IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI

KENNETH PEARSON, et al.	)	
	)	
Plaintiffs,	)	Case No. 11AC-CC00624
	)	
vs.	)	
	)	
CHRIS KOSTER, et al.,	)	
	)	
and	)	
	)	
Representative JOHN J. DIEHL and Senator SCOTT T. RUPP,	)	
	)	
Intervenor-Defendants.	)	

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

December 6, 2011

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Plaintiffs' recent amendments and strained attempt to recast Missouri law in their Opposition Brief have not fixed the fatal flaws in their theories. Plaintiffs' four counts assert two legal theories: (1) a violation of the "compactness" standard in Article III, Section 45 of the Missouri Constitution (Count I); and (2) vote dilution by political gerrymandering (Counts II and IV). Count III remains unintelligible.

Plaintiffs' first theory fails because the well-pled facts show that H.B. 193 does not "wholly disregard" compactness. Plaintiffs attached the map resulting from H.B. 193 to their Petition. *As a matter of law*, whatever mix of considerations, deliberation, political calculation, and debate (*i.e.*, the recipe for legislation) went into H.B. 193, the reasonably compact districts appearing on that map could not have emerged from a body that "wholly disregarded" compactness. *It is impossible to say that compactness was "wholly disregarded."*

Plaintiffs' second theory fails because their sparsely-pled "political gerrymandering" counts are (1) non-justiciable and (2) fail to state a vote dilution claim. Plaintiffs argue that Democrats are entitled to four of Missouri's eight seats because of an alleged 50-50 electoral split. But as a matter of law, whatever the legislators' intent, a lack of statewide "proportional representation" is not enough to make out an equal protection "vote dilution" claim.

Plaintiffs nonetheless hope that this Court (or the Supreme Court) recasts Missouri law and politics to favor Democrats, creating legal standards from whole cloth and engaging in its own political calculation and "gerrymandering" in order to bring Missouri's congressional delegation closer to the Democrats' statewide ideal.

Lacking any precedent for such radical judicial action in Missouri or federal law, Plaintiffs resort to creative citation of cases and obscure law reviews.

This Court need not follow this path of tangled law and logic. It need only review the handful of directly controlling Missouri and U.S. Supreme Court cases to find that Plaintiffs have failed to plead facts which, even if true, could justify any court's re-legislation of the General Assembly's congressional reapportionment.

I. Plaintiffs Confuse Their Own Discretely-Pled "Counts" and Mis-State the Holdings of the *Armentrout* and *Preisler* Cases

Plaintiffs organized their Petition into four counts. Count I asserts that H.B. 193 violates Mo. Const. Article III, Section 45 ("compactness"). Counts II and IV assert that Democrat votes will be "diluted" because of the way they are grouped ("political gerrymandering"). Count III asserts the "good of the whole" provision in the Missouri Constitution was violated.[1]

While this organization is reasonably clear, Plaintiffs' defense of their Counts seems at times like a shell game. Even a careful reader of the first 24 pages of Plaintiffs' brief could be forgiven for losing track of which Counts Plaintiffs are defending at various points. This is by design. To avoid law that is fatal to their theories, Plaintiffs lump all four claims under the title of "gerrymandering," using this word as a bridge to leap from Count I (alleging a violation of Missouri's

[1] Bizarrely, Plaintiffs express irritation that Defendants' legal analysis (following the law) treats the Counts as "distinct causes of action." *See* Plff Brief at 10. But it is Plaintiffs who pled distinct Counts, even strenuously urging an "amendment" to add a separate "Count IV." Defendants should not be charged with "mischaracterization" simply for assuming that Plaintiffs followed some rhyme or reason in organizing their disparate constitutional claims into "Counts" I through IV, both in their original Petition and recent amendment.

constitutional compactness) to Counts II and IV, and back again. This sleight of hand allows Plaintiffs to boldly announce principles that exist nowhere in Missouri law, and assign holdings to opinions that appear nowhere in the text. In short, Plaintiffs' portrait of redistricting law bears faint resemblance to reality.

A. The Missouri Constitution and Controlling Case Law Provide a Clear Standard of Review for Compactness Claims, *Not for "Partisan Gerrymandering" Claims*

As Defendants showed in their motions, over several decades, the Missouri Supreme Court in the *Preisler* cases announced a very clear and definite standard for compactness challenges (Mo. Const. Article III, Section 45) that applies to Plaintiffs' Count I: "wholly disregarded."

