

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBYN RENEE ESSEX,)
)
 Plaintiff,)
)
 and.)
)
 BENJAMIN D. CRAIG and)
 LARRY WINN III,)
)
 Intervenor Plaintiffs,)
)
 v.)
)
 KRIS KOBACH,)
 Kansas Secretary of State,)
)
 Defendant.)

CIVIL ACTION

Case No. 5:12-cv-04046-KHV-DJW

TRIAL BRIEF OF INTERVENOR PLAINTIFFS
BENJAMIN D. CRAIG AND LARRY WINN, III

Dated: May 28, 2012

Respectfully submitted,

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I. INTRODUCTION

Intervenor Plaintiffs Benjamin D. Craig and Larry Winn, III (the “Intervenor Plaintiffs”) are both residents of Overland Park, Johnson County, Kansas. They have long been active and prominent participants in the political process in Johnson County, and they have regularly exercised their right to vote in federal, state, county, and municipal elections. The Intervenor Plaintiffs seek to protect Johnson County voters’ right to have constitutionally adequate and fair representation in both houses of the State Legislature. That right would be vindicated by the Court’s adoption of the “Cottonwood 1” map for the Kansas House of Representatives and the “Buffalo 30 Revised” map for the Kansas Senate.

Both maps were prepared by the Kansas Legislative Research Department (“KLRD”) to ensure that their population distributions do not violate the Equal Protection Clause. U.S. CONST., Amend. XIV. The maps not only pass constitutional muster, they would also fairly represent the people of Kansas — and Johnson County — consistent with settled redistricting policies. Both Cottonwood 1 and Buffalo 30 Revised create compact and contiguous districts that preserve the integrity of existing political subdivisions. They also best reflect the shared communities of interest among Johnson County voters, including their desire, expressed in recent public opinion studies, to promote public education, economic development, public safety, and high-quality health care. Especially when compared to other proposals, Cottonwood 1 and Buffalo 30 Revised clearly offer the best combination of constitutional compliance and sound redistricting policy, and this Court should adopt them.

II. LEGAL STANDARD

When reviewing reapportionment plans, courts must take into account both constitutional considerations and relevant state policies. Here, of course, the Court cannot “review” anything, given the Kansas Legislature’s failure to adopt a reapportionment plan. Nevertheless, the same

principles guide this Court's efforts to select a reapportionment plan for the Kansas House of Representatives and Senate.

Any reapportionment plan must pass muster under the Equal Protection Clause of the Fourteenth Amendment. "In the context of reapportionment, equal protection requires one person's vote to be worth as much as another person's vote to the extent district population apportionment will permit." *In re 1992 House Bill No. 3083*, 836 P.2d 574, 579 (Kan. 1992). The United States and Kansas Supreme Courts have recognized that "the principle of one-person-one-vote applies to legislative as well as congressional districts." *In re 2002 Substitute for House Bill 2625*, 44 P.3d 1266, 1270 (Kan. 2002) (citing *Baker v. Carr*, 369 U.S. 186, 237 (1962)). In other words, "both houses of a bicameral [state] legislature must be apportioned on a population basis." *Id.*

In contrast to reapportionment plans for congressional districts, however, reapportionment plans for state legislative districts demand less "mathematical exactness" in their population distributions. *Id.* For example, the Supreme Court has "held that a population deviation with an overall range of 9.9% (5.8% over-representation and 4.1% under-representation) did not prove a prima facie case of discrimination in violation of the Equal Protection clause." *Id.* (citing *White v. Regester*, 412 U.S. 755, 763 (1973)). The Kansas Supreme Court, therefore, has recognized that a total deviation of under 10% would not establish a prima facie constitutional violation. *In re 1992 House Bill No. 3083*, 836 P.2d at 580; *In re 2002 Substitute for House Bill 2625*, 44 P.3d at 1271.

Nevertheless, because court-drawn plans may be held to a higher standard of population equality than a legislatively enacted plan, *see Large v. Fremont Cnty., Wyo.*, 670 F.3d 1133, 1139 (10th Cir. 2012), this Court must also consider whether various redistricting policies justify any deviation from the ideal district population, *see In re 2002 Substitute for House Bill 2625*, 44

P.3d at 1271. To that end, the Supreme Court and the Kansas Supreme Court have identified a number of legitimate policies that this Court should consider. For example, a redistricting map may be drawn to keep districts compact and contiguous or to preserve existing political boundaries or subdivisions. *See Bush v. Vera*, 517 U.S. 952, 973-74 (1996); *Karcher v. Daggett*, 462 U.S. 725, 740 (1983); *In re 2002 Substitute for House Bill 2625*, 44 P.3d at 1271, 1273. Districts should also take into account shared communities of interest among voters, such as “shared broadcast and print media, public transport infrastructure, and institutions such as schools and churches,” *Vera*, 517 U.S. at 964, or similar “social, cultural, racial, ethnic, and economic interests common to the population of the area,” *In re 2002 Substitute for House Bill 2625*, 44 P.3d at 1273.

