

IN THE CIRCUIT COURT OF COLE COUNTY  
STATE OF MISSOURI

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

FILED

JAN 30 2012

BRENDA A. UMSTATTD  
CLERK CIRCUIT COURT  
COLE COUNTY, MISSOURI

**PEARSON PLAINTIFFS' TRIAL BRIEF**

**INTRODUCTION**

This case is before the Court on remand from the Missouri Supreme Court for a determination of whether, for purposes of Plaintiffs' claims alleged in Count I of their Petition, the congressional districts reflected in H.B. 193 are composed of territory as compact as may be.

Plaintiffs, Missouri citizens and qualified voters residing in various areas of the State, brought this action to challenge the validity of the congressional redistricting map adopted by the Missouri General Assembly in May 2011, over the Governor's veto, as H.B. 193 (the "Map," or "H.B. 193 Map"). Count I of Plaintiffs' Petition asserted claims that the Map fails to comply with the requirements of Art. III, § 45 of the Missouri Constitution, that districts be composed of territory as compact as may be. Other counts of the Petition alleged claims of partisan gerrymandering in violation of other Missouri constitutional provisions.

This Court entered an Order and Judgment on December 12, 2011, granting Defendants' motions for judgment on the pleadings or, alternatively, to dismiss for failure to state a claim. On that basis, the Court dismissed the case.

Plaintiffs appealed to the Missouri Supreme Court. On appeal, the Supreme Court affirmed the dismissals of the claims alleging partisan gerrymandering. However, the Court

clarified the standard for determining compliance with the constitutional requirement of compactness. holding that “the applicable standard of review for a court in reviewing an article III, section 45 claim is the language of the constitution itself: “whether the General Assembly divided Missouri into districts of ‘contiguous territory as compact and as nearly equal in population as may be.’” Supreme Court Opinion issued January 17, 2012 (“Sct. Op.”), at 7.

The Supreme Court held that a question of fact exists as to whether the districts are composed of territory as compact as may be. On that basis, the Court reversed the dismissal of Count I and remanded the case to this Court to conduct a hearing on the issue of compactness. The Supreme Court directed that “[b]ecause time is of the essence, the circuit court is directed to conduct its hearing and to enter its judgment no later than February 3, 2012, so that the General Assembly will have time to redistrict the state, if necessary.” Sct. Op. at 14.

## **FACTUAL BACKGROUND**

### **Adoption of Redistricting Map**

Art. III, § 45 of the Missouri Constitution provides that following certification of decennial census results, “the general assembly shall by law divide the state into districts corresponding with the number of representatives to which it is entitled, which districts shall be composed of contiguous territory as compact and as nearly equal in population as may be.”

When the results of the 2010 United States Census were released in early 2011, it became the responsibility of the Missouri General Assembly to draw new congressional districts, to take effect for the 2012 election and remain in place for the next decade. The Census results revealed that the population of Missouri grew at a lower rate than the population of other states, and that Missouri, accordingly, would lose one of its seats in the United States House of Representatives. Thus, while Missouri previously was divided into nine congressional districts, the General

Assembly was required to draw a new map that reduced the number of districts from nine to eight.

In April 2011, both houses of the General Assembly approved a congressional redistricting map embodied in H.B. 193. Governor Jay Nixon vetoed the Map. Thereafter, the General Assembly voted to override the Governor's veto and adopted the Map on May 4, 2011.

### **Maps, Reports and Parties' Positions**

The congressional districts resulting from H.B. 193 are accurately depicted in stipulated Exhibit 2, which contains a drawing of the statewide map as well as reports generated using Maptitude Mapping Software ("Maptitude") relating to certain measures of compactness and political subdivisions split between districts. Plaintiffs have proffered an alternative congressional redistricting map ("hereafter referred to as "Pearson Alternative 2," or "Pearson (Court Alternative 2)"), which is accurately depicted in stipulated Exhibit 11. The said Exhibit 11 contains a drawing of the proposed alternative statewide map, as well as reports relating to it, generated using Maptitude, reflecting certain measures of compactness and political subdivisions split between districts.

