IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

KENNETH PEARSON, PHOEBE OTTOMEYER, BRIAN MURPHY, MILDRED CONNER, TIMOTHY BROWN, and JOAN BRAY	)	
Plaintiffs,	)	Case No. 11AC-CC00624
vs.	)	
ROBIN CARNAHAN, Missouri Secretary of State, and CHRIS KOSTER, Missouri Attorney General, in their official capacities,	)	
Defendants, and	)	
Representative JOHN J. DIEHL and Senator SCOTT T. RUPP,	)	
Intervenor-Defendants.	)	

INTERVENORS' MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM OR, IN THE ALTERNATIVE, JUDGMENT ON THE PLEADINGS

Representative John J. Diehl, Jr., and Senator Scott T. Rupp ("Intervenors"), pursuant to Rule 52.27(a)(6) and 55.27(b), move to dismiss the Petition for failure to state a claim or, alternatively, for judgment on the pleadings.

Introduction

Article III, Section 45 of the Missouri Constitution makes congressional apportionment the exclusive province of "the general assembly." The people of Missouri assigned this complex task to the legislative branch—not to the courts—for a reason. Dividing our diverse state into districts requires the type of decision-making that is truly appropriate only for a popularly elected (and therefore

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political) legislature. Drawing district lines requires listening to constituents, balancing interests, compromising, and, sometimes, choosing winners and losers. These decisions usually displease at least one political party. Sometimes they please no one. Indeed, there has probably never been a redistricting that has not been labeled as "partisan." As the U.S. Supreme Court has recognized time and again, the legislative calculus necessarily involves at least some political thinking.

Missouri's citizens made clear in their Constitution that while they expect their legislators to make these political calculations, they expect something very different from their courts. That is why it is puzzling that the Plaintiffs invite this Court to pass judgment on the political motivations of the General Assembly—a judgment that will necessarily require the Court to invoke political and even partisan principles. Without ever articulating neutral, manageable standards for the Court to follow, Plaintiffs openly ask the Court to re-legislate the General Assembly's congressional apportionment for the express purpose of creating fewer Republican and more Democratic "safe" districts. Missouri, which lent its name to the non-partisan court plan, has long proclaimed that such openly political judgments and remedies are anathema in its halls of justice.

This Court should dismiss Count I because it fails to plead that the General Assembly "wholly ignored" principles of compactness. The Missouri Supreme Court created this high burden long ago precisely because the "compactness" of a district, standing as an independent constitutional guideline, is largely left to the good sense of the legislature lest parties use the judiciary to adjudicate political disputes and

destroy the separation of powers. The Court should dismiss Counts II and III because, unlike Count I, they present political questions and simply cannot be adjudicated in a Missouri court of law.

ARGUMENT

I. Count I Should Be Dismissed Because Plaintiffs Failed to Plead that the General Assembly Wholly Failed to Consider Compactness.

a. Missouri Courts Only Invalidate Congressional Apportionment Legislation Where the General Assembly "Wholly Ignores" the Principle of Compactness

Missouri's "compactness" requirement arises from Article III, Section 45 of its constitution, which instructs the General Assembly that "districts shall be composed of contiguous territory as compact and as nearly equal in population as may be." While the principle of equality of population ("one person, one vote") appears coequal to the principle of "compactness" under the Missouri Constitution, in reality, the dominant principle of apportionment is equality of population because it is a federal constitutional requirement; under the Supremacy Clause, Missouri could not allow unequal population or otherwise violate the U.S. Constitution in a quest to draw perfectly compact districts. *See Preisler v. Kirkpatrick*, 528 S.W.2d 422, 425 (Mo. banc 1975) (citing *Reynolds v. Sims*, 337 U.S. 533, 579 (1964)).

Plaintiffs' Count I relies wholly upon this constitutionally subordinate principle—compactness. At most, the Plaintiffs have pled that the General Assembly violated the "compactness" requirement because a map with more

"compact" districts could have been drawn. According to Plaintiffs, the judiciary may step in to invalidate legislation so long as the resulting district shapes are not as "compact as can be." Petition, ¶ 35.

