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IN THE SUPREME COURT OF MISSOURI

No. SC100277

CLARA FAATZ AND WILLIAM CALDWELL,

Appellants,

v.

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

Respondents.

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

APPELLANTS' BRIEF

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JURISDICTIONAL STATEMENT

This is an appeal from an action alleging that a redistricting plan violates the Missouri Constitution. The Circuit Court of Cole County declared the Judicial Redistricting Commission's State Senate Map constitutional under Article III, Section 7 of the Missouri Constitution. A21, D248:P21

This Court has "exclusive appellate jurisdiction" for "[a]ny action expressly or implicitly alleging that a redistricting plan violates [the Missouri] Constitution [...]." Mo. Const. art. III, § 7(j).

The Judgment became final on October 12, 2023, and Appellants timely noticed their appeal on October 9, 2023. D245.

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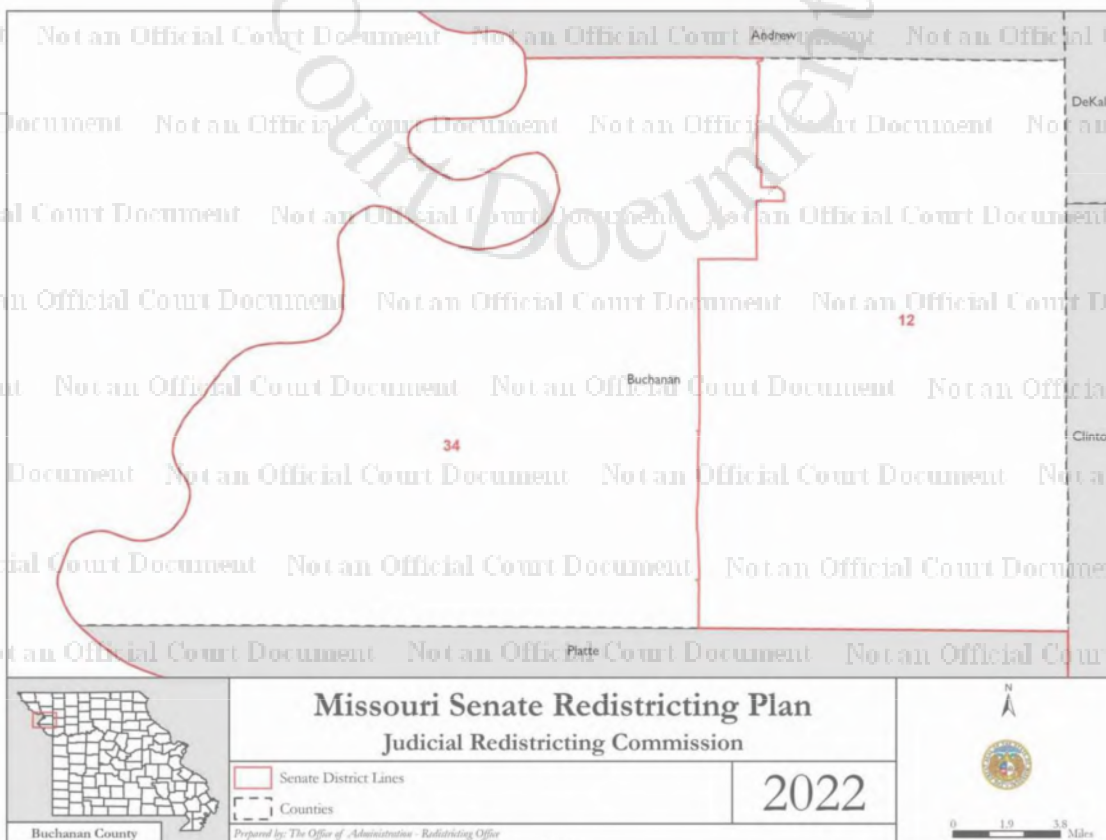
INTRODUCTION

Every ten years, the federal government conducts a census and Missouri redraws its state legislative districts to ensure fair representation. Mo. Const. Art. III, § 3(c). That happened most recently following the 2020 census. This appeal concerns the districts for the State Senate that resulted from that process. Under the state's Constitution, State Senate districts shall be drawn in a way that preserves communities. In practice, that means that Senate district boundaries must follow the borders of cities and counties if it is possible to do so while abiding by other redistricting directives. But there is no dispute that the recently-drawn State Senate map divides Buchanan County virtually down the middle. It also divides the City of Hazelwood.

Document 221, Page 9 shows that Buchanan County is divided between Senate Districts 34 (where Plaintiff Caldwell lives) and 12.

SC100277 Appeal Document Number 221 Page 8



A32, D221:P8

This happened once before and this Court called foul. *State ex rel. Teichman v. Carnahan*, 357, S.W.3d 601 (Mo. banc 2012). Although *Teichman* relied on language that has since changed—it is now more specific—the issue was the same. The "plan violated []the constitutional provision by improperly dividing the district boundaries. . . [because it] crossed county lines. *Id*. 607. That language might be dicta because in *Teichman* the citizen commission recognized their error and tried to file a second plan, which they had no authority to do. *Id.*

But the pronouncement itself reflects long standing, and deeply-rooted, policy of this state—communities (now specifically defined as counties and cities) must be preserved. *See Preisler v. Hearnes*, 362 S.W.2d 552, 556-57 (Mo. banc 1962) ("[C]ounties are important governmental units, in which the people are accustomed to working together[,] [t]herefore, it has always been the policy of this state, in creating districts of more than one county (congressional, judicial or senatorial) to have them composed of entire counties[.]"); *see also Teichman*, 357 S.W.3d at 607. ("[T]hat policy [of county importance, is] to be considered in the state Senate redistricting process."); *Pearson v. Koster*, 367 S.W.3d 36, 49 (Mo. banc 2012).

In 2020, that long-standing policy was specifically codified in the express language of the Missouri Constitution, which now addresses political subdivisions in subdivision (b)(1), (b)(3) and (b)(4) of section 3 of Article III (made applicable to State Senate districts in section 7(c) of that same Article)[1]. Indeed, political subdivisions are now the *only* redistricting factor specifically mentioned three different times in the redistricting criteria.

Such emphasis is consistent with legislative redistricting approaches throughout the United States. "[A]ttempting to avoid the splitting of political subdivisions" is a "traditional districting criteria." *Allen v. Milligan*, 143 S. Ct.

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

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1487, 1549 (2022) (Alito, J., and Gorusch, J., dissenting). That tradition is often followed by respecting "county, city and town lines" even when disregarding those lines might achieve the very important goal of improved minority voter representation. *Id.* at 1504 (Kavanaugh, J., concurring). Indeed, it is widely accepted that "districting, without any regard for political subdivision or natural or historical boundary lines, may be little more than an open invitation to partisan gerrymandering." *Preisler v. Kirkpatrick,* 528 S.W.2d 422, 425 (Mo. banc 1975) (citation and quotation omitted). Missouri voters, perhaps in recognition of gerrymandering concerns, have specifically placed that traditional value into the constitutional provisions that govern State Senate redistricting.

Plaintiffs Clara Faatz and William Caldwell live in two communities that have been fractured by the failure to uphold the voters' commitment to preservation of their communities. The 2022 State Senate map does not respect the county lines of the political subdivisions of Buchanan County or the municipal lines of Hazelwood—as the Constitution requires. So Plaintiffs took advantage of the Constitutional protections and the right to ask for judicial review. A25, Mo. Const. art. III, § 3(j)(repeated verbatim in Article III, §7(i)). But the circuit court declined to follow the plain language of the Missouri Constitution, upholding the divisions of Plaintiffs' communities. Now, Appellants ask this Court to follow the dictates of the Constitution and to preserve the communities of Buchanan County and the municipality of Hazelwood.

Along the way, the Court may find itself examining the following issues, among others:

1) How the 2020 amendments to the Missouri Constitution change redistricting criteria;
2) How the current criteria relate to and interact with each other. In other words, are some more important than others or do all the criteria work together;
3) Under the new constitutional language, what must a Plaintiff show to

succeed in a challenge; and

4) Must the entity that draws the map participate in litigation about their work and provide relevant discovery.

Appellants believe the law is clear and requires reversal on the record created below. But should the Court find that there are factual issues preventing relief to the Plaintiffs based on this Court's interpretation of the law, the Court should still reverse and remand for further proceedings. Although the Constitution expressly requires that the Judicial Redistricting Commission be a party to this action—because the Commission drew the district maps—the trial court improperly dismissed them. Worse yet, the trial court made findings about *why* the Commission did what it did but refused to allow the Plaintiffs to take any discovery from or about the Commission. Those rulings are fundamentally unfair to the Plaintiffs.

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STATEMENT OF FACTS

Most of the facts are uncontroverted. The parties stipulated to most of the material facts and the witnesses (only one for each party) agreed except as noted herein. *See* D220.

The Senate Independent Bipartisan Citizens Commission

Every ten years, after a federal decennial census, the Governor appoints a Senate Independent Bipartisan Citizens Commission (the "Citizens Commission") which tries to agree on Missouri's new State Senate map. D220:P1, ¶ 4. In 2021, the Citizens Commission was chaired by Marc Ellinger with Susan Montee as Vice-Chair. D220:P1, ¶¶ 5 & 7. In an unofficial capacity, Mr. Sean Nicholson ("Nicholson") advised the Citizens Commission during its deliberations and assisted in drawing iterations of the State Senate district map for the Citizens Commission. Tr. 42:17-43:11.

Nicholson's maps complied with all the constitutional requirements, but did not split the City of Hazelwood or Buchanan County. *See* Tr. 52:19-53:20. Mr. Ellinger and Ms. Montee also submitted their own maps for formal consideration by the Citizens Commission. Several of those maps complied with all other requirements of the constitution but none split the City of Hazelwood or Buchanan County. D220: P2, ¶ ¶ 6 and 8. However, the Citizens Commission could not agree on, nor did they adopt, a final map for Missouri's State Senate districts. D220:P2, ¶ 9-10.

The Judicial Commission

Because they could not agree, the Citizens Commission notified Secretary of State Ashcroft ("Secretary Ashcroft," the "Secretary," or "Respondent") that they had failed in their assigned task. D220:P2, ¶ 9-10. Pursuant to the constitutional process, this Court appointed a Judicial Redistricting Commission (the "Judicial Commission"), composed of six judges of the Missouri Court of Appeals, to draw a new State Senate map. D220:P2, ¶ 11.

In March 2022, the Judicial Commission released its map and notified

Secretary Ashcroft that it had successfully divided Missouri into thirty-four State Senate districts and established the populations and boundaries of those districts (the "Final Map" or the "Judicial Commission Plan"). D220:P2, ¶¶ 12-13. The Final Map was accompanied by various data that directed its creation, as the Constitution requires, including how much each district deviated from the ideal population for a district and racial information on each district. D220:P2, ¶ 14; D221.

The Judicial Commission's Final Map Divided Buchanan County and the City of Hazelwood

The Judicial Commission's Final Map split Buchanan County into two separate State Senate districts—District 12 and District 34. D220:P2, ¶ 15. The Final Map also split the City of Hazelwood into two separate State Senate districts—District 13 and District 14, crossing the City's municipal lines to do so. D220:P3, ¶ 18. Senate Districts 12, 13, 14, and 34 all exceed the ideal population of a State Senate district by more than one percent but less than three percent. D221:P15. Respondent intends to use the Final Map absent a court order preventing him from doing so. D208:P9.

