IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBYN RENEE ESSEX, *et al.*,	)	
Plaintiffs,	)	**CIVIL ACTION**
v.	)	**Case No. 12-CV-4046-KHV-JWL**
KRIS W. KOBACH, Kansas Secretary of State,	)	
Defendant,	)	
and	)	
THE STATE OF KANSAS *ex rel.* DEREK SCHMIDT, Attorney General of Kansas,	)	
Intervenor/Defendant	)	

POST-TRIAL BRIEF OF INTERVENOR/DEFENDANT THE STATE OF KANSAS ON THE ISSUE OF CONSTITUTIONALITY

COMES NOW the State of Kansas, on the relation of Derek Schmidt, Attorney General of Kansas, by and through counsel, and respectfully provides the Court with the following arguments and authorities on the constitutional considerations that are at issue as the Court undertakes the task of drafting redistricting maps for Congress, the State Legislature, and the State Board of Education. The Attorney General presents this brief to the Court in recognition of the State's interest in seeing that the maps approved by the Court are clearly constitutional and are, therefore, likely to avoid requests for appellate review, or, alternatively, to withstand appellate scrutiny. The interests represented by the

Attorney General in this matter, including the State's financial interest in limiting the cost of this action, will be best served by a swift and final resolution of this dispute.

I. INTRODUCTION

This is a case of first impression in the District of Kansas, and the precedents established by this Court will endure. Never before has the Kansas federal court been called upon to redraw state *legislative* districts. Indeed, the last time the Kansas Legislature failed to enact state legislative reapportionment, resulting in judicial intervention, was prior to *Reynolds v. Sims*, 377 U.S. 533 (1964). *See Harris v. Shanahan*, 192 Kan. 183, 213, 387 P.2d 771 (1963) (Kansas Supreme Court supervised legislative reapportionment). It is sad commentary that we are here – but here we are.

Confronted earlier this year with a similar inability of its Legislature to enact new legislative districts, the Supreme Court of New Mexico relied upon the sage advice of former Justice Felix Frankfurter: "[t]he one stark fact that emerges from a study of the history of [legislative] reapportionment is its embroilment in politics, in the sense of party contests and party interests. … [c]ourts ought not to enter this political thicket." *Maestas v. Hall*, 274 P.3d 66, 76 (N.M. 2012) (*quoting Colegrove v. Green*, 328 U.S. 549, 554 (1946)). Intervening Defendant State of Kansas, *ex rel* Derek Schmidt, Attorney General, respectfully suggests that the interests of the voters and taxpayers of Kansas will be well-served if this Court also assiduously avoids entering the "political thicket" of Kansas Legislative redistricting in its resolution of this case, relying instead upon a narrow judicial resolution consistent with the applicable commands of the United States Constitution.

This Court has equitable authority to adopt a map submitted to it, to modify a submitted map, or to draw its own map for Kansas Senate districts and for Kansas House of Representatives districts. *O'Sullivan v. Brier*, 540 F. Supp. 1200, 1202–03 (D. Kan. 1982) (citations omitted). Because the case law guiding this Court in redrawing Congressional maps is clear and has not been disputed, this brief will focus only on the law applicable to Kansas Senate and Kansas House of Representatives maps, where the applicable constitutional parameters have been subject to dispute.

To the extent it involves State legislative districts, this case comes before this Court because the Kansas Legislature failed to meet its non-discretionary duty imposed by Article 10, § 2, of the Kansas Constitution to redraw State Senate and State House boundaries during the 2012 regular session. This failure has tangible legal consequences. While it is true that the United States Supreme Court has commanded federal courts to accord deference to legitimate state policy judgments other than population deviation in maps drawn by states (*see, e.g., Perry v. Perez*, 132 S. Ct. 934, 943 (2012) (finding that federal district court erred by substituting its preference for lower overall population deviation for state legislature's preference for other legitimate factors); *Gaffney v Cummings*, 412 U.S. 735, 743 (1973)), it also is true that the failure of the Kansas legislature to enact by law a valid map has left wholly unanswered the question of what state policy judgments might be entitled to judicial deference. Put another way, there is no *State* policy for this Court to defer *to* – all that is present here are the competing policy preferences of various factions, none of which commanded sufficient support to become state law. There is no requirement that this Court defer to any proposed map that has been submitted during this proceeding. *See O'Sullivan v. Brier*, 540 F. Supp. at 1202

(*citing Sixty-Seventh Minnesota State Senate v. Beens*, 406 U.S. 187, 197 (1972)). By failing to express through enactment of law its preferences for weighing other legitimate factors that would have been entitled to deference by this Court, the Kansas Legislature essentially waived any entitlement to deference by this Court.

II. INTEREST OF THE STATE OF KANSAS

This case is before this Court because the Equal Protection Clause of the Fourteenth Amendment grants the right of each Kansas citizen to have his or her vote carry the same weight as that of every other citizen in the selection of state legislators. This right would be violated if the 2012 elections were to be conducted in the current districts, which are unconstitutionally malapportioned. The State respectfully suggests that protecting the voting rights of Kansas citizens by remedying the looming constitutional violation is the *only* duty that must be fulfilled by this Court.

