

1 IN THE SUPREME COURT OF MISSOURI

2 KATHLEEN WEINSCHEN, et al.,)

)
3 Respondents,)

)
4 vs.) No. SC 88039
) SC 88038

5 STATE OF MISSOURI, et al.,)

)
6 Appellants.)

7

8

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

10

 KATHLEEN WEINSCHENK, et al.,)

11)
 Plaintiffs,)

12)
 vs.) Case Nos.

13) 06AC-CC00656

 STATE OF MISSOURI, et al.,) 06AC-CC00587

14)
 Defendants.)

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 TRANSCRIPT ON APPEAL

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 REPORTED BY:

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 MINDY S. HUNT, CSR, CCR #840

 19th Judicial Circuit

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 Division II, Cole County

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1 SEPTEMBER 1, 2006

2 HEARING

3 THE COURT: I don't believe I've lost any
4 of the exhibits that were given to me at the last
5 hearing. The affidavits that were filed today, I
6 don't have. They are sitting in there on the desk
7 chair. I assume there would be courtesy copies.
8 If I'm wrong about that, let me know when we get to
9 that point in the case.

10 It is the Court's intention now to give
11 the Plaintiffs an opportunity to outline what their
12 exhibits -- what evidence or exhibits and
13 affidavits contain for the Court's consideration.
14 And then at the conclusion of that, we'll take the
15 legal evidentiary objections that the defendants
16 have, or the intervenors. I guess you're
17 intervenors and defendants.

18 MR. HEARNE: That's right.

19 MR. NEWMAN: Thank you, your Honor. On
20 behalf of the Jackson County plaintiffs, we had
21 four exhibits that we offered into evidence, your
22 Honor. The first, Plaintiffs' Exhibit No. 1 was a

23 copy of the petition filed in this case. Exhibit
24 No. 2 is a copy of Senate Bills Nos. 1014 and 730,
25 which we've referred to as the act of the Missouri

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1 Voters Protection Act. There is no Exhibit 3.

2 Exhibit 4 is a fiscal note from the
3 Committee on Legislative Research, Oversight
4 Division dated May 12, 2006. Specifically, your
5 Honor, pages 20 of 33 contains the Office of Boone
6 County Clerk fiscal note, which was testified to by
7 the County Clerk, Ms. Noren, and we would offer
8 into evidence that page. In addition to which
9 pages 21 of 33, 22 and 23 of 33 contain the fiscal
10 note of the Jackson County Board of Election
11 Commission, which was identified in testimony by
12 Mr. Nichols, the co-director of the Jackson County
13 Board of Election Commissions.

14 In both instances, both Boone County and
15 Jackson County, the individuals who testified,
16 Ms. Noren and Mr. Nichols, participated in and
17 prepared the notes that we're offering into
18 evidence from the fiscal note of May 12, 2006,
19 Exhibit 4.

20 Finally, Exhibit 5 is the deposition of
21 Mel Hancock, which was taken on August 17, 2006. I
22 previously read a limited portion of that

23 deposition into evidence, and I supplied the Court
24 at that time, and I will again now for convenience,
25 a copy of Plaintiffs' memorandum in support of

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1 admission of Mel Hancock's testimony.

2 And would mention, your Honor, that as we
3 had said throughout these proceedings, this
4 deposition of Mr. Hancock, who is considered the
5 author of the Hancock Amendment is not offered to
6 invade the province of the Court. We have cited
7 case law that the testimony of this nature is
8 probative. And, in fact, in Supreme Court
9 decision, which we cite in that memorandum I
10 presented to you, the Supreme Court indicated that
11 testimony of the drafters can be influential.

12 This is a question of weight, your Honor.
13 This is not a question of admissibility, in our
14 opinion. And the weight to be given to Mr.
15 Hancock's testimony is a question for you to
16 decide. The admissibility, I believe, has already
17 been decided by the Missouri Supreme Court in the
18 case that we cite.

19 Those are the only exhibits on behalf of
20 the Jackson County plaintiffs, your Honor.

21 THE COURT: I already heard, although I'll
22 allow the objections -- I already heard the

23 objections to the deposition of Mel Hancock. I'll
24 hear now any comments on the admissibility of any
25 of the exhibits.

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1 MR. PRESSON: Your Honor, with regard to
2 the copy of the petition, I mean, I think it is a
3 matter for the Court. It's in the file, so we have
4 no objection. That's a copy of Senate Bill 1014,
5 again, we have no objection. Exhibit 4, the fiscal
6 note, if I understand Mr. Newman's offer, he's
7 offering it only with regard to the statements it
8 contains with regard to Boone County and Jackson
9 County and St. Louis City and St. Louis County; is
10 that --

11 MR. NEWMAN: Only in respect to Boone
12 County where Ms. Noren testified she prepared the
13 note, and Jackson County where Mr. Nichols
14 testified that he participated in the preparation
15 of the note.

16 MR. PRESSON: Just to make it clear, it's
17 not being offered for any other statement?

18 MR. NEWMAN: No, sir.

19 MR. PRESSON: The reason I want to make
20 that clear, your Honor, is that it does contain an
21 awful lot of hearsay by a lot of other parties.
22 But since Mr. Newman isn't offering it for those

23 statements, then there really is nothing to object

24 to.

25 But I still object to the double hearsay

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1 of Boone County preparation of the fiscal note as
2 well as Jackson County. There was live testimony
3 here. That still doesn't make admissible an
4 out-of-court statement that they had previously
5 made. And so, you know, this was not really what
6 they prepared. It was what the Oversight
7 Committee, Division of Oversight prepared as far as
8 their fiscal note is concerned.

9 THE COURT: My recollection was their
10 testimony did -- they identified portions of the
11 pages on Exhibit 4 and identified it as --

12 MR. PRESSON: Your Honor, I think the only
13 things that's really admissible is their live
14 testimony that they gave, not this out-of-court
15 statement that they previously gave. I still think
16 that amounts to hearsay.

17 And then Exhibit 5, the Hancock
18 deposition, as your Honor may recall, I did object
19 to that at the time when it was offered back on
20 August 21st. One, I believe, offering an opinion
21 on matter of law is not an acceptable area for
22 expert testimony. It's invades the province of the

23 court.

24 And, second, even if it's a proper area

25 for expert testimony, I don't believe it was

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1 sufficiently established Mr. Hancock qualified as
2 an expert in this regard. His experience as a
3 legislator and his role in the drafting of the
4 Hancock Amendment is really not enough to qualify
5 him as an expert in that regard. The courts have
6 indicated that the drafter of the petition or
7 drafter of a statute or referendum petition or
8 whatever, is not really, you know, acceptable
9 evidence on behalf of what it means.

10 The courts have indicated really what is
11 the relevant inquiry, what the voters when they
12 adopted it, meant or understood it to mean and not
13 what the drafter meant. That was what the court's
14 statement that was made with regard to Mr. Hancock
15 in particular in the case. And, you know, the
16 deposition itself indicates he has, in fact,
17 disagreed with some of the court decisions that
18 have interpreted the Hancock Amendment. So what
19 his opinion is is not really carried over to what
20 the courts have, in fact, held.

21 THE COURT: I had the same experience in
22 drafting legislation.

23 MR. PRESSON: So for those two reasons,
24 both it's not a proper area for expert testimony,
25 and I don't think it was properly qualified as an

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1 expert.

2 THE COURT: I'm going to look at the
3 deposition to see to what extent that he was
4 involved in the actual drafting, but I understand
5 your objection. And it would be interesting, I
6 don't know if they are -- well, all right. Thank
7 you.

8 MR. LONG: And, judge, just for brevity,
9 I'll join exactly with the same arguments that
10 Mr. Presson had.

11 MR. HEARNE: We would join as well as to,
12 your Honor, the fiscal note objection, not
13 necessarily the Hancock objection.

14 MR. NEWMAN: Your Honor, if I could,
15 briefly, I believe you have indicated you want to
16 take a look at what Mr. Hancock's participation was
17 in the Hancock Amendment. It is contained within
18 the deposition.

19 THE COURT: The deposition. I intend to
20 look at that.

21 MR. NEWMAN: He was the principal
22 drafter. He was the chairman of the committee that

23 drafted the legislation. And, in addition, he
24 testified that in his years as a legislator, he
25 wrote, authored and reviewed, interpreted and so on

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1 various forms of legislation. And I think that his
2 opinion, particularly given the Supreme Court view
3 in the case we've cited, his opinion is entitled to
4 consideration by the court. Although, obviously,
5 not binding.

6 THE COURT: All right.

7 MS. WOOD: And for the record, your Honor,
8 we have no objection to any of the exhibits.

9 THE COURT: All right. Mr. Downing, will
10 you be as quick?

11 MR. DOWNING: I'll try, your Honor.

12 First of all, our first exhibit is
13 Plaintiffs' Exhibit 10 and we go through 52, I
14 believe. The first exhibit is our stipulations --
15 46 stipulations entered into. I won't try to go
16 through each of one of these individually, your
17 Honor. They primarily go to two issues. The
18 burdens that the plaintiffs and other similarly
19 situated have suffered, or will suffer as a result
20 of the photo ID requirement.

21 And, secondly, there are stipulations
22 designed to offer evidence to show that there is no

23 compelling need for photo ID law. In particular,
24 evidence from Secretary of State -- then Secretary
25 of State Blunt and others commenting about how

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1 fraud-free the elections in this state have been
2 since the year 2000. There's several pieces of
3 evidence on that score. So I won't go through
4 those individually.

5 Most of those stipulations deal with
6 documents that I will go through that are exhibits
7 and we'll just go through them one by one.

8 THE COURT: Let me ask you something, and
9 I note that the stipulation refers to some of the
10 documents that the Department of Revenue is issuing
11 and the like. In the stipulation, and I'm just
12 looking through it now, if a person is born without
13 a -- born and doesn't get a birth certificate or
14 doesn't have one because they are born at home,
15 it's my -- I had a case this week where an
16 individual was requesting a birth certificate to be
17 issued by the Department of Health.

18 And we had a hearing from parents
19 explaining the child was born at home and where, et
20 cetera, but it did require a lawsuit. And I'm not
21 clear if that's -- and I think I had that case on
22 Monday.

23 MR. DOWNING: Your Honor, the Department
24 of Revenue's website says a certified birth
25 certificate's required. But I understand that

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1 there is some administrative procedure -- and,
2 perhaps, the state can speak to this better than
3 I -- an administrative procedure if a birth
4 certificate is not available, if they don't have a
5 record. If it's for someone, for example, who was
6 born before 1910, they don't maintain birth
7 certificates.

8 THE COURT: This person was a 19-year-old
9 who was just born at home.

10 MR. DOWNING: I don't pretend to be
11 conversant on the nuances of that. I understand
12 there is either an administrative procedure or
13 court proceeding that someone could go --

14 THE COURT: Well, it required a lawsuit in
15 this case.

16 MR. DOWNING: Right. Right. So that's
17 the substance of my knowledge on it, which I just
18 might point out, obviously, the administrative
19 procedure or court proceeding is far more
20 burdensome than having to pay \$15 to get a birth
21 certificate, so that would make our point even
22 further.

23 Your Honor, the next several exhibits,
24 Plaintiffs' Exhibits 11, 12, 13, 14, 15 and 16 are
25 affidavits from our plaintiffs, our individual

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1 plaintiffs. And what we attempted to do in these
2 affidavits, your Honor, is establish standing, is
3 establish the burdens that they would suffer in
4 their individual capacities if this photo ID law
5 were to go into effect for the November election.
6 And that's basically what they say.

7 The next exhibit, your Honor, is the
8 affidavit of a Missouri state legislator, Margaret
9 Donnelly, is Plaintiffs' Exhibit 17. We offer this
10 affidavit for a couple of purposes, your Honor.
11 First of all, we wanted to establish that this law
12 was enacted by a republican legislator and signed
13 by a republican governor. And then all the
14 democrats in the Legislature voted against this to
15 establish -- and that goes to one of our
16 substantive claims on the disparate impact claim.

17 THE COURT: That's Exhibit 17?

18 MR. DOWNING: Exhibit 17, your Honor. And
19 we also offer this affidavit -- Ms. Donnelly, State
20 Representative Donnelly was a member of the
21 Elections Committee in the House, and she offers
22 testimony in this affidavit that the House

23 Elections Committee offered testimony in the
24 hearing that this law would disproportionately
25 affect African/Americans and disabled people.

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1 Again, that evidence goes to our disparate impact
2 claim, which I believe is Count IV -- no. I'm
3 sorry. Count V in our lawsuit to show purposeful
4 discrimination.

5 Your Honor, the next exhibits --

6 THE COURT: I'm not sure if I have -- and
7 I'm looking -- this isn't following the book, which
8 is something else, right?

9 MR. DOWNING: I'm sorry? Yeah. I gave
10 you a manilla folder at the last hearing that had
11 all of our exhibits in order, in numerical order.
12 And the book is something I was going to use during
13 the oral presentation at the last hearing. All the
14 affidavits should be in that book at tab four.

15 THE COURT: All right. I have Exhibit 17
16 here.

17 MR. DOWNING: Then Exhibit 18, this is the
18 affidavit of Brenda Hatfield. This affidavit is
19 simply used to show the difficulties and burdens
20 that people in this state inevitably are going to
21 have when they try to obtain documents from the
22 Department of Revenue, the Department of Motor

23 Vehicles and other bureaucracies in the state.

24 This is just one citizen. She's not a

25 plaintiff in the case, but this is just an example

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1 from a citizen of the State of Missouri of some of
2 the difficulties that are incurred every day in
3 this state in dealing with the bureaucracies.

4 Exhibit 19 is a document which was
5 prepared by the National Conference of State
6 Legislatures. It goes state by state for those
7 states that have enacted either some form of voter
8 identification law, or some form of either
9 mandatory or optional photo ID law.

10 As the court will see, a majority of
11 states in this country don't require identification
12 at the polls. There are a good number that require
13 some form of identification like Missouri did
14 before this law was enacted, but don't require a
15 photo identification. And then at the top you will
16 see that there are seven states that either request
17 or require a photo identification. And the balance
18 of this document goes through exactly the details
19 in each of those states.

20 I might point out that out of the seven
21 that request or require photo ID, only three
22 actually require a photo ID. And one of those

23 states, Georgia, that law has been declared

24 unconstitutional.

