IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

KENNETH PEARSON, PHOEBE OTTOMEYER, BRIAN MURPHY, MILDRED CONNER, TIMOTHY BROWN and JOAN BRAY,	)	
Plaintiffs,	)	
vs.	)	Cause No. 11AC-CC00624
CHRIS KOSTER, in his official capacity as Missouri Attorney General,	)	
and	)	
ROBIN CARNAHAN, in her official capacity as Missouri Secretary of State,	)	
Defendants.	)	

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

A few of the arguments made by Plaintiffs' in opposition to the pending Motion merit response – or reinforcement.

If Plaintiffs are right and the Missouri Supreme Court's standard for evaluating whether a redistricting plan passes constitutional muster is "substantial compliance" rather than "wholly ignored and completely disregarded," the result is the same. On their face, it is apparent that the

redistricting plans in *Preisler v. Hearnes*, 362 S.W.2d 552 (Mo. banc 1962) (*Preisler I*), and *Preisler v. Kirkpatrick*, 528 S.W.2d 422 (Mo. banc 1975) (*Preisler II*), do not differ appreciably from the one at issue here. Thus Plaintiffs effectively concede that what they really seek to impose is an "additional subjective test." Plaintiffs' Memorandum in Opposition at 15.

Plaintiffs claim that they can defeat a motion to dismiss or for judgment on the pleadings under that "subjective test" with a conclusory allegation regarding the legislators' motivation: "that the Republican-dominated General Assembly 'utilized an overreaching process for *wholly* partisan purposes, and produced a Map designed *solely* to serve partisan ends.' " Plaintiffs' Memorandum in Opposition at 12 (emphasis in original), citing ¶ 1 of the Petition. Curiously, even in federal court, with its notice pleading, that broad statement would not state a claim; that a majority of the legislators had a single, exclusive objective is not plausible. *See Blakley v. Schlumberger Technology Corp.*, 648 F.3d 921, 931 (8th Cir. 2011) quoting *Ashcroft v. Iqbal*, 556 U.S. 662 (2009), and *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007) ("To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to 'state a claim to relief that is plausible on its face.' "). That courts in Missouri, which requires fact pleading, would find such a broad statement sufficient to state a claim would be curious, at best.

The reason that Plaintiffs have not provided the kind of specificity that federal practice would now require may be explained in their concession that the evidence that would actually be required to prove their generalization is simply not available. As Plaintiffs say, the Missouri Constitution "preclude[s] legislators from being questioned about their legislative activities." Plaintiffs' Memorandum in Opposition at 15, citing Missouri Const. Art. III, § 19. Paraphrasing Plaintiffs, it would not be "sufficient if one legislator, or a few, state that they" drew every line for purely partisan ends. *See id.* Perhaps that is why in prior cases Missouri courts have resisted the urge to move past consideration of a redistricting plan on its face to question the motives of those preparing it.

If it were possible to question all the legislators who voted for the plan about every line drawn by the plan, the result would undoubtedly be a hodge-podge of reasons. Every bit of every line advantages or disadvantages someone. Because every line divides or unites someone's "community of interest" (an undefined and likely undefineable term; compare *Bingham County v. Idaho Comm'n for Reapportionment*, 55 P.3d 863, 877 (Idaho 2002), and *Carstens v. Lamm*, 543 F.Supp. 68, 91 (D.C. Colo., 1982)), avoiding "vote dilution" as Plaintiffs define it (Plaintiffs' Memornadum in Opposition at 7) is literally impossible. The Voting Rights Act, 42 U.S.C. §§ 1973–1973aa-6, protects some communities based on race. And the Missouri Constitution

protects those based on county lines – but only as to State Senate redistricting. Mo. Const. Art. III, § 7. Neither state nor federal law protects "communities of interest" based on party affiliation or voting history.

CONCLUSION

Because the Plaintiffs do not and cannot state claims on which relief may be granted under any of the three counts of their petition, the petition should be dismissed with prejudice or judgment entered on the pleadings.

Respectfully submitted,

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CERTIFICATE OF SERVICE

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