IN THE
SUPREME COURT OF MISSOURI

SC92200

KENNETH PEARSON, ET AL.,

Appellants,

v.

CHRIS KOSTER, ET AL.,

Respondents.

From the Circuit Court of Cole County, Missouri
The Honorable Daniel Green

BRIEF OF THE ATTORNEY GENERAL

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RESPONSE TO APPELLANTS' STATEMENT OF FACTS

The Plaintiff/Appellants' Statement of Facts is entirely accurate in one respect: it assumes that everything stated in the Petition is true, as the standard of review requires. But that accuracy results in the Statement frequently moving past the bounds of Rule 84.04(c). It goes well beyond stating "the facts relevant to the questions presented for determination without argument." That is because the Petition itself mixes facts with argument. Moreover, the Statement of Facts, parroting the Petition, states as true broad, likely unsupportable, and largely implausible statements, rather than being limited to specifics that might actually be proven at trial.

Among the examples of argument are statements such as:

- "The Map *violates* the Missouri Constitution in multiple respects …." App. Br. at 3.[1]
- "[T]he redistricting plan *improperly* dilutes the votes …." *Id.* at 3.
- "[T]he requirements that districts be compact and contiguous … ultimately concern the ability of citizens to relate to one another …." *Id.* at 11.

[1] Throughout this section, we insert italics to note the most problematic words in the Plaintiffs' Statement of Facts.

Elsewhere, the Statement (again, parroting the Petition) includes value-laden statements and argumentative adjectives, adverbs, and metaphors to describe how and what the General Assembly enacted, such as:

- "The Map achieves its purposes through *extreme* instances of gerrymandering …." *Id.* at 5.
- "Another *highly egregious* aspect of the Map …." *Id.* (repeated three times on 6)
- "[T]he Republican-dominated General Assembly …" *Id.* at 8.
- "[A]n *unnatural* appendage …." *Id.* at 10 and 11.
- "[L]ikened to a three-headed toad." *Id.* at 10.
- "[L]ike lobster claws." *Id.* at 11.
- "[C]ompactness and contiguousness connot[e] that communities of interest *should* be kept together …." *Id.* at 11.
- "The principle of keeping communities of interest together *weighs strongly in favor* of mid-Missouri being included within a single congressional district." *Id.* at 12.

- "[W]ere the Map allowed to stand … it would *violate* the State constitutional rights of countless Missouri citizens …." *Id.* at 13.
- "The Map [is] intended to *unfairly* enhance the election prospects of Republican candidates …." *Id.* at 14.

In places, the Statement uses terms that have no precise meaning as if they did. For example, it refers to "the St. Louis region" as having "boundaries." *Id.* at 7. It accuses the General Assembly of having created "safe" Republican districts." *E.g.*, *id.* at 5. And it refers repeatedly to undefined – and likely undefineable – "communities of interest." *E.g.*, *id.* at 6.

But perhaps most troubling is the presence of broad and conclusory – indeed, implausible – statements of "fact," most notably:

- The "Map [is] designed *solely* to serve partisan ends …." *Id.* at 3.
- The "Map … *wholly* ignor[es] and *completely* disregard[s]" compactness and contiguity. *Id.* at 3.
- "The Map … *ignores* the undesireability of splitting up a political subdivision …." *Id.* at 12.

The key facts, stripped of rhetoric and uncertainty, are that on May 4,

2011, the General Assembly passed H.B. 193, establishing new congressional districts, over the Governor's veto. The vote was 109-44 in the House of Representatives and 28-6 in the Senate. L.F. at 11 and 2011 House Journal pp. 1806-07, 1862; 2011 Senate Journal 1326. All Senators and Representatives elected as Republicans, plus a few elected as Democrats, voted in favor of the bill. The map marked as Exhibit 1 to the Petition, LF 21, shows the boundaries set out by H.B. 193.

The defendant Attorney General sought to dismiss the case or for judgment on the pleadings because the Petition did not state any cognizable claim.[2] The circuit court granted that motion.

[2] The Secretary of State, presumably sued solely because of her role as the chief state elections official, did not take a position in the trial court on the merits. Nor does she do so on appeal.

ARGUMENT

Introduction

Though the Plaintiffs make other arguments, this case really presents two colorable claims: that the General Assembly did not comply with the constitutional requirement that it draw congressional districts that are "as compact as may be"; and that by drawing districts in a way that favors one political party, the General Assembly violated the "right to vote" of Missouri voters who typically favor another party. To address those claims, the Court will have to tackle five questions of law.

