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JURISDICTIONAL STATEMENT

The Weinschenk Respondents alleged before the lower Court that the new Photo ID Requirement enacted in Senate Bill 1014 violated numerous provisions of the Missouri Constitution. The trial court found that the new Section 115.427, including its Photo ID Requirement, was unconstitutional in that it: (a) constitutes an impermissible additional qualification to vote in violation of Article VIII, Section 2 of the Missouri Constitution; (b) interferes with the “free exercise of the right of suffrage” and that “all elections shall be free and open” in violation of Article I, Section 25 of the Missouri Constitution; (c) requires payment of a fee, an electoral standard in violation of the Due Process and Equal Protection Clause, Article I, Sections 10 and 2, respectively; and, (d) constitutes an undue burden on the fundamental right to vote that is not narrowly tailored to meet a compelling state interest in violation of the Due Process and Equal Protection Clause of the Missouri Constitution, Article I, Sections 10 and 2, respectively. Therefore, this action involves the constitutionality of statutes of the State of Missouri, and jurisdiction is proper in this Court. Article V, Section 3 of the Missouri Constitution.

STATEMENT OF FACTS

Senate Bill 1014

Senate Bills Nos. 1014 and 730 (SB1014), which modified Missouri election laws, were passed by the General Assembly during the most recent regular legislative session and were signed into law by Governor Matt Blunt on June 14, 2006. [Appellant's Appendix, A58-102; LF314, ¶14; Ex.2]¹ Section 115.002 (as enacted by SB1014) stated that the revised provisions may be cited as the "Missouri Voter Protection Act." [A58]

SB1014 revised Section 115.427, RSMo, sets forth the forms of personal identification a voter was required to present to identify themselves at the polls before receiving a ballot. [A74-80; Ex.2] Under current law, which was adopted in 2002, a voter is required to identify themselves but is allowed to do so by presenting one of many forms of identification which are readily available to virtually all voters. Section 115.427.1, RSMo 2002. The acceptable forms of ID include:

- (1) Identification issued by the state of Missouri, an agency of the state,
or a local election authority of the state;

¹ Appellant's Appendix is referenced as "A". The transcript is referenced as "Tr.". The legal file is referenced as "LF". The exhibits filed with the trial court are referenced as "Ex.".

- (2) Identification issued by the United States government or agency thereof;
- (3) Identification issued by an institution of higher education, including a university, college, vocational and technical school, located within the state of Missouri;
- (4) A copy of a current utility bill, bank statement, government check, paycheck or other government document that contains the name and address of the voter;
- (5) Driver's license or state identification card issued by another state;
- (6) Other identification approved by the secretary of state under rules promulgated pursuant to subsection 3 of this section other identification approved by federal law; or
- (7) Personal knowledge of the voter by two supervising election judges, one from each major political party, shall be acceptable voter identification upon the completion of an affidavit that is signed by both supervisory election judges and the voter that attests to the personal knowledge of the voter by the two supervisory election judges.

Section 115.427.1, RSMo 2002.

SB1014 amended Section 115.427 to restrict the ID requirements to only allow certain types of photographic identification (Photo ID) to be presented by each voter who votes in-person at a polling place before being allowed to receive a

regular ballot (Photo ID Requirement). [A74-80; Ex.2] The Photo ID Requirement applies to all elections held after August 28, 2006. [A101-102; Ex.2]

Under SB1014 the only acceptable forms of Photo ID are:

- (1) Nonexpired Missouri driver's license showing the name and a photograph or digital image of the individual; or
- (2) Nonexpired or nonexpiring Missouri nondriver's license showing the name and a photographic or digital image of the individual; or
- (3) A document that satisfies all of the following requirements:
 - (a) The document contains the name of the individual to whom the document was issued, and the name substantially conforms to the most recent signature in the individual's voter registration record;
 - (b) The document shows a photographic or digital image of the individual;
 - (c) The document includes an expiration date, and the document is not expired, or if expired, expired not before the date of the most recent general election; and,
 - (d) The document was issued by the United States or

the state of Missouri; or

- (4) Any identification containing a photographic or digital image of the individual which is issued by the Missouri National Guard, the United States armed forces, or the United States Department of Veteran Affairs to a member or former member of the Missouri National Guard or the United States armed forces and that does not have an expiration date.

[A74-80; Ex.2]

SB1014 allows certain categories of voters who are unable to obtain an acceptable Photo ID to cast a “provisional” ballot in certain elections (primary and general elections.) [Tr.237-238²; A81; Ex.2] To do so, the voter must execute an affidavit averring that the voter is the person listed in the precinct register and that the voter is “unable” to obtain a current and valid Photo ID because of:

- (1) A physical or mental disability or handicap of the voter, if the voter is otherwise competent to vote under Missouri law; or
- (2) A sincerely held religious belief against the forms of personal identification described in subsection 1 of this section; or

² Unless otherwise noted, references to the Transcript are to the oral testimony on August 21, 2006.

(3) The voter being born on or before January 1, 1941.

[A76-77; Ex.2]

SB1014 further provided that for elections held on or before November 1, 2008, an individual who appears at the polling place without the newly required Photo ID and who is otherwise qualified to vote, may cast a provisional ballot after executing an affidavit and providing the forms of ID acceptable under current law. [A79-80; Ex.2] However, the provisional ballot referenced in SB1014 will only be counted after the election authority, among other requirements, verifies the identity of the individual by comparing that individual's signature to the signature on file with the election authority (voter registration application) and also determines that the individual was eligible to cast a ballot at the polling place where the ballot was cast. [A19,23,81-83; Ex.2]

SB1014 also amended Section 115.430, RSMo, regarding provisional ballots. [A81-88; Ex.2] Prior to SB 1014, the provisional ballot only contained the statewide candidates and issues, and federal candidates. [LF81; Ex.2] The revised section 115.430 requires the provisional ballot to be the complete ballot for that voter's precinct [LF81; Ex.2]. The provisional ballot is now a full ballot for the voter's precinct of residence rather than a ballot limited to only statewide candidates and issues, and federal candidates. [A81; Ex.2] This section further contains the steps necessary to be taken to establish a voter's eligibility to vote at a polling place as well as other requirements for provisional ballots. [A81-88; Ex.2] Section 115.430.1, RSMo, however, did not eliminate the limitation that

provisional ballots only apply in primary and general elections. [A81; Ex.2] Section 115.430, RSMo, specifically continues to provide that “[t]his section shall apply to primary and general elections where candidates for federal or statewide offices are nominated or elected and any election where statewide issue or issues are submitted to the voters.” [A81; Ex.2] Betsy Byers, Co-Elections Director for the Secretary of State’s Office, testified that in the 2004 general election over 8,000 provisional ballots were cast and only approximately 3,000 were actually counted. [Tr.243]

