

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

ROBYN RENEE ESSEX, Plaintiff, vs. KRIS W. KOBACH, Kansas Secretary of State, Defendants))))))))))))	CIVIL ACTION Case No. 12-4046-KHV-DJW
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TRIAL BRIEF OF INTERVENOR PLAINTIFFS SENATOR JEFF KING, SENATOR STEVE ABRAMS, AND SENATOR RAY MERRICK

COME NOW Plaintiff Intervenors Senator Jeff King, Senator Steve Abrams, and Senator Ray Merrick, by and through counsel of record, and state that the senatorial map For the People 13(b) best satisfies federal and state constitutional, statutory requisites and guidelines issued by the Kansas legislature for senatorial redistricting.

I. Intro

This cause of action arose in the face of the 2010 Census, which made clear the present districting map of the State of Kansas is unconstitutional. The Kansas legislature has so far failed to agree on a redistricting map, causing this suit to ensue and pray this Court delivers the map that best meets the constitutional requirements. Accordingly, several redistricting maps were drawn and proposed for this court’s consideration, specifically the For the People series of maps culminating in For the People 13(b), and the Buffalo 30 and Buffalo 30 Revised map (jointly “Buffalo 30” or “Buffalo 30 plan”). Plaintiffs King, Abrams and Merrick’s arguments will focus solely on the senatorial redistricting maps. Particularly, established federal and state constitutional requirements

are mandated in developing redistricting plans for the court's consideration, and "For the People 13(b)" best upholds these directives.

II. Facts

In 2002, the Kansas Legislature passed the current version of Chapter 4 of the Kansas Statutes apportioning districts for Kansas' congressional seats, and both houses of the Kansas Legislature, pursuant to the 2000 Federal Census. *See Joint Stip. of Facts, paras. 33, 34, attached hereto as Exhibit 1.* Upon completion of the 2010 Federal Census Article 10 of the Kansas Constitution required the Kansas Legislature to re-apportion districts during the regular 2012 legislative session. *See Ex. 1, Joint Stip. of Facts, paras. 31, 33, 36.* The Kansas Legislature is also commanded by the 14th Amendment of the United States Constitution and the Voting Rights Act to apportion its congressional seats every ten years, with the last apportionment having taken place in 2002. *See Ex. 1, Joint Stip. of Facts, paras. 31, 33.* Under the April 2010 Federal Census, the ideal Kansas congressional district would contain 713,280 persons. *See Ex. 1, Joint Stip. of Facts, para. 34.*

As set forth by the Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting¹ ("Guidelines") approved and adopted by the Kansas legislature, the legislative redistricting was to apportion districts as numerically as equal in population as practical, and deviations were not to exceed plus or minus 5 percent of the ideal population of 22,716 for each House district and 70,986 for each Senate district, except in unusual circumstances. *See Ex. 1, Joint Stip. of Facts, para. 37; see also,*

¹ The Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting were developed using Constitutional requirements and criteria provided by Federal Courts in redistricting maps, specifically *O'Sullivan v. Brier et. al*, 540 F. Supp 1200, 1203 (D. Kan. 1982).

Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting, attached hereto as Exhibit 2. Accordingly, the Guidelines applied the following criteria to achieve these goals:

- a) The “building blocks” to be used for drawing district boundaries shall be voting districts (VTDs) as described on official 2010 Redistricting U.S. Census maps.
- b) Districts should be as compact as possible and contiguous.
- c) The integrity and priority of existing political subdivisions should be preserved to the extent possible.
- d) There should be recognition of similarities of interest. 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. While some communities of interest lend themselves more readily than others to being embodied in legislative districts, the Committee will attempt to accommodate interests articulated by residents.
- e) Contests between incumbent members of the Legislature or the State Board of Education will be avoided whenever possible.
- f) Districts should be easily identifiable and understandable by voters.

See Ex. 2, Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting.

