**IN THE SUPREME COURT OF MISSOURI**

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| **BOB JOHNSON, et al.,** | ) | |
| | ) | |
| **Plaintiffs/Appellants,** | ) | |
| | ) | |
| **v.** | ) | **Case No. SC92351** |
| | ) | |
| **STATE OF MISSOURI, et al.,** | ) | |
| | ) | |
| **Defendants/Respondents,** | ) | |
| | ) | |
| **JAY BARNES, et al.,** | ) | |
| | ) | |
| **Intervenors/Respondents.** | ) | |

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

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# RESPONDENT-INTERVENORS' BRIEF

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## STATEMENT OF FACTS

Appellants' Statement of Facts is incomplete. Accordingly, Respondent-Intervenors set forth these additional facts.

### A. The New House Map

On November 30, 2011, an Appellate Apportionment Commission consisting of six non-partisan judges (Commissioners) of the Missouri Court of Appeals filed a new apportionment plan for the Missouri House of Representatives (New House Map). L.F. 136. The Commissioners had 90 days to complete their task. Mo. Const. Art. III, § 2. The non-partisan judges "worked collaboratively to draw maps that comply with the constitution, the Voting Rights Act and other legal requirements." L.F. 147. The overall population difference between the largest and smallest districts in the New House Map was 7.8 percent. *Id.*

The New House Map contains 16 African-American majority districts. *Id.* It also has two districts in which the combined racial minority population comprises a majority of the population. *Id.* Thus, the New House Map has a total of 18 districts where racial minorities constitute a majority of the population. *Id.* Minority representation data for every district in the New House Map is published as part of the plan and is included at pages 175-179 of the Legal File.

The population deviations in the New House Map are consistent with the population deviations that have existed in maps that have been drawn since the current constitutional language was adopted in 1966:

POPULATION DEVIATIONS FOR DISTRICTS BASED ON
CENSUS DATA USED TO CONDUCT DECENNIAL REAPPORTIONMENT

| Year | Ideal (Population ÷ 163) | Population / % Deviation from ideal | | |
|---|---|---|---|---|
| | | Smallest District | Largest District | Overall % deviation |
| 2011: AAC Plan | 36,742 | 35,303 | 38,170 | 7.80 |
| | | -3.92% | 3.89% | |
| 2001 | 34,326 | 33,355 | 35,424 | 6.03 |
| | | -2.83 | +3.20 | |
| 1991 | 31,393 | 29,976 | 32,789 | 8.96 |
| | | -4.51 | +4.45 | |
| 1981 | 30,164 | 28,708 | 31, 530 | 9.36 |
| | | -4.83 | +4.53 | |
| 1971* | 28,697* | 28,336 | 29,077 | 2.58 |
| | | -1.26 | +1.32 | |
| 1961* † | 26,502* | 23,858 | 28,636 | 18.03 |
| | | -9.98 | +8.05 | |

Notes:

* Ideal population values calculated using final census counts which may have been adjusted from the counts used during the redistricting process.

† The 1961 figures do not take into account districts in the City of St. Louis, which were not reported with the rest of the 1961 plan.

L.F. 204.

The Appellate Commissioners did not draw the New House Map to favor or disfavor any group. The parties have stipulated that: "There is no basis for finding that *any* district was drawn with the purpose of favoring or disfavoring any groups of individuals compared to any other group of individuals including, but not limited to, any constitutionally protected or suspect class of citizens." L.F. 137 (emphasis added).

### B. Girouard Affidavit

The parties stipulated to graphical representations of a map drawn by the Republican members of the citizens' Commission that was filed on August 11, 2011, and a map drawn by the Democratic members of citizens' Commission that was filed on August 11, 2011. L.F. 137. The Appellants, in turn, filed an affidavit of Christopher Girouard which included population deviation data for those maps. Mr. Girouard's affidavit notes that the maximum population deviation between the districts in those maps were 3.87 percent and 3.27 percent, respectively. L.F. 242.

Mr. Girouard's affidavit was not limited to submitting fact evidence, but also included a completely new map (Exhibit F to his affidavit).[1] Mr. Girouard graduated from college in 2009 – less than three years ago. L.F. 205. He currently serves as the legislative director for the Democratic caucus of the House. *Id.* He attended a training session provided by the distributors of the mapping software used in redistricting and has spent more than 1,000 hours using that software. L.F. 205-06. Based on that experience, he claims only to be "an expert in both the operation and capabilities of the software package." L.F. 206. He claims no other expertise regarding redistricting. He did not attach a resume or other description of his professional qualifications to his affidavit.

[1] As argued below, Mr. Girouard is not qualified to offer expert testimony in the form of a new map. His affidavit is incompetent evidence and should be disregarded to the extent he offers opinion testimony or an alternative map. The Circuit Court, it should be noted, did not rely on the Girouard affidavit or map in its findings of fact.

Mr. Girouard opines that the boundaries of New House Map districts 12, 15-18, 21-22, 35-38, 41, 42, 63, 64, 102, and others could be adjusted to create districts that are more nearly equal. L.F. 209-210. Mr. Girouard, however, did not submit a map showing what the cumulative effect of those boundary adjustments would be and included no analysis of the effect of those adjustments on compactness, contiguity, or minority voter representation.

Mr. Girouard also prepared an alternative House map at the instruction of Appellants' counsel (Exhibit F). L.F. 211. He was instructed to create an alternative map with "(a) the smallest possible population deviation, (b) every district comprised a contiguous territory, and (3) [*sic*] each district as compact as possible given the prior two criteria." L.F. 211. He drew the map based on "these criteria and no others." *Id.* Accordingly, he did not consider minority representation in the drawing of his map. In fact, there is no minority representation data included with Exhibit F.

Appellants did not produce evidence from any witness that any of the alternative maps (the August 11 Republican and Democratic proposals and Girouard Exhibit F) would in fact comply with the federal Voting Rights Act. They have not included any minority representation data from which any such evaluation can be made. The only map in the record supported with minority representation data is the New House Map that was drawn by the six non-partisan judges.

### C. Hofeller Affidavit

Respondent-Intervenors submitted the affidavit of Dr. Thomas Hofeller. His qualifications are set forth in 13 separately numbered paragraphs in his affidavit. L.F.

276-78. Dr. Hofeller also attached a 12 page resume to his affidavit further describing his qualifications and experience in the area of redistricting. L.F. 284-295. To briefly summarize, Dr. Hofeller's company provides redistricting services including database construction, strategic political and legal planning and preparation for actual line drawing, support services and training on the use of geographic information systems used in redistricting, analysis of plan drafts and actual line drawing when requested. L.F. 276. He has a Ph.D. from Claremont Graduate University where he majored in American political philosophy, urban studies, and American politics. *Id.* He has been involved in the redistricting process for over 46 years. *Id.* He played a major role in development of computerized redistricting systems. *Id.* He has drawn maps and provided expert testimony in numerous redistricting cases. L.F. 277-78.

Dr. Hofeller reviewed the compactness and population equality of the New House Map. Dr. Hofeller first explained that there is no single definition for compactness. L.F. 279. It is a concept that is viewed differently by different people. *Id.* There are many different tests for compactness and no single test is controlling. *Id.* Rather than opine whether a district is or is not compact, experts generally talk about degrees of compactness. L.F. 280. Dr. Hofeller noted that one way to make maps more compact is to split precincts. L.F. 280-281. However, increasing compactness can negatively affect other goals such as preserving communities of interest, political subdivision lines, and other values the redistricting process seeks to preserve. *Id.* Because of Missouri's large number of legislative districts, the ideal district size for Missouri is small compared to legislative district ideal populations in many other states. *Id.* Given the large number of

districts, increasing compactness would tend to require additional tradeoffs by severing communities of interest and other political subdivisions. L.F. 281.

