IN THE SUPREME COURT OF MISSOURI

NO. SC92317

KENNETH PEARSON, et al.,

Appellants,

vs.

CHRIS KOSTER, et al.

Respondents.

On Appeal from the Circuit Court of Cole County, Missouri
The Honorable Daniel Green, Judge

BRIEF OF APPELLANTS

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JURISDICTIONAL STATEMENT

This case comes before the Court for the second time, as a direct appeal from the Circuit Court of Cole County. The case involves a State constitutional challenge to the congressional redistricting plan adopted by the Missouri General Assembly in May 2011, as H.B. 193. Plaintiffs allege that H.B. 193 violates Art. III, § 45 of the Missouri Constitution in that the districts drawn are not composed of "territory as compact … as may be."

In an earlier decision, this Court partially reversed an Order and Judgment of the circuit court (Hon. Daniel Green), which had dismissed, in their entirety, Plaintiffs' claims grounded in Art. III, § 45, as well as additional claims of partisan gerrymandering implicating other provisions of the State Constitution. *Pearson v. Koster*, No. SC92200 (Mo. banc January 17, 2012). This Court held that Plaintiffs' allegations based on Art. III, § 45 state a claim, and that "the applicable standard of review for a court in reviewing an article III, section 45 claim is the language of the constitution itself: whether the General Assembly divided Missouri into districts of 'contiguous territory as compact and as nearly equal in population as may be.'" Slip Op. at 7. This Court further held that there exists "a question of fact, yet to be tried, whether those districts are 'as compact and nearly equal in population *as may be*.' Mo. Const. art. III, sec. 45." Slip. Op. at 8 (emphasis in Court opinion).

Based on the foregoing, this Court reversed the dismissal of Count I of Plaintiffs' Petition, and remanded the case to the circuit court for a hearing on the issue of

compactness. On remand, the circuit court conducted a two and one-half day bench trial, which commenced January 31, 2012. On February 3, 2012, the circuit court entered Judgment against Plaintiffs on their compactness claims. (L.F. 69). The Judgment contains no specific findings of fact concerning the compactness of any district, or the H.B. 193 Map as a whole. Rather, the circuit court reinterpreted the meaning of "territory as compact … as may be," for purposes of Art. III, § 45; concluded that it does not mean as compact as possible; and held that the standard is satisfied by any plan embodying at least some degree of compactness. On that basis, the trial court concluded that H.B. 193 passes constitutional muster.

Plaintiffs filed a notice of appeal in the circuit court, appealing the Judgment to this Court, on February 6, 2012. (L.F. 76).

As is apparent from the foregoing, this action challenges the validity of a statute of this state, alleging that H.B. 193 violates the Missouri Constitution. Accordingly, this Court has exclusive appellate jurisdiction of this case pursuant to Art. V, § 3 of the Missouri Constitution.

STATEMENT OF FACTS

I. ADOPTION OF REDISTRICTING MAP

Art. III, § 45 of the Missouri Constitution provides that following certification of decennial census results, "the general assembly shall by law divide the state into districts corresponding with the number of representatives to which it is entitled, which districts shall be composed of contiguous territory as compact and as nearly equal in population as may be." Accordingly, when the results of the 2010 United States Census were released in early 2011, it became the responsibility of the General Assembly to draw new congressional districts, to take effect for the 2012 election and remain in place for the next decade. (L.F. 62).

The Census results revealed that the population of Missouri grew at a lower rate than the population of other states, and that Missouri, accordingly, would lose one of its seats in the United States House of Representatives. Thus, while Missouri previously was divided into nine congressional districts, the General Assembly was required to draw a new map that reduced the number of districts from nine to eight. (*Id.*).

In April 2011, both houses of the General Assembly approved a congressional redistricting map embodied in H.B. 193 (hereafter, the "H.B. 193 Map," or the "Map"). Governor Jay Nixon vetoed the Map. Thereafter, the General Assembly voted to override the Governor's veto and adopted the Map on May 4, 2011. (*Id.*).

II. COURSE OF PRIOR PROCEEDINGS

Plaintiffs, Missouri citizens and qualified voters residing in various areas of the State, brought this action in Cole County Circuit Court to challenge the validity of the

H.B. 193 Map. Count I of Plaintiffs' Petition asserted claims that the Map fails to comply with the requirements of Art. III, § 45 of the Missouri Constitution, that districts be composed of territory as compact as may be. Other counts of the Petition alleged claims of partisan gerrymandering, in violation of other Missouri constitutional provisions.

Named as defendants were Chris Koster, in his official capacity as Missouri Attorney General, and Robin Carnahan, in her official capacity as Missouri Secretary of State and the State's chief election official. Shortly after the case was filed, Representative John J. Diehl, Jr. and Senator Scott T. Rupp, the chairs of the state House and Senate redistricting committees that drew the Map, intervened as defendants. Intervenors and the Attorney General actively defended the case. The Secretary of State took no position as to the claims asserted, or any underlying factual or legal issue. (Intervenors and the Attorney General hereafter are collectively referred to as "Defendants".)

On December 12, 2011, the circuit court (Hon. Daniel Green) entered an Order and Judgment granting Defendants' motions for judgment on the pleadings or, alternatively, to dismiss for failure to state a claim. On that basis, the circuit court dismissed the case.

Plaintiffs appealed to this Court. On appeal, this Court affirmed the dismissals of the claims alleging partisan gerrymandering. However, the Court clarified the standard for determining compliance with the constitutional requirement of compactness, holding that "the applicable standard of review for a court in reviewing an article III, section 45

claim is the language of the constitution itself: "whether the General Assembly divided Missouri into districts of 'contiguous territory as compact and as nearly equal in population as may be.'" *Pearson v. Koster*, No. SC92200 (Mo. banc January 17, 2012), Slip Op. at 7.

This Court held that "Plaintiffs stated a claim as to the compactness of the districts," and there exists "a question of fact, yet to be tried, whether those districts are 'as compact and nearly equal in population *as may be*.' Mo. Const. art. III, sec. 45." Slip. Op. at 8 (emphasis in Court opinion). The Court noted that "Districts 3 and 5 are alleged to be particularly suspect, as can be confirmed by any rational and objective consideration of their boundaries." *Id.* The Court also noted that, "[i]n oral argument before the circuit court, counsel for the Attorney General stated '[F]rankly, I'm not going to stand here and defend the compactness of District 5. District 5 seems to me to be problematic.' Record at 15." *Id.*

Based on the foregoing, this Court reversed the dismissal of Count I of Plaintiffs' Petition, and remanded the case to the circuit court for a hearing on the issue of compactness. In so doing, this Court stated, "[b]ecause time is of the essence, the circuit court is directed to conduct its hearing and to enter its judgment no later than February 3, 2012, so that the General Assembly will have time to redistrict the state, if necessary." Slip Op. at 14.[1]

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[1] A later-filed case involving overlapping issues with this case was heard on a common record in the circuit court, decided similarly, and ultimately appealed to this

III. PROCEEDINGS ON REMAND

On remand, the circuit court conducted a two and one-half day bench trial from January 31 to February 2, 2012. The significant evidence adduced at trial may be summarized as follows.

