IN THE SUPREME COURT OF MISSOURI

No. SC100277

CLARA FAATZ AND WILLIAM CALDWELL,

Appellants,

v.

JOHN ASHCROFT,
IN HIS OFFICIAL CAPACITY AS MISSOURI SECRETARY OF STATE, AND
THE JUDICIAL REDISTRICTING COMMISSION

Respondents.

Appeal from the Circuit Court of Cole County
The Honorable Judge Jon E. Beetem

AMICUS BRIEF OF HOUSE REPUBLICAN CAMPAIGN COMMITTEE, INC.

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INTEREST OF THE AMICUS

Amicus Curiae House Republican Campaign Committee, Inc. (HRCC) is a public benefit non-profit corporation in good standing. It is also registered with the Missouri Ethics Commission as a continuing committee. *See Mo. Const. Art VIII. §2.3.7(c)(6)* and *§130.011(9) RSMO*. The mission of HRCC is to support republican candidates for the Missouri House of Representatives.

Because of this mission, HRCC has a strong interest in the redistricting process and in supporting the constitutional procedures for redistricting. HRCC was heavily involved in the map-drawing process that led to the Bi-Partisan Citizens' Redistricting Commission successfully drawing a map for the Missouri House of Representatives. For the first time in a long time, this was done unanimously. HRCC's executive director served on that Citizens' Commission. Accordingly, HRCC supports the position of the Appellants in the case.

While the map for the Missouri House is not at issue in this case, the resolution of this case might well impact the House map, and therefore HRCC. As will be explained below, the Final Judgment in this case does not follow the constitutional directives as to redistricting. If the Judgment is affirmed on any rationale like that in the Judgment, this Court will endorse a process quite different from that required by the Constitution. The new process created by the Judgment was not the process used to draw the House map. Accordingly, if the Judgment is affirmed, HRCC's concern is that litigation about the House map might occur, and ultimately this court might well be called to determine if the

House map is lawful under the new standard created by any decision that affirms the Judgment.

In addition to this short-term concern, HRCC has a longer term interest. Redistricting occurs every ten years. If the Judgment is affirmed, it is very possible that the 2030 redistricting will be done under a new standard. HRCC believes the House map in 2030 should be drawn under the standard and process that the Constitution established by a vote of the People.

These concerns are particularly acute because the House and Senate maps are to be drawn using the same standards. *Missouri Constitution Art. III, § 3(b)* establishes the "methods" to be used, listed in "order of priority" to redistrict the House of Representatives. Article III, § 7(c) says that for redistricting the Senate "the same methods and criteria as those required by subsection (b), section 3 of this Article for the redistricting of the house of representatives. Accordingly, HRCC has a strong and direct interest in the outcome of this case because the constitutional standards for the House and Senate are identical.

ARGUMENT

As it does every decade, in 2020 the State of Missouri redrew its State legislative districts after the federal census. *Mo. Const. Art. III, § 3(c) (House); § 7(a) (Senate)*. This case concerns the districts for the State Senate that resulted from that process. Under the state's Constitution, Senate and House districts shall be drawn in a way that follows the borders of cities and counties if it is possible to do so while abiding by other redistricting directives. This is a clear constitutional imperative. But here, the State Senate map drawn by the Judicial Redistricting Commission and approved by the trial court divides Buchanan County virtually down the middle. It also divides the City of Hazelwood. This was completely unnecessary and hence, unlawful.

The Senate map approved in the Judgment violates an important policy of this state counties and cities must be preserved. *See Preisler v. Hearnes*, 362 S.W.2d 552, 556-57 (Mo. banc 1962) ("[C]ounties are important governmental units, in which the people are accustomed to working together[,] [t]herefore, it has always been the policy of this state, in creating districts of more than one county (congressional, judicial or senatorial) to have them composed of entire counties[.]"); *see also State ex rel. Teichman v. Carnahan*, 357 S.W.3d 601, 607 (Mo. banc. 2012) ("[T]hat policy [of county importance, is] to be considered in the state Senate redistricting process."); *Pearson v. Koster*, 367 S.W.3d 36, 49 (Mo. banc 2012). That long-standing policy is now codified in the express language of the Missouri Constitution, which addresses political subdivisions

in subdivision (b)(1) and (b)(3) in section 3 of Article III (made applicable to Senate districts in section 7(c))[1].

