UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF MISSOURI

BEVERLY EHLEN, et al. Plaintiffs, v. ROBIN CARNAHAN, Defendant.	Case No. 6:12-cv-03122-FJG

MOTION TO DISMISS

Intervenor Molly Teichman states as follows.

Background Facts

1. Plaintiffs challenge "a districting plan which is undergoing final approval" (Doc. 1 "Complaint" ¶ 1; *see also* Complaint Exhibit B).

2. The apportionment plan challenged by Plaintiffs is merely a tentative plan (*see* Complaint Exhibit B at 3) submitted to the Missouri Secretary of State pursuant to Article III, Section 7 of the Missouri Constitution:

> Not later than five months after the appointment of the commission, the commission shall file with the secretary of state a tentative plan of apportionment and map of the proposed districts and during the ensuing fifteen days shall hold such public hearings as may be necessary to hear objections or testimony of interested persons.

Mo. Const. Art. III, § 7.

3. Under the Missouri Constitution, the commission that submitted the tentative plan (the "Bipartisan Reapportionment Commission") is a political body that has discretion *not* to file

a final redistricting plan, in which case the constitution shifts the redistricting task to a nonpartisan commission to be appointed by the state supreme court:

> Not later than six months after the appointment of the commission, the commission shall file with the secretary of state a final statement of the numbers and the boundaries of the districts together with a map of the districts. . . . except that if the statement is not filed within six months of the time fixed for the appointment of the commission, it shall stand discharged and the 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. . . .

Mo. Const. Art. III, § 7.

4. Pursuant to the six-month time frame quoted above, the Bipartisan Reapportionment Commission has until July 31, 2012 to determine whether or not it will submit a final plan or else turn the task over to the nonpartisan commission (*see* Complaint Exhibit B at 9-10, *indicating appointment occurred January 31, 2012*).

5. Plaintiffs allege on information and belief that the Bipartisan Reapportionment Commission will finally approve the tentative plan "no later than March 12, 2012" (Complaint ¶¶ 70 & 84). This allegation cannot be based on information because it forecasts a future official act by a discretionary body composed of ten members who cannot lawfully bind their future votes and who are presently engaged in a 15-day comment period, after which they have approximately five additional months to revise and file (or not to file) a final apportionment plan.

6. Nevertheless, Plaintiffs seek relief that would have the Court intervene and nullify Missouri's ongoing constitutional reapportionment process due to the alleged "tardiness of Missouri's approval" of an apportionment plan (Complaint ¶ 1).

7. The Missouri Constitution does not require that an apportionment plan be approved by any particular calendar date or by any certain period in advance of any particular event. To the contrary, the Missouri Constitution measures the timeliness of the plan by the number of months since the Bipartisan Reapportionment Commission was appointed. *See* Mo. Const. Art. III, § 7. By this constitutional standard, Missouri's approval of an apportionment plan is not "tardy."

8. Filing for the 2012 primary election opened on February 28, 2012, and numerous senate candidates have already filed.

Plaintiffs' Claims Are Not Ripe

9. Neither of Plaintiffs' claims are ripe because the Bipartisan Reapportionment Commission—which is presently authorized to make (or not to make) the future apportionment that Plaintiffs attempt to control through this action—has not reached a final decision, and because Plaintiffs' claims rest upon the contingent future approval and filing of an apportionment plan that may not occur as anticipated or indeed may not occur at all. *See Williamson County Reg'l Planning Comm'n v. Hamilton Bank of Johnson City*, 473 U.S. 172, 186, 105 S. Ct. 3108, 3116, 87 L. Ed. 2d 126 (1985)(ripeness requires final decision); *Texas v. United States*, 523 U.S. 296, 300, 118 S. Ct. 1257, 1259, 140 L. Ed. 2d 406 (1998); *see also* 13A Charles A. Wright, Arthur R. Miller, & Edward H. Cooper, FEDERAL PRACTICE AND PROCEDURE § 3532, p. 112 (1984).

Plaintiffs Lack Standing Because There Is No Presently-Justiciable Controversy

10. Plaintiffs have no standing because their claims present "only abstract questions at this point and therefore are non-justiciable." *See Warth v. Seldin*, 422 U.S. 490, 500, 95 S.Ct. 2197, 2206, 45 L.Ed.2d 343 (1975).

Plaintiffs' First Count States No Claim

11. Plaintiffs' first count is an equal representation claim alleging that the tentative apportionment plan "discriminates against overpopulated rural districts and in favor of underpopulated urban districts on the basis of regionalism" (Complaint ¶¶ 55-57, 68). Plaintiffs support this claim with statistics showing a mathematical inequality among what Plaintiffs characterize as rural and urban districts in the tentative plan (Complaint ¶ 31 et seq.).

12. "[M]inor deviations from mathematical equality among state legislative districts are insufficient to make out a prima facie case of invidious discrimination under the Fourteenth Amendment so as to require justification by the State." *Gaffney v. Cummings*, 412 U.S. 735, 745, 93 S. Ct. 2321, 2327, 37 L. Ed. 2d 298 (1973); *see also Reynolds v. Sims*, 377 U.S. 533, 579, 84 S. Ct. 1362, 1391, 12 L. Ed. 2d 506 (1964)("Some deviations from the equal-population principle are constitutionally permissible with respect to the apportionment of seats in either or both of the two houses of a bicameral state legislature.").

13. This Court cannot "conclude from relatively minor 'census population' variations among legislative districts that any person's vote is being substantially diluted." *Gaffney*, 412 U.S. at 745-46, 93 S. Ct. at 2328.

