IN THE
SUPREME COURT OF MISSOURI

Supreme Court Appeal No. 88039

KATHLEEN WEINSCHENK, WILLIAM KOTTMEYER, ROBERT PUND, AMANDA MULLANEY, RICHARD VON GLAHN, MAUDIE MAE HUGHES and GIVE MISSOURIANS A RAISE, INC.

Respondents

v.

STATE OF MISSOURI

Appellant

ROBIN CARNAHAN, SECRETARY OF STATE

Respondent

DALE MORRIS and SENATOR DELBERT SCOTT

Intervenors/Appellants

RESPONDENTS' BRIEF

Appeal from the Circuit Court of Cole County, Missouri
Honorable Richard G. Callahan

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TABLE OF CONTENTS

PAGE(S)

TABLE OF AUTHORITIES

PAGE(S)

Cases:

Constitutions:

Statutes:

Regulations:

Other Authorities:

STATEMENT OF FACTS

Procedural Background

On June 14, 2006, Governor Blunt signed into law substantial revisions to Missouri's election law. (L.F. at 314, ¶ 14) One of those revisions requires Missouri voters, for the first time in Missouri history, to present specified forms of photographic identification (the "Photo ID Requirement") before being provided a regular ballot. These revisions are contained in Senate Bill Numbers 1014 and 730, entitled the "Missouri Voter Protection Act" (the "MVPA"). (Ex. 2)

Plaintiffs filed this action on August 3, 2006, alleging that - -far from protecting the rights of qualified Missouri voters - - the MVPA imposes an unnecessary, unauthorized and undue burden on the fundamental right to vote of thousands of registered Missouri voters who do not currently possess an acceptable Photo ID. Plaintiffs further alleged that the MVPA's Photo ID Requirement places a particularly heavy burden on the most disadvantaged in our society - - the poor, the elderly, the disabled and minorities.

For these and other reasons, Plaintiffs asserted that the Photo ID Requirement violates multiple provisions of the Missouri Constitution, specifically that:

(a) It constitutes an impermissible additional qualification to vote in violation of Article VIII, Section 2 (Count I);

(b) It violates the prohibition on interference with the "free exercise of the right of suffrage" and the requirement that "all elections shall be free and open" contained in Article I, Section 25 (Count II);

(c) It requires the payment of money to vote, in violation of the Due Process and Equal Protection Clauses in Article I, Sections 10 and 2, respectively (Count III);

(d) It constitutes an undue burden on the fundamental right to vote that is not narrowly tailored to meet a compelling state interest, in violation of the Due Process and Equal Protection Clauses in Article I, Sections 10 and 2, respectively (Count IV);

(e) It was designed to, and does, disparately impact registered voters in suspect classes, including African-Americans, in violation of the Equal Protection Clause in Article I, Section 2 (Count V);

(f) It improperly discriminates between in-person voters, who are required to show a Photo ID, and absentee voters, who are not required to show a Photo ID, in violation of the Equal Protection Clause in Article I, Section 2 (Count VI); and

(g) It, and other provisions in the MVPA, violate the Hancock Amendment (Article X, Sections 16 and 21) because they increase costs to local election authorities without any state appropriation to pay for those costs (Count VII).

A related case, *Jackson County, Missouri, et al. v. State of Missouri*, No. 06AC-CC00587, was consolidated with this case. Plaintiffs in that case asserted only that the Photo ID Requirement and related provisions violated the Hancock Amendment.

The trial court consolidated the two cases and held an evidentiary hearing on August 21, 2006. (L.F. at 296-297) On August 28, 2006, Intervenors Senator Delbert Scott and Dale Morris were permitted to intervene. Additional evidence was taken on September 1 and September 6, 2006, and argument was heard on September 6, 2006. (L.F. at 297)

On September 14, 2006, the trial court issued its Judgment. It found that the Photo ID Requirement impermissibly infringes on the "core voting right guaranteed by the Missouri Constitution," (L.F. at 304) and that:

(a) It constitutes an impermissible additional qualification to vote in violation of Article VIII, Section 2 of the Missouri Constitution;

(b) It violates the prohibition on interference with the "free exercise of the right of suffrage" and the requirement that "all elections shall be free and open" contained in Article I, Section 25 of the Missouri Constitution;

(c) It requires the payment of money to vote, in violation of the Due Process and Equal Protection Clauses in Article I, Sections 10 and 2, respectively of the Missouri Constitution; and

(d) It constitutes an undue burden on the fundamental right to vote that is not narrowly tailored to meet a compelling state interest, in violation of the Due Process and Equal Protection Clauses in Article I, Sections 10 and 2, respectively of the Missouri Constitution. (L.F. at 306-307)

The trial court therefore entered judgment in favor of Plaintiffs and against Defendants on Counts I, II, III and IV. The trial court entered judgment in favor of Defendants and against Plaintiffs on Counts V, VI and VII. It also entered judgment in favor of Defendants and against Plaintiffs in the *Jackson County* case. (L.F. at 307) Finally, the trial court issued an injunction against State of Missouri, the Secretary of State and others acting in concert with the Secretary of State barring implementation and enforcement of the changes to Section 115.427 in the MVPA, including the Photo ID Requirement, and ordering the Secretary of State to promptly provide actual notice of its judgment to each of the 116 local election authorities in the State of Missouri. (L.F. at 307-308)

Also on September 14, 2006, the trial court issued its Findings of Fact and Conclusions of Law which included 58 detailed findings of fact and 50 conclusions of law. (L.F. at 309-352) This appeal followed.

Plaintiffs

Plaintiff Kathleen Weinschenk is a citizen of the United States, a resident of Columbia, Missouri, a qualified voter in the State of Missouri, and does not possess a photo ID acceptable under the MVPA. Ms. Weinschenk was born in the State of Arkansas, and the fee to obtain a certified birth certificate from the Arkansas Division of Vital Records is twelve dollars ($12.00). Ms. Weinschenk was born with cerebral palsy. Because of her disability, she is unable to make a consistent signature or mark, and

therefore her signature will not match the signature on her voter registration record. (Ex. 16; Tr. at 266-273[1]; L.F. at 310, ¶ 1)

Plaintiff William Kottmeyer is a citizen of the United States, a resident of Chesterfield, Missouri, a qualified voter in the State of Missouri, and does not possess a photo ID acceptable under the MVPA. Mr. Kottmeyer has not driven in over ten years. Due to his lack of mobility, Mr. Kottmeyer will have difficulty gathering all of the documents necessary to obtain a nondriver's license and standing in long lines at the Department of Revenue office. (Ex. 12; L.F. at 310, ¶ 2)

Plaintiff Robert Pund is a citizen of the United States, a resident of Columbia, Missouri, a qualified voter in the State of Missouri, and does not possess a photo ID acceptable under the MVPA. Due to his physical condition, Mr. Pund will be required to arrange transportation to and from the Department of Revenue office to employ an attendant to assist him in order to obtain a nondriver's license. (Ex. 14; L.F. at 310-311, ¶ 3)

Plaintiff Amanda Mullaney is a citizen of the United States, a resident of the City of St. Louis, Missouri, a qualified voter in the State of Missouri, and does not possess a photo ID acceptable under the MVPA. Ms. Mullaney has no need for a Missouri driver's license because she does not have an automobile. Ms. Mullaney was born in Kentucky and her current name does not match the name on her birth certificate because her parents were not married at the time of her birth. Therefore, in order to provide "Proof of

[1] Unless otherwise noted, references to a transcript ("Tr.") are to the August 21, 2006 trial court hearing.

Identity" to obtain a Missouri nondriver's license, she will be required to provide "Proof of Name Change" in the form of either a certified court order or certified amended birth certificate. (Ex. 13; L.F. at 311, ¶ 4)

Plaintiff Richard von Glahn is a citizen of the United States, a resident of Maplewood, Missouri, a qualified voter in the State of Missouri, and does not possess a photo ID acceptable under the MVPA. Mr. von Glahn unsuccessfully attempted to obtain a nondriver's license in late June 2006 at the Deer Creek Contract Office in Maplewood, Missouri. After waiting in line for approximately 45 minutes, Mr. von Glahn explained to the Department of Revenue employee that he needed a Missouri nondriver's license for the purpose of voting. The employee did not know what he was talking about, and asked a co-worker for assistance. Ultimately, Mr. von Glahn was told that because he was not over sixty-five years of age, he would be required to pay $11.00 for a Missouri nondriver's license. Even if Mr. von Glahn would have agreed to pay the fee, he would not have been allowed to obtain the nondriver's license without first obtaining a certified copy of his birth certificate from the Ohio Department of Social Services for a fee of twenty dollars ($20.00). (Ex. 15; L.F. at 311-312, ¶ 5)

Plaintiff Maudie Mae Hughes is a citizen of the United States, a resident of Kansas City, Missouri, a qualified voter in the State of Missouri, and does not possess a photo ID acceptable under the MVPA. She is a taxpayer in the State of Missouri. Ms. Hughes is an African-American who was born in Mississippi. The State of Mississippi has informed Ms. Hughes on multiple occasions that it does not have any record of her birth. (Ex. 11; L.F. at 312, ¶ 6)

Give Missourians a Raise, Inc., is a Missouri non-profit corporation with a registered office located at 304 Cheval Square Drive, Chesterfield, Missouri. This entity was the petitioner for the statewide ballot initiative to raise the minimum wage, which will be on the November 2006 ballot. (Ex. 55)

Each individual Plaintiff is also a Missouri taxpayer. (Exs. 11-16; L.F. at 312, ¶ 10)

Defendant Secretary of State's Role as the State's Chief Election Official

Defendant Robin Carnahan is the Missouri Secretary of State, and is sued in her official capacity only. (L.F. at 64, ¶ 16) Defendant 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. Defendant Carnahan 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 is required to publish the Missouri Election Laws for use by county clerks and election boards. Defendant Carnahan convenes the State Board of Canvassers and totals and announces election results. Defendant Carnahan designs and provides to local election authorities the envelopes and forms necessary to carry out provisional voting throughout Missouri. Defendant Carnahan is responsible for producing various election materials including instructions for poll workers, training videos and a manual for election authorities. Defendant Carnahan 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. Defendant

Carnahan cooperates with other officials and civic organizations to provide materials to support voter registration, responsibility and education. Defendant Carnahan 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. at 240; L.F. at 313-314, ¶ 11) A high priority of the Secretary of State is to work with local election officials, the media and other groups to increase voter participation. (L.F. at 314, ¶ 12) Local election authorities in the State of Missouri work in concert with the Missouri Secretary of State in conducting, administering and certifying elections. (Ex. 51, ¶ 2; Tr. at 181, 238-240; L.F. at 314, ¶13)

The New Photo ID Requirement in the MVPA

The MVPA modified Missouri election laws in various ways, including imposing a requirement that one of certain listed forms of "nonexpired" or "non-expiring" Photo ID be presented by each voter who votes in-person at a polling place before being allowed to receive a regular ballot (the "Photo ID Requirement"). The Photo ID Requirement applies to all elections held after August 28, 2006. (L.F. at 314, ¶ 15)

The only acceptable forms of Photo ID under the MPVA are:

(1) Nonexpired Missouri driver's license showing the name and a photograph or digital image of the individual; or

(2) Nonexpired or nonexpiring Missouri nondriver's license showing the name and a photographic or digital image of the individual; or

(3) A document that satisfies all of the following requirements:

(a) The document contains the name of the individual to whom the document was issued, and the name substantially conforms to the most recent signature in the individual's voter registration record;

(b) The document shows a photographic or digital image of the individual;

(c) The document includes an expiration date, and the document is not expired, or if expired, expired not before the date of the most recent general election; and

(d) The document was issued by the United States or the state of Missouri; or

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

(L.F. at 314-315, ¶ 16)

Provisional Ballots Under the MVPA

The MVPA allows certain categories of voters who cannot obtain a Photo ID acceptable under the MVPA to cast a "provisional" ballot in certain elections. To do so, the voter must execute an affidavit averring that the voter is the person listed in the

precinct register and that the voter is "unable" to obtain a current and valid Photo ID "because of:"

> (1) A physical or mental disability or handicap of the voter, if the voter is otherwise competent to vote under Missouri law; or
>
> (2) A sincerely held religious belief against the forms of personal identification described in subsection 1 of this section; or
>
> (3) The voter being born on or before January 1, 1941.

