

STATE OF MINNESOTA  
SPECIAL REDISTRICTING PANEL  
A21-0243  
A21-0546

**FILED**

May 31, 2022

**OFFICE OF  
APPELLATE COURTS**

Peter S. Wattson, et al.,

Plaintiffs,

and

Paul Anderson, et al.,

Plaintiff-Intervenors,

vs.

Steve Simon, et al.,

Defendants,

and

Frank Sachs, et al.,

Plaintiffs,

and

Dr. Bruce Corrie, et al.,

Plaintiff-Intervenors,

vs.

Steve Simon,

Defendant.

**DEFENDANT SECRETARY OF  
STATE'S MEMORANDUM  
PARTIALLY OPPOSING  
ATTORNEY FEES AND COSTS**

This litigation resulted from four groups of plaintiffs asking this Special Redistricting Panel to draw new legislative and congressional district boundaries in response to new decennial census data and the absence of legislative action. The Panel released new boundary maps in February. Three of the four plaintiff groups now seek attorney fees and costs totaling more than \$1 million. While the Secretary recognizes that the plaintiffs are prevailing parties based on previous redistricting panels' decisions, the Panel should significantly reduce the amounts requested. The central legal issue on which the parties prevailed—that Minnesota needed new district boundaries beginning with the 2022 statewide primary election—was undisputed and did not require twenty plaintiffs' attorneys accumulating more than \$1 million in fees to address. In addition to the fee requests being generally excessive, the parties further seek reimbursement for work that was either unrelated or unnecessary to prevailing in the litigation. Consistent with past panels' orders, the Panel should significantly reduce the requested fees and instead award each requesting plaintiff group no more than \$147,000.

## **FACTS**

Redistricting of Minnesota's legislative and congressional district boundaries is required every ten years following the release of decennial census data by the U.S. Census Bureau. *E.g.*, Minn. Const. art. IV, § 3. While redistricting is the province of the Minnesota Legislature, state courts have historically completed redistricting when the legislature does not act.

This redistricting litigation involved four groups of plaintiffs: The Anderson plaintiffs, the Corrie plaintiffs, the Sachs plaintiffs, and the Wattson plaintiffs. The Wattson

plaintiffs and the Sachs plaintiffs each filed complaints seeking redistricting, and the other plaintiffs later intervened. The complaints each named Secretary of State Steve Simon as a defendant, and the Wattson and Anderson plaintiffs also named Carver County Elections and Licensing Manager Kendra Olson as a defendant. (Anderson Compl.; Corrie Compl.; Sachs Compl.; Wattson Compl.<sup>1</sup>) The actions were then consolidated before this Panel. (Mar. 22 and May 20, 2021 Orders.)

The proceedings before the Panel followed the same structure as those in past redistricting cycles: the Panel asked the parties to address preliminary issues and file statements of unresolved issues, and the Panel then permitted the parties to propose redistricting principles and new boundary locations. *Wattson v. Simon*, 970 N.W.2d 42,46 (Minn. Spec. Redist. Panel 2022); *see also, e.g., Hippert v. Ritchie*, 813 N.W.2d 374, 379-80 (Minn. Spec. Redist. Panel 2012) (describing 2011 redistricting litigation); *Zachman v. Kiffmeyer*, No. C0-01-160, at 3 (Minn. Spec. Redist. Panel Mar. 19, 2002) (describing 2001 redistricting litigation). Also similar to past redistricting panels, the Panel solicited significant public input, holding public hearings across the state and allowing any member of the public to provide oral and written comments and to submit proposed new boundary locations. (Sept. 13, 2021 Order.) In February 2022, the Panel established new legislative and congressional district boundaries. *Wattson v. Simon*, 970 N.W.2d 56 (Minn. Spec.

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<sup>1</sup> Filings in this case are posted at <https://www.mncourts.gov/2021RedistrictingPanel.aspx>. Orders in this litigation that have not been republished elsewhere are cited by their date. Filings from the 2011 litigation are available at <https://www.mncourts.gov/Media/Historic-High-Profile-Cases/Special-Redistricting-Panel-2011.aspx>, while orders from the 2001 litigation are available at <https://www.mncourts.gov/Media/Historic-High-Profile-Cases/Special-Redistricting-Panel-2001.aspx>.

Redist. Panel 2022) (establishing legislative district boundaries); *Wattson*, 970 N.W.2d 42 (establishing congressional district boundaries).

Multiple attorneys represented the plaintiffs and three of the plaintiff groups—the Anderson, Sachs, and Wattson plaintiffs—now seek fees and costs for time and expenses they attribute to this litigation. The following table summarizes their requests:

	<b>Anderson</b>	<b>Sachs</b>	<b>Wattson</b>	<b>Total</b>
<i>Attorneys</i>	4	13	3	20 <sup>2</sup>
<i>Paralegals</i>	2	-	1	3
<i>Hours</i>	783.00	780.60	738.15	2,301.75
<i>Fees</i>	\$344,961.00	\$383,305.00	\$304,196.25	\$1,032,462.25
<i>Costs</i>	\$58.97	-	\$1,163.87	\$1,222.84
<b>Total Request</b>	\$345,019.97	\$383,305.00	\$305,360.12	\$1,033,685.09

(Brama Aff. ¶¶ 5, 11, Ex. A; Sachs Pls.’ Mem. 2, 14-16; Sienkowski Aff. ¶¶ 4, 7.)<sup>3</sup> Claimed attorney rates range from \$300 to \$750 an hour, and claimed paralegal rates range from \$125 to \$325 an hour. (Brama Aff. Ex. A Nov. 24, 2021 invoice at 4, Dec. 13, 2021 invoice at 4; Nauen Decl. ¶ 6; Sienkowski Aff. ¶ 9; Stafford Decl. ¶ 7.) Addressing the plaintiffs’ motions requires some additional context for each parties’ involvement in the case.

<sup>2</sup> Counting the two attorneys of record who appeared for the Corrie plaintiffs, twenty-two attorneys represented the various plaintiffs in this litigation.

