IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF KANSAS

ROBYN RENEE ESSEX, Plaintiff,	)	CIVIL ACTION
	)	Case No. 12-4046-KHV-DJW
vs.	)	
KRIS W. KOBACH, **Kansas Secretary of State,** Defendants	)	

PLAINTIFF INTERVENOR JOHN W. BRADFORD'S MEMORANDUM ABOUT THE APPLICATION OF CONSTITUTIONAL PRINCIPLES TO THE COURT'S CONSIDERATION OF REDISTRICTING PLANS FOR THE KANSAS SENATE

To be clear, even though the United States Supreme Court has said that in drawing lines for a legislative districting plan the integrity of political subdivisions is a permissible prudential consideration justifying departures from strict population equality, *White v. Weiser*, 412 U.S. 783, 795-97, 37 L. Ed. 2d 335, 93 S. Ct. 2348 (1973); *Mahan v. Howell*, 410 U.S. 315, 321-26, 35 L. Ed. 2d 320, 93 S. Ct. 979 (1973); *Reynolds v. Sims*, 377 U.S. 533, 578-81 (1964), Intervenor John Bradford has found no case, and, therefore, does not argue, that the observance of county lines is a mandatory consideration under the Constitution. *See Favors v. Cuomo,* 2012 U.S. Dist. LEXIS 68634, ** 25-27 (E.D.N.Y. May 16, 2012) (rejecting intervenor's argument that a plan which divided intervenor's hometown into three districts diminished intervenor's voting power without due process of law or violated the one person, one vote requirement of the Equal Protection Clause and citing cases).

Further, even though the Supreme Court has held that partisan gerrymandering claims are justiciable under the Equal Protection Clause, *see Davis v. Bandemer*, 478 U.S. 109, 125, 106 S. Ct. 2797, 92 L. Ed. 2d 85 (1986); *but see Vieth v. Jubelirer*, 541 U.S. 267, 305-06, 124 S. Ct. 1769, 158 L. Ed. 2d 546 (2004) (plurality opinion) (partisan gerrymandering claims are non-justiciable political questions), Intervenor John Bradford does not argue that any of the proposed plans which split Leavenworth County in some fashion is an impermissible political gerrymander.

Our purpose here, in light of the parties' apparent confusion at the recent trial about the court's obligation in districting the Kansas Senate, is to take this opportunity to add clarity.

There are three tiers of redistricting analysis: (1) the controlling constitutional principle of "one person, one vote," *see e.g. Abrams v. Sanders*, 376 U.S. 1, 7-8 (1997); (2) of equal importance is a principle that the districting plan not intentionally discriminate against a racial or ethnic group, *see e.g., City of Mobile v. Bolden*, 446 U.S. 55, 66 (1980);[1] and (3) consideration of traditional districting factors of district compactness, contiguity, respect for political subdivisions, and preservation of communities of interest, *see e.g., O'Sullivan v. Brier*, 540 F. Supp. 1200, 1203 (D. Kan. 1982).

[1] At trial there were arguments that one of the senate plans might violate Section 2 of the Voting Rights Act, because it was said to dilute Hispanic votes. We do not address that issue here. But we do note that Section 5 of the Voting Rights requires certain jurisdictions to "pre-clear" their plans with the United States Attorney General. 42 U.S.C. 1973c. This rule does not require federal courts to pre-clear court-drawn plans, but this can be tricky when a court chooses from plans offered by parties to the litigation. Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1144 (2005). Professor Persily observes, "[t]he degree of innovation required by a court before a plan can be said to be court-drawn will depend greatly on the facts of the individual case." *Id.*

For the first tier of the analysis, though there is apparent agreement among the parties that the equal population constraint is stricter for court-drawn plans than legislative-drawn plans—see an informative discussion of this at Nathaniel Persily, *When Judges Carve Democracies: A Primer on Court-Drawn Redistricting Plans*, 73 Geo. Wash. L. Rev. 1131, 1147 (2005)—the parties sharply dispute the circumstances under which a redistricting plan with population disparities closely approaching some arbitrary percent range is acceptable.

