IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

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

POST-TRIAL BRIEF OF DEFENDANT KRIS W. KOBACH, KANSAS SECRETARY OF STATE

Defendant Kris W. Kobach (hereinafter the "Secretary" or "Defendant") by and through counsel, submits the following Post-Trial Brief. In light of the law and the evidence presented to the Court, Defendant urges the Court to issue a reapportionment plan consistent with the legal analysis that follows.

INTRODUCTION

At the end of the day, this case comes down to one issue—satisfying the requirements of the Equal Protection Clause of the Fourteenth Amendment. All other issues are subservient to the principle that one person's vote should be equal in weight to another's. Accordingly, minimizing relative overall range must be the overriding objective of the Court in issuing its reapportionment plan. Except for "Essex A" (1.98%), the proposed state legislative plans in this case have relatively high overall deviations—deviations that are unconstitutional in a plan issued by an Article III court: "For the People 12" (5.22%), "Buffalo 30" (6.12%), "Buffalo 30 Revised" (6.14%), "For

the People 13 b" (7.41%), "Cottonwood 1" (9.86%), and "Cottonwood II" (9.86%). Therefore, if any of the proposed plans are used, they should merely be a starting point to ultimately achieve a plan with *de minimis* deviations.

ARGUMENT

I. Other than Essex A, the Proposed Plans are Unconstitutional if Issued by a Court.

The Court's role is to right the constitutional wrong of malapportionment caused by population shifts over the past ten years. Because of this, "the one-person, one-vote requirement of the United States Constitution is always the paramount concern of a court-ordered remedial plan." *Colleton County Counsel v. McConnell*, 201 F. Supp.2d 618, 627 (D.S.C. 2002). In a situation where "the court performs in the legislature's stead when the latter has failed to redistrict in accordance with the Constitution, [the Court] in fact operate[s] under more stringent requirements than those imposed on the state legislature. *Id*. (*quoting Conner v. Finch*, 431 U.S. 407, 415 (1977) (where Court rejected proposed plans with overall deviations of 4.86% and 3.13%, instead adopting state legislative plans with under 2% overall deviations)) (internal quotation marks omitted). In comparing court-ordered plans to legislatively passed plans, the *McConnell* Court specifically stated, "[c]ourt-ordered remedial plans for bicameral state legislative bodies, in contrast, are held to a much more stringent standard of population equality." *Id*. (*citing Chapman v. Meier*, 420 U.S. 1, 27 (1975)); *see also McDaniel v. Sanchez*, 452 U.S. 130, 139 (1981) (stating that legislative plans may employ multi-member districts and have greater population disparities).

The *McConnell* Court essentially defined *de minimis* deviation as being 2% relative overall range. *See Id*. at 655. The *McConnell* Court explained the differing standard for courts and

legislatures as follows: "the court must always act circumspectly, and in a manner free from any taint of arbitrariness or discrimination. Federal courts, unlike state legislatures, are not in a position to reconcile conflicting state policies on the electorate's behalf, nor at liberty to engage in political policy-making decisions." *Id*. (*quoting Conner v. Finch*, 431 U.S. 407, 415 (1977)) (internal quotation marks omitted). While the *McConnell* Court did attempt to follow certain traditional state policies, such as avoiding pitting incumbents against each other, such policies were followed only to the extent they did not detract from the constitutional mandate; and they were clearly subordinate to the constitutional requirement of reducing population deviations. *See generally id*.

The *McConnell* Court is not alone in its assessment of the relevant law in this area. In *Wisconsin State AFL-CIO v. Elections Board*, the Court ordered a plan with an overall deviation of 1.74%. 543 F. Supp. 630, 637 (E. D. Wis. 1982) (rejecting a proposed plan with a deviation of 2.83%). In doing so, the court stated that "maintaining the integrity of county lines may be a desirable objective, we believe its general incompatibility with population equality makes it only a consideration of secondary importance." *Id*. at 635. It was also conceded in *AFL-CIO* that "the maintenance of municipal boundaries is not constitutionally required." *Id*. at 636. Defendant agrees with the *Amicus Curiae* Brief filed by Governor Brownback that the consensus among other three-judge panels undertaking the task of court-drawn redistricting is that the *de minimis* standard is no more than two percent relative overall range. (*See* Doc. 235, p. 7-8) *see also Baldus v. Members of the Wisconcin Government Accountability Board*, -- F. Supp.2d --, 2012 WL 983685 (E.D. Wis. 2012); *Stenger v. Kellett*, -- F. Supp. --, 2012 WL 601017 (E.D. Mo. 2012); *Larios v.*

Cox, 314 F. Supp.2d 1357 (N.D. Ga. 2004); *Smith v. Cobb County Board of Elections*, 314 F. Supp.2d 1274 (N.D. Ga. 2002); *Farnum v. Burns*, 561 F. Supp. 83 (D. R. I. 1983).

