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LEGAL ANALYSIS AND COMMENTARY FROM JUSTIA

Déjà Vu All Over Again for the Eighth Circuit in the Missouri Redistricting Matter

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The Odyssey continues. I am talking here not about the motion picture (based on Homer's epic story) that dominated box offices this summer. I am talking instead about the almost equally surreal journey of Missouri's congressional districting maps through the state and federal courts.

The litigation has been dizzying, and many readers will probably need to consult postings [here](#), [here](#) and [here](#) to refresh their memory of what

happened earlier this month. But today we must process the most recent twist: On Monday of this week, the Eighth Circuit Court of Appeals purported to resuscitate efforts by Republican politicians in Missouri to use Republican-friendly congressional maps adopted by state lawmakers in September 2025 (in a measure called HB1) for the upcoming November 2026 midterm elections. Most observers (understandably) assumed that after the Supreme Court about two weeks ago (on September 10) blocked a district court's temporary restraining order (TRO) mandating use of HB1's maps this fall (a Supreme Court ruling discussed [here](#)), HB1's fate, at least as regards the 2026 election, had been put to rest. After all, the Supreme Court's affirmative issuance of a stay directly (albeit without explanation) repudiated the unanimous Eighth Circuit panel that just one day earlier had denied an identical stay request.

And yet that very same three-judge Eighth Circuit panel (with Judge David Stras writing separately to say he agreed with the court's bottom line but would have affirmed the district court's TRO on the ground that HB1's opponents lacked standing to appeal) has this week (re-)embraced the arguments the Supreme Court found wanting, and has directed the district court to enter a permanent injunction directing the Missouri Secretary of State to use HB1's maps in November.

I do not expect Monday's Eighth Circuit ruling (which the Eighth Circuit itself directed should not take effect for one week, until September 28) to last. HB1's opponents have asked the Eighth Circuit to delay its ruling beyond September 28 to give them time to file papers in the U.S. Supreme Court. Whether the Eighth Circuit obliges that request or not, I

expect the case to move to the Supreme Court, and shortly after briefs there are filed either Justice Kavanaugh alone or a majority of the whole Court will act to block the Eighth Circuit's order mandating use of HB1's maps for the upcoming election. (It is also possible, though at this point unlikely, that the Eighth Circuit as a whole will take the case *en banc* and revisit the three-judge panel's flawed ruling.)

I say this not merely because of what I (sometimes alongside my brother Akhil) observed in earlier posts, but also because the Eighth Circuit's action this week is even more untenable than was its action the week before last, in at least two respects. First, the Supreme Court itself on September 10 necessarily (given the prerequisites for the issuance of a stay) found that HB1's *opponents* had a high likelihood of succeeding on the merits of their contention that use of HB1's maps is *not* supported by anything in federal law, which means that HB1's *proponents* had a low probability of success. The Eighth Circuit on Monday disagreed with this merits assessment and found that HB1's maps must be used in November because they were used in last month's primary; the Eighth Circuit reasoned that, if different maps are used in a general election than were used in a primary, the primary voters' federal constitutional right to vote will inevitably be violated. As I (and Akhil) **explained previously**, that argument fails miserably; there is no federal constitutional or statutory requirement that states utilize primary elections at all, and if a state's primary election is flawed (as Missouri's was here because—according to the Missouri Supreme Court—HB1 does not have, and has never had, the force of state law), then there is nothing in federal law or general reliance principles that permits, much less compels, the legal flaws in the primary election to be repeated in the

general. To the contrary, use of HB1's maps—which, again, are not and have never been law according to the supreme expositor of the Missouri constitution—in the 2026 general election (the only election required under the U.S. Constitution) would itself violate the federal rights (including the federal statutory right to have congressional elections administered according to the “law of [the] State”) of general-election voters.

But whether I am right on this score (and I firmly think I am) is somewhat beside the point. The Supreme Court has already indicated, by finding that the requirements for the September 10 stay were satisfied, that *it* believed the merits claims of HB1's proponents to be weak and those of HB1's opponents likely to prevail. And the Supreme Court in *Trump v. Boyle* instructed that the Court's “interim orders” (i.e., its emergency-docket actions) “*inform how a court should exercise its equitable discretion in like cases.*” Monday's ruling by the Eighth Circuit on HB1 is not just a case “like” the September 10 case—it's the *same* case! So before the Eighth Circuit exercised its equitable discretion to grant HB1's backers a permanent injunction, the Eighth Circuit judges needed to take much more seriously the “inform[ation]” the entire Supreme Court (and not just a single Circuit Justice) provided on September 10. It was problematic enough for the Eighth Circuit to disregard Justice Kavanaugh's decision on September 8 to deny a stay application from the Missouri Secretary of State when the Eighth Circuit judges let stand the district court's TRO on September 9; Monday's ruling flouting the entire Supreme Court's affirmative intervention on September 10 is more problematic still.

That leads me to a second way Monday's ruling is even more dubious than were the lower court judicial decisions within the Eighth Circuit on September 8 and 9: Monday's edict comes 11 days *after* the Court's action on September 10 in an already tight election calendar. If the district court's attempted implementation of HB1 on September 8 (which was stayed on September 10) did not already run afoul of the so-called *Purcell* doctrine (and I think *Purcell* might have partially informed the September 10 stay), federal court interference on September 21 (or, rather, September 28, the effective date of the Eighth Circuit's command) with what state courts and state election officials have since September 10 been planning to do definitely does violate *Purcell*. Missouri already sent ballots to overseas military personnel last Saturday, and is slated to mail other ballots out this week, well before September 28. Federal court injunctive relief at this late date undeniably implicates the heart of the *Purcell* doctrine.

The Eighth Circuit opined that the *Purcell* rule is not absolute (a proposition with which I am inclined to agree) and does not apply where the violation of federal law alleged by plaintiffs is clear. (That second proposition might make sense, but I note the Supreme Court as a whole has never so held.) The Eighth Circuit says that using the pre-HB1 maps (from the 2022 redistricting after the 2020 census) would *clearly* violate the federal Constitution. But how, if that violation is so clear, could the Supreme Court have determined (without recorded dissent) the week before last that such an argument was quite *unlikely* to succeed? You see the problem.

Given all this, I expect the Supreme Court (or Justice Kavanaugh) to

stay the Eighth Circuit ruling until the time within which HB1's opponents are permitted to file a cert. petition has expired (typically 90 days from the date of the lower court ruling) or (if a petition is filed) until the Supreme Court has disposed of the petition/case. Unless the time for seeking cert. is modified by the Court (and I wouldn't expect it to be), after a cert. petition is indeed filed (in a couple of months), the Court could/would deny it as moot (since the only election in question in this litigation will have already taken place) and instruct the Eighth Circuit to vacate Monday's ruling under the so-called *Munsingwear* doctrine.

Alternatively, the Court in the coming days could vacate the Eighth Circuit ruling now on the ground that the only relief sought (an injunction to use HB1's lines for the upcoming election) is foreclosed by *Purcell*. Either way, and without predicting how much the Justices may give voice to any frustration they understandably might feel about their September 10 decision not being taken seriously enough, I do not expect HB1's lines to be used in November. And any post-election lawsuits or protests in the House of Representatives in January by HB1's advocates should also be rejected.

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