IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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

Brief of *Amicus Curiae* Samuel D. Brownback
in his Official Capacity as Governor of the State of Kansas

COMES NOW Samuel D. Brownback, as *amicus curiae* in his official capacity as the Governor of the State of Kansas, by and through counsel pursuant to this court's Minute Order of May 25, 2012 (Document No. 152) and to D. Kan. Rule 7.6, and submits his *Amicus* Brief as follows.

I. NATURE OF THE CASE

This is a case brought pursuant to 28 U.S.C. § 2284 seeking a court ordered reapportionment plan for the Kansas Congressional Districts, the Kansas Senate, the Kansas House of Representatives, and the Kansas Board of Education. The Kansas Legislature has failed to adopt any reapportionment plan. As such, this court must order such reapportionment plans in order to preserve the constitutional rights of Kansas citizens.

II. STATEMENT OF INTEREST OF *AMICUS* GOVERNOR BROWNBACK

Amicus Governor Brownback has a substantial interest in the reapportionment plans adopted by this court for the state of Kansas. In particular, *Amicus* Governor Brownback has a special interest as he is the state officer who would have been required to either approve or veto

any reapportionment plan that successfully passed both the Kansas Senate and the Kansas House of Representatives. *Amicus* Governor Brownback's specific interest concerns the state reapportionment plans for the Kansas Senate and for the Kansas House of Representatives. *Amicus* Governor Brownback has made public statements to the Kansas Legislature indicating that for a politically passed reapportionment plan to obtain his support, it must contain districts with low deviations from the ideal population.

While *Amicus* Governor Brownback does not advocate in favor of any particular reapportionment plan in this brief, he does have a substantial interest in protecting the equality of every Kansas citizen's vote. As such, *Amicus* Governor Brownback has an interest in ensuring that any court ordered reapportionment plan adopted by this court meets the stringent "one person, one vote" rule with a near zero total deviation from ideal.

III. STATEMENT OF FACT

Currently, based on the State's total adjusted population, the ideal population for each Kansas state senatorial district is 70,986 persons and the ideal population for each Kansas state representative district is 22,716 persons. *See* Stipulation at ¶ 37. Deviation from ideal district size is measured as a percentage of the ideal. "Total deviation" of any particular plan is calculated by adding the largest negative percentage deviation to the largest positive percentage deviation, regardless of mathematical sign. *See Farnum v. Burns*, 561 F.Supp. 83, fn. 5 (D. Rhode Island 1983) ("The total deviation of a reapportionment plan is determined by adding the deviation of the district with the largest population to the deviation of the district with the smallest population."). Total deviation is referred to by the Kansas Legislative Research Department as "Relative Overall Range." *See, e.g.*, Buffalo 1, Population Summary at http://redistricting.ks.gov/_Plans/Proposed_Plans/m5_buffalo1/30-m5_buffalo1-popsum.pdf. This brief will refer to any particular plan's Relative Overall Range as "total deviation."

The total deviation of each of the Kansas Senate reapportionment plans considered by the Legislature are as follows:

Ad Astra	9.94%
For the People V6 Amendment	9.74%
Ad Astra Revised	9.94%
For the People 12 Amendment	5.22%
Wheat State Amendment	9.95%
For the People 13b	7.41%
Buffalo 30 Revised	6.14%
Buffalo 20	9.93%
Buffalo 30	6.12%
Buffalo 40 Revised	9.8%
Buffalo 1	9.96%
Ad Astra Revised JoCo Amendment	9.94%
Ad Astra Revised Wichita 3 Amendment	9.94%
Ad Astra Revised JoCo Wichita 3	9.94%
Colonel Henry Leavenworth 2 Amendment	8.51%
Wheat State 5 Amendment	7.41%
Alf Landon 1 Amendment	8.23%

See Stipulation at ¶ 91; Population Summaries at http://redistricting.ks.gov/_Plans/plans_proposed_3.html.

The total deviation of each of the Kansas House of Representatives reapportionment plans considered by the Legislature are as follows:

Cottonwood 1	9.86%
LeDoux Amendment	9.86%
Cottonwood 1 Knox B Amendment	9.86%
Cottonwood II	9.86%

See Stipulation at ¶ 91; Population Summaries at http://redistricting.ks.gov/_Plans/plans_proposed_2.html.