The first is: What is the standard of review for the legislature's compliance with the constitutional mandate that it draw congressional districts that are "compact"? (See I.A. below.) This Court, recognizing that the Missouri Constitution assigns responsibility for congressional redistricting specifically to the General Assembly, has said that a redistricting law will be upheld unless the General Assembly "wholly ignores" its constitutional obligation. Plaintiffs argue for a less deferential standard.

The second question is: What kind of allegation is sufficiently specific and plausible so as to demand acceptance in response to a motion for judgment on the pleadings, or to state a claim under Missouri's "fact pleading" requirement? (See I.B. below.) "Fact pleading" does not permit Plaintiffs to merely state broad, conclusory, and largely implausible, claims.

And that is what Plaintiffs point to when they assert that the General Assembly "wholly ignored" its responsibility to draw "compact" districts.

The third question is: What is the meaning of the "right to vote" under the Missouri Constitution? (See II.A. below.) This Court has recognized the "right to vote" in two respects: every eligible voter must be given the opportunity to vote, free from unwarranted interference and unjustified prerequisites; and districts must be drawn so as to give each voter equal say, *i.e.*, districts must be approximately equal in population so that the vote of a person in a district with few residents is not worth more than the vote of a person in a district with many. And Plaintiffs never allege that H.B. 193 violates either of those rights.

Because the answer to the third question not only eliminates the Plaintiffs' "right to vote" claim but also their insistence on heightened scrutiny for their equal protection claim, their equal protection claim depends on their ability to prove that H.B. 193 has no "rational basis." The fourth question, then, is a variation on the second: Is a broad, conclusory statement that there is no "rational basis" for H.B. 193 other than partisan advantage sufficient to state a claim or to fend off a motion for judgment on the pleadings? (See II.B. below.)

The fifth question is: Does Article I, §§ 1 and 2 – in particular the language in those sections about "political power" being "instituted solely for

the good of the whole" (§ 1) and government being "intended to promote the general welfare" (§ 2) – provide a basis for a claim regarding allegedly partisan redistricting? (See III below.) Because the broad language of those provisions does not provide the courts with a test by which to evaluate legislative action, it is not possible to state a claim based solely on the General Assembly allegedly having violated them.

In addition, the Court must address whether the pleadings actually stated claims according to the standards derived from the answers to the questions posed above. In fact, they did not. The districts drawn by the General Assembly in H.B. 193 are sufficiently compact, when compared to those upheld by this Court previously. (See I.C. below.) And because the new districts are equal in population, everyone's vote has precisely the same value. That some voters in a "community of interest" defined according to their political party preferences are less likely than those in a "community" of those favoring another party is simply not a violation of anyone's "right to vote" under the Missouri Constitution, nor a violation of the equal protection clauses of the Missouri and U.S. constitutions.

I. Plaintiffs fail to state a claim that H.B. 193 is invalid because the plan it enacts ignores "compactness." (Responds to Appellants' Point I.)

A. Consistent with the constitutional assignment of responsibility for congressional redistricting to the General Assembly, this Court's precedents establish that an act by which the General Assembly draws congressional districts pursuant to its authority under Art. III, § 45 should be upheld unless the act "totally ignores" the compactness requirement.

Our state constitution specifically assigns to the General Assembly the authority and responsibility to redraw congressional districts:

> When the number of representatives to which the state is entitled in the House of the Congress of the United States … is certified to the governor, the general assembly shall by law divide the state into districts corresponding with the number of representatives to which it is entitled, which districts shall be composed of contiguous territory as compact and as nearly equal in population as may be.

Art. III, § 45.[3] The mandatory criteria are: the number of districts must conform to the federal allocation of members of congress to Missouri (in 2011, eight rather than nine); the districts must be "contiguous"; they must be "as compact … as may be"; and they must be "as nearly equal in population as may be."[4]

Here, Plaintiffs do not claim that the General Assembly erred in defining eight districts rather than nine, nor that the districts are not equal

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[3] Because the constitution assigned the task to the legislature, it would be inappropriate for a court to draw new districts even if the first set enacted were found to be unconstitutional and the old ones were no longer permitted as a result of federal law.

