

**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.

MOTION TO RECONSIDER

VERIFIED MOTON FOR TEMPORARY RESTRAINING ORDER

Plaintiff, Paul Berry III, and upon knowledge with respect to information, hereby allege for this Motion to Reconsider Plaintiff Berry's Verified Motion for Temporary Restraining Order pursuant to Rule 54(b) of the Federal Rules of Procedure, state as follows:

INTRODUCTION

Plaintiff Berry seeks the Court to review and reconsider the Court's denial (Doc. 25) of Counts I, II and III of the underlying temporary restraining order application (Doc. 2) pursuant to Rule 54(b), due to facts and information publicly-disclosed by Defendants and

previously-unknown to Plaintiff Berry prior to the Court's TRO hearing, which are relevant to the Court's previous denial of the instant TRO. The facts and information publicly-disclosed by Defendants and previously-unknown to Plaintiff Berry prior to the Court's TRO hearing are of a nature that establish irreparable harm to Plaintiff Berry necessary for the Court to reconsider and grant Counts I, II and III of the instant TRO application.

STANDARD OF REVIEW

"The Federal Rules of Civil Procedure do not mention motions for reconsideration."

Elder-Keep v. Aksamit, 460 F.3d 979, 984 (8th Cir. 2006) (citation omitted). However, Rule 54(b) provides that "any order or other decision, however designated, that adjudicates fewer than all the claims or the rights and liabilities of fewer than all the parties does not end the action as to any of the claims or parties and may be revised at any time before the entry of a judgment adjudicating all the claims and all the parties' rights and liabilities." "The exact standard applicable to the granting of a motion under Rule 54(b) is not clear, though it is typically held to be less exacting than would be a motion under Federal Rule of Civil Procedure 59(e), which is in turn less exacting than the standards enunciated in Federal Rule of Civil procedure 60(b).

Bancorp Servs., L.L.C. v. Sun Life Assur. Co. of Canada, No. 00-CV1073, 2011 WL 1599550, at *1 (E.D. Mo. Apr. 27, 2011).

"A court may reconsider an interlocutory order to 'correct any clearly or manifestly erroneous findings of fact or conclusions of law.'" Id. (quoting Jones v. Casey's Gen. Stores, 551 F. Supp. 2d 848, 854 (S.D. Iowa 2008)). However, "[t]he scope of the motion for reconsideration is critical A motion for reconsideration is not a vehicle to identify facts or legal arguments

that could have been, but were not, raised at the time the relevant motion was pending.” SPV-LS, LLC v. Transamerica Life Ins. Co., 912 F.3d 1106, 1111–12 (8th Cir. 2019) (quoting Julianello v. K-V Pharm. Co., 791 F.3d 915, 923 (8th Cir. 2015)). “Nor may a motion for reconsideration serve to introduce evidence that the movant could have produced before the district court decided the prior motion.” Id. (citing Julianello, 791 F.3d at 922); see also Hagerman v. Yukon Energy Corp., 839 F.2d 407, 414 (8th Cir. 1988) (stating that motions for reconsideration cannot be used to introduce new evidence or legal theories that “could have been adduced during pendency of the [relevant] motion” (quoting Rothwell Cotton Co. v. Rosenthal & Co., 827 F.2d 246, 251 (7th Cir. 1987))).

NEW EVIDENCE PREVIOUSLY UNAVAILABLE TO PLAINTIFF BERRY

1. The Court’s hearing and decision of the instant TRO occurred on May 9, 2022.
2. On May 12, 2022, the Missouri Senate voted to pass a congressional map bill previously-voted for passage by the Missouri House on May 9, 2022 (“2022 Missouri Congressional Map”).
3. On May 12, 2022, the Missouri Senate voted to immediately end the General Session of the 101st Missouri Senate one day earlier than the statutory deadline to end the General Session of the 101st Missouri Senate and prior to the Missouri Pro Tem Senator Dave Schatz actually signing 2022 Missouri Congressional Map bill, which provides 2022 Missouri Congressional Map bill as a matter of law can not and has not been sent to the Missouri Governor for consideration of signage, veto or no action.

