**IN THE SUPREME COURT OF MISSOURI**

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**NO. SC92351**

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**BOB JOHNSON, et al.,**

***Appellants*,**

**vs.**

**STATE OF MISSOURI, et al.,**

***Respondents*.**

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**On Appeal from the Circuit Court of Cole County**
**The Honorable Patricia Joyce, Presiding Judge**

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# APPELLANTS' BRIEF

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## JURISDICTIONAL STATEMENT

This case comes before the Court by virtue of its Order, dated February 17, 2012, granting transfer from the Court of Appeals, Western District, prior to disposition pursuant to Rule 83.01. Appellants lodged their appeal in the Court of Appeals following the entry of final judgment in the Circuit Court because the issues in this case do not involve any matters within this Court's exclusive appellate jurisdiction under Article V, Section 3 of the Missouri Constitution.

## STATEMENT OF FACTS

### I. Appointment of Commission and Adoption of the New House Map

On September 8, 2011, acting pursuant to Article III, Section 2 of the Missouri Constitution, this Court appointed a commission (the "Commission") consisting of six Judges of the Missouri Court of Appeals. L.F. at 145-146. Under Section 2, the Commission would reapportion the Missouri House of Representatives (the "House") if the bipartisan reapportionment commission (previously appointed by the Governor pursuant to Section 2) was unsuccessful in reaching consensus on a new House map by its constitutional deadline of September 18, 2011. *Id.* When the bipartisan reapportionment commission failed to meet this deadline, sole constitutional authority to reapportion the House passed to the Commission. *Teichman*, Slip Op. at 4-5.

On November 30, 2011, the Commission unanimously signed and filed the Missouri House Redistricting Plan (the "New House Map"). L.F. at 143. However, because the New House Map fails to conform to the requirements of Article III, Section 2 (as well as Article I, Sections 2 and 25) of the Missouri Constitution, and because the New House Map was the result of repeated Sunshine Law violations, this Court should declare the New House Map invalid and enjoin the Secretary of State (the "Secretary") from using it for any purpose. Then, 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.

## II. Prior Proceedings and the Evidence Adduced in the Trial Court.

On January 23, 2012, less than a week after this Court announced its decisions in *Teichman v. Carnahan*, Case No. SC92237 (Mo. banc, January 17, 2012), and *Pearson v. Koster*, Case Nos. SC92200 and 92003 (Mo. banc January 17, 2012), Appellants Johnson, *et al.*, sought a writ of prohibition in this Court to prevent the Secretary from relying upon the New House Map in accepting candidate declarations for the August 2012 primary or thereafter. On January 26, 2012, finding that the petition "involves disputed issues of fact," the Court denied it "without prejudice to filing a declaratory judgment action in the appropriate court to resolve the factual issues in dispute in a manner similar to *Pearson*[.]" *State ex rel. Johnson v. Carnahan*, Case No. SC92282 (Mo. banc January 26, 2012), Order at 1.

The next day, January 27, 2012, Appellants filed this action in the Circuit Court of Cole County. L.F. at 313 (Appendix at A3). Mindful of this Court's admonition to "expedite this matter to ensure a prompt decision in this election case," the Circuit Court set the case for trial on February 3, 2012. *Id.* On February 3, however, trial was continued over Plaintiffs' objection because the State (which

spent three days that week trying the *Pearson* case) and the Intervenors (who had only that day been granted intervention) were not prepared for trial. *Id.*

Because the Circuit Court had no hearing date available in the relevant timeframe, Judge Joyce ordered that all parties submit their evidence and arguments, simultaneously and in writing, on February 10. *Id.* That day, all parties submitted a Stipulation of Facts, with exhibits, Appellants submitted the Affidavit of Chris Girouard, with exhibits, and the Intervenors submitted the Affidavit of Thomas Hofeller, Ph.D., with exhibits. Neither the State nor the Secretary offered any evidence other than the Stipulation. The Stipulation and the two Affidavits are included in the Legal File, L.F. at 134-310, and each is discussed – where relevant – in the Argument section below. All parties (other than the Secretary, who takes no position on the merits) submitted briefs and proposed findings and conclusions, as requested by the Court, and the matter was submitted for judgment on all counts on February 10 without further proceedings.

On February 14, 2012, the Circuit Court entered judgment for the State and the Intervenors (referred to herein, collectively, as "Defendants" unless otherwise indicated). L.F. at 311 (Appendix at A1). Appellants filed their Notice of Appeal the same day.

## POINT RELIED ON I.

**THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DECLARING THAT THE NEW HOUSE MAP MEETS THE MISSOURI CONSTITIONAL REQUIREMENT THAT THE STATE BE APPORTIONED INTO 163 HOUSE DISTRICTS THAT ARE AS NEARLY EQUAL IN POPULATION "AS POSSIBLE" BECAUSE THE COURT APPLIED THE WRONG LEGAL STANDARD TO STIPULATED FACTS IN THAT THE COURT HELD THAT THE NEW HOUSE MAP'S POPULATION DEVIATION RANGE OF 7.8% WAS "WELL WITHIN THE RANGE ALLOWED BY FEDERAL COURTS AND WITHIN THE RANGE OF PLANS FILED SINCE" 1966, AND IN THAT THE COURT HELD THAT GREATER EQUALITY WAS POSSIBLE, BUT ONLY AT AN UNACCEPTABLE COST TO COMPACTNESS OR CROSSING POLITICAL SUBDIVISION LINES OR "THREATENING TO CREATE" A DISCRIMINATORY EFFECT IN VIOLATION OF THE FEDER VOTING RIGHTS ACT.**

Art. III, § 2 Mo. Const.

*Pearson v. Koster*, Case Nos. SC92200 and 92003 (Mo. banc January 17, 2012)

*Teichman v. Carnahan*, Case No. SC92237 (Mo. banc, January 17, 2012)

*Kirkpatrick v. Preisler*, 394 U.S. 526 (1969)

*ate ex rel. Barrett v. Hitchcock*, 146 S.W. 40 (Mo. banc 1912)

## POINT RELIED ON II.

**THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DECLARING THAT THE NEW HOUSE MAP MEETS THE MISSOURI CONSTITIONAL REQUIREMENT THAT THE STATE BE APPORTIONED INTO 163 HOUSE DISTRICTS EACH OF WHICH IS COMPRISED OF CONTIGUOUS TERRITORY BECAUSE THE COURT APPLIED THE WRONG LEGAL STANDARD TO STIPULATED FACTS IN THAT THE COURT HELD THAT DISTRICTS IN THE NEW HOUSE MAP WHICH SPAN THE MISSOURI AND MERAMEC RIVERS BUT DO NOT ENCOMPASS WITHIN THOSE DISTRICTS ANY BRIDGE OR OTHER REASONABLY CONVEYANCE WERE "CONTIGUOUS" ONLY WITHIN THE MEANING OF AN IRRELEVANT COMMON LAW LIMITATION ON ANNEXATIONS AND THE LANGUAGE OF THE CONSTITUTION OF VIRGINIA, AND IN THAT THE COURT FAILED TO APPLY THE STANDARD INTENDED BY MISSOURI VOTERS**

**ENACTING MISSOURI'S CONTIGUITY REQUIREMENT THAT NO PART OF A DISTRICT BE ISOLATED FROM THE REMAINDER IN A COMMON SENSE, PRACTICAL WAY.**

Art. III, § 2 Mo. Const.

