

**IN THE UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF ALABAMA
SOUTHERN DIVISION**

EVAN MILLIGAN, *et al.*,

Plaintiffs, vs.

WES ALLEN, *et al.*,

Defendants.

No. 2:21-cv-01530-AMM
(three-judge court)

MARCUS CASTER, *et al.*,

Plaintiffs, vs.

WES ALLEN, *et al.*,

Defendants.

No. 2:21-cv-01536-AMM

IN RE REDISTRICTING 2023

SPECIAL MASTER

No. 2:23-mc-1181-AMM

**MOTION FOR LEAVE TO FILE AMICUS BRIEF BY THE BRENNAN CENTER FOR
JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW**

The Brennan Center for Justice at New York University School of Law (“the Brennan Center”) hereby moves this Court for leave to file the proposed amicus curiae brief attached hereto as Exhibit A.

INTERESTS OF AMICUS CURIAE

The Brennan Center is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice. The Brennan Center conducts regular empirical, qualitative, historical, and legal research on redistricting and has participated in a number of voting rights and redistricting cases around the country in state and federal court, both as counsel and as amicus curiae, including filing amicus briefs at the United States Supreme Court.

ARGUMENT

By submitting an amicus brief in this matter, the Brennan Center seeks to assist this Court in evaluating the three proposed remedial maps included in the Special Master’s Report and Recommendation. (doc. 44). By providing expert analysis and information related to the long-term viability of the remedial proposals under consideration, the Brennan Center thus fulfills the essential role of an amicus curiae. Courts routinely authorize the filing of amicus briefs in such circumstances. *See, e.g., Maples v. Thomas*, No. 5:03-CV-2399-SLB-MHH, 2013 WL 5350669 (N.D. Ala. Sept. 23, 2013) (“Amicus briefs are particularly helpful . . . in cases where . . . the amicus has a unique perspective or specific information that can assist the court beyond what the parties can provide.”) (internal quotations omitted).

In any event, the Brennan Center submits that there is no downside to the Court’s consideration of its amicus brief. Courts have recognized that “it is preferable to err on the side of granting leave” to file an amicus brief. *Neonatology Assocs., P.A. v. Comm’r*, 293 F.3d 128, 133 (3d Cir. 2002). This is so because “[i]f an amicus brief that turns out to be unhelpful is filed, the

[court], after studying the case, will often be able to make that determination without much trouble and can then simply disregard the amicus brief.” *Id.* “On the other hand, if a good brief is rejected, the [court] will be deprived of a resource that might have been of assistance.” *Id.*

CONCLUSION

For the foregoing reasons, the Brennan Center respectfully requests that this Court grant it leave to file the proposed amicus curiae brief attached hereto as Exhibit A.

Dated: September 28, 2023

Respectfully submitted,

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CERTIFICATE OF SERVICE

The forgoing was served on all counsel of record via the Court's CM/ECF system this 28th day of September, 2023.

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***AMICUS CURIAE* BRIEF OF THE BRENNAN CENTER
FOR JUSTICE AT NEW YORK UNIVERSITY SCHOOL OF LAW**

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INTEREST OF AMICUS CURIAE

Founded in 1995 to honor the extraordinary contributions of Justice William J. Brennan, Jr. to American law and society, the Brennan Center for Justice is a not-for-profit, non-partisan think tank and public interest law institute that seeks to improve systems of democracy and justice.¹

The Brennan Center seeks to bring the idea of representative self-government closer to reality, including by working to ensure fair and non-discriminatory redistricting practices and to protect the right of all Americans to vote. The Brennan Center conducts regular empirical, qualitative, historical, and legal research on redistricting and has participated in a number of voting rights and redistricting cases around the country in state and federal court, both as counsel and as amicus curiae, including filing amicus briefs at the United States Supreme Court in *Alabama Legis. Black Caucus v. Alabama* (2015), *Cooper v. Harris* (2016), and *Allen v. Milligan* (2023).

The Brennan Center has an interest in this case because it concerns application of the Voting Rights Act and the standards and principles that courts should use in assessing the strength of competing proposals for remedying vote dilution. The Voting Rights Act is one of the most important pieces of legislation in American history, helping to equalize access to the political

¹ No person other than counsel authored this brief in whole or in part and no person other than amicus curiae made a monetary contribution to its preparation or submission. This brief does not purport to convey the position of New York University School of Law.

process for marginalized racial and language minorities communities. But in order for its remedies to be effective and enduring, the VRA must be applied carefully and with sensitivity. Otherwise, gains could be short-lived and fleeting. The Brennan Center writes to offer information and expertise that it believes will help this Court with this undertaking.