<sup>3</sup> The Sachs plaintiffs incorporate a clerical error that stems from Charlie Nauen’s time; while their summary represents that he spent 106 hours at a rate of \$700 per hour, the total for his time is listed as \$73,940, rather than \$74,200 (a \$260 difference). (Nauen Decl. ¶ 6.)

## *Wattson Plaintiffs*

The U.S. Census Bureau released the data needed to create new district boundaries on August 12, 2021. This was later than its historical release, but the delays were well known in advance. (Wattson Compl. ¶ 29 & n. 7.) The Wattson plaintiffs nonetheless served their complaint in February 2021. (*Id.*) The 93-page complaint, with exhibits, included proposed new maps and analyzed population data from 2018. (*Id.* ¶¶ 15-16, 22, 28-29, 40, Ex. A.) The lead plaintiff submitted his early proposed maps, and later provided testimony, to the legislature. (*Id.* ¶ 29; Minn. House of Rep. Redistricting Comm. 2021-22, <https://www.house.leg.state.mn.us/committees/home/92030> (reflecting testimony filed by Peter Wattson on September 10 and 13, 2021)).

The Wattson plaintiffs were six individuals with extensive experience with the redistricting process and the League of Women Voters Minnesota. (Wattson Compl. ¶¶ 4-5; July 21, 2021 Order.) At times, the Wattson plaintiffs continued to press issues that the Panel had rejected. For example, when the Panel asked the parties to propose redistricting principles, the Wattson plaintiffs proposed specific principles concerning political competitiveness and partisanship. (*E.g.*, Wattson Pls.’ Proposed Cong’l & Leg. Dist. Princ. 26-29 (Oct. 12, 2021)). While not requested, they further devoted extra briefing to proposed requirements for the parties’ plan submissions. (*Id.* at 30-39.) In particular, they asked the Panel to require a partisanship report. (*Id.* at 37-38.) The Panel did not adopt the proposed principles or reporting requirement. (Nov. 18, 2021 Order at 5-9.) On the topic of partisanship, the Panel followed the approach of past panels and noted that districts cannot be drawn with the purpose or helping or hurting an officeholder, candidate, or

political party. (*Id.* at 8.) The Panel directed the parties to submit maps with the following reports: Population summary, plan components, contiguity, political subdivision splits, minority voting-age population, measures of compactness, and, if applicable, community of interest. (*Id.* at 10-11.)

The Wattson plaintiffs nonetheless later submitted a 116-page memo supporting their proposed boundaries that included nearly 40 pages addressing political competitiveness and partisanship. (Wattson Mem. Supp. Cong'l & Leg. Redist. Plans 77-104 (Dec. 7, 2021); *see also, e.g.*, Dec. 7, 2021 Wattson Aff. ¶¶ 13-16, 93-123, Ex. E). They also submitted a partisanship report. (*E.g.*, Wattson Aff. Ex. E-9.)

Throughout the litigation, three attorneys from one law firm represented the Wattson plaintiffs, charging hourly attorney rates that ranged from \$400 to \$600 and an hourly paralegal rate of \$125. (Sienkowski Aff. ¶ 4.)

### ***Anderson Plaintiffs***

The Anderson plaintiffs intervened in the Wattson plaintiffs' litigation. (Anderson Notice of Intervention (Mar. 15, 2021); June 29, 2021 Order.) The Anderson plaintiffs consisted of seven individuals who asserted that they would represent the interests of Republicans in Minnesota. (Anderson Compl. ¶ 10.) Relative to the claims asserted, their complaint was largely duplicative of the Wattson plaintiffs' complaint, alleging that the new census data required new district boundaries. (*E.g., id.* ¶¶ 19-20, 40.) Later in the litigation, they unsuccessfully opposed the Wattson plaintiffs' motion to add the League of Women Voters Minnesota as a plaintiff. (*E.g.*, Anderson Pls.' Response Mot. Join Add'l Party (June 30, 2021); Aug. 23, 2021 Order.)

Throughout the litigation, four attorneys from one law firm represented the Anderson plaintiffs, charging hourly rates fees that ranged from \$350 to about \$593. (Brama Aff. Ex. A Nov. 24, 2021 invoice at 4, Jan. 6, 2022 invoice at 7.) They received assistance from two paralegals who charged rates of \$230 and \$325 an hour. (*Id.* Dec. 13, 2021 invoice at 4.) Their lead attorney had extensive experience with the redistricting process, having served as counsel to a redistricting panel in 2001 and represented parties to the 2011 redistricting litigation. (Brama Aff. ¶¶ 2-3.)

### ***Sachs Plaintiffs***

The Sachs plaintiffs filed a separate complaint in April 2021, alleging that they would advocate for Democratic-Farmer-Labor Party interests. (Sachs Compl. ¶¶ 2, 6.) As with the other plaintiffs, they alleged that the new data required new district boundaries. (*Id.* ¶¶ 22-29.) When the Panel directed the parties to address various preliminary issues, the Sachs plaintiffs were unwilling to stipulate that Minnesota's present districts will be unconstitutional only as of the August 22 statewide general primary. (Stip. Regarding Preliminary Issues ¶¶ 2-3 (Sept. 23, 2021); Sachs Pls.' Stmt of Unresolved Preliminary Issues at 2-3 (Sept. 24, 2021).)

The Sachs plaintiffs were represented by thirteen attorneys: four from a local law firm and nine from a New York-based law firm. (Nauen Decl. ¶ 6; Stafford Decl. ¶ 7.) These lawyers' hourly rates ranged from \$300 to \$750 an hour. (Nauen Decl. ¶ 6; Stafford Decl. ¶ 7.) The Sachs plaintiffs' counsel have extensive experience with political and election-related litigation in general and with redistricting specifically. (Sachs Mem. 14-16.)