On the other hand, no standard *even exists* under Missouri or federal law for adjudicating "partisan gerrymander" claims based on vote dilution (Counts II and IV). Even if such a standard could be articulated, Plaintiffs have not begun to plead or state it—even in their 30-page brief. Rather than locating such a standard and showing how they meet it, Plaintiffs blanket-label their distinct claims as "gerrymandering," relying on off-point opinions to simultaneously make the case for all four claims together. Plaintiffs also suggest that this Court (or "four" Missouri Supreme Court judges) make up the relevant standards on its own. Plff. Br. 20.

Plaintiffs lay the foundation of their argument on quicksand. In a vain effort to find Missouri "partisan gerrymandering" cases, they seriously mischaracterize the holding of *Armentrout v. Schooler*, 409 S.W.2d 138 (Mo. 1966). At page 5 of their brief, Plaintiffs claim that the *Armentrout* case "points to three pertinent state

constitutional provisions" which "significantly restrict...partisan gerrymandering." That is false. *The words "partisan" and "gerrymander" appear nowhere in Armentrout, which had nothing to do with gerrymandering.* The case was simply a reapportionment of Louisiana, Missouri's four wards. The city admitted they had not been redistricted for 75 years and were grossly malapportioned by population. *Id.* at 141. The Court remedied this disparity by relying expressly on the Missouri and federal equal protection clauses:

> We conclude that the present districting of the City of Louisiana must be held unconstitutional **because it violates the equal protection of the laws clauses of the constitutions of the United States and the State of Missouri** and that [the] wards, must be altered and modified so as to include 'as near as may be,' or 'as nearly as is practicable,'... the same number of inhabitants in each ward.

Armentrout, 409 S.W.2d at 144 (emphasis added). In short, *Armentrout* is a run of the mill equal-population case; it is not a partisan gerrymandering case and does not stand for the principles Plaintiffs assign it.

Next, Plaintiffs argue that that the right to vote is a fundamental right in Missouri, but never articulate why this brings their claims outside of the *Preisler* cases or authority from the U.S. Supreme Court. That the right to vote is "fundamental" in Missouri is unremarkable and is "equally" true under federal law. *Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. banc 2006) ("Federal courts also have consistently held that the right to vote is **equally fundamental** under the United States Constitution) (citing federal case law) (emphasis added).[2]

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[2] Throughout their brief, Plaintiffs try in vain to eke some advantage from *Weinshenk*'s observation that the Missouri constitution gives greater protection to "voting rights" than its federal counterpart. But this was relevant in *Weinshenk* (if

Third, Plaintiffs' suggestion that the Missouri Constitution's compactness requirement was meant to avoid "the gerrymander" does nothing to change the "wholly disregarded" standard for judging compactness. Plff. Br. at 6, citing *Preisler v. Kirkpatrick*, 528 S.W.2d 422, 425 (Mo. banc 1975). Indeed, Plaintiffs' quote from *Kirkpatrick* leaves out its conclusion, which fatally contradicts their argument:

> **However, as these authorities show, the courts may not interfere with the wide discretion which the Legislature has** in making apportionments for establishing such districts when legislative discretion has been exercised. It is only when constitutional limitations 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. In such a case, discretion has not been exercised and the action is an arbitrary exercise of power without any reasonable or constitutional basis.

Kirkpatrick, 528 S.W.2d at 425.

Finally, Plaintiffs argue at pages 6-7 and again at pages 10-11 that because "vote dilution" violates the right to vote, and because "partisan gerrymandering" claims rest on a "vote dilution" theory, then "partisan gerrymander" assertions must state a claim for a constitutional violation. *Notably, Plaintiffs cite no state or federal cases which actually use this reasoning or involve partisan gerrymandering.*

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at all) only because it involved a voter ID requirement—a qualification for voting—and at the federal level, those are "left to legislative determination, not constitutionally enshrined, as they are in Missouri." *Weinshenk*, 203 S.W.3d at 211-212. In the present case, in contrast, no qualification for voting is at issue. Instead, the Plaintiffs are bringing a "partisan gerrymander" claim, and no authority whatsoever holds or suggests that the equal protection analysis under Missouri law is any different than the equal protection analysis under federal law. There is certainly no logical reason that this should be so. Indeed, even *Weinshenk* applied the traditional two-part federal equal protection analysis to the plaintiffs' state law claims in that case, which dealt with an area in which the Missouri Constitution was arguably more specific than its federal counterpart. *Id.* at 210-211.

The problem for Plaintiffs is that "vote dilution" means very different things in different contexts. It is a vague way of describing a harm that, under an equal protection theory, could apply to a wide range of cases. It can describe severe population malapportionment (the votes of people in heavy-population districts are "diluted") and also, less directly, cases of racial gerrymandering (the votes of people of one race, which is an immutable and unchanging characteristic, count for less because of creative line-drawing). But all three cases are legally distinct.

