SC92326

IN THE SUPREME COURT OF MISSOURI

STAN MCCLATCHEY, DONNA TURK, IVAN GRIFFIN, PATRICIA SMITH, MOLLY M. TEICHMANN, LAURA MEEKS & MATT ULLMAN

Appellants,

vs.

ROBIN CARNAHAN, *in her official capacity as Missouri Secretary of State*, REP. JOHN DIEHL & SEN. SCOTT RUPP,

Respondents.

Appeal from the Circuit Court of Cole County
Honorable Daniel R. Green, Circuit Judge
Case No. 11AC-CC00752

BRIEF OF THE APPELLANT

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PRELIMINARY STATEMENT

Article III, § 45 of the Missouri Constitution provides for periodic reallocation of voting wards and precincts among electoral districts by the General Assembly. These provisions place only three limitations on legislative discretion in drawing boundaries: That the districts be composed of contiguous territory, and that they be as compact and equal in population as may be.

"As compact as may be" is an objective standard. Respondents would have the words "as may be" given no effect at all. But no constitutional text can fail to have meaning. According to the ordinary meaning of the text, and acknowledging that a perfectly compact district is impossible, "as compact as may be" means that a reasonable person would find the district to be reasonably compact under the circumstances. Because "compact" is itself a relative term, a "reasonably compact" district would be a district that cannot be made substantially more compact. Because each Missouri resident has the right to live in a compact district, and because changing a single district's boundaries necessitates a change in adjacent district boundaries, a single noncompact district causes the entire plan to fail constitutional muster.

In 2011, the General Assembly approved a bill that apportions Missouri's wards and precincts among eight Congressional districts. The apportionment creates at least one district that is highly irregular in shape, that sprawls across 5

counties when it could contain as few as two, that joins highly disparate communities, and that contains an interior teardrop-shaped carveout that crosses county, municipal and even precinct boundaries. This apportionment violates the requirement that the districts be "as compact as may be."

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JURISDICTIONAL STATEMENT

This is a direct appeal from an Order and Judgment of the Circuit Court of Cole County, Missouri, entered February 3, 2012. This is an action questioning whether the congressional redistricting plan adopted by the General Assembly in May 2011 as H.B. 193 violates one or more provisions of the Missouri Constitution and the United States Constitution. This is a case involving the validity of a statute or provision of this state. Therefore, pursuant to Article V, § 3 of the Missouri Constitution, the questions in this case fall within the exclusive appellate jurisdiction of the Missouri Supreme Court.

STATEMENT OF FACTS

A. BACKGROUND OF THE 2011 CONGRESSIONAL REDISTRICTING AND H.B. 193

In February 2011, the United States Census Bureau released the results of the 2010 Census, which reflected that, over the preceding ten years, Missouri's population grew at a lower rate than many other states. As a result, Missouri must lose one member of its delegation to the United States House of Representatives – reduced from nine members to eight – for the elections in 2012, 2014, 2016, 2018 and 2020.

Mo. Const. Art. III, § 45, provides that following certification of the decennial census results, "the general assembly shall by law divide the state into districts corresponding with the number of Representatives to which it is entitled, which districts shall be composed of contiguous territory as compact and as nearly equal in population as may be." Accordingly, it fell to the Missouri General Assembly to draw the new congressional districts that will take effect for the 2012 election.

In February and March 2011, the Senate and House redistricting committees held hearings throughout Missouri for testimony from members of the public as to how the Congressional redistricting map should be drawn. These hearings were not publicized in any manner consistent with bringing any significant numbers of citizens of Missouri to the hearings. Additionally, the General Assembly chose to have an expedited calendar for citizen input that made it difficult, if not impossible, for many citizens to be notified in time to participate in the public hearing process.

