SC92003

IN THE SUPREME COURT OF MISSOURI

STAN MCCLATCHEY, DONNA TURK, IVAN GRIFFIN, PATRICIA SMITH, MOLLY M. TEICHMANN, LAURA MEEKS & MATT ULLMAN

Appellants,

vs.

ROBIN CARNAHAN, *in her official capacity as Missouri Secretary of State*, REP. JOHN DIEHL & SEN. SCOTT RUPP,

Respondents.

Appeal from the Circuit Court of Cole County
Honorable Daniel R. Green, Circuit Judge
Case No. 11AC-CC00752

BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

Article III, § 45 of the Missouri Constitution provides for periodic reallocation of voting wards and precincts among electoral districts by the General Assembly. These provisions place only three limitations on legislative discretion in drawing boundaries: That the districts be composed of contiguous territory, and that they be as compact and equal in population as may be.

In 2011, the General Assembly approved a bill that apportions Missouri's wards and precincts among eight Congressional districts. The apportionment violates the requirement that the districts be compact. The apportionment also carves up communities for the purpose and effect of diluting voter interests and increasing partisan leanings of each district in violation of the equal protection guarantees of the Missouri Constitution and the US Constitution.

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JURISDICTIONAL STATEMENT

This is a direct appeal from an Order and Judgment of the Circuit Court of Cole County, Missouri, entered December 12, 2011. This is an action questioning whether the congressional redistricting plan adopted by the General Assembly in May 2011 as H.B. 193 violates one or more provisions of the Missouri Constitution and the United States Constitution. This is a case involving the validity of a statute or provision of this state. Therefore, pursuant to Article V, § 3 of the Missouri Constitution, the questions in this case fall within the exclusive appellate jurisdiction of the Missouri Supreme Court.

STATEMENT OF FACTS

A. BACKGROUND OF THE 2011 CONGRESSIONAL REDISTRICTING AND H.B. 193

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 many other states. As a result, Missouri must lose one member of its delegation to the United States House of Representatives – reduced from nine members to eight – for the elections in 2012, 2014, 2016, 2018 and 2020.

Mo. Const. Art. III, § 45, provides that following certification of the decennial 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, it fell to the Missouri General Assembly to draw the new congressional districts that will take effect for the 2012 election.

In February and March 2011, the Senate and House redistricting committees held hearings throughout Missouri for testimony from members of the public as to how the Congressional redistricting map should be drawn. These hearings were not publicized in any manner consistent with bringing any significant numbers of citizens of Missouri to the hearings. Additionally, the General Assembly chose to have an expedited calendar for citizen input that made it difficult, if not impossible, for many citizens to be notified in time to participate in the public hearing process.

In April 2011, both houses of the General Assembly approved a congressional redistricting map codified in House Bill 193 ("the Map"). The Map ignored the principles and testimony adduced at the redistricting committee hearings as well as the constitutional requirements that districts be compact. Following the General Assembly's adoption of the Map, Governor Jay Nixon quickly vetoed it, stating that the Map "did not adequately protect the interests of all Missourians." The General Assembly then voted to override the Governor's veto in May 2011.

B. CHARACTERISTICS OF THE 2011 MAP

The Map divides Jackson County between the Fifth and Sixth Districts, ignoring traditional historical, geographic, community and even precinct boundaries. The new Fifth District dilutes the urban areas of Jackson County by appending three primarily rural counties – Lafayette, Ray, and Saline – that extend 100 miles to the east and cross the Missouri River. In no prior Congressional redistricting has the Fifth District ever

crossed the Missouri River. The Map carves out a teardrop-shaped area of the inner Kansas City suburbs in Jackson County and places it in the Sixth District, which is otherwise composed entirely of rural areas in northern Missouri stretching from Nebraska to Illinois. This carveout divides two of Jackson County's largest cities, Blue Springs and Independence; cleaves both Lee's Summit, which has 97.9% of its 91,364 citizens in Jackson County, and Oak Grove, which has 98.6% of its population in Jackson County; and even splits tiny communities in Jackson County such as Lake Lotawana and Grain Valley.

The Map fragments Jackson County in order to effectuate a "bipartisan gerrymander", a new twist on the partisan gerrymander. Rather than trying to gerrymander the opposing party's incumbents out of office, the political parties strike a bargain in order to maintain the status quo. Also known as "incumbent protection," the parties cooperate to protect all existing incumbents and, where possible, to preserve their traditional constituencies. Unrelated and geographically-distant communities are combined in a district solely because of their traditional voting patterns. The Map thus creates six "safe" Republican districts (including the Sixth District) and two "safe" Democrat districts (including the Fifth District) among the eight congressional seats allocated to Missouri.