4. On May 13, 2022, the Missouri Governor made the following statement by his official Facebook account¹ regarding the Senate's vote to pass the Missouri House congressional map bill voted on by the Missouri Senate on May 12, 2022:

“Statement on General Assembly’s Proposed Congressional Redistricting Map: We are thankful and encouraged that the General Assembly was finally able to agree on a map for Missouri’s congressional districts. We understand that timing is an important consideration and that implementation by local elected officials will be burdensome with less than three months until Missouri’s primary election. This is why, while we have not yet received the bill, my office has already started the review process of the proposed map. We will be prepared to take action soon after the bill is sent to my desk on May 18.”

5. On May 11, 2022, two (2) days after the hearing on the instant TRO, Defendants with Missouri local election officials participated in an interview with Associated Press,² which states:

“Republicans currently hold six of Missouri’s eight U.S. House seats. Ashcroft had been among those advocating for an approach that would give Republicans a shot at winning seven of those seats. But some GOP legislative leaders feared that could backfire by spreading Republican voters too thin. The debate more recently has focused on efforts to shore up GOP strength in the 2nd Congressional District in suburban St. Louis, the only one which is relatively competitive. Earlier this week, the House passed another attempt at a redistricting plan that is now pending in the Senate. Even if the Senate passes that plan, “my concern is that it will turn out to be too late for all the work that has to be done, and I’m afraid it will cause confusion and problems in the August election, and I do not want that to happen,” Ashcroft said. His concerns were echoed by Shane Schoeller, president of the Missouri Association of County Clerks & Election Authorities. If the Legislature were to pass a redistricting plan by Friday and Gov. Mike Parson were to quickly sign it, election authorities would have only about one week to make the necessary changes before the state’s centralized voter registration system is locked in place on May 25 for the preparation of ballots that must be available for absentee voters in mid-June, Schoeller said. “If they’re concerned about fair and accurate elections, they cannot pass a map this week and be assured that the congressional districts will be accurate when voters go to vote,” said Schoeller, a Republican who is the Greene County clerk. The time crunch poses a problem primarily for counties that are split among

¹ <https://www.facebook.com/GovMikeParson> (May 13, 2022, 2:43pm)

² <https://apnews.com/article/2022-midterm-elections-voting-legislature-census-2020-e6244aaa12a4dc355609148bd2374341>

multiple congressional districts. The latest redistricting plan passed by the state House would split several counties in the St. Louis and Kansas City areas, as well as Columbia's home of Boone County, Webster County to the east of Springfield, and Camden County, which contains part of the Lake of the Ozarks."

6. On May 11, 2022, two (2) days after the hearing on the instant TRO, Defendants with Missouri local election officials participated in an interview with St. Louis Public Radio³, which states:

"Before he entered the Missouri Senate lounge, state Rep. Dan Shaul reached into his pocket and took out a mint. The chairman of a House committee redrawing Missouri's eight congressional districts was expecting to present a plan his colleagues passed earlier this week. He remarked, "It's kind of ironic that we're eating Life Savers." Shaul's quip turned out to be prophetic: The Senate committee handling congressional redistricting gavelled in on Thursday afternoon and then recessed just seconds later. Secretary of State Jay Ashcroft called on lawmakers to abandon their last-ditch attempt to draw a map before Friday's adjournment. Ashcroft says there's legal precedent for using the existing map, but others disagree. Missouri's congressional redistricting impasse has stretched on for months. The numerous conflicts include whether to make the districts more favorable to Republicans and how to change Missouri's 2nd Congressional District in the St. Louis area. The House-passed map likely keeps the existing congressional breakdown of six Republicans and two Democrats. Lawmakers are trying to push through a revised plan in the final week of session. But in an interview on Thursday, Ashcroft said passing a new map before adjournment Friday would create tremendous logistical issues for local election officials. Specifically, they need time to move voters whose congressional districts change because of whatever map that legislature passes. Ashcroft says they would need to potentially change scores of people in less than a week. "The concern is that you'll get the wrong ballot, because there's not enough time for the local election authorities to do the double-checking and triple-checking that we like to do," Ashcroft said. "We like to be methodical and use a lot of checklists and go over things multiple times." Local election officials like Greene County Clerk Shane Schoeller have been sounding alarm bells for months that failure to pass a congressional map would present a logistical nightmare in the run-up to the Aug. 2 primary. "There's a lot of addresses you have to move any time you need to move districts," Schoeller said. "Even if theoretically they thought they completed all the work, as I told people there's no time to go and check the work. It would be like building a house and a family moving into it — but nobody ever inspected the home to make sure it was built correctly." Frozen in time? Ashcroft contends that if lawmakers don't pass a map, courts are likely to require candidates to run in districts that were created in 2011. That's based on precedent known as the Purcell

