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' REPLY BRIEF

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INTRODUCTION

This Reply brief attempts not to "reargue points covered in the . . . initial brief." Rather, we reply to Respondents' arguments. For organizational purposes, Part I returns to the order of Appellants' Points. Part II addresses Respondents' "four reasons" analysis and Part III addresses various procedural arguments.

The main dispute here is whether the Judicial Redistricting Commission needed to follow political subdivision lines in drawing state senate maps, or whether it could ignore those lines in favor of compactness. On its face, the Final Map is unconstitutional because it impermissibly segmented Buchanan County into two districts and because it crossed the municipal lines of Hazelwood, putting that city in two different districts.

There is no fact dispute that it is possible, as Respondent's expert acknowledged, to draw a map that does not segment Buchanan County or cross Hazelwood's municipal lines. Indeed, Respondent's expert drew 5,000 maps—only 11% split Buchanan County. Only 23% split Hazelwood. D248:P9, ¶ 41. Tr. 202-206.

Respondents speculate that the Commission applied a new standard—elevating compactness over respect for political lines. But the more likely scenario is that the Commission applied the correct standard to most of the districts, but made a mistake when it comes to these particular districts. After all, the rest of the Final Map respects political subdivision lines.

ARGUMENT

I. Appellants' points relied on

Respondents eschewed the structure of Appellants' brief. Appellants believe it would be helpful to address those original Points in order, and does so in Section I.

A. Point I- the Parties agree there is no "reasonableness" standard

Respondents concede there is no "reasonableness" standard in Article III, Section 3. Resp.Br. 51-52. The Parties apparently agree this Court cannot affirm the Judgment to the extent it applies a reasonableness standard—that is an error of law.

Nevertheless, Respondents misstate Appellants' position. Resp.Br. 54. More fundamentally, they misunderstand and misinterpret the Constitution's plain language. While Appellants agree a mapmaker has some discretion to make certain choices, those choices are bound by the language of Article III, Section 3.

B. Point II- the Final Map does not comply with 3(b)(1)

Respondents claim Appellants failed to preserve Point II. Resp.Br. 68. That ignores the plain reading of Article III, Section 3. Respondents would like this Court to read each redistricting "method" in isolation. But, that is not the way constitutional provisions are interpreted and ignores the practical realities of redistricting. Appellants provided evidence and testimony about the process of redistricting, including how 3(b)(1) factors in. App.Br. 27-8. In fact, one of Respondents' themes throughout their brief is that Appellants bear the burden to show the Final Map is unconstitutional. The only way Appellants could have done so would have been to address 3(b)(1).

The substance of this argument goes back to the plain language of the Constitution. Respondents concede—as they must—that section 3(b)(1) refers a mapmaker to subdivision (4). They say it refers to "the entirety of subdivision (4), not just part of it." Resp.Br. 75. That is not precisely correct. The actual language

of subdivision (1) is that districts may deviate by more than one percent from ideal population, if necessary, to follow political subdivision lines "*consistent with*" subdivision (4). Regardless, the Parties agree that in step one, related to population allocation, one must consult subdivision (4).

So, failure to follow subdivision (4) is a violation of subdivision (1) and as a matter of law, unconstitutional. That is what Appellants' first Point Relied on argued. The Commission did not do that and it was error for the trial court to uphold the map.

1. Article III, Section 3 is unambiguous

The crux of the Parties' dispute is how to read the Constitution. We interpret it using the same rules we use with statutes. *Mo. Prosecuting Att'ys v. Barton Cty.*, 311 S.W.3d 737, 741 (Mo. banc 2010). "If the language . . . is plain and unambiguous, this Court is bound to apply that language as written and may not resort to canons of construction to arrive at a different result." *State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 605 (Mo. banc 2019) (cleaned up). The plain language of the Constitution is clear and unambiguous about how to redistrict, particularly when it comes to preserving counties and municipalities.

2. Article III, Section 3 provides redistricting methods

The Constitution lists the redistricting steps in "priority" order, but the word "priority" cannot be read—as Respondents try—to mean some steps are more important than others *or* that the steps must be followed strictly in the order they are listed. Respondents' interpretation is undermined by the Constitution's use of the word "methods" to describe those steps. *See* Mo. Const. art. III, § 3(b). A method is "the procedures or plans followed to accomplish a given task." *Webster's New College Dictionary* at 689 (1999). The use of the term "methods" rather than "factor" signals that each step in the process is to be followed and applied to a map per each method's language.

a. Section 3(b)(1)

The first method instructs a mapmaker how to split the state into 34 senate districts. Mo. Const. art. III, § 3(b)(1). Those districts should be "nearly as equal as practicable" in population, meaning no district deviates from the ideal population by more than 1%. *Id.* But, a mapmaker is permitted to deviate by up to 3% from ideal population in one circumstance: to follow political subdivision lines "consistent with" subdivision (4). *See Id.* In other words, 3(b)(1) explicitly requires that—in that very first step—a mapmaker follow political subdivision lines and use a method consistent with subdivision 4 to do so. *See Id.*

The logic is evident. First, using political subdivision lines to draw districts is logical. Otherwise, and under Respondents' interpretation, a mapmaker would start by drawing 34 boxes higgledy-piggledy on a map of Missouri with no other guidance. That would be chaos, eliminate all predictability, and result in absurd outcomes. Second, and relatedly, there *must* be some additional instruction to a mapmaker when starting to draw. The drafters could have chosen anything (including compactness), but instead chose political subdivisions. Likely for the reasons above. Finally, political subdivision lines reflect pre-existing constituencies (taxing districts for example). Residents in a political subdivision share common interests and concerns. *See State ex rel. Teichman v. Carnahan,* 357 S.W.3d 601, 607 (Mo. banc 2012). Providing singular representation for any such population amplifies and gives power to that population to have local concerns more easily addressed by the state legislature. *Id.*

Respondents make this exact argument—they claim subdivision 1 incorporates *all of* subdivision 4, not just the instruction that a mapmaker is not to split a county or a city. Resp.Br. 75 They also concede that:

> [Section] 3(b)(1) states that the 1% standard can be deviated from only when the Commission is attempting to follow the priorities in subdivision (4). It could not deviate from the 1% requirement, for instance in order to make a district more contiguous or compact—priorities

> listed in subdivision (3)—or make districts more fair or competitive—priorities listed in subdivision (5).