(L.F. at 315-316, ¶ 17)[2] The provisional ballot affidavit form required by the statute also contains the sentence: "I understand that knowingly providing false information is violation of law and subjects me to possible criminal prosecution." (L.F. at 316, ¶ 18)

Provisional ballots may be counted under the law only if each of six separate requirements are satisfied - - none of which are required to count a regular ballot. (L.F. at 86, ¶64; Ex. 2 at pp. 26-30) For example, before a provisional ballot may be counted under the MVPA, the election authority must verify the identity of the individual by

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[2] The MVPA also has a transitional provision that permits provisional balloting for others without Photo ID's for elections prior to November 1, 2008. See new Section 115.427.13, Mo. Rev. Stat. Provisional balloting both before and after November 1, 2008 does not cure the constitutionality of the Photo ID Requirement, as the trial court found (L.F. at 352, ¶ 49) and as discussed below. For that reason, and because this provision is not severable from the remainder of the MVPA provisions found to be unconstitutional, it will not be analyzed separately. See Point V below.

comparing that individual's signature to the signature on file with the election authority. (L.F. at 316, ¶ 19)

Provisional ballots are not available in all elections. They are not available in local elections. They are available only in primary and general elections. (Tr. at 237; Ex. 10, ¶ 36; Section 115.430 (Mo. Rev. Stat. (2002))

Identification Requirements in Prior Missouri Law

Identification requirements in prior Missouri law, which were adopted in 2002, required voters to identify themselves but allowed them to do so by presenting one of many forms of identification readily available to virtually all voters, including a utility bill, bank statement, government check, paycheck, voter identification card, any ID issued by the U.S. Government, the State of Missouri, an agency of the state or a local election authority. (Tr. at 233-234; Section 115.427.1 (Mo. Rev. Stat. (2002); L.F. at 316-317, ¶ 20)

By contrast, many Missouri citizens - - including each of the individual Plaintiffs in this case - - do not possess the type of Photo ID required under the MVPA. According to an analysis by the Missouri Secretary of State dated August 18, 2006, approximately 240,000 registered Missouri voters may not have acceptable Photo ID's. (Ex. 21; Ex. 10, ¶ 46) According to information prepared by the Missouri Department of Revenue and included in the fiscal note that accompanied the MVPA, there "are approximately 169,215 individuals who do not have a photographic personal identification." (Ex. 20; Ex. 10, ¶ 1; L.F. at 317, ¶ 21)

The Three Different Forms of Proof Required to Obtain a Photo ID

For those Missouri citizens who do not possess a Photo ID acceptable under the MVPA and wish to obtain one, three different forms of proof must be obtained and presented: Proof of Lawful Presence, Proof of Identity, and Proof of Residency. (Ex. 22; Ex. 10, ¶ 11; L.F. at 317, ¶ 22)

For someone born in the United States, only two documents are acceptable to establish Proof of Lawful Presence; a birth certificate (certified with embossed or raised seal by state or local government) or a U.S. Passport. *Id.* (L.F. at 317, ¶ 23)

To obtain a certified birth certificate, a person born in Missouri must make a request to the Department of Health and Senior Services in Jefferson City, Missouri or a local health department, pay $15, and allow six to eight weeks for delivery. (Ex. 23; Ex. 10, ¶ 12; L.F. at 317-318, ¶ 24) If requested by mail, additional postage costs must be paid for the transmittal of the request and for the self-addressed, stamped envelope required for the return of the certificate. (Ex. 10, ¶13; L.F. at 317-318, ¶ 24) The State of Missouri does not maintain birth certificate records prior to January 1, 1910. (Ex. 10, ¶ 23; L.F. at 318, ¶ 25) For someone born in another state, that person must contact his or her state of birth to obtain a certified birth certificate. (Ex. 10, ¶ 14; L.F. at 318, ¶ 26) The required fees to obtain birth certificates in other states range from $5.00 to $30.00. (Ex. 41; Ex. 10, ¶ 15; L.F. at 318, ¶ 27) Several states (including the neighboring states of Illinois and Oklahoma) require a Photo ID to obtain certified birth certificates. (Ex. 24; Ex. 10, ¶ 24; L.F. at 318, ¶ 28) Like in Missouri, it takes time to obtain certified birth certificates from other states. For example, it takes eight to ten weeks to obtain a

certified birth certificate from the State of Louisiana. (Ex. 25; Ex. 10, ¶ 25; L.F. at 318, ¶ 29) Over 1.6 million Missouri residents were born in another state. (Ex. 26 at p. 2,¶ 21; Ex. 10, ¶ 26; L.F. at 318, ¶ 30)

The only option for a person born in the United States to establish Proof of Lawful Presence other than a certified birth certificate is a U.S. Passport. To obtain a passport, a person must contact the United States Department of State, fill out an application, request a passport, and pay a fee of $97.00 for delivery within six weeks, or $236.00 for delivery through private agencies within seven to ten days. (Ex. 27; Ex. 10, ¶ 16; L.F. at 318-319, ¶ 31)

For someone born in another country and wishing to establish proof of lawful presence, that person must obtain and present one of three documents: Certificate of Citizenship, Certificate of Naturalization or a Certificate of Birth Abroad. (Ex. 22; Ex. 10, ¶ 11; L.F. at 319, ¶ 32) These documents likewise cost time and money and take time to receive. For example, a certificate of citizenship costs $255, requires completion of a seven-page application, and takes three weeks simply to receive a notification that the government has received the application. (Ex. 28; L.F. at 319, ¶ 33)

For those whose name has changed since birth, additional certified documents must be obtained and presented to establish Proof of Lawful Presence. These include a certified marriage license, a certified divorce decree, a certified court order, certified adoption papers or amended birth certificate. (Ex. 22; Ex. 10, ¶ 17; L.F. at 319, ¶ 34) These records also cost money. For example, to obtain a certified copy of a marriage license, the fee ranges from $5.00 to $30.00. (Ex. 41; Ex. 10, ¶ 18; L.F. at 319, ¶ 35)

In addition to establishing Proof of Lawful Presence, any person who needs a Photo ID must also establish Proof of Identity. To establish Proof of Identity, a Social Security card or Medicare card with the person's current name can be presented. If the name on the Social Security card or Medicare card does not match that person's current name, additional documents must be presented to supply proof of the name change. (Ex. 22; L.F. at 319-320, ¶ 36)

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

(a) Proof of U.S. citizenship: U.S. birth certificate, U.S. passport, Certificate of Naturalization or Certificate of Citizenship;

(b) Proof of age: birth certificate, U.S. passport;

(c) Proof of identity: U.S. driver's license; state-issued nondriver identification card or U.S. passport (document must be current (not expired) and show name, identifying information (date of birth or age) and preferably a recent photograph). If the person does not have one of these specific documents or cannot get a replacement for one of them within 10 days, other documents accepted for proof of identity are:

i) employee ID card;

ii) school ID card;

iii) health insurance card (not a Medicare card)

iv) U.S. military ID; or

v) adoption decree.

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

(Ex. 29; Ex. 10, ¶ 20; L.F. at 320, ¶ 37)

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

(a) U.S. citizenship (if not previously established with Social Security) or immigration status;

(b) Legal name change: marriage document; divorce decree specifically stating person may change her name; certificate of naturalization, or court order for a name change;

(c) Identity: U.S. driver's license; state-issued nondriver identification card or U.S. passport (document must be current (not expired) and show name, identifying information (date of birth or age) and preferably a recent photograph).

(If documents do not give date of birth, age or recent photograph, person will need to produce one document with old name and a second document

with the new legal name containing the identifying information (date of birth or age) or a recent photograph.)

(Ex. 29; Ex. 10, ¶ 21; L.F. at 321, ¶ 38)

The final of the three "Proofs" that must be established to obtain a Photo ID is "Proof of Residency." Options to establish Proof of Residency are many. Those options include the most recent utility bill, voter registration card, bank statement, government check, pay check, property tax receipt or an official letter by state or local governmental agency on its letterhead issued within the last 30 days. (Ex. 22; L.F. at 312, ¶ 39)

The Photo ID Requirement's Disparate Impact on African-Americans

More than 21% of Missouri's African-American households have no car, and therefore have no need for a driver's license. (Ex. 34; Ex. 10, ¶ 2; L.F. at 321, ¶ 40) This is over four times the percentage of white Missourians who have no car. (Ex. 34; Ex. 10, ¶ 2; L.F. at 322, ¶ 41) Twenty-five percent of Missouri African-Americans live in poverty; only ten percent of whites do. (Ex. 34; Ex. 10, ¶ 3; L.F. at 322, ¶ 42) The average per capita income for Missouri African-Americans is $15,099 compared to $23,583 for Missouri whites. (Ex. 34; Ex. 10, ¶ 4; L.F. at 322, ¶ 43) Seventeen and nine-tenths percent of Missouri African-Americans over the age of 25 have less than a high school education; only thirteen and one tenth percent of whites do. (Ex. 34; Ex. 10, ¶ 5; L.F. at 322, ¶ 44) Given these facts, the financial and other burdens imposed by the Photo ID Requirement disproportionately affect African-Americans. (Ex. 34; Ex. 10, ¶¶ 2-5; L.F. at 322, ¶ 45)

Lack of Evidence of Voter Impersonation Fraud in Missouri

Proponents of the Photo ID Requirement have attempted to justify it on the ground that it will prevent election fraud. (L.F. at 322, ¶ 46) The only type of election fraud that potentially could be deterred or prevented by the Photo ID Requirement is voter impersonation fraud - - a voter claiming that he is someone other than himself. (Tr. 197-200, 230-235; L.F. at 322, ¶ 47) No evidence was presented that voter impersonation fraud exists to any substantial degree in Missouri. (L.F. at 322, ¶ 48) In fact, the evidence establishes that voter impersonation fraud is not a problem in Missouri. *Id*. Robert Nichols, Director of Elections for Jackson County, Missouri for the last 20 years, credibly testified that voter identification fraud is not a problem in Jackson County, Missouri. (Tr. at 96; L.F. at 323, ¶ 49) Judy Taylor, Director of Elections for St. Louis County, Missouri for the last 12 years, credibly testified that voter impersonation fraud is not a problem in St. Louis County, Missouri. (Tr. at 150-151; L.F. at 325, ¶ 51) Carol Signigio, former Assistant Director of Elections for the City of St. Louis, Missouri for 12 years and a consultant to the St. Louis City Election Board for the past 7 years, credibly testified that voter impersonation fraud is not a problem in the City of St. Louis. (Tr. at 119-120; L.F. at 328, ¶ 53)

Wendy Noren, Boone County Clerk, also credibly testified that voter impersonation fraud is not a problem in Boone County, Missouri. (Tr. at 194-195) Ms. Noren, who also served for 15 years on the legislative committee for the Association of Missouri State County Clerks and Election Authorities, and who regularly is in contact with local election authorities throughout the State of Missouri, testified that no one in

the Association ever suggested that a Photo ID Requirement was needed, or that it would be helpful in preventing voter fraud. She further testified that there never has been any general perception in her Association that voter identification fraud was a problem. She testified that the current ID requirements, in conjunction with current voter registration application verification procedures, have been successful in identifying and protecting against potential fraudulent registrations resulting in casting fraudulent ballots at the polling place. Ms. Noren testified that there have been problems in the State of Missouri with absentee ballot fraud. She also testified that many Missouri voters will not have sufficient time to obtain the required documents necessary to obtain a Photo ID in time for the November general elections. (Tr. at 179-182, 194-200, 221-222; Ex. 51, ¶¶ 3, 6, 8, 10, 14, 15; L.F. at 328-329, ¶ 54)

Betsy Byers, who for the last seven and one-half years has served under Republican and Democratic administrations as Co-Director of Elections in the Missouri Secretary of State's Office, credibly testified that since 2000 she has not received any reports of voter impersonation fraud from anywhere in the State of Missouri. Ms. Byers further testified that if there had been any widespread or significant issues or concerns about voter impersonation fraud occurring in Missouri, she believes she would have heard about it. During the same time period, Ms. Byers testified that she has received reports of absentee ballot fraud. Ms. Byers further testified that there is no evidence that voter impersonation fraud exists or that the Photo ID Requirement would solve any existing problem in our election system. (Tr. at 231-234, 241-242; L.F. at 330, ¶ 56)

In a May 11, 2006, letter to Governor Matt Blunt, Secretary of State Robin Carnahan likewise pointed out that "there is no evidence that such voter fraud actually exists or that [The Photo ID Requirement] would solve any existing problem in our elections system." Secretary of State Carnahan further stated that "Missouri's voter identification requirements are already among the strictest in the nation and have proven an effective safeguard to prevent wrongful voting." She further stated that "[r]ather than solve any real problem, Senate Bill 1014 will jeopardize the integrity of our elections by getting in the way of 170,000 Missourians' right to vote and have their votes counted." (Ex. 33; L.F. at 331, ¶ 57)

Governor Matt Blunt, when he was Missouri's Secretary of State, stated in a 2004 letter to then-Governor Holden that Missouri's statewide elections in 2002 and 2004 "were two of the cleanest and problem-free elections in recent history." (Ex. 31; Ex. 10, ¶ 30) Governor Blunt, also while he was Secretary of State, in a 2004 letter to the St. Louis Post Dispatch, similarly characterized these elections as "fraud-free." (Ex. 32; Ex. 10, ¶ 31; L.F. at 331, ¶ 58)

