IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

KENNETH PEARSON, et al.,	)	
	)	
Plaintiffs,	)	
	)	Cause No. 11AC-CC00624
vs.	)	
	)	
CHRIS KOSTER, in his official capacity as Missouri Attorney General, et al.,	)	Division II
	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS OR, ALTERNATIVELY, FOR JUDGMENT ON THE PLEADINGS

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PLAINTIFFS' MEMORANDUM IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS OR, ALTERNATIVELY, FOR JUDGMENT ON THE PLEADINGS[1]

INTRODUCTION

The overriding issue in this case is whether a political party may use its stranglehold on the machinery of state government to rig elections over the next decade for Missouri's members of the United States House of Representatives in favor of that party's candidates, by engaging in partisan gerrymandering of congressional districts so as to magnify the impact of the party's voters and correspondingly dilute the voting power of others.

Plaintiffs allege that Defendants' redistricting plan reflects a blatant gerrymander in which an overzealous enthusiasm for partisan gain has improperly and unconstitutionally trumped all other considerations. Among the allegations in the Petition are that "the General Assembly, currently dominated by the Republican party, utilized an overreaching process for wholly partisan purposes, and produced a Map designed solely to serve partisan ends"; the Map "achieves its purposes through extreme instances of gerrymandering, among other constitutional deficiencies"; and its net effect will be "that for at least the next ten years, six out of Missouri's eight congressional seats likely will be safe Republican seats, despite the fact that, according to the results of recent elections, Missouri appears to be equally divided between Republican and

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[1]Plaintiffs submit this memorandum in opposition to both the Motion to Dismiss for Failure to State a Claim or, in the Alternative, for Judgment on the Pleadings, filed by defendants Chris Koster and Robin Carnahan (the "State Defendants' Motion to Dismiss"), and Intervenors' Motion to Dismiss for Failure to State a Claim or, in the Alternative, Judgment on the Pleadings, filed by Intervenors John J. Diehl, Jr. and Scott T. Rupp ("Intervenors' Motion to Dismiss"). (The State Defendants and Intervenors are referred to collectively as "Defendants.")

Democratic voters." Petition, ¶¶ 1, 19, 32.

Moreover, the pernicious effects of gerrymandering are not limited to unfairly favoring one political party over another. Gerrymandering also can serve to unfairly dilute the voting power of residents of a particular region, by splintering the region among multiple congressional districts – as H.B. 193 does to mid-Missouri. And, as alleged in the case recently consolidated with the present controversy,[2] gerrymandering also can serve to unfairly benefit favored incumbents, to the detriment of other candidates and those who wish to vote for them.

That partisan gerrymandering of the kind alleged here raises deep constitutional concerns is demonstrated by Missouri Supreme Court case law recognizing that "[n]o right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live," *Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. banc. 2006), *quoting Wesberry v. Sanders*, 376 U.S. 1, 17-18 (1964); and that "the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise," *Armentrout v. Schooler*, 409 S.W.2d 138, 142 (Mo. 1966), *quoting Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

These principles assume prime importance every ten years when legislative redistricting occurs, during which the normal processes of democracy are inverted. Ordinarily, voters choose their elected officials. But, in redistricting, elected officials choose their voters. In so doing, legislators make decisions that significantly influence, for an entire decade, their own personal political fortunes and those of the political parties to which they belong. In light of this self-

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[2] *McClatchey v. Carnahan*, No. 11AC-CC00752.

interest inherent in the process, redistricting, perhaps more than any other area in which legislators act, is an area fraught with risks of corruption, self-dealing and sacrifice of the public interest at the altar of personal or partisan gain.

For these reasons, no legislative act so urgently requires judicial oversight than redistricting. Yet, astonishingly, that is exactly what Defendants claim Missouri courts lack the authority to do. Defendants are mistaken. The ability of the General Assembly to perpetuate and entrench the power of the dominant political party through gerrymandering is significantly constrained by the Missouri Constitution, and the authority to monitor and prevent abuse of the power to redistrict is vested squarely in the only organ of government capable of exercising it – the judiciary.

Nearly a century ago, the Missouri Supreme Court announced: "The choice of electors must be judicially respected unless their voice is made to speak a lie." *Nance v. Kearby*, 158 S.W. 629, 631 (Mo. 1913). That is precisely what the congressional redistricting plan challenged in this action will do, if left undisturbed – force the voters of Missouri to speak a lie, by electing a congressional delegation that fails to fairly and properly represent them.

As demonstrated below, the Petition not only clearly states viable claims, it asserts claims of a kind which Missouri courts previously have confronted and not hesitated to adjudicate. Defendants' contrary position rests on a serious misreading of the applicable case law and Plaintiffs' Petition.

LEGAL STANDARDS GOVERNING DEFENDANTS' MOTIONS

Defendants' motions fail to address the applicable legal standards – with respect to both their motions to dismiss and their motions for judgment on the pleadings – and their arguments largely ignore the applicable standards. Accordingly, we pause to recite the standards which Defendants must meet to obtain dismissal or judgment at this early stage of this action.

Regarding Defendants' motions to dismiss for failure to state a claim, it is well settled, under Mo. R. Civ. P. 55.27(a)(6), that in considering such a motion, "the facts contained in the petition are treated as true and they are construed liberally in favor of the plaintiffs." *Brooks v. City of Sugar Creek*, 340 S.W.3d 201, 211 (Mo. App. W.D. 2011), *quoting Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008). And, "[i]f the petition sets forth any set of facts that, if proven, would entitle the plaintiffs to relief, then the petition states a claim." *Id.*

The standards applicable to a motion for judgment on the pleadings, under Mo. R. Civ. P. 55.27(b), are similar. "Judgment on the pleadings is appropriate where the question before the court is strictly one of law." *Twehouse Excavating Co., Inc. v. L.L. Lewis Investments, L.L.C.*, 295 S.W.3d 542, 546 (Mo. App. W.D. 2009), *quoting Eaton v. Mallinckrodt, Inc.*, 224 S.W.3d 506, 599-600 (Mo. banc. 2007). "The question presented by a motion for judgment on the pleadings is whether the moving party is entitled to judgment as a matter of law on the face of the pleadings." *Twehouse,* 295 S.W.3d at 546, *quoting RGB2, Inc. v. Chestnut Plaza, Inc.*, 103 S.W.3d 420, 424 (Mo. App. S.D. 2003).

