

SC92200

IN THE SUPREME COURT OF MISSOURI

KENNETH PEARSON, et al.,

Appellants,

vs.

CHRIS KOSTER, et al.

Respondents.

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

BRIEF OF INTERVENOR-RESPONDENTS

January 3, 2012

Respectfully Submitted by:

Todd P. Graves (MO Bar No. 41319)
Edward D. Greim (MO Bar No. 54034)
Clayton J. Callen (MO Bar No. 59885)
Graves Bartle Marcus & Garrett, LLC
1100 Main Street, Suite 2700
Kansas City, MO 64105
Telephone: (816) 256-4144
Facsimile: (816) 817-0863
E-mail: edgreim@gbmglaw.com

Attorneys for Intervenor-Respondents

TABLE OF CONTENTS

Statement of Facts. 1

I. Substantive Allegations. 1

II. Procedural History and Course of Proceedings Below. 2

Argument. 4

I. The Trial Court Correctly Held That Count I is Not
Viable Because On the Well-Pled Facts, H.B. 193 Does Not
Wholly Disregard Compactness (Appellants’ Point I) 4

A. Introduction: Article II of the Missouri Constitution
Mandates Separation of Judicial from Legislative
and Political Power and Should Guide this Court. 4

1. The Separation of Powers Protects Both
the General Assembly and the Judiciary From
Judicial Entanglement in Political Decisions. 5

2. Appellants Now Suggest that it Would Appear
Improper for Most Missouri Trial Courts to
Entertain Their Claims. 6

3. This Court Only Exercises Judicial review
Within Narrow, Well-Defined Limits. 8

B. The Standard of Review: Appellants’ Petition Must Be
Judged on its Well-Pled Facts. 9

C. The Well-Pled Facts Do Not Show that H.B. 193
Evinces a Complete Disregard of Compactness. 10

1. Consistent with the Separation of Powers,
Judicial Review of Compactness Claims Employs
a “Wholly Ignored” Standard. 10

2. H.B. 193 Passes Constitutional Muster. 14

- D. Appellants Continue to Misrepresent the Prior Holdings of this Court and the General State of Missouri Redistricting Law. 19
- E. Conclusion. 22
- II. The Trial Court Properly Found that Counts II and IV are Non-Justiciable and Non-Viable because They Present a Political Question that Cannot be Resolved by Clear and Judicially Manageable Standards, and because There is No Right to Proportional Partisan Representation (Appellants’ Points II and IV) 22
 - A. Introduction: The Separation of Powers and Our Constitutional Structure Severely Limit Partisan Gerrymandering Claims. 23
 - B. Appellants’ Partisan Gerrymandering Claim Presents a Non-Justiciable Political Question. 26
 - 1. Partisan Gerrymandering Claimants Must Plead a Judicially Administrable and Manageable Standard for Resolving Their Claims In Order to Warrant Judicial Intervention. 26
 - 2. Appellants Have Not Pled a Justiciable Claim. 28
 - 3. Missouri Should Follow Federal Courts’ Reasoning. 31
 - a. Federal and Missouri Law Are and Should Be Congruent. 32
 - b. Missouri Courts Have Not Adjudicated or Adopted Appellants’ So-Called “Principles” of Partisan Gerrymandering Law. 36

C. Even If Appellants Had Presented a Judicially Administrable and Manageable Standard for Their Claim, It Would Fail Because Citizens Have No Right to Proportional Partisan Representation in Congress. 41

III. The Trial Court Properly Found That Count III is Non-Justiciable Because It Presents a Political Question, and Non-Viable Under Any Conceivable Standard (Appellants’ Point III) 45

IV. Appellants’ Unprecedented Request for Remand to a “Non-Partisan” Circuit Judge Based on Non-Record “Political Facts” is an Admission of the Political and Judicially Unresolvable Nature of Their Claims. 47

Conclusion. 49

TABLE OF AUTHORITIES

Cases

Armentrout v. Schooler,

409 S.W.2d 138 (Mo. 1966) 36, 45, 46

Bennett v. Mallinckrodt, Inc.,

698 S.W.2d 854 (Mo. App. 1985) 32, 33

Buschardt v. Jones,

998 S.W.2d 791 (Mo. App. W.D. 1999) 48

Bush v. Vera,

517 U.S. 952 (1996) 44

Comm. for Educ. Equal. v. State,

294 S.W.3d 477 (Mo. banc 2009) 9

Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections,

2011 WL 6318960 (N.D.Ill. Dec. 15, 2011) 23

Davis v. Bandemer,

478 U.S. 109 (1986) 24, 26, 30, 42, 44

Devitre v. Orthopedic Center of St. Louis, LLC,

349 S.W.3d 327 (Mo. banc 2011) 10

Gaffney v. Cummings,

412 U.S. 735 (1973) 18

League of United Latin American Citizens v. Perry (“LULAC”),

548 U.S. 399 (2006) 24, 29

Matter of Impeachment of Moriarty,

902 S.W.2d 273 (Mo. banc 1994) 6, 33

Molumby v. Shapleigh Hardware Co.,

395 S.W.2d 221 (Mo. App. 1965) 9

Preisler v. Doherty,

284 S.W.2d 427 (Mo. banc 1955) 10, 11

Preisler v. Hearnnes,

362 S.W.2d 552 (Mo. banc 1962) 10, 14

Preisler v. Kirkpatrick,

528 S.W.2d 422 (Mo. banc 1975) 11, 20, 21, 22, 37

Radogno v. Illinois State Bd. of Elections,

2011 WL 5868225 (N.D. Ill. Nov. 22, 2011) 23, 26, 27, 28, 30

State ex rel. Barrett v. Hitchcock,

241 Mo. 433, 146 S.W. 40 (1912) 21, 40

State ex rel. Jackson County Library Dist. v. Taylor,

396 S.W.2d 623 (Mo. banc 1965) 9

State ex rel. Lamb v. Cunningham,

53 N.W. 35 (Wis. 1892) 20

Vieth v. Jubelirer,

541 U.S. 267 (2004) *passim*

Weinschenk v. State,

203 S.W.3d 201 (Mo. banc 2006) 34, 35

Constitution

United States Constitution, Article I, § 4. 6

Other Authorities

Hon. William Ray Price, Jr., *Chief Justice Delivers 2011 State of the Judiciary Address*,

67 J. Mo. Bar 82, 85 (2011) 5

STATEMENT OF FACTS

I. Substantive Allegations

Appellants' Statement of Facts faithfully repeats the language of the Petition. But in so doing, Appellants inaccurately introduce as "facts" certain legal conclusions, arguments, or rhetorical flourishes mined from their Petition. That such argument was uttered may form a part of the procedural history, but the arguments themselves are not facts. The Petition's well-pled facts are the kernels of data which, were the case to be tried, could be either proved or disproved by evidence. Those facts, and those facts alone, are considered admitted for purposes of the Respondents' dispositive motions and are given the same treatment on appeal. *See infra* at 11-12. The following assertions in Appellants' Statement of Facts are argument, not well-pled facts.

1. The two full paragraphs of "facts" on page 3 are block-cited to Appellants' Petition. Br. 3. Appellants claim that H.B. 193 was drafted "for wholly partisan purposes" and was "designed solely to serve partisan ends, which will operate to the detriment of all who desire fair and legitimate districts." *Id.* Appellants claim that H.B. 193 "violates the Missouri Constitution in multiple respects," creates districts that are "not compact and contiguous" and "wholly ignores and completely disregards those requirements," "denies plaintiffs equal rights and opportunity under the law," and "reflects an exercise of governmental power for the benefit of the few." *Id.* Finally, Appellants claim H.B. 193

“improperly dilutes the votes of Democrats and Independents, as compared with Republicans...” *Id.* These statements are labels for Appellants’ legal theories or arguments, not well-pled facts.

2. In the first full paragraph under Section C, Appellants state that H.B. 193 “achieves its purposes through extreme instances of gerrymandering, among other constitutional deficiencies.” Br. 5.

3. In the remaining paragraphs of Section C, Appellants label various “aspects” of H.B. 193 as “highly egregious” or liken district shapes to various reptiles and amphibians. Br. 5-7. The well-pled facts are not Appellants’ rhetoric, but rather, the details of the map resulting from H.B. 193. The map is attached to the Petition as Exhibit 1.

4. Appellants argue that when the “Republican-dominated Missouri General Assembly” overrode a gubernatorial veto to pass H.B. 193, it “impose[d] the Map on the State.” Br. 8. Similar language appears two paragraphs later. *Id.* This is political rhetoric, not a predicate fact that could be determined by any court of law for purposes of analyzing or establishing a cause of action.