C. PROCEEDINGS BELOW

On November 22, 2011, Appellants filed their Petition for declaratory and injunctive relief in Cole County Circuit Court against Robin Carnahan, in her official capacity as Missouri Secretary of State and chief elections officer for the state (L.F. 3),

seeking to invalidate H.B. 193 and prevent Sec. Carnahan from conducting elections according to the Map. Appellants requested and obtained an order granting a hearing on common record with *Pearson v. Koster*, Case No. 11AC-CC00624 in Cole County Circuit Court (L.F. 34), a case making similar claims and requesting similar relief.[1] Appellants further requested leave to file an amended petition on December 8, 2011, which was granted (L.F. 49) and the amended petition filed (L.F. 50).

Respondent Carnahan filed an Answer on December 7, 2011 (L.F. 20). Respondents Diehl and Rupp obtained permission from the court to intervene and filed their separate Answer on December 5, 2011 (L.F. 25). Respondents Diehl and Rupp further filed a Motion to Dismiss on the grounds that Appellants failed to state a claim for which relief could be granted, or in the alternative, for judgment on the pleadings (L.F. 36).

On December 8, 2011, the circuit court heard arguments on Respondents' Motion, and entered an Order and Judgment granting Respondents' Motion and dismissing Appellant's claims (L.F. 75; Appx. A1). Upon conclusion of oral arguments, Judge Green stated "I certainly think Appellants 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). The circuit court did not enter any findings of fact or conclusions of law.

[1] An appeal in *Pearson v. Koster* is pending in this court as SC92200.

POINTS RELIED ON

COUNT I. The trial court erred in dismissing Appellants' Petition *because* Appellants' Petition stated a valid claim of violation of Mo. Const. Art. III, § 45 *in that* Appellants demonstrated sufficient facts to support a finding that the Congressional redistricting map produced by the General Assembly in H.B 193 created one or more legislative districts that are in no way compact and that as a result the map as a whole did not substantially comply with compactness requirements.

Preisler v. Kilpatrick, 528 SW2d 422 (Mo. banc 1975)

State ex rel. Barrett v. Hitchcock, 146 SW 40 (Mo. 1912)

Preisler v. Doherty, 284 SW2d 427 (Mo. banc 1955)

Preisler v. Hearnes, 362 SW2d 552 (Mo. banc 1966)

Mo. Const. art. III, § 45

COUNT II. The trial court erred in dismissing Appellants' Petition *because* Appellants' Petition stated a valid claim of violation of Mo. Const. Art. I, § 2 and US Const. Amend. XIV *in that* Appellants demonstrated that communities were combined into congressional districts under the Congressional redistricting map produced by the General Assembly in H.B. 193 solely on the basis of partisan leanings and in violation of historical, physical and economic realities, and that the characteristics of these communities varied so substantially that effective representation was impossible.

Armentrout v. Schooler, 409 SW2d 138 (Mo. 1966)

Weinschenk v. State, 203 SW3d 201, 215 (Mo. banc 2006)

Reynolds v. Sims, 377 US 533 (1964)

Vieth v. Jubelirer, 541 US 267 (2004)

Mo. Const. Art. I, § 2

US Const. Amend. XIV, § 2

ARGUMENT

Count I

The trial court erred in dismissing Appellants' Petition because Appellants' Petition stated a valid claim for a violation of Mo. Const. Art. III, § 45 in that Appellants demonstrated that the Congressional redistricting map produced by the General Assembly in H.B. 193 creates one or more legislative districts that are not compact. As a direct result the map, as a whole, does not substantially comply with the compactness requirement.

