Cotlow v. Growe, C8-91-985 (Dec. 9, 1991)

STATE OF MINNESOTA

SPECIAL REDISTRICTING PANEL

C8-91-985

Patricia Cotlow, Phillip Krass Sharon LaComb, James Stein, and Theodore Suss, individually and on behalf of all Citizens of Minnesota similarly situated,

Plaintiffs,

and

John Walker, Howard Miller,
Don Sudor, and Hkajlo Vangh,

Plaintiff-Intervenors,

vs.

Joan Growe, Secretary of State of Minnesota; and Patrick H. O'Connor, Hennepin County Auditor, individually and on behalf of all Minnesota county chief election officers,

Defendants,

and

The Seventy-seventh Minnesota State House of Representatives and the Seventy-seventh Minnesota State Senate,

Defendant-Intervenors.

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND ORDER FOR JUDGMENT ON LEGISLATIVE REDISTRICTING

The Special Redistricting Panel convened hearings on July 26, August 29, September 24, October 16, November 14, and December 3, 1991.[2]

Plaintiffs were represented by Alan W. Weinblatt, Weinblatt & Davis; plaintiff-intervenors were represented by Bruce D. Willis and Mark B. Peterson, Popham, Haik, Schnobrich & Kaufman, Ltd.; defendant Joan Growe, Secretary of State, was represented by John R. Tunheim, Chief Deputy Attorney General, and Jocelyn Olson, Assistant Attorney General; defendant Patrick H. 0'Connor, Hennepin County Auditor, was represented by Michael 0. Freeman, Hennepin County Attorney, and Toni A. Beitz, Senior Assistant Hennepin County Attorney; and defendant-intervenors were represented by John D. French and Michael L. Cheever, Faegre & Benson, and Peter S. Wattson, Senate Counsel.

All parties were directed to file legislative redistricting plans on October 7, 1991. The panel convened hearings on October 16, November 14, and December 3, 1991 for comments on the plans.

Based on the record received from the Minnesota District Court, Fourth Judicial District; the record compiled during the course of the hearings; and the submissions of the parties; the panel makes the following Findings of Fact and Conclusions of Law.

FINDINGS OF FACT

1. In January 1991, Patricia Cotlow, Phillip Krass, Sharon LaComb, James Stein, and Theodore Suss initiated this action in Minnesota District Court, Fourth Judicial District. They asked the court to declare the present legislative apportionment, Minn. Stat. §§ 2.019, 2.042 through 2.702 (1990), and the present congressional apportionment, outlined in *LaComb v. Growe*, 541 F. Supp. 145 [3] (D. Minn. 1982), invalid under the Minnesota and United States Constitutions.

2. The plaintiffs further requested the court to retain jurisdiction during the 1991 session of the legislature to determine whether any legislatively enacted plans for redistricting satisfied the Minnesota and United States Constitutions. In the absence of the enactment of a constitutionally valid apportionment by the legislature, the plaintiffs asked this court to devise a proper legislative and congressional apportionment for the State of Minnesota.

3. On February 15, 1991, John Walker, Howard Miller, Don Sudor, and Nkajlo Vangh served notice and statement of intervention. On March 14, 1991, plaintiffs served notice of objection to the intervention.

4. On February 25, 1991, the previously named plaintiffs and defendants Joan Growe and the Hennepin County Auditor stipulated that the court had subject matter jurisdiction; that as a result of population changes reflected in the 1990 federal census, the present legislative and congressional districts contravene the Minnesota and United States Constitutions; and that the Chief Judge of the Hennepin County District Court could request the Chief Justice of the State of Minnesota to appoint a panel of three district court or appellate judges to hear and decide this action.

5. On April 2, 1991, the Minnesota House of Representatives and the Minnesota Senate served notice of intervention as defendants and a statement of intervention. No party objected.[4]

6. On May 18, 1991, the legislature passed Chapter 246, S.F. No. 1571, establishing a legislative redistricting plan. The bill was presented to the governor on May 24, 1991.