II. Procedural History and Course of Proceedings Below

H.B. 193 was passed in its final form in April 2011. LF 9. In May 2011, the General Assembly overrode a gubernatorial veto. LF 8. Appellants did not file suit in federal or state court upon passage of H.B. 193. Instead, Appellants waited until September 23, 2011. LF 1. On that day, Appellants filed in Cole County Circuit Court. *Id.*

Appellants asked the Court for “preliminary injunctive relief,” to “expedite” proceedings so that appeals could be concluded by February 2011, and, as part of those proceedings, to “draw a new congressional districting map.” LF 12, 15. This Court can take judicial notice that the recipients of these pleas—the judges of the Cole County Circuit Court—are elected outside of the Missouri Non-Partisan Court Plan.

At no point did Appellants request that the judges of Cole County, including either judge assigned to the case pursuant to the local rules, be disqualified from acting upon their request to “expedite” the proceedings, grant preliminary relief, and “draw a new...map.” LF 1-4. At no point did Appellants suggest that it was inappropriate or improper for elected judges to adjudicate their claims. *Id.* Appellants’ only reference to judges in the Court below was their suggestion to the trial judge that either he or “four judges of the Missouri Supreme Court” could develop a new legal standard for adjudicating partisan gerrymandering claims. LF 150. Appellants never suggested to the trial judge that because voters had elected him to office, he should decline Appellants’ invitation to create new law or otherwise rule in their favor. LF 1-4. Nor did Appellants file a timely application for change of judge or file any opposition to Respondents’ timely-filed application. *Id.*

After both sets of Respondents filed Motions to Dismiss, on November 1, 2011, Appellants moved for leave to amend their Petition. LF 1-2. Respondents Diehl and Rupp objected on the grounds that Appellants’ proposed amendments

were legally futile. LF 100-107. Respondents argued that the proposed amendments to Count I were not well-pled facts, and that Count IV (dilution of Democrats' voting power as a violation of their right to vote) was a mere restatement of the already fatally flawed Count II (dilution of Democrats' voting power as unequal protection of the right to vote). *Id.* The Circuit Court granted Appellants' motion without oral argument. After ten more days of briefing (LF 3-4), the Circuit Court heard substantial oral argument on Respondents' motions, and at the conclusion, indicated that he would grant the motions and grant judgment against Appellants. Tr. 2-56.

ARGUMENT

I. THE TRIAL COURT CORRECTLY HELD THAT COUNT I IS NOT VIABLE BECAUSE ON THE WELL-PLED FACTS, H.B. 193 DOES NOT WHOLLY DISREGARD COMPACTNESS (APPELLANTS' POINT I)

A. Introduction: Article II of the Missouri Constitution Mandates Separation of Judicial from Legislative and Political Power and Should Guide this Court

Appellants claim H.B. 193 fails in two ways: (1) insufficient compactness (Count I); and (2) "dilution" of Democratic votes because only two—not four—of Missouri's eight districts will be safe Democrat seats (Counts II, IV, and perhaps III). Appellants' theories founder on the same shoals: a failure to respect Missouri

voters' decision, through Article III, Section 45 of the Constitution, to expressly assign congressional districting exclusively to our most political—and politically accountable—branch of government, the General Assembly.

**1. The Separation of Powers Protects Both the General
Assembly and the Judiciary From Judicial Entanglement in
Political Decisions**

Missourians gave redistricting to the legislature—not the courts—for a reason. Dividing our diverse state into congressional districts requires the type of decision-making that is truly appropriate only for a popularly-elected (and therefore unavoidably partisan) legislature. *Vieth v. Jubelirer*, 541 U.S. 267, 285, (2004) (“The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics.”) Drawing districts requires listening to constituents, balancing interests, compromising, creating winners and losers, and reaching conclusions that usually displease at least one party (and sometimes please no one). As the U.S. Supreme Court has made clear time and again, the redistricting calculus necessarily involves politics. *Id.* (collecting cases).

Although Missourians elect legislators to make such political calculations, they expect something quite different from their courts. *See* Hon. William Ray Price, Jr., *Chief Justice Delivers 2011 State of the Judiciary Address*, 67 J. Mo. Bar 82, 85 (2011) (“Our job is different than yours. You serve the majority.”); *Vieth*, 541 U.S. at 278 (legislators’ laws can be “illogical and *ad hoc*,” but judicial

rulings must be “principled, rational, and based on reasoned distinctions”); *Matter of Impeachment of Moriarty*, 902 S.W.2d 273, 277 (Mo. banc 1994) (“Whatever the constitutional reason for our [impeachment] responsibility, however, this Court must assume that our role is as a court, not as a substitute political body.”) If the Court treads this carefully even where the people agreed to assign it a historically political function like impeachment, how much more cautiously must it tread in redistricting, a historically political function that the U.S.¹ and Missouri Constitutions assign to the legislature?

2. Appellants Now Suggest that it Would Appear Improper for Most Missouri Trial Courts to Entertain Their Claims

Despite Missouri’s constitutional separation of powers mandate, Appellants nonetheless invited the Circuit Court—and now invite this Court—to fashion a new redistricting jurisprudence which would convert the Court into a “substitute” General Assembly, juggling unwritten and ever-changing factors in considering “compactness” and “partisan gerrymandering” challenges. In reality (or, as importantly, in public perception, for justice can be in the eye of the beholder), the

¹ “The Times, Places and Manner of holding Elections for Senators and Representatives, shall be prescribed in each State by the Legislature thereof; but the Congress may at any time by Law make or alter such Regulations, except as to the Places of chusing Senators.”

U.S. Const., Art. I, Section 4.

Court would pass judgment on the political decisions and motivations of the General Assembly—a judgment that, under any standard, would embroil the Court in political and partisan considerations.

As Justice Kennedy warned in *Vieth*, “With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.” *Id.* at 307. Appellants maximize the “ill will and distrust” of a wide-open judicial inquiry into political affairs by openly seeking partisan gain. They unblushingly ask the Court to re-legislate the General Assembly’s apportionment for the purpose of creating fewer Republican and more Democratic seats.

On appeal, Appellants have doubled down, demanding remand to a “non-partisan” judge. Br. 61. But by suggesting that the question they present—and the relief they request—is so inherently political and discretionary that adjudication by most Missouri trial courts would carry an “appearance of impropriety,” Appellants unwittingly expose the arbitrary and standardless void that lies at the core of the redistricting jurisprudence they ask this Court to cobble together. Missouri, which gave its name to the non-partisan court plan, has long proclaimed that regardless of how its judges are chosen, such openly political judgments and remedies are anathema in its halls of justice.

3. This Court Only Exercises Judicial Review

Within Narrow, Well-Defined Limits

As discussed below, this Court has counseled for over a century that when Missouri courts are asked to reconsider the political judgment of a coordinate branch and re-legislate congressional districts, the separation of powers requires courts to grant the people's representatives in the General Assembly maximum leeway and to invalidate laws only under the most clear, precise, non-arbitrary and judicially administrable standards. In the case of Count I, the principle of compactness is clear enough that the separation of powers does not completely foreclose judicial review; instead, it requires a deferential and easily applied standard: "wholly disregarded."

As discussed below, the well-pled facts show that H.B. 193 does not "completely disregard" compactness. Plaintiffs attached the map resulting from H.B. 193 to their Petition. *As a matter of law*, whatever mix of considerations, deliberation, political calculation, and debate (*i.e.*, the standard recipe for legislation) went into H.B. 193, the reasonably compact districts appearing on that map could not have emerged from a body that "completely disregarded" compactness. *It is impossible to say that compactness was "completely disregarded."*

B. The Standard of Review: Appellants' Petition Must Be Judged on its Well-Pled Facts

Appellants correctly state the standard for reviewing pleadings-based dispositive motions, including failure to state a claim and judgment on the pleadings: whether the facts in the Petition state a claim. Br. 27. This standard applies to all of Appellants' counts.

Appellants omit, however, an important threshold question: what are the facts? Only "averments of fact sufficiently well pleaded in the return will be taken as admitted, eliminating conclusions of law and matters not well pleaded the truth of which this motion does not admit." *State ex rel. Jackson County Library Dist. v. Taylor*, 396 S.W.2d 623, 624 (Mo. banc 1965).

Further, claims about the effect, interpretation, or construction of legal documents (necessarily including statutes) are legal conclusions which are not admitted: "[c]onclusions of law and the construction and interpretation placed on documents pleaded in the petition are not admitted by the motion to dismiss." *Molumby v. Shapleigh Hardware Co.*, 395 S.W.2d 221, 225 (Mo. App. 1965). Instead, those are matters of law left to the Court. And as this Court has repeatedly held, "Legislative acts are entitled to deference, and this Court must give these acts any reasonable construction to avoid nullifying them." *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 488 (Mo. banc 2009). Accordingly, legal conclusions, argument, and rhetoric about the content or effect of statutes are not "facts" for purposes of review.

