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IN THE SUPREME COURT OF MISSOURI

JACKSON COUNTY, MISSOURI, et al.,)
)
Respondents,)
)
vs.) No. SC 88038
)
STATE OF MISSOURI, et al.,)
)
Appellants.)

IN THE CIRCUIT COURT OF COLE COUNTY, MISSOURI
BEFORE THE HONORABLE RICHARD G. CALLAHAN

JACKSON COUNTY, MISSOURI, et al.,)
)
Plaintiffs,)
)
vs.) Case No.
) 06AC-CC00587
STATE OF MISSOURI, et al.,)
)
Defendants.)

TRANSCRIPT ON APPEAL

REPORTED BY:

MINDY S. HUNT, CSR, CCR #840
19th Judicial Circuit
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1 SEPTEMBER 6, 2006

2 HEARING

3 THE COURT: As I indicated to the
4 attorneys both sides will be given an hour to make
5 their arguments. And as I understand it, the
6 petitioners are going to divide their time roughly
7 45 minutes and 15 minutes.

8 MR. NEWMAN: That's correct, Judge.

9 THE COURT: It won't be like the academy
10 awards, but I'll try to give you a five-minute
11 notice when your time is done.

12 All the proposed findings of fact, if you
13 could, I would like to have those submitted by
14 e-mail as an attachment in Word so I can work with
15 any of the language that's submitted.

16 And finally, when you're making your
17 arguments, it's fine with me if you remain seated.
18 Some are more comfortable standing. It doesn't
19 make any difference to me, so -- all right.

20 Anything else?

21 You may.

22 MR. NEWMAN: Thank you, your Honor,

23 counsel, may it please the Court: Your Honor, if I
24 could, I know time is limited, but I want to make a
25 brief comment for the record. When the case began,

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1 when our case began back in June, I was working
2 hand in hand with Rich Miller. Rich and I had
3 worked on the conceal and carry case, the Brooks
4 case at trial in the Supreme Court, and we had
5 planned on bringing this case to fruition, to
6 conclusion as well. As the court knows, Rich died
7 unexpectedly on August the 15th.

8 And Rich Miller represented what is best
9 in the legal profession, your Honor. And I just
10 wanted the record to reflect that Rich made a
11 substantial contribution to this case. And,
12 unfortunately, his death came just a few days
13 before testimony began, and I actually wish that it
14 was Rich giving this argument and not me.

15 THE COURT: I appreciate that.

16 MR. NEWMAN: Your Honor, the concerns of
17 my clients when they turned to the ACLU, Katheryn
18 Shields, County Executive of Jackson County, Mayor
19 Slay of St. Louis, and County Executive Dooley of
20 St. Louis County, when they turned to the ACLU for
21 representation in this case, there were two
22 underlying themes that they were concerned about.

23 Their concerns were twofold.

24 The first concern was with the burden that

25 this act, particularly 115.427, that this

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1 Identification Act would impose on their respective
2 jurisdictions. They're, of course, taxpayers but
3 they also represent taxpayers. And they are well
4 aware that these unfunded mandates present a burden
5 to the taxpayers of Missouri counties when there is
6 no appropriation from the Legislature to fund the
7 mandates required by legislation.

8 Their second concern was protecting the
9 fundamental right to vote, to free voters in this
10 state from the unnecessary burdens imposed by this
11 Missouri Voter Protection Act and to maintain
12 elections in the free spirit that they exist in at
13 the present time.

14 The remedy that was chosen to protect the
15 fundamental right to vote and to stop the unfunded
16 mandates was the Hancock Amendment. The Hancock
17 Amendment was viewed as a non-partisan,
18 straightforward vehicle for striking down this
19 legislation. And I consider the citizens'
20 amendment, your Honor.

21 We have the deposition in this case of Mel
22 Hancock. Mr. Hancock is considered by many, the

23 author of the Hancock Amendment, certainly a
24 principal drafter of it. And we have as a backdrop
25 of the case, his views about the violations of the

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1 Hancock Amendment posed by this legislation.

2 But the real proof, the real proof in this
3 case came from the elected officials of the highest
4 level in the counties where we presented evidence
5 of the unfunded mandates. And that evidence was
6 presented to this court with specificity. It was
7 compelling evidence. It was practically undisputed
8 evidence.

9 THE COURT: Let me ask you something. And
10 I understand, particularly from Jackson County the
11 testimony was pretty specific and precise and
12 persuasive in that regard as to an increased cost.
13 But at what point -- if you're going to view the
14 Hancock Amendment, government is always going to
15 get more and more complicated. It's just the
16 nature of the beast, I think.

17 But local governments have been
18 responsible for conducting and supervising
19 elections for years. And to the extent that the
20 procedures get changed every now and then, not --
21 it's just getting more complicated to trigger the
22 Hancock Amendment. And if so, as a matter of

23 policy, then government services are to some extent

24 frozen forever.

25 MR. NEWMAN: Your Honor, there has been

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1 other changes in election law, which did not give
2 rise to Hancock violations. But in particular, not
3 only from Jackson County, from
4 Mr. Nichols, but from Judy Taylor in St. Louis
5 County, whose testimony was that the additional
6 costs, the unfunded mandate would be \$215,000 alone
7 for St. Louis County, the largest county in the
8 state, for the upcoming election.

9 Wendy Noren from Boone County testified to
10 her fiscal note as to the amounts the would be
11 required. And Carol Signaigo, likewise testified
12 that there would be increased costs, increased
13 costs which are a direct result of this act.

14 THE COURT: The Legislature passes
15 criminal laws that make mandatory jail time a
16 condition of probation. Is that an unfunded -- I
17 mean, the fact that we have the police and the
18 courts and the jail already there, and they change
19 criminal laws and require mandatory minimum
20 sentences of jail time as a condition of probation,
21 is every change in state law going to -- or does it
22 have to be something new? It seems to me that the

23 conduct of elections and the ascertaining who the
24 people are and that is something that's already
25 there. Yes, they've changed the procedures. Yes,

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1 maybe it's a little bit more complicated, but does
2 every change in the law that makes things a little
3 bit more complicated mean that the state has to
4 appropriate the money for that? And I don't know
5 if --

6 MR. NEWMAN: Your Honor, this is a policy
7 question that was answered by the voters of the
8 State of Missouri. The Hancock Amendment isn't a
9 statute. It's part of our constitution. And as
10 long as the Legislature mandates new costs and
11 services, which they have in this case, according
12 to all these witnesses. We are talking about Bob
13 Nichols, 20 years as a director; Carol Signaigo, 12
14 years as assistant and a consultant to this day for
15 the City of St. Louis; Judy Taylor, 14 years
16 assistant and director; Wendy Noren, 22 years as
17 county clerk.

18 THE COURT: I'm not questioning the
19 evidence as to the increased costs at the moment.
20 That's not my question.

21 MR. NEWMAN: With due respect, your Honor,
22 when the evidence is that there are new and

23 increased costs, it is mandated or dictated, I
24 should say, by the Hancock Amendment that those
25 costs be borne by the state through an

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1 appropriation of funds. That did not occur here.

2 There is no question whatsoever that there is no

3 appropriation of funds in this case, none

4 whatsoever.

5 And each of these individuals, your Honor,

6 if you recall when I showed them the allegations of

7 the petition, they said they had all reviewed the

8 act, and they said these are new and increased

9 costs, and they fixed amounts on those costs. They

10 fixed amounts. And these are substantial amounts.

11 The Jackson County was \$470,00 for the next five

12 elections. So, your Honor, I think that that's a

13 policy question that's been answered by the

14 citizens of the State of Missouri when they passed

15 the Hancock Amendment.

16 In addition, your Honor, when the evidence

17 came in from these individuals, these high-level

18 individuals, they did it in a manner that they had

19 been doing it hundreds of times. They did it in

20 the manner required of election officials under

21 115.077 of the existing statutes. They made

22 estimates according to that statute and they did it

23 in this particular case. They found the unfunded
24 mandates new requirements for notification cards,
25 new requirements for signage, new requirements for

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1 postage, new requirements for training, new
2 requirements for staff, new requirements for new
3 ballots. All new requirements that had costs
4 affixed to them. All violating the Hancock
5 Amendment.

6 Your Honor, I think the broader issue, the
7 broader issue in this case, is what failed in the
8 Brooks case, and that was the lack of statewide
9 proof. And in this case we have the statewide
10 proof. We have, I believe, unassailable evidence.
11 Real evidence from Betsy Byers. Here is a woman.
12 There is no better witness in the State of Missouri
13 to testify about election law than Betsy Byers.
14 I'll even call this the Byers role. She is the
15 person. She is the director. She's at the top.

16 Her tasks as Deputy Secretary and now as
17 Secretary as co-director of elections statewide,
18 her job is to implement the laws, interpret the
19 laws, supervise the training, and she has found
20 increased costs statewide in every county in this
21 state, every county in this state for creation of a
22 new voter identification card, the clear and

- 23 conspicuous signage that's required, additional
- 24 expenses related to hiring and training of staff,
- 25 additional poll worker training.

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1 Your Honor, these are not modifications of
2 what was previously being done. These are
3 substantial additional costs that are being imposed
4 on the counties. And what did Judy Taylor tell
5 us? If these costs are not appropriated by the
6 Legislature, the result is that general revenue,
7 general revenue funds that go to schools and fire
8 protections and water works are diverted from those
9 public purposes, diverted from those purposes to go
10 to funding of this law, which clearly violates the
11 Hancock Amendment. I think that that conclusion is
12 inescapable, your Honor. These are new costs.
13 These are substantial costs and these are costs,
14 according to Betsy Byers, that runs statewide.

15 THE COURT: Your view is that any time
16 legislation results in an additional cost to local
17 government, that's a violation?

18 MR. NEWMAN: And I think the Supreme Court
19 has so said. I think the Supreme Court has so
20 stated. Your Honor, in the Brooks case, we had
21 such sparse evidence from three counties and the
22 court called it sparse evidence. We had evidence

23 that it cost 38,000 to get fingerprinting done

24 for --

25 THE COURT: But there you were clearly

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1 dealing with a new application. Something that was
2 new to the law of the State of Missouri.

3 MR. NEWMAN: It wasn't as clear as this
4 case, your Honor, and I'll tell you why. There was
5 an issue in that case of whether or not that was a
6 fee, whether or not that might be exempted from the
7 Hancock Amendment. This is a classic, classic
8 Hancock Amendment case. This case has the unfunded
9 mandates, the new costs, the lack of appropriation
10 and the burden that has to be borne by local
11 taxpayers. That's the purpose of the amendment.
12 That's the reason the citizens of Missouri passed
13 it. That's the policy of this state. And that is
14 what the Supreme Court has recognized.

15 And I don't think that a hypothetical,
16 with due respect, your Honor, hypothetical of some
17 other legislation, is going to detract from the
18 fact that in this case these costs are real. These
19 costs are there, and these costs are not
20 appropriated by the Legislature. And they result
21 in the violation of the Hancock Amendment.

22 Your Honor, Section 115.427 under the

23 Hancock Amendment is unconstitutional. There is
24 ample evidence in this case for the Court to
25 consider. That evidence has been thorough,

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1 complete. It's compelling evidence and it's
2 statewide evidence. If your Honor fails to issue
3 an injunction enforcing this act, if this act
4 should stand, then the counties are going to incur
5 as costs the additional costs that we heard
6 testimony about in this case from the various
7 witnesses.

8 That is exactly and precisely what the
9 Hancock Amendment is intended to prevent. It's
10 intended to prevent additional burdens on the
11 citizens, the taxpayers of the State of Missouri.
12 In this case your ruling that the act is
13 unconstitutional will preserve free and fair
14 elections without unnecessary burdens placed upon
15 the voters of this state. Thank you.

16 THE COURT: Thank you.

17 MR. DOWNING: May it please the Court.
18 Your Honor, I won't rehash the facts that we went
19 through last week. I just want to highlight the
20 fact that the burdens that our evidence established
21 that will be imposed upon those who don't have
22 photo IDs in this state are burdens that are

23 specifically targeted to those who are poor, who
24 are uneducated, who are minorities. These are the
25 people in our state who don't have driver's

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1 licenses. So these are the very people who are
2 going to be impacted by this law. It's not the
3 lawyers, the doctors, the politicians, the
4 journalists. It's the poor. And so I just ask the
5 Court to keep that in mind as we go through each of
6 these claims.

7 Our first claim, your Honor, is Count I.
8 This is a facial challenge. Our claim in Count I
9 is that a photo ID requirement constitutes an
10 additional qualification on the right to vote under
11 Article 8, Section 2. And this is at tab 18 in
12 your notebook. It's also on page 31 of the first
13 amended petition. The language, although it's
14 quite lengthy, is fairly straightforward, your
15 Honor.

16 What this provision does, it established
17 five qualifications for the right to vote in the
18 State of Missouri. You must be a citizen of the
19 United States, you must be over the age of 18, you
20 must be a resident of this state, you must be
21 resident of the political subdivision in which you
22 are to vote, and you must be registered within the

23 time prescribed by law. Those are the exclusive
24 qualifications that our constitution sets forward
25 as a qualification to vote in the state.

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1 Now, this provision also has two exclusive
2 disqualifications. If you are a person who has a
3 court-appointed guardian of his or her estate by
4 reason of mental incapacity, your constitutionally
5 disqualified from voting in this state, or if
6 you're a person who is involuntarily certified for
7 a mental institution pursuant to a court
8 adjudication, you're constitutionally disqualified
9 from voting.

10 What this provision also does, finally,
11 your Honor, it gives the Legislature one and only
12 one discretionary decision in terms of
13 qualifications to vote. The Legislature's
14 empowered by this section that to provide by law
15 that a person convicted of a felony or crime
16 connected with the exercise of the right of
17 suffrage, the Legislature can determine that those
18 people are not qualified. That's the only
19 discretion that this provision gives the
20 Legislature in terms of qualifications to vote.

21 THE COURT: Let me ask you this: Was the
22 old section, 427, unconstitutional?

23 MR. DOWNING: We don't believe so, your
24 Honor, and let me point out why. That section
25 required the voter when they showed up at the polls

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1 to present one of maybe 25 different types of forms
2 of identification. All of which are readily
3 available to every voter in the state. One of
4 which is mailed. The voter identification mailed
5 to every voter in the state. The utility bill,
6 bank statements, government check, there's been no
7 claim that I'm aware of anywhere in this state that
8 that's unconstitutional because it doesn't require
9 affirmative steps of the voter to do anything.
10 They just have to show up at the polls with readily
11 available identification.

12 This is different. For those who didn't
13 have photo IDs in this state, you're not only
14 required to show up at the polls, you're required
15 to take several additional steps. You're required
16 to deal -- as we went through last week -- with the
17 bureaucratic maze in Missouri, maybe in multiple
18 states, you're required to pay money and that's
19 unconstitutional. That's an additional
20 qualification.

21 Your Honor, this section drives home how
22 important this provision is. If you look in

23 Article 8, Section 2, again, it says specifically
24 that all persons who are qualified to vote under
25 this section, not disqualified, are

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1 constitutionally entitled. That's the word in the
2 constitution. It's a constitutional entitlement to
3 vote. If you possess the qualifications in this
4 constitutional provision, and the Legislature can't
5 interfere with that.

6 And the Legislature has interfered in
7 three ways. It's added a new qualification to
8 vote, you have to possess, you have to go out and
9 get and possess and present a photo ID. If you
10 don't have that, you're disqualified. And it's an
11 intent to exclude by law from voting a category of
12 people that the constitution says that the
13 Legislature can't prohibit from voting, because
14 it's not people convicted of a crime.

15 So for all those reasons this is an
16 additional qualification to vote under our
17 constitution.

18 THE COURT: Let me ask you something. If
19 there hadn't been the changes to the revenue
20 license laws in 2000-- I don't know if it was 2004
21 or 2005 -- but if we hadn't had those significant
22 changes in how someone obtains a driver's license

23 or an ID card, do we have the same infringement on

24 the burden to vote or the right to vote?

