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' STATEMENT OF UNRESOLVED ISSUES

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.

Plaintiffs Paul Anderson, *et al.* submit this Statement of Unresolved Issues in support of the following recommendations, which are consistent with the Minnesota Special Redistricting Panel decisions on redistricting principles in *Hippert v. Ritchie*[1] and *Zachman v. Kiffmeyer*[2]: (1) the issue of the constitutionality of the current congressional and legislative districts is not ripe unless and until the Legislature and Governor of Minnesota fail to reach an agreement on redistricting legislation on or before February 15, 2022;[3] (2) for congressional districts, absolute population equality shall be the goal, meaning that the tolerable deviation for congressional districts shall be +/- one person[4]

[1] *Hippert v. Ritchie*, No. A11-152, Order Stating Redistricting Principles and Requirements for Plan Submissions (Minn. Special Redistricting Panel, Nov. 4, 2011) ("Hippert Principles Order").
[2] *See Zachman v. Kiffmeyer*, No. C0-01-160, Order Stating Redistricting Principles (Minn. Special Redistricting Panel, Dec. 11, 2001) ("Zachman Principles Order").
[3] Hippert Principles Order at p. 2-4.
[4] Hippert Principles Order at p. 5.

regardless of whether precincts are divided; and (3) de minimis deviation shall be the goal for legislative districts, with a tolerable deviation of no more than +/- two percent (2%).[5]

I. The Constitutionality of the Current Legislative and Congressional Districts is Not Ripe for this Panel's Review

Among other matters, the Panel asked the parties to address whether the current districts are unconstitutionally flawed in light of the 2020 Census. While all parties agree that the current election districts are unequally apportioned in light of the 2020 census, the parties could not agree on whether the current districts are presently unconstitutional, or whether they will become unconstitutional should the Minnesota Legislature and Minnesota Governor fail to redistrict.

However, this question was settled by the *Hippert* Panel in the 2011 redistricting cycle, when the Panel declined at this stage in the proceedings to declare the current districts unconstitutional. Hippert Principles Order at 2-4. Now, as then, this Panel will order the adoption of the redistricting plans formulated in this litigation "only if the Legislature and the Governor do not reach an agreement on redistricting legislation by" February 15, 2022. *Id*. at 3 (citing Minn. Stat. § 204B.14, subd. 1(a)). Accordingly, because the scenario in which the Legislature and Governor do not reach an agreement is "purely hypothetical," the issue of constitutionality of the current districts is "not ripe for [the Panel's] decision." *Id*. (*citing Camreta v. Greene*, 131 S. Ct. 2020, 2031 (2011)). *See also Kahn v. Griffin*, 701 N.W.2d 815, 821 (Minn. 2005) (a controversy is not justiciable if it involves "[m]erely possible or hypothetical injury").

[5] Hippert Principles Order at p. 7.

Nothing since the *Hippert* panel's resolution of this question should lead this Panel to a different conclusion. Just as in 2011, the Minnesota redistricting process is appropriately underway to ensure redistricting occurs, but Minnesota congressional and legislative districts are not unconstitutional until the Legislature and Governor fail to establish new districts by their statutory deadline to do so.

II. To Abide by the Constitutional One Person, One Vote Principle, the Tolerable Deviation is +/- One Person for Court-Ordered Congressional Redistricting Plans

For congressional districts to be constitutionally sound, "as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7 (1964). Thus, "equal representation for equal numbers of people [is] the fundamental goal for the House of Representatives" under the United States Constitution. *Id.* at 18. This one person, one vote principle for the drawing of congressional districts has been affirmed by the United States Supreme Court time and again. *See, e.g.*, *Kirkpatrick v. Preisler*, 394 U.S. 526, 531 (1969) ("Equal representation for equal numbers of people is a principle designed to prevent debasement of voting power and diminution of access to elected representatives. Toleration of even small deviations detracts from these purposes."); *Karcher v. Daggett*, 462 U.S. 725, 731 (1983) ("Article I, § 2 establishes a 'high standard of justice and common sense' for the apportionment of congressional districts: 'equal representation for equal numbers of people.'" (citing *Wesberry*, 376 U.S. at 18)).

In other words, population equality, as a constitutional requirement, is paramount in the drawing of congressional districts. And this constitutional requirement "permits only

the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown." *Kirkpatrick*, 394 U.S. at 531. This is particularly true when those lines are drawn by courts, rather than by a state legislature. As the *Hippert* Panel held: "Because a court-ordered redistricting plan must conform to a higher standard of population equality than a redistricting plan created by a legislature, absolute population equality shall be the goal." Hippert Principles Order at 5 (citing *Abrams v. Johnson*, 521 U.S. 74, 98, 117 S.Ct. 1925, 1939 (1997)).

Most recently, Minnesota's court-appointed 2001 and 2011 Special Redistricting Panels have adhered to this constitutional principle. *See* Zachman Principles Order at 2 ("The districts must be as nearly as equal in population as is practicable . . . Because a court-ordered redistricting plan must conform to a higher standard of population equality than a legislative redistricting plan, absolute population equality will be the goal."); Hippert Principles Order at 5 (same). And the parties here again stipulate to the application of this principle and agree that "[b]ecause Minnesota's total population is not divisible into eight congressional districts of equal population, the ideal result is six districts of 713,312 persons and two districts of 713,311 persons." *Wattson v. Simon*, No. A21-0243, Stipulation Regarding Preliminary Issues (Sept. 24, 2021). In other words, all parties agree that, consistent with the constitutional one person, one vote principle, the ideal population for Minnesota's congressional districts is achievable with a deviation of +/- one person.

