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IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI *ex rel.* BOB JOHNSON, *et al.*,	)	
Relators,	)	
	)	Case No. ____________
vs.	)	
ROBIN CARNAHAN	)	
Respondent.	)	

SUGGESTIONS IN SUPPORT OF RELATORS' PETITION FOR A WRIT OF PROHIBITION

Less than one week ago, this Court re-invigorated the plain language of the Missouri Constitution imposing mandatory and objective duties in the reapportionment of state and federal districts, and consigned to the judicial dustbin the subjective, deferential standards in prior decisions which had robbed these constitutional requirements of force and effect. *See Teichman v. Carnahan*, Case No. SC92237 (Mo. banc, January 17, 2012), Slip Op. at 8-9; *Pearson v. Koster*, Case Nos. SC92200 and 92003 (Mo. banc January 17, 2012), Slip Op. at 6-7. Equally important, the Court reaffirmed that a writ of prohibition is a proper means of enforcing these requirements when the material facts are not in dispute and the constitutional violations are manifest. *Teichman*, Slip Op. at 13.

Accordingly, Petitioners request that this Court declare the reapportionment map for the House of Representatives invalid and prohibit the Secretary from relying upon it, just as it did for the new Senate map in *Teichman*. The new House map violates the constitutional requirements of population equality, contiguity, and compactness, which requirements are "mandatory and objective, not subjective." *Pearson*, Slip Op. at 8. As

in *Teichman*, these constitutional defects are proved by undisputed facts, and thus there is no need for time-consuming factual development or trial.

Background

On September 8, 2011, acting pursuant to Article III, Section 2 of the Missouri Constitution, this Court appointed a commission (the "AAC") consisting of six Judges of the Missouri Court of Appeals for the purpose of apportioning the Missouri House of Representatives (the "House") in the event that the bipartisan reapportionment commission previously appointed by the Governor pursuant to this same constitutional provision failed to file a new House map by its constitutional deadline (i.e., September 18, 2011). When the bipartisan reapportionment commission failed to reapportion the House by September 18, sole constitutional authority to reapportion the House passed to the AAC, and this Court's September 8 order took effect. *Teichman*, Slip Op. at 4-5.

On November 30, 2011, the AAC unanimously signed and filed its House Redistricting Plan (the "New House Map"). *See* Exhibit A., p.1 to the Petition (AAC letter to the Secretary dated November 30, 2011).[1] However, because the New House Map fails to conform to the requirements of Article III, Section 2 of the Missouri

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[1] The entire AAC House Redistricting Plan (1270 pp.), including depictions of the New House Map, is available at http://oa.mo.gov/bp/redistricting/houseplan.htm, and that Plan is incorporated into the Petition's Exhibit 1 as if it were included in its entirety therein. Relevant statistical excerpts of the Plan, as well as depictions of certain House districts (or portions thereof), are attached as exhibits to the Petition and are referred to below.

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Constitution, the New House Map is invalid and the Secretary of State (the "Secretary") must be prohibited from using it for any purpose. And, under the express terms of Article III, Section 2, the House reapportionment process automatically returns to the Governor, who must appoint a bipartisan commission to begin the process anew. *Teichman*, Slip Op. at 13.

Summary of Argument

The drawing of legislative districts is fundamentally a legislative process, regardless of the individuals assigned to the task. *Teichman*, Slip Op. at 5. Indeed, it might be said that the apportionment process is among the most important of all legislative acts given its long-term effect on the remainder of the legislative process. And, as with most legislative actions, reapportionment requires the weighing and balancing of numerous, competing considerations such that there is seldom (if ever) an indisputably "right" answer.

The Missouri Constitution recognizes these principles, and sets out a process designed to foster them. However, the Constitution refuses to cede absolute discretion to those who draw these maps and, instead, imposes certain mandatory and objective criteria against which their results must be tested. Regarding the reapportionment of the House, these criteria are set forth in Article III, Section 2 of the Constitution, which requires that ***every*** district: (1) be as nearly equal in population "as possible," (2) be composed of contiguous territory, and (3) be as compact "as may be."

