

STATE OF MINNESOTA

IN SUPREME COURT

A11-152

OFFICE OF  
APPELLATE COURTS

MAY 18 2011

**FILED**

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

Petitioners,

**MOTION TO LIFT STAY  
AND APPOINT PANEL**

vs.

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

Respondents.

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To: The Honorable Lorie S. Gildea, Chief Justice of the Minnesota Supreme Court, 305  
Minnesota Judicial Center, 25 Constitution Avenue, St. Paul, MN 55155-6102:

By Order dated February 14, 2011, this Court granted Petitioners' motion to appoint a special redistricting panel. However, the Court stayed appointment of the special redistricting panel and further proceedings in this matter "until further order of the Chief Justice". Petitioners respectfully move that the Court lift the stay in this matter and appoint a special redistricting panel to facilitate the drawing of legislative and congressional district boundaries in accordance with constitutional requirements. The grounds for this motion are:

1. The rationale for the stay, "recognition of the primacy of the legislative role in the redistricting process" (Order, p. 3), no longer exists. By issuing a stay of appointment of a special redistricting panel, this Court has indeed respected the primacy of the legislative role in the redistricting process. However, the Minnesota House of Representatives and Minnesota

State Senate have passed bills adopting redistricting principles, legislative district maps and congressional district maps. However, Governor Mark Dayton has signaled an intention to veto such bills. Hence, the Minnesota Legislature is about to adjourn without enactment of any laws governing redistricting principles or adopting constitutional legislative and congressional redistricting plans.

2. Time is of the essence. During Minnesota's last redistricting cycle, in *Zachmann v. Kiffmeyer*, Wright County District Court File No. CX-01-116, the Court appointed a special redistricting panel on July 12, 2001, for the purpose of adopting redistricting principles and drawing legislative and congressional plans consistent with those standards and constitutional requirements of equal population. (*See* Order of Chief Justice, No. C0-01-160 (July 12, 2001)). The statutory deadline for adopting constitutional redistricting plans (legislative and congressional) under Minn. Stat. § 204B.14, **February 21, 2012**, is several weeks shorter than during the 2001-2002 redistricting process (in which plans were judicially adopted on March 19, 2002). This Court must move quickly to enable the special redistricting panel to facilitate and adjudicate all matters involved in the redistricting litigation process, including without limitation, establishing deadlines for intervention, adopting redistricting principles, establishing deadlines for submission and responses to legislative and congressional maps as proposed by the various parties, and scheduling hearings, particularly in light of potential federal judicial action relative to the Minnesota redistricting process.

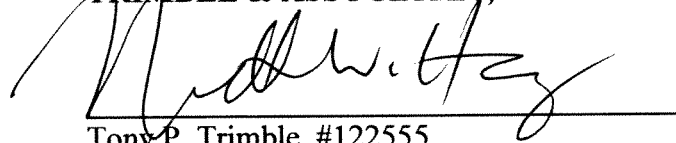
3. This Court must act now to maintain the primacy of the Minnesota judiciary's role in redistricting. As this Court is aware, an action has been filed in United States District Court for the Federal District of Minnesota, *Audrey Britton et al. v. Mark Ritchie et al.*, Civil Action No: 11-cv-93 (the "Federal Litigation"), requesting the federal district court to redress Minnesota's currently unconstitutional congressional and legislative district boundaries. By Order dated January 19, 2011 in the Federal Litigation, the Chief Justice of the Eighth Circuit

Court of Appeals appointed a three (3) judge panel to oversee the Federal Litigation. Petitioners were granted leave to intervene in the Federal Litigation, and all parties thereto have agreed to a stay of the Federal Litigation. However, at 4:35 p.m. on Tuesday, May 17, 2011, counsel for plaintiffs in the Federal Litigation filed a Motion to Lift Stay, with motion hearing date schedule for June 6, 2011 at 9:00 a.m. before Magistrate Judge Boylan. Prompt appointment of a state court special redistricting panel, commensurate with actions by such panel to facilitate judicial adoption of constitutional plans by February 21, 2012, will likely preclude the federal judiciary from assuming jurisdiction and supplanting the Minnesota state judiciary's primary role (which result would be contrary to the rationale within the Chief Justice's February 14, 2011 Order granting Petitioner's motion to appoint a special redistricting panel).

For the foregoing reasons, Petitioners request the Chief Justice to lift the stay imposed by the February 14, 2011 Order and appoint the members of the special redistricting panel.

