No. SC92237

IN THE SUPREME COURT OF MISSOURI

State of Missouri, ex rel.

MOLLY TEICHMAN,

Relator,

v.

ROBIN CARNAHAN, et al.,

Respondents.

Original Petition in Mandamus and Prohibition

RELATOR'S BRIEF

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JURISDICTIONAL STATEMENT

This action challenges the validity of Article III, Section 7 of the Missouri Constitution, and hence involves the validity of a provision of the constitution of this state. This action also challenges the validity of official filings made by a commission carrying out the delegated legislative function of reapportioning the senate, and hence involves the validity of official filings equivalent to a statute. To the extent that this action is not originally within the exclusive jurisdiction of this Court, this Court has waived Rule 84.22 for the purpose of allowing this action to be brought directly in this Court.

STATEMENT OF FACTS

On September 8, 2011, this Court appointed a commission (the "Appellate Apportionment Commission") composed of Respondents Hardwick, Richter, Rahmeyer, Burrell, Dowd, and Welsh (the "Respondent Commissioners"; collectively, the "Commission") for the purpose of reapportioning the Missouri senate. *See* Pet.Ex. A *05-06*.[1] When a separate commission appointed by the governor failed to file a final statement apportioning the senate by September 18, 2011, constitutional authority to apportion the senate vested in the Appellate Apportionment Commission. *See* Pet.Ex. A *05*.

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[1] *Pet.Ex.* __ refers to exhibits to Relators' petition.

The First Reapportionment

On November 30, 2011, the Respondent Commissioners unanimously approved a plan and map reapportioning the senate (the "First Reapportionment Plan"). *See* Pet.Ex. A *03*. In the First Reapportionment Plan, Jackson County is apportioned among multiple senate districts, two of which (Districts 8 and 10) cross county lines; *see* Pet.Ex. A *at 15 & 17;* Greene County is apportioned among multiple senate districts, two of which (Districts 20 and 28) cross county lines; *see* Pet.Ex. A *15 & 18*; and St. Louis County is apportioned among multiple senate districts, two of which (Districts 4 and 27) cross county lines. *See* Pet.Ex. A *15 & 16*.

On or about November 30, 2011, the Respondent Commissioners filed the First Reapportionment Plan with the Missouri Secretary of State (the "Secretary"), *see* Pet.Ex. A *03 & 07*, and on November 30, 2011, the Secretary accepted said filing (the "First Reapportionment")(*see Pet.* ¶ *17; S.S. Resp. 2*).

The Second Reapportionment

On December 9, 2011, a majority of the Relator Commissioners approved a plan and map (the "Second Reapportionment Plan") that is distinct from the First Reapportionment Plan. *See* Pet.Ex. B *21*. The Second Reapportionment Plan apportions the senate into districts that are different from the districts in the First Reapportionment Plan. *Cf.* Pet.Ex. A.

In the Second Reapportionment Plan, St. Louis County is apportioned among multiple senate districts, two of which (Districts 4 and 27) cross county lines, *see* Pet.Ex.

B 33 & 34. Also, parts of the previous District 8 and the previous District 10 are combined such that there is no presently elected senator residing in the reapportioned District 8, there are two presently elected senators residing in the reapportioned District 10, and due to the staggering of senate elections (*see Article III, Section 11 of the Missouri Constitution*), this situation will not be rectified until the general election in 2014 (*Pet. ¶ 24 & 25*).

On or about December 9, 2011, the Respondent Commissioners filed a statement with the Secretary purporting to "withdraw" the First Reapportionment Plan and file in its place the Second Reapportionment Plan. *See Pet.Ex. B 21 & 25.*

POINTS RELIED ON

I.

RELATOR IS ENTITLED TO AN ORDER COMPELLING THE SECRETARY OF STATE TO DENY THE WITHDRAWAL OF THE FIRST REAPPORTIONMENT PLAN AND THE FILING OF THE SECOND REAPPORTIONMENT PLAN, AND RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE SECRETARY OF STATE FROM USING THE SECOND REAPPORTIONMENT PLAN FOR ANY PURPOSE RELATED TO THE NOMINATION OR ELECTION OF ANY SENATOR, BECAUSE SAID WITHDRAWAL, SAID FILING, AND THE SECOND REAPPORTIONMENT PLAN WERE VOID AB INITIO PURSUANT TO ARTICLE III, SECTION 7 OF THE MISSOURI CONSTITUTION, IN THAT THE COMMISSION HAD ALREADY PERFORMED THE TERMINAL ACT OF FILING THE FIRST REAPPORTIONMENT PLAN AND HAD NO AUTHORITY TO RECONSIDER, TAKE FURTHER ACTION, OR OTHERWISE INVALIDATE THE FIRST REAPPORTIONMENT PLAN.

Mo. Const. Art. III, Section 7;

State ex rel. Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40 (1912);

Missouri Coal. for Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125 (Mo. 1997);

State ex rel. Ashcroft v. Blunt, 696 S.W.2d 329 (Mo. 1985).

II.

RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE SECRETARY OF STATE FROM USING THE FIRST REAPPORTIONMENT PLAN FOR ANY PURPOSE RELATED TO THE NOMINATION OR ELECTION OF ANY SENATOR, AND RELATOR IS ENTITLED TO AN ORDER IN MANDAMUS "UNDOING" THE FIRST REAPPORTIONMENT OF THE SENATE, BECAUSE THE FIRST REAPPORTIONMENT VIOLATES ARTICLE III, SECTION 7 OF THE MISSOURI CONSTITUTION IN THAT IT UNNECESSARILY CROSSES COUNTY LINES AND CROSSES COUNTY LINES TO COMPLETE MORE THAN ONE DISTRICT.

Mo. Const. Art. III, Section 7;

Preisler v. Hearnes, 362 S.W.2d 552 (Mo. 1962);

Preisler v. Kirkpatrick, 528 S.W.2d 422 (Mo. 1975)*;*

State, on Inf. of McKittrick v. Williams, 346 Mo. 1003, 1013, 144 S.W.2d 98 (1940).

III.

RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE SECRETARY OF STATE FROM USING THE SECOND REAPPORTIONMENT PLAN FOR ANY PURPOSE RELATED TO THE NOMINATION OR ELECTION OF ANY SENATOR, AND RELATOR IS ENTITLED TO AN ORDER IN MANDAMUS "UNDOING" THE SECOND REAPPORTIONMENT OF THE SENATE, (A) BECAUSE THE SECOND REAPPORTIONMENT VIOLATES ARTICLE III, SECTION 7 OF THE MISSOURI CONSTITUTION IN THAT IT UNNECESSARILY CROSSES A COUNTY LINE AND CROSSES A COUNTY LINE TO COMPLETE MORE THAN ONE DISTRICT AND (B) BECAUSE THE SECOND REAPPORTIONMENT VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION IN THAT IT UNNECESSARILY DEPRIVES CERTAIN VOTERS OF SENATE REPRESENTATION, AND IT AFFORDS TWO REPRESENTATIVE VOTES IN THE SENATE TO CERTAIN OTHER VOTERS, UNTIL 2015.

