

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

ROBYN RENEE ESSEX,)	
)	
Plaintiff,)	
)	
BENJAMIN D. CRAIG, et al.)	
)	
Intervenor-Plaintiffs,)	
)	CIVIL ACTION
v.)	
)	No. 12-4046-KHV-JWL
KRIS W. KOBACH,)	
Kansas Secretary of State,)	
)	
Defendant,)	
)	
STATE OF KANSAS,)	
Intervenor-Defendant.)	
_____)	

Before KATHRYN H. VRATIL, Chief District Judge, MARY BECK BRISCOE, Chief Judge of the Tenth Circuit, and JOHN W. LUNGSTRUM, District Judge

On May 20, 2012, the Kansas legislature adjourned without redrawing existing maps for congressional, state Senate, state House and Kansas Board of Education districts based upon the results of the 2010 decennial census.¹ Apparently anticipating the legislature’s failure, plaintiff on May 3, 2012 filed this suit against Kansas Secretary of State Kris W. Kobach. Plaintiff contended that as a registered voter who intended to vote in the upcoming primary election, she had the right to vote in federal and state districts that were constitutionally permissible and fair. Within two weeks, the Secretary of State filed an answer. The Court agreed to expedite the case, scheduled a pretrial conference and requested appointment of a three-judge panel. The Court also allowed

¹ A more detailed account of the background, both factual and procedural, is set forth in Essex v. Kobach, 874 F. Supp. 2d 1069 (D. Kan. 2012).

numerous parties to intervene.²

On May 29 and 30, 2012, the Court heard testimony, received evidence and entertained argument from the original parties and the intervenors. Because the Court concluded that none of the proposed plans were both constitutional and fully comported with non-constitutional criteria that apply to redistricting plans approved or crafted in a judicial context, the Court drew its own plans. The Court issued its per curiam opinion – complete with maps and supporting census data – on June 7, 2012.

The Court found that the Kansas congressional, legislative and Board of Education districts were constitutionally infirm because a shift in population documented by the 2010 decennial census revealed that the districts were substantially unequal in population. It therefore (1) enjoined the Secretary of State from holding elections with the districts as they then existed; (2) imposed a remedy in the form of new plans for each such elective body; and (3) ordered that any party who intended to seek statutory attorney's fees comply with Rule 54.2 of the Rules of Practice of the United States District Court for the District of Kansas and Rule 54(d) of the Federal Rules of Civil Procedure. Plaintiff and several Intervenor-Plaintiffs filed motions seeking such fees. This matter is before the Court on the following motions: (1) Intervenor-Plaintiff Mearl Denning's Motion For Attorneys' Fees (Doc. #250); (2) Plaintiff-Intervenor John W. Bradford's Motion For An Award Of

² The following intervened as party plaintiffs: (1) Senator Thomas C. Owens, John E. Henderson, Bernie Shaner and Ron Wimmer; (2) Benjamin D. Craig and Larry Winn III; (3) William Roy, Jr. and Paul T. Davis; (4) Kevin Yoder; (5) Mearl Denning; (6) Michael R. O'Neal; (7) Walter T. Berry and Lynn Nichols; (8) Richard Keller; (9) Frank Beer; (10) John W. Bradford; (11) Jeff King, Steve Abrams and Ray Merrick; (12) L. Franklin Taylor; (13) Mary Pilcher-Cook, Gregg Philip Snell and Carri Person; and (14) Brenda Landwehr, Gary Mason and Greg A. Smith. The State of Kansas, through its Attorney General, also moved to intervene as party defendant. The Court sustained that motion for a limited purpose – allowing the Attorney General to litigate the question of attorney's fees.

Attorneys' Fees And Costs Pursuant To 42 U.S.C. § 1988 (Doc. #254); (3) Motion For Award Of Attorneys' Fees And Costs On Behalf Of Intervenor-Plaintiffs Senator Owens, Henderson, Shaner, And Wimmer (Doc. #256); (4) Intervenor Taylor's Motion For Attorneys' Fees And Costs (Doc. #257); (5) Intervenor Plaintiffs Dr. William Roy, Jr. And House Minority Leader Paul Davis's Motion For Attorney's Fees (Doc. #258); (6) Intervenor-Plaintiffs Walter T. Berry and Lynn Nichols's South-Central Kansas Intervenors' Motion For Attorney Fees And Costs (Doc. #260); (7) Intervenor Plaintiff Richard Keller's Motion For Attorney's Fees And Costs Pursuant To 42 U.S.C. § 1988 (Doc. #261); (8) Intervenors Benjamin Craig And Larry Winn III's Motion For An Award Of Attorneys' Fees And Costs (Doc. #262) all filed June 20, 2012; and (9) Plaintiff Robyn Renee Essex's Motion For An Award Of Attorney's Fees And Costs (Doc. #266) filed June 21, 2012.³

After the parties filed their fee motions, the Attorney General asked the Court to bifurcate the attorney's fee issue by first deciding whether any moving parties were "prevailing parties" and if so, deciding the reasonableness of their fee requests. Intervenor-Defendant The State Of Kansas Ex Rel. Attorney General Derek Schmidt's Motion To Bifurcate Determinations Regarding Attorney's Fee Requests With Supporting Memorandum Incorporated (Doc. #272) filed June 26, 2012. The Secretary of State and the Attorney General asked the Court to stay their deadlines to respond to the fee applications pending a ruling on the motion to bifurcate. Intervenor-Defendant The State Of Kansas Ex Rel. Attorney General Derek Schmidt's Motion To Stay Responses To

³ Intervenor-Plaintiff Kevin Yoder filed a motion seeking attorney's fees (Doc. #252) but later withdrew his motion. (Doc. #274). Intervenor-Plaintiffs Mary Pilcher Cook, Gregg Phillip Snell and Carri Person did the same (Docs. #264, 322), as did Intervenor-Plaintiff Frank Beer (Docs. #265, 293). Two sets of Intervenor-Plaintiffs – (1) Jeff King, Steve Abrams and Ray Merrick and (2) Brenda Landwehr, Gary Mason and Greg A. Smith – and individual Intervenor-Plaintiff Michael R. O'Neal are not seeking attorney's fees.