Proponents of the Photo ID Requirement and Intervenors also have attempted to justify it on the ground that it is supported by the Carter-Baker Commission. (Int. Br. at 11) It is not, as expressly stated by former President Jimmy Carter. (Ex. 53) The Carter-Baker report recommendations are far different than the Photo ID Requirement imposed by the MVPA. (*Id.*)

In a June 2006 poll of Missouri voters on statewide issues, 54% of respondents stated that they opposed the Photo ID Requirement, while only 18% favored it (an

additional 17% were in favor of it only if it was phased in over a longer period of time). (Ex. 43; Ex. 10, ¶ 27)

Intervenors offered the "expert" affidavits of Professors Overby and Milyo for the proposition that Photo ID Requirements are not likely to have a significant effect on voter participation or the outcome of elections. (Int. Br. at 28-29) Those affidavits not only are completely irrelevant to the constitutional issues presented in this case, but also are inadmissible under Section 490.065, Mo. Rev. Stat., because the conclusions offered on their face are not reasonably reliable. Their reports concede that there "are no systematic statistical studies of the effects of Photo ID Requirements for voting," and then proceed to speculate as to what the effects might be. (Tr. at 96-99; (Sept. evidentiary hearing); Exs.: Affs. of Overby and Milyo.) Similarly, Intervenors offer the affidavit and report of Dr. John Lott for the proposition that regulations that prevent fraud increase voter participation. (Int. Br. at 29-30) That affidavit and report likewise is wholly irrelevant to the constitutional issues presented in this case and is also without proper foundation and inadmissible. Dr. Lott's report itself concedes that "it is still too early to evaluate the possible impact of mandatory Photo ID's on U.S. elections." (Tr. at 99-100; (Sept. evidentiary hearing); Aff. of Dr. John Lott and attached report as Ex. B to Aff.) These reports are public policy expositions and are completely irrelevant to any constitutional issue presented in this case. Apparently for these reasons, the trial court did not refer to their affidavits or reports in his findings. Because this Court must reject all evidence not supportive of the trial Court's findings, and because these affidavits and reports on their face are speculative and unreliable, this Court should likewise ignore them.

ARGUMENT

Standard of Review

Review of a court-tried civil matter is governed by *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976), which provides that the judgment of the trial court will be affirmed "unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Reddish v. Heartland Auto Plaza*, 197 S.W.3d 634, 636 (Mo. Ct. App. 2006). The court "will affirm the judgment if there is any reasonable theory on which to sustain it." *Illinois State Bank of Quincy, Illinois, v. Yates*, 678 S.W.2d 819, 823 (Mo. Ct. App. 1984)

The Court must view the evidence in the light most favorable to the judgment and disregard all other evidence. *Reddish*, 197 S.W.3d at 636. The credibility of the witnesses and the weight to be given their testimony are matters for the trial court, which is free to believe none, part, or all of the testimony. *Reddish*, 197 S.W.3d at 636. "An appellate court not only defers to a trial court's ability to determine the witnesses' credibility, but also to its ability to choose between conflicting evidence." *Reddish* at 636 (citing *In the Interest of A.H.*, 9 S.W.3d 56, 59 (Mo. Ct. App. 2000)). An appellate court defers to the factual findings made by the trial court. *Ridgeway v. TTnT Development Corp*., 126 S.W.3d 807, 812-13 (Mo. Ct. App. 2004); *Cook v. Martin*, 71 S.W.3d 677, 680 (Mo. Ct. App. 2002) ("We defer to the trial court's findings of fact, accepting the evidence and inferences drawn therefrom favorable to the judgment, while disregarding contrary evidence.")

Preliminary Statement

"The right to vote freely for the candidate of one's choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government."

Reynolds v. Sims, 377 U.S. 533, 555 (1964)

"No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined."

Wesberry v. Sanders, 376 U.S. 1, 17-18 (1964)

"The right of universal suffrage is the attribute of sovereignty of a free people. We accept as a verity that 'Eternal vigilance is the price of liberty.' For the vast majority the only opportunity to exercise that vigilance is in the polling place."

State v. Dry-Brite Lightening, 240 S.W. 2d 886, 892, (Mo. 1951)

"Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the naughty heirs of distinguished names, more than the humble sons

of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States."

- *James Madison, The Federalist*, No. 57 (Cooke ed. 1961), at 385 (urging adoption of the United States Constitution)

"Suffrage is the pivotal right."

- *Susan B. Anthony*

"The vote is the most powerful instrument ever devised by man for breaking down injustice and destroying the terrible walls which imprison men because they are different from other men. . . . There can no longer be anyone too poor to vote."

- *President Lyndon B. Johnson* (in connection with signing the Voting Rights Act)

From James Madison's Federalist papers through the present time, the right to vote has been a cornerstone of our democracy. Our Missouri Constitution, unlike the U.S. Constitution, provides express and repeated protections to this fundamental right, including the extraordinary clause in our Missouri Bill of Rights that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

That is exactly what the Missouri legislature did when it enacted the misnamed "Missouri Voter Protection Act." This Act does not protect Missouri voters - - it

interferes and unduly burdens many thousands of them. Qualified Missouri voters who do not have an acceptable Photo ID will be required to wind their way through a bureaucratic maze, or sometimes multiple and multi-state bureaucratic mazes, and pay money to obtain one. Without it, these voters will not be allowed to cast a regular ballot or, in most cases, any ballot at all.

Without doubt, this is the most restrictive voter identification law in our country, perhaps in the history of our country. It is inconsistent with our Constitution, inconsistent with the right of universal suffrage, and inconsistent with our values.

Those who are burdened by the new law are not those who can easily deal with the bureaucracy. They are not judges, lawyers, doctors, teachers, businessmen, engineers and others in our society who have a current driver's license. Those people would not be burdened at all by the new law. Instead, the MVPA puts this burden squarely on those least likely to be able to bear it - - the poor, the elderly, the disabled, the uneducated and minorities. Many of these people, who are obviously the least fortunate in our society, do not have access to computers or the web, some are without telephones and virtually all do not drive. To put these burdens on the people least able to bear it - - and require them to bear these burdens or be stripped of their right to vote - - is beneath the dignity of our great state.

Many in these groups not only will be unduly burdened by the law, but will become discouraged, confused and disenchanted, and simply will give up and not vote. This type of pernicious interference with the free exercise of the right to vote is precisely what the drafters of our Constitution sought to prevent.

What overriding and compelling purpose could possibly justify this? At first, the proponents of this legislation claimed it was justified to prevent voter fraud. But the record establishes that the only type of voter fraud that the Photo ID Requirement would prevent is voter impersonation fraud - - someone who shows up at the polls wanting to vote, realizing he or she is not properly registered to vote, and then pretending to be someone who is registered. That type of fraud is virtually non-existent in Missouri. The record establishes that there has not been a single reported instance of that type of fraud occurring in at least the last six years anywhere in Missouri, with over 6 million votes cast in that time period. Even Governor Blunt, when he was Secretary of State, remarked that the 2002 and 2004 elections in Missouri were "fraud-free" and were "two of the cleanest and problem-free elections in recent history."

Obviously realizing that there is no need - - compelling or otherwise - - to combat nonexistent voter impersonation fraud in Missouri, the proponents of the legislation then shifted to the argument that the Photo ID Requirement was needed to combat the **perception** that there was voting fraud. No court anywhere in the country - - and certainly no court in Missouri - - has ever bought the argument that a state can directly infringe on the fundamental right to vote based on a mere perception. The cases cited in the State's and Intervenors' briefs do not say that - - those were campaign finance cases in which no right to vote was being impinged upon.

The State has argued that all the Photo ID Requirement does is require the voter to identify himself or herself, and that is not unconstitutional. That is **not** what the new law does. **Existing** Missouri law requires all voters to identify themselves, but it does it in a

way that is not burdensome and does not impinge on the right to vote. The existing law obviously has been sufficient to deter any voter impersonation fraud - - none has been reported since the existing law has been in effect. What the new law does is require those without Photo ID's to pay money and jump through several hoops to gather documents needed to obtain an acceptable Photo ID. To argue that all the new law does is require the voter to identify himself is to ignore reality.

At the end of the day, what would be accomplished by this Photo ID Requirement? Millions of state and local taxpayers' dollars would be spent educating the public and paying for the substantially increased costs of administering elections in this state. Many thousands of dollars in fees would be paid by citizens to obtain documents necessary to vote. Thousands of hours would be devoted to standing in lines and otherwise dealing with bureaucracies that issue the needed documents. And, for what? To make it harder to vote for those least fortunate in our state. That is all this Photo ID law will accomplish.

The trial court's detailed and carefully crafted factual findings -- which have not been challenged -- establish that the Photo ID Requirement violates Missouri's Constitution in multiple ways, as explained below. Rather than address the legal implications of these established facts, Intervenors argue their own version of the facts -- a version that was not accepted by the trial court. Intervenors' brief is primarily a public policy diatribe. It relies on newspaper articles, interest-group expositions and polls, wholly speculative and irrelevant "expert" reports, and other "evidence" that Intervenors claim support the public policy conclusion that the Photo ID requirement is a useful tool

in the battle against election fraud.

This is not a public policy debate. The constitutional issues presented in this case are far more important than a political debate on the extent to which election fraud is a problem and the best manner to prevent it. At stake are the fundamental voting rights of many thousands of Missouri citizens, most of whom are among the least fortunate in our society. Before we as part of the legal system infringe upon their fundamental right to vote, we better be certain that doing so is absolutely necessary to prevent an important -- and existing -- problem and that the manner in which we do so is the least burdensome on our citizens. Our Constitution demands no less, and that is what the trial court found lacking in the evidence presented to it.

Regardless of the best way to prevent election fraud, the rights of our fellow citizens cannot be trampled in the process. That is the very purpose for a constitution -- to prevent momentary political winds from interfering with our citizens' fundamental rights. As the trial court found, our Constitution plainly protects our citizens from the very type of interference and undue burden the Photo ID Requirement imposes.

The trial court was correct to recognize precisely what was at stake in this case, was correct to recognize the burdens and costs that would be imposed by the Photo ID Requirement, was correct to declare it unconstitutional, and was correct to enjoin its implementation. Its sound judgment should be affirmed.

I. THE PHOTO ID REQUIREMENT CONSTITUTES AN ADDITIONAL QUALIFICATION TO VOTE UNDER ARTICLE VIII, SECTION 2. (Responds to point relied on I of Appellant's brief and point relied on (a) of Intervenor-Appellant's brief.)

A. Article VIII, Section 2 Sets Forth The Exclusive List Of Voting Qualifications And Disqualifications, And Also Sets Forth The Single Issue On Which The Legislature May Make A Determination On Qualifications To Vote.

Article VIII, Section 2 of the Missouri Constitution provides:

All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of eighteen who are residents of this state and of the political subdivision in which they offer to vote **are entitled to vote at all elections by the people**, if the election is one for which registration is required if they are registered within the time prescribed by law, or if the election is one for which registration is not required, if they have been residents of the political subdivision in which they offer to vote for thirty days next preceding the election for which they offer to vote: Provided however, no person who has a guardian of his or her estate or person by reason of mental incapacity, appointed by a court of competent jurisdiction and no person who is involuntarily confined in a mental institution pursuant to an adjudication of a court of competent jurisdiction shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise

of the right of suffrage may be excluded by law from voting. (emphasis added)

This provision sets forth the **exclusive** list of qualifications to vote in Missouri. Those are:

- Citizen of the United States;
- Over the age of eighteen;
- Resident of this state;
- Resident of the political subdivision in which the person offers to vote; and
- Registered within the time prescribed by law.

This provision also sets forth the **exclusive** list of disqualifications to vote in Missouri. Those are:

- Person who has a court-appointed guardian of his or her estate by reason of mental incapacity; and
- Person who is involuntarily confined in a mental institution pursuant to a court adjudication.

This provision also gives the legislature authority to make one, and only one, determination on qualifications to vote. The legislature can, if it so chooses, exclude by law from voting "persons convicted of felony, or crime connected with the exercise of the right of suffrage." That is the **only** constitutionally permissible basis upon which the legislature may deny an otherwise qualified Missouri citizen the right to vote.

Article VIII, Section 2 emphasizes that "**[a]ll"** persons qualified to vote, not disqualified to vote, and not properly precluded by law from voting, are "**entitled** to vote at **all** elections by the people." (emphasis added) So important is this constitutional entitlement to vote that Missouri voters are constitutionally protected from arrest while "going to, attending, and returning from elections," except in cases of treason, felony or breach of the peace. Article VIII, Section 4. Article I, Section 25, which is part of Missouri's Bill of Rights, further reinforces - - in rather extraordinary language - - that "no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage."

In short, Article VIII, Section 2 sets forth the exclusive list of qualifications and disqualifications, and the single issue on which the legislature may make a qualifications decision.

