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

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Plaintiffs/Appellants submit this reply brief in response to both the Brief of the Attorney General ("AG Br.") and the Brief of Intervenor-Respondents ("Int. Br."). (The Attorney General and Intervenors hereafter are collectively referred to as "Defendants.")

As discussed below, the foregoing briefs appear to have the same twin goals. First, with respect to the language of Art. III, § 45 of the Missouri Constitution, that congressional "districts shall be composed of contiguous territory as compact … as may be," Defendants seek to persuade the Court that the constitutional language should not be deemed to mean: (1) what the plain meaning of its words clearly suggest; (2) what a substantial body of Missouri case law, interpreting similar words and phrases, has construed that language to mean; and (3) what this Court appears to have contemplated by its decision in the first appeal on January 17, 2012. *Pearson v. Koster*, No. SC92200 (Mo. banc. January 17, 2012) ("*Pearson I*").

In the latter regard, although the ink on this Court's decision in the first appeal is barely dry, Defendants seek to have this Court cast aside, as unsound and unworkable, virtually the entire substance of the Court's prior decision. Defendants urge that the Court transform its prior decision from one designed to put teeth into the constitutional compactness requirement, as a means of combating the recognized legislative evil of gerrymandering, to one that completely eviscerates the compactness requirement as an effective weapon against gerrymandering. Defendants would have this Court define the applicable standard to be equivalent to the standard argued for by Defendants in the first appeal – but rejected by this Court – that courts are powerless to enforce compliance with

the constitutional compactness requirement, absent a showing that the legislature "wholly ignored and completely disregarded" that requirement. *Pearson I*, Slip. Op. at 6.

Among the important principles reflected in this Court's prior decision, that Defendants would have the Court now cast aside, are: "the applicable standard of review for a court in reviewing an article III, section 45 claim is the language of the constitution itself;" the compactness requirement is "mandatory and objective, not subjective;" to the extent compactness is "achieved, numerous other constitutional problems are avoided;" and "[t]he protection of [Art. III, § 45 concerning compactness] applies to each Missouri voter, in every congressional district." Slip Op. at 6-7.

Defendants' second apparent goal is to convince the Court that it should choose to disbelieve what is before its very eyes. As discussed in Appellants' opening brief ("App. Br.") at 33-35, there is a substantial body of Missouri case law defining what compactness means in the context of districting. And, a visual examination of the H.B. 193 Map, assessing it in light of the meaning of compactness established under Missouri law, establishes a serious lack of compactness – as shown by, among other things, this Court's observation 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 counsel for the Attorney General's statement that he is "not going to stand here and defend the compactness of District 5. District 5 seems to me to be problematic." Slip Op. at 8 and n. 2. Defendants maintain that the Court should allow Dr. Hofeller – working in furtherance of his mission to draw redistricting maps in as partisan a manner as possible

(App. Br. at 13) – to literally pull the wool over the Court's eyes, so that it regards as highly compact, what clearly is not.

As discussed below, Defendants should not be deemed to have succeeded in either of their foregoing goals.

ARGUMENT

I. REPLY TO BRIEF OF THE ATTORNEY GENERAL

A. Plaintiffs' View of "As Compact As May Be" is Consistent With This Court's Prior Decision and Entirely Workable.

Appellants' opening brief demonstrates, based on this Court's prior decision, the plain meaning of the constitutional language, the purposes of the constitutional compactness requirement, and a substantial body of Missouri case law to the effect that "as compact as may be" means as compact as possible under the circumstances. App. Br. at 24-30.

In contrast to Defendants' position, the limiting circumstances referred to by Plaintiffs are not anything and everything the General Assembly might decide to use to temper or even wholly undermine the constitutionally-mandated districting criteria. Rather, "under the circumstances" refers, first, to the constitutional requirements that districts be composed of equal population and contiguous territory. *See Pearson I*, Slip Op. at 4-5. That language also "allow[s] for minimal and practical deviations required to preserve the integrity of the existing lines of our various political subdivisions" – most notably, counties. *Id.* at 7-8 and n.1. It also refers to limitations on compactness

resulting from the shape of Missouri and its borders, and recognizes, as this Court held, that compactness "cannot be achieved with absolute precision." Slip Op. at 6.

