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,

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,

Intervenors,

and

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

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.

MARTIN INTERVENORS' RESPONSE TO MOTIONS TO ADOPT PROPOSED REDISTRICTING CRITERIA

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I. INTRODUCTION

Pursuant to Scheduling Order No. 1, the Martin Intervenors respectfully submit this response to the other parties' proposed redistricting criteria.

With limited exceptions, the parties agree in broad form as to which redistricting criteria the Panel should adopt. They disagree as to whether those criteria should be formally ranked in order of importance or application. They also disagree as to the proper formulation of particular criteria.

The Martin Intervenors submit that the Panel *should* number legislative districts with reference to the seven-county Twin Cities metropolitan area and adopt criteria recognizing compactness and precluding unfair results for incumbents or potential challengers. On the other hand, the Panel should *not* adopt a hard maximum population deviation for legislative districts or formally rank criteria in order of importance. In addition, the Panel should adopt the formulation of the political subdivision criterion offered by the Martin Intervenors, and reject the formulation offered by the Hippert Plaintiffs.

II. ARGUMENT

A. The Panel Should Number Legislative Districts With Reference to the Seven-County Metropolitan Area Defined by State Law

For over forty years, the Minnesota legislature has, by statute, defined a seven-county Twin Cities metropolitan area. Minnesota's district maps have reflected this seven-county definition ever since. Absent legislative action to alter the statutory seven-county definition of the Twin Cities metropolitan area, the Panel should continue the

long-standing practice of recognizing the seven-county area when drawing and numbering maps.

The Hippert Plaintiffs contend, on the other hand, that the Panel should draw legislative maps with reference to an eleven-county metropolitan region. Without explanation or elaboration, they argue the seven-county definition is "inappropriate" and "outdated." This is simply incorrect as a matter of law.

The seven-county Twin Cities metropolitan area is a creature of statute and an area specifically defined by state law. In 1967, the Legislature created a seven-county Twin Cities "metropolitan area," made up of Anoka, Carver, Dakota, Hennepin, Ramsey, Scott, and Washington counties. *See* Minn. Stat. §§ 473.121, 123. The Legislature created a Metropolitan Council as a public corporation and political subdivision of the state to serve the Metropolitan Area. *Id.* § 473.123, subd. 1. The Metropolitan Council has 16 members who each represent a geographic district within the seven-county region. Members are appointed by the governor and confirmed by the senate. The Metropolitan Council has wide-ranging powers within the seven-county area. Among other things it (1) operates the region's largest bus system; (2) provides planning, acquisitions, and funding for regional parks and trails; and (3) provides a framework for decisions and implementation for regional systems such as aviation, transportation, parks and open space, water quality and water management. http://www.metrocouncil.org/about/

about.htm. The seven-county metropolitan area overseen by the Metropolitan Council is thus a defined, tangible entity with real consequences under state law.[1]

The seven-county region has, moreover, played a central role in every round of redistricting since its creation in 1967. The seven-county metropolitan area has been recognized by every judicial body to conduct redistricting in Minnesota in the past forty years. *See Beens v. Erdahl*, 349 F. Supp. 97 (D. Minn. June 2, 1972); *LaComb v. Growe*, 541 F. Supp. 145, 147 (D. Minn. 1982); *Cotlow v. Growe*, No. C8-91-985 (Minn. Special Redistricting Panel Sept. 13, 1991) (Pretrial Order No. 2); *Zachman v. Kiffmeyer*, No. C0-01-160 (Minn. Special Redistricting Panel Dec. 11, 2001) (Order Stating Redistricting Principles and Requirements for Plan Submissions ("*Zachman* Criteria Order"), at 2 ¶ 3. The suggestion that it is "outdated," or "inappropriate," is simply wrong.

By contrast, there is no eleven-county metropolitan region recognized in state law, and such a region has never been recognized for redistricting purposes. Indeed, the Hippert Plaintiffs rely primarily on a federal "metropolitan area" definition that lumps the Twin Cities region with part of *Wisconsin*. On its face, this definition plainly cannot be utilized for Minnesota redistricting purposes.

