IN THE
SUPREME COURT OF MISSOURI

SC92351

BOB JOHNSON, *et al.*,

Plaintiffs-Appellants,

vs.

STATE OF MISSOURI, *et al.*,

Defendants-Respondents.

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

RESPONDENT'S BRIEF FOR STATE OF MISSOURI

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RESPONSE TO STATEMENT OF FACTS

This appeal addresses the "plan and map" adopted and timely filed in November 2011 by the judicial House of Representatives reapportionment commission appointed in September 2011 by this Court pursuant to Art. III, § 2 and Art. V, § 4.3, of the Missouri Constitution.

The commission's "plan and map" divided the State into 163 House districts, with population near the "ideal" of 36,742. L.F. 204. The largest district has 38,170 persons; the smallest 35,303 persons. *Id.* That means that the overall range or deviation[1] of 7.8%. The districts laid out by the

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[1] "Overall deviation" or "overall range" has become the accepted method of evaluating population differentials. The calculation (shown for various Missouri House redistricting plans at L.F. 204) takes four steps: (1) divide the total population by the number of districts, producing the population of an "ideal" district; (2) identify the district with the smallest population, and calculate what percentage below the "ideal" that district's population is; (3) find the largest district and calculate its percentage above the "ideal"; and (4) add the two percentages together to produce an "overall deviation" or "range." So if the ideal district were 10,000, the largest 11,000, and the smallest 9,000, the overall deviation would be 20% – 10% below plus 10% above = 20% overall.

commission include 16 in which a majority of the residents are African-American (L.F. 173), and 18 in which a majority of residents are minorities (L.F. 179). In nine more districts, minority residents comprise at least 30% of the population. L.F. 175-79.

Appellants ("plaintiffs" herein) challenged the "plan and map," first by writ petition in this Court, then in the circuit. In support of their challenge, they identified various alternative plans. But they did not present data regarding the minority population in any of the districts in those plans. The matter was tried on written submissions – a joint stipulation of fact, which included as exhibits the "plan and map" and other material; and competing affidavits with exhibits.

The circuit court entered judgment against the plaintiffs (L.F. 311; Appellant's Appendix A1), holding that the judicial reapportionment commission was not a "public governmental body" covered by Chapter 610, RSMo (and that even if it were, the "open meetings" provision would not apply because the Constitution authorizes the commission to meet in "executive session as it deems appropriate"); that the districts set out in the plan each consist of "contiguous territory"; and that the plaintiffs failed to prove that it was possible to develop a plan with districts that were more equal in population or in which all districts (or the districts overall) were more compact to any constitutionally significant degree.

ARGUMENT

Plaintiffs take the position that, in effect, every judicial reapportionment commission – in 1981, 1991, 2001, and 2011 – violated the law, in two respects: by holding their executive meetings without public announcement; and by adopting redistricting plans that could be more equal in population, with districts that could be more compact. The circuit court declined to find in the 35-year-old Sunshine Law and in provisions of the Missouri Constitution that date back to at least 1875 the basis for a sea change in both the process and the result of drawing new legislative districts. This Court should follow suit.

I. The commission did not violate the Sunshine Law by declining to publicly announce the meetings that the Missouri Constitution gave it the right to hold in private. (Responds to Appellant's Points V and VI.)

We begin with the fifth and sixth of the plaintiffs' "points," those relating to the Sunshine Law, Chapter 610, RSMo. We do so because if the plaintiffs were right both as to the requirements of that law and the appropriate result of a violation, the court could avoid the constitutional issues altogether. But the judicial reapportionment commission did not violate the Sunshine law – both because as a judicial entity it is not a "public governmental body" within the terms of that law, and because if it were

covered, it would have a constitutional privilege of meeting when and where it wishes, without interference by the legislative branch.

A. Background

The judicial reapportionment commission for the House of Representatives is created in Art. III, § 2 and Art. V, § 4.3, Mo. Const. Section 2 first requires the appointment of a bipartisan reapportionment commission. Art. III, § 2. If six months pass, and the bipartisan commission has failed to submit a final map, that commission is discharged. *Id.* The Missouri Supreme Court then appoints from among the judges of the court of appeals the judicial reapportionment commission. *Id.*; Art. V, § 4.3. The reapportionment commission has only 90 days to submit a map to the Secretary of State. *Id.*

After the 2010 census, the bipartisan reapportionment committee was created, but failed to agree to a House of Representatives district plan and map to submit to the Secretary of State. The judicial reapportionment commission was appointed, and after holding a public hearing, it later met without giving public notice. Within 90 days of the discharge of the bipartisan commission, the judicial commission submitted a plan and map to the Secretary of State – the plan and map challenged by plaintiffs here.

B. "Public governmental body," as defined in the Sunshine Law, excludes a "judicial entity" unless that entity is operating in an "administrative capacity."

Section 610.011.1, RSMo, of the Sunshine Law, requires "public governmental bodies" to hold public meetings, after public notice:

> Except as otherwise provided by law, all public meetings of *public governmental bodies* shall be open to the public as set forth in section 610.020, [and] all public records of public governmental bodies shall be open to the public for inspection and copying as set forth in sections 610.023 to 610.026….

§ 610.011.2, RSMo (emphasis added). The first analytical question in any Sunshine Law case, then, is whether the entity holding meetings is a "public governmental body." [2]

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[2] This case addresses only meetings, not public records, though both are addressed in § 610.011.2. The decision of the court may reach records indirectly – not just because a holding as to whether the judicial reapportionment commission is a "public governmental body" would apply as to both records and meetings, but also because there may be some records that are the records of "meetings." A "public meeting" includes some

"Public governmental body" is defined in § 610.010(4), RSMo, in pertinent part, as "any legislative, administrative or governmental entity created by the Constitution or statutes of this state, by order or ordinance of any political subdivision or district, [and] judicial entities when operating in an administrative capacity …." The first phrase suggests broad application; standing alone, it could be read to include even the judiciary. But the later phrase clarifies that judicial entities are included "when operating in an administrative capacity." *Id.* If judicial entities were included in the phrase, "legislative, administrative or governmental entity," then the phrase "judicial entities when operating in an administrative capacity" would be mere surplusage. *Stewart v. Williams Communications, Inc.*, 85 S.W.3d 29, 35

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electronic communication among the members of a public governmental body. *See* § 610.010(5). In contrast to communications among all the members or a quorum of a "public governmental body," communications with individual members of a "body," whether it be the General Assembly or a bipartisan reapportionment commission, are not records of the body and would not be subject to the Sunshine Law. *State ex rel. Moore v. Brewster*, 116 S.W.3d 630 (Mo. Ct. App. E.D. 2003) (member of a public governmental body is not the body for purposes of open records requirements of Chapter 610).