14. The tentative districts challenged by Plaintiffs have a maximum deviation of 9.6% (Complaint Exhibit B at 3). Teichman asks the Court to take judicial notice that the districts have an average deviation from the ideal senate district of 2.8%.

15. It is permissible for districts to have a maximum deviation as large as 16.4% and an average variation as large as 3.89%. *Mahan v. Howell*, 410 U.S. 315, 93 S.Ct. 979, 35 L.Ed.2d 320 (1973).

16. Districts with a maximum variation of "only about 8%" and an average deviation from the ideal district of "only about 2%" fail to state even "a prima facie case of invidious discrimination under the Fourteenth Amendment." *Gaffney*, 412 U.S. at 751, 93 S. Ct. at 2330.

17. The districts in the tentative plan challenged by Plaintiffs are comparable to those in *Gaffney* and well within the range affirmed in *Mahan*.

18. Because Plaintiffs allege no other or further basis for relief in their first count, their first count states no claim upon which the Court may grant relief.

19. Notably, the districts in the Second Nonpartisan Plan (which Plaintiffs ask this Court to impose as a remedy for the alleged lack of equal representation in the tentative plan) have a maximum deviation of 7.8% (Complaint Exhibit A at 2). Teichman asks the Court to take judicial notice that these districts have an average deviation from the ideal senate district of 3.7%. As such, the Second Nonpartisan Plan (which Plaintiffs ask this Court to impose by judicial order) is not meaningfully different in mathematical equality when compared to the tentative apportionment plan being developed by Missouri's constitutional process (which Plaintiffs challenge).

Plaintiffs' Second Count States No Claim

20. Plaintiffs' second count is an equal representation claim alleging that the tentative apportionment plan discriminates against voters in District 10 by assigning them "a senator for whom no one in the district has ever voted. . . who lives in and represents an urban area in a distant part of the state." (Complaint ¶¶ 79-80).

21. Plaintiffs suggest that if the tentative apportionment plan becomes final, Senator Jolie Justus, who currently resides in Kansas City, will for two years represent a district in the eastern part of Missouri in which she does not reside (Complaint ¶ 43). This is untrue as a matter of law.

22. Article III, Section 6 of the Missouri Constitution prevents the harm that Plaintiffs forecast by requiring that after a reapportionment, each newly established district must be represented by a senator who for one year has been a resident of the districts from which the newly established district is formed:

> Each senator shall be thirty years of age, and next before the day of his election shall have been a qualified voter of the state for three years and a resident of the district which he is chosen to represent for one year, if such district shall have been so long established, and if not, then of the district or districts from which the same shall have been taken.

Mo. Const. Art. III, § 7.

23. Pursuant to the constitutional provision quoted above, Senator Justus will be constitutionally unqualified to serve as the senator from District 10 if the tentative plan is finally approved because she does not live in one of the districts that are proposed to be combined to

form District 10.* This will cause Senator Justus to vacate her office for lack of residency if the tentative district ten becomes final, and the governor will issue a writ of election to fill the vacancy. *See* Mo. Const. Art. III, §§ 13 & 14. Contrary to Plaintiffs' assertion, Senator Justus will not represent a district in which she does not reside.

24. Because the discrimination alleged by the Plaintiffs in their second claim is a legal impossibility, it states no claim upon which this Court may grant relief.

This Court May Not Equitably Grant the Relief That Plaintiffs Request

25. Due to equitable considerations, this court should not grant relief effective for the present election cycle because "an impending election is imminent and [Missouri's] election machinery is already in progress." *Reynolds v. Sims*, 377 U.S. 533, 585, 84 S. Ct. 1362, 1393-94, 12 L. Ed. 2d 506 (1964). This admonition holds even if the Court concludes that the challenged districting scheme is invalid. *Id.*

26. This Court should not redraw Missouri districts because "the goal of fair and effective representation is not furthered by making the standards of reapportionment so difficult to satisfy that the reapportionment task is recurringly removed from legislative hands and performed by federal courts which themselves must make the political decisions necessary to formulate a plan or accept those made by reapportionment plaintiffs who may have wholly

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* Senator Justus would, however, be qualified to run for the senate in the new district that includes her place of residence.

different goals from those embodied in the official plan." *Gaffney v. Cummings*, 412 U.S. 735, 749, 93 S. Ct. 2321, 2329-30, 37 L. Ed. 2d 298 (1973).

27. The Fourteenth Amendment does not require displacement of Missouri's constitutional reapportionment process "in the name of essentially minor deviations from perfect census-population equality that no one, with confidence, can say will deprive any person of fair and effective representation in his state legislature." *Gaffney*, 412 U.S. at 749, 93 S. Ct. at 2329-30.

28. Because the filing mechanism of Missouri's 2012 election cycle is already underway, as a matter of equity this Court should not entertain this action to intervene and redraw Missouri's senate districts for such election.

29. (In the alternative to paragraph 28) because Missouri officials are in the process of carrying out their duties to redraw Missouri's senate districts pursuant to the Missouri Constitution and a recent decision of the Missouri Supreme Court (*see* Doc. 2 "Motion to Intervene" Exhibit 2), as a matter of equity this Court should not entertain this action to intervene, should not preempt Missouri's constitutional reapportionment process, and should not redraw Missouri's senate districts.

Conclusion

30. This action should be dismissed because (A) it is not ripe; (B) Plaintiffs lack standing; (C) Plaintiff's first claim fails to state a claim upon which relief can be granted; (D) Plaintiff's second claim fails to state a claim upon which relief can be granted; and (E) as a matter of equity this Court may not grant the relief that Plaintiffs seek.

Relief Requested By Movant Teichman

Teichman requests that the Court grant this motion and enter its order dismissing this action.

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