The Kansas Legislature is now in its regular 2012 session, and has failed to reapportion districts for Kansas’ congressional seats as commanded by 14th Amendment of the United State Constitution and the Voting Rights Act, and has yet to re-apportion seats for the Kansas State Legislature, as required by Article 10 of the Kansas Constitution. *See Ex. 1, Joint Stip. of Facts, para. 40.* For the People 13(b) was passed by the House of Representatives on May 10, 2012. *See Ex. 1, Joint Stip. of Facts, para. 86.*

Both houses of the Kansas Legislature have passed segments of re-apportionment plans, but these bills (and all others) have failed to advance. *See Ex. 1, Joint Stip. of Facts, paras. 74-87.* With the Kansas Legislature having adjourned sine die on Sunday, May 20, 2012, the two houses of the Legislature are at an impasse in their efforts to re-apportion Kansas' congressional and state legislative districts. *See Ex. 1, Joint Stip. of Facts, para. 40.*

According to the April 2010 United States Federal Census, the Kansas Congressional districts and state legislative districts established in 2002 that remain in the legal maps of the state are unequally apportioned in violation of the Equal Protection standards as interpreted by the courts over the years. *See Joint Stip. of Facts, paras. 31, 35.* The present apportionment of Kansas' congressional and state legislative districts are therefore no longer based upon any logical or reasonable formula, but are arbitrary and capricious. *See Ex. 1, Joint Stip. of Facts, para. 40.*

The redistricting map For the People 13(b) was developed using the Guidelines, working with numerous legislators and considering many Guideline factors to create a well-tailored map that could garner the required number of votes to become law. *See Affidavit of Senator Steve Abrams, paras. 8, 11, attached hereto as Exhibit 3.* Although it passed the Kansas House, a similar map (For the People 12) failed by a mere two votes in the Kansas Senate from becoming law. *See Ex. 1, Joint Stip. of Facts, para. 86.* For the reasons stated below, For the People 13(b) best observes the criteria and spirit of the redistricting Guidelines adopted by the Kansas Legislature. *See Ex. 3, Affidavit of Senator Steve Abrams, para. 26.*

III. For the People 13(b) best upholds the constitutional requirements of all proposed redistricting maps.

In considering the constitutionality of proposed redistricting maps, the ultimate goal is to “make as nearly as is practicable one man’s vote in a congressional election . . . be worth as much as another’s.” *O’Sullivan v. Brier et. al*, 540 F. Supp 1200, 1203 (D. Kan. 1982) (citing *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964)); *see also Reynolds v. Sims*, 377 U.S. 533, 84 (1964); *see also In re Senate Bill No. 220*, 593 P.2d 1, 6 (Kan. 1979). Courts additionally consider multiple factors in determining the constitutionality of redistricting plans, including (1) whether a proposed plan preserves county and municipal boundaries, (2) whether a plan dilutes the vote of any racial minority, (3) whether a plan creates districts that are compact and contiguous, (4) whether a plan preserves existing congressional districts, and (5) whether a plan groups together communities sharing common economic, social, or cultural interests. *O’Sullivan*, 540 F. Supp at 1203.

a. For the People 13(b) reapportions the district with a reasonable population deviation, as nearly as practicable to the one-man, one-vote standard.

“While the Supreme Court has rejected the argument that there is a fixed numerical or percentage population variance small enough to be considered de minimus . . . it has recognized the difficulty of drawing congressional districts with mathematical precision.” *Id.* at 1206 (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 530(1969); *Wesberry v. Sanders*, 376 U.S. 1, 18 (1964)). Therefore, “[i]nsignificant deviations from the population of the ideal district are permitted without justification unless there is established a convincing case that a violation of equal protection is involved. *In re Senate Bill No. 220*, 593 P.2d at 6. “To determine whether the deviation in population is

insignificant, the sum of the greatest percentage above the ideal and the greatest percentage below the ideal, which has been termed ‘total deviation’ and perhaps more accurately ‘total maximum variation,’ is compared with total deviations previously approved by case law.” *Id.*

The Supreme Court has found that population deviations of 10.00% or less are prima facie evidence of constitutional validity for the reapportionment of state legislative districts. *See generally Vionovich v. Quilter*, 507 U.S. 146, 161 (1993); *Brown v. Thompson*, 462 U.S. 835, 842-43 (1983); *White v. Regester*, 412 U.S. 755, 764 (1973) (holding that minor population deviation of 9.9% did not establish a prima facie constitutional violation); *see also Petition of Stephan*, 836 P.2d 574 (Kan. 1992) (holding no justification for deviation needed where the overall deviation for the representative districts was 9.72 percent and the overall deviation for the senatorial districts was 6.89 percent).

In *Kirkpatrick*, the Court set forth population variances are permitted where they “are unavoidable despite a good-faith effort to achieve absolute equality, or for which justification is shown.” 394 U.S. at 531, 533; *see also White v. Weiser*, 412 U.S. 783, 790 (1973); *see also O’Sullivan*, 540 F. Supp at 1203. Put another way, the Supreme Court recognized in *Swann v. Adams* that the federal standard permits “minor variations which ‘are based on legitimate consideration incident to the effectuation of a rational state policy.’” 385 U.S. 440, 444 (1967).

