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 MISSOURI SENATE CAMPAIGN COMMITTEE, INC.

EDWARD D. GREIM, No. 54034
TODD P. GRAVES, No. 41319
CODY S. HAGAN, No. 69111
JACKSON C. TYLER, No. 73115
GRAVES GARRETT, LLC
1100 Main Street, Suite 2700
Kansas City, MO 64105
Tel: 816-256-3181
edgreim@gravesgarrett.com
tgraves@gravesgarrett.com
chagan@gravesgarrett.com
jtyler@gravesgarrett.com
Attorneys for Amicus Curiae

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INTEREST OF THE AMICUS

Amicus Curiae Missouri Senate Campaign Committee, Inc. (the "MSCC") was formed to maintain and expand the number of Senators in the Missouri Senate who support Republican principles and policies. Because of this mission, the MSCC participates in the redistricting process (including the process that led to the Missouri Senate map at issue in this case). It also has a strong interest in supporting the existing Constitution's procedures for redistricting.

The MSCC is the Senate counterpart of another Republican entity that seeks electoral success in the House of Representatives and also seeks amicus curiae status, the House Republican Campaign Committee (the "HRCC"). In a surprising twist, the HRCC seeks leave to file an amicus brief in favor of the *Appellants*, individuals aligned with Democratic interests. This strange alignment is worthy of this Court's attention because it speaks to the interest of each amicus.

The MSCC's interest in the Senate map is far more direct than that of the HRCC. Whereas the MSCC is directly tasked to elect Republicans to Senate districts, the HRCC has no such mission. Instead, individual members of the HRCC who aspire to advance to the Senate may have a purely personal interest in tailoring Senate districts in which they hope to run in the future. Indeed, legislators who may have the ear of those who control the HRCC "have clear personal, financial, and professional interests in drawing the district lines to increase their chances of reelection—or all but assure it." Ryan Snow, *Legislative Control Over Redistricting as Conflicts of Interest: Addressing the Problem of Partisan Gerrymandering Using State Conflicts of Interest Law*, 165 U. Pa. L. Rev., 146 (2017). It

is an open question, then, whether the HRCC's amicus brief is truly motivated by the corporate purposes of the HRCC to increase Republican House membership, or is, instead, an *ultra vires* act meant to advance the personal interests of a few individual HRCC members who hope to have this Court "draw" Senate districts that will advance the next stage of their careers.

This is no idle concern. The HRCC actually admits that the very attorney who authored its proposed brief also was appointed to serve on the Senate Citizens Commission, and offers this attorney's "expertise and practical knowledge" regarding his recent service for the Senate Commission. *See* Motion for Leave, pp. 3. To the extent the HRCC's attorney failed the first time around to influence the Senate Citizens Commission or Senate Judicial Commission to achieve certain HRCC's members' desired drawing of Senate districts, it would be inappropriate for counsel to put on a different hat now, openly representing the HRCC while still claiming to merely stand for the integrity of the Missouri Constitution. In short, the MSCC's interest as amicus is at least as strong as that of the HRCC, and there is good reason to doubt the HRCC's claimed interest.

INTRODUCTION

This case presents one simple question: should the Court enforce Missouri voters' preference that in Senate redistricting the longstanding requirement that districts be "compact and contiguous" should be restored as a dominant criterion? It should, as Missouri's Constitution requires. Compact, contiguous territory is the first and most powerful line of defense against political and racial gerrymanders. *See Preisler v. Kirkpatrick*, 528 S.W.2d 422, 425 (Mo. banc 1975) ("The requirements of contiguity and compactness were placed [in the Missouri constitution] for a purpose. … no doubt they were found to be necessary to the preservation of true representative government and to 'guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as the "gerrymander."'") (internal cites omitted).

