Summary of SC92351, *Bob Johnson, et al. v. State of Missouri, et al.*
Appeal from the Cole County circuit court, Judge Patricia Joyce
Argued and submitted Monday afternoon, Feb. 27, 2012; opinion issued May 25, 2012

Attorneys: The challengers were represented by Paul C. Wilson of Van Matre, Harrison, Hollis, Taylor and Bacon PC in Columbia, (573) 874-7777; the state was represented by Solicitor General James R. Layton of the attorney general's office in Jefferson City, (573) 751-3321; the secretary of state was represented by Deputy Solicitor General Jeremiah J. Morgan of the attorney general's office in Jefferson City, (573) 751-3321; and the legislators were represented by Harvey M. Tettlebaum and Robert R. Harding of Husch Blackwell LLP in Jefferson City, (573) 635-9118.

Overview: Challengers sued the state and two of its officials in a constitutional challenge to the reapportionment plan for the state's house of representatives, and certain legislators intervened in the suit. The challengers argued that the court should not have allowed the legislators to intervene and that the commission violated the state's "sunshine law" in developing the plan. The circuit court denied each of the challengers' claims. In an opinion written by Judge Patricia Breckenridge and joined by three members of the Court, the Supreme Court of Missouri affirms the judgment. Because the legislators had a unique personal and economic interest at stake, the trial court did not abuse its discretion in permitting them to intervene. The trial court also did not err in finding no violation of the "sunshine law" and in upholding the map under that law because the commission was a judicial entity that was not acting in an administrative capacity. Finally, the challengers failed to meet their burden of proving that the plan clearly and undoubtedly is unconstitutional.

Judge William Ray Price Jr. wrote a concurring opinion in which two judges join. He agrees with the Court's holdings about the intervention and the sunshine law as well as with the Court's holding that the challengers failed to meet their burden of proving the plan clearly and undoubtedly violates the state constitution. The finding that the challengers presented no evidence that the plan was not drawn to comply with the federal voting rights act – a mandatory requirement – alone is sufficient to affirm the trial court's judgment. He would have ended the Court's inquiry there and discusses why he believes it is inappropriate for the Court to go on to discuss adherence to a number of discretionary legislative factors never expressly written in the constitution. Because such considerations are not afforded constitutional or other imperative significance, they should not be considered to offset constitutional and federally mandated requirements to assure voters' rights to fair electoral districts. There is no discretion to violate expressly written mandatory provisions of the constitution.

Facts: Article III, section 2 of the Missouri Constitution requires that the state's 163 seats in the state's house of representatives be reapportioned after each decennial United States census. After the bipartisan reapportionment commission appointed by the governor failed to meet the constitutional deadline for filing its statement of reapportionment and map of new district

boundaries with the secretary of state, this Court appointed a nonpartisan reapportionment commission as required by article III, section 2. On Nov. 30, 2011, that commission unanimously signed and filed with the secretary of state its house reapportionment plan. On Jan. 27, 2012, a group of individuals including Bob Johnson (collectively, the challengers) filed a declaratory judgment action against the state in the circuit court, asserting that the plan is unconstitutional and that the nonpartisan reapportionment commission violated the "sunshine law" (chapter 610, RSMo) in its meetings before issuing the plan. Shortly thereafter, the trial court permitted – over objection – three members of the state house of representatives to intervene in the case.

The parties submitted to the trial court a joint stipulation of facts and corresponding exhibits. They stipulated, "There is no basis for finding that any district was drawn with the purpose of favoring or disfavoring any group of individuals compared to any other group of individuals including, but not limited to, any constitutionally protected or suspect class of citizens." They also stipulated that the nonpartisan reapportionment commission held at least three meetings for which no public notice was given, no public vote to close the meetings was taken, and no journal or minutes were kept and that the commission did not announce at which non-public sessions it made its decisions. In addition, the challengers and legislators each submitted an affidavit of their respective expert witnesses along with supporting documents.

The challengers' expert stated that, according to his analysis, the plan filed by the nonpartisan reapportionment commission has a "total deviation range" in population of 7.8 percent, whereas his map and those proposed in August 2011 by the Democratic and Republican members of the bipartisan reapportionment commission had total population-deviation ranges of 0.18 percent, 3.87 percent and 3.27 percent. He opined that the boundaries of at least 16 districts could be adjusted to create districts that are more equal in population. He further opined that five districts are not contiguous because they are split by a river that cannot be crossed by a bridge without travel outside the district.

The legislators' expert stated that there was nothing in the data he analyzed to "suggest a violation of federal or state compactness principles." He opined that the nonpartisan reapportionment commission's plan compared favorably against those proposed in August 2011 by the bipartisan commission members. He also stated that a total population-deviation range of 7.81 percent is well within the 10-percent range that is considered valid on its face under the federal population-equality standard.

On Feb. 14, 2012, the trial court entered judgment denying each of the claims. On March 27, 2012, this Court entered its order affirming the trial court's judgment. This opinion follows.

