

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

ROBYN RENEE ESSEX,
Plaintiff,

vs.

KRIS W. KOBACH,
Kansas Secretary of State,
Defendants

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) CIVIL ACTION
) Case No. 12-4046-KHV-DJW
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PLAINTIFF INTERVENOR JOHN W. BRADFORD’S TRIAL BRIEF

Plaintiff Intervenor John W. Bradford (“Bradford”), a resident of and voter in Leavenworth County, Kansas, strongly supports and adopts the argument of Plaintiff Intervenor and former State Representative Martha Crow, or her substitute party Richard Keller, that Leavenworth County should remain in the Second Congressional district. Furthermore, Bradford supports and adopts the argument of Plaintiff Intervenors Senator Steve Abrams, Senator Jeff King, and Senator Ray Merrick that the senatorial map “For the People 13b” best satisfies the constitutional requisites, with one exception—Leavenworth County should have its own Senate district.

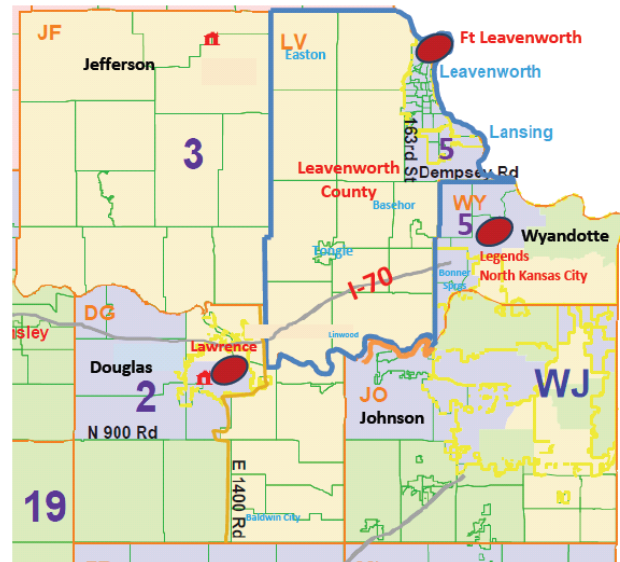
According to the 2010 Census, Leavenworth County is the sixth most populous county in the state. *See* Ex. 1100 (Kansas Legislative Research Department, Adjusted Population Data, July 29, 2011, http://redistricting.ks.gov/_Census/PDF/ks_adj_pop.pdf); *see also* 2010 County Population and Housing Occupancy Status, U.S. Census Bureau. http://factfinder2.census.gov/faces/tableservices/jsf/pages/productview.xhtml?pid=DEC_10_PL_GCTPL2.ST05&prodType=table. From the 2000 Census to the 2010 Census, its population increased by 10.97%. *See* Ex 1101 (Kansas Legislative Research Department, 2010 Census

Data-County Populations, March 3, 2011, http://redistricting.ks.gov/_Census/PDF/ks-county_populations.pdf). Leavenworth County has more than 2.5%, or one-fortieth, of the state’s population. *See* Exs. 1100 and 1101.

However, Leavenworth County is the only one of Kansas’ 10 largest counties that does not have a self-contained senatorial district. The current map (see graphic below) splits the county so that the cities of Leavenworth and Lansing and the eastern parts of the county are in the 5th District with Wyandotte County and the primarily rural western parts of the county are in the 3rd District with Douglas and Jefferson Counties.

**Current
Senatorial
Districts**

Douglas CO: 2, 3, 19
 Jefferson CO: 3
 Leavenworth CO: 3, 5
 Wyandotte CO: 4, 5, 6



The current senatorial district map is available at http://redistricting.ks.gov/_Plans/Current_Plans/SenatePlan21AA/subsb256.html and the court should take judicial notice of it.

All of the proposed maps that were considered by the Legislature during the 2012 session split Leavenworth County in some fashion. These maps are available at

http://redistricting.ks.gov/_Plans/plans_proposed_3.html and the court can take judicial notice of them.

It is well known that the way in which districts are drawn when the boundaries of the district and the geographic community do not coincide can affect the public's participation in politics, electoral competition, and partisan fairness.

Thus, the court should put Leavenworth County in a self-contained district, especially since the state can offer no reasonable explanation for the communal disruption of the county.

