SUPREME COURT

OF THE

STATE OF CONNECTICUT

S.C. 18907

IN RE PETITION OF REAPPORTIONMENT COMMISSION, EX. REL.

COMMENTS OF THE REPUBLICAN MEMBERS OF THE CONNECTICUT REAPPORTIONMENT COMMISSION ON THE DRAFT REPORT AND PLAN OF THE SPECIAL MASTER

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INTRODUCTION AND STATEMENT OF FACTS

On January 13, 2012, the Special Master submitted a Draft Report and Plan ("Report and Plan") and ordered that the parties file any comments on them by January 18, 2012. Accordingly, the Republican Members of the Reapportionment Commission ("Republican Members") herby submit the following comments to the Special Master.

The Special Master's Report and Plan reflect his understanding that his role was narrowly limited by the Court's January 3, 2012 Order ("Order"). Such an understanding is not unreasonable in light of the Court's directive to "modify the existing congressional districts *only to the extent reasonably required* to comply with the following applicable legal requirements: [equal population, contiguous territory, and compliance with] the Voting Rights Act and federal law." (Emphasis added.) Report and Plan at 2-3. To that extent, the Republican Members acknowledge that the Report and Plan comply with the Order. The Republican Members nevertheless object to the Report and Plan on the grounds that they represent a fundamental derogation of the redistricting process contemplated in the Connecticut constitution; perpetuate gerrymandered districts (the First and the Fifth Districts) that ill serve the citizens of Connecticut; and will have the unintended consequence of promoting future partisan gridlock in the legislative redistricting process.

REPUBLICAN MEMBERS' POSITION STATEMENT

I. The Report and Plan Undermines the Supreme Court's Fundamental Role in Redistricting Embodied in the State Constitution.

The United States Supreme Court has recognized that "drawing lines for congressional districts is one of the most significant acts a State can perform to ensure citizen participation in republican self-governance." *League of United Latin American*

Citizens v. Perry, 548 U.S. 399, 416, 126 S. Ct. 2594, 165 L. Ed. 2d 609 (2006) (Kennedy, J.). The constitution of Connecticut also acknowledges the significance of drawing voting districts and establishes an important role for the Supreme Court. *See Conn. Const.,* art. III, § 6(d). The state constitution provides that the legislature shall have the first opportunity at redistricting. The constitution also contemplates, however, that there will be occasions when the legislative process at the Reapportionment Committee and the Reapportionment Commission do not bear fruit. In those instances, the constitution entrusts the redistricting process to the Supreme Court and provides for three months for the Court to complete its work. As the Court acknowledged in *Fonfara v. Reapportionment Comm'n*, 222 Conn. 166, 173-74 (1992), the Court's responsibility at this point is *legislative*. ("Only when a reapportionment commission fails to promulgate a reapportionment plan at all is this court given direct, legislative authority to fill the constitutional vacuum.")

As interpreted by the Special Master, however, the Supreme Court's Order essentially relegates the Court (and, by extension, its Special Master) to a largely clerical role, taking little account of fundamental redistricting principles that have been adopted and reiterated time and again by many of our nation's courts, including the United States Supreme Court. Such a role is not consistent with the fundamental legislative role contemplated by the constitution for the Supreme Court under these circumstances. Indeed, the Report and Plan state with respect to the plan put forth by the Republican Members:

> All of these considerations—communities of interest, minority influence beyond that required by the Voting Rights Act, and political impact—can be legitimate considerations for a redistricting process. However, these are not the factors sanctioned by the Court's order for

> my consideration. A process that would evaluate such claims and balance among competing interests would require different criteria than those that have guided the development of the Special Master's Plan.

Report and Plan at 24.

The Court's reluctance to embrace its constitutionally mandated legislative role is particularly evident in the Special Master's determination that he was constrained with respect to considering the influence of racial minorities beyond that which is specifically required by the Voting Rights Act. While the Republican Members acknowledge that the Special Master is correct in concluding that "the geographic dispersion of the minority population makes a compact majority-minority district impossible" (Report and Plan at 12), present demographic trends suggest that the minority population in some areas could approach or achieve majority-minority status within the next ten years. Certainly, consideration of this issue, along with the other good governance principles, should not have been precluded in the exercise of the Court's legislative responsibility.

In essence, the Special Master believed he could not consider neutral, objective, and fair criteria in drawing the Court's redistricting map and was constrained to rubber-stamp a congressional map that is the remnant of a partisan gerrymander conceived a decade ago. This cannot be the legislative role contemplated by the constitution of Connecticut for the Connecticut Supreme Court under these circumstances.

II. The Report and Plan Would Have the Supreme Court Adopt a Gerrymandered Map That Is Not in the Best Interests of the Citizens of Connecticut.

As noted above, the Supreme Court has a constitutional mandate to re-draw Connecticut's congressional districts. It has an unprecedented opportunity to accomplish this critical task in a way that best serves the citizens of Connecticut.

