

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

ROBYN RENEE ESSEX)
)
Plaintiff,)
)
GREG A. SMITH,)
BRENDA LANDWEHR and)
GARY MASON,)
)
Intervenor-Plaintiffs)
)
v.)
)
KRIS W. KOBACH,)
Kansas Secretary of State)
)
Defendant.)

CIVIL ACTION
Case No. 12-CV-04046

**TRIAL BRIEF OF INTERVENOR-PLAINTIFFS BRENDA LANDWEHR,
GARY MASON AND GREG A. SMITH ON CONSTITUTIONAL ISSUES**

Intervenor-Plaintiffs Brenda Landwehr, Gary Mason, and Greg A. Smith argue that the four Kansas Senate reapportionment plans considered in and, in two cases, passed by the Kansas Senate in 2012 – “Ad Astra,” see Joint Stipulation Ex. 66 (Population Summary) and 67 (Map); “Ad Astra Revised JoCo Wichita 3,” see Joint Stipulation Ex. 68 (Population Summary) and 69 (Map), contained in HB 2371, see Joint Stipulation Ex. 110, passed by the Kansas Senate 21-19 on May 1, 2012 but defeated in the Kansas House 43-72 on May 2, 2012; “Buffalo 30,” see Joint Stipulation Ex. 70 (Population Summary) and 71(Map); and “Buffalo 30 Revised,” see Joint Stipulation 72 (Population Summary) and 73 (Map), contained in HB 2807, see Joint Stipulation 127, passed by the Kansas Senate 21-17 on May 18, 2012, but not considered by the House – are unconstitutionally drawn and accordingly should not be considered or adopted by the Court in

determining and establishing the Kansas Senate reapportionment plans and new districts that will govern the 2012 Kansas Senate elections, for the reasons set forth below.

A. THE “AD ASTRA REVISED JOCO WICHITA 3” KANSAS SENATE REAPPORTIONMENT PLAN UNCONSTITUTIONALLY DIVIDES AND DILUTES THE VOTING STRENGTH OF HISPANIC VOTERS IN CONTRAVENTION OF SECTION 2 OF THE VOTING RIGHTS ACT, 42 U.S.C. SEC. 1973, AND THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT

Evidence adduced at trial, including in particular the direct testimony of Intervenors Rep. Greg A. Smith and Kansas House Speaker Mike O’Neil, the testimony on cross examination of Senator Thomas Owens, the sworn Declarations of Intervenors Rep. Brenda Landwehr (Ex. 1320) and Gary Mason (Ex. 1321), Joint Stipulation Exs. 68 and 69, and Joint Ex. 3, conclusively establish that there is currently one and only one district in the Kansas Senate, District 36, represented by Senator Allan Schmidt, a majority of the population of which is comprised of a census-recognized racial or ethnic minority, specifically a Hispanic/Latino minority, and that the “Ad Astra Revised JoCo Wichita 3” reapportionment plan, passed by the Senate on May 1, 2012, but voted down by the House on May 2, effectively diluted and divided the voting strength of that recognized minority by collapsing the 36th Kansas Senate District and dividing its population among three other Senate districts.

A state violates Sec. 2 of the Voting Rights Act:

“ if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial or ethnic group] in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 U.S.C. Sec. 1973(b).

The U.S. Supreme Court has identified three threshold conditions for establishing a Sec. 2 violation: (1) the racial or ethnic group is “sufficiently large and geographically compact to constitute a majority in a single member district”; (2) the racial or ethnic group is “politically cohesive”; and (3) the majority “votes sufficiently as a bloc to enable it...usually to defeat the minority’s preferred candidate.” *Johnson v. De Grandy*, 512 U.S. 997, 1006-1007 (1994) (quoting *Grove v. Emison*, 507 U.S. 25, 40 (1993), in turn quoting *Thornburg V. Gingles*, 478 U.S. 30, 50-51 (1986)). These are the so-called *Gingles* requirements, and the present Intervenor contend that they have all been established by the evidence in this case described above.

