UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF MISSOURI

PAUL BERRY III,	)	
	)	
Plaintiff,	)	
	)	Case No. 4:22-cv-00465-JAR-JLK-AGF
v.	)	
	)	
JOHN R. ASHCROFT, et al.,	)	
	)	
Defendants.	)	

DEFENDANTS' MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Defendants Secretary Ashcroft and the State of Missouri, by and through their undersigned counsel, respectfully request that the Court dismiss Plaintiff Berry's First Amended Complaint, Doc. 45, under Federal Rules of Civil Procedure 12(b)(1) and (b)(6) for failure to state a claim and because the court lacks jurisdiction because Berry has no standing.

The Amended Complaint fails to allege sufficient facts that show his claim for racial gerrymandering is plausible on its face. Berry's single factual allegation that legislatures "packed" African American voters into Congressional District 1 is based on a lone state senators comments during an interview that the Black Caucus gave the map broad support to pass the map. Even if that comment were enough, and it is not, the state senator also identified a political and race-neutral reason for District 1: to weaken support for the incumbent. The Amended Complaint further fails to allege any facts showing that the legislature varied from traditional districting tools or considered race outside of the context of complying with the Voting Rights Act. All of this fails to push the allegations of racial gerrymandering over the plausibility line as Rule 8(a) requires.

The Amended Complaint further fails to show that Berry has standing because he only requests relief that would otherwise violate the principle of one person, one vote, and he has limited his claims to the 2022 Missouri primary contest. Even if he could show a plausible claim and

persuade the Court that he had a likelihood of success on the merits, federal courts cannot change the rules of an election this close to the contest. *See Merrill v. Milligan*, 142 S. Ct. 879, 882 (Feb. 7, 2022) (Kavanaugh, J., concurring) ("practical considerations sometimes require courts to allow elections to proceed despite pending legal challenge"). As a result, because the Court cannot grant the relief he requests and cannot grant effective relief, he lacks standing and the case must be dismissed.

Dated: June 10, 2022

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2022, the foregoing was filed electronically through the Court's CM/ECF system, to be served electronically upon all parties to the case. Out of an abundance of caution, counsel has also sent a copy via first-class mail to:

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/s/ Jeff P. Johnson

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DEFENDANTS' MEMORANDUM IN SUPPORT OF THE MOTION TO DISMISS THE FIRST AMENDED COMPLAINT

Plaintiff Berry now claims that when the Missouri General Assembly passed the new 2022 congressional map, the Missouri General Assembly racially gerrymandered the First District by "packing" African American voters that reside in the cities of Bridgeton and Maryland Heights into that district, when they had formerly been in the Second District. Doc. 45, ¶¶ 25-29. He bases this accusation on the comments of one state senator—a Democrat who is running for Congress in the first district and voted *for* the map—made after the map was enacted. *Id.* ¶ 9. He asks this court to "modify the 2022 Missouri Congressional Map by removing African American voters who reside in the City of Maryland Heights from Missouri Congressional District 1 into Missouri Congressional District 2." *Id.* at 12. He also asks that the court prevent the Secretary from using the newly enacted map to conduct the August 2, 2022 primary. *Id.*

The Amended Complaint fails for a number of reasons and the Court should dismiss it under Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure.

First, Berry's suit fails to state a claim because he has not pleaded factual allegations that plausibly allege that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Cooper v. Harris*, 137 S. Ct. 1455, 1463 (2017) (quoting *Miller v. Johnson*, 515 U.S. 900, 916 (1995)). Nor has he pleaded

that the map is not narrowly tailored or otherwise fails strict scrutiny. *Id.* at 1464. Indeed, the allegations do not even support the conclusory statements he pleads. As a result, using no more than the Amended Complaint and materials cited in it, the Amended Complaint fails to plead a violation of either the Equal Protection Clause of the Fourteenth Amendment or § 2 of the Voting Rights Act.[1]

Second, the Court cannot give Berry the relief he requests, and therefore he lacks standing. Even if he pleaded a constitutional or statutory violation and the Court found either violation (and neither exist), a court's remedy cannot itself violate the constitution. *INS v. Pangilinan*, 486 U.S. 875, 883 (1988) ("A Court of equity cannot, by avowing that there is a right but no remedy known to the law, create a remedy in violation of law."). Here, Berry asks that the Court modify the 2022 Congressional Map by removing African American voters from one district and adding them to another. Doc. 45 at 12. Assuming that he means that those jurisdictions should be added and not just certain voters, the 2022 Congressional Map is numerically equal and removing/adding those cities would violate the principle of one person, one vote. *Karcher v. Daggett*, 462 U.S. 725, 730 (1983) (holding congressional districts must "achieve population equality as nearly as is practicable").

