STATE OF MINNESOTA

SPECIAL REDISTRICTING PANEL

A21-0243
A21-0546

Peter S. Wattson, Joseph Mansky, Nancy B. Greenwood, Mary E. Kupper, Douglas W. Backstrom and James E. Hougas III, individually and on behalf of all citizens and voting residents of Minnesota similarly situated, and League of Women Voters Minnesota,

Plaintiffs,

and

Paul Anderson, Ida Lano, Chuck Brusven, Karen Lane, Joel Hineman, Carol Wegner, and Daniel Schonhardt,

Plaintiff-Intervenors,

vs.

Steve Simon, Secretary of State of Minnesota; and Kendra Olson, Carver County Elections and Licensing Manager, individually and on behalf of all Minnesota county chief election officers,

Defendants,

and

Frank Sachs, Dagny Heimisdottir, Michael Arulfo, Tanwi Prigge, Jennifer Guertin, Garrison O'Keith McMurtrey, Mara Lee Glubka, Jeffrey Strand, Danielle Main, and Wayne Grimmer,

Plaintiffs

and

ANDERSON PLAINTIFFS' RESPONSE TO PROPOSED REDISTRICTING PRINCIPLES

ORAL ARGUMENT REQUESTED

Dr. Bruce Corrie, Shelly Diaz, Alberder Gillespie, Xiongpao Lee, Abdirazak Mahboub, Aida Simon, Beatriz Winters, Common Cause, OneMinnesota.org, and Voices for Racial Justice,

Plaintiff-Intervenors,

vs.

Steve Simon, Secretary of State of Minnesota,

Defendant.

INTRODUCTION

Notably absent from any of the parties' arguments in support of their proposed redistricting principles is any contention that Minnesota's Special Redistricting Panels have in years past failed to draw fair and equitable congressional and legislative maps utilizing the principles Minnesota Panels have adopted the last 20 years. Likewise, no party asserts that congressional or legislative redistricting plans previously adopted in Minnesota have been impermissibly gerrymandered, overtly partisan, unfair to minority groups, or improperly biased in favor of any certain groups over others. No such argument is made because no such argument can be made. Reliance on historical, neutral, and objective redistricting principles, many of which are constitutionally or statutorily mandated, has served Minnesotans well in the past and resulted in maps that are widely lauded as fair and equitable.

Despite this, other parties to this litigation urge the Panel to elevate the consideration of subjective principles over those that are objective and neutral, in a sweeping departure

from the approach taken by Minnesota's Special Redistricting Panels in years past. The Panel should view these proposals, all coming from one side of the political aisle, for what they are: pretext for partisan manipulation. Simply put, in the view of the parties making such proposals, the application of Minnesota law and neutral, objective criteria does not sufficiently tilt the political playing field toward their political ideology. But this Panel should reject the invitation to wade into the partisan fray by considering partisan data to draw district lines. Rather, the Panel should follow the examples set by the Minnesota Special Redistricting Panels in *Hippert* and *Zachman* and make clear from the outset that this process will focus on the objective and non-partisan criteria, that are now well-established in Minnesota.

ARGUMENT

"When the judicial branch performs redistricting, it lacks the political authority of the legislative and executive branches and, therefore, must act in a restrained and deliberative manner to accomplish the task." *Hippert v. Ritchie*, 813 N.W.2d 374, 378 (Minn. 2012) (citing *Connor v. Finch*, 431 U.S. 407, 415 (1977)). Thus in previous redistricting cycles, Minnesota's Special Redistricting Panels have "established and utilized politically neutral redistricting principles that advance the interests of the collective good and preserve the public's confidence and perception of fairness in the redistricting process." *Id.* This Panel must likewise "not become entangled in the politics that might surround redistricting processes and are common to the legislative arena" *Zachman v. Kiffmeyer*, C0-01-160, Order Stating Redistricting Principles and Requirements for Plan Submissions at 10 (Minn. Special Redistricting Panel, Dec. 11, 2001) (citing *Connor*, 431

U.S. at 415) ("Zachman Principles Order"), and should reject proposals from the other parties to stray from principles historically recognized as fair, objective, and neutral.

I. Population Equality Must Take Precedence in the Panel's Final Redistricting Plans

The Wattson Plaintiffs with respect to congressional districts, and the Corrie Plaintiffs with respect to legislative districts, propose a stark departure from Minnesota precedent regarding population equality requirements. They do so by asking the Panel to place no restrictions on tolerable population deviations so that the Panel may eschew constitutional requirements in favor of unspecified "legislative policies" and "rational state policy." But the constitutional requirement of population equality is the very reason redistricting occurs every ten years and simply cannot be cast aside in favor of other goals advanced by the parties.

A. The Wattson Plaintiffs' proposed deviation from the well-established +/- one person standard for congressional districts must be rejected

The Wattson Plaintiffs propose that the Panel allow population equality in congressional districts to be subordinate to nearly every other conceivable principle. In particular, the Wattson Plaintiffs suggest that deviations in the population of congressional districts may be justified by "*any number* of consistently applied *legislative policies* … including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives." Wattson Br. at 9 (emphases added). These positions are wholly improper for maps drawn by a judicial panel, and would undermine the constitutional reasons for why redistricting occurs.

The United States Supreme Court established the standards for congressional redistricting decades ago. Especially for congressional districts, the standard is "one person one vote" and strict population equality is required. *Gray v. Sanders*, 372 U.S. 368, 381 (1963). It would be improper for this judicial Panel to pursue "legislative policies" in the first place, much less to prioritize them over the "one-person, one vote" constitutional mandate that is the entire purpose of redistricting. *See* U.S. Const. art. I, § 2; Minn. Const. art. IV, § 2; *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964). Regardless of "legislative policies" – particularly those not accepted across the political spectrum, let alone enacted into law – constitutional principles take legal precedence.

Consistent with the law, the *Hippert* Panel adopted, and the Anderson Plaintiffs support, a standard stating only that congressional districts be "as nearly equal in population as is practicable," and that "absolute population equality shall be the goal." *Hippert v. Ritchie*, A11-152, Order Stating Redistricting Principles at 5 (Minn. Special Redistricting Panel, Nov. 4, 2011) ("Hippert Principles Order"). And consistent with this goal, the *Hippert* and *Zachman* Panels both ultimately adopted final congressional redistricting plans in which the population of congressional districts deviated by just one person. *See Zachman*, C0-01-160, Final Order Adopting Redistricting Plan at 3 (March 19, 2002) ("Zachman Final Order") at Appendix B; *Hippert*, A11-0152, Final Order Adopting a Congressional Redistricting Plan at Appendix B (Minn. Special Redistricting Panel Feb. 21, 2012). Strict population equality, then, is plainly achievable. The Panel should once again hold itself to that high standard. Conversely, deviating from it would tacitly

acknowledge that one political party succeeded in moving the Panel from the most fundamental of redistricting principles.

B. The Corrie Plaintiffs' proposed elimination of Minnesota's long-established 2 percent maximum population deviation for legislative districts must be rejected

Similarly, the Corrie Plaintiffs propose a break from the 2 percent maximum tolerable deviation from ideal population for legislative districts, instead suggesting that the Panel "shall allow for deviation from the ideal so long as it is based on legitimate considerations incident to the effectuation of rational state policy." Corrie Br. at 5. "Legitimate consideration" and "rational state policy" are so broad as to permit almost any deviation from this population goal, which makes them unworkable standards and removes virtually all meaning from such a goal.

The Corrie Plaintiffs also do not provide argument or explanation as to why the Panel should make this significant departure from previous Minnesota legislative district population goals. And we know that past Panels' adherence to a 2 percent standard resulted in maps that have served Minnesota well the past decades.