Such emphasis is consistent with legislative redistricting approaches throughout the United States. "[A]ttempting to avoid the splitting of political subdivisions" is a "traditional districting criteria." *Allen v. Milligan*, 143 S. Ct. 1487, 1549 (2022) (Alito, J., and Gorusch, J., dissenting). That tradition is often followed by respecting "county, city and town lines" even when disregarding those lines might achieve the very important goal of improved minority voter representation. *Id.* at 1504 (Kavanaugh, J., concurring). Indeed, it is widely accepted that "districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." *Preisler v. Kirkpatrick,* 528 S.W.2d 422, 425 (Mo. banc 1975) (quoting *Reynolds v. Sims Vann v. Baggett,* 377 U.S. 533, 579 (1964)). Missouri voters have specifically placed that traditional value into the constitutional provisions that govern State Senate redistricting.

With those authorities that make clear that political subdivision boundaries are important in mind, let's turn to the Judgment. It makes three overarching mistakes.

First, it reorders the priorities away from the constitutional text. This has the effect of reducing the priority of political subdivision boundaries and elevating compactness and contiguousness. D44:P15.

[1] Although those sections address redistricting conducted by a "citizens commission," the same criteria must be used when the districts are drawn—as they were here—by a "judicial commission." *Mo. Const. Art. III, § 7(f)*.

Second, it says, without any textual support, that map-drawers (the House, Senate, or Judicial commissions) may exercise "discretion and choices… to sacrifice a lower priority, such as following subdivision lines, for a higher priority like compactness." D244:P15. This is a double error. Error One is that constitutional priority hierarchy is exactly the opposite of what the Judgment says. In truth, following subdivision lines is *higher* in priority than is compactness. Error Two is that the "discretion and choices" imagined by the Judgment is found nowhere in the constitution. Giving map-drawers unrestrained "discretion and choices" is not only not in the constitution, it is terrible public policy. Redistricting standards should be objective and precise, not subjective and indeterminate.

Third, the Judgment adopts a non-text-based standard that a map is constitutional if it is "reasonable." D244:P18. This suffers from the same constitutional and policy defects as the "discretion and choices" standard in it is indeterminate and vague.

Turning now to the constitutional text, Article III, §3(b) of the constitution adopted by the People in 2020 establishes what it calls "methods" for redistricting, "listed in order of priority."

Priority One is that the districts shall be as nearly equal as practicable in population, and shall be drawn on the basis of one person, one vote. *Mo. Const. Art. III, § 3(b)(1)*. "As nearly equal as practicable in population," is defined. First, a measurement is made by dividing the number of districts into the statewide population, creating what is called "the ideal population." *Id.* Districts may generally deviate from the ideal population by only one percent. *Id.* More latitude, up to a three percent

deviation from the ideal population, is given "if necessary to follow political subdivision lines consistent with subdivision (4) of this subsection."

Priority One is somewhat oddly structured, but when read carefully, it makes sense. Subdivision (4), one would think would be a lower priority than (1), (2), and (3). But the reference in Priority One to Priority Four essentially moves Priority Four into Priority One. So, what does Priority Four add to the text of Priority One? Priority Four says "communities shall be preserved." *Mo. Const. Art III § 3(b)(4)*. It then provides details as to how that occurs. The Priority Four details that matter here are as follows: "Lines shall follow political subdivision lines to the extent possible," "As few municipal lines shall be crossed as possible," and "split counties shall be as few as possible." *Id.*

So, in English, what this means is that Priority One has these requirements:

- Ideal population, plus or minus one percent in general.
- Ideal population, plus or minus three percent if necessary to comply with Priority Four.
- "As few municipal lines shall be crossed as possible."
- "Split counties shall be as few as possible."

Let's stop here for a moment to focus on the mandatory language of the constitution. Each priority uses the word "shall." As few municipal lines shall be crossed "as possible." Split counties shall be as few "as possible." There is no distinction given to the map-drawer to avoid, ignore, or not follow these mandatory directories.

Now, on to the other priorities. Priority Two is compliance with the United States Constitution and federal law and is not at issue. Priority Five is partisan fairness and competitiveness, also not at issue here.

Priority Three needs brief discussion. It reads in pertinent part:

> Subject to the requirements of subdivisions (1) and (2) of this subsection, districts shall be composed of contiguous territory as compact as may be.
>
> ***
>
> In general compact districts are those which are square, rectangular, or hexagonal in shape to the extent permitted by natural or political boundaries.

