

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

Evan Milligan *et al.*,

Plaintiffs,

vs.

Wes Allen, in his official capacity
as Secretary of State of Alabama,
et al.,

Defendants.

Case No. 2:21-cv-1530-AMM

Three-Judge Court

**The Alabama Democratic Conference’s Objections to the
Report and Recommendation of the Special Master**

The Alabama Democratic Conference (“ADC”) respectfully submits these objections to the report and recommendation of the special master.

(ECF 295.) The ADC objects to each of the proposed remedial plans contained in the report.

The ADC’s objection to the plans is quite simple: none of them provides a complete remedy to the likely Section 2 violation identified in this Court’s order of September 5, 2023 (ECF 272). That’s because

District 2 in each plan gives Black Alabamians an opportunity to elect a representative of their choice *only if White Alabamians don't disagree too strongly*.

This Court's instructions to the special master were clear. His first priority in drawing proposed remedial plans was to

[c]ompletely remedy the likely Section 2 violation identified in this Court's order of September 5, 2023. Each map shall remediate the essential problem found in the 2023 Plan – the unlawful dilution of the Black vote in Alabama's congressional redistricting regime. To that end, each proposed map shall “include[] either an additional majority-Black congressional district, or an additional district in which Black voters otherwise have an opportunity to elect a representative of their choice.” *Milligan* Doc. 107 at 5.

(ECF 273 at 7.)

To determine whether his plans would create an additional opportunity district, the special master relied on a performance analysis.

(ECF 295 at 30-34.) His analysis, which is summarized in Table 4 of his report, shows that Black-preferred candidates would have won between 13 and 16 out of 17 hypothetical contests in District 2 in his three proposed remedial plans.

Table 4
Election Performance of the Black-Preferred Candidate
in Districts Included in the Proposed Remedial Plans,
out of 17 Election Contests (and Average Margin of Victory or Defeat)

District	Remedial Plan 1	Remedial Plan 2	Remedial Plan 3
District 1	0 contests (-52.4%)	0 contests (-50.6%)	0 contests (-51.7%)
District 2	15 contests (+10.3%)	13 contests (+8.2%)	16 contests (+10.3%)
District 3	0 contests (-40.1%)	0 contests (-40.1%)	0 contests (-40.1%)
District 4	0 contests (-57.7%)	0 contests (-57.7%)	0 contests (-57.7%)
District 5	0 contests (-29.3%)	0 contests (-29.3%)	0 contests (-29.3%)
District 6	0 contests (-42.7%)	0 contests (-42.7%)	0 contests (-42.9%)
District 7	17 contests (+29.3%)	17 contests (+29.3%)	17 contests (+28.8%)

(ECF 295 at 32.) The details of his performance analyses are contained in the report's exhibits. (ECF 296-1 at 3 (Remedial Plan 1); ECF 296-2 at 3 (Remedial Plan 2); ECF 296-3 at 3 (Remedial Plan 3).) The special master concludes that all three of his plans satisfy the complete-remedy requirement because each of them "includes two districts (Districts 2 and 7) in which the Black-preferred candidate often wins the election." (ECF 295 at 31.)

The special master's report also discusses the performance of remedial proposals submitted to him by the parties and others, including the ADC. (ECF 295 at 32-34.) He notes that "Black-preferred candidates

would have performed better under the ADC Plan, with the Black-preferred candidate winning every election in the two Black opportunity districts and a higher average margin of victory.” (ECF 295 at 32; *see also* ECF 296-6 at 3 (ADC Plan performance analysis).)

The special master’s report doesn’t analyze *why* some of the Black-preferred candidates failed to carry District 2 in his proposed plans. But a racial bloc voting analysis (also known as a racially polarized voting analysis) can reveal the answer. This kind of analysis estimates the Black and White voter support for the Black-preferred candidates in each district in a given plan. It’s the same analysis that courts use to determine whether a plaintiff has satisfied the second and third *Gingles* preconditions. *See Thornburg v. Gingles*, 478 U.S. 30, 51 (1986). And it’s the same analysis that this Court used in its order enjoining Alabama’s 2023 plan. (ECF 272 at 91, 178.)

The *Milligan* plaintiffs’ expert, Dr. Baodong Liu, performed this kind of analysis on Alabama’s 2023 plan and on many of the proposed remedial plans submitted to the special master. (ECF 200-2 at 3; ECF 272 at 91.) *See also* Supplemental Remedial Report of Baodong Liu at 4, *In re Redistricting 2023*, No. 2:23-mc-1181-AMM (Sept. 11, 2023) (ECF

7-2); Supplemental Remedial Report II of Baodong Liu at 4, *In re Redistricting 2023*, No. 2:23-mc-1181-AMM (Sept. 13, 2023) (ECF 23-2); Supplemental Remedial Report III of Baodong Liu at 1, *In re Redistricting 2023*, No. 2:23-mc-1181-AMM (Sept. 14, 2023) (ECF 35-2).