(Mo. App. W.D. 2002) (Sunshine Law definition of public governmental body would not be interpreted in such a manner as to render some of its phrases to be mere surplusage).

Inclusion of the judiciary in the definition of "public governmental body" has evolved. In *Remington v. City of Boonville*, 701 S.W.2d 804, 807 (Mo. App. W.D. 1985), the court held that the phrase in the 1982 version of the statutory definition of public governmental body, "any legislative or administrative governmental entity," § 610.010(2), RSMo Cum. Supp. 1982, "totally removed the judiciary from the definition of a 'public governmental body', and, ipso facto, from the operation of Missouri's 'Sunshine Law'." Before the amendment at issue there, the definition included "any constitutional or statutory governmental entity," § 610.010(2), RSMo Cum. Supp. 1982, but gave the judiciary power to close "any meeting, record, or vote of judges," and a wide variety of other court proceedings. § 610.025.1, RSMo Cum. Supp. 1973. The 1987 amendment took the "or" out to read "any legislative, administrative governmental entity," and included a long list of these types of entities. § 610.010(2), RSMo Cum. Supp. 1987. In 1993 the phrase "judicial entities when operating in an administrative capacity" was added. § 610.010(4), RSMo Cum. Supp. 1993. In 1998, the "or" was reinserted; it now reads, "legislative, administrative or governmental entity". *See* § 610.010(4), RSMo 2000, and RSMo Cum. Supp. 1998. But throughout

these changes to the statutory definition of "public governmental body," the judiciary has always had the power to close its meetings, been excluded entirely, or has been excluded unless it is operating in an administrative capacity.

Consistent with that authority, plaintiffs apparently agree that the judicial reapportionment commission is not a "public governmental body" under Chapter 610 if it is a "judicial entity" not operating in an "administrative capacity."

C. The Commission is a "judicial entity."

Chapter 610 does not define "judicial entity" directly. Nor can a definition be easily found by reference to the Missouri Constitution. The judicial reapportionment commission is created in Article III of the Missouri Constitution.[3] Article III does address the Legislative Department, which would seem to add weight to the idea that it is a legislative entity. But the

[3] At one point, plaintiffs assert that "[t]here is only one commission" under Art. III, § 2 and that the judges simply replace the citizens as members of that commission. Appellant's Brief ("App. Br.") at 51. That is not what the constitution says. It instructs this Court to appoint "a commission," not to appoint judges as replacement members of the commission originally created by appointment by the governor.

judicial reapportionment commission is also controlled by Art. V, § 4.3, Mo. Const. Article V is the article concerning the Judicial Department. Moreover, the article under which a provision is found seems to have little or no weight in determining the nature of the power involved. *See, e.g., State ex rel. Cason v. Bond*, 495 S.W.2d 385, 392 (Mo. banc 1973) (governor's power to participate in appropriations process was legislative in nature; power is found in Art. IV, the Executive Department); *State ex rel. Jones v. Atterbury*, 300 S.W.2d 806, 813-17 (Mo. banc 1957) (in discussing requirement that bills be presented to governor, articles under which the provision had existed mentioned, but not relied upon, in stating that approving or vetoing power is a legislative power).

The nature of the task may be pertinent, but it, too, does not answer the question. The judicial reapportionment commission, appointed by and from the judiciary, performs a task somewhat analogous to the Governor's veto. Both functions are legislative. Compare *Teichman v. Carnahan*, No. SC92237 (Mo. banc Jan. 17, 2012) slip op. at 5 ("The reapportionment of the senate districts and preparation of the map continues to be a legislative function despite the constitution's requiring appellate judges to draw the lines."); *State ex rel. Wulfing v. Mooney*, 247 S.W.2d 722, 724 (Mo. banc 1952) (creating senatorial districts is a legislative function); and *State ex rel. Carroll v. Becker*, 45 S.W.2d 533, 537 (Mo. banc 1932) ("[D]ividing a state into

political subdivisions, or creating territorial districts of any kind, is a legislative act."); *cert. granted and decision affirmed in Carroll v. Becker*, 285 U.S. 380 (1932); with *State ex rel. Cason v. Bond*, 495 S.W.2d at 392; *State ex rel. Jones v. Atterbury*, 300 S.W.2d 806, 817 (Mo. banc 1957) (when vetoing an act of the legislature, "the governor acts in a legislative capacity"). When the governor exercises his veto authority, he does not cease to be the state's chief executive, who holds "the supreme executive power." Art. IV, § 1, Mo. Const. Similarly, the General Assembly does not become something other than a legislative entity when it performs constitutionally assigned powers that are executive in nature. *See* Mo. Const. Art. III, § 18 (general assembly may exercise the executive power of arrest and the judicial power of assessing a fine and imprisonment on a person exhibiting disorderly or contemptuous behavior). Like the legislature and the governor, the judicial reapportionment commission does not come out from the judicial umbrella when it performs a constitutionally-assigned legislative task: to draw new legislative districts.

Further, the judicial reapportionment commission only comes into being when the political process for reapportionment – here, the bipartisan reapportionment commission, but in other circumstances the General Assembly or some other elected, legislative body – fails to produce a plan, and the time for filing for office rapidly approaches. That suggests that at least

one reason for giving this very limited legislative power to a group of judges is that judges are somewhat insulated from political currents and therefore are in a better position to make prompt, unbiased decisions. If the bipartisan apportionment commission cannot reach a decision, it is likely because the current political situation has made it difficult for the parties to work with each other for a common solution. Where that occurs, it makes sense to require judges to step in and quickly draw new districts.

Before 1966, in the absence of a new plan and map from the bipartisan commission, the constitution permitted elections to proceed under the existing map, and the appointment of a new commission. *See* Art. III, § 2, RSMo 1959. The change in 1966 was made in recognition that the system in place would no longer be permitted under federal law. The 1966 amendment was a direct result of the "one-man, one-vote" holdings of the U.S. Supreme Court. *E.g.*, *Reynolds v. Sims*, 377 U.S. 533 (1964) (applying *Baker v. Carr*, 369 U.S. 186 (1962)). It was apparent that if the state did not draw constitutionally acceptable districts in a timely fashion, a single judge – likely a federal judge – would complete the task. The 1966 change in Art. III, § 2 recognized that the changes had to be made before the first election after the census; their efforts to change the process had already failed once (*see* pp. 42-45, *infra*), and there was no longer time to try again the next year. The insertion of the judicial reapportionment commission as an immediate

backstop for the bipartisan commission ensured that the responsibility for drawing the plan and map even for the first post-census legislative election would remain within the state authority – and be performed not by a single federal judge, but by a group of Missouri judges. That we would have a preference both for judges who know the state and for a collective rather than an individual decision is hardly surprising.