25 MR. DOWNING: Your Honor, I don't profess

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1 to be an expert on what the prior requirements
2 were. To the extent that they require a voter to
3 jump through hoops and to pay money to vote, they
4 would be unconstitutional. To the extent that they
5 didn't, if all they did was require the voter to
6 present what everybody already has, maybe not, but
7 I haven't studied those requirements.

8 THE COURT: Okay.

9 MR. DOWNING: Moving on, your Honor, to
10 the next count, Count II, this count is also based
11 on an expressed provision in our constitution. And
12 this is an extraordinary provision. This is at tab
13 19 of the notebook, your Honor, also set forth on
14 page 33 of our first amended petition. This
15 provision says that no power, civil or military,
16 shall at any time interfere to prevent the free
17 exercise of the right of suffrage.

18 This is a powerful extraordinary provision
19 that doesn't exist in federal constitution. But it
20 exists in our state constitution to make it -- this
21 is our Bill of Rights. This is the Bill of Rights
22 that our founding fathers in Missouri put into this

- 23 constitution to make it crystal clear that the
- 24 Legislature or any other power can't interfere with
- 25 the right to vote.

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1 Well, this photo ID requirement does just
2 that, your Honor. It imposes burdensome and
3 time-consuming hurdles for some, as the evidence
4 established. It will make it impossible to vote
5 for some.

6 Your Honor, our Supreme Court has looked
7 at dictionary meanings of words in interpreting our
8 constitution statutes. I looked in the Merriam
9 Webster dictionary for the definition of
10 interfere. What does that mean? It says, To
11 interpose in a way that hinders or impedes. It
12 doesn't say prevent. There's no requirement that a
13 law prevents someone from voting to be
14 unconstitutional. All it has to do is hinder or
15 impede someone from voting.

16 And this law unquestionably hinders or
17 impedes registered voters from the free exercise of
18 the right of suffrage. It places an obstacle in
19 front of people. The poor, the elderly, the
20 disabled, the obstacle serves a very substantial
21 hinderance or impediment, so the law is
22 unconstitutional under this provision as well.

23 Third, your Honor, this is our claim that
24 the photo ID requirements makes payment of a fee an
25 electoral standard and, therefore, violates the due

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1 process and equal protection clauses of our
2 constitution. Now, your Honor, the Legislature,
3 when it enacted the Missouri Voter Protection Act,
4 recognized that it was unconstitutional to require
5 anyone to pay money to vote. It waived the \$11 fee
6 that otherwise would be applied to obtain a
7 non-driver's license ID. So it recognized it was
8 unconstitutional to have to pay money to vote.

9 But what the Legislature did not do,
10 either intentionally, through oversight or
11 otherwise, it did not agree to pay or waive the
12 fees necessary to obtain underlying documents to
13 get the non-driver's license ID. And because you
14 have to have a photo ID to vote, the Legislature,
15 in essence, has mandated that you pay money to
16 vote. And that's been unconstitutional in this
17 country for over 40 years as dictated by the Harper
18 versus Virginia Board of Elections case from the
19 US Supreme Court.

20 If you look at tab 20 in the notebook,
21 your Honor, there are a couple of quotes there from
22 Harper that are directly on point. It says -- the

23 Supreme Court says that we conclude that the state
24 violates the equal protection clause, the 14th
25 amendment, whenever it makes the affluence of the

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1 voter or payment of a fee an electoral standard.

2 Now, in Harper, your Honor, the argument
3 was raised, just like the proponents of this photo
4 ID requirements are arguing now. In Harper, the
5 court said it is argued that a state may exact fees
6 from citizens from many different kinds of
7 licenses. That if it can demand from all an equal
8 fee for a driver's license, it can demand from all
9 an equal poll tax for voting. Just like the
10 argument that's raised here. The state's saying
11 all we're doing is requiring somebody to pay money
12 for a license. That's clearly not
13 unconstitutional.

14 And in tab 20 in the notebook, the second
15 quote, the Supreme Court expressly reject that kind
16 of argument. It says, To introduce wealth or
17 payment of a fee as a measure of a voters'
18 qualifications, is to introduce a capricious or
19 irrelevant factor. The degree of discrimination is
20 irrelevant.

21 Your Honor, what the state is arguing here
22 really, is that it can do indirectly what it

- 23 acknowledges it can't do directly. It fails to
- 24 explain how the payment of a fee by a voter for a
- 25 birth certificate to obtain the right to vote is

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1 any different from making them pay for the
2 non-driver's license ID. And from the perspective,
3 your Honor, from the person needing to obtain a
4 photo ID to vote, paying a fee to get an underlying
5 document to vote is clearly no different than
6 paying a fee to get a non-driver's license ID to
7 vote. There is no material difference.

8 Now, your Honor, the state has argued that
9 it can require the payment of money to vote based
10 upon the Indiana and Georgia federal court
11 decisions. As I mentioned a week or two ago, your
12 Honor, at our first hearing, I believe, those cases
13 provide no support for that argument for this
14 reason: In those cases, and I'll quote the
15 language from the Indiana judge, the courts found
16 that it was wholly speculative that anybody would
17 have to pay money to get any of the underlying
18 documents to vote in that case. There were other
19 documents that were allowed to get a non-driver's
20 license ID in those states that did not require the
21 payment of money.

22 In this state, there are only two

23 documents. If you're a resident of the United
24 States, a citizen of the United States, that you
25 can present to get a certified birth certificate.

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1 You have to get a birth certificate or a passport
2 and both of those cost money. So those cases are
3 not precedent, your Honor, for the argument that
4 they are making here.

5 Now, you can call this a poll tax or you
6 can call it a fee. But at the end of the day, at
7 the end of the day, a Missouri voter without a
8 photo ID is going to be forced to pay money to vote
9 in this state. That's unconstitutional.

10 Your Honor, our next claim is under
11 Article 1, Section 10 and 2, our due process and
12 equal protection claims. This is a broader claim,
13 your Honor. This is a claim that the photo ID
14 requirement constitutes an undue burden on a
15 fundamental constitutional right, the right to
16 vote. And that is not narrowly tailored to meet a
17 compelling state interest in violation of our
18 constitution.

19 So, your Honor, even if the photo ID
20 requirement didn't require the payment of money to
21 vote, it's still unconstitutional under the equal
22 protection and due process clause for this reason:

23 Our Supreme Court, your Honor, has been consistent
24 and clear that whenever the constitutionality of a
25 state statute is at issue, there's a two-part

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1 analysis that must be undertaken. We cite in our
2 brief, and it's at tab 21 of your notebook, the
3 Etling versus Westport Heating case. That's a
4 Missouri Supreme Court 2003 case, but it's no
5 different than a myriad of other Missouri Supreme
6 Court cases on this issue.

7 The required analysis for any Missouri
8 court analyzing the constitutionality of the
9 statute is this: The first step -- and I'm quoting
10 from Etling -- the first step is to determine
11 whether the classification operates to the
12 disadvantage of a suspect class -- I'll get to that
13 in a minute -- or impinges upon a fundamental right
14 explicitly or implicitly protected by the
15 constitution. If so, the classification is subject
16 to strict scrutiny, and this Court must determine
17 whether it's necessary to accomplish a compelling
18 state interest. And then Etling goes on to say,
19 fundamental rights include the right to vote.

20 There is an unbroken line of cases in this
21 state, your Honor, that make crystal clear strict
22 scrutiny is required in cases in which the right to

23 vote is impinged.

24 One case not cited in our brief that I'll

25 present to your Honor on the right to vote issue

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1 specifically where strict scrutiny was applied, In
2 Re Extension of Boundaries of Glaze Creek Sewer
3 district in Jefferson County, 574 S.W.2nd 357.
4 That's a Missouri Supreme Court 1978. That's a
5 voting rights case where the court mandated strict
6 scrutiny be applied.

7 So the proper inquiry under Missouri law,
8 your Honor, under our constitution is whether the
9 photo ID requirement is necessary to only
10 accomplish a compelling state interest and whether
11 it's narrowly tailored to effectuate only those
12 interests.

13 Now, the professed state interest here as
14 you have heard is to prevent voting fraud.
15 Assuming for a minute that this is a legitimate,
16 compelling state interest, the real question, your
17 Honor, is the photo ID requirement necessary to
18 accomplish this interest? Based on all the
19 evidence that's been presented in this Court, your
20 Honor, the unequivocal answer to that question is,
21 no, it's not necessary. By any stretch of the
22 imagination it's not necessary.

23 The type of election fraud that could be
24 prevented, as the Court heard from witness after
25 witness from the stand and it's also in the

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1 affidavits, the only type of voting fraud that can
2 be prevented by this is voter impersonation fraud.
3 That doesn't exist here. As you heard from the
4 Secretary --

5 THE COURT: But don't they have a right
6 to, at least, address that if they choose? And in
7 what fashion would it be -- would it be appropriate
8 to require a thumbprint or a fingerprint from every
9 voter instead of the signature?

10 MR. DOWNING: Your Honor, the analysis
11 would be on that, first of all, it's a burden.
12 Does it impinge the constitutional right to have
13 somebody put a fingerprint out? You can argue that
14 it doesn't, that that's not a burden. You don't
15 have to wind through the bureaucratic mazes. You
16 just give them your finger. So it may not even
17 impinge upon a constitutional right to begin with.
18 And if it does, then the question becomes is it
19 necessary to fulfill a compelling state interest.
20 And your Honor has heard from witness after witness
21 voter impersonation fraud is not a problem in this
22 state.

23 THE COURT: And assuming -- and I
24 understand that from the evidence, but assuming
25 that to be true, the state would still have some

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1 interest in ensuring it doesn't become a problem.

2 I mean, that would still be --

3 MR. DOWNING: Okay.

4 THE COURT: Now, you believe you're okay

5 with the old 427.

6 MR. DOWNING: Yes.

7 THE COURT: But surely they are not -- are

8 there other things they could do in that regard?

9 MR. DOWNING: Your Honor, exactly. And

10 that was going to be the next part. That was the

11 next part of the analysis. Even if the Court found

12 that what they did was necessary to fulfill a

13 compelling state interest, we don't think it is for

14 reasons we talked about, then the next step -- that

15 doesn't end the analysis. The next step is, Okay.

16 Is the law narrowly tailored to effectuate only

17 that interest or less restrictive means to

18 accomplish the same purpose?

19 Well, we modified our law in 2002 in this

20 state to provide the identification requirements

21 that your Honor has referenced today. You have to

22 provide some form of identification. The

23 identification that's readily available to
24 everybody. The evidence in on that, your Honor,
25 there's been no reported instance of voter

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1 identification fraud in this state since 2002,
2 since the law has changed. So the Legislature has
3 already enacted less restrictive means to
4 accomplish the same end. So the second part of the
5 analysis is, is this narrowly tailored to
6 effectuate only what is necessary to accomplish or
7 the less restrictive means to do it? There are
8 less restrictive means.

9 Other things the Legislature has done to
10 prevent this type of voter fraud in Missouri, your
11 Honor, it's a felony in this state. If you go into
12 the poll and try to impersonate another voter to
13 vote, that's a felony. And, your Honor, the
14 reason -- the other thing that the state has done,
15 a less restrictive means, if you go to the polls to
16 vote, your name is checked off the registration
17 list. And if someone comes in later and tries to
18 impersonate you, that person is going to find out
19 through the election authorities, who has already
20 crossed somebody off, is somebody is committing a
21 felony. The election authorities are bound to
22 report it.

23 By contrast if someone comes in before you
24 and votes under your name, and you come in to vote
25 and you've already had your name crossed off, they

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1 are going to know about that, too. You are going
2 to complain about it. So that's why this type of
3 fraud doesn't occur in Missouri, your Honor. It's
4 too easily caught. And the penalty if you get
5 caught, you're committing a felony.

6 Now, your Honor, there's been a lot of
7 discussion about whether strict scrutiny applies or
8 whether there's a flexible test of what the US
9 Supreme Court applies. I don't have a lot of
10 time --

11 THE COURT: I assume if I find there's an
12 undue burden, then strict scrutiny does?

13 MR. DOWNING: Under Missouri
14 constitutional law, there's no question if there's
15 an undue -- if the law impinges, if it impinges on
16 a constitutional right, a fundamental right, strict
17 scrutiny is required. Now, what the intervenors
18 have argued and the state is, well, you know, we
19 got this line in the US Supreme Court cases. The
20 Berdict case and some other cases that talk about
21 this flexible scrutiny.

22 Let me just try to get to the point and

23 cut to the chase. None of those cases, your Honor,
24 deal with direct impact on a voter's fundamental
25 right to vote. Those cases deal with situations in

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1 which -- like for example, Berdict --

2 THE COURT: I understand.

3 MR. DOWNING: So those deal with different

4 situations. They have not offered a single US

5 Supreme Court case, at least, and I have found one,

6 that when there's a direct impact, an impingement

7 on the right to vote of a voter, right to cast a

8 ballot, that strict scrutiny hadn't been applied by

9 the US Supreme Court. So whether you apply the US

10 Supreme Court precedent or Missouri Supreme Court

11 precedent, this court should partly apply that the

12 result's the same.

13 THE COURT: Let me ask one last question.

14 I understand and it seems to me that there is quite

15 an impact on women just because of the fact with

16 the name changes, it's still commonplace on

17 marriages or even if you get into hyphenated names,

18 I guess that's a name change. And so it clearly

19 with women getting certified copies of marriage

20 licenses or multiple licenses is going to be a

21 requirement in addition to the birth certificate,

22 where is your proof -- I understand the logical

- 23 argument that it affects minorities and poor
- 24 disproportionately. But how much of that is
- 25 speculation and -- well, how much of that is

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1 speculation? How strong is your proof in that

2 area?

3 MR. DOWNING: Your Honor, you're moving on

4 to our disparate impact now. Because it doesn't --

5 we don't have to show any statistics or anything

6 like that on our count we have just gone through,

7 the undue burden on fundamental right. There's no

8 disparate impact we're required to show on

9 minorities or women or anybody else. But now let's

10 move to the next count where that issue is raised,

11 and that's our count, the next count in the case in

12 which the photo ID requirement we allege was

13 designed to and does disparately impact people in

14 suspect classes.

15 THE COURT: Do I have to find it was

16 designed to?

17 MR. DOWNING: Your Honor, you do. You

18 do. You have to find that it was purposeful

19 discrimination under that count. We have to show

20 disparate impact and purposeful discrimination.

21 And then our case that says that, your Honor, is

22 Hunter versus Underwood. This is a case the

23 intervenors have cited.

24 THE COURT: And which counts are you

25 talking about now?

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1 MR. DOWNING: This is Count V, your
2 Honor. And if you turn to tab 26 in the notebook,
3 this is where you raise the issue of proof. Here's
4 some of the proof that we have offered --

5 THE COURT: Which tab?

6 MR. DOWNING: Tab 26. Okay. I won't go
7 through all this proof, your Honor, but let me just
8 highlight what I think the most important fact that
9 we have highlighted. And these are all
10 stipulated. More than 21 percent of Missouri's
11 African/American households have no car and,
12 therefore, have no need for a driver's license.
13 This is over four times the percentage of Missouri
14 white citizens that have no car.

15 So from that fact just alone, and we've
16 got a lot of other statistics about poverty and how
17 it affects blacks and whites and the those sorts of
18 things, but from that fact alone, the reasonable
19 inference from the evidence, your Honor, is that
20 African/Americans are less -- far less likely to
21 have a valid photo ID to vote in this state than
22 white Missourians. So we believe that fact alone

23 is sufficient to show disparate impact.

