
**IN THE
SUPREME COURT OF MISSOURI**

No. SC88038

JACKSON COUNTY, MISSOURI, et al.

Respondents,

v.

STATE OF MISSOURI,

Appellant.

**On Appeal from the Circuit Court of Cole County,
The Honorable Richard G. Callahan**

Appellant's Brief

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Jurisdictional Statement

This is an appeal from a judgment entered in a declaratory judgment action. Plaintiffs were taxpayers who alleged that S.B. 1014 of the 93rd General Assembly, second regular session, violated Article X, § 21 of the Missouri Constitution by imposing unfunded mandates on local election authorities. Because this action involves the constitutionality of legislative action of the General Assembly it is within this Court's jurisdiction. Article. V, § 3 of the Missouri Constitution.

Statement of Facts

Senate Bill 1014, known as the “Missouri Voter Protection Act. of 2006,” was signed into law by the Governor on June 14, 2006. LF- 23. The bill went into effect on August 28, 2006.

Senate Bill 1014 amended § 115.427, RSMo, to require that a person, before voting, must present certain listed forms of “nonexpired” or “non-expiring” photographic identification (“Photo ID”). This requirement applies to all elections held after August 28, 2006. Appendix p. A-80.

The new § 115.427.7 provides that those wanting a nondriver’s license for the purpose of voting is free to the applicant. Appendix p. A-77.

For those who arrive at the polls without proper Photo ID, Senate Bill 1014 provides that the voter may cast a provisional ballot by executing an affidavit either (1) stating that they are the person listed in the precinct register and that they are unable to obtain a current and valid Photo ID due to physical or mental disability or handicap of the voter; or a sincerely held religious belief against the forms of personal identification; or they were born on or before January 1, 1941, or (2) as to their identify. Appendix pp. A-76 &79-80.

Senate Bill 1014 also amended § 115.430, RSMo, concerning provisional ballots. Under the new law, a provisional ballot is now a “full” ballot, containing all

federal, state, and local candidates and issues, rather than the previous provisional ballot which only contained federal and statewide candidates and issues. Appendix p. A-81. Senate Bill 1014 requires the election authorities to verify the identity of the individual by comparing their signature to the signature on file with the election authority, and to determine that the individual was eligible to cast a ballot at the polling place where the ballot was cast. Appendix pp. A-83-87.

Procedural Background

Two suits were filed over the new law. The first, *Jackson County, et al. v. State of Missouri*, Cole County Cir. No. 06AC-CC00587, claimed that Senate Bill 1014 violated Article X, § 21 of the Missouri Constitution (the Hancock Amendment). LF-8. The individually named plaintiffs in the *Jackson County* case are county executives – Katheryn J. Shields of Jackson County, Charlie A. Dooley of St. Louis County – or a mayor, Francis G. Slay of St. Louis. LF-8-10. Each individual plaintiff is a Missouri taxpayer. LF 9-10, 22. That case is before this Court, No. SC88038.

The second suit, *Kathleen Weinschenk, et al. v. State, et al.*, Cole County Cir. No. 06AC-CC00656, in addition to a Hancock challenge, claimed that Senate Bill 1014 violated various other sections of the Missouri Constitution. Weinschenk LF-9.

The two cases were consolidated by the circuit court. Weinschenk LF-59. A hearing for oral testimony was held on August 21, 2006. LF-4. The parties also submitted as exhibits various documents and affidavits. The circuit court granted a Motion to Intervene as a Defendant filed by a Missouri voter, Dale Morris, and Missouri State Senator Delbert Scott, the sponsor of Senate Bill 1014. LF-5.

On September 1, 2006, the circuit court heard argument as to the relevancy and admissibility of various exhibits. LF-5. Oral argument on the case was heard on September 6, 2006. LF-6.

The circuit court issued its Judgment and its Findings of Fact and Conclusions of Law on September 14, 2006 for both cases. LF 58, 71. The court found that there was a Hancock violation, but denied any relief on that claim as the relief requested was for a state-wide injunction, rather than county-by-county relief. LF-67-68.

Evidentiary Background

The parties entered into a stipulation as to various facts and documents (although retaining their right to argue relevancy and hearsay). Ex. 10. Some of the documents were affidavits of various persons, and such affidavits were submitted in lieu of live testimony.

