

JAN 13 2012

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**In The
Supreme Court of the United States**

STATE OF LOUISIANA and
JAMES D. CALDWELL, Attorney General,
Plaintiffs,

v.

JOHN BRYSON, Secretary of Commerce,
ROBERT GROVES, Director, United States Census
Bureau, and KAREN LEHMAN HAAS, Clerk,
United States House of Representatives,
Defendants.

On Motion For Leave To File A Bill Of Complaint

**BRIEF OF THE AMICUS CURIAE
KRIS W. KOBACH, SECRETARY OF STATE
OF THE STATE OF KANSAS
IN SUPPORT OF PLAINTIFFS' MOTION
FOR LEAVE TO FILE A BILL OF COMPLAINT**

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Kris W. Kobach, in his capacity as the Secretary of State for the State of Kansas respectfully submits this *amicus curiae* brief in support of the Plaintiffs.¹

INTERESTS OF THE AMICUS CURIAE

Kris W. Kobach is the Secretary of State for the State of Kansas (hereinafter, referred to as the “Amicus”). Kansas is one of only a few states that conducts an adjustment to the United States Census.² This adjustment is conducted by the Amicus and used as the basis of the State’s legislative reapportionment³ process. By conducting the adjustment, the Amicus is required under the Kansas Constitution to provide the legislature with data, that based on the Plaintiffs’ arguments in this case, is likely to result in

¹ Pursuant to Rule 37.6 of the Rules of the Supreme Court, counsel of record for all parties received notice at least 10 days prior to the due date of the *amicus curiae*’s intention to file this brief. All parties have consented to the filing of this brief. Consent by Plaintiffs was filed with the Court on November 17, 2011. Consent for the Defendants is being lodged herewith. No counsel for a party authored this brief in whole or in part, and no counsel or party made a monetary contribution intended to fund the preparation or submission of this brief.

² Other states such as Hawaii have adjusted census figures from the federal government. Additionally, New York, Maryland, and Delaware passed legislation to adjust federal census data for prisoners.

³ This brief uses the term “reapportionment” because it is the term used in the Kansas Constitution. See KAN. CONST., Art. 10 § 1.

unconstitutionally-apportioned legislative districts. The Amicus is directly involved in adjusting Census data and ultimately providing the Kansas Legislature with a product which may violate the Fourteenth Amendment. Any potential defect in data given to the office of the Amicus becomes a defect in the data produced by the Amicus; therefore, the Amicus may be involuntarily violating the constitutional rights of Kansas citizens under a mandate from the Kansas Constitution and Kansas Law. Based on this, the Amicus has an interest in ensuring that the United States Census data provided to his office contains information that makes a constitutionally sound apportionment possible.



SUMMARY OF THE ARGUMENT

The framers of the Constitution were acutely aware of the dangers of allowing “alien residents” to enter the political community of the United States in a manner that might disrupt republican government:

May it not happen in fine that the minority of CITIZENS may become a majority of PERSONS, by the accession of alien residents, of a casual concourse of adventurers, or of those whom the Constitution of the State has not admitted to the rights of suffrage.

The Federalist 43 (Madison) (emphasis in original).
By allowing the United States Census to count

unlawfully present aliens and nonimmigrant aliens, the Defendants are arguably allowing exactly what Madison feared in Federalist 43.

The Court can ultimately resolve this issue by accepting this case and resolving this question. As a state agency involved in the state reapportionment process, the Amicus brings a perspective from the state level that may be shared by state officers in other states. One is hard pressed to identify an issue more fundamental to our Republic than the apportionment of representation. Few issues other than representational reapportionment can raise such political contention and divisiveness. However, this political discord reflects the vital importance of this issue, not only to our Republic as a whole, but to each state in defining the representational structure at the state level. The constitutionality of whether non-citizens may be counted by the United States Census is a question that touches the fundamental fibers of the government of the United States and each state in the union. Without this Court's resolution, the Amicus is at risk of having this question raised each time the Amicus conducts its census adjustment. Without venue being placed in this jurisdiction, there is a substantial possibility that states themselves may attempt to address this issue and produce disparate results. The issues raised by the Plaintiffs are of great interest to the Amicus as well as other state officers and secretaries of state across the nation. They are of sufficient seriousness and dignity

to find resolution in the original jurisdiction of this Court.

ARGUMENT

I. This Court Should Exercise its Original Jurisdiction and Grant Plaintiffs' Motion for Leave to File a Complaint

Nearly all states rely on the results of the decennial census to apportion their state legislative districts. As these state legislative districts must comply with the one person, one vote principle, it is of vital importance to all fifty states that census data is accurate and constitutional. *Reynolds v. Sims*, 377 U.S. 533, 579 (1964). The questions presented here also involve the fundamental matters of voting and equality. *See id.* at 562.