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

*Specter v. Levin*, 293 A.2d 15 (Pa. 1972)

## POINT RELIED ON III.

**THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DECLARING THAT THE NEW HOUSE MAP MEETS THE MISSOURI CONSTITIONAL REQUIREMENT THAT THE STATE BE APPORTIONED INTO 163 HOUSE DISTRICTS EACH OF WHICH IS "AS COMPACT AS MAY BE" BECAUSE THE COURT APPLIED THE WRONG LEGAL STANDARD TO STIPULATED FACTS IN THAT THE COURT HELD THAT THE DISTRICTS IN THE NEW HOUSE MAP WERE NOT DRAWN WITH ANY APPARENT PARTISAN OR IMPROPER MOTIVE, AND IN THAT THE DISTRICTS WERE MORE**

**COMPACT THAT DISTRICTS IN MARYLAND AND VIRGINIA AND OTHER MISSOURI MAPS THE COMMISSION HAD AVAILABLE TO IT.**

Art. III, § 2 Mo. Const.

*Pearson v. Koster*, Case Nos. SC92200 and 92003 (Mo. banc January 17, 2012)

## POINT RELIED ON IV.

**THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DECLARING THAT THE NEW HOUSE MAP DOES NOT VIOLATE APPELLANTS' RIGHTS UNDER ARTICLE I, SECTIONS 2 AND 25 TO PARTICIPATE IN FREE AND OPEN ELECTIONS FOR THE MISSOURI HOUSE ON THE SAME BASIS AS EVERY OTHER VOTER BECAUSE THE CIRCUIT APPLIED THE WRONG LEGAL STANDARD TO STIPULATED FACTS IN THAT THE COURT CONCLUDED THAT THE DISTRICTS IN THE NEW HOUSE MAP WERE AS NEARLY EQUAL IN POPULATION "AS POSSIBLE," COMPRISED OF "CONTIGUOUS TERRITORY" AND "AS COMPACT AS MAY BE" EVEN THOUGH UNDER THIS NEW MAP THE APPELLANTS WILL RESIDE IN DISTRICTS IN WHICH THEIR VOTE IS EITHER SIGNIFICANTLY**

**MORE MEANINFUL OR LESS MEANINGFUL THAN A VOTE IN ANOTHER DISTRICT AND THEY WILL EITHER BE SIGNIFICANTLY MORE ABLE OR LESS ABLE TO COALESCE AND COOPERATE WITH OTHERS IN THEIR DISTRICTS THAN IS A VOTER IN A CONTIGUOUS AND COMPACT DISTRICT.**

Art. III, § 2 Mo. Const.

## POINT RELIED ON V.

**THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN DECLARING THAT THE COMMISSION DID NOT VIOLATE THE SUNSHINE LAW BECAUSE THE COURT APPLIED THE WRONG LEGAL STANDARD TO STIPULATED FACTS IN THAT THE COURT HELD THAT THE COMMISSION WAS NOT A PUBLIC GOVERNMENTAL BODY EVEN THOUGH IT IS CREATED BY THE MISSOURI CONSTITUTION, AND IN THAT THE COURT HELD THAT THE COMMISSION WAS A JUDICIAL ENTITY AND THAT ITS MAP-DRAWING FUNCTION WAS NOT DONE IN AN ADMINISTRATIVE CAPACITY EVEN THOUGH THE COMMISSION IS CREATED BY ARTICLE I, THE LEGISLATIVE ARTICLE, TO PERFORM A LEGISLATIVE FUNCTION, AND TO MAKE A DECISION WHICH WILL**

**IMPACT EVERY MEMBER OF THE PUBLIC FOR A DECADE OR MORE.**

Art. III, § 2 Mo. Const.

§ 610.010, RSMo

§ 610.020, RSMo

§ 610.022, RSMo

§ 610.027, RSMo

§ 610.030, RSMo

**POINT RELIED ON VI.**

**THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN FINDING THAT THE PUBLIC'S INTEREST IN ENFORCING THE SUNSHINE LAW DOES NOT OUTWEIGH ITS INTEREST IN PRESERVING THE NEW HOUSE MAP BECAUSE THE COURT APPLIED THE WRONG STANDARD TO IRRELEVANT AND MALEABLE FACTS IN THAT THE COURT LOOKED ONLY TO THE DATE THIS CASE WAS FILED AND THE DATE CANDIDATE FILING IS PRESENTLY SET TO OPEN (UNLESS EXTENDED BY THE LEGISLATURE) EVEN THOUGH THE ONLY MEANINGFUL DATE IS WHEN CANDIDATE FILING CLOSES AND EVEN THOUGH THE IMPORTANCE OF THE MAP HEIGHTENS**

**THE PUBLIC'S INTEREST IN ENSURING THAT THE COMMISSION'S PROCESS COMPLIES WITH THE SUNSHINE LAW'S REQUIREMENTS OF NOTICE AND ACCOUNTABILITY.**

Art. III, § 2 Mo. Const.

§ 610.027, RSMo

## POINT RELIED ON VII.

**THE CIRCUIT COURT ERRED AS A MATTER OF LAW IN GRANTING INTERVENTION BECAUSE THE INTERVENORS FAILED TO ESTABLISH FACTS SUFFICIENT TO MEET THE REQUIREMENTS OF RULE 52.12 IN THAT INTERVENORS ASSERT NO LEGALLY PROTECTABLE INTEREST IN APPELLANTS' CLAIM THAT THE NEW HOUSE MAP IS UNCONSTITUTIONAL OR INVALID, BY WHICH INTERVENORS WILL GAIN OR LOSE BY DIRECT OPERATION OF SUCH A JUDGMENT, THAT IS SUFFICIENT TO JUSTIFY INTERVENTION AND IS NOT ALREADY ADEQUATELY PROTECTED BY THE ATTORNEY GENERAL, AND IN THAT IT IS AN ABUSE OF DISCRETION TO GRANT PERMISSIVE INTERVENTION TO PARTIES WITH NO DISTINCT INTEREST IN THE SUBJECT MATTER OF THE**

**SUIT MERELY SO THEY CAN REPEAT THE SAME ARGUMENTS AS THE ATTORNEY GENERAL.**

Rule 52.12(a)

*Committee for Educational Equality v. State*, 294 S.W.3d 477 (Mo. banc 2009)

*Whitehead v. Lakeside Hosp. Ass'n*, 844 S.W.2d 475 (Mo. App. 1992)

## INTRODUCTION

On January 17, 2012, this Court re-invigorated the plain language of the provisions of the Missouri Constitution which impose "mandatory and objective" criteria for the reapportionment of state and federal legislative districts. In doing so, this Court consigned to the judicial dustbin the subjective and/or deferential standards employed in prior cases which had robbed these constitutional requirements of force and effect. *See Teichman*, Slip Op. at 8-9; *Pearson*, Slip Op. at 6-7. This Court declared that the Commission's new Senate map was invalid for failing to comply with the plain language Article III, Section 7, *Teichman*, Slip Op. at 13, and remanded the "compactness" challenge to the statutory reapportionment of congressional districts to trial, *Pearson*, Slip Op. at 14.