The language of Section 2 could not be clearer. It instructs that the indispensable, unalterable and uncompromising characteristic of a valid House apportionment is that

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every district must be equal in population to every other district, i.e., that every person must have equal representation in the "People's Chamber." Thus, the Constitution will not countenance a House map in which district populations are "roughly equal," or "nearly equal," or even "substantially equal." Nor is Section 2 satisfied with House districts that are "as nearly equal as practicable in population," which is the standard Section 7 imposes for senatorial districts in multi-district counties. In fact, Section 2 is not even willing to accept the standard for congressional districts articulated in Article III, Section 45, which requires districts that are "as nearly equal in population as may be." Instead, Section 2 instructs those who reapportion the House to divide the state's population by 163, and then requires that every "district shall, ***as nearly as possible,*** equal that figure." [Emphasis added.]

The New House Map fails the constitutional requirement of population equality as a matter of law. One out of every four districts in the New House Map misses the constitutional population target by ***1,100 people or more***. The Constitution recognizes that absolute equality is not the standard but, at the same time, the Constitution will not permit inequality where it was "possible" to do better. Not only was it "possible" to achieve much greater equality than did the New House Map, such equality was readily achievable and, in fact, it repeatedly had been achieved by both caucuses during the bipartisan commission process. This is not a close call; the New House Map is unconstitutional as a matter of law because its districts are not as nearly equal in population "as possible."

The New House Map's failure to comply with the Constitution's population equality requirement is so clear and indisputable, the Court may never need to reach Relator's remaining claims. However, Section 2 also imposes contiguity and compactness requirements that are just as mandatory and just as objective as the requirement of population equality. And the New House Map's failure to comply with these requirements is equally clear and indisputable. No less than six times, the New House Map establishes a district comprised of two parcels that are physically separated from each other by the Missouri or Meramec Rivers. Residents in any one of these districts cannot travel from one end of their district to the other without having to leave the district and travel through another district (or several districts) in order to reach the non-contiguous portions of their own district.

Similarly, even a cursory glance of the New House Map reveals many districts which show no sign that the Missouri Constitution even prefers – let alone requires – that legislative districts be compact. To be sure, Section 2 recognizes that compactness may have to be sacrificed in order to obtain population equality; that is why districts need only be as compact "as may be." But any "rational and objective" review (*Pearson*, Slip op. at 8) of the New House Map reveals many districts in which it appears not only that compactness was not sacrificed to obtain population equality, but that the lack of compactness may even have contributed to the population ***inequality***.

Neither the calendar nor the clock should be allowed to saddle Missouri citizens with a House reapportionment embodying such clear constitutional violations. Missourians must live with these reapportionments for a long time, and that is why

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Constitution's mandatory and objective are meant to ensure that each map meets basic standards of fairness and equality. *Pearson*, Slip op. at 6. Thus, if it is possible to draw a map with districts more nearly equal in population, the Missourians are ***entitled*** to such a map under the Constitution. If it is possible to apportion the House without creating districts that span great rivers (even by accident), the Constitution entitles Missourians to such a map. And, if it is possible to draw districts that do not meander across the map like marble rolling across a warped linoleum floor, the Constitution requires that it be done to the extent possible without infringing upon the contiguity and population equality requirements.

Accordingly, this Court should declare the New House Map unconstitutional and prohibit the Secretary from using it in connection with the 2012 primary or general elections. Obviously, this Court has no authority – and even less inclination – to micro-manage the House apportionment process, regardless of which commission is drawing the map. Just as obvious, however, if the decades which ended with *Pearson* and *Teichman* are any guide, constitutional apportionment requirements that are not enforced cease to be requirements at all.