This Court's longstanding practice is to exercise its original jurisdiction sparingly and only when appropriate. *Utah v. United States*, 394 U.S. 89, 95 (1969). Among the factors this Court has considered when deciding whether to exercise original jurisdiction are the "seriousness and dignity" of the claim, whether the issue is of vital importance to multiple states, and whether there is another adequate forum in which to settle the claim. *Illinois v. City of Milwaukee*, 406 U.S. 91, 93 (1972); *South Carolina v. Regan*, 465 U.S. 367, 382 (1984); *United States v. Nevada and California*, 412 U.S. 534, 538 (1973). This case satisfies all of these factors.

A. This Subject is of the Utmost Seriousness and Dignity

This case deals with an issue of fundamental importance to all fifty states. Kansas, like the other states, when apportioning state legislative districts must comply with the one person, one vote requirement of the Equal Protection Clause of the Fourteenth Amendment. To comply with the one person, one vote requirement, each state must ensure that the vote of a citizen be of approximately equal weight from district to district. *Reynolds v. Sims*, 377 U.S. at 579. This equality is necessary to guarantee the fundamental voting rights of each citizen. There can be no issue more “serious” or “vital” to a state than ensuring that the fundamental right to vote, the bedrock for our form of government, is properly protected. When states apportion their legislative districts based upon inaccurate and potentially unconstitutional census data, the fundamental voting rights of their citizens are violated as the votes of citizens from district to district become unequal. If one legislative district contains a large number of aliens and another district does not, citizens in the former will have vastly greater voting strength than the citizens in the latter.

B. This Subject is of Vital Importance to Multiple States

This issue is vital to all fifty states. All states must comply with one person, one vote requirements when apportioning state legislative districts and all

rely on census data to achieve this compliance. In addition, each of the fifty states contain a significant number of unlawfully present aliens and nonimmigrant aliens. Pew Research Data *available at* <http://www.pewhispanic.org/2011/02/01/appendix-a-additional-figures-and-tables/>. The census bureau currently includes these unlawfully present aliens and nonimmigrant aliens in its census count, skewing the results for all fifty states not only for the purposes of federal reapportionment but at the state level as well.

1. History and Background about the Kansas Adjustment to the Census

In 2011, the Amicus submitted a report to the Kansas Legislature (the “Adjustment Report”) as well as data to be used in the reapportionment process (the “Adjustment data”) as required by Kansas Law. *See* K.S.A. §§ 11-301 - 321 (2009). Data from the United States census was used as the starting point in this adjustment process. *See* KAN. CONST., Art. 10, § 1; *see also* “Adjustment to the 2010 U.S. Decennial Census” (the Adjustment Report) at 4 *located at* <http://www.kssos.org/forms/elections/2010CensusAdj.pdf>. The object of the project was to adjust United States Census data according to the following rules: (1) nonresident defendants from military institutions and higher education institutions in Kansas were subtracted from the state’s population total; and (2) resident military personnel and resident college and university students located in Kansas were recorded

in the census blocks of their permanent residence. See KAN. CONST., Art. 10, § 1. Questionnaires were issued to the applicable students and military personnel. Adjustment Report at 4. Responses were collected by the Amicus and applied to the census data. *Id.* at 6.

The adjustment process described above is a relatively new process compared to the process used by Kansas for the majority of the 20th century. The Adjustment Report describes the history of the adjustment process as follows:

Kansas has had a long-standing tradition of drawing its state legislative districts according to information assembled from statewide censuses. In the years 1918 through 1979, redistricting in Kansas was conducted in the ninth year of each decade in accordance with population figures as submitted to the State Board of Agriculture. Under this procedure, each Kansas county was charged with collecting its own population figures, which were then reported to the State Board of Agriculture for compilation. This census became known as the Agriculture or "Ag" Census. In 1979, the state legislature redistricted according to the most recent agriculture Census and then voted to abolish the state census. In 1987, with redistricting on the horizon, the state legislature passed a law commissioning a one-time state census to be conducted by the Secretary of State. In 1988, the state legislature proposed an amendment to Article 10, Section 1 of the

Kansas Constitution concerning reapportionment. The citizens of Kansas ratified this change by popular vote in November 1988. The amendment provided that beginning in 1992, redistricting of the Kansas Legislature and the State Board of Education would occur in the second year of each decade, rather than in the ninth, and would be accomplished by using decennial federal census data adjusted by the state rather than relying on a state enumeration. The amendment also required the subtraction of nonresident students and military personnel who were located in Kansas on April 1 of that year and for the enumeration of all other college students and military personnel in the districts of their permanent residence. With the passage of K.S.A. 11-301, *et seq.*, during the 1989 legislative session, the task of adjusting the federal census was assigned to the Secretary of State's office. New regulations were promulgated in 1989 to codify the procedures of the census adjustment process; and in 1992, for the first time in its history, Kansas reapportioned its state legislature according to the new provisions in Article 10, Section 1, of the state constitution.