The Attorney General contends that this standard is unworkable in that it would lead to a never-ending game of one-upmanship, involving a search for the ideally compact map. However, that argument represents Defendants' own straw man, not Plaintiffs' position, and is belied by what Plaintiffs actually do contend, as well as the testimony of Defendants' own expert witness.

For one thing, Defendants' argument presupposes that compactness must be measured by statistical tests. However, no Missouri court ever has so held, and Plaintiffs do not so advocate. All Missouri cases decided to-date have applied the visual examination test, and that test seems wholly appropriate, particularly since both sides' experts testified that all of the tests developed have their biases, flaws and limitations, and none of them is a perfect measure of compactness. *See* App. Br. at 8-9, 14-15.

Moreover, Dr. Hofeller testified that striving for optimal compactness is not a never-ending exercise. To the contrary, he acknowledged that as a map gets more compact, further tinkering with it produces diminishing returns. You reach a point where, as you try to increase the compactness of one portion of it, you wind up reducing the compactness of other aspects, or of the map as a whole. *Id.* at 17.

Further, this Court held in its prior decision that perfect compactness is not required, and Plaintiffs do not contend otherwise. To the contrary, Plaintiffs acknowledge that the purposes underlying the compactness requirement help define the degree of compactness required, and there is a permissible zone of variance. Thus, while

the standard clearly requires more, as opposed to less, compactness, what is of prime importance is that the required degree of compactness be sufficient to safeguard against the legislature's choosing to engage in gerrymandering, as opposed to following the constitutionally-mandated criteria for districting.

In light of the plain language of Art. III, § 45, the compactness requirement plainly contemplates that a map and its districts must reflect a greater, not lesser, degree of compactness. Accordingly, the constitutional requirement cannot be deemed satisfied simply by an expert witness – and a partisan champion at that – affixing a label of "compact" to the map, no matter how minimal the degree of compactness may be.

B. Defendants' View of "As Compact As May Be" Substantially Deviates from this Court's Prior Decision, and Emasculates Compactness as a Tool to Prevent Gerrymandering.

After endeavoring to undermine Plaintiffs' view as to the meaning of "as compact as may be," but only succeeding in knocking down their own straw man, Defendants proffer their own alternative interpretation as to the meaning of Art. III, § 45.

In constructing their alternative interpretation, Defendants start by trying to draw guidance as to the meaning of the phrase "as may be" from other places in the Missouri Constitution where it appears. The most closely analogous use of similar words elsewhere in the Constitution is in Art. I, § 15, dealing with warrants. That section requires that a warrant describe "the place to be searched, or the person or thing to be seized, as nearly as may be." AG Br. at 9. Notably, Defendants' citation of Art. I, § 15

supports Plaintiffs' position, not Defendants.' In the context cited by Defendants, the phrase "as nearly as may be" clearly seems to mean, to the maximum extent possible.

Defendants next try to predicate their proffered alternative interpretation upon a convoluted legislative history argument, relating to what citizens who voted to adopt a new Missouri Constitution in 1954 must have thought the language of Art. III, § 45 meant, based upon their presumed knowledge and understanding of State House and Senate districts drawn years earlier, and a 1911 federal statute, which expired before the 1930 census. AG Br. at 12-14. However, this argument requires several giant assumptions and leaps of faith, and its factual predicates were seriously undermined by the testimony of Dave Roland, an expert in constitutional history called by the *McClatchey* Plaintiffs. *See* Tr. v.I 143-94.

Moreover, Defendants' argument ignores the most cogent and directly applicable legislative history available concerning the meaning of Art. III, § 45, found in the debates at the Constitutional Convention. In the course of those debates, it was stated, "[n]ow Missouri has been a shining example of gerrymander of representative districts for years and years and if we will put a thing like this [a requirement that districts be compact and contiguous] in our Constitution, it will protect the people of our state against such a thing until Congress passes its own act." *Preisler v. Sec'y of State*, 279 F.Supp. 952, 960 n.5 (W.D. Mo. 1968), *quoting* Debates 1945 Mo. Const. Conv. pp. 5559-5565.

