

SC92203

IN THE SUPREME COURT OF MISSOURI

STAN MCCLATCHEY, et al.,

Appellants,

vs.

ROBIN CARNAHAN, in her official capacity as Missouri Secretary of State, et al.

Respondents.

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

BRIEF OF INTERVENOR-RESPONDENTS

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ARGUMENT

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

A. Introduction

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

As discussed below, the well-pled facts show that H.B. 193 does not "completely disregard" compactness. Appellants attached the map resulting from H.B. 193 to their Petition. LF 15. *As a matter of law*, whatever mix of considerations, deliberation, political calculation, and debate (*i.e.*, the standard recipe for legislation) went into H.B. 193, the reasonably compact districts appearing on that map could not have emerged from a body that "completely

disregarded” compactness. *It is impossible to say that compactness was “completely disregarded.”*

B. Standard of Review

Appellants correctly state the standard for reviewing pleadings-based dispositive motions, including failure to state a claim and judgment on the pleadings: whether the facts in the Petition state a cause of action. This standard applies to both of Appellants’ counts.

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

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

conclusions, argument, rhetoric and hyperbole about the content or effect of statutes cannot be considered as “facts” for purposes of review.

As discussed below, Appellants’ well-pled facts fall far short of the threshold necessary for judicial intervention.

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

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

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

This Court has consistently held that the General Assembly’s reapportionment laws are not subject to judicial scrutiny unless the legislature “completely disregarded” the principle of compactness. *See Preisler v. Doherty*, 284 S.W.2d 427, 434 (Mo. banc 1955); *Preisler v. Hearnnes*, 362 S.W.2d 552, 557 (Mo. banc 1962). “It is only when constitutional placed upon the discretion of the Legislature have been **wholly ignored and completely disregarded** in creating districts that courts will declare them to be void.” *Preisler v. Kirkpatrick*, 528 S.W.2d 422, 425-426 (Mo. banc 1975) (emphasis added).

Notably, the case cited by Appellants as standing for the principle that the General Assembly *loses* the presumptive deference granted to legislative acts, and does not have much “wobble room” in redistricting (Br. 8), actually stands for the *exact opposite* principle. See *State ex rel. Barrett v. Hitchcock*, 146 S.W. 40 (Mo. banc 1912). Collecting authority from other states, *Barrett* cited the basic presumption of statutory constitutionality, a cornerstone that Appellants now mistakenly claim this Court long ago discarded:

In applying these rules prescribed by the Constitution itself, and by which the constitutionality of the statutes in question must be decided, it must be borne in mind that, **where there is any reasonable doubt as to whether a statute is constitutional or not, the courts will incline in favor of the law, and hold it valid...**

Barrett, 146 S.W. at 60. Continuing, this Court then made one of the earliest articulations of and rationales for the “wholly ignored” standard.

In other words, if it clearly appear that in the formation of any district the requirement of compactness of territory and equality in population had been **wholly ignored, had not been considered or applied at all, to any extent**, then the statute would be clearly unconstitutional. But if it has been considered and applied, **though to a limited extent only**, subject to the other more definitely expressed limitations, then the General Assembly has not

transcended its power, although it may have very imperfectly performed its duty, and the act is valid...

...It follows, also, that it cannot be said that the Legislature wholly failed to have in view and apply the principle of compactness of territory. **No district, unless a circle or a square, can be so compact that it cannot be made more so.**

Barrett, 146 S.W. at 61.

Following *Barrett*'s century-old precedent, the subsequent *Preisler* decisions made clear that the separation of powers underlies the forgiving standard of review for apportionment challenges: Missouri's courts cannot second-guess the legislature's use of discretion in considering a multitude of factors in redistricting, and can only invalidate a law if the General Assembly completely failed to exercise discretion by "wholly ignoring" the principle of compactness. See *Preisler v. Doherty*, 284 S.W.2d at 434 ('There is a vast difference between determining whether the principle of compactness of territory has been applied at all or not, and whether or not the nearest practical approximation to perfect compactness has been attained. The first is a question which the courts may finally determine; the latter is for the legislature.');

Preisler v. Kirkpatrick, 528 S.W.2d at 425-426 (courts only decide whether the General Assembly had *used* its discretion—not whether it had used that discretion *well*).

