



To: Cuyahoga County Council Districting Commission
From: Gregory G. Huth, Esq., Law Director
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Re: Substantially Equal District Population
Date: August 25, 2021

CONFIDENTIAL – SUBJECT TO THE ATTORNEY-CLIENT PRIVILEGE

Question Presented

Whether there is a numerical limit to the permissible deviation among Cuyahoga County District populations for the purposes of establishing district boundaries of substantially equal population pursuant to Section 3.04 of the Charter of Cuyahoga County?

Brief Answer

While there is not a bright line numerical limit to the permissible deviation of Council District populations to ensure that said districts are of *substantially equal populations* as required by the Charter of Cuyahoga County, there are guidelines in Ohio and Federal law that are instructive in determining levels of deviation for the purposes of redistricting.

Background

The citizens of Cuyahoga County adopted a Charter form of government in November of 2009. The Charter reorganized the Cuyahoga County Government and vested with it home rule powers. In this regard, Section 1.01 of the Charter provides that “the County may exercise all powers specifically conferred by this Charter or incidental to powers specifically conferred by this Charter and all other powers that the Constitution and laws of Ohio now or hereafter grant to counties to exercise or do not prohibit counties from exercising, including the concurrent exercise by the County of all or any powers vested in municipalities by the Ohio Constitution or by general law.” Out of the 88 counties in Ohio, Cuyahoga and Summit are the only two counties that have adopted a Charter form of government.

An important difference between Cuyahoga County and most other counties is that, rather than a Board of three County Commissioners selected at-large, Cuyahoga County has a county Council consisting of 11 members representing distinct districts. These districts must be redrawn every ten years. It is the redrawing of these 11 districts boundaries that gives rise to the question presented.

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Discussion

The County of Cuyahoga

Section 3.04 of the Charter of Cuyahoga County (“Charter”) divides the County into 11 districts from which the members of council are elected. Charter Section 3.04 also provides that these districts be reviewed every ten years after each decennial Federal census¹. All districts must be of *substantially equal population*, however neither the Chart nor the Cuyahoga County Code provide a definition for what constitutes *substantially equal population*.²

In 2011, the first Cuyahoga County Districting Commission (“2011 Commission”) confronted the issue of substantially equal populations by adopting an allowable population deviation range of +/- 5% from the ideal district population.³ The ideal district population is determined by taking the total population of Cuyahoga County and dividing it by the number of districts (11). The population deviation is the percentage difference between a district’s population and the ideal district population. An allowable deviation range of +/- 5% signifies that any districts population may not be greater than 5% larger (more populous) than the ideal district population, nor more than 5% less (less populous) than the ideal district population. This same +/- 5% allowable deviation was also adopted by the current Cuyahoga County Districting Commission (“Commission”) at its first meeting on August 17, 2021, but it retains the right and ability to change this criteria at any time.⁴

The State of Ohio

Ohio has a bicameral legislative body, the General Assembly⁵, which consists of the Ohio State Senate with 33 members and the Ohio House of Representatives with 99 members.⁶ The members of each house present a distinct district and every ten years after the decennial Federal census these districts are redrawn by the Ohio Redistricting Commission.⁷ Notably, the population of each Ohio General Assembly district must be *substantially equal* to the ratio of representation noted above.⁸ The Ohio Constitution then goes further by affirmatively establishing the limits of *substantially equal* in an allowable deviation of +/- 5% from the ideal district population.⁹ The Ohio jurisprudence concerning this +/- 5% threshold is limited, likely due to the relatively clear language of Art. XI, Sec. 3 of the Constitution.

¹ Charter of Cuyahoga County, Article III, Section 3.04(2).

² Charter of Cuyahoga County, Article III, Section 3.04(3).

³ Presentation of TRIAD Research Group to the Cuyahoga County Districting Commission August 4, 2011, Slide 8

⁴ Commission Meeting Minutes of Aug. 5, 2021, Item 3(c).

⁵ Ohio Constitution, Article II

⁶ See, Ohio Constitution, Article XI, Sections 3 and 4.

⁷ Ohio Constitution, Article XI.

⁸ The ratio of representation means the quotient when the total population of the state is divided by the number of representative seats. Thus, the ratio for the 99-person Ohio House of Representatives is the total population of the state divided by 99. That number is then the ideal district population for the Ohio House and no district can have a population greater than 105% of that ideal population, or lower than 95% of that population. For example, if the ideal district population was 10,000, no district could have a population greater than 10,500 residents, or smaller than 9,500 residents. Ohio Constitution, Article XI, Section 3(B)(1)

⁹ Ohio Constitution, Article XI, Section 3(B)(1).