History is important. In 2018, voters approved a motley mix of political-related constitutional amendments that had been marketed under the ironic catchphrase, "CLEAN Missouri" (hereinafter, "CLEAN").[1] The redistricting portion of CLEAN, which received little attention, de-emphasized traditional redistricting factors—most notably compactness and contiguousness—in favor of overtly partisan factors. Critics pointed out that by replacing compact, contiguous districts with districts calculated to achieve a particular partisan outcome, legislators would be elected by predetermined collections of voters selected based on their likely voting patterns, rather than by voters within a compact, understandable district. *Backers and Critics of "Clean Missouri" View Amendment One*

[1] *See* 2018 Amendment 1 (online at https://www.sos.mo.gov/elections/petitions/2018BallotMeasures.)

Differently, MissouriNet, Oct. 9, 2018. CLEAN, they said, would allow politically or racially engineered districts to stretch from cities out into rural areas, or to trace bizarre local subdivision lines in chase of a particularized mix of voters. Allison Kite, *Missouri ethics reform, redistricting initiative tossed from November ballot by judge*, The Kansas City Star, September 14, 2018. But did voters agree with these criticisms? Did they regret their 2018 vote?

These questions were definitively answered in 2020. In the general election, voters were finally able to individually consider redistricting provisions, and in particular, to scrutinize CLEAN's devaluation of compactness and contiguity in favor of partisan-based factors.[2] Voters resoundingly rejected CLEAN. They re-ordered CLEAN's redistricting criteria as follows:

(1) equal population (within a tolerance window);

(2) federal constitutional and statutory criteria;

(3) compactness and contiguity;

(4) a mix of community-based factors, of which avoiding county splits and minimizing the crossing of municipal lines were the two lowest priorities; and

(5) partisan fairness and competitiveness.

Id. (now Mo. Const. art. III, § 3(b), for the House; and at § 7(c), adopting House criteria for the Senate).

[2] *See* 2020 Amendment 3 (online at https://www.sos.mo.gov/elections/petitions/2020BallotMeasures).

The first two of these factors are essentially required by the United States Constitution and federal law, making compactness and contiguity the most important Missouri-required factors on the list. This was not lost on the Circuit Court in this case. It applied the new factors correctly and in precisely the right order. It correctly held the new version of the Senate map drawn by the Judicial Redistricting Commission complies with article III, § 7(c). In particular, it recognized that compactness and contiguity (from Tier 3 of the redistricting priorities) might require that counties and cities be split (from Tier 4, a lower priority). That alone resolves this case.

Potential amicus, the HRCC, constructs a serpentine argument that attempts to vault municipal line-crossing (a low fourth-tier factor) over compactness and contiguity and onto Tier 1 with equality of population. The HRCC claims that any contrary reading will prompt endless litigation and even endanger the House map. Hogwash. If tracing the bizarre and constantly-changing shapes of Missouri municipalities becomes our highest constitutional priority, litigation will be endless and the House map itself will likely come under attack from the same interests who back the Appellants, the HRCC's current ally of convenience. This Court should reject the HRCC's argument and affirm.

ARGUMENT

I. The Constitution Plainly Places Compactness and Contiguity Above Political Subdivision Lines.

The plain text of article III, section 3 (relevant to Senate redistricting under section 7) creates five priorities for legislative map-drawing. Compactness and contiguity—for

good reason, as discussed below—sit at Tier 3, prevailing over the mixture of community and political subdivision criteria collected at Tier 4.

Contrary to the text, the HRCC argues that community and political subdivision lines should be treated as a Tier 1 priority. Tier 1, equality of population, imposes a requirement "that no district deviates by more than one percent from the ideal population of the district." Mo. Const. art. III §3(b)(1). The ideal population is calculated by "dividing the number of districts into the statewide population data being used." *Id.* A district's population, though, "**may** deviate by up to three percent [of the ideal population] if necessary to follow political subdivision lines consistent with subdivision (4) of this section." *Id.* (emphasis added).