In April 2011, both houses of the General Assembly approved a congressional redistricting map codified in House Bill 193 ("the Map"). The Map ignored the principles and testimony adduced at the redistricting committee hearings as well as the constitutional requirements that districts be compact. Following the General Assembly's adoption of the Map, Governor Jay Nixon quickly vetoed it, stating that the Map "did not adequately protect the interests of

all Missourians." The General Assembly then voted to override the Governor's veto in May 2011.

B. CHARACTERISTICS OF THE 2011 MAP

The Map divides Jackson County between the Fifth and Sixth Districts along a jagged and highly irregular boundary, ignoring traditional historical, geographic, community and even precinct boundaries. The Map carves out a teardrop-shaped area of the inner Kansas City suburbs in Jackson County and places it in the Sixth District, which is otherwise composed entirely of rural areas in northern Missouri stretching from Nebraska to Illinois. This carveout divides two of Jackson County's largest cities, Blue Springs and Independence; cleaves both Lee's Summit, which has 97.9% of its 91,364 citizens in Jackson County, and Oak Grove, which has 98.6% of its population in Jackson County; and splits tiny communities in Jackson County such as Lake Lotawana and Grain Valley. The new Fifth District then appends three primarily rural counties – Lafayette, Ray, and Saline – that extend 100 miles to the east and cross the Missouri River. The district also juts briefly across the Missouri River into the southern portion of Clay County on the northwestern corner of the Fifth District, thereby sprawling across five counties. In no prior Congressional redistricting has the Fifth District ever crossed the Missouri River, and has never before included any part of Ray,

Lafayette or Saline Counties. It now takes 90 minutes on the interstate to traverse the district by car.

C. PROCEEDINGS BELOW

On November 22, 2011, Appellants filed their Petition for declaratory and injunctive relief in Cole County Circuit Court against Robin Carnahan, in her official capacity as Missouri Secretary of State and chief elections officer for the state (L.F. 6), seeking to invalidate H.B. 193 and prevent Sec. Carnahan from conducting elections according to the Map. Appellants requested and obtained an order granting a hearing on common record with *Pearson v. Koster*, Case No. 11AC-CC00624 in Cole County Circuit Court (L.F. 37), a case making similar claims and requesting similar relief.[1] Appellants further filed an amended petition on December 23, 2011.

Respondent Carnahan filed an Answer on December 7, 2011 (L.F. 23). Respondents Diehl and Rupp obtained permission from the court to intervene and filed their separate Answer on December 5, 2011 (L.F. 28). From January 31 through February 2, the circuit court held a hearing on the compactness claims of both cases (Tr. Vol. I at *2; Tr. Vol. II at *2; Tr. Vol. III at *2). On February 3, 2012, the Court issued judgment on these claims in favor of Respondents (L.F. 66).

[1] An appeal in *Pearson v. Koster* is pending in this court as SC92317.

POINTS RELIED ON

COUNT I. **The trial court erred in failing to strike down H.B. 193 as unconstitutional *because* the court incorrectly interpreted the legal standard "as compact as may be" under Mo. Const. Art. III, § 45 *in that* a congressional district "as compact as may be" means neither merely "compact" nor "as compact as possible", but that a reasonable person would find the district to be reasonably compact under the circumstances.**

Pearson v. Koster, SC92200 (Mo. banc 2012) (unpublished)

State ex rel. Barrett v. Hitchcock, 146 SW 40 (Mo. 1912)

Preisler v. Doherty, 284 SW2d 427 (Mo. banc 1955)

Preisler v. Hearnes, 362 SW2d 552 (Mo. banc 1966)

Mo. Const. art. III, § 45

COUNT II. **The trial court erred in failing to strike down H.B. 193 as unconstitutional *because* the Respondents failed to meet their burden of proof *in that* the state bears the burden of justifying deviations from reasonable compactness.**

Karcher v. Daggett, 462 U.S. 725, 730-31 (1983)

Kirkpatrick v. Preisler, 394 U.S. 526, 532 (1969)

Preisler v. Kirkpatrick, 528 SW2d 422 (Mo. banc 1975)

