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,

Ken Martin, et al.,

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.

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

Proposed Intervenors.

MEMORANDUM IN SUPPORT OF MOTION AND APPLICATION FOR INTERVENTION

Background

The within action was originally filed in the Wright County District Court on January 21, 2011. It seeks judicial relief in the form of a declaratory judgment that the current Minnesota legislative and congressional districts are unconstitutional as being in violation of various provisions of the United States Constitution and the Constitution of Minnesota. On or about January 25, 2011, Petitioners filed a Petition with the Chief Justice of the Minnesota Supreme

Court seeking the appointment of a Special Redistricting Panel to oversee all judicial aspects of legislative and congressional redistricting based upon the 2010 census. By Orders of the Chief Justice dated February 14 and June 1, 2011, the action was transferred to this Panel. Applicants now seek to intervene as additional plaintiffs, as a matter of right under Rule 24.01 of the Minnesota Rules of Civil Procedure. In the alternative, they seek permissive intervention under Rule 24.02, Minnesota Rules of Civil Procedure.

This Application and Motion are authorized by the Order of this Panel dated July 18, 2011 and Rule 24, Minnesota Rules of Civil Procedure.

Applicants

Applicants are citizens and voters in various legislative and congressional districts as alleged in their proposed Complaint in Intervention (Exhibit A, ¶ 2) whose rights to Due Process and Equal Protection of Law as guaranteed by the United States Constitution and the Constitution of Minnesota are currently abridged by the Final Order of the Minnesota Special Redistricting Panel dated March 19, 2002.

Applicants are also Plaintiffs in that certain action pending in the United States District Court for the District of Minnesota captioned *Audrey Britton, et al. v. Mark Ritchie, et al.* (hereinafter "*Britton*"), which case was served and filed on January 12, 2011. If Applicants' Motion and Application for Intervention is granted, a modified version of their Federal Court Complaint, as set forth in Exhibit A, will be served and filed as Applicants' pleading herein.

Procedural History of Federal Case

The State and County defendants answered Applicants' Federal Court Complaint on February 2, 3, and 4, 2011. The Republican Intervenors in that case who are the Plaintiffs in this case were allowed, without opposition, to intervene in that case by Order dated February 7, 2011. The Democratic-Farmer-Labor applicants also were allowed to intervene, unopposed, by Order dated July 21, 2011 (copy attached as Exhibit B).

On February 2, 2011, the parties in the Federal *Britton* case agreed upon a temporary stay of proceedings therein in order to give the Minnesota political branches, House, Senate and Governor, an opportunity to perform their constitutional duties to redistrict the state based upon the results of the 2010 decennial census. The political branches did not perform that duty despite the fact that the census block data for Minnesota was released on March 16, 2011.

On May 17, 2011, the Minnesota House and Senate adopted highly partisan legislative and congressional redistricting plans which did not meet any of the Governor's criteria. He therefore vetoed them on May 19, 2011. (Exhibit C). The legislature thereafter adjourned without having adopted any redistricting plan satisfactory to the Governor. The next regular session of the Minnesota Legislature is not scheduled to begin until January 24, 2012.

On June 6, 2011, Applicants' Motion to the United States District Court to lift the temporary stay was heard by the Honorable Arthur J. Boylan, Chief Magistrate Judge. This Panel has received copies of Applicants' letter to Magistrate Boylan dated July 14, 2011, and the responses thereto.

Judge Boylan's Order denying Applicants' Motion without prejudice was entered July 21, 2011. (Exhibit B)

Procedural History of This Case

As noted above, this case was originally filed January 21, 2011 in the Wright County District Court. On January 25, 2011, Plaintiffs filed a Motion for Appointment of a Special Redistricting Panel. On February 14, 2011, the Chief Justice granted the Petition but stayed the Appointment of the Panel. On May 18, 2011, Plaintiffs moved the Chief Justice to lift her stay and appoint the Panel. On June 1, 2011 this Panel was appointed. On July 18, 2011, this Panel issued pre-trial Scheduling Order No. 1.

Based upon that Scheduling Order and Magistrate Boylan's Order dated July 21, 2011, Applicants make their Motion to Intervene as Plaintiffs pursuant to Rule 24, Minnesota Rules of Civil Procedure.

Intervention as a Matter of Right

Rule 24.01 of the Minnesota Rules of Civil Procedure provides:

> Upon timely application anyone shall be permitted to intervene in an action when the applicant claims an interest relating to the property or transaction which is the subject of the action and the applicant is so situated that the disposition of the action may as a practical matter impair or impede the applicant's ability to protect that interest, unless the applicant's interest is adequately represented by existing parties.

This rule, permitting intervention as a matter of right, is to be liberally construed because Minnesota courts encourage intervention. *Blue Cross/Blue Shield of Rhode Island v. Flam*, 509 N.W.2d 393, 396 (Minn. App. 1993) *rev. denied*; *BE&K Const. Co. v. Peterson*, 464 N.W.2d 756 (1991).

In order to intervene as a matter of right under the above Rule, a non-party must demonstrate:

(1) timely application for intervention;

(2) an interest relating to the property or transaction which is the subject of the action;

(3) circumstances demonstrating that the disposition of the action may as a practical matter impair or impede the party's ability to protect that interest; and

(4) a showing that the party is not adequately represented by the existing parties.

