

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBYN RENEE ESSEX)
)
 Plaintiff,)
)
 v.)
)
 KRIS W. KOBACH,)
 Kansas Secretary of State)
)
 Defendant.)
)

CIVIL ACTION
Case No. 12-CV-04046-KHV-DJW

Trial Brief of Plaintiff Intervenors Marearl Denning and Kevin Yoder

Plaintiff Intervenors Marearl Denning and Kevin Yoder, by and through their Counsel, Smithyman & Zakoura, Chartered, hereby file the following Trial Brief in the above-captioned matter.

I. Statement of Facts

1. Kansas, as authorized by a Certificate of Entitlement issued by the United States Congress, is entitled to four congressional districts in the 2012 congressional elections. (Joint Stipulation ¶ 32.)

2. The Kansas Legislature is required by Article I, Section 2 of the United States Constitution to apportion its congressional districts every ten years based on the most recent U.S. Census data. (Joint Stipulation ¶ 33.) The most recent apportionment was performed by the Kansas Legislature in 2002. (*Id.*) Therefore, Kansas Legislature was required by law to reapportion its congressional districts during the 2012 Legislative Session.

3. In April, 2010, the United States Government conducted its decennial Census as required by law. (Joint Stipulation ¶ 31.) Following the 2010 Census, the population of Kansas, excluding nonresident military personnel and nonresident students living within the state, was estimated to be 2,839,445 persons. (Joint Stipulation ¶ 37.) Based on the 2010 Census, the ideal standard population for each of the four congressional districts in Kansas is 713,280 persons. (Joint Stipulation ¶ 34.)

4. The existing four congressional districts in Kansas, as established on the basis of the 2000 decennial Census and set forth in K.S.A. 4-139, K.S.A. 4-141, and K.S.A. 4-142, are no longer constitutionally apportioned as a result of substantial shifts in Kansas population reflected in the 2010 decennial Census. (Joint Stipulation ¶ 35.) Included within these shifts, the population of the 3rd Congressional District has grown at a higher rate than the remaining three congressional districts in Kansas.

5. The Kansas Legislature adjourned its regular 2012 session on May 20, 2012, and has failed to reapportion the Kansas congressional districts as required by Article I, Section 2 of the United States Constitution. (Joint Stipulation ¶ 40.)

6. During its 2012 legislative session, representatives of the Kansas Legislature proposed and presented approximately fourteen redrawn congressional maps reapportioning the four Kansas congressional districts based on 2010 Census data.¹ The Kansas Legislature failed to approve any proposed congressional map. As stated in Paragraph No. 4, the current congressional districts are unconstitutionally apportioned.

¹ See Proposed Plans, Kansas Redistricting 2012, Kansas Legislative Research Department, May, 27, 2012, at http://redistricting.ks.gov/_Plans/plans_proposed.html.

7. The 3rd Congressional District of Kansas, as apportioned and approved by the Kansas Legislature in 2002, currently contains the entirety of Wyandotte and Johnson Counties, and an eastern portion of Douglas County, Kansas. (Denning Ex. 702.) Due to the comparatively high population growth rate of the 3rd Congressional District relative to the remaining three congressional districts of Kansas and the constitutional requirement for equally apportioned congressional districts, the boundaries of the 3rd Congressional District must be redrawn to reduce the total population of the 3rd Congressional District to as near 713,280 persons as possible.

8. Of the fourteen congressional maps proposed by the Kansas Legislature, the boundaries of the 3rd Congressional District were most often drawn—ten out of the fourteen congressional maps—to include either: (1) the entirety of Wyandotte and Johnson Counties and a portion of northern Miami County, Kansas; or (2) the entirety of Wyandotte and Johnson Counties and a portion of southeast Leavenworth County, Kansas.² (Denning Ex. 704-13.)

8. Wyandotte and Johnson Counties have been a part of the 3rd Congressional District, pursuant to approved redistricting plans in Kansas, in 1982, 1992, and 2002. *O'Sullivan v. Brier*, 540 F.Supp. 1200, App. B. (D. Kan. 1982). (Denning Ex. 700-03.) As a result, these counties were a part of the 3rd Congressional District during the period 1982 through 2010.