Appellants Filed this Lawsuit

Clara Faatz ("Faatz") n is a Missouri citizen and resident of the City of Hazelwood. D220:P1, ¶ 2. William Caldwell ("Caldwell") is a Missouri citizen and resident of Buchanan County. D220:P1, ¶ 2. Both Faatz and Caldwell (together, "Appellants" or "Plaintiffs") reside in State Senate districts that are challenged here. D220:P1, ¶¶ 1-2. On July 27, 2022, they filed suit in the Circuit Court of Cole County naming both Secretary Ashcroft and the Judicial Commission, which had drawn the map. They sought a declaratory judgment that the Final Map is unconstitutional. D205:P1-2. They also asked the trial court to adopt their proposed map (the "Proposed Map" or "Remedial Map"), which resolved the splitting of Buchanan and Hazelwood, and to enjoin Secretary Ashcroft from using the Final Map for any purpose. D205:P7.

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Appellants issued discovery to the Judicial Redistricting Commission, requesting communications sent among the Commission members and any maps considered by the Commission. D193. On motion of the Commission, the circuit court quashed all discovery efforts directed to the Judicial Commission and entered a protective order that quashed outstanding discovery requests and "prevent[ed] further discovery on the Commission, its members or staff, or anyone assisting the Commission during the process of considering and filing the Senate map." D198. The circuit court also dismissed the Judicial Commission from the action over the objections of Appellants. D199; D219. A bench trial was held before the circuit court on Wednesday, July 12, 2023. *See* A1, D248:P1.

The Witnesses and Evidence at Trial

At trial, the Court received the Judicial Commission Plan into evidence pursuant to a Joint Stipulation, which included other documents and facts. D220; D221-222. Thereafter, the parties presented deposition designations and live testimony through one witness for each side. Appellants called Sean Nicholson ("Nicholson") and Respondent called Sean Trende ("Trende"). Tr. 39:20; 168:5-6.

The parties' stipulation included the Judicial Commission's redrawn State Senate district maps, together with statistical information about the population, racial make-up, and partisan fairness and competitiveness of each district. D221:P15-21. The parties also stipulated to the admission of Citizen Commission-drawn maps which did not split Buchanan County or the City of Hazelwood. D220: P2, ¶ ¶ 6,8. There were nine such maps. In addition, the parties offered "remedial" maps for the disputed districts—one was drawn for Appellants by Nicholson, Ex. P-1, and another was drawn for the Secretary by Trende. Ex. DX1. Neither of the remedial district maps split the City of Hazelwood. Appellants' map did not split Buchanan County, but Respondent's remedial map continued to do so, although in a different way than the Judicial Commission had.

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Appellants' Witness

In addition to the stipulations, the circuit court heard from live witnesses. Plaintiffs called Nicholson. Tr. 39:20. The Secretary moved to exclude/strike Nicholson's testimony as an expert witness. The circuit court denied that motion, finding that he was "qualified to give the testimony he gave." Tr. 158:11-16. In its written judgment, the trial court "did not find that Mr. Nicholson to be a useful fact witness." (sic). A8, D248:P8.

Nicholson was familiar with the Missouri redistricting process, having worked with the software recommended by the State for such a process and having advised the Citizens Commission. *See* A7, D248:P7, ¶ 34. During the Citizens Commission process, Nicholson assisted with drawing maps that did not split Buchanan County or Hazelwood and complied with all other criteria in the Constitution. Tr. 52:19-53:17.

Nicholson analyzed the Judicial Commission Plan and attempted to revise the plan to draw district maps that did not divide Buchanan County and also to draw district maps that did not cross Hazelwood municipal lines. Tr. 76:20-77:2. Nicholson was able to draw such district maps using the software the State suggested for redistricting. Tr. 42:19-43:4; Tr. 77:21-24. In doing so, he redrew only the specific districts necessary to address Buchanan County and Hazelwood (which means he adjusted the lines for only two Senate Districts near St. Louis for Hazelwood and only three Senate districts to address Buchanan County). Tr. 78:21-83:19. The reason he adjusted three districts for Buchanan County was that it was necessary to meet equal population requirements. *Id.* Nicholson considered all the constitutional requirements when drawing his map and drew a map that complied with all of those requirements. *Id.*

Nicholson was able to draw a map that had fewer split counties than the Final Map and kept Buchanan County whole and the City of Hazelwood whole. *Id.* Those district maps also complied with all of the other requirements of the Constitution. *Id.* The circuit court accepted those district maps into evidence

without objection. Tr. 84:1-3. 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. Tr. 78:21-83:19.

The Secretary's Witness

Respondent Secretary of State called only Sean Trende. Tr. 168:5-6. The Court found the Secretary's witness to be well qualified to provide opinions on legislative map drawing. A8, D248:P8, ¶ 36. The Court described Trende's testimony in its Judgment. The Court found that "Mr. Trende testified that...Buchanan County is a typical county to split." A9, D248: P9. The Court also described that Mr. Trende "explained that for the City of Hazelwood, [t]he tendency is to split the more populated cities because if you are trying to make things overall populous that is where you want to balance it out." A9, D248: P9, ¶ 42. Mr. Trende's testimony concluded (as the Court described) that "if there is no discretion, this [map drawing] just goes on and on…because there is an infinite number of maps." A10, D248:P10, ¶ 49.

Trende also testified and the Court found facts regarding the Secretary of State's "remedial map." A10, D248:P10, ¶ 47. Trende ran approximately 5,000 computer simulations, specifying that it was acceptable for the simulation to split one county (or one city) and found that: (1) 89% of the simulations would not split Buchanan County and 11% of those simulations would split Buchanan; and (2) 77% of the time the simulations would not split the City of Hazelwood and 23% of the time the simulations would split Hazelwood. A9, D248:P9, ¶ 41. Tr. 202-206. Trende, as an expert called by the Secretary, testified that: "it is within the ability of a map drawer to draw a map that complies with all the Missouri requirements and also does not split Buchanan County, . . . [and to do the same] with regard to Hazelwood because [he] did it." Tr. 243:16-244:10.

Trende's remedial maps differed from Nicholson's because Trende's kept the City of Hazelwood together by adjusting the two Senate districts in order to make those districts more compact (using Trende's own metrics) than the

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districts in the map proposed by Nicholson. A10, D248:P10 ¶ 48. Although he said it was possible to draw a map that did not split Buchanan County, his remedial map continued to split Buchanan, although not in the same way the Commission's map did. Tr. 163:8-164:16; Ex. P-4, 101:22-102:3.

The Final Judgment

The circuit court entered its Opinion and Final Judgment on September 12, 2023. A1-A21, D248. In its Final Judgment, the circuit court found in favor of Respondent and held that the Judicial Redistricting Commission's Final Map is constitutional. A21, D248:P21.

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POINTS RELIED ON

I. The trial court erred when it applied a "reasonableness" standard in order to reach its Judgment for Defendants because the Constitution contains specific criteria for drawing State Senate districts—none of which is reasonableness—in that the Judicial Commission map divided political subdivisions and reasonableness is not relevant to the analysis.

- Mo. Const. Art. III, § 3
- *Pearson v. Koster*, 367 S.W.3d 36 (Mo. banc 2012)
- *Pestka v. State,* 493 S.W.3d 405 (Mo. banc 2016)

II. The trial court erred when it declined to rely on subdivision (1) of Article III, Section 3(b) in entering its Judgement because that subsection requires State Senate districts which deviate more than 1% from the ideal population may do so only when necessary to preserve political subdivisions in that Districts 12 and 13 (where Plaintiffs reside) deviated from ideal population by more than 1%, yet the Commission did not preserve the political subdivisions of Buchanan County and the City of Hazelwood.

- Mo. Const. Art. III, § 3(b)(1)
- *Pearson v. Koster*, 367 S.W.3d 36 (Mo. banc 2012)

III. The trial court erred by not following the plain language of the Constitution in entering its Judgment because subdivision (3) (compactness) incorporates preservation of communities in that the challenged districts cross county and municipal lines.

- Mo. Const. Art. III, § 3(b)(3)
- *Pestka v. State,* 493 S.W.3d 405 (Mo. banc 2016)
- *Johnson v. State,* 366 S.W.3d 11 (Mo. banc 2012)

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IV. The trial court erred by using a mathematical calculation of compactness to compare the challenged maps with the remedial maps in entering its Judgment because subdivision (3) requires only that the districts be "as compact as may be" and that they "in general" resemble shapes in that the trial court applied a mathematical standard to find, by conducting an erroneous comparison, that Plaintiffs' alternative district maps were not as compact as the enacted district maps.

- Mo. Const. Art. III, § 3(b)(3)
- *Pearson v. Koster*, 367 S.W.3d 36 (Mo. banc 2012)

V. The trial court erred when it found that Plaintiffs had a 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" because that evidentiary burden is an erroneous application of the law in that Plaintiffs did provide evidence that the Final Map clearly and undoubtedly contravenes the Constitution which was admitted, on the record, by both parties.

- Mo. Const. Art. III, § 3
- *Johnson v. State,* 366 S.W.3d 11 (Mo. banc 2012)

VI. The trial court erred when it found that Plaintiffs did not meet 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 on that issue was undisputed and uncontroverted in that, all witnesses for both the parties agreed that there was *no other redistricting factor* requiring splitting Buchanan County or the City of Hazelwood.

- Mo. Const. Art. III, § 3
- *Johnson v. State,* 366 S.W.3d 11 (Mo. banc 2012)

VII. The trial court erred when it dismissed the Judicial Commission from this lawsuit because the Constitution requires the Judicial Commission to be a party to the case in that the Judicial Commission is the body that drew the challenged district maps.

- Mo. Const. art. III, § 7(f)
- Rule 55.27(a)(6)
- *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993)

VIII. The trial court erred when it entered a protective order and prohibited all discovery from the Judicial Commission (or anyone supporting the Commission) because Plaintiffs are entitled to conduct discovery that may lead to admissible evidence in that the Judicial Commission drew the challenged district maps and discovery on it was reasonably calculated to lead to admissible evidence concerning why political subdivisions were divided, whether the Commission had to do so to comply with other provisions of the Constitution, and/or whether there were other district maps that could have been drawn to comply.

- Mo. Const. art. III, § 7(i)
- *Tate v. Dierks*, 608 S.W.3d 799, 803 (Mo. App. 2020)
- *State ex rel. Missouri Ethics Comm'n v. Nichols*, 978 S.W.2d 770, 773 (Mo. App. 1998)

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STANDARD OF REVIEW

The constitutional validity of a redistricting plan is reviewed "as if it were a statute enacted by the legislature." *Johnson v. State*, 366 S.W.3d 11, 20 (Mo. banc 2012). Like a properly enacted statute, a redistricting plan is assumed to be constitutional unless it "plainly and palpably affronts fundamental law embodied in the constitution." *Id* (citation and quotation omitted).