25 THE COURT: I take it the other one is

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1 Indiana?

2 MR. DOWNING: The other is Indiana where
3 it was upheld, and we're here on Missouri.

4 Plaintiffs' Exhibit 20, your Honor, is a
5 fiscal note. And we're not -- hopefully, we're not
6 going to draw any hearsay objections here. The
7 only reason we offer this document is page 7 of 27,
8 the statement in there from Missouri Department of
9 Revenue about the fact that there are approximately
10 169,215 individuals in this state who do not have a
11 photographic personal identification.

12 And, I guess, technically we wouldn't even
13 need to offer this document to show that, because
14 the state has stipulated to that fact as quoted
15 from this document.

16 Exhibit 21 is the Secretary of State's
17 analysis that was released on August 18, 2006 in
18 which the Secretary of State's analysis is that
19 there are approximately 240,000 registered voters
20 who may not have photo IDs in this state who would
21 need one to vote. And attached to the first page
22 of that document is their methodology that they

23 undertook to determine that. The last page of the
24 document has that total, 241,682 and itemized by
25 county.

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1 The next document, your Honor, is what you
2 get if you go to the website of the Missouri
3 Department of Revenue on Show Me Proof. And it
4 takes you through the specific requirements if you
5 want to obtain a non-driver's license ID for
6 purposes of voting. You have to establish three
7 proofs: Proof of lawful presence, proof of
8 identify, proof of residence. And it details what
9 those proofs entail, what you have to do, in some
10 instances what you have to pay to obtain some of
11 those documents.

12 The next exhibit is Exhibit 23. It's from
13 the website of our Department of Health. And this
14 basically is offered simply to show that if you
15 need to obtain a certified copy of a birth
16 certificate in the State of Missouri, you need to
17 pay \$15. And also to show that you need to allow,
18 as it says at the bottom of the first page, six to
19 eight weeks for delivery of that birth
20 certificate.

21 Plaintiffs' Exhibit 24 are documents from
22 other states, four other states. Illinois,

23 Oklahoma, Florida and Georgia. These states are
24 somewhat unique, your Honor, in that in order to
25 obtain a birth certificate in these states, a

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1 certified birth certificate, that you need to get a
2 photo ID in Missouri to vote. You have to give
3 them a photo ID. So it becomes extraordinarily
4 difficult, as you can understand. If you don't
5 have a photo ID sufficient to vote in Missouri, how
6 you're going to be able to get a photo ID in these
7 states to get your birth certificate if you were
8 born in these states, it's very problematic.

9 I will direct the Court's attention on the
10 first page of Plaintiffs' Exhibit 24, which is
11 Florida, on the very first page it says, "All
12 letters or applications must include a copy of a
13 picture ID of the applicant."

14 THE COURT: I'm sorry. Where?

15 MR. DOWNING: This is on the first page of
16 Exhibit 24, out to the side it says, "To order",
17 colon, and the second paragraph in that section it
18 says, "All letters or applications must include a
19 copy of a picture ID." So that's one of the
20 requirements to get a birth certificate from
21 Florida. And I'll be happy to take you through the
22 pages for the other states and point out where they

23 say that they require a photo ID to get a copy of a

24 birth certificate.

25 If you turn -- these pages, because they

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1 deal with four states, they are not consecutively
2 numbered -- but if you turn to the fourth page of
3 the document, that's the first page from the
4 Georgia website. Under the heading, Required
5 Information, there it says, "A person requesting a
6 copy of a certified -- certified copy of a birth
7 record must provide all the information below: A
8 signed request form, a photocopy of your valid
9 photo ID." And it goes on to talk about other
10 things that are required. That's Georgia.

11 And then the other two states, if you will
12 turn, again, the fourth page from there is from
13 Illinois. And Illinois, on the first page of its
14 document from the website, here's the Application
15 for Search of Birth Record Files. And in all
16 capital print at the top it says, "Submit a copy of
17 your current photo ID."

18 And I might point out that Illinois and
19 the next state we'll get to, Oklahoma, are
20 particularly important for Missouri citizens,
21 because they are neighboring states. And certainly
22 from the St. Louis area, a lot of people who live

23 in Missouri on the St. Louis side of the state were
24 born in Illinois. So if you don't have a photo ID
25 in Missouri, according to this, you're not going to

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1 be able get a birth certificate in Illinois, which
2 you need to vote in Missouri if you don't have a
3 photo ID.

4 Oklahoma is the final state. That's the
5 last page of this document, Exhibit 24. And if you
6 look, there's a series of bullet points in the
7 middle of the page. And the last bullet point says
8 "A valid, legal photo ID is required from the
9 applicant or the individual representing the
10 applicant." So, again, Oklahoma is another example
11 of a state in which you have to have a valid photo
12 ID to get a birth certificate.

13 We don't pretend to be --

14 THE COURT: What's a valid photo? Can it
15 be government issued, or do they say?

16 MR. DOWNING: Some of the states flush
17 some of that out. Others don't, your Honor. This
18 is not intended to be a comprehensive list of all
19 the states that require photo IDs to get a birth
20 certificate. These are just the ones we were able
21 to find.

22 THE COURT: Let me ask you this: I

23 assume, were most of these requirements as a result
24 of the federal legislation trying to make it harder
25 for -- I guess for would-be terrorists to get false

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1 birth certificates or --

2 MR. DOWNING: I'm not certain if some of
3 these predated that or not, your Honor.

4 Exhibit 25, if you're ready to move on, is
5 from the State of Louisiana. And this documents --
6 this is intended to show that in Louisiana, if you
7 happen to be a citizen of Missouri wanting to vote
8 in Missouri in this upcoming election, and you were
9 born in Louisiana, it says in the third numbered
10 point on this page that you're going to have to
11 wait eight to ten weeks because of problems with
12 Hurricane Katrina in the record system down there.

13 That becomes particularly important for
14 those particularly in Southeast Missouri and
15 Southwest Missouri who have had influx of Katrina
16 refugees, so it's not a minor problem. And
17 Louisiana, because of the backlog, is saying eight
18 to ten weeks to get a certified birth certificate
19 there.

20 Plaintiffs' Exhibit 26, your Honor, there
21 are a lot of numbers on this document, but it's
22 offered for a limited purpose. If you turn to the

23 second page of the document, these are census
24 documents that the foundation has been stipulated
25 to. And actually the fact that we wanted to offer

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1 into evidence, four has been stipulated to. The
2 second page of the document, the third column, the
3 segment entitled "Place of Birth by Citizenship
4 Status" shows that 1,620,482 Missouri residents
5 were born in another state. So this idea that
6 people in Missouri are going to have to go to other
7 states to get their birth certificates is real and
8 it's concrete and it's not unsubstantial.

9 THE COURT: Those aren't registered
10 voters, obviously, those are just Missouri
11 residents?

12 MR. DOWNING: Those are citizens. It
13 would have been nice if the census figures would
14 have designed a test that we could have just
15 plugged in for this case, but they didn't do that.

16 Your Honor, Exhibit 27 is a document,
17 again, that's been stipulated to. This simply is
18 offered to show -- this is from the federal
19 government -- what it costs to get a passport. As
20 we pointed out earlier, you have to establish proof
21 of lawful presence. And if you're a citizen born
22 in the United States there are only two ways you

23 can do that. A birth certificate, which we've gone
24 through, and the other way is if you can get a
25 passport. And this is offered to show that if you

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1 want to get a passport, it costs money.

2 At the top of this page it says \$97. If
3 you want to expedite delivery, several pages back,
4 the figure gets up to \$236 with all the fees you
5 have to pay through private delivery service, but
6 that's what this is offered for.

7 Exhibit 28, your Honor, is a certificate
8 of citizenship document from the federal
9 government. If you're not born in the United
10 States and you want to obtain a non-driver's
11 license ID in Missouri, one of the ways you can do
12 that is by obtaining a certificate of citizenship.
13 And this is offered to show, not just that it costs
14 \$255 as it says on the first page to obtain one of
15 those, it's a very extensive application,
16 seven-page application. And if you read in the
17 fine print it will tell you that they will not even
18 agree that they would acknowledge their receipt of
19 your application for three weeks.

20 The next document, your Honor, is
21 Plaintiffs' Exhibit 29. This is one of the ways
22 you can establish proof of identity under our law.

23 And, again, one of the three proofs you have to
24 establish in order to obtain a photo ID in Missouri
25 is through obtaining a Social Security card. This

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1 is from the Social Security Administration. Again,
2 the documents have been stipulated to, and it just
3 goes through the requirements of how you obtain a
4 Social Security card.

5 And, I believe, it also has, your Honor,
6 yes, if your name has been changed since birth, it
7 talks about the documents that you need to have in
8 addition to other documents to establish your
9 current name, like a marriage certificate, divorce
10 decree, those sorts of things. To obtain a Social
11 Security card with your current name on it, you
12 will need to have those things, if your current
13 name is not your name as it was when you were
14 born.

15 The next series of exhibits, your Honor,
16 go to this issue of the justification for the photo
17 ID law. The asserted justification is to prevent
18 voter fraud in this state. There are a series of
19 exhibits that go to that issue that we have
20 offered. The first is Plaintiffs' Exhibit 30.
21 This is a public record. This is the consent
22 decree that the Ashcroft Justice Department entered

23 into with the Board of Election Commissioners for

24 the City of St. Louis.

25 As the Court may recall, as our briefs

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1 have explained, there were charges of election
2 fraud in the City of St. Louis in 2000. As a
3 matter of fact, Secretary of State Blunt then made
4 some allegations of election fraud in that
5 election. The Justice Department came in with a
6 full-scale investigation with subpoena power,
7 investigated what types of election fraud that may
8 exist.

9 And their findings agreed to by the City
10 Election Board back at this time and made part of
11 this consent injunction, the problem with the
12 election in the City of St. Louis in 2000 was not
13 that people were not being -- the problem was that
14 people were not allowed to vote that should have
15 been allowed to vote because they were improperly
16 eliminated from the registration laws.

17 There was no finding anywhere that there
18 were people voting who shouldn't have been allowed
19 to vote. No finding made by the Justice
20 Department. This is offered to show that finding
21 and the agreement by the St. Louis Board of
22 Election Commissioners to those findings.

23 Exhibit 31, your Honor, is a March 23,
24 2004 letter from then Secretary of State Blunt to
25 then Governor Holden. And this is offered simply

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1 for a statement made in the second page of the
2 document. Under No. 2, and this is a sentence
3 beginning midway through that paragraph in which
4 Secretary of State Blunt states, "Furthermore,
5 subsequent statewide elections, the November 2002
6 general election and the February 2004 presidential
7 primary were two of the cleanest and problem-free
8 elections in recent history." That's what this is
9 offered for.

10 The next document is Exhibit 32, and it's
11 offered for a similar purpose. This is a letter,
12 March 3 of 2004 letter from then Secretary of State
13 Blunt to the St. Louis Post Dispatch. And in the
14 letter, Secretary of State Blunt, at the bottom of
15 the first page, refers to the statewide elections
16 of 2002 and the 2004 presidential primary election
17 as, quote, fraud free. That's the last two lines
18 of the page.

19 Your Honor, Plaintiffs' Exhibit 33 is a
20 letter written by Secretary of State, the current
21 Secretary of State, Robin Carnahan, to Governor
22 Blunt dated May 11, 2006 in which Secretary of

- 23 State Carnahan urges Governor Blunt to veto the
- 24 Missouri Voter Protection Act because of its photo
- 25 ID requirement. It contains a lot of statements in

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1 there. The Court can read it. I don't need to
2 read the whole document.

3 Much of the statements in this document,
4 there was testimony from Betsy Byers, the Secretary
5 of State's Office about, so I don't want to belabor
6 the point. But certainly, I believe that it's
7 important that the highest elected official in the
8 state, her views on this bill and whether -- to fit
9 it within the framework of our counts, whether
10 there's a compelling need for this law to prevent
11 voter fraud, I think the current Secretary of
12 State's views on this subject are certainly
13 relevant and important.

14 Plaintiffs' Exhibit 34, your Honor, are,
15 again, statistics from the Census Bureau. And
16 these are simply offered -- these are offered to
17 show several things. Primarily, though, I offer
18 these for Count V, that's our disparate treatment
19 count, to show that in this state, 21 percent of
20 African/Americans do not own a car. That's four
21 times the rate of white Missouri citizens.
22 Therefore, this law will severely and

- 23 disproportionately affect African/Americans,
24 because if you don't own a car, you don't need a
25 driver's license.

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1 There are other statistics that we've used
2 in our brief that come from this document, your
3 Honor. The document, the authenticity of it has
4 been stipulated to. We can argue relevance of some
5 of those statistics later, if we need to.

6 Your Honor, the next two exhibits,
7 Exhibits 35 and 36, again, go to the disparate
8 impact claim. And one of the things that we need
9 to show on that claim is, again, this is a
10 purposeful discrimination. And as certainly
11 circumstantial evidence, purposeful discrimination,
12 we wanted to offer these documents to show that
13 overwhelmingly in this state, African/Americans
14 have voted for democrats and not republicans. I
15 believe in the last election for Governor, 87
16 percent of Missouri African/Americans voted for
17 Claire McCaskill, 11 percent voted for Matt Blunt.
18 And there are similar overwhelming margins in the
19 presidential race that year and in other races.

20 Plaintiffs' Exhibit 37, your Honor, is our
21 next exhibit. This is simply offered -- again,
22 this is Census Bureau statistics. This is simply

23 offered to show that in 1999 Missouri had 637,000
24 people below the poverty line. And, again, many of
25 those people are people who don't have or can't

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1 afford cars. That's what that is offered for.

2 Plaintiffs' Exhibit 38, your Honor, is an
3 article that appeared in the St. Louis Post
4 Dispatch on June 14 of 2006 in which --

5 THE COURT: Hold it one second. Okay.
6 You're on 37 did you say?

7 MR. DOWNING: 38.

8 THE COURT: 37 was just some --

9 MR. DOWNING: Census Bureau statistics
10 offered to show the number public of Missourians in
11 poverty in 1999.

12 THE COURT: All right. I'm sorry.

13 MR. DOWNING: Exhibit 38, your Honor, is
14 an article that appeared in the St. Louis Post
15 Dispatch on June 14th of this year. It's offered
16 for the sole purpose of a statement attributed to
17 Governor Blunt on the last page and it's the last
18 paragraph on the last page. The article states,
19 "Asked whether the state would help disabled
20 people cover transportation costs for assembling
21 the necessary documents", Blunt stated, quote,
22 We're not going to reimburse people who are driving

23 to fulfill a civic obligation. The's an absurd

24 suggestion, closed quote.