A still further flaw in Defendants' legislative history-based argument is that the plain meaning of the constitutional language is perfectly clear. Accordingly, it is neither necessary nor appropriate to resort to legislative history to try to glean the meaning of the

constitutional language. The meaning is derived from the plain meaning of the words used. *See, e.g., Boone County Court v. State,* 621 S.W.2d 321, 324 (Mo. banc 1982):

> Rules applicable to constitutional construction are the same as those applied to statutory construction, except that the former are given a broader construction, due to their more permanent character. In determining the meaning of a constitutional provision the court must first undertake to ascribe to the words the meaning which the people understood them to have when the provision was adopted. The meaning conveyed to the voters is presumptively equated with the ordinary and usual meaning given thereto. The ordinary, usual and commonly understood meaning is, in turn, derived from the dictionary.

Defendants then come to their proffered meaning of the language "as compact as may be," which is that it merely requires "districts that are reasonably compact, under the circumstances – with the circumstances broadly construed." AG Br. at 18. And Defendants make clear that their notion of "circumstances broadly construed" means "the panoply of circumstances before the General Assembly," *i.e.*, whatever myriad and unlimited scope of circumstances the legislature decides to take into account. AG Br. at 19.

In advancing this interpretation, Defendants not only substantially ignore the plain meaning of the constitutional language, they completely eviscerate the compactness requirement as a tool for combating gerrymandering. If the legislature can drown the requirement of compactness in a boundless sea of other considerations, be they political

or otherwise, the compactness requirement is meaningless. Under Defendants' interpretation, the law is back to the compactness requirement having no significance, unless it can be shown that the legislature "wholly ignored and completely disregarded it" – a standard which this Court has rejected. *Pearson I*, Slip Op. at 5-6.

Further, Defendants' proffered interpretation, if adopted, would turn this Court's prior decision on its head. In *Pearson I*, this Court held that the compactness requirement, along with contiguity and equal population, are mandatory, and may be subject to "minimal and practical deviations" to achieve certain specified goals. Slip Op. at 7. However, under Defendants' interpretation, the permitted deviations in favor of non-constitutional considerations are by no means minimal. To the contrary, they are limitless and could serve to entirely swallow up any notion of compactness. *See* AG Br. at 15-16, 18-19.

Yet another flaw in Defendants' position is their refusal to recognize that each district must comply with the constitutional compactness test. AG Br. at 22-23. Defendants' position flies in the face of this Court's holding in *Pearson I*, that "[t]he protection of this constitutional provision [Art. III, § 45] applies to each Missouri voter, in every congressional district." Slip Op. at 6. Defendants' position harkens back to the now-discredited approach, whereby a few non-compact districts, in a map that otherwise was compact, would not necessarily require that the map be invalidated.

Finally, when the language of Art. III, § 45 is properly construed and understood, it cannot seriously be disputed that the H.B. 193 Map, and its many misshapen districts, cannot pass constitutional muster, particularly in light of the uncontroverted evidence that

it is readily feasible to draw more compact alternatives, the lack of any explanation or justification offered in defense of the legislature's badly misshapen map, and the unrefuted evidence in the record that the H.B. 193 Map reflects gerrymandering. *See* App. Br. at 12.

II. REPLY TO BRIEF OF INTERVENOR-RESPONDENTS

The Brief of the Intervenor-Respondents is largely in the nature of a filibuster. It seeks to erect multiple smokescreens in apparent hopes that, through the haze, this Court will have difficulty recognizing that multiple districts within the H.B. 193 Map are so obviously misshapen that they are not "as compact as may be."

Moreover, as discussed below, Intervenors apparently now recognize, albeit belatedly, that Dr. Hofeller's testimony is wholly insufficient to sustain their position in this case, in that he never opined that the H.B. 193 Map is "as compact as may be." Accordingly, they attempt to reinvent his testimony as something substantially different from what he said. Further, as also discussed below, the entire framework of Dr. Hofeller's testimony and opinions is dramatically at odds with settled Missouri law, which makes that testimony of little relevance here.

Further, Intervenors' Brief rests on a number of other untenable arguments, including, but not limited to, its assertions that the circuit court applied a legal standard requiring more, not less, compactness, and otherwise properly followed the legal standard for "as compact as may be" set forth in this Court's prior decision.

