SUPREME COURT

OF THE

STATE OF CONNECTICUT

SC 18907

IN RE PETITION OF REAPPORTIONMENT
COMMISSION, EX. REL.

PROCEEDINGS BEFORE SPECIAL MASTER

REPLY BRIEF OF THE REAPPORTIONMENT COMMISSION DEMOCRATIC MEMBERS MARTIN LOONEY, SANDY NAFIS, BRENDAN SHARKEY, AND DONALD WILLIAMS IN SUPPORT OF REDISTRICTING PLAN SUBMITTED TO SPECIAL MASTER

ATTORNEYS FOR REAPPORTIONMENT
COMMISSION DEMOCRATIC MEMBERS

Aaron S. Bayer
Thomas F. Clauss, Jr.
Bradley W. Moore
WIGGIN AND DANA LLP
One CityPlace
185 Asylum Street
Hartford, CT 06103-3402
(860) 297-3700
(860) 525-9380 (fax)
Juris No. 67700
abayer@wiggin.com
tclauss@wiggin.com
bmoore@wiggin.com

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Introduction

In direct contravention of the Supreme Court's January 3rd Order, the Republican Members' redistricting plan proposes substantial revisions to Connecticut's existing congressional districts – effectively asking the Special Master to make changes that they did not accomplish through the political process. That is precisely what the Supreme Court has instructed the Special Master not to do. Moreover, the plan does not even accomplish the goals that it proffers as the basis for its reworking of the existing districts.

I. The Republican Members' Plan Significantly Changes Existing Congressional Districts in Violation of the Supreme Court's January 3rd Order

The Court's Order requires the Special Master to "modify the existing congressional districts only to the extent reasonably required" to equalize the population in the districts, make them contiguous, and comply with the Voting Rights Act. Order ¶ 2. In other words, the Order mandates a minimum changes plan.

The Republican Members assert that their proposed plan "substantially mirrors the existing congressional map" and makes changes "only as reasonably required" to comply with the Supreme Court's Order. (Rep. Br. p. 1.) That is untrue, as is apparent even from a quick review of the proposed map. (*See* Exh. 1 and 2.) The plan would make changes in 14 towns, and would move seven (7) towns in their entirety into new congressional districts. In a redistricting cycle in which only minimal populations shifts are required, under this plan over 185,000 people would wake up in a new congressional district for the 2012 elections on February 15th.[1] (*See* Exh. 3.) In New Britain alone, the plan would move the entire

[1] The Republican Members brief boasts that over 94% of the population is not moved under their plan. But the more than 5% of the population that would change districts vastly exceeds the number "reasonably required" to equalize the districts' population, as is clear from the fact that the Democratic Members' plan would move only 0.8% to new districts. (*See* Exh. 3.)

town of 73,206 people out of the 5th district, even though that district needs to *gain* 523 people to equalize its population. The chart below summarizes just how far the plan modifies the existing congressional districts in comparison to the plan proposed by the Reapportionment Commission Democrats.[2]

PROPOSED CHANGES	REP. PLAN	DEM. PLAN
Number of towns affected	**14**	**5**
Number of towns moved entirely to new district	**7**	**0**
Number of people moved to new districts	**185,726**	**29,447**
Percentage of state population moved to new districts	**5.2%**	**0.8%**
Geographic area affected[3]	**663 square miles (13.2% of state)**	**90 square miles (1.8% of state)**

II. The Republican Members Brief Misreads The Court Order and the Applicable Law In Order to Support Their Desired Redistricting Changes

The substantial alterations in the Republican Members' plan require a rewriting of the Court's clear directive to the Special Master: "modify the existing congressional districts only to the extent reasonably required" to equalize the population in the districts, make them contiguous, and comply with the Voting Rights Act. Order ¶ 2. As is apparent from

[2] The Republican Members plan reduces the number of towns divided between congressional districts from six to four, while the Democratic Members plan reduces the number of divided towns from six to five (without dividing any new towns). An earlier Nov. 10, 2011 minimum changes plan, submitted by the Democratic Members of the Reapportionment Commission, reduced the number of divided towns to four, but would have moved a slightly larger number of people to new districts. (1.2% of the state's population would change districts in the Nov. 10, 2011 plan, compared to 0.8% in the Democratic plan submitted to the Special Master and 5.2% in the Republican plan.) The Nov. 10, 2011 alternative minimum changes plan is attached for reference at Exh. 4.

[3] Calculations are based on total of 5018 square mileage in Connecticut. *See* http://www.ct.gov/ctportal/cwp/view.asp?a=843&q=246434.

the chart above, the proposed changes far exceed those needed for population equality, and as is discussed in Part II.A below, they are completely unnecessary to comply with the Voting Rights Act.

