

IN THE CIRCUIT COURT OF COLE COUNTY...
STATE OF MISSOURI

KENNETH PEARSON,)
PHOEBE OTTOMEYER,)
BRIAN MURPHY, MILDRED)
CONNER, TIMOTHY)
BROWN and JOAN BRAY,)

Plaintiffs,)

vs.)

Cause No. 11AC-CC00624

CHRIS KOSTER, in his)
official capacity as Missouri)
Attorney General,)

and)

ROBIN CARNAHAN, in her)
official capacity as Missouri)
Secretary of State,)

Defendants.)

MOTION TO DISMISS FOR FAILURE TO STATE A CLAIM
OR, IN THE ALTERNATIVE, FOR
JUDGMENT ON THE PLEADINGS

The 2011 General Assembly, in response to new census data, the loss of a seat in the U.S. House of Representatives, and the mandate in Article III, § 45 of the Missouri Constitution, enacted H.B. 193, defining eight new districts to replace the current nine.¹ Plaintiffs challenge H.B. 193 in three

¹ In their Petition, the plaintiffs repeatedly refer to a “map” “adopted” by the General Assembly. The General Assembly did not adopt nor enact a map. Instead, it enacted a statute – over the Governor’s veto – setting out each district by county, voting district, and tract-block. We will treat the Petition as if it used “H.B. 193” instead of each reference to a “map.”

counts. But plaintiffs do not – and cannot, on the facts presented in the Petition, viewed in light of Missouri Supreme Court precedent – state a claim as to any of those counts.

Plaintiffs' first count asserts that H.B. 193 violates the requirement in Article III, § 45 that congressional districts be "compact." The plaintiffs make a credible claim that at least one district is not "compact." But that is not enough. The Petition ignores binding precedent as to the standard to be used by the courts in evaluating H.B. 193. The deference mandated by the Missouri Supreme Court requires that the plaintiffs' challenge be rejected because the plan overall shows that the General Assembly did not ignore the "compactness" requirement.

Plaintiffs' second count alleges a violation of the "equal protection" clause of the Missouri Constitution. The plaintiffs do not identify any "fundamental right" infringed by H.B. 193. The only possibility is their right to vote. But they do not claim that they have been deprived of that right. H.B. 193 is thus subject to rational basis review, and the plaintiffs do not even assert that the districts it creates lack a rational basis. They merely disagree with the rationale for the lines the legislature drew – not enough to state an equal protection claim.

Finally, in their third count the plaintiffs assert that H.B. 193 violates the broad language of the introductory sections of our Bill of Rights. But

those sections do not define enforceable rights; they merely reserve to the people the right to govern themselves, and provide a prelude to the more specific, enforceable provisions that follow. Plaintiffs cannot state a claim based on introductory language.

I. Plaintiffs have not alleged, nor can they allege nor prove, that in H.B. 193, the General Assembly “wholly ignored” the compactness requirement of Article III, § 45.

Unlike the U.S. Constitution, our state constitution specifically addresses not just the population, but the shape of congressional districts. It does so by instructing the General Assembly to define, after each decennial census, new congressional districts that are compact and nearly equal in population:

When the number of representatives to which the state is entitled in the House of the Congress of the United States under the census of 1950 and each census thereafter is certified to the governor, the general assembly shall by law divide the state into districts corresponding with the number of representatives to which it is entitled, which districts shall be composed of contiguous territory as compact and as nearly equal in population as may be.

Article III, §45. The petition does not complain about the population equality of the districts set out in H.B. 193. Rather, it complains about their shape, arguing that some of those districts are not sufficiently “compact.”

Twice, the Missouri Supreme Court has addressed compactness. The first time was fifty years ago, in response to a challenge to congressional

districts enacted pursuant to Article III, § 45. *Preisler v. Hearnese*; 362 S.W.2d 552 (Mo. banc 1962) (*Preisler I*). There, the Court found that “[a]ll of the districts established by the 1961 Act [were] reasonably compact except the Tenth,” although others “could have been improved in that respect.” *Id.* at 557.² Despite the problem with the Tenth, the Court upheld the statute. In doing so, it set out the test for evaluating a redistricting plan enacted by the legislature – and held that the plan was entitled to a level of deference that defeats the plaintiffs’ claim here.

In *Preisler I*, the Court observed that courts should not readily interfere with the exercise by the General Assembly of its constitutional authority to define congressional districts. Indeed, the Court held that the courts should become involved only when the legislature “wholly ignores” constitutional requirements:

[T]he courts may not interfere with the wide discretion which the Legislature has in making apportionments for establishing such districts when legislative discretion has been exercised. It is only when constitutional limitations placed upon the discretion of the Legislature have been wholly ignored and completely disregarded in creating districts that courts will declare them to be void. In such a case, discretion has not been exercised and the action is an arbitrary exercise of power without any reasonable or constitutional basis.

