IN THE SUPREME COURT OF MISSOURI

NO. SC92200

KENNETH PEARSON, et al.,
Appellants,
vs.
CHRIS KOSTER, et al.
Respondents.

On Appeal from the Circuit Court of Cole County, Missouri
The Honorable Daniel Green, Judge

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

Plaintiffs appeal to this Court from an Order and Judgment of the Cole County Circuit Court. The case involves a constitutional challenge, based solely on provisions of the Missouri Constitution, to the congressional redistricting plan adopted by the Missouri General Assembly in May 2011, as H.B. 193. Plaintiffs allege that the General Assembly's redistricting plan embodied in H.B. 193 reflects extreme partisan gerrymandering and violates multiple provisions of the Missouri Constitution, including Art. I, §§ 1, 2 and 25; Art. III, § 45; and Art. VIII, § 2.

Defendants filed motions to dismiss for failure to state a claim or, alternatively, motions for judgment on the pleadings. On December 12, 2011, the Cole County Circuit Court (Hon. Daniel Green) entered an Order and Judgment granting the motions and dismissing this case. On December 13, 2011, Plaintiffs filed a notice of appeal in the Cole County Circuit Court, appealing the Order and Judgment to this Court.

Because this action challenges the validity of a statute of this state, alleging that H.B. 193 violates multiple provisions of the Missouri Constitution, this Court has exclusive appellate jurisdiction of this case pursuant to Art. V, § 3 of the Missouri Constitution.

STATEMENT OF FACTS

I. FACTS ALLEGED IN PETITION

This case involves a state constitutional challenge to the congressional redistricting plan adopted by the Missouri General Assembly in May 2011, as H.B. 193. Plaintiffs appeal from an Order and Judgment of the Cole County Circuit Court (Hon. Daniel Green) granting judgment to Defendants on the pleadings or, alternatively, dismissing the case for failure to state a claim upon which relief can be granted. In light of the trial court's disposition of the case, the relevant facts are those set forth in the Petition – which must be taken as true and viewed in the light most favorable to Plaintiffs. The facts alleged in the Petition, as amended,[1] are summarized below.

A. Introduction

Plaintiffs, six Missouri citizens and registered voters residing in various areas of the State,[2] brought this action to challenge the validity of the congressional redistricting

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[1] Plaintiffs' filed their original Petition on September 23, 2011. (L.F. 5). On November 29, 2011, pursuant to leave of Court granted on November 28, 2011, Plaintiffs filed their First Amendment to Petition by Interlineation, which added certain language to ¶ 1 as well as a new Count IV. (L.F. 120-22).

[2] Plaintiffs are Kenneth Pearson, Phoebe Ottomeyer, Brian Murphy, Mildred Conner, Timothy Brown and Joan Bray. (L.F. 5-6).

plan adopted by the Missouri General Assembly in May 2011 over the Governor's veto.[3] (The legislature's redistricting plan, embodied in H.B. 193, is hereafter referred to as the "Map." The redistricting plan, in map form, is appended to the Petition as Exhibit 1, and also is included in the Appendix to this brief at A2.) (L.F. 5-6).

In drawing and adopting the Map, the General Assembly, currently dominated by the Republican party, utilized an overreaching process for wholly partisan purposes, and produced a Map designed solely to serve partisan ends, which will operate to the detriment of all who desire fair and legitimate districts for Missouri congressional elections through the next decade, including Democrats, Republicans and Independents. The Map violates the Missouri Constitution in multiple respects in that it creates districts which are not compact and contiguous – wholly ignoring and completely disregarding those requirements, denies plaintiffs equal rights and opportunity under the law, and reflects an exercise of governmental power for the benefit of a few, rather than for the good of the whole and the general welfare of the people. (L.F. 2, 120).

Further, the redistricting plan improperly dilutes the votes of Democrats and Independents, as compared with Republicans, and therefore burdens, impinges upon and violates their rights to vote as guaranteed by the Missouri Constitution. (L.F. 121-22).

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[3] Named as defendants were Chris Koster and Robin Carnahan in their official capacities as Missouri Attorney General and Secretary of State, respectively. (L.F. 7).

B. Congressional Redistricting Process

In February 2011, the United States Census Bureau released the results of the 2010 census, which reflected that over the preceding ten years, Missouri's population grew at a lower rate than that of many other states. As a result, Missouri will lose one congressional seat – dropping from nine seats to eight – in the United States House of Representatives to be elected in 2012, and in the succeeding elections of 2014, 2016, 2018 and 2020, until the next census is taken in 2020. (L.F. 7-8).

Art. III, § 45 of the Missouri Constitution provides that following certification of the census results, "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." Accordingly, in the first instance, it fell to the Missouri General Assembly to draw the new congressional districts that will first take effect for the 2012 election. (L.F. 8).

As of 2011, the Republican party held an overwhelming majority in both the Missouri Senate and House of Representatives, and the Republican leadership in each chamber appointed a committee on redistricting, both of which were dominated by Republican members. (*Id.*) In February and March 2011, the Senate and House redistricting committees held a series of hearings around Missouri, to hear testimony from members of the public as to how the congressional redistricting map should be drawn. The bipartisan testimony presented at the hearings emphasized a number of generally accepted redistricting principles, including the importance of keeping together

long-established geographic regions and communities of interest based on social, cultural, ethnic and economic similarities, and the undesirability of splitting regions and political subdivisions, such as counties, among multiple districts. (*Id.*).

The point also was made at the hearings that when political parties work to draw safe seats for their incumbents, the result can be excessive partisanship and a loss of voter control over the political process; and voters would have more say over the process if districts were drawn to be more competitive. (*Id.*).

C. Adoption of Redistricting Map

In April 2011, both houses of the Republican-dominated General Assembly adopted, by a highly partisan vote in each chamber, the above-referenced congressional redistricting Map, which largely ignored the principles and testimony adduced at the redistricting committee hearings. (L.F. 9). The Map has the clear purpose and effect of protecting the interests of certain incumbents, and otherwise promoting Republican interests, by creating six safe Republican districts among the eight congressional seats allocated to Missouri. The Map achieves its purposes through extreme instances of gerrymandering, among other constitutional deficiencies. (For an explanation and illustration of the meaning and origin of the term "gerrymandering," *see* Exhibit 2 attached to the Petition [excerpt from http://en.wikipedia.org/wiki/Gerrymandering, last visited Sept. 23, 2011].) (*Id.*).

One highly egregious aspect of the Map is its treatment of mid-Missouri – the area encompassing Cole County, Boone County and the Lake of the Ozarks – which includes the cities of Columbia and Jefferson City. Mid-Missouri generally has been viewed as

one geographic region and the areas comprising it have highly similar interests. Accordingly, the principle of keeping communities of interest together weighs strongly in favor of mid-Missouri being included within a single congressional district. However, the Map divides the region among multiple congressional districts. (*Id.*).

Another highly egregious aspect of the Map is the newly drawn Fifth District, which splits Jackson County among two districts and combines the highly urban portion of Jackson County with three largely rural counties – Ray, Lafayette and Saline Counties – which stretch 100 miles to the east. Moreover, the Map carves out a tear drop-shaped area of Jackson County and places it in the Sixth District. The shape of the newly drawn Fifth District has been likened to a dead lizard. (L.F. 9-10).

Another highly egregious aspect of the Map is its treatment of Jefferson County. The Map divides Jefferson County among three congressional districts, and thus wholly ignores the undesirability of splitting up a political subdivision. Similarly, the Map divides each of Audrain, Camden, Clay, Jackson, St. Charles and Webster Counties among two districts. (L.F. 10).

Another highly egregious aspect of the Map is its treatment of the St. Louis metropolitan area, which constitutes a distinct and unique region. Among the unique aspects of the St. Louis region are that it encompasses a city which is not part of any county – the City of St. Louis – the only such entity in Missouri; the region historically has been represented by three members of Congress, with portions of the City of St. Louis lying in two districts; and the region is the primary economic engine of Missouri, generating 42 percent of the State's income. (*Id.*).

As defined by the United States Office of Management and Budget, resulting from applying published standards to United States Census Bureau data, the St. Louis Metropolitan Statistical Area ("MSA") – a recognized indicator of the area comprising the St. Louis region – includes the Missouri counties of Crawford (partial), Franklin, Jefferson, Lincoln, St. Charles, St. Louis, Warren and Washington, as well as the City of St. Louis. (A map depicting the St. Louis MSA as of 2008, before the addition of a portion of Crawford County, is appended to the Petition as Exhibit 3, and also is included in the Appendix to this brief at A3.) (*Id.*).

Based on population growth in the areas surrounding its core, as well as its overall population, the St. Louis region has ample population to warrant three congressional districts being drawn within the region's boundaries. Such an approach would further the interests of keeping distinct regions and communities of interest together, and leave the St. Louis region represented by an aggregate of three members of Congress – with portions of the City of St. Louis lying in two districts – as is the case currently. (L.F. 10-11).

However, under the Map drawn and adopted by the General Assembly, only the new First and Second districts – which encompass St. Louis City, St. Louis County and portions of St. Charles and Jefferson Counties – lie wholly within the St. Louis MSA. The remaining counties forming part of the St. Louis MSA are included in the new Third district, which also includes, and is dominated by, a number of counties in mid-Missouri which are not part of the St. Louis region. (L.F. 11). The net effect of the Map's configuration of the new First, Second and Third Districts is to reduce the St. Louis

region's congressional representation from three representatives to two, and leave the St. Louis region underrepresented and unnecessarily divided. (*Id.*).

D. Veto and Override

Following the General Assembly's adoption of the Map, Governor Jay Nixon vetoed it, stating that the Map "did not adequately protect the interests of all Missourians." (*Id.*). Subsequently, the Republican-dominated Missouri General Assembly voted to override the veto and thus impose the Map on the State, despite the Governor's veto. (*Id.*).

The maneuverings by which the Republican-dominated General Assembly mustered the votes in the Missouri House of Representatives necessary to override the Governor's veto were unseemly, at best. The Republican party mustered the vote of every Republican representative; and, as described by numerous news reports, extracted the votes of four Democratic representatives through trading various perks and promises of future political favors, and subjecting certain representatives to extreme pressure. (*Id.*).

