IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBYN RENEE ESSEX, *et al*,	)	
	)	
Plaintiff and Intervenor-Plaintiffs,	)	
	)	**CIVIL ACTION**
	)	**Case No.: 5:12-cv-04046-KHV-JWL**
v.	)	
	)	
KRIS W. KOBACH, in his official capacity as Kansas Secretary of State, *et al.*,	)	
	)	
Defendant and Intervenor-Defendant.	)	
_____	)	

POST-TRIAL MEMORANDUM IN SUPPORT OF REDISTRICTING PLANS PROPOSED BY INTERVENOR-PLAINTIFFS SENATOR OWENS, HENDERSON, SHANER, AND WIMMER

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I. THE UNITED STATES SUPREME COURT DOES NOT REQUIRE THE ADOPTION OF A PLAN WITHIN AN OVERALL DEVIATION OF 2%.

A. The Court must apply the standard articulated by the United States Supreme Court in *Chapman v. Meier* and *Connor v. Finch*.

In their memorandum in support of their redistricting plans, *see Memorandum*, pp. 14-15 (Doc. 224), the Owens Intervenors explained that where a federal court draws a state legislative plan, the allowable statistical variation is narrower than the 10% deviation that applies to review of a state drawn plan. *Connor v. Finch*, 431 U.S. 407, 417-18, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977); *Chapman v. Meier*, 420 U.S. 1, 26-27 and n.19, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975) at 26-27. More specifically, where a state legislature has failed to devise a reapportionment and redistricting plan, the United States Supreme Court has held as follows:

> [w]e have made clear that in two important respects a court will be held to stricter standards in accomplishing its task than the state legislature: "[**U]nless there are persuasive justifications**, a court-ordered reapportionment plan of a state legislature must avoid use of multimember districts, and, as well, **must ordinarily achieve the goal of population equality with little more than *de minimis* variation**."

Connor, 431 U.S. at 413 (quoting *Chapman*, 420 U.S. at 26-27).

The *Chapman/Connor* standard does not require that court-ordered plans stay within an overall deviation of 2% from ideal district size. It merely instructs that, in the absence of **persuasive justifications**, the court-ordered plans must **ordinarily** achieve the constitutional goal with little more than *de minimis* deviation. Neither the United States Supreme Court nor the United States Tenth Circuit Court of Appeals has ever interpreted this standard to establish a hard and fast rule requiring that a court-ordered plan fall within any specific range of statistical

deviation, much less the arbitrarily restrictive 2% overall range advocated by the Governor in his *amicus curiae* brief.[1]

In fashioning court-ordered redistricting plans, the United States Supreme Court has acknowledged "the federal courts are often going to be faced with hard remedial problems in minimizing friction between their remedies and legitimate state policies." *Connor*, 431 U.S. at 414 (quoting *Taylor v. McKeithen*, 407 U.S. 191, 194, 92 S.Ct. 1980, 32 L.Ed.2d 648 (1972)(internal quotation marks omitted)). It has not sought to alleviate that friction by establishing a hard-and-fast range of allowable overall statistical deviation for the ideal. Instead, it has acknowledged that courts may consider state policies and districting principles as justifications for their chosen deviation from the ideal, while cautioning that "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." *Id*. at 415 (quoting *Roman v. Sincock*, 377 U.S. 695, 710, 84 S.Ct. 1449, 12 L.Ed.2d 620 (1964)).

The Supreme Court's two principal cases on court-ordered redistricting do not support the Governor's notion that this Court must hew to an overall range of no more than 2%. In *Connor v. Finch*, the Supreme Court reviewed a court-ordered state senatorial plan with an overall deviation of 16.5% from ideal and an absolute range of -08.3% below the ideal to 08.2% above the ideal. 431 U.S. at 416-17. The Supreme Court wrote that these districts "can hardly be characterized as *de minimis*; they substantially exceed the 'under-10' deviations the Court previously has considered to be of *prima facie* constitutional validity only in the context of legislatively enacted apportionments." *Id*. The Supreme Court noted further that in *Chapman* it

[1] Where the Supreme Court has defined the meaning of the term *de minimis* in the context of its review of state legislative redistricting plans, it has consistently described it in reference to an overall deviation of 10%--not 2%. *See, e.g., Brown v. Thompson*, 462 U.S. 835, 842, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983)(explaining that [o]ur decisions have established, as a general matter, that an apportionment plan with a maximum population deviation under 10% falls within this category of minor deviations. [Citing, among other cases, *Connor*, 431 U.S. at 418].")