If all three *Gingles* requirements are established, the statute directs the Court to consider the “totality of circumstances” to determine whether members of a racial or ethnic group have less opportunity to vote for candidates of their choice than do other members of the electorate. *League of United Latin American Citizens v. Perry, Governor of Texas*, 548 U.S. 399, 418 (2006); *De Grandy, supra*, at 1011-1012 ; see also *Abrams v. Johnson*, 521 U.S. 74,91 (1997). In *League of United Latin American Citizens*, the Court found dilution and weakening of Latino voting strength in one Congressional district in Texas and, considering the compactness of such voting strength in one specific district, coupled with the fact that such dilution was not sufficiently offset by Latino voting strength in other districts, the Court concluded that a violation of Sec. 2 of the Voting Rights Act had occurred in the Congressional redistricting plan at issue in that case.

The present Intervenor contend that exactly the same circumstances exist here: Since Latinos comprise a majority of the population of current Kansas Senate District 36, and thus hold a compact voting strength there; since such compact voting strength is not offset by Latino

voting strengths in other Kansas Senate districts, because no other such district contains a population the majority of which is comprised of a recognized Latino (or other racial or ethnic) minority; and since the current Kansas Senate District was collapsed and its population dispersed among three other Senate districts in the “Ad Astra Revised JoCoWichita 3” Senate reapportionment plan; it is clear that the “Ad Astra Revised” plan unconstitutionally dilutes and divides the Latino voting strength in the one recognized majority/minority district in the Kansas Senate, in contravention of Sec. 2 of the Voting Rights Act and, accordingly, fails to comport with the Equal Protection Clause of the 14th Amendment. As such, this Court should reject such Kansas Senate reapportionment plan and not consider it in any way in determining and establishing Kansas Senate district boundaries for purposes of the 2012 elections.

B. THE “AD ASTRA,” BUFFALO 30,” AND “BUFFALO 30 REVISED” SENATE REAPPORTIONMENT PLANS ARE UNCONSTITUTIONAL IN THAT THEY EACH CONSTITUTE POLITICAL GERRYMANDERING VIOLATING THE “ONE PERSON ONE VOTE” GUARANTEE OF THE EQUAL PROTECTION CLAUSE OF THE 14TH AMENDMENT

The uncontroverted evidence in this case -- in particular the testimony of Intervenor Rep. Greg A. Smith and House Speaker Mike O’Neil, the cross examination of Intervenor Senator Thomas Owens, the sworn Declarations of Intervenor Rep. Brenda Landwehr (Ex. 1320) and Gary Mason (Ex. 1321), the applicable Senate Reapportionment plan maps and population summaries, Joint Stipulation Exs. 66, 67, and 70-73, and the Senate District Core Population Migration Summary (Ex. 815) -- establishes the following:

1. Intervenor Landwehr is a current member of the Kansas House of Representatives and a duly filed and declared candidate for election to current District 25 of the Kansas Senate in 2012, a district in which she has resided since 1980. The current incumbent of this district is Senator Jean Schodorf. Intervenor Mason is a duly filed and declared candidate

for election to current District 31 of the Kansas Senate in 2012, a district in which he has resided since April 1999. The current incumbent of this district is Senator Carolyn McGinn. Intervenor Smith is a current member of the Kansas House of Representatives and a duly filed and declared candidate for election to current District 8 of the Kansas Senate, a district in which he has resided since the 1990s. The current incumbent of this district is Senator Thomas Owens, Chair of the Senate Reapportionment Committee and an Intervenor in this proceeding.

2. Landwehr publically filed with the Kansas Secretary of State for election to the 25th Kansas Senate seat on October 26, 2011, Smith did so for the 8th Kansas Senate seat on September 9, 2011, and Mason did so for the 31st Kansas Senate seat on March 6, 2012, after having publically filed an Appointment of Treasurer for his Senate campaign on September 26, 2011 and having conducted a press conference publically announcing his candidacy for the 31st Senate seat on January 3, 2012. All Kansas senators, including the incumbents in these three Senate districts—District 25 Senator Jean Schodorf, District 31 Senator Carolyn McGinn, and District 8 Senator Thomas Owens, Senate Reapportionment Committee Chair – had access to this public information regarding the known Senate candidacies of their opponents, Landwehr, Mason and Smith, and Senator Owens admitted he had actual knowledge that Landwehr, Mason and Smith were known challengers for their respective Senate district seats, at the time the Seante was proposing, deliberating and voting on Senate reapportionment plans during the 2012 Legislative session.
3. The original “Ad Astra” and the “Buffalo 30” Kansas Senate reapportionment plans originating in the Senate, and the “Buffalo 30 Revised” Senate reapportionment plan

