IN THE SUPREME COURT OF MISSOURI

NO. SC92351

BOB JOHNSON, et al.,

Appellants,

vs.

STATE OF MISSOURI, et al.,

***Respondents*.**

On Appeal from the Circuit Court of Cole County
The Honorable Patricia Joyce, Presiding Judge

APPELLANTS' REPLY BRIEF

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INTRODUCTION

Like a one-person bell choir, Respondents' arguments compensate with volume what they lack in range. Yet, when the last chorus dies out, the Court is left with the New House Map which every party and the trial court admit ***could have been*** drawn with districts that were ***more*** equal in population, ***more*** compact in configuration, ***and*** contiguous under Appellants' definition.

Respondents argue, with metronomic monotony, that Appellants failed to submit the perfect map, unassailable on any theory. That is not Appellants' obligation, nor can Respondents make it this Court's job. Similarly, Respondents argue that Appellants have not articulated the perfect test for the constitutional criteria expressed in Article III, Section 2, of the Missouri Constitution, which answers every question and removes every uncertainty for all time. Again, Appellants are not required to do so, and neither is this Court. The Constitution speaks for itself.

Appellant's only burden is to demonstrate: (1) that the districts in the New House Map are not as nearly equal in population "as possible," or (2) that at least one district is not comprised of "contiguous territory," or (3) that at least one district is not "as compact as may be." Appellants have carried this burden (and more), and the New House Map is void *ab initio*. This Court need only make this declaration and enjoin the Secretary of State from relying upon this Map. No other

remedy is needed or permitted. The express provisions of Section 2 determine the of such a declaration, and neither the dubious constitutional rights of candidates to top placement on the August primary ballot nor a hypothetical refund of their declaration filing fee should one of them elect to withdraw and re-file are not before this Court.

ARGUMENT

The districts in the New House Map are not as nearly equal in population "as possible," and no one is seriously contending they are. Respondents attempt to intimidate this Court out of declaring this obvious fact – and the constitutional consequences of it – by arguing that the Court cannot know where enforcing the Constitution's plain language will lead. Respondents concede that the population equality requirement in Section 2 is stricter than the "as may be" formulation, State's Brief, at p.45, but they ask: "How much stricter?" The answer this Court should give – and the only answer it can give – is that the Constitution requires districts to be as nearly equal in population "as possible."

Similarly, Respondents' echo Judge Green's decision in *Pearson* and argue that compactness cannot be enforced until this Court states categorically how much compactness is "enough," and demonstrates to every future Commission how to comply. Finally, Respondents concede that this Court may enforce Section 2's

contiguity requirement, provided that this Court uses a definition which will allow the Commission to do whatever it wants to do.

In sum, Respondents tell this Court it cannot hold that the New House Map falls short of the plain language criteria in Section 2 unless it eliminates any meaningful role for contiguity and describes, right now, precisely how much population equality and compactness will be required in every future circumstance and what, precisely, compliance with those requirements should look like. That is not the way this Court works or ever has, nor is it the proper way to enforce the Constitution. Respondents make no attempt to explain why this Court is any less entitled to proceed one case at a time in this area than was the Supreme Court in *Reynolds v. Sims*, 377 U.S. 533 (1964). "[*Reynolds*] recognized that it set forth no definite tests or yardsticks with which to measure the variances which might be necessary or permissible in different states. It preferred to leave this job to case-by-case decisions as the various apportionment schemes should come before the lower courts." *Jonas v. Hearnes*, 236 F. Supp. 699, 707 (W.D. Mo. 1964)

The Court does not know why the Commission drew this map the way it did, and there is ***nothing in the record*** on this point.[1] When Respondents assert that District X was drawn in order to comply with the Voting Rights Act, or District Y was drawn to preserve a political subdivision boundary, they may be right but they are only arguing an inference they wish this Court to draw. There is no ***evidence*** why any district, or the Map as a whole, was drawn the way it is.

Appellants contend that the most compelling inference to be drawn from New House Map is that it looks the way a map ***would look*** if the Commission assumed that the language of Section 2 is comprised of quaint anachronisms, and

> (1) that the requirement that "each district . . . shall, as nearly as possible, equal [36,742]" means only that population deviations cannot exceed 10.0%,
>
> (2) the requirement that "each district shall be composed of contiguous territory" means only that a district cannot be divided in two by another district, and

[1] Nor is such evidence appropriate. The maps must speak for themselves, and it will not assist the Court's inquiry to require that every Commissioner be summoned to testify why a given map was drawn as it was.

(3) the requirement that "each district shall be . . . as compact as may be" means only that the map – viewed as a whole – cannot appear to be intentionally "gerrymandered."

