

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

ROBYN RENEE ESSEX,	)	
	)	
<i>Plaintiff</i>	)	Case No. 12-4046
	)	
v.	)	
	)	
KRIS W.KOBACH, Secretary of State	)	
	)	
	)	
<i>Defendant.</i>	)	
	)	

**SOUTH-CENTRAL KANSAS INTERVENORS' POST-TRIAL BRIEF**

**I. INTRODUCTION**

This Court's has a duty to draw a series of voter district maps because the Legislature abdicated theirs in the first instance. Because the Court is not a legislature, its universe of considerations is smaller and devoid of political machinations described by some trial witnesses. In discharging its constitutional responsibility, this Court is not casting the tie-breaking vote between competing factions. Instead, this Court's plan must attain *de minimis* deviations not available under Buffalo 30 Revised. In this Post-Trial Brief, Intervenors will address the constitutionality of Senate Districts in south-central Kansas. The law as applied to the evidence establishes that the Buffalo 30 plans are unconstitutional because:

1. The deviations from voting equality are not *de minimis* and are unacceptable in a court-ordered plan.
2. This Court has a constitutional mandate to alter existing districts only so much as to achieve one person, one vote standards, but has no political mandate to abolish, relocate, or create new districts in violation of historically significant state policies.

3. The population trends asserted as justifications for Buffalo 30 plans were not supported by acceptable evidence and were unevenly applied in violation of Equal Protection standards.

The law and the evidence showed the best way achieve a constitutional, court-ordered plan. In particular, this Court should begin with the 2002 map as the starting point and move existing boundaries as little as possible until near perfect deviation is obtained. As noted by the testimony, this can be done consistent with legitimate state interests affecting south-central Kansas as shown in the Essex A and For the People maps.

## **II. ARGUMENT AND AUTHORITIES**

### **A. Equal Protection Requires Senate Districts With Only *De Minimis* Deviations From One Person, One Vote.**

*Reynolds v. Sims*, 373 U.S. 533, 557 (1964), established the inviolate maxim that a vote in Cowley County or Sumner County is worth no less than a vote in Johnson County. And, while state legislators may have the flexibility to weigh competing political factors within this framework and enact a map with more tolerance for deviations, *see generally Brown v. Thomson*, 462 U.S. 835, 842 (1983), this Court – in our federal system of government – cannot, *see Abrams v. Johnson*, 521 U.S. 74, 98 (1997). Instead, the sole task is to draw a map with as near zero total deviation as possible. *See Chapman v. Meier*, 420 U.S. 1, 26-27 (1975); *Connor v. Finch*, 431 U.S. 407, 415 (1977); *see also Large v. Fremont County, Wyo.*, 670 F.3d 1133, 1138 n.6 (10th Cir. 2012). Population equality– a lack of total deviation – is the paramount objective of the Equal Protection Clause. *See Karcher v. Daggett*, 462 U.S. 725, 732 (1983).

The Buffalo 30 Revised Plan imposes unjustified, unconstitutional deviations on the South-Central Kansas Intervenors and every other south-central Kansas voter. The adverse deviations in most area districts are approximately 3% more population than idea. The total

deviation, comparing with the favored districts in Johnson County, is more than 6%. The South-Central Kansas Intervenors have found no case approving a court-ordered plan with such a high deviation. *See generally Bodker v. Taylor*, Case No. 02-CV-999, 2002 WL 32587312, at \* (N.D. Ga. June 5, 2002) (assuming a .98% deviation was *de minimis*, but still explaining the deviation).

**B. There Are No Persuasive Justifications To The Greater Deviation Buffalo 30 Maps Require.**

There are no compelling state justifications for this Court to draw a map that does not obtain *de minimis* deviations. It is the burden of those seeking greater deviation to justify why such deviation is necessary. None of the Buffalo 30 Revised proponents met this high burden. Instead, the evidence at trial firmly supported the contentions in the South-Central Kansas Intervenors' Trial Brief, ECF No. 218, that the traditional redistricting factors recognized to be strong state policies supported retaining Senate Districts 16 and 32 without material change.