The judicial reapportionment commission, then, having been created by and from the judiciary, and taking a role that otherwise would flow to a judge upon default by the political branch, is a "judicial entity" despite the legislative nature of its assignment.

D. In adopting its redistricting plan and map, the Commission was not operating in an "administrative capacity."

The next question, then, is whether, in drawing new legislative districts, the judicial reapportionment commission is "operating in an administrative capacity." § 610.010(4), RSMo Cum. Supp. 2011. Again, there is neither a definition in Chapter 610, nor a clearly applicable precedent. But relevant authorities point strongly to the conclusion that what the judicial reapportionment commission does is not "administrative."

First, as discussed above, it is well-established that the task of drawing new districts is not legislative – something distinct from administrative functions, which apply, not make, the law.

Second, the conclusion fits the dictionary definitions of "administrative," *e.g.*, "[t]he management or performance of the executive duties of a government … the practical management and direction of the executive department and its agencies." Black's Law Dictionary (7th Ed., 1999), pg. 44.

Third, the conclusion is consistent with this Court's Operating Rules. Consistent with the Sunshine Law, the Court requires: "Administrative records are generally considered to be open to the public." Supreme Court Operating Rule 2.06. The Court then defines "administrative records" as "all records, including reports and correspondence, pertaining to the administration of the courts." Supreme Court Operating Rule 2.03(a). Using those Rules, the judicial reapportionment commission would not be "operating in an administrative capacity" because its work does not relate to "administration of the courts," nor of any other entity.

And finally, the conclusion is consistent with caselaw that addresses instances where a judicial entity is performing an administrative function. For example, in *Shawnee Bend Special Road Dist. D v. Camden County Comm'n*, 839 S.W.2d 343, 347-48 (Mo. App. S.D. 1992), the court explained

that in certain circumstances, a trial court is required to act as an "administrative agency" and make "administrative decisions." The Sunshine Law was amended in the legislative session immediately after this case was decided, § 610.010(4), RSMo Cum. Supp. 1993, suggesting the legislature added the "judicial entities when acting in an administrative capacity" language in response to this ruling. There are a few other situations in which a court acts in an administrative capacity. *See, e.g.*, *Abmeyer v. State Tax Comm'n*, 959 S.W.2d 800, 801 (Mo. banc 1998) ("the legislature has, occasionally, invested circuit courts with non-judicial, administrative functions."). But the creation of new legislative districts is not an "administrative function" in that sense. It results in a new law, binding on third parties, not merely an administrative instruction.

The judicial reapportionment commission, then, though a judicial entity, does not act in an administrative capacity. Because the Sunshine Law does not include judicial entities unless they are acting in an administrative capacity, the judicial reapportionment commission is thus not a "public governmental body" under § 610.010(2).

E. The Missouri Constitution authorizes the Commission to hold "closed" meetings as it deemed necessary.

The Constitution gives the apportionment commissions the right to meet in "executive" session whenever they wish: "Executive meetings may be

scheduled and held as often as the commission deems advisable." Art. III, §§ 2, 7. "Executive session" is not defined in the Constitution. But the dictionary definition demonstrates that it has the same meaning as "closed meeting" under the open meetings law: "a usu. closed session of a legislative or other body." Webster's Third New International Dictionary (1993), p. 795. *See also* Black's Law Dictionary (7th ed., 1999) ("A session of a board or governmental body that is closed to the public and that only invited persons may attend."). The Constitution contemplates only two types of meetings for the reapportionment commissions: "executive" or "closed," and "hearings open to the public." Art. III, §§ 2, 7. Though nothing prevents any reapportionment commission from opening meetings other than the required public hearings, they are constitutionally empowered to meet as they wish beyond the mandated public hearings.

By giving the reapportionment commissions the constitutional authority to meet in executive or closed session "as often as the commission deems advisable," the Constitution preempts any legislative attempt to decide when or how or with what prerequisites the commissions can meet. So even if the judicial reapportionment commission were a "public governmental body" subject to the Sunshine Law, the provisions of Chapter 610 regarding notice, votes, and other prerequisites could not be applied to it. If the members of a commission decide to meet with no notice whatsoever, they are

simply invoking their constitutional authority to schedule and hold a meeting whenever they deem it advisable.

The need for that flexibility should be apparent. If the commission meets one day, and wants to continue its business overnight, it has the constitutional right to do so – regardless of whether it has given 24 hours notice as generally required by § 610.020.2, even if shorter notice is not absolutely "necessary" as provided by § 610.020.4. If two of the commissioners are speaking on the phone, find they are making progress, and decide to invite others to join them, they do not have to wait for 24 hours to initiate that call, then invite the public to join them before they formally vote to close the meeting and continue their discussion; they have a constitutional right to convene that executive session. Those who drafted §§ 2 and 7 of Art. III understood the need for that kind of flexibility if the commissioners – whether bipartisan or judicial – are going to have any real hope of accomplishing their task, particularly given the 90-day window in which the judicial reapportionment commission must act.

F. Invalidation of the plan and map at this late date would not be appropriate even if there had been a Sunshine Law violation.

Because the judicial reapportionment commission is a judicial entity not operating in an administrative capacity, it does not fall within the

Sunshine Law. And if it did, its executive sessions would still be constitutionally permissible. But even if the commission were covered by Chapter 610 in all respects, the relief that Plaintiffs seek – invalidation of the House redistricting plan – would not be appropriate.

Rendering a decision void is one permissible Sunshine Law remedy – to be used only when the balance of public interests merits that relief:

> 5. Upon a finding by a preponderance of the evidence that a public governmental body has violated any provision of sections 610.010 to 610.026, a court shall void any action taken in violation of sections 610.010 to 610.026, if the court finds under the facts of the particular case *that the public interest in the enforcement* of the policy of sections 610.010 to 610.026 *outweighs the public interest in sustaining the validity of the action* taken in the closed meeting, record or vote.

§ 610.027.5 (emphasis added).

Here, to invalidate on what are essentially procedural grounds the House districts immediately before (or perhaps even after) filing for office begins, in response to a claim brought two months after the decision being challenged was publicly announced, would not be in the public interest. The

Commission no longer exists; unlike most "public governmental bodies," it cannot reopen the question, hold the allegedly required public sessions, and file a new plan and map. Rather, the entire process would have to start over with the appointment of a new bipartisan citizens commission, which would then have six months (until after the August primary) to file its plan and map, and if it failed, a new judicial reapportionment commission, which would then have 90 days (until after the November elections) to complete its task.

Plaintiffs try to avoid that result by citing the date of this Court's first decision in *Teichman* and *Pearson v. Koster,* Nos. SC92200 and SC92203 (Mo. banc Jan. 17, 2012), as the starting point for evaluating their delay in bringing suit. App. Br. at 3. But that does not excuse them. In November, the plaintiffs knew or should have known what the districts were and that they had been drawn in executive sessions. To the extent they rely on questions addressed in *Teichman* and *Pearson*, they could have posed those same questions in November – or at least as early as the *Pearson* plaintiffs did.

