FILED
11-08-2023
CLERK OF WISCONSIN
SUPREME COURT

Supreme Court of Wisconsin

NO. 2023AP001399 - OA

REBECCA CLARKE, RUBEN ANTHONY, TERRY DAWSON, DANA GLASSTEIN, ANN GROVES-LLOYD, CARL HUJET, JERRY IVERSON, TIA JOHNSON, ANGIE KIRST, SELIKA LAWTON, FABIAN MALDONADO, ANNEMARIE MCCLELLAN, JAMES MCNETT, BRITTANY MURIELLO, ELA JOOSTEN (PARI) SCHILS, NATHANIEL SLACK, MARY SMITH-JOHNSON, DENISE SWEET, AND GABRIELLE YOUNG,

Petitioners,

vs.

WISCONSIN ELECTIONS COMMISSION; DON MILLIS, ROBERT F. SPINDELL, JR., MARK L. THOMSEN, ANN S. JACOBS, MARGE BOSTELMANN, JOSEPH J. CZARNEZKI, in their official capacities as members of the Wisconsin Election Commission; MEAGAN WOLFE, in her official capacity as the administrator of the Wisconsin Elections Commission; ANDRE JACQUE, TIM CARPENTER, ROB HUTTON, CHRIS LARSON, DEVIN LEMAHIEU, STEPHEN L. NASS, JOHN JAGLER, MARK SPREITZER, HOWARD MARKLEIN, RACHAEL CABRALGUEVARA, VAN H. WANGGAARD, JESSE L. JAMES, ROMAINE ROBERT QUINN, DIANNE H. HESSELBEIN, CORY TOMCZYK, JEFF SMITH AND CHRIS KAPENGA, in their official capacities as members of the Wisconsin Senate,

Respondents.

NON-PARTY AMICUS BRIEF OF JO ELLEN BURKE, JENNIE TUNKIEICZ, AND JOHN PERSA

Abha Khanna*
ELIAS LAW GROUP LLP
1700 Seventh Ave, Suite 2100
Seattle, WA 98101
akhanna@elias.law

William K. Hancock*
Julie Zuckerbrod*
ELIAS LAW GROUP LLP
250 Mass. Ave NW, Suite 400
Washington, D.C. 20001
whancock@elias.law
jzuckerbrod@elias.law

Samuel T. Ward-Packard
State Bar No. 1128890
ELIAS LAW GROUP LLP
250 Mass. Ave NW, Suite 400
Washington, D.C. 20001
swardpackard@elias.law

Attorneys for proposed Amici Curiae Jo Ellen Burke, Jennie Tunkieicz, and John Persa

**Motion for Admission Pro Hac Vice Forthcoming*

ARGUMENT

After the 2020 Census, the Legislative and Executive branches were unable to enact new district boundaries for the State of Wisconsin's legislative chambers or congressional delegation. As a result, the task of drawing maps fell to this Court. But rather than applying traditional redistricting principles recognized under Wisconsin law and exercising its independent judgment to develop a redistricting plan that served those principles, this Court selected those maps which "make the least change from current district boundaries." *Johnson v. Wis. Elections Comm'n (Johnson II)*, 2022 WI 14, ¶ 12, 400 Wis. 2d 626, 971 N.W.2d 402, rev'd on other grounds sub nom. *Wis. Legislature v. Wis. Elections Comm'n*, 595 U.S. 398 (2022). In binding itself to decade-old maps, the Court allowed "least change" considerations to supersede all others. *See, e.g.*, *id.* ¶¶ 18–19 (declining to "pick and choose which changes" the court approved of or consider "which [party] explained their changes the most comprehensively"

in favor of "look[ing] to which maps actually produce the least change").

The separation of powers doctrine does not permit this type of judicial abdication in the redistricting context. The Court's approach to developing redistricting plans—and the electoral maps that emerged from that process—were not the product of the independent exercise of judicial power and are, therefore, unconstitutional.

The adoption of the state legislative maps under a least-change approach abdicated this Court's constitutional duty to exercise independent judgment and therefore violated the Wisconsin Constitution's separation of powers.