Blue Cross/Blue Shield of Rhode Island v. Flam, 509 N.W.2d 393, 395 (Minn. App. 1993) *rev. denied.*

1. Timeliness of Application

The timeliness of an application to intervene depends on factors such as 1) how far the suit has progressed, 2) the reason for the delay in seeking intervention, and 3) any prejudice to the existing parties because of the delay. *Flam, supra.*

In the case at bar, the suit has not progressed very far. The first Scheduling Order was issued July 18, 2011. Nothing further has occurred. Any delay in submitting this Motion was due to the pendency of Applicants' Motion to Lift Stay filed in the Federal Court case on May 17, 2011, heard on June 6, 2011 and decided on July 21, 2011. Until that Motion was heard and decided, there was no reason for Applicants to be plaintiffs in both cases. This Panel's Scheduling Order No. 1 anticipated that Motions to Intervene would be timely if filed and served on or before July 29, 2011. An Application to Intervene filed and served by that date is timely. No party is prejudiced by the timely filing.

2. Applicants claim an interest in the subject matter of this case.

The subject matter of the instant action is to seek a judicial remedy for the failure of the Minnesota Legislature to redraw the state's legislative and congressional districts as required by the United States Constitution and the Constitution of the State of Minnesota.

Applicants' interests in that subject matter are:

1. A prompt judicial determination that the legislative and congressional districts adopted by the Minnesota Special Redistricting Panel in its Order dated March 19, 2002, are now, with the passage of time and the release of a new decennial census, unconstitutional and in violation of the one person - one vote rule of *Reynolds v. Sims*, 377 U.S. 533 (1964), the Fourteenth Amendment to the United States Constitution, Article I, Section 2, Clause 3 of the United States Constitution, Article 4, Section 3 of the Minnesota Constitution, Article 1, Section 2 of the Minnesota Constitution, and Article 7, Section 1 of the Minnesota Constitution.

2. A prompt judicial determination that those districts may not be used for any purpose.

3. A prompt commencement and determination of criteria for the development of new congressional and legislative redistricting plans that meet the requirements of the one person – one vote rule and other applicable provisions of the United States Constitution (as well as the Minnesota Constitution) and the requirements of Section 2 of the Voting Rights Act of 1965, 42 U.S.C. § 1973, as well as the adoption of those plans.

Those interests are demonstrated by Applicants' actions in commencing and prosecuting the Federal Court *Britton* case and in filing this Application promptly upon receipt of Magistrate Boylan's Order of July 21, 2011. In order to ensure that Applicants' constitutional rights as alleged in the attached proposed pleading (Exhibit A) are maintained, intervention should be allowed.

3. Circumstances exist demonstrating that the disposition of the action may, as a practical matter, impair or impede the party's ability to protect that interest.

If Applicants are not permitted to intervene and this Panel timely completes its redistricting work without them, then *Growe v. Emison*, 507 U.S. 25, 113 S.Ct. 1075 (1993), says that Applicants' federal court action may be mooted. Therefore, as a practical matter, Applicants may not be able to protect their interests unless they are allowed to participate in this case.

Applicants' claims in the Federal court will now be heard and determined by this Panel. Those claims are so situated that their disposition by this Panel may, as a practical matter, under the rule of *Growe v. Emison*, 507 U.S. 25, 37 (1993), and the Order of Chief Justice Gildea dated June 1, 2011, impair or impede Applicants' ability to protect their interests.

Other parties have been routinely allowed to intervene in prior redistricting cases.[1] In the pending case in the United States District case, Republican intervenors (the plaintiffs herein)

[1] Since before *Reynolds v. Sims*, 377 U.S. 533 (1964), interested individual parties and institutions have been allowed to intervene in redistricting cases. *See e.g., Silver v. Jordan*, 241 F.Supp. 576 (S.D. Ca. 1964); *Beens v. Erdahl*, 336 F.Supp. 715 (D. Minn. 1972); *LaComb v. Growe*, 541 F.Supp. 160 (D. Minn. 1982); *Cotlow v. Growe*, C8-91-985; *Cotlow v. Growe*, 622 N.W.2d 565 (MN 2002).

have been allowed to intervene to protect their interests.[2] Likewise, the Democratic-Farmer-Labor Party interests have been allowed to intervene, both in this case and in the Federal court case.[3]

The test that a potential intervenor must claim an interest relating to the subject matter is a relatively easy test to meet. Courts recognize less tangible, non-parties' interests as being sufficient to support intervention of right. 1 Minn. Practice § 24.4. Applicants respectfully submit that there is no greater interest than the protection of their right to vote and have that vote equally counted.

4. Applicants' interest is not adequately represented by existing parties.

Applicants' interests are not adequately represented by either the original plaintiffs, who represent Republican Party interests, nor by Intervenors Ken Martin, et al., who represent Democratic-Farmer-Labor Party institutional interests. These groups apparently believe that Applicants do not adequately represent their interests. Applicants concur in that conclusion. For the same reasons neither the Republican Party Plaintiffs nor the DFL Party Intervenors adequately represent Applicants' interests.

Plaintiffs Hippert et al. are associated with the Republican Party of Minnesota. They have consented to this Motion and Application to Intervene. (Exhibit E attached.)

