

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

APPELLANTS' REPLY BRIEF

SPENCER FANE BRITT & BROWNE LLP

Gerald P. Greiman #26668
Frank Susman #19984
Thomas W. Hayde #57368
1 N. Brentwood Blvd., Suite 1000
St. Louis, MO 63105
(314) 863-7733 (telephone)
(314) 862-4656 (facsimile)
ggreiman@spencerfane.com
fsusman@spencerfane.com
thayde@spencerfane.com

Keith A. Wenzel #33737
308 E. High Street, Suite 222
Jefferson City, MO 65101
(573) 634-8115 (telephone)
(573) 634-8140 (facsimile)
kwenzel@spencerfane.com

Attorneys for Appellants

TABLE OF CONTENTS

TABLE OF CONTENTS i

TABLE OF AUTHORITIES iii

ARGUMENT 1

I. DEFENDANTS’ ARGUMENTS IGNORE THE SETTLED PRINCIPLES
 THAT PLAINTIFFS’ AVERMENTS MUST BE TAKEN AS TRUE AND
 LIBERALLY CONSTRUED IN THEIR FAVOR. 1

II. DEFENDANTS’ ARGUMENTS CONCERNING PLAINTIFFS’ CLAIMS
 OF NON-COMPACTNESS, IN VIOLATION OF ART. III, § 45 OF THE
 MISSOURI CONSTITUTION, ARE LEGALLY AND FACTUALLY
 FLAWED. 3

A. Legal Fallacies 3

B. Factual Fallacies..... 6

III. DEFENDANTS’ ARGUMENTS CONCERNING EQUAL PROTECTION
 AND THE RIGHT TO VOTE REFLECT AN UNDULY NARROW
 VIEW OF THE APPLICABLE AUTHORITIES..... 9

A. Legal Impermissibility of Partisan Gerrymandering. 9

B. Vote Dilution..... 11

IV. DEFENDANTS’ CONTENTIONS CONCERNING REMEDIES AND
 JUDICIAL ASSIGNMENT ON REMAND ARE LEGALLY
 ERRONEOUS..... 15

A. Remedies 15

B. Judicial Reassignment on Remand	16
CONCLUSION	18
CERTIFICATE OF SERVICE.....	20
CERTIFICATE OF COMPLIANCE	21

TABLE OF AUTHORITIES

	Page(s)
FEDERAL CASES	
<i>Bush v. Vera,</i>	
517 U.S. 952 (1996).....	9, 15
<i>Davis v. Bandemer,</i>	
478 U.S. 109 (1986).....	12, 13, 15
<i>Growe v. Emison,</i>	
507 U.S. 25 (1993).....	16
<i>Karcher v. Daggett,</i>	
462 U.S. 725 (1983).....	13
<i>League of United Latin American Citizens v. Perry,</i>	
548 U.S. 399 (2006)	9, 12
<i>Purcell v. Gonzalez,</i>	
549 U.S. 1 (2006).....	13
<i>Reynolds v. Sims,</i>	
377 U.S. 533 (1964).....	13
<i>Scott v. Germano,</i>	
381 U.S. 407 (1965).....	16
<i>Vieth v. Jubelrier,</i>	
541 U.S. 267 (2004).....	10, 11

Voinovich v. Quilter,
507 U.S. 146 (1993)..... 12

STATE CASES

Armentrout v. Schooler,
409 S.W.2d 138 (Mo. 1966)..... 13

City of Lake St. Louis v. City of O’Fallon,
324 S.W.3d 756 (Mo. banc. 2010)..... 1

Devitre v. Orthopedic Center of St. Louis, LLC,
349 S.W.3d 327 (Mo. banc. 2011)..... 1

Edwards v. Gerstein,
237 S.W.3d 580 (Mo. banc. 2007)..... 17

In re Reapportionment of Towns of Hartland, Windsor and West Windsor,
160 Vt. 9, 624 A.2d 323 (Vt. 1993)..... 8