In other words, this Court *must* remedy the one-person, one-vote violation that will occur because of the Kansas Legislature's failure to enact new maps through the normal political process. While this Court *may*, in its discretion, weigh legitimate factors other than population deviation, all such other factors are subordinate to the principles of the Fourteenth Amendment that lie at the heart of the constitutional infirmity of existing legislative districts.

The State has been allowed to intervene in order to defend the Kansas fisc against unreasonable costs that may result from any fees or costs awarded at the conclusion of this proceeding. A past appeal from a decision of this Court redrawing Kansas Congressional district boundaries after a failure of the Kansas Legislature to do so resulted not only in an award of plaintiffs' fees incurred through trial *but also an award*

of additional fees incurred during the appeal. See In re Kansas Congressional Districts Reapportionment Cases, 745 F. 2d 610, 614 (10th Cir. 1984). The State notes that more than 30 attorneys have appeared to represent the plaintiff and various intervenors, and, although there is no showing that any party is entitled to fees, the State's potential fee exposure in this case is not inconsequential. Kansas citizens, whose rights this action seeks to protect, are one and the same as the Kansas taxpayers who have paid once for the 2012 Legislature's incomplete work that resulted in no reapportionment. They are the same taxpayers who have been asked, by the pleadings of the plaintiff and most intervenors, to pay a second time for the cost of having this Court draw districts to remedy the Legislature's failure. Kansas taxpayers should not be put at risk of having to pay a third time, upon appeal, for the cost of protecting their own constitutional rights and certainly not a fourth time should an appeal result in remand and further proceedings on any issue. Therefore, the State seeks to assist this Court in identifying the constitutional requirements that must be applied to this case in order to stay clearly within the bounds of the Constitution, thereby reducing the likelihood of appeal.

III. ARGUMENTS AND AUTHORITIES

After *Baker v. Carr*, 369 U.S. 186 (1962), held that equal protection claims relating to apportionment of a state legislature were justiciable, the Supreme Court announced the basic rule still in effect today, *i.e.*, that both houses of a State legislature must be apportioned on a population basis. *Reynolds v. Sims*, 377 U.S. 533, 568 (1964). Fair and effective representation is the basic goal of legislative apportionment; the Equal Protection Clause of the Fourteenth Amendment requires equal representation for all voters. The dilution of the weight of a person's vote because of the person's place of

residence impairs a basic right in violation of the Fourteenth Amendment. *Id.* As the *Reynolds* Court stated: "[t]he Equal Protection Clause demands no less than substantially equal state legislative representation for all citizens, of all places as well as of all races." *Id.* at 568.

The State has previously urged this Court to adopt legislative maps that are "clearly within" the overall deviation standards required by the Fourteenth Amendment. See Answer of State of Kansas to Essex Complaint, Prayer for Relief, ¶ 3 (Doc. 130). In doing so, the only factors that this Court *must* consider are compliance with the Fourteenth Amendment's one-person, one-vote requirement and compliance with the Voting Rights Act. No Voting Rights Act violation has been alleged (other than that arising from malapportionment itself). Therefore, only a failure of this Court to approve legislative maps that clearly satisfy the one-person, one-vote requirement of the Fourteenth Amendment is likely to result in reasonable ground for appeal. For that reason, the State urges this Court to elevate that issue above others and to decline invitations to resolve other disputes that would have been more suitable for resolution in the political arena of the Kansas Legislature.

It is clear that the 10 percent overall deviation standard for state-drawn legislative districts established by *White v. Regester* and its progeny is inapplicable in this case. The justification for allowing such significant deviation from absolute population equality -- deference to the primary role of the states in redistricting -- is wholly absent in this case because of the unprecedented inability of the Kansas Legislature to fulfill that role. Consequently, the constitutionally permissible overall deviation that this Court must apply is clearly less than 10 percent.

The United States Supreme Court has not established a bright-line threshold to be applied by federal courts, such as this one, that are of necessity drawing state legislative maps. Despite the absence of a bright-line test, the Supreme Court has made clear that in circumstances like the one before this Court "[a] court-ordered plan, however, must be held to higher standards than a State's own plan. With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features." *Chapman v. Meier*, 420 U.S. 1, 26 (1975). Thus, *Chapman* held that "unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature must … achieve the goal of population equality with little more than *de minimis* variation." *Id.* at 26-27. In *Chapman*, the Supreme Court stopped short of requiring court-drawn legislative maps to comply with the strict zero-deviation standard of congressional redistricting, *id.*, n. 19, but made clear the Supreme Court's preference for low overall deviation in circumstances such as this one. Since *Chapman*, the Supreme Court consistently 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)). In short, the applicable law appears to be that lower deviations are clearly better.