[2] Order dated February 7, 2011, *Britton, et al. v. Ritchie, et al.*, Docket No. 30.
[3] Order dated July 21, 2011, *Britton, et al. v. Ritchie, et al.*, Docket No. 71.

Intervenors Martin et al. have "intervened to advance the interests of the DFL Party." Their counsel of record, David L. Lillehaug, advised the United States District Court that his clients have "the support and encouragement of the DFL Party, the Governor, the DFL caucuses in the Minnesota House and the Minnesota Senate, and some (but not all) DFL members of Minnesota's congressional delegation." (Exhibit D attached.) Applicants Audrey Britton et al. do not represent those interests in the Federal case nor would they in this case. The DFL Party institutional interests in the Federal case were allowed to intervene precisely because they represent institutional, not individual interests.

Applicants' counsel is advised that Defendant Ritchie does not object to this Application and that Intervenors Martin, et al. do not plan to file any response to this Motion and Application.

Permissive Intervention

If, for any reason, the Panel does not grant Applicants' Motion and Application for Intervention under Rule 24.01, Applicants request that their intervention be allowed under Rule 24.02. Since Applicants cannot protect their constitutional rights in the Federal Court *Britton* action, they should be allowed to do so in this action. There are no substantial differences in the legal rights at issue in the two actions. These are primarily common claims. A comparison of Applicants' Federal Court Complaint and the original Complaint herein confirms that commonality.

Rule 24.02, Minnesota Rules of Civil Procedure provides (in part):

> Rule 24.02 permits anyone to intervene in an action if the potential intervenor's claim or defense and the pending action have any common issues of law or fact.

This standard for permissive intervention is as broad as can be imagined. 1 Minn. Practice §24.7.

Applicants' intervention will not delay or prejudice any party to the case. On the other hand, both this Panel's Pretrial Scheduling Order No. 1 and the above referenced Orders of Chief Justice Gildea make it clear that all claims and parties regarding 2011 redistricting litigation should be heard before this Panel. Requiring Applicants to commence another case which would then undoubtedly be consolidated herein would achieve nothing.

Conclusion

For the reasons set forth above and in compliance with *Growe v. Emison, supra*, the Motion and Application for Intervention should be granted.

Respectfully Submitted,

WEINBLATT & GAYLORD, PLC

Dated: July 29, 2011

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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,

Ken Martin, et al.,

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.

COMPLAINT IN INTERVENTION

Plaintiff Intervenors Audrey Britton, David Bly, Cary Coop, and John McIntosh, for their cause of action against Defendants, state and allege as follows:

JURISDICTION:

1. This Court has subject matter jurisdiction over this action based upon the provisions of 42 U.S.C. §§ 1983 and 1988, as well as its general jurisdiction as supplemented by Minn. Stat. § 2.724, Minn. Stat. § 480.16, and Minn. Stat. Chapter 555.

PARTIES:

2. Plaintiffs are citizens and qualified voters of the United States of America and of the State of Minnesota residing in various counties, legislative districts and congressional districts in the State of Minnesota as shown on Exhibit "A" which is attached hereto and incorporated herein by reference.

3. Plaintiffs bring this action individually and as representatives of all of the citizens of the State of Minnesota who are similarly situated, as being currently denied Equal Protection of the Laws and Due Process of Law, as further alleged herein and whose rights under the constitutional provisions listed below are being violated by the actions of the Defendants.

4. Defendant Mark Ritchie is the duly elected and acting Secretary of State of the State of Minnesota whose duties under Minnesota Statutes Chapters 200 through 211B inclusive, charge him, in his official capacity, with the duties of keeping records of state elections, giving notice of such elections, receiving filings for office, preparing ballots and instructions to voters, distributing election laws of the State of Minnesota, receiving election returns, furnishing blank election ballots and forms, furnishing certificates of elections in multi-county legislative districts and Congressional Districts and statewide elections, membership on the Minnesota State Canvassing Board and various other election duties.

5. Defendant Robert Hiivala is the duly elected County Auditor and chief election officer for Wright County, Minnesota, whose duties under Minnesota Statutes Chapters 200 through 211B inclusive, charge him, in his official capacity, with the duties of keeping records of state elections, giving notice of such elections, receiving filings for office, preparing ballots and instructions to voters, distributing election laws, receiving

election returns, furnishing blank election ballots and forms, furnishing certificates of elections in Wright County legislative districts and congressional districts. This action is brought against him in his official capacity and as representative of all eighty-seven chief county election officers of the State of Minnesota.

COUNT I:

LEGISLATIVE MALAPPORTIONMENT

6. This case arises under the Fourteenth Amendment, Section 1, to the Constitution of the United States which provides in pertinent part:

> "[1]No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

The provisions thereof guaranty to the citizens of each state the right to vote in State and Federal elections and that the vote of each citizen shall be equally effective with any other vote cast in such election. A state statute and/or court order which enforces or effects an apportionment which invidiously discriminates against citizens in highly populous legislative districts and prefers other voters in the least populous legislative districts violates the above quoted constitutional provision.

7. This case also arises under the Fifth Amendment of the Constitution of the United States, which provides in pertinent part: "No person shall ... be deprived of life, liberty or property without due process of law."