The net effect of the Republicans' success in imposing their highly partisan, gerrymandered Map upon the State is that in a democracy built on the principle that the people are supposed to select their representatives, Missourians will live under a system in which their representatives select their voters. (L.F. 12). A further net effect of the Republicans' success in imposing their highly partisan, gerrymandered Map upon the State is that for at least the next ten years, six out of Missouri's eight congressional seats likely will be safe Republican seats, despite the fact that, according to the results of

recent statewide and national elections, Missouri appears to be equally divided between Republican and Democratic voters. (*Id.*).

It is readily feasible to draw a congressional redistricting map which complies with Missouri constitutional requirements and avoids the pitfalls of the Map drawn and adopted by the General Assembly. As one illustration of the feasibility of drawing an alternative map, attached to the Petition as Exhibit 4 is an alternative congressional redistricting map for Missouri, which contain eight districts of equal population. (A copy of Exhibit 4 to the Petition is included in the Appendix to this brief at A4). In contrast to the General Assembly's Map, which, in two instances, has districts straddling distinct regions, the map attached as Exhibit 4 confines each district to a single region, and thus better fulfills the goal of keeping communities of interest together within a common district. Moreover, under Exhibit 4, no county is split among more than two districts, whereas, the General Assembly's Map (Exhibit 1 to the Petition) splinters Jefferson County among three different districts. (*Id.*).

II. CLAIMS ALLEGED IN PETITION

Based on the foregoing facts, Plaintiffs' Petition, as amended, alleges claims in four counts. The claims asserted under each count are summarized below.

A. Count I

Art. III, § 45 of the Missouri Constitution provides that congressional districts must be "composed of contiguous territory as compact . . . as may be." Under the plain language of Art III, § 45, the constitutional requirements are not satisfied by districts

merely having some degree of compactness; rather, districts must be compact as can be. (L.F. 13).

Looking, first, to the shape and layout of the districts reflected in the Map, the districts fail to satisfy the requirement that they be compact and contiguous in a number of respects, including but not limited to the following: (*Id.*).

a. The new Fourth district is not compact as may be in that its borders to the east, northeast and south are irregularly shaped. The northeast corner of the district mirrors the shape of the State of Texas. The eastern portion of the district has an unnatural appendage from the new Third district protruding into it, and the southern portion is penetrated by an unnatural appendage from the new Seventh district, comprised of Polk County. The overall shape of the district may be likened to a three-headed toad. (*Id.*).

b. The new Jackson County district is not compact as may be in that it has an irregular and bizarre shape, which has been likened to a dead lizard. It has a teardrop shaped area carved out of it, which is an unnatural appendage to the new Sixth district. Moreover, Ray County is attached to the new Fifth district as an unnatural appendage on the north side. (*Id.*).

c. Also, the new Jackson County district should not be regarded as comprised of contiguous territory in light of the teardrop shaped appendage protruding into it from the new Sixth district, and the narrowness of the area in the district lying south of the appendage. Traveling over land from the northwest portion of the district, lying within Clay or Jackson County, to the Ray, Lafayette

or Saline County areas of the district, without leaving the district, would require a highly circuitous route. (L.F. 13-14).

d. The new Third district is not compact as may be in that it has two unnatural appendages shaped like lobster claws extending east around St. Louis. Moreover, the dividing line between the new Third and Fourth districts is irregularly shaped. The western portion of the new Third district, comprised of Cole and Miller Counties and a portion of Camden County, constitutes an unnatural appendage which thrusts well into the new Fourth district. (L.F. 14).

e. The new Sixth district is not compact as may be in that it has an unnatural appendage carved out of the new Fifth district. (*Id.*).

f. The new Seventh district is not compact as may be in that its border to the north is irregularly shaped, marked by an unnatural appendage comprised of Polk County, which protrudes into the Fourth district. (*Id.*).

In addition to the foregoing, the requirements that districts be compact and contiguous concern more than simply the shape or layout of a district. Those requirements ultimately concern the ability of citizens to relate to one another and to their representatives, and the ability of a representative to relate effectively to his or her constituency; and such relationships are fostered through creating districts comprised of citizens having geographical affinity and shared interests, *i.e.*, communities of interest. (*Id.*).

In the context of compactness and contiguousness connoting that communities of interest should be kept together in drawing congressional districts, the Map drawn and

adopted by the General Assembly violates the requirements of Art. III, § 45 of the Missouri Constitution in a number of additional respects, including but not limited to the following: (*Id.*).

a. The principle of keeping communities of interest together weighs strongly in favor of mid-Missouri being included within a single congressional district. However, the Map divides mid-Missouri among multiple congressional districts. (L.F. 15).

b. As to the new Fifth district, Jackson County has sufficient population such that it easily could comprise its own congressional district, coupled with an area from an adjoining county containing approximately 75,000 additional people. However, in drawing the new Fifth district, the General Assembly followed an approach – wholly unnecessary and explicable only as an act of political gerrymandering – of joining highly urban areas of Clay and Jackson Counties with largely rural areas distant from the Kansas City area. (*Id.*).

c. The Map divides Jefferson County among three congressional districts, and thus ignores the undesirability of splitting up a political subdivision and the resulting splintering of a natural community of interest, instead of keeping Jefferson County whole and part of a St. Louis regional district. In the same vein, and with similar effects, the Map divides each of Audrain, Camden, Clay, Jackson, St. Charles and Webster Counties among two districts. (*Id.*).

d. With respect to the St. Louis region, the Map leaves it underrepresented and unnecessarily divides the region by placing a portion of it into the new Third district, which is dominated by mid-Missouri counties. (*Id.*).

In light of the many respects in which the Map departs from the Missouri constitutional requirements that congressional districts be compact and contiguous, were the Map allowed to stand and govern the election of Missouri's representatives to the United States House of Representatives in 2012, 2014, 2016, 2018 and 2020, it would violate the State constitutional rights of countless Missouri citizens – including Democrats, Independents and Republicans – who desire, and are entitled to, a fair political process for electing their congressional representatives. (L.F. 15-16).

In light of the machinations which led to the drawing and adopting of the Map, as alleged above, there is no reason to believe that further efforts by the General Assembly would lead to the adoption of a proper Map complying with Missouri constitutional requirements. Moreover, there is a compelling need for a proper, constitutional congressional redistricting map to be drawn promptly, before the 2012 election cycle begins – which commences with the opening of candidate filing in February 2012. Accordingly, the only feasible remedy for the constitutional violations alleged herein is for the courts to draw a new congressional redistricting map. (L.F. 16).[4]

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[4] Count I and each of Counts II, III and IV seek the same relief – a declaratory judgment that the Map as drawn by the General Assembly is invalid as contravening the Missouri Constitution, injunctive relief precluding Defendants from conducting any

B. Count II

Art I, § 2 of the Missouri Constitution provides, among other things, "that all persons are created equal and are entitled to equal rights and opportunity under the law." (L.F. 17). The Republican-dominated General Assembly drew and adopted the Map for the purpose of preserving and enhancing the political power of the Republican party. (*Id.*).

The Map, as drawn and adopted by the General Assembly, represents a partisan political gerrymander, intended to unfairly enhance the election prospects of Republican candidates for election to the United States House of Representatives; has the purpose, and will have the effect, of depriving Plaintiffs and countless other Missouri citizens of their constitutional rights guaranteed to them under the Missouri Constitution of equal rights and opportunity under the law to elect candidates of their choice to the United States House of Representatives; and will discriminate in favor of Republicans, and against Democrats and Independents, with respect to their respective ability to elect candidates of their choice to the United States House of Representatives. (*Id.*).

Among the evidence of the discriminatory purpose and effect of the Map, as alleged above, is that Missouri may be viewed as a State which has roughly equal numbers of Republican and Democratic voters, based on election results from recent

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elections utilizing the Map, and a request that the courts draw a new congressional redistricting map in conformance with Missouri constitutional requirements. (L.F. 16-18, 19-20, 122).

statewide and national elections; however, the Map virtually guarantees that of Missouri's eight seats in the United States House of Representatives, six of them – 75 percent – will be safe Republican seats. (L.F. 18). No legal or other justification exists for drawing and adopting a congressional redistricting Map which has the purpose and effect of depriving Plaintiffs and others of their equal rights and opportunity under the law relating to congressional elections. (*Id.*).

C. Count III

Art. I, § 1 of the Missouri Constitution provides, in part, that "all political power . . . is instituted solely for the good of the whole;" and Art. I, § 2 provides, in part, that "all constitutional government is intended to promote the general welfare of the people." (L.F. 18-19). The Republican-dominated General Assembly drew and adopted the Map for the purpose of preserving and enhancing the political power of the Republican party. (L.F. 19). The Map, as drawn and adopted by the General Assembly, represents an overreaching partisan political gerrymander, intended to unfairly enhance the election prospects of Republican candidates for election to the United States House of Representatives. (*Id.*).

The Map, as drawn and adopted by the General Assembly, reflects an exercise of political power instituted for the good of partisan Republicans, rather than the good of the whole, is intended to promote the general welfare of partisan Republicans, and does not promote the general welfare of the people. (*Id.*). No legal or other justification exists for drawing and adopting a congressional redistricting Map which has the purpose and effect

of depriving Plaintiffs and others of their aforesaid rights guaranteed under Art. I, §§ 1 and 2 of the Missouri Constitution. (*Id.*).

D. Count IV

The Missouri Constitution guarantees the right of its qualified, registered citizens to vote in candidate elections, including elections to select Missouri's representatives to the United States House of Representatives. (L.F. 121). The provisions of the Missouri Constitution embodying the foregoing right to vote include, but are not limited to, Art. 1, § 25, which states: "That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage;" and Art. VIII, § 2, which states in pertinent part: "All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of eighteen who are residents of this state and of the political subdivision in which they offer to vote are entitled to vote at all elections by the people . . . ." (*Id.*).

For the right to vote embodied in the Missouri Constitution to have its intended meaning and effect, each citizen's vote must have the potential to be of equal force, weight and effect, and may not be diluted as compared with other citizens' votes. (*Id.*). Partisan gerrymandering that unduly fragments or unnecessarily concentrates a group's voting strength, and which serves to minimize or cancel out the voting strength of that group, constitutes vote dilution which violates the right to vote as guaranteed by the Missouri Constitution. (*Id.*).