Mo. Const., Art III, § 3(b)(3). Two things are important. Priority Three is below Priority One which incorporates Priority Four. Second, Priority Three expressly limits the importance of compactness and contiguousness to be lower on the hierarchy than "natural or political boundaries. Quite clearly, this means the constitution intended following political boundaries to be a higher priority than compactness and contiguousness, just the opposite of what the Judgment did.

With this all in mind, how well did the Judgment apply the priorities? The answer is "poorly." The errors start at the bottom of Page 14 and top of Page 15. D244:P14-15.

> This judgment needs the relevant [2020] changes largely reordered the criteria: (1) equal population, (2) U.S. Constitution and federal obligations, (3) and (4) contiguity and compactness, (5) political subdivisions, (6) partisan fairness, and (7) competitiveness. Mo. Const. Art. III, § 3(b) (2020). These restored compactness and contiguity to their pre-2018 prominence. Indeed, the Amendment specifically subordinates following political subdivision lines because a map shall follow political subdivision lines "[t]o the extent consistent with subdivisions (1)-(3)," which includes the contiguity requirement and compactness requirement. Mo. Const. Art. III, § (3(b)(4) (2020). Subdivision 1 expressly

> contemplates that political subdivision lines will be crossed. Mo. Const. Art. III § 3(b)(1) (2020). The 2020 changes provide discretion and choices for the redistricting commissions to sacrifice a lower priority such as following political subdivision lines, for a higher priority, like compactness.

This language from the Judgment misses the constitutional mark in several respects.

First, it relegates political subdivision lines to Priority Five even though Priority One expressly mentions following political subdivision lines with the additional lines with the additional latitude of a three percent direction from the ideal population.

Second, the Judgment places far too much significance on the reference in Priority Four to "To the extent consistent with subdivisions (1) to (3) of this subsection, communities shall be preserved." The Judgment somehow concludes that this language places compactness and contiguousness above political subdivisions.

Third, the Judgment cherry-picks the reference to subdivision (3) and ignores the reference to subdivision (1). If the "To the extent…" language is as important as the Judgment indicates, the language out to be applied consistently.

Fourth, the Judgment ignores the unambiguous reference in Priority One to Priority Four's requirements. Priority One says the three precent deviation is permissible "if necessary to follow political subdivision lives consistent with subdivision (4) of this subsection." Thus any district with a deviation of more than one percent must meet the Priority Four criteria. The Judgment completely ignores the Priority One cross-reference to Priority Four.

Fifth, the Judgment ignores the plain text in Priority Three that compactness and contiguousness apply only "to the extent permitted by natural or political boundaries."

Sixth, this language on page 15 of the Judgment establishes out of nowhere, a standard that map-drawers may have "discretion and choices . . . to sacrifice a lower priority, such as following subdivision lines, for a higher priority, like compactness." As stated above, the constitutional requirements are mandatory not permissive. There is no discretion for map-drawers to rewrite the priorities.

Seventh, moving to pages 17 and 18, there is another major error. D244:P17-18. The Judgment says "the Constitution does not require numerical precision or any kind of perfection for the redistricting commissions" that is just plain wrong. Priority One requires the calculation of the ideal population of each district. That is mandatory "numerical precision." It also establishes the goalposts for deviation of one percent and three percent. That is mandatory "numerical precision."

Eighth, at page 18, the Judgment says, "to the extent there is any perceived imperfection in the Senate Map, the choices made by the Judicial Redistricting Commission are reasonable." D244:P18. Nothing in the text of the constitution supports a "reasonableness" standard.

Given the errors in the Judgment's understanding of the Constitution, it unsurprisingly got the outcome wrong. It was stipulated by the parties that the districts challenged by the Plaintiffs deviated from the ideal population by more than one percent. By the plain text of Priority One, that deviation is permitted only if "necessary to follow political subdivision lines." But the challenged districts do not "follow political

subdivision lines" because Buchanan County and Hazelwood are split. This error is so obvious and egregious it is, frankly, hard to see how the Judgment got it wrong.

Indeed, the Judgment never even discusses the one percent/three percent distinction. This is a major error since ideal population and the deviation goalposts are plainly in Priority One. But somehow, the very highest priority method (to use the constitutional language) is totally absent from the Judgment. Plainly, the map drawn by the Judicial Redistricting Committee is unconstitutional and should have been struck down, and the trial court should have adopted a constitutional map.

So why does the erroneous Judgment matter and why does HRCC care?

First and obviously, the People adopted an unambiguous structure and that ought to be applied as written.