7. On June 4, 1991, the Minnesota Supreme Court appointed the undersigned three-judge panel to hear and decide all matters, including all pretrial and trial motions, and to reach an ultimate disposition of this case.

8. On June 20, 1991, the Minnesota Supreme Court declined original jurisdiction on the question of the validity of the enactment of a number of bills, including Chapter 246, the legislative redistricting bill. A declaratory judgment action was filed in Ramsey County District Court.

9. On July 26, 1991, the special redistricting panel conducted a pretrial status conference and, on July 29, 1991, issued Pretrial Order No. 1 ordering (a) that John Walker, Howard Miller, Don Sudor, and Nkajlo Vangh be permitted to intervene as plaintiff-intervenors; (b) that parties submit responses to the criteria adopted by the Minnesota Legislature for legislative and congressional redistricting plans; and (c) that arrangements be made to permit the panel to view the legislature's redistricting computer system.

10. On August 2, 1991, by order of Ramsey County District Court, Chapter 246 was declared to be a validly enacted law.

11. On August 16, 1991, the special redistricting panel issued Pretrial Order No. 2 establishing certain preliminary [5] criteria for legislative and congressional redistricting and directing oral argument on other reserved criteria.

12. After the parties' arguments on the reserved criteria, the panel issued Pretrial Order No. 3 on September 13, 1991, adopting the criteria for congressional and legislative redistricting. The criteria for legislative redistricting are as follows:

> 1. The Senate must be composed of 67 members. The House of Representatives must be composed of 134 members.
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> 2. Each district is entitled to elect a single member.
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> 3. A representative district may not be divided in the formation of a Senate district.
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> 4. The districts must be substantially equal in population. The population of a district must not deviate from the ideal by more than two percent. Because a court-ordered reapportionment plan must conform to a higher standard of population equality than a legislative reapportionment plan, *de minimis* deviation from the population norm will be the goal for establishing districts. *See Chapman*, 420 U.S. 1, 95 S. Ct. 751; *Connor*, 431 U.S. 407, 97 S. Ct. 1828.
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> 5. The districts must be composed of convenient contiguous territory structured into compact units. Contiguity by water is sufficient if the water is not a serious obstacle to travel within the district.
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> 6. The districts must be numbered in a regular series, beginning with House district 1A in the northwest corner of the state and proceeding across the state from west to east, north to south, but bypassing the seven-county metropolitan area until the southeast corner has been reached; then to the seven-county metropolitan area outside the cities of Minneapolis and St. Paul; then in Minneapolis and St. Paul.
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> 7. The districts must not dilute the voting strength of racial or language minority populations. Where a concentration of a racial or [6] language minority makes it possible, the districts must increase the probability that members of the minority will be elected. Any plan adopted by the court shall comply with the applicable provisions of Federal Voting Rights Act, 42 U.S.C. 1971, *et seq*.
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> 8. The districts will be drawn with attention to county, city and township boundaries. A county, city, or township will not be divided into more than one district except as necessary to meet equal population requirements or to form districts that are composed of convenient, contiguous and compact territory. When any county, city or township must be divided into one or more districts, it will be divided into as few districts as practicable. *Reynolds v. Sims*, 377 U.S. 533, 578-79, 84 S. Ct. 1362, 1390-91 (1964); *Swann v. Adams*, 385 U.S. 440, 444, 87 S. Ct. 569, 572 (1967).
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> 9. The districts should attempt to preserve communities of interest when that can be done in compliance with the preceding standards. The panel may recognize a community's character as urban, suburban or rural. *See Skolnick v. State Electoral Bd. of Ill.*, 336 F. Supp. 839 (N.D. Ill. 1971); *LaComb v. Growe*, 541 F. Supp. 145 (D. Minn. 1982)*; LaComb v. Growe*, 541 F. Supp. 160 (D. Minn. 1982); *Maryland Citizens Comm. for Fair Congressional Redistricting, Inc. v. Tawes*, 253 F. Supp. 731 (D. Md. 1966)*, aff'd sub. nom, Alton v. Tawes*, 384 U.S. 315, 86 S. Ct. 1590 (1966). Additional

communities of interest shall be considered if persuasively established and not in violation of applicable case law.

