

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

ROBYN RENEE ESSEX, *et al.*,

Plaintiffs,

v.

Case No. 12-CV-4046-KHV-DJW

KRIS W. KOBACH, *et al.*,

Defendants.

**BRIEF OF THE BOARD OF COUNTY COMMISSIONERS OF
JOHNSON COUNTY, KANSAS AS *AMICUS CURIAE***

COMES NOW the *amicus curiae* Board of County Commissioners of Johnson County, Kansas, by and through its attorneys of record, F. Charles Dunlay, Assistant County Counselor, Johnson County Legal Department, and Donald D. Jarrett, Chief Counsel, Office of the Chief Counsel, and hereby sets forth its Brief of the Board of County Commissioners of Johnson County, Kansas as *Amicus Curiae* to assist the Court in its consideration of the weighty issues presented in this case.

NATURE OF THE MATTER

This is an action brought pursuant to Article 1, Section 2 of the United States Constitution asserting a voting rights claim and alleging illegal and unconstitutional malapportionment of the Congressional, legislative, and state school board districts in the State of Kansas resulting from the Kansas Legislature's failure to timely and properly adopt a reapportionment bill based on the 2010 Federal Census. The parties to this action have stipulated to the Court that the existing district apportionment for all of the designated districts is unconstitutional and have requested that this Court approve a map to make the apportionment for the state.

QUESTION PRESENTED

The question presented for the Court in this action is to determine and approve a reapportionment plan for the State of Kansas covering the Congressional, the state legislative, and the state school board districts based on the 2010 Federal Census data.

STATEMENT OF FACTS

The Board of County Commissioners of Johnson County, Kansas, as *amicus curiae*, incorporates herein and relies upon the Joint Stipulation of Facts as submitted by the parties to this action. In addition, Johnson County asserts the following as relevant, material facts:

1. Johnson County is a body corporate and politic created under the laws of the State of Kansas. See K.S.A. 18-146 and K.S.A. 19-101.
2. For the purposes of this action, the 2010 Adjusted Population for the State of Kansas, based upon the 2010 Federal Census, according to the Kansas Legislative Research Department, was 2,839,445 persons, and the 2010 Adjusted Population for Johnson County was 550,253 persons. See *2010 Adjusted Population Data*, Kansas Legislative Research Department, attached to the Memorandum dated July 29, 2011 from Corey J. Carnahan, Principle Analyst, and Alan D. Conroy, Director, to the Kansas Legislature.¹
3. Based upon the Adjusted Population data provided by the Kansas Legislative Research Department for the year 2010, Johnson County is the most populous county in the State, by more than 40,000 people, and has approximately 19.4% of the entire State population. See *2010 Adjusted Population Data*, Kansas Legislative Research Department, attached to the Memorandum dated July 29, 2011 from Corey J. Carnahan, Principle Analyst, and Alan D. Conroy, Director, to the Kansas Legislature.

¹ The parties have agreed and stipulated to the accuracy and admissibility of these records. The records are before the Court and, therefore, are not attached hereto. See *Joint Stipulation of Facts* (Doc. 171), ¶90.

4. Based upon data from the Kansas Legislative Research Department, the population in Johnson County increased by 93,093 persons (most in the State), an increase of 20.64% (the second most in the State), between the years 2000 and 2010, demonstrating a continuous trend of population increase. See *2010 Census Data – County Populations*, Kansas Legislative Research Department, attached to the Memorandum dated March 3, 2011 from Corey J. Carnahan, Research Analyst, and Alan D. Conroy, Director, to the Kansas Legislature.²

5. Based upon data from the Kansas Legislative Research Department, the population for the State of Kansas increased by 164,700 people from the year 2000 to the year 2010, which means that Johnson County accounted for more than 56.5% of the total population increase for the State during that ten year period. See *2010 Census Data – County Populations*, Kansas Legislative Research Department, attached to the Memorandum dated March 3, 2011 from Corey J. Carnahan, Research Analyst, and Alan D. Conroy, Director, to the Kansas Legislature.