The Supreme Court's enunciated standard—"Unless there are persuasive justifications, a court-ordered reapportionment plan of a state legislature . . . must ordinarily achieve the goal of population equality with little more than *de minimis* variation," *Chapman v. Meier*, 420 U.S. 1, 26-27 (1975)—provides very few guiding principles for courts drawing lines. Professor Persily notes, "[p]ut differently, the Court has expressed very little of what might be considered a coherent philosophy of representation, but it knows one thing: districts should have equal numbers of people in them." Persily, *supra* at p. 1140.

And so, the question addressed here is the degree of adherence to population equality required of the parties' proposed, or court-drawn, Senate districting plans. Various parties argue that the total deviation[2] within the remedial plan should not exceed: 2%, 5%, or 10%.

As for a plan drawn by a legislature, there is general agreement among the parties that a ten point range of deviation is within the range that would be permissible. *See*

[2] Total deviation is determined by adding together the percentage deviation from "ideal" of the most overpopulated and most underpopulated districts, ignoring their signs. *See e.g., Connor v. Finch*, 431 U.S. 407, 416-17, 52 L. Ed. 2d 465, 97 S. Ct. 1828 (1977).

Voinovich v. Quilter, 507 U.S. 146, 161 (1993) (remanded state legislative redistricting case to consider whether state policy that favored preserving county boundaries justified total deviation greater than 10%); *Brown v. Thomson*, 462 U.S. 835, 850 (1983); *Connor*, 431 U.S. at 418; *Garza v. County of Los Angeles*, 918 F.2d 763, 773 (9th Cir. 1990), *cert. denied*, 498 U.S. 1028, 112 L. Ed. 2d 673, 111 S. Ct. 681 (1991); *Johnson v. State*, 2012 Mo. LEXIS 99, *6 (Mo. May 25, 2012) (court approved plan by the nonpartisan reapportionment commission that had a total deviation of 7.80%, even though there were other possible plans with lower deviations); *State ex rel. Cooper v. Tennant*, 2012 W. Va. LEXIS 77 (W. Va. Feb. 13, 2012) (court approved a plan with a total deviation of 9.99%); *but see Larios v. Cox*, 300 F. Supp. 2d 1320, 1339-41 (N.D. Ga. 2004) (three judge panel, instead of holding that the ten point range of deviation is a safe harbor, concluded that numbers within the range create a rebuttable presumption of constitutionality that requires deviations from absolute population equality among legislative districts to be justified in terms of a legitimate state interest), *summarily affirmed without oral argument* 542 U.S. 947 (2004).

A court-drawn plan, on the other hand, must satisfy the more stringent "*de minimis*" deviation standard. *Connor*, 431 U.S. at 414 (quoting *Chapman*, 420 U.S. at 26-27).

"At this point the path ends and our journey through the thicket begins." *Gorin v. Karpan*, 775 F. Supp. 1430, 1439 (D. Wyo. 1991). The Court has never articulated an un-crossable bright line for a court-drawn plan. Although *de minimis* does not equate to the near-population equality applicable to federal congressional districting, the Supreme Court has provided few clues as to what *de minimis* really means. In *Connor* the Court

observed that *Chapman* "refused to assume" that a 5.95% deviation would be satisfactory in a court-ordered plan, but its mathematical analysis ended there. *Connor,* 431 U.S. at 418 n. 17. Instead of reliance on pure mathematics the Court said that if "important and significant state considerations rationally mandate departure from" the *de minimis* standard, a court-drawn plan with greater than *de minimis* population deviation is constitutionally permissible. *Chapman,* 420 U.S. at 26-7**.**

There is some guidance from the Court about the higher limits of the total deviation range. Maximum population deviations of 16.5% and 19.3%, said the Court in *Connor*, "can hardly be characterized as *de minimis*; they substantially exceed the 'under-10%' deviations the Court has previously considered to be of prima facie constitutional validity only in the context of legislatively enacted apportionments." *Connor*, 431 U.S. at 418. In *Chapman,* a population deviation of 20.14% in a court-drawn plan was found to be "constitutionally impermissible in the absence of significant state policies or other acceptable considerations that require adoption of a plan with so great a variance." 420 U.S. at 22.

