

---

IN THE SUPREME COURT OF MISSOURI

---

KENNETH PEARSON, et al.,

Appellants,

vs.

CHRIS KOSTER, et al.

Respondents.

---

On Appeal from the Circuit Court of Cole County  
Honorable Daniel R. Green, Circuit Judge

---

**BRIEF OF INTERVENOR-RESPONDENTS**

---

February 13, 2012

Respectfully Submitted by:

Todd P. Graves (MO Bar No. 41319)  
Edward D. Greim (MO Bar No. 54034)  
Graves Bartle Marcus & Garrett, LLC  
1100 Main Street, Suite 2700  
Kansas City, MO 64105  
Telephone: (816) 256-4144  
Facsimile: (816) 817-0863  
E-mail: edgreim@gbmglaw.com

*Attorneys for Intervenor-Respondents*

**TABLE OF CONTENTS**

PRELIMINARY STATEMENT..... 1

STATEMENT OF FACTS..... 4

Dr. Thomas Hofeller ..... 4

Dr. David C. Kimball..... 12

Phoebe Ellen Ottomeyer..... 17

Ensley Terrence Jones..... 18

ARGUMENT..... 19

I. The Circuit Court Correctly Held that “Compact  
As May Be” Does Not Require Courts to Invalidate  
Redistricting Legislation So Long as a “More Compact”  
Map Meeting the Equal Population and Contiguity  
Requirements Can Be Drawn, and Correctly Found  
as a Matter of Fact That It Is Impossible In Theory  
And Practice to Settle Upon the “Most Compact” Map  
that Meets these Requirements ..... 19

A. The Standard of Review for a Bench-Tried Case..... 20

B. Introduction ..... 22

- C. The Circuit Court Correctly Found as a Matter of Fact that It Is Not Possible in Theory or Practice to Find the Most Compact of All Maps that Meet the Other Constitutional Mandates. . . . . 25
- D. The Circuit Court’s Legal Analysis Was Correct. . . . . 30
  - 1. The Circuit Court’s Analysis Was Consistent with this Court’s Prior Ruling. . . . . 31
  - 2. The Circuit Court’s Analysis Was Consistent with the Plain Language of the Constitution. . . . . 35
  - 3. The Circuit Court’s Analysis Was Consistent with Prior Case Law. . . . . 36
  - 4. The Circuit Court’s Analysis Was Consistent with Common Sense, Unlike Appellants’ Proposed Compromise Standard, Which Requires a Determination Regarding Gerrymandering. . . . . 39
- II. The Circuit Court Correctly Found as a Matter of Fact that the Grand Compromise Is As Compact As May Be. . . . . 45
  - A. Standard of Review. . . . . 45
  - B. The Circuit Court Properly Relied Upon Respondents’ Showing Rather than Appellants’ “Compactness” Expert. . . . . 49

- 1. The Court Was Free to Find, and Correctly Found  
as a Matter of Fact, that it Is Not Possible to Know  
the Most Compact Map that Controls for Equal  
Population and Contiguity. . . . . 50
  
- 2. The Court Was Free to Find and Correctly Found  
that under Any Definition, the Maps Are Compact,  
and that they Are As Compact As May Be Because  
the Differences Are Not Great, the Differences In  
Shapes Are Not Great, the Map Complies With Other  
Requirements, and the Map Reflects a Degree of  
Compactness that Leaves Ample Room for  
Political Decisions. . . . . 57
  - a. The Circuit Court’s Decision Is Consistent with  
Precedent on “Compactness” . . . . . 57
    - 1. Courts Consider More than Shape. . . . . 58
    - 2. Courts’ Review of Shape Has Resulted  
Only in the Invalidation of Districts Less  
Compact than Those Created by H.B. 193. . . . . 60
    - 3. Courts Can Consider Measures that Are  
More Objective than an Individual’s or

Judge’s Eyeball Review. . . . . 64

b. H.B. 193 Is “As Compact As May Be” Under  
Any Standard. . . . . 66

c. Summary. . . . . 71

III. The Circuit Court’s Ruling Is Supported by the  
Independent Ground that No Pearson Appellant  
Has Standing to Challenge Districts Three or Seven. . . . . 73

A. Standard of Review. . . . . 73

B. No Appellant Lives In, Was Injured By, Or Has  
Standing to Challenge the Compactness of Districts  
Three or Seven. . . . . 73

CONCLUSION. . . . . 78

TABLE OF AUTHORITIES

Cases

Abeles v. Wurdack,  
285 S.W.2d 544 (Mo. 1955) ..... 48

Barrett v. Hitchcock,  
241 Mo. 433, 146 S.W. 40 (Mo. banc 1912) ..... 41

Brownstein v. Rhomberg-Haglin & Associates, Inc.,  
824 S.W.2d 13 (Mo. banc 1992) ..... 20, 45

Burdick v. Takushi,  
504 U.S. 428 (1992) ..... 74

Comm. for Educ. Equality v. State,  
294 S.W.3d 477 (Mo. banc 2009) ..... 74

Davis v. Bandemer,  
478 U.S. 109 (1986) ..... 43

Frito-Lay, Inc. v. So Good Potato Chip Co.,  
540 F.2d 927 (8th Cir. 1976) ..... 46, 47

Gaffney v. Cummings,  
412 U.S. 735 (1973) ..... 44

Hammerschmidt v. Boone County,  
877 S.W.2d 98 (Mo. banc 1994) ..... 22

Harris v. Desisto,

932 S.W.2d 435 (Mo. App. W.D. 1996) . . . . . 21, 51, 73

Hoefelman v. Conservation Comm'n of Missouri Dept. of Conservation,

718 F.2d 281 (8th Cir. 1983) . . . . . 47

Karcher v. Daggett,

462 U.S. 725 (1983) . . . . . 37

King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter

Day Saints,

821 S.W.2d 495 (Mo. banc 1991) . . . . . 48

League of United Latin American Citizens v. Perry,

548 U.S. 399 (2006) . . . . . 42

Murphy v. Carron,

536 S.W.2d 30 (Mo. banc 1976) . . . . . 20, 46

Preisler v. Doherty,

284 S.W.2d 427 (Mo. banc 1955) . . . . . 58, 63

Preisler v. Hearnnes,

362 S.W.2d 552 (Mo. banc 1962) . . . . . 59, 60, 61

Preisler v. Kirkpatrick,

528 S.W.2d 422 (Mo. banc 1975) . . . . . 60, 63

Preisler v. Secretary of State,

341 F. Supp. 1158 (W.D. Mo. 1972) . . . . . 61, 62

*R.J.S. Sec., Inc. v. Command Sec. Services, Inc.,*

101 S.W.3d 1 (Mo. App. W.D. 2003) . . . . . 20, 21, 25, 49, 73

*Reed v. City of Union,*

913 S.W.2d 62 (Mo. App. E.D. 1995) . . . . . 58

*Schaefer v. Rivers,*

965 S.W.2d 954 (Mo. App. S.D. 1998) . . . . . 21

*Seitz v. Lemay Bank & Trust Co.,*

959 S.W.2d 458 (Mo. banc 1998) . . . . . 48

*Smith v. Harbison-Walker Refractories Co.,*

100 S.W.2d 909 (Mo. 1937) . . . . . 40

*United States v. Hays,*

515 U.S. 737 (1995) . . . . . 74, 75

*Vieth v. Jubelirer,*

541 U.S. 267 (2004) . . . . . 3, 41, 44

**Constitutional Provisions, Statutes and Rules**

Colo. Const. Art. 5 section 47. . . . . 38

Mo. R. Civ. P. 73.01(c) . . . . . 21, 49, 71, 73

**Other Authorities**

M. Altman, Modeling the Effect of Mandatory District Compactness on

Partisan Gerrymanders, 17 Pol. Geography 989 (1998) . . . . . 44

## PRELIMINARY STATEMENT

Compactness is like temperature. It runs from very cold, compact plans, to very hot, non-compact plans. The facts showed that H.B. 193, the Grand Compromise, is cold. Stretching away from it on one end of the scale is a vast zone of cold, cool, crisp, mild, warm, and finally, "hot" plans. There is also a smaller but sizable zone between Appellants' "cold" proposed alternative and the theoretically "perfect" zero-Kelvin maps. But there is only a very small gap in coldness between H.B. 193 and Appellants' plans. Does Missouri have a previously unknown constitutional bright line that happens to fall not into the first, vast zone covering most of the temperature scale; and not into the second, still sizeable zone of increasingly icy plans; but instead, into the narrow gap between H.B. 193 and Appellants' plans, tailored long after the fact and solely to "beat" H.B. 193 in litigation?

The circuit court thought not. It correctly found as a matter of fact that H.B. 193, the General Assembly's congressional redistricting legislation (the "Grand Compromise"), is as compact as may be. Appellants did not carry their burden of proving clearly and undoubtedly that the Grand Compromise fails this standard.

Just as significantly, the circuit court found as a matter of fact that, even after controlling for other constitutional mandates, it is not

possible in theory or in practice to find the “most compact” districting plan or the plan that is “as compact as possible.” What is susceptible to proof and judicial determination is the factual question of whether a districting plan is clearly closer to the pole of perfect compactness than the pole of non-compactness, and the factual question of whether a plan satisfies the three “fundamental ideas” this Court previously instructed were embodied in the “as may be” language. The circuit court fully discharged its duties in finding these facts within the severely constricted timetable that was ultimately caused by Appellants’ decision to wait five months before filing a lawsuit and asking for expedited proceedings.

On appeal, this Court presumes that trial courts found the facts necessary to support their conclusions, and it must affirm those factual findings unless there is no substantial evidence to support them or they are against the clear weight of the evidence. Contrary to Appellants’ urging, only the circuit court’s legal analysis is reviewed *de novo*. This Court has never departed from its standard of review based on an appellant’s mere caricatures of a trial court’s findings and conclusions. It is telling, however, that Appellants believe the standard of review must be altered or the circuit court’s judgment must be recast in order for them to prevail on appeal.

It is just as telling that for the first time, Appellants appear to recognize that their proposed “most compact,” or “compactness maximization,” standard is untenable. In its place, Appellants posit a permissible zone of reasonable plans between the plan that complies with other constitutional criteria and is the most compact, and the least compact plan that a court finds contains no gerrymandering. Appellants correctly concede that compactness maximization will not work; they are wrong to rely on an even murkier and less judicially manageable concept than compactness—partisan gerrymandering—to measure gradations within compactness.

Ultimately, both of Appellants’ proposed alternative standards fail because they ask courts to apply uncertain limits—or in the case of the “compactness maximization” standard, nonexistent limits. As Justice Kennedy warned in *Vieth v. Jubelirer*, “With uncertain limits, intervening courts—even when proceeding with best intentions—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.” 541 U.S. 267, 307 (2004).

It is possible for courts to meaningfully and objectively apply the concept of compactness to legislation while respecting Missouri citizens’ choice to assign an inherently political process to our most political branch, the General Assembly, without endless and essentially *de novo*

review by the seven appointed judges of this Court. This Court's first decision outlined such an approach, and contrary to Appellants' caricature, the circuit court faithfully applied it. No constitutional bright line runs through the small gap between Appellants' litigation plans and H.B. 193. By affirming the circuit court, as discussed below, this Court will uphold both the people's decision to assign redistricting exclusively to the legislature, and their instruction that districts shall be "as compact...as may be."

### STATEMENT OF FACTS

#### Dr. Thomas Hofeller

Intervenor-Defendants called Dr. Thomas Hofeller, PhD., as their expert witness. The parties stipulated to Dr. Hofeller's qualification as an expert in redistricting. (Tr. II 46.) Dr. Hofeller's resume showed that he has been involved as an expert or consultant in each round of decennial redistricting since 1970. (Tr. II 56; Ex. 201.)

Only a handful of experts have been working this field for the same amount of time as Dr. Hofeller in such a wide range of different states and different types of plans. (Tr. II 147.) All of the people with his experience work either primarily for Republicans or Democrats. *Id.* However, Dr. Hofeller has also done work for Democrats in major redistricting cases and in a major Illinois case, testified against his

Republican clients by opining that their map violated the Voting Rights Act. (Tr. II 148-149.) In overruling a “leading” objection, the Court observed, “I doubt that this witness can be led anywhere he doesn’t want to go.” (Tr. II 68-69.)