6. The population of Johnson County has dramatically increased in the last seventy years from 33,327 persons in 1940 to 62,783 persons in 1950 to 143,792 persons in 1960 to 217,662 persons in 1970 to 270,269 persons in 1980 to 355,054 persons in 1990 to 457,160 persons in 2000 to 550,253³ persons in 2010. See *Kansas Population of Counties by Decennial Census 1900 to 1990*, U.S. Bureau of the Census, incorporated herein by reference and attached hereto as Exhibit 1.⁴

² The parties have agreed and stipulated to the accuracy and admissibility of these records. The records are before the Court and, therefore, are not attached hereto. See *Joint Stipulation of Facts* (Doc. 171), ¶90.

³ The population figures for 2000 and 2010 are based upon the State's Adjusted Population. See *Joint Stipulation of Facts* (Doc. 171), ¶37.

⁴ The Board of County Commissioners of Johnson County, Kansas respectfully requests that the Court take judicial notice of the facts contained within the document pursuant to Fed. R. Evid. 201 and 44 U.S.C. §1507.

7. The U.S. Census Bureau projects that Johnson County will have a population of 645,145⁵ persons by 2020. The Census Bureau further projects that Johnson County's population will increase by 56.3% by 2040. See *Population Projection of Counties for Kansas, by County 2010-2040, Selected Years*, U.S. Census Bureau, incorporated herein by reference and attached hereto as Exhibit 2.⁶

ARGUMENTS AND AUTHORITIES

I. INTRODUCTION

This is an action seeking the reapportionment of the Congressional, State legislative, and State School Board Districts in Kansas based on the 2010 Federal Census. The parties are asking this Court to do what the Kansas State Legislature is required by law, but failed, to do. See Article I, Section 2 of the United States Constitution and Article 2, Section 2 of the Kansas Constitution. To assist the Court, the parties have submitted for consideration an array of reapportionment plans, most of which were created and deliberated by the legislature. However, it is not and should not be the task of this Court to simply weigh and balance the various submittals and then select one for adoption. Rather, this Court must take a focused look at all of the factors that guide reapportionment and fashion a plan that satisfies the demanding Constitutional standards. See, e.g., *Chapman v. Meier*, 420 U.S. 1 at 26-27, 95 S.Ct. 751 at 766, 42 L.Ed.2d 766 (1975).

Johnson County, as *amicus curiae*, will not take a position on the determination of a reapportionment plan for the State's Congressional Districts, comfortable that the Court has ample evidence to proscribe boundaries for the four Districts and that the characteristics of

⁵ The figure will increase upon the State's adjustment for college students and military service members by 6,000 to 10,000 persons. See *Joint Stipulation of Facts* (Doc. 171), ¶37.

⁶ The Board of County Commissioners of Johnson County, Kansas respectfully requests that the Court take judicial notice of the facts contained within the document pursuant to Fed. R. Evid. 201 and 44 U.S.C. §1507.

Johnson County as a community of interests will be fairly considered in the Court's process and will ultimately be preserved in the Court's decision. Similarly, Johnson County, as *amicus curiae*, will not take a position on the configuration of State School Board Districts since those boundaries will be largely decided by the ultimate determination of the State Senate Districts.

Johnson County, however, does offer the following arguments related to the Kansas Legislative Districts, primarily the Kansas State Senatorial Districts. While Johnson County recognizes that it lacked standing as an entity to seek intervention as a party in this litigation, *see Graham v. Thornburgh*, 207 F.Supp.2d 1280, 1283 (D. Kan. 2002), the County asserts that it possesses identifiable considerations that should be presented to the Court. As the governing body of Johnson County, the Board of County Commissioners is well-positioned, indeed uniquely suited, to highlight the significant interests of the most populated County in Kansas, provide suggestions to the Court with regard to lawful and proper resolution of this matter, and address the perspectives of the state's largest community of interests.