² The Court did not include with its 1962 opinion a map showing the districts that were enacted. For the convenience of this Court, we have attached as Exhibit A the map printed in THE OFFICIAL MANUAL, STATE OF MISSOURI, 1963-1964 (“The Blue Book”).

Id. at 555. In *Preisler I*, the Court held that despite some problematic districts, the plan as a whole showed that the legislature did not “wholly ignore” the compactness requirement. Thus the Court upheld the new districts.

After the 1970 census, the same plaintiff brought to the Court a challenge to new districts for the State Senate – and he lost again, in the same fashion. *Preisler v. Kirkpatrick*, 528 S.W.2d 422 (Mo. banc 1975) (*Preisler II*). The Court reaffirmed the standard that it articulated in *Preisler I*, quoting with approval the statement that “only when constitutional limitations placed upon the discretion of the Legislature have been wholly ignored and completely disregarded in creating districts that courts will declare them to be void.” *Preisler I*, 362 S.W.2d at 555, quoted in *Preisler II*, 528 S.W.2d at 425.

Before the Court was a plan filed by the Senate Redistricting Commission, pursuant to Article III, § 7. That section does not use the word “compact”; instead it requires that “no county lines shall be crossed except when necessary to add sufficient population to a multi-district county or city to complete only one district which lies partly within such multi-district county or city so as to be as nearly equal as practicable in population.” But the Commission was also bound by Article III, § 5, which predated the creation of such Commissions in §7. Section 5 contains a requirement

parallel to that required of congressional districts under § 45: “For the election of senators, the state shall be divided into convenient districts of contiguous territory, as compact and nearly equal in population as may be.”

As it had 13 years before, the Court agreed with plaintiff Preisler that some districts did “not meet the compactness requirement”: District 6 in the City of St. Louis, which stretched from the north nearly to the south end of the city; and District 33, which “thrust[] a narrow appendage from the middle of its body into the heart of Greene county.” 528 S.W.2d at 427.³ But “considering the overall, state-wide plan developed by the Commission the districts established substantially comply with the compactness requirement of § 5 of Article III.”

Under *Preisler I* and *Preisler II*, then, the plaintiffs here must plead and prove that the General Assembly, in enacting H.B. 193, “wholly ignored and completely disregarded” the compactness requirement. And plaintiffs cannot make such a showing by demonstrating that a couple of districts are not sufficiently compact, nor that any district – or even all districts – could be more compact.

Count I of the Petition says nothing about the “over-all state-wide plan.” It makes no allegation that the plan set out in H.B. 193 is different – much less, different in a constitutionally infirm way – from the plan set out

³ The Court included with its opinion appendices showing the district boundaries. We have attached copies of those appendices as Exhibit B.

for congressional districts after the 1960 census, nor from the plan set out for State Senate districts after the 1970 census. Indeed, the Petition does not even hint that such a showing is possible – and even a cursory comparison of the maps showing the boundaries at issue in the *Preisler* cases with the map (Exhibit 1 to the Petition) of the H.B. 193 districts demonstrates that under the *Preisler* standard, the plaintiffs' challenge must fail.

II. The plaintiffs have not alleged that the redistricting plan enacted in H.B. 193 has no rational basis.

The Missouri Court of Appeals, Western District, has recently summarized the analysis the Court must undertake at the outset in considering an equal protection claim:

Article I, Section 2 of the Missouri Constitution states “[t]hat all persons are created equal and are entitled to equal rights and opportunity under the law.” “In deciding whether a statute violates the Equal Protection clause, this Court engages in a two-part analysis.” *Etling v. Westport Heating & Cooling Servs., Inc.*, 92 S.W.3d 771, 774 (Mo. banc 2003) (footnote omitted). “The first step is to determine whether the classification operates to the disadvantage of some suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution.” *Id.* (internal quotation marks omitted). “If so, the classification is subject to strict scrutiny and this Court must determine whether it is necessary to accomplish a compelling state interest.” *Id.* “If not, review is limited to determining whether the classification is rationally related to a legitimate state interest.” *Id.*

Thompson v. ICI American Holding, --- S.W.3d ----, 2011 WL 3444008 *7 (Mo. App. W.D. 2011). So plaintiffs are required to articulate “a fundamental right explicitly or implicitly protected by the Constitution” in order to demand that the court give H.B. 193 “strict scrutiny.” They fail to do so.

“[T]he right to vote is fundamental to Missouri citizens.” *Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. banc 2006). But plaintiffs do not allege that they are being prevented or deterred from voting. What they invoke is not the right to vote, but a right “to elect candidates of their choice.” Petition at 13. Their “choice,” of course, is to elect members of Congress of their own political party. And the petition does not identify the source of any “right” to elect candidates that a particular voter or group of voters prefers. In fact, the Missouri Supreme Court has never held that a right “to elect candidates of [the voter’s own] choice” is a “fundamental right” as that term is used in equal protection analysis. Nor, logically, could it enforce such a right, since every district will, in the sense plaintiffs allege, disadvantage some voters – Republicans v. Democrats, rich v. poor, urban v. rural, etc. – thus making every possible district subject to an equal protection challenge.

