IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBYN RENEE ESSEX,	)	
	)	
Plaintiff,	)	Case No. 12-4046-KHV-DJW
	)	
vs.	)	
	)	
KRIS W. KOBACH,	)	
Kansas Secretary of State,	)	
	)	
Defendant.	)	
	)	

INTERVENOR PLAINTIFFS WILLIAM ROY, JR. AND PAUL DAVIS'S POST TRIAL BRIEF

NATURE OF THE CASE

This is an action by Plaintiff and Intervenor-Plaintiffs seeking a constitutional reapportionment of the Kansas Congressional, Kansas Senate, Kansas House of Representatives, and Kansas State Board of Education districts. At the conclusion of the trial the Court permitted post trial briefs. This brief will address the constitutionality of the "Sunflower 13," "Buffalo 30 Revised," "Buffalo 30 rev-SBOE," and "Cottonwood 1" maps.

ISSUE

The United States Supreme Court has ruled that, without persuasive justifications, court drawn redistricting maps should achieve the goal of population with little more than *de minimus* variation. No case defines how much deviation in population is *de minimus* as it depends on the facts of a given case. Are the maps urged by these Intervenor Plaintiffs within a *de minimus* variation, or in the alternative, are the population deviations supported by persuasive justification?

Population Variation in the Constitutional Context

The parties to this case agree on only one thing about the issue of the constitutionality of court-drawn state redistricting plans– the starting point is *Chapman v. Meier*, 420 U.S. 1, 95 S.Ct. 751, 42 L.Ed.2d 766 (1975). *Chapman* provides:

> [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." (*Chapman* at 26-27)(emphasis added).

But the Chapman Court also noted "court-ordered reapportionment of a state legislature need not attain the same preciseness required for congressional redistricting."

Chapman was followed by *Connor v. Finch*, 431 U.S. 407, 97 S.Ct. 1828, 52 L.Ed.2d 465 (1977) which stated a population variance of 16.5% in the state Senate and 19.3% in the state House could not be tolerated in a court-ordered plan *in the absence of some compelling justification*. *Connor* at 417.

Indeed, both *Chapman* and *Connor* recognized plans had been found to be constitutional even when the population deviation exceeded the 10% safe harbor as long as the deviation was based on legitimate considerations incident to the effectuation of a rational state policy. (*Chapman* at 23-24, noting constitutional approval in *Mahan v. Howell* which approved a plan with a total population variance of 16.4% among house districts.) The *Chapman* Court even indicated it could approve the variance of 20% in the North Dakota plan, which was formulated by a federal court if it was based on state policies or other acceptable considerations. In that case it simply found the rationale of the district court did not necessitate the population deviation in the plan.

But in no case does the United States Supreme Court, or the Tenth Circuit Court of Appeals set out any specific maximum percentage of deviation – much less the 2% maximum claimed in the

amicus brief of Governor Brownback. All of the cases recognize the principal that there can be no set arbitrary maximum percentage of variation due to the wide-ranging considerations of state policy.

The *Chapman* Court also stated 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 in others. (Citing *Swann v. Adams*, 385 U.S. 440, 445 (1967).) In *Swann,* the court had found population deviations of 25.65% in one house and 33.55% in the other to be impermissible *absent a satisfactory explanation grounded on acceptable policy.* Thus if such an explanation exists, even such a high deviation would then be permissible. With a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features.

The Kansas case most relevant is *O'Sullivan v. Brier*, 540 F.Supp. 1200 (1982). In that case the Court redrew the Congressional map of Kansas. Even though the standard for population deviation is much stricter in Congressional redistricting, the Court noted population deviation is not the sole criteria, citing *Chapman* and *Mahan v. Howell*, 410 U.S. 315, 322, 93 S.Ct. 979, 984, 35 L.Ed. 2d 320 (1973). The court even noted the Supreme Court had rejected the argument that there is a fixed numerical or percentage variance to be de minimus. *Kirkpatrick v. Preisler*, 394 U.S. 526, 530, 89 S.Ct. 1225, 1228, 22 L.Ed. 2d 519 (1969). Furthermore the *O'Sullivan* Court recognized that although it need not give deference to plans that had not made it completely through the legislative process, it did need to give "thoughtful consideration" to plans that had been passed by elected representatives even though not signed into law.

The important fact for consideration here is that neither *Chapman* nor *Connor* nor any other case establish any hard and fast rule regarding the maximum permissible percent deviation a court-drawn, state redistricting plan must meet in order to be constitutional.

The Defendant's Trial Brief suggested that the "preeminent goal" of the Court should be eliminating population disparity. But it cites the *Chapman* case which specifically says such a goal is appropriate only in Congressional redistricting, not state redistricting. While the cases which review state drawn plans, and adopt the ten percent safe harbor, may not be applicable, clearly this Court is permitted to adopt a map for state districts with population variance as long as it recognizes and states the legitimate considerations incident to the effectuation of a rational state policy.

