

STATE OF MINNESOTA
IN SUPREME COURT

OFFICE OF
APPELLATE COURTS

MAY 27 2011

A11-152

FILED

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,

**RESPONSE OF MARK RITCHIE,
SECRETARY OF STATE OF
MINNESOTA, TO PLAINTIFFS'
MOTION TO LIFT STAY AND
APPOINT PANEL**

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.

Respondent Mark Ritchie does not challenge the Court's jurisdiction in this matter. However, it is still premature for the Court to lift its stay and appoint a special redistricting panel because the Legislature and Governor must first be given an adequate opportunity to agree to redistricting plans.

On May 19, 2011, the Governor vetoed the legislative and congressional redistricting plans adopted by the Legislature, citing a lack of bipartisan support. *See* Governor's Letters to Speaker of the House Zellers (attached as Exhibits A and B). On May 23, 2011, the Legislature adjourned without passing a biennial budget.

Accordingly, a special session will presumably be called to resolve the State's budget impasse. *See* Minn. Const. art. IV, § 12 (authorizing the Governor to call a

special session); Minn. Const. art. XI, § 6 (requiring a balanced biennial budget). During any special session, the Legislature may have a further opportunity to consider plans for legislative and congressional redistricting. Since the Legislature and Governor may still adopt legislative and congressional redistricting plans, the Court's stay should remain in place so that the judiciary is not drawn prematurely into the redistricting process.¹

CONCLUSION

The Court should deny Plaintiffs' motion to lift stay and appoint panel members.

Dated: May 27, 2011

Respectfully submitted,

LORI SWANSON
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ATTORNEYS FOR RESPONDENT
MARK RITCHIE, SECRETARY OF
STATE OF MINNESOTA

AG: #2826512-v1

¹ Attached hereto as Exhibit C is the Memorandum in Opposition to Motion to Lift Stay that Respondent Ritchie recently filed in *Britton, et al. v. Ritchie, et al.*, Civil File No. 11-CV-93 PJS/AJB.



STATE OF MINNESOTA

Office of Governor Mark Dayton

130 State Capitol ♦ 75 Rev. Dr. Martin Luther King Jr. Boulevard ♦ Saint Paul, MN 55155

May 19, 2011

The Honorable Kurt Zellers
Speaker of the House
463 State Office Building
St. Paul, Minnesota 55155

Dear Speaker Zellers:

I have vetoed and am returning Chapter 35, House File 1425, a bill adopting a legislative districting plan for use in 2012 and thereafter.

In my letter of April 25th to Representative Sarah Anderson, the Chief Author of this bill, I stated that I would not support a plan whose districts were drawn for the purpose of protecting or defeating incumbents. This bill violates that principle. It pairs five DFL senators, but only one Republican senator. It pairs 14 DFL representatives, but only six Republicans. In each pair, one incumbent must either move, not run for re-election, or be defeated. The districts in this bill are too partisan, drawn for the purpose of defeating a disproportionate number of Democrats.

My April 25th letter also made clear that, to earn my approval, the plan must be passed with strong bipartisan support, both in committee and on the floor. This bill was not. After all DFL amendments to the districting principles were defeated, both in committee and on the floor, the map was unveiled and adopted with little opportunity for public analysis and reaction, and the plan received no DFL votes in either the House or the Senate.

Legislative districts must endure for a decade. They must provide fair representation for voters of all political parties. A plan without bipartisan support is one I will not approve.

Sincerely,

A handwritten signature in black ink that reads "Mark Dayton".