On the Hancock challenge, the Plaintiffs submitted testimony from Jackson County, St. Louis County, St. Louis City, and Boone County as to the expected financial impact of Senate Bill 1014.

Robert Nichols, Director of Elections for Jackson County, testified to costs that would be associated with the increased number of provisional and absentee ballots which he estimated would be cast because of Senate Bill 1014. Tr. -August 21, p. 59. Jackson County has over 216,000 registered voters. Tr. -August 21, p.62. Mr. Nichols helped prepare a fiscal note that was submitted to the legislature concerning the fiscal impact of the Act on Jackson County; an estimate of \$470,308 per year for five elections as a result of the new and additional services and duties required of the Board of Elections by the Act. Tr.-August 21, p. 65.

Judy Taylor, Director of Elections for St. Louis County, testified to costs that would be associated with the increased number of provisional ballots which she estimated would be cast because of Senate Bill 1014. St. Louis County is the largest county in the state and has over 650,000 registered voters, 1,500 precincts, and 448 polling places. Tr.-August 21, p. 132, 134. Based on her experience in preparing election costs estimates, Ms. Taylor estimated an increase in the overall cost of St. Louis County elections by \$215,000 for each election. Tr. August 21, p. 157.

Carol Signigio, former Assistant Director of Elections for the City of St. Louis, Missouri and a consultant to the St. Louis City Election Board, as to increased costs she estimated would result from S.B 1014. Tr.-August 21, p. 106. But the trial court found that her testimony lacked the specificity required. Appendix p. A-33.

Wendy Noren, Boone County Clerk, Noren also testified to costs that would be associated with the increased number of provisional ballots she estimated would occur because of Senate Bill 1014. Ms. Noren submitted a fiscal note indicating that implementation of the Act would cause new and additional expenditures by Boone County in the amounts of \$21,000 for postage and printing and \$10,275 for employee training. Tr.-August 21, p.204.

Betsy Byers, is the Co-Director of Elections in the Missouri Secretary of State's Office. Tr.-August 21, p. 228. She testified that most of the Act's provisions challenged by plaintiffs applied to all counties but she did not quantify the amount of increased costs on a county specific basis. Tr.-August 21, pp. 247-252. Appendix p. A-35.

There was contrary evidence offered as to the alleged costs. Specifically, the Defendant-Intervenors submitted the testimony of John Diehl , chairman of the St. Louis County Board of Election Commissioners and Scott Leindecker, Director of

the Board of Elections of the City of St. Louis, testified to the absence of costs that would be incurred by the passage of Senate Bill 1014, and even cost savings. Affidavits of Diehl and Leiendecker. Similarly, the fiscal note for Senate Bill 1014 noted that several counties, including St. Louis County, had reported no costs associated with Senate Bill 1014, or even savings. Ex. 20.

The circuit court was also presented with statistical evidence. The number of registered voters in Missouri on August 8, 2006 was 3,983,542. Ex. 10, ¶ 34. As of August 16, 2006, the number of Missourians with a driver's or nondriver's license, excluding permits, was 4,421,900. Ex. B, ¶ 5.

Missouri's Secretary of State, Robin Carnahan is the chief election official for the State of Missouri and is responsible for administering all statewide elections, including those for state and federal office. She assists the 116 local election authorities in interpreting and administering the state election laws, and promulgates rules governing elections and electronic voting systems. Defendant Carnahan designs and provides to local election authorities the envelopes and forms necessary to carry out provisional voting throughout Missouri. Tr.-August 21, pp. 238-9.

The Secretary of State is also responsible for producing various election materials including instructions for poll workers, training videos and a manual for

election authorities. She is also responsible for maintaining a computerized statewide voter registration database, known as the “Missouri Voter Registration System,” for use by the local election authorities in Missouri. The Secretary is the chief state election official responsible for the administration and coordination of state responsibilities pursuant to Help American Vote Act of 2002 and the coordination of state responsibilities under the National Voter Registration Act of 1993. Tr.-August 21, p. 239-40.