In their Point VI the plaintiffs also argue that the imminence of opening of the filing period is not a factor in the analysis. App. Br. at 10. But it must certainly be; the advantages of appearing at the top of the ballot are well-known, and by statute that position goes to someone who files on the

first day. § 115.395.2. Moreover, those filing for office must pay a fee (§ 115.357.1), and the statute that provides for withdrawal of candidacy (§ 115.359) does not include authority for the fee to be refunded, even to those who find themselves ineligible to run for newly-defined districts. The Court should not reward someone who delays for months in bringing suit with the ability to frustrate state statutes that regulate filing for office.

II. Except as to the absolute requirement of contiguity, the plaintiffs had the burden of demonstrating as to the non-exclusive constitutional criteria for redistricting that there was a "better" alternative that met all legal requirements.

In *Teichman*, the Missouri Supreme Court held that the Commission's plan for new Senate districts violated the Missouri Constitution because it crossed county boundaries too many times. *In re Teichman*, slip op. at 8-9. The instructions for drawing House districts do not include such a requirement. Instead, they provide three criteria – two of which allow the Commission (like the General Assembly, with regard to congressional districts) more freedom to adapt to the particular needs and situations of small areas throughout the State.

The three criteria are found in Art. III, § 2 in the instructions given to the bipartisan reapportionment commission whose failure leads to the judicial commission's appointment:

> The commission shall reapportion the representatives by dividing the population of the state by the number one hundred sixty-three and shall establish each district so that the *population* of that district shall, *as nearly as possible, equal* that figure.
>
> Each district shall be composed of *contiguous* territory as *compact as may be*.

(Emphasis added.) The contiguity and compactness language matches the instructions given for Senate and congressional districts, but there is some variation in wording as to population. The congressional provision applies the "as may be" standard to population and compactness both:

> When the number of representatives to which the state is entitled in the House of the Congress of the United States under the census of 1950 and each census thereafter is certified to the governor, 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*.

Art. III, § 45 (emphasis added). There are two Senate provisions; both address population and shape. The first parallels the Missouri House and congressional provisions as to shape, and the congressional provision as to population:

> The senate shall consist of thirty-four members elected by the qualified voters of the respective districts for four years. For the election of senators, the state shall be divided into convenient districts of *contiguous* territory, as *compact and nearly equal in population as may be*.

Art. III, § 5 (emphasis added). The second is different with regard to shape, but it matches the House provision with regard to population:

> The commission shall reapportion the senatorial districts by dividing the population of the state by the number thirty-four and shall establish each district so that the *population* of that district shall, *as nearly as possible, equal* that figure; no county lines shall be crossed except when necessary to add sufficient population to a multi-district county or city to complete only one district which lies partly within

> such multi-district county or city so as to be as nearly equal as practicable in population. ….

Art. III, § 7 (emphasis added).

There are also critical federal overlays. First, as discussed above, the 1966 amendment that now regulates House redistricting was intended to comply with federal population equality that preventing the State from continuing to allocate a House seat to each and every county – as Missouri had done since 1820. And the new districts must comply with federal population equality standards. *See, e.g.*, *Chapman v. Meier*, 420 U.S. 1 (1975); *Connor v. Finch*, 431 U.S. 407 (1977); *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983); *Voinovich v. Quilter*, 507 U.S. 146 (1993). The plaintiffs do not argue that the districts fail that test.

The new districts must also comply with Section 2 of the Voting Rights Act, 42 U.S.C. § 1973. "The essence of a § 2 claim is that a certain electoral law, practice, or structure interacts with social and historical conditions to cause an inequality in the opportunities enjoyed by black and white voters to elect their preferred representatives." *Thornburg v. Gingles*, 478 U.S. 30, 47 (1986). So the new districts cannot diminish the ability of minority voters to "elect their preferred representatives" by drawing lines that dilute the ability they had under the lines in place since 2001.

The only one of the three state constitutional criteria that does not permit a departure from the ideal is contiguity; it is a term with a precise meaning, and there is no adverb nor adverbial phrase that allows for deviation. Population is less strict; rather than set a goal of "equal population," the requirement is modified by the terms "nearly" and "as may be" or, for Missouri House districts, "as possible." Compactness is even more flexible, both because the term itself (unlike "contiguous" and "equal population") has no precise meaning, and because compactness is required only "as may be."

Below we discuss the three constitutional requirements for Missouri House districts – as well as the plaintiffs' equal protection claim, which is largely a variation on their population argument. But before doing that, we turn briefly to the question of burdens – a question that is critical with regard to the plaintiffs' population and compactness challenges.

A plaintiff who challenges a statute or an ordinance bears the burden of showing that the statute or ordinance is invalid. *E.g.*, *R.W. v. Sanders*, 168 S.W.3d 65, 68 (Mo. banc 2005) ("As the party raising the challenge, R.W. bears the burden of demonstrating that the statute is unconstitutional."); *American Motorcyclist Ass'n v. City of St. Louis*, 622 S.W.2d 267, 268 (Mo. App. E.D. 1981) ("because plaintiffs challenge the ordinance's constitutionality they bear the burden of proof on that issue"). The maps and

plans filed by the reapportionment commissions are the legal equivalent of statutes and ordinances; plaintiffs challenging them bear the burden of proving that they violate some constitutional requirement.

With regard to the first of the three constitutional criteria, the burden imposed on the plaintiff is readily apparent: to prove that a district is not composed of "contiguous territory." Art. III, § 5. The burden for the other two criteria is less clear because, as discussed further below, neither sets a fixed standard. But it seems apparent that a plaintiff challenging a map on equal population or compactness grounds must at the very least prove that there is an alternative plan that meets all legal requirements – including the Voting Rights Act. Plaintiffs suggest (App. Br. at 38) that the State bears the burden of proving a Voting Rights Act violation. But a violation by what? Every alternative map? No precedent – and no logic – compels the State to attack every possible alternative map that a plaintiff can present. Rather, it is the plaintiffs' burden to show that the map they present complies with all applicable law. And as discussed in IV and V below, the plaintiffs here did not present that proof as to any of the plans they referenced: they simply ignored the question of whether those plans complied with the federal statute.

We next turn briefly to the standard of review. It is unclear what standard the plaintiffs believe is appropriate. They cite neither *Murphy v.*

Carron, 536 S.W.2d 30 (Mo. banc 1976), nor any other precedent defining the standard. Much of their argument appears to be based on the assumption that the standard of review is *de novo* – to some degree logically, because large portions of the case are purely legal decisions based on undisputed facts. But where there are facts at issue, *Murphy* does apply, and the findings of the circuit court are entitled to deference.