Mark Dayton
Governor

cc: Senator Michelle L. Fischbach, President of the Senate
Senator Amy T. Koch, Majority Leader
Senator Thomas M. Bakk, Minority Leader
Senator Geoff Michel
Representative Paul Thissen, Minority Leader
Representative Sarah Anderson
The Honorable Mark Ritchie, Secretary of State
Mr. Cal R. Ludeman, Secretary of the Senate
Mr. Albin A. Mathiowetz, Chief Clerk of the House of Representatives

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EXHIBIT A



STATE OF MINNESOTA
Office of Governor Mark Dayton

130 State Capitol ♦ 75 Rev. Dr. Martin Luther King Jr. Boulevard ♦ Saint Paul, MN 55155

May 19, 2011

The Honorable Kurt Zellers
Speaker of the House
463 State Office Building
St. Paul, Minnesota 55155

Dear Speaker Zellers:

I have vetoed and am returning Chapter 36, House File 1426, a bill adopting a congressional districting plan for use in 2012 and thereafter.

In my letter of April 25th to Representative Sarah Anderson, the Chief Author of this bill, I stated that I would not support a plan whose districts were drawn for the purpose of protecting or defeating incumbents. This bill violates that principle. It creates safe seats for six incumbents, while the First District has been drawn for the purpose of defeating the incumbent.

My April 25th letter also made clear that, to earn my approval, the plan must be passed with strong bipartisan support, both in committee and on the floor. This bill was not. After all DFL amendments to the districting principles were defeated, both in committee and on the floor, the map was unveiled and adopted with little opportunity for public analysis and reaction, and the plan received no DFL votes in either the House or the Senate.

Congressional districts must endure for a decade. They must provide fair representation for voters of all political parties. A plan without bipartisan support is one I will not approve.

Sincerely,

A handwritten signature in black ink that reads "Mark Dayton".

Mark Dayton
Governor

cc: Senator Michelle L. Fischbach, President of the Senate
Senator Amy T. Koch, Majority Leader
Senator Thomas M. Bakk, Minority Leader
Senator Geoff Michel
Representative Paul Thissen, Minority Leader
Representative Sarah Anderson
The Honorable Mark Ritchie, Secretary of State
Mr. Cal R. Ludeman, Secretary of the Senate
Mr. Albin A. Mathiowetz, Chief Clerk of the House of Representatives

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EXHIBIT B

UNITED STATES DISTRICT COURT

DISTRICT OF MINNESOTA

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

Civil File No. 11-CV-93 PJS/AJB

Plaintiffs,

vs.

Mark Ritchie, Secretary of State of Minnesota, Rachel Smith, Hennepin County Elections Manager, Fran Windschitl, Rice County Auditor, Cindy Geis, Scott County Auditor, Robert Hiivala, Wright County Auditor, individually and on behalf of all citizens of Minnesota similarly situated,

**MEMORANDUM OF
DEFENDANT MARK RITCHIE,
SECRETARY OF STATE OF
MINNESOTA, IN OPPOSITION
TO PLAINTIFFS' MOTION TO
LIFT STAY**

Defendants.

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,

Intervenors.

Defendant Mark Ritchie submits this Memorandum in opposition to Plaintiffs' Motion to Lift Stay in this matter.¹ The stay should remain in place because the

¹ On May 23, 2011, various Applicants filed a Motion to Lift Stay and Intervene for the limited purpose of obtaining leave to intervene in this matter. Applicants' Proposed Order does not seek a lifting of the stay for any other purpose. Defendant Ritchie does not oppose Applicants' intervention.

Minnesota Legislature and Governor still have an opportunity to adopt new legislative and congressional redistricting plans, and in any event, the Court must defer to the Minnesota state court redistricting proceeding.

FACTS AND BACKGROUND

On January 11, 2011, Plaintiffs initiated the present action, alleging that the preliminary census showed that Minnesota's current legislative and congressional districts are unequally apportioned in violation of the state and federal constitutions. Compl. ¶¶ 16, 28. Plaintiffs asked this Court to take over the redistricting process if, by the end of the current legislative session, the Minnesota Legislature does not adopt redistricting plans that are approved by the Governor and found acceptable by the Court. Compl., prayer for relief, ¶¶ 1-6.