Mo. Const. Art. III, Section 7;

WMCA, Inc. v. Lomenzo, 377 U.S. 633, 84 S. Ct. 1418, 12 L. Ed. 2d 568 (1964);

City of Mobile v. Bolden, 446 U.S. 55, 100 S. Ct. 1519, 64 L. Ed. 2d 47 (1980);

Armentrout v. Schooler, 409 S.W.2d 138 (Mo. 1966).

IV.

RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE SECRETARY OF STATE FROM USING EITHER DISPUTED REAPPORTIONMENT PLAN FOR ANY PURPOSE RELATED TO THE NOMINATION OR ELECTION OF ANY SENATOR, AND RELATOR IS ENTITLED TO AN ORDER IN MANDAMUS "UNDOING" ALL ACTIONS OF THE COMMISSION, BECAUSE THE COMMISSIONS' REAPPORTIONMENT OF THE SENATE VIOLATED MISSOURI'S ORGANIC SEPARATION OF POWERS AND ARTICLE II, SECTION 1 OF THE MISSOURI CONSTITUTION, IN THAT THE COMMISSION EXERCISED A PURELY LEGISLATIVE POWER WHILE COMPOSED OF PERSONS OTHERWISE CHARGED WITH THE EXERCISE OF JUDICIAL POWERS.

Mo. Const. Article II, § 1;

VanSickle v. Shanahan, 212 Kan. 426, 511 P.2d 223 (1973);

State Auditor v. Joint Comm. on Legislative Research, 956 S.W.2d 228, 231 (Mo. 1997);

State ex rel. Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40, 57-58 (1912).

V.

THE AFFIRMATIVE DEFENSES ASSERTED BY THE RESPONDENT COMMISSIONERS HAVE NO MERIT FOR THE REASONS DISCUSSED HEREIN.

Armentrout v. Schooler, 409 S.W.2d 138, 142 (Mo. 1966);

State ex rel. Leigh v. Dierker, 974 S.W.2d 505 (Mo. 1998)*;*

State ex rel. Richardson v. Randall, 660 S.W.2d 699 (Mo. banc 1983);

Missouri Coal. for Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125 (Mo. 1997).

ARGUMENT

Standard of Review

The Court has discretion to issue extraordinary writs, and that discretion "is sometimes influenced by the public importance of the matter." *State ex rel. Keystone Laundry & Dry Cleaners, Inc. v. McDonnell, 426 S.W.2d 11, 15 (Mo. 1968).*

I.

RELATOR IS ENTITLED TO AN ORDER COMPELLING THE SECRETARY OF STATE TO DENY THE WITHDRAWAL OF THE FIRST REAPPORTIONMENT PLAN AND THE FILING OF THE SECOND REAPPORTIONMENT PLAN, AND RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE SECRETARY OF STATE FROM USING THE SECOND REAPPORTIONMENT PLAN FOR ANY PURPOSE RELATED TO THE NOMINATION OR ELECTION OF ANY SENATOR, BECAUSE SAID WITHDRAWAL, SAID FILING, AND THE SECOND REAPPORTIONMENT PLAN WERE VOID AB INITIO PURSUANT TO ARTICLE III, SECTION 7 OF THE MISSOURI CONSTITUTION, IN THAT THE COMMISSION HAD ALREADY PERFORMED THE TERMINAL ACT OF FILING THE FIRST REAPPORTIONMENT PLAN AND HAD NO AUTHORITY TO RECONSIDER, TAKE FURTHER ACTION, OR OTHERWISE INVALIDATE THE FIRST REAPPORTIONMENT PLAN.

Relator contends that the Second Reapportionment Plan was procedurally void because the Commission had already performed the terminal act of officially reapportioning the senate on November 30, 2011, and the Commission had no authority to reconsider, withdraw, or otherwise invalidate that First Reapportionment. Notably, the Secretary takes no position on this controversy and asks the Court for guidance as to what reapportionment to use in administering future elections (*Secretary's Response 2*).

A. The Appellate Apportionment Commission Has Limited Powers

A committee that is a creation of the constitution "has only the power granted it by the constitutional provision that creates it." *Thompson v. Comm. on Legislative Research, 932 S.W.2d 392, 394-95 (Mo. 1996).* Such powers should be construed to be limited "to those expressly granted" by the constitution. *State ex inf. Shartel v. Brunk, 326 Mo. 1181, 1190, 34 S.W.2d 94, 97 (1930)(limited legislative power to remove public officers), citing State ex rel. York v. Locker, 266 Mo. 384, 181 S.W. 1001 (1915).* Any fair, reasonable doubt concerning the existence of a power should be resolved against the body claiming the power and the power denied. *Am. Aberdeen Angus v. Stanton, 762 S.W.2d 501, 503 (Mo. Ct. App. 1988)(county possessed no authority to confer tax-exempt status).*

The Appellate Apportionment Commission was enabled pursuant to Article III, Section 7 of the Missouri Constitution ("Section 7"), and there are no other constitutional or statutory provisions that enable the Commission. Section 7 contemplates that the Commission will perform a single official act—the filing of a signed apportionment plan and map with the secretary of state. "Thereafter senators shall be elected according to

such districts" unless and until the reapportionment is invalidated by a court of competent jurisdiction or a successive reapportionment is made as a result of the next decennial census. *Mo. Const. Art. III, § 7; see Appx. A3, lines 53-55; see also Appx. A1, lines 1-4*. The express powers granted to the Commission by Section 7 are: (1) a general power to apportion the senate; and (2) the specific power for a majority of the Commission to sign and file an apportionment plan and map with the secretary of state. *Mo. Const. Art. III, § 7; see Appx. A3, lines 48-53*.

A constitutional reapportionment becomes "operative and effective" and "shall become as effectual as an act of the Legislature" when the procedural requirements "mentioned to be performed" by the constitution have been performed. *State ex rel. Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40, 50-53 (1912)(analyzing reapportionment under the 1912 constitution—since amended)*. Applying this principle to Article III, Section 7, it is evident that a reapportionment of the senate occurs immediately when the Commission files a signed apportionment plan and map.

B. The Commission Has No Express Remedial Powers

The Commission's official act of filing an apportionment plan and map with the secretary of state is a terminal, complete resolution of the duties of the Commission. The constitution does not expressly grant the Commission any continuing or remedial power to reconsider, revise, withdraw, or invalidate a reapportionment, and nothing in Section 7 indicates that a reapportionment is, or may be, tentative, provisional, contingent, or subject to recall, revision, or reconsideration by the Commission. *Cf. Dore & Associates*

Contracting, Inc. v. Missouri Dept. of Labor & Indus. Relations Comm'n, 810 S.W.2d 72, 75 (Mo. Ct. App. 1990)(finality of agency action defined for purposes of judicial review). To the contrary, Section 7 expressly provides that upon filing, "[t]hereafter senators shall be elected according to such districts." *Mo. Const. Art. III, § 7; see Appx. A3, lines 53-55*. Unlike a court judgment, there is no interim period of non-finality when reconsideration by the decision maker is allowed. *Cf. Rule 81.05.*

C. The Commission Has No Implied Power to Withdraw a Reapportionment

An express power includes by implication such additional power as may be necessary to give effect to the express power. *See, e.g. State ex rel. St. Louis-San Francisco Ry. Co. v. Darby, 333 Mo. 1145, 1150, 64 S.W.2d 911, 913 (1933)(implied power to acquire a site on which to build).* In the present case, the Commission arguably has implied powers to meet, to vote, to produce interim work product, and to delegate support functions to the Office of Administration or some other support agency. Such implied powers are necessary for the Commission to produce a signed plan and map that apportions the senate, as required by Section 7.