Plaintiffs' pleading fails to state a claim. It fails to distinguish between the language of Article III, Section 45—which provides guidance for the *General Assembly* in exercising its exclusive legislative functions—and the high standard that plaintiffs in *Missouri's courts* must satisfy before they exercise the power of judicial review to strike down the act of a coordinate branch of government. If our courts could freely second-guess legislative judgments on compactness, there would be no standard of review, violating the separation of powers between the legislature and the judiciary.

For this reason, the Missouri Supreme Court has consistently held that the General Assembly's reapportionment laws are not subject to judicial attack unless the legislature "completely disregarded" the principle of compactness. *See Preisler v. Doherty*, 284 S.W.2d 427, 434 (Mo. banc 1955); *Preisler v. Hearnes*, 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).

b. The Separation of Powers Requires Courts to Review Apportionments Using the "Wholly Ignored" Standard

All three *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. In its 1955 decision, the Supreme Court explained:

> It was well stated in *People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N.E. 307, 315: '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, 284 S.W.2d at 434.

Twenty years later, in the third *Preisler* decision, the Supreme Court again relied upon the principle of separation of powers to reaffirm that it would only decide whether the General Assembly had used its discretion—not whether it had used that discretion *well*:

> As said in a leading case, State ex rel. Lamb v. Cunningham, 83 Wis. 90, 53 N.W. 35, 55, 17 L.R.A. 145: 'If, as in this case, there is such a wide and bold departure from this constitutional rule that it cannot possibly be justified by the exercise of any judgment or discretion, and that evinces an intention on the part of the legislature to utterly ignore and disregard the rule of the constitution in order to promote some other object than a constitutional apportionment, then the conclusion is inevitable that the legislature did not use any judgment or discretion whatever." 362 S.W.2d at 555.

Preisler, 528 S.W.2d at 425-426.

The third *Preisler* decision is particularly instructive because it succinctly highlights the practical difficulties (even setting aside the violation of the separation of powers doctrine) inherent in requiring Missouri courts to engage in the exacting *de novo* compactness review urged by the Plaintiffs:

> It must be recognized that there will be some degree of unavoidable noncompactness in any apportionment of this state into 34 senatorial districts. The county lines do not lend themselves to perfect compactness. The population density of the state is, of course, uneven and any effort to accomplish both the overriding objective of substantial equality of population and the preservation of county lines reasonably may be expected to result in the establishment of districts that are not esthetically pleasing models of geometric compactness. It is also true that the population density is uneven in the two metropolitan areas and a good faith effort to adhere to all constitutional requirements will still produce some districts in those areas, the boundary lines of which will have stair-step shape as well as the straight lines of urban blocks and suburban and urban census districts, and the sweeping curves of major thoroughfares. It has been said that only a district having the shape of a square or a circle can be so compact that it cannot be made more so. *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40, 62 (1912).
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> We would remind the parties (and ourselves) that whatever the body charged with the responsibility of reapportionment of the state into districts (whether it be the Legislature or a Commission) it is made up of fallible human beings; that no matter how compact in shape or equal in population the districts they establish may be, none will be so perfect that there will not be room for improvement; that there will always be those with knowledge of and interest in the subject, who, unhampered by the experience of having had to work closely with the overall plan and with shaping and fitting into that plan each individual district thereof, can improve upon what has been done.

Preisler, 528 S.W.2d at 426.

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 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 it could possibly be, it

was whether the overall legislation, on its face, showed that the principle of compactness had at least been considered—even if imperfectly.

Finally, the second *Preisler* decision points out that apportionment is ultimately a puzzle requiring creativity and compromise; if citizens are dissatisfied with the particular compromise that was reached, then—as with most legislation—their remedy is political, not legal:

> While both compactness and population of the Tenth district could have been aided by also adding these counties plaintiff mentions and others adjoining them it must be realized that every member of the Legislature has his own views (as do his constituents) as to the district in which his county (and others with which his county has previously been associated in a congressional district) should be placed and it is not improper to consider the precedents of allocation of counties to existing districts in deciding the composition of new enlarged districts. Very likely each legislator individually would draw somewhat different district lines. Therefore, any redistricting agreed upon must always be a compromise. Mathematical exactness is not required or in fact obtainable and a compromise, for which there is any reasonable basis, is an exercise of legislative discretion that the courts must respect. Furthermore, the people of this state have a remedy for even valid redistricting, which they do not like, through our initiative and referendum provisions.