IV. STATEMENT OF THE QUESTION PRESENTED

1. Should this court follow the weight of federal court precedent and adopt reapportionment plans that fall within the zero to two percent total deviation safe harbor when there are no significant and articulable non-political state policies that could not otherwise be vindicated by such a near zero deviation plan?

V. ARGUMENTS AND AUTHORITIES

1. Court ordered plans of reapportionment for state legislatures are held to a significantly more stringent constitutional standard for equal population than are plans approved through the political process.

The Constitutional principle of "one person, one vote" was derived from the Equal Protection Clause and has been the guiding principle of political apportionment ever since. Population equality is the "overriding objective" of any court taking up a reapportionment case. *See Reynolds v. Sims*, 377 U.S. 533, 579 (1964). In *Reynolds*, the Court "established that both houses of a state legislature must be apportioned so that districts are as nearly of equal population as is practicable. While mathematical exactness or precision is not required, there must be substantial compliance with the goal of population equality." *Chapman v. Meier*, 420 U.S. 1, 22 (1975) (citing *Reynolds*, 377 U.S. at 577) (internal quotations and citations omitted).

When reapportionment plans are approved through the political process, the Constitution permits wider latitude to deviate from the ideal population for the districts in question. As a general rule, the Court has stated that any plan adopted by the political branches will be presumed to comply with "one person, one vote" if its total deviation is 10% or less. *See Voinovich v. Quilter*, 507 U.S. 146, 161 (1993). However, when the state has failed to adopt a reapportionment plan through the political process, as in the instant case, the Supreme Court has dictated a far more stringent standard of equal representation.

In *Chapman*, the Supreme Court established the rule to apply 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." 420 U.S. at 26 (emphasis added). 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 subsequent decisions, the Court has clearly elucidated the rationale for the *Chapman* rule. The "high standards" of this rule reflects

> the unusual position of federal courts as draftsmen of reapportionment plans. We have repeatedly emphasized that legislative reapportionment is primarily a matter for legislative consideration and determination, for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people's name. In the wake of a legislature's failure constitutionally to reconcile these conflicting state and federal goals, however, a federal court is left with the unwelcome obligation of performing in the legislature's stead, while lacking the political authoritativeness that the legislature can bring to the task. In such circumstances, the court's task is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner free from any taint of arbitrariness or discrimination.

Connor v. Finch, 431 U.S. 407, 414-415 (1977) (internal quotations and citations omitted).

2. This court should adopt a de minimis *standard of zero to two percent total deviation for its court ordered plan of reapportionment for the Kansas Senate and the Kansas House of Representatives.*

The question of what, precisely, is a *de minimis* total deviation per the *Chapman* rule is a question federal courts have struggled to answer. It is clear that there is no bright line rule or mathematically precise standard. Rather, the "question is one of degree." *Connor*, 431 U.S. at 419. Courts have regularly cited *Chapman* for the proposition that the Supreme Court has declined to accept a 5.95% total deviation as *de minimis*. *See, e.g., Connor*, 431 U.S. at fn. 17. While one court has held that a total deviation of 4.11% qualifies as "sufficiently *de minimis*," *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1159 (5th Cir. 1981), this decision appears to be an outlier. The bulk of opinions lead to the conclusion that a *de minimis* standard should fall in the range of zero to two percent total deviation.

For example, in *Colleton County Council v. McConnell*, 201 F.Supp.2d 618 (D. South Carolina 2002), the three judge district court panel rejected plans submitted to the court by the South Carolina House of Representatives and by the Governor with total deviations of 4.86% and 3.13% respectively. The court ruled that both plans "exceed the range of *de minimis* population deviation and, therefore, could not be adopted by this court even if they were to survive the preclearance process under the Voting Rights Act." *Id.* at 652. The plans were "beyond an acceptable range of deviation for a court-ordered plan." *Id.* Instead, the court adopted a plan of reapportionment that "achieves the requisite population equality, with a total *de minimis* deviation of plus or minus one percent variation." *Id.* at 655.