Absent an infringement of a recognized “fundamental right” (and knowing that neither Republicans nor Democrats constitute a “suspect class,” for constitutional purposes), this court’s review of H.B. 193 “is limited to determining whether the classification is rationally related to a legitimate

state interest.” Or to put it in the words recently quoted by the Western District, “a court will strike down the challenged legislation only if the classification ‘rests on grounds wholly irrelevant to the achievement of the state’s objective.’” *Etling v. Westport Heating & Cooling Servs., Inc.*, 92 S.W.3d 771, 774 (Mo. banc 2003), quoting *Riche v. Dir. of Revenue*, 987 S.W.2d 331, 337 (Mo. banc 1999).

H.B. 193 must be upheld, then, “if any state of facts can be reasonably conceived that would justify it.” *Missourians for Tax Justice Education Project v. Holden*, 959 S.W.2d 100, 103 (Mo. banc 1997). And the burden is on the plaintiffs to prove that “no state of facts can be reasonably conceived that would justify” the lines drawn in H.B. 193: “Under the rational basis test, a claimant will prevail only if he shows that ‘the classification has no reasonable basis and is purely arbitrary.’” *State v. Brink*, 218 S.W.3d 440, 445 (Mo. App. W.D. 2006), quoting *State v. Pike*, 162 S.W.3d 464, 471 (Mo. banc 2005).

Rather than alleging facts sufficient to demonstrate that H.B. 193 “has no reasonable basis,” plaintiffs merely claim that the plan enacted “virtually guarantees that of Missouri’s eight seats in the United States House of Representatives, six of them – 75 percent – will be safe Republican seats.” Petition at 14. That a particular plan, based on a particular set of assumptions, would advantage one political party (or any other defined or

undefined group) is not enough to state a constitutional claim. To state an equal protection claim under rational basis review, plaintiffs would have to do more: they would have to allege – and state facts sufficient to show that they could prove – that boundaries could not be justified on the basis of any possible state interest. Among those possible interests can be keeping political subdivisions (counties, cities, etc.) in single districts, and maintaining “communities of interest” (a term that has no legal definition, but can include keeping like-minded voters together in a district). It is impossible, of course, for any line to fully serve every permissible basis for drawing a district. But the fact (if it is a fact) that overall the lines drawn may lead to an advantage for one political party is not the same as alleging and proving that the lines drawn do not serve any conceivable state purpose – the test that an equal protection claim must meet.

III. There is no cause of action under Article I, §§ 1 and 2.

Finally, plaintiffs claim that H.B. 193 violates Article I, §§ 1 and 2, in particular the language in those sections about “political power” being “instituted solely for the good of the whole” (§ 1) and government being “intended to promote the general welfare” (§ 2). But those clauses do not establish rights that can be enforced through judicial action.

In *Committee for Educational Equality v. State*, 294 S.W.3d 477, 488 (Mo. banc 2009), the Missouri Supreme Court dealt with a claim based on

similar language regarding the purpose of a portion of the Missouri constitution – and refused to find in such language a basis for suit. To paraphrase the Court’s language, the “introductory clauses” found in §§ 1 and 2 “outline the purpose and subject of” our Bill of Rights. But they “provide no specific directive or standard for how the State must accomplish” those goals.

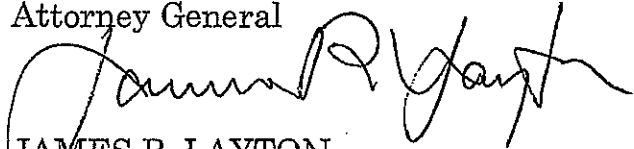
We are not aware of any reported case in which any Missouri court held that a cause of action could be based on the language that plaintiffs cite in Count III. And if there were such a cause of action, what would its elements be? What would be the test for compliance? The only standard that plaintiffs suggest is that the constitution bars action that deliberately benefits one political party more than another. But the history of partisan legislation since 1820, under four Missouri constitutions, strongly evidences that when the people enacted the 1945 Constitution, they had no intention of precluding partisan political objectives from being part of the calculus in enacting legislation.

CONCLUSION

Because the Plaintiffs do not and cannot state claims on which relief may be granted under any of the three counts of their petition, the petition should be dismissed with prejudice or judgment entered on the pleadings.

