
**SUPREME COURT
OF THE
STATE OF CONNECTICUT**

S.C. 18907

IN RE PETITION OF REAPPORTIONMENT COMMISSION, EX REL.

BRIEF OF THE GOVERNOR OF THE STATE OF CONNECTICUT, DANIEL P. MALLOY

For the GOVERNOR

**ANDREW McDONALD
General Counsel
Office of the Governor
State Capitol
210 Capitol Avenue
Hartford, CT 06106
Tel: (860) 524-7316
Fax: (860) 524-7391
Email: Andrew.McDonald@ct.gov**

TABLE OF CONTENTS

	<u>PAGE</u>
TABLE OF AUTHORITIES.....	ii
INTRODUCTION.....	1
I. THE GOVERNOR'S RECOMMENDATIONS FOR SPECIAL MASTER.....	1
II. THE FACTORS TO BE CONSIDERED IN APPOINTING A SPECIAL MASTER.....	4
III. THE PROCESS AND PROCEDURES TO BE EMPLOYED BY THE SPECIAL MASTER.....	5
IV. THE SCOPE OF THE DUTIES OF THE SPECIAL MASTER.....	6
V. THE LEGAL AND POLICY PARAMETERS GOVERNING THE REDISTRICTING MAP TO BE PROPOSED BY THE SPECIAL MASTER.....	7

TABLE OF AUTHORITIES

<u>CASES</u>	<u>PAGE</u>
<u>Bush v. Vera</u> , 517 U.S. 952 (1996).....	7
<u>Gaffney v. Cummings</u> , 412 U.S. 735 (1973).....	6
<u>Karcher v. Daggett</u> , 462 U.S. 725 (1983).....	7
<u>Miller v. Johnson</u> , 515 U.S. 900 (1995).....	7
<u>Shaw v. Reno</u> , 509 U.S. 630 (1993).....	7
 <u>STATUTES AND CONSTITUTIONAL PROVISIONS</u>	
U.S. Const., art. 1, § 2.....	7
Conn. Const. art. third, § 5.....	7
Conn. Const. art. third, § 6.....	5
42 U.S.C. § 1973.....	7

INTRODUCTION

On December 23, 2011, this Court issued an order inviting prospective interested parties in this matter to file appearances with the Court no later than 10:00 a.m. on Tuesday, December 27, 2011. In response to that order, the Governor of the State of Connecticut, Dannel P. Malloy ("Governor"), timely filed his appearance.

Thereafter, on December 27, 2011, this Court issued an order stating that a special master will be appointed to assist the Court in resolving this matter and requesting that the parties attempt to agree upon a nomination for the position of special master, but, if they were unable to agree, that they each submit a list of the names and biographies of proposed special masters to the Court no later than Friday, December 30, 2011, at 10 a.m. The Court further ordered that each party also submit arguments addressing the following issues: (1) the factors to be considered in appointing a special master; (2) the process and procedures to be employed by the special master; (3) the scope of the duties of the special master; (4) the legal and policy parameters governing the redistricting map to be proposed by the special master, and (5) any other matters deemed relevant by the parties. In response to the Court's request, the Governor is submitting this brief to address the issues raised by the Court.

I. THE GOVERNOR'S RECOMMENDATIONS FOR SPECIAL MASTER

The Governor is aware that the Democratic and Republican members of the Reapportionment Commission have agreed to submit the names of Prof. Nathaniel Persily and Prof. Bernard Grofman to this Court as qualified individuals who could fulfill the duties as the special master in this case. Of the two candidates, the undersigned counsel represents that he has spoken twice with Prof. Nathaniel Persily about his experience and

training.¹ The Governor's office has not been in contact with Prof. Grofman, though his curriculum vitae has been reviewed in detail.

Based on telephone conversations with Prof. Persily, a review of Columbia Law School's course offerings, Prof. Persily's biographical information and some of his writings, the undersigned represents as follows:

Prof. Persily is the Charles Keller Beekman Professor of Law and Political Science at Columbia Law School. He also serves as the law school's director of the Center for Law and Politics. He is an expert in election law, where his scholarship focuses on what is sometimes called the "law of democracy" and encompasses the legal aspects of voting rights, political parties, campaign finance, and redistricting. In the realm of redistricting, he has served as a court-appointed expert to draw up legislative districting plans for Georgia, Maryland, and New York. His biography from Columbia Law school indicates that "he currently serves as a redistricting consultant to the Chief Justice of Puerto Rico, the redistricting commission of Prince George's County, Maryland, and other governmental bodies and interest groups."

As director of the Center for Law and Politics, Prof. Persily teaches two advanced legal classes relevant to this proceeding. First, he teaches a course entitled "Redistricting and Gerrymandering," which focuses on the law, politics, and technology of the redistricting process. In addition to the applicable case law, Prof. Persily incorporates the relevant provisions of the Voting Rights Act, state statutes, and the U.S. and state constitutions into

¹ Pursuant to the instructions received from the clerk's office on December 29, 2011, counsel for the Governor has confirmed that Prof. Persily is available for this assignment, should he be selected, and can be reached at (212) 854-8379 or by email at npersi@law.columbia.edu (if personal cell phone or email information is needed, that can be provided as well.)

the curriculum. Under his supervision, students draft redistricting plans for one or more states throughout the semester using the most current computer modeling technology and data points relevant to redistricting.