Despite this agreement, the Wattson Plaintiffs advocate for the injection of another consideration in the evaluation of tolerable deviations from the ideal population for congressional districts – namely, the division of precincts (i.e., "voting districts" in the

Census data). However, the division of precincts has never been adopted as a consideration by Minnesota's redistricting panels in determining tolerable deviations and there is no reason for its adoption now. The existing voting districts/precincts are now ten years old, and it is specifically contemplated that their boundaries should be redrawn following congressional and legislative redistricting – not vice versa. *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."). While the Wattson Plaintiffs are of course free to advocate for the consideration of precinct splits in proposing principles or maps for this proceeding (and the Anderson Plaintiffs do not at this time take any position as to the adoption of such criteria), their effort to tie population deviation to voting precincts should be rejected.

III. The Tolerable Deviation for Legislative Districts Should be Two Percent, with a Goal of De Minimis Deviation

The Anderson Plaintiffs advocate strongly for adhering as closely as possible to *de minimis* population deviation for legislative districts. However, they also support this Panel's adoption of two percent as the maximum tolerable percentage deviation from the ideal for legislative districts. This has been the standard in Minnesota in every redistricting cycle since the 1970s. In contrast, the Corrie Plaintiffs propose a tolerable deviation of 10 percent, or *five times* greater than that

established standard. But two percent is the most appropriate maximum tolerable deviation as discussed in more detail below.

A. A Two Percent 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). *Reynolds* states that legislative districts be constructed "as nearly of equal population as is practicable." 377 U.S. 533, 577. The Corrie Plaintiffs proposed a maximum deviation of under 10 percent in a legislative district, impliedly claiming that such a deviation would satisfy this requirement.[6] But even if such a percentage could be tolerable under constitutional limits, "this does not mean that where the legislature has failed to enact a valid plan, courts should not strive to implement, along with other constitutional concerns, a plan of redistricting which provides the greatest numerical equality possible." *Emison v. Growe*, 782 F. Supp. 427, 443-44 (D. Minn. 1992) (reversed on other grounds by 507 U.S. 25 (1993)).

Further, the Corrie Plaintiffs fail to account for Minnesota's constitutional requirements and other principles of law, or for the ability of past Panels to issue fair

[6] *See Harris v. Arizona Indep. Redistricting Comm'n*, 578 U.S. 253, 136 S. Ct. 1301, 1307, 194 L. Ed. 2d 497 (2016) (holding that deviations from the ideal legislative district population under 10 percent do not, "by themselves, make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State.").

and equitable redistricting plans with much lower legislative district population deviations. The Minnesota Constitution imposes an even higher standard than *Reynolds*, requiring that "representation in *both houses* shall be apportioned *equally* throughout the different sections of the state in proportion to the population thereof." Minn. Const. art. IV, Sec. 2 (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). These constitutional mandates mean that the primary relief owed to Minnesota voters in this action is not the preservation of political subdivisions or communities of interest; rather, it is a map that restores population equality between the districts. Accordingly, this Panel should adopt a tolerable population deviation of two percent consistent with past practice, with a focus on *de minimis* deviations to the extent possible.

B. A Two-Percent Maximum Deviation Standard Is Well-Established and Tested in Minnesota

The Minnesota judiciary has long recognized that a maximum tolerable deviation of two percent for legislative districts is a sensible standard that serves Minnesota voters well. Most recently, the *Hippert* panel recognized that "[b]ecause a court-ordered redistricting plan must conform to a higher standard of population equality than a plan created by a legislature, de minimis deviation from the ideal district population shall be the goal." *Hippert* Principles Order at p. 7 (*citing Connor*, 421 U.S. at 414). Accordingly, the Panel held that "the population of a legislative

district shall not deviate by more than two percent from the population of the ideal district." *Id*.; *see also Zachman*, No. C0-01-160, 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*, N. 4-71-Civil 151 (D. Minn., Nov. 26, 1971).

This standard is achievable while allowing more than enough flexibility to preserve other objective criteria. For example, after setting a maximum tolerable deviation of two percent, the *Hippert* panel adopted a legislative plan with a maximum deviation of 0.86 percent. *Hippert*, No. A11-152, Final Order Adopting a Redistricting Plan (Feb. 21, 2012). The Hippert panel did so without sacrificing any of its other criteria. *Id*. The *Zachman* panel similarly set a two-percent maximum tolerable deviation in 2001, and then adopted a plan with a maximum deviation of less than one percent while satisfying other legitimate state objectives. *See Zachman*, No. C0-01-160, Final Order Adopting a Legislative Redistricting Plan (Mar. 19, 2002).

The Anderson Plaintiffs anticipate that the Corrie Plaintiffs may argue for population deviation greater than two percent to achieve some other goal – perhaps to maintain certain communities of interest, political subdivisions (i.e., counties, cities, townships), or in service of other criteria or preferred outcomes. However,

the very purpose of redistricting is to achieve the one person/one vote standard, which is largely prioritized over all other criteria in redistricting – especially where, as with Minnesota Redistricting Panels, it has been repeatedly shown that a two percent legislative standard can result in fair districts. As with the Wattson Plaintiffs effort to elevate precincts over population equality, the Corrie Plaintiffs' efforts to reduce population equality in service of other goals they failed to identify in the stipulation process is not appropriate for a court-ordered redistricting plan.

In short, a two-percent deviation standard has served Minnesotans well, and the Panel should not deviate from established judicial precedent. Rather, the Anderson Plaintiffs support a +/- two percent maximum deviation, with direction from the Panel that all parties and the Panel should strive for a lower individual district population deviation and total average deviation to the greatest extent possible.

Dated: September 24, 2021

Respectfully submitted,

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