The Secretary of State did an analysis of her computerized database versus the database of the those with Missouri driver’s or nondriver’s licenses and estimated that some 240,000 registered Missouri voters may not have acceptable Photo ID’s. Ex. 21; Stip 46. But that report also acknowledged that it might not be accurate, due to the differing information used by the Secretary and the Department. Ex. 21. The Department of Revenue examined the Secretary’s findings, and found a number of people who actually had the proper ID. Ex. C. Two University of Missouri professors examined the available data and estimated that around 8,000 Missourians might need a Photo ID. Affidavits of L. Marvin Overby and Jeffrey Milyo.

The Judgment and the Findings of Fact and Conclusions of Law

In its Judgment, the circuit court found that provisional balloting, authorized by amendment to § 115.427 in Senate Bill 1014, and its implementation violated the Hancock Amendment to the Missouri Constitution. Appendix p. A-10. However, as the relief requested was statewide, rather than county by county, the Court declined to order any relief based on the Hancock violation. Appendix p. A-11.

The Appeal

Both the State of Missouri and the Defendant-Intervenors Dale Morris and Delbert Scott filed timely notices of appeal. LF-115, 178. This Court has ordered these cases expedited on appeal.

Points Relied On

- I. The trial court erred in concluding that the provision of S.B. 1014, allowing the casting of provisional ballots, is a violation of Article X, § 21 of the Missouri Constitution because said provision is not a new State mandate on local election authorities, in that, provisional balloting is currently permitted under existing election laws and any increased use of this option will be the result of actions by individual voters, not the result of a State mandate within the meaning of the Hancock Amendment.**

County of Jefferson v. Quiktrip Corp., 912 S.W.2d 487 (Mo. banc 1995);

Brooks v. State, 128 S.W.3d 844 (Mo. banc 2004);

Purler-Cannon-Schulte, Inc. v. City of St. Charles,

146 S.W.2d 31 (Mo. App. 2004);

City of Jefferson v. Mo. Dept. of Natural Resources,

916 S.W.2d 794 (Mo. banc 1996).

II. The trial court erred in finding that the provisions of S.B 1014, allowing the casting of provisional ballots, is a violation of Article X, § 21 of the Missouri Constitution because there was no substantial evidence of increased costs resulting from said provision, in that, (1) there was no substantial evidence that a significant number of provisional ballots would be cast, (2) the Act does not mandate additional election judges, poll workers or other personnel, (3) the Act does not mandate additional training for election judges, poll workers or other personnel, (4) the Act does not mandate that local election authorities purchase additional computers, telephones or other equipment, (5) the Act does not mandate printing new poll challenger instructions, and (6) there was no substantial evidence that any peripheral provisions of the Act, such as affidavits, signs or notification cards involved more than de minimis costs.

Brooks v. State, 128 S.W.3d 844 (Mo. banc 2004);

Fort Zumwalt School District v. State, 896 S.W.2d 918 (Mo. banc 1995);

City of Jefferson v. Mo. Dept. of Natural Resources,

916 S.W.2d 794 (Mo. banc 1996);

County of Jefferson v. Quiktrip Corp., 912 S.W.2d 487 (Mo. banc 1995).

Standard of Review

This is a review of a decision in a court tried case. Under *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976) such a decision is to be upheld unless it is not supported by substantial evidence, is against the weight of the evidence, erroneously declares the law or erroneously applies the law.

Argument

Introduction

In order to establish a violation of Article X, § 21 of the Missouri Constitution (the Hancock Amendment), a political subdivision must prove (1) that the State has required a new or increased activity or service by the subdivision and (2) that the subdivision experiences more than de minimis increased costs in performing that activity or service. Each element requires specific proof and cannot be established by mere common sense, speculation, or conjecture.

The trial court's conclusion that S.B. 1014's (the Act) authorization of provisional balloting is a new or increased a new or increased service/ activity is erroneous because the Act does not require that more provisional ballots be cast. As the trial court observed, the Act's photo ID requirement is an obligation imposed on the voter. The Act allows voters lacking a photo ID to cast a provisional ballot under existing procedures. But any increase in provisional balloting is the result of actions of the individual voter—voters who even under the old law might cast provisional ballots, not a mandate of the Act. And there is no substantial evidence that there will be a more than de minimis increase in the cost of elections either as a result of a hypothesized significant increase in provisional balloting or any of the Act's provisions relating to provisional ballots.