On the other hand, the Commission can file a plan and map that reapportions the senate without ever withdrawing official filings from the secretary of state. The power to withdraw is simply unnecessary. After an apportionment plan and map has been signed and filed, simple logic dictates that no further powers are necessary because the Commission has carried out its complete constitutional duty. Whether additional power is desired or would be convenient is immaterial. *See, e.g., State ex rel. Penrose Inv. Co. v.*

McKelvey, 301 Mo. 1, 256 S.W. 474, 476 (1923); see also State ex rel. Cass County v. Pub. Serv. Comm'n, 259 S.W.3d 544, 548 (Mo. Ct. App. 2008).

Furthermore, Section 7 expressly indicates that a reapportionment may be "invalidated by a court of competent jurisdiction." *Mo. Const. Art. III, § 7; see Appx. A1, lines 3-5*. Because the express mention of one thing implies the exclusion of another, *see Brown v. Morris, 365 Mo. 946, 955, 290 S.W.2d 160, 166 (1956)*, it is exclusively the courts, and not the Commission, that may invalidate a reapportionment.

In summary, it is incumbent upon the Commission to perform its single official act deliberately, and when the Commission signs and files an apportionment plan and map with the secretary of state, this effects an immediate reapportionment that is not subject to reconsideration by the Commission and that can only be invalidated by a court of competent jurisdiction. It is not the constitutional function of the Commission to judicially review or invalidate its own actions, and it is impermissible in any event for the Commission to unilaterally repeal an official act that has established substantive rights. *See Missouri Coal. for Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125, 131 (Mo. 1997), citing with approval National Treasury Employees Union v. Cornelius, 617 F.Supp. 365, 371 (D.C.D.C.1985) (Agency not entitled to summarily revise rule upon deciding it was "promulgated in error")*.

D. The First Reapportionment Remains in Effect

On November 30, 2011, the Commission performed the only official act that it is authorized to perform when it signed and filed a reapportionment plan and map with the

secretary of state. This First Reapportionment became operative and effective immediately, and there occurred a terminal resolution of the duties of the Commission. Because the Commission had no power to withdraw or modify the First Reapportionment, its subsequent attempt to do so was ultra vires and void. This left the First Reapportionment with force and effect.

Because there has been no subsequent decennial census, and because no court of competent jurisdiction has invalidated the First Reapportionment, pursuant to the plain language of Section 7 "senators shall be elected according to such districts." This makes the First Reapportionment the proper object of substantive review in this case (*see Point II*), and if the First Reapportionment is held valid, it must govern all future elections of senators. Under no circumstance should the void Second Reapportionment govern any election.

E. The Maximum 90-Day Period is Not an Implied Grant of Remedial Power

Relator anticipates that the Respondent Commissioners will argue that Section 7 granted them plenary reapportionment authority for a fixed term of 90 days and that any filing made by them was subject to reconsideration so long as the 90-day term remained open. As established above, no such remedial power to reconsider is expressed or implied in Section 7, and the case law holds that a reapportionment becomes operative and effective immediately when the procedural requirements mentioned to be performed by the constitution have been performed. The "90-day" provision does not undermine this construction but instead supports it.

Terms used in the constitution "must be given their plain or ordinary meaning unless such construction will defeat the manifest intent of the constitutional provision." *Rathjen v. Reorganized Sch. Dist. R-II of Shelby County, 284 S.W.2d 516, 523 (1955)*. In the present case, the singular subject "its apportionment plan and map" plainly indicates that the Commission is authorized to make *one* reapportionment filing during the 90-day period, and the term "thereafter" plainly refers to the date of this singular filing:

> [T]he senate shall be apportioned by a commission of six members appointed from among the judges of the appellate courts of the state of Missouri by the state supreme court, a majority of whom shall sign and file its apportionment plan and map with the secretary of state within ninety days of the date of the discharge of the apportionment commission. Thereafter senators shall be elected according to such districts. . . ."

(*Mo. Const. Art. III, § 7; see Appx. A3, lines 48-54*).

As used above, the term "ninety days" merely sets a maximum time period "within" which the Commission must perform the official act of filing "its apportionment plan and map." There is nothing in Section 7 to indicate that the term "ninety days" creates a fixed term of appointment or that it implies a remedial power to reconsider and file multiple, tentative apportionment plans and maps, with the final such filing to be given effect on the ninetieth day.

Notably, the day on which the 90-day period concludes is never referenced in Section 7; the key reference is instead to a variable date "within" the 90-day period,

which resolves not to the final day of the 90-day period but to whatever date "within" the period is the date on which the Commission files "its apportionment plan and map." This supports Relator's construction that the effective date of a reapportionment (the "thereafter" date) resolves to the date that the apportionment map and plan is filed. Nothing in Section 7 reasonably indicates otherwise, and as a result, the Commission's claim of a remedial power to file and then reconsider and invalidate reapportionments for up to 90 days should be resolved against the Commission. *See Am. Aberdeen Angus, 762 S.W.2d at 503.*

F. Conclusion as to the Procedural Controversy

For the foregoing reasons, the Second Reapportionment is ultra vires and procedurally void, and the Court should grant writs of mandamus and prohibition against the Secretary, as requested in Relator's petition, to ensure that the Second Reapportionment is nullified and does not govern any aspect of any senate election. As a preliminary matter (before consideration of Points II-V), this leaves the First Reapportionment in effect. *See State ex rel. Ashcroft v. Blunt, 696 S.W.2d 329, 332 (Mo. 1985)(grant of extraordinary writ against secretary of state caused statutes to remain as they existed prior to the secretary's disputed act).*

II.

RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE SECRETARY OF STATE FROM USING THE FIRST REAPPORTIONMENT PLAN FOR ANY PURPOSE RELATED TO THE NOMINATION OR ELECTION

OF ANY SENATOR, AND RELATOR IS ENTITLED TO AN ORDER IN MANDAMUS "UNDOING" THE FIRST REAPPORTIONMENT OF THE SENATE, BECAUSE THE FIRST REAPPORTIONMENT VIOLATES ARTICLE III, SECTION 7 OF THE MISSOURI CONSTITUTION IN THAT IT UNNECESSARILY CROSSES COUNTY LINES AND CROSSES COUNTY LINES TO COMPLETE MORE THAN ONE DISTRICT.

Assuming that the Court grants Relator's first point and voids the Second Reapportionment on procedural grounds, then the First Reapportionment has force and effect and becomes the focus of Relator's substantive challenge. Relator contends that the First Reapportionment is invalid because it violates the requirements of Article III, Section 7 of the Missouri Constitution.

A. The Section 7 Reapportionment Procedure

In the present case, the disputed constitutional provision is Article III, Section 7 ("Section 7"), which is reproduced in its entirety in the Appendix to this Brief (*see A-1 et seq.*).

