

**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.**

PER CURIAM.

Under the state Constitution, every ten years, the Kansas legislature must draw new districts for the United States Congress, the Kansas Senate, the Kansas House of Representatives and the Kansas Board of Education.¹ Since the 2010 decennial census, the legislature has failed to approve new maps. While legislators publicly demurred that they had done the best they could, the impasse resulted from a bitter ideological feud – largely over new Senate districts. The feud primarily pitted GOP moderates against their more conservative GOP colleagues. Failing consensus, the process degenerated into blatant efforts to gerrymander various districts for ideological political advantage

¹ U.S. Const. art. I, § 2 (congressional districts); Kan. Const. art. 10, § 1(a) (state Senate and House districts); Kan. Const. art. 6, § 3 (Board of Education districts).

and to serve the political ambitions of various legislators. Consequently, for reasons explained below, this Court is left to the task of approving or creating plans to redistrict the United States Congress, the state Senate, the state House of Representatives and the state Board of Education. The Secretary of State advised us of the June 11, 2012 filing deadline that candidates for Congress, the state legislature and the Kansas Board of Education face, and we have endeavored to complete this order as expeditiously as possible to permit that deadline to remain in place.

FACTUAL BACKGROUND

Anticipating the legislative default which eventually occurred, plaintiff brought suit against the Kansas Secretary of State, seeking to enjoin him from conducting the 2012 elections under existing state law. Specifically, she alleged that the 2002 districts are now unconstitutional because of population shifts documented by the 2010 census, which caused existing districts to become unequal in population and thus violate the constitutional requirement of one person, one vote. At the hearing and in their pleadings, all parties have stipulated that the existing districts are unconstitutional. The Court agrees.²

Plaintiff's suit is authorized under 42 U.S.C. § 1973j(f), and a three-judge panel has been appointed to hear it under 28 U.S.C. § 2284(a).³

² Under the 2010 U.S. decennial census, the population of Kansas is 2,853,118. The state has four congressional districts, and thus the ideal population of each congressional district is approximately 713,280. See Secretary of State 2010 Census Adjustment, July 26, 2011, at 30 (found at www.kssos.org/forms/elections/2010CensusAdj.pdf). However, the four congressional districts have an actual population (according to the 2010 census) of 655,310 (First District); 710,047 (Second District); 767,569 (Third District); and 720,192 (Fourth District) (available at <http://factfinder2.census.gov>).

Appendix A to this order contains similar information for each of the 40 Kansas state Senate and 125 Kansas state House districts.

³ A district court of three judges shall be convened when otherwise required by Act of Congress, or when an action is filed challenging the constitutionality of the apportionment of congressional districts

(continued...)

All parties now call upon the federal court to do in very short order what the legislature failed to accomplish in two regular sessions. Exercising its jurisdiction under 28 U.S.C. §§ 1331 and 1343(a)(4), the Court therefore assumes the “unwelcome obligation” of performing in the legislature’s stead. Connor v. Finch, 431 U.S. 407, 415 (1977).

Historical Facts

The Kansas legislature consists of 40 single-member senatorial districts⁴ and 125 single-member state representative districts.⁵ Congress has issued a certificate of entitlement to the Kansas Secretary of State stating that Kansas is entitled to four congressional districts in the 2012 elections. These numbers remain unchanged from ten years ago.

Every ten years, subject to the governor’s approval, the Kansas legislature must redistrict the

³(...continued)
or the apportionment of any statewide body.

28 U.S.C. § 2284(a).

Upon the filing of a request for three judges, the judge to whom the request is presented shall, unless he determines that three judges are not required, immediately notify the chief judge of the circuit, who shall designate two other judges, at least one of whom shall be a circuit judge. The judges so designated, and the judge to whom the request was presented, shall serve as members of the court to hear and determine the action or proceeding.

28 U.S.C. § 2284(b). This case was originally randomly assigned to United States District Judge Kathryn H. Vratil, Chief Judge of the District of Kansas. On May 18, 2012, United States Circuit Judge Mary Beck Briscoe, Chief Judge of the Tenth Circuit Court of Appeals, appointed herself as the circuit judge on the panel, and appointed United States District Judge John W. Lungstrum of the United States District Court for the District of Kansas to serve along with Judge Vratil.

⁴ See K.S.A. 4-4,454 through 4-4,493.

⁵ See K.S.A. 4-3,734 through 4-3,858.

congressional, state Senate and state House districts.⁶ The Kansas Supreme Court must evaluate new legislative districts after their enactment. Kan. Const. art. 10, § 1(b). Redistricting is primarily a matter for the legislature to consider and determine, but if a legislature fails to redistrict in a timely fashion after having a chance to do so, federal courts are called upon for relief. See White v. Weiser, 412 U.S. 783, 794-95 (1973). As judges, we do not tread unreservedly into this political thicket. Colegrove v. Green, 328 U.S. 549, 556 (1946). The Court acts only because it must – as it did in 1982.⁷

According to the 2010 census, Kansas has a population of 2,853,118.⁸ Dividing the 2012 population into four congressional districts, the average congressional district should contain 713,280 persons.

For purposes of state rather than federal districting, the Kansas Constitution requires that the Secretary of State adjust the total state population by excluding nonresident military personnel stationed within Kansas and nonresident students attending colleges and universities within Kansas. Conversely, it includes military personnel within the state who are residents of Kansas and students

⁶ This order uses the term “redistricting” to refer to the process by which state legislatures or courts draw the boundaries of voting districts. The terms “redistricting,” “apportionment” and “reapportionment” frequently are used interchangeably. Technically, “reapportionment” applies to the allocation of seats among units, such as the allocation of U.S. congressional seats among the states. “Redistricting” refers to redrawing district lines. See National Conference of State Legislatures, Redistricting Law 2010 8 n.41 (2009).

⁷ In 1982, the Kansas legislature passed two congressional reapportionment maps which the governor vetoed. See O’Sullivan v. Brier, 540 F. Supp. 1200, 1201 (D. Kan. 1982) (three-judge panel).

⁸ This figure represents a population increase of 164,700 since 2000, and involves significant shifts in population, primarily from rural western and northern Kansas to urban and suburban areas in the eastern part of the state. These shifts were not unexpected or unpredictable. In anticipation of the 2010 census figures, the legislature appointed committees, conducted public hearings, gathered information from legislators in both chambers about their preferences for new districts, studied the legal requirements and political consequences of redistricting, and used sophisticated computer software (“Maptitude”) and highly trained operators in the Kansas Legislative Research Department (“KLRD”) to draw new map proposals.

attending colleges and universities within the state who are residents of the state. The included individuals are counted in the district of their permanent residence. Kan. Const. art. 10, § 1(a). The total adjusted population of Kansas is 2,839,445. Thus the ideal population for each Kansas Senate district is 70,986 and the ideal population for each Kansas state House district is 22,716. Article 6 of the Kansas Constitution requires the Kansas legislature to establish districts for the Kansas State Board of Education, with each district consisting of four contiguous Kansas Senate districts. Kan. Const. art 6, § 3. Based on the total adjusted population, the ideal population for each Kansas State Board of Education district is 283,944.

As noted, the Kansas legislature had advance notice that it had to draw new districts for the 2012 elections, and it began the redistricting process in 2011. Each body appointed a redistricting committee⁹ and the chairpersons of each committee (Senator Tim Owens and Representative Mike O’Neal) co-chaired a joint Special Committee on Redistricting. The Special Committee conducted six days of public hearings in 2011.¹⁰ In January of 2012, the House and Senate adopted written “Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting” (“the Guidelines”). The House Redistricting Committee conducted hearings from June 1, 2011, through May 17, 2012, and the Senate Reapportionment Committee conducted hearings from January 18 through May 11, 2012.

For congressional redistricting, the Guidelines state that:

1. The basis for congressional redistricting is the 2010 U.S. Decennial Census as published by the U.S. Department of Commerce, Bureau of the Census. The

⁹ The titles differ; they are the House Committee on Redistricting and the Senate Committee on Reapportionment.

¹⁰ The hearings in 2011 occurred in Wichita and Hutchinson on July 26, Salina and Manhattan on July 27, Chanute and Pittsburg on August 2, Lawrence and Overland Park on September 2, Kansas City and Leavenworth on September 30, and Colby and Hays on October 20. Senator Owens testified that most of the expressed concern had to do with changes to the state’s congressional maps.