Third, Berry's relief is centered on the August 2, 2022 primary, and any modifications to the map at this late stage would be severely disruptive and likely unfeasible to implement and comport with federal and state law. *See Merrill v. Milligan*, 142 S. Ct. 879, 882 (Feb. 7, 2022)

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[1] It's unclear from the Amended Complaint whether Berry asserts a claim under section 2 of the Voting Rights Act. Doc. 45, at 12. To the extent he does, "no private right of action exists to enforce § 2 of the Voting Rights Act[.]" *Arkansas State Conf. NAACP v. Arkansas Bd. of Apportionment*, No. 4:21-CV-01239-LPR, 2022 WL 496908, at *9 (E.D. Ark. Feb. 17, 2022), *appeal docketed*, No. 22-1395 (8th Cir. Feb. 24, 2022).

(Kavanaugh, J., concurring) (noting that "practical considerations sometimes require courts to allow elections to proceed despite pending legal challenge[s]"). The primary is mere weeks away and federal law requires local jurisdictions to print and mail ballots to certain voters by June 17, 2022. 52 U.S.C. § 20302(a)(8)(A) (requiring the State to transmit a validly requested ballot not later than 45 days before the election). As the Secretary has publicly stated, for practical reasons, any changes to the map had to be finalized weeks ago. In February, the Supreme Court lifted a district court injunction that sought to effect changes to Alabama's map before the November 2022 election, and Berry's proposed timeline here is much, much narrower. Indeed, the practical obstacles to changing the map are insurmountable on this shortened timeline. *Merrill*, 142 S. Ct. at 882; *see also League of Women Voters of Fla., Inc. v. Fla. Sec'y of State*, 32 F.4th 1363, 1370–72 (11th Cir. 2022) (per curiam) (applying "*Purcell* principle" in staying district court order permanently enjoining the operation of new state election laws for August 23, 2022, primary election).

For all these reasons, the Court should dismiss the First Amended Complaint.

LEGAL STANDARD

Article III of the Constitution only grants federal courts the power to hear "Cases" or "Controversies." *Teague v. Cooper*, 720 F.3d 973, 976 (8th Cir. 2013). The party invoking the Court's jurisdiction must establish standing. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992); *Iowa League of Cities v. EPA*, 711 F.3d 844, 869 (8th Cir. 2013). This requires showing an "injury in fact," "a causal connection between the injury and the conduct complained of," and that it is "'likely,' as opposed to merely 'speculative,' that the injury will be redressed by a favorable decision." *Lujan*, 504 U.S. at 560–61. "Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court." *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 107,

(1998). "[S]tanding is not dispensed in gross; rather, plaintiffs must demonstrate standing for each claim that they press and for each form of relief that they seek." *TransUnion LLC v. Ramirez*, 141 S. Ct. 2190, 2208 (2021).

In addition to standing, complaints "must contain 'a short and plain statement of the claim showing that the pleader is entitled to relief.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 677–78 (2009) (quoting Fed. R. Civ. P. 8(a)(2)). To survive a Rule 12(b)(6) motion to dismiss, a complaint's "[f]actual allegations must be enough to raise a right to relief above the speculative level," which "requires more than labels and conclusions, and a formulaic recitation of the elements of a cause of action will not do." *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007). Although the court accepts all factual allegations as true, "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements, do not suffice." *Iqbal*, 556 U.S. at 678. "Where a complaint pleads facts that are 'merely consistent with' a defendant's liability, it 'stops short of the line between possibility and plausibility of 'entitlement to relief.'" *Id.* (quoting *Twombly*, 550 U.S. at 557). Although "*pro se* complaints are to be construed liberally, they still must allege sufficient facts to support the claims advanced." *Glover v. Bostrom*, 31 F.4th 601, 605 (8th Cir. 2022) (citation omitted).