**1. Ordinary Political Considerations That Often Guide The Legislature May Not Be Relied Upon To Deviate From *Reynolds*.**

The political considerations offered by the legislator-witnesses in favor of Buffalo 30 Revised do not meet *Chapman's* high threshold. For example, much testimony was offered to justify Buffalo 30 Revised on the basis of (i) traditional deference between the House and Senate, (ii) protecting an incumbent, (iii) drawing challengers in or out of Senate Districts, and/or (iv) cannibalizing a Senate District from an area of the state based upon "whose turn" it is to subjugate themselves to Johnson County's interests. These are political calculations that legislators are permitted to make based upon the (perhaps generous) assumption they can adequately weigh the competing interests of "traditional state policies within the constitutionally mandated framework of substantial equality." *Connor v. Finch*, 431 U.S. at 414-15; *see also Abrams v. Johnson*, 521 U.S. 74, 101 (1997) (recognizing the task of resolving competing

redistricting policies is best left to the legislators accountable to the voters). Federal courts, on the other hand, “possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people’s name.” *Connor*, 431 U.S. at 415; *see also Perry v. Perez*, 132 S. Ct. 934, 941 (2012) (recognizing courts have difficulty defining neutral legal principles because redistricting ordinarily involve criteria weighed and evaluated by the elected branches in the exercise of their political judgment); *Fletcher v. Golder*, 959 F.2d 106, 109 (8th Cir. 1992) (“The political motivations behind any of the plans are legally irrelevant.”). Indeed, as the public interest and media coverage of this dispute demonstrated, it is an arena that this Court should altogether avoid. *See Connor*, 431 U.S. at 415; *Williams v. Jeffersonville City Council*, Case No. 03-0002, 2003 WL 1562565, at \*7 (S.D. Ind. 2003) (citing *Wyche v. Madison Parish Police Jury*, 769 F.2d 265, 268 (5th Cir. 1985)).

## **2. Cannibalizing A Senate District Is A Political – Not Judicial – Choice.**

There is also no pervasive state policy to support cannibalizing Senate District 32 and moving it to Lenexa. As noted, Senator Owens and twenty colleagues believed collapsing a Senate District was a good idea. Nineteen Senate colleagues – not to mention a majority of the House – disagreed. Indeed, all proposed maps except for the Buffalo series of maps that Senator Owens championed, rejected the idea of collapsing a Senate District.

Even those that wanted to collapse a Senate District could not agree on which Senate District to target. As Senator Owens testified, Senate District 32 was only one of three areas he considered cannibalizing for the benefit of Johnson County. *See Buffalo 20* (retaining Senate Districts 16 and 32); *Buffalo 40 Revised* (same). His (or the Senate’s) wish of cannibalization never passed the House (much less became law) and is contrary to the 2002 map. *See Carstens*,

543 F. Supp. at 78-79; *Shayer v. Kirkpatrick*, 541 F. Supp. 922, 932 (W.D. Mo. 1982) (“failure of a bill to be enacted evidences a legislative policy that the bill is not desired by the legislature).

The Supreme Court’s recent decision in *Perry v. Perez* demonstrates this Court has no basis for any radical departure from the 2002 map. In *Perry*, the Court was given the task of dropping in four new congressional districts awarded to the State of Texas following the 2010 Census. The State had recently enacted a plan, but the plan had not yet obtained preclearance of Voting Rights Act compliance from the D.C. Circuit. Nevertheless, the Supreme Court held the district court had to use the state-approved plan as the starting point for state policy. “To the extent the District Court exceeded its mission to draw interim maps that do not violate the Constitution or the Voting Rights Act, and substituted its own concept of ‘the collective public good’ for the Texas Legislature’s determination of which policies serve ‘the interests of the citizens of Texas,’ the court erred.” 132 S. Ct. at 941; *see also Shayer*, 541 F. Supp. at 932.

Unlike in *Perry*, Kansas has no new state senate districts on which this Court can rely. There were and remain only 40, and there is and no agreed-upon state policy to abolish or move any of them 200 miles or more. Instead, this Court can – and should – make only incremental changes to the 2002 map until *de minimis* deviations are obtained and await further legislative declaration of state policy, if any. *See, e.g., South Carolina State Conf. of NAACP v. Riley*, 533 F. Supp. 1178, 1180-81 (D. S.C. 1982) Because none of the competing maps obtained the constitutionally-required affirmative vote of both chambers nor the signature of the Governor, none of the maps considered by the Legislature contain state policy that this Court may rely upon to support cannibalization. *See Carstens v. Lamm*, 543 F. Supp. 68, 79 (D. Colo. 1982). Accordingly, the best statement of policy is the 2002 map, which retains south-central Kansas’ voting districts.

