No. 86976-6

SUPREME COURT OF THE STATE OF WASHINGTON

In re 2012 WASHINGTON STATE REDISTRICTING PLAN

John Milem, Petitioner

BRIEF OF PETITIONER IN RESPONSE TO STATE'S OPENING BRIEF DIRECTED TO INTERIM USE OF REDISTRICTING PLAN

John Milem, *pro se*
1600 NE 125th Ave
Vancouver, Washington 98684
milemjohn@comcast.net
360.909.7592
360.828.5592

TABLE OF CONTENTS

Page

APPENDIX

TABLE OF AUTHORITIES

Page

Constitutional Provisions

Statutes

INTRODUCTION

The State has done a great disservice to the Court and to the voters by encouraging a cumbersome and unnecessarily lengthy process based largely on two issues, the supposed complexity of constitutional litigation and the overstated difficulties of drawing new precinct lines to comply with a new plan.

THIS MATTER IS BEING UNNECESSARILY DELAYED.

"Justice in all cases shall be administered openly, and without unnecessary delay." Const., art. I, sec. 10. As Petitioner has shown previously, courts in other states have handled similar challenges to redistricting plans expeditiously, resulting in court orders in two weeks or less striking down plans for violations of governing laws imposing limits on dividing political subdivisions. Brief of Petitioner on Interim Plan ("Petitioner's Interim Plan Brief"), pp. 4-6.

The current process involves unnecessary delay in direct contravention to the statutory provision that the Court give challenges under RCW 44.05.130 precedence over all other matters. Petitioner urges

the Court to move immediately to the merits of the case.

IT IS TIMELY FOR THE COURT TO STRIKE DOWN THE PLAN ON CONSTITUTIONAL GROUNDS AND TO ORDER A PLAN TO GOVERN THE 2012 ELECTIONS.

Petitioner presented in his submission on February 13, 2012, a process by which this matter could have been resolved by March 1, 2012. Letter of John Milem to Ronald R. Carpenter (February 13, 2012). The State recommended that the Court adopt a cart-before-the-horse process to prevent the Court from reaching the merits until too late to do anything about the Plan in time for the 2012 elections. Letter of Attorney General to Ronald R. Carpenter (February 15, 2012). The State now argues that because March 1 has passed it is no longer possible to adopt a new plan without interfering with orderly and efficient administration of the 2012 elections. State's Opening Brief, pp. 11, 14.

The State has furnished nothing but generalizations and statements based upon unstated assumptions in support of its assertions.

The closest the State has come to actually giving some data in

support of its assertion regarding the work to be done is contained in paragraph 4 of the Declaration of Sherril Huff (February 27, 2012). This indicates that 106 King County precincts are divided by district boundaries in the Plan.

Petitioner's recommended plan divides only 75 King County precincts. In only 31 of these precincts will new precinct boundaries have to be drawn dividing the populations of these precincts between districts in the recommended plan. *See* Appendix 1.

Petitioner believes that it is possible for the King County Elections Department to draw new boundaries for these 31 precincts in time to avoid disruption of the 2012 elections. The amount of work which would be involved in adjusting precinct boundaries to accommodate the plan offered by Petitioner is not so daunting as the State wishes the Court to believe.

The Plan divides 20 of the State's 39 counties between congressional or legislative districts or both. Petitioner's recommended plan divides only 11. Therefore, nine counties which are required to accommodate congressional or legislative boundaries or both under the Plan will not have to be concerned about this under Petitioner's

recommended plan, since those counties are undivided in that plan. An additional three counties divided between congressional districts are undivided by a congressional district boundary in Petitioner's recommended plan. In these twelve counties, any workload in drawing new precinct boundaries would either be completely removed by the adoption of Petitioner's recommended plan or would be reduced. As the case of King County shows, the amount of work in that county would also be reduced.

In summary, because of the simplicity of the boundaries drawn by Petitioner, it is still possible for the Court to order a new plan without risk of disruption of the 2012 elections. Even if there should be some inconvenience in the process, this is a small price other states have been willing to pay to avoid holding elections under plans determined to be unconstitutional.

Petitioner urges the Court to give as much credit to the State's arguments as they are due, very little.

