

**IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS**

ROBYN RENEE ESSEX,)	
)	
Plaintiff,)	Case No. 12-4046-KHV-DJW
)	
vs.)	
)	
KRIS W. KOBACH,)	
Kansas Secretary of State,)	
)	
Defendant.)	
_____)	

**INTERVENOR PLAINTIFFS WILLIAM ROY, JR. AND PAUL DAVIS’
TRIAL BRIEF**

William Roy, Jr. and Paul T. Davis, by and through their attorneys of record Steven R. Smith and Eldon J. Shields of the firm of Gates, Shields & Ferguson, P.A., submit this Trial Brief for the Court’s consideration.

NATURE OF THE CASE

This is an action by Plaintiff and Intervenor-Plaintiffs, citizens and voters of the State of Kansas, who claim they are being denied equal protection and due process guaranteed by the Fourteenth Amendment to the United States Constitution because of the failure of the Kansas Legislature to comply with constitutional requirements of reapportioning the Congressional and legislative district boundaries, as well as the district boundaries for the Kansas State Board of Education. The Defendant admits the current boundaries are unconstitutional. The current task before the Court is therefore to determine new boundaries for all four maps – United States Congressional districts, districts for the Kansas Senate, districts for the Kansas House of Representatives, and districts for the Kansas State Board of Education.

STANDARD OF REVIEW

Congressional Reapportionment

In evaluating a congressional reapportionment plan, the preeminent constitutional requirement is that it must make “as nearly as is practicable one man’s vote in a congressional election...be worth as much as another’s.” *Wesberry v. Sanders*, 376 U.S. 1,7-8, 84 S. Ct. 526, 529-530, 11 L. Ed.2d 481 (1964). This requirement is the “preeminent, if not the sole, criterion” for evaluating the constitutionality of redistricting plans. *Chapman V. Meier*, 420 U.S. 1, 23, 95 S. Ct. 751, 764, 42 L. Ed. 2d 766 (1975); *accord, Mahan v. Howell*, 410 U.S. 315, 322, 93 S. Ct. 979, 984, 35 L. Ed. 2d 320 (1973). Although the Constitution does not always require that population deviations among districts be as small as is mathematically possible, it requires a State to make a good-faith effort to achieve precise mathematical equality. It appears all of the congressional plans presented to the Court in this matter meet the mathematical equality requirement.

Courts frequently face situations in which several redistricting plans achieve virtually identical levels of population equality. In these cases, courts have considered such factors as:

(1) whether a proposed plan preserves county and municipal boundaries (*see, Carstens v. Lamm*, 543 F. Supp. 68, 91-92 (D.Colo. 1982)(unnecessary fragmentation undermines ability of constituencies to organize effectively and increases likelihood of voter confusion regarding other elections based on political subdivision geographics); *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 926, (W.D.Mo.), *aff’d sub nom. Schatzle v. Kirkpatrick*, 456 U.S. 966, 102 S. Ct. 2228, 72 L. Ed. 2d 841 (1982); *Dunnell v. Austin*, 344 F. Supp. 210, 216 (E.D.Mich.1972); *David v. Cahill*, 342 F. Supp. 463, 469 (D.N.J.1972); *Preisler v. Secretary of Missouri*, 341 F. Supp. 1158, 1162 (W.D.Mo.), *aff’d*

sub nom. Danforth v. Preisler, 407 U.S. 901, 92 S. Ct. 2440, 32 L. Ed. 2d 678 (1972); *Skolnick v. State Electoral Bd. of Ill.*, 336 F. Supp. 839, 846 (N.D.Ill.1971));

(2) whether a plan dilutes the vote of any racial minority (*Carstens*, *supra* at 85 and *Shayer*, *supra* at 930);

(3) whether a plan creates districts that are compact and contiguous (*Carstens*, *supra* at 87, (prevents partisan gerrymandering, reduces electoral costs, and increases effective representation); *Shayer*, *supra* at 931 ; *David*, *supra* at 469; *Skolnick*, *supra* at 843; *Tawes*, *supra* at 734);

(4) whether a plan preserves existing congressional districts (*Dunnell*, *supra* at 216); and

(5) whether a plan groups together communities sharing common economic, social, or cultural interests (*see Carstens*, *supra* at 91; *Skolnick*, *supra* at 845; *Tawes*, *supra* at 73).