The New House Map violates Article III, Section 2 of the Missouri Constitution because (a) the new House districts are not as nearly equal in population "as possible," (b) each district is not comprised of "contiguous territory," and (c) every district is not "as compact as may be." These same defects also violate Article I, Sections 2 and 25 of the Missouri Constitution because a voter whose vote counts substantially more or less than a voter's vote in another district, or who cannot coalesce and cooperate with other residents as easily as voters in another district cannot participate in a free and open elections on equal footing with others as promised in these two sections of the Missouri's Bill of

Rights. Finally, the New House Map was the result of repeated violations of Sections 610.010 through 610.115 RSMo (the "Sunshine Law") and, pursuant to Section 610.027.5, should be declared invalid even if it complies with the redistricting provisions of the Missouri Constitution. For these reasons, any one of which is sufficient, the New House Map is invalid and the Secretary should be enjoined from relying upon it in accepting candidate declarations for the August 2012 primary or thereafter.

This Court already has noted that the drawing of legislative districts is fundamentally a legislative process, regardless of the individuals assigned to perform the task. *Teichman*, Slip Op. at 5. As with most legislative actions, reapportionments require 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, as discussed below, Missouri voters refused to cede absolute discretion to those who would draw these legislative maps and, instead, imposed certain mandatory and objective criteria against which the results must be tested.

**Population Equality**: The language of Section 2 could not be clearer – and this Court in *Pearson* and *Teichman* instructed that such provisions must be enforced as written. Section 2 provides that the "center of gravity," i.e., the single

organizing principle to which all other considerations must yield, is that every House district must be equal in population to every other district. In plain language, every person must have equal representation in the "People's Chamber."

For this reason, 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. Section 2 does not even use the standard higher standard set forth for congressional districts in Article III, Section 45, which requires such districts be "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 draw a map which ensures that the population of every district "shall, ***as nearly as possible, equal*** that figure." [Emphasis added.]

The population data for the New House Map is undisputed. L.F. at 137. The only issue for this Court to decide, therefore, is whether districts in the New House Map are as nearly equal in population "as possible." To ask the question is to answer it; the gross population deviations in the New House Map could have been reduced dramatically and were not. Prior redistricting efforts – and other maps created from the 2010 census data – achieved far greater population equality than the New House Map. Therefore, the only constitutionally permitted excuse,

i.e., possibility, can be employed to justify population deviations in the New House Map.

Using the equation set out in the Constitution, the parties have stipulated (and it could not have been disputed) that the constitutional population target for of each district is 36,742. L.F. at 137. Therefore, under Section 2, the map must be drawn to ensure that the population in every district "shall, ***as nearly as possible, equal*** [36,742]." As discussed in detail below, the New House Map does not come close. For example:

- 40 districts (one out of every four) miss this constitutional population target by ***1,100 people or more.***
- 20 districts miss the mark by ***1,300 people or more.***
- The largest district has ***2,867 more people*** in it than the smallest district.

*See* L.F. at 242 (Appendix at A16).

The Constitution recognizes that absolute equality is not required. But, the Missouri voters who approved Article III, Section 2 in 1966 insisted that inequality not be tolerated where it was "possible" to do better. Here, not only was it "possible" to achieve greater equality than in the New House Map, such equality was readily achievable and, in fact, it repeatedly had been achieved in prior redistricting efforts, and in 2011 by both caucuses during the bipartisan commission process. In addition, Appellants submitted an alternative map which

is almost 50 times as precise as the New House Map. All of this proves that it was "possible" for the New House Map to achieve greater population equality.

Faced with this evidence, the Circuit Court concluded (as it cannot be denied) that greater population was "possible." L.F. at 314 (Appendix at A4). But, the Circuit Court deprived the voters of their requirement that populations be as nearly equal "as possible" by holding that deviations of up to 10.00% are to be ignored. *Id.* The Court reached this "close enough is good enough" conclusion based on Defendants' assertion that the federal courts' lenient standard under the Equal Protection Clause should govern the enforcement of Article III, Section 2 of the Missouri Constitution. This was legal error. The Court further erred by holding that Section 2 does not require population equality if it comes at the cost of compactness, the loss of adherence to political subdivision boundaries, or the "threat" of a discriminatory effect that would violate federal law. This holding has no basis in fact and, worse, ignores the plain language of Section 2, as well as the history behind the voters' approval of it.

Defendants contend that the New House Map is close enough, but "close enough" is not the standard. The New House Map is unconstitutional because its districts are not as nearly equal in population "as possible."

**Contiguity:** The New House Map's failure to comply with the Constitution's population equality requirement is so clear and irrefutable, the Court

may never need to reach Appellants' remaining claims. However, Section 2 also imposes contiguity and compactness criteria on each and every district that are just as "mandatory and objective" as the requirement of population equality. The New House Map fails to meet these criteria as well. At least six districts are comprised of two parcels that are physically separated from each other by the Missouri or Meramec Rivers. Residents in 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 other districts) in order to reach the non-contiguous portions of their own district. The plain language of the Constitution requires that every district must meet the contiguity test. Defendants ask this Court to ignore six clear failures because other districts do not have the same flaw or because districts in prior maps had the same flaw but were not challenged. The Circuit Court erred in rejecting this claim by applying a definition of "contiguous" taken from irrelevant court decisions and the Virginia Constitution. L.F. at 316 (Appendix at A6). The issue is what Missouri voters intended, and they could not have intended that the Missouri and Meramec Rivers would be ignored by those drawing House district boundaries.

**Compactness:** Finally, a "rational and objective" review (*Pearson*, Slip op. at 8) of the New House Map reveals dozens of districts in the New House Map that cannot be considered "compact" in any sense of the word. Of course, 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 the grossly "uncompact" districts discussed below cannot be justified on the ground that their distorted shapes were necessary to ensure population equality because in many cases the lack of compactness seems to have contributed to the ***lack*** of population equality. A review of the New House Map as a whole would hardly convince *Pearson*'s "rational and objective" observer that the Missouri Constitution even prefers – let alone requires – compactness. One would more likely conclude that Article III, Section 2 requires greater allegiance to county lines than compactness. However, the plain language of the Constitution tells the opposite tale; compactness is mandatory and preserving county lines is not mentioned at all. The Circuit Court erred as a matter of law by assuming discretion the Commission did not have to weigh factors that are not mentioned in Section 2 more heavily than those which are mentioned.

**Constitutional Mandates:** Neither the calendar nor governmental convenience should be allowed to saddle Missouri citizens with a House redistricting map that embodies such clear constitutional violations. Missourians must live with these redistricting plans for a long time, which is why the mandatory and objective criteria in Article III, Section 2 are meant to ensure that each map meets basic standards of fairness and equality. *Pearson*, Slip op. at 6.

Appellants brought this challenge less than two months after the Map was filed, within a week of this Court's decisions in *Pearson* and *Teichman*, and one day after this Court directed their claims to the Circuit Court.

Under the plain language of the Constitution, if it is possible to draw a map with districts more nearly equal in population, then Missourians are ***entitled*** to such a map under their Constitution. If it is possible to apportion the House without creating districts that span great rivers (even accidentally), the Constitution ***entitles*** Missourians to such a map. And, if it is possible in the context of the preceding criteria to draw districts that do not meander across the map like a marble rolling across a warped linoleum floor, the Constitution ***requires*** that it be done.

**Sunshine Law:** Finally, the Commission held its meetings without public notice, without a public vote to go into closed session, and without keeping minutes or a journal of the actions (including votes) taken in these closed sessions. Thus, the Commission's meetings violated very basic – and hardly onerous – provisions of the Sunshine Law. There is no excuse for these violations. As a public governmental body, the Commission's obligations were clear. If the Commission did not want its meetings open to the public, they could close their meetings just like any other public governmental body. First, the Commission was required to give at least twenty-four hours' written notice of the time and place of

its meeting, including the legal basis for closing such meetings if it intends to do so. Second, even for a properly closed meeting, the Commission was required to convene in public and take a public vote to go into closed session. Finally, the Commission was required to keep minutes or a journal in which each closed vote or decision of the Commission and its members was recorded. There is no dispute about the facts – these things simply were not done.