Dr. Hofeller reviewed the maps and standard compactness scores for the New House Plan and did not find anything in the data that suggested a violation of federal or state compactness principles. L.F. 281. He also compared the compactness scores for the New House Map to compactness scores for the proposal put forth by the Republican Commissioners on August 11, 2011 and the proposal put forth by the Democratic Commissioners on August 11, 2011. *Id.* The New House Map compared favorably with both plans. It scored better than the Democratic proposal. L.F. 281. It also scored favorably compared to the previous Missouri House districts. *Id.*

Dr. Hofeller also reviewed the New House Map regarding its population equality. Dr. Hofeller noted that, under federal population equality standards, maps with total deviations under 9.99 percent are prima facie valid and represent the valid exercise of legislative discretion in drawing the map. L.F. 282. Such maps will be invalidated only if there is evidence of discriminatory intent in drawing the districts. *Id.*

The total deviation for the New House Map is 7.81 percent. This total deviation is well within the latitude of discretion afforded map drawers according to the federal population equality standards. *Id.* Dr. Hofeller further noted that the population deviations of the districts are evenly distributed and do not cluster. *Id.* That even distribution indicates that most of the population does not live in districts with large deviations from the ideal. *Id.*

## ARGUMENT

The reapportioning of legislative representatives is not a simple or mechanical process. Map drawers must balance and weigh various "sensitive considerations." *Pearson v. Koster*, Mo. Supreme Court Case Nos. SC 92200, SC 92203, slip op. at 6 (Jan. 17, 2012). There is no perfect map. Emphasizing one set of considerations will likely require tradeoffs in another area. As such, redistricting is a predominately political and legislative function. *Id.; State ex. rel. Teichman v. Carnahan*, Mo. Supreme Court Case No. SC92237, slip op. at 5 (Jan. 17, 2012).

The redistricting process can be abused. Politically influential groups may use the process to try to bolster their own political position or undermine the position of groups that they disfavor. Thus, the people of the state and the United States have adopted fundamental rules to guide the process. In Missouri, state House and Senate redistricting is conducted by a bipartisan Commission of citizens in the first instance and, if they are not able to achieve a supermajority consensus (seven tenths agreement), a Commission of six non-partisan appellate judges. Mo. Const. Art. III, §§ 2, 7. Thus, the people of Missouri have chosen to take the General Assembly out of the process and to leave the drawing of maps to citizens and non-partisan judges. This structural decision creates a buffer between the process and the self-interested members of the General Assembly, but it comes at a cost. State legislative redistricting is conducted without the benefit of the expertise, diversity of viewpoints, and resources that legislative bodies can bring to bear on questions of public policy. Lay citizens and non-partisan judges – being less "political" than elected officials by definition – can be expected to approach the issues

with a broader perspective. The people of Missouri when adopting the 1966 constitutional amendments obviously thought that broader perspective was more important than the technical expertise and resources of the legislature.

In drawing legislative districts, specific requirements guide the process. The Missouri constitution requires that the districts be as compact and contiguous as may be and composed of equal population as nearly as possible. Mo. Const. Art. III, § 2. The equal protection clause of the federal constitution likewise requires that districts comply with the one person, one vote standard. U.S. Const. Amend. XIV. Federal law further requires compliance with the Voting Rights Act. 42 U.S.C. §§ 1973-1973aa-6. These requirements share a common purpose – to prevent any one group from obtaining an unfair advantage over any other group. *See Pearson*, slip op. at 4-5. If a map is not tilted so that one group is advantaged or another group is disadvantaged, the map does not offend the purpose behind these laws.

Legislative map drawers may also properly consider a number of other factors that inform democratic governance. They legitimately seek to draw districts that preserve political subdivision lines and allow communities of common interest to be represented by a single representative. *See Teichman*, slip op. at 8-9; *Pearson*, slip op. at 7-8 & n. 1 (quoting *Preisler v. Hearnes*, 362 S.W.2d 552, 557 (Mo. banc 1962)). They appropriately consider natural and historical factors in drawing maps as well. *Preisler v. Kirkpatrick*, 528 S.W.2d 422, 435 (Mo. banc 1975) (Finch, J., dissenting). As the United States Supreme Court and this Court have recognized, failure to consider such factors may actually *increase* the likelihood of abuse of the process: "Indiscriminate districting,

without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." *Reynolds v. Sims*, 377 U.S. 533, 579 (1964), quoted in *Preisler*, 528 S.W.2d at 425.

This Court recently synthesized the key principles that govern the redistricting process in Missouri:

> [1] **First**, redistricting is predominantly a political question. Decisions must be made regarding a number of sensitive considerations to configure the various House districts. These maps could be drawn in multiple ways, all of which might meet the constitutional requirements. These decisions are political in nature and best left to political leaders, not judges.
>
> [2] **Second**, compactness and numerical equality are mandatory. To the extent that they are achieved, numerous other constitutional problems are avoided.
>
> [3] **Third**, compactness and numerical equality cannot be achieved with absolute precision. This is recognized by the "as may be" language used in article III, section 45.

*Pearson*, slip op. at 6 (emphasis and numerical divisions supplied). These principles were articulated in the context of the congressional redistricting case, but the similarity in the constitutional language makes them equally applicable to state legislative redistricting.

House districts shall be composed of "contiguous territory as compact *as may be*." Mo. Const. Art. III, §§ 2 (emphasis added). The populations of districts shall "*as nearly as possible*" equal the population of this state divided by the number of seats in the legislative body. *Id.* (emphasis added). The modifying language on the population equality, compactness, and contiguity standards all reflect that tradeoffs among the different criteria are required. The *Pearson* decision reaffirmed this practical reality. The Court expressly noted that "compactness and numerical equality cannot be achieved with absolute precision." *Pearson*, slip op. at 6. "[A]llowance must be made for precision that cannot be obtained in absolute numerical equality." *Id.* Moreover, "minimal and practical deviations" are appropriate to preserve existing political lines. *Id.*

Finally, redistricting is a legislative act even when conducted by a Commission of appellate judges. *See Teichman*, slip op. at 5. Courts presume that a legislative enactment is valid "unless it clearly contradicts a constitutional provision." *Asbury v. Lombard*, 846 S.W.2d 196, 199 (Mo. banc 1993). Legislative enactments are held unconstitutional only if they "clearly and undoubtedly" violate a constitutional prohibition. *Ocello v. Koster* 354, S.W.3d 187, 2011 WL 5547027 at *3 (Mo. banc 2011).

Thus, the *purpose* of the redistricting rules is to prevent any one group from gaining an unfair advantage over any other group. The *principles* that guide the redistricting process are: (1) the process is predominately political (2) compactness and numerical equality are mandatory requirements, and (3) those requirements cannot be

absolutely achieved. The minimum *proof* that is required in a redistricting challenge is evidence of an alternative map that satisfies all of the legal requirements.

Appellants' challenge to the New House Map fails at all three levels. First, the New House Map was not drawn with the purpose of favoring or disfavoring any group. The New House Map was drawn by a Commission of six, nonpartisan appellate judges, applying the constitution, federal Voting Rights Act, and other legal requirements to draw a map that would fairly balance competing criteria. L.F. 147. The parties have stipulated that "there is no basis for finding that any district was drawn for the purpose of favoring or disfavoring any group of individuals compared to any other group of individuals including, but not limited to, any constitutionally protected or suspect class of citizens." L.F. 137. Accordingly, at the most basic level, Appellants' challenge fails. They make a wholly technical argument that minor deviations from perfection – which were not made for the purpose of favoring or disfavoring any group – should vitiate the work of six non-partisan judges executing a constitutional duty. It is exactly the kind of second-guessing of political decision-making that courts should not entertain.

Second, they ignore the principles that this Court has laid down in its most recent redistricting cases. This Court very clearly identified three overarching principles to guide redistricting inquiry: (1) redistricting is a political process requiring consideration of numerous factors, (2) compactness and numerical equality are mandatory requirements, (3) compactness and numerical equality cannot be achieved with absolute precision and practical deviations are necessary. *Pearson*, slip op. at 6. Appellants argue that the New House Map must be invalidated if any district in the map could have been

made more compact or closer to its ideal population. Under their theory, the political nature of the process – the predominating principle identified in *Pearson* – is ignored and map drawers must devote themselves to the quest for the perfect map focusing only compactness, contiguity, and population equality.[2] Likewise, Appellants disregard the allowance made for minimal and practical deviations and argue for a "near-zero-tolerance" rule. App. Br. 34. Thus, Appellants do not fairly or accurately read this Court's recent decision, but instead single-mindedly focus on the second *Pearson* principle to the exclusion of the first and third principles.