Attorney's Fee Motions And Further D. Kan. Rule 54.2 Consultations (Doc. #277); Defendant Secretary of State's Motion To Stay The Briefing Schedules On All Motions For Attorneys' Fees And Joining Intervenor-Defendant The State Of Kansas's Motion To Bifurcate (Doc. #279) both filed June 28, 2012. On July 3, 2012, the Court overruled those motions and provided additional direction with respect to the attorney's fee requests, as follows:

The Court will determine the attorneys' fee issues in the following manner. All parties are relieved of the consultation obligations that are imposed under D. Kan. Rule 54.2. The Court will instead entertain requests from parties who believe that they are able to demonstrate their entitlement to fees as described below.

Although the Court has ruled that the 2002 districts are now unconstitutional because of population shifts documented by the 2010 census, the Court reserves judgment on the question whether every party who advocated unconstitutionality is a prevailing party. The Court therefore asks each fee applicant to establish that he or she added value to the map-drawing process (the remedy) by presenting persuasive evidence on the competing interests that were legitimately at stake: ensuring that all votes were of equal weight to the degree required by law; respecting different demographic groups and political interests; and to the extent practicable maintaining the geographical integrity of political subdivisions, voting districts and communities of interest. Parties who believe that they are able to demonstrate the value which they added are ordered to submit evidence to support their fee applications as to those issues only.

The parties may file briefs on the issue described herein, of no more than 10 pages, on or before July 6, 2012. To any brief in support of a fee application, each applicant shall attach an affidavit which establishes the reasonableness of the requested hourly rates for all billers on the case, the number of hours and the amount of expenses reasonably incurred in relation to the specific issues on which (other than unconstitutionality) the applicant claims to have prevailed. The affidavit shall also break down the requested fees into specific categories, as follows:

- (1) Time expended in preparing complaints and motions to intervene and participating in intervention-related proceedings;
- (2) Advocacy of a proposed map; and
- (3) Advocacy of specific map characteristics (separate from specific proposed maps).

The parties shall take care to exclude from their fee requests any time or expenses related to the advocacy of partisan or political interests, and any time and expenses related to advocacy for maps that the Court could not have adopted under relevant

constitutional standards. For purposes of this order, the Court defines such maps as state maps that contained more than a total population deviation of 2 per cent.

Each affidavit shall include a copy of any agreement for payment of attorneys' fees and expenses, which may be filed under seal, and shall state whether third parties such as political parties, business or civic groups are potentially responsible for payment of such fees.

Defendant and Intervenor-Defendant may file responsive briefs, of 5 pages or less, no later than July 13, 2012.

Order (Doc. #281). The moving parties have filed additional documents pursuant to the foregoing order,⁴ and the Secretary of State and the Attorney General have responded. (Docs. #294-311). The Court will grant movants' fee requests and award attorney's fees to each in an amount appropriate under the applicable legal standards.⁵

Legal Standards

The Civil Rights Attorney's Fees Awards Act of 1976, 42 U.S.C. § 1988, provides that in

⁴ Intervenor Plaintiff Marearl Denning's Brief In Support Of Fee Application (Doc. #282) filed July 10, 2012; Plaintiff-Intervenor John W. Bradford's Revised Motion For An Award Of Attorneys' Fees And Costs Pursuant To 42 U.S.C. § 1988 (Doc. #283) filed July 10, 2012; Intervenor Plaintiffs William Roy, Jr. And House Minority Leader Paul Davis's Supplemental Memorandum In Support Of Motion For Attorney's Fees (Doc. #285) filed July 11, 2012; Memorandum In Support Of Motion For Award Of Attorneys' Fees And Costs On Behalf Of Intervenor-Plaintiffs Senator Owens, Henderson, Shaner, and Wimmer (Doc. #286) filed July 11, 2012; Intervenor Taylor's Amended Motion For Attorneys' Fees And Costs Pursuant To 42 U.S.C. § 1988 And Memorandum In Support (Doc. #287) filed July 11, 2012; Supplemental Memorandum In Support Of Intervenor Plaintiffs Benjamin Craig And Larry Winn III's Motion For An Award Of Attorneys' Fees (Doc. #289) filed July 11, 2012; Walter Berry and Lynn Nichols's South-Central Kansas Intervenor's Memorandum In Support Of Motion For Attorney Fees (Doc. #290) filed July 11, 2012; Intervenor Plaintiff Richard Keller's Memorandum In Support Of His Motion For Attorney's Fees And Costs Pursuant To 42 U.S.C. § 1988 (Doc. #291) filed July 11, 2012; Plaintiff Robyn Renee Essex's Supplemental Brief In Support Of Motion For Attorneys' Fees (Doc. #292) filed July 11, 2012.

⁵ "The road to democracy is complete. All that is left is the bill." Belderas v. Texas, No. 6:01CV158, 2002 WL 32113830, at *1 (E.D. Tex. Feb. 20, 2002) (Higginbotham, J., writing for three-judge panel considering fee applications after court rejected intervenors' proposed redistricting maps and drew its own).

actions to enforce civil rights, “the court, in its discretion, may allow the prevailing party . . . a reasonable attorney’s fee as part of the costs.” A prevailing party is ordinarily entitled to such fees unless special circumstances would render an award unjust. Kentucky v. Graham, 473 U.S. 159, 164 (1985). In other words, districts courts have “quite narrow” discretion to deny fees to a prevailing plaintiff. Dahlem ex rel. Dahlem v. Bd. of Educ. of Denver Pub. Schs., 901 F.2d 1508, 1514 (10th Cir. 1990). A plaintiff prevails “when actual relief on the merits of his claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” Lefemine v. Wideman, 133 S. Ct. 9, 11 (2012) (per curiam) (quoting Farrar v. Hobby, 506 U.S. 103, 111-12 (1992)). A court need not award damages to satisfy this test; injunctive or declaratory relief will suffice. See Lefemine, 133 S. Ct. at 11.