The Map, as drawn and adopted by the General Assembly, improperly dilutes the votes of Democrats and Independents, including but not limited to Plaintiffs, as compared

with Republicans, and therefore burdens, impinges upon and violates their rights to vote as guaranteed by the Missouri Constitution. (L.F. 122). No legal or other justification exists for drawing and adopting a congressional redistricting Map which has the purpose and effect of burdening, impinging upon and violating Plaintiffs' and others' said constitutional rights to vote. (*Id.*).

III. COURSE OF PROCEEDINGS BELOW

Subsequent to the filing of this case, Defendants Koster and Carnahan filed an Answer[5] (L.F. 25); and Defendant Koster further filed a motion to dismiss for failure to state a claim or, alternatively, for judgment on the pleadings. (L.F. 37). Thereafter, Rep. John J. Diehl and Sen. Scott T. Rupp intervened as additional defendants, and they too filed an answer as well as a motion to dismiss or for judgment on the pleadings. (L.F. 1-2, 71, 82).

The case originally was assigned to the Hon. Patricia Joyce, the Presiding Judge of Cole County. (L.F. 1-2). However, Intervenors subsequently took a change of judge, pursuant to Mo. R. Civ. P. 51.05; and under Cole County Circuit Court Local Rule 6.5, the case then went to Division II (Hon. Daniel Green) for reassignment. (L.F. 2, 66-67). Judge Green elected to retain the case. (L.F. 2).

[5] The Answer states that Defendant Carnahan "takes no position as to the claims made in this case; she answers only to avoid default." (L.F. 25).

Thereafter, the motions to dismiss or for judgment on the pleadings were fully briefed (L.F. 125, 129, 162, 188); and, on December 8, 2011, the trial court heard oral argument.[6] (Tr. 1-56). At the conclusion of oral argument, Judge Green stated: "I certainly think that the plaintiffs have a political quarrel with these maps, but I don't think the claims [have] been stated and/or [if] it has, judgment on the pleadings is appropriate." (Tr. 55).

On December 12, 2011, the trial court entered an Order and Judgment, in both the present case and *McClatchey*, granting the motions for judgment on the pleadings or, in the alternative, for dismissal for failure to state a claim, and dismissing both cases. (L.F. 196. A copy of the Order and Judgment is included in the Appendix to this brief at A1.)

Plaintiffs in the instant case filed a Notice of Appeal on December 13, 2011. (L.F. 197). An appeal in *McClatchey* also is pending in this Court. No. SC92203.

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[6] At the same time, the trial court heard arguments concerning similar motions in another challenge to the legislature's congressional redistricting Map, filed by other plaintiffs, *McClatchey v. Carnahan*, No. 11AC-CC00752, which the trial court agreed to hear with the instant case. (Tr. 1-56). The issues in *McClatchey* are overlapping with, but distinct from, the issues in this case. In *McClatchey*, the plaintiffs maintain that the Map reflects a bi-partisan gerrymander, intended to favor certain incumbents of both parties. (Tr. 50).

POINTS RELIED ON

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING COUNT I OF PLAINTIFFS' PETITION, OR GRANTING JUDGMENT ON THE PLEADINGS, BECAUSE THE PETITION AMPLY DEMONSTRATES A FUNDAMENTAL LACK OF DISTRICT COMPACTNESS IN VIOLATION OF ART. III, § 45 OF THE MISSOURI CONSTITUTION, IN THAT PLAINTIFFS SPECIFY NUMEROUS COMPACTNESS DEFICIENCIES, REFLECTING A LACK OF SUBSTANTIAL COMPLIANCE WITH THE COMPACTNESS REQUIREMENTS, AND ALLEGE THAT THE LEGISLATURE WHOLLY IGNORED AND COMPLETELY DISREGARDED THOSE REQUIREMENTS.

Mo. Const. Art. III, §45

Preisler v. Kirkpatrick,

528 S.W.2d 422 (Mo. banc 1975)

Armentrout v. Schooler,

409 S.W.2d 138 (Mo. 1966)

State ex. rel. Barrett v. Hitchcock,

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

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING COUNT II OF PLAINTIFFS' PETITION, OR GRANTING JUDGMENT ON THE PLEADINGS, BECAUSE PLAINTIFFS ALLEGE JUSTICIABLE AND VIABLE

CLAIMS OF PARTISAN GERRYMANDERING RESULTING IN DEPRIVATIONS OF EQUAL RIGHTS AND INFRINGEMENT OF THE FUNDAMENTAL RIGHT TO VOTE, IN VIOLATION OF ART. I, § 2 OF THE MISSOURI CONSTITUTION, IN THAT A POLITICAL PARTY SUPPORTED BY 50 PERCENT OF THE STATE'S VOTERS CANNOT PROPERLY USE ITS STRANGLEHOLD ON THE MACHINERY OF STATE GOVERNMENT TO DRAW 75 PERCENT OF THE STATE'S CONGRESSIONAL DISTRICTS AS SAFE DISTRICTS FOR ITS CANDIDATES.

Mo. Const. Art. I, § 2

Weinschenk v. State,

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

Armentrout v. Schooler,

409 S.W.2d 138 (Mo. 1966)

Kasten v. Guth,

375 S.W.2d 110 (Mo. 1964)

III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING COUNT III OF PLAINTIFFS' PETITION, OR GRANTING JUDGMENT ON THE PLEADINGS, BECAUSE PLAINTIFFS SET FORTH JUSTICIABLE AND VIABLE CLAIMS THAT THE LEGISLATURE'S REDISTRICTING PLAN VIOLATES THE REQUIREMENTS OF ART. I, §§ 1 AND 2 OF THE MISSOURI CONSTITUTION, THAT POLITICAL OR GOVERNMENTAL POWER BE

EXERCISED "SOLELY FOR THE GOOD OF THE WHOLE" AND "TO PROMOTE THE GENERAL WELFARE OF THE PEOPLE," IN THAT PLAINTIFFS ALLEGE THAT THE PLAN HAS THE PURPOSE AND EFFECT OF BENEFITING ONE POLITICAL PARTY AND ITS FOLLOWERS.

Mo. Const. Art. I, §§ 1 and 2

Weinschenk v. State,

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

Armentrout v. Schooler,

409 S.W.2d 138 (Mo. 1966)

Preisler v. Sec'y of State,

279 F. Supp. 952 (W.D. Mo. 1968)

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING COUNT IV OF PLAINTIFFS' PETITION, OR GRANTING JUDGMENT ON THE PLEADINGS, BECAUSE PLAINTIFFS SET FORTH JUSTICIABLE AND VIABLE CLAIMS THAT THE LEGISLATURE'S CONGRESSIONAL REDISTRICTING PLAN INFRINGES THE RIGHT TO VOTE AS GUARANTEED BY ART. I, § 25 AND ART. VIII, § 2 OF THE MISSOURI CONSTITUTION, IN THAT PARTISAN GERRYMANDERING CAN EFFECT A DENIAL OF THE RIGHT TO VOTE BY DILUTING THE WEIGHT OF VOTES.

Mo. Const. Art. I, § 25

Mo. Const. Art. VIII, § 2

Weinschenk v. State,

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

Armentrout v. Schooler,

409 S.W.2d 138 (Mo. 1966)

ARGUMENT

I. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING COUNT I OF PLAINTIFFS' PETITION, OR GRANTING JUDGMENT ON THE PLEADINGS, BECAUSE THE PETITION AMPLY DEMONSTRATES A FUNDAMENTAL LACK OF DISTRICT COMPACTNESS IN VIOLATION OF ART. III, § 45 OF THE MISSOURI CONSTITUTION, IN THAT PLAINTIFFS SPECIFY NUMEROUS COMPACTNESS DEFICIENCIES, REFLECTING A LACK OF SUBSTANTIAL COMPLIANCE WITH THE COMPACTNESS REQUIREMENTS, AND ALLEGE THAT THE LEGISLATURE WHOLLY IGNORED AND COMPLETELY DISREGARDED THOSE REQUIREMENTS.

A. Introduction

The overriding issue in this case is whether a political party may use its stranglehold on the machinery of state government to rig elections over the next decade for Missouri's members of the United States House of Representatives in its favor, by engaging in partisan gerrymandering so as to magnify the impact of the party's voters and correspondingly dilute the voting power of others.

A fundamental principle of democracy is that elections of public officials should be conducted on a level playing field.[7] So, it cannot be permissible for a political party to

[7] *See, e.g., In re Legislative Districting of the State*, 370 Md. 312, 805 A.2d 292, 296 (Md. 2002), stating "[a] fairly apportioned legislature lies at the very heart of

use its commanding majorities in the legislature to tilt the electoral playing field in its favor. As Justice Anthony Kennedy observed:

> If a State passed an enactment that declared "All future apportionment shall be drawn so as most to burden Party X's rights to fair and effective representation, though still in accord with one-person, one-vote principles," we would surely conclude the Constitution has been violated. If that is so, we should admit the possibility remains that a legislature might attempt to reach the same result without that express directive. . . .

Vieth v. Jubelirer, 541 U.S. 267, 312 (2004) (concurring opinion).

Deliberate skewing of the electoral playing field for partisan advantage is precisely what Plaintiffs claim here. Plaintiffs allege that the legislature's redistricting plan reflects a blatant gerrymander in which an overzealous enthusiasm for partisan gain has improperly and unconstitutionally trumped all other considerations. The Petition alleges that "the General Assembly, currently dominated by the Republican party, utilized an overreaching process for wholly partisan purposes, and produced a Map designed solely to serve partisan ends"; the Map "achieves its purposes through extreme instances of gerrymandering, among other constitutional deficiencies"; and its net effect will be "that for at least the next ten years, six out of Missouri's eight congressional seats likely will be safe Republican seats, despite the fact that, according to the results of

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representative democracy," *citing Baker v. Carr*, 369 U.S. 186 (1962); *Gray v. Sanders*, 372 U.S. 368 (1963); and *Reynolds v. Sims*, 377 U.S. 533 (1964).

recent elections, Missouri appears to be equally divided between Republican and Democratic voters." (L.F. 6, 9, 12). Drawing districts to enable a party supported by 50 percent of the State's voters to elect 75 percent of the State's congressional delegation hardly constitutes a level playing field.[8]

That partisan gerrymandering of the kind alleged here raises deep constitutional concerns is demonstrated by this Court's cases recognizing that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live," *Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. banc. 2006), *quoting Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964); and that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," *Armentrout v. Schooler*, 409 S.W.2d 138, 142 (Mo. 1966), *quoting Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

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[8] The pernicious effects of gerrymandering are not limited to unfairly favoring one political party over another. Gerrymandering also can serve to unfairly dilute the voting power of residents of a particular region, by splintering the region among multiple congressional districts – as H.B. 193 does to mid-Missouri. And, gerrymandering also can serve to unfairly benefit favored incumbents, to the detriment of other candidates and those who wish to vote for them, as alleged in another gerrymandering case pending in this Court, *McClatchey v. Carnahan*, No. SC92203.