On a motion for judgment on the pleadings, "the well-pleaded facts of the petition are treated as true for purposes of the motion and the non-moving party is accorded all reasonable inferences drawn therefrom." *Twehouse*, 295 S.W.2d at 546. For a judgment on the pleadings to

lie, there must be no material issue of fact. *See, e.g., Paragon Lawns, Inc. v. Barefoot, Inc.*, 304 S.W.3d 298, 301 (Mo. App. W.D. 2010). "A motion for judgment on the pleadings is of common law origin, and it is not favored by the courts." *In re Marriage of Busch*, 310 S.W.3d 253, 259 (Mo. App. E.D. 2010), *citing McIntosh v. Foulke*, 228 S.W.2d 757, 761 (Mo. 1950).

ARGUMENT

I. THE MISSOURI CONSTITUTION SIGNIFICANTLY RESTRICTS PARTISAN GERRYMANDERING AND ASSIGNS ENFORCEMENT OF THOSE RESTRICTIONS TO THE JUDICIARY.

Before focusing on the specifics of Defendants' arguments, it is instructive to consider the overall legal landscape against which Plaintiffs' claims must be measured. As discussed below, the Missouri Constitution significantly restricts partisan gerrymandering and assigns enforcement of those restrictions to the judiciary.

A. The Missouri Constitution Imposes Significant Restrictions on Legislative Gerrymandering.

A number of provisions of the Missouri Constitution significantly restrict the ability of the General Assembly to engage in partisan gerrymandering. In *Armentrout*, a case involving apportionment of a municipal legislative body, the Missouri Supreme Court pointed to three pertinent state constitutional provisions in that regard:

> Art. I, § 1, provides 'That all political power is vested in and derived from the people; that all government of right originates from the people, is founded upon their will only, and is instituted solely for the good of the whole'; Art I, § 2: ' . . . that all persons are created equal and are entitled to equal rights and opportunity under the law; . . .'; and Art. I, § 25: 'That all elections shall be free and open[3]; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.'

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[3]The excerpt quoted above from *Armentrout* includes a footnote following the phrase "free and open" which states: "Construed in *Preisler v. Calcaterra*, 362 Mo. 662, 243 S.W.2d

409 S.W.2d at 143. *Armentrout* thus recognized that multiple provisions of the Missouri Constitution protect the right to vote.

The Missouri Supreme Court similarly recognized a constitutionally protected right to vote in *Weinschenk*, grounded not only in the State constitutional provisions addressed in *Armentrout*, but also in Art. VIII, § 2, which prescribes voter qualifications. 203 S.W.2d at 211 ("These constitutional provisions establish with unmistakable clarity that the right to vote is fundamental to Missouri citizens." [footnote omitted]).

In addition to constraining redistricting through recognition of a constitutionally protected right to vote, the Missouri Constitution inhibits gerrymandering through the imposition of direct restrictions on how the legislature may draw districts. Under the relevant provisions, all legislative districts must be "composed of contiguous territory as compact . . . as may be," and of equal population. Missouri Const., Art. III, §§ 2, 5, 45. The purpose of these provisions is not in doubt: it "was 'to guard, as far as practicable . . . against a legislative evil, commonly known as "the gerrymander". . . .'" *Preisler v. Kirkpatrick*, 528 S.W.2d 422, 425 (Mo. banc 1975), *quoting State ex rel. Barrett v. Hitchcock*, 146 S.W. 40, 61 (Mo. 1912).

Together, these provisions establish two propositions relevant here. First, the Missouri Constitution provides strong and direct protection of an individual's right to vote that not only is "fundamental," but enjoys "more expansive and concrete protections" than are afforded the merely derivative right to vote recognized by the U.S. Constitution. *Weinschenk*, 203 S.W.2d at 211-12; *compare* U.S. Const., Art. I, § 2, and Amend. XVII (qualifications to vote in U.S. elections derivative of those established by states). Second, that right to vote also is protected

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62, as substantially the same as 'free and equal.'" 409 S.W.2d at 143 n.2.

from impairment by constitutional provisions prohibiting the legislature from using devices historically used for purposes of partisan gerrymandering, such as drawing misshapen districts. *See, e.g,. Preisler v. Doherty*, 284 S.W.2d 427, 435 (Mo. banc 1955).

As noted above, a citizen's right to vote can be denied as effectively by diluting its weight, as by barring the citizen from the polls. *Armentrout*, 409 S.W.2d at 142. "Vote dilution has been defined as the minimizing or cancelling out of the voting strength of a given group through practices such as . . . electoral gerrymandering that unduly fragment or unnecessarily concentrate a group's voting strength." Bernard Grofman, "An Expert Witness Perspective on Continuing and Emerging Voting Rights Controversies: From One Person, One Vote to Partisan Gerrymandering, 21 Stetson L. Rev. 783 (1991-92), *citing* CHANDLER DAVIDSON, MINORITY VOTE DILUTION (1984). This is precisely what is alleged here: by manipulating district lines, the General Assembly has diluted and weakened the voting power of one party's followers, representing 50 percent of Missouri voters, leaving them in a position to elect only 25 percent of Missouri's eight-person congressional delegation, while correspondingly magnifying the voting power of the other party's followers – enabling them to elect 75 percent of Missouri's congressional delegation, despite representing only half of Missouri's voters. And, Plaintiffs allege that this evisceration of a fundamental tenet of democracy – that elections be conducted on a level playing field – is not only the effect of H.B. 193, but its very purpose!

B. Missouri and Other Courts Commonly Enforce Anti-Gerrymandering Provisions Found in State Constitutions.

Defendants strive to create the impression that Missouri courts have no business whatsoever overseeing legislative redistricting, or that such oversight is so rare and disfavored

that it easily can be terminated at its inception by a motion to dismiss. In fact, judicial oversight of redistricting is both common and meaningful, in Missouri and throughout the United States.

Nearly a century ago, in *Barrett*, the Missouri Supreme Court articulated its view of the relationship between judicial power and the Missouri Constitution's anti-gerrymandering provisions. The words of the Missouri Constitution "show conclusively," the Court said, "that it 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." 146 S.W. at 54.