Resp.Br. 76.

It appears there is *no* dispute between the Parties as to the priority of political subdivisions. All agree following political subdivision lines, as described in subdivision 4, is required by subdivision 4. The Commission had *no discretion* to ignore this instruction. And everything needed for this analytical step turns on stipulated facts.

b. Section 3(b)(4)

Because subdivision 1 directs us to subdivision 4, the issue is now subdivision 4's requirements. Although there will be some instances when a mapmaker will move from subdivision 1 to subdivision 2 without consulting subdivision 4, Respondents ignore that when the population deviation exceeds one percent—as was the case here—a mapmaker must consider subdivision 4 either in tandem with subdivision 1 (when drawing the initial district) or immediately thereafter (when considering whether they have done it correctly). Subdivision 4 explains how to preserve communities:

- (1) Each county should hold as many districts as its population allows. For example, Boone County can wholly contain district 19. *See* D221.
- (2) If a county's population is bigger than a single district can contain (bigger than the ideal population), the county can be split into two or more districts, but should be wholly made up of population from that county. For example, District 22 contains only Jefferson County residents, but not all of them. *Id.* If there is leftover population, that population should be kept together and joined into another district. *See e.g. Id.* (Districts 3 and 20).
- (3) If a county population is too small to wholly contain a district, the county should be split into only two segments and each segment joined with an adjoining county. *Id.*

- (4) Districts should be drawn to limit split counties and county segments. *See e.g, Id.* (Districts 31, 32, 18).
- (5) Districts should be drawn to cross as few municipal lines as possible.

c. Section 3(b)(2)

Section 3(b)(2) generally prohibits denying rights based on race or color. This method is not at issue here. *See* Tr. 77:3-85:17.

d. Section 3(b)(3)

Once a mapmaker has complied with 3(b)(1), consistent with (b)(4), and (b)(2), the mapmaker must then consider how to make districts contiguous and "as compact as may be." "[I]n general, compact districts are those which are square, rectangular, or hexagonal in shape *to the extent permitted by natural or political boundaries*." Mo. Const. art. III, § 3(b)(3) (emphasis added).

This method for redistricting bolsters Appellants' interpretation that political subdivisions are (i) necessary when drawing the initial map and (ii) privileged over other methods. In 3(b)(3), compactness is to be achieved *only* "to the extent permitted by natural or political boundaries." Perfectly compact districts can, and should, be sacrificed to follow natural and political boundaries. To the extent it was not required in step 1 (it was here) it is required in step 3.

e. Section 3(b)(5)

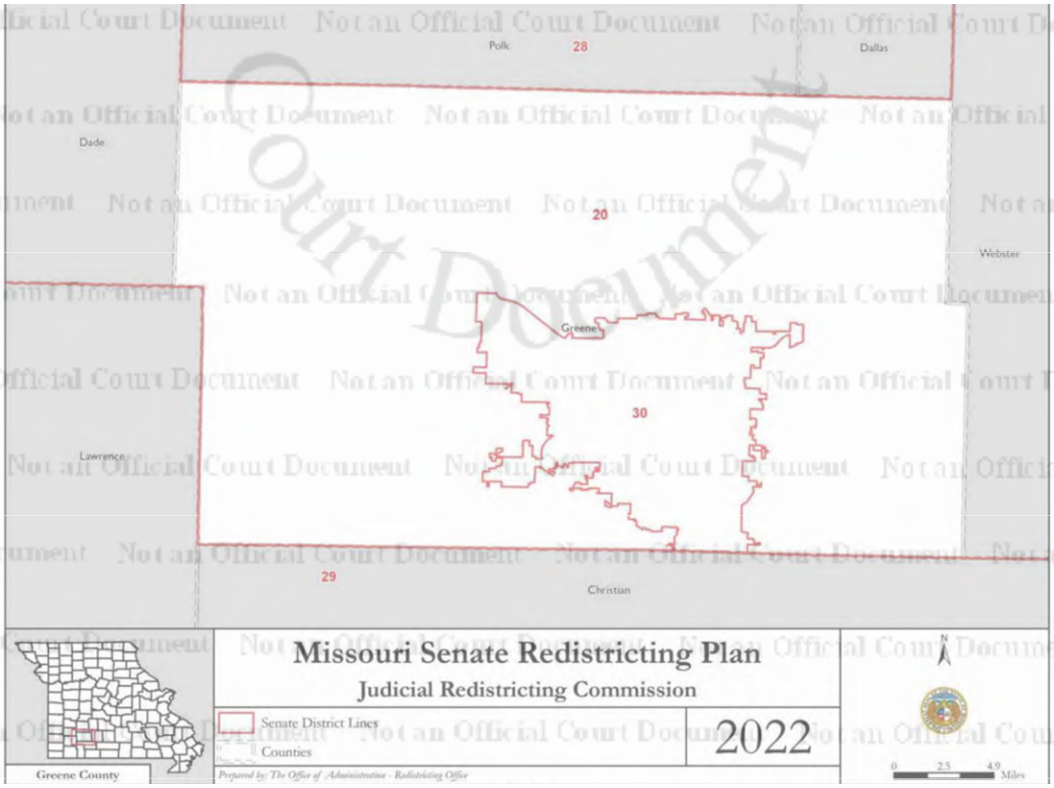
The last method provides instructions regarding partisan fairness, which is not at issue here. Mo. Const. art. III, § 3(b)(5).

