SC92237

IN THE SUPREME COURT OF MISSOURI

STATE EX REL. MOLLY TEICHMAN,

Relator,

vs.

ROBIN CARNAHAN, et al.,

Respondents.

Original Proceedings for Writ of Mandamus and Prohibition

BRIEF OF RESPONDENTS

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STATEMENT OF FACTS

After the completion of the 2010 United State census, a senatorial apportionment commission ("citizens' commission") was created under Article III, § 7 of the Missouri Constitution. The senatorial apportionment commission failed to file a "statement of reapportionment within the time prescribed by the Missouri Constitution, Article III, Section 7." Relator's Ex. B, p. 21. By operation of law, the citizens' commission was discharged on September 19, 2011. Relator's Ex. B, p. 23. The Supreme Court was then authorized to, and did, appoint a commission composed of six members from among the court of appeals. *Id.*

The appointed commission (hereinafter "Commission") was comprised of the Honorable Don E. Burrell, Jr., the Honorable Robert G. Dowd, Jr., the Honorable Lisa White Hardwick, the Honorable Nancy Steffen Rahmeyer, the Honorable Roy L. Richter, and the Honorable James E. Welsh. Relator's Exhibit A, pp. 5-6. Following their appointment, the Commission had ninety days from the date of discharge of the citizens' commission, or until December 19, 2011, to file its apportionment plan and map with the Secretary of State. *See* Mo. Const. Art. III, § 7; Relator's Ex. A, pp. 5-6.

On November 30, 2011, nearly three weeks early, the Commission filed a plan and map. Relator's Ex. A, pp. 9-18. Ten days later, on December 9, 2011, and still before the expiration of the ninety day period of appointment, the Commission by a majority vote withdrew the previously filed plan and map and

filed a substitute plan and map with the Secretary of State. Relator's Ex. B, pp. 19-36. This is not the first time changes have been made by a committee after filing an apportionment plan.

Following the 1980 United States census, on November 11, 1981, the Vice-Chairman noted in a letter to the Secretary of State that an "error in the maps presented to you by the Missouri House Reapportionment Commission . . . has come to the attention of the members of said Commission." Respondents' Ex. A. The commission certified the new map filed with the Secretary of State, noting that "seven-tenths of the members of the Missouri House Reapportionment Commission are needed to certify a Reapportionment Plan." *Id.* Two months later, on January 13, 1982, still more corrections with the maps came to the attention of the Secretary of State. Respondents' Ex. B.

ARGUMENT

The Petition challenges the authority of the Commission under Article III, § 7 the Missouri Constitution to file a substitute apportionment plan with the Secretary of State. In addition, the Petition challenges the merits of the apportionment plan, claiming it violates a multitude of constitutional provisions, including Article III, § 7 of the Missouri Constitution, the Equal Protection Clause, and the Guarantee Clause of the United States Constitution. Only the first challenge to the Commission's authority, however, is appropriate for writ proceedings. Challenges on the merits should be the subject of an action seeking declaratory or injunctive relief, or in the alternative should be rejected.[1/]

[1/] Relator Molly Teichman asserts that she is a citizen, taxpayer, and qualified voter in the State of Missouri, but she does not identify where she lives or how she is affected, if at all, by the alleged violations in the Petition. Relator's Petition, ¶ 1.

Writ Standards

A writ of mandamus is a discretionary writ and will lie only when there is a "clear, unequivocal, and specific right." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576 (Mo. banc 1994) (citing *State ex rel. Sayad v. Zych,* 642 S.W.2d 907, 911 (Mo. banc 1982)). Thus, a writ of mandamus is not "appropriate to establish a legal right, but only to compel performance of a right that already exists." *Id.* (citing *State ex rel. Brentwood School Dist. v. State Tax Comm'n,* 589 S.W.2d 613, 614 (Mo. banc 1979)).