This case also requires interpretation of certain provisions found within the Missouri Constitution. There, the "primary goal [...] is to 'ascribe to the words of a constitutional provision the meaning that the people understood them to have when the provision was adopted.'" *Doyle v. Tidball*, 625 S.W.3d 459, 463 (Mo. banc 2021)(quotation and citation omitted).

Finally, as this case was tried by the Circuit Court of Cole County, and not by a jury, the trial court's Judgment can be reversed if there is no substantial evidence to support it, if it is against the weight of the evidence, or if it erroneously declares or applies the law. 366 S.W.3d at 18.

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ARGUMENT

I. The trial court erred when it applied a "reasonableness" standard in order to reach its Judgment for Defendants because the Constitution contains specific criteria for drawing State Senate districts—none of which is reasonableness—in that the Judicial Commission map divided political subdivisions and reasonableness is not relevant to the analysis.

Preservation. Plaintiffs' Petition urged the Court to adopt the correct standard—which is found in the plain language of the Constitution (Article III, Section 3). D205:P4-6. Plaintiffs also pointed out that the correct standard by which to judge State Senate districts is the criteria listed in the Constitution. Tr. 50:3-51:8; 64:16-65:9; 69:15-76:13; 77:14-78:2. But the trial court instead found that "to the extent there is any perceived imperfection in the Senate Map, the choices made by the Judicial Commission are reasonable." A17-A18, D248:P17-18.

Standard of Review. This point challenges the application of a legal standard. This Court's review is *de novo*. *State v. Williams,* 673 S.W.3d 467, 473 (Mo. banc 2023).

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This case calls for the Court to decide the circumstances in which Missouri State Senate districts may be drawn to divide communities of interest. The most recent Judicial Commission plan divides Buchanan County and the City of Hazelwood. That basic fact is undisputed. Plaintiffs contend that is unconstitutional while the Secretary of State (and the trial court) found it "reasonable."

A. The Constitution's plain language describes the steps a mapmaker must take to draw lawful districts.

The Missouri Constitution's scheme for redistricting legislative districts has followed the same basic principles for many decades. The latest version of the

redistricting requirements (adopted by the voters in 2020—after this Court last reviewed these issues) provides the most clarity yet as to how redistricting must be done. Article III, Section 3 explains how to redistrict the State House and Section 7 incorporates Section 3 to explain how to redistrict the State Senate. This appeal focuses on subsection 3(b) of Article III as applied to State Senate districts.

That subsection outlines the steps that "shall" be followed for drawing State Senate districts. The Constitution purports to list these steps in an order of priority, although, as discussed herein, priority in context of the plain language of Article III, Section 3 might not mean that some are more important than others. Instead, it may help to think of the criteria as steps to be accomplished in the redistricting process.

Step 1: Divide the state into 34 State Senate districts with the population of each district as nearly equal as "practicable." This means district population shall not deviate more than one percent from the ideal population, although a district may deviate up to three percent "if *necessary to follow political subdivision lines* consistent with" step 4. A22, Mo. Const. art. III, § 3(b)(1) (emphasis added).

Step 2: Make sure the districts comply with federal law, focusing on not denying rights based on race or color. *Id.* at § 3(b)(2). This provision states that the principles in this section "shall take precedence over any other part of this constitution." *Id.*

Step 3: The districts shall be contiguous and "as compact as may be." The Constitution elaborates that "in general, compact districts are those which are square, rectangular, or hexagonal in shape *to the extent permitted by natural or political boundaries*." *Id.* at § 3(b)(3) (emphasis added).

Step 4: Preserve communities. Districts shall "follow political subdivision lines to the extent possible. Relevant here, split counties and county segments, defined as any part of the county that is in a district not wholly within that county, shall be as few as possible. And, "as few municipal lines shall be crossed

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as possible." *Id.* at § 3(b)(4).

Step 5: Partisan fairness (not at issue here).

Instead of following the steps outlined above, and entering judgment based on the plain language of the Constitution, the trial court adopted a "reasonableness" standard. A17-A18, D248:P17-18. That was error.

B. Reasonableness is not the standard by which redistricting must be conducted.

The State Senate redistricting process is governed by specific criteria in the Constitution. Those criteria "shall" be applied when conducting redistricting. The word "reasonable" appears nowhere in the text. The plain language of the redistricting provision requires mapmakers to follow objective criteria.

This clear absence of map drawer discretion to deviate from the terms of the Constitution has been a hallmark of this Court's jurisprudence on redistricting. "In *Pearson I*, this Court expressly rejected the good faith standard and held that the applicable standard is the language of the constitution itself, which is an objective standard." 367 S.W.3d at 46. While map drawers have some discretion, "*their discretion always is limited by mandatory constitutional requirements*." 366 S.W.3d at 33 (Mo. banc 2012) (Price, J., concurring). Although the language is now more precise, the result is no different under the current constitutional provision—the only standard to apply is the language of Article III, Section 3.

The Constitution's redistricting section has been amended twice since the last round of redistricting, so, there is no case law specifically interpreting the new language. But the current redistricting language contains similar concepts to those prior provisions. In many cases, as discussed below, the current language is even more specific than previous versions of the Constitution. The trial court's finding that "the choices made by the Judicial Commission are reasonable" to reach its Judgment erroneously applied the law and requires reversal. A18, D248:P18. When the Court reverses, it should instruct the Court to apply the

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correct standard, as discussed in the next point.

II. The trial court erred when it declined to rely on subdivision (1) of Article III, Section 3(b) in entering its Judgement because that subsection requires State Senate districts which deviate more than 1% from the ideal population may do so only when necessary to preserve political subdivisions in that Districts 12 and 13 (where Plaintiffs reside) deviated from ideal population by more than 1%, yet the Commission did not preserve the political subdivisions of Buchanan County and the City of Hazelwood.

Preservation. The trial court found that this argument was not made or preserved below, but the trial court is incorrect. A16-A17, D248:P16-17. Because the trial court raised the issue in its Judgment, it clearly it was an argument the Plaintiffs had made during the course of the litigation. *Id.* The record supports that conclusion.

The Amended Petition sought a declaration that the State Senate map was "invalid because it impermissibly divides Buchanan County. . . [and] the municipality of Hazelwood." D205:P7. The Amended Petition included the Final Map as an exhibit and alleged that the map "does not preserve communities because the district lines drawn in the New Senate Map divide Buchanan County." D205:P5, ¶ 40 The Amended Petition also alleged the same about the municipality of Hazelwood. D205:P6, ¶ 60. The fact that Plaintiffs did not specifically say that their action was brought under one of the several subsections of Article III, Section 3 requiring preservation of communities did not waive the legal theory.

Instead, a court should ignore what the plaintiffs call their theory and instead look at the pled facts. *See Thomas v. City of Kansas City*, 92 S.W.3d 92, 96 (Mo. App. 2002). When that standard is applied, it is clear that Plaintiffs complained of divided political subdivisions and sought such relief as may be

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appropriate under whatever theory would give them relief.

Those theories are straightforward. The plain text of the Constitution requires that any claim relating to splitting political subdivisions must consider subdivisions 1, 3, and 4 of subsection 3(b), because all three subdivisions mention the concept. The Amended Petition stated a claim because the facts it pled required the trial court to consider whether splitting Buchanan County and the City of Hazelwood was unlawful under Article III, Section 3.

And the issue of compliance with subsection 1 was actually tried. When the trial began, Plaintiffs were quite specific on their legal theories. The first thing Plaintiffs' counsel's opening statement discussed was the equal population requirement. Tr. 9:24-10:19. He argued (without any objection that it was outside the scope of the pleadings) that "all three of these [districts] deviate by more than 1 percent. . . So that kicks us into the discussion we're really here about which is these political subdivisions." *Id.*

After Plaintiffs' counsel specifically outlined that theory, the parties stipulated to the introduction of evidence. One stipulated document, D221-222, included statistics about the adopted plan. D221:P15. Page 15 of that exhibit contained the population deviation statistics showing that the two challenged districts exceeded ideal population by more than one percent. The Secretary did not object, but instead *stipulated,* to that evidence. D220:P1 andP2, ¶ 14. By that same stipulation, the Secretary also agreed to the admission of Joint Exhibit 26, which was a "Population Deviation Chart" created by the Secretary's expert. It also documents the deviations of more than one percent. Ex. JT-26. And, during Plaintiffs' case in chief, their only witness testified about Joint Exhibit 1 as follows *without objection:*

> Q. And have you seen information like this going through mapping and Dave's, et cetera?
> A. Yes.
> Q. What are we looking at? It says it but just tell the Judge what we're seeing here.
> A. Yes. This is a chart that outlines the deviation of each

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> of the Senate districts in the enacted plan. That is how many more or fewer people it has than the ideal population number. 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. 71:20-72:16.

Appellants believe the issue was sufficiently presented to the trial court in the pleadings but to the extent it was not, the issue was tried by either express consent (because the parties affirmatively stipulated to evidence) or by implied consent (because there was no objection to evidence which bore solely on the issue of population deviation). *See Bone v. Director of Revenue,* 404 S.W.3d 883, 886 (Mo. banc 2013); Rule 55.33(b).

Standard of Review. This point challenges the application of a legal standard. This Court's review is *de novo*. 673 S.W.3d at 473.

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As discussed in Point I, the plain language of the Constitution, not a "reasonableness" standard, instructs a mapmaker how to draw State Senate districts. *See* 367 S.W.3d at 46 (Mo. banc 2012); *see also Pestka v. State,* 493 S.W.3d 405, 408-9 (Mo. banc 2016). Following the plain language reveals mandatory provisions the Judicial Commission failed to follow.

In step 1, subdivision (1) of the Constitution required the Commission to draw districts with each district "as nearly equal as practicable in population." For State Senate Districts, that is 1/34th of the statewide population. The current language of the Constitution elaborates on "as nearly equal as practicable" by requiring that a district may deviate up to one percent from that ideal population, but greater deviations may only occur "to follow political subdivision lines." And

under no circumstances may any district deviate from ideal population by more than three percent. *See* A22, Mo. Const. art. III, § 3(b)(1).

This would appear to be the first time in Missouri's history that respect for political subdivision lines is specifically incorporated into the equal population requirements. That change to Missouri's approach has to mean something. The two challenged districts vary by more than one percent from ideal population yet they do not respect political subdivision lines. D221:P15. That is not allowed.

A. The trial court erred when it failed to find that the population deviations of greater than one percent for the challenged districts mean those districts may not cross political subdivision lines.

The parties' stipulated evidence established that the challenged districts deviated from ideal population by more than one percent. D221:P15. As a matter of law, that level of deviation from ideal population is unconstitutional unless the deviation is "necessary to follow political subdivision lines." A22, Mo. Const. art. III, § 3(b)(1).[2] Yet, the challenged districts do not do so.

That decision failed to follow constitutional mandates. The constitutional redistricting criteria are listed in an order of "priority"—dictating how those criteria are applied to map drawing. A22, Mo. Const. art. III, § 3(b). All subdivisions are expressed in mandatory ("shall") terms but, because of their prioritization, some appear subordinate to others.

Furthermore, complying with one subdivision requires an examination of compliance with another subdivision: to wit, when beginning the map drawing process to account for equal populations under subdivision (1), mapmakers must consider subdivision (4) to preserve communities and political subdivision lines and may deviate from the baseline population equality to do so.