A district court has circumscribed authority to significantly reduce or deny an attorney’s fee award to a prevailing civil rights litigant. Zinna v. Congrove, 680 F.3d 1236, 1239 (10th Cir. 2012). One circumstance in which a district court may reduce or reject a fee request is when plaintiff’s victory is merely technical or de minimis. Phelps v. Hamilton, 120 F.3d 1126, 1131 (10th Cir. 1997).

Analysis

I. Prevailing Party

Both the Secretary of State and the Attorney General address whether and to what degree each movant prevailed. The Attorney General first raised the issue in his motion to bifurcate, framing it as a challenge to the reasoning of In re Kansas Congressional Districts Reapportionment Cases (O’Sullivan v. Brier), 745 F.2d 610, 613 (10th Cir. 1984) (“O’Sullivan”), which moving parties rely upon to support their argument that they are prevailing parties. The Attorney General

urges the Court to disregard O'Sullivan in favor of more recent decisions from the United States Supreme Court and other circuit courts of appeal.

The Attorney General first argues that O'Sullivan is factually distinguishable because it included one set of plaintiffs and a single set of intervening plaintiffs, each representing the interests of a major political party, and the court effectively adopted one side's proposed statewide maps and awarded attorney's fees to both sets of plaintiffs at the rate of \$75 an hour. These factual differences, however, are not of any import. Furthermore, although the case may have arisen 30 years ago, the mere passage of time is not particularly significant. The principles which O'Sullivan addressed are very much the salient principles in this case; the statutory language concerning attorney's fees has not changed, and courts have not overhauled the jurisprudence surrounding it.⁶

Second, the Attorney General argues that significant and more recent authority in other circuits holds that not all intervenors in a redistricting case are automatically prevailing parties as a matter of law. See Hastert v. Illinois State Bd. of Election Comm'rs, 28 F.3d 1430 (7th Cir. 1994); Daggett v. Kimmelman, 811 F.2d 793 (3d Cir. 1987). The Court agrees with this general proposition (although in those cases, neither the Seventh nor the Third Circuit expressly so held),⁷

⁶ O'Sullivan awarded fees because both sets of plaintiffs succeeded on a significant issue which achieved some of the benefit the parties sought by bringing the action. 745 F.2d at 612 (quoting Hensley v. Eckerhart, 461 U.S. 424 (1983)). That issue was to invalidate the existing congressional districts and have the district court adopt a constitutionally permissible plan. The same issue is present here, along with the need to redraw districts for the state Senate, state House and the Kansas Board of Education.

⁷ In Hastert, the Seventh Circuit stated in dicta that "in the redistricting context the touchstone for whether a party 'prevails' is simply whether that party's map (or the map the party ultimately embraces) is ultimately adopted." Hastert, 28 F.3d at 1443. We disagree with this statement, for which the Seventh Circuit cites no authority. And in Daggett, the Third Circuit never addressed prevailing party status; the opinion solely related to the amount of fees. Daggett, 811 F.2d (continued...)

and rejects the implicit argument that O’Sullivan holds to the contrary.

Our analysis of prevailing party status begins with the decisions of the United States Supreme Court. More than 20 years ago, in Farrar v. Hobby, 506 U.S. 103 (1992), the Supreme Court announced the prevailing formulation of federal court jurisprudence on the issue. Farrar holds that a party prevails “when actual relief on the merits of [a plaintiff’s] claim materially alters the legal relationship between the parties by modifying the defendant’s behavior in a way that directly benefits the plaintiff.” 506 U.S. at 111-12. The elements of prevailing party status, therefore, include at least some relief on the merits of plaintiff’s claim through an enforceable judgment or comparable relief. Id. at 111. Whether one is a prevailing party does not turn on the magnitude of the relief obtained, and the degree of plaintiff’s success does not affect his or her eligibility for a fee award. Id. at 114. When plaintiff succeeds in remedying a civil rights violation, he or she serves as a private attorney general, vindicating a policy that Congress considered of the highest priority. Fox v. Vice, 131 S. Ct. 2205, 2213 (2011). Although the Supreme Court has denied prevailing party status in situations in which defendant’s change in conduct is voluntary,⁸ it has continued to define

⁷(...continued)
at 797-802.

⁸ Buckhannon Bd. & Care Home, Inc. v. W. Va. Dep’t of Health & Human Res., 532 U.S. 598 (2001) (abrogating “catalyst theory” cases, including Beard v. Teska, 31 F.3d 942 (10th Cir. 1994), which allowed award without judicially sanctioned change in parties’ legal relationship).

A related issue is whether the citizens of Kansas should be made to pay because their elected representatives did not fulfill their duty. Unfortunately, forcing taxpayers to pay for legislative dereliction occurs “whenever the political branches of government fail to vindicate important rights and the affected parties must seek a judicial hearing.” Hastert, 28 F.3d at 1444. Likewise, it is of no consequence that the Secretary of State admitted the unconstitutionality of the existing districts, “since fees may be taxed even against entities whose role is limited to enforcement of regulations they played no role in promulgating.” Id. at 1444 n.16. See also Johnson v. Mortham, 950 F. Supp. 1117, 1122-23 (N.D. Fla. 1996) (in redistricting case, Secretary of State who did not create maps
(continued...))

“prevailing party” as set forth in Farrar. See Lefemine, 133 S. Ct. at 11.

