

Virginia General Assembly



November 12, 2021

Muriel-Theresa Pitney
Clerk of Court
Supreme Court of Virginia
100 North Ninth Street, 5th Floor
Richmond, Virginia 23219-1315

Dear Madame Clerk:

On behalf of the Senate Republican Caucus and the House Republican Caucus, we write to request the disqualification of the remaining nominees for Special Master that were provided to this Court by the Democratic leaders of Virginia's Senate and House of Delegates.

Earlier today, the Court issued an order disqualifying four of the six nominees for Special Master. In so doing, the Court noted that, “[a]lthough the Special Master candidates are to be nominated by legislative leaders of a particular political party, the nominees—upon being appointed by this Court as Special Masters—will serve as officers of the Court in a quasi-judicial capacity.” Order at 1. For that reason, the Court stated that “the Special Masters must be neutral and must not act as advocates or representatives of any political party.” *Id.* And, accordingly, the Court decided as follows:

- Because “Thomas M. Bryan, was recently retained and paid by the Virginia Senate Republican Caucus to consult on Virginia redistricting using the 2020 census data, . . . “the Court believes that” he has a disqualifying conflict, *id.* at 1-2;
- “Upon a review of the Republican submissions,” the Court expressed “concerns about the ability of the remaining Republican nominees to serve in the role of Special Master as described in this Order” and requested “the names of three or more additional nominees” without conflicts that might “preclude them from prudently exercising independent judgment, dispassionately following the Court’s instructions, and objectively applying the governing decision-making criteria,” *id.* at 1-2; and
- Because “[o]ne of” the Democratic Caucus’s “nominees has asserted a condition or reservation that suggests to the Court he may not be willing to serve as Special Master in accordance with Code § 30-399(F) (“The two Special Masters shall work together to develop any plan to be submitted to the Court for its consideration.”),” the Court disqualified him as well, *id.* at 2.

Based on the context provided in the Court’s Order, we respectfully request that the Court disqualify all three of the Democratic Caucus’s Special Master nominees. Each suffers from the same disqualifying conflicts of interest that led the Court to dispense with the Republican Caucus’s nominees.

Bruce Cain has, since 1999, been identified as having “long ties to Democrats.”¹ Indeed, Mr. Cain has served as a non-resident senior fellow at the Brookings Institution, a left-leaning liberal think tank, and has, since 2004, it appears that he has contributed exclusively to Democratic politicians. In 2001, Mr. Cain told the *San Francisco Chronicle* that, because he “was hired by the Democrats” to help their California redistricting effort in the early 1980s, “to many Republicans [he] still [has] partisan blood on [his] hands.”² These comments have well-founded support; Mr. Cain helped mastermind “the most bitter reapportionment” in California’s history,³ which added five Democratic seats to the State and was described as “a classic exercise of political power.”⁴ “As a result, between 1980 and 1982, the Democrats’ margin over Republicans in California’s House delegation increased from just one seat to 11, for a 28-17 advantage.”⁵

Mr. Cain continued his efforts after the 2010 census in his role Maryland’s Independent Redistricting Expert. During that redistricting cycle, the U.S. Department of Justice was asked to consider whether Democratic leaders had racially gerrymandered Maryland’s congressional districts to cement their party’s advantage.⁶ In litigation that would eventually progress to the U.S. Supreme Court, then-Democratic Governor Martin O’Malley “testified that his aim was to ‘use the redistricting process to change the overall composition of Maryland’s congressional delegation to 7 Democrats and 1 Republican by flipping’ one district.”⁷

Bernard Grofman has similarly contributed to Democratic efforts to cement or to create left-leaning Congressional districts. The *Richmond Times Dispatch* reported that, in 2015, Mr. “Grofman redrew [Virginia’s] 4th District congressional lines around Richmond to create a new Democratic-leaning district.”⁸ When Mr. Goffman was selected in 2018 by a federal court to redraw Virginia’s House of Delegate lines, it was considered “a victory for the Democratic plaintiffs” and a “likely setback for Republicans trying to preserve the House’s current partisan makeup.”⁹ It was also roundly celebrated by Democratic politicians (such as outgoing Attorney General Mark Herring) as well as Democratic legal and political operatives (like Democratic lawyer Mark Elias). Mr. “Grofman has since published or contributed to several opinion pieces criticizing Republicans while championing Democratic politicians.”¹⁰

¹ “Punditry at Your Fingertips: When it’s time for a quote on state politics, reporters tend to call the same dozen or so analysts. It’s not a diverse group, and some are known to pull their punches,” *Los Angeles Times*, Oct. 5, 1999.

² “Political junkie making a big splash,” *San Francisco Chronicle*, Jul. 23, 2001.