### *Secretary of State and Panel Decisions*

As in past redistricting cases, the Secretary was a nominal defendant. The complaints acknowledged that the Minnesota Legislature's failure to act would necessitate the need for court action; they did not allege that any action or inaction by the Secretary resulted in the need for new district maps. (*E.g.*, Wattson Compl. ¶ 21; Anderson Compl. ¶ 27; Sachs Compl. ¶¶ 4-5.) The Secretary stipulated that the 2020 Census required redistricting for purposes of elections to be conducted as of the 2022 statewide primary election in August. (Stip. Regarding Preliminary Issues ¶¶ 2-3.) But he highlighted that the maps were not presently unconstitutional as to any election that would occur before then. (Sec'y Position Stmt Regarding Current Constitutionality of Cong'l & Leg. Dists. (Sept. 24, 2021).) This briefing was required because the Sachs plaintiffs were unwilling to concede it. (Sachs Pls.' Stmt. Unresolved Prelim. Issues 2-3.)

Ultimately, the Panel agreed with the Secretary and enjoined the use of current maps only as of the 2022 statewide primary. *Wattson*, 970 N.W.2d at 66; *Wattson*, 970 N.W.2d at 51-52. It also did not fully adopt any party's proposed redistricting plan, instead taking a restrained approach that adjusted boundaries only as constitutionally necessary. *Wattson*, 970 N.W.2d at 59; *Wattson*, 970 N.W.2d at 45-46. The Panel further relied heavily on the public input it received. *Wattson*, 970 N.W.2d at 60-61; *Wattson*, 970 N.W.2d at 46-48.

### **ARGUMENT**

A court has discretion to award reasonable attorney's fees to a prevailing party in a section 1983 action. 42 U.S.C. § 1988(b) (2018). Awarding attorney fees has two components: (1) determining whether the party seeking fees was a prevailing party; and



(2) assessing the propriety of a fee award. *Farrar v. Hobby*, 506 U.S. 103, 114 (1992) (distinguishing eligibility for award from amount of award, if any). The party seeking fees bears the burden of proving an entitlement to fees and producing sufficient documentation to support its requests. *Hensley v. Eckerhart*, 461 U.S. 424, 437 (1983); Minn. R. Gen. Prac. 119.02.

The Secretary does not dispute the plaintiffs' general prevailing-party status for purposes of their fee requests. But the Secretary disputes the appropriateness of the fees the plaintiffs seek. Consistent with past redistricting panels, the Panel should only partially grant the plaintiffs' motions and should significantly reduce the fees sought. The plaintiffs prevailed on a limited and undisputed issue, lost other issues, and primarily litigated against each other. Their fee requests further reflect significant over-lawyering and time billed for activities that are not the proper subject of a fee award. Finally, given the excessive nature of the fees sought, the Panel should give significant weight to the amount of fees past redistricting panels have decided is appropriate for litigating a redistricting matter in Minnesota. Applying this approach, the Panel should award no more than \$147,000 to each plaintiff group seeking fees.

**I. THE PLAINTIFFS PREVAILED ON ONLY A LIMITED, UNDISPUTED ISSUE.**

A section 1983 plaintiff is a prevailing party when the plaintiff succeeds on a significant issue and receives relief that benefits the party. *Farrar*, 506 U.S. at 109. Past Minnesota redistricting panels have concluded that a plaintiff who pursues section 1983 litigation to update district boundaries when the legislature fails to do so is a prevailing party eligible for attorney fees. *Hippert v. Ritchie*, No. A11-152, at 3 & n.4 (Minn. Spec.

Redist. Panel Aug. 16, 2012) (“2012 Fee Order”); *Zachman v. Kiffmeyer*, No. C0-01-160, at 3 (Minn. Spec. Redist. Panel Oct. 16, 2002) (“2002 Fee Order”).

But establishing the amount of fees requires a deeper look at the nature and extent of the party’s victory. *Farrar*, 506 U.S. at 110; *Hensley*, 461 U.S. at 436. Fees should not be awarded for work on non-prevailing claims, and a court may award “low fees or no fees” when an award would be disproportionate to the success in the case. *Farrar*, 506 U.S. at 114-15; *Milner v. Farmers Ins. Exch.*, 748 N.W.2d 68, 622-24 (Minn. 2008). While arguments regarding the specific fees sought are addressed below, the Court should address the fee requests against the backdrop of the narrow legal issue on which the plaintiffs prevailed.

Here, the central issue that the plaintiffs prevailed on was the declaration that the 2011 boundary maps created by the redistricting panel in *Hippert v. Ritchie* cannot be used as of the 2022 statewide primary election. This was a foregone conclusion, as redistricting is required after each decennial census. The point was also undisputed by the Secretary. Meanwhile, to the extent that some plaintiffs sought a declaration that using the *Hippert* maps earlier would be unconstitutional, they lost. The Panel enjoined the use of the 2011 maps only as of the statewide primary election. The death of U.S. Representative Jim Hagedorn two days after the Panel issued its decisions underscores that the Secretary’s concerns about a ruling to the contrary were significant and non-hypothetical. (*See* Secretary’s Position Stmt Regarding Current Constitutionality at 4-5 (noting impact that ruling could have on special elections).) Consistent with Minnesota law and the Panel’s decisions, the special primary and general elections to fill the vacancy in the First

Congressional District for the remainder of Representative Hagedorn's term are being conducted using the *Hippert* boundaries. *See* Minn. Stat. § 204D.26 (2020).

The parties' central interest in the litigation appeared to be not in litigating the continuing constitutionality of the maps established in *Hippert* but in advocating for new boundaries in locations that the respective plaintiffs preferred. Indeed, all plaintiffs spent the majority of the litigation advocating against each other. Further, throughout the process, the Panel garnered significant input from the public, receiving oral and written comments and allowing anyone to submit proposed new boundaries.

Finally, the Panel ultimately did not adopt any party's proposed boundaries in total, instead taking a restrained approach in altering the boundaries in the *Hippert* maps. *Wattson*, 970 N.W.2d at 59; *Wattson*, 970 N.W.2d at 45. Moreover, some of the parties' proclaimed victories are overstated. For example, the Sachs plaintiffs attribute to their work the Panel's use of a redistricting principle to preserve American Indian reservations to the extent possible. (Sachs Mem. 6.) But every party generally agreed this type of principle was appropriate, even if they phrased it slightly different ways. (Sachs Mem. 6; *see generally* Memoranda filed Oct. 12, 2021 – Anderson at 11-12, Corrie at 4, Sec'y at 3, 6, Wattson at 18-19.) And in adopting the principle, the Panel mostly made explicit an approach that was implicit in prior redistricting cycles. *E.g.*, *Hippert v. Ritchie*, 813 N.W.2d at 384-85.

