IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

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

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

JUDGMENT

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.

Article III, section 45 of the Missouri Constitution was triggered when the results of the 2010 United States Census revealed that the population of the State of Missouri grew at a lower rate than the population of other states and Missouri would lose one member of its delegation to the United States House of Representatives. It is the responsibility of the Missouri General Assembly to draw new congressional election districts. The new districts will take effect for the

2012 election and remain in place for the next decade or until a Census shows that the districts should change. While Missouri previously was composed of nine congressional districts, the General Assembly had to draw a new map that reduced the number of districts to eight.

In April 2011, both houses of the General Assembly approved a congressional redistricting map embodied in House Bill 193 ("the Map"). Governor Jay Nixon vetoed the Map. Following the veto, the General Assembly voted to override the Governor's veto and adopted the Map on May 4, 2011.

Six Missouri citizens and qualified voters residing in various areas of the state brought this action against Attorney General Chris Koster and Secretary of State Robin Carnahan, in her official capacity as the chief elections officer for the State, challenging the validity of the congressional redistricting plan. A second group of citizens and qualified voters filed an action in the Circuit Court of Cole County against Secretary Carnahan, seeking declaratory and injunctive relief. Collectively, both sets of plaintiffs (hereinafter, "Plaintiffs") seek to invalidate the Map and prevent Secretary Carnahan from conducting elections in accordance with the Map.

Defendants Koster and Carnahan filed answers. Representative John J. Diehl and Senator Scott T. Rupp, the chairs of the state House and Senate redistricting committees that drew the Map, intervened as defendants in both cases. They filed an answer in both cases. Defendants Koster, Carnahan, and the two intervenors are referred to collectively as "Defendants."

ANALYSIS

At the outset, it is important to note that the map drawn by the legislature is, in fact, a statute. As such, a statute is presumed valid "unless it clearly contradicts a constitutional provision." *Asbury v. Lombardi*, 846 S.W.2d 196, 199 (Mo. banc 1993). Because of a statute's presumed validity, the proper inquiry is whether the statute at issue is "clearly and undoubtedly"

prohibited. *Hammerschmidt v. Boone County*, 877 SW.2d 98, 102 (Mo. banc 1994)." See also *Ocello v. Koster*, --- S.W.3d ----, 2011 WL 5547027 at *3 (Mo. banc 2011).

Article III, section 45 of the Missouri Constitution sets out only three requirements for the redistricting of seats in Missouri for the United States House of Representatives. The districts "shall" be composed of "contiguous territory as compact and as nearly equal in population as may be." Mo. Const., art. III, sec. 45. The purpose of these requirements is "to guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as 'gerrymander,' and to require the Legislature to form districts, not only of contiguous, but of compact or closely united, territory." *State ex rel. Barrett v. Hitchcock,* 241 Mo. 433, 146 S.W. 40, 61 (1916). "[T]he provision requiring compactness of territory, subject, as it must be, to other more definitely expressed rules, may also, in application, be modified by the requirement of equality in population ... that 'compactness, being of less importance, may, to some extent, yield in aid of securing a nearer approach to equality of representation.'" *Id.* at 61 (internal citations omitted). A claim that a district lacks compactness following redistricting is justiciable. "[C]ourts have jurisdiction and authority to pass upon the validity of legislative acts apportioning the state into senatorial or other election districts and to declare them invalid for failure to observe non-discretionary limitations imposed by the Constitution." *Preisler* v. *Doherty,* 284 S.W.2d 427, 431 (Mo. banc 1955) *(Preisler I); see also Barrett,* 146 S.W. 40 (holding that the act of apportionment did not conform to the constitutional compactness requirement). Missouri courts must uphold the mandatory language of the constitution that the "districts *shall be* composed of contiguous territory as compact and as nearly equal in population as may be." Mo. Const., art. III, sec. 45.

Simply put, 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." Mo. Const., art. III, sec. 45. Here, Plaintiffs have alleged that various districts, and the Map as a whole, violate the compactness requirement of article III, section 45. Thus, the sole issue in this matter is the question of fact whether those districts are "as compact and nearly equal in population *as may be."* Mo. Const, art. Ill, sec. 45.