Parella v. Montalbano,
899 A.2d 1226 (R.I. 2006)..... 8

Preisler v. Hearnnes,
362 S.W.2d 552 (Mo. banc. 1962)..... 7

Preisler v. Kirkpatrick,
528 S.W.2d 422 (Mo. banc 1975)..... 5, 6, 7

State ex rel. Barrett v. Hitchcock,
241 Mo. 433, 146 S.W. 40 (Mo. 1912) 4, 5

Weinschenk v. State,
 203 S.W. 3d 201 (Mo. banc. 2006)..... 11

Wilson v. Eu,
 1 Cal.4th 707, 823 P.2d 545 (1992)..... 8

STATUTES AND RULES

U.S. CONST. AMEND. XIV 11, 12, 13
 2 U.S.C. § 2a(c)..... 16
 42 U.S.C. §§ 1973 *et seq.*..... 12
 MO. CONST. ART I, § 1..... 14
 MO. CONST. ART. I, § 25 14
 MO. CONST. ART. III, § 19..... 4
 MO. CONST. ART. III, § 45..... 3, 6, 9
 MO. R. CIV. P. 51.05 17

OTHER AUTHORITIES

Mitchell N. Berman, "Managing Gerrymandering," 83 Tex. L. Rev. 781 (2005)..... 10
 James A. Gardner, "Foreword: Representation Without Party: Lessons from State
 Constitutional Attempts to Control Gerrymandering," 37 Rutgers L.J. 881
 (2006)..... 8, 9
 David Schultz, "Regulating the Political Thicket: Congress, the Courts and State
 Reapportionment Commissions," 3 Charleston L. Rev. 107 (2008)..... 12

ARGUMENT

I. DEFENDANTS' ARGUMENTS IGNORE THE SETTLED PRINCIPLES THAT PLAINTIFFS' AVERMENTS MUST BE TAKEN AS TRUE AND LIBERALLY CONSTRUED IN THEIR FAVOR.

The starting point in this case, as in any lawsuit, is what are the facts? In arguing for a constricted view of the pertinent facts, as Defendants do in their briefs, Defendants ignore the well-settled principles that, in considering a motion to dismiss for failure to state a claim or a motion for judgment on the pleadings, “a plaintiff’s averments are taken as true and all reasonable inferences are liberally construed in favor of the plaintiff.” *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). See Brief of Appellants (“App. Br.”) at 27.

Defendants make no assertion that Plaintiffs’ recitation of the facts strays beyond what is set forth in their pleadings. Indeed, Defendants concede that Plaintiffs’ Statement of Facts largely reflects a verbatim recitation of the allegations contained in the Petition, as amended. See, e.g., Brief of the Attorney General (“AG Br.”) at 4. Defendants contend, however, that in considering the pertinent facts, the Court should cull out, and ignore, allegations characterized as “broad, likely unsupportable, and largely implausible;” “value-laden statements and argumentative adjectives, adverbs, and metaphors;” or “terms that have no precise meaning.” *Id.* at 4-6.

Defendants’ suggestions that the Court should undertake an assessment of whether various of Plaintiffs’ factual allegations are “likely unsupportable” or “largely

implausible” fly in the face of the established rules concerning accepting Plaintiffs’ averments as true at this stage of the proceedings. Illustrative of the fallacies in Defendants’ position is the Attorney-General’s recitation, at pp. 6-7 of his Brief, as to what he considers to be the “key facts, stripped of rhetoric and uncertainty:”

[O]n May 4, 2011, the General Assembly passed H.B. 193, establishing new congressional districts, over the Governor’s veto. The vote was 109-44 in the House of Representatives and 28-6 in the Senate. L.F. at 11 and 2011 House Journal pp. 1806-07, 1862; 2011 Senate Journal 1326. All Senators and Representatives elected as Republicans, plus a few elected as Democrats, voted in favor of the bill. The map marked as Exhibit 1 to the Petition, LF 21, shows the boundaries set out by H.B. 193.