Adjustment Report at 2. The adjustment process as well as Kansas's use of its own census prior to the adjustment highlights a key point that should be considered by this Court in determining whether or not to accept the case at bar. If questions involving the constitutionality of including unlawfully present aliens and nonimmigrant aliens are not answered by

this Court, it is possible that disparate court opinions will emerge regarding the use of this data. Additionally, it is possible that some state courts will rule that the use of the United States Census is unconstitutional and mandate instead the creation of state census processes such as Kansas's "Ag. Census" or adjustment.⁴

2. Uncertainty in Constitutional Soundness of Census Data Creates the Possibility of Disparate State Solutions to this Federal Problem

Kansas, like other states, relies on census data when determining the makeup of state legislative districts. The Kansas Constitution requires state legislative districts to be apportioned on the basis of the population of the state as established by the most recent census of population as taken by the United States Bureau of the Census. The Kansas Secretary of State provides the state legislature with these numbers. The Kansas Secretary of State, when

⁴ Using an adjustment process to correct issues raised by the Plaintiffs in this case is unlikely because the United States Census data does not contain the citizenship data necessary at the block level to perform such an adjustment. Adjusting the census numbers to exclude unlawfully present aliens would be cost prohibitive as the U.S. Census Bureau does not ask defendants to declare their citizenship status. For Kansas, on its own to accurately adjust the census numbers to exclude unlawfully present aliens would require the Kansas Secretary of State to essentially conduct another Kansas specific census. Alternatively, the Court could order the census to include the appropriate questions necessary to compile this data.

providing the census numbers for apportionment purposes, does so in reliance on the numbers meeting constitutional requirements. The United States Census Bureau by purposefully counting unlawfully present aliens and nonimmigrant aliens in the census count, forces the Kansas Secretary of State to provide the Kansas Legislature with census data that results in unconstitutional reapportionment districts as argued by the Plaintiffs.

This Court has in the past declared that States are only required to use the “best census data available” or the “best population data available.” *Karcher v. Daggett*, 462 U.S. 725, 731 (1983). While satisfying this “best population data available” requirement process outside of census data has proven difficult for states, it is possible but likely to be incredibly costly. This Court in *Kirkpatrick v. Preisler*, considered a Missouri apportionment plan deviating from United States Census data. 394 U.S. 526 (1969). In striking down Missouri’s deviations the Court declared that any allowable deviations must be “highly accurate,” “thoroughly documented,” and systematically applied throughout the state. *Id.* at 535. Satisfying these standards would require such extremely costly measures as a state run census. The financial burden on a state to determine the “best population data available” would be high.

By not clearly answering the questions raised in the Plaintiffs’ brief yet allowing for states to depart from the United States Census, this Court leaves open the possibility for different states and circuits to

apply different criteria and processes. Courts have been inconsistent about what statistics are constitutionally allowed to be used in the apportionment process. This point was made in a dissenting opinion by Justice Thomas when pointing out that the Fifth Circuit has declared the choice to be one left to the political process. *Chen v. City of Houston*, 532 U.S. 1046, 1048 (2001) (mem.) (Thomas, J., dissenting). For example, the Fourth Circuit has found the choice of using total population or voting age population to be one of political choice, however, the Ninth Circuit has held that apportionment based on voting population and not total population is unconstitutional. *Id.* While the cost and uncertainty causes Kansas, and other states, to rely on the potentially unconstitutional and inaccurate census data as the basis for the “best population data available” for apportionment purposes, the same equal protection concerns raised by the Plaintiffs also exist at the state level.

There are an estimated 65,000 unlawfully present aliens in Kansas.⁵ Pew Research Data at Table A3 *available at* <http://www.pewhispanic.org/2011/02/01/appendix-a-additional-figures-and-tables/>. These 65,000 individuals make up 2.3% of the state’s total population of 2,853,118. *Id.* To put these numbers in perspective a population of 65,000 would be the seventh largest city in Kansas and is approximately the size of three Kansas House Districts and one Kansas

⁵ The Pew Research Center estimates the number of unlawfully present aliens in Kansas to be 65,000 with a range of 45,000 to 85,000.

Senate District.⁶ By relying on the census, the Amicus, through the adjustment process, provides this potentially unconstitutional census data to the Kansas Legislature. That data is used to create state legislative districts which possibly violates the one person, one vote principle.