Relator argues that *State ex rel. Leigh v. Dierker*, 974 S.W.2d 505, 506 (Mo. banc 1998) stands for the proposition that mandamus will lie to " 'undo' that which is prohibited by law." Relator's Suggestions in Support, at 3. But *Dierker* merely holds that an act of a court can be undone if "the Court was by law prohibited from doing it." *State ex rel. Leigh v. Dierker*, 974 S.W.2d 505, 506 (Mo. banc 1998). Similarly, a writ of prohibition lies to " 'prevent commission of a future act, not to undo an act already performed.' " *State ex rel. Missouri Public Serv. Comm'n v. Joyce*, 258 S.W.3d 58, 60 (Mo. banc 2008) (quoting 24 Daniel P. Card II & Alan E. Freed, Missouri Practice *Appellate Practice* section 12.4 (2d ed. 2001)).

While the authority to file a plan is likely appropriate for writ proceedings, the actual merits of the plan may not be. Indeed, in one of the few cases to address apportionment – *Preisler v. Doherty*, 265 S.W.2d 404 (Mo. banc 1954) – this Court considered the issues in a declaratory judgment action. These writ

proceedings should not consider the merits of the plan, but instead be limited to the sole question of the Commission's authority to file a substitute apportionment plan within the ninety days to file such a plan.

I. The Commission's Constitutional Authority to File a Substitute Plan Within the Ninety Days Authorized to File an Apportionment Plan.

Relator's principal claim rests on the constitutional provision assigning redistricting to a six-judge commission. As with statutory provisions, the "Constitution in general is subject to the same rules of construction." *State ex rel. Curators of University of Mo. v. Neill*, 397 S.W.2d 666, 669 (Mo. banc 1966). The difference, however, is that because of the more permanent character of the Constitution, the Court gives "due regard" for the "broader scope and objects of the Constitution as a charter of popular government, and the intent of the organic law is the primary object to be attained in construing it." *Id.* (citing *State ex rel. Jones v. Atterbury*, 300 S.W.2d 806, 810 (Mo. banc 1957); *see also State, at the Info. of Martin v. City of Independence*, 518 S.W.2d 63, 65 (Mo. 1974) (giving the Constitution a broader construction).

Here, a broader construction of Article III, § 7 of the Missouri Constitution would authorize the Commission to file a substitute plan within the ninety days appointed for filing an apportionment plan.

A. Article III, § 7 Does Not Expressly Prohibit the Filing of a Substitute Plan.

In determining the meaning of a constitutional provision the Court "must first undertake to ascribe to the words the meaning which the people understood them to have when the provision was adopted." *Boone Co. Court v. State*, 631 S.W.2d 321, 324 (Mo. banc 1982) (superseded on other grounds) (citing *State ex info. Danforth v. Cason*, 507 S.W.2d 405, 408 (Mo. banc 1974)). "The meaning conveyed to the voters is presumptively equated with the ordinary and usual meaning given thereto." *Boone Co. Court*, 631 S.W.2d at 324. And the "ordinary, usual, and commonly understood meaning is derived from the dictionary." *Id.*

Furthermore, the "grammatical order and selection of the associated words as arranged by the drafters is also indicative of the natural significance of the words employed." *Id.* (citing *Cason*, 507 S.W.2d at 408 and *O'Malley v. Continental Life Ins.*, 75 S.W.2d 837 (Mo. banc 1934). "Finally, due regard is given to the primary objectives of the provision in issue as viewed in harmony with all related provisions, considered as a whole." *Boone Co. Court*, 631 S.W.2d at 324 (citing *City of Independence*, 518 S.W.2d at 65). By adherence to these rules the "fundamental purpose of constitutional construction is accomplished, to give effect to the intent of the voters who adopted the amendment." *Boone Co. Court*, 631 S.W.2d at 324 (citing *Rathjen v. Reorganized Sch. Dist. R-II of Shelby County*, 284 S.W.2d 516, 522 (Mo. banc 1955)).

Article III, § 7 provides, in relevant part as follows:

> [T]he senate shall be apportioned by a commission of six members appointed from among the judges of the appellate courts of the state of Missouri by the state supreme court, a majority of whom shall sign and file its apportionment plan and map with the secretary of state within ninety days of the date of the discharge of the apportionment commission. Thereafter senators shall be elected according to such districts until a reapportionment is made as herein provided.