The State continues to raise side issues with little or no relevance to the merits of this matter, presumably seeking to distract attention and

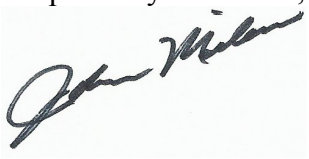
delay resolution of this matter. Petitioner does not wish to dignify this tactic by responding to these points in the body of this brief. On the other hand, should any of these side issues seem to the Court to have relevant merit, Petitioner does not wish to leave an impression that he agrees with points which he chooses not to address here. Thus, Petitioner has included in Appendix 2 to this brief his comments on numerous collateral matters, matters which Petitioner believes the Court should disregard.

CONCLUSION

Petitioner urges the Court to move to the merits of this matter expeditiously. If the Court should continue to believe that, in spite of the language of RCW 44.05.130, it is the Court's place to first decide what plan to use for the 2012 elections, Petitioner urges the Court to adopt the plan recommended by Petitioner.

DATED this eighth day of March, 2012.

Respectfully submitted,



John Milem
Petitioner, *pro se*

APPENDIX 1

REDRAWING OF KING COUNTY PRECINCTS

The declaration of Sherril Huff, King County Elections Director, includes the following statement: "Timely preparation of new precinct boundaries for use in the 2012 election is unrealistic if a new redistricting plan with substantive changes is delivered after March 1, 2012." Declaration of Sherril Huff, pp. 2-3.

The Declarant fails to provide the assumptions about the volume of changes in a replacement plan to support her conclusion.

The declaration contains in paragraph 4, the following statement: "Congressional and legislative redistricting result in numerous changes to precinct boundaries in King County. In King County, 106 precincts were split by the new congressional and legislative district boundaries . . . ." *Id*, p. 2.

In response to the State's filing, Petitioner requested from the State the list of the 106 precincts mentioned in paragraph 4 of the Declaration. Petitioner was not furnished this list. Instead, Petitioner was given a spreadsheet of the precincts with a coding. It was explained to Petitioner that the code S referred to a precinct split by one or more district boundaries in the Plan. In addition, Petitioner downloaded from the King County GIS site an electronic file of King County precincts (with a last data refresh date of December 21, 2011).

The assertion in the Declaration was that 106 precincts were divided in the Plan. Petitioner found that 98 precincts were coded as split in the spreadsheet. Petitioner's examination of the map of the downloaded electronic precinct file showed 102 precincts which he was able to identify as split by the Plan's district boundaries. Without further information, Petitioner is unable to reconcile these three numbers.

Petitioner has made a similar examination of the plan offered to the Court in response to its request for a recommendation of an interim plan.

Petitioner's proposed plan splits 75 precincts in King County, about 3% of the precincts in the County.

Of these precincts, five are divided along a boundary which is identical to a precinct-splitting boundary in the Plan. Therefore, as to these five precincts, Petitioner's proposed plan requires no work in drawing new precinct boundaries additional to what the Plan already requires.

Three additional precincts are presently composed of non-contiguous parts. A district boundary in Petitioner's proposed plan runs between non-contiguous parts of these precincts, requiring that they be placed in separate precincts. However, there is no new boundary to be drawn within these non-contiguous precincts. Each of their parts already has its full boundary. Petitioner's plan requires no new precinct-boundary drawing with respect to these three precincts.

With respect to 24 additional precincts, the district boundaries which divide these precincts are

school district boundaries. Although these have not been precinct boundaries, they function as such in school district elections. These are not new boundaries to the King County Elections Department. They routinely use these boundaries within precincts which contain parts of more than one school district. It seems reasonable to Petitioner to believe that no additional precinct-boundary drawing is required when the boundaries are already in use by the County Elections Department.

With respect to three precincts, areas were annexed to a city after the census and these areas have been added to precincts already in the city. Due to the limitation of drawing boundaries in accordance with census geography, it is not possible to draw district boundaries along the new boundaries of these cities. The district boundaries proposed to divide these precincts are simply the previously-existing boundaries of these precincts. Restoring them should not unduly burden elections administrators. Petitioner understands that some states require that precinct boundaries be locked from the date that precinct boundaries are finalized for the census to the completion of redistricting. (Additional precinct boundaries could, of course, be created in such cases as annexations, but during the freeze period no precinct would be allowed to cross a frozen boundary.) If Washington had such a law, or if election administrators voluntarily followed this desirable practice, the issue with this group of precincts would not exist.