On this record, we have no difficulty in concluding that movants are prevailing parties for purposes of Section 1988.⁹ The principal relief that Plaintiff and Intervenor-Plaintiffs sought was an injunction against any future elections using the unconstitutional districts that had remained in place as a result of the legislature’s failure to act. The Court ordered precisely that relief. The judgment modified the Secretary of State’s behavior by enjoining him from receiving nominations and petitions for office, issuing certificates of nominations and elections and all further acts necessary to the holding of elections.¹⁰ Other courts share our view. See Balderas v. Texas, No. 6:01CV158, 2002 WL 32113830, at *2 (E.D. Tex. Feb. 20, 2002); Johnson v. Mortham, 950 F. Supp. 1117, 1121 (N.D. Fla. 1996); see also Shaw v. Hunt, 154 F.3d 161, 164-65 (4th Cir. 1998) (intervening plaintiffs fit within “prevailing party” for attorney’s fees purposes). We hold that movants are prevailing parties.

II. Special Circumstances

Although a prevailing party is ordinarily entitled to recover attorney’s fees under Section 1988, we must also consider whether special circumstances render such an award unjust. Kentucky v. Graham, 473 U.S. 159, 164 (1985). An opponent must make a strong showing of special circumstances to support the denial of fees, and we are to narrowly construe the existence of special

⁸(...continued)
but enforced election law responsible for attorney’s fees).

⁹ The Court notes that not all Intervenor-Plaintiffs are seeking fees. See n.4, *supra*. The Court’s ruling is limited to the parties who have pending fee applications.

¹⁰ The State of Kansas, through its Attorney General, was permitted to intervene for the limited purpose of addressing attorney’s fees. See Order (Doc. #128). We therefore do not apply prevailing party analysis with respect to the State.

circumstances. Phelps v. Hamilton, 120 F.3d 1126, 1131 (10th Cir. 1997). Only certain circumstances warrant a significant reduction or outright denial of fees. Zinna v. Congrove, 680 F.3d 1236, 1239 (10th Cir. 2012). One such circumstance is when a plaintiff’s victory is “purely technical or de minimis,” Phelps, 102 F.3d at 1131, which is what many of the Intervenor-Plaintiffs received according to the Secretary of State and the Attorney General. The Tenth Circuit uses three factors to determine whether a party’s success is merely technical or de minimis: (1) the degree of success obtained by plaintiffs; (2) the extent to which plaintiffs succeeded on their theory of liability; and (3) the public purpose served by plaintiffs’ success. Zinna, 680 F.3d at 1239-40. No single factor is dispositive. Id. Furthermore, application of these factors does not undermine the general rule that prevailing parties should recover attorney’s fees absent special circumstances. Id. at 1240 (citing Brandau v. Kansas, 168 F.3d 1179, 1182 (10th Cir. 1999)).¹¹

The first factor, the degree of success obtained by the plaintiffs, is the most critical of the three and requires a court to consider the difference between the judgment recovered and the recovery sought. Phelps, 120 F.3d at 1131-32. In the second factor, a court considers the extent

¹¹ Although it is clear that a prevailing party may receive a fee award of zero, courts sometimes ascribe that to the presence of “special circumstances” and other times reach that conclusion through a “reasonableness” determination. Compare Farrar, 506 U.S. at 117 (O’Connor, J., concurring) (“While [prior Supreme Court precedent] may be read as indicating that this de minimis or technical victory exclusion is a second barrier to prevailing party status, the Court makes clear today that, in fact, it is part of the determination of what constitutes a reasonable fee.”) with id. (“And even if the exclusion’s location is debatable, its effect is not: When the plaintiff’s success is purely technical or de minimis, no fees can be awarded. . . . [W]hen a plaintiff’s victory is purely technical or de minimis, a district court need not go through the usual complexities involved in calculating attorney’s fees.”).

We conclude that the law creates no meaningful legal distinction between the two descriptions. For the sake of clarity, we analyze movants’ rights to collect a fee of any amount under the rubric of special circumstances, and we examine the reasonable amount of any such awards (whether zero or any other figure) under the traditional lodestar analysis.

to which plaintiff succeeded on its theory of liability. This factor looks beyond the awarded relief and examines the extent to which plaintiff succeeded in its theory of liability. Id. at 1132. Finally, a court takes into account the public purpose served by plaintiff's success. Id. This third factor acknowledges Section 1988's purpose of ensuring the vindication of important rights, even when large sums of money are not at stake. Farrar, 506 U.S. at 122 (O'Connor, J., concurring).

As we consider each of these three factors, we are mindful that our order of July 3, 2012 both shaped the parties' submissions regarding attorney's fees and revealed our attentiveness to the issue of special circumstances. The order directed the parties to "exclude from their fee requests any time or expenses related to the advocacy of partisan or political interests, and any time and expenses related to advocacy for maps that the Court could not have adopted under relevant constitutional standards." Order (Doc. #281). Those parameters virtually mooted the issue of special circumstances because the parties were required to focus on the underlying issues.

Particularly given the first and third Farrar factors, the Court concludes that no special circumstances override the presumption that movants should receive attorney's fees. Every movant asked the Court to grant injunctive and declaratory relief to prevent elections from being conducted under the districts as they existed, and to approve or create constitutionally permissible districts. The Court did just that. Movants received exactly the relief which they requested, thus satisfying the first factor. Moreover, the public purpose served by this lawsuit was to obtain from a federal court what the public did not get from its legislators – timely, constitutionally valid maps under which Kansas voters could elect congressional representatives, state senators and representatives and members of the state Board of Education.