II. Applicable Legal Principles

The one person-one vote principle originates from the guarantees of the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution. In *Baker v. Carr*, 369 U.S. 186, 237, 82 S.Ct. 691, 7 L.Ed.2d 663 (1962), the United States Supreme Court held that the principle applies to state legislative as well as congressional districts. The most elemental requirement of the Equal Protection Clause in the apportionment of legislative districts is that the districts be "as nearly of equal population as is practicable." *Connor v. Finch*, 431 U.S. 407, 410, 97 S.Ct. 1828 (U.S. 1977) (*quoting Reynolds v. Sims*, 377 U.S. 533, 577, 84 S.Ct. 1362, 1389-1390, 12 L.Ed.2d 506; *Chapman v. Meier*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766). The Supreme Court has acknowledged that some leeway in the equal-population requirement should

be afforded States in devising their legislative reapportionment plans. *See Chapman*, 420 U.S. at 23, 27, 95 S.Ct. at 764, nt. 19 (“This is not to say, however, that court-ordered reapportionment of a state legislature must attain the mathematical preciseness required for congressional redistricting under *Wesberry v. Sanders*, 376 U.S. 1, 84 S.Ct. 526, 11 L.Ed.2d 481 (1964); *Kirkpatrick v. Preisler*, 394 U.S. 526, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969); *Wells v. Rockefeller*, 394 U.S. 542, 89 S.Ct. 1234, 22 L.Ed.2d 535 (1969); and *White v. Weiser*, 412 U.S. 783, 93 S.Ct. 2348, 37 L.Ed.2d 335 (1973”). The federal district courts, however, when called upon to draft or adopt a reapportionment plan due to the inaction of a state legislature or in their remedial role following the invalidation of the action of a state legislature, are subject to more exacting standards. *See Chapman*, 420 U.S., at 26-27, 95 S.Ct., at 766 (“(U)nless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature. . . must ordinarily achieve the goal of population equality with little more than *de minimis* variation” (*further citation omitted*)); *Reynolds*, 377 U.S. at 586, 84 S.Ct. at 1394; *Connor*, 431 U.S. at 409-10, 97 S.Ct. 1828. Therefore, the primary factor for this Court to consider in constructing a valid apportionment of the State Legislative Districts is numerical proportionality.

However, the United States Supreme Court has identified a number of legislative policies which, if consistently applied, may justify a deviation from an ideal district population. Those policies include: “making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives.” *In re Stovall*, 273 Kan. 715, 719, 44 P.3d 1266 (2002) (*quoting Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct. 2653, 77 L.Ed.2d 133 (1983)); (*citing Bush v. Vera*, 517 U.S. 952, 977, 116 S.Ct. 1941, 135 L.Ed.2d 248 (1996)). In *Mahan v. Howell*, and in *Reynolds*, the Supreme Court noted the common and long-standing legislative goal of maintaining the integrity of political subdivisions

in reapportionment. *Mahan v. Howell*, 410 U.S. 315, 321-22, 93 S. Ct. 979, 35 L. Ed. 2d 320 (1973), *modified on other grounds*, 411 U.S. 922, 93 S. Ct. 1475, 36 L. Ed. 2d 316 (1973); *Reynolds*, 377 U.S. at 580-81, 84 S.Ct. at 1394.

