

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

ROBYN RENEE ESSEX)	
)	
Plaintiff,)	
)	CIVIL ACTION
)	
)	Case No. 12-CV-04046-KHV-DJW
)	
KRIS W. KOBACH,)	
Kansas Secretary of State)	
)	
Defendant.)	

TRIAL BRIEF OF DEFENDANT KRIS W. KOBACH, KANSAS SECRETARY OF STATE

Defendant Kris W. Kobach (hereinafter the “Secretary” or “Defendant”) by and through counsel, submits the following Trial Brief. In light of the stipulated facts and the evidence disclosed by the parties, Defendant urges the Court to issue a reapportionment plan consistent with the legal analysis that follows.

STATEMENT OF FACTS

The Defendant incorporates by reference as if fully set forth herein the Joint Stipulation of Facts (Doc. # 171) and associated Exhibits.

INTRODUCTION

This Court has been given the task of reapportioning legislative districts after the Kansas Legislature has failed to do so. Consequently, a proposed reapportionment plan is not being challenged. Instead, this Court is being asked to develop such a plan out of whole cloth. Because this Court is undertaking a task normally reserved for the legislature, it should provide some deference to the reapportionment plans considered by the Kansas Legislature. However, as

Defendant has conceded there is *only one reason why the legislative and congressional districts drawn in 2002 cannot be used in 2012*: the Fourteenth Amendment violation resulting from unequal district sizes. That is the sole violation of law for which this Court has been asked to provide a remedy. There is no other constitutional issue in this case. Therefore, this Court must be focused on the constitutional requirement of maintaining equal population among districts. Accordingly, in issuing a redistricting plan, this Court must minimize deviation from the ideal district size, even beyond the deviations contained in plans proposed in the Kansas Legislature.

While a legislature may articulate rational state policies that permit *de minimis* deviations from ideal district size, this Court operates under a higher standard and must eliminate deviations to the maximum extent possible. To do so quickly and efficiently, the Court should begin with the legislative plans that have the lowest deviations then make modifications that further decrease those deviations to achieve as close to absolute equality as possible. Because Defendant must administer any reapportionment plan and may be required to defend on appeal the plan issued by this Court, Defendant is particularly interested in ensuring that any remedy ordered by this Court is constitutional and above reproach. Therefore, Defendant urges the Court to adhere to two guiding principles: (1) the Court must seek the minimum deviation possible, and (2) the Court should reject plans from the Kansas Legislature that represent politically-motivated efforts to achieve partisan or parochial advantage or to exclude challengers.

ARGUMENT

I. The Preeminent Goal of the Court Should be Eliminating Population Disparity Between Districts

In this case, the Court should be concerned chiefly, if not solely, with achieving the Equal Protection Clause objective of “one person, one vote.” While the legislature may be entitled to

some leeway in allowing minimal deviations between districts, this Court does not have that luxury. Instead, this Court must strive to meet a higher standard of nearly-absolute equality.

The Supreme Court in *Reynolds v. Sims* “established that both houses of a state legislature must be apportioned so districts are ‘as nearly of equal population *as is practicable*.’” *Chapman v. Meier*, 420 U.S. 1, *22 (1974) *citing Reynolds v. Sims*, 377 U.S.533, 577 (1964) (emphasis added). However, “[a]s contrasted with congressional districting, where population equality appears now to be the preeminent, if not the sole criterion on which to adjudge constitutionality [citations omitted], when state legislative districts are at issue [the Supreme Court] ha[s] held that minor population deviations do not establish a prima facie constitutional violation.” *Chapman*, 420 U.S. at *23. The Court went on to say that without “persuasive justifications, a *court ordered* reapportionment plan of a state legislature [] must ordinarily achieve the goal of population equality with *little more than de minimis variation*.” *Id.* at *26-*27 (emphasis added). A decade later, the Supreme Court would reiterate this exacting standard: “[a]dopting any other standard other than population equality, using the best census data available, would subtly erode the Constitution’s ideal of equal representation.” *Karcher v. Daggett*, 462 U.S. 725, 731 (1983).

While the Supreme Court has granted a presumption of constitutionality to reapportionment plans drawn by state legislatures if such plans have deviations under ten percent, such high deviation allowances do not apply in with respect to a court-ordered reapportionment plan. The Supreme Court has “held that court-ordered reapportionment plans are subject in some respects to stricter standards than plans developed by a state legislature.” *Upham v. Seamon*, 456 U.S. 37, 42 (1982), *citing Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) *and Connor v. Finch*, 431 U.S. 407, 414 (1977). *See also Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) (permitting deviation up to ten percent in the furtherance of “rational state policy” by legislature). It should