The Wisconsin Constitution "created three branches of government, each with distinct functions and powers, and the separation of powers doctrine is implicit in this tripartite division." *Gabler v. Crime Victims Rts. Bd.*, 2017 WI 67, ¶ 11, 376 Wis. 2d 147, 897 N.W.2d 384 (citations omitted). The "judicial power" was

exclusively vested in this Court—specifically, the power "to exercise independent judgment in cases over which [it] preside[s]." *Id.* ¶ 46. When presented with a case concerning redistricting maps, it is "the judiciary's *exclusive* responsibility to exercise judgment" to resolve that controversy. *Id.* ¶ 37 (emphasis added). The separation of powers doctrine "prevents [this Court] from abdicating [its] core power." *Tetra Tech EC, Inc. v. Wis. Dep't of Revenue*, 2018 WI 75, ¶ 48, 382 Wis. 2d 496, 914 N.W.2d 21.

But when faced with a controversy over redistricting after the 2020 census, this Court declined to "exercise [its] independent judgment" in developing new maps, *Gabler*, 2017 WI 67, ¶ 46, and instead adopted a "least change method" that deferred entirely to the judgment of the political branches from a decade prior, with only those alterations "necessary to resolve constitutional or statutory deficiencies," *Johnson v. Wis. Elections Comm'n (Johnson I)*, 2021 WI 87, ¶ 72, 399 Wis. 2d 623, 967 N.W.2d 469.

This Court was explicit that the purpose of the least-change framework was to "minimize judicial policymaking," *Johnson II*,

2022 WI 14, ¶ 11, and defer to the "policy choices of the legislature" as constituted a decade earlier, *Johnson I*, 2021 WI 87, ¶ 81. But the Court's effort to "remov[e] [itself] from the political fray," *id.* ¶ 77, ignored the fact that courts "called upon to perform redistricting are, of course, judicially legislating." *Jensen v. Wis. Elections Bd.*, 2002 WI 13, ¶¶ 9–11, 249 Wis. 2d 706, 639 N.W.2d 537. Indeed, federal courts defer to state courts on redistricting matters precisely *because* it is a "highly political task." *Growe v. Emison*, 507 U.S. 25, 33 (1993); *see also id.* ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged." (quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965)). State courts are thus empowered to independently craft redistricting plans when legislatures "refuse[] to reapportion themselves" because "citizens have a right to have their legislature properly apportioned and their congressional districts properly drawn and the responsibility for seeing that this

right is enforced rests with the states, not the federal courts." *Alexander v. Taylor*, 2002 OK 59, ¶ 16, 51 P.3d 1204, 1209, as corrected (June 27, 2002).

Deferring to a decade-old map—enacted by a decade-old legislative body and signed by a Governor who is no longer in office—does not properly discharge this responsibility. Contrary to the Court's least-change approach, the Court's constitutional duty to exercise its independent judgment is neither qualified nor quieted by the politicized nature of the task before it.

State courts across the country recognize that the judiciary's role in redistricting cannot be circumscribed by deference to any one political branch. Courts are "bound by the same commands that the Legislature must satisfy" when crafting a redistricting plan. *Carter v. Chapman*, 270 A.3d 444, 461 (Pa. 2022), cert. denied sub nom. *Costello v. Carter*, 143 S. Ct. 102 (2022). Accordingly, when a state court is "thrust into the position of choosing a redistricting plan due to the political stalemate between the Legislature and the Governor," it must "endeavor to adopt a

plan" that is "superior or comparable to all of the plans submitted" based "[f]irst and foremost" on "the traditional core criteria" that guide the state's redistricting decisions. *Id.* at 451, 461–62 (internal quotation omitted); *see also Hippert v. Ritchie*, 813 N.W.2d 391, 395 (Minn. 2012) (adopting a remedial plan by utilizing "redistricting principles that advance the interests of the collective public good and preserve the public's confidence and perception of fairness in the redistricting process").

There are no shortcuts to this endeavor. State courts cannot fulfill their redistricting duties by blindly deferring to prior plans. For example, while the Pennsylvania Supreme Court recently adopted a plan that represented the least change from the previous court-ordered plan, it "d[id] not select [that] Plan *because* it utilized the least change approach but because the least change approach worked . . . to produce a map that satisfies the requisite traditional core criteria while balancing the subordinate historical considerations and resulted in a plan that is reflective of and responsive to the partisan preferences of the Commonwealth's

voters." *Carter*, 270 A.3d at 464 (emphasis added). While least-change may be a virtue of a judicially developed map, it cannot be used to supplant the judiciary's independent judgment on the host of relevant criteria for the state's citizens.[1]

Similarly, though the Minnesota Supreme Court has considered existing districts when drawing remedial maps, it has also recognized that "least change" cannot be the end goal because applying a court's independent judgment to existing districts "does not necessarily yield little change." *Wattson v. Simon*, 970 N.W.2d 42, 45–46 (Minn. 2022). Accordingly, in the most recent redistricting cycle, the Minnesota court balanced seven core principles to guide its task of drawing new legislative districts, which resulted in a "cascading effect," where "even a district drawn ten years ago that remains within appropriate population deviation will need to change along with the rest of the state." *Id*.

