No. SC100277

In the

# Supreme Court of Missouri

CLARA FAATZ AND WILLIAM CALDWELL,
*Appellants*,

v.

JOHN R. 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

## RESPONDENTS' BRIEF

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## INTRODUCTION

Plaintiffs allege that six Judges appointed through the merits system to the Missouri Court of Appeals unlawfully "gerrymander[ed]" the Senate redistricting map they drew—all by splitting into different districts just one county and one city in the entire state. This is as unlikely as it is wrong.

In doing so, Plaintiffs ask this Court to read the express Constitutional redistricting priorities backward—making priority (4) (drawing lines that follow political subdivision lines) more important than priority (3) (drawing compact districts), even though the Constitution is clear that the "methods[ are] listed in order of priority" and even though priority (4) states that it must be followed only "[t]o the extent consistent with subdivisions (1) to (3)."

Plaintiffs also wrongly and repeatedly suggest that splitting counties and cities is unconstitutional even though the Constitution expressly allows it in article III, section 3(b)(4). In fact, Plaintiffs make so many contradictory, confusing arguments, many of which are not included in their Points Relied On, that it is difficult even to keep track of them all, and even more difficult to believe they are meritorious.

In fact, the circuit court ruled that the Final Map did not violate article III, section 3(b)(4)—the preserving political subdivisions provision—for four independent reasons.

1) **Reason 1**: "[T]o the extent any political lines were crossed, the Judicial Commission['s Final Map] chose districts that were more compact" than the Plaintiffs' Proposed Map, which is permitted because the Constitution ranks compactness as a higher priority than political subdivisions. D244:p.16.

2) **Reason 2**: Even if the Judicial Commission's Final Map was not more *compact* than the Plaintiffs' Proposed Map, it had a lower population deviation, which is first priority under § 3(b)(1)—the equal population provision—and so makes the Final Map better than the Proposed Map. D244:p.16.

3) **Reason 3**: Even if the above two conclusions were not true, Plaintiffs failed to satisfy their burden of demonstrating that "any minimal and practical deviation" from what Plaintiffs claim is optimal "does not result from application of recognized factors that may have been important considerations in the challenged map"—for instance, compliance with federal laws. D244:pp.19–20.

4) **Reason 4**: Even if the above three conclusions were not true, Plaintiffs failed to satisfy their burden to demonstrate that their Proposed Map, which they claim better complied with the Constitution than the Final Map, satisfied the other constitutional requirements, such as compliance with federal law, as required by article III, sections 3(b)(1) and 3(b)(2). D244:p.19.

The arguments Plaintiffs raise throughout the brief typically address only one of these four arguments. But Plaintiffs bear the burden on appeal of demonstrating that the circuit court erred in making *all four* of these determinations. Showing that less than all four conclusions are wrong means any error was harmless, and this Court does not reverse for harmless error. Rule 84.13(b). In fact, Plaintiffs fail to challenge Reason 2 at all, and so have waived any claim of error with respect to Reason 2. This Court thus may speedily affirm on this basis.

On appeal, Plaintiffs separately claim that the Final Map violates article III, section (3)(b)(1)—the equal population provision—but the circuit court correctly determined that this claim was neither pleaded nor tried by consent. Indeed, because this is a constitutional claim, it is not preserved unless it was expressly raised at the earliest opportunity. But here, neither the Petition nor Amended Petition—the earliest opportunities to challenge the Final Map—alleged a § 3(b)(1) violation. Even if the § 3(b)(1) argument were preserved, it lacks merit because it misreads the Constitution in a way that causes its language to become superfluous.

Finally, the circuit court did not err in dismissing the Judicial Commission from the case or in denying Plaintiffs discovery from the Judicial Commission. These claims are improperly before this Court, as Plaintiffs did not even name the Judicial Commission as a respondent in their notice of appeal. But the Plaintiffs also lose on the merits. The Judicial Commission no longer exists and has not existed since it issued the Final Map; it is *functus officio* and neither a necessary nor indispensable party after it has been named in the suit. For the same reason, and others, the Plaintiffs were rightly denied discovery from the Commission. Finally, any possible error would be harmless because there is no recovery available from the Judicial Commission that Plaintiffs could not recover from the Secretary, who remained in the case. Determining a map's compliance is an objective inquiry without the need for discovery from judicial members, and the information in the record below was the same information in the record in recent Missouri redistricting cases.

For these reasons and more discussed below, this Court should affirm the circuit court's judgment in favor of the Secretary.

## STATEMENT OF FACTS

### I. Factual History

Every ten years, after a decennial census, a Senate Independent Bipartisan Citizens Commission appointed by the Governor is charged with drawing Missouri's state senate legislative districts. D244:¶4. For the 2022 redistricting process, the Senate Commission included Marc Ellinger as chairman and Susan Montee as vice-chairwoman. D244:¶¶5–8. Despite Ellinger and Montee submitting several maps to the Senate Commission, *see* D228, D229, D230 (Ellinger maps); Exhibits D231, D232, D233, D234, D235, D236 (Montee maps), the Senate Commission did not agree on or adopt any submitted map. D244:¶¶6–9. On December 23, 2021, the Senate Independent Bipartisan Citizens Commission notified Secretary Ashcroft that the Commission had not agreed upon a new state senate map. D244:¶10.

This Court then appointed a Judicial Redistricting Commission ("Judicial Commission") composed of six merits-appointed judges[1] of the Missouri Court of Appeals (two from each district) to draw a new Missouri state senate map. D244:¶11. On February 17, 2022, the Judicial Commission issued a notice of public hearing to be held on February 25, 2022, where it allowed the public to submit comments (including written materials and proposed maps) regarding the Judicial Commission's charge to draw new Senate district lines. D241; D244:¶23. The Commission held a hearing on February 25, 2022. D242 (Feb. 25, 2022 Hearing sign-in sheet).

[1] Judges Cynthia L. Martin, Thomas N. Chapman, Michael E. Gardner, Gary W. Lynch, Angela Turner Quigless, and Mary W. Sheffield. *See* D241; D239.

On March 14, 2022, the Judicial Commission made public its tentative redistricting map ("Tentative Map"). D244:¶21. The next day, the Judicial Commission notified Secretary Ashcroft that it had developed its Final Map, which divided Missouri into 34 senate districts and established those districts' populations and boundaries.[2] D220:¶13; D239 (Judicial Commission Letter to Secretary Ashcroft); D221:p.7 (Final Map and Data); D222 (part two of the Final Map and information released); D240 (Final Map in color). The Final Map splits Buchanan County between two districts—District 12 (which contains 18 other counties in northwest Missouri) and District 34 (which contains only one other county—Platte County). D221:p.7; *see also* D225 (Judicial Commission map showing close-up of District 12); D226 (Judicial Commission map showing close-up of District 34). The Final Map also divides the municipality of Hazelwood (northwest of St. Louis City) into two districts—Districts 13 and 14. *See* D223 (Judicial Commission map showing close-up of District 13); D224 (Judicial Commission map showing close-up of District 14).[3] A screenshot of the final map is below:

[2] For the purposes of this case, there is no material difference between the Commission's Tentative Map released on March 14, 2022, and its final map filed on March 15, 2022. D220:¶22 (Jt. Stip.). The only difference between the Tentative and Final Maps are data on Pages 18 and 20 of the Final Map, D220:¶22; *see also* D221, which did not impact the Final Map and plan boundaries. *See* D239 (Judicial Commission description of changes between Tentative and Final Maps).

[3] The city of Hazelwood is located in the northwesternmost segment of District 14 and the westernmost segment of District 13. Hazelwood is labeled in D224 (showing District 14).


D221:p.7.

## II. Procedural History

As relevant here, Plaintiffs William Caldwell and Clara Faatz—neither of whom participated in the Judicial Commission's February 25, 2022 public hearing, *see* D242—sued Missouri Secretary of State John Ashcroft and the Judicial Redistricting Commission, alleging that the Missouri Senate Districts that they live in (Districts 12 and 14,[4] respectively) violate article III, section 3(b)(4) of the Missouri Constitution

[4] The Amended Complaint alleged that Faatz was a resident of District 14, but the circuit court's judgment found that she was a resident of District 13.

(through incorporation by article III, section 7). D250:p.1. The Petition, as relevant here, asked the circuit court to invalidate the Final Map, as it "does not preserve communities" because the district lines drawn in the New Senate Map impermissibly divide the municipality of Hazelwood and Buchanan County. D250:¶¶45, 66. The Petition also requested that the circuit court enjoin the Secretary from using the New Senate Map and requested that the circuit court instead impose Plaintiffs' Proposed Remedial Map, which was attached to the Petition as Exhibit B. D250:pp.2, 10; D252. Plaintiffs did not raise a challenge under section 3(b)(1)—the equal population provision.

**A. Motion to Dismiss and Motion to Quash**

The Judicial Commission moved to be dismissed from the case on the grounds that the Petition failed to state a claim against it or, in the alternative, because it was neither a necessary nor indispensable party. D190:p.1. Specifically, the Judicial Commission argued that the Petition did not state a claim against it because it "no longer exists" or "play[s] any constitutional role in Missouri's redistricting process." D190:pp.1–2. Rather, the Judicial Commission argued that "only th[e circuit court] and the Supreme Court shall have authority to 'bring the map into compliance' by redrawing [it], if necessary," citing Mo. Const. art. III, § 7(i). D190:p.2. The Judicial Commission also noted that the Petition asked for injunctive relief only against the Secretary. D190:p.2. The Judicial Commission argued that it was not a necessary or indispensable party because the Commission's involvement was neither (1) "necessary for Missouri courts to grant complete relief" because "injunctive relief is asserted only against the

Secretary," nor (2) necessary because the Commission has no "interest relating to the subject matter of this action, and disposing of this action in the Commission's absence will not impair or impede *any* party's ability to protect their interests." D190:p.3.

Around the same time, the Judicial Commission moved to quash discovery served on it and for a protective order (Motion to Quash). D191. The discovery served on the Judicial Commission sought information and documents concerning the Commission's thought process, deliberations, motivations, and communications during its development of the Senate redistricting map and plan. D191:p.4; D192 (Interrogatories); D193 (Requests for Production). In its Motion to Quash, the Judicial Commission argued that (1) it no longer was a functioning body and so lacked legal competence or capacity to answer discovery, D191:p.1; (2) discovery sought information that was irrelevant, not reasonably calculated to lead to the discovery of relevant information, and disproportional because the subjective intent of the Commission and maps other than the final map are irrelevant to the constitutionality of the Final Map, D191:p.2; (3) discovery sought privileged information because the Constitution expressly required only release of the Tentative and Final Maps and demographic and partisan data used in their creation, D191:pp.2–3; and (4) discovery sought privileged information because redistricting is a privileged legislative function, D191:p.3.

Plaintiffs opposed the Judicial Commission's Motion to Dismiss and Motion to Quash. D194 (Opposition to Motion to Dismiss); D195 (Opposition to Motion to Quash). With respect to the Motion to Dismiss, Plaintiffs argued solely that the Judicial Commission was a required party because article III, section 7(i) states that any lawsuit

challenging the constitutionality of a redistricting plan "shall name the body that approved the challenged redistricting plan as a defendant." D194. With respect to the Motion to Quash, Plaintiffs argued that the Judicial Commission must respond to its discovery requests because they only sought relevant information to determine (1) whether other iterations of the map better preserved communities, D195:p.2; (2) whether other iterations of the map protected the voting rights of communities of color, D195:p.2; (3) the Commission's process and factors considered in arriving at the Final Map, D195:p.3, and they argued that (4) legislative privilege does not provide an absolute privilege from discovery, D195:p.4; and (5) the courts should prefer transparency over secrecy in redistricting, D195:p.7. In their opposition to the Motion to Quash, Plaintiffs admitted that "the internal and subjective deliberations or motives of individual commissioners" were irrelevant and that "Plaintiffs have the burden to prove that another," "better," "map could have been drawn." D195:p.3.

The circuit court granted both the Motion to Dismiss and Motion to Quash. In granting the Motion to Dismiss, it held that (1) despite the fact that article III, section 7(i) requires the Judicial Commission to be named at the outset of litigation, that constitutional section does not mandate the Judicial Commission's ongoing engagement as a party, especially when it is no longer a necessary party, as it was here because no judicial relief has been sought from it and no relief can be afforded by it, D199:p.2; (2) the Judicial Commission did not have an interest in the litigation; and (3) Plaintiffs sought relief only from the Secretary—not the Commission, D199:pp.3–4.

In granting the Motion to Quash, the circuit court held that (1) Missouri case law and the Missouri Constitution make clear that whether redistricting constitutional requirements are satisfied is a question determined objectively—that the Final Map either is constitutional, or it is not, D198:pp.1–2; (2) the discovery requests were impermissibly broad because they were directed to the Commission and also to its members, staff, and anyone assisting it during the map-drawing process, D198:p.3; (3) the Commission is not likely to possess the information requested, as it ceased to exist after it completed its work, D198:pp.4, 7–8; and (4) the Commission and its members and staff are protected by both constitutional and legislative privilege, D198:pp.5–6.

Plaintiffs then moved to file a first amended petition on the basis that they wished to simplify their claims and drop a previously unmentioned plaintiff (Estes) and her previously unmentioned claims. D253. The Court granted the Motion to Amend Petition, D257, after which Plaintiffs Faatz and Caldwell filed their Amended Petition, which added back in the Judicial Commission as a Defendant. D205. The Judicial Commission renewed its motion to dismiss, D209, which the circuit court granted, D219.

**B. Trial**

Before trial, the parties filed a Joint Stipulation of Facts and Joint Exhibits with the circuit court. D220–D243. At a one-day bench trial, Tr.2, Plaintiffs and Defendants each produced one witness. Tr.3. Plaintiffs offered the testimony of Sean Nicholson. Tr.3. The Secretary offered the testimony of Sean Trende. Tr.3.

**1. Plaintiffs' Statement of Facts relating to the Trial is argumentative and misleading.**

The discussion of the trial in Appellants' brief violates Rule 84.04(c), which governs the Statement of Facts, and should be stricken to the extent of the violation. The Statement of Facts is supposed to be prepared "without argument," *id*., but Plaintiffs' Statement of Facts contains improper argument. *See In re Adoption of C.M.B.R.*, 332 S.W.3d 793, 822 (Mo. banc 2011) (*abrogated on other grounds by S.S.S. v. C.V.S.*, 529 S.W.3d 811, 816 n.3 (Mo. banc 2017)). For instance, Plaintiffs' Statement of Facts contains the following argumentative claims: (1) Nicholson's "district maps [ ] complied with all of the other requirements of the Constitution," App.17; and (2) "Nicholson's alternative map changes as few Senate districts as possible in order to remedy the violation of splitting Buchanan County and crossing the City of Hazelwood's municipal lines," App.18.

At the very least, these statements are misleading. The portion of the trial transcript Plaintiffs cite (Tr.52:19–53:20) does not demonstrate that Nicholson's maps complied with all constitutional requirements. In fact, despite being asked numerous times about whether any other map complied with all constitutional requirements, Nicholson refused to definitively answer "yes" to that question. Tr.124:10–133:16.

**C. Final Judgment**

On September 12, 2023, the circuit court issued a final judgment in favor of the Secretary. D244. In it, the circuit court made findings of fact and conclusions of law. D244. As a preliminary matter, the circuit court found that Plaintiffs Caldwell and Faatz

live in Districts 12 and 13,[5] meaning that these are the only districts that can be challenged as unconstitutional, and that the circuit court would only be deciding whether to instead adopt Plaintiffs Map that altered Districts 12, 13, 14, 21, and 34. D244:p.2. The circuit court determined that Plaintiffs were not entitled to a declaration that portions of the Final Map were unconstitutional. D244:p.2.

**1. Findings of Fact**

Beyond the Joint Stipulated Facts, the circuit court found the following facts, as relevant here:

**a. Plaintiffs' witness, Nicholson:**

i. "[T]he testimony of [Plaintiffs' witness] Mr. Nicholson was not [h]elpful to the Court." D244:p.7.

ii. Nicholson testified that he drew most of the maps listed or affiliated with Chairwoman Montee as member of the Citizens Commission. D244:p.7.

iii. Nicholson's testimony about what various proposed maps, including Montee's, did or did not do was unhelpful because those maps were not adopted and no one fully vetted them, including for compliance with the federal Voting Rights Act. D244:p.7.

iv. Nicholson drew Plaintiffs' Proposed Map. D244:p.7.

[5] The Court's determination that one plaintiff lived in District 13 was erroneous. That plaintiff in fact lives in District 14 (under the Final Map). D205, ¶¶ 2, 4. That error does not change the outcome of the appeal. If anything, District 14 is even more clearly constitutional.

v. Nicholson did not have extensive experience in evaluating maps based on constitutional redistricting requirements. D244:p.7.

vi. Nicholson relied on a computer program to evaluate maps, but he could not corroborate that the information provided to him by the program was correct. D244:p.7 (citing Tr.99:14–111:3). For instance, he did not know how the computer program calculated any of its metrics that he relied on or what they meant. D244:pp.7–8 (citing Tr.112:22–116:15).

vii. Nicholson also was not well versed on the generally accepted measurements for redistricting. D244:p.7 (citing Tr.112:22–116:15).[6]

viii. "Nicholson's process was further not reliable because he relied on 'compactness scores for this plan' rather than compactness scores for each district, as the Missouri Constitution requires." D244:p.8; *see also* Tr.81:22–82:12.

ix. Overall, the "court did not find that Mr. Nicholson [was] a useful fact witness." D244:p.8.

