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November 13, 2001

VIA MESSENGER

Clerk of Appellate Courts Office
25 Constitution Avenue
Suite 305
St. Paul, MN 55155

Re: Susan M. Zachman, et al. v. Mary Kiffmeyer, et al.
Special Redistricting Panel, File No. C0-01-160

Dear Clerk:

Enclosed for filing in the above matter please find the original and nine (9) copies of Plaintiff-Intervenor Jesse Ventura's Statement of Unresolved Issues Relating to Criteria.

Sincerely,

Marianne D. Short

MDS/MBF/mkl
cc: All Counsel of Record
Enclosures

STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL
CO-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,

v.

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.

PLAINTIFF INTERVENOR JESSE VENTURA'S STATEMENT OF UNRESOLVED ISSUES RELATING TO CRITERIA

INTRODUCTION

Plaintiff-Intervenor Jesse Ventura submits this Statement of Unresolved Issues Relating to Criteria in conjunction with the parties' submission of proposed criteria to the Special Redistricting Panel. Plaintiff-Intervenor Ventura joins the parties in their stipulation to certain, traditional redistricting principles, but provides this statement in support of a maximum tolerable deviation of plus or minus two (2) percent for the state's legislative districts and to request the Panel adopt "political competitiveness" and "compactness" as additional redistricting criteria.[1]

ARGUMENT

I. The Panel Should Set The Maximum Tolerable Deviation For Legislative Districts At Two Percent.

Under the Minnesota Constitution, "the representation in both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof." Minn. Const., art. IV, § 2. Recognizing this same mandate under federal law, the United States Supreme Court has stated that all legislative districts must achieve "substantial equality of population among the various districts." Reynolds v. Sims, 377 U.S. 533, 577 (1963); see Gaffney v. Cummings, 412 U.S. 735, 742 (1973) (noting "mathematical exactness or precision is hardly a workable constitutional requirement"). This standard has been interpreted to mean that a legislative plan will not be invalidated if its overall population deviation remains below ten (10) percent. Brown v. Thomson, 462 U.S. 835, 842, 103 S.Ct. 2690, 2696 (1983). In

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[1] In addition to these criteria, Plaintiff-Intervenor Ventura advocates the following language at Paragraphs 6 and 7 of the Criteria Stipulation:

> 6. 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.
>
> 7. PRESERVING POLITICAL SUBDIVISIONS. A county, city, or town must not be divided into more than one district except as necessary to meet equal-population requirements or to form districts that are composed of convenient contiguous territory. When a county, city, or town must be divided, district boundaries shall be located on prominent, clearly recognizable features.

1991, adhering to this ten (10) percent standard, Minnesota's Special Redistricting Panel set the maximum tolerable deviation for the state's legislative districts at plus or minus two (2) percent. Cotlow v. Growe, No. C8-91-985 (Minn. Special Redistricting Panel Dec. 9, 1991) (Findings of Fact, Conclusions of Law, and Order for Judgment On Legislative Redistricting) (available at http://www.senate.leg.state.mn.us/departments/scr/redist/cotlo129.htm). Likewise, the federal court criteria for legislative plans adopted in 1971 and1981 required deviations in population equality not to exceed two (2) percent. S.F. No. 1326, Clause (3)(a) (April 20, 2001).

Here, Plaintiff-Intervenor Ventura requests that the Panel follow past practice and include a redistricting criterion that sets the maximum tolerable population deviation for the state's legislative districts at plus or minus two (2) percent. This standard remains significantly below the ten (10) percent standard for legislative districts, yet permits the Panel to consider "factors that in day-to-day operation are important to an acceptable representation and apportionment arrangement," such as the redistricting criteria submitted by the parties. Brown, 462 U.S. at 842. Indeed, a lower standard would force the Panel to engage in a "mere nose count," without proper consideration of other rational state policies that may help the Panel achieve its ultimate goal of fair and effective representation for all citizens. Gaffney, 412 U.S. at 749.