---

[1] As one Justice cautioned, "[t]he utility" of the least-change approach "might be diminished significantly if our point of reference—i.e., the thing to be changed least—is a grossly gerrymandered map . . . In that instance, it would not [be] prudent to require mapmakers to measure their proposals against manifestly unconstitutional lines." *Id.* at 490 (Wecht, J., concurring).

This approach is consistent with decades of Minnesota courts' practice of independently exercising judgment by assessing the merits of redistricting plans based on all redistricting criteria relevant to the state's voters. *See Hippert*, 813 N.W.2d at 398–402 (analyzing each congressional district's adherence to traditional redistricting principles, compliance with state and federal law, and responsiveness to public comments, including political outcomes); *Zachman v. Kiffmeyer*, No. C0–01–160 (Minn. Special Redistricting Panel Mar. 19, 2002) (Final Order Adopting a Congressional Redistricting Plan) (adopting a plan "different from any submitted by the parties, but ultimately balanced" and "fundamentally fair" by considering a range of redistricting criteria including contiguity, compactness, respecting communities of interest, keeping minority populations together, and incumbent protection and conflicts).

In sum, courts routinely acknowledge their constitutional duty to independently develop and analyze the merits of proposed redistricting plans by applying a wide range of redistricting

criteria. This Court's failure to discharge that duty with respect to Wisconsin's state legislative maps was an unconstitutional affront to the separation of powers doctrine.

CONCLUSION

For the reasons stated above, this Court should hold that the adoption of the existing state legislative maps violated the Wisconsin Constitution's separation of powers principle.

Dated: November 8, 2023

Respectfully submitted,

Electronically signed by
Samuel T. Ward-Packard
Samuel T. Ward-Packard
State Bar No. 1128890
ELIAS LAW GROUP LLP
250 Mass. Ave NW, Suite 400
Washington, D.C. 20001
swardpackard@elias.law

Abha Khanna*
ELIAS LAW GROUP LLP
1700 Seventh Ave, Suite 2100
Seattle, WA 98101
akhanna@elias.law

William K. Hancock*
Julie Zuckerbrod*
ELIAS LAW GROUP LLP
250 Mass. Ave NW, Suite 400
Washington, D.C. 20001
whancock@elias.law
jzuckerbrod@elias.law

Attorneys for proposed Amici Curiae Jo Ellen Burke, Jennie Tunkieicz, and John Persa

**Motion for Admission Pro Hac Vice Forthcoming*

FORM AND LENGTH CERTIFICATION

I certify that this brief conforms to the rules contained in Wis. Stat. § 809.19(8)(b), (bm), and in this Court's October 6, 2023 Order, for a non-party brief produced with a proportional serif font. The length of this brief is 1,419 words.

Dated: November 8, 2023 *Electronically signed by*

Samuel T. Ward-Packard

Appendix

STATE OF MINNESOTA

SPECIAL REDISTRICTING PANEL

C0-01-160

Susan M. Zachman, Maryland Lucky R. Rosenbloom, Victor L.M. Gomez, Gregory G. Edeen, Jeffrey E. Karlson, Diana V. Bratlie, Brian J. LeClair and Gregory J. Ravenhorst, individually and on behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs,

and

Patricia Cotlow, Thomas L. Weisbecker, Theresa Silka, Geri Boice, William English, Benjamin Gross, Thomas R. Dietz and John Raplinger, individually and on behalf of all citizens and voting residents of Minnesota similarly situated,

Plaintiffs-Intervenors,

and

Jesse Ventura,

Plaintiff-Intervenor,

and

Roger D. Moe, Thomas W. Pugh, Betty McCollum, Martin Olav Sabo, Bill Luther, Collin C. Peterson and James L. Oberstar,

Plaintiffs-Intervenors,

vs.