also be noted that the “ten percent rule” as applied to deviations in maps drawn by state legislatures is not a “safe harbor” or *per se* “*de minimis*” standard, thereby allowing state legislatures to deviate up to ten percent for any reason. *See Larios v. Cox*, 300 F.Supp.2d 1320, 1340-41 (N.D. Georgia, 2004), *affirmed Cox v. Larios*, 542 U.S. 947 (Mem.)(2004). Instead, the ten percent rule is merely a tool for allocating the burden of proof with state legislative plans that have already been passed. *Id.* at 1339. In *Cox*, state officials believed that as long as they complied with the ten percent rule, regardless of circumstantial evidence of political motivation, such a plan would be *per se* constitutional. *See Id.* Those state leaders were incorrect, and the Supreme Court affirmed the lower Court’s decision to invalidate the reapportionment plan. In doing so, the Supreme Court again cited *Reynolds* explaining “that the “overriding objective” of districting “must be substantial equality of population among the various districts” and that deviations from the equal-population principle are permissible only if “incident to the effectuation of a rational state policy.” *See Id.* *citing Reynolds*, 377 U.S. at 579 (2004).

Because there is no legislatively-drafted plan that is being challenged in the case at bar, the ten percent rule does not apply. This Court cannot substitute itself for the Kansas Legislature and pursue one “rational state policy” over another in its selection of a reapportionment plan. Indeed, an Article III Court cannot regard itself as a policy-making body in any context. “The role of the federal courts, of course, is ... not as policy makers or enlargers of congressional intent.” *Syngenta Seeds, Inc. v. Bunge North America, Inc.*, 820 F. Supp.2d 953, 975 (N.D. Iowa 2011) *quoting Furrer v. Brown*, 62 F.3d 1092, 1102 (8th Cir. 1995) *and United States v. Gibbens*, 25 F.3d 28, 33 (1st Cir. 1994). “Nor should a court arrogate the legislative authority to do what Congress did not, even when doing so would serve ends the court might view as salutary.” *In re Johnson*, 399 B.R. 72, 78 (S. D. Cal 2008). The policy objectives advanced by some Plaintiffs in

this case are completely outside the scope of what this Court may consider. Therefore, this Court must adopt population equality as the overriding principal guiding its selection of a reapportionment plan.

As noted above, “court-ordered reapportionment plans are subject in some respects to stricter standards than plans developed by a state legislature.” *Upham*, 456 U.S. at 42, *citing Wise*, 437 U.S. at 540 and *Connor*, 431 U.S. at 414. Accordingly, this Court should be guided solely by the foundational “one person, one vote” requirement that all districts in a state legislature must be “as nearly of equal population as is practicable.” *See Reynolds v. Sims*, 377 U.S. 533, 577 (1962). While *de minimis* deviations by a state legislature are permitted if they are driven by a “rational state policy,” no state policy at all may be pursued by this Court.

Additionally, the Court should note that the “as practicable” and “*de minimis*” standard has changed over time with the advent of new technology. The map-drawing technology available today makes it much easier to obtain population equality and to generate nearly-equal maps astonishingly quickly. *See eg. Hulme v. Madison County*, 188 F.Supp.2d 1041, 1055 (S. D. Ill. 2001) (applying this concept to state reapportionment statute). With GPS and mapping software available to this Court, redistricting can be accomplished more quickly and precisely than in the past. Therefore, what is “practicable” has changed. Given these factors, the Court should order a reapportionment plan that has near zero deviation.

II. While the Plans Proposed in the Legislature are a Good Starting Point, the Court Should Reduce Deviations Further.

In cases where a court reviews a reapportionment plan that has passed through both the legislative and executive branches, this Court has recognized that deference to the legislature is an important linchpin of judicial review and that the Court cannot replace the legislature’s judgments with its own. *Graham v. Thornburgh*, 207 F.Supp. 2d. 1280, 1296 (D. Kan. 2002). *Graham*

clearly differed from this case in that reapportionment plans had been adopted by both the legislative and executive branches. Where there has been no plan adopted by the legislature, there is a reduced standard of deference. This Court stated that, “a federal court should defer to any enacted, constitutionally acceptable state redistricting plan, [the court] is not required to defer to any plan that has not survived the full legislative process to become law.” *O’Sullivan v. Brier*, 540 F. Supp. 1200, 1202 (D. Kan. 1982).

This Court explained the overriding importance of reducing district-size deviation in *O’Sullivan*. The *O’Sullivan* Court stated that “the *only* relevant constitutional requirement imposed upon a plan [the court] adopt[s] 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.” *Id.* at 1203, *citing Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) (emphasis added). The Court further stated that “this requirement is the ‘preeminent if not sole criterion’ for evaluating the constitutionality of redistricting plans.” *Id. citing Chapman*, 420 U.S. at 23. Although, the *O’Sullivan* Court was stating this in reference to a congressional reapportionment plan, the same logic applies to all reapportionment plans at issue in the case at bar. It should further be noted that that other considerations that enter into redistricting, such as compactness, contiguity, respect for political subdivisions, and like criteria are not constitutionally required. Only reducing deviation in district size is constitutionally required. *See Vera v. Richards*, 861 F. Supp. 1304 (S.D. Tex. 1994). Therefore this Court must be guided by the simple constitutional principle - that populations of each district should be as equal as possible.