As to the second factor, the Secretary of State and the Attorney General challenge the extent

to which certain movants succeeded in their theories of liability, measured by similarities or dissimilarities between the maps which they advocated and the maps which the Court ultimately created.¹² The Court did not adopt any movant's map or set of maps, but clearly some are closer to the final product than others. The Court agrees that this comparison is a relevant measure of a party's success, but it is not the only relevant measurement. The Court considered the parties' views as to how their proposed plans complied with constitutional requirements and the "Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting" ("the Guidelines").¹³ And the Court did so in a highly compressed time frame. See Essex v. Kobach, 874 F. Supp. 2d 1069, 1079 (D. Kan. 2012) ("Thanks to impressive focus, industry and organization by dozens of lawyers, the Court was in a position to receive a huge volume of evidence on short notice, in a highly compressed and efficient format."). The parties thus assisted the process of applying the law to the facts and by this measure, the Court finds that no movant should be denied fees by virtue of the fact he or she sponsored a map which was dissimilar to what the Court ultimately adopted.

The Court recognizes that Plaintiff and the Intervenor-Plaintiffs achieved their initial goal – invalidating existing districts – with virtually no effort: the Secretary of State never denied that the then-current districts were unconstitutional. The Secretary's concession did not create the remedy, however, or otherwise resolve the case. Much hard work followed, and counsel for all parties

¹² Degree of success is a relevant factor in determining special circumstances and it also appears in considering adjustments to the lodestar. The Court will revisit the movants' degree of success in our lodestar analysis.

¹³ The Kansas House and Senate adopted the Guidelines in January of 2012. These Guidelines represent the only uncontroverted set of significant state policies articulated by the legislature, and we relied on these and substantially similar policies when assessing the 2002 Kansas redistricting plan, Graham v. Thornburgh, 207 F. Supp. 2d 1280, 1292-93 (D. Kan. 2002), and when creating a congressional plan in 1982, O'Sullivan v. Brier, 540 F. Supp. 1200, 1203 (D. Kan. 1982).

contributed to the effort. Contrary to the Attorney General's argument, this case – with its far greater number of parties and many competing plans that garnered fractured and often tepid or partial support – presents a much more compelling argument for a fee award than O'Sullivan. No neat partisan plans came from the legislature, and the political parties did not generate acceptable plans. The legislative session did not end in a stalemate over two competing plans, leaving the Court a clear choice between one or the other. Instead, the Court received evidence concerning 25 maps that the legislature considered throughout the redistricting process, see id. at 1077, nn.11-14, plus the “Essex A” map that originated in the governor's office. The Court was called upon to absorb a great deal of information and analyze that information under applicable legal authority within the ambitious schedule that the Court set for the parties and itself. Under the case law that the Court has cited, including O'Sullivan, the Court has no difficulty in concluding that special circumstances do not preclude a fee award under Section 1988.

III. What Fees Are Reasonable

Finally, the Court must determine what constitutes a reasonable attorney's fee, a matter committed to the district court's discretion. Carter v. Sedgwick County, 36 F.3d 952, 956 (10th Cir. 1994). The presumptively reasonable attorney's fee is the product of reasonable hours times a reasonable rate, which yields a “lodestar” figure that is subject to adjustment. Perdue v. Kenny A. ex rel. Winn, 130 S. Ct. 1662, 1673 (2010) (lodestar produces presumptively reasonable fee that court may adjust in “rare circumstances”). In setting the hourly rate, “the court should establish, from the information provided to it and from its own analysis of the level of performance and skills of each lawyer whose work is to be compensated, a billing rate for each lawyer based upon the norm for comparable private firm lawyers in the area in which the court sits calculated as of the time the

court awards fees.” Ramos v. Lamm, 713 F.2d 546, 555 (10th Cir. 1983) abrogated by Pennsylvania v. Del. Valley Citizens’ Council for Clean Air, 483 U.S. 711, 725 (1987). A reasonable hourly rate comports with rates “prevailing in the community for similar services for lawyers of reasonably competent skill, experience, and reputation.” Blum v. Stenson, 465 U.S. 886, 896 n.11 (1984).

The Attorney General asserts that Intervenor-Plaintiffs should not receive fees because their participation was not intended to vindicate federal rights, but to advance noncompensable “political, partisan, or personal interests.”¹⁴ The Attorney General further describes Intervenor-Plaintiffs as “volunteers,” now looking for a payday at taxpayer expense. Id. at n.1. Finally, he cautions that the Court “should not encourage future redistricting litigation by creating the wrong incentives.” Id. The Court disagrees with the characterization of Intervenor-Plaintiffs as volunteers and is confident that this ruling will not incentivize reasonable legislators to repeat the sorry history of this case; if anything, it should encourage legislators to timely perform their prescribed duties and encourage taxpayers to demand that they do so. Moreover, the Court directed the parties to exclude from their applications any time or expenses related to the advocacy of partisan or political interests, and any time and expenses related to advocacy for maps that the Court could not have adopted under relevant constitutional standards. Order (Doc. #281). The parties appear to have done so.¹⁵ These were significant issues with state-wide impact. The Court therefore rejects the Attorney General’s

¹⁴ The Attorney General incorporated this statement into his responses to the other Intervenor-Plaintiffs’ motions for attorney’s fees.

¹⁵ Of course, by merely examining the billing records, the Court cannot determine with certainty that the parties have complied with this directive. To the extent that the Court is unable to do so, it relies on counsel’s representations and affidavits as officers of the court. The Attorney General’s conclusory argument that Intervenor-Plaintiffs sought to advance only noncompensable interests is too general to be of assistance in this analysis.

argument that the appropriate fee is no fee at all.¹⁶

A. Reasonable Hours

The Secretary of State and the Attorney General object to the number of hours that movants expended, arguing generally that having multiple attorneys work on the matter created inherent duplication of efforts. The moving parties submitted billing records which indicate how many attorneys they used: four of the parties used three attorneys; two parties used two attorneys; and three parties used five attorneys. Although the parties with the greatest number of attorneys also expended the most hours, the Court finds that with the exception of attendance in court, the parties are not seeking fee awards for more than one attorney to perform the same task. The parties must exercise billing judgment with respect to a claim of the number of hours worked, and that requires counsel to make a good-faith effort to exclude from the fee request hours that are excessive, redundant or otherwise unnecessary. Ellis v. Univ. of Kan. Med. Ctr., 163 F.3d 1186, 1202 (10th Cir. 1998). The Court has a corresponding obligation to exclude from the award hours not reasonably expended. Id.