SUMMARY OF ARGUMENT

Black voters in Alabama have waited a long time for a remedy for the vote dilution found by the Court. In adopting a remedial map following the State's abject failure to do so, this Court should carefully consider how durable its order will be. In particular, in evaluating the merits of the three proposals from the Special Master, the Court should consider the relative sustainability of remedial district configurations over time. Since the maps ordered by the Court will only be in place for five years before the next national census, it is important to consider whether natural population decline in a district will demand major boundary changes after 2030, which could undermine the nascent and hard-won advancement in the opportunity to elect candidates at issue in this case.

With this factor in mind, the Brennan Center submits this brief to offer an analysis showing how key differences in Alabama's growth trends in the regions covered by the proposed remedial districts could impact their viability as remedies. Considering these population trends in light of the three recommended maps, our analysis finds that the configuration of CD-02 in the Special Master's Plan 1, based on the plaintiffs' proposal, has greater potential to sustain its existing population because it includes more counties where the population is growing. By contrast, the configuration of CD-02 in the Special Master's Plan 2 is likely to require substantial changes after the 2030 in order to equalize population. The fact that Black-preferred candidates also perform the worst in Plan 2's version of CD-02 is further reason for concern because it

raises the possibility that changes needed to equalize district populations might, intentionally or otherwise, weaken the viability of the district as an effective and sustainable remedy. Insofar as Alabama has repeatedly expressed policy preferences to sustain the “core” of districts, the Court is well advised to select a plan with remedial districts that need relatively minimal adjustments to account for likely population changes between now and the 2030 census.

ARGUMENT

A. The court should consider expected population changes when deciding which remedial map to adopt.

In remedying vote dilution, it is important for this Court to consider not only whether a district created as a remedy provides Black voters the opportunity to elect their preferred candidates today but whether such a configuration is likely to be a stable one for the foreseeable future. This is especially important in a state like Alabama where certain regions, including the Black Belt and the Wiregrass, have experienced sizable and persistent population declines and are likely to continue to do so. Remedial plans that may offer relief in the present could be undone after the next census if population shortfalls prompt map drawers to make large-scale changes to districts in order to equalize populations.

Some changes to district boundaries are unavoidable due to natural population shifts each decade, but in considering the three remedial proposals offered by the Special Master, the Brennan Center urges the Court to adopt a plan with remedial districts that are unlikely to need more than minimal changes after the 2030 census. Otherwise, whether intentionally or not, the redrawing of districts ostensibly to equalize population could result in undermining any new and possibly still tenuous exercise of political opportunity finally established after this extended litigation. Insofar as the State has articulated a policy of preserving the “core” of districts both in its 2021 and 2023 legislative sessions, it is especially fitting for the Court to consider whether the

district configurations the Court adopts would likely be easily be preserved in the round of redistricting that will take place after the 2030 census —which is only five years after the representatives elected by these districts first would assume office.

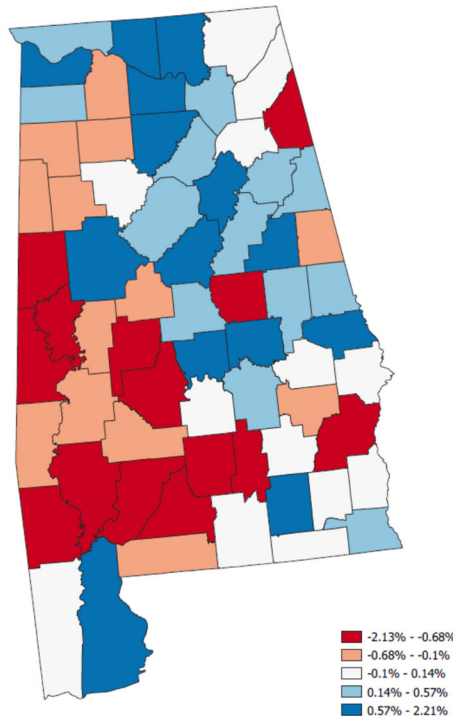
B. The population stability principle strongly favors adoption of the Special Master’s Remedial Plan 1 or something substantially similar.

To assist the Court in this undertaking, the Brennan Center examined recent growth trends in Alabama using data from the Census Bureau’s American Community Survey. This well-established data tracks population changes between each official census and offers a reasonable estimate of likely future growth trends. Figure 1 illustrates population shifts in Alabama’s 67 counties using the ACS estimates from two five-year periods, 2013-2017 and 2017-2021.