1. The "County Line Rule" and the "Multi-District Exception" Explained

Section 7 contains express limitations on the manner in which senate districts may be drawn. *See Appx, A2, lines 26-34.* One of these limitations is that "no county lines shall be crossed except when necessary to add sufficient population to a multi-district county or city to complete only one district which lies partly within such multi-district county or city so as to be as nearly equal as practicable in population." *See Appx. A1,*

lines 29-32. Restated for clarity, the general rule is that no county lines shall be crossed when redistricting, and the critical exception, applicable when dividing a multi-district area, is as follows:

> After as many complete districts as possible have been drawn, if there remains an area with insufficient population to form a complete district, it is permissible, if necessary, to extend the area across county lines to add sufficient population to form exactly one more district from the population of the multi-district area.

As a corollary:

> When dividing a multi-district area, at most, one district may cross county lines.

2. Section 7 Limits the Commission's Discretion

In the Commission's December 9, 2011 filing, the Commission suggests that the county line rule "may not apply" to the districts it draws. *See Pet.Ex. B at 25.* The implication is that the express limitations on redistricting discretion that are included in Section 7 are meant to apply to the governor's commission (*see Appx. A1, lines 9-11*) but not to the Appellate Apportionment Commission. This implication is untenable and demonstrably wrong.

3. The Provisions of Section 7 Must Be Harmonized

The Court should harmonize and give effect to all constitutional provisions. *Brown v. Morris, 365 Mo. 946, 955, 290 S.W.2d 160, 166 (1956)*. It is elementary that in

constitutional construction all of the provisions bearing upon a particular subject are to be considered together and effect given to the whole. *State, on Inf. of McKittrick v. Williams, 346 Mo. 1003, 1013, 144 S.W.2d 98, 103 (1940).*

In the present case, the Commission's disputed reapportionment authority must be determined in light of all constitutional provisions that bear upon this subject. Section 7 contains both (i) specific, mandatory instructions for redistricting that limit the discretion of the body performing a reapportionment (*see Appx. A2, lines 26-34*), and (ii) a general grant of reapportionment authority to the Appellant Apportionment Commission (*see Appx. A3, lines 48-53*). These provisions, which are in no way contradictory, should be harmonized so as to give effect to the constitution's specific instructions and limitations rather than nullify them. "The law is well settled that it is the duty of the court, in construing the constitution, to give effect to an express provision rather than an implication." *Rathjen v. Reorganized Sch. Dist. R-II of Shelby County, 365 Mo. 518, 527, 284 S.W.2d 516, 522 (1955)*. Accordingly, the constitution's express limitations on redistricting discretion should be given effect rather than the implication that they do not apply to the Commission.

Furthermore, to the extent (if any) that the disputed provisions are inconsistent, it is a well-established rule of constitutional construction that the specific must prevail over the general. *State ex inf. Danforth v. Cason, 507 S.W.2d 405, 413 (Mo. 1973)*. The limiting provisions are definitely more specific than the general grant of reapportionment authority, so the limiting provisions must prevail.

4. The Constitution Intends to Limit Reapportionment Discretion

"The fundamental purpose of constitutional construction is to give effect to the intent of the voters who adopted the Amendment." *Keller v. Marion County Ambulance Dist., 820 S.W.2d 301, 302 (Mo. banc 1991), citing, Boone County Court v. State, 631 S.W.2d 321, 324 (Mo. banc 1982).* "In arriving at the intent and purpose the construction should be broad and liberal rather than technical." *State Hwy. Comm'n v. Spainhower, 504 S.W.2d 121, 125 (Mo.1973), citing Rathjen v. Reorganized Sch. Dist. R–II, 365 Mo. 518, 284 S.W.2d 516, 524 (1955); see also Missourians to Protect the Initiative Process v. Blunt, 799 S.W.2d 824, 830 (Mo. 1990).*

The obvious purpose of the specific instructions and limitations in Section 7 is to limit the discretion that can be exercised when reapportioning the senate. Absent such limitations, redistricting would be an arbitrary exercise of power without any reasonable or constitutional basis. *See Preisler v. Hearnes, 362 S.W.2d 552, 555 (Mo. 1962)*. It is untenable that the Commission have arbitrary power. "Certainly the framers of the Constitution did not intend for senatorial districts to be laid out according to the free will and caprice of the officers charged with that duty." *Preisler v. Kirkpatrick, 528 S.W.2d 422, 425 (Mo. 1975), quoting Preisler v. Doherty, 284 S.W.2d 427, 425 (Mo. banc 1955).* As this Court held in *Hearnes*, the exercise of an unfettered reapportionment power:

> . . . is beyond all reasonable controversy, a gross and deliberate violation of the plain intent of the Constitution, and a disregard of its spirit and the

> purpose for which express limitations are included therein, such act is not the exercise of discretion. . . .

362 S.W.2d at 555. Accordingly, the Section 7 limitations must be applied to the Commission.

B. The First Reapportionment Violates Section 7

Assuming that the Court voids the Second Reapportionment so that the First Reapportionment remains in effect, the dispositive issue in this case becomes the constitutional validity of the First Reapportionment, which is the subject of this Point II. Relator contends that the First Reapportionment is invalid because it violates Section 7 by unnecessarily crossing county lines and crossing county lines to complete more than one district.

1. Jackson County

Jackson County is a multi-district county that is apportioned among multiple senate districts, two of which cross county lines. District 8 crosses county lines into Cass County. District 10 crosses county lines into both Clay and Cass Counties. This impermissibly completes more than one district by crossing county lines. *See Pet.Ex. A at 15 & 17.*

2. Greene County

Greene County is a multi-district county that is apportioned among multiple senate districts, two of which cross county lines. District 28 crosses county lines into Dallas, Polk, Dade, Cedar, Barton, and Vernon Counties. District 20 crosses county lines into

Christian, Webster, Wright, and Douglass Counties. This impermissibly completes more than one district by crossing county lines. *See* Pet.Ex. A *at 15 & 18.*

3. St. Louis County

St. Louis County is a multi-district county that is apportioned among multiple senate districts, two of which cross county lines. District 27 crosses county lines into Jefferson County. District 4 crosses county lines into St. Louis City. This impermissibly completes more than one district by crossing county lines. *See* Pet.Ex. A *at 15 & 16.*

C. Conclusion as to the Validity of the First Apportionment

For the foregoing reasons, the First Reapportionment is constitutionally invalid, and the Court should grant writs of mandamus and prohibition against the Secretary of State and the Commission, as requested in Relator's petition, to ensure that the invalid First Reapportionment does not govern any aspect of any senate election.