10. Past voting behavior and residency of incumbents shall not be used as criteria; however, they may be used to evaluate the fairness of plans submitted to the court.

13. Subsequently, the panel adopted an additional criterion that all submitted plans should be based on Chapter 246. Defendant-intervenors, joined by other parties, urged the panel to adopt, as a criterion, certain "curative amendments" to [7] Chapter 246. The amendments had passed out of the special redistricting committees of both houses on August 26, 1991, after the legislature had adjourned. However, the amendments had not been passed by the full bodies of either house, nor had they been presented to the governor for his signature. The panel declined to adopt as a criterion the legislative committees' proposed corrections to Chapter 246.

14. The August 29, 1991 Pretrial Order No. 3 also ordered suspension, until further order of the panel, of the time periods within which local units of government are required to complete the redefining of the boundaries of election precincts, wards, or other local election districts pursuant to Minn. Stat. §§ 204B.135, 204B.14, 205.84, 205A.12, and 375.02 (Supp. 1991). The pretrial order designated the format for submission of redistricting plans and directed oral argument on various notions, including whether Chapter 246 violates the Minnesota or United States Constitutions or the Federal Voting Rights Act. Finally, recognizing that the time requirements for congressional redistricting are less stringent, the panel deferred submission of congressional redistricting plans.

15. Following submissions from the parties, the panel issued Pretrial Order No. 4, on October 1, 1991, which (a) denied plaintiff-intervenors' motion to stay this proceeding; (b) declared that the numerous facial infirmities in Chapter 246, including noncontiguous districts, violate Article IV, sections 2 and 3 of the Minnesota Constitution; and (c) declared that facial [8] infirmities also violate the equality of representation requirement of the fourteenth amendment to the United States Constitution. The panel denied plaintiff's motion to enforce Chapter 246, together with its "curative amendments", as the reapportionment plan for the State of Minnesota. Because no party submitted specific allegations of Voting Rights Act violations, the panel ordered submission of any Chapter 246 violations of the Federal Voting Rights Act without waiver of jurisdictional objections by October 7, 1991.

16. On October 7, 1991, defendant-intervenors, the Minnesota Legislature, renewed its submission of Chapter 246 together with the curative amendments adopted by the Senate and House Committees on Redistricting; plaintiffs proposed adoption of the legislature's plan, with curative amendments, as the court-ordered legislative redistricting plan; defendant Secretary of State Growe supported the submission of the legislature; defendant Hennepin County Auditor supported the submission of the legislature; and plaintiff-intervenors submitted a proposed legislative redistricting plan. The panel received additional submissions from citizens groups and individual legislators, only one of which was made part of the record.

17. No violations of the Federal Voting Rights Act were asserted.

18. On October 15, 1991, defendant-intervenors submitted a written response to the plaintiff-intervenors' proposed legislative redistricting plan. On October 16, defendant Growe submitted a [9] written response to plaintiff-intervenors' proposed legislative redistricting plan; plaintiff-intervenors submitted a written response to the legislature's redistricting plan; and defendant Hennepin County Auditor submitted a written analysis of the plaintiff-intervenors' plan. On October 17 and 18, 1991, defendant-intervenors submitted additional responses to the plaintiff-intervenors' redistricting plan.

19. On November 4, 1991, defendant-intervenors submitted a congressional plan. The plan is based on S.F. No. 1597/H.F. No. 1728, adopted by the House of Representatives Committee on Redistricting and the Senate Committee on Redistricting on October 30 and 31, 1991, and referred to the full House and Senate for consideration in early January, 1992.

