

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF FLORIDA
TALLAHASSEE DIVISION**

Common Cause Florida, FairDistricts Now,
Dorothy Inman-Johnson, Brenda Holt,
Leo R. Stoney, Myrna Young, and Nancy
Ratzan,

Plaintiffs,

Michael Arteaga, et al.,

Intervenor Plaintiffs,

v.

Laurel M. Lee, in her official capacity as
Florida Secretary of State,

Defendant.

Case No.: 4:22-cv-109-AW-MAF

**PLAINTIFFS' SUPPLEMENTAL MEMORANDUM REGARDING
PROPOSED COURT-APPOINTED EXPERTS**

In accordance with this Court's Order dated April 4, 2022 (ECF No. 64), Plaintiffs Common Cause Florida, FairDistricts Now, Dorothy Inman-Johnson, Brenda Holt, Leo R. Stoney, Myrna Young, and Nancy Ratzan (together, the "Plaintiffs"), file this supplemental memorandum on potential experts for Court appointment to assist the Court in evaluating and/or preparing a Congressional map, if that becomes necessary.

As provided in the Joint Report (ECF No. 61), Plaintiffs respectfully suggest the Court appoint Dr. Nathaniel Persily. Defendant proposes Sean Trende, and

Intervenor Plaintiffs (who do not oppose Dr. Persily's appointment) propose Dr. Michael P. McDonald. For the reasons set forth below, Plaintiffs submit that Dr. Persily is the preferable choice due to his breadth of experience assisting similarly situated courts in a non-partisan capacity. Accordingly, Plaintiffs provide the Court with the following information regarding the qualifications and experiences of Dr. Persily, Mr. Trende, and Dr. McDonald:

I. Dr. Nathaniel Persily

Plaintiffs respectfully suggest the Court appoint Dr. Persily as the Court-appointed expert. He is one of the Nation's leading, non-partisan redistricting experts, can interpret federal and state constitutional redistricting requirements, and has more experience assisting courts with remedial map drawing than Mr. Trende and Dr. McDonald combined. Plaintiffs asked Dr. Persily whether he would be willing to serve as a court-appointed expert in this case and he responded that he would be willing to have his name put forward only by Common Cause, a non-partisan organization, and its co-plaintiffs.

Dr. Persily is the James B. McClatchy Professor of Law at Stanford Law School, where he teaches Election Administration and Redistricting among other courses. Prior to his academic appointment at Stanford, he taught law at Columbia Law School and the University of Pennsylvania Law School. He received a J.D., with distinction, from Stanford Law School as well as an M.A. and Ph.D. in Political

Science from U.C. Berkeley. He also has a B.A. and M.A. in Political Science from Yale University.

Dr. Persily has extensive experience serving as a Special Master or court-appointed expert in numerous federal and state redistricting cases, including in multiple cases concerning remedial Congressional districts, such as:

- Connecticut: *In Re Petition of Reapportionment Commission, Ex. Rel.*, No. SC 20661 (Conn. Sup. Ct. 2022).
- Pennsylvania: *League of Women Voters v. Commonwealth*, 645 Pa. 1, 178 A.3d 737 (Pa. 2018).
- New York: *Favors v. Cuomo*, No. 11-CV-5632, 2012 U.S. Dist. LEXIS 36910 (E.D.N.Y. March 19, 2012).
- Connecticut: *In Re Petition of Reapportionment Commission, Ex. Rel.*, 303 Conn. 798, 36 A.3d 661 (Ct. Sup. Ct. 2012).
- New York: *Rodriguez v. Pataki*, 2002 U.S. Dist. LEXIS 9272 (S.D.N.Y. May 23, 2002).

Dr. Persily's work as a court-appointed expert has been heavily relied upon and regarded favorably by many courts across the country. In particular and pertinent to this matter, Dr. Persily was recommended by the Republican-led Florida Senate as a "Court-Appointed Consultant to Draw the Senate Map" when a legislative

impasse failed to produce a Florida Senate map in 2015.¹ The Florida Senate argued that the appointment of a consultant, for which Dr. Persily was their first choice, would “eliminate any suspicion that the adopted map was laden with improper intent.”²

In 2019, a North Carolina state court three-judge panel, which utilized Dr. Persily to review and develop remedial Legislative districts, concluded that “Professor Persily has also consulted about election matters on a bipartisan basis [and] has no apparent conflicts of interest.” Order at 3, *Common Cause v. Lewis*, 18 CVS 014001 (N.C. Super. Ct. Sept. 13, 2019).³ And Dr. Persily was lauded in *Favors v. Cuomo* for completing all the work necessary to “ensure that every aspect of the [redistricting] plan received thorough and careful consideration” despite a “punishing schedule” set by the court.⁴ In that case, “[s]everal parties urged and no party opposed Dr. Persily’s retention” by the court.⁵

In addition to this experience, Dr. Persily has published extensively on election law and redistricting and provided Congressional and other testimony on

¹ Mot. for Appointment of a Court-Appointed Consultant to Draw the Senate Map, *League of Women Voters of Florida v. Detzner*, 2015 WL 13920208 (Fla. Cir. Ct. 2015).