With respect to eight additional precincts, the division of the precinct is for the purpose of simplifying the precinct boundary and involves no population in the area separated from the precinct. For example, I-5 is generally in use in north Seattle as a precinct boundary. However, from NE 125th Street to the north boundary of the city, the boundary shifts from I-5 to NE 5th Avenue. No one lives between the freeway and the avenue according to the census. I-5 is certainly a more significant "artificial barrier" (Const., Art. II, sec.43(5)) than is NE 5th Avenue.

Provan precinct is split among three districts. One of the splits is a zero population split of the variety mentioned in the preceding paragraph. The other is a split along a school district boundary which is already in use as an election boundary.

In summary, for five precincts, the boundary change (proposed by Petitioner's recommended plan) is already required by the Plan. For 30 precincts, the proposed boundary is already in election use. For nine precincts, slight boundary adjustments affecting no population are required.

This leaves 31 precincts of the 75 for which new boundaries must be drawn in a county with over 2500 precincts and 30% of the population of the State. Most of these new boundaries are to be drawn following interstate or state highways or major local streets. They are not intricate, complex boundaries.

Because of the simplicity of the boundaries drawn by Petitioner, it is still possible for the Court to order a new plan without risk of disruption of the 2012 elections.

LIST OF KING COUNTY PRECINCTS SPLIT BY PETITIONER'S RECOMMENDED PLAN

Group one. Precincts split along boundaries already shown in the Plan.

5 Farley, Marymoor, Pipeline, Sno Pass, Stevens.

Group two. Precincts composed of non-contiguous parts.

3 RED 45-2659, SNQ 05-1097, White River.

Group three. Precincts divided only along school district boundaries.

24 Brinn, Cedar Park, Cedar River, Cleveland, Daniel, Fairhaven, Falcon, Hobart, Hutchinson, Lake Alice, Lake Youngs, Little Soos, Meander, Neuwaukum, Preston, RNT 41-2583, RNT 41-3287, RNT 41-3404, RNT 41-3564, RNT 41-3609, Rattlesnake, Riverside, Salal, Valencia.

Group four. Precincts divided only along former municipal boundary.

3 RNT 11-0031, RNT 11-3222, SNQ 05-3513.

Group five. Precincts divided with no population in area removed from precinct.

8 RNT 41-3162, SEA 34-1413, SEA 34-1455, SEA 37-2685, SEA 46-2361, SEA 46-2363, SEA 46-2364, SEA 46-2366.

Group six. Precinct divided both as group three and as group four.

1 Provan.

Group seven. Precincts within which new boundaries must be drawn resulting in division of the population of each precinct.

31 BEL 41-0102, BEL 41-2719, CherryValley, Hill, Horseshoe, Middle Fork, Novelty, RNT 11-0980, RNT 11-1004, Ramona, SEA 34-1484, SEA 34-1486, SEA 34-1488, SEA 34-3175, SEA 37-1879, SEA 37-1880, SEA 37-1883, SEA 37-1899, SEA 37-1901, SEA 37-1902, SEA 37-1906, SEA 37-3573, SEA 43-1264, SEA 43-1275, SEA 43-1277, SEA 43-1278, Sean, Sno-Valley, Tolt, Twin Peaks, Wintergreen.

The following page shows for each precinct in groups five through seven, the feature along which the precinct is divided.

Dividing Feature	Precinct(s)
I-90	Middle Fork, Ramona, Sean
SR 202, SR 203 or both	Cherry Valley, Horseshoe, Novelty, Sno-Valley, Tolt, Twin Peaks
Bear Creek	Hill
Avondale Rd NE, Redmond	Provan, Wintergreen
I-5	SEA 46-2361, SEA 46-2363, SEA 46-2364, SEA 46-2366
NE 65th St, Seattle	SEA 43-1278, SEA 43-1277
Meridian Ave N, Seattle	SEA 43-1275
Wallingford Ave N, Seattle	SEA 43-1264
E Cherry St or 30th Ave, Seattle or both	SEA 37-1879, SEA 37-1880, SEA 37-1883, SEA 37-1899, SEA 37-1901, SEA 37-1902, SEA 37-1906, SEA 37-3573
Yesler Way, Seattle	SEA 37-2685
Unidentified block boundary	SEA 34-1413
35th Ave SW, Seattle	SEA 34-1455, SEA 34-1484, SEA 34-3175
SW Myrtle St, Seattle	SEA 34-1486
Sylvan Way SW, Seattle	SEA 34-1488
Cedar River	RNT 41-3162
NE 12th St, Renton	RNT 11-1004, RNT 11-0980
Somerset Blvd SE, Bellevue	BEL 41-0102, BEL 41-2719