Noun v. Turner, 193 NW2d 784, 791 (Ia. 1972)

COUNT III. **The trial court erred in failing to strike down H.B. 193 as unconstitutional *because* the Fifth District is not "as compact as may be" under Mo. Const. Art. III, § 45 *in that* a reasonable person would find that the district could be made substantially more compact without adverse consequences to other districts or other constitutional or practical considerations.**

Pearson v. Koster, SC92200 (Mo. banc 2012) (unpublished)

Preisler v. Kirkpatrick, 528 SW2d 422 (Mo. banc 1975)

State ex rel. Barrett v. Hitchcock, 146 SW 40 (Mo. 1912)

Preisler v. Doherty, 284 SW2d 427 (Mo. banc 1955)

Mo. Const. art. III, § 45

COUNT IV. The trial court erred in failing to strike down H.B. 193 as unconstitutional *because* the Fifth District is not "compact" under Mo. Const. Art. III, § 45 *in that* the district does not contain closely united territory.

State ex rel. Barrett v. Hitchcock, 146 SW 40 (Mo. 1912)

Preisler v. Doherty, 284 SW2d 427 (Mo. banc 1955)

Preisler v. Hearnes, 362 SW2d 552 (Mo. banc 1966)

Preisler v. Kirkpatrick, 528 SW2d 422 (Mo. banc 1975)

Mo. Const. art. III, § 45

ARGUMENT

Count I

THE TRIAL COURT ERRED IN FAILING TO STRIKE DOWN H.B. 193 AS UNCONSTITUTIONAL BECAUSE THE COURT INCORRECTLY APPLIED THE LEGAL STANDARD "AS COMPACT AS MAY BE" UNDER MO. CONST. ART. III, § 45 IN THAT A CONGRESSIONAL DISTRICT "AS COMPACT AS MAY BE" MEANS NEITHER MERELY "COMPACT" NOR "AS COMPACT AS POSSIBLE", BUT THAT A REASONABLE PERSON WOULD FIND THE DISTRICT TO BE REASONABLY COMPACT UNDER THE CIRCUMSTANCES.

Standard of Review

When considering the legal issue of the constitutional validity of a statute, this question of law is to be reviewed de novo. *City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008). A statute is presumed to be constitutional and will not be invalidated unless it `clearly and undoubtedly' violates some constitutional provision and `palpably affronts fundamental law embodied in the constitution.'" *Board of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 368-69 (Mo. banc 2001)

* * *

The Missouri Constitution places only three limits on the prerogative of the General Assembly to apportion the state's residents among legislative districts, an act also known as "redistricting": the districts must be (1) contiguous, and (2) as compact and (3) equal in population as may be. Mo. Const. Art. III, § 45. This Court has stated repeatedly that the purpose of these requirements is "to 'guard, as far as practicable, … against a legislative evil, commonly known as "the gerrymander"…'" *Preisler v. Kirkpatrick*, 528 SW2d 422, 455 (Mo. banc 1975) (quoting *State ex rel. Barrett v. Hitchcock*, 146 SW 40, 61 (Mo. 1912)). While ordinary legislative acts are entitled to deference from this Court, these constitutional provisions indicate that the people of Missouri do not provide the General Assembly with much wiggle-room in redistricting. "[I]t was not the intention of the framers of the Constitution to confer upon the Legislature the unlimited power and discretion to form the districts in such shapes and dimensions as it might, in its own opinion, deem proper, nor to give to each a population which it deemed best." *Barrett*, 146 SW at 54.

"Compact as may be" does not mean simply "as compact as possible". Perfect compactness is neither attainable nor required. *See, e.g., Kirkpatrick*, 528 SW2d at 426. As this Court previously stated in *Pearson v. Koster*, SC92200 at *8 (Mo. Banc 2012), an objective standard applies to the constitutional text.

"Compact as may be" under an objective standard means that a reasonable person would describe the district as reasonably compact under the circumstances.