had refused to **assume** that a 5.95% deviation would **necessarily** satisfy the standard for a court-ordered plan, but it did not hold that a court-ordered plan must fall below an overall deviation of 5.95%. *Id*. at 418, n. 17. The Supreme Court did not, however, articulate the bright-line deviation rule the Governor asks the Court to adopt, nor did it suggest that it had established 5.95% as the outside limit for deviations in a court-ordered plan.[2]

In *Chapman*, the Supreme Court reviewed a court-ordered state senatorial plan with an overall deviation of 20.14%. from ideal and an absolute range of -08.71% below the ideal to 11.43% above the ideal. 420 U.S. at 22-23. In examining the court-ordered plan, the Supreme Court explained that "each case must be evaluated on its own facts, and a particular population deviation from the ideal may be permissible in some cases but not others…." *Id*. The Supreme Court wrote further as follows:

> We believe that a population deviation of [20%] in a court ordered plan is constitutionally impermissible in the absence of significant state policies or other acceptable considerations that require adoption of a plan with so great a variance. 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.

Connor and *Chapman* rejected court-ordered plans involving, respectively, overall deviations of 16.5% and 20.14%, which are far greater than the deviations of Buffalo 30

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[2] On this point, the Governor flatly misstates the Supreme Court's articulation of its *Chapman/Connor* standard. Citing only to footnote 17 from *Connor*, the Governor writes that "[c]ourts have regularly cited *Chapman* for the proposition that the Supreme Court has declined to accept a 5.95% total deviation as *de minimis*." *Governor Brownback's Amicus Curiae Brief*, p. 6 (Doc. 227-1). As discussed above, footnote 17 from *Connor* notes only that *Chapman* "refused to **assume** that even a 5.95% would **necessarily** satisfy the high standards required of court-ordered plans." *Connor*, 431 U.S. at 418 n.17. It does not note, much less hold, that deviations higher than 5.95% are *per se* inappropriate notwithstanding compelling justifications based on state policy and traditional districting principles, such as those present in our case. Moreover, when one examines *Chapman*, particularly with an eye toward its discussion of the Ostenson plan, it is clear that *Chapman* does not state, as a matter of law, that court—ordered plans with overall deviations of 5.95% are unsound. See Chapman, 420 U.S. at 25-26. The Court in *Chapman* merely intended to qualify its discussion of the Ostenson plan such that it would not be construed to establish a rule that overall deviations of 5.95% are *per se* appropriate absent justification by factors such as historically significant state policy or unique features. *Id*.

Revised. Neither may fairly be read to disapprove of a court-ordered plan with a deviation as low as 6.14%, which is the overall deviation present in Buffalo 30 Revised. In fact, the Supreme Court has been unmistakably clear that "mathematical nicety is not a constitutional requisite" in drawing state senatorial districts. *See Reynolds v. Sims*, 377 U.S. 533, 569, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). Thus, the Governor's suggestion that the Court must adopt a plan with an overall deviation of no more than 2%, while perhaps serving his personal interest in imposing the Essex A plan on the citizens of Kansas, has no basis in 14th Amendment redistricting doctrine.

B. Courts have not interpreted *Chapman* and *Connor* to impose a hard-and-fast overall rule requiring a statistical deviation of no more than 2%.

The Governor misinterprets the *Chapman/Connor* standard in an effort to advance a senatorial redistricting plan, Essex A, that apparently was either created in or emanated from his office. *See Governor Brownback's Amicus Curiae Brief*, (Doc. 227-1). This plan was not presented to either the Senate Committee on Reapportionment or its counterpart committee in the House, and it never received consideration on the floor of either body. Indeed, the plan's public debut appears to have been as an exhibit to Plaintiff's complaint—an exhibit she later withdrew.

On pages 7-9 of his *amicus* brief, the Governor cites a variety of cases from which he attempts to divine a bright-line constitutional standard never endorsed by the United States Supreme Court. He invites the Court to take comfort in a false precision that simply does not exist in the Supreme Court's constitutional redistricting doctrine. *See*, *e.g.*, *Mahan v. Howell*, 410 U.S. 315, 329, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973)(writing that "[n]either courts nor legislatures are furnished any specialized calipers that enable them to extract from the general language of the Equal Protection Clause of the Fourteenth Amendment the mathematical formula that establishes what range of percentage deviations is permissible, and what is not"). His invitation carries with it the substantial risk of reversible error.