Preisler v. Hearnes, 362 S.W.2d 552, 557 (Mo. 1962).

c. Plaintiffs' Pleading Fails Because it Rests on an Exacting Standard of Review that Breaks With Controlling Authority and Offends the Separation of Powers

Instead of seeking their political remedies from the Missouri people, the Plaintiffs have decided to bring their argument to the Missouri courts. However, this effort must fail because the Plaintiffs' pleading falls far short of the "wholly ignored" standard. Indeed, Paragraph 35 of the Petition affirmatively pleads the Plaintiffs out of their compactness claim: it pleads not that compactness was wholly

ignored, but rather suggests that the districts might have "some degree of compactness" that falls short of an exacting standard of judicial review ("compact as can be") that, as discussed above, the Missouri Supreme Court has clearly rejected.[1]

The remainder of Count I pleads specific reasons why Plaintiffs believe the General Assembly's legislation *could* or *should* have created more compact districts. Plaintiffs' arguments only serve to demonstrate what the Court is really being asked to do: supplant its discretion for that of the General Assembly. For example, Plaintiffs would like to create a regional-cultural entity known as "Mid-Missouri" and then have the Court find as a matter of fact and rule as a matter of law that Plaintiffs' proposed apportionment, but not the General Assembly's, preserves the unity of this "community of interest." Petition, ¶¶ 37, 38(a). Plaintiffs do something similar with St. Louis, relying upon the boundaries of the Census Bureau's massive "Metropolitan Statistical Area" as an area that should not be shared with "outstate" congressional districts. *Id.* at ¶¶ 38(c), (d). Finally, Plaintiffs make dubious claims about the supposedly uniformly "urban" nature of Jackson County and its immediate environs.

The point is not whether Plaintiffs' geographical and political arguments are right or wrong. The point is that the Plaintiffs would have this Court preside over discovery and a trial in which these discretionary legislative matters are

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[1] Plaintiffs' pleading attempts to liken the shapes of the General Assembly's districts to various animals. Plaintiffs show a marked preference for amphibians and lizards who are either dead or mutant. Intervenors cannot discern the similarities, but may lack Plaintiffs' imagination. In any event, the Court can draw its own conclusions by reviewing the exhibits attached to Plaintiffs' Petition, which are a part of the pleading for purposes of this motion. See Rule 55.12.

investigated and argued. The Court would then be asked to issue findings of fact and rulings of law on whether it agrees or disagrees with the General Assembly's exercise of discretion. Such a proceeding would be a far cry from the standard of review articulated by the Supreme Court in the *Preisler* cases, and it is hard to imagine a more sweeping judicial encroachment on the apportionment power which Missouri's citizens assigned to the legislature.

Because Plaintiffs have failed to plead that the General Assembly wholly ignored the principle of compactness, and because Plaintiffs have affirmatively pled (through their Petition and also through the attached Exhibits) that the basis of their claim is that the General Assembly crafted somewhat compact districts which could have been made even more compact, the Court should dismiss Count I for failure to state a claim, or, in the alternative, enter judgment against Plaintiffs on the pleadings.

II. Counts II and III Should Be Dismissed Because They Present Political Questions.

Counts II and III essentially make the same argument: that both houses of a General Assembly consisting of Republican majorities freely elected by Missouri voters passed legislation intended to benefit Republicans. This alone, Plaintiffs say, requires Missouri's courts to seize the task of apportionment from the General Assembly. But Plaintiffs fail because they present political questions which, while appropriate for argument in the halls of the General Assembly, in the press, and on election day, cannot be litigated or remedied in Missouri courts.

a. Count II Presents a Non-Justiciable Political Question Because Plaintiffs Plead No Judicially Discoverable and Manageable Standards for Determining that the General Assembly's Decision Was "Too" Political