“building blocks” to be used for drawing district boundaries shall be Kansas counties and voting districts (VTDs) as their population is reported in the 2010 U.S. Decennial Census.

2. Districts are to be as nearly equal to 713,280 population as practicable.
3. Redistricting plans will have neither the purpose nor the effect of diluting minority voting strength.
4. Districts should attempt to recognize “community of interests” when that can be done in compliance with the requirement of guidelines No. 2.

a. Social, cultural, racial, ethnic and economic interests common to the population of the area, which are probable subjects of legislation (generally termed “communities of interest”), should be considered.

b. If possible, preserving the core of the existing districts should be undertaken when considering the “community of interests” in establishing districts.

c. Whole counties should be in the same congressional district to the extent possible while achieving population equality among districts. County lines are meaningful in Kansas and Kansas counties historically have been significant political units. Many officials are elected on a countywide basis, and political parties have been organized in county units. Election of the Kansas members of Congress is a political process requiring political organizations which in Kansas are developed in county units. To a considerable degree most counties in Kansas are economic, social and cultural units, or parts of a larger socioeconomic unit. These interests common to the population of the area, generally termed “community of interests” should be considered during the creation of congressional districts.

5. Districts should be as compact as possible and contiguous, subject to the requirement of guideline No. 2.

Ex. 9 at p.2.

The guidelines state the following for legislative redistricting:

1. The basis for legislative redistricting is the 2010 U.S. Decennial Census as recalculated by the Kansas Secretary of State pursuant to Article 10, Section 1 of the *Constitution of the State of Kansas* and K.S.A. 11-301 *et seq.*

2. Districts should be numerically as equal in population as practical within the limitations of Census geography and application of guidelines set out below. Deviations should not exceed plus or minus 5 percent of the ideal population of 22,716 for each House district and 70,986 for each Senate district, except in unusual circumstances

3. Redistricting plans will have neither the purpose nor the effect of diluting minority voting strength.

4. Subject to the requirements of guideline No. 2:

a. The “building blocks” to be used for drawing district boundaries shall be voting districts (VTDs) as described on official 2010 Redistricting U.S. Census maps.

b. Districts should be as compact as possible and contiguous.

c. The integrity and priority of existing political subdivisions should be preserved to the extent possible.

d. There should be recognition of similarities of interest. Social, cultural, racial, ethnic and economic interests common to the population of the area, which are probable subjects of legislation (generally termed “communities of interest”), should be considered. While some communities of interest lend themselves more readily than others to being embodied in legislative districts, the Committee will attempt to accommodate interests articulated by residents.

e. Contests between incumbent members of the Legislature or the State Board of Education will be avoided whenever possible.

f. Districts should be easily identifiable and understandable by voters.

Ex. 9 at p.1.

Throughout the redistricting process, the Kansas legislature considered a number of maps, including eleven congressional maps,¹¹ nine state Senate maps,¹² three state Board of Education maps¹³ and two state House maps.¹⁴ At this point, with one exception, the history of the failed plans

¹¹ The congressional maps are titled “34th Great State,” “Black & White,” “Bob Dole 1,” “Capitol 1,” “Ella & Jean,” “Free Willie,” “Kansas Six,” “Sunflower 9C,” “Sunflower 13,” “Tradition” and “Groundhog 1 Amendment.”

¹² The state Senate maps are titled “Ad Astra,” “Ad Astra Revised JOCO Wichita 3,” “Buffalo 30,” “Buffalo 30-Revised,” “For the People 6,” “For the People 12,” “For the People 13b,” “Wheat State 1” and “Wheat State 5.”

¹³ The state Board of Education maps are titled “For the People 13b-v1-SBOE,” “Ad Astra Revised-SBOE” and “Buffalo 30-Revised-SBOE.”

¹⁴ The state House maps are titled “Cottonwood 1” and “Cottonwood II.” (NOTE: This (continued...))

is largely academic. It is important to note, however, that on February 9, 2012, the House passed a new House map, “Cottonwood 1,” by a vote of 109-14. In a separate piece of legislation on May 1, 2012, the Senate approved Cottonwood 1 by a vote of 21-19. The following day, the House denied a motion to concur because 72 House members objected to the Senate redistricting map which the Senate attached to Cottonwood 1. Consequently, although the House and Senate each approved Cottonwood 1, they did so in separate pieces of legislation which never became law.

With regard to the Senate maps, on May 18, 2012, the Senate approved “Buffalo 30-Revised” to redistrict the Senate and “Buffalo 30-Revised-SBOE” to redistrict the Board of Education. The House took no action on either map and neither was enacted into law.

On May 20, 2012, the legislature gave up on redistricting and adjourned. On May 25, Senator Jeff King asked the Kansas Legislative Research Department (“KLRD”) to run its usual set of reports for “Essex A,” a redistricting plan that originated in the governor’s office – apparently as a precursor to this lawsuit.¹⁵ Neither chamber had considered Essex A in the legislative process. Indeed, some parties expressed confusion, disbelief, suspicion and anger at its sudden appearance as an exhibit to plaintiff’s complaint and an exhibit in this suit, after plaintiff had apparently disavowed its use. We note that the Supreme Court has discounted the significance of a map submitted to a court in a manner that prevents meaningful examination of the map at trial. Abrams

¹⁴(...continued)

is not a typo on the Court’s end; the legislation variously involved Arabic and Roman numerals.)

¹⁵ The KLRD is a nonpartisan agency that provides support services for the Kansas legislature. In the redistricting process, KLRD provides technical support to legislative staff in drawing district plans as well as network and web support. KLRD is the custodian of the redistricting plans that the Kansas legislature considered during its 2012 legislative session. Using Maptitude software it created all of the maps that accompanied those plans. With periodic updates, KLRD used this same software to create the maps that the legislature agreed on in 2002. All parties agree that KLRD’s versions of the various plans are accurate representations associated with the respective map names, and that the analysis packets which KLRD prepared accurately reflect the demographic, adjusted and unadjusted census information for each respective plan.

v. Johnson, 521 U.S. 74, 84 (1997) (discounting the significance of a map submitted by the Justice Department after the close of evidence, because the late submission prevented cross examination of the map's developer).

Procedural Background

Plaintiff filed her complaint on May 3, 2012. On May 16, 2012, the Kansas Secretary of State filed his answer. The Secretary of State also filed an unopposed Motion To Expedite Pursuant To 28 U.S.C. § 1657 And Issue A Scheduling Order (Doc. #9), in which he pointed out a series of electoral deadlines, including a filing deadline of June 11, 2012 for candidates for Congress, the state legislature and the Kansas Board of Education. See K.S.A. § 25-205. The district court sustained defendant's motion, set a pretrial conference for May 21, 2012, and requested appointment of a three-judge panel. (Doc. #10) entered May 17, 2012.¹⁶ The Court allowed numerous parties to intervene.¹⁷ Most of the intervenors have unabashedly political reasons for intervening, and they seek to advance their respective political agendas by arguing for and against various maps that the

¹⁶ The order of May 17 also (1) directed the parties to make all Fed. R. Civ. P. 26 disclosures by May 18; (2) ordered that all parties and intervenors be joined by May 21; (3) directed the parties to file all briefs and memoranda proposing reapportionment plans no later than May 29; and (4) pending the appointment of a three-judge panel pursuant to 28 U.S.C. § 2284, tentatively set a hearing on proposed reapportionment plans to begin May 29.

¹⁷ The following intervened as party plaintiffs: (1) Senator Thomas C. Owens, John E. Henderson, Bernie Shaner and Ron Wimmer (Complaint Doc. #53); (2) Benjamin D. Craig and Larry Winn III (Complaint Doc. #76); (3) William Roy, Jr. and Paul T. Davis (Complaint Doc. #81); (4) Kevin Yoder (Complaint Doc. #89); (5) Marearl Denning (Amended Complaint Doc. #159); (6) Michael R. O'Neal (Complaint Doc. #94); (7) Walter T. Berry and Lynn Nichols (Amended Complaint Doc. #96); (8) Richard Keller (Complaint Doc. #98); (9) Frank Beer (Amended Complaint Doc. #104); (10) John W. Bradford (Complaint Doc. #117); (11) Jeff King, Steve Abrams and Ray Merrick (Complaint Doc. #119); (12) L. Franklin Taylor (Complaint Doc. #127); (13) Mary Pilcher-Cook, Gregg Philip Snell and Carri Person (Complaint Doc. #154); and (14) Brenda Landwehr, Gary Mason and Greg A. Smith (Complaint Doc. #156). 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. (Doc. #128) entered May 24, 2012.

legislature considered, along with “Essex A.”