Standard of Review

This Court reviews *de novo* the trial court's grant of a motion to dismiss. *City of Lake Saint Louis v. City of O'Fallon*, 324 SW3d 756, 759 (Mo. banc 2010). Under Rule 55.27(a)(6) of the Missouri Rules of Civil Procedure, in considering a motion to dismiss, "the facts contained in the petition are treated as true and they are construed liberally in favor of the Appellants." *Lynch v. Lynch*, 260 SW3d 834, 836 (Mo. banc 2008). "If the petition sets forth any set of facts that, if proven, would entitle the Appellants to relief, then the petition states a claim." *Id.*

* * *

The Missouri Constitution places only three limits on the prerogative of the General Assembly to apportion the state's residents among legislative districts, an act also known as "redistricting": the districts must be (1) contiguous, and (2) as compact and (3) equal in population as may be. Mo. Const. Art. III, § 45. This Court reliably has exercised its authority and met its obligation to review redistricting efforts, whether by

the General Assembly or by a commission charged with that responsibility. This Court also enforces these constitutional restrictions. House Bill 193, passed in April 2011 (and reaffirmed over the governor's veto in May 2011), creates eight congressional districts. It includes at least one district that violates the constitutional compactness requirement. Appellants filed a Petition alleging that the districts were not compact. The Petition includes both contemporary and historical maps to support the allegations. Appellants' Petition makes allegations and provides factual support in the same fashion as numerous challenges to earlier legislative redistricting efforts. Notwithstanding, the trial court dismissed the Petition for failure to state a claim upon which relief can be granted. This was error.

A. LACK OF COMPACTNESS CLAIMS UNDER THE MISSOURI CONSTITUTION ARE JUSTICIABLE.

The Missouri Constitution requires that all legislative districts be "composed of contiguous territory as compact and equal in population as may be." Mo. Const. Art. III, § 45. This Court has stated repeatedly that the purpose of these requirements is "to 'guard, as far as practicable, … against a legislative evil, commonly known as "the gerrymander"…'" *Preisler v. Kilpatrick*, 528 SW2d 422, 455 (Mo. banc 1975) (quoting *State ex rel. Barrett v. Hitchcock*, 146 SW 40, 61 (Mo. 1912)). While ordinary legislative acts are entitled to deference from this Court, these constitutional provisions indicate that the people of Missouri do not provide the General Assembly with much wiggle-room in redistricting. "[I]t 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, nor to give to each a population which it deemed best." *Barrett*, 146 SW at 54. This Court has the duty to insure the General Assembly's compliance with the constitutional requirements and has evaluated legal challenges based on these constitutional provisions on numerous occasions. *Id.*; *see also Kilpatrick*, *supra*; *Preisler v. Doherty*, 284 SW2d 427 (Mo. banc 1955); *Preisler v. Hearnes*, 362 SW2d 552 (Mo. banc 1966).

Prior decisions striking down legislative redistricting efforts rest solely on the appearance of the districts as evidenced by the district maps. *See Barrett*, 146 SW at 65 ("We are also of the opinion that the act of apportionment … violates the Constitution, in that it does not conform to the provision which requires compactness of [districts]. At another place we have set out a map of several of [the districts], which shows a total disregard of this constitutional provision.") Appellants' Petition makes claims and allegations similar to those in other cases filed to challenge legislative redistricting maps. To procedurally bar these claims from any consideration on the merits is a significant change to constitutional law in Missouri.

B. THIS COURT HAS ESTABLISHED LEGAL STANDARDS FOR REVIEWING COMPACTNESS CLAIMS ON THE MERITS.

The General Assembly is required by the Constitution to abide by its provisions when drawing legislative districts. *Doherty*, 284 SW2d at 435 ("There is no discretion to violate mandatory provisions of the Constitution.") As a general matter, the courts will not invalidate a legislative redistricting plan unless it finds that the General Assembly wholly ignored constitutional limitations. *Hearnes*, 362 SW2d at 555. Whether a

challenged redistricting plan's deficiencies meet the "wholly ignored" standard is a legal conclusion that depends heavily on the particular facts of the plan. *Cf. Doherty*, 284 SW2d at 432-433, with *Hearnes*, 362 SW2d at 553-554.

An examination of previous redistricting cases reviewed by this Court is instructive. In evaluating a 1952 redistricting plan, this Court found that the General Assembly "wholly ignored" constitutional limitations because that map's lack of compactness was not required by the other constitutional considerations, namely contiguity and equal population.

> "It is obvious from the record in this case not only that departures from compactness were not made to obtain equality of population, but also that the departures from ward lines in making districts were not used to obtain compactness but instead aided in making them less compact, more irregular, longer and narrower. We think the only reasonable conclusion from the facts in this case is that the Board did not apply the principle of compactness of territory in the 1952 redistricting but instead completely disregarded this mandatory provision of the constitution."

