SC92317

IN THE SUPREME COURT OF MISSOURI

KENNETH PEARSON, et al.,

Appellants,

vs.

CHRIS KOSTER, et al.

Respondents.

On Appeal from the Circuit Court of Cole County
Honorable Daniel R. Green, Circuit Judge

# BRIEF OF *AMICUS CURIAE* THE HONORABLE WILLIAM LACY CLAY, JR.

February 15, 2012

Respectfully Submitted by:

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## ARGUMENT

### I. THE TRIAL COURT CORRECTLY RULED THAT MISSOURI'S NEW CONGRESSIONAL DISTRICTS COMPLIED WITH THE STATE CONSTITUTIONAL REQUIREMENT FOR COMPACTNESS.

The proof of compactness at the trial was well nigh overwhelming against the unfounded claims of the Pearson Plaintiffs. Intervenors' expert witness (Dr. Hofeller) cogently explained the multiple standard objective tests of compactness and the drawbacks of each. He demonstrated how well the Grand Compromise of HB 193 measured under all of them. He also discussed the lack of a standard accepted definition of "compact" in the political setting.

After presentation of their expert witnesses (Drs. Kimball and Jones) the Pearson Plaintiffs were reduced to arguing for reliance upon a so-called "eyeball test" of compactness, a wholly subjective inquiry, rather than any or more of the standard measurements.

The opinion and judgment of the trial court and its assay of the evidence was measured and balanced and painstakingly thorough. More importantly in the view of your *Amicus* Clay, Judge Green's judgment thoroughly complied with all the Federal requirements imposed upon all states in regard to redistricting: the Voting Rights Act, 42 U.S.C. 1973; the Equal Protection Guarantee of the 14th Amendment; and the Federal Supremacy Clause, U.S. Constitution Art. 6, Clause 1.

The First District of the legislature's Grand Compromise plan and map, in the considered opinion of *Amicus* Clay, properly balanced the Federal interests above against the Missouri requirement for compact districts. This was no accident. Rather, it was the result of a thorough and painstaking consultation and an educated awareness of the desirability of avoiding to prolonged litigation in the Federal courts. The new First District has 49.5 % Black population and 6.8% of other minorities (and those whose Census responses placed them outside either the Black or White categories, what we might call "non-Black, non-White").

Although Intervenors and their legislative colleagues were precluded from maintaining the 42-year tradition of drawing district boundaries so as to continue the status of the First District as a "majority minority" district[1] this was a constitutional necessity because of the need to dramatically expand the population of each of the remaining eight congressional districts. Because of surprisingly low numbers in the 2010 Census, Missouri by a small margin lost one of its nine representatives in the U.S. House. This required each of the remaining eight congressional districts to increase its population to more than 748,000. Because of internal migration within the St. Louis Metropolitan

[1] This distinction came into the jurisprudence of the Voting Rights Act in 1986 as the Supreme Court grappled with the flood of VRA cases filed after the 1982 re-enactment of the VRA abolished the requirement for proof of intentionality. *See, e.g.,Thornburg v. Gingles,* 478 U.S. 30, 106 S. Ct. 2752 (1986).

Area, in the case of the First District this required adding some 160,000 inhabitants to the area which this district formerly occupied. In order to maintain its character as a minority-represented district, Intervenors and their legislative colleagues made a few border adjustments to include as many Blacks as possible. It was not possible to include all Blacks in the Missouri portion of the Metro Area because some resided in non-contiguous areas. The voting age population in the new district is 49.01 % Black and Hispanic and 47.28 % non-HispanicWhite. Therefore, additional line-drawing in the name of compactness could, by shifting only a few percent, change the First District's minority status and leave the 370,566 African-American residents without Black representation in the Congress. Extreme circumspection by this Court upon review is called for. Your *Amicus* urges that the Intervenors made a diligent and good-faith effort to comply with the national policy favoring racial equality and full political participation by African-Americans and other racial or ethnic minorities.