ARGUMENT

I. <u>This Court should set aside Its Rule 84.22(a)</u>.

Because of the nature of the action and the relief sought – including the fact that candidate filing for the 2012 primary election is required by statute to open on February 28, 2012, and close on March 27, 2012 – Relators respectfully request that the

Court waive its Rule 84.22(a) requiring Relators to seek relief from the lowest court in which "adequate relief" may be had.

Relators cannot be given adequate, and timely, relief in any lower court. As this Court noted in *Teichman*, the constitutionality of the New House Map cannot be adjudicated in the Court of Appeals because six of its members drew the map being challenged. *Teichman*, Slip Op. at 5. Seeking relief in a Circuit Court creates the risk that the New House Map will not be declared invalid until after candidates have begun to file for election in the invalidated districts. Moreover, proceeding first in a Circuit Court will have little practical effect because any judgment entered (or writ issued) there will be reviewed by this Court under a *de novo* (rather than deferential) standard given that the facts are not disputed and the New House Map is unconstitutional as a matter of law.[2]

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[2] If their Petition is denied, Petitioners are prepared to bring these same claims in the Circuit Court of Cole County, together with certain other claims not appropriate for adjudication in a writ proceeding (i.e., claims that New House Map must be invalidated pursuant to § 610.027.5 on the grounds that the AAC, as a public governmental body under § 610.010(4), failed to post notice for every meeting at which a majority of its members were present and public business was discussed, and that it failed to begin each meeting in public session if only for the purpose of taking a vote to retire to the executive sessions authorized by Article III, Section 2 of the Missouri Constitution). As this Court is well-aware, however, the dockets of that Circuit Court already are strained by election-year matters such as initiative petition challenges, etc. Thus, even though there

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Accordingly, just as in *Teichman*, no time-consuming factual development and/or findings by a lower court is needed, nor should they be required. *Teichman*, Slip Op. at 3-4. Instead, by setting aside Rule 84.22(a) and employing the means to expedite these proceedings under Rule 84.24(e) and (j), the Court can ensure that – if the New House Map is invalidated as Relators believe it should be – the House apportionment process will remain nearly in sync with the soon-to-be-restarted Senate process, and there will be as much time for that process as possible under the circumstances.

II. The "Mandatory and Objective" Requirements of Section 2 Mean What They Say, and This Court Will Enforce Them Where the Violation is Manifest.

The New House Map violates the constitutional requirements set forth in Article III, Section 2 of the Missouri Constitution, which states:

> [T]he commission [whether the bipartisan commission or the AAC] shall reapportion the representatives by dividing the population of the state by the number one hundred and sixty-three and shall establish each district so that the population of that district shall, **as nearly as possible, equal** that figure. Each district shall be composed of **contiguous** territory as **compact as may be**.

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are no facts to be developed, tried or found, disposition of this type of matter in less than three weeks (or more) cannot be assumed.

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[Emphasis added.] These three constitutional requirements, i.e., (1) population equality, (2) contiguity, and (3) compactness, are "mandatory and objective, not subjective." *Pearson*, Slip Op. at 8.

In *Pearson* and *Teichman*, this Court laid to rest decades of confusion over whether constitutional defects in reapportionment maps can be defended on the ground that (i) a map "substantially" complies with constitutional requirements, or (ii) a map's authoring commission (whether it is the AAC or the bipartisan commission) has discretion to depart from these constitutional requirements, or (iii) a map is sufficient as long as it complies with most of the constitutional requirements in most of the districts. *Teichman*, Slip Op. at 8-9; *Pearson*, Slip Op. at 5-8. Rejecting these standards, this Court held that the Constitution means what it says, and that a clear violation of any one or more of these constitutional requirements, occurring in any one or more districts, renders the entire map invalid. *Teichman*, Slip Op. at 8-9, 13; *Pearson*, Slip Op. at 8. *See also Preisler v. Doherty*, 284 S.W.2d 427, 435 (Mo. banc 1955) ("There is no discretion to violate mandatory [apportionment] provisions of the Constitution").