## **II. THE PLAINTIFFS SEEK GENERALLY EXCESSIVE FEES AND REIMBURSEMENT FOR NONCOMPENSABLE WORK.**

A prevailing party is entitled to recover only reasonable fees. 42 U.S.C. § 1988(b). Fees may be unreasonable for a variety of reasons, such as when a case is overstaffed or when time is spent on activities unnecessary to achieving the sought result. *Hensley*, 461 U.S. at 434; *Milner*, 748 N.W.2d at 621; *Shepard v. City of St. Paul*, 380 N.W. 140, 144 (Minn. Ct. App. 1985). A court typically starts by determining the lodestar amount by multiplying a reasonable hourly rate times a reasonable number of hours expended. *Milner*, 748 N.W.2d at 621; *Cty of Dakota v. Cameron*, 839 N.W.2d 700, 711-12 (Minn. 2013). And when a lodestar amount is still unreasonably high, the court can adjust the amount downward. *Hensley*, 461 U.S. at 436; *2012 Fee Order* at 8.

Plaintiffs have the burden of proving their entitlement to attorney fees, and a court should not blindly accept billed time as reasonably expended. *Anderson v. Hunter, Keith, Marshall & Co.*, 417 N.W.2d 619, 628-29 (Minn. 1988). It is also not incumbent on a defendant or court to flyspeck billing records to identify and itemize every improper claim. *See Fox v. Vice*, 563 U.S. 826, 838 (2011) (noting goal in fee award is “rough justice, not achieving auditing perfection”). In this case, some plaintiffs assert unreasonable hourly rates, and all plaintiffs seek recovery of fees for time not reasonably expended.

### **A. Attorney and Paralegal Rates**

Attorney fees must be charged at a reasonable rate for the type of litigation in the market in which a case is litigated. *Blum v. Stenson*, 465 U.S. 886, 895 n.11 (1984). This includes paralegal rates. *Missouri v. Jenkins*, 491 U.S. 274, 287-88 (2008). The Secretary

does not generally dispute the reasonableness of the billing rates identified in the plaintiffs' supporting documentation, with two exceptions: the two highest billing rates for the Sachs plaintiffs' counsel and the billing rate for the Anderson plaintiffs' paralegals.

In this case, the most experienced counsel for each party claim to bill a reasonable rate relative to the type of litigation involved. (Brama Aff. ¶¶ 6-7; Gilbert Aff. ¶ 10; Nauen Decl. ¶ 4; Stafford Decl. ¶ 4.) But two of these attorneys charge about \$600 per hour, one \$700 per hour, and one \$750 per hour. The Anderson plaintiffs' lead attorney appears to have the most direct experience in Minnesota redistricting cases as a lawyer, and she charged a top rate of \$593.32 an hour. (Brama Aff. ¶¶ 2-3, Ex. A Jan. invoice at 7.) Similarly, the Wattson plaintiffs' top billing rate is \$600 for former Minnesota Supreme Court Justice James Gilbert. (Gilbert Aff. ¶ 10.) The Secretary believes that the Panel should therefore reduce the top billing rates for the Sachs plaintiffs' counsel to no more than \$600 an hour. The Sachs plaintiffs note that out-of-state lawyer Marc Elias's \$750 hourly rate is already half of his usual billing rate. (Stafford Decl. ¶ 4.) But the relevant standard is the local market rate, not his usual rate. *See Avalon Cinema Corp. v. Thompson*, 689 F.2d 137, 141 (8th Cir. 1982) (rejecting argument that out-of-state counsel could recover higher rate because he was specialist with national practice in area of law at issue). As reflected by the other experienced Minnesota attorneys on the case, \$750 an hour is not the going market rate in the Twin Cities for experienced, competent counsel in a redistricting case.

Similarly, the Anderson plaintiffs claim \$230 and \$325 hourly rates for their two paralegals. (Brama Aff. Ex. A Dec. 13, 2021 invoice at 4.) This is excessive, particularly

compared to the rates identified for (a) the other paralegal in the litigation, who charged \$125 an hour, and (b) some attorneys who billed at a lower rate or only slightly higher rates. Sienkowski Aff. ¶ 4; Nauen Decl. ¶ 6; *see also Safelite Grp. Inc. v. Rothman*, No. 15-1878, 2017 WL 3495768, at \*10 (D. Minn. Aug. 11, 2017) (concluding that \$150 billing rate for paralegal was reasonable and noting other case in which court found \$125 was reasonable hourly rate).

To the extent that the Panel calculates a lodestar amount, it should reduce the top lawyer rates to \$600 consistent with other senior counsel in the case and reduce the higher paralegal rates to no more than \$125 an hour.

## **B. Fee Reductions<sup>4</sup>**

The plaintiffs' specific billing records reflect work that should not be included in any lodestar calculation, either because the work was unreasonable or because the work was not for matters that can be recovered through attorney fees. Representative, but not exhaustive, examples are provided below.

### **1. Overstaffing**

The largest category of billings that highlight the unreasonable nature of the plaintiffs' fee requests relates to general overstaffing. Courts may consider "overlawyering" when assessing the reasonableness of claimed fees. *2012 Fee Order* at 9,

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<sup>4</sup> The amounts reflected in this section are based on the claimed billing rates and do not account for the fee reductions requested in Section II.A. of this memorandum. Further, the Anderson attorneys' final invoice reflects that their rates slightly increased during the litigation. (Brama Aff. Ex. A Jan. invoice at 7.) For the sake of simplicity, the estimates in this memo were calculated using their initial lower rates. The true amounts are therefore likely higher than those highlighted in this memo.

11-12. Participating in proceedings may be valuable to attorney development, but “it does not follow necessarily that their time is ‘reasonably expended’ [o]n behalf of the client, and if not, properly billed to one’s adversary.” *Anderson*, 417 N.W.2d at 629. Overlawyering is particularly significant when redistricting litigation follows a standard course, involves experienced counsel, and generally does not present any novel issues. *2012 Fee Order* at 9.