Both the H.B. 193 Map and the Pearson Alternative 2 map provide for eight districts composed of contiguous territory and equal population. Accordingly, the sole issue with respect to compliance with the express terms of Art. III, § 45 of the Missouri Constitution relates to compactness.

Plaintiffs maintain that, on an overall basis, and particularly with respect to each of the Third, Fourth, Fifth, Sixth and Seventh districts – which they characterize as containing obviously distorted shapes – the H.B. 193 Map does not reflect districts which are composed of territory as compact as may be. Plaintiffs have offered the Pearson Alternative 2 map as one non-exclusive example of alternative approaches that could be taken to drawing a congressional

redistricting map for Missouri, reflecting districts that are more compact than those reflected in the H.B. 193 Map.

In support of their position concerning compactness, Plaintiffs rely, first, on a visual comparison of the H.B. 193 Map, on the one hand, and the Pearson Alternative 2 map, on the other. Plaintiffs maintain that the Third, Fourth, Fifth, Sixth and Seventh districts in their alternative map are composed of territory that is more compact than the corresponding districts in the H.B. 193, pointing to the following, in particular:

a. The shape of the Fifth district is highly irregular. The Jackson County portion has a teardrop-shaped area carved out of it, which is joined with the Sixth district, to the north. The district is largely narrow and elongated, stretching nearly 100 miles to the east, and its shape is further irregular in that Ray County sits like a chimney atop Lafayette County. The teardrop-shaped area extends so far south that the remaining area within the district below it is fairly narrow. This configuration means that if one wishes to travel over land throughout the district, while at all times remaining in the district, the required route is quite circuitous.

b. In light of what has been said about the Fifth district, the Sixth district also is irregularly shaped. It has a teardrop-shaped appendage protruding far into the Fifth District, and the protrusion of Ray County into the Sixth gives the district a highly irregular southwestern border.

c. The Third district is irregularly shaped in that it has two appendages shaped like lobster claws extending east around St. Louis, one to the north and one to the south. Also, the dividing line between the westernmost portion of the Third district and

the Fourth district is irregular, with an appendage-like portion of the Third district protruding into the Fourth.

d. The Fourth district is irregularly shaped in that it has protruding clusters appended to three of the district's four corners: the northeast, southeast and southwest corners. The southeast corner of the district is said to mirror the shape of the State of Texas. The eastern portion of the district has an appendage from the Third district protruding into it, and the southern portion is penetrated by an appendage from the Seventh district, comprised of Polk County.

e. In light of what has been said about the Fourth district, the Seventh district also is irregularly shaped in that Polk County sits atop its northern border like a chimney, and protrudes into the Fourth district.

Plaintiffs additionally point to statements made at a previous hearing in this case by counsel for the Attorney General, in which he stated: “[F]rankly, I’m not going to stand here and defend the compactness of District 5. District 5 seems to me to be problematic.” Transcript of hearing of December 8, 2011 (“Tr.”) at 15.

Plaintiffs also point to the Attorney General's responses to Plaintiffs' requests for admissions that the Third, Fourth, Fifth, Sixth and Seventh Congressional Districts created by H.B. 193 are not as compact as may be within the meaning of Art. III, § 45 of the Missouri Constitution. The Attorney General responded, in part: “If ‘as compact ... as may be’ means that it is literally impossible to draw a more compact district without violating other constitutional (population equality and contiguity) or federal (*e.g.*, Voting Rights Act) requirements, then defendant would admit....” Defendant Attorney General's Response to Plaintiffs' First Request for Admissions.

Plaintiffs also point to the reports concerning various measures of compactness, generated by Maptitude, relating to both the H.B. 193 Map and the Pearson Alternative 2 map. In those reports, the Pearson Alternative 2 map generally scores as more compact than the H.B. 193 Map on most measures, both on an overall basis and a district-by-district basis.