Dr. Hofeller was the co-author of the article, “Measuring Compactness and the Role of a Compactness Standard in a Test for Partisan and Racial Gerrymandering,” published in *The Journal of Politics*. (Ex. 201.) Dr. Hofeller has been a major player in the ongoing process of finding an objective method of measuring and applying courts’ (and dictionaries’) “simple intuitive” explanation of the concept of compactness. (Ex. 59 at p. 1158, admitted at Tr. II 53.)

Dr. Hofeller testified that the article he co-authored offered a “further examination of some of the principles” of another article, “Measuring the Compactness of Legislative Districts,” authored by H.P. Young. (Tr. II 52; Ex. 59, 223.) Dr. Hofeller testified that Dr. Young’s article recites the Webster dictionary definition of compact, but “in many ways, it says that there really isn’t an operational definition.” (Tr. II 53-54.)

Dr. Hofeller testified that while the word “compact” may have a simple and intuitive dictionary definition, there is no general definition

of “exactly how compactness manifests itself in redistricting.” (Tr. II 125-126.) “The problem is it’s a very complex principle.” (Tr. II 126.)

In Dr. Hofeller’s published works, and in his testimony, he asserted that many different attributes, at least including dispersion, perimeter shape, and population, are relevant for determining compactness. (Ex. 59 at p. 1158-1159; Tr. II 49-50.) Dr. Hofeller’s testimony concluded that “in terms of redistricting, compactness is really a principle in search of a definition.” (Tr. II 49.) Similarly, Dr. Hofeller and his colleagues concluded that compactness is not simply a matter of outline but instead has “multiple, distinct components.” (Ex. 59 at p. 1176.) Dr. Hofeller testified that there may be attributes of compactness that are not measured by a statistical test. (Tr. II 50; Tr. II 87-88.) At the same time, Dr. Hofeller testified that one cannot simply apply the dictionary definition visually to a map, because despite the difficulty of mathematical analysis, “everybody found as they got into it, it was more complicated and multi-faceted than they ever imagined it was going to be.” (Tr. II 152.)

Dr. Hofeller testified that there is no “bright line between a compact and noncompact district.” (Tr. II 49.) Dr. Hofeller then explained that this is because there is disagreement about “what are the exact attributes of compactness.” *Id.* “...[I]n terms of redistricting,

compactness is really a principle in search of a definition. So there's no general agreement on what the attributes of compactness are." *Id.* Second, "there's no general agreement on the weight that proposed attributes would be given." *Id.* Third, there is "also no agreement on how to measure [those attributes]." *Id.* Fourth, there is no agreement "that there's any bright line where a plan moves automatically at some point on some given continuum from being compact to noncompact." (Tr. II 49-50.)

Dr. Hofeller also testified that it would not be possible to arrive at the "most compact" map, or the map that is as compact as possible, even after controlling for equality of population and contiguity. (Tr. II 85-86.) Specifically, he explained that "You can actually take any of the general map concepts that were presented here and you could tinker with it and go into endless iterations of draws and redraws, and each time you drew you may be able to get it a little better on the scores." *Id.*

Dr. Hofeller testified further that in search for the "most compact" map, there would be diminishing returns and there would begin to be "trade-offs" among different "factors," or "attributes" of, compactness. (Tr. II. 86.) Eventually, such efforts would lead to, Dr. Hofeller testified, "an endless loop of changing any map and, each time you do

it, there are less choices on what you're drawing [for] whoever is drafting them." *Id.* He further testified that this would result in very little "room left for the General Assembly or legislature to make decisions." (Tr. II 86-87.) Instead, one could generate the appearance of options by manipulating maps "on the block level" to "create hundreds of maps." (Tr. II 86.) Significantly, this dynamic would occur even after controlling for equal population and contiguity. (Tr. II 86.)

Dr. Hofeller testified that despite the unworkability of compactness maximization, it is possible to determine whether a plan is compact or noncompact, and that "you have to remember that compactness is like a continuum running from hot to cold." (Tr. II 56.) He explained that at certain temperatures, everyone will agree that something is hot or cold, even if there is no agreement on when a "bright line" is passed from hot to cold. *Id.* Dr. Hoffeller testified that it is possible to make this determination by examining a general body of knowledge and precedent from Missouri and other states that apply a compactness criterion. (Tr. II 56-57; 119.)

Dr. Hofeller testified that the Grand Compromise is clearly closer to the "perfectly compact" pole than the "noncompact" pole. (Tr. II 57-58.) Whether based on an eyeball test or statistical test, Dr. Hofeller testified that none of the maps offered by the Appellants were

substantially more compact than the Grand Compromise, that all of the proposals were within the same general degree of compactness, and that if there were a line dividing compact from noncompact maps, it would not fall in between the Appellants' proposals and the Grand Compromise. (Tr. II 57-58.)

Dr. Hofeller's testimony included a comparison of Missouri maps to court-drawn or court-approved maps from several other states that also place importance on compactness, and in each case, he found that H.B. 193 was as compact or more compact than the other plans. (Tr. II 70-81; 120; Exs. 204-214; 222.) Dr. Hofeller's state-to-state analysis was primarily visual (Tr. II 121), and took into account the fact that some states' shapes are less compact than Missouri. (Tr. II 72.) Dr. Hofeller explained that his comparison did include statistical analysis, and the "scores may be somewhat instructive, but certainly not definitive." (Tr. II 120.) For an example of where statistical tests can be "somewhat instructive," Dr. Hofeller showed how one can use the most relevant statistical tests to confirm that one map—Missouri's Grand Compromise—is "as good as better" than another map, a compact California congressional map drawn by a redistricting commission. (Tr. II 149-150; 156-160.)

In responding to the court's question about other states in his analysis that use the phrase, "as may be," Dr. Hofeller stated that Colorado "comes really close." (Tr. II 167.) Dr. Hofeller testified that Colorado requires that "Each district shall be as compact in area as possible..." *Id.* Dr. Hofeller testified that even when considering Colorado's constitutional provisions, the fact that Colorado's seven-district maps were court-drawn, and the fact that one would expect to see more compact districts in a state like Colorado, Missouri's H.B. 193 was still more compact than either of the two Colorado maps. (Tr. II 73-76; Exs. 206, 207.)

Based on all of this, Dr. Hofeller testified that H.B. 193 is "compact," and stated that based on his experience, it does "not come near crossing" the transition from compact plans to non-compact plans. (Tr. II 119.) Dr. Hofeller further testified that based on his experience with designing and using methods of measuring compactness over several decades, even the map proposed by the Pearson Appellants immediately before trial was not significantly more compact than H.B. 193. (Tr. II 85; Ex. 215.) Dr. Hofeller also testified that the McClatchey Appellants' proposed map generally did not score as well as the last Pearson alternative, which itself was not significantly more compact than H.B. 193. (Tr. II 133-134.) Dr. Hofeller repeatedly

testified that all the maps were within the same zone of compactness. (See, e.g., Tr. II 143.) Finally, Dr. Hofeller demonstrated that the first alternative Pearson plan contained similar features to the ones attacked by Appellants in H.B. 193, including a narrow neck extending from a largely rural and suburban third district extending into urban St. Louis. (Tr. II 145-146.)

Nowhere did Dr. Hofeller testify that any of the proposed alternative maps were significantly more compact than H.B. 193. Indeed, Dr. Hofeller testified that to be compact, a map must clearly be something akin to “cold” on a temperature scale, and not in the arguably temperate middle. (Tr. II 56.) On cross-examination, Dr. Hofeller testified that H.B. 193 “does not come near crossing” this middle zone, even if it is not a bright line. (Tr. II 119.)

Further, Dr. Hofeller testified that based on his experience, if H.B. 193 were invalidated for noncompactness, it would be the most compact map ever invalidated by any court in the United States. (Tr. II 81-82.) Dr. Hofeller testified that he “tracks all of the cases that come through,” had even been tracking the instant case before he was contacted to be an expert, and that if he had seen a plan that he “felt was as compact as this plan was... overturned due to lack of compactness, [he] would have remembered it.” (Tr. II 152-153.) Were

H.B. 193 invalidated, Dr. Hofeller testified, it would lead to a “tremendous number of congressional” and other maps “that would be redrawn across the country, probably throughout the whole decade.” (Tr. II 82.)

**Dr. David C. Kimball**

Appellants called David C. Kimball, Ph.D., an Associate Professor of Political Science at the University of Missouri-St. Louis, as an expert.

Dr. Kimball had limited experience. His relevant experience in the field of political science includes three works he has co-authored relating to congressional elections and districts, but Dr. Kimball acknowledged that none of them actually examine the standards or process for drawing congressional districts. (Tr. I 30-31.) Further, Dr. Kimball teaches an election course every other year in the fall focusing on congressional elections and drawing districts. While it involves a “general idea that compactness is one of the factors that are weighted in drawing districts,” he does not teach about different compactness standards. (Tr. I 31-32.)

Dr. Kimball admitted that he has never used any mathematical tests to generate scores and compare the compactness of congressional districts (Tr. I 74-75), nor has he ever used the Maptitude software (Tr.

I 74), although it was used to generate the scores for the statistical compactness tests he relied upon in much of his expert testimony. *Id.* Finally, Dr. Kimball also admitted that he has never testified as expert in a redistricting matter. (Tr. I 77.) He did not testify to any other experience or training relating to the use of compactness standards in congressional redistricting.

Dr. Kimball was asked by Plaintiffs' counsel to explain "in layman's terms" the various compactness tests. (Tr. I 39.) After Dr. Kimball had answered questions on a few of the tests, Defendants' counsel objected that Dr. Kimball's response was not one based on his own experience or expertise and that he was simply reading from a Maptitude-generated print out summary of the general characteristics of the various tests already admitted as a stipulated exhibit. (Tr. I 38-42; Ex. 15.) A few minutes later, the Court interrupted direct examination to question Dr. Kimball regarding details of certain of the compactness tests, and was able to observe Dr. Kimball's demeanor as he attempted to respond. (Tr. I 43-44.)

Dr. Kimball testified that he is an expert on the meaning of "compactness." (Tr. I 69-70.) Dr. Kimball testified that the term has a generally accepted meaning in the field of political science, "that the areas within a district are as close together or as closely packed

together as possible. Usually refers to the shape of a district. Closely approximating a square or a circle as the ideal.” (Tr. I 33-34.) Dr. Kimball was able to point to no authority in support of his claim that the definition of compact that he testified to was the generally accepted meaning in the field of political science.

Instead, Dr. Kimball testified that he relied on two published articles as his sources for the definition of compactness, including an article in the Journal of Politics authored by Richard Niemi and colleagues (including Dr. Hofeller, Respondents’ expert), as well as an article by Dr. H.P. Young published in Legislative Studies Quarterly. (Tr. I 70; 79; Exs. 59, 223.)

Before agreeing that Dr. Hofeller’s articles are authoritative in the field of redistricting and that he relied on them (Tr. I 85-86), Dr. Kimball admitted that Dr. Hofeller’s article did not in fact contain a general definition of compactness. (Tr. I 70-71.)

Nonetheless, citing the two articles as sources for his claim, Dr. Kimball testified that “shape is the most important factor” for compactness. (Tr. I 79.) And in testifying that the “shape – that compactness for the visual test, the shape...is more important than the size,” Dr. Kimball stated that this definition of compactness is partly

based on an understanding of what Plaintiffs' counsel had told him but that it is also his own personal definition of compactness. (Tr. I 77-78.)

During his testimony, Dr. Kimball was asked to use his visual "eyeball" test to analyze the compactness of alternative district shapes in Missouri. (Tr. I 60-64.) Dr. Kimball stated that he would want to review mathematical measures as a supplement to a pure eyeball test. (Tr. I 61.) When asked to compare the compactness of a square and a triangle, Dr. Kimball went on to admit that a strict visual inspection might not lead him to say that one shape was more compact than the other. (Tr. I 80.)