**b. Secretary's Witness, Trende**

i. Trende, in contrast, was well qualified to provide opinions on legislative map drawing. D244:p.8.

ii. A Convex Hull score describes how closely a district resembles a square, rectangle, or hexagon, and is a generally accepted measurement of compactness. The

[6] *See also* Tr.116:16–118:20.

higher the Convex Hull score, the more it complies with the Missouri Constitution's compactness criteria. D244:p.8 (citing Tr.192:3–193:6), p.10 (¶48).

iii. Trende testified that the Judicial Commission's Final Map had a lower population deviation than Plaintiffs' Proposed Map and that in Plaintiffs' Proposed Map, the challenged districts become less compact and the population deviations increase. D244:p.8 (citing Tr.198:20–21).

iv. Trende ran a few different simulations to determine whether splitting Hazelwood and Buchanan County made sense. He ran 5,000 simulations, which showed that Hazelwood was split about 23% of the time and Buchanan County was split about 11% of the time, meaning that Buchanan County and Hazelwood were among the political subdivisions that would tend to get split during redistricting. D244:pp.8–9.

v. Plaintiffs' Proposed Map does not make the "least changes" to the Final Map because it moves six counties out of District 12 into unchallenged District 21. D244:p.9.

vi. Plaintiffs' Proposed Map favored keeping political subdivisions together at the expense of compactness. D244:p.10.

vii. The Secretary prepared a proposed Remedial Map for illustrative purposes, to highlight the deficiencies in Plaintiffs' Proposed Map, and as a proposal in the event that the court found that the Final Map was not compliant with the Missouri Constitution. The Secretary's Remedial Map keeps District 21 unchanged, as it is unchallenged; Buchanan County remains split; but the population deviations for both Districts 34 and

12 are under 1%. This deviation was achieved by shifting a few precincts from District 34 to District 12 and shifting Sullivan County to District 18. D244:p.10.

viii. The Secretary's Remedial Map better complies with the Missouri Constitution than the Plaintiffs' Proposed Map, to the extent that any alternative map would need to be developed. D244:p.10.

ix. Neither alternative map had higher compactness, as measured by the Convex Hull score, than the Final Map. D244:p.10.

x. Trende testified that "if there is no discretion, then map drawing goes on and on because there is an infinite number of maps that could be drawn and because running more and more simulations will eventually result in a more compact map than the one enacted." D244:p.10 (citing Tr.207:15–25).

xi. Trende ran additional simulations to demonstrate that, with enough time and resources, a better map (*e.g.*, more compact) can always be found. In a simulation he ran of 5,000 maps, he found a map more compact than any of the maps drawn so far. In a simulation he ran of 50,000 maps, he found an even more compact map on the 8,500th try. And he testified that if the simulation ran 500,000 times, the computer would find another, even more compact map. Given the infinite number of maps that can be drawn, simulations would "never" stop finding unique maps. D244:p.11 (citing Tr.216:6–9).

### 2. Conclusions of Law

#### a. Standard of Review for Redistricting Plan

1) A redistricting plan is assumed constitutional unless a plaintiff proves it clearly and undoubtedly contravenes the constitution. D244:p.11.

#### b. Burden of Proof

2) Plaintiffs have the burden of proving the Final Map is unconstitutional, and if the trier of fact does not believe the evidence of the party bearing the burden, it can properly find for the other party. D244:p.12.

#### c. History and Law Governing Redistricting

3) From 1982 to 2018, then-article III, section 7 of the Missouri Constitution governed Missouri Senate redistricting. It provided:

> The commission shall reapportion…by dividing the population of the state by the number thirty-four and shall establish each district so that the population of the district shall, as nearly as possible, equal that figure; no county lines shall be crossed except when necessary to add sufficient population to a multi-district county or city to complete only one district which lies partly within such multi-district county or city so as to be as nearly equal as practicable in population. Any county with a population in excess of the quotient obtained by dividing the population of the state by the number thirty-four is hereby declared to be a multi-district county.

D244:pp.12–13; *see also* A0008 (article III, section 7 (1982)).

4) While this version of article III, section 7 was in effect, this Court held that: (1) redistricting is predominantly a political question, as maps can be drawn in multiple ways, all of which might meet the constitutional requirements; and (2) the language used in the requirements themselves creates a level of flexibility in their compliance. D244:p.13 (citing *Pearson v. Koster*, 359 S.W.3d 35 (Mo. banc 2012) (*Pearson I*)).

5) In 2018, Missourians amended the redistricting criteria and used the same criteria for both chambers of the General Assembly. During this time (until 2020), article III, section 7 adopted the requirements of article III, section 3, which enumerated six redistricting methods listed in order of priority: (1) population, (2) federal compliance, (3) partisan fairness and competitiveness, (4) contiguity (subject to (1)–(3)), (5) political subdivision boundaries (subject to (1)–(4)), (6) compactness (subject to (1)–(5)). D244:p.14; *see also* A0004–A0005 (article III, section 3 (2018)).

6) Constitutional priorities and priority order changed between the 1982 and 2018 Senate redistricting rules. D244:p.14.

7) Constitutional priorities for Senate redistricting again changed in 2020, when Missourians modified the priorities and their order again. D244:p.15.

8) The new priorities were, in order of importance: (1) equal population (art. III, § 3(b)(1)), (2) federal compliance (§ 3(b)(2)), (3) and (4) contiguity and compactness (§ 3(b)(3)), (5) political subdivisions (§ 3(b)(4)), (6) and (7) partisan fairness and competitiveness (§ 3(b)(5)). D244:p.15, *see also* Mo. Const. art. III, § 3(b).

9) Subdivision 3(b)(4)—the political subdivisions provision—is expressly subordinated to the first four factors (subdivisions 3(b)(1)–(3)), including compactness (uses "subject to" language). D244:p.15.

10) The 2020 changes provide discretion and choices for the redistricting commission to sacrifice a lower priority, such as following political subdivision lines, for a higher priority, like compactness. D244:p.15.

11) Article III, section 7 provides that if a "court renders a judgment in which it finds that a completed redistricting plan" violates the constitution, the "judgment shall adjust only those districts, and only those parts of district boundaries, necessary to bring the map into compliance." D244:p.15.

12) Article III, section 7 "means that the Court must respect the boundaries drawn by any commission and that any remedy must only make the least changes necessary to redress the alleged violations and nothing further." D244:p.15.

**d. Application of the Law Governing Redistricting to the article III, section 3(b)(4) claim.**

13) Plaintiffs argued that the Final Map violates article III, section 3(b)(4) by invoking in their Amended Petition the phrase "preserve communities," which is a quote from section 3(b)(4). D244:p.16.

14) "The evidence clearly shows that to the extent any political lines were crossed, the Judicial Commission chose districts that were more compact," which is permitted because the Constitution ranks compactness as a higher priority than political subdivisions. D244:p.16.

15) The evidence confirmed that the Final Map was more compact than either of the two proposed remedial maps. D244:p.16.

16) The evidence also showed that the Final Map's population deviations were lower than Plaintiffs' Proposed Map. D244:p.16.

**e. Article III, section 3(b)(1) claim.**

17) Plaintiffs may argue that their theory is that the Final Map violates article III, section 3(b)(1)'s 1% population deviation rule in Districts 34, 13, and 14 because the population deviation in those districts exceed 1% and do not follow political subdivision lines. But this claim is not referenced in either filed petition, which exclusively invoke subdivision 3(b)(4). D244:pp.16–17.

18) When Defendant moved for judgment after Plaintiffs rested, Plaintiffs did not dispute that their case was limited to the article III, section 3(b)(4) challenge. Thus, the article III, section 3(b)(1) claim was not tried by either express or implied consent. D244:p.17 (citing Tr.161:15–19).

19) Even if Plaintiffs made an article III, section 3(b)(1) claim, it fails because when article III, section 3(b)(1) permits a deviation "up to three percent if necessary to follow political subdivision lines consistent with" § 3(b)(4), it incorporates the all the rules for following political subdivision lines in § 3(b)(4), which includes the statement that it be "[t]o the extent consistent with subdivision[ ] (3)," the compactness requirement. D244:p.17.

20) With respect to both sections 3(b)(1) and 3(b)(4), the court does not fault the Judicial Commission for not having the best possible map, as there are an infinite number of maps. Giving less deference to the Commission would inevitably require courts to draw a map in litigation. D244:p.18.

### f. Plaintiffs' Failure to Meet the Burden of Proof

21) To succeed in their constitutional claim, Plaintiffs must show that "any minimal and practical deviation" "does not result from application of recognized factors that may have been important considerations in the challenged map"—for instance, federal laws or other recognized factors. D244:p.19 (citing *Johnson v. State*, 366 S.W.3d 11 (Mo. banc 2012)).

22) Plaintiffs did not meet this burden. D244:pp.19–20.

23) Plaintiffs have failed to produce evidence that any deviation from an optimal map is more than "minimal and practical." For instance, both Buchanan County and Hazelwood were commonly split by random simulations, and it makes sense to split populous municipalities like Hazelwood based on the equal-population priority. D244:p.20.

24) Despite Plaintiffs' provision of proposed maps, no one had reviewed them for compliance with federal law, racial gerrymandering, or district compactness. D244:p.19.

25) The evidence showed that the reason for any alleged deviation in the Final Map was that the challenged districts are more compact than in Plaintiffs' Proposed Map. Plaintiffs did not address or rebut this evidence, as Nicholson stated he had "no reason to disagree with [Mr. Trende's compactness] analysis of Plaintiffs' Proposed Map." D244:p.21.

26) The circuit court entered judgment for the Secretary. D44:p.21.

## D. Appeal

On October 9, 2023, Plaintiffs filed a notice of appeal, which named as respondent only the Secretary. D245:p.1. It did not list the Judicial Commission as a respondent. D245:pp.1, 3. This Court's docketing system does not list the Judicial Commission as a respondent in this case. Nevertheless, Plaintiffs filed an Appellant's Brief naming the Judicial Commission as a respondent.

## RESPONSE TO POINTS RELIED ON

**I. This Court should affirm the circuit court's judgment on the article III, section 3(b)(4) claim.** (Addresses Points Relied On I, III–VI)

**A. Response to Point III: The circuit court correctly interpreted that compactness (subdivision (3)) is a higher priority than preserving communities (subdivision (4)), and the circuit court's finding that the Judicial Commission's Final Map was more compact than the Plaintiffs' proposed map was supported by substantial evidence and was not against the weight of the evidence.**

- *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752 (Mo. banc 2010)
- *State ex rel. Coleman v. Wexler Horn*, 568 S.W.3d 14 (Mo. banc 2019)
- *Pearson v. Koster*, 367 S.W.3d 36 (Mo. banc 2012)
- *Johnson v. State*, 366 S.W.3d 11 (Mo. banc 2012)

**B. Response to Point IV: The circuit court did not err by using math to determine "compactness in accordance with the requirements in article III, section 3(b)(3).**

- *Johnson v. State*, 366 S.W.3d 11 (Mo. banc 2012)
- *Pearson v. Koster*, 367 S.W.3d 36 (Mo. banc 2012)
- *State ex rel. Dep't of Health & Senior Servs. v. Slusher*, 638 S.W.3d 496 (Mo. banc 2022)

- *Angoff v. Marion A. Allen, Inc.*, 39 S.W.3d 483 (Mo. banc 2001)

**C. <u>Response to Point I</u>: The circuit court used the proper standard to address Plaintiffs' article III, section 3(b)(4) claim.**

- *Interest of D.L.S.*, 606 S.W.3d 217 (Mo. App. 2020)

**D. <u>Response to Point V</u>: The circuit court correctly assigned the burden of proof to Plaintiffs and correctly interpreted that burden.**

- *Johnson v. State*, 366 S.W.3d 11 (Mo. banc 2012)
- *Pearson v. Koster*, 367 S.W.3d 36 (Mo. banc 2012)
- *Zink v. State*, 278 S.W.3d 170 (Mo. banc 2009)
- *State ex rel. Dep't of Health & Senior Servs. v. Slusher*, 638 S.W.3d 496 (Mo. banc 2022)

**E. <u>Response to Point VI</u>: The circuit court correctly determined that Plaintiffs did not meet their burden to establish that "any minimal and practical deviation from population equality or compactness does not result from application of recognized factors that may have been important considerations in the challenged map."**

- *Interest of D.L.S.*, 606 S.W.3d 217 (Mo. App. 2020)
- *Pearson v. Koster*, 367 S.W.3d 36 (Mo. banc 2012) (*Pearson II*)
- *White v. Dir. of Revenue*, 321 S.W.3d 298 (Mo. banc 2010)
- *Johnson v. State*, 366 S.W.3d 11 (Mo. banc 2012)

**II. <u>Response to Point II</u>: This Court should affirm the circuit court's judgment on the article III, section 3(b)(1) claim.**

- *Fowler v. Missouri Sheriffs' Ret. Sys.*, 623 S.W.3d 578 (Mo. banc 2021)
- *Thomas v. City of Kansas City*, 92 S.W.3d 92 (Mo. App. 2002)
- *Smith v. City of St. Louis*, 395 S.W.3d 20 (Mo. banc 2013)

- *City of St. Joseph, Mo. v. St. Joseph Riverboat Partners*, 141 S.W.3d 513, 516 (Mo. App. 2004).

**III. <u>Response to Point VII</u>: The circuit court correctly dismissed the Judicial Commission because it became *functus officio* after it developed the Final Map, and under *State ex rel. Teichman* its presence as a party is not required.**

- *State ex rel. Teichman v. Carnahan*, 357 S.W.3d 601 (Mo. banc 2012)
- *Litton v. Kornbrust*, 85 S.W.3d 110 (Mo. App. W.D. 2002)
- *Johnson v. State*, 366 S.W.3d 11 (Mo. banc 2012)
- *Newman v. City of Warsaw*, 129 S.W.3d 474 (Mo. App. W.D. 2004)

**IV. <u>Response to Point VIII</u>: The circuit court did not abuse its discretion in quashing any discovery into the Commission because the discovery sought was irrelevant to determining the Final Map's constitutionality, and the Commission is protected by both constitutional and common law privileges. (Responds to Plaintiffs' Eighth Point Relied On).**

- *State ex rel. Teichman v. Carnahan*, 357 S.W.3d 601 (Mo. banc 2012)
- *Johnson v. State*, 366 S.W.3d 11 (Mo. banc 2012)
- *Arizona Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088 (Ariz. Ct. App. 2003)
- *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, 2011 WL 4837508 (N.D. Ill. Oct. 12, 2011)

## ARGUMENT

Plaintiffs challenge the circuit court's judgment for the Secretary on two bases: that the Final Map violated article III, section 3(b)(4) (splitting political subdivisions) and that the Final Map violated article III, section 3(b)(1) (equal population). Part I of this Brief addresses the section 3(b)(4) claim. Part II addresses the section 3(b)(1) claim. Plaintiffs also challenge the circuit court's decision to dismiss the Judicial Commission from the suit and the circuit court's grant of the Motion to Quash discovery sought from the Judicial Commission. Part III addresses the Motion to Dismiss. Part IV addresses the Motion to Quash. Throughout, this brief points out which arguments are not raised in a given Point Relied On and so are not preserved or otherwise waived.

Additionally, with respect to Plaintiffs' article III, section 3(b)(4) (splitting political subdivisions) claim, Plaintiffs fail to address each of the *four independent reasons* for which the circuit court ruled in favor of the Secretary. *See* Introduction; Statement of Facts; D244. Most (if not all) of Plaintiffs' arguments relating to section 3(b)(4) address only *one* of the four independent bases the circuit court relied on. Thus, if this Court agrees with even one of the grounds the circuit court relied on to come to its judgment, this Court should affirm. Put another way, if Plaintiffs succeed in demonstrating that three of the four bases for the circuit court's judgment were incorrect, this Court should still affirm because of the doctrine of harmless error. Additionally, if this Court wishes to affirm on one ground, it need not address the multitude of other arguments the Plaintiffs raise (with respect to section 3(b)(4)). As noted in the Introduction, Plaintiffs *entirely fail to address* the circuit court's Reason 2 for entering judgment in favor of the Secretary. Because

Plaintiffs have not challenged Reason 2, any arguments against it are waived. This Court can rule in favor of the Secretary on the section 3(b)(4) claim on the basis that the circuit court's analysis expressly rejected Plaintiffs' challenge because of Reason 2, and yet Plaintiffs do not challenge that analysis on appeal. Rule 84.04(e) ("The argument shall be limited to those errors included in the 'Points Relied On.'").

For the reasons stated below, this Court should affirm the circuit court in all respects.

## I. This Court should affirm the circuit court's judgment on the article III, section 3(b)(4) claim. (Addresses Points Relied On I, III–VI)

### A. Response to Point III: The circuit court correctly interpreted that compactness (subdivision (3)) is a higher priority than preserving communities (subdivision (4)), and the circuit court's finding that the Judicial Commission's Final Map was more compact than the Plaintiffs' proposed map was supported by substantial evidence and was not against the weight of the evidence.

**Standard of Review:** This Court reviews a circuit court's interpretation of the Missouri Constitution, including subdivisions (3) and (4) of article III, section 3(b), *de novo*. *See City of Arnold v. Tourkakis*, 249 S.W.3d 202, 204 (Mo. banc 2008). The circuit court's findings of fact in a bench trial like this one are affirmed "unless there is no substantial evidence to support [them]" or they are "against the weight of the evidence." *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. banc 2012) (*Pearson II*).

"The reviewing court cannot review the judgment of a trial court properly under a given standard of review without considering the burden of proof governing the trial court's determination." *Id*. A challenge to a redistricting map is treated as "a challenge to the constitutional validity of a statute." *See id*. For a court to find that a redistricting map is unconstitutional, "the plaintiff must overcome a burden of proof that assumes

constitutional validity." *Id.* It "will not be held unconstitutional unless the plaintiff proves that it 'clearly and undoubtedly contravene[s] the constitution' and 'plainly and palpably affronts fundamental law embodied in the constitution.'" *Id.* Should there be any doubts about the redistricting map's constitutionality, they are "resolved in favor of the constitutionality" of the map. *Id.* "[W]hether the constitutional requirements are satisfied is determined objectively," not based on the Commission's subjective intentions. *Johnson v. State*, 366 S.W.3d 11, 32 (Mo. banc 2012).

An appellate court may "overturn a trial court's judgment under" the "no substantial evidence to support the judgment" standard or "against the weight of the evidence" standard only "when the court has a firm belief that the judgment is wrong." *Id.* "Implicit in th[is] standard[ ] is the recognition that the trial court, in reaching its judgment, is in a better position to determine factual issues than an appellate court reviewing only the record on appeal." *Id.* "The appellate court's role is not to re-evaluate testimony through its own perspective." *White v. Dir. of Revenue*, 321 S.W.3d 298, 309 (Mo. banc 2010).

