# WEINBLATT & GAYLORD PLC

ATTORNEYS & COUNSELORS AT LAW

1616 Pioneer Building
336 North Robert Street
St. Paul, MN 55101
Telephone: (651) 292-8770
Fax: (651) 223-8282
weglaw@usinternet.com

Alan W. Weinblatt
Kathleen A. Gaylord
Madonna M. Kasbohm

Katharina E. Liston
Of Counsel


November 13, 2001

*Hand Delivered*

Mr. Frederick K. Grittner
Clerk of Appellate Courts
305 Minnesota Judicial Center
25 Constitution Ave.
St. Paul, MN 55155-6102

Re: Cotlow, et al. v. Kiffmeyer, et al.
Case No. C0-01-160

Mr. Grittner:

Enclosed for filing in the above-entitled matter please find the original and nine (9) copies of the Cotlow Plaintiffs' Memorandum Regarding Redistricting Criteria.

Alan W. Weinblatt

ALAN W. WEINBLATT
FOR
WEINBLATT & GAYLORD PLC

AWW:kq
Enclosure
cc: Alan I. Gilbert *(via facsimile and U.S. Mail)*
Mark B. Levinger *(via facsimile and U.S. Mail)*
Brian J. Asleson *(via facsimile and U.S. Mail)*
Brian Melendez *(via facsimile and U.S. Mail)*
Marianne B. Short, Esq. *(via facsimile and U.S. Mail)*
Timothy D. Kelly *(via facsimile and U.S. Mail)*

STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL
C0-01-160

Susan M. Zachman, Maryland Lucky R. Rosenbloom, Victor L.M. Gomez, Gregory G. Edeen, Jeffrey E. Karlson, Diane V. Bratlie, Brian J. LeClair and Gregory Ravenhorst, individually and on Behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs,

and

Patricia Cotlow, Thomas L. Weisbecker, Theresa Silka, Geri Boice, William English, Benjamin Gross, Thomas R. Dietz, John Raplinger, individually and on behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs-Intervenors,

And

Jesse Ventura,

Plaintiff-Intervenor,

and

Roger D. Moe, Thomas W. Pugh, Betty McCollum, Martin Olav Sabo, Bill Luther, Collin C. Peterson and James L. Oberstar,

Plaintiffs-Intervenors,

vs.

Mary Kiffmeyer, Secretary of State of Minnesota; and Doug Gruber, Wright County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants.

**MEMORANDUM REGARDING REDISTRICTING CRITERIA**

## INTRODUCTION

Pursuant to this Court's Order dated October 29, 2001, counsel for the parties exchanged drafts of proposed redistricting criteria and conferred by telephone on November 9, 2001, and thereafter through this date. The result of that conference was a joint stipulation of agreed criteria which has now been executed by counsel and is being filed. The *Cotlow* Plaintiffs concur with that stipulation. This Memorandum is submitted regarding certain unagreed principles suggested by one or more parties but which did not receive unanimous support.

## I. PERMITTED DEVIATIONS IN LEGISLATIVE PLANS

The Minnesota Federal District Court in the cases of *Beens v. Erdahl*, (349 F. Supp. 97), and *LaComb v. Growe* (541 F. Supp. 145 and 160 D. Minn. 198), adopted a maximum permitted deviation of two percent (+or-) from absolute equality as the maximum tolerable deviation in the 1971 and 1981 legislative redistricting cases respectively. The Minnesota Special Redistricting Panel adhered to that same standard. *Cotlow v. Growe*, (Order dated August 16, 1991) (File MX 91-001562). The *Cotlow* Plaintiffs see no constitutional reason to change that criteria. If any party wishes to submit a legislative plan with a smaller deviation, they are certainly free to

do so. Unless constitutionally required, the Beens, LaComb, Cotlow standard should not be overruled.

## II. COMPACTNESS

For the following reasons, the Cotlow Plaintiffs strongly argue that "compactness" should not be a principle required for legislative or congressional districts except in those situations where it is also alleged that districts have been drawn for a prohibited racial reason.[1]

A. "Compactness" is not a constitutionally mandated criteria. *Shaw v. Reno 517 U.S. 899, 935 116 S. Ct. 1894, 1915 (1996).* As the Supreme Court there noted,

> "Neither the State nor federal constitution requires districts to be compact. Critics often refer to the lack of compactness of a particular district or group of districts as a sign of gerrymandering, but no court has ever struck down a plan merely on the basis that it did not appear to be compact. Although there are geometric methods for measuring the compactness of an area, these methods have not been recognized as judicial standards for evaluating the compactness of districts." *Id at fn 12.*

No matter how bizarre or convoluted a district appears, that fact standing alone does not implicate the U.S. Constitution. *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 2826-27 (1993). Nor does the Minnesota constitution require compact districts.

