



Written Testimony of:

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&

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on SJR 38

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The Missouri NAACP and the Brennan Center for Justice at New York University School of Law¹ oppose **Senate Joint Resolution 38**.

The Missouri State Conference of the NAACP is a grassroots organization dedicated to the mission of ensuring the political, educational, social, and economic equality of rights of all persons and to eliminate race-based discrimination.

The Brennan Center is a non-partisan law and policy institute that works to improve our nation's systems of democracy and justice. Redistricting reform has long been an integral part of this mission. Over the years, we have partnered with Republican and Democratic lawmakers and grassroots advocates to promote independent, community-driven, and transparent redistricting.

We offer this testimony to highlight the fundamental flaws in SJR 38 and strongly urge the legislature to **vote no** on the resolution.

In 2018, Missourians overwhelmingly voted for redistricting reform. Amendment 1 passed with 62 percent of the vote, winning in every state senate district, 149 of 163 state house districts, and 80 of Missouri's 114 counties (plus the City of St. Louis), including a majority of heavily Republican counties. It was a landslide, grassroots, bipartisan victory for fair representation.

¹ The views expressed in this testimony are made on behalf of the Brennan Center for Justice and not New York University School of Law.

SJR 38 would undo many of the most important gains secured by voters just two years ago. Specifically, the resolution would harm Missourians in at least three critical ways:

1. **Weakening protections for communities of color.** Amendment 1 offers robust protections for communities of color in the redistricting process. Beyond those contained in the Voting Rights Act, Amendment 1 provides independent state-law protections that protect minority communities' ability to participate in the political process and elect their representatives of choice. While SJR 38 would retain some state-level protections, it significantly weakens them by eliminating Amendment 1's prohibition against making it harder for communities of color to elect representatives of their choice and its protection of coalitional districts where different communities can combine their voting strength. As a result, SJR 38 would leave minority communities more vulnerable during the redistricting process.
2. **Undermining independence.** Amendment 1 made Missouri's redistricting process more independent by putting the technical work of drawing maps in the hands of a nonpartisan demographer. SJR 38 would eliminate the nonpartisan demographer and re-entrust the map drawing to the partisan process that has deadlocked in the past. Demographers would inevitably continue to be involved in Missouri's map-drawing process; the only question is how they would be selected. Amendment 1 provides both political parties an equal say over the selection of the nonpartisan demographer, incentivizing compromise and increasing the likelihood of a smooth process resulting in fair maps. In contrast, SJR 38 would lead to both parties hiring their own *partisan* demographers, which would create a zero-sum conflict and increase the likelihood of a deadlocked process.
3. **Deprioritizing partisan fairness.** Amendment 1 assigns a high priority to ensuring that maps promote partisan fairness. But SJR 38 deprioritizes and dilutes the partisan fairness criterion, demoting it to the bottom of the redistricting criteria list. Only after ensuring that districts satisfy a host of other criteria would SJR 38 permit the map drawer to attend to the map's partisan fairness. And whereas Amendment 1 requires that districts be as fair as practicable, SJR 38 would afford the map drawers almost limitless leeway in satisfying that provision. The potential for abuse is clear. SJR 38 would re-open the door to the extreme partisan gerrymandering that the voters overwhelmingly rejected with Amendment 1.

SJR 38 would not only change who draws the lines in Missouri; it might also be construed to limit who counts when the lines are drawn. SJR 38 would erase language expressly requiring that districts be established on the basis of total population. In its place, the resolution provides that districts be drawn on the basis of "one person, one vote"—wording that is found in no other state constitution or statute in any state across the country and that potentially opens the door to discriminatory abuse. During the floor debate in the senate, resolution sponsor Senator Dan Hegeman (R—District 12) suggested that this language was intended to shift the apportionment base used to draw

districts from total population to the “people that are able to vote.”² These remarks have stoked the controversy and added uncertainty to the public debate on SJR 38. In response, we stress three points:

1. **Redistricting commissions could continue to use total population as the apportionment base even if the current language of SJR 38 becomes law.** In 2016, the Supreme Court unanimously held in *Evenwel v. Abbott* that districts drawn on the basis of total population satisfy the “One Person, One Vote” principle.³ Indeed, every state in the country uses total population for reapportionment, a uniform nationwide practice dating back to the earliest days of “One Person, One Vote.” Even if SJR 38 becomes law in Missouri, the redistricting commissions would not be required to make any changes to their historical practice of using total population as the apportionment base in Missouri.
2. **Missouri should retain its longstanding express requirement that districts be drawn on the basis of total population.** For nearly 150 years, Missouri law has required that districts be drawn on the basis of total population. Missouri should leave this longstanding requirement in place. Fiddling with this language will only invite confusion, and would generate costly and burdensome litigation. In adopting Amendment 1, Missouri’s voters unambiguously voiced their preference to enshrine Missouri’s longstanding policy as a clear constitutional command. There is no reason to overturn the will of the voters and depart from Missouri’s longstanding policy.
3. **Apportioning on the basis of citizen voting age population (CVAP)—or any basis narrower than total population—would be discriminatory.** Apportioning on the basis of CVAP would be discriminatory. The main proponent of CVAP-based apportionment was Thomas Hofeller, the architect behind racially discriminatory maps in North Carolina, Texas, Virginia, and other states, who explained in a memo made public after his death that apportioning on the basis of CVAP would be “advantageous to Republicans and Non-Hispanic whites.”⁴ Research proves that to be true in Missouri as well.

Over 90 percent of the people excluded from Missouri’s apportionment base under CVAP apportionment would be citizen children. Missouri’s citizen children are not evenly distributed across the state—in fact, Missouri’s communities of color skew younger than their white counterparts. As a result, these minority communities would suffer disproportionate representational losses if citizen children were excluded from the apportionment base.

² Missouri Senate floor debate (Audio 2) at 56:44, January 29, 2020, available at <https://media.senate.mo.gov/DebateArchive/2020/012920/012920II.mp3>.

³ 136 S.Ct. 1120 (2016).

⁴ See Exhibit D to Letter Motion to Compel Defendants to Show Cause, *New York v. U.S. Dep’t of Commerce*, No. 18-cv-2921 (S.D.N.Y. May 31, 2019), ECF No. 595-1.

For white communities, only 21 percent of their population is under eighteen years of age. But households in Black and Latino communities tend to include more children, with 26.7 percent and 37 percent of their respective populations aged under eighteen. In other words, more than a quarter of Missouri's Black community and more than a third of the state's Latino community simply would not count under a CVAP-based apportionment.

These disparities would result in a dramatic loss of representation for Missouri's communities of color if CVAP-based apportionment is used. Under the current senate map, two out of the four districts that elected members of Missouri's Legislative Black Caucus—districts 9 and 14—would become more underpopulated under CVAP-based apportionment. As a result, CVAP apportionment would make it significantly more difficult for Missouri's communities of color to elect candidates of their choice or receive equal representation. Future maps would similarly see representation shift away from communities of color and toward older communities with fewer children, which are disproportionately white. By reducing representation for communities of color, CVAP-based apportionment would have a discriminatory impact.

Even if Missouri were to institute an apportionment base that did not exclude children, apportioning on the basis of citizens alone would also be discriminatory. The roughly 130,000 noncitizens who reside in Missouri constitute a sliver of the state's nonvoting population; as noted above, it is the nearly 1.4 million citizen children who form the overwhelming majority of nonvoters. Cutting out noncitizens while including citizen children would render the purported justification—counting only the “people that are able to vote”—mere pretext. Considering that noncitizens—like many other constituents—pay taxes, contribute to their communities, raise citizen children, and may soon become voters themselves, there is no plausible justification for a citizen-based apportionment other than discriminatory anti-immigrant sentiment.

SJR 38 threatens to move Missouri backwards. It would make redistricting in Missouri less protective of communities of color and less independent of partisan politics, and would result in less fair maps. What is more, the resolution would threaten Missouri's longstanding practice of counting everyone. For these reasons, the Missouri NAACP and the Brennan Center firmly oppose SJR 38 and urge members of the committee to vote no.