

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
RICHMOND DIVISION

GLORIA PERSONHUBALLAH, et al.,)
Plaintiffs,)
v.)
JAMES B. ALCORN, et al.,) Civil Action No. 3:13cv00678
Defendants &)
Intervenor-Defendants)

**PLAINTIFFS' PROPOSED SPECIAL MASTERS AND COMMENTS ON
COURT-IDENTIFIED POSSIBLE CANDIDATES**

I. INTRODUCTION

Pursuant to the Court's Order dated September 2, 2015 (Dkt. Entry No. 207), Plaintiffs submit this memorandum to address the appointment of a Special Master to assist the Court in drawing a remedial congressional plan. Plaintiffs first set out the criteria that they respectfully submit should guide the Court in selecting a Special Master. Plaintiffs then submit their proposed candidates, in order of preference. Finally—to the extent that Plaintiffs do not propose such candidates themselves—Plaintiffs provide their comments on other candidates identified by the Court during the September 2, 2015, telephonic hearing.

A. Suggested Criteria for Special Masters

Plaintiffs believe that the Court's goal in choosing a Special Master should be to ensure fairness and independence in drawing district lines, consistent with Fed. R. Civ. P. 53(a)(2). Plaintiffs further submit that, given the Court's familiarity with the record evidence and the Court-identified constitutional violation, the Special Master's function should be to provide the Court with technical assistance in evaluating the remedial maps

proposed by parties and non-parties and in preparing the final remedial map. Because the proposed Special Master did not attend or participate in the trial and thus is not familiar with either the record evidence or the specific constitutional violation at issue, he or she should be limited to a technical assistance role. That calls for a Special Master with particular expertise in preparing districting plans; a “mapdrawing” expert. To that end, Plaintiffs suggest that any Special Master appointed by the Court satisfy the following criteria:

1. **Fairness and Independence:** The Special Master should operate under the authority and direction of the Court; the Special Master should not be responsible in any way to the executive or legislative branches of government. Additionally, the Special Master should not hold any position of employment that may subject him or her to undue political pressure or influence, and should not present a partisan affiliation (or perceived partisan affiliation) that could call his or her work on behalf of the Court into question. *Cf.* Fed. R. Civ. P. 53(a)(2).
2. **Experience:** The Special Master should have requisite experience (whether as an academician or a mapdrawer) in redistricting. Specifically, the Special Master should have experience as a mapdrawer/demographer, rather than possessing particular expertise in statistical analysis, such as of voting patterns, which is less important at this phase of the proceedings.
3. **Immediate Availability:** As discussed during the September 2, telephonic hearing, a new map must be in place well before the end of 2015 to (a) provide prompt relief from the ongoing constitutional violation to which the Commonwealth has subjected Plaintiffs, and (b) avoid unnecessary disruption to the Commonwealth’s administration of the 2016 elections. Accordingly, Plaintiffs submit that the Court should ensure that the appointed Special Master has sufficient time and availability to provide the Court with

such assistance as is necessary to have the new map in place well before the end of 2015.

B. Plaintiffs' Proposed Special Masters

Plaintiffs propose the following candidates for appointment as a Special Master, all of whom were previously identified by the Court. Plaintiffs rank their proposed Special Masters in order of preference, but submit that any of the three candidates below would be appropriate selections. Plaintiffs have not contacted these candidates and thus do not know whether they are available to serve as Special Master.

1. Bruce E. Cain

At Stanford University, Cain is the Spence and Cleone Eccles Family Director of the Bill Lane Center for the American West, and Charles Louis Ducommun Professor in Humanities and Sciences. Cain is a pioneer in computer-assisted redistricting. Cain has experience assisting courts, commissions, and legislatures in drawing legislative districts. Cain served as special master for the three-judge panel overseeing Arizona State Legislative Redistricting in 2002. Cain has also served as a consultant to Los Angeles County (1991); to the San Diego Citizens Commission on Redistricting (2001); and to the City and County of San Francisco (2002). In addition, Cain has served as an expert witness in numerous redistricting cases. Cain's CV is available at

https://politicalscience.stanford.edu/sites/default/files/cain.full_cv_1214a.pdf.