Figure 1

Alabama Population Growth Rate by County (%)

Population change reported between the 2013-2017 American Community Survey and 2017-2021 American Community Survey



Source: U.S. Census Bureau: American Community Survey 5-year estimates of total population by county

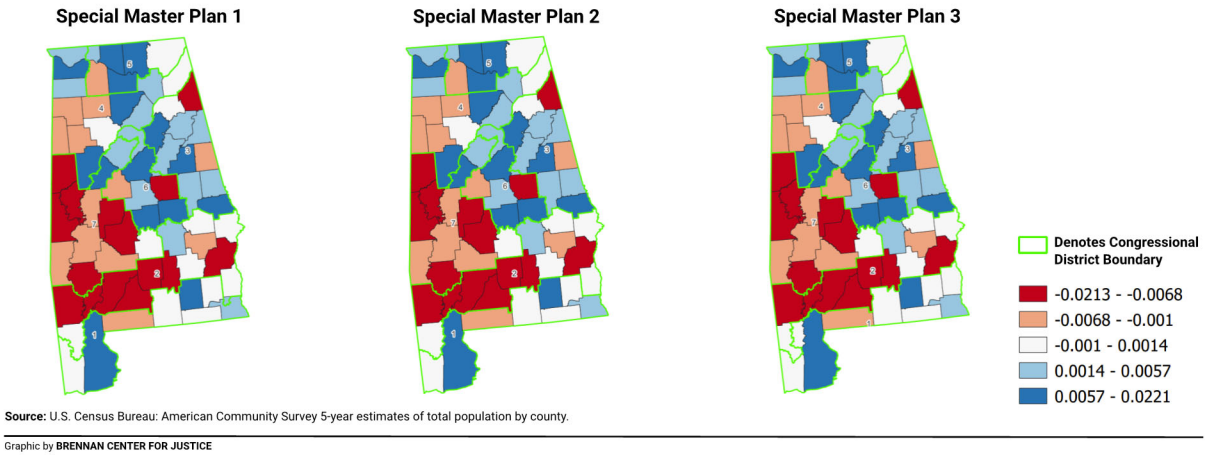
Graphic by BRENNAN CENTER FOR JUSTICE

As shown in [Figure 1](#), the data tells two very divergent Alabama stories. On one hand are the counties with the state's metropolitan centers, led especially by Jefferson and Madison, which have grown at a steady to moderately strong pace. Counties in the immediate metropolitan regions have experienced even stronger growth, including Baldwin County (east of Mobile), Shelby County (south of Jefferson) along with Elmore County (north of Montgomery). Tuscaloosa, with large sectors included in a Black opportunity district in all three of the Special Master's plans, has also seen a spike in its population. On the other hand, the counties of Alabama's rural Black Belt, which has been the central focus of this litigation, have some of the most pronounced population decline. A detailed table showing the county level population changes during this period is included as [Appendix A](#).

Based on this analysis of population changes by county, the Brennan Center believes that there is a strong basis for preferring adoption of the Special Master's Plan 1 over the other two recommended plans. As shown in [Figure 2](#), in each of the three recommended plans, CD-02 is positioned in the Black Belt and includes a large number of counties with shrinking or static populations. The plans differ mainly in how they treat the southern part of the Wiregrass region.

Figure 2**County Population Changes in Proposed Maps**

Percentage population change reported between the 2013-2017 American Community Survey and 2017-2021 American Community Survey



Although all three plans have their relative merits, a distinction of Plan 1 is its inclusion of additional centers of likely growth in its version of CD-02. This approach gives CD-02 a population that is much more likely to be sustained or to grow in the years to come. By comparison, under the versions of CD-02 in Plan 2 and Plan 3, Montgomery County is the only populous county included in the district where the population is growing by a meaningful amount.² While the configuration of CD-01 in Plan 1 employs the same basic footprint, it also adds fast-growing and comparatively more populous portions of Houston County (including the county seat of Dothan). The Brennan Center believes this small difference is likely to make a substantial difference in the district's stability in the long range.

In evaluating the three plans, it is also important to consider how relatively large-scale population changes likely needed to shore up Plan 2's version of CD-02 after 2030 could threaten the remedy's longevity as a performing district. Indeed, Plan 2's configuration of CD-02

² Although parts of populous Mobile County are also included in CD-02 under all three of the Special Master's plans, Mobile County's population growth is expected to remain basically flat for the balance of the decade,

has the weakest support levels for Black-preferred candidates among the three plans, raising serious concerns about whether it will be less capable of providing opportunity if, as seems likely, large numbers of people need to be added to the district. For example, Democratic presidential candidate Joe Biden carried Plan 2's CD-02 by a comparatively narrow 9.2 percentage points in 2020 compared 12.1 points in Plan 1's version of the district and 15.3 points in Plan 3's version. In 2016, the Black-preferred candidate for United States Senate carried the district by just 6.4 points. It is not hard to see how poorly planned (or even strategically deliberate) additions after the 2030 census could make a district that Black-preferred candidates already win with relatively narrow margins even more unfavorable for Black voters. The best way to avoid this danger is to adopt the plan where CD-02 has the most stable and sustainable population. By that metric, Plan 1 is, by far, the best choice for a remedy.