Based on this standard, as discussed in Respondents' response to Appellants' Statement of Facts, large swaths of Appellants' factual "background" must be disregarded, and cannot serve as analytical building blocks for this Court's "almost academic" determination of whether the facts "meet the elements of a recognized cause of action." *Devitre v. Orthopedic Center of St. Louis, LLC*, 349 S.W.3d 327, 331 (Mo. banc 2011). The Court must instead focus on the well-pled facts—including the maps Appellants attached to their Petition—to determine whether those warrant judicial re-drafting of the General Assembly's redistricting legislation. As discussed below, Appellants' well-pled facts fall far short of the threshold necessary for judicial intervention.

C. The Well-Pled Facts Do Not Show that H.B. 193 Evinces a Complete Disregard of Compactness

Appellants' well-pled facts on Count I—which primarily include their maps attached as exhibits—do not make out a claim, and required the trial court to grant dismissal or judgment on the pleadings.

1. Consistent with the Separation of Powers, Judicial Review of Compactness Claims Employs a "Wholly Ignored" Standard

This Court has consistently held that the General Assembly's reapportionment laws are not subject to judicial scrutiny unless the legislature "completely disregarded" the principle of compactness. *See Preisler v. Doherty*, 284 S.W.2d 427, 434 (Mo. banc 1955); *Preisler v. Hearnnes*, 362 S.W.2d 552, 557 (Mo. banc 1962). "It is only when constitutional 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 v. Kirkpatrick*, 528 S.W.2d 422, 425-426 (Mo. banc 1975) (emphasis added).

All three *Preisler* decisions made clear that the separation of powers underlies the forgiving standard of review for apportionment challenges: Missouri’s courts cannot second-guess the legislature’s use of discretion in considering a multitude of factors in redistricting, and can only invalidate a law if the General Assembly completely failed to exercise discretion by “wholly ignoring” the principle of compactness. In its 1955 decision, the Supreme Court explained:

‘There is a vast difference between determining whether the principle of compactness of territory has been applied at all or not, and whether or not the nearest practical approximation to perfect compactness has been attained. The first is a question which the courts may finally determine; the latter is for the legislature.’

Preisler, 284 S.W.2d at 434 (internal citation omitted).

Twenty years later, in the third *Preisler* decision, the Supreme Court again relied upon the principle of separation of powers to reaffirm that it would only decide whether the General Assembly had *used* its discretion—not whether it had used that discretion *well*:

As said in a leading case... “If, as in this case, there is such a wide and bold departure from this constitutional rule that it cannot

possibly be justified by the exercise of any judgment or discretion, and that evinces an intention on the part of the legislature to utterly ignore and disregard the rule of the constitution in order to promote some other object than a constitutional apportionment, then the conclusion is inevitable that the legislature did not use any judgment or discretion whatever.”

Preisler, 528 S.W.2d at 425-426 (internal citation omitted).

The third *Preisler* decision is particularly instructive in highlighting practical difficulties (potential violations of the separation of powers aside) were Missouri courts to undertake the essentially *de novo* compactness review urged by Appellants:

...The county lines do not lend themselves to perfect compactness.

The population density of the state is, of course, uneven and any effort to accomplish both the overriding objective of substantial equality of population and the preservation of county lines reasonably may be expected to result in the establishment of districts that are not esthetically pleasing models of geometric compactness.

It is also true that the population density is uneven in the two metropolitan areas and a good faith effort to adhere to all constitutional requirements will still produce some districts in those areas, the boundary lines of which will have stair-step shape as well as the straight lines of urban blocks and suburban and urban census

districts, and the sweeping curves of major thoroughfares. It has been said that only a district having the shape of a square or a circle can be so compact that it cannot be made more so.

Preisler, 528 S.W.2d at 426 (internal citations omitted).

Even after finding that two state senate districts failed to meet its forgiving standard (one district “thrust[] a narrow appendage from the middle of its body into the heart of Greene county”), the Court found that the “overall, state-wide plan...substantially compl[ied] with the compactness requirement” and reversed the trial court’s judgment which had found the plan unconstitutional. *Id.* at 427. The standard was not whether every district was as compact as possible, it was whether the overall legislation, on its face, showed that the principle of compactness had at least been considered—even if imperfectly.

Finally, the second *Preisler* decision points out that apportionment is ultimately a puzzle requiring creativity and compromise; if citizens are dissatisfied with a particular compromise, then—as with most legislation—their remedy is political, not legal:

While both compactness and population of the Tenth district could have been aided by also adding these counties plaintiff mentions and others adjoining them it must be realized that every member of the Legislature has his own views (as do his constituents) as to the district in which his county (and others with which his county has previously been associated in a congressional district) should be

placed and it is not improper to consider the precedents of allocation of counties to existing districts in deciding the composition of new enlarged districts. Very likely each legislator individually would draw somewhat different district lines. Therefore, any redistricting agreed upon must always be a compromise. Mathematical exactness is not required or in fact obtainable and a compromise, for which there is any reasonable basis, is an exercise of legislative discretion that the courts must respect. Furthermore, the people of this state have a remedy for even valid redistricting, which they do not like, through our initiative and referendum provisions.

Preisler v. Hearnnes, 362 S.W.2d 552, 557 (Mo. 1962).

In sum, this Court consistently reviews redistricting legislation under a “wholly ignored” standard, both because of the separation of powers and because of its healthy respect for the practical and political difficulties inherent in drawing legislative boundaries.

2. H.B. 193 Passes Constitutional Muster

Appellants’ well-pled facts include maps showing the physical layout of H.B. 193’s districts. LF 21. Although some districts might be made more compact while still conforming to equal population and Voting Rights Act requirements relating to racial minorities, the map shows *on its face* that the districts are completely contiguous and are not so sprawling or serpentine that compactness was wholly ignored. It would be impossible for a drafter to “wholly

ignore” compactness and yet produce the map that results from H.B. 193. For that reason alone, Count I fails on the pleadings.

Appellants nonetheless recite specific flaws in the shapes of the districts, in particular the Fifth and Third. The shape of neither district is remarkable, especially considering that Missouri’s loss of one district required each survivor to expand and become less compact. LF 21.

As both the *Pearson* and *McClatchey* Appellants’ suggested “alternative” maps show, it has been impossible for at least 10 years to contain the entire Fifth District within Jackson County, Missouri, which is itself an urban, suburban, and rural mixture. LF 24; *McClatchey* LF 18. Some mixture of suburban and rural areas in neighboring regions had to be added. The *Pearson* and *McClatchey* Appellants would each affix a different mix of rural and suburban areas. That the General Assembly chose to add the southern extremity of suburban Clay County, just to the north, and primarily rural areas in three counties along the Missouri River does not establish a complete disregard for compactness. LF 21. As the Solicitor General noted in oral argument below, those areas themselves share much in common. Tr. 10-11.² Indeed, the Missouri River counties previously

² Appellants note the Solicitor General’s remark that District 5 was “problematic.” Br. 36. He concluded, however, that it was “not so problematic as to be a basis for defeating the entire plan.” (Tr. 17). *See also Preisler*, 528 S.W.2d at 427 (upholding statewide plan even after finding two districts were not just

formed the northwestern section of the Fourth District, which cradles the Fifth to the south and east. *McClatchey* LF 17. These three counties may share more with Eastern Jackson County than Eastern Jackson County shares with the densely populated western half of the county. While a suburban section of north-central Jackson County is attached to a suburban section of the neighboring Sixth, the eastern and western portions of the Fifth are still contiguous via a broad band of southern Jackson County which, like the rest of the district, is a mixture of suburban and rural. *McClatchey* LF 16. All in all, the Fifth is still the third-smallest district in Missouri. While more compact districts could be drawn, neither the Fifth District in isolation nor the state as a whole can be said to be “wholly” noncompact.

District Three is the outermost of three districts occupying the St. Louis area and East Central Missouri. LF 21. Out of its far eastern end are carved two very compact districts, One and Two, which correspond to the heart of the St. Louis area and sit in a forty-mile eastward bulge created by the Mississippi River. *Id.* While this carve-out means that District Three contains small sections north

“problematic,” but actually failed the compactness requirement). Appellants halfheartedly claim that because the Kansas City metropolitan area is Missouri’s second-largest, some unarticulated chain of consequences requires that the entire plan be judicially re-legislated. Br. 36. Appellants drop this argument by failing to brief (much less plead in their Petition) how or why this is so.

and south of One and Two which are also part of the bulge, District Three clearly consists primarily of one large mass and cannot be said to be “wholly” noncompact. *Id.*

Recognizing that a shape-based analysis will not fare well under this Court’s “wholly ignored” standard, Appellants create arbitrary “communities of interest” that they say must remain undivided in districting. Br. 36. Appellants cite no constitutional provision or case which requires congressional districts to identify, define, and build around “communities of interest.” *Id.* Indeed, after several rounds of briefing and oral argument, Appellants have still failed to provide a definition or test for isolating and scrutinizing the General Assembly’s exercise of discretion regarding such “communities,” even if they exist. While shape-based compactness may be an objective standard that lends some form and predictability to an underlying preference for keeping “likes with likes,” it is not an invitation to litigate social scientists’ views regarding Missouri’s “communities.” Some Missourian’s “community of interest” will always be divided.