### **Counties and Other Communities of Interest**

Plaintiffs maintain that one of the purposes of requiring congressional districts to be composed of territory as compact as may be is to keep together in common districts, to the extent possible, local communities of economic interest.

In support of that position, Plaintiffs will offer evidence that, in contrast to the Pearson Alternative 2 map, the H.B. 193 Map unnecessarily divides mid-Missouri – a distinct region encompassing Boone County, Cole County and the Lake of the Ozarks – among multiple congressional districts; unnecessarily divides Jackson County; unnecessarily joins two disparate local communities of economic interest by melding largely urban portions of Jackson County with three largely rural counties, Ray, Saline and Lafayette; and unnecessarily divides the St. Louis region by joining a portion of it with a district dominated by areas outside the St. Louis region (the Third district).

With respect to keeping counties intact within a single district, the H.B. 193 Map splits eight counties into more than one district, while the Pearson Alternative 2 map splits seven counties. The H.B. 193 Map splits Jefferson County – which has a population of approximately 218,000 – among three congressional districts.

## **APPLICABLE LAW**

### **Parties and Jurisdiction**

This Court has jurisdiction of this action pursuant to Art. V, § 14 of the Missouri Constitution, and Mo. Rev. Stat. § 527.010. Plaintiffs have standing to bring this action in that

the protection afforded voters by the requirements of Art. III, § 45 of the Missouri Constitution, including the requirement of compactness, “applies to each Missouri voter, in every congressional district.” SCt. Op. at 6. Also, it has been held that a litigant challenging a reapportionment plan need not confine the challenge to the individual’s own district, but rather has standing to attack the entire plan, given the interlocking nature of the various districts. *See Erfer v. Commonwealth*, 568 Pa. 128, 794 A.2d 325, 329-30 (Pa. 2002). This reasoning appears to reflect the law of Missouri in that the Missouri Supreme Court has entertained challenges to a statewide apportionment plan, brought by a single individual, on three separate occasions. *See Preisler v. Kirkpatrick*, 528 S.W.2d 422 (Mo. banc 1975); *Preisler v. Hearnnes*, 362 S.W.2d 552 (Mo. banc 1962); *Preisler v. Doherty*, 365 Mo. 460, 284 S.W.2d 427 (Mo. banc 1955).

Attorney General Koster is a proper defendant in that this action involves allegations that the redistricting Map as drawn and adopted by the General Assembly is unconstitutional under the Missouri Constitution. Mo. R. Civ. P. 87.04. Secretary of State Robin Carnahan is a proper defendant in that she is the chief election official of the State of Missouri and, in that capacity, presides over elections to public office, including elections of Missouri’s representatives to the United States House of Representatives.

**Constitutional Requirement of Compactness**

Article III, § 45 of the Missouri Constitution sets out three requirements for the redistricting of Missouri’s seats in the United States House of Representatives: “districts shall be composed of contiguous territory as compact and as nearly equal in population as may be.” The purpose of the foregoing constitutional requirements is to “guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as ‘gerrymander.’” SCt. Op. at 4, *quoting Barrett*, 146 S.W. at 61 (internal quotation marks omitted).

“The applicable standard of review for a court in reviewing an article III, section 45 claim is the language of the constitution itself: whether the General Assembly divided Missouri into districts of ‘contiguous territory as compact and as nearly equal in population as may be.’” SCt. Op. at 7. Thus, the constitutional requirements are not satisfied by districts merely having some, or a minimal, degree of compactness; rather, districts must be compact as possible. Like the requirements of numerical equality and contiguity, the requirement that districts be as compact as may be is “mandatory and objective, not subjective.” SCt. Op. at. 6, 8.

In reviewing districts for compactness, courts may “allow for minimal and practical deviations required to preserve the integrity of the existing lines of our various political subdivisions.” SCt. Op. at 7. “The Missouri Constitution has historically recognized counties as ‘important governmental units, in which the people are accustomed to working together,’ and has provided for that policy to be considered in the redistricting process.” SCt. Op. at 7-8 and n.1, *quoting Hearnnes*, 362 S.W.2d at 557.