If relief is granted on this Point I and also on Point I, then neither reapportionment attempted by the Commission will have effect, and all senate districts will remain as they existed prior to the First Reapportionment. *See State ex rel. Ashcroft v. Blunt, 696 S.W.2d 329, 332 (Mo. 1985)(writ of prohibition caused statutes to revert and "remain as they existed prior to" the prohibited act).* This is a result contemplated by Article III, Section 7 of the Missouri Constitution, which provides that "after notification by the governor that a reapportionment has been invalidated by a court of competent jurisdiction" the Section 7 reapportionment process is to be performed de novo. *See Mo. Const. Art. III, § 7, Appx. A1, line 3 et seq.* Accordingly, if this Court grants Point I and Point II, the

governor must restart the Section 7 reapportionment process, which is to be performed de novo. *See Mo. Const. Art. III, § 7, Appx. A1, line 3 et seq.* It is conceivable, and it is Relator's hope, that the governor's commission will complete an expedited reapportionment before February 28, 2012, when filing period opens for the primary election. This circumstance is addressed more fully below in the Final Conclusion section of this Brief.

III.

RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE SECRETARY OF STATE FROM USING THE SECOND REAPPORTIONMENT PLAN FOR ANY PURPOSE RELATED TO THE NOMINATION OR ELECTION OF ANY SENATOR, AND RELATOR IS ENTITLED TO AN ORDER IN MANDAMUS "UNDOING" THE SECOND REAPPORTIONMENT OF THE SENATE, (A) BECAUSE THE SECOND REAPPORTIONMENT VIOLATES ARTICLE III, SECTION 7 OF THE MISSOURI CONSTITUTION IN THAT IT UNNECESSARILY CROSSES A COUNTY LINE AND CROSSES A COUNTY LINE TO COMPLETE MORE THAN ONE DISTRICT AND (B) BECAUSE THE SECOND REAPPORTIONMENT VIOLATES THE FOURTEENTH AMENDMENT TO THE UNITED STATES CONSTITUTION AND ARTICLE I, SECTION 2 OF THE MISSOURI CONSTITUTION IN THAT IT UNNECESSARILY DEPRIVES CERTAIN VOTERS OF SENATE

REPRESENTATION, AND IT AFFORDS TWO REPRESENTATIVE VOTES IN THE SENATE TO CERTAIN OTHER VOTERS, UNTIL 2015.

Assuming, arguendo, that the Court rejects Relator's first point and holds that the Second Reapportionment has force and effect, then the Court must consider this Point III, which challenges the constitutional validity of the Second Reapportionment.[2]

A. The Second Reapportionment Violates Section 7

The Second Reapportionment violates the county line rule for St. Louis County in the same manner as the First Reapportionment (*see supra, p. 25*). Specifically, St. Louis County is a multi-district county that is apportioned among multiple senate districts, two of which cross county lines. District 27 crosses county lines into Jefferson County. District 4 crosses county lines into St. Louis City. This impermissibly completes more than one district by crossing county lines.

B. The Second Reapportionment Violates Equal Protection

The Fourteenth Amendment to the United States Constitution guarantees "[t]he right of a citizen to equal representation and to have his vote weighted equally with those of all other citizens." *See, e.g., City of Mobile v. Bolden, 446 U.S. 55, 115-16, 100 S. Ct. 1519, 64 L. Ed. 2d 47 (1980).* As a result, seats in the legislative branch of the state government must be apportioned substantially on the basis of population. *Armentrout v. Schooler, 409 S.W.2d 138, 142 (Mo. 1966).* An apportionment scheme violates the

[2] If the Court grants Point I, then this Point III is moot.

federal Equal Protection Clause if it results "in a significant undervaluation of the weight of the votes of certain of a State's citizens merely because of where they happen to reside." *WMCA, Inc. v. Lomenzo, 377 U.S. 633, 653, 84 S. Ct. 1418, 1428, 12 L. Ed. 2d 568 (1964).* This Court interprets Article I, Section 2 of the Missouri Constitution to be coextensive with the Fourteenth Amendment equal protection clause. *Bernat v. State, 194 S.W.3d 863, 867 (Mo. 2006)*.

In the present case, as alleged (and verified) in the petition, the Second Reapportionment has combined the previous District 8 and the previous District 10 such that there is no presently elected senator residing in the reapportioned District 8, and there are two presently elected senators residing in the reapportioned District 10. As further alleged in the petition, due to the staggering of senate elections (*see Article III, Section 11 of the Missouri Constitution*) , this situation will not be rectified until 2015. In the meantime, voters in the reapportioned District 8 have no representation in the senate, and their votes in the 2010 senate election have been disenfranchised. This calamity could have been avoided if the Commission had followed the practical rule not to combine two even-numbered districts. Instead, the Second Reapportionment has eliminated the representation of voters in the reapportioned District 8 merely because of where they happen to reside. This will not only dilute but will entirely deny their underlying right to elect legislators. *See Reynolds v. Sims, 377 U.S. 533, 562, 84 S. Ct. 1362, 1381, 12 L. Ed. 2d 506 (1964)*.

A collateral consequence of removing senate representation from the reapportioned District 8 is that the "missing" senator now resides in the reapportioned District 10, affording voters in this district two representative votes in the senate until 2015. This offends the equal protection rights of the voters in every other district because their votes have been given less weight than those in the reapportioned District 10, and because it causes the senate not to be apportioned substantially on the basis of population for a period of three years.

C. Conclusion as to the Validity of the Second Reapportionment

For the foregoing reasons, the Second Reapportionment is constitutionally invalid. As a result, even if the Court does not grant relief on Point I, the Court should nonetheless grant writs of mandamus and prohibition against the Secretary of State and the Commission, as requested in Relator's petition, to ensure that the Second Reapportionment does not govern any aspect of any senate election. As discussed in Point I, invalidation of the Second Reapportionment will leave the First Reapportionment in effect and make Point II, which challenges the First Reapportionment, dispositive.

IV.

RELATOR IS ENTITLED TO AN ORDER PROHIBITING THE SECRETARY OF STATE FROM USING EITHER DISPUTED REAPPORTIONMENT PLAN FOR ANY PURPOSE RELATED TO THE NOMINATION OR ELECTION OF ANY SENATOR, AND RELATOR IS ENTITLED TO AN ORDER IN MANDAMUS "UNDOING" ALL ACTIONS OF

THE COMMISSION, BECAUSE THE COMMISSIONS' REAPPORTIONMENT OF THE SENATE VIOLATED MISSOURI'S ORGANIC SEPARATION OF POWERS AND ARTICLE II, SECTION 1 OF THE MISSOURI CONSTITUTION, IN THAT THE COMMISSION EXERCISED A PURELY LEGISLATIVE POWER WHILE COMPOSED OF PERSONS OTHERWISE CHARGED WITH THE EXERCISE OF JUDICIAL POWERS.

Relator anticipates that in order to defend its disregard of the Section 7 limitations on reapportionment discretion, the Commission will contend that these limitations apply only to the governor's commission and not to the Appellate Apportionment Commission. There is a viable reading of the relevant provisions of Section 7 that supports this construction, and—in the alternative to Points I, II, and III—Relator contends in this Point IV that this construction is correct. If so, then the Court must sever and strike down the terms of Section 7 that enable the Appellate Apportionment Commission because they delegate to the judicial department unfettered discretion to perform the inherently legislative function of reapportionment. As discussed more fully below, this impermissibly violates the fundamental, organic separation of powers that is inherent in Missouri government.