8. The current Minnesota legislative apportionment system established by a five (5) member Special Redistricting Panel in Zachman v. Kiffmeyer, Civil File No. CO-01-160 (Final Order dated March 19, 2002) effects a legislative apportionment which invidiously discriminates against citizens in the most highly populous legislative districts, including Plaintiffs, and prefers other citizens in the least populous legislative districts in violation of the Fifth and Fourteenth Amendments to the United States Constitution.

9. This case also arises under Article IV, Section 2 of the Minnesota State Constitution, which provides:

> The number of members who compose the senate and house of representatives shall be prescribed by law. The representation in both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof.

10. This case also arises under Article IV, Section 3 of the Minnesota Constitution provides:

> At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional and legislative districts. Senators shall be chosen by single districts of convenient contiguous territory. No representative district shall be divided in the formation of a senate district. The senate districts shall be numbered in a regular series.

11. Plaintiffs are citizens of the United States and of the State of Minnesota and have the rights conferred by the above provisions of the United States Constitution and the

Minnesota Constitution to have the entire membership of the Minnesota Legislature apportioned and elected on the basis of the 2010 Federal Census.

12. The intent and the purpose of the above referenced provisions of the Minnesota Constitution is to require that the members of the Minnesota Legislature be elected by the people of the State of Minnesota on a basis of equal representation of the individual citizens of the state. Therefore, all Minnesota State Senators and Representatives must be equally apportioned throughout the state in districts which are arranged in population according to the number of inhabitants thereof as shown by the 2010 Federal Census.

13. The United States Federal Census taken as of April 2010 shows that the Minnesota state legislative districts as established by the Special Redistricting Panel in Zachman v. Kiffmeyer, Civil File No. CO-01-160 (Order dated March 19, 2002), are now unequally apportioned; that despite the compilation of said Census the State of Minnesota has failed and neglected, and unless otherwise ordered, will continue to fail and neglect to reapportion the legislative districts in the State of Minnesota; and that the present apportionment of the state legislative districts is no longer based upon any logical or reasonable formula but is arbitrary and capricious.

14. Based upon the April 2010 Federal Census, the ideal population for each Minnesota State House of Representatives district is 39,581.5. The ideal population for each Minnesota State Senate district is 79,163.

15. These Plaintiffs are residents, citizens and voters of certain legislative districts in the State of Minnesota, the population of which has increased since the last Federal Census at a rate greater than the state population as a whole.

16. The unequal population of the Minnesota House of Representatives districts and the Minnesota State Senate districts deprives Plaintiffs and all other citizens of the highly populated districts of the rights guaranteed to them by the Fourteenth Amendment to the United States Constitution, including the rights of Due Process of Laws and the Equal Protection of the Laws. It further deprives them of the rights guaranteed to them by the above quoted provisions of the Minnesota State Constitution.

17. The plaintiffs are informed and believe and, therefore, allege that the Legislature of the State of Minnesota will not pass a law reapportioning itself in conformity with the United States Constitution and the Constitution of the State of Minnesota during the 2011 Legislative Session. The plaintiffs further allege on information and belief that the defendants intend to and will, unless sooner restrained by an order of this Court, conduct the election for the 2013 Minnesota State Legislature during the year 2012 on the basis of the senatorial and representative districts determined by the Special Redistricting Panel in the case of Zachman v. Kiffmeyer, Case File No. CO-01-160 (Order dated March 19, 2002) and that until there is a legislative reapportionment, defendants will continue to do so in subsequent elections for members of the Minnesota State Legislature.

18. Plaintiffs further allege that they intend to and will vote in the state primary and general elections to be held in 2012 and thereafter for candidates for Minnesota State Senate and Minnesota House of Representatives; and that said elections conducted in accordance with final order of the Special Redistricting Panel in the case of Zachman v. Kiffmeyer, Case File No. CO-01-160 (Order dated March 19, 2002) will continue to deprive plaintiffs of their rights guaranteed under the Constitution of the United States and the Constitution of the State of Minnesota.

19. In the absence of reapportionment of the legislative districts of the State of Minnesota in conformance with the Minnesota Constitution, any action of these defendants in conducting an election of the members of the Minnesota Legislature in accordance with the districts ordered by the Special Redistricting Panel in the case of Zachman v. Kiffmeyer, Case File No. CO-01-160 (Order dated March 19, 2002) will continue to deprive plaintiffs of their constitutional rights in that:

(a) They are and will be arbitrarily deprived of their liberty and property without Due Process of Law, and are and will be arbitrarily deprived of the Equal Protection of the Laws in violation of the Fourteenth Amendment to the Constitution of the United States.

(b) They are and will be in substantial measure, disenfranchised and deprived of their rights and privileges, all in violation of Article I, Section 2 of the Minnesota Constitution.

(c) They are and will be deprived of equally apportioned congressional districts of the Minnesota Legislature as guaranteed by Article IV, Section 2 and Article IV, Section 23 of the Minnesota Constitution.

(d) Their right to vote, as guaranteed by Article VII, Section 1 of the Minnesota Constitution, is and will continue to be abridged, diluted and infringed.

20. By reason of the failure of the Legislature of the State of Minnesota to reapportion the legislative districts of the state in conformity with the Minnesota Constitution, thus violating the above cited constitutional rights of these plaintiffs and of all other members of the class of citizens and voters whom they represent, a justiciable controversy exists.