The plain English is beyond doubt. When the map-drawers reach "subdivision (4)" and see that they can follow subdivision lines within a three percent deviation, they "may deviate by up to three percent." It is "necessary," however, that in exercising this discretion they follow subdivision lines; if the three percent deviation is not "necessary" for following subdivision lines, the one-percent standard applies. It is this simple, and it is the Court's duty to discern and apply this plain meaning. *Independence-Nat. Educ. Ass'n v. Independence School Dist.*, 223 S.W.3d 131, 137 (Mo. banc 2007). When the plain meaning is clear, the Court has "no authority … to read into the Constitution words that are not there." *Id.* Even where this analysis may lead to results that were not intended by the proponents of the constitutional provision (which is not the case here), the "Court will not change the language the people have adopted." *Id.*

The HRCC's error may be that it ignores the permissive word, "may," which makes clear that the decision to apply the three-percent rule is not an absolute duty. Further, subdivision 1 does not state that it "**is** necessary" to follow subdivision lines. Rather, it provides that the relaxed three percent rule "may" be resorted to "**if** necessary"—that is, if relaxation of the population equality requirements is something that is required (necessary) for district lines to follow subdivision lines. It would have been easy to draft Tier 1 to match the HRCC's contorted reading; Tier 1 could simply have stated that "it is necessary for a district to follow political subdivision lines, and districts shall deviate by no more than three percent to meet this requirement." But that is not the language Missouri voters approved.

There are even more serious problems with the HRCC's interpretation. The HRCC would move all of Tier 4 into Tier 1, leapfrogging Tiers 2 and 3. With respect to Tier 2, this leapfrogging would place Missouri's entire redistricting plan at odds with Missourians' federal civil rights. What is Tier 2? It requires compliance "with all requirements of the United States Constitution and applicable federal laws, including, but not limited to, the Voting Rights Act of 1965." Mo. Const. art. III § 3(b)(2). So the HRCC would read the Missouri Constitution to prioritize following municipal boundaries over the bedrock Tier 2 requirement that "no district shall be drawn in a manner which results in a denial or abridgment of the right of any citizen of the United States to vote on account of race or color," or that no citizen in a protected class have "less opportunity than other members of the electorate to participate in the political process and to elect representatives of their choice." *Id*. Does the HRCC want this Court to enforce a bizarre reading of the Missouri

Constitution that endangers federal civil rights and equal protection for racial minorities? It seems so.

The same point can be made for Tier 3, compactness and contiguity, the requirements that were actually weighed by the Circuit Court. As noted above, compactness and contiguity have historically been Missouri's primary bulwark against partisan gerrymandering. *Preisler*, 528 S.W.2d 422, 425 ("The requirements of contiguity and compactness were … to 'guard, as far as practicable, under the system of representation adopted, against a legislative evil, commonly known as the "gerrymander."'") (internal cites omitted). CLEAN was so controversial because it elevated partisan factors—trying to create a particular partisan balance in the General Assembly as the top priority—over regular districts that represented coherent regions. Thus, CLEAN would have allowed archipelago districts, islands of territory constructed precisely to yield a given number of "wasted" Republican and Democrat votes and a given number of Republican and Democrat seats. In its tame form, CLEAN would still have allowed spidery districts, connecting Missouri's inner urban areas along highways and irregular municipal boundaries out to suburban and rural voters. These voters would have nothing in common other than the role they played in a mathematical formula, intended to elect precise numbers of Republicans and Democrats.

Tier 3 (compactness and contiguity) sits atop the CLEAN factors precisely to avoid this deeply unpopular result. But Tier 3 also sits above political subdivision lines (Tier 4) for the same reasons. Missouri's municipal boundaries are in constant flux and do not yield coherent or predictable shapes. While they are more objective and less malleable than the

CLEAN factors, municipal boundaries are inferior to compactness and contiguity as guarantees against bizarrely-shaped gerrymanders. The HRCC claims that it is protecting its House map from litigation, but by asking this Court to elevate Tier 4 over Tier 3, it is actually opening the door to endless litigation as individuals try to use the maze of Missouri municipal boundaries as the next frontier in gerrymandering litigation.