I. The trial court erred in concluding that the provision of S.B. 1014, allowing the casting of provisional ballots, is a violation of Article X, § 21 of the Missouri Constitution because said provision is not a new State mandate on local election authorities, in that, provisional balloting is currently permitted under existing election laws and any increased use of this option will be the result of actions by individual voters, not the result of a State mandate within the meaning of the Hancock Amendment

A. Provisional Balloting is Not a Mandate Within the Meaning of the Hancock Amendment.

The threshold element of a claim under Article X, § 21 of the Missouri Constitution is that “a new or increased activity or service is required of a political subdivision by the State.” *Miller v. Director of Revenue*, 719 S.W.2d 787, 788 (Mo. banc 1986). The trial court concluded that the “provisional balloting and its implementation provided for in S.B. 1014 does constitute a new and expanded activity imposed on local government which must be funded if there are increased

costs” Appendix p. A-10.¹ But that finding lacks adequate support in the record. The trial court ignored a key point; that there must be specific proof of this element. It may not be established by mere “common sense” or “speculation and conjecture.” *Id.* at 789; *Brooks v. State*, 128 S.W.3d 844, 849 (Mo. banc 2004). The evidence must establish that the State has not only imposed a mandate but that the mandate is imposed on a political subdivision. The Act’s authorization for individual voters to cast a provisional ballot is not such a mandate.

¹Although evidence was offered on an alleged increase in absentee ballots, neither the trial court’s judgment nor conclusions of law held that any of the Act’s provision on absentee ballots constituted an unfunded mandate in violation of the Hancock Amendment. Moreover, the evidence offered was based on the assumption that there would be an increase in absentee ballots because no photo ID was required to cast them. Tr. pp. 63, 146. But the Act did not expand the qualifications for voting absentee contained in § 115.277 RSMo 2005 Supp. In fact, the Act might have limited the persons who could vote absentee by prohibiting absentee ballots for those who had registered by mail and never voted in person with the proper ID. Appendix p. A-62.

State mandates imposed on persons or entities other than a political subdivision do not come within the terms of Article X, § 21, even if such statutes have some financial impact on the subdivision. *St. Charles County v. Director of Revenue*, 961 S.W.2d 44, 48 (Mo. banc 1998)(statute placing a mandate on the Director of Revenue was not a Hancock violation); *Purler-Cannon-Schulte, Inc. v. City of St. Charles*, 146 S.W.2d 31, 41 (Mo. App. 2004)(alleged mandate on private contractors was not a Hancock violation). As the trial court recognized, the Act's photo ID requirement was an obligation imposed on the voter, not local government. Appendix p. A-9. But what the trial court failed to recognize was that granting voters without photo ID the option of casting a provisional ballot was not a statutory mandate on the election authorities.

The present situation is similar to the one this Court faced in *County of Jefferson v. Quiktrip Corp.*, 912 S.W.2d 487, 491 (Mo. banc 1995). This case arose under tax increment financing legislation. A city created a redevelopment district under state law. The county was then required by law to pay to the city a portion of increased revenues from the district. This Court rejected the county's claim that this statutorily require payment violated Hancock by requiring it to perform a new activity. "Nothing in subsections 2 and 3 of §99.845 mandates a new activity by a local government. While the state authorizes public

improvements and reallocation of local revenues by statute, the mandate to do so is accomplished entirely by the city in which the tax is collected.” *Id.*

Similarly, provisional balloting under the Act is simply a state authorization for the voter. Provisional balloting is currently authorized under § 115.430 RSMo 2005 Supp. The Act does not mandate that voters cast provisional ballots. Neither does the Act mandate that there be an increase in provisional ballots. In fact, the Act seeks to minimize the use of provisional ballots by imposing significant responsibilities on the Secretary of State and the Department of Revenue to assist all Missourians in securing a photo ID. What it does do is authorize those without photo ID to cast a provisional ballot. An individual “without identification in the form prescribed . . . may cast a provisional ballot.” Appendix pp. 76 & 79. The provisional balloting authorized by new § 115.427.13 will expire prior to the 2008 general election. Appendix p. 79.