Respectfully submitted,

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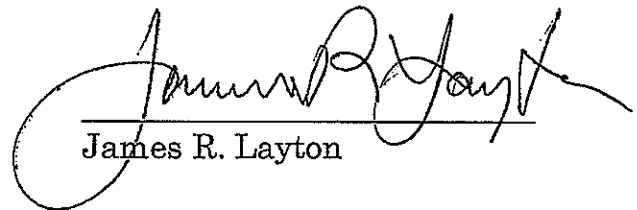
CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing was mailed
postage prepaid on October 6, 2011, to:

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POLITICAL PARTIES AND DIVISIONS



Political Divisions

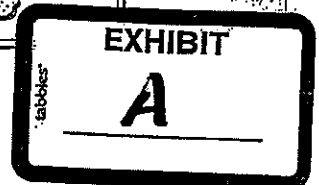
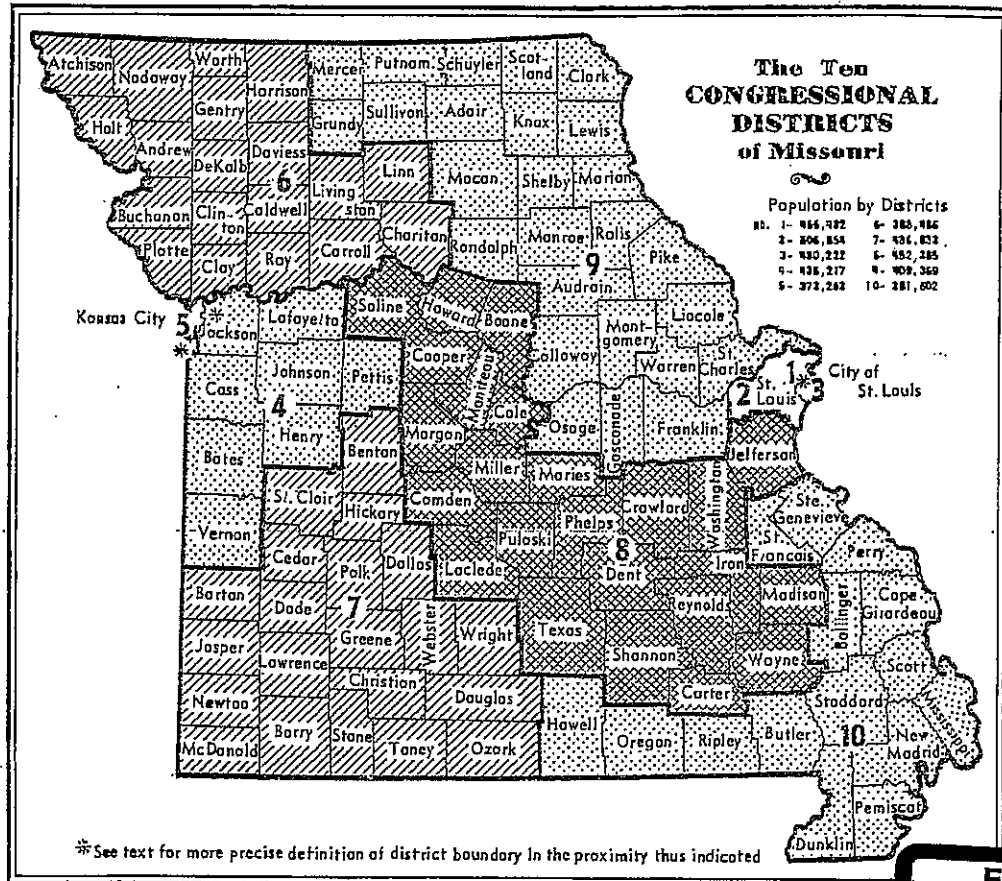


Congressional Districts of Missouri

First District—The first district shall be composed of the following townships from St. Louis County: Florissant, Normandy, St. Ferdinand and Washington; and the following wards in the City of St. Louis: Wards 1, 2, 3, 4, 5, 19, 20, 21, 22, 27. Population, 1960, 466,482.

Second District—The second district shall be composed of the following townships in St. Louis County: Airport, Bonhomme, Clayton, Concord, Creve Coeur, Gravois, Hadley, Jefferson, Lemay, Lincoln, Meramec and Midland. Population, 1960, 506,854.

Third District—The third district shall be composed of the following wards in the City of St. Louis: Wards 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 23, 24, 25, 26 and 28. Population, 1960, 480,222.



Fourth District—The fourth district is composed of the following Wards and Precincts in Kansas City, Missouri: Ward 15—all; Ward 17—all; Ward 18, precincts 4 and 5; Ward 22, precincts 3, 11 and 14; Ward 23—all; and Ward 24—all. Also, all of Jackson County, Missouri, outside of the corporate limits of Kansas City, Missouri, except that portion lying within the city limits of Grandview, Missouri, and being west of United States Highway Number 71, and of the following counties: Bates, Cass, Henry, Johnson, Lafayette, Pettis and Vernon. Population, 1960, 425,217.

Fifth District—The fifth district is composed of the following Wards and Precincts in Kansas City, Missouri: Wards 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 16—all. Ward 18, precincts 1, 2, 3, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18. Ward 19—all. Ward 20—all. Ward 22, precincts 1, 2, 4, 5, 6, 7, 8, 9, 10, 12, 13, 15; also that portion of Jackson County, Missouri, lying within the city limits of Grandview, Missouri, and being west of United States Highway Number 71. Population, 1960, 372,263.