² *Id.* at 1–2.

³ Order available at: <https://www.brennancenter.org/sites/default/files/legal-work/2019-09-13-Order.pdf>.

⁴ 2012 WL 928223, at *15 (E.D.N.Y. March 19, 2012).

⁵ *Id.* at *2 n.10.

these topics. A complete listing of Dr. Persily’s service as a Special Master or court-appointed expert, other relevant redistricting experience, and scholarly publications is available in the Curriculum Vitae appended to this submission as **Exhibit 1**.

In light of the above, Plaintiffs respectfully submit that Dr. Persily is the best choice to serve as the Court-appointed expert in this matter.

II. Mr. Sean Trende

Plaintiffs oppose the appointment of Mr. Trende to assist the Court in evaluating and/or preparing a map. Mr. Trende lacks Dr. Persily’s bipartisan track record and reputation. Indeed, Defendants at the status conference on April 4, 2022, called Mr. Trende the Republican choice. This statement, coupled with his professional experience, raises serious questions about Mr. Trende’s neutrality.

Mr. Trende is a Senior Elections Analyst with RealClearPolitics, a political analysis website based in Washington, D.C. RealClearPolitics, founded in 2000, is “one of the most heavily trafficked political websites in the world,” is “recognized as a pioneer in the field of poll aggregation,” and “produces original content, including both data analysis and traditional reporting.”⁶ RealClearPolitics was founded as a site for self-styled political junkies, but has shifted in recent years to

⁶ Affidavit of Sean Trende, *Harper v. Hall*, 21 CVS 015426 (N.C. Super. Ct. 2021) at ¶ 6. Available at <https://www.nccourts.gov/assets/inline-files/LDTX106%20Expert%20Report%20of%20Mr.%20Sean%20Trende.pdf?mscId=bd744577b53411ecafde7ff28218509f>.

become a more partisan outlet, including spreading unverified and misleading information concerning the results of the 2020 presidential election.⁷ Mr. Trende’s work for RealClearPolitics focuses primarily on “tracking, analyzing, and writing about elections.”⁸

In contrast to Dr. Persily’s long history of serving as a Special Master or court-appointed expert in redistricting cases, Mr. Trende has only served as a Special Master or court-appointed expert in one such matter. That case arose in 2021, when Mr. Trende was appointed as one of two Special Masters by the Supreme Court of Virginia to assist in the redistricting process after the Virginia Redistricting Commission failed to produce a map.⁹ Of note, Mr. Trende was appointed pursuant to Virginia Code § 30-399(F), which instructs the Supreme Court of Virginia to “appoint *two* special masters to assist the Court in the establishment of districts” in the event of a failure by the Commission to produce or the Virginia legislature to approve a map.¹⁰

⁷ Jeremy W. Peters, *A Popular Political Site Made a Sharp Right Turn. What Steered It?*, N.Y. TIMES (Nov. 17, 2020), <https://www.nytimes.com/2020/11/17/us/politics/real-clear-politics.html>.

⁸ Affidavit of Sean Trende, *supra*, at ¶ 7.

⁹ Redistricting Appointment Order, In re: Decennial Redistricting Pursuant to the Constitution of Virginia, art. II, §§ 6 to 6-A, and the Virginia Code § 30-399 (Nov. 19, 2021). Available at https://www.wric.com/wp-content/uploads/sites/74/2021/11/redistricting_appointment_order_2021_1119.pdf.

¹⁰ Va. Code § 30-399(F) (emphasis added).

Mr. Trende was appointed alongside Dr. Bernard Grofman, a highly experienced redistricting expert who has served as a Special Master in a multitude of redistricting cases. Dr. Grofman was submitted by the Democratic leadership,¹¹ and Mr. Trende was submitted by the Republican leadership.¹² The Supreme Court of Virginia referenced that Dr. Grofman and Mr. Trende “each was nominated by legislative leaders of a particular political party” in its November 19, 2021 Order appointing them as Special Masters.¹³ This single appointment forms the sum total of Mr. Trende’s experience as a Special Master or court-appointed expert in redistricting cases.

Additionally, while Mr. Trende has more experience when the category is broadened to include serving as an expert witness generally—mostly in non-

¹¹ Nov. 1, 2021 Submission of Eileen Filler-Corn, Speaker of the House of Delegates, available at https://www.vacourts.gov/courts/scv/districting/special_masters_nominations_speaker_filler_corn.pdf; Nov. 1, 2021 Submission of Richard L. Saslaw, Senate Majority Leader, available at https://www.vacourts.gov/courts/scv/districting/special_masters_nominations_senator_saslaw.pdf.

¹² Additional Republican Nominees Pursuant to November 12, 2021, Supreme Court Order, available at https://www.vacourts.gov/courts/scv/districting/additional_republican_nominees.pdf.