This Court not only reinvigorated the three "mandatory and objective" requirements set out in in Article III, Section 2, it also re-affirmed that a writ of prohibition is an appropriate means of raising these issues and that this Court will address such claims in the first instance where the facts are not in dispute, where the constitutional violations are clear, and where the exigencies of the circumstances require dispatch. *Teichman,* Slip Op. at 13. Without such a venue for timely relief the promise of these constitutional protections will go largely unrealized.

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III. The New House Map Violates the Population Equality Requirement as a Matter of Law.

The New House Map fails to comply with the constitutional mandate that House districts be as nearly equal in population "as possible." Perfect precision is not required, but the New House Map falls far short of what is "possible" and, therefore, far short of what Article III, Section 2 of the Missouri Constitution requires. "The facts necessary to analyze this case are undisputed," *Teichman*, Slip Op. at 13, and this Court can declare the New House Map invalid as a matter of law.

Article III, Section 2 establishes a "population target" for House districts by requiring that the State's total population as stated in the new decennial census be divided by 163, i.e., the number of House districts. Based upon the 2010 census data, Section 2's population target for this reapportionment is 36,742. Section 2 then requires that the House be apportioned so that every district "shall, ***as nearly as possible,*** equal that figure."

The New House Map misses this mandatory and objective population target by ***at least 1,100 people*** (or 3.0% of the target) in no fewer than ***40 districts, or 25%*** of all 163 districts statewide. *See* Exhibit B, pp. 2-6 (Population Deviation Statistics submitted by the AAC). In addition, the New House Map misses the constitutional population target by ***at least 735 people*** (2.0% of the target) in ***67 House districts, or 41%*** of all districts. These facts cannot be disputed; the population figures are there for all to see.

A. Greater Equality Was Not Only Possible, But Previously and Repeatedly Achieved.

Deviations from exact population equality can only be countenanced under Article III, Section 2 if – and only to the extent that – no greater equality is "possible." Any contention that it is not "possible" to come closer than 1,100 people in 25% of the districts does not even pass the blush test. In addition, such a dubious argument cannot survive the fact that, on August 11, 2011, the Democratic Members and the Republican Members of the bipartisan House Reapportionment Commission each submitted House map proposals achieving greater degrees of equality. Obviously, the two maps varied greatly from each other because each was drawn to achieve different goals and reflects different principles and priorities. But, both maps share one feature which the New House Map lacks. ***Not one single district*** out of the combined 326 districts proposed in the two partisan maps presented on August 8 missed the constitutional population target by as much as 1,100 people (3.0% of the target), which inequality occurs in 25% of the districts in the New House Map.

Moreover, ***not one single district*** out of the combined 326 districts proposed in these two maps missed the constitutional population target by as much as 735 people (2.0% of the target). *See* Exhibit C, pp. 7-10 (comparing deviation data for the New House Map and the Republican and Democratic Commissioner proposals dated August

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11, 2011).[3] Even though these two maps were drawn in pursuit of diametrically opposite and competing political goals, both maps not only achieve greater equality than the New House Map, they are each more than ***twice as precise*** as the New House Map. *See* Exhibit C, p. 10 (deviation range for the New House Plan is 7.80%, while the deviation ranges for the two August 11 maps are 3.87% and 3.27%).

Accordingly, what was "possible" for these two politically motivated maps was surely "possible" for the New House Map. Its failure to match (or exceed) their degree of population equality demonstrates beyond question, and as a matter of law, that the districts in New House Map are not as nearly equal in population "as possible."

B. Greater Equality Was Readily Achievable With Minimal Changes.

Even a cursory glance at some of the New House Map districts which depart most substantially from the constitutional population target shows that greater equality was not only "possible" but readily achievable. Time and again, some of the most over-populated districts are found next to – and even surrounded by – under-populated districts. In those regions, relatively minor changes to the boundaries could have brought an entire cluster of districts closer to the constitutional requirement of population equality. *See* Exhibit D, pp. 11-16 to the Petition (New House Map regions, color-coded to show over-populated and under-populated districts). Such "missed opportunities" repeatedly highlight that greater population equality was "possible."