Having reviewed the case law since *Chapman*, the State has been unable to identify a single case in which a *federal* court that is drawing a state legislative map (as opposed to reviewing a map enacted by a state legislature) has successfully applied an overall population deviation greater than 2 percent. The State has identified several cases in which a federal court has drawn a state legislative map with overall deviation of 2

percent or less. *See, e.g., Baldus v. Wisconsin Gov't Accountability Board*, 2012 WL 983685 (E.D. Wisc., Mar. 22, 2012); *Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga. 2004); *Stenger v. Kellett*, 2012 WL 601017 (E.D. Mo., Feb. 23, 2012). While there are post-*Chapman* cases in which a court-drawn map exceeded 2 percent overall deviation, those cases have arisen in state, not federal, court. *See Burling v. Chandler*, 148 N.H. 143, 804 A.2d 471 (2002) (per curiam) (approving 9.26 percent deviation); *Below v. Gardner*, 148 N.H. 1, 963 A.2d 785 (2002) (approving 4.96 percent deviation); *Maesta v. Hall*, 274 P.3d 66, 81 (N.M. 2012)(finding error in lower court's adherence to ultra-low deviation at the expense of other legitimate state interests); *but see Wilson v. Eu*, 4 Cal. Rptr. 2d 379, 823 P.2d 545 (Cal. 1992); *Hippert v. Ritchie*, 2012 WL 540946 (Minn., Feb. 21, 2012). Legislative maps drawn by a state court are entitled to broader deference in population deviations for the same reasons as maps drawn by state legislatures.

Therefore, while the State cannot say with certainty that a legislative map adopted by this *federal* Court that has an overall population deviation exceeding 2 percent would be found constitutionally defective, neither can the State say with any certainty that it would not. It is the State's view that a decision by this Court to adopt a legislative map with deviation above 2 percent would invite appeal, while a map with overall deviation less than 2 percent would discourage appeal.

IV. CONCLUSION

The narrowly focused interest of the State at this point in the proceedings is to assist this Court in resolving the constitutional issues before it in a manner most likely to constitute a final determination of those issues rather than in a manner that is likely to invite appeal and the associated delay, uncertainty, and cost. To that end, the State urges

this Court to err on the side of certainty and finality and to adopt state legislative maps with overall population deviations below 2 percent. Given the posture of this case and the available case law, that level of deviation is the most likely to result in broad acceptance as being "clearly within" the deviation permitted by the Fourteenth Amendment. Such an approach is consistent with the fundamental notion that "The right to vote is the essence of our country's democracy, and therefore the dilution of that right strikes at the heart of representative government." *Maestas v. Hall*, 274 P.3d 66, 70 (N.M. 2012) (*citing Wesberry v. Sanders*, 376 U.S. 1, 17 (1964)).

As it focuses on its duty of satisfying that singular constitutional requirement, this Court should also remain mindful of Justice Frankfurter's "political thicket" in which it is operating. Universal acceptance of the maps ultimately approved by this Court – and, thus, avoidance of appeal – is most likely to arise not only from the precise mathematics of the Court-drawn maps but also from a shared perception among all parties that this Court has carefully avoided becoming yet another political actor in the months-long saga that has been Kansas legislative reapportionment in the year 2012. "Because the redistricting process is embroiled in partisan politics, when called upon to draw a redistricting map, a court must 'do so with both the appearance and fact of scrupulous neutrality.' To avoid the appearance of partisan politics, a judge should not select a plan that seeks partisan advantage. Thus, a proposed plan that seeks to change the ground rules so that one party can do better than it would do under a plan drawn up by someone without a political agenda is unacceptable for a court-drawn plan." *Maestas v. Hall*, 274 P.3d at 76 (*quoting Peterson v. Borst*, 786 N.E.2d 668, 673 (Ind. 2003)). The *Maestas* Court also looked favorably upon precedent "rejecting plans submitted by the parties

because each had calculated partisan political consequences, the details of which were unknown, leaving no principled way for the court to choose between the plans, while knowing that the court would be endorsing an unknown but intended political consequence if it chose one of the plans," *Maestas*, at 76 (*citing Wilson v. Eu*, 4 Cal. Rptr. 2d 379, 823 P.2d 545, 576–77 (1992) (en banc)).

The State of Kansas seeks certainty and finality in the legislative maps ultimately approved by this Court. The interests of the State and of its voters and taxpayers will best be served if this dispute ends here, without further litigation but with the full protection of every Kansas voter's Fourteenth Amendment rights. For that reason, the State urges this Court to craft new maps for the Kansas Senate and the Kansas House of Representatives that have overall population deviation of less than 2 percent and that reach this goal based upon this Court's own independent assessment of how such maps should be drawn and not from a more narrow interest. Because of the precedent-setting nature of this case of first impression in Kansas, this Court's independent approach is especially important. No particular party or intervenor should have reason to believe this process operated to its ultimate advantage. There should be no incentive created for factions within future Legislatures to desire to invoke this process again in derogation of their assigned constitutional duty.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 1, 2012, I electronically filed the foregoing with the clerk of the court by using CM/ECF system which will send a notice of electronic filing to all counsel of record.

s/ Jeffrey A. Chanay
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