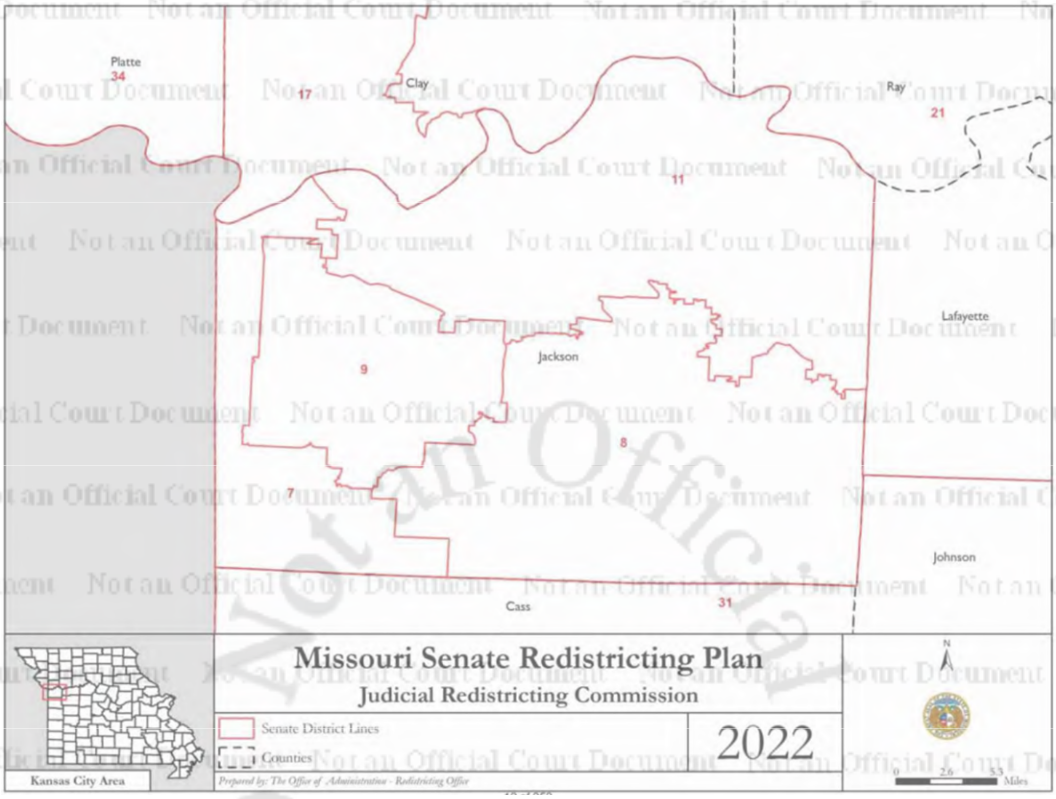
3. The Final Map is unconstitutional because it did not have to create a county segment or cross a municipal boundary

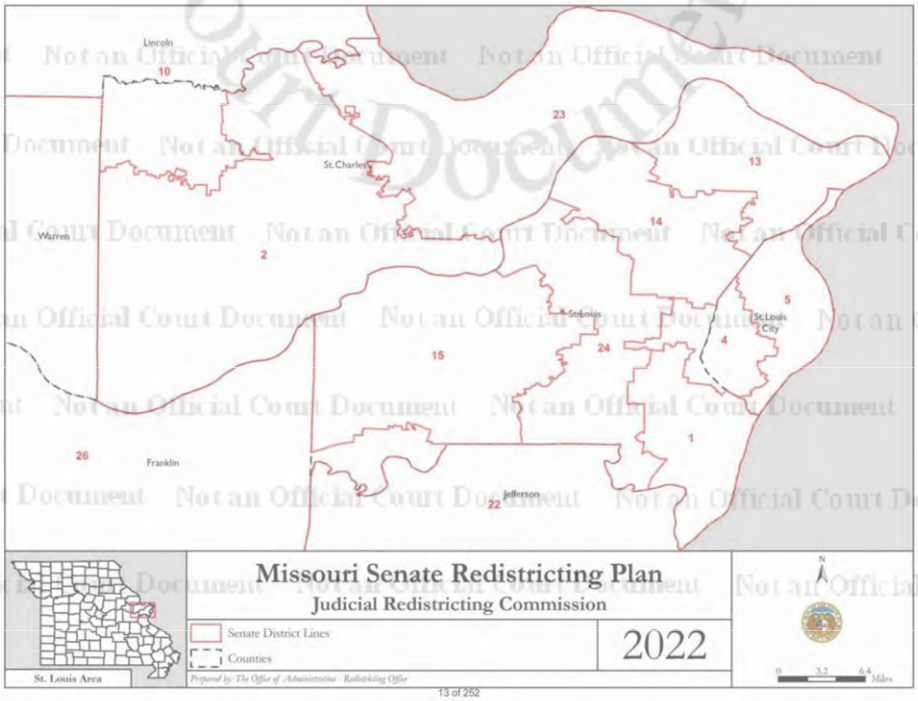
Respondents argue a map is not unconstitutional "simply because it is possible to draw districts that do not split a county and a city." Resp.Br. 76. But that is exactly what the constitutional scheme requires. The Constitution requires a mapmaker to look at, use, and comply with all the methods listed in Section 3(b), to the extent possible. Mo. Const. art. III, § 3(b). It could not be clearer that

political subdivisions must be kept together, if at all possible (and in compliance with population requirements).