Far from adopting a blanket rule that might require dismissal of most challenges to legislative gerrymandering, the Court noted that "each case that arises must stand largely upon the facts thereof," *id.* at 57, an approach that not only invites, but demands, close judicial scrutiny. The Court went on to quote with approval – and obvious relish – a then-recent opinion of the Chief Justice of the Michigan Supreme Court:

> [T]he time for plain speaking has arrived in relation to the outrageous practice of gerrymandering, which has become so common, and has so long been indulged in without rebuke, that it threatens, not only the peace of the people, but the permanency of our free institutions. *The courts alone, in this respect, can save the rights of the people*, and give to them a fair count and equality in representation. It has been demonstrated that the people themselves cannot right this wrong. They may change the political majority in the Legislature, as they have often done; but the new majority proceeds at once to make an apportionment in the interest of its party as unequal and politically vicious as the one that it repeals. There is not an intelligent school boy but knows what is the motive of these legislative apportionments; and it is idle for the courts to excuse the action upon other grounds, or to keep silent as to the real reason, which is nothing more nor less than partisan advantage taken in defiance of the Constitution, and in utter disregard of the rights of the citizen.

Id. at 57, *quoting Giddings v. Blacker*, 93 Mich. 1, 11 (1892) (Morse, C.J., concurring)

(emphasis added).

Consistent with this view, Missouri courts repeatedly have scrutinized legislative redistricting under the Missouri Constitution. In cases such as *Barrett* itself and, more recently, *Doherty*, *Preisler v. Hearnes*, 362 S.W.2d 552 (Mo. banc 1962), and *Kirkpatrick*, the Missouri Supreme Court, without hesitation, has entertained challenges to alleged gerrymanders on the constitutional merits.

Of equal significance, the Missouri Supreme Court has actively undertaken to protect the voting franchise from infringements coming from other directions as well. *See Kasten v. Guth*, 375 S.W.2d 110 (Mo. 1964) (invoking the "free and open" elections clause, Art. I, § 25, to interpret an election statute to permit write-in voting); *Weinschenk*, 203 S.W.2d at 211 (invoking state constitutional protections for the right to vote to invalidate a photo-ID requirement). Nothing could be clearer from those cases than that the mantle of enforcing the Missouri Constitution's provisions protecting the voting franchise falls ultimately upon this State's judicial branch.

In this, the courts of Missouri stand in a position no different from that of any other state judiciary. The highest courts of other states routinely have addressed challenges to gerrymandered districting plans under their state constitutions. Such decisions are so commonplace that the cases are far too numerous to list. By way of partial example only, decisions *invalidating* districting plans or individual districts for failure to satisfy state constitutional compactness requirements include: *In re 2001 Redistricting Cases*, 44 P.3d 141 (Alaska 2002); *Acker v. Love*, 496 P.2d 75 (Colo. 1972); *In re Reapportionment of Colorado General Assembly*, 647 P.2d 209 (Colo. 1982); *Schrage v. State Bd. of Elections*, 430 N.E.2d 483

(Ill. 1981); *People ex rel. Burris v. Ryan*, 588 N.E.2d 1023 (Ill. 1991); *In re Legislative Districting of General Assembly*, 193 N.W.2d 784 (Iowa 1972); *Davenport v. Apportionment Commission of State of N. J.*, 304 A.2d 736 (N.J. App. Div. 1973*), modified and aff'd on other grounds*, 319 A.2d 718 (N.J. 1974); *In re Sherill*, 81 N.E. 124 (N.Y. 1907); *Stephenson v. Bartlett*, 582 S.E.2d 247 (N.C. 2003). Dozens of additional decisions have adjudicated gerrymandering claims under a wide variety of state constitutional constraints on legislative districting. *See generally*, "Application of Constitutional "Compactness Requirement" to Redistricting, 114 A.L.R. 5th 311 (2011); James A. Gardner, "Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering," 37 Rutgers LJ. 881 (2006).

II. THE PETITION STATES VIABLE CLAIMS FOR UNCONSTITUTIONAL PARTISAN GERRYMANDERING.

Against this backdrop, we turn to a discussion of Defendants' attacks on Plaintiffs' claims, and demonstrate that Defendants' arguments are wholly without merit.

A. Defendants Mischaracterize Plaintiffs' Claims.

Defendants treat Plaintiffs' claims as though they consist of three wholly distinct causes of action bearing no relation to one another: a claim of noncompactness, a conceptually distinct equal protection challenge to the legislature's districting plan, and a third, equally distinct claim that the redistricting map serves private interests rather than the interests of the public as a whole. Defendants' approach mischaracterizes the thrust of Plaintiffs' allegations.

This is an action challenging the legislature's congressional redistricting law on grounds that it effectuates an egregious partisan gerrymander of a kind forbidden by the Missouri

Constitution. As the Petition clearly states, "the General Assembly . . . utilized an overreaching process for wholly partisan purposes, and produced a Map designed solely to serve partisan ends." Petition, ¶ 1.

Gerrymandering can be, and historically has been, accomplished in numerous ways, including but not limited to creating population disparities among districts, drawing bizarrely shaped districts to suppress the political strength of voters in disfavored groups, and/or breaking up local political units or communities of interest. But no matter how effectuated, gerrymandering is, at bottom, an infringement of the right to vote. *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (gerrymandering through malapportionment impairs "[t]he right to vote freely for the candidate of one's choice," which can be accomplished "by a debasement or dilution" of the right to vote just as much as by outright denial); *Gomillion v. Lightfoot*, 364 U.S. 339, 347 (1960) (gerrymandering through manipulation of "geometry and geography" deprived plaintiffs of their "voting rights"). This is the root claim undergirding each of the specific counts of the Petition.

Defendants further mischaracterize Plaintiffs' Petition in asserting that Count I, attacking the legislature's redistricting plan as violating the compactness requirements set forth in Art. III, § 45 of the Missouri Constitution, fails to state a viable claim. Defendants contend that, under applicable case law, a lack of compactness can provide no basis for invalidating a districting plan absent allegations and proof that the General Assembly "wholly ignored and completely disregarded" the compactness requirements, and that Plaintiffs' Petition cannot be viewed as alleging a lack of compactness reaching that extreme. *See* State Defendants' Motion to Dismiss at 3-7; Intervenors' Motion to Dismiss at 7-9.