First, a population difference is a direct violation of the one-person, one-vote rule. Second, racial gerrymandering is flatly unconstitutional because it considers race. However, the third case, partisan gerrymandering, is not *per se* unconstitutional because *politics can be considered.* This means that party-based districting is not inherently unconstitutional and does not inherently dilute votes:

> The Constitution clearly contemplates districting by political entities, see Article I, § 4, and unsurprisingly that turns out to be root-and-branch a matter of politics. See *Miller, supra,* at 914, 115 S.Ct. 2475 ("[R]edistricting in most cases will implicate a political calculus in which various interests compete for recognition ..."); *Shaw, supra,* at 662, 113 S.Ct. 2816 (White, J., dissenting) ("[D]istricting inevitably is the expression of interest group politics ..."); *Gaffney v. Cummings,* 412 U.S. 735, 753, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) ("The reality is that districting inevitably has and is intended to have substantial political consequences"). **By contrast, the purpose of segregating voters on the basis of race is not a lawful one, and is much more rarely encountered.** Determining whether the shape of a particular district is so substantially affected by the presence of a rare and constitutionally suspect motive as to invalidate it is quite different from determining whether it is so substantially affected by the excess of an ordinary and lawful motive as to invalidate it. **Moreover, the fact that partisan districting is a lawful and common practice means that there is almost *always* room for an election-impeding lawsuit contending that partisan advantage was the predominant motivation; not so for claims of racial**

> **gerrymandering.** Finally, courts might be justified in accepting a modest degree of unmanageability to enforce a constitutional command which (like the Fourteenth Amendment obligation to refrain from racial discrimination) is clear; **whereas they are not justified in inferring a judicially enforceable constitutional obligation (the obligation not to apply *too much* partisanship in districting) which is both dubious and severely unmanageable.** For these reasons, to the extent that our racial gerrymandering cases represent a model of discernible and manageable standards, they provide no comfort here.

Vieth v. Jubelirer, 541 U.S. 267, 285-86 (2004) (portion of a 4-judge plurality opinion whose reasoning was approved by a fifth justice, Justice Kennedy) (emphasis added).[3] Plaintiffs simply refuse to come to terms with the legal reality that partisan gerrymandering is not *per se* unconstitutional in the same way as racial gerrymandering.

In conclusion, Plaintiffs' entire argument is built on quicksand. "Compactness" claims and "racial gerrymander" claims are distinct from the type of "partisan gerrymander" claim Plaintiffs seek to bring here. *Armentrout* and *Kirkpatrick* cannot bear the weight Plaintiffs place on them. From here, (as discussed below), Plaintiffs' argument drifts ever further from controlling law.

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[3] *See* Justice Kennedy's concurrence in the judgment:

> **That courts can grant relief in districting cases where race is involved does not answer our need for fairness principles here.** Those controversies implicate a different inquiry. They involve sorting permissible classifications in the redistricting context from impermissible ones. Race is an impermissible classification. See *Shaw v. Reno,* 509 U.S. 630, 113 S.Ct. 2816, 125 L.Ed.2d 511 (1993). Politics is quite a different matter. See *Gaffney v. Cummings,* 412 U.S. 735, 752, 93 S.Ct. 2321, 37 L.Ed.2d 298 (1973) ("It would be idle, we think, to contend that any political consideration taken into account in fashioning a reapportionment plan is sufficient to invalidate it").

Vieth, 541 U.S. at 307 (emphasis added).

B. No Missouri Courts and Few Federal or State Courts Have Passed on Partisan Gerrymandering Claims

1. No Missouri Decision Recognizes a Claim for Partisan Gerrymandering

Plaintiffs argue at pages 7-10 and again at pages 17-18 that Missouri and other courts "commonly" enforce anti-gerrymandering provisions.[4] *In fact, Plaintiffs fail to direct this Court to any case in which a Missouri court has passed upon or articulated the elements of a partisan gerrymandering claim.*[5] Nor have Plaintiffs pointed to any Missouri case which has departed from recent U.S. Supreme Court or other federal decisions by even so much as suggesting a workable test for avoiding the political question doctrine and actually adjudicating such claims.

Plaintiffs do cite Missouri cases that decided "compactness" challenges brought under specific provisions of the Missouri Constitution (analogous to Count I

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[4] At page 9, Plaintiffs allege that the "highest courts of other states routinely have addressed challenges to gerrymandered redistricting plans under their state constitutions." Plaintiffs refer to such cases as "commonplace." *Id.* However, each of the cases cited by Plaintiffs involve constitutional *compactness* issues, not partisan gerrymandering issues. Pl. Br. 9-10. None of these cases suggest, let alone support, the proposition that a claim for partisan gerrymandering is justiciable.