If there is an increase in the number of provisional ballots it is the result of the actions of individual voters (in not obtaining or not showing a photo ID) and their personal decision to exercise the option to cast a provisional ballot.

Authorization of provisional balloting is not a mandate imposed by the State on local government any more than the state’s authorization for cities to create development districts. It is beyond the scope of the Hancock Amendment.

The trial court's conclusion should be reversed either because there is no substantial evidence supporting the existence of a mandate or because the trial court erroneously applied the law to the facts. *Murphy*, 536 S.W.2d at 32.

B. The Trial Court Did Not Specifically Declare Which Provisions of the Act Imposed a Mandate in Violation of the Hancock Amendment.

The trial court's judgment did not specify which sections of the Act it was declaring in violation of the Hancock Amendment, other than subsections 3 and 13 of § 115.427. Appendix p. A-10. Which provisions the trial court intended to include by the term "implementation" of provisional balloting is unclear. As a result, it is difficult to determine whether there is substantial evidence (1) that a specific section imposes a mandate on the local election authorities and (2) that it results in more than de minimis increased costs.

But a Hancock claim for an unfunded mandate is limited to a specific mandate. In *City of Jefferson v. Mo. Dept. of Natural Resources*, 916 S.W.2d 794, 797 (Mo. banc 1996) this Court affirmed a judgment as to § 260.325.8 RSMo, requiring a new solid waste plan, but reversed to the extent the judgment applied to other subsections. Thus, a judgment regarding an unfunded mandate cannot automatically encompass related provisions. Each provision must be judged individually. Because of the trial court's failure to specify which sections of the

Act it was holding unconstitutional, it should be reversed and remanded for further proceedings.

II. The trial court erred in finding that the provisions of S.B. 1014, allowing the casting of provisional ballots, is a violation of Article X, § 21 of the Missouri Constitution because there was no substantial evidence of increased costs resulting from said provision, in that, (1) there was no substantial evidence that a significant number of provisional ballots would be cast, (2) the Act does not mandate additional election judges, poll workers or other personnel, (3) the Act does not mandate additional training for election judges, poll workers or other personnel, (4) the Act does not mandate that local election authorities purchase additional computers, telephones or other equipment, (5) the Act does not mandate printing new poll challenger instructions, and (6) there was no substantial evidence that any peripheral provisions of the Act, such as affidavits, signs or notification cards involved more than de minimis costs.

The second element of a claim under Article X, § 21 of the Missouri Constitution is that “the political subdivision experiences increased costs in performing that activity or service.” *Miller*, 719 S.W.2d at 788. Here, the trial

court found that there was “specific and credible evidence from three jurisdictions as to substantial increased costs associated with provisional balloting.” Appendix p. A-10. But like the first element, there must be specific proof of the cost. It may not be established by mere “common sense” or “speculation and conjecture.” *Id.* at 789; *Brooks*, 128 S.W.3d at 849. A claim under Article X, § 21 “will require sophisticated budgetary evidence and economic expertise.” *Fort Zumwalt School District v. State*, 896 S.W.2d 918, 923 (Mo. banc 1995). And the cost must be more than de minimis. *County of Jefferson*, 912 S.W.2d at 491. The evidence below was either speculation and conjecture or failed to demonstrate more than de minimis costs associated with provisional balloting.

A. There is No Substantial Evidence of an Increase in Provisional Balloting.

The foundation for most of the testimony regarding the alleged increased costs from the Act was the anticipation that there would be an increase in the number of provisional ballots cast. But that testimony is a web of interlocking assumptions, lacking an adequate factual foundation. Robert Nichols of the Jackson County Board of Election Commissioners testified that the Act’s greatest impact in his jurisdiction would be the provisional ballot provisions. But his testimony was based on an unproven assumption: “there’s an assumption that we

made that there would be a greater entries in the number of provisional ballots that we would have to process, which then in turn require more people to process those in our office after the election.” Tr.- August 21, p. 59. He testified, based on his assumption, that there would be 10,000 additional provisional ballots. Tr. of August 21, 2006, p. 62. He based his figure on another assumption—one that is clearly contrary to fact: that all seniors living in residential facilities will cast provisional ballots, i.e. that they both lack IDs and will vote without obtaining them. But he didn’t know the facts in either respect. Tr.-August 21, pp. 74, 76.