[2] For example, District 20 (the portion of Greene County that is not in District 30) deviates by -2.62% in order to keep the City of Springfield wholly contained in one District (District 30). *See* D221:P10.

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The first step and highest priority when drawing districts is to ensure population equality. A22, Mo. Const. art. III, § 3(b)(1). This provision was adopted by the people in 2020 and requires that when initiating the map drawing process, the division of population is based on "one person, one vote." *Id.* Prior to that time, the Constitution provided vague direction as to how to make districts equal in population.

Until 2018, the Constitution directed that the population of the state be divided by 34 and each district be drawn "so that the population of that district shall, as nearly as possible, equal that figure." Mo. Const. art. III, § 2 (1982). The 2018 Constitution clarified, only somewhat, how to make populations equal by requiring that districts have "a total population as nearly equal as practicable to the ideal population for such districts[.]" Mo. Const. art. III, § 3(c)(1)a (2018). This Court recognized the difficulty of applying such a vague constitutional standard to redistricting. *See generally* 367 S.W. 3d 36 (discussing the application of the standard "as may be" to compactness).

Perhaps in an effort to clarify the standard, the latest Constitution is much more specific, specifying that a district "may deviate up to three percent if necessary to follow political subdivision lines consistent with subdivision (4) of this subsection." A22, Mo. Const. art. III, § 3(b)(1). Thus, the Constitution now permits deviation from ideal population, but it sets guardrails that prohibit wild deviations between districts and allows variations within those guardrails only for one other criteria—preservation of political subdivisions.

In the initial step of redistricting, first an "ideal population" is calculated by taking the total population of Missouri as determined by the most recent decennial census and dividing it by thirty-four, the number of State Senate districts set forth in the Constitution. *See* A22, Mo. Const. art. III, § 3. In this step, mapmakers may draw a State Senate district that deviates from the ideal population figure by up to one percent for any reasons, but districts may go *over* the one percent guardrail (up to three percent) only "***if necessary*** to follow

political subdivision lines." A22, Mo. Const. art. III, § 3(b)(1) (emphasis added).

That part is all new language. It allows some districts to represent fewer voters than others (meaning those voters have a little more say in who they elect) but that disparity is limited to one percent unless necessary to preserve communities, then it can go up to three percent. It is not a trivial matter. Population deviation implicates "one person, one vote" requirements and rights guaranteed by the U.S. Constitution. *See* U.S. Const. amend. XIV; *See also Baker v. Carr,* 369 U.S. 186 (1962); *Reynolds v. Sims,* 377 U.S. 533 (1964); *Gaffney v. Cummings,* 412 U.S. 735 (1973).

In analyzing the requirement that population be distributed to provide equal protection for the voters, the Supreme Court has recognized that "maintaining the integrity of political subdivision lines" is a reasonable justification to deviate (somewhat) from the equal population requirement. *Mahan v. Howell,* 410 U.S. 315, 327 (1973), *modified* 411 U.S. 922. Missouri's most recent constitutional language seems to track that jurisprudence, allowing small deviations (1%) for no particular reason and allowing slightly more deviation (up to 3%) only when justified to maintain the integrity of political subdivision lines.

The Final Map contains districts that do not pass muster under this population equality mandate. Plaintiff Caldwell's district (12) in the Final Map deviates from the ideal population by 2.71%. D221:P15. According to the Constitution, this is only permitted if such a deviation is "necessary to follow political subdivision lines." A22, Mo. Const. art. III, § 3(b)(1). However, District 12 does not follow the political subdivision lines of Buchanan County and still exceeds the population deviation limit of one percent. Thus, its deviation is unjustified. Similarly, Plaintiff Faatz's district (14) has a population deviation of 2.67%, but fails to follow municipal lines for the City of Hazelwood. D221: P15.

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B. The Constitution authorizes crossing county and municipal lines, but under limited circumstances described by the plain language of Article III, Section 3.

Following subdivision (1)'s reference to subdivision (4) reveals that there may be times when crossing county and municipal lines would be appropriate. That is allowed, for example, when a county's population is large enough that it must be divided into not more than two Senate districts. That's the case with Jefferson County, for example. *See* D221:P11. The Constitution authorizes the Commission's treatment of Jefferson County in subdivision (4)—"[i]f a county wholly contains one or more districts, the remaining population shall be wholly joined in a single district made up of population from outside the county."

But that is not the case for either of the challenged State Senate districts. Here, crossed county and municipal lines must be "as few as possible." A22, Mo. Const. art. III, § 3(b)(4). The parties stipulated that Plaintiff Caldwell's Senate District contains a split county and that, in Plaintiff Faatz's district, the municipal lines of Hazelwood were crossed.

The undisputed and uncontested testimony—provided by both witnesses (one for each party)—agreed that it was possible to draw districts that did not create a county segment in Buchanan County or cross the municipal lines of Hazelwood but still comply with the equal population requirement. Tr. 52:19-54:25; 243:16-244:6. In other words, it was possible to draw districts with fewer county segments—meaning the Commission's map did not keep county segments "as few as possible"—and to draw districts that crossed fewer municipal lines—meaning the Commission did not comply with the requirement that "as few municipal lines shall be crossed as possible." A22, Mo. Const. art. III, § 3(b)(4).

And the trial court did *not* find that the Judicial Commission districts crossed as few lines as possible. Instead, the trial court misread the law and found that it was permissible to cross the political subdivision lines because "subdivision one incorporates subdivision 4." A17, D248:P17. That part was

correct. But then the trial court held essentially that subdivision (4) (as incorporated into subdivision (1)) is subordinate to subdivisions (1) through (3).[3] A17, D248:P17. The trial court's judgment then focused on the "compact as may be" requirement of subdivision (3) to find that it was permissible to cross political subdivision lines in the interest of compact districts. That interpretation of the law was incorrect.

There are three problems with that conclusion. First, subdivision (1)'s reference to subdivision (4) does not say to follow political subdivision lines "as specified in subdivision (4)." Rather the language is "consistent with subdivision (4)." The plain language makes clear that a deviation of more than one percent must follow political subdivision lines in the general manner outlined in subdivision (4), not that the language incorporates all the other subdivisions of the section. The second problem is that the trial court's ruling makes subdivision (1)'s requirement that districts exceeding a one percent population deviation must preserve communities meaningless. Essentially, the trial court would read the Constitution to say that population deviation may exceed one percent without following political subdivision lines if other considerations (like compactness) would dictate otherwise. Had the drafters intended that, they could have said so. The trial court's misguided reading also renders meaningless the requirement that the subdivisions are listed "in order of priority." The trial court's ruling makes subdivision (1) subordinate to subdivision (3), rather than giving it top priority.

Finally, the trial court ignored that subdivision (3) itself requires respect for political subdivisions. In that subdivision, districts shall be "as compact as may be. . . to the extent permitted by natural and political boundaries."

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[3] The judgment actually misquotes the constitution to say that political subdivisions must be followed "to the extent consistent with subdivisions (1) *and* (3)" rather than "subdivisions (1) to (3)" although the error is of no import to the analysis.

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Subdivision (3)'s plain language makes the goal of compactness subordinate to the important public policy of respecting communities as reflected by political subdivision lines.

Ensuring population equality, the first step and highest priority for drawing districts in Article III, § 3, is already outlined in subdivision (1). It does not allow subdivision (3) to override its requirements. Instead, deviations greater than 1% from the ideal population are only justified "if necessary" to follow political subdivision lines. Mo. Const. art III, § 3(b)(1). Thus, as a natural and logical result, an inquiry into the preservation of political subdivision lines requires analysis of the fourth priority criteria, which acts as sub-criteria of population equality. The inquiry into political subdivisions is a necessary part of the population equality analysis when the Constitution is correctly interpreted. This appeal can be resolved – and the trial court reversed—based solely on the stipulated evidence and the plain language of subdivision (1).

III. The trial court erred by not following the plain language of the Constitution in entering its Judgment because subdivision (3) (compactness) incorporates preservation of communities in that the challenged districts cross county and municipal lines.

Preservation. Plaintiffs provided evidence to support the application of the compactness standard as expressed in the plain language of Article III, Section 3 at trial. Tr. 50:3-51:8; 64:16-65:9; 69:15-76:13; 77:14-78:2. But, the trial court instead found that "the compactness requirement retains the same force as above and permits any alleged deviation from political subdivisions in this case. A17, D248:P17.

Standard of Review. This point challenges the application of a legal standard. This court's review is *de novo*. 673 S.W.3d at 473.

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If this Court does not resolve the matter before it based on Point II, which it should, it will turn to the redistricting subdivisions that come after subdivision

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(1). The trial court did it that way, but when it got to subdivision (3) it went even further astray. The trial court erroneously determined that "the compactness requirement…permits any alleged deviation from political subdivisions in this case" (A17, D248:P17) and "the compactness requirement…has priority over the political subdivision requirement…" *Id* at P16. The plain language of that subdivision says the opposite.

A. Subdivision (3) specifically directs that a "compact as may be" district is one that is a certain shape permitted by political boundaries.

A major theme of the trial court's Judgment is that compactness is more important than preserving communities. That is wrong because subdivision (3) calls for an analysis of a district to determine whether such district is "compact as may be" given the other criteria that must be considered Mo. Const. art. III, § 3(b)(3). And compactness is a goal only "to the extent permitted by "natural or political boundaries." *Id.* The plain language of subdivision (3) makes clear that a district need only be as "compact as may be" *after* taking into account natural boundaries (presumably rivers and the like) and political boundaries (like state, county, and municipal boundaries). In other words, a district need *not* be compact if following political or natural boundaries is the reason it is not. To apply a compactness analysis to any district without consideration of natural or political boundaries is to ignore the words of the Constitution and cast aside deeply rooted canons of constitutional construction.

Constitutional provisions are "subject to the same rules of construction as other laws, except that constitutional provisions are given a broader construction due to their more permanent character." 493 S.W.3d at 408-9 (citation and quotation omitted). In construing a constitutional provision, "[t]his Court must assume that every word contained in a constitutional provision has effect, meaning, and is not mere surplusage." *Id.* at 409 (citation and quotation omitted). "Words used in constitutional provisions are interpreted to give effect

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to their plain, ordinary, and natural meaning." *Id.* at 409 (citation and quotation omitted).

Subdivision (3) specifically directs that "compact districts are those which are square, rectangular, or hexagonal in shape *to the extent permitted by natural or political boundaries*." A22, Mo. Const. art. III, § 3(b)(3) (emphasis added). Reading the plain language of subdivision (3), the Constitution directs that districts should generally be compact but only to the extent they can respect natural or political boundaries. The trial court's Judgment ignores this crucial limiting criteria, rendering the phrase "to the extent they can respect natural or political boundaries" mere surplusage.

The trial court's finding (unsupported by any evidence) that the Judicial Commission acceptably put compactness ahead of political subdivisions gets the analysis exactly backwards. The trial court's legal conclusion that "[t]he compactness requirement in subdivision 3 has priority over the political subdivision requirement in subdivision 4" (A16, D248:P16) is just plain wrong. This Court should avoid that trap and analyze compactness in the context of respecting political boundaries, as the Constitution directs.