25 Again, this is offered to show -- there's

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1 been some testimony about mobile units and the
2 efforts of the state to try to help people to
3 comply with these requirements. This is just some
4 evidence to rebut that, that the state is not doing
5 all that it could do to help people overcome the
6 burdens that this law imposes upon them.

7 And Exhibit 39, Exhibit 39 is a document
8 that goes to the same point, your Honor. This is a
9 July 25, 2006 article in the Post Dispatch in
10 St. Louis. And this is offered for the sole
11 purpose of the quote attributed to Missouri
12 Director of Revenue, Trish Vincent on the first
13 page. Middleway through the page it says, "Vincent
14 also emphasized that her Department will not be
15 using the units to go into low-income areas to help
16 the poor obtain voter identification cards."
17 Quote, The law is clear, she said. We are to work
18 with older folks, the seniors, the disabled and not
19 the low income.

20 Again, to the extent that the state has
21 tried to offer evidence that it's making steps to
22 help those who are burdened by this law, this is in

23 rebuttal to that evidence.

24 Your Honor, Exhibit 40 is a June 15th

25 article, a wire article by the Associated Press.

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1 And this has been stipulated to, but the reason
2 that the document is offered is the statement in
3 the third paragraph of the document.

4 THE COURT: Hold on one second. I'm
5 missing -- I'm missing that one.

6 MR. DOWNING: I wish I had an extra copy
7 for you, Judge, but I can leave this one with you,
8 if you would like.

9 THE COURT: I'm making notes right now,
10 but we'll make a copy when there's a break.

11 MR. DOWNING: And this document is
12 Exhibit 40. It's offered solely to establish what
13 the state's justification was for the bill. It
14 attributes a quote to Governor Blunt when he signed
15 the bill, which he says, The right to vote is a
16 cornerstone of democracy. Blunt said at the
17 Capitol bill signing ceremony. That right is
18 undermined whenever fraud occurs. A system that
19 people do not trust is a system that undermines the
20 people's trust in their elected government. Just
21 to establish that voter fraud is their professed
22 reason for this bill.

23 Again, I think that fact, the center part
24 of the document has been stipulated to by the
25 state.

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1 Your Honor, Exhibit 41 is simply a
2 document which state by state shows what people
3 need to do to obtain their vital records across the
4 country, including birth certificates, marriage
5 licenses, things of that nature. So to the extent
6 the Court wanted to look at any particular state
7 what it costs to get a birth certificate or a
8 marriage license, this document would establish
9 that.

10 Exhibit 42 is a document from Missouri
11 Department of Revenue called the Driver Guide. And
12 this document, beginning on page 18, again,
13 reinforces what the requirements are in Missouri to
14 establish proof of lawful presence, proof of
15 identify, and proof of residency when applying for
16 a new license, driver's license or a permit. It
17 rehashes a lot of the things in some of the other
18 documents, but we wanted to have a complete set of
19 what Department of Revenue is telling people on
20 this subject.

21 Your Honor, Exhibit 43 is an article that
22 appeared in the June 24, 2006 edition of the

- 23 St. Louis Post Dispatch. And it's a poll conducted
24 by Research 2000 on various issues in the state.
25 And I would direct the Court's attention to -- it's

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1 the fifth page of the document. They did a poll,
2 this organization did a poll on the voter ID
3 proposal. And this document shows that in Missouri
4 as of June of this year, 54 people -- 54 percent of
5 Missouri voters oppose the photo ID requirement.
6 18 percent -- well, there are categories of people
7 who are in favor of it in general, and who are in
8 favor of it only if delayed. And this poll shows
9 those categories.

10 Your Honor, you might ask what a poll has
11 to do with anything here. And this document is
12 offered in anticipation of some poll results that I
13 anticipated if the intervenors were allowed, that
14 they would offer. They've offered several polls.
15 And this is also offered in anticipation of a
16 potential argument that they may offer. And if
17 they don't offer those arguments, there's no need
18 for this document.

19 But the argument that is anticipated is
20 that this law can be upheld because it's needed to
21 address a mere perception that there's a problem
22 with voting fraud in Missouri. I don't believe the

23 case law supports that argument in this context
24 when fundamental voting rights are being impinged
25 upon, but I know that argument is there. So to the

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1 extent that a perception of Missouri voters is
2 important in this case, this is offered for that.

3 THE COURT: I know they say in politics
4 perception is realty. I'm not sure that the courts
5 have adopted that view.

6 MR. DOWNING: Your Honor, the only area
7 they have, and it's in the briefs, is in the area
8 of campaign finance. The 8th Circuit and some
9 other courts have mentioned -- and Buckley versus
10 Vallejo, US Supreme Court case that's this thick
11 (indicating), talks about there are instances in
12 which a Legislature can legitimately address a
13 perception of a problem. They have never done that
14 when a fundamental right of voting has been
15 impinged upon. So that's why I don't think those
16 cases apply here.

17 But to the extent the Court disagrees, our
18 point here that the only poll that's been done
19 solely in Missouri and Missouri voters shows that
20 Missouri voters don't believe there's a need for
21 this law, overwhelming.

22 The next document, your Honor, Exhibit 44,

23 is a document from Secretary of State Becky Cook
24 when she was then Secretary of State, January 4,
25 2001. And we quote from this document a couple of

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1 places in our brief. If you will turn -- the
2 essence, it's contained several pages in here --
3 but basically it documents what I just said about
4 the findings on the 2000 election in St. Louis.

5 Her office did an investigation.

6 And there are several instances in here.

7 I'll just point out one of them. This is -- well,

8 I'm quoting from attachment A to the document.

9 It's a December 4 memo from June Striegel Doughty
10 to Becky Cook in which Ms. Doughty, who was the
11 general counsel for the Office of Secretary of
12 State at that time, top of page 2 of that report
13 states --

14 THE COURT: Exhibit B or A?

15 MR. DOWNING: It's Exhibit A. And the top
16 of page 2 of that report next to the word
17 allegation states, "Many qualified, registered
18 voters were turned away from the polls because
19 their names could not be found in the precinct
20 rosters and their qualifications could not be
21 verified by the election judges." Response: "This
22 appears to be true, but did not materially impact

23 the outcome of the contested race."

24 This is just further corroboration that

25 the problem in St. Louis in 2000 was not people who

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1 were voting who shouldn't have been allowed to
2 vote. It was just the opposite. People were not
3 allowed to vote that should have been allowed to
4 vote in St. Louis in 2000.

5 Exhibit 45, your Honor, is a document,
6 again, from the Missouri Department of Revenue
7 website. And this document is simply offered for
8 the statements made on the second page of the
9 document in bold next to word "note", where it
10 says, "Provisional ballots may not be available in
11 all elections." It says that twice. It's offered
12 for that purpose.

13 THE COURT: I'm sorry. On 45 did you
14 say?

15 MR. DOWNING: Exhibit 45, page 2 of that
16 document. There are two places in the -- one in
17 the middle and one at the top of the page that
18 says, "Note: Provisional ballots may not be
19 available in all elections." And that's consistent
20 with what I've argued earlier, your Honor, that
21 provisional ballots are only available in primary
22 and general elections in the state. So it's

23 offered to rebut the argument that somehow
24 provisional ballots, the availability of those for
25 certain categories of voters, that that somehow

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1 cures any unconstitutionality of the law.

2 It doesn't for a lot of reasons, but one
3 of the reasons is they are not even available in
4 non-primary and non-general elections in the
5 state.

6 THE COURT: But that's just -- there's not
7 a dispute about that as to the law, correct, is
8 there? I thought there was something in the
9 stipu--

10 MR. HEARNE: I think the law says -- what
11 the website says may be entirely different than
12 what the law says. I think the statute is what
13 compels the available and provisional ballot. And
14 what the statute says, which I believe it does, a
15 provisional ballot is available to a voter, then
16 statute is certainly going to control over what's
17 on a website.

18 MR. DOWNING: Well, let me move to the
19 next exhibit that goes to that issue. We don't
20 read the statute that way, your Honor. We believe
21 the statute is exactly as the Department of Revenue
22 and the Secretary of State's Office says. There

23 are not going to be provisional ballots in the
24 state in any election except the primary and
25 general. And there's good evidence of that.

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1 Exhibit 46 is from Missouri Secretary of
2 State, who is the chief elections officer in the
3 state. And if you look under the Frequently Asked
4 Questions on the first page of the document, the
5 fifth question, the question raised, What is a
6 provisional ballot? And the Secretary of State
7 answers: A provisional ballot is only issued to
8 the voter when the identity and eligibility of the
9 voter has not yet been confirmed. The voter must
10 sign an affidavit declaring their identity and put
11 the ballot into a special container from regular
12 ballots. It is not counted until the election
13 authority can verify the voter's identity by
14 matching the voter's signature on the registration
15 card. Additionally, provisional ballots are only
16 available in primary and general elections.

17 So, certainly, the chief election officer
18 in the state does not intend -- interprets the law
19 that they are not available except in primary and
20 general elections.

21 Your Honor, Plaintiffs' Exhibit 47 is a
22 document from the United States Election Assistance

23 Commission. It's a thick document. And the only
24 reason we're offering this document is a table,
25 which is table four on page 15. And this just

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1 confirms what Secretary of State Carnahan says --

2 THE COURT: These aren't numbered, right?

3 MR. DOWNING: Well, if you look at the far

4 right-hand side, I think they do have page

5 numbers. It's not where you would expect it at the

6 bottom or the top, but on the right-hand column of

7 these pages, I think they have some page numbers.

8 So this is the table I'm directing your attention

9 to. It's on page 15. It says, Provisional Ballots

10 Cast and Counted. And this is just offered as

11 additional evidence as to what Secretary of State

12 Carnahan said in a letter to Governor Blunt about

13 the low number of provisional ballots that are

14 counted in Missouri. And in the last election this

15 table shows that only 40.2 percent of provisional

16 ballots cast in Missouri were counted in the last

17 election.

18 Exhibit 49, your Honor -- 48 and 49, these

19 are documents that the numbers are difficult to

20 decipher. I can walk you through the analysis.

21 And I don't think the state quibbles with our

22 ultimate numbers here, but it takes a while to go

23 through it, and I won't waste the Court's time
24 unless you want me to. But these documents are
25 simply offered to show that 11 percent of the

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1 elderly people in this state don't have a valid
2 photo ID. And there are 713,000 people over 65 in
3 this state from the 2004 census date, which means
4 if you do the math, 11.3 percent of Missouri's
5 citizens over the age of 65 do not have a valid
6 photo ID.

7 Plaintiffs' Exhibit 50, your Honor, is a
8 document that was obtained from the Department of
9 Revenue website that I used in my examination of
10 one of the witnesses last week. It simply shows
11 these mobile units that have been authorized by the
12 Legislature to go out and --

13 THE COURT: Hold on one moment. 50?

14 MR. DOWNING: Yeah, 50.

15 THE COURT: I'm not sure I have it.

16 MR. DOWNING: I'll make a note and leave
17 it with your Honor.

18 THE COURT: In fact, I think I ran out at
19 49.

20 MR. DOWNING: Okay. I'll leave with you
21 what you don't have.

22 THE COURT: All right.

23 MR. DOWNING: This is a chart that simply
24 shows, at least as of the date that we printed this
25 off, which was August 18th, the status of their

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1 mobile unit trips around the state to sign up
2 people for voting, to get photo IDs to people for
3 voting.

4 And then Exhibit 51, your Honor, is the
5 affidavit of Wendy Noren. Some of the testimony
6 that she gave live is incorporated in this
7 affidavit. This affidavit contains some areas of
8 testimony that we didn't get into live just for
9 brevity's sake. And I know that there are some
10 objections that the Attorney General's Office has
11 raised to a certain portion of the affidavit, and
12 we can go through that.

13 I have a few additional exhibits, your
14 Honor, that I e-mailed last night to the Attorney
15 General's Office. I just wanted to, while we go
16 into these, I want to make it complete.

17 Exhibit 52 is our supplemental
18 stipulations that they have not yet had a chance to
19 look at them thoroughly enough to agree to them, so
20 I'll offer that.

21 THE COURT: These are proposed?

22 MR. DOWNING: These are proposed, subject

23 to their agreement. I tried to draft them in the
24 way the we did the other stipulations. I don't
25 anticipate as long as they can reserve objections a

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1 problem, but that's for them to speak to.

2 Exhibit 53 is a letter from President
3 Jimmy Carter, former President Jimmy Carter, dated
4 March 16, 2006 to Secretary of State Robin
5 Carnahan. This letter is offered in rebuttal to
6 some evidence that was provided to us Wednesday at
7 five o'clock by the intervenors. They have offered
8 a Carter/Baker commission report that's about this
9 thick (indicating), a commission that looked at
10 various election issues in the country. And it's
11 offered simply to the extent that they are claiming
12 that that report supports what Missouri Legislature
13 has done in this state regarding photo ID
14 requirements. This is offered to rebut that from
15 President Carter himself.

16 Exhibit 54, your Honor, at the time we
17 filed this lawsuit, one of our plaintiffs, Give
18 Missourians a Raise, they have sponsored a ballot
19 initiative to put the increase in the minimum wage
20 on the November ballot. At the time we filed our
21 lawsuit, the Secretary of State's Office did not
22 finally certify that that issue was going to be on

23 the ballot. Exhibit 54 is simply offered to
24 establish that now that issue has been certified to
25 be on the November ballot.