On January 21, 2011, a separate group of Minnesota citizens and qualified voters (hereinafter "Intervenor Plaintiffs") initiated a similar redistricting action in Minnesota state court. (Case No. 11-cv-93-PJS/MJD, Doc. 15-1). Intervenor Plaintiffs alleged that the preliminary census showed Minnesota's current legislative and congressional districts are unequally apportioned in violation of the state and federal constitutions. (*Id.*) They also asked the state district court to, among other things, retain jurisdiction to ensure that the Minnesota Legislature and Governor adopt new districts in conformity with the state and federal constitutions and if they fail to do so, to "consider evidence, determine and order valid plans for new Minnesota legislative and congressional districts." (*Id.*, Doc. 15-1 at 16-17, prayer for relief, ¶¶ 1-5.)

Also on January 21, 2011, Intervenor Plaintiffs filed a complaint in intervention in the action before this Court. (See Case No. 11-cv-93-PJS/MJD, Doc. 17). Intervenor Plaintiffs' purpose in seeking intervention was to

request this Court to dismiss this proceeding or, in the alternative, to stay this proceeding until and unless credible evidence exists that neither the Minnesota courts (through a Special Redistricting Panel) nor the Minnesota Legislature will adopt a constitutional plan with ample time for use in the 2012 primary election; namely, prior to February 21, 2012.

(See Case No. 11-cv-93-PJS/MJD, Doc. 14 at 3-4). On February 7, 2011, the Court granted Intervenor Plaintiffs' motion to intervene, and, based upon an agreement of the parties, stayed further proceedings in the action. (See Case No. 11-cv-93-PJS/MJD, Doc. 30).

On January 25, 2011, Intervenor Plaintiffs petitioned the Chief Justice of the Minnesota Supreme Court to appoint a special redistricting panel to "hear and decide all matters including all pretrial and trial motions relative to *Hippert v. Ritchie* [their state court action] that might arise relative to legislative and congressional redistricting based on the 2010 Census." *Hippert* Pet. for Appointment of Special Redistricting Panel at 5 (Declaration of Alan I. Gilbert ("Gilbert Dec."), Ex. 1). Chief Justice Lorie Gildea granted the petition for appointment of a special redistricting panel but stayed the actual appointment of the panel and further proceedings in the case in order to honor "the primacy of the legislative role in the redistricting process" and to ensure "the judiciary not be drawn prematurely into that process." *Hippert* Feb. 14, 2011 Order at 3-4 (Gilbert Dec., Ex. 2).

Plaintiffs now seek to vacate the Court's stay of proceedings in the federal action.

ARGUMENT

I. PLAINTIFFS' MOTION TO LIFT STAY SHOULD BE DENIED.

The Court should deny Plaintiffs' motion for two reasons. First, a lift of the stay in this action is premature because the Legislature and Governor must first be given an adequate opportunity to agree to redistricting plans. Second, this Court must defer to the state court redistricting proceeding.

A. Plaintiffs' Motion Should Be Denied Because the Legislature And Governor May Yet Agree To New Redistricting Plans.

On May 19, 2011, the Governor vetoed the legislative and congressional redistricting plans adopted by the Legislature, citing a lack of bipartisan support. See Governor's Letters to Speaker of the House Zellers (Gilbert Dec., Exs. 3 and 4). On May 23, 2011, the Legislature adjourned without passing a biennial budget. A special session will presumably be ordered by the Governor to resolve the State's budget impasse. See Minn. Const. art. IV, § 12 (conferring the Governor with the power to call a special session); Minn. Const. art. XI, § 6 (requiring a balanced biennial budget). During a special session, the Legislature may have a further opportunity to consider plans for legislative and congressional redistricting. Accordingly, because the Legislature and Governor may still agree to redistricting plans, the Court's stay should remain in place. See *Emison*, 507 U.S. at 34, 113 S. Ct. at 1081 (referring to "the primacy of the legislative role in the redistricting process.").

B. In Any Event, Plaintiffs' Motion Should Be Denied Because the Court Must Defer to the State Court's Redistricting Proceeding.