II. The Circuit Court Correctly Applied Tiers 1-4.

The Circuit Court properly applied the constitutional analysis required by Section 3(b). It found as a matter of fact—which deserves deference—that the need for compactness (a Tier 3 priority) required Buchanan County and the City of Hazelwood to be split. In court-tried civil cases, including those regarding redistricting, "the reviewing court will defer to the trial court's assessment of the evidence if any facts relevant to an issue are contested." *Pearson v. Koster*, 367 S.W.3d 36, 44 (Mo. banc 2012) (quoting *White v. Director of Revenue*, 321 S.W.3d 298, 308 (Mo. banc 2010)). This includes factfinding on the issue of compactness.

The HRCC nonetheless maintains that the Circuit Court erred because its compactness analysis did not incorporate consideration of "natural or political boundaries." Art. III, Sec. 3(b)(3). Once again, this assertion is based on a willful twisting of the constitutional text. Section 3(b)(3) states that "[i]n general, compact districts are those which are square, rectangular, or hexagonal in shape to the extent permitted by natural or political boundaries." In other words, compact districts should typically be square, rectangular, or hexagonal in shape, except some boundaries (such as the Missouri-

Mississippi River confluence, which seems to give St. Charles County a sparsely-populated "claw") should not count against compactness.

At trial, the Secretary of State's expert witness testified about these shapes and how they are evaluated under various mathematical formulas to determine compactness scores. However, both the Secretary of State's expert witness and the language of Section 3(b)(3) acknowledge that certain areas of the state—like St. Charles County—do not lend themselves to these uniform shapes. In such situations, the language of Section 3(b)(3) provides leeway for compactness to be determined in accord with other methods. Therefore, contrary to the HRCC's assertion, Section 3(b)(3) does not lift Tier 4 (community and political subdivision lines) into Tier 3. Section 3(b)(3) simply allows compactness to be determined in non-uniform ways when the natural or political boundaries of the area require it.

Finally, the HRCC engages in a slippery slope fallacy by arguing that the Circuit Court's constitutional analysis will lead future map drawers to "ignore all political subdivision lines" and simply break the state up into a series of squares, rectangles, and hexagons. Nothing in the record below, however, suggested that compactness or contiguity would actually require this absurd result in Missouri. The record did show that these two minor deviations from political subdivision lines were required to comply with compactness, and no party has provided a basis for the Circuit Court's factual finding to be overturned.

CONCLUSION

The Circuit Court properly implemented the plain language of article III, section 3(b) of the Missouri Constitution when it determined that the new Senate map drawn by the Judicial Redistricting Commission was constitutional. This Court should resist the HRCC's request that it re-prioritize the factors Missouri voters approved in 2020 after carefully considering the problems of an alternative 2018 scheme. If this Court is concerned with avoiding unnecessary redistricting litigation and promoting regularity and predictability in legislative districts, it would be harder to imagine a more destructive change than requiring district lines to follow Missouri's ever-morphing maze of municipal boundaries. The Constitution should be applied as written, and the Circuit Court should be affirmed.

Respectfully submitted,

GRAVES GARRETT LLC

By: */s/ Edward D. Greim*

Edward D. Greim, 54034
Todd P. Graves, 41319
Cody S. Hagan, 69111
Jackson C. Tyler, 73115
1100 Main St., Suite 2700
Kansas City, MO 64105
Telephone (816) 256-3181
Facsimile (816) 256-5958
edgreim@gravesgarrett.com
tgraves@gravesgarrett.com
chagan@gravesgarrett.com
jtyler@gravesgarrett.com
Counsel for Missouri Senate Campaign Committee, Inc.

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 2,619 words excluding the parts of the brief exempted by Mo. Sup. Ct. R. 84.06(b), based on the word count provided by Microsoft Word.

/s/ Edward D. Greim
Counsel for Missouri Senate Campaign Committee, Inc.

CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 27th 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/ Edward D. Greim
Counsel for Missouri Senate Campaign Committee, Inc.