CONCLUSION

For the foregoing reasons, the Brennan Center urges the Court to adopt the Special Master's Remedial Plan 1, or something substantially similar, as the remedy for the vote dilution found by the Court in these cases.

APPENDIX A

Population Growth in Alabama Counties

Population change reported between the 2013-2017 American Community Survey and 2017-2021 American Community Survey

COUNTY	2013-2017 ACS	2017-2021 ACS	POPULATION CHANGE	GROWTH RATE	COUNTY	2013-2017 ACS	2017-2021 ACS	POPULATION CHANGE	GROWTH RATE
Autauga	55,036	58,239	3,203	5.8%	Houston	104,108	106,355	2,247	2.2%
Baldwin	203,360	227,131	23,771	11.7%	Jackson	52,326	52,548	222	0.4%
Barbour	26,201	25,259	-942	-3.6%	Jefferson	659,460	672,550	13,090	2.0%
Bibb	22,580	22,412	-168	-0.7%	Lamar	14,021	13,929	-92	-0.7%
Blount	57,667	58,884	1,217	2.1%	Lauderdale	92,590	93,342	752	0.8%
Bullock	10,478	10,386	-92	-0.9%	Lawrence	33,288	33,089	-199	-0.6%
Butler	20,126	19,181	-945	-4.7%	Lee	156,597	172,223	15,626	10.0%
Calhoun	115,527	116,425	898	0.8%	Limestone	91,695	101,217	9,522	10.4%
Chambers	33,895	34,834	939	2.8%	Lowndes	10,362	10,334	-28	-0.3%
Cherokee	25,855	24,975	-880	-3.4%	Macon	19,358	19,490	132	0.7%
Chilton	43,805	44,857	1,052	2.4%	Madison	353,213	382,149	28,936	8.2%
Choctaw	13,188	12,792	-396	-3.0%	Marengo	19,743	19,397	-346	-1.8%
Clarke	24,625	23,346	-1,279	-5.2%	Marion	30,058	29,392	-666	-2.2%
Clay	13,407	14,184	777	5.8%	Marshall	94,738	97,179	2,441	2.6%
Cleburne	14,939	15,046	107	0.7%	Mobile	414,328	414,620	292	0.1%
Coffee	51,073	53,043	1,970	3.9%	Monroe	21,745	20,115	-1,630	-7.5%
Colbert	54,435	56,789	2,354	4.3%	Montgomery	227,120	229,072	1,952	0.9%
Conecuh	12,649	11,778	-871	-6.9%	Morgan	119,157	122,608	3,451	2.9%
Coosa	10,955	10,442	-513	-4.7%	Perry	9,680	8,702	-978	-10.1%
Covington	37,519	37,490	-29	-0.1%	Pickens	20,170	19,240	-930	-4.6%
Crenshaw	13,866	13,300	-566	-4.1%	Pike	33,287	33,176	-111	-0.3%
Cullman	81,703	87,129	5,426	6.6%	Randolph	22,530	21,984	-546	-2.4%
Dale	49,393	49,443	50	0.1%	Russell	58,480	58,695	215	0.4%
Dallas	40,755	39,162	-1,593	-3.9%	Shelby	208,721	220,780	12,059	5.8%
DeKalb	71,194	71,554	360	0.5%	St. Clair	86,937	90,412	3,475	4.0%
Elmore	80,989	87,146	6,157	7.6%	Sumter	13,084	12,482	-602	-4.6%
Escambia	37,621	36,879	-742	-2.0%	Talladega	80,888	81,850	962	1.2%
Etowah	103,132	103,468	336	0.3%	Tallapoosa	40,756	41,284	528	1.3%
Fayette	16,657	16,365	-292	-1.8%	Tuscaloosa	204,424	223,945	19,521	9.6%
Franklin	31,507	32,034	527	1.7%	Walker	64,927	65,194	267	0.4%
Geneva	26,572	26,604	32	0.1%	Washington	16,746	15,574	-1,172	-7.0%
Greene	8,533	7,851	-682	-8.0%	Wilcox	10,919	10,686	-233	-2.1%
Hale	14,995	14,819	-176	-1.2%	Winston	23,968	23,650	-318	-1.3%
Henry	17,110	17,165	55	0.3%	Statewide total	4,850,771	4,997,675	146,904	3.0%

Source: U.S. Census Bureau: American Community Survey 5-year estimates of total population by county

Graphic by BRENNAN CENTER FOR JUSTICE