Count II is couched as an equal protection claim. Plaintiffs argue that in purpose and effect, the General Assembly's legislation discriminates against Democrats. While the Intervenors agree with Attorney General Koster that Plaintiffs' pleading fails under standard equal protection jurisprudence,[2] this Court should not and need not reach the merits. Instead, the Court should dismiss Count II as non-justiciable because of the political question doctrine.[3]

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[2] *See* Defendant Attorney General's Motion to Dismiss or, in the Alternative, for Judgment on the Pleadings ("AG Motion"), pp. 7-10. As Defendant Koster points out, Democrats are not a "suspect class" and a given voter's "right" to successfully elect a candidate of his or her political party in a contested race has never been deemed a "fundamental right." *See* AG Motion at 8. While the Petition could certainly be dismissed for failure to meet the pleading requirements of an equal protection claim on the merits, Intervenors believe that the political question doctrine renders Counts II and III non-justiciable, which means they should not be reached at all on the merits.

[3] Even setting the political question doctrine aside, there is another fatal defect in Plaintiffs' Petition which also requires the Court to dismiss the case before it reaches the merits: the Plaintiffs have not pled "equal protection" standing. First, somewhat surprisingly, *the Plaintiffs nowhere plead that they are members of any alleged suspect class* (including, *arguendo*, the Democratic Party, although neither major party is remotely close to being the kind of group that has traditionally endured discrimination because of political weakness). Second, the Plaintiffs do not allege that they would support Democratic candidates but will have no meaningful opportunity to vote for them and see them elected in their particular districts. *See* Petition, ¶¶ 2-8 (failing to make any of the required allegations regarding equal protection); ¶¶ 43-50 (no required allegations in equal protection count). Indeed, certain parts of Plaintiffs' Petition even suggest that some "Republicans" and "Independents" could be a part of the suspect class, but Plaintiffs also fail to state whether they are members of either of these groups. An equal protection claim cannot be adjudicated without plaintiffs who actually have standing.

Missouri courts have long recognized that "[t]he political question doctrine establishes a limitation on the authority of the judiciary to resolve issues, decidedly political in nature, that are properly left to the legislature." *Bennett v. Mallinckrodt, Inc.*, 698 S.W.2d 854, 863-64 (Mo. App. 1985). If a case involves "resolution of a political question, the matter is immune from judicial review." *Id.* Like federal courts, Missouri courts use a flexible six-factor test (in descending order of importance) to determine whether a question is political:

> "[p]rominent on the surface of any case held to involve a political question [there] is found **[1]** a textually demonstrable constitutional commitment of the issue to a coordinate political department; or **[2]** a lack of judicially discoverable and manageable standards for resolving it; or **[3]** the impossibility of deciding without an initial policy determination of a kind clearly for nonjudicial discretion; or **[4]** the impossibility of a court's undertaking independent resolution without expressing lack of the respect due coordinate branches of government; or **[5]** an unusual need for unquestioning adherence to a political decision already made; or **[6]** the potentiality of embarrassment from multifarious pronouncements by various departments on one question." *Baker v. Carr*, 369 U.S. 186, 217, 82 S.Ct. 691, 710, 7 L.Ed.2d 663 (1962).

Bennett, 698 S.W.2d at 864 (bolded numbering added to indicate individual factors).

In this case, Plaintiffs' claim fails because they have not pled any "judicially discoverable and manageable standard for resolving" their charge of undue political influence. In the context of political gerrymandering claims, this is a fatal flaw.

Plaintiffs' "political gerrymandering" claim is a rare animal which, as opposed to a Voting Rights Act or racial gerrymandering claim, has never resulted in a court ordering redrawn districts. *See Vieth v. Jubelirer*, 541 U.S. 267, 279-280 (2004) (holding in majority opinion that plaintiff's showing of "predominant intent"

of partisan advantage plus specifically-defined "practical effects" of loss of influence on political process were insufficient to state a political gerrymandering claim and were not judicially manageable, and holding in plurality opinion that no test could ever be devised to save political gerrymandering claims from nonjusticiability under the political question doctrine). *See also League of Latin American Citizens v. Perry* ("*LLAC*") 548 U.S. 399, 413-414 (2006) (holding that plaintiff failed to plead workable standard for political gerrymandering claim, rendering the claim non-justiciable, and recognizing a long-standing split on the court regarding whether such a standard can ever exist).

