

STATE OF MINNESOTA
SPECIAL REDISTRICTING PANEL

Susan M. Zachman, et al.,

No. CO-01-160

Plaintiffs,

vs.

Mary Kiffmeyer, et al.,

Defendants.

**MOE INTERVENORS'
RESPONSES TO OTHER PARTIES'
PROPOSED REDISTRICTING PRINCIPLES**

Pursuant to the Order Granting Motions for Permissive Intervention, Directing Filing of Stipulation and Statement of Unresolved Issues, and Stating Preliminary Timetable at 9 (Oct. 9, 2001), and Scheduling Order No. 2 at 5 (Oct. 29, 2001), the Moe Intervenors respectfully submit this response to the other Parties' proposed redistricting principles.

I. Maximum population deviation for legislative districting

The Zachman Plaintiffs propose "a population deviation of plus or minus 0.75% for legislative districts." The Moe Intervenors, the Cotlow Intervenors, and Intervenor Jesse Ventura have all proposed a maximum population deviation for legislative districts of two percent.

Contrary to the Zachman Plaintiffs' argument that "Minnesota's State Constitution requires lower population deviations than U.S. Supreme Court precedent

applying the U.S. Constitution,” and that “this is a question of first impression before this Panel; no federal or Minnesota redistricting panel or court has considered or interpreted the Minnesota Constitution provision requiring ‘equal districts’ . . . ,” the Supreme Court of Minnesota has indeed construed the relevant constitutional provision on more than one occasion. The seminal case is *State ex rel. Meighen v. Weatherill*,¹ construing the provision that “[t]he representation in both Houses shall be apportioned equally throughout the different sections of the State, in proportion to the population thereof”— wording identical to the current constitutional provision.² The *Weatherill* court held that “[p]erfect exactness in the apportionment according to the number of inhabitants is neither required nor possible,”³ and rejected a challenge to a reapportionment act where “[t]he only objection to the act is that there is not an entire uniformity in the population of the different districts,” even though “[s]ome of the districts, as defined by the act, contain a greater, and some a less, population than the unit [average].”⁴

The Supreme Court of Minnesota has cited *Weatherill* in several subsequent cases, including a case almost four decades later involving a statute similar to the constitutional provision requiring equal apportionment—“the statutory requirement that [county] commissioner districts shall ‘contain as nearly as practicable an equal

¹125 Minn. 336, 147 N.W. 105 (1914).

²*Compare* Minn. Const., art. IV, § 2 (1857) (“The representation in both Houses shall be apportioned equally throughout the different sections of the State, in proportion to the population thereof, exclusive of Indians not taxable under the provisions of law.”) *with* Minn. Const., art. IV, § 2 (2001) (“The representation in both houses shall be apportioned equally throughout the different sections of the state in proportion to the population thereof.”).

³125 Minn. at 342, 147 N.W. at 107 (quoting *State v. Cunningham*, 81 Wis. 440, 51 N.W. 724, 730 (1892)).

⁴125 Minn. at 342-43, 147 N.W. at 107.

population.”⁵ The state supreme court there held, in construing that provision requiring “as nearly as practicable an equal population,” that

Mathematical equality of course is not required. A well-established population trend may justify for the moment the award of a slightly greater representation to a district with a rapidly expanding population. Certain inequalities, not amounting to gross disparities, may be justified because of the complexities arising from [preserving political subdivisions]. . . . It is also not to be overlooked that each redistricting problem is to be related to the time and conditions under which it takes place.⁶

This case suggests not only that equal population apportionment does not require “mathematical equality,” but that the standard for equal apportionment must be flexible in view of “the time and conditions under which it takes place,” and that that standard is met even if “certain inequalities” result, absent a “gross disparity.” A maximum population deviation for legislative districts of two percent is not by any stretch a “gross disparity” and thus satisfies the state constitution under the applicable state-law precedents.

