

No. SC88039

IN THE SUPREME COURT OF MISSOURI

KATHLEEN WEINSCHENK, *et al.*,

Plaintiffs-Respondents,

v.

STATE OF MISSOURI, *et al.*,

Defendants-Appellants.

Appeal from the Circuit Court of Cole County, Missouri
Case Nos. 06AC-CC00587 & 06AC-CC00656 – Richard G. Callahan, Judge

INTERVENOR-APPELLANT'S REPLY BRIEF

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Given the expedited schedule for briefing and argument of this appeal, this Reply Brief addresses only two discrete points raised in Respondents' Brief, which Intervenors may not have adequately addressed in their Opening Brief.

ARGUMENT

1. Neither the Circuit Court nor the Respondents Offer any Persuasive Rationale for Declaring Unconstitutional or Enjoining the Voter Identification Requirements in Effect Until November 1, 2008; Those Provisions Are Severable from the Post-2008 Photo ID Requirement, and Are Plainly Constitutional.

Section 115.427, RSMo, the provision of the Missouri Voter Protection Act (“MVPA”) at issue in this appeal, contains two separate types of identification requirements:

- (1) provisions that went into effect on August 28, 2006, and will apply to the election to be held on November 7, 2006; and
- (2) provisions that do not go into effect until elections held after November 1, 2008.

Significantly, the provisions which have been the primary focus of the Respondents' constitutional challenges – the requirement that voters present government-issued photo identification subject only to specified exceptions, *see* §§ 115.427.1 and .3 (the “Photo ID requirement”) – will only be fully implemented with regard to elections held after November 1, 2008.

Until November 1, 2008, the statute permits voters to present either the form of identification specified in § 115.427.1, or the forms of identification permissible under prior law, *including* such non-Photo ID forms of identification as “a current utility bill, bank statement, government check, paycheck, or other government document that contains the name and address of the voter.” § 115.427.14, RSMo. In the latter event, the voter is allowed to cast a provisional ballot upon completion of a simple affidavit, *id.*; the Act specifies that the voter’s provisional ballot is “entitled to be counted” if “the election authority verifies the identity of the individual by comparing that individual’s signature to the current signature on file with the election authority and determines that the individual was otherwise eligible to cast a ballot at the polling place where the ballot was cast.” § 115.427.13, RSMo.¹

¹ The existence of this two-year transition period, in which voters can cast provisional ballots by presenting the forms of identification previously employed, shows the falsity of Respondents’ claim that “[w]ithout doubt, this is the most restrictive voter identification law in our country, perhaps in the history of our country.” Br. 34. To the contrary, both Georgia’s and Indiana’s photo identification requirements were effective on much shorter notice, and contain other restrictions not found in Missouri’s law. *See Common Cause/Ga. v. Billups*, 439 F. Supp.2d 1294 (N.D. Ga. 2006) (Georgia provision passed in January 2006 in effect in July 2006 primary elections; free identification only available on completion of affidavit of indigency; no exceptions for disabled, elderly, or those with religious objections); *Indiana Democratic Party v. Rokita*, 2006 WL 1005037,

The Circuit Court specifically found that the forms of identification which a voter is allowed to present until November 1, 2008 in order to cast a provisional ballot were “readily available to virtually all registered voters.” LF316-17 ¶ 20. Respondents essentially concede that presenting these forms of identification does not present any unconstitutional burden on the right to vote. *See* Respondents’ Br. at 21 (agreeing that such forms of identification are “readily available to virtually all voters”). While the Circuit Court stated its conclusion that the provisional balloting available to voters both before and after November 1, 2008 “does not solve or ameliorate any of they [sic] constitutional issues raised by the Photo ID requirements,” LF352 ¶ 49, it offered no justification for concluding that the pre-November 1, 2008 provisions contained in §§ 115.427.13 and .14 were unconstitutional.

Respondents do not argue that the voter identification requirements in place until November 1, 2008 themselves violate any constitutional provision. Instead, Respondents attack the pre-2008 requirements only in footnotes, and argue their invalidity based *solely* on Respondents’ claim that the pre-November 2008 identification requirements are non-

*4-*5 (S.D. Ind. April 14, 2006) (Indiana provision effective immediately, and contains no exception for elderly or disabled voters; voters asserting indigency or religious objection to photo ID must complete affidavit at location separate from polling place).

severable; they do not separately address the constitutionality of the identification requirements now in effect. Br. 20 n.2, 92 n.15.²

Under § 1.140, RSMo, “[s]tatutes are presumptively severable”; “[a]ll statutes should be upheld to the fullest extent possible.” *General Motors Corp. v. Director of Rev.*, 981 S.W.2d 561, 568 (Mo. 1998). The provisions of the MVPA in effect until November 1, 2008 are severable from the remaining provisions. The MVPA enacts an identification regime effective until November 1, 2008 which “is complete and capable of enforcement” on its own³ – indeed, it was designed to be applied without reference to the post-November 1, 2008 requirements. Consistent with the presumption in favor of severability codified in § 1.140, RSMo, this Court should separately assess, and uphold, the constitutionality of the voter identification requirements enacted by the MVPA as they apply through November 1, 2008.