[5] At page 18, Plaintiffs attempt a double-bank shot that not even Kim English could make. Plaintiffs claim that because Missouri's specific constitutional "compactness" provisions in Article III were drafted with the intent of warding off partisan gerrymanders, all cases that deal with violations of these specific compactness provisions can be defined as "gerrymandering" claims, which also means that all gerrymandering-based claims must be justiciable in Missouri courts. First, as Defendants show in this section, none of Plaintiffs' cited cases even address partisan gerrymandering claims or discuss what sort of showing one would have to make to prevail on such a claim. Second, a compactness provision provides a workable and objective test that can be wielded in a justiciable controversy, whereas a free-standing "partisan gerrymander" claim is standardless and invites the court to answer political questions. *See* Intervenor-Defendants' Motion to Dismiss, pp. 9-14.

of Plaintiffs' Petition, which cites Article III, Section 45). But again (as Plaintiffs fail to disclose) those courts uniformly applied the "wholly ignored" standard. Indeed, it was actually *Barrett*, a 1912 case cited by Plaintiffs as justifying some more searching level of review, that first articulated the "wholly ignored" standard:

> "In applying these rules prescribed by the Constitution itself, and by which the constitutionality of the statutes in question must be decided, it must be borne in mind that, **where there is any reasonable doubt as to whether a statute is constitutional or not, the courts will incline in favor of the law, and hold it valid...**
>
> In other words, if it clearly appear that in the formation of any district the requirement of compactness of territory and equality in population had been **wholly ignored, had not been considered or applied at all, to any extent,** then the statute would be clearly unconstitutional. But if it has been considered and applied, **though to a limited extent only**, subject to the other more definitely expressed limitations, then the General Assembly has not transcended its power, although it may have very imperfectly performed its duty, and the act is valid...
>
> "It follows, also, that it cannot be said that the Legislature wholly failed to have in view and apply the principle of compactness of territory. **No district, unless a circle or a square, can be so compact that it cannot be made more so.** Nor can it be said, we think, that this construction gives to the phrase 'contiguous and compact territory,' as used in the Constitution of 1870, no more force than the phrase 'contiguous territory,' as used in the Constitution of 1848. The territory forming the districts under the act of 1893 is not contiguous merely, but is, to some degree, compact. Doubtless a district can be formed of counties so 'strung out' and barely touching as to make the territory contiguous, but not compact in any sense; but we cannot see that such a district has been formed...

State ex rel. Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40, 62 (1912) (collecting and citing authority from other states; internal citations omitted).

2. Federal Courts Do Not Recognize any Basis for Judicially Resolving Partisan Gerrymandering Claims

Federal case law makes clear that Plaintiffs have not pled a justiciable case.[6] First, federal case law applies because, even though Plaintiffs tried to plead around federal law by citing only Missouri's equal protection clause, there is no appreciable difference in federal and state equal protection jurisprudence. *See Weinschenk*, 203 S.W.3d at 210-211 (citing federal and state constitutional provisions and case law together, and applying one equal protection test to analyze application of both constitutions). Second, federal cases on partisan gerrymanders apply both to Count II (denominated "equal protection") and Count IV (denominated "right to vote") because *both* claims stem from alleged "dilution." *See* Plff Br. at 22 and 27. While dilution *implicates* the right to vote, a dilution claim is based on unequal weight and is therefore simply a "fundamental right" type of equal protection challenge.

While Plaintiffs quibble with applying federal law and with whether individual Supreme Court justices have offered tests for partisan gerrymandering claims, they do not disagree with Defendants' statement that no such claim has ever resulted in a court ordering redrawn districts. *See* Plff. Br. pp. 19-21. Further, while Plaintiffs suggest several "tests" that individual justices in the Court's liberal minority unsuccessfully proffered in their dissenting opinions, Plaintiffs do not (and cannot) deny that in each case, the Court rejected those tests as unworkable. *Id.*

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[6] As Intervenor Defendants argued in their initial motion, the "political question" doctrine precludes Missouri courts from entertaining lawsuits that do not present a "judicially discoverable and manageable standard for resolving" the claims. Def. Br. at 11. Political questions are not justiciable. *Id.*

Finally, even though the Supreme Court has held that a workable test for sorting out permissible partisan considerations from "overly" partisan considerations is a *prerequisite* for a partisan gerrymandering claim, Plaintiffs do not deny that the Court itself has been unable to fashion a test that would allow partisan gerrymandering claims to be judicially decided. Until that happens, partisan gerrymandering claims will continue to be dismissed for being non-justiciable or for failing to state a claim. *See LLAC v. Perry*, 548 U.S. 399, 413-414 (2006).