**C. There Is No Existing Or Permissible State Policy To Over-Value Johnson County Voters And Under-Value South-Central Kansas Voters.**

The Equal Protection Clause, as set forth in *Reynolds*, does not permit geographic discrimination any more than it permits race discrimination. *See Reynolds*, 377 U.S. at 566. The Buffalo 30 Revised Plan indisputably discriminates against south-central Kansas voters, where all senate districts are “heavy” (more voters than ideal, leaving each vote with *less* weight) in favor of Johnson County, where all senate districts are “light” (fewer voters than ideal, leaving each vote with *more* weight). *See* ECF 218, p. 14 (describing the disparate impact upon South-Central Kansas intervenors). The Buffalo 30 proponents tried to justify deviations based on projections of future population trends in Johnson County.

In *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969), the Supreme Court concluded that reliance on growth projections is permissible only if “thoroughly documented and applied throughout the State in a systematic, not *ad hoc*, manner.” 394 U.S. at 535; *see also* ECF No. 218, p. 27-29. Although the Johnson County contingent spent considerable time describing what they hoped the numbers would be for Johnson County in 2022, they spent no time and offered no evidence analyzing the systematic growth projections in the rest of the state. They offered no analysis of data they merely parroted.<sup>1</sup> Instead, they seem comfortable suggesting that a current constitutional violation of every other Kansan should persist until their projections of Johnson

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<sup>1</sup> In particular, an individual – paid by a grant from Johnson County – testified that he had seen a report that census bureau estimated the population of Johnson County by 2020 would be 645,000. Leaving aside the fact that the actual census data – not projections – is the benchmark, the estimate was undocumented and uncertain. For example, Johnson County Community College’s website, <http://www.jccc.edu/about/profile.html>, projects a 2020 population of 589,000, which is 56,000 *fewer* than estimated by Buffalo 30 proponents. The website is certainly not evidence, but it demonstrates the wildly speculative nature of the premise in Buffalo 30 Revised.

County growth (and, presumably, unstated assumptions about population change in the rest of the State) come to fruition (if ever).

There is good reason why no data or projections for south-central Kansas were considered by the Buffalo 30 proponents. As noted by the South-Central Kansas Intervenors, south-central Kansas also grew during the past ten years and has been growing consistently for over 30 years. *See* ECF Nos. 207, 208, and 209; Joint Exh. 2; ECF No. 218, Ex. 511. The evidence is undisputed that Wichita grew more in total population than any other city from 2000 to 2010 – by more than 38,000 people. *See* Joint Exh. 2. And, the Wichita MSA grew by 51,600 people in the same period. *See* ECF No. 218, Ex. 511. No one testified that the Wichita area was expected to stop growing or decline in population during the next decade. The evidence is to the contrary. *See* ECF Nos. 207, 208, and 209 (admitted as Trial Exhibits 501, 502, and 503). But, the Buffalo 30 Revised Plan is based on projecting significant declines in population in every single district included in south-central Kansas and the Wichita metro area:

**Districts in whole or part in Wichita MSA/CSA**

<u>Dist #</u>	<u>Population</u>	<u># deviation</u>	<u>% deviation</u>
15	72,939	1,953	2.75
16	73,100	2,114	2.98
25	73,177	2,191	3.09
26	72,113	1,127	1.59
27	73,140	2,154	3.03
28	73,041	2,055	2.89
29	72,974	1,988	2.80
30	72,736	1,750	2.47
31	73,168	2,182	3.07
32	Collapsed/Relocated	---	
33	72,026	1,040	1.47

ECF No. 218, Ex. 504. Adoption of Buffalo 30 Revised would impose an immediate denial of Equal Protection upon all residents within south-central Kansas. *See Reynolds*, 377 U.S. at 566.

**D. South-Central Kansas Districts Can Be Drawn To Achieve *De Minimis* Deviations Without Injuring Historic Governmental Boundaries, Voting Allegiances, And Shared Communities Of Interest.**

The current Senate District map was challenged and approved in *In re Stovall*, 273 Kan. 731, 731-32, 45 P.3d 855, 856 (2002). The plan, known as Senate Bill 256, passed the Senate (29-11) on April 2, 2002 and, two days later, the House also passed it by wide margins (106-15). *See id.* Governor Graves signed the bill on April 8, 2002. *See id.* [This map](#) is the last to be approved by the elected representatives of the voters in Kansas. As noted previously, the 2002 map – like the maps before it – retained the critical voting alignment in south-central Kansas.. ECF No. 218, p. 29-30; *see also* ECF 171, ¶ 93 & Ex. 130.