Nowhere in this language is there an express authorization or prohibition for the filing of a substitute apportionment plan. Thus, we are left to discern this novel issue under the Constitution based upon the meaning of individual words, as well as within the grammatical context and structure of the relevant provisions. In Relator's view, "thereafter" means the Commission's filings, regardless of whether a revision is required for whatever reason. The alternative, the interpretation used by the Commission, is that "thereafter" means after the "ninety days."

1. The definitions of key terms do not preclude the filing of a substitute apportionment plan.

There are several key terms that stand out as potentially instructive of the meaning of Article III, § 7. These are defined in relevant part as follows:

> **Appointed – 1a(1) :** to fix by a decree, order, command, resolve, decision, or mutual agreement . . . **c :** to assign, designate, or set apart by authority . . . .
>
> **File – 3a(1) :** to deliver (as a legal paper or instrument) after complying with any condition precedent (as the payment of a fee) to the proper officer for keeping on file or among the records of his office . . . **b :** to place (as a paper or instrument) on file among the legal or official records of an office esp. by formally receiving, endorsing, and entering . . . .
>
> **Plan – 3a :** a method of achieving something : a way of carrying out a design . . . **b :** a method of doing something . . . **c :** a detailed and systematic formulation of a large-scale campaign or program of action . . . .

Webster's Third New International Dictionary 105, 849 and 1729 (1993). The definitions for each of these terms describe something formal and deliberate while at the same time not precluding the possibility of substitution or amendment.

It is worth noting that in Article III, § 7, the term "plan" is used in the singular, not the plural. But the use of the singular is not necessarily conclusive as to its meaning. It could mean that either the Commission can sign and file only one plan one time, or that the Commission cannot have on file more than one plan or file multiple plans at the same time. Typically, in the law something

can be filed, refiled, and amended within a proscribed period of time. Thus, although a pleading may be filed or a judgment entered, there is a time before it is "final" and not revocable (or at least not easily revocable). The definitions of these terms, though descriptive of something quite formal, do not describe an act or thing that is irrevocable.

2. The surrounding provisions in Article III, § 7 do not contemplate that the filing of a plan is irrevocable.

In addition to the plain and ordinary meaning of these terms as described in the dictionary, we look to the surrounding provisions to determine meaning. One of the more intriguing evidences is the process used before the issue ever gets to the appellate judges. The citizens' commission that is made up of ten members, "five each from the two political parties casting the highest vote for governor at the last preceding election," is instructed to "file with the secretary of state a tentative plan of apportionment and map." Art. III, § 7 (emphasis added). After public hearings, a "final statement" is filed with the secretary of state. *Id.* (emphasis added).

This could be read to show that the filing of a plan with the Secretary of State has never been viewed as a one-time irrevocable event. Instead, filing is just a formal means of recording an assigned task but until the time appointed has passed it is still tentative. Relator may argue, instead, that because this provision for the filing of a tentative plan by the citizens' commission was not

included in the process for the appellate judges, the judges' act of filing under a provision that omits mention of a tentative plan makes the first-filed plan irrevocable.

The context of Article III, § 7 also gives some guidance by spelling out deadlines. Each step of the process has an allotted time for completion (*e.g.*, "Within sixty days"; "on the fifteenth day"; "No later than five months after"; "No later than six months"; "within ninety days"). Only after the expiration of the proceeding period is the next stage undertaken. And as is the case with most appointments, there is both an allotted task and an allotted time.

For the judges, the allotted time is ninety days, not a shortly period if the plan is filed early.

3. The broad construction of the Constitution suggests the Court should resolve the issue in favor of allowing the Commission to file a substitute plan and fulfilling its purpose.

Despite some help from the language and structure of the constitutional provision, the issue of the Commission's authority to file a substitute plan remains uncertain. This leaves the Court to construe the constitutional provisions so as to best comply with the policies of the provisions at issue.

The Constitution is to be broadly construed so as to effectuate the will of the people. *See State ex rel. Curators of University of Mo.*, 397 S.W.2d at 669. Indeed, the law does not favor a narrow interpretation that would defeat the

very purpose of the provision. *Bates v. Dir. of Rev.*, 691 S.W.2d 273, 278 (Mo. banc 1985). An interpretation of Article III, § 7 that limits the Commission to "one shot" regardless of whether the appointed time has expired or whether corrections need to be made might to defeat the purpose, and making that an unnecessarily narrow construction.

