STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL
A11-152

Sara Hippert, Dave Greer, Linda Markowitz, Dee Dee Larson, Ben Maas, Gregg Peppin, Randy Penrod and Charles Roulet, individually and on behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs,

Kenneth Martin, Lynn Wilson, Timothy O'Brien, Irene Peralez, Josie Johnson, Jane Krentz, Mark Altenburg, and Debra Hasskamp, individually and on behalf of all citizens of Minnesota similarly situated,

Plaintiff-Intervenors,

Audrey Britton, David Bly, Cary Coop, and John McIntosh, individually and on behalf of all citizens of Minnesota similarly situated,

Plaintiff-Intervenors,

vs.

Mark Ritchie, Secretary of State of Minnesota; and Robert Hiivala, Wright County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants.

STATEMENT OF UNRESOLVED ISSUES OF PLAINTIFF-INTERVENORS BRITTON, ET AL.

The following issues, which are important to the resolution of this case, have not been agreed to by the parties:

1. The first "open" issue is whether or not the current legislative and congressional districts are unconstitutional or not. The *Britton, et al.* Plaintiffs strongly urge that they are unconstitutional because they violate the one person, one vote rule of *Reynolds v. Sims*, 377 U.S. 533(1964). Not surprisingly, Defendant Ritchie contends that

they are not unconstitutional or, in the alternative, the issue should be ignored until November 2012 because no general election is imminent.

Britton, et al. request a judicial determination on this issue and specifically request an Order granting them a Summary Judgment that the districts created by the Redistricting Panel in *Zachman v. Kiffmeyer*, Civil File No. CO-01-160 (Dec. 11, 2011 Order), are now unconstitutional and may not be used for any purpose without further order of this Panel.

The Secretary of State seems to take the position that he agrees that the current districts (legislative and congressional) do not have equal population as required by the Constitutions of the United States and Minnesota.[1] However, he argues that because no general election is scheduled to be held until November 2012, there is no constitutional violation.

That argument has no basis in fact or law. The issue is: are unequal districts unconstitutional or not? If they are unconstitutional, relief in the form of a declaratory judgment should be entered now. The issue that the Secretary of State raises is one of when relief should be ordered. While the Britton Plaintiffs also disagree with the Defendant on the issue of timing of the remedial plans,[2] the current issue that is raised but not agreed to by Defendant Ritchie, i.e., the present constitutionality of the current

[1] Indeed, he so stipulates.

[2] Despite his argument that there is no constitutional violation until November 2012, the Secretary has also stipulated that final new district plans should be completed by February 21, 2012, a confusing and inconsistent position.

districts, is one that is ripe for decision now. If it is not ripe, why is this Panel and the parties spending all their time working on proposed relief?

If the Panel does not believe that the issue is ripe for adjudication despite the Stipulation of unequal population and despite the undisputed data, the matter should be set for a trial very soon on "liability" i.e., the current unconstitutionality of the *Zachman v. Kiffmeyer* districts. Why wait?

2. Permissible deviations from ideal population for the plans to be submitted by the parties for new Minnesota legislative districts.

The parties' respective positions are:

Hippert, et al. urge a plus (+) or minus (-) 1% allowable maximum.

Martin, et al. argue for a "*de minimis*" deviation.

Britton, et al. agree to the "*de minimis*" standard but with a maximum permissible deviation of plus (+) or minus (-) 0.5% (1/2%).

Defendant takes no position with regard to permissible legislative plan deviation.

Thus, all parties agree that the plus (+) or minus (-) 2% deviation used by the Minnesota Courts in the four (4) prior redistricting cases should be modified. Deviations as large as plus (+) or minus (-) 2% can no longer be justified on technical grounds. Modern high speed computers can easily generate several different plans with much smaller deviations. As noted by the Court in *Larios v. Cox*, 300 F.Supp. 2d 1320, 1324 (N.D. Ga. 2004) affirmed 542 U.S. 947, 124 S.Ct. 2806 (2004).

> Both houses of the General Assembly used Maptitude software to draw their redistricting plans. With the available technology and the use of this software, redistricting plans in 2001 could have been created with a deviation of 0 to 1 persons. The combination of technology and political data available to legislators

> and plan drafters also allowed for sophisticated analyses of political performance, so that maps could be drawn and then immediately analyzed politically. Thus, in drafting and considering their proposed maps, members of both houses relied on political performance projections, indicating the percentage of votes Democrats and Republicans would likely receive in future elections based upon an assessment of past election results. 300 F.Supp.2d 1320, 1324.

If both houses of the Georgia General Assembly could have had districts created with a deviation of 0-1 persons, so, too, could Minnesota.

The *Larios* Court recognized, as Plaintiff-Intervenors ask this Panel to recognize:

> The Constitution of the United States requires that congressional and state legislative seats be apportioned equally, so as to ensure that the constitutionally guaranteed right of suffrage is not denied by debasement or dilution of the weight of a citizen's vote. *Larios v. Cox, supra*, 300 F.Supp.2d at 1337 citing *Reynolds v. Sims*, 377 U.S. 533, 555, 568, 84 S.Ct. 1362, 1378, 1385.

Since the technology is possible, the burden passes to a plan's proposer to prove that <u>any</u> particular deviation is necessary in order to accomplish some other, more pressing standard. Where population deviations are not supported by other, higher priority, legitimate interests, but, rather are tainted by arbitrariness, they cannot withstand constitutional scrutiny. *Larios v. Cox*, *supra*, at 300 F.Supp. 2d 1320 at 1338, citing *Roman v. Sincock*, 377 U.S. 695, 710, 84 S.Ct. 1449, 1458 (1964).

It is the position of Plaintiffs *Britton, et al.* that while a permissible deviation of zero might be ideal and is theoretically possible, the parties to the litigation and anyone else who submits a proposed legislative redistricting plan should be on notice of some permissible deviation which, if exceeded, would require strong justification, by evidence or on legal grounds of the reason.

A .5% (1/2%) deviation as suggested by *Britton, et al.,* would not be a "safe harbor," but would be the point at which evidence or legal reason justifying such deviation would be required. That number is suggested because it is easy to meet and because it generally reflects the deviation actually achieved by the 2001 Minnesota Special Redistricting Panel. Furthermore, it is much closer to "*de minimis*" than is 1% or 2% without requiring needless division of communities of interest or political subdivisions.

3. The third unresolved issue that is important to Plaintiffs *Britton, et al.* and that has not been agreed upon is the question of use of "compactness" as a criterion. The *Britton, et al.* Plaintiffs oppose this artificial criterion for the following reasons:

a. "Compactness" is not a constitutionally mandated criterion.

b. "Compactness" is not a legally sound criterion.

c. "Compactness" is not a useful tool. It is hazy, vague and ill defined.

d. Pick your favorite measure – there are very many different measures.

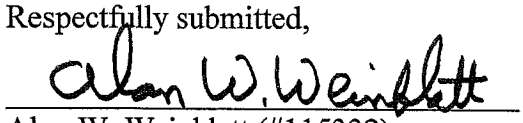
e. It is not a neutral factor. It strongly favors Republicans.

f. It is not a meaningful or objective measure. It determines nothing.

g. "Compactness" is not required by Minnesota Law.

Respectfully submitted,

Dated: September 28, 2011



Alan W. Weinblatt (#115332)
Jay Benanav (#0006518)
Jane L. Prince (#0388669)
WEINBLATT & GAYLORD, PLC
111 East Kellogg Boulevard, Suite 300
St. Paul, MN 55101
Attorneys for Plaintiff-Intervenors Britton, et al.