Those facts represent a mere fraction of the factual allegations set forth in Plaintiffs’ Petition. Moreover, had Plaintiffs limited the facts alleged in their Petition to those quoted above, Defendants surely would have sought to dismiss Plaintiffs’ claims as failing to set forth factual predicates establishing that something wrongful occurred and explaining the basis of the wrongs alleged. Indeed, in the proceedings below, a main thrust of Defendants’ position was that Plaintiffs’ allegations were lacking in critical aspects and therefore deficient, as opposed to their present position on appeal, that Plaintiffs’ allegations are overabundant.

Defendants’ arguments concerning the facts material to this case ignore the governing legal standards and are wholly without merit.

II. DEFENDANTS' ARGUMENTS CONCERNING PLAINTIFFS' CLAIMS OF NON-COMPACTNESS, IN VIOLATION OF ART. III, § 45 OF THE MISSOURI CONSTITUTION, ARE LEGALLY AND FACTUALLY FLAWED.

Defendants advance various arguments in asserting that Plaintiffs have not alleged, and cannot prove, any viable claim pursuant to Count I of their Petition, which alleges that the General Assembly's redistricting plan fails to comply with the compactness requirements mandated in Art. III, § 45 of the Missouri Constitution. As discussed below, Defendants' arguments suffer from several fallacies, both legally and factually.

A. Legal Fallacies

As a starting point, Defendants argue that the standard governing Plaintiffs' non-compactness claims is a literal and extreme application of language found in various of this Court's cases, concerning the General Assembly having "wholly ignored and completely disregarded" compactness requirements. However, in arguing that this language must be applied literally and in the extreme, Defendants ignore the fact that what the Court actually did in the pertinent cases was undertake an examination of the non-compactness claims on the merits, and apply tests of substantial compliance and honest and good faith efforts to comply with the compactness requirements – not inquire at the outset whether there was some catastrophic failure by the legislature to consider the constitutionally-mandated criteria, with the action being subject to dismissal absent plaintiff making a threshold showing of same. *See* App. Br. at 37-40.

Further, after strenuously arguing that the standard governing non-compactness claims is an extreme and literal interpretation of the “wholly ignored and completely disregarded” test, Defendants concede that it is impossible to make a showing which meets that standard, and that any ability of a plaintiff to maintain a non-compactness claim thus is illusory. As stated in the Brief of the Attorney General at 19:

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

Accordingly, the unavoidable thrust of Defendants’ position concerning the standard governing Plaintiffs’ non-compactness claims is that no such claim ever can be maintained. But that is not what Missouri law provides.

A century ago, this Court held that the words of the Missouri Constitution “show conclusively 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.” *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40, 54 (Mo. 1912). And this Court has adhered to that view over the years by undertaking review of non-compactness claims on the merits, and inquiring whether the districting plan under review reflects substantial compliance with compactness requirements and honest and good faith efforts at compliance.

The Court's approach in that regard hardly is surprising in that the Court repeatedly has recognized the "legislative evil, commonly known as 'the gerrymander.'" *Preisler v. Kirkpatrick*, 528 S.W.2d 422, 425 (Mo. banc 1975), quoting *Barrett*, 146 S.W. at 61. See also, App. Br. at 56-57, discussing statements made in the course of debates at the 1945 Constitutional Convention, reflecting that the requirement of compactness in legislative districting was intended to protect the people of Missouri against gerrymandering.

Moreover, as discussed in our opening brief at 26, redistricting by legislators is inherently fraught with risks of corruption or self-dealing, and the prospect of personal or partisan gain taking precedence over the public interest; and the judiciary represents the only organ of government capable of reining in abuses of the redistricting power. Accordingly, it is of critical importance that the courts continue to serve as a bulwark against redistricting abuses, and perform their traditional role of preventing those in control of the machinery of government from riding roughshod over the rights and interests of those in the minority. The circumstances presented by this case cry out for the courts to play a strong role in guarding against the recognized evils of gerrymandering.¹

¹ As discussed above and in our opening brief, Plaintiffs believe that when the standards actually applied in this Court's previous compactness cases are properly understood and applied here, Plaintiffs state valid claims in Count I of their Petition and are entitled to prevail in this litigation upon proving the facts alleged. However, should