These principles assume prime importance every ten years when legislative redistricting occurs, during which the normal processes of democracy are inverted. Ordinarily, voters choose their elected officials. But, in redistricting, elected officials choose their voters. In so doing, legislators make decisions that significantly influence, for an entire decade, their own personal political fortunes and those of the political parties to which they belong. In light of this self-interest inherent in the process, redistricting, perhaps more than any other area in which legislators act, is an area fraught with risks of corruption, self-dealing and sacrifice of the public interest at the altar of personal or partisan gain.

For these reasons, no legislative act so urgently requires judicial oversight than redistricting. Yet, Defendants claim Missouri courts lack the authority to do so. Defendants are mistaken. The ability of the General Assembly to perpetuate and entrench the power of the dominant political party through gerrymandering is significantly constrained by the Missouri Constitution, and the authority to monitor and prevent abuse of the power to redistrict is vested squarely in the only organ of government capable of exercising it – the judiciary.

Nearly a century ago, this Court announced: "The choice of electors must be judicially respected unless their voice is made to speak a lie." *Nance v. Kearby*, 251 Mo. 374, 158 S.W. 629, 631 (Mo. 1913). That is precisely what the congressional redistricting plan challenged in this action will do, if left undisturbed – force the voters of Missouri to speak a lie, by electing a congressional delegation that fails to fairly and properly represent them.

As demonstrated below, the Petition clearly presents viable claims.

B. Standard of Review

This Court "reviews dismissals for failing to state a claim *de novo* without any deference to the circuit court decision." *Weber v. St. Louis County,* 342 S.W.3d 318, 321 (Mo. banc 2011). The Court "reviews the petition 'in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case.'" *Devitre v. Orthopedic Center of St. Louis, LLC*, 349 S.W.3d 327, 331 (Mo. banc. 2011), *quoting City of Lake St. Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo. banc. 2010). "In so doing, a plaintiff's averments are taken as true and all reasonable inferences are liberally construed in favor of the plaintiff." *Id.* "This Court will not consider matters outside the pleadings." *Id.*

The standards applicable to a motion for judgment on the pleadings, under Mo. R. Civ. P. 55.27(b), are similar. "The question presented by a motion for judgment on the pleadings is whether the moving party is entitled to judgment as a matter of law on the face of the pleadings." *Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 596, 599-600 (Mo. banc. 2007), *quoting RGB2, Inc. v. Chestnut Plaza, Inc.*, 103 S.W.3d 420, 424 (Mo. App. S.D. 2003). "The well-pleaded facts of the non-moving party's pleading are treated as admitted for purposes of the motion." *Eaton.* "A motion for judgment on the pleadings is of common law origin, and it is not favored by the courts." *In re Marriage of Busch*, 310 S.W.3d 253, 259 (Mo. App. E.D. 2010), *citing McIntosh v. Foulke*, 360 Mo. 481, 228 S.W.2d 757, 761 (Mo. 1950).

These standards of review apply to all of the points which are the subject of this appeal, since the trial court disposed of Plaintiffs' claims in their entirety by granting Defendants' motions to dismiss or, alternatively, for judgment on the pleadings.

C. The Missouri Constitution Imposes Significant Restrictions on Legislative Gerrymandering.

As a threshold matter, it is instructive to consider the overall legal landscape against which Plaintiffs' claims must be measured. A number of provisions of the Missouri Constitution significantly restrict the ability of the General Assembly to engage in partisan gerrymandering. In *Armentrout*, a case involving apportionment of a municipal legislative body, this Court pointed to three pertinent State constitutional provisions in that regard:

> Art. I, § 1, provides 'That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole'; Art I, § 2: ' . . . that all persons are created equal and are entitled to equal rights and opportunity under the law; . . .'; and Art. I, § 25: 'That all elections shall be free and open[9]; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.'

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[9] The excerpt quoted above from *Armentrout* includes a footnote following the phrase "free and open," which states: "Construed in *Preisler v. Calcaterra*, 362 Mo. 662, 243 S.W.2d 62, as substantially the same as 'free and equal.'" 409 S.W.2d at 143 n.2.

409 S.W.2d at 143. *Armentrout* thus recognized that multiple provisions of the Missouri Constitution protect the right to vote.

This Court similarly recognized a constitutionally protected right to vote in *Weinschenk*, grounded not only in the State constitutional provisions addressed in *Armentrout*, but also in Art. VIII, § 2, which prescribes voter qualifications. 203 S.W.3d at 211 ("These constitutional provisions establish with unmistakable clarity that the right to vote is fundamental to Missouri citizens." [footnote omitted]).

In addition to constraining redistricting through recognition of a constitutionally protected right to vote, the Missouri Constitution inhibits gerrymandering through the imposition of direct restrictions on how the legislature may draw districts. Under the relevant provisions, all legislative districts must be "composed of contiguous territory as compact . . . as may be," and of equal population. Mo. Const., Art. III, §§ 2, 5, 45. The purpose of these provisions is not in doubt: it "was 'to guard, as far as practicable . . . against a legislative evil, commonly known as "the gerrymander". . . .'" *Preisler v. Kirkpatrick*, 528 S.W.2d 422, 425 (Mo. banc 1975), *quoting State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40, 61 (Mo. 1912).

Gerrymandering can be, and historically has been, accomplished in numerous ways, including but not limited to creating population disparities among districts, drawing bizarrely shaped districts to suppress the political strength of voters in disfavored groups, and/or breaking up local political units or communities of interest. But no matter how effectuated, gerrymandering is, at bottom, an infringement of the right to vote. *Reynolds v. Sims*, 377 U.S. at 555 (1964) (gerrymandering through malapportionment

impairs "[t]he right to vote freely for the candidate of one's choice," which can be accomplished "by a debasement or dilution" of the right to vote just as much as by outright denial); *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (gerrymandering through manipulation of "geometry and geography" deprived plaintiffs of their "voting rights"). This is the root claim undergirding each of the specific counts of the Petition.

The foregoing provisions, together, establish two propositions relevant here. First, the Missouri Constitution provides strong and direct protection of an individual's right to vote that not only is "fundamental," but enjoys "more expansive and concrete protections" than are afforded the merely derivative right to vote recognized by the U.S. Constitution. *Weinschenk*, 203 S.W.3d at 211-12; *compare* U.S. Const., Art. I, § 2, and Amend. XVII (qualifications to vote in U.S. elections derivative of those established by states). Second, that right to vote also is protected from impairment by constitutional provisions prohibiting the legislature from using devices historically used for purposes of partisan gerrymandering, such as drawing misshapen districts. *See, e.g., Preisler v. Doherty*, 365 Mo. 460, 284 S.W.2d 427, 435. (Mo. banc 1955).

As noted above, a citizen's right to vote can be denied as effectively by diluting its weight, as by barring the citizen from the polls. *Armentrout*, 409 S.W.2d at 142. "Vote dilution has been defined as the minimizing or cancelling out of the voting strength of a given group through practices such as . . . electoral gerrymandering that unduly fragment or unnecessarily concentrate a group's voting strength." Bernard Grofman, "An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies: From One Person, One Vote to Partisan Gerrymandering," 21 Stetson L. Rev. 783 (1991-92),

citing Chandler Davidson, MINORITY VOTE DILUTION (1984). This is precisely what is alleged here: by manipulating district lines, the General Assembly has diluted and weakened the voting power of one party's followers, representing 50 percent of Missouri voters, leaving them in a position to elect only 25 percent of Missouri's eight-person congressional delegation, while correspondingly magnifying the voting power of the other party's followers – enabling them to elect 75 percent of Missouri's congressional delegation, despite representing only half of Missouri's voters. And, Plaintiffs allege that this evisceration of a fundamental tenet of democracy – that elections be conducted on a level playing field – is not only the effect of H.B. 193, but its very purpose!

D. Missouri and Other Courts Commonly Enforce Anti-Gerrymandering Provisions Found in State Constitutions.

Defendants strive to create the impression that Missouri courts have no business overseeing legislative redistricting, or that such oversight is so rare and disfavored that it easily can be terminated at its inception by a motion to dismiss. In fact, judicial oversight of redistricting is both common and meaningful, in Missouri and throughout the United States.

Nearly a century ago, in *Barrett*, this Court articulated its view of the relationship between judicial power and the Missouri Constitution's anti-gerrymandering provisions. The words of the Missouri Constitution "show conclusively," the Court said, "that it was not the intention of the framers of the Constitution to confer upon the Legislature the unlimited power and discretion to form the districts in such shapes and dimensions as it might, in its own opinion, deem proper." 146 S.W. at 54.

Far from adopting a blanket rule that might require dismissal of most challenges to legislative gerrymandering, the Court noted that "each case that arises must stand largely upon the facts thereof," *id.* at 57, an approach that not only invites, but demands, close judicial scrutiny. The Court went on to quote with approval – and obvious relish – a then-recent opinion of the Chief Justice of the Michigan Supreme Court:

> [T]he time for plain speaking has arrived in relation to the outrageous practice of gerrymandering, which has become so common, and has so long been indulged in without rebuke, that it threatens, not only the peace of the people, but the permanency of our free institutions. *The courts alone, in this respect, can save the rights of the people*, and give to them a fair count and equality in representation. It has been demonstrated that the people themselves cannot right this wrong. They may change the political majority in the Legislature, as they have often done; but the new majority proceeds at once to make an apportionment in the interest of its party as unequal and politically vicious as the one that it repeals. There is not an intelligent school boy but knows what is the motive of these legislative apportionments; and it is idle for the courts to excuse the action upon other grounds, or to keep silent as to the real reason, which is nothing more nor less than partisan advantage taken in defiance of the Constitution, and in utter disregard of the rights of the citizen.