An ongoing Illinois case is instructive. There, Republicans sued Democrat officials for partisan gerrymandering in congressional redistricting. On November 22, 2011, a three-judge panel rejected the plaintiffs' second attempt to plead a workable standard for judicial consideration of their claim. The Court reasoned:

> As we explained in our previous order, the point that we draw from these cases is that political gerrymandering claims remain justiciable in principle but are currently "unsolvable" based on the absence of any workable standard for addressing them. The crucial theoretical problem is that partisanship will *always* play *some* role in the redistricting process. As a matter of fact, the use of partisan considerations is inevitable; as a matter of law, the practice is constitutionally acceptable. *See Vieth,* 541 U.S. at 286–88 (plurality opinion); *id.* at 313 (Kennedy, J., concurring in the judgment). **The relevant question is not whether a partisan gerrymander has occurred, but whether it is so excessive or burdensome as to rise to the level of an actionable equal-protection violation. How much is too much, and why?**
>
> So as things currently stand, minority-party plaintiffs may continue to bring political gerrymandering claims, **but they face the Sisyphean task of articulating a standard by which judges may reliably and objectively sort the "routine" use of partisanship in redrawing district lines from that which is excessive to the point of violating the Equal Protection Clause.** To illustrate concretely the enormity of this challenge, it is useful to identify the standards that a majority of the Supreme Court has rejected...

Radogno v. Illinois State Bd. of Elections, 1:11-CV-04884, 2011 WL 5868225 (N.D. Ill. Nov. 22, 2011). The Court went on to list the many standards that were rejected in *Vieth*, *LLAC* and prior Supreme Court decisions. It then closely scrutinized the Republican plaintiffs' proposed six-point test and, while lauding their effort, found the test was ultimately arbitrary and unworkable:

> The Plaintiffs can hardly be faulted for failing to sail successfully between the Scylla of administrability and the Charybdis of non-arbitrariness; no such ship has yet found this narrow path. Because the Plaintiffs have not identified a workable standard for partisan gerrymanders, Count 2 of the Second Amended Complaint must be dismissed for failure to state a claim.

Id. at *5.

Here, despite having had months to draft a lawsuit, amending their Petition after reviewing Defendants' dispositive motions, and having been invited by Intervenor-Defendants to furnish the Court and parties with a suggested standard pursuant to the guidance of *Vieth* and *LLAC*, Plaintiffs have punted again. They feebly suggest that "this Court" or "four or more Judges of the Missouri Supreme Court" come up with the standard instead. Plff. Br. 20. The burden, however, was Plaintiffs'. "'I know it when I see it' will not do." *Radogno*, 2011 WL 5868225 *3.

3. Conclusion

Plaintiffs cannot obscure the controlling law underlying their distinct "compactness" (Count I) and "political gerrymandering" theories (Counts II and IV). As to the first theory, the standard is clear: "wholly ignored." As to the second theory, no Missouri court has ever indicated that a plaintiff could bring such a claim, and the U.S. Supreme Court has either dismissed partisan gerrymander

claims that have come before it or, in plurality opinions, stated that no such claims can succeed because it is impossible to articulate a workable standard for resolving them. Indeed, to this day, the Court has never announced such a standard. Plaintiffs' effort to argue otherwise incorrectly states Missouri law. As discussed in the next two sections, Plaintiffs' underlying claims fail.

II. Plaintiffs Fail to State a Compactness Claim Under Count I

A. Plaintiffs' Claim Fails For Two Reasons

As discussed in Defendants' motion, Plaintiffs' well-pled facts on Count I—which must include their maps attached as Exhibits—do not make out a claim, and require judgment on the pleadings. This is so for two reasons.

First, the well-pled facts of Plaintiffs' Petition include the maps, which show what H.B. 193's districts actually look like. While it may be possible to make some districts more compact while still conforming to equal population and Voting Rights Act requirements relating to racial minorities, the map shows *on its face* that the districts are completely contiguous and are not so spread out that the idea of compactness was wholly ignored. It would be impossible for a drafter to "wholly ignore" compactness and yet produce the map that results from H.B. 193.[7] For that reason alone, Count I fails on the pleadings.

[7] Defendants noted this in opposing the Motion to Amend. Plaintiffs did not fix the flaw in their compactness argument—conclusively shown by the facts in the map they attached as an exhibit—merely by belatedly uttering the magic words, "wholly ignored." Plaintiffs can include legal conclusions within their Petition, but the well-pled facts about district shapes are in the map. The map is fatal to their claim.

