

**SUPREME COURT
OF THE
STATE OF CONNECTICUT**

IN RE PETITION OF REAPPORTIONMENT COMMISSION, EX. REL.

**POSITION STATEMENT OF THE REPUBLICAN MEMBERS OF THE CONNECTICUT
REAPPORTIONMENT COMMISSION ON THE CONGRESSIONAL REDISTRICTING
PROCESS**

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THEIR ATTORNEYS

Pursuant to this Court's order of December 6, 2011, the Reapportionment Commission (the "Commission") was granted an extension until noon on December 21, 2011 to redraw Connecticut's Congressional districts in accordance with the principles and requirements set forth in article third, § 6(d) of the state constitution, as amended by articles XII, XVI, XXVI, and XXX. The Commission failed to reach an agreement on a new redistricting map. Accordingly, the task of redrawing the Connecticut Congressional districts now reverts to this Court. Pursuant to article third, § 6(d) of the Connecticut constitution, as amended, the deadline for this Court to file a redistricting plan with the Secretary of the State is February 15, 2012.

The undersigned, representing Representative Lawrence Cafero, Senator John McKinney, Senator Leonard Fasano, and Representative Arthur O'Neill, the Republican House and Senate members of the Commission, respectfully propose the following procedure to assist this Court in adopting a Congressional redistricting plan as constitutionally mandated.

I. This Court Should Appoint a Special Master to Develop a Redistricting Map for the Court's Consideration.

As a starting point for redrawing the Congressional districts in the absence of a plan adopted by the Commission, this Court should appoint a special master to evaluate available data, consider the positions of interested parties, and prepare a preliminary districting plan. Such an approach is consistent with past practice in Connecticut and elsewhere, would maximize public confidence in the process, and would minimize interference with the Court's ongoing business.

In the past, Connecticut and its sister states have used special masters under

similar circumstances as a means of expeditiously obtaining expert, objective guidance, while preserving the role of courts as neutral, non-political arbiters of public disputes. While the Court would not be bound to adopt a master's proposal as presented, a detailed, well considered recommendation from a special master who is experienced in drawing fair-minded redistricting maps that comport with the various requirements imposed by the federal and state constitutions, federal statutes, and the U.S. Supreme Court would provide this Court with a solid starting point and help to ensure public confidence in the final plan.

A. Connecticut courts traditionally have relied on special masters under similar circumstances.

Both this Court and Connecticut's federal courts have previously recognized the virtues of appointing a special master to help resolve thorny redistricting questions and similar election challenges. In *Fonfara v. Reapportionment Commission*, 222 Conn. 166 (1992), this Court discussed its reluctance to play a larger role than necessary in resolving redistricting conflicts:

Judicial reluctance to become too deeply involved in reapportionment disputes is not confined to prudential concerns about entering the political thicket. . . . It also stems from the inherent unsuitability of such disputes to the ordinary and traditional principles of adjudication.

As the United States Supreme Court has observed, districting inevitably has and is intended to have substantial political consequences. . . . This is why it is better for reapportionment to be done by a politically accountable and accessible legislature or commission than in the cloistered chambers of a court. One rationale for the constitutional scheme assigning this task to us only as a last resort is to be found in an assessment of comparative political expertise. Agreement by politically sophisticated decisionmakers in the first instance may be made more likely by the in terrorem effect of the knowledge that otherwise a court untutored in political realities would undertake so politically sensitive an assignment.

Courts are justifiably reluctant to rule on political questions that they lack the competence to adjudicate judiciously.

(Citations and internal quotation marks omitted.) *Id.* at 183-84. The Court in *Fonfara* identified further concerns over judicial resolution of political questions such as redistricting, including the risk of “undermining the Court’s authority,” and “difficulties in gaining judicial access to relevant information.” *Id.* at 185. While the Court in *Fonfara* was called upon only to pass on the constitutionality of a legislatively adopted redistricting plan, the Court indicated that, if it were required to develop its own plan, it would mitigate these concerns by following the lead of the California Supreme Court, which has twice appointed special masters to recommend reapportionment plans following the Legislature’s failure to pass legislative and congressional reapportionment bills acceptable to the Governor. *Id.* at 184 n.4 (citing *Wilson v. Eu*, 54 Cal.3d 471 (1991)).

That is precisely what Connecticut’s federal courts have done when faced with similar challenges. For example, in *Butterworth v. Dempsey*, 237 F.Supp. 302, (D.Conn. 1964), the United States District Court for the District of Connecticut appointed a special master to develop a plan for redistricting the state Senate and reapportioning the House should the General Assembly fail to do so. *Id.* at 313 (selecting Director of Yale University Computer Center as special master).