APPENDIX 2

COLLATERAL ISSUES

THE COMMISSION DID NOT ACT IN ACCORDANCE WITH THE CONSTITUTION.

The State asserts that: "The Commission acted pursuant to the procedure set forth in article II, sec. 43 of the Washington Constitution and its implementing statutes . . . ." State's Opening Brief, p. 1.

Petitioner asserts that the Commission failed to act in accordance with the "standards to govern the Commission." Const., art. II, sec. 43(4).

THE LEGISLATURE DID NOT ADOPT OR APPROVE THE PLAN.

The State asserts that: "The Legislature . . . adopted the Plan." State's Opening Brief, p. 1, 19. The State also asserts that the Legislature "approved the Plan". *Id*., pp. 8, 10.

Petitioner asserts that the Legislature has no authority to "adopt" the Plan. That authority is limited to the Commission. The authority of the Legislature is to make limited amendments to the Plan, affecting no more than 2% of the population of any district. RCW 44.05.100(2). The vote of the Legislature to amend the plan was not a vote to adopt it or to approve it. Once the Plan was adopted by the Commission, it would become the law of the State, subject to the limited amendments the Legislature would pass. Thus, the choice of the Legislature was not whether to adopt or approve the plan, but rather whether the Legislature thought it better to have the plan adopted by the Commission with or without the amendment. With one small exception affecting four persons in Okanogan County, it is Petitioner's understanding that the amendment to the plan was approved by the Commission and that the Commission requested that the amendment be adopted to correct technical deficiencies in the Plan. Given this sponsorship of the amendment by the Commission, it is understandable that the Legislature would conclude that the State would be better served by the amended Plan than by the unamended Plan. The Legislature amended the Plan; it did not adopt or approve the Plan.

THE PLAN IS ENTITLED TO A REBUTTABLE PRESUMPTION OF VALIDITY.

The State asserts: "This law [referring to the Plan] is entitled to a presumption of validity." State's Opening Brief, p. 2, also p. 8.

Petitioner concurs and recognizes that Petitioner must carry the burden of proof at the beginning of this proceeding.

The State asserts: "The interim use of Petitioner's proposed maps, rather than the Plan . . ., would effectively destroy the presumption of the Plan's validity." State's Opening Brief, p. 19.

Petitioner disagrees. This entire issue is the result of the substitution by the State of a procedure different from the procedure set out in the Redistricting Act. RCW 44.05.100, .130. There is no need for an interim plan until the Court has issued an order setting aside the Plan. Until that happens, it is the law of the State. The State appears to be arguing indirectly that the presumption of validity is irrebuttable. If the presumption of validity were irrebuttable, why would there be a provision in the law

for challenge? RCW 44.05.130. The presumption is rebuttable. The Legislature knows how to write an irrebuttable presumption. "Any such plan approved by the Court is final . . . and constitutes . . . law applicable to this state . . . ." RCW 44.05.100(4).

THE VOTERS INTENDED TO RADICALLY ALTER THE REDISTRICTING PROCESS.

The State asserts: "In 1983 the voters of Washington radically altered the redistricting process." State's Opening Brief, p. 2.

Petitioner asserts that in 1983 the voters of Washington intended to radically alter the redistricting process. Unfortunately, their effort to alter the process was successful only in getting the process out of the Legislature, but not in changing the dynamics of the process itself. It is a truism that it is not enough to pass a law; the law must also be enforced. This the reformers who pressed for adoption of the law did not do. When the 1991 Commission ignored the "standards to govern the Commission" the reformers should have filed a challenge under RCW 44.05.130. Had they done so, the case before this Court would have been resolved 20 years ago, and it is unlikely that this matter would be before the Court today. In the absence of enforcement, the voters of Washington have not received the benefit of their votes in 1983. The procedures for redistricting have been changed, but the guiding principles of redistricting in Washington have continued unimpaired by the "standards to govern the Commission." Const., art. II, sec. 43(4). In short, on three occasions of the operation of this process, the "standards to govern the Commission" have been ignored.