Lastly, Appellants' proof is insufficient even if their legal theories were correct. Appellants have failed to introduce evidence sufficient to show that another map with greater population equality and compactness is legally "possible." Other than the New House Map, there are only three proposed maps in evidence in this case – a map submitted by the Democratic citizen commissioners on August 11, 2011, a map submitted by the Republican citizen commissioners on August 11, 2011, and a map drawn by a Democratic staffer and third year college graduate on or about February 10, 2012. No minority representation statistics are included with any of those maps. No evidence in the record addresses whether the maps would in fact comply with the Voting Rights Act. At a bare minimum, even under Appellants' erroneous legal theories, a map is "possible" only if it meets *all* of the requirements imposed by the Missouri constitution and the federal constitution (including federal statutory requirements applied via the Supremacy

[2] As noted below and specifically addressed in Section V of the Argument, Appellants' argument ignores the federal Voting Rights Act – an omission that is fatal to their case.

Clause). While Appellants' speculate that it would be "possible" to draw a more compact, more equal map that also complies with federal Voting Rights Act, they have not introduced evidence of a map that actually satisfies those criteria.

Appellants' case fails because the purpose of the redistricting laws has been fulfilled, the principles of redistricting do not require a focus on compactness and population equality to the exclusion of all other criteria, and their proof is insufficient to show that an alternative map meeting the requirements that they espouse was legally possible. Appellants' specific arguments are addressed below.

## I. The New House Districts Are Nearly Equal In Population. (Responds to Point Relied On I).

In 1966, the citizens of Missouri amended their constitution to require for the first time that the populations of House districts be "as nearly as possible" equal to the population of the state divided by 163. Mo. Const. Art. III, § 2. They took that action in response to the United States Supreme Court cases applying the "one person, one vote" standard to state legislative districts. *Baker v. Carr*, 369 U.S. 186 (1962); *Reynolds v. Sims*, 377 U.S. 533 (1964). *See also Jonas v. Hearnes*, 236 F. Supp. 699, 705-707 (W.D. Mo. 1964) (relying on *Reynolds v. Sims* to invalidate Missouri's previous redistricting provisions). In *Reynolds*, the Court held that "the Equal Protection Clause requires that a State make an honest and good faith effort to construct districts, in both houses of its legislature, *as nearly of equal population as is practicable*." *Reynolds*, 377 U.S. at 577. When the Missouri Constitution was adopted, the citizens chose nearly identical language

to frame the equality of population requirement. Mo. Const. Art. III, § 2 ("as nearly as possible").

The conclusion that the citizens of Missouri were adopting the federal standard is also confirmed by common usage. "Possible" and "practicable" are synonyms. *Compare Merriam Webster's Collegiate Dictionary* 909 (10th ed. 1993) (defining "possible" as "being within the limits of ability, capacity, or realization" and identifying "practicable" as a synonym), *with id.* at 915 (defining "practicable" as "capable of being put into practice or being done or accomplished" and identifying "possible" as a synonym). By using language that was nearly identical to the language used in *Reynolds v. Sims*, the citizens of Missouri clearly intended to bring their state constitution into compliance with the federal equal protection standard and adopt that standard as the state standard.

Moreover, the Missouri constitution itself has used the terms interchangeably. When the citizens of Missouri amended the provisions relating to House redistricting, they likewise amended the provisions relating to Senate redistricting. Population equality of senate districts is addressed in two separate sections. The population equality language of Article III, § 5 pre-dates the "one person, one vote" cases, and provides that senate districts shall be "as compact and nearly equal in population as may be." This language was left intact by the 1966 amendments but further clarified in Article III, § 7. Section 7 uses language identical to the House provision and provides that the population of each senate district shall "as nearly as possible, equal" the ideal district size. Section 7 goes on to provide that, for multi-district counties, county lines may be crossed to add sufficient population "so as to be nearly equal as practicable in population."

For the Senate map, county lines cannot be crossed except for multi-district counties. Mo. Const. Art. III, § 7. *See generally Teichman*, slip op. The constitutional requirement to follow county lines means that greater population equality deviations are generally required. "Near-zero-population" deviation is not achievable for a Senate map. Yet, despite that reality, the Constitution uses the terms "as may be", "as nearly as possible", and "as nearly as practicable" to describe the population equality standards for Senate districts. If those terms were intended to convey "the highest degree of population equality that can be expressed in the English language," App. Br. 25, then the Senate redistricting provisions would be internally inconsistent. Rather, it is clear that the voters understood those qualifying terms to permit minimal and practical deviations from population equality to accommodate other redistricting values. The "as possible" and "as practicable" language mirrors the United States Supreme Court's language in *Reynolds v. Sims* and reflects a clear intent to incorporate the federal standard into Missouri's constitution.

The United States Supreme Court has explained the standards that apply in state legislative redistricting and the acceptable levels of deviation that a plan may include while balancing other factors considered in the redistricting process:

- Population deviations of 9.9% or less are prima facie valid and will be invalidated only if plaintiffs can establish that some group was improperly discriminated against, *see, e.g.*, *White v. Regester*, 412 U.S. 755 (1973);
- Districts between 9.9% and 16.4% deviation may be permissible but must be justified by a rational state policy, *see, e.g.*, *White*, 412 U.S. at 764

(upholding a plan with 9.9% deviation but noting larger deviations would require justification); *Mahan v. Howell*, 410 U.S. 315, 329 (1973) (upholding districts with a 16.4% maximum deviation because the state had demonstrated a policy of avoiding fragmentation of local political subdivision and the legislature's plan produced minimum population deviation possible while still advancing the state policy);

- Maximum deviations over 16.4% are per se unconstitutional, *see, e.g.*, *Swann v. Adams*, 385 U.S. 440, 444 (1967) (invalidating plans with 25.65% and 33.55% deviations); *Mahan*, 410 U.S. at 329.

**A. Since 1966, Missouri had consistently applied the federal standard in House redistricting.**

Since the "nearly as possible" standard was adopted for House districts in 1966, Missouri map drawers have consistently adhered to the federal framework for population deviations. In 1971, 1981, 1991, and 2001, the maximum deviations in the House maps were 2.58%, 9.36%, 8.96%, and 6.03%, respectively. L.F. 204. Thus, no House redistricting map in Missouri has ever been drawn with zero population deviation. It always has been accepted that population deviations within the federal limits are constitutional. Though not binding, this continuous and longstanding construction of the population equality provision as permitting deviations consistent with federal law is entitled to "serious consideration" by the Court. *Sch. Dist. of Kansas City v. State*, 317 S.W.3d 599, 609 (Mo. banc 2010) (noting that courts must give serious consideration to

legislative and administrative constructions of constitutional provisions by the bodies charged with implementing and administering those provisions).

When the Commission of non-partisan judges drew the new House Map, they were careful to observe these limits. The New House Map has a maximum overall deviation of 7.8% between the largest and smallest district. L.F. 204. Moreover, the parties have stipulated that there was no purpose of favoring or disfavoring any group in drawing the districts. L.F. 137. For population deviations under 9.9%, districts can be invalidated due to population deviations only if there was some improper discriminatory purpose. The fact that the parties have stipulated that there was no purpose to favor or disfavor any group completely forecloses a claim of a violation of the "as nearly as possible" standard. L.F. 137.

**B. The only admissible expert testimony supports the Circuit Court decision.**

Redistricting expert Thomas Hofeller reviewed the New House Map and confirms that the population deviations are within the latitude offered to map drawers by the federal constitution. L.F. 275. He also reviewed the distribution of the districts, and found that they are evenly distributed and are not clustered. L.F. 275-276. Those findings indicate most of the residents live in districts near the ideal district population. *Id.*

To the extent Christopher Girouard offers opinion testimony in his affidavit and supporting exhibits, they should be disregarded. Section 490.065, RSMo, governs the admissibility of expert testimony in Missouri. Expert testimony may be offered by

"qualified" witnesses if it will assist the trier of fact to understand the evidence or determine a fact in issue. § 490.065.1, RSMo 2000. "The facts and data . . . must be of a type reasonably relied upon by experts in the field in forming opinions or inferences upon the subject and must be otherwise reasonably reliable." § 490.065.3, RSMo 2000. *See generally State Bd. Of Registration for the Healing Arts v. McDonagh*, 123 S.W.3d 146 (Mo. banc 2003).