Additionally, this Court does not reverse the circuit court when the error committed was harmless. Rule 84.13(b) ("No appellate court shall reverse any judgment unless it finds that error … materially affect[s] the merits of the action.").

**Preservation:** Plaintiffs make arguments in the section entitled "Point III" that are not contained in the Point Relied On, and so are waived. Rule 84.04(e) ("The argument shall be limited to those errors included in the 'Points Relied On.'"); *Klotz v. St. Anthony's Med. Ctr.*, 311 S.W.3d 752, 763 n.4 (Mo. banc 2010) (holding that a claim was not preserved for review because it was not "included in the 'Points Relied On'"). In Point III

(the actual point/heading), Plaintiffs argue that the circuit court incorrectly determined the legal standard for compactness. But that is not the only argument Plaintiffs raise in their prose under Point III.

Plaintiffs also argue that the circuit court improperly applied the law to the facts. This was not preserved in the Point Relied On and therefore cannot be a basis for reversal. *See Klotz*, 311 S.W.3d at 763 n.4; Rule 84.04(e). Also not included in the Point Relied On are any arguments about subdivision 3(b)(1), so arguments about subdivision 3(b)(1) in this section are similarly unpreserved. *See Klotz.*, 311 S.W.3d at 763 n.4; Rule 84.04(e).

Finally, Plaintiffs did not preserve the arguments they make in Appellant Brief Part III.C, which argues that the circuit court applied the incorrect standard because (1) it failed to determine whether the remedial districts were "as compact as may be" when accounting for natural and political boundaries and (2) it incorrectly determined that the Plaintiffs' proposed map must be "better" than the challenged maps. *Compare* App.39–40 (argument) *with* App.20 (Point Relied On III). Not only was this argument not contained in Point Relied On III. It also was not preserved in the circuit court, as Plaintiffs cite to no instance in which Plaintiffs either encouraged the circuit court to adopt their version of this standard or argued that the circuit court erred in (allegedly) not using their version of this standard. Plaintiffs could have raised this argument in a motion to amend the judgment, but they did not. Because they did not, it is not preserved. *See* Rule 78.07(b)–(c); *Interest of D.L.S.*, 606 S.W.3d 217, 225 (Mo. App. 2020).

**1. Legal Merits: The circuit court correctly concluded that compactness (subdivision (3)) is a higher priority than preserving communities (subdivision (4)).**

Point Relied On III addresses only the circuit court's Reason 1 for ruling in favor of the Secretary—that "to the extent any political lines were crossed, the Judicial Commission['s Final Map] chose districts that were more compact" than the Plaintiffs' Proposed Map, which is permitted because the Constitution ranks compactness as a higher priority than political subdivisions. D244:p.16.

Under the current redistricting requirements, a court cannot fault the Judicial Commission for choosing a map that prioritized compactness over keeping together two political subdivisions because article III, section 3(b) expressly prioritizes compactness over keeping political subdivisions intact. Plaintiffs claim that the trial court erred when it read subdivision (3)'s compactness priorities as higher priority than subdivision (4)'s community preservation priorities because Plaintiffs argue that subdivision (3) incorporates community preservation, making it the same priority level as compactness. Not so. Several textual cues suggest the opposite.

First, article III, section 3(b) expressly states that its priorities are "listed in order." That means that subdivision (3), which is listed before subdivision (4), is higher priority than subdivision (4). The order in which priorities are listed is particularly important because the Constitution was amended in 2020 specifically to adjust the priority order. That is, the article III, section 3 approved by voters in 2018 listed compactness as the lowest priority, below political subdivisions. A0004–A0005 (Art. III, § 3(c)(1) (2018) (stating

that priorities are listed in order); *id*. § 3(c)(1)(a)–(e) (2018) (listing the priorities)). The current version of article III, section 3 moves compactness to the third highest of five priorities, right above political subdivisions. Art. III, § 3(b)(3) (compactness); *id*. § 3(b)(4) (political subdivisions). This change means something. *See State ex rel. Coleman v. Wexler Horn*, 568 S.W.3d 14, 21 (Mo. banc 2019) (amendment of law presumed to change law's meaning). Plaintiffs would have it mean nothing, which offends textual canons of construction.

Second, subdivision (4) itself expressly states that "communities shall be preserved" "[t]o the extent consistent with subdivisions (1) to (3)." Then subdivision (4) clarifies that there are multiple ways to "satisfy th[e] requirement" of preserving communities, which in turn are listed in order of priority, and some of these methods of preserving communities allow splitting political subdivisions.

Plaintiffs wrongly claim that "a district need not be compact if following political or natural boundaries is the reason it is not." *See* App.36 (emphasis omitted). That is not what subdivision (3) says—it always requires compactness:

> 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). The reference to "natural or political boundaries" in this subdivision means that if natural or political boundaries prevent a district from being square, rectangular, or hexagonal, that does not make the district fail subdivision (3)'s

compactness requirement. Nothing about this analysis makes the circuit court's Reason 1 incorrect.

Subdivision (3) also does not incorporate or operate as lower priority than subdivision (4) due to subdivision (1)'s permissive reference to subdivision (4). Subdivision (1) states that: "Districts shall be as nearly equal as practicable in population," which means that "no district deviates by more than one percent from the ideal population of the district…except that a district *may* deviate by up to three percent if necessary to follow political subdivision lines consistent with subdivision (4)." (Emphasis added). Nothing about this subdivision requires that subdivision (4) be treated as higher priority than subdivision (3). Rather, the reference simply allows the Judicial Commission, in its discretion, to deviate by up to three percent in circumstances addressed by subdivision (4). One cannot read subdivision (4) as a requisite part of subdivision (1) because deviating up to three percent is discretionary, as evinced by used of the word "may."

Finally, Plaintiffs try to embed in Point III a legal argument that the Final Map violates subdivision (1).[7] This claim was not addressed in Point Relied On III, and consequently this Court should not entertain it. *See* Rule 84.04(e). Additionally, this Court should not address this argument because, as the circuit court found, Plaintiffs did not plead an article III, section 3(b)(1) claim. Part II of this brief (below) addresses why the circuit

[7] Plaintiffs argue that "[b]ecause the Judicial Commission chose to draw districts that exceeded a one percent deviation from population, they could only do so" under article III, section 3(b)(1) "if necessary to follow political subdivision lines," but that the Judicial Commission failed to follow this directive. App.38–39.

court correctly determined that Plaintiffs failed to plead an article III, section 3(b)(1) claim and (in the alternative) why such a claim fails on the merits anyway.

**2. Fact Merits: The circuit court's finding that the Judicial Commission's Final Map was more compact than the Plaintiffs' proposed map was supported by substantial evidence and was not against the weight of the evidence.**

As noted in the preservation section above, Plaintiffs' arguments challenging the circuit court's factual findings are unpreserved because they are not included in Point Relied On III. But even if they were preserved, they have no merit.

As this Court noted in *Pearson II*, 367 S.W.3d at 51, "maps could be drawn in multiple ways, all of which might meet the constitutional requirements." Here, this Court should not reverse the circuit court's determination that the Final Map satisfies article III, section 3(b)(4) because Plaintiffs did not prove that the Final Map "'clearly and undoubtedly contravene[s] the constitution' and 'plainly and palpably affronts fundamental law embodied in the constitution." *Id*. at 43.

The circuit court correctly found that the Final Map was more compact than either of the proposed remedial maps. D244:pp.10, 16 ("The evidence at trial confirmed that the enacted [Final] Map was more compact than either of the proposed remedial Maps." (citing D244:¶¶39, 46, 47)). This finding was neither lacking substantial evidence nor against the weight of the evidence. Map compactness was and can be determined by Convex Hull scores, which describes how closely a district resembles a rectangle, hexagon, or square. D244:pp.8, 10; Tr.193:3–194:6. The Convex Hull scores of the Final Map and proposed alternative maps were testified to by the Secretary's expert (Trende), who was the only

expert whose testimony the circuit court found helpful, D244:p.8, as the Plaintiffs' witness (Nicholson) did not understand how the any of the metrics for compactness were calculated or whether the information provided to him by the computer program he used was correct. D244:pp.7–8 (citing Tr.99:14–111:3 and 112:22–116:15); *see also* Tr.116–118.[8] Plaintiffs did not address or rebut the evidence on compactness, as Nicholson stated that he had "no reason to disagree with [Mr. Trende's compactness] analysis of Plaintiffs' Proposed Map." D244:p.21; Tr.83:21–84:4.

Plaintiffs claim that circuit court incorrectly found that the Final Map was more compact than Plaintiffs' Proposed Map because the Secretary's expert testified to multiple compactness measures and "found the scores to be mixed—with some scores favoring one map, but with no indication that any particular map is definitively more mathematically correct." App.40. This argument was not preserved in Point III because it was not included in that Point. To the extent this Court finds that it was preserved, it has no merit.

This argument aims to demonstrate that the circuit court's factual findings about compactness were without substantial evidence or otherwise against the weight of the evidence. Neither is true. The Secretary's expert did testify about different ways that compactness is typically measured in redistricting cases across the country. Tr.178, 192–95. But the Secretary's expert testified that "the Convex Hull score is actually very relevant to what is written in the Missouri constitution because the Missouri Constitution says, generally speaking…a compact district is one that is a square, a hexagon, et cetera" and

[8] *E.g.*, Tr.116:25–117:2 ("Q: You don't know what a Convex Hull score tells you, right? A: I don't. I couldn't give you a precise definition off the top of my head.").

"what the Convex Hull metric does, is it takes a district and…the more your district resembles a square or a rectangle or a hexagon the higher your Convex Hull score is going to be, so in this instance there is a metric that lines up with what the Missouri constitution requires." Tr.193–94. The circuit court used this metric to determine compactness, for which there was substantial evidence and which does not go against the weight of the evidence. For instance, the other two methods for measuring compactness did not measure how close a district was to being a rectangle, square, or hexagon. Tr.194–95 (describing how to measure a Reock score and a Polsby-Popper score). Even Joint Exhibit 27 demonstrates that the Final Map ("Enacted Plan") has on average a higher Convex Hull score (avg: 0.7815) than Plaintiffs' Plan (avg: 0.7742) (calculating the compactness of all measured districts). The same is true if one averages only the challenged Districts 12 and 13 (the same is true for Districts 12 and 14).

Plaintiffs attack the circuit court's analysis on the grounds that allegedly the circuit court (1) should not have required Plaintiffs' map to be "better" than the challenged district maps and (2) failed to conduct an "analysis of whether the remedial districts were 'as compact as may be' when accounting for natural and political boundaries." As noted in the Preservation section, above, neither of these arguments are preserved because they are not included in the text of Point Relied On III, as required by Rule 84.04(e). Plaintiffs also did not make either argument in the circuit court below. But to the extent they are preserved, they have no merit.

With respect to the argument that the circuit court should not have required Plaintiffs' map to be "better" than the challenged district maps, but only constitutional, this

is incorrect. And Plaintiffs know it. They argued that they had to prove a better map could have been drawn in their Opposition to the Motion to Quash. D195:p.3 (arguing that "Plaintiffs have the burden to prove that another map could have been drawn" and that "drawing a better map was 'possible'"). Plaintiffs should be estopped from making the opposite argument on appeal.

Additionally, Plaintiffs argument falsely assumes that the Final Map is unconstitutional. It is not, for the reasons stated in this Brief.

Further, this Court's correctly reasoned case law prevents the circuit court from adopting the Plaintiffs' Proposed Map (or finding that the Final Map was unconstitutional for splitting districts—something the map is allowed to do under subdivision (4)) unless the Proposed Map conformed better to the Constitution than the Secretary's proposed map. *See, e.g.*, *Johnson*, 366 S.W.3d at 32 (holding that a proposed map failed to prove that an enacted map was unconstitutional because there was no evidence that the proposed map took into account required factors like federal law).

Plaintiffs argument also fails to the extent they argue that the circuit court failed to conduct an analysis of whether the remedial districts in the Plaintiffs' Proposed Map were "as compact as may be" when accounting for natural and political boundaries. *See* App.39. This argument wrongly assumes that when districts follow natural or political boundaries perfectly, their compactness score goes up to 1 (100% compact). This is not based in § 3(b)(3)'s text. Section 3(b)(3) requires that "districts shall be … as compact as may be." It also specifies that districts do not become un-compact simply because they are following natural or political boundaries. But this does not make them *more compact* than districts

that are closer to being the shape of one of the approved polygons. In the alternative, even if the circuit court should have adjusted the compactness scores of districts that followed natural or political boundaries, there still is no evidence that the Plaintiffs' map was better than the Final Map (or Secretary's map) with respect to compactness. We do not have evidence that it was, from either expert or any other source, and it is Plaintiffs' burden to prove. Additionally, even if there were evidence that the Plaintiffs' Map was better on compactness than the Final Map, it still is not a constitutionally better map because the trial court correctly found that the Final Map had a lower population deviation than Plaintiffs' proposed map. D244:¶39; Tr.198:16–17, 24–25; 199:1–21.[9]

Assuming the truth of Plaintiffs' argument also does not prove whether Plaintiffs' proposed map was otherwise compliant with federal law or racial gerrymandering questions, which the circuit court correctly found that "no one had reviewed them for." D244:p.19. That is, Plaintiffs' expert refused to testify "yes" when directly asked whether he checked the Proposed Map for compliance with all other constitutional requirements. Tr.124:10–133:16. This is important because, as this Court previously held that the "as compact as may be" language recognizes that there are other factors that affect the ability to draw district boundaries with closely united territory, such as the federal factors referenced in subdivisions (1) and (2). *Johnson*, 366 S.W.3d at 27 (holding that "as

[9] Plaintiffs claim that the Secretary's expert witness did not apply the "as compact as may be" standard from the Constitution, citing Tr.237:18–238:15, but this is not true. The Secretary's expert testified that he applied the "as compact as may be" standard, *as defined by the Plaintiffs*, to the Final Map. Tr.238:18–239:5. Plaintiffs cannot now suggest that the Secretary's expert applied the wrong standard when it was the same one the Plaintiffs espoused.

possible" in redistricting priorities had to be "construed broadly enough to permit consideration of additional [required] factors," such as federal constitutional and statutory requirements, "by a reapportionment commission"); *Pearson II*, 367 S.W.3d at 49 (defining "as compact … as may be" the same way). It is Plaintiffs' burden to demonstrate that any decrease in compactness was not caused by such factors. *Id*. at 30.

Finally, even if Plaintiffs could prove that their map was both more compact and followed all the other constitutional requirements better than the Judicial Commission's map, this does not automatically make the Judicial Commission's map unconstitutional. As the circuit court noted, there are an infinite number of more compact or otherwise "better" maps which can be found if a person runs a computer simulation thousands and thousands of times. D244:p.11. As long as the deviations from the "better" map are "minimal and practical," they do not violate the Constitution, or courts would be re-drawing every redistricting map.[10]

### B. Response to Point IV: The circuit court did not err by using math to determine compactness in accordance with the requirements in article III, section 3(b)(3).

**Standard of Review:** What constitutes "compactness" is a question of constitutional interpretation that this Court reviews *de novo*. *See City of Arnold*, 249 S.W.3d at 204. Whether the circuit court erroneously compared the compactness scores of

[10] Plaintiffs claim that the Secretary's expert testified that "compactness" is a "wishy-washy" requirement, but this is misleading. Trende's testimony was that "compactness" is "wishy-washy" in other states, where compactness is not expressly defined. Tr.238. In Missouri, Trende testified that it was not "wishy-washy" because the Constitution defined it. *Id*.

the Final Map and Remedial Maps is determined *de novo* if the question is whether the correct legal standard was applied. But if the Plaintiffs challenge the circuit court's factual findings, those findings must be upheld if they are supported by substantial evidence and are not against the weight of the evidence. *Pearson II*, 367 S.W.3d at 43.

**Preservation:** Point IV challenges (1) using math to compare the Final Map with the Proposed Maps and (2) "conducting an erroneous comparison, that Plaintiffs' alternative district maps were not as compact as the enacted district maps." App.40. In the Court below, Plaintiffs did not argue (as here) that the compactness language must either literally be a polygon or follow political boundaries, so it is not preserved here. In fact, Plaintiffs' own expert attempted to opine on compactness on the basis of mathematical formulas used by a computer program, so Plaintiffs cannot now object to using such formulas to calculate compactness. D244:p.8; Tr.81:22–82:12. Plaintiffs have not cited where they objected to the use of mathematical formulas for determining compactness in the circuit court, as there is no reference to the correct compactness standard in the only two parts of the Transcript that Plaintiffs cite to: Tr.85:1–18 or 152:3–17. Additionally, Plaintiffs did not argue in the circuit court that the Final Map should have, but did not, expressly explain that compactness takes precedence over political subdivisions, so this argument also is unpreserved.

**1. A court may use math to determine compactness.**

This Point IV is similar to Point III in that it challenges the court's method for demonstrating compactness. This relates to the circuit court's Reason 1 for ruling for the

Secretary, but not the other three reasons. Again, Reason 1 is that: "to the extent any political lines were crossed, the Judicial Commission[ʻs Final Map] chose districts that were more compact" than the Plaintiffs' Proposed Map, which is permitted because the Constitution ranks compactness as a higher priority than political subdivisions. D244:p.16. If this Court relies on any of the other three Reasons, it need not address this argument, as any error would be harmless.

Plaintiffs argue that no mathematical standard can determine compactness. Instead, Plaintiffs argue that compactness is a requirement that the districts must either literally be a polygon or follow political boundaries. This is a subset of the "wishy-washy" argument addressed in Part I.A.2 (footnote 10), above. In any event, Plaintiffs are incorrect.