Procedural Background

Two lawsuits were filed in state court challenging the Photo ID requirements of SB1014. The first lawsuit, *Jackson County, et al. v. State of Missouri*, Cole County Circuit Court No. 06AC-CC00587, alleges that the Photo ID requirements of SB1014 violated Article X, Section 21 of the Missouri Constitution (Hancock Amendment). [LF58-59] The individually named plaintiffs are Katheryn J. Shields, County Executive of Jackson County; Charlie A. Dooley, County Executive of St. Louis County, and Francis G. Slay, Mayor of the City of St. Louis. The case is before this Court under No. SC88038. Robin Carnahan, Secretary of State, is not a named defendant in that lawsuit.

The second lawsuit, *Kathleen Weinschenk, et al., v. State of Missouri and Robin Carnahan, Secretary of State*, Cole County Circuit Court No. 06AC-CC00656, alleges, in addition to a Hancock challenge, that the Photo ID requirements: (1) constitute an impermissible additional qualification to vote

under Article VIII, Section 2 of the Missouri Constitution; (2) interfere with the “free exercise of the right of suffrage” and the requirement that “all elections shall be free and open” in violation of Article I, Section 25 of the Missouri Constitution; (3) require the payment of money to vote in violation of the Due Process and Equal Protection Clause of the Missouri Constitution, Article I, Section 2; (4) constitute an undue burden on the fundamental right to vote that is not narrowly tailored to meet a compelling state interest in violation of the Due Process and Equal Protection Clause of the Missouri Constitution, Article I, Sections 10 and 2, respectively; (5) constitute a disparate impact upon qualified voters in suspect classes in violation of the Equal Protection Clause in Article I, Section 2 of the Missouri Constitution; and, (6) discriminate between absentee voters and in-person voters in violation of the Equal Protection Clause in Article 1, Section 2 of the Missouri Constitution. [Tr.268; LF9-54; Ex.11-16]

All except for one of the individually named plaintiffs in the second lawsuit are qualified voters in the state of Missouri who do not possess a Photo ID acceptable under SB1014. [LF310-312; Tr.268; Ex.11-16] The remaining named plaintiff is Give Missourians a Raise, Inc., a Missouri not-for-profit organization, which is the petitioner for a statewide ballot initiative to raise the minimum wage which was certified by the Missouri Secretary of State’s Office for placement on the November, 2006 ballot. Robin Carnahan, Secretary of State, is a named defendant in this lawsuit. [LF9]

The two cases were consolidated by the Circuit Court of Cole County.

[LF59] On August 21, 2006, an evidentiary hearing was held during which oral testimony, exhibits, affidavits, and party stipulations were presented to the Court.

[Tr.2] Subsequent to this hearing, the trial court granted the Motion to Intervene filed by Dale Morris, a Missouri voter, and Missouri State Senator Delbert Scott.

[LF6]

On September 1, 2006, the circuit court heard argument as to relevancy and admissibility of exhibits and affidavits filed with the court as of that date. [Tr., September 1, 2006] Final oral argument was heard on September 6, 2006. [LF7]

On September 14, 2006, the circuit court issued its Judgment and its Findings of Fact and Conclusions of Law for the consolidated cases. [LF296-308, 309-352] The court found that the new Section 115.427, including its Photo ID Requirement is unconstitutional in that it: (a) constitutes an impermissible additional qualification to vote in violation of Article VIII, Section 2 of the Missouri Constitution; (b) interferes with the “free exercise of the right of suffrage” and that “all elections shall be free and open” in violation of Article I, Section 25 of the Missouri Constitution; (c) requires payment of a fee, an electoral standard in violation of the Due Process and Equal Protection Clause, Article I, Sections 10 and 2, respectively; and, (d) constitutes an undue burden on the fundamental right to vote that is not narrowly tailored to meet a compelling state interest in violation of the Due Process and Equal Protection Clause of the

Missouri Constitution, Article I, Sections 10 and 2, respectively. [LF296-308, 309-352]

The court further found that there was a Hancock violation but denied the requested relief as the relief was for a statewide injunction, rather than county-by-county injunction. [LF296-308, 309-352] The court denied the claims regarding disparate impact of qualified voters and discrimination between absentee voters and in-person voters. [LF296-308, 309-352]

The court enjoined the defendants State of Missouri and the Secretary of State and those respective officers, agents, representatives, employees, and successors, and all other persons in active concert and participation with the defendants in administering and certifying elections within the state, including local election officials from implementing and enforcing the changes to Section 115.427 enacted in SB1014 including the Photo ID Requirement.³ [LF296-308]

The Defendant State of Missouri and the Intervenors Dale Morris and Senator Delbert Scott timely filed notices of appeal. [LF358, 421] This Court has ordered these cases be expedited on appeal.

³ The Secretary of State's office provides guidance and assistance to the local election authorities. However, the Secretary of State's Office has no supervisory enforcement as to the local election authorities. (TR. 262).

Evidentiary Background

The parties entered into stipulations as to various facts and documents. [Ex.10; 52] The parties also submitted numerous affidavits in lieu of live witness testimony and exhibits which have been indexed by and will be provided to this Court by the Appellant, the State of Missouri.

