

**IN THE UNITED STATES DISTRICT COURT
EASTERN MISSOURI
EASTERN DIVISION**

PAUL BERRY III,

Plaintiff,

Case Number: No.4:22-CV-465-JAR

v.

JOHN R. (JAY) ASHCROFT,
in his official capacity as
Missouri Secretary of State and
STATE OF MISSOURI,

Defendants.

**PLAINTIFF BERRY REPLY TO DEFENDANTS REPLY TO TEMPORARY
RESTRAINING ORDER**

Plaintiff, Paul Berry III, files this Plaintiff Berry Reply to Defendants Reply to Temporary Restraining Order, responding to such TRO application reply from Defendants (“Defendants or “Missouri”), states as follows:

POINT I

**PLAINTIFF BERRY IS LIKELY TO PREVAIL ON ALL COUNTS OF THE
UNDERLYING COMPLAINT**

By our respective pleadings, Plaintiff Berry and Missouri are in agreement that the “likely to prevail” standard is appropriate to adjudicate the instant TRO application, which is a mandatory cornerstone of the Eighth Circuit’s *Datasphere* injunction requirements. In order to adjudicate the instant TRO, the Court must consider whether Counts I thru VI of the underlying

complaint meets the legal standard necessary for a “likely” meritorious determination on each such Count of the underlying complaint.

A. Plaintiff Berry is Likely to Prevail on Counts I and II of the Underlying Complaint.

The Supreme Court of the United States has held that Article I, § 2 of the Constitution requires “equal representation for equal numbers of people” in congressional districts. *Wesberry*, 376 U.S. at 18. That rule (the “one-person, one-vote” rule) “does not require that congressional districts be drawn with precise mathematical equality” as to population. *Tennant v. Jefferson County Com’n*, 567 U.S. 758, 759 (per curiam). Instead, the Court is “willing to defer to state legislative policies, so long as they are consistent with constitutional norms, even if they require small differences in the population of congressional districts.” *Karcher*, 462 U.S. at 740.

The Court’s consideration of whether Plaintiff Berry is likely to prevail on Count I and Count II of the underlying complaint turns on a two-part analysis. “First, the parties challenging the plan bear the burden of proving the existence of population differences that could practicably be avoided.” *Tennant*, 567 U.S. at 760. The underlying complaint and TRO each provided “the existence of population differences that could be practicably be avoided” by the 20212 Missouri Primary Congressional Map, which are undisputed by Missouri’s reply to the underlying TRO.

Second, upon that showing, “the burden shifts to the State to ‘show with some specificity’ that the population differences ‘were necessary to achieve some legitimate state objective.’” *Id.* (quoting *Karcher*, 462 U.S. at 741). The “specificity” the State must provide depends, in turn, on four factors. The Supreme Court has explained: “The showing required to

justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." Karcher, 462 U.S. at 741.

Missouri has not made any argument by their reply as to how Missouri failing to enact a new congressional map to replace the 2012 Missouri Congressional Map was "necessary to achieve some legitimate state object", nor does Plaintiff Berry anticipate any such argument from Missouri by further reply to the underlying complaint. Additionally, Missouri fails "to justify population deviations is flexible, depending on the size of the deviations, the importance of the State's interests, the consistency with which the plan as a whole reflects those interests, and the availability of alternatives that might substantially vindicate those interests yet approximate population equality more closely." Quite frankly, Missouri does not even challenge Plaintiff Berry's charge that the 2012 Missouri Congressional Map violates the "one man, one voter" rule anywhere by Missouri's TRO reply

Blatant violations of the United States Constitution by Missouri refusing to enact a constitutional congressional map in time for a congressional election, in violation of the Equal Protection Clause, is (in)consistent with constitutional norms" and can never be deemed as "necessary to achieve some legitimate state object". Plaintiff Berry is likely to prevail on the Equal Protection Clause of Counts I and II of the underlying complaint.

B. Plaintiff is Likely to Prevail on Counts III and IV of the Underlying Complaint.

Mo. Const. art. III, sec. 45 requires that the General Assembly draw the House districts according to census figures, making the districts: (1) contiguous territory; (2) as compact as may be; and (3) as nearly equal in population as may be. These requirements are mandatory and objective — each must be satisfied — although the language used in the requirements may allow some flexibility in their compliance.”

Interpreting the language "as may be" as allowing for consideration of other recognized factors is consistent with the United States Supreme Court's requirement for congressional districts to have population equality "as nearly as is practicable" under its interpretation of the Equal Protection Clause in the United States Constitution. See *Reynolds*, 377 U.S. at 577, 84 S.Ct. 1362. The federal standard permits "minor variations which `are based on legitimate considerations incident to the effectuation of a rational state policy.'" *Swann v. Adams*, 385 U.S. 440, 444, 87 S.Ct. 569, 17 L.Ed.2d 501 (1967).