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1 And Exhibit 55 is an affidavit from that
2 organization, the person who is in charge of that
3 organization. And Exhibit 56, your Honor, is a
4 document from the National Weather Service. That
5 provides the odds of a Missourian being struck by
6 lightning. And I simply offer this, your Honor, to
7 show --

8 THE COURT: .02 percent.

9 MR. DOWNING: That's right. I simply
10 offer this, your Honor, to show that it is more
11 likely -- based on reported instances of voter
12 impersonation fraud in the state, and I say
13 reported, because this is based -- I'm including
14 all of the 16 -- 14 instances of dead people voting
15 in St. Louis that Secretary of State Blunt eluded
16 to in his 2000 report on the City of St. Louis. If
17 you assume that's true, and, again, the Ashcroft
18 Justice Department didn't find that that was true,
19 but if you assume that's true, it literally is more
20 likely for a Missourian to be struck by lightning
21 than it is for a Missourian to have his or her vote
22 canceled by someone voting through voter

23 impersonation fraud.

24 Other than that, your Honor, and other

25 than the testimony we offered last week, that's all

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1 we have at this time. As I mentioned to your Honor
2 in chambers, we would reserve the right to offer
3 rebuttal evidence based on the eight affidavits we
4 got Wednesday afternoon from the intervenors.

5 MR. NEWMAN: Your Honor, I have no
6 objections to any of the exhibits offered by
7 Mr. Downing.

8 MR. LONG: As you can anticipate, your
9 Honor, I do. And for brevity's sake, Judge, we
10 will have a number of relevancy arguments, but I
11 will try to lump the ones together that seem to
12 go. The exhibits that we'll stipulate to, Judge,
13 because most of the stipulations were that
14 that's -- you don't have to bring anybody to tell
15 me that this is what it says. You don't have to
16 bring a statement of records, but I will go through
17 the exhibit numbers that reference back to the fact
18 as to whether or not it's relevant or not.

19 For example, Exhibits 11 and 12, 13 and
20 14, are all affidavits from individual plaintiffs.
21 We have some relevancy and some conclusory
22 objections on these, Judge. Basically they say

23 they I don't have a photo ID, but it has no
24 information that it indicates that they were unable
25 to get one, or that it is totally impossible for

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1 them to do so. And so to that extent what they say
2 is I currently don't have it, and that's the extent
3 of the testimony. There is nothing about this
4 other than their conclusion of this will be some
5 sort of undue burden. And they complain that they
6 will have to travel to go get these documents or
7 travel to the Revenue office. They have to travel
8 to get to the polls, too, your Honor.

9 And in terms of relevancy, it doesn't show
10 just because you currently don't have a photo ID
11 that, A, you can't get one. Also does not
12 demonstrate that is completely impossible for you
13 to vote either provisionally, absentee or in
14 person. And to that extent, they are conclusory as
15 far as that goes.

16 THE COURT: Except the fact that they
17 don't have them is a fact.

18 MR. LONG: But, Judge, the fact of the
19 matter is that in Missouri, qualifications are set
20 by Article 8, Section 2. You have to be a citizen,
21 you have to be above 18 years of age, you have to
22 be a resident. And as far as that goes, the

23 documents that are required by Senate Bill 1014 are
24 exactly the documents that verifies that you're a
25 citizen of the United States and you are above the

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1 age of 18 and that you are a resident of the
2 precinct in which you're voting.

3 THE COURT: Well, but to the extent --
4 well, okay. I understand. I don't know that I
5 agree with your objection on relevance there, but
6 whether it's decisive is a separate issue.

7 MR. LONG: Correct, Judge. With respect
8 to --

9 MR. DOWNING: Your Honor, this is just --
10 if I may here, our claim as to these people are not
11 that it's impossible for them to get all the
12 documents. That's not our constitutional claim at
13 all. It's an undue burden and that's what these
14 documents show.

15 MR. LONG: Judge, we can argue. I feel
16 like we're going to argue the case. I know that's
17 not what you want. I'll try to move on to the
18 objections. Exhibit 15 contains hearsay statements
19 of a DOR --

20 THE COURT: I'm sorry. Who?

21 MR. LONG: It's the affidavit of Richard
22 Von Glahn, Exhibit 15, contains hearsay statement

23 from Department of Revenue employees. There's no
24 evidence that they were authorized to make such
25 statements. I'll also point out that even

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1 statement that are contained in there are
2 fraudulently wrong because --

3 THE COURT: One moment. Let me get back
4 to the --

5 MR. LONG: I believe it's tab four.

6 THE COURT: Exhibit number?

7 MR. LONG: 15, your Honor.

8 THE COURT: 15. We're still on the group
9 of affidavits.

10 MR. LONG: Right. He was told, and I
11 believe it's -- sorry, Judge -- paragraph 13. He
12 said he was told that if he doesn't pay \$11 to get
13 a non-voter ID, that he doesn't vote. That is just
14 wrong.

15 THE COURT: It's not offered for the
16 truth. It's offered -- you have a witness
17 testifying that the statement was made.

18 MR. LONG: That's hearsay.

19 THE COURT: And so your objection as to
20 hearsay, that's overruled. That's clearly not --
21 the hearsay has to be for the truth of the
22 statement, not the fact that it was made.

23 MR. LONG: Well, I'll also point out that
24 it's also false under Senate Bill 1014. You don't
25 have to pay for a non-driver's license.

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1 THE COURT: It's not being offered for the
2 truth.

3 MR. LONG: To the extent that they are
4 offering it, it would be a hearsay objection to it,
5 because his thing -- his complaint is, is that it's
6 going to cost me \$11 to get this.

7 THE COURT: Well, if that's -- if that's
8 his complaint, that would be incorrect. But to the
9 extent the Court would admit that for the purpose
10 of showing the statement that according to this
11 witness, the statement was made to him.

12 MR. DOWNING: And, your Honor, it was made
13 by -- I believe we'll run into this a little bit
14 later so I'll just lay it on the table. Our view,
15 certainly, is that this is a Department of Revenue
16 employee. This is a state employee. This is a
17 statement of party opponent, so it's not hearsay.

18 THE COURT: I don't know that that covers
19 any Revenue employee.

20 MR. LONG: Judge, we can have a long
21 argument.

22 MR. DOWNING: I know you've dealt with

23 that before, and I've dealt with it, but that's --

24 MR. LONG: Our position is still laid.

25 Exhibit 16 is the affidavit from Kathleen

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1 Weinschenk. Again, relevancy and conclusory
2 statements that were contained in Exhibits 11
3 through 14. She's another individual plaintiff. I
4 assume you're going to rule is the same as this one
5 as on the priors, so I'll just note that one.

6 Exhibit 17 is the affidavit of Margaret
7 Donnelly. There's a different problem with this
8 one. It contains all types of hearsay. First off,
9 it says somebody told the Legislature X. It
10 doesn't identify him. It doesn't identify what he
11 said. They obviously, according to what
12 Mr. Downing was saying, is offered for the truth of
13 the matter asserted that it is and this law will
14 create a disparate impact. They should have
15 brought that evidence. They didn't. They brought
16 a hearsay statement from the member of the
17 legislature that says somebody said.

18 MR. DOWNING: We're not offering this for
19 the truth of it, your Honor. We're not offering
20 this to show disparate impact. Only that the
21 Legislature was told that.

22 MR. LONG: And that's hearsay.

23 THE COURT: Well, it's not necessarily

24 hearsay. It depends on how your evidence --

25 MR. LONG: Judge, you can't circling it

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1 any way. If you're going to offer as evidence that
2 there's disparate impact, then it has to be
3 hearsay.

4 THE COURT: But he's not offering it for
5 evidence. It's just disparate impact.

6 MR. LONG: Explain that they are put on
7 notice. This statement doesn't have reliability
8 that would allow you to --

9 THE COURT: I understand. I'll consider
10 it.

11 MR. LONG: Same concern for Exhibit 18, a
12 current voter on how difficult it was for her to
13 get, without any indication that this is
14 commiserate with anyone else other than herself.
15 This isn't offered as a class representative. This
16 isn't offered as a representative to people in
17 general. To the extent that it is, they haven't
18 established that fact by any other evidence in this
19 case. She showed up. She didn't have the correct
20 documents. She had to go back and get the correct
21 documents. So we have a relevancy objection, and
22 we also have some legal --

23 THE COURT: I understand your objection.

24 MR. LONG: Judge, Exhibit 19 is the

25 website on voter IDs in other states. We're under

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1 Missouri law; to a certain extent what other states
2 do. If Alabama allows you to vote using your
3 hunting license, is not really relevant to the
4 Missouri issues that are in here, so we have a
5 relevancy objection.

6 MR. DOWNING: Your Honor, this really is
7 offered more in the nature of a demonstrative
8 exhibit to help the court, and not as a factual
9 exhibit. So we would simply agree to withdraw
10 Exhibit 19 as anything other than a demonstrative
11 exhibit for the court, because I agree with
12 Mr. Long, that what all the other states may be
13 doing or may not be doing is not directly relevant
14 to the constitutional issues in Missouri.

15 MR. LONG: We have an objection to
16 relevancy whether or not it shows Missouri is
17 stricter, or not stricter. To the extent that it
18 is --

19 THE COURT: I understand your objection.
20 I assume it will be a little change in position
21 later on when we get to Indiana.

22 MR. LONG: I'm sure there will be, Judge.

23 Exhibit 21 is a Secretary of State's analysis.
24 And, judge, to put it very nicely, they even admit
25 in their own methodology that you can't trust the

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1 numbers. And to offer a report as to a figure that
2 even the proponent of it says cannot be verifiable
3 and probably is not accurate, raises the question,
4 not only the foundation of it, it's reliability,
5 but also relevancy in any issue in this case.

6 MR. DOWNING: Your Honor, this is offered
7 merely as the Department of Revenue figures were
8 offered to give the Court a general sense of the
9 scope of the issue. We believe that whether there
10 are 10 people, or 10,000, or 10 million people
11 burdened by this, the result is the same. But this
12 is to give the Court a sense of how widespread the
13 scope of the problem will be in Missouri's
14 background.

15 MS. WOOD: And, your Honor, if I can speak
16 on that, I think that Mr. Long misstates what our
17 methodology says. We do not say you cannot rely on
18 the numbers. What we point out is the fact that we
19 were merging two databases. The voter registration
20 database and the DOR database. We are putting them
21 together to determine our mailing list because we
22 have to provide education to voters. And we point

23 out that it may not be, obviously, 100 percent
24 accurate plus you're merging two different lists.

25 THE COURT: You may continue.

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1 MR. LONG: Thank you, your Honor. I'm
2 assuming that's all the arguments you want to hear
3 on 21?

4 THE COURT: Uh-huh.

5 MR. LONG: Back on 20, your Honor, the
6 only thing they argued is it's an actual fiscal
7 note, which is Exhibit 20, the same as Exhibit
8 No. 4 that was offered by Mr. Newman. So to that
9 extent, the argument there, we'll restrict
10 ourselves to just the relevance argument of the
11 169,000 figure that they gave you, which is not the
12 difference between registered voters and people
13 with licenses. It's the difference between the
14 number of people above the age of eighteen and the
15 number of people with licenses.

16 THE COURT: I'm sorry. What exhibit are
17 you on now?

18 MR. LONG: I'm sorry, your Honor. They
19 cited the Department of Revenue figure that said
20 there was 169,000 people in that fiscal note that
21 are above age 18 that do not have a -- not have a
22 Missouri driver's license or a non-driver's

23 license. That didn't compare registered voters of
24 fact. That number, the 4.4 million that have
25 driver's licenses or a non-driver's license is

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1 higher than the number of people who are actually
2 registered to vote in this state. So the 169,000
3 figure is not relevant --

4 THE COURT: That would be people who would
5 be eligible to vote if they otherwise registered,
6 correct?

7 MR. LONG: Could be, yes.

8 THE COURT: There seems to me to be a
9 number --

10 MR. LONG: As long as they are not
11 incarcerated or --

12 THE COURT: Pardon?

13 MR. LONG: As long as they are not
14 incarcerated.

15 THE COURT: Currently incarcerated,
16 right.

17 MR. LONG: Or otherwise disqualified under
18 article 8, Section 2.

19 MR. DOWNING: Your Honor, our point on
20 these numbers, again, no precise number is
21 necessary for the Court to make any determinations
22 on. It's just the two different state officials

- 23 acting pursuant to the scope of their duties have
- 24 made determinations and estimates as to what the
- 25 scope of the issue is, and that's all it's offered

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1 for.

2 MR. LONG: Your Honor, with respect to
3 Exhibits 24, 25 and 26, they offer evidence as to
4 how many people born outside the state. There's no
5 evidence as to how many people in the state were
6 born in Florida, Georgia, Illinois, Oklahoma or
7 Louisiana. In fact, Mr. Downing cited that there
8 must be a lot of people living in St. Louis who
9 were born in Illinois. That's why these facts are
10 not relevant. They don't have any evidence as to
11 how many people were born outside of this state and
12 they are not connecting the dots on that.

13 The fact that Florida requires a photo ID
14 is of no interest to this Court until there's
15 evidence that somebody is from Florida. You don't
16 have that evidence at this moment making all this
17 irrelevant to any issue that's present in this
18 case.

19 THE COURT: I understand your objection.
20 I don't agree, but I understand it.

21 MR. LONG: You may agree at the end,
22 Judge.

- 23 THE COURT: Pardon?
- 24 MR. LONG: You may agree at the end.
- 25 With respect to Exhibit 31 and 32, we have

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1 newspaper articles where people said, you know,
2 elections were fraud free. Judge, the fact that
3 they didn't have any fraud does not mean there is
4 no fraud. So, therefore, we question relevance to
5 the newspaper articles that quote that.

6 With respect to Exhibit 33 --

7 THE COURT: I'm not sure about the
8 stipulation here. I understand the -- your
9 question about the newspaper articles, and I guess
10 the underlying foundation is simply that the
11 newspaper articles exist, not that the quote -- I
12 guess your objection is that there's no evidence
13 that the underlying quote was made, and you're
14 contesting that or --

15 MR. LONG: No, Judge. We don't contest
16 that the newspaper article appeared. We don't
17 contest that the quote did not appear in the paper
18 or that it wasn't stated like that. The problem
19 is, is that's their argument and they are trying to
20 offer it for the purpose of showing there wasn't
21 fraud. And it simply doesn't establish that fact.
22 It is not relevant to that issue that they did not

23 find fraud.

24 THE COURT: But it shows that the election

25 authority discovered no fraud or at least --

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1 MR. LONG: That's a relevancy objection
2 that we're making on those issues.