A. Stipulations

At the start of trial, the parties entered into certain Stipulations Regarding Facts and Exhibits, which were made part of the record. (Tr. v.I 6; L.F. 59). The parties stipulated to the admission into evidence of the H.B. 193 Map, including its underlying data files, a drawing of it, and various statistics relating to it, including map-wide and district-by-district statistics relating to eight measures of compactness, calculated by Maptitude Mapping Software ("Maptitude"). (L.F. 63). The parties further stipulated to the admission into evidence of parallel information – including data files, drawings and various statistics – relating to a number of alternative congressional redistricting maps for Missouri, all of them dividing the state into eight districts comprised of equal population and contiguous territory. (L.F. 63-66).

Court. *McClatchey v. Carnahan,* Cole County Circuit Court No. 11AC-CC00752, Supreme Court No. SC92003. The proceedings on remand involved both cases. The *McClatchey* Plaintiffs also are pursuing an appeal to this Court from the circuit court's Judgment entered February 3, 2012, which has been docketed in this Court as No. SC92326.

In all, the parties stipulated to the admission into evidence of 23 exhibits. Copies of the exhibits which Plaintiffs deem most pertinent to this appeal are included in the Appendix to this brief. The appended exhibits include a drawing and statistics for the H.B. 193 Map (Ex. 2); a drawing and statistics for the McClatchey Alternative map (Ex. 10); a drawing and statistics for the Pearson (Court Alternative 2) map (hereafter, the "Pearson Alternative 2 Map") (Ex. 11)[2]; and a drawing and statistics for the Pearson (Court Alternative 3) map (hereafter, the "Pearson Alternative 3 Map") (Ex. 12). Also included in the Appendix are two additional exhibits admitted into evidence at trial, Exhibits 60 and 61, which contain summaries and comparisons of certain of the statistical information contained in stipulated exhibits.

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[2] The Pearson Alternative 2 Map contains only minute differences from the Pearson (Court Alternative 1) map, and was generated to correct for tiny disparities in the population of the various districts in the first alternative, involving a total of five people. *Compare* Exhibits 9 and 11. The primary alternative map relied on by Plaintiffs at trial was the Pearson Alternative 2 Map. (Ex. 11). Plaintiffs also placed some reliance on the Pearson Alternative 3 Map (Ex. 12), which contains an alternative configuration of the districts in the St. Louis region and provides for a First district having the same racial make-up as the First district in the H.B. 193 Map. *Compare* Exs. 2 and 12.

B. Dr. Kimball

Beyond the stipulated facts and exhibits, Plaintiffs presented expert testimony from David C. Kimball, Ph.D., an Associate Professor of Political Science at the University of Missouri-St. Louis.[3]

As a starting point, Dr. Kimball testified that the term "compactness" has a generally accepted meaning in the field of political science, in the context of drawing electoral districts for legislative seats. He stated: "It generally means that areas within a district are as close together or as closely packed together as possible. Usually refers to the shape of the district. Closely approximating a square or a circle as the ideal." (Tr. v.I 33-34). He went on to state that compactness relates to shape, not size, and "the more irregular the shape, the less compact the district." (Tr. v.I 34).

Dr. Kimball gave testimony relating to whether the H.B. 193 Map contains districts as compact as may be, based on a visual examination of the maps at issue, as well as a comparison of the relative scores of various maps and districts on the eight different statistical measures of compactness calculated by Maptitude.

Dr. Kimball explained the eight different measurements that Maptitude calculates, and an exhibit was introduced into evidence describing those measurements. (Tr. v.I 38-43; Ex. 15). Dr. Kimball further testified that none of those tests is a perfect

[3] Apart from his Ph.D. and Masters degree, one of Dr. Kimball's dual majors in his undergraduate studies was Applied Mathematics. Dr. Kimball's full Curriculum Vitae was admitted into evidence as Exhibit 51.

measure of compactness, and there is no bench mark score on any of the tests from which it can be said that a map scoring better than the benchmark is compact, or that a map scoring worse is non-compact. (Tr. v.I 42-43). He testified that such statistical measures generally are used to compare a plan or district with other plans or districts in relative terms. (Tr. v.I 43). Dr. Kimball further testified that he did not believe it appropriate to make comparisons between districts or a map of one state, and those of a different state, explaining:

> One, different state boundaries vary in their compactness. Some states like Colorado are drawn in a perfect rectangle, pretty compact. Other states follow a coastline or follow a river or follow a mountain range. They have a very jagged or less compact boundaries and that's going to influence the compactness scores that you get when you run these physical tests.
>
> Different states have, you know, different standards for how they create the district, different standards for legal review, different criteria that are applied in terms of what's acceptable and what's not, and different states have different methods for drawing district plans in the first place. So I don't think it's a good idea to compare one state's plan versus a map in another state.

(Tr. v.I 55).

Dr. Kimball testified that, in his opinion, "the HB 193 map is not as compact as may be, partly based on my visual comparison with the Pearson Alternative map." (Tr. v.I 36; Exs. 2, 11). He stated that "[t]he section carved out at Jackson County in the Fifth

that's added to the Sixth district makes the Fifth in the HB 193 map less compact than the alternative. And adding Ray County to the north and Saline County to the east also makes the Fifth less compact in the HB 193 map." (*Id.*).

He further testified that the teardrop or little tail of the Sixth district dipping down in the Fifth district makes that district less compact than the Sixth district in the Pearson Alternative. (Tr. v.I 36-37). With respect to the Third district, Dr. Kimball testified that, "[i]n the HB 193 map, the Third district has the two sections, the sort of pincers that go north and south of St. Louis that gives it more of an irregular shape, which looks to me less compact than the Third in the Pearson Alternative." (Tr. v.I 37).

Dr. Kimball further testified that the Fourth district in H.B. 193 looks less compact than the Fourth district in the Pearson Alternative, based on the sections extending to the northeast, southeast and southwest. (*Id.*). He further testified that the Seventh district in the H.B. 193 Map appears less compact than the corresponding district in the Pearson Alternative, in that it has "the Polk County section that extends up in the area of the Fourth." (Tr. 38).

Dr. Kimball gave further testimony concerning the application of the eight statistical measures of compactness calculated by Maptitude. He compared the mean scores on all eight measures for the H.B. 193 Map as a whole, with the mean scores on the same eight measures for the Pearson Alternative 2 Map as a whole, and concluded that the Pearson Alternative 2 Map scored as more compact on seven of the eight

measures, with the differences on at least five of those measures being sizeable. (Tr. v.I 44-49).[4]

Dr. Kimball also testified to a comparison of the statistical measures for H.B. 193 and Pearson Alternative 2, on a district-by-district basis.[5] As to the Fifth district, he testified that the Pearson Alternative 2 scored as more compact than H.B. 193 on all eight measures, with some of the differences being quite sizeable. (Tr. v.I 49-50; Exs. 2, 11, 61). He further testified to a comparison of the Fifth district in the McClatchey Alternative with the Fifth district in the H.B. 193 Map, with the McClatchey Alternative scoring as more compact on all eight tests, and the differences in all eight categories being significant. (Tr. v.I 54-56; Exs. 2, 10).