As with this Court, the United States Supreme Court recognizes that legitimate considerations include recognition of natural boundary lines, recognition of historical district boundary lines, and respect for boundaries of political subdivisions. See *id.*; *Karcher*, 462 U.S. at 740, 103 S.Ct. 2653. Similar to the United States Supreme Court's interpretation of the "as nearly as is practicable" standard under the Equal Protection Clause, this Court interprets the requirements in the Missouri Constitution to implicitly permit the legislature to comply with federal laws and consider recognized factors yet still comply with the requirements of the Missouri Constitution. The requirement for compactness "as may be" allows for consideration of

these recognized factors. See Pearson I, 359 S.W.3d at 39.”

The Court’s consideration of whether Plaintiff Berry is likely to prevail on Count III of the underlying complaint requires adjudication of a claim pursuant to MO Const art III § 45, which requires “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.” Pearson v. Koster, 367 SW 3d 36 - Mo: Supreme Court 2012.

Statistical variations of the 2012 Missouri Congressional Map provided by the United States Census Bureau results plead by the underlying petition and the instant TRO establish that the 2012 Missouri Congressional Map does not provide a “nearly equal population as may be”. Plaintiff Berry is likely to prevail on Count III of the underlying complaint seeking declaratory and injunctive relief.

Addressing Count IV of the underlying complaint, Missouri does not contest by their Reply Plaintiff Berry’s assertion that Missouri does not maintain the legal authority to conduct the 2022 Missouri Primary congressional election with a new congressional map enacted by the 101st Missouri General Assembly without an emergency clause. Missouri claims that because no intention has been declared or performed by Missouri to conduct the 2022 Missouri Primary congressional election with a new congressional map enacted by the 101st Missouri General Assembly without an emergency clause that Plaintiff Berry’s instant complaint is hypothetical in

nature.

First, there is nothing hypothetical about Defendants threatening to execute any Missouri statute before a competent court of law in a manner that defies the legal requirements of such statute. On June 18, 2022, Missouri filed a responsive pleading in a Missouri state court case (Exhibit 1) involving a different plaintiff related to the 2022 Missouri Primary congressional election, to which, Missouri publicly states:

“Contrary to Plaintiffs’ speculation, the General Assembly still has ample time to act, and it may replace the current congressional district map; thus, judicial intervention is unwarranted before that time has expired. The federal and state constitutions entrust map-drawing to the State’s legislature. U.S. CONST. art. I, § 4; MO. CONST. art. III, § 45. Ninety days before the August 2, 2022, primary is May 4, 2022.¹ The last day of the General Assembly’s regularly scheduled session is May 13, 2022. On March 24, 2022, the Missouri Senate passed a new map with an emergency clause, 30-2. St. Louis Public Radio, *Missouri Senate passes new 6-2 Republican majority congressional map*, STLPR (Mar. 24, 2022), available at <https://bit.ly/3r2K838>. As a result, a map can pass on the last day of the session with an emergency clause, or before May 4, 2022 to be effective before the August primary. Even after that, the General Assembly may still act through a special session called by the Governor.”

Under Missouri’s legal interpretation of MO Const art III § 29, Missouri erroneously believes that a Missouri congressional map enacted by the 101st Missouri General Assembly without an emergency clause ninety (90) days before the 2022 Missouri Primary congressional election date (May 4, 2022) may be utilized to conduct the 2022 Missouri Primary congressional election set for August 2, 2022, as opposed to, such Missouri congressional map enacted by the 101st Missouri General Assembly without an emergency clause being required to be enacted

ninety (90) days before early voting begins on June 21, 2022, because any Missouri statute (including an enacted congressional map) does not go into legal effect until ninety (90) days after the last day of the 101st Missouri General Assembly regular session, which concludes on May 13, 2022.

Simply stated, how can any congressional map be enacted after the first day of absentee voting for the 2022 Missouri Primary congressional election (June 21, 2022) be utilized by Missouri to conduct the same congressional election set for August 2, 2022, that does not go into legal effect until August 28, 2022, in the manner Missouri suggests by the aforementioned state court filing? Plaintiff Berry is likely to prevail on Count IV of the underlying complaint seeking declaratory and injunctive relief.

C. Plaintiff is Likely to Prevail on Counts V and VI of the Underlying Complaint.

Again, Missouri does not contest Plaintiff Berry's interpretation of Missouri law plead by Counts V and VI of the underlying petition, Missouri charges that declaratory and injunctive relief regarding what date the 2022 Missouri Primary congressional election will be held and does Missouri intend to reopen filing for a congressional election, to which, Plaintiff Berry is a candidate of is spectating in nature.