Mr. Girouard's work experience in using the map-drawing software or his claimed "expertise" in the "operation and capabilities" of the software does not represent any type of "scientific, technical, or other specialized knowledge" that will assist the Court in determining the facts in this case. His college education, familiarity with the software, and less than three years of work experience are not sufficient to quality him to offer expert opinions on redistricting. § 490.065.1, RSMo 2000. Accordingly, to the extent his affidavit claims to be offering expert opinion testimony, it is incompetent evidence and should be disregarded.

Exhibit F to the Girouard Affidavit is a purported House redistricting map prepared by Mr. Girouard. L.F. 255-265. Mr. Girouard avers that Appellants' counsel requested that he create a map with "(a) the smallest possible population deviation range, (b) every district comprised of continuous territory, and (3) [*sic*] each district as compact as possible given the prior criteria." L.F. 211. Mr. Girouard's affidavit specifically states that he considered those concepts and "no other" criteria. *Id.* Mr. Girouard thereby admits that he has not considered whether the map he drew complies with the federal Voting Rights Act. Mr. Girouard's failure to consider compliance with the federal

Voting Rights Act means that his affidavit provides no assurance or reason to believe that Exhibit F is in fact a lawful map. As such, the facts and data that Mr. Girouard used are incomplete and are not "otherwise reasonably reliable." § 490.065.3, RSMo 2000.

The Court should not consider the opinions and alternative map prepared by Mr. Girouard because they are incompetent evidence. *See, e.g.*, *Thompson v. Rockett*, 313 S.W.3d 175, 181 (Mo. App. 2010) (appellate courts ignore incompetent evidence in review of a court-tried case). To the extent the Court does consider them, they should be afforded little or no weight.

Appellants also cite to proposed maps offered by the Republican and Democratic Commissioners of the Bipartisan House Apportionment Commission as examples of maps with lower deviations. App. Br. 27-29. But they offer no evidence that the maps comply with the additional legal requirements for such maps. Moreover, they characterize those maps as being "drawn in pursuit of diametrically opposite and competing political goals." App. Br. 28. Slightly greater population equality in allegedly partisan maps does not establish a constitutional violation. The very fact that the New House Map was drawn by a group of non-partisan judges, giving weight to broader societal interests, may have resulted in a map with slightly greater population deviations.[3]

[3] It is entirely possible that such partisan proposals necessarily resulted in districts with lower population *because* they were partisan.

### C. Zero tolerance for population deviations is not the standard.

In its January 17 opinions, the Missouri Supreme Court expressly cautioned that absolute population equality is not required and allowances must be made for the balancing of other factors. *Teichman*, slip op. at 8-9; *Pearson*, slip op. at 6-8. Appellants ignore this clear instruction. They argue for a "near-zero-tolerance" approach and argue that this Court should prohibit the consideration of any factors other than compactness, population equality, or contiguity, if such consideration would have the effect of decreasing compactness or population equality. App. Br. 31, 33-36, 44. They analogize to cases where courts have been called upon to draw maps when the political process fails and congressional reapportionment cases arising under Article I, § 2 of the United States Constitution. App. Br. 33-36. In those cases, courts acting in their judicial capacity cannot appropriately consider political factors in drawing a map, and state legislatures must justify the local policies that they use to determine federal representation. Neither situation is presented in this case. Appellants do not offer any basis for concluding that Missouri intended to foreclose its redistricting bodies from considering the traditional range of redistricting considerations.

Appellants' "near zero tolerance" focus on population equality, compactness, and contiguity to the exclusion of all other factors has never been the law and is inconsistent with the Courts' most recent opinions. First, the Court expressly recognizes that the redistricting process in Missouri – even when conducted by a Commission of non-partisan judges – is still a legislative and political function. *Teichman*, slip op. at 5.

There are a "number of sensitive considerations" and multiple ways to draw the maps that would be constitutional. *Pearson*, slip op. at 6.

Second, the Court has specifically held that the constitution does not define the only permissible factors that may be considered. For example, in congressional redistricting, the constitution says nothing about adhering to county lines. *See*, Mo. Const. Art. III, § 45. The Court, however, recognized the historical importance of adhering to political subdivision lines and held that population and compactness deviations were appropriate to consider that interest. *Pearson*, slip op. 7-8 & n. 1. Appellants argue that, since the House redistricting provision does not expressly require consideration of county lines as the Senate redistricting provision does, the House redistricting commissions are prohibited from considering them. App. Br. 31. (criticizing the New House Map for adhering to county lines and arguing that they are "forbidden" from doing so if it results in a loss of population equality that is otherwise "possible"). That is simply bad logic. That a factor is not a required consideration does not mean it is not a permissible consideration. The proper conclusion to draw for House redistricting is the same conclusion that this Court drew for Congressional redistricting (which does not expressly require consideration of political subdivision lines either). Political subdivision lines have been and continue to be a permissible consideration in legislative map drawing and "minimal and practical" deviations from absolute compactness and population equality are appropriate to maintain consistency with them. *Pearson*, slip op. at 7-8 & n. 1 ("The Missouri constitution has historically recognized counties as 'important governmental units in which the people are accustomed to working

together,' and has provided for that policy to be considered in the redistricting process"; quoting *Preisler v. Hearnes*, 362 S.W.2d 552, 557 (Mo. banc 1962)).

Like the language of the Missouri constitution itself, the allowance for "minimal and practical deviations" tracks federal case law which has repeatedly recognized that a maximum deviation of 9.9% between the largest and smallest district is "relatively minor." *See, e.g., Voinovich v. Quilter*, 507 U.S. 146, 161 (1993) (maximum population deviations of less than 10% are "within this category of minor deviations"); *Brown v. Thomson*, 462 U.S. 835, 842-843 (1983) (same); *White*, 412 U.S. at 764 (characterizing a total deviation of 9.9% as "relatively minor"). *Cf. Pearson*, slip op. at 7 (noting the "substantial compliance" language of older opinions appropriately reflected the mandatory nature of the requirements but did not "improve upon" the constitutional language). This standard is clear, manageable, and federal court decisions expounding upon it offer a ready source of guidance for this Court and redistricting commissions to consult in the drawing of maps.

Appellants disparage the federal standard as a "10% safe harbor rule." App. Br. 33. That statement, however, mischaracterizes the federal standard. There is no federal safe harbor for population deviations in state legislative maps. To the contrary, challengers can still establish a constitutional violation for population deviations of less than 10% if they also establish a discriminatory purpose in the drawing of the districts. *See, e.g., Larios v. Cox*, 300 F. Supp. 1320, 1322 (N.D. Ga. 2004) (invalidating state legislative maps with 9.98% total deviation because the districts were drawn with discriminatory purpose), *aff'd*, 542 U.S. 947 (2004). In this case, however, the

Appellants stipulated that the New House Map was not drawn to favor or disfavor any group (including constitutionally protected groups). L.F. 137. To the extent this case falls within a federal "safe harbor", it does so by virtue of the fact that the parties have all agreed that the New House Map districts were not drawn with the purpose of giving any group an advantage over any other group in the political process.

Appellants acknowledge that they are arguing for a "near-zero-tolerance rule." App. Br. 34. They contend that Missouri has adopted "the highest degree of population equality that can be expressed in the English language, short of demanding precise equality." App. Br. 25. They decline to define what level of deviations would be acceptable. App. Br. 34, 35-36 ("[T]his Court cannot know how near the goal of absolute equality it can reasonably and reliably expect future redistricting maps to be. That question is best left for another day."). "Zero tolerance" was not the standard when the Commission drew the map, and has never been applied in any House redistricting since the current constitutional language was adopted. If Appellants were correct in that assertion, every House map that has been drawn since 1966 was unconstitutional.

The appropriate standard is the one that the federal courts have devised for state legislative districts, that was adopted in the state constitution, and that has been consistently applied in Missouri over the years. That standard is consistent with this Court's decisions allowing for minimal and practical deviations, and will provide ready guidance to future redistricting commissions.

Maximum population deviations of 9.99% or less with no improper purpose of benefitting or harming any group satisfy the "as nearly as possible" standard and are

constitutional. Since the New House Map's maximum population deviation is significantly lower than that threshold (7.8%) and it has been stipulated that the districts were not drawn with a purpose of favoring or disfavoring *any* group, the Map's compliance with the equal population standard is conclusively established. The Circuit Court decision should be affirmed.