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[3] The maps, deviation data, and depictions for these two August 11 proposals may be found at http://oa.mo.gov/bp/redistricting/housedownload.htm.

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For example, in downtown St. Louis, four of the districts are over-populated and the other four are under-populated. *See* Exhibit D, p. 12. District 78 (which is over-populated) actually reaches out and takes population from Districts 79 and 81, both of which are under-populated. As discussed below and depicted in Exhibit F, p. 23, this region could easily have been drawn with the same outside boundary and the same number of districts, but with a deviation range or 1.20%.

Similarly, in the western suburbs of St. Louis (Warren, Montgomery, Lincoln and St. Charles Counties), some of the most over-populated districts in the state are clustered together, virtually surrounded by under-populated districts. *See* Exhibit D, p. 13. As discussed below in the argument on compactness, this obvious defect was exacerbated by adherence to county lines. Not only does Article III, Section not require the new map to follow county lines, it is absolutely forbidden from doing so (or doing anything else) when the result is a loss of population equality which was otherwise "possible." Though the re-write would have been a bit more substantial, the Court can easily see how it is "possible" for Audrain, Gasconade, Pike and Franklin Counties to relieve Districts 41-42, 63-64 (and others) of their over-population, bringing the entire region closer to the constitutional population target.

Finally, Districts 35-37 is another cluster of districts that are over-populated, yet hemmed in on all sides by districts which are under-populated. *See* Exhibit D, p. 14. Even though they are over-populated, the boundaries for all three of these districts contained wholly inexplicable "tentacles" reaching out to take population they do not need from districts which do not have it to spare. Here, boundaries drawn with a straight-

edge rather than a B-B-Q fork would have brought both the "red" and the "blue" districts[4] closer to the constitutional population target.

C. The Missouri Constitution Has No "Safe Harbor" For Population Deviations.

Relators claim that the New House Map is unconstitutional under Article III, Section 2 of the Missouri Constitution because the districts are not as nearly equal in population "as possible." Relators are not claiming that the New House Map violates the Equal Protection Clause of the Fourteenth Amendment of the Constitution of the United States (though it does, or at least should). Nevertheless, the Secretary may attempt to rebut Relators' claim by citing federal court cases refusing to entertain equal protection claims concerning state reapportionments unless the map being challenged has a deviation range of 10.0% or more. *See, e.g., Brown v. Thomson*, 462 U.S. 835, 842-43 (1983) ("as a general matter, . . . [a] plan with a maximum population deviation under 10% falls within this category of minor deviations").

However, this 10% "safe harbor" is more a function of the federal courts attempting to fashion a one-size-fits-fifty standard (even though the variations in

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[4] Districts are colored green-to-blue as the over-population increases, and orange-to-red as the under-population increases. *See* Exhibit D, p. 11. Thus, the "bluer" a district is, the more each individual voter's vote has been diluted and the less it is worth. Conversely, the "redder" a district is, the more each voter's vote is worth because there are comparatively fewer voters there to control the outcome of elections.

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geography, history and state constitutional processes and requirements make doing so nearly impossible) than it is a determination that any higher standard would be impractical or unenforceable. To the contrary, these same federal courts expressly rejected the notion of "safe harbors" for congressional districts under Article I, Section 7 of the federal constitution, holding instead:

> We reject Missouri's argument that there is a fixed numerical or percentage population variance small enough to be considered *de minimis* and to satisfy without question the 'as nearly as practicable' standard. . . . Since 'equal representation for equal numbers of people (is) the fundamental goal for the House of Representatives, **the 'as nearly as practicable' standard** requires that the State make a **good-faith effort to achieve precise mathematical equality**. Unless population variances among congressional districts are shown to have resulted despite such effort, the State must justify each variance, no matter how small

Kirkpatrick v. Preisler, 394 U.S. 526, 530-31 (1969) (citations omitted, emphasis added) (rejecting deviation range of 5.97%).