2. William Cooper

Cooper is a private consultant. To Plaintiffs' knowledge, Cooper has the most practical experience drawing district maps of any of the candidates identified by Plaintiffs or the Court. Since 1986, Cooper has prepared proposed redistricting maps of approximately 600 jurisdictions for Section 2 litigation, Section 5 comment letters, and for use in other efforts to promote compliance with the Voting Rights Act of 1965. Cooper also has particular familiarity with the Commonwealth. He is a resident of Virginia and has

previously drawn districts in the Commonwealth. In the past two redistricting cycles, Cooper has drawn the district plan for the Sussex County Board of Supervisors. Plaintiffs provide a copy of what they understand to be Cooper's CV as Exhibit A.

3. Bernard Grofman (proposed by Court)

Grofman is the Jack W. Peltason Endowed Chair Professor of Political Science and Director, Center for the Study of Democracy University of California, Irvine Department of Political Science. Grofman has previous experience as a court-appointed redistricting expert, serving as an expert to the special masters in redistricting cases in Georgia and New York: *Flateau v. Anderson*, 537 F. Supp. 257 (S.D.N.Y. 1982); *Rodriguez et al. v. Pataki*, No. 02 CIV. 618(RMB), 02 CIV. 3239(RMB) (S.D.N.Y. 2002); *Larios v. Cox*, 305 F Supp. 2d 1355 (N.D. Ga. 2004). Grofman also served as expert for the New York City Council redistricting 1991. Grofman's CV is available at <http://www.socsci.uci.edu/bgrofman/>.

C. Plaintiffs' Comments on Court-Identified Potential Special Masters

Plaintiffs provide their comments below regarding the additional proposed special masters identified by the Court during the September 2 hearing. Plaintiffs rank these additional candidates in order of preference, but do not support the appointment of any of them. As set out below, although all are respected in their field of expertise, Plaintiffs have concerns about the suitability of each in this matter. In some instances, the candidate's experience lies in the statistical analysis of voting patterns, voting turnout, and other issues that *relate* to redistricting but which does not provide the requisite expertise as a mapdrawer the Special Master must possess here. In other cases, the candidate's past work and/or partisan affiliation calls into question whether he will be (or will be perceived as) a neutral, non-partisan assistant to the Court.

1. Theodore Arrington

Arrington is a Professor Emeritus at UNC Charlotte. Arrington does have experience assisting courts with redistricting. In 1992, Arrington was appointed to serve as an expert to

assist the Special Master tasked with drawing congressional and state legislative districts in New York. Arrington has served as a consultant to other localities redrawing legislative districts. He has also testified for litigants in voting rights act cases on a variety of issues related to redistricting.

Notwithstanding his credentials, Plaintiffs do not put Arrington on their recommended list and would not support his appointment as Special Master in this litigation. Though Arrington has some relevant background, Plaintiffs submit that their preferred candidates have more recent and more applicable experience assisting courts and jurisdictions in drawing new districts. In addition, Plaintiffs are concerned that Arrington's CV specifically discusses his history of partisan political affiliation. <https://claspages.uncc.edu/theodore-arrington/files/2012/10/Curriculum-Vita-Jan-2015.pdf> (at page 19). Among other things, Arrington has served as Vice Chair of a county Republican party, run as a Republican candidate for city council, and was appointed to a local board of elections six times by the Republican Party. Although Arrington has impressive academic credentials, has served as an expert witness in a wide variety of capacities over the years for disparate parties, and Plaintiffs do not question his objectivity, Plaintiffs believe that the fairness of a court-drawn remedial map should be above any reproach or challenge. Given that there are many other strong candidates, Plaintiffs would not support appointment of Arrington as a Special Master.