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[1] In addition, state agencies and entities are organized in recognition of different regions, in which the seven-county metropolitan area is recognized as "Region 11." *See, e.g.* http://education.state.mn.us/MDE/Teacher_Support/Math_Sci_Teach_Acad/Teach_Centers/Metro/index.html (discussing Minnesota Department of Education Region 11 Teacher Center); http://www.arts.state.mn.us/racs/ (identifying Minnesota State Arts Regional Arts Council for Region 11).

In short, if the Hippert Plaintiffs take issue with the continuing salience of the seven-county structure of the Twin Cities metropolitan area, as set out in state law, their remedy is to obtain an amendment to existing state law. There is no reason or basis for the Panel to depart from the long-standing seven-county statutory definition of the Twin Cities metropolitan area.

B. The Panel Should Not Adopt a Strict Maximum Population Deviation

All parties agree to the basic principle governing permissible population deviation for legislative districts –absolute population equality is the goal but some deviation from mathematical exactitude is permitted to meet other redistricting criteria. Moreover, all parties agree that relatively little deviation from population equality will prove necessary. The State and Wright County propose a 2% maximum deviation, the Hippert Plaintiffs a 1% maximum deviation, and the Britton Intervenors a .5% deviation. The parties' expectation that new plans can be drawn with minimal deviation from population equality comports with the experience of the last redistricting cycle, in which the *Zachman* panel was able to draw senate and house districts with a mean deviation of .28% and .32%, respectively, and a maximum deviation of .80%. *Zachman v. Kiffmeyer*, No. C0-01-160 (Minn. Special Redistricting Panel Mar. 19, 2002) (Final Order Adopting a Legislative Redistricting Plan ("*Zachman* Legislative Plan")), at 3.

The Martin Intervenors reiterate their view that it is unnecessary for the Panel to adopt an arbitrarily determined maximum deviation. Because true population equality is always the goal, permissible deviations can only be considered in context. A plan with

an unnecessary population deviation is not necessarily inoculated from constitutional review simply because it falls below some arbitrary threshold: There is no constitutional "safe harbor." *See Cox v. Larios*, 542 U.S. 947, 949, 124 S. Ct. 2806 (2004) ("[A]ppellant invites us to weaken the one-person, one-vote standard by creating a safe harbor for population deviations of less than 10 percent, within which districting decisions could be made for any reason whatsoever. The Court properly rejects that invitation") (Stevens J., concurring); *cf. Ziols v. Rice Cnty. Board of Com'rs*, 661 N.W.2d 283, 288-89 (Minn. App. 2003) (rejecting county commissioner redistricting plan that met maximum statutory deviation where board did not explain why it did not adopt alternative plans with lower deviations). But a plan is not unconstitutional if it has a .5%, 1%, 2%, or some even higher population deviation if that deviation is necessary in light of rational state policies and objectives. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). There is no maximum permissible population deviation in the abstract.

The only utility of establishing a formal maximum population deviation in advance, then, is to ensure that the parties do not burden the Panel with unrealistic plans containing extreme deviations. Here, the parties have all expressed their intent to submit plans with relatively minor variations. Thus, the Panel need not adopt a maximum population deviation to guide the plans the parties may submit, and should instead adopt the goal of population equality with *de minimis* population deviation among legislative districts justified only by longstanding state redistricting principles.

C. The Panel Should Not Mechanistically Rank Redistricting Criteria in Order of Importance

The Hippert Plaintiffs seek to formally rank redistricting criteria in order of importance. This overly mechanistic approach to redistricting is inappropriate. Redistricting is a complex task that requires balancing often conflicting considerations. It requires careful evaluation of how the relevant criteria should be applied in particular cases to best ensure fair representation for all Minnesotans. The criteria cannot be applied formulaically, but must be considered as a whole. The suggestion that the Panel should formally rank the criteria in order of importance or application would unnecessarily limit the Panel's flexibility in this balancing process.

The underlying purpose of redistricting is to ensure fair representation to all Minnesotans. Redistricting requires full consideration of relevant factors because, as the *Zachman* panel recognized, "the adoption of redistricting criteria involves a number of conflicting considerations." *Zachman* Criteria Order, at 9. Depending on particular circumstances, it may make sense to prioritize one criterion over another in one instance, but not in another. The determination of whether to prioritize one conflicting consideration over another cannot be made in the abstract, and must be premised in particular cases on the geographic and demographics of Minnesota and the wishes of the people of Minnesota as expressed in the public testimony being heard by the Panel.