A. The Fundamental Separation of Powers

1. Generally

The separation of powers originates from the United States Constitution and requires that the legislative, executive, and judicial branches of government be kept

distinct in order to prevent abuse of power. *See, e.g., Youngstown Sheet & Tube Co. v. Sawyer, 343 U.S. 579, 635, 72 S.Ct. 863, 870, 96 L.Ed. 1153 (1952) (Jackson, J., concurring)*. Separation of powers is not merely a doctrine or a remedy but is a "structural safeguard" within the American constitutional system. *Plaut v. Spendthrift Farm, Inc., 514 U.S. 211, 239, 115 S. Ct. 1447, 1463, 131 L. Ed. 2d 328 (1995)*.

2. The Guarantee Clause

Article IV, Section 4 of the United states Constitution (the "Guarantee Clause") provides that "[t]he United States shall guarantee to every State in this Union a Republican Form of Government." The separation of powers is an inherent and integral element of the republican form of government. *See, e.g., VanSickle v. Shanahan, 212 Kan. 426, 427, 511 P.2d 223, 226 (1973)(lengthy discussion beginning with the Federalist Papers)*; see also, *Montecalvo v. City of Utica, 170 Misc. 2d 107, 117, 647 N.Y.S.2d 445, 452 (Sup. Ct. 1996) aff'd, 233 A.D.2d 960, 649 N.Y.S.2d 852 (1996) (separation of judicial powers required for republican form of government).*

Although in modern jurisprudence the Guarantee Clause is generally held to be a non-justiciable requirement for statehood, *see, e.g., Luther v. Borden, 48 U.S. 1, 42, 12 L. Ed. 581 (1849), see also Baker v. Carr, 369 U.S. 186, 221, 82 S. Ct. 691, 712, 7 L. Ed. 2d 663 (1962)*, it nonetheless establishes the separation of powers as an essential and fundamental aspect of state government. This Court has consistently affirmed the basic principle of the Guarantee Clause, holding that the doctrine of separation of powers is "vital to our form of [state] government." *Missouri Coal. for Env't v. Joint Comm. on*

Admin. Rules, 948 S.W.2d 125, 132 (Mo. 1997), quoting State ex inf. Danforth v. Banks, 454 S.W.2d 498, 500 (Mo. banc 1970).

The U.S. Supreme Court holds that it is "a breach of the national fundamental law" if legislative power is transferred to the judicial branch. *Buckley v. Valeo, 424 U.S. 1, 121-22, 96 S. Ct. 612, 683, 46 L. Ed. 2d 659 (1976)*. Accordingly, "the carefully defined limits on the power of each Branch must not be eroded." *I.N.S. v. Chadha, 462 U.S. 919, 957-58, 103 S. Ct. 2764, 2787, 77 L. Ed. 2d 317 (1983)*.

3. Mo. Const. Article II, Section 1

As shown above, the separation of powers is an inherent, organic, and fundamental aspect of state government. In Missouri, the separation of powers is also codified at Article II, Section 1:

> The powers of government shall be divided into three distinct departments—the legislative, executive and judicial—each of which shall be confided to a separate magistracy, and no person, or collection of persons, charged with the exercise of powers properly belonging to one of those departments, shall exercise any power properly belonging to either of the others, except in the instances in this constitution expressly directed or permitted.

Mo. Const. Article II, § 1. This clause is interpreted to mean that each branch of Missouri government "ought to be kept as separate from and independent from each other as the

nature of free government will admit." *Asbury v. Lombardi, 846 S.W.2d 196, 199 (Mo. 1993).*

B. Section 7 Violates the Separation of Powers

(The following construction of Section 7 is argued in the alternative to Points I, II, and III.)

Section 7 contains express limitations on the manner in which senate districts may be drawn, and these limitations clearly apply to the commission appointed by the governor as a predecessor to the Appellate Apportionment Commission. By contrast, if the governor's commission fails to file a final statement apportioning the senate, the Appellate Apportionment Commission is vested with general, plenary authority to "apportion the senate" (*see Appx. A3, line 48-51*). There are no express limitations on the discretion of the Appellate Apportionment Commission, and there is no implication that the instructions and limitations applicable to the governor's commission apply also to the Appellate Apportionment Commission. To the contrary, the absence of express limitations in the provision enabling the Appellate Apportionment Commission is obvious and must be given effect.

Under this construction of Section 7, the Appellate Apportionment Commission has unfettered discretion to reapportion the senate. This justifies the apparently arbitrary maps that the Commission drew, but it also violates the purpose of the separation of powers, which is to "preclude the exercise of arbitrary power." *State Auditor v. Joint Comm. on Legislative Research, 956 S.W.2d 228, 231 (Mo. 1997), quoting Myers v.*

United States, 272 U.S. 52, 293, 47 S.Ct. 21, 85, 71 L.Ed. 160 (1926) (Brandeis, J., dissenting). This violation is fatal because the unfettered discretion of the Commission is checked only by judicial review, which places the entire reapportionment power within the judicial branch. Although Relator in no way suggests that this Court or the judiciary of this state presently lack integrity, delegating the reapportionment function to appellate judges, subject only to judicial review by their peers, is precisely the kind of concentrated power that runs afoul of "history's bitter assurance" that a single department of state government must not "be trusted with unbridled power." *State Auditor v. Joint Comm. on Legislative Research, 956 S.W.2d 228, 231 (Mo. 1997)*; *see also State Tax Commission v. Administrative Hearing Commission, 641 S.W.2d 69, 73–74 (Mo. banc 1982)*.

The separation of powers is also violated when "one branch assumes a power that more properly is entrusted to another." *State Auditor at 231, quoting I.N.S. v. Chadha, 462 U.S. 919, 963, 103 S.Ct. 2764, 2790–91, 77 L.Ed.2d 317 (1983). (Powell, J., concurring)*. Legislative reapportionment is a matter for legislative consideration and determination. *Sixty-Seventh Minnesota State Senate v. Beens, 406 U.S. 187, 196, 92 S. Ct. 1477, 1483-84, 32 L. Ed. 2d 1 (1972), citing Reynolds v. Sims, 377 U.S. 533, 586, 84 S. Ct. 1362, 1394, 12 L. Ed. 2d 506 (1964)*. This Court has expressly held that reapportionment is an "exercise of legislative discretion." *State ex rel. Barrett v. Hitchcock, 241 Mo. 433, 146 S.W. 40, 57-58 (1912)*. Such legislative power cannot be wholly delegated to the judiciary without violating the separation of powers. In the present case, persons generally charged with the exercise of judicial powers have

impermissibly exercised the legislative power of reapportionment. This violates the organic, fundamental separation of powers required in a republican democracy and the related principle that the judiciary must remain "truly distinct from both the legislative and executive." *Plaut, 514 U.S. at 223*.