The Zachman Plaintiffs’ argument is flawed in other respects as well. For the proposition that “[c]ourt precedent requires a lower population deviation when a judicial body draws a redistricting map,” and for other propositions, they cite the trial court’s holding in *Emison v. Growe*.⁷ But once again they are relying on authority that has been reversed on appeal and that is not the law, without disclosing that fact.⁸ The Supreme

⁵*State ex rel. S. St. Paul v. Hetherington*, 240 Minn. 298, 305, 61 N.W.2d 737, 742 (1953).

⁶240 Minn. at 302-03, 61 N.W.2d at 741.

⁷782 F. Supp. 428 (D. Minn. 1982), cited in Zachman Pls.’ Statement Unresolved Issues re Criteria, I.A at 3 (11/13/2001); see also *id.*, I.B at 5.

⁸The Zachman Plaintiffs cited the trial court’s holding in *LaPorte County Republican Central Committee v. Board of Commissioners*, 851 F. Supp. 340 (N.D. Ind. 1994), for the proposition that “[t]here is no constitutional right to run for office from a particular district.” Pls.’ Mem. Opp’n Interven’n Moe,

Court of the United States reversed and remanded the trial court's judgment in *Emison* "with instructions to dismiss."⁹ The ruling that the Zachman Plaintiffs cite is therefore null, since "[a]n overruling decision destroys the effect of the overruled decision as a precedent."¹⁰ And even if the ruling was good law, the trial court in *Emison* recognized a maximum population deviation of two percent—the very standard against which the Zachman Plaintiffs are arguing—as "state policy as expressed in . . . a bipartisan concurrent resolution unanimously adopted by both houses of the legislature."¹¹

The Zachman Plaintiffs also argue that "[m]odern technology enables drawing of redistricting maps with lower deviation while preserving political subdivisions." As the Moe Intervenors have already argued, the mere fact that somebody can draw a tighter map does not tighten the constitution. That a smaller deviation is mathematically—or technologically—possible does not mean that it is constitutionally required: "Fair and effective representation . . . does not depend solely on mathematical equality among district populations."¹² The constitutional tolerance for deviation from districts of equal population is not based on "the difficulty of drawing mathematically equal legislative

Argument II.A at 4 (9/21/01). But they did not mention that the trial court's holding in *LaPorte* was reversed on appeal. See 43 F.3d 1126 (7th Cir. 1994), *rev'g* 851 F. Supp. 340. The appellate court held that the *LaPorte* plaintiffs had indeed stated a viable claim, 43 F.3d at 1129-30, so the case on which the Plaintiffs were relying was not good law.

⁹*Grove v. Emison*, 507 U.S. 25, 42 (1993).

¹⁰23 C.J.S. *Courts* § 147 at 176 (1990 & pocket part 2001).

¹¹*Emison v. Grove*, 782 F. Supp. 427, 442 & n.44 (D. Minn. 1992), *rev'd*, 507 U.S. 25 (1993).

¹²*Gaffney v. Cummings*, 412 U.S. 735, 748 (1973).

districts,” as the Zachman Plaintiffs argue,¹³ but rather on “the effectuation of a rational state policy.”¹⁴ Technology may change, but the constitution has not.

The Zachman Plaintiffs are correct, in a general way, that “court precedent requires a lower population deviation when a judicial body draws a redistricting map.” The Supreme Court of Minnesota’s precedents suggest that the state constitutional principle of equal apportionment in drawing legislative districts is not unlike the analogous federal constitutional principle: it tolerates “divergences from a strict population standard” if they are “based on legitimate considerations incident to the effectuation of a rational state policy,”¹⁵ so a legislative redistricting plan must achieve “*substantial* equality of population among the various districts, so that the vote of any citizen is *approximately* equal in weight to that of any other citizen in the State,”¹⁶ and “substantial equality of population” generally means a deviation of less than ten percent¹⁷ (although the Court has sometimes upheld even greater deviations in particular cases¹⁸).

¹³Zachman Pls.’ Statement Unresolved Issues re Criteria, I.C at 8 (11/13/01).