This Court has previously stated that "compact" in this context means "closely united territory". *Barrett*, 146 S.W. at 61. A district is not compact where the district does not contain closely united territory. Indicia of noncompactness are found where a narrow part of one district extends like a finger into another district; where a district contains substantial interior carveouts, shoestring connections between disparate areas and/or other highly irregular boundaries; and where district boundaries unnecessarily divide political subdivisions. *See Kirkpatrick; Preisler v. Hearnes*, 362 SW2d 552 (Mo. banc 1966)*; Doherty, Barrett*. Circumstances include competing constitutional interests such as contiguity and equal population, other legislative interests such as the Voting Rights Act, and maintaining political subdivision and historic district boundaries. *See Pearson* at *7. ("As long as the districts comply with these constitutional requirements, the circuit court shall respect the political determinations of the General Assembly and allow for minimal and practical deviations required to preserve the integrity of the existing lines of our various political subdivisions.")

This definition harmonizes this Court's prior redistricting precedents. In evaluating a 1952 redistricting plan, this Court found that the map's lack of

compactness was not required by the other constitutional considerations, namely contiguity and equal population.

> "It is obvious from the record in this case not only that departures from compactness were not made to obtain equality of population, but also that the departures from ward lines in making districts were not used to obtain compactness but instead aided in making them less compact, more irregular, longer and narrower. We think the only reasonable conclusion from the facts in this case is that the Board did not apply the principle of compactness of territory in the 1952 redistricting but instead completely disregarded this mandatory provision of the constitution."

Doherty, 284 SW2d at 434. The *Doherty* Court struck down a seven-district municipal apportionment plan because two of the districts were found to lack compactness. Comparatively, in *Hearnes*, this Court upheld a congressional redistricting plan where although one challenged district (out of ten) could have been made more compact, the challenged district was not "of such a nature that 'it would be absurd to claim that this district meets any standard of compactness.'" *Kirkpatrick*, 528 SW2d at 438 (FINCH, J., dissenting (discussing *Hearnes*)). *Doherty* and *Hearnes* together suggest that an unreasonably noncompact district invalidates a redistricting plan.

In *Preisler v. Kirkpatrick,* 528 SW2d 422 (Mo. banc 1975), this court found that two of 34 districts were not reasonably compact. *Id.* at 426-27. The noncompact districts in *Kirkpatrick* closely resembled the Fifth District in H.B 193 by including distant, barely contiguous areas within the same district and in having a finger-like appendage reaching deep into the center of another district.

All of these cases support the construction of "compact as may be" to mean reasonably compact territory under the circumstances. Separation-of-powers concerns are also amply addressed by this definition. The prior redistricting cases uniformly indicate that Missouri courts defer to the legislature unless there is substantial evidence of unconstitutional action. *See, e.g., Doherty*, 284 SW2d at 431 ("It is only when constitutional limitations placed upon the discretion of the Legislature have been wholly ignored and completely disregarded in creating districts that courts will declare them to be void. In such a case, discretion has not been exercised and the action is an arbitrary exercise of power without any reasonable or constitutional basis.").

In the instant matter, such deference means that the allegedly noncompact district must be capable of a substantial improvement in compactness in order for a challenge to succeed. Marginal improvements would not reach this standard,

assuaging Respondents' fears of endless compactness complaints.[2] A truly "compact as may be" district would not be capable of substantial improvement under the circumstances.

In the instant case, the trial court gave judgment to Respondents because it did not agree that "as compact as may be" means "as compact as possible," in that any district in any plan could conceivably be made more compact. (L.F. 084). The trial court did not further expound on the meaning of "as may be". In fact, "compact as may be" is a reasonable standard that does not require perfect compactness. Granting judgment to Respondents was therefore error.

Count II

THE TRIAL COURT ERRED IN FAILING TO STRIKE DOWN H.B. 193 AS UNCONSTITUTIONAL *BECAUSE* THE RESPONDENTS FAILED TO MEET THEIR BURDEN OF PROOF *IN THAT* THE STATE BEARS THE BURDEN OF JUSTIFYING DEVIATIONS FROM REASONABLE COMPACTNESS.