The Circuit Court erred as a matter of law concluding that the Commission was not a "public governmental body." L.F. at 315 (Appendix at A5). Instead, the Court held the Commission was a judicial entity working in a judicial capacity. One can imagine a constitution provision which such a judicial remedy built into it – and one must imagine it because there is nothing in the text of Section 2 which even suggests that this is what the voters intended. However much Defendants may wish that the Section 2 had been written to provide for such a process, it did not. There is only one Commission in Section 2, though its members change. As an entity created by the Constitution making decision that impact the entire public for a decade or more, the Commission is a public governmental body.

Because the New House Map resulted from repeated Sunshine Law violations, the Circuit Court should have declared the New House Map invalid under Section 610.027.5 (as well as unconstitutional) and enjoined the Secretary from using it in connection with the 2012 primary or general elections. This Court

can, and respectfully should, enter the judgment the lower court should have entered.

## ARGUMENT

### I. The "Mandatory and Objective" Requirements of Article III, Section 2 Mean What They Say.

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**.

[Emphasis added.][1] 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 should be overlooked

[1] Article III, Section 2 is reprinted in Appellants' Appendix ("Appendix") at A10-A11.

because (i) a map "substantially" complies with constitutional requirements, or (ii) a map's authoring commission (whether the appellate commission or the bipartisan commission) had discretion to depart from these constitutional requirements, or (iii) a map complied 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").

In enforcing these criteria, the Court should give special attention to how and when the Missouri Constitution came to include them. Under the 1945 Constitution, the House was apportioned using a radically different – and now arcane – process. The "center of gravity" or organizing principle for reapportionment then was the ***county***. Every county had at least one House district of its own, regardless of how small its population was, and no House district ever crossed county lines. Each county was apportioned additional House districts as its population increased, e.g., a second district if the county had 1.5% of the state's total population, a third district if it had 3% of the population, and another district

for each 1% of the state's total population above that (i.e., another district at 4%, 5%, etc.). To illustrate, a county with only 100 people had one House district, the boundaries of which were the same as the county line. But, a county with 12% of the state's population had 11 House districts, and the county court (or county commission) was responsible for dividing the county into districts that were as "nearly equal in population as may be." Thus, there was some insistence that districts within the same county be equal to each other, but no requirement that districts be equal in size throughout the state. Obviously, the size of the House grew with the states' population and, by design, the population of House districts varied wildly.

After the United States Supreme Court's 1962 "one-man-one-vote" decision in *Baker v. Carr*, 369 U.S. 186 (1962), the process in the 1945 Constitution had to be abandoned. *See Jonas v. Hearnes*, 236 F. Supp. 699, 708-09 (W.D. Mo. 1964) (holding Missouri House apportionment process unconstitutional under *Carr* and giving Missouri one year to enact a constitutional apportionment procedure). The General Assembly reacted by proposing an amendment to Article III, Section 2, which froze the number of districts at 168 and only provided that the House would be redistricted "as provided by law." In other words, by whatever process the General Assembly might choose to employ. The voters rejected this standard-less approach.

Instead, at a special election in January of 1966, Missouri voters approved the process we now have (except that, until 1982, the Appellate Apportionment Commission was selected from Supreme Court Commissioners rather than Judges of the Court of Appeals). Thus, the voters rejected the "just trust us" approach proposed in 1965 and insisted, instead, on the "mandatory and objective" criteria that were re-invigorated by this Court in *Teichman* and *Pearson*.

There were several standards to choose from regarding population equality. There was the "as nearly equal in population as may be" standard, which the Missouri Constitution used for apportioning Congressional districts. There was also the "as nearly as is practicable" standard announced in *Wesberry v. Sanders*, 376 U.S. 1, 7-8 (1964) ("the command of Art. I, s 2, that Representatives be chosen 'by the People of the several States' means that as nearly as is practicable one man's vote in a congressional election is to be worth as much as another's"), and used by federal courts today to ensure that congressional districts have population deviation ranges 50 times smaller (or more) than the 7.8% deviation range in the New House Map.

Instead of these standards, Missouri voters approved a standard that imposes the highest degree of population equality that can be expressed in the English language, short of demanding precise equality (which is not achievable unless the state's population is divisible by 163 with not remainder). The voters approved a

requirement that every "district shall, ***as nearly as possible,*** equal" 1/163rd of the state's total population.

The history and development of this language must be considered – and the deliberate decision not to use the population equality language already found in Article III, Section 7 and 45, must be given effect – when enforcing the population equality criteria approved by the voters in Article III, Section 2.

## II. The Circuit Court Erred as a Matter of Law by in Holding that the New House Map Districts were as Nearly Equal in Population "as Possible." (Point Relied On I)

The language of the Constitution is clear and the facts are undisputed. The New House Map fails to comply with the constitutional mandate that House districts be as nearly equal in population "as possible" because those populations vary by as much as 7.80% and because all the evidence proves that better equality was "possible." L.F. at 242 (Appendix at A16). 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.

Article III, Section 2 establishes a "population target" for House districts by dividing the State's total population as stated in the new decennial census by the 163, i.e., the number of seats in the House. Based upon the 2010 census data,

Section 2's population target for this reapportionment is 36,742. L.F. at 137. 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* L.F. at 242 (Appendix at A16). (Population Deviation Statistics). 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. *Id.* 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 cannot 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 submitted separate and competing House map proposals, ***both*** of

which achieved substantially greater degrees of equality than the New House Map.[2]

Obviously, these two partisan 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*** in either map missed the constitutional population target by as much as 1,100 people (3.0% of the target), as opposed to the New House Map in which this degree of inequality occurs in one out of every four districts. See L.F. at 242 (Appendix at A16.)

Moreover, ***not one single district*** in either of the August proposals missed the constitutional population target by as much as 735 people (2.0% of the target). *Id.* 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. *Id.* (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)

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[2] The parties stipulated to the maps, deviation data, and depictions for these two August 11 proposals. L.F. at 137.

their degree of population equality demonstrates beyond question, and as a matter of law, that the districts in the New House Map are not as nearly equal in population "as possible."

In addition to the two August partisan proposals, Appellants also introduced evidence of an alternative map which achieves a population deviation of ***only 67 people, or 0.18%.*** L.F. at 270 (Appendix at A44). Thus, in terms of deviation range, this alternative map is almost ***50 times*** more precise than the New House Map. *Id.* Appellants do not offer Exhibit F as a preferred map. They offer it only to prove that far greater equality is possible than what was delivered by the New House Map.

The Circuit Court attempted to justify the New House Map by saying that its population deviation of 7.80% was "within the range" of prior redistricting efforts since 1966. L.F. at 314 (Appendix at A4). This is not accurate. The map adopted in 1971, closest in time to the voters' approval of Article III, Section 2, had a deviation range of 2.58%, or 3 times as precise as the New House Map. L.F. at 204. The current House districts, adopted in 2001, had a deviation range of only 6.03; again, substantially more equal than the New House Map. *Id.* Only the 1981and 1991 maps failed more miserably than the New House Map, *id.*, and the fact that they were not challenged is not proof that no greater population equality is "possible" today.