Finally, Appellants conclusorily state that H.B. 193 was passed for “wholly partisan purposes” or “partisan ends.” Br. 35. Even if this were a well-pled fact, allegations of overwhelming partisan intent are irrelevant to the question of whether that intent *in fact resulted in a map which shows compactness was not “wholly ignored.”* Intentions to be “wholly partisan” and to observe compactness

can and often do co-exist.³ Indeed, as suggested in the preceding footnote, they may be correlated; the principle of “compactness” can hurt Democrats, who often live in high-density areas. But in that case, the Democrat/Plaintiffs’ problem would be that “compactness” fails to yield the political map they want; the problem is not with legislators who followed a facially neutral provision to advance “wholly partisan” ends.

Of course, the Court need not follow Appellants down this path, mixing communities of interest with partisan gerrymandering concerns in search of a hybrid compactness “analysis.” The Court can simply review the map attached to

³ Justice Kennedy explained how this is so:

...For example, if we were to demand that congressional districts take a particular shape, we could not assure the parties that this criterion, neutral enough on its face, would not in fact benefit one political party over another. See *Gaffney, supra*, at 753, 93 S.Ct. 2321 (“District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely”); ...M. Altman, Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders, 17 *Pol. Geography* 989, 1000–1006 (1998) (explaining that compactness standards help Republicans because Democrats are more likely to live in high density regions).

Vieth v. Jubelirer, 541 U.S. 267, 308-09 (2004) (some citations omitted).

the Petition and hold that the trial court correctly found that, while Appellants may disagree with H.B. 193, the principle of compactness was not “wholly ignored.”

**D. Appellants Continue to Misrepresent the Prior Holdings of this
Court and the General State of Missouri Redistricting Law**

The first ten pages of Appellants’ Point I (Br. 23-34) include extended discussion *not* of the ostensible subject of Point I—compactness—but of “partisan gerrymandering.” This discussion has little relevance to Count I, Appellants’ “compactness” claim.⁴ As Respondents show in Section I.C.1, *supra*, the three *Preisler* cases—not cases on equal population requirements or voter qualifications—control the “compactness” analysis. For a century, this Court’s standard of review has remained “wholly ignored.”

Later in Point I, however, Appellants return to legal argument about “compactness” and attempt to recast this Court’s decision in *Preisler v. Kirkpatrick*. See Br. 37. *Kirkpatrick*, they say, stands for some searching level of review that goes by the name, “substantial compliance.” *Id.*

Appellants are wrong. In *Kirkpatrick*, this Court surveyed every Missouri case prior to 1975 and concluded: “It is only when constitutional limitations

⁴ Even on the question of partisan gerrymandering claims, Appellants’ analysis and representations about the holdings of specific cases are incorrect and deeply flawed in many ways. Respondents address those arguments where they are actually relevant, in Points II and III.

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.” *Kirkpatrick*, 528 S.W.2d at 425. Driving the point home, the Court cited a “leading” Wisconsin case which used an almost identically worded standard: “utterly ignore and disregard the rule of the constitution.” *Id.* (citing *State ex rel. Lamb v. Cunningham*, 53 N.W. 35, 55 (Wis. 1892)).

Appellants nonetheless claim that because the Court just after these holdings remarked that the redistricting commission’s plan was “within acceptable limits of compactness” and “substantially compl[ied] with the compactness requirement...” it must have overruled its prior case decisions and authorized a new, more searching inquiry. There are several problems with Appellants’ argument.

First, Appellants take these words out of context and assign them new meanings which are unsupported by the surrounding opinion. The quoted phrases simply refer back to the “limits of compactness” and the “compactness requirement” the Court had just finished defining after surveying several decades of Missouri law. That “requirement,” and those “limits,” were nothing more than the “wholly ignored” standard that the Court had just cited and then, its own words, held out as the applicable standard. *Kirkpatrick*, 528 S.W.2d at 425.

Second, if this Court had overruled the decades of prior precedent it had just cited favorably and paraphrased in its own words, one would have expected some recognition of this fact, accompanied by reasons for the departure and an

explanation of how the new standard (whatever it was) altered the old. This Court's opinion otherwise provides a detailed explanation of law and fact, so there is no reason to believe that it was silent on a major change in the law.

Indeed, the *Kirkpatrick* dissent attacked the majority opinion as allowing districts "even if [they] look like an elongated 'S' or a twisted shoestring and are so lacking in compactness that they do not meet 'anybody's standards of compactness.'" 528 S.W.2d at 436. The dissent also cited one of this Court's first redistricting cases to support its position, even though that case applied the "total disregard" standard. *Id.* (citing *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40, 62 (1912)). In short, the long and vigorous dissent, which cited the same prior case law relied upon by the majority, dropped no hint that a new standard had been fashioned.

Third, as the dissent implicitly suggested, the majority itself clearly employed the very permissive "wholly disregarded" standard. Even though it found that two districts were not compact, this Court found that the commission's plan as a whole passed muster. *Kirkpatrick*, 528 S.W.2d at 426.

Finally, Appellants briefly suggest that *Kirkpatrick* created a brand new two-part compactness test that is both subjective and objective. The "subjective" element, Appellants claim, is one of honesty and "good faith." Br. 38-39. But strangely, in the very next paragraph, Appellants complain that a "subjective" test is "impossible to apply" because one will never know (and under the Speech and Debate Clause, one *can* never know) exactly what each legislator was thinking or

hoping for when casting his or her vote. Ultimately, Appellants' reading of *Kirkpatrick* to create a multi-pronged test is strained and incoherent. The test is simply whether the end result of the legislature's discretion shows that the legislature had to have "wholly disregarded" compactness. *Kirkpatrick*, 528 S.W.2d at 425. To make this determination, a reviewing court can simply review the well-pled facts: a map showing the geographical districts created by the challenged legislation.

E. Conclusion

Like the map in *Kirkpatrick*, the map resulting from H.B. 193 shows that when all of Missouri's districts were stretched to make up for a lost seat in Congress, "compactness" was not "wholly disregarded." The trial court was correct in dismissing Appellants' compactness claim, Count I. Appellants' Point I must be denied.

II. THE TRIAL COURT PROPERLY FOUND THAT COUNTS II AND IV ARE NON-JUSTICIABLE AND NON-VIABLE BECAUSE THEY PRESENT A POLITICAL QUESTION THAT CANNOT BE RESOLVED BY CLEAR, NON-ARBITRARY, AND JUDICIALLY MANAGEABLE STANDARDS, AND BECAUSE THERE IS NO RIGHT TO PROPORTIONAL PARTISAN REPRESENTATION (APPELLANTS' POINTS II AND IV)

A. Introduction: The Separation of Powers and Our Constitutional Structure Severely Limit Partisan Gerrymandering Claims

“Vote dilution” partisan gerrymandering claims, unlike Voting Rights Act and racial gerrymanders, are rare and almost always fail. *See, e.g., Radogno v. Ill. State Bd. of Elections*, 2011 WL 5868225 (N.D. Ill. Nov. 22, 2011) (reviewing the last 25 years of authority and holding that “political gerrymandering claims remain justiciable in principle but are currently ‘unsolvable’ based on the absence of any workable standard for addressing them”); *Comm. for a Fair & Balanced Map v. Ill. State Bd. of Elections (“CFBM”)* 2011 WL 6318960 (N.D.Ill. Dec. 15, 2011) (“[Plaintiff’s] effects test simply doesn’t provide a workable standard to determine when partisan gerrymandering has become unconstitutionally *excessive*.”)

Appellants’ claims⁵ are no different. Appellants supply no good reason for Missouri’s courts to jettison long-standing precedent, disregard the last quarter

⁵ Respondents treat Points II and IV, and Counts II and IV, together. While pled separately, they seek the same relief on the same vote dilution/partisan gerrymander theory. Appellants do not argue that different standards or law apply to each count, and because they both allege harm based on the “weight” of a group’s votes when compared to another group, the two counts are really two ways of stating the same equal protection/fundamental rights claim.

century of federal authority,⁶ and forge a new right for Missouri party members to have the state's congressional districts judicially legislated so that their party's number of seats in Congress matches some benchmark poll or election result.