[1] Even in such cases compactness as an aesthetic norm may be unrelated to the evil sought to be cured. Dillard v. Baldwin County Board of Education, 686 F.Supp. 1459, 1465-66 (MD Ala. 1988).

Article 4, Sec. 3 requires only that state Senate districts be comprised of convenient and contiguous territory.

B. Beyond the constitutional issue, it is generally recognized that "compactness" is a weak consideration at best. *Diaz v. Silver* 932 F. Supp. 462, 464 (E.D. NY 1996). Irregular district shapes may be justified because the district line follows a significant geographic feature or political subdivision boundary or promotes population equality. *Smith v. Beasley*, 946 F. Supp. 1174, 1179 (D.So.Car. 1996). Further, a district may lack compactness due to geographic or demographic reasons but still serve the traditional goal of joining communities of interest. *Hunt v. Cromartic*, 526 U.S. 541, 555 fn.1, 119 S.Ct. 1545, 1554 (1999) (Stevens J., concurring). Finally, municipal boundaries, towns, census districts and precincts are not necessarily compact. This criteria is artificial, signifying nothing.

C. Compactness is not a useful or operational criteria for judging whether a districting plan is fair. *Young*, Measuring The Compactness of Legislative Districts, XIII Legislative Studies Quarterly 105, 106 (Feb 1988). Compactness is such a hazy and ill-defined concept that it is impossible to apply, in any rigorous sense, to matters of law*Young*, op cit at 113. Indeed, reliance on any one or more of the 36 potential measures of compactness opens the door to subtle types of gerrymandering (the result sought to be avoided) "in which high speed computers manipulate data bases in order to create plans that meet superficial mathematical

criteria of equality and compactness while being grossly gerrymandered in the political sense. *Id.* See Dillard v. Baldwin County Board of Education, *686 F. Supp.* 1459, *1465-66 (MD Ala. 1988).*

It has been recognized that there are 36 different measures of "compactness". Each of them is flawed in one or more ways. See *Altman, The Consistency and Effectiveness of Mandatory District Compactness Rules,* page 9 (unpublished paper found at http://data.fas.harvard.edu/micah_altman/papers/cpt_cst2_3.pdf.), and *Niemi, Grofman, et al, "Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering,"* 53 Journal of Politics 1155 at 1179 (1991); see also Young, supra. Indeed, it is not unfair to describe them as "junk science."

D. Because there are so many measures of compactness, because they are so vague and because they are nearly all outcome determinative (choose the "test" that gets you the desired result) courts generally have been reluctant to enforce them. *Pildes and Niemi, Expressive Harms, "Bizarre Districts" and Voting Rights: Evaluating Election-District Appearances after Shaw v. Reno,* 92 Mich. L. Rev. 483, 529-533 (1993). This court should not adopt a measure or principle without evidence of its consequences intentional or unintentional.

E. While population equality is a principle that favors neither the Republicans nor the Democrats, "compactness" is not similarly neutral. It has been recognized that:

> "On the whole, the adoption of compactness as a criterion for drafting or evaluating districting plans will systematically advance the interests of the Republican Party and correspondingly disadvantage the Democratic Party." Lowenstein and Steinberg *The Quest for Legislative Districting in the Public Interest: Elusive or Illusory* 33 UCLA L. Rev. 1, 23-27 (1985).

F. At least of equal importance is the conclusion "...that the presence or absence of compact districts does not assure either the presence or absence of ... gerrymandering." *id.* Reaching the same conclusion, see *Altman, Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders,* 17 Political Geography 989 (1988). It seems clear that the reason for the worthlessness of compactness as a criterion is that compactness has none of the characteristics that make population equality and contiguousness desirable districting criteria. Lowenstein and Steinberg, op cit at pages 25 et seq. For example, applying a subjective measure of compactness will further embroil the court in the substantive political controversies inherent in districting. Id.