Whatever their reasons, the Corrie Plaintiffs' proposed change would be contrary to the Minnesota Constitution, which treats Minnesota's legislative districts equal to congressional districts in pursuit of population equality. *See* Minn. Const. IV ("representation in *both houses* shall be apportioned *equally* throughout the different sections of the state in proportion to the population thereof.").

As set forth in the Anderson Plaintiffs' opening memorandum, both the *Hippert* and *Zachman* panels adopted legislative redistricting plans with less than a *1 percent* maximum

deviation from the ideal, establishing that such population equality is achievable without sacrificing other statutory or constitutional principles. *See* Anderson Mem. at 8. Accordingly, the Panel does not need, and should not accept, flexibility to draw unequally apportioned electoral districts.

II. Maintaining Political Subdivisions Must Be Prioritized Consistent with Minnesota Law and Precedent

The other parties to this litigation further attempt to minimize the significant role political subdivision boundaries play in Minnesota congressional and legislative redistricting both under Minnesota statute and Minnesota precedent. They do so by attempting to more broadly enumerate the factors (*e.g.*, the preservation of "communities of interest") that would justify dividing subdivisions, despite plain statutory language that in redistricting "political subdivisions not be divided more than necessary to meet *constitutional* requirements." Minn. Stat. § 2.91, subd. 2 (emphasis added). The reason for this proposed minimization of political subdivisions is plain – to open the door to the partisan manipulation of district lines based upon political data. The Panel should reject these efforts and continue to apply this Minnesota statute as written.

The Panel should likewise reject the Wattson Plaintiffs' attempted inclusion of precincts, the boundaries of which will be redrawn following the conclusion of this redistricting cycle, in the definition of political subdivisions. Finally, while all parties propose the preservation of individual federally-recognized American Indian reservations as a legitimate redistricting principle, the Anderson Plaintiffs propose that it simply be

treated the same way as, and thus pursuant to the principle governing, the preservation of political subdivisions.

A. The language used by the *Hippert* Panel is appropriate to ensure the protection of statutory and constitutional guarantees

Minnesota Statutes § 2.91, subd. 2 requires that in drawing electoral districts, "political subdivisions not be divided more than necessary to meet constitutional requirements." The *Hippert* Panel adopted this requirement verbatim as a redistricting principle, making clear what the parties' obligations were and ensuring Minnesota voters the respect for their cities and towns guaranteed by statute.

Nonetheless, in their proposal for congressional and legislative districts, the Wattson Plaintiffs replace "constitutional requirements" with "equal population or minority representation requirements or to form districts that are composed of convenient, contiguous territory." Wattson Br. at 17. This change is both disingenuous and inappropriate. First, it is inappropriate because it identifies a limited number of other "requirements," even when state constitutional and statutory law do no such thing. Nor is it clear whether each of these items are indeed constitutional requirements, as "minority representation requirements" could be broader than or different from constitutional requirements. In fact, the Sachs Plaintiffs expressly state that they included such a requirement because it is not a constitutional requirement. Sachs Br. at 24. Second, it would deprioritize political subdivisions in a specific way Minnesota law does not allow.

Similarly, in their proposals for legislative and congressional districts, the Corrie and Sachs Plaintiffs would each replace "constitutional requirements" with "constitutional

or minority representation requirements; form districts that are composed of convenient contiguous territory;[1] or preserve communities of interest." Sachs Br. at 5; Corrie Br. at 3. These insertions spell out certain principles that are included elsewhere in the *Hippert* panel's language – again, seeking to give priority to specific principles over political subdivisions, without strictly adhering to the statutory language. The Corrie and Sachs Plaintiffs also inappropriately elevate "communities of interest" to the level of the constitutional requirements in justifying the split of political subdivisions – which as discussed below, this Panel cannot do.

These transparent efforts to minimize the importance of political subdivisions should not be accepted, particularly in light of the importance of political subdivisions to the functioning of government at all levels. Voters living in the same political subdivision often share an interest in government services such as law enforcement, public transit, road maintenance, election administration, garbage pick-up, utilities, and more. And as the *Hippert* Panel recognized ten years ago, respecting the boundaries of political subdivisions in drawing both congressional and legislative districts "minimizes voter confusion and gives political subdivisions a stronger voice." *Hippert v. Ritchie*, 813 N.W.2d at 382; *see also* Zachman Final Order at 3 ("legislative boundaries that respect political subdivisions

[1] The Sachs Plaintiffs argue that the need to specifically call out the preservation of contiguity, "where, for example, political subdivisions are contiguous at only a single point," is a reason for the subordination of political subdivisions. Sachs Br. at 24. But contiguity is a constitutionally-prescribed principle in Minnesota and thus does not need to be specifically identified. Moreover, the language adopted by *Hippert* and proposed by all of the parties to this case provides that "areas that connect at only one point shall not be considered contiguous." Hippert Principles Order at 6, 9; Sachs. Br. at 3, 6; Wattson Br., Ex. A; Corrie Br. at 3, 6; Simon Br. at 3, 6; Anderson Br., Ex. A.

will give political subdivisions a stronger, unified voice, and will minimize confusion for the state's voters."). As the United States Supreme Court noted in *Reynold v. Sims*, this is important because:

> Local governmental entities are frequently charged with various responsibilities incident to the operation of state government. In many States much of the legislature's activity involves the enactment of so-called local legislation, directed only to the concerns of a particular political subdivision.

377 U.S. 533, 580-81 (1964). In addition to this need for common representation in the state legislature, keeping political subdivisions intact eases the burden placed on such localities in the conduct of elections, minimizing the number of different ballot forms that must be produced for each election, and thereby increasing efficiency and decreasing costs. Indeed during the course of public testimony, both before the Panel and before the Minnesota House and Senate redistricting committees, Minnesota voters have expressed time and time again their desire to keep their political subdivisions in one district.

Accordingly, the Panel should reject these proposed changes.

B. The preservation of political subdivisions is statutorily-mandated in Minnesota and must be prioritized over the preservation of communities of interest

The Sachs and Corrie Plaintiffs' proposal to elevate the preservation of communities of interest over the preservation of political subdivisions must be rejected both because it would violate Minnesota law and because it would be precarious policy to elevate subjective redistricting criteria over objective redistricting criteria. Sachs Br. at 23 ("political subdivisions shall not be divided more than necessary to . . . preserve communities of interest"); Corrie Br. at 3 (same).

Most importantly, to switch the order of priority of these two principles would result in a violation of Minnesota statute, which mandates that in congressional and legislative redistricting "[p]olitical subdivisions shall not be divided more than necessary to meet constitutional requirements." Minn. Stat. § 2.91. The preservation of communities of interest is simply not a constitutional requirement. Thus while Minnesota statute permits the division of political subdivisions to, for instance, meet population equality or convenience and contiguity requirements, it does not permit such divisions to preserve communities of interest. The Sachs and Corrie Plaintiffs' proposal must therefore be rejected as inconsistent with the redistricting statute adopted by the Minnesota legislature, as well as with Minnesota redistricting precedent. *See* Hippert Principles Order at 6, 9; Zachman Principles Order at 2, 4. Regardless of the veracity (and the Anderson Plaintiffs doubt it) of the Sachs Plaintiffs' contention that "preservation of communities of interest may justify splitting political subdivisions, since political subdivisions should not be mechanistically preserved where doing so splits obvious communities of interest," it makes that argument to the wrong body. The Minnesota legislature has required by statute that the preservation of political subdivisions be given priority in redistricting and it is the Minnesota legislature that must amend that prioritization.