Respecting those boundaries has always been the rule for Missouri redistricting plans. Although this Constitution is now clear that compactness must be considered within the context of political boundaries, it has always been the case. For example, under the 1982 Constitution, "compact as may be" (a phrase which has been preserved in subsequent versions) "implicitly permit[ed] consideration in the redistricting process of population density; natural boundary lines; the boundaries of political subdivisions, including counties, municipalities, and precincts; and the historical lines of prior redistricting maps. 367 S.W.3d at 50. Compactness has always been an aspiration, subject to the more objective standards applied to redistricting—with political and natural boundaries being arguably the most objective of all. The most recent version of the Constitution makes that quite clear.

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B. Subdivision (3) specifically requires consideration of subdivision (1)—meaning political subdivisions must be respected when considering compactness.

Subdivision (3) begins with the directive that it is to be applied "[s]ubject to the requirements of subdivisions (1) and (2) of this subsection." A22, Mo. Const. art. III, § 3(b)(3). This requirement, therefore, must mean something and should not be rendered mere surplusage. *See* 493 S.W.3d at 409.

At a minimum, this requirement means that subdivision (3) should not be applied in a vacuum, nor can the trial court's holding that "the compactness requirement [] takes precedence over following political subdivision lines" be correct. A17, D248:P17. Rather, assessing whether a district is "as compact as may be" requires that a mapmaker prioritize equal population, minority protections, and preservation of communities over compactness. *See* Mo. Const. art. III, § 3(b)(1)-(2).

This is logical considering the Constitution says that the methods of redistricting are listed "in order of priority." A22, Mo. Const. art. III, § 3(b). Once a mapmaker has complied with subdivision (1) and subdivision (2), the considerations for compliance with those subdivisions are then carried over to the consideration of subdivision (3) "compact as may be" requirement. One of those considerations, as made clear in subdivision (1), is the deviation of a district's population from the ideal. Thus, if a mapmaker made a choice to deviate up to three percent from the ideal population in order to keep a political subdivision together, that decision cannot be undone once a mapmaker makes his or her way to subdivision (3) to assess compactness.

Because the Judicial Commission chose to draw districts that exceeded a one percent deviation from population, they could do so only as "if necessary to follow political subdivision lines." But, it appears on the face of the Commission's plan that the challenged districts were drawn without regard to how the constitutional standards should be applied. The Judicial Commission should

have read the plain language of subdivision (1) to direct them to look at political subdivision boundaries when splitting the state into 34 State Senate districts. If any of those boundaries demands that a district population deviate by more than 1% to preserve that political subdivision wholly within a district, then the population deviation may be up to 3% from the ideal population. Instead, the Judicial Commission ignored that directive and skipped over the second half of the instructions in subdivision (1). The trial court found—without any evidence to support the conclusion—"that to the extent any political subdivision lines were crossed, the Judicial Commission chose districts that were more compact." A16, D248:P16. To the extent that conclusion is correct, the Judicial Commission failed to follow the requirements of the Constitution.

C. When applying the plain language of subdivision (3) to the remedial maps, there is no significant difference in the compactness of the challenged districts.

Even if the trial court's conclusion was correct, the Judgment also misreads subdivision (3) in its findings about Plaintiffs' remedial map. The trial court found that "the enacted Senate Map was more compact than either of the proposed remedial maps." A16, D248:P16. But that is the wrong standard. Of course the remedial map must comply with all provisions of the Constitution. 366 S.W.3d at 20. But the map is not required to be "better" than the challenged district maps, it need only fix the constitutional violation while complying with the other requirements in order to demonstrate it is "possible" to divide fewer counties and municipalities. The trial court conducted no analysis of whether the remedial districts were "as compact as may be" when accounting for natural and political boundaries. The undisputed evidence is that those districts were as compact as may be.

The Secretary's own expert witness testified at length about the various statistical measures of compactness, but admitted that in his own analysis of the relevant districts he did not apply the compactness standard, "as compact as may

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be," from the Constitution. Tr. 237:18-238:15. He also admitted compactness is a "wishy-washy" standard. Tr. 237:4-237:1. In his analysis comparing the compactness measures between the enacted map and the remedial maps, the State's expert found the scores to be mixed—with some scores favoring one map, but with no clear indication that any particular map is definitively more mathematically compact. JT-Ex. 27.

Plaintiffs' witness similarly testified that the compactness scores showed that Plaintiffs' remedial map "was as compact as what the Judicial Redistricting Commission put forward." Tr. 81:1-5. And in preparing the remedial map and assessing its compactness, Plaintiffs' witness testified that "the language in the constitution is general…but that is subordinate to…keeping counties whole[.]" Tr. 154:25-155:2. Plaintiffs' remedial map was drawn by staying faithful to the plain language of subdivision (3), maintaining compactness while also preserving political subdivisions. It was error for the trial court to ignore the requirement in the compactness standard to preserve political subdivisions.

IV. The trial court erred by using a mathematical calculation of compactness to compare the challenged maps with the remedial maps in entering its Judgment because subdivision (3) requires only that the districts be "as compact as may be" and that they "in general" resemble shapes in that the trial court applied a mathematical standard to find, by conducting an erroneous comparison, that Plaintiffs' alternative district maps were not as compact as the enacted district maps.

Preservation. Plaintiffs provided evidence to support the application of the correct compactness standard, as expressed in Article III, Section 3, at trial. Tr. 85:1-18; 152:3-17. But, the trial court instead incorrectly relied on mathematical formulas, such as the Convex Hull score, to assess compactness and erroneously compare the compactness scores of the enacted map and remedial maps. *See* A10, D248:P10, ¶ 48.

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Standard of Review. This point challenges the application of a legal standard. This Court's review is *de novo*. 673 S.W.3d at 473.

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If this Court does not stop the analysis with subdivision (1) and if the Court finds that subdivision (3) does not, by its plain language, subordinate compactness to the greater goal of preservation of communities, it should still reverse because the trial court misunderstood "compact as may be." The trial court incorrectly compared the challenged district maps against the remedial maps when it entered judgment relying on mathematical calculations (compactness scores) to decide whether a district was "as compact as may be." Neither the text of the Constitution, nor any Missouri case, has ever held that there are some precise, objective criteria by which one judges compactness, much less that the courts should use a formula for compactness that ignores political boundaries/subdivisions.

Yet that is exactly the error to which the Secretary enticed the trial court. The Secretary's witness testified extensively regarding the various mathematical calculations that one might use in order to assess compactness. Tr. 192:3-194:22.[4] That testimony was irrelevant because those measures generally look at the shapes of the districts without any consideration of following natural or political boundaries. Nevertheless, the trial court appeared to consider those useful for assessing the compactness of the challenged districts, something the Constitution does not allow. Instead, the Constitution is clear as to how "compact as may be" must be applied to determine whether a district is compact.

A. The 2020 amendment clarified the compactness standard.

Unlike prior constitutional provisions, subdivision (3) now states clearly that "[i[n general, compact districts are those which are square, rectangular, or

[4] Although the Secretary's witness used three indexes, only one—the "Convex Hull" score—had anything to do with whether a district is "square, rectangular, or hexagonal in shape…" *See* Tr. 233:13-234:14

hexagonal in shape *to the extent permitted by natural or political boundaries*." A22, Mo. Const. art. III, § 3(b)(3) (emphasis added). The language of the Constitution, not some abstract statistical analysis, therefore, must guide the mapmakers when drawing compact districts.

In prior redistricting provisions, compactness was modified with the "as may be" standard, but the Court was left to infer what should be considered when assessing compactness because there was no further constitutional language. *See* 367 S.W.3d at 49. During review of the last set of district maps (2010 census), this Court found that there might be value in referring to statistical measures describing compactness. *Id.* But that was when the word compact did "not refer solely to physical shape or size" and when a "visual observation…is not a decisive factor in determining whether a district departs from the principle of compactness." *Id.*

No more. The voters, in their wisdom, fixed this issue and added language to the Constitution in 2020 clearly *describing* how to assess compactness. While under the 1982 Constitution (as was the case in *Pearson I and II*) a visual observation was not a decisive factor in determining compactness, it is now. The Constitution demands that a mapmaker look at the *shape* of the district (as limited by political subdivisions) to make a determination as to compactness. And those shapes are <u>not</u> a factor if it is necessary to deviate from them to follow the boundaries of counties and municipalities.

B. The trial court applied the wrong compactness standard.

The trial court's fundamental error was making the compactness standard too complicated. The Constitution intends that a mapmaker (whether sophisticated or not) can determine whether districts meet the requirements set forth in Article III, Section 3. The plain language directs that all they need to do is visually assess the shapes of districts and then consider whether those districts

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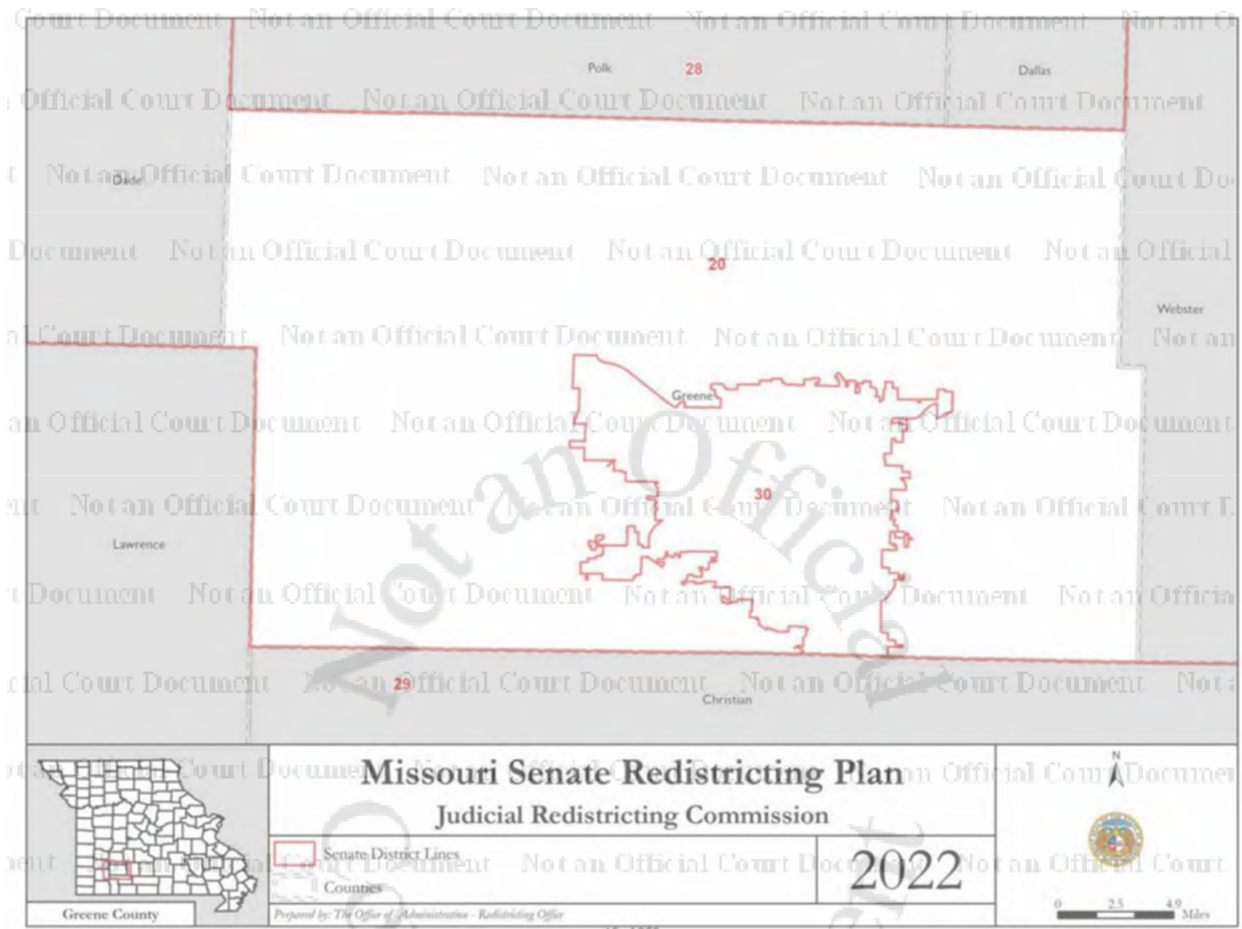
respect political subdivisions. No mathematical formula is necessary.[5] The trial court erred in finding that compactness was 1) an objective standard and 2) requires the mapmaker to ignore political boundaries.