Id. at 57, *quoting Giddings v. Blacker*, 93 Mich. 1, 11, 52 N.W. 944 (1892) (Morse, C.J., concurring) (emphasis added).

Consistent with this view, Missouri courts repeatedly have scrutinized legislative redistricting under the Missouri Constitution. In cases such as *Barrett* itself and, more recently, *Doherty*; *Preisler v. Hearnes*, 362 S.W.2d 552 (Mo. banc 1962); and *Kirkpatrick;* this Court, without hesitation, has entertained challenges to alleged gerrymanders on the constitutional merits.

Of equal significance, this Court has actively undertaken to protect the voting franchise from infringements coming from other directions as well. *See Kasten v. Guth*, 375 S.W.2d 110 (Mo. 1964) (invoking the "free and open" elections clause, Art. I, § 25, to interpret an election statute to permit write-in voting); *Weinschenk*, 203 S.W.3d at 211 (invoking state constitutional protections for the right to vote to invalidate a photo-ID requirement). Nothing could be clearer from those cases than that the mantle of enforcing the Missouri Constitution's provisions protecting the voting franchise falls ultimately upon this State's judicial branch.

In this, the courts of Missouri stand in a position no different from that of any other state judiciary. The highest courts of other states routinely have addressed challenges to gerrymandered districting plans under their state constitutions. Such decisions are so commonplace that the cases are far too numerous to list. By way of partial example only, decisions *invalidating* districting plans or individual districts for failure to satisfy state constitutional compactness requirements include: *In re 2001 Redistricting Cases*, 44 P.3d 141 (Alaska 2002); *Acker v. Love*, 178 Colo. 175, 496 P.2d 75 (Colo. 1972); *In re Reapportionment of Colorado General Assembly*, 647 P.2d 209 (Colo. 1982); *Schrage v. State Bd. of Elections*, 88 Ill.2d. 87, 430 N.E.2d 483 (Ill. 1981);

People ex rel. Burris v. Ryan, 147 Ill.2d. 270, 588 N.E.2d 1023 (Ill. 1991); *In re Legislative Districting of General Assembly*, 193 N.W.2d 784 (Iowa 1972); *Davenport v. Apportionment Commission of State of N. J.*, 124 N.J. Super 30, 304 A.2d 736 (N.J. Super. A.D. 1973*), modified and aff'd on other grounds*, 65 N.J. 125, 319 A.2d 718 (N.J. 1974); *In re Sherill*, 188 N.Y. 185, 81 N.E. 124 (N.Y. 1907); *Stephenson v. Bartlett*, 357 N.C. 301, 582 S.E.2d 247 (N.C. 2003). Dozens of additional decisions have adjudicated gerrymandering claims under a wide variety of state constitutional constraints on legislative districting. *See generally*, "Application of Constitutional 'Compactness Requirement' to Redistricting, 114 A.L.R. 5th 311 (originally published in 2003); James A. Gardner, "Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering," 37 Rutgers LJ. 881 (2006).

E. Count I States a Claim for Violation of Art. III, § 45 of the Missouri Constitution.

Against this backdrop, we turn to a discussion of Defendants' attacks on Plaintiffs' claims, and demonstrate that Plaintiffs' claims clearly are viable. As to the claims embodied in Count I of the Petition, that the legislature's redistricting plan violates the compactness requirements set forth in Art. III, § 45 of the Missouri Constitution, Defendants contend that, under applicable case law, a lack of compactness can provide no basis for invalidating a districting plan absent allegations and proof that the General Assembly "wholly ignored and completely disregarded" the compactness requirements, and that Plaintiffs' Petition cannot be viewed as alleging a lack of compactness reaching that extreme. (L.F. 39-43, 88-90).

As discussed in section F, *infra*, the judicial gloss of "wholly ignored and completely disregarded" relied on by Defendants does not have the meaning they seek to ascribe to it. However, regardless of what that language ultimately may be construed to mean, Plaintiffs' Petition plainly alleges a failure to comply with the applicable requirements. In paragraph 1 of their Petition, Plaintiffs allege that the Republican-dominated General Assembly "utilized an overreaching process for *wholly* partisan purposes, and produced a Map designed *solely* to serve partisan ends (emphasis added)." (L.F. 6). If, as Plaintiffs allege, the Map was drawn solely to serve partisan ends, and partisanship was the whole purpose of the process, it follows that no other considerations entered into the process and, accordingly, the compactness requirements were wholly ignored.[10]

In the same vein, the specific allegations set forth in Count I are entirely consistent with the notion that the legislature wholly ignored the compactness requirements. This is not a situation in which Plaintiffs allege one or two technical failures to achieve optimal compactness, in a map which otherwise substantially complies with the compactness

[10] To avoid becoming embroiled in a battle over semantics, Plaintiffs sought, and were granted, leave to amend their Petition to expressly include the "wholly ignored and completely disregarded" language. (L.F. 59, 120). As amended, paragraph 1 of the Petition reads, in pertinent part: "The Map violates the Missouri Constitution in multiple respects in that it creates districts which are not compact and contiguous – wholly ignoring and completely disregarding those requirements . . . ." (L.F. 120).

requirement. Paragraphs 36 and 38 of the Petition contain broad, general allegations concerning the failure to comply with constitutional compactness requirements. (L.F. 13-15). Moreover, the subparagraphs of paragraph 36 point out numerous non-exclusive examples of ways in which, from a shape and layout standpoint, the Map fails to satisfy the compactness requirements, and specifies defects in five of the eight districts created by the Map. (L.F. 13-14). For instance, the Petition points to the new Fifth District, which is bizarrely shaped and can be likened to a dead lizard, and the new Third District, which places significant portions of the St. Louis area in lobster claw-shaped areas appended to an otherwise largely rural district that stretches halfway to Kansas City.

Notably, at the hearing on Defendants' motions to dismiss, counsel for Defendant Koster did not even try to defend the Fifth District as being compact, referring to it as "problematic." (Tr. 15). This point, alone, establishes a substantial deviation from the compactness requirements, particularly since the Fifth District encompasses one of Missouri's two major metropolitan areas, and remedying the gerrymandered aspects of that district likely would require changes to a number of other districts; and, without more, can justify granting the relief Plaintiffs seek.

Further, the subparagraphs of paragraph 38 point to numerous other non-exclusive examples of ways in which, from a communities of interest standpoint, the Map fails to comply with compactness requirements.[11] (L.F. 11). For instance, the Map improperly

[11] Intervenors appear to maintain that the concepts of "communities of interest," on the one hand, and "compactness and contiguity," on the other, have nothing to do with

splinters mid-Missouri among multiple congressional districts, and divides Jefferson County among three districts. Overall, the Petition clearly alleges that the General Assembly has transmogrified Missouri's congressional districts into something far different from what the State constitution requires.

In sum, Plaintiffs' Petition must be deemed to allege that the General Assembly wholly ignored the compactness requirements set forth in Art. III, § 45 of the Missouri Constitution, and to be susceptible of proof in that regard. It must be borne in mind that, on a motion to dismiss or for judgment on the pleadings, the facts alleged in the Petition are regarded as true and construed liberally in favor of Plaintiffs, and the Petition states a claim if it sets forth any set of facts that, if proven, would entitle Plaintiffs to relief. That certainly is the case here.

F. *Preisler v. Kirkpatrick* Supports Review of Plaintiffs' Claims on the Merits, Not Dismissal.

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one another. That argument is dead wrong: the two concepts are integrally related. *See* James A. Gardner, "Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering," 37 Rutgers L.J. 881, 968 (2006) (Traditional districting principles, such as requirements that districts be compact and composed of contiguous territory, "are aimed at . . . preserving the integrity of local economies in a political system based on the representation of homogeneous local communities of economic interest.").

In contending, relying primarily on *Kirkpatrick*, that no claim for violation of the constitutional compactness requirements can lie absent a showing that the legislature "wholly ignored and completely disregarded" the district compactness requirements, 528 S.W.2d at 425, Defendants misperceive the governing legal standard.

As a starting point, notwithstanding the quoted language, the Court, in *Kirkpatrick*, did not in fact apply a standard nearly so deferential as Defendants would have this Court believe. What the Court actually did was "find, and hold" that all but two of the 34 senatorial districts drawn under the challenged map "are within acceptable limits of compactness," *id.* at 426, and "also find, and hold, that . . . the districts established *substantially comply* with the compactness requirement of § 5 of Art. III." *Id.* at 427 (emphasis added). Thus, the standard the Court actually applied in *Kirkpatrick*, in the portion of its decision that the Court itself identified as its holding, is "substantial compliance" with the constitutional requirement of compactness.

Moreover, the Court further stated in *Kirkpatrick*, "[w]e find, and hold, that the Commission made an honest and good faith effort to construct senatorial districts as compact as may be." *Id.* at 426. Thus, in addition to the test of substantial compliance – an objective test – the Court applied a subjective test of honest and good faith effort to comply with the constitutional requirements.

There is a world of difference between those standards, applied by the Court in *Kirkpatrick*, and the standard which Defendants urge upon this Court in their motions to dismiss. A holding of substantial legislative compliance with a constitutional standard is, by definition, a decision *on the merits* of the legislature's plan, *after judicial review of the*

entire map. It is not a threshold standard that invites dismissal of claims of noncompactness at their inception by shifting to Plaintiffs the burden to demonstrate some kind of complete and catastrophic legislative failure.[12]

In the present case, the Petition fairly can be read – indeed, must be read – to state a claim of substantial noncompliance with the constitutional requirement of compactness. Moreover, the Petition further must be read to allege noncompliance with the additional subjective test discussed by the Court in *Kirkpatrick*, of honest and good faith effort on the part of the legislature to comply with the constitutional requirement of compactness.