B. As A Matter Of Constitutional Construction, The Legislature Cannot Add Qualifications Or Disqualifications Not Specifically Enumerated In The Constitution.

As a matter of constitutional construction, the legislature cannot add qualifications that are not specifically enumerated in the Constitution. Courts from around the country have long recognized that when a constitution "undertakes to enumerate and describe . . . that enumeration and description is exhaustive, and the legislature cannot therefore enlarge the list." *Stewart v. State*, 205, 25 S.E. 424, 425 (1896); *see also Morris v. Powell*, 25 N.E. 221, 223 (Ind. 1890) ("That when the people by the adoption of the Constitution have fixed and defined in the Constitution itself what qualifications a voter

shall possess to entitle him to vote, the legislature can not add an additional qualification, is too plain and well recognized for argument, or to need the citation of authorities. The principle is elementary that when the Constitution defines the qualification of voters, that qualification can not be added to or changed by legislative enactment."); *Koy v. Schneider*, 377-78, 218 S.W. 479, 480 (1920) ("All the authorities seem in accord with the statement that 'where the right of suffrage is fixed in the Constitution of a state, as is the case in most states, it can be restricted or changed by an amendment to the Constitution or by an amendment to the federal Constitution, which, of course, is binding upon the states. But it cannot be restricted or changed in any other way. The legislature can pass no law directly or indirectly either restricting or extending the right of suffrage as fixed by the Constitution.") *See also Gerberding v. Munro*, 949 P.2d 1366 (Wash. 1998) ("this general rule has been repeatedly expressed in cases across the United States. . . . [that] where the Constitution establishes specific eligibility requirements for a particular constitutional office, the constitutional criteria are "exclusive.")

Missouri law is in accord. *See, e.g., Wickland v. Handoyo*, 181 S.W.3d 143, 152 (Mo. Ct. App. 2005) ("It is an elementary principle of statutory construction, as well as established law in Missouri, that the expression of one thing means the exclusion of another."); *State v. Campbell*, 26 S.W.3d 249, 254 (Mo. Ct. App. 2000) (applying same principle); *Schudy v. Cooper*, 824 S.W.2d 899, 901 (Mo. 1992) (applying same principle).

In two analogous cases, the Supreme Court held the power of Congress and the states to be similarly limited. In *Powell v. McCormack*, 395 U.S. 486 (1969) the

Supreme Court held that although Congress is expressly authorized by Article 1, Section 4 of the Constitution to judge the qualifications of its members, Congress was not authorized to use its power to refuse to seat a member of the House for reasons other than those expressly set forth in Article 1, Section 2 of the United States Constitution. 395 U.S. at 556.

In its subsequent opinion in *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 798 (1995), the Supreme Court struck down a provision in the Arkansas Constitution imposing term limits on its U.S. Senators and Congressmen on the ground that, "the qualifications for service in Congress set forth in the text of the Constitution are 'fixed' at least in the sense that they may not be supplemented by Congress." 514 U.S. at 779. The Court explained its earlier decision in *Powell* based on the text of the Qualifications Clause:

> [T]he enumeration of a few qualifications would by implication tie up the hands of the Legislature from supplying omissions . . .
>
> It would seem but fair reasoning upon the plainest principles of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others.

514 U.S. at 793 n. 9 (internal citations and quotations omitted).

C. The Legislature In Imposing The Photo ID Requirement Added A New Qualification And Disqualification Not Enumerated In The Missouri Constitution, And Therefore Violated Article VIII, Section 2 As The Trial Court Properly Held.

By requiring that registered voters obtain and pay for multiple documents establishing three different forms of proof necessary to obtain a Photo ID before being issued a ballot, the MVPA violates Article VIII, Section 2 of the Missouri Constitution in three ways:

(a) It adds a new qualification to vote - - obtaining and presenting a Photo ID - - not specified or permitted by Article VIII, Section 2;

(b) It adds a new disqualification to vote - - not possessing and presenting a Photo ID - - not specified or permitted by Article VIII, Section 2; and

(c) It attempts to exclude by law from voting - - persons not possessing and presenting a Photo ID - - persons other than those permitted to be excluded under Article VIII, Section 2.

Voters without a photo ID, with certain narrow exceptions, are not qualified to vote.[3] Unlike the identification options under the current statute which require no action

[3] Voters who fall within these narrow exceptions are permitted to cast a provisional ballot in certain defined circumstances in certain elections. As explained below and as

by the voter to obtain and pay for documents necessary to present acceptable identification, the Photo ID Requirement requires, for those without an unexpired Photo ID, multiple and burdensome **affirmative steps**. If the voter does not take those steps, the voter is not qualified to vote under the MVPA. The addition of a new qualification and a new disqualification for voting is plainly beyond the legislature's authority as the trial court correctly held. (L.F. at 311-315, ¶¶ 4-16)

D. A Georgia State Court's Recent Ruling Invalidating A Similar Georgia Photo ID Requirement As An Impermissible Additional Qualification To Vote Under A Similar Georgia Constitutional Provision Is Instructive.

Five days after the trial court issued its ruling, a state court in Georgia interpreting a similar Georgia Photo ID Requirement and a similar constitutional provision reached the same result.[4] *Lake v. Perdue*, File No. 2006CU119207 (Superior Court of Fulton County, Georgia September 19, 2006). (A - 103-120) Like Article VIII, Section 2 of the Missouri Constitution, the Georgia Constitution has a provision that sets forth qualifications of voters:

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the trial court expressly found, the availability of provisional ballots does not cure the unconstitutionality of the Photo ID Requirement.

[4] A federal court in Georgia has three times invalidated the Georgia Photo ID Requirement as violative of the United States Constitution. Those decisions are discussed below.

> Every person who is a citizen of the United States and a resident of Georgia as defined by law, who is at least 18 years of age and not disenfranchised by this article, and who meets minimum residency requirements as provided by law **shall be entitled to vote** at any election by the people.
>
> The General Assembly shall provide by law for the registration of electors.

Ga. Const., art. II, § 1, ¶ 2 (emphasis added).

The Georgia court observed that there is "nothing equivocal about the words **"shall be entitled to vote"** (A - 116) - - much like the words "are entitled to vote at all elections by the people" in Article VIII, Section 2 of the Missouri Constitution. The Georgia court also recognized the fundamental principle that "where a Constitution undertakes to enumerate and describe . . . that enumeration and description is exhaustive, and the legislature cannot therefore enlarge the list." *Id.* (citations and internal quotations omitted) The court also pointed out that the

> role of the legislature in our State is both expressly **defined** and **limited** by Article II, Section 1, Paragraph 2 of the Constitution to two specific functions: (1) establishing minimum residency requirements; and (2) providing for the registration of electors. The new photo ID only requirement is *ultra vires* because it is neither a residency requirement nor is it a condition of registration. "[W]here the State constitution provides who shall be entitled to vote, the legislature cannot take from or add to the qualifications unless the power is granted expressly or by necessary implication."

Id. at A - 117. (emphasis in original; citations omitted) Likewise, the Georgia Court recognized that the

> new photo ID only requirement is also prohibited by Article II, Section 1, Paragraph 3 because the Constitution limits the grounds on which a Georgia citizen who is registered may be denied the right to vote to those person who have been (1) convicted of a felony involving moral turpitude, or (20 judicially determined to be mentally incompetent to vote. **Nowhere in the Constitution is the legislature authorized to deny a registered voter the right to vote on any other ground, including possession of a photo ID of the type required by § 21-2-417.1 of the 2006 law.**

Id. at A - 117. (emphasis added)

The Georgia Court concluded:

> By requiring Georgia residents over 18 who are properly registered to vote to present an approved form of photo ID as the exclusive means of identification in order to have one's vote counted, the 2006 Voter ID law violates the plain terms of this constitutional provision.

Id. at A - 116.

The Georgia trial court's rationale was virtually identical to the trial court's rationale in this case, and relied upon the same fundamental and well-established principles of constitutional interpretation. The Georgia ruling supports affirmance here.

E. The State's Arguments And Authorities Are Misdirected, Do Not Involve Similar Constitutional Provisions And/Or Are Factually Inapposite.

The State devotes most of its discussion on this point to arguing that preventing election fraud is a legitimate state interest. *See* App. Br. at pp. 44-46. That argument (which is not disputed by Plaintiffs) has no application to this Article VIII, Section 2 claim; it applies only to Plaintiffs' equal protection and due process claims in Count IV that the Photo ID Requirement is an undue burden on a fundamental right. The analysis under Article VIII, Section 2 is far more simple and straightforward. It simply requires a determination of whether the Photo ID Requirement constitutes an additional qualification to vote. If it does, as the trial court expressly found, the Photo ID Requirement is unconstitutional under Article VIII, Section 2.

The election contest cases cited by the State, *Nance v. Kearbey*, 156 S.W. 629 (Mo. banc. 1913) and *State ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229, 234 (Mo. Ct. App. 1978) merely go to the issue of whether the State may regulate elections generally, not to the issue presented here - - whether imposition of the burdens necessary to obtain a Photo ID constitute an impermissible additional qualification to vote. Those cases therefore are irrelevant.

The State's reliance on *State ex rel. McClellan v. Kirkpatrick*, 504 S.W.2d 83 (Mo. 1974) is similarly misplaced. That case held that a requirement that a voter make his primary ballot preference known to election judges to permit the judges to deliver the proper ballot to the voter does not violate the Missouri Constitution. 504 S.W.2d at 89.

That finding was based on the court's conclusion that the statutory requirement was "not an unreasonable burden, if a burden at all" on the right to vote and was not an additional qualification to vote. That case presented facts far different than those found by the trial court here - - that the Photo ID Requirement was a "great if not insurmountable," burden (L.F. at 304) and that it required the voter to take "affirmative steps" to become qualified to vote. (L.F. at 338, ¶ 15) *McClellan* therefore is consistent with the trial court's ruling in this case.

F. The State's Exaggeration That The Trial Court's Ruling Would Prevent Election Regulation By The State Is Fanciful.

Perhaps in the hope of dredging up the proverbial "parade of horribles," the State also grossly exaggerates and mischaracterizes the effect of the trial court's ruling. It argues that under the "trial court's rationale, the State can take no steps to regulate elections by requiring that potential voters demonstrate the constitutional qualifications." (App. Br. at 46) That is not close to being true. In fact, the State in its 2002 revisions did just that by requiring voters to present one of many forms of identification. Those revisions are working -- there has not been one reported instance of voter impersonation fraud since that time.

Under the trial court's ruling, the 2002 revisions are plainly constitutional because that identification requirement does not require voters to "take any affirmative steps to obtain acceptable identification because they already had it." (L.F. at 298-299; *see also* L.F. at 338, ¶ 15) ("Unlike the identification option under the current statute which require no action by the voter to obtain identification, the Photo ID Requirement regains,

for those without an unexpired Photo ID, affirmative steps. If the voter does not take these steps, the voter is not qualified to vote under the MVPA.")

In addition, the State remains free to take additional steps and impose additional burdens **on itself** to verify voter eligibility, reduce registration roles and otherwise minimize the potential for election fraud. As Wendy Noren testified, various options are available to the State. (Ex. 51, ¶¶ 7-12) The MVPA, however, places undue burdens on the citizens and little burden on the State as the trial court expressly recognized. *See* L.F. at 303-304 ("[T]he legislature has chosen a scheme of identification that places little burden on the State . . . and places most of the burden on the citizen voter." All the trial court's ruling does is prevent the State from interfering with a citizen's fundamental right to vote. Any state regulation that does that **should** be held unconstitutional. The State's attempt to inflate the restrictions imposed by the trial court's ruling should be ignored.

G. Intervenors' Arguments Ignore The Factual Findings By The Trial Court And Their Authorities Are All Federal Cases Interpreting United States Constitutional And Statutory Provisions Completely Unlike Article VIII, Section 2 Of The Missouri Constitution.

Intervenors devote only about three pages in their 101-page brief to this claim. (Int. Br. at 90-92) Their arguments similarly miss the mark. They first argue that the Photo ID Requirement is "fundamentally different from the voter-qualification law" because it does not present a "barrier to voting." (Int. Br. at 90) That argument is directly contrary to multiple and detailed findings by the trial court, which neither the State nor the Intervenors have challenged. *See, e.g.*, L.F. at 304 ("[F]or the elderly, the poor, and

under-educated, or otherwise disadvantaged, the burden can be great if not insurmountable, and it is those very people outside the mainstream of society who are least equipped to bear the costs or navigate the many bureaucracies necessary to obtain the required documentation."); L.F. at 317-321, ¶ ¶ 22-39 (detailing the many burdens and barriers to voting imposed by the Photo ID Requirement); L.F. at 339-340, ¶ ¶ 20-21 (summarizing barriers to voting imposed by the Photo ID Requirement, including that "[f]or some, it will make it impossible to vote."); L.F. at 345, ¶ 36 (summarizing barriers to voting imposed by the Photo ID Requirement). Thus, the fundamental premise upon which Intervenors base their argument is not factually supportable.