9. Miami County, Kansas, has historically been a part of the 3rd Congressional District, pursuant to approved redistricting plans in Kansas, in 1982 and 1992. *O'Sullivan*, 540

² Of the fourteen congressional maps proposed by the Kansas Legislature, five maps proposed that the 3rd Congressional District include the entirety of Wyandotte and Johnson Counties and a portion of Miami County, while five maps proposed the inclusion of the entirety of Wyandotte and Johnson Counties and a portion of Leavenworth County.

F.Supp. at App. B. (Denning Ex. 700-01.) Miami County was removed from the 3rd Congressional District following the approved redistricting plan of 2002. (Denning Ex. 702.)

10. Leavenworth County has not been a part of the 3rd Congressional District in the 1982, 1992, or 2002 redistricting maps. *O'Sullivan*, 540 F.Supp. at App. B. (Denning Ex. 700-03.) Instead, Leavenworth County has continuously been a part of the 2nd Congressional District, pursuant to the 1982, 1992, and 2002 redistricting maps. *O'Sullivan*, 540 F.Supp. at App. B. (Denning Ex. 700-03.)

II. Argument and Authorities

All evidence and argument submitted by Intervenor Plaintiff Denning and Intervenor Plaintiff Yoder is offered only in regard to the proposed redistricting of the 3rd Congressional District of Kansas. Intervenor Plaintiffs Denning and Yoder take no position concerning the communities, individual populations, history, or congressional boundaries of the remaining three congressional districts of Kansas.³

A. The Boundaries of the Current 3rd Congressional District, Pursuant to the Approved Redistricting Map of 2002, are Unconstitutional as Apportioned.

The boundaries of the 3rd Congressional District of Kansas are unconstitutional. (Joint Stipulation ¶ 35.) The Kansas Legislature failed, during its 2012 Legislative Session, to approve a redistricting plan for its four congressional districts, although required to do so pursuant to the

³ The Court is not bound to adopt any of the congressional redistricting maps presented in the Kansas Legislature. This Brief discusses the 3rd Congressional District of Kansas, as drawn in certain congressional maps presented to the Kansas Legislature, for the Court's consideration. This Brief proposes a map for the 3rd Congressional District that, in the opinion of Intervenor Plaintiffs Denning and Yoder, is both constitutional (lawful) and fair, and should be ordered by the Court.

U.S. Constitution. U.S. Const. art I, § 2. Article I, Section 2 of the United States Constitution requires the Kansas Legislature to apportion its congressional districts every ten years based upon the most recent U.S. Census data. *Id.* The U.S. Census Bureau last conducted its decennial Census in 2010. The Census indicated that, during the period of 2000 to 2010, the population of Kansas increased from 2,688,418 persons to 2,853,118 persons. (Joint Stipulation ¶ 37.) Additionally, the 2010 Census indicated that the population of the 3rd Congressional District, most significantly Johnson County, was growing at a greater rate than the three remaining congressional districts of Kansas. This growth in the 3rd Congressional District, as well as population shifts in the remaining congressional districts of Kansas, has resulted in an unconstitutional variance of population among each congressional district. (Joint Stipulation ¶ 35.) Such variance is directly contrary to the constitutional principle of “one person, one vote” as set forth in *Baker v. Carr*. See 369 U.S. 186 (1962).

The current 3rd Congressional District was established pursuant to the Kansas Legislature’s approved 2002 redistricting plan. (Denning Ex. 702). The 3rd Congressional District is currently comprised of all of Wyandotte and Johnson Counties and the eastern portion of Douglas County, including a divided portion of Lawrence, Kansas. (*Id.*) According to the 2010 Census, the total population of the current 3rd Congressional District is significantly above the constitutionally “ideal standard population”⁴ of 713,280 persons for each Kansas congressional district. (Joint Stipulation ¶ 34.) The boundaries of the 3rd Congressional District should therefore have been redrawn by the Kansas Legislature, during its 2012 Session, to proportionally reduce the total population of 3rd Congressional District to be as near to the 713,280 person ideal as possible.

⁴ The “Ideal Standard Population” is calculated by dividing the total 2010 population of Kansas of 2,853,118 persons between the four congressional districts of Kansas.

The population of Lawrence, Kansas and eastern Douglas County is too great for continued inclusion in the 3rd Congressional District, which continues to include Wyandotte and Johnson Counties. The 2010 Census places the population of Wyandotte County at 157,505 persons and the population of Johnson County at 544,179 persons for a total population of 701,684. (Joint Ex. 3 at 2-3.)⁵ It is not possible to place any material part of Douglas County, which has a total 2010 population of 110,826 persons, into the 3rd Congressional District without causing the total population of the 3rd District to greatly exceed the 713,280 person ideal. (Joint Ex. 3 at 2.) Furthermore, due to the high population of Lawrence and eastern Douglas County, the continued inclusion of any part of Douglas County in the 3rd District would require a more extreme division of that county and its residents.