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<https://news.stlpublicradio.org/2022-05-12/ashcroft-to-legislature-drop-last-ditch-attempt-to-redraw-missouri-congressional-map>

principle, in which federal judges are hesitant to make election-related rulings close to when voters go to the polls. Other election experts disagree with that assumption, contending that having elections based on a map created 10 years ago violates prohibitions against having districts of unequal populations. They expect federal courts to draw what's known as a "least changed map" that alters boundaries due to population shifts — but keeps the map somewhat similar to the current one. When asked if he was worried about a federal court ending up drawing a map, Ashcroft said, "I'm actually not concerned about that." "The United States Supreme Court has been very clear that federal courts should not be required to draw new maps," Ashcroft said. "Why? Because they're afraid it will cause confusion and difficulties running the election well. We are at that point now." Ashcroft said he didn't speak out earlier because, among other things, letters were sent to lawmakers in January outlining "the dates we needed to be able to close our voter registration system to make sure this went" smoothly. "And I have communicated these concerns to the legislators more in a private manner, because I didn't want to be confrontational about it," Ashcroft said. "I know that leadership was told very clearly by the [county clerks] a week or two weeks ago it's too late. And when it looked like it was going to continue, I had to stand up for the local election authorities." Ashcroft, a Republican, was a proponent of creating a map likely to elect seven Republicans and one Democrat — a proposal that has run into bipartisan opposition in the Missouri General Assembly. If lawmakers don't pass a map, it's likely that the end result will help Democrats — because either a 2011 map or a slightly altered plan would keep the 2nd Congressional District competitive. "I think the data would suggest that it's better for Democrats to stay with the 2020 (election) map and use that in 2022 than for a Republican-controlled legislature to make a more pro-Republican map," Ashcroft said. "I want voters to know with certainty that they will be able to vote. They'll know who to vote on — and their vote will count." Lawmakers are slated to adjourn at 6 p.m. Friday.

7. The only oral argument from Defendants to the instant TRO before the Court was that the Missouri General Assembly could still enact a Missouri congressional map to replace the 2012 Missouri Congressional Map for use during the 2022 Missouri Primary congressional election and for such a reason the Court should deny the instant TRO.

8. Shane Schoeller, president of the Missouri Association of County Clerks & Election Authorities declares that Defendants intend to lock in place "the state's centralized voter registration system... on May 25 for the preparation of ballots that must be available for absentee voters in mid-June."

9. Missouri Governor states he will consider 2022 Missouri Congressional Map bill on or after May 18, 2022, which still requires the Missouri Senate Pro Tem to sign and deliver 2022 Missouri Congressional Map bill to the Missouri Governor.

10. Plaintiff and the Court were both unaware whether Defendants would enact a new Missouri congressional map to replace the 2012 Missouri Congressional Map prior to the end of the 101st Missouri General Assembly General Session which was constitutionally-required to expire at 6:00pm on May 13, 2022.

11. Plaintiff and the Court were both unaware that a three-judge court would not be empaneled on the date of this Motion, which is one week after the Court was statutorily-required to notify the Chief Judge of the necessity to empanel a three-judge court to adjudicate the underlying complaint.