As to the constitutional challenges, plaintiffs submitted testimony of Wendy Noren, Boone County Clerk, and Betsy Byers, Co-Election Director for the Missouri Secretary of State's Office. [Tr.178-227, 228-262]

Ms. Noren has been Boone County Clerk since 1982 and has extensive experience in conducting research as to issues of alleged voter fraud in Missouri. [Tr.178-183; Ex.51] Ms. Noren testified regarding the difficulty that individuals, especially senior citizens and women who change their name, will face in voting due to the new Photo ID requirement. [Tr.184-186; Ex.51]. She also testified regarding the impact the new ID requirement will have on individuals who lose their ID as victims of crime or have them confiscated by the police based on a speeding or other traffic violations. [Tr.191-192, 223; Ex.51] Ms. Noren further testified that in her 24 years of experience in elections, voter impersonation fraud has not been an issue in Boone County. [Tr.194; Ex.51] She stated that the most prevalent form of alleged voter fraud is voter intimidation through absentee ballots which the Photo ID Requirement will not prevent. [Tr.194-195; Ex.51] Ms. Noren testified that, in her opinion based on her years of election experience, the

Photo ID Requirement is not necessary to prevent any type of fraud that exists anywhere in this State. [Tr.199-200; Ex.51]

Betsy Byers has been employed as either Co-Director of Elections or Deputy Secretary of State for Elections since 1999. [Tr.228] In those positions, she has served under both Republican and Democratic Secretaries of State. [Tr.228] Prior to her position with the Secretary of State's Office, Ms. Byers served as a local election authority, Shelby County Clerk, for six years. [Tr.229] For the last 13 and half years, Ms. Byers has been involved in the administration of elections in this state. [Tr.229] Ms. Byers testified that in her years of experience she has not received any reports of voter impersonation fraud. [Tr.231-232, 234-235, 260] Specifically, since she has been an elections director for the Secretary of State's Office, Ms. Byers testified she has not received any reports of impersonation fraud nor been informed of widespread or significant issues of concern about voter impersonation fraud occurring in Missouri. [Tr.231-232, 234-235] She further stated that if there had been any widespread or significant issues with regard to this type of voter fraud, she would have heard about it. [Tr.231-232] Ms. Byers testified that during her tenure with the Secretary of State's office she has received reports of concerns about voter intimidation through absentee ballots and voter registration fraud; however, neither of these would be remedied or assisted by the new Photo ID Requirement. [Tr.231-232]

Plaintiffs also elicited testimony from Robert Nichols, Director of Elections for Jackson County (20 years of election experience); Judy Taylor, Director of

Elections for St. Louis County (30 years of election experience); and Carol Signaigo, former Assistant Director of Elections for the City of St. Louis (approximately 30 years of election experience) regarding the lack of voter impersonation fraud in their respective jurisdictions. [Tr.96, 120, 150-151]

As to the Hancock challenge, Mr. Nichols, Ms. Signaigo, Ms. Taylor, and Ms. Noren testified regarding the increased costs associated with the new Photo ID Requirement for their respective jurisdictions including the cost for increased use of provisional and absentee ballots. (Tr.51-73, 101-119, 132-150, 200-212; Ex.51 Ms. Byers testified as to the increased costs for all the local election authorities but did not quantify a specific amount. [Tr.243-252, 260-262]

The remainder of the evidence was submitted through stipulations, affidavits, and exhibits. The parties presented the following evidence as to the constitutional claims.

The parties submitted evidence of the number of Missouri citizens who potentially do not possess the form of Photo ID necessary under SB1014. Defendant Carnahan presented the affidavit of Richard Lamb, Director of Policy and Government Affairs for the Missouri Secretary of State's Office. Mr. Lamb stated that the Secretary of State's Office estimated that approximately 240,000 registered voters may not have acceptable Photo ID. This estimate was based on a comparison of the Missouri Centralized Voter Registration list and the Missouri Department of Revenue's driver's and nondriver's license records. [Affidavit-Richard Lamb;Ex.21]

This compilation was created in order to send mailings to households with registered voters who may not have the required Photo ID as part of the advance public notice that the Secretary of State's Office was directed to do under SB1014. [Affidavit-Richard Lamb; Ex.21] This advance public notice was calculated to inform the public generally of the new Photo ID Requirement and became effective immediately upon signature of the Governor under an emergency clause in SB1014. [A.77; Ex.2]

Lowell Pearson, Deputy Director of the Missouri Department of Revenue, stated, in a supplemental affidavit, that after a random check of the Secretary of State's list Revenue found that 11 out of about 100 registered voters actually possessed a Department of Revenue-issued Photo ID when Revenue's history of name change was used. [Ex.C] Assuming Revenue's random sample is accurate then approximately 213,600 registered votes may not have the Photo ID required by SB1014. [Affidavit-Richard Lamb] While SB1014 was proceeding through the legislative process, the Missouri Department of Revenue stated in their fiscal note that there are approximately 169,215 individuals who do not have the required Photo ID. [Ex.10,¶1; Ex.4]

The State of Missouri presented evidence that as of August 30, 2006, Revenue had issued 1601 free non-driver licenses. [Ex.C] Therefore, according to Revenue's error rate based on its random sampling of the Secretary of State's mailing list, 1601 of 213,600 is 0.75% of the registered voters who may not have

the Photo ID; or 211,999 (99.25%) potential registered voters would still need the Photo ID. [Affidavit-Richard Lamb]

Statistical census evidence was presented to the Court regarding the percentage of African-Americans who do not possess the newly required Photo ID and may be impacted by SB1014. More than 21% of Missouri's African-Americans have no automobile, over four times the percentage of white Missourians. [Ex.10,¶2;Ex.34] Twenty-five percent of Missouri's African-Americans live in poverty as compared to ten percent of white Missourians. [Ex.10,¶3; Ex.34] The average per capita income for Missouri African-Americans is \$15,099 compared to \$23,583 for white Missourians. [Ex.10,¶4; Ex.34] Furthermore, seventeen and nine-tenths percent of Missouri African-Americans over the age of 25 have less than a high school education while only thirteen and one tenth percent of white Missourians have this level of education. [Ex.10,¶5; Ex.34]

The parties submitted the Missouri Department of Revenue Information Systems Bureau, Driver Records Inquiry, Total Drivers by Class, Sex, and Age, available at

http://www.dorx.mo.gov/publicreports/drivers_class_sex_age_report.txt.

