IN THE SUPREME COURT OF MISSOURI

STATE OF MISSOURI *ex rel.* BOB JOHNSON, *et al.*,	)	
Relators,	)	
	)	Case No. SC92282
vs.	)	
ROBIN CARNAHAN	)	
Respondent.	)	

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

Today, Attorney General Koster, would-be Intervenor, asks this Court to return to the days of "close enough is good enough" constitutional law which this Court abandoned in *Teichman v. Carnahan*, Case No. SC92237 (Mo. banc, January 17, 2012), Slip Op. at 8-9; *Pearson v. Koster*, Case Nos. SC92200 and 92003 (Mo. banc January 17, 2012), Slip Op. at 6-7. Citing an inapposite, overruled and out-dated case, the State suggests that the "New House Map" complies with Article III, Section 2's requirement that all Missouri House districts be as nearly equal in population "as possible," even though it contains districts which deviate from the constitutional population target by more than 1,400 people and a span of deviations ranging from 3.92% below to 3.89% above that target. Relators have no burden to say how close is close enough. All Relators need to show, as they undoubtedly have according to the uncontested facts before this Court, that ***closer*** was undisputedly "possible."

As predicted, the State argues that a 10% variation is permissible, citing federal cases applying the equal protection clause of the Fourteenth Amendment to

apportionment of state legislative districts. But ***not one*** of those federal decisions ever suggested that their 10% "minimal deviation" standard should be used by state courts to enforce their own state constitutional standards; certainly not when that standard requires equality as nearly "as possible." In fact, when enforcing the federal constitutional requirement that population be as nearly equal as "practicable," federal courts require far greater precision – and so should this Court. *See Kirkpatrick v. Preisler*, 394 U.S. 526, 530-31 (1969). Federal courts have had no trouble policing a more exacting standard, and the State presents no reason why this Court should not be able to do as well.

The State cites *Preisler v. Hearnes*, 362 S.W.2d 552 (Mo. banc 1962), which dealt with congressional districts (not the state House), and did not construe Article III, Section 2 at all. Of course, *Hearnes* is decidedly bad law in light of the federal cases cited by the State. The Court should note, though the State ignores, that those federal cases descend from *Kirkpatrick*, 394 U.S. at 530-31, which requires a "good-faith effort to achieve precise mathematical equality" and which rejected the same lax *Preisler* standard that the State seeks to resurrect today. Moreover, two generations have passed since *Preisler*, and the population equality that is "possible" with today's computers and software obviously is far greater than what was "practicable" in 1962.

The only case in which this Court has resolved a challenge to the population deviations of state House districts is *State ex rel. Barrett v. Hitchcock*, 146 S.W. 40, 64-65 (Mo. banc 1912). There, the Court relied – as Relators ask this Court to do now – on the standard used by federal courts to assess federal (i.e., congressional) legislative

districts. In *Barrett*, finding that the districts did not even attempt such equality, the Court held them unconstitutional. *Id.*

So, the choice is clear. The State asks for a standard that ignores the plain language of the constitution, and pretends that a 10% population variance is as equal "as possible." Relators ask the Court to find that the districts in the New House Map are not as nearly equal in population as possible – no more – and the State admits this throughout its brief. Neither the State, nor the Relators nor this Court knows whether the next map drawn by the bipartisan reapportionment commission will have districts that are as nearly equal in population "as possible" as the Constitution requires. But, what everyone does know is that the New House Map does not even try.

The State urges the Court to ignore the language of our Constitution because it is inconvenient. However, the Constitution either means what it says, or it does not. And, when it comes to making sure that each person's vote counts the same as the next person's, convenience is not a relevant consideration. The text of the Constitution is the only thing that should matter.[1]

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[1] Relators will stand on their brief regarding "contiguity" and "compactness." Every state has different constitutional requirements and different geographical conditions. The only thing that matters is what Missouri voters meant in requiring contiguity and compactness, and the New House Map falls short of that standard.

Accordingly, Relators respectfully request that the Court grant the relief sought.

Dated: January 25, 2012

Respectfully Submitted,

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Certificate of Service: An electronic copy of the foregoing will be served James R. Layton, State Solicitor, Missouri Attorney General's Office, via the Court's E-Filing system.

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