[4] The section does not limit, expressly nor implicitly, the use of other criteria, provided that those criteria do not prevent compliance with the mandatory criteria. Thus, Appellants in *McClatchey*, No. SC92203, correctly say, "The Missouri Constitution *places only three limits* on the prerogative of the General Assembly to apportion the state's residents among [congressional] districts …." *McClatchey* Appellant's Brief at 7 (emphasis added).

in population. Nor do they levy an attack on contiguity.[5] That leaves just one basis for complaint grounded in Art. III, § 45: compactness.

Twice, this Court has addressed compactness. The first time was fifty years ago, in response to a challenge to congressional districts enacted pursuant to Art. III, § 45. *Preisler v. Hearnes*, 362 S.W.2d 552 (Mo. banc 1962) (*Preisler I*). There, the Court found that "[a]ll of the districts established by the 1961 Act [were] reasonably compact except the Tenth," although others "could have been improved in that respect." *Id*. at 557.[6] Despite the problem with the Tenth, the Court upheld the statute. In doing so, it set out a test for evaluating a redistricting plan enacted by the

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[5] Plaintiffs do reference contiguity. *E.g.*, App. Br. at 3. But the reason for the reference is obscure. "Contiguous" means "touching or connected throughout." Webster's Third New International Dictionary (1993) p. 492. The contiguity requirement bars the General Assembly from defining districts that have portions not attached to each other. It does not address the shape of districts.

[6] The Court did not include with its 1962 opinion a map showing the districts that were enacted. For the convenience of this Court, we have attached in the Appendix the map printed in THE OFFICIAL MANUAL, STATE OF MISSOURI, 1963-64 ("The Blue Book").

legislature – and held that the plan was entitled to a level of deference that defeats the Plaintiffs' claim here.

In *Preisler I*, the Court observed that courts should not readily interfere with the exercise by the General Assembly of its constitutional authority to define congressional districts. Indeed, the Court held that the courts should become involved only when the legislature "wholly ignores" constitutional requirements:

> [T]he courts may not interfere with the wide discretion which the Legislature has in making apportionments for establishing such districts when legislative discretion has been exercised. It is only when constitutional limitations placed upon the discretion of the Legislature have been wholly ignored and completely disregarded in creating districts that courts will declare them to be void. In such a case, discretion has not been exercised and the action is an arbitrary exercise of power without any reasonable or constitutional basis.

Id. at 555. In *Preisler I*, the Court held that despite some problematic districts, the plan as a whole showed that the legislature did not "wholly

ignore" the compactness requirement. Thus, the Court upheld the new districts.

After the 1970 census, the same plaintiff brought a challenge to new districts for the State Senate – and he lost again, in the same fashion. *Preisler v. Kirkpatrick*, 528 S.W.2d 422 (Mo. banc 1975) (*Preisler II*). The Court reaffirmed the standard that it articulated in *Preisler I*, quoting with approval the statement that "only when constitutional limitations placed upon the discretion of the Legislature have been wholly ignored and completely disregarded in creating districts that courts will declare them to be void." *Preisler I*, 362 S.W.2d at 555, *quoted in Preisler II*, 528 S.W.2d at 425.

Before the Court was the 1971 plan filed by the Senate Redistricting Commission, pursuant to the then-newly revised Art. III, § 7. That section does not use the word "compact"; instead, it requires that "no county lines shall be crossed except when necessary to add sufficient population to a multi-district county or city to complete only one district which lies partly within such multi-district county or city so as to be as nearly equal as practicable in population." But the amendment of Art. III, §7 did not eliminate the portion of Art. III, § 5 that contains a requirement parallel to that required of congressional districts under § 45: "For the election of

senators, the state shall be divided into convenient districts of contiguous territory, as compact and nearly equal in population as may be."

As it had 13 years before, the Court agreed with plaintiff Preisler that some districts did "not meet the compactness requirement": District 6 in the City of St. Louis, which stretched from the north nearly to the south end of the city (perhaps more the shape of a snake than plaintiffs' "three-headed toad"); and District 33, which "thrust[] a narrow appendage from the middle of its body into the heart of Greene county." 528 S.W.2d at 427.[7] But "considering the overall, state-wide plan developed by the Commission the districts established substantially comply with the compactness requirement of § 5 of Article III."