Respectfully submitted,

**TRIMBLE & ASSOCIATES, LTD.**



Tony P. Trimble, #122555

Matthew W. Haapoja, #268033

Mark D. Fosterling, #389690

10201 Wayzata Boulevard, Suite 130

Minnetonka, MN 55305

*Attorneys for Petitioners*

Dated: May 18, 2011

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County Auditor, individually and on behalf  
of all Minnesota county chief election  
officers,

Respondents.

**PETITIONERS' MEMORANDUM OF  
LAW IN SUPPORT OF  
MOTION TO LIFT STAY  
AND APPOINT PANEL**

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By Order dated February 14, 2011, this Court granted Petitioners' motion ("Motion") to appoint a special redistricting panel. However, the Court stayed appointment of the special redistricting panel and further proceedings in this matter "until further order of the Chief Justice". Petitioners respectfully submit that the judicial role in the current redistricting process should now commence. Petitioners therefore respectfully request the Minnesota Supreme Court Chief Justice to lift the stay in this matter and appoint a special redistricting panel to facilitate the drawing of legislative and congressional district boundaries by the Minnesota judiciary in accordance with constitutional requirements.

Petitioners base this Motion on the arguments set forth herein and on the affidavits and supporting documents submitted herewith.

**I. Governor Dayton is likely to veto or refuse to sign the redistricting principles and plans passed by the Minnesota Legislature, and the Minnesota Legislature is about to adjourn without enactment of a constitutional legislative or congressional redistricting plans.**

This Court, in its Order dated February 14, 2011 (the “Order”), recognized the “primacy of the legislative role” in redistricting. (Order, p. 3.) In deference to the Minnesota Legislature, the Order therefore stayed judicial action as to redistricting efforts. At that time, the 2011 Minnesota legislative session was in its infancy, and Petitioners did not object to the Court’s stay of litigation proceedings. However, the Minnesota Legislature (Republican majorities in both the Minnesota House and Senate) and Democratic-Farmer-Labor (“DFL”) Governor Mark Dayton have failed to reach agreement on redistricting principles, legislative maps or congressional maps and will very likely adjourn on May 23, 2011 (Minnesota Constitution, Art. 4, § 12) without any agreement between the Legislature and the Governor.

On April 25, 2011, Governor Mark Dayton stated in a letter to Representative Sarah Anderson, Chair of the Minnesota House Redistricting Committee, that he would veto any redistricting bill that did not have “bipartisan support”. (Affidavit of Tony P. Trimble dated May 18, 2011, Exhibit A.) The Minnesota House and Minnesota Senate reached agreement on the principles to be followed for legislative and congressional redistricting, passing identical redistricting principles. H.F. 1547 92<sup>nd</sup> Session (2011) passed the Minnesota House on April 28, 2011 and was concurred to by the Minnesota Senate on May 3, 2011. (Id., Exh. B.)

On May 6, 2011, by vote of 69 Republican members in favor, to 58 Democrat-Farmer-Labor (“DFL”) members in opposition, the Minnesota House passed a legislative redistricting plan, H.F. 1425. (Id., Exh. C.) On May 13, 2011, the Minnesota House passed a congressional redistricting plan. H.F. 1426. (Id.) On May 17, 2011, the Minnesota Senate passed the legislative and congressional redistricting plans approved by the Senate Redistricting Committee,

which plans were identical to the plans passed by the Minnesota House (H.F. 1425; H.F. 1426).

(Id.)

Because the legislative and congressional district plans did not pass with bipartisan majorities, all evidence indicates that any compromise or agreement between the Minnesota Legislature (Republican majority) and DFL Governor Mark Dayton during the remainder of the session is highly unlikely. An Associated Press article dated May 17, 2011 entitled “Minn. Senate sends redistricting bills to Dayton; gov not likely to support GOP proposals”, reproduced at [www.startribune.com](http://www.startribune.com), stated:

The state Senate has sent Gov. Mark Dayton bills that alter the boundaries of Minnesota’s eight congressional districts and 67 legislative districts, *but they are likely to draw a veto from the Democratic chief executive*. Both bills passed the Senate Tuesday with support only from majority Republicans. *Dayton has said he would not support redistricting bills that lack bipartisan support.*

(Id., Exh. D.)

In sum, the Legislature and Governor have had their opportunity to pass redistricting plans and were unable to accomplish this task. Therefore, grounds no longer exist for the stay of appointment of a special redistricting issued by this Court to continue; as discussed below, the Minnesota judiciary must act now to preserve the role of Minnesota state courts in redistricting and to judicially adopt constitutional redistricting plans before Minnesota’s statutorily-imposed February 21, 2011 deadline.