Because the census data for Kansas includes approximately 65,000 unlawfully present aliens and nonimmigrant aliens, who as argued by the Plaintiffs should not be included, some legislative districts contain citizenship populations that vary greatly from the ideal district size. Because the census lacks citizenship data, the level of the disparity between districts is not apparent. As the Plaintiffs argue, this is a direct violation of the one person, one vote principle at the state level that requires approximate equality of citizenship population among state districts. Adding to this inequality is the concentration of unlawfully present aliens and nonimmigrant aliens in Kansas in certain areas. They are not located evenly throughout the state; instead these individuals are heavily concentrated in a few pockets.⁷ These

⁶ The ideal Kansas House district following the Secretary of State adjustment is 22,716 and the ideal Kansas Senate district following the adjustment is 70,986. See generally Corey J. Carnahan, *Memo on Adjusted Population Data*, Kansas Legislative Research Department, available at <http://skyways.lib.ks.us/ksleg/KLRD/Redistrict/2011documents/AdjPopData7-29-11.pdf>.

⁷ Because citizenship information is not obtained by the United States Census, actual data making this point is not readily available. If such data were available and dependable at the block level, states like Kansas could adjust the census data to protect the constitutionality of reapportionment plans.

high concentration areas lead to legislative districts with citizen populations well below the ideal size. The citizen voters in these districts correspondingly have a vote worth several times that of a citizen voter in a legislative district that is the ideal size. This is precisely the type of situation this Court referred to when it declared that "to the extent that a citizen's right to vote is debased, he is that much less a citizen. The fact that an individual lives here or there is not a legitimate reason for overweighting or diluting the efficacy of his vote." *Reynolds v. Sims*, 377 U.S. 533, 567 (1964). Only this Court can issue a definitive answer on this question thereby providing clear direction to the states as to whether or not the use of census data is constitutionally sound.

C. Any other Forum Leads to Disparate Results and Continued Uncertainty at the State Level

This case raises questions that cannot be adequately settled elsewhere. The constitutionality of the census is an issue affecting all fifty states. Allowing the judicial debate to spread over the state and federal district court system would likely result in conflicting results. These conflicting results would cast doubt upon the redistricting process in all fifty states. States would be unsure of the appropriateness of relying on census data when apportioning state legislative seats and how this Court would treat such reliance for one person, one vote compliance purposes. As already shown by this redistricting cycle alone, the

redistricting process is already prone to lawsuits. While many of these cases occur at the federal level, litigation is also prevalent at the state level. *See, e.g., In re Colorado General Assembly*, 2011 WL 5830123 (Colo. 2011); *State ex rel. Ohioans for Fair Districts v. Husted*, 957 N.E.2d 277 (Ohio 2011); *Wilson v. Fallin*, 262 P.3d 741 (Okla. 2011); *In re Finneran*, 919 N.E.2d 698 (Mass. 2010); *In re Standards for Establishing Legislative District Boundaries*, 24 So.3d 1198 (Fla. 2009); *Arizona Minority Coalition for Fair Redistricting v. Arizona Independent Redistricting Commission*, 208 P.3d 676 (Ariz. 2009). Every state in the nation is currently involved or has recently completed a redistricting process. During this redistricting cycle, like other cycles in the past, secretaries of state are often parties in litigation involving reapportionment. *See, e.g., Jefferson County Com'n v. Tennant*, ___ F. Supp. 2d ___, 2012 WL 10500 (S.D. W. Va. 2012); *Smith v. Hosemann*, 2011 WL 6950914 (S.D. Miss. 2011); *Rodriguez v. Perry*, 2011 WL 3209075 (W.D. Tex. 2011).

Without a party even filing a case, Kansas Law dictates that the State's redistricting plan must be reviewed by the Kansas Supreme Court. KAN. CONST., Art. 10, § 1. Because the Plaintiffs present arguments that are persuasive, the potential for state courts to create a patchwork of incongruent decisions exists. This Court has said that states are not necessarily mandated to use United States Census data. *Karcher*

v. Daggett, 462 U.S. 725, 731 (1983). Given the litigiousness of the redistricting process, there is a high possibility that some state or federal courts could find unconstitutional the usage of United States Census data for reapportionment purposes. Additionally, the claims raised by the Plaintiffs' brief have been made in the past in different venues but not in the same manner as the case at bar. See, e.g., *Ridge v. Verity*, 715 F. Supp. 1308 (W.D. Pa. 1989); *Federation for American Immigration Reform v. Klutznick*, 486 F. Supp. 564 (D.D.C. 1980), *appeal dismissed*, 447 U.S. 916 (1980). The history of these cases demonstrate that the issues raised by the Plaintiffs are repetitious. Only a decision from this Court will put these issues to rest.

CONCLUSION

For all of the above reasons, it is the belief of the Kansas Secretary of State that these issues can only be adequately resolved by this Court. The Kansas Secretary of State, therefore, respectfully asks the Court to exercise its original jurisdiction to decide this issue of fundamental national importance. By allowing the parties in this case to submit their arguments and issuing an opinion bringing clarity to this uncertain area, this Court will, with one action, stop

an endless succession of lawsuits, the frequency of which is only likely to increase in the future.

Respectfully submitted,

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