Plaintiffs, of course, claim that the Court did not really adopt the "wholly ignored" standard, but evaluated the districts in terms of "substantial compliance" with the compactness requirement. App. Br. at 38-41. In our view, that misreads the *Preisler* decisions. But even the "substantial compliance" standard is highly deferential, permitting deviation from the ideal in multiple respects. Regardless of the rhetorical expression of the test, the holdings in both *Preisler* cases unambiguously demonstrate that a limited

[7] The Court included with its opinion appendices showing the district boundaries. We have attached copies of those appendices in our Appendix.

compactness problem – even one that results in a district that can be described with a reptilian, amphibian, or crustacean analogy – with a couple of districts is not enough to fatally afflict a redistricting plan.

B. Broad, conclusory, and largely implausible allegations regarding the basis for lines drawn pursuant to Art. III, § 45 are not sufficient to state a claim or to avoid judgment on the pleadings.

Once the Attorney General pointed out the correct standard of review, Plaintiffs amended their petition to include the statement that the legislature did "wholly ignore" compactness. L.F. at 120. But that kind of broad, conclusory statement is not sufficient to state a claim nor to avoid judgment on the pleadings.

Regarding judgments on the pleadings, Plaintiffs quote the correct rule: "The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion." *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 599 (Mo. banc 2007), *quoted in* App. Br. at 27. But they never tackle the obvious question: what does it take for a fact to be "well-pleaded"?

It is certainly not the case that every factual statement made by a plaintiff, regardless of its specificity and plausibility, is enough. Missouri appellate courts have frequently demanded more than conclusory allegations. *E.g.*, *Castle Rock Remodeling, LLC v. Better Bus. Bureau of Greater St. Louis,*

Inc., --- S.W.3d ----, 2011 WL 5152855 at *10 (Mo. App. E.D. 2011) ("Castle Rock's conclusory allegations that BBB was carrying out a personal vendetta to destroy Castle Rock are insufficient."); *Eltiste v. Ford Motor Co.*, 167 S.W.3d 742, 752 (Mo. App. E.D. 2005) ("A pleading that makes a conclusory statement and does not plead the specific facts required to support the affirmative defense fails to adequately raise the alleged affirmative defense, and the alleged affirmative defense fails as a matter of law."), with approval, *Clean Uniform Co. St. Louis v. Magic Touch Cleaning, Inc.,* 300 S.W.3d 602, 612 (Mo. App. E.D. 2009), and *Echols v. City of Riverside*, 332 S.W.3d 207, 211 (Mo. App. W.D. 2010); *Holley v. Caulfield*, 49 S.W.3d 747, 753 (Mo. App. E.D. 2001) ("After review of the record, we find that the trial court did not err in dismissing Defendants' counterclaims because their pleadings for abuse of process merely alleged conclusory statements, which even if assumed true were insufficient as a matter of law."); *Tinsley v. B & B Engines, Inc.*, 27 S.W.3d 859, 861 (Mo. App. E.D. 2000) ("However, bare statements amounting to mere speculations or conclusions fail to meet the pleading requirements."); *Cooper v. Minor*, 16 S.W.3d 578, 581 (Mo. banc 2000) ("Appellant's eleventh claim is a bare and conclusory statement without sufficient factual information plead to support it. … The circuit court was correct in dismissing appellant's petition."); *Porter v. Reardon Mach. Co.*, 962 S.W.2d 932, 939

(Mo. App. W.D. 1998) ("Missouri is a fact-pleading state, however, mere conclusory allegations are insufficient.").

This Court should demand more than what Plaintiffs have given. Even federal courts have done so; the U.S. Supreme Court has recently held that not all conclusory statements are sufficient even under notice pleading. Statements – at least those accusing government officials of perfidy – must be at least plausible. *See Blakley v. Schlumberger Technology Corp.,* 648 F.3d 921, 931 (8th Cir. 2011) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 570 (2007)) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' "). Such a rule is appropriate in Missouri as well.

We recognize that this approach imposes a peculiar burden on the Plaintiffs in this case, whose proof is necessarily found only from legislators. As Plaintiffs concede, those legislators – the only people who have personal knowledge of the motives that Plaintiffs attack – cannot be "questioned about their legislative activities, including reasons or motives underlying their votes." App. Br. at 40, citing Art. III, § 19.

