

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

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

ANSWER OF DEFENDANT KRIS W. KOBACH

COMES NOW, Defendant Kris W. Kobach in his official capacity as Kansas Secretary of State (the “Defendant”), by and through counsel himself and Ryan A. Kriegshauser and for his Answer to the Complaint, states the following to the best of present knowledge and belief:

JURISDICTION

1. Admitted. Defendant further states that Plaintiff raises issues of federal constitutional concern, particularly the Fourteenth Amendment, Section 1, of the United States Constitution. Additionally, this Court is the only court possessing proper jurisdiction for the remedy sought on all maps at issue. The Kansas Supreme Court has stated that it lacks jurisdiction to draw any reapportionment maps: “First, the duty of reapportionment is legislative in nature and is committed by the Constitution to the legislature, and courts cannot make a reapportionment themselves.” *Harris v. Shannahan*, 192 Kan. 183, 206 (1963). While the Kansas Supreme Court must review state maps for “validity” in its role under the Kansas Constitution, the Kansas Constitution is devoid of language granting the Court the authority to

create state maps out of whole cloth. *See* Kan. Const., Art. 10 § 1(b). Additionally, the Kansas Supreme Court has no authority to review any federal congressional map because federal statute dictates the exclusive procedure to be used when a map for congressional districts is challenged. *See* 28 U.S.C. § 22841. Conversely, the United States Supreme Court has made it clear that federal courts may “devise and impose” reapportionment plans if state legislatures fail to act. *See Wise v. Lipscomb*, 437 U.S. 535, 540 (1978) *citing Conner v. Finch*, 431 U.S. 407, 431 (1977). This same power has been applied when federal courts review state maps. *See, e.g., Larios v. Cox*, 300 F. Supp. 2d 1320 (N.D. Ga.) (*per curiam*), *summarily aff’d*, 542 U.S. 947 (2004) *see also Long v. Docking*, 283 F. Supp. 539, 543-544 (D. Kan. 1968). Additionally, Defendant admits that this case is now ripe for adjudication. When analyzing ripeness a court must examine: (1) the fitness of the issue for judicial resolution, and (2) hardship to the parties of withholding judicial consideration. *Skull Valley Band of Goshute Indians v. Nielson*, 376 F.3d 1223, 1237 (10th Cir. 2004). As explained above, this issue is fit for judicial resolution by a federal court. There would be immense hardship to Defendant in carrying out his duty to administer elections in the State of Kansas if this Court were to withhold its judicial consideration. Defendant notes that, according to K.S.A. § 25-205(h,) the candidate filing deadline is June 11, 2012. Furthermore, Defendant states that both Kansas and federal law dictate that ballots for military and overseas citizens must be mailed forty-five (45) days prior to the August 7, 2012, primary, which is June 23, 2012. *See* K.S.A. § 25-1220 and 42 U.S.C. § 1973ff-1(a)(8). The Kansas Constitution grants the Kansas Attorney General fifteen (15) days to assess the validity of state maps passed by the Kansas legislature and signed by the governor. Kan. Const. Art. 10 § 1(b). Additionally, the Kansas Constitution grants the Kansas Supreme Court thirty (30) days to assess the validity of state maps

¹ This statute may also be applied to the apportionment of any “statewide legislative body.” *See* 28 U.S.C. 2284.

approved by the Kansas Attorney General and brought before the Supreme Court by petition. *Id.* Based on these time lines, adequate time no longer exists before (1) the candidate filing deadline, and (2) the 45-day deadline to mail Uniformed and Overseas Citizens Absentee Voting Act (UOCAVA) ballots in order for state maps to be adopted by the legislature, signed by the Governor, assessed by the Attorney General, and assessed by the Kansas Supreme Court . Therefore, regarding the deadline imposed by state law (the June 11 filing deadline), this case became ripe on April 26, 2012. Regarding the deadline imposed by federal law (the 45-day UOCAVA mailing period), this case became ripe on May 8, 2012. With respect to the federal maps, there is a present danger of immediate harm if this Court does not act. The filing deadline is less than four weeks away. As demonstrated in the following paragraphs, legislative leaders have indicated their belief that maps will not be passed this legislative session. Currently, potential challengers are unable to determine the congressional district in which they reside. Because congressional campaigns require a large amount of preparation and fund raising, it is imperative that certainty be provided by this Court as soon as possible. To allow time for potential challengers to make an informed decision regarding whether or not they wish to run for Congress by the June 11, 2012, filing deadline, this Court must act as expeditiously as possible. Additionally, Defendant needs adequate time before the filing deadline to program the state's Election Voter Information System (ELVIS) with new districts ordered by this Court. Based on the foregoing considerations, this case is ripe and judiciable; and this Court is the only body with jurisdiction to issue a remedy with respect to all four maps at issue.

