

IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

KENNETH PEARSON, *et al.*,)
)
Plaintiffs,)
)
vs.) Case No. 11AC-CC00624
)
CHRIS KOSTER, *et al.*,) Div. II
)
Defendants.)

STAN MCCLATCHEY, *et al.*,)
)
Plaintiffs,)
)
v.) Case No. 11AC-CC00752
)
ROBIN CARNAHAN,) Div. II
)
Defendant.)

**DEFENDANT KOSTER'S AND INTERVENOR-DEFENDANTS'
PRE-TRIAL BRIEF**

Defendant and Intervenor-Defendants present four legal and factual points for the Court to consider as it takes the evidence.

I. Plaintiffs Bear the Burden of Proving the Districts Clearly and Undoubtedly Are Not "As Compact As May Be;" They Cannot Merely Prove More Compact Districts Are Possible

First, the Supreme Court's opinion left intact two fundamental rules: (1) Plaintiffs bear the burden of proof; and (2) statutes are presumed valid unless Plaintiffs show they "clearly and undoubtedly"

conflict with the constitution, with “all doubt” resolved in favor of the statute’s validity. See *In re Brasch*, 332 S.W.3d 115, 119 (Mo. banc 2011) (burden); *Ocello v. Koster*, --- S.W.3d ----, 2011 WL 5547027 at *3 (Mo. banc 2011) (presumption).

Second, the Supreme Court clarified that the standard of review is the constitutional language itself: “as compact as may be.”

- With respect to the word “**compact**,” the Court:
 - held it should be objectively determined;
 - did not state what attributes should be present in “compact” districts, or that the General Assembly had lost its constitutional discretion to decide what attributes make a district compact;
 - held that compactness protects an individual’s right “of having a voice in the election of those who make the laws under which, as good citizens, we must live.”
- With respect to “**as may be**,” the Court explained that this phrase requires leniency.
 - “As **may be**” does not mean districts must be as compact “as **can be**,” or “as **possible**.”
 - Instead, “as may be” means that Plaintiffs’ showing must make allowance for the following:

- the legislature may decide to follow the lines of political subdivisions (decision at p.7);
- the legislature must draw less compact than optimal districts because of higher-priority or co-equal constitutional requirements that are also mandatory (p. 6);
- the legislature must have room to make decisions in an area which presents “predominately a political question” (p. 6); and
- by its very nature, compactness is not a precise concept and cannot be achieved with precision (p. 6).

In conclusion, Plaintiffs must prove, clearly and undoubtedly, as a matter of fact, that:

- (1) the districts are not compact; and
- (2) even if the districts are not compact, the “as may be” factors do not require the Court to uphold the districting plan.

II. What Facts Are Relevant

First, based on the Supreme Court’s finding that the standard of review is objective, only facts about the districts—not legislators’ intentions—are relevant to determining compactness.

Second, because compactness is a lower-order criterion than equality of population or compliance with federal constitutional and statutory standards, it is relevant whether alternative proposals comply with those controlling criteria.

Third, because the test is not whether other plans are more compact than H.B. 193, but whether H.B. 193 is compact in the first place, the existence of "more compact" plans is of limited relevance.

III. Expert Testimony

This case will be tried largely on expert testimony. Although there is no jury, the Court should nonetheless consider Section 490.065, RSMo., when deciding whether to admit or assign value to expert testimony. The statute is particularly relevant here, where the resumes and reports of Plaintiffs' identified experts, three of whom will be called, indicate no "knowledge, skill, experience, training, or education," and no prior testimony or academic articles, classes, or work, in the field of redistricting, let alone congressional redistricting or compactness. See § 490.065, RSMo. In conclusion, when considering the testimony, the Court should determine whether:

- a. The expert is qualified;
- b. The expert's testimony will assist the Court;
- c. The expert's testimony is based upon facts or data that are reasonably relied on by experts in the field; and

d. The facts or data on which the expert relies are otherwise reasonably reliable.

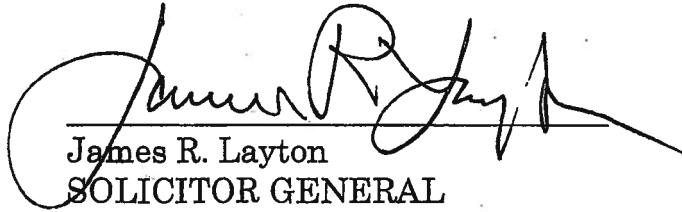
See State Bd. of Registration for Healing Arts v. McDonagh, 123 S.W.3d 146, 153 (Mo. banc 2003).

IV. Standing

Finally, standing is a threshold issue; if not even a single plaintiff has standing to assert a given compactness claim, the Court lacks jurisdiction to consider it on the merits. *See Comm. for Educ. Equality v. State*, (“CEE”) 294 S.W.3d 477, 484, 486 (Mo. banc 2009).

The parties have already stipulated that no Plaintiff lives in the new Third or Seventh Districts. This is fatal to Plaintiffs’ standing to challenge those districts because the Supreme Court has now clarified that the basis of “compactness” is an individual right to have a voice in electing one’s own representatives. Without residency, there is no injury to this right and Plaintiffs can have no standing. *See United States v. Hays* 515 U.S. 737, 741-42 (1995) (plaintiffs who did not live in challenged district had no standing to raise racial gerrymander claim). The lack of standing is an independent basis to enter judgment against Plaintiffs on their attempts to challenge H.B. 193 as it pertains to the St. Louis and Springfield areas.

Respectfully submitted,



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CERTIFICATE OF SERVICE

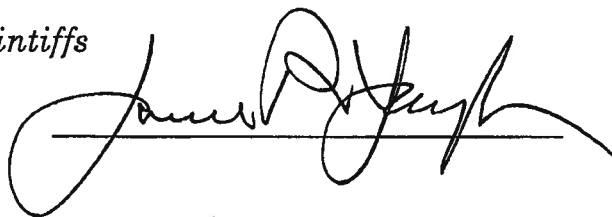
The undersigned certifies that a complete copy of the foregoing was served by electronic mail at approximately 3:30 p.m. on January 30, 2011, to:

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A handwritten signature in black ink, appearing to read "James R. Hughes", is written over a horizontal line. The signature is cursive and stylized.