"[C]ourts have 'wide discretion to allow affidavits, other documents, and a limited evidentiary hearing to resolve disputed jurisdictional facts under Rule 12(b)(1).' " *Davis v. Anthony, Inc.*, 886 F.3d 674, 677 (8th Cir. 2018). Under a Rule 12(b)(6) standard, a court may "consider matters incorporated by reference or integral to the claim, items subject to judicial notice, matters of public record, orders, items appearing in the record of the case, and exhibits attached to the complaint whose authenticity is unquestioned; without converting the motion into one for summary judgment." *Zean v. Fairview Health Servs.*, 858 F.3d 520, 526 (8th Cir. 2017) (quotation

marks omitted). A federal court can take judicial notice of a state legislature's redistricting efforts. *Whitcomb v. Chavis*, 403 U.S. 124, 139 (1971).

ARGUMENT

I. The First Amended Complaint fails to state a claim.

The Amended Complaint and its incorporated materials show that Berry cannot state a claim for racial gerrymandering because he did not allege facts showing that "race was the predominant factor motivating the legislature's decision to place a significant number of voters within or without a particular district." *Cooper*, 137 S. Ct. at 1463. Indeed, the cited news interview confirms that *political* considerations, not racial considerations, weighed prominently for the Black Caucus in supporting passage of the map. The Amended Complaint does not provide factual allegations that allow an inference that the General Assembly racially gerrymandered District 1.

At the outset, the Secretary notes that the Amended Complaint appears to confuse how a § 2 vote dilution claim works. Usually, the plaintiff attempts to show that the state legislature is trying to deny a minority group representation by spreading their votes among several districts or multimember districts. *Thornburg v. Gingles*, 478 U.S. 30, 52 (1986). Berry appears to be claiming that adding more African American voters to District 1 could only be racially motivated because the African American minority in District 1 was already successful in electing African American representatives. But the success of African American politicians in District 1, as alleged by Berry, makes it more plausible, rather than less, that the minority group in District 1 is politically cohesive—a threshold condition to determine whether a vote dilution claim is possible. *Cooper*, 137 S. Ct. at 1470. So under existing precedent, mere consideration of one district's racial makeup does not mean race was the predominating factor. *Id.*

The Supreme Court has explained that successful complaints for racial gerrymandering usually require allegations that the enacted plan conflicts with traditional race-neutral redistricting principles. *Bethune-Hill v. Virginia State Bd. of Election*s, 137 S. Ct. 788, 799 (2017); *see also Miller v. Johnson*, 515 U.S. 900, 913 (1995). As of 2017, the Court had "not affirmed a predominance finding, or remanded a case for a determination of predominance, without evidence that some district lines deviated from traditional principles." *Bethune-Hill*, 137 S. Ct. at 799. The Secretary knows of no exception, and Berry has not alleged any conflict with traditional districting principles. Though Berry has alleged that African Americans are often elected in District 1, the only fact he alleges about the voters is that the Black Voter Age Population in the city and county of St. Louis is less than 50 percent. Doc. 45 at ¶¶ 18-20. He has otherwise alleged no facts about the previous or current racial makeup or traditional districting criteria of the congressional districts.

Berry's only allegation as to the Missouri General Assembly's intent comes from one state senator's interview on a news show. Because this interview is incorporated by reference in Berry's pleading, the Court should listen to the relevant portion in its entirety for context. *See* The Marc Cox Morning Show, *Ep. "I'm there for the community my democrat community*, at 2:50-9:05 (May 26, 2022) ("Interview").[2] The state senator makes no claims about the Missouri General Assembly's intent in drawing the map or that the committee used race in drawing the map. The state senator stated that he was on the committee and that the Black Caucus wanted to make sure that "the only congressional district protected by the Voting Rights Act" had "the most amount of minority representation." *Id.* at 5:15-6:20. The senator explained that "[i]t was really the focus of *the caucus* that the district followed that majority-minority representation, not now, but you know

[2] *Available at* https://www.audacy.com/971talk/podcasts/the-marc-cox-morning-show-20668/im-there-for-the-community-my-democrat-community-1434637585.

when we're doing this again in ten years. So it got broad support on both sides of the *Black Caucus* to pass that map." *Id.* (emphasis added). At most, the Interview merely shows some concern about complying with the Voting Rights Act—an interest the Supreme Court has long assumed was a compelling interest. *Cooper*, 137 S. Ct. at 1469.