[2] Appellants would also note that in 100 years there have been a total of six redistricting cases in Missouri courts, including both *Pearson* and *McClatchey*. A massive wave of nitpicking litigation seems unlikely.

A shifting burden of proof applies to redistricting cases. First, the challenger must make an initial showing that a district is not reasonably compact by proving that the district could be made substantially more compact. Then the burden of proof shifts to the state to prove that circumstances exist that prevent a substantially more compact district.

That the state bears the burden of justifying deviations from population equality in redistricting is well established. As the U.S. Supreme Court in *Karcher v. Dagge*tt said:

> Thus two basic questions shape litigation over population deviations in state legislation apportioning congressional districts. First, the court must consider whether the population differences among districts could have been reduced or eliminated altogether by a good-faith effort to draw districts of equal population. Parties challenging apportionment legislation must bear the burden of proof on this issue, and if they fail to show that the differences could have been avoided the apportionment scheme must be upheld. If, however, the plaintiffs can establish that the population differences were not the result of a good-faith effort to achieve equality, the State must bear the burden of proving that each significant variance between districts was necessary to achieve some legitimate goal.

Karcher v. Daggett, 462 U.S. 725, 730-31 (1983) (citing *Kirkpatrick v. Preisler*, 394 U.S. 526, 532 (1969); *Swann v. Adams*, 385 U.S. 440, 443-444, (1967)).

Judge Finch in his *Preisler v. Kirkpatrick* dissent applied the equal-population analysis to compactness claims. "It is well established that the burden of justifying deviations from parity in population is on the state. . . . There is no reason why the rule should be different with respect to explaining and justifying a lack of compactness." *Preisler v. Kirkpatrick*, 528 S.W.2d 422, 436 n.6 (Mo. banc 1975) (Finch, J., dissenting). Other courts apply this sort of burden-shifting in compactness claims. *See, e.g.*, *Noun v. Turner*, 193 NW2d 784, 791 (Ia. 1972). The reasons why the state could not create constitutional districts, whether from an equal population or compactness standpoint, are uniquely within the knowledge of the state. The state therefore is the proper party to bear the burden of proof on that point.

The Maps attached to Appellants' Petition adequately demonstrate that the Fifth District in H.B. 193 is not reasonably compact. A simple visual review of the district indicates it is not compact. The evidence and expert testimony indicated that the Fifth District in H.B. 193 was suspiciously noncompact both from a comparison of the district to other districts in H.B. 193 and from a comparison of the district to historical district maps. Appellants met their burden of proof. Respondents, on the other hand failed to provide any rationale whatever for the

Fifth District in H.B. 193. Consequently, granting judgment to Respondents was error.

Count III

THE TRIAL COURT ERRED IN FAILING TO STRIKE DOWN H.B. 193 AS UNCONSTITUTIONAL *BECAUSE* THE WEIGHT OF THE EVIDENCE INDICATES THE FIFTH DISTRICT IS NOT "AS COMPACT AS MAY BE" UNDER MO. CONST. ART. III, § 45 *IN THAT* A REASONABLE PERSON WOULD FIND THAT THE DISTRICT COULD BE MADE SUBSTANTIALLY MORE COMPACT WITHOUT ADVERSE CONSEQUENCES TO OTHER DISTRICTS OR OTHER CONSTITUTIONAL OR PRACTICAL CONSIDERATIONS.

A. A Visual Review of the Fifth District in H.B. 193 Proved the District Is Not Reasonably Compact.

A plain visual inspection is sufficient proof of noncompactness. Prior decisions striking down legislative redistricting efforts rest solely on the appearance of the districts as evidenced by the district maps. *See Barrett*, 146 SW at 65 ("We are also of the opinion that the act of apportionment … violates the Constitution, in that it does not conform to the provision which requires

compactness of [districts]. At another place we have set out a map of several of [the districts], which shows a total disregard of this constitutional provision.")