Vieth and *LLAC* both discuss the underlying problem with political gerrymandering claims: there is simply no workable standard for determining when a coordinate branch of government, the legislature, has allowed "politics" to play too great a role in reapportionment. First, it is not enough that politics played an important role in districting, as the *Vieth* plurality recognized in agreeing with dissenting Justice Stephen Breyer on this point:

> We agree with much of Justice BREYER's dissenting opinion, which convincingly demonstrates that "political considerations will likely play an important, and proper, role in the drawing of district boundaries." *Post,* at 1823. This places Justice BREYER, like the other dissenters, in the difficult position of drawing the line between good politics and bad politics. Unlike them, he would tackle this problem at the statewide level.
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> The criterion Justice BREYER proposes is nothing more precise than "the *unjustified* use of political factors to entrench a minority in power." *Post,* at 1825 (emphasis in original). While he invokes in passing the Equal Protection Clause, it should be clear to any reader that what constitutes *unjustified* entrenchment depends on his own theory of "effective government." *Post,* at 1823. While one must agree

> with Justice BREYER's incredibly abstract starting point that our Constitution sought to create a "basically democratic" form of government, *post*, at 1822, that is a long and impassable distance away from the conclusion that the Judiciary may assess whether a group (somehow defined) has achieved a level of political power (somehow defined) commensurate with that to which they would be entitled absent *unjustified* political machinations (whatever that means).

Justice Kennedy's concurrence, which provided the fifth vote for the *Vieth* plurality and was therefore decisive in the court's determination that the plaintiffs' claim was non-justiciable, explains why even the most well-defined and well-pled political gerrymandering claims have repeatedly failed to be found justiciable:

> The object of districting is to establish "fair and effective representation for all citizens." *Reynolds v. Sims*, 377 U.S. 533, 565–568, 84 S.Ct. 1362, 12 L.Ed.2d 506 (1964). At first it might seem that courts could determine, by the exercise of their own judgment, whether political classifications are related to this object or instead burden representational rights. **The lack, however, of any agreed upon model of fair and effective representation makes this analysis difficult to pursue.**
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> **The second obstacle—the absence of rules to confine judicial intervention—is related to the first.** Because there are yet no agreed upon substantive principles of fairness in districting, we have no basis on which to define clear, manageable, and politically neutral standards for measuring the particular burden a given partisan classification imposes on representational rights. Suitable standards for measuring this burden, however, are critical to our intervention. Absent sure guidance, the results from one gerrymandering case to the next would likely be disparate and inconsistent.
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> In this case, we have not overcome these obstacles to determining that the challenged districting violated appellants' rights. **The fairness principle appellants propose is that a majority of voters in the Commonwealth should be able to elect a majority of the Commonwealth's congressional delegation. There is no authority for this precept.** Even if the novelty of the proposed principle were accompanied by a convincing rationale for its adoption,

there is no obvious way to draw a satisfactory standard from it for measuring an alleged burden on representational rights.

Vieth, 541 U.S. at 307-308 (Kennedy, concurring) (emphasis added).

Indeed, as is implicit in this excerpt, a majority of the U.S. Supreme Court *has never been able to agree on a "political gerrymandering" test* that would convert these claims from political questions into justiciable causes of action. *See Vieth*, 541 U.S. at 303. In each recent case to come before the court, the Supreme Court has simply disposed of the particular political gerrymandering claim as a nonjusticiable political question because it was not presented as a violation of any clear, judicially-manageable standard.