There is a closely related question: the degree to which the plaintiffs must prove their point. Usually, as in *Pearson* and *McClatchey*, one challenging the constitutionality of a law is required to show that it is "clearly and undoubtedly" unconstitutional (*Ocello v. Koster*, 345 S.W.3d 187, 196 (Mo. banc 2011); if the question cannot be definitively resolved against the legislature, then that co-equal branch is given the ability to apply the constitution itself. Very recently, the Pennsylvania Supreme Court observed the obvious: an apportionment commission is not itself a co-equal branch of government. *Holt v. 2011 Legislative Reapportionment Comm'n*, --- A.3d ----, 2012 WL 375298 at *16 (Pa. 2012). But we cannot agree with the Pennsylvania court's conclusion, then, that a reapportionment commission's decision is "not entitled to a presumption of constitutionality." *Id.* at *17. After all, the people of Missouri, through our constitution, assigned the redistricting task to the commissions. To deprive a commission, whether bipartisan or judicial, of at least the presumption that its product is valid is

to deny the people's faith in the institution they created as a means of accomplishing a critical task, either through compromise by the major parties meeting on equal terms (the bipartisan commission) or by judges willing to put themselves in the crossfire of political attacks.

III. The districts in the Commission's plan consist of "contiguous" territory. (Responds to Appellant's Point II.)

Plaintiffs' contiguity claim is based on the language of Art. III, § 2, with regard to the required characteristics of Missouri House of Representatives districts. Referring specifically to the bipartisan citizens commission that is first tasked with drawing districts, the Constitution requires, "Each district shall be composed of contiguous territory …." Art. III, § 2.

The concept of contiguity first appeared in the Missouri Constitution with regard to Senate districts at least as early 1848. *See* Mo. Const. Art. III, § 6, RSMo 1848. It did not include the word, "contiguous." Rather, when allowing counties to be combined into a single state senate district, the Constitution said that the counties in the districts "shall not be entirely separated by any county belonging to another district." *Id.* The 1875 Constitution embodied that concept in the single requirement, continued in 1945, that senate districts be of "contiguous territory." Mo. Const. Art. III, § 6, RSMo 1879.

Until 1945, there was no express contiguity requirement for Missouri House districts. Rather, each county had at least one representative; when a county had more than one representative, the county was to be divided into "compact and convenient districts." Mo. Const. Art. IV, § II, RSMo 1872. The 1945 Constitution included – again, only for counties that had more than one House seat – the "contiguous territory" requirement for House districts that had long been in place for Senate districts. Mo. Const., Art. III, § 2, RSMo 1949. That requirement was extended to all House districts for the first time in 1966, when by constitutional amendment we replaced the county-based system for apportioning House seats with the language still found in Art. III, § 2. *See* pp. 42-45, *infra.*

Missouri constitutions have never defined "contiguous," so we turn first to dictionaries. "Contiguous" means "touching or connected throughout." Webster's Third New International Dictionary (1993) p. 492. Using the dictionary definition, the contiguity requirement bars a district that has two parts that are not connected or do not touch.

In challenging the contiguity of House districts, the plaintiffs do not suggest that there are any House districts with one part in one place and another some distance away, with an intervening district. Rather, they ask the Court to look only at dry land. In the plaintiffs' view, if water separates

two parcels of dry land, and there is no bridge, the two parcels do not "touch," and are not contiguous.

That proposition has not been tested in Missouri, but it has been consistently rejected elsewhere. *E.g.*, *Kingman Park Civic Ass'n v. Williams*, 924 A.2d 979, 986 (D.C. App. 2007) ("The fact that Wards 6 and 7 now traverse the Anacostia River does not render them noncompact or noncontiguous."); *Parella v. Montalbano*, 899 A.2d 1226, 1255-56 (R.I. 2006) ("Considering contiguity as a separate and distinct prong of the constitutional analysis, this Court holds that the districts … are in fact contiguous. …[W]hile the districts are not contiguous on land, this Court finds that the districts are contiguous on the basis of shore-to-shore contiguity."); *Jamerson v. Womack*, 1991 WL 835368 *3 (Va. Cir. Ct. 1991) ("courts have declined to find that intervening bodies of water or wetlands defeat the concept of contiguity of territory").

Similar conclusions have been reached in adjacent states. A federal court in Indiana explained that "a district lacks contiguity only when a portion of the district is separated from the remainder of the district *by another district*." *Vigo County Republican Central Committee v. Vigo County Commissioners*, 834 F.Supp. 1080, 1087 (S.D. Ind. 1993) (emphasis added), citing *Mader v. Crowell*, 498 F.Supp. 226, 229 (M.D. Tenn. 1980). Thus the "requirement of contiguity is not violated because water divides part of the

district. … Although no physical structure, such as a bridge, provides for foot or motor passage between" parts of a district, the plaintiffs did "not claim that the pertinent portion of the Wabash River cannot be crossed by watercraft." 834 F.Supp. at 1087. In *Mader*, the Tennessee court rejected the premise that "the lack of a bridge or ferry traversing the river … renders [a district] noncontiguous." 498 F.Supp. at 229. After all, "[a] person obviously could cross the river by boat without entering another district." *Id.*

A bit further afield, Virginia courts recently rejoined the chorus in rejecting the idea that water disrupts contiguity. In *Wilkins v. West*, 571 S.E.2d 100 (Va. 2002), the Virginia Supreme Court reflected on the impact of modern technology:

> The trial court's requirement that there be a bridge, road, or ferry allowing full internal access to all parts of the district is a requirement grounded in the theory that residents of the district need to have physical access to other parts of the district. However, such physical access is not necessary for exercising the right to vote, does not impact otherwise intact communities of interest, and, in today's world of mass media and technology, is not necessary for communication among the residents of

> the district or between such residents and their elected representative.

Id. at 109.

Plaintiffs' reading of the contiguity requirement, like the reading asserted in Tennessee, "requires an inference that only terrestrial, as distinguished from marine, forms of transportation are intended." *Id.* But "convenience or ease of travel" is not "an essential element of contiguity" (*id.*); there is no swim test for candidates.

Plaintiffs say that contiguity is broken only by "large rivers" (App. Br. at 39), and name just two: The Missouri and the Meramec. App. Br. at 18. But why just those two? Why, constitutionally, is 100 yards of water different from 100 inches? Is there some constitutional difference between a river or lake that can only be crossed by canoe or other watercraft, and one that can be crossed with a mighty leap? Plaintiffs also say that contiguity can be created by a bridge. App. Br. at 40. But what in the Missouri Constitution suggests that the Department of Transportation and county highway departments can redefine contiguity by erecting or neglecting bridges?