As discussed in section II, B, *infra*, the judicial gloss of "wholly ignored and completely disregarded" relied on by Defendants does not have the meaning they seek to ascribe to it. However, regardless of what that language ultimately may be construed to mean, Plaintiffs' Petition plainly alleges a failure to comply with the applicable requirements. In paragraph 1 of their Petition, Plaintiffs allege that the Republican-dominated General Assembly "utilized an overreaching process for *wholly* partisan purposes, and produced a Map designed *solely* to serve partisan ends (emphasis added)." If, as Plaintiffs allege, the Map was drawn solely to serve partisan ends, and partisanship was the whole purpose of the process, it follows that no other considerations entered into the process and, accordingly, the compactness requirements were wholly ignored.[4]

In the same vein, the specific allegations set forth in Count I are entirely consistent with the notion that the legislature wholly ignored the compactness requirements. This is not a situation in which Plaintiffs allege one or two technical failures to achieve optimal compactness, in a map which otherwise substantially complies with the compactness requirement. Paragraphs 36 and 38 of the Petition contain broad, general allegations concerning the failure to comply with constitutional compactness requirements. Moreover, the subparagraphs of paragraph 36 point out numerous non-exclusive examples of ways in which, from a shape and layout standpoint, the Map fails to satisfy the compactness requirements, and specifies defects in five of the eight

[4] To avoid the parties and the Court from becoming embroiled in a battle over semantics, Plaintiffs sought, and were granted, leave to amend their Petition to expressly include the "wholly ignored and completely disregarded" language. As amended, paragraph 1 of the Petition reads, in pertinent part: "The Map violates the Missouri Constitution in multiple respects in that it creates districts which are not compact and contiguous – wholly ignoring and completely disregarding those requirements . . . ." Plaintiffs' First Amendment to Petition by Interlineation, filed November 29, 2011, at 1.

districts created by the Map. For instance, the Petition points to the new Fifth District, which is bizarrely shaped and can be likened to a dead lizard, and the new Third District, which places significant portions of the St. Louis area in a lobster claw-shaped area appended to an otherwise largely rural district that stretches halfway to Kansas City.

Further, the subparagraphs of paragraph 38 point to numerous further non-exclusive examples of ways in which, from a communities of interest standpoint, the Map fails to comply with compactness requirements.[5] For instance, the Map improperly splinters mid-Missouri among multiple congressional districts, and divides Jefferson County among three districts. Overall, the Petition clearly alleges that the General Assembly has transmogrified Missouri's congressional districts into something far different from what the State constitution requires.

In sum, Plaintiffs' Petition must be deemed to allege that the General Assembly wholly ignored the compactness requirements set forth in Art. III, § 45 of the Missouri Constitution, and to be susceptible of proof in that regard. It must be borne in mind that, on a motion to dismiss or for judgment on the pleadings, the facts alleged in the Petition are regarded as true and construed liberally in favor of Plaintiffs, and the Petition states a claim if it sets forth any set of facts that, if proven, would entitle Plaintiffs to relief. *See* pp. 4-5, *supra*. That certainly is the case here.

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[5] Intervenors appear to maintain that the concepts of "communities of interest," on the one hand, and "compactness and contiguity," on the other, have nothing to do with one another. That argument is dead wrong: the two concepts are integrally related. *See* James A. Gardner, "Foreword: Representation Without Party: Lessons from State Constitutional Attempts to Control Gerrymandering," 37 Rutgers L.J. 881, 968 (2006) (Traditional districting principles, such as requirements that districts be compact and composed of contiguous territory, "are aimed at . . . preserving the integrity of local economies in a political system based on the representation of homogeneous local communities of economic interest.").

B. *Preisler v. Kirkpatrick* Supports Review of Plaintiffs' Claims on the Merits, Not Dismissal.

As noted above, Defendants contend, relying primarily on *Kirkpatrick*, that no claim for violation of the constitutional compactness requirements can lie absent a showing that the legislature "wholly ignored and completely disregarded" the district compactness requirements. 528 S.W.2d at 425. However, Defendants' arguments misperceive the governing legal standard.

As a starting point, notwithstanding the quoted language, the Court, in *Kirkpatrick*, did not in fact apply a standard nearly so deferential as Defendants would have this Court believe. What the Supreme Court actually did was "find, and hold" that all but two of the 34 senatorial districts drawn under the challenged map "are within acceptable limits of compactness," *id.* at 426, and "also find, and hold, that . . . the districts established *substantially comply* with the compactness requirement of § 5 of Art. III." *Id.* at 427 (emphasis added). Thus, the standard the Court actually applied in *Kirkpatrick*, in the portion of its decision that the Court itself identified as its holding, is "substantial compliance" with the constitutional requirement of compactness.

Moreover, the Supreme Court further stated in *Kirkpatrick*, "[w]e find, and hold, that the Commission made an honest and good faith effort to construct senatorial districts as compact as may be." *Id.* at 426. Thus, in addition to the test of substantial compliance – an objective test – the Supreme Court applied a subjective test of honest and good faith effort to comply with the constitutional requirements.

There is a world of difference between those standards, applied by the Missouri Supreme Court in *Kirkpatrick*, and the standard which Defendants urge upon this Court in their motions to dismiss. A holding of substantial legislative compliance with a constitutional standard is, by

definition, a decision *on the merits* of the legislature's plan, *after judicial review of the entire map*. It is not a threshold standard that invites dismissal of claims of noncompactness at their inception by shifting to plaintiffs the burden to demonstrate some kind of complete and catastrophic legislative failure.[6]

In the present case, the Petition fairly can be read – indeed, must be read – to state a claim of substantial noncompliance with the constitutional requirement of compactness. Moreover, the Petition further must be read to allege noncompliance with the additional subjective test discussed by the Missouri Supreme Court in *Kirkpatrick*, of honest and good faith effort on the part of the legislature to comply with the constitutional requirement of compactness.