II. The Panel Should Adopt A "Political Competitiveness" Criterion.

As just noted, traditional redistricting principles, and redistricting actions in general, are based on the purpose of creating a more "politically fair" result. Id. at 753; see Hastert v. State Bd. of Elections, 777 F. Supp. 634, 659 (N.D. Ill. 1991) (upholding redistricting plan that achieves population equality, fairness to racial and language minorities and creates politically fair projected distribution of congressional seats across party lines); see Sanchez v. State of Colo., 97 F.3d 1303, 1307 (10th Cir. 1996) (noting Reapportionment Commission, in creating redistricting plan, prioritized traditional redistricting principles and also considered preservation of politically competitive district). Given this overriding concern, any redistricting consideration

beyond political fairness must further the goal of "one person, one vote." Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964); see Reynolds, 377 U.S. at 568 (noting overriding concern in redistricting is fair and effective representation for all citizens).

Recognizing this limitation, Minnesota's 1991 Special Redistricting Panel stated that "past voting behavior and residency of incumbents shall not be used as criteria; however, they may be used to evaluate the fairness of the plans submitted to the court." Cotlow v. Growe, No. C8-91-985 (Minn. Special Redistricting Panel Dec. 9, 1991) (Findings of Fact, Conclusions of Law, and Order for Judgment On Legislative Redistricting) (emphasis added) (available at http://www.senate.leg.state.mn.us/departments/scr/redist/cotlo129.htm). In doing so, that Panel indirectly recognized that consideration of the location of incumbents is subordinate to traditional redistricting factors that further the goal of political fairness. See also Dillard v. City of Greensboro, 956 F. Supp. 1576, 1580 (M.D. Ala. 1997) (stating that incumbency protection is subordinate factor to traditional redistricting criteria); LaComb v. Growe, 541 F. Supp. 160, 165 (D. Minn. 1982) (considering incumbency protection only to justify minor adjustments made after consideration of traditional criteria). That Panel also indirectly acknowledged the fact that incumbent protection is a political consideration that is inappropriate in judicial redistricting proceedings. See also Wyche v. Madison Parish Police Jury, 769 F.2d 265, 268 (5th Cir. 1985) ("Wyche II"); LaComb, 541 F. Supp. at 166 (J. Alsop, dissenting) (stating "[w]hether or not incumbent residency is a legitimate and proper consideration in a judicially devised redistricting plan is open to legitimate differences of view").

In Wyche II, the Fifth Circuit noted that a "court-ordered plan is subject to a more stringent standard than a legislative plan" and stated that

> [m]any factors, such as the protection of incumbents, that are appropriate in the legislative development of an apportionment plan have no place in a plan formulated by the courts.

Wyche II, 769 F.2d at 268. Similarly, in Good v. Austin, 800 F. Supp. 557 (E. & W.D. Mich.

1992), a three-judge federal court devising a redistricting plan refused to consider "the maintenance of the geographic and population cores of existing districts" because it was a criterion "designed primarily to protect incumbents" and thus was "so laden with political considerations" as to be "inappropriate . . . in the formulation of a judicial redistricting plan." Id. at 564; see Wyche v. Madison Parish Police Jury, 635 F.2d 1151, 1162 (5th Cir. 1981) ("Wyche I") (noting district courts should not go beyond fixing boundaries that are compact, contiguous and that preserve natural, political and traditional representation; "[b]eyond that courts should not go: 'We are not legislatures'") (citing Marshall v. Edwards, 582 F.2d 927, 937 (5th Cir. 1978)).

The parties have stipulated to several redistricting criteria that further this proceeding's goal of achieving fair and effective representation for all state citizens. During discussions of these criteria, however, the parties also indicated a desire to protect "existing legislative and congressional districts" as part of the "Communities of Interest" criterion. Moreover, the parties wanted to include a "Preserving the cores of existing districts" criterion that explicitly stated the court must strive to preserve the cores of existing districts.