B. Factual Fallacies

Defendants' arguments concerning Plaintiffs' claims of unconstitutional non-compactness also suffer from multiple factual fallacies. For one thing, the Attorney General asserts that "Count I of the Petition says nothing about the 'overall state-wide plan.'" AG Br. at 20. Here again, however, Defendants ignore the well-settled rule that the Court must accept Plaintiffs' averments as true and construe them liberally in Plaintiffs' favor. The Petition contains broad allegations of non-compactness aimed at the Map as a whole. L.F. 5-6, 9-17. Moreover, the districts which Plaintiffs attack as non-compact span the entire State, ranging from a district shaped like a dead lizard to the west, a district shaped liked a three-headed toad in the middle of the State, and a district containing lobster claw-shaped appendages to the east. *Id.*

the Court conclude that the applicable standard is an extreme and literal application of the "wholly ignored and completely disregarded" language, as Defendants assert, Plaintiffs request that the Court reconsider the standard and adopt a new and less stringent test for resolving compactness challenges, which is more consistent with the actual language of Art. III, § 45. The language of that constitutional provision does not merely require minimal compactness, or that the legislature pay lip service to that criterion; rather, Art. III, § 45 requires that congressional districts be "composed of contiguous territory as compact . . . as may be." That wording demonstrates that the framers of the Missouri Constitution had in mind maximum, not minimal, compactness.

Defendants argue that the Map at issue here cannot be invalid in that, according to Defendants, it is not appreciably less compact than the map upheld in *Preisler v. Hearnnes*, 362 S.W.2d 552 (Mo. banc. 1962). However, that is an inherently factual argument which is wholly inappropriate for consideration or resolution at this stage of these proceedings. Moreover, comparing the two maps, Defendants' arguments do not hold water. The map in *Hearnnes* consisted of ten districts, only one of which was deemed not to be reasonably compact. 362 S.W.2d at 557. Here, Plaintiffs attack the compactness of several of the eight districts created by H.B. 193.

Defendants attempt a similar argument based on *Kirkpatrick*, asserting that the Map at issue here compares favorably with the one upheld in *Kirkpatrick*, so cannot be deemed constitutionally infirm. Here again, the argument is inherently factual, so not appropriate for consideration. Moreover, the argument compares apples to oranges in that *Kirkpatrick* involved State Senate districts, so concerned a map dividing Missouri into 34 districts. That two problematic districts did not preclude a 34-district Senate map from being deemed to substantially comply with constitutional compactness requirements does not mean the same must be true of an eight-district congressional map of which at least three districts are severely gerrymandered. Moreover, a facial comparison of the shapes of the districts involved in *Kirkpatrick*, with the districts at issue here, shows that the Senate districts in *Kirkpatrick* are far more regular and compact than the congressional districts which are the subject of the present case.

We note further there is no indication in *Hearnnes* or *Kirkpatrick* that either of those cases involved claims of non-compactness based on factors other than shape. Here,

by contrast, Plaintiffs further claim non-compactness stemming from the Map's splitting of communities of interest among multiple districts, or joining disparate communities of interest in a single district. Defendants argue that communities of interest have nothing to do with compactness, but ignore the discussion in Appellants' opening brief demonstrating the historical and legal linkage between the two. *See* App. Br. at 36-37, *citing* James A. Gardner, "Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering," 37 Rutgers L.J. 881 (2006). *See Wilson v. Eu*, 1 Cal.4th 707, 823 P.2d 545, 553 (1992):

Compactness does not refer to geometric shapes but to the ability of citizens to relate to each other and their representatives and to the ability of representatives to relate effectively to their constituency. Further, it speaks to relationships that are facilitated by shared interests and by membership in a political community, including a county or city. (Internal quotation marks and citations omitted).