Overlawyering this case exorbitantly increased the fees expended. The redistricting process is important. But the outcome of the central legal issue in this case—whether new decennial census data necessitated new district boundaries—was a foregone conclusion and not complex. Moreover, redistricting litigation in Minnesota has followed a predictable and consistent process that was again followed in this case. While the plaintiffs are entitled to their counsel of choice, this case was overlawyered to an unreasonable degree, and Minnesota taxpayers—who will ultimately foot the bill of any fee award—should not have to subsidize this overstaffing. The large number of attorneys was particularly unnecessary given the redistricting experience on the litigation teams. Each plaintiff group included counsel or clients who are intimately familiar with the redistricting process.

The Sachs plaintiffs particularly illustrate the overstaffing problem. Despite having competent local counsel, they also engaged an out-of-state law firm, resulting in thirteen attorneys working on the case. The presence of numerous attorneys resulted in counsel frequently conferring, discussing, strategizing, updating, and otherwise engaging with the “team”—both within the two law firms and between local and out-of-state counsel. For example, the Sachs plaintiffs’ billing records reflect at least approximately \$117,200 in

time involving these types of communications.<sup>5</sup> (*E.g.*, Stafford Decl. Ex. A entries for Sept. 3-4, 6-10, 13, 16-18, 20-21, 24, 28-29, Oct. 12-13, 17-18, Nov. 5, 11, 15-16, 18, Dec. 1-7, 9-10, 13-16, 22, 29-30, 2021, Feb. 15-16, 2022; Nauen Decl. Ex. A entries for Feb. 3, 5, 23, 25-26, 28, Mar. 3, Apr. 12, 24-26, 28-29, May 7, 11-12, 28, June 4, 8, 29, 30, July 1, 15, 22, Aug. 2, 12, 22, 31, Sept. 3-4, 6, 8-10, 13, 16, 21, Oct. 5, 12-13, 19, 26, Nov. 1, 3, 5, 9, 11-12, 16, 18-19, 22-24, 26-27, 29-30, Dec. 1-4, 6, 8-10, 13, 21-22, 30, 2021; Jan. 4-5, 11, Feb. 14-17, 2022.)

While less substantial, the other plaintiffs' attorneys also spent significant time conferring and consulting with co-counsel, with the Anderson plaintiffs' counsel billing approximately \$62,500 and the Wattson plaintiffs' counsel billing about \$10,300 for these types of activities. (*E.g.*, Brama Decl. Ex. A entries for Oct. 2, 4-7, 10-11, 15, 17-20, 26-29, 31, Nov. 2, 4, 18, 21-22, 29, Dec. 1-6, 8, 10, 12-13, 15-16, 21-23, 27, 30, 2021, Jan. 3, 2022; Sienkowski Aff. Ex. A entries for Mar. 2, June 21, 30, July 21, Oct. 26, Nov. 2, 18-19, 22, 24, Dec. 3, 7, 28, 31, 201, Jan. 3, Feb. 15, 2022.)

In addition to the numerous instances of co-counsel conferring with each other, the billing records also provide numerous examples of attorneys completing the same work or billing for the same event. As just one example, the Sachs plaintiffs' records reflect at least

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<sup>5</sup> Some billing entries delineated which portion of the entry was attributable to conferring with co-counsel, while others did not and block-billed. (*Compare* Stafford Decl. Ex. A entry for Sept. 3, 2021 (Hawley) *with* Nauen Decl. Ex. A entry for Apr. 25, 2021.) For entries that identified the portion of time attributable to those activities, only that portion is included in the calculations above. For others, the entire time is included, as it is the plaintiffs' burden to establish their entitlement to fees. Moreover, these types of entries were then excluded from this memo's illustrative examples of duplicative work, even though they also reflect significant overlap in work performed across attorneys.



six attorneys working on the same memo. (Stafford Decl. Ex. A entries for Dec. 2, 3, 5, 2021; Nauen Decl. Ex. A Dec. 3, 6-7, 2021.) And multiple attorneys routinely billed for observing the court's oral arguments. (*E.g.*, Stafford Decl. Ex. A entries for Nov. 3, 2021, Jan. 4, 2022; Nauen Decl. Ex. A entries for Nov. 3, 2021, and Jan. 4, 2022.) The billing records are replete with these types of duplicative work; nearly every event for each plaintiff group involved multiple attorneys to some degree. The duplicative work cumulatively accounts for an excessive amount of fees: approximately \$99,000 for the Wattson plaintiffs, \$83,900 for the Anderson plaintiffs, and \$52,900 for the Sachs plaintiffs. (*See, e.g.*, Sienowski Aff. Ex. A at Feb. 17-22, June 8, 14-15, 21-23, July 28, Sept. 17, 22, 28, 30, Oct. 1, 4-6, 8-13, 15, 18-22, 27-28, Nov. 2-3, 18, Dec. 1, 3, 5-6, 14-17, 2021, Jan. 3, 2022; Brama Aff. Ex. A entries for Oct. 6, 8, 12-15, 17-20, 26-28, Nov. 3-5, 8-9, 17-19, 29, Dec. 1-3, 6-8, 11-13, 15-17, 21, 23, 27-31, 2021, Jan. 4, 2022; Stafford Decl. Ex. A entries for Sept. 3-4, 8-9, 13, 16-18, 20-24, 27-30, Oct. 4, 6-9, 11-12, 17-20, Nov. 2-3, Dec. 2-6, 15-16, 2021, Feb. 15, 2022; Nauen Decl. Ex. A entries for May 10, Sept. 7, 10, 17, Nov. 3, Dec. 7, 16-17, 31, 2021)

While less amenable to precise calculation, the presence of four plaintiffs' groups further underscores the overstaffing issues throughout the litigation. Briefing on proposed redistricting principles and proposed boundary maps cumulatively resulted in 971 pages of briefing from the plaintiffs, with 768 pages attributable to the plaintiffs seeking fees. (*See* Anderson, Corrie, Sachs, and Wattson plaintiffs' memoranda filed on Oct. 12, 20, Dec. 7, 17, 2021.) The bulk of this briefing related not to the underlying cause of action, but to their new and conflicting boundary preferences.