24 Okay. But that's not enough, as the

25 Court's raised. We need to show discriminatory

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1 purpose. What evidence do we have of that? Well,
2 here are a couple of points, your Honor. At tab
3 four of the notebook, is Margaret Donnelly's
4 affidavit. And a new affidavit was just presented
5 by Rich Lamb this morning. Both those affidavits
6 are based on personal knowledge, and both of those
7 affidavits attest to the fact that the Missouri
8 Legislature was specifically informed in its
9 deliberations over this act that the photo ID
10 requirement would disparately impact
11 African/American citizens in this state. It's
12 unequivocal testimony from two different sources
13 now. So the Legislature knew that if it enacted
14 the photo ID requirement, it would disparately
15 impact African/Americans.

16 Discriminatory purpose can also be
17 inferred, your Honor, from the fact that -- I mean,
18 let's be real. You've got Republican majorities in
19 the House and Senate in the State and a Republican
20 governor. This is a law that African/Americans --
21 will disproportionately impact African/Americans.
22 And we presented evidence and it's a

- 23 well-established fact in this state that
- 24 African/Americans vote overwhelmingly for
- 25 Democrats.

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1 Our evidence shows that in the last
2 gubernatorial election in this state, 88 percent of
3 African/Americans voted for Claire McCaskill as
4 compared to 11 percent for Matt Blunt. In the same
5 election, the African/American voters voted by a
6 15-to-1 overwhelming majority for John Kerry --

7 THE COURT: Well, let me ask you this:
8 Where am I -- if I find disparate impact, but I
9 don't find the purposeful, intentional
10 discrimination?

11 MR. DOWNING: You're left with Count IV.
12 It's still an undue burden on a fundamental right
13 that's unconstitutional. But I don't want to be
14 dishonest with your Honor. You need to find
15 discriminatory purpose under Count V before it's
16 unconstitutional under that argument.

17 So here's some more evidence, though
18 discriminatory purpose. We have a republican
19 majority enacting a law that they know
20 disproportionately affects African/Americans. They
21 have a strong motive to disproportionately affect
22 African/Americans because African/Americans vote

23 against them in elections in Missouri.

24 And some other reasons that show that

25 this -- there are reasons -- sort of like an

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1 employment discrimination case, your Honor. They
2 articulated a reason for this that is legitimate,
3 voter fraud. Well, what that raised is a pretext
4 for discrimination. Why do I say that? Their own
5 republican governor, Matt Blunt has said there's no
6 need for this law. The last two elections in this
7 state have been fraud-free, so there's no need for
8 the law.

9 If they really wanted to address voter
10 fraud, what would they have done? They would have
11 gone to the area where voter fraud is documented in
12 the last six years, absentee ballot fraud. Did
13 they, in this law, require someone who is voting
14 absentee at the local county clerk's office to show
15 a photo ID? No. That undermines any argument that
16 the real reason for this was to prevent voter
17 fraud.

18 Other evidence of a protectoral nature of
19 this, your Honor, they require you, not only to
20 present a photo ID, but it has to be a non-expired
21 photo ID. Well, your Honor, and if the purpose is
22 simply to identify the voter, what does it matter

23 if you have a driver's license that expired two
24 months ago? Your driver's license is still going
25 to identify you as a voter. This is additional

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1 evidence that the purpose of this was not really to
2 prevent voter fraud, but was in reality to suppress
3 voting by those people most likely to have expired
4 driver's licenses. Who are those people? The
5 poor, the elderly, minorities, the
6 African/Americans are disproportionately poor in
7 this state, as some of our additional statistical
8 evidence shows.

9 So for all these reasons, your Honor, we
10 believe there's enough evidence in the record. The
11 Court is only required to make this finding by a
12 preponderance of the evidence. There's no clear
13 and convincing standard that I'm aware of in this
14 state. So if the Court believes by a preponderance
15 of the evidence that the purpose of this law was in
16 whole or in part to disadvantage African/American
17 citizens of this state, was to put an undue burden
18 on them disproportionate to others, then we prevail
19 on that count as well.

20 Your Honor, on our next count, this is
21 Count VI, is the photo ID requirement improperly
22 discriminate between in-person voters and absentee

23 voters. Your Honor, there is no rational basis

24 whatsoever. I mean, talk about strict scrutiny.

25 Even under rational basis analysis, there is no

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1 articulated rational basis from the state to allow
2 this type of discrimination. These are voters who
3 are voting in an election. They are equally
4 qualified.

5 THE COURT: What about the line of cases,
6 though, that allow the Legislature to proceed one
7 step at a time in terms of reform as opposed to all
8 at once?

9 MR. DOWNING: Well, if it truly is one
10 step at a time -- well, first of all, that doesn't
11 apply when you're impinging a constitutional
12 right. Those cases don't apply at all in that
13 scenario. And, your Honor, on rebuttal I'll find
14 the the case that says that. But when you're
15 impinging constitutional rights, the deference
16 normally shown to the legislative judgments doesn't
17 apply. So when you've got a situation where you're
18 discriminating on a fundamental right, this is a
19 right to vote, you're discriminating among voters
20 who are similarly situated.

21 THE COURT: And I've to look at the
22 Georgia cases again, but I didn't quite understand

23 that argument as much for the simple reason on one
24 hand you're arguing the voter ID is an undue
25 burden. And then you're arguing if they had placed

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1 it on absentee voters, if they had taken this undue
2 burden and also placed it on absentee voters,
3 somehow that would be better?

4 MR. DOWNING: Well, here's what's at
5 issue. It would cure the discrimination between
6 absentee voters and in-person. What it would do is
7 unduly burden the absentee voters. I mean, what
8 the real argument is it shouldn't be a burden on
9 anyone is the real argument.

10 Your Honor, with the short time, let me
11 move on finally, and I'll stop and want to address
12 this in less value if the Court believes that
13 you're thoroughly familiar with this. The other
14 argument that's been really advanced fundamentally
15 is, well, you know, even if we've got some
16 constitutional problems with this law, we've got
17 this whole provisional ballot scenario and this
18 will cure it. And let me just run through briefly
19 why that doesn't cure it, your Honor.

20 THE COURT: And are we talking about the
21 provisional ballot for 2006 or are we just
22 considering the ultimate provisional ballot in

23 2008?

24 MR. DOWNING: Well, my view is to consider

25 the ultimate, the long-term aspect of this law

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1 because of a provisional ballot in the short term,
2 we're challenging the law going long term, your
3 Honor. So there are only three categories of
4 people who are entitled to a provisional ballot.
5 Those are the disabled, people with religious
6 belief against photo IDs and people who are born
7 before 1941.

8 THE COURT: Let me ask you about that, and
9 I intend to ask the state. But on that, it seems
10 to me they have to sign an affidavit that says I am
11 unable to obtain a current, valid form of personal
12 identification because I was born before January 1,
13 of '41. I've got a lot of older relatives who may
14 have been born before '41. I don't know that they
15 would claim that that -- the fact that they were
16 born in the '30s is the reason they are unable to
17 obtain it.

18 MR. DOWNING: Your Honor, you are exactly
19 right.

20 THE COURT: It's not just an age
21 exemption. It seems to me they have to sign an
22 affidavit swearing that their age has caused them

23 and so that's --

24 MR. DOWNING: That's exactly right. And,

25 your Honor, you may remember Kathleen Weinschenk's

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1 testimony. She was the disabled, the woman with
2 cerebral palsy who testified through the
3 interpreter, she specifically testified that she
4 could not get a provisional ballot under that
5 provision, because she didn't feel she could
6 truthfully swear under oath that she was unable to
7 get a photo ID because she has people who can help
8 her do things. What she did testify, though, it
9 was an undue burden on her right to vote.

10 So the provisional ballot language that
11 your Honor has pointed out, it doesn't cure
12 anything. And let me just leave you with one more
13 point before the Secretary of State's lawyer kicks
14 me out of here, the other point on this, it can't
15 cure a constitutional issue as to elections where
16 provisional ballots aren't allowed.

17 As you have heard the testimony,
18 provisional ballots are not allowed in local
19 elections in the state, only in primary and general
20 elections. So even if it could cure the
21 unconstitutionality of the law, otherwise it can't
22 cure it as to all elections.

23 THE COURT: I take it you also have the
24 problem with they have to come back a second time?

25 MR. DOWNING: Absolutely, your Honor.

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1 That's an additional burden.

2 THE COURT: You're not making any claims
3 under the United States code as they did in the
4 Georgia case.

5 MR. DOWNING: Under what, your Honor?

6 THE COURT: 42 USC 1971 or --

7 MR. DOWNING: No. We're strictly under
8 our state constitution.

9 THE COURT: All right. Thank you.

10 Yes. I apologize. I could hear fine. I
11 didn't have the podium microphone on during the
12 first part. It is now on so you may not have to
13 shout as loud as Mr. Downing and Mr. Newman did.

14 MS. WOOD: Your Honor, the Secretary of
15 State's Office will be very brief. As we started
16 out this case, it's the position of the Secretary
17 of State's Office that we share many of the
18 concerns expressed by the plaintiffs, as that the
19 photo ID requirements may jeopardize the ability of
20 thousands of Missourians to exercise their
21 fundamental right to vote. I will not go back over
22 the legal argument by Mr. Newman or Mr. Downing,

23 because I think they have done a very exhaustive
24 job of explaining the legal part. We would just
25 like to focus the Court on two things.

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1 The first is on the issue of
2 constitutionality and the burden on the fundamental
3 right to vote. The Secretary of State's Office --
4 under Senate Bill 14, the Secretary of State's
5 Office is charged with providing advanced notice to
6 voters. And we have do that within four months.
7 The bill was signed by the Governor under an
8 emergency clause. Four months everybody was
9 supposed to scramble and make sure that the public
10 knew what they needed to do in order to have the
11 photo ID.

12 As part of that campaign, that we have
13 started initiating, the Secretary of State's Office
14 did a comparison between the Missouri Centralized
15 Voter Registration Database and the Department of
16 Revenue's driver's and non-driver's list. And in
17 order to do a targeted mailing to voters who most
18 likely will not have a photo ID. That match came
19 up to 240,000 Missourians. Obviously, we admit
20 that whenever you compare two lists that are
21 created for a different purpose, you may have a
22 situation where it's not 100 percent accurate. But

23 it's the best estimate available at this time of

24 the voters who may be impacted.

25 Even if you look at Lowell Pearson's

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1 affidavit, who is Deputy Director for Revenue, we
2 gave him a courtesy copy of our list to assist them
3 with their duties under Senate Bill 1014. They did
4 a random look at ours and came up with 11 voters
5 out of 100 that may have the photo ID required. If
6 you take that number, then you're at 213,000
7 Missourians. And when you put that together with
8 the plaintiffs' evidence of the affidavits they
9 have submitted, the live testimony, as well as the
10 census information, that is a large majority of
11 Missourians that may be impacted on their ability
12 to vote. So we wanted to present that evidence and
13 put that in front of the Court.

14 The other issue in terms of Missourians
15 getting notification, is the mobile units by the
16 Department of Revenue, and the Department of
17 Revenue's issuance of the non-driver's license.
18 Based on Mr. Pearson's affidavit, as of August
19 30th, they have done approximately 1,600 of these
20 non-driver's license. If you use either number,
21 the 240,000 or the 213,000 you're still at
22 approximately 99 percent of the people who still

23 may need this type of photo ID to vote. So with
24 that, we would just like to join in the arguments
25 of the plaintiffs on the rest of their legal

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1 arguments.

2 The other thing we would like to address
3 is the provisional ballots. You have heard
4 evidence last week that this bill doesn't have an
5 impact, because people can still vote. They can
6 vote a provisional ballot. But a provisional
7 ballot, as we all know, is not a regular ballot.
8 It's a ballot that you go in. It's a different
9 ballot. It's stamped provisional. It may or may
10 not entitle you to vote. It has to jump through
11 hoops. You have to have a signature verification,
12 and then there are other requirements that already
13 existed in 115.430 that a provisional ballot has to
14 jump through in order to be counted.

15 The other key thing is that the position
16 of the --

17 THE COURT: Those are the transitional
18 rules --

19 MS. WOOD: Right.

20 THE COURT: -- right? Okay.

21 MS. WOOD: As well as our position would
22 be actually any provisional ballot under 115.427 or

- 23 115.430 has to go through the extra hoops. Because
- 24 when you look at the provisional ballot language in
- 25 115.427, either the classes of voters or that

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1 bridge group to 2008, the standard is you have to
2 do a signature verification, and you have to make
3 the determination if the person was eligible to
4 cast a ballot at the polling place. The only place
5 in the statute where it talks about eligibility to
6 cast a ballot is over in 115.430. So our argument
7 is that you have to read all of the provisional
8 ballot provisions in 115.427 has to be read in
9 harmony with 115.430, therefore, provisional
10 ballots are not available for anyone. Provisional
11 ballots are only available in primary and general
12 elections, which would leave an exclusion for local
13 elections.

14 So with that, your Honor, the Secretary of
15 State's Office would just request that this Court
16 make a determination as to the constitutionality of
17 the photo ID requirements in Senate Bill 1014. And
18 we will reserve the rest of the time for the
19 plaintiffs.

20 MR. PRESSON: May it please the Court: I
21 will be addressing the Hancock Amendment that were
22 explained by Mr. Newman. And with all due respect

23 to him, I don't think this is the classic Hancock
24 case. An unfunded mandate claim under cases of the
25 Supreme Court and others, have established quite

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1 clearly that there are two fundamental requirements
2 here. First, there must be a requirement by the
3 state of a new or increased activity or service.
4 And, second, there must be the requirement that the
5 political subdivisions experiences increased costs
6 as a result of that new requirement.

7 Now, what I find interesting is the courts
8 have made very clear that neither of these is
9 presumed. They both must be proven. They are not
10 to be established by common sense, speculation or
11 conjecture. What I find interesting here is that
12 proof even of the mandate is essential. What we
13 have here, I think, is trying to circumvent the
14 very initial threshold issue here and that is
15 whether there is a mandate.

16 Most of the evidence of costs that the
17 plaintiffs submitted was based largely on the idea
18 that there is going to be a substantial increase in
19 the number of provisional or maybe absentee ballots
20 in the next election.

21 THE COURT: Or they would have to
22 prepare. Whether there would be or not, they would

23 have to prepare for a substantial increase in the

24 number of provisional ballots.

25 MR. PRESSON: Well, either way, your

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1 Honor, they have to prepare for a turnout, you
2 know, of every registered voter, as Mr. Nichols, I
3 think, said. But that's not really the way the
4 real world operates. I mean, if they, you know,
5 know that off-year elections like this is, has as a
6 turnout rate of approximately 50 percent, I don't
7 think they are going to prepare and print ballots
8 for all 100 percent turnout of their registered
9 voters. But even if that's true, that's really
10 what they have to do anyway. As he said, they have
11 to prepare for basically a worst-case scenario.

12 But the point is, your Honor, is the idea
13 of provisional ballots or absentee ballots are an
14 existing part of the election scheme. And the idea
15 that there may be more of them, you know, is,
16 first, not only speculative, but it is not the
17 result here of any mandate. There is no
18 requirement in Senate Bill 1014 that there be more
19 or that certain voters have to use them. If there
20 is, in fact, some mandate in this bill, it is a
21 mandate on the voters to use the photo ID. And if
22 they don't have that, and have, you know, some

23 religious objection, can't get it --

24 THE COURT: What religious objections are

25 they? I don't recall hearing any evidence.

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1 MR. PRESSON: That's probably more
2 Mr. Harding's issue, but I frankly don't know. I
3 assume maybe Muslims would have some, you know,
4 particularly women who wear veils or whatever,
5 might have some religious objections, but that's
6 just speculation on my part, your Honor.