Doherty, 284 SW2d at 434. This assessment indicates that while some lack of compactness is acceptable where it is necessary to satisfy a competing constitutional mandate (such as to create districts of equal population), it is not permissible to satisfy some other purpose. The *Doherty* Court struck down a seven-district apportionment plan because two of the districts were found lacking in compactness.

In *Hearnes*, this Court upheld a congressional redistricting plan. Albeit one challenged district (out of ten) could have been made more compact, the district was not "of such a nature that 'it would be absurd to claim that this district meets any standard of compactness.'" *Kilpatrick*, 528 SW2d at 438 (FINCH, J., dissenting (discussing *Hearnes*)). *Doherty* and *Hearnes* together suggest that a district must clearly and unequivocably lack compactness in order to invalidate a redistricting plan. It also illustrates the degree to which this Court reviews the specific facts of each redistricting plan to determine whether it violates constitutional requirements.

This Court addressed compactness in redistricting most recently in the 1975 case *Preisler v. Kilpatrick*, 528 SW2d 422 (Mo. banc 1975). The *Kilpatrick* court upheld a map where two of 34 districts were not compact, finding that the overall map substantially complied with constitutional requirements. *Id.* at 426-27. *Kilpatrick* significantly differs from this case insofar as the challenged Map in the instant case contains a mere eight districts, not 34. Unlike the map in *Kilpatrick*, the Map here under review also departs significantly from historical district boundaries.

C. APPELLANTS' PETITION STATED FACTS SUFFICIENT TO SUPPORT A FINDING OF LACK OF DISTRICT COMPACTNESS UNDER THE MISSOURI CONSTITUTION.

a. The Boundaries of the Fifth District Demonstrate Complete Disregard for the Constitutional Compactness Requirement.

The Fifth District, according to the challenged Map, is patently not compact. Appellants included with their Petition a copy of the redistricting map created by H.B.

193 (L.F. 15-16; Appx. 170-171). This Map alone provides a sufficient factual basis to conclude that the Fifth District is not compact. The Fifth District stretches from Kansas City more than halfway to Columbia. A large piece of the inner Kansas City suburbs in Jackson County is hollowed out and appended to the Sixth District. Counsel for Respondent Carnahan even admitted at the hearing on December 8, 2011, that the District was "problematic" (Tr. 15).

There is no constitutional rationale for the Fifth District to lack compactness to this degree. The Map does not respect ward, precinct, city, or county boundaries. It achieves perfect equality of population among districts by carving up communities at the census block level (Appx. 9). The Fifth District is not required to be irregularly shaped in order to create districts of equal population. Any district shape is possible, even a perfect circle or square, when splitting precincts and wards. Also, the irregular shape of the Fifth District is not required to meet the requirement of contiguity. The District, as it now exists, is barely contiguous with numerous carveouts and shoestring connections. Whatever the General Assembly's motivation for shaping the Fifth District, certainly it was not to address a constitutional mandate. The Map itself is evidence that the General Assembly wholly ignored its constitutional obligations when creating the new Fifth District.

b. The Lack of Compactness in the Fifth District Contaminates the Map in Its Entirety.

The grave constitutional infirmities of the Fifth District together with the small number of districts in the Map demonstrates that the General Assembly's entire plan fails

to pass constitutional muster. The Fifth District includes most of urban Kansas City (the second-largest metropolitan area in the state and home to some of the state's most densely-populated communities). A small change of boundary in or around suburban Kansas City would require the adjustment of multiple rural counties to offset the population. Appellants' proposed map (L.F. 18-19; Appx. 173-174) would create substantially more compactness in the Fourth, Fifth, and Sixth Districts. Even so, it requires an adjustment of the boundaries of nearly half the districts in the State. This is the very definition of "substantial".

Furthermore, even a single District can be so unconstitutionally non-compact as to invalidate an entire map. Judge Finch's dissent in *Kilpatrick* is notable for its clear and persuasive reasoning on this point:

> "When Art. III, § 5 says that in establishing senate districts, 'the state shall be divided into convenient districts of contiguous territory, as compact and nearly equal as may be,' it applies all three of these standards to all of the … districts, not just to some or most of them. ... [T]he plan must contain districts, none of which are in clear violation of the compactness requirement. There is not one word in Art. III, § 5 which indicates to the contrary."