Dr. Kimball stated at one point that he did not consider or weigh any other factors or attributes of compactness in his compactness analysis. (Tr. I 76.) He admitted that he had not considered population dispersion—in one example, at the confluence of the Missouri and Mississippi Rivers—in rendering his opinions. (Tr. I 67.) Yet, later, Dr. Kimball testified that population-based measures were "as relevant as each of the other measures" for determining compactness. (Tr. I 76-77.) Further, Dr. Kimball refused to accept the sentence in Appellants' disclosures of his expected testimony that population is not a "relevant factor." *Id.*

When questioned whether he would accept another expert's view that size could be a factor in determining compactness, Dr. Kimball admitted that "I can see how size might be a factor, but I think shape is clearly the more important factor than the size." (Tr. I 79-80.)

Dr. Kimball initially asserted that a map can only be deemed compact if compared to some alternative map. (Tr. I 69.) Dr. Kimball admitted that the comparison method he used to allege H.B. 193 was not as compact as may be was not supported by either published article he used to support the expert opinion he purported to offer on the meaning of compactness. (Tr. I 71.) Nor did Dr. Kimball testify to any other published materials in his field to support his comparison method for judging compactness of congressional electoral districts or his conclusion that a "less compact" map is not "as compact as may be."

In his analysis, Dr. Kimball did not testify to any map or district as being compact as possible. (Tr. I 34-55.) Not only did he not know, but Dr. Kimball testified that he had never even considered, whether a map comprised of the most compact districts possible could ever be drawn when controlling for such factors as population equality and adherence to the Voting Rights Act. (Tr. I 74.)

Dr. Kimball admitted that it was possible that more compact districts could be created than the districts proposed in the Pearson

Alternative 2 map. (Tr. I 59-62.) Likewise, Dr. Kimball admitted that in using his comparison theory, the possibility existed for more compact maps or districts so long as there is another map or district to compare. (Tr. I 69.) Dr. Kimball then conceded that his test would require another plan to be “substantially more compact” than the legislation being challenged. (Tr. I 80-81; 82.) Dr. Kimball did not define what he meant by “substantially more compact,” but allowed that the differences “might be” at least 5% to be substantial. *Id.* Dr. Kimball then concluded that there was no reason to chase down this “substantial” threshold standard for compactness, but instead suggested, “let’s keep finding a more compact map than what we’ve got.” (Tr. I 81.) There is no bright line test, he stated, to distinguish compact and non-compact districts. *Id.*

### Phoebe Ellen Ottomeyer

Plaintiff Phoebe Ellen Ottomeyer was one of only two plaintiffs to testify. Ms. Ottomeyer lives in Jefferson County, Missouri. Ms. Ottomeyer testified that under H.B. 193, she resides in the Missouri 8<sup>th</sup> Congressional District, not the Third District. (Tr. I 29.)

Ms. Ottomeyer testified that her primary concern with residing in the 8<sup>th</sup> district is “that the political and economic interest of the residents of Jefferson County will be impacted by having three different

legislative districts within the county.” (Tr. II 29-30.) Her concern, she explains, is having multiple legislators “working the area.” (Tr. II 30.)

Ms. Ottomeyer testified that if Jefferson County were not divided into different congressional districts, Jefferson County citizens’ representation in the US Congress would be “more effective.” (Tr. II 30-31.) However, Ms. Ottomeyer conceded that if she lived in the City of St. Louis, she would also deem it important that the City not be split. (Tr. II 32.) The map attached to Ms. Ottomeyer’s petition which she stated would address her own concerns, Pearson Alternative 1, splits St. Louis City and pulls a portion of it into Jefferson County.

Although Ms. Ottomeyer admitted it was her “desire” to live in the 3<sup>rd</sup> district (Tr. II 31), she did not provide any testimony to suggest that residing in the 8th district would provide her with less opportunity to elect the representative of her choice or that changes to the shape or compactness of the Third District would necessarily bring her portion of Jefferson County (let alone all of it) into the Third.

### **Ensley Terrence Jones**

Plaintiffs called Professor Terrence Jones as an expert witness. Prof. Jones is a resident of University City, Missouri, and currently a professor of political science and public policy administration at the University of Missouri-St. Louis. (Tr. II 6-7; Ex. 52.)

Prof. Jones testified only regarding the St. Louis Metropolitan Statistical Area. He testified that “not splitting unnecessarily metropolitan regions between congressional districts is an important consideration in redistricting.” (Tr. II 27.) Prof. Jones admitted that he had not addressed any of the other MSAs across the state of Missouri (Tr. II 15-16), but acknowledged that in other maps presented to the Court, both the Springfield and Columbia MSAs are split among separate Congressional districts. *Id.* Prof. Jones stated that the redistricting process should consider other factors, not just population and geographic compactness. (Tr. II 19.)

### ARGUMENT

**I. THE CIRCUIT COURT CORRECTLY HELD THAT “COMPACT AS MAY BE” DOES NOT REQUIRE COURTS TO INVALIDATE REDISTRICTING LEGISLATION SO LONG AS A “MORE COMPACT” MAP MEETING THE EQUAL POPULATION AND CONTIGUITY REQUIREMENTS CAN BE DRAWN, AND CORRECTLY FOUND AS A MATTER OF FACT THAT IT IS IMPOSSIBLE IN THEORY AND PRACTICE TO SETTLE UPON THE “MOST COMPACT” MAP THAT MEETS THESE REQUIREMENTS**

### A. The Standard of Review for a Bench-Tried Case

This Court has long held that “[i]n [a] bench tried case, we must sustain the judgment unless there is no substantial evidence to support it, or it is against the weight of the evidence or it erroneously declares or misapplies the law.” *Brownstein v. Rhomberg-Haglin & Associates, Inc.*, 824 S.W.2d 13, 15 (Mo. banc 1992).

It is rare for Missouri appellate courts to reverse trial courts’ factual determinations. “Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is ‘against the weight of the evidence’ with caution and with a firm belief that the decree or judgment is wrong.” *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). Contrary to Appellants’ implied assertion that the testimony must be construed most favorably to them, “[t]he credibility of witnesses and the weight to be given their testimony is a matter for the trial court, which is free to believe all, part, or none of the testimony of any witness.” *R.J.S. Sec., Inc. v. Command Sec. Services, Inc.*, 101 S.W.3d 1, 9-10 (Mo. App. W.D. 2003) (internal citation omitted).

Rather than considering only Appellants’ characterization of their favorite snippets of testimony, appellate courts “accept as true evidence and inferences favorable to the trial court’s judgment,

*disregarding all contrary evidence.”* *Id.* (emphasis added). *See also Harris v. Desisto*, 932 S.W.2d 435, 443 (Mo. App. W.D. 1996) (“we accept as true all evidence and permissible inferences favorable to respondents, the prevailing parties, and disregard any contradictory evidence”).

Finally, it is telling that Appellants fail to remind the Court of Mo. R. Civ. P. 73.01(c), which requires that “[a]ll fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached.” *See also R.J.S. Sec., Inc.*, 101 S.W.3d at 22. A corollary is that “judgment will be affirmed under any reasonable theory supported by the evidence.” *Id.* “A correct result will not be disturbed on appeal merely because the trial court gave a wrong or insufficient reason for its judgment.” *Harris*, 932 S.W.2d at 443. And in applying all of these principles, of course, “[t]he trial court’s judgment is presumed valid and the burden is on the appellant to demonstrate its incorrectness.” *Schaefer v. Rivers*, 965 S.W.2d 954, 956 (Mo. App. S.D. 1998).

As discussed below, these principles foreclose Appellants’ angle of attack: to bring a caricature of the General Assembly’s—and now the circuit court’s—decision before this Court as a seven-judge factfinder. Rather, the circuit court was entitled to find that the General

Assembly's Grand Compromise was "compact...as may be" under any of the judicially manageable standards that have been proposed—even those proposed for the first time in Appellants' briefing.

### **B. Introduction**

Appellants do not appeal from the circuit court's holding that they had the burden of proof to show that the Grand Compromise was "clearly and undoubtedly" unconstitutional. C. Ct. Op. at 3-4 (citing, *inter alia*, *Hammerschmidt v. Boone County*, 877 S.W.2d 98, 102 (Mo. banc 1994)). Instead, Appellants argue that the circuit court applied the wrong substantive standard. This assertion fails on every level.

First, as discussed below, there can be no question that the circuit court *did* apply the legal standard—"as compact... as may be" mandated by this Court's prior opinion. The circuit court clearly stated, "Under the standard and rationale announced by the Supreme Court, and the facts adduced at trial, the Plaintiffs have failed to prove that H.B. 193 is unconstitutional because it is not "as compact as may be." C. Ct. Op. 7. That standard is consistent with the plain language of the constitution, prior case law, common sense, and the facts.

Second, Appellants utterly fail to allow for the fact—as they must, given the standard of review—that the circuit court found facts based upon the uncontroverted expert testimony of Dr. Thomas

Hofeller regarding the application of the compactness principle to districting plans. It was these factual findings, not (as Appellants' caricature suggests) the circuit court's arbitrary "reinterpretation" of the constitution, that led the circuit court to reject Appellants' proposed "most compact" or "compact as possible" standards as impossible to apply as a matter of fact, both in theory and practice—even after winnowing out plans that fail to comply with other constitutional mandates. On appeal, Appellants identify no contrary evidence.

Instead, Appellants manufacture four "beliefs" about the facts and law that the circuit court "apparently" held. Br. 22-24. As discussed below, the circuit court's decision rests on none of these obviously flawed "beliefs." Nothing in the record supports Appellants' blind conjecture, and the very exercise of manufacturing such straw men violates every principle of appellate review of court-tried cases.

What the circuit court did find was that "as compact...as may be" could not require perfect compactness or the "most compact" plan because, even after controlling for all other constitutional mandates, no such state of being exists. This is so for two reasons. First, there is no agreement on what attributes make up compactness. Second, there is no agreement on how to weight, measure, or maximize those

attributes—whether using either a rough “eyeball” test or some combination of statistical tests.

Finally, rather than blindly jumping to “the opposite extreme,” as Appellants claim with no record support (once again ignoring the standard of review), the circuit court applied a standard that does require significantly “greater, rather than lesser, compactness.” As Dr. Hofeller testified, the Grand Compromise is clearly closer to the “perfectly compact” pole than the “noncompact” pole. Whether based on an eyeball test or statistical test, Dr. Hofeller testified that: (1) none of the maps the Appellants specially crafted for this litigation were substantially more compact than the Grand Compromise; (2) all of the proposals were within the same general degree of compactness; and (3) if there were a line dividing compact from noncompact maps, it would not fall in between the Appellants’ litigation-focused proposals and the Grand Compromise.

Finally, Dr. Hofeller testified that in his experience of five decennial redistricting cycles nationwide, H.B. 193 would be the most compact map ever invalidated for “noncompactness.” If the Grand Compromise were to be found noncompact, he testified, applying this standard to other “compactness” states across the country would require a complete redrawing of the legislative landscape.

These facts hardly support Appellants' naked conjecture that the circuit court must have required only "some degree compactness, no matter how minimal." Br. 24. Instead, the court applied a robust test based on the most objective and expert observations possible, and specifically found facts on each of the three distinct and "fundamental" ideas this Court specifically enumerated in discussing the meaning of "as may be" in its previous opinion in this very case. S. Ct. Op. 6.

Rather than teasing out error from the most absurd possible caricature of a circuit court's factual findings and legal conclusions, this Court affirms "under any reasonable theory supported by the evidence" and "[a]ll fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached." *R.J.S. Sec., Inc.*, 101 S.W.3d at 22; Mo. R. Civ. P. 73.01(c). As discussed below, this requires the Court to affirm the judgment below.

**C. The Circuit Court Correctly Found as a Matter of  
Fact that It Is Not Possible In Theory or Practice to  
Find the Most Compact of all Maps that Meet the  
Other Constitutional Mandates**

The circuit court made specific findings on how compactness is perceived and measured in the redistricting context. Appellants nowhere argue that these specific findings are unsupported by

substantial evidence or against the weight of the evidence; they merely argue that the circuit court's findings led it to legal error. For the reasons discussed below, this is incorrect. But first, it bears repeating the key findings of fact left unchallenged by Appellants. At page 5-6, the circuit court found as follows:

“[T]he evidence and facts put forth at trial does not convince the Court that ‘as can be’ is an appropriate definition. Defendants’ evidence and facts presented at trial boil down to the proposition that there is no one ‘bright line test’ for compactness and that even after requirements like numerical equality and contiguity are satisfied, compactness exists along a continuum, it is not a specific idealized result. Even if the only maps considered are those that already meet the contiguity, equal population, and other constitutional requirements, Defendants’ factual evidence showed that it is not possible in theory or practice to find the most compact map. The evidence and facts showed that the futile search for the most compact map will, however, tend to severely limit the options left for the General Assembly in choosing its map. As a matter of fact, this would leave it little space to exercise its legislative discretion and make decisions ‘regarding a number of sensitive considerations.’ S. Ct. Op. 6.”