COUNT II:

CONGRESSIONAL REDISTRICTING

21. Plaintiffs reallege paragraphs 1 through 5 hereof.

22. This case arises under the Fourteenth Amendment, Section 1 of the Constitution of the United States, which provides in pertinent part:

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty or property, without due process of law; nor deny any person within its jurisdiction equal protection of the laws.

The provisions thereof guaranty to the citizens of each state the right to vote in State and Federal elections and that the vote of each citizen shall be equally effective with any other vote cast in such elections. A state statute and/or court order which enforces or effects an apportionment, which invidiously discriminates against citizens in highly populous congressional districts and prefers other citizens in the least populous congressional districts violates the above quoted constitutional provision.

23. This case also arises under the provisions of Article I, Section 2, Clause 3 of the Constitution of the United States which provides in part:

> Representatives . . . shall be apportioned among the several states . . . according to their respective numbers.

24. Article 4, Section 3 of the Minnesota State Constitution provides:

> At its first session after each enumeration of the inhabitants of this state made by the authority of the United States, the legislature shall have the power to prescribe the bounds of congressional and legislative districts.

25. Plaintiffs are citizens of the United States and of the State of Minnesota, and have the rights conferred by the above provisions of the United States Constitution and the Minnesota Constitution to have all Representatives in Congress from the State of Minnesota apportioned and elected on the basis of the 2010 Federal Census. The intent and purpose of the aforesaid provision of the Minnesota Constitution is to require that Representatives in Congress be elected by the people of the State of Minnesota on a basis of equal representation of the individual electors in the state and that the Minnesota Representatives in Congress from the State of Minnesota must be equally apportioned throughout the state in districts which are arranged in proportion to the number of inhabitants therein.

26. The United States Federal Census taken as of April 2010 shows that the congressional districts as established by the Court in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002), and Minnesota Statutes Sections 2.742 through 2.812 are now unequally apportioned; that despite the compilation of said Census, the Minnesota Legislature has failed and neglected to reapportion lawfully the congressional districts in the State of Minnesota; and the present apportionment of the congressional districts is not based upon any logical or reasonable formula whatsoever, but is arbitrary and capricious.

27. Based upon the April, 2010 Federal Census, the ideal population for each congressional district in Minnesota is 662,990.

28. The unequal representation effected by the congressional districts created and ordered by the Court in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002), deprives plaintiffs and all other citizens of the highly populated congressional districts of the rights guaranteed to them by the Fourteenth Amendment to the Constitution of the United States including their rights of Due Process of Law and the Equal Protection of the laws. It further deprives them of their rights as guaranteed by the above quoted provisions of the Minnesota State Constitution.

29. The plaintiffs are informed and believe and, therefore allege, that the Legislature of the State of Minnesota will adjourn without reapportioning the state's congressional districts in conformity with the United States Constitution and the Constitution of the State of Minnesota during the 2011 legislative session. The plaintiffs further allege on the information and belief that all of the Defendants intend to and will, unless sooner restrained by an order of this Court, conduct the next election for Representatives in Congress during the year 2012, on the basis of the current congressional districts and that until there is a congressional reapportionment, Defendants will continue to do so in subsequent elections of Representatives in Congress.

30. Plaintiffs further allege that they intend to and will vote in the state primary and general election in 2012 and thereafter for candidates for Representatives in Congress; and that said elections conducted in accordance with the present congressional districts will continue to deprive Plaintiffs and the class that they represent of their rights guaranteed under the above cited provisions of the Constitution of the United States and of the Constitution of the State of Minnesota.

31. In the absence of reapportionment of the congressional districts of the State of Minnesota in conformity with the United States Constitution, any action of these Defendants in conducting an election for Representatives in Congress in accordance with the present districts has deprived and will continue to deprive Plaintiffs of their constitutional rights in that:

(a) They are and will be arbitrarily deprived of liberty and property without Due Process of Law, and are and will be arbitrarily deprived of the Equal Protection of the Laws in violation of the Fourteenth Amendment to the Constitution of the United States.

(b) They are and will be arbitrarily deprived of their rights under Article I, Section 2, Clause 3 of the Constitution of the United States.

(c) They are and will be in substantial measure disenfranchised and deprived of their rights and privileges, all in violation of Article 1, Section 2 of the Minnesota Constitution.

(d) They are and will be deprived of equally apportioned congressional districts as guaranteed by Article 4, Section 3 of the Minnesota Constitution.

(e) Their right to vote, as guaranteed by Article 7, Section 1of the Minnesota Constitution, is and will continue to be abridged, diluted and infringed.

32. By reason of the failure of the Legislature of the State of Minnesota to reapportion the congressional districts of the state in conformity with the United States and Minnesota Constitutions, thus violating the constitutional rights of these plaintiffs and of all other members of the class of citizens and voters whom they represent, a justiciable controversy exists.