We note, further, that the standard Defendants would have this Court apply – an extreme and literal application of the words "wholly ignored and completely disregarded" – is a subjective standard that would be impossible to apply. The General Assembly is made up of 163 representatives and 34 senators. What showing must be made to demonstrate that compactness requirements were "wholly ignored?" Is it sufficient if one legislator, or a few, state that they considered compactness? Is it enough if one or two lines, on a map containing more than a hundred lines, are suggestive of compactness? Also, Art. III, § 19 of the Missouri Constitution provides that legislators "shall not be

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[12] Consistent with the above analytic framework, the trial court in *Kirkpatrick* reviewed the map on its merits, finding that the districts "are not compact," 528 S.W.2d at 424, and this Court then reversed the trial court, not for failure to apply a proper threshold standard, but *on the merits* of its substantive assessment of the compactness of the districts drawn by the legislature. *Id.* at 426-27.

questioned for any speech or debate in either house in any other place" – commonly known as the speech or debate privilege – which generally is construed to preclude legislators from being questioned about their legislative activities, including reasons or motives underlying their votes. *See, e.g., Eastland v. U.S. Servicemen's Fund,* 421 U.S. 491, (1975). Accordingly, Defendants advocate a standard for assessing claims that the legislature violated the compactness requirements of the Missouri Constitution which is wholly incapable of being applied.[13]

Reading *Kirkpatrick* in the manner Defendants urge would severely undermine the ability of the judiciary to police unconstitutional gerrymandering by the legislature. Indeed, doing so would essentially read the compactness requirement out of the Constitution because a legislature always can defend itself against a charge of "wholly ignoring" and "completely disregarding" a topic simply by paying it lip service while in fact ignoring and disregarding it.

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[13] *Kirkpatrick* also is distinguishable from the present case because this action raises additional and different kinds of claims. As this Court noted early in its decision in *Kirkpatrick*, "the *sole question* presented" was whether the challenged districts were adequately compact. 528 S.W.2d at 424 (emphasis added). Here, in contrast, noncompactness is not the "sole question," or even the primary question. Rather, Plaintiffs contend in this case that the partisan gerrymandering engaged in by the legislature is legally wrongful in multiple respects.

Such a result would not be consistent with the significant importance this Court has attached to compactness as a principle of sound redistricting in other contexts. In *Armentrout*, for example, the Court faced the question whether the one-person, one-vote standard controlling state-level redistricting also applied at the municipal level. Applying the U.S. and Missouri Constitutions in tandem, the Court held that both constitutions independently require districts of equal population at the municipal level. And, in issuing an order requiring the local districting map to be redrawn, the Court added a requirement: the city, it held, "also will observe the requirement that the wards newly created shall be composed of contiguous territory as compact as possible," 409 S.W.2d at 144, a requirement not imposed on local governments by any provision of the Missouri Constitution. The Court's order thus expressed a strength of commitment to compactness in redistricting much more consistent with the "substantial compliance" approach to compactness review than the approach urged by Defendants.[14]

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[14] A review of the cases from other jurisdictions cited by this Court in its decisions relied on by Defendants further illustrates that the test for whether a legislature violates state constitutional requirements of compactness in drawing legislative districts is not nearly so extreme as Defendants suggest. For example, in *In re Sherill*, *supra*, quoted in *Doherty*, 284 S.W.2d at 469, the New York Court of Appeals invalidated a reapportionment of 51 state senate districts based on the failure of two districts to comply with compactness requirements. The Court held, "[t]he disregard of constitutional provisions [requiring compactness] in forming the Second and Thirteenth senate districts

II. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING COUNT II OF PLAINTIFFS' PETITION, OR GRANTING JUDGMENT ON THE PLEADINGS, BECAUSE PLAINTIFFS ALLEGE JUSTICIABLE AND VIABLE CLAIMS OF PARTISAN GERRYMANDERING RESULTING IN DEPRIVATIONS OF EQUAL RIGHTS AND INFRINGEMENT OF THE FUNDAMENTAL RIGHT TO VOTE, IN VIOLATION OF ART. I, § 2 OF THE MISSOURI CONSTITUTION, IN THAT A POLITICAL PARTY SUPPORTED BY 50 PERCENT OF THE STATE'S VOTERS CANNOT PROPERLY USE ITS STRANGLEHOLD ON THE MACHINERY OF STATE GOVERNMENT TO DRAW 75 PERCENT OF THE STATE'S CONGRESSIONAL DISTRICTS AS SAFE DISTRICTS FOR ITS CANDIDATES.

Intervenors maintain that the claims which are the subject of Count II of the Petition are not justiciable, and all Defendants contend that those claims are not viable. As discussed below, Defendants are wrong in both respects.[15]

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is clear, and they so affect the entire apportionment as to make it necessary to declare the act wholly unconstitutional and void." *Id.* Notably, the Thirteenth district – which the Court deemed extremely misshapen, and of which a diagram is included in the Court's opinion – is no more misshapen than some of the districts in the Missouri congressional redistricting plan at issue here, *e.g.,* the Third and Fifth districts.

[15] The justiciability arguments discussed above, as well as Plaintiffs' responses thereto, apply equally to Counts III and IV.

A. Partisan Gerrymandering Claims are Justiciable in Missouri.

As a starting point, there is no question that Count I of Plaintiffs' Petition, grounded in Art. III, § 45 of the Missouri Constitution, presents the type of claim that Missouri courts can and do adjudicate. *See* discussion at pp. 31-34, *supra*. As also discussed above, what the compact and contiguous requirements, found in Art. III, § 45, are designed to address is the "evil of political gerrymandering," which impinges upon Missouri citizens' right to vote. *Kirkpatrick*, 528 W.W.2d at 425, *quoting Barrett*, 146 S.W. at 61. The compact and contiguous requirements are found in only one of the multiple Missouri constitutional provisions which protect the right to vote from being diluted or otherwise infringed – others being found in Art I, §§ 1, 2 and 25, and Art. VIII, 2. *See* discussion at pp. 28-29, *supra*. If alleged infringement of the right to vote, as protected by Art III, § 45 of the Missouri Constitution, presents a justiciable claim – as it clearly does – it follows that alleged infringements of the right to vote, as protected by other Missouri constitutional provisions, similarly are justiciable.

Indeed, this Court has been presented with a number of cases alleging infringement of the right to vote, grounded in various State constitutional provisions, including the guarantee of equal rights, the provision that government is instituted for the good of the whole, and the free and open elections provisions quoted above. *See Weinschenk*; *Armentrout*; *Kasten*. In none of those cases did the Court hold that it involved a non-justiciable political controversy; rather, the Court adjudicated each of those cases on the merits.

With respect to Intervenors' assertions that no judicially manageable standards exist for adjudicating such claims, Intervenors again are wrong. The standards available to be applied include, but are not necessarily limited to, those traditionally utilized to determine whether a constitutional right has been infringed, including whether the challenged action contravenes a constitutional mandate, *see, e.g., Kasten*; whether a challenged action has the purpose and/or effect of infringing constitutional rights, *see, e.g., St. Louis University v. Masonic Temple Ass'n*, 220 S.W.3d 721, 729 (Mo. banc. 2007); and, where a deprivation of equal rights is alleged, whether the challenged action is rationally related to a legitimate state interest, or, if one subject to strict scrutiny, whether it is justified by a compelling state interest and narrowly tailored, *see, e.g., Weinschenk*, 203 S.W.3d at 215-16.

Intervenors argue that claims of political gerrymandering – and, in particular, those grounded in a claimed denial of equal rights – should be deemed non-justiciable, for lack of judicially manageable standards for adjudicating such claims, because a majority of the U.S. Supreme Court has not to date been able to agree as to the standards that should govern such cases. That argument, however, is flawed in a number of respects.

For one thing, federal law concerning the justiciability of political gerrymandering claims is of little, if any, relevance here since, as discussed previously, Plaintiffs' claims rest solely on State constitutional provisions, those provisions are not entirely congruent with their federal counterparts, and the Missouri Constitution is more protective of the right to vote than the U.S. Constitution. Moreover, federal law currently holds that a

challenge to political gerrymandering grounded in the equal protection clause of the U.S. Constitution *does* present a justiciable claim. The U.S. Supreme Court so held in *Davis v. Bandemer*, 478 U.S. 109, 113 (1986). While, in a subsequent case, *Vieth v. Jubelrier*, 541 U.S. at 281, four Justices favored overruling *Davis* in that regard, they failed to command a majority for that position.[16] Accordingly, the holding of *Davis*, concerning political gerrymandering claims grounded in the federal equal protection clause being justiciable, remains the law of the land.

Further, the current status of federal constitutional law concerning political gerrymandering and equal protection is *not* that neither the Supreme Court, nor any Justice or group of Justices, has been able to identify a workable standard for adjudicating claims of unconstitutional political gerrymandering. To the contrary, the three dissenting opinions in *Vieth* discussed a number of potential standards, generally turning on some combination or variation of purposes and/or effects. 541 U.S. at 317, 343, 355. Similarly, in the subsequent case of *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), several possible tests for adjudicating claims of partisan

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[16] In providing the fifth vote to reject the plaintiffs' claims which were the subject of *Vieth*, Justice Kennedy made clear that he did not agree with the premise that claims grounded in political gerrymandering never could be justiciable. To the contrary, Justice Kennedy stated, "I would not foreclose all possibility of judicial relief if some limited and precise rationale were found to correct an established violation of the Constitution in some redistricting cases." 541 U.S. at 306.

gerrymandering were discussed in the various opinions, with four Justices proposing different standards; Justice Kennedy rejecting the plaintiffs' proposed standard, but concluding that the issue is justiciable and still in search of a standard; and four Justices concluding that the issue is non-justiciable and therefore rejecting all standards. 548 U.S. at 409-10, 417, 447-48, 483, 491-92, 511-12.

The fact that at least five of the nine Justices on the U.S. Supreme Court thus far have been unable to coalesce around a single test as a matter of federal law does not mean that this Court cannot adopt an appropriate test as a matter of Missouri law, as a means of enforcing the Missouri constitutional provisions against the recognized evil of political gerrymandering. And that is particularly so since it is settled that, "[d]ue to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart." *Weinschenk*, 203 S.W.3d at 212.

As stated at the hearing on the motion to dismiss, beyond the standards for finding constitutional violations previously applied by this Court, there are other possible standards, or variations on those standards, discussed at one time or another by the U.S. Supreme Court, that also might be applied to this case, and under which the Petition clearly states viable claims. (Tr. 33-34). Those standards are summarized in *Radogno v. Ill. State Bd. of Elections*, No. 1:11-cv-04884 (N.D. Ill. Nov. 22, 2011), 2011 WL 5868225. At least five of those standards clearly would or could lead to the Map in this case being held unconstitutional:

> Whether boundaries were drawn for partisan ends to the exclusion of fair, neutral factors.
>
> Whether mapmakers acted with the predominant intent to achieve partisan advantage and subordinated neutral criteria; for example, where the map packs and cracks the rival party's voters and thwarts its ability to translate a majority of votes into a majority of seats.
>
> Whether, at a district to district level, a district's lines are so irrational as to be understood only as an effort to discriminate against a political minority.
>
> Whether a statewide plan results in unjustified entrenchment, such that a party's hold on power is purely the result of partisan manipulation and not other factors.
>
> Whether the sole intent of a redistricting plan is to pursue partisan advantage.