The Fifth District in H.B. 193 (Appx. 009) is not compact under a plain visual inspection. Missouri's Fifth Congressional District previously included the part of Kansas City in Jackson County together with suburban areas along Highways 50 and 71 south and east of the city. For H.B. 193, the General Assembly carved a hand-shaped portion of suburban Jackson County out of the Fifth District, a portion that follows no municipal boundaries, and replaced that population with three distant rural counties that have few historic, economic, social or other ties to the Kansas City metropolitan area.

The General Assembly could sensibly have added other suburban areas on the east and south sides of the city, particularly those within Jackson County (Appx. 015). The General Assembly could also sensibly have crossed the Missouri River and added areas to the north, since both Kansas City proper and its suburbs extend northward (Appx. 018). Instead, they removed closely-united suburban territory and replaced it with distant and unconnected rural counties. This is not "compact" under the Court's *Barrett* standard.

B. Expert Testimony Proved the Fifth District in H.B. 193 Is Not Reasonably Compact.

Expert testimony established that, from a historic perspective, the Fifth District under H.B. 193 was not compact. Mr. David Roland, Appellants' expert witness, took the court through a lengthy discussion of the history of Missouri's 1943-44 Constitutional Convention, wherein the delegates were quite concerned with the language later codified in Article III, § 5 regarding state senatorial districts that crossed county boundaries. (Tr. Vol. I at *147-167.) This concern overrode even concerns about equal population in districts. *Id.* at 167.[3] This language was not recommended for congressional districts by the Drafting Committee, but the delegates chose not to accept the committee recommendation and instead borrowed the stricter senatorial district language for congressional districts (Tr. Vol. I at*153-54, 179-80). The Supreme Court case of *Reynolds v. Sims*, 377 US 533 (1964), established that equal population must take priority over other considerations, but clearly preserving political subdivision boundaries was still of paramount importance. Such boundaries would only be crossed if

[3] Mr. Roland testified that "I do know or I do believe that they wouldn't have great concerns about dividing Jackson County in that way and appending these other three counties." This appears to be a typo; from the context of Mr. Roland's testimony it is clear he meant "would" and not "wouldn't".

absolutely necessary. The Framers would not have approved of adding counties to a district where closer territory within the county was available. Tr. Vol. I at *147-167; see also *Pearson*, at *7 n.1 (citing *Hearnes*, 362 SW2d 552, 557 (Mo. banc 1962) ("The Missouri Constitution has historically recognized counties as "important governmental units, in which the people are accustomed to working together," and has provided for that policy to be considered in the redistricting process.")).

In this case, closer territory in the Kansas City Metropolitan Area within Jackson County and in a single immediately adjacent county could have been joined with urban Jackson County to create a district of sufficient population. Under the circumstances, the Fifth District in H.B. 193 was not compact.

C. Appellants Proved a More Compact Fifth District Was Possible Under the Circumstances.

Both the McClatchey Plaintiffs and the Pearson Plaintiffs proposed a substantially more compact Fifth District. The McClatchey Alternative Plan created a Fifth District covering all of Jackson County together with the northern portion of Cass County, adjacent to the south (Appx. 015). The Pearson Alternative Map[4] created a Fifth District covering all of Jackson County together

[4] The "Pearson Alternative Map" mentioned herein refers specifically to Pearson Alternative 2 (Appx. 018).

with the southern tip of Clay County, adjacent to the north (Appx. 018). Even Dr. Hofeller, the Respondent-Intervenors' expert, admitted that both the McClatchey and Pearson plans produce a substantially more compact Fifth District than H.B. 193. (Tr. Vol. II at *137-141). The statistical compactness measures of the Fifth District in both the McClatchey and Pearson plans, calculated by the Maptitude redistricting software, are invariably substantially better than the measures of the Fifth District in H.B. 193. Tr. Vol. I at *52-53, 56-58; *Cf.* Appx. 010, 016 & 019. The other districts' statistical measures in the McClatchey and Pearson Alternative Plans are at least as good as the other districts in H.B. 193. *Cf.* Appx. 010, 016 & 019. These plans prove that not only was a substantially more compact district possible, but also that such a district could feasibly have been drawn in numerous and quite different ways.

