IN THE
SUPREME COURT OF MISSOURI

SC92317

KENNETH PEARSON, ET AL.,

Appellants,

v.

CHRIS KOSTER, ET AL.,

Respondents.

From the Circuit Court of Cole County, Missouri
The Honorable Daniel Green

BRIEF OF THE ATTORNEY GENERAL

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RESPONSE TO APPELLANTS' STATEMENT OF FACTS

In general, the Attorney General simply adopts the Statement of Facts in the brief of the Intervenor-Defendants.[1]

We feel the need to emphasize one point, however – a point made unequivocally in Rule 73.01: "All fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." To dwell on testimony by appellants' own experts and the pleas of their fact witnesses to have the circuit court second-guess legislatures choices where all witnesses conceded choices had to be made is inappropriate.

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[1] Under the Court's scheduling order, the Intervenor-Defendants filed a few hours before the Attorney General. Having reviewed their Statement of Facts, we see no need to restate those facts. Similarly, we have shortened Part IV of the Argument so as to avoid unnecessary duplication of points already made.

ARGUMENT

Much of our discussion below is directed to the constitutional standard – to the question of what "compact as may be" really means. We dedicate our attention to that question because this case is of greater importance than just to evaluate the constitutionality of HB 193. The "compact as may be" language appears in the instructions regarding Missouri House and Senate redistricting as well. Mo. Const. Art. III, §§ 2, 5. So this Court will face the question of its application to the Missouri House districts should *Johnson v. Carnahan;* 12AC-CC00056 return to this Court after a decision by the Circuit Court for Cole County. The new bipartisan apportionment commission recently appointed by Governor Nixon will face the question when it holds its first meeting on February 18. Should this Court reverse the decision below and hold that HB 193 violates the constitutional requirements, the General Assembly will need to know how to apply the "compact as may be" standard. And regardless of what else happens this year, in ten years the commissions and the General Assembly will need to know within what parameters they must work – or a repeat of this year's litigation may be inevitable.

I. Plaintiffs bear the burden of showing that HB 193 "clearly and undoubtedly" violates the constitutional requirement that congressional districts (like legislative districts) be "as compact as may be."

Despite our plea for guidance, we must begin with a standard that may interfere with the Court's ability to give such guidance.

This Court has long held that anyone challenging the constitutionality of a statute must prove that the statute "clearly and undoubtedly" violates the constitution. This Court very recently reiterated that rule:

> A statute is presumed valid, and the Court will uphold it unless it " 'clearly and undoubtedly' conflicts with the constitution. … This Court 'resolve[s] all doubt in favor of the [statute's] validity.' "

Ocello v. Koster, 345 S.W.3d 187, 196 (Mo. banc 2011), quoting *Prokopf v. Whaley*, 592 S.W.2d 819, 824 (Mo. banc 1980), and *Westin Crown Plaza Hotel Co. v. King*, 664 S.W.2d 2, 5 (Mo. banc 1984).

There is no reason for this case to be an exception to that general rule. And as discussed below and by the trial court, plaintiffs failed to meet that requirement: they may have cast doubt on the validity of HB 193, but they did not prove that it "clearly and undoubtedly" violates a constitutional

provision that lacks precision. In fact, the map and plan established by HB193 do meet the constitutional requirement, properly understood: though there is some irregularity in the lines, and a few places where there are appendages, they are insufficient to make the plan less compact than constitutionally required.

II. "As compact as may be" requires that districts overall be reasonably compact, given the circumstances before the General Assembly.

a. The phrase "as may be," considered in the context of the constitution, allows for legislative discretion.

At issue here is a five-word phrase that appears in the constitutional instructions for all state-level redistricting: "as compact as may be." Art. III, §§ 2, 5, & 45. That phrase is imprecise from beginning to end.

The constitution does not define "compact." Thus everyone involved in this case – courts and litigants alike – cites dictionary definitions. Those definitions give no precision to the term. Indeed, they at least implicitly confirm that the term is a relative one. The definition of "compact" itself features imprecise adverbs: "firmly," "predominately," "closely." Webster's Third New International Dictionary (1993) at 461. It speaks of the absence of "very slight intervals or intervening space." *Id.* One definition is "marked by concentration in a limited space" (*id.*), a definition that suggests why a

"compact" district in a heavily populated urban area like St. Louis would look quite different from a "compact" district in a sparsely populated rural area like far Northwest Missouri. That particular definition proceeds to use language that fits patterns of redistrict seen elsewhere: "without straggling or rambling over a wide area." *Id.* But again, the terms are imprecise. So "compact" does not really tell us what either district must look like – except that it must be more closer to a circle or a square than to a narrow line that rambles from one corner of the state to another.