Indeed, the Supreme Court detailed a number of state policies that, “when applied in a consistent and nondiscriminatory manner, can justify some level of population deviation.” *Larios v. Cox*, 300 F. Supp. 2d 1320, 1331 (N.D. Ga. 2004). The Supreme

Court indicated some policies that may permit some deviation from perfect population equality in *Karcher v. Daggett*: “Any number of consistently applied legislative policies might justify some variance, including, for instance, making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives.” 462 U.S. 725, 740 (1983); *see also* *Petition of Stovall*, 44 P.3d 1266, 1271 (Kan. 2002). Ultimately, the *O’Sullivan* court held that population deviation did no violence to the Constitution's one-person one-vote requirement “when, as a trade-off, Kansas [would] be able to maintain the political integrity of its county units.” 540 F. Supp at 1207.

In the case at bar, no claim has been raised that any proposed plan has sufficient deviations to violates the equal protection clause, and For the People 13(b) and Buffalo 30, satisfy the prima facie constitutionality requirement of having less than 10% deviation. As the Court in *Regester* held that a minor population deviation of 9.9% did not establish a prima facie constitutional violation, For the People 13(b)’s population of 7% falls within the requisite percentage of meeting constitutional requirements. Like *Karcher* where the Court held that any number of consistently applied legislative policies might justify some variance, including making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives, the minor deviation under For the People 13(b) is wholly justified under other required considerations, more fully set forth below. Therefore, the court should look to these additional considerations as set forth below to determine which plan would be best to adopt given the other factors.

b. For the People 13(b) best preserves the current county and municipal boundaries, and existing districts.

Courts attach “great importance to the preservation of county and municipal boundaries.” *O’Sullivan*, 540 F. Supp at 1203. This has been viewed as the “most important factor after the need to achieve constitutionally acceptable population variances.” *Id.* The *O’Sullivan* court noted “that county lines are meaningful in Kansas, and that a redistricting plan should split counties only if absolutely necessary to maintain a constitutional population variance.” *Id.* The Supreme Court has held that “districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering.” *Reynolds v. Sims*, 377 U.S. 533 (1964).

From the proposed maps before this court, For the People 13(b) unquestionably most closely resembles the current districts. Its drafters tailored this map to address the *O’Sullivan* court’s focus on preserving existing Senate, county, and other municipal boundaries, varying from such lines only if absolutely necessary to maintain a constitutional population variance. The impact of this effort is evident throughout For the People 13(b), but especially in its ability to preserve the integrity of Districts 1 and 21 in northeast Kansas, and preserve the historical unity of Cowley and Sumner counties in District 32 in south-central Kansas.

For the People 13(b) also best maintains the integrity of counties and other municipalities. When one considers that: (a) the map must split six Kansas counties because they contain too many people for only one senate district; and (b) one town split by For the People 13(b) (Spring Hill) is already divided between Johnson and Miami

counties, the paucity of municipal boundaries divided by For the People 13(b) becomes even more impressive.

Conversely, Buffalo 30 would severely alter current county and municipal boundaries and current senate districts, arguably for political gains. The numerosity of these unnecessary changes demonstrates Buffalo 30's non-compliance with these two factors, demonstrated by its:

a) collapsing of two districts in areas of the state with a stable (and often growing) population;

b) splitting of Cowley and Sumner counties that have been unified for decades;

c) taking district 37, currently exclusively in Johnson County, far out of Johnson County even though this district had the highest population of any in the state;

d) splitting of Butler County even though this county is near the ideal size of a Senate district and constitutes a community of interest within itself;

e) moving of Pottawatomie County from District 1 to 21 and Nemaha County from District 21 to 1 even though District 1 does not need to change population and the trade would move virtually the same population between the two senate districts;

f) splitting Miami County for apparently no reason other than to divide a historically unified county and, by way of political agenda, take away all of the land around Senator Apple's home;

g) removing approximately 90% of Butler County's land (over 42,000 of its people) from the 32nd District, even though it currently maintains a near ideal population;

h) dividing the 15th District into four different Senate districts even though the surrounding population does not justify or necessitate such a change;

i) changing Sedgwick County districts (specifically, districts 25, 27 and 28) with no known population justification;

j) changing of Districts 7, 8 and 25 dramatically from current lines without any population rationale;

k) apparent alteration of Districts 7 and 8 to force an unneeded shift in District 10 and justify placing the proposed new Johnson County district much further north than population shifts would otherwise support;

l) placing the new Johnson County District in an area of slower population growth (or population decline) rather than in the rapidly growing areas of southern Johnson County, which new district could be made almost entirely out of the extra population of districts 9, 23, and 37;

m) splitting of Leavenworth County even though it could support a senate seat on its own; and

n) splitting of Lawrence three ways with the only potential justification being to spread out its Democrat votes to protect current Democrat incumbents.

