

# Virginia General Assembly



November 10, 2021

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

Dear Madame Clerk:

Legislative leaders have a narrowly defined role to play in the redistricting process, limited only to the nomination of candidates for special master. We respect that limited role and the Supreme Court of Virginia's independence in this realm, and do not intend to trespass upon it or attempt to influence the Court's decisions. We write only in response to Senate Majority Leader Richard L. Saslaw's letter of November 8, 2021, submitted on behalf of the Senate Democratic Caucus (the "Saslaw Letter"). The requests made by Sen. Saslaw are totally lacking in legal support and are an obvious partisan power grab intended to exert an undue amount of influence over this Court's oversight of the 2021 redistricting process. They should be rejected on their face.

In accordance with Section 30-399(F), this Court promulgated a rule earlier this year outlining the procedure for nominating special masters in the event that the Virginia Redistricting Commission failed to submit approved maps for the General Assembly's consideration.<sup>1</sup> Rule 2 requires, in relevant part, that "[t]he persons appointed to serve as special masters should have the requisite qualifications and experience to serve as a special master and should have no conflicts of interest." Va. Redistricting Rule 2(b). On November 1, 2021, seven days after the Commission missed its statutory deadline, we submitted our list of three individuals for this Court's consideration to serve as special master in the 2021 redistricting process. This was after our list of candidates was thoroughly vetted for qualifications and for conflicts. All three individuals submitted to the Court are highly respected demographers and statisticians who routinely draw maps for courts, commissions and legislatures and none had any conflict of interest.

It is unfortunate that following the submission of candidates to the Court, the Democrats promptly initiated the first step of their legal and political strategy to influence redistricting. It has been their default strategy around the country when they do not control the map drawing process. In this case, they launched a media and mud-slinging attack meant to dirty the process before it even starts. They hope to influence the Court to select only map drawers partial to them. We find their hubris and their efforts to apply undue influence over the redistricting process appalling. While the Democrats submitted

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<sup>1</sup> Va. Supreme Court, *Rules and Procedures for Implementing the Requirements of Article II, Section 6-A of the Constitution of Virginia*, [https://www.vacourts.gov/courts/scv/article\\_2\\_section\\_6a\\_rules\\_procedures.pdf](https://www.vacourts.gov/courts/scv/article_2_section_6a_rules_procedures.pdf).

highly partisan candidates with politically charged and controversial map drawing histories, we made no comment.

It is also critical to note that the Democrats have misstated the law. Sen. Saslaw claims that the special masters appointed by this Court to assist in redistricting must not have prior partisan affiliations. Neither Section 30-399(F) of the Virginia Code nor this Court's February 2021 *Rules and Procedures* implementing that section make any mention of a neutrality requirement. To support his claim, Sen. Saslaw cites to various federal court decisions and canons of judicial conduct as if those sources have any relevance to the question at hand. Saslaw Letter at 2-3. If this Court had seen fit to require special master nominees to be totally free of partisan attachments, then it would have said that, and we would have nominated people who fit the bill (although it should be noted that discriminating against individuals on the basis of their associations would raise serious concerns under a different federal law: The First Amendment).

Instead, both parties' nominees are simply required to possess "the requisite qualifications and experience" and have "no conflicts of interest." The only "conflicts of interest" addressed in the Court's Rule are close familial or household attachments with members of Congress or the General Assembly, attachments which our nominees do not have. Va. Redistricting Rule 5. Any additional requirements are ones that the Democrats have pulled out of thin air. Claiming that our nominees "cannot lawfully serve" on the basis of such fictional preconditions is not only offensive, it is incorrect. Saslaw Letter at 1.

It is also unclear why Sen. Saslaw believes that we somehow concealed our nominees' political experience in our November 1<sup>st</sup> letter. In fact, we expressly mentioned it in the biographies of each of our three nominees. Mr. Bryan has provided litigation support to Republican clients, but he has also worked for Democrats—no different than the Democrats' nominees who have served as expert witnesses for both sides in different litigation. Mr. Kincaid is one of the top Republican experts on redistricting in the country, so experienced that he is leading the party's entire effort this year. And Mr. Foltz has extensive experience both designing maps and defending them against legal challenges in two states that are just as politically competitive as Virginia. It is perplexing that Sen. Saslaw claims this kind of relevant experience "undermines public confidence" in the process, given that the two special masters ultimately selected are likely to be publicly identified with the party leaders that nominated them no matter the depth of their partisan work experience. Saslaw Letter at 1. Any of the Republican nominees could do the job required of special masters, and all of them understand that they would need to perform their new role in a nonpartisan manner in accordance with law.

Indeed, as Sen. Saslaw correctly points out, it is now *illegal* in Virginia to create maps that are partisan gerrymanders—no matter whether the body drawing those maps is the Commission, the Court-appointed special masters, or the Court itself. Section 24.2-304.04 of the Virginia Code requires that the final maps "shall not, when considered on a statewide basis, unduly favor or disfavor any political party." The personal political affiliations of the respective special masters are therefore irrelevant, because they are *bound by law* to draw nonpartisan maps. There is no reason to believe that any of the six individuals nominated would fail to uphold their legal obligation to abjure partisan maps.


Furthermore, the special masters selected by the Court—whoever those individuals might ultimately be—will not have unilateral control over the outcome of this process. Instead, they will have to work together pursuant to Virginia law and this Court's Rules to devise compromise plans for the Court's consideration. Hence, no matter which two special masters are chosen, the Court will still exercise the final authority over which plan is adopted. The Court's role as final arbiter is what should

give every member of the public confidence in the integrity of this process. We are confident that both special masters will be cognizant of the fact that they answer to this Court and, by extension, the people of Virginia, and design their proposals accordingly.

Certainly, we are not pleased with the Democrats' nominees for special master either, given that two of them have previously devised redistricting plans in Pennsylvania, North Carolina, Virginia and Arizona that overwhelmingly favored Democrats. Nevertheless, we understand that we do not exercise veto power over their nominees and so we have not attempted to disqualify any of them. We trust this Court will select the special masters who are best suited to assist it in this endeavor, and the Democrats ought to share that faith in the process laid out in Virginia law.

This Court has not articulated any standard that would preclude any of our three nominees from serving as special master, and it should reject this attempt by Senate Democrats to make one up. We look forward to learning which of the qualified individuals nominated by both sides will have the honor of working with this Court to devise maps that represent all Virginians.

Sincerely,

  
Senator Tommy Norment

  
Delegate Todd Gilbert