The testimony of Dr. Hofeller amply supported this view. He testified that there was no “bright line between a compact and noncompact district.” (Tr. II 49.) This is because there is disagreement about “what are the exact attributes of compactness.” *Id.* “[I]n terms of redistricting, compactness is really a principle in search of a definition. So there’s no general agreement on what the attributes of compactness are.” *Id.* Second, “there’s no general agreement on the weight that proposed attributes would be given.” *Id.* Third, there is “also no agreement on how to measure [those attributes].” *Id.* Fourth, there is no agreement “that there’s any bright line where a plan moves automatically at some point on some given continuum from being compact to noncompact.” (Tr. II 49-50.)

Indeed, there may be attributes of compactness that are not even measured by a statistical test. (Tr. II 50; Tr. II 87-88) (non-statistical attributes include communities of interest and political subdivision lines). Further, compactness tests that look only to shape ignore the fact that some relatively large and naturally noncompact areas, like the confluence of the Missouri and Mississippi Rivers, hold very few people. (Tr. II 91.) Given all of this, Dr. Hofeller testified that while the word “compact” may have a simple and intuitive dictionary definition, there is no general definition of “exactly how compactness manifests itself in

redistricting.” (Tr. II 125-126.) “The problem is it’s a very complex principle.” (Tr. II 126.)

Dr. Hofeller testified that it is possible to determine whether a plan is compact or noncompact, but “you have to remember that compactness is like a continuum running from hot to cold.” (Tr. II 56.) At certain temperatures, everyone will agree that something is hot or cold, even if there is no agreement on when a “bright line” is passed from hot to cold. *Id.*

Dr. Hofeller testified that it is possible to make this determination by examining a general body of knowledge and precedent from Missouri and other states that apply a compactness criterion. (Tr. II 56-57; 119.) The state-to-state part of the analysis, rather than relying heavily on statistical tests, which can be skewed by state outlines, is primarily visual. (Tr. II 121.) For this reason, the “scores may be somewhat instructive, but certainly not definitive.” (Tr. II 120.) For an example of where statistical tests can be “somewhat instructive,” Dr. Hofeller showed how one can use the most relevant statistical tests to confirm that one map—Missouri’s Grand Compromise—is “as good as better” than another map, a compact California congressional map drawn by a redistricting commission. (Tr. II 149-150; 156-160.)

On the other hand, Dr. Hofeller testified that it would not be possible to arrive at the “most compact” map, or the map that is as compact as possible: “You can actually take any of the general map concepts that were presented here and you could tinker with it and go into endless iterations of draws and redraws, and each time you drew you may be able to get it a little better on the scores.” (Tr. II 85-86.) There would be diminishing returns and there would begin to be “trade-offs” among different “factors,” or “attributes” of, compactness. *Id.* Because there is no way of resolving which of these different factors is the most important criterion for compactness purposes, “you can just get into an endless loop of changing any map and, each time you do it, there are less choices on what you’re drawing [for] whoever is drafting them.” (Tr. II 86.)

This means there are very few options left for the legislature to make decisions. (Tr. II 86-87.) Instead, one could generate the appearance of options by manipulating maps “on the block level” to “create hundreds of maps.” (Tr. II 86.) And this dynamic would occur even after controlling for equal population and contiguity. (Tr. II 86.)

Considering, as this Court must, only the evidence supporting the circuit court’s specific factual findings, its decision was clearly backed by substantial evidence and was not against the weight of the evidence.

The circuit court was correct in its factual finding that even after considering only maps that meet all of the other constitutional criteria, “it is not possible in theory or practice to find the most compact map.” Further, the circuit court was correct in its factual finding that “the futile search for the most compact map will, however, tend to severely limit the options left for the General Assembly in choosing its map. As a matter of fact, this would leave it little space to exercise its legislative discretion and make decisions ‘regarding a number of sensitive considerations.’ S. Ct. Op. 6.”

These unassailable findings of fact are significant because they provided an additional reason for the circuit court—and on appeal, for this Court—to avoid the strained and unreasonable reading of this Court’s prior opinion and the Missouri Constitution urged by the Appellants. As discussed below, as a matter of law, courts do not and should not review the General Assembly’s redistricting legislation to ensure that, of all maps that would comply with other constitutional mandates, they are as “compact as possible,” that no more compact can be drawn, or that they are the “most compact.”

#### **D. The Circuit Court’s Legal Analysis Was Correct**

The circuit court correctly decided that Appellants had the burden of proving clearly and undoubtedly that the Grand Compromise

was not “as compact...as may be.” The circuit court also correctly decided that nothing in the Court’s prior decision, Missouri law, or any authority cited to it required it to apply a standard requiring that a redistricting plan, after satisfying other constitutional requirements, be the “most compact” of possible plans or “as compact as possible.” The circuit court correctly applied the standard that a redistricting plan must be much closer to the perfectly compact pole than to the perfectly noncompact pole, and correctly decided that it should apply the three enumerated criteria this Court announced were necessary to decide whether a plan is “compact... as may be.”

### **1. The Circuit Court’s Analysis Was Consistent with this Court’s Prior Ruling**

This Court’s prior decision clarified that the standard of judicial review is the same as the standard the General Assembly initially confronts when exercising its discretion to draw districts: “as compact...as may be.” S.Ct. Op. 7. However, the Court *did*, contrary to Appellants’ assertion, explain how these words (or any other equivalent words) were to be applied:

**Regardless of what language is used, three ideas are fundamental. First, redistricting is predominately 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. **Second**, compactness and numerical equality are mandatory. To the extent that they are achieved, numerous other constitutional problems are avoided. **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.**

S. Ct. Op. 6 (emphasis added). In the very next paragraph, the Court repeated that the “appropriate standard of review must reflect deference to the predominate role of the General Assembly and the inability of anyone to draw compact districts with numerical precision...” while still implementing the language of the constitutional mandate. *Id.*

Nowhere did this Court state that some commonly recognized attributes of compactness in redistricting, but not others, should be considered by the General Assembly. Nor did the Court state that “compact as may be” means that, after controlling for constitutional mandates, “compactness” must be maximized at the expense of all

traditional discretionary factors, or that of all remaining maps, only the “most compact” map is constitutional. The Court did not state that whenever a challenger presents another map that meets the other constitutional criteria and is “more compact” than a legislative plan, the legislation becomes unconstitutional. In its second fundamental point on page 6, the Court stated that “compactness”—not “maximum compactness”—is mandatory.

Second, the Court stated that the first principle of the standard of review for compactness must be that “redistricting is predominately a political question.” S. Ct. Op. 6. But this principle is no longer “fundamental”—indeed, it is irrelevant—if, as Appellants now suggest, the General Assembly and courts must maximize compactness using an eyeball test or statistical test once the other constitutional mandates like equal population have been satisfied. If the maximization is successful, there will be no room for any other factors, good or bad, political or nonpolitical, to be applied, and a mechanistic process will determine the redistricting plan virtually devoid of legislative discretion. If the maximization is unsuccessful and generates an endless loop of disagreement among substantially similar plans, as Dr. Hofeller testified and as the circuit court found as a matter of fact it would, the result will be the same. There will be no room to apply the

very first “fundamental” principle announced by the Court. Thus, the first two of the “fundamental” ideas the Court announced should be applied “regardless of what language is used” to support the circuit court’s approach and militate against the Appellants’ varied suggestions.

Finally, the Court noted not only that compactness cannot be measured, but also that it cannot be “achieved” with “absolute precision.” As the circuit court noted, this acknowledgment of logical and judicial humility would seem to preclude reading “as compact as may be” to invalidate legislation that is edged out by slightly higher scoring or more eyeball-friendly maps designed for litigation, and would seem to preclude the search for the “most compact” map among those that meet the other constitutional criteria.

At the same time, there is room for a standard that requires plaintiffs to prove that a legislative plan is *not* closer to the “compact” pole than the “noncompact” pole, using the temperature analogy to which Dr. Hofeller testified, while also ensuring that the plan satisfies the three fundamental ideas set forth on page 6 of this Court’s prior opinion. First, it should fall in a zone of compactness where there are still so many political choices available to the legislature that redistricting remains a “predominantly,” not marginally, “political

question” (this Court’s fundamental point one). Second, it should meet other constitutional requirements (fundamental point two). And third, the reviewing court should consider claims about compactness with the understanding that there is no precise way to measure, let alone “achieve” compactness. (fundamental point three). This standard has teeth but is not, as is Appellants’ standard, set up to fail.

## **2. The Circuit Court’s Analysis Was Consistent with the Plain Language of the Constitution**

Respondents agree that the words “as may be” must have some meaning (whether italicized or not), and suggest that this Court’s prior opinion—several pages of which Appellants studiously avoid—sheds more light on this topic than any other source.

Nonetheless, Appellants strenuously mine dictionaries to find definitions of “may” or “possible” or “can” that coincide or share other words and phrases. Ultimately, Appellants conclude, the dictionaries agree that “as may be” can only mean “as possible under the circumstances.” Br. 25. But if “circumstances” are to be considered, “as may be” must refer to some permissible departure from the hypothetical state of perfect compactness; no logical interpretation of the phrase would seem to require super-compactness or maximization of compactness.

The heart of the matter then becomes what “circumstances” can be considered in departing from the hypothetical state of perfect compactness. The Court provided significant guidance on that question at pages 6 and 7 of its previous opinion, explaining three “fundamental” ideas that underlie the “as may be” standard of review and expressly concluding, “This is recognized by the ‘as may be’ language used in article III, section 45.” S. Ct. Op. 6. As discussed in subsection 2, *supra*, the Court recognized in this section that after the relatively easy task of complying with other constitutional requirements, maximization of compactness—the search for the most compact remaining map—is not achievable.

The circuit court’s factual findings, unchallenged on appeal, confirmed that the “most compact” remaining map, if it is ever discovered, cannot as a practical or theoretical matter be the constitutional standard. The circuit court’s legal analysis was consistent with this reasoning and was not in error.

### **3. The Circuit Court’s Analysis Was Consistent with Prior Case Law**

The circuit court did not find persuasive Appellants’ invocation of the *Armentrout* case or the *cy pres* doctrine, and neither should this Court. First, it should be noted that Appellants’ wide-ranging survey of

the law ends at essentially the same point as Appellants' dictionary review: "reasonable... in view of the circumstances." See Br. 28. This standard, while still objective, is arguably even more liberal than the standard proposed by Respondents, enunciated in this Court's prior opinion, and applied by the circuit court.

At any rate, the heart of the matter is what circumstances can be considered in applying the objective standard. If the "circumstances" are merely the constitutional mandates of equal population and contiguity, criteria that are quickly and easily met by almost any mapping program, then the Court is actually calling for maximization of compactness against all other traditional districting criteria, except perhaps for a few minimal deviations for county lines. *See, e.g., Karcher v. Daggett*, 462 U.S. 725, 733 (1983) (advances in computer technology make it "relatively simple to draw contiguous districts of equal population").

Again, the circuit court found that as a matter of fact, this determination cannot be made in theory or in practice. Further, it would leave so few policy options for the General Assembly that it could hardly be said to be exercising any discretion in districting. As a matter of law, a maximization standard would seem to violate this Court's first fundamental principle of redistricting, that it is a

“predominately political question,” its second fundamental principle, that “compactness,” not compactness maximization, is “mandatory,” and its third fundamental principle, that compactness cannot be achieved with precision.