Second, Plaintiffs conclusorily state that H.B. 193 was passed for "wholly partisan purposes" or "partisan ends." Plff. Br. 12. As Defendants already noted in opposing Plaintiffs' Motion for Leave to Amend, however, allegations of overwhelming partisan intent are irrelevant to the question of whether that wholly partisan intent in fact resulted in a map which shows compactness was not "wholly ignored." Intentions to be "wholly partisan" and to observe compactness can and often do co-exist.[8] That is particularly true where the principle of "compactness" hurts Democrats, who often live in high-density areas. But in that case, the Democrat/Plaintiffs' problem would be that the "compactness" provision will not give them the political map they want—the problem is not with legislators who tried to follow a facially neutral provision in order for "wholly partisan" ends.

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[8] In *Vieth*, Justice Kennedy explained how contiguity and compactness do not require political neutrality, and could in fact coexist with highly partisan "intent" or "effect:"

...For example, if we were to demand that congressional districts take a particular shape, we could not assure the parties that this criterion, neutral enough on its face, would not in fact benefit one political party over another. See *Gaffney, supra,* at 753, 93 S.Ct. 2321 ("District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely"); see also R. Bork, The Tempting of America: The Political Seduction of the Law 88–89 (1990) (documenting the author's service as a special master responsible for redistricting Connecticut and noting that his final plan so benefited the Democratic Party, albeit unintentionally, that the party chairman personally congratulated him); M. Altman, Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders, 17 Pol. Geography 989, 1000–1006 (1998) (explaining that compactness standards help Republicans because Democrats are more likely to live in high density regions).

Vieth, 541 U.S. at 308-09.

Of course, the Court does not need to follow the Plaintiffs down this path. The Court can review the map attached to Plaintiffs' Petition as an exhibit and find that it does not show that the principle of compactness was "wholly ignored."

B. *Kirkpatrick* Forcefully Restated Missouri's Long-Standing "Wholly Ignored" Standard

Every single Missouri case to consider the standard of judicial review for compactness has identified the "wholly ignored" test. This includes *Kirkpatrick*, which surveyed every Missouri case to that point and concluded: "It is only when constitutional limitations 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." *Kirkpatrick*, 528 S.W.2d at 425. Driving the point home, the Court cited a "leading" Wisconsin case which used an almost identically worded standard: "utterly ignore and disregard the rule of the constitution." *Id.* (citing *State ex rel. Lamb v. Cunningham*, 53 N.W. 35, 55 (Wis. 1892)).

Plaintiffs nonetheless claim that because the opinion just after these holdings states that the redistricting commission's plan was "within acceptable limits of compactness" and "substantially compl[ied] with the compactness requirement..." the Court must have overruled prior case law and authorized a new, more searching inquiry that Plaintiffs label (not surprisingly) "substantial compliance." Plff. Br. 14-18. There are several problems with Plaintiffs' argument.

First, Plaintiffs take these words out of context and ascribe new meanings to them which are not supported by the surrounding opinion. The quoted phrases simply refer back to the "limits of compactness" and the "compactness requirement"

the Court had just finished defining after surveying several decades of Missouri law. That "requirement," and those "limits," were nothing more than the "wholly ignored" standard that the Court had just cited and then, its own words, held out as the applicable standard. *Kirkpatrick*, 528 S.W.2d at 425.

Second, if the Court had overruled decades of prior precedent that it had just cited favorably and paraphrased using its own words, one would have expected it to announce that it was doing so, providing reasons for its departure and explaining how the new standard (whatever it was) was different from the old. The Court's opinion is otherwise lengthy and provides a detailed explanation of law and fact, so there is no reason to believe that it was silent on a major change in the law.

Indeed, the dissent attacks the majority opinion as allowing districts "even if [they] look like an elongated 'S' or a twisted shoestring and are so lacking in compactness that they do not meet 'anybody's standards of compactness.'" 528 S.W.2d at 436. The dissent also cites *Barrett* to support its position, even though that case applied the "total disregard" standard. *Id.* (citing *Barrett*, 146 S.W. 40 at 65). In short, the long and vigorous dissent, which cites the same prior case law relied upon by the majority, gives no clue that a new standard has been fashioned.

Third, as the dissent implicitly suggests, the majority itself clearly employed the very permissive "wholly disregarded" standard. Even though it found that two districts were not compact, it found that the commission's plan as a whole passed muster. Relevant here, the Court's words of wisdom are tailored to Missouri's geography and further support the "wholly disregarded" standard:

> 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).
>
> 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.