If compactness is not a reasonable measure of anything and is unfair to the Cotlow plaintiffs by reason of its political favoritism of Republican interests then why has it been often stated as a criteria but not generally applied? One author suggests an answer:

> "When physical geography is stretched too thin, when it is twisted, turned, and tortured - all in the apparent pursuit of fair and effective minority representation - at some point, too much becomes too much. That appears to be the judicial impulse that accounts for Shaw: in the conflict of territory and interest, the Constitution requires policymakers somehow to hold the line and accommodate both.
>
> But judicial impulses are one thing, legal doctrine another. That most people, judges included, recoil instinctively from willfully misshapen districts is understandable enough. Yet defining the values and purposes that might translate this impulse into an articulate, justifiable set of legal principles is no easy task. Leading academic experts in redistricting have long argued that this impulse reflects untutored intuition, an instinctive response that careful analysis reveals to be unwarranted."

Pildes and Niemi, op cit at p. 484. The Cotlow plaintiffs argue that unless alleged racial discrimination is shown in a plan, the use of compactness as a measure offers only an opportunity for mischief and should be rejected.

## III. COMMUNITIES OF INTEREST

The parties have agreed by stipulation that in adopting any districting plan, the court should include recognition and maintenance of communities of interest as a principle. They differ over what types of communities shall be included. The Cotlow Plaintiffs urge the court to adopt the definition contained in the stipulation and to add (a) neighborhoods, (b) economic interests, and (c) transportation as additional elements of the definition.

Neighborhoods by definition are communities of interest. While some neighborhoods may have to be divided between districts in order to achieve population equality or because use of census tracts or blocks requires such division, this category is a reasonable addition to the list of factors that should at least be considered. There should be no reason to totally ignore neighborhoods as a community of interest without some basis in law or fact.

Economic factors also bear upon the definition of a community of interest. Factors such as median income, median housing prices, or school lunch participation, in adjoining geographic areas give strong weight in deciding what is a "community of interest."

Transportation is a factor that clearly impacts communities of interest. The ability to easily get from one geographic area to another ties people together and helps create a sense of community. While it is not a factor that should be controlling, it certainly merits consideration. Data from the Minnesota Planning Department and the Metropolitan Council make this an easy factor to consider.

## IV. PREVIOUS OR PROJECTED VOTING BEHAVIOR BY PARTY AND POLITICAL COMPETITIVENESS

The Cotlow Plaintiffs submit that where a plan is to be drawn by a court, these factors should have no bearing. The Cotlow Plaintiffs are DFL orientated. Their

plan will most likely be oriented in that direction. Likewise, the Moe Plaintiffs and the Zachmann Plaintiffs will submit plans drawn to favor their respective interests. So, too, does the Governor's plan. He will try to seek political advantage using the vague and unenforceable concept of "political competitiveness". The drawing of district lines is inherently a "political" action. That is precisely the reason that such line drawing belongs in the political branch unless constitutional rights are being violated.

While there is nothing legally, constitutionally or ethically wrong in the use of political data by a legislative body or by any party to this litigation, the Court itself should not become engaged in the practice of drawing district lines for partisan advantage. To do so would enmesh the judiciary in precisely the "political thicket" horrible predicted by *Colgrove v. Green*. [2]

Furthermore, there are no measurable judicial standards for a court adopted partisan political plan whether Republican, DFL, Jesse or "competitive". Instead, the court should adopt the very best plan that it can fashion, giving the greatest weight to population equality and communities of interest principles. Above all, do no harm. *Davis v. Bandemere*, 478 U.S. 109, 106 S. Ct. 2797 (1986), does not require or authorize a court to become a political body when drawing a districting plan.

---

[2] 328 U.S. 549, 66 S. Ct. 1198 (1946). See Grofman, Criteria for Redistricting, A Social Science Perspective, 33 UCLA L. Rev. 77, 123-4 (1985).

## V. USE OF CURRENT DISTRICTS AND PRESERVATION OF THEIR CORE

One or more parties may ask the court to adopt a plan using the cores of the old, unconstitutional districts with "minimal tinkering" necessary to achieve population equality as the basis for a plan. The Cotlow Plaintiffs submit that there is great merit to that concept, but that it should not be adopted as a separate districting principle because it should not become a talisman for disregarding the concept of communities of interest. In certain parts of the state, strict adherence to the old districts may be desirable, i.e., to the extent that they reflect a community of interest. Per contra, in areas, using the current "core" may be detrimental to the recognition of these communities as they now exist or reasonably may be expected to develop over the current decade. In these districts, maintaining the present core would be both illogical and unfair. For example, in certain parts of the state the present or future community of interest may be more accurately reflected by the districts that existed after 1971 litigation (Beens districts) or after 1981 case (LaComb districts) than they are by the 1991 plan (Cotlow districts).