Plaintiffs argue that "as may be" is synonymous with "as possible." Plaintiffs' evidence suggests a position that "as may be" is to be interpreted to read, "as can be." In argument, Plaintiffs directed the Court to two cases in support of this proposition, namely *Armentrout v. Schooler*, 409 S.W.2d 138 (Mo. 1966) and *Mott v. Morr*is, 249 Mo. 137, 155 S.W. 434 (Mo. 1913.) It is unclear whether either of these cases even posits this assertion; nonetheless, the Court does not view them as persuasive in the search for this definition. Likewise, the evidence and facts put forth by Plaintiffs at trial does not convince the Court that "as can be" is an appropriate definition.

Defendants argue that the "as may be" language stands for the proposition that it is possible for more than one specific map to pass Missouri Constitutional muster. Defendants' evidence and facts presented at trial boil down to the proposition that there is no one "bright-line test" for compactness and that even after requirements like numerical equality and contiguity are satisfied, compactness exists along a continuum, it is not a specific idealized result. Even if the only maps considered are those that already meet the contiguity, equal population, and other constitutional requirements, Defendants' factual evidence showed that it is not possible in theory or practice to find the most compact map. The evidence and facts showed that the futile search for the most compact map will; however, tend to severely limit the options left for the General Assembly in choosing its map. As a matter of fact, this would leave it little space to exercise its legislative

discretion and make decisions "regarding a number of sensitive considerations." SCt. Op. 6. The Supreme Court has instructed that those kinds of considerations are the province of "political leaders," not the courts. SCt. Op. 6.

This Court's review of the text of the Missouri Constitution, the holdings of the Supreme Court's recent opinion, and the facts found by this Court support this view. It is important to note that "every word in a constitutional provision is assumed to have effect and meaning; their use is not surplusage." *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. banc 1983). During closing arguments, Defendants cited another redistricting provision relating to equality of population for Missouri House of Representatives districts that actually uses the "as possible" language:

> The commission shall reapportion the representatives by dividing the population of the state by the number one hundred sixty-three and shall establish each district so that the population of that district shall, **as nearly as possible**, equal that figure.

Mo. Const., art. III, sec. 2. (Emphasis added) This "as nearly as possible" provision was added in January 1966 by special election after the United States Supreme Court held that the principle of equality of population applied to state legislative districts in the case of *Reynolds v. Sims*, 377 U.S. 533 (1964). It is significant that while the "as possible" provision was added to reflect the need for close compliance with equal population after *Reynolds*, the formulation of "as may be" was used for the compactness and contiguity standards. This difference in the constitutional text, which resulted from an amendment that had a specific purpose, must have meaning.

The Court also observes that all of the constitutional equal population standards use the phrase "as nearly." This suggests that the goal is an ever-nearer approach to equality that is to some meaningful degree measurable. *See* Mo. Const., art. III, sec. 5 (Mo. Senate districts); Mo. Const., art. III, sec. 45 (U.S. House districts). In contrast, the constitutional compactness measures do not say, "as nearly compact as may be possible" Instead, they simply say, "as

compact as may be." This seems to recognize that perfect compactness is not an ideal that can be reached.

The Supreme Court's opinion in this case affirmed this principle in discussing the three ideas it said were "fundamental" to the standard of review. SCt. Op. 6. Among other things, the Supreme Court held that "compactness" was mandatory along with "equal population." The Court did not say that it was mandatory to have districts with "maximum compactness" or districts that are "as compact as possible." SCt. Op. 6.

Accordingly, this Court declines Plaintiffs' invitation to engage in a never-ending game of one-upmanship in a constant search for the ultimate map. The Defendants' reading of the phrase "as may be" is much more grounded. It relies on the "three ideas" the Supreme Court stated were "fundamental." SCt. Op. 6. Discussing those ideas, the Supreme Court stated that "[T]hese maps could be drawn in multiple ways, all of which might meet the constitutional requirements," and that "compactness and numerical equality cannot be achieved with absolute precision." SCt. Op. 6. This alone would seem to preclude the Plaintiffs' proposed standard. The Defendants' reading of the phrase "as compact as may be" follows the Supreme Court's instruction that "compactness" is "mandatory," while allowing for the fact that perfection is unattainable for the reasons set forth on page 6 of the Supreme Court's opinion. Under the standard and rationale announced by the Supreme Court, and the facts adduced at trial, the Plaintiffs have failed to prove that H.B. 193 is unconstitutional because it is not "as compact as may be."

Accordingly, judgment is entered against the Plaintiffs on their remaining claims, the compactness claims in Count I of the petitions of both sets of Plaintiffs.

Dated: 2/3/12

Judge Daniel R. Green