Kirkpatrick, 528 S.W.2d at 426.[9] The same words apply to H.B. 193. Like the map in *Kirkpatrick*, the map resulting from H.B. 193 shows that when all of Missouri's

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[9] Plaintiffs suggest in passing that *Kirkpatrick* initiated a 2-part test that is both subjective and objective. The "subjective" element, Plaintiffs claim, is one of honesty and "good faith." Plff. Br. at 15. Then, strangely, in the very next paragraph, Plaintiffs complain that a "subjective" test is "impossible to apply" because one will never know (and under the Speech and Debate Clause, one *can* never know) exactly what each legislator was thinking or hoping for when casting his or her vote. Ultimately, Plaintiffs' reading of *Kirkpatrick* to create a multi-pronged test is strained and incoherent. The test is simply whether the end result of the legislature's discretion shows that the legislature had to have "wholly disregarded" compactness. *Kirkpatrick*, 528 S.W.2d at 425.

districts were stretched to make up for a lost seat in Congress, "compactness" was not "wholly disregarded." Plaintiffs' Count I must be dismissed.

III. Plaintiffs Fail to State a Claim for Partisan Gerrymandering under Counts II and IV

For the reasons discussed in Section II.B, *supra*, Plaintiffs' partisan gerrymandering claim is non-justiciable. Because partisan gerrymandering is not itself unconstitutional, the question becomes, "how much is too much?" The burden is on Plaintiffs to articulate a standard for judges to use in measuring partisanship and deciding whether a law injured a particular plaintiff because it was "too" partisan. No plaintiff or court identified by Plaintiffs (at Defendants' repeated invitation) has successfully done so.

Even if Plaintiffs' Counts II and IV were justiciable, however, they fail to state a claim. First, Plaintiffs incorrectly state that partisan gerrymandering "conventionally receives heightened constitutional scrutiny." This is puzzling, as none of the cases cited by Plaintiffs so hold. *Gomillion* case is not even a partisan gerrymandering case and does not discuss levels of scrutiny; *Davis* never applied scrutiny because the plaintiffs had failed to make even a "threshold showing of discriminatory vote dilution." *Davis v. Bandemer*, 478 U.S. 109, 143 (1986). And it is hard to know what Plaintiffs mean when they represent to the Court that Missouri's *Armentrout* decision "expressly recognized and adopted these principles." Plff. Br. 22. *Armentrout* was decided decades before *Davis*, which seemed to announce new law (at least until *Vieth*). Further, as discussed above, *Armentrout* does not even contain the words "partisan" or "gerrymander" and in no way, shape,

or form makes any holding or comment on such cases. Plaintiffs have perhaps made a mistake in their citations, but regardless, are simply wrong.

Plaintiffs' mistake in citing *Davis* on "strict scrutiny" points to an even more serious flaw in their argument. The only facts Plaintiffs have pled about the *effect* of H.B. 193 is that 50% of Missouri voters are Democrats, but only two of Missouri's eight seats (instead of four) are safe Democrat seats, causing a dilution of Democrats' votes. The Supreme Court has clearly explained why such dilution allegations do not make out a partisan gerrymandering claim:

> **Our cases, however, clearly foreclose any claim that the Constitution requires proportional representation or that legislatures in reapportioning must draw district lines to come as near as possible to allocating seats to the contending parties in proportion to what their anticipated statewide vote will be.** *Whitcomb v. Chavis,* 403 U.S., at 153, 156, 160, 91 S.Ct., at 1874, 1876, 1878; *White v. Regester,* 412 U.S., at 765-766, 93 S.Ct., at 2339-2340.
>
> The typical election for legislative seats in the United States is conducted in described geographical districts, with the candidate receiving the most votes in each district winning the seat allocated to that district. If all or most of the districts are competitive-defined by the District Court in this case as districts in which the anticipated split in the party vote is within the range of 45% to 55%-even a narrow statewide preference for either party would produce an overwhelming majority for the winning party in the state legislature. This consequence, however, is inherent in winner-take-all, district-based elections, and we cannot hold that such a reapportionment law would violate the Equal Protection Clause because the voters in the losing party do not have representation in the legislature in proportion to the statewide vote received by their party candidates.

Davis, 478 U.S. at 130. As we saw above, the end result of the *Davis* plaintiffs' failed reliance on "proportional" party representation was dismissal for failure to state a claim; under *Davis*, this failed theory could not satisfy the threshold

requirement of dilution, or injury. *Id.* at 143. Thus, by bandying about various forms of rational basis or hybrid levels of scrutiny[10] at pages 22-24, Plaintiffs—who rely on the same failed "proportional representation" theory—are getting far ahead of themselves.