Moreover, the Amended Complaint does not plausibly allege that this is more than just the post-enactment personal view of one legislator or, at best, the Black Caucus. *Tennessee Valley Auth. v. Hill*, 437 U.S. 153, 193 (1978) (such personal views cannot change pre-enactment intent of whole legislature). "What motivates one legislator to make a speech about a statute is not necessarily what motivates scores of others to enact it, and the stakes are sufficiently high for us to eschew guesswork." *United States v. O'Brien,* 391 U.S. 367, 384 (1968). Because intent is a "daunting" task "[w]hen the actor is a legislature and the act is a composite of manifold choices," *League of United Latin Am. Citizens v. Perry*, 548 U.S. 399, 418 (2006), it is not plausible to infer that the entire legislature had the intent to use race from these remarks. That is especially true when the legislator was talking about one faction within the Missouri General Assembly. The state senator did not claim that the Black Caucus vote was necessary to the map's creation or enactment or that the map targeted the racial makeup of the current districts. That state senator did not cosponsor the bill, and House Bill 2909 passed 101-47 in the Missouri House and 22-11 in the Missouri Senate.[3] Berry does not plausibly claim that the Missouri General Assembly passed the map based on the race of any voter in any district.

The cited newscast similarly shows that other interests predominated the drawing of District 1. The host asked the state senator whether District 1 reflected the priority of defeating

[3] Missouri House of Representatives, HB 2909 (last visited June 9, 2022), *available at* https://house.mo.gov/Bill.aspx?bill=HB2909&year=2022&code=R.

the progressive vote that supported Representative Cori Bush by finding more moderate voters; he responded, "I believe so, yes. Yes, that's accurate." Interview at 6:54-7:21. Crediting the state senator's remarks show a race-neutral purpose for his support for changing the boundaries of District 1—curtailing political support for the current representative.

For all these reasons, the Amended Complaint fails to plausibly allege that District 1 was racially gerrymandered.

II. The Court cannot grant the relief requested in the First Amended Complaint.

Even if the Amended Complaint had made sufficient factual allegations (and it did not), the Court cannot grant the relief requested because it requests relief that would undo the numerical equality the Missouri General Assembly achieved (which Berry previously demanded), and no injunction may issue against the August primary at this late stage. As a result, because the Court cannot order relief that will redress his injury, Berry lacks standing.

The Amended Complaint requests that the Court modify the 2022 Congressional Map by "removing African American voters" who reside in the City of Maryland Heights from District 1. Doc. 45, at 12. The Amended Complaint also asks for the "African American residents of the City of Bridgeton" to be included in District 2. Doc. 45 at ¶ 28. According to the 2020 U.S. Census, the populations of these cities are 28,024 and 11,380, respectively, or 39,404 combined.[4] Berry asks for a permanent injunction against "utilizing the 2022 Missouri Congressional Map to conduct the 2022 Missouri Primary congressional election, limited to any part of a congressional district that resides in St. Louis County," *id.*, and declaring that Districts 1 and 2 of the "2022 Missouri

[4] U.S. Census Bureau, *QuickFacts*: *Bridgeton city Missouri* (June 9, 2022), *available at* https://www.census.gov/quickfacts/bridgetoncitymissouri; U.S. Census Bureau, *QuickFacts: Maryland Heights city, Missouri* (June 9, 2022), *available at* https://www.census.gov/quickfacts/marylandheightscitymissouri.

Primary congressional election violate[]" the Voting Rights Act[5] and the Equal Protection Clause of the Fourteenth Amendment. *Id.* Thus, Berry does not request relief beyond the August 2, 2022 primary.

Berry's requested relief, that the Court redraw the map to move two cities into a different congressional district, would likely violate the one person, one vote principle. Instead of having congressional districts that deviate by one person, Berry proposes that the new map move nearly 40,000 residents, making District 1 have nearly 40,000 less residents than six districts and nearly 80,000 less residents than District 2. That is significantly less equal than the current map and, under these circumstances, not achieving "population equality as nearly as is practicable." *Karcher*, 462 U.S. at 730; *see also Mahan v. Howell*, 410 U.S. 315, 339 (1973) (Brennan, J., concurring) (goal of population equality in federal congressional redistricting scheme is "paramount"). It is well-established that the Court cannot redraw a map that allegedly violates the Constitution in one way to violate it another way. *Hedges v. Dixon Cnty.*, 150 U.S. 182, 192 (1893) ("Courts of equity can no more disregard statutory and constitutional requirements and provisions than can courts of law."); *INS*, 486 U.S. at 883.