We note, further, that the standard Defendants would have this Court apply – an extreme and literal application of the words "wholly ignored and completely disregarded" – is a subjective standard that would be impossible to apply. The General Assembly is made up of 163 representatives and 34 senators. What showing must be made to demonstrate that compactness requirements were "wholly ignored?" Is it sufficient if one legislator, or a few, state that they considered compactness? Is it enough if one or two lines, on a map containing more than a hundred lines, are suggestive of compactness? Also, Art. III, § 19 of the Missouri Constitution provides that legislators "shall not be questioned for any speech or debate in either house in any other place" – commonly known as the speech or debate privilege – which generally is construed to preclude legislators from being questioned about their legislative activities, including reasons

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[6]Consistent with the above analytic framework, the trial court in *Kirkpatrick* reviewed the map on its merits, finding that the districts "are not compact," 528 S.W.2d at 424, and the Supreme Court then reversed the trial court, not for failure to apply a proper threshold standard, but *on the merits* of its substantive assessment of the compactness of the districts drawn by the legislature. *Id.* at 426-27.

or motives underlying their votes. *See, e.g., Eastland v. United States Servicemen's Fund,* 421 U.S. 491 (1975). Accordingly, Defendants advocate a standard for assessing claims that the legislature violated the compactness requirements of the Missouri Constitution which is wholly incapable of being applied.[7]

Reading *Kirkpatrick* in the manner Defendants urge would severely undermine the ability of the judiciary to police unconstitutional gerrymandering by the legislature. Indeed, doing so would essentially read the compactness requirement out of the Constitution because a legislature always can defend itself against a charge of "wholly ignoring" and "completely disregarding" a topic simply by paying it lip service while in fact ignoring and disregarding it.

Such a result would not be consistent with the significant importance the Missouri Supreme Court has attached to compactness as a principle of sound redistricting in other contexts. In *Armentrout*, for example, the Court faced the question whether the one-person, one-vote standard controlling state-level redistricting also applied at the municipal level. Applying the U.S. and Missouri Constitutions in tandem, the Court held that both constitutions independently require districts of equal population at the municipal level.

And, in issuing an order requiring the local districting map to be redrawn, the Court added a requirement: the city, it held, "also will observe the requirement that the wards newly created shall be composed of contiguous territory as compact as possible," 409 S.W.2d at 144, a

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[7] *Kirkpatrick* also is distinguishable from the present case because this action raises additional and different kinds of claims. As the Missouri Supreme Court noted early in its decision in *Kirkpatrick*, "the *sole question* presented" was whether the challenged districts were adequately compact. 528 S.W.2d at 424 (emphasis added). Here, in contrast, noncompactness is not the "sole question," or even the primary question. Rather, Plaintiffs contend in this case that the partisan gerrymandering engaged in by the legislature is legally wrongful in multiple respects. *See* Petition (as amended), ¶¶ 1, 44-50, 51-57, 59-65.

requirement not imposed on local governments by any provision of the Missouri Constitution. The Court's order thus expressed a strength of commitment to compactness in redistricting much more consistent with the "substantial compliance" approach to compactness review than the approach urged by Defendants.[8]

C. Partisan Gerrymandering Claims are Justiciable in Missouri.

The Intervenors – but not the State Defendants – argue that Plaintiffs' claims set forth in Counts II and III must be rejected as a matter of law as raising non-justiciable political questions. That argument is wholly without merit.

As a starting point, there is no question that Count I of Plaintiffs' Petition, grounded in Art. III, § 45 of the Missouri Constitution, presents the type of claim that Missouri courts can and do adjudicate. *See* discussion at pp. 8-10, *supra*.[9] As also discussed above, what the compact

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[8]A review of the cases from other jurisdictions cited by the Missouri Supreme Court in its decisions relied on by Defendants further illustrates that the test for whether a legislature violates state constitutional requirements of compactness in drawing legislative districts is not nearly so extreme as Defendants suggest. For example, in *In re Sherill*, 81 N.E. 124, 132 (N.Y. 1907), quoted in *Doherty*, 284 S.W.2d at 469, the New York Court of Appeals invalidated a reapportionment of 51 state senate districts based on the failure of two districts to comply with compactness requirements. The Court held, "[t]he disregard of constitutional provisions [requiring compactness] in forming the Second and Thirteenth senate districts is clear, and they so affect the entire apportionment as to make it necessary to declare the act wholly unconstitutional and void." *Id.* Notably, the Thirteenth district – which the Court deemed extremely misshapen, and of which a diagram is included in the Court's opinion – is no more misshapen than some of the districts in the Missouri congressional redistricting plan at issue here, *e.g.*, the Third and Fifth districts.

[9]At various points in their Motion to Dismiss, Intervenors seem to suggest that the compactness requirement found in Art. III, § 45 of the Missouri Constitution is merely a directive to the Missouri General Assembly which cannot be judicially enforced. However, any such argument is completely untenable in light of the fact that Missouri courts, in several cases, have proceeded to adjudicate claims of non-compliance with state constitutional compactness requirements. Moreover, at one point, Intervenors state that, insofar as they assert that Counts II

and contiguous requirements, found in Art. III, § 45, are designed to address is the "evil of political gerrymandering," which impinges upon Missouri citizens' right to vote. *Kirkpatrick*, 528 W.W.2d at 425, *quoting Barrett*, 146 S.W. at 61. The compact and contiguous requirements are found in only one of the multiple Missouri constitutional provisions which protect the right to vote from being diluted or otherwise infringed – others being found in Art I, §§ 1, 2, 3 and 25, and Art. VIII, 2. *See* discussion at p. 6, *supra*. If alleged infringement of the right to vote, as protected by Art III, § 45 of the Missouri Constitution, presents a justiciable claim – as it clearly does – it follows that alleged infringements of the right to vote, as protected by other Missouri constitutional provisions, similarly are justiciable.

Indeed, the Missouri Supreme Court has been presented with a number of cases alleging infringement of the right to vote, grounded in various State constitutional provisions, including the guarantee of equal rights, the provision that government is instituted for the good of the whole, and the free and open elections provisions quoted above. *See Weinschenk*; *Armentrout*; *Kasten*. In none of those cases did the Supreme Court hold that it involved a non-justiciable political controversy; rather, the Court adjudicated each of those cases on the merits.