The *Zachman* panel's order adopting a legislative plan is illustrative. In it, the *Zachman* panel discussed how it weighed conflicting considerations in particular cases. For example, based on public feedback, the Panel placed the township of Breckenridge,

in Wilkin County, in a Red River Valley senate district that included portions of Clay County. *Zachman* Legislative Plan, at 6 at n.3. As the *Zachman* Panel noted, this decision "illustrate[d] the frequent choices between accommodating communities of interest and creating tidy districts boundaries." *Id.* In short, drawing statewide maps inevitably necessitates making context-specific tradeoffs. The fact that conflicting criteria will require such choices to be made in order to draw the best map possible is precisely the reason the Panel should not rank redistricting criteria.

Further, such ranking is unnecessary to combat the evil the Hippert Plaintiffs fear. The Hippert Plaintiffs are concerned that giving due consideration to the full gamut of redistricting criteria will somehow "increase[] the potential for partisan manipulation of the redistricting process." The Hippert Plaintiffs' apparent concern that the Panel will manipulate the redistricting process to benefit one party over another is misplaced for multiple reasons.

Where a legislature (particularly one controlled by a single party) is tasked with redistricting, the Hippert Plaintiffs' concern about partisan manipulation may carry more force. An inability to determine from the outside why the Legislature is drawing lines in a particular fashion may indeed give rise to the suspicion that gerrymandering is afoot.

But the Panel is not the Legislature. It is an appointed, nonpartisan judicial body that has conducted its business transparently and on a nonpartisan footing. The plans created by the Panel at the end of this process will be debated and adopted in the open. The parties must submit explanatory memoranda in support of their proposed plans, and the Panel will hear oral argument and issue written orders adopting its own plans. And

unlike the Legislature, the Panel must and will eschew political considerations when drawing its redistricting plans. Courts "left with the unwelcome obligation of performing in the legislature's stead . . . lack[] the political authoritativeness that the legislature can bring to the task." *Connor v. Finch*, 431 U.S. 407, 415 (1977). As a result, "a court is forbidden to take into account the purely political considerations that might be appropriate for legislative bodies." *Wyche v. Madison Parish Policy Jury*, 635 F.2d 1151, 1160 (5th Cir. 1981). As the Fifth Circuit has stated succinctly "We are not legislatures." *Marshall v. Edwards*, 582 F.2d 927, 937 (5th Cir. 1978). Simply put, there is little danger the Panel will invidiously draw districts for partisan gain.

Moreover, the relevant redistricting criteria in Minnesota are fairly well-defined and the Panel thus has ample authority to guide it in drawing new districts in light of the demographic and cultural shifts of the past ten years. Some of those criteria can be evaluated by looking at a map or viewing a population analysis. That others are not readily reducible to mathematical tables does not make them any less important or any more subject to "manipulation" by the Panel. For example, that the Panel may need to hear public testimony to identify particular communities of interest rather than look at a map to do so does not minimize the importance of this criterion or render it "subjective" or "nebulous."

Indeed, the Hippert Plaintiffs fail to duly recognize that Minnesota courts have time and again recognized communities of interests as an important redistricting criterion. *See* Amended Order Setting Public Hearing Schedule (Sept. 13, 2011) (recognizing communities of interest as a "well-established redistricting principle" and seeking "public

comment about communities of interest that should be identified and preserved in the redistricting process"); *Zachman* Criteria Order, at 3 ¶ 7, 5 ¶ 8; *see also Johnson-Lee v. City of Minneapolis*, 2004 WL 2212044, at *6 (D. Minn. Sept. 30, 2004) (discussing Minneapolis Charter Commission's determination that keeping intact a housing project was an "important goal" that warranted altering a tentative redistricting plan that would have split the project between two wards). The United State Supreme Court—and other courts—have likewise recognized that preservation of community of interests is a legitimate, neutral, and objective redistricting criterion. *See, e.g.*, *Bush v. Vera*, 517 U.S. 952, 964, 116 S. Ct. 1941, 1954 (1996) (noting "the legitimate role of communities of interest in our system of representative democracy"); *Prejean v. Foster*, 227 F.3d 504, 512 (5th Cir. 2000) (noting that traditional redistricting principles such as maintaining communities of interest "are important 'not because they are constitutionally required . . . but because they are objective factors'") (quoting *Shaw v. Reno*, 509 U.S. 630, 647, 113 S. Ct. 2816, 2827 (1993)).