The present violation of separation of powers is particularly troublesome because it entangles the judiciary in the inherently political act of legislative apportionment. *See Barrett, 146 S.W. at 57-58; see also Wesberry v. Sanders, 376 U.S. 1, 3-4, 84 S. Ct. 526, 528, 11 L. Ed. 2d 481 (1964), quoting Colegrove v. Green, 328 U.S. 549, 554, 66 S. Ct. 1198, 1200, 90 L. Ed. 1432 (1946) (reapportionment raises only political questions)*. Reapportionment is a divisive "political thicket" that involves an "embroilment in politics, in the sense of party contests and party interests."*Colegrove, 328 U.S. at 554-56, 66 S. Ct. at 1200-01.* The obvious danger to the judiciary is that involvement in such matters will inevitably "bring the judiciary into disrepute and promote ill-will and possible retribution from the political branches." *61 Alb. L. Rev. 1417, 1424.*

The remedy, required to vindicate the separation of powers and maintain in Missouri the required republican form of government, is to extricate the judiciary from its wrongful place executing the legislative function of reapportionment by severing all provisions concerning the Appellate Apportionment Commission (*see Appx. A3, lines 46-55*) and striking them from the Missouri Constitution. This drastic result is required because, as shown above, the language to be stricken cannot be harmonized with the fundamental requirement for a separation of powers.

C. Conclusion as to Separation of Powers

For the foregoing reasons, the mechanism by which the Appellate Apportionment Commission was enabled and thereafter reapportioned the senate must be stricken from the Missouri Constitution. As a result, both reapportionments challenged in this case are void, and even if the Court does not grant relief on Points I, II, or III, the Court should nonetheless grant writs of mandamus and prohibition against the Secretary of State and the Commission, as requested in Relator's petition, to ensure that neither reapportionment governs any aspect of any senate election.[3]

If relief is granted on this Point, neither reapportionment attempted by the Commission will have effect, and all senate districts will remain as they existed prior to the First Reapportionment. *See Ashcroft, 696 S.W.2d at 332 (writ of prohibition caused statutes to revert and "remain as they existed prior to" the prohibited act).* As discussed above, this is a result contemplated by Article III, Section 7 of the Missouri Constitution, which provides that "after notification by the governor that a reapportionment has been invalidated by a court of competent jurisdiction" the Section 7 reapportionment process is to be performed de novo. *See Mo. Const. Art. III, § 7, Appx. A1, line 3 et seq.*

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[3] The present action challenges only the actions of Respondents in attempting to reapportion the Missouri senate based on the 2010 decennial census. This case presents no issue regarding the apportionment of the senate that was in effect prior to such actions.

V.

THE AFFIRMATIVE DEFENSES ASSERTED BY THE RESPONDENT COMMISSIONERS HAVE NO MERIT FOR THE REASONS DISCUSSED HEREIN.

In their Answer, the Respondent Commissioners assert four affirmative defenses. Because no supporting facts are pleaded, Relator can only speculate as to the factual basis (if any) for each affirmative defense. Of course, Relator is not required to do so. *See ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp., 854 S.W.2d 371, 383 (Mo. 1993).* Because the affirmative defenses consist of bare legal conclusions, they are insufficient as a matter of law. *Id. at 384*. Furthermore, because Respondents submitted no suggestions in opposition to the petition, and because the parties are submitting simultaneous briefs, Relator is unsure of Respondents' legal theories. Nevertheless, Relator responds to the affirmative defenses as follows.

A. Failure to State a Claim

Respondents assert that Relator has failed to state a claim for mandamus or prohibition. This Court typically grants the appropriate writ without regard to which writ was requested. *See Mansur v. Morris, 355 Mo. 424, 433, 196 S.W.2d 287, 294 (1946); State ex rel. Unnerstall v. Berkemeyer, 298 S.W.3d 513, 516 (Mo. 2009), reh'g denied (Dec. 22, 2009); State ex rel. Chassaing v. Mummert, 887 S.W.2d 573, 575 (Mo. 1994)(discretion to grant appropriate writ).* As a result, it has become common to petition for both writs and ask the court to choose which is appropriate. *See Unnerstall at*

516, citing State ex rel. Pidgeons v. Ryan, 759 S.W.2d 837, 837 (Mo. banc 1988). This practice is tolerated because "the subject matter to which the two writs apply overlap to a great extent." *Unnerstall at 515-16 (Mo. 2009).* Accordingly, in the present case Relator asks for writs of mandamus and prohibition and asks the Court to fashion an appropriate remedy.

1. Mandamus is Appropriate Generally

Mandamus will lie both to compel that which is obligated by law and also to "undo" that which was prohibited by law. *State ex rel. Leigh v. Dierker, 974 S.W.2d 505, 506 (Mo. 1998).* In the present case the Court may employ mandamus both to compel Respondents to comply with Article III, Section 7 of the Missouri Constitution and also to undo any ultra vires filings and unconstitutional reapportionments that have occurred.

2. This Case Implicates Clearly Established Rights

A writ of mandamus is the appropriate method for a party to enforce a right that is "clearly established and presently existing." *State ex rel. Chassaing v. Mummert*, 887 S.W.2d 573, 576 (Mo. banc 1994). Relator seeks to enforce (i) her right to be governed by senators elected from districts established in accordance with the Missouri constitution; and (ii) her right to equal representation in the Missouri senate. These rights are manifest in the plain language of the Missouri Constitution, and they have been acknowledged by this Court for a century. *See, e.g., Preisler v. Kirkpatrick, 528 S.W.2d 422 (Mo. 1975); Preisler v. Hearnes, 362 S.W.2d 552, 553 (Mo. 1962); Preisler v. Doherty, 365 Mo. 460, 284 S.W.2d 427 (Mo. 1955); Barrett, 146 S.W. at 41.*The

underlying right to elect legislators without the votes of those in disfavored areas being effectively diluted is a basic right of representative democracy. *See Reynolds v. Sims, 377 U.S. 533, 562, 84 S. Ct. 1362, 1382, 12 L. Ed. 2d 506 (1964)*.

3. This Case Involves Abuse of Discretion

Although mandamus is frequently mischaracterized as applying only to ministerial duties, mandamus also lies to correct an abuse of discretion. *See, e.g., State ex rel. Dreppard v. Jones, 215 S.W.3d 751, 752 (Mo. Ct. App. E.D. 2007)("discretion exercised arbitrarily, capriciously or in bad faith"); State ex rel. Johnston v. Luckenbill, 975 S.W.2d 253 (Mo. Ct. App. W.D. 1998) (abuse of discretion); State ex rel. Peavey Co. v. Corcoran, 714 S.W.2d 943 (Mo. Ct. App. E.D. 1986) (discretion exercised arbitrarily, capriciously, or in bad faith); St. Louis Little Rock Hosp., Inc. v. Gaertner, 682 S.W.2d 146 (Mo. Ct. App. E.D. 1984) (abuse of discretion).* As this Court held in *State ex rel. Kelleher v. St. Louis Pub. Sch.*:

> [I]t is well settled that, if the discretionary power is exercised with manifest injustice, the courts are not precluded from commanding its due exercise. Such an abuse of discretion is controllable by mandamus.