Courts applying the *Chapman*/*Connor* standard recognize that it contemplates a sliding scale dependent, in part, upon the weight of various justifications that may be derived from state policy and districting principles. *See, e.g., Wisconsin State AFL-CIO v. Elections Board*, 543 F.Supp. 630, 634 (E.D.Wis. 1982)(although ultimately concluding that the facts supported a plan with an overall deviation of 1.74%, explaining that the Supreme Court "has declined to define a statistically permissible level of population variation" and acknowledging that "[e]ach case must be considered on its own facts"). For instance, in *Burton v. Sheheen*, 793 F.Supp 1329 (D.S.C. 1992), the district court explained as follows:

> There is no definition or demarcation of the *de minimis* standard offered [by the Supreme Court] except to say district courts are not required to "attain the mathematical preciseness required for congressional redistricting." [Citation omitted]. While population equality may well have been the goal of the *Chapman* Court, it was not the requirement. Rather, the opinion clearly states "with a court-ordered plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features." [Citation omitted].

793 F.Supp. at 1343.

Courts that have faithfully followed *Connor* and *Chapman* recognize that these two cases do not establish an absolute and arbitrary overall deviation range of 2% from which they may not vary. *See, e.g., Wisconsin AFL-CIO*, 543 F.Supp. at 634 (describing the range of permissible deviations as follows--"a constitutionally acceptable plan should not deviate as high as 10%, and should**, if possible**, be kept below 2%"--but citing no authority for its choice of 2%)(emphasis added); *Burton*, 793 F.Supp. at 1345 (describing the *de minimis* deviation as falling somewhere along a range of 10% to 0%).

Some courts even designed their court-ordered plan with reference to the 10% safe-harbor, *see, e.g., Smith v. Cobb County Bd. of Elections*, 314 F.Supp.2d 1274, 1286-86 and 1288 (D.Ga. 2002)(noting that proposed plans were "well within the maximum 10% population

deviation ordinarily allowed for legislative plans under the one-person, one-vote standard"). Instead, they acknowledge that these two decisions simply require them to justify any deviation from approximate population equality by precisely articulating state policies and principles that justify the deviation. *See Chapman*, 420 U.S. at 26 (writing that "[w]ith a court-ordered plan, any deviation from approximate population equality must be supported by an enunciation of historically significant state policy or unique features").

Depending upon the facts of a particular case, and depending upon the relative weight of the justifications present in the evidentiary record, the overall deviation that a court may deem appropriate under *Connor and Chapman* may fluctuate along a fairly broad range. There simply is no controlling or persuasive authority that a court-ordered plan is constitutionally suspect if it exceeds a range of 2%. The question ultimately turns on the nature of the justifications underlying the court's plan. As they have more fully set forth in their trial brief, the Owens' Intervenors believe that Buffalo 30 Revised is supported by historically significant state policies and considerations that easily justify its overall deviation of 6.14%.

II. ESSEX A OFFENDS BASIC NOTIONS OF FUNDAMENTAL FAIRNESS.

A. Essex A is inferior to Buffalo 30 Revised for the same reasons as For the People 13b.

Essex A redraws the senatorial map in ways that profoundly and negatively impact districts held by the Democratic Senate leadership in the same manner as the For the People series of maps. The evidence introduced at trial demonstrates that the manner in which Essex A redraws the 3rd and 19th District has the purpose and effect of gerrymandering out of office 2 Democrats.[3] As a result, Democrats not only will lose their current leaders, but their numbers

[3] As the trial testimony demonstrated, the 3rd District is held by Tom Holland, who happens to have been Governor Brownback's opponent in the last gubernatorial election, and the 19th District is held by Anthony Hensley, who happens to be the Senate Minority leader, as well as the longest serving member in the history of the Kansas Legislature.

will be reduced from 8 of 40 seats to only 6 of 40. Not only is this patently unfair, but it is unlawful, as well. "While all parties are entitled to advocate a legislative redistricting plan that furthers their partisan interests, it is inappropriate for the court to engage in political gerrymandering." *Colleton County Council v. McConnell*, 201 F.Supp.2d 618, 629 (D.S.C. 2002).

In addition to obvious political gerrymandering, Essex A sacrifices the State's significant historical redistricting policies in order to achieve an overall deviation within a false safe-harbor. Historically, the State has collapsed a district in order to accommodate Johnson County's population growth. However, Essex A deviates from the State's well-established redistricting policies by opting to manipulate the boundaries of existing districts such that some districts lose any semblance of compactness,[4] many districts split political subdivisions and community of interests (*e.g.*, it splits sizable cities that Buffalo 30 Revised does not),[5] and some districts are drawn in a way that cannot reasonably be said to attempt to render them easily identifiable and understandable by voters.

A. Essex A was never submitted to the Kansas Legislature for consideration by the reapportionment and redistricting committee of either house or for a floor vote.