With respect to Intervenors' assertions that no judicially manageable standards exist for adjudicating such claims, Intervenors again are wrong. The standards available to be applied include, but are not necessarily limited to, those traditionally utilized to determine whether a constitutional right has been infringed, including whether the challenged action contravenes a constitutional mandate, *see, e.g., Kasten*; whether a challenged action has the purpose and/or

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and III must be dismissed as non-justiciable political questions, Counts II and III are "unlike Count I." Intervenors' Motion to Dismiss at 3. Thus, Intervenors expressly acknowledge that Count I raises a justiciable claim.

effect of infringing constitutional rights, *see, e.g., St. Louis University v. Masonic Temple Ass'n*, 220 S.W.3d 721, 729 (Mo. banc. 2007); and, where a deprivation of equal rights is alleged, whether the challenged action is rationally related to a legitimate state interest, or, if one subject to strict scrutiny, whether it is justified by a compelling state interest and narrowly tailored, *see, e.g., Weinschenk*, 203 S.W.2d at 215-16.

Defendants argue that claims of political gerrymandering – and, in particular, those grounded in a claimed denial of equal rights – should be deemed non-justiciable, for lack of judicially manageable standards for adjudicating such claims, because a majority of the U.S. Supreme Court has not to date been able to agree as to the standards that should govern such cases. That argument, however, is flawed in a number of respects.

For one thing, federal law concerning the justiciability of political gerrymandering claims is of little, if any, relevance here since, as discussed previously, Plaintiffs' claims rest solely on State constitutional provisions, those provisions are not entirely congruent with their federal counterparts, and the Missouri Constitution is more protective of the right to vote than the U.S. Constitution. Moreover, federal law currently holds that a challenge to political gerrymandering grounded in the equal protection clause of the U.S. Constitution *does* present a justiciable claim. The U.S. Supreme Court so held in *Davis v. Bandemer*, 478 U.S. 109, 113 (1986). While, in a subsequent case, *Vieth v. Jubelrier*, 541 U.S. 267, 281 (2004), four Justices favored overruling *Davis* in that regard, they failed to command a majority for that position.[10] Accordingly, the

[10]In providing the fifth vote to reject the plaintiffs' claims which were the subject of *Vieth*, Justice Kennedy made clear that he did not agree with the premise that claims grounded in political gerrymandering never could be justiciable. To the contrary, Justice Kennedy stated, "I would not foreclose all possibility of judicial relief if some limited and precise rationale were

holding of *Davis*, concerning political gerrymandering claims grounded in the federal equal protection clause being justiciable, remains the law of the land.

Further, the current status of federal constitutional law concerning political gerrymandering and equal protection is *not* that neither the Supreme Court, nor any Justice or group of Justices, has been able to identify a workable standard for adjudicating claims of unconstitutional political gerrymandering. To the contrary, the three dissenting opinions in *Vieth* discussed a number of potential standards, generally turning on some combination or variation of purposes and/or effects. 541 U.S. at 317, 343, 355. Similarly, in the subsequent case of *League of United Latin American Citizens v. Perry*, 548 U.S. 399 (2006), several possible tests for adjudicating claims of partisan gerrymandering were discussed in the various opinions, with four Justices proposing different standards; Justice Kennedy rejecting the plaintiffs' proposed standard, but concluding that the issue is justiciable and still in search of a standard; and four Justices concluding that the issue is non-justiciable and therefore rejecting all standards. 548 U.S. at 409-10, 417, 447-48, 483, 491-92, 511-12.

The fact that at least five of the nine Justices on the U.S. Supreme Court thus far have been unable to coalesce around a single test as a matter of federal law does not mean that this Court cannot adopt an appropriate test as a matter of Missouri law, or that four or more Judges of the Missouri Supreme Court could not agree upon an appropriate standard, as a means of enforcing the Missouri constitutional provisions against the recognized evil of political gerrymandering. And that is particularly so since it is settled that, "[d]ue to the more expansive

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found to correct an established violation of the Constitution in some redistricting cases." 541 U.S. at 306.

and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart." *Weinschenk*, 203 S.W.3d at 212.[11]

D. The Petition States an Equal Rights Claim for Violation of the Fundamental Right to Vote.

In their Motion to Dismiss, the State Defendants argue that Count II of the Petition must be dismissed for three reasons: (1) Plaintiffs have not alleged that the challenged congressional map violates their fundamental right to vote; (2) accordingly, minimal, rational basis scrutiny applies; and (3) Plaintiffs have failed to allege that the redistricting plan is irrational. State Defendants' Motion to Dismiss at 8-10. Defendants are wrong on all three points.

First, the Petition unequivocally alleges partisan gerrymandering, Petition, ¶ 46, and violation of the right to vote as protected by the Missouri Constitution, *id.* (as amended), ¶¶ 59-65. As indicated earlier, an equal rights-based challenge to a redistricting plan on grounds of gerrymandering is *inherently* a claim of violation of the fundamental right to vote. Gerrymandering, by definition, affords unequal treatment to certain individuals in their ability to exercise their right to vote, by discriminating against supporters of the political party representing a minority in the gerrymandering legislature and diluting their votes.

Because it is a form of discrimination in the exercise of a fundamental right, partisan gerrymandering, like racial gerrymandering, conventionally receives heightened constitutional

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[11]Adoption by Missouri courts of standards for adjudicating political gerrymandering cases in Missouri, under Missouri State constitutional provisions – which are distinct from and more hostile to gerrymandering than their federal counterparts – is a less daunting task than that faced by the U.S. Supreme Court in attempting to fashion such standards for the entire country, as a means of enforcing federal constitutional principles.

scrutiny. *See, e.g., Gomillion*, 364 U.S. at 347 (racial gerrymandering deprived plaintiffs of their "voting rights"); *Davis*, 478 U.S. at 132 (plurality opinion) (a claim of "statewide political gerrymandering" alleges a form of "unconstitutional vote dilution"; "unconstitutional discrimination occurs . . . when the electoral system is arranged in a manner that will consistently degrade a voter's or a group of voters' influence on the political process as a whole"). The Missouri Supreme Court has expressly recognized and adopted these principles. *See Armentrout*, 409 S.W.2d at 142.[12]

Second, Defendants' contention that rational basis scrutiny applies to partisan gerrymandering claims is incorrect as a matter of law. Defendants have cited to no Missouri case applying the rational basis standard to a gerrymandering claim, and we are aware of none. Particularly where "the more expansive and concrete protection of the right to vote under the Missouri Constitution [confers] greater protection than its federal counterpart," *Weinschenk*, 203 S.W.3d at 212, it is highly implausible to suggest that judicial review of partisan gerrymandering under the State constitution would invoke the lowest conceivable level of constitutional scrutiny. In fact, to the extent that any of the Missouri Constitution's anti-gerrymandering provisions have been adjudicated, the Missouri Supreme Court has applied more searching review, as it did in applying the "substantial compliance" standard, described earlier, to the Constitution's compactness requirement. *Kirkpatrick*, 528 S.W.2d at 427.