The Court received briefs from *amicus curiae* Samuel D. Brownback in his official capacity as Governor of the State of Kansas (Doc. #235) and the Board of County Commissioners of Johnson County, Kansas (Doc. #238).

On May 29 and 30, 2012, the Court heard testimony, received evidence and entertained arguments from the original parties and intervenors. 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. Most of the relevant evidence is undisputed and was received in written form. In addition, the Court heard testimony from many individuals who wished to be personally heard. Having thoughtfully considered the testimony and the evidence, the Court finds that none of the proposed plans are both constitutional and fully comport with the non-constitutional criteria that apply to redistricting plans approved or crafted in a judicial context. As a result, the Court has regrettably resorted to the painstaking task of drawing its own plans.

Confronted with the unusual complexity and difficulty of computer-generated redistricting plans, and faced with the daunting prospect of redrawing four new plans on essentially ten days’ notice, the Court secured Corey Carnahan, Principal Analyst for the KLRD, to serve as a technical advisor pursuant to Reilly v. United States, 863 F.2d 149 (1st Cir. 1988).¹⁸

GOVERNING LAW

This case causes us to examine Supreme Court precedent with respect to both congressional and state legislative redistricting principles.

¹⁸ Mr. Carnahan was not appointed as an expert under Fed. R. Evid. 706 or a special master under Fed. R. Civ. P. 53, and he took no part in the deliberations of the Court. At the hearing on May 30, 2012, the Court gave notice that it might seek technical assistance from the KLRD, and no party objected.

Legal Principles Concerning the Proposed Congressional Plans

Article I, Section 2 of the U.S. Constitution¹⁹ provides that “as nearly as practicable one man’s vote in a congressional election is to be worth as much as another’s.” Wesberry v. Sanders, 376 U.S. 1, 7-8 (1964). For this reason, redistricting plans for congressional districts are subject to stringent equal population requirements. In Karcher v. Daggett, the Supreme Court noted that Article 1, § 2 of the United States Constitution permits only limited population variances which are unavoidable despite a good faith effort to achieve absolute equality, or for which justification is shown. 462 U.S. at 725, 730 (1983) (quoting Kirkpatrick v. Preisler, 394 U.S. 526, 531 (1969)). Without justification, no *de minimis* population variations which are avoidable will satisfy Article 1, § 2. Karcher, 462 U.S. at 734. Karcher sets forth a two-pronged inquiry for assessing any variation in districts from a standard of equality: (1) does a plan represent a good faith effort to draw districts of equal population; and (2) is any “significant” variance between districts necessary to achieve some legitimate state goal. Id. at 731; Anne Arundel Cnty. Republican Cent. Comm. v. State Admin. Bd. of Election Laws, 781 F. Supp. 394, 396 (D. Md. 1991).²⁰

Absolute population equality is the paramount objective of a congressional plan, and this Court must achieve that objective “with little more than *de minimis* variation.” Abrams v. Johnson, 521 U.S. 74, 98 (1997) (quoting Karcher, 462 U.S. at 732 and Chapman v. Meier, 420 U.S. 1, 26-27

¹⁹ The relevant part states as follows: “The House of Representatives shall be composed of Members chosen every second Year by the People of the several States Representatives . . . shall be apportioned among the several States which may be included within this Union, according to their respective Numbers” U.S. Const. art. I, § 2.

²⁰ The first prong of Karcher is essentially a comparative exercise: what are the deviations from equality in the proffered plans? Cf. Karcher, 462 U.S. at 739; Hastert v. State Bd. of Elections, 777 F. Supp. 634, 644 (N.D. Ill. 1991). As to the second prong, important state goals justifying “significant” variations include but are not necessarily limited to “making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbent Representatives.” Karcher, 462 U.S. at 740.

(1975)). The Supreme Court has not enunciated a fixed number that satisfies the *de minimis* standard for deviation from absolute equality.²¹ In writing about a state's efforts to arrive at constitutionally acceptable congressional districts, however, the Supreme Court has explained its reason as follows:

We reject [the] argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the as nearly as practicable standard. The whole thrust of the as nearly as practicable approach is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to the circumstances of each particular case. The extent to which equality may practicably be achieved may differ from State to State and from district to district.

Kirkpatrick, 394 U.S. at 531. Although more than 40 years old, this pronouncement holds true today.

While this Court can attempt to justify variances in population between districts, the Supreme Court has been loath to allow even *de minimis* variations in congressional redistricting plans. See Karcher, 462 U.S. at 731-32. Karcher teaches that no level of population inequality among congressional districts is too small to be of concern if potential challengers to a plan can demonstrate that the inequality could have been avoided. Lower courts have applied Karcher to determine if congressional district plans achieve constitutional population equality. E.g., Larios v. Cox, 300 F. Supp. 2d 1320 (N.D. Ga. 2004) (congressional plan with total deviation of 72 people constitutional because of legitimate state interest in avoiding precinct splits along boundaries not easily recognized, even through deviation could be smaller), aff'd, 542 U.S. 947 (Mem.); Graham v. Thornburgh, 207 F. Supp. 2d 1280 (D. Kan. 2002) (congressional plan with maximum deviation of 33 people constitutional despite existence of plan with lower deviations because adopted plan

²¹ Deviation from ideal district size is measured as a percentage of the ideal. "Total deviation" of any particular plan is calculated by adding the largest negative percentage deviation to the largest positive percentage deviation to calculate the numerical distance between them. This is also termed population variance. The KLRD refers to total deviation as "Relative Overall Range."

balanced legitimate state goals and had smallest population shift from 1992 plan); DeWitt v. Wilson, 856 F. Supp. 1409 (E.D. Cal. 1994) (plan with overall range of 0.49 percent justified by legitimate state objectives).

While variance may be based on legitimate state policies, we cannot assume that any such variance would pass constitutional muster.²² Accordingly, our goal is to achieve absolute population equality and, if circumstances necessitate departure from that goal, to articulate clearly the relationship between the variance and the state policy furthered. Chapman, 420 U.S. at 24.

Legal Principles Concerning Proposed State Plans

The rigorous standard of population equality demanded of congressional districts under U.S. Const. Art. 1, § 2, is not equally applicable to redistricting of state legislative districts or the State Board of Education. Karcher, 462 U.S. at 732-33. Such districts are governed by the Equal Protection Clause of the Fourteenth Amendment, which requires that we construct maps under the one person, one vote principle. Reynolds v. Sims, 377 U.S. 533, 568 (1964); Bd. of Estimate of New York v. Morris, 489 U.S. 688, 692-93 (1989). It requires an honest and good faith effort to construct districts as nearly of equal population as is practicable. Reynolds, 377 U.S. at 577. The Supreme Court has recognized that it is practically impossible to arrange legislative districts so that each one has an identical number of residents, citizens or voters, and has held that mathematical exactness or precision is not a workable constitutional requirement. Id. Thus, court-ordered reapportionment of a state legislature need not attain the mathematical preciseness required for congressional redistricting. Chapman, 420 U.S. at 27 n.19.²³

²² See, e.g., White v. Weiser, 412 U.S. 783, 795 (1973) (when adherence to state policy does not detract from requirements of federal Constitution, district court should honor state policies in context of congressional reapportionment.).

²³ States typically have far more legislative districts than congressional districts, and
(continued...)

While the Constitution requires that legislative districts be as nearly of equal population as is “practicable,” Connor v. Finch, 431 U.S. 407, 409-10 (1977), the Supreme Court has not assigned a numerical standard to “as equal as practicable” when applied to court-crafted maps. In the context of legislatively-enacted maps, the Supreme Court has held that population deviations under 10 percent are constitutionally valid on their face, id., 431 U.S. at 419,²⁴ with a high-water mark of 16.4 percent for a Virginia house map. Mahan v. Howell, 410 U.S. 315, 333 (1973).

Where a federal court is called upon to draw a state legislative redistricting plan, as we are, the 10 percent standard does not apply.²⁵ Court-enacted maps are held to a higher standard, but the

²³(...continued)

as the Court has recently learned from first-hand experience, it is much more difficult to mathematically achieve one person-one vote standards when working with larger numbers of districts, without sacrificing other concerns (such as those stated in the legislative guidelines). See Mahan v. Howell, 410 U.S. 315, 321 (1973) (recognizing disparity between numbers of state legislative and congressional districts).