Also, Intervenors' Brief is as notable for what it fails to address, as for what it does discuss. Nowhere do Intervenors even attempt to offer any justification or

explanation for the badly misshapen districts embodied in H.B. 193, despite the fact that Intervenors were the architects of the H.B. 193 Map and, thus, presumably have that knowledge. Finally, Intervenors say nothing about the extreme and unnecessary degree to which H.B. 193 divides counties – including Jackson County and its three-way division of the 218,000 residents of Jefferson County.

A. Intervenors' Effort to Reinvent Dr. Hofeller's Testimony Is Not Supported by the Record.

As discussed in Appellants' opening brief, Dr. Hofeller's testimony at trial was not that the H.B. 193 Map is "as compact as may be," but rather that it is "compact." He testified to compactness being like a continuum, in which one extreme is "really lacking in compactness" and the other is "very compact," and that there is no bright line at which a districting plan shifts from non-compact to compact. He made clear that so long as a map falls anywhere within the area of the continuum considered to be compact – no matter where – he considers it to be "compact." App. Br. at 13-17.

Now, however, apparently recognizing the gaping hole in their case and in the circuit court's decision left by this testimony, Intervenors attempt to reinvent Dr. Hofeller's testimony as supposedly presenting a continuum running from non-compactness to perfect compactness, with a dividing line in the middle, and the H.B. 193 Map falling much closer to the compactness pole. Int. Br. at 8-9, 11, 24, 34, 67, 69. However, Dr. Hofeller testified to no such thing, and the record references cited by Intervenors in support of their effort to recast his testimony do not withstand scrutiny.

For instance, at p. 8 of their brief, Intervenors assert, "Dr. Hofeller testified that the Grand Compromise is clearly closer to the 'perfectly compact' pole than the noncompact pole. (Tr. II 57-58.)." However, that assertion is not supported by the cited reference. Dr. Hofeller testified, at v.II 56 of the Transcript, to his concept of a continuum running from "really, really lacking in compactness" to the "very compact," and stated "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." In the testimony cited by Intervenors (*id.* at 57-58), Dr. Hofeller went on to say: "it passes in my mind the test of being a compact district because I would place it on that continuum above that line. As a matter of fact, I place all the plans that I've seen so far that have been placed before the court as being compact."

Thus, Dr. Hofeller's testimony does not support the notion that there is a dividing line between non-compact and perfectly compact, resting equidistant between those poles, and that the H.B. 193 Map resides well into the half of the continuum representing compactness, close to the pole of perfect compactness. For one thing, Dr. Hofeller made clear that there is no bright line dividing the compact from the non-compact. Moreover, at no time did Dr. Hofeller testify that to the extent a dividing line can be divined, it resides at the midpoint of the continuum running from "really lacking in compactness" to the "very compact."

To the contrary, Dr. Hofeller made clear elsewhere in his testimony that the transition from non-compact to compact occurs at a very low threshold on the continuum. When asked what he considers "a noncompact district," Dr. Hofeller pointed to only a

few maps representing egregious extremes. (Tr. v.II 160-65). When asked to give "a non-egregious example of a noncompact district," Dr. Hofeller was unable to do so, stating, "I would have to consider that – okay. I'm sorry." (Tr. v.II 163). Accordingly, it is clear from Dr. Hofeller's testimony that a map which bears only the most minimal attributes of compactness will, in his view, qualify for the label of "compact," which he has sought to affix to the H.B. 193 Map here.

Further, at p. 11 of their brief, Intervenors state, "Dr. Hofeller testified that to be compact, a map must clearly be something akin to 'cold' on a temperature scale, and not in the arguably temperate middle. (Tr. v.II 56)." However, nothing in the cited transcript reference supports the assertion that Dr. Hofeller would deem to be non-compact, a map falling in the "arguably temperate middle."