For much of Missouri's history, our largest rivers were not a barrier to transportation, but the most advantageous means of transportation. To hold

that those liquid highways now make election districts non-contiguous would be a dramatic change in Missouri law.

And it is one that would be inconsistent with the use of the contiguity concept in Senate redistricting, the constitutional context in which it originated. For Senate districts, the Constitution has long required that counties be kept intact – even when Lafayette and Jackson counties cross the Missouri River. Whether there is a bridge between the portions of those counties North and South of the Missouri River never was and should not now be of constitutional significance; the counties did not become discontiguous when the river moved, and neither would legislative districts.

IV. The plaintiffs failed to prove that the districts in the Commission's plan are not sufficiently equal in population. (Responds to Appellant's Point I.)

As the plaintiffs observe, "[t]his Court has never had to resolve a claim based on the population equality requirement of Article III, Section 2." App. Br. at 34. The same would be true, of course, were new State Senate districts before the court, based on the population equality requirement of Article III, § 7 that uses the same words.

The plaintiffs' equal population requirement raises a series of issues: What leeway does the language allow? How do the House and Senate "nearly equal population as possible" requirements interact with required (contiguity

and compactness) and permissible (*e.g.*, political subdivision lines) criteria? *I.e.*, do they simply override them all, so that no matter how bizarre the shape and how many political subdivision lines are crossed, population equality is paramount? How do these population equality requirements differ from those found in the equal protection rights under the U.S. and Missouri constitutions? But as noted at the conclusion of this section, in this case all of those questions must be considered, if at all, in light of the plaintiffs' failure to prove that any alternative map meets the requirements of the Voting Rights Act.

A. The "nearly equal as possible" requirement does not demand strict equality, nor override all other considerations.

As noted above, prior to 1966, Missouri apportioned the House among the counties, with each county getting at least one seat. Art. III, § 2, Mo. Const., RSMo 1848; Art. III, § 2, Mo. Const. RSMo 1959. That approach resulted in districts with widely varying populations. *See* L.F. at 204. As noted above, the impact of *Reynolds* and other federal cases in the early 1960's was twofold: to require that states abandon geographic, county-based apportionment; and to threaten that if a state persisted, districts would be drawn by a federal judge.

In response, the people of Missouri on January 14, 1966, amended Art. III, § 2, to eliminate the use of county boundaries for House districts (though retaining their use for State Senate districts, *see* Art. III, § 7). The people chose not to import the language regarding population used since 1945 for congressional districts – as "nearly equal in population as may be" – language pursuant to which the Missouri Supreme Court had permitted population variation as high as 30%. *Preisler v. Hearnes*, 362 S.W.2d 552, 554 (Mo. banc 1962) (smallest district 13% below the "ideal"; largest district 17% above). Such variation was unlikely to survive the scrutiny of the federal courts – as shown just two years later by a federal court decision rejecting Missouri's legislative post-1960-census Senate reapportionment, *Jonas v. Hearnes*, 236 F.Supp. 699, 708 (D.C. Mo. W.D. 1964) ("The present Senatorial Districts with a disparity of 96,477, the lowest in population and 160,288 as the most populous, do not comport with constitutionally permissible standards ….").

In *Jonas,* the court cited *Reynolds v. Sims*, 377 U.S. 533, 577 (1964), for the proposition that at the scale of state legislative districts (as opposed to much larger congressional districts, with many more options to find the population necessary to achieve equality), having "an identical number" of people in each district was a "practical impossibility." 236 F.Supp. at 706. The district court went on to cite *Reynolds* for the proposition that historical and economic basis for drawing districts were "an insufficient justification for

deviation from the equal-population principle." 377 U.S. at 579, quoted at 236 F.Supp. at 706.

Since *Jonas*, federal courts have not insisted on the kind of purity that the 1964 decision suggested. Rather, they have accepted state legislative plans if the overall range of deviation is less than 10%, absent proof of intentional discrimination. The 10% standard first appeared seven years after the amendment to the Missouri Constitution, in a dissenting opinion written by Justice Brennan in the cases of *Gaffney v. Cummings*, 412 U.S. 735 (1973), and *White v. Regester*, 412 U.S. 755 (1973). The Court majority later endorsed and followed that rule in cases such as *Chapman v. Meier*, 420 U.S. 1 (1975); *Connor v. Finch*, 431 U.S. 407 (1977); *Brown v. Thomson*, 462 U.S. 835, 842-43 (1983); and *Voinovich v. Quilter*, 507 U.S. 146 (1993).

Plaintiffs correctly observe (App. Br. at 24) that the Missouri General Assembly's first attempt to comply with the *Jonas* mandate was to amend the constitution to simply assign the redistricting task to the General Assembly, with no criteria whatsoever. H.J.R. 48, Session Laws 1965 at 678. The people defeated that proposition by a vote of 112,211 for to 160,568 against. Session Laws 1965 at 817. That was hardly surprising; in 1944 the constitutional convention had concluded that standardless congressional redistricting was unacceptable, and inserted the entirely new Art. III, § 45 into the Constitution to fill a void created when federal law regarding

compactness expired. *See* Debates, Constitutional Convention of 1943-44, at 7024. And the situation in 1966 was worse: by then the people faced the prospect of both House and Senate redistricting governed by just one criteria – population equality – regulated by federal courts, without the input of Missouri law.

Still under the gun from the federal court in *Jonas*, the General Assembly proposed a second version. H.J.R. 1, Session Laws 1965 at 811. That version passed in a close election – and more voted against it than voted against the first version (178,924 for; 165,395 against; Session Laws 1967 at 935), despite being a special January election. The question was obviously a hotly disputed one.

Instead of the unfettered discretion of the first version or the "as may be" language that the constitution used for congressional (Art. III, § 45) and previously for Senate districts (Art. III, § 5), the people chose language for both House and Senate districts language closer to "as *can* be": the "as nearly possible, equal" formula. Though it seems unlikely that the people intended the "as nearly as possible, equal" standard in Art. III, § 2 and § 7 to be stricter than what the federal courts required, the language does suggest a standard stricter than the alternative "as may be." But how much stricter?

Plaintiffs seem to demand that the population totals must be almost precisely equal – much like the congressional districts must be. *See* App. Br.

at 34 (citing "the near-zero-tolerance rule applied in the *Kirkpatrick* [*v. Preisler*, 394 U.S. 526, 530-31 (1969)] line of cases," under which "federal courts routinely reject [congressional redistricting] plans with deviation ranges of 2.0% (or less.")). Then, moving beyond even the possibility of a 2% deviation, plaintiffs cite *State ex rel. Barrett v. Hitchcock,* 146 S.W. 40 (Mo. banc 1912), for the proposition that the division as to population must be "as near perfect as can be" – and then insist that the standard is not what the voters thought it was in 1966, but instead strives for greater perfection as technology and data improve. App. Br. at 35. In other words, for these plaintiffs, the standard is not a fixed but an evolving one – akin, perhaps, to the Eighth Amendment bar on "cruel and unusual punishment." *See, e.g., State ex rel. Simmons v. Roper*, 112 S.W.3d 397 (Mo. banc 2003), affirmed sub nom. *Roper v. Simmons*, 543 U.S. 551 (2005).