20. On November 8, 1991, the panel issued Pretrial Order No. 5 ordering final oral argument on (a) the existence and use of any legislative history of Chapter 246, including maps, and (b) the application of the rules of statutory interpretation to avoid, modify, or correct constitutional or other defects in Chapter 246. In addition, the panel ordered that all parties have computer access to each proposed plan file and written geographic description of both plans.

21. On November 14, 1991, defendant-intervenors submitted a memorandum on Chapter 246's legislative history, appending affidavits of State Representative Peter Rodosovich, State Senator Lawrence J. Pogemiller, and Craig Lindeke from the Revisor of [10]Statutes Office. The panel has adopted the following as relevant pieces of legislative history:

a. A set of two small black and white maps, one of the state and one of the metropolitan area. These maps were distributed to each member of the House in the House chamber on May 161991, before the members voted on Chapter 246. These two maps were also distributed to each member of the Senate in the Senate chambers on May 16, 1991, before the members voted on Chapter 246. In each instance, the chief authors of the bill represented that the proposed redistricting plan was depicted in the two black and white maps.

b. A second map group consisting of four large color maps depicting respectively the areas of (1) the State of Minnesota, (2) the seven-county metropolitan area, (3) the City of Minneapolis, and (4) the City of St. Paul. The maps were used in both the House and Senate committees and displayed in the House retiring room on May 17, 1991, the House chamber on May 18, 1991, the Senate retiring room on May 16, 1991, and in the Senate chamber on May 16, 1991.

c. A group of seven reports, primarily population tables. Three of the reports were distributed to members of the House on May 18, 1991, before they voted on Chapter 246. Three of the reports were distributed to all members of the Senate on May 18, 1991, before they voted on Chapter 246. The [11] remaining report was distributed to the members of the Senate Redistricting Committee on May 3, 1991.

CONCLUSIONS OF LAW

1. Minnesota Laws 1991, Chapter 246, violates Article IV, sections 2 and 3 of the Minnesota Constitution because, among other defects, it creates noncontiguous districts.

2. Minnesota Laws 1991, Chapter 246, violates the equality of representation requirement of the fourteenth amendment of the United States Constitution.

3. Unless a legislative plan is incorrectably invalid, a court may not simply substitute its own reapportionment preferences for those of the state legislature. *See Upham v. Seamon*, 456 U.S. 37, 40-42, 102 S. Ct. 1518, 1520-21 (1982). Courts are not permitted to disregard state apportionment policy or plans without solid constitutional grounds for doing so. *White v. Weiser*, 412 U.S. 783, 795, 93 S. Ct. 2348, 2355 (1973) (citing *Whitcomb v. Chavis*, 403 U.S. 124, 160, 91 S. Ct. 1858, 1878 (1971)). The court must reconcile constitutional requirements with the goals of state political policy by limiting its modifications "to those necessary to cure any constitutional or statutory defect." *Upham* 456 at 43, 102 S. Ct. at 1522; *see also*

Rybicki v. State Bd. of Elections, 574 F. Supp. 1082 (N.D. Ill. 1982) (making only those corrections necessary to remove unconstitutional defects). Such deference does not extend to the curative amendments, as they have not been adopted into law.
[12]

4. Most of the constitutional and statutory defects in Minnesota Laws 1991, Chapter 246 can be cured by ascertaining and effectuating the legislative intent, *see* Minn. Stat. § 645.16 (Supp. 1991); and by applying canons of statutory construction, Minn. Stat. §§ 645.16-645.43 (Supp. 1991). The remaining defects require corrections and adjustments which are based on legislative policy and the court's redistricting criteria. These corrections and adjustments are made in the attached plan and explained in the accompanying annotations.