7 But in any event, there is no mandate here
8 that there will be an increase. The bill just
9 doesn't say, you know, that it has to be. As a
10 matter of fact --

11 THE COURT: Let me ask you: They are
12 arguing that there is a mandate that they have to
13 require a certain type of identification and if the
14 people don't have that identification, so there is
15 some sort of mandated activity on the board also.
16 They would be violating the law if they didn't.

17 MR. PRESSON: Well, I think the mandate
18 here that exists is not on the counties, not on the
19 election authorities. It's on the voters. The
20 voters who have to present what is now the
21 appropriate ID. And if they don't have it, if they
22 didn't get it for whatever reasons, and if they

23 choose to use one of the alternatives, either a

24 provisional or an absentee, but that's all the

25 result of their personal decisions, personal

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1 actions.

2 And the Supreme Court has made clear that,
3 you know, a mandate on a third person that might,
4 you know, indirectly have some financial impact on
5 a local subdivision is not really the subject of
6 the Hancock Amendment.

7 THE COURT: Well, let me ask you this: In
8 the provisional balloting and the like, there's all
9 sorts of extra or new activities from the election
10 judges and the like. I mean, certainly provisional
11 balloting -- well, is more complicated than it used
12 to be.

13 MR. PRESSON: Well, it may be. I mean,
14 complicated is kind of a value term. Certainly
15 it's new. There may be some new steps in the
16 process for a provisional ballot.

17 THE COURT: Provisional balloting was only
18 enacted when?

19 MR. PRESSON: I believe the evidence was
20 in 2002.

21 THE COURT: Now, for purposes of this
22 lawsuit, can I -- because that 2002 legislation

- 23 wasn't challenged, is that an existing level of
- 24 activity or services already being provided by
- 25 local government, or can I consider 2002, plus 2006

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1 in deciding whether there's a new activity or
2 service?

3 MR. PRESSON: Well, I think they haven't
4 pleaded that 2002 changes in any way violated the
5 constitution. So I think you must start here based
6 on these pleadings where that's the existing --

7 THE COURT: I thought they said diminimus,
8 that 2002 was diminimus, but maybe I'm --

9 MR. PRESSON: Well, I don't think there's
10 any allegation, you know, that that was the
11 violation or that, you know, that it was a new
12 mandate. I think the allegation here is that
13 Senate Bill 1014 is the new mandate.

14 THE COURT: So I consider 2002 legislation
15 as existing activity or service?

16 MR. PRESSON: I would say you have to,
17 yes, your Honor, based on the way the claim has
18 been presented.

19 THE COURT: So I'm only looking at 2006?

20 MR. PRESSON: And only look at the 2006.
21 So, you know, we have an existing activity or
22 service of provisionals. And we've long had

23 absentee ballots.

24 THE COURT: Let me ask you this: What

25 about the notion that the state just making things

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1 more complicated isn't necessarily an increased

2 level of services or activity?

3 MR. PRESSON: Well, again, complicated is

4 kind of a value judgment. Changes, let's say,

5 there have always been changes and probably always

6 will be. But I would say this: If there's an

7 existing activity or service, just the fact that

8 over time it become more expensive to do that, the

9 cases indicate that is not a Hancock violation. I

10 mean, the first case that says --

11 THE COURT: But they are saying it's not

12 over time, it's because of a specific change in

13 legislation in 2006 that the existing level is

14 going to be more complicated?

15 MR. PRESSON: Well, it's just, you know, a

16 change. For instance, what if, a hypothetical,

17 what if the state embarked on a campaign to have

18 more people register or to get better voter

19 turnout? I mean, that would mean more people --

20 ultimately, I assume, some percentage of newly

21 registered voters would show up. That means more

22 people would show up. Would that be a Hancock

23 problem? Somehow I don't think so, your Honor.

24 Just because it becomes more expensive if more

25 people vote. I don't think that's a Hancock

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1 problem.

2 It isn't tied, what I think, as to a
3 change in a mandate. And I think that's why the
4 courts have focused on and insisted upon proof of
5 both elements, not just costs, but proof of a new
6 mandate. And that's why, you know as I say, in the
7 Perler O'Cannon (phonetic sp) where they were
8 talking about alleged changes in the prevailing
9 wage law, they said it is a mandate, and even if it
10 was a change, which was a matter of argument, as I
11 understand in that case, but even if it is, you
12 know, that's a mandate on somebody else other than
13 the political subdivision, on the contract.

14 Now, the fact that political subdivisions
15 might then have some increased costs because they
16 can only deal with the contractor that pays
17 prevailing wage, well, that's not a Hancock
18 problem, because the mandate there is on somebody
19 else. Similarly in the St. Charles versus the
20 Director of Revenue case, there was a mandate on a
21 state official. It definitely had a financial
22 impact on St. Charles County. But, again, that

23 wasn't a Hancock problem. So putting a mandate on
24 somebody else even if it does have some indirect
25 financial impact is not the case have indicated not

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1 a real Hancock problem.

2 The problem also is, you know, not only
3 whether theoretically, we might say anticipated,
4 but we have no real idea here. This is, I think,
5 nothing more than conjecture and speculation, which
6 the courts have indicated is not enough in terms of
7 an increased cost. On the one hand, we had
8 Mr. Nichols from Jackson County base his estimates
9 on 10,000 additional provisional ballots. But his
10 testimony, as I recall, was also that that was
11 based on the population in Chapter 198 facilities
12 of the elderly that he thought might use this and
13 might need or might not have a photo ID.

14 But, you know, why would you necessarily
15 make that assumption? I mean, I'm not sure that as
16 a sociologist, you know, he had any sort of
17 qualifications to make that sort of connection.
18 Why that would be a good basis for it saying there
19 would be 10,000 extra provisional ballots? On the
20 other hand, we had Ms. Taylor from St. Louis County
21 testify that she expected a 20 percent increase in
22 the number of provisional ballots. But 20 percent

23 increase in St. Louis County amounted to only a few
24 hundred. And if you spread that out over their
25 500, approximately, precincts, you had basically

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1 one a precinct.

2 So we have two very divergent views here
3 as to the number of additional provisional ballots
4 we might even have. That's why I think it amounts
5 to really nothing more than conjecture and
6 speculation here. Because if it is, you know,
7 something like one or two additional provisional
8 ballots showing up at every polling place, I think
9 that is diminimus. I don't think you're going to
10 need two extra poll workers, you know, for every
11 poll location across the state if that's what we
12 have. And we don't really know what we're going to
13 have.

14 THE COURT: If there is an increase in
15 provisional ballots, what's the effect?

16 MR. PRESSON: Well, I don't know what the
17 effect will be.

18 THE COURT: No. I mean, in terms of is
19 that a Hancock issue?

20 MR. PRESSON: No. Because I don't think
21 there is the mandate here to actually, you know,
22 force the use of a provisional. Like I say, the

23 mandate here is really not on the subdivision. The

24 mandate is on the voters. And then it's on their

25 actions. I mean, the General Assembly didn't, you

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1 know, pass a law that said there should be an extra
2 20,000 provisional ballots cast in the next
3 election that we're just going to willy-nilly take
4 some provisional ballots and treat them as
5 provisional and thereby make it more complicated,
6 to use your Honor's terminology. That wasn't the
7 sort of thing they did.

8 I mean, the mandate here is really photo
9 ID. And if people don't get that, if they didn't
10 want to pursue one of these options, it's really
11 their own choices. Not the result of any mandate,
12 if there is even going to be an increase. It's not
13 the result of a mandate. And that's why there are
14 two essential elements here. And I think they are
15 lacking really on both.

16 There's really no, I think, substantial
17 evidence that they will need that, any additional
18 people, two for every polling place. Training is,
19 again, an existing requirement under Section
20 115.103. I assume that as the laws change over
21 time -- and as plaintiffs have acknowledged they
22 change over time -- that the training changes over

23 time. But that's just a general, you know,
24 existing requirement that there be training. So
25 there may be new things to be trained on, but I

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1 don't think there's nothing in Senate Bill 1014
2 that says it now must be an additional day of
3 training or something like or the time or anything
4 like that. They still set the amount of time they
5 want to.

6 As to the other things, you know, the
7 signage, the affidavits, you know, I think, again,
8 we don't really know what the need for these are
9 going to be. In terms of signs, again, there's no
10 real specification as to the type size. You don't
11 have to have them professionally printed. You
12 don't have to have the affidavits professionally
13 printed. Whenever I need an affidavit, I just type
14 it up on the computer and print it off. It seems
15 to me, even if I wanted to run off 500 of them,
16 that that's still pretty much a diminimus cost.
17 The paper isn't that expensive.

18 But, you know, we really don't know,
19 again, what they are going to be, what the costs
20 are going to be. And the cases are also clear that
21 in terms of an unfunded mandate, discretionary
22 costs are not to be covered. And so if they want

23 to engage in some additional activity, they can't
24 thereby create a Hancock problem. You know, the
25 complaints about the disaster provision, I mean,

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1 this is simply --

2 THE COURT: That's asking to be
3 discretionary. I wasn't as convinced on that.

4 MR. PRESSON: I'm confused by that, your
5 Honor, because I don't know what it is they are
6 actually alleging is the new mandate. This set up
7 panels of courts and the courts of appeals, and Mr.
8 Nichols testified the only example in his opinion
9 or in his knowledge was that, you know, I believe
10 he said, "St. Joe, cancel an election," but had to
11 do it pursuant to a court order. This simply sets
12 up a procedure for a particular court to go to. I
13 don't know that that really changes anything.

14 I think they are really trying to build up
15 a lot of discretionary items, guesses and
16 speculation into this unfunded mandate claim, and I
17 don't think that that is going to be sufficient.
18 The cases are very clear that you need evidence on
19 all of these, and I think the evidence is lacking.

20 THE COURT: Thank you.

21 MR. HARDING: May it please the Court:
22 The Missouri Voter Protection Act is a

- 23 constitutional application of our State
- 24 Legislature's power to enact reasonable regulations
- 25 with respect to the voting process in Missouri.

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1 The Missouri General Assembly is vested, your
2 Honor, in its representative capacities, with the
3 full power of the people. This has been described
4 by the Missouri Supreme Court as the cornerstone of
5 our state government. Legislation aimed at
6 confirming that a voter is, in fact, who they claim
7 to be falls squarely within this power.

8 Your Honor, I'm going to try to address
9 the issue the Mr. Downing discussed with reference
10 to the first amendment claim. I think I'm going to
11 take those in a little bit of a different order,
12 but I'm going to try to briefly hit them all, if
13 possible. And the first was the allegations that
14 the Missouri Voter Protection Act is a new
15 qualification to vote.

16 Prior to the law, voters showing up at
17 their polling place were required to provide
18 identification proving that they were, in fact, who
19 they claim to be. After the law, voters are still
20 required to show up at the polling place and prove
21 that they are the person they claim to be. The
22 only change in the law is what constitutes adequate

23 identification. This does not create a new
24 qualification for voting. The qualifications today
25 are the same as they were prior to Senate Bill

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1 1014. A voter must show that they are a citizen of
2 the United States, that they are of the appropriate
3 age, that they are a residency of the State of
4 Missouri, and that they are properly registered.

5 The plaintiffs, your Honor, notably cannot
6 show a single case in Missouri or any other court
7 where a court has held that the state is not
8 allowed to ask for identification from a voter.

9 According to the plaintiffs' argument, any
10 identification would run afoul of the
11 constitution. I believe the term that Mr. Downing
12 used was hinder or impede. But under that
13 analysis, the current law is unconstitutional.

14 As the law stands now, voters must show up
15 with some form of identification. The
16 constitution, obviously, as it exists now and has,
17 does not specify what form of identification is
18 appropriate. So under the existing law, according
19 to the plaintiffs' theory, any identification would
20 run afoul of the constitution. And it wouldn't
21 stop at identification. Using the hinder or impede
22 analysis, you could argue that precinct-based

23 voting is not constitutional. The Missouri Supreme
24 Court and certainly the US Supreme Court has held
25 to the contrary. They've held that voters are

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1 required to show up at the proper precinct. Well,
2 under the hinder and impede analysis, this would
3 also be unconstitutional.

4 THE COURT: Let me ask you this: In the
5 2008 general election, if somebody shows us to vote
6 that everybody in the polling place knows them, all
7 the judges, everybody working there, they recognize
8 the person. They know who he is, and they know
9 he's been voting there all his life, but he doesn't
10 have any picture ID, can he vote?

11 MR. HARDING: I believe there is an
12 exception within the statute, your Honor, that
13 allows for election judges to sign an affidavit.
14 Two election judges. One would be the democratic
15 appointee. The other would be the republican
16 appointee acknowledging that they know the
17 individual, that the individual --

18 THE COURT: That was in the old statute.
19 But that looks to be repealed.

20 MR. HARDING: I believe, your Honor, that
21 there is a provision for that in the new statute.

22 THE COURT: I'm not -- I'll give you leave

23 to file something short in writing after the

24 argument.

25 MR. HARDING: And I believe it may be in

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1 the briefs also, your Honor, although, I'm not
2 certain on that.

3 THE COURT: I didn't see that, but . . .

4 MR. HARDING: Your Honor, a voter
5 identifying themselves to the polls in Missouri
6 dates back to at least 1921. In 1921 a voter was
7 required to give their name, and if asked, their
8 address to the election judges. In 1983, depending
9 on the precinct that the voter was voting at, they
10 were required to identify themselves by name. And
11 in some cases write their address and sign their
12 name on a certificate. Other precincts at that
13 time required them to actually show their voter
14 identification card.

15 In 2002, the ability to actually write
16 your name and address down on a piece of paper was
17 changed to what the requirements before the new
18 senate bill were, which was that you have to show
19 up with some form of identification. Typically, as
20 I understand the testimony to be, voters would use
21 either their driver's license or their voter ID
22 card. Other forms were also acceptable. But the

23 fact that remains that some form of identification

24 was required.

25 Senate Bill 1014 is simply an evolution in

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1 an ongoing process of requiring voters to identify
2 who they claim to be. As cited by petitioners
3 repeatedly, the purpose of the senate bill is to
4 prevent fraud. Plaintiffs have spent considerable
5 effort and attention in alleging that the
6 documented cases of fraud in Missouri are low. But
7 as I believe the Court hinted at, there's no magic
8 number of cases of fraud that the state must
9 achieve before they can pass legislation. Surely
10 as Ms. Byers testified to, any level of fraud is
11 not acceptable.

12 I don't think that the standard is or has
13 ever been that in the last election we only have,
14 hypothetically, 10 cases of fraud, and that wasn't
15 sufficient to pass new legislation. But in this
16 election we had 11, so now we've reached some sort
17 of magic number and we can enact legislation to
18 prevent this sort of thing. I think the state has
19 a compelling and important interest in ensuring
20 that no fraud exists at any level in any amount and
21 at any time.

22 In addition to that, your Honor, there

23 are --

24 THE COURT: Let me ask you: If there had

25 been evidence of in-person fraud, would that

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1 strengthen the state's case, or is that

2 irrelevant?

3 MR. HARDING: I think the level of fraud

4 is far less important than is the fact that the

5 state is entitled to prevent any fraud.

6 THE COURT: But not completely

7 irrelevant?

8 MR. HARDING: Well, I guess that's all,

9 you know, in the eye of the beholder whether it's

10 completely irrelevant. I think it's certainly

11 relevant. But I think more importantly, there are

12 documented cases of fraud in Missouri. The fact of

13 the matter is that in this case, in this state,

14 there have been documented case of election judges

15 voting twice. There have been documented cases of

16 dead people voting. There's even been a documented

17 case of somebody's dog voting. So there has been

18 documented cases --

19 THE COURT: I thought they were just

20 registered, but I --

21 MR. HARDING: I believe they actually cast

22 a vote.

23 THE COURT: Let me ask you this: Under
24 this legislation, generally speaking, isn't every
25 voter going to have to purchase a birth certificate

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1 unless they already have one?