This Court has not seen what a Commission would draw if it is instructed that the plain language of Section 2 means what it says and will be enforced. More important, if Respondents' arguments prevail, the Court never will.

I. The New House Map Fails Voters' Requirement for District Populations As Nearly Equal "As Possible"

(Point Relied On I.)

The Circuit Court concluded that the districts in the New House Map were not as equal in population as possible. L.F. at 314 (Appendix at A4). But, the Circuit Court agreed with Respondents that the Constitution must not mean what it says, and therefore applied the 10% "safe harbor" that Missouri voters had never heard of and did not approve as part of Missouri's Constitution. The Circuit Court erred as a matter of law and, based upon the undisputed evidence and the trial court's own findings of fact, this Court should reverse and declare the New House Map invalid.

A. The Development of Section 2 Repudiates Respondents' Arguments

Respondents concede that the voters enacted Article III, Section 2 in response to *Jonas*, 236 F. Supp. at 708-09. There, the District Court held both the Missouri House and Senate apportionments unconstitutional under *Reynolds*' requirement that districts be "as nearly of equal population as is practicable." *Id.*, at 707. *Jonas* ordered the Missouri General Assembly to create state constitutional apportionment processes that would withstand constitutional scrutiny. *Id.* at 708-09. In deferring to the legislature (and, ultimately, Missouri voters), *Jonas* advised that any deviations from *Reynolds*' requirement that districts be "as nearly of equal population as is practicable" must be "based on legitimate considerations incident to the effectuation of a rational state policy." *Id.* at 706 (*citing Reynolds*, 377 U.S. at 579). But, the Court emphasized the Supreme Court's warning that "neither history alone, nor economic or other sorts of group interests, are permissible factors in attempting to justify disparities from population-based representation. Citizens, not history or economic interests, cast votes." *Id.* *See also Reynolds*, 377 U.S. at 579 ("Any suggested criteria for the differentiation of citizens are insufficient to justify any discrimination, as to the weight of their votes, unless relevant to the permissible purposes of legislative apportionment").

The foregoing is what the General Assembly had to work with in drafting the language that became Article III, Section 2, and it is presumably what the voters considered in approving that language. Respondents, uncomfortable with

the strict language of *Reynolds* and *Jonas*, are quick to point out that "[s]ince *Jonas*, federal courts have not insisted on the kind of purity that the 1964 decision suggested." State's Brief at p.44. But Missouri voters were not to know that.

Taking *Jonas* and *Reynolds* at their word, Missouri voters approved language that made no attempt to justify deviations from equality by referring to any "rational state policy" other than equality, or listing any "legitimate considerations incident to" any such a policy. Moreover, the voters did not simply incorporate *Reynolds*' requirement that district populations must be as equal "as is practicable," which might have indicated a willingness to be bound by federal law as it developed. Instead, voters approved stricter equality language than the "as practicable" standard in *Reynolds* and required all districts to be as nearly equal in population "as possible."[2]

Respondents claim *Reynolds* does not require such equality, and that state apportionments are valid today under *Reynolds* if the population deviation range is less than 10.0%. However, Respondents admit that "[t]he 10% standard first

[2] Respondents argue that "it seems unlikely that the people intended the "as nearly as possible, equal" standard … to be stricter than what the federal courts required[.]" State's Brief, at p. 45. Unlikely or not, "as possible" is plainly more strict than "as practicable" and the voters approved the former, not the latter.

appeared ***seven years after*** the amendment to the Missouri Constitution." State's Brief, at p.44 (emphasis added). Therefore, neither the legislators who drafted Article III, Section 2, nor the voters who approved it could possibly have known that this "10% standard" would emerge. More important, they could not possibly have intended to incorporate such a standard in 1966 (seven years before it was first proposed) when the voters approved Section 2's "as possible" requirement. By choosing a standard ***different*** from (and Appellants contend ***stricter*** than) *Reynolds*' "as equal as practicable," the voters foreclosed Respondent's argument that they intended this requirement to be coextensive with federal law (much less future federal law).[3] In other words, suppose *Reynolds* had been overruled in 1967

[3] Respondents take time out from arguing that this Court should super-glue Section 2's "as possible" population equality standard to the ever-weakening federal court Equal Protection standard, to scoff at Appellants' suggestion that the "as possible" standard "is not what the voters thought it was in 1966, but instead strives for greater perfection as technology and data improve." State's Brief, at p.46. Respondents accurately state Appellants' argument, but miss the critical distinction. There is no textual basis in Section 2 for Respondents' evolving standard based on federal law, but the use of the words "as possible" necessarily requires an evolving standard as greater precision becomes "possible." Missouri

(Footnote continued on following page)

(or suppose it had been rendered largely meaningless by subsequent "safe harbors"), the language of Section 2 nevertheless survives and must be enforced as written.

