discrimination did not show that the State’s legislative districts “would deny minority voters equal political opportunity *today*.” *Id.* (emphasis added). Even without the benefit of *Callais*, the *ALBC* court conducted a proper totality-of-the-circumstances analysis; the district court below did not.

Plaintiffs try to distinguish *ALBC* as “concerning a different region in Alabama,” Resp.56, but the first §2 claim there asserted dilution “across the State” in every majority-black district including Senate District 26 at issue here, 989 F. Supp. 2d at 1280-81, 1298, 1306. Nor was *ALBC*’s conclusion that plaintiffs could not satisfy the totality of the circumstances “brief[] dicta,” *contra* Resp.56; it was an alternative holding entitled to the same weight as its *Gingles* I conclusions. *See* 989 F. Supp. 2d at 1286 (“Even if the Plaintiffs had proved all three *Gingles* requirements... the totality of the circumstances does not support a claim of vote dilution.”); *accord Bravo v. United States*, 532 F.3d 1154, 1162 (11th Cir. 2008) (“[A]lternative holdings are not dicta....”). Plaintiffs’ attempts to distinguish the records between this case and *ALBC*, Resp.56-57, rely on their continued focus on evidence with only a “remote bearing” on the inquiry (as discussed below).

The district court and Plaintiffs also improperly focus on evidence with little-to-no relevance after *Callais*. Their totality-of-the-circumstances analyses cite discrimination by those other than the Legislature (including many instances by non-State actors), “[d]iscrimination that occurred some time ago, [and] present-day disparities that are characterized as the ongoing ‘effects of societal discrimination.’” *Contra Callais*, 146 S.Ct. at 1160, 1162. But this evidence does not support “an objective likelihood that the State’s challenged map was the result of intentional discrimination.” *Id.* at 1162. *Callais* has disciplined the analysis. Evidence of historic discrimination is not evidence of “present-day” discrimination. While the district court correctly did not assign such evidence “dispositive weight,” Op.204, 206-209, it should have given it little or no weight. So too with evidence concerning the asserted ongoing effects of historic discrimination, which the district court appears to have given “substantial” weight. Op.211-16; *see also* Resp.54 (alleging effects of historic segregation). Evidence of discrimination unrelated to voting is also not very relevant. *Contra* Resp.53-54 (citing cases “involving discrimination in other areas” such as employment or education). And evidence regarding discrimination by political subdivisions or political candidates is not discrimination “by the State.” *Contra* Resp.52-53. Plaintiffs put far too much stock in such evidence, which has (at most) a “remote bearing” on the inquiry.

Stripped of these superfluities, the meager present-day evidence in the record doesn't come "close to showing an objective likelihood that the State's challenged map was the result of intentional discrimination." *Callais*, 146 S.Ct. at 1162. For instance, Plaintiffs cite *ALBC* (at 51-52), but that court expressly rejected an intentional-discrimination claim and credited the "consistent and unequivocal testimony" that the legislative map-drawers had not "acted with a racially discriminatory purpose or motive." 989 F. Supp. 2d at 1278. Although some districts there were found to be gerrymanders, the Legislature faced "a difficult task" navigating the various legal hazards of the VRA and the Constitution, *id.* at 1032, and had "understandably took" §5 of the VRA's non-retrogression standard "as requiring it to maintain the same percentages of minority voters in majority-minority districts," *ALBC*, 575 U.S. at 302 (Thomas, J., dissenting). The *ALBC* holding does not provide evidence of improper racial motivation supporting §2 liability today.

As the most "recent" piece of evidence, Plaintiffs cite the affirmance of a preliminary injunction finding *a likely violation of §2* as to Alabama's congressional districts. Resp.51 (citing *Milligan*, 599 U.S. at 22). But the Supreme Court never suggested that the 2021 redistricting plans had been the result of intentional discrimination; that was not the issue on appeal. *Milligan* thus neither provides evidence that the State engaged in *intentional* racial discrimination in voting nor supports even a "strong inference" of such—the intent of the 2021 Legislature

simply wasn't passed upon in *Milligan*. Even had Plaintiffs cited the subsequent *district court* findings in those cases about the districts drawn in 2023, those findings do not shed light on the Legislature's intent two years earlier in 2021 when drawing the State Senate Plan. And, in any event, the Supreme Court has either vacated or stayed the district court's injunctions in *Milligan*. See *Milligan*, No. 25A1316, *supra*.

* * *

Callais clarified how §2 claims are to be assessed and made clear that intentional discrimination must be at the center of that analysis. Plaintiffs contend that they anticipated and “assembled evidence” to meet *Callais*'s updated standard in response to the Secretary's arguments below. Resp.29. But Plaintiffs failed. And, because Plaintiffs are content with the record they built, this Court need not gift them a do-over to shore it up now. Accordingly, this Court should reverse on the merits outright just as the Supreme Court did in *Callais* or, at a minimum, vacate the injunctions and remand with instructions clarifying the scope of further proceedings below.

II. If The Court Vacates And Remands, It Should Take The Equities Into Account.

While the Secretary initially sought immediate vacatur and remand so Alabama could use its enacted Plan for the 2026 election, this Court's stay order has properly allowed for that. Candidates have since been certified for the affected districts under Alabama's enacted Plan. Plaintiffs now seek immediate vacatur so

they can ask the district court to enter a preliminary injunction “‘alter[ing] the election rules on the eve of an election’”—something the Supreme Court has “‘repeatedly cautioned that lower federal courts should not” do. *Milligan*, 25A1315, slip op. 3 (quoting *RNC v. DNC*, 589 U.S. 423, 424 (2020)). If the Court does vacate and remand, it should take these equities into account both in the timing of its decision and the issuance of the mandate and in any instructions it provides to the district court. The Court should be clear that the district court should not “‘interpose[] itself into Alabama’s ongoing efforts to conducts its imminent 2026 [State Senate] elections under maps that its elected representatives selected.” *Id.* at 4.

CONCLUSION

The Secretary respectfully asks the Court to reverse on the merits or, in the alternative, to vacate the injunctions and remand with instructions clarifying the scope of the district court’s task in any further proceedings.

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CERTIFICATE OF COMPLIANCE

1. I certify that this brief complies with the type-volume limitations set forth in Fed. R. App. P. 32(a)(7)(B)(ii). This brief contains 6,457 words, including all headings, footnotes, and quotations, and excluding the parts of the response exempted under Fed. R. App. P. 32(f).

2. In addition, this response 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.

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CERTIFICATE OF SERVICE

I certify that on June 2, 2026, I electronically filed this document using the Court's CM/ECF system, which will serve counsel of record.

s/ A. Barrett Bowdre

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