"Compact" is paired with a modifying phrase, "as may be." But that phrase, too, is far from precise. It is used many times in the Missouri constitution. Usually, it assigns to the legislative (though sometimes executive) body responsibility for exercising discretion. In fact, in almost every other instance, "as may be" is followed by some defining or explanatory term that suggests a legislative value judgment, among them:

- "as may be provided by law" (Art. I, § 27; Art. V, §§ 13, 17; Art. IX, § 10; Art. XII, § 2(b));
- "as may be prescribed by law" (Art. I, § 22(a); Art. X, § 14);
- "as may be necessary" (Art. III, §§ 37(b), 37(h), 47);
- "as may be determined" (Art. IV, § 43(b); Art. X, § 6(a));

- "as may be deemed in the public interest" (Art. VI, § 21);
- "as may be fair and equitable" (Art. VI, § 32(b));

"Provided" and "prescribed by law," of course, make the exercise of legislative discretion a prerequisite. But value-laden terms like "public interest" and "fair and equitable," though perhaps permitting judicial review, reflect a constitutional recognition of the need for fact-based policy decisions – that is, for legislative discretion.

Other than in the redistricting context, the constitution uses the phrase "as may be" without a succeeding, limiting term only once: in Art I, § 15, where it defines the right against unreasonable search and seizure and sets a requirement for each warrant to describe "the place to be searched, or the person or thing to be seized, as nearly as may be." Even there, we have more direction than in the redistricting context: the constitution adds the word, "nearly." But more important, the assignment is not given to a coequal, non-judicial body. After all, warrants are issued by judges. The constitutional language thus leaves an element of *judicial* discretion – a conclusion supported by the "great deference" given to judges who issue warrants. *See State v. Neher*, 213 S.W.3d 44, 49 (Mo. banc 2007).

Construing "as may be" to permit – if not command – the use of discretion is consistent not just with the usage of the phrase in the

constitution, but with the words themselves. The drafters chose to use the permissive or aspirational "may be," not the mandatory or prescriptive "can be."

And such construction is consistent with the constitutional imposition of competing – and at least arguable more precise and higher priority (at least since *Baker v. Carr*, 369 U.S. 186 (1962)) – criteria: contiguity and equal population. To have the three criteria combine and yet have ideally compact districts[2] would be possible only were the state rectangular, the number of districts evenly divisible by four, and the population evenly dispersed.

Missouri, of course, has irregular shape and borders. Though the number of Congressional districts is now divisible by four, that is a brand-new development. And the population is certainly not evenly dispersed. Thus both those who drafted Art. III, § 45 and the people who voted for the 1945 constitution knew that someone would have to make choices about shapes – *i.e.*, about whether a neighborhood like The Hill in St. Louis would be divided for the sake of improved geometry. Nothing in the language of § 45 suggests that the choices were to be made by someone other than the

[2] Presumably square ones; circles are not possible in any circumstance, because they would leave space between districts.

General Assembly. Indeed, that provision clearly assigns the responsibility to that legislative body. And nothing in the constitution suggests that the legislator who represents The Hill is violating her oath to uphold the constitution by insisting that the neighborhood remain in a single congressional or legislative district, even if doing so makes two or more districts less compact than they otherwise could be.

b. The voters' experience with redistricting before 1945 suggests that they intended to allow legislative discretion.

The constitution must be construed, of course, according to the intent of those who enacted it – the people who voted in 1945. Unfortunately, we have no public declaration of their intent with regard to the words, "as may be." We do not even have news reports, editorials, speeches, or other contemporaneous documents that address those words, from which we might attempt to derive a public understanding. That is hardly surprising; though the 1945 constitution made many significant changes, so far as we have been able to determine no one, during the campaign for its ratification, listed the addition of Art. III, § 45 among them.