2 MR. HARDING: Unless they already have
3 one, I believe, that with -- there are some
4 exceptions, but I believe that if somebody does not
5 fall within those exceptions that, yes.

6 THE COURT: And I assume those aren't
7 given out? I don't recall whether I got one at
8 birth or not. But presumably, certainly a high
9 percentage of individuals of voters are going to
10 have to purchase, everybody is going to have to
11 purchase a birth certificate.

12 MR. HARDING: Well, your Honor, I don't
13 think there's been, and I think that is a fatal
14 problem with the plaintiffs' case, is I don't think
15 there's been any evidence whatsoever on what the
16 percentage of people are that are going to have to
17 purchase a birth certificate. I think there's been
18 a lot of fight about what the numbers are of people
19 who may not have the proper identification, but
20 there's been no evidence of those people who don't
21 already have a birth certificate. And there's been
22 no evidence --

23 THE COURT: But right now the people who
24 have driver's licenses weren't required to present
25 birth certificates or the like in getting those

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1 driver's licenses. And as they renew their
2 driver's licenses for the first time under the 2005
3 law, they are not going to be allowed to renew
4 unless they purchased a birth certificate. And if
5 they've been married, they are going to have to
6 purchase a certified marriage certificate for each
7 marriage.

8 MR. HARDING: Well, your Honor, I think
9 that --

10 THE COURT: Is that true?

11 MR. HARDING: Well, I think that, first of
12 all, it could be. I think that the requirements to
13 have a birth certificate with your driver's license
14 changed when the federal law changed, so I --

15 THE COURT: I understand where the blame
16 lies, perhaps, but it doesn't change the fact that
17 Missouri had to change their law in 2005 because of
18 the federal legislation. And so everybody does
19 have to obtain a birth certificate, and they are
20 not giving it out for free.

21 MR. HARDING: Well, again, I would
22 respectfully take issue with everybody, because I

- 23 don't think that's been the evidence on the case.
- 24 But hypothetically, yes, I think there are
- 25 certainly some people who will have to obtain a

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1 birth certificate.

2 THE COURT: Well, wouldn't every woman who
3 has been married and had any name change, whether
4 it's hyphenated or not, would have to obtain a --
5 have to buy a certified marriage certificate for
6 each such change?

7 MR. HARDING: That may be the case, but I
8 also think, your Honor, that that would be the case
9 under the existing law. I think under the existing
10 law, if you were to show up with a voter ID card
11 that did not have your current name on it, that
12 would certainly present a problem. You, obviously,
13 also wouldn't be able to present a driver's license
14 with your maiden name on it.

15 THE COURT: I'm not clear that this is to
16 get the driver's license.

17 MR. HARDING: I'm sorry. I don't
18 understand.

19 THE COURT: Go ahead.

20 MR. HARDING: And, your Honor, also if I
21 could just briefly --

22 THE COURT: Let me ask you this just as a

- 23 follow up, the fact that there are those costs
- 24 involved, what does that do in terms of the Harper
- 25 decision, the payment of any fee for the right to

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1 vote?

2 MR. HARDING: I don't think it does
3 anything. I think your Honor is asking whether or
4 not this qualifies as a poll tax.

5 THE COURT: No. Because the term poll
6 tax -- the Harper decision said more than just a
7 tax. It said the payment of any fee --

8 MR. HARDING: To vote.

9 THE COURT: -- to vote. So I would
10 describe it as the payment of a fee to vote.

11 MR. HARDING: Well, your Honor, I would
12 certainly not categorize this as a situation where
13 somebody has to pay a fee to vote. I think the
14 fact that you have to pay a fee for a birth
15 certificate, with all due respect to the
16 plaintiffs, is simply that it's obtaining a birth
17 certificate. A birth certificate can be used for
18 any number of things, as can a photo ID, as I
19 believe the Secretary of State pointed out
20 previously. I believe it was Secretary Carnahan,
21 you can't even cash a check without a valid photo
22 ID. I believe that in order to get on an airplane,

23 you need a valid photo ID.

24 In today's society, Judge, there are all

25 sorts of situations where people need a photo ID.

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1 I think the fact that a birth certificate may be
2 required for those situations does not make that a
3 fee in order to vote. It might make it --

4 THE COURT: But are those you have a
5 constitutional right in those areas? You're not
6 talking about constitutional rights, are you?

7 MR. HARDING: Well, I think what's
8 important is the fact that the Supreme Court has
9 repeatedly said that incidental burdens on voting
10 do not violate the constitution. Again, I would go
11 back to precinct-based voting. Precinct-based
12 voting certainly carries with it inherent fees.
13 You either need to, hypothetically, drive to the
14 polling place. There's a fee for that. There's a
15 fee for gas. Some people might have to take the
16 bus. Some people might have to take the cab. Some
17 people might have to take off work and walk.
18 That's time they are not spent at work getting
19 paid. So there's all sorts of incidental fees, I
20 think, related to voting.

21 And I think the Supreme Court has been
22 very consistent in saying that just because a fee

23 is incidental to the right to vote doesn't make it
24 a fee to vote and it doesn't run afoul of the
25 constitution.

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1 If I could go back, your Honor, briefly to
2 some of the exceptions, because I think they are
3 directly relevant to the plaintiffs' proof. And
4 I'm referring to exceptions with respect to the
5 birth certificate requirement. If an individual is
6 under 65 years of age and has a 15-year Missouri
7 driving history, you may be issued a one-year
8 non-renewable license. So in other words, this
9 license for anybody with a 15-year driving history
10 would allow the person one year in order to obtain
11 the appropriate documentation going forward in the
12 future.

13 For anybody over 65 years old who is
14 renewing their license or their non-driver's
15 license, they are not required to show a birth
16 certificate in order to do that in that instance.
17 There's also an exception for people who were born
18 in 1930 or before who simply do not have -- do not
19 have a birth certificate. And I believe the Court
20 had asked about that in the prior hearing.

21 And the name of that administrative
22 process is called the Show Me Proof Review Panel.

- 23 And under that panel if you're getting a
24 non-driver's license for the first time and you
25 don't have a birth certificate, there's all sorts

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1 of additional identification that that panel will
2 accept in order to try to determine that you're the
3 person who you actually claim to be.

4 Those includes baptismal records, military
5 records, insurance policies that your parents may
6 have taken out. They even include potentially a
7 family Bible where the individual's name and birth
8 date was what's written down on the Bible. So I
9 believe that for those people born before 1930,
10 there's certainly a process where they can obtain
11 the appropriate documentation.

12 THE COURT: Let me ask you this: And I
13 don't know that there's anything inherently wrong
14 with photo ID or, perhaps, requiring a photo ID,
15 except my question is this: As a result of
16 September 11th, my recollection is that some of the
17 terrorists had driver's licenses. They had some
18 identification that would suggest that they were
19 US citizens. And so it was the federal legislation
20 which was passed to really shore up the issuance of
21 state identifications, because there was a
22 compelling state interest to say that people got on

23 airplanes and this and that.

24 But the considerations for shoring those

25 sorts of things up in terms of fighting terrorisms,

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1 are those same interests there, that same
2 strictness of requirement of identification, are
3 they there when we are talking about a fundamental
4 right to vote, or are there different
5 considerations?

6 MR. HARDING: I think it's a different
7 analysis. I think that getting a driver's
8 license -- there's no fundamental right to get a
9 driver's license, so I don't think that the
10 analysis is the same. But I think --

11 THE COURT: But don't -- I guess my point
12 is, if the 2005 legislation hadn't happened,
13 perhaps the requirement of a photo ID wouldn't have
14 the same burden that it does because of September
15 11th in the resulting 2005 legislation.

16 MR. HARDING: That may or may not be true,
17 your Honor. And I think that that was the
18 plaintiffs' burden to establish that, if that was
19 the case. I don't think -- and I want to turn --
20 and this is related to that -- to the specific
21 evidence that the plaintiffs have presented,
22 because I don't think that there has been any

23 evidence that there is any person in this state who

24 cannot obtain the required documentation.

25 In fact, Mr. Downing said their case is

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1 not about what people simply can't do. It's an
2 undue burden. But I think when you boil it down,
3 it's not even that.

4 THE COURT: But if that's true, if
5 everybody can obtain, that would make provisional
6 ballot language if they have to swear "I am unable
7 to obtain" meaningless.

8 MR. HARDING: Well, the provisional ballot
9 language would certainly cure that problem. But I
10 think at the end of the day, this case boils down
11 to the fact that the evidence in this case just
12 doesn't establish an undue burden. What it
13 establishes is that people might not want to do
14 this. That it might be inconvenient to them to do
15 it. But I don't think that the Supreme Court in
16 Missouri or in the United States has ever held that
17 these incidental burdens or these incidental
18 inconveniences are sufficient.

19 And if we could briefly turn to the
20 specific evidence that the plaintiffs offered, and
21 I'm referring to, your Honor, the affidavits that
22 the plaintiffs submitted in support of their case.

23 And the first was by by Robert Pund. He stated
24 that he needed a birth certificate and
25 transportation to get to the Revenue office. Well,

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1 notably the transportation that Mr. Pund would need
2 to get to the Revenue office is the identical
3 transportation that he would need to get to the
4 polling place. So, again, I don't see any
5 increased burden there.

6 There was also a newspaper article
7 attached to Mr. Pund's affidavit where he indicated
8 that had he had already obtained a birth
9 certificate. So clearly Mr. Pund does not run
10 afoul of the law. Next one is Mr. Kottmeyer. He
11 was in 1942 and has an expired Missouri driver's
12 license. Again, your Honor, Mr. Kottmeyer may very
13 well fall under the exception that I mentioned of
14 people with the 15-year driving history in
15 Missouri.

16 And in addition, your Honor, as you know,
17 115.427, even if he did not fall under the renewal
18 of a license provision, 115.427 would allow him to
19 cast a provisional ballot.

20 Moving on, your Honor, to Mr. Glahn. He's
21 lived in Missouri since August of 2005 and states
22 he has an unexpired Illinois license. Your Honor,

23 in Missouri, residents of this state are required
24 if they are driving in this state to have a
25 Missouri driver's license. So in other words, it

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1 seems to me, and I'm just speculating here, but it
2 appears that Mr. Glahn wants it both ways. It
3 appears on the one hand he wants to keep his
4 Illinois driver's license and drive in the State of
5 Missouri. On the other hand, he doesn't want to
6 expend the time and energy and potentially expense
7 in getting a Missouri driver's license. I simply
8 don't think that that choice that he is making is
9 protected by the constitution.

10 Amanda Mullaney was another affidavit
11 presented by the Plaintiffs. And she's lived in
12 St. Louis since January of 2006 and has an
13 unexpired Kentucky driver's license. Same thing
14 with respect to her. Your Honor, in review of the
15 requirements for a Kentucky driver's license
16 indicate that they are actually similar to the
17 requirements for a Missouri driver's license, i.e.,
18 she would need a birth certificate. In other
19 words, in order to get her Kentucky driver's
20 license, she must have had a birth certificate at
21 some time, so it doesn't seem to me to be an --

22 THE COURT: Pardon?

23 MR. HARDING: In order to get a Kentucky
24 driver's license, she would have needed a birth
25 certificate.

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1 THE COURT: Well, as of 2005 or whatever
2 Kentucky passed that law. Maybe she hasn't renewed
3 yet when the requirement of the birth certificate
4 was enacted.

5 MR. HARDING: Perhaps. But she as the
6 birth certificate. And there's no indication in
7 her affidavit that she doesn't possess a birth
8 certificate. In fact, it's entirely unclear from
9 her affidavit why she is not able to obtain a
10 Missouri driver's license or a Missouri
11 non-driver's license.

12 Moving on, your Honor, Maudie Mae Hughes,
13 who is 95, claims to have no photo ID, nor any way
14 to get one. Assuming all this is correct, she
15 would certainly fall within the group of people
16 born prior to 1930 who would not need a driver's
17 license. She also would fall within the group of
18 people who would, if she did not have a birth
19 certificate because of when she was born, who could
20 file a provisional ballot.

21 Finally, your Honor, I think mostly
22 importantly, is Kathleen Weinschenk. And she, as

23 you know, is the named plaintiff in this case. She

24 testified that she has a Missouri ID card with no

25 expiration date. Your Honor, the language of

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1 Senate Bill 1014 and 115.427 sub 1, sub 2, lists as
2 an acceptable form of personal identification a
3 non-expired or non-expiring Missouri driver's
4 license. So the fact that her current non-driver's
5 license does not have an expiration date would not
6 mean that she couldn't vote. I think this is
7 significant for a number of reasons.

8 THE COURT: I'm curious about -- I was
9 curious about that. What is a non-expiring -- does
10 it have to say on it, this never expires?

11 MR. HARDING: I believe it was the old
12 photo identification card that Missouri used to
13 issue. And I'm not -- I'm not an expert in terms
14 of why people would get those instead of a driver's
15 license. But I assume that if people suffered from
16 some sort of disability, and they wanted a Missouri
17 ID, that that was the process through which they
18 went. And at that time those IDs did not have
19 expiration dates on it. And it appears to me that
20 the General Assembly has included within the new
21 law that form of identification as being
22 acceptable.

23 So in other words, your Honor, the named
24 plaintiff in this case, the face of the case for
25 the plaintiffs does not run afoul of the law. In

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1 fact, the plaintiffs have failed to produce
2 anyone. This case has been going on for probably
3 almost two months now, if not a little longer, and
4 the law has been in effect for even longer than
5 that. They have failed to produce a single person
6 who cannot obtain the required documentation.

7 We'll move on quickly at this point, your
8 Honor. I believe we've already discussed the poll
9 tax issue. With regard to the equal protection
10 claim, the US Supreme Court has stated repeatedly
11 the states indisputably have compelling interest in
12 preserving the integrity of their election
13 process.

14 US Supreme Court has also stated a
15 compelling interest in assuring the electoral
16 system's legitimacy protecting it from both the
17 appearance and reality of corruption. I think the
18 campaign finance cases, which we cited in the
19 brief, are a perfect example of the Supreme Court,
20 even when it does affect a fundamental right
21 stating that the appearance of corruption is a
22 valid state interest that the state is entitled to

23 protect against.

24 I want to move on to the strict scrutiny

25 argument, because I simply do not believe that

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1 that's the standard in this case. Since the
2 Burdick case, where the United States Supreme Court
3 stated it's an erroneous assumption that a law that
4 imposes any burden on the right to vote must be
5 subject to strict scrutiny. Since that time there
6 has been no Missouri case that I can tell that
7 addresses voting.

8 So in other words, I believe to the extent
9 that in the past, Missouri courts applied strict
10 scrutiny. I think Missouri Courts would be bound
11 by Burdick by the US Supreme Court's latest
12 interpretation of the law with respect to equal
13 protection claims. The Burdick court, your Honor,
14 stated regulations imposing severe burdens on
15 plaintiffs' rights must be narrowly tailored and
16 advance a compelling state interest. Lesser
17 burdens, however, trigger less exacting review.
18 And a state's important regulatory interest will
19 usually be enough to justify reasonable
20 non-discriminatory restrictions.

21 THE COURT: Now, Burdick didn't involve
22 the right to vote, as such? I mean, it was

23 write-in candidates that were not permitted under

24 Hawaii law.

25 MR. HARDING: It was a fundamental right

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1 case as I recall, your Honor. And I believe that
2 the language in that case certainly indicated that
3 it is applicable, that is applicable to voting
4 cases. And I was quoting the Supreme Court when
5 they stated it's an erroneous assumption that a law
6 that imposes any burden on the right to vote must
7 be subject to strict scrutiny. I don't have the
8 facts of that case specifically memorized, but it
9 seems like it was certainly relevant to the Supreme
10 Court's analysis as indicated by the quote.