Similarly, also at p. 11 of their brief, Intervenors assert, "Dr. Hofeller testified that H.B. 193 'does not come near crossing' this middle zone, even if it is not a bright line. (Tr. II 119)." Nothing in the cited testimony refers, in words or substance, to any "middle zone." Rather, Dr. Hofeller testified that, "in my judgment, this plan has not crossed or come near crossing that bright line," going on to say, he "[c]an't really say when it crosses the bright line," because "[t]here isn't any bright line" (Tr. v.II 119).[1]

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[1] In the same vein, Intervenors state, at p. 24 of their brief: "As Dr. Hofeller testified, the Grand Compromise is clearly closer to the 'perfectly compact' pole than the 'noncompact' pole." No citation to the record is provided for this assertion. *See also*, Int. Br. at 34, 67, 69. Similarly, at p. 25 of their brief, in attempting to refute Plaintiffs'

B. Dr. Hofeller's Opinions Fall With a Framework Wholly at Odds With Missouri Law Regarding the Meaning and Significance of Compactness, and Thus Are Not Instructive as to Whether the H.B. 193 Map Satisfies the "As Compact As May Be" Standard.

Leaving aside the fact that Dr. Hofeller testified in this case not from the perspective of purporting to share independent and unbiased expertise, but rather in pursuit of his partisan mission "to put in place redistricting maps around the county which are as favorable to Republican interests as possible" (Tr. v.II 96),[2] there is another reason why his testimony provides no support for the conclusion that the H.B. 193 Map is "as compact as may be." As discussed below, there is a fundamental disconnect between Missouri law regarding compactness, and Dr. Hofeller's views on that subject.

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position that the "circuit court must have required only 'some degree [of] compactness, no matter how minimal,'" Intervenors assert that "the court applied a robust test" – again without any citation to the record.

[2] Dr. Hofeller testified concerning his efforts in North Carolina last summer, in which he helped produce a new congressional redistricting map, under which ten of the state's thirteen congressional districts would lean Republican – a big change from the current split of seven Democrats and six Republicans. (Tr. v.II 96-98). Intervenors tout the fact that, in a few instances, he appears to have worked for other interests besides Republicans, but ignore the fact that the last time he did so appears to be during the mid-1980s. (Tr. v.I 155).

As is clear from the Missouri Constitution and this Court's prior decision in this case, the Constitution requires that congressional districts be drawn "as compact as may be," as a means of combating the legislative evil of gerrymandering; a substantial body of case law establishes what "compactness" means in the context of drawing legislative districts; and this Court now has made clear that, for the constitutional compactness requirement to effectively serve its intended purpose, the words "as compact as may be" must be construed according to their plain meaning.

The framework within which Dr. Hofeller testified recognizes virtually none of the foregoing. In his view, it appears to be an open question whether compactness should be viewed "as a prime defense against gerrymandering," or "as outdated, irrelevant, or even as a positive nuisance and as biased toward one party." *See* Tr. v.II 105-06 and Ex. 59 at 1156 (internal citations omitted). Also, he testified that "compactness" has no generally accepted meaning in the context of districting, but rather is a term in search of a meaning. As Intervenors summarize in their brief, at 6-7:

> Dr. Hofeller testified that there is no "bright line between a compact and noncompact district." (Tr. II 49). Dr. Hofeller then explained that this is because there is disagreement about "what are the exact attributes of compactness." *Id.* "…[I]n terms of redistricting, compactness is really a principle in search of a definition. So there's no general agreement on what the attributes of compactness are." *Id.* Second, "there's no general agreement on the weight that proposed attributes would be given." *Id.* Third, there is "also no agreement on how to measure [those attributes]."

Id. Fourth, there is no agreement "that there's any bright line where a plan moves automatically at some point on some given continuum from being compact to noncompact." (Tr. II 49-50).

Dr. Hofeller further testified that "compactness is such a hazy and ill-defined concept that it seems impossible to apply it in any rigorous sense to matters of law." (Tr. v.II 53, quoting H.P. Young, Ex. 223 at 113).