### 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. The Circuit Court admits this, but holds – wrongly, as demonstrated below – that the Map should not give up compactness (or cross political subdivision boundaries) to achieve greater population equality. L.F. at 314 (Appendix at A4).

As the Circuit Court noted, 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* L.F. at 244-48 (Appendix at A18-A23) (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."

For example, in downtown St. Louis, four of the districts are over-populated and the other four are under-populated. L.F. at 244 (Appendix at A18). District 78 and 79 (which are over-populated) actually reach out and take population from Districts 77 and 80, both of which are under-populated. 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 and virtually surrounded by under-populated districts. L.F. at 245 (Appendix at A19). As discussed below in the argument on compactness, this obvious defect was exacerbated by adherence to county lines. Not only does Article III, Section 2 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." The Court can easily see how it is "possible" for Audrain, Gasconade, Pike and Franklin Counties to relieve Districts 41-42, 63-64, 102, 104, and 107 (and others) of their over-population, bringing the entire region closer to the constitutional population target. L.F. at 245 (Appendix at A19).

Finally, Districts 35-37 are another example of a cluster of districts which are not only over-populated, but also virtually hemmed in by districts which are under-populated. L.F. at 246 (Appendix at A20). Even though they are over-populated, the boundaries for all three of these districts contained wholly unjustified "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[3] closer to the constitutional population target.

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[3] Districts are colored green-to-blue as the over-population increases, and orange-to-red as the under-population increases. L.F. at 243 (Appendix at A17). Thus, the

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

The Circuit Court held that population deviations below 10.00% can be constitutionally ignored, notwithstanding the language of Article III, Section 2 that districts be as nearly equal in population "as possible." L.F. at 314 (Appendix at A4). In so holding, the Court erred as a matter of law by applying the wrong legal standard. At Defendants' insistence, the Court applied the test used by federal courts in assessing state legislative districts under federal equal protection principles. *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").

Appellants, however, are not making a federal equal protection claim. Instead, their claim is under Article III, Section 2. As this Court held in Teichman, the standard to be applied in enforcing Missouri's "mandatory and objective" redistricting criteria is the language of the constitution itself. Section 2 contains no

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"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.

such "safe harbor" for deviations of up to 10.00% when greater equality was "possible."

Moreover, the entire history and policy behind the federal courts' 10% "safe harbor" is inapplicable to this situation. The federal courts assumed that state courts would enforce their own constitutional requirements, leaving them only the need to fashion a "one-size-fits-fifty" standard that enforce the federal constitution while respecting variations in state constitutional language. Federal courts did not adopt this lenient standard because a stricter standard would be unfair or impractical. To the contrary, these same federal courts expressly rejected the notion of "safe harbors" for ***congressional*** districts. Instead, the Supreme Court held:

> 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 hindered 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 mean "a good-faith effort to achieve precise mathematical equality." Just as important, if not more so, the near-zero-tolerance rule applied in 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., Karcher v. Daggett*, 462 U.S. 725 (1983) (holding constitutional districts with a variance of 0.6984% unconstitutional because greater equality was possible); *Shayer v. Kirkpatrick*, 541 F.Supp. 922 (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 Missouri Supreme Court adopted the federal court standard used for congressional districts under Article I, Section 2 of the United States Constitution and employed it to disapprove the senatorial apportionment plan under Article III, Section 7. *Id.* at 65.

In the present case, this Court should do what it did in *Hitchcock* a century ago, and what it did in *Teichman* and *Pearson* just weeks ago, and apply the plain language of Constitution as written.

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 it can reasonably and reliably expect future redistricting maps to be. That question is best left for another day. What is before the Court today, however, and what is clear as a matter of law, is that the New House Map falls far, far short of what is "possible" ***now***. Accordingly, under the plain language of Section 2, under *Hitchcock*, and under *Kirkpatrick*, any map in which 25% of the districts miss the constitutional mark by 3.0%, and in which the gap between the largest and smallest district is nearly 8%, is invalid as a matter of law. And it is not a close call.

Accordingly, this Court should reverse the judgment of the Circuit Court and declare that the New House Map is invalid because its districts are not as nearly equal in population "as possible." This requirement was the driving force in the 1966 Amendment, and the voters spoke loudly – and clearly – that population equality was their highest priority. For whatever reason, the New House Map does not deliver population equality, nor does it come as close "as possible." In fact, it does not come close at all.

### D. The Voting Rights Act does NOT Forbid Population Equality.

Finally, Defendants waive the bloody shirt of the federal Voting Rights Act in a last ditch effort to distract the Court from noting the obvious and undisputable failure of the New House Map to meet the constitutional requirement that all

districts be as nearly equal in population "as possible." And, in the Circuit Court, this tactic worked (but only to a degree). The Circuit Court found that greater population equality than that produced by the New House Map was possible, but achieving it "threatened" to create a discriminatory effect that would violate the Voting Rights Act. L.F. at 314 (Appendix at A4).

Defendants' argument is absurd. Nothing in the Voting Rights Act prohibits population equality. And, as the undisputed evidence (and the Courts' own eyes) show, there is no reason why the Commission could not have drawn a map with substantially greater population equality without discriminating against any persons or classes in violation of federal law.

The Voting Rights Act, § 2, is only violated if, based on the totality of the circumstances, 'it is shown that the political processes leading to nomination and election in the State or political subdivision are not equally open to participation" by the protected class in that "its members have less opportunity to participate in the political process and to elect representatives of their choice." 42 U.S.C. § 1973(b). To assert such a claim, the plaintiff must prove the so-called *Gingles* factors: "(1) the minority group is sufficiently large and geographically compact to constitute a majority in a properly drawn single-member district; (2) minority group is politically cohesive; and (3) that racial bloc voting typically frustrates the election of the minority group's preferred candidate." *Corbett v. Sullivan*, 202 F.

Supp. 2d 972, 983 (E.D. Mo. 2002) (citations omitted). This is an intensive fact-specific inquiry.

Although such a claim defies logic and the undisputed facts in this case, Appellants cannot prove – as Defendants argue they must – that every ***conceivable*** map with greater population equality than the New House Map does ***not*** violate the Voting Rights Act. First, the burden is on the party alleging the existence of such a violation to prove it, and Appellants cannot be obligated to prove such an overwhelming complex negative. More important, Voting Rights Act cases are difficult to prove when real people are suffering real discrimination in real life. It is nearly impossible to prove such a violation on a hypothetical map, and absolutely impossible to prove the absence of a Voting Rights Act violation in a map that has not be drawn yet.

On this point, and so many others, Judge Perry's opinion in *Corbett* is instructive and enlightening. There, drawing the county council districts and applying by analogy the provision of Article III, Section 2 at issue here, Judge Perry eschewed all criteria other than federal law and the express state law requirements of population equality, contiguity and compactness, and emerged with a map very close to perfect equality. *Corbett*, 202 F. Supp. 2d at 989-990 (deviation range of 12 people).

Finally, it should be noted that the Defendants use the Voting Rights Act as a shield, but there has never been a determination that the New House Map is valid under that Act. Appellants raise no Voting Rights Act claim, but that does not mean that it is sacrosanct and such a perfect example of non-discrimination that the slightest change in the boundaries of district in regions of the state hitherto thought not to implicate Voting Rights Act concerns would inevitably cause the entire map to crumble into a wasteland of rank discrimination. This Court should reject Defendants' efforts to defend obvious inequality by hiding behind a statute intended to protect equality.