The legitimate state interests previously recognized by this Court are embodied in the 2002 Senate District map and should be preserved with minimal alterations to attain the lowest possible deviation.<sup>2</sup> “A frequently used model in reapportioning districts is to begin with the current boundaries and change them as little as possible while making equal the population of the districts.” *Stenger v. Kellett*, Case No. 11-CV-2230, 2012 WL 601017, at 3 (E.D. Mo. Feb. 12, 2012) (recounting the testimony of Dr. David Kimball, who performed the redrawing exercise for the Court to obtain deviations of less than one-tenth of one percent). The 2002 map should be the starting point of this Court’s re-drawing exercise because it embodies the will of the people as expressed just ten years ago, the Kansas Legislature was unable to muster sufficient interest in departing from those choices, and it maintains the continuity of representation for each

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<sup>2</sup> The South-Central Kansas Intervenors adopt and incorporate by reference the discussion concerning what is and what is not *de minimis* deviation contained in the brief of amicus curiae, ECF No. 235. *See* Fed. R. Civ. P. 10(c).

district. *See id.*; *see also Riley*, 533 F. Supp. at 1180-81 (recognizing any court-drawn plan should alter the old only insofar as necessary to obtain acceptable deviation).

Using the 2002 map also has a practical benefit. As the testimony confirmed of Senator King and Corey Carnahan confirmed, starting with the 2002 map and making minor alterations to each district until *de minimis* deviation obtained is the simplest way to draw a constitutionally-acceptable map. They further testified that this is what occurred when drafting For the People 12 and 13b and Essex A.

Making minor alterations to the 2002 map will also maintain allegiance to the traditional redistricting guidelines Kansas legislators have historically relied upon. These guidelines focus upon traditional redistricting factors, including preservation of county and municipal boundaries to promote voter representation, compactness and contiguity, preservation of existing boundaries, and grouping those communities sharing a common social, civic, economic, and cultural interests. *See generally* ECF No. 171, ¶ 45 & Ex. 9; ECF No. 218, pp. 15-23. Making minor alterations would, as Essex A demonstrates, largely keep these districts and the respective communities of interest of south-central Kansas together. On the other hand, collapsing a Senate District from anywhere, especially in south-central Kansas, violates these principles. *See* ECF No. 218; ECF No. 171, Ex. 9, ¶ 4.c & 4.e.

**III. CONCLUSION**

The South-Central Kansas Intervenors – like every Kansan – are entitled to equal representation under Reynolds. Buffalo 30 Revised, regardless of the political issues Senator Owens proffered, denies them this right and cannot be justified. The South-Central Kansas Intervenors therefore respectfully request this Court adopt a map, recognizing the 2002 map as the last state-approved districts, and protecting their historical boundaries, voting allegiances and community of interests.

Respectfully submitted,

FOULSTON SIEFKIN LLP

By: /s/ Toby Crouse  
Toby Crouse, KS #20030

James D. Oliver, KS #08604  
32 Corporate Woods, Suite 600  
9225 Indian Creek Parkway  
Overland Park, Kansas 66210-2000  
(913) 498-2100  
(913) 498-2101 FAX  
Email: [tcrouse@foulston.com](mailto:tcrouse@foulston.com)  
[joliver@foulston.com](mailto:joliver@foulston.com)

and

Jay Fowler, KS #10727  
1551 N. Waterfront Parkway, Suite 100  
Wichita, Kansas 67206  
(316) 267-6371  
(316) 267-6345  
Email: [jfowler@foulston.com](mailto:jfowler@foulston.com)

ATTORNEYS FOR WALTER T. BERRY  
and LYNN NICHOLS

**CERTIFICATE OF SERVICE**

I hereby certify that on the 1st day of June, 2012, a true and correct copy of the above and foregoing was filed using the Court's CM/ECF filing system, which will serve all interested parties of record by electronic mail.

/s/ Toby Crouse  
ATTORNEY FOR WALTER T. BERRY  
and LYNN NICHOLS