That difficulty adds another justification to the reasons for looking at the districts drawn in H.B. 193 on their face, rather than sending this matter back for a trial at which to evaluate motives. After all, from the face of the

map showing the new districts it is apparent that a claim that the General Assembly "wholly ignored" compactness is not plausible. The map shows the districts to be largely rectangular (though in a couple of instances with areas carved out) so far as that is possible while trying to avoid splitting counties, a preference the Missouri Constitution endorses. *See* Art. III, § 7 (regarding state Senate districts). If the legislature really had "wholly ignored" compactness, the districts would certainly look quite different than they do. It makes no sense (in others words, it is not plausible) to suggest that a single appendage from District 6 into District 5 in Jackson County is sufficient to show that the legislature "wholly ignored" compactness. Nor does adding to that intrusion the carving out of the inner St. Louis area to create compact Districts 1 and 2 from the otherwise largely rectangular District 3 push the Petition to the point of making a cognizable claim.

C. Whether the test is defined as "wholly ignored" or "substantially complied," comparison of the plan upheld under that standard with the one at issue here demonstrates that H.B. 193 should be upheld.

Count I of the Petition says nothing about the "over-all state-wide plan." It makes no allegation that the plan set out in H.B. 193 is different – much less, different in a constitutionally infirm way – from the plan set out for congressional districts after the 1960 census, nor from the plan set out for

State Senate districts after the 1970 census. Indeed, beyond the conclusory statements addressed above, the Petition does not even hint that such a showing is possible.

Even a cursory comparison of the maps showing the boundaries at issue in the *Preisler* cases (*see* App. pp. A1-A8) with the map of the H.B. 193 districts (L.F. at 21; App. p. A9) demonstrates that under the *Preisler* standard, the Plaintiffs' challenge must fail. The presence of a single "unnatural appendage" has never resulted in this Court striking down a redistricting plan. And it should not have that result today.

II. Plaintiffs failed to state a claim that H.B. 193 violates their "right to vote" or to be treated equally with other voters. (Responds to Appellants' Points II and IV.)

A. The "right to vote" under the Missouri Constitution ensures that each voter has an equal vote, not that one group – those who vote with a particular political party – cannot be disadvantaged by a particular set of boundary lines.

Plaintiffs invoke the "right to vote" in three different ways: In Count IV of the Petition and in Point IV of their brief as an independent right; in Count II of their Petition and in Point II of their brief as a "fundamental right" that moves scrutiny for their equal protection claims from "rational

basis" to some form of heightened scrutiny; and in Point I of their brief as part of the analysis in evaluating compactness. In each instance, they claim that their "right to vote" is violated by "diluting" their vote, *i.e.*, by isolating them from others who share their preference for candidates fielded by a particular political party, and by so doing making it harder for their preferred candidates to win elections. But this Court has never recognized that kind of "dilution" as a violation of the "right to vote."

This Court did recognize "dilution" in a case that Plaintiffs cite nearly a dozen times in their brief, *Armentrout v. Schooler*, 409 S.W. 2d 138 (Mo. 1966). Nothing in *Armentrout*, however, provides support for the aspect of a "right to vote" that Plaintiffs assert. In *Armentrout*, the state courts were reacting to the line of federal cases that began with *Baker v. Carr*, 369 U.S. 186 (1962). Those cases required, applying the U.S. Constitution, that districts be equal in population – a rule that required immediate changes in how Missouri and other states drew districts not just for Congress, or even for the state legislature, but for local governments as well. This Court, addressing the division of the City of Louisiana into wards, cited *Reynolds v. Sims*, 377 U.S. 533 (1964), as holding:

> that state legislative districting schemes which give the same number of representatives to unequal numbers of constituents have the effect of dilution

> and undervaluation of the votes of those living in the overweighted and overvalued districts, thus resulting in discrimination against those living in disfavored areas, and that *diluting* the weight of votes because of place of residence 'impairs basic constitutional rights under the Fourteenth Amendment, just as much as invidious discrimination based on factors such as race.'

Armentrout, 409 S.W.2d at 142 (emphasis added). The Court then reiterated "the principle that in a representative government the people are entitled to equal representation." *Id.* at 143. And it demanded that because "the members of the City Council … perform primarily legislative functions importantly affecting the people, the wards from which they are elected must be substantially equal in population, under the equal protection of the laws clauses of the constitutions of the United States and of the State of Missouri." *Id.*

The entire discussion in *Armentrout* – and in the cases on which the Court there relied – was on population equality. Nowhere in the decision was there a hint that the City of Louisiana had to consider or was barred from considering any other factor – neighborhood boundaries, economic status, or even partisan or other voting patterns – in dividing the city into four wards.