The Court has no reason to believe that the moving parties have not complied with the directive that fee applications exclude requests for hours not reasonably expended.¹⁷ This case began and ended in a matter of weeks, which alleviates any concern about it becoming a convenient

¹⁶ The Court recognizes that state government money will fund this award, which is an ordinary occurrence in Section 1983 actions. “Fee awards against government officials are run-of-the-mill occurrences, even though, on occasion, had a state legislature acted or reacted in a different or more timely manner, there would have been no need for a lawsuit or for an injunction.” Supreme Court of Va. v. Consumers Union, 446 U.S. 719, 739 (1980).

¹⁷ Again, while the Attorney General argues to the contrary, his arguments are too unspecific to frame any helpful analysis of this issue.

or routine source of billing. Accordingly, the Court accepts the representation that the parties reasonably expended the number of hours which they reported. For work performed outside of the courtroom, the Court does not reduce the number of hours for which it awards fees. As for in-court representation, the Court will award fees for the appearance of two attorneys for each movant. Because the Court is limiting the award for in-court appearances to two attorneys per movant, the Court will allow fees for the two highest-billing attorneys.¹⁸

B. Reasonable Rates

In determining what constitutes a reasonable hourly rate, the court should base its decision on evidence which shows the market rate for analogous litigation in the area where the court sits. Ramos, 713 F.2d at 555. The fee applicant bears “the burden of showing that the requested rates are in line with those prevailing in the community for similar services by lawyers of reasonably comparable skill, experience, and reputation.” Ellis, 163 F.3d at 1203 (internal citations omitted). Movants propose a wide range of hourly fees and present evidence as to customary rates in variously-described geographic markets for lawyers with similar experience. The Court has determined that the State of Kansas is the relevant area for purposes of this lawsuit. The Court has further determined that a reasonable rate is a maximum of \$300 an hour for partners, \$200 an hour for associates, \$100 an hour for paralegals and \$75 an hour for law students.

C. Adjustments to the Lodestar

The law imposes a strong presumption that the lodestar figure is reasonable. Perdue, 130 S. Ct. at 1673. However, once a court has determined the lodestar amount, “[t]here remain other

¹⁸ For those parties who were represented at trial by lawyers from two firms, the Court allows fees for one lawyer from each firm.

considerations that may lead the district court to adjust the fee upward or downward.” Hensley v. Eckerhart, 461 U.S. 424, 434 (1983). The “most critical factor” in determining the reasonableness of a fee award “is the degree of success obtained.” Id. at 436. The Secretary of State and the Attorney General ask the Court to reduce the lodestar downward to take into account the limited success each movant achieved, measured primarily by how closely the maps this Court drew resemble the maps each movant advocated. The Court considered this issue in deciding whether special circumstances exist which would wholly preclude an award of attorney’s fees, noting that this comparison is one measure of success. It is not, however, the only measure of success. Plaintiff did not advocate specific characteristics which the Court determined were essential to a constitutionally acceptable result, but without plaintiff’s complaint, this lawsuit would not have existed and Kansas voters would have been denied the opportunity to vote in 2012 primary and general elections for their congressional delegation as well as members of the state Senate, House and Board of Education. The Intervenor-Plaintiffs all brought perspectives to the litigation which the Court considered carefully and which, to a greater or lesser extent, influenced the final result. On the other hand, almost none of the applicants were entirely successful when measured by the Court’s final product. Much of what Intervenor-Plaintiffs argued was in some sense cumulative or redundant. Thus, we must examine each applicant’s relative success and adjust the award accordingly. The Court does not suggest that the percentage of success attributed to each movant derives from scientific precision; rather, the following percentages represent the Court’s assessment based on the record.

1. Plaintiff Robyn Renee Essex

Essex acknowledges that her advocacy precludes the Court from considering her a prevailing

party under the attorney fee paradigm, as her focus was directed more to the creation of constitutional maps than to any specific characteristics thereof. She nonetheless asserts that her status as sole plaintiff places her in a significantly different position, and the Attorney General agrees that the Court should evaluate her fee application differently from those of Intervenor-Plaintiffs. The Court recognizes that without her complaint, this case would not have existed, the old maps would not have been declared unconstitutional and new maps would not exist. Moreover, the Court acknowledges the efforts of plaintiff's counsel in organizing the parties and the evidence such that the case was able to proceed apace. The Court therefore finds that plaintiff was 50% successful.

2. Benjamin D. Craig and Larry Winn III

Intervenor-Plaintiffs Craig and Winn argued in favor of proper representation for Johnson County in the state Senate and House, which they defined as eight Senate seats and 26 House seats. While Johnson County's representation increased such that it now has parts of nine Senate seats and 25 House seats, the Court does not attribute that result to Craig and Winn's advocacy. Craig and Winn were helpful, however, in pointing out that the For the People maps carved out downtown Olathe and placed it in a district centered in Douglas and Leavenworth Counties, a configuration which the Court did not adopt. The Court finds that Craig and Winn were 50% successful.