Kilpatrick, 528 SW2d at 435 (FINCH, J., dissenting).[2] A map that includes a single noncontiguous District would obviously require the entire map to be invalidated. A map that includes one district of substantially higher population than all the others would cause the entire map to fail the equal population requirement. *See Preisler v. Hearnes*, 362 SW2d 552 (Mo. banc 1962); *Vieth v. Jubelirer*, 541 US 267 (2004). The compactness requirement, found in the same constitutional provision and using the same text, must not be treated differently.

Whether a redistricting map substantially complies with state constitutional requirements of contiguity, compactness and equal population is a matter that can only be determined by the particular facts of the plan. There must be a balance between the number of districts created and considerations for compactness, contiguity and equal population. A trial court errs when it simply dismisses claims of an unconstitutional lack of compactness in legislative districts without reaching the merits of the claims.

c. Respondents Have Not Met Their Burden to Justify Their Departure from Constitutionally-Mandated Redistricting Standards.

Once a District is determined not to be compact, the body tasked with drawing the boundaries has the burden of justifying the lack of compactness. This burden-shifting applies where the redistricting challenge is based on equality of district population. *Swann v. Adams*, 385 US 440, 445-446 (1967). Although this Court has not ruled

[2] Art. III, § 5 governs state senate district apportionment. The text is identical to that governing congressional district apportionment in Art. III, § 45.

directly on the issue, Judge Finch was also of the opinion that the burden belongs on the state:

> "Appellants have offered no evidence to justify the lack of compactness in any of these districts, nor to demonstrate why the commission could not have complied with the [constitutional] requirements …. In my view, that burden rested on them when, as here, lack of compactness in fact exists and it is recognized that this was not brought about as the result of physical features or historical consideration and there is nothing to show it was to achieve equality in population."

Kilpatrick, 528 SW2d at 436 (FINCH, J., dissenting). Appellants cannot know, much less prove, the many thoughts of individual legislators when designing and approving the Map. The Maps attached to Appellants' Petition adequately demonstrate an unconstitutional gerrymandering. Appellants can only suggest possible motivations. The designers of the Map have exclusive knowledge of their subjective motives and purposes. Respondents Diehl and Rupp participated in designing the Map. Therefore Respondents bear the burden of justifying the lack of compactness following Appellants' preliminary showing of non-compactness. That showing of non-compactness has been offered by Appellants and conceded by Respondent Carnahan. Respondents failed to provide any justification for the Map. Appellants satisfied their burden. Respondents did not. Consequently, granting Respondents' motion to dismiss was error.

Count II

The trial court erred in dismissing Appellants' Petition *because* Appellants' Petition stated a valid claim of violation of Mo. Const. Art. I, § 2 and US Const. Amend. XIV *in that* Appellants demonstrated that communities were combined into congressional districts under the Congressional redistricting map produced by the General Assembly in H.B. 193 solely on the basis of partisan leanings and in violation of historical, physical and economic identities, and that the characteristics of these communities varied so substantially that effective representation was impossible.

* * *

The Missouri Constitution and the US Constitution guarantee the equal protection of the laws to all citizens. Both Missouri and federal courts have interpreted this to include the fundamental right of each citizen to participate in the political process by exercising the right to vote. Missouri and federal courts have recognized that the drawing of irregular voting district boundaries can effectively disenfranchise voters. House Bill 193, passed in April 2011 and reaffirmed over the governor's veto in May 2011, creates eight congressional districts of highly irregular shape. In dividing the state, the Map takes account of neither physical nor historic boundaries, nor communities with similar economic and social values and needs (i.e., "communities of interest"). Instead, the redistricting Map embarrasses itself in that its sole consideration is the protection of the incumbent officeholders. Predominantly-Republican suburban neighborhoods in the former Fifth District were added to the Sixth District to increase the Republican partisan leaning of the Sixth District. Historically Democratic rural counties in the former Fourth

and Sixth Districts were appended to the Fifth District to preserve the Democratic partisan leaning of the Fifth District. Partisan leanings are not a constitutional consideration in the redistricting process. They cannot have a priority over the equality of representation guarantees in the state and federal constitutions.

Appellants' Petition alleges that the Map unconstitutionally divides communities of interest to protect incumbent officeholders and prevents voters from electing congresspersons truly representative of their communities. The trial court's dismissal of the Petition for failure to state a claim upon which relief could be granted was contrary to established rules for pleading a challenge to redistricting artwork.