In an effort to minimize the importance of communities of interest, the Hippert Plaintiffs make much of a single district court case from Georgia, *Larios v. Cox*, 300 .F. Supp. 2d 1320 (N.D. Ga. 2004), arguing the case confirms that "subjective communities of interest" should be deemed relatively unimportant because their recognition can create "mischief." But the Hippert Plaintiffs have simply misread *Cox*. *Cox* involved judicial review of a legislatively-drawn plan—not a court-drawn plan—and it was not a case about communities of interest. As the *Cox* court expressly noted, "The creators of the state plans did not consider such traditional redistricting criteria as district compactness,

contiguity, *protecting communities of interest*, and keeping counties intact." *Id.* at 1325 (emphasis added). Instead, the plans were drawn with the goal of protecting Democratic incumbents, and doing so by systematically underpopulating Democratic-leaning areas and overpopulating Republican-leaning areas to maximize partisan advantage. *Id.* at 1325, 1334. As a result, population deviations between districts were reduced only to what Georgia legislators perceived would avoid constitutional infirmity (a 9.98% total population deviation and district-to-district deviations between 4% and 5%), rather than any actual effort to achieve population equality. *Id.* at 1325-27. *Cox* hardly suggests that communities of interest are not worth protecting in their own right or that legitimate maintenance of preservation of communities of interest must be subordinated to other redistricting criteria. Indeed, the suggestion would run contrary to decades of settled redistricting jurisprudence both in Minnesota[2] and elsewhere.[3]

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[2] *See, e.g.*, *Zachman* Legislative Plan, at 6 at n.3 (discussing how, in particular circumstances, preservation of a community of interest may outweigh other factors); *Johnson-Lee*, 2004 WL 2212044, at *6 (discussing alteration of tentative redistricting plan to avoid splitting community of interest identified in public hearing and noting that preserving communities of interest was an "important" consideration); *Ziols*, 661 N.W. 2d at 289 (noting with approval board of commissioners' consideration of relevant redistricting factors, including that "the board attempted to take into account communities of interest"); *LaComb*, 541 F. Supp. at 164 (noting that court "attempted, where practicable," to maintain communities of interest).

[3] *Larios*, 314 F. Supp. 2d at 1362 (putting on equal footing "the traditional state interests of compactness, contiguity, minimizing the splits of counties, municipalities, and precincts, recognizing communities of interest, and avoiding multi-member districts"); *Dillard v. City of Greensboro*, 956 F. Supp. 1576, 1579 (M.D. Ala. 1997) (affirming plan drawn by special master who, in "order to produce a plan that best applies traditional districting criteria to the geography and demographics of the City of Greensboro, "endeavored first to define and protect communities of interest") (internal quotation marks omitted); *Moon v. Meadows*, 952 F. Supp. 1141, 1150 (E.D. Va. 1997), (rejecting redistricting plan where state "subordinated traditional districting principles,

In sum, the Panel should adopt a set of relevant redistricting criteria, consider the public testimony and the plans submitted to it by the parties, and then draw maps that make the most sense in light of the criteria adopted and testimony heard. That may require balancing and weighing criteria to achieve a result in the interests of all Minnesotans. The Panel need not and should not formally prioritize particular criteria over others. Doing so would inappropriately tie the Panel's hands later and impede the effort to ensure that the plans adopted best serve the demographic and geographical realities of Minnesota.

D. The Panel Should Not Adopt The Hippert Plaintiffs' Proposed Criterion on Splitting Political Subdivisions

The Hippert Plaintiffs acknowledge that political subdivisions will need to be split in some cases. They propose a criterion that specifically delineates the circumstances when a political subdivision may be split, clarifying their proposed language is intended to account for cities and towns that are noncontiguous. This language is unnecessary. All parties propose a criterion incorporating the constitutional mandate that districts be composed of contiguous territory. As such, it is unnecessary to include additional verbiage reiterating that political subdivisions can be split when noncontiguous.