The Secretary appreciates that some ongoing coordination and review is inevitable and appropriate within a legal team, that different plaintiffs may have different views, and that disentangling unnecessary from necessary work with precision can be difficult. But the cumulative nature of the types of interactions and work noted above underscores the generally excessive fee requests from all three plaintiff groups. The Court should therefore substantially reduce the hours that the plaintiffs assert were reasonably expended.

## **2. Legislation and Media**

Fees awarded must be for work necessary to the litigation. Attorney time spent on matters related to the legislature are not recoverable. *2012 Fee Order* at 11. Nor is time attributable to a party responding to or seeking out the media. *Id.*; *see also In re Kujawa*, 270 F.3d 578, 582 (8th Cir. 2001) (holding court abused its discretion by awarding fees for time counsel spent speaking to press).

The Wattson and Sachs plaintiffs seek costs related to legislative work. The Wattson plaintiffs seek to recover about \$1,200 for their client's decision to provide testimony to the legislature on redistricting and for reviewing a legislative redistricting proposal after the Panel took the case under advisement. (*See Sienkowski Aff. Ex. A* entries for Aug. 10, Sept. 13, 2021 and Jan. 13, 2022.) The Sachs plaintiffs seek about \$4,400 for time spent monitoring legislative developments, including those that occurred when the Panel had the case under advisement. (*Nauen Decl. Ex. A* entries for Mar. 4, 16, May 10, 12, June 1, July 27, Aug. 18, Nov. 19, 22, 2021, Jan. 7, 10, 2022.) While the parties may separately have an interest in legislative redistricting proposals, the work was not necessary to this litigation, and the Panel should not award these fees.

The billing entries for the Sachs and Wattson plaintiffs further reflect that they seek to recover approximately \$1,400 and \$3,000, respectively, for time spent preparing press statements. (Nauen Decl. Ex. A entries for Feb. 2, 14, 2022; Sienkowski Aff. Ex. A entries for Feb. 21-22, June 21, Sept. 3, Nov. 16, 2021.) The Panel should deduct this time from any fee award.

### **3. Clerical Work**

While the recovery of attorney fees can include paralegal work, the work must be of a substantive nature. *See Missouri v. Jenkins*, 491 U.S. 274, 286-288 & n.10 (1989). Work recoverable at a paralegal rate may include tasks like investigating facts, interviewing witnesses, assisting with depositions and discovery, drafting pleadings, or checking citations. *Id.* at 288 n.10. But “purely clerical and secretarial tasks should not be billed at a paralegal rate, regardless of who performs them.” *Id.*; *Gruttemeyer v. Transit Auth.*, 31 F. 4th 638, 651 (8th Cir. 2022).

The parties seek fees for time spent by paralegals, but their billing records for this time reflect primarily administrative and clerical tasks. For example, the Wattson plaintiffs seek approximately \$1,800 for paralegal work that consisted mainly of printing and indexing pleadings. (*E.g.*, Sienkowski Aff. Ex. A entries for July 15-16, 21, Sept. 9, Nov. 3, Dec. 1-2, 2021, Jan. 10, 12-13, 2022.) Similarly, the Anderson plaintiffs seek approximately \$4,200 for work by paralegals that appears to have primarily included downloading pleadings, maintaining files, and troubleshooting technology issues. (Brama Decl. Ex. A entries for Nov. 11-12, 15-17, 19, 23, 29-30, Dec. 1, 7-8, 14.) Because these

billing records do not reflect substantive legal assistance, such as conducting research or drafting pleadings, the Panel should exclude this time from any fee award.

#### **4. Miscellaneous**

Finally, the parties' billings reflect some miscellaneous entries for work that is unclear and should not be included within a fee award. For example, before this Panel held any public hearings, the Sachs plaintiffs billed \$410 to "[c]oordinate public hearing recruitment" and address other public testimony. (Nauen Decl. Ex. A entry for Sept. 15, 2021; Stafford Decl. Ex. A entry for Sept. 20, 2021). The purpose of the Panel's public hearings was to hear from the public, not to provide a second opportunity for existing parties to stack the deck and reassert their views. Thus, while it was reasonable for the parties to have an attorney observe each public hearing, it was not reasonable to spend time trying to affect the content of any hearing. The Sachs plaintiffs also billed \$3,045 for researching and drafting a common interest and nondisclosure agreement with unspecified others. (Nauen Decl. Ex. A. entries for May 10, 23, 25-26, 2021). It is unclear who the agreement was with or how it was necessary for litigating the legal issue of whether new census data required new district boundaries. Finally, the Sachs plaintiffs also billed more than \$2,200 to conduct background research on panel members, other parties, and other counsel. (Nauen Decl. Ex. A entries for June 30, July 1, 8, 15, 2021). Given the consistent and predictable nature of redistricting litigation, this time does not appear to have been reasonably expended.

Finally, while less readily quantifiable, the Wattson plaintiffs devoted significant briefing on measures of political competitiveness and partisanship on which they did not

prevail. Moreover, they pressed these issues after the Panel rejected them. The costs noted in this paragraph are not included in the summary table below, but they are provided as further context for why the Panel should substantially reduce the requested fee awards.

## 5. Summary

The table below summarizes the Secretary’s proposed minimum reductions, and the reasons for them, to the base fees the parties’ request. But, as discussed above, the Panel should further substantially reduce the fee requests to account for less readily quantifiable time, such as time spent on unnecessary issues or for the generally excessive lawyering addressed above or the intra-plaintiff litigation discussed below.