In addition, the parties to this action have submitted to the Court the *Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting*⁷ (2012 Guidelines). The 2012 Guidelines, according to the *Joint Stipulation of Facts* (Doc. 171), ¶45, were agreed to by the Kansas House and Senate for use in the redistricting process. While they are not binding upon this Court, they provide a summary of the reapportionment considerations established by case law, and they are generally consistent with the long-standing, traditional, and consistently applied reapportionment principles of the State of Kansas. *See In re Stovall*, 273 Kan. at 721-23; *In re House Bill No. 3083*, 251 Kan. 595, 606-07, 833 P.2d 1017 (1992); *In re Senate Bill No. 220*, 225 Kan. 628, 635, 593 P.2d 1 (1979) (“The legislative committee which drafted Senate Bill No. 220 took into consideration future population trends and it gave priority and used as a guideline the preservation and integrity of existing political subdivisions (counties) so far as practicable.”). Moreover, the 2012 Guidelines rely upon reapportionment principles consistently regarded by the Supreme Court as legitimate state interests. *See Karcher*, 462 U.S. at 740, 103 S.Ct. 2653 (*and cases cited therein*); *Bush*, 517 U.S. at 977, 116 S.Ct. 1941 (*further citation omitted*); *Mahan*, 410 U.S. at 321, 93 S. Ct. 979; *Reynolds*, 377 U.S. at 580-81, 84 S.Ct. at 1394.

With regard to legislative redistricting the 2012 Guidelines provide, beyond the preeminent principles of general numerical equality and the prohibition of diluting minority voting strength:

⁷ Marked Exhibit 9

- 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.

*Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting.*⁸

“[R]eview of the substantive validity of the reapportionment legislation includes a determination of whether the districts are compact and contiguous as drawn. ‘[L]ack of contiguity or compactness raises immediate questions as to political gerrymandering and possible invidious discrimination which should be satisfactorily explained by some rational state policy or justification.’ ” *In re Stovall*, 273 Kan. at 724-25 (quoting *In re House Bill No. 2620*, 225 Kan. at 834). A court is not entitled to the sort of deference ordinarily given to legislative reapportionment. *See Chapman*, 420 U.S., at 26-27, 95 S.Ct., at 766; *Reynolds*, 377 U.S. at 586, 84 S.Ct. at 1394; *Connor*, 431 U.S. at 409-10, 97 S.Ct. 1828.

To assist this Court in applying the Constitutional standards and the legally recognized guideline factors, Johnson County offers the Court the following arguments as they relate to Johnson County.

⁸ See Exhibit 9 filed herein and *Joint Stipulation of Facts* (Doc. 171), ¶45.

III. Fair and Equitable Apportionment of State Legislative Districts Warrants the Apportionment of a Full Eight State Senate Districts For and Within Johnson County.

A. Numerical Proportionality

Johnson County is the most populous County in the State of Kansas with a 2010 Adjusted Population of 550,253 people – 19.4% of the entire Kansas populace. Applying the principles of proportionality set forth in the *Chapman*, *Reynolds*, and *Connor* decisions cited above, judicially directed reapportionment of the Kansas Senate Districts based on the 2010 Adjusted Population figures would clearly mandate eight State Senate Districts within Johnson County.

Pursuant to the 2002 legislative apportionment, Johnson County is currently represented in the Senate by seven of the 40 districts: Senate Districts 7, 8, 9, 10, 11, 23, and 37 – equating to approximately 17.5% of the Kansas Senators. These Senators serve not only Johnson County's 19.4% of the state's population, but they serve areas outside of Johnson County.⁹ As a result, Johnson County residents are presently, and starkly, underrepresented in the State Senate. Even with the addition of a new senate district confined entirely within Johnson County, the residents of Johnson County will once again be underrepresented prior to the next reapportionment in 2022 following the 2020 decennial census due to the increase in population traditionally experienced and unquestionably expected for the county.