Eight years later, another Connecticut federal district court, having held Connecticut’s 1971 reapportionment plan invalid, appointed a special master to devise a plan conforming to federal and state constitutional requirements. See *Cummings v. Meskill*, 347 F.Supp. 1173 (D.Conn. 1972) (appointing special master to draw plan due to failure of legislature to adopt plan comporting with constitutional requirements), *rev’d*

on other grounds, *Gaffney v. Cummings*, 412 U.S. 735 (1973) (plans drafted by district court-appointed special master unnecessary because General Assembly's challenged plan, which considered partisan balance of electing representatives from both Democratic and Republican parties, did not violate equal protection clause); see also *Montano v. Lee*, 384 F.2d 172, 176 (2d Cir. 1967) (recommending that, if parties to New Haven aldermanic election dispute failed in their efforts to obtain fair redistricting, district court "should consider appointing a special master"); *Kapral v. Jepson*, 271 F.Supp. 74, 81, 84 (D.Conn. 1967) (appointing Yale Law School professor special master to develop temporary constitutional redistricting plan in aldermanic election dispute).

A similar approach has been used by federal courts in neighboring states. In *Montano v. Suffolk County Legislature*, 263 F.Supp.2d 644, 649–650 (E.D.N.Y. 2003), the court noted that "[i]n redistricting, courts have generally appointed Special Masters to prepare a redistricting plan," but declined to do so in that case because the only issue before the court was whether a legislatively adopted plan passed constitutional muster. See also, *Jackson v. Nassau County Board of Supervisors*, 157 F.R.D. 612, 615 (E.D.N.Y. 1994) ("In the Court's view, the Special Master performed his duties [of devising the most politically fair, constitutionally valid districting plan] in a highly professional and outstanding manner."); *id.* at 623-24 (further noting that special master performed "invaluable" service by completing "very thorough" plan "in a very short time frame," and concluding that "in this Court's view the Special Master's fees are a small price to pay for [his] valuable contribution"); *Fund for Accurate & Informed Representation, Inc. v. Weprin*, 92-CV-283, 1992 WL 512410, *1 (N.D.N.Y. Dec. 23, 1992) ("[The special master] and his staff should be and are commended for the manner

in which they met this challenge. They rushed into immediate service, satisfied a rigorous time frame within which to complete this enormous task, and produced a product of superior quality.”).

In light of the foregoing authority recognizing the substantial advantages afforded by the appointment of a special master to assist in the redistricting process, the Republican House and Senate members of the Commission respectfully recommend that the Court appoint a qualified special master to recommend a redistricting plan to the Court.

B. The appointment of a special master would be advantageous given the legal and statistical complexity of adopting a redistricting plan, especially in light of the fast-approaching mandated completion date.

Courts have noted that devising a politically fair plan that complies with all of the diverse legal mandates and principles, and completing such a plan in a matter of weeks, can be a “herculean task” given the large quantities of data and multiple analytic parameters involved. *Jackson, supra*, 157 F.R.D. 624.

First and foremost, a redistricting plan must comply with constitutional requirements. Chief among these is Article 1, § 2 of the federal constitution, which requires that a Congressional redistricting plan must make a good-faith effort to achieve precise mathematical equality between districts. *Karcher v. Daggett*, 462 U.S. 725, 730 (1983).

The maps must also meet the federal statutory standards of § 2 of the 1965 Voting Rights Act, as amended, 42 U.S.C. § 1973(a), which prohibits redistricting plans that, by intent or effect, dilute minority votes or reduce minorities' opportunities to elect representatives of their choice.

The United States Supreme Court also has identified various “traditional redistricting principles” that, while not binding, bear on the question of whether a proposed redistricting plan comports with the equal protection clause of the fourteenth amendment to the federal constitution. Among these are contiguity, compactness, conformity to political subdivisions and natural geographic boundaries, and respect for “communities of interest.” *Bush v. Vera*, 517 U.S. 952, 959-60 (1996); *Miller v. Johnson*, 515 U.S. 900, 919-920 (1995); Nathaniel Persily, “When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans,” 73 *Geo. Wash. L. Rev.* 1131, 1157 *et seq.* (2005). In addition, the United States Supreme Court has recognized and approved of Connecticut’s traditional goal of achieving “political fairness” in redistricting. See *Gaffney v. Cummings*, 412 U.S. 735, 752-53 (1973).

Finally, in Connecticut, the state constitution incorporates the federal standards outlined above. See Ct. Const. article third, § 5 (“The establishment of congressional districts and of districts in the general assembly shall be consistent with federal constitutional standards.”). Additionally article third, § 4 (relating to state House districts) embodies the Connecticut public policy supporting the maintenance of town integrity. See Ct. Const. article third, § 4 (“no town shall be divided except for the purpose of forming . . . districts wholly within the town”).

Sophisticated computer models must be used to process the census and demographic data that form the bedrock of any redistricting analysis. This data must be balanced with the constitutional and statutory mandates as well as the general principles outlined above. Thus, in order to realize the significant benefits that can be achieved with the use of a special master, it is important to select a special master who

has previously demonstrated knowledge of the governing legal standards, is familiar with the use of these computer models, and is experienced in drawing redistricting maps. Such an appointment would greatly assist the Court in meeting its constitutional obligations with confidence and expediency. Since the Connecticut Congressional redistricting plan must be complete and filed by February 15, 2012, the House and Senate Republican members of the Commission respectfully urge the Court to appoint a special master who has these qualifications.