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[12] Intervenors make a half-hearted argument, at p. 10, n.3 of their Motion, that "Plaintiffs have nor pled 'equal protection' standing," in that they fail to plead that they are members of a suspect class. However, this argument is a red herring. As discussed above, Plaintiffs maintain that the General Assembly's gerrymandered Map warrants heightened scrutiny not because Plaintiffs comprise a suspect class, but because the partisan gerrymandering impacts their fundamental right to vote by diluting the weight of their votes.

Third, even assuming *arguendo* that the rational basis standard applied to this case, Defendants are wrong in contending that Plaintiffs have failed to allege a violation of that standard. Paragraph 50 of the Petition alleges that "[n]o legal or other justification exists for drawing and adopting a congressional redistricting Map which has the purpose and effect of depriving plaintiffs and others of their equal rights and opportunity under the law relating to congressional elections." These allegations clearly encompass claims that the redistricting Map is constitutionally invalid regardless of whether it is evaluated under strict scrutiny, the rational basis standard, or some other standard.

Fourth, as Defendants concede, to pass muster under rational basis review, the challenged action must be "rationally related to a legitimate state interest." Defendants' Motion to Dismiss at 7, *quoting Thompson v ICI American Holding*, 347 S.W.3d 624, 635 (Mo. App. W.D. 2011). In that regard, the question is *not* whether it is possible to find any degree of rationality somewhere in the challenged redistricting plan, such as equality of population among districts, keeping many counties intact, or a degree of compactness appearing in places. To so hold would completely insulate gerrymandering from meaningful judicial review, which would be plainly inconsistent with the Missouri Constitution's multi-faceted restraints on legislative gerrymandering.

Rather, this case arises against a backdrop making clear that it is readily feasible to draw one or more alternative maps that reflect equality of population and compactness, in terms of both shape and keeping communities of interest together, as well or better than the challenged map, and in a manner which does not reflect partisan gerrymandering. Thus, the critical inquiry here is whether adopting a districting plan which also includes the partisan gerrymandering

aspects of H.B. 193 is rationally related to a legitimate state interest.

Drawing district lines for partisan gain is not, and never has been held to be, an interest that is either legitimate or, indeed, governmental. It is, on the contrary, a quintessentially illegitimate interest; one intended to advance private, partisan interests over those of the general public; and thus is not an interest of "the state" in any constitutionally relevant sense. Gerrymandering is a paradigmatic example of what James Madison long ago referred to as factionalism – a situation in which control of government is secured by "a number of citizens, whether amounting to a majority or a minority of the whole, who are united and actuated by some common impulse of passion, or of interest, adverse to the rights of other citizens, or to the permanent and aggregate interests of the community." James Madison, The Federalist, No. 10. Such an impulse virtually defines illegitimacy for purposes of constitutional review. That the plan challenged here was motivated by such an impulse must, at this stage of these proceedings, be presumed because it is so alleged in the Petition, the allegations of which must be taken as true for purposes of adjudicating a motion to dismiss or for judgment on the pleadings.

E. Count III of the Petition States a Viable Claim.

Count III of Plaintiffs' Petition points to Art. I, §§ 1 and 2 of the Missouri Constitution as further support for their position that the General Assembly's congressional redistricting plan reflects unconstitutional partisan gerrymandering, and specifically the language that "all political power . . . is instituted solely for the good of the whole," and that "all constitutional government is intended to promote the general welfare of the people." The Defendants assert that the cited constitutional clauses do not establish rights that can be enforced through judicial action. *See* State Defendants' Motion to Dismiss at 10-11. However, Defendants' arguments are flawed in

several respects.

For one thing, the Missouri Supreme Court, in *Armentrout*, expressly relied on the "good of the whole" language – indeed, referencing it first in its list of relevant constitutional provisions – as protecting the right to vote. 409 S.W.2d at 143. This strongly suggests that the language on which Plaintiffs rely has independent substantive meaning, and Defendants have cited no authority to the contrary dealing with the same language.

Defendants' position to the contrary rests almost entirely on *Committee for Educational Equality v. State*, 294 S.W.2d 477 (Mo. banc 2009) ("*CEE*"). However, that case addressed completely different constitutional language, found in an entirely different article of the Missouri Constitution – Art. IX – and therefore is of no relevance here. The plaintiff in *CEE* argued that prefatory language contained in Art. IX, § 1(a), "[a] general diffusion of knowledge and intelligence being essential to the preservation of the rights and liberties of the people," requires that the legislature "adequately" fund free public school in all districts, above and beyond the minimum 25% mandated by § 3(b), if necessary. The Court held that the "introductory clause" of § 1(a) cannot, on its own, provide a basis for a constitutional challenge because it is "purely aspirational," "provides no specific directive or standard for how the State must accomplish a 'diffusion of knowledge'" and because § 3(b) provides the specific constitutional parameters for funding. 294 S.W.2d at 488-89.[13]

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[13] The Court remarked that "Plaintiffs are attempting to read a separate funding requirement into section 1(a) that would require the legislature to provide 'adequate' funding in excess of the 25-percent requirement contained in section 3(b). Such language does not exist." 294 S.W.2d at 488. The Court noted that it had previously held that "section 1(a)'s language, as a whole, including the introductory portion of the section, requires the State to provide free public schools that charge no admission or course fees," but that "[t]he introductory clause alone

The language in Art. I, §§ 1 and 2, on which Plaintiffs rely here, is nothing like the language at issue in *CEE*. In contrast to the prefatory language in *CEE*, which is a dependent clause providing no specific directive, the language here consists of independent clauses, utilizing active language and providing explicit directives. Moreover, the language of Art. I, § 2, that "all persons are created equal and are entitled to equal rights under the law," repeatedly has been held to provide an actionable right to challenge state legislation on equal protection grounds, *see, e.g.*, *Weinschenk,* and the State equal protection clause is no more specific, and uses no more active or direct language, than the "good of the whole" and "general welfare" clauses.[14]

Finally, Defendants also argue that "when the people enacted the 1945 Constitution, they had no intention of precluding partisan political objectives from being part of the calculus in enacting legislation." This is simply false, as it relates to redistricting. The history of the 1945 Constitutional Convention demonstrates that Art. III, § 45 was expressly intended to prohibit partisan political gerrymandering. In the course of the debates during that Convention, it was stated, "[n]ow Missouri has been a shining example of gerrymander of representative districts for

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. . . has never been given direct effect, as it is purely aspirational in nature." *Id.* at 488-89.