The Final Map did not comply with this requirement. Respondents convinced the trial court that the Commission prioritized compactness over deference to political subdivisions. We don't think that was true for most of the districts, but if it is true, it was legally wrong. Upon review of the other districts, the Commission clearly understood the mandate to follow political subdivision lines to the extent possible. *See* D221. The shapes of the districts follow political subdivision requirements and many (good examples are Districts 7, 20, and 30) are not compact, as defined by the Constitution, precisely *because they follow political subdivision lines*. Under Respondents' interpretation, Districts like 7, 20, 30 and most of those in the St. Louis area are unconstitutionally drawn.







D221.

C. Point III- the Constitution does not "prioritize" compactness over political subdivisions

Respondents' erroneous reading of the Constitution underlies their argument that Section 3(b) "expressly prioritizes compactness over keeping political subdivisions intact." Resp.Br. 36. But, that is not what the plain language directs. The method described in 3(b)(1) expressly instructs a mapmaker to draw districts that preserve political subdivisions as addressed in subdivision (4). Mo. Const. art. III, § 3(b)(1). This can only mean what Respondents conceded on page 76 of their Response Brief: Subdivision 1 permits a deviation from the ideal population only to preserve political subdivisions.

Under Appellants' (and Respondents', at least in part of their brief) interpretation of the Constitution, it is impossible for compactness to be prioritized higher than preserving communities. The only way to accomplish what Respondents ask this Court to do is to read the word "priority" as an instruction to follow the numbering rather than the words of the Constitution. In that case, of course, 3 comes before 4. But the *words* of Section 3(b) (which is what we all rely on to implement the law) tell us otherwise. Subdivision 1 requires consideration of political subdivisions as expressed in subdivision 4.

But even if the Constitution is more paint-by-numbers than a matter of understanding the language, methodically marching down those numbers still requires consideration of political units over compactness. The language of subdivision 3, the compactness method, is clear. Districts are to be compact only "to the extent permitted by natural or political boundaries." Mo. Const. art. III, § 3(b)(3). A mapmaker may not draw a compact district without considering where natural or political boundaries fall. Although compactness is generally defined as square, rectangular, or hexagonal, the Constitution instructs the mapmaker that respecting natural or political boundaries is more important than having a district be perfectly geometrical.

Under Respondents' interpretation, however, subdivision 3's directive to consider "natural or political boundaries" is essentially meaningless. That is not permitted. Every single word in a constitutional provision must be given meaning. *State ex rel. Dep't of Health & Senior Servs. v. Slusher*, 638 S.W.3d 496, 498 (Mo. banc 2022).

Respondents' argument that subdivision (3) does not operate as a "lower priority than subdivision (4) due to subdivision (1)'s permissive reference to subdivision (4)" similarly fails. Resp.Br. 38. Rather, the method for drawing districts of nearly equal population relies on political subdivisions to determine *how* to draw those districts.

D. Point IV- the Constitution does not use mathematical formulations of compactness

Respondents advocate imposing a mathematical standard for compactness that is nowhere in the Constitution or even arguably authorized by its language. Resp.Br. 45-8. They rely on *Johnson* and *Pearson II* for the proposition that "compact as may be" can include other factors not expressly listed in the Constitution. Resp.Br. 46. That might have been true under prior versions of Article III. Now, however, the Constitution clearly says how to assess compactness: by looking at a district and assessing how closely it resembles certain shapes, "to the extent permitted by natural or political boundaries." Mo. Const. art. III, § 3(b)(3).

Respondents' rebuttal to Point IV relies on an interpretation of the Constitution that assumes there is no definition in Section 3(b)(3) of "compact as may be." While that may have been the case under prior constitutional provisions, it is now erroneous to read "compact as may be" without the supplied definition of compactness. *See Id.* Put simply, the Constitution tells us what "compact as may be" means. Abandoning the plain language for a mathematical formula is not allowed.

E. Point V- Appellants' burden is to show the Final Map contravenes the Constitution—no more, no less

The Parties agree this Court need not reach Point V. App.Br. 46; Resp.Br. 56. To extent this Court must, Respondents ask to default to a prior formulation of the burden. But, the Constitution has changed. Those provisions provided little detail and instruction to mapmakers, leaving the standards less precise. Today's constitutional provision includes explicit instructions with "methods" for how to draw a senate map. To support their argument, Respondents cherry pick from prior constitutions, claiming that since the phrase "as compact as may be" appeared in prior constitutions, current redistricting standards and burdens must be exactly the same. Resp.Br. 57. That cannot be.

There is no doubt redistricting maps are reviewed in the same manner as statutes: whether they "clearly and undoubtedly" violate the Constitution. *Pearson v. Koster,* 367 S.W.3d 36, 43 (Mo. banc 2012). Here, the stipulations take care of that. The Parties agreed the Final Map segmented Buchanan County and crossed Hazelwood's municipal lines. *See* D220 (¶¶ 15 and 18); D221-222; Resp.Br. 13. The "methods" dictated by the Constitution require maps be drawn to respect political subdivision lines to the extent possible. The Final Map did not comply with that requirement and is unconstitutional on its face.