2. Allen J. Lichtman

Lichtman is a well-known academician at American University who has testified in numerous voting rights cases. Plaintiffs do not believe, however, that Lichtman has the same degree of relevant map-drawing experience as the experts Plaintiffs have identified. Plaintiffs have reviewed Lichtman's testimony in numerous of the cases in which he has served as an expert. Lichtman's testimony has focused primarily on analysis of voter turnout

and related issues. Plaintiffs have not identified cases in which Lichtman has served primarily in the capacity of map-drawer.

3. Richard Engstrom

To Plaintiffs' knowledge and in the experience of Plaintiffs' counsel, Engstrom's expertise lies primarily in the statistical analysis of voting behavior and patterns, and less in the nuts and bolts of creating and assessing legislative maps. That is, Plaintiffs' understanding is that Engstrom is not chiefly a "mapdrawer" and instead generally provides an analysis of the degree of racially polarized voting in a given jurisdiction. In that capacity, Engstrom excels. The record here, however, already contains a thorough analysis of racially polarized voting in the Commonwealth. Plaintiffs submit that the Court needs a mapdrawer, not a statistician such as Engstrom.

4. Ronald Weber

Weber is a Professor Emeritus at the University of Wisconsin-Milwaukee. Plaintiffs have reviewed Weber's CV, and it appears that, like Engstrom, Weber's work has focused on the statistical analysis of voting behavior and patterns, rather than mapdrawing. In addition, it appears that Weber has served as an expert primarily on behalf of local and state governments defending against racial gerrymandering and Voting Rights Act claims—particularly in recent years. Weber's past work experience would raise concerns with regard to the appearance of fairness, given that Weber has generally testified *against* plaintiffs challenging aspects of maps drawn by state and local legislative bodies. Accordingly, Plaintiffs do not believe that Weber is a strong candidate for appointment as a neutral Special Master in this matter.

5. John Alford

Like Engstrom, Alford's work in redistricting has been primarily in the statistical analysis of voting behavior and patterns. In addition, to Plaintiffs' knowledge, Alford has served as a testifying expert primarily on behalf of jurisdictions defending against racial

gerrymandering and Voting Rights Act claims. Thus, although he appears qualified in his own area of expertise, Plaintiffs do not believe that Alford presents an appropriate profile for a neutral Special Master in this matter.

6. Nathan Persily

Persily is a respected academician with relevant past experience serving as a Special Master in redistricting matters. Plaintiffs, however, would object to Persily's appointment as Special Master for two primary reasons.

First, during his tenure at Columbia Law School, Persily taught a course titled "Redistricting and Gerrymandering," in which Persily and his students used 2010 Census data to draw maps of every congressional district in the country, including those in Virginia. According to the "DrawCongress" website created to showcase these plans, the purpose of this endeavor was to create plans that "serve[d] as a benchmark against which incumbent-drawn plans can be assessed" and to "provide[] ready-made congressional plans" for those states that failed to craft lawful redistricting plans of their own.

<http://web.law.columbia.edu/redistricting>. Plaintiffs are concerned of the possibility (or perception) that Persily may have preconceptions about redrawing Virginia's congressional districts, based on this project, that are uninformed by the record in this matter.

Plaintiffs' second concern again relates to the appearance of fairness. As the Court knows, Plaintiffs' counsel represents plaintiffs in the *Bethune Hill* case, which challenges certain of Virginia's state legislative districts. The *Bethune Hill* plaintiffs' expert witness is Professor Stephen Ansolabehere of Harvard University. In the interest of candor, Plaintiffs must bring to the Court's attention the fact that Persily has worked closely with Ansolabehere over the past several years, including coauthoring numerous articles. During the *Bethune Hill* trial, the substance of the articles that Persily and Ansolabehere coauthored was the subject of cross-examination. Given the close professional relationship between Persily and Ansolabehere, and the fact that Persily's work was subject to scrutiny in a closely-related

case, Plaintiffs submit that despite his credentials, Persily would not be an appropriate choice for Special Master here.