State Redistricting

The *Equal Protection Clause of the Fourteenth Amendment* permits only “the limited population variances which are unavoidable despite a good-faith effort to achieve absolute equality.” *Mahan v. Howell*, 410 U.S. 315, 321, 93 S. Ct. 979, 984, 35 L. Ed. 2d 320 (1973). Therefore in addressing the apportionment of state legislatures, the principal question is whether or not population variances from the ideal are justified by some legitimate State interest.

In *Reynolds v. Sims*, 377 U. S. 533, 568 (1968), the United States Supreme Court held that “the *Equal Protection Clause* requires that the seats in both houses of a bicameral state legislature must be apportioned on a population basis.” This holding requires only “that a State make an honest and good faith effort to construct districts ...as nearly of equal population as is practicable,” because “it is a practical impossibility to arrange legislative districts so that each one has an identical number of residents, or citizens, or voters. “ *Id.*, at 577. The Court has held that “minor deviations from

mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the *Fourteenth Amendment* so as to require justification by the State. *Gaffney v. Cummings*, 412 U.S. 735, 745, (1973).

The Court's decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. *See, e.g., Connor v. Finch*, 431 U.S. 407, 418 (1977); *White v. Regester*, 412 U.S. 755, 764 (1973). The Kansas Supreme Court has recognized and approved this same standard in its review of reapportionment legislation. *In re Substitute For House Bill 2625*, 273 Kan. 715, 44 P.3d 1266 (2002) citing *In re House Bill No. 3083*, 251 Kan. 595, 606, 836 P. 2d 574 (1992). A plan with larger disparities in population, however, creates a prima facie case of discrimination and therefore must be justified by the State. *Swann v. Adams*, 385 U.S. 440, 444 (1967).

The ultimate inquiry, therefore, is whether the legislature's plan "may reasonably be said to advance [a] rational state policy" and , if so, "whether the population disparities among the districts that have resulted from the pursuit of this plan exceed constitutional limits." *Brown v. Thompson* 462 U.S. 835, 844, (1983) citing *Mahan v. Howell*, 410 U.S. 315, 328 (1973). The consistency of application and the neutrality of effect of the nonpopulation criteria must be considered along with the size of the population disparities in determining whether a state legislative apportionment plan contravenes the *Equal Protection Clause*. *Id.* at 845-846.

Legislative Guidelines and Criteria

In evaluating potential plans, the House Committee on Redistricting and Senate Committee on Reapportionment adopted "Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting" ("Guidelines").(Attached hereto as Exhibit 1 and also attached to the Joint

Stipulation of Facts as Exhibit 10, document 171-9) The Guidelines are identical to those used in prior years.

Deference to Legislative Acts

In addressing the congressional plans or the state legislative plans currently being urged by the Parties, the Court should consider first whether it owes deference to any plan passed by either chamber of the legislature. Congressional redistricting is primarily the state legislature's task, but becomes a judicial task when the legislature fails to redistrict after having an adequate opportunity to do so. *White v. Weiser*, 412 U.S. 783, 794-95, 93 S. Ct. 2348, 2354, 37 L. Ed. 2d 335 (1973). Although a federal court should defer to any enacted, constitutionally acceptable state redistricting plan, *id.* at 795, 93 S. Ct. at 2354, the Court is not required to defer to any plan that has not survived the full legislative process to become law. See *Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 197, 92 S. Ct. 1477, 1484, 32 L. Ed. 2d 1 (1972). In accordance with *Beens* the Court is bound to give only "thoughtful consideration" to plans that were passed by the state legislature but subsequently vetoed by the Governor. See *Carstens v. Lamm*, 543 F. Supp. 68, 79-81 (D.Colo. 1982).