[14] To the extent it is necessary and appropriate to look elsewhere in the Missouri Constitution for analogous language, in seeking guidance as to how the language in Art. I, §§ 1 and 2 relied on by Plaintiffs should be construed, the most instructive case law consists not of CEE, construing Art. IX, but rather cases construing other language in Art. I, § 2, providing "that all persons have a natural right to . . . the enjoyment of the gains of their own industry." That language has been used numerous times to strike down laws. *See State ex rel. Scott v. Roper*, 688 S.W.2d 757, 768–69 (Mo. banc 1985); *Moler v. Whisman*, 147 S.W. 985, 987–88 (Mo. 1912); *State ex rel. Knese v. Kinsey*, 282 S.W.2d 437, 439 (Mo. 1926). In *Scott*, the Court held that the clause provided an "express[] protect[ion]" to Missouri citizens. 688 S.W.2d at 76.

years and years and if we will put a thing like this [a requirement that districts be compact and contiguous] in our Constitution, it will protect the people of our state against such a thing until Congress passes its own act." *Preisler v. Sec'y of State*, 279 F.Supp. 952, 960 n.5 (W.D. Mo. 1968), *quoting* Debates 1954 Mo. Const. Conv. pp. 5559-5565.[15]

F. Count IV of the Petition States a Viable Claim.

Count IV of Plaintiffs' Petition further states a claim for violation of the right to vote as protected by the Missouri Constitution. It alleges that for the right to vote to be vindicated, "each citizen's vote must have the potential to be of equal force, weight and effect, and may not be diluted as compared with other citizens' votes"; "[p]artisan gerrymandering that unduly fragments or unnecessarily concentrates a group's voting strength, and which serves to minimize or cancel out the voting strength of that group," constitutes unconstitutional vote dilution; the Map challenged here "improperly dilutes the votes of Democrats and Independents"; and no legal or other justification exists for same. Petition (as amended), ¶¶ 62-65.

The case law establishing the right to vote as protected by the Missouri Constitution, that Missouri law is particularly protective of that right, and that the right can be infringed as effectively by diluting the weight of a vote as by barring a voter from the polls, has been discussed previously. *See* discussion at pp. 5-7, *supra*.

The standard that may be applied in this case to establish the constitutional violation – regardless of whether the constitutional right implicated is deemed to be the right to vote or equal

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[15] With respect to the question the State Defendants raise at p. 11 of their Motion to Dismiss, that "if there were such a cause of action . . . [w]hat would be the test for compliance"?, the answer is the same as with respect to the enforcement of other rights under the Missouri Constitution. *See* discussion at pp. 19-20, *supra*, and pp. 29-31, *infra*.

protection – is pernicious purpose and effect, and lack of any countervailing legal justification. Accepting Plaintiffs' allegations as true, as the Court must, the General Assembly, by a highly partisan vote in each chamber, adopted a Map having the clear purpose and effect of promoting partisan interests by creating six safe Republican districts among the eight congressional seats allocated to Missouri, and did so through extreme instances of gerrymandering. Petition, ¶¶ 18-19. Moreover, after the Governor vetoed H.B. 193, the majority used its political muscle to force an override, mustering the vote of every Republican representative, and extracting the votes of four Democratic representatives through trading various perks and promises of future political favors, and subjecting certain representatives to extreme pressure. *Id.* at 29-30. The effect of the foregoing is that one political party has been able to use its stranglehold on the machinery of state government to inflate the voting power of its supporters by a factor of 50 percent – enabling a party which comprises half of Missouri's voters to elect 75 percent of Missouri's congressional delegation to Congress, while correspondingly diluting the voting power of other Missouri voters. *Id.* (as amended) at 32, 62-63.

It is readily feasible to draw a Map which fulfills the traditional districting principles of compactness, contiguity, equal population, respecting political subdivision boundaries and keeping communities of interest together, in an equivalent or better manner than does H.B. 193, but without the evil intent and pernicious effects of the gerrymandering embodied in the legislature's Map. Petition, ¶ 33. Accordingly, the General Assembly's drawing the Map in the manner it did only can be explained as the product of a desire to gain partisan advantage. Thus, H.B. 193 is not supported by a compelling governmental interest, or even a rational basis grounded in a legitimate governmental interest, and is not narrowly tailored to serve a proper

governmental interest.

We note that Defendants cannot even muster an argument – sometimes advanced to try to justify gerrymandering – that the Map was intended to enhance incumbents' prospects for re-election and thereby increase the state's congressional delegation's "clout" in Washington. Here, the General Assembly abolished the district of a four-term Democratic incumbent, while preserving the seats of two first-term Republican incumbents and another Republican incumbent in the midst of his second term. Accordingly, there is no rational connection between what the General Assembly did here and any desire to bolster the influence of Missouri's congressional delegation.

The redistricting Map adopted here represents nothing other than a brazen exercise of bare-knuckled political power, by which the majority in the General Assembly rode roughshod over the constitutional rights of countless Missouri voters who may not share their political persuasion, and tilted the electoral playing field significantly in the majority party's favor – a tilt which, absent judicial intervention, will remain in effect for ten years. A primary function of Missouri's Constitution and judiciary is to prevent a political majority from abusing its power so as to trample the constitutional rights of those in the minority. This case cries out for the courts to intervene and perform their traditional role of protecting constitutional rights from the tyranny of the majority.

CONCLUSION

For all of the foregoing reasons, we respectfully submit that Defendants' motions to dismiss or for judgment on the pleadings must be denied in their entirety.

Respectfully submitted,

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