A. EQUAL PROTECTION CLAIMS ARE JUSTICIABLE IN STATE AND FEDERAL COURTS.

Federal courts have routinely entertained political gerrymandering challenges to redistricting plans on the merits under an equal protection theory. See, e.g., *Reynolds v. Sims*, 377 US 533 (1964); *Vieth v. Jubelirer*, 541 US 267 (2004). Missouri courts have also considered cases alleging infringement of the right to vote grounded in the guarantee of equal rights. *Weinschenk v. State*, 203 SW3d 201, 215 (Mo. banc 2006); *Armentrout v. Schooler*, 409 SW2d 138 (Mo. 1966); *Kasten v. Guth*, 375 SW2d 110 (Mo. 1964). It is well established in Missouri that the guarantee of equal protection in the Missouri Constitution exceeds the protection afforded by the guarantee of equal protection in the US Constitution. *Weinschenk*, 203 SW3d at 212. Missouri courts have also opined that political gerrymanders endanger equality of representation:

> "[T]he evident intention of the people of the state, as manifested in said constitutional provision, is that, when counties are combined to form a district, they must not only touch each other, but they must be closely united territory, and thereby guard, as far as practicable, the system of representation adopted in the state against the legislative evil commonly known as 'the gerrymander'… Inequality of representation in a republican form of government is just as offensive and unjust as is taxation without representation. Both are repugnant to and inconsistent with the American idea of government and true citizenship."

Barrett, 146 SW at 65. Missouri courts are equally as concerned as federal courts with the tendency of legislatures to gerrymander legislative districts, thereby effectively disenfranchising residents of those districts.

Although the US Supreme Court recently attempted to enunciate a standard for evaluating political gerrymandering in *Vieth*, the only holding to attain a majority was that gerrymander claims are justiciable. The *Vieth* Court could not agree on the proper standard. That confusion was repeated in the following case *League of United Latin American Citizens v. Perry*, 548 US 399 (2006), where the Court again found gerrymandering claims to be justiciable (but again failed to agree on a standard).

Regardless of the lack of an agreed-upon standard at the federal level, the issue is clearly justiciable. It is well within this Court's purview to adopt its own standard for political gerrymandering claims in Missouri. The US Supreme Court specifically envisions such proceedings. *Vieth*, 541 US at 306 (KENNEDY, J., concurring) ("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"). Missouri's equal protection precedents that evaluate the fundamental right to vote indicate that an appropriate standard is whether the redistricting Map has the purpose and effect of infringing constitutional rights, *see, e.g., St. Louis University v. Masonic Temple Ass'n*, 220 SW3d 721, 729 (Mo. banc 2007), and whether the redistricting Map is narrowly tailored to serve a compelling government interest, *see e.g., Weinschenk*, 203 SW3d at 215-16. In the alternative, if competitive elections are not considered part of the fundamental right to vote, an appropriate standard is whether the Map chosen is rationally related to a valid government interest. *Id*.

B. APPELLANTS' PETITION STATES FACTS TO SUPPORT A FINDING THAT THE MAP VIOLATES CONSTITUTIONAL EQUAL PROTECTION GUARANTEES THROUGH VOTE DILUTION.

Appellants' Petition, as amended, states facts that clearly support their claim of a violation of the fundamental right to vote grounded in the equal protection guarantees of the state and federal Constitutions. Appellants have alleged that the Map was intended to (and that it will) have the effect of protecting incumbents of both parties to the detriment of challenger candidates and those who wish to vote for them. Appellants also allege that the Map creates districts that combine residents from distant communities having opposing economic and social interests, such that it is impossible for a single Congressperson to fairly and equitably represent. Appellants allege that the infringement of their right to vote can only be justified by a compelling government interest, of which

there is none. But even if the infringement could be rationally justified, Respondents refuse to provide the Court with any justification whatsoever. They sit atop their own political privilege as "Kings of the Hill."

a. The Map Has the Purpose and Will Have the Effect of Diluting the Votes of Missouri Citizens in Order to Prevent Competitive Challenges to Incumbents of Both Parties.

The right to vote is one of the most fundamental rights in a republican democracy. This right to vote "can be denied by debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise thereof." *Armentrout*, 409 SW2d at 142 (quoting *Reynolds*, 377 US at 555). In our system of representative government, community residents elect a lawmaker to represent the interests of their community.