The severe and numerous changes listed above are unsupported by any reason other than to achieve political gains for the drafter and supporters of Buffalo 30. Conversely, For the People 13(b) accomplishes constitutionally required redistricting by most closely maintaining current district, county and municipal boundaries, and should thereby be adopted for the State of Kansas.

c. For the People 13(b) does not dilute the vote of any racial minority.

The Supreme Court has issued numerous opinions with regard to reapportionment since 1992 dealing mainly with the 1982 amendments to the Voting Rights Act. *See e.g.*

Petition of Stovall, 44 P.3d at 1271. Section 2 of the Voting Rights Act prohibits any “standard, practice or procedure,” including redistricting plans, that result in discrimination against minority voters. *Id.* (citing 42 U.S.C. § 1973 (1994)). “The purpose of 42 U.S.C. § 1973 is to create minority opportunity districts, not maximization of minority voting strength,” and “[s]tates may not dilute a minority group's voting strength by dividing such a group among numerous representative districts.” *Petition of Stovall*, 44 P.3d at 1272. “On the other hand, a state may not dilute a minority group's strength by “packing” as many members of such a group into one district as possible and, thus, diluting the minority group's bloc voting strength in adjacent districts.” *Id.* “In general, minority representation may not be diluted by fracturing, packing, or other methods of gerrymandering of political boundaries.” *Id.* (citing *In re House Bill No. 3083*, 836 P.2d 574 (Kan 1992)).

No Plaintiffs have raised the dilution of racial minority votes as a concern in the case at bar. Nonetheless, For the People 13(b) satisfies this constitutional mandate. Specifically, through the development of For the People 13(b), efforts were taken to not dilute minority voting strength under the Guidelines and Criteria in addition to constitutional requirements. *See Affidavit of Sen. Abrams, paragraph 10*. Moreover, the data compiled by the Kansas Legislative Research Department supports this conclusion. Thus, For the People 13(b) properly takes into consideration and does not dilute the minority vote.

d. For the People 13(b) best links communities of common economic, social and cultural interests.

Court consider a variety of considerations as to economic, social and cultural interests, including educational connections, economic, educational projects, social

projects, demographic factors, military reservation locations, and agriculturally oriented counties. *O’Sullivan*, 540 F. Supp. at 1204-05. For example, when the *O’Sullivan* court was deciding whether to separate Wyandotte County and Johnson County into separate districts, the court reasoned that “the ties that bind the two counties together economically, politically, and culturally are significantly greater than those that divide them.” *Id.*

For the People 13(b) unites multiple “communities of interest.” Specifically, it links the four senate districts the 17-county area historically known as southeast Kansas. Most recently, the unity of this area is shown by Project 17, a regionalization initiative between these 17 counties that has brought widespread community buy-in throughout the region, won a million dollar leadership training grant from the Kansas Leadership Center, and received national recognition as a regionalization model in the US Senate. For the People 13(b) ensures common representation of this over 270,000-person area through four southeast Kansas senators. Such focused, region-specific representation (which Buffalo 30 would destroy) is vital to Project 17 and the entire area in that it maintains a core of individuals who can ensure Project 17 accountability and promote regional unity. For the People 13(b) also binds together the historic communities of interest of Lawrence as well as those of south-central Kansas.

While Buffalo 30 purports to uphold common social, economic and cultural interests, this is directly contradicted in its placement of the new Johnson County district in an area of slower population growth rather than in a fast growing area of population in the south. Even though the new district could be fashioned almost entirely out of the extra population of districts 9, 23, and 37, this is not what the plan would accomplish.

Moreover, the Buffalo 30 plan fragments the community of interest in southeast Kansas and reduces this representation from four to three Senators, thereby destroying the foundation of Project 17. Additionally, the Buffalo 30 plan splits Butler County even though this county very close to the ideal size of a Senate district and a community of interest within itself.

Thus, as For the People 13(b) binds together communities that are economically, politically, and culturally like-minded and organized, this plan best accomplishes grouping together similar interests of the State of Kansas.

e. For the People 13(b) maintains a compact and contiguous district.