³ “Political junkie making a big splash,” *San Francisco Chronicle*, Jul. 23, 2001.

⁴ “Surgery on G.O.P. was deft, not painless,” *The New York Times*, Mar. 3, 1991.

⁵ “Next California governor may change balance of power in Congress,” *The Associated Press*, May 8, 1998.

⁶ “Political battle over Md. redistricting over, but legal fight concerning minorities may be next,” *The Washington Post*, Oct. 20, 2011.

⁷ *Rucho v. Common Cause*, 139 S. Ct. 2484, 2493 (2019). The Court held in *Rucho* that partisan gerrymandering claims are not justiciable in the federal courts, a conclusion that has no bearing on whether Mr. Cain may serve as a Special Master.

⁸ “Expert who redrew Va. congressional map selected for state House project,” *Richmond Times Dispatch*, Oct. 19, 2018.

⁹ “Expert who redrew Va. congressional map selected for state House project,” *Richmond Times Dispatch*, Oct. 19, 2018.

¹⁰ See, e.g., Thomas B. Edsall opinion, “White Riot,” *The New York Times*, Jan. 13, 2021; Bernard Grofman op-ed, “As the Democrats skirmish over their omnibus bill, here’s what they can learn from Harry Truman,” *The Washington Post*, Oct. 1, 2021.

Nathaniel Persily was hired in 2017 to draw election maps in North Carolina for a panel of federal judges. Media reports stated bluntly that Mr. Persily’s “[r]edrawn election maps would help Democrats.”¹¹ Specifically, at least one draft of Mr. “Persily’s plan appear[ed] to make it easier for Democrats to defeat Republican incumbents in four House races and two Senate races.”¹² As time went on, it came to light that Mr. Persily “had connections to both the chief lawyer for the” Democratic “voters who sued over the maps, as well as to the voters’ allies.”¹³ A court filing in that litigation stated:


Professor Persily’s specific comments about the [Republican] legislative defendants are also concerning, such as when he told *The New York Times* that North Carolina election law changes were driven by a “mix of racial discrimination and partisan greed,” that redistricting plans in North Carolina and Virginia were “motivated by the incumbents in order to screw their opponents” and publicly opining about the “high correlation between party and race” in North Carolina redistricting litigation.¹⁴

In January 2018, the Pennsylvania Supreme Court (a body comprised of five partisan-elected Democrats and two partisan-elected Republicans) selected Mr. Persily to help draw a new congressional map for that commonwealth. Shortly after, the *New York Times* reported that Mr. Persily’s map was “better for Democrats—by nearly every measure—than the maps that Democrats themselves proposed.”¹⁵ Mr. Persily’s responsibility for this Democratically favored map, in turn, was extreme. As described by Pennsylvania Senate Majority Leader Jake Corman, Mr. Persily “act[ed] as the prosecutor by presenting the evidence, . . . act[ed] as the juror by evaluating the evidence, and . . . solely . . . act[ed] as a judge by ultimately ruling on the evidence and producing a map—one person—to the [Pennsylvania Supreme Court] for the people of Pennsylvania to live under.”¹⁶ The *Wall Street Journal*’s Editorial Board referred to the process as “Pennsylvania’s Redistricting Coup.”¹⁷

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As of this morning, the Court has made clear that it is interested solely in Special Master nominees that have no discernable conflicts of interest, particularly partisan ones, that might “preclude them from prudently exercising independent judgment, dispassionately following the Court’s instructions, [or] objectively applying the governing decision-making criteria.” Order at 1. Based on the lopsided political records of each Democratic Caucus nominee, it is beyond reasonable dispute that not one should be allowed to serve as Special Master. For that reason, we respectfully request their disqualification.

Sincerely,


Senator Tommy Norment


Delegate Todd Gilbert

¹¹ “Redrawn election maps would help Democrats,” *The News & Observer*, Dec. 1, 2017.

¹² “Redrawn election maps would help Democrats,” *The News & Observer*, Dec. 1, 2017.

¹³ “Republicans object to special master in N. Carolina remap,” *The Associated Press*, Oct. 30, 2017.

¹⁴ “GOP leaders object to using outside expert on redistricting maps,” *The News & Record*, Oct. 30, 2017.

¹⁵ “Democrats Didn’t Even Dream of This Pennsylvania Map. How Did It Happen?,” *The New York Times*, Feb. 21, 2018.

¹⁶ “In Pennsylvania, New Court-Drawn Voting Map Could Shift Advantage To Democrats,” *NPR*, Feb. 19, 2018.

¹⁷ “Pennsylvania’s Redistricting Coup: Democratic judges decide they can redraw election lines,” *The Wall Street Journal*, Feb. 20, 2018.