Second, Prof. Persily teaches "Advanced Constitutional Law: Law and the Political Process," which examines the constitutional and statutory framework that governs the American electoral process. The curriculum covers the legal landscape of the right to vote; legislative apportionment, including the role of population, race, and partisanship in districting; access to the ballot and the regulation of political parties; and campaign finance regulation. The course also examines the relevant constitutional law, primarily under the First, 14th and 15th Amendments of the U.S. Constitution, as well as key statutes, such as the Voting Rights Act, the Federal Election Campaign Act, the Bipartisan Campaign Reform Act, and the Help America Vote Act.

Prof. Persily received a B.A. and M.A. in political science from Yale University in 1992. He earned his J.D. from Stanford University in 1998, where he was president of the *Stanford Law Review*, and received his Ph.D. in political science from the University of California at Berkeley in 2002. After spending 2001 as an adjunct professor at Columbia Law School, he joined the University of Pennsylvania law faculty, becoming a full professor in 2005. He joined the Columbia Law School faculty in 2007. While at Penn, he authored a comprehensive law review article entitled, "*When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*," 73 *Geo. Wash. L. Rev.* 1131 (2005).

While counsel for the Governor has not spoken with Prof. Grofman, his resume has been reviewed in detail. His qualifications seem relevant and substantial. That, coupled with the fact that counsel for all Reapportionment Commission members agreed to the appropriateness of him being named a special master in this proceeding, leads the Governor to concur that he should be considered by the Court for this appointment.

The Governor urges the Court to select the individual who most closely meets the qualifications suggested in Section II immediately below.

II. THE FACTORS TO BE CONSIDERED IN APPOINTING A SPECIAL MASTER.

In appointing a special master, this Court should consider factors that will promote a constitutional, fair, and efficient resolution of this matter that all parties and the public will respect. Such factors should include the proposed special master's expertise with computer modeling regarding redistricting, actual experience in drawing district lines (as opposed to the theories of redistricting), knowledge of redistricting requirements under relevant constitutional and statutory provisions, and degree of political partisanship. Ideally, the Court should appoint a special master who has an in-depth understanding of the complex computer modeling that is crucial to the highly technical redistricting process, and has had significant experience in the redistricting process from both a practical and legal perspective. In addition, it is vitally important to the integrity of the process, and public respect for the outcome, that the special master be impartial and nonpartisan. Additionally, consideration should be given to the time that will be necessary to fulfill these duties, and the ability to do so consistent with the individual's other responsibilities. Finally, the Court should inquire about the costs associated with the appointment, and whether the special master will need the assistance of others in discharging his duties, and at what expense.

III. THE PROCESS AND PROCEDURES TO BE EMPLOYED BY THE SPECIAL MASTER.

The state constitutional requirement that the Court file its redistricting plan with the Secretary of the State by February 15, 2012, means that the special master will have limited time following his or her appointment on January 5, 2012, in which to gather information and assist the Court. See Conn. Const. art. third, § 6(d). Given the tight time frame, and the fact that the Reapportionment Commission invited the public to participate in a series of public hearings around the State in July, 2011, and has accepted commentary and prospective plans from interested persons, the special master should not hold additional public hearings before beginning work on a plan. In addition, to avoid prolonging the process, the special master should not conduct trial-type proceedings. Instead, the Court should adopt a more streamlined, appellate-style process in which the parties submit simultaneous briefs to the special master (together with simultaneous reply briefs), the special master hears argument, and then formulates a report and recommendation for the Court. The parties should be allowed an opportunity to present oral argument to the Court on the special master's recommended plan.

Although the special master need only make minimal adjustments to the existing districts to draft a proposed redistricting map that complies with the constitutional requirement of numerical equality, it is nonetheless important that he or she have the necessary information to ensure continued compliance with the minority representation requirements of the Voting Rights Act and traditional redistricting principles, including contiguity and respect for political subdivisions, natural geography, and communities of interest. Accordingly, the procedures this Court adopts should not restrict the types of data

that the special master may consider, including census, political, and geographic data, as well as all information previously provided to the Commission by the public and interested persons. See Gaffney v. Cummings, 412 U.S. 735, 753 (1973)(“[i]t may be suggested that those who redistrict and reapportion should work with census, not political, data and achieve population equality without regard for political impact. But this politically mindless approach may produce, whether intended or not, the most grossly gerrymandered results”). Additionally, the special master should have access to the nonpartisan staff of the General Assembly’s Office of Legislative Research, together with the information in the possession of that office that has been assembled during the redistricting process, to assist the special master in his or her endeavors.