Sixth District—The sixth district shall be composed of the following counties: Andrew, Atchison, Buchanan, Caldwell, Carroll, Chariton, Clay, Clinton, Daviess, DeKalb, Gentry, Harrison, Holt, Linn, Livingston, Nodaway, Platte, Ray and Worth. Population, 1960, 388,486.

Seventh District—The seventh district shall be composed of the following counties: Barry, Barton, Benton, Cedar, Christian, Dade, Dallas, Douglas, Greene, Hickory, Jasper, Lawrence, McDonald, Newton, Ozark, Polk, St. Clair, Stone, Taney, Webster and Wright. Population, 1960, 426,983.

Eighth District—The eighth district shall be composed of the following counties: Boone, Camden, Carter, Cole, Cooper, Crawford, Dent, Howard, Iron, Jefferson, Laclede, Madison, Maries, Miller, Moniteau, Morgan, Phelps, Pulaski, Reynolds, Saline, Shannon, Texas, Washington and Wayne. Population, 1960, 452,385.

Ninth District—The ninth district shall be composed of the following counties: Adair, Audrain, Callaway, Clark, Franklin, Gasconade, Grundy, Knox, Lewis, Lincoln, Macon, Marion, Mercer, Monroe, Montgomery, Osage, Pike, Putnam, Randolph, Ralls, St. Charles, Schuyler, Scotland, Shelby, Sullivan and Warren. Population, 1960, 409,369.

Tenth District—The tenth district shall be composed of the following counties: Bolinger, Butler, Cape Girardeau, Dunklin, Howell, Mississippi, New Madrid, Oregon, Pemiscot, Perry, Ripley, St. Francois, Ste. Genevieve, Scott and Stoddard. Population, 1960, 381,602.

Senatorial Districts of Missouri

City of St. Louis

First District—City of St. Louis is composed of the following wards and parts of wards, viz: All of Wards 11, 12, 13 and precincts 1, 2, 3, 4, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19, 20, 21, 22, 23, 24, 25, 26, 27, 28, 29, 30, 31, 32, 33, 34, 35 and 36 of Ward 23, bounded as follows: Beginning at a point in the center line of the main channel of the Mississippi River where the prolongation of the center line of Meramec Street intersects the same, thence running southwestward along the center line of the main channel of the Mississippi River to the city limits; northwestward and northward along the city limits to the center line of Southwest Avenue; eastward along the center line of Southwest Avenue to the center line of Tamm Avenue; southward along the center line of Tamm Avenue to the center line of Arsenal Street; eastward along the center line of Arsenal Street to the center line of Hampton Avenue; southward along the center line of Hampton Avenue to the center line of Olive Avenue; eastward along the center line of Olive Avenue to the center line of Tedmar Avenue; southward along the center line of Tedmar Avenue to the center line of Pernod Avenue; eastward along the center line of Pernod Avenue to the center line of Macklind Avenue; southward along the center line of Macklind Avenue to the center line of Chippewa Street; eastward and along the center line of Chippewa Street to the center line of Meramec Street; southeastward and eastward along the center line of Meramec Street and the prolongation thereof to the center of the main channel of the Mississippi River, the point of beginning. Population, 1960, 124,929.

Second District—City of St. Louis is composed of the following wards and parts of wards, viz: All of Wards 9, 10 and 15, and precincts 13, 14, 15, 16, 17, 18, 19 and 20 of Ward 8; precincts 1, 2, 3, 4, 5, 6, 7, 8, 9, 10, 11, 12, 13, 14, 15, 16, 17, 18, 19 and 20 of Ward 14; and precincts 10, 11, 12, 13, 14, 15, 16, 17 and 18 of Ward 16, bounded as follows: Beginning at a point in the center line of the main channel of the Mississippi River where the prolongation