Intervenors next argue that the Photo ID Requirement "merely establishes a procedure for verifying a voter's qualifications." (Int. Br. at 90) Again, that argument is directly inconsistent with the facts as found by the trial court. Far more than a mere "procedure," the Photo ID Requirement places substantive burdens on prospective voters who do not possess an acceptable Photo ID as the trial court expressly found. Even if the Photo ID Requirement could properly be characterized as a mere "procedure," any procedure that requires voters to take significant affirmative steps to qualify themselves to vote is an impermissible additional qualification under Article VIII, Section 2 - - whether it is called a "procedure" or something else.

The cases cited by Intervenors do not support the false distinctions they attempt to draw. They are all federal cases interpreting federal constitutional and statutory provisions completely unlike Article VIII, Section 2 of the Missouri Constitution. *Rosario v. Rockfeller*, 410 U.S. 752 (1973) evaluated only whether a law that imposed a

time deadline for enrollment to vote in a political party's primary election was unconstitutional under the U.S. Constitution. That case obviously has nothing to do with the issues presented under Article VIII, Section 2 here. Plaintiffs do not argue that the State lacks authority to impose reasonable time deadlines for registration under the Missouri Constitution. Indeed, Article VIII, Section 2 itself expressly recognizes that the State has authority to do just that by stating that one of the qualifications to vote is that the voter be "registered within the time prescribed by law."

Ayers-Schaffner v. Distefano, 37 F.3d 726 (1st Cir. 1994) examined whether under the federal constitution a state may condition the right to vote in one election on whether the right was exercised in a previous election. The particular footnote cited by Intervenors merely states the "well-established" proposition that "states may restrict the voting privilege through residency and other **registration** requirements." 37 F.3d at 729, n. 8. (emphasis added) That obviously is not what the State has done in this case, and was not what the State did in *Ayers-Schaffner*. Indeed, in the very next sentence in the footnote, the court, in **striking down the voting qualification in that case**, made this very point: "The crucial distinction here is that the plaintiffs have satisfied the State's standard voting requirements." *Id*. That is precisely the case here. *Ayers-Schaffner* also specifically rejected, in language equally applicable here, Intervenors' argument that the Photo ID Requirement is akin to a "time, place and manner" restriction:

> **The Board's effect to characterize its order as merely a "time, place and manner" restriction blinks reality.** The States' authority to regulate elections stems from a recognition, embodied in the Constitution, that

> elections must be structured carefully to ensure that they are fair and honest, and so that "some sort of order, rather than chaos, is to accompany the democratic processes." *Burdick*, 504 U.S. 428, 112 S.Ct. at 2063; (quoting *Storer v. Brown*, 415 U.S. 724, 730, 94 S.Ct. 1274, 1279, 39 L.Ed.2d 714 (1974). This authority, however, does not extinguish the State's responsibility to observe the limits established by the First Amendment rights of the State's citizens. **The power to regulate the time, place, and manner of elections does not justify, without more, the abridgement of fundamental rights, such as the right to vote....**
>
> *Tashjian v. Republican Party of Connecticut*, 479 U.S. 208, 217, 107 S.Ct. 554, 550, 93 L.Ed.2d 514 (1986) (citing *Wesberry v. Sanders*, 376 U.S. at 6-7, 84 S.Ct. at 529). **In this case, the contested order does not implicate the structure of the election, but goes directly to the heart of the voting privilege, denying the privilege to many fully qualified voters.**

37 F.3d at 729. (emphasis added) Thus, far from supporting Intervenors' argument, *Ayers-Schaffner* undermines it.

Intervenors' final case, *Gonzales v. Arizona*, 435 F. Supp. 2d 997 (D. Ariz. 2006) likewise addressed, purely as a matter of statutory construction, whether certain state voter **registration** requirements violated **federal statutory** law, not whether the imposition of additional **qualifications to vote,** violates **Missouri's Constitution**. *Gonzales* has nothing to do with the issues presented here.

For the reasons expressed above and in the trial court's sound ruling, the Photo ID Requirement is an additional and impermissible qualification to vote, and is unconstitutional for that reason alone.

II. THE PHOTO ID REQUIREMENT INTERFERES WITH THE FREE EXERCISE OF THE RIGHT OF SUFFAGE IN VIOLATION OF ARTICLE I, SECTION 25. (Responds to point relied on IV of Appellant's brief and point relied on (b) of Intervenor-Appellant's brief.)

A. Article I, Section 25 Expressly Prohibits The Legislature From Taking Any Action To Interfere With The Right Of Suffrage.

Article I, Section 25 of the Missouri Constitution provides:

> That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.

This extraordinary provision, unparalleled in the United States Constitution, expressly prohibits the legislature or any other "power, civil or military" from taking any action to interfere with the fundamental right to vote. The General Assembly, in imposing the Photo ID Requirement, did just that.

B. The Legislature Interfered With The Right Of Suffrage By Imposing The Photo ID Requirement.

In numerous ways detailed in the trial court's findings, the Photo ID Requirement unquestionably interferes with the free exercise of the right of suffrage as to those without a photo ID, including in the following ways specifically found by the trial court:

(a) It requires the payment of money to vote;

(b) It imposes burdensome and time consuming hurdles that must be overcome before receiving a ballot; and

(c) For some, it will make it impossible to vote.

(L.F. at 339, ¶ 20)

These unchallenged findings easily fall within the definition of "interfere" as used in Article I, Section 25. As defined in the Merriam-Webster's Collegiate Dictionary, Tenth Edition, "interfere" means "to interpose in a way that hinders or impedes." As the trial court's findings establish, the Photo ID Requirement unquestionably "hinders or impedes" qualified voters from the free exercise of their constitutional right to vote. It places in front of voters an obstacle that must be overcome before being permitted to vote. For those who are poor, elderly or disabled, the obstacle will serve as a substantial hindrance and impediment to voting. This type of obstacle is precisely what this constitutional provision was designed to prevent. As the trial court eloquently concluded:

> The photo ID burden placed on the voter may seem minor or inconsequential to the mainstream of our society for whom automobiles, driver licenses, and even passports are a natural part of everyday life. However, for the elderly, the poor, the under-educated, or otherwise disadvantaged, the burden can be great if not insurmountable, and it is those very people outside the mainstream of society who are the least equipped to bear the costs or navigate the many bureaucracies necessary to obtain the required documentation. For these many reasons, this court concludes that

the voting restrictions imposed by SB 1014 impermissibly infringe on core voting right guaranteed by the Missouri Constitution.

(L.F. at 304)

C. The State's And Intervenors' Arguments Ignore The Factual Findings By The Trial Court And The Plain Meaning Of Article I, Section 25, And None Of Their Cases Involve State Regulation That Interferes With the Right To Vote.

The State and Intervenors argue that the express constitutional prohibition against interference with the right to vote does not mean what it says. They argue that as long as state regulations are reasonable and designed to combat election fraud, the State may regulate as it sees fit - - even if its regulation interferes with the fundamental right to vote. That is plainly **not** the law.

Not surprisingly, **none** of the cases cited by the State or Intervenors remotely support this proposition; indeed none involve any state regulation that interfers with the right to vote. Both cite *State ex rel. Dunn v. Doburn*, 168 S.W.956 (Mo. 1914). At issue in that case was the constitutionality of a statute that prohibited a candidate from appearing on the ballot as the nominee of more than one party. The court found that regulation to be reasonable and constitutional - - in part because it did **not** interfere with the right to vote:

> This statute does not prevent the free exercise of suffrage. The voter is left free to vote for whom he pleases. Nor does the statute permit any power, "civil or military" to interfere "to prevent the free exercise of the right of

> suffrage." Under this statute, when the voter goes to the quietude of his booth to vote, he has the absolute and unqualified right to vote for whom he pleases.

168 S.W. at 959. Thus, *Dunn* certainly does not support - - and implicitly rejects - - the argument asserted by the State and Intervenors that the State may regulate as it sees fit as long as its regulation is reasonable and designated to prevent fraud.

Intervenors also cite three other cases for the same or a similar proposition. None of these cases involve interference with the fundamental right to vote, and therefore are inapplicable for the same reason. *See Totton v. Murdock*, 482 S.W.2d 65 (Mo. 1972) (holding that a person not of proper voting age at the time of a primary election (and therefore not qualified to vote) is not permitted to vote in that election even if that person will be of proper voting age in the general election); *State ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229, 234 (Mo. Ct. App. 1978) (holding that a new election for absentee voters only may not be ordered when a candidate for whom some of the absentee voters voted was removed from the ballot prior to election day, holding that "[t]o vote by absentee ballot is not a matter of an inherent right but rather a special privilege available only under certain conditions"); and *State ex rel. Kirkpatrick v Board of Election Commissioners*, 686 S.W.2d 888 (Mo. 1985) (holding that the Secretary of State could require that ballot label and ballot card contain only names of candidates of one political party).

Finally, Intervenors cite *State ex rel. Bush-Cheney 2002 v. Baker*, 34 S.W.3d 410 (Mo. Ct. App. 2000) for the unremarkable (and undisputed) general proposition that the

State has a legitimate role in regulating election procedure to prevent fraud. That court simply held that the trial court should have followed and applied a state statute which specified the hours in which voters are allowed to cast ballots. 34 S.W.3d at 412. The Court specifically noted that the plaintiffs had not alleged that the statute was unconstitutional. *Id.* Thus, it did not present the constitutional issue presented here.

D. Intervenors' Mischaracterization Of The Trial Court's Ruling Ignores The Carefully Articulated Basis For And Language Of That Ruling.

Intervenors grossly mischaracterize the trial court's ruling, indicating that it stated "broadly and without qualifications, that the legislature had no power to regulate election procedures." (Int. Br. at 44) The trial court issued no such ruling. Rather, the trial court held that the Photo ID Requirement was an impermissible interference with the fundamental right to vote because it:

> unquestionably "hinders or impedes" qualified voters from the free exercise of their constitutional right to vote. It places in front of voters an obstacle that must be overcome before being permitted to vote. For those who are poor, elderly or disabled, the obstacle will serve as a substantial hindrance and impediment to voting. This type of obstacle is precisely what this constitutional provision was designed to prevent.

(L.F. at 339, ¶ 21)

As explained above, nothing in the trial court's ruling would prevent the State from regulating election procedures - - as long as the regulation did not hinder or impede qualified voters from the free exercise of their constitutional right to vote. To suggest

otherwise is simply to ignore the trial court's carefully-crafted and painstakingly-detailed judgment and findings.

For all these reasons, the Photo ID Requirement is unconstitutional because, based upon the unchallenged findings by the trial court, it unquestionably interferes with the free exercise of the right of suffrage in violation of Article I, Section 25.

III. THE PHOTO ID REQUIREMENT MAKES PAYMENT OF A FEE AN ELECTORAL STANDARD AND THEREFORE VIOLATES THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE MISSOURI CONSTITUTION, ARTICLE I, SECTIONS 10 AND 2, RESPECTIVELY. (Responds to point relied on II of Appellant's brief and point relied on (c) of Intervenor-Appellant's brief.)

A. The Trial Court Expressly Found That The Photo ID Requirement Requires Missouri Citizens Without A Photo ID To Pay Money To Vote, And That Is Unconstitutional.

The trial court expressly and in painstaking detail found that those who do not have a Photo ID must pay money to vote. (L.F. at 303; L.F. at 317-321, ¶ 22-39; L.F. at 339, ¶ 20, ¶¶ 27-28) That is unconstitutional.

The State cannot impinge upon the fundamental right to vote by directly or indirectly requiring payment of a fee as a precondition to voting. The United States Supreme Court made that crystal clear forty years ago in *Harper v. Virginia Bd of*

Elections, 383 U.S. 663 (1966).[5] For those registered Missouri voters who do not already possess a Photo ID, that is precisely what the State has done. To obtain a photo ID, one must first obtain, pay for and provide three forms of documents. The first is typically a birth certificate. To obtain a birth certificate, those born in the State of Missouri must pay $15. For those not born in the State of Missouri, one must pay a fee that varies from $5 to $30. For someone born in the United States, the **only** alternative to paying for a certified birth certificate is to pay for a passport. The cost of a passport is $97. These fees obviously are far greater than the $1.50 fee that was held unconstitutional in *Harper*.

Because the record establishes that the Photo ID Requirement requires Missouri citizens to pay money to vote, the Photo ID Requirement is unconstitutional.

B. The State's And Intervenors' Argument That The State Can Do Indirectly What It Cannot Do Directly Was Properly Rejected By The Trial Court And Was Rejected By The United States Supreme Court.