II. CONCLUSION

For the reasons stated above, Plaintiffs submit that the Court should select one of the candidates identified by Plaintiffs. Plaintiffs further submit that the other potential candidates identified by the Court—though all respected in their fields of specialty—are not appropriate choices here.

Dated: September 4, 2015

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 4th day of September, 2015, I caused the foregoing to be electronically filed with the Clerk of this Court using the CM/ECF system, which will then send a notification of such filing (NEF) to the following:

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Respectfully submitted,

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Summary of Redistricting Work

I have a BA degree in Economics from Davidson College in Davidson, North Carolina.

Since 1986, I have prepared proposed redistricting maps of approximately 600 jurisdictions for Section 2 litigation, Section 5 comment letters, and for use in other efforts to promote compliance with the Voting Rights Act of 1965. I have analyzed and prepared election plans in over 100 of these jurisdictions for two or more of the decennial censuses – either as part of concurrent legislative reapportionments or, retrospectively, in relation to litigation involving many of the cases listed below.

Since the release of the 2010 Census in February 2011, I have developed statewide legislative plans on behalf of clients in five states (Alabama, Georgia, Florida, South Carolina, and Virginia), as well as about 100 local redistricting plans in approximately 20 states – primarily for groups working to protect minority voting rights.

In March 2011, I was retained by the Sussex County, Virginia Board of Supervisors and the Bolivar County, Mississippi Board of Supervisors to draft new district plans based on the 2010 Census. In the summer of 2011, both counties received Section 5 preclearance from the Department of Justice.

Also in 2011, I was retained by way of a subcontract with Olmedillo X5 LLC to assist with redistricting for the Miami-Dade County Board of Commissioners and the

Miami-Dade School Board. Final plans were adopted in late 2011 following public hearings.

In the fall of 2011, I was retained by the City of Grenada, MS to provide redistricting services. The ward plan I developed received preclearance in March 2012.

In August 2012, I began serving as a redistricting consultant for Tunica County, MS.

I testified in two redistricting lawsuits in 2011 in New Mexico and New York – *Archuleta v. City of Albuquerque* and *Pope v. County of Albany*.

I am also a consultant and expert for the plaintiffs in *Georgia State Conference NAACP, et al. v. Fayette County, Alabama Legislative Black Caucus et al. v. Alabama, Montes v. City of Yakima, Washington, Everett Dean et al. v. Washington County, Mississippi, and Navajo Nation v. San Juan County, Utah..*

I also serve as a redistricting and demographic consultant to the Massachusetts-based Prison Policy Initiative and Demos for a nationwide project to end prison-based gerrymandering. I have analyzed 2011 election plans in over a dozen states as part of my work with these two organizations. In December 2011, I filed a declaration in *Fletcher v. Lamone* in support of an *amicus* brief submitted by PPI and Demos.

During the 2000's, I analyzed census data and prepared draft election plans involving about 300 local-level jurisdictions in 25 states. I produced these plans at the request of local citizens' groups, national organizations such as the NAACP and, in a few instances, by contract with local governments. Election plans I developed for two counties – Sussex County, Virginia and Webster County, Mississippi – were adopted and precleared in 2002 by the U.S. Department of Justice. A ward plan I prepared for the City of Grenada, Mississippi was precleared in August 2005. A county council plan I developed for Native

American plaintiffs in a Section 2 lawsuit (*Blackmoon v. Charles Mix County*) was adopted by Charles Mix County, South Dakota in November 2005. A county supervisors' plan I produced for Bolivar County, Mississippi was precleared in January 2006. A plan I drafted for Latino plaintiffs in Bethlehem, Pennsylvania (*Pennsylvania Statewide Latino Coalition v. Bethlehem Area School District*) was adopted in March 2009. Plans I developed for minority plaintiffs in Columbus County, NC and Cortez-Montezuma School District in Colorado were adopted in 2009.