Indeed, even after finding that two state senate districts failed to meet its

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

Additionally, the second *Preisler* decision points out that apportionment is ultimately a puzzle requiring creativity and compromise; if citizens are dissatisfied with a particular compromise, then—as with most legislation—their remedy is political. *Preisler v. Hearnese*, 362 S.W.2d 552, 557 (Mo. 1962) (“Very likely each legislator individually would draw somewhat different district lines. Therefore, any redistricting agreed upon must always be a compromise.”).

Indeed, in their review of the same cases, Appellants slowly but finally concede that the “wholly ignored” standard applies (Br. 9) and that an entire plan must “clearly and unequivocally lack compactness” (Br. 11). But Appellants mistakenly read one portion of *Preisler v. Doherty* for the principle that any deviation from perfect compactness must be justified by a competing constitutional mandate. Br. 10.

In fact, the *Preisler* Court said nothing of the sort, merely observing that in the case before it, the worst compactness violations coincided with the worst population differences. *Id.*, 284 S.W.2d at 434. This is a far cry from Appellants’

conclusion: that as a matter of law, compactness deviations can *only* be justified by complying with the few other constitutional mandates, such as equal population. Such a novel reading of the law would turn the “wholly disregarded” standard on its head. Because districts will almost never violate equal population or contiguousness requirements,¹ in almost every case, courts will invariably be in the position that *Barrett* and all three *Preisler* cases strictly disavow: scrutinizing each deviation from perfect compactness that was not required by population or

¹ Appellants raise a novel “burden-shifting” argument that seems related to their suggestion that the legislature must prove what required it departed from perfect compactness. Br. 14-15. Appellants admit that this is not the law of Missouri and cite only to a suggestion in the *Kirkpatrick* dissent that the redistricting commission should have “offered evidence” to justify departures from compactness. *Id.* Appellants’ argument misunderstands the procedural posture of this case: review of a pleadings-based motion for judgment. Respondents argued that Appellants’ well-pled facts did not show that the “wholly disregarded” standard was met, regardless of whether other considerations, such as equal population, traditional constituencies, the Voting Rights Act, provide rational justifications for the districts. At any rate, the test is objective; the subjective thoughts of Respondents or other legislators are irrelevant to the legal question presented. *See* Br. 15. The Court can simply apply an objective test, review the map, and determine whether it shows that compactness was “wholly disregarded.”

contiguity. That cannot be right. Instead, the standard is simply as Appellants admit elsewhere: “wholly ignored.”

2. H.B. 193 Passes Constitutional Muster

Appellants’ well-pled facts include maps showing the physical layout of H.B. 193’s districts. LF 15-16. Although some districts might be made more compact while still conforming to equal population and Voting Rights Act requirements relating to racial minorities, the map shows *on its face* that the districts are completely contiguous and are not so sprawling or serpentine that compactness was wholly ignored. It would be impossible for a drafter to “wholly ignore” compactness and yet produce the map that results from H.B. 193. For that reason alone, Count I fails on the pleadings.

Appellants nonetheless recite specific flaws in the shape of the Fifth District. Its shape, however, is not remarkable, especially considering that Missouri’s loss of one district required each survivor to expand and become less compact.

As both the *Pearson* and *McClatchey* Appellants’ suggested “alternative” maps show, it has been impossible for at least 10 years to contain the entire Fifth District within Jackson County, Missouri, which is itself an urban, suburban, and rural mixture. LF 18; *Pearson* LF 24. Some mixture of suburban and rural areas in neighboring regions had to be added. The *Pearson* and *McClatchey* Appellants would each affix a different mix of rural and suburban areas. That the General Assembly chose to add the southern extremity of suburban Clay County, just to

the north, and primarily rural areas in three counties along the Missouri River does not establish a complete disregard for compactness. LF 16. As the Solicitor General noted in oral argument below, those areas themselves share much in common. (Tr. 10-11.)²

Indeed, the Missouri River counties previously formed the northwestern section of the Fourth District, which cradles the Fifth to the south and east. LF 17. These three counties probably share more with Eastern Jackson County than Eastern Jackson County shares with the densely populated western half of the state. While a suburban section of north-central Jackson County is attached to a suburban section of the neighboring Sixth, the eastern and western portions of the Fifth are still contiguous via a broad band of southern Jackson County which, like the rest of the district, is a mixture of suburban and rural. LF 16. All in all, the Fifth is still the third-smallest district in Missouri. LF 15. While more compact districts could be drawn, neither the Fifth District in isolation nor the state as a whole can be said to be “wholly” noncompact.