AFFIRMED.

Court en banc holds: (1) The trial court did not abuse its discretion in permitting intervention by the three members of the house of representatives. Nothing in the trial court's summary ruling regarding the legislators' motion to intervene expressly states whether the court intended to allow the legislators to intervene as a matter of right or by permission of the court, but because its findings regard issues more relevant to permissive intervention, this Court focuses on whether

the legislators were entitled to permissive intervention under Rule 52.12(b). The rule provides for permissive intervention when allowed by statute, when an applicant's claim or defense has a question of law or fact in common with the main action, or when the state seeks to intervene in a case raising constitutional or statutory challenges. Intervention can be appropriate when the applicants can show an interest unique to themselves or when the applicant has an economic interest in the outcome of the suit. Here, the trial court's findings highlighted the legislators' personal and economic interests related to their planned reelection efforts, including interests in preventing delay and uncertainty and in avoiding unnecessary expenditures of time and resources. Based on the facts of this case, the trial court did not abuse its discretion in permitting the legislators to intervene under Rule 52.12(b).

(2) The trial court properly found that the nonpartisan reapportionment commission did not violate the sunshine law. Assuming solely for the purposes of this opinion that the sunshine law were to govern judicial institutions, the law's express language makes its provisions inapplicable to the meetings held by the nonpartisan reapportionment commission. Under section 610.010, the sunshine law applies to "judicial entities" only "when operating in an administrative capacity." Because the nonpartisan reapportionment commission is comprised solely of members of the judicial branch, it is a "judicial entity." But the commission was not acting in "an administrative capacity" for the administration of the courts. *See* Supreme Court Operating Rule 2.03(a). As such, the commission's meetings explicitly were exempt from the provisions of the sunshine law pursuant to section 610.010. The trial court did not err in refusing to invalidate the plan on this basis.

(3) The trial court did not err in finding that the challengers failed to prove that the house reapportionment map is unconstitutional under article III, section 2.

> (a) This Court reviews the constitutional validity of the plan as if it were a statute enacted by the legislature, assuming constitutional validity and not holding it unconstitutional unless it clearly and undoubtedly contravenes the constitution or plainly and palpably affronts fundamental law embodied in the constitution.
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> (b) Article III, section 2 was proposed by the legislature and adopted by voters in January 1966 as a result of a successful equal protection challenge to the previous constitutional provisions relating to legislative reapportionment. The section requires that house districts be equal in population "as nearly as possible," contiguous and "as compact as may be." Although these requirements are mandatory and objective, their language creates a level of flexibility in complying with them. The standard for contiguousness is absolute, as there is no adverbial phrase to broaden the meaning of "contiguous." In contrast, population equality and compactness are not absolute. As such, the starting point for drawing a valid map is that the district be contiguous. The requirements for compactness and population equality are interrelated – one cannot be determined without consideration of the other – although it is more important to attain population equality in each district than compactness. *Pearson v. Koster*, 359 S.W.3d 35, 40 (Mo. banc 2012) (*Pearson I*). The constitution does not require perfection in a map because compactness and numerical equality cannot be achieved with absolute precision. *Id.* The determination of the constitutional validity of the plan under article III, section 2, however, remains

(c) The map filed by the commission satisfies the constitutional requirement of contiguity. In considering this requirement that house districts "shall be composed of contiguous territory," the plain and ordinary meaning of "contiguous" is provided by the dictionary definition of "touching or connected throughout" and of "territory" as referencing a geographic area without regard to whether the portions of the land within that area are split by bodies of water. Separation of one part of a district from another by a large river, regardless of methods of land travel within the territory, does not violate Missouri's constitutional requirement that the district be composed of contiguous territory.

(d) The trial court did not err in finding that the challengers failed to prove that the map is unconstitutional under the requirements for population equality "as nearly as possible" and for compactness "as may be." In ascertaining the meaning of the word "possible" in the standard for population equality, the primary rule is to give effect to the intent of the voters who adopted the amendment by considering the word's plain and ordinary meaning as the voters commonly would have understood it at the time. If a word has more than one standard dictionary definition that applies in the context of the provision, then the word is ambiguous. In light of the several potential dictionary definitions of "possible" that could apply in the context of the constitutional provision, the term is ambiguous. In the context of the population standard, the term "possible" cannot mean population equality "to the utmost degree," as such a narrow construction is precluded on federal constitutional grounds. Although article III, section 2 is in the Missouri Constitution, it also must comply with the United States Constitution due to the supremacy clause (article VI, clause 2 of the federal constitution), which provides that state laws and constitutional provisions are "preempted and have no effect" to the extent they conflict with federal laws. By operation of the supremacy clause, in determining what population equality is "possible," a commission must comply with the federal voting rights act and the equal protection clause of the Fourteenth Amendment to the federal constitution. The dictionary definition of "possible" as "being within or up to the limits of one's ability or capacity as determined by nature, authority, circumstances, or other controlling factors" – and synonym of "possible" as "practicable" – meets the state constitutional standards and permits compliance with mandatory requirements of federal law.