See also, In re Reapportionment of Towns of Hartland, Windsor and West Windsor, 160 Vt. 9, 624 A.2d 323, 330 (Vt. 1993) (quoting with approval *Wilson v. Eu*); *Parella v. Montalbano*, 899 A.2d 1226, 1252 (R.I. 2006) ("The compactness requirement, applied here, is intended to provide an electorate with effective representatives rather than with a

design to establish an orderly and systematic geometric pattern of electoral districts.”) (Internal quotation marks and citation omitted).²

Finally, the communities of interest to which Plaintiffs refer in their non-compactness claims are not undefined, or subject to being defined in myriad ways, as Defendants maintain. Rather, they refer to local, economic communities of interest, *i.e.*, “distinct, coherent groupings of people engaged in shared economic activity – and, to a lesser extent, administrative and political activity – thereby giving rise to communities of primarily economic interest entitled to separate legislative representation.” Gardner, 37 Rutgers L.J. at 950.

Plaintiffs’ allegations in Count I of their Petition clearly allege viable claims for violation of the compactness requirements of Art. III, § 45 of the Missouri Constitution.

III. DEFENDANTS’ ARGUMENTS CONCERNING EQUAL PROTECTION AND THE RIGHT TO VOTE REFLECT AN UNDULY NARROW VIEW OF THE APPLICABLE AUTHORITIES.

A. Legal Impermissibility of Partisan Gerrymandering.

From Defendants’ arduous efforts to try to justify the General Assembly’s Map (other than the Attorney General’s concession that the new Fifth District is indefensible),

² The U.S. Supreme Court repeatedly has referred to “communities of interest” as one of the “traditional districting principles.” *See, e.g., League of United Latin American Citizens v. Perry (“LULAC”),* 548 U.S. 399, 433 (2006) (Opinion of Kennedy, J.); *Bush v. Vera,* 517 U.S. 952, 977 (1996) (Opinion of O’Connor, J.).

and their arguments that controlling authorities render the Map impervious to meaningful judicial review, Defendants appear to be of the view that there is nothing whatsoever wrong with blatant partisan gerrymandering – that it simply reflects politics as usual. However, that view is legally untenable.

This Court has recognized the “legislative evil, commonly known as the ‘gerrymander,’” for a hundred years. *See* App. Br. at 29. Moreover, in *Vieth v. Jubelrier*, 541 U.S. 267 (2004), all nine Justices of the U.S. Supreme Court “agreed that the pursuit of partisan advantage in redistricting is sometimes unconstitutional.” Mitchell N. Berman, “Managing Gerrymandering, 83 Tex. L. Rev. 781, 809 n.192 (2005). None of them espoused the view that extreme partisan gerrymandering is perfectly acceptable.³

While the courts have yet to recognize a constitutional right to proportional representation on the part of political groups, “[i]t does not follow that the Constitution permits every state action intended to achieve any extreme form of disproportionate representation.” *Vieth*, 541 U.S. at 352 (Dissenting opinion of Souter, J.). What the U.S. Supreme Court has grappled with is how to distinguish a tolerable degree of partisanship in districting decisions, from a level of partisanship that is legally impermissible. As Justice Souter put it, “the issue is one of how much is too much, and we can be no more

³ In his concurring opinion in *Vieth*, Justice Kennedy stated, “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.

exact in stating a verbal test for too much partisanship than we can be in defining too much race consciousness, when some is inevitable and legitimate.” *Id.* at 344.

This case presents pernicious purposes, pernicious effects and an overtly partisan legislative process. Whatever difficulties the U.S. Supreme Court has encountered in endeavoring to fashion a one size fits all standard for the entire country, or the Justices have faced in trying to reconcile their individual views, this Court, on the present record, should conclude that for Missouri, the degree of partisan gerrymandering reflected in this case is too much. And that is particularly so in light of *Weinschenk v. State*, 203 S.W. 3d 201, 211-12 (Mo. banc. 2006), which teaches that the Missouri Constitution provides “more expansive and concrete protections” of an individual’s right to vote than does the U.S. Constitution.