passed by the Kansas Senate on May 18, 2012 but not voted on in the House, all are configured in such a way as to exclude Mason's residence from the 31st Senate District for which he has filed as a candidate, in most cases by dividing the very residential subdivision in which he resides such that his residence is placed approximately 700 yards outside the proposed new 31st Kansas Senate District. All three such plans maintain incumbent Senator McGinn's residence within the 31st District. To accomplish this, all three plans place Mr. Mason's residence in a tiny, narrow "peninsula" of land jutting up from the north end of the 30th Kansas Senate district, to the south of his current 31st District.

4. The "Ad Astra," "Buffalo" and "Buffalo 30" plans all are configured in such a way as to exclude Landwehr's residence from the 25th Senate District for which she has filed as a candidate, despite the fact that she resides no more than 12 blocks from the residence of the 25th District's incumbent Senator, Jean Schodorf. These three plans all maintain incumbent Senator Schodorf's residence within the 25th District. To accomplish this, these three plans all place Landwehr in the 29th Kansas Senate District, to the east of her current 25th District, despite the fact that all significant population growth in the Wichita, Sedgwick County area in recent years has been to the west in the 31st District and beyond, and each plan moves 25-26% percent of the current 25th Kansas Senate District core population into other districts.
5. The "Ad Astra," "Buffalo 30," and "Buffalo 30 Revised" all are configured in such a way as to exclude Smith's residence from the 8th Senate District for which he had filed as a candidate by placing him in the 10th Senate District, only eight houses, or approximately 500 feet, from the 10th District's boundary with the 8th District. These three plans all

maintain Reapportionment Chair Senator Owen's residence within the 8th District. To accomplish this, these three plans all move the 8th Senate District's core community, downtown Overland Park, including Overland Park City Hall, Police Department, city offices, and Shawnee Mission West High School, out of the 8th District; each move all of Rep. Smith's current 22nd House District entirely out of the 8th Senate District, despite the fact that Smith's 22nd House District is a core Overland Park district comprised almost entirely of Overland Park precincts, sharing a community of interest with the 8th Senate District; and each plan moves from 51-54% of the 8th Kansas Senate District's core population into other districts.

6. The applicable Population Summary Reports for "Ad Astra" (Joint Stipulation Ex. 66), "Buffalo 30" (Joint Stipulation Ex. 70), and "Buffalo 30 Revised" (Joint Stipulation Ex. 72) show percentage district-by-district variances from the ideal new Senate district population of 70, 986, based on 2010 Census figures, of from -4.38 to +3.03 (7.41 relative overall range), -3.04 to +3.09 (6.13 relative overall range), and -3.04 to +3.10 (6.14 relative overall range), respectively. These variances far exceed the -1% to +1% per district ranges (2.0% relative overall range) considered the outside limit of population variances tolerated under the Equal Protection Clause's "one person one vote" principle, discussed below, absent compelling additional *legitimate* public purpose principles recognized by the courts and reflected in the "Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting" (Joint Stipulation Ex. 9).

Intervenors Landwehr, Mason and Smith contend that the foregoing uncontroverted facts lead to the inescapable conclusion that the "Ad Astra," "Buffalo 30," and "Buffalo 30 Revised" plans were clearly crafted, considered and voted favorably on by Intervenor Owens, as Senate

Reapportionment Chair, and other Senators purely for purposes of political gerrymandering, rather than for any fair, judicially recognized purpose, in order to narrowly exclude Landwehr, Mason and Smith, known challengers to incumbents Schodorf, McGinn and Owens himself, from their current Senate districts, thereby denying these known challengers the opportunity to oppose the current incumbents of their districts in 2012 election contests.

It has long been recognized by the Supreme Court that state reapportionment plans that constitute political gerrymandering, when solely motivated by partisan objectives, are justiciable violations of the Equal Protection Clause of the 14th Amendment and the First Amendment, because such plans serve no legitimate public purpose and burden one group because of its political opinions and affiliations. See *Davis v. Bandemer*, 478 U. S. 109, 118-127 (1986); *Vieth v. Jubelirer*, 541 U.S. 267, 306 (2004); *League of United Latin American Citizens, supra*, at 409.