In the circumstances before the Court, with the 2002 Kansas redistricting plan being admittedly unconstitutional and therefore unacceptable, and the legislature having failed to enact a new redistricting plan, the Court's powers are broad. It may adopt in whole a proposed plan, see *O'Sullivan v. Carlin* 540 F. Supp. 1200 (1982) citing *Donnelly v. Meskill*, 345 F. Supp. 962 (D.Conn.1972); *Dunnell v. Austin*, 344 F. Supp. 210 (E.D.Mich.1972); *David v. Cahill*, 342 F. Supp. 463 (D.N.J.1972); *Skolnick v. State Electoral Bd. of Ill.*, 336 F. Supp. 839 (N.D.Ill.1971), adopt a proposed plan with some modifications, see *O'Sullivan, supra*, or draw up a new plan, see *Carstens v. Lamm*, 543 F. Supp. 68 (D.Colo. 1982); *Preisler v. Secretary of Missouri*, 341 F. Supp. 1158

(W.D.Mo.), *aff'd sub nom. Danforth v. Preisler*, 407 U.S. 901, 92 S. Ct. 2440, 32 L. Ed. 2d 678 (1972); *Maryland Citizens Comm. for Fair Congressional Redistricting, Inc. v. Tawes*, 253 F. Supp. 731 (D.Md.), *aff'd sub nom. Alton v. Tawes*, 384 U.S. 315, 86 S. Ct. 1590, 16 L. Ed. 2d 586 (1966).

Congressional Districts

Intervenor Plaintiffs Roy and Davis urge the Court to adopt the map discussed in the Kansas legislature and analyzed by the Kansas Legislative Research Department which is titled "Sunflower 13." Mr. Davis introduced a map in the House Committee on Redistricting titled "Free Willie". The map was never voted on. This map is very similar to the "Sunflower 13" map that was approved by the Senate Committee on Redistricting, but never voted on by the full Senate. Having reviewed all the congressional maps presented in both houses of the Legislature, the "Sunflower 13" map is the preferred map because it meets all the criteria and guidelines adopted by the Special Committee on Redistricting, House Committee on Redistricting and Senate Committee on Redistricting. Furthermore, it preserves the core (see Guideline 4(b)) of the existing districts better than any other map introduced.

The Kansas Senate adopted a congressional map on February 8, 2012, by a vote of 23-17 designated as "Sunflower 9C". The Kansas House defeated a bill containing the map "Sunflower 9C" on March 21, 2012, by a vote of 48-76. The Kansas Senate Committee on Redistricting adopted a congressional map on May 2, 2012 titled "Sunflower 13". The map was never voted on by the full Senate. (Ex. 300, par. 24,26) The primary difference between "Sunflower 9C" and "Sunflower 13" is that Riley County is placed in the 1st congressional district in the "Sunflower 9C" map and placed in the 2nd congressional district in the "Sunflower 13" map. (Ex. 305,306)

Guideline 4(c) provides that “whole counties should be in the same congressional district to the extent possible while achieving equality among districts. (Ex. 311, p. 2) There are currently seven congressional maps being proposed in this litigation. This trial brief will primarily address the four major plans. They are “Sunflower 13,” “Sunflower 9C,” “Bob Dole 1” and “Kansas Six.” (Ex. 59, 61, 49, 57) The 2002 reapportionment for Kansas, which was approved by the federal court, had a deviation of thirty-three individuals. It split four counties and one “voting district” (VTD). Each of the four major plans split only three counties and Kansas Six splits sixteen VTDs, Bob Dole 1 splits twelve VTDs, while Sunflower 9C splits only five VTDs and Sunflower 13 splits ten VTDs. (Ex. 310)

Guideline 4(b) provides that “preserving the core of the existing districts should be undertaken when considering the “community of interests” in establishing districts.” (Ex. 311) In “Sunflower 13” only 5.7% of residents (163,086 individuals) are relocated to a new district; in “Sunflower 9C” 8.8% of residents(251,905 individuals) are relocated to a new district; in “Bob Dole 1” 10.9% of residents (310,086 individuals) are relocated to a new district; and in Kansas Six 14.5% of residents (412,780 individuals) are relocated to a new district. (Ex. 300, par. 29-31; Mary Galligan testimony, Exhibit 310). “Sunflower 13” is clearly best at preserving the core of the existing districts.