WHEREFORE, Plaintiffs respectfully pray that:

1. This Court declare the rights of these Plaintiffs pursuant to Minn. Stat. Chapter 555, to wit:

(a) That the present legislative apportionment of the State of Minnesota as ordered by the court in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002) and in Minnesota Statutes §2.043 through 2.703 has deprived and continues to deprive plaintiffs and all citizens of the State of Minnesota similarly situated in underrepresented districts of their liberty and property without Due Process of law and has denied and continues to deny plaintiffs and all citizens of the State of Minnesota similarly situated in underrepresented districts of the Equal

Protection of the law all in violation of the Fourteenth Amendment to the Constitution of the United States; and

(b) That the present plan of congressional apportionment as ordered by the court Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002) Minnesota Statute §§ 2.742 through 2.812 deprives plaintiffs and the class they represent of Due Process of Law and Equal Protection of the Law all in violation of the Fourteenth Amendment to the Constitution of the United States.

(c) That the present plan of Congressional districts, as ordered by the court in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002), and §§2.742 through 2.812, unlawfully impairs the rights of the plaintiffs and the class they represent as guaranteed by Article 4, Section 3, and Article 1, Section 2 of the Minnesota Constitution.

(d) That the decision of the Special Redistricting Panel in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002), and Minnesota Statute §§2.043 through 2.703 unlawfully impairs the rights of the plaintiffs and the class they represent as guaranteed by Article I, Section 2 and Article 4, Sections 2 and 3 of the Minnesota Constitution.

2. The Court issue a permanent injunction and judgment decreeing that the plan of the legislative apportionment set forth in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002), and Minnesota Statute §§2.043 through 2.703 may not hereafter be used as a valid plan of legislative apportionment.

3. The Court permanently restrain defendants and the class of persons they represent from receiving nominations and petitions for legislative office, from issuing certificates of nominations and elections, and from all further acts necessary to the holding of elections for members of the Minnesota Legislature in the districts set out and described in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002), and Minnesota Statutes §§2.043 through 2.703 until such time as the legislature passes and the governor approves legislation reapportioning the state legislative districts in accordance with the Constitution of Minnesota and the Due Process and Equal Protection clauses of the United States Constitution.

4. The Court issue its permanent injunction and judgment decreeing that the plan of congressional apportionment set forth in Minnesota Statutes §§2.043 through 2.703 and §§2.742 through 2.812 and as set forth in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002), may not hereafter be used by Defendants as a valid plan and scheme of congressional apportionment.

5. The Court permanently restrain the defendants and the class of persons they represent from receiving nominations and petitions for Congressional office, from issuing certificates of nomination and elections, and from all further acts necessary to the holding of elections for members of Congress in the districts to the decree of the Court in Zachman et al v. Kiffmeyer et al, Civil File No. CO-01-160 (Order dated March 19, 2002) until such time as the legislature passes and the Governor approves legislation reapportioning the eight (8) Minnesota Congressional districts in accordance with the Constitution of Minnesota and the Due Process and Equal Protection clauses of the United States Constitution.

6. That this Court notify the Governor and Legislature of the State of Minnesota that it will retain jurisdiction of this action and, upon the failure of the State of

Minnesota to adopt constitutionally valid plans of congressional redistricting and legislative reapportionment, prior to the end of the current legislative session, the Court will issue an Order requesting the parties hereto to submit proposed plans of congressional redistricting and legislative reapportionment for the Court's consideration.

7. The Court order defendants to pay to plaintiffs, pursuant to 42 U.S.C. §1988, Minn. Stat. § 15.472 and Minn. Stat. §§555.08 and 555.10, their reasonable attorneys fees and expenses, expert fees, costs and other expenses incurred in prosecuting this action.

8. For such other and future relief as is just in the circumstances.

Dated: July 29, 2011

WEINBLATT & GAYLORD, PLC

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Attorneys for Intervenors Britton, et al.

ACKNOWLEDGEMENT

The undersigned hereby acknowledges that costs, disbursements and reasonable attorney and witness fees may be awarded pursuant to Minn. Stat. §549.211, subd. 2, to the party against whom the allegations in this pleading are asserted.

Alan W. Weinblatt, #115332

Exhibit A

	Congressional District	Legislative District
Audrey Britton	3	43A (Hennepin County)
David Bly	2	25B (Rice County)
Cary Coop	2	25B (Scott County)
John McIntosh	6	19B (Wright County)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA

Audrey Britton, et al.,

Plaintiffs,

v.

Mark Ritchie, et al.,

Defendants.

Civil No. 11-93 PJS-MJD-DM

ORDER ON MOTIONS TO TO LIFT STAY AND MOTION FOR INTERVENTION

This matter is before the Court, Chief Magistrate Judge Arthur J. Boylan, on Plaintiffs' Motion to Lift Stay [Docket No. 32] and Motion to Lift Stay of Proceedings and Intervene by Lori Sellner, et al. [Docket No. 41]. The case concerns legislative and congressional redistricting in Minnesota following the 2010 census. Hearing was held on June 6, 2011, at the U.S. Courthouse, 300 South Fourth Street, Minneapolis, Minnesota 55415. Alan W. Weinblatt, Esq., Jay Benanav, Esq., and Jane L. Prince, Esq. appeared on behalf of the plaintiffs. Tony P. Trimble, Esq., and Matthew W. Haapoja, Esq. appeared on behalf of previous intervener plaintiffs. Allan I. Gilbert, Esq., and Mark T. Berhow, Esq., appeared on behalf of the defendant Minnesota Secretary of State. David L. Lillehaug, Esq., and Marc E. Elias, Esq. appeared on behalf of the applicant plaintiff interveners. A three-judge panel consisting of the Honorable Diana E. Murphy, United States Circuit Judge for the Eighth Circuit; the Honorable Michael J. Davis, Chief Judge, United States District Court, District of Minnesota; and the Honorable Patrick J. Schiltz, United States District Court Judge, District of Minnesota, has been designated to hear this case.[1] The present motions have been referred to the magistrate judge for