In *Wisconsin State AFL-CIO v. Elections Board*, 543 F.Supp. 630 (E.D. Wisconsin 1982), the three judge district court panel again rejected all plans that had been partially worked by the state legislature, including a relatively low variance plan with a 2.83% total deviation. The court held that "[w]e believe that a constitutionally acceptable plan … *should, if possible, be kept below 2%* [total deviation]." *Id.* at 634 (emphasis added). While the court considered the various state policies present in the partially worked legislative plans, it "reluctantly concluded that we can, by drawing our own plan, be more faithful to the goals of reapportionment than would be the case if we were to take the easy way out and merely adopt one of the plans submitted to us. For this reason we promulgated the attached plan …. The deviation in our plan is a scant 1.74%." *Id.* at 637.

A review of other three judge district court panel opinions demonstrates that the consensus of opinion in cases similar to the instant case tends to cohere around a *de minimis* standard of zero to two percent total deviation. *See Baldus v. Members of the Wisconsin Government Accountability Board*, -- F.Supp.2d --, 2012 WL 983685 (E.D. Wisconsin March

22, 2012) (holding that state legislative reapportionment plans with total deviations of 0.76% and 0.62% complied with the requirement of *de minimis* deviation); *Stenger v. Kellett*, -- F.Supp.2d --, 2012 WL 601017 (E.D. Missouri February 23, 2012) (approving a court ordered reapportionment plan stating that "[t]he maximum deviation between the highest population district and the lowest population district is less than one-tenth of one percent, much lower than the difference [of 1.13%] approved by the Court of Appeals in *Fletcher v. Golder*, 959 F.2d 106, 109 (8th Cir. 1992)."); *Larios v. Cox*, 314 F.Supp.2d 1357 (N.D. Georgia 2004) (holding that a plus or minus one percent total deviation complied with the *de minimis* standard for court ordered plans while rejecting higher total deviation plans); *Smith v. Cobb County Board of Elections*, 314 F.Supp.2d 1274 (N.D. Georgia 2002) ("Under the Court's plan, none of the districts deviates from the ideal district size by more than one percentage point. Furthermore, the Court's plan has an overall deviation of only 1.51%, which is a smaller total deviation than either of the plans proposed by the parties."); *Farnum v. Burns*, 561 F.Supp. 83 (D. Rhode Island 1983) (holding that a total deviation of 1.58% was *de minimis*).

Recently, some courts have even indicated that the progression towards the zero to two percent total deviation standard has been a justified, and even necessary, result of the advent of powerful computer drafting technology which can satisfy a wide variety of state interests and still maintain near zero deviations. "[I]ndeed, it is an interesting question whether deviations that might have been acceptable in an earlier time ought to be tolerated now that … it is possible for a computer to draw not one, but an unlimited number of districts with the perfect number of voting inhabitants." *Baldus, supra* at *7. "Technology is such today that precise population equality is not only possible but commonplace in state redistricting plans. Thus, the focus has shifted from a question of what can practicably be done to a question of what is desirable within a

redistricting process." *Burton v. Sheheen*, 793 F.Supp. 1329, 1342 (D. South Carolina 1992), *vacated on other grounds by Statewide Reapportionment Advisory Committee v. Theodore*, 508 U.S. 968 (1993).

In any event, it is clear that a near zero total deviation plan, when ordered by a federal court, is not only possible and desirable, but is constitutionally mandated. This court should adopt as its *de minimis* total deviation standard, in keeping with the weight of prior precedent, a zero to two percent total deviation standard.

3. None of the state reapportionment plans considered by the Kansas Legislature satisfy the standard for de minimis *total deviation required by the Constitution for court ordered plans of reapportionment.*

a. Reapportionment plans considered by the Kansas Legislature for the Kansas Senate or the Kansas House of Representatives have total deviations ranging from 9.96% to 5.22%.

In light of the weight of precedent set forth above, none of the state reapportionment plans considered by the Kansas Legislature satisfy the constitutional standards for equality that must be present in any court ordered plan. As such, this court must reject them all. Even the lowest deviation plan considered by the Legislature, For the People 12 Amendment, has a deviation of 5.22% which cannot withstand the *Chapman* rule. As demonstrated, courts applying the *Chapman* rule have rejected plans with total deviations of 4.86%, 3.13%, and 2.83% as insufficiently equalized in population. Even utilizing the outlier *Wyche* decision as the extreme of acceptable total deviation at 4.11%, every single plan considered by the Kansas Legislature must fail. On the other hand, federal courts have routinely found a *Chapman* safe harbor in adopting court ordered plans that fall in the zero to two percent total deviation range. This court should do the same and, following the *Wisconsin State AFL-CIO* court, refuse to "take the easy

way out," instead adopting a reapportionment plan that strictly adheres to the constitutional principle of equally distributed population in order to preserve "one person, one vote" in Kansas.

b. There exist no substantial and discernible state policies that would justify any departure from the strict standard of equality preserved by adopting a zero to two percent total deviation plan of reapportionment.