Finally, there are certain areas of Minnesota (e.g. Eden Prairie, Woodbury, Inver Grove Heights) where demographic changes since 1991 have been gigantic. In those areas, maintaining current "cores" (however that may be defined) is counter productive and measures no value that the court's plan need preserve.

## VI. OTHER MATTERS

A. Minority Representation.

The Cotlow Plaintiffs believe that a criteria pertaining to minority representation should be adopted by the Court. They agree to either of the proposals attached to this Memorandum.

B. Preserving Political Subdivisions.

The goal of recognition of existing political subdivisions has merit. The rhubric of blind adherence to them does not. The Cotlow Plaintiffs request that the proposed compromise attached to this Memorandum be adopted. Legislators represent people, not trees, acres, counties, towns or cities.

C. Political Competitiveness.

For the reasons set forth above, the Cotlow plaintiffs do not support the proposal to add an unspecified (or even specified) political litmus test to any plan adopted by the Court.

Dated: November 13, 2001

Alan W. Weinblatt, #115332
Weinblatt & Gaylord, PLC
Suite 1616, Pioneer Building
336 North Robert Street
St. Paul, MN 55101
Telephone: (651) 292-8770
Attorney for Plaintiffs-Intervenors
Cotlow, et al

COTLOW VERSION 1

MINORITY REPRESENTATION. No district shall be drawn that dilutes the voting strength of racial or language minority populations. Where a sizeable concentration of a racial or language minority makes it possible, and where it can be done in compliance with the other principles in this resolution, the districts must increase the probability that members of the minority will be elected.

COTLOW VERSION 2

MINORITY REPRESENTATION. No district shall be drawn to dilute racial or ethnic minority strength in violation of the Voting Rights Act of 1965, as amended.

COTLOW VERSION

PRESERVING POLITICAL SUBDIVISIONS. The integrity of existing boundaries of political subdivisions of the State (counties, cities and towns) will be respected to the extent practicable to minimize their division in the formation of a district.

STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL
C0-01-160

Susan M. Zachman, Maryland Lucky R. Rosenbloom, Victor L.M. Gomez, Gregory G. Edeen, Jeffrey E. Karlson, Diane V. Bratlie, Brian J. LeClair and Gregory Ravenhorst, individually and on Behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs,

and

Patricia Cotlow, Thomas L. Weisbecker, Theresa Silka, Geri Boice, William English, Benjamin Gross, Thomas R. Dietz, John Raplinger, individually and on behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs-Intervenors,

And

Jesse Ventura,

Plaintiff-Intervenor,

and

Roger D. Moe, Thomas W. Pugh, Betty McCollum, Martin Olav Sabo, Bill Luther, Collin C. Peterson and James L. Oberstar,

Plaintiffs-Intervenors,

vs.

Mary Kiffmeyer, Secretary of State of Minnesota; and Doug Gruber, Wright County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants.

**AFFIDAVIT OF SERVICE**

Alan W. Weinblatt, being first duly sworn, deposes and says that on November 13, 2001, I served upon each of the persons listed in Exhibit A attached hereto by United States Mail and by facsimile a true and correct copy of the Memorandum Regarding Redistricting for Patricia Cotlow, et al.

Alan W. Weinblatt

Subscribed and sworn to before me
this 13th day of November, 2001.

Notary Public

KATHLEEN A. GAYLORD
NOTARY PUBLIC - MINNESOTA
My Commission Expires 1/31/2006

**EXHIBIT A**

Timothy D. Kelly
Kelly & Berens, P.A.
Suite 3720 IDS Center
80 South Eighth Street
Minneapolis, MN 55403

Marianne D. Short
Dorsey & Whitney
220 South Sixth Street, Suite 1300
Minneapolis, MN 55402

Brian J. Asleson
Deputy Wright County Attorney
Wright County Courthouse
Wright County Attorney's Office
10 Second St. NW
Buffalo, MN 55313

John French, Esq.
Brian Melendez, Esq.
2200 Wells Fargo Center
Faegre & Benson, LLP
90 South 7th Street
Minneapolis, MN 55402

Alan I. Gilbert
Chief Deputy & Solicitor General
Mark B. Levinger
Assistant Attorney General
Mike Hatch
Attorney General, State of Minnesota
445 Minnesota Street, Suite 1100
St. Paul, MN 55101