11 Your Honor, in this case we have
12 referenced the specific instances of fraud. And
13 although they are low, they do exist. I also want
14 to briefly reference what there is ample evidence
15 of, and that is registration fraud. The
16 Baker/Carter Commission Report, which is in the
17 record, indicated ample evidence of registration
18 fraud. And I think that enacting this law, even
19 though it doesn't affect the registration
20 requirements, it really makes a certain amount of
21 sense to enact a law with respect to voting when
22 you're concerned about registration fraud. And the

23 reason for that is twofold.

24 One, if people are fraudulently

25 registered, it seems to me that it's a logical

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1 conclusion to infer that they are actually carrying
2 through with that fraudulent registration in
3 casting fraudulent votes. Secondly, it's
4 reasonable to assume that if they fraudulently
5 registered, they are likely to cast a fraudulent
6 vote in the future. I think that a potential
7 response may be, well, why didn't they change the
8 registration requirements, and I think the answer
9 to that is clear. Changing the registration
10 requirements would have required four million
11 people in this state to re-register.

12 There's no actual real tangible harm from
13 fraudulently registering. Of course, it's against
14 the law. And it's not -- it's condone-- it's not
15 condoned. But the real harm is when somebody takes
16 that fraudulent registration and goes to the polls
17 and casts a vote. And I think that it's perfectly
18 reasonable and makes a great deal of sense to head
19 that harm off when it occurs, which is at the
20 polls.

21 THE COURT: Let me ask you this: When
22 somebody registers to vote, they provide whatever

23 information the state requires at that time,

24 right?

25 MR. HARDING: That's correct.

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1 THE COURT: And so the state has -- and
2 assuming the state is not requiring documents, just
3 requiring information, the state has it within its
4 power to some extent to check on the veracity or
5 accuracy of the registration. And that would be
6 within the state's power.

7 MR. HARDING: Sure.

8 THE COURT: I mean, part of this is rather
9 than the state doing that, the burden has shifted
10 to the voter at the time the voter votes to prove
11 the accuracy of the information.

12 MR. HARDING: Well, if you're asking, you
13 know, would it have been better to keep the current
14 system and then, you know, somehow the state
15 recheck every single person that registered, I
16 think that that would actually be an example of a
17 law that wasn't narrowly tailored. You know, I
18 suppose there's two ways to do that. You can
19 require everybody to re-register or the state can
20 go back and simply check that everybody that
21 registered is registered appropriately. I think
22 the problem with that is that the registration

23 requirements have changed, and they changed

24 pursuant to federal law.

25 So people that registered several years

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1 ago may have very well fraudulently registered, and
2 there may be no way to check that. For example, if
3 they didn't present a birth certificate at the time
4 they register, or they registered through getting
5 their driver's license and a birth certificate
6 wasn't required, I'm not sure what steps the state
7 could take in that case to --

8 THE COURT: Federal law doesn't require
9 that for voting, does it?

10 MR. HARDING: I believe there were changes
11 in the federal law that require or that discussed
12 birth certificates. I don't know if it
13 specifically mandates it or not, but --

14 THE COURT: I understand with respect to
15 driver's license because of the 9/11 matter.

16 MR. HARDING: That's right.

17 THE COURT: I don't recall that it
18 addressed itself to voting.

19 MR. HARDING: That's right. I think just
20 the state law changed with respect to that, Judge.

21 But, again, I think the point is the
22 same. I think if somebody fraudulently registered,

- 23 I'm not sure how the state -- how the state can go
24 back and somehow verify that their registration was
25 correct when the registration requirements were

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1 actually different.

2 Just briefly, your Honor, I think the
3 disparate impact claim in this case is a severe
4 stretch. The US Supreme Court has claimed that has
5 stated the statistics seldom, if ever, suffice to
6 establish an equal protection claim. In this case
7 there really isn't even that much evidence. The
8 only evidence is that the General Assembly --

9 THE COURT: You're talking about Counts V
10 and VI?

11 MR. HARDING: Yes. The only evidence is
12 that the General Assembly may have been told that
13 this might disproportionately affect somebody. I
14 don't think that indicates at all what their
15 motives were. And I don't believe that there's any
16 evidence of disparate impact in this case, Judge.
17 I see I've already taken quite a bit of time. I
18 want to allow Mr. Hearne the opportunity to talk.
19 I would just ask that the motion for preliminary
20 and permanent injunction be denied.

21 Thank you, your Honor.

22 THE COURT: Thank you.

23 MR. HEARNE: If it may please the Court,
24 your Honor. Mr. Downing and Mr. Newman have done a
25 very abled job of presenting their clients' case.

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1 There are certainly a few, but it is a case I don't
2 believe that warrants this court in validating an
3 act of the Legislature as they have requested. And
4 I will address principally Mr. Downing's points
5 will embrace for the intervenors the work and
6 argument presented by Mr. Presson for the Attorney
7 General on the Hancock components of this case.

8 Let me address Mr. Downing's points point
9 by point. Qualifications to vote being a voter
10 identification that's a new qualification to vote.
11 Photo ID is not an additional qualification to vote
12 in any way that a non-photo ID is a qualification
13 to vote. I think he tries to prove too much with
14 that argument, your Honor, because if, as he
15 acknowledged, the old non-photo ID requirements,
16 which are mandated actually in certain cases by the
17 federal Hava law, which is one of the reasons
18 Missouri adopted those, are not a constitutional
19 violation under that point, or not a new
20 qualification. Then how can changing that to a
21 photo ID suddenly change it to a new
22 qualification?

23 THE COURT: Let me ask you what I asked

24 Mr. Harding. Come the 2008 general election,

25 somebody shows up that everybody knows, if the

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1 person doesn't have the photo ID?

2 MR. HEARNE: Correct. Well, if they fit
3 in one of those exceptions, being born before
4 '41 --

5 THE COURT: Not one of those exceptions.

6 MR. HEARNE: So somebody not within those
7 exceptions, they would not be able to vote if they
8 didn't have a photo ID.

9 THE COURT: Even though everybody knew
10 their identification?

11 MR. HEARNE: That's my reading of the
12 law. It does not --

13 THE COURT: Whereas the old law did have
14 a -- everybody knew -- and that's, at least,
15 troubling then under the new law if identification
16 isn't an issue, that they would be prohibited from
17 voting under the new law.

18 MR. HEARNE: Well, I think that what the
19 new law is trying to do is establish a uniform
20 standard so all voters are treated equally, as
21 opposed to somebody walking into the polling place
22 and everybody says, Oh, we all know Bob, so we can

23 vouch for Bob, as opposed to a more uniform

24 objective standard.

25 THE COURT: It takes a republican and a

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1 democrat to vouch for Bob, I assume, and a
2 libertarian, perhaps.

3 MR. HEARNE: And certainly, the
4 Legislature has available to them a variety of ways
5 to address this issue. I think, though, that they
6 have rationally addressed their objective here by
7 requiring a uniform rule that every voter is
8 treated equally under. Every voter has to show up
9 with a photo ID whether you do or don't know the
10 election officials administering the election, and
11 that's the rule after '08.

12 The next point Mr. Downing mentioned was
13 that concerned the free exercise of the right.
14 And, again, I think this proves too much. The
15 argument is that this requirement of a photo ID
16 would be a hinderance or impairment on the right to
17 vote. Well, as Mr. Downing is suggesting,
18 hinderance or impairment, using the dictionary
19 words, is how we define that statutory
20 requirement -- or that constitutional requirement.
21 You would eliminate virtually any regulation of the
22 election process, because there's everything from

23 registering to vote, to making it to the polling
24 place, to filling out the form, all involves some
25 effort on the part of the voter. So I think that,

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1 again, that proves too much. This is something
2 that does not impose a violation of a free exercise
3 clause.

4 The third point Mr. Downing mentioned was
5 his count for due process. Essentially, the poll
6 tax argument, that the cost of obtaining the birth
7 certificate. And there's been quite a bit of
8 discussion today on this point, the cost of
9 obtaining the birth certificate. That's not a
10 payment to vote. In fact, what I find very helpful
11 is precisely what the Georgia Court said to this
12 very argument. Where the Georgia Court rejected,
13 as did the Indiana Court, and the Georgia Court --
14 I'm quoting from the slip opinion at page 62 --
15 where the court agrees with the United States --
16 this being the Georgia Court -- agrees with the
17 United States Court for Southern District in
18 Indiana's reasoning in rejecting a similar poll tax
19 claim in a lawsuit concerning Indiana's. It's a
20 dramatic overstatement of what fairly constitutes
21 a, quote, poll tax is axiomatic that election laws
22 will invariably impose some burden.

23 It goes on. They made exactly that same
24 argument in Georgia that a requirement of obtaining
25 a birth certificate was a cost. They made the same

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1 argument in Indiana in both courts, even though the
2 Georgia Court was, of course, very sympathetic to
3 them on other arguments.

4 THE COURT: I thought, at least, the 2005
5 Georgia case did find in the plaintiffs' favor on
6 that.

7 MR. HEARNE: I'm looking at the 2006
8 decision.

9 THE COURT: April 14, 2006?

10 MR. HEARNE: That is correct. And, again,
11 I have the Slip opinion on than, which is a West
12 Law print, your Honor, page 62. Here is what they
13 say, "Plaintiffs have failed to demonstrate that
14 the cost of obtaining a birth certificate is
15 sufficiently tied to the requirements of voting
16 whereas to constitute a poll tax. That is the same
17 situation, again, as in Indiana and elsewhere.

18 You had mentioned also the cost of --

19 THE COURT: You're right.

20 MR. HEARNE: Excuse me?

21 THE COURT: Yeah, you're right. In the
22 2006 decision.

23 MR. HEARNE: 2006, which is where I'm
24 referencing. So the poll tax argument that the
25 cost of obtaining -- and to be absolutely precise,

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1 your Honor, the argument is that the cost of
2 obtaining a birth certificate, because we would
3 acknowledge that somebody who has no photo ID,
4 somebody who does not fit within the exemptions
5 under this Missouri law, may face the incidental
6 cost of paying \$11 or \$12, or whatever the cost is
7 in Missouri, or whatever it may be out of state, to
8 obtain a birth certificate, that they can use for
9 obtaining a driver's license for whatever purpose.

10 THE COURT: Let me ask you this: And I
11 don't pretend to understand the poll tax argument
12 completely. It doesn't look like a small -- like a
13 tax, as we would understand that, but you have the
14 Harper case talking about the payment of any fee.
15 In the Georgia decision, one of the rationales was
16 that there were -- that the birth certificate was
17 only one of some primary documents that were
18 acceptable. And since there were other
19 documents --

20 MR. HEARNE: Correct.

21 THE COURT: Now, I'll be quite honest, I'm
22 not clear what other documents are available here

23 under Missouri law. I mean, I understand the
24 passport is. But it seems to me the requirement
25 for a passport is a certified copy of the birth

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1 certificate, so I don't quite understand the
2 Georgia Court's -- I mean, the Georgia Court's
3 rationale seems to say because if the documents
4 were available, the birth certificate wasn't
5 required and, therefore, they weren't going to
6 consider that as a requirement of payment of a fee
7 in relation to right to vote, but I'm not sure
8 Missouri law is the same.

9 MR. HEARNE: Well, I would say two
10 things. I mean, as Mr. Harding noted, you can
11 obtain the appropriate ID in Missouri without
12 necessarily presenting a birth certificate.
13 There's other ways to obtain that through the
14 procedures of the Department of Revenue. If you
15 don't have a birth certificate, you have those
16 procedures, a family Bible, if you fit into those
17 certain exceptions. So --

18 THE COURT: I'm assuming there's a birth
19 certificate out there, but you don't want to buy
20 it.

21 MR. HEARNE: Oh, right. So if somebody
22 just simply says, I don't want to pay the \$16 to

23 buy my birth certificate necessary to obtain an ID,

24 well --

25 THE COURT: And let me -- and I'll give

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1 you plenty of time, but I -- what's today?
2 Thursday. I lose track of the week. Either this
3 Monday or last Monday, the Court had a case where a
4 person born at home had to file a lawsuit to get a
5 birth certificate issued from the Department of
6 Health. And I don't know what other
7 documentation -- I mean, it required a retention of
8 a lawyer, the lawsuit was -- they won. But I don't
9 know -- and maybe the Show Me -- is it the Show Me
10 Panel?

11 MR. HEARNE: The Show Me Panel.

12 THE COURT: What section is that, do you
13 know? Let me say this: I'll give all lawyers
14 leave at the end of the arguments, I'll give you a
15 day if there's something you forgot to say or
16 wanted to say or bring to my attention, as long as
17 it's under five pages, anybody can submit something
18 additional or information like that.

19 MR. HEARNE: And so, your Honor, I bring,
20 in terms of the poll tax argument, I just note that
21 that was an argument that has been presented both
22 in Georgia and Indiana in exactly the same case,

23 arguing exactly the same point that the ID -- or
24 the cost of obtaining a birth certificate is a poll
25 tax. And that was rejected, even again in the

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1 Georgia case, which was sympathetic to the
2 plaintiffs' claims.

3 I note also the Harper decision, when you
4 read the Harper decision, what's involved there, if
5 I recall correctly, it's Virginia where somebody
6 said when you come to the polling place, you must
7 bring a receipt that you've been paying this
8 property tax, or this tax. But this is a very
9 different situation than the incidental cost, which
10 is really the reasoning of these cases, obtaining
11 certain incidental costs and that is not
12 something -- and they also found in the Harper
13 case, your Honor, that it was done with a purpose
14 of trying to affect who could participate in the
15 election process to be just a class of people who
16 had paid this particular tax.

17 So I think what you find is that both in
18 terms of the intent, as well as the actual
19 requirements in Harper, as every court that I know
20 of that has ever examined an ID requirement,
21 particularly Indiana and Georgia, have all rejected
22 this as a poll tax.

23 THE COURT: Let me ask you this: On the

24 poll tax argument, is it -- do I have to find a bad

25 purpose or intention? And the reason I ask as I

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1 will confess, I'm at least troubled by the fact --
2 it's one thing for everybody to have to obtain a
3 birth certificate. But with respect to women,
4 unless they don't change their name at all, it
5 seems to me they will need a certified copy of
6 their marriage license for each marriage for the
7 name, and so there is some expense involved.

8 And I don't believe there are any bad
9 intentions or bad animus or the like, but yet if
10 there is that result, and I'm not clear where
11 Harper brings us. And I don't like alternatives
12 the Georgia Court said to that problem of tracing
13 the name change.

14 MR. HEARNE: Right. Well, I think the
15 same situation existed in Georgia. You look at the
16 Georgia requirements, I think they had the same
17 situation presented to the court in Georgia as it
18 was in Indiana. In fact, when you compare Georgia,
19 Indiana and Missouri's photo ID requirements, what
20 you find is actually Missouri's is more lenient
21 than either Georgia's or Indiana's. I mean,
22 Missouri makes specific exemption for those born

23 before '41, those with disabilities, for those with
24 religious objections. Georgia did not have those
25 kind of exceptions.

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1 THE COURT: Those states had no more
2 expansive absentee balloting provisions in
3 Missouri?

4 MR. HEARNE: They did to some degree
5 expand their absentee voting. But it did not in
6 those states -- again, it is not a -- the photo ID
7 requirements in Georgia it's a fair statement to
8 say, as well as Indiana, were stricter than those
9 in Missouri. I mean, Indiana made an exception if
10 you're a nursing home resident and there's a poll
11 in your nursing home, but it certainly did not make
12 the exceptions that Missouri made.

13 THE COURT: What's your take on a
14 provisional ballot language that requires them even
15 born before 1941 that that has to be the reason
16 they are unable to obtain? Poor choice of language
17 or what?

18 MR. HEARNE: Well, I read the affidavit in
19 the context, your Honor. If somebody walks in, and
20 they say I was born before '41, and I don't have a
21 photo ID because I was born at home, and I don't
22 have -- I would have to go through this procedure

23 to obtain one, they sign the affidavit.