Petitioner asks the Court to uphold the language of the Constitution and the Redistricting Act and strike down the Plan as a violation of the State Constitution and the State Redistricting Act.

BECAUSE THE PLAN CONSTITUTES STATE DISTRICTING LAW, NO ORDER OF THE COURT IS NECESSARY FOR THE 2012 ELECTIONS TO BE CONDUCTED UNDER IT.

The State asserts: "This Court should enter an order providing for the Plan to govern the 2012 elections because the Plan constitutes the State Districting Law." State's Opening Brief, p. 7.

Petitioner asserts that it is unnecessary for the Court to enter such an order because, unless the Court orders that the Plan be struck down as requested by the Petitioner, the Plan is the law of the State, and the order of this Court to that effect is entirely unnecessary. The State, having encouraged the Court to depart from the statutory procedure for dealing with this challenge has put the cart before the horse and is seeking to get the Court to commit to the Plan, even if only for the 2012 elections, as its opening gambit in seeking to defeat the claim of Petitioner that the Plan violates the State Constitution and the State Redistricting Act.

The filing of the challenge does not justify the setting aside of the usual procedures with regard to the validity and effectiveness of a law of the State. The State has created the problem it is seeking to solve. It has encouraged the Court to set aside the provisions of the Redistricting Act relating to this challenge and to adopt a different procedure and a different time frame from that contemplated in the plain language of the Act. RCW 44.05.100, .130.

LIMITS PLACED ON FEDERAL COURTS BY THE U S SUPREME COURT DO NOT PREVENT COMPLIANCE BY THIS COURT WITH THE STATE CONSTITUTION.

The State asserts: "Earlier this year, the United States Supreme Court emphasized that courts deciding upon interim redistricting plans pending litigation 'should take guidance from the State's recently enacted plan.' *Perry v. Perez*, ___ U.S. ___, 132 S.Ct. 934, 941, ___ L. Ed. 2nd ___ (Jan. 20, 2012). Doing so avoids putting the Court into the position of 'being compelled to make [an] otherwise standardless decision[],' . . . ." State's Opening Brief, p. 9.

Petitioner asserts that *Perry v. Perez* is entirely inapposite to the case before this Court. The circumstances of that case are quite complex and entirely outside the scope of the circumstances in the case presently before this Court. Should the Court indicate that it is important to do so, Petitioner will be glad to support his claim of inappositeness.

The State cites another case in the federal system for the proposition that "regulatory action" is necessary to avert "the danger of chaos in the electoral process." State's Opening Brief, p. 16. This is cited as supposedly supporting the assertion of the State that: ". . . disruption and confusion, for elections administrators, candidates, and the electorate alike, would result if the Plan were abruptly replaced with some other set of district or precinct boundaries." *Id.*

Petitioner offers the relevant context for the words the State extracted from the case and finds no connection whatsoever between the assertion of the State regarding a new plan and the absence of state regulation of elections which could lead to chaos.

". . . there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes. In any event, the States have evolved comprehensive, and in many respects complex, election codes regulating in most substantial ways, with respect to both federal and state elections, the time, place, and manner of holding primary and general elections, the registration and qualifications of voters, and the selection and qualification of candidates." *Storer v Brown*, 415 U.S. 724, 730, 94 S. Ct. 1274, 39 L. Ed. 2d 714 (1974).

THE 2002 REDISTRICTING PLAN SHOULD NOT BE USED FOR THE 2012 ELECTIONS.

The State asserts that the 2002 Redistricting Plan should not be used for the 2012 elections. State's Opening Brief, p.16-18.

Petitioner agrees with the State. The 2002 Redistricting Plan should not be used for the reasons stated by the State. In addition, the 2002 Redistricting Plan should not be used because it failed to comply with governing law in 2002. It has the very same flaws as the 2012 Plan, though with differences in the details.

IF PETITIONER'S PLAN WAS REJECTED BY THE COMMISSION, THIS WAS DONE IN VIOLATION OF THE STATE'S OPEN PUBLIC MEETINGS ACT.