With respect to the Third district, Dr. Kimball testified that the Pearson Alternative 2 Map scored higher than the H.B. 193 Map on seven of the eight measures, with some of those differences being very sizeable. (Tr. v.I 50-51). Regarding the Fourth district, Dr. Kimball testified that the Pearson Alternative 2 Map scored higher than the H.B. 193 Map on seven of the eight tests, with some those differences being

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[4] The statistical comparison of the H.B. 193 Map and the Pearson Alternative 2 Map, on a map-wide basis, is contained in Exhibit 60, a copy of which is included in the Appendix to this brief.

[5] The statistical comparison of the H.B. 193 Map and the Pearson Alternative 2 Map, on a district-by-district basis, is contained in Exhibit 61, a copy of which is included in the Appendix to this brief.

sizeable. (Tr. v.I 51-52). As to the Sixth district, Dr. Kimball testified that the Pearson Alternative 2 Map scored higher than the H.B. 193 Map on all eight tests, with some those differences being sizeable. (Tr. v.I 52-53).

Based on all of the foregoing analyses and comparisons, from both a visual examination standpoint and statistical comparisons, Dr. Kimball opined that "the districts in the HB 193 map are not as compact as may be." (Tr. v.I 54-55).

At the conclusion of his testimony, the Court asked Dr. Kimball whether H.B. 193 is a gerrymandered map, and Dr. Kimball said yes, explaining as follows:

> I guess I would define a gerrymandered map, at least in partisan terms, as it creates districts where the likely election outcome is going to produce a higher proportion of one party's numbers than their rough share of the – of support among the voting number in the state.
>
> I think the HB 193 map, the probably likely outcome is you're going to six Republican districts. And I think Missouri is more of a 50/50 state. I think it's a Republican-leaning state, maybe 52/48 or 53/47, something like that. So I think by that standard this is probably a gerrymandered plan.

(Tr. v.I 87.)

C. Dr. Hofeller

Defendants called, as their sole witness, an expert witness, Thomas B. Hofeller, Ph.D. Dr. Hofeller is a Redistricting Consultant to the Republican National Committee and to the State Government Leadership Foundation – an organization associated with the

Republican State Legislators Association. (Tr. v.II 99-100). Dr. Hofeller acknowledged that his work on this case was under the auspices of both the Republican National Committee and the State Government Leadership Foundation. (Tr. v.II 101). He also acknowledged that all of his work relating to redistricting has been performed for Republicans since the mid-1980s (Tr. v.II 100, 155); and that he recently testified, in another case, that he sees his "mission as working to put in place redistricting maps around the country which are as favorable to Republican interests as possible." (Tr. v.II 96).[6]

Dr. Hofeller did not testify to any opinion that the H.B. 193 Map or any aspect of it is "as compact as may be," and, indeed, pointedly refrained from doing so. (Tr. v.II 61, 127-28). He testified only that, in his view, the H.B. 193 Map is "compact." (Tr. v.II 49, 127).

As to his definition of compactness, Dr. Hofeller testified to a general, dictionary definition, as follows:

> Compactness, at a simple intuitive level, conforms to a standard dictionary definition: a figure is compact if it is "packed into … a relatively small space" or if its parts are "closely … packed together" (American Heritage). By way of contrast, a figure is not compact to the degree that it is "spread out." Thus, we think of circles and squares as compact and long, narrow forms, areas with protruding arms or fingers, and "odd" shapes like salamanders, as not compact."

[6] Dr. Hofeller's full Curriculum Vitae was admitted into evidence as Exhibit 201.

(Tr. v.II 124-25; Ex. 59 at 1158). Dr. Hofeller also acknowledged the statement in an article he co-authored, that "a few researchers have argued that size is indeed relevant, but the arguments for incorporating size into a definition of compactness are not compelling and few have taken the idea seriously." (Tr. v.II 107; Ex. 59 at 1160).

Also regarding definition, Dr. Hofeller went on to say that, using the dictionary definition as a starting point, political scientists have searched for "some hard and fast mathematical analysis that could help to establish and fully define the principal [sic] of compactness as it relates to redistricting. And everybody found as they got into it, that it was more complicated and multi-faceted than they ever imagined it was going to be." (Tr. v.II, 152). Accordingly, "it's a very arcane and difficult path and it's hard to judge what's the best way and where the line would be." (*Id.*).

In the same vein, Dr. Hofeller testified that the problem with the tests is "that they each have their advantages and disadvantages and things which they inform you of and don't." (Tr. v.II 51). He also stated that "quantitative scores should be used to make comparisons not to eliminate plans or districts that fail to meet a predetermined level." (Tr. v.II, 108; Ex. 59 at 1176). He further testified that "there is no score for any one measure, much less for all of them that, on the face of it, indicates unsatisfactory compactness. Characteristics of the area being districted make identification of such levels impossible." (Tr. v.II 108-09; Ex. 59 at 1176). He also testified that "multiple measures should be used whenever possible, "and that "when multiple measures coalesce in support of a single plan, the evidence in its favor is very strong." (Tr. v.II 109-10; Ex. 59 at 1176).

Dr. Hofeller went on to state that "mathematical measures of compactness can have two possible court uses." (Tr. v.II 1007-18; Ex. 58 at 27). One – which he acknowledged is extremely unlikely, and inapplicable here – is where a state has judicially adopted its own mathematical measure of compactness. (*Id.*). The other is as "evidence that validates that a specific district is far less compact than other districts in the jurisdiction." (*Id.*).

Much of Dr. Hofeller's testimony involved making comparisons of the H.B. 193 Map to various congressional or state house or senate districts drawn in other states. (Tr. v.II 66-81). However, he acknowledged stating in the article he co-authored that such comparisons, at least on a statistical basis, are not appropriate. His article states:

> [C]omparisons should almost always be limited to the state or other jurisdiction being districted. Because of different initial shapes, along with rivers, coasts, and other "natural" boundaries, Maryland and Montana, Wisconsin and Wyoming, New York and Nebraska, etc., are unlikely to achieve comparable degrees of compactness.

(Tr. v.II 63; Ex. 59 at 1176).

Dr. Hofeller testified that it is possible to determine whether a district or a plan is compact, on the basis of whether it falls within a continuum, but that there is no bright line between compact and non-compact districts. (Tr. v.II 56-57).

> [C]ompactness is like a continuum running from hot to cold. Let us say hot is really, really lacking in compactness, and cold is – very cold is being very compact. And you can look at the continuum and you can say, well,

> okay, 20 percent, 20 degrees is cold and certainly 99 degrees is hot, but when you cross that line between saying this is compact and this isn't compact, it's not agreed on by anybody. There's no bright line that you can cross.