3 MR. DOWNING: And --

4 THE COURT: That's fine.

5 MR. DOWNING: Okay.

6 MR. LONG: Judge, Exhibit 33 is the letter
7 from Secretary of State to the Governor. It
8 contains hearsay, including an estimate by the
9 Secretary of State that 20 percent of the voting
10 public -- or excuse me -- of the registered voters
11 would be affected by this, which is much lower than
12 what she found in Exhibit 21. But it also has no
13 foundation of basis which would constitute hearsay.

14 MR. DOWNING: As to that aspect?

15 MR. LONG: To that aspect. They also cite
16 the Ashcroft report would, again, be hearsay. The
17 report will speak for itself and their
18 characterization of it would obviously be hearsay.

19 THE COURT: You're talking about a consent
20 order?

21 MR. LONG: They said the Ashcroft report.
22 It does not report the consent order itself.

23 THE COURT: Which exhibit are you

24 referring to?

25 MR. LONG: I'm sorry, your Honor. 33.

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1 MR. DOWNING: Your Honor, obviously, our
2 point is that the chief election official for the
3 State of Missouri's views on whether there's a
4 compelling need for this law to prevent voter fraud
5 is directly relevant to our claim that this is an
6 undue burden on our constitutional fundamental
7 right.

8 THE COURT: I'm unclear on whether -- on
9 whether the Governor or the Secretary of State's
10 views on the need or lack of need. I'm not clear
11 right now what -- the Court's inclined to give some
12 deference to the officials, that would include the
13 Governor, as well as the Secretary of State, but I
14 am not clear how that fits in. It seems to me
15 there should be some deference to their views
16 because of the positions they occupy and presumed
17 experience or what-have-you, so I'm --

18 MR. DOWNING: Your Honor, we're offering
19 it not only for that issue, the reason the Court
20 just articulated, but also for the issue of they've
21 got to show that there's compelling need. That
22 this is necessary -- under the constitutional

23 standard, this is necessary for a compelling state
24 interest. And the Secretary of the State is
25 telling the Governor we both know there's not been

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1 any fraud in this state for the last six years.

2 How can this be necessary for compelling needs?

3 And we're offering it for that, in addition to

4 that.

5 THE COURT: And I take it that eventually

6 when we're arguing whether it should be strict

7 scrutiny or --

8 MR. DOWNING: Right. It will go to that.

9 THE COURT: Okay.

10 MR. LONG: Your Honor, Exhibit 34 and 37,

11 I will take those two together. Consensus data is

12 how many people are in poverty or how many people

13 do not have an automobile. Those are not relevant

14 in that they do not demonstrate people who do not

15 have a photo ID, do not have a driver's license.

16 We fundamentally object that just because you don't

17 have a car, doesn't mean you don't have a driver's

18 license in this state. If you live next to a metro

19 line, if you drive a cab for a living. There's

20 many reasons you may not own an automobile, like

21 many other reasons like you might have a driver's

22 license.

23 MR. DOWNING: Your Honor, we just offered
24 it, again, as general background on the general
25 scope of the problem. And it certainly, in terms

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1 of evidence, is more likely than not that if a
2 person doesn't own a car, it's more likely than not
3 they don't own a driver's license. It may not be
4 the crucifer to that or definitive proof, but is
5 some evidence, circumstantial evidence.

6 MR. LONG: Judge, we're arguing our case
7 now. I would say to relevancy, that's a stretch
8 way far to say that just because you don't have an
9 automobile doesn't mean you don't have a driver's
10 license. So on that basis for 34 and 37, I object
11 on the basis of relevancy.

12 35 and 36 are polls. And, Judge, they say
13 it's for purposeful discrimination. How people
14 voted in an election for US Senator or US President
15 does not establish or does not have any relevance
16 to passing of Senate Bill 1014 without some
17 additional evidence that isn't in exhibits 1
18 through 56. The fact that so many people voted one
19 way or the other does not establish purposeful
20 discrimination. It is not relevant to any issue in
21 this case, and it has absolutely nothing to do with
22 photo IDs.

23 MR. DOWNING: Your Honor, it's evidence of

24 motive.

25 MR. LONG: Judge, that's a burden that

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1 they bear very highly, and I haven't found a single
2 exhibit that indicates motive. The fact that X
3 number of people voted for somebody in an election
4 is not a motive as to the law. If there's evidence
5 to that, I would expect to see it by now. So we
6 object to relevancy of Exhibits 35 and 36.

7 Exhibit 38, your Honor, the mobile units,
8 which there's been much talk about, and I'll point
9 out Exhibit 39 also, which Ms. Vincent was saying
10 we're going out to the nursing homes. That's
11 exactly what Senate Bill 1014 requires her to do,
12 is to go out to Chapter 198 facilities as is
13 established in the affidavit of Mr. Lowell
14 Pearson. There's 1,500 of those units.

15 But Exhibit 38 also contains a statement
16 from Ms. Johnson Blanco saying -- I'm sorry,
17 Judge. It's in my other book. It is at the bottom
18 of page 2 and top of page 3, she's identified as a
19 staff with voter rights project and Lawyers
20 Committee for Civil Rights. She has some opinions
21 as to what legislatures are or are not doing that
22 would be a hearsay statement that's offered for the

23 truth of the matter asserted. If it's not, it's a
24 statement from someone that has no relevance to
25 this issue and no establishment of her credentials

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1 as an expert or anything else that's been
2 established in this case.

3 THE COURT: I think 38 was offered simply
4 because of the Governor's statement in there.

5 MR. DOWNING: That's right. Solely for
6 that purpose.

7 MR. LONG: But I will point out that it
8 says -- again, I need to preserve my objection
9 because that statement is contained in this
10 document, your Honor. The Governor's statement as
11 to what the mobile units are doing, et cetera, is
12 accurate and as stated in Lowell Pearson's
13 affidavit, that's exactly what is going on. I just
14 wish for the Court to note my objection of Ms.
15 Johnson Blanco's statement.

16 THE COURT: I thought when he offered the
17 exhibit, I thought it was for the purpose of the
18 statement of the Governor? I didn't believe it was
19 offered for any other purpose.

20 MR. DOWNING: Correct. Right.

21 MR. LONG: The Exhibit 43 is another poll
22 of statewide issue. And I would question relevancy

23 of what 800 people at a snapshot on June 24, '06
24 believed. You also asked, Judge, about perception
25 being reality. Mention of the campaign finances

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1 cases brings up that, you know, if you leave things
2 alone, sometimes things happen, and in campaign
3 finance cases they even talk about, you know, we
4 have to have laws against fraud because otherwise
5 we have fraud. We have corruption if we don't have
6 these laws. The US Supreme Court has consistently
7 said that that is a situation where the states can
8 take actions.

9 And with respect to page -- or Exhibit 44,
10 the Cook report, your Honor, they have some
11 findings and they have some things in there, but
12 none of this touches on as to what issue they are
13 actually asserting it for. If they are asserting
14 it for the fact that there's no fraud, that's not
15 what it says. And so we question relevancy to the
16 Cook report as to what they have cited.

17 Your Honor, with respect to Exhibit --

18 THE COURT: So the report will speak for
19 itself?

20 MR. DOWNING: Right.

21 MR. LONG: But that's why I question
22 relevancy to what they argued as to what the reason

23 was that it came in, Judge. It is irrelevant for
24 purpose from which they state, but the document
25 does speak for itself. We are not questioning the

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1 exhibit as not a true and accurate copy of the
2 document.

3 Judge, with respect to Exhibits 45 and 46
4 about provisional balloting. Judge, that's a
5 legal -- we'll just leave that up to what the law
6 says. The lawyers can argue about that. I'm not
7 going to take up any amount of time on that.

8 MR. DOWNING: Well, my only point on that,
9 your Honor, is if the state elections chief is
10 going to run the elections without having
11 provisional ballots available in local elections,
12 even if the law says otherwise, there's a
13 constitutional problem.

14 MR. HEARNE: Your Honor, to address that,
15 two points. First, I don't want to argue the
16 merits, but to the extent that the website comes
17 in, if the statute says or this very statute,
18 Missouri Voter act, that a provisional ballot shall
19 be available in all elections, every voter shall be
20 able to cast a provisional ballot in every race,
21 that is certainly the law that I think the Court
22 would be bound by, not a website.

23 THE COURT: I don't think it's going to be
24 a pivotal issue. But in some instances, certainly,
25 how the executive branch intends to administer the

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1 law is relevant in a constitutional challenge.

2 Now, whether in this instance that becomes pivotal,

3 I'm not sure.

4 MS. WOOD: And I can tell you, your Honor,

5 from the Secretary of State's position, we agree

6 with Mr. Downing about the provisional ballots

7 under Senate Bill 1014 are only in primary and

8 general elections.

9 THE COURT: I'll have to look at the

10 statute myself to see what --

11 MR. DOWNING: It's Section 115.430, your

12 Honor. It says, This section shall apply in only

13 the primary and general elections. This was the

14 section on provisional ballots.

15 MS. WOOD: And just one other thing --

16 THE COURT: We'll get to that.

17 MR. HEARNE: I'm sure we'll be arguing

18 this issue a little further.

19 MR. LONG: That was my point, your Honor.

20 We'll be arguing that point further, and I won't

21 belabor the Court any more on this.

22 Judge Exhibits 48 and 49, which involve

23 the US Census Bureau figures as to the number of
24 the elderly in this state is not relevant because
25 it does not have any correlation to how many people

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1 of that age are not registered voters or are
2 registered voters. With respect to the DOR cite,
3 the age, sex, class, et cetera, of your license,
4 doesn't correlate to registered voters.

5 I will also point out that we can argue
6 about calculations, but our calculation show that
7 one percent of those people don't have a driver's
8 or non-driver's license. And the 11 percent
9 figure, which are driver's licenses.

10 Judge, Exhibit 51, the affidavit of Wendy
11 Noren, she testified in this case. Her testimony
12 is not only conclusory in many spaces, but also has
13 a lot of hearsay running through it. We can go
14 through it point by point, or I can just trust the
15 Court that you will disregard any hearsay
16 statements that are not admissible in this
17 evidence.

18 THE COURT: I think trust the Court.

19 MR. LONG: In other words, Judge, we've
20 been here a long time here talking. I'm sure you
21 want to move on to something else.

22 The supplemental stipulations and

- 23 supplemental documents, the Carter letter is
- 24 Mr. Carter's opinion. To that extent, we view it a
- 25 little bit like Mel Hancock's deposition as there's

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1 a report out that says what the Baker/Carter
2 Commission found. We would prefer to stick with
3 just the evidence and what it is. And Mr. Carter's
4 opinion being what it is. We just don't think it's
5 relevant to the issue as far as this. We would
6 rather stick with the report.

7 MR. DOWNING: Your Honor, I just want to
8 make it clear, we were only offering this if the
9 Baker/Carter Commission report comes into
10 evidence. If it doesn't, we don't offer this.
11 This is conditional.

12 MR. LONG: Judge, Exhibits 54 and 55 are
13 sort of odd. Mr. Kottmeyer in his affidavit says
14 that now that his organizations ballot measure is
15 on there, he calls them a candidate. We have
16 questioned in our answer whether or not this is a
17 proper party. They are not a taxpayer. They are
18 not a voter. They are a supporter of an initiative
19 proposition. And his affidavit basically says
20 because fewer people will vote or there will be
21 more problems with voting is going to hurt our
22 ballot measure. We have sustaining arguments as to

23 all that. We also have some deep relevancy and
24 conclusory arguments to his affidavit, especially
25 Exhibit 55.

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1 MR. DOWNING: We believe he has faith.
2 This is akin to candidate standing, your Honor. We
3 can brief that and argue it next week, if you would
4 like.

5 THE COURT: Yeah.

6 MR. LONG: Your Honor, we finally get down
7 to whether or not being struck by lightning, what
8 the odds are of that. Given it's cloudy outside,
9 I'm not going to dispute anything. I hope the
10 figure is low. Judge, that's not relevant. It
11 makes for a nice sounding argument, but it's not
12 relevant to any issue in this case, how often or
13 how many people get struck by lightning in the
14 State of Missouri.

15 Your Honor, with respect to this, we
16 also -- we'd offer Exhibit B, which is Mr.
17 Pearson's affidavit. I have sent to the parties a
18 supplemental affidavit from Mr. Pearson, updated
19 some of the information. I would like that marked
20 as Exhibit C. I provided a --

21 THE COURT: We're going to go into your
22 exhibits?

23 MR. LONG: If you want to do that now, or
24 we can get it out and move on from there, whichever
25 way.

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1 THE COURT: I take it, there are some --
2 you were carrying the laboring oar, I assume, but
3 I'll give the other parties a chance to also,
4 without repeating the objections that were made,
5 but if you have additional ones.

6 MR. LONG: Thank you, your Honor.

7 THE COURT: Then we'll wait. Let's get
8 through the objections before --

9 MR. PRESSON: Just to keep the record
10 clear, your Honor, I'm not sure if Mr. Downing's
11 exhibits were actually offered in connection with
12 his Hancock claim or in connection with --

13 THE COURT: We consolidated cases, so it's
14 one case. Now, some exhibits may have more
15 relevance or only relevance to one of the claims --

16 MR. PRESSON: I see very little relevance
17 in anything that Mr. Downing offered, but to the
18 extent they are offered for that purpose, I'll
19 simply join in Mr. Long's objections.

20 THE COURT: All right.

21 MR. HEARNE: Your Honor, we would also
22 likewise join in with those objections. I don't

23 want to belabor the point or argue the case.

24 THE COURT: All right. Thank you.

25 MS. WOOD: And, your Honor, we have no

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1 objections to Mr. Downing's exhibits.

2 THE COURT: Now, we are at the point where
3 we can proceed with exhibits.

4 MR. LONG: Your Honor, the only one that
5 I -- I'm sorry. Did you have any additional ones?

6 MR. DOWNING: Not today.

7 MR. LONG: I'm stepping up, Judge, before
8 it may be my time. I believe we're on Exhibit C.

9 THE COURT: Well, let me -- no. I want to
10 start at the beginning --

11 MR. LONG: Certainly.

12 THE COURT: -- because I don't know that I
13 have your A and Bs here, and they are probably in
14 my office. Since you didn't have as many, they
15 were easier to lose.