It is well established that the federal courts must defer to the actions of state courts in matters of reapportionment and redistricting. In *Emison*, a unanimous United States Supreme Court reaffirmed that federal courts are “to defer consideration of disputes involving redistricting where the State, through its legislative *or* judicial branch, has begun to address that highly political task itself.” 507 U.S. at 33, 113 S. Ct. at 1080 (emphasis in original) (reaffirming *Scott v. Germano*, 381 U.S. 407, 85 S. Ct. 1525 (1965) (per curiam) (recognizing the district court should have “stayed its hand” and, in failing to do so, overlooked the state court’s significant role in formulating valid reapportionment and redistricting plans)).

The Court in *Emison* held that the federal district court in that case clearly erred by failing to defer to the state court proceeding. As the Court explained:

Today we renew our adherence to the principles expressed in [*Scott v. Germano*] which derive from the recognition that the Constitution leaves with the States primary responsibility for apportionment of their federal congressional and state legislative districts. See U.S. Const., Art. I, § 2. “We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature *or other body*, rather than of a federal court.” *Chapman v. Meier*, 420 U.S. 1, 27, 95 S. Ct. 751, 766, 42 L. Ed. 2d 766 (1975). Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it.

Id. at 34, 113 S. Ct. at 1081 (emphasis added). Because “Minnesota can have only one set of legislative districts,” the Court recognized “the primacy of the State in designing those districts *compels* a federal court to defer.” *Id.* at 34–35, 113 S. Ct. at 1081

(emphasis added) (stating “both state branches [legislative and judicial]” are preferred “to federal courts as agents of apportionment”). The Court therefore held that federal courts must defer to state court consideration of legislative and congressional redistricting. *Id.* at 37, 113 S. Ct. at 1083.

Since *Emison*, federal courts have routinely deferred to parallel state court reapportionment and redistricting proceedings out of respect for the primacy of the state’s interests in this area. See, e.g., *Vigil v. Lujan*, 191 F. Supp. 2d 1273, 1274–75 (D. N.M. 2001) (deferring consideration of the merits of redistricting plans to the state where there was no evidence the state legislature or judiciary was unwilling or unable to adopt a redistricting plan in a timely manner); *Arrington v. Elections Bd.*, 173 F. Supp.2d 856, 860 (E.D. Wis. 2001) (same); *Rice v. Smith*, 988 F. Supp. 1437, 1439–40 (M.D. Ala. 1997) (recognizing deferral to parallel state proceedings in the reapportionment context “should be the routine course” and noting the court had twice “stayed its hand” pursuant to *Emison*); see also *Maryland Citizens for a Representative Gen. Assembly v. Governor of Maryland*, 429 F.2d 606, 608-10 (4th Cir. 1970) (dismissing complaint for declaratory and injunctive relief regarding reapportionment of Maryland state districts because state had not yet had an adequate opportunity to act on redistricting plan).

Just as in *Emison*, in this case there is a parallel state court proceeding that raises similar challenges to the current legislative and congressional districts and seeks the same relief as in the present action. The Minnesota Supreme Court Chief Justice has granted Petitioners’ motion to appoint a special redistricting panel to hear and decide all matters

in the state court action. (Gilbert Dec., Ex. 2 at 3). The Chief Justice stayed² appointment of the panel and all other further proceedings to allow the Minnesota Legislature and Governor the opportunity to adopt new legislative and congressional redistricting plans. *Id.*

If the Minnesota Legislature and Governor do not agree to new redistricting plans, this Court must defer to the state court redistricting proceeding due to the primacy of the State's interests in this important subject. *Emison*, 507 U.S. at 33–34, 113 S. Ct. at 1080–81. The Court therefore should not lift the stay of proceedings in this case.

² There is now pending a motion before the Chief Justice to lift the stay in the state court redistricting proceeding. *Hippert Motion to Lift Stay & Appoint Panel* (Gilbert Dec., Ex. 5).

CONCLUSION

For all the foregoing reasons, Defendant Ritchie respectfully requests that the Court deny Plaintiffs' motion to lift stay.

Dated: May 27, 2011

Respectfully submitted,

LORI SWANSON
Attorney General
State of Minnesota

s/ Alan I. Gilbert

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