Respondent's acknowledgment that the 10% "safe harbor" had never been contemplated, let alone approved, by the federal courts when Section 2 was amended in 1966, also debunks another of their arguments (and one of the Circuit Court's findings). The Circuit Court found that the deviation range of the New House Map (7.80%) was "within the range" of all redistricting efforts after the 1966 amendment. L.F. at 314 (Appendix at A4). Respondents', too, trumpet this "fact." State's Brief, at p.50 (7.80% is "well within the range of plans that have been adopted every 10 years since . . . 1966").

However, a close look at this evidence (L.F. at 204) shows that the redistricting in 1971 (i.e., the first under the amended Article III, Section 2) had a deviation range of ***2.58%***, the nearest to population equality of any

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voters could have chosen an objective, unchanging standard, *see* Art. V, §46, Colo. Const. (requiring population equality to the extent required by the United States Constitution, "but in no event shall there be more than five percent deviation"), but they did not. Instead, they chose a standard that demanded the greatest equality "possible."

post-amendment redistricting. Only after the federal courts announced the 10% "safe harbor," which Respondents explain occurred ***after*** the 1971 redistricting and ***before*** the 1981 redistricting, did the population deviations in Commission plans balloon to the "range" touted by Respondents and referred to by the trial court. *See* L.F. at 204 (9.36% in 1981, 8.96% in 1991, 6.03% in 2001). Accordingly, past Commissions seem to have been willing to allow subsequent federal court decisions to alter the meaning of Article III, Section 2 even though the voters could not have known of those decisions and approved no language which reasonably can be construed to incorporate them. Thus, to the extent the Circuit Court's finding was intended as evidence of the voters' intent behind the amended Section 2, it was clearly erroneous.

B. The Evidence Repudiate Respondents' Arguments

Respondents pay predictably little attention to the uncontested population deviation statistics for the New House Map. But, the Court (and Missouri voters) are stuck with them nonetheless. For example:

- 40 districts (one out of four) miss this constitutional population target by ***1,100 people or more.***
- 20 districts (one out of eight) miss the mark by ***1,300 people or more***.
- The largest district has ***2,867 more people*** than the smallest district.

See L.F. at 242 (Appendix at A16).

Any objective, rational review of the population deviation figures for the New House Map will leave the Court with a definite and firm conviction that greater population equality was possible. The Circuit Court had no trouble finding that obvious fact. L.F. at 314 (Appendix at A4). Respondents, however, argue that the New House Map's failure to deliver on the Constitution's promise of population equality as nearly "as possible" should be "excused" because any greater equality would: (1) cause a loss of compactness; or (2) require that political subdivision lines be crossed; or (3) "threaten" a Voting Rights Act violation. The trial court agreed. These "excuses" are wrong on the law, clearly erroneous as a factual matter, or both.

Compactness: As noted below, population equality is the Constitution's highest priority (other than contiguity, which should never conflict). Thus, as a matter of law, compactness can ***never*** be used as an excuse for a lack of equality.

Crossing Political Subdivision Lines: Political subdivision lines are not mentioned in Article III, Section 2 – yet they are mentioned numerous times in Respondents briefs as a primary justification for inequality and a lack of compactness. In 1966, the voters specifically threw out a redistricting scheme aimed at respecting county lines – and Respondents cannot now defend the New House Map on the ground that the Commission had discretion (or, they even

suggest, the duty) to follow political subdivision lines at the expense of population equality or compactness.

In addition, the Commission's allegiance to political subdivision boundaries seems to wax and wane to suit other unidentified purposes. Like the Missouri River, the Map follows political subdivisions boundaries when it suits, and ignores them when it does not. Here are only a few examples:

City	County	Split Between Districts
Fairdealing	Butler	153-152
Shell Knob	Barry	158-138
Pierce City	Lawrence	158-157
Garden City	Cass	55-57
Raymore	Cass	55-37-56
California	Moniteau	50-58
Elsberry	Lincoln	41-40
Agency	Buchanan	11-9

If the Commission can split political subdivisions like these for no discernible reason, it can do so to enhance population equality, which must be achieved as nearly "as possible."