Rather than rely on a bright line for a court-drawn plan, the Court has preferred to adjudicate these claims on a case-by-case basis. This approach means that the determining factor in the outcome of cases tends to be the justification for the deviation, rather than a hard-and-fast numerical percentage. And so, the precedential value of any case is limited. Nevertheless, here are a few cases.

In *Burton ex rel. Republican Party v. Sheheen*, 793 F. Supp. 1329 (D.S.C. 1992), the court struggled to beat a path of reason through a wilderness of guiding principles. In the wake of the 1990 census, the South Carolina Senate had passed a redistricting plan for

itself, with a total deviation of 63.15%, as did the House, with a total deviation of 113.86%, but neither body was able to consider the plan passed by the other before adjournment *sine die*. 793 F. Supp. at 1337-38 & n. 13. Suit was then filed alleging that proposed plans were unconstitutional.

The court struggled with the case law in order to define its role. Its discussion at 793 F. Supp. at 1343-45 is worth reading. The court concluded,

> without quantifying the *de minimis* standard, that the standard lies somewhere between the 10 percent presumption of *Brown* and the mathematical preciseness required for congressional redistricting under *Wesberry v. Sanders*, 376 U.S. 1, 11 L. Ed. 2d 481 , 84 S. Ct. 526 , (1964), and in the opinion of this court, it lies closer to *Wesberry* than *Brown*.

793 F. Supp. at 1345.

The court noted the obvious—the Senate plan's total deviation of 63.15% was unacceptable. 793 F. Supp. at 1359, n. 58. As for its own plan, the court found that the total deviation range of 1.95% was *de minimis* under the case law. 793 F. Supp. at 1359. The court rejected lower deviation plans proposed by the Governor (0.0106%) and the Republican Party (0.0145%), because they split county lines, precinct lines, and communities-of-interest. 793 F. Supp. at 1359-62. It rejected for the same reasons the Statewide Reapportionment Advisory Committee's plan, with a deviation of 2.74%, which the court noted "push[ed] the outer limits of the *de minimis* standard." 793 F. Supp. at 1359 n. 58. The court's plan for the House of Representatives had a total deviation of 1.98%. The court said that, "to the extent possible," the House plan "attempts to honor the express state policy of preserving county boundaries in the creation of election districts." 793 F. Supp. at 1363.

In a mandamus action about a federal court-drawn plan for state congressional districts, the Illinois Supreme Court in *People ex. rel. Scott v. Kerner*, 33 Ill. 2d. 460, 211 N.E. 2d 736 (1965) approved the plan as constitutional, citing *Reynolds v. Sims*, 377 U.S. 533. The plan had a total deviation of 13.6% (the district with the least population was -6.1% and the district with the largest population was +7.5%). 211 N.E. 2d at 737-38. The court wrote, "Mathematical nicety is not required, and the principle of preservation of the integrity of historic political subdivisions more than justifies slight deviation from the perfectly populated district." 211 N.E. 2d at 737.

In *Williams v. Jeffersonville City Council*, 2003 U.S. Dist. LEXIS 4590 (S.D. Ind. Feb. 19, 2003), the court adopted plan proposed by a council member that established new election districts for the City Council and had a total population deviation of 3.4%. The plans that the court drew, considered and rejected all had "total deviations of 10 percent of more." 2003 U.S. Dist. LEXIS 4590, *8. The only argument supporting other plans before the court that had larger deviations than the court-approved plan had to do with "protecting one incumbent member of the City Council," which the court held was "not proper consideration for the court in structuring a remedy for the existing constitutional violation." *Id.*

See also Wyche v. Madison Parish Police Jury, 635 F.2d 1151, 1156 (5th Cir. 1981) (districting plan for a Louisiana Police Jury and School Board that had a total deviation of 4.11%); *Smith v. Cobb County Board of Elections*, 314 F. Supp. 2d 1274, 1302-03 (N.D. Ga. 2002) (court adopted plan with a 1.51% deviation which "respected the traditional districting principles"); *Smith v. Clark*, 189 F. Supp. 2d 512, 525-27 (S.D. Miss. 2002) (court adopted plan with a 10% deviation for a congressional district based

on traditional districting principles); *Kirksey v. Board of Supervisors*, 468 F. Supp. 285, 303 (S.D. Miss. 1979) (total deviation of 3.02% satisfied the *de minimis* standard); *Chargois v. Vermilion Parish School Board*, 348 F. Supp. 498, 500 (W.D. La. 1972) (court adopted plan that had total deviation of 5.0%).