Compactness is a priority ("as compact as may be"), *see* art. III, § 3(b)(3), but not a hard and fast requirement that districts either be a polygon (straight lines and all) or abandon compactness entirely to follow political boundaries. As discussed in Part I.A.1, above, this Court defines "as compact as may be" as recognizing that there are other factors that affect the ability to draw district boundaries with closely united territory, such as the federal factors referenced in subdivisions (1) and (2). *Johnson*, 366 S.W.3d at 27 (holding that "as possible" in redistricting priorities had to be "construed broadly enough to permit consideration of additional [required] factors," such as federal constitutional and statutory requirements, "by a reapportionment commission"); *Pearson II*, 367 S.W.3d at 48–49 (defining "as compact … as may be" the same way). In short, even though compactness is defined by being a particular shape, the "as compact as may be" standard realizes that

there may be other reasons, like federal requirements referenced in subdivisions (1) and (2), that may require the subdivisions to be less than a perfect polygon.[11]

Plaintiffs then argue that the circuit court's use of the phrase "in general" before describing "compact districts as those which are square, rectangular, or hexagonal in shape" means that persons cannot use a mathematical formula to determine whether a district is "compact." App.40. For similar reasons, Plaintiffs argue that that the circuit court erred in finding that compactness was an objective standard, as they say that neither the Constitution nor Missouri cases have held that there is objective criteria by which to judge compactness. App.41. Plaintiffs' claim is incorrect, as clearly there are constitutional criteria for compactness—compact districts are square, hexagonal, or rectangular, and the districts should be "as compact as may be." Plaintiffs even admit this standard themselves. App.41–42.

Then Plaintiffs suggest that one can only "eyeball" how close a district is to being a square, hexagon, or rectangle, but no one can use math to make this determination. App.42 (alleging "visual observation" is the standard). But there is no reason why a person cannot use math to come up with a more precise measurement for how close a district is to being one of the named polygons in article III, section 3(b)(3). As discussed in Part I.A.2, above, the Secretary's expert testified that the Convex Hull Score measured how close a district was to being one of § 3(b)(3)'s named polygons, and so it lined up with the Missouri

[11] *See also* Part I.A.2.

Constitution's express compactness test. As more fully described in the transcript by the Secretary's expert:

> [W]hat the Convex Hull metric does, is it takes a district and … snaps a rubber band around it so you end up with a polygon, kind of a square or hexagonal shape around the district, and it looks at how much that district that you drew fills up. That [measure] is actually the percentage of the area of that polygon that is filled up by the district you draw. So if you were to draw a perfect square you would be filling up 100 percent of that polygon and you would have a Convex Hull score of 1[, which] means that you are filling up 100 percent of a polygon around that district.

Tr.193:10–20.

Interpreting compactness as subjective would be useless and meaningless, which is disfavored, as the courts favor interpreting all legal provisions as having meaning and not being mere surplusage. *See State ex rel. Dep't of Health & Senior Servs. v. Slusher*, 638 S.W.3d 496, 498 (Mo. banc 2022) ("[E]very word contained in a constitutional provision has effect, meaning, and is not mere surplusage."). Similarly, Plaintiffs' interpretation that one can only "eyeball" a district to determine compactness, but not use math, violates the canon against absurdity. *Id*. at 501 ("Courts should avoid constructions of the Missouri Constitution that are unreasonable or would lead to absurd results."). It is absurd to suggest that a party cannot use math to show or measure something relevant. *See* Mo. Const. art. III, § 3(b)(3) (defining compactness).

**2. The circuit court correctly held that the Final Map better complied with the article III, § 3's constitutional priorities than Plaintiffs' Proposed Map.**

Plaintiffs then claim that there is no Constitutional requirement or Missouri case that has ever held that courts should use a formula for compactness that ignores political

boundaries and subdivisions. App.41. For a fulsome refutation of Plaintiffs' argument here, *see* Part I.A, above.

### 3. The circuit court did not misapply the "as compact as may be" standard.

Plaintiffs claim that the circuit court misapplied the "as compact as may be" standard, which they also challenged in their Point Relied On III (the prose, not the actual Point Relied On). Plaintiffs do not, however, explain the proper understanding of "as compact as may be." As noted in Part I.A.2, "as compact as may be" is defined in *Pearson II* as "a determination of whether there is a departure from the principle of compactness in the challenged district and, if there are minimal and practical deviations, whether the district is nonetheless 'as compact … as may be' under the circumstances." 367 S.W.3d at 48. The "as may be" standard recognizes that there are other factors that affect the ability of a commission to draw compact districts, such as subdivisions (1) and (2), which reference federal constitutional and statutory requirements for redistricting. *Id*. at 49. Thus, "as compact as may be" allows for deviations from compactness if those deviations are due to mandatory or permissive constitutional factors. *Id*. at 51.

### 4. The Final Map did not have to expressly explain that compactness takes precedence over political subdivisions.

Plaintiffs claim that the Final Map did not explain that compactness takes precedence over political subdivisions and therefore assume the Judicial Commission did not believe this. But Plaintiffs cite no authority in the Constitution or case law that would require the Judicial Commission to state this. Rather, the Constitution sets forth an

exclusive list of what the Judicial Commission must disclose. *See* Mo. Const. art. III, § 7(f) ("The judicial commission shall make public the tentative redistricting plan and map of the proposed districts, as well as all demographic and partisan data used in the creation of the plan and map."). Under the *expressio unius* canon of construction, when a law lists out specific items, as here, the expression of these items implies the exclusion of other items. *See Harrison v. MFA Mut. Ins. Co.*, 607 S.W.2d 137, 146 (Mo. banc 1980). Thus, because there is no Constitutional requirement that the Final Map explain that compactness takes precedence over political subdivisions or explain what compactness measures it used, this Court should not fault the Judicial Commission or adversely infer anything for its decision not to include such information in the Final Map.

Further, even if Plaintiffs' arguments in this section succeed, there are also three other reasons this Court should affirm the circuit court. For this reason, this Court should affirm the circuit court.

### C. Response to Point I: The circuit court used the proper standard to address Plaintiffs' article III, section 3(b)(4) claim.

**Standard of Review:** Plaintiffs have the burden of proving that the Final Map is unconstitutional. *Pearson II*, 367 S.W.3d at 45 ("Plaintiffs have the burden of proof at all times."). To do so, Plaintiffs must show that the map "clearly and undoubtedly" contravenes the constitution. *Id*. at 43. Ambiguities and doubts are construed in favor of finding the map constitutional. *Id*. Whether facts about the map, as found by the circuit court, violate the constitution, is an application of law to fact that this Court reviews *de novo*. *See Singleton v. Singleton*, 659 S.W.3d 336, 341 (Mo. banc 2023). However, to the

extent Plaintiffs are challenging the circuit court's factual findings, those are reviewed for lack of substantial evidence or for whether they are against the weight of the evidence. *Pearson II*, 367 S.W.3d at 43.

Whether the so-called "reasonableness" standard that Plaintiffs allege the circuit court applied is the proper standard is a question of law this Court reviews *de novo*. *See Singleton*, 659 S.W.3d at 341. This Court also reviews whether the circuit court actually applied such a standard *de novo*, as this too is a question of law. *Id*. However, this Court does not reverse if the error committed was harmless. Rule 84.13(b).

**Preservation:** Plaintiffs' argument that the trial court erred when it allegedly applied a "reasonableness" standard is not preserved, as the argument was not made before the trial court. Plaintiffs could have, and were required to, file a motion to amend to preserve the arguments in this Point Relied On, but did not. *See* Rule 78.07(b)–(c); *Interest of D.L.S.*, 606 S.W.3d at 225.

* * *

Plaintiffs tell this Court that they want this Court to apply the language of article III, section 3, but then go and make up their own four "steps" rather than using the "priorities" actually set forth in the Constitution. *See* App.24; Mo. Const. art. III, § 3(b). This Court should follow the actual text of the Constitution.

**1. The circuit court's "reasonableness" language is not responsible for the outcome of this case, so any alleged error is harmless.**

Whether or not the circuit court's "reasonableness" language was correct or not, it is not responsible for this case's outcome. Thus, any alleged error is harmless, and this

Court should affirm the circuit court regardless of what it thinks about the "reasonableness" language. Rule 84.13(b).

As noted in the Introduction, the circuit court determined that the Plaintiffs failed to bear their burden of proving the Final Map unconstitutional for *four independent reasons*:

1) "to the extent any political lines were crossed, the Judicial Commission['s Final Map] chose districts that were more compact" than the Plaintiffs' Proposed Map, which is permitted because the Constitution ranks compactness as a higher priority than political subdivisions. D244:p.16.
2) Even if the Judicial Commission's Final Map was not more *compact* than the Plaintiffs' Proposed Map, it did have a lower population deviation, which is first priority under § 3(b)(1). D244:p.16.
3) Even if the above two conclusions were not true, Plaintiffs failed to demonstrate that "any minimal and practical deviation" from what Plaintiffs claim is optimal "does not result from application of recognized factors that may have been important considerations in the challenged map"—for instance, federal laws. D244:pp.19–20 (citing *Johnson*, 366 S.W.3d 11).
4) Even if the above three conclusions were not true, Plaintiffs failed to demonstrate that their Proposed Map, which they claim better complied with the Constitution than the Final Map, satisfied the other constitutional requirements such as compliance with federal law, as required by article III, sections 3(b)(1) and 3(b)(2). D244:p.19.

Where does the circuit court's "reasonableness" language fit in with any of these arguments? It does not at all. The circuit court mentions reasonableness three times—two of the three times saying the same thing:

- "Moreover, the Constitution does not require numerical precision or any other kind of perfection from the redistricting commissions…. The evidence clearly shows that to the extent there is any perceived imperfection in the Senate Map, the choices made by the Judicial Redistricting Commission are *reasonable*."

D244:p.17 (cross-referencing D244:¶¶41–43).

- "Trende explained why it was *reasonable* to split Hazelwood: splitting more populous municipalities allow map drawers to more easily achieve equal population criteria."

D244:p.18 (cross-referencing D244:¶43, which references Trende's testimony at Tr.204:14–17 and 207:8–12).

- "Trende explained why it was *reasonable* to split Hazelwood: splitting more populous municipalities allow map drawers to more easily achieve equal population criteria."

D244:p.20 (cross-referencing D244, ¶ 43, which references Trende's testimony at Tr.204:14–17 and 207:8–12).

These statements are not clearly doing any work with respect to any of the *four independent reasons* the circuit court ruled in the Secretary's favor. They may be an independent reason the circuit court used as a fifth reason to affirm the judgment, and they may provide context for the Commission's choices, but they are not in any way required for this Court to affirm. There are four other bases for doing so.

**2. In the alternative, "reasonableness" means the same thing as "discretion," which even the Plaintiffs admit the Judicial Commission gets when drawing a map.**

In the alternative, there is no reason to believe that "reasonableness" means anything more than "discretion" which Plaintiffs admit that the Judicial Commission is entitled to in drawing the map for all but mandatory constitutional requirements. App.26. Indeed, during the trial, the Secretary used "discretion" and "reasonableness" interchangeably. Tr.199:22–200:3.

Perhaps this whole line of argument comes from Plaintiffs' incorrect notions about what Constitutional provisions are mandatory and which are discretionary. For instance, Plaintiffs sometimes seem to suggest that the Judicial Commission cannot split cities or counties, which is incorrect. Section 3(b)(4) sets forth when and how they can be split. Plus, cities and counties can be split to support a higher-order priority, as section 3(b)(4) provides when it states that "communities shall be preserved" "[t]o the extent consistent with subdivisions (1) to (3) of this subsection." Plaintiffs also misleadingly refer to five "redistricting requirements," App.25, when the Constitution itself refers to them as "priorit[ies]," of which some are mandatory while others are discretionary. *See* Mo. Const. art. III, § 3(b)(1)–(5). Other times, Plaintiffs incorrectly refer to the "priorities" as "steps" instead of "methods." App.25; Art. III, § 3(b). And Plaintiffs do not seem to grasp that the Constitution purposely lists the priorities in order, from highest priority (federal constitutional and statutory rights in subdivisions (1) and (2)) to lowest priority, and that according to the Constitution, the three lowest priorities can be overridden by higher

priorities. *See, e.g.*, Mo. Const. art. III, § 3(b)(3), (b)(4), (b)(5) (using "[s]ubject to," "[t]o the extent consistent with," and "[other subdivisions] shall take precedence over," in reference to higher priorities).

In short, this Court should affirm for the four independent bases the circuit court used to rule for the Secretary, and it should not get too caught up in the circuit court's use of the word "reasonable," which is doing no work in determining who prevails.

### D. Response to Point V: The circuit court correctly assigned the burden of proof to Plaintiffs and correctly interpreted that burden.

**Standard of Review:** What burden of proof applies to Plaintiffs at trial is a legal question that this Court reviews *de novo*. *See, e.g.*, *Pearson II*, 367 S.W.3d at 46–47 (reviewing the burden of proof as a legal question, without any deference). Whether the circuit court applied the correct burden of proof at trial is a legal question that this Court reviews *de novo*. *Singleton*, 659 S.W.3d at 341 (application of law to facts reviewed *de novo*).

**Preservation:** It is not clear where in the trial court transcript or elsewhere the Plaintiff preserved the burden issue. In fact, Plaintiffs admitted at trial that they had the burden of proof. Tr.163:23–25 (C. Hatfield: "I understand that we have the burden of evidence, which I think we've covered."). To the extent Plaintiffs are arguing that they should not have been assigned the burden of proof, they should be estopped from making such an argument based on their prior admission.

Additionally, Point V lists only one error (relating to the burden to show that "any minimal and practical deviation from population equality or compactness in a district does

not result from application of recognized factors that may have been important considerations in the challenged map"), but the prose under Point V in the Appellants' Brief argues a second error that is unpreserved because it does not appear in Point Relied On V. Rule 84.04(e). The second, unpreserved argument is that the trial court erred when it held that "Appellants failed to produce evidence establishing that any other map achieved [Appellants'] goals without violating any other provision of the constitution." This is a separate and independent basis on which the circuit court ruled in favor of the Secretary. *See* Part I.C.1, above. This argument is unpreserved because it is not contained in Point Relied On V.

**1. The circuit court correctly held that Plaintiffs had the burden to show that "any minimal and practical deviation from population equality or compactness in a district does not result from application of recognized factors that may have been important considerations in the challenged map."**

First, understand the nature of the Plaintiffs' argument here. This argument addresses only one of the four *independent* bases on which the circuit court ruled for the Plaintiffs (Reason 3). If this Court intends to rely on one of the other three bases, it need not even address this argument, as any error would be harmless. Rule 84.13(b).

On the merits, Plaintiffs claim that, assuming they have a map that is more compact than the Final Map (there is no evidence that they do, *see* Part I.A.2), they should not have to prove that "any minimal and practical deviation from … compactness in a district [in the Final Map] does not result from application of recognized factors that may have been important considerations in the challenged map." App.46. Plaintiffs have a tough sell on

this argument because this standard comes from this Court's case law in *Johnson* and *Pearson II*, 2012 cases. *Johnson*, 366 S.W.3d at 30; *Pearson II*, 367 S.W.3d at 48. Plaintiffs claim that *Johnson* shouldn't apply because the constitutional rules for redistricting were different in 2012, and Plaintiffs claim that those rules did not explicitly list the factors that mapmakers must consider when redistricting (whereas the current rules do). Even if true, this fact does not support tossing the *Johnson* and *Pearson II* burden.

The 2012 (House) redistricting standard stated that:

> The commission shall reapportion…by dividing the population of the state by the number one hundred sixty-three and shall establish each district so that the population of that district shall, as nearly as possible, equal that figure. Each district shall be composed of contiguous territory as compact as may be.

A0002 (Mo. Const. art. III, § 2 (1982)). The current standard states:

> 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) (current).

Plaintiffs' argument actually cuts the other way. The standard "as compact as may be" appears in both the 2012 and the current standard. *Pearson II*, 367 S.W.3d at 48 (applying the burden to a challenge to "as compact as may be"). The fact that the current redistricting standards expressly set forth what other standards to take into account—specifically the federal requirements in subdivisions (1) and (2)—make it even more important that Plaintiffs demonstrate that subdivisions (1) and (2) were not the reasons for an allegedly lower compactness score in the Final Map.

Putting the burden of proof on Plaintiffs, which Plaintiffs admitted to having at trial, Tr.163:23–25, is consistent with how this Court reviews redistricting plans and statutes similarly. *Pearson II*, 367 S.W.3d at 43. Courts assume both are constitutional until proved to "clearly and undoubtedly" violating the Constitution. *Id*.

**2. The circuit court correctly held that Plaintiffs had to prove that their Proposed Map achieved Plaintiffs' goals without violating any other constitutional provision.**

Plaintiffs next argue that the circuit court erred in determining that Plaintiffs needed to "produce evidence establishing that any other map achieved [Plaintiffs'] goals without violating any other provision of the constitution" before it found that the Plaintiffs' map proved the Final Map unconstitutional. App.47 (cleaned up). As noted in the preservation section, above, this Court should not review this argument because it is not fairly included in Point Relied On V. Additionally, this argument addresses only one of the four independent reasons on which the circuit court ruled for Plaintiffs. Thus, unless this Court finds against the Secretary on the other three independent bases, there is no reason to even address the question raised in this section. Any error would be harmless. Rule 84.13(b).

But if this Court disagrees and addresses this section, it should affirm the circuit court's placement of this burden on Plaintiffs. *See, e.g.*, *Johnson*, 366 S.W.3d at 32 (holding that a proposed map failed to prove that an enacted map was unconstitutional because there was no evidence that the proposed map took into account required factors like federal law). This burden makes sense. Plaintiffs' real claim is not that a map can never split a political subdivision, but that it cannot do so when there is a way not to. If

the Plaintiffs are trying to prove that there is a way not to split a political subdivision, they should have to show that the rest of their proposed map is also constitutional.

### 3. The circuit court did not lack substantial evidence, or find facts against the weight of the evidence, when it found that Plaintiffs "presented no evidence establishing that any other map achieved Plaintiffs' goals without violating any other provision of the constitution."