Ordinarily, legislative districts have some commonality of character or identity that enables a single legislator to represent the common interests of the community. "To be an effective representative, a legislator must represent a district that has a reasonable homogeneity of needs and interests; otherwise the policies he supports will not represent the preferences of most of his constituents." *Prosser v. Elections Board*, 793 F.Supp. 859, 863 (W.D. Wisc. 1992). However, the purpose and effect of the Map here under review is to pack citizens from highly disparate communities into districts solely on the basis of partisan leanings so as to create a "safe" district for an incumbent legislator. These citizens have divergent needs, priorities and interests. With a view to the current Map, it is a practical impossibility for such parochial interests to receive fair and

equitable representation or attention. The voting interests of the few residents in the rural counties appended to the otherwise urban and suburban Fifth District are diluted. The voting interests of the few suburban residents in Jackson County appended to the otherwise rural Sixth District are diluted. Where it is impossible for a citizen to elect a representative that truly represents his interests, his right to vote is denied as absolutely as if he had been physically turned away from the polls.

b. The Map Does Not Serve Any Articulable Interest, Much Less a Compelling Governmental Interest, and Must Be Invalidated.

The right to vote is so fundamental to our representative democracy that impairments and dilution of that right deserve the most intense scrutiny. Federal courts apply strict scrutiny to political gerrymandering claims. *See Reynolds*, 377 US at 555. Missouri courts have similarly found that gerrymanders deserve special scrutiny. See *Armentrout*, 409 SW2d at 142. Carving up communities to further the partisan political interests of incumbents, the only conceivable reason for the shape of the Fifth District, is not a compelling governmental interest.

Even assuming *arguendo* that the right to vote is deserving of only minimal protection in this state, there is no rational, articulable reason for appending rural Ray, Lafayette and Saline counties to an urban Kansas City district. Respondent Carnahan suggested at the hearing on December 8, 2011, that possible rationales might include drawing a district to include all commuters to a particular city, or to include all schools in a football conference, or in the same judicial district (Tr. 9-11). The problem remains that none of these possible rationales actually applies to the Fifth District. By carving out

close-in Kansas City suburbs, the Fifth District would not include all metro-area commuters. There is no common sports conference uniting the District. The District includes pieces of multiple judicial circuits. The only thing these communities have in common is language and a Constitutional right to be heard. Respondents do not offer any rational basis for their gerrymandering artwork, and certainly nothing compelling.

Appellants' Petition states that the Map divides communities that have been historically, physically and economically united (L.F. 7-8). The Petition states that these communities were divided solely to preserve the political power of incumbent Representatives (L.F. 12). The Petition states that "the Map has the purpose – and will have the effect – of depriving Appellants and countless other Missouri citizens of the rights guaranteed to them under the State and Federal Constitutions, including equal rights, opportunity, and protection under the law to elect candidates of their choice to the United States House of Representatives." (L.F. 12) Appellants further allege that the bipartisan gerrymander results in promotion of party-selected candidates, with a consequent lack of political power and fair representation for voters (L.F. 12). Appellants' Amended Petition alleges that voters will be unable to elect officials responsive to their needs, because rural and urban residents have such disparate needs that simultaneous representation is impossible (L.F. 59). Appellants have alleged sufficient facts to support a finding that the Map creates unconstitutional dilution of Appellants' voting rights. The trial court's Order and Judgment granting Respondents' motion to dismiss was error.

CONCLUSION

Missouri's form of government is a representative democracy. A fundamental requisite is that legislative representatives are fairly elected from districts as compact and as equal in population as possible. Apportioning districts on an exclusively partisan basis dilutes the voting power of citizens in violation of equal protection guarantees. These basic principles are spelled out in the Missouri Constitution and the US Constitution. It is the duty and obligation of the judiciary to insure compliance with constitutional safeguards.

The long history of reapportionment and redistricting litigation tells a clear story – without judicial restraints, encroachments on constitutional safeguards are a progressive cancer infecting the republic. Appellants respectfully submit that if this Court affirms the dismissal of these claims (thereby validating the existing, non-compact districts), future legislators will be unleashed with judicial precedent for further violations of the compactness doctrine. This will eviscerate the concept of equal protection in the context of political gerrymandering. The present plan will be cited as justification for even more excessive variances from constitutional guidelines. Only this Court can order a halt.

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 6,326 words.

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CERTIFICATE OF SERVICE

I hereby certify that on December 23, 2011, I filed a true and accurate Adobe PDF copy of this Brief of the Appellants and its Appendix via the Court's electronic filing system, which notified the following of that filing:

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