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Federal Law

Conversely, there is a long history of challenges to redistricting related to the populations of legislative districts, at both the state level and for the United States Congress. The Federal caselaw concerning population deviation follows two main tracks based on whether the Courts are reviewing the apportionment of state legislative districts (e.g. the Ohio House of Representatives) or the United States House of Representatives (“Congressional”). The lines of jurisprudence diverge because the representative bodies are subject to different Federal laws; the division of Congressional districts is controlled by Article I, Section 2 of the U.S. Constitution while state-level legislative redistricting is guided by the Fourteenth Amendment.

The caselaw concerning Congressional district population deviation is strict.¹⁰ In *Wesberry v. Sanders*, the United States Supreme Court, in 1964, found that Article I, Section 2 of the U.S. Constitution, which says that Representatives shall be chosen ““by the People of the several States” means that as nearly as is practicable one man’s votes in a congressional election is to be worth as much as another’s.”¹¹ The Court acknowledged the difficulty in drawing districts with mathematical precision, but further found that such difficulty is “no excuse for ignoring our Constitution’s plain objective of making equal representation for equal numbers of people the fundamental goal for the House of Representatives.”¹² This one-for-one stance softens only slightly in *Kirkpatrick v. Preisler*, to a standard which requires the state to “make a good-faith effort to achieve a precise mathematical equality.”¹³ The *Kirkpatrick* Court, however, expressly rejected the notion that there is a fixed numerical percentage of population variance that is small enough to be considered de minimis to satisfy the “as nearly as practical standard”¹⁴ More recently, the Supreme Court held that Congressional districts must be mathematically equal in population, unless necessary to achieve a legitimate state interest.¹⁵ Notably, “legitimate state interest” includes making districts compact, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbents.¹⁶

Federal caselaw concerning apportioning state legislative districts (“State Districts”) is not as strict. In *Baker v. Carr*, the U.S. Supreme Court held that federal courts have jurisdiction to hear claims concerning the inequality of representation due to population deviation in state districts as a violation of the Equal Protection Clause of the Fourteenth Amendment.¹⁷ *Reynolds v. Sims* builds on *Baker* to require that states must “make an honest and good-faith effort” to make the districts as nearly of equal population as is practicable” but rejects the notion that mathematical exactness or precision is a workable standard.¹⁸ The *Reynolds* Court also points to legitimate state interests as a permissible reason for deviation of district populations.¹⁹

¹⁰ In *Kirkpatrick*, supra, the questioned populations deviations are very small. On average each district deviated from the ideal by only .1384%. The total deviation between the largest and the smallest district was only .6984%. The total population deviation was less than 1%.

¹¹ *Wesberry v. Sanders*, 376 U.S. 1, 7-8 84 S.Ct 526, 11 L.ed.2d 481 (1964).

¹² *Wesberry v. Sanders*, 376 U.S. 1, 30 84 S.Ct 526, 11 L.ed.2d 481 (1964).

¹³ *Kirkpatrick v. Preisler*, 394 U.S. 526, 530-531, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969).

¹⁴ *Kirkpatrick v. Preisler*, 394 U.S. 526, 530, 89 S.Ct. 1225, 22 L.Ed.2d 519 (1969).

¹⁵ See, *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct 2653, 77 L.Ed.2d 133 (1983).

¹⁶ *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct 2653, 77 L.Ed.2d 133 (1983).

¹⁷ *Baker v. Carr*, 369 U.S. 186, 245, 82 S.Ct. 691, 1 ed.2d 663 (1962).

¹⁸ *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); emphasis added.

¹⁹ *Reynolds v. Sims*, 377 U.S. 533, 578, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

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As this line of caselaw develops, the Courts begin to settle on a maximum population deviation of 10% under which state district plans are presumptively constitutional.²⁰ When the population of any district is more than 10% greater than the population of any other district, there is a *prima facie* case of discrimination and therefore must be justified by the state as advancing a rational state policy.²¹ Note, however, that later cases make it clear that even deviations below 10% are not immune from constitutional attack, and that a 10% or less deviation is no safe harbor if there remains evidence of discrimination.²²

Application and Analysis

One of the critical decisions the Commission must make as part of the redistricting process is to determine the parameters for allowable population deviation among the districts to adhere to the Charter's requirement that all of the districts be *substantially equal* in population.

As noted, the Ohio Constitution does set a bright-line rule for permitted population deviation among the Ohio General Assembly Districts which equates to a +/- 5% deviation from the ideal district size. This bright-line rule has some advantages being that its clear, well defined, and easy to apply when determining if the districts are substantially equal. While the Constitutional provision is informative, it's not binding on the Commission as it is tasked with drawing Cuyahoga County Council districts and not Ohio General Assembly Districts, to which the +/- 5% deviation expressly applies. The Ohio Constitution, however, is, most likely, the first place a court would look when interpreting the Charter as the Charter's *substantially equal population* requirement is the functional equivalent of Ohio's *substantially equal to the ratio of representation* requirement. Consequently, the +/- 5% rule is most likely to survive a court challenge.