Of course, *Kirkpatrick* and its progeny do not control the analysis under Article III, Section 2 of the Missouri Constitution – but ***neither*** do *Brown* and its progeny. The value of *Kirkpatrick* is that the United States Supreme Court, when not bound by the institutional hesitance to inject federal courts into the quintessentially local matter of apportioning state legislative districts, interprets the plain meaning of the phrase "as nearly as practicable" to require "a good-faith effort to achieve precise mathematical equality." Just as important, if not more so, is that the near-zero-tolerance rule applied in

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the *Kirkpatrick* line of cases is a ***workable standard***, and federal courts routinely reject plans with deviation ranges of 2.0% (and less). *See, e.g., Shayer v. Kirkpatrick*, 541 F.Supp. 922, 929 (W.D. Mo. 1982) (drawing districts with 0.18% variance, and rejecting dissent's map which had a 1.17% deviation).

This Court has never had to resolve a claim based on the population equality requirement of Article III, Section 2, nor has it reached a population equality claim regarding senatorial districts since 1912. *State ex rel. Barrett v. Hitchcock*, 146 S.W. 40, 64-65 (Mo. banc 1912). In *Hitchcock*, where the Court was dealing with an apportionment process much more constrained than its modern-day descendant in Section 7, the Court nevertheless looked to the language of Article I, Section 2 of the federal constitution for guidance:

> The Constitution, therefore, must be understood, not as enjoining an absolute relative equality, because that would be demanding an impossibility, but as requiring Congress to make an apportionment of Representatives among the several states, according to their respective numbers, as nearly as may be. **That which cannot be done perfectly must be done in a manner as near perfection as can be**.

Hitchcock, 146 S.W. at 64 (quotations omitted, emphasis added). Persuaded, the Court adopted the standard from Article I, Section 2 of the federal constitution and employed it to disapprove the senatorial apportionment plan at issue. *Id.* at 65.

In the present case, when determining what standard to use to enforce the population equality requirement of Article III, Section 2, Relators urge this Court to do

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what it did in *Teichman* and *Pearson* and apply the constitutional language as written. To the extent any external reference points are needed, this Court should be guided by Article I, Section 2 of the federal constitution today, just as it was a century ago in *Hitchcock*: "That which cannot be done perfectly must be done in a manner as near perfection as can be."

Over the last century, ever-more-detailed census data, computers and sophisticated software have greatly increased the degree of population equality that is "possible" during reapportionment. Nevertheless, this Court cannot know how near the goal of absolute equality we can reliably and repeatedly expect future reapportionments to be. What is certain, however, is that the New House Map falls far, far short of what we can do – and previously have done – ***now***. Accordingly, under the plain language of Section 2, under *Hitchcock*, and under *Kirkpatrick*, any map in which 25% of the districts miss the mark by 3.0% and the gap between the larges and smallest district is nearly 8% is invalid as a matter of law. And it is not a close call.

IV. Districts Split by Large Rivers Cannot be "Contiguous."

The New House Map also fails as a matter of law to conform to the requirement in Article III, Section 2 that "[e]ach district shall be composed of contiguous territory[.]" Unlike compactness, which can be a relative matter, a district is either "composed of contiguous territory" or it is not. The plain language of Section 2 requires that every district in the New House Map must meet the test for contiguity.

This Court has held that, when Missouri voters approved the constitutional requirement of contiguity, they meant that "no part of any district [can be] ***physically***

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separate from any other part." *Preisler v. Kirkpatrick,* 528 S.W.2d 422, 426 (Mo. banc 1975) (emphasis added). *See also Specter v. Levin*, 293 A.2d 15 (Pa. 1972) (contiguous district is "one in which a person can go from any point within the district to any other point (within the district) without leaving the district") (internal quotations and footnote omitted).