	<b>Anderson</b>	<b>Sachs</b>	<b>Watson</b>	<b>Total</b>
<i>Conferring</i>	\$62,539	\$117,195	\$10,280	\$190,014
<i>Duplicative</i>	\$83,925	\$52,938	\$99,020	\$235,882
<i>Legislation</i>	-	\$4,410	\$1,180	\$5,590
<i>Media</i>	-	\$1,360	\$2,980	\$4,340
<i>Clerical</i>	\$4,237	-	\$1,825	\$6,062
<i>Miscellaneous</i>	-	\$5,668	-	\$5,668
<b>Total</b>	<b>\$150,701</b>	<b>\$181,571</b>	<b>\$115,285</b>	<b>\$447,556</b>

### III. PRECEDENT AND PUBLIC POLICY COUNSEL A SIGNIFICANT FEE REDUCTION.

Even after accounting for reasonable time billed at a reasonable rate, a court has broad discretion to reduce the amount of claimed attorney fees. *Hensley*, 461 U.S. at 434. If a plaintiff presents “distinctly different claims for relief” that are based on different facts and legal theories and result in work on secondary claims that is unrelated to counsel’s

work on the central claim on which the plaintiff prevailed, no fee may be awarded for services on the ancillary claim. *Id.* at 434-35. In this case, the Court should substantially reduce the requested fees because, beyond the general issue of overstaffing discussed above, the plaintiffs devoted most of their time to fighting each other, not to litigating the merits of their claims against the defendants.

**A. A Reasonable Fee Does Not Include Compensation for Intra-Plaintiff Litigation.**

Redistricting cases are unique in the universe of section 1983 litigation in that a substantial proportion of the plaintiffs' litigation work is commonly performed in service of claims and arguments that are directed not against the nominal defendants but against each other—contending, for example, that a court should not adopt a redistricting principle suggested by a co-plaintiff or that a court should reject a co-plaintiff's proposed district boundaries. This litigation has been replete with disputes between the plaintiffs over redistricting principles and district maps, while the Secretary has contested almost nothing. Most explicitly, during the January 4 hearing on the parties' proposed redistricting plans, all plaintiffs provided extensive critiques of each other's redistricting plans (supported, as their submissions now demonstrate, by extensive attorney time spent preparing those critiques), while the Secretary neither submitted a redistricting plan nor criticized the plaintiffs' plans.<sup>6</sup> (Dec. 28, 2021 Order at 2-3.)

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<sup>6</sup> As some other examples of increased costs not attributable to the defendants, the Anderson plaintiffs opposed the Wattson plaintiffs' motion to add a party. While the Anderson plaintiffs do not seek reimbursement for their time, objecting to the motion resulted in the Wattson plaintiffs seeking to recover \$1,240 for their time responding to the objection. (Sienkowski Aff. Ex. A entries for July 19, 2021). And two parties seek fees for

The purpose of attorney fees under section 1988 is to ensure effective access to the judicial process for persons with civil rights grievances. *Hensley*, 461 U.S. at 429. The extensive intra-plaintiff disputes in this matter are at best tenuously related to the narrow constitutional questions before the Panel. As a result, the Panel should exercise its discretion to substantially reduce the portions of the fee award that are attributable to the plaintiffs' litigation against one another rather than to their constitutional claims against the defendants.

In the context of the plaintiffs' disagreements with one another, the defendants did not impose additional burdens on the vindicating their claim that new boundaries maps were needed. In this way, the defendants are in a position analogous to a private party who intervenes as a co-defendant in section 1983 litigation. Such an intervenor-defendant is typically liable for attorney fees only if, and to the extent that, it imposes additional burdens on the plaintiff's attempts to vindicate its civil-rights claims. *See, e.g., Thorstenn v. Barnard*, 883 F.2d 217, 219-21 (3d Cir. 1989) (denying fees against defendant-intervenor because intervenor "imposed no additional burden on plaintiffs in the litigation"); *Moten v. Bricklayers, Masons & Plasterers*, 543 F.2d 224, 239 (D.C. Cir. 1976) (awarding fees because plaintiffs "were compelled to defend against [intervenor-defendant's] efforts"); *Kirkland v. N.Y. State Dep't of Corr. Servs.*, 524 F. Supp. 1214, 1218-19 (S.D. N.Y. 1981)

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time spent responding to a third-party motion to intervene that the Panel denied, with the Wattson plaintiffs seeking \$3,200 for objecting to intervention and the Sachs plaintiffs seeking about \$2,460 for supporting it. (Nauen Decl. Ex. A entries for Sept. 7, 2021; Sienkowski Aff. Ex. A entries for Sept. 7-8, 2021; Stafford Decl. Ex. A entries for Sept. 6, 8, 2021; Sept. 10, 2021 Order.)

(denying fees against intervenor-defendant because intervenors did not obstruct vindication of plaintiffs' rights). The Secretary's participation in this matter has been functionally equivalent: every time one plaintiff in this action defeated another one regarding (for example) the placement of a given district boundary, the Secretary did nothing to obstruct the successful party; he imposed no burden on the plaintiffs' advocacy for their district maps.

Holding that a reasonable fee under section 1988 does not include compensation for time one private plaintiff spends litigating against another is consistent with the fundamental purpose of the statute to ensure effective access to the judicial process for persons with civil rights grievances; by definition, the points that were litigated between the plaintiffs (e.g., the proper placement of an individual district boundary, in a dispute between two or more constitutionally permissible options) had little or no connection to the actual civil rights grievance before the Panel. Allowing plaintiffs to collect fees from the state to bankroll unlimited litigation against one another finds no support in law and is clearly contrary to the public interest.

**B. The Fees the Plaintiffs Demand Represent a Severe and Unjustified Increase from the Amounts that Previous Minnesota Redistricting Panels Have Awarded.**

Redistricting panels in Minnesota have consistently awarded attorney fees to plaintiffs in redistricting litigation. *See, e.g., 2012 Fee Order; 2002 Fee Order.* But the fee amounts that the plaintiffs in the instant litigation seek are vastly disproportionate to the amounts that past panels have awarded. The Panel should reject the current plaintiffs' demands and order a fee award that is consistent with prior panel awards.