Adherence to this statutorily-mandated objective redistricting principle over the inherently subjective communities of interest principle is likewise good policy. To be sure, drawing lines that, to the extent possible, allow local communities and neighborhoods to use their common voice to advocate for public issues of common concern – *e.g.*, roads, public education, public transportation – is an important goal in redistricting. But the

elevation of communities of interest above political subdivisions is not the best way to achieve this goal. In contrast to a political subdivision, evaluating who and what makes up a community of interest is by its nature a subjective and uncertain endeavor. Elevating the role of communities of interest as a redistricting principle increases the likelihood of partisan manipulation, allowing parties to justify their proposed gerrymandered lines with after-the-fact explanations that they were drawn to preserve communities of interest. The prioritization of the communities of interest principle further raises a significant concern that the voices of more marginalized "communities of interest" will be drowned out by those that are better-organized and better-funded.

The inherent problems with elevating communities of interest over political subdivisions are evident in the sheer number of identified common interests in the proposals submitted to the Panel in this case. *See, e.g.*, Sachs Br. at 14-15; Wattson Br. at 29-20; Corrie Br. at 3-4,6. While the Anderson Plaintiffs do not quarrel with the identification of common interests (*e.g.*, "regional, historic, socioeconomic, occupational, trade, and transportation" (Sachs. Br. at 15)), the Anderson Plaintiffs urge that the Panel not abandon interests traditionally recognized in the past, such as economic interests.

This does not mean, however, that the Panel must abandon the goal of ensuring that, to the extent possible, local communities and neighborhoods reside and vote in the same district. Indeed, the Panel can work to achieve this goal without becoming "entangled in the politics that might surround redistricting processes . . .." *See* Zachman Principles Order at 10. This goal can be more fairly achieved through prioritizing the use of objective criteria, such as drawing districts to avoid political subdivision splits and to be compact.

These objective criteria recognize and enable map drawing that accounts for the fact "that people sort themselves into neighborhoods and communities with others who share similar attitudes and behaviors . . .." (Sachs Br. at 16-17), but are not open to the same opportunities for partisan manipulation. And where a community of interest is suggested, the Panel can further guard against manipulation by continuing to require that such communities of interest be "persuasively established" and that their consideration "not violate applicable law." Zachman Principles Order at 3, 5; Hippert Principles Order at 6, 9. This approach has, again, served the State of Minnesota well for the last two decades and allowed the Panel to avoid entanglement with the partisan politics of redistricting.[2]

The Sachs Plaintiffs' arguments as to why the preservation of communities of interest should be elevated are simply not persuasive. In nearly the same breath, the Sachs Plaintiffs argue that "people sort themselves into neighborhoods and communities with

[2] Both the Corrie Plaintiffs and the Wattson Plaintiffs propose that the Panel adopt certain "Plan Submission Requirements." Because the Panel did not request such submissions in its August 24, 2021 Order, it should disregard these proposals. More specifically, the Wattson Plaintiffs' proposed community of interest report requirements should be rejected for a number of reasons. First, as discussed *infra* p.15, precinct splits need not be considered by this Panel and thus should not be required to be delineated on any report. Second, the Panel need not impose any requirements for the separate submission of a "description of the research process used to identify the community of interest" a party proposes to preserve. The basis for the identification of any such a community will be included by their parties in their briefs in support of proposed redistricting plans. Finally, given the inherently subjective nature of the meaning of a "community of interest," a report purporting to "show the number of communities of interest that are split and the number of times a community of interest is split" is of limited value and dubious veracity. *See* Wattson Br., Ex. B.

others who share similar attitudes and behaviors," but that the political subdivisions in which people live are not a good indicator of their common concerns. *See* Sachs Br. at 17-19. Both of those propositions cannot be true. Moreover, the Sachs Plaintiffs speculate that "following political subdivision lines too rigidly might result in the inadvertent 'cracking' of minority communities." *Id.* at 24. But the Sachs Plaintiffs provide no evidence or support for this assertion, and ignoring or splitting political subdivisions could well result in the same "cracking." *See Reynolds,* 377 U.S. at 581 ("[A] State may legitimately desire to construct districts along political subdivision lines to deter the possibilities of gerrymandering."); *see also The Application of Reynolds,* 79 Harv. L. Rev. 1248, 1249 (1966) ("It is simply not as easy to 'load the dice' against or in favor of a particular group when political subdivision lines are followed as when they are not."); Brian Gordon, *An End to Gerrymandering: How Rigorous and Neutral Design Criteria Can Restrain or End Partisan Redistricting*, 93 Temp. L. Rev. 533, 545 (2021) ("Gerrymandering in the 2011 [Pennsylvania] map was made possible by the drafters' ability to abandon the requirements that districts be compact and that drafters minimize splits in political subdivisions.").

Finally, the Sachs Plaintiffs' purported concern that annexed noncontiguous territory "might have little in common with the annexing jurisdiction" is alleviated by the fact that Minnesota's constitution and Minnesota statute require that districts be contiguous. There being no good reason to adopt a principle that violates Minnesota statute, the Panel should reject calls to elevate the preservation of communities of interest above the preservation of political subdivisions.

C. Precincts are not political subdivisions and should not be treated as such

Incorporated within their proposed principles regarding the division of subdivisions, the Secretary of State and the Wattson Plaintiffs further propose a new criterion never before adopted by Minnesota's Special Redistricting Panels – namely, a requirement that in drawing district lines, existing precincts should not be divided more than necessary. But precincts are not political subdivisions. And, in fact, precinct boundaries are required by Minnesota statute to be reestablished every ten years after the congressional and legislative redistricting process has been concluded. *See* Minn. Stat. § 204B.14, subd. 1a ("It is the intention of the legislature to complete congressional and legislative redistricting activities in time to permit counties and municipalities to begin the process of reestablishing precinct boundaries as soon as possible after the adoption of the congressional and legislative redistricting plans but in no case later than 25 weeks before the state primary election in the year ending in two."). In other words, Minnesota's existing precinct boundaries are outdated and will soon be redrawn at the conclusion of the congressional and legislative redistricting process. Their preservation should not be used by the Panel as a specific criterion in adopting its congressional and legislative redistricting plans.[3]

D. American Indian reservations should be treated as political subdivisions and their preservation need not be identified as a separate principle

All parties to this redistricting litigation agree that the boundaries of individual federally-recognized American Indian reservations should be kept intact, unless otherwise

[3] Precinct reports should thus likewise not be mandated in the parties' plan submissions, as proposed by the Wattson Plaintiffs. Wattson Br. at 30, 33.

necessary to comply with constitutional requirements. It is thus likewise not disputed that those boundaries should be treated no differently than the boundaries of counties, cities, and townships in Minnesota. The Anderson Plaintiffs simply contend, like the Secretary of State,[4] that no separate criterion need be adopted to minimize the division of individual federally-recognized American Indian reservations because they are and should be treated no differently than political subdivisions. Indeed, like cities and townships, American Indian reservations are "distinct, independent political communities" which have power to "legislate and to tax activities on the reservation, to determine tribal membership, and to regulate domestic relations among members[.]" *Plains Com. Bank v. Long Fam. Land & Cattle Co*., 554 U.S. 316, 327 (2008); *see also Michigan v. Bay Mills Indian Cmty*., 572 U.S. 782, 788 (2014) ("Indian tribes are domestic dependent nations that exercise inherent sovereign authority.") (quotations omitted). Accordingly, persons living within their jurisdictions, like persons living within cities and townships, share common interests and concerns and should be able to speak in the political process with a common voice.