(Tr. v.II 56).

Dr. Hofeller admitted that on a map-wide basis, the Pearson Alternative 2 Map scores better than the H.B. 193 Map on seven of the eight measures, although he said he didn't believe the differences are significant. (Tr. v.II 82-85; Ex. 215).

Dr. Hofeller further testified that comparing the Fifth district in the McClatchey Alternative with the Fifth district in H.B. 193, the McClatchey Fifth scored as more compact on all eight tests, and he considered the differences on all eight tests to be significant. (Tr. v.II 135-42; Exs. 2, 10).

We note that comparing the Fifth district in the Pearson Alternative 2 Map with the Fifth district in the McClatchey Alternative, the Pearson Alternative 2 scores as more compact than the McClatchey Fifth on five of the eight tests, with the other three being virtual ties. (Exs. 10 and 11). Dr. Hofeller having conceded that the McClatchey Fifth district is significantly more compact than the H.B 193 Fifth district, he also must be deemed to have admitted that the Pearson Alternative 2 Fifth is significantly more compact than the H.B. 193 Fifth. Dr. Hofeller also acknowledged that on a map-wide basis, the Pearson Alternative 2 scores as more compact than the McClatchey Alternative on six of the eight statistical measures. (Tr. v.II 133-34).

Dr. Hofeller testified that if you set about to draw a districting map that scored as compact as possible on the statistical measures, you could draw a series of maps, with one being more compact than the next. He said, however, that you eventually would reach a point of diminishing returns. At some point, as you marginally increased the compactness of one district, one or more other districts would become less compact, so you no longer were improving the compactness of the overall map. (Tr. v.II 86-87).[7]

Although Dr. Hofeller was employed as an expert witness by the two architects of the H.B. 193 Map, Intervenors, he testified to no explanation, or even speculation, as to reasons for the configuration of the Fifth district. When asked if he had inquired of the Intervenors what accounts for the Fifth district being drawn the way it was, he responded: "Not really. You know, I could make assumptions, but I don't specifically know." (Tr. v.II 113).

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[7] The trial court concluded that "the futile search for the most compact map will . . . tend to severely limit the options left for the General Assembly in choosing its map." (L.F. 73). However, Dr. Hofeller seemed to testify to the contrary, that "[w]e haven't even scratched the surface of how many different iterations of how many different maps you could be drawing, particularly after the fact." (Tr. v.II 86-87). In any event, there is no doubt that limiting the options of the General Assembly to engage in gerrymandering is precisely what the frames of Art. III, § 45 intended.

D. Other Evidence

In its prior decision, this Court noted the importance, grounded in the Missouri Constitution, of keeping counties intact in a single congressional district to the extent possible. Slip Op. at 7-8. The facts are undisputed that the H.B. 193 Map does not fully vindicate that principle, as demonstrated by the fact that various of the alternative maps presented perform better on that measure.

Specifically, the H.B. 193 Map splits seven counties among two districts, and one additional county – Jefferson – among three districts. In contrast, the Pearson Alternative 2 Map splits six counties among two districts, plus one additional county – St. Louis County – among three districts. *Compare* Exhibits 2 and 11. And, the Pearson Alternative 3 Map splits only five counties among two districts, plus one additional county – St. Louis County – among three districts. *See* Exhibit 12.[8]

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[8] Other evidence adduced by Plaintiffs largely pertained to the extent to which the H.B. 193 Map keeps intact local communities of economic interest. The thrust of that evidence is that the misshapen districts in H.B. 193 cannot be explained as an attempt to vindicate that interest. Among other things, the legislature's Map unnecessarily divides mid-Missouri; unnecessarily divides the St. Louis region, by joining portions of it with a large, mostly rural area in the center of the State; unnecessarily divides Jackson County; and inappropriately joins urban areas in eastern Jackson County with three largely rural counties stretching nearly 100 miles to the east – Ray, Lafayette and Saline Counties. (Tr. v.I 88-94, v.II 6-15, 28-31, 33-37).

E. Trial Court's Judgment

On February 3, 2012, the trial court entered its Judgment, ruling against Plaintiffs on their claims that H.B. 193 is unconstitutional in that its districts are not "as compact as may be." (L.F. 69).

Although both sides submitted proposed Findings of Fact and Conclusions of Law, the Judgment contains no specific factual findings denominated as such. The court first addressed the meaning of the language "as compact … as may be," and concluded that it does not mean as compact as possible. (L.F. 73). The court reasoned that "compactness exists along a continuum, it is not a specific idealized result;" that "Defendants' factual evidence showed that it is not possible in theory or practice to find the most compact map;" and that "[t]he evidence and facts showed that the futile search for the most compact map will; however, tend to severely limit the options left for the General Assembly in choosing its map." *Id.*[9]

Having rejected the premise that "as compact … as may be" means "perfect compactness" or as compact as possible, the circuit court did not endeavor to otherwise view the phrase as connoting some relative measurement or comparison, so as to enable the compactness requirement to serve as a bulwark against the "legislative evil, commonly known as 'gerrymander,'" which the court acknowledged is its purpose. (L.F. 72). Instead, the court defaulted to an interpretation that the compactness requirement is satisfied by any map exhibiting some degree of compactness. (L.F. 73-75).

Plaintiffs filed their notice of appeal on February 6, 2011. (L.F. 76).

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[9] *But see* note 7, *supra*.

POINTS RELIED ON

I. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN RULING THAT H.B. 193 MEETS THE MISSOURI CONSTITUTIONAL REQUIREMENT OF ART. III, § 45 THAT CONGRESSIONAL DISTRICTS BE COMPOSED OF TERRITORY "AS COMPACT AS MAY BE," BECAUSE THE COURT FAILED TO APPLY THE PROPER TEST INHERENT IN THIS COURT'S PRIOR DECISION, REQUIRING MORE, NOT LESS, COMPACTNESS, IN THAT THE CIRCUIT COURT HELD THAT ANY MAP REFLECTING SOME DEGREE OF COMPACTNESS, NO MATTER HOW MINIMAL, SATISFIES THE COMPACTNESS REQUIREMENT, THUS RENDERING THE "AS MAY BE" LANGUAGE MEANINGLESS.

Obermeyer v. Bank of America, N.A.,

140 S.W.3d 18 (Mo. banc. 2004)

Buechner v. Bond,

650 S.W.2d 611 (Mo. banc 1983)

Armentrout v. Schooler,

409 S.W.2d 138 (Mo. 1966)

Smith v. Harbison-Walker Refractories Co.,

340 Mo. 389, 100 S.W.2d 909 (Mo. 1937)

II. THE CIRCUIT COURT ERRED AS A FACTUAL MATTER IN RULING THAT H.B. 193 MEETS THE MISSOURI CONSTITUTIONAL REQUIREMENT, IN ART. III, § 45, THAT CONGRESSIONAL DISTRICTS BE COMPOSED OF TERRITORY "AS COMPACT ... AS MAY BE," BECAUSE THE UNDISPUTED FACTUAL RECORD OVERWHELMINGLY DEMONSTRATES OTHERWISE, IN THAT IT IS INDISPUTABLE, FROM VISUAL EXAMINATION AS WELL AS STATISTICAL MEASURES, THAT ALTERNATIVE MAPS PRESENTED CONTAIN DISTRICTS SIGNIFICANTLY MORE COMPACT THAN THOSE IN H.B. 193.