²⁴ The Supreme Court opinion in Chapman guides all lower courts in devising redistricting plans for state legislatures, but it does not provide a working percentage. Instead, it holds as follows:

[U]nless 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. Where important and significant state considerations rationally mandate departure from these standards, it is the reapportioning court’s responsibility to articulate precisely why a plan of single-member districts with minimal population variance cannot be adopted.

420 U.S. at 26-27. While the Court may have had the goal of population equality, Chapman did not require it.

²⁵ As noted above, constitutional tolerance for 10 percent deviation in legislative districts does not extend to those same districts if they are part of a court-drawn plan. This case involves a real-life illustration of the difference between acceptable variance levels. Both the House and the Senate passed bills containing the Cottonwood 1 House map. Cottonwood 1 has a relative overall range of 9.86 percent, which falls within the acceptable range for legislatively drawn maps. Had the legislature sent the Cottonwood 1 plan to the governor and had he signed it, it perhaps could have withstood an equal protection challenge under the Fourteenth Amendment. This Court, however, is constrained from adopting Cottonwood 1 because it exceeds any percentage variance (continued...)

Supreme Court has not explained how much higher.²⁶ Connor, 431 U.S. at 414.

The decision not to adopt a fixed standard grows from the Supreme Court’s view, expressed above, that the “[w]hole thrust of the ‘as nearly as practicable’ approach to the one man-one vote rule is inconsistent with adoption of fixed numerical standards which excuse population variances without regard to circumstances of each particular case.” Kirkpatrick, 394 U.S. at 530-31. This view leads the Supreme Court to require justification for even extremely small deviations in population for state legislative districts, even though “court-ordered reapportionment of a state legislature [need not] attain the mathematical preciseness required for congressional redistricting.” Chapman, 420 U.S. at 26 n.19. As the Court explained in Chapman, “[w]ith a court plan, any deviation from approximate population equality must be supported by enunciation of historically significant state policy or unique features [of the state].” Id. at 26.

Other courts have interpreted this language to indicate that low level deviations are constitutional. At the high end, the Fifth Circuit has held that a total deviation of 4.11 percent qualifies as “sufficiently de minimis,” Wyche v. Madison Parish Police Jury, 635 F.2d 1151, 1159 (5th Cir. 1981). The Eighth Circuit approved a plan with a 1.13 percent total deviation, but did not consider whether that marked the high end of the acceptable range. Fletcher v. Golder, 959 F.2d 106, 109 (8th Cir. 1992).

District courts, which have seen many more of these cases, have approved maps ranging up

²⁵(...continued)

that is unequivocally sanctioned by the Constitution.

²⁶ The Supreme Court came closest to addressing deviations similar to those in the Senate maps before us. It carefully noted, “[w]e do not imply that [a] . . . 5.95% population variance necessarily would be permissible in a court-ordered plan.” 420 at 25-26 n.17. The Supreme Court later characterized this as “refusing to assume . . . that even a 5.95% deviation from the norm would necessarily satisfy the high standards required of court-ordered plans.” Connor, 431 U.S. at 418 n.17. Apart from this guidance, the Supreme Court has not addressed total deviations in a court-ordered state legislative redistricting plan which are close to those in the maps before us.

to two percent total deviation. Baldus v. Members of the Wis. Gov't Accountability Bd., No. 11-CV-562, 2012 WL 983685 (E.D. Wis. March 22, 2012) (holding that total deviation of 0.76 percent was *de minimis*); Stenger v. Kellett, No. 4:11CV2230, 2012 WL 601017 (E.D. Mo. Feb. 23, 2012) (approving court-ordered reapportionment plan with total deviation of less than one-tenth of one percent); Larios, 314 F. Supp. 2d 1357 (holding 2 percent total deviation *de minimis*); Smith v. Cobb County Bd. of Elections & Registrations, 314 F. Supp. 2d 1274 (N.D. Ga. 2002) (adopting plan with total deviation of 1.51 percent); Colleton County Council v. McConnell, 201 F. Supp. 2d 618 (D.S.C. 2002) (adopting map with 2 percent total deviation after rejecting maps at 4.86 percent and 3.13 percent as too high); Farnum v. Burns, 561 F. Supp. 83 (D.R.I. 1983) (holding total deviation of 1.58 percent *de minimis*); Wis. State AFL-CIO v. Elections Bd., 543 F. Supp. 630 (E.D. Wis. 1982) (noting that “a constitutionally acceptable plan . . . should, if possible, be kept below 2%” and adopting a map with 1.74 percent total deviation);.

Lacking more precise guidance from the Supreme Court, this Court can only deduce that 5.95 percent is probably too high in terms of population deviation, and that lower is better. We agree with Burton v. Sheheen, 793 F. Supp. 1329, 1344-45 (D.S.C. 1992), judgment vacated on other grounds by Statewide Reapportionment Advisory Comm. v. Beasley, 508 U.S. 968 (1993), and we repeat that opinion’s conclusion:

We conclude, without quantifying the *de minimis* standard, that the standard lies somewhere between the 10 percent presumption of Brown [v. Thompson], 462 U.S. 835 (1983)] and the mathematical preciseness required for congressional redistricting under Wesberry v. Sanders, 376 U.S. 1 (1964), and in the opinion of this court, it lies closer to [the equal population standard for congressional districts.]

793 F. Supp. at 1345.

Thus, we seek to make the population deviations as low as possible, and we will explain the factors necessitating our most significant deviations from that standard.

Further, to the extent we vary from the population ideals in order to accommodate

historically significant state policies, we note those deviations. Chapman, 420 U.S. at 26. The only uncontroverted set of significant state policies articulated by the legislature is contained in the 2012 Guidelines adopted by the legislature. We might be reluctant to rely on a set of guidelines approved only by the two committees as a statement of Kansas redistricting policies, but these same guidelines were approved nearly verbatim in 2002, and we relied on these guidelines as statements of Kansas redistricting policy when assessing the 2002 Kansas redistricting plan. Graham v. Thornburgh, 207 F. Supp. 2d 1280, 1292-93 (D. Kan. 2002). Further, we relied on substantially similar policies when creating a congressional plan in 1982. O’Sullivan v. Brier, 540 F. Supp. 1200, 1203 (D. Kan. 1982) (listing these factors and adding factor of preserving municipal boundaries). These guidelines, then, are the legislative policies underlying the existing plan, and we will rely on them as a statement of Kansas redistricting policies.

Legal Principles Concerning the Proposed Remedy

The legislative failure to devise a remedy for the currently unconstitutional plans leaves this Court with three options for each set of districts in question: we may (1) adopt a proposed plan in its entirety, (2) adopt a proposed plan and modify it or (3) devise a new plan.²⁷ See O’Sullivan, 540 F. Supp. at 1202-03. Regardless which option our constitutional analysis prompts us to choose, we owe no deference to any proposed plan, as none has successfully navigated the legislative process to the point of enactment. See Connor, 431 U.S. at 415; O’Sullivan, 540 F. Supp. at 1202. Rather, we must carefully follow Supreme Court guidance for federal courts who find themselves in the “unusual position” of drafting reapportionment plans. See Connor, 431 U.S. at 414.

The Supreme Court has repeatedly emphasized that

“legislative reapportionment is primarily a matter for legislative consideration and

²⁷ We must make this choice four separate times, as competing plans exist for Congress, the state Senate, the state House of Representatives and the state Board of Education.

determination,” for a state legislature is the institution that is by far the best situated to identify and then reconcile traditional state policies within the constitutionally mandated framework of substantial population equality. The federal courts by contrast possess no distinctive mandate to compromise sometimes conflicting state apportionment policies in the people’s name. In the wake of a legislature’s failure constitutionally to reconcile these conflicting state and federal goals, however, a federal court is left with the unwelcome obligation of performing in the legislature’s stead, while lacking the political authoritativeness that the legislature can bring to the task.

Id. at 414-15 (quoting Reynolds, 377 U.S. at 586).

All parties concede that the Kansas congressional, legislative and Board of Education districts as currently drawn are constitutionally infirm because a shift in population documented by the 2010 decennial census reveals that the existing districts are substantially unequal in population.²⁸ The Court need not further address the constitutionality of the current districts, but will focus solely on the remedy.