In noting Dr. Hofeller’s testimony regarding Colorado’s standard, Appellants unwittingly underscore the problems with adopting compactness maximization in Missouri. Br. 28. In responding to the circuit court’s question about other states in his analysis that use the phrase, “as may be,” Dr. Hofeller stated that Colorado “comes really close.” (Tr. II 167.) Dr. Hofeller did not say Missouri’s legal standard was as strict as Colorado’s; instead, he correctly stated that Colorado requires that “Each district shall be as compact in area as possible...” *Id.*

Significantly, the conclusion of that sentence of Colorado’s provision states, “...and the aggregate linear distance of all district boundaries shall be as short as possible.” Colo. Const. Art. 5 section 47. Dr. Hofeller testified that despite this provision, which is attached to a precise, measurable “perimeter test,” despite the fact that Colorado’s seven-district maps were court-drawn, and despite the fact that one would expect to see more compact districts in a state like Colorado,

Missouri's H.B. 193 was still more compact than either of the two Colorado maps. (Tr. II 73-76; Exs. 206, 207.)

The facts of the Colorado case showed that even when the phrase "as compact in area as possible" is tied to a precise maximization-based test, it does not (because it cannot) actually lead to compactness maximization. This Court should not lead Missouri down a similarly directionless path by adopting Respondents' proposed standard and for the first time, requiring maximization of compactness.

**4. The Circuit Court's Analysis Was Consistent with Common Sense, Unlike Appellants' Proposed Compromise Standard, Which Requires a Determination Regarding Gerrymandering**

Perhaps finally recognizing that a compactness maximization standard is illogical, unworkable, and judicially unmanageable, Appellants float for the first time a "compromise" standard. Appellants take the first tentative step in their foray into compromise by recognizing two obvious instances in which perfection is impossible: the need to comply with other constitutional requirements, and the need to minimize splitting county boundaries. Br. 29. Of course, as discussed at length above and as the circuit court found as a matter of fact based on expert testimony, these concessions from perfection are relatively

minor; they would still place compactness maximization above all other traditional redistricting criteria, essentially squeezing the discretion and “political questions,” which this Court has said should “predominate,” out of the picture.

Appellants step still further in the direction of compromise at pp. 29-30, explaining that even after satisfying the other constitutional mandates, “as may be” allows for a zone of permissible variance that allows other deviations so long as the resulting map satisfies the purpose of the statute. *See Smith v. Harbison-Walker Refractories Co.*, 100 S.W.2d 909 (Mo. 1937) (requirement that buildings “shall be so ventilated to render harmless all impurities, as near as may be” meant not that *everything* possible to render harmless impurities must be done, only “as near as may be necessary for reasonable safety”) (emphasis added).

Respondents agree with Appellants that were *Smith’s* reasoning applied to “as compact as may be,” the resulting standard would clearly not require the “most compact” map that could be drawn once the easy task of checking off the other constitutional mandates were completed; in other words, it repudiates the illogical and impossible-to-apply concept of compactness maximization. Instead, only the degree of compactness necessary to allow for reasonable districting would be

required. Indeed, the portion of *dicta* in the *Barrett* case cited by this Court and all of the parties suggests that Missouri has long subscribed to a reasonableness standard for compactness, not a requirement that it be maximized after controlling for all other factors. See *Barrett v. Hitchcock*, 241 Mo. 433, 146 S.W. 40, 65 (Mo. banc 1912) (language from Illinois case, *People v. Thompson*, was “peculiarly applicable” in holding that counties composing districts should be “as compact as the nature of the work would reasonably permit”). And as this Court has recognized, the “nature of the work” of redistricting is supposed to be “predominately political,” in which sensitive political considerations hold sway, not simply a mechanical process.

Thus, Appellants’ concessions start off in the right direction. But the underlying problem is that by focusing on only one purpose of the “compact as may be” standard, gerrymandering, and by converting *Smith’s* reasonableness standard into one that would absolutely prohibit “gerrymandering,” the Appellants are simply converting compactness claims into the very sort of subjective partisan gerrymandering claims that the Supreme Court, and now this Court, have found are incapable of judicial resolution. See *Vieth v. Jubelirer*, 541 U.S. 267 (2004) (holding that the plurality “standard” from *Bandemer v. Davis* and the standards proposed by the plaintiffs and

dissenters in *Vieth* were all unworkable, holding that no workable standard had yet been found, and dismissing the claim); *League of United Latin American Citizens v. Perry* (“LULAC”), 548 U.S. 399, 413-414 (2006) (recognizing that the Court’s disagreement in *Bandemer* about what standard makes partisan gerrymandering cases justiciable “persists,” and finding that the plaintiffs failed to “offer the Court a manageable, reliable measure of fairness for determining whether a partisan gerrymander violates the Constitution.”); S. Ct. Op. 10-11.

As the weight of authority over a quarter of a century has made clear, there is no standard definition or test for gerrymandering, nor is there any agreement on how much is too much. How importing such a standardless concept into the already slippery principle of compactness could *improve* the compactness standard of review is left unaddressed by Appellants. This is the crux of the matter, of course, and there is no satisfactory answer.

Further, if *any* gerrymandering is too much and we are to outlaw political considerations in districting, then compactness is the wrong continuum for allowing compromise. It is well-recognized that compactness itself can be used to allow and cover up gerrymanders of

minority voters who live in compact areas.<sup>1</sup> Justice Kennedy has explained in detail how this is so:

For example, if we were to demand that congressional districts take a particular shape, we could not assure the parties that this

---

<sup>1</sup> Appellants claim that in this case, the Grand Compromise map is a gerrymander, citing only their expert's answer to the Court's question at the conclusion of his testimony. Dr. Kimball was not (and would not have been) qualified as an expert on gerrymandering, and the standard he chose to apply—whether the number of seats for Democrats is less than Democrats' share of the statewide vote—has never been accepted as the standard for determining gerrymandering. *See, e.g., Davis v. Bandemer*, 478 U.S. 109, 130-132 (1986). This Court implicitly rejected such an approach at pages 10-11 its prior decision dismissing Appellants' claims based on this same theory, and the circuit court was correct in giving no weight to this testimony in its judgment. Indeed, given Dr. Kimball's willingness to propound on the fly a plainly simplistic and impermissible "standard" without reference to any authority, the circuit court would have been correct in finding that Dr. Kimball's decision to respond as he did reflected poorly on his overall credibility and expertise. (Tr. I 87.)

criterion, neutral enough on its face, would not in fact benefit one political party over another. See *Gaffney, supra*, at 753, 93 S. Ct. 2321 (“District lines are rarely neutral phenomena. They can well determine what district will be predominantly Democratic or predominantly Republican, or make a close race likely”); ...M. Altman, Modeling the Effect of Mandatory District Compactness on Partisan Gerrymanders, 17 *Pol. Geography* 989, 1000–1006 (1998) (explaining that compactness standards help Republicans because Democrats are more likely to live in high density regions).

*Vieth v. Jubelirer*, 541 U.S. 267, 308-09 (2004) (some citations omitted). By striving for perfect compactness, Appellants may be running into the arms of a partner that holds the political outcome it has desperately sought to avoid throughout the twists and turns of this case. A similar dynamic will doom this test in future litigation.

But in conclusion, Appellants are correct in finally recognizing that some standard other than compactness maximization and “one-upmanship” must be applied in judicial review. Although their cure is far worse than the disease and would essentially import a judicially unmanageable “gerrymander prevention” inquiry into what is otherwise an objective standard, this Court should accept Appellants’

apparent surrender of the “most compact” standard they have proposed until this point in the litigation, and adopt instead a logical, more manageable analysis. That analysis should be familiar: the same three factors the Court itself announced in its opinion, and that were applied by the circuit court in this case.

In conclusion, the circuit court was not in error in applying its legal analysis, and its factual findings—unchallenged on appeal—confirm its refusal to adopt Appellants’ proposed compactness maximization standard. Point I should be denied.

## **II. THE CIRCUIT COURT CORRECTLY FOUND AS A MATTER OF FACT THAT THE GRAND COMPROMISE IS AS COMPACT AS MAY BE**

### **A. Standard of Review**

As discussed above, the circuit court’s decision must be affirmed “unless there is no substantial evidence to support it, or it is against the weight of the evidence or it erroneously declares or misapplies the law.” *Brownstein v. Rhombert-Haglin & Associates, Inc.*, 824 S.W.2d 13, 15 (Mo. banc 1992). “Appellate courts should exercise the power to set aside a decree or judgment on the ground that it is ‘against the weight of the evidence’ with caution and with a firm belief that the

decree or judgment is wrong.” *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

Appellants’ apparent belief that a “*de novo*” standard must be applied in order to reverse the trial court’s factual decisions is telling, but has no basis in law. Indeed, the sole case cited by Appellants on their proposed standard of review relies on the seminal decision of *Murphy v. Carron*, which seems to foreclose Appellants’ standard: “The use of the words *de novo* and *clearly erroneous* is no longer appropriate in appellate review of cases under Rule 73.01.” *Id.* at 32.

Appellants argue that there are no genuine issues of material fact, since no one disputes the accuracy of the data: the maps or statistics that were admitted. Br. 31; 32-33. But the law does not simply pick up where the statistical data leaves off, as Appellants themselves conceded by putting on two experts to talk about what the data means for purposes of compactness, and how “communities of interest” require a different drawing of districts in eastern Missouri.<sup>2</sup>

---

<sup>2</sup> For this same reason, Appellants misplace their reliance on *Frito-Lay, Inc. v. So Good Potato Chip Co.*, 540 F.2d 927, 930 (8th Cir. 1976). See Br. 33. In *Frito-Lay*, there was no expert testimony, the evidence consisted of two chip packages that were brought before the Court of

As is apparent from the parties' Statement of Facts, there was substantial dispute about what conclusions of fact can be deduced from that data: the parties reached opposite conclusions.

Further, Appellants' sole focus on evidentiary facts like maps and data ignores the importance of "ultimate facts" in Missouri practice.

---

Appeals, and the only question was whether the colors were "similar" under an unambiguous contract. *Id.* As a later Eighth Circuit court emphasized in returning to a deferential "clearly erroneous" standard where the parties *did* present expert testimony (albeit only in deposition format), the *Frito Lay* court justified its departure from the "clearly erroneous" standard of review based on the fact that there was no expert testimony. *See Hoefelman v. Conservation Comm'n of Missouri Dept. of Conservation*, 718 F.2d 281, 285 (8th Cir. 1983). In the instant case, the circuit court made specific findings of fact regarding the many (and to some degree disputed) facets of the compactness principle, which is far more complex than the simple, one-dimensional issue of color similarity. All lay witnesses but the color-blind can (and do) compare colors, but as Dr. Hofeller testified, compactness is a different matter entirely. (Tr. II 49, 54-55, 86, 124-126.)

Ultimate facts are factual findings, not conclusions of law. For example, in applying *res judicata*, “the questions, points or matters of fact in issue in a previous suit which were essential to that decision, and which were decided in support of the judgment are referred to as ‘ultimate facts.’ Other findings are referred to as ‘evidentiary facts.’” *Abeles v. Wurdack*, 285 S.W.2d 544, 548 (Mo. 1955). See also *King Gen. Contractors, Inc. v. Reorganized Church of Jesus Christ of Latter Day Saints*, 821 S.W.2d 495, 502 (Mo. banc 1991).

In jury-tried cases, ultimate facts are submitted to the jury and must neither assume evidentiary facts nor be an “abstract” legal conclusion that allows a “roving commission.” See *Seitz v. Lemay Bank & Trust Co.*, 959 S.W.2d 458, 462-463 (Mo. banc 1998). Both the subordinate evidentiary findings and the ultimate factual findings are for the finder of fact. *Id.* Appellate review of ultimate findings is nothing like *de novo*, and where the instructions and verdict directors submitting the ultimate findings are attacked, the only question is whether they “misdirected, misled, or confused the jury.” *Id.* at 463.

In a bench-tried case, courts find both the evidentiary and ultimate facts, and the standards for review of facts and law most recently reiterated by this Court in *Brownstein* apply. Further, “[a]ll fact issues upon which no specific findings are made shall be considered

as having been found in accordance with the result reached.” Mo. R. Civ. P. 73.01(c). “Judgment will be affirmed under any reasonable theory supported by the evidence.” *R.J.S. Sec., Inc. v. Command Sec. Services, Inc.*, 101 S.W.3d 1, 22 (Mo. App. W.D. 2003).

**B. The Circuit Court Properly Relied Upon Respondents’ Showing Rather than Appellants’ “Compactness” Expert**

On each area of disagreement between Respondents’ showing and Appellants’, the circuit court was not only entitled to find, but was correct in finding, the facts favorable to Respondents.