[Ex.10,¶6]

The Defendants presented statistical evidence that the total population of Missouri was 5,800,310 on July 1, 2005, and that the number of Missourians 18 years of age or older on that same date was 4,422,078. [Ex.10, ¶33] The number

of registered voters in Missouri on August 8, 2006, was 3,983,542. [Ex.10, ¶34] As of August 16, 2006, the number of Missourians with a driver's or nondriver's license, excluding permits, was 4,421,900. [Ex.B]

The parties also presented evidence regarding the process for Missourians to obtain a driver's or non-driver's license. The evidence was in the form of an affidavit from Lowell Pearson, Deputy Director of the Department of Revenue, and information obtained from the websites of the Departments of Revenue and Health and Senior Services. (Ex.10, ¶11 through 26, Exs.22, 23, 24, 25, 26, 27, 29, 41, 42] For a Missouri citizen who does not possess a Photo ID acceptable under SB1014, three different forms of proof must be obtained and presented: Proof of Lawful Presence, Proof of Identity, and Proof of Residency. [Ex.22, 42; Ex.B]

For an individual born in the United States, only two documents are acceptable to establish Proof of Lawful Presence. These documents are a birth certificate that is certified with embossed or raised seal by the state or local government, or a U.S. Passport. [Ex.22, 42] The parties presented evidence of the cost of the birth certificate (\$15 in this state; range from \$5.00 to \$30.00 in other states) and of the time required (6 to 8 weeks in this state; 8 to 10 weeks from the state of Louisiana). [Ex.10, ¶12, 15; Ex.23; Ex.25] The parties presented evidence that Missouri does not maintain birth certificate records prior to January 1, 1910, and that over 1.6 million Missouri residents were born in another state. [Ex.10, ¶23, 26; Ex.26] Further, to obtain a U.S. passport a person must contact

the United States Department of State, fill out an application, request a passport, and pay a fee of \$97 for delivery within six weeks, or \$236 for delivery through private agencies within seven to ten days. [Ex.10, ¶16; Ex.27]

For an individual born in another country, lawful presence is only established if they present one of three documents: Certificate of Citizenship, Certificate of Naturalization, or a Certificate of Birth Abroad. [Ex.10, ¶11; Ex.22] These documents also require payment of money and take time to receive. For example, a certificate of citizenship costs \$255, requires completion of a seven-page application, and takes three weeks simply to receive notification that the government has received the application. [Ex.28]

The parties presented evidence that for those individuals whose name has changed since birth, additional certified documents must be obtained and presented to establish Proof of Lawful Presence. These include a certified marriage license, a certified divorce decree, a certified court order, certified adoption papers or amended birth certificate. [Ex.10, ¶17, Ex. 22]. These records also cost money. For example, the fees to obtain a certified copy of a marriage license range from \$5.00 to \$30.00. [Ex.10, ¶18; Ex. 41]

In addition to establishing Proof of Lawful Presence, any person who needs a Photo ID must also establish Proof of Identity. To establish Proof of Identity, a Social Security card or Medicare card with the person's current name can be presented. If the name on the Social Security card or Medicare card does not match that person's current name, additional documents must be presented to

supply proof of the name change. [Ex. 22; Ex.42].

To obtain a Social Security card, an individual must personally submit a completed application to the local Social Security office and provide at least two documents from the following satisfying the three categories identified:

- a) Proof of U.S. citizenship: U.S. birth certificate, U.S. passport, Certificate of Naturalization or Certificate of Citizenship;
- b) Proof of age: birth certificate or U.S. passport;
- c) Proof of identity: U.S. driver's license; state-issued nondriver identification card or U.S. passport (document must be current (not expired) and show name, identifying information (date of birth or age) and preferably a recent photograph). If the person does not have one of these specific documents or cannot get a replacement for one of them within 10 days, other documents accepted for proof of identity are:
 - i) employee ID card;
 - ii) school ID card;
 - iii) health insurance card (not a Medicare card)
 - iv) U.S. military ID; or
 - v) adoption decree.

(Documents must be original or copies certified by the issuing agency. Proof of U. S. citizenship and age are not required for those requesting a replacement card.)

[Ex.10, ¶20; Ex. 29]

For persons whose names have changed (such as persons who have married or have divorced and requested a change of name), an applicant must take or mail a completed application to the local Social Security office and must submit original documents (or copies certified by the issuing agency) from the following to show proof of the name change:

- a) U.S. citizenship (if not previously established with Social Security) or immigration status;
- b) Legal name change: marriage document; divorce decree specifically stating person may change her name; certificate of naturalization, or court order for a name change;
- c) Identity: U.S. driver's license; state-issued nondriver identification card or U.S. passport (document must be current (not expired) and show name, identifying information (date of birth or age) and preferably a recent photograph).

(If documents do not give date of birth, age or recent photograph, person will need to produce one document with old name and a second document with the new legal name containing the identifying information (date of birth or age) or a recent photograph.)

[Ex.10, ¶21; Ex. 29]

The final of the three “Proofs” that must be established to obtain a Photo ID is “Proof of Residency.” Options to establish Proof of Residency are many. Those options include the most recent utility bill, voter identification card, bank statement, government check, pay check, property tax receipt or an official letter by state or local governmental agency on its letterhead issued within the last 30 days. [Ex. 22; Ex.42]

Intervenors offered contrary evidence on the existence of voter fraud in the state of Missouri through two reports of alleged experts L. Marvin Overby, political science professor at the University of Missouri - Columbia, and Jeffrey Milyo, an associate professor of public affairs and economics at the University of Missouri - Columbia. However, these reports state that there are no studies or existing scholarly literature that examine Photo ID laws. [Affidavits – L. Marvin Overby and Jeffrey Milyo]

As to the Hancock claims, the Defendants offered contrary evidence in the form of affidavits submitted by John Diehl, chairman of the St. Louis County Board of Election Commissioners, and Scott Leiendecker, Director of Elections of the City of St. Louis. The former has held his position for approximately one year and 6 months and the latter has held his position for approximately one year. [Affidavit-Scott Leiendecker; Tr.- September 1, 2006 hearing at page 90] Each affidavit discussed the absence of costs that would be incurred by SB1014.

[Affidavits-Scott Leiendecker and John Diehl]

POINT RELIED ON

The trial court did not err in finding that the Photo ID Requirement in SB1014 violated the Equal Protection Clause of the Missouri Constitution because this Requirement impinges on the fundamental right to vote of as many as 240,000 registered voters in Missouri and is not necessary to promote any compelling state interest in that there are no reported instances of voter impersonation fraud in Missouri, the only type of fraud that the Photo ID could prevent. (This is in response to Appellant State of Missouri's Point III in their Argument Section.)