Much of the issue depends on the purpose of Article III, § 7. It seems from these provisions, that the voters intended to put in place several stages and fallbacks – all for the purpose of accomplishing the task of apportioning senate districts. The voters did not desire that the process be defeated, thereby requiring that the multi-stage process be repeated or subject to federal court intervention. Thus, an interpretation that would narrowly draw the terms so that the process fails or is ineffective would not be consistent with the "due regard" for the "broader scope and objects of the Constitution." *Id.*

II. The Plan Filed by the Commission is Constitutional Under Article III, § 7.

The Relator claims that the plan and map filed on December 9, 2011 is unconstitutional under several theories, all because "the line of St. Louis County is unnecessarily crossed and crossed to complete more than one district."[2/]

[2/] Here we assume that the geographic requirements imposed on the citizens' commission also apply to the judges' commission. Because those requirements were met with the December 9 plan, as discussed here, and

Relator's Petition, ¶ 23. The plan and map, however, comply with the requirements of the Constitution and should be approved.

A. The St. Louis County Line was Crossed Consistent with Article III, § 7.

The heart of the Relator's claims as to the substitute plan and map filed on December 9, 2011, stems from crossing the St. Louis County line twice to apportion multi-district counties. The Commission, in order to properly apportion the districts in the City of St. Louis with nearly equal population, was required to cross the St. Louis County line. The Constitution specifically contemplates this situation as it provides for the crossing of county lines for a multi-district city. And there is no other choice of county line to cross, of course, because the City of St. Louis is completely bounded on all sides by St. Louis County.

By taking a portion of St. Louis County to complete a district in the City of St. Louis (as required for proper apportionment), the Commission was then required to cross a different county line to complete a district in St. Louis

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because the judges' commission had authority to replace the earlier plan, as discussed above, the Court does not need to decide the open question of whether the geographic and other requirements imposed on the citizens' commission do, in fact, apply to the judges' commission.

County. This was done by crossing the Jefferson County line. That is consistent with the language of the Constitution. The Constitution provides that

> [N]o county lines shall be crossed except when necessary to add sufficient population to a multi-district county or city to complete only one district which lies partly within such multi-district county or city so as to be as nearly equal as practicable in population.

Art. III, § 7.

Here, the City of St. Louis has a population exceeding the number for one senatorial district, and the St. Louis County line was the only county line crossed (and the only one possible to cross) to fill an additional district. Fortunately, the Constitution does not prohibit crossing a different county line to then complete a district in St. Louis County. Otherwise, given that the city of St. Louis borders no other county, it would be impossible to comply with both the county boundary provision and the equal population requirement, and it might be impossible to comply with those and the Voting Rights Act. Indeed, the 2001 apportionment plan for senatorial districts in Missouri involved the same application of Article III, § 7. *See* http://www.senate.mo.gov/pdf-maps/newdistricts.htm.

B. Reapportionment, by Definition, Results in Changes to District Boundaries and Does Not Violate Other Constitutional Provisions.

As an alternative, Relator argues that the apportionment plan filed on December 9, 2011 violates equal protection under the Fourteenth Amendment to the United States Constitution and Article I, § 2 of the Missouri Constitution, because districts have new boundaries and therefore some representatives may find themselves in new districts. This is an inevitability with redistricting unless senate terms are prematurely ended and all senators stand for election in 2012. Relator cites to general equal protection cases for support. But these are inapposite. There is no authority for the proposition that redistricting violates equal protection merely because some voters find themselves represented by someone new.

Relator also amends to add claims for violation of Article II, § 1 of the Missouri Constitution (Separation of Powers) and Article IV, § 4 of the United States Constitution (Guarantee of Republican Form of Government). It is unclear how the apportionment plan and map violates separation of powers as the authority is derived from the Missouri Constitution itself and the people have the "inherent, sole and exclusive right to regulate the internal government and police thereof, and to alter and abolish their constitution and form of government whenever they may deem it necessary . . . provided such change be not repugnant to the Constitution of the United States." Mo. Const. art. I, § 3.