This definition of "possible" also is consistent with this Court's precedent recognizing that other factors inherently are included within the constitutional standards governing reapportionment, although they are not articulated expressly as a separate requirement in the constitution. *See Preisler v. Doherty*, 284 S.W.2d 427 (1955); *Preisler v. Hearnes*, 362 S.W.2d 552 (Mo. banc 1962); and *Preisler v. Kirkpatrick*, 528 S.W.2d 422 (Mo. banc 1975). As provided in these cases, the language used in the constitutional requirements implicitly permits minor deviations from the principles of population equality and compactness because of application of the recognized factors of population

density; natural boundary lines; the boundaries of political subdivisions; and the historical boundary lines of prior redistricting maps. This Court in *Pearson I* affirmed the continued propriety of these distinct recognized factors. This Court's interpretation of "as possible" and "as may be" to include recognized factors is analogous to the United States Supreme Court's interpretation of population equality "as nearly as practicable" as required under the United States Constitution for congressional districts. *Pearson I* recognized that the Missouri constitutional requirements are mandatory and objective for each district, overruling *Doherty, Hearnes* and *Kirkpatrick* to the extent that they used the subjective "wholly disregard" and "good faith effort" standards and failed to require that each district comply with the constitutional standards. *Pearson I*. Beyond the application of the "wholly disregard" and "good faith effort" standards and consideration of the validity of a map as a whole, *Doherty*, *Hearnes* and *Kirkpatrick* remain good law, and both *Pearson I* and *State ex rel. Teichman v. Carnahan*, 357 S.W.3d 601 (Mo. banc 2012), cite them as such.

The challengers' proposed map and other evidence fail to prove the map is unconstitutional because the proposed map and evidence fail to address the federal law and other recognized factors that can support minimal and practical deviations from the principles of population equality and compactness. The challengers' expert specifically stated in his affidavit that he created his proposed map with the smallest possible population-deviation range and that he considered "no other" factors. In contrast, the nearly 1,300 pages of maps and supporting documents the commission filed objectively show that multiple factors could impact the challenged map, including data and statistical analysis of Missouri's population figures, voting age topography, racial demographics and other factors. The population figures included in the commission's plan were provided by the federal census bureau in the form of voter tabulation districts comprised of blocks, block groups, census tracts and counties. None of the challengers' evidence addresses these factors, including whether their proposed map complies with the requirements of federal law, whether the districts were drawn to maintain the boundaries of political subdivisions, or whether population density, physical features in the territory or historical boundaries were considered. As such, the record supports the trial court's finding that the challengers failed to prove it is possible to achieve greater population equality and compactness when considering federal law requirements and other factors. The challengers failed to meet their burden of proving, clearly and undoubtedly, that the plan and map is unconstitutional.

Concurring opinion by Judge Price: The author agrees with the Court's holdings as to the intervention and the sunshine law as well as with the Court's holding that the challengers failed to meet their burden of proving the plan clearly and undoubtedly violates the state constitution. The finding that the challengers presented no evidence that the plan was not drawn to comply with the federal voting rights act – a mandatory requirement – alone is sufficient to affirm the trial court's judgment. Accordingly, he would end the Court's inquiry there.

He does not believe it is appropriate to require adherence to a number of discretionary legislative factors never expressly written in the constitution. Because such considerations are not afforded constitutional or other imperative significance, they should not be considered to offset

constitutional and federally mandated requirements to assure voters' rights to fair electoral districts. There is no discretion to violate expressly written mandatory provisions of the constitution. Such an approach overrules the holdings central to *Pearson v. Koster*, 359 S.W.3d 35 (Mo. banc 2012) (*Pearson I*). As to compactness, far from promoting unconstitutional standards, *Pearson I* merely recognized existing political subdivisions because article III, section 7 of the state constitution itself discusses county lines in state senate redistricting. Non-compactness is allowed only when necessary to enable compliance with Missouri's contiguity, equal population or county boundary requirements or federal law. The constitutional standards are mandatory and objective, not subjective, *Pearson I*, 359 S.W.3d at 40, but the Court's repeated use of "considerations" and "consider" belies this characterization and articulates a contradictory legal standard. Additional factors could be incorporated into a truly objective standard only if this Court definitively lists these factors or at least explains how to ascertain them independently of the legislative body's mental state. Instead, by allowing subjective, discretionary factors not mentioned in the constitution to trump the express constitutional requirements that districts be compact, contiguous and equally populated, the Court effectively writes the compactness and population equality standards out of the constitution. Individuals challenging a plan should not have to prove that noncompactness did not arise from an infinite number of unspecified factors not even raised by the state as defenses. Such a burden would leave reapportionment challenges not capable of judicial decision and constitutional rights unenforceable. At the very least, the burden should be shifted to the state to raise and prove issues involving discretionary factors, as some states have done.