Common Cause/Georgia v. Billups, 406 F.Supp.2d 1326 (N.D. Ga. 2005)

Etling, et al. v. Westport Heating & Cooling Services, Inc., 92 S.W.3d 771

(Mo. banc 2003)

Burdick v. Takushi, et al., 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992)

STANDARD OF REVIEW

For a court tried case, the standard of review is well-established. An appellate court must sustain the judgment of the lower trial court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.

Murphy v. Carron, 536 S.W.2d 30, 32 (Mo. banc 1976).

This Court requires that strict scrutiny be applied under Missouri's Equal Protection Clause to any law that "impinges upon a fundamental right." *Etling v. Westport Heating and Cooling Systems, Inc.*, 92 S.W.3d 771, 774 (Mo. banc 2003). The right to vote under the Missouri Constitution in Article VIII, Section 2 and Article I, Section 25 is given explicit protection. This Court and other lower Missouri appellate courts have uniformly made it clear that the right to vote is fundamental. *Etling v. Westport Heating and Cooling Systems, Inc.*, 92 S.W. 3d at 774; *Mullenix-St. Charles Properties, L.P. v. City of St. Charles*, 938 S.W.2d 550, 559 (Mo.App.E.D. 1998); *Blaske v. Smith & Entozeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. banc 1991); *Nguyen v. Nguyen*, 882 S.W.2d 176, 177-78 (Mo.App.W.D. 1994). Therefore, under Missouri constitutional law, strict scrutiny is required and as such is the appropriate standard on review.

ARGUMENT

Respondent Carnahan incorporates and adopts by reference the arguments of Respondents Weinschenk, et al., as to Counts I, II, III and VI. These counts are consistent with the petition filed by the respondents before the trial court.

Respondent Carnahan incorporates and adopts by reference the arguments of Respondents Weinschenk, et al., as to Count IV with additional argument consistent with Respondent Carnahan's position before the Circuit Court of Cole County. In the interest of judicial economy, arguments of Respondents Weinschenk, et al., will not be repeated within this brief.

Count I refers to SB1014 constituting an impermissible additional qualification to vote in violation of Article VIII, Section 2 of the Missouri Constitution and relates to Appellant State of Missouri's Point I in their Argument section. Count II refers to SB1014 violating the prohibition on interference with the "free exercise of the right of suffrage" and the requirement that "all elections shall be free and open" contained in Article I, Section 25 of the Missouri Constitution and relates to Appellant State of Missouri's Point IV in their Argument section. Count III addresses the requirement of payment of money to vote in violation of the Due Process and Equal Protection Clauses of Article I, Sections 10 and 2, respectively, of the Missouri Constitution and relates to Appellant State of Missouri's Point II in their Argument section. Count IV refers to SB1014 constituting an undue burden on the fundamental right to vote that is not narrowly tailored to meet a compelling state interest in violation of the Due

Process and Equal Protection Clauses in Article I, Sections 10 and 2, respectively of the Missouri Constitution and relates to Appellant State of Missouri's Point III in their Argument Section. Count VI relates to the Hancock violations of SB1014 and relates to Appellant State of Missouri's Points V and VI in their Argument section.

The position of Respondent Carnahan during the legislative process and before the lower court was, and remains before this Court, that the Photo ID Requirement in SB1014 jeopardizes thousands of Missourians' fundamental right to vote in violation of the Equal Protection Clause of the Missouri Constitution. See Article I, Section 2 of the Missouri Constitution.

The evidence clearly established that the new Photo ID Requirement impinges on the fundamental right to vote of as many as 240,000 registered voters or of, at minimum, a range from 169,215 to 213,600 registered voters who do not possess the type of ID now required to cast a regular ballot. [Affidavit-Richard Lamb; Ex.4; Ex.10, ¶1; Ex.21; Ex.C] The record is devoid of any evidence to support the alleged compelling government interest that this bill purported to protect – voter impersonation fraud. In fact, the evidence is to the contrary. Since the 2002 change in election laws requiring some form of identification and even prior to that change, there have been no reported instances of voter impersonation fraud. (Tr.96, 120, 150-151, 194, 199-200, 231-232, 234-235, 260; Ex.51] Governor Blunt – then Secretary of State Blunt- stated that the two statewide elections in 2002 and 2004 (presidential primary) were “fraud-free” and “were two

of the cleanest and problem-free elections in recent history.” [Ex.10, ¶31; Ex.31, Ex.32]

Missouri’s Equal Protection Clause (Mo. Const. Article I, Section 2) provides, in relevant part:

[T]hat all persons are created equal and are entitled to equal rights under the law.

To determine the constitutionality of a state statute under Missouri’s Equal Protection Clause, the Missouri Supreme Court requires a “two-part analysis.”

Etling v. Westport Heating & Cooling Systems, Inc., 92 S.W.3d at 774.

The first step is to determine whether the classification “operates to the disadvantage of some suspect class or **impinges upon a fundamental right explicitly or implicitly protected by the Constitution.**” **If so, the classification is subject to strict scrutiny and this Court must determine whether it is necessary to accomplish a compelling state interest.** If not, review is limited to determining whether the classification is rationally related to a legitimate state interest. Suspect classes are classes such as race, national origin or illegitimacy that “command extraordinary protection from the majoritarian political process” for historical reasons. Fundamental rights include the rights to free

speech, to vote, to freedom of interstate travel, and other basic liberties.

(emphasis added).

The right to vote is given explicit protection under the Missouri Constitution pursuant to Article VIII, Section 2 and Article I, Section 25. This Court and lower appellate courts uniformly have made it clear that the right to vote is a fundamental right. See, e.g. *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d at 774; *Mullenix-St. Charles Properties, L.P. v. City of St. Charles*, 983 S.W.2d at 559; *Blaske v. Smith & Entozeroth, Inc.*, 821 S.W.2d at 829; *Nguyen v. Nguyen*, 882 S.W.2d at 177-78. Therefore, under Missouri constitutional law, strict scrutiny is required.