Indeed, the senate reapportionment provision of the Missouri Constitution was added after the separation of powers provision.

Furthermore, Guarantee Clause challenges "usually are considered political questions, and courts rarely find them justiciable." *County of Charles Mix v. U.S. Dept. of Interior*, 799 F. Supp.2d 1027, 1037-37 (D.S.D. 2011) (citing *New York v. United States*, 505 U.S. 144, 184 (1992) ("[T]he guarantee clause has been an infrequent basis for litigation throughout our history. In most of the cases in which the Court has been asked to apply the Clause, the Court has found the claims presented to be nonjusticiable under the 'political question' doctrine.")). As such, Relator's Guarantee Clause challenge should be rejected along with her other constitutional challenges.

III. The Relator is Not Entitled to Simply Return to the Old District Maps.

The last point in the writ that Relator seeks is an order "[c]ompelling the secretary of state to continue to use, for all purposes related to the nomination and election of senators, the valid apportionment of the senate that was in effect prior to the events described in [the] petition." Relator's Petition at 6. But that remedy is not appropriate under the Missouri constitution.

The Missouri constitution dictates precisely what happens if this or any other court invalidated the plan filed by the apportionment commission: the process starts over again. When "a reapportionment has been invalidated by a court of competent jurisdiction," the governor notifies the "state committee of

each of the two political parties casting the highest vote for governor at the last preceding election," each of which shall then "select by a vote of the individual committee members, and thereafter submit to the governor a list of ten persons, and within thirty days thereafter the governor shall appoint a commission of ten members, five from each list, to reapportion the thirty-four senatorial districts and to establish the numbers and boundaries of said districts." Art. III., § 7. The citizens' commission then has six months in which to file a final plan with the secretary of state. *Id.* If the citizens fail to do so, six appellate judges are again appointed to file a plan.

If the plan now on file with the Secretary of State is held by this or another court to be invalid, then the citizens' commission process would be immediately invoked. The constitution sets deadlines for that process. But it does not prevent the process from moving more quickly, so long as the Commission holds three public hearings before filing a proposed plan, and another public hearing during 15 subsequent days, before filing a final plan. Art. III. § 7. Whether all of that can happen before candidate filing must begin is best left to the political parties that submit names, the Governor who appoints the commission from those names, and the commission itself – and to the General Assembly, which could change the filing date.

Should the court invalidate the plan and the Commission fail to file a new plan in time for filing for this year's election, there is no assurance that the 2001 plan could still be used. Continuing old boundaries may have been possible in

1945 or even 1965 – but not today. As the United States Supreme Court observed, the United States Constitution does not permit districts with disproportionate populations:

> Overweighting and overvaluation of the votes of those living here has the certain effect of dilution and undervaluation of the votes of those living there. The resulting discrimination against those individual voters living in disfavored areas is easily demonstrable mathematically. Their right to vote is simply not the same right to vote as that of those living in a favored part of the State. Two, five, or 10 of them must vote before the effect of their voting is equivalent to that of their favored neighbor.

Reynolds v. Sims, 377 U.S. 533, 563 (1964).

Though precise mathematical equality is not required, undoubtedly someone would argue that the variation among Missouri state senate districts recorded by the 2010 census is beyond the bounds permitted by federal constitutional law. The State Demographer reported that the population of existing districts varied from District 9 at 142,146, to District 2 at 242,885 – a difference of more than 100,000 people. *See* http://oa.mo.gov/bp/redistricting/pdf/120911/Senate%20Deviation%20Table.pdf.

But even if the Court invalidates the plan filed with the Secretary of State, what instruction to give the Secretary of State is a question for another day (*i.e.*, to be addressed only if the citizens' commission fails to file new districts in time) and perhaps by another court (*i.e.*, one hearing a challenge under federal constitutional law to the continued use of districts that the 2010 census shows have dramatically different populations).

CONCLUSION

For the foregoing reasons, this Court should deny the writ.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and served, on January 10, 2011, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 4,459 words.

/s/ *Jeremiah J. Morgan*
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