16 MR. PRESSON: Well, Exhibit A, your Honor,
17 I have an extra copy here, if you would like it.

18 It's an affidavit from the Director of the
19 Oversight Division of Legislative Research. With
20 regard to the preparation of fiscal note such as
21 the one in this case. And that the statements that
22 are submitted by local entities that are contained

23 therein are not separately reviewed by the
24 Oversight Division. So to indicate that this is
25 just kind of a follow-through or flow-through of

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1 information rather than any independent analysis or
2 independent statement by the Oversight Commission,
3 it simply bolsters the idea that the statements
4 that are contained in there apply to various
5 elections, which is hearsay.

6 THE COURT: When we take a break, let me
7 see if it's in there with a different pile. And if
8 it's not, I want to --

9 MR. PRESSON: Like I said, I have a couple
10 extra copies.

11 THE COURT: That's Exhibit A?

12 MR. LONG: Your Honor, Exhibit B is the
13 affidavit of Lowell Pearson. He's the Deputy
14 Director of Missouri Department of Revenue. I also
15 have an extra copy of that in case you need it.
16 Basically, to be brief about it, it discusses the
17 implementation by the Department of Revenue of the
18 requirements of Senate Bill 1014, the amount of
19 money spent, the amount of letters, visits,
20 et cetera, to Chapter 198 comes. He also listed
21 the number of people with a Missouri driver's or
22 non-driver's license as of a date certain, which I

23 believe may have been August 17th.

24 It also listed exactly what the

25 requirements to get a Missouri driver's and

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1 non-driver's license, specifically with respect to
2 proof of lawful, proof of identify and proof of
3 residency.

4 THE COURT: All right.

5 MR. DOWNING: As we've already indicated,
6 your Honor, we have no objection. The Weinschenk
7 Plaintiffs have no objection.

8 MR. NEWMAN: Jackson County plaintiffs
9 have no objection to that.

10 THE COURT: That's A and B. Now, you were
11 getting ready to offer C?

12 MR. LONG: Yes.

13 MR. NEWMAN: Do you have an extra copy?

14 MR. LONG: I have extra copies.

15 Your Honor, this is a supplemental
16 affidavit to Mr. Pearson that is already shared
17 with counsel at this time. I believe, your Honor,
18 that's C. Your Honor, basically it does three
19 things. One, is it updates the figures that were
20 previously contained as the number of visits and
21 also -- updates figures from the affidavit. It
22 also has some more information on interaction

23 between the Secretary of State and Missouri
24 Department of Revenue with respect to what's
25 labeled as Exhibit 21 in this case, the Secretary

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1 of State's analysis of -- or comparison of the
2 voter registration database versus the Department
3 of Revenue's database. Some interactions they've
4 had since then as to the finding of the Department
5 of Revenue and its offers to help ascertain the
6 number of people needs to be notified, if any, if
7 they need a photo ID.

8 THE COURT: Is that it on your exhibits?

9 MR. LONG: Yes, your Honor.

10 MR. DOWNING: Your Honor, as to that
11 exhibit, again, to the extent that the numbers are
12 considered by the Court as some general background
13 in the scope of the problem, we have no objection
14 for this being considered. And to the extent the
15 numbers aren't all important, we reserve the right
16 and offer a counter affidavit to this evidence.

17 THE COURT: Mr. Presson, did you have
18 anything other than your one exhibit?

19 MR. PRESSON: Nothing further, your
20 Honor.

21 MS. WOOD: And, your Honor, from the
22 Secretary of State's Office, just for the record,

23 as to Exhibit C, we received it yesterday. We are
24 in the process of looking at it. But as to its
25 applications to our list, our mailing list, we

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1 reserve the right to file a supplemental affidavit
2 next week.

3 THE COURT: All right. Okay.

4 MR. HEARNE: Your Honor, we have several
5 exhibits that we wanted to present. They are in
6 the form of affidavits we've already provided to
7 the Court. I can go through them very briefly.

8 THE COURT: Do you have -- either I have
9 to go get them or --

10 MR. DOWNING: I have got them.

11 MR. HEARNE: They have been provided to
12 all the parties.

13 THE COURT: Do you have an extra set for
14 me? The file-stamped copies I left with the
15 secretary to make sure they made it into the file,
16 and she wasn't here this morning, so if you have an
17 extra set. If you don't, I'll go get the ones that
18 are --

19 MR. HEARNE: I'll give you a set. I
20 believe those are in the order I'm going to go
21 through, your Honor. The quickest way to do that
22 is just by reference. And, again, trying to be

- 23 quick and respectful of everybody's time. I
- 24 prepared a short summary of the evidence that I
- 25 presented on the top of that that just very briefly

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1 summarizes what's in each of the individual
2 affidavits and exhibits. This is -- all of these
3 items, and I have one or two at the end that I need
4 to add to that.

5 All eight of these items that I summarized
6 have been provided to the other counsel on
7 Wednesday. And these are all affidavits of
8 individuals who will testify in the manner -- who
9 will be willing to come to court and testify in the
10 manner stated in the affidavit.

11 MR. DOWNING: Could we have a copy of that
12 summary?

13 MR. HEARNE: Yeah, I just got it.

14 The first item is the affidavit of State
15 Senator Delbert Scott. He, of course, is the chair
16 of the committee in the Senate. He was one who
17 introduced Senate Bill 1014. What his affidavit
18 goes to are several points that have been
19 introduced into this discussion by Mr. Downing's
20 clients.

21 And specifically what he does, is he goes
22 through the legislative history of Senate Bill 1040

23 and notes particularly during the course of
24 deliberation in the Senate how that was amended,
25 amended specifically to take into account the

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1 considerations that have been presented by those
2 who have some concern that it may present some
3 burden to any Missourian wanting to vote.

4 He notes particularly the fact and, again,
5 most of the discussion, your Honor, in this case
6 has been focused just on the voter ID provision.
7 Senator Scott goes through the fact that this is a
8 comprehensive election reform. Mr. Downing has
9 made the point that there's some motive -- some
10 invidious motive to try to prevent certain segments
11 from participating in elections.

12 In fact, what Senator Scott's affidavit
13 points out is that this packet of election reform
14 included a whole host of protections of voters,
15 including specific provisions against intimidation
16 or harassment. He specifically disclaims in his
17 affidavit that there was any intention to achieve
18 some partisan or racial or any invidious objective
19 with this legislation. In fact, he indicates that
20 the entire purpose of it was to increase
21 Missourians' confidence in the election process.

22 MR. NEWMAN: Excuse me, Mr. Hearne. Your

23 Honor, I think this is really argument of the
24 case. These were presented to us Wednesday
25 evening, late. And I think this is an attempt to

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1 argue the case, which I understand is to take place
2 next week.

3 THE COURT: He wasn't allowed to
4 participate in the first case, so I -- but I --

5 MR. HEARNE: I'll try to be brief and fact
6 specific, your Honor, of what's in here.

7 THE COURT: I agree with -- I think you
8 were being a little argumentative, but if you slow
9 down a little on that.

10 MR. HEARNE: Yes. I'll try to focus very
11 specifically on what's in his affidavit and why
12 it's relevant and should come. Senator Scott would
13 be available to testify to this. It goes to,
14 again, the specific provisions of this legislation,
15 how it was amended to address the specific issues
16 of those with disabilities, those born before 1941,
17 how it was changed during the course of
18 deliberations, so it did not become effective this
19 November, but in '08 and how additional provisions
20 were made to provide specifically for making
21 certain Missourians had access to free photo ID.

22 The next is an affidavit of Dale Morris.

23 She's one of the other party intervenors. Her
24 affidavit states she's a disabled elderly voter,
25 who currently lives in St. Louis County. She is

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1 formerly from St. Louis City. She indicates that
2 she testified before the House when they were
3 considering this. And despite her age and
4 disabilities, she is supporting this, because it
5 increases her confidence that her vote will be
6 fairly and accurately counted.

7 She also states that she does have a
8 government-issued photo ID, which she was able to
9 obtain even before the provisions of the Missouri
10 Voter Protection Act made it free.

11 The next item, your Honor, is an affidavit
12 of John Diehl, Junior. John Diehl is the chairman
13 of St. Louis County Election Board. During the
14 hearing, this Court heard testimony of Judy Taylor,
15 the democrat director of the election board.

16 Mr. Diehl states that as chairman of the
17 board, Ms. Taylor was not authorized to speak in
18 terms of the board's position. And he, in fact,
19 comes forward and testifies in his affidavit that
20 the cost would be -- the effect, the financial
21 effect of the Missouri Voter Protection Act from
22 the St. Louis County Board is one that does not

23 increase their cost. And, in fact, is a net cost

24 savings.

25 He also testifies to their fiscal note

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1 that is attached as an exhibit to his affidavit,
2 and that fiscal note specifically is one that
3 was -- that he states is signed by Ms. Taylor as
4 well. And it's consistent with his testimony that
5 there's no cost imposed on St. Louis County Board
6 of Elections.

7 An affidavit of Scott Winedecker. You
8 heard the testimony of an individual. I believe
9 she was Carol Signaigo, who testified during the
10 hearing in person as to what she believed to be the
11 cost to the City of St. Louis Election Board by
12 reason of Missouri Voter Protection Act. She is
13 not authorized to speak for the board.
14 Mr. Winedecker's affidavit states that he is. He
15 is the director of the City of St. Louis
16 elections. He states -- he goes through each of
17 the individual items that Mrs. Signaigo testified
18 to in states that not only do they not impose a
19 cost from the City, but that it actually represents
20 a cost savings. And he simply refutes her
21 testimony to the contrary. Again, he does so, as
22 the representative of the City Election Board.

- 23 The fifth item is the affidavit of the
- 24 Secretary of State from Indiana, Todd Rokita.
- 25 Attached to his affidavit is a copy of the Indiana

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1 law, the actual statute that was passed and
2 challenged in federal court in Indiana and upheld.
3 He states as the chief election official in Indiana
4 that he's had occasion to observe and monitor the
5 effect of several elections conducted in Indiana
6 under that voter identification law, which is
7 stricter than Missouri's. And he found that there
8 was no valid complaint of any eligible Indiana
9 voter being prevented from voting by reason of
10 their photo ID requirements.

11 He further states that he found that that
12 increased confidence in Indiana citizens in the
13 conduct of their elections.

14 The next item, number six, is an affidavit
15 from the University of Missouri professors.
16 There's actually two affidavits that have been
17 submitted. Both of them are identical. Each
18 professor submitted them. They are two
19 professors -- well, first off, Marvin Oberby is a
20 professor of political science at the University of
21 Missouri in Columbia, a doctorate. And Jeffrey
22 Milyo is professor of economics and public

23 affairs. Also with a doctorate from Stanford

24 University.

25 These two professors from Mizzou have

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1 studied the effects of the Missouri Voter
2 Protection Act. They have reviewed the Department
3 of Revenue's fiscal note. They have reviewed
4 census data. They have reviewed scholarly
5 political science, social science, literature
6 dealing with voter participation, dealing with the
7 effects of these kind of regulation of election
8 process.

9 And they conclude, first, that by their
10 analysis looking at the actual law as written, not
11 as originally proposed and considered by the
12 Department of Revenue, and looking at census data,
13 those are who are eligible to vote who otherwise do
14 not have a photo ID, they find to be only 19,000
15 people in Missouri, and of which they find that
16 only 6,000 are those who would likely require one
17 to vote.

18 The next finding that they conclude is
19 that the ID requirements in the Missouri Voter
20 Protection Act are not likely to have a significant
21 affect on voter participation or turnout. Now,
22 they do that by reference to statistical analysis

- 23 of other states where there is photo identification
- 24 or voter identification laws, and they study
- 25 particularly before and after voter identification

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1 law was put in place. They determined that there's
2 no evidence to suggest that it has a disparate
3 impact on any racial group or any group of voters
4 that are participating by reason of that
5 requirement, that the statistical and scholarly
6 evidence does not support that intention.

7 THE COURT: Are the studies attached to
8 the affidavits?

9 MR. HEARNE: What's that?

10 THE COURT: Their studies are attached to
11 the affidavits?

12 MR. HEARNE: They do attach. Now, in some
13 of their studies they cite some studies in social
14 literature. There's one particularly that is
15 attached. I'm going to come to that next.

16 But the third conclusion that they reach,
17 is that actually the -- and, again, looking at the
18 scholarly literature and social science and
19 political science, they do find and decide a
20 Rasmussen poll that there has been and is a
21 significant lack of confidence in the election
22 process. And that what they find -- and this will

23 be referenced in just a moment by the next
24 affidavit as well -- if that measures an increased
25 voter confidence in the election process, actually

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1 increase voter participation.

2 So a requirement such as in the Missouri
3 Voter Protection Act requirement of photo ID
4 actually they find evidence to say not only did it
5 not reduce voter participation, you have to find an
6 increase when you have these kind of measures to
7 enhance the confidence in the election process.

8 The affidavit of Dr. John Lott. Dr. Lott
9 has a Ph.D. in economics from the University of
10 California, Los Angeles. He was resident scholar
11 of Yale University law school. He's also
12 undertaken a national study. Now, Dr. Lott's study
13 was also referenced by the two professors from
14 Mizzou. Dr. Lott's study does have all of the
15 detailed tables attached to it of how he has done a
16 nationwide analysis of how voter registration,
17 voter identification requirements affect voter
18 participation.

19 Again, his conclusion is that there is no
20 basis to conclude that these kind of voter
21 identification requirements reduce voter
22 participation, but, in fact, he finds a slight

- 23 increase in voter participation when you have these
- 24 confidence-building measures in the election
- 25 process.

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1 The next item and the last item is the
2 affidavit of Kay Cole James. She is a former
3 director of the of US Office of Personnel
4 Management. She testified before the US House of
5 Representatives providing testimony in voter
6 identification requirements. That testimony is
7 attached. She also is a member of the Carter/Baker
8 Commission. And attached to her affidavit is not
9 only her testimony to the US House of
10 Representatives on voter identification issues, but
11 also a copy of the Carter/Baker recommendations.

12 The Carter/Baker recommendations have been
13 referenced before, but they basically represent
14 what a bipartisan commission in the past two years
15 came together and recommended as best practices to
16 conduct --

17 THE COURT: What was the date of that
18 report?

19 MR. HEARNE: It was October of '05, your
20 Honor, about this -- about last year it was
21 released. It was about a year that that report was
22 in process and then it was released last October.