Under strict scrutiny, the Court must determine whether the challenged statute “is necessary to accomplish a compelling state interest.” *Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d at 774. See also *State v. Williams*, 729 S.W.2d 197 (Mo. banc 1987) (when a statutory scheme impinges upon a fundamental right explicitly or implicitly protected by the Constitution it receives strict judicial scrutiny to ascertain whether the classification is necessary to promote a compelling state interest.) Also, as held in *Komosa v. Komosa*, 939 S.W.2d 479, 482 (Mo.App.E.D. 1997), “[a]ny state restriction which significantly interferes with the exercise of a fundamental right is subject to strict scrutiny and cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”

The Photo ID Requirement cannot survive strict scrutiny. It impinges on the fundamental right to vote of as many as 240,000 registered voters in Missouri. [Affidavit-Richard Lamb; Ex.21] Even based on the numbers by the Department of Revenue, the Photo ID Requirement impacts the fundamental right to vote of as many as 169,215 to 213,600. [Affidavit-Richard Lamb; Ex.10, ¶1; Ex.4; Ex.C]

As submitted in the affidavit of Richard Lamb, Director of Policy and Government Affairs for the Missouri Secretary of State's Office, the Secretary of State's Office estimated that approximately 240,000 registered voters may not have acceptable Photo ID. [Affidavit-Richard Lamb] This estimate was based on a comparison of the Missouri Centralized Voter Registration list and the Missouri Department of Revenue's driver's and nondriver's license records and a list was created in order to send mailings to households of registered voters who may not have the required Photo ID as part of the advance public notice initiative that the Secretary of State's Office was directed to conduct under SB1014. [Affidavit-Richard Lamb; Ex.21] Any time you compare two different lists compiled for reasons separate and apart from each other to make a third list, the third list may not be 100% accurate. [Ex.21]

Furthermore, as of August 30, 2006, the Department of Revenue had issued 1601 free nondriver licenses. [Ex.C] Therefore, even according to Revenue's error rate based on its random sampling of the Secretary of State's mailing list, 211,999 (99.25%) potential registered voters would still need the ID. [Affidavit-Richard Lamb]

These thousands of Missourians will be unduly burdened by having to jump through the myriad of governmental bureaucracies and pay the costs to obtain the necessary Photo ID. As explained in the factual section of this brief, for a registered voter to obtain a nondriver's license, he or she must provide, among other things, "Proof of Lawful Presence," which typically requires the voter to obtain a certified copy of the voter's birth certificate from the state in which the voter was born, at a cost of \$15 with a wait of six to eight weeks in Missouri or at a cost of \$5 to \$30 and a wait of eight to ten weeks in other states; "Proof of Lawful Identity," which most commonly is a Social Security card with the applicant's current name; and "Proof of Residency," which can be a voter ID card, utility bill, or government check showing the voter's address. [Ex.10, ¶12, 15, 20; Ex.22; Ex.23; Ex.25; Ex.42; Ex.B]

Additional certified documents including marriage license, divorce decree, court order, adoption papers, or amended birth certificate are necessary for individuals who have changed their name. [Ex.10, ¶17, 18, 21; Ex.29; Ex.42] This has a direct impact and demonstrates a further undue burden on women who change their name due to marriage. The expense, time and effort required to obtain the underlying documents to satisfy these three requirements will place a substantial and undue burden on the fundamental right to vote of the properly registered Missouri voters who do not currently possess a valid Photo ID, including the individual respondents in this case.

The Census statistical data and the affidavits of the named Respondents submitted into evidence established that the groups of individuals most likely to be affected are the elderly, the poor, the under-educated, or otherwise disadvantaged. [Ex.10, ¶2, 3, 4, 5, 6; Ex.34] This is further supported by the groups specifically enumerated in SB1014 as being eligible for provisional ballots if they do not have the required photo ID.

The lower Court correctly found that while the Photo ID burden placed on the voter may seem

“minor or inconsequential to the mainstream of our society for whom automobiles, driver licenses, and even passports are a natural part of everyday life. However, for the elderly, the poor, the under-educated, or otherwise disadvantaged, the burden can be great if not insurmountable, and it is those very people outside the mainstream of society least equipped to bear the costs or navigate the many bureaucracies necessary to obtain the required documentation.”

[LF304]

The evidence presented to the lower court demonstrated that the Photo ID requirement is not necessary to accomplish any compelling state interest. There is no evidence that existing state law is insufficient to deter and prevent voter impersonation fraud, the only type of fraud the Photo ID Requirement could prevent. Since the 2002 change in Missouri election laws requiring some form of identification, there have been no reported instances of voter impersonation fraud.

Governor Blunt stated that the two statewide elections – 2002 general and 2004 presidential primary- held after these changes were implemented were “fraud-free” and “were two of the cleanest and problem-free elections in recent history.” Furthermore, it is already a Class One election offense to impersonate a voter. See Section 115.631(4), RSMo.

Four seasoned local election authorities and the Co-Director of Elections for the Secretary of State’s office Betsy Byers (who was also Shelby County Clerk for six years) testified that voter impersonation fraud is not an issue in this state, that there were no reported instances of such fraud, and that the Photo ID Requirement would do nothing to prevent the most prevalent types of alleged voter fraud reported in this state. See testimony of Betsy Byers – 13 years of elections experience (Tr.231-232, 234-235, 260); Wendy Noren - 24 years of elections (Tr.194); Robert Nichols - 20 years of election experience (Tr.96); Judy Taylor - 30 years of election experience (Tr.150-151); and Carol Signaigo - approximately 30 years of election experience (Tr.120).