II. This Court Should Adopt a Schedule That Will Afford the Court, the Parties and a Special Master an Expeditious and Orderly Procedure for Developing the Redistricting Plan.

Courts faced with the daunting task of developing a politically sensitive, constitutionally permissible, and statistically sound reapportionment plan over the course of just a few weeks frequently turn to special masters with both legal and technical experience to assist them in drawing a redistricting map. Additionally, courts have recognized the importance of allowing the parties to brief the court on the process to be followed; provide for fact-finding; give both the parties and the public an opportunity to comment on the special master's recommendations; and provide a court with sufficient time to evaluate a recommendation of the special master and comments of the parties in rendering its final decision. See, e.g., *Hickel v. Southeast Conference*, 846 P.2d 38, 64 (Alaska 1992); *Jensen v. Wisconsin Elections Board*, 249 Wis.2d 706, 720-21 and n.8. In fact, this is exactly the process that the Nevada courts followed in similar redistricting litigation earlier this year. See *Guy v. Miller*, No. 11 OC 00042 1B (Nev. 1st Dist. 2011).

Consistent with those goals, the Republican House and Senate members of the

Commission respectfully propose the following schedule for the Court's consideration:

- December 28, 2011: Deadline for parties to submit names of potential special masters and to file briefs on the process and procedures to be employed by the special master and the Court, as well as any legal arguments and proposed districting maps.¹
- January 6, 2012: Supreme Court appoints special master(s).
- January 9-25, 2012: Proceedings before the special master.
- January 25, 2012: Deadline for parties to submit final briefs and maps to special master.
- February 1, 2012: Special master issues report and makes recommendations to Supreme Court.
- February 6, 2012: Deadline for parties to submit final briefs to Supreme Court.
- February 15, 2012: Constitutional deadline for Supreme Court's decision.

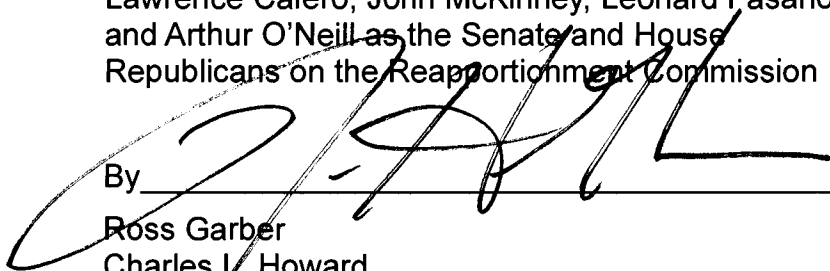
The House and Senate Republicans believe that such a schedule will permit an orderly procedure for the Court to complete its redistricting obligations.

¹ To be most helpful to the Court, such briefing would encompass: (1) factors to be considered in selecting a special master or masters; (2) special master directives (i.e., the instructions special masters should follow in conducting their work); (3) special master proceedings (i.e., identify the procedures that the parties and special master(s) will follow, including how discovery will be handled); (4) governing law (i.e., the legal issues that the parties must present and the Court decide in developing a constitutionally sound redistricting plan); (5) the names of recommended special masters and a brief summary of their backgrounds and qualifications for the position; and (6) any other potential issues the parties foresee.

Respectfully submitted,

Lawrence Cafero, John McKinney, Leonard Fasano,
and Arthur O'Neill as the Senate and House
Republicans on the Reapportionment Commission

By _____

A large, stylized handwritten signature in black ink, appearing to be "ROSS GARBER", is written over a horizontal line. The signature is written in a cursive, somewhat compressed style.

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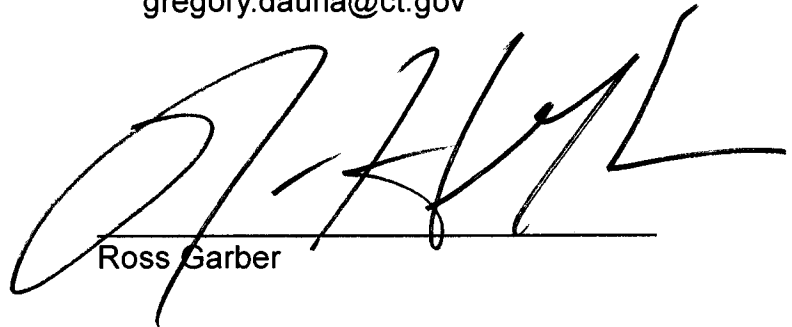
CERTIFICATION OF COMPLIANCE AND SERVICE

This is to certify that the foregoing complies with all the requirements of Practice Book §§ 62-7 and 66-3.

This is further to certify that on this 21st day of December, 2011, a copy of the foregoing was electronically delivered to the following counsel, who have consented to electronic delivery, in compliance with the requirements of Practice Book § 62-7.

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