The State and Intervenors argue that because the State will not charge any fee for the actual nondrivers license itself (if needed to vote), the State is not actually requiring payment of a fee to vote. To the person needing to obtain a nondriver's license to vote, however, being required to pay a fee (or multiple fees) to obtain an underlying document (or multiple documents) is no different than being required to pay a fee to obtain the nondriver's license itself - - both violate the Equal Protection Clause because they make payment of a fee an electoral qualification. The trial court expressly recognized this

[5] The analysis is no different under the Missouri Constitution. *See Casualty Reciprocal Exchange v. Missouri Employers Mutual Ins. Co.*, 956 S.W.2d 249 (Mo. 1997).

"economic reality:"

> The fact that the state does not charge for the non drivers license itself (if obtained for the purpose of voting) does not avoid the constitutional issue or economic reality that voters will have to "buy" numerous governmental documents to get the "free" Photo ID to qualify for the privilege of voting.

(L.F. at 303)

The U.S. Supreme Court likewise made clear that the State cannot do indirectly what it is constitutionally prohibited from doing directly. In language directly applicable here, the Supreme Court concluded:

> **We conclude that a State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.** Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax. Our cases demonstrate that the Equal Protection Clause of the Fourteenth Amendment restrains the States from fixing voter qualifications which invidiously discriminate.

Harper v. Virginia State Board of Elections, 383 U.S. 663, 666 (1966).

Harper held that legislation that attempts to put a price on the right to vote can never pass constitutional scrutiny - - regardless of the justification asserted - - because "wealth or fee paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned." *Id*. at 670; *see also United Mine Workers v. Illinois State Bar Ass'n.*, 389 U.S. 217, 222 (1967) ("We have therefore

repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purposes of dealing with some evil within the State's legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil."); *see also Jenness v. Little*, 306 F. Supp. 925, 929 (N.D. Ga. 1969) (holding that prohibiting candidates from being listed on the ballot unless they post a certain amount of money is illegal and unconstitutional).

Contrary to the State's and the Intervenors' argument, the State cannot do indirectly what it is constitutionally prohibited from doing directly - - requiring payment of a fee as a precondition to voting.

C. Intervenors' Argument That The State Constitutionally May Require A Fee To Vote If The Fee Is Paid In Connection With Obtaining A License Has Been Rejected By The United States Supreme Court And Was Properly Rejected By The Trial Court.

The Supreme Court in *Harper* went on to address the same argument made by supporters of the Photo ID Requirement - - that the State is only extracting a fee for a license and that is permissible. In specifically rejecting that argument, the Court stated:

> It is argued that a State may exact fees from citizens for many different kinds of licenses; that if it can demand from all an equal fee for a driver's license, it can demand from all an equal poll tax for voting. But we must remember that the interest of the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process.

> Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored. **To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant.**

383 U.S. at 668. (emphasis added) (citations omitted).

The trial court itself emphasized the difference between a license, with respect to which the State can demand a fee, and a fundamental right, for which no fee can be constitutionally required: "While a license to drive may be just that: a license and not a right. The right to vote is also just that: a right and not a license." (L.F. at 303) The mere fact that the State generally can require the payment of a fee in connection with providing a license does not mean that it can do so if the license is required to vote.

D. The Georgia And Indiana Federal Court Decisions Provide No Support For The State's And Intervenors' Arguments That The State Can Require The Payment Of Money To Vote.

The State and the Intervenors rely on Georgia and Indiana federal court decisions as support for their assertion that the State constitutionally can require the payment of money to vote. Those cases do not support their assertion under the facts presented here. In each case, the federal court found that it was "speculative" whether any voters would actually be required to pay the fee to obtain a certified birth certificate because a birth certificate was only one of many acceptable documents and not all documents required the payment of a fee (unlike in Missouri.)

As expressed by the Georgia court:

> Plaintiffs' contention that some voters might be required to pay a fee to obtain a birth certificate in order to obtain a Voter ID card, however, is **wholly speculative**. **Plaintiffs have failed to show that any particular voter would actually be required to incur that cost in order to vote**. Indeed, under the 2006 Photo ID Act and the accompanying rules and regulations adopted by the State Election Board, **a birth certificate is only one of the many documents that the registrar may accept to issue a Voter ID card**. Consequently, Plaintiffs have failed to demonstrate that the cost of obtaining a birth certificate is sufficiently tied to the requirements of voting so as to constitute a poll tax.

Common Cause/Georgia v. Billups, 439 F. Supp. 2d 1294, 1355 (N.D. Ga. 2006). (emphasis added) *See also Indiana Democratic Party, et al. v. Rokita, et al*., 2006 WL 1005037 at *37 (S.D. Ind. 2006) ("Plaintiffs' contention about the need for individuals to pay a fee for a birth certificate is **purely speculative and theoretical**, since they have provided no evidence to demonstrate that anyone will actually be required to incur this cost to vote . . . (and) overlooks the fact that a **valid birth certificate is only one of the primary documents acceptable** . . .")

In Missouri, the **only** two documents permitted to show proof of lawful presence for those born in the United States are a certified birth certificate and a passport. Both cost money. Thus, even if the Georgia and Indiana cases were right in rejecting the arguments made under federal law in those cases and under the facts presented in those cases, those holdings do not apply to the Missouri law question presented here under

different facts.

E. Intervenors' Federal Cases Involving Disclosure Of Social Security Numbers Do Not Address the Payment Of Money To Vote And Are Therefore Inapplicable.

Intervenors also cite two federal decisions that address whether a state violates the United States Constitution if it requires citizens to disclose a social security number during the voter registration process. *See Greidinger v. Davis*, 988 F.2d 1344 (4th Cir. 1993) and *McKay v. Thompson*, 226 F.3d 752 (6th Cir. 2000). Plaintiffs' concern in both of these cases was **privacy** -- they did not want their social security numbers disclosed publicly as was contemplated by the state statutes. No argument was made in either case that it would cost money or be a burden to **obtain** a social security number as suggested by Intervenors. *See* Int. Br. at 89. Indeed, plaintiffs in those cases **already had** a social security number and therefore would not have to pay money to obtain one. These cases plainly are inapplicable here.[6]

[6] Contrary to Intervenors' position that something less than strict scrutiny should be applied, the Fourth Circuit in *Greidinger* ruled that strict scrutiny was required because the requirement that the voter disclose his or her social security number was a substantial burden of the voter's fundamental right to vote. It further ruled that the law was not narrowly tailored to fulfill the state's asserted interest in preventing voter fraud, and invalidated the law. 988 F.2d at 1352-55.

F. Whether Called A "Poll Tax" Or A Fee, The Photo ID Requirement Requires Those Without A Photo ID To Pay Money To Vote, And That Is Unconstitutional.

Finally, the State and Intervenors contend that the fees Missouri voters would be required to pay to obtain a Photo ID are not really a "poll tax." But there is no magic ascribed to the words "poll tax." As the Supreme Court in *Harper* made clear, requirement to pay "any fee" to be able to vote is unconstitutional. Whether it's called "poll tax" or a fee, at the end of the day a Missouri voter without a Photo ID is going to have to pay money to vote. That is unconstitutional, period.

IV. THE PHOTO ID REQUIREMENT CONSTITUTES AN UNDUE BURDEN ON THE FUNDAMENTAL RIGHT TO VOTE THAT IS NOT NARROWLY TAILORED TO MEET A COMPELLING STATE INTEREST IN VIOLATION OF THE DUE PROCESS AND EQUAL PROTECTION CLAUSES OF THE MISSOURI CONSTITUTION, ARTICLE I, SECTIONS 10 AND 2, RESPECTIVELY. (Responds to point relied on III of Appellant's brief and point relied on (b) of Intervenor-Appellant's brief.)

A. Under Settled Missouri Law, The Photo ID Requirement Must Be Subjected To Strict Scrutiny Because It Impinges On A Fundamental Right.

To determine the constitutionality of a state statute under Missouri's Equal Protection Clause, the Missouri Supreme Court requires a "two-part analysis." *Etling v. Westport Heating & Cooling Systems, Inc.*, 92 S.W.3d 771, 774 (Mo. 2003):

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

92 S.W.3d at 774 (emphasis added).[7]

As *Etling* teaches, the "first step" is to determine whether the Photo ID Requirement "impinges on a fundamental right." Based upon the unchallenged factual findings by the trial court, there can be no reasonable question that the Photo ID

[7] An identical analysis is used when determining the constitutionality of a statute under the Due Process Clause. *See Casualty Reciprocal Exchange v. Missouri Employers Mutual Ins. Co*., 956 S.W.2d 249 (Mo. 1997).

Requirement impinges on a fundamental right. The trial court found in detail that the Photo ID Requirement impinges on the right to vote by requiring the payment of money to vote and by imposing burdensome and time consuming hurdles that must be overcome before receiving a ballot. (L.F. at 317-321; L.F. at 339, ¶ 20) The trial court further found that "for the elderly, the poor, the under-educated, or otherwise disadvantaged, the burden can be great if not insurmountable." (L.F. at 304) "For some," the trial court found, "it will make it impossible to vote." (L.F. at 339, ¶ 20)[8]

The right to vote under the Missouri constitution, unlike under the United States Constitution, is given explicit protection. Article VIII, Section 2; Article I, Section 25.

[8] These factual findings - - like all factual findings by the trial court - - are unchallenged by any point relied on asserted by the State or the Intervenors, and therefore must be taken as true. Intervenors state that only about 19,000 Missourians do not already possess State-issued photo identification. (Int. App. Br. at 83) Not so. This statement is contradictory to the circuit court's finding that approximately 240,000 registered Missouri voters may not have acceptable Photo IDs. (L.F. at 317, ¶ 21; L.F. at 345, ¶ 35) Intervenors have not challenged the trial court's findings of fact. Regardless, it does not matter how many Missouri voters do not have acceptable photo IDs – the court found that each named Plaintiff does not possess a photo ID acceptable under the MVPA, (L.F. at 310-312, ¶¶ 1-6), and that for those similarly situated to Plaintiffs, "the elderly, the poor, the under-educated, or otherwise disadvantaged," the photo ID burden is "great if not insurmountable." (L.F. at. 304)

Missouri cases uniformly make clear that the right to vote is a fundamental right. *See, e.g. Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d at 774; *Mullenix-St. Charles Properties, L.P. v. City of St. Charles*, 983 S.W.2d 550, 559 (Mo. Ct. App. 1998); *Blaske v. Smith & Entozeroth, Inc*, 821 S.W.2d 822, 829 (Mo. 1991); *Nguyen v. Nguyen*, 882 S.W.2d 176, 177-78 (Mo. Ct. App. 1994). Therefore, under Missouri constitutional law, strict scrutiny is required because the Photo ID Requirement impinges on a fundamental right.

Missouri courts consistently have applied strict scrutiny to laws that impinge on fundamental rights, including the right to vote. *See, e.g., In re Extension of Boundaries of Glaize Creek Sewer District of Jefferson County*, 574 S.W.2d 357 (Mo. 1978) (Applying strict scrutiny to strike down a statute that granted the right to vote only to property owners in a local election.); *Bernat v. State,* 194 S.W.3d 863 (Mo. 2006)(fundamental right of liberty); *In re Care and Treatment of Norton*, 123 S.W.3d 170 (Mo. 2003)(same); *Komosa v. Komosa,* 939 S.W.2d 479 (Mo. Ct. App. 1997)(fundamental right to marry).[9]

[9] State courts from other jurisdictions uniformly apply strict scrutiny to laws that impinge on the fundamental right to vote. *See, e.g., Jones v. Womacks*, 852 N.E.2d 1035 (Ind. Ct. App. 2006) (applying strict scrutiny to strike down a statute which called for what amounted to a de facto "election" because it violated the Equal Protection Clause in that it restricted the right to participate in the process to owners of real property living within the political subdivision); *Akins v. Secretary of State*, 904 A.2d 702 (N.H. 2006); *Kahn v.*

B. The State's and Intervenors' Argument That The Photo ID Requirement Is Subject To Only Rational Basis Scrutiny Is Directly Contrary to Controlling Missouri Caselaw And Is Not Supported By, And In Some Cases Is Directly Contrary To, Their Own Cases.

The State and the Intervenors advance the unsupportable position that the Photo ID Requirement is subject only to rational basis analysis. *See, e.g.*, Int. Br. at 46. ("[T]he legislature's election regulations must be enforced if they are rationally related to a conceivable governmental objective."); App. Br. at 38; Int. Br. at 43. (Regulations governing elections "will be sustained if they bear a rational relationship to an articulable state purpose.") **None** of the cases cited in support of that position involve an impingement on the right to vote, and therefore are inapplicable to the facts presented here. Plaintiffs do not dispute that election regulations that do **not** impinge on a fundamental right like the right to vote are subject to rational basis scrutiny. It is equally clear, however, that election regulations (and any other laws) that **do** impinge on a

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Griffin, 701 N.W.2d 815 (Minn. 2005)(the right to vote is a fundamental right and potential infringements are analyzed using strict scrutiny); *Fumarolo v. Chicago Bd. Of Educ*., 566 N.E.2d 1283, 1291 (Ill. 1990)("When the means used by the legislature to achieve a legislative goal impinges upon a fundamental right, such as the right to vote, a court will examine a claim that there was a violation of the constitutional right to equal protection under a standard of strict scrutiny."); *City of Seattle v. State*, 694 P.2d 641 (Wash. 1985); *Choudhry v. Free*, 552 P.2d 438 (Cal. 1976).

fundamental right are subject to strict scrutiny as *Etling* and many other Missouri cases have uniformly held.