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such as compactness, *communities of interest*, and respect for cities and counties" to impressible ends) (emphasis added), *aff'd*, 521 U.S. 1113 (1997); *Miller*, 515 U.S. at 915–16, 115 S. Ct. at 2488 (defining "traditional race-neutral districting principles" as "including but not limited to compactness, contiguity, [and] respect for political subdivisions or communities defined by actual shared interests"); *Vera v. Richards*, 861 F. Supp. 1304, 1337 (S.D. Tex. 1994) (noting the "traditional districting principles . . . [are] compactness, contiguity, respect for political subdivisions, and communities of interest"), *aff'd*, 517 U.S. 952 (1996); *Carstens v. Lamm*, 543 F. Supp.

E. The Panel Should Adopt a Compactness Criterion

The Court should adopt a compactness criterion. Drawing compact districts where possible often fits hand in glove with drawing "convenient" districts, as required by state law. It is a factor worth considering.

The Britton Intervenors, on the other hand, entirely oppose the inclusion of compactness as a redistricting criterion. Their objections do have some force. The Britton Intervenors correctly note that compactness is an ill-defined concept. Too great an adherence to compactness could favor the interests of the political party with greater support in rural areas at the expense of the party that dominates dense urban areas.

Nonetheless, it is clear that compactness is a traditional redistricting criterion in Minnesota. *See Zachman* Criteria Order, at 11-12. The United States Supreme Court has likewise repeatedly cited geographical "compactness" as a traditional districting principle. *See, e.g., Bush*, 517 U.S. at 962; *Shaw v. Hunt*, 517 U.S. 899, 905-06 (1996). Ultimately, the Britton Intervenors' objections do not counsel for the outright rejection of compactness but, rather, for the Panel to give compactness relatively little weight and see that it gives way to efforts to respect political subdivision boundaries and communities of interest. *See, e.g., LaComb*, 541 F. Supp. at 164-65. Properly conceived of, then, "[c]ompactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency." *Wilson v. Eu*, 1 Cal. 4th 707, 719, 823 P.2d 545

68, 93-94 (D. Colo. 1982) (noting efforts to "achieve[] a balance among the many communities of interest affected by congressional redistricting").

(1992). Thus, "it speaks to relationships that are facilitated by shared interests and by membership in a political community, including a county or city." *Id.*

With that conception of what it means for a district to be "compact" in mind, the Martin Intervenors submit that the Panel should adopt a compactness criterion.

F. The Panel Should Adopt a Criterion to Avoid Unfair Results for Incumbents or Potential Challengers

All parties but the Hippert Plaintiffs propose that the Panel adopt the criterion adopted by the *Zachman* panel that the Panel will, as a final step subordinate to all other redistricting criteria, consider whether a redistricting plan results in an unfair result for incumbents or potential challengers. This is appropriate. Of course, the Panel's primary purpose is not to draw districts to benefit one political party over another or to protect incumbents at the expense of challengers. That said, it is prudent for the Panel to ensure that a plan it adopts does not inadvertently and excessively favor one group over another. *See, e.g., Arizonans for Fair Representation v. Symington*, 828 F. Supp. 684, 688-89 (D. Ariz. 1992) ("The court [plan] also should avoid unnecessary or invidious outdistricting of incumbents"). Because this criterion "is inherently more political than factors such as communities of interest and compactness," however, courts generally subordinate this criterion to other considerations. *Johnson v. Miller*, 922 F. Supp. 1556, 1565 (S.D. Ga. 1995), *aff'd sub nom. Abrams v. Johnson*, 521 U.S. 74 (1997); *see also Dillard*, 956 F. Supp. at 1581; *LaComb*, 541 F. Supp. at 165. The Panel should do so here, as the *Zachman* panel did before it.

III. CONCLUSION

For the reasons stated above, and in the Martin Intervenors' motion to adopt redistricting criteria, the Panel should adopt the criteria proposed by the Martin Intervenors to guide redistricting.

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