Reed v. City of Union,

913 S.W.2d 62 (Mo. App. 1995)

Preisler v. Doherty,

365 Mo. 460, 284 S.W. 2d 427 (Mo. banc 1955)

State ex rel. Barrett v. Hitchcock,

241 Mo. 433, 146 S.W. 40 (Mo. 1912)

ARGUMENT

I. THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN RULING THAT H.B. 193 MEETS THE MISSOURI CONSTITUTIONAL REQUIREMENT OF ART. III, § 45 THAT CONGRESSIONAL DISTRICTS BE COMPOSED OF TERRITORY "AS COMPACT AS MAY BE," BECAUSE THE COURT FAILED TO APPLY THE PROPER TEST INHERENT IN THIS COURT'S PRIOR DECISION, REQUIRING MORE, NOT LESS, COMPACTNESS, IN THAT THE CIRCUIT COURT HELD THAT ANY MAP REFLECTING SOME DEGREE OF COMPACTNESS, NO MATTER HOW MINIMAL, SATISFIES THE COMPACTNESS REQUIREMENT, THUS RENDERING THE "AS MAY BE" LANGUAGE MEANINGLESS.

A. Standard of Review

The standard of review regarding whether the circuit court applied proper legal standards to this case is *de novo*. "Questions of law are matters for the independent judgment of [this] Court." *City of St. Joseph v. Village of Country Club*, 163 S.W.3d 905, 907 (Mo. banc. 2005).

B. Overview

The most fundamental error in the circuit court's Judgment is that the court failed to abide by the meaning of the constitutional language, "as compact … as may be," manifest in this Court's prior decision. The circuit court apparently believed that construing that language to be akin to as compact as possible would set a standard requiring perfection, that would be unworkable. On that basis, the court reinterpreted the

compactness language found in Art. III, § 45 to strip it of virtually all force and effect, leaving the phrase "as may be" having no meaning whatsoever.

Aside from the circuit court's lack of authority to reinterpret constitutional language, the meaning of which this Court already has made clear, the circuit court's reasoning rests on three fundamentally flawed premises. The first is that the compactness standard requires perfection. This Court made clear in its earlier decision that it does not, recognizing that compactness "cannot be achieved with absolute precision." Slip Op. at 6. Plaintiffs do not contend otherwise.

Second, the circuit court apparently believed that optimal compactness must be determined by statistical measurements, thus inviting a never-ending search for the most statistically compact map and districts. However, there is nothing in this Court's prior decision, or elsewhere in Missouri law, requiring that compactness be determined by statistics, as opposed to visual examination. And, there is no basis for adopting any such statistical standards here, since all parties to this litigation agree that the statistical tests are by no means perfect measures of compactness.

Third, there is no basis for the circuit court's view that striving to draw a map reflecting optimal compactness would be an exercise without end. Even viewing optimal compactness as measured by statistical tests, Defendants' own expert, Dr. Hofeller, acknowledged that you eventually would reach a point of diminishing returns. As you marginally improved the compactness of one district, other districts would become less compact, so you no longer would be improving the compactness of the overall map. (Tr. v.II 85-86).

A further error on the part of the circuit court is that, having concluded that "as compact as may be" cannot mean as compact as possible, the court failed to consider any other interpretation of the compactness standard that is more relaxed but still requires greater, rather than lesser, compactness. Instead, the court jumped to the opposite extreme, concluding that if the standard is not perfect compactness, it must be deemed satisfied by any districting plan reflecting some degree of compactness, no matter how minimal. In so doing, the circuit court read the phrase "as may be" entirely out of the Missouri Constitution.

In sum, and as further discussed below, the circuit court ignored the plain meaning of the constitutional compactness language, deviated substantially from the thrust of this Court's prior decision, otherwise relied on flawed premises, and completely eviscerated the constitutional compactness requirement as an effective weapon in the battle against the legislative evil known as gerrymandering.

C. Plain Meaning of the Constitutional Language

In its prior decision, this Court did not agonize over the meaning of the phrase "as compact as may be," or deem necessary additional interpretation beyond the plain meaning of the words found in the Constitution. The Court implied that the plain meaning of the constitutional language is clear and controlling, in holding that the standard to be applied "is the language of the constitution itself," and that the compactness standard with which the legislature must comply is "mandatory and objective, not subjective." Slip Op. at 7-8.

It is well settled that constitutional provisions are to be construed according to the plain and ordinary meaning of the words used. *See Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. banc 1983):

> The words used in constitutional provisions are interpreted so as to give effect to their plain, ordinary, and natural meaning. The plain, ordinary, and natural meaning of words is that meaning which the people commonly understood the words to have when the provision was adopted. The commonly understood meaning of words is derived from the dictionary. (Internal citations omitted).

Under these principles, the language "as compact as may be" clearly means as compact as possible under the circumstances, and thus requires more, not less, compactness. The circuit court's premise that "as compact as may be" does not mean anything like as compact as possible is belied, first, by the standard dictionary definition of the word "may." The first listed meaning of "may" in a commonly used Webster's dictionary is: "1. Originally, ability or power; now generally replaced by *can*." Webster's New World Dictionary (College ed. 1962) (emphasis in original). Similarly, the Black's Law Dictionary definition of "may" includes the statement: "In dozens of cases, courts have held *may* to be synonymous with *shall* or *must*, usu. in an effort to effectuate legislative intent." (9th ed. 2009).

Moreover, the ordinary meaning of the word "possible" reflects that it does not connote perfection, but rather only what is capable of being achieved under the circumstances, taking into account other requirements and limitations. *See* Webster's

New World Dictionary, *supra*, defining "possible" to mean, among other things, "that can be used, selected, done, etc., depending on circumstances," and listing "practicable" and "feasible" as synonyms. Here, for example, limiting circumstances would include the requirements of population equality and contiguousness, and the interest in preserving the integrity of county boundaries. *See* Slip Op. at 7-8.

That the foregoing constitutional language requires a greater, rather than lesser, degree of compactness in legislative districts further is clear from the discussion at p. 8 of this Court's prior decision. There, after stating that "Districts 3 and 5 are alleged to be particularly suspect, as can be confirmed by any rational and objective consideration of their boundaries," and noting counsel for the Attorney General's statement that, "I'm not going to stand here and defend the compactness of District 5. District 5 seems to me to be problematic," the Court stated: "it is a question of fact, yet to be tried, whether those districts are 'as compact and nearly equal in population *as may be*.'" (Italics in original).