IV. THE SCOPE OF THE DUTIES OF THE SPECIAL MASTER.

Pursuant to this Court’s December 27, 2011 order, the special master will be responsible for submitting a report and recommended plan of districting to the Court, including a proposed redistricting map. Because the existing districts are only very slightly out of compliance with constitutional requirements, reflect a political compromise to which the 2001 Reapportionment Commission unanimously agreed, and have not experienced significant shifts in their minority populations, it is not necessary for the special master to start from scratch. Indeed, such an approach would needlessly disrupt settled expectations and upend a districting plan that was carefully and successfully negotiated through the legislative process. Given the minimal population shifts since the last redistricting, any proposed significant alteration to the existing districts should overcome a heavy burden demonstrating why such changes are necessary. Under the circumstances, and considering the strict time constraints on the process, this Court should limit the scope of

the special master's duties to making the most minimal adjustments to existing districts that are necessary to render them constitutional and still in compliance with the Voting Rights Act and traditional redistricting principles.

V. THE LEGAL AND POLICY PARAMETERS GOVERNING THE REDISTRICTING MAP TO BE PROPOSED BY THE SPECIAL MASTER.

The legal parameters governing the redistricting map to be proposed by the special master are set forth in federal and Connecticut constitutional provisions, statutes, and caselaw.

The U.S. Constitution, article 1, § 2, requires that Congressional districts provide “equal representation for equal numbers of people.” Recognizing that precise mathematical equality among districts may be impossible to achieve, the U.S. Supreme Court construes this requirement to mean that the State must make “a good faith effort” to achieve precise mathematical equality. Karcher v. Daggett, 462 U.S. 725, 730 (1983). Adherence to this principle is reinforced by the Connecticut Constitution, article third, § 5, which requires that Congressional districts be consistent with federal constitutional standards.

Congressional redistricting must also comply with section 2 of the Voting Rights Act, 42 U.S.C. § 1973, which prohibits redistricting plans that dilute minority votes or provide minorities with less opportunity to elect representatives of their choice. See 42 U.S.C. § 1973(b). In addition, the U.S. Supreme Court has set forth a series of “traditional redistricting principles” that are not constitutionally required, but typically guide the redistricting process. These include contiguity, respect for political subdivisions, compactness, maintaining “communities of interest,” and respecting natural geographic boundaries. Shaw v. Reno, 509 U.S. 630, 647 (1993); Bush v. Vera, 517 U.S. 952, 959-960 and 977 (1996); Miller v. Johnson, 515 U.S. 900, 916 (1995).

With regard to policy parameters, although this Court has noted that the drawing of voting districts is a quintessentially legislative function, the Court's role in the present matter will, to a large extent, be classically judicial. By appointing a special master to marshal the facts and make recommendations based on those facts, this Court can focus on the relevant legal principles and whether the special master's proposed redistricting plan comports with those principles to produce a constitutional and fair result. Given the very minimal modifications that need to be made to the existing districts, this Court, by starting with those districts, should largely be able to avoid the difficult policy questions and political thicket that it would confront if it were starting the process from scratch.

Respectfully submitted,

DANNEL P. MALLOY
GOVERNOR

BY: 

Andrew McDonald – Juris No. 405211
General Counsel
Office of the Governor
State Capitol
210 Capitol Avenue
Hartford, CT 06106
Tel: (860) 524-7316
Fax: (860) 524-7391
Andrew.McDonald@ct.gov

CERTIFICATION

The undersigned attorney hereby certifies that this brief complies with all provisions of Connecticut Rules of Appellate Procedure 67-2 and that a copy of the foregoing was mailed, first class postage prepaid, this 30th day of December, 2011 to:

Aaron S. Bayer
Bradley W. Moore
Wiggin and Dana LLP
One CityPlace
185 Asylum Street
Hartford, CT 06103-3402
Tel: (860) 297-3700
Fax: (860) 525-9380
abayer@wiggin.com
bmoore@wiggin.com


Ross Garber
Charles L. Howard
Shipman & Goodwin LLP
One Constitution Plaza
Hartford, CT 06103
Tel: (860) 251-5000
Fax: (860) 251-5219
RGarber@goodwin.com

George C. Jepsen
Greg D'Auria
Maura Murphy-Osborne
Office of the Attorney General
55 Elm Street
Hartford, CT 06103
Tel: (860) 808-5000
Gregory.DAuria@ct.gov
Maura.MurphyOsborne@ct.gov

John Hartwell
35 Beachside Avenue
Westport, CT 06880
Tel: (203) 216-1425
johnhartwell@gmail.com


Koskoff, Koskoff & Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
Tel: (203) 583-8634
Fax: (203) 368-3244

David Rosen
Jeremy Golubcom-Teglasi
David Rosen & Associates, PC
400 Orange Street
New Haven, CT 06511
Tel: (203) 787-3513
Fax: (203) 789-1605
Info@davidrosenlaw.com


Andrew J. McDonald

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing memorandum complies with all of the provisions of the Connecticut Rules of Appellate Procedure § 66-3.


Andrew J. McDonald