Intervenor Landwehr, Mason and Smith argue here that the Equal Protection Clause's "one person one vote" principle that is the foundation for assessing the constitutionality of state reapportionment plans, which suggests that only minor variances (+/-1%, 2% overall range) from ideal per district population numbers can be constitutionally tolerated, may constitutionally be modified within a larger *de minimus* range (up to +/-5%, 10 overall range), *only* to accommodate legitimate public policy purposes recognized by the courts, and political gerrymandering solely for partisan purposes, as with the "Ad Astra" and "Buffalo 30" plans, is *not* such a legitimate public policy purpose.

Article I, § 2 of the United States Constitution requires that any voting plan must guarantee that "as nearly as is practicable one man's vote in a congressional election . . . to be worth as much as another's." *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964); *see also Reynolds v. Sims*, 373 U.S. 533, 560-61 (1964). Although this standard only applies in congressional voter district

challenges, similar concepts of fair representation, which have their basis in the Equal Protection Clause of the Fourteenth Amendment, are applied to drawing maps for state legislative voting districts. *See Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) (citing cases establishing that generally an apportionment plan with a maximum population deviation under 10% is considered a “minor deviation” from mathematical equality where legitimate public policy purposes dictate the wider range); *Reynolds*, 373 U.S. at 557; *Marylanders for Fair Representation v. Schaefer*, 849 F. Supp. 1022, 1030-31 (D. Md. 1994) (citing *Gaffney v. Cummings*, 412 U.S. 735, 748 (1973)).

When considering among available plans that produce similar levels of population equality, the courts consider five primary factors that are sometimes known as “traditional districting principles.” *See generally Shaw v. Reno*, 509 U.S. 630, 647 (1993) (referring to compactness, contiguity, and respect for political subdivisions as objectively defensible districting policies); *Carstens v. Lamm*, 543 F. Supp. 68, 82 (D. Colo. 1982). First, the inquiry considers whether a proposed plan preserves county, municipal and other political subdivision boundaries, as fragmentation of such known and respected political units frustrates the ability of constituencies to organize effectively and increases the likelihood of voter confusion. Second, the Court looks to whether any of the proffered plans dilute the vote of any racial minority. Third, consideration is given to whether a plan creates districts that are “compact and contiguous” so as to prevent political gerrymandering, reduce electoral costs, and increase the effectiveness of voter representation. Fourth, voting plans that preserve existing district boundaries are preferred. The fifth and final component of the inquiry is whether a plan “groups together communities sharing common economic, social, or cultural interests.” *O’Sullivan*, 540 F. Supp. at 1204. These “traditional districting principles” long recognized by the courts have been adopted in the Kansas

Legislature’s “Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting” (“Guidelines”). *See* Joint Stipulation, Ex. 9.

Intervenors here contend that these are the “legitimate public policy purposes” contemplated by *Davis*, *Vieth*, *League of United Latin American Citizens* and their progeny, described above as justifying wider than +/-1% population variances from the “one person one vote” rule otherwise dictated by the Equal Protection Clause. Notably absent from this list of “primary factors” recognized by the courts, and embodied in the “Guidelines,” is political gerrymandering solely for partisan political purposes. But Intervenors here argue that the uncontroverted facts of this case clearly establish that political gerrymandering solely for partisan political purposes was and is the sole motivation for and intent of the “Ad Astra” and “Buffalo 30 Revised” plans. As this purpose is not a legitimate basis for enlarging the +/-1% variances otherwise required by the “one person one vote” principle, and since the population variances occurring in the “Ad Astra” and “Buffalo 30 Revised” plans, as set forth above, are far greater than that, these politically gerrymandered plans each violate the Equal Protection Clause of the 14th Amendment, and should be rejected by the Court.

Dated: June 1, 2012

Respectfully submitted,

s/John J. Rubin
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CERTIFICATE OF SERVICE

I hereby declare and certify that I filed Intervenor-Plaintiffs Brenda Landwehr's, Gary Mason's and Greg A. Smith's Trial Brief on Constitutional Issues with the Court and served copies thereof on all parties by way of the Court's CM/ECF System this 1st day of June, 2012.

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