It is further worth noting that, like it would for those living within cities and townships, deprioritizing objective and neutral redistricting criteria such as compactness and the preservation of political subdivisions (including federally-recognized American Indian reservations) in favor of the adoption of partisan political criteria would adversely

[4] In relevant part, the Secretary of State proposes the adoption of the following principle: "Political subdivisions shall not be divided more than necessary to meet constitutional requirements. Minn. Stat. § 2.91, subd. 2; *Karcher v. Daggett*, 462 U.S. 725, 733 n.5, 740-41 (1983). Lands within the jurisdiction of federally recognized sovereign tribes also shall not be divided more than necessary to meet constitutional requirements . . .." Simon Br. at 3, 6.

affect members of these sovereign tribes. It would do so by limiting their opportunity to speak with one voice through a common representative elected to advocate for their common interests. The potential marginalization of these individuals is yet another reason to reject the proposed adoption of this partisan criteria.

III. Compactness Should Not Be Deprioritized as a Redistricting Principle

No party disputes that compactness is an appropriate redistricting principle. However, before the Panel are proposals to separate the principle of compactness from the principles of convenience and contiguity. The same proposals would prioritize subjective criteria and partisan political criteria over the neutral and objective requirement that districts be compact. Again, such proposals seek to move the Panel away from principles that have served the Panel, the parties, and the public well for decades, and in doing so raise arguments which past Minnesota Special Redistricting Panels have soundly rejected. These proposals must again be rejected because (1) compactness is a necessary companion to contiguity, such that those principles should continue to be considered together, and (2) compactness is an objective and non-political criterion that is not subject to partisan manipulation.

A. The *Hippert* Panel appropriately evaluated compactness and contiguity as a single principle

"The United States Supreme Court has consistently recognized compactness as a legitimate redistricting criterion." Hippert Principles Order at 15 (citing *Miller v. Johnson*, 515 U.S. 900 (1995) and *Karcher v. Daggett*, 462 U.S. 725, 740 (1983)). In Minnesota, this criterion has long been appropriately applied side-by-side with the constitutional and

statutory requirements that districts be convenient and contiguous for at least the past five decades. *See, e.g.*, Zachman Principles Order at 2, 4 ("Districts will consist of convenient, contiguous territory structured into compact units."); Hippert Principles Order at 6 & 8-9 ("districts shall consist of convenient, contiguous territory structured into compact units."). The Secretary of State, the Wattson Plaintiffs, the Sachs Plaintiffs, and the Corrie Plaintiffs all urge this Panel to depart from this long-established approach in Minnesota by excising from the principle that districts consist of "convenient, contiguous territory" the related requirement that districts be compact. *See* Simon Br. at 3, 6, 8, 10; Wattson Br. at 16-17; Sachs Br. at 3, 6, 11-12; Corrie Br. at 3, 5-6. This Panel should decline the invitation.[5]

While these parties are correct in their assertion that, unlike convenience and contiguity, compactness is not specifically identified in the Minnesota Constitution or Minnesota statute, they fail to acknowledge that it has been persuasively recognized as a necessary companion to contiguity for the prevention of gerrymandering. As the *Zachman*

[5] There is no dispute by the parties here that this Panel should, consistent with the Minnesota Constitution and Minn. Stat. § 2.91, subd. 2, continue to require that districts be convenient and contiguous. All parties likewise agree that compactness is a legitimate redistricting criterion that should be considered by the Panel in adopting its congressional and legislative redistricting plans. *See* Simon Br. at 4, 7; Wattson Br. at Exhibit A; Sachs Br. at 5, 8; Corrie Br. at 4, 7.

The Wattson Plaintiffs further propose a change to the language of a convenience and contiguity principle to read as follows: "districts must be composed of convenient contiguous territory that allows for easy travel throughout the districts." Wattson Br. at 16 (emphasis added). The addition of this language would be a departure from the language used by the *Hippert* and *Zachman* Panels and does not fully account for the goal of compactness, including failing to sufficiently prevent gerrymandering and the appearance of gerrymandering. Moreover, ease of travel and does not have the same mathematical, objective measures as compactness. This Panel should continue to adopt the language adopted in the 2001 and 2011 redistricting cycles.

Panel noted, "the United States Supreme Court has repeatedly recognized compactness as one means of averting gerrymandering and preventing districts from sprawling across a state." Zachman Principles Order at 11 (citing *Shaw v. Reno*, 509 U.S. 640, 647 (1993); *Swann v. Adams*, 385 U.S. 440, 444 (1967); *Reynolds*, 377 U.S. at 578-79). Indeed absent a compactness requirement, a district could, without ever violating Minnesota's constitutional requirement that such a district be contiguous, meander from one corner of the state to another, picking up what one party or the other deems to be desirable voters along the way. As Daniel D. Polsby and Robert D. Popper explain in *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale Law & Policy Review 301, 331 (1991):

> [W]hatever contiguity adds to a gerrymanderer's burdens, noncompactness can take away. Noncompactness may render contiguity irrelevant as a constraint. For any existing scheme of contiguous districts, a single voter, no matter where in the state he lives, could in theory be included in any district by means of a gerrymandered plan that neither displaces any other voter nor renders any part of any district noncontiguous. Further, for *any* spatial arrangement of voters, a scheme of contiguous districts can be constructed such that each district contains only those voters that have been specified in advance, regardless of where they live.
>
> . . . Thus, from the viewpoint of a partisan mapmaker, compactness and contiguity are a single entity, and freedom from the constraint of compactness is equivalent to freedom from contiguity as well. In such a world, abusive results are predictable events.

In other words, in drawing maps free from gerrymandering, contiguity and compactness are two sides of the same coin, and one cannot be considered without the other. This Panel

should follow the lead of prior Special Redistricting Panels in adopting convenience, contiguity, and compactness as a single redistricting principle.[6]

B. Compactness should not be subordinate to subjective and political redistricting principles

Even if the Panel were to adopt compactness as a redistricting criterion separate from convenience and contiguity (which it should not), it should reject proposals from the Secretary of State and the Wattson Plaintiffs to deprioritize compactness in favor of criterion that is subjective, political, and capable of partisan manipulation.

First, the Panel should reject the proposal from the Secretary of State to deprioritize compactness – a traditional, objective, and politically neutral criterion – in favor of partisan political criteria such as competitiveness, partisan fairness, and the evaluation of impacts on incumbent officeholders. For the reasons discussed *infra* Part IV, the Panel should reject the proposed adoption of these partisan principles in their entirety, and it should certainly refuse to elevate them over well-established and politically-neutral criteria. *See Hippert*, 813 N.W.2d at 378 ("[w]hen the judicial branch performs redistricting, it lacks the political authority of the legislative and executive branches and, therefore, must act in a restrained and deliberative manner to accomplish the task."). Moreover, prioritizing the impact on

[6] The Sachs Plaintiffs further argue that compactness should be separated from the principle of convenience and contiguity because "there are significant analytical issues with preferring compactness at the expense of other redistricting principles." Sachs Br. at 12. The Sachs Plaintiffs, however, as do all parties, recognize that there are several statistical tests that can measure compactness. *See, e.g.*, Sachs Br. at 26; Wattson Br. at 34-35' Corrie Br. at 8. Notably, there are on the other hand no measurement tools for "convenience," yet the Sachs Plaintiffs do not urge the panel to deprioritize that principle in its list of redistricting criteria.

incumbent officeholders before compactness as a redistricting principle is a stark departure from the *Zachman* and *Hippert* Panels, both of which considered the former as "a factor subordinate to all redistricting criteria . . .." Zachman Principles Order at 3, 5; Hippert Principles Order at 7, 9. These proposals to elevate such partisan principles above a non-partisan and objective compactness principle are particularly concerning coming from the Secretary of State, who is responsible for elections in the State of Minnesota.