Consistent with its obligation and unique opportunity, the Supreme Court engaged one of the nation's most highly regarded experts in drawing and evaluating congressional districts. Notably, all participants in this action—including representatives of both political parties and all three branches of Connecticut's government—expressed faith and confidence in the expertise and impartiality of the Special Master. Instead of permitting the Special Master to utilize his expertise to recommend fair and equitable congressional districts using objective, well-established redistricting criteria, however, the Supreme Court's Order appears to require the Special Master to endorse, and at most only slightly tinker with, a grossly gerrymandered congressional map.

Testimony before the Special Master made clear that the current congressional districts are the product of a partisan gerrymandering effort conceived a decade ago to serve two incumbent representatives to Congress, neither of whom is still in office, at a time when Connecticut's congressional delegation was reduced by one seat. Special Master's Appendix at 238 *et seq.* By mandating only the fewest changes required by law, the Order required the Special Master to disregard the process that led to the current gerrymandered districts and required him to recommend a plan to the Court that would perpetuate this result for another ten years (and, as explained below, perhaps indefinitely).

The citizens of Connecticut are ill-served by a process by which the architects of our congressional districts must disregard fundamental redistricting principles and blindly adopt a map drawn a decade ago for the partisan benefit of two incumbents.

III. The Report and Plan Would Promote Partisan Gridlock in Future Redistricting Efforts.

If adopted by the Supreme Court, the Report and Plan will lead to gridlock in future legislative redistricting efforts and institutionalize reliance on the Supreme Court to draw maps for congressional districts, as well as state House and Senate Districts.

Connecticut's reapportionment committees and commissions have been successful in the past in drawing both legislative and congressional districts without requiring the Court to exercise the legislative function imposed on it by the Connecticut constitution. Even this year, the Reapportionment Commission completed maps for the state House and Senate districts. As in most endeavors, however, agreement on reapportionment issues has been the result of negotiation and compromise. Members of reapportionment committees and commissions have known that if they failed to draw districts, the Supreme Court would have jurisdiction to do so and would almost certainly draft its own map, likely without regard to political winners and losers. This context provided the committee and commission members with strong incentives to reach agreement. This critical point has been recognized by the Connecticut Supreme Court previously: "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." *Fonfara v. Reapportionment Comm'n*, supra, 222 Conn. at 184.

The lasting impact of the Court's narrow Order and the resulting Report and Plan is almost certain to be that members of future reapportionment committees and commissions will not approach redistricting negotiations with a genuine desire to reach a bipartisan agreement. This is because the present Order will be seen as a precedent

that gives them comfort that the Court will preserve the status quo and not fully examine proposed redistricting maps. When the Court's role is limited to adopting the most recent congressional map with only those changes absolutely necessary to equalize population and otherwise required by federal law, it is clear that the *in terrorem* effect of the Court's role is vitiated and any incentive for the party advantaged by the status quo to make concessions is eliminated. Concomitantly, a party disadvantaged by this intransigence is denied any effective means of redress. Conducted thus, the redistricting process will likely degenerate into gridlock and the Court will be called on, decade after decade, more often—not less— simply to endorse the previous districting map, regardless of the equities, and despite a clear lack of compliance with the good governance principles that underlie a thriving democracy. In other words, a Constitutional process that contemplated bi-partisan, legislative redistricting every ten years will, in reality, be converted into a system of legislative gridlock, followed by court adoption of a status quo plan. The impact of this result will not be limited to congressional redistricting. It will have profound effects on the redistricting process for all of the one hundred ninety-two legislative and congressional districts, not just the five congressional districts involved in the present dispute.

CONCLUSION

For the foregoing reasons, the Republican Members object to the Draft Report and Plan.

Respectfully submitted,

Dated: January 18, 2012

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

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CERTIFICATION OF COMPLIANCE AND SERVICE

This is to certify that the foregoing Comments comply with all the requirements of Practice Book §§ 62-7 and 67-2.

This is further to certify that on this 18th day of January, 2012, a copy of the foregoing was mailed electronically to the following counsel of record, who have consented to electronic delivery, in compliance with the requirements of Practice Book § 62-7.

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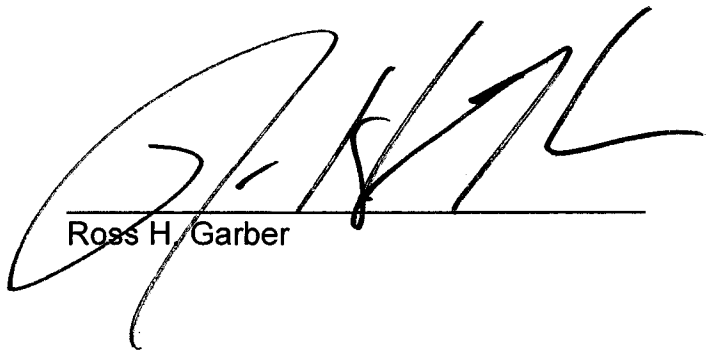

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