STATE OF MINNESOTA

SPECIAL REDISTRICTING PANEL

A11-152

OFFICE OF
APPELLATE COURTS

SEP 28 2011

FILED

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

Plaintiffs,

and

Kenneth Martin, Lynn Wilson, Timothy O'Brien, Irene Peralez, Josie Johnson, Jane Krentz, Mark Altenburg and Debra Hasskamp, individually and on behalf of all citizens of Minnesota similarly situated,

Intervenors,

and

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

Intervenors,

vs.

Mark Ritchie, Secretary of State of Minnesota; and Robert Hiivala, Wright County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants.

HIPPERT PLAINTIFFS' STATEMENT OF UNRESOLVED ISSUES

Plaintiffs Sara Hippert *et al.* submit this Statement of Unresolved Issues in support of the following recommendations: (i) The maximum tolerable percentage deviation[1] for legislative districts should be one percent (1%); and (ii) The current congressional and legislative districts are unconstitutionally flawed.

I. THE MAXIMUM DEVIATION FOR LEGISLATIVE DISTRICTS SHOULD BE PLUS OR MINUS ONE PERCENT (± 1%).

This Panel should adopt one percent (1%) as the maximum tolerable percentage deviation from the ideal for legislative districts. One-percent is the most appropriate maximum tolerable percentage deviation because it: (1) satisfies applicable legal standards; (2) is objective and measurable; (3) is technologically feasible and historically achievable; and (4) provides sufficient flexibility to avoid sacrificing other legitimate redistricting criteria.

A. A 1% Maximum Deviation Best Satisfies Applicable Legal Standards.

Article I, Section 2 of the United States Constitution is the basis of the one person, one vote principle at the heart of redistricting litigation. *See Reynolds v. Sims*, 377 U.S. 533, 577 (1964). But while *Reynolds* states that legislative districts need only have "substantial equality" in population to withstand Equal Protection scrutiny, 377 U.S. at 579, Article IV, Section 2 of the Minnesota Constitution requires that "representation in both houses *shall be apportioned equally* throughout the different sections of the state in proportion to the population thereof." (Emphasis added.) Moreover, court-ordered redistricting plans require stricter population equality than plans drafted by a legislative body. *Connor v. Finch*, 431 U.S. 407, 414 (1977).

Given these constitutional mandates, population inequality among districts – not preserving political subdivisions, communities of interest, or any otherwise legitimate state

[1] The "maximum tolerable percentage deviation" means the largest percentage by which any legislative district may deviate from the ideal district population size, whether the deviation is negative or positive.

interest – is why this lawsuit exists. Thus the primary relief owed to Minnesota voters is a map that rectifies unconstitutional vote dilution in existing districts and restores population equality.

To this end, a low tolerable population deviation should be adopted by this Panel. Since the 1970s – when redistricting calculations and maps were compiled largely by hand, and the ±2% maximum deviation was established as a "practicable" standard[2] – technology has advanced significantly and courts have successfully adopted legislative redistricting plans with maximum deviation percentages below one percent. *Zachman*, Final Order Adopting a Legislative Redistricting Plan (March 19, 2002). Accordingly, a one-percent maximum tolerable deviation is objective, appropriate, feasible, and will move this Panel closer to the goal of adopting legislative districts with substantially equal populations.

B. A 1% Maximum Deviation is Objective and Measurable.

Population deviation is the key metric for redistricting not only because it is the best measure of a plan's adherence to the constitutional "one person, one vote" principle, but also because it is an objective and measurable standard, limiting the ability to gerrymander. This is particularly important for court-drawn plans. By establishing an ideal population of ±1%, this Panel will place a premium on objective metrics in line with current technology.

Conversely, this Panel should reject the Martin plaintiffs' proposal to adopt the nebulous *de minimis* standard. Adopting this standard would not improve upon the concrete approach taken by Minnesota courts over the past three decades, but rather wholly depart from it. Moreover, an ambiguous *de minimis* standard is subject to disagreement and potential political

[2] *See Zachman v. Kiffmeyer*, No. C0-01-160 ("*Zachman*"), Order Stating Redistricting Principles (Minn. Special Redistricting Panel, Dec. 11, 2001); Order, *Cotlow v. Growe*, No. C8-91-985 (Minn. Special Redistricting Panel, Dec. 9, 1991); Order, *LaComb v. Growe*, No. 4-81-414 (D. Minn., Dec. 29, 1981); Order, *Beens v. Erdahl*, No. 4-71-Civil 151 (D. Minn., Nov. 26, 1971).

manipulation. The State of Minnesota will be better served by an objective, measurable, one-percent maximum tolerable deviation than by a vague and amorphous *de minimis* standard.