Communities develop along geographic lines. People who live close together tend to have a sense of subjective solidarity. See James A. Gardner, *Foreward: Representation Without Party: Lessons from state Constitutional Attempts to Control Gerrymandering*, 37 Rutgers L.J. 881, 950 (2006) ("People who live in close physical proximity inevitably share certain kinds of activities, and . . . the bonds created through these shared activities give rise to a community . . . that is deeply connected to, built upon the matrix or, even induced by, the particular locality in which the members live."); Dean Alfange, Jr., *Gerrymandering and the Constitution: Into the Thorns of the Thicket at Last*, 1986 Sup. Ct. Rev. 175, 216 ("Voters do identify with the place in which they live, and do have a feeling of sharing concerns with others who live in that place").

A cornerstone of our democratic tradition is that communities should be represented in the legislature. See Daniel D. Polsby & Robert D. Popper, *The Third Criterion: Compactness as a Procedural Safeguard Against Partisan Gerrymandering*, 9 Yale L. & Pol'y Rev. 301, 307 n. 29 (1991) ("The Founders valued the faction-diluting character of representation by place . . . The authors of the Constitution deliberately chose geographical representation."). When the boundaries of districts and communities coincide, they are easily understood by voters. See Bernard Grofman, *Would Vince Lombardi Have Been Right if He had Said: "When It Comes to*

Redistricting, Race Isn't Everything, It's the Only Thing?", 14 Cardozo L. Rev. 1237, 1262-63 (1993); see also *Davis v. Bandemer*, 478 U.S. 109, 173 n. 13 (1986) (Powell, J., concurring in part and dissenting in part) ("Confusion inevitably follows . . . when a citizen finds himself or herself forced to associate with several artificial communities . . .").

As long as district lines are drawn on the basis of geography, people who share similar community, cultural and social attributes should be placed in the same district, rather than be aggregated in a district that fuses separate communities and unites people who have little geographic connection to one another.

While senatorial districts should be relatively homogeneous, because each community in the state is represented in the Legislature, the Senate will be heterogeneous—a true reflection of the diversity of views in the state. In the words of John Adams, the legislature "should be an exact portrait, in miniature, of the people at large." Letter from John Adams to John Penn (Jan. 1776), in *The Political Writings of John Adams*, pp. 491, 493 (George W. Carey ed., 2000).

Granted that in the case of *Reynolds v. Sims*, 377 U.S. 533 (1964) the United States Supreme Court rejected the argument that deviations in district population could be justified on the basis of protecting the integrity of existing political subdivisions, noting that they are simply "subordinate governmental instrumentalities" and that "legislators are elected by voters, not farms or cities or economic interests." *Reynolds*, 377 U.S. at 562, 575. Likewise, in *Kirkpatrick v. Preisler*, 394 U.S. 526 (1969) the Court struck down a Missouri plan where population variances of less than 4% were supported by "regard for such factors as the representation of distinct interest groups [and] the integrity of county lines." *Kirkpatrick*, 394 U.S. at 528-30.

Beginning in the 1970s the Court signaled a retreat from this absolutist position. In a case involving districts for a county legislature, in *Abate v. Mundt*, 403 U.S. 182 (1971), the

Court upheld districts whose boundaries coincided with the county's five towns even though the districts had a maximum population deviation of 11.9%. *Abate*, 403 U.S. at 184-87. The Court observed, "The particular circumstances and needs of a local community . . . may sometimes justify departures from strict equality," and noted that the use of the town-district boundaries "encouraged town supervisors to serve on the county board." 403 U.S. at 185, 187.

The Court reached a similar conclusion in *Mahan v. Howell*, 410 U.S. 315, 324-28 (1973). There the Court upheld a Virginia plan where the districts had maximum population deviation of 16.4%. The Court deferred to Virginia's policy of "avoiding the fragmentation of such subdivisions" and "affording them a voice in Richmond." *Id.*

In 1983, the Court approved a Wyoming district for a small county even though the district's population deviated by 60% from the ideal. *Brown v. Thomson*, 462 U.S. 835, 843, 848 (1983). The Court again deferred to the Wyoming legislature's position that "the needs of each county are unique and the interests of each county must be guaranteed a voice." *Brown*, 462 U.S. at 839 n. 4. And so, in *Brown* the Court overlooked a pretty significant population imbalance since it was the result of a "legitimate policy of preserving county boundaries." 462 U.S. at 847.