D. Respondents Failed to Justify the District's Lack of Compactness.

As stated above in Count II, once Appellants showed that the district was not reasonably compact and could be made substantially more compact, Respondents properly bear the burden of proving that the state had valid reasons for drawing the district as it did. However, Respondents failed to meet this burden.

Respondents' expert, Dr. Hofeller, testified that a) the Fifth Districts in the McClatchey and Pearson maps were more compact than the H.B. 193 Fifth District (Tr. Vol. II at *133, 137-141); b) that the term "compact" has no generally agreed-

upon meaning (Tr. Vol. II at *49); and c) districts that appeared noncompact were nonetheless acceptable to courts in other states (Tr. Vol. II at *75-77). Dr. Hofeller failed to opine that the Fifth District was "as compact as may be"; his testimony merely opined the district was "compact", further suggested he would find only a flagrant and extreme gerrymander to not be compact. It is quite clear in this state that every word in a constitutional provision "is assumed to have effect and meaning." *Thompson v. Committee on Legislative Research*, 932 S.W.3d 392, 395 n.4 (Mo. banc 1996). "Compact as may be" cannot mean only "compact," and "compact" itself cannot be a meaningless term. Dr. Hofeller's expert opinion therefore goes against Missouri law, traditional principles of statutory construction, and plain logic.

Respondents offered no further proof or rationale for the district. They offered no proof the lines were necessary for competing constitutional considerations such as contiguity and equal population. Testimony by Dr. Hofeller indicated that the Fifth District could not possibly be drawn to create a majority-minority district, thus avoiding conflict with other legislative interests such as the Voting Rights Act (Tr. Vol. II at *176-177). The Fifth District in H.B. 193 plainly was not drawn to respect political subdivision boundaries, as it divides many such subdivisions both large and small. Testimony by David Roland and review of historical maps indicated there is no historical connection between the three rural

counties and urban Jackson County. (Tr. Vol. I at *67; Appx. 022-032) No circumstances were proved that would require or justify a noncompact district. Respondents did not meet their burden.

A much more compact Fifth District could have been drawn and no circumstances existed making such a district unfeasible. Closely-united territory was available to enlarge the Fifth District. Territory within the same county was available. Territory within some of the same cities was available. The General Assembly instead chose to append distant, rural, unconnected counties. The General Assembly made an unconstitutional choice. Finding for the Respondents in this matter was error.

Count IV

THE TRIAL COURT ERRED IN FAILING TO STRIKE DOWN H.B. 193 AS UNCONSTITUTIONAL *BECAUSE* THE EVIDENCE INDICATES THE FIFTH DISTRICT IS NOT "COMPACT" UNDER MO. CONST. ART. III, § 45 *IN THAT* THE DISTRICT DOES NOT CONTAIN CLOSELY UNITED TERRITORY.

Even if "compact as may be" means nothing more than "compact", the Fifth District in H.B. 193 still fails to meet this standard. "Compact" means "closely united territory". *Barrett*, 146 SW at 61. The Fifth District is not composed of

closely-united territory based on a plain-eye view. Appellants provided an illustration of how their map was created (Appx. 033), showing that closely united territory in Jackson and Cass Counties was added to the last iteration of the Fifth District to create an inarguably compact area of closely-united territory. Nearby territory was ignored and distant territory was annexed in H.B. 193. A district that formerly occupied mostly one county now sprawls over five. This is patently not a compact district.