### **Measures of Compactness**

Under Missouri law, “the word ‘compact’ means ‘closely united.’” *State ex rel. Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40, 61 (Mo. 1912), *quoting People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N.E. 307 (Ill. 1895). *See Preisler v. Doherty*, 365 Mo. 460, 284 S.W.2d 427, 435 (Mo. banc 1955). This means “that the counties or subdivisions of counties (when counties may be divided) when combined to form a district, must not only touch each other, but must be closely united territory.” *Barrett*, 146 S.W. at 61. Put another way, “compact” has been defined as “having parts or units closely packed or joined.” *Reed v. City of Union*, 913 S.W.2d 62, 64 (Mo. App. 1995), *quoting Websters New Collegiate Dictionary* 228 (1977) (internal quotation marks omitted).



Consistent with the foregoing, the compactness of a district is assessed by examining its “shape.” *Doherty*, 284 S.W.2d at 434; *Barrett*, 146 S.W. at 55. Perfect compactness is represented by the shape of a circle or square. *See, e.g., Schrage v. State Bd. of Elections*, 88 Ill.2d 87, 430 N.E.2d 483, 486 (Ill. 1981); *Kilbury v. Frankling County*, 151 Wash.2d 552, 90 P.3d 1071, 1077 (Wash. banc 2004).

An irregular or strange shape reflects a lack of compactness. *See, e.g., Doherty*, 284 S.W.2d at 469 (reasonably compact district has “comparatively few sides and angles”); *Barrett*, 146 S.W. at 62, *quoting Thompson* (“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.”); *Kilbury* (“In simplest terms, we conclude that the phrase ‘as compact as possible’ does not mean ‘as small in size as possible,’ but rather ‘as regular in shape as possible.’”); *Schrage* (referring to “strange” or “extremely elongated” shapes).

In most cases involving claims that a district is non-compact, courts have adjudicated the claims by undertaking a visual examination of the questioned districts, thus applying an “eyeball” test. *See, e.g., Schrage*, 439 N.E.2d at 487 (“[W]e can rely on a visual examination of the questioned district as other courts have done.”); *Rybicki v. State Bd. of Elections*, 574 F.Supp. 1082, 1096 (N.D. Ill. 1982) (“In *Schrage*, the Illinois Supreme Court ... adopted an ‘eyeball’ standard to determine if a given district met the compactness requirement.”). All of the reported Missouri cases to-date, concerning whether legislative districts comply with constitutional compactness requirements, have utilized the visual examination approach. *See Kirkpatrick; Hearnnes; Doherty; Barrett.*

Beyond determining compactness through visual examination, various statistical tests have been developed for measuring compactness. While such measures may be utilized, it is not

necessary to do so: the visual examination approach has been deemed sufficient. *See Schrage*, 430 N.E.2d at 487. And, it must be borne in mind that “[s]tatistics do not necessarily reveal compactness. *People ex rel. Burriss v. Ryan*, 147 Ill.2d 270, 588 N.E.2d 1023, 1028 (Ill. 1991). All of the various statistical measures have biases, and none of them is a perfect measure of compactness.

### **Application of Compactness Standards**

As the Supreme Court observed in its decision remanding this case, “any rational and objective consideration” of the boundaries of the Third and Fifth districts in the General Assembly’s Map confirms that they are “particularly suspect.” SCt. Op. at 8.

Regarding the Fifth district, as noted above, the Attorney General has declined to defend its compactness, referring to it as “problematic.” Tr. at 15. The shape of the Fifth district is comparable to the Seventh senatorial district in *Doherty*, which was held to be invalid. 284 S.W.2d at 438.