Even in a racial vote dilution case, in 2006 the Court found that when a "cohesive Latino community" that had previously enjoyed its own district was disbursed among dissimilar Hispanic communities in order to protect an incumbent politician, this was the type of community disruption that was prohibited. *League of United Latin American Citizens v. Perry*, 548 U.S. 399, 430-31, 435, 440-441 (2006) ("The State not only made fruitless the Latino's mobilization efforts [against the incumbent] but also acted against those Latinos who were

becoming most politically active, dividing them with a district line through the middle of Laredo.”).

In a racial gerrymandering case, the Court upheld a Georgia plan that avoided splitting counties. *Abrams v. Johnson*, 521 U.S. 74 (1997). The Court noted, “these small counties represent communities of interest” that should not be needlessly “chopped . . . in half.” *Abrams*, 521 U.S. at 100.

Several concurring opinions in the political gerrymandering cases provide strong support for protecting the integrity of existing political subdivisions. In *Karcher v. Daggett*, 462 U.S. 725 (1983), Justice Steven’s concurrence argued that a New Jersey plan “wantonly disregarded county boundaries” and evinced “little effort to create districts having a community of interests.” *Karcher*, 462 U.S. at 762, 764 n. 33. In *Davis v. Bandemer*, 478 U.S. 109 (1986), Justice Powell’s concurrence criticized Indiana’s district plan, which showed “no concern for any adherence to principles of community interest,” because it “carved up counties, cities, and even townships into “strange shapes lacking common interests.” *Davis*, 478 U.S. at 176-77.

Kansas courts have also addressed whether legislative and congressional districts correspond to the geographic communities they represent. *In re Petition of Stephan*, 251 Kan. 597, 836 P.2d 574 (1992) the Kansas Supreme Court held that it was permissible to split “political entities” and “communities of interest.” The Court noted, “[f]or the most part, the senatorial districts established in the reapportionment plan respect the integrity of existing political subdivisions of the state—the county boundary lines.” *Stephan*, 251 Kan. at 608. The division of certain counties was questioned, but the Court observed, “no explanation is given for the objection.” *Id.* at 609. The Court continued, “no argument is made that the split is the result of partisan gerrymandering or that it results in discrimination.” *Id.* There was also an objection

that certain cities and townships were not in the same district and that cities were split between two districts, but the advocates of the plan refuted concerns of gerrymandering and possible discriminatory motives. *Id.*

In *Graham v. Thornburgh*, 207 F. Supp. 2d 1280, 1294-95 (D. Kan. 2002), this court considered a congressional redistricting plan enacted by the Legislature that split four counties and one voting district. 207 F. Supp. 2d at 1293. The Legislature then used Guidelines similar to those used this year. 207 F. Supp. 2d at 1294-95. The Court wrote “[w]e acknowledge that preserving communities of interest is a legitimate and traditional goal in drawing congressional districts,” but “the fact that this a legitimate goal does not mean that there is an individual constitutional right to have one’s particular community of interest contained within one congressional district.” 207 F. Supp. 2d at 1296. The Court deferred to the judgment of the Legislature. *Id.*

In the congressional redistricting challenge this court heard in *O’Sullivan v. Brier*, 540 F. Supp. 1200 (D. Kan. 1982), then, as now, the Legislature had failed to enact a plan. The court noted that “we are not required to defer to any plan that has not survived the full legislative process to become law.” *O’Sullivan*, 540 F. Supp. at 1202. The court concluded, “[i]n the circumstances before us, with the 1971 Kansas redistricting plan being constitutionally unacceptable and the legislature having failed to enact a new redistricting plan, our powers are broad,” so that the court could “adopt in whole a proposed plan”; “adopt a proposed plan with some modifications”; or “draw up a new plan.” 540 F. Supp. at 1202-03. The only relevant constitutional imperative, noted the court, was that “as nearly as is practicable one man’s vote in a congressional election . . . be worth as much as another’s.” 540 F. Supp. at 1203 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964)). The court cited five factors that could be

considered: (1) “whether a proposed plan preserves county and municipal boundaries”; (2) “whether a plan dilutes the vote of any racial minority”; (3) “whether a plan creates districts that are compact and contiguous”; (4) “whether a plan preserves existing congressional districts”; and (5) “whether a plan groups together communities sharing common economic, social, or cultural interests.” *Id.*