## **II. Time is of the essence.**

During the 2001-2002 redistricting process, the Minnesota Supreme Court Chief Justice appointed a special redistricting panel by Order dated July 12, 2001. During that cycle, the Minnesota Legislature had adjourned without agreement on redistricting principles, a legislative plan or a congressional plan. Under Minnesota law effective in 2001, the statutory deadline for adopting a redistricting plan (twenty-five (25) weeks before the primary) was March 19, 2002. However, during the 2020 legislative session, the Minnesota Legislature statutorily moved the

date of Minnesota's primary from the first Tuesday in September to the first Tuesday in August. Minn. Stat. § 204D.03. Accordingly, for the instant litigation, the statutory deadline for adopting constitutional redistricting plans is February 21, 2012, several weeks sooner than in 2001. Minn. Stat. § 204B.14.

Moreover, the Minnesota Legislature will not re-convene until early 2012, at a date set by joint resolution of the Minnesota House and Senate (typically occurring in February of the even year). (Trimble Aff., Exh. E – “Frequently Asked Questions About the Minnesota Legislature”). This will leave the Minnesota Legislature (Republican majorities) with precious little (if any) time in 2012 to reach any agreement with DFL Governor Dayton before the February 21, 2012 statutory deadline. As such, this Court must act over the next several months to be ready to issue an order adopting legislative and congressional district boundaries if, as is extremely likely, the Minnesota Legislature and Mark Dayton fail to agree prior to February 21, 2012.

Accomplishment of the judicial tasks inherent in this litigation by February 21, 2012 will require some very tight deadlines. Preliminarily, the special redistricting panel members must be appointed. Then, parties must be given time to intervene. The first substantive task will likely be holding a hearing on redistricting principles, with time on either side of such a hearing for briefing and deliberation. Once redistricting principles are established, the special redistricting panel must then undertake the fact-intensive task of considering and drafting legislative and congressional plans consistent with these principles and constitutional doctrines, including conducting hearings as to plans proposed by various parties and potential *amici* briefs. With a statutory deadline just over nine months away, time is of the essence, particularly with the possibility of federal court intervention described at (III), *infra*.

**III. Prompt action is necessary to preserve and protect the State of Minnesota's judicial role in redistricting from usurpation by the federal judiciary.**

There is an additional factor regarding timely Minnesota state court action on redistricting. As the Chief Justice recognized at page 2 of the February 14, 2011 Order, “[R]eapportionment is primarily the duty and responsibility of the State through its legislative or other body, rather than that of a federal court” (citing *Emison v. Growe*, 507 U.S. 25, 34 (quoting *Chapman v. Meier*, 420 U.S. 1, 27 (1975))) The Supreme Court held in *Emison* that “the District Court erred in not deferring to the state court’s timely consideration of...reapportionment.” *Id.* at 37 (emphasis added). The Court also stated:

Absent evidence that these state branches will fail timely to perform that duty, a federal court must neither affirmatively obstruct state reapportionment nor permit federal litigation to be used to impede it...

Timely action by the state judiciary is now required to protect the federal Constitutional responsibility and authority delegated to the State of Minnesota to apportion congressional and legislative districts. *If the state judiciary fails to act, the potential for federal court action would be increased...Germano requires deferral, not abstention.*

*Id.* at 25, 34 and 37 (emphasis added).

As this Court is aware, an action has been filed in United States District Court for the Federal District of Minnesota, *Audrey Britton et al. v. Mark Ritchie et al.*, Civil Action No: 11-cv-93 (the “Federal Litigation”), requesting the federal district court to redress Minnesota’s currently unconstitutional congressional and legislative district boundaries. By Order dated January 19, 2011 in the Federal Litigation, the Chief Justice of the Eighth Circuit Court of Appeals appointed a three (3) judge panel to oversee the Federal Litigation. Subsequently, by Order of Honorable Arthur J. Boylan (Magistrate Judge) dated February 7, 2011, Petitioners were granted leave to intervene in the Federal Litigation and a stay of the Federal Litigation was imposed.