In addition, during the post-2000 reapportionment process, I drafted proposed statewide legislative plans on behalf of clients in eight states – Florida, Montana, New Mexico, North Dakota, South Dakota, Tennessee, Virginia, and Wyoming. In August 2005, a federal court ordered the State of South Dakota to remedy a Section 2 voting rights violation and adopt a state legislative plan I developed. (*Bone Shirt v. Hazeltine*)

Since 1986, I have prepared election plans for Section 2 litigation in Connecticut, Florida, Georgia, Louisiana, Maryland, Mississippi, Montana, Nebraska, New Jersey, New York, North Carolina, Ohio, South Carolina, South Dakota, Tennessee, Virginia, Washington, and Wyoming.

I have testified at trial as an expert witness on redistricting and demographics in federal courts in the following voting rights cases (approximate testimony dates are in parentheses):

Colorado

Cuthair v. Montezuma-Cortez School Board (1997)

Georgia

Cofield v. City of LaGrange (1996)

Love v. Deal (1995)

Askew v. City of Rome (1995)

Woodard v. Lumber City (1989)

Louisiana

Knight v. McKeithen (1994)
Reno v. Bossier Parish (1995)
Wilson v. Town of St. Francisville (1997)

Maryland

Cane v. Worcester County (1994)

Mississippi

Addy v Newton County (1995)
Boddie v. Cleveland (2003)
Boddie v. Cleveland School District (2010)
Ewing v. Monroe County (1995)
Farley v. Hattiesburg (2008)
Jamison v. City of Tupelo (2006)
Gunn v. Chickasaw County (1995)
NAACP v. Fordice (1999)
Nichols v. Okolona (1995)
Smith v. Clark (1995)

Montana

Old Person v. Cooney (1998)
Old Person v. Brown (on remand) (2001)

Nebraska

Stabler v. Thurston County (1995)

New York

Arbor Hills Concerned Citizens v. Albany County (2003)
Pope v. County of Albany (2011)

South Carolina

Smith v. Beasley (1996)

South Dakota

Bone Shirt v. Hazeltine (2004)
Cottier v. City of Martin (2004)

Tennessee

Cousins v. McWherter (1994)
Rural West Tennessee African American Affairs Council v. McWherter (1993)

Virginia

Henderson v. Richmond County (1988)
McDaniel v. Mehfoud (1988)
White v. Daniel (1989)
Smith v. Brunswick County (1991)

Wyoming

Large v. Fremont County (2007)

In addition, I have filed declarations or been deposed in these voting rights cases:

Alabama

Alabama Legislative Black Caucus et al. v. Alabama et al. (2013)

Florida

Burton v. City of Belle Glade (1997)

Johnson v. DeSoto County (1999)

Thompson v. Glades County (2001)

Georgia

Georgia State Conference NAACP, et al. v. Fayette County (2012)

Jones v. Cook County (1993)

Johnson v. Miller (1998)

Knighton v. Dougherty County (2002)

Louisiana

NAACP v. St. Landry Parish Council (2005)

Prejean v. Foster (1994)

Rodney v. McKeithen (1993)

Maryland

Fletcher v. Lamone (2011)

Mississippi

Dean v. Washington County (2012)

Williams v. Bolivar County (2005)

Clark v. Calhoun County (on remand))(1993)

Houston v. Lafayette County (2002)

Wilson v. Clarksdale (1992)

Stanfield v. Lee County(1991)

Teague v. Attala County (on remand)(1993)

Montana

Alden v. Rosebud County (2000)

North Carolina

Lewis v. Alamance County (1991)

Gause v. Brunswick County (1992)

Webster v. Person County (1992)

South Carolina

Vander Linden v. Campbell (1996)

South Dakota

Emery v. Hunt (1999)

Kirkie v. Buffalo County (2004)

Tennessee

NAACP v. Frost, et al. (2003)

Virginia

Moon v. Beyer (1990)

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