The fact that the Court italicized the words "as may be" shows that those words must have some meaning. And, it is, of course, a cardinal rule of construction that [w]ords used in constitutional provisions must be viewed in context; their use is presumed intended, and not meaningless surplusage." *Buechner*, 650 S.W.2d at 613: "Words used in constitutional provisions must be viewed in context; their use is presumed intended, and not meaningless surplusage."

We note also that there is no hard and fast requirement that compactness be determined by mathematical measurements, as opposed to visual examination. All four of the compactness cases decided by Missouri courts to-date have used the visual

examination approach. *Preisler v. Kirkpatrick*, 528 S.W.2d 422 (Mo. banc 1975); *Priesler v. Hearnes*, 362 S.W.2d 552 (Mo. banc 1962); *Preisler v. Doherty*, 365 Mo. 460, 284 S.W. 2d 427 (Mo. banc 1955); and *State ex rel. Barrett v. Hitchcock,* 241 Mo. 433, 146 S.W. 40 (Mo. 1912). The development of mathematical measures, and computer software to calculate them, does not mean that such measures must be viewed as providing the dividing line between what is compact and what is not. And that is particularly so since both sides' experts testified that all of the mathematical tests have flaws and biases, and none of them is a perfect measure of compactness.

D. Other Precedent

A prior decision of this Court in the reapportionment context suggests that the phrases "as may be," and "as possible," when appended to the words "as compact as," are interchangeable and mean the same thing. *Armentrout v. Schooler*, 409 S.W.2d 138, 144 (Mo. 1966). There, this Court directed that the City of Louisiana, in reapportioning its wards, "will observe the requirement that the wards newly created shall be composed of contiguous territory as compact as possible, citing to Art. III, §§ 2 and 7 of the Missouri Constitution, as amended January 14, 1966. Art. III, § 2, as cited to, refers not to territory "as compact as possible," but rather, to "territory as compact as may be."

Similarly, a number of cases concerning the doctrine of *cy pres* use the terms "as possible" and "as may be" interchangeably. *See, e.g., Obermeyer v. Bank of America, N.A.*, 140 S.W.3d 18, 23 (Mo. banc. 2004); *First Nat'l Bank of Kansas City v. Jacques*, 470 S.W.2d 557, 561-62 (Mo. 1971); *Mott v. Morris*, 249 Mo. 137, 155 S.W. 434, 436 (Mo. 1913); *Levings v. Danforth*, 512 S.W.2d 207, 209-11 (Mo. App. 1974). For a

similar view in another context, *see Litchfield Mfg. Co. v. American Hardwood Lumber Co.*, 237 S.W. 831, 833 (Mo. App. 1922), in which the court stated, "[t]ext writers and courts all agree that the phrase "as soon as you are able," "as soon as possible," or "as soon as may be," and similar phrases, when used as terms in contracts providing for delivery, entitles the seller to a reasonable time in view of the circumstances …."

We note, finally, further confirmation that the plain meaning of "as may be" is akin to "as possible" comes from the testimony of Defendants' own expert witness, Dr. Hofeller. The court inquired of him, "is it your testimony based on your familiarity with this field that there is no other state constitution or state statute or state commission direction that includes the language "as may be" after the word compact?" (Tr. v.II 167). Dr. Hofeller responded, "I believe there's one that comes really close," and cited to language in Colorado law providing, "each district shall be as compact in area as possible." *Id.*

E. Construction in Light of Purpose

The erroneous premises underlying the circuit court's decision further are revealed by considering the meaning of the constitutional language in light of its underlying purposes. In its prior decision, this Court recognized, as it has previously, that the purpose of the compactness requirement is "to guard, as far as practicable, under the system of representation adopted, against a legislative evil commonly known as [the] 'gerrymander,' and to require the Legislature to form districts, not only of contiguous, but of compact or closely united, territory." Slip Op. at 4, *quoting Barrett*, 146 S.W. at 61 (internal quotation marks omitted). The Court further stated that, to the extent

compactness, along with numerical equality, is achieved, "numerous other constitutional problems are avoided." Slip Op. at 6.

For the compactness requirement to fulfill these salutary goals, it is essential that the requirement have teeth and impose real constraints on a legislature's ability to engage in gerrymandering. That conclusion is inherent in this Court's characterization of the compactness requirement as "a non-discretionary limitation[] imposed by the Constitution." Slip op. at 5, quoting *Doherty*, 284 S.W.2d at 431, and also citing *Barrett*. It further is inherent in this Court's movement away from the "wholly ignored and completely disregarded" test for determining compliance with the constitutional compactness requirement, and holding that the test "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." Slip Op. at 7. The circuit court's interpretation of the constitutional language would render it wholly ineffectual as a means of combating gerrymandering.

Again, this is not to say that the constitutional language requires perfection. The compactness requirement is tempered by the need for every district to be comprised of equal population and contiguous territory. Slip Op. at 5. It also allows for "minimal and practical deviations required to preserve the integrity of the existing lines of our various political subdivisions," particularly counties. Slip Op. at 7-8.

The purposes underlying the compactness requirement – one of which is to serve as a bulwark against gerrymandering – help define the boundaries of the compactness requirement. Thus, it might be said that there is a zone of permissible variance between

utmost compactness, on the one hand, and the degree of compactness necessary to make certain that the legislature is creating districts based on the mandatory constitutional criteria, as opposed to engaging in gerrymandering, on the other. *See, e.g., Smith v. Harbison-Walker Refractories Co.*, 340 Mo. 389, 100 S.W.2d 909 (Mo. 1937). There, this Court construed a workplace safety statute mandating that certain establishments "shall be so ventilated as to render harmless all impurities, as near as may be." 100 S.W.2d at 917. Tying the "as near as may be" language to the purpose of the statute, the Court construed the language to mean not that everything imaginably possible must be done, but rather to mean: "As near as may be necessary for reasonable safety." *Id.*

The H.B. 193 Map, as skewed as it is – especially in comparison to the alternatives that are readily feasible – comes nowhere near a degree of compactness demonstrating that it is not the product of gerrymandering. Moreover, the only evidence in the record regarding gerrymandering – the testimony of Dr. Kimball responding to a question from the court – establishes as an undisputed fact that the H.B. 193 Map *is* the product of gerrymandering. (Tr. v.I 87).

II. THE CIRCUIT COURT ERRED AS A FACTUAL MATTER IN RULING THAT H.B. 193 MEETS THE MISSOURI CONSTITUTIONAL REQUIREMENT, IN ART. III, § 45, THAT CONGRESSIONAL DISTRICTS BE COMPOSED OF TERRITORY "AS COMPACT ... AS MAY BE," BECAUSE THE UNDISPUTED FACTUAL RECORD OVERWHELMINGLY DEMONSTRATES OTHERWISE, IN THAT IT IS INDISPUTABLE, FROM VISUAL EXAMINATION AS WELL AS STATISTICAL MEASURES, THAT ALTERNATIVE MAPS PRESENTED CONTAIN DISTRICTS SIGNIFICANTLY MORE COMPACT THAN THOSE IN H.B. 193.