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

Appellants argue that there is “no constitutional rationale” for the shape that the Fifth District assumed, even suggesting that if wards and precincts are to be split, the standard for judging should be a “circle or square,” since those shapes are at least “possible.” Br. 12. However, as discussed above, this is not the standard; no case holds that the General Assembly is required to justify each deviation from perfect compactness by reference to a constitutional “requirement.” Instead, the test (as Appellant admitted elsewhere) is “wholly ignored.” Br. 9, 11.

Next, Appellants argue that a change to the Fifth District will create a ripple effect of changes across the state and cause the invalidation of the entire map. Br. 13. While Appellants do not cite to any pled fact, and merely reference their maps (which do not necessarily prove their assertion), Appellants are asking the wrong question. The question is whether compactness concerns along a boundary of the Fifth District should cause the Court to rule the entire legislation unconstitutional (as Appellants seek to do). Under a “wholly disregarded” standard, where the overall plan is being tested and the overall plan shows that many districts actually became more compact, the answer must be no.

Consistent with Missouri’s long-standing policy of deference to the legislature, this Court followed this precise analysis in *Preisler v. Kirkpatrick*, declining to analyze how “fixes” to the compactness problems it identified in Springfield and St. Louis would ripple through the rest of the state. 528 S.W.2d 422, 427. Instead, the Court considered whether the noncompact boundaries

irretrievably marred the current statewide map under the “wholly disregarded” standard. *Id.*

Recognizing that this would doom their claim here, Appellants argue that this Court should now reverse *Kirkpatrick* and adopt the dissent’s position: that a single noncompact district renders an entire map (the entire law) unconstitutional. But again, this would be inconsistent with the “wholly disregarded” standard that even Appellants now admit applies. It would also violate the separation of powers principles that underlie the standard. While Appellants’ proposed “zero tolerance” rule could make sense with respect to contiguity in the unlikely event that some future General Assembly creates an archipelago district, as the *Kirkpatrick* majority recognized, applying this standard to compactness would present too great an opportunity for courts to interfere (or appear to interfere) in what has traditionally been a legislative, discretionary, and political process.

Appellants conclude with a plea to let the circuit court rule on “the merits.” But a dismissal on the pleadings or for failure to state a claim *is* on the merits—it is simply on the well-pled facts. On a compactness claim, the well-pled facts are the map. LF 15. Other than their allegations about split communities (which, of course, are already pled), Appellants do not suggest what other facts are needed to decide whether, based on the map, the districts appear to “wholly disregard” compactness.

Like the map in *Kirkpatrick*, the map resulting from H.B. 193 shows that when all of Missouri’s districts were stretched to make up for a lost seat in

Congress, “compactness” was not “wholly disregarded.” The trial court was correct in dismissing Appellants’ compactness claim, Count I. Appellants’ Point I must be denied.

II. THE TRIAL COURT PROPERLY FOUND THAT COUNT II IS NON-JUSTICIABLE AND NON-VIABLE BECAUSE IT PRESENTS A POLITICAL QUESTION THAT CANNOT BE RESOLVED BY CLEAR AND JUDICIALLY MANAGEABLE STANDARDS, AND BECAUSE IT DOES NOT STATE A CLAIM (APPELLANTS’ POINT II)

A. Introduction

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

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

century of federal authority,³ and forge a new right to have the state's congressional districts judicially legislated so that the plaintiffs' subgroup of the Republican Party can successfully elect their preferred candidate to the U.S. Congress.