Finally, Plaintiffs argue that the circuit court erred when it found that Plaintiffs "presented no evidence establishing that any other map achieved Plaintiffs' goals without violating any other provision of the constitution." App.50–51. As noted above, this argument was not preserved in Point Relied On V, and this Court should not address it for that reason.

In the alternative, it has no merit. First note that this argument only attacks one of the circuit court's four bases for ruling in the Secretary's favor (Reason 4). Thus, if this Court intends to affirm the circuit court on the basis of any of the three other bases, it need not address this argument, as any error would be harmless. Rule 84.13(b).

To prevail on this argument, Plaintiffs must also show that the disputed factual finding lacks substantial evidence or goes against the weight of the evidence, with deference given to the circuit court's factual findings. *Pearson II*, 367 S.W.3d at 43. They cannot do so here. Plaintiffs claim that their witness addressed this issue and testified that he drew a map using "all the criteria that are in the constitution." App.51 (citing Tr.76:9–77:2). Plaintiffs get the citation wrong. *See* Tr.77:16–17. But this was not the only testimony on that point, and the circuit court was free to disbelieve earlier testimony in

light of later testimony that contradicted it. *Zink v. State*, 278 S.W.3d 170, 192 (Mo. banc 2009) ("As the trier of fact, the trial court … is free to believe or disbelieve all or part of the witnesses' testimony."); *Exchange Bank of Missouri v. Gerlt*, 367 S.W.3d 132, 136 (Mo. App. 2012) (same). On cross-examination, Plaintiffs' witness was asked numerous times about whether any other map complied with all constitutional requirements, and Nicholson repeatedly refused to affirmatively answer "yes" to that question. Tr.124:10–133:16. The circuit court certainly had substantial evidence (and it was not against the weight of the evidence) for its conclusion that Nicholson did not determine whether any map, including Plaintiffs' Proposed Map, affirmatively complied with other constitutional requirements, such as subdivisions (1) and (2).

Plaintiffs also claim that the Secretary's expert agreed that it was possible to draw a map that did not divide Hazelwood that also complied with all of the other article III, section 3 factors. App.51. This does not establish that the Final Map was unconstitutional. For instance, it is possible for another map to be constitutional and not to split a municipality, but not follow the priorities *as well as* the Final Map did. This could happen, for instance, if the proposed map was within the permitted ranges for subdivision (1)'s population requirement, but the Final Map was even closer to having equal population between districts. Under the Missouri Constitution's priorities in article III, section 3, courts cannot fault a redistricting commission for choosing to prioritize what the Constitution lists as a higher priority like equal population (Priority 1) over a lower priority like splitting political subdivisions (Priority 4). Plaintiffs point to no evidence demonstrating that the map Trende was referencing better followed the Constitution's

priorities than the Final Map in all respects. In fact, the circuit court found the opposite about the Secretary's proposed remedial map, finding that it was less compact than the Final Map. D244:p.16. Because compactness is a higher priority than keeping political subdivisions together, Judicial Commission cannot be faulted for choosing compactness over strictly following the boundaries of two political subdivisions in the entire state. For these reasons, Plaintiffs cannot demonstrate that the Final Map is unconstitutional, as discussed in Part I.D.2, above.

Further, and independently, even if Plaintiffs *could have* pointed to a map that was better at every level than the Final Map, this does not necessarily make the Final Map unconstitutional, as the Final Map may still comply with the constitutional requirements, even if it is less "perfect" than a later map. The circuit court found that there are an infinite number of constitutional maps that could be better than the Final Map, and that one could find them if they ran computer simulations thousands of times. D244:p.18. And maps better than those could be found if those simulations were run tens of thousands of times. *Id*. And maps better than those could be found if those simulations were run hundreds of thousands of times. *Id*. Interpreting the Missouri Constitution to require the literal best map would cause endless litigation. Over the course of ten years between census data, districts could be challenged time and time again on the basis that a new and better map had been found. The circuit court correctly determined that this reading was incorrect. *Id*. Indeed, it is absurd, and this Court disfavors constitutional interpretations that are absurd. *Slusher*, 638 S.W.3d at 500–01.

### E. Response to Point VI: The circuit court correctly determined that Plaintiffs did not meet their burden to establish that "any minimal and practical deviation from population equality or compactness does not result from application of recognized factors that may have been important considerations in the challenged map."

**Standard of Review:** Plaintiffs argue that the circuit court erred when it found that Plaintiffs did not meet their burden to establish that "any minimal and practical deviation from … compactness in a district [in the Final Map] does not result from application of recognized factors that may have been important considerations in the challenged map" because the evidence was uncontroverted that there was no other redistricting factor that *required* splitting Buchanan County or the City of Hazelwood. App.50. The proper legal standard for establishing that "any minimal or practical deviation … in a district does not result from application of recognized factors that may have been important considerations" is a question of law that this Court reviews *de novo*. *Singleton*, 659 S.W.3d at 341. The circuit court's factual findings are reviewed for substantial evidence and to make sure they are not against the weight of the evidence, a deferential standard. *Pearson II*, 367 S.W.3d at 43. Application of the proper standard to the facts is a legal question reviewed *de novo*. *Singleton*, 659 S.W.3d at 341.

Plaintiffs' standard of review section assumes that there was, in fact, uncontroverted evidence and assumes the relevance of that allegedly uncontroverted evidence, which is incorrect. *See* below.

**Preservation:** The error alleged in Point Relied on VI occurred for the first time in the Judgment. Because Plaintiffs did not file a motion to amend the judgment on the basis of the allegedly uncontroverted evidence, Plaintiffs have not preserved this issue for

appellate review. *See* Rule 78.07(b)–(c); *Interest of D.L.S.*, 606 S.W.3d at 225. Plaintiffs wrongly claim that they preserved this issue because they provided evidence to support the correct standard on the application of the burden of proof at trial (which was not the same as the one the circuit court applied). This is not the same argument Plaintiffs are now making on appeal—that the circuit court wrongly found that Plaintiffs did not meet the burden the circuit court applied, regardless whether it was correct in the first place.

**1. Plaintiffs incorrectly assume that the only reason the Final Map could have split a county or a city is if a constitutional factor required it.**

Plaintiffs claim that they met their burden to establish that "any minimal and practical deviation from population equality or compactness in a district does not result from application of recognized factors that may have been important considerations in the challenged map" because the evidence was uncontroverted that there was no other redistricting factor that required splitting Buchanan County or the City of Hazelwood. But this argument incorrectly assumes that the only reason the Final Map could have split a county or a city is if there was a constitutional factor that *required* it. Not so. The question is not whether a constitutional factor *required* splitting those two subdivisions. The question is whether it violated the Missouri Constitution to split them, which it did not for the Reasons 1 and 2 relied on by the circuit court. Specifically, these two subdivisions were split because the Judicial Commission legitimately chose to focus on higher constitutional priorities, like compactness and equal population. The circuit court correctly found that Plaintiffs did not prove that the Final Map's splits lacked a higher purpose—

prioritizing either mandatory or permissive higher-priority factors. D244:pp.19–20; *see also* Part I.D.3. As noted in *Pearson II*, there are many constitutional ways to draw a map—not just one. 367 S.W.3d at 51 ("[M]aps could be drawn in multiple ways, all of which might meet the constitutional requirements.").

**2. The alleged evidence was not unconstested.**

Further, the alleged evidence that Plaintiffs reference was not uncontested. Uncontested evidence occurs when "the issue before the trial court involves *only* stipulated facts and does not involve resolution by the trial court of contested testimony" or when "a party has admitted … the basic facts of the other party's case" "in its pleadings, by counsel, or through the party's individual testimony." *White*, 321 S.W.3d at 308 (internal quotation marks and brackets omitted, emphasis added). Plaintiffs failed to show uncontested testimony here. Plaintiffs' citation backing up its claim of uncontested evidence is a citation of Plaintiffs' counsel's statements. App.51 (citing Tr.163–164). Even if Plaintiffs could cite the statements of the Secretary's expert, that is not sufficient for uncontested testimony under *White* because an expert is not the Party. Thus, the evidence is not uncontested, and the circuit court's findings were entitled to deference (no substantial evidence or against the weight of the evidence). *See Pearson II*, 367 S.W.3d at 43.

Further, even if Plaintiffs' expert claimed that he was able to draw a map that did not divide two political subdivisions, the circuit court correctly found that the Plaintiffs' witness did not check to make sure that map followed all other constitutional requirements, which is required before the circuit court invalidates a Final Map. Part I.D.3. In fact, the

circuit court correctly found that Plaintiffs' witness did not know what the map-drawing program's calculations and numbers signified, so the circuit court consequently found that his testimony was unhelpful. D244:pp.7–8 (citing Tr.99:14–111:3 and 112:22–116:15); *see also* Tr.116–118. Testimony that is unhelpful cannot be the basis of finding "uncontested" evidence.

Similarly, the fact that the Secretary's expert was able to draw a map that did not cross Hazelwood's municipal lines does not mean that the map drawn by the Judicial Commission violated the Missouri Constitution. *See* Part I.D.3; *Pearson II*, 367 S.W.3d at 51 ("[M]aps could be drawn in multiple ways, all of which might meet the constitutional requirements."). Plaintiffs wrongly claim that they don't have to show that the remedial map is better than the Judicial Commission's map or that it complies with all other constitutional requirements. *See* Parts I.D.1 and I.D.2. Plaintiffs also claim, in the alternative, that all they have to show is that all federal laws and other recognized factors did not affect the Final Map's district boundary. App.51. That is not correct—there are four reasons that the circuit court held that the Secretary prevailed, not just one. But even if Plaintiffs were correct, the circuit court found that they did not make this showing, which was supported by substantial evidence and was not against the weight of the evidence. D244:pp.19–20; Part I.D.1.

Finally, the Plaintiffs claim that *Pearson II* does not apply, or should be revisited (read: overruled). App.52–53. Plaintiffs do not claim here that *Pearson II* should not apply to compactness, but to deviations from keeping subdivisions together. But the rationale behind *Pearson II*'s burden of proof applies equally to § 3(b)(4) because § 3(b)(4) contains

language stating that districts shall follow subdivision lines "to the extent possible," which is akin to the "as may be" standard, and is basically the same as the standard in *Johnson*, 366 S.W.3d at 32 (applying the same standard as *Pearson II* to constitutional provision requiring "as nearly as possible, equal"). Thus, *Pearson II*'s (and *Johnson*'s—they are the same) burden of proof applies to § 3(b)(4).

Plaintiffs then claim that *Pearson II* should be overruled because it makes it nearly impossible to succeed in a redistricting challenge. The rule in *Pearson II* was not impossible to succeed under in 2012, but it is even *more possible* to succeed under now. The main complaint Plaintiffs raise about *Pearson II* is that it did not list out "what the [other] factors mean or how they relate to a plaintiff's burden." App.53. Under the new article III, section 3(b) requirements, which more specifically set forth the priorities that are higher order than keeping communities together, this is unlikely to be a problem. Proving that deviations from keeping political subdivisions together have not resulted from application of recognized factors that may have been important constitutional considerations is likely limited to those priorities listed in article III, section 3(b). No one is playing hide-the-ball here.[12]

**3. In the alternative, if the Court holds that the Judicial Commission's Final Map violates the Missouri Constitution, this Court should adopt the Secretary's Proposed Map, which is better than Plaintiffs' Proposed Map based on the**

[12] Additionally, Plaintiffs are confusing impossibility for improbability. Some challenges will be necessarily unlikely to succeed because some parts of article III, section 3(b) permit the judicial commission to use its discretion.

**priorities in art. III, § 3(b) and makes fewer changes, as required by art. III, § 7(i).**

In the alternative, if the Court invalidates the Final Map for any reason, this Court should adopt the Secretary's Proposed Map, which is better than Plaintiffs' Proposed Map based on the Constitutional Requirements and makes fewer changes. The Missouri Constitution states that "[i]f the court renders a judgment in which it finds that a completed redistricting plan exhibits the alleged violation, its judgment shall adjust only those districts, and only those parts of district boundaries, necessary to bring the map into compliance." Mo. Const. art. III, § 7(i). The Secretary's Proposed Map better complies with the Missouri Constitution than Plaintiffs' Proposed Map. Not only did the circuit court find that no one determined whether the Plaintiffs' Proposed Map met all other constitutional requirements. D244:p.19. The Secretary's Proposed Map did meet all the other constitutional requirements. Tr.164:7–25 (Plaintiffs' counsel admitting the same). Additionally, the circuit court found—and Plaintiffs did not challenge this finding on appeal—that the Plaintiffs' Proposed Map favored keeping political subdivisions together at the expense of compactness, which was a lower constitutional priority. D244:p.10. And finally, the circuit court found—and Plaintiffs do not challenge this finding on appeal—that the Secretary's Remedial Map better complies with the Missouri Constitution than the Plaintiffs' Proposed Map, to the extent that any alternative map would need to be developed. D244:p.10. If any remedial map needs to be adopted, it should be the Secretary's Proposed Map, not Plaintiffs'.

## II. Response to Point II: This Court should affirm the circuit court's judgment on the article III, section 3(b)(1) claim.

**Standard of Review:** Whether Plaintiffs pleaded an article III, section 3(b)(1) claim is an application of the law to the facts, which is reviewed *de novo*. *Singleton*, 659 S.W.3d at 341. Whether Plaintiffs tried by consent an article III, section 3(b)(1) claim (given the facts) is an application of law to facts that is reviewed *de novo*. *Id*. However, any facts found by the circuit court are reviewed for lack of substantial evidence and for being against the weight of the evidence. *Pearson II*, 367 S.W.3d at 43. The legal requirements of article III, section 3(b)(1) is a legal question that this court reviews *de novo*. *See City of Arnold*, 249 S.W.3d at 204.

**Preservation:** Appellants themselves admit that they "were not challenging population equality or compactness" of the Final Map at trial. App.47. This is an admission that should prevent the Court from addressing this Point Relied On to the contrary. Further, this claim was not preserved because the alleged error appeared for the first time on issuance of the judgment, and Plaintiffs did not file a motion to amend the judgment to preserve the issue, as they must to preserve it. Rule 78.07(b)–(c); *Interest of D.L.S.*, 606 S.W.3d at 225. For instance, in *D.L.S.*, a father's "first point relied on argue[d] that the trial court inappropriately considered Father's emotional bond with the Children in the analysis of whether a statutory basis for termination existed under" the statute and in violation of a particular case. *Id*. at 224. "This claimed error necessarily arose, for the first time, upon issuance of the Judgment." *Id*. "Yet there is nothing in the record to indicate that Father ever advised the trial court of its alleged error." *Id*. The court held that Rule

78.07(b) required Father to present this error to the trial court in a post-trial motion to preserve it. *Id*. at 225. When he did not, he "waived the opportunity to present the error on appeal." *Id*.; *see also Williams v. Williams*, 669 S.W.3d 708, 717 (Mo. App. 2023) ("In a case tried without a jury, a motion for a new trial or a motion to amend the judgment is not required to preserve an issue for appellate review 'if the matter was previously presented to the trial court," but "such motions are necessary when, as here, the matter was **not** presented to the trial court." (emphasis in original)); *Interest of A.M.R.*, 673 S.W.3d 864, 875–76 (Mo. App. 2023) (listing examples). The same is true here.

This Point Relied On is not preserved also because the constitutional issue it raises was not raised at the first opportunity in the method that this Court requires. This Court requires that:

> to properly raise and preserve a constitutional challenge, a party must: (1) raise the constitutional question at the first available opportunity; (2) designate specifically the constitutional provision claimed to have been violated, such as by explicit reference to the article and section or by quotation of the provision itself; (3) state the facts showing the violation; and (4) preserve the constitutional question throughout for appellate review.

*Fowler v. Missouri Sheriffs' Ret. Sys.*, 623 S.W.3d 578, 582 (Mo. banc 2021). Plaintiffs failed to raise the constitutional challenge to article III, section 3(b)(1) in their petition (or amended petition), which was the first opportunity they had to do so. Not only was the issue not raised (as required by *Fowler* Requirement 1). *Id*. The issue also was not designated specifically either—indeed 3(b)(1) was never mentioned in either the petition or amended petition and its language was never quoted in a way that told the circuit court that the Final Map was being challenged on these grounds. *Id*. Nor did Plaintiffs state the

facts showing the alleged violation in the petition or amended petition, as required. *Id*. Nor was the constitutional question preserved throughout for appellate review. *Id*.; D244:p.17 (citing Tr.161:15–19). For instance, the circuit court noted in its Judgment p.17 (D244) that "[w]hen Defendant moved for judgment after plaintiffs rested, plaintiffs did not dispute that their case was limited to the contention that the enacted Senate Map fails to comply with "subdivision (b)(4) of Article III, section 3." *See also* Tr.160:25–161:5 (State arguing that population deviations up to 3% are acceptable); Tr.162:21–165:17 (Plaintiffs' response, which did not include any argument that population deviations could not exceed 1% in the Final Map). Additionally, Plaintiffs' counsel expressly admitted at trial that the issue raised was solely about factor (4). Tr.163:20–25 ("More importantly, the issue here is—I mean…it is not about any of the factors except number (4)."). The article III, section 3(b)(1) argument was a sleeper constitutional issue not pleaded in the petition or amended petition. Because it was not pleaded as constitutional issues must be pleaded, and at the first opportunity, it cannot be challenged on appeal.

**A. The circuit court rightly determined that Plaintiffs neither pleaded an article III, section 3(b)(1) claim nor tried it by consent.**

The circuit court rightfully determined that Plaintiffs neither pleaded an article III, section 3(b)(1) claim nor tried it by consent. As noted above in the Preservation section, constitutional claims must be made expressly at the first available opportunity—here, in the petition or amended petition, which Plaintiffs did not do. On this basis alone, this Court should affirm the circuit court's holding that Plaintiffs did not plead an article III, section

3(b)(1) claim, which as a constitutional claim, effectively has a higher pleading standard. *Fowler*, 623 S.W.3d at 582.