A. Standard of Review

The facts of this case largely consist of stipulated facts, and there are no genuine, material issues of material fact. The issues essentially concern the legal consequences of established facts. That being the case, the standard of review is *de novo*. *See In re Expungement of Arrest Records Related to Brown v. State*, 226 S.W.3d 147, 150 (Mo. banc 2007), in which the Court held: "The facts of this case are essentially uncontroverted. Because there is no factual dispute bearing on the issues in question, the Court reviews to determine whether the trial court properly declared and applied the law."

B. Overview

This Court remanded this case to the circuit court for resolution of factual issues concerning whether the Fifth district, the Third district, other districts embodied within the H.B. 193 Map, and/or the Map as a whole are compact as may be. However, the

circuit court made no specific factual findings concerning any aspect of the Map. Indeed, the circuit court's judgment reflects no specific factual findings at all, despite the parties having submitted proposed Findings of Fact and Conclusions of Law. As discussed above, the circuit court essentially reinterpreted the meaning of Art. III, § 45, and ruled for Defendants based on erroneous conclusions of law.

In any event, the lack of factual findings provides no impediment to finally resolving this case in favor of Plaintiffs now, once the circuit court's errors of law are corrected. As discussed below, the record developed at trial reflects no genuine, material issues of fact. The parties stipulated to the most critical evidence in this case, consisting of maps and statistics relating to H.B. 193 and various alternatives. Moreover, there was a high degree of agreement between the parties' respective experts regarding the nature, use and meaning of statistical measures of compactness, and how they apply to this case. Finally, Defendants' expert witness did not join issue with Plaintiffs on the critical issue in this case – whether the H.B. 193 Map is as compact as may be. Dr. Hofeller rendered no opinion in that regard. He simply opined that the H.B. 193 Map is "compact" – an opinion that, even if sound, does little, if anything, to demonstrate that the Map is as compact as may be.

C. Stipulations

As discussed previously, the parties stipulated to the data files underlying the H.B. 193 Map, a drawing of the Map, the results of eight statistical measures of compactness for the Map – on both a map-wide basis and a district-by-district basis – and various other statistical data for that Map, including population by district, racial data, the number and

identity of counties split among two districts, and the number and identity of counties split among three districts. Moreover, the parties stipulated to the identical information for the alternative maps proffered by Plaintiffs as well as the *McClatchey* Plaintiffs, as well as various other maps that were considered during the legislative process leading up to the adoption of H.B. 193 and the override of the Governor's veto.

Accordingly, there was, and is, no dispute as to the configuration of, and statistics for, the various maps and districts. This Court has before it the same maps and statistical data as the circuit court did; the statistical comparisons are in the record and are undisputed; and this Court has the same ability as the circuit court to "eyeball" the various maps. *See Frito Lay, Inc. v. So Good Potato Chip Co.*, 540 F.2d 927 (8th Cir. 1976), a case involving claims that a competing manufacturer was wrongfully using packaging similar to the plaintiff's. On appeal, the court reversed the district's court's decision that the color of the packages was not similar. The court of appeals stated:

> We reach this conclusion by applying the same "eyeball" test as that applied by the District Court. We do not say that six eyes are necessarily apt to reach a more accurate assessment than are the two, but under the standard of review applicable in this case, our six eyes tell us that the color of the packages is similar.

540 F.2d at 931.

D. Meaning of Compactness

As discussed above, the testimony of Dr. Kimball and Dr. Hofeller concerning what the term compactness means in the context of drawing legislative districts was

remarkably similar. They testified to virtually identical concepts of compactness, in the context of what Dr. Hofeller termed "intuitive" or "dictionary" definitions. The sole point of possible divergence was Dr. Hofeller's testimony that various political scientists have sought to build upon the dictionary definition of compactness, creating various statistical measures, which has led to disagreement among some as to the utility of assessing compactness and the best method for doing so.

However, there is a substantial body of Missouri case law, amplified by cases from other jurisdictions, defining what compactness means in the context of legislative districting; and Missouri law is, of course, controlling on this point. In *Barrett*, this Court stated, "the word 'compact' means 'closely united,'" *quoting People ex rel. Woodyatt v. Thompson*, 155 Ill. 451, 40 N.E. 307 (Ill. 1895). *See Doherty*, 284 S.W.2d at 435. This means "that the counties or subdivisions of counties (when counties may be divided) when combined to form a district, must not only touch each other, but must be closely united territory." *Barrett*, 146 S.W. at 61. Put another way, "compact" has been defined as "having parts or units closely packed or joined." *Reed v. City of Union*, 913 S.W.2d 62, 64 (Mo. App. 1995), *quoting Websters New Collegiate Dictionary* 228 (1977) (internal quotation marks omitted).

Consistent with the foregoing, the compactness of a district is assessed by examining its "shape." *Doherty*, 284 S.W.2d at 434; *Barrett*, 146 S.W. at 55. Perfect compactness is represented by the shape of a circle or square. *See, e.g., Schrage v. State Bd. of Elections*, 88 Ill.2d 87, 430 N.E.2d 483, 486 (Ill. 1981); *Kilbury v. Franklin County*, 151 Wash.2d 552, 90 P.3d 1071, 1077 (Wash. banc 2004).

An irregular or strange shape reflects a lack of compactness. *See, e.g., Doherty*, 284 S.W.2d at 469 (reasonably compact district has "comparatively few sides and angles"); *Barrett*, 146 S.W. at 62, *quoting Thompson* ("Doubtless a district can be formed of counties so 'strung out' and barely touching as to make the territory contiguous, but not compact in any sense."); *Kilbury* ("In simplest terms, we conclude that the phrase 'as compact as possible' does not mean 'as small in size as possible,' but rather 'as regular in shape as possible.'"); *Schrage* (referring to "strange" or "extremely elongated" shapes).

Dr. Kimball's view of compactness is entirely congruent with these principles, as is Dr. Hofeller's view with respect to what compactness means, at least outside the realm of statistical measures.

E. Measuring Compactness

As to the methods for measuring compactness, there was similar agreement among the parties' respective experts. And, here again, there is a body of case law that is definitive.

In most cases involving claims that one or more legislative districts are not sufficiently compact, courts have adjudicated the claims by undertaking a visual examination of the questioned districts, thus applying an "eyeball" test. *See, e.g., Schrage*, 439 N.E.2d at 487 ("[W]e can rely on a visual examination of the questioned district as other courts have done."); *Rybicki v. State Bd. of Elections*, 574 F.Supp. 1082, 1096 (N.D. Ill. 1982) ("In *Schrage*, the Illinois Supreme Court ... adopted an 'eyeball' standard to determine if a given district met the compactness requirement."). All of the reported Missouri cases to-date, concerning whether legislative districts comply with

constitutional compactness requirements, have utilized the visual examination approach. *See Kirkpatrick*; *Hearnes*; *Doherty; Barrett.*

While statistical measures may be utilized, it is not necessary to do so; the visual examination approach has been deemed sufficient. *See Schrage*, 430 N.E.2d at 487. And, it must be borne in mind that "[s]tatistics do not necessarily reveal compactness." *People ex rel. Burris v. Ryan*, 147 Ill.2d 270, 588 N.E.2d 1023, 1028 (Ill. 1991).