The Kansas Legislature, by failing to constitutionally reapportion the congressional districts within Kansas and provide its citizens with equal voting power, has denied Kansas residents living within the current boundaries of the 3rd Congressional District the Equal Protection of the law and Due Process of laws guaranteed under the United States and Kansas Constitutions. Accordingly, the Court is authorized, under 28 U.S.C. § 2284(a), to convene a three-judge panel to correct the Kansas Legislature's failure to ensure the constitutional rights of its citizens and reapportion the congressional districts of Kansas in a manner consistent with the Constitution. The Court also has discretion to award Intervenor Plaintiffs their reasonable attorneys' fees pursuant to 28 U.S.C. § 1988(b). Intervenor Plaintiff Denning requests such an award of attorneys' fees. Intervenor Plaintiff Yoder may request such an award, either in whole or in part.

⁵ The cited population data was inadvertently omitted from the Joint Stipulation submitted by the parties. Joint Exhibits 1-3 were proposed for admission by counsel for Intervenor Plaintiffs Owens, Henderson, Shaner and Wimmer. If not offered and admitted, the cited population data is maintained on the Kansas Legislative Research Department Website at <http://skyways.lib.ks.us/ksleg/KLRD/Redistrict/2011documents/AdjPopData7-29-11.pdf>.

B. The Most Reasonable Apportionment of the 3rd Congressional District Includes All of Wyandotte and Johnson Counties and the Northern Portion of Miami County, Kansas.

Although they failed to act, the Kansas Legislature proposed fourteen redistricting maps for the congressional districts of Kansas.⁶ Within these fourteen plans, the Kansas Legislature essentially proposed two redistricting plans for the 3rd Congressional District. Five redistricting maps presented to the Kansas Legislature proposed that the 3rd Congressional District include the entirety of Wyandotte and Johnson Counties and a portion of northern Miami County, Kansas. (Denning Ex. 704-08.) Alternatively, another five redistricting maps proposed the 3rd Congressional District include the entirety of Wyandotte and Johnson Counties and a portion of southeast Leavenworth County, Kansas. (Denning Ex. 709-13.) The remaining four maps proposed other configurations of counties, or portions thereof, and maintained an undivided Johnson County as the core of the 3rd Congressional District. The notable provision of these four congressional maps is that all or a portion of Wyandotte County is moved out of the 3rd Congressional District. Intervenor Plaintiffs Denning and Yoder do not support such a reconfiguration, based on an analysis of 2010 Census data and application of the 2012 Legislative Guidelines and historical precedent.

⁶ See Proposed Plans, Kansas Redistricting 2012, Kansas Legislative Research Department, May, 27, 2012, at http://redistricting.ks.gov/_Plans/plans_proposed.html.

**(1) A 3rd Congressional District Which Consists of the Entirety of
Wyandotte and Johnson Counties and the Northern Portion of Miami
County Is Supported By History and Proximity.**

The 2012 Legislative Guidelines and Criteria for Congressional Redistricting, agreed to by the Kansas House and Senate, set forth the “building blocks” to be used for drawing constitutionally apportioned district boundaries. (Joint Stipulation Ex. 9.) Aside from each congressional district being apportioned as close to the 713,280 person ideal population as possible, congressional districts in Kansas cannot be drawn to purposefully or incidentally dilute minority voting power. (*Id.*) Congressional districts are to be drawn to include undivided “communities of interest” within each district. (*Id.*) “Communities of interest” are those areas of Kansas that share common traits, including “[s]ocial, cultural, racial, ethnic, and economic interests.” (*Id.*) Additionally, congressional districts are to be drawn to preserve the “core of the existing districts” while also including whole, undivided counties whenever possible. (*Id.*)

Wyandotte and Johnson Counties have been a part of the 3rd Congressional District, pursuant to approved redistricting plans in Kansas, in 1982, 1992, and 2002. *O’Sullivan*, 540 F.Supp. at App. B. (Denning Ex. 700-03.) Therefore, these counties have continuously been a part of the 3rd Congressional District for more than thirty years. Wyandotte and Johnson Counties’ extensive and common history as members of the 3rd Congressional District strongly supports their continued inclusion in the District, at least pursuant to 2010 U.S. Census data.