Voting Rights Act: First, there is no evidence that the Commission drew the New House Map, or any of its districts, for the purpose of complying with the federal Voting Rights Act. Nor has the New House Map been determined to comply with that law. Appellants do not challenge the New House Map under federal law, but there is no legal or factual basis for Respondents to hold the New House Map out as such a ***perfect*** expression of the Voting Rights Act's requirements that the movement of a single census block anywhere in the state must inevitably result in unlawful discrimination.

The New House Map contains sixteen districts in which African Americans comprise more than 50% of the population (Districts 22-23, 26-27, 66-67, 73-79, 84-86). Even ignoring these districts, and the districts they touch, there are still dozens of obvious locations where population equality could have been increased if the Commission had given equality the priority that Section 2 demands. But why should majority/minority districts be ignored? Section 2's population equality requirement applies to every district. Yet, Districts 23, 27, 84, and 77 are among the most under-populated districts, and Districts 66-67, 76, 78, 85-86 are some of the most over-populated.

Appellants' opening brief explains that St. Louis City contains under- and over-populated districts side by side. *See* L.F. 244 (Appendix at A18). That they also happen to be majority/minority districts is irrelevant. It is undisputable that

these districts can be made more equal (and more compact) without impacting their majority/minority status, and it is wrong (not to mention false) for Respondents to suggest that such inequality (or lack of compactness) is a necessary result of Voting Rights Act compliance. *See also, e.g.*, L.F. 246 (Appendix at A20) ("red," i.e., under-populated, districts sitting next to "blue," i.e., over-populated, districts where neither are majority/minority districts).

The only evidence needed to prove that the districts in the New House Map are not as nearly equal "as possible" is the Map itself. However, Appellants supplied additional evidence. The two partisan proposals from August 2011 had population deviation ranges less than half of the New House Map's deviation range. These proposals have the same Voting Rights Act "seal of approval" that the New House Map has, i.e., none. The maps and population data are in evidence, and there are numerous districts in these alternative maps that are substantially closer to the constitutional population target and yet sufficiently removed from any majority/minority districts to expose the over-breadth of Respondents' argument.

Finally Appellants submitted a map drawn using the same software and census data that the Commission used, yet achieving a population deviation range of only 67 people, or 0.18%. L.F. at 270 (Appendix at A44). This is not an "alternative map" and Appellants are not suggesting it could be or should be adopted. Appellants offered it only to prove – along with all the other evidence

before the Court – that greater population equality was ***possible***, and it does. It is not an expert ***opinion***, as Respondents claim (Intervenors' Brief at 10, 36-37), it is demonstration of what is possible using only what the Commission had before it.

From the forgoing evidence, the Circuit Court concluded that greater population equality was "possible" – and the factors cited by the Respondents to "excuse" the Map's failure to provide such equality are wrong legally and factually. Accordingly, the Circuit Court's Judgment on Count I should be reversed.

C. The Answers To Respondents' Questions

Respondents ask "How much leeway does the [population requirement in Section 2] allow," and how does that requirement "interact with required (contiguity and compactness) and permissible (e.g., political subdivision lines) criteria?" State's Brief, at p.42. The answers lie – as they must – in the plain language of the Constitution. Section 2 provides its own hierarchy of criteria in which each criterion is wholly subservient to the criteria above it

1. The top of this hierarchy is contiguity. However it is defined, compliance permits only a binary analysis (either a district is contiguous, or it is not), and even Respondents do not argue that the Commission has discretion on this point. Therefore, every district must be comprised of contiguous territory – without exception or qualification.

2. The next priority is population equality, which the plain language of Section 2 admits does not have to be achieved precisely, but which also unmistakably requires must be achieved as nearly "as possible." Respondents suggest this requirement is similar to "as can be." State's Brief, at p.47. They are correct, but there is no reason to re-state the language of the Constitution when it speaks clearly enough for itself: "each district . . . shall, as nearly as possible, equal [36,742]." All parties agree that "as may be" is a less-demanding standard than "as possible." Yet, "as possible" is fractionally more forgiving than the binary commandment for contiguity. Therefore, Section 2's population equality requirement is the second highest priority. Compactness cannot be used to justify a lack of equality, nor can maintaining political subdivision boundaries (assuming it is even a valid consideration at all) or any other criteria below population equality in the constitutional hierarchy. Accordingly, a deviation from equality can be excused ***only to the extent*** (a) it is necessary to achieve contiguity in every district (which should never be the case), or (b) it is simply not "possible" to create a map with greater equality.