The Panel should likewise reject proposals from both the Secretary of State and the Wattson Plaintiffs to prioritize the preservation of communities of interest over compactness as a redistricting principle.[7] Like the avoidance of political subdivision splits, requiring that districts be compact is an objective principle that furthers a goal all parties to the redistricting process advocate for – namely, allowing local communities, neighborhoods, and citizens with common interests and concerns to use their collective voice and to speak through a common representative – without the risk of the political and map-drawing gamesmanship that the more subjective communities of interest principle can foster. Minnesota's previous Special Redistricting Panels have recognized the utility of compactness "as one means of averting gerrymandering and preventing districts from

[7] While they do not specifically ask the Panel to elevate communities of interest above compactness, the Sachs Plaintiffs likewise propose removing language from the *Zachman* and *Hippert* Panel that formally subordinated communities of interest to other redistricting criteria, including compactness. *See* Sachs Br. at 16 ("Second, by adjusting the ordering of principles and altering the first sentence of this criterion, the Sachs Plaintiffs emphasize that this principle should not be formally subordinated to other considerations."). For all of the reasons set forth herein, the Panel should reject this proposal and should continue to provide that communities of interest shall be preserved "[w]here in compliance with" other principles such as population equality, contiguity and compactness, and the preservation of political subdivisions.

sprawling across the state" Zachman Principles Order at 11, despite arguments from parties in those cases against its adoption and against its consideration alongside contiguity. Those Panels echo Justice Stevens in *Karcher*: "[w]ithout some requirement of compactness, the boundaries of a district may twist and wind their way across the map in fantastic fashion in order to absorb scattered pockets of partisan support." 462 U.S. at 755–56 (Stevens, J. concurring opinion). Compact districts likewise assist in achieving other important goals, such as "[e]nsuring compliance with the United States Constitution and the Voting Rights Act" (Hippert Principles Order at 15 (citing *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 402, 433 (2006); *Bush v. Vera*, 517 U.S. 952, 955 (1996); *Karcher*, 462 U.S. at 740)). Indeed the benefits of compactness are recognized across the political spectrum. As noted by Justin Levitt in *A Citizen's Guide to Redistricting* at 52, Brennan Center for Justice (2010 Edition):

> Preferring compact districts is based on the idea that people who live close to one another will likely form a community worthy of representation, with shared characteristics and common interests (Indeed, the Supreme Court seems to have established a presumption that despite some shared characteristics, voters of the same race who live far from each other are not particularly likely to have race-based common interests that are worth representing.) Compact districts may also make it easier for candidates – especially candidates for local office – to campaign on the ground, without having to travel great distances from one end of the district to another.

Compactness has a long-established history in the United States of being used as an objective tool in drawing fair and equitable districting plans. It was a requirement in the federal Apportionment Act of 1901 and is currently used by 40 states as a redistricting principle via either statute, constitution, or judicial order. *See* Nat'l Conference of State Legislatures, *Redistricting Criteria* (July 16, 2021) (available at

https://www.ncsl.org/research/redistricting/redistricting-criteria.aspx); *see also* Zachman Principles Order at 11-12; Hippert Principles Order at 15-16. While the preservation of communities of interest should not be abandoned by this Panel as a redistricting criterion, it should not be elevated over compactness, a well-established and objective criterion.

IV. The Panel Should Not Consider Political Criteria Based on Partisan Data

The other parties further propose that the Panel consider partisanship-based political data in adopting its redistricting plan. These efforts make transparent the partisan goals of these parties, all of which are from one side of the political aisle. The explanation for these parties' focus on partisan political measures, never before adopted in this state, is self-evident: in their view, the application of Minnesota law and neutral, objective criteria does not sufficiently tilt the playing field toward their preferred political ideology. That, of course, is not a legitimate reason to depart from Minnesota's statutory requirements or established precedent.

In particular, the Wattson Plaintiffs and the Secretary of State each argue that the Panel should adopt two new criteria, measuring the "partisan fairness" and "electoral competitiveness" of congressional and legislative districts. Wattson Br. at 22-29; Simon Br. at 9.[8] As to partisan fairness, the Wattson Plaintiffs urge the Panel to use a "partisan index of election results" to "make it more likely than not that the political party whose

[8] While the Corrie and Sachs Plaintiffs do not propose entirely new political criteria, they do attempt to insert partisan consideration into the established criterion regarding treatment of incumbents: that districts "shall not be drawn for the purpose or effect of promoting, protecting, or defeating any incumbent, candidate, *or party*." Sachs Br. at 5; Corrie Br. at 4. The Anderson Plaintiffs oppose this addition, for all the same reasons discussed herein.

candidates receive a plurality of the statewide votes for seats in a legislative body will win a plurality of seats in the body." Wattson Br. at 23. The Secretary proposes, non-specifically, that the Panel "use judicial standards and the best available scientific and statistical methods to assess whether a plan unduly favors or disfavors a political party." Simon Br. at 4, 7. As to competitiveness, both the Wattson Plaintiffs and the Secretary argue that districts should be drawn such that "the plurality of the winning political party in the territory encompassed by the district … has historically been no more than eight percent." Wattson Br. at 27; Simon Br. at 4, 7. In short, both of these proposed principles would require the Panel to review the political party-based voting records of persons within a district when setting that district's boundaries, and then assume they are both accurate and fairly reflective of voters and non-voters' future voting patterns.

This effort to engineer a particular outcome in the next decade's elections should be rejected for three reasons. First, the use of political data in map-drawing would represent a sharp break from the restrained, non-political precedent established by Minnesota's previous redistricting panels – which rejected such plainly political devices. Second, political criteria are unnecessary and would be counterproductive in Minnesota, which does not suffer from partisan gerrymandering and is already competitive within the realities of Minnesota's political geography. Third, political criteria are of no use to a neutral, non-partisan judicial panel charged with choosing or drawing the next Minnesota maps.[9]

[9] For these same reasons, the Panel should likewise reject the Wattson and Corrie Plaintiffs' proposals that the parties be required to submit core constituency and partisanship reports with their proposed legislative and congressional redistricting plans. *See* Wattson Br. at 37-38; Corrie Br. at 9. Such a requirement injects unnecessary partisanship into what should

A. The Panel should follow Minnesota and United States Supreme Court precedent in avoiding political criteria

The *Hippert* panel recognized that "[w]hen the judicial branch performs redistricting, it lacks the political authority of the legislative and executive branches and, therefore, must act in a restrained and deliberative manner to accomplish the task." *Hippert*, 813 N.W.2d at 378 (citing *Connor*, 431 U.S. at 415). In recognition of this fundamental principle, the *Hippert* panel—like the *Zachman* panel before it—used "politically neutral redistricting principles that advance the interests of the collective public good and preserve the public's confidence and perception of fairness in the redistricting process." *Id*. at 379. In fact, as the Wattson Plaintiffs themselves note, a partisan fairness redistricting principle "has never been adopted by the legislature or a court in this state." Wattson Br. at 25. This is true despite certain parties' best efforts in the past. The same is true of political criteria that tries to protect politicians (not voters) by assuming past purported voting patterns should determine future elections through criteria like "competitiveness," or its sister, "proportionality."[10]

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be a neutral and objective process, and in light of the Panel's anticipated rejection of proposed partisan principles such reports are not necessary to the drawing of district lines.

[10] "Proportionality" is simply another term for the "partisan fairness" principle proposed here. *See e.g., Rucho v. Common Cause*, 139 S. Ct. 2484, 2501(2019). "Competitiveness and partisan fairness are distinct but intimately related," in that each incorporates a review of the historical voting data of persons residing within a proposed district and projects that historical data forward to achieve certain aims with respect to future election results. Benjamin Cover, *Quantifying Partisan Gerrymandering: An Evaluation of the Efficiency Gap Proposal*, 70 Stan. L. Rev. 1138, at 26 (2018).