[1] Order of Designation [Docket No. 7].

determination. The applicant interveners' motion to lift the stay is made for the limited purpose of permitting their intervention. The only opposition to the motion for intervention is made by previous interveners who contend that the motion is untimely and intervention applicants' interests are adequately represented by existing plaintiffs. Initial plaintiffs do not oppose the intervention but contend that the scope of intervention should be limited to remedies. Defendant Secretary of State states no position on the intervention motion, but opposes lifting the stay on the grounds the federal court should defer to the Minnesota state court redistricting process and it has not been shown that redistricting plans cannot be adopted in accordance with established government processes.

Based upon the file, declarations, memorandums and arguments of counsel, **IT IS HEREBY ORDERED** that:

1. The Motion to Lift Stay of Proceedings and Intervene by Lori Sellner, et al. is **granted** [Docket No. 41]. It is the court's determination that intervention is not untimely and is properly permitted as a matter of permissive intervention under Fed. R. Civ. P. 24(b)(1), and that such intervention will not unduly delay or prejudice the adjudication of the original parties' rights. Timeliness of a motion to intervene is a matter within the district court's discretion, subject to considerations which include: (1) the extent to which the case has progressed; (2) the applicants' knowledge of the litigation; (3) the reason for delay in seeking intervention; (4) and whether the intervention will prejudice existing parties. See American Civil Liberties Union v. Tarek Ibn Ziyad Acad., _ F.3d. _, 2011 WL 2637701 at *3 (8th Cir., July 7, 2011). The case is presently subject to an indefinite stay of proceedings and a pretrial scheduling order has yet to be issued. Under these circumstances the court concludes that the motion to intervene is not

untimely and the intervention will not prejudice existing parties. The scope of the intervention will not be limited to particular issues or remedies. An appropriate alignment of parties for purposes of conducting motion and trial practice can be established upon lifting the stay and implementation of a litigation scheduling and case management order.

2. The Motion to Lift Stay by plaintiffs Audrey Britton, et al. is **denied** [Docket No. 32].

Dated: July 21, 2011

s/ Arthur J. Boylan
Arthur J. Boylan
United States Chief Magistrate Judge

MEMORANDUM

This redistricting matter was stayed by court Order issued on February 7, 2011, and pursuant to agreement of parties. Plaintiffs now move to have the stay lifted, asserting that census data necessary for legislative and congressional redistricting has become available since the stay was imposed; it is not readily apparent that the matter will be addressed in the near future through Minnesota governmental processes; and lifting the stay and commencement of the judicial process, including possible appeals, is necessary to allow timely consideration and determination of redistricting issues prior to the scheduled dates for political candidate endorsements for elections to be held in November 2012. Defendants and initial intervener plaintiffs oppose the motion to lift the stay, arguing that federal courts must give deference to state courts on redistricting matters, and plaintiffs have not presented evidence to establish that a

state redistricting panel will be unable to adopt a plan in a timely fashion.

The stay that is currently in effect in the matter does not preclude parties from collecting public data, preparing legal arguments, conferring with experts, and otherwise readying themselves for anticipated legal proceedings. Indeed, there is no contention that the stay is delaying discovery, and the primary purpose of lifting the stay at this point is to ensure ample time is allowed for court decisions and expected appeals. Plaintiffs assert that the final determination on redistricting must be made before February 21, 2012, the statutory deadline for adopting constitutional redistricting plans. Plaintiffs further contend that the federal litigation appropriately provides a standby plan in the event that state redistricting processes fail, and there is no cause for further delay in this action. The defendant argues that the federal court should defer to parallel state court redistricting proceedings pursuant to the direction of Growe v. Emison, 507 U.S. 25, 32-37 (1993), and that a three-member redistricting panel has been established by Order by Supreme Court Justice Gildea, though actual appointments have not been made in deference to the legislature's role.

Although state and federal courts have concurrent jurisdiction over issues in the reapportionment and redistricting context, principles of comity and federalism typically favor giving deference to either or both legislative and judicial consideration of disputes at the state level. Emison, 507 U.S. at 32-33, 34 (citing Scott v. Germano, 381 U.S. 407 (1965)). "[T]he Constitution leaves with the States primary responsibility for apportionment of their federal and state legislative districts." Emison, 507 U.S. at 34 (citing U.S. Const., Art. I, § 2). Without showing that the state's legislative or judicial branches will be unwilling or unable to perform its duties in regards to redistricting, the federal court must not obstruct the state's performance or

allow such performance to be impeded by way of federal litigation. Id. With respect to the timely progression of state efforts, including the pace and time required for orderly appeals, it is recognized that redistricting can be successfully accomplished by the state under highly exigent circumstances and the prospect of appeals is not particularly relevant to the discussion. Id. at 35. Nonetheless, the federal courts are only required to defer to the states, not to abstain from any action, and the federal court is justified in setting deadlines for state legislative and state court action, and establishing its own redistricting plan, in the event that the state branches are unable to timely develop a redistricting plan in time for elections. Id. at 36-37.