12. Plaintiff Berry could not have been previously aware of all of the aforementioned facts and evidence prior to the instant TRO hearing date of May 9, 2022, because all such aforementioned evidence was performed or declared by Defendants after the Court's hearing and denial of the instant TRO on May 9, 2022.

ARGUMENT

Counts I, II and III of the underlying complaint seeks to declare and enjoin Defendants from utilizing the 2012 Missouri Congressional Map to conduct the 2020 Missouri primary congressional election. On May 9, 2022, the Court dismissed the instant TRO application from Plaintiff Berry, without prejudice. Defendants filed a written response to the instant TRO application from Plaintiff Berry, where, inter alia, Defendants argued that Plaintiff Berry's TRO

application was untimely because the Missouri General Assembly still had time to enact a new Missouri congressional map for use during the 2022 Missouri Primary congressional election.

The foundation of the Court's dismissal of the instant TRO was that the 101st Missouri General Assembly could still enact a new Missouri congressional map during the General Session of the Missouri General Assembly, which expired at 6:00pm on May 13, 2022. On May 12, 2022, the Missouri Senate voted to pass a Missouri House bill to enact a new congressional map to replace the 2012 Missouri Congressional Map that Plaintiff Berry contends is unconstitutional for use by Defendants to conduct the 2022 Missouri Primary congressional election and immediately afterwards ended the General Session of the 101st Missouri Senate one day early.

At the date and time of this filing, the Missouri Pro Tem has not signed the Missouri House congressional map bill voted on by the Missouri Senate on May 12, 2022, which is a legal requirement for such House congressional map bill to be sent to the Missouri Governor for consideration of signage, veto or no action. There is no legal reason that prohibited the Missouri Senate Pro Tem from immediately signing the Missouri House congressional map bill voted on by the Missouri Senate on May 12, 2022, and immediately deliver such Missouri House congressional map bill to the Missouri Governor, except for the fact that seconds after the Missouri Senate voted to pass the 2022 Missouri Congressional Map the Missouri Senate voted to end the 101st Missouri Senate General Session one day prior to the date that the Missouri Constitution provides the Missouri Senate may be in general session, and as such, the Missouri Senate Pro Tem was without authority to sign the 2022 Missouri Congressional Map while the

Missouri Senate was out of session.

On May 11, 2022, St. Louis Public Radio released a news article quoting Defendant Ashcroft informing the Missouri General Assembly that it was too late to enact a new Missouri congressional map to conduct the 2022 Missouri Primary congressional election, which directly conflicts with their core legal position against the instant TRO, specifically, the Court should not grant the instant TRO because the Missouri General Assembly still had time to enact a Missouri congressional map for use during the 2022 Missouri Primary congressional election.

Nor was Plaintiff Berry aware that Defendants intended on “locking” the state’s centralized voter registration system... on May 25 for the preparation of ballots that must be available for absentee voters in mid-June”, a declared act by Defendants that is not set by Missouri statute, rule or any publicly-published state administrative procedure, thus Plaintiff Berry was unaware of any such intended act by Defendants prior to the Court’s hearing of the underlying TRO.

CONCLUSION

By the underlying complaint, Plaintiff Berry seeks to defend his “one man, one vote” right against Missouri pursuant to the Equal Protection Act. To the instant TRO, Defendants concede by omission that the 2012 Missouri Congressional Map is malappointed based upon the 2020 United States Census results. By the additional circumstances and facts plead by this Motion, Plaintiff Berry is under irreparable harm by Defendants actively utilizing the unconstitutional 2012 Missouri Congressional Map to conduct the 2022 Missouri Primary congressional election.

While the excuse of “I left my mid-term paper in my car” may suffice some professors, assuredly such an excuse would be rejected by all faculty after the school year is over, which analogizes the instant argument against Missouri. The last day of the 101st Missouri Senate General Session was actually concluded a day early by vote of the Missouri Senate in unprecedented fashion in recent history, immediately after voting in favor of the congressional map passed by the Missouri House that was subsequently passed by the Missouri Senate on May 12, 2022.