The northern portion of Miami County, Kansas, including the cities and surrounding rural areas of Spring Hill and Louisburg, should be included with Johnson and Wyandotte Counties in the redrawn map of the 3rd Congressional District. Miami County and the cities of Spring Hill

and Louisburg have historically been a part of the 3rd Congressional District, pursuant to the Census and redistricting maps of 1982 and 1992. *O'Sullivan*, 540 F.Supp. at App. B. (Denning Ex. 700-01.) Five of the fourteen congressional district maps proposed and presented by the Kansas Legislature support this configuration of the 3rd Congressional District. (Denning Ex. 704-08.) Specifically, the 34th Great State, Black and White Amendment, Capital 1 Amendment, Bob Dole 1, and Kansas Six maps all draw the 3rd Congressional District to include the entirety of Wyandotte and Johnson Counties with the northern portion of Miami County. (*Id.*)

The City of Spring Hill, Kansas, straddles the border of Johnson and Miami Counties, and its Miami County residents share many common interests with those residing in Johnson County. (Denning Decl. ¶ 11.) The Spring Hill City Hall and Police Department are located within Johnson County. (*Id.*) A majority of the Spring Hill School District is located within Johnson County. (*Id.*) Additionally, Spring Hill has experienced rapid growth since the year 2000, much of which has occurred within or very near to Johnson County. (*Id.*) Inclusion of Spring Hill, and the northern portion of Miami County, in the 3rd Congressional District would preserve an undivided community of interest within one congressional district.

The City of Louisburg, Kansas, and the surrounding areas of Miami County are contiguous to, and are located a very short distance from, large Johnson County communities, including the cities of Overland Park and Olathe. Many residents of Louisburg work in these Johnson County communities and are otherwise engaged in the commercial and cultural fabric of Johnson County. (Denning Decl. ¶ 12.) Further, the city and the surrounding rural area of Miami County has historically been included as a part of the 3rd Congressional District pursuant

to the Census and redistricting maps of 1982 and 1992. *O'Sullivan*, 540 F.Supp. at App. B. (Denning Ex. 700-01.)

The inclusion of a contiguous portion of northern Miami County, with the entirety of Wyandotte and Johnson Counties, in the 3rd Congressional District would result in a constitutionally ideal population of 713,280 persons in the 3rd Congressional District. This population is exactly equal to 25 percent of the total 2010 population of Kansas and includes two communities—Spring Hill and Louisburg—which share many common interests with the existing core of the 3rd Congressional District. Accordingly, the 3rd Congressional District would be contiguous and compact and easily identified as all of Wyandotte and Johnson Counties and a small, but closely related, portion of northern Miami County.

(2) A 3rd Congressional District that Includes the Entirety of Wyandotte and Johnson Counties and a Divided Portion of Leavenworth County is Not Supported by History.

Leavenworth County, Kansas has not been included as a part of the 3rd Congressional District in the 1982, 1992, and 2002 redistricting maps. *O'Sullivan*, 540 F.Supp. at App. B. (Denning Ex. 700-03.) In fact, during the thirty year period from 1982 to present, Leavenworth County has continuously been included in the 2nd Congressional District. *O'Sullivan*, 540 F.Supp. at App. B. (Denning Ex. 700-03.) To now divide Leavenworth County, and include a portion thereof in the 3rd Congressional District, would unnecessarily split a previously undivided county and constitute a marked departure from at least 30 years of historical precedent.

III. Conclusion

For the foregoing reasons, the 3rd Congressional District of Kansas should be apportioned and redrawn to include the entirety of Wyandotte and Johnson Counties and the northern portion of Miami County, Kansas. Such a configuration would result in a constitutionally and ideally apportioned district comprised of 713,280 persons. Furthermore, inclusion of the northern portion of Miami County with all of Wyandotte and Johnson Counties would result in a compact and contiguous 3rd Congressional District that maintains common communities of interest and familiar historical boundaries.

Respectfully submitted,

SMITHYMAN & ZAKOURA, CHARTERED

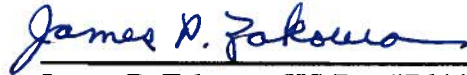
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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on counsel via the Court's Electronic Filing System, this 28th day of May, 2012.



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