3. Each and every district must be "compact" – but only "as compact as may be." As discussed below, "as may be" means as allowed or permitted by other factors. Thus, compactness must yield to population equality and contiguity, but ***nothing*** else. If compactness can be made subservient to any other criteria, i.e.,

criteria not mentioned in the Constitution, then the requirement of compactness is meaningless. There are, of course, hundreds or thousands of things which can influence redistricting. Appellants do not contend that, because only three are mentioned in Section 2, the remainder cannot be used. Appellants do contend, however, and the plain language of Section 2 demands, that non-constitutional criteria cannot be pursued at the ***expense*** of the only three criteria approved by the voters.

II. The New House Map Fails Missouri Voters' Requirement for Actual (not Academic) Contiguity

(Point Relied on II.)

Appellants need not Reply at length on this issue; the question presented to the Court has been well defined. Appellants' argue for a common sense meaning of the provision which serves a rational interest and imposes a meaningful restriction on the Commission's discretion in redistricting. Respondents argue for the least restrictive definition possible, limiting "contiguous" to its most academically benign meaning so that it can have no real impact on how a Commission may choose to draw its map.

As noted above, there is no evidence as to why the Commission drew any district the way it did. Any statement by Appellants or Respondents about why the New House Map looks as it does is merely an inference argued to the Court. In

that vein, Appellants contend that Districts 49, 50, 53, 70, 98, and 110 ignore the Missouri and Meramec Rivers because the mapping software ignores rivers and does not display or print them unless instructed. *Compare* L.F. at 249-54 (Appendix at A23-A28) (maps of these six districts showing these Rivers) *with* L.F. 225 (Appendix at A58) (map supplied by Commission, without rivers displayed). Human judgment must intervene, and the Commission failed to do so.

The only time this Court has spoken to the issue of "contiguity" in the context of redistricting is *Preisler v. Kirkpatrick*, 528 S.W.2d 422, 424 n.4 (Mo. banc 1975) ("*Preisler*"), in which the Court noted[4] that the contiguity requirement is intended to ensure, at least, that "no part of any district is physically separate from any other part." And this definition is all that the Court needs to resolve this case, if applied in a common sense, rather than purely academic, manner.

Long before Section 2 was amended to its present form, this Court stated that the constitutional requirements of contiguity and compactness, taken together, were "found to be necessary to the preservation of true representative government" when they were added to the 1875 Constitution. *Preisler v. Doherty*, 284 S.W.2d

[4] Regretfully, Appellants misidentified this as a "holding" in their opening brief. The footnote clearly states that contiguity was not disputed and the Court's observations were incidental to its holding.

427, 435 (1955) ("*Preisler-1955*"). Notwithstanding Respondents' references to canoes and other watercraft, the voters who approved that language in 1875, and the voters who approved Sections 2's present form a century later, intended contiguity to be used in a common sense or practical manner, and they intended for it to have a meaningful impact on the Commission's discretion in how to draw a redistricting map. Under Respondents' argument, contiguity only prevents a district split in two by another district. There is no reason to believe this would happen, let alone that preventing it was essential to the "preservation of true representative government." *Preisler-1955*, 284 S.W.2d at 435.

Appellants' construction, on the other hand, depends upon the same definition recited in *Preisler*, 528 S.W.2d at 424 n.4, and simply requires that districts be drawn so that residents are not physically separated from each other by a river that they will – as a practical matter – have to go out of their district to cross. On the other hand, if for example the ordinary and practical way for voters to travel between Weldon Springs and Bridgeton is by boat or ferry, then the voters' expectations would be met by District 70 (L.F. 252, Appendix at A26) and the Constitution would be satisfied. That is not the case, however, and District 70 (along with five other districts) violates the contiguity requirement. The only people confused by whether this common sense construction of the voters' choice of words extends to the streams and puddles hypothesized by Respondents are the

Respondents themselves. Accordingly, the Circuit Court's Judgment on Count II should be reversed.

III. The New House Map Fails Voters' Requirement that Districts be "As Compact as May Be"

(Point Relied On III.)

This Court already has read hundreds of pages of briefs, and heard oral arguments of counsel in *Pearson*, regarding the proper interpretation of the constitutional requirement that districts be "as compact as may be." In common usage, "may" connotes permission or authority, rather than "can" which refers to capacity or ability. As "compact as may be," therefore, means as compact as the district is allowed to be . . . given other considerations. There seems to be unanimity on this definition. The only dispute concerns which "considerations" are allowed to influence or restrict the degree of compactness that a particular district "may" attain. Any such dispute can easily be resolved with reference to the plain language of Section 2. Only two considerations are mentioned other than compactness, and both of them are expressly given higher priority than compactness. Thus, compactness is the Constitution's third priority. If Respondents' argument that other considerations – about which Section 2 is silent – should be allowed to influence or restrict a district's compactness is allowed to prevail, it will reduce compactness from a "mandatory and objective" requirement

to the constitutional equivalent of unwelcome suggestion and it will remove any means of enforcing this requirement in the future.