As we have noted in the past, when the legislature fails to pass a new redistricting plan, and the old plan is no longer constitutional, “our powers are broad.” O’Sullivan, 540 F. Supp. at 1202-03 (internal citations omitted). But, although “[t]he remedial powers of an equity court must be adequate to the task, . . . they are not unlimited.” Upham v. Seamon, 456 U.S. 37, 43 (1982) (citing Whitcomb v. Chavis, 403 U.S. 124, 161 (1971)). We recognize that we are limited “to remedies required by the nature and scope of the violation.” White v. Weiser, 412 U.S. 783, 793 (1973).

CONGRESSIONAL REDISTRICTING

As noted, according to the 2010 census, the population of the State of Kansas is 2,853,118, which equates to four ideal congressional districts with 713,279.5 persons in each. As also noted, the legislature failed to enact a congressional redistricting plan. The Senate passed Sunflower 9C

²⁸ For example, the current state Senate districts, adjusted for 2010 census figures, have a relative overall range of greater than 42 percent. The current state House districts, also adjusted for 2010 census figures, have a relative overall range of greater than 100 percent.

by a vote of 23 to 17, but that plan failed in the House of Representatives by a vote of 48 to 76. 34th Great State failed in the Senate by a vote of 17 to 22. The Senate Committee on Reapportionment passed Sunflower 13, but the entire Senate did not vote on it. The House passed a bill containing Bob Dole 1 for congressional redistricting by a vote of 81 to 43, but that plan failed to pass the Senate by a vote of 14 to 24. The House also passed Kansas Six by a vote of 64 to 51, but the Senate did not vote on it.

In this action, three of the plans proposed to the legislature – Sunflower 9C, Sunflower 13 and Kansas Six – are supported and proposed for court approval. Each plan (1) has essentially no deviation from the ideal population distribution among the four districts;²⁹ (2) maintains all of Wyandotte County and Johnson County in the Third District, along with a small section of either Miami County or Leavenworth County; (3) keeps Sedgwick County and surrounding counties in the Fourth District; (4) places much of the eastern part of the State (other than Johnson and Wyandotte Counties) in the Second District; (5) maintains a large First District – the so-called “Big First” – that includes the western half of the State; and (6) splits only three counties between districts.

Plaintiff advocates Kansas Six, which places Riley County (containing the city of Manhattan) and several counties south of Riley County in the Second District, and fashions a First District that spans the northernmost state line from Colorado to Missouri, and then dips south to include Atchison County, Jefferson County, Leavenworth County and the northeast portion of Douglas County. Plaintiff attaches significance to the fact that Kansas Six would keep the University of Kansas (“KU”), Kansas State University (“K-State”), Emporia State University, Washburn University and the City of Topeka together in the Second District.

²⁹ Sunflower 9C proposes districts with populations of 713,278; 713,279; 713,280; and 713,281. Sunflower 13 proposes three districts of 713,280, and one district of 713,278. Kansas Six proposes two districts of 713,280 and two districts of 713,279.

Intervenor O’Neal, Speaker of the Kansas House of Representatives, does not advocate a particular map, but he testified that during the redistricting process, the Senate and House committees learned that Riley County and K-State preferred to remain in the Second District, in part because of the National Bio- and Agro-Defense Facility (“NBAF”) that connects Riley County to eastern counties along the I-70 Corridor and Fort Leavenworth. Speaker O’Neal also testified that the House rejected Sunflower 9C because it does not maintain Riley County in the Second District. Finally, Speaker O’Neal testified that having the First District adjoin the Third District (as in Kansas Six) would better accommodate anticipated population shifts in future redistricting.

Intervenors Davis and Roy prefer Sunflower 13 or, alternatively, Sunflower 9C. Under Sunflower 13, the Second District would keep Riley County and most of Leavenworth County together, and include most of Wabaunsee County. These intervenors advocate keeping KU and K-State in one district, and also keeping Fort Riley and Fort Leavenworth in one district. They presented evidence that the Sunflower plans relocate less population from existing districts and divide fewer voting districts than Kansas Six. They also argue that Kansas Six unnecessarily splits the City of Lawrence, inappropriately adds Leavenworth and part of Douglas County to the First District in western Kansas, and removes the Flint Hills counties to the Second District from their previous home in the First District. Finally, in their post-hearing brief (leave for which was granted only with respect to issues of constitutionality), intervenors Davis and Roy argue that the Third District should include with Johnson and Wyandotte Counties a portion of Leavenworth County (instead of a portion of Miami County) because the portion of Leavenworth County adjacent to new development in Wyandotte County has more in common with the metropolitan area than does northern Miami County.

Intervenors Senator Owens et al. prefer Sunflower 9C, but do not object to Sunflower 13. These intervenors argue that Sunflower 9C is free of the gerrymandering in Kansas Six, particularly

with respect to the inclusion of Leavenworth in the First District. Senator Owens testified that during the redistricting process, his Senate Committee heard that the nine counties in southeast Kansas wish to be in the same district. He noted that Sunflower 9C would accomplish that goal by moving Montgomery County into the Second District from the Fourth District.

Intervenor Keller, a retired Army Lieutenant General, does not advocate a particular plan, but he testified that Riley and Leavenworth Counties should be in the same district, as they have been for many years, because of the ties between the two army posts in those counties. Intervenor Beer also seeks to keep Riley County in the Second District because of various initiatives that connect the City of Manhattan and Riley County to Eastern Kansas. Mr. Beer also presented evidence that both Riley County and the City of Manhattan passed resolutions preferring placement in the Second District.

Finally, intervenors Denning and Yoder (incumbent Third District Congressman) ask the Court to fill out the Third District with a portion of Miami County to the south, and not with a portion of Leavenworth County to the north. In support of their position, these intervenors argue that Miami County has been in the Third District as recently as 2002, while Leavenworth County has never been in the district; that the City of Spring Hill in northern Miami County straddles the Johnson-Miami County boundary, and should be contained in a single district; and that the City of Louisburg in northern Miami County is closely related to Johnson County, to which it is connected by a newly-improved US-69 Highway. Among the various plans that place part of Miami County in the Third District, these intervenors recommend either Capitol 1 or Black and White, which do not split the City of Hillsdale in Miami County.

The Court concludes that the best plan for the creation of new congressional districts is Sunflower 9C, modified to include a portion of Miami County instead of Leavenworth County in the Third District, specifically the portion of Miami County included in the Third District in Black

and White. In support of that plan, the Court reasons as follows.

The Court agrees with all of the recommended plans that the entirety of Johnson and Wyandotte Counties should be included in the Third District. Those counties have formed the core of the Third District for decades, and as the Court concluded in O'Sullivan, they should be placed in the same district because they “represent the Kansas portion of greater Kansas City, a major socio-economic unit,” and the counties’ economic, political and cultural ties are significantly greater than their differences. O'Sullivan, 540 F. Supp. at 1204. The Court also agrees with O'Sullivan that Wyandotte County should be placed in a single district so that the voting power of its large minority population may not be diluted. See id.

The combined population of Johnson County and Wyandotte County is 701,684, or 11,595.5 less than the ideal for a congressional district in Kansas. The recommended plans, and other plans proposed to the legislature, make up that amount by including a portion of either Miami County or Leavenworth County in the Third District. The Court concludes that a portion of northern Miami County is more appropriately included in the Third District. Although intervenors Davis and Roy have belatedly argued that a portion of Leavenworth County should be included instead of Miami County, the Court also received evidence that Leavenworth County residents wish for their entire county to be placed in the same district. Moreover, intervenors Denning and Yoder introduced persuasive evidence that any additional population for the Third District should come from Miami County. The Court agrees that the history of the district and the benefit of avoiding splitting the City of Spring Hill favor inclusion of northern Miami County. The Court also agrees that placing the City of Louisburg in a district with Johnson County is appropriate. Finally, the Court agrees that the Miami County division found in Black and White appropriately avoids splitting the City of

Hillsdale.³⁰

The Court further concludes that the Fourth District should continue to comprise Sedgwick County and surrounding counties. The only evidence offered specifically relevant to the composition of this district was that Wichita and south-central Kansas make up a community of interest. The Court believes that Sunflower 9C and Kansas Six are superior to Sunflower 13 because they would allow the nine counties in the southeastern corner of the State to remain together in the Second District. Moreover, Sunflower 9C creates a district which is more centered in south-central Kansas, and more compact, by adding counties to the west. Kansas Six, on the other hand, adds a county and thus creates a geographical protuberance to the north of the existing Fourth District.