Even after an extensive amendment and successive rounds of briefing and oral argument, Appellants have refused to bring their theories up to date. For example, Appellants still maintain that "partisan leanings are not a constitutional consideration in the redistricting process" (Br. 17), that this triggers strict scrutiny,

³ See *Davis v. Bandemer*, 478 U.S. 109 (1986) (holding that partisan gerrymander claims are justiciable, failing to state what standard can be used for resolving them, and holding that under any standard, claims based on proportional representation fail to state a claim); *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (holding that the plurality "standard" from *Bandemer* and the standards proposed by the plaintiffs and dissenters in *Vieth* were all unworkable, holding that no workable standard had yet been found, and dismissing the claim); *League of United Latin American Citizens v. Perry* ("LULAC"), 548 U.S. 399, 413-414 (2006) (recognizing that the Court's disagreement in *Bandemer* about what standard makes partisan gerrymandering cases justiciable "persists," and finding that the plaintiffs failed to "offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.").

and that because politics is not a legitimate state interest, partisan gerrymandering fails any level of scrutiny. Br. 21-22. This circular logic simply finds no support in the law.

This Court should not follow Appellants on their journey into a new era of judicial oversight of politics. Following the trial court, it should find that Appellants' Count II fails. First, it presents a non-justiciable political question. Second, it presents an incumbent-protection theory that was rejected long ago by the United States Supreme Court and has never been recognized in Missouri.

B. Appellants' Partisan Gerrymandering Claim Presents a Non-Justiciable Political Question

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

A partisan gerrymandering claim asserts that voters of a political party (or, in Appellants' new "twist," subgroups that are oppressed by both parties' leadership) have been improperly grouped or divided into districts, leading to an overall decrease in the number of legislators elected by that party or group and, potentially, the figurative "dilution" of the vote of each party or group member participating in the election. *See generally Bandemer*, 478 U.S. at 127.

However, partisan considerations are also inevitable and are a traditional and (as Appellants still refuse to recognize) constitutionally acceptable districting principle. *Vieth*, 541 U.S. 286-288 (plurality); *id.* at 313 (Justice Kennedy's

concurrence). The question, therefore, is not whether there has been gerrymandering, but when (and how to measure when) “too much” gerrymandering has occurred, unacceptably burdening a political group’s right to vote in comparison to opposing groups. *See Vieth*, 541 U.S. at 316 (“Excessiveness is not easily determined.”) (controlling concurrence by Justice Kennedy); *Radogno*, 2011 WL 5868225 at *2.

Underlying the Court’s demand for a standard and refusal to entertain these claims has been the political question doctrine (and therefore, the separation of powers). *Vieth*, 541 U.S. at 277-278. Because partisan motivations are impermissible only in excess, the cases turn on identifying a standard that will allow courts to even-handedly referee the recurring political fouls alleged by political interest groups in each cycle; without such a standard, inconsistent results are bound to occur from case to case, raising suspicions that the judiciary is also playing politics. *Id.* at 307-308.

It is quite possible that no workable standard exists. Although a majority of the U.S. Supreme Court has not yet concluded that *all* partisan gerrymandering claims are *always* nonjusticiable, in the last quarter century, every claim to have reached the Court has been rejected for failing to state a claim or for failing to present a judicially manageable and administrable standard for resolving the plaintiff’s particular grievance. *See Radogno*, 2011 WL 5868225 at *3 (cataloguing various standards that have been proposed, *all of which* have been rejected by the Supreme Court). As Appellants admit, majority has never adopted

a standard; indeed, the only standard to attract even a transient plurality, the vague test outlined in *Davis*, was later rejected in *Vieth* as unworkable. *Id.*

After all of this, a reader of the Court's opinions could be forgiven for agreeing with *Vieth's* four-judge plurality that no such standard can emerge, meaning that all partisan gerrymandering claims are nonjusticiable political questions. Perhaps the exercise is futile because, if politics are a permissible part of a historically and unavoidably political process, judges "risk assuming political, not legal responsibility" in trying to decide when a particular party has crossed the invisible line. *Vieth*, 541 U.S. at 307 (Kennedy concurrence).