Appellants are correct that Dr. Kimball, whom they offered as an expert even though he had no prior academic or practical experience with the principle of compactness in redistricting, generally defaulted to Dr. Hofeller’s position on the theory of compactness. Indeed, Dr. Hofeller co-authored one of the two articles that formed the sum total of the literature consulted by Dr. Kimball to educate himself on this new area of knowledge.

But the fact that Dr. Kimball was forced to continually agree with Dr. Hofeller on these fundamental points only serves to highlight and undermine Dr. Kimball’s blind and illogical pivot when he began to apply the “compactness maximization” test that he admitted had no

technical basis and was simply accepted from Appellants' counsel. The circuit court observed the demeanor and proficiency that each expert exhibited in answering questions over a prolonged period, and was justified in finding facts favorable to Respondents.

**1. The Court Was Free to Find, and Correctly Found as a Matter of Fact, that it Is Not Possible to Know the Most Compact Map that Controls for Equal Population and Contiguity**

Central to Dr. Hofeller's compactness opinion and his refusal to join Appellants' expert in rendering a "yes" or "no" expert opinion on the ultimate issue of fact in this case—whether the districts in H.B. 193 are as compact as may be—was his expert opinion about the nature of compactness, which in turn was based on five decennial cycles' worth of redistricting consulting and testimony. Dr. Hofeller has been one of the major players—perhaps the most prominent player—in the ongoing process of finding an objective method of measuring and applying courts' (and dictionaries') "simple intuitive" explanation of the concept of compactness. *See* Ex. 59 at p. 1158.

But upon closer examination, Dr. Hofeller has written—and testified—that many different attributes, at least including dispersion, perimeter shape, and population, are relevant for determining

compactness (See Ex. 59 at p. 1158-1159; Tr. II 49-50), making compactness in the redistricting context a “very complex principle.” (Tr. II 125-126.) Dr. Hofeller has concluded that “in terms of redistricting, compactness is really a principle in search of a definition.” (Tr. II 49.)

The problem is at least threefold. First, compactness is multi-dimensional and has multiple attributes; there is not complete agreement on what those attributes are. (Tr. II 49.) Put another way, none of the attributes of compactness “fully encompasses our intuitive notions of compactness.” Ex. 59 at 1159. Second, there is no agreement on what weight should be assigned to each attribute. *Id.* Third, there is no agreement on how to objectively measure each attribute. *Id.* Finally, there is no agreement on any bright line between compact and noncompact, no matter what manner of objective measurement or testing is done. *Id.*

Under the applicable standard of review, this testimony amply supported the circuit court’s decision that it is not possible in theory or practice to find the most compact map after controlling for other factors. See *Harris v. Desisto*, 932 S.W.2d 435, 443 (Mo. App. W.D. 1996) (“we accept as true all evidence and permissible inferences favorable to respondents, the prevailing parties, and disregard any

contradictory evidence”). Even following Appellants’ approach and discarding the standard of review, nothing in Dr. Kimball’s testimony indicates otherwise. Indeed, Dr. Kimball found both Dr. Hofeller’s article and a previous article upon whose analysis Dr. Hofeller’s article expressly “built” (Ex. 223, “Measuring the Compactness of Legislative Districts by H.P. Young) to be “authoritative;” they were the only authorities Dr. Kimball considered. (Tr. I 70; 79; 85-86; Exs. 59, 223.)

But the circuit court must be deemed to have noticed Dr. Kimball’s dramatic and arbitrary pivot away from these authorities once he began to offer “expert opinions.” For example, Dr. Kimball testified that (1) in political science, there is an accepted definition of “compactness;” and (2) that the only method for measuring compactness is an eyeball test that looks exclusively to shape, ignoring all other factors. Dr. Kimball’s only sources of authority were Dr. Hofeller’s article and Dr. Young’s article. (Tr. I 79.)

Dr. Young’s article provided no support for Dr. Kimball’s decision to use an “intuitive” definition from Webster’s as the authoritative definition for redistricting purposes. Dr. Young’s article merely cites Webster’s without comment, and in the very next sentence, states, “While this definition may appeal to our intuition, it does not provide a rigorous or precise standard that can be used to determine whether a

districting plan is or is not compact.” Ex. 223 at 105. Dr. Young continued that legislators may choose to use measures that compare the “relative compactness of different plans,” but stated that “unfortunately, even then there appears to be no completely satisfactory criterion for telling whether one plan is more compact than another. The problem seems inherent in the notion of compactness itself.” *Id.* at 106. Ultimately, Dr. Young concluded, “The truth of the matter is, however, that compactness is such a hazy and ill-defined concept that it seems impossible to apply it, in any rigorous sense, to matters of law.” Ex. 223 at 113.

Similarly, Dr. Hofeller and his colleagues concluded that compactness is not simply a matter of outline but instead has “multiple, distinct components.” Ex. 59 at p. 1176. (Indeed, Dr. Kimball admitted that there was no definition of compactness in Dr. Hofeller’s article. (Tr. I 79.) Therefore, Dr. Hofeller and his colleagues noted, objective tests should be used to make comparisons, “not to eliminate plans or districts that fail to meet some predetermined level.” Ex. 59 at p. 1176.

If all of this is authoritative, then Dr. Kimball grievously erred in applying a test that answered the “compact as may be” question solely by determining whether, to his eyes, the same numbered district could be made “more compact” under another plan. Using such an analysis

to definitively reject proposed plans is endorsed nowhere in the literature. Worse, this analysis would replace the “bright line” and “predetermined level” of compactness (which Dr. Kimball agreed was illusory) with something even worse: a *constantly moving* bright line based on new plans created purely for purposes of challenging the plan being reviewed. Dr. Kimball’s suggested test, a constant search for a more compact plan, would necessarily make compactness the “sole criterion after population equality and racial fairness.” But this concept is expressly rejected in Dr. Hofeller’s article, which Dr. Kimball admitted is authoritative. Ex. 59 at 1176. And Dr. Kimball testified that while his test allowed for the constant drawing of “more compact” maps (Tr. I 69), he had never considered whether it was even possible to comply with his own test by ending this cycle and drawing “the most compact districts possible when controlling for population equality and the Voting Rights Act.” (Tr. I 74.)

Further, Dr. Kimball would only have looked to the outline of the district, rather than to all of the components of compactness, including population dispersion within a district, discussed in the only authorities he cited, Dr. Young and Dr. Hofeller and his colleagues.

Ultimately, Dr. Kimball began to qualify his theories and conclusions upon cross-examination. For example, Dr. Kimball

admitted that the eyeball test does not consider other factors, such as size, which he ultimately testified could also be relevant for determining compactness. (Tr. I 79-80.) Then, when confronted with specific questions about alternative district shapes in Missouri, Dr. Kimball admitted that he would want to look to mathematical measures as a supplement to a pure eyeball test. (Tr. I 61.) Dr. Kimball first denied, but then immediately afterward admitted, that population-based measures were “as relevant as each of the other measures” for determining compactness. (Tr. I 76-77.) Dr. Kimball expressly refused to accept the sentence in Appellants’ expert disclosures that population is not a “relevant factor.” *Id.* Despite this new concession, Dr. Kimball had earlier admitted he had not considered population dispersion—for example, at the confluence of the Missouri and Mississippi Rivers—in rendering his opinions. (Tr. I 67.)

Most significantly, Dr. Kimball finally admitted that a strict visual inspection of two relatively compact shapes—say, a square or triangle—might not lead him to say that one was more compact than the other. (Tr. I 80.) Indeed, Dr. Kimball then admitted that his test would require another plan to be “substantially more compact” than the legislation being challenged. (Tr. I 80-81; 82.) Dr. Kimball allowed that the differences “might be” at least 5% to be substantial. *Id.*

Finally, Appellants offered no testimony whatsoever to rebut Dr. Hofeller's testimony regarding the fact that Dr. Kimball's test would lead to "endless iterations of draws and redraws." (Tr. II 86.) Indeed, Dr. Kimball did not deny this fact and openly admitted that at each turn, his answer would be, "Let's keep finding a more compact map than what we've got." (Tr. I 81.) Nor did Appellants rebut Dr. Hofeller's testimony that ultimately, there will be almost endless changes in maps, but "less choices" for the drafters and very little "room left for the General Assembly or legislature to make decisions." (Tr. II 86-87.)

After hearing the testimony of and observing the demeanor of Drs. Hofeller and Kimball, the circuit court could hardly have come to any conclusion other than that it is impossible in theory or practice to draw the "most compact" map that controls for other constitutional mandates, or to administer a test that invalidates any legislation for which a "substantially more compact" map, to the exclusion of other redistricting factors, can be drawn. Although the standard of review does not contemplate that an appellate court not present for the testimony will conduct a *de novo* balancing of one expert's points against the other's, the circuit court's findings meet even this test.

**2. The Court Was Free to Find and Correctly Found that under Any Definition, the Maps Are Compact, and that they Are As Compact As May Be Because the Differences Are Not Great, the Differences In Shapes Are Not Great, the Map Complies With Other Requirements, and the Map Reflects a Degree of Compactness that Leaves Ample Room for Political Decisions.**

The circuit court's ultimate finding of fact on the issue of "compact as may be" was consistent with Missouri case law, this Court's prior opinion, and the facts.

**(a) The Circuit Court's Decision Is Consistent with Precedent on "Compactness"**

First, Appellants cite Missouri and Illinois opinions—most of which rely on Webster's dictionary—for the principle that "compact" means "closely united territory." Br. 34. At a strictly intuitive level, this concept is unobjectionable, but it does not answer the question of what "closely joined territory" should look like on a congressional redistricting map.

Additionally, this concept is less useful if courts are to apply an inquiry more searching than the “wholly disregarded” standard that was applied in the cases cited by Appellants. Indeed, the same Webster’s definition is applied in municipal annexation cases, but as a review of any of Missouri’s city boundaries will show, that “compactness” requirement leads to shapes that are far more bizarre than anything at issue in this case. *See Reed v. City of Union*, 913 S.W.2d 62, 64 (Mo. App. E.D. 1995).

### **1. Courts Consider More than Shape**

Appellants also argue that only “shape” is relevant. Br. 34. While the cited cases certainly deal with shape, none of them hold that it is the exclusive factor for purposes of determining compactness. Indeed, the shapes in the first *Preisler* case are so irregular (far more so than any district in any plan before this Court), it appears the Court needed to resort to little else. *See Preisler v. Doherty*, 284 S.W.2d 427 (Mo. banc 1955). Other *Preisler* decisions have recognized that, especially in years in which districts are lost and the remaining districts must be enlarged, it is not necessary to create ideal shapes even if equal population concerns would be better served:

While both compactness and population of the Tenth district could have been aided by also adding these counties plaintiff mentions and others adjoining them it must be realized that every member of the Legislature has his own views (as do his constituents) as to the district in which his county (and others with which his county has previously been associated in a congressional district) should be placed **and it is not improper to consider the precedents of allocation of counties to existing districts in deciding the composition of new enlarged districts.** Very likely each legislator individually would draw somewhat different district lines. Therefore, any redistricting agreed upon must always be a compromise.

*Preisler v. Hearnnes*, 362 S.W.2d 552, 557 (Mo. banc 1962).

Three things are notable about this Court's holding in *Hearnnes*. First, it allowed deviations from compactness even where they were not necessary to keep county boundaries or equal population, and even where they arguably disserved the equal population principle. *Id.* Second, the Court recognized that every legislator (and his or her constituents) likely has different views about which counties should be grouped together, based on historical or other factors. *Id.* Third, the Court recognized that redistricting legislation is inherently a

compromise between legislators in a given house, and between the houses of the General Assembly. *Id.* That is by constitutional design, not by accident. In deciding what is “reasonable under the circumstances” for a legislature, how can a court instead use what was “reasonable under the circumstances” in litigation, applying a measuring stick crafted by an attorney and expert months after the fact, solely for use in court, and solely to invalidate a legislative act?

As *Hearnes* shows, Missouri courts have never looked exclusively to shape. The “population density” of different parts of the state—a measure of where people actually live—must also be considered rather than mere geographic shapes. *Preisler v. Kirkpatrick*, 528 S.W.2d 422, 426 (Mo. banc 1975).