## III. Districts Split by Large Rivers Cannot be "Contiguous." (Point Relied On II)

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 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 Circuit Court erred as a matter of law in holding that these districts are contiguous without even purporting to apply to the language of Article III, Section or determine what the voters intended thereby. L.F. 315-16 (Appendix at A5-A6). Instead, the Court applied the meaning of "contiguous" as used in an irrelevant court decision and the Constitution of Virginia – neither of which could have had any bearing in 1966 and 1982 when Section 2 was approved by Missouri voters.

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. L.F. at 249-54 (Appendix at A23-A28) (maps of these six districts showing major rivers, which are not shown on the Commissions' 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 ***and*** 59, in order to return to District 50 at St. Martins. L.F. at 250 (Appendix at A24) (map of District 50).

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. L.F. at 249 (Appendix at A23) (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* L.F. at 252 (Appendix at A26) (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* L.F. at 251 (Appendix at A25) (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. L.F. at 253 (Appendix at A27) (map of District 98). *See also* L.F. at 254 (Appendix at A28) (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. This failure can be defended on the ground that these districts are as contiguous "as may be." In each instance, no express constitutional imperative (such as population 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.

Accordingly, this Court should declare that the New House Map is invalid because it fails to comply with the constitutional requirement that each district be

comprised of contiguous territory. There is no excuse for the constitutional defects described above, and this Court should so declare.

## IV. The New House Map is Not as "Compact as May Be." (Point Relied On III)

Finally, Circuit Court erred as a matter of law in holding that the New House Map was "as compact as may be." L.F. at 318 (Appendix at A8). The Court based its holding on the "facts" that the New House Map is more compact than some districts in Maryland and Virginia, and it is statistically better than the partisan maps referred to above. *Id.* These "facts" are irrelevant to whether the New House Map is "as compact as may be." As in the Circuit Court's opinion in Pearson, the Court refused any meaningful analysis because a more compact map can always be found. *Id.* In so holding, the Court stripped the compactness requirement in Section 2 of all effect, and Missouri citizens of any meaningful judicial review.

The New House Map fails as a matter of law to conform to the constitutional compactness requirement. Compactness obviously 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 districts 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 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. L.F. at 244 (Appendix at A18) (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.

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. L.F. at 246 (Appendix at A20). 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). L.F. at 222-24, and 226 (Appendix at A55-A57, and A59). 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 L.F. at 245, 225 (Appendix at A19, A58), 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 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.

Appellants' alternative map (*see* L.F. at 255-65 (Appendix at A29-A39)) is substantially more compact than the New House Map, which proves that the New House Map was not as compact "as may be." Under any of the seven different statistical tests for compactness, Girouard Exhibit F was better – often far better than the New House Map. This evidence simply adds to the evidence the Court can spot with the "naked eye" that the New House Map falls far short of the "compact as may be" constitutional requirement.

On the basis of the foregoing facts, which cannot be disputed, this Court should reverse the judgment of the Circuit Court and declare that the New House

Map is invalid because it 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 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.

## V. The Population, Contiguity and Compactness Defects in the New House Map Violate Equal Protection and the Free Exercise of the Right to Vote and Fair and Open Elections under Article I, Sections 2 and 25.

**(Point Relied On IV)**

Article I, Section 25 provides "[t]hat all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage." Section 2 of Article I provides that these rights shall be given and enforced equally for all persons. These two constitutional provisions ensure that all Missourians (including, but not limited to Appellants) have a right to participate in Missouri elections on an equal footing with everyone else, regardless of where they live.

When districts are apportioned so that they contain unnecessary deviations from population equality, or they contain one or more districts comprised of territory that is not contiguous, or they contain one or more districts which are not as compact as may be, such a map has the practical effect of enhancing the impact of some voters' votes and diminishing the impact of votes cast by others. Not only do such defects deny Appellants constitutional right to have apportionments conducted in compliance with Article III, Section 2, they violate Appellants' equal rights as voters and Appellants' rights to participate in "free and open elections" through the "free exercise of the right of suffrage."

Some of Appellants reside in districts which are benefited by the New House Map in the sense that these Appellants' votes would have greater influence or impact than other voters. Some of Appellants reside in districts which are belittled by the New House Map such that these Appellants' votes would have less influence or impact than other voters. But, all Appellants have a constitutional right to Missouri elections in which every voter stands on an equal footing with every other voter, regardless of where they live. Appellants bring this claim in order to vindicate this right, which they hold individually but here assert collectively. Appellants seek protection of this right regardless of whether or which of them individually might have benefited from – or suffered under (or both) – the constitutional defects in the New House Map.

Accordingly, this Court should reverse the Circuit Court and declare that the New House Map is invalid because it violates Article I, Sections 2 and 25 (in addition to Article III, Section 2) because it contains districts which deviate from population equality, or which are comprised of territory that is not contiguous, or which are not as compact as may be, resulting in unjustifiably disparate impact on voter's right to free exercise of suffrage in free and open elections and every person's right to equal representation under law.

## VI. The New House Map is Void Because it Resulted from Repeated Violations of the Sunshine Law.

**(Point Relied On V and VI)**

The Circuit Court erred as a matter of law in holding that the Commission is not a "public governmental body" for purposes of Section 610.010 of the Missouri Sunshine Law. The Commission is created by Article III, Section 2 of the Constitution. Its decisions affect the public. No other analysis is required. The Court refused to so hold, however ,and held instead that the Commission was a judicial entity, and that it was not acting in an "administrative capcacity. L.F. at 315 (Appendix at A5).

The parties have stipulated that the Commission met on at least three occasions under circumstances in which it provided ***no*** public notice was given as required by Section 610.020 , there was ***no*** public vote to close these meetings as

required by Section 610.022, and ***no*** journal or minutes for these meetings was kept at Section 610.020 RSMo.

The Sunshine Law applies to "public governmental bodies," which Section 610.010 defines as "any legislative, administrative or governmental entity created by the constitution or statutes of this state, by order or ordinance of any political subdivision or district, judicial entities when operating in an administrative capacity, or by executive order[.]" Here, the "preparation of the [redistricting] map continues to be a legislative function despite the constitution's requiring appellate judges to draw the lines." *Teichman*, Slip Op. at 13. In *Teichman*, this Court referred to the Commission repeatedly as the "nonpartisan reapportionment commission" and never once as a "court" or its members as "judges" or its map as its "decision." In fact, the Court carefully distinguished between the legislative role of the Commission and the adjudicatory role of the Court. Thus, the Commission is unquestionably a "legislative, administrative or governmental entity created by the constitution." Even if the fact that the Commissioners were also appellate Judges makes the Commission a "court" for some purposes, it was certainly not acting in a judicial capacity in formulating the New House Map. Therefore, if it was a court, it was "operating in an administrative capacity." *See News-Press & Gazette Co. v. Cathcart*, 974 S.W.2d 576, 579 (Mo. App. 1998) (an entity is subject to the Sunshine Law "if its determinations affect the public").

The Circuit Court suggests, as Defendants argue, that Article III, Section 2 creates the Commission to provide a judicial remedy for the bipartisan commission's failure to complete a map on time. This is an interesting idea, and the Missouri voters might have approved it . . . if it had been presented to them. However, nothing in Section 2 supports this fanciful construction. There is only one "commission" in Section 2. Its members may change, and the entity appointing them, but there is only one commission. The commissioners – whoever they are – always act in a legislative capacity. The commission is a public governmental body.