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

2. Appellants Have Not Pled a Justiciable Claim

As a threshold matter, Appellants have not explicitly pled or briefed (Br. 19) any particular standard that articulates what sort of partisan "intent" and "effects" must be established. *See Radogno*, 2011 WL 5868225 (collecting tests rejected by the Supreme Court and summarizing their "intent" and "effects" prongs). Nor can their well-pled facts and legal arguments be strung together into

any sort of test or standard that, as summarized in *Radogno*, has not already been rejected by the Supreme Court in *Davis*, *Vieth*, or *LULAC*.

At best, Appellants have fact-pled that the General Assembly was motivated solely to protect both parties' incumbents to the detriment of intra-party challengers, and that H.B. 193 has the effect of combining citizens who are from communities (*i.e.*, rural and urban) that have opposing "economic and social interests." Br. 19. Appellants, who presumably make up one set of interests, have been grouped in a district with a different set of interests who elect a favored incumbent. The conclusion Appellants would draw is that it will be constitutionally impossible for the incumbent to represent their own interests because they are "too disparate", and that a bipartisan agreement (or "bipartisan gerrymander") to draw districts which place them with that incumbent violates their right to vote.

Surely, the *McClatchey* Appellants are not the first with such a grievance; similar claims could be made by almost any minority group that finds itself in the same district with "disparate" interests who continually elect their favored incumbent. But why should the Court intervene in this case and none of the other "safe" districts? Appellants must point to some standard for measuring unconstitutional intent and effect, and show how they meet the test. *See, e.g., Radogno*, 2011 WL 5868225 at *2-3. But aside from repeating inapposite and

unhelpful case law cited in the *Pearson* Appellants' briefing,⁴ Appellants offer no standard or test. Br. 19.

At any rate, there is no workable test for the specific "twist" on the partisan gerrymander claim Appellants bring here: the "bipartisan gerrymander." The unconstitutional intent alleged by Appellants is incumbent protection. But a political or partisan desire to protect incumbents is a constitutional and traditional redistricting principle. *Burns v. Richardson*, 384 U.S. 73, 89 (1966); *Bush v. Vera*, 517 U.S. 952, 968 (1996).

⁴A test of "whether the challenged action contravenes a constitutional mandate" begs the question. Br. 19. "Whether a challenged action has the purpose and/or effect of infringing constitutional rights" at least mentions the words, "purpose" and "effect," but merely announces the starting point for the problem; it does not explain what standard should be used to measure the intent and effect. Compare *Radogno*, 2011 WL 5868225 at *3. Finally, Appellants state that the Court can simply apply "rational basis" review or "strict scrutiny." *Id.* Of course, this is not the kind of "test" that *Davis* and its progeny have in mind, and puts the cart before the constitutional horse. Constitutional scrutiny is applied *only after* plaintiffs make a "threshold showing", by some reliable standard, that their rights were violated through vote dilution. *Bandemer*, 478 U.S. at 143 (plaintiff's claim should be dismissed, and no scrutiny was applied at all, because the plaintiff had not made its threshold showing of vote dilution).

Appellants fail on the “effect” side as well. Appellants complain that their corner of the Republican Party is an innocent victim of a bipartisan scheme to maximize the number of each party’s safe seats. But in *Bandemer*, the Supreme Court specifically recognized that while maximizing safe seats is not *required*, it is also not constitutionally *prohibited*:

To draw district lines to maximize the representation of each major party would require creating as many safe seats for each party as the demographic and predicted political characteristics of the State would permit. This in turn would leave the minority in each safe district without a representative of its choice. We upheld this “political fairness” approach in *Gaffney v. Cummings*, **despite its tendency to deny safe district minorities any realistic chance to elect their own representatives**. But *Gaffney* in no way suggested that the Constitution requires the approach that Connecticut had adopted in that case.

Davis v. Bandemer, 478 U.S. 109, 130-31 (1986). Because both the intents and effects alleged by Appellants are actually given sanction by the Supreme Court, there is no possible standard for adjudicating and remedying Appellants’ claim that their district should be re-drawn to make it harder for the current incumbent to be reelected.