Even after extensive amendments and successive rounds of briefing and oral argument, Appellants refuse to bring their theories up to date. For example, Appellants still maintain that political calculations are impermissible in redistricting, that this triggers strict scrutiny, and that because politics is not a

⁶ See *Davis v. Bandemer*, 478 U.S. 109 (1986) (holding that partisan gerrymander claims are justiciable, failing to state what standard can be used for resolving them, and holding that under any standard, claims based on proportional representation fail to state a claim); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (holding that the plurality "standard" from *Bandemer* and the standards proposed by the plaintiffs and dissenters in *Vieth* were all unworkable, holding that no workable standard had yet been found, and dismissing the claim); *League of United Latin American Citizens v. Perry* ("LULAC"), 548 U.S. 399, 413-414 (2006) (recognizing that the Court's disagreement in *Bandemer* about what standard makes partisan gerrymandering cases justiciable "persists," and finding that the plaintiffs failed to "offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.").

legitimate state interest, partisan gerrymandering fails any level of scrutiny. Br. 49-52. This circular logic simply finds no support in the law.

Finally, perhaps belatedly encountering negative federal authority, Appellants have responded (below and now in this Court) by seriously mischaracterizing this Court's prior holdings. Appellants argue that Missouri has somehow adopted an equal protection/vote dilution jurisprudence that contradicts all recent guidance from the United States Supreme Court. At each turn, Appellants stray farther from the law and venture farther outside the acceptable bounds of judicial intervention in the legislative and political process.

This Court should not follow Appellants on their journey into a new era of judicial oversight of politics. Following the trial court, it should find that Appellants' Counts II through IV fail. First, they present non-justiciable political questions. Second, they present a vote-dilution theory—the lack of statewide proportional representation for one of the two major parties—that was rejected long ago by the United States Supreme Court and has never been recognized in Missouri.

B. Appellants' Partisan Gerrymandering Claim Presents a Non-Judicially Administrable and Manageable Standard for Resolving Their Claims In Order to Warrant Judicial Intervention

1. Partisan Gerrymandering Claimants Must Plead a Judicially Administrable and Manageable Standard for Resolving Their Claims In Order to Warrant Judicial Intervention

A partisan gerrymandering claim asserts that voters of a political party have been improperly grouped or divided into districts, leading to an overall decrease in the number of legislators elected by that party and, potentially, the figurative “dilution” of the vote of each party member participating in the election. *See generally Bandemer*, 478 U.S. at 127.

However, partisan considerations are also inevitable and are a traditional and constitutionally acceptable districting principle. *Vieth*, 541 U.S. 286-288 (plurality); *id.* at 313 (Justice Kennedy’s concurrence). The question, therefore, is not whether there has been gerrymandering, but when (and how to measure when) “too much” gerrymandering has occurred, unacceptably burdening a political group’s right to vote in comparison to opposing groups. *See Vieth*, 541 U.S. at 316 (“Excessiveness is not easily determined.”) (controlling concurrence by Justice Kennedy); *Radogno*, 2011 WL 5868225 at *2.

Underlying the Court’s demand for a standard and refusal to entertain these claims has been the political question doctrine (and therefore, the separation of powers). *Vieth*, 541 U.S. at 277-278. Because partisan motivations are

impermissible only in excess, the cases turn on identifying a standard that will allow courts to even-handedly referee the recurring political fouls alleged by political interest groups in each cycle; without such a standard, inconsistent results are bound to occur from case to case, raising suspicions that the judiciary is also playing politics. *Id.* at 307-308.

It is quite possible that no workable standard exists. Although a majority of the U.S. Supreme Court has not yet concluded that *all* partisan gerrymandering claims are *always* nonjusticiable, in the last quarter century, every claim to have reached the Court has been rejected for failing to state a claim or for failing to present a judicially manageable and administrable standard for resolving the plaintiff's particular grievance. *See Radogno*, 2011 WL 5868225 at *3 (cataloguing various standards that have been proposed, *all of which* have been rejected by the Supreme Court). A majority has never adopted a standard; indeed, the only standard to attract even a transient plurality, the vague test outlined in *Bandemer*, was later rejected in *Vieth* as unworkable. *Id.* To the extent Appellants claim otherwise (Br. 44-45) they misread the law.

After all of this, a reader of the Court's opinions could be forgiven for agreeing with *Vieth's* four-judge plurality that no such standard can emerge, meaning that all partisan gerrymandering claims are nonjusticiable political questions. Perhaps the exercise is futile because, if politics are a permissible part of a historically and unavoidably political process, judges "risk assuming political,

not legal responsibility” in trying to decide when a particular party has crossed the invisible line. *Vieth*, 541 U.S. at 307 (Kennedy concurrence).

However, the current state of the law is that plaintiffs still have the opportunity to pull Excalibur from Merlin’s stone and be the first to identify and articulate a manageable standard. *Radogno*, 2011 WL 5868225 at *3. It has not happened in twenty-five years, and as discussed above, most recently failed in *Radogno* and *CFBM*, two cases in which Illinois Republicans brought claims that are mirror-images of Appellants.’ As discussed below, Plaintiffs’ pleading fails to measure up even to the arguments raised by the Illinois Republicans.

2. Appellants Have Not Pled a Justiciable Claim

As a threshold matter, Appellants have not explicitly pled or briefed (Br. 43-46) any particular standard that articulates what sort of partisan “intent” and “effects” must be established. *See Radogno*, 2011 WL 5868225 (collecting tests rejected by the Supreme Court and summarizing their “intent” and “effects” prongs). Nor can their well-pled facts and legal arguments be strung together into any sort of test or standard that, as summarized in *Radogno*, has not already been rejected by the Supreme Court in *Bandemer*, *Vieth*, or *LULAC*.

Giving Appellants the benefit of all reasonable doubts (and perhaps more), they have fact-pled that the General Assembly was motivated solely to hurt Democrats, and that H.B. 193 yielded only two “safe” Democrat seats when, based on polls or election results, they could clearly elect four if the districts were carefully drawn.

Such allegations would pass only the “sole intent” tests catalogued in *Radogno*’s graveyard of unworkable standards. But tests focusing solely on the “intent” of a legislature are not only unworkable because of the impossibility of judicially determining what motivations drove individual legislators, they are impermissible because plaintiffs must still “show a burden, as measured by a reliable standard, on [their] representational rights.” *LULAC*, 548 U.S. at 417-418; *Vieth*, 541 U.S. at 281 (even under *Bandemer*’s unworkable standard, a discriminatory effect is required).

Significantly, Appellants have never made any effort to plead or explain—here or below—how or why this Court should adopt a subjective test. Indeed, elsewhere (Br. 38-39), Appellants admit that a sole intent test would be “impossible to apply” and judicially unmanageable. Appellants’ rhetorical questions (“Is it sufficient if one legislator, or a few, considered compactness?”) say it best. *Id.* Further, as Appellants point out, Missouri’s Speech and Debate Clause will frequently prevent judicial inquiry into individual legislators’ thoughts and motivations. *Id.* Ultimately, sole intent tests are too subjective, are unreliable, ignore the requirement of showing unconstitutional “effects,” and simply cannot work.

This leaves the “effects” prong of Appellants’ pleading: that Democrats should be able to elect four representatives, but can only safely elect two under H.B. 193. This allegation matches up with none of the failed tests catalogued in *Radogno* and cursorily rattled off in Appellants’ brief. Br. 47. In fact, *Bandemer*

and *Vieth* rejected proportional representation-based “effects” claims precisely like Appellants.’ See *Bandemer*, 478 U.S. at 130-132 (no right for Democrats to have number of representatives equal statewide poll or election percentage); *Vieth*, 541 U.S. at 281 (“Relief could not be based merely upon the fact that a group of persons banded together for political purposes had failed to achieve representation commensurate with its numbers, or that the apportionment scheme made its winning of elections more difficult.”).

Appellants’ other proposed tests (Br. 44) are vague or circular. A test of “whether the challenged action contravenes a constitutional mandate” begs the question. *Id.* “Whether a challenged action has the purpose and/or effect of infringing constitutional rights” at least mentions the words “purpose” and “effect,” but only announces the starting point for the problem; it does not explain what standard should be used to measure the intent and effect. Compare *Radogno*, 2011 WL 5868225 at *3-4 (discussing more detailed tests). Finally, Appellants state that the Court can simply apply “rational basis” review or “strict scrutiny.” Br. 44. Of course, this is not the kind of “test” that *Bandemer* and its progeny have in mind, and puts the cart before the constitutional horse. Constitutional scrutiny is applied *only after* plaintiffs make a “threshold showing,” by some reliable standard, that their rights were violated through vote dilution. *Bandemer*, 478 U.S. at 143 (plaintiff’s claim should be dismissed, and no scrutiny was applied, because plaintiff had not made threshold showing of vote dilution).