## **2. Courts’ Review of Shape Has Resulted Only in the Invalidation of Districts Less Compact than Those Created by H.B. 193**

Even on a shape-only basis, the districts found noncompact in prior Missouri cases were less compact than any district at issue here. In *Hearnes*, the 10<sup>th</sup> Congressional District devised after the 1960 Census ran along the Mississippi River from below Jefferson County to the Bootheel, and then included a narrow finger of four counties in

single file extending to the west. This “T” shape was allowed despite the fact that moving counties from the Eighth District, which formed a wedge into the Tenth, would have made the Tenth and Eighth more compact and helped remedy the 70,000-person population difference between the counties. *See Hearnnes*, 362 S.W.2d at 557; McClatchey Appendix at 28.

Further, the 1962 Eighth District divided mid-Missouri and added awkward one-county appendages on each end: Saline in the west and Jefferson in the east. *Id.* The Ninth stretched from the so-called “lobster claw” of St. Charles County almost to Cole County and all the way to Mercer County in northwest Missouri. *Id.* This was despite the fact that it could have surrendered the northwesternmost counties to the neighboring Sixth and evened out the population difference between the districts, which reached into the tens of thousands. *Id.*

Finally, the overpopulated Fourth District approved in *Hearnnes* encompassed all but the westernmost sliver of Jackson County, stretching several counties to the south and including Vernon County projecting like a “chimney” to the south. McClatchey Appendix at 28.

In *Preisler v. Secretary of State*, 341 F.Supp. 1158 (W.D. Mo. 1972), a three-judge federal court applied Missouri’s constitutional compactness standard and drew a Tenth District that reached up from

southeast Missouri to include the St. Louis area's Jefferson County as an appendage. *Id.* McClatchey App. 29. Further, the court's Eighth District reached across the Missouri River only to take Boone County, and extended a small appendage into St. Louis County far to the east. *Id.* Notably, most of Jackson County was included in the Fourth District with the rural counties of Lafayette, Saline and Howard, extending far across the Missouri River to the east, and Vernon and Barton Counties, extending eventually in single file to the south. *Id.* The Sixth District projected a "chimney," Adair County, into the Ninth District. *Id.*

Similar examples can be found in the 1981 court-drawn map, which divided Jackson County three ways and included eastern Independence with Texas County, Missouri, deep in the Ozarks. McClatchey App. 30. Again, courts either drew or approved all of these maps under Missouri's compactness standard, which the McClatchey Appellants state requires "reasonable compactness under the circumstances."

Turning to state legislative districts, both *Preisler* cases, twenty years apart, approved districts that were less compact than the Fifth District in H.B. 193. The Fifth and Sixth Senatorial Districts in the City of St. Louis were drafted only a few years after the 1945

constitutional convention, contained multiple shoestring connections, and were far less compact than the Fifth in H.B. 193; indeed, it is difficult to even follow the outlines of the Fifth Senatorial District. See *Preisler v. Doherty*, 284 S.W.2d 427 (Mo. banc 1955).

Twenty years later, the situation was no better: the Sixth Senate District zigged and zagged down the length of St. Louis City, obviously several miles long but probably at no point much more than one mile wide. See *Preisler v. Kirkpatrick*, 528 S.W.2d 422 (Mo. banc 1975). Not even mentioned by the court majority, but also noticeably less compact than the Fifth District in H.B. 193, were the Fifth and First Senate Districts, the latter of which was shaped like a very skinny and long-toed “witch’s” boot. *Id.*

The division of Greene County also resulted in less compact districts than H.B. 193’s Fifth District. The Thirty-Third’s finger into Greene did not merely include a peripheral area that was small in size compared to the rest of the Greene district; it was a sizeable cut into the heart of the seat of a single-county district, leaving a correspondingly narrow appendage in the northeastern part of the county. *Id.* Further, the Thirty-Third barely connected to Texas County in the east, and reached out with another one-county appendage to nick the Kansas line. *Id.*

Finally, it should be noted that several of the 2002 Congressional districts, which the Appellants do not suggest fail the “reasonable compactness” standard, could be viewed as less compact than H.B. 193’s districts. *See McClatchey App. 32.* The 2002 Sixth District includes not one but two “appendages” across the Missouri River, into Jackson and Cooper Counties. The Fourth contains “appendages” similar to the districts under H.B. 193. And both the Second and Third Districts in St. Louis reach from large rural tracts into denser urban areas via necks far more narrow than the swath of Jackson County that connects the eastern and western portions of the new Fifth District under H.B. 193. Further, Jackson County is divided three ways, instead of two under H.B. 193. *McClatchey App. 32.*

Clearly, Missouri courts considering compactness challenges have never slavishly followed shape to the exclusion of all other attributes of compactness. When shape has been predominant in their analysis, it was for good reason: the deviations were worse than those alleged in this case.

**3. Courts Can Consider Measures  
that Are More Objective than  
an Individual’s or Judge’s  
Eyeball Review**

Finally, Appellants argue that the four Missouri compactness cases to date have held that only a “visual” approach can be used. First, the most recent Missouri case to consider a compactness challenge like Appellants’ is almost four decades old, when exhibits and maps were still frequently hand-drawn and, as Dr. Hofeller’s experience shows, the use of computer programs and statistical measures in redistricting was in its infancy.

Second, as discussed above, those cases did not hold that only shape should be considered, and mentioned other factors such as historical county-district affiliations and compactness. Third, a purely visual approach is much more appropriate to the “wholly ignored” standard that each of those cases applied, which only asks whether the General Assembly considered compactness—not whether it considered compactness “well.” An “eyeball” test alone is a much blunter instrument for the somewhat finer gradations of compactness that this Court’s new standard may require, and neither party’s expert ultimately employed an “eyeball” test without any reference to statistics and other attributes of compactness.

Finally, while statistics alone do not necessarily reveal compactness or the lack thereof, they are a useful check on purely visual inspection in which the eyes can be fooled, as Dr. Hofeller

testified. One cannot simply apply the dictionary definition visually to a map, because despite the difficulty of mathematical analysis, “everybody found as they got into it, it was more complicated and multi-faceted than they ever imagined it was going to be.” (Tr. II 152.)

Regardless of these relatively fine distinctions, none of which are inconsistent with this Court’s prior decision in this case, Appellants have not demonstrated that there was something in the circuit court’s analysis of these facts and standards that caused it to err.

**(b) H.B. 193 Is “As Compact As May Be” Under  
Any Standard**

Dr. Hofeller testified that H.B. 193 is “compact,” and stated that based on his experience, it does “not come near crossing” the transition from compact plans to non-compact plans. (Tr. II 119.) Dr. Hofeller further testified that based on his experience with designing and using methods of measuring compactness over several decades, even the map proposed by the Pearson Appellants immediately before trial in an effort to invalidate the Grand Compromise, H.B. 193, was not significantly more compact than H.B. 193. (Tr. II 85; Ex. 215.)

Dr. Hofeller also testified that the McClatchey Appellants’ proposed map generally did not score as well as the last Pearson alternative, which itself was not significantly more compact than H.B.

193. (Tr. II 133-134.) Dr. Hofeller did more than “quibble” about whether the overall statistical differences in the maps were significant, and after lengthy cross-examination continued to testify with certainty that all the maps were within the same zone of compactness. (Tr. II 143.)

Nowhere did Dr. Hofeller testify that any of the proposed alternative maps—even those prepared immediately before trial in a last-ditch effort to invalidate H.B. 193—were significantly more compact than H.B. 193, or, as Appellants falsely state at page 37 of their brief without citation to the record, that it did not matter where H.B. 193 fell along the compactness continuum. Indeed, Dr. Hofeller testified that to be compact, a map must clearly be something akin to “cold” on a temperature scale, and not in the arguably temperate middle. (Tr. II 56.) On cross-examination, Dr. Hofeller testified that H.B. 193 “does not come near crossing” this middle zone, even if it is not a bright line. (Tr. II 119.)

Further, Dr. Hofeller testified that based on his experience, if H.B. 193 were invalidated for noncompactness, it would be the most compact map ever invalidated by any court in America. (Tr. II 81-82.) Dr. Hofeller testified that he “tracks all of the cases that come through,” had even been tracking the instant case before he was

contacted to be an expert, and that if he had seen a plan that he “felt was as compact as this plan was... overturned due to lack of compactness, [he] would have remembered it.” (Tr. II 152-153.) Were H.B. 193 invalidated, Dr. Hofeller testified, it would lead to a “tremendous number of congressional” and other maps “that would be redrawn across the country, probably throughout the whole decade.” (Tr. II 82.)

Finally, Dr. Hofeller demonstrated that the alternative map the Pearson plan relied on for all but the last few days of this twisting and turning litigation contained similar features to the ones attacked by Appellants in H.B. 193, including a narrow neck extending from a largely rural and suburban Third District extending into urban St. Louis. (Tr. II 145-146.) The circuit court would certainly have observed this by looking at the maps, as it would have observed that the McClatchey alternative was by design almost identical to H.B. 193 (including the features in St. Louis of which the Pearson Appellants complained) except for adjustments between the Fifth and Sixth Districts, which in turn required adjustments in other parts of the state outside of the St. Louis area. *See* Ex. 10.

Additionally, the circuit court would have observed that none of the proposed alternative maps created markedly fewer county or

political subdivision splits than H.B. 193. Indeed, the primary Pearson alternative contains the most serious split of all, dividing St. Louis City in half and pulling a statistically important percentage of black voters from a minority-represented district into a suburban and rural district. (Tr. II 170.)

Finally, substantial evidence showed that each of the three ideas this Court enumerated as “fundamental” to the “as may be” standard of review were satisfied by H.B. 193 in this case.

With respect to the first criterion, Dr. Hofeller’s testimony indicated that H.B. 193 was much closer to the “perfectly compact” pole than the “noncompact” pole. Appellants offered testimony that other plans crafted in the closing moments of litigation might have been marginally more compact than H.B. 193, but never disputed Dr. Hofeller’s testimony about the relatively “cold” place of H.B. 193 on the overall temperature scale of compactness (assuming a perfectly compact plan is “cold”).

Appellants never contradicted Dr. Hofeller’s further testimony that if H.B. 193 were deemed not compact enough, this decision would be a clear outlier. Nor did Appellants contradict Dr. Hofeller’s testimony that if the compactness standard were raised to require something close to the most compact plan, there would be little if any

room left for the General Assembly to exercise its discretion, stripping the redistricting process of its “predominately political” character. Accordingly, the first of the Court’s three fundamental ideas was satisfied.

Second, the record was undisputed that H.B. 193 satisfies all other constitutional criteria.

Third, Dr. Kimball did not disagree with Dr. Hofeller that compactness cannot be measured with precision and that even the attributes which make up compactness—let alone their relative weights in the analysis—are subject to disagreement. Based on Dr. Hofeller’s testimony regarding his visual and statistical review, the circuit court could (and should) have concluded that the differences in compactness between even the Appellants’ last-minute, litigation-crafted plans and H.B. 193, the product of legislative compromise, were not so substantial that some plans could be judged to meet the standard, while one could be judged to fail.

Under any standard, the circuit court must be deemed to have found the evidentiary facts necessary to find the ultimate fact that H.B. 193 is “as compact as may be.” See Mo. R. Civ. P. 73.01(c).

**(c) Summary**

At best, Appellants can claim to have crafted litigation-specific plans which make various trade-offs with the Grand Compromise and achieve political results which are presumably more acceptable to them. But as Dr. Hofeller testified, those alternatives do not lead to plans that are not substantially more compact than H.B. 193, and all of the plans can be deemed acceptably compact. H.B. 193 is already much closer to the “perfect compactness” pole than to the noncompact pole, and were it invalidated, would be an outlier among all the plans judged to be “noncompact” by any court; it is as compact or more compact than plans approved or drawn by courts in other states that also treat compactness as important. Turning only to Missouri, H.B. 193’s Fifth District, perhaps the least compact of its districts, is more compact than the districts judged not “compact as may be” by prior Missouri courts, but allowed to stand based on the compactness of the overall map. Finally, H.B. 193 meets all of the elements of the “as compact as may be” standard of review as outlined by this Court in its prior opinion in this case.