There is nothing spectralive about either of the aforementioned injunctive challenges because Missouri's own failure to abide by the Missouri and United States Constitutions have caused such declaratory and injunctive relief necessary.

As questioning election laws and procedures immediately prior to an election is disfavored by the Federal Courts and apparently would not be deemed cause to challenge the election results for constructing an election that violates Missouri election statute, the instant TRO seeks to enjoin Missouri from changing the election date of the 2022 Missouri Primary congressional election or reopen candidate filing 2022 Missouri Primary congressional election, as Missouri has no statutory authority to commit either action by Missouri law.

Missouri has already shown a willingness to buck the Missouri and United States Constitutions, the injunctive relief requested by the instant TRO will ensure Missouri will not further violate related election law for the 2022 Missouri Primary congressional election and restore confidence in the congressional election system.

POINT II

PLAINTIFF BERRY IS NOT REQUIRED TO MEET ALL REQUIREMENTS SET BY THE DATASPHERE COURT FOR ISSUANCE OF THE INSTANT TRO

Missouri's reply to the underlying TRO provides a significant amount of argument towards whether Plaintiff Berry is irreparably harmed by Missouri's violation of the Missouri Constitution and the United States Constitution, to which, Plaintiff Berry addresses in turn by Point III of this Reply Brief.

While Plaintiff Berry contends that all four factors of *Datasphere* have been met by the instant TRO application, Plaintiff Berry also contends that because the underlying TRO

establishes the likelihood of the success of the merits of each Count of the underlying complaint, less or no weight should be given to the other three factors of *Datasphere*. “Preliminary injunctions in constitutional cases often turn on likelihood of success on the merits, usually making it unnecessary to dwell on the remaining three factors.” *Monclova Christian Acad. v. Toledo-Lucas Cnty. Health Dep’t*, 984 F.3d 477, 482 (6th Cir. 2020) (cleaned up).

Although “considerations specific to election cases” can affect the Court’s assessment of these factors, *Purcell v. Gonzalez*, 549 U.S. 1 (2006), the most important factor is often the movant’s likelihood of success on the merits, *Obama for Am. v. Husted*, 697 F.3d 423, 436 (6th Cir. 2012) (internal quotation marks omitted). The underlying complaint is clearly both a constitutional challenge and election case, and as such, the likelihood of success on the merits of the underlying complaint should outweigh *Datasphere* factors related to irreparably harm and public interest, as such factors can normally be inferred by the Court when a meritorious constitutional violation claim against the government has been sustained.

POINT III

OTHER ASSERTIONS PLED BY MISSOURI FAIL TO PROVIDE CAUSE TO DENY THE INSTANT TRO

Missouri’s reply to the instant TRO pleads several incorrect reasons to deny the underlying TRO, to which, Plaintiff Berry addresses each erroneous argument below.

A. Missouri Misinterprets Term Length of TROs Issued Pursuant to 28 U.S.C. § 2284.

Missouri erroneously claims that the instant TRO application may only grant relief to Plaintiff Berry for a period of up to fourteen (14) day (excluding any extension or termination of

such TRO), which is legally incorrect. A TRO granted pursuant to 28 U.S.C. § 2284 (unless TRO is terminated for other reasons) is granted until final resolution of the underlying congressional map constitutional challenge by a ‘three-judge’ court.

B. Missouri Misinterprets Purpose of TROs Issued Pursuant to 28 U.S.C. § 2284.

The purpose of the statutory authority granted to District Courts pursuant to 28 U.S.C. § 2284 is to enjoin states from conducting elections until such time that a “three judge” can be empaneled to try such a constitutional challenge to a congressional map.

When evidence exists that a congressional map is unconstitutional, District Courts are legislatively granted the authority to restrict further use of such unconstitutional congressional map for an impending election by issuance of a TRO, until the matter reaches final adjudication by the Federal District Court. The underlying TRO is a textbook example of when a TRO would be contemplated by 28 U.S.C. § 2284, or there would be no meaning to the language of 28 U.S.C. § 2284 that sets the standard for issuance of TRO applications related to unconstitutional congressional maps.

C. Missouri Erroneously Declares Plaintiff Berry is not Under Irreparable Harm by Missouri Utilizing the 2012 Missouri Congressional Map to Conduct the 2022 Missouri Primary Congressional Election.

Missouri is already conducting the 2022 Missouri Primary congressional election by utilizing the 2012 Missouri Congressional Map, specifically, (a) by accepting congressional

candidate filings based upon the 2012 Missouri Primary Map and (b) by concluding filing for the 2022 Missouri Primary congressional election, thus establishing such establishing the congressional ballot for the 2022 Missouri Primary congressional election. The underlying TRO seeks to restrain Missouri from any further use of the 2012 Missouri Primary Map to conduct the 2022 Missouri Primary congressional election, which is absolutely a circumstance of irreparable harm.