Based on the foregoing, Dr. Hofeller concludes that "objective tests should be used to make comparisons, 'not to eliminate plans or districts that fail to meet some predetermined level.'" Int. Br. at 53, quoting Ex. 59 at 1176. Accordingly, the entirety of Dr. Hofeller's testimony can be likened to trying to fit a square peg into a round hole, and is not at all instructive as to whether the H.B. 193 Map contains districts "as compact as may be," even if he had purported to express an opinion on that point, which he did not.[3]

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[3] Intervenors suggest that striving to produce a map that is as compact as possible would be a never-ending and fruitless exercise, because it always is possible to draw another map at least slightly more compact than the last one. However, this position suffers from several flaws. For one thing, Dr. Hofeller acknowledged that you eventually would reach a point of diminishing returns, such that further efforts would not be improving the compactness of the overall map. *See* App. Br. at 17. Moreover, this argument presupposes that perfect compactness is the goal, and that compactness must be measured by statistical analysis – neither of which is the case. Further, the argument that

C. No Basis Exists for Dr. Hofeller's Testimony That Were the H.B. 193 Map Invalidated for Lack of Compactness, It Would Be the Most Compact Map Overturned on That Basis, and Would Lead to a Tremendous Number of Maps Being Re-Drawn Across the Country.

At trial, Defendants sought to elicit from Dr. Hofeller testimony that, were the H.B. 193 Map held invalid for lack of compactness, it would be the most compact map overturned on that basis, and would lead to a tremendous number of maps being re-drawn across the country. However, as discussed below, it was established that Dr. Hofeller lacked any basis for making such statements. And, in light of how thoroughly he was discredited on that score, it is astonishing that Defendants would raise this point on appeal, and indicative of how hard Defendants must strain to try to defend the circuit court's decision.

After testifying to his conclusion that the H.B. 193 Map would be the most compact map ever invalidated for lack of compactness, it was established that Dr. Hofeller had conducted no analysis of a wide body of case law invalidating maps for lack of compactness, and could only recall one case where a map was adjudicated to fail a compactness test – a Maryland case. (Tr. v.I 128-31). Notably, he knew of no Missouri

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requiring more, rather than less, compactness would unduly limit the options of the General Assembly in redistricting is belied by Dr. Hofeller's testimony that "w]e haven't even scratched the surface of how many different iterations of how many different maps you could be drawing ...." *Id.* at 17 n.7.

cases in which a legislative map failed a compactness test (*id.* at 129), and thus was wholly ignorant of two Missouri cases in which just such a result was reached: *State ex rel. Barrett v. Hitchcock,* 241 Mo. 433, 146 S.W. 40 (Mo. 1912), and *Preisler v. Doherty,* 365 Mo. 460, 284 S.W.2d 427 (Mo. banc 1955). Moreover, he was thus further ignorant of the fact that the shape of the Fifth District in H.B. 193 can be likened to the Seventh Senatorial District in *Doherty*, which led to the map in that case being invalidated. 284 S.W.2d at 439.

Moreover, Dr. Hofeller apparently was ignorant of the nine cases cited at pp. 34-35 of the Brief of Appellants in *Pearson I*, in which maps were invalidated for lack of compactness, as well as the many cases cited in the ALR annotation: "Application of Constitutional Compactness Requirement to Redistricting," 114 ALR 5th 311 (originally published in 2003).

A similar lack of foundation was established with respect to Dr. Hofeller's testimony that a decision striking down the map here would lead to a wide swath of new districting maps around the country. He acknowledged that he knew of no constitutional provision like Missouri's, providing for districts to be as compact as may be, except for the Colorado Constitution, requiring that districts be as compact as possible. And, he further acknowledged that he knew little about the precise wording of various states' compactness requirement, or the laws of various states' concerning review of districting decisions for compliance with same – whether, for example, various states' laws provide for deferential review or close scrutiny. (Tr. v.II 114-17).

D. Plaintiffs Have Standing to Challenge All Aspects of the H.B. 193 Map.

Intervenors contend that Plaintiffs lack standing to challenge the failure of the Third and Seventh Districts, as drawn in H.B. 193, to comply with the constitutional requirement that they be "as compact as may be." However, that position is erroneous as a matter of law.