Further, and contrary to the Wattson Plaintiffs' incorrect contention that "the panel's 2001 and 2011 principles were *silent* on both parties and competition" (Wattson Br. at 26) (emphasis added), the *Zachman* panel expressly ***rejected*** competitiveness as a principle in 2001. Faced with such a proposed principle, that panel expressly reasoned that it "should not become entangled in the politics that might surround redistricting processes and are common to the legislative arena." Zachman Principles Order at 10. Accordingly, the panel "decline[d] to adopt … the goal of ensuring that 'politically-competitive districts will result.'" *Id*. The *Zachman* panel recognized that such political considerations were beyond its appropriate purview:

> As a practical matter, these proposed criteria might well conflict with … this panel's goal in redistricting, which is ***neither to maximize nor minimize political opportunities*** for any political party or incumbent, but to ensure that the final redistricting plan is fundamentally fair and based ***primarily on the state's population and secondarily on neutral redistricting principles***.

Id. (emphases added).

In addition to previous Minnesota redistricting panels, the U.S. Supreme Court has rejected proportionality, and similar attempts to introduce partisan criteria into redistricting, as a standard "umanageable" by the judiciary. *Vieth v. Jubelirer*, 541 U.S. 268, 288 (2004). In *Vieth*, Justice Kennedy cautioned courts, even those "proceeding with best intentions," to avoid "assuming political, not legal, responsibility for a process that often produces ill will and distrust." *Id*. at 307 (Kennedy J. concurring opinion). While Justice Kennedy noted that courts could intervene in partisan gerrymandering if "some limited and precise rationale were found," he emphatically rejected a "fairness principle" like the one proposed by the Wattson Plaintiffs. *Id*. at 308 (Kennedy J. concurring opinion) ("There is no

authority for this precept. Even if the novelty of the proposed principle were accompanied by a convincing rationale for its adoption, there is no obvious way to draw a satisfactory standard from it for measuring an alleged burden on representational rights."). The Court even expressly dismissed the use of "the results of statewide races as the benchmark of party support" (*id.*), which is precisely what the Wattson Plaintiffs propose here. As the Court reasoned:

> There is no statewide vote in this country for the House of Representatives or the state legislature. Rather, there are separate elections between separate candidates in separate districts, and that is all there is. … Political parties do not compete for the highest statewide vote totals or the highest mean district vote percentages: They compete for specific seats.

Id. at 1783 (citation omitted).

More recently, the Supreme Court rejected both partisan fairness and competitiveness as judicially manageable political criteria. In *Rucho v. Common Cause*, 139 S. Ct. 2484, 2501 (2019), the Court held that partisan gerrymandering claims are not justiciable, in part because "there are no discernible and manageable standards for deciding" whether a districting plan is politically fair. As to competitiveness, the Supreme Court expressed skepticism in *Rucho* that engineering competitiveness is even desirable, or at minimum could have unintended and disastrous consequences. "[M]aking as many districts as possible more competitive could be a recipe for disaster for the disadvantaged party. As Justice White has pointed out, '[i]f all or most of the districts are competitive ... even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature.'" *Id*. (emphasis added). The Supreme Court's

criticism and rejection of these political criteria further underscores that they are inconsistent with the judiciary's mandate when drawing electoral-district boundaries.

The parties urging this Panel to adopt political criteria fail to convincingly explain why such a reversal of course is warranted, or would be in the best interests of Minnesota voters. The Wattson Plaintiffs point, without support, to an unspecified "increase in concern about partisan gerrymandering since the 2010 Census." Wattson Br. at 22.[11] The Wattson Plaintiffs also assert, again without citation or support, that due to "public awareness of partisan bias and continual efforts to gain electoral advantages through partisan gerrymanders, now is the time to adopt a principle that addresses these issues." *Id.* at 25. But neither the Wattson Plaintiffs nor any other party can identify any such "increase in concern" or "awareness of partisan bias" relating to any of Minnesota's redistricting efforts conducted by a Special Redistricting Panel, nor to the outcomes of the last two decades of redistricting in the state. As discussed more fully below, Minnesota's electoral districts simply do not reflect the kinds of partisan bias or gerrymandering the Wattson Plaintiffs describe.

Accordingly, the *Zachman* panel's reasoning in 2001 applies with equal force today, and applies equally to all criteria based upon partisan voting data. It is for the elected officials of the Minnesota Legislature to decide how political data should shape

[11] The Wattson Plaintiffs also note that due to this "increase in concern," 17 states have adopted requirements relating to partisan fairness. Wattson Br. at 22. However, the Wattson Plaintiffs fail to note that states such as Montana (MCA 5-1-115(3)) and California (See California Constitution (article XXI section 2(e)) ban consideration of partisan information as a bulwark against partisan gerrymandering. As those states recognize, the way to prevent partisan gerrymandering is not to inject partisan data into redistricting.

Minnesota's districts. This Panel should follow established precedent and avoid making such political judgments.

B. Political criteria are unnecessary and would be counterproductive in Minnesota, because Minnesota does not suffer from partisan gerrymandering and its districts are competitive within the realities of political geography

Competitiveness and proportionality standards are not only inconsistent with precedent in this State, but they are also unnecessary for the State of Minnesota. Because the state's electoral districts have been consistently drawn by a non-partisan judicial panel using neutral, objective criteria, the state's districts are already fair and its elections competitive within the realities of Minnesota's political geography. Indeed, it is quite telling that no party even argued that the districts drawn by the *Hippert* panel unduly favored one party or another, or were insufficiently competitive. In other words, the parties propose a solution in search of a problem.

First, a review of the Minnesota legislature and congressional delegation makes plain that the state's districts do not unduly favor one party or the other. Following the 2020 elections, the Republican party holds a 34-33 majority in the Minnesota state Senate, the DFL holds a 70-64 majority in the Minnesota House of Representatives, and the Minnesota delegation to the U.S. House of Representatives is split 4-4. The lack of partisan bias in Minnesota's maps is widely acknowledged. *See, e.g.*, Editorial, *Credit Judges for Fair Representation*, Star Tribune (Feb. 22, 2012) ("To its credit, the panel opted for minimal changes in well-established political patterns … [S]peaks well of the even-handedness of the five-judge panel's work, befitting their mixed political pedigrees.");

Peter Callaghan, *Minnesota Gets Another Divided Legislature. Why?*, Twin Cities Business (Nov. 19, 2020) (describing Minnesota's "non-gerrymandered legislative map.")

Second, the state's elections are competitive within the realities of Minnesota's political geography. For instance, according to the website FiveThirtyEight, a statistical analysis website, three of Minnesota's eight districts – the Second, Third, and Eighth – are "highly competitive." Aaron Bycoffe *et al.*, *The Atlas of Redistricting*, FiveThirtyEight (Jan. 25, 2018), https://projects.fivethirtyeight.com/redistricting-maps/minnesota/. By comparison, just one of Wisconsin's eight congressional districts meet that standard. https://projects.fivethirtyeight.com/redistricting-maps/wisconsin/. The competitiveness of Minnesota's congressional districts are further reflected by the changes – just in the last decade – in the political party affiliations of the elected members of Congress. For example, the First and Eighth Congressional Districts flipped from DFL to Republican in 2018, while the Seventh did so in 2020 after 30 consecutive years of electing the a DFL representative. Meanwhile, the Second District elected a DFL representative in 2018 after voting for Republicans for 17 consecutive years, and the Third Congressional District did the same after being represented by Republicans for 58 years. In short, there is no shortage of increasingly competitive districts in the State of Minnesota, as established by past Panels on the basis of neutral redistricting principles.