Judith Taylor, director of elections for St. Louis County, testified that her cost estimates, too, were based on anticipation that there would be more provisional ballots. Tr.- August 21, p. 152. She thought there would be a 20% increase in provisional ballots over the number cast in 2002. Tr.- August 21, p. 152-3. This would be a net increase of approximately 380 provisional ballots. Tr.- August 21, p. 153. St. Louis County has 448 polling places, so over the entire county there would be less than one additional provisional ballot per each polling place. *Id.*

Wendy Noren, county clerk of Boone County, testified that there could be as many as 3,000 provisional ballots. Tr.- August 21, p. 212. But then she candidly acknowledged, “It was just a guess on my part.” Tr.- August 21, p. 212. The only

detail she could add was that Boone County projections involved students. *Id.* But she did not testify as to how many students lacked a photo ID or how many students would be likely to cast provisional ballots under the old law.

Such guesses do not constitute substantial evidence that there will be a significant increase in the number of provisional ballots.

Moreover, the estimates varied widely. Nichols estimated that there would be 10,000 provisional ballots in Jackson County. But in St. Louis County, which has three times as many registered voters as Jackson County, Taylor estimated that there would be an increase of approximately 380, above the 1971 provisional ballots St. Louis County had in 2002. And the 10,000 estimate for Jackson County is more than the estimate of Professors Overby and Milyo that there are 8,000 individuals statewide who will even need to secure a photo ID. Affidavits of Overby and Milyo.

Plaintiff's evidence amounts to nothing more than speculation and conjecture. It is not the sort of sophisticated analysis that this Court has held is required. And the importance of the right to vote (the ultimate basis for relief in the circuit court, addressed in the State's Weinschenk brief, No. SC 88039), does not justify abandoning that principle and opening the doors to a dramatic increase in Hancock suits.

B. The Act Does Not Mandate Additional Personnel for Election

Authorities.

The terms of the Act do not require local election authorities to hire additional election judges, poll workers, or other personnel. And the claimed expense for such personnel does not justify relief for two reasons. First, the claim is speculative. Nichols' testimony as to the need for additional personnel was based his assumption that there would be an increase in the number of provisional ballots. Tr.-August 21, p p. 62, 64, 71-2, 76-7. Taylor's testimony was similar. Tr.-August 21, pp. 142-3. But as explained in point I.A. above, the estimates for an increase in provisional balloting amounted to speculation and conjecture. Apart from this insubstantial evidence there is no direct statutory mandate in the Act to hire additional personnel of any type.

If a local election authority chooses to act on the basis of such insubstantial assumptions, it does so voluntarily. But a Hancock claim for an unfunded mandate extends only to the actual cost of a mandate and does not extend to a political subdivision's choice to incur expenses in excess there of. *City of Jefferson*, 916 S.W.2d at 797; *Fort Zumwalt School District*, 896 S.W.2d at 923.

Second, even the speculative evidence doesn't support the claim. As noted

above, for St. Louis County the total projected increase is less than one provisional ballot per polling place. If the proportional evidence is correct, and consistent statewide, there is simply no factual basis for concluding that staffing levels will grow appreciably. And again, conclusions without facts are not sufficient under this Court's Hancock jurisprudence.

C. The Act Does Not Mandate Additional Training of Election Personnel.

There was also testimony that an additional cost arising from the Act was for training of election personnel. But Nichols acknowledged that the Act does not require any additional training. Tr.-August 21, p. 83. Training of election judges is currently required by § 115.103 RSMo 2005 Supp. The frequency and extent of the training was and , under the Act, still is largely left to local discretion. Jackson County trains election judges before every election. Tr.-August 21, p. 82. St. Louis County trains election judges once a year and supervisors before every election. Tr.-August 21, p. 154. When election laws change, the training changes. Tr.-August 21, pp. 82, 154-5. There is nothing in the Act that is any different than what has routinely occurred in the past. Simply because existing activities become more expensive is not a Hancock violation. *In re The 1984 Budget for the Circuit Court of St. Louis County v. Simon*, 687 S.W.2d 896, 900 (Mo. banc 1985). There

was no substantial evidence that training of election personnel was the result of a mandate of the Act. And if election authorities chose to provide more training, it is the result of their decision. But discretionary spending is not within the scope of the Hancock Amendment. *City of Jefferson*, 916 S.W.2d at 797; *Fort Zumwalt School District v. State*, 896 S.W.2d 918 (Mo. banc 1995).