At the end of the day, the third tier consideration of the traditional districting factors of district compactness, contiguity, respect for political subdivisions, and preservation of communities-of-interest is inherently linked to the first tier "one person, one vote" analysis. In *White v. Weiser*, 412 U.S. 783 (1973) the Court held that

> 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 proposed by the state legislature, whenever adherence to state policy does not detract from the requirements of the Federal Constitution.

412 U.S. at 795. *See also Abrams v. Johnson*, 521 U.S. 74, 79 (1997) ("When faced with the necessity of drawing district lines by judicial order, a court, as a general rule, should be guided by the legislative policies underlying the existing plan, to the extent those policies do not lead to violations of the Constitution or the Voting Rights Act."). A court's task of reconciling the state policies and the federal equal protection goals "is inevitably an exposed and sensitive one that must be accomplished circumspectly, and in a manner free from any taint of arbitrariness or discrimination." *Connor*, 431 U.S. at 414-15.

Within the framework of the Legislature's 2012 Guidelines[3] there are hundreds of specific, personalized, and legitimate factors that contribute to a constitutional plan.

[3] Though several parties have made contrary arguments, 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)

These are the "important and significant state considerations," which may "rationally mandate departure from" the *de minimis* standard. *See Chapman,* 420 U.S. at 26-7**.**

In deference to these state policies, the court's analysis cannot begin and end with a Spartan number-crunching analysis using sophisticated software capable of producing a statewide equi-populous plan. Otherwise, any plan that does not hit a predetermined total deviation target would be declared unconstitutional regardless of the legislative policies underlying the existing plan and the proposed plans.

The product of a Spartan number-crunching analysis using Maptitude software may be a quick plan, but as Professor Persily notes, "A quick plan, however, is not necessarily a good plan. Indeed a computer can draw a statewide equi-populous plan by itself in a matter of hours or even minutes, but it is unlikely to be one a court (or anyone) would want to adopt." Persily, *supra* at p. 1146. Corey Carnahan, of KLRD, made this same point. If deference to legitimate state objectives requires the court to deviate from a 2%, or some other numerical percent, the court should do so.

Ultimately, the court's model must incorporate nuanced assumptions to prepare a constitutional plan. Though the statistical methods in the mapping software are set in stone, as repeatedly shown by witness testimony, different sets of assumptions, particularly those based on respecting communities-of-interest and political subdivision lines and preserving cores or configurations of prior districts, can yield different

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("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.").

conclusions. This is because a fair consideration of these state policies often requires highly nuanced assumptions. For example, to preserve to the extent possible the building blocks of any district map—the existing political subdivisions—the court,

> should be clear as to the hierarchy of political subdivisions that need to be protected and how violations of political subdivision boundaries will be measured. If one must choose between splitting a city between two districts or a county between two districts, for example, which political subdivision should one subordinate? In general, courts prefer to avoid splits of the largest subdivisions (usually counties) and tolerate a greater number of splits of cities and (especially) precincts.

Persily, *supra* at p. 1159-60. It is now up to the court to assess the relative credibility and relevance of witness testimony and the assumptions used in the various plans.

In sum, whether the court relies on the numeric analysis or the testimonial record or both to adopt a constitutional plan it will be necessary to sort out the relative importance of the factors that led to the deviations in the current plan and the various proposed plans. This cannot be a stark, number-crunching analysis, but rather a combination of methods that leads the court to a final map. However, this comment is not intended to diminish the value of mathematical analysis. It can and should be used to show how a plan can be drawn to reduce the existing deviations while still adhering to legitimate state policies that were behind the deviations. This is a workable concept that conforms to both the one person, one vote case law and the usual type of inquiries that courts have made based on traditional districting principles.

Respectfully submitted,

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CERTIFICATE OF NOTIFICATION

The undersigned certifies that on the 1st day of June, 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