The remaining directives in paragraphs 3 and 4 of the Order are ***limitations*** on what the Special Master can do in achieving the requirements of paragraph 2: he cannot substantially reduce compactness or divide town lines more than in the existing districts. As discussed in Part II.B below, the Republican Members construe those limitations as an invitation to ***expand*** the Special Master's authority – to use compactness as a basis for making more substantial changes than paragraph 2 permits and to use other traditional redistricting criteria not even mentioned in the Court's Order.

A. Voting Rights Act and Minority Influence Districts

Given the size and dispersion of the minority populations in Connecticut, the Voting Rights Act does not require creation of any majority-minority districts (*see* Report of Dr. Lisa Handley ("Handley Rep."), Exh. 5, pp. 1, 8), and the Republican Members do not suggest otherwise. Instead, their brief claims that "[f]ederal authority is divided as to whether a colorable vote dilution challenge may be brought" concerning a district in which minority voters do not constitute more than 50% of the population and that "maximizing minority influence in the First District is necessary and appropriate to protect the final redistricting map from a potential legal challenge." (Rep. Br. pp. 3, 4.)

Federal law is not divided, and, the U.S. Supreme Court has already foreclosed the possibility of the legal challenge that the Republican Members conjure. "[A] party asserting § 2 liability must show by a preponderance of the evidence that the minority population in the potential election district is greater than 50 percent." *Bartlett v. Strickland*, 129 S. Ct. 1231, 1246 (2009) (plurality opinion). The cases cited by the Republican Members to

suggest that a lower population threshold may underlie a § 2 claim all ***predate*** *Bartlett* – a controlling authority that their brief fails to cite.[4]

Straying far from established law, the Republican Members suggest (Br. pp. 3-4) that a legal challenge might somehow be mounted on the theory that: a) their plan would increase the minority voting age population in the 1st district from 31% to 35%; b) based on undocumented premonitions about continuing historical trends, that percentage might continue to grow and exceed 50% in another 10 years; and c) therefore it might be unlawful not to adopt a plan now that increases the 1st district's minority population to 35%. The flaws in this reasoning are self-evident. The argument contains none of the requisite analysis showing that the Hispanic/Latino and Black/African-American communities in either the 1st or 5th districts are politically cohesive for purposes of the Voting Rights Act, *see Thornburg v. Gingles*, 478 U.S. 30, 50-51 (1986). It is also based on speculation about future demographic trends and changes in the law – changes that *Barlett* now precludes.[5] In requiring compliance with the Voting Rights Act, it is inconceivable that the Connecticut Supreme Court intended the Special Master to make substantial changes in district lines to fend off such hypothetical claims.

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[4] The Supreme Court decision in *Bartlett* discussed and rejected the First Circuit's acceptance of a minority influence district claim in *Metts v. Murphy*, 363 F.3d 8 (1st Cir. 2004), a case cited in the Republican Members brief (p. 3). *See Bartlett,* 129 S. Ct. at 1242, 1249 ("This Court has held that § 2 does not require the creation of influence districts"; "the lack of [influence] districts cannot establish a § 2 violation.").

[5] Even assuming that in 10 years a minority voting group exceeded 50% of the voting age population and met all of the *Gingles* standards, such a development might require a minority district to be drawn during the *next* redistricting cycle in 2021, not today. "Section 2 concerns itself with the possibility of a minority group's present, but *unrealized*, opportunity to elect." *Texas v. United States*, Civil Action No. 11-1303, 2011 U.S. Dist. LEXIS 147586, *47-*48 (D.D.C. Dec. 22, 2011) (emphasis in original) (citing *Reno v. Bossier Parish School Bd. (Bossier I)*, 520 U.S. 471, 480 (1997)).

B. Reliance on Criteria Precluded by the Court's Order

The Republican Members brief asserts that the Court Order "establish[es] compactness as an important redistricting parameter." (Rep. Br. p. 4.) What the Order says is that, in making the fewest changes needed to equalize population and comply with the Voting Rights Act, the Special Master shouldn't make the existing districts less compact. That directive provides no basis for making wholesale revisions to the existing districts (such as moving 7 entire towns to new districts) in the name of increasing compactness. The reality is that Democrats and Republicans alike could propose hundreds of maps that increase compactness in many different ways and, not coincidentally, advance their political aims. But that is precisely what the Court Order instructs the parties and the Special Master not to do.