Much was said during the hearing about the Guidelines and Rules adopted by the House and Senate Redistricting Committees. *See* Joint Stip. Ex. 9 & 10. The only rule or guideline that is constitutionally-mandated is the achieving near equality in the population of districts. As this Court noted in *O'Sullivan v. Brier*, all other rules and guidelines are simply legitimate factors that a legislature may consider in choosing between two maps *if and only if* the population deviations are equal. 540 F. Supp. 1200 (1982). All other factors and considerations must be subordinated to the constitutional requirement of "one-person, one-vote." As the Supreme Court stated, "[a]dopting any other standard other than population equality, using the best census data available, would subtly erode the Constitution's ideal of equal representation." *Karcher v. Daggett*, 462 U.S. 725, 731 (1983). What that means in practice for this Court is that it should focus on the goal of reducing overall deviations to under 2%, and consider the other factors only when deciding which populations to add or subtract from a district. So, for example, if District X must lose population to be brought within 1% of ideal district size, the choice of which section is to be severed from the district can be guided by such factors as preserving a community of interest or maximizing compactness.

II. The "10% Rule" Does not Apply to the Proposed Plans in this Case.

In *Brown v. Thompson*, the United States Supreme Court stated, "[o]ur decisions have established, as a general matter, that an apportionment plan with a maximum deviation under 10% falls within this category of minor deviations" 462 U.S. 835, 842-843 (1983). This has become known as the "10% Rule" for legislatively-enacted reapportionment plans and has been incorrectly

been characterized as a "safe harbor." *See Larios v. Cox*, 300 F. Supp.2d 1320, 1340-41 (N.D. Georgia, 2004), *affirmed Cox v. Larios*, 542 U.S. 947 (Mem.) (2004) (upholding district court's rejection of a plan even though its deviations were under 10%); *see also Daly v. Hunt*, 93 F.3d 1212, 1219-1220. The Supreme Court has accepted some fairly high deviations for legislatively-enacted plans. *See Gaffney v. Cummings*, 412 U.S. 735 (1973) (upholding a plan with 7.83% absolute deviation); *White v. Regester*, 412 U.S. 755 (1973) (upholding a plan with 9.9% absolute deviation). However, the Supreme Court has stated that the 10% Rule applies "*only* in the context of legislatively enacted apportionments." *See Conner v. Finch*, 431 U.S. 407, 418 (1977) (emphasis added). Other courts have also made clear that the 10% Rule does not apply to court-ordered plans. *See eg. Daly v. Hunt*, 93 F.3d 1212, 1217 FN7 (1996); *Reed v. Town of Babylon*, 914 F. Supp. 843, 869 (1996) (distinguishing between court-ordered and legislatively-enacted redistricting plans).

The Owens Intervenor-Plaintiffs completely gloss-over this distinction in their trial brief, despite their claim to the Court that they presented case law supporting court-ordered plans with a relative overall range of up to 10%. They seem to simply assume that any proposed plan that fall under the 10% total deviation threshold is constitutionally sound. However, they pointedly fail to mention that the Supreme Court itself has refused to assume that a court-ordered plan with a 5.95% absolute deviation would "satisfy the high standards of court-ordered plans." *See Conner v. Finch*, 431 U.S. 407, 418 FN 17 (1977) *citing Chapman v. Meier*, 420 U.S. 1 (1975). Given that the only proposed plans falling under a 5.95% in this case are "Essex A" and "For the People 12," it is surprising that the Ownes-Intervenor Plaintiffs so confidently assert that plans such as Buffalo 30 (with an absolute deviation of 6.12%) are constitutional. Regardless, the blanket theory asserted

by the Ownes-Intervenor Plaintiffs that the 10% rule applies to the proposed plans at bar is unfounded because such plans would ultimately be ordered by this Court.