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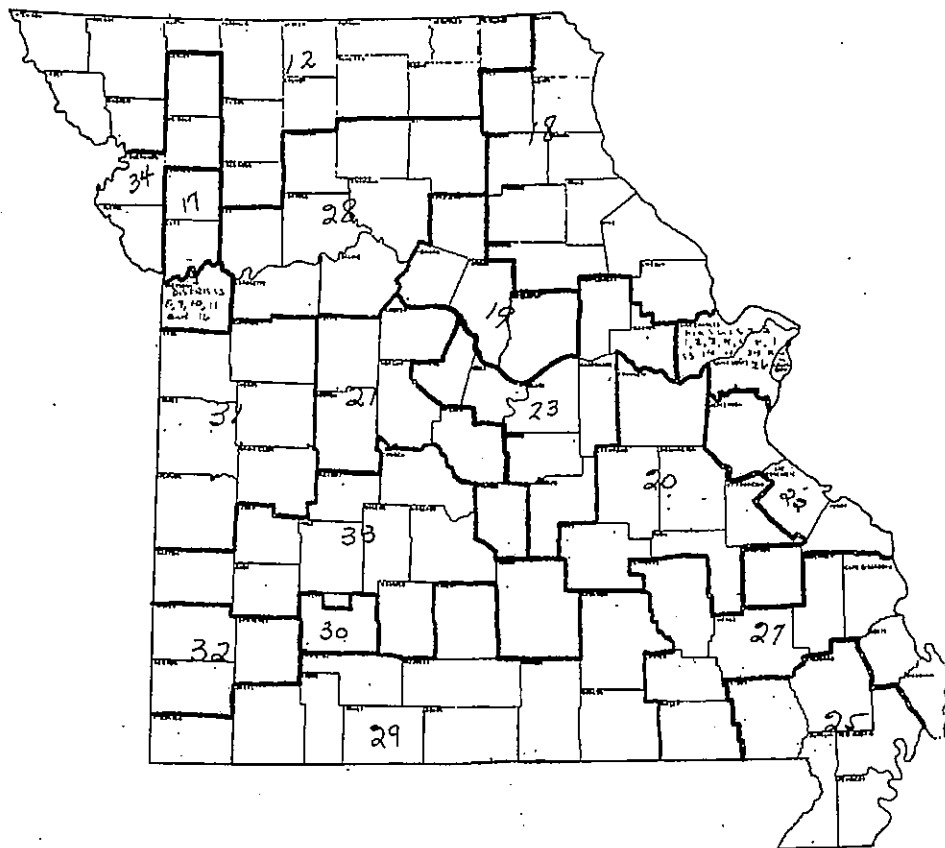
Mo. 429

Cite as 528 S.W.2d 422

APPENDIX 2

<u>DISTRICT</u>	<u>POPULATION</u>	<u>VARIATION</u>
1	138,812	+ .90%
2	138,038	+ .34%
3	138,917	+ .98%
4	138,042	+ .34%
5	137,575	.00%
6	137,309	- .19%
7	139,987	+ 1.8 %
8	131,001	- 4.8 %
9	131,045	- 4.7 %
10	130,761	- 4.9 %
11	130,932	- 4.8 %
12	143,514	+ 4.3 %
13	139,183	+ 1.2 %
14	139,838	+ 1.6 %
15	139,957	+ 1.7 %
16	130,819	- 4.9 %
17	136,106	- 1.1 %
18	138,609	+ .76%
19	139,856	+ 1.7 %
20	142,834	+ 3.8 %
21	137,625	+ .04%
22	141,149	+ 2.6 %
23	136,959	- .44%
24	139,441	+ 1.4 %
25	142,835	+ 3.8 %
26	139,444	+ 1.4 %
27	136,400	- .85%
28	138,636	+ .77%
29	139,080	+ 1.1 %
30	134,442	- 2.3 %
31	134,271	- 2.4 %
32	137,338	- .17%
33	142,283	+ 3.4 %
34	134,361	- 2.3 %

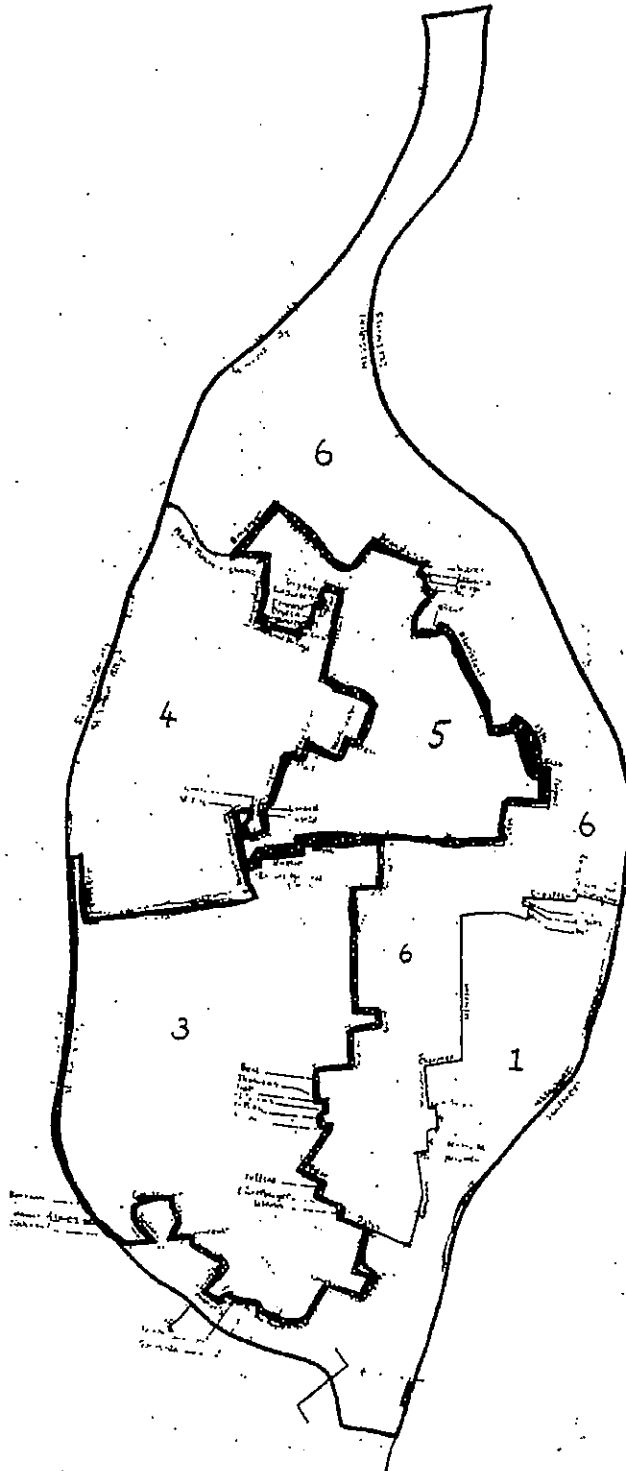
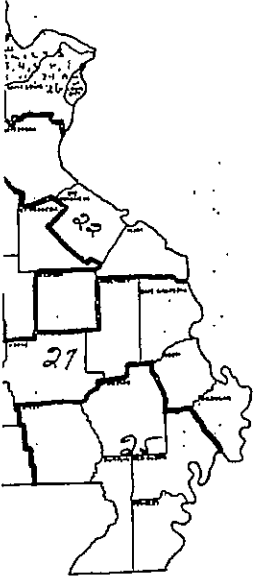
APPENDIX 3