PARTIES

2. Defendant lacks sufficient knowledge and information to form a belief as to the truth or falsity of the allegations in paragraph 2 of the Complaint and therefore denies the same.

3. The allegations in paragraph 3 of the Complaint state a legal conclusion to which no response is required. To the extent that a response is required, Defendant admits that based on the 2010 census as adjusted pursuant to the Kansas Constitution, the 26th State House District as drawn in 2002 currently has a deviation of 36.5% and the 23rd State Senate District as drawn in 2002 has a deviation of 28.9%.

4. Admitted.

STATEMENT OF FACTS

5. Admitted.

6. Admitted.

7. Admitted.

8. Admitted.

9. Denied. Defendant states that under the 2010 Federal Census, the ideal population of a Kansas congressional district is 713,280 (not 706,280). Under the 2010 Federal Census, the 3rd Congressional District has a population of 767,569 (not 760,569).

10. Denied. The Kansas Constitution requires Defendant to make an adjustment of the relevant federal census numbers to more precisely determine the voting addresses of students and military personnel for Kansas House and Kansas Senate districts (and by extension, the Kansas Board of Education districts). *See* Kan. Const., Art. 10 § 1(a). Defendant admits that under the 2010 Federal Census, as adjusted, the ideal population for each Kansas State Senate

district is 70,986. Defendant states that under the 2010 Federal Census, as adjusted, the ideal population for each Kansas State House of Representatives district is 22,716 (not 22,176). It is further admitted that as adjusted, the 2010 Federal Census shows that 31,014 people live in the 26th Kansas House District and 91,509 people live in the 23rd Kansas Senate District.

11. Denied. The Kansas Constitution requires Defendant to make an adjustment of the relevant federal census numbers to more precisely reflect the voting addresses of students and military personnel for Kansas House and Kansas Senate districts (and by extension, the Kansas Board of Education districts). *See* Kan. Const., Art. 10 § 1(a). Defendant admits that under the 2010 Federal Census, as adjusted, the ideal population for each Kansas State Board of Education district is 283,944. Defendant further admits that under the 2010 Federal Census, as adjusted, the 3rd Kansas State Board of Education District has a population of 344,392.

12. Admitted.

13. Admitted. Defendant additionally informs the Court that three series of state maps have gained significant support in the Kansas Legislature. The “Cottonwood” series of Kansas House maps has passed both chambers in one form or another. The “For the People” series of Kansas Senate maps has passed the Kansas House in version “13b” (this bill also included a State Board of Education version of the map (13bv1-SBOE)) but this series did not pass the Kansas Senate with a vote of 19 to 21 (on a motion to amend). The “Ad Astra” series passed the Senate but was rejected by the Kansas House with a vote 43 to 72 (on a motion to concur). Additionally, each chamber has passed a congressional map that has been rejected by the other chamber. “Sunflower 9C” passed the Senate with a vote of 23 to 17 but failed in the House with a vote of 48 to 76 (on final action). An amendment was proposed in the Senate to “Sunflower 9C” by Senator

Peterson called “34th Great State” but the amendment failed 17 to 22. The House used “34th Great State” as the framework to create the map “Bob Dole 1” which ultimately passed the House with a vote of 81 to 43 but then later failed in the Senate with a vote of 14 to 24 (on a motion to concur). For a full list of legislative votes on particular maps, see “Exhibit A.” Additionally, the Court may view all maps submitted to the legislature at http://redistricting.ks.gov/_Plans/plans.html.

14. Denied.

15. It is admitted that the Kansas Legislature has before failed to enact proper redistricting maps.

16. The allegations in paragraph 16 of the Complaint state a legal conclusion to which no response is required. It is admitted that the Kansas Legislature has failed and neglected to reapportion the congressional, state legislative, and State Board of Education districts in the State of Kansas as of the filing of this Answer.