This Court can and should do the same thing as the U.S. Supreme Court in *Vieth* and *LLAC*: dismiss the Petition as presenting a non-justiciable political question because it lacks clear standards for judicial management and determination. Despite having had several months to fashion an equal protection challenge to the General Assembly's legislation, Plaintiffs made no effort to plead a "judicially discoverable and manageable standard" for resolving their claim. *Vieth*, 541 U.S. at 280; *see also Vieth*, 541 U.S. at 307-308 (Justice Kennedy's concurrence). Even the standards set forth by the plaintiffs in *Vieth* and *LLAC*, which were far more specific than anything pled in Plaintiffs' Petition here,[4] were rejected by

[4] Plaintiffs allege only that the General Assembly's legislation has the "clear purpose and effect of protecting the interests of certain incumbents, and otherwise promoting Republican interests, by creating six safe Republican districts among the eight congressional seats allocated to Missouri. Petition at 19. Plaintiffs allege that four safe seats should instead be allocated to each party based upon "the results of recent statewide and national elections." Petition at 32. These allegations do not

Supreme Court majorities as insufficiently specific to bring the plaintiffs' claims above the level of non-justiciable political questions.

b. Count III Presents a Non-Justiciable Political Question and Should Be Dismissed

What was true for Count II—which was at least denominated as a recognizable equal protection claim—is even more true for Count III. Plaintiffs' Count III purports to state a claim under prefatory language in the initial sections of the Missouri Bill of Rights regarding the "good of the whole" and the "general welfare of the people." Plaintiffs would set up a zero-sum analysis of sorts, having the Court decide whether the reapportionment legislation is "intended to promote the general welfare of partisan Republicans," or, in contrast, is intended to support the "general welfare of the [other] people." Plaintiffs' pleading proposes no test or standard for this claim, and none exists under any Missouri decision.

As the AG's Motion points out at pages 10-11, past Missouri decisions have held that similar language in the Bill of Rights provides no specific directive or standard for legislators and therefore cannot properly serve as a barometer for judicial review of legislative actions. Thus, Count III presents a political question: whether the reapportionment legislation promoted the good of the whole, or welfare of the people, was a consideration for legislators in the General Assembly; it is not a standard, rule, or test to be enforced by this Court. Count III is non-justiciable and should be dismissed on those grounds without reaching the merits.

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even approach the specificity of the tests proffered by plaintiffs in *Vieth* and *LACC*, and even more obviously than in those cases, present the Court with a wide-open inquiry devoid of judicially discoverable and manageable standards and burdens.

Conclusion

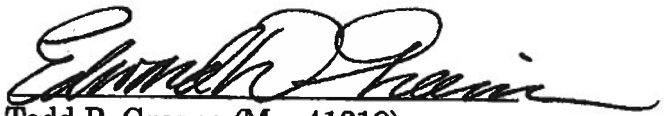
In various ways, Plaintiffs' Petition is an attempt to translate a political disagreement with the General Assembly into legally cognizable claims. Count I is justiciable, but fails to state a claim because it pleads a stringent "compactness" standard of judicial review that simply does not exist under Missouri law. Count II has been infrequently raised in courts, but fails here (as it has almost always failed before, and has failed in two recent U.S. Supreme Court cases) because it presents a standardless inquiry into a matter that the Missouri Constitution has committed to a coordinate branch of government. In other words, it presents a political question. Plaintiffs' remedy is through the ballot box or the initiative process, not through the courts. The same can be said of Count III, for which Missouri courts have not articulated a standard of judicial review. Any claim purporting to be brought "under" the "general welfare" clause is in reality a political question and should be dismissed without reaching the merits.

Plaintiffs may plead that they can articulate sound policy points. The General Assembly held numerous hearings during which these and other points could have been (and were) raised, but in the end, they did not prevail. Plaintiffs have a remedy even now, but it is through the political process—not through our courts. Intervenors welcome continuing debate regarding legislation. However, they have intervened in this proceeding because the separation of powers demands that political questions remain in the legislative and public arena and not in

Missouri's non-partisan judiciary. Plaintiffs' case must be dismissed with prejudice or judgment should be entered on the pleadings.

Respectfully Submitted,

GRAVES BARTLE MARCUS & GARRETT LLC

By: 

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that a complete copy of the foregoing was served by electronic mail and by first class mail, postage prepaid, this 25th day of October 2011, to:

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