PREISLER v. KIRKPATRICK

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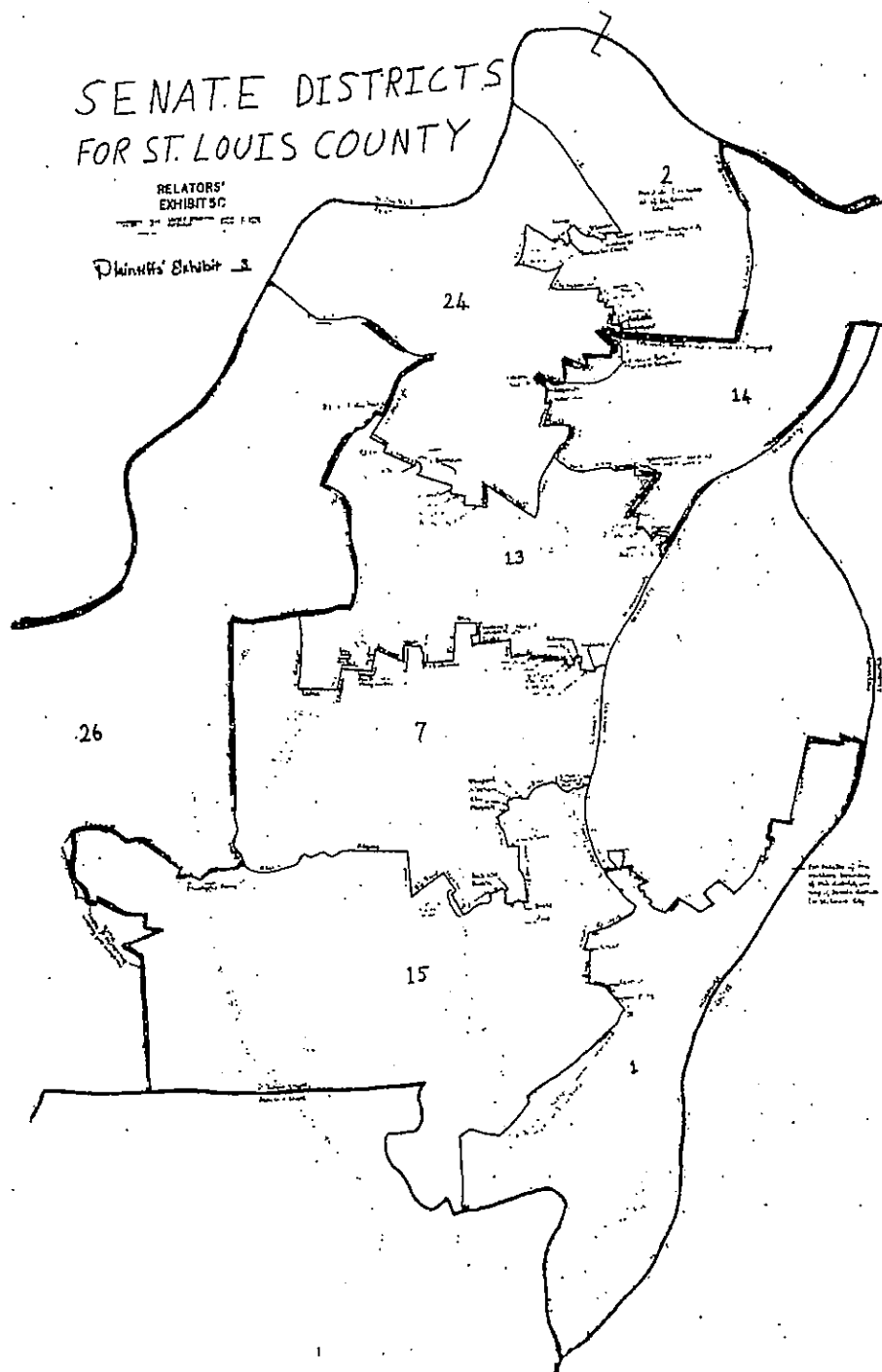
APPENDIX 4