Plaintiffs also fail to plead which, if any, of them are Democrats; which live in districts where their votes are diluted; which of them have been effectively denied the ability to "influence the political process effectively" throughout the nomination and election process; and how all of this has occurred over time and is projected to occur in the future. *Davis*, 478 U.S. at 132-33. These are essential both to standing and to making out a claim, even as envisioned under the *Davis* standard that failed to garner the support of a majority of the Court after *Vieth*. Plaintiffs stray farthest from the law (and reality) when, at page 23-24, they suggest they have properly pled and can prevail simply by showing that district lines were drawn "for partisan gain." Even at its most permissive, the law requires not just intent, but an unconstitutional effect that goes beyond the failure of legislative splits to equal statewide electoral splits. *Davis*, 478 U.S. at 129-143.

In conclusion, Counts II and IV not only fail to raise justiciable questions, they would also fail to state claims. Plaintiffs have had multiple bites at the apple over a period of months. Counts II and IV should now be dismissed.

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[10] Plaintiffs improperly suggest at various points in their brief that this is the time to apply judicial scrutiny. *See, e.g.*, Plff. Br. pp. 28-29. But Defendants' motions are based solely on the failure to state a claim or to raise justiciable questions. Only if the Court finds that Plaintiffs have raised justiciable cases, have stated claims, and have made their threshold showing of standing and injury will the parties litigate the various governmental interests and justifications underlying the plans.

IV. Plaintiffs' Count III Is Non-Justiciable or Fails to State a Claim

Plaintiffs' efforts to give substance to their Count III ("good of the whole") are unavailing. First, Plaintiffs assign yet another phantom holding to *Armentrout*, claiming that it "expressly relied on the 'good of the whole' language." Plff. Br. 25. That is wrong. As discussed above, the court *exclusively* relied on the state and federal equal protection clauses in ordering Louisiana, Missouri, to be reapportioned so that its wards had equal population. *Armentrout*, 409 S.W.2d at 144 ("We conclude that the present districting of the City of Louisiana must be held unconstitutional **because it violates the equal protection of the laws clauses of the constitutions of the United States and the State of Missouri**.") (emphasis added). The Court then directed that they be contiguous and compact, citing *only* Article III, Sections 2 and 7. *Id.*

The "good of the whole" provision plays no role in any of this analysis. The Court referenced it precisely once with no discussion, remarking only that it was one of three provisions that "are from the Constitution of Missouri." *Id.* at 143. Further, it was referenced *not* first, as Plaintiffs pointedly but mistakenly claim, but *after* the Court's citation to the federal equal protection clause—the provision the Court *did* expressly state formed the basis of its decision. Plaintiffs conclude their serial mischaracterizations of *Armentrout* by stating that the floating constitutional provision must have had *some* "independent substantive meaning," but then fail to seize the moment and say what it is. This silence speaks louder than any of Plaintiffs' arguments.

Indeed, even after laboriously attempting to distinguish a few of Defendants' cases (which cited similarly vague phrases under which courts have refused to grant specific remedies), Plaintiffs *still* do not state what "good of the whole" means for them in this case. They do not point to legislative history, decisions relating to similar provisions in other states, or even—as elsewhere in their brief—obscure law review articles. Nor do Plaintiffs explain how it adds anything to their claim other than the provisions they have already pled; indeed, at footnote 15, Plaintiffs seem to suggest that the elements are the same as for all of their other claims. This is a sure sign that Count III has no independent substantive meaning. It should be dismissed as non-justiciable or for failure to state a claim.

Conclusion

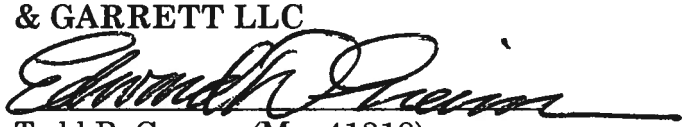
At bottom, Plaintiffs are asking this Court to grant a political remedy for a perceived political loss. Litigants have been coming to Missouri and federal courts for well over 100 years seeking redistricting relief, but rarely with such brazen appeal to partisan interests. Recognizing the serious separation of powers problems presented in such cases, courts have acted only within strict conformity to the law and controlling authority. Courts have been loathe to create new causes of action, and only when plaintiffs articulate standards of review and legal tests that are clear, capable of judicial administration, and non-arbitrary is legislation overturned and a new map judicially "legislated." That has never happened with a partisan gerrymandering claim, Plaintiffs' main theory. It has rarely happened with a

compactness claim, and H.B. 193 does not contain districts that remotely resemble the type of complete departure that has caused intervention in the past.

Despite multiple opportunities to do so, Plaintiffs have failed to plead facts and standards which would allow this Court to take the rare step of re-legislating a district. Plaintiffs now openly ask this Court or "four" judges of the Missouri Supreme Court to create their cause of action for them. This Court should decline to do so, and judgment should be entered against the Plaintiffs.

Respectfully Submitted,

GRAVES BARTLE MARCUS & GARRETT LLC



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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 6th day of December 2011, to:

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