The court wrote:

We attach great importance to the preservation of county and municipal boundaries. The joint legislative committee formally established this goal, apparently as the most important factor after the need to achieve constitutionally acceptable population variances. We believe that county lines are meaningful in Kansas, and that a redistricting plan should split counties only if absolutely necessary to maintain a constitutional population variance. The Kansas counties have historically been significant political units. Many officials are elected on a county-wide basis, and political parties have been organized in county units. Election of members of Congress is a political process requiring political organizations. Additionally, to a degree most counties are economic, social, and cultural units, or parts of a larger socio-economic unit. While many counties have both an urban and a rural flavor, the growth of suburban living has blurred the distinction in those counties that contain or are near cities of significant size . . . we consider as the lodestar of our analysis the grouping together of as many major communities of common economic, social, and cultural interests as possible without breaking county lines, if the resulting district realignment would not result in unconstitutional population deviations.

540 F. Supp. at 1203-04.

This court, using the *O’Sullivan* analysis, should approve a senatorial redistricting plan that preserves Leavenworth County’s lines. Since district lines are to be drawn on the basis of geography, those lines must correspond to something; spatial districts drawn at random do not capture the value that geography is intended to capture. Geographic districting rests on the concept of community, with a special emphasis on county lines.

This notion of protecting the integrity of existing political subdivisions is enshrined in the Kansas Legislature’s *Guidelines and Criteria for 2012 Kansas Congressional and Legislative*

Redistricting. See Ex. 1102

(www.kslegislature.org/li/b2011_12/committees/misc/ctte_h_redist_1_20120109_01_other.pdf).

The Guidelines direct that “political subdivision” boundaries “should be preserved to the extent possible.” Further, “communities of interest”—“Social, cultural, racial, ethnic, and economic interests common to population of the area, which are probable subjects of legislation”—“should be considered.”

The deference due these Guidelines did not end once the court became involved in process of line-drawing after the Legislature failed to adopt a map. *See Upham v. Seamon*, 456 U.S. 37, 41, 43 (1982) (“Whenever a district court is faced with entering an interim order that will allow elections to go forward, it is faced with the problem of reconciling the requirements of the Constitution with the goals of state political policy.”); *White v. Weiser*, 412 U.S. 783, 795 (1973) (“a federal district court, in the context of legislative reapportionment, should follow the policies and preferences of the State, as expressed in statutory and constitutional provisions or in the reapportionment plans proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution.”); *Kansas ex rel. Stephan v. Graves*, 796 F. Supp. 468, 470 (D. Kan. 1992) (court’s goal was to adopt a plan that comports with the Constitution and to the extent possible defers to the will of the state legislature).

Leavenworth County, as a political subdivision, has withstood the test of time. The City of Leavenworth was the first city in the state. Leavenworth County was formed on August 30, 1866 and is among the first 33 counties that were formed by the first territorial government. *See* Jesse Hall and LeRoy Hand *History of Leavenworth County Kansas* (Historical Publishing 1921) (downloadable PDF eBook [historyofleavenw00hall\[1\].pdf](#)). Leavenworth (Pop. 34,319) is the county seat. The other incorporated cities within the country are: Basehor (Pop. 2,258); Easton

(Pop. 362); Lansing (Pop. 9,222); Linwood (Pop. 375); and Tonganoxie (Pop. 2,741). Five unified school districts are within the county lines: Fort Leavenworth USD 207; Easton USD 449; Leavenworth USD 453; Basehor-Linwood USD 458; Tonganoxie USD 464; and Lansing USD 469. Leavenworth County is divided into ten townships, which exclude the cities of Leavenworth and Lansing. General demographic information from the U.S. Census Bureau about Leavenworth County is available at <http://quickfacts.census.gov/qfd/states/20/20103.html>. Kansas Department of Transportation's August 2010 Leavenworth County map is available at <http://www.ksdot.org/burtransplan/maps/county-pdf/leavenworth.PDF>. These are public documents of which the court can take judicial notice.