3. Richard Keller

Intervenor-Plaintiff Keller addressed the congressional districts only, advancing two arguments. First, he argued that Leavenworth County should remain in the Second District because of its history as part of that district and relevant communities of interest. The Court's map maintains Leavenworth County in the Second District, in part because of the arguments Keller raised but also

because no party advanced a reason to move it to the First District. Thus, although the position Keller advocated prevailed, it did not do so solely because Keller was in favor. Keller also argued that Forts Riley and Leavenworth should remain in the same district, but the Court did not agree and Fort Riley now resides within the First District. The Court finds that Keller was 25% successful.

4. Marearl Denning

Intervenor-Plaintiff Denning limited her argument to the congressional maps, advocating that the Court should redraw the Third District to add the portion of Miami County which includes the communities of Spring Hill and Louisburg without splitting the City of Hillsdale. She also argued that the Third District should include all of Wyandotte and Johnson Counties. As the Court noted in its opinion, Denning presented persuasive evidence that any additional population for the Third District should come from Miami County, and the Court drew the boundaries in the exact manner she suggested. The Court finds that Denning was 100% successful.

5. L. Franklin Taylor

Intervenor-Plaintiff Taylor addressed only the state Senate and House districts and primarily focused on the City of Olathe. Taylor argued that Olathe should not be split between more than one Senate district, and in that respect he prevailed as the map places the core of Olathe in a single district. Taylor likewise argued that the Court should draw the House districts coterminously with Olathe's municipal boundaries and should protect the City's right to have six representatives. His views prevailed in part; although the Court drew House maps that basically created districts within Olathe, the districts number three instead of six. Ultimately, though, the Court rejected the maps that Taylor proposed: For the People 13b for the Senate and Cottonwood I and II for the House. The Court finds that overall, Taylor was 75% successful.

6. Walter T. Berry and Lynn Nichols

Intervenor-Plaintiffs Berry and Nichols, who refer to themselves as the South-Central Kansas Intervenors, addressed the state Senate and House maps. Their primary argument was that the Court should recognize population growth in South-Central Kansas and Wichita and not allow those areas to be under-represented in favor of districts in Johnson County. The Court agreed that no Senate district should be collapsed in South-Central Kansas, and also agreed that Butler, Cowley and Sumner Counties should not be grouped with more rural counties. However, the Court rejected the maps they advocated (For the People 13b and Essex A). The Court finds that the South-Central Kansas Intervenors were 50% successful.

7. Dr. William Roy, Jr. and Paul Davis

Intervenor-Plaintiffs Roy and Davis presented arguments with respect to all of the legislative and Board of Education maps. They first argued in favor of congressional map Sunflower 13, which the Court rejected, and alternatively urged the Court to adopt Sunflower 9C. Roy and Davis concede that the Court chose to include a portion of Miami County, rather than Leavenworth County, in the Third District. Contrary to their argument, the Court also rejected Buffalo 30 Revised, the state Senate and Board of Education map they proposed. The Court was persuaded by certain arguments that Roy and Davis made concerning state Senate districts, however, including collapsing a district and creating a new one in Johnson County, and preserving two districts in Wyandotte County with unique African-American make-up, and their argument that the Court should not create a Board of Education District that would dilute the district of an African-American incumbent. As for the state House maps, the Court rejects their assertion that the ultimate product resembles Cottonwood I, the map they advocated. Finally, Roy and Davis did assist the Court by presenting the helpful testimony

of Mary Gallagin on the congressional and Senate maps, and by being the only Intervenors to express the views of the minority Democratic Party. The Court finds that Roy and Davis were 50% successful.

8. John W. Bradford

Intervenor-Plaintiff Bradford addressed the congressional and state Senate maps. He did not advocate specific maps, but as for the former, he essentially adopted Richard Keller's arguments that Leavenworth County should remain wholly in the Second District and should remain in the same district as Fort Riley (thereby keeping Forts Leavenworth and Riley together). He prevailed on the first argument but not on the second. He argued that all of Leavenworth County should be placed in a single state Senate district rather than being split between two districts that include other counties, but the Court drew a map that maintained the split. The Court finds that Bradford was 25% successful.

9. Senator Thomas C. Owens, John E. Henderson, Bernie Shaner, Ron Wimmer

This group of Intervenor-Plaintiffs advocated specific maps for all of the plans. It advocated in favor of the congressional Sunflower 9C map, which the Court largely adopted with the modification of adding Miami County instead of Leavenworth County to the Third District. As for the state Senate and Board of Education maps, this group advocated Buffalo 30 Revised, which the Court did not use. It also addressed specific issues such as collapsing a district and moving it to Johnson County; here, the Court did collapse a district but not in the area the Owens group proposed, in part because the proposal reflected the group's political aims. This group successfully argued that the Fourth Board of Education District should not be distorted in a way to oust the African-American incumbent. Finally, the Owens group does not argue that its views on the state

House maps prevailed in any way. Looking at the group's advocacy as a whole, the Court finds that it was 75% successful.

D. Expenses

Some movants also seek expenses they incurred in this lawsuit. The Secretary of State does not object to movants' submitted expenses, while the Attorney General objects to an unspecified amount of the Taylor and Bradford expenses on the ground that their descriptions are too general or vague. See Response Of Intervenor Defendant The State Of Kansas Ex Rel. Attorney General Derek Schmidt To Motion For Attorneys' Fees Of Intervenor Plaintiff Taylor (Doc. #310); Response Of Intervenor Defendant The State Of Kansas Ex Rel. Attorney General Derek Schmidt To Motion For Attorneys' Fees Of Intervenor Plaintiff Bradford (Doc. #298) both filed July 18, 2012. The Attorney General's objection is not compelling. The Court finds that movants reasonably incurred such expenses.