On the first day of trial, Senator King testified that he saw the plan now designated as Essex A during a visit to Governor Brownback's offices. Senator King visited the Governor's offices to discuss with Mr. Northcott, a member of the Governor's staff, the redistricting process, in general, and the drawing of redistricting maps, in particular. During the course of their

[4] For example, the 15th District twists and turns from its origin on the Oklahoma border all the way to the southwestern border of Douglas County, and the 3rd District contorts from its current eastern border along the Douglas County line to extend a thin strip from its current southeastern past DeSoto through Johnson County and, ultimately, curling up through and past Olathe.

[5] *See* the report on the KLRD website entitled "Political Subdivisions Split Between Districts," which reflects that Essex A splits 18 counties and 130 voting districts (i.e., precincts). The report is available at the following address: http://redistricting.ks.gov/_Plans/Proposed_Plans/M5_Eessex%20A/36-m5_essexa-split.pdf.

conversations, Mr. Northcott pulled up the "Maptitude" software used to draw redistricting maps, and he showed Senator King a copy of the map believed to be known as Essex A.

Up to that moment, Senator King, who testified that he was extensively involved in the drawing of the For the People series of maps, was unaware of the existence of this particular map. And, in fact, this map was never submitted to the KLRD for analysis and vetting until Senator King requested such review on the afternoon of Friday, May 25, 2012, well after the Legislature had adjourned, and only three days before trial.

However, prior to Senator King's submission of Essex A to the KLRD, Plaintiff Essex, during the parties' planning meeting, informed counsel for the other parties and intervenors that she intended to withdraw Essex A. Her decision to withdraw Essex A came following questions by counsel for some of the intervenors, including counsel for the Owens Intervenors, about the existence of data underlying the maps. Instead of producing that data, which did not yet exist, Plaintiff Essex agreed to withdraw Essex A and submit her case based upon the maps contained within the For the People series, specifically For the People 13b.

On the first day of trial, counsel for the South Central Intervenors offered Exhibit 912, which consisted of Essex A and statistical reports prepared by the KLRD in response to Senator King's request. Counsel for the Owens Intervenors made timely and contemporaneously objected, arguing that Essex A had been withdrawn by its proponent, Plaintiff Essex. The Court took this objection under advisement, but, ultimately, received Exhibit 912 into evidence.

III. IF THE COURT DRAWS ITS OWN MAPS FOR THE KANSAS SENATE AND BOARD OF EDUCATION, IT SHOULD DERIVE THEM FROM BUFFALO 30 REVISED

As is clear from the reports contained within Exhibit 912, Essex A sacrifices the State of Kansas's historical policies and significant districting principles in order to achieve an overall

deviation with an arbitrary 2% range. In light of the significant policy choices evident in the history of Kansas redistricting, it is indefensible to prefer a map, or a series of maps, whose goal is to preserve the *status quo* in the face of the undisputable reality of Kansas population trends.

The Buffalo 30 Revised plan attempted to draw districts within a narrow range of statistical deviation while still accommodating the explosive growth in Johnson County. It recognized that, given the population changes that occur in a country as mobile as the United States, electoral districts cannot be so fixed that they become malapportioned. Instead of distorting the borders of current districts in order to attempt to absorb some of the population increase in Johnson County, the Buffalo 30 Revised plan adheres to established Kansas redistricting policies and principles.

Beginning with the 1992 redistricting cycle, and continuing through the 2002 redistricting cycle, collapse has been the State's preferred solution to Johnson County's disproportionate growth. And, the Kansas Supreme Court acknowledged this policy by approving the senatorial 2002 plan. *See In re Petition to Determine Validity of 2002 Sub. for SB 256*, 273 Kan. 731, 734 (2002). Additionally, the concept of collapse has been applied by at least one other federal court operating under the *Chapman/Connor* standard. *See Colleton County Council*, 201 F.Supp.2d at 653-54 (collapsing two representative districts).

Finally, the Court should consider Buffalo 30 Revised not only in comparison to other proposed plans, but also in light of its improvements on the existing 2002 plan. Not only does it rectify the constitutional problems that developed over the last ten years, but it also drops the overall deviation from 9.27% to 6.14%.

CONCLUSION

The Owens Intervenors ask that the Court adopt the plans they advocated in the trial brief. *See* Memorandum (Doc. 224). In the alternative, they ask that the Court draw redistricting plans that conform to, or adhere as closely as practicable to, Buffalo 30 Revised (state senatorial) and Buffalo 30 Revised SBOE (state board of education).

Dated: June 1, 2012

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 1st day of June, 2012, I electronically filed the foregoing Complaint in Intervention with the Clerk of the Court using the CM/ECF system, which will automatically send a notice of electronic filing to all interested parties of record.

s/ *John C. Frieden*
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