Mary Kiffmeyer, Secretary of State of Minnesota, and Doug Gruber, Wright County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants.

FINAL ORDER

Adopting a Congressional Redistricting Plan

O R D E R

On January 4, 2001, Susan M. Zachman et. al brought an action in Wright County District Court alleging that "the present congressional district boundaries in the State of Minnesota violate Plaintiffs' rights to due process and equal protection guaranteed by the United States Constitution." (Zachman Compl. at 12.) The Zachman plaintiffs then petitioned Chief Justice Kathleen Blatz of the Minnesota Supreme Court to appoint a Special Redistricting Panel to oversee all of Minnesota's 2001-2002 redistricting litigation. (Zachman Pet. for Appointment of Spec. Redistricting Panel at 1.) Pursuant to her authority under Minnesota law, Chief Justice Blatz appointed this panel on July 12, 2001, directing us to adopt congressional and legislative redistricting plans only in the event the legislature failed to do so in a timely manner. *Zachman v. Kiffmeyer*, 629 N.W.2d 98, 98 (Minn. 2001) (Order of Chief Justice); *see also* Minn. Stat. §§ 2.724, subd. 1, 480.16 (2000).

According to Minn. Stat. § 204B.14, subd. 1a (2000), "[i]t is the intention of the legislature to complete congressional and legislative redistricting activities * * * in no case later than 25 weeks before the state primary election in the year ending in two." The statutory date falls on March 19, 2002 in this decade. Because that date has arrived and the legislature has not enacted a congressional redistricting plan, and because the electoral process must not be delayed any longer, we hereby adopt the congressional boundaries set forth in Appendices A through F to this order and discussed below.

I.

Reapportionment takes place every decade following the completion of the decennial United States Census. Karen M. Mills, U.S. Dep't of Commerce, *Census 2000 Brief: Congressional Apportionment* 1 (July 2001). Because Minnesota's population grew at a rate only slightly slower than the national average, Minnesota retained eight congressional seats. *Id.* at 2. Nonetheless, Minnesota's population underwent a substantial shift within the state.[1] State

Demographic Center, Minn. Planning, Population Change 1990-2000 (chart), *available at* http://www.mnplan.state.mn.us/demography/Cen2000redistricting/Cen00mapctychng.html. As a result, the parties have stipulated and this panel has held that "[t]he population of the State of Minnesota is unconstitutionally malapportioned among the state's current congressional districts." *Zachman v. Kiffmeyer*, No. C0-01-160, at 2 (Minn. Spec. Redistricting Panel Oct. 29, 2001) (Scheduling Order No. 2). The established remedy for this particular constitutional defect is the redrawing of a state's congressional districts to better reflect the state's population. *See Scott v. Germano*, 381 U.S. 407, 409 (1965) ("The power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been encouraged.").

Before reconfiguring Minnesota's eight congressional districts, we obtained information and contributions from a number of sources. Initially, the four parties to this lawsuit each presented a potential congressional redistricting plan. The plans represent different sets of interests, including those of Republican citizens ("Zachman plan"), Democratic citizens ("Cotlow plan"), Minnesota's Governor ("Ventura plan"), and Minnesota's Democratic legislators and members of Congress ("Moe plan"). We also recognized that although every Minnesotan has a stake in redistricting, not every interest is represented in this lawsuit. We therefore conducted public hearings around the state and received written input, including a few additional proposed plans, from a number of citizens, election officials, and community leaders. *Zachman v. Kiffmeyer*, No. C0-01-160, at 3-4 (Minn. Spec. Redistricting Panel, Jan. 17, 2002) (Order Setting Public Hearing Schedule).

We considered all of these contributions and reviewed different options, knowing that no plan would please everyone. Some political subdivisions – even small ones or cities that specifically requested to be left intact within a district – would have to be split. Additionally, while communities of interest could frequently be maintained within a district, the diverse

interests of the state might result in multiple communities of interest lying within any one district. Having considered these issues, we now set forth a plan different from any submitted by the parties, but ultimately balanced, "**fundamentally fair and based primarily on the state's population and secondarily on neutral districting principles." *Zachman v. Kiffmeyer*, No. C0-01-160, at 11 (Minn. Spec. Redistricting Panel Dec. 11, 2001)** (Order Stating Redistricting Principles and Requirements for Plan Submissions).