Based on a visual examination of the relevant maps, the conclusion is inescapable that the H.B. 193 Map contains a number of districts that are irregularly shaped, including the Third, Fourth, Fifth, Sixth and Seventh Districts; that, as demonstrated by the Pearson Alternative 2 map, it is readily feasible to draw a congressional map that does not have the irregular shapes reflected in H.B. 193, and which contains districts that are more compact than those contained in the H.B. 193 Map. Accordingly, all districts provided in H.B. 193 are not composed of territory as compact as may be, as required by Art. III, § 45 of the Missouri Constitution.

The conclusions discussed above, stemming from a visual examination of the relevant maps, are further supported by consideration of the statistical measures of compactness calculated for the H.B. 193 Map and the Pearson Alternative 2 map. Those statistical measures

generally reflect that the Pearson Alternative 2 map scores higher than the H.B. 193 Map on most of the statistical measures, both on an overall basis and a district-by-district basis.

The extent to which the statistical measures of compactness weigh in favor of the Pearson Alternative 2 map, as compared with the H.B. 193 Map, is even more pronounced when one looks solely to the statistical tests which measure *territorial* compactness, as opposed to *population* compactness. Two of the tests – the Population Circle and Population Polygon tests – focus on population, not territory. The Missouri constitutional requirement of compactness is not worded abstractly, but rather refers to “*territory* as compact ... as may be.” Art. III, § 45 (emphasis added). Accordingly, the territorial measures of compactness – not the population measures – are relevant here.

#### **Counties and Other Communities of Interest**

As noted above, the Supreme Court has expressly recognized the importance of keeping counties intact in redistricting, to the extent possible, and that the Missouri Constitution provides for that policy to be considered in the redistricting process. SCt. Op. at 7-8 and n.1. The Pearson Alternative 2 map better serves that interest as compared with the H.B. 193 Map, in that, as noted above, the Pearson Alternative splits one fewer county, avoids splitting Jefferson County into three districts, and, indeed, keeps Jefferson County, as well as Jackson County, intact.

Also, one of the purposes of requiring congressional districts to be composed of territory as compact as may be is to keep together in common districts, to the extent possible, local communities of economic interest. *See Wilson v. Eu*, 1 Cal.4th 707, 823 P.2d 545, 553 (1992) (Compactness refers to ability of citizens to relate to each other and their representatives, and speaks to relationships facilitated by shared interests and membership in a political community, including a county or city); *In re Reapportionment of Towns of Hartland, Windsor and West Windsor*. 160 Vt. 9, 624 A.2d 323, 330 (Vt. 1993) (quoting with approval *Wilson v. Eu*); *Parella*

v. *Montalbano*, 899 A.2d 1226, 1252 (R.I. 2006) (“The compactness requirement, applied here, is intended to provide an electorate with effective representatives ....”) (Internal quotation marks and citation omitted); 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.”).

As compared with the H.B. 193 Map, the Pearson Alternative 2 map better serves the interest of keeping local communities of economic interest together in that it places mid-Missouri in a single district; avoids joining the largely rural Ray, Lafayette and Saline Counties with urban Jackson County; and keeps the St. Louis region in districts that are all within that region.

### **Remedy**

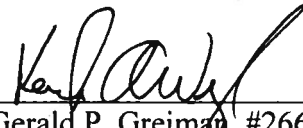
Once it is determined that the H.B. 193 Map and various districts within it are not composed of territory as compact as may be, H.B. 193 must be said to violate Art. III, § 45 of the Missouri Constitution and cannot be allowed to stand. On that basis, the Secretary of State must be enjoined from conducting any elections in reliance on H.B. 193.

The Supreme Court has made clear that, at this juncture, the appropriate further remedy is to afford the General Assembly another opportunity to redistrict the state in a constitutional manner in advance of the candidate filing period for congressional elections, which opens February 28, 2012.

Respectfully submitted,

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**CERTIFICATE OF SERVICE**

This is to certify that a copy of the foregoing was served by e-mail and U.S. Mail, first class, postage prepaid, on this 31<sup>st</sup> day of January, 2012, to the following:

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