COUNT I

LEGISLATIVE MALAPPORTIONMENT

17. The text of the Constitution speaks for itself. The remaining allegations in paragraph 17 of the Complaint state a legal conclusion to which no response is required.

18. The allegations in paragraph 18 of the Complaint state a legal conclusion to which no response is required.

19. Defendant lacks sufficient knowledge and information to form a belief with respect to the residence and citizenship of Plaintiff and therefore denies the same. With respect to the growth of the districts at issue, Defendant admits the allegations.

20. The allegations in paragraph 20 of the Complaint state a legal conclusion to which

no response is required.

21. Defendant lacks sufficient knowledge and information to form a belief as to whether or not the Kansas Legislature intends to act by producing a map before adjournment and therefore denies the same. However, Defendant states that Senator Tim Owens, the Senate Reapportionment Chair, has been quoted by the *Wichita Eagle* as saying,

I'm kind of at that point in the process, [w]e can continue to meet and continue to talk about the same things, but I don't think we need to do that. Frankly, I have confidence that if it goes to the court we'll get a better result out of the court than we'll get out of the House. And if that's the case, why waste everybody's time? Let's just move it along and let the court make the decision.

See Lefler, Dion, "Kansas House, Senate near impasse over drawing of district maps," *Wichita Eagle*, May 9, 2012 available at <http://www.kansas.com/2012/05/08/2328081/kansas-house-senate-near-impasse.html>. Defendant further states that on May 15, 2012, the Senate Republican caucus experienced what was reported as an "implosion." See Carpenter, Tim, "Senate GOP Map Negotiations Implode," *Topeka Capital Journal*, May 15, 2012 available at <http://cjonline.com/news/state/2012-05-15/senate-gop-map-negotiations-implode>. The Senate Redistricting Committee Chairman "walked out" of the meeting and a fellow key senator, Jeff King, was quoted as saying:

I think we're beyond resolution of this. As unfortunate as it is for everyone involved. . . it's going to end up in court. I don't see the point of putting our caucus through this very divisive and painful discussion.

See Lefler, Dion, "Kansas Senate's Planned Vote on Latest District Map Delayed," *Wichita Eagle*, May 15, 2012 available at <http://www.kansas.com/2012/05/15/2336162/kansas-senates-planned-vote-on.html>. The remaining allegations in paragraph 21 of the Complaint state a legal conclusion to which no response is required. To the extent a response is required, Defendant admits that he

has no statutory or administrative authority to change the congressional, legislative, and State Board of Education districts as they are defined by the Kansas Statutes. *See* K.S.A. 4-101 *et. seq.* Defendant further admits that he is required by statute to conduct elections in the State of Kansas and will proceed as directed by statute.

22. Defendant lacks sufficient knowledge and information to form a belief as to what Plaintiff intends to do and therefore denies the same. The remaining allegations in paragraph 22 of the Complaint state a legal conclusion to which no response is required.

23. The allegations in paragraph 23 of the Complaint state a legal conclusion to which no response is required.

24. Defendant lacks sufficient knowledge and information to form a belief with respect to the citizenship of Plaintiff and therefore denies the same. The remaining allegations in paragraph 24 of the Complaint state a legal conclusion to which no response is required.

COUNT II

CONGRESSIONAL REDISTRICTING

25. Defendant incorporates the foregoing responses as if fully set forth herein.

26. The allegations in paragraph 26 of the Complaint state a legal conclusion to which no response is required.

27. The text of the Constitution speaks for itself. The remaining allegations in paragraph 27 of the Complaint state a legal conclusion to which no response is required.

28. The allegations in paragraph 28 (mis-numbered in the Complaint as paragraph 24) of the Complaint state a legal conclusion to which no response is required.

29. The allegations in paragraph 29 (mis-numbered in the Complaint as paragraph 27)

of the Complaint state a legal conclusion to which no response is required.

30. Defendant lacks sufficient knowledge and information to form a belief as to whether or not the Kansas Legislature will adjourn without reapportioning the state's congressional districts and therefore denies the allegations in paragraph 30 (mis-numbered as paragraph 28). However, Defendant states that pursuant to H.C.R. 5034, the legislature shall adjourn *sine die* on June 1, 2012 and pursuant to K.S.A. § 25-205(h) the candidate filing deadline is June 11, 2012. Defendant admits that he has no statutory or administrative authority to change the congressional, legislative, and State Board of Education districts as they are defined by the Kansas Statutes. See K.S.A. 4-101 *et. seq.* Defendant admits that he is required by statute to conduct elections in the State of Kansas and will proceed as directed by statute.