II.

As previously noted, Minnesota's demographics did not remain static even though the state retained its eight congressional seats. Rather, following a trend of past decades, the state continued to experience its greatest growth in the eleven-county metropolitan statistical area, which includes the Minnesota counties of Anoka, Carver, Chisago, Dakota, Hennepin, Isanti, Ramsey, Scott, Sherburne (including a piece of St. Cloud), Washington, and Wright. *Hearings Before Minn. H.R. Comm. on Redistricting* 16-17 (Feb. 6, 2001) (testimony of Tom Gillaspy, Minnesota State Demographer); *see also* Jacob J. Lew, Office of Management and Budget, *OMB Bulletin No. 99-04, List I,* at 29 (June 30, 1999), *available at* http://www.whitehouse.gov/omb/inforeg/msa-bull99-04.html (defining Minneapolis-St. Paul metropolitan statistical area). In addition, Minneapolis and St. Paul experienced a small decrease in population, while the remainder of Minnesota had either some loss or modest growth. *Hearings Before Minn. H.R. Comm. on Redistricting*, *supra*, at 17. Accordingly, approximately 53.7% of Minnesota's population now lives in the seven-county metro area, and 58.3% of the state's population lives in the eleven-county metropolitan statistical area. Adding the portions of St. Cloud sitting in Stearns and Benton Counties to this total, 59.4%, or closer to five-eighths than one-half, of the state's population lives in the urban and suburban areas reaching from southeastern Dakota County to St. Cloud. Given that Minnesota has eight congressional seats, these statistics indicate that five of the eight districts should lie in this urban/suburban area, while

three of the eight districts should lie in Greater Minnesota.

We found further support for this proposition through an analysis of the parties' proposed plans. Of the four plans submitted by the parties, two – the Moe and Zachman plans – presented "four-four options" (meaning that each plan contained four metropolitan and four out-state districts) and two – the Cotlow and Ventura plans – presented "five-three" options. A number of rural Minnesotans supported the idea of a four-four plan because Greater Minnesota does not wish to lose a congressional representative. *E.g., Hearings Before Minn. Spec. Redistricting Panel* 13, 17-18, 35 (Marshall, Minn. Feb. 4, 2002); 43 (St. Cloud, Minn. Feb. 4, 2002). We also heard, however, that rural Minnesotans do not want their interests overshadowed by a strong suburban voice within any one district. *E.g.,* Marshall Hearing*, supra,* at 32, 39-40. An examination of the proposed four-four plans indicates that approximately 40% of the population of the Moe plan's second congressional district would live in suburban counties and St. Cloud, and two other districts would be approximately 12% and 19% suburban. Similarly, the Zachman plan's second and seventh congressional districts would be 38% and 33% suburban, respectively. We considered other four-four options, but concluded that at least one or two districts in any such plan would have a significant mix of rural and suburban populations.

As a result, we have drawn a plan with three predominantly rural districts, recognizing three distinct rural areas in southern, western, and northeastern Minnesota. Under any five-three plan, having one district that crossed Minnesota from border to border was inevitable. Given the location of the metropolitan area in the central and eastern part of the state, we had three choices: (1) create a district extending from the North Dakota to Wisconsin borders along the northern border of the state; (2) create a district extending from Canada to Iowa along the western border of the state; or (3) create a district extending from South Dakota to Wisconsin along the southern border of the state. We chose the last option for a number of reasons.

First, the first congressional district contains the community of interest that naturally

arises along a highway such as Interstate 90 and tends to run in an east-to-west direction in southern Minnesota. Marshall Hearing*, supra,* at 6, 18; *Hearing Before Minn. S. Redistricting Working Group* 21 (Sept. 13, 2001). Second, Minn. Const. art. IV, § 3 states that all districts must be composed of "convenient contiguous territory." In part, "convenient" means that a district must be "'[w]ithin easy reach; easily accessible.'" *LaComb v. Growe*, 541 F. Supp. 145, 150 (D. Minn. 1982) (quoting *The Compact Edition of the Oxford English Dictionary* (Oxford University Press 1971)), *aff'd sub nom. Orwoll v. LaComb*, 456 U.S. 966 (1982). Of course, convenience is at times limited in Minnesota, as it is in other states, by the state's shape, the availability of accessible roads in Greater Minnesota, and the need for rural districts to grow in area as their populations shrink. Minnesota's western and northern borders may have roads that transverse them, but we have heard any number of objections to the inconvenience of using these roads and the difficulty a congressional representative would have in representing such districts. *E.g.,* Marshall Hearing*, supra,* at 16; St. Cloud Hearing*, supra,* at 44, 53. Conversely, Interstate 90 makes a district along the state's southern border the most convenient option.