¹⁴*Reynolds v. Sims*, 377 U.S. 533, 579 (1964) (“History indicates . . . that many states have deviated, to a greater or lesser degree, from the equal-population principle So long as the divergences from a strict population standard are based on legitimate considerations incident to the effectuation of a rational state policy, some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.”).

¹⁵*Id.*

¹⁶*Id.* (emphasis added).

¹⁷See, e.g., *Voinovich v. Quilter*, 507 U.S. 146, 161 (1993); *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983); *Connor v. Finch*, 431 U.S. 407, 418 (1977); see generally Peter S. Wattson, *How to Draw Redistricting Plans That Will Stand Up in Court*, II.D.1 at 6, available at <http://www.senate.leg.state.mn.us/departments/scr/REDIST/Draw/Draw202web.htm>.

¹⁸See *Voinovich*, 507 U.S. at 161-62; *Brown*, 462 U.S. at 842-43; *Mahan v. Howell*, 410 U.S. 315, 328 (1973); see generally Peter S. Wattson, *How to Draw Redistricting Plans That Will Stand Up in Court*, II.D.2 at 7.

With that ten-percent standard in mind as a guide for redistricting by means of the *legislative* process, the courts—this Panel’s predecessors—have already adopted a more exacting standard for redistricting by means of a *judicial* process: a maximum deviation of two percent.¹⁹ That standard has been state constitutional law for a generation.

While one can certainly draw a map that deviates from the ideal by less than two percent, and while the “best” redistricting plan in this census cycle may deviate by less than two percent, neither the federal nor the state constitution requires that result. Absent a strong showing why that law ought to change—a showing that the Zachman Plaintiffs have not made—this Panel ought to adhere to existing law and precedent, and adopt a maximum population deviation for legislative districting of two percent.

II. Compactness

Intervenor Ventura has proposed that “the Panel . . . should adopt a compactness criterion.”²⁰ The Cotlow Intervenors oppose that proposal, on various grounds.²¹ The More Intervenors support it.

While the Cotlow Intervenors correctly argue that compactness is not a *federal* constitutional requirement,²² the Minnesota Constitution does require that “[s]enators shall be chosen by single districts of convenient contiguous territory,”²³ and that “[n]o

¹⁹Findings Fact, Conclusions Law, & Order J. Legislative Redistricting, Findings of Fact 12(4), *Cotlow v. Grove*, No. C8-91-985 (Minn. Special Redistricting Panel Dec. 9, 1991), *available at* <http://www.senate.leg.state.mn.us/departments/scr/redist/cotlo129.htm>.

²⁰Ventura’s Statement Unresolved Issues re Criteria, Argument III at 6-7 (11/13/01).

²¹Mem. re Redistricting Criteria, II at 3-7 (11/13/01).

²²*Id.* at 3 (quoting *Shaw v. Reno*, 517 U.S. 899, 935 (1996)).

²³Minn. Const., art. IV, § 3.

representative district shall be divided in the formation of a senate district.”²⁴ The notion of “compactness” inheres in the adjective “convenient.”²⁵ A district that is not compact is generally not “convenient” and therefore does not satisfy the state constitution.

III. Political competitiveness

Intervenor Ventura has proposed that “the Panel should adopt a ‘political competitiveness’ criterion.”²⁶ The Zachman Plaintiffs²⁷ and the Cotlow Intervenors²⁸ oppose that proposal. The Moe Intervenors support it.

The Zachman Plaintiffs argue that

In practical terms, the major problem with a criteria [sic] of “political competitiveness” is the lack of an objective standard by which to measure such competitiveness. It is so broad as to encompass any notion that suits any party’s current interest. To date, no party to this litigation has proposed a standard or test to be used to judge political competitiveness, and, if asked, each party to this litigation could very well offer its own test of competitiveness.²⁹

On the contrary, “an objective standard by which to measure such competitiveness” does indeed exist. Earlier this year, the Governor’s Citizen Advisory Commission on Redistricting published “Redistricting Principles and Standards” “that will be used to

²⁴*Id.*

²⁵*See Reynolds v. Sims*, 377 U.S. 533, 578 (1964) (“A State may legitimately desire to . . . provide for compact districts of contiguous territory in designing a legislative apportionment scheme.”).