The Federal cases specific to drawing State Districts are also informative as they interpret the Equal Protection Clause of the Fourteenth Amendment to require that districts be drawn “as nearly of equal population as is practicable.”²³ In doing so, the courts have set a 10% total deviation as a helpful standard, but not a bright-line rule.²⁴ The Commission would, therefore, be in a defensible position should it choose to apply a 10% total-deviation criteria when determining whether districts are of substantially equal population. As noted, however, the 10% total deviation is not a safe harbor. Focusing its holding on the application of the protections of the Fourteenth Amendment to State Districts, *Reynolds*, signals that such protections would be considered whenever population deviation among districts circumvent a federal protected right.²⁵ Accordingly, this is a standard for the Commission to consider.

²⁰ See, e.g. *Chapman v. Meier*, 420 U.S 1 (1975); *Connor v. Finch*, 431 U.S. 407 (1997); *Brown v. Thompson*, U.S. 835, 842-843 (1983); *Voinovich v. Quilter*, 507 U.S. 146 (1993).

²¹ *Brown v. Thomson*, 462 U.S. 835, 843, 103 S.Ct. 2690, 77 L.Ed.2d 214 (1983); *Voinovich v. Quilter*, 507 U.S. 146, 161-162, 113 S.Ct. 1149, 122 L.Ed.2d 500 (1983). Please note later cases make it clear that even deviations below 10% are not immune from constitutional attack and is no safe harbor if there remains evidence of discrimination below the 10% threshold. See, *Larios v. Cox*, 300 F.Supp.2d 1320, 1339-1341 (N.D.Ga.2004).

²² See, *Larios v. Cox*, 300 F.Supp.2d 1320, 1339-1341 (N.D.Ga.2004).

²³ *Reynolds v. Sims*, 377 U.S. 533, 577, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964); emphasis added.

²⁴ See, *Larios v. Cox*, 300 F.Supp.2d 1320, 1339-1341 (N.D.Ga.2004).

²⁵ *Reynolds v. Sims*, 377 U.S. 533, 566-567, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

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Conversely, the strictness of the federal caselaw for Congressional districting need not be considered as it is applicable only to the Congressional districts described in Article I, Section 2 of the U.S. Constitution. This is standard does not extend to State Districts and, similarly, does not extend to Cuyahoga County Council Districts.²⁶

Conclusion

In consideration of the foregoing, there is no single legally required bright-line limit for defining substantially equal population when drawing districts under the Charter. There is, however, guidance the Commission can follow to set and select its own preference on population deviation. The guidance is helpful to assess the risk of potential legal challenges associated with several possible measures of allowable deviation the Commission might choose. For the purposes of this Memo, we consider the following schemes most likely to be considered by the Commission:

1. +/- 5% deviation from the ideal district (the “Ohio Model”);
2. Total deviation of 10% or less (the “Federal Model”); and
3. Total deviation of more than 10% supported by specific and rational and legitimate county interest (the “Interest Model”)

The Ohio model is the least risky option to consider. A +/- 5% deviation from the ideal district population was adopted by the 2011 Commission in drawing the current districts. It also mirrors the Ohio Constitutional standard which a court would likely look to for guidance. The Ohio model also has the additional benefit of meeting the 10% or less deviation of the Federal Model and the protections (although not a safe harbor) it affords to a potential challenge under the Fourteenth Amendment.

The Federal Model is the second least risky option. The focus on total deviation will afford the Commission more latitude in drawing districts that may better meet other criteria such as compactness and contiguousness, preserving the boundaries of political subdivisions within the County, and other legitimate interests. Although they are not the same, the Ohio Model and Federal Model do both permit a total deviation of up to 10%, which may factor into a court’s review of districts drawn using this standard.

The riskiest option is the Interest Model. By exceeding the limits of both the Ohio Model and Federal Model, this approach relies heavily on the Commission showing with specificity that a particular objective required specific deviations.²⁷ The Commission must prove that the population deviations, on a district-by-district basis, were necessary to achieve specific County interest(s)²⁸. If choosing this approach, the Commission must consider whether the increased risk and burden of specifically justifying each deviation is justified by the substantially greater freedom in drawing district boundaries to further legitimate county interests.²⁹

²⁶ *Reynolds v. Sims*, 377 U.S. 533, 566, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964).

²⁷ *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct 2653, 77 L.Ed.2d 133 (1983).

²⁸ *Karcher v. Daggett*, 462 U.S. 725, 740, 103 S.Ct 2653, 77 L.Ed.2d 133 (1983).

²⁹ Related caselaw holds that compactness, respecting municipal boundaries, preserving the cores of prior districts, and avoiding contests between incumbents may justify some variance.