These settled principles are embodied in the Kansas Legislature’s own Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting (the “Guidelines”), which were approved by the relevant committees in the Kansas Senate and House of Representatives. (*See* attached Exhibit A.) Subject to the principle that “[d]istricts should be numerically as equal in population as practical,” with no more than a five percent deviation above or below the ideal population (*Id.* ¶ 2), the Guidelines identify additional policies that should be considered, namely that: “[d]istricts should be as compact as possible and contiguous”; “[t]he integrity and priority of existing political subdivisions should be preserved to the extent possible”; “[t]here should be recognition of similarities of interest”; and “[d]istricts should be easily identifiable and understandable by voters.” (*Id.* ¶ 4(b)-(d), and (f).)

III. ARGUMENT

Intervenor Plaintiffs urge this Court to adopt the Cottonwood 1 proposed map for the Kansas House of Representatives and the Buffalo 30 Revised proposed map for the Kansas Senate. Both maps were proposed for consideration in the state legislature and prepared by the

KLRD for constitutional compliance. In addition to satisfying the Fourteenth Amendment’s one-person-one-vote requirement, Cottonwood 1 and Buffalo 30 Revised create compact and contiguous districts, protect the integrity of existing political subdivisions, and recognize communities of interest, particularly with respect to Johnson County. Other maps — most notably the “For the People 13b” and “Wheat State 5” maps for the Kansas Senate, advocated by Plaintiff Essex and others — would create oddly shaped districts that meander across existing political boundaries in total disregard of the diverse interests of the would-be constituents. In short, Cottonwood 1 and Buffalo 30 Revised represent the best balance between the constitutional demand of equal population distribution and the promotion of legitimate, recognized redistricting policy.

A. The Cottonwood 1 Map for the Kansas House of Representatives Is Constitutionally Sound and Supported by Strong Redistricting Policy.

The proposed Cottonwood 1 map for the state House of Representatives equally distributes the state population among the 125 House districts. It creates compact, contiguous districts that respect various existing political subdivisions, especially in the Johnson County area, and reflects communities of interest in Johnson County, while avoiding pairing Johnson County voters with voters from neighboring counties with potentially dissimilar interests.

The population distribution among districts in the Cottonwood 1 map adequately protects each Kansas citizen’s Fourteenth Amendment right to equal protection. Based on the 2010 total population of Kansas of 2,839,445, the ideal population for each of the 125 House districts is 22,716. The most underrepresented district in Cottonwood 1 is the 31st District, with a population of 21,599, 4.92% below the ideal; the most overrepresented district is the 66th District, with a population of 23,838, 4.94% above the ideal. (KLRD Population Summary Report for Cottonwood 1, attached hereto as Exhibit B.) The total deviation of 9.86% is below

the 10% threshold necessary to establish a constitutional violation. *See In re 1992 House Bill No. 3083*, 836 P.2d at 580; *In re 2002 Substitute for House Bill 2625*, 44 P.3d at 1271.

Even though this population deviation requires no justification to pass constitutional muster, several strong policy considerations support the districts as drawn in Cottonwood 1. A visual review of the maps shows that the districts, on the whole, are compact and contiguous. (*See Cottonwood 1 Maps for State of Kansas, Eastern Kansas, and Johnson County*, attached hereto as Exhibits C, D, and E, respectively.) None of the districts are bizarrely shaped, with pieces that “interlock like a jigsaw puzzle” or “districts [that] are so finely crafted that one cannot visualize their exact boundaries without looking at a map at least three feet square.” *See Vera*, 517 U.S. at 973 (quotations and citations omitted).

Moreover, in Johnson County, the districts respect and preserve existing political boundaries. All but three districts, the 10th, 38th, and 118th, are fully contained within the county. And even then, the deviations outside Johnson County’s borders are justified by other existing boundaries. For example, the proposed 38th District, which includes both eastern Douglas County and western Johnson County, covers much of the same territory as the Eudora, Kansas school district. (*See Map of Johnson County School Districts*, attached hereto as Exhibit F; *Map of Eudora School District 491*, attached hereto as Exhibit G).

Most importantly, the Intervenor Plaintiffs will demonstrate at the hearing, Cottonwood 1 best recognizes the strong communities of interest within Johnson County. Doug Davidson, the president of the County Economic Research Institute, will testify at trial about recent economic and population trends in Johnson County. In particular, Johnson County now has the highest population in the state and has seen a dramatic increase in the amount of new business development. Johnson County voters, as reflected in a January 2012 survey, place a high priority on public education, economic development, public safety, and high-quality health care. (*See*

Public Opinion Strategies, Johnson County, Kansas, Registered Voters Interview Schedule, at p.2, attached hereto as Exhibit H.)

Because Cottonwood 1 primarily keeps the House districts within the boundaries of Johnson County, the map ensures that Johnson County voters' similar interests will be fairly represented in the state House of Representatives. If, instead, large sections of Johnson County were carved out and grouped with neighboring counties — counties with lower populations, less business growth, and different priorities among voters — these strong communities of interest would be inadequately represented in the Kansas House of Representatives.

B. The Buffalo 30 Revised Map for the Kansas Senate Is Also Constitutionally Sound and Supported by Strong Redistricting Policy.