If this court determines that there exists any factual rational for population variations higher than zero to two percent total deviation, "it is the reapportioning court's responsibility to articulate precisely why a plan … with minimal population variance cannot be adopted." *Chapman*, 420 U.S. at 27. Moreover, the "burden is on the District Court to elucidate the reasons necessitating any departure from the goal of population equality, and to articulate clearly the relationship between the variance and the state policy furthered." *Id.* at 24.

Even though this court is permitted within certain narrow parameters to seek to discover through the evidentiary process the various state policies present in Kansas's reapportionment efforts, this court "is forbidden to do so when the legislative plan would not meet the special standards of population equality … that are applicable to court-ordered plans." *Upham v. Seamon*, 456 U.S. 37, 39 (1982). Moreover, of those state policies, this court is further restricted in considering only such policies as are non-political. *See Colleton County Council*, 201 F.Supp.2d at 628 ("[W]e do not possess the latitude afforded a state legislature to advance political agendas."). Finally, courts have generally recognized that due to the overriding goal of population equalization, the articulation of substantial state policies that could justify higher total deviations is an extremely high burden. One court explained that "[g]iven that compliance with the principles of one man, one vote is the preeminent concern of court-ordered plans, the very real possibility exists that certain state policies will be compromised in a court-ordered plan which could have been better served had judicial intervention not been necessary." *Burton*, 793

F.Supp. at 1343, *vacated on other grounds by Statewide Reapportionment Advisory Committee v. Theodore*, 508 U.S. 968 (1993).

In the instant case, while certain parties will undoubtedly argue in favor of their preferred state policies inherent in their preferred plans of reapportionment, there are no policies that are non-political and which are sufficiently articulable to override the primacy of a near zero total deviation plan. This court may be required to let any such state policy go less than fulfilled in the face of the constitutional necessity of equalized population. More likely, however, given the powerful computer aided drawing technology available, any such policy can be given equal or nearly equal vindication in a near zero total deviation plan.

Where two plans exist that are comparable in their satisfaction of state policies, this court is obligated to choose the plan with a more equalized population distribution. In fact, by way of example, it is noted that the Essex A plan presented by the Plaintiff in this action has a 1.98% total deviation (within the safe harbor of zero to two percent total deviation). *See* Stipulation at ¶ 91; Essex A, Population Summary at http://redistricting.ks.gov/_Plans/Proposed_Plans/M5_Eessex%20A/30-m5_essexa-popsum.pdf. While maintaining this constitutionally permissible near zero total deviation, Essex A vindicates any cognizable non-political state policy at least as well as the other legislatively proposed plans, all of which have total deviations of 5.22% or higher. Whether this court adopts Essex A or not, its existence demonstrates clearly that there are no significant non-political state reapportionment policies that cannot be adequately addressed by a near zero total deviation plan.

VI. CONCLUSION

This court should and must adopt a stringent standard for equality of population distribution. The weight of authority allows that for a court ordered plan of reapportionment of

state legislative bodies, there is a safe harbor of constitutionality when the court ordered plan has a zero to two percent total deviation. In the instant case, there are no substantial and articulable non-political state policies that justify any greater deviation. While this court has in front of it many plans considered at some point in the political process by the Kansas Legislature, none of those plans comes close to the stringent standard of equality required by the Constitution for court ordered plans. Therefore, this court must eschew the easy route of simply approving one or the other of these plans. Rather, this court must reject all legislatively proposed plans and adopt a plan that succeeds in meeting the near zero total deviation rule of *Chapman*.

s/ Caleb Stegall

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CERTIFICATE OF SERVICE

I hereby certify that on May 31, 2012, I electronically filed the foregoing with the clerk of the court by using the CM/ECF system which will send a notice of electronic filing to the following:

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