²⁶Ventura’s Statement Unresolved Issues re Criteria, Argument II at 3-6 (11/13/01).

²⁷Zachman Pls.’ Statement Unresolved Issues re Criteria, II at 9-12 (11/13/01) (“Plaintiffs urge this Panel to reject ‘political competitiveness’ as a redistricting criteria [sic]”).

²⁸Mem. re Redistricting Criteria, IV at 8-9 (11/13/01) (“previous or projected voting behavior by party and political competitiveness”).

²⁹Zachman Pls.’ Statement Unresolved Issues re Criteria, II at 11.

evaluate bills for legislative and congressional plans proposed for submission to the governor for enactment into law.”³⁰ That document provided,

G. Political competitiveness of districts

The new legislative and congressional plans should maximize the number of districts that are politically competitive to the extent practical and consistent with the previous standards.

Political competitiveness will be determined from an index of nominal party support. Nominal party support will be determined from one or more of the following races: 1998 secretary of state, 1998 state auditor, 1998 state treasurer, and 1998 attorney general.

The competitiveness index will be determined by calculating the votes received by the candidate of one party as a proportion of the total votes cast for the office. When two or more offices are considered together, the result will be divided by the number of offices considered.⁶

⁶The following is an example of an equation to calculate competitiveness using the 1998 secretary of state and 1998 state treasurer races.

$$C_{\text{party}} = ((\text{party votes for SOS98}/\text{total votes for SOS98}) + (\text{party votes for TREAS98}/\text{total votes for TREAS98})) / 2$$

A multipartisan panel unanimously adopted this political-competitiveness index.³¹

The law does not disfavor political competitiveness as a criterion in drawing legislative districts; in fact, the Supreme Court of the United States has held that

The very essence of districting is to produce a different—a more “politically fair”—result than would be reached with elections at large, in which the winning party would take 100% of the legislative seats. . . . It is not only obvious, but absolutely unavoidable, that the location and shape of districts may well determine the political complexion of the area. District lines are rarely neutral phenomena.³²

While a court can and must divorce itself from partisanship and other overtly “political considerations” in drawing legislative districts, a court cannot avoid the fact that districting implicates politics. It is not any less true for a court than for a legislature that

³⁰Governor’s Citizen Advisory Commission on Redistricting, *Redistricting Principles and Standards* at 1 (Apr. 4, 2001).

³¹See <http://www.mnplan.state.mn.us/redistricting/members.htm>.

³²*Gaffney v. Cummings*, 412 U.S. 735, 753 (1973).

“[t]he very essence of districting is to produce a different—a more ‘politically fair’—result,” and it is not any less obvious or any more avoidable for a court than for a legislature that “the location and shape of districts may well determine the political complexion of the area.” Having gotten involved in a process with inherent political ramifications, a court that cannot avoid those ramifications ought to strive for political competitiveness and fairness.³³

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FAEGRE & BENSON LLP



John D. French, No. 31914
Brian Melendez, No. 223633
2200 Wells Fargo Center
90 South Seventh Street
Minneapolis, MN 55402-3901
Ph. 612.766.7309
Fax 612.766.1600

Attorneys for
Moe Intervenors

M1:818136.01

³³Just last week, a three-judge federal court in a redistricting case in Texas held that a political-fairness analysis “is a traditional last check upon the rationality of any congressional redistricting plan, widely relied-upon by political scientists to test plans, if only in an approximating manner.” *Balderas v. Tex.*, Civ. Action No. 6:01CV158 (E.D. Tex. Nov. 14, 2001) (three-judge panel); *see also Good v. Austin*, 800 F. Supp. 557, 566-67 (E.D. Mich. & W.D. Mich. 1992) (three-judge panel).