134 Mo. 296, 35 S.W. 617, 619-20 (1896).

Although reapportionment involves discretion, "when constitutional limitations placed upon the discretion of the [apportioning body] have been wholly ignored and completely disregarded in creating districts. . . courts will declare [the districts] to be void." *Kirkpatrick, 528 S.W.2d at 425; see also Armentrout v. Schooler, 409 S.W.2d 138,*

142 (Mo. 1966), quoting Doherty, 284 S.W.2d at 431. This is because when constitutional limitations are ignored or disregarded, "discretion has not been exercised" and the resulting apportionment "is an arbitrary exercise of power without any reasonable or constitutional basis." *Id.*; *see also Preisler v. Hearnes, 362 S.W.2d 552, 555 (Mo. 1962).*

4. Relator Has No Remedy Through Appeal

Mandamus is available where the decision maker has exceeded its authority and there is no remedy through appeal. *See State ex rel. Kauble v. Hartenbach, 216 S.W.3d 158, 159 (Mo. 2007).* Relator contends that both the secretary of state and the Commission have exceeded their constitutional authority. The law, however, provides Relator no remedy by direct appeal.

5. Prohibition is Appropriate as to the Secretary of State

To control the actions of the secretary of state in the 2012 election cycle, prohibition is arguably more appropriate than mandamus. Prohibition is a powerful writ, divesting a body against whom it is directed to cease further activities. *State ex rel. Riverside Joint Venture v. Missouri Gaming Comm'n, 969 S.W.2d 218, 221 (Mo. 1998)*. Prohibition will issue when an "absolute irreparable harm may come to a litigant if some spirit of justifiable relief is not made available," *State ex rel. Richardson v. Randall, 660 S.W.2d 699, 701 (Mo. banc 1983)*, or where there is an important question of law decided erroneously that would otherwise escape review and the aggrieved party may suffer considerable hardship as a consequence of an erroneous decision. *State ex rel. Chassaing*

v. Mummert, 887 S.W.2d 573, 577 (Mo. banc 1994); *see also State ex rel. Noranda Aluminum, Inc. v. Rains, 706 S.W.2d 861, 862 (Mo. 1986)*.

In the present case, absent a writ of prohibition against the secretary of state, the important procedural question as to which reapportionment should govern the next election of the senate will be decided by the secretary's interpretation of the constitution, without judicial review, under circumstances where an erroneous decision will deny voters their fundamental voting rights. *See Reynolds, 377 U.S. at 562, 84 S. Ct. at 1382*. This Court should decide the controversy and divest the secretary of state of authority to perform her election-related functions based on void and invalid apportionments of the senate.

B. Separation of Powers

Relator supposes that Respondents raise the separation of powers doctrine to argue that the judiciary may not control the inherently legislative act of apportioning the senate. To the contrary, this Court has repeatedly held that it has "authority to pass upon the validity of legislative acts apportioning the state into senatorial or other election districts." *See, e.g., Preisler v. Doherty, 284 S.W.2d 427, 431 (Mo.banc 1955)*. This authority is justified where constitutional limitations on reapportionment have been wholly ignored and completely disregarded. *See, e.g., Preisler v. Kirkpatrick, 528 S.W.2d 422, 425-26 (Mo. 1975)*.

C. Standing

Where a public official has a duty to act and no discretion, any member of the general public has standing to bring an action in mandamus to enforce the duty. *See Missouri Coal. for Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125, 131-32 (Mo. 1997) (secretary of state could be compelled to publish rulemaking order)*. The principle at the heart of the writ of mandamus is that public officers are required to perform certain duties without any request or demand, and the entire public has the right to that performance. *State ex rel. Twenty–Second Judicial Circuit v. Jones,* 823 S.W.2d 471, 475 (Mo. banc 1992). The threshold for standing to enforce such duties is "extremely low." *State ex rel. Kansas City Power & Light Co. v. McBeth, 322 S.W.3d 525, 531 (Mo. 2010)*. As a member of the general public, Relator has sufficient standing to enforce the mandatory public duties of the Secretary and the Commission in regard to the reapportionment of the senate.

Furthermore, legislative reapportionment is, in general, a justiciable issue upon which an aggrieved citizen whose right to vote has been impaired may resort to the courts for relief. *Armentrout v. Schooler, 409 S.W.2d 138, 142 (Mo. 1966)*. As a qualified voter Relator has been impaired because, absent the relief that she seeks, she will be forced to elect a senator, and be governed by a senate, selected according to districts that violate the Missouri constitution, and—if the Second Apportionment stands—because she will have her vote diluted until 2015 in comparison to certain other voters, who will receive two representative votes in the senate. This is legally cognizable interest in the

reapportionment and elections, such that Relator has standing for a writ of prohibition. *See, e.g., Columbia Sussex Corp. v. Missouri Gaming Comm'n, 197 S.W.3d 137, 145 (Mo. Ct. App. 2006).*

D. Mootness

A cause of action is moot "when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy." *State ex rel. Reed v. Reardon, 41 S.W.3d 470, 473 (Mo. 2001)*. Relator cannot conceive how the defense of mootness might apply to the present controversy. As noted above, the appreciates the untenable nature of the controversy and is seeking the Court's guidance (*S.S. Resp. 2*). The Court's decision, which will determine the apportionment of the senate for the 2012 election cycle and resolve a very real existing controversy, is in no way moot.

FINAL CONCLUSION

For the foregoing reasons, the Court should grant permanent writs of mandamus and prohibition:

1. Compelling the secretary of state to deny the Commission's unauthorized withdrawal of the First Reapportionment Plan;

2. Compelling the secretary of state to deny the Commission's unauthorized filing of the Second Reapportionment Plan;

3. Undoing the Commission's unconstitutional reapportionment of the senate by invalidating the First Reapportionment Plan; or, in the alternative, by invalidating the Second Reapportionment Plan.

4. Prohibiting the secretary of state from using either the First Reapportionment Plan or the Second Reapportionment Plan for any purpose related to the nomination or election of any senator; and

5. Compelling the secretary of state to continue to use, for all purposes related to the nomination and election of senators, the apportionment of the senate that was in effect prior to the events described in Relator's petition.

In addition to granting the relief requested by Relator, the Court should specify in its opinion how reapportionment will proceed. As discussed above, Article III, Section 7 of the Missouri Constitution mandates that when a reapportionment is invalidated by a court of competent jurisdiction, the governor must restart the Section 7 reapportionment process, which is to be performed de novo. *See Mo. Const. Art. III, § 7, supra, Appx. A1, line 3et seq.* It is conceivable, and it is Relator's hope, that the governor's commission will complete an expedited reapportionment before February 28, 2012, when filing period opens for the primary election. The Court should make clear in its opinion that if this favorable result occurs, the 2012 election cycle will be governed by the districts so determined, and no further legal challenges may intervene.

On the other hand, the Court should make equally clear that if reapportionment has not been completed prior to February 28, 2012, then the 2012 election cycle will be governed by the districts as they exist on February 28, 2012. Such finality is required to avoid further controversy.

Respectfully Submitted,

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CERTIFICATE OF COMPLIANCE WITH RULE 84.06

This brief complies with the type-volume limitation of Rule 84.06 because this brief contains less than 10,505 words, excluding the parts of the brief exempted by Rule 84.06(b). This brief complies with the typeface and type style requirements of Rule 84.06(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 13-point Times New Roman.

/s/ David G. Brown
Attorney for Relator

CERTIFICATE OF SERVICE

I certify that on January 10, 2012, I electronically filed the foregoing with the Clerk of the Court using the CaseNet system.

/s/ David G. Brown
Attorney for Relator