In this instance the plaintiffs have simply not shown that proceedings which have been commenced at the state level will be ineffective or will fail to provide timely results. Allowing federal court proceedings to go forward on a parallel track with state litigation and redistricting processes would not necessarily burden the political parties to a great extent because respective arguments and proposed remedies would presumably overlap significantly. The Minnesota legislature did send a redistricting plan to the legislature which was vetoed by the governor.[2] The bill and the veto manifest the highly political nature of the redistricting task, a reality which was acknowledged in Emison, 507 U.S. at 33. However, the actions also indicate that the legislature and the governor are cognizant of redistricting duties in general, and it is premature to conclude that those duties will not be timely performed. Likewise, the judicial branch has taken the initial step of establishing a three-member redistricting panel. Finally, the federal three-judge panel has been designated to hear the present case. It is apparent that each of the institutions that may be called upon to consider reapportionment and redistricting in

[2] Declaration of Tony P. Trimble, Ex. B.

Minnesota is currently poised for the challenge and plaintiffs' request to lift the stay is based substantially upon a largely speculative time line rather than concrete evidence of the state's inability or unwillingness to act on the matter. Of course, the passage of time itself may alter the analysis, but for the present, it has simply not been shown that a complete breakdown of the state reapportionment and redistricting process has occurred or is imminent and the stay should therefore remain in effect, and the state legislative and judicial processes should be allowed to proceed without the interference of federal litigation. The court does not conclude that the stay in this case can never be lifted so long as some nominal state level activity is occurring, but the necessity for federal court intervention in Minnesota redistricting has not yet come to fruition.

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,

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

EXHIBIT C TO APPLICATION FOR INTERVENTION

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,

Mark Dayton
Governor

cc: Senator Michelle L. Fischbach, President of the Senate
Senator Amy T. Koch, Majority Leader
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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

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF MINNESOTA

Audrey Britton, David Bly, Cary Coop, and John McIntosh, individually and on behalf of all citizens of Minnesota similarly situated, 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 Minnesota county chief election officers, Defendants.	Civil Action No. 11-cv-93 PJS/AJB **AFFIDAVIT OF DAVID L. LILLEHAUG REGARDING INTERVENTION**

STATE OF MINNESOTA)
) ss.
COUNTY OF HENNEPIN)

David L. Lillehaug, being duly sworn, states and deposes as follows:

1. I am one of the attorneys for the eight individuals (collectively, "the Sellner Intervenors") who have moved to intervene in this action. I submit this Affidavit to clarify the interests of the Sellner Intervenors.

2. The Sellner Intervenors seek to intervene to advance the interests of the DFL Party. Their intent to intervene has the support and encouragement of the DFL Party, the Governor, the DFL caucuses in the Minnesota House and the

Minnesota Senate, and some (but not all) DFL members of Minnesota's congressional delegation.

3. As the Hippert Intervenors note, one of the attorneys for the plaintiffs herein, Alan Weinblatt, is an experienced lawyer who has been involved in previous redistricting litigation. However, he has not been retained by the DFL Party for this litigation or for the redistricting case in Minnesota District Court, *Hippert, et al. v. Ritchie, et al.*, presently venued in the Tenth Judicial District. Mr. Weinblatt does not represent -- and we understand that he does not purport to represent -- the interests that the Sellner Intervenors seek to advance.

Further affiant sayeth not.

/s/ David L. Lillehaug
David L. Lillehaug

Subscribed and sworn to before me
this 31st day of May, 2011.

/s/ Mary E. Nelson
Notary Public

STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL
A11-152

Sara Hippert, Dave Greer, Linda Markowitz, Dee Dee Larson, Ban Maas, Gregg Peppin, Randy Penrod and Charles Roulet, individually and on behalf of all citizens and voting residents of Minnesota similarly situated,

Petitioners,

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.

CONSENT TO INTERVENTION

Plaintiffs Sara Hippert, Dave Greer, Linda Markowitz, Dee Dee Larson, Ban Maas, Gregg Peppin, Randy Penrod and Charles Roulet, by and through their undersigned counsel of record, do hereby consent to the intervention of Audrey Britton, David Bly, Cary Coop, and John McIntosh as additional Intervenor-Plaintiffs in the within action, pursuant to Rule 24.01 of the Minnesota Rules of Civil Procedure. The undersigned further agree that they will accept service of a Complaint in Intervention in the within matter.

Dated: July 27, 2011

TRIMBLE & ASSOCIATES, LTD.

By: Tony P. Trimble
Tony P. Trimble, #122555
Matthew W. Haapoja, #268033
Mark D. Fosterling, #389690
10201 Wayzata Boulevard, Suite 130
Minnetonka, MN 55305

Dated: July 27, 2011

BRIGGS AND MORGAN, P.A.

By: Elizabeth M Brama
Eric J. Magnuson (#0066412)
Elizabeth M. Brama (#0301747)
Michael C. Wilhelm (#0387655)
2200 IDS Center
80 South Eighth Street
Minneapolis, Minnesota 55402-2157

EXHIBIT E TO APPLICATION FOR INTERVENTION