² Respondents *do* argue that the “highly subjective ‘signature match’ requirement” contained in the MVPA constitutes the “absence of specific standards” to judge voter qualifications, in violation of *Bush v. Gore*, 531 U.S. 98, 106 (2000). Respondents’ Br. at 95. But the Circuit Court did not find any constitutional defect in the requirement that election officials verify voters’ signatures. Respondents’ unsupported claim that election officials are incapable of accurately verifying a voter’s signature cannot support a declaration of unconstitutionality.

³ *Akin v. Director of Rev.*, 934 S.W.2d 295, 301 (Mo. 1996).

2. The Circuit Court Properly Rejected Respondents’ Claim that the Photo ID Requirement Was Unlawful due to its Allegedly Discriminatory Impact on Minority Groups, because Respondents Presented No Evidence of any Discriminatory Intent in the Enactment of the Challenged Provisions.

Respondents’ Brief cites to statistics which they claim show that “the financial and other burdens imposed by the Photo ID Requirement disproportionately affect African-Americans.” Br. 26.

Respondents fail to acknowledge, however, that the Circuit Court *rejected* their claim that the Photo ID Requirement unconstitutionally discriminated against minority groups, observing that “[d]iffering perceptions and opinions about the effect of a strict photo ID system on suspect classes do not constitute proof of purposeful discrimination.” LF303.

The Circuit Court’s rejection of Respondents’ disparate impact claim was plainly proper. The requirement that a challenger show discriminatory intent, not merely differential results, follows from the fundamental nature of the equal protection guarantee: “the Fourteenth Amendment guarantees equal laws, not equal results.” *Personnel Administrator of Mass. v. Feeney*, 442 U.S. 256, 273 (1979).

The fact that a law impacts different groups differently does not establish a constitutional violation *unless* a challenger can show that the law was enacted *with the purpose* of disadvantaging particular, protected groups.

[E]ven if a neutral law has a disproportionately adverse effect upon a racial minority, it is unconstitutional under the Equal Protection Clause *only if that impact can be traced to a discriminatory purpose.*

Id. at 272 (emphasis added).

[O]fficial action will not be held unconstitutional solely because it results in a racially disproportionate impact. * * * Proof of racially discriminatory intent or purpose is required to show a violation of the Equal Protection Clause.

Village of Arlington Heights v. Metropolitan Housing Dev. Corp., 429 U.S. 252, 264-65 (1977).

Thus, in order to make out a constitutional “disparate impact” claim, a plaintiff must show more than simply *different results*; instead, the challenger must show that the legislation was enacted *for the purpose of* disadvantaging the disfavored group.

“Discriminatory purpose” * * * implies that the decisionmaker, in this case a state legislature, selected or reaffirmed a particular course of action at least in part “because of,” not merely “in spite of,” its adverse effects upon an identifiable group.

Personnel Administrator v. Feeney, 442 U.S. at 279 (citation, footnotes omitted).

There simply is no evidence in this case that the Missouri Legislature enacted the MVPA, or the Photo ID requirement in particular, “at least in part *because of* [any purported] adverse effects upon” the poor, the elderly, the disabled, or racial minorities. The Circuit Court properly rejected Respondents’ contrary claim. Given their failure to

even challenge this holding, Respondents' citation to the purportedly "disproportionate[] [e]ffect" of the Photo ID Requirement on African Americans is irrelevant to any legal issue in this appeal, and is obviously intended to obscure what is truly at issue here.

CONCLUSION

For the foregoing reasons, and the reasons stated in the Opening Briefs of Intervenors and the State of Missouri, the judgment of the Circuit Court should be reversed.

Respectfully submitted,

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This brief complies with the type-volume limitation of Rule 84.06 because this brief contains 1,630 words, excluding the parts of the brief exempted by Rule 84.06(b).

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I further certify that on this 4th day of October, 2006, I served a copy of this Brief by e-mail, and two copies of this Brief by U.S. Mail, postage prepaid, on the following:

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