The guidelines adopted by the Kansas Legislature are certainly not binding on this Court, but they demonstrate the recognition of the legislative bodies of the case law regarding redistricting and a commitment of the Legislature to follow the principles set out in *Chapman* and *O'Sullivan*. Therefore the Court should give "thoughtful consideration" to those guidelines as well as the plans approved by legislators which were drafted pursuant to those guidelines. Indeed the only guideline which is probably not appropriate at this stage is avoiding incumbent contests such as the one created by the collapse of the Senate district contemplated in "Buffalo 30 Revised."

Congressional Reapportionment

There was no constitutional challenge made by any of the parties to the four Congressional maps discussed at trial. Indeed, from the perspective of population equality, they could not be closer to the ideal. Thus, the only issue for the Court is whether to adopt an existing map, and if so, which one, or draw a new map that was never considered by Kansas' elected officials.

In picking between constitutional maps, the *O'Sullivan* case provides five factors for the Court to consider:

(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.

Intervenor Plaintiffs Roy and Davis urge the Court to adopt the map titled "Sunflower 13." Mary Galligan testified and prepared a spreadsheet comparing the four maps being urged by the various parties, which is in evidence as Exhibit 310. Comparing the maps and applying the five factors from *O'Sullivan*, it is clear that "Sunflower 13" best fits the criteria.

1. All four maps are equal with regard to preserving County borders and not diluting votes of a racial minority.

2. "Sunflower 13" and "Sunflower 9C" do not split any city of the first class, while "Kansas Six" splits Lawrence and "Bob Dole 1" splits Topeka. In those latter cases, large segments of the urban population of either Topeka or Lawrence are unnecessarily moved to the agricultural First District.

3. "Sunflower 13" better preserves the core of the existing districts than "Sunflower 9C" by keeping Riley County in the Second District.

4. "Sunflower 13" also preserves the communities of interest expressed by Kansans at the public hearing held across the state before the Kansas Legislature began its attempt to redraw the districts which was mirrored in the presentations to the Court at trial.

The only other consideration discussed at trial was whether the additional population for the Third District, in addition to Johnson County and Wyandotte County, should come from the southeast corner of Leavenworth County or northern Miami County. It is respectfully submitted that

the portion of Leavenworth County, which includes the city of Basehor and is adjacent to the new developments of the Kansas Speedway and the Legends area in Wyandotte County, has more in common with the Kansas City urban area than the areas in northern Miami County and these issues were considered by the legislature. Therefore the Court should adopt "Sunflower 13" for the map of the new Congressional Districts in the State of Kansas.

Kansas Senate and Kansas State Board of Education Districts

Intervenor Plaintiffs Roy and Davis urge the Court to adopt the map for the Kansas Senate which is titled "Buffalo 30 Revised" and to adopt the map for the Kansas State Board of Education which is titled "Buffalo 30 rev-SBOE."

The *O'Sullivan* case provides that the Court need not give "deference" to any map that has not survived the full legislative process to become law, but it is required to give "thoughtful consideration" to plans passed by the legislative bodies. These Intervenor Plaintiffs have had an opportunity to confer with Intervenor Plaintiffs Owens, Henderson, Shaner and Wimmer, and hereby adopt and incorporate by reference the arguments they have put forth regarding the constitutionality of "Buffalo 30 Revised" in their post trial brief.

In addition, these Intervenor Plaintiffs urge the Court to give no weight or consideration to the map titled "Essex A." Although it was admitted into evidence, it was not provided to the parties in a timely fashion. In fact, in the parties' planning conference telephone calls, the Plaintiff represented to all parties that it would not use the map, and at the time the parties stipulated to the use of maps on the Kansas Legislative Research Department website, "Essex A" was not on the site. Furthermore, at 1:45 p.m. Friday, no intervenor had advised it was intending to use "Essex A" in any

way. This is confirmed in Exhibit A to the Parties' Planning Report and Trial Plan which lists the maps being urged by each party, a copy of which is attached hereto as Exhibit 1.

More importantly, because of the failure to provide timely notice of the map, and the fact that the accompanying reports were not provided, Mary Galligan was deprived from including "Essex A" in her analysis and comparison. Indeed, she saw the reports for the first time when they were discussed in open court. Therefore, the Court should adopt "Buffalo 30 Revised" as the map for the new districts for the Kansas Senate.

Since the districts for the Kansas State Board of Education are comprised of four contiguous Senate districts, for the same reasons set forth for those Senate districts, these Intervenor Plaintiffs urge the adoption of "Buffalo 30 rev-SBOE" for the map for the new districts for the Kansas State Board of Education. In addition, these Intervenor Plaintiffs remind the Court of the problem the other proposed map created with existing district 4 which is the seat of the first and only African-American member of the Kansas State Board of Education.