The Republican Members brief suggests that "it is unclear what degree of deference to the other traditional redistricting principles is mandated by the Court's reference to other 'federal law' in paragraph 2(c) of its order." (Rep. Br. p. 5.) But it is clear. Paragraph 2.c deals with the Voting Rights Act and nothing else. It is far-fetched to assume that, in requiring compliance with all provisions of the Act and federal law, the Supreme Court was indirectly requiring compliance with all traditional redistricting criteria and chose to accomplish that directive by not mentioning them. Even the federal case law cited in the Republican Members brief (pp. 4-5) does not stand for the proposition that state courts are required to use those criteria as a matter of federal law,[6] particularly when there is an

[6] The U.S. Supreme Court cases cited, *Miller v. Johnson,* 515 U.S. 900, 919 (1995); *Bush v. Vera,* 517 U.S. 952, 960-62 (1996), stand for the proposition that a state's disregard of traditional redistricting criteria and creation of districts clearly on the basis of race is relevant in establishing a racial gerrymandering claim under the equal protection clause – a proposition of no relevance here. The quote from *Karcher v. Daggett,* 462 U.S. 725, 756

express order from the state's highest court endeavoring to minimize changes to the existing districts. And the discussion of the law ignores the substantial precedent urging court deference to state plans and to existing districts where no plan has been produced by the political process. (See Dem. Mem. Opening Br. p. 2 nn. 2 & 3.)

III. Even If Additional Criteria Were Permitted to Be Considered, the Republican Members Plan Does Not Advance The Goals It Purports To Pursue

A. The Republican Members Plan Would Not Increase Minority Voting Influence

As discussed in Part II.A above, no changes in existing district lines are required to comply with the Voting Rights Act, including proposed changes to enhance minority voting influence. Even assuming, however, that the Court Order permitted the Special Master to make changes based on minority influence claims, the changes in the Republican Members plan are more likely to dilute, rather than increase, minority voting influence.

The 1st district is already a "minority influence" district by accepted measures. (*See* Handley Rep. pp. 2-4.) Increasing the minority voting population there by approximately 4% would not materially increase minority voting influence. (*Id.* pp. 6-8.) However, shifting New Britain's minority voters from the 5th district to the 1st district and simultaneously incorporating overwhelmingly white towns into the 5th district would reduce the already fragile ability of minority voters in the 5th district to elect their preferred

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(1983), comes from Justice Stevens' concurring opinion discussing the possibility of a political gerrymandering claim – a type of claim that has never been accepted by the Court.

The district court cases cited are also of little utility here. In *Larios v. Cox*, 306 F. Supp. 2d 1214, 1217 (N.D. Ga. 2004), the court order allowed the Special Master to consider traditional criteria (making it clear that they were of "secondary" importance), while the Court order here takes a more restrictive approach. In *Colleton Cty. Council v. McConnell*, 201 F. Supp. 2d 618 (D.S.C. 2002), large population shifts required substantial changes in state legislative districts (including collapsing house districts), and, in congressional redistricting, the court "sought to maintain the cores of the existing congressional districts, adding or subtracting compact and contiguous population" as needed "to correct the population deviations." *Id.* at 664.

candidates. (*Id.* pp. 7-8.) The Republican Members' plan puts that opportunity to elect the minority-preferred candidate "in jeopardy . . . for no reason." (*Id.* p. 8.)

B. The Republican Members Plan Would Not Enhance Representation Of Communities Of Interest

The Court Order does not authorize the Special Master to redraw districts based on claims about communities of interest. But even if it did, the Republican Members plan does not advance that interest. They propose to move all of New Britain into the 1st district because of its proximity to Hartford and common transportation interests of New Britain and Hartford. In exchange, the plan would move six towns into the 5th district, purportedly because they have greater interests in common with the 5th district.

These claims are, at best, debatable. The proposed changes are based on the factually inaccurate suggestion that New Britain "has little in common with much of the rest of the Fifth District," which "is composed mostly of Litchfield County." (Rep. Br. p. 10.) The same reasoning is offered to justify moving the six new towns into the 5th district – that it "is a largely rural district in northwestern Connecticut, and the same can be said of each of these towns." (Rep. Br. p. 11.) In fact, Litchfield County accounts for only 20% of the people in the 5th district. The district is in fact comprised more of medium-sized cities like New Britain, Waterbury, Danbury and Meriden, which account for 43% of the district's population and share many common characteristics and concerns.[7]

More to the point, there are many other alternative changes to the 1st and 5th districts that would recognize greater communities of interest – with very different political

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[7] Data from the US Census Bureau's American FactFinder (factfinder.census.gov) and Connecticut Economic Resources Center, Inc. (www.cerc.com/TownProfiles) show that these four cities share many characteristics, including large and growing Hispanic populations, poverty levels, unemployment rates, educational test scores, and manufacturing levels. *See* Exh. 6.

implications – and no principled way for the Special Master to choose among them consistent with the Supreme Court's directives.[8]

CONCLUSION

For the reasons discussed above, the Reapportionment Commission Democrats respectfully request that the Special Master recommend the Democratic Members' Proposed Plan to the Connecticut Supreme Court.