Other than population equality, the only requirements the Court imposed were those imposed on the General Assembly by Art. III, § 25: "that the wards newly created shall be composed of contiguous territory as compact as possible." 409 S.W.2d at 144.

As noted above, Plaintiffs never challenged the population equality of the districts created in H.B. 193. Indeed, they cannot make such a challenge, for the documents they incorporate into their Petition show that the districts are precisely equal. L.F. at 21; App. at A9. The kind of "dilution" at issue in *Armentrout* is simply not at issue here.

The other facet of the "right to vote" this Court has recognized is the right to actually cast a ballot. The most recent precedent on that point is another case that Plaintiffs cite repeatedly in their brief, *Weinschenk v. State*, 203 S.W.3d 201 (Mo. banc 2006). But *Weinschenk*, like *Armentrout*, does not endorse the expansive reading of the "right to vote" that Plaintiffs articulate.

In *Weinschenk*, the question was the constitutionality of statutory provisions addressing the prerequisites for voting. Nowhere in that case was there a hint that an individual voter is entitled to anything more than the ability to actually appear at the polls and cast a ballot. The court held that the law at issue "creates a heavy burden on the right to vote and is not narrowly tailored to meet a compelling state interest." *Id.* at 221-22. H.B. 193 does not impose a burden on anyone's ability to vote. Rather, it

ensures, consistent with *Armentrout* and *Baker v. Carr*, that every eligible citizen can vote, and that each vote will have precisely the same value.

The concept of "dilution" as applying to a particular class of voters comes not from the Missouri Constitution, nor from this Court's precedents, but from the federal Voting Rights Act. Section 2 of that Act articulates the concept; it bars "political processes leading to nomination or election in the State or political subdivision [that] are not equally open to participation by members of a class of citizens protected by subsection (a) of this section 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.A. § 1973(b). Applying only to "protected" "classes of citizens"– those defined by "race or color" (§ 1973(a) and (b)) – this prevents states and local governments from changing election procedures, including drawing new district boundaries, so as to dilute or diminish the ability of members of those classes to assert power in elections.

As a practical matter, the Voting Rights Act concept of dilution works solely because it is limited to very limited, defined classes – those created by "race or color." It is possible to evaluate what a particular change – including a new district boundary – does to a single, objectively defined group. But the concept becomes impractical the more groups are involved, and when they are defined by changeable, self-declared preferences rather than by

immutable characteristics. Already, there are difficulties in apply the Voting Rights Act standard where members of two racial groups live side-by-side. But what the Plaintiffs propose here is an application of the standard that will create problems that go well beyond balancing the protection fo two groups, for they propose that "dilution" be applied without limits.

Explicitly, Plaintiffs propose that the Court treat people who claim to self-identify as Democrats – and, presumably, as Republicans, Libertarians, etc. – as the Voting Rights Act treats racial minorities. But they never even pretend to draw a constitutional line around those who today (and perhaps tomorrow – or perhaps not) affiliate with a particular political party. Thus their analysis, if accepted, would apply to each and every self-identified group – or to every "community of interest," to use a term often used but never specifically defined in the district-drawing context. And it would immediately result in conflicts: every district line that can be drawn advantages one "community of interest" at the expense of those in another. Every line makes some candidate or potential candidate less likely to win, and thus makes those favoring that candidate less likely to obtain what they want in the election. Thus under Plaintiffs' proposed rule, those who want to be represented by a member of their Catholic parish could claim that their right to vote is violated by a line that divides the parish. Those who want to be represented by a member of their elementary school community could

claim that their right to vote is violated by a line that places them into a district dominated by those served by the adjoining school. And residents of a city who want to be represented by a resident of their city, rather than someone who lives in the unincorporated portion of the county, could claim that their right to vote is violated by a district line that does not precisely follow the municipal boundary.

But there is no authority, in the Missouri Constitution nor in this Court's decisions interpreting and applying that Constitution, for the proposition that any of those claims would be valid. Again, the "right to vote" is limited to the ability to cast a ballot, and to have that ballot count as one vote, equal to the vote of one's neighbor or that of a cousin across the state, regardless of whether the neighbor or the cousin desires to elect the same candidate or someone from a different political party.