Respondents claim there is no evidence to support Appellants' argument that their proposed map meets all constitutional requirements. Under subdivision (1), the Court need only look to the stipulated population figures and the stipulation that political lines are crossed. But if the Court adopts Respondents' paint-by-numbers theory, the evidence of compliance was not controverted. While Appellants may have inadvertently cited to the incorrect part of the hearing transcript in their opening brief, the evidence is that Appellants' proposed map complies with *all* constitutional requirements. Tr. 77:3-85:17. Respondents' expert agreed. Ex. P-4 at 5-6, 11. The other, less definitive

testimony to which Respondents refer, Tr. 124:10-133:16, discussed the *Citizen's Commission maps*, not the Appellants' proposed map.

Respondents' contention is even more absurd considering the Secretary's expert drew a map that did not split Hazelwood while complying with all other constitutional requirements. Ex. DX1. Although that map would still be unconstitutional because it split Buchanan County, one of its districts avoids the constitutional infirmity.

Regardless, the Constitution does not require or authorize a judgment which considers the degrees of compliance with the Constitution. Resp.Br. 60-1. A map is either constitutional or it is not. There can be many maps that are constitutional, but there are no degrees of constitutionality. Rather, the Commission was required to draw a map that complies with *all* constitutional requirements. The Final Map does not because it splits a county it does not need to split and crosses municipal lines it does not need to cross. Appellants' map is constitutional because it resolves those deficiencies and should be adopted.

F. Point VI – the Final Map is unconstitutional on its face because it splits Buchanan County and crosses Hazelwood's municipal lines

Respondents argue whether the split of Buchanan and Hazelwood is constitutional depends on "whether it violated the Missouri Constitution to split them." Resp.Br. 63. That misstates the law. A split in a political subdivision that *is not necessary* is unconstitutional. The Constitution provides a list of methods a mapmaker must comply with. One such method (subdivision 4) directs a mapmaker to keep county segments to as few as possible, given the other factors. A map is per se unconstitutional if a mapmaker creates a county segment when it is possible to avoid such segment.

With respect to municipal lines, "as few . . . shall be crossed as possible." Mo. Const. art. III, § 3(b)(4). *Everyone agreed* it is possible to draw a map that does not split Hazelwood. The Secretary's expert *drew* a map that did not split

Hazelwood while complying with all other requirements. Ex. DX1. There was also uncontroverted testimony it is possible to draw a map that does not split Buchanan County. Tr. 163:8-164:16; Ex. P-4, 101:22-102:3. Respondents' expert drew innumerable maps and conceded the vast majority did not split Hazelwood or Buchanan County. Respondent Secretary's retained expert ran computer simulations showing that 89% percent of the time, Buchanan County would *not* have been split and nearly 75% of the time, Hazelwood would not have been split. D248:P9, ¶ 41; Tr. 202-206.

Respondents' defense is that the Commission "legitimately chose to focus on higher constitutional priorities." Resp.Br. 63. But nowhere in the record is there anything about what the Commission "chose." Instead, the trial court endorsed Respondents' efforts to thwart discovery on that very issue. Now, Respondents want it both ways. Either the Commission's inner workings and choices about the map are important or they are not. Respondents said they were not, then enticed the trial court to enter judgment opining on *why* the Commission did what it did and now ask this Court to affirm based on pure speculation.

Respondents also wrongly assert that there is no uncontested evidence. Resolving Point VI requires the Court to answer two questions. First, under Article III, is it permissible for the Final Map to divide Buchanan County and Hazelwood absent any constitutional criteria mandating or justifying such division? Respondents agree that is a legal question, reviewed *de novo*. Resp.Br. 62. Second, if the answer to Question 1 is "no," *did* any constitutional criteria mandate or justify splitting these communities? The parties disagree on the standard of review.

When the evidence is uncontested, "the issue is legal" and "no deference is due to the trial court's findings." *White v. Dir. of Revenue*, 321 S.W.3d 298, 307 (Mo. banc 2010). Evidence is uncontested "when a party has admitted in its

pleadings, by counsel, or through the party's individual testimony the basic facts of other party's case." *Id.* at 308 (cleaned up, quotations omitted).

Here, it is uncontested that no other constitutional factor required or justified splitting these communities. Plaintiffs' expert testified he drew a map that complied with other constitutional requirements and did not divide Buchanan County or Hazelwood. Tr. 77:9-78:2; Ex. P-1. The Secretary's expert agreed it was possible to draw a map that complies with all constitutional requirements and does not divide these communities. Ex. P-4 at 5-6, 11. In fact, he acknowledged Plaintiffs' remedial map complies with all constitutional requirements. *Id.* at 11.

So the question is simply whether, as a matter of law, it was constitutionally permissible for the Final Map to divide Buchanan County and Hazelwood. This Court owes no deference to the trial court's "finding" that Plaintiffs "presented no evidence establishing that any other map achieved Plaintiffs' goals without violating any other provision of the constitution." A19; D248:P19.

Respondents want to ignore the evidence offered by *Respondent Secretary*. They say "an expert is not the Party." Resp.Br. 64. That's obvious, but irrelevant. They were not required to offer his testimony. An "expert witness is wholly in the control of the party who retained him or her." *Hancock v. Shook*, 100 S.W.3d 786, 797 (Mo. banc 2003) (quotations omitted). "[A] party is bound [] by the uncontradicted testimony of his own witnesses." *Calvin v. Jewish Hosp. of St. Louis*, 746 S.W.2d 602, 607 (Mo. App. 1988); *see also Furlong v. Stokes*, 427 S.W.2d 513, 518 (Mo. 1968) ("The plaintiffs produced expert witness, George Moll, and are therefore bound by his uncontradicted evidence.").