Appellants conclude by protesting that they have “clearly” (Br. 47) proposed clear, non-arbitrary, and judicially manageable standards. But in comparison to the plaintiffs in *Radogno* and *CFBM*, they have done almost nothing (other than to block-quote the very standards rejected in those cases). Appellants next suggest that requiring plaintiffs to devise and plead a workable legal standard is unnecessary, as Justice Scalia agreed in the portion of his *Vieth* plurality opinion Appellants cite. Br. 47. But Justice Scalia’s point was not that plaintiffs should be excused from onerous pleading hurdles, it was that the *task itself is pointless because no workable standard has ever been, or can ever be, devised*. *Vieth*, 541 U.S. at 301 (arguing that claim should be disposed of as nonjusticiable rather than for failure to state a claim). As discussed above, that was the holding of a plurality of the Court, and a majority rejected even the *Bandemer* standard.

In conclusion, after multiple attempts, Appellants have failed to articulate any standard that can be generally applied and used to adjudicate their particular case. Although, as discussed below, they also have failed to state a claim, their inability to articulate any standard to save their claim from the political question doctrine is sufficient to require dismissal.

3. Missouri Should Follow Federal Courts’ Reasoning

Two additional points deserve response. First, Appellants continue to suggest—despite the fact that they rely upon federal redistricting case law throughout their argument—that the rationale of the U.S. Supreme Court or other

persuasive federal authority has “little relevance” in Missouri. Br. 44. Second, Appellants misrepresent the holdings of prior opinions of this Court, mistakenly suggesting that it has previously considered partisan gerrymandering cases or has adopted some jurisprudence that contravenes the federal treatment. Appellants’ first argument is undeveloped but wrong; Appellants’ second argument misstates the law.

**a. Federal and Missouri Law Are and Should Be
Congruent**

First, Missouri courts respect the separation of powers and follow the political question doctrine at least as faithfully as their federal counterparts. Missouri has long recognized that “[t]he political question doctrine establishes a limitation on the authority of the judiciary to resolve issues, decidedly political in nature, that are properly left to the legislature.” *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 863-64 (Mo. App. 1985). If a case involves “resolution of a political question, the matter is immune from judicial review.” *Id.* Missouri uses the federal courts’ six-factor test (in descending order of importance) for applying the doctrine:

“[p]rominent on the surface of any case held to involve a political question [there] is found [1] a textually demonstrable constitutional commitment of the issue to a coordinate political department; or [2] a lack of judicially discoverable and manageable standards for resolving it; or [3] the impossibility of deciding without an initial

policy determination of a kind clearly for nonjudicial discretion; or [4] the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or [5] an unusual need for unquestioning adherence to a political decision already made; or [6] the potentiality of embarrassment from multifarious pronouncements by various departments on one question.” *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962).

Bennett, 698 S.W.2d at 864 (numbering added to highlight factors).

Significantly, Missouri relies on the seminal U.S. Supreme Court decision of *Baker v. Carr*—a case which also formed the starting point for the justiciability analysis in *Bandemer* and *Vieth*. Under the first *Baker* factor, the Missouri Constitution, like the U.S. Constitution, assigns the task of congressional districting exclusively to the state legislature. Further, the people of Missouri saw fit to add to their constitution Article II, which unlike its federal counterpart, expressly requires that no department “shall exercise any power properly belonging to either of the others” unless the constitution “expressly” directs otherwise.

Finally, even where the Missouri Constitution expressly assigns historically political functions to the Supreme Court, this Court acts only under clear, non-arbitrary, and judicially manageable standards. *See, e.g., Matter of Impeachment of Moriarty*, 902 S.W.2d 273, 277 (Mo. banc 1994) (“Whatever the constitutional

reason for our [impeachment] responsibility, however, this Court must assume that our role is as a court, not as a substitute political body.”) For all of these reasons, there is no reason to think that Missouri courts would be any more eager to venture into the political thicket of legislative redistricting than their federal counterparts.

Appellants argue that the Missouri Constitution gives broader and more specific protection to the right to vote than the U.S. Constitution. Br. 46 (citing *Weinschenk v. State*, 203 S.W.3d 201 (Mo. banc 2006)). But Appellants never articulate why this should convince this Court to fashion a completely separate jurisprudence, so that plaintiffs who (like the *Pearson* Appellants, but unlike the *McClatchey* Appellants) leave the Fourteenth Amendment out of their pleadings can wield a completely different set of rules in trying to reshape Missouri’s U.S. Congressional Districts. In fact, there is no reason for Missouri to strike out on its own.

The right to vote is equally “fundamental” under Missouri and federal law. *Weinschenk*, 203 S.W.3d at 211 (“Federal courts also have consistently held that the right to vote is **equally fundamental** under the United States Constitution) (citing federal case law) (emphasis added). *Weinschenk* involved a voter ID requirement—a qualification for voting—and at the federal level, those are “left to legislative determination, not constitutionally enshrined, as they are in Missouri.” *Weinschenk*, 203 S.W.3d at 211-212. In this unique context, there was good reason for *Weinschenk* to consider Missouri’s special voter qualification

protections. But ultimately, even *Weinschenk* applied the traditional two-part federal equal protection analysis to the plaintiffs' state law claims in that case, which dealt with an area in which the Missouri Constitution was arguably more specific than its federal counterpart. *Id.* at 210-211.

In the present case, in contrast, no qualification for voting is at issue. Appellants are bringing a "partisan gerrymander" claim. Appellants have never explained how the specific voting "right" at issue—the right of a plaintiff-defined political group to "proportional representation"—has any more basis in the text of the Missouri than the U.S. Constitution. Of course, that right is of Appellants' own invention, as "...the Constitution contains no such principle." *Vieth*, 541 U.S. at 288.

Nor do Appellants identify any authority whatsoever that holds or suggests, contrary to *Weinschenk*, that equal protection analysis under Missouri law departs from federal equal protection analysis. Finally, Appellants never explain why, for partisan gerrymander claims, Missouri should apply the critical first two factors of the *Baker* "political question" test—constitutional dedication of the question to a coordinate branch of government, and the need for judicially discoverable and manageable standards—and reach a result opposite from their federal counterparts. This Court should follow the persuasive authority of the U.S. Supreme Court and the federal courts, which have closely scrutinized the congressional "partisan gerrymandering" issue three times in the last quarter century.

**b. Missouri Courts Have Not Adjudicated or Adopted
Appellants' So-Called "Principles" of Partisan
Gerrymandering Law**

In a large section of their "Point I," Appellants paint a false picture of what they call Missouri's "partisan gerrymandering" law. Br. 28-34, 43. First, in a vain effort to find Missouri "partisan gerrymandering" cases, they seriously mischaracterize the holding of *Armentrout v. Schooler*, 409 S.W.2d 138 (Mo. 1966). Appellants claim *Armentrout* "points to three pertinent state constitutional provisions" which "significantly restrict...partisan gerrymandering." Br. 28. That is false. The words "partisan" and "gerrymander" appear nowhere in *Armentrout*, which had nothing to do with gerrymandering. The case was simply a reapportionment of Louisiana, Missouri's, four wards. The city admitted they had not been redistricted for 75 years and were grossly malapportioned by population. *Id.* at 141. The Court remedied this disparity by relying expressly on *both* the Missouri and federal equal protection clauses:

We conclude that the present districting... must be held unconstitutional **because it violates the equal protection of the laws clauses of the constitutions of the United States and the State of Missouri** and that [the] wards, must be altered and modified so as to include 'as near as may be,' or 'as nearly as is practicable,' ...the same number of inhabitants in each ward.

Armentrout, 409 S.W.2d at 144 (emphasis added).

Armentrout, in short, is a simple equal-population case; it is not a partisan gerrymandering case and does not stand for the principles Appellants assign it. No more helpful to Appellants is *Weinschenk* (Br. 29, 43) which, as discussed above, is a voter qualification case having nothing to say about whether partisan gerrymander cases are justiciable, and if so, what standards should be applied.

Next, Appellants' suggestion that the Missouri Constitution's compactness requirement was intended to combat "the gerrymander" does nothing to explain whether and how free-standing proportional representation/vote dilution claims, as opposed to compactness claims, should be adjudicated. Br. 29-30, 43, citing *Kirkpatrick*, 528 S.W.2d at 425. Indeed, it seems more likely that the compactness standard was meant to provide courts with an objective and judicially manageable test for remedying serious gerrymanders (albeit using a forgiving standard of review), sparing courts from having to answer political questions in the inherently standardless and probably impossible task of adjudicating free-standing vote dilution claims.