Instead of the Missouri Senate Pro Tem signing the congressional map passed by the Missouri House immediately upon a passage vote the Missouri Senate (or 24 hours afterwards, as such bill was passed before 6:00pm on May 12, 2022), no congressional map passed by the Missouri House and further passed by the Missouri Senate has been delivered to the Missouri Governor.

The Missouri Governor declares that no congressional map bill has been delivered to him by the Missouri General Assembly and does not anticipate any such congressional map bill being delivered to him for consideration of signage, veto or no action. Further, there is no guarantee or any ability to demand that the Missouri Senate Pro Tem sign the Missouri House congressional map voted for on May 12, 2022, or the Missouri Governor to sign into law any such Missouri House congressional map into law on May 18 2022, or otherwise.

There is no excuse for the Missouri Senate not to stay in session as permitted by Missouri law until 6:00pm on May 13, 2022, for the Missouri Senate Pro Tem to sign the Missouri House

congressional map voted for on May 12, 2022. Within hours after the Court denying the instant TRO application on May 9, 2022, Defendants make declarations to different media sources stating that the Missouri General Assembly is out-of-time to enact a new congressional map to replace the 2012 Missouri Congressional Map, while declaring orally and by written reply before the Court that the 101st Missouri General Assembly still had time to enact a new congressional map to replace the 2012 Missouri Congressional Map prior to the 2022 Missouri Primary congressional election.

Further, since the instant TRO clearly does not seek to restrain Missouri from enacting any new Missouri congressional map, public interest does not favor Defendants right to enact a congressional map free from unnecessary intervention from the Court when Plaintiff Berry's instant TRO does not seek any such injunction against Defendants.

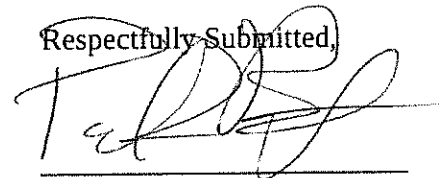
The entire purpose of 28 U.S.C. § 2284 is to provide relief against all branches of a state government (executive, legislative and judiciary) who stand with an unconstitutional map established by the Election Clause that may be utilized in congressional election to by declaratory and injunctive relief from the Federal District Court. 28 U.S.C. § 2284(b)(3) provides Plaintiff Berry relief by temporary restraining order against Missouri under the instant circumstances and facts pleading specific irreparable harm until a three-judge court can try the underlying complaint, to which, the Court states can not be expedited until a three-judge court is empaneled, which has not occurred. The instant TRO application provides the quintessential facts and circumstances where a TRO should issue against a state pursuant to 28 U.S.C. § 2284(b)(3).

In the words of musician Johnny Cash when denied cashing a check without identification at the bank “if I can’t cash it, it don’t mean nothing, it’s just a piece of paper.” This Honorable Court should prohibit Missouri from making the same true with the United States Constitution that protects Plaintiff Berry’s statutory and constitutional right to relief from the Court to be represented in our United States Congress with a constitutional congressional map. Plaintiff Berry contends that Counts I, II and III of the instant TRO meets the threshold for immediate issuance by the Court, post haste.

PRAYER FOR RELIEF

WHEREFORE, Plaintiff Berry requests the Court reconsider its previous order and issue a temporary restraining order on Counts I, II and III of the underlying TRO motion prohibiting the Missouri Secretary of State and State of Missouri from any further utilization of the 2012 Missouri Congressional Map to conduct the 2020 Missouri Primary congressional election.

Respectfully Submitted,



Paul Berry III
Plaintiff, Pro Se
11932 Barbara
Maryland Heights, MO 63043
314-755-9252
PBIIIUSA@gmail.com

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", written over a horizontal line.

Paul Berry III
Plaintiff

RETRIEVED FROM DEMOCRACYDOCKET.COM