B. Vote Dilution

Defendants contend that no case has recognized the kind of vote dilution which Plaintiffs assert here – that partisan gerrymandering serves to dilute the weight of Plaintiffs’ votes by unduly fragmenting or unnecessarily concentrating their votes and thereby minimizing or cancelling out their voting strength. *See* App Br. at 30-31. Defendants are mistaken. Plaintiffs’ concept of vote dilution is of the same ilk as that recognized in one-person, one-vote cases, as well as race discrimination cases brought

under the Equal Protection Clause of the U.S. Constitution and/or the federal Voting Rights Act, 42 U.S.C. §§ 1973 *et seq.*⁴

One-person, one-vote was a redistricting revolution launched from the Equal Protection Clause. Using it as a basis for litigation may have made sense given the differential treatment alleged among voters or the racial motives that often were at the root of much malapportionment, as in *Gomillion*. Thus, if violation of the one-person, one-vote mandate and racial gerrymandering could be actionable under the Equal Protection Clause, why could gerrymandering solely for the sake of partisan advantage not also be a constitutional violation? (Footnote omitted).

David Schultz, “Regulating the Political Thicket: Congress, the Courts and State Reapportionment Commissions,” 3 *Charleston L. Rev.* 107, 122-23 (2008).

Davis v. Bandemer, 478 U.S. 109 (1986), similarly confirms the legal soundness of Plaintiffs’ concept of vote dilution. Justice White’s plurality opinion in *Davis* is replete with references to “vote dilution.” 478 U.S. at 113, 131, 132, 138, 143. And it is

⁴ *See, e.g., LULAC*, in which Chief Justice Roberts stated, voting rights cases have “confirmed that ‘manipulation of [single-member] district lines’ could also dilute minority voting power if it packed minority voters in a few districts when they might control more, or dispersed them among districts when they might control some.” 548 U.S. at 495 (Concurring and dissenting opinion), *citing Voinovich v. Quilter*, 507 U.S. 146, 153-54 (1993).

clear that the plaintiffs not succeeding on their claims in *Davis* was due to the district court's failure to apply a sufficiently demanding standard for finding unconstitutional political gerrymandering, not any flaw in plaintiffs' reasoning that if unlawful political gerrymandering occurred, it served to dilute the weight of their votes. *See also, Karcher v. Daggett*, 462 U.S. 725, 744 (1983), in which Justice Stevens stated, in his concurring opinion, "political gerrymandering is one species of 'vote dilution' that is proscribed by the Equal Protection Clause." (Footnote omitted).

More recently, the concept of vote dilution has surfaced in cases dealing with other forms of electoral issues, such as fraudulent voting. *See Purcell v. Gonzalez*, in which the Court stated: "Voters who fear their legitimate votes will be outweighed by fraudulent ones will feel disenfranchised. "[T]he 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 exercise of the franchise." 549 U.S. 1, 4 (2006), *quoting Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

Particularly in view of the foregoing, Defendants' assertions that Plaintiffs mis-cite *Armentrout v. Schooler*, 409 S.W.2d 138 (Mo. 1966), are wholly without merit. While there is no dispute that *Armentrout* involved whether a city must be reapportioned into wards having equal population, its reasoning concerning vote dilution has direct implications with respect to the claims asserted in this case of partisan gerrymandering resulting in vote dilution. Indeed, if anyone fails to fairly treat *Armentrout*, it is Intervenors, who claim that the case turned solely on federal and state equal protection principles, and almost completely ignore the Court's citation of other provisions of the

Missouri Constitution, *i.e.*, Art. I, §§ 1 and 25. Brief of Intervenor-Respondents (“Int Br.”) at 36, 46. Surely, the Court’s citation of those provisions in its opinion reflects that those provisions have some relevance to the Court’s decision.