Based on the 2010 Adjusted Population data, the ideal Kansas Senate district would contain 70,986 residents. Using those population figures, Johnson County should contain eight State Senate Districts. That conclusion is re-enforced in light of the fact that the population growth of Johnson County will result in the County's population exceeding 21.5% of the total population of the State before the expiration of the reapportionment ordered by the Court. The apportionment of the Kansas senate districts should account for the consistent and explosive

⁹Senate Districts 7, 8, 9, 10, 11, 23, and 37 serve 552,251 residents – 19.449% of the population of the State.

population growth of Johnson County. Indeed, Johnson County is not only the most populous County in the State of Kansas, it is growing at rate far exceeding that of the remainder of the State. Between 2000 and 2010, the population of Johnson County grew by 93,093 – an increase in excess of 20%. Johnson County’s population growth accounted for 57% of the population growth in the entirety of the State (93,093 of 164,700). During that same time period, 77 of Kansas’ 105 counties suffered population losses. In reaching its decision in this case on the State Legislative redistricting, the Court must first and foremost look to the numerical proportionality. *Connor v. Finch, supra* at 410. Any reapportionment of the State Senate Districts which does not include eight Senate Districts within Johnson County would violate the proportionality requirement. Therefore, Johnson County strongly opposes any plan or proposal submitted to this Court which does not provide for eight full Senate Districts in Johnson County.

B. Johnson County Presents a Clear and Cognizable Political Subdivision and Community of Interest.

The first and foremost political subdivisions within the State of Kansas are its counties. See K.S.A. Ch. 18 – *Names and Boundaries of Counties* & Ch. 19 – *Counties and County Officers*. Counties have historically been prominent local governmental units, with Johnson County having been created on August 25, 1855 by the Kansas Territorial Legislature. K.S.A. 18-146; Terr. Stat. 1855, Ch. 30. County lines and boundaries are the oldest of the political subdivisions of the State of Kansas and are established solely by statute. K.S.A. 18-101 *et seq.*; K.S.A. 18-301 *et seq.*; K.S.A. 19-101. The boundaries are well-known, static, and designated in easily discernible and understandable fashion. In Kansas, County lines have long been used as the foundation of and for other political and judicial subdivisions. *See, e.g.*, Article 9 of the Constitution of the State of Kansas. The judicial districts of the State of Kansas are established

in strict adherence to its counties. See K.S.A. 20-301. The vast majority of all other political subdivisions within the State are contained within the individual counties. Counties provide the building block to any rational legislative apportionment – particularly in the state senate – in light of preserving the integrity of political subdivisions, identifying “communities of interests,” and in providing identifiable and understandable districts. Moreover, the continuity of county boundaries must generally take priority over other political subdivisions in meeting the dictates of the enumerated factors.

Johnson County represents a distinct and well-defined community of interests – particularly at the state level. In fact, Johnson County has been separately and specifically identified as an Urban Area under state statutes as authorized by the Kansas Constitution in Article 2, Section 17. See K.S.A. 19-3524. As an Urban Area, the county can and does have legislative authority that differs from other counties and can even establish a Charter form of Government – which Johnson County has done. See K.S.A. 19-2680, *et seq.* While Johnson County recognizes the diversity of viewpoints, ideas, and experiences of its residents, the County represents a remarkably consistent shared set of values and expectations. Both within and outside of Johnson County, the residents of the State of Kansas – with regard to their political and social identity within the State of Kansas or the Kansas City metropolitan area – identify one another as Johnson County residents or as being from Johnson County.

Moreover, Johnson County represents a very clear grouping of economic interests. The manner in which economic development, growth, and interdependence occur locally, regionally, and nationally is primarily addressed in Johnson County by the County as a whole. In addition, the economic base and the power of the economy may be undermined by the dilution of the County’s representation in the State Senate. The provision of federal, state, and private funding

is similarly undercut by the dilution of the County's vote. Such collective goals are the very basis of the term "community of interests" and providing the voters with opportunity to jointly further those goals the underpinning of the doctrine.

While municipalities located within Johnson County may have some role in the establishment of individual senate districts, the first order of priority must be to establish compact and contiguous Senate districts based upon the County unit and its community of interests, since the cities and other municipalities are a part of and within the demographics of the County. Proposed reapportionment plans which extend one of the eight Senate districts needed to meet the numerical proportionality standard for Johnson County outside of the corporate boundaries of Johnson County (other than to include the northern boundary of Lake Quivira and the southern boundary of Spring Hill), or which include portions of Johnson County with one or more other County to form one of the eight districts, or which remove a portion of Johnson County from inclusion within one of the eight districts are inconsistent with the traditional principles of legislative reapportionment enumerated above. For that reason, Johnson County would oppose any such plan and would suggest to this Court that any such plan would raise immediate concerns of impermissible political gerrymandering and invidious discrimination.