2011 WL 5868225 at *2-3 (internal citations and quotation marks omitted).[17]

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[17] Intervenors criticize Plaintiffs for supposedly failing to propose standards for adjudicating their claims. However, Plaintiffs clearly have done so and, in any event, as Justice Scalia pointed out in his plurality opinion in *Vieth*, "it is *our* job, not the plaintiffs', to explicate the standard that makes the facts alleged by the plaintiffs adequate

We note, finally, that while we acknowledge the importance of the Court rendering decisions which can serve as precedent in future cases, the Court is engaged in adjudicating the case before it, not rulemaking. The Court is not being asked to rule on whether some other hypothetical legislative action, not before it here, might pass constitutional muster. One can conjure up many different scenarios, such as a map reflecting partisan purposes, but not effects; a map reflecting partisan effects, but not purposes; the skewed aspects of the map along partisan lines being incidental, not intentional; or the gerrymandered districts being supported by some legitimate governmental interest, and being narrowly tailored to fulfill those interests. None of those descriptions fits this case. And, whether injecting any of those factors should lead to a different result is a question for another day, and another case.

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or inadequate to state a claim. We cannot nonsuit *them* for our failure to do so." 541 U.S. at 301 (emphasis in original).

B. The Petition States an Equal Rights Claim for Violation of the Fundamental Right to Vote.

In his Motion to Dismiss, Defendant Koster argues that Count II of the Petition must be dismissed for three reasons: (1) Plaintiffs have not alleged that the challenged congressional map violates their fundamental right to vote; (2) accordingly, minimal, rational basis scrutiny applies; and (3) Plaintiffs have failed to allege that the redistricting plan is irrational. (L.F. 44-46). All three of these contentions are wrong.

First, the Petition unequivocally alleges partisan gerrymandering (L.F. 17) and, as amended, violation of the right to vote as protected by the Missouri Constitution. (L.F. 121-22). As indicated earlier, an equal rights-based challenge to a redistricting plan on grounds of gerrymandering is *inherently* a claim of violation of the fundamental right to vote. Gerrymandering, by definition, affords unequal treatment to certain individuals in their ability to exercise their right to vote, by discriminating against supporters of the political party representing a minority in the gerrymandering legislature and diluting their votes.

Because it is a form of discrimination in the exercise of a fundamental right, partisan gerrymandering, like racial gerrymandering, conventionally receives heightened constitutional scrutiny. *See, e.g., Gomillion*, 364 U.S. at 347 (racial gerrymandering deprived plaintiffs of their "voting rights"); *Davis*, 478 U.S. at 132 (plurality opinion) (a claim of "statewide political gerrymandering" alleges a form of "unconstitutional vote dilution"; "unconstitutional discrimination occurs . . . when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters'

influence on the political process as a whole"). This Court has expressly recognized and adopted these principles. *See Armentrout*, 409 S.W.2d at 142.

Second, the contention that rational basis scrutiny applies to partisan gerrymandering claims is incorrect as a matter of law. Defendants have cited to no Missouri case applying the rational basis standard to a gerrymandering claim, and we are aware of none. Particularly where "the more expansive and concrete protection of the right to vote under the Missouri Constitution [confers] greater protection than its federal counterpart," *Weinschenk*, 203 S.W.3d at 212, it is highly implausible to suggest that judicial review of partisan gerrymandering under the State constitution would invoke the lowest conceivable level of constitutional scrutiny. In fact, to the extent that any of the Missouri Constitution's anti-gerrymandering provisions have been adjudicated, this Court has applied more searching review, as it did in applying the "substantial compliance" standard, described earlier, to the Constitution's compactness requirement. *Kirkpatrick*, 528 S.W.2d at 427.

Third, even assuming *arguendo* that the rational basis standard applied to this case, Defendants are wrong in contending that Plaintiffs have failed to allege a violation of that standard. Paragraph 50 of the Petition alleges that "[n]o legal or other justification exists for drawing and adopting a congressional redistricting Map which has the purpose and effect of depriving plaintiffs and others of their equal rights and opportunity under the law relating to congressional elections." (L.F. 18). These allegations clearly encompass claims that the redistricting Map is constitutionally invalid regardless of

whether it is evaluated under strict scrutiny, the rational basis standard, or some other standard.

Fourth, as Defendant Koster concedes, to pass muster under rational basis review, the challenged action must be "rationally related to a legitimate state interest." (L.F. 43-44), *quoting Thompson v ICI American Holding*, 347 S.W.3d 624, 635 (Mo. App. W.D. 2011). In that regard, the question is *not* whether it is possible to find any degree of rationality somewhere in the challenged redistricting plan, such as equality of population among districts, keeping many counties intact, or a degree of compactness appearing in places. To so hold would completely insulate gerrymandering from meaningful judicial review, which would be plainly inconsistent with the Missouri Constitution's multi-faceted restraints on legislative gerrymandering.

Rather, this case arises against a backdrop making clear that it is readily feasible to draw one or more alternative maps that reflect equality of population and compactness, in terms of both shape and keeping communities of interest together, as well or better than the challenged map, and in a manner which does not reflect partisan gerrymandering. Thus, the critical inquiry here is whether adopting a districting plan which also includes the partisan gerrymandering aspects of H.B. 193 is rationally related to a legitimate state interest.

Drawing district lines for partisan gain is not, and never has been held to be, an interest that is either legitimate or, indeed, governmental. It is, on the contrary, a quintessentially illegitimate interest; one intended to advance private, partisan interests over those of the general public; and thus is not an interest of "the state" in any

constitutionally relevant sense. As Justice Kennedy observed in his concurring opinion in *Vieth*, "I do not understand the plurality to conclude that partisan gerrymandering that disfavors one party is permissible. Indeed, the plurality seems to acknowledge it is not." 541 U.S. at 316. Similarly, As Justice Souter stated in *Vieth*, "the issue is one of how much is too much." 541 U.S. at 344 (dissenting opinion).

Gerrymandering is a paradigmatic example of what James Madison long ago referred to as factionalism – a situation in which control of government is secured by "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." James Madison, The Federalist, No. 10. Such an impulse virtually defines illegitimacy for purposes of constitutional review. That the plan challenged here was motivated by such an impulse must, at this stage of these proceedings, be presumed because it is so alleged in the Petition, the allegations of which must be taken as true for purposes of adjudicating a motion to dismiss or for judgment on the pleadings.

III. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING COUNT III OF PLAINTIFFS' PETITION, OR GRANTING JUDGMENT ON THE PLEADINGS, BECAUSE PLAINTIFFS SET FORTH JUSTICIABLE AND VIABLE CLAIMS THAT THE LEGISLATURE'S REDISTRICTING PLAN VIOLATES THE REQUIREMENTS OF ART. I, §§ 1 AND 2 OF THE MISSOURI CONSTITUTION, THAT POLITICAL OR GOVERNMENTAL POWER BE EXERCISED "SOLELY FOR THE GOOD OF THE WHOLE" AND "TO PROMOTE THE GENERAL WELFARE OF THE PEOPLE," IN THAT PLAINTIFFS ALLEGE THAT THE PLAN HAS THE PURPOSE AND EFFECT OF BENEFITING ONE POLITICAL PARTY AND ITS FOLLOWERS.

Count III of Plaintiffs' Petition points to Art. I, §§ 1 and 2 of the Missouri Constitution as further support for their position that the General Assembly's congressional redistricting plan reflects unconstitutional partisan gerrymandering, and specifically the language that "all political power . . . is instituted solely for the good of the whole," and that "all constitutional government is intended to promote the general welfare of the people." Defendant Koster asserts that the cited constitutional clauses do not establish rights that can be enforced through judicial action. (L.F. 46-47). However, that argument is flawed in several respects.

For one thing, this Court, in *Armentrout*, expressly relied on the "good of the whole" language – indeed, referencing it first in its list of relevant constitutional provisions – as protecting the right to vote. 409 S.W.2d at 143. This strongly suggests

that the language on which Plaintiffs rely has independent substantive meaning, and Defendants have cited no authority to the contrary dealing with the same language.

Further, Justice Stevens stated in *Vieth*, "the District Court in a recent case correctly described political gerrymandering as a 'purely partisan exercise' and 'an abuse of power that, at its core, evinces a fundamental distrust of voters, serving the self-interest of the political parties *at the expense of the public good.*'" 541 U.S. at 338 n.30 (dissenting opinion), *quoting* App. to Juris Statement in *Balderas v. Texas*, O.T. 2001, No. 01-1196, p. 10 (emphasis added).

Defendants' position to the contrary rests almost entirely on *Committee for Educational Equality v. State*, 294 S.W.3d 477 (Mo. banc 2009) ("*CEE*"). However, that case addressed completely different constitutional language, found in an entirely different article of the Missouri Constitution – Art. IX – and therefore is of no relevance here. The plaintiff in *CEE* argued that prefatory language contained in Art. IX, § 1(a), "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people," requires that the legislature "adequately" fund free public school in all districts, above and beyond the minimum 25% mandated by § 3(b), if necessary. The Court held that the "introductory clause" of § 1(a) cannot, on its own, provide a basis for a constitutional challenge because it is "purely aspirational," "provides no specific directive or standard for how the State must accomplish a 'diffusion

of knowledge'" and because § 3(b) provides the specific constitutional parameters for funding. 294 S.W.3d at 488-89.[18]

The language in Art. I, §§ 1 and 2, on which Plaintiffs rely here, is nothing like the language at issue in *CEE*. In contrast to the prefatory language in *CEE*, which is a dependent clause providing no specific directive, the language here consists of independent clauses, utilizing active language and providing explicit directives. Moreover, the language of Art. I, § 2, that "all persons are created equal and are entitled to equal rights under the law," repeatedly has been held to provide an actionable right to challenge state legislation on equal protection grounds, s*ee, e.g.*, *Weinschenk,* and the State equal protection clause is no more specific, and uses no more active or direct language, than the "good of the whole" and "general welfare" clauses.[19]

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[18] The Court remarked that "Plaintiffs are attempting to read a separate funding requirement into section 1(a) that would require the legislature to provide 'adequate' funding in excess of the 25-percent requirement contained in section 3(b). Such language does not exist." 294 S.W.3d at 488. The Court noted that it had previously held that "section 1(a)'s language, as a whole, including the introductory portion of the section, requires the State to provide free public schools that charge no admission or course fees," but that "[t]he introductory clause alone . . . has never been given direct effect, as it is purely aspirational in nature." *Id.* at 488-89.