**However, at 4:35 p.m. on Tuesday, May 17, 2011, counsel for the Britton plaintiffs in the Federal Litigation filed a Motion to Lift Stay, Memorandum of Law and supporting affidavits, and a motion hearing date has been scheduled for June 6, 2011 at 9:00 a.m. before Magistrate Judge Boylan. (See Trimble Aff., Exhibits F, G, H and I).**

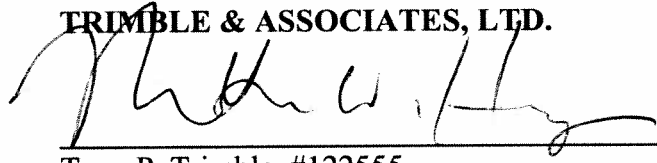
Accordingly, appointment of a Minnesota state court special redistricting panel, and commencement by such panel of its work relative to redistricting, will constitute evidence of “timely action by the state judiciary” justifying denial of the motion to lift the stay in the Federal Litigation. Prompt appointment of a state court special redistricting panel, commensurate with actions by such panel to facilitate judicial adoption of constitutional plans by February 21, 2012, will likely preclude the federal judiciary from assuming jurisdiction and supplanting the Minnesota state judiciary’s primary role (which result would be contrary to the rationale within the Chief Justice’s February 14, 2011 Order granting Petitioner’s motion to appoint a special redistricting panel).

### **CONCLUSION**

The initial rationale for a stay of this action no longer exists. The Minnesota Legislature and Governor have not agreed, and will not agree, on bills relative to on redistricting principles, legislative redistricting plans or congressional redistricting plans. Given the minimal time available for the state judiciary to now take up the task of redistricting, and in light of the motion to lift the stay in the Federal Litigation, Petitioners respectfully request that the Chief Justice lift the stay and appoint a special redistricting panel.

Respectfully submitted,

**TRIMBLE & ASSOCIATES, LTD.**



Tony P. Trimble, #122555

Matthew W. Haapoja, #268033

Mark D. Fosterling, #389690

10201 Wayzata Boulevard, Suite 130

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*Attorneys for Petitioners*

Dated: May 18, 2011

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individually and on behalf of all citizens and  
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Petitioners,

**AFFIDAVIT OF TONY P. TRIMBLE  
IN SUPPORT OF MOTION TO LIFT  
STAY AND APPOINT PANEL**

vs.

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

Respondents.

---

TONY P. TRIMBLE, (“Affiant”), being first duly sworn, on oath deposes and states the following:

1. Affiant is an attorney at Trimble & Associates, Ltd. and is counsel for Petitioners with respect to the above-captioned matter.

2. Attached hereto as Exhibit A is a true and correct copy of correspondence dated April 25, 2011, from Governor Mark Dayton to Representative Sarah Anderson, Chair of the Minnesota House Committee on Redistricting

3. Attached hereto as Exhibit B is a true and correct copy of H.F. 1547 as passed by the Minnesota Senate and Minnesota House of Representatives.

4. Attached hereto as Exhibit C are true and correct copies of H.F. 1425 and H.F. 1426 as passed by the Minnesota Senate and Minnesota House of Representatives.

5. Attached hereto as Exhibit D is a true and correct copy of an Associated Press article dated May 17, 2011 entitled “Minn. Senate sends redistricting bills to Dayton; gov not likely to support GOP proposals”, printed from [www.startribune.com](http://www.startribune.com).

6. Attached hereto as Exhibit E is a true and correct copy of “Frequently Asked Questions About the Minnesota Legislature”, printed from the Minnesota Legislature website at <http://www.house.leg.state.mn.us/leg/faqtoc.asp?subject=12>.

7. Attached hereto as Exhibit F is a true and correct copy of a Motion to Lift Stay dated May 17, 2011 as filed in United States District Court for the Federal District of Minnesota, *Audrey Britton et al. v. Mark Ritchie et al.*, Civil Action No: 11-cv-93 (the “Federal Litigation”).

8. Attached hereto as Exhibit G is a true and correct copy of the Notice of Hearing dated May 17, 2011 as filed in the Federal Litigation.

9. Attached hereto as Exhibit H is a true and correct copy of the Memorandum of Law in Support of Motion dated May 17, 2011 as filed in the Federal Litigation.

10. Attached hereto as Exhibit I is a true and correct copy of the Affidavit of Jane Prince dated May 17, 2011 as filed in the Federal Litigation.

(THIS SPACE INTENTIONALLY LEFT BLANK).

FURTHER YOUR AFFIANT SAYETH NOT.

Dated: May 18, 2011

Tony P. Trimble  
Tony P. Trimble

*Attorney for Petitioners*

Subscribed and sworn to before me  
this 18<sup>th</sup> day of MAY, 2011

[Signature]  
Notary Public