C. A 1% Maximum Deviation is Technologically and Historically Achievable

Ongoing improvements in technology and recent Minnesota redistricting cycles demonstrate that a 1% maximum tolerable deviation is practical and achievable. Ten years ago, the *Zachman* Panel adopted a 2% overall maximum population deviation for its legislative plan, but the Panel's final plan resulted in significantly lower population deviations. *Zachman*, Final Order Adopting Legislative Redistricting Plan at 3 (March 19, 2002) ("The mean deviation for the plans' senate districts is .28%.... The mean deviation for the plan's house districts is .32%.... No house or senate district has a population deviation greater than .80%. These deviations are lower than those in any of the plans submitted by the parties and significantly lower than the deviations in plans of past decades.") The *Zachman* plan was widely lauded, was not appealed, and was achieved without sacrificing other objective criteria. Meanwhile, redistricting data and software continue to improve such that a 1% standard can be readily met.

D. A 1% Maximum Deviation Provides Sufficient Flexibility to Address Other Legitimate State Objectives.

As a final matter, the 1% standard provides the Panel with sufficient flexibility to accommodate legitimate state interests other than population equality. *See Reynolds*, 377 U.S. at 579. Notably, ten years ago the *Zachman* Panel was able to satisfy other legitimate state objectives, such as convenience, contiguity, preserving political subdivisions, and considering communities of interest, while simultaneously achieving a maximum population deviation of less than 1%. *See Zachman*, Final Order Adopting a Legislative Redistricting Plan at 2-6 (Mar. 19, 2002). Indeed, the *Zachman* Panel achieved this maximum deviation while maintaining a lower number of political subdivision splits than any plan submitted by the parties to that litigation.

However, the 0.80% maximum deviation of the *Zachman* Panel counsels against adopting a more restrictive maximum tolerable deviation, such as the 0.5% maximum deviation proposed by the Britton plaintiffs. A 0.5% maximum deviation would likely require the Panel to sacrifice other legitimate state objectives for the sake of population equality. A maximum tolerable deviation of 1% will enable the Panel to appropriately balance the primary goal of minimizing population variation with other legitimate state objectives.

II. THE CURRENT DISTRICTS ARE UNCONSTITUTIONALLY FLAWED IN LIGHT OF THE 2010 CENSUS.

Among other matters, this Panel asked the parties to address whether the current districts are unconstitutionally flawed following the 2010 Census. Defendant Ritchie has stated his intent to argue that no constitutional issue exists before the 2012 general election. Based on established precedent and the very reason for redistricting, the Hippert plaintiffs respectfully disagree.

In *Zachman*, the Panel addressed this question and twice held – prior to 2002 general elections – that "the population of the State of Minnesota is unconstitutionally malapportioned among the state's current congressional [and current legislative] districts." *Zachman*, Scheduling Order No. 2 at 2 (Oct. 29, 2001). The Panel based these findings on both the United States and Minnesota Constitutions. *Id.*; *see Wesberry*, 376 U.S. at 7-8 (holding that U.S. CONST. art. I, § 2 requires decennial congressional redistricting to ensure each person's vote carries equal weight); MINN. CONST. art. IV, § 2. Here, all parties agree that in light of the 2010 Census, Minnesota's population is "unequally apportioned" among current legislative districts. *See* Stipulation at ¶ 2(a-b) (Sept. 28, 2011). As such, the current districts are unconstitutionally flawed.