The greatest dispute with respect to congressional redistricting involves the composition of the First and Second Districts. As an initial matter, members of the legislative committees testified that the counties in southeast Kansas wish to reside in the same district. The Court agrees that the southeast Kansas community of interest is real and should be respected. Sunflower 9C and Kansas Six satisfy that goal by moving Montgomery County into the Second District.

The Court next concludes that Leavenworth County should not be moved to the First District, as in Kansas Six, but should instead abide in its historical place in the Second District, as proposed by Sunflower 9C. Leavenworth County residents wish to remain in the Second District, and no party has suggested any way in which Leavenworth County shares more in common with the western Kansas core of the First District than it does with the Second District counties. With its proximity to the Kansas City metropolitan area, and its unique communities of interest – including a military base and federal and state penitentiaries – Leavenworth County is more appropriately

³⁰Adoption of this portion of Black and White results in a deviation from the ideal population that is slightly lower than the deviation that would result from adoption of the relevant portion of the Capitol 1 plan.

placed in the Second District, which is centered in eastern Kansas.

The Court also notes the Guidelines' preference not to split populous cities or counties. Thus, the Court concludes that Douglas County and the City of Lawrence should not be split between the First and Second Districts, as in Kansas Six, but they are more appropriately placed entirely within the Second District.

The Court now addresses whether Riley County and the City of Manhattan should be placed in the Second District, as requested by intervenors Keller and Beer and as proposed by Kansas Six and Sunflower 13. The Court agrees that Riley County has some ties to eastern Kansas, as argued by those intervenors. Messrs. Keller and Beer also note that Riley County has long resided in the Second District. The Court appreciates the general desirability of maintaining counties in their past districts, but circumstances that affect the placement of this county have changed over the last few decades. For example, including Riley County in the Second District made more sense before 1992, when the State of Kansas was allotted five congressional seats. Continued population shifts away from western Kansas and toward northeastern Kansas have made it increasingly difficult to keep Riley County in an eastern Kansas district, as evidenced by the fact that the layout of the existing Second District contains a significant protuberance for the sole purpose of reaching Riley and Pottawatomie Counties.

The plans that try to keep Riley County in the Second District thus cause adverse effects elsewhere in the State. Kansas Six, for example, accomplishes its goal of keeping Riley County in the Second District by creating an extremely contrived First District that quite inappropriately circles around the Second District to grab Leavenworth County, two other counties on the eastern border of the State and the northeastern portion of Douglas County (thereby dividing the City of

Lawrence).³¹ Sunflower 13 succeeds in keeping Riley County in the Second District only by creating a protuberant Second District and a First District that extends a narrow finger nearly to Missouri in the north while doing the same in the center of the State. Sunflower 13 also eats into the Second District's column of southeastern Kansas counties, which share a community of interest, and would divide Riley County from nearby Junction City in Geary County.

The Court concludes that the superior plan places Riley County, together with its neighboring Pottawatomie and Geary Counties, in the First District, as Sunflower 9C does. Placement of Riley County in a primarily agricultural district is not inappropriate, particularly given K-State's position as the State's preeminent agricultural university. Counsel for intervenor Beer conceded at the Court hearing that Riley County and Manhattan do share a community of interest with the counties in the First District. Certainly Riley County's ties to western Kansas are far stronger than those of Leavenworth County or Douglas County, which Kansas Six proposes to move to the First District.

In short, Riley County's ties to western Kansas, and the difficulty in creating a satisfactory map that keeps Riley County in the Second District, outweigh the county's ties to eastern Kansas. Moving Riley County to the First District, as accomplished in Sunflower 9C, creates very compact districts without splitting major cities or counties, a result which the Court favors.

Finally, the Court also notes that although Riley County has previously been in the Second District, Sunflower 9C places only 8.8 percent of Kansas residents in a new district, while Kansas Six would relocate 14.5 percent of residents. Sunflower 9C also splits fewer voting districts than does Kansas Six. Thus, Sunflower 9C better satisfies the state's policy, as embodied in the Guidelines, of attempting to respect existing political boundaries.

³¹The Court does not feel compelled to make the First and Third Districts adjoining so that future redistricting might be easier, as suggested by Speaker O'Neal.

The Court's plan results in two districts with populations of 713,278 and two with populations of 713,281. Such a distribution provides equality among Kansas voters as nearly as practicable, and therefore satisfies Article I, Section 2 of the U.S. Constitution. The Court's plan maintains the voting strength of the minority population in Wyandotte County. The parties have not identified other possible issues concerning race or ethnicity. The Court's plan most effectively furthers state goals of creating compact and contiguous districts, preserving existing districts, maintaining county and municipal boundaries and grouping together communities of interest. See O'Sullivan, 540 F. Supp. at 1203. Accordingly, the Court orders that the State of Kansas adopt the congressional redistricting plan which is attached hereto as Appendix B.

**REDISTRICTING OF THE KANSAS SENATE
AND THE KANSAS STATE BOARD OF EDUCATION**

The parties advocate four potential maps for the Senate. Several parties propose Buffalo 30-Revised, which passed the Senate as HB 2087 by a vote of 21 to 7; the House took no action on it. Buffalo 30 Revised has a total population deviation of 6.14 percent (relative mean deviation of 1.97 percent) and a Roeck score of 0.44 (standard deviation of 0.09).³²

The other principal maps proposed by the parties were the For the People series of maps (For the People 12, For the People 13b and Essex A, which was derived as a low-population deviation map from the For the People series) and Wheat State 5. For the People 13b was introduced as part of SB 102 and passed the house by a vote of 67 to 50, but the Senate took no action on it. For the People 12 and Wheat State 5 failed to pass either house of the Kansas

³² As noted above, the total population deviation is the difference between the largest district and the smallest district, expressed as a percent of the mean district. Relative mean deviation is the average deviation of all districts from the mean district, expressed as a percent of the mean district. A Roeck score compares a district's area to that of the circle. This ratio is always between 0 and 1; the closer it is to 1, the more compact the district. A map's Roeck score is the average Roeck score of all of the map's districts. The standard deviation measures how widely the Roeck scores vary among a map's districts.

legislature. Essex A was prepared for the present litigation and was not before the state legislature or publicly vetted in any way. Defendant Secretary of State advocates the adoption of For the People 12 as a base map, and asks the Court to work from it to bring the total population deviation below two percent. All of the parties advocating State Board of Education maps do so based on the particular Senate map or maps that they favor.

For the People 12 has a total population deviation of 5.22 percent (relative mean deviation of 1.59 percent) and a Roeck score of 0.44 (standard deviation of 0.09). For the People 13b has a total population deviation of 5.22 percent (relative mean deviation of 1.59 percent) and a Roeck score of 0.44 (standard deviation of 0.09). Essex A has a total population deviation of 1.98 percent (relative mean deviation of 0.66 percent) and a Roeck score of 0.45 (standard deviation of 0.09). Wheat State 5 has a total population deviation of 7.37 percent (relative mean deviation of 2.08 percent); its Roeck score is not available on the Secretary of State's website.

Beyond the question of map selection, several of the parties advocate specific positions they would like reflected in the new Senate map. Intervenors Roy and Davis argue that the panel should collapse an existing Senate district and add a new district in Johnson County to accommodate growth there, but caution that the Johnson County districts should not include any surrounding rural areas.

Intervenors Senator Owens, Henderson, Shaner and Wimmer argue that if the panel draws its own map, it should collapse a district in south-central Kansas to give Johnson County a new Senate district.

Intervenors Berry and Nichols argue that we should prepare a court-drawn map based upon the 2002 Senate map, that we should not collapse a district in south-central Kansas, and that Butler, Cowley and Sumner counties should not be grouped with more rural counties.

Intervenors Senator King, Abrams and Merrick argue that the panel should not collapse

districts in south-central or southeast Kansas; that Sumner and Cowley counties should be unified in a district; that Butler County should not be split; and that if a district is added in Johnson County, it should be in the southern portion of the county.

Intervenor Taylor argues that the panel should not split Olathe among multiple districts but instead should respect Olathe's municipal boundaries. If it is necessary to augment Olathe's population to obtain a more even population distribution, Intervenor Taylor argues that the panel should include citizens outside of Olathe city limits who are still served by Olathe school districts.