The Judicial Commission plan appears to have generally valued political boundaries over compactness, except when it came to the challenged districts. The Judicial Commission's plan included data regarding other measures required in the Constitution—for example, population deviation. D221:P15. But this plan provides no compactness measures for any district or for the map as a whole. *See* D221:P15-21.

In addition, the Judicial Commission almost certainly did not agree with the trial court's holding that compactness takes precedence over political subdivisions. For example, the Judicial Commission's District 30 wholly encompasses the City of Springfield in Greene County. That District (as pictured below) is not "square, rectangular, or hexagonal" but it is compact according to the Constitution because it could not be one of the recognized shapes as that was not "permitted by natural or political boundaries." The City of Springfield was preserved in its own district only because subdivision (3) allows that to be the case, unless the trial court's Judgment stands.

[5] Nor is there a mathematical formula that would inform a trier of fact as to whether a district was compact because "there is no magic number" that tells you when a district is compact. Tr. 235:7-236:5.



D221:P10.

The Judicial Commission took a similar approach with other districts. The districts within Jackson County—particularly District 7—are also good examples:

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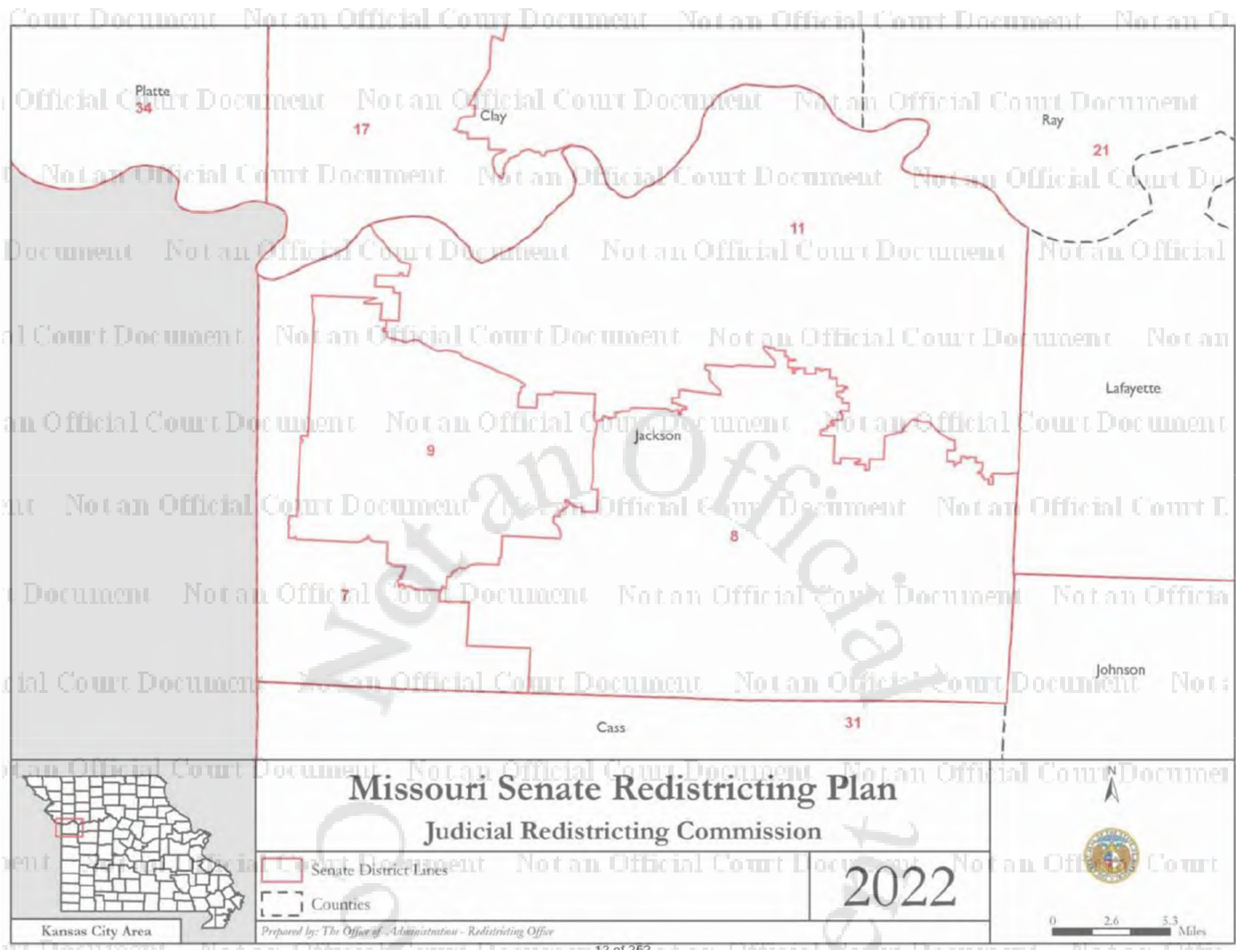

D221:P12.

If this Court affirms the trial court's holding that compactness is more important than following political subdivision lines, there may well be further challenges to other 2020 Senate districts that do not appear to comply with the trial court's interpretation of the law.

V. The trial court erred when it found that Plaintiffs had a 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" because that evidentiary burden is an erroneous application of the law in that Plaintiffs did provide evidence that the Final Map clearly and undoubtedly contravenes the Constitution which was admitted, on the record, by both parties.

Preservation. Plaintiffs provided evidence to support the correct standard on the application of the burden of proof at trial. Tr. 50:3-51:8; 64:16-65:9; 69:15-76:13; 77:14-78:2. But, the trial court instead found that Plaintiffs' must 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." A12, D248:P12.

Standard of Review. This point challenges the application of a legal standard. This Court's review is *de novo*. 673 S.W.3d at 473.

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This appeal can be resolved without reaching Point V. But if the Court believes that the other points do not resolve the issue, it must turn to the trial court's treatment of Plaintiffs' burden. As discussed above, when the proper standard is applied, any burden disappeared when the parties stipulated to the fact that Buchanan and Hazelwood were divided and that the challenged districts exceed a one percent population deviation.

But the trial court held that Appellants must have shown 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 consideration in the challenged map." A19, D248:P19 (citing *Johnson v. State*,

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366 S.W.3d 11, 30 (Mo. banc 2012)). Of course, the Appellants were not challenging population equality or compactness, so the trial court's holding seems to be out of place and irrelevant to the issue to be decided. Nevertheless, the trial court also found that Appellants failed to produce "evidence establishing that any other map achieved [Appellants'] goals without violating any other provision of the constitution." A19, D248:P19. Placing that burden—related not to proving the unconstitutionality of the enacted map, but to justifying their own remedial map—on Appellants was an error of law. To the extent the circuit court's Final Judgment is based upon it, the Judgment should be reversed.

A. The application of the burden of proof found in *Johnson* as articulated by the trial court is error because *Johnson* was decided under an entirely differently constitutional scheme for redistricting.

The trial court attempts to fit a square peg into a round hole. The *Johnson* standard relied on by the trial court was created under a constitutional provision that did not explicitly list the factors mapmakers must consider when districting. Instead, the constitutional scheme under *Johnson* provided little, if any guidance to a map drawer:

> The commission shall reapportion the representatives by dividing the population of the state by the number [34] 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.

366 S.W.3d at 24.

Under this constitutional scheme, it of course makes sense that the Court need mandate a standard of proof that incorporates "additional factors that the reapportionment commission must consider and those that it is permitted to consider." *Id.* at 30. If the *Johnson* Court did not, then mapmakers would be free to ignore a whole host of important factors, such as political boundaries and

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racial makeup.

But that is not necessary under today's Constitution because Article III, Section 3 clearly provides, in order of priority, the factors to be considered by a mapmaker. If that order of priority is considered, then a mapmaker (including an individual challenging an existing map) meets their burden to show that a map is either constitutional or not.

B. The applicable standard is whether the redistricting plan clearly and undoubtedly contravenes the Constitution and Plaintiffs met that burden.

Johnson does generally articulate Plaintiffs' burden of proof, but it is now a much more manageable standard than what the trial court erroneously adopted. Plaintiffs accept that they must prove that the current map "clearly and undoubtedly contravene[s] the constitution." 366 S.W.3d at 20 (citation and quotation omitted). *Johnson* may elaborate on how, under *that constitution,* a map could be proven to be unconstitutional, but that burden of proof has been modified by the new language in the Constitution. A redistricted map is reviewed in comparison to the constitutional provision that governs it, like any other statute. *See Id.* In this case, the challenged districts fail that comparison, as Plaintiffs proved. Once a plaintiff establishes that, the Constitution provides that the circuit court "in its judgment shall adjust only those districts, and only those parts of district boundaries, necessary to bring the map into compliance." A30, Mo. Const. art. III, § 7(i).

The stipulations plainly show that the challenged districts in the Final Map create a county segment in Buchanan County and cross the municipal lines of the City of Hazelwood. *See* D221-222. Additionally, the population deviations for each district were stipulated to and plainly show that the relevant districts' population deviations exceed one percent while crossing the aforementioned boundary lines. *See* D221:P15. Based on a visual review of the map and the evidence presented at trial, the trial court could not have reasonably found that

the Final Map does not clearly and undoubtedly contravene the Constitution. And all of the evidence at trial agreed that district maps could be drawn that do not create a segment in Buchanan County or cross municipal lines of the City of Hazelwood. *See* Tr. 76:9-77:2; Tr. 163:8-164:16. This evidence was put forward by Plaintiffs' witness and admitted by Defendant's witness. Although the trial court found that the Plaintiffs' witness was "not [h]elpful" or "useful" and "duplicative," it made no determination as to his credibility and the evidence from him was sufficient to prove that Plaintiffs carried their evidentiary burden. A7-A8, D248:P7-8.

