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,

Petitioners,

and

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,

Respondents.

STATEMENT OF SECRETARY OF STATE OF MINNESOTA MARK RITCHIE REGARDING UNRESOLVED ISSUE OF CONSITUTIONALITY OF CURRENT DISTRICTS

The Panel's Scheduling Order No. 1 identified, *inter alia*, the following issue: "Whether the current districts are unconstitutionally flawed in light of the 2010 census." While this specific issue is unresolved, the parties have stipulated that the plans ordered by the *Zachman v. Kiffmeyer* panel are "unequally apportioned" based on the 2010 Census, and therefore need to be changed "to reflect the 2010 Census" for purposes of Minnesota's 2012 legislative and congressional elections. (See Stipulation, p. 2.) Secretary of State Mark Ritchie submits this Statement to address the specific unresolved issue of whether the current districts, which will not be used for the 2012 regular State elections, are "unconstitutionally flawed."

I. THE CURRENT DISTRICTS ARE NOT "UNCONSTITUTIONALLY FLAWED" IN LIGHT OF THE 2010 CENSUS.

Consistent with U.S. Supreme Court, Minnesota Supreme Court and Minnesota federal district court authority, the current districts are not "unconstitutional" since they will not be used for the 2012 regular State elections. *See, e.g., Reynolds v. Sims*, 377 U.S. 533, 583, 585 (1964); *Kahn v. Griffin*, 701 N.W.2d 815 (Minn. 2005); *Kahn v. Griffin*, 2004 WL 1635846 (D. Minn. 2004). Instead, the Panel should simply conclude, consistent with the parties' Stipulation, that the current districts must be redrawn for use commencing with the 2012 regular State elections.

The Minnesota Constitution gives the legislature the power of reapportionment after each Census enumeration. Minn. Const. art. IV, § 3. The Minnesota Constitution also provides that "there shall be an entire new election of all the senators at the first election of representatives after each new legislative apportionment provided for in this

article." Minn. Const. art. IV, § 4. Minnesota Statutes provide for the reapportionment process to be completed no later than 25 weeks before State primary elections. Minn. Stat. § 204B.14, subd. 1a (2010).

Read together, these provisions clearly contemplate redistricting every ten years for use in the next regular State election after a redistricting plan is adopted, here, the 2012 legislative and congressional elections. *See, e.g., Reynolds*, 377 U.S. at 583, 585 ("Decennial reapportionment appears to be a rational approach to readjustment of legislative representation in order to take into account population shifts and growth . . . although undoubtedly reapportioning no more frequently than every 10 years leads to some imbalance in the population of districts toward the end of the decennial period. . . ."); *Kahn*, 2004 WL 1635846 (finding no federal constitutional violation where city elections using old districts took place after new census data was released, but before *Zachman* redistricting plan was adopted, even though next election would occur four years later); *Kahn*, 701 N.W.2d at 832-833, 835 (same under Minnesota Constitution and reasoning that the "[redistricting] statutes' timelines are designed simply to ensure that redistricting occurs promptly after every decennial census, so that new districts are established in time to be used in *regular elections* taking place in years ending in two.") (emphasis in original).[1]

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[1] *See also French v. Boner*, 963 F.2d 890 (6th Cir. 1992) (finding city was not constitutionally required to re-run elections held just after new decennial census data became available, but before old apportionment plan could be changed); *Political Action Conf. of Illinois v. Daley*, 976 F.2d 335 (7th Cir. 1992) (finding no constitutional violation even though, because of length of terms of office, there would be a four-year
(footnote continued on next page)

This Panel's process fulfills these constitutional requirements. *See Timothy D. Utz Amicus Curiae Order*, A11-152, dated Sept. 12, 2011 ("If the Legislature and the Governor do not reach a timely agreement on redistricting, it is the role of the judicial branch to prepare and order the adoption of valid redistricting plans so that constitutional and statutory requirements are fulfilled.") Through this Panel's process, the current districts will be revised within ten years after their adoption by the *Zachman* panel in 2002, and new districts drawn in light of the 2010 Census data will be used commencing with the 2012 regular State elections. As a result, there is no constitutional violation.

II. AN UNNECESSARY FINDING THAT THE CURRENT DISTRICTS ARE UNCONSTITUTIONAL MAY ADVERSELY AND UNCONSTITUTIONALLY AFFECT INTERVENING SPECIAL ELECTIONS.

A finding of current unconstitutionality would create the potential for chaos regarding any special elections which occur prior to the 2012 regular State elections.[2] Special elections have and may still occur in particular districts to fulfill the remainder of

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delay between decennial reapportionment and elections using new districts); *Gaona v. Anderson*, 989 F.2d 299 (9th Cir. 1993) (rejecting Voting Rights Act challenge to California's use of old district in special election to fill vacant state senate seat instead of newly created districts).

[2] Petitioners apparently seek a finding that the current districts are "unconstitutionally flawed" so that they may on that basis request an award of attorneys' fees. However, that is not a proper basis to erroneously declare the current districts unconstitutional. In any event, the determination of attorneys' fees is premature and subject to other considerations. *See, e.g., Navajo Nation v. Arizona Indep. Redistricting Comm'n*, 286 F. Supp.2d 1087, 1093-1094 (D. Ariz. 2003) (concluding that where all parties agreed that old districts were unequally apportioned and had to be redrawn for use in 2002 legislative elections, plaintiffs did not prevail on a significant issue entitling them to attorneys' fees award). *See also Farrar v. Hobby*, 506 U.S. 103, 113-114 (1992) (concluding that a "technical victory" did not justify an award of attorneys' fees).

the term of a vacant seat, which was originally filled pursuant to the current districts established by the 2002 *Zachman* Order.

If the Panel finds that the current districts are unconstitutional now, such a finding may lead to arguments that the special election districts must be redrawn. As discussed above, this would be contrary to applicable law. For example, the Minnesota Supreme Court reasoned as follows in *Kahn*:

> [W]e acknowledge that the principles of mathematical equality and majority rule are important considerations when conducting a right-to-vote analysis. But mathematical equality in representation is not required at all times during the census and election cycles and, further, those concerns cannot outweigh all other factors. . . . Requiring rigid mathematical equality at all times would result in a sacrifice of stability and experience due to shorter terms, increase the costs of elections for taxpayers, make it more difficult for citizens of limited means to participate in local elective politics, and undermine the settled expectations that both voters and elected officials hold.

701 N.W.2d at 833 (citations omitted).

Just as importantly, the redrawing of particular districts for use before the regular State elections could itself violate one-person-one-vote principles. *See Wesberry v. Sanders*, 376 U.S. 1, 7-9 (1964). Special elections using new districts could result in the dual representation of some voters, and the disenfranchisement of others. Such a process may lead to a voter having had the opportunity to participate in the election of more than one sitting representative (*i.e.*, the sitting representative of the voter's old district, and the replacement representative in the voter's new, redrawn special election district). On the other hand, some voters will be deprived of the opportunity to participate in the election of a sitting legislator (*i.e.*, a voter who, because of the redrawing of boundaries for the

special election, now lives outside the boundaries of his original district). *See Gaona*, 989 F.2d at 303 ("[M]itigating vote deferral by holding the special election in the new [district] will simply create vote deferral elsewhere.")

For the foregoing reasons, the Panel should not find that the current districts are unconstitutional, but rather, consistent with the parties' Stipulation, that the current districts need to be redrawn pursuant to applicable Minnesota statutes for use commencing with the 2012 regular State elections.

Dated: September 28, 2011

Respectfully submitted,

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