Respondents raise four points in response to Appellants' compactness claims.

1. Respondents argue that Section 2 does not impose a compactness requirement on every district, but only on the map as a whole. This argument is refuted by the language of Section 2, which provides: "***Each district*** shall be composed of contiguous territory as compact as may be." [Emphasis added.] There simply is no way to read this language other than that the compactness requirement applies – and thus must be adjudged – on a district-by-district basis. True, changes in any one district will affect adjoining districts, but such is the task of redistricting. The choice before the Court is not whether Missouri should ***have*** a compactness requirement, for we do. The choice is whether it will be ***enforced***.

2. Respondents assert that, viewed as a whole, the compactness statistics for the New House Map are better than the alternatives presented. This argument is not altogether clear, in that there is only one statistical test (the "perimeter" test) which scores a map "as a whole." On that test, the New House Map scored next-to-worst, and Appellants' equality and compactness demonstration showed a 15% improvement over the New House Map. *See* L.F. 271 (Appendix A45). All other statistical comparisons evaluate the best and worst districts on the map, and

calculate the mean and the standard deviation of all districts. Regardless, on virtually every test and in every category, the New House Map was outperformed by two (if not all three) of the alternatives. *Id.*

3. Respondents contend that Appellants failed to show that changes in boundaries will cause a change in population equality, or that this can be done without "cost." State's Brief, at p. 55-56. Specifically, Respondents point to District 42, and warn that changing the boundaries will divide towns along the highways. *See* L.F. 245, 225 (Appendix at A19, A58). The New House Map (and Respondents' arguments) is a study in contradictions. Respondents claim that the southern boundary of District 42 is fixed because it is the Missouri River – which is blithely ignored elsewhere. See L.F. 249-254 (Appendix at A23-A28). In addition, Respondents emphasize that District 42 illustrates the Commission's commitment to honoring county lines, without noting that this "historical" criterion is forsaken when it comes to Wright City, which is excised from District 42 and abandoned to District 63. L.F. 245, 225 (Appendix at A19, A58). Most important, District 42 is among the most over-populated districts in the state, and it is adjacent to Districts 43 and 40, two of the most under-populated. Whenever "red" shares a border with "blue," the opportunity to move both districts toward population equality cannot be legitimately disputed.

4. Finally, with predictably monotony, Respondents argue that any change which results in an increase in compactness must ***certainly*** result in racial discrimination and a violation of the Voting Rights Act. But this argument makes no more sense under compactness than it did under population equality. For example, even ***within*** a cluster of majority/minority districts, St. Louis City districts lack both population equality and compactness. *See* L.F. 244 (Appendix at A18). That they also happen to be majority/minority districts is irrelevant. A lack of compactness is no more required by the Voting Rights Act than in population ***in***equality, and greater compactness is possible without disturbing the number of majority/minority districts. *See also, e.g.*, L.F. 246 (Appendix at A20).

Ultimately, however, Respondents' Voting Rights Act arguments are a straw man's strawman. Even if every majority/minority district is set to one side, Respondents cannot justify – and this Court cannot condone – the "rogues gallery" of districts (*see* L.F. 216-233 (Appendix at A49-A66)) that fly in the face of a compactness requirement. District 55 (L.F. 247, 226 (Appendix at A21, A59), for example, defies credibility. Along every edge, of which is has (roughly) sixteen, District 55 displays a patent effort to include or exclude specific voters. As noted above, even though District 55 is under-populated and District 37 is over-populated, the Commission abandoned Respondents' self-proclaimed essential criterion to avoid splitting political subdivisions and split Raymore not just two

ways, but three. In addition, the Commission included the entire town of Garden City in District 55, except for the two voters exiled to District 57. No definition of "compactness," and no discussion of the "interaction of criteria," can defend this district. And no map with this (and similar districts) presents the sort of "hair-splitting" challenge that Respondents contend this case to be. Accordingly, the Circuit Court's Judgment on Count III should be reversed.

IV. The Commission is not a Judicial Entity, and the New House Map was the Result of Multiple Sunshine Law Violations

(Point Relied on V.)

Respondents contend that the "appellate apportionment commission" is different from the "bipartisan apportionment commission," and that the former is a judicial entity empowered by the Constitution to remedy the latter's failure to produce a timely map. But these labels come from Respondents, not the Constitution. Article III, Section 2 refers only to one "commission."