Once this Court finds that the Commission was a "public governmental body," there is nothing left to decide because the Sunshine Law violation has been stipulated.[4] First, Section 610.020 requires notice of meetings be given to the

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[4] This Court should reject Intervenors' contention (opposed by the State and the Appellants) that the Sunshine Law claim cannot be litigated unless the Court of Appeals Judges who are the former members of the Commission are joined as defendants. Intervenors are simply wrong. Nothing in Chapter 610 requires that the Commissioners be individually named when the entity no longer exists and no remedy is sought against them individually. The venue provision cited by Intervenors is just that, a venue statute (with which Appellants complied). Because the State contended that the Commission no longer existed, Appellants dismissed

public at least twenty-four hours in advance. Here, no notice was given for the meetings at which the Commission decided upon the New House Map. Second, Section 610.022 requires that the Commission give notice that it intends to exclude the public from all or any portion of a meeting and cite its legal authority for doing so. Because there was no notice at all, the notice also was not sufficient under Section 610.022. Third, Section 610.022 requires that the Commission convene in public and take a public vote to go into close session. Here, again, this was not done for the meetings at which the Commission decided upon the New House

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the Commissioners who had been named and served with the original Petition and proceeded on the Sunshine Law claim against the State and Secretary alone. The only remedies sought by the Appellants under the Sunshine Law Are a declaration that the New House Map is invalid under Section 610.027.5, and an injunction against the Secretary under Section 610.030. This relief could not be obtained from the Commission, even if it still existed. This relief can only be – and here should be – obtained from the State and the Secretary. The Sunshine Law claim was ably defended. Having the individual Commissioners in the case would have added nothing and their absence did not prejudice them or anyone else. Appellants made every effort not to harass or annoy the former Commissioners and still assert their claim. They should not be punished for having done so.

Map. Finally, Section 610.020 requires that a journal or minutes be kept of all votes or decisions made in closed session. This, too, was not done.

Once the Appellants have shown that the Commission is a "public governmental body" and that it held non-public meetings without following the requirements of Sections 610.020 and 610.022, the burden of persuasion shifts to the Commission under Section 610.027.2 to show that there was no violation of the Sunshine Law. The Commission cannot avoid or excuse its actions. The Sunshine Law was violated.

Section 610.027.5 provides the remedy for a Sunshine Law violation that the Appellants seek in this case:

> Upon a finding by a preponderance of the evidence that a public governmental body has violated any provision of sections 610.010 to 610.026, ***a court shall void any action taken in violation of sections 610.010 to 610.026, if the court finds under the facts of the particular case that the public interest in the enforcement of the policy of sections 610.010 to 610.026 outweighs the public interest in sustaining the validity of the action taken in the closed meeting, record or vote.*** Suit for enforcement shall be brought within one year from which the violation is ascertainable and in no event shall it be brought later than two years after the violation.

[Emphasis added.]

The language of the statute is clear. The Court must invalidate the New House Map if the public interest in enforcing the Sunshine Law outweighs the interest in sustaining the New House Map. The Circuit Court clearly erred when it found that the public's interest in enforcing the Sunshine Law was outweighed by the interest in preserving the New House Map, L.F. at 315 (Appendix at A5), based upon an implied assertion of laches which is not only unwarranted but irrelevant to Section 610.027.5's analysis of the **public**'s interests.

The public has a keen interest in upholding the Sunshine Law, and it takes no evidence to prove that there was a sense that this interest was violated in the creation of the New House Map. This Court will decide if it was or not. But, if it was, then throwing out the map on that account is a vindication of the public's concern with little significant cost. Whether the Court finds that the Map is unconstitutional or not, the Map unquestionably falls far short of what the plain language of the Constitution expects and the people deserve. Another map, drawn by the bipartisan commission, can be expected to do better. Whether that happens or not, it certainly can – and should – be done without violating the Sunshine Law.

## VII. The Circuit Court Erred in Allowing Intervention.

**(Point Relied On VII)**

The District Court erred in granting Intervenors' motion to intervene. The Court's order did not indicate whether intervention was granted under Rule 52.12(a) or (b), and it does not matter because Intervenors failed to make the showing necessary for intervention as a matter or right, or by permission of the Court. To put it simply: there are only ***two*** sides to this lawsuit – either the New House Map is constitutional and valid, or it is not. The Attorney General says it is, and Appellants say it is not. Intervenors add nothing.

The days when intervenors could insert themselves into constitutional litigation – either to bolster the Attorney General's defense or because they did not trust the Attorney General's defense – ended (thankfully) with *Committee for Educational Equality v. State*, 294 S.W.3d 477, 487 (Mo. banc 2009) (hereinafter *"CEE"*). There, this Court held that the Cole County Circuit Court erred in granting even ***permissive*** intervention when the movants failed to demonstrate a separate interest in the subject matter of the suit. This Court went on to hold that granting intervention in such a situation was an abuse of discretion, even though there was no harm to the original parties. *Id.* Firmly grounded in the distinction between "having a legally cognizable "interest" in the subject matter of a lawsuit and merely being "interested" in the outcome of a lawsuit, this Court stated in no

uncertain terms that no legitimate public purpose is served by allowing those who are essentially bystanders (however "interested") to intervene in constitutional litigation simply to take the same positions as the Attorney General to "defend the status quo." *Id.*

Because *CEE* unequivocally prohibits permissive intervention in this case, the Intervenors were required to demonstrate a ***right*** to intervene under Rule 52.12(a). They did not. Rule 52.12(a) requires Intervenors to prove three separate elements: (1) that they have an interest in the subject matter of this lawsuit, i.e., the constitutionality and validity of the New House Map; (2) that the disposition of Appellants' action must impair or impede Intervenors' ability to protect that interest; and (3) that their interests may not be adequately represented by the existing parties. *Estate of Langhorn v. Laws*, 905 S.W.2d 908, 910 (Mo. App. 1995).

The first element, the "interest" test, operates to separate those who actually have something at risk in a lawsuit from those who simply care (or say they care) which side wins or loses.

> The "interest" that qualifies for intervention as of right in an action "means a direct and immediate claim to, and having its origin in, t***he demand made or proceeds sought or prayed for*** by one of the parties to the original action ... [T]he 'interest' must be such an ***immediate and direct claim upon the very***

***subject matter*** of the action that intervenor will either gain or lose by the direct operation of the judgment that may be rendered therein."

*Whitehead v. Lakeside Hosp. Ass'n*, 844 S.W.2d 475, 479 (Mo. App. 1992) (quoting *State ex rel. Farmers Mut. Auto Ins. Co. v. Weber,* 273 S.W.2d 318, 321 (Mo. banc 1954)) (emphasis in original).

Intervenors fail the "interest" test because they assert only the following: (1) that they are House Members, (2) that they want to be candidates under the New House Map, and (3) that they are voters and taxpayers. None of these is the sort of "direct and immediate claim to, and having its origin in, the ***demand*** made" in this case that Rule 52.12(a) requires. The "demand" in this case is that the New House Map be declared unconstitutional or otherwise invalid. Obviously, not only do Intervenors' asserted "interests" not claim "to, and having its origin in," that demand, such an "interest" will seldom (if ever) be present when a taxpayer or voter brings a facial constitutional challenge to a statute (or, as here, a map). This was the Court's principle teaching in *CEE*, 294 S.W.3d at 487.