Third, of the new first, seventh, and eighth congressional districts, only the eighth district has any population from counties that are part of the metropolitan statistical area. This population resides in Isanti and Chisago Counties, which include only 12% of the district's population, are not part of the original seven-county metropolitan area, were part of the prior eighth district, and have common interests with counties to the west and north. This configuration of districts, then, best reflects the citizens of Minnesota living outside the metropolitan area.

III.

The counterpart to three largely rural districts is an urban, suburban, and exurban core of five districts. The Zachman plaintiffs have maintained throughout these proceedings that the nucleus of any congressional plan should be a single urban district containing most of

Minneapolis and St. Paul, the state's most populous cities. We decline to adopt this suggestion for a number of reasons.

Minneapolis and St. Paul have been in separate districts since 1891. Even now, as the cities' combined population nears that of one complete district, it would be necessary to split a substantial piece of one of the cities into a separate district in order to approximate, let alone achieve, the ideal population in the single urban district.[2] According to current and former mayors of both cities and resolutions passed by the cities themselves, this is neither desirable nor practical. *Hearing Before Minn. Spec. Redistricting Panel* 39, 41, 88, 91 (St. Paul, Minn. Feb. 6, 2002) (testimony of Minneapolis Mayor R. T. Rybak, St. Paul Mayor Randy Kelly, former Minneapolis Mayor Don Fraser, former St. Paul Mayor George Latimer, respectively); St. Paul City Council Res. 01-460 (May 2, 2001); Ramsey County Bd. of Comm'rs Res. 2001-162 (May 8, 2001); Minneapolis City Council Res. 2001 R-195 (May 18, 2001). The Zachman plaintiffs have argued that Minneapolis and St. Paul have similar interests, unique to large cities, in federal issues where congressional representation is particularly relevant. This is not borne out, however, by these plaintiffs' proposal to put a section of the state's largest city into a predominantly suburban district.

To the extent that Minneapolis and St. Paul do have similar federal concerns, they, like most large cities in this country, must compete in Congress for state and federal aid, as well as for the support of metro area citizens. Consequently, improved infrastructure into Minneapolis, for example, may benefit those living in Minneapolis and its suburbs, but it does not necessarily benefit residents of St. Paul and its suburbs, who often wish to attract visitors, tourists, and employees away from Minneapolis and into St. Paul. Such competition would make it difficult for one congressional representative to fairly represent both cities' interests.

Furthermore, the question is not solely whether Minneapolis and St. Paul have similar federal interests; we must also consider whether Minneapolis and St. Paul have stronger

communities of interest with their own suburbs or with each other. We received arguments on both sides of this question. Some claimed that the first-ring suburbs of Minneapolis and St. Paul identify with their cities more than with distant suburbs, and some claimed that suburbs identify with other suburbs. We never heard, however, that a resident of Minneapolis considers herself or himself also a part of St. Paul, or that the two have similar identities or cultures. Thus, at this point we cannot justify combining the two cities and departing from a long history of separate identities and separate congressional districts.

The strongest argument advanced in support of joining Minneapolis and St. Paul has been that doing so would create a minority opportunity district – that is, a district in which more than 30% of its population would consist of racial minorities. By adding the population of every racial minority defined by the U.S. Census and living in a combined Minneapolis/St. Paul district, the district would have an overall minority population of 39% and a minority voting age population of 30.8%.

However, although "a court may not presume bloc voting within even a single minority group," *Growe v. Emison*, 507 U.S. 25, 41 (1993) (citing *Thornburg v. Gingles*, 478 U.S. 30, 46 (1986)), no definitive proof has been offered that such diverse groups have either similar interests or tend to vote as a bloc. Additionally, different minority groups have expressed different opinions regarding the advisability of creating an urban core district. While some preferred a single minority opportunity district, leaving the maximum minority population for any other district at or under 12% of the total population, others preferred having two districts that would each have at least a 20% overall minority population. *Compare* St. Paul Hearing, *supra,* at 49-50, 58 *with* St. Paul Hearing, *supra,* at 54, 72. Without proof that combining Minneapolis and St. Paul would benefit the majority of minority groups, and given our conclusion that the other proposed reasons do not warrant putting Minneapolis and St. Paul in the same district, we may not purposefully create a minority opportunity district solely for the

sake of the Voting Rights Act.