Respectfully submitted,

REAPPORTIONMENT COMMISSION DEMOCRATIC MEMBERS

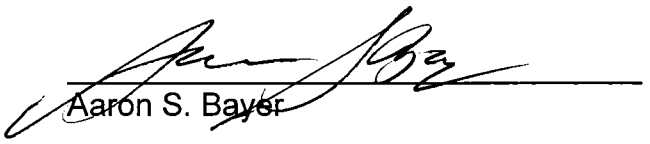
By: _____
Aaron S. Bayer
Thomas F. Clauss, Jr.
Bradley W. Moore
Wiggin and Dana LLP
One CityPlace
185 Asylum Street
Hartford, CT 06103-3402
(860) 297-3700
(860) 525-9380 (fax)
Juris No. 67700
abayer@wiggin.com
tclauss@wiggin.com
bmoore@wiggin.com

[8] To give just one example: if the Court's Order were to be disregarded, the Democratic Members could have proposed a plan that would leave New Britain where it is, move Bristol and Southington to the 5th district, and move the Farmington Valley towns (Avon, Simsbury, Canton and Farmington) to the 1st district. That would restore historic connections between Bristol, Southington, Plainville and New Britain, as well as those between the Farmington Valley towns and Hartford, West Hartford and Bloomfield, including strong connections through regional government councils and regional planning agencies. *See http://www.crcog.org/municipal_ser/homepages.html* (Capitol Region Council of Governments); *http://www.ct.gov/opm/cwp/view.asp?a=2986&q=383046* (OPM regional planning map); http://www.ccrpa.org (Central Connecticut Regional Planning Agency). *See also* http://www.cerc.org/TownProfiles/county.asp?county=Hartfordwww.cerc.com (Connecticut Economic Resource Center, town profiles, showing greater percentage of people from Farmington Valley towns commute to Hartford than do so from New Britain).

Not surprisingly, the most significant difference between those alternatives is that they would have profoundly different political implications – and the Supreme Court has specifically precluded the Special Master from considering that. Order ¶ 4.

CERTIFICATE OF COMPLIANCE

I hereby certify that the foregoing brief complies with all of the provisions of the Connecticut Rules of Appellate Procedure § 67-2.



Aaron S. Bayer

CERTIFICATION

This is to certify that on this 9th of January 2012, a copy of the foregoing Reply Brief of the Reapportionment Commission Democratic Members in Support of Redistricting Plan Submitted to Special Master and the accompanying Appendix was served by email upon all counsel of record, as listed below. If counsel require a hard copy, please advise the undersigned.

Ross H. Garber, Esq.
Charles Howard, Esq.
Shipman & Goodwin, LLP
One Constitution Plaza
Hartford, CT 06103-1919
(860) 251-5000
(860) 251-5099 (fax)
rgarber@goodwin.com
choward@goodwin.com

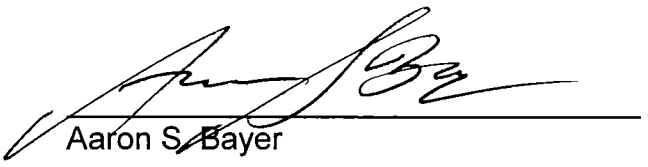
George Jepsen, Attorney General
Gregory T. D'Auria, Solicitor General
Maura Murphy-Osborne, Associate Attorney General
55 Elm Street
P. O. Box 120
Hartford, CT 06141-0120
(860) 808-5020
(860) 808-5347 (fax)
george.jepsen@ct.gov
gregory.dauria@ct.gov
maura.murphyosborne@ct.gov

Andrew J. McDonald, Chief Legal Counsel
Governor's Office, State of Connecticut
State Capitol
210 Capitol Avenue
Hartford, CT 06106
(860) 566-4840
andrew.mcdonald@ct.gov

John Hartwell
35 Beachside Avenue
Westport, CT 06880
(203) 216-1425
(203) 254-6439 (fax)
johnhartwell@gmail.com

David N. Rosen
Jeremy Golubcow-Teglasi
David Rosen & Associates, P.C.
400 Orange Street
New Haven, CT 06511
(203) 787-3513
(203(789-1605 (fax)
drosen@davidrosenlaw.com

William M. Bloss
Koskoff Koskoff & Bieder, P.C.
350 Fairfield Avenue
Bridgeport, CT 06604
(203) 336-4421
(203) 368-3244
bbloss@koskoff.com



Aaron S. Bayer