As discussed previously, Dr. Kimball and Dr. Hofeller both undertook a combination of visual examinations and statistical comparisons of various maps. And their testimony was similar with respect to the utility and limits of statistical measures. They both testified that none of the tests is a perfect measure of compactness; there is no benchmark score on any of the tests from which it can be said that a map having better scores than the benchmark is compact, or that a map having worse scores is non-compact; and that statistical measures generally are used to compare a plan or district with other plans or districts in relative terms.

F. Application of Standards to This Case

As discussed above, Dr. Kimball testified to opinions, regarding the H.B. 193 Map as a whole, and as to various districts contained within it, that the Map is not as compact as may be. In contrast, Dr. Hofeller did not testify to any opinion that the H.B. 193 Map or any aspect of it is "as compact as may be," and, indeed, pointedly refrained from doing so. He testified only that, in his view, the H.B. 193 Map is compact.

Dr. Hofeller made clear the criteria he was applying in coming to his opinion that the H.B. 193 Map is compact. He testified that there is a continuum of compactness,

ranging from minimally compact to the most compact, and that to earn his label of being compact, a map simply has to fall somewhere within that continuum – it doesn't matter where. The map simply has to be above the dividing line, below which rest maps which are clearly not compact.

From a statistical standpoint, Dr. Hofeller testified to the same statistical results for the various maps that Dr. Kimball did, and which are in evidence; and acknowledged the same statistical disparities as Dr. Kimball did, reflecting that, in a number of respects, the Pearson Alternative 2 Map, as well as the McClatchey Alternative, score as more compact than the H.B. 193 Map. At some points in his testimony, Dr. Hofeller quibbled about whether the statistical advantages that the alternative maps enjoyed over the H.B. 193 Map were significant. However, he ultimately conceded that there were a number of *significant* differences in that regard.

G. Counties

As discussed previously, there is no dispute that both the Pearson Alternative 2 Map and the Pearson Alternative 3 Map better serve the interest of honoring county boundaries, than does the H.B. 193 Map.

Moreover, the shortcomings in the H.B. 193 Map are magnified when one considers the facts that a congressional district must contain 748,616 people, and the population of St. Louis County is 998,954. *See* Exhibit 2. Accordingly, the requirement that districts contain equal population requires that St. Louis County be divided among at least two districts; so, the fact that some maps divide St. Louis County one additional time does not necessarily leave it unduly fractured.

By contrast, the H.B. 193 Map takes Jefferson County, which has a population of only 218,733, and divides it three ways – placing 44,106 people in the Second district, 114,133 people in the Third and 60,494 people in the Eighth. *See* Exhibit 2. Fracturing a county of 218,000 people into three parts certainly does violence to the interest articulated by this Court of keeping counties intact, and can be viewed as indicative of gerrymandering.[10]

H. Summary

In summary, applying the proper legal standards, the evidence in this case is undisputed and overwhelming that the H.B. 193 Map and various districts contained within it – most notably the Fifth and Third, but also the Fourth, Sixth and Seventh – are not composed of "territory as compact … as may be."

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[10] Defendants have placed the label "Grand Compromise" on the H.B. 193 Map, as if to suggest that it reflects a statesman-like accommodation, in which all competing interests participated and were recognized. In fact, however, an examination of various alternative maps proposed in the Missouri House or Senate while the legislative process was unfolding reveals that the main compromise was between members of the party who were in control of the House, and members of the same party who were in control of the Senate, with the real issue being how voters residing in Jefferson County – many of them likely to vote Democratic – should be dispersed among the Second, Third and Eighth districts. *See* Exhibits 2, 3, 7 and 8.

The record contains this Court's observation that "any rational and objective consideration" of the boundaries of the Third and Fifth districts in the General Assembly's Map confirms that they are "particularly suspect." Slip Op. at 8. It further contains the statements of counsel for the Attorney General, declining to defend the compactness of the Fifth district, and referring to it as "problematic." Indeed, the shape of the Fifth district is comparable to the Seventh senatorial district in *Doherty*, which was held to be invalid. 284 S.W.2d at 438.

It further reflects admissions on the part of the Attorney General to the effect that, if the standard means as compact as possible, the districts are not as compact as may be. *See* Exhibit 55.

The record further contains various maps of the pertinent districts, including H.B. 193 and a number of alternatives, which the Court can visually examine for itself. And, as Dr. Kimball testified, the H.B. 193 Map contains several irregularly-shaped districts, and alternative maps presented show conclusively that it is readily feasible to draw a more compact map and districts. Thus, the H.B. 193 Map clearly is not as compact as may be.

Further, the record contains statistical comparisons reflecting that the Pearson Alternative 2 Map, as well as other alternatives, score higher than the H.B. 193 Map on many statistical tests of compactness, both on an overall basis and a district-by-district basis. And the record contains Dr. Hofeller's acknowledgment of the accuracy of these comparisons and that, at least in some instances, the statistical differences favoring alternative maps over the H.B. 193 Map are significant.

Finally, the record is undisputed that the H.B. 193 Map serves the interest of honoring county boundaries, to the extent possible, less well than do various of the proffered alternatives.

In sum, the entire factual record in this case points in a single direction. The circuit court should have ruled in favor of Plaintiffs. And, the court having failed to do so in light of its errors of law, this Court should now do so.

CONCLUSION

For all of the foregoing reasons, we respectfully submit that the trial court's Judgment should be reversed, and this Court should enter final judgment in favor of Plaintiffs, ruling that H.B. 193 is unconstitutional, in violation of Art. III, § 45 of the Missouri Constitution, in that it fails to provide for districts composed of "territory as compact … as may be."

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 9th day of February, 2012, the foregoing Brief of Appellants was filed electronically with the Clerk of the Court, to be served by operation of the Court's electronic filing system on all counsel of record, and that, in addition, a copy of the foregoing was served by e-mail upon the following:

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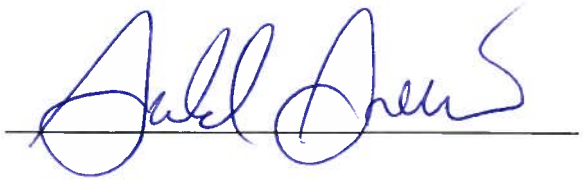

CERTIFICATE OF COMPLIANCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Brief of Appellants complies with Rule 55.03, and with the limitations contained in Rule 84.06(b), and that it contains 10,647 words, excluding the cover page, the signature block, certificate of service and this certificate, as determined by the Microsoft Word 2010 Word-counting system.