The current senators who represent Leavenworth County only have parts of the county in their district and do not reside in the county. Senator Tom Holland represents the 3rd District, which combines the rural western parts of the Leavenworth County with Douglas and Jefferson Counties. He resides at 961 E. 1600 Road Baldwin City, KS 66006. *See* www.kslegislature.org/li/b2011_12/members/sen_holland_tom_1/. Senator Kelly Kutala represents the 5th District, which combines the cities of Leavenworth and Lansing and the eastern parts of the county with Wyandotte County. She resides at 12232 Hubbard Road, Kansas City, KS 66109. *See* www.kslegislature.org/li/b2011_12/members/sen_kutala_kelly_1/. This is public information of which the court can take judicial notice.

The county has a rich heritage of common economic, historic, social and cultural interests that set it apart from Douglas, Jefferson, and Wyandotte Counties. Among other notable inter-county differences, Leavenworth County enjoys a significant military presence, a federal presence, and a large correctional industry. These facts are discussed in greater detail in the Declaration of John W. Bradford attached hereto and these are facts of which the court can take

judicial notice. These facts alone point to obvious probable subjects of important legislation unique to Leavenworth County.

When a map splits Leavenworth County among two districts that fuses separate counties and communities and unites people who have little geographic connection to one another and have dissimilar social, cultural, and economic interests, there is always a risk that the common interests unique to Leavenworth County will not be given the attention they deserve.

Leavenworth County has a sufficient justification for a self-contained senatorial district based on population alone. The county's 2010 Census population (see Ex. 1100) was 76,227 residents (this number does not include active duty military personnel at Fort Leavenworth). A census adjustment by the Kansas Secretary of State (see Ex. 1100) put the county's population at 76,562. The adjusted number is what members of the Legislature used during the 2012 session to draw senatorial maps. According to the Kansas Legislative Research Department, for senate districts the "ideal" population size based on the 2010 Census is 70,986. The Legislature's Guidelines for a single senatorial district provide a population range from 67,437 to 74,535. *See* Ex. 1102. As the United States Supreme Court noted in *Abate v. Mundt*, "The particular circumstances and needs of a local community . . . may sometimes justify departures from strict equality." *Abate*, 403 U.S. at 185, 187. Further, in *Brown v. Thomson* the Court, approving a single county's 60% deviation from the ideal, observed that "the needs of each county are unique and the interests of each county must be guaranteed a voice." *Brown*, 462 U.S. at 839 n. 4.

By any measure, Leavenworth County, having significant social, economic and political interests that are unique among its neighboring counties and having more than one-fortieth of the state's population, deserves one of the 40 senate seats.

The state has offered no reasonable explanation for splitting Leavenworth County between two districts. Nor can it do so. A district that uses the boundary lines of a long established organic political subdivision obviates concerns of gerrymandering and possible discriminatory motives. County lines are presumed to be fair proxies for groups of people who share common interests.

Leavenworth County should be placed in its own Senate district. Under the current plan and all proposed plans considered by the Legislature during the 2012 session, Leavenworth County stands alone among the state's ten most populous counties as the county that has no self-contained or mostly self-contained Senate district. County lines as the basis of senatorial districts, has a robust pedigree in history, theory and case law. The integrity and priority of Leavenworth County's lines should be preserved. The residents of Leavenworth County deserve their own senator.

Respectfully submitted,

/s/ F. James Robinson, Jr.

F. James Robinson, Jr. # 11589

HITE, FANNING & HONEYMAN, L.L.P.

100 North Broadway, Suite 950

Wichita, Kansas 67202

Telephone: (316) 265-7741

Facsimile: (316) 267-7803

E-mail: robinson@hitfanning.com

Attorneys for Intervenor John W. Bradford

CERTIFICATE OF NOTIFICATION

The undersigned certifies that on the 25th day of May, 2012, a copy of the above and foregoing document was electronically filed with the Clerk of the Court using the CM/ECF system which sent electronic notification of such filing to all those individuals currently electronically registered with the Court.

/s/ F. James Robinson, Jr.

Attorney for Intervenor