As this Court held in *Pearson I*, Art. III, § 45 of the Missouri Constitution, including the requirement of compactness, "applies to each Missouri voter, in every congressional district." Slip Op. at 6. Also, it has been held that a litigant challenging a reapportionment plan need not confine the challenge to the individual's own district, but rather has standing to attack the entire plan, given the interlocking nature of the various districts. *See Erfer v. Commonwealth*, 568 Pa. 128, 794 A.2d 325, 329-30 (Pa. 2002). This reasoning appears to reflect the law of Missouri in that this Court has entertained challenges to a statewide apportionment plan, brought by a single individual, on three separate occasions. *See Preisler v. Kirkpatrick*, 528 S.W.2d 422 (Mo. banc 1975); *Preisler v. Hearnes*, 362 S.W.2d 552 (Mo. banc 1962); *Preisler v. Doherty*, 365 Mo. 460, 284 S.W.2d 427 (Mo. banc 1955).

We note, also, that Plaintiff Phoebe Ottomeyer's interests are directly implicated by the configuration of the Third district in H.B. 193, as she testified. She is a resident of Jefferson County and testified to the violence H.B. 193 does to the principle of striving to keep counties intact, as it relates to Jefferson County. (Tr. v.II 28-31). As discussed in Appellants' opening brief, under H.B. 193, Jefferson County – having a population of approximately 218,000 – is divided among three congressional districts. App. Br. at 38.

Moreover, Ms. Ottomeyer testified that were the Third district configured properly in accordance with the constitutional compactness requirement, she would reside in the Third district. (Tr. v.II 31).

E. No Voting Rights Act Considerations Justify the Misshapen Districts Embodied in the H.B. 193 Map.

During the course of this litigation, Defendants have not sought to justify the misshapen aspects of the H.B. 193 Map as stemming from federal Voting Rights Act considerations. 42 U.S.C. § 1973. However, the issue has arisen tangentially at times, through questions from the circuit court and the participation of Congressman William Lacy Clay as an amicus curiae. Accordingly, we briefly address those issues to demonstrate that there are no Voting Rights Act considerations relating to this case that serve to justify the misshapen districts in H.B. 193.

The Pearson Alternative 3 Map contains identical African-American population percentages to the First District in H.B. 193, *see* Exs. 2 and 12; and the Pearson Alternative 2 map reflects a difference of only four percentage points. *See* Exs. 2 and 11. Accordingly, it is readily feasible to draw a more compact map than H.B. 193 which fully recognizes minority rights and interests, no one has proposed doing otherwise, and there are no valid Voting Rights Act concerns present in this case.

Moreover, Missouri never has been subject to § 5 of the Voting Rights Act, requiring pre-clearance of districting plans by the U.S. Department of Justice. While § 2 potentially can come into play, one prerequisite to its doing so would be a showing that voters in the affected area tend to vote as a racial bloc against minorities. *See Thornburg*

v. Gingles, 478 U.S. 30 (1986). That requirement is not met here, as the sole evidence on that point in the record reflects a lack of such racial bloc voting. *See* Exhibit 66, reflecting that Congressman Clay received 73.6% of the vote in the 2010 general election for U.S. Representative for the First district, which was then 54 percent African-American. *See also* Exhibit 67, reflecting that President Obama received 49.3% of the Missouri vote in the 2008 general election.

Congressman Clay appears to assert that any challenge to the H.B. 193 Map must be intended to threaten his continued re-election as an African-American member of Congress. He thus appears focused solely on his own perceived self-interest, to the exclusion of all other interests, including those of his party. However, as discussed above, there is not a shred of evidence in the record that the present challenge to H.B. 193 has the purpose, or would have the effect, of adversely affecting Congressman Clay or minority representation of the St. Louis area in Congress.[4]

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[4] Indeed, that Congressman Clay would even raise this issue is highly ironic. To the extent that any appreciable threat to Congressman Clay's continued re-election arises from the recent redistricting, it arises from H.B. 193 itself. The H.B. 193 Map transforms the First district from a majority-minority district, to a minority-minority district – albeit one having an African-American population of 49.5 percent. However, it abolishes Congressman Russ Carnahan's present Third district, and places Congressman Carnahan's residence in the First district – thus planting the seeds of a potential primary contest between Congressmen Clay and Carnahan.

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 15th day of February, 2012, the foregoing Reply 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 Reply Brief of Appellants complies with Rule 55.03, and with the limitations contained in Rule 84.06(b), and that it contains 5,887 words, excluding the cover page, the signature block, certificate of service and this certificate, as determined by the Microsoft Word 2010 Word-counting system.