For example, the State and the Intervenors cite *State ex rel. McClellan v. Kirkpatrick*, 504 S.W.2d 83 (Mo. banc 1974). (App Br. 37-38; Int. Br. 40-42) That case is not applicable here because it addressed the constitutionality of a regulation that did not impinge upon the fundamental right to vote. That regulation simply required that a primary election voter make his ballot choice known to the election judges to permit the judges to deliver the appropriate ballot to the voter. The court made clear the obvious - - that regulation did not impinge on the right to vote. 504 S.W.2d at 89. In fact, *McClellan* also makes clear that the state's authority to enact voting regulations does not extend to those that infringe on the right to vote. *See id.* (Legal regulations regulating voting must be enforced "unless their application offends against the constitutional rights of people to exercise their right to vote.").

State ex rel. Dunn v. Coburn, 168 S.W. 956 (Mo. 1914), another case upon which the State and the Intervenors rely, is inapplicable for the same reason. (App. Br. at 60-61; Int. Br. at 42-43) *State ex rel. Dunn* merely held that a statute prohibiting the placing of the name of a candidate for political office on a primary or general ballot in more than one place and under more than one party designation did not violate the Missouri Constitution. That statute did not impinge on the right to vote, as the court itself made clear. *State ex rel. Dunn*, 168 S.W. at 959 ("This statute does not prevent the free exercise of suffrage. The voter is left free to vote for whom he pleases. Nor does the

statute permit any power, 'civil or military,' to interfere 'to prevent the free exercise of the right of suffrage.'").

The State and the Intervenors also cite *State ex rel. Kirkpatrick v. Board of Election Commissioners of St. Louis County*, 686 S.W.2d 888 (Mo. Ct. App.1985), which involved a challenge to the constitutionality of 15 CSR 30-030, which required that the ballot label and ballot card in primary elections contain only names of candidates of one political party and that polling booths be identified by party label in primary elections. *State ex rel. Kirkpatrick*, 686 S.W.2d at 890. Again, no impingement on the right to vote was involved.

The State and the Intervenors simply fail to recognize the difference between administrative election regulations that do not infringe on the right to vote, which are subject to a rational basis review, and those that do infringe on the right to vote, which are subject to strict scrutiny. There can be no reasonable question, based upon the facts found by the trial court, that the Photo ID Requirement impinges on a fundamental right and is therefore subject to strict scrutiny under Missouri law.

C. To The Extent Federal Precedent Interpreting The United States Constitution Is Considered, Strict Scrutiny Still Must Be Applied.

While Missouri constitutional law obviously governs the legal issues presented here, the State and the Intervenors have relied heavily on federal cases interpreting the United States Constitution. They argue that those cases do not necessarily require that strict scrutiny be applied in this case. As pointed out above, the United States Constitution, unlike the Missouri Constitution, contains no explicit guarantee of the right

to vote. Voting is, and has always been, a matter regulated primarily by the States. There is no reason for this Court to depart from its sound and consistent practice of applying strict scrutiny to statutes that impinge on the fundamental rights like right to vote. But even if federal case law were examined and applied, strict scrutiny still would be required under the facts presented here.[10]

As the United States Supreme Court has recognized, "[i]n decision after decision, this Court has made clear that a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction [and that,] as a general matter, before that right to vote can be restricted, the purpose of the restriction and the assertedly overriding interests served by it must meet close constitutional scrutiny." *Dunn v. Blumstein*, 405 U.S. 330 (1972) (state law requiring waiting period prior to voting, purportedly to combat fraud, did not further any compelling state interest and violated the equal protection clause of the Fourteenth Amendment). In *Reynolds v. Sims*, 377 U.S. 533 (1964), the Supreme Court stated:

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[10] The brief filed by Amici National Association for the Advancement of Colored People (NAACP), Inc., Missouri Citizens Education Fund, Grass Roots Organzing, The Whole Person, Disabled Citizens Alliance for Independence, Southwest Center for Independent Living, Lawyers' Committee for Civil Rights Under Law, the American Civil Liberties Union Foundation, Inc. (ACLU), and People for the American Way Foundation focuses primarily on this particular issue, and Plaintiffs refer the Court to that brief for its extended analysis of this issue.

> Undoubtedly, the right of suffrage is a fundamental matter in a free and democratic society. Especially since the right to exercise the franchise in a free and unimpaired manner is preservative of other basic civil and political rights, and alleged infringement of the right of citizens to vote must be carefully and meticulously scrutinized.

Reynolds v. Sims, 377 U.S. 533, 561-62 (1964).

Likewise, in *Kramer v. Union Free School District*, 395 U.S. 621 (1969), the Supreme Court stated, "if a challenged state statute grants the right to vote to some bona fide residents of requisite age and citizenship and denies the franchise to others, the Court must determine whether the exclusions are necessary to promote a compelling state interest." 395 U.S. at 629 (holding that a statute limiting voting rights to owners or lessees of taxable realty was not necessary to promote a compelling state interest and denied equal protection to persons excluded); *see also Morgan v. City of Florissant*, 147 F.3d 772 (8th Cir. 1998) (outlining differences between election laws that provide for the redrawing of political subdivisions, which are analyzed under a rational basis test, and election laws imposing restrictions on voters based on characteristics such as wealth and race, which "affect more significant rights and constitutional concerns, meriting strict-scrutiny review."); *Antonio v. Kirkpatrick*, 453 F. Supp. 1161, 1163 (W.D. Mo. 1978) (If the classification affects a fundamental right or is based on a "suspect" criterion, then it will be strictly scrutinized, and "the state must demonstrate a clear showing that the

burden imposed is necessary to protect a compelling and substantial government interest.").[11]

Under federal constitutional analysis, even though a governmental purpose may be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly reached. *Antonio*, 453 F. Supp. at 1167. This is strict scrutiny.

The State and Intervenors rely heavily on *Burdick v. Takushi*, 504 U.S. 428 (1992) to argue that federal courts would not apply strict scrutiny in this case. In *Burdick*, the United States Supreme Court applied a flexible test in holding that Hawaii's prohibition on write-in voting did not unreasonably infringe upon its citizens' rights under the United States Constitution's First and Fourteenth Amendments. That case would not be applicable here even if federal law was controlling. The law challenged in *Burdick* did not impinge or interfere with a qualified voter's fundamental right to cast a ballot. Rather, it limited the potential candidates whose names would appear on the ballot. Under this limited circumstance, *Burdick* did not apply strict scrutiny but instead used the following test:

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[11] "When a classification is subjected to strict scrutiny, it is almost always found unconstitutional." *Stiles v. Blunt*, 912 F.2d 260, 263 fn5 (8th Cir. 1990)(citing Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv.L.Rev. 1, 8 (1972) (strict scrutiny review is "strict" in form but usually "fatal" in fact)).

> A court considering a state election law challenge must weigh the character and magnitude of the asserted injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate against the precise interests put forward by the State as justification for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights.

Id. at 434. The Court explained that the reason it used a different standard was because "it [could] hardly be said that the laws at issue here unconstitutionally limit access to the ballot by party or independent candidates *or unreasonably interfere with the right of voters to associate* and have candidates of their choice placed on the ballot." *Id*. at 434 (emphasis added). In fact, the *Burdick* court held that the state laws in Hawaii generally "provide[d] easy access to the ballot" for voters. *Id*. at 436-37.

Significantly, and contrary to the State's and Intervenors' argument, *Burdick* did not hold that strict scrutiny could not be appropriately applied to election laws. In fact, it pointed out that when election laws burden constitutional rights, strict scrutiny was appropriate. *Id*. at 434 ("[A]s we have recognized when those rights are subjected to "severe" restrictions, the regulation must be "narrowly drawn to advance a state interest of compelling importance."). Lower courts, including Georgia federal court analyzing a similar Photo ID Requirement, have followed *Burdick* and applied strict scrutiny when election laws burdening constitutional rights were at issue.

The Georgia federal court found - - citing *Burdick* - - that the State of Georgia's recently passed Photo ID Act was unconstitutional in part because it unduly burdened the fundamental right to vote:

> [T]he burden on the affected voters to obtain a Photo ID . . . is severe. Under those circumstances, the State Defendants' proffered interest does not justify the severe burden that the 2006 Photo ID Act's Photo ID Requirement places on the right to vote . . .

See Common Cause/Georgia v. Billings, 439 F.Supp.2d 1294 (N.D. Ga. 2006). It further found:

> The evidence in the record demonstrates that many voters who lack an acceptable Photo ID for in-person voting are elderly, infirm, or poor, and lack reliable transportation to a country registrar's office. For those voters, requiring them to obtain a Voter ID card in the short period of time before the …primary elections…is unduly burdensome.

Id. at 1345. The Georgia federal court found that the photo identification requirement violated the Equal Protection Clause, stating:

> Unfortunately, the 2006 Photo ID Act's Photo ID Requirement is most likely to prevent Georgia's elderly, poor, and African-American voters from voting in the …primary elections and subsequent run-off elections. The Court again observes that for these citizens, the character and magnitude of their injury-the loss of their right to vote-is undeniably

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

Id. at 1350.

The Georgia federal court is not alone in applying strict scrutiny under *Burdick* to invalidate election laws that burden the right to vote. *See Republican Party of Arkansas v. Faulkner County, Arkansas*, 49 F.3d 1289, 1297 (8th Cir. 1995) (striking down statute that required parties desiring to have candidates on the general election ballot to conduct primary elections and which required each party to fund its primary election) ("Our assessment of the burdens imposed by the combined effects of [the statutes] upon the First and Fourteenth Amendment rights of voters and parties convinces us that we must apply strict scrutiny even under the more flexible, sliding-scale standard of review articulated in *Burdick.*"); *Libertarian Party of Ohio v. Blackwell*, - - F.3d - - - -, 2006 WL 2547511 at *7 (6th Cir. 2006) (discussing *Burdick* but applying strict scrutiny to an election law); *Greidinger v. Davis*, 988 F.2d 1344, 1349-55 (4th Cir. 1993)(applying strict scrutiny to an election law); *Van Valkenburgh v. Citizens for Term Limits*, 15 P.3d 1129, 1134 (Idaho 2000)(The Idaho statute, "unlike the statute in Burdick, is not simply a time, place or manner voting restriction to which a more deferential standard of review might be applied. The ballot designation here relates to the very basic right of a voter to express support for a candidate within the sanctity of the voting booth. We find no reason to apply a different standard to the exercise of this fundamental right and will apply strict scrutiny.")

Intervenors rely on *Clingman v. Beaver*, 544 U.S. 581 (2005), where the United

States Supreme Court subjected a statute requiring voters to register with a party before participating it its primary to the *Burdick* flexible scrutiny because it "minimally burden[ed] voters' *associational* rights." *Clingman*, 544 U.S. at 582 (Int. Br. at 50-51) (emphasis added). The court found that Oklahoma's semiclosed primary election imposed "an even less substantial burden than did the Connecticut closed primary at issue in *Tashjian*. 544 U.S. at 582. ("Such minor barriers between a voter *and party* do not compel strict scrutiny.") (emphasis added). Because *Clingman*, like every case relied upon by the Intervenors, does not involve a law that unreasonably interfered with the fundamental right to vote, the analysis contained therein does not apply here.

Intervenors also rely on *Indiana Democratic Party, et al. v. Rokita, et al*., 2006 WL 1005037 (S.D. Ind. 2006), where the court declined to apply strict scrutiny to Indiana's Photo ID Requirement because plaintiffs "totally failed to adduce evidence establishing that any actual voters will be adversely impacted." 2006 WL 1005037 at *32. Specifically, plaintiffs failed (1) to submit "any statistics or aggregate data indicating particular groups who will be unable to vote or will be forced to undertake appreciable burdens in order to vote"; and (2) "to produce any evidence of any individual, registered or unregistered, who would have to obtain photo identification in order to vote, let alone anyone who would undergo any appreciable hardship to obtain photo identification in order to be qualified to vote." *Id*. at *34-35. The court found that because there was no demonstrated "severe burden" on the right to vote, the photo identification requirement would not be subjected to strict scrutiny. *Id*. at *36. However, the court strongly implied that if the plaintiffs had presented such evidence, strict scrutiny

would have been warranted. *Id*. at *34 ("Plaintiffs have not demonstrated that SEA 483 will impose severe burdens on the rights of voters, thereby rendering strict scrutiny unwarranted.")