Although Appellants cite *Vieth*, part of the recent line of U.S. Supreme Court authority requiring plaintiffs to articulate and meet a measurable “intent”

and “effect” standard in order to adjudicate partisan gerrymander claims, they attempt to sidestep the issue by remarking that various Missouri and U.S. Supreme Court decisions have expressed “concern” with partisan gerrymandering or with vote dilution in other contexts. That may be true. However, no authority whatsoever indicates that these kinds of claims are *suitable for adjudication* without a specific intent-and-effect standard that is both non-arbitrary and judicially manageable. *See, e.g., Radogno*, 2011 WL 5868225 at *2-3. Appellants’ well-pled facts and opening brief indicate that no standard is suitable for adjudicating their specific “bipartisan gerrymander” claim.

C. Even if Appellants Had Presented a Judicially Administrable and Manageable Standard for Their Unique Claim, It Would Fail On the Merits

Even if Appellants’ Count II were justiciable under some standard, it fails to state a claim because, as discussed above in Section II.B.2, incumbent protection is not an unconstitutional intent, and a political minority’s inclusion in a “safe seat” district of another party is not an unconstitutional effect.

Such rules may seem harsh. Millions of voters who have lived in a congressional district whose residents continually elect members of another party (or of another faction of their own party) well know the frustration of defeat, year after year. But because of where voters live, this result is inevitable.

Alternatives simply do not exist under the U.S. Constitution or would be unworkable.⁵ A system of statewide at-large elections for all eight seats with proportional representation might guarantee each Missourian a meaningful vote, but this contravenes our constitutional system. On the other hand, a perfect “non-partisan” gerrymander of districts so that each district matched the statewide partisan divide would result in winner-take-all elections: in 2012 in Missouri, a theoretical 51-49 edge for the Republican Party would elect all eight representatives by that same margin (although even then, minority groups outside each party establishment or third parties could still claim “dilution” Appellants’ rationale). *See Bandemer*, 478 U.S. at 130.

⁵ Respondents’ reference to “alternatives” is not to suggest that Appellants have met their burden of pleading an unconstitutional intent and effect, triggering judicial scrutiny. Br. 21-22. As Respondents noted in their *Pearson* briefing, rational basis review or strict scrutiny is premature and should not be reached where the Appellants have not first adequately pled a legally cognizable constitutional injury. *Bandemer*, 478 U.S. at 143. Further, although this Court need not reach the issue, Appellants are incorrect that “strict scrutiny” would apply. Br. 21. “We have not subjected political gerrymandering to strict scrutiny.” *Bush v. Vera*, 517 U.S. 952, 964 (1996).

Ultimately, no system of districting and electing representatives is perfect. Our constitutional system and the Supreme Court's denial of "incumbency protection" and "safe seat" voter dilution arguments

...rest on a conviction that **the mere fact that a particular apportionment scheme makes it more difficult for a particular group in a particular district to elect the representatives of its choice does not render that scheme constitutionally infirm.** This conviction, in turn, stems from a perception that the power to influence the political process is not limited to winning elections. An individual or a group of individuals who votes for a losing candidate is usually deemed to be adequately represented by the winning candidate and to have as much opportunity to influence that candidate as other voters in the district. We cannot presume in such a situation, without actual proof to the contrary, that the candidate elected will entirely ignore the interests of those voters. **This is true even in a safe district where the losing group loses election after election.**

Bandemer, 478 U.S. at 131-32 (emphasis added). On the well-pled facts, Appellants cannot state a claim.

Whether Appellants' Count II was non-justiciable or failed to state a claim, the Circuit Court correctly dismissed it. This Court should deny Appellants' Point II and affirm the Circuit Court.

CONCLUSION

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

Second, Appellants' "partisan gerrymandering" theories are non-justiciable questions or, because they claim injury from "intents" and "effects" that are not unconstitutional, fail to state a claim. Either ground independently supports dismissal, but perhaps this Court will choose, like the U.S. Supreme Court over the past quarter century, to simply hold that Appellants' claim fails, reserving for another day the question of what makes a "partisan gerrymandering" claim justiciable.

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

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I prepared this brief using Microsoft Word 2010 in Times New Roman size 13 font. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that it contains 6,752 words.



Attorney

CERTIFICATE OF SERVICE

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

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A handwritten signature in cursive script, appearing to read "Edward D. Greim", written over a horizontal line.

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