The language of the trial court's judgment appears to confuse the issue of what a plaintiff must show to prevail. It is the plaintiff's burden to show that the *enacted map* is unconstitutional—a burden Plaintiffs clearly met here—not to show that the remedy—which is now in the hands of the trial court, is constitutional. A30, Mo. Const. art. III, §7(i).

VI. The trial court erred when it found that Plaintiffs did not meet 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 on that issue was undisputed and uncontroverted in that, all witnesses for both the parties agreed that there was *no other redistricting factor* requiring splitting Buchanan County or the City of Hazelwood.

Preservation. At trial, Plaintiffs provided evidence to support the correct standard on the application of the burden of proof at trial. Tr. 50:3-51:8; 64:16-65:9; 69:15-76:13; 77:14-78:2. But, the trial court instead found that Plaintiffs' did not 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

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challenged map." A12, D248:P12.

Standard of Review. In the face of uncontroverted evidence (as was the case here), the trier of fact is not free to simply disregard that evidence in the absence of an adverse credibility determination, even though it would otherwise be free to disbelieve the testimony. *See, e.g., Martin v. Dir. of Revenue*, 248 S.W.3d 685, 689 (Mo. App. 2008); *Rugg v. Dir. of Revenue*, 271 S.W.3d 613, 617 (Mo. App. 2008); *Bouillon v. Dir. of Revenue*, 306 S.W.3d 197, 202 (Mo. App. 2010). When "evidence is uncontested in a court-tried civil case. . .the only question before the appellate court is whether the trial court drew the proper legal conclusions. . ." *White v. Dir. of Revenue,* 321 S.W.3d 298, 308 (Mo. banc 2010). Evidence is uncontested when a party's own testimony admits "the basic facts of the other party's case." *Id.* (citation and quotation omitted).

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As discussed above, the trial court's holding on failure to establish evidence about population deviations and compactness does not appear to address Appellants' challenge below—which was to the dividing of communities. But to the extent the holding could be interpreted to say that Appellants had the burden to prove that the deviations from the political subdivision requirements were not the result of other factors—the Appellants met that burden.

Appellants believe the trial court applied the incorrect legal standard. As outlined in the points above there *is* no other factor that, as a matter of law, would justify crossing county or municipal lines except as outlined in subdivision (4) itself. And, as discussed below, the trial court refused to allow any discovery on this issue. But even if the trial court was correct in its reading of the law, the evidence is uncontroverted that no other constitutional factor required creating a county segment or crossing Hazelwood's municipal lines—all of the witnesses, including the Defendant's only offered witness—agreed on this point.

The trial court found that Plaintiffs "presented no evidence establishing that any other map achieved Plaintiffs' goals without violating any other

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provision of the constitution." A19, D248:P19. As discussed above, that is not the standard. But if it is, Plaintiffs' witness addressed exactly that issue, testifying that using "all the criteria that are in the constitution" he was able to draw a map that did not divide Buchanan County or the City of Hazelwood. Tr. 76:9-77:2. Implicit (and likely explicit) in that testimony is that when considering the factors listed in the Constitution, there is no factor that *requires* splitting Buchanan County or the City of Hazelwood. If some other factor, such as race, required it, Plaintiffs would not have been able to present a map that remedied those splits.

And the only witness called by the Secretary of State agreed. In his deposition, he discussed his own successful efforts to draw district maps that did not cross Hazelwood's municipal lines. He was able to do that while also complying with all of the other factors explicitly listed in Article III, Section 3. Although his remedial map also left Buchanan County with a county segment (although different than the segment created by the Judicial Commission) the Secretary's proffered witness also agreed with "the basic facts" of the Plaintiffs' case—it is possible to draw a district that does not split Buchanan County and still comply with all other constitutional requirements. Tr. 163:8-164:16; Ex. P-4, 101:22-102:3.

The trial court also misconstrued the standard it claimed to be applying. In finding that Plaintiffs had not met their burden to prove that "any other map" remedied the violation without violating other laws, the trial court relied on *Johnson v. State*. A19, D248:P19. But *Johnson* did not impose the crushing burden the circuit court thinks it did. The circuit court seems to think that when a Plaintiff presents a remedial State Senate map, they must affirmatively prove compliance with all sorts of unidentified requirements—or at least the circuit court did not identify any particular requirement.

But that is not actually what *Johnson* held. Under that standard when it comes to challenging the *enacted* map, "the plaintiff must also show that all federal laws or other recognized factors did not affect the district boundary." 366

S.W.3d at 31. "This showing *is not burdensome on the plaintiff:* the plaintiff needs only to submit maps or other evidence that shows that county lines, political subdivisions, or historical boundary lines were not a basis for the district boundary or that it goes beyond a 'minimal and practical deviation.'" *Id.* (emphasis added). Here the Plaintiffs did submit district maps and they did show a violation of the express language of the current version of the Missouri constitution.

In doing so, Plaintiffs approach was consistent with the standards for redistricting. The burden is to show that the district maps are unconstitutional, and the Plaintiff always has it. 367 S.W.3d at 47. In *Pearson,* this Court found that Plaintiff had not met its burden in a case where the trial court made no findings of fact, so this Court had no conclusions to review. *Id.* at 52. In that case, the Plaintiffs were trying to prove that the districts were not "as compact as may be." Because "as may be" refers to other recognized factors, the Plaintiff had the burden to prove that deviations from compactness were not the result of things like the map drawers' respect for natural or political subdivisions. That burden of proof was specific to the language of the factor under which Plaintiffs brought their claim.

But even there, the Court acknowledged that "stipulations of fact relieved the parties from proving the matters stipulated." *Id.* at 54. So, in *Pearson,* the Plaintiff had not met its burden to show that district maps were unconstitutional. There were "factual disputes regarding whether the [compactness] deviations in the boundary of district 4 were minimal and practical deviations." *Id.* at 56.

But here, Plaintiffs are not challenging the "as may be" standard and therefore did not take on the burden to prove that the district maps were not drawn to comply with other factors. Instead, the parties stipulated to the essential facts (a county segment, crossing a municipal line, districts exceeding 1% population deviation) such that the Plaintiffs were relieved of any burden to establish the facts of the violation. The only issues remaining were issues of law

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as discussed herein.

Finally, if the Court disagrees and believes that the *Pearson* standards apply, the Court may wish to reexamine or clarify *Pearson*. That case was a fractured, 4-3, decision with three special judges (two in the majority and one in dissent). As the circuit court's Judgment demonstrates, some of the language in *Pearson* can be read too broadly to prevent a plaintiff from ever succeeding in a challenge to a redistricting map. *See Id.* at 74 (Price, J., dissenting) ("Administering the rule espoused by the majority will be nearly impossible.") The *Pearson* majority did "not define what the [other] factors mean or how they relate to a plaintiff's burden. . ." *Id.* That lack of clarity is clear in the circuit court's Judgment which never identifies any factor the Plaintiff should have proven or how that factor could possibly have justified creating a county segment or crossing a municipal line.

VII. The trial court erred when it dismissed the Judicial Commission from this lawsuit because the Constitution requires the Judicial Commission to be a party to the case in that the Judicial Commission is the body that drew the challenged district maps.

Preservation. The Judicial Commission moved to be dismissed, which Plaintiffs' opposed. P190; P194. The Court ordered the Commission dismissed. D198.

Standard of Review. This point challenges the application of a legal standard. This Court's review is *de novo*. 673 S.W.3d at 473.

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Even if this Court disagrees with every other point relied on, it should reverse the trial court's judgment dismissing the Judicial Commission and remand to allow further proceedings after the Commission files an answer and participates in discovery (as outlined further in the next point). Upon its appointment, the Judicial Redistricting Commission set about to draw a State Senate map—releasing first a tentative map, then a final map. D220:P3, ¶ 22. It is

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undisputed that the Judicial Redistricting Commission is the body that drew the districts challenged in this suit.

So, as required by Article III, Section 7, Plaintiffs "name[d] the body that approved the challenged redistricting plan." A30, Mo. Const. art. III, § 7(i). In compliance with that constitutional mandate, Appellants filed suit against the body that approved the redistricting plan, the Judicial Redistricting Commission. D205. However, on January 31, 2023, the circuit court erroneously dismissed the Judicial Redistricting Commission as a named defendant. D199.

When considering how to implement the constitutional provision that requires naming the body that approved the map, this Court is required to assume that "every word contained in a constitutional provision has effect, meaning, and is not mere surplusage." 493 S.W.3d at 409(citation and quotation omitted). "Words used in constitutional provisions are interpreted to give effect to their plain, ordinary, and natural meaning." *Id.* (citation and quotation omitted).

The trial court, however, ignored that plain language and found that the Commission was not a "necessary party." D199:P2-3 The trial court also appeared to find that Plaintiffs did not state a claim against the Commission because there was no relief to be had against the Commission. Rule 55.27(a)(6). *Id.* at 3-4. But the Constitution makes the Commission necessary.

It is simply nonsensical to read the Constitution as requiring the Commission to be named in the first instance, but then allowing them to be dismissed immediately upon a filing of a petition. There is nothing that requires the Secretary to be named, so a plaintiff might choose to name only the Commission itself as that is all the Constitution requires. In that instance, the dismissing the Commission would end the lawsuit and deprive a plaintiff of their right to challenge the redistricted map. The trial court's interpretation cannot stand and cannot be the rule for this or future challenges.

Although Plaintiffs sought a declaratory judgment that the district maps

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drawn by the Judicial Commission were invalid and for such relief as the Court deemed proper, the trial court seemed to focus on the request for an injunction against Secretary Ashcroft. D205:P7. Even if the Petition had limited the request to relief against the Secretary, it does not matter. The circuit court's dismissal order invoked Rule 55.27(a)(6) D199:P3. However, that rule does not require a specific demand for relief. All that is required is that the moving party demonstrate that the non-movant failed to establish to establish a legal cause of action. *Nazeri v. Missouri Valley College*, 860 S.W.2d 303, 306 (Mo. banc 1993).

Whether a plaintiff demonstrates that relief can be had against one party in particular is not the standard. This was error by the circuit court. Appellants stated the cause of action, as provided by Article III, § 7(i) of the Missouri Constitution, and supported it with facts demonstrating that a justiciable controversy exists entitling it to relief. *See Wheeler v. Sweezer*, 65 S.W.3d 565, 568 (Mo. App. 2022). Requiring more from a plaintiff in an initial pleading contravenes the Missouri Constitution and established case law.

VIII. The trial court erred when it entered a protective order and prohibited all discovery from the Judicial Commission (or anyone supporting the Commission) because Plaintiffs are entitled to conduct discovery that may lead to admissible evidence in that the Judicial Commission drew the challenged district maps and discovery on it was reasonably calculated to lead to admissible evidence concerning why political subdivisions were divided, whether the Commission had to do so to comply with other provisions of the Constitution, and/or whether there were other district maps that could have been drawn to comply.

Preservation. Plaintiffs' issued discovery to the Judicial Commission. D192; D193. The Commission moved to quash that discovery and Plaintiffs opposed such motion. D191; D195. The trial court granted the Commission's

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motion to quash. D198.