We do, however, have something that sheds light on what the voters likely thought: their own history with State Senate and House districts, the context in which the constitution used the phrase "compact[ness] as may be." *See* Art. III, §§ 2, 5, Mo. Const., RSMo. 1939. The State Senate plan in use

starting in 1942 put both Boone and St. Charles counties in the Tenth District. Exhibit 22. The Fifteenth District reached from the Missouri River to Hickory County. *Id.* The Twentieth District paired Springfield and Nevada. *Id.* None of those districts were remotely close to a circle or a square – even though the federal decisions that required closely equal populations were still more than two decades in the future. We have found nothing in the record of events leading to the 1945 vote to suggest that the voters understood that "compact as may be" would dramatically change the rules.

c. The proceedings of the 1943-44 convention suggest that the delegates understood that the language they chose would allow the considerable variation in the shape of districts.

Though the method is certainly indirect, it is possible to infer some of the voters' intent by looking at what happened in the convention drafting the 1945 constitution. There, too, the key is to look at the delegates' experience with past districts, and read their debate about the addition of Art. III, § 45, in light of that experience.

Prior to 1945, the Missouri Constitution said nothing about the shape of congressional districts. But following the 1910 census, federal law did: it required, quite simply and absolutely, that the districts be "compact." *See*

Wood v. Broom, 287 U.S. 1, 5 (1923), citing § 3 of the Act of Congress of August 8, 1911 (c. 5, 37 Stat. 13). Delegates to the 1943-44 convention were presumably familiar, then, with the districts drawn in Missouri pursuant to that mandate. As shown in Exhibit 19, those districts included ones that stretched across the state.

Congress did not pass a new apportionment statute following the 1920 census, and the 1911 Act expired before the 1930 census. The debate at the 1943-44 convention about the need for what became Art. III, § 45 focused largely on that expiration – *i.e.*, on the return to a legal regime in which there were no mandatory criteria for congressional district shape. *See* 1943-44 Debates, Page 7024. Thus the committee drafting the apportionment language cited an Illinois "gerrymander" that allegedly included districts that had as much as "two to three times the population" of other districts. *See* Exhibit 109 at 13. The delegates voted to import the 1911 congressional language, *id.* at 7024-32, which is still in place in the Maryland (Art. III, § 4) and Virginia (Art. II, § 6) constitutions. Presumably, at that point in the convention, they found the kind of shapes that the Missouri General Assembly had enacted pursuant to the 1911 Act to be entirely acceptable.

When the legislative article returned from the Committee on Phraseology for a third reading, the convention, entirely without debate, adopted language long used in Senate and House redistricting, "compact as

may be," instead of the congressional language. 1943-44 Debates at 7454 (adoption on this third reading of File 17, the legislative file). The absence of discussion (and the practice of the convention) suggests that the delegates thought the Committee on Phraseology had merely restated the language, not changed its meaning.

But assuming that the delegates did intend something other than what their earlier vote for "compact" districts had suggested, their intent can be divined in part in the same way as the intent of the voters in ratifying that choice: to look at the kind of districts drawn previously pursuant to the mandate from which the words were taken. Thus the vote of the delegates, like the votes of the citizens, to apply to congressional districts the same language that had applied to some legislative districts suggests that the intent was to permit districts with the kind of variation in shape with which delegates were familiar. Those shapes were not circles nor squares; they were generally rectangular, but with myriad exceptions, as the circumstances demanded.

d. Consistent with the constitutional scheme, this Court already recognized in this case that there is room for legislative consideration of a non-exclusive list of factors beyond contiguity and equal population in looking at what "as may be" permits.

This Court held, in the first appeal in this case, that the General Assembly (and, presumably, the apportionment commissions established pursuant to Art. III, §§ 2 and 7 and Art. V, § 4) can use criteria other than those mandated by the constitution, i.e., other than just contiguity, equal population, and compactness. *Pearson* slip op. at 7-8.