The New House Map fails the contiguity requirement as a matter of law because Districts 49, 50, 53, 70, 98, 110 each have one portion of the district which is cut off from the remainder by a major river, with no connecting bridge in the district. *See* Exhibit E, pp. 17-22 (maps of these six districts showing major rivers, which are not shown on the official maps). Accordingly, each of these six districts fails the test for contiguity set forth in *Preisler* because each consists of two parcels that are "physically separate" from each other. A resident of any of these districts cannot travel from one end of their district to the other without having to leave their district, cross through at least one or more other districts, just to find a bridge to give them access to the non-contiguous portion of their district.

For example, it cannot be maintained that Missouri voters intended, in requiring contiguity, to condone District 50 in the New House Map, which is split in half by the Missouri River. There, a resident or House candidate who wants to go from one constituent's home in southeastern Columbia to another constituent's home in California must leave District 50, travel through Districts 49, 60, 59, ***and*** 58, in order to return to District 50 at California. *See* Exhibit E, p. 18 (map of District 50).

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Similarly, District 49 (which consists almost entirely of an uncompact portion of southern Callaway County) inexplicably crosses the Missouri River to encompass areas west of Jefferson City. *See* Exhibit E, p. 17 (map of District 49). Therefore, a Kingdom City resident of District 49 will have to leave their district and cross District 60 in order to visit co-residents of District 49 in eastern Cole County. *See also* Exhibit E, p. 20 (map of District 70, in which the Missouri River separates parts of Bridgeton and Hazelton on the east side of the river from parts of the St. Charles riverfront and Weldon Spring on the west side) *and* Exhibit E, p. 19 (map of District 53, which isolates a physically separate portion north of the Missouri River such that 30-mile trip into and out of District 39 is required to visit the non-contiguous portion of District 53).

And the Missouri River is not the only river ignored by the New House Map. The Meramec River splits District 98 almost in half, with the result that Ballwin residents must either make the long roundabout journey through District 99 or District 110 to meet with co-residents of District 98 in Fenton. *See* Exhibit E, p. 21 (map of District 98). *See also* Exhibit E, p. 22 (map of District 110, which includes a physically separate portion east of the Meramec River so that a trip through District 98 is required to reach the non-contiguous portion of District 110).

The failure of the New House Map to comply with the constitutional requirement of contiguity can be decided by this Court as a matter of law with a single glance at the maps of these six districts in Exhibit 5. Discovery and fact finding are not necessary. Nor can this failure be defended on the ground that these districts are as contiguous "as may be." In each instance, no express constitutional imperative (such as population

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equality) requires district boundaries to cross major rivers, nor does the less-stringent constitutional requirement of compactness justify doing so. In fact, the opposite is true. If the New House Map had complied with the voter's contiguity requirement by not crossing these large rivers, the resulting districts would have been made more compact and population equality could still have been achieved.

V. The New House Map is Not as "Compact as May Be."

Finally, the New House Map fails as a matter of law to conform to the constitutional compactness requirement. Compactness is a relative term, and the degree to which legislative districts can be compact is influenced by any other criteria given greater importance. For example, the constitutional requirement that House district be "contiguous" may require one or more districts to have jagged, irregular borders where they follow (rather than ignore) a major river where there are no bridges nearby to physically connect the river banks.

Another factor which must affect compactness in the reapportionment of senatorial districts under Article III, Section 7 of the Missouri Constitution, but which cannot justify a lack of compactness (or population equality) in the New House Map, is the need to follow county lines. Section 7 requires that senatorial district adhere to county lines wherever possible. Section 2 says nothing about county lines and, with 115 counties and only 163 legislative districts, it is obvious why no attempt to compel adherence was included.

The only constitutional imperative for the apportionment of House districts is that they all have the same population "as nearly as possible." The Constitution recognizes

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that compactness may have to be sacrificed to achieve population equality, and thus Section 2 only requires that districts be as compact "as may be." The New House Map, however, lacks both compactness ***and*** population equality. In many districts, compactness – which is expressly required in the constitution – is sacrificed for no discernible policy and certainly not for any policy expressly condoned by Section 2. Worse, in many cases this lack of compactness may even have aggravated the lack of population equality.