5. Minnesota Laws 1991, Chapter 246 complies with the Federal Voting Rights Act.

BASED ON THE ENTIRE RECORD,
IT IS HEREBY ORDERED:

1. That subject to the stay issued by the United States District Court in *Emison v. Growe*, No. 4-91-202 (D. Minn. Dec. 5, 1991), and in conformity with Minn. R. Civ. P. 54.02 the following reapportionment of the Minnesota Legislature shall be final and effective beginning with the 1992 primary and general elections, unless a constitutional plan is enacted by the State of Minnesota. The stay of time periods for completion of redistricting for local units of government is dissolved.

2. Subject to the stay issued by the United States District Court in *Emison v. Growe*, No. 4-91-202 (D. Minn. Dec. 5, 1991), all plans for congressional redistricting shall be submitted to this panel on or before January 17, 1992.
[13]

3. The panel retains jurisdiction over this matter to ensure that any bill enacted into law complies with the Minnesota and United States Constitutions and the Federal Voting Rights Act.

Dated: December 9, 1991

BY THE COURT:

Harriet Lansing
Kenneth J. Maas
William E. Walker

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[14]

Memorandum

The Minnesota Constitution places the power and responsibility of redistricting with the legislature and the governor. Minn. Const., art. IV, §§ 3, 24. In the last 78 years, however, Minnesota's redistricting rule has become its exception. Only once during this time have the legislature and the governor been able to pass a redistricting plan. Consequently, courts have been compelled to assume a more legislative role to adjust for the detrimental lack of a "current expression of the state's political preferences regarding the complicated

redistricting process." *LaComb v. Growe*, 541 F. Supp. 145, 150-51 (D. Minn. 1982).

Following the 1990 federal census, the 1991 Minnesota House and Senate were able to pass Chapter 246, S.F. No. 1571, prescribing the boundaries of Minnesota's legislative districts. This bill was subsequently determined to be validly enacted law. The United States Supreme Court has consistently declared that when a state has enacted a redistricting plan, courts may not pre-empt the legislature's redistricting responsibility or unnecessarily intrude on state policy except as necessary to correct an unconstitutional plan. *See Upham v. Seamon*, 456 U.S. 37, 102 S. Ct. 1518 (1982); *White v. Weiser*, 412 U.S. 783, 93 S. Ct. 2348 (1973).

A court's first responsibility is to determine whether any errors in an enacted plan are so pervasive as to invalidate it entirely, requiring adoption of an alternate plan. *See e.g., Cook v. Luckett*, 735 F.2d 912, 918 (5th Cir. 1984) (citing *Upham* and [15] *Weiser*). If the plan is not incorrectably invalid, the court must ascertain the nature and scope of each error and modify the legislative plan to the extent necessary to correct such defects. *Upham* at 41-3, 102 S. Ct. at 1521-22; *Cook*, 735 F.2d at 918.

Our detailed analysis of Chapter 246 reveals numerous errors in Chapter 246 as enacted. The legislature's curative amendments propose approximately 160 changes in 63 pages of text. Some of the proposed amendments clarify wording and are only refinements in language which are not necessary to discern the boundaries or contents of districts. Other proposed changes, however, point to substantive errors requiring changes to correct defects in the statute.

In addressing the needed substantive changes, some corrections were obvious, and there was no need to employ the rules of statutory construction or to refer to legislative history. In other instances, the errors could be rectified by reference to the context of the language, the geographic context of the district, or by referring to the maps or tables which form part of the legislative history. *See* Minn. Stat. §§ 645.16, 645.17. In the remaining instances where corrections and adjustments were required and legislative intent was not clear, we drew the boundaries by attempting to preserve surrounding constitutional boundaries and by examining the submissions of the parties and weighing these and other alternatives against our adopted criteria. In no instance have we found the problems to be so incorrectable that the basic plan had to be abandoned.
[16]

Plaintiff-intervenors have urged acceptance of a substantially different plan with a lower average deviation. We recognize that the primary objective of redistricting is to achieve population equality in all state districts. Courts have, however, uniformly recognized that population deviations of ten percent or less in legislative plans do not affect the plan's constitutionality. *See Connor v. Finch*, 431 U.S. 407, 418, 97 S. Ct. 1828, 1835 (1977). The limited population deviations in the corrected Chapter 246 are in almost all instances well within two percent. To accept an alternative plan with slightly lower population deviations over an enacted legislative plan would require us to disregard an entire body of established redistricting case law.