24 THE COURT: Assume they weren't born at

25 home.

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1 MR. HEARNE: What's that?

2 THE COURT: They weren't born at home.

3 They were born in a hospital.

4 MR. HEARNE: I would say if they just

5 simply are saying, I'm here at the polling place,

6 and I don't have one, I think it's in the context

7 that that election, the affidavits says, I'm here

8 today to present myself as a qualified voter. I do

9 not have a photo ID. I was born before 1941, and I

10 don't have one. I think that they come within the

11 exception.

12 THE COURT: At first I thought it was just

13 a bad choice of language in this section. The

14 problem is the next subsection includes -- sets out

15 in detail how the affidavit has to read. And there

16 the statutory language requires them to say, I am

17 unable to obtain because I was born before 1941.

18 MR. HEARNE: Well, I would say that the

19 voter born before 1941 who has a photo ID and who

20 just chose to leave it at home wouldn't necessarily

21 be able to sign that affidavit. Somebody who

22 doesn't have a photo ID can come in and they can

23 vote and they can sign the affidavit and there

24 should not be any problem. That's what I

25 understand that affidavit is addressing.

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1 So it should not be -- the point, though,
2 is those voters born before 1941, they can
3 participate, they can vote, and their vote will be
4 counted by a provisional ballot.

5 The due process equal protection argument,
6 which was point four of Mr. Downing's petition,
7 really goes to some of the things we've been
8 talking about, the undue burden. There's the
9 difference between the strict scrutiny and the
10 intermediate scrutiny. I don't want to revisit
11 that issue, but what I would note is that in terms
12 of the strict scrutiny, your Honor, the verdict
13 rule is I think the rule that the Missouri Supreme
14 Court has and would follow given the fact that they
15 have embraced the US Supreme Court's direction on
16 these issues.

17 In *Burdick*, it certainly involved a
18 question of a fundamental right to vote. It
19 involved in that case the ability of a voter to
20 cast a vote for a right in candidate in the Hawaii
21 election, but the court, the Supreme Court analyzed
22 that under the individual's right to participate in

23 that process.

24 Another example would be the recent --

25 this is not a Supreme Court case -- but the recent

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1 Gilmore v. Gonzalez decision of the Ninth Circuit
2 Court of Appeals that's cited in our proposed
3 findings of fact and conclusions of law. In that
4 case the Ninth Circuit, your Honor, upheld a
5 requirement that you have to provide photo ID in
6 order to travel and they upheld that. They
7 recognized that the right of travel, interstate
8 travel is a protected fundamental constitutional
9 interest. And they, nonetheless, upheld the
10 requirement that you present a photo ID in order to
11 exercise that fundamental requirement even though
12 that created a burden --

13 THE COURT: I take it that was an airline
14 case?

15 MR. HEARNE: That was an airline case.
16 What's that?

17 THE COURT: I apologize. I haven't read
18 that one.

19 MR. HEARNE: It's an airline case.

20 THE COURT: It's an airline case?

21 MR. HEARNE: That is correct. The
22 challenge in that case was I shouldn't have to show

- 23 photo ID in order to travel on an airline or to
- 24 exercise my fundamental constitution protective
- 25 right to travel.

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1 The compelling state interest, it's been
2 cited in the briefs and in our memorandum, your
3 Honor. The Supreme Court's recognized repeatedly
4 and extensively that the states have a compelling
5 interest to protect the election process and to
6 enact regulation to do so. The right to -- that a
7 vote can be disenfranchised as much by illegally
8 cast vote as it can by somebody who is denying the
9 right to vote. There are two sides of the same
10 coin. That's the US Supreme Court going all the
11 way back to the Ku Klux Klan cases to Classic to
12 Bush v. Gore.

13 The court has consistently recognized that
14 there's two issues here. It's not just making sure
15 people have the ability to access the polling
16 place, but also that those who are not eligible to
17 cast a vote don't dilute out a vote of a lawful
18 voter. And that states and legislatures are given
19 authority and constitutional mandate to protect
20 that; indeed, failure to do so would be to affect a
21 disenfranchisement of lawfully-cast votes.

22 THE COURT: Let me ask you something. On

- 23 the equal protection thing, what's your assessment
- 24 of the plaintiffs' evidence on, for example, that
- 25 poor people are less likely to own automobiles and,

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1 therefore, less likely to have driver's licenses?
2 How do you -- how strongly do you view their proof
3 on --

4 MR. HEARNE: I don't think that's
5 sufficient proof at all, your Honor, to draw that
6 conclusion. You know, to simply try to tie it to a
7 driver's license, the percentage of population does
8 or doesn't have a driver's license does not tell
9 you -- first off, Missouri law says we're talking
10 about 2008. It's an important distinction between
11 Indiana laws, because Georgia -- if you read the
12 Georgia opinion, the Georgia 2006 opinion, it
13 struck it down primarily as the court itself has
14 observed -- it noted that this was not just because
15 the court there said there's -- I believe this
16 court has indicated that they did not find a
17 problem, per se, with photo ID.

18 It simply said that in that case they had
19 photo ID requirements adopted in Georgia and
20 implemented in the second primary election when the
21 rules were put in place. Further, they said the
22 voters that never had chance to get a photo ID.

- 23 One thing they say is a requirement. We're not
24 given the ability to meet that requirement in
25 Missouri legislature. Senator Scott says what they

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1 did, they amended this bill from its original
2 proposal to specifically make sure we had two years
3 for everybody to obtain a photo ID, and then they
4 increased the resources devoted to making sure they
5 provided that from one mobile unit to nine mobile
6 units specifically in the statutes.

7 They have in Missouri, unlike Georgia, 200
8 places in the state where somebody can obtain a
9 photo ID. If you were, indeed, born in Arkansas,
10 it's likely that there may be a little bit of time
11 required to obtain a birth certificate, but two
12 years should be sufficient for anybody to obtain
13 that.

14 Again, so the question and just for the
15 court's reference the language that, I believe, I'm
16 referring to under Georgia decision is from page 59
17 where I indicate that they address the reason for
18 validating the Georgia photo ID is just in
19 sufficient time when the law was adopted when it
20 became effective, being several months or a month.

21 Continuing, your Honor, with the equal
22 protection, due process analysis, compelling state

23 interest, I realize that time is quickly passing.

24 I'll try to be as expeditious as I can. The state

25 had a legislative objective. This is a

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1 comprehensive election reform bill, the Missouri
2 Voter Protection Act has a number of provisions in
3 it. It had a provision that dealt with the
4 protection of the right to vote, protection of
5 increased penalties for those who had some
6 intimidated voters participating in the process and
7 provisions to make sure people had free ID, but no
8 stretch can this be viewed as simply having a very
9 limited target partisan focus suggested by the
10 plaintiffs.

11 In fact, specifically stated in Senator
12 Scott's was one of the primary objectives was to
13 increase the confidence of voters in the election
14 process. We submitted the duties done by
15 University of Missouri professors, as well as the
16 study of Professor Lott. They have all found
17 throughout this country when you have measures that
18 try to increase the voters' confidence in the
19 election process, you increase participation. That
20 the goal is to have an election process where
21 voters have confidence that their vote count the
22 fairly and honestly counted and that there wouldn't

23 be disenfranchised illegal cast ballots.
24 That confidence is an important and
25 compelling state interest, in addition to the

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1 importance and compelling state interest in
2 compelling state fraud, an allegation there is no
3 impersonation voter fraud. I think Mr. Harding
4 made an important point, your Honor; that is, first
5 off, I would say we only look at the Official State
6 Manual published by former Secretary of State Cook,
7 which has been submitted in the record. It's also
8 in our brief, which is dead men voting in ballots
9 from City of St. Louis, Missouri has an unfortunate
10 history of voter fraud in this state. Certainly
11 the Legislature is aware of it and the Secretary of
12 State is aware of it. They put it on page 36 of
13 the Official State Manual. So this is a legitimate
14 concern. It is a concern of impersonation voter
15 fraud going on at polling places was reported in
16 that sort of historical account of how elections
17 had been run in Missouri. So the Legislature has a
18 compelling interest to try to reassure the voters
19 of taking steps to address that.

20 The studies of professors have shown when
21 you take these kind of measures of increased voter
22 independence, you increase participation.

23 THE COURT: I don't quarrel with the
24 state's interest in this area whether or not
25 there's cases of fraud.

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1 MR. HEARNE: Well, you may. The final
2 point I would like to say is that somehow the
3 Legislature must first establish some large problem
4 before addressing it is to say that you can't lock
5 your door until after you've been raped. I think
6 they can certainly go ahead.

7 You mentioned highjackers. The federal
8 photo ID proposed in all the states because of that
9 which is interesting to note several highjackers
10 also registered to vote. And when you get somebody
11 on the voter registration illegally registered to
12 vote, I will add if you get somebody on the voter
13 registration poll like Ritzy the dog in St. Louis,
14 what they do and the only thing keeping Ritzy the
15 dog from casting a ballot when Ritzy is going or
16 reporting to be Ritzy in that case, goes to a
17 polling place, somebody says let me see
18 identification. Similar in St. Louis, we've had a
19 number of deceased show up on registration polls as
20 someone voting.

21 You talked also about the Burdick standard
22 and strict scrutiny and what is the appropriate

23 standard to use. Mr. Downing made the point no one
24 followed Burdick in the voting rights. Georgia's
25 Court's sympathetic to plaintiffs' position,

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1 Georgia's Court raised that law under the Burdick
2 intermediate standard. It embraced that Supreme
3 Court standard. It did not impose a strict
4 scrutiny standard. So, again, I think that that is
5 a recognition the Burdick standard is the fact that
6 this federal court is applying to this kind of
7 interest.

8 Finally, and I might have discussed it
9 slightly, but under Mr. Downing's Count V, which is
10 the disparate impact. First off, evidence does not
11 suggest disparate impact. The fact that there has
12 been no showing of that, that has somehow a unique
13 burden when you have to consider the requirement.
14 When somebody obtains a photo identification for
15 2008, that this is something that is disparate
16 impact on only minorities or low income or some
17 other protective class that isn't.

18 And certainly Mr. Downing acknowledges
19 there must be a showing of intents, purposeful
20 intents. I find there's absolutely no showing of
21 that in the record, your Honor. I would simply say
22 a statement from the Legislature is not going to

23 allege that by inference and speculation. In fact,
24 I think when you look at what you find they took
25 the Carter/Baker recommendation, they've took it

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1 into this piece of legislation. They made 11 of
2 those recognitions if in Missouri photo ID
3 requirement is very consistent with the
4 recognitions of bipartisan Carter/Baker. It's hard
5 to say that by adopting a recommendation for photo
6 ID, that's actually less of a burden than proposed
7 by President Carter's Commission. You somehow
8 engage in some partisan effort to target some
9 group. I take strong objection to suggesting that
10 there's any of that. And certainly no evidence to
11 support a purposeful effort on this part.

12 Again, look at this bill in its entirety,
13 your Honor. I think you will find a number of very
14 important protections of the election process
15 including felony protections against voter
16 impersonation, harassment. They are not consistent
17 at all with that kind of purposeful allegation.

18 Finally, the distinction between in person
19 and absentee on equal protection analysis. That
20 falls apart, your Honor, because there is no
21 distinction that can be legitimately made. Whether
22 I chose to vote by absentee, whether I chose to

23 vote by provisional ballot, whether I chose to vote

24 by a, quote, regular ballot, it's all the same.

25 The right is to cast a ballot that is fairly and

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1 accurately counted. That is my fundamental right.
2 There's a difference whether I choose at my whim to
3 exercise that right by absentee or by regular
4 ballot or even if I am compelled to exercise that
5 right by absentee ballot instead of a regular
6 ballot. The right can't be whether I vote by
7 absentee or vote at a polling place. I have a
8 right to cast a ballot. And this legislation does
9 not change that. And the fact somebody casts their
10 ballot or may be even forced to cast their ballot
11 absentee or in provisional does not in any way
12 diminish their right to have a legitimate vote
13 count.

14 Finally, provisional ballot discusses
15 where provisional ballots are available in all
16 elections. The Missouri Voter Protection Act very
17 specifically says the provisional ballots are to be
18 available to anybody in every election.

19 THE COURT: What section? Let me read
20 those two sections. What section number?

21 MR. HEARNE: Section No. 13, your Honor.
22 It said on page 22 of the final print of line 183

23 it says, I quote, For any election held on or
24 before November 1, 2008 for any election it goes on
25 to require the provisional ballot. The fact is

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1 this Secretary of the State's website says she only
2 understands there to be provisional ballots in
3 general and primaries. The Missouri Voter
4 Protection Act was amended to increase the
5 protections of voters with these provisional
6 ballots they now have under this law the right to
7 cast a full provisional ballot in every race.
8 That's one of the protections and reform that
9 increases voter participation in this law. And,
10 again, it is one that helps every voter to make
11 sure they vote.

12 THE COURT: Okay.

13 MR. HEARNE: Thank you, your Honor.

14 THE COURT: I said two hours for
15 argument. I'll still give you 15 minutes; I'll
16 take a five-minute recess. Five minute recess and
17 then I've got a case. We'll take a five-minute
18 recess and then I'll give you 15 minutes, very
19 strict 15 minutes. Okay. We'll take a short
20 recess.

21 (A BREAK WAS TAKEN.)

22 THE COURT: You may.

23 MR. NEWMAN: Thank you, your Honor. May
24 it please the court. I just have a couple of
25 points, your Honor. Your Honor, I want to go to

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1 some of the questions you posed about -- if I
2 understood them correctly -- about where you have
3 existing activities and legislation adds to those,
4 whether that could be a violation of the Hancock
5 Amendment, if I'm understanding it. And I would
6 direct the Court to the very face of the Hancock
7 Amendment, Article 10, Section 16 of Missouri
8 Constitution, quote, The state is prohibited from
9 requiring any new or expanded activities by
10 counties.

11 And here, your Honor, we have all kinds of
12 expanded activities, new signage, new notification
13 cards. We can get into the provisional ballot
14 issue, the absentee ballot issue --

15 THE COURT: Let me ask you, on the cards,
16 there already are cards.

17 MR. NEWMAN: Right.

18 THE COURT: I'm sure they have to do new
19 cards, but as I understood it from the witnesses,
20 they weren't all going to send out
21 four million cards this month. It will be in the
22 course of time those new cards would be sent out.

23 MR. NEWMAN: In the course of time, your

24 Honor, that would be eliminated. But the others

25 would, for example, more staff, more training.

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1 There's no question that these are mandates when
2 you are telling the election authorities or the
3 county clerk you must now train your personnel to
4 understand new provisions in the law. And these
5 provisions in the law are going to require the
6 consumption of time. And, your Honor, I --

7 THE COURT: Let me -- and I want to give
8 you a chance. Every time there's a change,
9 training is required. But you're always going
10 to -- you have new judges coming in. You always
11 have training as a process. And to say that every
12 time there's a change in the law, that requires new
13 training as a Hancock issue seems to me that you're
14 interpreting Hancock way beyond what --

15 MR. NEWMAN: I respectfully disagree for
16 this reason, your Honor: These changes -- this
17 training that's required now is to teach poll
18 workers and to teach judges how to handle an
19 entirely new area, photo IDs. They have never
20 touched it before.

21 THE COURT: But the election authority in
22 some fashion is responsible for ascertaining that

23 the person is who they say they are.

24 MR. NEWMAN: That may be true.

25 THE COURT: And so the ultimate goal or

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1 job remains the same, how you ascertain who the
2 person is, is changed a little bit or maybe more
3 than a little bit.