The evidence only “points one way,” as Appellants say, if this Court is prepared to implement Appellants’ designed-to-fail “compactness maximization” standard (a standard from which even

Appellants are now prepared to retreat by proposing various compromise definitions and tests) and assign value to eyeball tests and statistical measures that neither party's expert was prepared to confer. Further, in future litigation, as Dr. Hofeller testified, that standard would devour even the maps that, until only a few weeks ago, Appellants claimed would satisfy the constitution and should be implemented by judicial fiat. Litigants who are not even before the Court today but are waiting in the wings with maps to beat the Appellants' will launch the race to come ever closer to the unattainable "perfectly compact" map that complies with other constitutional criteria. It will not end well. Missouri should not accept Appellants' invitation to be the first—and likely only—state to wade into this morass.

Instead, the Court should affirm the circuit court and make clear that although Missouri's objective standard requires the General Assembly to take compactness seriously and draw districts that are at the higher end of the compactness scale, it does not require compactness maximization at the expense of the political decisions and compromise that have always "predominated" and rested at the heart of redistricting.

### **III. The Circuit Court's Ruling Is Supported by the Independent Ground that No Pearson Appellant Has Standing to Challenge Districts Three or Seven**

#### **A. Standard of Review**

Under Mo. R. Civ. P. 73.01(c), “[a]ll fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached.” “[J]udgment will be affirmed under any reasonable theory supported by the evidence.” *R.J.S. Sec., Inc. v. Command Sec. Services, Inc.*, 101 S.W.3d 1, 22 (Mo. App. W.D. 2003) (internal citation omitted). “A correct result will not be disturbed on appeal merely because the trial court gave a wrong or insufficient reason for its judgment.” *Harris v. Desisto*, 932 S.W.2d 435, 443 (Mo. App. W.D. 1996).

#### **B. No Appellant Lives In, Was Injured By, Or Has Standing to Challenge the Compactness of Districts Three or Seven**

Below, the parties stipulated that no Appellant resides in H.B. 193 Districts Three or Seven. Without residency, there is no injury to a compactness or gerrymandering-based right, and the plaintiff can have no standing. *See United States v. Hays* 515 U.S. 737, 741-42 (1995)

(plaintiffs who did not live in challenged district had no standing to raise racial gerrymander claim).

Standing is a threshold issue; if not even a single plaintiff has standing to assert a given compactness claim, the Court lacks jurisdiction to consider it on the merits. *See Comm. for Educ. Equality v. State*, (“*CEE*”) 294 S.W.3d 477, 484, 486 (Mo. banc 2009). For this reason, the failure of any Pearson Appellant (or, in the companion case, McClatchey Appellant) to reside in the Seventh or Third Districts defeats Appellants’ standing to challenge those districts.

The Pearson Appellants living in adjoining districts created by H.B. 193 may claim that they are challenging the “entire plan.” This may be, but no Pearson Appellant demonstrated or alleged any injury stemming from the compactness of Districts Three or Seven. This Court made clear in its initial opinion that compactness is a “protection” that “applies to each Missouri voter, in every congressional district,” because “No right is more precious...than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” S. Ct. Op. 6-7 (citing *Burdick v. Takushi*, 504 U.S. 428, 441 (1992)). A voter in one district has no right to have certain candidates elected in other districts, just as a voter in one

district has no right to have his party or interest group hold some overall proportion of all of the seats in his or her state.

While it is at least conceivable that some feature of a noncompact district could have caused a change in the shape of a surrounding district, impacting the abilities of the surrounding districts' citizens to "have a voice in the election" of their own legislators,<sup>3</sup> Appellants were required to prove that problems with adequate representation in their own districts were an inevitable result of the allegedly noncompact districts. *United States v. Hays* 515 U.S. 737, 741-42 (1995). Appellants submitted no evidence that noncompact features in the Third District made their own districts noncompact, or even if so, that the noncompact features that other districts "created" in their own districts injured their rights to adequate representation in their own districts.

---

<sup>3</sup> Nor can Appellants who live in districts such as the Eighth argue that they have a right to have certain representatives elected in other districts. Such a claim would be tantamount to the sort of absurd and standardless "partisan gerrymandering" claims that the U.S. Supreme Court and this Court have declined to grant.

At most, Plaintiff Ottomeyer testified that she wished Jefferson County were not split among three districts, and that her “desire” would be to have the county whole and included within the Third District. (Tr. II 31, citing Exhibit 11, Pearson Court Alternative 2.) But Plaintiff Ottomeyer next admitted that if she were to live in St. Louis City where she used to work, she would not want “split” representation—the exact problem caused by Exhibit 11, the proposed “fix” for Jefferson Count that she endorsed. (Tr. II 32).

Indeed, Plaintiff Ottomeyer’s contradictory answers prove that the peculiar sort of non-resident “compactness” injury does not match the definition or standard for compactness Appellants actually relied upon to prove their case, which seemed to be based only on shape, not other features such as communities of interest, political affinity among members of the district, population dispersion, size, and ease of transport and communication. There is no objective way of knowing whether merely making the shape of the Third District more compact would remedy Appellants’ peculiarly-perceived “representational” harm, necessarily placing Ms. Ottomeyer in a unified Jefferson County in a new Third District that did not create new representational injuries of its own—perhaps for citizens of a newly-split City of St. Louis under Ms. Ottomeyer’s desired map, Exhibit 11. This Court is

not required to speculate, of course, because the burden of proof was on Appellants. After a full opportunity to testify, Appellants were unable to connect the dots.

Appellants may argue that they have standing because they do have Fourth, Fifth, and Sixth District plaintiffs, and changes there would necessarily ripple through to the Third District (and vice versa). But the McClatchey proposal, which is also before this Court, shows that changes can be made to the former districts without altering the Third District. *See Ex. 10*. Indeed, the McClatchey Appellants now admit that this was precisely their aim and that they have no basis to challenge the Third District or the surrounding districts in the eastern half of the state. *See Ex. 221, p. 2*.

The lack of injury arising from the compactness or shape of the Third or Seventh Districts is a significant failure in Appellants' case. For whatever reason, Appellants waited five months after H.B. 193 was passed before filing their lawsuit, apparently using this time to recruit plaintiffs from various parts of Missouri who could show injury. They were unsuccessful in at least one instance: Cole County Presiding Commissioner Marc Ellinger, who submitted a proposed map to the General Assembly that he believed would keep a mid-Missouri community of interest whole. Commissioner Ellinger believed that this

was necessary to ensure adequate representation for mid-Missouri, but nonetheless, decided not to join Appellants' lawsuit. (Tr. II 99.) Appellants recruited Democrats in several districts as plaintiffs, but never found a plaintiff in H.B. 193's Third or Seventh Districts. That no Third or Seventh District voter stepped forward to join Appellants after all of this time cannot have been a mere oversight.

This Court does not issue advisory opinions and does not invalidate actions of a coordinate branch of government unless some person can at least allege that he or she has been injured. There are definite standards for standing in compactness claims, and none of the many plaintiffs recruited by the Pearson Appellants meets those standards. For that reason, the Appellants have no standing to challenge the compactness of the Third or Seventh Districts. To the extent the circuit court's judgment disposes of these claims, the lack of standing independently supports this disposition based on the undisputed facts.

### CONCLUSION

Missouri's courts have almost completed their first foray in almost forty years into judicial review of the General Assembly's "compactness" determinations. As discussed in the parties' earlier briefing before this Court and in this Court's prior decision, a century of

precedent may have resulted in different articulations of the standard of review, but certain constitutional constants run through all of the cases. Foremost among them are the separation of powers, the political question doctrine, and the long-standing recognition that this Court should not interfere with political determinations that have been entrusted to a coordinate branch. The very first “fundamental” idea this Court enumerated in its recent opinion is that “redistricting is predominately a political question... These decisions are political in nature and best left to political leaders, not judges.”

Assaults on this principle are seldom direct or even purposeful, and are usually cloaked in the language of well-known principles, legal-sounding tests and standards, and good intentions. Justice Kennedy recognized this in refusing to entertain partisan gerrymandering claims that were seemingly replete with detailed “objective” tests, warning famously that “[w]ith uncertain limits, intervening courts—**even when proceeding with best intentions**—would risk assuming political, not legal, responsibility for a process that often produces ill will and distrust.” *Id.* 541 U.S. 267, 307 (2004) (emphasis added).

While Appellants’ arguments are styled as objective “compactness” claims, this legal ground is no less prone to the dangers of which Justice Kennedy warned. The separation of powers and

political question concerns that this Court has already recognized inhere in this dispute will make it a milestone in recent Missouri constitutional and political history. And the consequences will be far-reaching. The question of “how compact is compact enough?” is relevant not only for legislators, but for citizens and litigants who will rely upon this Court’s decision to challenge future redistricting legislation.

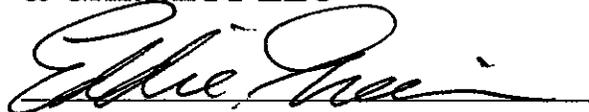
Given the Court’s new reliance on citizens’ individually-enforceable rights to “have a voice” in elections in their own districts, this Court’s decision may also require greater judicial involvement in reviewing many other election-related laws. And were this Court to follow Appellants’ proposed standards, redistricting litigation to enforce other individuals’ compactness-related rights will likely continue until the 2020 Census reapportionment. In each case (as here) litigants will ask why the constitutional line falls precisely within the space between the proposed map and the map in force. Litigation of these and other ongoing election-related disputes would, in time, fundamentally change this Court’s relationship with the General Assembly and the division of powers between the two co-equal branches.

None of these consequences need occur, however, if this case is resolved on existing Missouri law and the facts. For all of the reasons

discussed above, it is apparent that, relying on this Court's prior decisions and the facts as it found them, the circuit court followed the correct course in refusing to find that on the vast scale of compactness, the constitutional line happens to follow between the Appellants' proposal and H.B. 193. The Appellants have failed to carry their burden of proving that the General Assembly's Grand Compromise, H.B. 193, is not "as compact as may be." This Court should affirm the circuit court's decision and order that final judgment be entered against the Appellants on their last remaining claims.

Respectfully Submitted,

**GRAVES BARTLE MARCUS  
& GARRETT LLC**



Todd P. Graves (Mo. 41319)

Edward D. Greim (Mo. 54034)

Clayton J. Callen (Mo. 59885)

1100 Main Street, Suite 2700

Kansas City, Missouri 64105

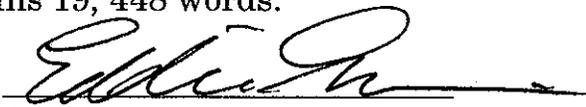
Tel: (816) 256-4144

[edgreim@gbmglaw.com](mailto:edgreim@gbmglaw.com)

*Attorneys for Intervenor-  
Respondents*

CERTIFICATE OF COMPLIANCE

I hereby certify that I prepared this brief using Microsoft Word 2010 in Century Schoolbook size 13 font. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that it contains 19, 448 words.

  
Attorney

**CERTIFICATE OF SERVICE**

I hereby certify that on February 13, 2012, I filed a true and correct copy of the foregoing Brief and its Appendix via the Court's electronic filing system, which notified the following:

James R. Layton  
SOLICITOR GENERAL  
207 W. High Street  
PO Box 899  
Jefferson City, MO 65102-0899  
James.Layton@ago.mo.gov  
*Counsel for Secretary of State Carnahan and  
Attorney General Koster*

Jamie Barker Landes  
211 SE Grand Avenue  
Suite A  
Lee's Summit, MO 64063  
jlandes@gmail.com  
*Counsel for McClatchey Appellants*

Gerald P. Greiman  
Frank Susman  
Thomas W. Hayde  
1 N. Brentwood Blvd.  
Suite 1000  
St. Louis, MO 63105  
ggreiman@spencerfane.com  
fsusman@spencerfane.com  
thayde@spencerfane.com

Keith A. Wenzel  
308 E. High Street, Ste. 222  
Jefferson City, MO 65101  
(573) 634-8115 (telephone)  
(573) 634-8140 (facsimile)  
[kwenzel@spencerfane.com](mailto:kwenzel@spencerfane.com)

*Counsel for Appellants*

A handwritten signature in black ink, appearing to read "Edward D. Greim", written over a horizontal line.

Edward D. Greim