To achieve this goal, the Court should begin by comparing the deviations of maps considered in the Kansas Legislature. Below is a listing of the state legislative reapportionment

plans¹ proposed in the Kansas Legislature that are being advocated by a party in this action. The respective deviation of each map is noted. Relative overall range is the most important consideration, since it reflects the maximum potential difference between the strength of a vote in the largest district and the strength of a vote in the smallest district. It therefore represents the strongest case that a voter in largest district could make the case that his or her rights under the Equal Protection Clause have been violated.

Senate			
Rank	Map Name	Relative Overall Range	Relative Mean Deviation
1	For The People 12	5.22%	1.59%
2	Buffalo 30	6.12%	1.97%
3	Buffalo 30 Revised	6.14%	1.97%
4	For The People 13 b	7.41%	2.07%
5	Wheat State 5	7.37%	2.08%
6	For The People 6	9.74%	3.06%
7	Wheat State 1	9.95%	3.33%
8	Ad Astra	9.94%	3.89%
9	Ad Astra Revised JoCo Wichita 3	9.94%	3.89%

House			
Rank	Map Name	Relative Overall Range	Relative Mean Deviation
1	Cottonwood 1	9.86%	2.80%
2	Cottonwood II	9.86%	2.84%

Based solely on the objective criterion of lowest deviation, the Court should begin with two state legislative maps: For the People 12 and Cottonwood 1.² However, the Court should not simply order reapportionment based on these maps. The relative overall range of each can be cut in half with relatively little work. With the assistance of the Kansas Legislative Research Department and its Maptitude software, the Court could easily and significantly reduce the

¹ The Defendant notes that the congressional maps generally have the same deviations. As for the Congressional map, it would appear that, of the maps proposed in the legislature, Bob Dole 1 (which was based on the 34th Great State (*Compare* Joint Stipulation Exhibit 44 and Exhibit 49) has the most overall support in the legislature. *See* Joint Stipulation ¶¶ 75 & 79.

² Cottonwood 1 is the only map that arguably “passed” the Kansas Legislature, in the sense that it was approved by both houses. *See* Joint Stipulation ¶¶ 76 & 81. Therefore, it is conceivable that this Court could allow a higher deviation on this map for this reason. However, Defendant does not necessarily support such an approach.

deviation of each map in one or two days' time. Defendant respectfully urges the Court to take the additional step of modifying these two maps to eliminate the deviation as much as possible. Doing so would advance the Fourteenth Amendment requirement that is at the center of this case and would render the resulting maps constitutionally unassailable. Because of the time constraints that surround this litigation, foreclosing any appeal based on excessive deviation is of paramount importance if the citizens of Kansas are to have their elections in a timely manner.

III. The Court Should Reject Maps that are Designed to Afford Political Advantage to Certain Incumbents.

The United States Supreme Court has repeatedly recognized that incumbent protection is a legitimate state goal (for legislatures) when drawing maps, only in so far as the goal is to avoid contests between incumbents. *See Bush v. Vera*, 517 U.S. 952, 964 (1996); *Karcher v. Daggett*, 466 U.S. 725, 740 (1983). The Supreme Court has never gone so far as to create a blanket immunity allowing incumbent legislators to protect themselves from challenger. On the contrary, in a 2004 memorandum opinion the Court affirmed a lower court decision that held that there is no legitimate state goal in incumbency protection, broadly defined. *Cox v. Larios*, 542 U.S. 947 (Mem.)(2004) *affirming Larios v. Cox*, 300 F.Supp.2d 1320, 1348-49 (N.D. Georgia, 2004). The lower court in reaching its decision cited several other federal district courts that found “only the prevention of contests between incumbents” as a legitimate state goal, not protecting incumbents from challengers in general. *Larios v. Cox*, 300 F.Supp.2d at 1348-49 *citing: Marylanders v. Schaefer*, 849 F.Supp. 1022, 1036 (D.Md. 2004); *Gonzalez v. Monterey County*, 808 F.Supp. 727, 735 (N.D. Cal. 1992); *Wesch v. Hunt*, 785 F.Supp 1491, 1499 (S.D. Ala. 1992).