## II. The New House Districts Are Contiguous. (Responds to Point Relied On II)

The Circuit Court did not err in finding that the House Plan is contiguous.

Article III, Section 2 provides that "[e]ach district shall be composed of contiguous territory." According to Appellants, when Missouri voters approved Article III, Section 2, they "intended to ensure that a resident...could go from any point within that district to any other point within that district without having to leave the district[.]" L.F. 34. *See also* App. Br. 40. This proposition – for which Appellants cite no authority – is not supported by the plain meaning of the word "contiguous" or Missouri case law.

The Missouri Constitution does not define the meaning of *contiguous*. In the absence of a statutory definition, Missouri courts attribute to the words used in a particular statute (or in the Missouri Constitution) their plain and ordinary meaning. *Sermchief v. Gonzales*, 660 S.W.2d 683, 688 (Mo. banc 1983). The plain and ordinary meaning is derived from the dictionary. *Buechner v. Bond*, 650 S.W.2d 611, 613 (Mo. banc 1983).

*Merriam Webster's Collegiate Dictionary* defines "contiguous" as "next or near in time or sequence." *See Merriam Webster's Collegiate Dictionary* 250 (10th ed. 1993). Similarly, *Webster's New Twentieth Century Dictionary* defines "contiguous" as

"meeting or joining at the surface or border." *See Webster's New Twentieth Century Dictionary* 395 (2d ed. 1979). Accordingly, the plain and ordinary meaning of the word "contiguous" does not support the Appellants' assertion that Missouri House Districts may never cross a body of water. Instead, the constitutional requirement of contiguity, per the plain and ordinary meaning of the term, requires only that the districts themselves be near or adjoined; not that one be able to reach *any* point in the district without leaving the district, as argued by the Appellants. L.F. 34, App. Br. 40. *See also Priesler*, 528 S.W.2d at 424 n. 4 (districts are contiguous if "no part of any district is physically separate from any other part").

Notably, the Missouri Supreme Court has held that contiguity is *not* broken by a body of water. In *State ex rel. Kansas City v. North Kansas City*, the Missouri Supreme Court examined whether contiguity is broken by the Missouri River for the purpose of a proposed annexation. 228 S.W.2d 762 (Mo. 1950). In holding that the Missouri River did not break contiguity, the Missouri Supreme Court stated:

> It is contended that relator's proposed annexation area is not contiguous to its present area. Relator's present north city limits, as defined in its charter is the center line of the river. That center line is the northern boundary of Jackson County, and the southern boundary of Clay County. The area in Clay County described in relator's charter amendment is contiguous to relator's present northern boundaries and *the contiguity is not broken by the Missouri River*.

*Id.* at 773 (internal citations omitted; emphasis added).

In *Wilkins v. West*, the Virginia Supreme Court reached the same conclusion in a challenge to the apportionment of Virginia's legislative districts. 264 S.E.2d 100, 110 (Va. 2002). There, challengers to the proposed legislative districts argued – as Appellants argue here – that the proposed districts violated Virginia's contiguity requirement because some of the districts were separated by water.[4] *Id.* at 109. In rejecting the argument that a legislative district may not cross a body of water, the Virginia Supreme Court articulated the need to balance various constitutional requirements with the practical needs of the citizenry:

> the General Assembly must balance a number of competing constitutional and statutory factors when designing electoral districts...While ease of travel is a factor to consider when resolving issues of compactness and contiguity, resting the constitutional test of contiguity solely on physical access within the district imposes an artificial requirement which reflects neither the actual needs of the residents of the district nor the panoply of factors which must be considered by the General Assembly in the design of a district.

*Id.* (internal citation omitted).

[4] Article II, § 6 of the Virginia Constitution requires that legislative districts be comprised of "contiguous and compact territory[.]"

A similar "panoply of factors" exists in Missouri. Indeed, imposing an imaginary constitutional mandate of contiguity that prohibits a proposed legislative district from crossing a body of water ignores the topography of the State, since Missouri is rife with land masses that are separated by rivers, lakes and streams that are not accompanied by a bridge for vehicular traffic, and ignores the additional requirements imposed by the Missouri constitution.

Notably, under the constitutional prohibition proposed by Appellants, i.e., that a resident be able to go from any point within a particular district to any other point within that district without having to leave the district, eight current House districts violate the Missouri Constitution. (House District 26 contains four separate locations at which an individual must leave the district to reach a separate portion of the district because of a body of water; House Districts 115, 133, 155 and 159 all contain a portion of the district where an individual must leave the district to reach a separate portion of the district because of a body of water). L.F. 198-203.

Accordingly, the decision of the Circuit Court should be affirmed.

## III. The New House Map Districts Are Compact. (Responds to Point Relied On III).

Like population equality, the constitutional directive for compact districts is qualified. Districts must be as compact "as may be." Mo. Const. Art. III, § 2. This qualified language allows for necessary balancing of compactness against other principles in the political redistricting process.

Redistricting expert Thomas Hofeller has explained that there is no single definition of compactness. L.F. 279-280. Many different concepts are used to try to describe compactness. *Id*. There is no single test for determining compactness. *Id.* Rather, redistricting experts generally conduct a number of tests and compare the districts' scores on those tests to determine the relative compactness of the plans. L.F. 280. Compactness is affected by the number of precincts that are split. L.F. 280-281. Splitting precincts could increase compactness, but that would also require additional tradeoffs by severing communities of interest and other political subdivisions. L.F. 281.

Dr. Hofeller has analyzed the compactness of the New House Map as compared to the Republican and Democratic proposals of August 11, 2011, to which the Appellants compared the new House Map. L.F. 281. The New House Map compares favorably with the Republican proposal, and scores *better* than the Democratic proposal. *Id.* Dr. Hofeller also found that the New House Map compared favorably on compactness scores to the 2001 House Districts. *Id.* Dr. Hofeller also reviewed the plan generally and found nothing in the data that suggests a violation of federal or state compactness principles. *Id*. There is simply no basis for concluding that the new House districts are not as compact "as may be."

Appellants claim that a group of over-populated districts "is located in one of the fastest growing areas of the state" and that the population deviations in those areas are "likely to worsen" over the next 10 years. App. Br. 46. They do not cite any place in the record to support this assertion. In fact, the record contains no evidence on fast growing or slow growing areas.

Appellants argue that if any district may be made marginally more compact without decreasing population equality, the entire New House Map is unconstitutional. App. Br. 43-47. They cite no case law in support. For the same reason that argument is incorrect concerning population equality, it is incorrect for compactness. The "as may be" language qualifies the compactness requirement and permits the consideration of other legal and practical consideration in the drawing of the House Map. *See, e.g.*, *Pearson*, slip op. at 7 & n.1 ("minimal and practical deviations" are appropriate to respect other political considerations). The Circuit Court's decision that the New House Map is as compact as may be should be affirmed.

## IV. The New House Map Does Not Violate Missouri's Equal Protection or Free and Open Election Provisions. (Responds to Point Relied on IV)

Appellants argue that the New House Map also violates the Missouri Equal Protection and Free and Open Election provisions in Article I, §§ 2 and 25. App. Br. 47-49. They cite no cases in support. They simply restate their belief that the New House Map is unconstitutional because it does not satisfy their understanding of the equal population, compactness, and contiguity standards. They add nothing to their previous arguments on those points. Accordingly, Respondent-Intervenors restate and incorporate their previous arguments in response.

Moreover, population equality, compactness, and contiguity are specifically addressed in Article III, § 2 of the Missouri Constitution. Appellants make no argument that the general clauses in Article I, §§ 2 and 25 impose more stringent requirements than that specific section. Since Article III, § 2 specifically addresses those issues, its specific

language controls the general provisions in Article I, §§ 2 and 25. For the same reason that Appellants' arguments should be rejected under Article III, § 2, they should be rejected under Article I, §§ 2 and 25. The Circuit Court decision should be affirmed.