Next, Appellants seem to argue that because "vote dilution" violates the right to vote, and because all "partisan gerrymandering" claims rest on a "vote dilution" theory, then "partisan gerrymander" claims can be bootstrapped over the "right to vote" fence. Br. 29-31; 43. Appellants cite no case which actually uses such circular reasoning.

There is a dearth of authority for a simple reason: "vote dilution" means different things in different contexts. It is a vague way of describing a harm that,

under an equal protection theory, could apply to a wide range of cases. It can describe severe population mal-apportionment (the votes of people in heavy-population districts are “diluted”) and also, less directly, cases of racial gerrymandering (the votes of people of one race, which is an immutable and unchanging characteristic, count for less because of creative line-drawing). But each of the three cases are legally distinct.

First, population disparities directly violate the one-person, one-vote rule. Second, racial gerrymandering is flatly unconstitutional. The third case, partisan gerrymandering, is not *per se* unconstitutional because *politics can be considered*. *Vieth*, 541 U.S. at 285-86. This means that party-based districting *does not* inherently “dilute” votes:

...the fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation; not so for claims of racial gerrymandering. Finally, courts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which (like the Fourteenth Amendment obligation to refrain from racial discrimination) is clear; **whereas they are not justified in inferring a judicially enforceable constitutional obligation (the obligation not to apply *too much* partisanship in districting) which is both dubious and severely unmanageable.**

For these reasons, to the extent that our racial gerrymandering cases represent a model of discernible and manageable standards, they provide no comfort here.

Vieth v. Jubelirer, 541 U.S. 267, 285-86 (2004) (part of 4-justice plurality opinion whose reasoning was approved by Justice Kennedy) (emphasis added).⁷

Finally, Appellants return to case law in another attempt to show that Missouri and other courts “commonly” enforce anti-gerrymandering provisions. Br. 31-34; 43. *In fact, Appellants fail to direct this Court to any case in which a Missouri court has considered or articulated the elements of a partisan gerrymandering claim.* Nor do Appellants identify any Missouri case which departs from recent U.S. Supreme Court or other federal decisions by even so much as suggesting a workable test for avoiding the political question doctrine and actually adjudicating such claims.

⁷ See Justice Kennedy’s concurrence in the judgment:

That courts can grant relief in districting cases where race is involved does not answer our need for fairness principles here. Those controversies implicate a different inquiry. They involve sorting permissible classifications in the redistricting context from impermissible ones. Race is an impermissible classification... Politics is quite a different matter...

Vieth, 541 U.S. at 307 (emphasis added, internal citations omitted).

Instead, Appellants merely cite “compactness” decisions which decide claims brought under specific “compactness” provisions of the Missouri Constitution (analogous to Count I of the Petition, which cites Article III, Section 45). They are not partisan gerrymander/vote dilution cases. But even then (as Appellants fail to disclose) those courts hewed to the principle that judicial intervention in the inherently political process of districting is limited and can proceed only under well-defined, objective, and forgiving standards; each case, in fact, uniformly applied the “wholly ignored” standard. Indeed, it was actually *Barrett*, a 1912 case Appellants suggest justifies some more searching level of review, that first articulated the “wholly ignored” standard. *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40, 62 (1912) (collecting and citing authority from other states).

Just as fruitless is Appellants’ promise to show that the “highest courts of other states routinely have addressed challenges to gerrymandered redistricting plans under their state constitutions.” Br. 22. Appellants claim this is “commonplace.” *Id.* But like the Missouri cases, Appellants’ out-of-state cases involve constitutional *compactness*, not partisan gerrymandering. Br. 33-34. None of these cases remotely suggest, let alone support, the proposition that a claim for partisan gerrymandering is justiciable under some specific standard.

In sum, Appellants have not only failed to identify any workable test for adjudicating their claims, they have not kept their promise to show that Missouri courts have “commonly” (or ever) announced some standard or set of principles

that avoids the political question doctrine or departs from the guidance of the U.S. Supreme Court. Appellants' claims present political questions and should be dismissed.

C. Even if Appellants Had Presented a Judicially Administrable and Manageable Standard for Their Claim, It Would Fail Because Citizens Have No Right to Proportional Partisan Representation in Congress

Even if Appellants' Counts II and IV were justiciable, they fail to state a claim because there is no right to proportional representation: members of political groups have no right to insist that their groups hold legislative seats in proportion to polling numbers or their share of the statewide vote in other races. As a Court majority held in *Vieth*:

Deny it as appellants may... this standard rests upon the principle that groups (or at least political-action groups) have a right to proportional representation. But the Constitution contains no such principle. It guarantees equal protection of the law to persons, not equal representation in government to equivalently sized groups. It nowhere says that farmers or urban dwellers, Christian fundamentalists or Jews, Republicans or Democrats, must be accorded political strength proportionate to their numbers.

Id., 541 U.S. at 288. See also *Bandemer*, 478 U.S. at 130 (“Our cases... clearly foreclose any claim that the Constitution requires proportional representation or that legislatures that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.”).

While political scientists may debate whether democracies should require proportional representation for parties (or in the case of the *McClatchey* Appellants, subgroups of parties), the *Bandemer* court explained that our constitutional system of district-based, winner-take-all elections requires this result:

If all or most of the districts are competitive-defined by the District Court in this case as districts in which the anticipated split in the party vote is within the range of 45% to 55%-even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature. This consequence, however, is inherent in winner-take-all, district-based elections, and we cannot hold that such a reapportionment law would violate the Equal Protection Clause because the voters in the losing party do not have representation in the legislature in proportion to the statewide vote received by their party candidates.

Id., 541 U.S. at 288.

Ruling otherwise would open the courts to litigation from *any* group claiming that it had the right to one seat. Amazingly, Appellants seem to embrace this concept, admitting that their “gerrymandering” theory extends to subgroups such as “residents of a particular region” (like “Mid-Missouri”), who could claim the right to a seat. Br. 25. Appellants even suggest that gerrymandering claims could be brought by subgroups *within* parties—like the *McClatchey* Appellants—who claim a right to have a district drawn so that their favored candidates, not the candidates favored by party leadership, are elected. *Id.* If all of these political, geographical, and cultural groups have cross-cutting rights to proportional representation, our existing federal system of congressional districting and elections is unworkable.

Yet this “proportional representation” theory is exactly what Appellants plead. Appellants’ only well-pled allegation about the *effect* of H.B. 193 is that statewide results from other elections show that 50% of Missouri voters are Democrats, but only two (instead of four) of eight seats are safe Democrat seats, causing a “dilution” of Democrats’ votes. When the *Bandemer* plaintiffs asserted the same theory, of course, the Court held their claim “justiciable” (albeit under a plurality standard that was later rejected in *Vieth*), but concluded that a “proportional representation” theory cannot satisfy the threshold requirement of dilution, or injury. *Id.* at 143. This Court should similarly find that Appellants’ proportional representation-based “dilution” is not a constitutional injury, and that Appellants fail to state a claim.

The Court should not be distracted by Appellants' extended and unnecessary digression into levels of scrutiny. As *Bandemer* demonstrates, plaintiffs do not advance to "Go" and collect \$200 simply by alleging vote dilution; courts only apply scrutiny *after* plaintiffs successfully demonstrate that partisan gerrymandering crossed an objective line under some judicially manageable test, causing a constitutional injury. *Id.*, 478 U.S. at 143. As discussed above, Appellants have failed to establish any such standard, and their alleged "dilution" injury, a failure of proportional representation, does not establish a constitutional violation. There is no need to reach scrutiny.⁸

⁸ It should be noted, however, that Appellants' discussion of scrutiny is seriously flawed. Appellants mistakenly claim that partisan gerrymandering "conventionally receives heightened constitutional scrutiny." Br. 49. But as the plurality in *Bush v. Vera* observed, "[w]e have not subjected political gerrymandering to strict scrutiny." *Id.*, 517 U.S. 952, 964 (1996). Although Appellants may have missed *Vera*, none of their cited cases come close to standing for their contrary assertion. *Gomillion* is not a partisan gerrymandering case and does not discuss levels of scrutiny, and *Davis* never applied scrutiny because the plaintiffs had failed to make the "threshold showing of discriminatory vote dilution." *Id.*, 478 U.S. at 143. It is hard to know why Appellants represent to this Court that Missouri's *Armentrout* decision "expressly recognized and adopted these principles." Br. 50. As discussed above, *Armentrout* does not even contain

In conclusion, Counts II and IV not only fail to raise justiciable questions, they would also fail to state claims under any conceivable standard. Counts II and IV were properly dismissed, and Appellants' Points II and IV should be denied.