Downtown St. Louis City provides a startling example. *See* Exhibit D, p. 12 (map of Districts 76-84). There, Districts 77 and 78 are nearly caricatures of compactness, and their neighbors are not much better. Yet, District 78 is one of the most over-populated districts in the state and District 77 is under-populated. None of the districts in this area are compact, yet only District 83 comes close to the Constitution's population target; all the others are greatly over- or under-populated. Even within this single region, it was clearly "possible" for the New House Map to have created districts with greater population equality ***and*** which were more compact. *See* Exhibit F, p. 23 (alternative map showing compact districts with a deviation range of 1.20%).

Jackson County and northern Cass County, too, reveal districts which almost suggest that compactness was sacrificed to ***avoid*** population equality rather than to comply with that constitutional mandate. *See* Exhibit D, pp. 14-16. Simply put, nothing in Section 2 of Article III can justify the shapes of Districts 27, 35-37, or 55 (among many others in this region). Whatever policy was served (if any) by these boundaries, it came at the direct expense of the only two policies expressly set out in Section 2, *i.e.*,

population equality (the most important) and compactness. Not only do Districts 35-37 have needlessly jagged and irregular boundaries, they are among the most over-populated in the State . . . and yet they are surrounded by districts which are under-populated. Simply smoothing these boundaries would have produced districts that were ***both*** more compact and more nearly equal in population than those in the New House Map.

Similarly, District 42 is one of the most over-populated districts in the New House Map (*see* map in Exhibit D, 13), and it is located at the western edge of a cluster of other over-populated districts. However, as above, this cluster of over-populated districts is virtually surrounded by under-populated districts such as Districts 40, 43 and 61. Here, again, ***both*** compactness and population equality have been lost, even though relatively small changes could have salvaged both. Because the New House Map adheres to county lines – which Section 2 ***does not require*** – the result is districts which fail the constitutional requirements for both compactness and population equality. Unfortunately, this cluster of over-populated districts is located in the one of the fastest growing areas of the state. Therefore, unless this map is invalidated by this Court, this unconstitutional population deviation is likely to worsen over the ten-year life of the reapportionment.

On the basis of the foregoing facts, which cannot be disputed, this Court should determine as a matter of law that the New House Map fails to comply with the constitutional requirement that each district be as "compact as may be." Though a lack of compactness might still satisfy the "as may be" standard when it is needed to meet the constitutional imperative of population equality, this Court should not countenance the

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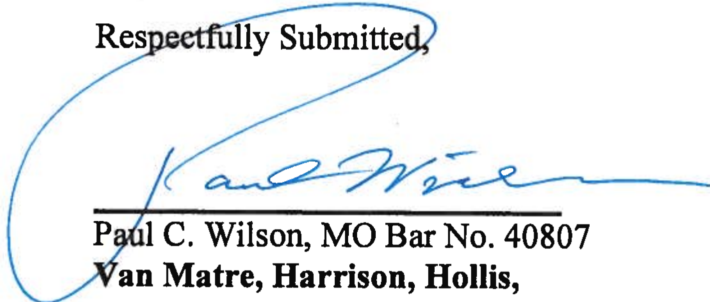
New House Map's wandering boundaries when they actually appear to aggravate (or, at least, missed an opportunity to correct) the unconstitutional population deviations in adjacent and nearby districts.

Conclusion

For the reasons set forth above, Relators respectfully request that this Court set aside with its Rule 84.22(a) so as to allow this action to be brought directly in this Court, expedite these proceedings under Rules 84.24(c) and (i) as provided in Rule 84.24(e) and (j), and issue a peremptory or permanent writ of prohibition prohibiting the Secretary from making any use of the New House Map for any purpose related to the nomination or election of any member of the House.

Dated: January 23, 2012

Respectfully Submitted,



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