23 THE COURT: Let me ask you this: Since I
24 haven't had a chance to look at the affidavits or
25 the attachments, the prior -- and I may be off a

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1 year -- but two or three years ago, or maybe three
2 or four years ago, renewing your driver's license
3 didn't require a whole lot of identification when
4 you went in. And so when people went to renew
5 their driver's license, no matter how many times
6 they've been married or their name had changed,
7 obtaining a driver's license was relatively a
8 paper-free process. You had to be there in person
9 and sign something under oath, I believe.

10 But with the change, I think, mandated by
11 congress --

12 MR. HEARNE: That's correct.

13 THE COURT: -- there's some people who
14 probably haven't had to renew their driver's
15 license, people who have a driver's license who
16 haven't had to renew their driver's license under
17 the new requirements. And so I guess what I'm
18 wondering is whether some of these studies take
19 into account the more stringent requirements
20 mandated by the federal law or not, or if some of
21 these studies take into account pre-federal
22 law-mandated changes, or they even address this as

23 an issue?

24 MR. HEARNE: The studies, your Honor, do

25 address post. It's a Federal Wheel ID Act. And

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1 basically the Federal Wheel ID Act is what required
2 states to have to get a driver's license or certain
3 types of state-issued ID. You have to have these
4 additional documents that the federal government
5 required, if that's what you're speaking to, I
6 believe.

7 THE COURT: Uh-huh.

8 MR. HEARNE: It also provides beginning in
9 2010, you have to have one of these forms of
10 acceptable Federal Wheel ID in order to get any
11 federal benefits or --

12 THE COURT: Obviously, some people are
13 driving around with the old driver's license since
14 they haven't had to go through this yet.

15 MR. HEARNE: Right. And what this study
16 does, two points, the study by the professors looks
17 at voter ID requirements. And then photo ID
18 requirements, there's just less data, but they do
19 go into that analysis in Indiana and the two
20 elections, three elections that they have had there
21 since then. So that is a post Federal Wheel ID Act
22 analysis as of this spring. That's Professor

23 Lott.

24 Initially, Mizzou professors look at

25 similar issues both before and in general. They

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1 make a more general statement about what do these
2 kind of requirements, what effect --

3 THE COURT: All right. I'll look at the
4 affidavits.

5 MR. HEARNE: The final point I would note
6 is in reference to the Carter/Baker Commission,
7 your Honor, it very specifically is a post Federal
8 Wheel ID Act. In fact, it premises its
9 recommendation on the Federal Wheel ID Act. It's
10 recommendation of the type of photo ID that
11 Carter/Baker propose is a best practice for states
12 to require for somebody to vote is actually far
13 stricter than what is found in Missouri Voter
14 Protection Act. And that's in there and it's
15 provided.

16 They have a number of other
17 recommendations. In fact, what you will find, is
18 there's probably 11 different Carter/Baker
19 recommendations that found their way into the
20 Missouri Voter Protection Act.

21 THE COURT: I don't want to get into
22 argument now. Does that conclude your --

23 MR. HEARNE: That concludes the
24 affidavits, your Honor. The other items that I
25 would note, and this was a brief that we have filed

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1 to the Court in a memorandum of law when we first
2 proposed intervention in the case, and that has a
3 few articles that have been referenced, both in
4 polls. I mentioned the Rasmusen poll, which is --

5 THE COURT: Are they being offered into
6 evidence?

7 MR. HEARNE: Including the Official Manual
8 for the State of Missouri. The 2000 Official
9 Manual that's quoted in there and cited in there,
10 and I would offer that. As well as I have not seen
11 Mr. Downing's Carter, President Carter letter, but
12 I would request permission to offer some rebuttal
13 evidence to that letter from President Carter in
14 terms of any comment that that might have. So
15 those would be what we propose, your Honor, and
16 move for the admission of those at this time.

17 THE COURT: All right. Mr. Long, Mr.
18 Presson, I assume there's no objections?

19 MR. PRESSON: We have no objections, your
20 Honor.

21 MR. LONG: We have no objections, your
22 Honor.

23 MR. NEWMAN: Your Honor, I have objections
24 to two of the affidavits. I have a very strong
25 objection to two of the affidavits. Those are the

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1 affidavits of Scott Winedecker, who has been with
2 the St. Louis Board of Election Commissioners for
3 about nine months. And the other is to the
4 affidavit of John Diehl, who has been with the St.
5 Louis County Board of Election Commissioners as a
6 commissioner, not a director, I believe, for about
7 two years.

8 Your Honor, first let me say this: These
9 affidavits contain double and triple and quadruple
10 hearsay. On top of that, we now have another layer
11 of hearsay that Mr. Hearne has provided the court
12 in the way of his summary and interpretation.

13 THE COURT: No. The summary is just a
14 legal pleading. The summary is not coming in as
15 evidence.

16 MR. NEWMAN: All right. I just wanted to
17 be clear about that, your Honor. I didn't want the
18 Court to think we were not objecting to that
19 summary.

20 Your Honor, I have a memorandum for the
21 Court. I have supplied copies to the parties on
22 the admissibility of affidavits. The first

23 principle, your Honor, there is no authority for
24 treating an affidavit as evidence and determining
25 the issues therefrom as to a stipulation of the

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1 parties.

2 The Jackson County plaintiffs have not and
3 will not stipulate to the admission of the
4 affidavit of Scott Winedecker, nor will we
5 stipulate to the admission of the affidavit of
6 Mr. John Diehl. Let me point out further, your
7 Honor, I think that these affidavits are fatal in
8 that respect.

9 But in the case of Mr. Diehl, there is a
10 further flaw, which is fatal, and that is his
11 affidavit nowhere indicates that it is based upon
12 personal knowledge. And we have cited to the Court
13 the Hinton versus Proctor and Schwarz case, an
14 affidavit must be made on personal knowledge. In
15 the absence of an allegation of personal knowledge
16 the contents of an affidavit become inadmissible
17 hearsay and should not be considered by a trial
18 court.

19 Mr. Diehl's affidavit, in its entirety,
20 your Honor, I believe must be excluded from
21 evidence in this case based upon the lack of
22 personal knowledge contained in the affidavit on

23 its face. Furthermore, as far as Mr. Winedecker's
24 deposition -- his affidavit is concerned, you know,
25 earlier, your Honor, we were arguing about the

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1 admissibility of Mel Hancock's deposition, which
2 was taken in accordance with the court rules, and
3 Mr. Presson cross-examined the witness. And that
4 was all done according to the procedures outlined
5 in our rules. And there's still some question
6 about the admissibility of that deposition when the
7 rules indicate depositions can be admitted for any
8 purpose. And now we're arguing about affidavits,
9 particularly Mr. Winedecker's affidavit, which I
10 think is an attempt, your Honor, to circumvent your
11 ruling on the 28th of August.

12 The Board of Election Commissioners for
13 the City of St. Louis were denied status as
14 intervenors in this case. And Mr. Winedecker's
15 deposition repeatedly -- as I've mentioned, this
16 gentleman has only been with the board since
17 November of '05, about nine months, maybe ten
18 months. His affidavit repeatedly states that he is
19 giving the Court the, quote, position of the
20 board.

21 Your Honor, he states no qualifications
22 whatsoever. We have witnesses who testified in our

23 case who combined had over 400 elections that they
24 had conducted. And this gentleman has nine months
25 of experience and is providing the Court with

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1 triple hearsay statements about the official
2 position of the board when the board's been
3 excluded from these proceedings. And I think this
4 is a raw attempt to circumvent the Court's previous
5 ruling. This gentleman is arguing the law in this
6 affidavit and providing legal opinions. And, your
7 Honor, there's no foundation whatsoever for him to
8 have the qualifications to present any arguments of
9 this nature. And we would ask that both of these
10 affidavits be excluded from evidence in this case.

11 MR. HEARNE: Your Honor, let me address
12 that real quickly. Our objective here has been, as
13 we said when we came into this case, to try to aid
14 the Court and the parties in presenting the
15 evidence in a quick and timely fashion, to not
16 delay it.

17 Mr. Newman, you had a number of witnesses
18 that you had testify, including a retired poll
19 worker from the City of St. Louis representing what
20 you testified was the position of the City of
21 Election Board --

22 THE COURT: Well, let me say, I don't

23 think it was the position of the City Election

24 Board. It was her opinion as to what --

25 MR. HEARNE: What the cost would be.

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1 THE COURT: -- the cost would be. And I'm
2 not interested in the official position of the city
3 board. I'm interested in testimony as to whether
4 there will be increased -- one of the issues I
5 would be interested in is whether there would be
6 increased costs as a result of this legislation.

7 MR. HEARNE: And that's what we would
8 propose to offer in the affidavits merely to try to
9 speed the process. I am glad to have them come and
10 testify live, your Honor, and they will testify
11 exactly what they stated in their affidavit. My
12 preference would be to have them testify live.

13 MR. NEWMAN: Your Honor, let me just say
14 this, as far as speed of the proceedings, I filed
15 this suit on July 17, 2006. It wasn't until five
16 weeks later that Mr. Hearne came to this Court.

17 THE COURT: The motion to intervene was
18 granted.

19 MR. NEWMAN: I understand.

20 THE COURT: And so they are parties in
21 this suit. It doesn't matter. The history is
22 history.

23 MR. NEWMAN: I only mention it in terms of
24 the speed of the proceedings, your Honor. There
25 was an opportunity to present these things at an

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1 earlier date and it wasn't taken advantage of.

2 THE COURT: Well, we're here where we
3 are. And my problem is that I believe if the -- I
4 understand on the issues of relevance. Now, to the
5 extent that there's some language that indicates
6 the position of the board, that doesn't seem to me
7 to be persuasive.

8 Now, as to the fact of the matters here, I
9 understand that the testimony -- what's a little
10 bit different about your case is that the bulk of
11 your evidence was presented by live testimony with
12 some right of cross-examination.

13 MR. NEWMAN: And no affidavits.

14 THE COURT: But the only solution I have,
15 and we've got to get our calendars, then allow them
16 to present, at least with respect to the City of
17 St. Louis and St. Louis County, live testimony.

18 MR. NEWMAN: Well, your Honor, under the
19 conditions you've just outlined, I understand how
20 the Court would consider the affidavits, and I
21 don't have any problem with that. But the
22 affidavit of Mr. Diehl does not state his own

23 personal knowledge.

24 THE COURT: Well, I'll have to go back. I

25 was looking at -- I mean, on Mr. --

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1 MR. NEWMAN: Mr. Winedecker does say his
2 personal knowledge.

3 THE COURT: Yes. I'll go back to the
4 other one. Well, we have this issue yet.

5 MR. HEARNE: Your Honor, I would ask if
6 that is an issue, we can submit later today even
7 Mr. Diehl's statement of his personal opinion.

8 THE COURT: Let's see if we can work it
9 out. In terms of the -- okay. I understand your
10 lack of personal knowledge objection.

11 MR. NEWMAN: Yes, your Honor. And my only
12 other point would be that in the event the Court
13 should consider his affidavits to whatever extent,
14 that we be granted leave to submit rebuttal
15 evidence.

16 THE COURT: Absolutely.

17 MR. DOWNING: Your Honor, I have a few
18 objections. Let me organize these first by
19 addressing the expert affidavits. There are three
20 expert affidavits, as I think Mr. Hearne indicated,
21 two of them are identical. The affidavits of Mr.
22 Milyo and Mr. Overby, I believe, are identical.

23 MR. HEARNE: That's correct.
24 MR. DOWNING: Then there's a third
25 affidavit of Mr. Lott. Your Honor, I don't need to

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1 refresh you on this, but I just want to refer to
2 the admissibility standard for expert testimony in
3 civil litigation in this state. And I'm
4 referencing the State Board of Registration for
5 Healing Arts versus McDonough case. It's a
6 Missouri Supreme Court case, December 23, 2003,
7 which makes it clear that the standard for
8 admissibility is Section 490.065, Missouri Revised
9 Statutes.

10 And just to indicate a couple pertinent
11 portions from that statute, it says, In any civil
12 litigation if scientific, technical or other
13 specialized knowledge will assist the trier of
14 fact, the court, to understand the evidence or to
15 determine the fact at issue, it may be admissible.
16 But then it goes on to say, The facts or data in a
17 particular case upon which the expert bases an
18 opinion must be of a type reasonably relied upon by
19 experts in the field in forming opinions or
20 inferences upon the subject and must be otherwise
21 reasonably reliable.

22 Your Honor, these affidavits on their face

23 are not based upon the kind of reliable evidence
24 that experts in the field base their opinions on,
25 and they are otherwise not reasonably reliable.

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1 And I need to go no further than what they say in
2 their own conclusions. I'm looking at the
3 affidavit of Jeffrey Milyo, for example.

4 THE COURT: Hold on a minute. Let me get
5 there with you. All right.

6 MR. DOWNING: Mr. Milyo has an affidavit,
7 and then attached to that affidavit are a couple of
8 exhibits. And Exhibit B is his and Mr. Overby's
9 report. I'll give you a minute to find Exhibit B.

10 THE COURT: Is that the, "We have been
11 asked"?

12 MR. DOWNING: Yes.

13 THE COURT: That's the report?

14 MR. DOWNING: That's the report.

15 THE COURT: Okay.

16 MR. DOWNING: And if you turn to page five
17 in that report, under the heading, Review of
18 Scholarly Literature, in that section, these two
19 expert affiants say, point blank, There are no
20 systematic statistical studies of the effects of
21 photo ID requirements for voting.

22 And then they proceed to go on and talk

- 23 about what they speculate or believe the impact
24 might be admitting that they've done no study and
25 no one else has either. So there's no question

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1 that under our standard for admissibility of expert
2 testimony in civil litigation in this state, these
3 affidavits are not admissible on this point.

4 And Mr. Lott, if you look at Mr. Lott's
5 affidavit and his report, he says pretty much the
6 same thing. Do you have Mr. Lott in front of you,
7 your Honor?