The Guidelines provide that “social, cultural, racial, ethnic, and economic interests common to the population of the area, which are probable subjects of legislation (generally termed “communities of interest”), should be considered. (Ex. 311) In considering these issues, Sunflower 13 separates Riley and Geary counties at the county boundary. It keeps the two major universities in the same congressional district, the University of Kansas and Kansas State University. It keeps

the two Army forts in the same congressional district. It retains the Flint Hills counties in the rural 1st district and adds the northern rural counties. The 2nd district loses the northern tier of rural counties and adds a portion of Wabaunsee county in the Topeka metropolitan area. The plan moves the 3rd district into a portion of southern Leavenworth county by adding the Leavenworth county area surrounding Bonner Springs. No city of the first class is divided. The plan also moves Kingman, Harper and a part of Sumner counties from the 4th to the 1st. All of these counties have a strong agricultural economy and are compatible as part of the 1st district. (Ex. 300, par. 26, 29-34; Ex. 310)

“Sunflower 9C” separates the two Army forts and the two major universities with Riley and Geary counties being placed in the 1st district. The same area of southern Leavenworth County is placed in the 3rd district as in Sunflower 13. The 2nd district is wider by one row of counties in the southern portion of the state to compensate for the loss of Riley and Geary counties. It also extends further west along the northern tier of counties. The 1st district retains the rural Flint Hills and the 4th district spreads out as a result of Montgomery county moving to the 2nd district. (Ex. 300, par. 24, 26-34; Ex. 310)

“Bob Dole 1” was passed by the Kansas House but was defeated in the Kansas Senate on a vote of 14-24. (Davis declaration, par. 25) “Bob Dole 1” splits Topeka placing 81% (103,261 individuals) of the city’s population in the rural 1st district. It also places the eastern portion of Shawnee county in the 1st district while the western portion of the county is in the 2nd district. The city of Topeka is a city of the first class, as defined by Kansas Statute and is a “community of interest and should not be split under the Guidelines unless absolutely necessary. The existence of “Sunflower 9C” and “Sunflower 13” show that dividing the City of Topeka is unnecessary and therefore contrary to the Guidelines. (Ex. 300, par. 25, 29-34; Ex. 310)

“Kansas Six” was adopted late in the session by the Kansas House of Representatives but was not considered by the Kansas Senate prior to adjournment. “Kansas Six” relocates to a new district the most Kansas citizens of any plan, 412,780 individuals. It adds two eastern urban areas to the 1st district, Leavenworth County and part of Douglas County. It splits the city of Lawrence between the 1st and 2nd districts with 63.6% of the city being placed in the 1st district. It also places the cities of Leavenworth and Lansing in the 1st district. The city of Lawrence is a city of the first class, a defined by Kansas statute, and is a “community of interest”. Even though the city of Lawrence is split between the 2nd and the 3rd congressional districts currently, the split was caused by necessity, ten years ago, as the population shift at the time would not allow the entire city of Lawrence to remain in the 3rd district. That circumstance does not exist now. Numerous individuals spoke at the public hearing in Lawrence conducted by the Special Committee on Redistricting and voiced their desires to not have Lawrence and Douglas County split again. The existence of “Sunflower 9C” and “Sunflower 13” show that dividing the City of Lawrence is unnecessary and therefore contrary to the Guidelines. This plan puts the two major Army forts in different districts. The 2nd district would lose its far northeast counties but would extend further into rural central Flint Hills region which has customarily been in the 1st district. (Ex. 300, par. 25, 29-34; Ex. 310)

“34th Great State” map was defeated by the Kansas Senate 17-22. “Black and White” and “Capitol I” maps did not reach the floor of either the Kansas House of Representatives or the Kansas Senate. (Ex. 300, par. 27-28)

Should the Court believe that deference is due a map which was passed by the Kansas House or Kansas Senate, Sunflower 9C was passed by the Kansas Senate on February 8, 2012, by a vote of 23-17 and preserves the core of the existing districts better than Bob Dole 1 or Kansas Six.