Finally, Defendants contend that Plaintiffs’ concept of vote dilution only can be applied to groups which are clearly defined on the basis of immutable characteristics, such as race. *See* AG Br. at 25-27. However, Defendants’ arguments largely involve setting up and knocking down their own straw men, as opposed to refuting Plaintiffs’ arguments. Plaintiffs do not contend that every imaginable group of people, *e.g.*, members of a religious group or an elementary school community, have a right to proportional representation or, more to the point, to not be victims of a deliberate and effective scheme to dilute the weight of their votes. Plaintiffs’ claims are focused on *partisan* gerrymandering. The significance of maintaining a level electoral playing field among partisan groups is self-evident in a State and country which are run on a two-party system. And that is especially so in this day and age, when partisan divides in legislative politics seem as sharp as they ever have been, and party affiliation often appears to be the dominant factor in how legislators vote. Using the law to bar partisan gerrymandering does not mean that other groups or individuals,⁵ be they dog walkers, union members,

⁵ We note also that Plaintiffs’ claims do not necessarily turn on recognizing the rights of groups, as opposed to individuals. It might be said that Plaintiffs are harmed individually by partisan gerrymandering in that their personal votes are made to be worth

bridge players or the subject of any other conceivable classification, would have equivalent gerrymandering claims.⁶

IV. DEFENDANTS' CONTENTIONS CONCERNING REMEDIES AND JUDICIAL ASSIGNMENT ON REMAND ARE LEGALLY ERRONEOUS.

Defendants make certain contentions concerning available remedies in respect of Plaintiffs' claims, as well as Plaintiffs' request for judicial reassignment on remand, which are legally erroneous.

A. Remedies

First, with respect to remedies, Plaintiffs request that the courts draw a proper, constitutional congressional redistricting map in light of the General Assembly's failure to do so, the lack of reason to believe the legislature would adopt a proper Map if given a

less than those of certain others, because he or she has fewer opportunities to combine successfully with like-minded voters in a winning coalition.

⁶ With respect to Intervenors' argument that *Bush v. Vera*, 517 U.S. 952 (1996), rejects the notion that strict scrutiny applies to political gerrymandering claims (Int. Br. at 44 n.8), Intervenors mischaracterize Plaintiffs' position. Plaintiffs state in their opening brief that partisan gerrymandering claims receive "heightened," not necessarily "strict," scrutiny (*Id.*). In *Davis*, it is clear that the U.S. Supreme Court was applying a more searching level of scrutiny than rational basis, and nothing in the subsequent cases of *Vieth* or *LULAC* suggests that the rational basis standard applies to political gerrymandering cases.

further opportunity to do so, and the need for a replacement map to be drawn promptly, since candidate filing for Congress opens in February. In response, the Attorney General, without any citation of authority, asserts that “[b]ecause the constitution assigned the task to the legislature, it would be inappropriate for a court to draw new districts even if the first set enacted were found to be unconstitutional and the old ones were no longer permitted as a result of federal law.” AG Br. at 12 n.3.

Contrary to that assertion, it is clear as a matter of law that the courts of this State have the power to formulate a congressional redistricting plan where the legislature has failed to adopt a proper plan. The U.S. Supreme Court has held, “[t]he power of the judiciary of a State to require valid reapportionment or to formulate a valid redistricting plan has not only been recognized by this Court but appropriate action by the States in such cases has been specifically encouraged.” *Grove v. Emison*, 507 U.S. 25, 33 (1993), quoting *Scott v. Germano*, 381 U.S. 407, 409 (1965).

We note also that a further possible remedy, in the event the time for congressional elections arrives before a proper redistricting plan can be adopted, is for the State’s congressional delegation to be elected at large. *See* 2 U.S.C. § 2a(c).

B. Judicial Reassignment on Remand

Intervenors take issue with Plaintiffs’ request that, on remand, the case be reassigned to a trial court judge appointed under the Missouri Non-Partisan Court Plan, rather than a judge elected through a partisan election. However, none of the points raised by Intervenors provides any valid basis for denying the requested relief.

Intervenors complain that Plaintiffs failed to exercise their option to take a change of judge, pursuant to Mo. R. Civ. P. 51.05, as Intervenors did when this case originally was assigned to a judge elected as a Democrat. However, Intervenors ignore the fact that such a change would have accomplished nothing in that the remaining Cole County Circuit Judge to whom the case would have gone next, Hon. Jon E. Beetem, also was elected in a partisan election as a Republican.