Second, the Judgment unwisely and inconsistently with existing case law gives map-drawers "discretion and choices" to adopt a map that may "sacrifice a lower priority" "for a higher priority," as long as it is "reasonable." In prior cases, this Court has rejected such discretionary standards. In *Pearson*, this Court expressly rejected a good faith standard and held that the applicable standard is the language of the constitution itself, which is an objective standard. *Pearson v. Koster*, 367 S.W.3d 36, 46 (Mo. banc 2012). Moreover, the discretion of map-drawers is always limited by mandatory constitutional requirements. *Johnson v. State*, 366 S.W.3d 11, 33 (Mo. banc 2012) (Pierce, J. concurring). The Judgment is wholly inconsistent with those cases.

Third, the "discretion and choices" "sacrificing and advancing priorities" and "reasonableness standards" in the Judgment provide no legal guidance to map-drawers or courts. And where map-drawers have no objective criteria to guide them, problems arise.

This is exemplified by the U.S. Supreme Court's jurisprudence on partisan gerrymandering. For years, the Court reviewed and considered partisan gerrymandering. *See , e.g. Gaffney v. Cummings*, 412 U.S. 735 (1973); *Davis v. Bandemer*, 478 U.S. 109 (1986).

Finally, in 2019 in *Rucho v. Common Cause*, 585 U.S. __ No. 18-422 (2019) the court ruled that partisan gerrymandering cases were not justiciable in federal courts.

Rucho is instructive because the Supreme Court's concern was that partisan gerrymandering is inherently subjective standard that cannot be given meaningful definition. The Court said:

- "It is vital . . . that the Court act only in accord with . . . clear standards" Slip Op. at 15.
- The Court must be armed with a standard that can reliably differentiate unconstitutional for constitutional actions. *Id*.
- Redistricting standards need to be "limited and precise" and be "judicially discernible and manageable." *Id*., at 22

While the holding in *Rucho* is not relevant here, the concerns are. The Judgment adopts a methodology that is not a "clear standard," that cannot reliably differentiate constitutional from unconstitutional map-drawing, and that is within "limited and precise" nor "judicial discernible and manageable."

Fourth, placing compactness and competitiveness is irreconcilable with the long standing Missouri authority cited at pages 3 and 4 of this brief. And it is completely unworkable. If compactness and contiguousness trumps political subdivisions, how would one draw a map? The map drawer would start in the corners and build districts from there that are square hexagonal, or otherwise compact, and keep going under 34 (Senate) or 163 (House) districts are drawn.

Remember the discussion above that the compactness and contiguousness language in Priority Three permits competitiveness and contiguousness "to the extent permitted by natural or political boundaries." But as described above, the judgment ignores this language and places political subdivisions below contiguousness and compactness. So, our map-writer, if following the Judgment's methodology, would ignore all political subdivision lines. So, the map would be a series of squares, circles, and hexagons with a one percent population deviation. Quite clearly the 2020 constitutional amendment did not envision such an absurd map-drawing process and outcome. That means neither map drawers nor courts can fairly and objectively draw maps.

Fifth, the Judgment's rewriting of the constitutional standard potentially imperils the map drawn by the House Citizens' Redistricting Commission. That map was drawn as the Constitution is written. It was unanimously adopted by a Commission comprised of ten republicans and ten democrats. The Judgment's standards, if adopted in an opinion affirming might well lead to otherwise unnecessary litigation challenging the House map.

CONCLUSION

This is actually a quite simple case. The constitutional priorities are clear. No rational reading or parsing of the text would place compactness and contiguousness above political subdivision lines. But the trial court did. No constitutional text supports the discretion and choices and reasonableness standards. But the trial court imposed them. Accordingly, for the reasons set out in this brief and in Appellant's brief, HRCC respectfully requests that this Court reverse the Judgment of the Trial Court and remand to the Circuit Court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies that pursuant to Mo. Sup. Ct. R. 84.06(c) that this brief (1) contains the information required by Mo. Sup. Ct. R. 55.03, (2) complies with the limitations contained in Mo. Sup. Ct. R. 84.06(b), and (3) contains 3,041 words excluding the parts of the brief exempted by Mo. Sup. Ct. R. 84.06(b), based on the word count that is part of Microsoft 2010.

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 15th day of December, 2023, the foregoing was filed with the Court using the Missouri Court's Electronic Filing System, which sent notification to all counsel of record.

/s/ Lowell D. Pearson
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