Additionally in *Larios*, the district court found the protection of incumbents is not a legitimate state policy when applied in an inconsistent and non-neutral fashion. *Larios v. Cox* at 1347. In *Larios*, the Democrat-controlled legislature protected Democrat incumbents while

purposefully damaging the re-election hopes of Republican legislators, including placing Republican incumbents within the same district. *Id.* Justice Stevens, joined by Justice Breyer, stated that “drawing district lines that have no neutral justification in order to place two incumbents of the opposite party in the same district is probative of the same impermissible intent as the ‘uncouth twenty-eight sided figure’, that defined the boundary of Tuskegee, Alabama, in *Gomillion v. Lightfoot* or the ‘dragon descending on Philadelphia from the west’ that defined Pennsylvania’s District 6 in *Vieth*.” *Cox v. Larios*, 542 U.S. 947 (Mem.) (2004) (Steven, J. concurring) (internal citations omitted). The same logic dictates that a state legislative plan drawn to protect certain incumbents from non-incumbent primary election challengers is not consistent or neutral and thus is not a legitimate state policy. A court, when fashioning a reapportionment plan, cannot give judicial force to such base motivations. Consequently, the exclusion of primary challengers in Buffalo 30, Buffalo 30 Revised, and Ad Astra renders such maps illegitimate in an Article III judicial proceeding.

No legitimate interest—either in the state legislature or in this Court—is served by the purposeful removal of known challengers from incumbents’ districts. Where this Court finds such schemes they should be repudiated. “[N]ever before have districts been drawn on a block-by-block or neighborhood- or town-splitting level to corral voters perceived as sympathetic to incumbents or *to exclude opponents of the incumbents*. This form of incumbent protection is much different in degree from the generalized, and legitimate, goal of incumbent and seniority protection previously recognized by the Supreme Court.” *Vera v. Richards*, 861 F. Supp. 1304, 1334 (S.D. Tex. 1994) (*citing White v. Weiser*, 412 U.S. 783, 791 (1973), and *Gaffney v. Cummings*, 412 U.S. 735, 753 n.18 (1973)) (emphasis added). Allowing such a practice to be reflected in a redistricting plan issued by this Court would not result in a circumstance where “the

people select their representatives, but in which the representatives have selected the people.” *Id.*

Attempting to maintain superiority over one’s political opponents through the redistricting process is a decennial fact of life in state legislatures that control the redistricting process. Such efforts may be sanctioned by the courts only where the purpose is to ensure that two incumbents do not face one another in an election. The elimination of known challengers from one’s district has never been lended the legitimacy of an Article III court decision. As this Court pursues the driving principle of one-person, one vote, it must take care not to embrace any map that has been constructed to serve this plainly-illegitimate purpose.

CONCLUSION

WHEREFORE, Defendant requests that the Court select the reapportionment plans for the Kansas House of Representatives and Kansas Senate with the lowest deviation (lowest relative overall range) and modify those plans to decrease the deviations so that no district varies more than one percent from the ideal district size. Additionally, the Defendant requests that the Court reject any plan that affords certain advantages to certain incumbents. Defendant requests that the Court adopt a State Board of Education plan based on the resulting Senate plan. With respect to the congressional reapportionment plan, Defendant requests the Court to adopt Bob Dole 1, which falls within this minimal deviation range.

Defendant further requests that the Court issue a reapportionment plan containing congressional, state legislative, and State Board of Education Districts as soon as possible, with the following additional orders, if necessary, to ensure that the upcoming primary election can be conducted in an orderly manner that complies with applicable state and federal laws:

- If the decision is issued on or before **June 8th**, the candidate filing deadline and the primary election date are adequate as they stand currently. They should not be altered.

- If the decision is issued between **June 9th** and **June 13th**, inclusive, the filing deadline should be moved to **June 15th**. The primary election date should not be altered.
- If the decision is issued between **June 14th** to **June 20th**, inclusive, the filing deadline should be moved to **June 22nd**, and the primary election date should be moved to **August 14th**. The Court should also order all counties election officers in the State of Kansas to move any elections that were to be held on August 7th to the new date of August 14th.

Finally, Defendant further requests that the Court use the Maptitude software and infrastructure available with the Kansas Legislative Research Department (KLRD) of the Kansas Legislature and run all available quality control checks through the KLRD to ensure that a plan issued is adequately precise and can be acted on immediately by my office.

Respectfully submitted,

**OFFICE OF THE KANSAS
SECRETARY OF STATE**

By: /s/ Ryan A. Kriegshauser
Ryan A. Kriegshauser, Kan. Bar No. 23942
Kris W. Kobach, Kan. Bar No. 17280
Memorial Hall, 1st Floor
120 SW 10th Avenue
Topeka, KS 66612-1597
Phone: (785) 296-4564
Fax: (785) 368-8032
Email: sos@sos.ks.gov

ATTORNEYS FOR DEFENDANT

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on counsel for Plaintiff via the Court's Electronic Filing System, this 29th day of May, 2012.

/s/ Ryan A. Kriegshauser
Attorney for the Defendant