## V. Appellants Have Not Introduced Evidence of An Alternative Map That Complies With the Voting Rights Act and Therefore Have Not Met Their Burden of Proof Under Their Own Legal Theories. (Additional Response to Points Relied On I, II, III, and IV)

Under Appellants' legal theory, map drawers may only consider factors that are legally required like compactness, contiguity, and population equality. According to Appellants, consideration of any practical concerns must give way if they would result in a map with a greater population deviation or make the map less compact. App. Br. 31 ("Not only does Article III, Section 2 not require the new map to follow county lines, it is absolutely forbidden from doing so (or doing anything else) when the result is a loss of population equality which was otherwise 'possible.'"); App. Br. 42 ("Another factor . . . which cannot justify a lack of compactness (or population equality) in the New House Map, is the need to follow county lines".). Their argument is incorrect and contravenes the recent decisions of this Court. But even if it were correct, they did not prove their case because they ignore the legal requirements of the federal Voting Rights Act. Those requirements – as much as compactness, contiguity, and population equality – apply to the state House map by virtue of the Supremacy Clause of the United States constitution.

The New House Map is entitled to a presumption of constitutionality. At the very least, Appellants must introduce evidence of an alternative map which actually improves

upon the New House Map and continues to meet all other legal requirements to factually support their legal theory that a more nearly equal, more compact map was "possible." Appellants have not done so. The three alternative maps to which they directed the Circuit Court (the Republican Commissioners' August 11 proposal, the Democratic Commissioners' August 11 proposal, and the Girouard map) were submitted without any minority representation data. Nothing in the evidence indicates whether those maps would comply with the Voting Rights Act.

Compliance with the Voting Rights Act is not a trivial matter that map drawers or courts are free to ignore. The Appellate Commission's media release expressly noted the Commission's consideration of the Voting Rights Act and outlined the number of minority districts that were created: 16 African-American majority districts and two additional combined minority majority districts, for a total of 18 minority majority districts. L.F. 147. District-by-district minority representation data was included as part of the New House Map. L.F. 175-179.

Appellants cite the opinion of Judge Perry in *Corbett v. Sullivan*, 202 F.Supp.2d 972, 983 (E.D. Mo. 2002), as "instructive and enlightening." App. Br. 38. In that case, Judge Perry was required to draw a legislative map for St. Louis County Council after the political process failed. Far from supporting Appellants' position, Judge Perry specifically identified Voting Rights Act compliance as a legal requirement that she was required to consider in drawing the map. 202 F. Supp.2d at 989 (listing "racial fairness" as one of the factors that absolutely must be considering in drawing a map).

Appellants complain that determining Voting Rights Act compliance "is an intensive fact-specific inquiry." App. Br. 38.[5] They further complain that they cannot prove "that every ***conceivable*** map with greater population equality than the New House Map does ***not*** violate the map Voting Rights Act." *Id*. (emphasis in the original) But that is a straw man argument. Appellants have not introduced evidence of even *one* map with that meets the population equality and compactness standards they have set forth and that also complies with the Voting Rights Act. They have not even provided minority representation statistics for the alternative maps that they have cited as examples of "better" maps. It is pure speculation to surmise what the effect of their alternative proposals would be.

Appellants' legal construction of the population equality and compactness standards is wrong. But, even assuming their construction was correct, they at least bear the burden of introducing evidence of one alternative legislative map that meets all of the legal requirements that they propose. They have not done so. Accordingly, their proof fails as a matter of law.

[5] Their delay in filing this case may have limited their ability to marshal any evidence that they might gather on this point. Appellants could have initiated their lawsuit much sooner instead of waiting for nearly two months after the New House Map was adopted. Regardless, their argument that Voting Rights Act compliance is "fact-intensive" does not make it any less essential to their theory of the case.

## VI. The Commission Did Not Violate The Sunshine Law. (Responds to Point Relied On V)

The Circuit Court did not err in refusing to invalidate the House Map pursuant to the Missouri Sunshine Law. It held that the Appellate Commission was a judicial body that was acting in a non-administrative capacity.[6]

The Missouri Sunshine Law covers only "public governmental bodies," as defined in § 610.010(4). Section 610.010(4) explicitly excludes "judicial entities" except insofar as they are acting in an "administrative capacity." As noted by the Attorney General, in drawing the new legislative districts, the Commission was not operating in an administrative capacity, since its function in creating the House Map had the same force and effect of a generally applicable statute. *Teichman*, slip op. 5, 13. *Cf.* §§ 128.245-128.458, RSMo. Accordingly, the Commission constitutes a judicial entity operating in a *legislative* capacity and is, therefore, not subject to the provisions of Chapter 610. For this reason alone, the decision of the Circuit Court should be affirmed.

Even if the Commission is subject to the Sunshine Law, the decision of the Circuit Court should still be affirmed because Appellants' Amended Petition failed to name a party against which relief may properly be granted under Chapter 610. Section 610.027.1, RSMo. Supp. 2010 requires that any action premised upon an alleged violation of the Sunshine Law be asserted against the *public governmental body* that performed the action ("Suits...shall be brought in the circuit court for the county in which

[6] Appellants incorrectly state that the Circuit Court held that the Appellate Commission was a judicial body acting "in a judicial capacity." App. Br. 21.

the public governmental body has its principal place of business."). Section 610.027 further outlines the remedies imposed on *public governmental bodies* that violate the Sunshine Law. These remedies include voiding any unlawful acts of the specific *public governmental body*, not merely voiding acts of the State of Missouri. § 610.027.5. Thus, § 610.027 plainly provides that an action may lie *only* against the public governmental body that performed the allegedly unlawful act. Appellants' original Petition – in apparent recognition of this requirement – named the individual members of the Commission as Defendants. L.F. 5-24. However, Appellants' Amended Petition did not assert claims against the Commission or any of its members.[7] L.F. 25-47. Although Appellants' Amended Petition failed to assert claims against the Commission or its members, Appellants' Amended Petition still sought an Order declaring that the *Commission* violated Chapter 610. L.F. 44-45. But, again, this claim is alleged only against the state of Missouri and the Missouri Secretary of State, not the Commission or any of its members. L.F. 41-45. Thus, even if the Commission is subject to the Sunshine Law, the failure of the Appellants to allege their claims against the Commission or its members prohibits the Appellants from obtaining any relief under Chapter 610.

## VII. The Public Interest Does Not Weigh In Favor Of Invalidating The House Plan. (Responds to Point Relied On VI)

Even if this Court determines that the Commission is subject to the Sunshine Law – and even if this Court finds a violation of the Sunshine Law – and even if this Court

[7] Plaintiffs subsequently filed a Notice of Dismissal of the individual members of the Commission. L.F. 71-72.

determines that it may properly grant relief to the Appellants in the absence of the Commission and/or any of its members in this case – the Court should still *not* invalidate the New House Map.

Section 610.027.5 permits a court to void an action taken in violation of the Sunshine Law *only* if the Court "finds under the facts of the particular case that the public interest in the enforcement of [the Sunshine Law] outweighs the public interest in sustaining the validity of the action taken in the closed meeting[.]" Here, the Circuit Court properly determined that the public interest weighed in favor of sustaining the action of the Commission.

In fact, Appellants complain only that the Commission failed to properly notice a meeting prior to going into closed session. L.F. 41-45. Accordingly, the public was not deprived of any opportunity to provide public comment or input with regard to the New House Map. As the public was not deprived of any substantive right as the result of the actions of the Commission, the public interest weighs in favor of upholding the validity of the plan. Otherwise, Missouri voters and taxpayers (and their representatives) will be subject to outdated legislative districts – premised on an 11 year old census from 2000 – based solely on an unintentional, technical violation of the law. Based on the 2010 census data, the maximum deviation in those districts is now 122.34%. L.F. 204. Reverting to those districts would be manifestly worse and would likely lead to yet more litigation asking a federal court to draw an interim map. As determined by the Circuit Court, the public interest here is best served by allowing the New House Map to stand,

thereby permitting an orderly and cohesive election process for the November 2012 elections.

Thus, the decision of the Circuit Court should be affirmed.

**VIII. The Circuit Court Did Not Err In Granting Intervention. (Responds to Point Relied On VII)**

The Circuit Court did not err in granting intervention.