Plaintiffs also did not plead this claim under normal pleading standards. Plaintiffs claim they did, citing *Thomas v. City of Kansas City*, 92 S.W.3d 92, 96 (Mo. App. 2002). But the reference they use from *Thomas* is about whether a petition should be *dismissed* when "the factual allegations seem more consistent with something other than plaintiff's stated legal theory." *Id*. This is a standard for surviving a motion to dismiss, not for pleading and preserving a constitutional claim. In fact, *Thomas* cuts against Plaintiffs' argument because it also addresses the pleading standard, which Plaintiffs did not satisfy. According to *Thomas*, the typical (non-constitutional-claim) pleading standard is that the petition must "contain the necessary allegations to advise the defendant of the claim and the relief demanded." *Id*. As noted in the Preservation section above, the Secretary was not advised of the claim because nothing in the complaint referenced a 3(b)(1) alleged violation. Everything pointed to a 3(b)(4) alleged violation. The standard in *Thomas* is the same as this Court's non-constitutional pleading standard. This Court has held that "[t]o the extent that [a] judgment goes beyond the pleadings, it is void." *Smith v. City of St. Louis*, 395 S.W.3d 20, 24 (Mo. banc 2013). Further, "[t]he purpose of a pleading is to limit and define the issues to be tried in a case and [to] put the adversary on notice thereof." *Id*. As noted, here, the only issue the pleadings could have fairly put the Secretary on notice of is the § 3(b)(4) claim.

The circuit court rightly determined that that issue also had not been tried by express or implied consent. First, Plaintiffs cite to no authority that an unpreserved constitutional

claim not raised at the first available opportunity somehow becomes preserved because it was tried by consent. But even if that was the rule, the article III, section 3(b)(1) claim was not tried by consent here.

The Secretary never expressly consented to trying the § 3(b)(1) issue because the "parties did not expressly agree to try" it. *See City of St. Joseph, Mo. v. St. Joseph Riverboat Partners*, 141 S.W.3d 513, 516 (Mo. App. 2004). Indeed, as in *City of St. Joseph*, "the transcript of the parties' arguments before the trial court makes clear that the issues before the trial court were" limited to § 3(b)(4). Tr.163:20–25 ("Plaintiffs' counsel stating that "the issue here is—I mean…it is not about any of the factors except number (4)."); Tr.160:4–162:19 (State moving for a directed verdict on the whole case solely on the basis that Plaintiffs had not shown a violation of "subdivision (b)(4) of Article III, Section 3").

The Secretary also never implicitly consented to trying the § 3(b)(1) issue. "It is the burden of the party contending that an issue was tried by implied consent to demonstrate implied consent." *Smith*, 395 S.W.3d at 25. "The doctrine of trial by implied consent provides that issues not raised by the pleadings may be determined by the trial court when evidence is offered, without objection by any other party, bearing solely on that issue." *Id*. "The evidence offered must relate only to the proposed new issue, without bearing upon other issues in the case." *Id*. Like in *Smith*, "[g]iven the complexity" of the redistricting process and rationale for the same, "there are innumerable" reasons that a party might introduce the evidence that Plaintiffs also would use to support their § 3(b)(1) claim.

The § 3(b)(1) claim is that the Final Map violated that subdivision because certain districts had population deviations of more than 1% (but less than 3%), and that those deviations were made for reasons other than following subdivision lines. The evidence that Plaintiffs would have used to support that claim would have been evidence about how much certain districts in the Final Map deviated from the optimal district population. But this information also related to whether the Final Map had prioritized a higher order constitutional priority over a lower order one. Further, it related to whether Plaintiffs properly bore their burden to prove that "any minimal and practical deviation from … compactness in a district does not result from application of recognized factors [such as population equality] that may have been important considerations in the challenged map." *See* Part I.D.1.

Plaintiffs argue that their counsel argued about the equal population requirement during his opening statement. But opening statements are not "evidence," *State v. McFadden*, 369 S.W.3d 727, 747 (Mo. banc 2012), and so cannot be a basis for trying an issue by implied consent per *Smith*, which requires "evidence." 395 S.W.3d at 25. Plus, the opening statement here did not state that Plaintiffs were trying a violation of subsection (1).

Plaintiffs also argue that the issue was tried by consent because their witness testified that:

> The constitution is very clear that under these circumstances you can—you've got to keep the deviation under 1 percent and if you want to go to 3 percent, per the other conditions, so the final column is what I would have spent most of the time looking at in drawing and evaluating plans, which is, you know, are any of these

> more than 3 percent in absolute terms, and then of the ones that are more than 1 percent, do they follow the community boundaries as outlined in the constitution.

Tr.73:8–16. This testimony was given in response to a question raised by Plaintiffs' counsel regarding Joint Exhibit 1, *see* Tr.72:20–21, which was the exhibit showing the Final Map and the information released about it by the Judicial Commission. *See* D221 (Joint Exhibit 1, part 1); D222 (Joint Exhibit 1, part 2). That exhibit, and even the population statistics Plaintiffs' witness was referencing, were relevant to more than just an alleged section 3(b)(1) violation for the reasons stated above. *See also* Part I.D.1. Additionally, the Plaintiffs did not appear to be intentionally soliciting their witness's advice on the meaning of section 3(b)(1); the witness simply gave it spontaneously in response to the question, "What are we looking at?" in reference to p.15 of Joint Exhibit 1 (Final Map's population deviation data). Tr.73:3–16; D221:p.15. Testimony about what Plaintiffs thought the rules were for article III, section 3(b)(1) were relevant to other claims, such as whether the Final Map had chosen to prioritize a higher constitutional priority like equal population over a lower one, and whether Plaintiffs' Proposed Map complied with all other constitutional requirements. Part I.D.1, I.D.2. This is insufficient to try the § 3(b)(1) issue by implied consent.

**B. Even if the article III, section 3(b)(1) claim was properly preserved and pleaded, it has no merit.**

In the alternative, even if the article III, section 3(b)(1) claim was properly preserved and pleaded, it has no merit. The work of the Judicial Commission is given the same deference as the legislature when it passes a statute. *Pearson II*, 367 S.W.3d at 43. Therefore, the Judicial Commission's map must "clearly and undoubtedly" violate the

Missouri Constitution in order for this Court to overturn a part of it. *Id.* Thus, when interpreting the Missouri Constitution, ambiguities and doubts must be interpreted in favor of the Judicial Commission's Final Map the same way they are with respect to the General Assembly. *Id.*[13]

The circuit court and the Judicial Commission (7 judges in all) correctly found that article III, section 3(b)(1) does not limit the 3% exception to instances in which the Commission does not have to break up a county or a city. Article III, section 3(b)(1)'s reference to "if necessary to follow political subdivision lines consistent with subdivision (4)" references the entirety of subdivision (4), not just part of it. This allows the Commission to use the 3% exception whenever necessary to follow subdivision (4)'s description of how a county or a city must be broken up, if it is broken up. If subdivision (1) intended to limit the 3% exception to only "if necessary to follow political subdivision lines" precisely, it would not have added in the words "consistent with subdivision (4)." Under Plaintiffs' interpretation, the words "consistent with subdivision (4)" become superfluous and add nothing to the phrase "if necessary to follow political subdivision lines." This Court disfavors interpretations which render words in the Missouri Constitution superfluous. *Slusher*, 638 S.W.3d at 498.

[13] Note that the Plaintiffs challenge three districts as violating the 1% rule: Districts 13, 14, and 34. D244:pp.16–17. According to the circuit court, Plaintiffs live in Districts 12 and 13. D244:p.2. Thus, District 13 is the only district that can be challenged on this basis because a Plaintiff must live in a District to challenge it. *See* Mo. Const. art. III, § 7(i) (permitting only residents of a District to sue, and limiting the challenge to a plaintiff's District).

The circuit court's reading of the 3% exception does not make the 1% default standard meaningless, contrary to Plaintiffs' contention. App.34. Again, 3(b)(1) states that the 1% standard can be deviated from only when the Judicial Commission is attempting to follow the priorities in subdivision (4). It could not deviate from the 1% requirement, for instance, in order to make a district more contiguous or compact—priorities listed in subdivision (3)—or to make districts more fair or competitive—priorities listed in subdivision (5). Thus, the 1% standard has real teeth; it simply does not apply here.

### C. The fact that it is possible to draw districts that do not create a county segment and a municipal segment does not make the Final Map unconstitutional.

Plaintiffs then argue that the Final Map is unconstitutional because it is possible to draw districts that do not split a county and a city.

**Preservation:** Plaintiffs did not preserve this argument in Point Relied On II, so this Court should not address it. Rule 84.04(e). Additionally, Plaintiffs did not preserve the argument because they did not raise it in a motion to amend the judgment, which they should have done because the error arose for the first time in the judgment itself. *See* Rule 78.07(b)–(c); *Interest of D.L.S.*, 606 S.W.3d at 225.

* * *

To the extent that this Court decides to review this issue despite its lack of preservation either in the circuit court or on appeal, this Court should affirm the circuit court. The Final Map does not become unconstitutional simply because it is possible to draw districts that do not split a county and a city. As noted above and in the circuit court's

judgment, there are four independent reasons why the circuit court correctly ruled in the Secretary favor:

1) "to the extent any political lines were crossed, the Judicial Commission[‘s Final Map] chose districts that were more compact" than the Plaintiffs' Proposed Map, which is permitted because the Constitution ranks compactness as a higher priority than political subdivisions. D244:p.16.

2) Even if the Judicial Commission's Final Map was not more *compact* than the Plaintiffs' Proposed Map, it did have a lower population deviation, which is first priority under § 3(b)(1). D244:p.16.

3) Even if the above two conclusions were not true, Plaintiffs failed to demonstrate that "any minimal and practical deviation" from what Plaintiffs claim is optimal "does not result from application of recognized factors that may have been important considerations in the challenged map"—for instance, federal laws. D244:pp.19–20 (citing *Johnson*, 366 S.W.3d 11).

4) Even if the above three conclusions were not true, Plaintiffs failed to demonstrate that their Proposed Map, which they claim better complied with the Constitution than the Final Map, satisfied the other constitutional requirements such as compliance with federal law, as required by article III, sections 3(b)(1) and 3(b)(2). D244:p.19.

None of these four reasons fails simply because it is possible to draw a map that does not split a county and a city. Reasons 1 and 2 address how compactness and equal population are higher priority in the Missouri Constitution, so the Judicial Commission necessarily

can choose to prioritize them over lower priorities like keeping all political subdivisions intact (even if it is technically possible to keep those political subdivisions together by using lower compactness and/or higher population deviations). Thus, simply showing that it is possible to draw a map that does not split a county and a city is not sufficient evidence to rebut Reasons 1 and 2. Reasons 3 and 4 reference what else the Plaintiffs have to demonstrate, beyond the fact that it is possible to draw a map that does not split a county and a city. Thus, simply showing that it is possible to draw a map that does not split counties or cities is insufficient to rebut Reasons 3 and 4.

Plaintiffs incorrectly claim that holding otherwise violates article III, section 3(b)(4)'s statement that "split counties and county segments, defined as any part of the county that is in a district not wholly within that county, shall each be as few as possible." *See* App.33. Plaintiffs' reading ignores the fact that section 3(b)(4)'s statement about split counties is expressly lower priority than subdivisions (1), (2), and (3) and is only required "[t]o the extent consistent" with those three, higher priorities. For instance, it is permissible for the Judicial Commission to split more counties to create a map that has higher population equality and/or compactness.

Plaintiffs also claim that the goal of compactness is "subordinate" to subdivision lines. App.35. As noted in Part I.A.1, this is incorrect. It is also not a basis on which to reverse the circuit court because Plaintiffs do not explain how this negates any of the four independent reasons the circuit court ruled in favor of the Secretary, other than Reason 1. Likewise, for the reasons stated in Part I.A.1, subdivision (4) is not a sub-criteria of the

first criteria (population equality). This Court should affirm the circuit court for the four independent reasons on which the circuit court relied.

## III. Response to Point VII: The circuit court correctly dismissed the Judicial Commission because it became *functus officio* after it developed the Final Map, and under *State ex rel. Teichman* its presence as a party is not required.

The Judicial Commission's work concluded on March 15, 2022, when it filed the Final Map with the Secretary. After that day, it ceased to play any constitutional role in Missouri's redistricting process. The Commission no longer meets. Indeed, it no longer exists: as this Court held in the most recent cycle of redistricting challenges, the Commission is *functus officio* "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished." *State ex rel. Teichman v. Carnahan*, 357 S.W.3d 601, 608 (Mo. banc 2012) (citing BLACK'S LAW DICTIONARY 696 (8th ed. 2004)). Though the Commission was required to be named as a nominal defendant at the time Plaintiffs filed their suit, Mo. Const. art. III, § 7(i), Plaintiffs claims were able to be litigated without the presence of the Commission as a named party.

This Court should affirm the circuit court's decision dismissing or dropping the Commission, and it should reject Plaintiffs' invitation to remand the case for further proceedings. The Commission's role as a named party would not affect the course of litigation, and Plaintiffs' Amended Petition sought no prospective injunctive relief against the Commission.

Additionally, Plaintiffs have failed to argue against *both* bases supporting the circuit court's decision. The circuit court found that the Commission could be both dismissed

under Rule 55.27(a)(6) and dropped as a party under Rule 52.06. On appeal, Plaintiffs have raised only the dismissal argument; they have waived any argument about the Commission being dropped a party under the latter rule. This Court should affirm the circuit court's decision to dismiss the Commission.

**Standard of Review:** A circuit court's decision "sustaining a motion to dismiss for failure to state a claim upon which relief can be granted is reviewed de novo." *Smith v. Humane Soc'y of United States*, 519 S.W.3d 789, 797 (Mo. banc 2017). And for a claimed error in the lower court to be resolvable on appeal, the error must have been prejudicial. Rule 84.13(b).

**Preservation:** The only argument Plaintiffs made below for why the Judicial Commission should not be dismissed is that the Constitution states that the Commission should be named as a party when the lawsuit is filed. D194. Any other arguments are not preserved.

### A. The circuit court correctly dismissed the Commission under Rule 55.27(a)(6).

The Commission fulfilled its constitutional mission after it filed the Final Map with the Secretary. The Commission was formed for the limited purpose of redistricting the Missouri Senate after the Senate Independent Bipartisan Citizens Commission failed to file a redistricting plan after the recent decennial census. That work concluded on March 15, 2022.

This Court has already settled the issue of a judicial commission's need to be involved after its work has concluded. In *State ex rel. Teichman*, this Court held that a

judicial commission becomes "*functus officio*" immediately upon the filing of its final plan and map, in that it is "without further authority or legal competence because the duties and functions of the original commission have been fully accomplished." 357 S.W.3d at 608 (citing BLACK'S LAW DICTIONARY 696 (8th ed. 2004)). This Court concluded that allowing the commission to "revise its plan and map after signing and filing it . . . runs afoul" of the *functus officio* doctrine. *Id.*

There is no principled reason why that same logic should not apply to the Commission's necessity to be involved in the litigation as a party after it already has been named. Although article III, section 7(i) of the Missouri Constitution requires that a lawsuit challenging a redistricting plan "name the body that approved the challenged redistricting plan as a defendant," this merely authorizes the identification of the Commission as a nominal defendant. The Commission is a functional equivalent of a defendant *ad litem*, meaning a defendant "who has no personal interest in or liability for the litigation." *Litton v. Kornbrust*, 85 S.W.3d 110, 116 (Mo. App. 2002) (internal quotation marks omitted). So too here. The Commission has no personal interest in or liability for this litigation. Article III, section 7(i) at most requires the identification of the Commission as a nominal party at the outset of the litigation. It does not prevent a court from later dismissing the Commission from the suit.

The issue here is a limited one: whether the Commission *must* continue to be involved in a redistricting challenge after the point it has been named. Plaintiffs were not wrong to identify the Commission as a named defendant, because article III, § 7(i) required them to. But that initial command does not deprive a named party from availing itself of

other subsequent legal mechanisms. Here, the *functus officio* doctrine makes sense in the context of a motion to dismiss. As the Commission no longer exists, its ongoing participation raises serious and avoidable practical and legal difficulties, such as which member or members of the Court of Appeals who served on the now-defunct Commission will direct litigation strategy and authorize and make factual representations that may be included in an answer to a petition. It cannot now vote to authorize one of its members to speak or act on its behalf. Plaintiffs' brief does not explain how these problems can be overcome or what law would authorize those actions after "the duties and functions of the original commission have been fully accomplished." *See State ex rel. Teichman*, 357 S.W.3d at 608.

In fact, none of Plaintiffs' claims required the Commission's ongoing participation, and so they failed to state a claim for relief *against the Commission* such that the Commission was a compulsory defendant after the original petition was filed and the Secretary filed his Answer. Only the circuit court and this Court have authority to "bring the map into compliance" by redrawing a map, if necessary. Mo. Const. art. III, § 7(i). Both the Petition and Amended Petition asked for injunctive relief only against the Secretary, requesting that the Secretary not utilize the Commission's map "for any purpose." *See* D205:p.7. Nor does the Commission have a stake in the declaratory relief Plaintiffs sought. The Commission's work speaks for itself through the Final Map. *See Johnson*, 366 S.W.3d at 30 (holding that "the issue of whether the constitutional requirements are satisfied is determined objectively, requiring no proof of the subjective intent of the reapportionment commission"). The Petition did not demand any relief

against the Commission, perhaps because there is no relief that can be ordered against the Commission under *State ex rel. Teichman*. Article III, section 7(i) does not compel the Commission's ongoing participation in a lawsuit, provides no remedy against the Commission, and it does not mandate any liability or judgment against the Commission.

The best understanding of article III, section 7(i) is that once a redistricting lawsuit has been filed and, if another party is also named, a judicial commission at most becomes a nominal party and may no longer be a necessary party at all. For this case, it certainly is not a compulsory party after it was named and after the Secretary answered the petition and materially participated in the litigation. This Court should not read article III, section 7(i) to eclipse the typical rules of civil procedure for party dismissal and involvement. The Constitution and the Missouri Supreme Court Rules can exist in harmony.