“Sunflower 13” meets the requirements of the Guidelines better than any other plan, preserves the core of existing districts, best addresses the community of interests of the various areas of the State, and does not split any city of the first class, and should be approved by the Court. In the alternative Sunflower 9C should be approved.

Kansas Senate and Kansas State Board of Education Districts

Intervenor Plaintiffs Roy and Davis urge the Court to adopt the map for the Kansas Senate discussed in the Kansas Legislature, passed by the Kansas Senate, and analyzed by the Kansas Legislative Research Department which is titled “Buffalo 30 Revised 13.” Likewise, Intervenor Plaintiffs Roy and Davis urge the Court to adopt the map for the Kansas State Board of Education discussed in the Kansas legislature, passed by the Kansas Senate, and analyzed by the Kansas Legislative Research Department which is titled “Buffalo 30 rev-SBOE.”

At the outset it should be noted that Kansas law requires the ten (10) districts of the Kansas State Board of Education are each to be comprised of four contiguous districts of the Kansas Senate. Thus, when the map for the Kansas Senate is determined, the map for the Kansas State Board of Education districts are essentially determined as well.

Furthermore, the Parties have indicated that the existing maps for the Kansas Senate districts that the Parties are now urging the Court to adopt are “Buffalo 30 Revised,” “For the People 13b” and “Wheat State 5.” Both “Buffalo 30 Revised” and “For the People 13b” have a corresponding map for the Kansas State Board of Education districts which has been analyzed by the non-partisan Kansas Legislative Research Department (“KLRD”). There is no corresponding map on the KLRD web site for “Wheat State 5” that is identified as such. Inasmuch as these Intervenor Plaintiffs are

advocating the adoption of “Buffalo 30 Revised,” we are also advocating the adoption of “Buffalo 30 rev-SBOE.”

The leadership of both the Kansas House of Representatives and Kansas Senate agreed in 2011 to adopt the same guidelines and criteria for the 2012 redistricting/reapportionment as the legislature used in 2002 and past years. The Guidelines and Criteria for 2012 were approved by the Kansas Senate Committee on Reapportionment on April 28, 2011, and the Kansas House Committee on Redistricting on January 9, 2012.

When the Legislature has dealt with the issue of redistricting/reapportionment in the past, the Kansas House of Representatives has prepared the map for its chamber and the Kansas Senate has prepared the map for its chamber. The Senate has not prepared a map for the House of Representatives and the House of Representatives has not prepared a map for the Senate. Both chambers have simply adopted or “rubber-stamped” the map prepared by the opposing chamber. This tradition was discontinued in the 2012 when a majority of members of the House of Representatives declined to approve the Senate redistricting map that was prepared and adopted by the Kansas Senate. The House of Representatives then went on to prepare and adopt its own Senate redistricting map.

As reflected in the Joint Stipulation of Facts, The Kansas Senate, on May 18, 2012, passed HB 2087 by a vote of 21-17. The bill contained the Senate map named “Buffalo 30 Revised” and “Buffalo 30-Revised-SBOE” The Kansas House did not take action on HB 2087 and the legislature adjourned until *Sine Die*.

Buffalo 30-Revised” collapses one (1) Kansas Senate district and creates one (1) new district in Johnson County to address the population shift in Kansas that was revealed through the 2010

census. This is consistent with the action of the House in adopting “Cottonwood 1.” Collapsing a district is consistent with the vote of the Senate Reapportionment Committee of February 29, 2012 reflected in the Minutes that are attached to the Stipulation as Exhibit 36, in which a motion “not to collapse a Senate district” failed. It is also consistent with the vote of the full Senate on May 18, 2012.

The other proposed Kansas Senate maps being urged, “For the People 13b” and “Wheat State 5” do not collapse any existing district and instead attempt to deal with the significant population growth in Johnson County by taking districts currently outside of Johnson County and moving their boundaries into Johnson County.

While collapsing a district has the negative effect of adversely putting two incumbents in the same district, it is necessary due to the significant population shift to Johnson County. Johnson County gained more population than an ideal Senate district, the House of Representatives recognized this and created 3 new House districts in Johnson County. While the one factor of incumbent contests favors “For the People 13b” and “Wheat State,” it is submitted the evidence will show that all the other factors are better served with “Buffalo 30 Revised.”