D. The Act Does Not Mandate That Election Authorities Purchase Additional Computers, Telephones, or Other Equipment.

Although the Act does not require an election authority to acquire any additional or new equipment, Nichols testified that Jackson County would need ten additional phone lines, 10 additional wire drops for computers, 10 additional computers and 193 additional cell phones for polling places. Appendix p. A-29. But, like the two additional poll workers per polling location, this was all based on his assumption that there would be an increase in provisional ballots of 10,000. These additional phones and computers would be for checking voter registration information and signatures. Tr.-August 21, pp. 80-1. He testified that this is already done but on a “smaller scale” than his new assumption. Tr.-August 21, pp. 80-1. Regardless, his assumption does not constitute substantial evidence of a new state mandate. Nichols’ testimony amounts to nothing more than a list of discretionary spending beyond the scope of the Hancock Amendment. *City of*

Jefferson, 916 S.W.2d at 797; *Fort Zumwalt School District v. State*, 896 S.W.2d 918 (Mo. banc 1995).

Oddly, Taylor did not estimate any increased equipment costs for St. Louis County, other than \$30,000 for additional phone lines to handle calls to the election authority's central office by poll challengers or voters. Tr.-August 21, pp. 144-5, 158-9. She acknowledged that there was a current shortage of phone lines. Tr.-August 21, p. 159. Given that she estimated only around 380 new provisional ballots, there is no reason to conclude that this hypothesized increase would require 10 new phone lines.

E. The Act Does Not Require the Printing of Challenger Instructions.

Plaintiffs alleged that the Act imposes a requirement to reprint challenger instructions. L.F.-13. Challengers are not employees of the election authority. They are representatives of political parties. § 115.105 RSMo 2005 Supp. Tr.-August 21, pp. 86-7. Nichols testified that he did not take this into account in preparation of Jackson County's fiscal note, but that if he had, it would have resulted in an increase in the fiscal note. Tr.-August 21, p. 69. But he did not identify any state requirement to actually print instructions for the challengers. He did testify that the Act did not change challengers' duties or how they should be

instructed. Tr.-August 21, p. 87. Taylor also testified that she was unaware of any state requirement to print challenger instructions or whether they do it “as a courtesy.” Tr.-August 21, p. 158.

The current version of § 115.105 does not refer to any instructions to challengers printed by the election authority. The Act’s amendment to § 115.105 does not refer to any challenger instructions, reprinted or otherwise. The new subsection 6 states: “Any challenge by a challenger to a voter’s identification for validity shall be made only to the election judges or other election authority. If the poll challenger is not satisfied with the decision of the election judges, then he or she may report his or her belief that the election laws of this state have been or will be violated to the election authority as allowed under section 115.105.” Appendix p. A-61. Plaintiff’s evidence does not provide any basis for looking beyond the plain wording of the Act. There is simply no new or increased mandate for printing challenger instructions.

F. There Was No Substantial Evidence That Any Peripheral Provisions of the Act, Such as Affidavits, Signs, Photocopying, or Notification Cards Involved More Than De Minimis Costs.

As noted above, the trial court did not identify which sections of the Act implementing provisional balloting it was holding in violation of the Hancock

Amendment. Even following the plaintiff's allegations does not eliminate the confusion because not all of their allegations relate to provisional balloting or its implementation. For instance, plaintiffs claim that new § 115.024 imposes "expenses for relocating or scheduling and election." L.F.-14. Since this is not related to provisional balloting, it is doubtful that it is encompassed by the trial court's judgment. But in any event, this new section requires this Court to establish a panel in each district of the court of appeals to hear petitions under the section. If a disaster prohibits an election from occurring on the day required, the election authority "may petition the election panel . . . to authorize a relocation of the polling places . . . or . . .to schedule a new date" for the election. Appendix p. A-59. Since this provision of the Act only authorizes election authorities to seek relief from the state judiciary, it does not impose a new mandate on local government within the meaning of the Hancock Amendment.