Following the issuance of our Findings of Fact, Conclusions of Law and Preliminary Order for Legislative Redistricting, the federal district court in *Emison v. Growe*, No. 4-91-202, at 15 (D. Minn. Dec. 5, 1991), ordered a stay of "any future orders that (the Minnesota Special Redistricting Panel] may issue relating to the adoption of any state redistricting plan or congressional redistricting plan ... until further order of [the district] court." All parties involved in the federal and state proceedings have been enjoined from enforcing or implementing any order of this court that proposes adoption of a reapportionment plan. The stay was purportedly issued in aid of federal jurisdiction and to avoid inhibiting the legislative process before the legislature acts.

From the outset of the litigation in this court, we have proceeded with the understanding that redistricting is

essentially [17] a legislative function, and courts should not intrude in that function unless upon proper request and until the legislature has had the opportunity to reapportion. The Minnesota Legislature *has acted* on state legislative redistricting. It retains the power to amend the act at any time. However, the present act has been declared a valid law; it is the constitutionality of that law that has been challenged in this court.

All of the parties in this action, except the plaintiff-intervenors, have urged this court to proceed as expeditiously as possible to review the legislature's redistricting law and to take steps necessary to ensure that a valid legislative redistricting is in effect for February's precinct caucuses. The plaintiff-intervenors' counterparts in the federal action have repeatedly represented to the federal panel that the legislature's adjournment until 1992 "requires that a court conduct redistricting" and that "neither the federal nor the state court can properly defer to the legislature" because "the clock ticks toward the 1992 election process." *See Plaintiff's Memorandum in Opposition to Motions for Federal Court to Abstain or Stay*, at 2, 12 (August 9, 1991); *Plaintiff's Reply Memorandum in Support of Motion to Stay Separate State Court Proceedings*, at 6 (August 16, 1991). The federal court itself acknowledges that this litigation has reached "the eleventh hour." *Emison v. Growe*, No. 4-91-202, at 14 (D. Minn. Dec. 5, 1991).

The legislature has represented that its work on legislative redistricting in January 1992, will likely be limited to an attempt [18] to pass the technical corrections bill that constituted its plan proposal to this court. In view of the governor's affidavit filed in *Emison v. Growe*, stating an intent to veto such a bill, and given the time constraints posed by the upcoming caucuses, we have perceived a clear obligation to complete our review process. Our intent has been to approve a valid redistricting plan that could take effect in time for precinct caucuses, while leaving ample time for appeal, if any. Although the effective date of our order is subject to the federal court's stay, legislative redistricting is now complete and ready to be implemented absent an alternative enactment by the state and subject to whatever review is deemed necessary.

Establishing boundaries for congressional districts presents different issues because the legislature and the governor have not acted. As we stated in our November 21, 1991 order, we do not intend to proceed until they have had an opportunity to act. One plan has been reported out of the redistricting committees, and the legislature is scheduled to meet from January 6 through January 17, 1992, to consider congressional redistricting. The federal court's statement in its December 5 order (p. 7, footnote 6) that we have indicated we would issue a congressional redistricting plan by the end of December is simply wrong, without any basis and contrary to the language of our previous orders. *See Cotlow v. Growe*, No. C8-91-985 (Minn. Sp. Redistricting Panel Sept. 13, 1991) (setting state legislative redistricting schedule); *Cotlow v. Growe*, No. C8-91-985, at 7 (Minn. Sp. Redistricting Panel Nov. 21, 1991) [19] (emphasizing deferral of congressional redistricting plans submission). We have not until today even scheduled a date for submission of congressional plans. Formal action on such a plan awaits resolution of the legislative process and further order from the federal court.