III. THE TRIAL COURT PROPERLY FOUND THAT COUNT III IS NON-JUSTICIABLE BECAUSE IT PRESENTS A POLITICAL QUESTION, AND IS NON-VIABLE UNDER ANY CONCEIVABLE STANDARD (APPELLANTS' POINT III)

Appellants' efforts to impart substance to their Count III ("good of the whole") are unavailing. First, Appellants assign yet another phantom holding to *Armentrout*, claiming that it "expressly relied on the 'good of the whole' language." Br. 53. That is wrong. As discussed above, the court *exclusively* relied on the state and federal equal protection clauses in ordering Louisiana, Missouri, to be reapportioned into wards of equal population. *Armentrout*, 409 S.W.2d at 144 ("We conclude that the present districting of the City of Louisiana must be held unconstitutional **because it violates the equal protection of the laws clauses of the constitutions of the United States and the State of Missouri.**") (emphasis added). The Court then required contiguity and compactness, citing *only* Article III, Sections 2 and 7. *Id.*

the words "partisan" or "gerrymander" and makes no holding or stray remark on such cases.

The “good of the whole” provision played no role in the Court’s analysis. The Court referenced it precisely once with no discussion, remarking only that it was one of three provisions that “are from the Constitution of Missouri.” *Id.* at 143. Further, it was referenced *not* first, as Appellants pointedly but mistakenly claim, but *after* the Court’s citation to the federal equal protection clause—the provision the Court *did* expressly state formed the basis of its decision. Appellants conclude their serial mischaracterizations of *Armentrout* by stating that the floating constitutional provision must have had *some* “independent substantive meaning,” but then fail to seize the moment and say what it is. Br. 53-54. This silence speaks louder than any of Appellants’ arguments.

Appellants next rely on a quote from Justice Stevens’ dissent in *Vieth*, a recent U.S. Supreme Court decision which they elsewhere claim (Br. 44) has “little relevance” in Missouri. Br. 54. But surely Justice Stevens’ coincidental utterance of the phrase “expense of the public good” is not evidence of the meaning of the phrase “good of the whole” in Article I of the Missouri Constitution, which was drafted long before *Vieth*. Nor do Appellants try to explain how Justice Stevens’ turn of phrase adds substance or judicially manageable standards to Sections 1 or 2 of Article I.

Indeed, even after laboriously attempting to distinguish a few of this Court’s prior opinions (which cited similarly vague phrases and have refused to grant specific remedies), Appellants *still* do not state what “good of the whole” means for them in this case. Nor do Appellants explain how it adds anything to

their claim other than the provisions they have already pled. Tellingly, at footnote 20, Appellants seem to suggest that the elements are the same as for all of their other claims. This is a sure sign that Count III has no independent substantive meaning.

Count III was correctly dismissed as non-justiciable. In the alternative, because the only “effects” Appellants have pled for *any* count relate to a lack of proportional representation, it was correctly dismissed for failure to state a claim. *See* Section II.C. Point III should be denied.

IV. APPELLANTS’ UNPRECEDENTED REQUEST FOR REMAND TO A “NON-PARTISAN” CIRCUIT JUDGE BASED ON NON-RECORD “POLITICAL FACTS” IS AN ADMISSION OF THE POLITICAL AND JUDICIALLY UNRESOLVABLE NATURE OF THEIR CLAIMS

The culmination of Appellants’ argument is actually a page-long footnote appended to their one-sentence conclusion. Br. 61. Unwittingly exemplifying Justice Kennedy’s warning in *Vieth* that judicial intervention risks “assuming political... responsibility for a process that often produces ill will and distrust,” Appellants predict that *any elected Missouri trial judge’s ruling* could assume the “appearance of bias or impartiality” “[i]n light of the political aspect of this case.” Br. 61. This remarkable assertion, which doubles as both an admission and allegation, is troubling on many levels.

First, Appellants needlessly inject non-record evidence about the political disposition of both prior circuit judges, whom Appellants say ran for judicial office, respectively, as a Democrat and Republican. Br. 61. Appellants ask the Court to assume that these and other elected circuit judges—but not judges chosen by the Missouri Non-Partisan Court Plan—will at least appear to violate Rule 2.03 of this Court whenever they hear cases with a partisan or “political aspect.” *Id.*

Other than these judges’ election to office as required under the Missouri Constitution, Appellants point to no objective facts or record evidence to support the “impropriety” that appears—at least to them. Indeed, Appellants knew their non-record “facts” about Cole County circuit judges long before they made the strategic decision to file claims with a “political aspect” in that court on September 23, 2011. Compare *Buschardt v. Jones*, 998 S.W.2d 791 (Mo. App. W.D. 1999) (court made comments at final hearing about unwritten rules he applied in custody cases regarding cohabitation and sexual relationships outside of “lawful” marriage, and because it was then too late to object to evident partiality, issue could be raised for first time on appeal). Appellants’ showing falls so far short of *Buschardt*, their only cited case, that it is difficult to understand their motivation in calling the circuit judge—and all elected judges—into question.

But Appellants’ allegation is also an admission that the decision they are asking this Court to make is political, not judicial. Because they call for a political remedy—the creation of fewer Republican and more safe Democratic seats—based on no fixed, generally applicable legal standard, perhaps Appellants sense

that courts will in fact have to “assum[e] political responsibility” for finding in their favor. *Vieth*, 541 U.S. at 307 (Kennedy concurrence).

However, the answer to this problem is not, as Appellants plead, to simply shuffle the operation of the law deeper into the judicial black box, employing *ad hoc* assignment procedures to find the perfect, coolly “nonpartisan” judge who is immune from political pressure to deny Appellants their political remedies. Instead, this Court should look at the nature of the “problem” itself. As the Circuit Court noted and as Appellants admit, they have a political grievance that, on the well-pled facts, cannot be remedied by application of any established cause of action or objective, non-arbitrary, and judicially manageable standard. This Court should affirm the Circuit Court’s decision.

CONCLUSION

No further factual development is needed to conclude that Appellants’ two theories are fatally flawed. First, the map resulting from H.B. 193 shows that, while a few districts could perhaps have been compressed or shaved, no one could conclude that compactness was “wholly ignored.” This century-old, objective standard has survived the test of time because it minimizes judicial supervision of the legislature. In an inherently political process, that is a good thing.

Second, Appellants’ “partisan gerrymandering” theories are non-justiciable questions or, because they rely on the non-existent right of proportional representation for parties, fail to state a claim. Either ground independently

supports dismissal, but perhaps this Court will choose, like the U.S. Supreme Court over the past quarter century, to simply hold that Appellants' claim fails, reserving for another day the question of what makes a "partisan gerrymandering" claim justiciable.

Most importantly, by affirming and leaving the resolution of Appellants' partisan grievances to Missouri voters and the robust politicking of the election season, this Court will do much to maintain the separation of powers and preserve the integrity of our courts and legislature. Ultimately, no party to this case could ask for more.

Respectfully Submitted,

**GRAVES BARTLE MARCUS
& GARRETT LLC**



Todd P. Graves (Mo. 41319)

Edward D. Greim (Mo. 54034)

Clayton J. Callen (Mo. 59885)

1100 Main Street, Suite 2700

Kansas City, Missouri 64105

Tel: (816) 256-4144

edgreim@gbmglaw.com

Attorneys for Intervenor-Respondents

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 13,814 words.


Attorney

CERTIFICATE OF SERVICE

I hereby certify that on January 3, 2012, I filed a true and correct copy of this Brief and its Appendix via the Court's electronic filing system, which notified the following:

James R. Layton
SOLICITOR GENERAL
207 W. High Street
PO Box 899
Jefferson City, MO 65102-0899
James.Layton@ago.mo.gov
*Counsel for Secretary of State Carnahan and
Attorney General Koster*

Jamie Barker Landes
211 SE Grand Avenue
Suite A
Lee's Summit, MO 64063
jlandes@gmail.com
Counsel for McClatchey Appellants

Gerald P. Greiman
Frank Susman
Thomas W. Hayde
1 N. Brentwood Blvd.
Suite 1000
St. Louis, MO 63105
ggreiman@spencerfane.com
fsusman@spencerfane.com
thayde@spencerfane.com

Keith A. Wenzel
308 E. High Street, Ste. 222
Jefferson City, MO 65101
(573) 634-8115 (telephone)
(573) 634-8140 (facsimile)
kwenzel@spencerfane.com

Counsel for Appellants

A handwritten signature in black ink, appearing to read "Edward D. Greim". The signature is fluid and cursive, with a long horizontal stroke at the end.

Edward D. Greim