Standard of Review. This point involves a discovery order, which is reviewed for abuse of discretion. *Tate v. Dierks*, 608 S.W.3d 799, 803 (Mo. Ct. App. 2020) (citation and quotation omitted). In reviewing the circuit court's decision this Court shall grant the circuit court great deference unless the trial court's discretionary ruling "results in prejudice or unfair surprise." *Scheck Indus. Corp. v. Tarlton Corp.*, 435 S.W.3d 705, 717 (Mo. App. 2014) (citation and quotation omitted). "Prejudicial error is an error that materially affects the merits and outcome of the case." *Bar Plan Mut. Ins. Co. v. Chesterfield Mgmt. Assocs.*, 407 S.W.3d 621, 635 (Mo. App. 2013) (citation and quotation omitted).

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If this Court were to affirm all of the legal conclusions of the trial court, it would essentially hold that Plaintiffs have a burden to show that compactness (and other factors) were more important to the mapmakers than preservation of political subdivisions. At the outset of the litigation, Appellants attempted to develop evidence on those points in order to cover all the possible arguments the Defendants might make. Before the trial court dismissed the Commission, Appellants issued discovery to the Commission requesting communications sent among the Commission members and any versions of district maps considered by the Commission. D193. This discovery was reasonably calculated to lead to admissible evidence including 1) whether other district maps considered by the Commission might show it was possible to draw districts that crossed fewer political subdivision lines 2) whether the Commission had in fact crossed subdivision lines due to some compactness or other analysis and 3) admissions of a party opponent on whether it was possible to draw district maps that complied with all of the constitutional requirements without crossing the lines of Buchanan County and the City of Hazelwood.

The Commission moved to quash and the trial court granted that motion and "issue[d] a protective order…preventing discovery on the Commission, its

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members or staff, or anyone assisting the Commission during the process of considering and filing the Senate Map." D198. The Court held that the discovery sought was irrelevant, protected by constitutional and common law privilege, and that the Commission was "functus officio" and, thus, unable to re-form as an entity to respond to the requests. D198. Each of the justifications the Court used to quash the discovery requests were error and should be reversed as it prejudiced Appellants' attempts at meaningful discovery and their chance at success on the merits.

A. The trial court abused its discretion by finding that Plaintiffs' discovery was irrelevant, not reasonably calculated to lead to admissible evidence and not proportional.

The trial court erred in ruling that Appellants' discovery efforts were "irrelevant, not reasonably calculated to lead to admissible evidence, and not proportional to the needs of the case." D198:P3. Evidence is relevant if it is both logically relevant, or if it makes the existence of any fact of consequence to the determination of the action more or less probable, and legally relevant, or its probative value outweighs its prejudicial effect. *Brummett v. Burberry Ltd.*, 597 S.W.3d 295, 304 (Mo. App. 2019).

Here, the discovery sought would have been logically relevant because information regarding the mapmaking process of the Commission has a high probative value. Considering the burden of proof as discussed in *Johnson* and adopted by the trial court, this discovery would have likely shown the factors the Commission considered in drawing the Final Map as well as any evidence that the Commission could have complied with the Constitutional mandates—whether it was possible to draw a map with fewer county segments and/or that crossed fewer municipal lines. Appellants' discovery efforts were undoubtedly reasonably calculated to lead to admissible evidence.

Appellants were prejudiced by the ruling. That much is evident from the

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face of the trial court's ruling. The Judgment makes several findings about the decisions of the Judicial Commission, yet the trial court allowed no discovery on those issues. The trial court's Final Judgment found that "the Judicial Commission chose districts that were more compact," and "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" and "the evidence also shows that splitting those two political subdivisions are natural choices that do not show any indication of improper manipulation of the districts." A18, D248: 18. These findings cannot be reconciled with the trial court's protective order which found that "[t]he final plan and map is either constitutional or it is not. This Court finds that the objective legal inquiry will not be aided by information regarding the Commission's deliberations, thought processes, [or] other potential maps." D198:P2. Instead, the Plaintiffs were entitled to discover evidence that would show why the choices were made (was it because the districts were more compact, for example).

It is fundamentally unfair to make findings about areas into which Plaintiffs were not allowed discovery. At a minimum, because Plaintiffs were trying to prove that it was possible to draw district maps that did not cross political subdivision lines, Plaintiffs were entitled to discover whether the Judicial Commission possessed such maps. And because the trial court considered whether the Judicial Commission's district maps prioritized compactness over community preservation, Plaintiffs were entitled to discover what information the Commission had about the compactness of the districts it drew—there is no such information in the official report from the Commission, which would seem to contradict the Court's finding that they made any decisions based on compactness. A16, D248:16.

B. The trial court erred in holding the discovery sought was protected by constitutional and common law privilege.

The trial court also erred when it denied discovery on grounds that the

information sought is protected by constitutional and common law privilege. D198. "Because claims of privilege present an exception to the usual rules of evidence they are carefully scrutinized" and any statutory (or constitutional) privilege is construed narrowly. *State ex rel. Missouri Ethics Comm'n v. Nichols*, 978 S.W.2d 770, 773 (Mo. App. 1998).

The trial court improperly conflates legislative immunity, found in Article III, § 19(a) of the Constitution, and a legislative evidentiary privilege. D198:P5. Legislative immunity protects "Senators and Representatives" from arrest during the legislative session and for a short period before and after. Mo. Const. Art. III, § 19(a). That immunity also mandates that certain legislative records and proceedings are public. There is no argument that the Judicial Commission is made up of Senators and Representatives in the context of Article III, § 19(a), so that privilege most certainly was erroneously applied.

Even if there is an argument (there is not) that the Commission is composed of legislators as described in Article III, Section 19, Missouri does not recognize an absolute legislative privilege that shields legislators from the discovery process. No such privilege should be recognized in this case either. If left untouched, the circuit court's order will almost certainly ensure future redistricting challenges are filed in vain, preventing all Plaintiffs from a meaningful trial. These types of cases must proceed as "fair contest[s] with the basic issues and facts disclosed to the fullest practicable extent" and not as "a game of blindman's bluff." *United States v. Procter & Gamble Co.*, 356 U.S. 677, 682 (1958). This Court should adopt an approach that favors transparency over secrecy.

And even if this Court were to agree that the Commission is entitled to some sort of privilege, Plaintiffs were unable to assess and challenge claims of privilege as related to individual documents because the Commission did not even provide a privilege log, nor did the Court order it to. *See State ex rel. Atchison, Topeka and Santa Fe. Ry. Co. v. O'Malley,* 898 S.W.2d 550, 554 (Mo.

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banc 1996)(party challenging privilege must have "sufficient information to assess whether the claimed privilege is applicable."). A privilege log is "competent evidence" when determining whether a claim of privilege should be upheld. *See State ex rel. Ford Motor Co. v. Westbrooke,* 151 S.W.3d 364, 367 (Mo. banc 2004). It was error to allow the Commission to claim a blanket privilege without at least providing Plaintiffs a privilege log.

C. Plaintiffs were still entitled to discovery, even if the Commission is "functus officio."

The trial court's order finding the Commission is "functus officio" should not have prevented meaningful discovery attempts by Appellants. A mere change in status does not absolve the previously existing entity from being held to account for its acts. *See* §§ 351.478 – 351.483, RSMo (outlining the parameters for resolving claims following limited liability company dissolution); *see also Def. Supplies Corp. v. Lawrence Warehouse Co.*, 336 U.S. 631, 632 (1949) ("But a time-honored feature of the corporate device is that a corporate entity may be utterly dead for most purposes, yet have enough life remaining to litigate its actions. All that is necessary is a statute so providing.").

So it was here—the Constitution's specific requirement that the Commission be named in any suit challenging the district maps leaves it enough legal life to litigate this action and participate in discovery. Indeed, the Commission acknowledged that it had such authority as is "implicitly necessary to carry out its duties." D191:P5. The Commission also participated in the suit by filing pleadings in its own name, which it could not have done unless it "existed." *See* D190, D191, D196, D197, and D200. The Constitution expressly authorizes a suit against the Commission, which must logically be filed *after* the work of drawing the district maps is done. A30, Mo. Const. art. III, § 7(i). By requiring the Commission to be named, the Constitution makes clear that the Commission had authority to carry out its duties and defend the district maps it alone created. The Commission had the power—indeed the obligation—to defend its work here and

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the circuit court erred when it ruled that it did not.

D. The trial court's order quashing discovery prejudiced Plaintiffs.

Finally, the circuit court's order quashing discovery was prejudicial error that materially affected the outcome of the case. In its Final Judgment, the circuit court held that Appellants did not carry their evidentiary burden to succeed on the merits. A19, D248:P19. The circuit court cannot prevent Appellants from embarking on meaningful discovery and then continue to hold that they did not meet their evidentiary burden. Such precedent almost ensures that future plaintiffs challenging legislative redistricting will fail for pre-trial evidentiary reasons alone. For all the forgoing reasons, the circuit court's order preventing Appellants from meaningful discovery into the Judicial Redistricting Commission should be reversed.

CONCLUSION

Left to stand, the circuit court's holdings will result in precedent further complicating constitutional redistricting criteria. Additionally, it will enable efforts to gerrymander state legislative districts for nefarious political purposes, all while rendering the single provision permitting citizens to challenge such districts useless. The ruling is a plain and palpable affront to fundamental law regarding redistricting and undermines the public policy of this State to preserve and respect the boundaries of communities, cities, and counties.

The circuit court's Judgment should be reversed and remanded for the circuit court to follow the requirements of the Constitution. If the circuit court correctly follows those provisions and "finds that [the] completed redistrict plan exhibits the alleged violation," it should enter a judgment adjusting those districts and boundaries "necessary to bring the map into compliance." A30, Mo. Const. Art. III, § 7(i).

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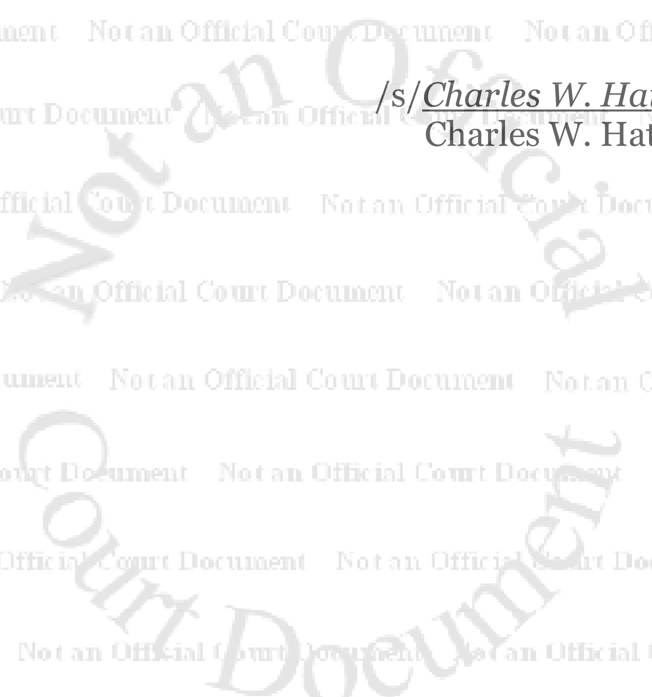
CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 30th day of November, 2023, to all counsel of record.

I also certify that the foregoing brief complies with the limitations in Rule 84.06(b) and that the brief contains 16,315 words.

/s/*Charles W. Hatfield*
Charles W. Hatfield



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