8 THE COURT: Too many affidavits. All
9 right. Yes.

10 MR. DOWNING: On Mr. Lott, the second --
11 I'm directing you to the second page of his
12 affidavit, paragraph five, the third sentence --
13 fourth sentence in paragraph five, Mr. Lott states,
14 "While this study examines a broad range of voting
15 regulations, it is still too early to evaluate the
16 possible impact of mandatory photo IDs on US
17 elections." So there is no question that this does
18 not meet the standard of reliability or
19 admissibility of expert testimony in Missouri. And
20 there's been no foundation laid for their
21 speculation contained in these affidavits.

22 Your Honor, I would also raise the issue

23 of relevancy. None of these affidavits address at
24 all any of the legal issues that I presented in my
25 lawsuit. None of them go to the issue of whether

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1 there's a compelling need in the State of Missouri
2 to have a photo ID requirement when there's been no
3 evidence in the last six years in this state of
4 voter impersonation fraud. These are social policy
5 arguments that are being made, not factual
6 arguments related to the issues in this case, so
7 they are not relevant, in addition to not having
8 proper foundation for admissibility in our state.

9 As to Senator Delbert Scott's affidavit,
10 your Honor, now, Senator Scott is perfectly
11 competent to offer his testimony as to why he voted
12 for or against this legislation. But he is not
13 competent to offer testimony, your Honor, as to why
14 the Senate or why the House or why the General
15 assembly passed the legislation. He can't speak
16 for hundreds of other legislators as to why they
17 voted for this or why they did not vote for it. So
18 for that purpose, it's inadmissible. Well, that's
19 the main objection I have to Senator Scott's
20 affidavit.

21 As to the affidavit of Scott Winedecker
22 from the St. Louis -- from the City of St. Louis

- 23 Board of Election Commissioners, I would join in
24 certainly the objections to that made by
25 Mr. Newman, in general, in terms of the foundation

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1 for his statements being a short-term employee.

2 I would also strongly object to paragraph
3 26 of that affidavit in which he states, "The City
4 of St. Louis has historically been plagued by
5 election fraud and allegations of election fraud.
6 More importantly, if individuals continue to
7 attempt to commit voter fraud in the City of
8 St. Louis." He offers absolutely no foundation for
9 that statement, that he has any personal knowledge
10 of that. As a matter of fact, he'd only been there
11 nine months. So there's no foundation for him to
12 offer any statement about voting fraud in the City
13 unless he personally has seen it or is aware of
14 it.

15 And then he goes on in paragraph 27 to
16 state, "Following the two -- he just reiterates the
17 Secretary of State alleged that there was voting
18 fraud in the City of St. Louis. Not competent to
19 make that statement either. Whatever the Secretary
20 of State said, he said. And whatever the Justice
21 Department did later, it did. Those exhibits are
22 in evidence, but he is not competent to make those

23 statements and he lacks foundation, so I would
24 object to the admission of that part of his
25 evidence.

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1 The affidavit, your Honor, of Kay Cole
2 James, your Honor, again this falls in the realm of
3 public policy debate. She is not talking about
4 Missouri. She is not talking about any of the
5 legal issues or factual issues in this case. She
6 is talking about her service on the Carter/Baker
7 Commission and generally what that group thought
8 might or shouldn't be done in certain
9 circumstances. I've already pointed out that
10 President Jimmy Carter doesn't believe what
11 Missouri did is consistent with the Carter/Baker
12 Commission report.

13 But her testimony on that subject is
14 irrelevant. It has nothing to do with the legal or
15 factual issues presented in the case. It's just
16 part of public policy debate, so I would move to
17 strike that affidavit as well. And the
18 Carter/Baker Commission report for the same
19 reason. It doesn't address any of the legal or
20 factual issues in this case and it's irrelevant.

21 Your Honor, Secretary of State from
22 Indiana, Todd Rokita, for much of the same

23 reasons. This affidavit does not address or is
24 relevant to any of the factual or legal issues
25 presented in this case. The Indiana election laws

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1 are different in many respects, your Honor, than
2 Missouri's. And the photo ID law in Indiana is
3 less restrictive than the one in Missouri.

4 For example, in Indiana, you're entitled
5 to vote absentee for a myriad of reasons. If
6 you're over 65, for example, you have an automatic
7 right to vote absentee. If you're handicapped, you
8 have an automatic right to vote absentee, unlike in
9 Missouri. So the effect -- whatever effect the
10 photo ID, different photo ID had in a different
11 state under different state's law has no relevance
12 to what the effect or the undue burden on Missouri
13 voters is of our law.

14 THE COURT: Seems to me you can
15 distinguish it. I'm not convinced it has
16 absolutely no relevance. If the law requirements
17 can be sufficiently distinguished, then it may
18 reduce its relevant, but I don't say absolutely no
19 relevance. I don't know that I buy that. Let me
20 just -- the affidavit of James -- what it is? I'm
21 not clear -- seems to me a lot of your objections
22 to that are well founded.

23 MS. WOOD: Your Honor, we have a few

24 objections to what Mr. Downing has.

25 THE COURT: I was going to have Mr. Hearne

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1 respond first but, Ms. Wood, go ahead.

2 MS. WOOD: First of all -- and I'll be
3 brief, your Honor. First of all, we have an
4 objection to the affidavits of John Lott and the
5 other two experts, I believe, Mr. Overby and
6 Mr. Milyo, for the same reasons expressed by
7 Mr. Downing, in that we don't believe they are
8 relevant. They clearly state that there's no
9 studies as to photo ID, the fraud that photo ID law
10 intended to dissuade. So for that, we join that
11 objection. As to -- and we also don't believe it's
12 relevant.

13 As to the affidavit of Senator Scott, we
14 join in the relevancy objection. We also object to
15 any paragraphs in the affidavit that are hearsay
16 where he generalizes about testimony that was put
17 into evidence by unnamed local election
18 authorities. We object to that type of evidence in
19 the affidavit, as well as to any opinions of law
20 that the elected official put in his affidavit.

21 As to the Kay Cole James affidavit on the
22 Carter/Baker report, we further object similar to

23 Mr. Downing as to the relevancy. Much of her
24 testimony deals with the State of Wisconsin, as
25 well as a comprehensive report from the American

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1 Center for Voting Rights. One, we don't have that
2 report into evidence and, two, the allegations of
3 voter fraud in both of those instances are
4 different than the voter fraud that this bill is
5 designed to prevent. In Wisconsin, I believe, it
6 was registration fraud. Although, that's not clear
7 from the evidence that's been presented.

8 And the second is from the report from the
9 American Report. I'm sorry. The report for
10 American Center for Voting Rights. That was on
11 incidence of violence and intimidation, which is
12 different than the type of --

13 THE COURT: Where are these things?

14 MS. WOOD: These are in her testimony.
15 They are attached as her testimony in front of the
16 United States House of Representatives. And much
17 of her testimony talks about the State of Wisconsin
18 as well. And then at the very end, I believe, it
19 talks about a comprehensive report prepared by the
20 American Center for Voting Rights. And it talks
21 about -- it's the very last page of the attachments
22 to the affidavit. And it talks about incidents of

23 violence and intimidation.

24 THE COURT: Oh, there. Okay. I see. The

25 excerpt of her test-- I was going to say -- well,

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1 let me hear from Mr. Hearne. A lot of her
2 testimony does sound like testimony you would
3 receive in front of a legislative committee.

4 MR. HEARNE: Well, let me address this
5 point in two ways, your Honor. First, as Senator
6 Scott's testimony makes clear, one of the
7 compelling factors that the Legislature considered
8 in adopting the Missouri Voter Protection Act was
9 the recommendation -- were the recommendations of
10 the Carter/Baker Commission. As such what they
11 have is that is certainly relevant if they are --
12 Mr. Downing has pled that they were adopting these
13 for some partisan objective.

14 And what you find is that the relevance of
15 the Carter/Baker is if you have a recommendation
16 from its bipartisan commission, you have Senator
17 Scott's affidavit that they considered that
18 recommendation when they wrote the statute. That
19 certainly goes to an issue that Mr. Downing put
20 before this Court.

21 THE COURT: But by the same token, there
22 was some objection to the affidavit of another

23 legislator as to other testimony that was received
24 by the committee.

25 MR. HEARNE: I didn't object to that.

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1 THE COURT: That was Mr. Long.

2 MR. LONG: I did, your Honor.

3 THE COURT: Did you object to this
4 testimony or not?

5 MR. LONG: Judge, if it's sauce for the
6 goose, it's sauce for the gander. They can't just
7 say somebody said the Baker/Carter Commission
8 report is specifically cited to and specifically
9 identified. Senator Scott, to the same extent that
10 he testified that there -- I ran the committee.
11 People came in and testified one way or the other,
12 if it's not offered for the truth of that matter
13 asserted, then it's not hearsay. But if they try
14 to offer it for the truth of the matter asserted,
15 it could be. And that was the point that I was
16 making is they were arguing that this shows the
17 disparate impact --

18 THE COURT: No, he wasn't. I don't
19 believe that was his purpose. And he said that
20 wasn't his purpose in offering it. It was to show
21 that these argu-- at least I don't believe, was
22 that the committee had that testimony. I think,

23 perhaps, that motivation is what it was offered.

24 MR. LONG: Well, and that's the part that

25 I objected to, your Honor. But we wouldn't --

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1 THE COURT: And that would be why he's
2 offering it is also on the issue of motivation.

3 MR. LONG: But the problem is, your Honor,
4 is that -- I think we're talking apples and
5 oranges, as far as they go. Margaret Donnelly's
6 affidavit is simply her saying people were against
7 this. People say it had disparate impact. That
8 doesn't show motivation. It isn't relevant as to
9 motivation. It isn't relevant as to any issue in
10 this case. I believe this is, and we would not
11 object to this evidence coming in.

12 THE COURT: All right.

13 MR. HEARNE: So, your Honor, speaking to
14 the Kay Cole James affidavit and what's attached,
15 her statement before the House of Representatives,
16 there's obviously parts of that that aren't
17 relevant to the issue here. But there are other
18 parts of it directly relevant to the -- and this is
19 an African -- distinguished African/American woman
20 who is part of the Carter/Baker Commission.
21 Mr. Downing has pled that the reason the
22 Legislature adopted this was to try and make it

23 more difficult for apparently African/Americans to

24 vote. That's what he's contended.

25 We have an African/American woman who is

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1 part of the Carter/Baker Commission who ran the
2 election observers for the federal government who
3 has provided testimony in support of photo ID
4 requirements. That goes directly to --

5 THE COURT: She supports -- I understand
6 where you're coming from.

7 MR. HEARNE: That's why we're offering it,
8 your Honor, is to address that specific point and
9 that contention.

10 THE COURT: It seems to me that some of
11 these various reports, but I also think the
12 testimony is relevant, perhaps, to show different
13 reasons for supporting or opposing the
14 legislation. How that -- whether that impacts
15 greatly on a lot of the issues here, I'm not
16 clear.

17 MR. HEARNE: Certainly.

18 THE COURT: But I'm a little -- but in
19 terms of the James -- so I understand the report,
20 perhaps, I think I understand and am somewhat
21 sympathetic to their objections to her generalized
22 opinions on this subject.

23 MR. HEARNE: And we're not offering for
24 her generalized opinions other than the point that
25 there is a consensus, there are prominent policy

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1 people out there who have credible reasons other
2 than trying to prevent some or achieve some --

3 THE COURT: And I understand that, the
4 purpose of that offer.

5 MR. HEARNE: As to the experts, your
6 Honor, let me first discuss Professor Lott.
7 Professor Lott's analysis, in fact, does deal with
8 the analysis of photo identification in elections.
9 Now, what he does say is he said this is an area
10 that has not been studied systematically or
11 extensively, but he does do that in his report.
12 You have in his report specific analyses in his
13 Exhibit B. He has specific analyses, including
14 tables at the bottom of that on the effects of both
15 photo and non-photo ID requirements on voter
16 participation.

17 THE COURT: That will be on the report.
18 I'm going to have to look at that a little. They
19 are going to have to have an opportunity to look at
20 that.

21 MR. HEARNE: And I would just say
22 similarly, the two Mizzou professors, the two

23 Mizzou professors not only provide an analysis on
24 the social sciences study, but they also look very
25 specifically and directly at the Missouri fiscal

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1 note, analyzed that relative to census information
2 and providing a very specific credible expert
3 analysis of that.

4 Now, again, these are offered, your Honor,
5 as what these individuals would testify to if they
6 came into court. I offered in that sense of we are
7 glad, in fact, our preference would be to provide
8 live testimony. This is what they have affirmed
9 they would testify to if they came here. We're
10 glad to have them come to the court and provide
11 this testimony and be available for
12 cross-examination, if that were sought.

13 Finally, I would just renew the request
14 that if the statement about personal knowledge
15 dealing with John Diehl, the chairman of the
16 St. Louis County Commission, was an issue, I would
17 ask leave to submit an amended affidavit dealing
18 with that.

19 THE COURT: We'll cover that at a -- we'll
20 take a short recess and see if we can work through
21 that.

22 Does that conclude the affidavits for the

23 moment subject to some --

24 MR. HEARNE: That does, your Honor. That

25 concludes, and we move for the admission of those

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1 and their attached exhibits.

2 THE COURT: Let's take a short or --

3 MR. NEWMAN: Whatever your pleasure is,
4 your Honor.

5 THE COURT: I was going to say --

6 MR. NEWMAN: Do we have anything else to
7 cover?

8 THE COURT: The Mr. Diehl thing, I want to
9 visit with you about.

10 MR. NEWMAN: Okay. Well, your Honor, I
11 can stay. I can't -- obviously, if they are going
12 to file an amended affidavit stating that it's
13 based upon his personal knowledge, then that part
14 of my objection would be appeased.

15 THE COURT: I mean, the other alternative
16 is would be to allow him a chance to either change
17 the affidavit or have him testify personally or a
18 deposition?

19 MR. NEWMAN: No, your Honor.

20 THE COURT: That's why I was going to take
21 a short recess so everybody can study on this just
22 for a minute and talk. Just take -- I understand

23 it's Friday afternoon. We'll take about -- we'll
24 figure to start again at 10 after, but I'm happy to
25 visit with counsel if we're working our way through

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1 any -- working our way through this one item.

2 Okay. All right.

3 We'll be in recess for 10 minutes or so.

4 (A BREAK WAS TAKEN.)

5 (OFF THE RECORD.)

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