Dr. Liu's analyses show a stark pattern of racial polarization in the elections he analyzed. They show that Black voters supported their preferred candidate with more than 90 percent of their votes and that less than 11 percent of White voters voted for the Black-preferred candidates. But they also show that White voters gave especially low support to one candidate in particular: the 2022 candidate for Governor, Yolanda Flowers.

Flowers is the only candidate who would lose in District 2 in all three of the special master's remedial plans. (ECF 296-1 at 3 (Remedial Plan 1); ECF 296-2 at 3 (Remedial Plan 2); ECF 296-3 at 3 (Remedial Plan 3).)

If the ADC had access to Dr. Liu's data, the ADC would replicate his racial bloc voting analysis for each of the special master's plans to shed light on why Flowers always loses. Was it because Black voters

were less cohesive behind her candidacy? Or was it because White voters voted against her more than other Black-preferred candidates?

Dr. Liu's existing analyses suggest that Flowers lost because of White voters, not because of Black voters. The special master notes that his Proposed Remedial Plan 1 "is a modest variation" on the VRA Plaintiffs' Plan. (ECF 295 at 15.) District 2 in Remedial Plan 1 is identical to District 2 in the VRA Plaintiffs' Plan. (*Compare* ECF 296-1 at 4 *with* ECF 296-16 at 4.) Remedial Plan 2 is a slight variation on Remedial Plan 1, with only small changes to District 2 in Mobile and Houston counties. (*Compare* ECF 296-1 at 4 *with* ECF 296-2 at 4.) As a result, Dr. Liu's analysis of the VRA Plaintiffs' Plan sheds considerable light on District 2 voting behavior in Remedial Plans 1 and 2. *See* Supplemental Remedial Report of Baodong Liu at 4, *In re Redistricting 2023*, No. 2:23-mc-1181-AMM (Sept. 11, 2023) (ECF 7-2).

Dr. Liu estimates that Flowers' support among Black voters in District 2 was 93.3 percent. That's about average. But Flowers' support among White voters is only 8.1 percent—well below average and lower than White support for any other candidate included in Dr. Liu's analysis. Dr. Liu's analysis thus suggests that Flowers lost in the VRA

Plaintiffs' District 2 because of that low level of White support, and one can infer a similar reason for Flowers' loss in the special master's Remedial Plans 1 and 2. "[F]igures speak and when they do, Courts listen." *Brooks v. Beto*, 366 F.2d 1, 9 (5th Cir. 1966)¹; *see also United States v. Alabama*, 304 F.2d 583, 586 (5th Cir. 1963) ("In the problem of racial discrimination, statistics often tell much, and Courts listen.").

Remedial Plan 3 makes further modest changes to District 2 in Mobile and Henry counties. (*Compare* ECF 296-1 at 4 *with* ECF 296-3 at 4.) Flowers loses. (ECF 296-3 at 3.) Dr. Liu's analysis of the VRA Plaintiffs' Plan covers the vast majority of District 2 in Remedial Plan 3, and one would expect voting behavior to be quite similar. But a full replication of the analysis for Remedial Plan 3's exact boundaries would provide more precise estimates.

Why does this matter? Because a district that gives Black voters an opportunity to elect candidates of their choice only when White voters don't veto that choice doesn't satisfy Section 2's guarantee of equal electoral opportunity. *See* 52 U.S.C. § 10301(b); *cf. Mo. State Conf. of the*

¹ The Eleventh Circuit has adopted as binding precedent all Fifth Circuit decisions prior to October 1, 1981. *Bonner v. City of Prichard*, 661 F.2d 1206, 1209 (11th Cir. 1981) (en banc).

NAACP v. Ferguson-Florrisant Sch. Dist., 201 F. Supp. 3d 1006, 1047 (E.D. Mo. 2016) (“An electoral system does not provide equal opportunity if Black voters cannot elect their top candidate(s) of choice and can only elect lesser preferred candidates, and only if they are white.”). There are no majority-White districts in Alabama where Black voters have an effective veto over the choices of White voters.

The special master had before him one plan in which White voters wouldn’t have veto power—the ADC Plan.² (ECF 295 at 32.) He rejected that plan because it “compromised” districting principles of lesser importance than remedying a violation of Section 2. (*Id.* at 33.) That was a mistake.

As a result, this Court should either adopt the ADC Plan or instruct the special master to try again. There is likely more than one way to draw a plan that would *completely* remedy the likely Section 2 violation found by this Court, but none of the special master’s three proposed plans would do that.

² The special master notes that the Black-preferred candidate would have carried all 17 elections in two districts in one other plan, the McCrary Plan B. (ECF 295 at 32.) But the McCrary Plan B only includes one majority-Black district. (ECF 296-11 at 2.) The other has only a 45.0 percent Black voting-age population. White voters would have veto power in that district.

Respectfully submitted this 28th day of September, 2023.

/s/ Mark Sabel

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