The issue here is purely legal. This Court owes no deference to the trial court.

G. Point VII- the trial court erred in dismissing the Commission

The Constitution explicitly instructs that a Plaintiff "shall name the body that approved the challenged redistricting plan as a defendant." Mo. Const. art. III, ¶ 7(i). Appellants say it was error to dismiss that body.

Respondents argue Appellants waived their objection because the Court dismissed under Rule 52.04 and 52.06. Resp.Br. 80, 83. Rule 52.04 provides no procedure for "dropping a party." *See* Rule 52.04. Appellants are uncertain how Respondents can rely on that rule as a basis for dismissal. But, to the extent Respondents can, they requested dismissal because "the Commission was not a necessary and indispensable party." Appellants squarely addressed that argument, regardless of whether Appellants cited to Rule 52.04. App.Br. 53-55. There is no waiver.

Respondents also claim Appellants waived any argument under Rule 52.06, but that rule also does not provide for any relief to a party that wants to be dropped. Instead, a party may be dropped "by order of the court." Rule 52.06. Here, the Commission was dismissed by trial court order. There is no separate argument Appellants can make regarding Rule 52.06. *See also*. Resp.Br. 84 ("If this Court does address the merits of dropping the Commission under Rules 52.04(a) and 52.06, *the same reasons for sustaining the Commission's dismissal also support dropping the Commission as a named party*." (emphasis added)).

As to the merits, Respondents seek to read into the Constitution something that is just not there—an allowance for the Commission to not participate. Their position means a plaintiff must name some other party in the litigation to see it through and obtain relief. Arguably, the requirement to name the Commission means that no other party can be named, because the expression of the one is the exclusion of others. Instead, a plaintiff is instructed to name the entity that drew the map and that entity is the only party instructed to defend it.

H. Point VIII- the trial court erred in quashing Appellants' discovery

Respondents claim the Commission made decisions or findings that support the Final Map. *See e.g.*, Resp.Br. 77. If that is true—and if it matters—Appellants were entitled to explore those decisions or findings through discovery. Respondents surmise that Appellants sought discovery to prove the Commission was ill intentioned. Wrong. Appellants sought discovery to see if there was another way to draw the map. If there wasn't, and the Commission found the best way to draw the map, that would have moved the litigation forward (and quite possibly concluded it). The discovery was reasonably calculated to determine if the Commission considered keeping political subdivisions together in light of population deviations, i.e., discovery would have revealed whether the Commission considered other maps that would have supported Appellants' case.

II. Respondents' "Four Reasons" analysis

Respondents urge the Court to analyze the trial court's judgment as based on "four independent reasons." Resp.Br. 9-10. The trial court's judgment does not specifically claim to be based on these reasons, rather Respondents' analysis is simply their own summary of what they think the Judgment says.[1] *Cf.* A1-21. They say Appellants "address only one of these four arguments." That is not correct. "Reason 1" is addressed in Points Relied on II through IV. "Reason 2" is not a reason at all as discussed below. "Reason 3" is addressed in Point V, VI, and VIII. And Reason 4 is addressed in Points VI and VIII.

A. Reason 1—the Commission chose more compact districts

Appellants and Respondents *agree* one of the reasons the trial court entered the Judgment it did was because it found that "the Commission chose

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[1] The Secretary's summaries are not always fair or sufficient. *See e.g.*, *Fitz-James v. Ashcroft,* ___S.W. 3d ___ WD86595 (Mo. App. 2023); *Pippens v. Ashcroft,* 606 S.W.3d 860 (Mo. App. 2020); *Sedey v. Ashcroft,* 594 S.W.3d 256 (Mo. App. 2020).

districts that were more compact." Resp.Br. 9. Of course, as evidenced by the Judgment's citation to a non-existent exhibit right after that sentence, there is no evidence that the Commission made any choices at all, much less that it chose one factor over another. The trial court allowed no discovery on that issue. Nevertheless, if one can assume that the Commission made a particular choice based on analyzing the districts after the fact, that "choice" was erroneous as a matter of law. *See* Section I.C. above.

B. Reason 2 – something about population deviations

Respondents identify "reason 2" as being that the Commission's Final Map had a lower population deviation than the Plaintiff's Proposed Map. Resp.Br. 10. Again, the trial court did not specify this as a reason it found the map constitutional. Respondents' assumption here seems to be based on one sentence on page 16 of the Judgment. A16. That sentence reads, in its entirety, "The enacted Senate Map's population deviations are also lower than Plaintiffs' Proposed Map." It recounts a stipulated fact, but there is no indication that it was part of the Court's legal analysis. To say it was a "reason" for the trial court's decision is quite a stretch.

Nor is the statement relevant as a matter of law. Whether the Commission's map had a lower deviation than the later-proposed Plaintiffs' Map is irrelevant to any analysis at all. Nothing in the Constitution or this Court's jurisprudence requires the court to analyze whether one map has a smaller deviation than another. The question is whether the Commission map complied with the Constitution.

As discussed above, it does matter whether the population deviation from ideal exceeded three percent—that would violate the population requirement. And it matters whether that deviation exceeded one percent—that means the mapmaker must drop down to subdivision 4 and consider respect for political subdivisions. *See* I.B and I.C *above*. But the fact that there is some deviation between one and three percent or between two different proposed maps is

irrelevant. If the Proposed Map did not exceed three percent and respected political boundaries, it is constitutional even if the Commission map came in closer to a one percent deviation.