Intervenors further complain that Plaintiffs did not ask one or more of the elected Cole County Circuit Judges to recuse themselves, but this argument misses the point. The concern Plaintiffs raise, regarding a potential appearance of impropriety when a partisan gerrymandering claim is decided by a judge elected as a partisan, relates to the Missouri judiciary as an institution, and thus is peculiarly appropriate for this Court to address. It would be beyond the pale, and likely beyond the Cole County Circuit Court's jurisdiction, for that court to decline to adjudicate this case and transfer it to a judge outside the Circuit.

Intervenors also suggest that Plaintiffs should be foreclosed from raising the issue of this case being adjudicated by a judge elected as a partisan because Plaintiffs chose to file this case in Cole County Circuit Court. This argument, however, ignores the fact that Plaintiffs were required to file this case in Cole County, since the named defendants are state executive department heads whose offices are located, and principal official duties are performed, in Cole County. *See Edwards v. Gerstein*, 237 S.W.3d 580, 583-84 (Mo. banc. 2007).

Finally, Intervenors also complain that “Appellants needlessly inject non-record evidence about the political disposition of both prior circuit judges, whom Appellants say ran for judicial office, respectively, as a Democrat and Republican.” Int. Br. at 48. However, in light of the points raised by Plaintiffs, injection of the fact that Cole County Circuit Judges are elected through partisan elections, and who was elected on what ticket, is not at all ‘needless’; and the information on which Plaintiffs rely is contained in the Official Manual of the State of Missouri (“Blue Book”) and in reports of election results maintained on the Secretary of State’s web site, and is indisputable. The Court can take judicial notice of such information. Plaintiffs’ pointing to that information is no different than the Attorney General’s injecting into the record past districting maps taken from the Blue Book.

This case obviously is a politically sensitive one – as evidenced by the fact that three Judges of this Court have deemed it appropriate to recuse themselves from hearing this appeal. There are strong and sound reasons for this Court to reassign this case to a non-elected trial court judge on remand, so as to avoid any appearance of impropriety and thereby promote public confidence in the judiciary.

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, if remanded, should be reassigned to a Judge other than one elected through a partisan election.

Respectfully submitted,

SPENCER FANE BRITT & BROWNE LLP

By: 

Gerald P. Greiman #26668

Frank Susman #19984

Thomas W. Hayde #57368

1 N. Brentwood Blvd., Suite 1000

St. Louis, MO 63105

(314) 863-7733 (telephone)

(314) 862-4656 (facsimile)

ggreiman@spencerfane.com

fsusman@spencerfane.com

thayde@spencerfane.com

Keith A. Wenzel #33737

308 E. High Street, Suite 222

Jefferson City, MO 65101

(573) 634-8115 (telephone)

(573) 634-8140 (facsimile)

kwenzel@spencerfane.com

Attorneys for Appellants

CERTIFICATE OF SERVICE

I hereby certify that on the 9th day of January, 2012, the foregoing Appellants' Reply Brief 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:

James R. Layton, Solicitor General
P.O. Box 899
Jefferson City, MO 65102
(James.Layton@ago.mo.gov)

*Attorneys for Respondents Chris Koster
and Robin Carnahan*

Todd P. Graves
Edward D. Greim
Clayton J. Callen
GRAVES BARTLE MARCUS &
GARRETT LLC
1100 Main Street, Ste. 2700
Kansas City, MO 64105
(edgreim@gbmglaw.com)

*Attorneys for Respondents Rep. John J.
Diehl, Jr. and Senator Scott T. Rupp*

In addition, a copy of the foregoing was sent via e-mail to the following, who is not counsel of record in this case, but is counsel in a related case:

Jamie Barker Landes
211 SE Grand Avenue, Ste. A
Lee's Summit, MO 64063
(jlandes@gmail.com)

Attorney for McClatchey Appellants


Gerald P. Greiman

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Appellants' Reply Brief complies with Rule 55.03, and with the limitations contained in Rule 84.06(b), and that it contains 4,997 words, excluding the cover page, the signature block, certificate of service and this certificate, as determined by the Microsoft Word 2010 Word-counting system.