As stated above, one of the legislative policies courts consider with regard to selecting a proper reapportionment plan is which make legislative districts compact and contiguous. *Karcher*, 462 U.S. at 740; *see also Petition of Stovall*, 44 P.3d at 1271. Considerations noted by the court in *Petition of Stephan* included a committee taking into account the availability and facility of transportation and communication between the people in a proposed district. 836 P.2d at 608. One of the requirements set forth as to this element in the Guidelines and Criteria for redistricting states that the districts should be easily identifiable and understandable by voters. *See generally Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting*. Some courts define “compact” as referring to “the physical shape or size of electoral districts,” while others define it as referring to “closely united territory, a phrase not necessarily limited to physical dimensions.” *See Kurtis A. Kempter, Annotation, Application of Constitutional “Compactness Requirement” to Redistricting*, 114 A.L.R.5th 311 (2003).

For the People 13(b) undoubtedly upholds this requirement. Specifically, as shown by numerous reports, the drafters of For the People 13(b) used the underlying rationales of availability, transportation and communication when devising how to redistrict the current districts. Conversely, the proposed Buffalo 30 plan greatly alters the 21st District in a non-compact way with no population justification. This is done primarily to allow changes in District 1 to be made for political purposes alone. While the drafters of Buffalo 30 may assert that both maps have nominal differences in compactness studies, as For the People 13(b) best preserves the original compactness of the districts, For the People 13(b) most satisfies this requirement. Therefore, For the People 13(b) better accomplishes the goal of compact and contiguous districts.

f. For the People 13(b) achieves federal and state constitutional requirement while avoiding contests between incumbents where possible.

As previously stated, the Supreme Court in *Karcher v. Daggett* averred that among the consistently applied legislative policies that might justify variance in population between legislative districts was avoiding contests between incumbent Representatives.” 462 U.S. at 740. While For the People 13(b) makes every effort to comply with federal and state constitutional requirements while circumventing these types of contests, the Buffalo 30 plan reduces representation in southeast Kansas from four to three Senators, and places incumbent senators in direct contest. The drafters of For the People 13(b) specifically worked to alleviate these types of contests, demonstrating an intent to redistrict without advancing a politically motivated agenda. Thus, as For the People 13(b) avoids unnecessary contests between incumbent senators more so than other proposed plans, this plan should be adopted for the State of Kansas.

IV. No deference should be given to plans that have not survived the bicameral legislative process of approval.

The bicameral legislative process is fundamental to the creation of law. In *O'Sullivan*, the court was faced with a similar situation to the case at bar, where the Legislature failed to adopt a redistricting plan. 540 F. Supp 1200. The court correctly began its review by stating, “we are not required to defer to any plan that has not survived the full legislative process to become law.” *Id.* at 1202. The court further stated that “with the 1971 Kansas plan being constitutionally unacceptable and the legislature having failed to enact a new redistricting plan, our powers are broad,” so that the court could adopt in whole a proposed plan, adopt a proposed plan with some modifications, or draw up a new plan. *Id.* at 1202-03. However, no matter the end result, the court would not entertain a mandatory deference to a plan that had not been made law through the fundamental process of bicameralism. *Id.*

As it currently stands, none of the proposed redistricting plans have survived the full legislative process. The proponents of Buffalo 30 confusingly argue that deference should be given to their redistricting plan as it passed a vote in the Kansas Senate. However, this argument has no supporting legal authority, which is easily explained due to its effect of undercutting the foundation of a bicameral legislative system. The reason all the Plaintiffs in the case at bar are before the court is that no redistricting plans survived the required process to become adopted as law. Buffalo 30 cannot circumvent this constitutional requirement by pointing fingers at subjective points of the process that it would argue adds weight to its plan. Had passing the Senate been enough for Buffalo 30 to be made law, this suit would simply not be before this court. Thus, the court

respectively should not interject itself into the bicameral process and assess which elements of the process are due more weight than others.

V. Conclusion

Thus, as For the People 13(b) makes it as nearly as is practicable one man's vote to be worth as much as another's, best preserves current county and municipal boundaries, takes into consideration the Voting Rights Act in not diluting the vote of any racial minority, best creates districts that are compact and contiguous, and best groups together communities sharing common economic, social, or cultural interests, this legislative redistricting plan should be adopted for the State of Kansas.

Respectfully submitted,

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SENATOR RAY MERRICK

CERTIFICATE OF SERVICE

This is to certify that on May 29, 2012, a true and accurate copy of the above and foregoing was e-filed with the Court using the CM/ECF system which sent notification to all parties entitled to service.

/s/Ricardo Kolster