Plaintiffs also alleged that the Act imposed a mandate regarding notice of election cards under §§ 115.127 & 115.129. L.F. -13-14. But the Act does not amend these sections. Section 115.127 RSMo 2005 Supp. generally relates to notification of an election by publication. But subsection 4 provides that in certain circumstances an election authority may mail notice. Such notice "shall include the date and time of the election, the location of the polling place, the name of the

officer or agency calling the election and a sample ballot.” Section 115.129 RSMo 2000 provides that an election authority may mail to each registered voter a notice of the election. Notice shall include the date and time of the election, the location of the voters polling place and the name of the agency calling the election. It may include a sample ballot. “The election authority may provide any additional notice of the election it deems desirable.” Thus, these sections do not apply to the Act’s provisional balloting provision and do not impose a new or increased mandate on the election authorities.

Plaintiffs also challenged the portions of the Act relating to the new affidavits for provisional ballots. L.F.12-3. But aside from training (addressed above), this section did not play any part in Nichols’ or Taylor’s estimates of costs. Tr.-August 21, p. 84-5, 140-1. And there was no evidence that the affidavits themselves could not be prepared inexpensively by simply typing them on a computer and printing as many copies as needed.

Plaintiffs also challenged the Act’s requirement that notice of the new identification requirements be posted in polling places. L.F.-13. Taylor estimated that St. Louis County would need 500 such “signs” costing around \$5,000. Tr.-August 21, p. 142. Even at \$10 apiece it is obvious that a jurisdiction with fewer polling places would have much lower costs. But the Act really does not say a “sign.” It only says a notice. Appendix p. A-75. There is no evidence that such

“notice” could not be prepared on a computer and printed very inexpensively.

Plaintiffs also challenged the Act’s requirement that the envelopes of provisional ballots be photocopied. L.F.-13. Part of this claim relates to the alleged need for more personnel stemming from an anticipated increase in provisional ballots. These matters are addressed above. As to the copying costs itself, Taylor testified that for St. Louis County this would only be about \$200. Tr.- August 21, p. 145. Currently a regulation of the Secretary of State requires that the envelopes of all rejected provisional ballots be photocopied. 15 CAR 30-8.010(5). Copying all provisional ballot envelopes amounts to no more than a de minimis increase.

Finally, plaintiffs challenged the Act’s provision instituting a new voter notification card which would include notice of the identification requirement. L.F.-12. This section requires that the new notification card be sent to voters at least 90 days prior to a general or primary election. Appendix p. A-64. But since the Act did not go into effect until August 28, 2006, this section has no application until the 2008 elections. And by itself, this section would not be grounds for finding that the Act’s entire system of provisional balloting is a Hancock violation. *City of Jefferson*, 916 S.W.2d at 797.

Even if a statute imposes a mandate, this Court has repeatedly emphasized

that it “will not presume increased costs resulting from increased mandated activity,” *City of Jefferson v. Mo. Dept. of Natural Resources*, 863 S.W.2d 844, 848 (Mo. banc 1993); *Brooks*, 128 S.W.3d at 849, and that “common sense,” or “speculation and conjecture” are insufficient to demonstrate increased costs, *Miller*, 719 S.W.2d at 788; *Brooks*, 128 S.W.3d at 849. Minor modification to existing administrative activity is not enough. *County of Jefferson*, 912 S.W.2d at 491. The evidence below is insufficient to meet these standards and as a result the judgment of the trial court is not supported by substantial evidence.

Conclusion

The trial court's judgment that S.B. 1014's provisional balloting provisions is a violation of Article X, § 21 of the Missouri Constitution should be reversed.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

The undersigned hereby certifies that on this 28th day of September, 2006, one true and correct copy of the foregoing brief, and one disk containing the foregoing brief, were mailed, postage prepaid, to:

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The undersigned further certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 6,604 words.

The undersigned further certifies that the labeled disk, simultaneously filed with the hard copies of the brief, has been scanned for viruses and is virus-free.

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