31. Defendant lacks sufficient knowledge and information to form a belief as to what the Plaintiff intends to do and therefore denies the allegations in paragraph 31 (mis-numbered as paragraph 29). The remaining allegations in paragraph 31 (mis-numbered in the Complaint as paragraph 29) of the Complaint state a legal conclusion to which no response is required.

32. The allegations in paragraph 32 (mis-numbered in the Complaint as paragraph 30) of the Complaint state a legal conclusion to which no response is required.

33. The allegations in paragraph 33 (mis-numbered in the Complaint as paragraph 31) of the Complaint state a legal conclusion to which no response is required.

COUNT III

STATE SCHOOL BOARD MALAPPORTIONMENT

34. Defendant incorporates the foregoing responses as if fully set forth herein.

35. The text of the Constitution speaks for itself. The remaining allegations in

paragraph 35 (mis-numbered in the Complaint as paragraph 33) of the Complaint state a legal conclusion to which no response is required.

36. The allegations in paragraph 36 (mis-numbered in the Complaint as paragraph 34) of the Complaint state a legal conclusion to which no response is required.

37. Defendant lacks sufficient knowledge and information to form a belief with respect to the citizenship of Plaintiff and therefore denies the same. The remaining allegations in paragraph 37 (mis-numbered in the Complaint as paragraph 35) of the Complaint state a legal conclusion to which no response is required.

38. Defendant lacks sufficient knowledge and information to form a belief with respect to the residence and citizenship of Plaintiff and therefore denies the same. With respect to the growth of the district at issue, Defendant admits the allegations in paragraph 38 (mis-numbered in the Complaint as paragraph 36).

39. The allegations in paragraph 39 (mis-numbered in the Complaint as paragraph 37) of the Complaint state a legal conclusion to which no response is required.

40. Defendant lacks sufficient knowledge and information to form a belief as to whether or not the Kansas Legislature will adjourn without reapportioning the State Board of Education districts and therefore denies the allegations in paragraph 40 (mis-numbered as paragraph 38). However, Defendant states that pursuant to H.C.R. 5034, the legislature shall adjourn *sine die* on June 1, 2012 and pursuant to K.S.A. § 25-205(h) the candidate filing deadline is June 11, 2012. Defendant further admits that he has no statutory or administrative authority to change the congressional, legislative, and State Board of Education districts as they are defined by the Kansas Statutes. See K.S.A. 4-101 *et. seq.* Defendant further admits that he is required by

statute to conduct elections in the State of Kansas and will proceed as directed by statute.

41. Defendant lacks sufficient knowledge and information to form a belief as to what Plaintiff intends to do and therefore denies the same. The remaining allegations in paragraph 41 (mis-numbered in the Complaint as paragraph 39) of the Complaint state a legal conclusion to which no response is required.

42. The allegations in paragraph 41 (mis-numbered in the Complaint as paragraph 40) of the Complaint state a legal conclusion to which no response is required.

43. All allegations not specifically and expressly admitted herein are hereby denied.

WHEREFORE, Defendant respectfully asks this Court for the following relief:

1. Pursuant to the provisions of 28 U.S.C. § 2284(a), the Court convene a three judge panel to adjudicate this matter.

2. The Court issue a permanent injunction and judgment decreeing that the plan of legislative apportionment established in 2002 by the Kansas Legislature in Chapter 4 of the Kansas Statutes may not hereafter be used as a valid plan of legislative apportionment, congressional apportionment, and State Board of Education apportionment.

3. The Court issue an order including a valid plan of legislative apportionment, congressional apportionment, and State Board of Education apportionment based on maps introduced in the Kansas legislature. Alternatively, Defendant stands ready to submit valid plans of legislative apportionment, congressional apportionment, and State Board of Education apportionment for the Court's consideration and issuance.

4. For such other and future relief as this Court finds just and equitable.

Respectfully submitted,

**OFFICE OF THE KANSAS
SECRETARY OF STATE**

By: /s/ Ryan A. Kriegshauser
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ATTORNEYS FOR DEFENDANT

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 16th day of May, 2012.

/s/ Ryan A. Kriegshauser
Attorney for the Defendant