Appellants included with their Petition a copy of the redistricting map created by H.B. 193 (L.F. 018; Appx. 015). This Map alone provides a sufficient factual basis to conclude that the Fifth District is not compact. The Fifth District stretches from Kansas City more than halfway to Columbia. A large piece of the inner Kansas City suburbs in Jackson County is hollowed out and appended to the Sixth District. Counsel for Respondent Carnahan even admitted at the hearing on December 8, 2011, that the District was "problematic" (*Pearson*, at *8 n.2).

Dr. Tom Hofeller, Respondent-Intervenors 'expert witness, failed to opine that the Fifth District was "as compact as may be"; his testimony merely opined the district was "compact" (Tr. Vol. II at *127), and the remainder of his testimony proved he would have found nearly any district to be compact (Tr. Vol. II at *145-46). Dr. Hofeller was not aware of any other jurisdiction where the constitutional text required districts "as compact as may be" (Tr. Vol. II at *167). Dr. Hofeller

was aware of only one map that was ever overturned by a court for lack of compactness and aware of none in Missouri (Tr. Vol. II at *129-131). *Cf. Doherty*, 284 SW2d 427, 435 (senatorial district map overturned by the Missouri Supreme Court for lack of compactness). Dr. Hofeller could not establish that the district was compact under the meaning of Article III, § 45.

In *Kirkpatrick*, this court said that two districts at issue in that case were not within acceptable limits of compactness. 528 SW2d at 426-27 ("...all districts, except the sixth in St. Louis, and the 33rd because it thrusts a narrow appendage from the middle of its body into the heart of Greene county, are within acceptable limits of compactness.") Like the 33rd district in *Kirkpatrick*, the Sixth District in H.B. 193 thrusts a narrow appendage from the middle of its body into the heart of Jackson County in the Fifth District. Like the 6th district in *Kirkpatrick*, the Fifth District in H.B. 193 "resembles a mountainous 'S' curve, a corkscrew or a twisted shoestring." *Id.* at 435 (Finch, J., dissenting). The Fifth District in H.B. 193 is simply not compact, and neither is the Sixth District where it dives into the interior of the Fifth.

There is no constitutional rationale for the Fifth District to lack compactness to this degree. The District, as it now exists, is barely contiguous with numerous carveouts and shoestring connections. The Map does not respect ward, precinct, city, or county boundaries. The Fifth District does not need to be irregularly

shaped in order to create districts of equal population. Close-in suburban neighborhoods of dense population were ignored in favor of far-flung, sparsely-populated rural areas. The Map itself provides all necessary evidence that the district is not compact in any way, in violation of Article III, § 45 of the Missouri Constitution.

CONCLUSION

Missouri's form of government is a representative democracy. A fundamental requisite is that legislative representatives are fairly elected from districts as compact and as equal in population as possible. Apportioning districts on an exclusively partisan basis dilutes the voting power of citizens in violation of equal protection guarantees. These basic principles are spelled out in the Missouri Constitution and the US Constitution. It is the duty and obligation of the judiciary to insure compliance with constitutional safeguards.

The long history of reapportionment and redistricting litigation tells a clear story – without judicial restraints, encroachments on constitutional safeguards are a progressive cancer infecting the republic. Appellants respectfully submit that if this Court affirms the judgment of the trial court (thereby validating the existing, non-compact districts), future legislators will be unleashed with judicial precedent for further violations of the compactness doctrine. The present plan will be cited

as justification for even more excessive variances from constitutional guidelines. Only this Court can order a halt.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

I hereby certify that I prepared this brief using Microsoft Word 2010 in Times New Roman size 14 font. I further certify that this brief complies with the word limitations of Rule 84.06(b), and that it contains 5,964 words.

/s/ Jamie Barker Landes
Attorney

CERTIFICATE OF SERVICE

I hereby certify that on February 9, 2012, I filed a true and accurate Adobe PDF copy of this Brief of the Appellants and its Appendix via the Court's electronic filing system, which notified the following of that filing:

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In addition, a copy of this Brief of the Appellants and its Appendix was sent via email, to the following:

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