For all these reasons, we opt to leave Minneapolis and St. Paul in two separate districts surrounded by their first-ring suburbs. We have thereby created a plan with three predominantly suburban and exurban districts and two predominantly urban districts, in addition to the three rural districts. Of course, as with cities and rural areas, not all suburbs have interests in common with each other. This plan has nonetheless preserved suburban communities of interest where possible, including such areas as the south and western Hennepin County suburbs; Carver, Scott, and southern Dakota Counties; the Interstate 94 corridor to St. Cloud; and Anoka and northern Washington Counties. We adopt this plan because we conclude that it best reflects a balance between urban, suburban, and rural interests.

IV.

Overall, this plan is balanced and fair and satisfies the criteria set forth in our order of October 29, 2001. It is among the lowest in number of split counties, minor civil divisions, and voting districts while achieving a zero population deviation. The districts are composed of convenient, contiguous territory, and are compact.[3] The plan preserves many of the state's largest communities of interest, including Native American reservations, counties that have affinities with each other, and groups with common land use interests. The plan also recognizes that there are some natural divisions within the state; for example, northwestern Minnesota and the Red River Valley have interests separate from northeastern Minnesota's interests in its forests, the Iron Range, and Lake Superior.

Because we previously held that the current congressional districts are inappropriate for use in future elections, *see* Scheduling Order No. 2, *supra*, at 2, we enjoin the defendants and the class of election officials they represent from conducting congressional elections using the current congressional districts or any congressional redistricting plan other than that which we hereby adopt.[4] In the alternative, defendants may conduct elections under any constitutional

congressional plan subsequently enacted by the Minnesota Legislature and the Governor of the State of Minnesota.

DATED: March 19, 2002

BY THE PANEL:

_____
Edward Toussaint, Jr.
Presiding Judge

_____
Thomas J. Kalitowski

_____
Gary J. Pagliaccetti

_____
Heidi S. Schellhas

_____
Renee L. Worke

[1] Eight congressional districts apportioned among Minnesota's U.S. Census 2000 population of 4,919,479 people results in seven districts with an ideal population of 614,935 people and one district with 614,934 people. The current sixth congressional district has a population of 720,995 people, or 106,060 persons more than the ideal. In contrast, the fifth congressional district has a population of 557,819 people, or 57,116 persons less than the ideal. Changes to these two districts alone affect the entire congressional map.

[2] The combined population of Minneapolis and St. Paul is 669,769 people. Given this number, 54,834 people must be split from either Minneapolis or St. Paul and placed with a neighboring district to achieve the ideal district population of 614,935 people.

[3] Statistical computations of compactness are currently the most objective means of measuring the compactness of various districts. These measures have their limitations, however, because they tend to compare a district's shape to circles or squares even though Minnesota's contours often do not lend themselves to the creation of circular or square districts. Thus, a district following the state's borders will necessarily have lower compactness scores. The first congressional district in this plan, for example, fares the most poorly in the Roeck measure of compactness, but is a neat, rectangular district that follows the state's border, accommodates the Interstate 90 corridor, and encompasses whole counties except in the one instance it was necessary to add a small piece of another county to achieve the ideal population. The sixth congressional district is less rectangular, but recognizes the growth corridor between Hennepin County and St. Cloud along Interstate 94, and includes additional growth areas in Anoka and Washington Counties. While adding counties such as Isanti and Chisago to the sixth district might have made it look more square, the domino-like effect of altering one district would have resulted in removing Carver County, one of the counties in the original seven-county metropolitan area, from a metropolitan district and adding it to the seventh congressional district. This would have been a poor trade for additional statistical compactness points, given the suitability of placing Isanti and Chisago Counties with counties to their north.

[4] We will provide Secretary of State Mary Kiffmeyer's office with a block equivalency file and a copy of this order to facilitate the implementation of this plan. If any ambiguities should arise regarding the plan set forth in this order, the secretary of state is directed to act in accordance with Minn. Stat. §§ 2.91, subds. 2 – 3, 204B.146, subd. 3 (2000).