Those arguments ignore the context of the 1966 amendment – when Missourians were forced, not volunteered, to abandon the apportionment methods in place since 1820. They had been told in no uncertain terms that the wide variations at issue in *Jonas* were now impermissible. But although the language they chose is more restrictive than the language rejected in *Jonas*, it still contains room for variation among districts.

The goal stated in the Constitution is not "equal population"; it is "nearly equal population." So even when the people conformed our

apportionment method to federal requirements that appeared, in 1965 and 1966 to be very strict, they deliberately chose not to insist on perfection. Moreover, though "as possible" may be more like "as can be" than the broader "as may be," even "as possible" contemplates that there are circumstances in which "nearly equal" population is not required.

One place where that may be true is with regard to following, where possible, county boundaries – even if that results in some deviation from the ideal. Plaintiffs demand that the court tell commissions drawing House of Representative district boundaries that they are "absolutely forbidden" from following county lines, if by doing so there is any "loss of population equality." App. Br. at 31. That would be an astounding departure from Missouri practice, both preceding and succeeding the 1966 change. It would defy this Court's express recognition in *Pearson* (slip op. at p. 7, n. 1) that the Constitution contemplates using county and other political subdivision lines even in congressional redistricting under Art. III, § 45, where the drafters of the Constitution chose not to include those criteria.

Ultimately, it may not be possible to precisely define "nearly equal in population as possible" (though a presumptive "safe harbor" of the sort the federal courts have developed would certainly be helpful to those drafting future plans). But it seems apparent that the people enacting that language in 1966 did not intend to bluntly override every other consideration – nor

even every consideration other than contiguity and the amorphous "compactness" – in redistricting.

B. The plaintiffs failed to show that any other "plan and map," with smaller population deviation, was legally "possible," *i.e.*, that it is permitted by the Voting Rights Act.

Here, however, a precise definition is unnecessary. The burden on the plaintiffs was to prove to the trial court that even given the leeway allowed by "nearly" and "as possible," the plan clearly and undoubtedly violates the population requirement. They attempted to make that showing with an approach that the Court also saw in *Pearson*: by presenting alternative maps that they believe show it is "possible" to draw districts that are more equal in population but are still contiguous and "compact as may be." But regardless of how the Court might define "as possible," the plaintiffs' claim fails because they do not fully address a key aspect of what is "possible": the legal requirements imposed on the alternative plans. In particular, the plaintiffs' anecdotal focus on districts that have populations above or below the ideal does not tackle section 2 of the federal Voting Rights Act, 42 U.S.C. § 1973.

As noted above, the Voting Rights Act – which overrides Missouri law by virtue of the supremacy clause, Art. VI, U.S. Const. – requires that minorities not lose their ability to elect – or at least to influence the election

of – their preferred candidates. Many of the districts that the plaintiffs point to are in urban areas where minority populations are a factor, often a very significant one. For example, plaintiffs point to Districts 78 and 81 in the city of St. Louis. App. Br. at 30. District 78, as drawn by the commission, is a majority-minority district; adjacent District 81 is not. *See* L.F. at 171. Plaintiffs also point to District 79 (App. Br. at 30), another majority-minority district, again without discussing the impact of changes in that district's boundaries, without considering how the boundaries of that district could move without losing its status, even though it, too borders non-minority Districts 80 and 81. *See* L.F. at 171.

Plaintiffs never presented evidence to the circuit court on which they could base a claim that any of the alternative plans they champion comply with the Voting Rights Act. Though the record includes the racial data for the plan and map adopted by the judicial reapportionment commission (L.F. at 169-85), it does not include comparable data for the alternative plans. It is literally impossible, on this record, to determine whether those plans retain majority-minority or minority-influence districts, nor how many nor where.

In addition to not even attempting to show that any alternative plan complies with the Voting Rights Act, the plaintiffs do no more than poke a toe into the complex interaction among contiguity, compactness, and population equality. A plan with the most compact districts possible will always

sacrifice population equality, and a plan with precisely equal populations will wreak havoc with compactness. And if contiguity means what the plaintiffs say it means, that would further complicate the process, barring districts from crossing not just the Missouri and Meramec Rivers, but other bodies of water.

But again, the plaintiffs insist on a degree of exactness that the constitutional language does not require. That is shown not just by linguistic analysis (the use of "nearly" and "as possible," rather than a simple demand for "equal population") and the history and context of the enactment of Art. III, § 2, but by the history of its application: the overall variation from the ideal population of the districts in the judicial commission's plan is well within the range of plans that have been adopted every 10 years since the equal population provision was amended in 1966. *See* L.F. at 204. And even a cursory look at past districting maps would demonstrate that commissions, both bipartisan and judicial, have concluded that although the history of county-based districting has been modified, the county line preservation concept has not been rejected – as this Court recognized in *Pearson*. This Court should reject the premise that those commissions were all wrong.

C. The population of the districts in the commission's plan meet the "equal protection" requirement of the Missouri and U.S. constitutions, and do not infringe on anyone's right to vote. (Responds to Appellant's Point IV.)

In addition to arguing that the districts are not sufficiently equal in population under the constitutional provision instructing the commissions, plaintiffs also argue that they are so far out of line that they violate the equal protection guarantee of Art. I, § 2. They do not cite the U.S. Constitution, but this Court has long applied the same "equal protection" standards to claims made under both the U.S. and Missouri constitutions. *E.g.*, *Bernat v. State*, 194 S.W.3d 863, 867 (Mo. banc 2006); *Greenlee v. Dukes Plastering Service*, 75 S.W.3d 273, 277 (Mo. banc 2002). In doing so, the Court has relied on federal precedent. *E.g.*, *Oliver v. State Tax Comm'n of Missouri,* 37 S.W.3d 243, 252 (Mo. banc 2001).

Plaintiffs suggest no reason to depart from that practice here. And they at least implicitly concede that federal courts have applied a population equality standard that the plan and map at issue meet. App. Br. at 32. If there is to be a stricter population requirement for Missouri legislative districts, it should be found in Art. III, §§ 2 and 7, addressed above.