Intervenor Bradford argues that Leavenworth County should have its own Senate district.

Intervenors Landwehr, Smith and Mason argue that the panel should not disturb the alleged Hispanic majority in the 36th Senate District.

Intervenors Person, Pilcher-Cook and Snell argue that the panel should not divide the City of Shawnee into two or more districts, but should instead keep it as intact as possible in a single district.

Finally, in an amicus brief the Johnson County Commissioners argue that Johnson County is entitled to eight senate districts; that the panel should not extend Johnson County's Senate districts outside the boundaries of Johnson County (except to include Lake Quivira or Spring Hill); that the panel should not include portions of Johnson County with other counties in a district; and that the panel should not remove any portion of Johnson County from any existing district.³³

Ideally, we would begin our effort to redraw the districts with the 2002 map and adjust that map as necessary to achieve constitutional compliance. Where, however, the degree of changes in

³³ In light of the focus on Johnson County, we note that Johnson County was among the fastest growing counties in the state, growing by 20.64 percent from the 2000 Census to the 2010 Census. Only Geary County, at 22.95 percent, grew faster, and the growth there was smaller in absolute terms, since Geary county started with a lower population. http://redistricting.ks.gov/_Census/PDF/ks_co._pop_change_2000_2010.pdf

a state's population requires significant changes to the state's legislative districts, and particularly where, as here, legislative districts may need to be collapsed or relocated to areas of new growth, it may be that "no semblance of the existing plan's district lines can be used." Perry v. Perez, 132 S. Ct. 934, 941 (2012). We conclude that the shifts in Kansas's population since 2000 make the 2002 maps an impractical starting point for the construction of new legislative maps.

Our effort to choose a base map for modification is further frustrated by the higher standards applied to legislative maps drawn by district courts, as compared to maps drawn by the legislature itself. Connor v. Finch, 431 U.S. 407, 414 (1977) ("[A] court will be held to stricter standards in accomplishing its task than will a state legislature."). In this case, because the standards for court-drawn maps are higher, the high population deviations of the maps considered by the legislature and proposed in this litigation preclude our selection of any of them. Moreover, the maps proposed by the parties appear to be motivated in part by political considerations that do not merit consideration by the Court. Cox v. Larios, 542 U.S. 947, 949 (2004) (Mem.) (Stevens, J., concurring) ("[T]he drafters' desire to give an electoral advantage to certain regions of the State and to certain incumbents (but not incumbents as such) did not justify the conceded deviations from the principle of one person, one vote."), aff'g Larios v. Cox, 300 F. Supp.2d 1320, 1348-49 (N.D. Ga. 2004) . The alleged political motivations attributed to each map by those opposing it was made more than evident to the Court during our two days of evidentiary hearings in this matter.

Thus, rather than adopt a plan proposed by the parties or begin from the 2002 maps, we have drawn new legislative maps, motivated by "the most elemental requirement of the Equal Protection Clause in this area[,] that legislative districts be as nearly of equal population as is practicable." Connor, 431 U.S. at 409-10 (internal quotation marks omitted). This requirement is the "preeminent, if not the sole, criterion" for evaluating the constitutionality of redistricting plans. Chapman v. Meier, 420 U.S. 1, 23 (1975).

In undertaking the construction of new legislative maps, we have followed the Supreme Court's instruction that, "[w]hen faced with the necessity of drawing district lines by judicial order, a court, as general rule, should be guided by legislative policies underlying the existing plan." Abrams v. Johnson, 521 U.S. 74, 79 (1997). The Guidelines and Criteria for 2012 Kansas Congressional and Legislative Redistricting are discussed in detail in the Introduction, supra.

In light of this guidance, we have developed new legislative maps that distribute population as evenly as practicable between districts, while also considering to a much lesser degree the state's legislative policies guiding redistricting. In considering these guidelines, we note that the Supreme Court has enunciated several precautions. First, the Court has stated that "we do not find legally acceptable the argument that variances are justified if they necessarily result from a State's attempt to avoid fragmenting political subdivisions by drawing congressional district lines along existing county, municipal, or other political subdivision boundaries." Kirkpatrick, 394 U.S. at 533-534. See also Abrams, 521 U.S. at 99; Connor, 431 U.S. at 419-420. Second, while preservation of incumbents is a permitted policy, White, 412 U.S. at 796 (holding that minimizing contests between incumbents is not inherently "invidious") (citing Burns v. Richardson, 384 U.S. 73, 89 n.16 (1966)), the Court in Abrams, 521 U.S. at 84, implicitly approved the district court's decision to subordinate protection of incumbents to other state policy factors, "because [incumbent protection] was inherently more political." We will follow the Abrams Court's lead in subordinating the protection of incumbents to the other legislative goals. Finally, we recognize that race should not be the predominant redistricting factor to the exclusion of other factors, Shaw v. Reno, 509 U.S. 630, 657-58 (1993), so we balance the need to avoid dilution of minority voting strength with the other redistricting principles. See Bush v. Vera 517 U.S. 952, 958-59 (1996).

In keeping with the Supreme Court's guidance, we have confined ourselves to drawing maps that comply with the Constitution and the Voting Rights Act, without displacing legitimate

state policy judgments with the court’s own preferences. Perry, 132 S. Ct. at 941.³⁴ The Senate map and detailed description are presented in Appendix C.

The new Kansas Senate map has a total population deviation of 2.03 percent, with a relative mean deviation of 0.52 percent. This map is lower in total population deviation than any map passed by either house of the state legislature, and in fact lower in total deviation than any map presented to the state legislature. Among the maps in evidence, only Essex A has a lower total population deviation, and then by only 0.05 percent, roughly 36 people. The map we have adopted has a lower relative mean deviation, absolute mean deviation and standard deviation than Essex A. These statistics indicate that although the extreme ends of the population distribution may be slightly further apart, on average the districts in the map we have adopted are closer to a perfectly even population distribution.

In light of the Supreme Court’s view that “court-ordered reapportionment of a state legislature [need not] attain the mathematical preciseness required for congressional redistricting,” the population variation in the map we have adopted is *de minimis* and thus need not be justified by

³⁴ A § 2 Voting Rights Act violation occurs when “it is shown that the political processes leading to nomination or election in the State or political subdivision are not equally open to participation by members of [a racial minority] . . . in that its members have less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice.” 42 U.S.C. § 1973(b). Thornburg v. Gingles, 478 U.S. 30 (1986), set out the basic framework for establishing a vote dilution claim. Plaintiffs must show three threshold conditions: first, the minority group “is sufficiently large and geographically compact to constitute a majority in a single-member district”; second, the minority group is “politically cohesive”; and third, the majority “votes sufficiently as a bloc to enable it . . . to defeat the minority’s preferred candidate.” Id. at 50-51. Once plaintiffs establish these conditions, the court considers whether, “on the totality of circumstances,” minorities have been denied an “equal opportunity” to “participate in the political process and to elect representatives of their choice.” 42 U.S.C. § 1973(b). Here, no party has produced evidence showing political cohesion among the minorities or showing that the white electorate votes as a bloc. Nevertheless, we follow the Supreme Court’s lead and note that, “[o]n its face, § 2 does not apply to a court-ordered remedial redistricting plan, but we . . . assume courts should comply with the section when exercising their equitable powers to redistrict.” Thus, we have attempted to avoid the dilution of minority voting strength, in keeping with both § 2 of the Voting Rights Act and the Kansas redistricting Guidelines.

additional explanation. Chapman, 420 U.S. at 26-27 n.19. Nevertheless, we offer some additional information on the two districts with the largest deviations from ideal.

The district with the greatest deviation from perfect population equality, District 4, reflects our attempt to preserve the district's historical core, the district's community of interest and the district's unique African American racial makeup. After reviewing the makeup of the adjoining precincts, we concluded that adding additional population to that district threatened the values just identified. We chose instead to preserve that district with a slightly lower population in order to accommodate the state's policies. Similarly, District 38 largely preserves a historical majority-minority district with a significant, predominantly Hispanic, minority base; this district's slightly lower population allows for the preservation of the core of the old district and the district's community of interest, while avoiding dilution of minority voting strength. We elected to leave the population of these two districts with slight deviations from the ideal because we could not achieve lower population deviations in these districts while also accommodating these recognized state policies and complying with federal law.

