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

POST-TRIAL BRIEF OF INTERVENOR PLAINTIFFS SENATORS KING, ABRAMS AND MERRICK

COMES NOW Intervenor Plaintiffs Senators Jeff King, Steve Abrams and Ray Merrick, by and through counsel, and submit their post-trial brief.

The Supreme Court has rejected the argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and has recognized the difficulty of drawing districts with mathematical precision." *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.

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 Voinovich 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 v. Brier et. al*, 540 F. Supp 1200, 1203 (D. Kan. 1982). 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.

Following the 1980 decennial census, this very court was faced with the same question when the legislative process failed to produce maps for state legislative districts as required by

the Kansas Constitution and as required by equal protection standards under the 14th amendment to the US Constitution. Despite the passage of 30 years, the basic principals enunciated by the United States Supreme Court concerning this issue remain the same and the seminal cases utilized by this Court in 1982 are still the seminal cases when analyzing this issue today. These cases and their progeny are cited by all parties in this litigation. Specifically, this court properly found that "The only relevant constitutional requirement imposed upon a plan we adopt is that it must make 'as nearly as is practicable one man's vote …be worth as much as another." *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). The court also cited the important case of *Chapman v Meier,* 420 U.S. 1 (1975) in finding that "This requirement (population equality) is 'the preeminent, if not the sole, criterion' for evaluating the constitutionality of redistricting plans." O'Sullivan, 540 F.Supp. at 1203. However, the terms "as practicable" and "preeminent" are not absolute and clearly contemplate that factors other than pure population equality can be considered by a Court.. This is supported by the clear and unambiguous language of *Chapman* which states that "enunciation of historically significant state policy or unique feature" can support a deviation from the strict rule of application of equal population standards in maps drawn by the court versus the legislature. *Id.* at 26. This case and its progeny have been cited by virtually every court which has considered this issue, including virtually every relevant case cited in the Governor's Amicus brief.

Deviations are permissible if supported by historically significant state policy or unique features. *Chapman* acknowledges that persuasive justification allows deviation from *de minimis* deviation plans. A near zero deviation plan is not constitutionally required here because the

factual record justifies the exception that "historically significant state policy or unique features" allows for greater deviation.

No Supreme Court case identifies, requires, or even mentions a strict zero to two percent deviation standard be applied to judge drawn state legislative maps when the legislature fails to act. There are federal appellate circuit cases cited by the Governor. None of these cases identifies, requires nor mentions a strict zero to two percent safe harbor or deviation standard to be applied to judge drawn state legislative districts when the legislature fails to act. In fact, *Wyche v. Madison Parish Police Jury*, 635 F.2d 1151, 1162 (5th Cir. 1981) permits a deviation of 4.11%, acknowledging that a deviation is proper to account for the legitimate desire to maintain the integrity of various political subdivisions.. The Court noted this factor is "just as appropriate for consideration in court ordered plan as it is in a legislatively adopted plan reviewed by the Court." *Id.*

The remaining cases cited by the Governor are an eclectic mix of redistricting cases gone awry, with little relation to the facts under the current action. Clearly, reapportionment plans for a state legislative plan are not subject to the same strict standards applicable to congressional redistricting plans. *See Farnum v. Burns*, 561 F.Supp. 83, 93 (D. Rhode Island 1983). Some of the cited cases involve, among other things, voting rights act cases with some including preclearance maps (which involve a higher level of scrutiny) and cases involving multi-candidate districts, not germane to the analysis in this case. The most distinguishable case cited by the Governor is a case purporting to support a two percent *de minimis* rule because the court ordered a less than two percent plan. However, that case involved districting of county council seats (and thus no interest in preserving county lines) and, furthermore, all submitted plans considered by that court had a two percent deviation, or less. *Stenger v. Kellet*, -- F.Supp.2d --, 2012 WL

601017 (E.D. Missouri February 23, 2012). All District Court cases cited in the Governor's brief addressing the issues at hand (whether dicta or otherwise) acknowledge the historically significant state interest principal and reject strictly applying "across the board" *de minimis* standards as suggested in the Governor's brief.

Intervenors submit that "historically significant state policies or unique features," as reflected in trial testimony, should not be ignored to the exclusion of just satisfying a low deviation. Any map drawn by this Court should not solely be a ministerial or numerical exercise. Rather, the Court should consider issues of vital importance to communities throughout Kansas, and it can efficiently accomplish this by taking advantage of the work performed on the For The People series of Maps and modifying such maps to the extent necessary to satisfy the Court's sense of the requisite *de minimis* deviation.