Rule 52.12(a) allows a party to intervene in a pending lawsuit as a matter of right if: (1) the applicant has an interest in the subject matter of the action; (2) disposition of the action may impair the applicant's ability to protect its interest; (3) the applicant's interest is not adequately represented by the parties to the action. *Borgard v. Integrated National Life Ins. Co.*, 954 S.W.2d 532, 535 (Mo. App. 1997). This rule is liberally construed so as to permit broad intervention. *Maries County Bank v. Hoertel*, 941 S.W.2d 806, 810 (Mo. App. 1997). If the intervenor will either gain or lose by direct operation of the judgment, it has shown a sufficient interest in the subject matter of the action. *Toombs v. Riley*, 591 S.W.2d 235, 236 (Mo. App. 1979).

The elements of 52.12(a) are met here. Respondent-Intervenors have a significant interest in the subject matter of this cause *and* disposition of this cause will impact the Respondent-Intervenors' ability to protect that interest because: (1) Intervenors are citizens, taxpayers and registered voters of the State of Missouri who will reside and vote in a different House District from the district in which they are currently registered if this Court declares the New House Map unlawful; (2) as duly elected Representatives of the Missouri House of Representatives, the determinations made in this case will have a

direct impact on the House district in which Respondent-Intervenors serve and run for re-election; and (3) as citizens, taxpayers, and registered voters of the State of Missouri and as Representatives of the Missouri House of Representatives, Respondent-Intervenors have an interest in ensuring that additional state resources are not unnecessarily expended for the purpose of drafting a new redistricting plan. L.F. 74-82.

Thus, the first two prongs of 52.12(a) are satisfied. The third prong of 52.12(a) is also met. It requires only a "minimal showing" that existing representation "may be inadequate." *Toombs*, 591 S.W.2d at 237 (remote warrantors should have been allowed to intervene in quiet title action despite current owner's defense of action since the warrantors could ultimately be liable).

Respondent-Intervenors' interests are not adequately protected by the other defendants to this action. In fact, the Secretary of State has taken no position with regard to the legality of the New House Map. L.F. 125-129. And, while the Attorney General may have academic interests in the legality of the New House Map, he will not directly suffer the consequences that would accompany an order from this Court that declares the New House Map unlawful. Indeed, as Republican members of the Missouri House of Representatives, Respondent-Intervenors' interests in ensuring that the New House Map is not declared unlawful by this Court is entirely distinct from the interests of the current

parties herein.[8]

The fact that the Attorney General and Respondent-Intervenors have distinct interests in this case is further demonstrated by the Attorney General's opposition to the Respondent-Intervenors' Motion to Dismiss. L.F. 112-115. That motion argued (as Intervenors argue here) that the Appellants' claim should be dismissed for failure to name the Commission or its members. L.F. 101-107. Alternatively, the Respondent-Intervenors requested that the Circuit Court add the Commission as a necessary party, per Rule 52.04. *Id.* The Attorney General filed suggestions in opposition to that request, and argued that the Commission was not a proper party in this case. L.F. 112-115. Accordingly, the Attorney General does *not* maintain the same interests as the Respondent-Intervenors with regard to the ultimate disposition of this matter, as the Attorney General was apparently willing to forgo the potential dismissal of the case on the basis proposed by the Respondent-Intervenors in exchange for the Circuit Court denying the Respondent-Intervenors' request to add the Commission as a party, pursuant to Rule 52.04. *Id.*

The Attorney General also does not maintain the same interest as the Respondent-Intervenors with regard to the delay caused by Appellants (see Respondent-Intervenors' laches arguments below). In fact, the Respondent-Intervenors – not the Attorney General

[8] Appellants' argument that House candidates and officeholders are not specifically affected by this litigation is belied by the fact their affiant is a paid staff member for the House Democratic caucus. Clearly, his employers believe that they have personal interests at stake in this lawsuit.

– are the parties most aggrieved by the Appellants' delay in this case, as Respondent-Intervenors – not the Attorney General – are impacted by the filing period in this case, which begins on February 28, 2012.

The fact that the Respondent-Intervenors are the only defendant parties herein who will actually be candidates under either the House Plan or some other plan – combined with the fact that the Respondent-Intervenors are the only defendant parties who have a constitutional duty to represent constituents under either the House Plan or some other plan – combined with the fact that the Attorney General maintains interests with regard to the ultimate disposition of the Sunshine Law claims that are different from those of the Respondent-Intervenors – combined with the fact that Respondent-Intervenors, not the Attorney General, are prejudiced by the Appellants' unjustified delay in filing this cause – more than satisfies the requirement of a "minimal showing" that existing representation "may be inadequate."[9] *Toombs*, 591 S.W.2d at 237. Respondent-Intervenors demonstrated, therefore, the required elements for intervention as a matter of right pursuant to Rule 55.12(a).

Respondent-Intervenors also established that they were entitled to permissive intervention.[10] Per Rule 55.12(b), permissive intervention is appropriate when the

[9] Indeed, any one of these factors, standing alone, would satisfy the requirement.

[10] This Court reviews permissive intervention for abuse of discretion. *State ex rel. Nixon v. Am. Tobacco Co.*, 34 S.W.3d 122, 131 (Mo. 2000). In addition, reversal based on an improperly granted motion to intervene is appropriate only if the party opposing

intervenor has a claim with a common question of law or fact in common with the main action, *e.g.*, when the applicant has an economic interest in the outcome of the action. *Meyer v. Meyer*, 842 S.W.2d 184, 188 (Mo. App. 1992). For the reasons set forth above, Respondent-Intervenors have economic interests in this case, as both taxpayers *and* employees of the Missouri General Assembly. Respondent-Intervenors also have an interest with regard to the constituents that they currently represent and the House district in which they reside and vote.

Although Appellants assert no prejudice resulting from the intervention, Appellants rely on *Committee for Educational Equality v. State*, 294 S.W.3d 477, 487 (Mo. 2009) ("*CEE*") for the proposition that Intervenors were not entitled to permissive intervention. According to Appellants, *CEE* "unequivocally prohibits permissive intervention in this case." *See* App. Br. 56. *CEE* does not stand for this proposition. Rather, *CEE* highlights why permissive intervention is appropriate here.

In *CEE*, this Court held that the Circuit Court abused its discretion in allowing intervention – over the objection of *both* the Appellants and the State – on the eve of trial. *Committee for Educational Equality*, 294 S.W.3d at 487. *CEE* noted that intervenors, who asserted an interest in the case *only* as Missouri taxpayers, failed to establish a "property or transactional interest" interest in the outcome of the case. *Id.* Thus, *CEE* held simply that Intervenors' status as taxpayers – standing alone – did not establish a sufficient basis upon which to grant permissive intervention:

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intervention can show that it was harmed. *CEE*, 294 S.W.3d at 487-488. Appellants do not argue that they were harmed here.

> Applying taxpayer standing to Defendant-Intervenors would open the floodgates to allow all Missouri taxpayers to seek intervention in the State's defense of constitutional and statutory challenges. No public policy is served by allowing intervention premised on a taxpayer's mere interest in the subject matter of a suit. Defendant-Intervenors here could have sought leave to express their views in an amicus brief, rather than through intervention.

*Id*.

But here, Respondent-Intervenors assert interests that are separate and distinct from their interests as Missouri taxpayers. As noted above, Respondent-Intervenors' interests include the fact that Intervenors are current members of the Missouri House of Representatives and will be required to run for re-election (and potentially serve their constituents) under either the New House Map or some other plan. Additionally, Respondent-Intervenors have an interest as the duly elected representatives of individuals who will vote and reside in districts established by the New House Map. And Respondent-Intervenors *themselves* have an interest in the district in which they vote and reside. Thus, Respondent-Intervenors have asserted interests that relate to their current and future employment, their constitutional duty to serve their constituents, and their rights as Missouri voters. Appellants' reliance on *CEE* is therefore misplaced, and the Circuit Court did not abuse its discretion in granting intervention.

Indeed, Courts routinely permit candidates for public office and registered voters to intervene in election cases or cases that otherwise impact voting rights. *See State ex rel. Kirkpatrick v. Board of Election Commissioners of St. Louis County*, 686 S.W.2d 888, 889 (Mo. App. W.D.1985); *State ex rel. Burke v. Campbell*, 542 S.W.2d 355, 356 (Mo. App. 1976); *Daggett v. Commission on Governmental Ethics and Election Practices*, 172 F.3d 104, 114 (1st Cir. 1999); *Bradas v. Rapides Parish Police Jury*, 508 F.2d 1109, 1111 (5th Cir. 1975); *Kruse v. City of Cincinnati*, 142 F.3d 907, 910 (8th Cir. 1998); *Meek v. Metropolitan Dade County, Florida*, 985 F.2d 1471, 1475 (11th Cir. 1993).