The practical effect for these purposes of the enumerated Federal interests is that the Missouri Constitution and its "compact as may be" requirement must be interpreted in accord with these fundamental national policies. There is no Federal constitutional or legislative requirement for compactness of congressional districts. With regard to the Missouri constitutional requirement for population equality there is no practical conflict. If anything, the Federal requirement for equality is less tolerant of deviations in population. Missouri's compactness requirement eventually would have to yield to the

Fourteenth Amendment and the Voting Rights Act in the event the judgment below were overturned here.[2]

Though the new First District contains a higher (52%) percentage of Black and Hispanic voting age population than the non-Hispanic White voting age population, the alternative redistricting plans put forward by the Pearson Plaintiffs would siphon away favorable population while appearing simply to draw straighter lines. And their plans would do so to protect the non-Hispanic White Democratic incumbent who presently represents the old District Three now slated to disappear as Missouri is forced to adjust to life with a House delegation of eight with six Republicans.

After the drawing away of large swaths of South St. Louis City and key sections of South County in the various Pearson alternative plans, the non-Hispanic White population will constitute a majority of the First District's voting age population. That intentional alteration of a minority district to protect a non-Hispanic White incumbent raises significant questions about denial of the14th Amendment's Guarantee of Equal

[2] Section 2 of the Voting Rights Act, 42 U.S.C. 1973 (b) provides that "a violation …..is established if, based on the totality of circumstances, it is shown that the political processes leading to nomination or election ……are not equally open to participation by a class of citizens protected ….. 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." An action for a violation of this Section is commonly referred to as a Dilution of Voting Strength or a Vote Dilution case.

Protection. *See Garza v. County of Los Angeles*, 918 F. 2d 763 (9th Circuit 1990), *cert. denied* 498 U.S. 1028 (1991).

Under the holding of the *Garza* case invidious discriminatory intent can be presumed where plans to whittle away minority voters are proclaimed and urged upon the Court. *See Garza, supra*, 918 F. 2d at 778. "[W]here, as here, the record shows that ethnic or racial communities were split to assure a safe seat for an incumbent, there is a strong inference -- indeed a presumption -- that this was a result of intentional discrimination." The renowned Judge Alex Kozinski observed that "the Supervisors appear to have acted primarily on the political instinct of self-preservation." *Id*. In choosing fragmentation of the Hispanic voting population as the avenue by which to achieve their self-preservation, the "Supervisors intended to create the very discriminatory result that occurred. That intent was with the intent to preserve incumbencies, but the discrimination need not be the sole goal in order to be unlawful." *Id*. at 771, citing *Arlington Heights v. Metropolitan Housing Dev. Corp.*, 429 U.S. 252 (1977).

The Pearson Plaintiffs by acting to preserve the incumbent of the Third District through undermining the Black incumbent of the First District have launched themselves to engage in the same behavior as did the Los Angeles County Supervisors in *Garza*. The Pearson Plaintiffs want this Court to do their dirty work because they cannot do it by themselves as did the Supervisors.

Because their conduct can constitute invidious discriminatory intent under the 14th Amendment the First District need not be a "majority minority" district to attach civil

rights liability to the Pearson Plaintiffs. *See Gomillion v. Lightfoot,* 364 U.S. 339, 341 (1960).

## CONCLUSION

At trial before Judge Green and in their Brief here the Intervenors Representative Diehl and Senator Rupp through their counsel have masterfully exposed, dissected and reduced to mere rhetoric the Pearson Plaintiffs' by now threadbare evidence as well as their distortions of the relevant jurisprudence. So has the Solicitor General. Your *Amicus* was permitted to participate in argument below, and would have welcomed the chance to do that here while recognizing that this Court has scant time available to hear and finish this case.

*Amicus* observed closely as Mr. Pearson and his Co-Plaintiffs thoroughly lost a well conducted, factually intensive trial before Circuit Judge Green where their counsel encountered no limits on his efforts to prove a number of quite dubious propositions. That fairly run trial was exactly what this Court had mandated in its January 17 Order. And now, your *Amicus* would contend, the time has arrived for this Court to affirm the decision of the Circuit Court and to reject the challenge to the Grand Compromise congressional districts identified here as HB 193.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that I prepared this brief using Microsoft Word 2010 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that it contains 2,012 words.

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## CERTIFICATE OF SERVICE

I hereby certify that on February 15, 2012, I filed a true and correct copy of the foregoing Brief via the Court's electronic filing system, which notified the following:

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