In order to accommodate the county's population growth, we created a new Senate district in Johnson County. Because the Kansas Constitution requires exactly 40 Senate districts, we concluded the recognized shift in our state's population from rural to urban areas called for a collapse of an existing district. Because old District 21, located in north-central to northeast Kansas, was among the 2002 districts with the most significant population loss, Kansas Legislative Research Department, 2010 Adjusted Population Data (By Kansas Senate District) 7 (July 29, 2011), available at http://redistricting.ks.gov/_Census/PDF/ks_adj_pop.pdf, and because the Senator from District 21 has determined not to seek reelection, we collapsed that district. We hasten to add that this does not mean that the citizens in the former District 21 are left without representation – it means instead that new district will encompass different and greater territory than before and will carry a different

number. By collapsing this district, we could create a new district, the new District 21, in Johnson County. Creation of the new district required that we adjust boundary lines throughout the Kansas City metropolitan area, and in doing so we sought to respect Kansas redistricting policy while also considering the arguments and evidence provided by interveners to this action. Specifically, we adjusted the districts to place the core of Olathe into one district, and the core of the city of Shawnee in another.

We recognize that this map removes some incumbents from their districts and also may place more than one incumbent in a district. As noted, we have subordinated protection of incumbents to other state policy factors and, of course, to the constitutional requirement of one person, one vote. When focused primarily on forming districts that comply with constitutional requirements while also respecting other Kansas redistricting policies, any efforts to protect incumbents would require our choosing among incumbents, an inherently political exercise that we are neither able nor inclined undertake.

We have developed new State Board of Education districts, described in Appendix E; these districts are nearly equal in population and reflect the decisions we made in developing the new Senate map. The new State Board of Education map has a total population deviation of 0.90 percent, with a relative mean deviation of 0.16 percent. This variation is *de minimis*.

REDISTRICTING OF THE KANSAS HOUSE OF REPRESENTATIVES

The parties, including plaintiff Essex, generally advocate the adoption of Cottonwood 1, a map that passed both the Kansas House (as HB 2606, by a vote of 109 to 14) and Kansas Senate (as HB 2371, by a vote of 21 to 19). The House failed to pass HB 2371 by a vote of 43 to 72, and the Senate failed to take action on HB 2606. Thus, although the same map passed both houses, neither house passed the other house's bill and the map was never presented to the governor for his signature. Cottonwood 1 has a total population deviation of 9.86 percent (relative mean deviation

of 2.8 percent). Cottonwood 1 has a mean Roeck score of 0.44 (standard deviation of 0.11). The Secretary of State argues that the court should take Cottonwood 1 as a starting point and then adjust the map to lower the total population deviation below two percent.

In the alternative, plaintiff supports the adoption of Cottonwood II, passed by the House as SB 102, by a vote of 67 to 50. The Senate took no action on SB 102. Cottonwood II was reintroduced as part of SB 176, which passed the House by a vote of 81 to 43 but failed in the Senate by a vote of 12 to 14. Cottonwood II also has a total population deviation of 9.86 percent (relative mean deviation of 2.84 percent). Cottonwood II has a mean Roeck score of 0.44 (standard deviation of 0.11). Cottonwood 1 and II differ only in a few small respects: only districts 2, 4, 13, 93 and 101 differ in population between the two maps. According to Speaker O’Neal’s affidavit, Cottonwood II differs from Cottonwood 1 only in that it has minor adjustments made when representatives in adjoining districts agreed upon a shift in the proposed district boundaries. Aside from advocating particular maps, the parties have largely avoided advocating particular characteristics that a court-drawn map should include.

Our approach to drawing a new House map is largely discussed in the section addressing legislative redistricting above. We pause only to note that the maps proposed by the parties here have total population deviations close to 10 percent, far in excess of the high standard required for court-drawn maps. Again, in order to hone as closely as possible to the one-person-one-vote standard, we did not defer to the Cottonwood maps, but instead started with a clean slate. See Connor, 431 U.S. at 415; O’Sullivan, 540 F. Supp. at 1202 (“[W]e are not required to defer to any plan that has not survived the full legislative process to become law.”). Where it was possible, we did our best to draw districts that were cohesive and easily identifiable for voters. But given the large number of House districts and the very uneven population in many of our rural counties, we often had to split towns in order to “share” their population with surrounding rural areas.

The new House map and a detailed description are presented in Appendix D. The new Kansas House map has a total population deviation of 2.87 percent, with a relative mean deviation of 0.52 percent. The two districts with the largest deviations are districts 34 and 35; the deviations in these districts, as in Senate District 4, reflect our attempt to preserve the districts' community of interest and the districts' unique African-American racial makeup. After reviewing the makeup of the adjoining precincts, we concluded that adding additional population to these two districts threatened the values just identified. For the map overall, the *de minimis* total population deviation is as low as is practicable – it is the best we can achieve while respecting the state Guidelines.

CONCLUSION

Given the nature of this proceeding, the evidence and the law, the Court is satisfied that its plans meet the requirements of Article I, Section 2 (with regard to the congressional map) and the Equal Protection Clause (with regard to the state maps) of the United States Constitution. The Court believes that its maps strike an appropriate balance between the competing interests which are legitimately at stake in a proceeding such as this: ensuring that all votes are 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. The Court recognizes that because it has tried to restore compact contiguous districts where possible, it is pushing a re-set button; its maps look different from those now in place. Some changes may not be popular and some people – perhaps many – will disagree that the Court has struck the appropriate balance. To those in that category – our fellow Kansans – we reiterate that the Court did not tread unreservedly into this political thicket. On short notice, with elections pending on the immediate horizon, we have acted solely to remedy a legislative default.

IT IS THEREFORE HEREBY DECLARED that the present congressional districts set forth in Chapter 4 of the Kansas Statutes deprive the citizens of the State of Kansas of their rights under Article 1, Section 2 of the United States Constitution, and that the present legislative and State Board of Education districts set forth in Chapter 4 of the Kansas Statutes deprive the citizens of the State of Kansas of their rights under the Fourteenth Amendment to the United States Constitution.

IT IS FURTHER DECLARED that the present congressional, legislative and Board of Education districts set forth in Chapter 4 of the Kansas Statutes may not hereafter be used as valid.

IT IS FURTHER ORDERED that defendant Secretary of State of the State is Kansas is hereby enjoined from receiving nominations and petitions for congressional office, from issuing certificates of nominations and elections and from all further acts necessary to the holding of elections for members of Congress in the districts established in 2002 as set forth in Chapter 4 of the Kansas Statutes.

IT IS FURTHER ORDERED that defendant Secretary of State of the State is Kansas is hereby enjoined from receiving nominations and petitions for legislative office, from issuing certificates of nominations and elections and from all further acts necessary to the holding of elections for members of the Kansas legislature in the districts established in 2002 as set forth in Chapter 4 of the Kansas Statutes.

IT IS FURTHER ORDERED that defendant Secretary of State of the State is Kansas is hereby enjoined from receiving nominations and petitions for membership on the State Board of Education, from issuing certificates of nominations and elections and from all further acts necessary to the holding of elections for members of the Kansas Board of Education in the districts established in 2002 as set forth in Chapter 4 of the Kansas Statutes.

IT IS FURTHER ORDERED that the State of Kansas shall have as its congressional

districts those contained in the plan which is described and depicted in Appendix B attached hereto; as its state Senate districts those contained in the plan which is described and depicted in Appendix C attached hereto; as its state House districts those contained in the plan which is described and depicted in Appendix D attached hereto; and as its Board of Education districts those contained in the plan which is described and depicted in Appendix E attached hereto.

IT IS FURTHER ORDERED that defendant Secretary of State of the State of Kansas shall receive nominations and petitions for office, issue certificates of nominations and elections and conduct all further acts necessary to the holding of elections for members of Congress, members of the Kansas legislature and members of the Kansas Board of Education in the districts established by this order and set forth in Appendixes B through E attached hereto.

IT IS FURTHER ORDERED that any party who seeks an award of statutory attorney's fees shall comply with Rule 54.2 of the Rules of Practice of the United States District Court for the District of Kansas and with Rule 54(d) of the Federal Rules of Civil Procedure.

List of Appendices

Appendix A	Adjusted population data for 2012 Kansas state Senate, House and Board of Education districts
Appendix B	Congressional maps, location descriptions and population summary report
Appendix C	State Senate maps, location descriptions and population summary report
Appendix D	State House maps, location descriptions and population summary report
Appendix E	State Board of Education maps, location descriptions and population summary report