The appellants relied on the 2000 election for evidence of voter fraud in this state. However, “the chaos” that Appellant State of Missouri is referring to was not fraud but rather eligible voters being disenfranchised. The United States Department of Justice conducted an investigation subsequent to the reports of then-Secretaries of State Cook and Blunt and came to the conclusion that the real issue was that eligible voters were not being allowed to vote because they had been improperly taken off the voter registration list and there was not sufficient

staff or resources to address the needs of these voters. [Ex.30] Specifically, on August 14, 2002, the United States Department of Justice concluded that the St. Louis City Election Board had “improperly removed voters from the registration rolls by placing voters on inactive status without notice and then failing to maintain procedures on Election Day adequate to ensure that those voters could reactivate their registration status and vote without undue delay.” [Ex.30]

Further, the State relies on the testimony of Judy Taylor that during the recent primary election an election judge attempted to cast a vote after they had already voted by absentee ballot. What the State fails to mention is that this person was stopped prior to voting without the necessity for a photo ID. [Tr.166] Even if this person had successfully committed fraud and voted twice, this is not the type of fraud that the Photo ID Requirement would prevent – voter impersonation fraud, or someone coming to vote at the polls claiming to be someone other than who they really are and attempting to vote. [Tr.166]

The Intervenors stretch even further for their evidence relying on newspaper articles and allegations in an unresolved pending federal lawsuit that has no evidentiary value in the present case. The lawsuit referenced by the Intervenors is over the elections held in 2002 and 2004 which were under the watch of Governor Matt Blunt who was Secretary of State at the time of both of these elections. One of these elections is the very election that Governor Blunt proudly stated was “fraud-free” and one of “the cleanest and problem-free elections in recent history”. Further, there was no evidence presented of any fraud

occurring in the 2004 general election. The pending federal lawsuit contains no allegations of voter fraud of any kind but rather is specifically targeted to the allegation that some of the local election authorities are not properly following the National Voter Registration Act (i.e. possibly removing voters without providing them with the proper notice). See *U.S. v. Missouri, et al.*, No. 2:05-cv-04391-NKL (filed in the Western District). It is also important to note that the National Voter Registration Act requires that voters after receiving the proper notifications remain on the voter registration lists for two federal elections. See Section 1973gg-6(d).

Conspicuous by its absence in the evidence and arguments of the Appellants is a single reported or prosecuted case of voter impersonation fraud in the state of Missouri which the Photo ID Requirement is allegedly designed to prevent. The Photo ID Requirement is overbroad and not narrowly tailored to address any types of alleged voting fraud that exists. As the lower court found “the stated purpose of the Photo ID Requirement - - preventing election fraud - - could not rationally have been its true purpose, but was mere pretext and certainly was not necessary to accomplish any compelling state interest.” [LF346]

In a May 11, 2006, letter to Governor Matt Blunt, Respondent Secretary of State Robin Carnahan pointed out that “Proponents of this legislation have argued the legislation is necessary to remedy perceived voter fraud. However, there is no evidence that such voter fraud actually exists or that [the Photo ID Requirement] would solve any existing problem in our elections system.” Secretary of State

Carnahan further stated that “Missouri’s voter identification requirements are already among the strictest in the nation and have proven an effective safeguard to prevent wrongful voting.” She further stated that “[r]ather than solve any real problem, Senate Bill 1014 will jeopardize the integrity of our elections by getting in the way of 170,000 Missourians’ right to vote and have their votes counted.” (Ex. 33).

Appellants State of Missouri and Intervenors have argued that strict scrutiny is not required based upon U.S. Supreme Court precedent. In *Burdick v. Takushi*, 504 U.S. 428 (1992), 112 S.Ct. 2059, 119 L.Ed. 2d 245 (1992), the United States Supreme Court applied a somewhat more flexible test in holding that Hawaii’s prohibition on write-in voting did not unreasonably infringe upon its citizens’ rights under the United States Constitution’s First and Fourteenth Amendments. *Id.* at 433-34. The *Burdick* case specifically stated

“a court considering a challenge to a state election law must weigh the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth amendments that the plaintiff seeks to vindicate against the precise interests put forward by the State as justifications for the burden imposed by the rule taking into consideration the extent to which those interest make it necessary to burden the plaintiff’s rights.”

Burdick v. Takushi, 504 U.S. at 433-34. See also *Anderson v. Celebrezze*, 460 U.S. 780, 103 S.Ct. 1564, 75 L.Ed.2d 547 (1983). Under this standard,

the rigorousness of our inquiry into the propriety of a state election law depends upon the extent to which a challenged statute burdens the constitutional rights. When those rights are subjected to “severe” restrictions, the regulation must be narrowly drawn to advance a state interest of compelling importance. *Burdick v. Takushi*, 504 U.S. at 433-34.

Distinguishable from the voter restrictions presently before this Court, the law challenged in *Burdick* did not impinge or interfere with a qualified voter’s fundamental right to cast a ballot. Rather, it limited the potential candidates whose names would appear on the ballot. Under this type of circumstance, *Burdick* did not apply strict scrutiny but instead used the more flexible standard. The *Burdick* Court explained that the reason it used a lesser standard was because “it [could] hardly be said that the laws at issue here unconstitutionally limit access to the ballot by party or independent candidates or unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot.” *Id.* at 434. The Photo ID Requirement, unlike the law challenged in *Burdick*, is a “severe restriction” as it unreasonably interferes with the right to vote of thousands of qualified Missouri voters. Therefore, *Burdick* is factually distinguishable and should not be applied to the present case.

Even if this Court were to apply the *Burdick* standard to SB1014, the Photo ID Requirement would still be unconstitutional. That was the conclusion reached by the Georgia federal court in *Common Cause/Georgia v. Billups*, 406 F.Supp.2d 1326 (N.D. Ga. 2005). In this decision, the federal court found that the “character

and magnitude” of the asserted injury to the fundamental right to vote is significant and irreparable. The precise interests put forward by the state as justification for the burden imposed by the Photo ID Requirement, preventing voter fraud, is not narrowly tailored and is likely not rationally based on that interest. Therefore, under any scrutiny – strict, flexible or otherwise – the Photo ID Requirement is unconstitutional. *Id.*

It is important to also note that in Georgia there are more options for the underlying documents that can be provided to obtain the required Photo ID than in Missouri. See *Common Cause/Georgia v. Billups*, 439 F.Supp.2d 1294, 1306-1311 (N.D. Ga. 2006). For example, nonphoto documents that can be used to obtain the required photo ID include, but are not limited to, voter registration application, copy of marriage license application, a copy of the applicant’s state or federal tax return filed for the previous calendar year, paycheck bearing the imprinted name of the applicant’s employer, any other document issued by local, state, or federal government so long as the document provides a reasonably reliable confirmation of the identity of the applicant. *Id.* at 1310-1311. Missouri only allows a birth certificate, certified with embossed or raised seal by state or local government, or a U.S. Passport. [Ex.10, ¶11;Ex. 22]

Therefore, the Photo ID Requirement in SB1014 violates the Equal Protection Clause of the Missouri Constitution under the strict scrutiny standard or the lower more flexible standard of *Burdick*.