The remainder of the state's population, as the Wattson Plaintiffs correctly acknowledge, is sorted politically such that "it is impossible to draw competitive districts" without violating the principles of compactness and preserving political subdivisions." Wattson Br. at 28. In other words, "the only way you could probably create more-

competitive districts is to gerrymander[.]" Callaghan, Twin Cities Business (Nov. 19, 2020).

As the Wattson Plaintiffs' acknowledgement makes clear, the political criteria proposed by the parties are in conflict with the neutral, objective, non-political principles historically relied upon by Minnesota redistricting panels. Indeed it is widely acknowledged that due to "a range of complex geographically-linked factors such as immigration, migration, education, income, and religion … Republicans are increasingly surrounded by other Republicans and Democrats by other Democrats." Alan I. Abramowitz, *Incumbency, Redistricting, and the Decline of Competition in U.S. House Elections*, 68 The Journal of Politics 1, 79 (2006). This "complex process of migration, sorting, and residential segregation … has left the Democrats with a more geographically concentrated support base than Republicans." Jowei Chen & Jonathan Rodden, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*, 8 Quarterly Journal of Political Science 239, 254 (2013). To reverse-engineer political outcomes such as proportionality or competitiveness, then, would require drawing districts that are not compact, do not respect political subdivisions or communities of interest, and/or deviate from ideal population equality. *See* Michael P. McDonald, *Drawing the Line on District Competition*, 39 PS: Political Science and Politics 91 (Jan. 2006) ("accommodating communities of interest … conflicts with the goal of drawing competitive districts."). Any efforts to do so would have the unavoidable result of benefitting the DFL, with its more geographically concentrated support base, at the expense of Republicans. *See* Chen, *Unintentional Gerrymandering: Political Geography and Electoral Bias in Legislatures*,

8 Quarterly Journal of Political Science 239 (2013) (creating more proportional statewide representation would require "partisan cartography").

The Anderson Plaintiffs strongly oppose any suggestion that the Panel should violate those long-established, neutral, objective criteria in favor of "competitiveness" criteria advanced by left-leaning groups with concern only for their political odds, rather than actual concerns about non-competitiveness in Minnesota. The Panel should not engage in such "partisan cartography." Instead, it should simply focus on the neutral, objective criteria that have established fair district boundaries in Minnesota for decades.

C. Political criteria are of no use to a neutral judicial panel drawing districts

Finally, political criteria are simply of no use to a neutral judicial panel drawing its own maps, as opposed to reviewing a challenge to partisan-drawn maps. To whatever limited extent these measures are useful, it is as evidence of a controlling political party's intent to unduly favor its own candidates in elections or as part of a remedial measure to correct preexisting partisan gerrymandering.[12] For example, the Wattson Plaintiffs cite

[12] In other words, these criteria are intended to evaluate legal challenges to maps adopted by "partisan elected officials (namely, state legislative bodies) who have vested interests in protecting their own incumbency and protecting or expanding their political party's opportunity to get their chosen candidates elected." *See* Elizabeth M. Brama, et al., *Partisan Gerrymandering: Blurring The Line Between Law And Politics*, Mitchell Hamline Law Review, Vol. 45: Issue 5, Article 1 (2019) (available at: https://open.mitchellhamline.edu/mhlr/vol45/iss5/1). Minnesota courts have already succeeded in redistricting, with positive outcomes and without legal challenges, by focusing on neutral districting criteria and rejecting voting history-based criteria. Whether or not it might be ideal to have a metric that clearly and specifically determines where partisan gerrymandering *by partisan legislatures* is both intentional and would actually harm voters, such a metric does not currently exist. The United States Supreme Court confirmed as much (and indeed put to rest the concept of political gerrymandering as a

Common Cause v. Lewis, a case in which the Court found that "partisan intent predominated" in a political party's 2017 districting plan. The same is true of the high-profile "political gerrymandering" cases to appear in federal courts in recent years. *See Rucho v. Common Cause*, 279 F. Supp. 3d 587, 597 (M.D.N.C. 2018) ("[The Republican-controlled North Carolina General Assembly expressly directed the legislators and consultant … to draw a districting plan that would ensure Republican candidates would prevail in the vast majority of the state's congressional districts."); *Benisek v. Lamone*, 348 F. Supp. 3d 493, 521 (D. Md. 2018) (finding that Democrats who controlled the governorship and General Assembly of Maryland "specifically intended" to favor their own party with their district map.); *Whitford v. Gill*, 218 F. Supp. 3d 837, 890 (W.D. Wis. 2016), vacated and remanded, 138 S. Ct. 1916, 201 L. Ed. 2d 313 (2018) ("The evidence at trial establishes that one purpose of Act 43 was to secure the Republican Party's control of the state legislature for the decennial period.").

That scenario is inapplicable here, where a non-partisan, non-political panel of judges has been appointed to adopt a districting plan and has done so with even-handedness and fairness for each of the last two redistricting cycles. Put simply, this Panel's task is not to decide whether the districts established by political parties are unlawful partisan gerrymanders, as has been the case in other states. Instead, the Panel itself, as previous panels have done, can simply set district boundaries "based primarily on the state's population and secondarily on neutral districting principles." Zachman Principles Order at

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justiciable claim under the United States Constitution) in its subsequently-issued decision in *Rucho*, 139 S. Ct. at 2499.

10. In doing so, it will ensure that the plan will not "unduly favor or disfavor a political party." Wattson Br. at 23, Simon Br. at 7. The Panel need not "assess whether a plan unduly favors or disfavors a political party" when the Panel itself has drawn fair boundaries based on neutral criteria, and where the incumbent pairing criteria adopted by past Minnesota Panels (and which the Anderson Plaintiffs support consistent with precedent) provide sufficient if not ample protections. This Panel should, Minnesota Special Redistricting Panels' have before it, reject the proposed adoption and consideration of political and partisan criteria in redistricting. *See, e.g.*, *Cotlow v. Growe*, No. C8-91-985, Findings of Fact, Conclusions of Law, and Order for Judgment on Legislative Redistricting at 3-4 (Minn. Special Redistricting Panel Dec. 9, 2011) (rejecting the adoption of past voting behavior as criteria in redistricting); Zachman Principles Order at 10 (rejecting the adoption of competitiveness as a redistricting criteria).

V. The *Hippert* Panel's Language Protects the Rights of Minority Groups Under the United States Constitution and The Voting Rights Act Without Injecting Unnecessary Ambiguity

The *Hippert* Panel required that districts not be drawn with "either the purpose or effect of denying or abridging the voting rights of any United States citizen on account of race, ethnicity, or membership in a language minority group and must otherwise comply with the Fourteenth and Fifteenth Amendments to the United States Constitution and the Voting Rights Act of 1965[.]" Hippert Principles Order at 5. As stated by the Hippert Panel, this principle makes appropriately clear the obligations of the parties, while preserving for Minnesota voters precisely the rights guaranteed to them by Constitution and statute.

The parties in this litigation seek to complicate this principle unnecessarily. In particular, the Wattson Plaintiffs and Corrie Plaintiffs propose that districts must not "diminish" the ability of minority groups "to elect representatives of their choice." Wattson Br. at 15; Corrie Br. at 3. In addition, the Corrie Plaintiffs and the Sachs Plaintiffs suggest the Panel require that minorities who constitute "less than a voting-age majority of a district" have an opportunity to "elect candidates of their choice" or "influence the outcome of an election." Corrie Br. at 3; Sachs Br. at 4.