In the 2002 redistricting litigation, four groups of plaintiffs sought attorney fees and costs from the defendants, the Secretary and a county auditor. The panel awarded the groups amounts ranging from \$55,420.25 to \$104,500, with an average award of \$92,107.67. *2002 Fee Order* at 4-5. Accounting for inflation, that average award amounts to \$146,878.97 in 2022 dollars.<sup>7</sup> Ten years later, the redistricting panel awarded each of the three *Hippert* plaintiff groups \$115,000 in fees and costs. *2012 Fee Order* at 22. In 2022 dollars, this amounts to \$144,316.69. These figures are reflected in the table below:

<i>Redistricting Fee Year</i>	<i>Average Award</i>	<i>Adjusted for 2022</i>
<b>2002</b>	\$92,107.67	\$146,878.97
<b>2012</b>	\$115,000.00	\$144,316.69

In real-dollar terms, the two awards are notably consistent: adjusted for inflation, the amount of the 2012 award differs from the amount of the 2002 award by less than two percent. In other words, Minnesota redistricting panels have been relatively consistent in determining the amount of attorney fees that are reasonably incurred in redistricting litigation.

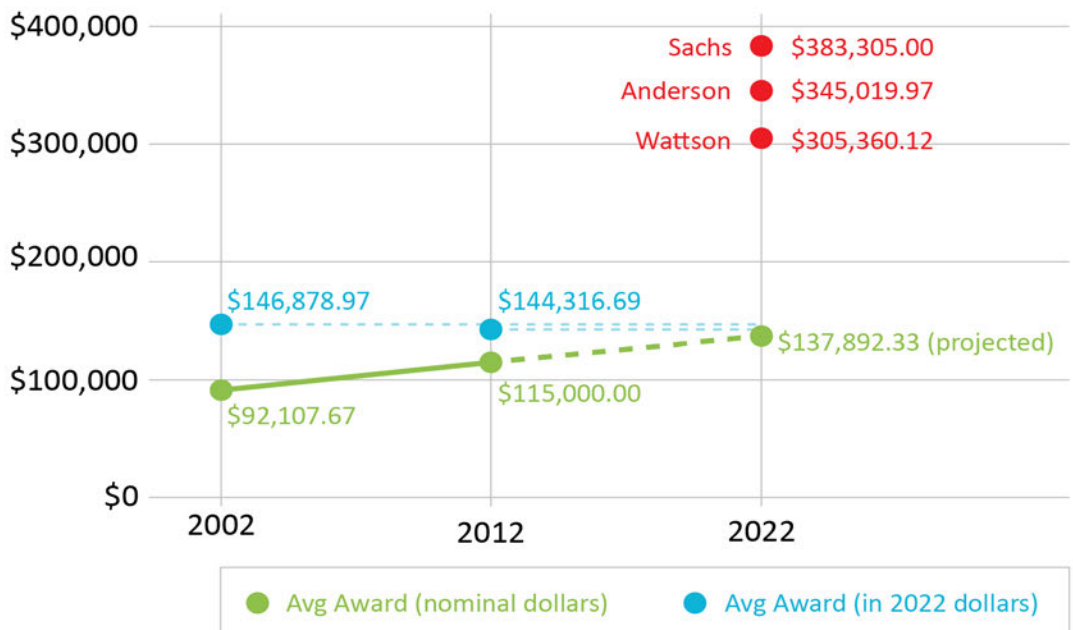
The plaintiffs to the current litigation demand fee awards that bear no resemblance to those awarded in the last two redistricting cycles. The Wattson plaintiffs seek more than \$305,000 in fees and costs, while the Anderson and Sachs plaintiffs request more than

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<sup>7</sup> All inflation calculations in this memorandum were generated by the CPI Inflation Calculator provided by the U.S. Bureau of Labor Statistics (BLS) on its website at [https://www.bls.gov/data/inflation\\_calculator.htm](https://www.bls.gov/data/inflation_calculator.htm). The process included providing the BLS online calculator with the month of the prior redistricting fee awards—October 2002 for the *Zachman* fee order and August 2012 for the *Hippert* order—and setting April 2022, the latest time period for which the BLS currently has statistics, as the current time.

\$345,000 and \$383,000, respectively. The average of these three requests—just above \$344,500—represents a nearly 140% increase to the 2012 award, even in inflation-adjusted terms.<sup>8</sup> Despite bearing the burden of proof, the plaintiffs did not explain why they believe the reasonable cost of litigating a redistricting case in Minnesota has more than doubled, even after adjusting for inflation, within the last ten years.

The chart below summarizes the fee-and-cost awards ordered by the 2002 and 2012 panels, both in nominal (green) and inflation-adjusted (blue) terms:



As the chart indicates, an average fee-and-cost award in this matter of slightly under \$138,000 would fit the gradual upward nominal-dollar trend established by the amounts the redistricting panels awarded in 2002 and 2012. When inflation is factored in, however,

<sup>8</sup> In precise terms, the average of the three fee requests (\$344,561.70) would amount to a 138.75% increase of the inflation-adjusted fees awarded by the 2012 redistricting panel (\$144,316.69).

the panels' awards do not suggest a particular progressive trend so much as a general intention to keep fee awards within a narrow inflation-adjusted range: most notably, the average 2012 award was slightly *lower* than the 2002 award when adjusted for inflation. In 2022 dollars, the range of past panels' awards falls at \$145,000, plus or minus a few thousand. The Secretary therefore believes that an award of no more than \$147,000 per requesting plaintiff group would be appropriate.

The red dots on the chart represent the three plaintiff groups' fee requests in this matter. As the chart makes clear, the requests constitute vast departures from the range of fee awards marked out by past decisions involving near-identical litigation. The plaintiffs provided no justification for the enormous disparity. The Court should reject fee requests so drastically at odds with fee awards in all recent Minnesota redistricting litigation.

### **CONCLUSION**

For the above reasons, the plaintiffs' fee requests are unreasonable. The plaintiffs prevailed on only a narrow issue that the defendants did not dispute, and the documentation they have provided for their fee claims demonstrates that their requests are excessive and based in substantial part on work that cannot reasonably be charged to the defendants. Because the majority of this litigation consisted of the plaintiff groups litigating redistricting principles and maps against one another, rather than constitutional claims against the defendants, the Panel should substantially reduce the fees they claim. Finally, the plaintiffs offer no justification for demanding more than double the inflation-adjusted amounts that redistricting panels have awarded for fees and costs in prior cycles. The

Secretary therefore requests that the Panel award the three groups of plaintiffs no more than \$147,000 each for their fees and costs in this litigation.

Dated: May 31, 2022

Respectfully submitted,

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