Furthermore, it is a subterfuge to argue that a properly registered voter who has voted for years, but now can not exercise that fundamental right simply because they are unable to obtain the newly required Photo ID, is not disenfranchised because he or she can cast a provisional ballot. First, a provisional ballot does not guarantee that the vote will be counted. Second, the provisional ballots are only available in primary and general elections.

The provisional ballot referenced in SB1014 will only be counted after the election authority, among other requirements, verifies the identity of the individual by comparing that individual's signature to the signature on file with the election authority (which may be many years old). [LF76, 80; Ex.2] The election authority must also determine that the individual was eligible to cast a ballot at the polling place where the ballot was cast. [LF76, 80, 81-88; Ex.2] Section 115.430 (as amended by SB1014) contains the steps necessary to be taken to establish a voter's eligibility to vote at a polling place as well as other remaining requirements for provisional ballots. [LF81-88; Ex.2] In the 2004 general election, approximately 8,000 provisional ballots were cast but only 3,000 were counted. [Tr.243]

As set forth above, provisional ballots are governed by section 115.430, RSMo. The plain language of section 115.430, RSMo, provides that provisional ballots only "apply to primary and general elections where candidates for federal or statewide offices are nominated or elected . . ." Section 115.430, RSMo, lays out the requirements for a provisional ballot to be eligible to be counted (except

for the new signature requirement for provisional ballots under section 115.427, RSMo).

The Intervenors point to Section 115.427.13 to advance the argument that provisional ballots are available for any individual who appears at a polling place without identification for any election on or before November 1, 2008. [LF79-80; Ex.2] Sections 115.427 and 115.430 must be read in harmony. See *State of Missouri ex rel. Rothermich v. Gallagher*, 816 S.W.2d 94 (Mo. banc 1991) (All consistent statutes relating to the same subject are in pari materia and are construed together as though constituting one act, whether adopted at different dates or separated by long or short intervals . . . The rule of construction in such instances proceeds upon the supposition that the statutes in question are intended to be read consistently and harmoniously in their several parts and provisions.)

The term “any election” in this specific Section of 115.427 has to be interpreted as an election in which an individual is lawfully entitled to cast a provisional ballot. See section 115.430, RSMo. Intervenors’ argument would lead to the absurd result that provisional ballots under section 115.427.13 would be available in any election but only for a limited time; while the provisional ballots under sections 115.427.3 and 115.430 would only be available in primary and general elections. Section 115.427.3 does not contain the language relied on by the Intervenors in making their argument.

Furthermore, Section 115.430.2(1) as revised by SB1014 expands the content of the provisional ballot. [LF81; Ex.2] Prior to SB1014, the provisional

ballot only contained the statewide candidates and issues, and federal candidates. [LF81; Ex.2] The revised section 115.430 requires the provisional ballot to be the complete ballot for that voter's precinct [LF81; Ex.2]. If Section 115.430 is not applicable to the provisional ballot set forth in Section 115.427.13, then there is no guidance or direction as to the scope of provisional ballot the voter is entitled to receive. There would also be no guidance or direction as to the steps to be taken to establish a voter's eligibility to vote at a polling place (Section 115.430.2(2)) or to be taken to determine that a provisional ballot is eligible to be counted (Section 115.430.5). Therefore, Sections 115.427 and 115.430 must be read in harmony and consistent with each other and as such provisional ballots remain only available in primary and general elections.

Therefore, as the above demonstrates, the trial court did not err in finding that Photo ID Requirement in SB1014 violated the Equal Protection Clause of the Missouri Constitution because the Requirement impinges on (unduly burdens) the fundamental right to vote of as many as 240,000 registered voters in Missouri. Further, the Requirement is not necessary to promote any compelling state interest in that there are not reported instances of voter impersonation fraud in Missouri, the only type of alleged fraud that the Photo ID could prevent, and it is not narrowly tailored to address any type of alleged voting fraud.

Respondent Carnahan further asserts that this Court should extend injunction of the lower trial court to include Section 115.159.3 (as enacted by SB 1014). (LF62-63; Ex.2] This section was amended to be consistent with the Photo

ID Requirement in Section 115.427 for individuals who register by mail under the National Voter Registration Act of 1993 but seek to vote absentee for the first time after such registration. Prior to the change in SB1014, such mail registrants could vote absentee for the first time if they provided either (1) a copy of a current and valid photo identification or (2) a copy of current utility bill, bank statement, government check, paycheck or government document that shows the name and address of the voter. [LF62-63; Ex.2] SB1014 deleted the second option. [LF62-63; Ex.2] Extension of the lower court's injunction to include this provision will maintain the status quo of allowing an individual who registers by mail pursuant to the National Voter Registration Act of 1993 as it existed prior to the changes in SB1014.

CONCLUSION

For the above stated reasons, Respondent Carnahan requests that this Court affirm the decision of the trial court and find that the Photo ID Requirement in SB1014 is unconstitutional. Specifically, the Photo ID Requirement is unconstitutional because it (a) constitutes an impermissible additional qualification to vote in violation of Article VIII, Section 2 of the Missouri Constitution; (b) interferes with the “free exercise of the right of suffrage” and that “all elections shall be free and open” in violation of Article I, Section 25 of the Missouri Constitution; (c) requires payment of a fee, an electoral standard in violation of the Due Process and Equal Protection Clause, Article I, Sections 10 and 2, respectively; and, (d) constitutes an undue burden on the fundamental right to vote that is not narrowly tailored to meet a compelling state interest in violation of the Due Process and Equal Protection Clause of the Missouri Constitution, Article I, Sections 10 and 2, respectively.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

The undersigned certifies:

1. That this Brief complies with Rule 84.06(b) of this Court; and
that this Brief contains 9,396 words according to the word count
feature of Microsoft Word Version 2003 SP-1 software with which
it was prepared.
2. That the disks accompanying this Brief have been scanned for
viruses, and to the best of her knowledge are virus-free.
3. That this Brief meets the standards set out in Mo. Civil Rule 55.03.

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CERTIFICATE OF SERVICE

I hereby certify that a true and accurate copy and one copy on diskette of the foregoing were served by hand-delivery, facsimile transmission, certified mail or United States mail, postage prepaid, this 2nd day of October, 2006, to:

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