These suggestions indicate the parties' underlying strategy of indirectly including incumbent protection in this redistricting proceeding. But, as noted above, the judicial remedial process should remain free from all political considerations. White v. Weiser, 412 U.S. 783, 799 (1973) (J. Marshall, dissenting); Emison v. Growe, 782 F. Supp. 427, 442 (D. Minn. 1992), rev'd on other grounds, 507 U.S. 25 (1993) (a judicial redistricting plan "must be nonpartisan"); see also Gaffney, 412 U.S. at 754 (noting judicial interest should be at its lowest ebb when redistricting plan is apportioned within tolerable limits). Given this general rule, Plaintiff-Intervenor Ventura requests that the Panel adopt an additional "political competitiveness" criterion that expressly prohibits the consideration or protection of incumbents, core constituencies or traditional configurations in any redistricting plan. Such a "political

competitiveness" criterion would force the parties to draft their proposed redistricting plans from a clean slate, without the goal of protecting their traditional partisan interests. Moreover, such a criterion would enable this Panel to engage in redistricting efforts without having to sanitize the submitted plans of inappropriate political considerations. Ultimately, a "political competitiveness" criterion would enable the Panel to focus on a neutral goal of creating a redistricting plan that provides fair and effective representation for all state citizens, while furthering specific, traditional state policies. See Minn. Const., art. IV, § 2; Minn. Stat. § 2.91, subd. 2 (2000); House Concurrent Res. Nos. 1-2 (May 13, 1991) (all recognizing criteria considered by legislature in creating congressional and legislative redistricting plans); see also Brown, 462 U.S. at 842 (noting traditional redistricting principles, which further sound state policy).

III. The Panel Also Should Adopt a Compactness Criterion

Compactness is a well-established redistricting principle. Minnesota law requires that all districts created by redistricting plans "consist of convenient contiguous territory." Minn. Stat. § 2.91, subd. 2 (2000); see also Minn. Const., art. IV, § 3 (requiring senatorial districts of "convenient contiguous territory"). Expanding on this, the Minnesota legislature requires that, where consistent with other standards, "districts should be compact" in any redistricting plan presented to the Senate or House of Representatives. House Concurrent Resolution No. 1 (May 13, 1991) (concerning redistricting seats in the United States House of Representatives); House Concurrent Resolution No. 2 (May 13, 1991) (concerning redistricting seats in the Minnesota Senate and House of Representatives).

Courts also have recognized the importance of compactness as a redistricting principle. Minnesota's 1991 Special Redistricting Panel included among the criteria for legislative redistricting that "[t]he districts must be composed of convenient contiguous territory structured into compact units." Cotlow v. Growe, No. C8-91-985 (Minn. Special Redistricting Panel Dec.

9, 1991) (Findings of Fact, Conclusions of Law, and Order for Judgment On Legislative Redistricting) (available at http://www.senate.leg.state.mn.us/departments/scr/redist/cotlo129.htm). Moreover, the United States Supreme Court has held that "making districts compact" is among the traditional redistricting principles that justify deviation from mathematical equality. Karcher v. Daggett, 462 U.S. 725, 740 (1983); see also Shaw v. Reno, 509 U.S. 630, 633, 647 (1993) (in a case involving "district boundary lines of dramatically irregular shape," the Supreme Court reiterated the importance of "traditional districting principles such as compactness, contiguity, and respect for political subdivisions" in holding that redistricting is an area in which "appearances do matter"); Emison v. Growe, 782 F. Supp. 427, 442 (D. Minn. 1992), rev'd on other grounds, 507 U.S. 25 (1993) ("[t]he constitutional requirements of redistricting plans are well established ... a court must strive to achieve the lowest population deviations while also following expressions of state policy on compactness and contiguity"). For these reasons, Plaintiff-Intervenor Ventura requests that the Panel adopt a compactness criterion stating that: "to the extent consistent with other criteria, districts should be compact."

Dated: November 13, 2001

DORSEY & WHITNEY LLP

By _____

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STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

Peggy Brink Ohm, being first duly sworn upon oath, deposes and states that on November 13, 2001 she did send via facsimile and deposit in the United States mails an envelope properly sealed and with first-class postage prepaid thereon, addressed to:

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the last known address of said addressee(s), in which envelope she had first placed a true and correct copy of the attached:

Plaintiff-Intervenor Jesse Ventura's Statement of Unresolved Issues Relating to Criteria.

Peggy Brink Ohm

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

Notary Public

ANN E. SMITH
NOTARY PUBLIC-MINNESOTA
My Commission Expires Jan. 31, 2005