The Owens Intervenor-Plaintiffs also assign some special significance to the fact that Ad Astra and Buffalo 30 passed the Kansas Senate with a constitutional majority. They attribute this significance to the "longstanding and unbroken" tradition of one chamber deferring to the other on their respective reapportionment plans. *See* Doc. 224 at 9. However, this tradition is not codified anywhere in Kansas law and should be given no weight whatsoever by this Court. More importantly, there is no case law supporting an argument that a mere tradition would transform a Senate-passed plan from the status of being "court-ordered" to 'legislatively-enacted" and thereby operating under the 10% Rule.

III. The Court Must Limit the Relative Overall Range to 2% or Less

"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." *Chapman v. Meier*, 420 U.S. 1, 24 (1975). In the case at bar, there can be no justification for overall deviation in excess of 2%. Plaintiff-Intervenors in this case may attempt to argue that a higher overall deviation is required in order to avoid splitting political subdivisions. That assertion would be incorrect. For example, when Buffalo 30 is compared to Essex A, it is clear that the lower deviation of Essex A can be achieved splitting *fewer* political subdivisions. *Compare* http://www.sos.ks.gov/elections/redistricting/Senate/M5_Buffalo%2030/40-m5_buffalo30_split.pdf (Buffalo 30 splits 19 counties and 134 voting districts) *to* http://www.sos.ks.gov/elections/redistricting/Maps/Senate/M5_Essex%20A/

36-m5_essexa-split.pdf (Essex A splits 18 counties and 130 voting districts). Given the Essex A example, it is demonstrably the case that avoiding splitting political subdivisions does not justify an overall deviation above 2%.

IV. Further Information for the Court on Changing the Date of the August Primary

As has been discussed before the Court as well as in the Declaration submitted by Mr. Brad Bryant (Trial Exhibit 1503), there are numerous difficulties presented by moving back the August Primary. In particular, this difficulty increases if the August Primary is delayed more than one week. There will be approximately 1,200 – 1,400 polling places in the August primary. County election offices have been working for months to find locations, sign contracts, and pay fees where necessary. If the primary is moved, counties will have to scramble to find new locations because many locations will not be available on a different date. For instance, schools prefer not to be used as polling places when school is in session because of security concerns. During the trial, the Court asked why this was an issue, given that the general election is during the school year. The answer is that in November schools are rarely used as polling places. This is not a problem in the November general election because counties have had months to find other locations that will be suitable. Such a luxury will not be available this August.

There will be approximately 10,000 – 12,000 board workers in the August primary. County election offices have been working for months to find board workers of each party and assign them to the correct polling places. Each county must also provide training to each board worker. That training is especially critical this year with the implementation of the new voter identification law statewide. There is no guarantee that board workers will be available on a different date. Counties will have to scramble to find suitable replacements and provide adequate

training.

The events leading to the general election are carefully timed in accordance with state law, federal law, and administrative policy. The first event is the state canvass of the primary election. Once that is complete, there is just enough time to get military ballots out 45 days before the General Election in a non-redistricting year. (Those ballots must be mailed by September 21, 2012). The State Canvass is required to be held no later than September 1st. If the primary election date is moved back, the canvass date will need to be moved back to allow the state time to collect and accumulate results for all national and state offices in 105 Kansas counties. After the primary results are certified at the State Canvass, there must be time for objections to be filed, the general election list be certified, vacancies in candidacies filled, ballot rotation to be completed, and ballot layout design completed. All of this must be completed by September 21, 2012 (45 days before the general election). The bottom line is that moving the August primary will have a ripple effect on the November election; and moving it more than one week will dramatically increase the magnitude of this ripple effect.

CONCLUSION

WHEREFORE, Defendant requests that the Court select the reapportionment plans for the Kansas House of Representatives and Kansas Senate with the lowest overall deviation (lowest relative overall range) and modify those plans to decrease the deviations so that the relative overall range of the district sizes is 2% or less. Alternatively, Defendant requests that the Court start with the districts of the status quo and reduce their deviations to the same relative overall range. Defendant further respectfully requests that the Court render a decision no later than June 20, 2012, and modifies any relevant deadlines as described in Defendant's Trial Brief. If June 8,

2012, arrives and the Court is not yet prepared to issue its final order, Defendant respectfully requests that the Court, at that time, issue an interim order moving the filing deadline to either June 15, 2012, or June 22, 1012, whichever is appropriate, given the Court's anticipated completion date.

Respectfully submitted,

OFFICE OF THE KANSAS SECRETARY OF STATE

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CERTIFICATE OF SERVICE

I certify that a copy of the foregoing was served on counsel for Plaintiff via the Court's Electronic Filing System, this 1st day of June, 2012.

/s/ Ryan A. Kriegshauser
Attorney for the Defendant