¹³ Redistricting Appointment Order, In re: Decennial Redistricting Pursuant to the Constitution of Virginia, art. II, §§ 6 to 6-A, and the Virginia Code § 30-399 (Nov. 19, 2021). Available at https://www.wric.com/wp-content/uploads/sites/74/2021/11/redistricting_appointment_order_2021_1119.pdf.

redistricting voting rights cases¹⁴—his work in those cases also counsels against his appointment here for two reasons. First, Mr. Trende’s experience as a non-redistricting voting rights expert is not as relevant as Dr. Persily’s wealth of experience serving as a Special Master and/or court-appointed expert in redistricting matters. Second, Mr. Trende has not worked on a bipartisan basis, but rather has served as an expert witness exclusively on behalf of Republican interests.¹⁵ This stands in sharp contrast to Dr. Persily’s bipartisan and non-partisan work in the field.

For these reasons, the Court should reject Defendant’s proposal to appoint Mr. Trende.

III. Dr. Michael P. McDonald

Plaintiffs agree that Dr. McDonald is well-qualified by experience and training to assist the Court in evaluating and/or preparing a Congressional map if that becomes necessary. However, Plaintiffs submit that Dr. Persily’s well-established non-partisan credentials and greater experience as a court-appointed expert or Special Master make him the preferred choice.

Dr. McDonald is a Professor of Political Science at the University of Florida. His research interests include the areas of elections and methodology, and he teaches

¹⁴ Affidavit of Sean Trende, *supra*, at ¶¶ 16–24.

¹⁵ *Id.*

a variety of classes related to elections and American politics.¹⁶ Dr. McDonald is a co-principal investigator on the Public Mapping Project, which encourages public participation in redistricting.¹⁷

Unlike Dr. Persily, Dr. McDonald has only once assisted a redistricting commission with map drawing at the behest of the state supreme court. And unlike Dr. Persily, who has on numerous occasions performed his work single-handedly, Dr. McDonald worked with the assistance of another expert on this occasion. Specifically, this past March, Dr. McDonald served as *one of two* independent map drawers to assist the Ohio Redistricting Commission in the state legislative map-drawing process.¹⁸ Although he is not identified as a partisan expert in the same way as Mr. Trende, Dr. McDonald was proposed and selected by the Democratic Commissioners in the Ohio matter, and therefore does not share Dr. Persily's non-partisan reputation.¹⁹

CONCLUSION

¹⁶ Dr. Michael P. McDonald, "Vita," United States Election Projects. Available at <http://www.electproject.org/mcdonald-cv>.

¹⁷ *Id.*

¹⁸ Tr. of Mar. 21, 2022 Ohio Redistricting Comm'n Hrg., at 14, <https://www.redistricting.ohio.gov/assets/organizations/redistricting-commission/events/commission-meeting-march-21st-257/transcript-1381.pdf> (emphasis added).

¹⁹ *Id.* at 1–2.

Plaintiffs submit that Dr. Persily is the superior choice to aid this Court in its important work as the Court-appointed expert. While Plaintiffs believe the selection of Dr. Persily alone will best serve the Court, in the alternative, if the Court has a preference for two experts, Dr. Persily should be the Court's first choice.

Date: April 7, 2022

Respectfully submitted,

SOUTHERN COALITION FOR SOCIAL JUSTICE

By: /s/ Katelin Kaiser

Katelin Kaiser (*pro hac vice*)
SOUTHERN COALITION FOR SOCIAL
JUSTICE
1415 W. Highway 54, Suite 101
Durham, NC 27707
919-323-3909
katelin@scsj.org

-and-

Gregory L. Diskant (*pro hac vice*)
H. Gregory Baker (*pro hac vice*)
Peter A. Nelson (*pro hac vice*)
Catherine J. Djang (*pro hac vice*)
Jacob Tuttle Newman (*pro hac vice*)
Ariel Rudofsky (*pro hac vice*)
PATTERSON BELKNAP WEBB & TYLER
LLP
1133 Avenue of the Americas
New York, NY 10036
(212) 336-2000
gldiskant@pbwt.com
hbaker@pbwt.com
pnelson@pbwt.com

cdjang@pbwt.com
jtuttlenewman@pbwt.com
arudofsky@pbwt.com

Henry M. Coxe III (FBN 0155193)
Michael E. Lockamy (FBN 69626)
BEDELL, DITTMAR, DEVAULT, PILLANS &
COXE
The Bedell Building
101 East Adams Street
Jacksonville, Florida 32202
(904) 353-0211
hmc@bedellfirm.com
mel@bedellfirm.com

Counsel for Plaintiffs

LOCAL RULE 7.1(F) CERTIFICATION

Undersigned counsel certifies that this memorandum contains 1,758 words, excluding the case style and certifications.

/s/ Katelin Kaiser

Katelin Kaiser

CERTIFICATE OF SERVICE

I hereby certify that on April 7, 2022, I electronically filed the foregoing with the Clerk of Court by using CM/ECF, which automatically serves all counsel of record for the parties who have appeared.

/s/ Katelin Kaiser

Katelin Kaiser