Under Respondents' construction, if Section 2's references to the commission to which members are appointed by this Court are different from its references to the commission to which the Governor appoints the members, then the so-called "appellate apportionment commission" has ***no*** obligation to apportion the House so that all district populations are as nearly equal "as possible."

Fortunately, such absurdities are precluded by the plain language of Section 2, which has only ***one*** set of rules and ***one*** commission. If the members appointed by the Governor fail, this Court appoints new members, but the Commission's duties (and its character, for purposes of the Sunshine Law) remain the same.

Respondents acknowledge that the task assigned to the Commission is essentially a legislative function. But, they assert that the application of the Sunshine Law to the Commission is determined by the fact that its members are also Judges of the Court of Appeals. Because the Sunshine Law does not apply to judicial entities (unless acting in an administrative capacity), Respondents conclude that the Commission is immune from the Sunshine Law. Following the Respondents' logic, the Sunshine Law cannot apply to the Commission while the Governor's appointees are serving, either. Those appointees are private citizens or individual members of a legislative body, and surely they do not lose their individual "status" any more than the Judges do. Therefore, because the Sunshine Law obviously does not apply to private citizens or individual members of the General Assembly, it cannot apply to the Commission when comprised of such. So, too, would it follow that the Sunshine Law cannot apply to the Board of Healing Arts. Because physicians and other citizen members of the Board do not lose their individual "status" merely by serving on the Board, and because the Sunshine Law does not apply to physicians or other private citizens, the Board is

immune from the Sunshine Law. Obviously, Respondents' individual "status" argument must fail.

This Court should reject Respondent's arguments and clarify that the Commission is bound by the Sunshine Law – just the same as every other entity created by the Constitution (including this Court when acting in an administrative capacity). But the more compelling reason to reject these claims is that Respondents have woven throughout their briefs, both explicitly or implicitly, this assertion that the Commission was acting in a judicial role when it drew the New House Map. First and foremost, there is no textual basis for this assertion. Second, the supremacy clause of the United States Constitution makes it palatable (though only barely) that a member of the federal judiciary can – under limited circumstances – invade the legislative province of the State of Missouri and draw electoral districts. But, for any one or more members of the co-equal state judiciary to assert such power would require extraordinarily clear authority in the Constitution – authority which is wholly lacking in Section 2.

Finally, for Respondents to suggest that the Commission was a judicial entity acting in a judicial capacity – in other words, a "***court***" – when it created the New House Map, does disservice to the judicial branch as a whole. Courts decide ***cases***; they do not weigh interests and establish public policy, which is what a redistricting map does. And, when a court decides a case, it does so on the basis of

a finite set of information (evidence of record), compiled in public if at all possible, on which its decision must be based and to which reference ordinarily is made to explain or justify the court's decision. Here, ***no one*** knows what information the Commission considered in deciding upon the New House Map, and ***no one*** knows why the Map was drawn the way it is. That may be proper for a Commission, but it is decidedly improper for a court. As a Commission, the Sunshine Law applies. As a court, the entire process and product is suspect.

Ultimately, whether the Court accepts Respondents' arguments or those of Appellants, the Commission cannot have it both ways. It cannot ignore the Sunshine Law on the ground that it is a judicial entity acting in its judicial capacity, and then expect its maps to be afforded the deference due the General Assembly. The legislature has plenary authority under the Constitution to enact any map that is not plainly and unequivocally prohibited a specific provision of the Missouri Constitution or federal law. In stark contrast, the Commission operates under a specific grant of authority, not plenary authority, and its discretion is well circumscribed. And, in final contrast, a court imposing a remedy for a constitutional violation has little or no "policy" discretion at all, and a "decision" such as the New House Map would be remanded for sufficient findings to permit meaningful appellate review.

Accordingly, though Respondents' ill-considered arguments to avoid the Sunshine Law threaten the legitimacy of the Commission and its work, those arguments must fail because the New House Map is not a decision by a "court." Instead, it is a legislative finding by the Commission. This Court must review it on that basis, but it must apply the Sunshine Law to it on that same basis. Accordingly, the Circuit Court's Judgment on Count V should be reversed.

V. Intervenors Have No Right Or Need to Intervene

Intervenors' arguments in support of the Circuit Court's decision to grant intervention merely strengthen Appellant's arguments. They have asserted no separate interests that the law recognizes or will protect and, more tellingly, they sought ***no separate relief***. If, as they say, Respondents' constitutional obligations to represent their current districts are at risk, why not seek relief? If, as they say, their constitutional right to run for office is imperiled, why not seek relief? The answer is that there is no relief a court can give, which demonstrates that they present no separate right or interest.