[19] To the extent it is necessary and appropriate to look elsewhere in the Missouri Constitution for analogous language, in seeking guidance as to how the language in Art.

Finally, Defendant Koster also argues that "when the people enacted the 1945 Constitution, they had no intention of precluding partisan political objectives from being part of the calculus in enacting legislation." (L.F. 47). This is simply false, as it relates to redistricting. The history of the 1945 Constitutional Convention demonstrates that Art. III, § 45 was expressly intended to prohibit partisan political gerrymandering. In the course of the debates during that Convention, it was stated, "[n]ow Missouri has been a shining example of gerrymander of representative districts for years and years and if we will put a thing like this [a requirement that districts be compact and contiguous] in our Constitution, it will protect the people of our state against such a thing until Congress

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I, §§ 1 and 2 relied on by Plaintiffs should be construed, the most instructive case law consists not of *CEE*, construing Art. IX, but rather cases construing other language in Art. I, § 2, providing "that all persons have a natural right to . . . the enjoyment of the gains of their own industry." That language has been used numerous times to strike down laws. *See State ex rel. Scott v. Roper*, 688 S.W.2d 757, 768–69 (Mo. banc 1985); *Moler v. Whisman*, 234 Mo. 571, 147 S.W. 985, 987–88 (Mo. 1912); *State ex rel. Knese v. Kinsey*, 314 Mo. 80, 282 S.W. 437, 439 (Mo. banc 1926). In *Scott*, the Court held that the clause provided an "express[] protect[ion]" to Missouri citizens. 688 S.W.2d at 769.

passes its own act." *Preisler v. Sec'y of State*, 279 F.Supp. 952, 960 n.5 (W.D. Mo. 1968), *quoting* Debates 1945 Mo. Const. Conv. pp. 5559-5565.[20]

IV. THE TRIAL COURT ERRED AS A MATTER OF LAW IN DISMISSING COUNT IV OF PLAINTIFFS' PETITION, OR GRANTING JUDGMENT ON THE PLEADINGS, BECAUSE PLAINTIFFS SET FORTH JUSTICIABLE AND VIABLE CLAIMS THAT THE LEGISLATURE'S CONGRESSIONAL REDISTRICTING PLAN INFRINGES THE RIGHT TO VOTE AS GUARANTEED BY ART. I, § 25 AND ART. VIII, § 2 OF THE MISSOURI CONSTITUTION, IN THAT PARTISAN GERRYMANDERING CAN EFFECT A DENIAL OF THE RIGHT TO VOTE BY DILUTING THE WEIGHT OF VOTES.

Count IV of Plaintiffs' Petition further states a claim for violation of the right to vote as protected by the Missouri Constitution. It alleges that for the right to vote to be vindicated, "each citizen's vote must have the potential to be of equal force, weight and effect, and may not be diluted as compared with other citizens' votes"; "[p]artisan gerrymandering that unduly fragments or unnecessarily concentrates a group's voting strength, and which serves to minimize or cancel out the voting strength of that group,"

[20] With respect to the question Defendant Koster raises, that "if there were such a cause of action . . . [w]hat would be the test for compliance"? (L.F. 47), the answer is the same as with respect to the enforcement of other rights under the Missouri Constitution. *See* discussion at pp. 44-48, *supra*.

constitutes unconstitutional vote dilution; the Map challenged here "improperly dilutes the votes of Democrats and Independents"; and no legal or other justification exists for same. (L.F. 121-22).

The case law establishing the right to vote as protected by the Missouri Constitution, that Missouri law is particularly protective of that right, and that the right can be infringed as effectively by diluting the weight of a vote as by barring a voter from the polls, has been discussed previously. *See* discussion at pp. 28-31, *supra*.

The standard that may be applied in this case to establish the constitutional violation – regardless of whether the constitutional right implicated is deemed to be the right to vote or equal protection – is pernicious purpose and effect, and lack of any countervailing legal justification. *See,* discussion at pp. 44-48, *supra*.

Accepting Plaintiffs' allegations as true, as the Court must, the General Assembly, by a highly partisan vote in each chamber, adopted a Map having the clear purpose and effect of promoting partisan interests by creating six safe Republican districts among the eight congressional seats allocated to Missouri, and did so through extreme instances of gerrymandering. (L.F. 9). Moreover, after the Governor vetoed H.B. 193, the majority used its political muscle to force an override, mustering the vote of every Republican representative, and extracting the votes of four Democratic representatives through trading various perks and promises of future political favors, and subjecting certain representatives to extreme pressure. (L.F. 11). The effect of the foregoing is that one political party has been able to use its stranglehold on the machinery of state government to inflate the voting power of its supporters by a factor of 50 percent – enabling a party

which comprises half of Missouri's voters to elect 75 percent of Missouri's congressional delegation to Congress – while correspondingly diluting the voting power of other Missouri voters. (L.F. 12, 121).

It is readily feasible to draw a Map which fulfills the traditional districting principles of compactness, contiguity, equal population, respecting political subdivision boundaries and keeping economic communities of interest together, in an equivalent or better manner than does H.B. 193, but without the evil intent and pernicious effects of the gerrymandering embodied in the legislature's Map. (L.F. 12). Accordingly, the General Assembly's drawing the Map in the manner it did only can be explained as the product of a desire to gain partisan advantage. Thus, H.B. 193 is not supported by a compelling governmental interest, or even a rational basis grounded in a legitimate governmental interest, and is not narrowly tailored to serve a proper governmental interest.

We note that Defendants cannot even muster an argument – sometimes advanced to try to justify gerrymandering – that the Map was intended to enhance incumbents' prospects for re-election and thereby increase the State congressional delegation's "clout" in Washington. Here, the General Assembly abolished the district of a four-term Democratic incumbent (Rep. Carnahan), while preserving the seats of two first-term Republican incumbents (Reps. Hartzler and Long) and another Republican incumbent in the midst of his second term (Rep. Luetkemeyer). Accordingly, there is no rational connection between what the General Assembly did here and any desire to bolster the influence of Missouri's congressional delegation.

The redistricting Map adopted here represents nothing other than a brazen exercise of bare-knuckled political power, by which the majority in the General Assembly rode roughshod over the constitutional rights of countless Missouri voters who may not share their political persuasion, and tilted the electoral playing field significantly in the majority party's favor – a tilt which, absent judicial intervention, will remain in effect for ten years. A primary function of Missouri's Constitution and judiciary is to prevent a political majority from abusing its power so as to trample the constitutional rights of those in the minority. This case cries out for the courts to intervene and perform their traditional role of protecting constitutional rights against the tyranny of the majority.

CONCLUSION

For all of the foregoing reasons, we respectfully submit that the trial court's Order and Judgment dismissing Plaintiffs' Petition for failure to state a claim or, alternatively, granting judgment on the pleadings, must be reversed, and this case should be remanded

for trial and other proceedings.[21]

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[21] On remand, in order to avoid any appearance of bias or unfairness, Plaintiffs request that this case be reassigned to a trial judge who obtained his or her seat on the bench through the Missouri Non-Partisan Court Plan, as opposed to being elected in a partisan election. In light of the political aspect of this case – Plaintiffs asserting that members of the Republican Party unfairly used their control over state government to benefit their own party, to the disadvantage of Democrats and Independents – an appearance of bias or unfairness could arise if the Judge presiding over trial court proceedings is one elected to the bench in a partisan election as a Republican, as is the case with Judge Green, (or, for that matter, as a Democrat). *See generally, Buschardt v. Jones*, 998 S.W.2d 791, 802-03 (Mo. App. W.D. 1999). The potential for such an appearance of bias or unfairness here is exacerbated by the fact that this case originally was assigned to a Cole County Circuit Judge elected to the bench as a Democrat (Hon. Patricia Joyce), and came to be reassigned to Judge Green because Intervenors John J. Diehl, Jr. and Scott T. Rupp took a change of judge pursuant to Mo. R. Civ. P. 51.05. (L.F. 1-2, 66-67). It would do much to avoid an appearance of bias or unfairness, and promote respect for and confidence in the judiciary, if, on remand, this case were assigned to a Judge appointed under the Missouri Non-Partisan Court Plan. As stated in *Buschardt*, "[l]itigants who present their disputes to a Missouri court are entitled to a trial which is not only fair and impartial, but which also appears fair and impartial. 998 S.W.2d at 803.

Respectfully submitted,

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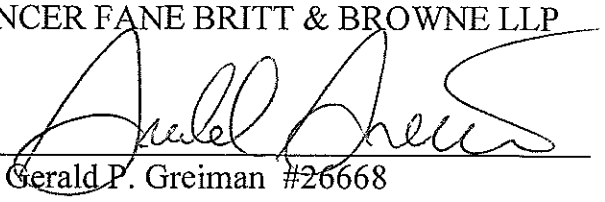
By: 

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CERTIFICATE OF SERVICE

I hereby certify that on the 23rd day of December, 2011, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system on all counsel of record. In addition, a copy of the foregoing was sent via e-mail to the following:

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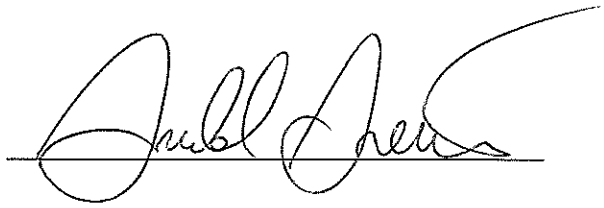

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Brief of Appellants complies with Rule 55.03, and with the limitations contained in Rule 84.06(b), and that it contains 16,128 words, excluding the cover page, the signature block, certificate of service and this certificate, as determined by the Microsoft Word 2010 Word-counting system.