IT IS THEREFORE ORDERED that (1) Intervenor-Plaintiff Marearl Denning's Motion For Attorneys' Fees (Doc. #250) filed June 20, 2012; (2) Motion For Award Of Attorneys' Fees And Costs On Behalf Of Intervenor-Plaintiffs Senator Owens, Henderson, Shaner, And Wimmer (Doc. #256) filed June 20, 2012; (3) Intervenor Plaintiffs Dr. William Roy, Jr. And House Minority Leader Paul Davis's Motion For Attorney's Fees (Doc. #258) filed June 20, 2012; (4) Intervenor-Plaintiffs Walter T. Berry and Lynn Nichols's South-Central Kansas Intervenors' Motion For Attorney Fees And Costs (Doc. #260) filed June 20, 2012; (5) Intervenor Plaintiff Richard Keller's Motion For Attorney's Fees And Costs Pursuant To 42 U.S.C. § 1988 (Doc. #261) filed June 20, 2012; (6) Intervenors Benjamin Craig And Larry Winn III's Motion For An Award Of Attorneys' Fees And Costs (Doc. #262) filed June 20, 2012; (7) Plaintiff Robyn Renee Essex's Motion For An Award Of

Attorney's Fees And Costs (Doc. #266) filed June 21, 2012; (8) Plaintiff-Intervenor John W. Bradford's Revised Motion For An Award Of Attorneys' Fees And Costs Pursuant To 42 U.S.C. § 1988 (Doc. #283) filed July 10, 2012; and (9) Intervenor Taylor's Amended Motion For Attorneys' Fees And Costs Pursuant To 42 U.S.C. § 1988 And Memorandum In Support (Doc. #287) filed July 11, 2012, be and hereby are **SUSTAINED**.¹⁹ The Court awards attorney's fees and expenses in the following amounts.²⁰

<u>PARTY</u>	<u>ATTORNEY'S FEES REQUESTED</u>	<u>ATTORNEY'S FEES AWARDED</u>	<u>EXPENSES</u>	<u>TOTAL</u>
Essex	\$43,005.50	\$19,436.00	\$2,150.12	\$21,586.12
Craig & Winn	\$74,397.00	\$22,735.00	\$0	\$22,735.00
Keller	\$42,275.00	\$10,568.75	\$0	\$10,568.75
Denning	\$48,280.00	\$46,242.50	\$152.30	\$46,394.80
Taylor	\$64,785.12	\$53,605.00	\$1,250.37	\$54,855.37
Berry & Nichols	\$88,234.50	\$41,272.50	\$0	\$41,272.50
Roy & Davis	\$100,994.00	\$45,979.25	\$83.29	\$46,062.54
Bradford	\$42,559.00	\$10,639.75	\$672.99	\$11,312.74
Owens et al.	\$157,646.64	\$129,524.06	\$4,691.27	\$134,215.33

TOTAL OF ALL ATTORNEY'S FEES REQUESTED = \$662,176.76

TOTAL OF ALL ATTORNEY'S FEES AWARDED = \$380,002.81

TOTAL OF ALL EXPENSES AWARDED = \$9,000.34

TOTAL OF ALL ATTORNEY'S FEES AND EXPENSES AWARDED = \$389,003.15

Dated this 30th day of April, 2013 at Kansas City, Kansas.

s/ Kathryn H. Vratil
FOR THE COURT

¹⁹ Plaintiff-Intervenor John W. Bradford's Motion For An Award Of Attorneys' Fees And Costs Pursuant To 42 U.S.C. § 1988 (Doc. #254) filed June 20, 2012 and Intervenor Taylor's Motion For Attorneys' Fees And Costs (Doc. #257) filed June 20, 2012 are overruled as moot.

²⁰ The numbers from which the following totals derive appear in the attached Appendix.

Appendix

PARTY	TIMEKEEPER	HOURLY RATE ALLOWED	HOURS ALLOWED	TIMEKEEPER	HOURLY RATE ALLOWED	HOURS ALLOWED	TIMEKEEPER	HOURLY RATE ALLOWED	HOURS ALLOWED	TOTAL FEES AWARDED	EXPENSES	TOTAL FEES REQUESTED
Essex	Haden	\$300	67.5							\$10,125.00	\$799.16	\$23,625.00
Essex	Boatman	\$240	48.3	Avery	\$185	38				\$9,311.00	\$1,350.96	\$19,380.50
Craig & Winn	Johnson	\$300	94.9	Carr	\$200	70.5	Naron	\$300	3	\$22,735.00		\$74,397.00
	Paralegal	\$100	18	Sr. Research Analyst	\$100	2						
Keller	Wright	\$250	111.6	Schimmel	\$250	57.5				\$10,568.75		\$42,275.00
Denning	Zakoura	\$300	73.8	Hinderks	\$175	111.2	Smithyman	\$300	7.6	\$46,242.50	\$152.30	\$48,280.00
	Law Clerk	\$75	31.5									
Taylor	Badgerow	\$300	40	Lamer	\$300	89.8	Perkins	\$200	60.4	\$53,605.00	\$1,250.37	\$64,785.12
	Delaney	\$300	1.75	Dixon	\$200	4.7	Paralegals	\$100	11.2			
Berry & Nichols	Crouse	\$275	175.8	Oliver	\$300	69.6	Sorenson	\$300	.5	\$41,272.50		\$88,234.50
	Fowler	\$300	1	Eberline	\$200	44.3	Paralegals/ Law Clerk	\$100	40.1			
Roy & Davis	Smith	\$295	173.9	Shields	\$295	90.9	Hammond	\$200	31.6	\$45,979.25	\$83.29	\$100,994.00
Bradford	Robinson	\$235	160.3	Farha	\$195	22.3	Law Clerk	\$75	7.2	\$10,639.75	\$672.99	\$42,559.00
Owens et al.	Irigonegaray	\$300	88.5							\$19,912.50		\$26,328.75
Owens et al.	Frieden	\$300	159.9	Unrein	\$225	180.5	Fowler	\$225	157.25	\$109,611.56	\$4,691.27	\$131,317.89
	Patty	\$225	98.6									