Setting aside whether these are laudable goals, these additions to the principle adopted by the *Hippert* panel are unnecessary and simply add ambiguity. For instance, what does it really mean for a group making up "less than a voting-age majority" of a district to have an opportunity to elect candidates of their choice? What does it mean for that group to "influence the outcome" of an election? How, precisely, would the Panel incorporate such a requirement in its ultimate congressional or legislative plan?[13] And how would it evaluate whether, in adopting such a principle, it might be making assumptions about the common interests of a group or groups – or creating unintended consequences for the voices of groups in other districts?

The Sachs Plaintiffs concede that the creation of their proposed "influence districts" is not constitutionally required. Sachs Br. at 13; *see also Bartlett v. Strickland*, 556 U.S. 1, 13 (2009) ("§ 2 [of the Voting Rights Act] does not require the creation of an 'influence'

[13] Because the Panel should draw district lines based upon constitutional, statutory, and objective criteria, not criteria intended to achieve a particular outcome, the provision of minority representation reports should not be required. *See* Wattson Br. at 31-32; Corrie Br. at 8.

district, in which a minority group can influence the outcome of an election even if its preferred candidate cannot be elected.") (citing *League of United Latin Am. Citizens*, 548 U.S. at 445). What's more, the creation of (or attempted creation of) such "influence districts" has been the subject of legitimate criticism. It is widely acknowledged, "[t]hey remain, however, the most poorly defined and least understood of the types of districts." Richard Engstrom, *Redistricting: Influence Districts—a Note of Caution and a Better Measure* at 2 (May 2011) (available at https://www.law.berkley.edu/files/Influence_Districts.pdf). Further, the concept of an "influence district" has likewise been described as "ambiguous" and "nebulous." Abigail Thernstrom, *Voting Rights—And Wrongs: The Elusive Quest for Racially Fair Elections* 181 (AEI Press, 2009); Richard H. Pildes, *Is Voting-Rights Law Now at War with Itself? Social Science and Voting Rights in the 2000s*, 80 N.C. L. Rev. 1539 (2002).

The Sachs Plaintiffs contend that minority "influence districts" should be adopted "as a powerful tool for vindicating the promise of political equality enshrined in the Fourteenth and Fifteenth Amendments." Sachs Br. at 14. However, their hoped for result of greater minority influence in electoral politics is far from assured. Indeed, the subsequent "cracking" of minority communities in an effort to increase the number "influence districts" may well result in a decrease of majority-minority districts, and thus decrease the likelihood that these groups will have "an opportunity to elect a representative of their choice, including one from their own group." Engstrom, *Redistricting: Influence Districts—a Note of Caution and a Better Measure* at 2. The only certainty with respect to

the creation of "influence districts" is that it should not be undertaken by the judiciary in its "restrained and deliberative" adoption of legislative and congressional redistricting plans. *See Hippert*, 813 N.W.2d at 378 (citing *Connor*, 431 U.S. at 415).

Moreover, there has notably been no argument by any party to this litigation that Minnesota has a history of racial gerrymandering that needs to be corrected. In fact, under the *Hippert* principles, the 2020 election produced "the most diverse Minnesota legislature ever." Becky Z. Dernback, et al., *In St. Paul, the most diverse Minnesota Legislature ever is just getting started*, MPR News (January 25, 2021). The most diverse legislature before that was likewise elected under the *Hippert* principles just the election before. Torey Van Oot, *Police reform debate showcases strength of Minnesota legislators of color*, Star Tribune (June 14, 2020). And certainly no argument can be made that this Panel will engage in impermissible racial gerrymandering that needs to be accounted for and corrected. The language adopted by the *Hippert* panel guarantees Minnesota voters the rights provided to them by the Constitution and the Voting Rights Act and this Panel will, as have panels in the past, ensure that those rights are protected and afforded in the maps that it draws. The *Hippert* language should be adopted without revision by this Panel.

VI. The New Legislative District Numbering Scheme Proposed by the Wattson Plaintiffs Would Create Unnecessary and Unjustifiable Confusion

All but the Wattson Plaintiffs agree that this Panel should adopt the same legislative district numbering principle that was adopted by the *Hippert* Panel in 2011. Contending that such a scheme causes confusion (Wattson Br. at 3-5), the Wattson Plaintiffs ask this Panel to overhaul the numbering system used for the past fifty years. But in advocating for

this overhaul, the Wattson Plaintiffs present this Panel with no evidence that there is, in fact, widespread confusion among Minnesota voters resulting therefrom. Indeed, the catalyst for confusion would not be maintaining the legislative district numbering system used in Minnesota for the past five decades, but rather scrapping that system in favor of a complete renumbering of Minnesota's 67 state senate districts and 134 state house districts.

Further, it is not clear whether this change would have unintended consequences, as the new numbering system could give a disingenuous party the opportunity to wholly redraw districts that seem less comparable to prior districts simply because the numbering system differs so significantly. Because there is no justifiable reason to upset the applecart, the Wattson Plaintiffs' proposed legislative district numbering principle must be rejected.

VII. The Corrie Plaintiffs' Attempt to Alter the Place of Residence of Incarcerated Persons Must be Rejected

Finally, without elaboration or explanation as to why, the Corrie Plaintiffs propose that this Panel adopt the following as a new redistricting principle: "Each person incarcerated on April 1, 2020 shall be deemed to be residing at his or her last known place of residence, rather than the institution of his or her incarceration." Corrie Br. at 4 & 6. The adoption of such a principle, however, exceeds the scope of this Panel's jurisdiction as established by its appointment in the March 22, 2021 Order of Chief Justice Lorie Gildea. As set forth therein, this Panel was appointed "to hear and decide challenges to the validity of state legislative and congressional districts based on the 2020 Census . . .." (3/22/21 Order at p. 3 ¶ 1 (emphasis added)). The 2020 Census counts incarcerated persons at the location at which they were incarcerated on April 1, 2020. (United States Census Bureau,

Residence Criteria and Residence Situations for the 2020 Census of the United States, available at https://www.census.gov/content/dam/Census/programs-surveys/decennial/2020-census/2020-Census-Residence-Criteria.pdf). This is not the appropriate forum for the Corrie Plaintiffs to challenge that methodology.

Even if this were within the Panel's jurisdiction, the Anderson Plaintiffs submit that the Panel should not adopt such a strong, politically-charged directional change in the course of this proceeding. There is significant political debate across the country regarding the matter, whereas the Census is definitive in how the matter has been resolved for the 2020 Census. If parties wish to seek a change, their claims are better resolved in the context of the Census itself and outside the context of this proceeding – which has a limited timeframe, purpose, and scope.

CONCLUSION

Previous Minnesota Special Redistricting Panels have appropriately adopted neutral, objective criteria, resulting in fair and equitable legislative and congressional districts and elections. This Panel should reject calls for it to depart from that precedent through the adoption of subjective criteria and the use of partisan data. Rather, the Anderson Plaintiffs respectfully request that the Panel adhere to precedent that has resulted in successful redistricting maps and fair outcomes for the citizens of Minnesota.

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Respectfully submitted,

TAFT STETTINIUS & HOLLISTER LLP

By: /s/ Elizabeth M. Brama

Elizabeth M. Brama (#0301747)
EBrama@Taftlaw.com
Maren M. Forde (#0390221)
MForde@Taftlaw.com
Samuel N. Louwagie (#0400885)
SLouwagie@Taftlaw.com
2200 IDS Center
80 South 8th Street
Minneapolis, MN 55402
Telephone: (612) 977-8400
Facsimile: (612) 977-8650

Attorneys for Plaintiffs Paul Anderson, Ida Lano, Chuck Brusven, Karen Lane, Joel Hineman, Carol Wegner, and Daniel Schonhardt