Moreover, it cannot be said that any of the interests asserted by Intervenors will "gain or lose by direct operation of the judgment" (emphasis in *Whitehead*) that the New House Map is unconstitutional or invalid. First, as sitting House Members, the New House Map has no impact on Intervenors. Each of them was elected to represent a particular district established in the 2002 apportionment

process, and each of them will represent that district until his term expires ***no matter what*** happens to the New House Map in this litigation. Accordingly, Intervenors have no protectable interest as House Members. *Cf. State ex rel. Mathewson v. Bd. of Election Com'rs of St. Louis County*, 841 S.W.2d 633, 635 (Mo. banc 1992) (status as legislator "presents no personal stake in the outcome of" constitutional question).

Second, as prospective candidates, Intervenors have no legally protectable right to the New House Map . . . or any other map. They must declare and run in whatever the lawfully constituted districts are at the time of the election. To illustrate this point, imagine if the Intervenors had tried to sue the Commission to force it to adopt a map in the shape of the New House Map. Simply put, the fact that the Intervenors ***prefer*** the New House Map does give them a legally protectable interest ***in*** the New House Map. Instead, the Constitution and this Court determine which map is in effect, and the Intervenors have no choice but to run in the districts as they are constituted at the time of the election.

This leaves only Intervenor's asserted interests as taxpayers and voters, which are precisely the same interests Plaintiffs are asserting.[5] Intervenors cannot

[5] Intervenors claim an interest as taxpayers that "additional state resources are not unnecessarily expended for the purposes of drafting a new Redistricting Plan." The only way a new map will result from this lawsuit is through the process set out

gain or lose by "direct operation" of the judgment in this case because that judgment will vindicate the rights of ***all*** voters and taxpayers . . . no matter who prevails. Accordingly, Intervenors failed to show any interest distinct from Appellants' interests. In truth, Intevenors simply demanded to participate so they could argue that Plaintiffs' claims are wrong – which is the Attorney General's job, not the Intervernors'.

The inadequacy of Intervenors' interest is demonstrated in the Answer they attach to their Motion. Rule 52.12(c) requires that a movant attach "a pleading ***setting forth the claim or defense*** for which intervention is sought." [Emphasis added.] But Intervenors' Answer ***raises no claim*** and ***asserts no "defense"*** that the Attorney General is not just as well (if not better) positioned to raise or assert than the Intervenors. For example, the most important (and obvious) constitutional defect in the New House Map is the fact that each district is not as nearly equal in population "as possible." Yet, Intervenors' Answer professes not to know the state's total population under the 2010 Census. *See* Intervenor's Proposed Answer, at ¶ 24.

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in Article III, Section 2 which automatically is invoked when any map (including the New House Map) is declared invalid. If that happens, this "new" map not be "unnecessary" in any sense. In any event, such costs (if any) are too remote and contingent an interest to support intervention.

Finally, even assuming that the Intervenors have a legally protectable interest in the New House Map, the Attorney General will adequately protect that interest. When the Attorney General defends that constitutionality of a state action, "[t]he doctrine of *parens patriae* creates a rebuttable presumption that the government adequately represents the public's interests in cases concerning matters of sovereign interest." *CEE*, 294 S.W.3d at 487 n.18. When "a public officer is engaged in litigation to protect public rights, and the officer's pleadings and procedure maintain the public interest," intervention as a matter of right is not appropriate. *Id.* (quoting *State ex rel. Cooper v. Wash. County Comm'n,* 848 S.W.2d 620, 622 (Mo. App.1993)).

Intervenors made no attempt to overcome the strong presumption that the Attorney General will adequately represent their interests. At most, they offer speculation that the Attorney General may not be sufficiently motivated because his interest is merely "academic," coupled with vague speculation as to hjis partisan allegiances. In essence, Intervenors suggest that, because the Attorney General does not plan to run for the House, he will not care whether the New House Map is invalidated and his defense will be half-hearted. This is absurd. The Attorney General seldom (if ever) is directly affected (either personally or in his official capacity) by the dozens of statutes, regulations, and other state actions he defends against constitutional challenges. This does not mean that the Attorney

General lacks sufficient motivation to defend those matters appropriately or, in this case, to protect Intervenors' interests adequately (assuming they have a legally protectable interest that is not already at issue in this lawsuit). Accordingly, if Intervenors have a legally protectable interest at risk in this lawsuit, that interest is adequately protected by the Attorney General.

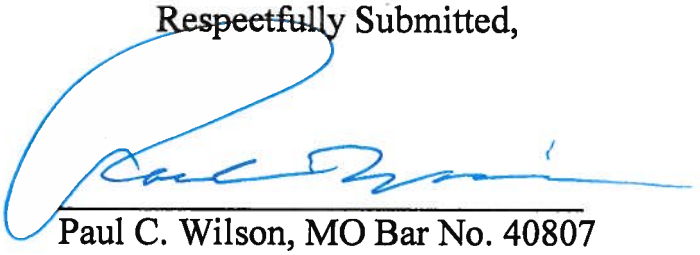
For the reasons set forth above, the Circuit Court erred in granting Intervenors' motion. As a matter of law, intervention under Rule 52.12(a) was improper because Intervenors have no interest sufficient to justify intervention as a matter of right, and because any interest they might have is adequately protected by the Attorney General. And, as a matter of law, intervention under Rule 52.12(b) is improper because, under *CEE*, it is an abuse of discretion to allow permissive intervention for parties alleging general taxpayer standing merely so they can repeat the same arguments as the Attorney General.

## CONCLUSION

For the reasons set forth above, Appellants respectfully request that this Court enter the declaratory judgments sought in Counts I through IV, enter the declaratory judgment and judgment enforcing the Sunshine Law sought in Count V, and enjoin 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 as sought in Count VI.

Dated: February 21, 2012

Respectfully Submitted,



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## CERTIFICATE OF SERVICE

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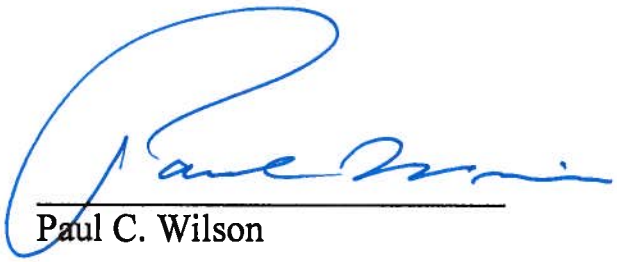

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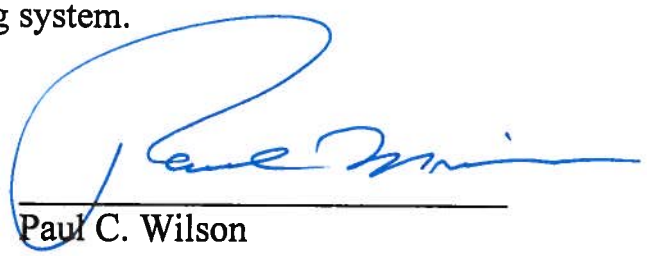
## CERTIFICATE OF COMPLAINCE

I hereby certify, pursuant to Supreme Court Rule 84.06(c), that this Brief of Appellants complies with Rule 55.03, and with the limitations contained in Rule 84.06(b), and that it contains 13,296 words, excluding the cover page, tables, the signature block, certificate of service and this certificate, as determined by the Microsoft Word 2010 Word-counting system.



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