This Court should affirm the circuit court's dismissal, and it should reject Plaintiffs' invitation for a remand. *See* App.53. Plaintiffs have not argued how the Commission's presence as a named party below would have changed the course of the litigation (it would not have), and so their point relied on fails to assert a sufficiently prejudicial error in the circuit court's dismissal order. Any alleged error is harmless.

**B. In the alternative, this Court should affirm the circuit court as the Commission was rightfully dropped as a party under Rules 52.04 and 52.06.**

The motion to dismiss below also requested dismissal under Rules 52.04 and 52.06, arguing that the Commission was not a necessary and indispensable party. D190. However, on appeal, Plaintiffs appear to have abandoned any Rule 52.04 argument. Their seventh point on appeal argues only that the "trial court erred when it dismissed the Judicial

Commission," App.53, and their arguments are limited to Rule 55.27, (*id.* at 54). There is no mention of the Commission being dropped as a party or Rule 52.04 or 52.06.

But, in fact, the circuit court found that the Commission can be *both* dismissed and dropped. D199:pp.2–3 (Commission can be dropped under Rule 52.04); *id*. pp.3–4 (Commission can be dismissed under Rule 55.27(a)(6)). Rule 52.06 authorizes a court to drop a party upon motion "on such terms as are just," and here the circuit court expressly found that "[u]nder Rule 52.04(a), the Commission is no longer a necessary party." D199:p.2. And the circuit court analyzed the traditional factors for dropping a party, concluding that "the Commission has no interest relating to the subject matter of this action, such that disposing of this action in the Commission's absence would not impair or impede any party's ability to protect their interests." (*Id.* at p.2-3, citing *Pauli v. Spicer*, 455 S.W.3d 667, 674 (Mo. App. 2014)). The Commission's motion to dismiss or drop itself as a party fully briefed this issue. D190; D196. This Court should affirm on the merits or, in the alternative, because Plaintiffs have waived any argument under Rule 52.04 or 52.06 on appeal.

If this Court does address the merits of dropping the Commission under Rules 52.04(a) and 52.06, the same reasons for sustaining the Commission's dismissal also support dropping the Commission as a named party. First, under Rule 52.04(a), the Commission is no longer a necessary party. It was named when the Petition was filed as article III, section 7(i) requires, but that does not mandate the Commission's ongoing involvement. Instead, a party is necessary only if

> (1) in the person's absence complete relief cannot be accorded among those already parties, or (2) the person claims an interest relating to the subject of the action and is so situated that the disposition of the action in the person's absence may: (i) as a practical matter impair or impede the person's ability to protect that interest or (ii) leave any of the persons already parties subject to a substantial risk of incurring double, multiple, or otherwise inconsistent obligations by reason of the claimed interest. If the person has not been joined, the court shall order that the person be made a party.

Rule 52.04(a); *see also Edmunds v. Sigma Chapter of Alpha Kappa*, 87 S.W.3d 21, 27 (Mo. App. 2002) ("A necessary party is a party meeting the description set forth in Rule 52.04(a)."). Neither part of this test is met here, and neither in the circuit court nor in this Court on appeal have Plaintiffs sufficiently argued that the elements are met. As discussed above, the Commission's involvement is not necessary for Missouri courts to grant complete relief as to the declaratory claims in this lawsuit. The Secretary is a named Defendant, and the Commission's work speaks for itself through the map. *See Johnson*, 366 S.W.3d at 30. Plus, Plaintiffs only asked for injunctive relief against the Secretary. D205:p.7. Next, the Commission did not claim any interest relating to the subject matter of this action, and disposing of this action in the Commission's absence did not impair or impede *any* party's ability to protect their interests.

Second, the Commission is not indispensable. Under Rule 52.04(b), "[a]n indispensable party is a necessary party who cannot feasibly be joined at the time but whose absence is so critical that equity and good conscience will not permit the matter to proceed without that party." But "[o]nly if a party is deemed necessary, does a court reach the second inquiry, *i.e.*, whether the party is also indispensable." *Pauli v. Spicer*, 445 S.W.3d

667, 674 (Mo. App. 2014). Because the Commission is not a necessary party, the indispensability test is irrelevant.

But even if it were a necessary party, this case can—and did—proceed in equity and good conscience without the Commission's involvement. Missouri courts make the ultimate judicial determination on the map's compliance with the Constitution in light of Plaintiffs' challenges, and the Secretary asserted defenses in support of the map. Rule 52.04(b) has a four-factor test to determine indispensability, but none of those factors weigh in favor of the Commission's continued joinder. A judgment rendered in the Commission's absence will not be prejudicial to the Commission, because it no longer exists. Again, under *State ex rel. Teichman*, the Commission has no further legal authority to act. No prejudice has occurred without the Commission's involvement, because the case seeks only declaratory relief against the map's constitutionality and injunctive relief against the Secretary. There is no need to shape relief or other measures in a final court judgment with respect to the Commission. A judgment rendered in the Commission's absence will be adequate as to the relief Plaintiffs requested.

As discussed above, no reading of article III, section 7(i) requires the Commission's perpetual involvement as a defendant. This is especially true here where another party is named and defending the case on the merits, and where the operative pleading merely asked the courts to review the Commission's Final Map to determine whether it complies with the Constitution, which is a question of law. *See Johnson*, 366 S.W.3d at 30.

"If [a party] is merely an unnecessary party, she may be dropped at any time…without affecting the rights of the other plaintiff who is a necessary party." *Jones*

*v. Kansas City, Ft. S. & M.R. Co.*, 77 S.W. 890, 893 (Mo. 1903). Rule 52.06 effectively enshrines that principle, authorizing a court to drop parties as justice requires. *Newman v. City of Warsaw*, 129 S.W.3d 474, 480 (Mo. App. 2004) (affirming trial court dropping individual board of aldermen members from an action where the plaintiff did not seek specific declaratory or equitable relief against those individuals). Because the Commission is neither necessary nor indispensable and Plaintiffs have waived any claim to the contrary, this Court should affirm the circuit court's decision dropping the Commission under Rules 52.04 and 52.06.

Further, any alleged error in dismissing the Commission from the case is harmless because Plaintiffs seek no remedy from the Judicial Commission that they cannot and have not sought from the Secretary. Rule 84.13(b).

## IV. Response to Point VIII: The circuit court did not abuse its discretion in quashing all discovery to the Commission because the discovery sought was irrelevant to determining the Final Map's constitutionality, and the Commission is protected by both constitutional and common law privileges.

In this Court's most recent round of redistricting challenges, it conclusively set forth the standard applicable to such challenges: "the issue of whether the constitutional requirements are satisfied is determined objectively." *Johnson*, 366 S.W.3d at 30. Any "subjective intent of the reapportionment commission" is irrelevant to that determination. *Id.* Plaintiffs' discovery requests to the Commission sought wide-ranging discovery into the Commission's thought processes, deliberations, motivations, and communications during its development of the Final Map. The circuit court properly quashed discovery after evaluating these requests, and its decision is consistent with both this Court's

redistricting jurisprudence and that of courts around the country that have considered similar discovery into judicial officers who draw legislative maps. This Court should affirm the circuit court's decision.

**Standard of Review:** "A trial court is vested with broad discretion in administering the rules of discovery, and an appellate court should not disturb the rulings absent an abuse of discretion." *State ex rel. Plank v. Koehr*, 831 S.W.2d 926, 927 (Mo. banc 1992). "A writ of prohibition [or] mandamus is the proper remedy for curing discovery rulings that exceed a court's jurisdiction or constitute an abuse of the court's discretion." *State ex rel. White v. Gray*, 141 S.W.3d 460, 463 (Mo. App. 2004) (internal quotation omitted).

**Preservation:** The Respondents do not challenge Plaintiffs' preservation of the error alleged in this Point Relied On.

**A. The Commission lacked capacity to respond to discovery because it is *functus officio*.**

As discussed above and which Respondent incorporates here, the Commission became *functus officio* when it fulfilled its constitutional mission on March 15, 2022. That divested of it of an authority to take further actions, such as verifying answers in discovery and assembling to gather records. The Office of Administration has published all potentially relevant work of the Commission, as discussed further below.

This Court held in *State ex rel. Teichman* that a judicial commission "is a constitutionally created commission of limited authority. In other words, it only has the authority expressly granted to it by the language of the constitution and implicitly necessary to carry out its duties." 357 S.W. 3d at 607. The *functus officio* doctrine and thus the

Commission's present non-existence renders responding to discovery as a body a legal impossibility. The Commission was a multi-member deliberative entity. Now that it has ceased to exist, it lacks any constitutional authority to continue meeting, or to respond as a body to legal process, including discovery. Moreover, no one member of the Commission has ever had the constitutional authority to respond to legal process of any kind on the Commission's behalf, an obstacle that is only exacerbated now that the Commission is *functus officio*.

Adopting the arguments made in Plaintiffs' eighth point on appeal would invite questions with no satisfactory or practical answer. Does the chair of the Judicial Commission have authority to verify interrogatory answers? Which judge of the Court of Appeals on the Commission is best-suited to be a corporate representative if such a notice of deposition is issued to the Commission? How does a multi-member deliberative body that ultimately performs a legislative function (as discussed in subpart C below) answer interrogatories? Must they all sit for a deposition if a notice is served? And if so, what would be the point, given the privileges that would attach to their answers? This Court can and should affirm the circuit court's decision, without needing to wrestle with these questions, as the Commission lacks sufficient capacity to respond to discovery in the first place under the *functus officio* doctrine.

### B. Plaintiffs' discovery requests sought irrelevant information under the proper standard for reviewing redistricting challenges.

Plaintiffs served at least 10 interrogatories (and likely more including subparts and compound questions) and 4 requests for production of documents on the Commission.

D192; D193. Generally, these requests sought information and documents concerning the Commission's thought process, deliberations, motivations, and communications during its development of the Senate redistricting map and plan.

To highlight some of the requests: Plaintiffs' requests for production asked the Commission to produce documents the Commission relied on when answering the interrogatories (No. 1); "all communications sent or received by members of the Commission about the development and/or filing of the map" (No. 2); "All draft versions of the Senate Map prepared or considered by the Commission" (No. 3); and "all other documents—whether in draft or final form—prepared or considered by the Commission" (No. 4).

Plaintiffs' interrogatories were also invasive and addressed the Commission's thought processes and work product. For example, Interrogatory No. 1 asked the Commission to "describe in detail" its process for developing the final map. D192:p.1. Interrogatory No. 2 asked the Commission to "explain all the reasons why [it] split Buchanan County ... rather than drawing a district that followed Buchanan County's political subdivision lines." *Id.* p.2. Other interrogatories, such as Nos. 5 through 9, asked the Commission to explain why it drew municipal boundaries in the St. Louis area a certain way and to identify the amount of consideration the Commission gave to protecting minority voting power. *Id.* pp.2-3.

The circuit court did not abuse its discretion in quashing these, and all of, Plaintiffs' discovery requests. The plain language of the Constitution underscores that the *final* plan and map filed by a redistricting body is the sole and only "work product" relevant to the

redistricting process. Article III, section 7(i) lends emphasis to this point, as it addresses how to challenge "a redistricting plan" on the basis that the plan "violates the Constitution, federal law, or the United States Constitution." In any such action, the circuit court's authority is limited to determining whether "a *completed* redistricting plan exhibits the alleged violation." (Emphasis added). Stated simply, all that is at issue in a lawsuit challenging a filed redistricting plan and map is whether that *plan and map* violate the Constitution—an observation that is underscored by the fact that Plaintiffs seek *declaratory relief* that the final plan and map filed by the Commission with the Secretary violates the Missouri Constitution in limited, discrete ways.

In the 2012 redistricting cases, this Court clarified years of imprecise standards governing challenges to a final redistricting plan. In one of the first redistricting opinions that year, this Court in *Pearson I* held that "the duty to draw the district lines of a contiguous territory as compact and as nearly equal in population as may be is one that is mandatory and objective, not subjective." 359 S.W.3d at 40. A few months later in the final redistricting case that year, this Court in *Johnson* emphasized the objective nature of the inquiry. There, this Court stressed that the inquiry "requir[es] no proof of the subjective intent of the reapportionment commission." *Johnson*, 366 S.W.3d at 30; *see also id.* at 29 n.11 (noting that *Pearson I* overruled the subjective standards employed in several previous redistricting cases to evaluate a map's compliance with the constitutional criteria). It is axiomatic that an objective assessment of the lawfulness of the final plan and map filed by the Commission, which will be necessarily gauged against the methods and criteria described in subsection (b) of article III, section 3 of the Missouri Constitution, is not aided,

furthered, influenced, or controlled by discovery of information or documents relating to the Commission's deliberative process—all of which is irrelevant and not proportional to the needs of the case considering the totality of the circumstances.

Plaintiffs' interrogatories can only be read to seek information to prove their case under subjective, not objective, standards of review. For example, Interrogatory No. 1 asked the Commission to "describe in detail" its process for developing the Final Map. D191:p.1. Interrogatory No. 2 asked the Commission to "explain all the reasons why [it] split Buchanan County. . . rather than drawing a district that followed Buchanan County's political subdivision lines." *Id.* p.2. The "why" and explanatory questions continue, asking the Commission to explain why it "split the City of Hazelwood" between two districts (No. 4); the process of drawing district lines that encompass St. Louis City and St. Louis County (No. 7); the "consideration the Commission gave to protecting minority voting power" and "how such consideration influenced the Senate Districts ultimately recommended in the Senate Map" (No. 8); and so on. D191.

The circuit court correctly recognized that no relevant judicial standard requires or permits Plaintiffs to use information gained from these interrogatories to prove their case. "Why" and explanatory questions are classic probes about the Commission's rationale and subjective intent. But under *Pearson I* and *Johnson*, *why* something is done is not the test, as those answers can only drive a subjective analysis. *See Pearson I*, 359 S.W.3d at 40; *Johnson*, 366 S.W.3d at 30. Instead, what matters is *that* the map does or does not comply with the constitutional standards, an objective determination. *See Pearson I*, 359 S.W.3d at 40; *Johnson*, 366 S.W.3d at 30.

In fact, those cases identify the evidence that a challenger can use to prove his case. For example, as to whether a final map met the population equality and compactness standards in 2012, this Court held that a plaintiff must present evidence that a better map could have been drawn. *Johnson*, 366 S.W.3d at 32 (holding that proposed map failed to prove enacted map unconstitutional because there was no evidence that the proposed map took into account required factors like federal laws); D195:p.3 (plaintiffs admitting the same). Population and compactness data is available in the public domain. The fact that Plaintiffs submitted a proposed, alternative map shows that the Commission's subjective, deliberative processes is not relevant to Plaintiffs' challenges.

From there, a challenger must demonstrate that a challenged final map's allegedly impermissibly-drawn boundary "objectively shows that" other important constitutional factors" such as "federal laws or other recognized factors did not affect the district boundary." *Johnson*, 366 S.W.3d at 31. That can be shown through "maps or other evidence." *Id.*

For the same reasons, Plaintiffs' requests for production sought documents irrelevant to the ultimate judicial inquiry. These requests asked the Commission to produce documents the Commission relied on when answering the interrogatories (No. 1); "all communications sent or received by members of the Commission about the development and/or filing of the map" (No. 2); "All draft versions of the Senate Map prepared or considered by the Commission" (No. 3); and "all other documents—whether in draft or final form—prepared or considered by the Commission" (No. 4). (D193). Certainly, the

Commission's communications would not aid the courts in deciding whether the Final Map complies with the Constitution.

Further, the Commission's communications were properly protected from discovery for a host of other reasons. Prior drafts of the Final Map and "all other documents" prepared or considered by the Commission go beyond what *Johnson* and *Pearson* instruct is relevant evidence. Whether the Commission has or does not have other maps is irrelevant under *Johnson* and *Pearson I*, and it was thus not "fundamentally unfair," *see* App.58, for the circuit court to quash any such inquiries. The purpose of a redistricting challenge is *not* to gain discovery or for a court to issue an advisory opinion; it is based on a claimed injury and the challenger's obligation to show that the final map does not comply with the Constitution.

When this Court in *Johnson* rejected the challengers' claim that the 2012 redistricting maps were unconstitutional, it noted that the challengers' burden "must account for the additional factors that the reapportionment commission must consider and those that it is permitted to consider." *Johnson*, 366 S.W.3d at 30. Those factors are evident from the Final Map filed with the Secretary's Office. It speaks for itself.

Before the Commission filed its Final Map with the Secretary, it "[made] public the tentative redistricting plan and map of the proposed districts, as well as all demographic and partisan data used in the creation of the plan and map." It then filed its final plan and map with the Secretary, along with the demographic and partisan data supporting the

map.[14] Those materials were in the public domain during trial, and they are still available today. They are the only records regarding the Commission's work that were required to be made public (discussed further below), and they are the only records that might be remotely relevant to the objective lawfulness of the Final Map.

Importantly, the publicly filed materials are the ***same type*** of materials in the record in *Johnson*. *See* 366 S.W.3d at 32 (recognizing that the record contained "approximately 1,270 pages of supporting documents and maps, including data about and statistical analysis of Missouri's population figures, voting age topography, and other factors"). Those materials are publicly available on the same Office of Administration redistricting and demographic data website.[15] Moreover, the Commission invited public comments and held a public hearing, which are also available on the Office of Administration's website. This *exceeds* constitutional transparency requirements for a judicial commission. Mo. Const. Art. III, § 7(f) ("The judicial commission shall make public the tentative redistricting plan and map of the proposed districts, as well as all demographic and partisan data used in the creation of the plan and map."). If *all* of the Commission's work were open to disclosure, there would be no reason for the Constitution to specify only the limited categories of information and documents that must be disclosed. A judicial commission has no constitutional obligation to conduct public hearings or to take public comment, or

[14] Available at: https://oa.mo.gov/budget-planning/redistricting-office/2022-judicial-redistricting-commission-process

[15] Available at: https://oa.mo.gov/budget-planning/demographic-information/2020-census-data

to conduct any of its deliberative processes publicly, rendering all of its deliberative processes constitutionally privileged. Plaintiffs' brief on appeal does not meaningfully address the source text in article III, section 7(f).