4 MR. NEWMAN: We certainly have more the
5 conjecture and speculation, as Mr. Presson
6 indicated. We had witnesses who have handled 400
7 elections, more than 400 elections. And they all
8 said --

9 THE COURT: I don't quarrel with your
10 evidence on costs.

11 MR. NEWMAN: And they all said these are
12 new and expanded, expanded -- new and expanded
13 costs, activities that weren't required before.
14 Signage, putting up new signs, yeah, you had to put
15 up signs before. But now you have to put up signs
16 that explain how it is that the photo ID is going
17 to work. That's an expanded activity.

18 Let me just mention one case, your Honor.
19 We've cited the Boone County Court case. In that
20 case there was a mandate from a legislator to
21 increase a salary at the Boone County Court. And
22 there was no appropriation of funds for that. Now,

23 that's an existing position. That position is
24 earning a particular amount of money. The
25 Legislature said pay more money and --

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1 THE COURT: I understand that with respect
2 to salaries.

3 MR. NEWMAN: -- it was a Hancock
4 violation.

5 Your Honor, I am not aware either on the
6 face of Hancock or any decisions under Hancock, as
7 I stand here right now, where there has been a
8 finding which says adding to existing functions is
9 not a violation when you have new costs or expanded
10 activities. Those are Hancock violations. I know
11 of no case to the contrary. Mr. Presson cited no
12 case to the contrary.

13 And certainly on the face of the Hancock
14 Amendment, your Honor, when it talks about expanded
15 activities, we are talking about existing
16 activities which must now be subjected to the use
17 of more personnel, the use of more effort, the use
18 of more time, the use of more training, and the use
19 of more staff, not to mention the various other
20 things that have been testified to by the
21 witnesses.

22 Your Honor, you must find what's more

23 likely true than not true. I still stick to my
24 statement, this is a classic, classic violation of
25 the Hancock Amendment in so many different ways.

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1 And in addition to which is a statewide violation
2 based upon the testimony of Betsy Byers.

3 Thank you very much.

4 THE COURT: Thank you.

5 MR. DOWNING: May it please the Court:

6 Your Honor, I will try to pore through a lot of
7 material very quickly. I know your docket is
8 busy. I had mentioned earlier that I had a
9 Missouri case that said that the legislative
10 deference that's normally shown is not shown in an
11 area where the Legislature is affecting the
12 fundamental right to vote. That case is the In
13 Re: Extension of Boundaries, Glaze Creek Sewer
14 District case that I cited earlier. It's 474
15 S.W.2nd 357. And the quote begins on page -- looks
16 like --

17 THE COURT: Do you know if Burdick changes
18 that?

19 MR. DOWNING: No, it doesn't, your Honor.

20 And I'll address that right now. Your Honor,
21 Burdick, the discussion about Burdick has been an
22 all-or-nothing sort of discussion. Burdick has

23 been applied by federal courts. And those courts
24 have used strict scrutiny under Burdick. When you
25 say Burdick, it doesn't mean that you're going to

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1 apply less than strict scrutiny. You have to look
2 at the balancing that the Supreme Court articulated
3 in Burdick.

4 Strict scrutiny was applied by the Georgia
5 Federal Court when it applied Burdick. It said
6 that the state had to show a compelling state
7 interest and that the law was necessary to fulfill
8 that interest.

9 THE COURT: Was that quote, the 2000 -- I
10 thought they applied both under either tests.

11 MR. DOWNING: Well, the first ruling they
12 applied both and said under either. Under the
13 second, they did apply Burdick. They say Burdick,
14 but we're still applying strict scrutiny under
15 Burdick. So the mere fact that a court might apply
16 Burdick doesn't mean that strict scrutiny is not
17 being applied.

18 And I will stand by my statement, your
19 Honor. There's no case that I found anywhere in
20 the country and certainly not Missouri or the US
21 Supreme Court where a court has examined a law that
22 impinged the fundamental right to vote and has

- 23 applied anything other than strict scrutiny,
24 whether you call it under Burdick, whether you call
25 it under traditional legal protection analysis.

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1 Strict scrutiny is required.

2 And the case that I just mentioned, your
3 Honor, Missouri Supreme Court case, says that when
4 we're reviewing statutes, which affect the
5 fundamental right to vote, the general presumption
6 of constitutionality affording state statutes and
7 the traditional approval given state
8 classifications, if the court can conceive of a
9 rational basis for the changes, are not
10 applicable. So that's the case that I mentioned I
11 would get to you.

12 Let me address quickly a couple of
13 Mr. Harding's points and a couple of Mr. Hearne's
14 points. Your Honor, this is an additional
15 qualification to vote. Make no mistake about it.
16 Under the dictionary definition of qualification,
17 it says a condition or standard that must be
18 complied with. There's no argument that if you
19 want to vote in this election, you've got to have a
20 photo ID required by the law. It's a condition or
21 standard that must be complied with. It's an
22 additional qualification under our constitution.

23 Now, Mr. Harding says, well, the prior law
24 has some of those. Well, we talked about that
25 earlier. The prior law only required you to

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1 present what you have. It's not an additional
2 qualification. All you had to do is go in there
3 and identify yourself with one of many forms of
4 identification readily available to all
5 Missourians. This is very and materially
6 different.

7 Under our Count II, Mr. Harding says
8 voters aren't hindered or impeded in their ability
9 to cast their ballot. Well, your Honor, there's no
10 question that for people who don't have a photo ID
11 they are hindered or impeded and, therefore,
12 interfered with in casting a ballot. Now, I think
13 Mr. Hearne said that, well, anything that you would
14 impose on registration requirements, any burden you
15 would impose there would somehow run afoul of the
16 law under Mr. Downing's interpretation. Not at
17 all, your Honor.

18 Under the Missouri Constitution, the
19 Legislature is entitled to impose registration
20 requirements. And certainly some of those may have
21 some burdens to it. But that's not this. This is
22 the right to vote. The Legislature can't by

23 constitution interfere with that right.

24 Your Honor, some of the discussion we're

25 talking, like, some of the defendant and the

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1 intervenor, they are talking like the right to vote
2 is a mere privilege. And you can require people
3 because you have to when they get a driver's
4 license, you can require people to do things. The
5 right to vote is not a privilege. It's a
6 fundamental right. And so it can't be analyzed
7 like the privilege law analyzes the rights to
8 impinge upon privileges.

9 Your Honor, Mr. Harding talked about that
10 Supreme Court cases or other cases, I forgot
11 exactly what he said, had approved the incidental
12 costs associating with voting, and said that was
13 okay. Well, I know of no case, and certainly no US
14 Supreme Court case that has ever held that the
15 state may impose any kind of incidental cost on the
16 right to vote. Harper says just the opposite. And
17 as your Honor knows, the poll tax at Harper was
18 \$1.50, not \$15, not \$255 for a passport. It was
19 \$1.50. And the court in Harper said the payment of
20 any fee to vote is unconstitutional. And it said
21 that the degree of discrimination is irrelevant.

22 THE COURT: What's your take on the

23 Georgia '06 decision?

24 MR. DOWNING: Here's what I take of it,

25 your Honor, and I brought it up just to address the

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1 point that I anticipated you would raise with me on
2 that. The Georgia '06 decision, and this is on
3 page 51 of my draft of what I printed off from
4 Westlaw, it says, Plaintiffs' contention that
5 some -- this is from the Georgia decision --
6 Plaintiffs' contention that some voters might be
7 required to pay a fee to obtain a birth certificate
8 in order to obtain a voter ID card is wholly
9 speculative. Plaintiffs have failed to show that
10 any particular voter would actually be required to
11 incur that cost to vote.

12 Indeed, under the 2006 Photo ID Act and
13 the accompanying rules and regulations, a birth
14 certificate is only one of many documents that the
15 registrar may accept to issue a photo ID card.
16 Consequently, plaintiffs have failed to demonstrate
17 the costs of obtaining a birth certificate is
18 sufficiently tied to the requirements of voting.
19 So it's not due to poll tax.

20 The Georgia Court is not saying that if
21 you impose a fee that's necessary to get a document
22 necessary to vote, that's not a poll tax. It's

- 23 saying there's a failure of proof in Georgia. In
- 24 Georgia there were many documents you could get.
- 25 And the plaintiffs have failed to show that all of

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1 those documents cost money.

2 Here, your Honor, there are two documents
3 and two documents only if you are a US citizen that
4 you can use to get a certified birth certificate in
5 Missouri. A birth certificate, which costs \$15 --

6 THE COURT: Okay. I see.

7 MR. DOWNING: You understand. Let me go
8 to another point made by Mr. Harding, the
9 affidavits. I won't go through the affidavits one
10 by one, your Honor, except to say that every single
11 one of our plaintiffs has sworn under oath that
12 they don't have the acceptable documents to get a
13 photo ID. They are going to have to obtain them,
14 and that's the burden that they are suing for.

15 In particular, Ms. Weinschenk, and I do
16 take issue with this. Ms. Weinschenk was here.
17 She had her old ID card. It's a Missouri ID card.
18 It's not a non-driver's license. That's the only
19 non-expiring card that's allowed. If you have a
20 non-expiring non-driver's license issued by the
21 state, then that's the only one that doesn't have
22 to have an expiration date. That's not what she

23 has. She clearly is qualified to be the plaintiff

24 in this case.

25 THE COURT: What's the term, non-driver's

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1 license?

2 MR. DOWNING: 427.1--

3 THE COURT: I've read 427 several times.

4 MR. DOWNING: It says, non-expired or
5 non-expiring Missouri non-driver's license showing
6 the name and photograph, a digital image of the
7 individual. This is not a non-driver's license.

8 THE COURT: That wouldn't be the old
9 Missouri ID card?

10 MR. DOWNING: No. No. There's a specific
11 document called a non-driver's license that's
12 issued by the Department of Revenue. She doesn't
13 have one of those.

14 Your Honor, there was some talk about
15 fraudulent registration problems and how a photo ID
16 is going to address that. As Wendy Noren
17 testified, your Honor, the type of fraudulent
18 registration problems that have been documented in
19 this state consists almost exclusively of the kind
20 where people are paid by the head to register
21 voters. And they go through the phone book, and
22 they write out the names. And so those people are

23 fraudulently registered.

24 Okay. Those people typically don't vote.

25 But if they do, a photo ID is not going to prevent

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1 them from voting fraudulently under that scenario.
2 That's not -- the photo ID is not going to prevent
3 voter registration fraud, or people from being
4 fraudulently registered from voting. It's not
5 going to prevent that at all, as Wendy Noren
6 testified.

7 Your Honor, on the disparate impact
8 case -- oh, let me go back to Harper just a
9 minute. Your Honor had asked a question whether
10 intentional, purposeful discrimination was required
11 for the Harper claim, the poll tax claim, it's
12 not. It's not. As long as there is discrimination
13 in terms of a making the payment of a fee, an
14 electoral standard. It matters not the purpose for
15 that. It's unconstitutional no matter what the
16 purpose.

17 On the disparate impact claim, your Honor,
18 I'll just leave it at this: Is it really
19 coincidental, is it merely coincidental that the
20 largest category of people who will be adversely
21 affected by this vote overwhelmingly are
22 democrats? Is that just a coincidence that there

23 are republican majorities in both house and a

24 republican governor? Is that a coincidence?

25 There was a commentator that issued an

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1 article on that and said, well, if you believe
2 that's a coincidence, then I've got some Missouri
3 fertile mules that I want to show you. It's not a
4 coincidence and our evidence establishes that it's
5 not.

6 THE COURT: Well, my problem is there are
7 some republicans that if it rained on their picnic,
8 would be convinced that the democrats had gotten a
9 rainmaking machine. And there's some democrats
10 that if it rained on their picnic, they would be
11 convinced that the republicans had obtained a
12 rainmaking machine. I understand your arguments.
13 But before I would find that type of invidious --
14 I'm just not convinced that the record necessarily
15 shows that type of invidious discrimination or
16 intent there. I mean, I'll look at your
17 statistics. And I understand the arguments.

18 MR. DOWNING: My time is about up, your
19 Honor. Two final things: Provisional ballots,
20 they are not available in all elections. And
21 Mr. Hearne gave you one cite. Let me give you
22 another. And this is to existing law that Barbara

- 23 Wood referenced earlier. This is existing law,
24 Section 115.430, which is a provisional ballot
25 section that specifically says this applies only to

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1 primary and general elections.

2 So as Ms. Wood pointed out earlier, you
3 have to read -- and there's Missouri Supreme Court
4 precedent that says you have to read all this in
5 harmony. Finally, the Carter/Baker Commission
6 Report that's been raised, your Honor, and this is
7 a lot similar to the arguments made by Mr. Hearne.

8 You know, we can have a public policy
9 debate in this state about whether voter photo ID
10 are a good or a bad thing. And you can argue about
11 that. But what there is no reasonable argument
12 about, your Honor, in this case under the
13 constitution is whether a photo ID requirement is
14 necessary to fulfill a compelling state interest.
15 There is no evidence that a photo ID requirement in
16 this state is necessary. It doesn't have to be a
17 good thing. It has to be necessary to fulfill a
18 compelling state interest. And that there aren't
19 other less restrictive means to accomplish the same
20 purpose.

21 The Carter/Baker Report makes a lot of
22 points. As I mentioned earlier in our evidence,

23 Jimmy Carter wrote a letter to the Secretary of

24 State in this state saying to the extent you're

25 using that to support photo ID as has been

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1 implemented in Missouri, we didn't say that. This
2 is a different animal than what we did. So don't
3 try to use the Carter/Baker Commission Report to
4 support what you did in Missouri. And leave it at
5 that, your Honor.

6 One final point, and this just drives home
7 the Georgia Federal Court decision. The Georgia
8 Federal Court referred to voting as a delicate
9 franchise. And it said given the fragile nature of
10 the right to vote and the restrictions imposed, the
11 court finds that photo ID requirement imposes
12 severe restrictions on the right to vote. In
13 particular, the photo ID requirement makes the
14 exercise of the fundamental right to vote extremely
15 difficult for voters currently without acceptable
16 forms of photo ID for whom obtaining a photo ID
17 would be a hardship.

18 Unfortunately, the photo requirement is
19 most likely to prevent Georgia's elderly, poor and
20 African/American voters from voting. For those
21 citizens, the character and magnitude of their
22 injury, the loss of their right to vote is

23 undeniably demoralizing and extreme as those
24 citizens are likely to have no other realistic or
25 effective means of protecting their rights.

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1 Your Honor, that eloquent language is
2 directly applicable here. And we would urge the
3 Court to enter judgment in favor of plaintiffs,
4 against defendants, enter a declaratory judgment
5 finding that the law is unconstitutional and enjoin
6 its enforcement.

7 Thank you.

8 THE COURT: Thank you very much.

9 As I said at the break, I'll give all
10 counsel a day or so if there's any -- providing
11 it's five pages or less, anything, any additional
12 cites or anything that comes to your mind. Just do
13 it by -- well, you can do that -- I guess a
14 courtesy copy in Word. Doesn't have to be by
15 e-mail, your choice. Make sure everybody else is
16 copied whatever is submitted.

17 Lastly, just let me say in the Indiana
18 case, the trial judge, at least, had -- I don't
19 think he had full confidence in the lawyers who
20 litigated that case, at least, on the plaintiffs'
21 side. But I want to thank everybody for the
22 excellent briefs and argument and lawyering that's

23 been done in this case, so thank you very much.

24 Case will be taken as submitted.

25 It's going to take -- realistically, I'll

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1 struggle with this. I wish I could promise a
2 decision by Monday. I will certainly try to get
3 something out by the end of next week, and I'll
4 work as hard as I can. And I understand there are
5 time constraints, so I'll keep that in mind also.

6 MR. NEWMAN: Excuse me, your Honor. Did
7 you say close of business tomorrow to submit --

8 THE COURT: Sure. If there's something --
9 and that's just sometimes you think of something
10 you forgot to say or there's an aside or something
11 else. As long as you copy everybody. All right.

12 Thank you very much.

13 Court will be in recess.

14 (OFF THE RECORD.)

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