Kansas House of Representatives Districts

Intervenor Plaintiffs Roy and Davis urge the Court to adopt the map titled "Cottonwood 1." As noted above, historically the Kansas House of Representatives has been allowed to adopt its own plan and that plan has always been approved by the Kansas Senate. That also occurred in this year's Legislature. These Intervenor Plaintiffs urge the Court to give "thoughtful consideration" to the actions and votes of the elected officials in both houses of the Kansas Legislature and adopt "Cottonwood 1."

While the Court is not bound to any map urged by the parties, it is instructive to note that the parties identified the maps each was urging. See, Exhibit 1. In the Planning Report, Plaintiff

identified "Cottonwood 1" and "Cottonwood II." But now Plaintiff, the party that has had the most time to prepare for this litigation, appears to have changed its position and claims both are unconstitutional. She now urges the Court to go to the House map attached to her Complaint, which has never been vetted by the Legislative Research Department. Thus, in a perhaps not-so-surprising twist, the Plaintiff and Defendant are aligned in interest against all the intervenors.

The deviation from the ideal population in a state district can be either *de minimus* or even more if persuasively justified. It is acknowledged that "Cottonwood 1" has a 9.86% deviation. While it may be possible to draw districts with lower deviations, one needs to also consider other factors such as not diluting the voting strength of minorities, avoiding splitting cities and counties to the extent possible, adhering to communities of interest, and having district boundaries easily understood and recognized by voters.

Drawing 125 districts in this state, and considering the impact on all these factors is much, much more difficult a task than drawing four or even forty as is the case with Congressional districts and Senate districts. The ideal population for a House district is 22,716. Thus many counties and all larger cities have to be split into more than one district, so communities of interest and natural understandable boundaries are even more important.

It might very well be possible for a computer to draw a zero percent deviation map, but the result would be no recognizable communities of interest, no recognizable boundaries easily understood by the voters, next door neighbors in different districts, and perhaps even single household being split. And doing so may create a constitutionally prohibited dilution of a minority majority in districts in Wyandotte County. This is why there is no set percentage that has been determined to be *de minimus*.

With thoughtful consideration, it must be remembered that the members of the Special Committee on Redistricting solicited input from the citizens of Kansas, and the House Committee on Redistricting held open committee meetings to invite direct public input as well as statements and arguments of representatives. The result was the drawing of a map that passed the House of Representatives and then passed the Kansas Senate. More importantly no one intervened to oppose Cottonwood 1. No one offered testimony objecting to the drawing of their districts.

The only objection is that the Secretary of State has decided that the deviation is "too large." No case gives us a number as being the threshold for what is universally deemed to be "too large" a deviation in population. This is because the circumstances in the states vary. The Secretary of State picks an arbitrary deviation of 2% as his view of the maximum. But there is no controlling authority to mandate this. It is an arbitrary number. Why not zero? Or four? Or 9.86?

It is submitted the only factor the House presumably considered which is not relevant to the court is political consequences. But we have no evidence of if was considered or if it had any impact, or if so, what that impact might have been. All we know is that the majority of both the House of Representatives and the Senate approved the plan.

It is respectfully submitted that 9.86% population deviation is a *de minimus* deviation for the Kansas House of Representatives districts. But even if it should be view as more than *de minimus,* there is ample evidence that there is persuasive justification for adopting the plan of the Kansas House since it was passed by both the House of Representatives and the Senate.

TIMING

One final issue concerns election timing requirements. The Defendant suggested in his Trial Brief that if the Court issued its decision on or before June 8th, the current deadlines for filing is

adequate as it stands. The deadline for filing is noon on June 11, 2012. A decision on June 8, would require prospective candidates to determine in which district they live, whether or not they want to run, and submit their filing papers by that deadline. It would be too late for mailing, so the candidates would have to physically travel to Topeka to meet the deadline. Accordingly, these Intervenor Plaintiffs suggest that the Court should include in its Order an appropriate extension of time for prospective candidates to make their decsions from the date of the Order.

CONCLUSION

Intervenor Plaintiffs Roy and Davis urge the Court to give thoughtful consideration to the actions of the Kansas Legislature in the maps the Senate adopted for the Senate and the House adopted for the House, and apply the criteria set forth in *O'Sullivan* with regard to the state maps. In so doing, there is persuasive justification for the population deviation in "Cottonwood 1," "Buffalo 30 Revised," and "Buffalo 30 rev-SBOE." In addition, it is respectfully submitted that the population deviations in each map are *de minimus* in light of the other factors the Court should consider when adopting a state redistricting map. Finally, applying the *O'Sullivan* principals, the Court should adopt "Sunflower 13" as the map for the new Kansas Congressional Districts.

Respectfully submitted,

s/Steven R. Smith
Eldon J. Shields, #08266
Steven R. Smith, #09690
Attorneys for Intervenors
Gates, Shields & Ferguson, P.A.
10990 Quivira, Suite 200
Overland Park, Kansas 66210
(913) 661-0222 Telephone
(913) 491-6398 Facsimile
ejshields@gsflegal.com
stevesmith@gsflegal.com

CERTIFICATE OF SERVICE

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

s/Steven R. Smith
Steven R. Smith, #09690