C. Reason 3—Plaintiffs failed to satisfy their burden

Appellants agree that one of the trial court's bases for its finding was an incorrect finding that Plaintiffs failed to satisfy their burden. As discussed above in I.E and I.F, Plaintiffs did in fact meet their burden by showing that the Commission's map did not keep county segments to "as few as possible" or cross "as few municipal lines... as possible" by presenting their own maps. In the case of municipal lines, the Secretary's witness also agreed that it was possible to cross fewer municipal lines. Both alternative maps also complied with all of the other requirements of the Constitution. *See* Tr. 77:3-85:17; Ex. P-4 at 5-6, 11.

Respondents' telling of Reason 3 also argues in favor of reversal for failure to allow discovery on the Commission. Respondents claim Plaintiffs needed to prove the creation of county segments and crossing of municipal lines "does not result from application of recognized factors." Resp.Br. 10. If that was Plaintiffs' burden, and if the stipulated facts were not sufficient to prove it, it was error to deny Plaintiffs the opportunity to ask the Commission whether the deviations resulted from some other factor. Plaintiffs served interrogatories and asked for documents that were in fact reasonably calculated to lead to the discovery of admissible evidence on whether other factors were the reason. *See* D192, D193. Perhaps that discovery would have shown admissions from the Commission that they were not, or perhaps it would have identified what factors lead to the dividing of Buchanan County and Hazelwood.

But the trial court put the Plaintiffs in a position of proving a negative about the Commission's decision. That was legally incorrect. The Court had all the information it needed as a matter of law—and if the facts presented were insufficient, it was an abuse of discretion to not allow the Appellants to explore additional facts.

D. Reason 4—lack of evidence about the Proposed Map

Respondents' "reason 4" is that the Plaintiffs "failed to demonstrate that their Proposed Map. . . satisfied the other constitutional requirements, such as compliance with federal law as required by article III, sections3(b)(1) and 3(b)(2)." Resp.Br. 10. Once again, the Secretary's summary of the trial court's judgment is unfair and insufficient.

What the trial court *actually* held was that no one had reviewed the *Citizen's Commission* maps for compliance with federal law. A19. Those were *not* the Plaintiffs' Proposed Maps, but were instead used as evidence that it was possible to draw maps that did not divide political subdivisions. When it came to the Plaintiffs' Proposed Map, the trial court only found that "Mr. Nicholson had not reviewed whether the districts he drew satisfied the compactness criteria, because he only looked at the compactness score…for the whole plan." The trial court did *not* find that the Plaintiffs failed to meet any burden about compliance with federal law. Nicholson testified that the Proposed Map did in fact comply with all the requirements of the Constitution, which was not contested. And Respondents' own witness testified his remedial map preserved the City of Hazelwood but also complied with all requirements of the Constitution.

III. Despite procedural protestations, Plaintiffs' points are properly preserved

Sprinkled throughout their Brief, Respondents ask this Court to avoid the important issues presented here in favor of various claims of waiver. To avoid multifariousness, Plaintiffs raised eight Points Relied On. Respondents argue Plaintiffs failed to preserve some or all of every Point. *See* Resp.Br. 11, 34, 38, 40, 41-42, 51, 55-56, 58-59, 62-63, 76, 68-75, 79-80, 84. Respondents obviously would prefer to avoid review on the merits.

All of those arguments are wrong.[2] In this court-tried case, Plaintiffs asked the trial court to apply the Constitution correctly. They were not required to specifically identify in oral presentation every conceivable legal error the trial court might make when entering judgment. The general rule in a court-tried case is that after-trial motions are unnecessary. Rule 78.07(b).

A. Plaintiffs were not required to file an after trial motion

Respondents cry foul over Points I, II, and VI for lack of an after-trial motion. *See* Resp.Br. 51, 62-63, 76. These bald assertions lack analysis. *Id.* Respondents do not explain whether or why they think Rule 78.07(b) or 78.07(c) required an after-trial motion.

The Points identified all claim the trial court misinterpreted the Constitution. *See* App.Br. 24-35, 49-53. After-trial motions are not required in court-tried cases "if the matter was previously presented to the trial court." 78.07(b). Plaintiffs filed a petition asking the trial court to apply the Constitution and invalidate the Final Map. They presented evidence and again requested judgment in their favor. Inherent in these prayers for relief was a request that the trial court *correctly* apply the Constitution. The trial court has no license to commit legal errors, which are reviewed *de novo*. Under Respondents' theory, parties would *always* need to file after-trial motions when a trial court misapplies the law in rendering judgment. Rule 78.07(b) does not require it.

Respondents also might be relying on Rule 78.07(c). That rule relates to the form or language of the judgment. Challenges to the sufficiency or weight of evidence (two of the *Murphy* standards) are not covered by Rule 78.07(c). *See Estate of Hutchison v. Massood*, 494 S.W.3d 595, 608 n.13 (Mo. App. 2016); *8000 Maryland, LLC v. Huntleigh Fin. Servs. Inc.*, 292 S.W.3d 439, 446 (Mo.

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[2] Respondents' arguments that Plaintiffs failed to plead or preserve a claim that the Final Map violates Article III, § 3(b)(1), Resp.Br. 68-75, are addressed above.

App. 2009). Misapplication of the law (the third *Murphy* standard) is likewise outside Rule 78.07(c).

B. Plaintiffs were not required to explain, at trial, how the trial court was to interpret the Constitution

Respondents also say Plaintiffs failed to preserve Point I, part of Point III, Point IV, and Point V because they did not explicitly advise the trial court during trial what the law is, or not to commit legal errors. *See* Resp.Br. 35, 41, 45, 51, 55. That's also wrong. *Id*.