The Buffalo 30 Revised map for the Kansas Senate likewise offers the best combination of constitutional and policy considerations. It complies with the Equal Protection Clause's requirement of equal population distribution among the districts, while promoting the important redistricting policies of compactness and contiguousness, respecting political boundaries, and preserving communities of interest. In contrast, the Senate maps proposed by other parties to this action, including For the People 13b and Wheat State 5, create districts with noncompact shapes that disregard political boundaries and shared communities of interest. The Court, therefore, should adopt the Buffalo 30 Revised map for the Kansas Senate districts.

Buffalo 30 Revised very evenly distributes the Kansas population among the 40 Senate districts. Based on the 2010 total population of Kansas of 2,839,445, the ideal population for each of the 40 Senate districts is 70,986. The most underrepresented district in Buffalo 30 Revised is the 20th District, with a population of 68,893, only 2.95% below the ideal; the most overrepresented district is the 14th District, with a population of 73,187, only 3.10% above the ideal. (KLRD Population Summary Report for Buffalo 30 Revised, attached hereto as Exhibit I.)

Thus, the total deviation is only 6.05%. The population distribution, therefore, easily protects the Fourteenth Amendment guarantee of “one person, one vote.” *See In re 1992 House Bill No. 3083*, 836 P.2d at 580; *In re 2002 Substitute for House Bill 2625*, 44 P.3d at 1271.

Buffalo 30 Revised also vindicates sound redistricting policy, for many of the same reasons as Cottonwood 1. Here, again, the Senate districts in Buffalo 30 Revised are compact and contiguous. (*See* Buffalo 30 Revised Maps for State of Kansas, Eastern Kansas, and Johnson County, attached hereto as Exhibits J, K, and L, respectively.) And the boundaries of the Senate districts, as drawn in Buffalo 30 Revised, respect existing political subdivisions. In Johnson County, for example, all but one district, the 37th Senate District, fall entirely within the county borders. Moreover, the 9th Senate District roughly tracks the De Soto School District, and the 23rd Senate District represents the Gardner-Edgerton and Spring Hill School Districts. (*See* Map of Johnson County School Districts.) And again, like Cottonwood 1, because the Senate districts in the Buffalo 30 Revised map almost entirely consist of Johnson County voters, Buffalo 30 Revised would protect Johnson County’s communities of interests.

In contrast, the maps advocated by other parties to this action, including For the People 13b and Wheat State 5, while still below the 10% threshold for population deviation, distribute voters far less evenly across the 40 Senate districts than does Buffalo 30 Revised. According to the KLRD, the most underrepresented district in both For the People 13b and Wheat State 5 is the 13th District, with a population of 67,877, a 4.38% deviation below the ideal; the most overrepresented district is the 17th District, with a population of 73,134, a 3.03% deviation above the ideal. (KLRD Population Summary Report for For the People 13b, attached hereto as Exhibit M; KLRD Population Summary Report for Wheat State 5, attached hereto as Exhibit N.) The total deviation is 7.41%, 1.6% greater than the total deviation in Buffalo 30 Revised.

Worse, however, the districts in both For the People 13b and Wheat State 5 are unsupported by redistricting policies. The 3rd Senate District in northeast Kansas illustrates the infirmities present in these proposed maps. As drawn, the 3rd District is neither compact nor wholly contiguous. The district snakes from the southern border of Douglas County, diverting into a narrow stretch of central-western Johnson County, before continuing northward into the southern half of Leavenworth County. (*See* For the People 13b Map for Eastern Kansas, attached hereto as Exhibit O; Wheat State 5 Map for Johnson County, attached hereto as Exhibit P.) Indeed, the interlocking pieces of the 3rd and 9th Districts in Johnson County — particularly near De Soto — make it very difficult to identify exactly where the boundaries are drawn. *See Vera*, 517 U.S. at 973. The 3rd District would also disregard existing communities of interest, combining voters from rural southeast Douglas County and suburban (and relatively affluent) Johnson County. With respect to northeast Kansas, in particular, the districts in For the People 13b and Wheat State 5 appear arbitrarily drawn. The Court should not adopt these proposed maps for the Kansas Senate.

IV. CONCLUSION

The Cottonwood 1 map, for the Kansas House of Representatives, and the Buffalo 30 Revised map, for the Kansas Senate, both fulfill the constitutional right to equal protection under the Fourteenth Amendment, and both would fairly represent the people of Kansas, in light of sound redistricting policies. In addition to complying with the Equal Protection Clause, both maps would create compact and contiguous districts that preserve the integrity of existing political subdivisions and best reflect the shared communities of interest among Johnson County voters. Accordingly, the Intervenor Plaintiffs respectfully urge this Court to adopt Cottonwood 1 for the Kansas House of Representatives and Buffalo 30 Revised for the Kansas Senate.

CERTIFICATE OF SERVICE

The undersigned certifies that a true and correct copy of the foregoing was filed with the Court and served on all parties, via the Court's CM/ECF filing system, on May 28, 2012.

/s/ Mark P. Johnson
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