Just as the standards related to numerical proportionality require that eight full State Senate Districts be included within Johnson County, the "community of interests" principles of legislative apportionment dictate that those eight all be located wholly within Johnson County (with the slight exception for the contiguous portions of the City of Lake Quivira and the City of Spring Hill).

C. Senate Districts Should Be Compact and Contiguous.

As the Kansas Supreme Court has stated: “review of the substantive validity of the reapportionment legislation includes a determination of whether the districts are compact and contiguous as drawn. ‘[L]ack of contiguity or compactness raises immediate questions as to political gerrymandering and possible invidious discrimination which should be satisfactorily explained by some rational state policy or justification.’ ” *In re Stovall*, 273 Kan. at 724-25 (quoting *In re House Bill No. 2620*, 225 Kan. at 834). The push and pull of the political process through a legislature may at times produce voting districts that are not compact or contiguous but which may nonetheless be sustained upon a showing of some legitimate legislative purpose for the deviations. As discussed above, when the Court exercises its authority to draw the boundaries for apportionment, it is not entitled to the sort of deference ordinarily given by the courts to legislatures when they draw reapportionment maps. *See Chapman*, 420 U.S., at 26-27, 95 S.Ct., at 766; *Reynolds*, 377 U.S. at 586, 84 S.Ct. at 1394; *Connor*, 431 U.S. at 409-10, 97 S.Ct. 1828. Departure from the numerical ideal, maintenance of political subdivisions – where possible, and compactness and contiguousness are likely to invite reversal and protracted litigation.

The Court finds itself in this unenviable position as a result of the Kansas Legislature’s failure to act.¹⁰ Johnson County beseeches the Court to utilize the principles of compactness and contiguousness to rigorously test the proposed apportionment plans and to turn aside those that fail or excise the offending portions from the plans. Such inexplicable inconsistencies may only be sustained upon a showing of no impermissible racially discriminatory purpose or effect and the showing of an otherwise legitimate legislative purpose. As discussed above, the Court is not

¹⁰ “We say once again what has been said on many occasions: reapportionment is primarily the duty and responsibility of the State through its legislature or other body, rather than of a federal court.” *Chapman v. Meier*, 420 U.S. 1 at 27, 95 S.Ct. 751 at 766 (citing *Reynolds v. Sims*, 377 U.S., at 586, 84 S.Ct., at 1394; *Maryland Committee v. Tawes*, 377 U.S., at 676, 84 S.Ct., at 1140).

entitled to the sort of deference ordinarily given to a state legislative body or agency. Moreover, the failure of the Kansas Legislature to pass a reapportionment plan extinguishes any political arguments which may ordinarily accompany the legal review of the legislative process.

CONCLUSION

The Board of County Commissioners of Johnson County, Kansas urges the Court to adopt a straight-forward Senate reapportionment plan based upon the following hierarchy of principles:

1. Numerical proportionality;
2. Maintenance of communities of interest;
3. Preservation of political subdivisions;
4. Utilization of compact and contiguous districts.

A properly drawn reapportionment plan relying upon these fundamental principles requires – and must result in – the placement of eight senate district within Johnson County.

The Board of County Commissioners of Johnson County, Kansas as *amicus curiae* respectfully requests that any reapportionment plan adopted or approved by this Court for the reapportionment of the Kansas Senate district include no less than eight Senate District within Johnson County, Kansas for the reasons stated herein and for any and all such further relief which the Court deems just and equitable.

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 the CM/ECF system which will send a notice of electronic filing to counsel for all interested parties, including the following:

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