The Court also cannot grant any relief because the Amended Complaint is only concerned with the August 2, 2022 primary, and any changes to the election's rules at this late stage would be extremely disruptive and contravene federal law. *See League of Women Voters of Fla., Inc.*, 32 F.4th at 1370–72 (applying "*Purcell* principle" in staying district court order permanently enjoining the operation of new state election laws for August 23, 2022, primary election). Indeed, changing the boundaries this late would be practically infeasible. The Supreme Court has

[5] *But see* n.1, *supra*.

repeatedly emphasized that last-minute changes to election laws are strongly disfavored, especially given "the imminence of the election." *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). "By changing the election rules so close to the election date . . . the District Court contravened this Court's precedents and erred by ordering such relief. This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (allowing Wisconsin's challenged absentee voter statutes to remain in effect immediately before an election and staying lower court's grant of preliminary injunction) (citing *Purcell,* 549 U.S. at 5); *see also, e.g., Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S. Ct. 9 (2014); *Raysor v. DeSantis*, No. 19A1071, 2020 WL 4006868 (U.S. July 16, 2020). Courts routinely refuse to impose changes to election procedures just weeks before an election—let alone changing procedures that are already in process. *See, e.g.*, *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014) ("The Supreme Court has repeatedly instructed courts to carefully consider the importance of preserving the status quo on the eve of an election.").

Twice this year the Supreme Court has disapproved orders that would have required rewriting federal congressional districts for the 2022 *November* election. *See Merrill*, 142 S. Ct. at 879 (staying a district court order requiring the redrawing of Alabama's congressional districts); *id.* (Kavanaugh, J., concurring) ("[T]his Court's election-law precedents … establish (i) that federal district courts ordinarily should not enjoin state election laws in the period close to an election, and (ii) that federal appellate courts should stay injunctions when, as here, lower federal courts contravene that principle."); *Moore v. Harper*, 142 S. Ct. 1089 (U.S. March 7, 2022) (Kavanaugh, J., concurring in denial of application for stay) ("In their emergency application, … the applicants are asking this Court for extraordinary interim relief—namely, an order from this

Court requiring North Carolina to change its existing congressional election districts for the upcoming 2022 primary and general elections. But this Court has repeatedly ruled that federal courts ordinarily should not alter state election laws in the period close to an election.").

Adhering to this principle is even more justified here, as the State's interests in an orderly election and fulfillment of its officials' duties under federal law are weighty. Notably, local election authorities in Missouri must send ballots overseas to the military for the August 2, 2022 primary more than 45 days before that election—i.e., no later than June 17, 2022. 52 U.S.C. § 20302(a)(8)(A). This means that ballots must be finalized and printed before mailing them. Even if the Court accepts as true that changes could be made in four hours,[6] and the Secretary stresses that is ***not*** possible, the briefing for this motion will not be complete until June 20, 2022, after the federal deadline to ***mail*** certain ballots, let alone print them. This does not include the time needed for briefing substantive issues (the racial makeup of these districts), for conducting the discovery necessary to disprove the casual assertions of racial gerrymandering, and for the Court to rule on these issues.

Because Berry does not request relief as to any election beyond the August 2, 2022 primary—not even in his request for declaratory relief—and the Court cannot practically provide the relief he requests, the Court cannot redress the alleged harms that Berry asserts.

CONCLUSION

For the reasons stated, Berry's First Amended Complaint should be dismissed.

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[6] The Secretary notes that the allegations do not accurately reflect the reality of what must occur—including that any ruling that changes the contours of one congressional district will affect every jurisdiction in each of the districts at issue. The Secretary of State's Office and local election authorities must begin (and did begin) the process of updating the Missouri voter registration database weeks in advance of the deadline to mail the military and overseas ballots for the primary election. This is not a four-hour process.

Dated: June 10, 2022

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CERTIFICATE OF SERVICE

I hereby certify that on June 10, 2022, the foregoing was filed electronically through the Court's CM/ECF system, to be served electronically upon all parties to the case. Out of an abundance of caution, counsel has also sent a copy via first-class mail to:

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