Mixed with their "equal protection" claim, plaintiffs allege a violation of their right to vote under Art. I, § 25. App. Br. at 48. But that allegation

makes little sense. Like the equal protection clause, the voting rights provision has been in Missouri constitutions since 1875 – including many years in which unequal population was not only permitted, but mandated. It has never been applied to replace the population equality requirements of Art. III, §§ 2, 5, 7, and 45, and it should not be so applied now – particularly in response to an argument that does not even hint at a standard to be employed in deciding whether the constitutional guarantee has been violated.

V. The plaintiffs failed to prove that the districts in the Commission's plan are not "as compact as may be." (Responds to Appellant's Point III.)

"Compact" is, to use the words of defendants' expert, "a concept in search of a definition." L.F. at 279. At issue here is the same five-word phrase based on that term that is at issue in *Pearson* and *McClatchey*: "as compact as may be." Art. III, §§ 2, 5, & 45. That phrase is imprecise from beginning to end. The imprecise "compact" is paired with the inexact modifying phrase, "as may be." The drafters chose to use the permissive or aspirational "may be," not the mandatory or prescriptive "can be," and we have struggled with what that choice means in practice.

In its first decision in *Pearson*, this Court gave the term no more definition than does the Constitution itself. After all, in addition to endorsing the use of the constitutionally mandated criteria – contiguity, population, and

compactness – the Court expressly endorsed use of one that the drafters of the Constitution chose to use for State Senate but omitted for the House: county boundaries. *Pearson*, slip op. at 7, n. 1. And the Court endorsed the use of other "political subdivisions" – and we have many, ranging from community college districts that can extend well beyond county lines (§ 178.770, RSMo), to block-long neighborhood improvement districts (§§ 67.453-67.475). *Pearson* slip op. at 7.

The Court also endorsed deference to the legislators – *i.e.*, to those who traditionally are assigned responsibility to choose among such criteria. *Id.* In that regard, that the plan at issue here was created by a commission comprised of appellate judges should not matter. The people having assigned to that commission – not to the reviewing courts – the obligation to weigh the competing considerations in drawing new districts, this Court should defer to the commission's choices, unless and until they clearly violate a constitutional mandate.

Such deference is consistent with the constitutional imposition of competing criteria addressed in III-IV above. To comply slavishly with population equality yet have ideally compact districts[4] would be possible only

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

were the state rectangular, the number of districts evenly divisible by four, and the population evenly dispersed. Missouri, of course, has irregular shape and borders. The number of House districts – 163 – is not divisible by four. And the population is certainly not evenly dispersed. Someone, then, must make decisions about what kind of compactness is appropriate in each and every one of the 163 Missouri House districts is evident.

Presumably this Court will clarify in *Pearson* and *McClatchey* the standard to be applied in deciding whether legislative districts are "as compact as may be." But meanwhile, we make four brief points particular to this case.

The first goes to the context: 163 House districts rather than eight congressional districts. There is language in *Pearson* suggesting that every district must be evaluated on its own – *i.e.*, that if there is just one district that is not "as compact" as that individual district could be, then any resident of that district could successfully sue to strike the entire plan. *Pearson*, slip op. at 6 ("The protection of this constitutional provision applies to each Missouri voter, in every congressional district."). But even if that were a workable approach for congressional districts, it is not workable here. Virtually every district could be made more compact, given the specificity of census data in the modern era. But every change made in every district to make that district more compact will affect other districts – some adjacent,

some further away. If every district is evaluated individually – *i.e.*, if a plaintiff can successfully challenge a map because her own district could be more compact – then no map will ever pass muster.

Neither the drafters in 1944 nor the voters in 1945 and 1966 gave any hint that they contemplated that either immediately upon ratification (1966) or after the 1950 (1945) census, every person living in any district that could be "improved" – always at the expense of someone else, of course – suddenly could start a litigation chain that could lead to a judge, rather than the legislature, drawing new districts.

Our other three points go to the record in this case.

The second goes to what the record shows. The record does contain confirmation that the commission's plan meets any version of the "as compact as may be" test, when the plan is considered overall rather than by letting an individual district's boundaries determine the validity of the entire plan: the statistical compactness measures for the commission's plan show that the plan, overall, is in line with or better than the alternatives identified by the plaintiffs. L.F. at 296.

The third goes to what the record does not show. If the plaintiffs are allowed to ignore the plan as a whole and focus instead on individual districts, their analysis must contain more than just the identification of adjacent districts with irregular lines that have varying populations (*see* App.

Br. at 45). It is also critical to know where the people live in the adjacent districts. It may well be that the irregularity is required in order for the districts to be close to even in terms of population, *i.e.*, that there is a substantial, concentrated population along the district border that would, if moved to the adjacent district, simply change the population disparity from favoring one district to favoring its neighbor. That the plaintiffs can draw a map that makes substantial changes in district boundaries (as their alternative maps do – without achieving significantly better overall compactness scores) does not prove that the same goal can be achieved by making small changes of the sort they posit.

And it certainly does not prove that the changes can be made without a cost. That is shown in the plaintiffs' criticism of District 42, which does not just conform in part to county lines, but also to the Missouri River. The record does not show any way that the boundaries of District 42 can be "simply smooth[ed]" (App. Br. at 45) without having an adverse impact on the population – and perhaps even on the shape – of nearby districts. To remove the extension of that district along the Missouri River, the most obvious factor in shaping the district, would separate towns either along Highway 94 or along Highway 19 – or both. To argue that compactness analysis require those drawing maps to ignore such transportation links cannot be reconciled

with the plaintiffs' insistence that contiguity is dependent solely on such links.

In our fourth and final point, we return to what we noted with regard to population (p. 48-50, *supra*) is not in the record here. Again, these plaintiffs failed to address the impact of the Voting Rights Act. So when they attack "Districts 77 and 78 [as] nearly caricatures of compactness" (App. Br. at 44), they fail to address whether the shapes of those majority-minority districts (*see* L.F. at 171, 176) can be "corrected" without diminishing the ability of minority voters to assert political power or influence. The same is true with regard to the plaintiffs' criticism of Districts 27, 35, and 36. App. at 45. District 27 is a majority-minority district; to change the boundaries of District 27 or adjacent Districts 35 and 36 would threaten to change that status. And even where two adjacent districts are both majority-minority districts, the plaintiffs' record is not enough to justify drawing a new boundary between them; where minority residents live within the each district is critical, and the charts that comprise the entire record here with regard to minorities simply do not contain that information.

Ultimately, that fourth point may be the most important: Because the plaintiffs failed to prove that their alternative, allegedly more compact maps comply with the Voting Rights Act, the plaintiffs' compactness claims, like their equal population claims, must fail.

CONCLUSION

For the reasons state above, the Court should affirm the judgment of the circuit court.

Respectfully submitted,

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CERTIFICATE OF SERVICE AND COMPLIANCE

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b) and that the brief contains 11,625 words.

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