B. A broad, conclusory statement that there is no "rational basis" for H.B. 193 other than partisan advantage is not sufficient to state a claim nor to fend off a motion for judgment on the pleadings.

Because drawing population-equal congressional districts does not violate a fundamental right (the right to vote), to succeed on their equal protection claim Plaintiffs must prove that there is no rational basis for drawing the lines of the eight congressional districts in H.B. 193. They claim

that their Petition can survive a motion for judgment on the pleadings – and that they state a claim sufficient to withstand a motion to dismiss – just by saying that there is no rational basis for the H.B. 193 lines, *i.e.*, that the lines were drawn solely for partisan advantage, which, they argue, is not a basis that rationally serves the State's interests.

But as discussed in I.B. above, Missouri's fact pleading rules should require more than that kind of conclusory statement. It is not – or should not be – enough to broadly assert that the lines set out in H.B. 193 were designed solely for partisan advantage. Moreover, the obvious fact that many of the lines precisely follow county boundaries disproves Plaintiffs' point, for undisputably, partisan preferences do not follow the boundaries of political subdivisions.

To survive a challenge to their pleadings, Plaintiffs should at the very least be required to make assertions that are specific enough that they could form the basis for a grant of relief. That means they must explain, at least to some degree, how it can be that so much of the map they dislike follows county boundaries and otherwise has, on its face, a basis that is not at all partisan. The conclusory facts stated by Plaintiffs in their Petition and reiterated in their brief simply do not accomplish that.

III. Plaintiffs cannot state a claim, independent of an equal protection claim, based on the broad, aspirational language in Article I, §§ 1 and 2. (Responds to Appellants' Point III.)

In their Count III, plaintiffs claim that H.B. 193 violates Art. I, §§ 1 and 2, in particular the language in those sections about "political power" being "instituted solely for the good of the whole" (§ 1) and government being "intended to promote the general welfare" (§ 2). But those clauses do not establish rights that can be enforced through judicial action.

In *Comm. for Educational Equality v. State*, 294 S.W.3d 477, 488 (Mo. banc 2009) ("*CEE*"), this Court dealt with a claim based on similar language regarding the purpose of a portion of the Missouri Constitution – and refused to find in such language a basis for suit. To paraphrase the Court's language, the "introductory clauses" found in §§ 1 and 2 "outline the purpose and subject of" our Bill of Rights. But they "provide no specific directive or standard for how the State must accomplish" those goals.

We are not aware of any reported case in which any Missouri court held that a cause of action could be based on the language that Plaintiffs cite in Count III. If there were such a cause of action, what would its elements be? What would be the test for compliance?

In the count below, Plaintiffs suggested only that the Constitution bars action that deliberately benefits one political party more than another. But

the history of partisan legislation since 1820, under four Missouri Constitutions, strongly evidences that when the people enacted the 1945 Constitution, they meant to limit the use of partisan political objectives, but they chose not to expressly bar them. Indeed, if the Constitution did bar consideration of party voting patterns, it would bar consideration of some of the Plaintiffs' own basis for seeking relief: their insistence that because past voting patterns in Missouri placed the two major parties in near-parity, the General Assembly *must* consider parity preferences and draw congressional districts so as to create fewer "safe" (whatever that may mean) seats for one party.

In their effort to justify invocation of Art. I, §§ 1 and 2 as grounds for a separate claim, Plaintiffs cite *Armentrout*. But in *Armentrout*, this Court did not suggest that there was a cognizable claim under those provisions other than as part of the basis for an equal protection claim – the claim actually addressed in *Armentrout*, stated by the Plaintiffs in their Count II, and discussed in II.A. above. *See Armentrout*, 409 S.W.2d at 143.

Like the language at issue in *CEE*, the language on which Plaintiffs rely in their Count IV is not a mandate to the General Assembly. It states purposes of the Missouri Constitution generally – purposes that illuminate the meaning, but do not substitute for the specifics, of the provisions that follow. True, the instructions given to the General Assembly in Art. III, § 45

should be read in light of Art. I, §§ 1 and 2. But that does not mean that those introductory provisions themselves form the basis for a cause of action.

CONCLUSION

For the reasons stated above, the decision of the circuit court should be affirmed and the challenge to H.B. 193 rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and served, on January 3, 2012, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 6,503 words.

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