## IX. Appellants' Claims Should Be Denied Based On The Doctrine Of Laches. (Additional Argument In Support of the Judgment)

The doctrine of laches may serve to deny a party relief when there is an unreasonable delay in the assertion of a party's rights. *Bergman v. Mills*, 988 S.W.2d 84, 93 (Mo.App. W.D. 1999). The invocation of laches requires that a party with knowledge of facts giving rise to its rights unreasonably delays asserting such rights for an excessive period of time, thereby causing another party to suffer legal detriment. [11] *Scheble v. Missouri Clean Water Com'n*, 734 S.W.2d 541, 560 (Mo. App. E.D., 1987). In determining whether to apply the doctrine, Missouri courts examine four factors: (1) the length of delay, (2) the reasons for the delay, (3) how the delay affected the other party,

[11] The United States Supreme Court has similarly held that laches requires (1) a lack of diligence by the party against whom the defense is asserted and (2) prejudice to the party asserting the defense. *Costello v. United States*, 365 U.S. 265, 282 (1961).

and (4) the overall fairness in permitting the assertion of the claim. *Id.* Each of these factors supports the application of laches here.

First, the length of the Appellants' delay in this case is significant. The House Plan was unanimously approved by the Commission on November 30, 2011. L.F. 48. However, Appellants failed to commence this action until January 27, 2012, or 58 days after the approval of the House Plan. L.F. 5. As the filing period for the November 2012 elections begins on February 28, 2012, Appellants filed this cause a mere 31 days prior to the beginning of the filing period.

In contrast, the challenges to the Senate redistricting plan was asserted shortly after the adoption of the plan, and well in advance of the candidate filing period, thereby allowing a more reasonable amount of time for judicial review and a timely remedy. Appellants in this case, on the other hand, did not assert their rights in a timely or reasonable manner. Rather, Appellants sat on their rights for nearly two months, ultimately filing this cause only 31 days prior to the initiation of the filing period. L.F. 5.

Second, the Appellants offer no justifiable reason for the delay. In fact, the claims alleged by Appellants in this matter could have been – and *should* have been – asserted shortly after the approval of the House Plan on November 30, 2011. Instead, Appellants inexplicably waited 58 days to assert their rights in this case. L.F. 5, 48. To date, Appellants have offered no logical justification for their delay, despite the fact that Respondent-Intervenors raised the defense of laches in both their Answer and briefing before the Circuit Court. Indeed, the lack of justification offered by the Appellants on

this issue effectively amounts to an admission that Appellants are unable to articulate any rational basis for their delay here.

Third, the Appellants' delay has prejudiced the Respondent-Intervenors and the Attorney General. This matter was submitted to the Circuit Court for final determination on February 10, 2012, only 14 days after the filing of the initial Petition, and a mere 10 days after the filing of the Amended Petition. L.F. 1, 25. This delay limited the ability of the parties to develop a complete record in this case. In fact, the time constraints necessitated by Appellants' delay prevented the Circuit Court from conducting a trial, and thereby required the parties to present this matter to the Circuit Court on a stipulated record without a single evidentiary hearing. L.F. 1-4.

Additionally, Appellants' argue that Respondent-Intervenors failed to develop a sufficient record in support of their intervention. *See* App. Br. 59-61. In support of this argument, Appellants note that Respondent-Intervenors' Answer did not admit or deny certain facts, namely the State's total population under the 2010 census. *Id.*at 59.[12] Although Intervenors contend (as discussed below) that intervention was proper in this case, the Appellants' argument in this regard is still puzzling, since any purported failure on the part of the Intervenors to establish a complete record with respect to the issue of intervention was the *direct result* of the Appellants' delay.[13] Indeed, Appellants sat on

[12] Respondent-Intervenors later stipulated to the State's total population under the 2010 census. L.F. 137.

[13] At a minimum, Appellants should be estopped from asserting that the Circuit Court erred in granting intervention.

the sidelines for 58 days, finally inserted themselves into the game a mere 31 days before the initiation of the filing period, and requested a highly expedited schedule that necessitated the need to submit the case to the Circuit Court a mere 10 days after the filing of the Amended Petition. L.F. 1-4, 25, 48. Yet, remarkably, Appellants now contend that the Intervenors failed to develop a record in support of intervention.

The Appellants' delay is also prejudicial to the Respondent-Intervenors with regard to their future candidacy for the Missouri House of Representatives. As noted above, the filing period for candidates for the November 2012 elections begins on February 28, 2012.[14] Thus, Appellants' delay in instituting this case created a situation whereby – if Appellants' claims are ultimately successful – there will be insufficient time to compile a new House Plan prior to February 28, 2012. Thus, Respondent-Intervenors may be forced to declare their respective candidacies in Missouri's old (and now outdated) House Districts, which are based on now outdated census data from 2000. This prejudice could have been avoided had Appellants filed this action in a more timely manner.

Since Appellants waited 58 days to commence this case, are unable to present a justified reason for their delay, and have prejudiced Intervenors by their unjustified and unnecessary delay, the fourth factor outlined in *Scheble* – overall fairness – also weights in favor of the application of laches in this case. And, as noted above, the maximum deviation in those districts is 122.34% and would likely lead to additional litigation

[14] This case is set for oral argument on February 27, 2012.

asking a federal court to draw an interim map. This prejudice could have been avoided if Appellants had filed this action in a timelier manner.

Notably, laches is commonly applied by Courts to prevent needless delay with regard to the election process. Just last month, the United States Court of Appeals for the Fourth Circuit applied laches in denying Texas Governor Rick Perry's request for an injunction ordering that he be placed on the ballot in the Republican Presidential Primary in Virginia. *Perry v. Judd*, 2012 WL 120076 (decided January 17, 2012). According to the Fourth Circuit, Governor Perry's delay in challenging the constitutionality of Virginia's ballot requirements rendered his claims barred by the doctrine of laches. The Fourth Circuit noted:

> If we were to find Movant's delay excusable, we would encourage candidates to wait until the last minute to bring constitutional challenges to state election laws...and we are loath to reach a result that would only precipitate a more disorderly presidential nominating process.

*Id* at p. 14.

The same concerns exist here. In fact, if Appellants' belated challenge to the constitutionality of the New House Map is permitted at this late stage, future challengers to Missouri election laws would maintain no incentive to assert their claims in a timely manner, resulting in needless delay and uncertainty with regard to the election process. The United States Supreme Court has repeatedly expressed its disapproval of such disruptions. *See Westermann v. Nelson*, 409 U.S. 1236, 1236-37 (1972) (Douglas, J., Circuit Justice) (denying injunction "not because the cause lacks merit but because

orderly election processes would likely be disrupted by so late an action."); *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968) (applying laches despite the unconstitutionality of the relevant statute, because "relief cannot be granted without serious disruption of election process"). *See also Fulani v. Hogsett*, 917 F.2d 1028, 1031 (7th Cir. 1990) (citing *Williams v. Rhodes*, 393 U.S. 23, 34-35 (1968) ("[A]ny claim against a state electoral procedure must be expressed expeditiously.")).

Accordingly, the decision of the Circuit Court should be affirmed for the additional reason that Appellants' claims are barred by laches.

## CONCLUSION

For the foregoing reasons, the judgment of the Circuit Court should be AFFIRMED.

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## CERTIFICATE OF COMPLIANCE

The undersigned counsel hereby certifies pursuant to Rule 84.06(c) that this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations contained in Rule 84.06(b); and (3) contains 13,257 words, exclusive of the sections exempted by Rule 84.06(b), based on the word count that is part of Microsoft Office Word 2010.

/s/ Robert L. Hess II

## CERTIFICATE OF SERVICE

The undersigned hereby certifies that on February 24, 2012, I electronically filed a true and accurate copy of the foregoing brief with the Clerk of the Court by using the Missouri eFiling System and for service on all counsel registered with the eFiling System.

/s/ Robert L. Hess II