D. The Purcell Principle Is Not Applicable in Missouri Until June 7, 2022.

The foundation of the Purcell Principle is based upon the Federal Courts avoiding election chaos prior to an election by issuing a ruling that would seriously disturb the election process. 115.127(6) RSMo permits Missouri to alter congressional ballots with a court order up until June 7, 2022, which states:

“6. Except as provided for in sections 115.247 and 115.359, if there is no additional cost for the printing or reprinting of ballots or if the candidate agrees to pay any printing or reprinting costs, a candidate who has filed for an office or who has been duly nominated for an office may, at any time after the certification of the notice of election required in subsection 1 of section 115.125 but no later than 5:00 p.m. on the eighth Tuesday before the election, withdraw as a candidate pursuant to a court order, which, except for good cause shown by the election authority in opposition thereto, shall be freely given upon application by the candidate to the circuit court of the area of such candidate's residence.”

The Missouri General Assembly has determined by Missouri election statute that chaos by Court orders affecting any election ballot should be addressed by Missouri on or prior to June 7, 2022, and as a result, the Purcell principle should not be considered until at least after such a date.

E. Missouri Argues Constitutional Violations Against Plaintiff Berry Are Insignificant In Nature, Thus No Relief Should Be Granted by the Court.

Missouri argues that the constitutional violations against Plaintiff Berry are insignificant because the population variations involving Missouri Congressional District 2 are only 1%, which conflicts with Federal caselaw, such as *Bush v. Gore*, which states:

“An early case in our one-person, one-vote jurisprudence arose when a State accorded arbitrary and disparate treatment to voters in its different counties. *Gray v. Sanders*, 372 U. S. 368 (1963). The Court found a constitutional violation. We relied on these principles in the context of the Presidential selection process in *Moore v. Ogilvie*, 394 U. S. 814 (1969), where we invalidated a county-based procedure that diluted the influence of citizens in larger counties in the nominating process. There we observed that “[t]he idea that one group can be granted greater voting strength than another is hostile to the one man, one vote basis of our representative government.” *Id.*, at 819.”

The 2012 Missouri Congressional Map provides the residents of Missouri Congressional District 1 with substantially “greater voter strength”, in comparison to, the voter strength of Missouri Congressional 2, which constitutes a textbook example of a “one man, one vote” violation. Malapportionment of any specific congressional district is a “one man, one vote” constitutional violation against every other congressional district and voter of the same state, regardless of the population variations of any specific congressional district in question.

Plaintiffs Berry seeks to steer Missouri “away from the rocky coast” of arguing any direct proximity to the unconstitutional congressional map is necessary to establish a constitutional violation, such as with complaints involving the Voters Rights Act. There are two main veins plaintiffs generally seek relief by the underlying complain, invalidate the unconstitutional

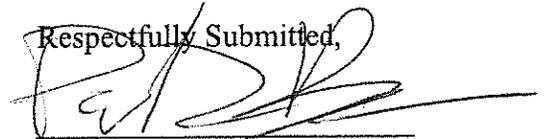
congressional map and received declaratory and injunctive relief protecting against the effects of such invalidation of the unconstitutional congressional map.

Missouri's judicial compliance with a Federal order that enjoins Missouri to follow two of the most basic election requirements to conduct a congressional election, declaring election day shall not be rescheduled and candidates may not change their congressional candidate filing designation, is also reasonable relief to Missouri's constitutional violations regarding use of the 2012 Missouri Congressional Map.

CONCLUSION

Plaintiff Berry has met the burden for this Honorable Court to issue the underlying temporary restraining order application against Defendants John R. ("Jay") Ashcroft, in his official capacity, and the State of Missouri.

Respectfully Submitted,

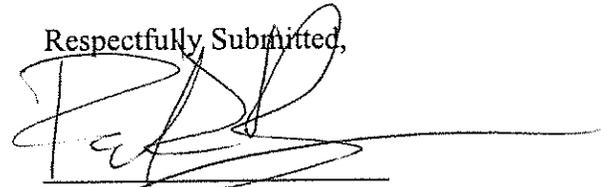


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CERTIFICATE OF SERVICE

A copy of the foregoing motion shall be served by United States Postal Service delivery to Defendant John (“Jay”) Ashcroft and Defendant State of Missouri by email transmission to each Defendant’s attorney of record at John.Sauer@ago.mo.gov and Jeff.Johnson@ago.mo.gov.

Respectfully Submitted,

A handwritten signature in black ink, appearing to read "Paul Berry III", with a long horizontal line extending to the right.

Paul Berry III
Plaintiff