There is, of course, a constitutional mandate for one such criteria: the use of county lines. But that mandate exists only with regard to drawing State Senate districts. Art. III, § 7; *see State ex rel. Teichman v. Carnahan*, slip op. at 6. When this Court endorsed consideration of county lines, it did not cite that specific example, though it did cite a 1962 precedent endorsing use of such lines. *Pearson*, slip op. at 7-8, n. 1. But in 1944 the drafters chose not to include county lines among the criteria they listed for drawing congressional districts – as did those who drafted the 1966 amendment that eliminated the county-based apportionment of Missouri House of Representatives districts as required by the federal "one-man, one-vote" decisions. There is no doubt that the Court is right that county lines are a

permissible criteria for congressional and Missouri House districts – but to so hold confirms that the constitutional list (contiguity, equal population, compactness) is not exclusive.

This Court confirmed that conclusion by endorsing not just the use of county lines, but also, far more broadly, the use of "various political subdivisions." *Pearson*, slip op. at 7. There is no express constitutional authority, of course, for using political subdivision lines other than county lines for redistricting in *any* context, congressional or legislative. By expressly endorsing consideration of the boundaries of the wide variety of "political subdivisions" in Missouri (ranging from community college districts that can extend well beyond county lines (§ 178.770, RSMo), to block-long neighborhood improvement districts (§§ 67.453-.475)), the Court implicitly endorsed the conclusion that the three express constitutional criteria do not comprise a complete list of permissible considerations.

The question becomes, then, what "as may be" permits, beyond those considerations actually defined in the constitution. And as discussed above, the context and history of the phrase lead to a single conclusion: that the legislative body assigned responsibility for redistricting may use a variety of objective criteria – indeed, that it must weigh and choose among a non-exclusive list of conflicting considerations.

e. Plaintiffs' own proof at trial confirms that other criteria are not just permissible, but appropriate.

At trial, most of the Pearson plaintiffs' evidence focused not on shape of districts, but on the reasons for particular shapes. Most notably, they presented an expert on the "St. Louis Area," and argued vehemently, through him, that the St. Louis area's "economic communities of interest" should be kept intact. *See*, Tr. at V. II, pp. 6-15. That line of questioning is entirely irrelevant if the contiguity, equal population, and compactness are the only permissible criteria.

The intent of the Pearson plaintiffs to ensure that the Court allows consideration of other criteria is evident in the maps they presented. Though each eliminated the protrusion of the Sixth District into Jackson County, each added a protrusion of the Third District through part of St. Louis County into the City of St. Louis. That protrusion cannot be explained by any constitutionally-defined redistricting criteria; it can only be explained by legislative choices among diverse "communities of interest", including, but not limited to, economic ones.

The McClatchey plaintiffs' evidence had a similar tone. Their witness complained about Lafayette, Ray, and Saline counties being placed in the Fifth District with much of the City of Kansas City – but her complaints focused on the desire to keep rural areas together, and separate from urban

ones. *See* Tr. at V. I, pp. 107-138. Again, those are legislative choices, not constitutional ones.

The plaintiffs' presentation in both cases demonstrates that it is simply not possible to divorce the redistricting process from legislative decisions. Whatever the test for "compact as may be" is, then, it must allow leeway for consideration of not just contiguity and population, but other values important to Missourians.

f. The test must be whether the General Assembly drew districts that are reasonably compact, under the circumstances – with circumstances broadly construed.

The McClatchey plaintiffs define the test for "compact as may be" as "reasonable under the circumstances." McClatchey Appellants' Brief at 10. The Pearson plaintiffs resist any clear articulation of any objective test, preferring the comparative anaylsis addressed in III.a. , below. But the concept of "reasonableness" appears in various of the authorities they. *See* Pearson Appellents' Brief at 28, 29, citing *Litchfield Mfg. Co. v. American Hardwood Lumber Co.*, 237 S.W. 831, 833 (Mo. App. 1922) ("as soon as may be" entitles party to "a reasonable time"); *Smith v. Harbison-Walker Refractories Co.,* 100 S.W.2d 909 (Mo. 1937) ("as near as may be" read to mean "for reasonable safety"). So does "depending on the circumstances."

Pearson Appellants' Brief at 26, citing Webster's New World Dictionary (College ed. 1962).

So long as "circumstances" are broadly construed, that test makes sense: it recognizes the imprecision of the constitutional language, it defers to the legislature to balance both the constitutional requirements and other permissible interests, and it gives some definition with which the courts have experience ("reasonableness") as a standard to be applied.