Each Point asserts the trial court misinterpreted or misapplied the law. App.Br. 24, 35, 41, 46. Respondents seem to argue a party waives all arguments the trial court misapplied the law unless one can locate—for each such argument—a specific transcript page where the party advised the trial court of the correct interpretation, or warned the trial court not to misapply the law. They cite no support for that assertion. There is none. It also misconceives the purpose of a trial.

Trials are where parties put on evidence. That's what happened here. While there may be (and here there was some) argument, that is not the primary purpose. Argument is for briefing. Here, the parties submitted proposed judgments rather than briefs. Per the trial court's standard practice, the parties submitted those briefs in Word format directly to the court, rather than filing them.

Once the case is submitted, the trial court must correctly declare and apply the law to the evidence. *See Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976). It is not possible for parties to anticipate every way a trial court may misapprehend the law and lard the transcript with statements regarding its correct application. Nor is such effort required to preserve claims of legal error.

C. Plaintiffs are not "estopped" from making any arguments

Respondents assert Plaintiffs should be "estopped" from making various arguments in Points III and V. Resp.Br. 42, 55. Respondents provide no authority

or analysis to support their assertion. "Estoppel" is not a talismanic phrase that can just be invoked to bar an argument. It is a doctrine with factors. *In re Contest of Primary Election Candidacy of Fletcher*, 337 S.W.3d 137, 140 (Mo. App. 2011). Generally, it requires a party to obtain some benefit from taking an inconsistent position, *id.*, which Respondents do not argue.

Relatedly, Respondents say Appellants waived Point IV because their expert discussed compactness formulas. Resp.Br. 45. This argument is, again, unexplained. Point IV argues the trial court committed legal error by relying on mathematical compactness standards rather than the constitutional standard—which incorporates consideration of political boundaries—when deciding whether the Final Map was lawful. App.Br. 40-45. Respondents cannot explain how Mr. Nicholson's brief mention of comparing compactness scores for the Final and Remedial Maps, Tr. 81:22-82:12, precludes an argument that the trial court misinterpreted the Constitution.

D. Plaintiffs' arguments do not exceed their points relied on

Respondents incorrectly assert some of Appellants' arguments in Points III and V are outside the scope of the relevant Point. Resp.Br. 34, 40-42, 56, 58-59. But, Point III claims the trial court erred by misinterpreting the interplay between Sections 3(b)(3) and 3(b)(4). App.Br. 35-40. The trial court incorporated that *legal* error into its judgment in two ways. First, it applied its legally erroneous compactness standard when assessing the Final Map's compliance with the Constitution. That is addressed in subparts A and B of Point III. App.Br. 35-39. Second, the court made the same error when assessing whether Plaintiffs' proposed Remedial Map satisfied the Constitution. That is the subject of subpart C. App.Br. 39-40.

Subpart C is not a "different" argument. Resp.Br. 35. Under this Court's decisions in *Johnson* and *Pearson II*, Plaintiffs and the trial court were required to consider whether *both* the Final Map and any Remedial Maps complied with the Constitution. Point III argues the trial court applied the wrong legal standard

to both issues. The standard was wrong regardless of which map the trial court applied it to.

Similarly, Point V argues the trial court erred by assigning a legally erroneous evidentiary burden to Plaintiffs. App.Br. 46-49. Specifically, Appellants contend the trial court erred in applying the analysis from *Johnson* (decided under a different version of Article III) rather than the current factors. *Id.* Respondents assert part of Appellants' argument is outside the scope of Point V. Resp.Br. 55-56. Not so. Point V concerned the trial court's erroneous application of the *Johnson* standard. Part of that erroneous application was insisting Plaintiffs prove the constitutionality of the remedial maps (which they nonetheless did) – a conclusion drawn from *Johnson*. That argument is fairly encompassed in the scope of Point V.

Even if this argument is technically outside the scope of Point V, the Court should nonetheless review it. The Court has discretion to consider arguments on the merits when a defective point "does not impede full consideration of the merits and gives adequate notice . . . of the contested issues." *Allen v. 32nd Judicial Circuit*, 638 S.W.3d 880, 887 n.8 (Mo. banc 2022) (reviewing arguments "well beyond" scope of State's Points Relied On). There is no confusion about what Appellants are arguing. Respondents devote considerable space to addressing the merits of Appellants' burden argument and to discussing whether the remedial maps complied with the Constitution. Resp.Br. 58-61, 66-67.

E. Any arguable deficiencies in the notice of appeal do not preclude review

Finally, Respondents assert Points VII and VIII are "improperly before this Court" because Plaintiffs did not "name" the Commission as a Respondent in the Notice of Appeal. Resp.Br. 11; *but see* Resp.Br. 88 (no challenge to preservation of Point VIII). Like every other preservation argument addressed herein, this one is not explained or accompanied by authority.

Procedural defects in a notice, aside from timeliness, do not affect the right to appeal. *Golsdby v. Lombardi*, 559 S.W.3d 878, 881-82 (Mo. banc 2018). Respondents identify no prejudice from the Notice of Appeal not specifically listing the Commission as a Respondent. It is identified as a Respondent in Appellants' brief. It is represented by the same attorneys representing the Secretary and received notice of the appeal. *And the Commission has filed a brief addressing the merits*. Resp.Br. 1, 108. It is properly before this Court, regardless of the contents of the Notice of Appeal. So are Points VII and VIII.

CONCLUSION

This Court should reverse the decision of the trial court and remand with instructions to follow the Constitution's mandate to redraw the maps in a manner consistent with this Court's opinion.

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 8th day of January, 2024, 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 7,046 words.

/s/Charles W. Hatfield
Charles W. Hatfield