Furthermore, the standard governing redistricting challenges under *Johnson* does not require discovery into the body—or its members—that drew the map. If all Plaintiffs sought is public and judicially noticeable information, then their requests directed at the Commission were irrelevant and cumulative. *Johnson*'s discussion of the evidence stresses that Plaintiffs must present alternative possibilities of a constitutional map—not that Plaintiffs must prove that other maps were actually considered by the body that drew the final map. To that end, *Johnson* reasoned that "proof that the standards for population equality and compactness are not met requires the party challenging the map to present evidence that greater population equality and compactness *are feasible* in that the [final] plan deviates from those principles." *Id.* (emphasis added). Challengers to a map can meet their burden by presenting judicially noticeable public information or any other evidence to determine whether any deviation is permissible. Population and compactness data is available in the public domain.

For these reasons, the circuit court did not abuse its discretion in quashing Plaintiffs' discovery requests propounded to the Commission given the scope of what they sought and the applicable standard for redistricting challenges under *Johnson*, *Pearson I*, and *Pearson II*.

**C. The circuit court, consistent with other courts around the country that have considered similar discovery efforts, correctly concluded that the Commission's work is protected by absolute or qualified legislative**

**privilege under both the plain text of the Missouri Constitution and the common law.**

Even if this Court would have concluded that the circuit court abused its discretion under typical discovery standards, it should not find abuse of discretion here because the information and documents sought from the Commission are privileged based on the plain text of the Constitution and settled common law protections afforded to the performance of legislative functions.

To the first point, article III, section 7(f) grants a constitutionally-created judicial commission "very limited authority." *State ex rel. Teichman*, 357 S.W.3d at 607. The Constitution's plain text describes the *only* aspects of the Commission's work that are required to be made public:

> [A] majority of [the appointed members of the judicial redistricting commission] shall sign and file its redistricting plan and map with the secretary of state within ninety days of the date of the discharge of the senate independent bipartisan citizens commission. The judicial commission shall make public the tentative redistricting plan and map of the proposed districts, as well as all demographic and partisan data used in the creation of the plan and map. Thereafter, senators shall be elected according to such districts until a redistricting plan is made as provided in this section.

Mo. Const. art. III, § 7(f). The Commission abided by this limited authority, making public its tentative plan and map along with the constitutionally required supporting materials on March 14, 2022,[16] and its final plan and map by filing same with the Secretary on March 15, 2022. D220:¶13; D239; D221:p.7. No other aspect of the Commission's work is

[16] *See* "Judicial Redistricting Commission Releases Tentative State Senate Redistricting Plan, Map," available at: https://oa.mo.gov/commissioners-office/news/judicial-redistricting-commission-releases-tentative-state-senate; *see also* D244:¶ 21.

required to be public. *See, e.g.*, *State ex rel. Teichman*, 357 S.W.3d at 607 (holding, in connection with the work of the judicial commission, that "[t]he constitution does not provide a time period for public comment on a tentative plan of apportionment and proposed map, as it does for the bipartisan reapportionment commission, nor does it otherwise provide for rehearing of the [judicial] commission's work"). This shrouds *anything else* done by the Commission with a constitutional privilege.

This holding in *State ex rel. Teichman* is of particular import here. In stark contrast to a judicial commission's very limited authority and obligation to conduct its redistricting work publicly or to make its deliberative work product public, the senate independent bipartisan citizens commission (as the entity first charged with redistricting) has different obligations. Relevant here, *that* Commission must: (1) establish "at least three hearing dates on which hearings open to the public shall be held to hear objections or testimony from interested persons"; (2) file with the Secretary "a tentative redistricting plan and map of the proposed districts and during the ensuing fifteen days [to] hold such public hearings as may be necessary to hear objections or testimony of interested persons"; and (3) "make public the tentative redistricting plan and map of the proposed districts, as well as all demographic and partisan data used in the creation of the plan and map." Mo. Const. art. III, § 7(b), (d). Given the expansive *public* work required of the senate independent bipartisan citizens commission, the Constitution makes clear that said commission is otherwise permitted to conduct "[e]xecutive meetings as often as the commission deems advisable." Mo. Const. art. III, § 7(b).

Contrast that with a judicial commission. A judicial commission has no constitutional obligation to conduct public hearings or to take public comment, or to conduct any of its deliberative processes publicly, thus necessarily rendering all of its deliberative process "executive" and constitutionally privileged. Plaintiffs' discovery efforts sought to undermine and invade the constitutional privilege attached to the entirety of the Commission's work preceding its making public a tentative plan and map and its filing of a final plan and map.

But the textual, constitutional foundations for the privilege attached to the Commission's work product is not the only source of the privilege. It is also wholly consistent with settled common law principles of absolute privilege that attach to the performance of legislative functions. Article III, section 19(a) prohibits legislators from being "questioned for any speech or debate in either house in any other place." Under article III, section 7, the Commission was formed to perform "a *legislative function*—i.e., to reapportion congressional districts[.]" *Johnson*, 366 S.W.3d at 19-20 (emphasis added, reasoning that judicial members of the former nonpartisan reapportionment commission performed a legislative function); *see also State ex rel. Teichman*, 357 S.W.3d at 605 (holding that "[t]he reapportionment of the senate districts and preparation of the map continues to be a legislative function despite the constitution's requiring appellate judges to draw the lines"). Missouri recognizes the doctrine of legislative immunity, *see Robinson v. City of Raytown*, 606 S.W.2d 460, 467 (Mo. App. 1980), and the same principles behind that doctrine extend to a privilege from discovery into non-public legislative deliberations,

thought processes, and communications.[17] *See Kay v. City of Rancho Palos Verdes*, 2003 WL 25294710, at *9-10 (C.D. Cal. Oct. 10, 2003) (noting that "legislative privilege derives from legislative immunity" and "[a] crucial aspect of legislative immunity is its use as an evidentiary privilege"). Thus, it stands to reason that article III, section 19(a) protects the Commission and its members, and their work, from "being questioned ... in any other place."

Several other courts have confronted this issue. As one Arizona appellate court held in a redistricting case, "[t]he legislative immunity doctrine also functions as a testimonial and evidentiary privilege." *Arizona Indep. Redistricting Comm'n v. Fields*, 75 P.3d 1088, 1095 (Ariz. Ct. App. 2003); *see also In re Perry*, 60 S.W.3d 857, 858 (Tex. 2001) (legislative privilege prevented discovery against appointed members of redistricting board that included statewide executive elected officials and senior staff); *Holmes v. Farmer*, 475 A.2d 976, 984 (R.I. 1984) (legislative privilege prevented deposition and trial testimony to legislators and their aides who performed work for state redistricting entity). The court in *Fields* held that individual citizens appointed to a redistricting body have legislative privilege when developing a redistricting map and plan that extends to any actions that are "an integral part of the deliberative and communicative processes utilized." 75 P.3d at 1097 (quoting *Gravel v. United States*, 408 U.S. 606, 625 (1972)). The court further

[17] Section 1.010, RSMo, incorporates into Missouri law "[t]he common law of England and all statutes" into Missouri law. The concept of legislative privileges and immunity were well established at common law. *See Supreme Ct. of Virginia v. Consumers Union of U. S., Inc.*, 446 U.S. 719, 732 (1980). And article III, § 19(a) of the Missouri Constitution codifies legislative privileges and immunities, prohibiting legislators from being "questioned for any speech or debate in either house in any other place."

extended the privilege to independent consultants hired by the redistricting body, as restricting it to only the members would constrain legislative actors "from freely engaging in legislative acts without the threat of executive judicial oversight; the core concern of legislative privilege." *Id.* at 1098.

This mirrors the more general holdings preventing discovery from legislators under the similarly worded U.S. Speech and Debate Clause in article I, section 6, clause 1 of the U.S. Constitution, which states that "Senators and Representatives … for any Speech or Debate in either House, [] shall not be questioned in any other Place." This privilege not only protects legislators from being hauled in for depositions or other discovery in civil cases. *Brown & Williamson Tobacco Corp. v. Williams*, 62 F.3d 408, 418–19 (D.C. Cir. 1995); *Alliance for Global Justice v. District of Columbia*, 437 F. Supp. 2d 32, 34–36 (D.D.C. 2006). It also prevents courts from "inquir[ing] into the motives of legislators" because "for a court to" do so is "not consonant with our scheme of government." *United States v. Johnson*, 383 U.S. 169, 180 (1966).

Indeed, the clause is even stronger in Missouri. It does not simply prohibit deposing legislators. Except perhaps in extraordinarily rare circumstances, it prohibits courts from assessing the motives of legislators at all. Missouri's clause is clear: legislators "shall not be questioned." Mo. Const. art. III, § 19(a). "[T]he Speech or Debate Clause protects against inquiry into the acts that occur into the regular course of the legislative process and into the motivation for those acts." *Eastland v. U.S. Servicemen's Fund*, 421 U.S. 491, 508 (1975). These "prohibitions … are absolute." *Id.* at 501. "If the mere allegation that a valid legislative act was undertaken for an unworthy purpose would lift the protection of

the Clause, then the Clause simply would not provide the protection historically undergirding it." *Id.* at 508–09. Because courts is prohibited from determining the motivations of legislators in passing legislation, this Court also should affirm the circuit court's order quashing discovery to the Judicial Commission—a body performing a legislative function.

Nothing in article III, section 7's redistricting provisions constitutes a waiver of absolute legislative privilege to quintessentially legislative functions. The provision's text says nothing about altering legislative privilege.

The Commission, its members, and any individuals that performed work for the Commission[18] cannot be compelled to offer evidence through discovery or testimony concerning their legislative function of redistricting. All of the Commission's deliberative work is privileged and non-public. As the authorities above recognize, there are good reasons for this rule. It protects the integrity of the legislative process by encouraging unvarnished and honest discussion between members. It prevents undue influence and public harassment of all members, especially those who may have minority viewpoints. These interests are especially salient for the Commission, comprised as it is of members of the judiciary who have not sought out the obligation to reapportion senate districts, but who have been involuntarily drafted to do so because the Senate Independent Bipartisan

[18] Plaintiffs' discovery attempts to broadly define the "Commission" as not merely the Commission as a body but also "its members or staff, or anyone assisting the Commission during the process of considering and filing the Senate Map." D192; D193. The Commission's constitutional and common law privileges extend to all within this definition, as other courts have held as discussed above.

Citizens Commission could not complete the work with which it was constitutionally charged.

These privileges do not impede the public's involvement or oversight. The Commission's tentative plan, draft map, and all supporting documentation specified by article III, section 7(f) of the Missouri Constitution are public. The Commission also publicly files its final plan and map with the Secretary. Moreover, the Commission invited public comments and held a public hearing.[19] The *final* plan and map is then subject to challenge pursuant to article III, section 7(i) of the Missouri Constitution, where its compliance with the methods and criteria set forth subsection (b) of article III, section 3 of the Constitution can be objectively gauged. In the redistricting process specifically, recognition and protection of the absolute privilege attached to the performance of a legislative function does not in any manner impair an objective inquiry into the final plan and map's compliance with the Constitution, and removes the incentive for litigants to stifle future redistricting deliberations.

Here, the Commission's work (other than the required release of its tentative and final plans and maps) is not merely subject to a common law legislative privilege but is also constitutionally privileged based on the plain text of the Constitution that specifically opens only *certain* work like the Final Map and the *objective* analysis required of the Final Map under *Johnson*. Though some courts have recognized a qualified privilege for similar

[19] Public comments and hearing audio from the Commission's public hearing is available at https://oa.mo.gov/budget-planning/redistricting-office/2022-judicial-redistricting-commission-process.

redistricting work, *see, e.g.*, *League of Women Voters of Fla. v. Fla. House of Representatives*, 132 So.3d 135, 143 (Fla. 2013); *Comm. for a Fair & Balanced Map v. Illinois State Bd. of Elections*, 2011 WL 4837508, at *10 (N.D. Ill. Oct. 12, 2011), there is no need to determine whether a qualified privilege applies over the absolute privilege in Missouri.

If this Court wades into that doctrine, it should conclude that at minimum, there is a qualified privilege here. For example, under *Committee for a Fair and Balanced Map*, courts may examine factors such as (i) the relevance of the evidence sought to be protected; (ii) the availability of other evidence; (iii) the seriousness of the litigation and the issues involved; (iv) the role of the government in the litigation and the issues involved; and (v) the possibility of future timidity by government employees who will be forced to recognize that their secrets are violable. 2011 WL 4837508 at *7 (concluding that qualified legislative privilege "information concerning the motives, objectives, plans, reports and/or procedures used by lawmakers," among other information).

The Commission's motion to quash easily meets the relevant factors under *Committee for a Fair and Balanced Map*. First, as discussed above, the information and documents Plaintiffs sought are simply not relevant to their specific redistricting challenge. Adjudicating that challenge requires no information about the Commission's deliberations, motives, and reasons for arriving at its Final Map because, under *Johnson*, *Pearson I*, and *Pearson II*, the Final Map speaks for itself.

Second, publicly available information provides Plaintiffs with what they need. The public record includes the Commission's tentative plan and map and all constitutionally

required supporting documents; its Final Map, plan, and mapping data; and other information publicly available on the Office of Administration's redistricting website. Plaintiffs sought discovery from the Secretary's Office. And Plaintiffs needed no discovery to assemble the demonstrative map attached to their Petition. Plaintiffs have not demonstrated a need for any additional evidence, and their pleaded claims in the Amended Petition do not require additional evidence from the Commission.

Third, although the legislative redistricting process is a matter of public importance, it is just as important as every other deliberation by a legislative body and does not warrant abrogating the Commission's legislative privilege. Courts appear to have only abrogated the privilege in criminal matters or legislative usurpation. *See United States v. Gillock*, 445 U.S. 360, 373 (1980); *State v. Edwards*, 337 S.W.3d 118, 121 (Mo. App. 2011).

Fourth, the Commission had very limited authority throughout its fleeting existence, and its work was done in the public's eye with the public's participation. Its final plan and map remains subject to scrutiny in the form of objective judicial review without invading the absolute legislative privilege. Plaintiffs have no need to seek further information.

Finally, if Plaintiffs are allowed to invade the Commission's deliberations, future redistricting commissions will be chilled, resulting in a significant likelihood of "future timidity by government employees," *Comm. for a Fair & Balanced Map*, 2011 WL 4837508 at *7. The members of the Commission (all judicial officers) devoted significant time to their redistricting work, for which they received no additional compensation. The discovery Plaintiffs sought—explanations for the Commission members' work and their motivations—is likely to chill the willingness of future redistricting commission members

to deliberate freely about redistricting and the merits (or flaws) of the iterative map-drawing process. Justice Scalia once said that "[f]erreting out political motives in minute population deviations seems to me more likely to encourage politically motivated litigation than to vindicate political rights." *Cox v. Larios*, 542 U.S. 947, 952 (2004) (Scalia, J., dissenting). This statement applies with even more force considering the scope of Plaintiffs' discovery requests here.

This Court should be mindful of the composition of a judicial commission, as have other courts. *See, e.g.*, *Rodriguez v. Pataki*, 280 F. Supp. 2d 89, 103 (S.D.N.Y.2003) (distinguishing between privileges that may attach to a redistricting body composed only of legislators and one composed of both legislators and citizens, where the latter is likely not protected given the presence of citizens); *Marylanders for Fair Representation, Inc. v. Schaefer*, 144 F.R.D. 292, 301 n. 19, 304–05 (D.Md.1992) (holding that legislators were protected by the privilege, but not citizens serving on a redistricting advisory committee); *cf. Harris v. Arizona Indep. Redistricting Comm'n*, 993 F. Supp. 2d 1042, 1069 (D.Ariz.2014) (concluding that five citizens who served on a redistricting commission "cannot assert a legislative evidentiary privilege" because there were not "persuasive reasons for extending the privilege to appointed citizen commissioners" that is otherwise enjoyed by members of a branch of government).

The nature of legislative redistricting in our democracy often results in litigation. But in what is believed to be the first time—at least in recent memory—in a Missouri redistricting case, Plaintiffs here sought invasive discovery into the Commission's deliberative processes. The Commission steps in only when the bipartisan legislative

process does not supply a map and completes that difficult process. Discovery into the Commission's thought process, deliberations, and non-public documents would deter members of the judiciary from serving on future commissions in the manner necessary to performing the work required by the Constitution. This critically important and time-sensitive work would be hindered if the commission members felt that their every word would be scrutinized by litigants.

Applying all these factors, Plaintiffs' discovery requests were rightfully quashed. They did not overcome the constitutional privilege extended to the Commission's work by the plain text of the Constitution. Nor did they overcome the legislative privilege extended at common law to the Commission's performance of a legislative function, whether that privilege is absolute or qualified. If this Court addresses the question at all, it should follow the lead of other state and federal courts and protect the Commission from Plaintiffs' discovery requests. *See Comm. for a Fair & Balanced Map*, 2011 WL 4837508 at *10 (preventing discovery into "pre-decisional, non-factual communications that contain opinions, recommendations or advice about public policies or possible legislation"); *Rodriguez*, 280 F. Supp. 2d at 103 (denying motion to compel discovery in redistricting case about "the actual deliberations of the Legislature—or individual legislators—which took place outside [the body], or after the proposed redistricting plan reached the floor of the Legislature"). Injecting members of the judicial branch into litigation that is often highly politicized not only does nothing to further the *objective* inquiry that this Court must undertake when reviewing the Final Map. It will only chill the work and honest conversations of future judicial commissions.

## CONCLUSION

For the reasons stated above, this Court should affirm the circuit court in all respects.

Respectfully submitted,

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## CERTIFICATE OF COMPLIANCE

I hereby certify that this brief contains 27,877 words, is in compliance with Missouri Supreme Court Rule 84.06(b), includes the information required by Rule 55.03, and includes information on how the brief was served on the opposing party.

*/s/Maria A. Lanahan*

## CERTIFICATE OF SERVICE

I hereby certify that, on January 2, 2024, a true and correct copy of the foregoing was filed with the Court's electronic filing system to be served by electronic methods on counsel for all parties entered in the case.

*/s/ Maria A. Lanahan*