Secretary Ritchie has argued that the districts cannot be "unconstitutionally flawed" until they are used in the 2012 general election. This, however, is a question of whether the malapportioned districts will cause damage to Minnesotans – not whether an unconstitutional

situation exists. The very basis for this Panel's jurisdiction and for redistricting litigation is that the United States and Minnesota constitutions require new districts to be drawn. *See* I(A), *supra*; *see also Magraw v. Donovan*, 163 F. Supp. 185, 187 (D. Minn. 1958) (holding that the court had jurisdiction over redistricting because of constitutional issues asserted). As a result, redistricting courts have repeatedly recognized the unconstitutionality of old districts, enjoined their use in elections, and required implementation of new, constitutional plans. *See, e.g., Zachman*, Final Order Adopting a Legislative Redistricting Plan at 8 (Mar. 19, 2002).

Secretary Ritchie referred plaintiffs to the *Kahn* cases[3] to support his position, but these decisions did not address whether obsolete districts are unconstitutionally flawed. Rather, the *Kahn* courts simply held that the burden on voting rights created by a city's failure to hold prompt post-redistricting elections was outweighed by other legitimate state concerns. 701 N.W.2d at 833-34. In contrast, the on-point case law is clear that prior decades' districts have constitutional and 42 U.S.C. § 1983 flaws following each decennial census. *See, e.g., In re Kan. Cong. Dist. Reapportionment Cases*, 745 F.2d 610, 611 (10th Cir. 1984) (holding that "the existing congressional districts were unconstitutional" and that "[t]he plaintiffs' constitutional rights therefore were threatened, and they did not need to rely on [the secretary of state's] assertion that he would not enforce the existing districts."); *Daggett v. Kimmelman*, 617 F. Supp. 1269, 1274 (D. N.J. 1985), *aff'd and remanded*, 811 F.2d 793 (3d Cir. 1987) ("[S]tate legislative-apportionment cases secure rights for which section 1983 provides a remedy . . . ."). If not for this fundamental proposition, there would be no reason for courts to oversee redistricting.

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[3] *Kahn v. Griffin*, 2004 WL 1635846 (D. Minn. 2004), and *Kahn v. Griffin*, 701 N.W.2d 815 (Minn. 2005).

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STATE OF MINNESOTA
IN SUPREME COURT

A11-152

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

Plaintiffs,

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individually and on behalf of all citizens of Minnesota similarly situated,

Intervenors,

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

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Mark Ritchie, Secretary of State of Minnesota; and Robert Hiivala, Wright County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants.

AFFIDAVIT OF SERVICE

STATE OF MINNESOTA)
) SS
COUNTY OF HENNEPIN)

I, Jill N. Yeaman, under the direction of Elizabeth M. Brama, being duly sworn, states that on September 28, 2011, true and correct copies of the **HIPPERT PLAINTIFFS' STATEMENT OF UNRESOLVED ISSUES** were filed by email and messengered to this Court; and true and correct copies thereof were served upon the following parties in this action by electronic mail and by placing copies in the U.S. mail, postage prepaid, addressed as follows, to-wit:

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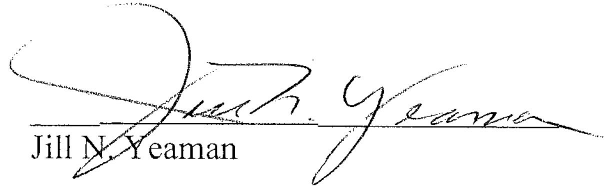
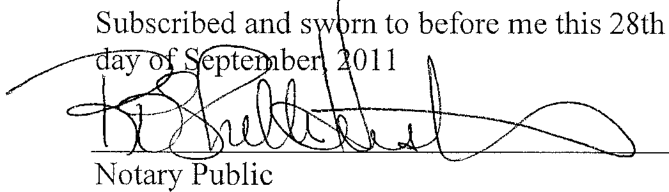
Dated: September 28, 2011



Jill N. Yeaman

Subscribed and sworn to before me this 28th
day of September, 2011



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VIA E-MAIL AND MESSENGER

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Re: ***Sara Hippert, et al. v. Mark Ritchie, et al.***
Court File No. A11-152

Dear Ms. Gernander:

The Hippert plaintiffs respectfully enclose an original and nine (9) copies of their individual Statement of Unresolved Issues in the above matter. All parties are being served by copy of this letter, and as evidenced by the enclosed Affidavit of Service.

Sincerely,

Elizabeth M. Brama

EMB/jy
Enclosures
cc: Michael C. Wilhelm (w/enc.)
Eric J. Magnuson (w/enc.)
Tony Trimble (w/enc.)
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