If Appellants are right, the New House Map is unconstitutional. Intervenors can have no legal interest in an unconstitutional map, nor is creating a constitutional map in the wake of such a decision a "waste" of money. If Appellants are wrong, Intervenors claim no harm. In short, they disagree with the Appellants and agree with the State. That the State would make different tactical

decisions (i.e., acknowledging that the Sunshine Law claim cannot and does not need to be brought against the Commissioners) does not mean the Attorney General will not protect Intervenors' interests. It only means he will not do it the way they want it done. By and large, however, Intervenors make the same arguments as the State, they assert no separate interest in the subject of the lawsuit, no do they seek any different relief. They are, for purposes of Rule 52.12, mere bystanders who may surely be "interested" but who lack a sufficient "interest" to merit intervention. Accordingly, the Circuit Court's decision granting intervention should be reversed.

VI. Neither Laches Nor Chicken-Little Arguments Will Save An Unconstitutional Map

Intervenors (though not the State) argue that Appellants' claims are barred by the doctrine of laches because (by their count) 58 days lapsed between the filing of the New House Map and Appellants' asserting their claim. Respondents do not say what the lower limit is, however. 48? 28? 8? The Circuit Court asked if every party agreed to the procedure used on February 3, when the revised scheduling order was entered. Intervenors did not object. The Circuit Court convened a teleconference on the morning of February 14, prior to ruling, to ask again if any party objected to the lack of argument or hearing. Intervenors did not

object. They cannot object now, and use this self-identified "prejudice" to tie this Court's hands or bar Appellants' claims.

If Appellants' arguments are correct, the New House Map is void *ab initio.* Yet, Respondents would impose them on Missouri voters for a decade because they claim nothing can be done about it. The issue must be resolved, *cf. Preisler v. Doherty*, 265 S.W.2d 404, 407-08 (Mo. banc 1954) (constitutionality of Senate map is not rendered moot by election), and it is better for all that it be resolved now. What the Court said about the Senate in *Tecihman* in January is no less true about the House in February. There is time for the constitutional process in Article III, Section 2 to produce a constitutional map in time for the August primary. The individuals involved may not ***have*** to do so, but they certainly ***can*** do so. If they do not, the 2001 map remains in effect. *Cf. State ex rel. Gordon v. Becker*, 49 S.W.2d 146, 149 (Mo. banc 1932) (under constitution, Senate districts do not lapse at the end of the decade, "we find nothing in the language of [Article III, Section 7] to indicate that if that duty is not performed the state government comes to an end").

Intervenors' chicken little claims concerning candidate declarations, ballot placement, and filing fees are not before this Court, nor are they directly affected by a declaration that the New House Map is (and always was) invalid. Respondents should heed the wisdom of Matthew 6:34, "Take therefore no thought

for the morrow: for the morrow shall take thought for the things of itself. Sufficient unto the day is the evil thereof." In addition, this Court should not attempt to address Intervenors' sky-is-falling arguments in the abstract, nor use them to bar Appellants' claims.

CONCLUSION

For the reasons set forth above and in Appellants' opening brief, Appellants respectfully request that this Court enter the declaratory judgments sought in Counts I through IV, enter the declaratory judgment and judgment enforcing the Sunshine Law sought in Count V, and enjoin the Secretary from making any use of the New House Map for any purpose related to the nomination or election of any member of the House as sought in Count VI.

Dated: February 27, 2012

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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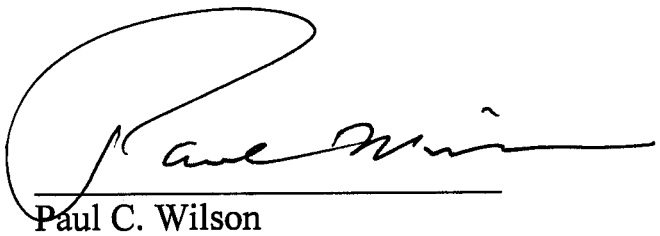
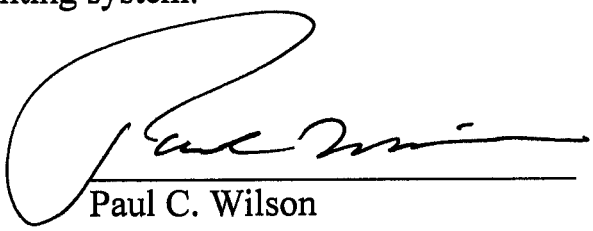


Paul C. Wilson

CERTIFICATE OF COMPLAINCE

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 6,873 words, excluding the cover page, tables, the signature block, certificate of service and this certificate, as determined by the Microsoft Word 2010 Word-counting system.



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