At trial, this Court expressed concerns that a map with a *de minimis* deviation of less than 2% deviation may be required. While these Intervenors do not believe that is required, even if this Court deems that it is, a map with such low deviation could easily be achieved by modifying any of the "For the People" series of Maps, as evidenced by testimony from Senator King regarding For the People 12 and the Essex-A Plan, the latter of which had a relative overall deviation range of 1.98%. Significantly, the For the People series of maps also best maintains the population make-up of the existing Districts. *See* Exhibit 815.

Intervenors respectfully suggest that "historically significant state policies or unique features" have been made apparent through credible and diverse testimony and evidence at the hearing. These should be considered by this Court in its deliberations and undertake an approach that least impacts existing populations by minimizing changes to the existing districts.

When this court decided *O'Sullivan* in 1982, it "attached great importance to the preservation of county and municipal boundaries". *O'Sullivan v. Brier*, 540 F. Supp 1200, 1203 (D. Kan. 1982). It further found that "Kansas Counties have historically been significant political units" (emphasis added) citing as justification the fact that "many officials are elected on a county wide basis and political parties have been organized in county units" *Id.* at 1203. These were important and significant findings by this Court in light of the fact that it cited and followed *Chapman* as precedent. This finding was undoubtedly made mindful of the "historically significant" exception of *Chapman*. This Court also identified that "the lodestar of its analysis the grouping together of as many major communities of common economic, social and cultural interests as possible without breaking county lines. *Id.* at 1204.

There is a long standing and historically significant state policy of the State of Kansas to preserving the integrity of county lines, grouping together of major communities of interest. These policies should be preserved to the extent possible in drawing districts for state legislative seats. According to *O'Sullivan*, this is permitted, even if the maps are court drawn after the legislature fails to act.

Under the current apportionment of legislative seats following the 2010 decennial census the target population for each senate district is 70,986. As a result, there are approximately 9 counties which must be split due to their population exceeding the target number for each senate district and thus necessitating that the county be split into more than one district.

When properly considering the historically significant policy of preserving county lines while maintaining constitutionally acceptable population deviations, For the People 12 performs the best compared to all maps. The next best performing maps are For the People 13b and Essex A. Buffalo 30 performs the worst of all considered maps with discretionary splits higher than

For the People 12, For the People 13b and Essex A. All maps fall within the accepted deviation standards set forth in *Larios* and related cases.

In addition, should the court choose to adopt Essex A, slight modifications consistent with previously identified communities of interest could eliminate two discretionary county splits and six city splits, giving it the same number of county splits as For the People 12 while maintaining a low deviation. Those changes are as follows:

> 1. keep the same split of Montgomery County as occurs now between District 14 and 15, and split Linn County with about 8000 in district 13 and the other 1700 in 12: draw southeast Kansas with a 2 county split (instead of a 4 county split) as follows: District 12 - Miami, Franklin, 1700 in northeast Linn, Johnson (11,000 in Spring Hill and part of Gardner/Edgerton); District 13 - Crawford, Bourbon, Linn (8000) and Anderson; District 14 - Cherokee, Labette, Montgomery (existing split including Coffeyville and surrounding area), Neosho; District 15 - Montgomery (other part of the split), Elk, Chautauqua, Greenwood, Wilson, Woodson, Coffey, Allen.
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> 2. Give the rest of Basehor back to District 3 from District 5 (435 people) and give about 500 people from District 3 in Johnson County back to District 23
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> 3. Give the 1 from District 16 in Bel Aire back to District 31
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> 4. Give the 6 in Bonner Springs from District 3 back to District 6
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> 5. Give the 148 from Maize in District 34 back to District 25
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> 6. Give the 125 in Valley Center from District 25 to District 31

Conclusion

A fixed numerical or percentage population variance small enough to be considered *de minimis* is, at the very least, extremely difficult in drawing districts with mathematical precision. Further, while it is possible to draw maps with a small percentage of population variance, the people and communities behind the numbers should not be forgotten. Insignificant deviations from the population of the ideal district are permitted. This Court is free to select a map

proposed by the parties in whole, modify an existing map, or create a new map. In either case, the Court should consider the historically significant Kansas policies and its unique features by safeguarding the communities of interest and preserving the integrity of county and municipal lines to the extent possible. The For the People series of maps best accomplishes these objectives.

Respectfully submitted,

/s/ Ricardo Kolster

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CERTIFICATE OF SERVICE

This is to certify that on June 1, 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