The tests discussed by experts at trial are somewhat different – but that is not surprising, because the constitutional test is a legal, not an analytical one. The experts agreed that there was no test for compactness – much less a test for "compact as may be," a legal rather than a factual standard – that creates a bright line between a plan of "compact" districts and a plan of districts that were not "compact." Their approaches, too, recognize that compactness is a complex question that necessarily requires a whole series of choices among competing values – the sort of thing that legislatures, not courts, do every day.

There is, then, some kind of redistricting plan that fails to be "compact as may be" – one where districts are not reasonably compact, given the panoply of circumstances before the General Assembly. But HB 193 does not contain that kind of plan.

III. The constitution does not require and practicality will not permit the use of alternative tests focused on comparisons to hypothetical plans or on individual districts.

a. A purely comparative test is neither workable nor constitutionally based.

Despite the McClatchey plaintiffs' statement of a "reasonable" test, and the Pearson plaintiffs' invocation of precedents that support such a test, what they really both asked for in the circuit court (and at least to some degree here) is a simply comparative test: that if a court is presented with an alternative plan in which the districts, considered overall, are more compact, and yet contiguous and of equal population, then the challenged plan must fail. Though the McClatchey plaintiffs seem to have moved on from that standard, it remains the focus of the Pearson plaintiffs.

Having heard the testimony, Judge Green stated what seems to be the most obvious problem with what the Pearson plaintiffs' request: such a test leads to "never-ending fame of one-upmanship." Pearson Appellants Appendix at A007. And the temptation to play such a game would be overwhelming.

The McClatchey plaintiffs' plan actually demonstrates the technique. They retained nearly all of the HB 193 lines, just redrawing the area around Jackson County to improve compactness in the Fifth and Sixth districts. *See*

Exhibit 11. That is, present a "more compact" plan with regard to a fraction of the state, and demand that the court on that basis alone strike the whole plan. The potential for political mischief, were that enough, would be great – particularly when the same test is applied to 163 Missouri House districts.

The Pearson plaintiffs redrew more of the map – apparently because although they cite the Kansas City area split between the Fifth and Sixth districts as the pinnacle of non-compactness, what they really want is a change among the First through Fourth Districts around St. Louis. Exhibits 9, 11, 12. Had it been sufficient to serve their purposes, they could have instead followed the McClatchy example: draw slightly more compact district lines in the First and Second Districts (St. Louis City and County), and leave the other lines intact. According to their theory, that would have been enough to defeat the entire plan.

Again, that cannot be the test. Ultimately, whether to split the mid-Missouri (*see* Tr. at 88-106) or other media markets, whether to put Ameren land around Lake of the Ozarks in the same district as Ameren customers in St. Louis, and whether to split St. Louis County rather than Jefferson County among three districts are all legislative choices, not judicial ones. To adopt a simple comparative test, even one that looks at the plan as a whole rather than at individual districts (*see* part III.b., *supra*), provides no real guidance to those drawing redistricting plans. Rather than telling future legislatures

(and apportionment commissions) what to do, that approach would ensure litigation for political advantage – perhaps repeatedly, as one plan, with its one compactness choices, replaces another.

The test must be an objective, not a comparative one. And again, it must be one that conforms to the apparent understanding of those who drafted and voted for the 1945 constitution.

b. The constitution does not require, and practicality will not permit, that each district be evaluated on its own.

In its prior decision in this case, the court used language that some have read to suggest not a comparative test, but one that requires that each district be evaluated on its own – *i.e.*, that if there is just one district that is not "as compact" as that individual district could be, then any resident of that district could successfully sue to strike the entire plan. *Pearson*, slip op. at 6 ("The protection of this constitutional provision applies to each Missouri voter, in every congressional district."). But that certainly cannot be the rule.

Again, to have eight congressional districts that are each as close as possible to a circle or a square, the population of the state would have to be evenly dispersed and the boundaries of the State would have to be rectangular. Given that those are not the facts, the evidence below strongly suggests that it is not humanly possible to draw a map in which no district

could be more compact. *See* Tr. atV. II, p. 89.[3] Moreover, to do so would mean that every county line, political subdivision line, and neighborhood definition be ignored entirely.