APPENDIX 5

SENATE DISTRICTS FOR ST. LOUIS COUNTY

RELATORS'
EXHIBIT 5 C
Plaintiff's Exhibit 5



PREISLER v. KIRKPATRICK

Mo: 433

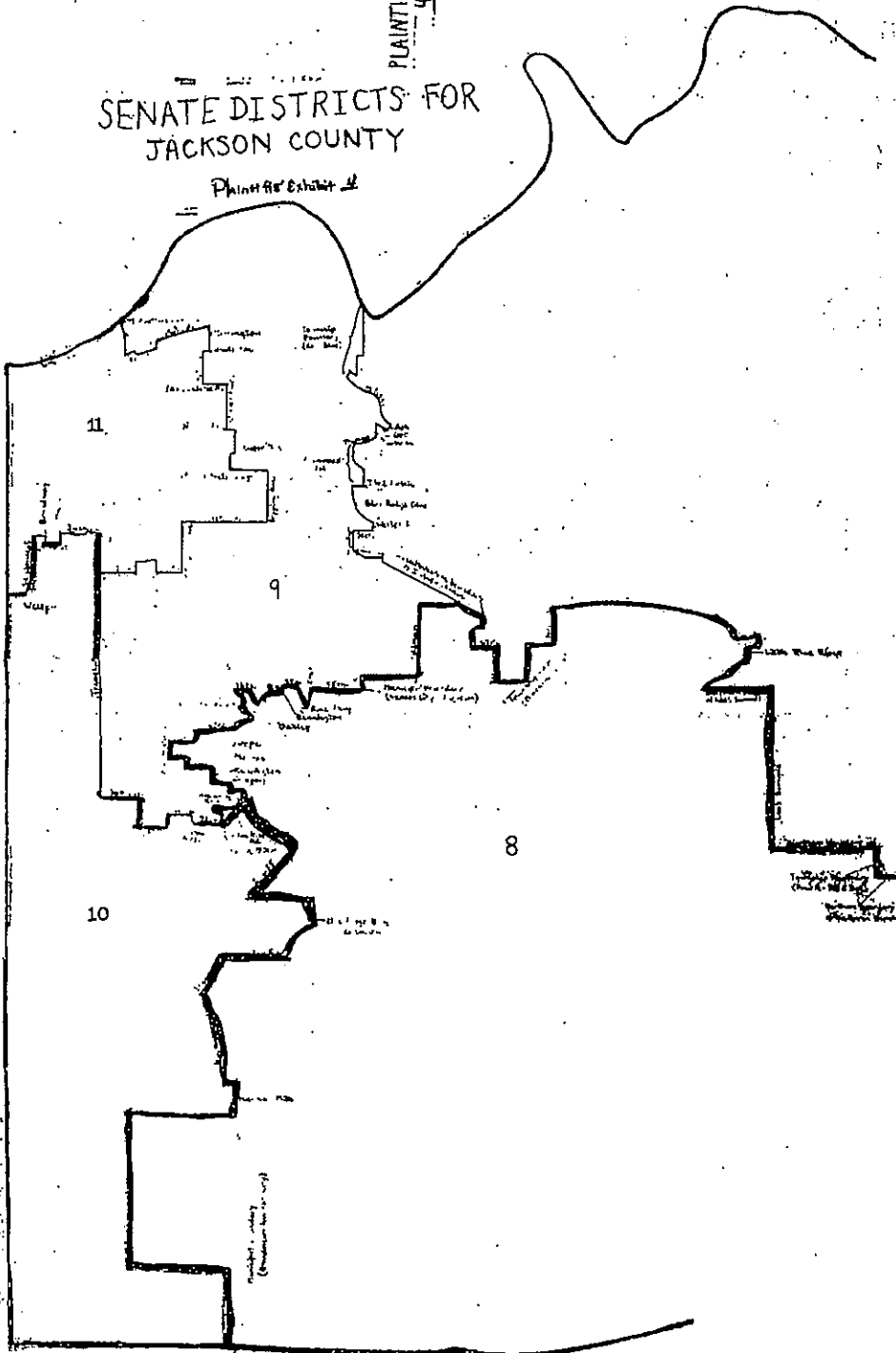
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APPENDIX 6

PLAINTIFFS
4

SENATE DISTRICTS FOR
JACKSON COUNTY

Plaintiff Exhibit 4



APPENDIX 7

PRESENT DISTRICTS LOCATED IN GREENE COUNTY
GREENE COUNTY
MISSOURI