These Intervenor Plaintiffs urge the Court to give deference to the Senate reapportionment plan adopted by the Senate, and adopt “Buffalo 30 Revised” as the new map for Senate districts in Kansas.

Kansas House of Representatives Districts

Intervenor Plaintiffs Roy and Davis urge the Court to adopt the map discussed in the Kansas legislature, passed by the Kansas House of Representatives, and analyzed by the Kansas Legislative Research Department which is titled “Cottonwood 1.”

As noted above, historically the Kansas House has been allowed to adopt its own plan and that plan is “rubber-stamped” by the Kansas Senate. In the present case all the parties interested in the House of Representative districts, now urge the Court to adopt either “Cottonwood 1” or “Cottonwood II.” The parties have stipulated that both were passed by the Kansas House of Representatives. In fact, “Cottonwood 1” was also passed by the Kansas Senate. But for it being defeated in the House of Representatives when it was attached to a bill that was rejected for the Senate districts, it would have been sent to the Governor for signature.

Cottonwood 1” follows the Guidelines and Criteria adopted by both the Kansas House and Kansas Senate. The population deviation is within the $\pm 5\%$ set out in the Guidelines for Legislative Redistricting that were adopted by the House of Representatives Committee on Redistricting and have been utilized in previous redistricting processes; it does not have the purpose or effect of diluting minority voting strength; the districts are compact and contiguous; the integrity and priority of the existing political subdivisions are preserved to the extent possible; the districts recognize similarities of interest; communities of interest were considered; there are no contests between incumbents intending to run for reelection; and an effort was made to make the districts easily identifiable and understandable.

Cottonwood 1” collapses 3 house districts and creates 3 new districts in Johnson County to address the population shift in Kansas that was revealed through the 2010 census. All three collapsed districts were held by incumbents who had announced their intention not to seek re-election.

The House of Representatives also passed a map called “Cottonwood II” that provided for the redistricting of the Kansas House of Representatives in SB 176. The “Cottonwood II” map makes minor changes to district lines adopted in the “Cottonwood 1” map in Bourbon County,

Neosho County and Kingman County. These changes were a result of adjoining representatives negotiating minor changes with their boundaries. The Kansas Senate did not pass a bill which included a "Cottonwood II" map.

For that reason, these Intervenor Plaintiffs suggest to the Court that "Cottonwood 1" should be adopted as it represents favorable votes in both houses rather than just one.

CONCLUSION

Intervenor Plaintiffs Roy and Davis urge the Court to adopt the congressional map discussed in the Kansas legislature and analyzed by the Kansas Legislative Research Department which is titled "Sunflower 13."; Intervenor Plaintiffs Roy and Davis urge the Court to adopt the map for the Kansas Senate discussed in the Kansas Legislature, passed by the Kansas Senate, and analyzed by the Kansas Legislative Research Department which is titled "Buffalo 30 Revised 13."; Intervenor Plaintiffs Roy and Davis urge the Court to adopt the map for the Kansas State Board of Education discussed in the Kansas legislature, passed by the Kansas Senate, and analyzed by the Kansas Legislative Research Department which is titled "Buffalo 30 rev-SBOE."; Intervenor Plaintiffs Roy and Davis urge the Court to adopt the map discussed in the Kansas legislature, passed by the Kansas House of Representatives, and analyzed by the Kansas Legislative Research Department which is titled "Cottonwood 1."; and for such other and further relief which the Court may deem just and proper.

Respectfully submitted,

s/Eldon J. Shields

Eldon J. Shields, #08266

Steven R. Smith, #09690

Attorneys for Intervenors

Gates, Shields & Ferguson, P.A.

10990 Quivira, Suite 200

Overland Park, Kansas 66210

(913) 661-0222 Telephone

(913) 491-6398 Facsimile

ejshields@gsflegal.com

stevesmith@gsflegal.com

CERTIFICATE OF SERVICE

I hereby declare and certify that on this 28th day of May, 2012, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system, which will automatically send a notice to all interested parties of record.

s/Steven R. Smith

Steven R. Smith, #09690