As a practical matter, then, any redistricting plan must be evaluated as a whole. It may be possible for a plan to have some districts that are so far from being "compact" that the entire plan should fail. The Pearson plaintiffs questioned Dr. Hofeller about some of the most dramatic of those (Tr. V. II, p. 110 and Exhibit 58), textbook examples, perhaps, of what those who wrote and voted for Art. III, § 45 wanted to preclude.

Ultimately, every voter must be in a district that is reasonably compact under the circumstances, *i.e.*, that is within the realm of districts that can fairly be considered "compact" given topography, population distribution, the boundaries of the state and its political subdivisions, and other concerns. But a rule that requires that every district approach the ideal, or that gives every voter the opportunity to challenge a plan because their district could be a little more compact, is both unworkable and impossible to reconcile with the absence of evidence that those who drafted and those who voted for the 1945 constitution intended such a sea change in Missouri law.

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[3] The task would be even harder for 163 State House districts, of course.

Neither the drafters in 1944 nor the voters in 1945 gave any hint that they contemplated that either immediately upon ratification or after the 1950 census, every person living in any district that could be "improved" – always at the expense of someone else, of course – suddenly could start a litigation chain that could lead to a judge, rather than the legislature, drawing new districts. Nowhere in the constitutional debates nor in the language presented to the voters is there a hint that the courts were to become the kind of active participant in the process that the "each and every district compact – or else" rule would inevitably require.

IV. The plan in HB 193 meets the constitutional requirement.

Here, neither the Pearson nor the McClatchey plaintiffs have proven that HB193 "clearly and undoubtedly" violates the "compact as may be" requirement. To the contrary, the record shows that the plan does meet that requirement. To put it in terms of the McClatchey plaintiffs' stated test, the circuit court found that the districts the legislature drew – even the districts that most offend the sensibilities of the individual voters who testified at trial – are reasonably compact, given the circumstances.

Those circumstances include, but are not limited to, the desire to minimize the breaching of county lines. In that regard, the Pearson plaintiffs argue that their proposal is slightly better. Pearson Appellants' brief at 37-

38. But when we are operating in the realm of the slightly better, we are in the realm of policy preference, not constitutional demand.

As defendant's expert Dr. Hofeller explained, Tr, at V. II, p. 57, each district is within the realm of districts that can be defined as "compact." No district rambles across the state in the fashion of districts elsewhere. *See, e.g.*, Exhibit 58. Both an "eyeball" test and mathematical calculations confirm that each district covers an approximate rectangle – albeit with some form of spur, appendage, or indentation.

Depending on the definition of "spur," "appendage," or "indentation," every district on every proposed map has something that a challenger can point to and call foul. After all, in order to achieve precise population equality (perhaps required by federal courts of congressional district plans, though not required by Missouri law), there is no way to draw more than one or perhaps two districts without such irregularities.

The plan (Exhibit 18) urged by Cole County Presiding Commissioner Marc Ellinger, put on the stand by the Pearson plaintiffs (Tr. V. I, at 88-107), is an excellent example. He was determined to keep Cole and Boone Counties intact and together – valid policy preferences, ones that the drafters of Art. III, § 45 might well have endorsed. And he sought, and obtained, greater compactness in the Kansas City area. But at what cost? A Fourth District that starts with a rectangle in mid-Western Missouri, but then

extends one arm to McDonald County in the Southwest corner of the State, and other arm to Pulaski County – both of them just one county wide – and a finger extending from the Seventh into Polk County. A Sixth District that includes bedroom communities of both Kansas City and St. Louis. And an Eighth District that extends from St. Louis County to the end of the Bootheel.

As noted above, no one – including the plaintiffs in both of these cases – has suggested a plan that does not include some spurs, appendages, and indentations – and the constitution does not require such purity. It merely requires reasonable compactness, given circumstances that include all of the things that this court, in the first appeal, and that the plaintiffs, in both cases, have pointed to – and then some. So long as a plan consists of districts that are reasonably rectangular, with few appendages, spurs, or indentations, that try to minimize the number of county lines split outside of the urban areas, the plan passes the "compact as may be" test, and should be affirmed.

CONCLUSION

For the reasons stated above, the decision of the circuit court should be affirmed and the challenge to HB 193 rejected.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was filed electronically via Missouri CaseNet, and served, on February 14, 2012, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 5,555 words.

/s/ *James R. Layton*
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