The State asserts that: "Petitioner's plans were rejected by the Redistricting Commission and are not a viable alternative to the Plan." State's Opening Brief, p.18.

The Commission is subject to the Open Public Meetings Act. RCW 44.05.080(4). At no time

did the plans submitted by Petitioner or by anyone else who submitted plans to the Commission come before the Commission in a public meeting for any discussion, let alone decision. If the Commission rejected any plans submitted by members of the public, it was done in violation of the Open Meetings Act.

THE COMMISSION ABUSED ITS DISCRETION.

The State asserts: "The use of Petitioner's plans would disregard the discretion placed in the Commission and the Legislature, and the decisions that the Commission and Legislature made following months of public input, in favor of the preferred alternative of one individual." State's Opening Brief, p.19.

Until specifically requested by the Court, Petitioner did not ask for adoption of any of his plans. Petitioner recommended that the Court deal with the substance of the case and then, if it struck down the Plan, that it have a review made of all offered plans to determine which should be considered by the Court. The Court did not take up this suggestion. The Court asked Petitioner to recommend an interim plan. Petitioner responded to the request of the Court with a plan which Petitioner believes satisfies governing standards to a far greater degree than the Plan. The argument of the State seems to Petitioner to be that the "standards to govern the Commission" are not intended to restrict the discretion of the Commission. Petitioner denies that, in its discretion, the Commission can ignore the "standards to govern the Commission." Such an interpretation violates art. I, sec 29 of the state Constitution: "The provisions of this Constitution are mandatory, unless by express words they are declared to be otherwise."

The "standards to govern the Commission" are intended to limit the discretion of the Commission. At the second public forum in Olympia on May 18, Petitioner specifically requested that the Commission make a statement regarding the extent of its discretion under the Constitution and the Act. As far as Petitioner knows, this request was given no more consideration than the redistricting plans Petitioner submitted.

THE ISSUE IN THIS CASE IS WHETHER THE PLAN COMPLIES WITH THE STATE CONSTITUTION, NOT THE STATE'S INTERPRETATIONS OF HOW PETITIONER DOES REDISTRICTING WORK, INFORMATION WHICH PETITIONER FURNISHED IN COMPLIANCE WITH A COMMISSION RULE.

The State asserts: ". . . the law provides the Commission with wide latitude to determine how the criteria should be applied given the particular circumstances. However, Petitioner's plans apparently are based on a different, ordered hierarchy that is not found in state law but rather seemingly represents his own individual conception of how redistricting should occur. These policy preferences of an individual should not take preference over an official state redistricting plan that was the product of months of public input and deliberation . . . ." State's Opening Brief, pp. 20-21.

Petitioner fully agrees with the State that the policy preferences of an individual should not take precedence over official action.

Petitioner disputes the State's characterization of how he goes about drawing plans. Petitioner is making no assertion that how he does it is how it "should" be done. Petitioner is complying with the

Commission's own rules: "The Commission is required to adhere to the constitutional and statutory requirements applicable to redistricting plans. Therefore, any plan submitted to the Commission must also adhere to the requirements applicable to Commission plans, in art. 2, sec. 43 of the Constitution of the state of Washington and RCW 44.05.090." WAC 417-06-120. "Individuals and groups submitting formal plans shall supplement their paper map or electronic submissions with the following information: . . . a narrative explanation of the plan's compliance with the constitutional and statutory requirements identified in WAC 417-06-120; and a description of the original source materials and data used for the submission. They may also include with the formal plan such other supporting materials and data as they deem appropriate." WAC 417-06-130(2).

The issue in this case is not the order of the thought process of Petitioner when he draws maps but whether the Commission complied with or ignored the "standards to govern the Commission", both the substantive ones relating to the substance of the plans and the procedural one regarding explaining the criteria actually used in preparing the Plan.

It is ironic that the State does not mount a defense of the Plan but instead attacks Petitioner by using material of a kind the Act calls for the Commission to supply and that "therefore" Petitioner is also required to supply.

Petitioner urges the Court to recognize that whatever the State may think about Petitioner's process is not relevant. The question for the Court is whether the work of Petitioner shows that the work of the Commission fails to satisfy constitutional standards.

Petitioner urges the Court to find that the Plan is not in compliance with "standards to govern the Commission."