Here, the trial court's findings make clear that there was not any such failure of proof in this case. The named Plaintiffs themselves are qualified Missouri voters whose fundamental right to vote will be burdened if they are required to go through the process of obtaining the required Photo ID in order to vote. (L.F. at 310-313, ¶¶ 1-10) In fact, the court below found that the burden imposed by the Photo ID Requirement would be "great if not insurmountable." (L.F. at 304) "For some," the trial court found, "it will make it impossible to vote." (L.F. at 339, ¶ 20) Thus, the Indiana case provides no support for the State's and the Intervenors' argument that something less than strict scrutiny should be applied here, and impliedly rejects that argument.[12]

[12] Intervenors also argue that the Indiana Photo ID law is stricter than Missouri's, and that the experience of Indiana voters with Indiana's Photo ID Requirements demonstrates that Photo ID Requirements do not impose a burden on legitimate voters. (Int. Br. at 82) Any experience voters in Indiana may have had with that State's Photo ID Requirement is irrelevant. The Indiana Photo ID law is far less burdensome to Indiana voters than the MVPA would be to Missouri voters because many categories of Indiana voters have an automatic right to vote absentee. Absentee voting in Indiana does not require a photo ID. Under Missouri law, absentee voting is far more restricted, both in terms of permissible justifications and procedure. For example, to vote absentee in Missouri, an individual

Thus, whether long-established Missouri constitutional analysis or federal constitutional principles are applied, the result is the same. The constitutionality of the Photo ID Requirement must be evaluated under strict scrutiny.

D. The Photo ID Requirement In The MVPA Cannot Survive Strict Scrutiny.

There can be no question that the Photo ID Requirement cannot survive strict scrutiny. Under strict scrutiny, the Court must determine whether the challenged provision "is necessary to accomplish a compelling state interest." *Etling*, 92 S.W.3d at 774; see *State v. Williams*, 729 S.W.2d 197 (Mo. banc 1987) (when a statutory scheme impinges upon a fundamental right explicitly or implicitly protected by the Constitution it receives strict judicial scrutiny to ascertain whether the classification is necessary to a compelling state interest).

Additionally, to survive strict scrutiny, the challenged provision must also be narrowly tailored to effectuate only those compelling interests asserted. *See Komosa v. Komos*a, 939 S.W.2d 479, 482 (Mo. Ct. App. 1997)("Any state restriction which significantly interferes with the exercise of a fundamental right is subject to strict scrutiny

---

must swear that he or she will be "prevented" from going to the polls on election day for one of five narrow reasons. Mo. Rev. Stat. § 115.277. No such requirement exists in Indiana. For this reason, Intervenors' evidence about Indiana voters' experiences under a different election scheme is a classic "apples" to "oranges" comparison that has no relevance to the Missouri constitutional issues presented here.

and cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.").

As explained below, the Photo ID requirement is not necessary to promote any compelling state interest, and is not narrowly tailored to effectuate only the compelling state interests asserted. The same interests can be - - and have been - - accomplished by other, less restrictive alternatives.

1. The Photo ID Requirement In The MVPA Is Not Necessary To Accomplish Any Compelling State Interest.

Also as explained above, the Photo ID requirement is far from necessary to accomplish any compelling state interest. There is no evidence that existing State law is insufficient to deter and prevent voter impersonation fraud, the only type of fraud the Photo ID Requirement actually could prevent. (Tr. 197-200, 230-235; L.F. at 322 ¶ 47) In fact, the evidence is to the contrary. As the trial court found, since the 2002 change in Missouri election laws requiring some form of identification, there have been no reported instances of voter impersonation fraud. (L.F. at 298) Governor Blunt himself recognized that the two statewide elections held after these changes were implemented were "fraud-free" and "were two of the cleanest and problem-free elections in recent history." (Ex. 31, Ex. 10, ¶ 30) Secretary of State Carnahan has made the same point. (Ex. 33, L.F. at 331, ¶ 57) The evidence that was presented establishes that voter impersonation fraud is not a problem in Missouri. (L.F. at 322, ¶ 48) Robert Nichols, Director of Elections for Jackson County, Missouri for the last 20 years, testified that voter impersonation fraud is not a problem in Jackson County, Missouri. (Tr. at 96; L.F. at 323, ¶ 49) Judy Taylor,

Director of Elections for St. Louis County, Missouri for the last 12 years, testified that voter identification fraud is not a problem in St. Louis County, Missouri. (Tr. at 150-51; L.F. at 325, ¶ 51) Carol Signigio, former Assistant Director of Elections for the City of St. Louis, Missouri for 12 years and a consultant to the St. Louis City Election Board for the past 7 years, testified that voter impersonation fraud is not a problem in the City of St. Louis. (Tr. at 119-120; L.F. at 328, ¶ 53) Wendy Noren, Boone County Clerk, also testified that voter impersonation fraud is not a problem in Boone County, Missouri. (Tr. at 194-195) The court found the testimony from each of these witnesses to be credible. (L.F. at 323, ¶ 49; L.F. at 325, ¶ 51; L.F. at 327-330, ¶¶ 52-56)

Further, there is no perception among Missouri voters that this kind of voter fraud is a problem or that the Photo ID requirement is needed to address it. In a June 2006 poll of Missouri voters on statewide issues, 54% of respondents stated that they opposed the Photo ID Requirement, while only 18% favored it (an additional 17% were in favor of it only if it was phased in over a longer period of time). (Ex. 43; Ex. 10, ¶ 27) Ms. Noren, who also served for 15 years on the legislative committee for the Association of Missouri State County Clerks and Election Authorities, and who regularly is in contact with local election authorities throughout the State of Missouri, testified that there has never been any general perception in her Association that voter identification fraud was a problem. (Tr. at 180, 195-197, 221-222; Ex. 51, ¶¶ 3, 6; L.F. at 328-329, ¶ 54) There is simply no need - - compelling or otherwise - - for the Photo ID Requirement. It certainly is not **necessary** to accomplish a compelling state interest.

To attempt to create a need where none exists, Intervenors and proponents of the Photo ID Requirement have trumpeted a report by Missouri Secretary of State Matt Blunt describing the 2000 St. Louis election. That report was relied upon and cited in many of the articles Intervenors offered as "evidence" in this case. This is the primary and most recent part of what Intervenors claim is Missouri's "unfortunate history" of vote fraud. (The rest is based on alleged instances of election fraud that occurred many years, if not decades, ago.) Obviously, the subject of that report - - activities concerning voting in St. Louis in the 2000 election - - occurred **before** the 2002 changes went into effect, and therefore does not - - and cannot - - raise any legitimate concerns about voter identification fraud under the 2002 law which, as explained above, for the first time generally required some form of voter identification to be presented for in-person voting.

That report likewise does not document any widespread voter **identification** fraud before the 2002 changes became effective. The report identified 114 alleged votes by convicted felons (not solved by Photo ID); 79 voters allegedly registered with vacant-lot addresses (not solved by Photo ID); 45 people who allegedly voted twice (not solved by Photo ID); and 14 votes allegedly by deceased persons (potentially solved by photo ID, but also solved by HAVA's new database provisions.) Even if these allegations proved true – and most were debunked upon further investigation as explained below – at most 0.01% of the ballots cast in the City of St. Louis - - and less than 0.0006% in the State of Missouri - - were tainted by the kind of election fraud that might have been prevented by

Photo ID Requirement.[13] But even to address these miniscule percentages, the Photo ID Requirement is an unnecessary response, as the problems will already be remedied simply by implementing existing federal law.

The United States Department of Justice under Attorney General John Ashcroft conducted an investigation on voter fraud in Missouri in the 2000 election. It did not find any problems with people voting that were not entitled to vote, but did document many situations in which voters were not permitted to vote. The Department of Justice found in 2002 that the St. Louis Board of Elections prior to the 2000 election improperly removed voters from the registration rolls by placing voters on inactive status without notice and then failing to maintain procedures on election day adequate to ensure that those voters could reactivate their registration status and vote without undue delay:

> The United States' Complaint alleges that the placement of eligible voters on inactive status by the Board of Election Commissioners for the City of St. Louis, when combined with the election-day procedures that inactive

[13] By contrast, the odds of being struck by lightning in a person's lifetime is .02%. (Ex. 56) That is 33 times greater than the odds of a Missourian in the 2000 election having his or her vote cancelled by someone posing as another voter. The odds of being struck by lightening are infinitely greater than the odds of a Missourian in elections since 2000 having his or her vote cancelled by someone posing as another voter; not a single documented instance - - in over 6 million votes cast in statewide elections since 2000 - - has been reported. (Ex. 44 at p. 2 of attached report)

> voters were required to follow in order to restore their active voter status and vote during the November 2000 and March 2001 elections, constituted a removal of those voters from the voter registration rolls in violation of Section 8 of the NVRA.

(Ex. 30) Although the Department investigated the allegations raised in a report by Secretary of State Blunt, it did not make any findings on those allegations or require any corrective action related to those allegations. No one was convicted of any voting fraud. No one was even charged with voting fraud.

In an investigation of 2000 election activities in the City of St. Louis performed by Secretary of State Rebecca McDonnell Cook, Secretary of State Cook found, like the Department of Justice, that "there were many people who registered to vote prior to the October 11, 2000 statutory deadline whose names did not appear in the proper precinct registers on election day." (Ex. 44) It also found that "[m]any qualified, registered voters were turned away from the polls because their names could not be found in the precinct rosters and their qualifications could not be verified by the election judges." *Id.* at p. 2 of attached report. Also like the Department of Justice, the report by Secretary of State Cook documented no evidence of voter impersonation fraud.

Secretary of State Blunt himself recognized in 2004 that "Missouri's problems in November 2000 were a result of problems in St. Louis City relating to mishandling the City's inactive voter list, improper voting through the abuse of court orders to vote, and an attempt to keep the City polls open in violation of state law." (Ex. 31, ¶ 2) Importantly, Secretary of State Blunt in the same letter specifically rejected the notion

that any significant type of voter fraud - - voter impersonation or otherwise - - has occurred since the 2002 election law changes: "Furthermore, subsequent statewide elections (the November 2002 general election and the February 2004 presidential primary) were two of the cleanest and problem-free elections in recent history." *Id.* In another letter in March, 2004 to the St. Louis Post-Dispatch Governor Blunt characterized these elections as "fraud-free." (Ex. 32) For all these reasons, Intervenors' and the State's attempt to justify the Photo ID Requirement on the need to prevent existing or ongoing voter fraud is wholly unfounded.

The State argues that identification requirements are part of the General Assembly's authority to regulate elections and that preserving the integrity of elections is a legitimate state goal. (App. Br. at 43-44) Plaintiffs do not dispute that preserving the integrity of elections is a legitimate state goal. However, as stated above, while the legislature may enact regulations as to the time, place and manner of elections, those regulations must not impinge upon the fundamental right to vote.

The State argues that a state has a "compelling interest in preserving the integrity of its election process" and "protecting it from the appearance and reality of corruption." (App. Br. at 45-46) However, "electoral 'integrity' does not operate as an all-purpose justification flexible enough to embrace any burden, malleable enough to fit any challenge and strong enough to support any restriction." *Republican Party of Arkansas v. Faulkner County, Arkansas,* 49 F.3d 1289, 1299 (8th Cir. 1995)(holding that the state had failed to come forward with a compelling state interest necessitating the "heavy burdens" placed upon the First and Fourteenth Amendment rights of voters and political parties).

Further, none of the cases upon which the State relies apply here. *Burson v. Freeman*, 504 U.S. 191 (1992), which upheld a Tennessee statute prohibiting solicitation of votes and display or distribution of campaign materials within 100 feet of the entrance to the polling place, clearly does not apply, but to the extent that this Court considers *Burson*, this Court should note that "[t]o survive strict scrutiny. . .a State must do more than assert a compelling state interest – it must demonstrate that its law is *necessary* to serve the asserted interest." 504 U.S. at 199 (emphasis added). The final two cases cited by the State, *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604 (1996) and *Buckley v. Valeo*, 424 U.S. 1 (1975), were campaign finance cases in which there was no infringement on the right to vote.

In short, the State and Intervenors have offered no facts or law that suggest, much less establish, that the Photo ID Requirement is **necessary** to accomplish any compelling state interest. This is sufficient reason alone to find the requirement unconstitutional.

2. The Photo ID Requirement In The MVPA Is Overbroad And Not Narrowly Tailored To Address The State Interest Of Preventing Voter Fraud.

Even if some type of identification requirement was necessary to prevent fraudulent voting by imposters, the Photo ID Requirement still is unconstitutional because it is overbroad and is not narrowly tailored to advance only that governmental interest. For example, the Photo ID Requirement is:

(i) Overbroad because it applies to and burdens the right to vote of at least 170,000 (or more) registered voters who do not have a Photo

ID to supposedly prevent a hypothetical miniscule number of people from fraudulently casting ballots by misrepresenting their identities to poll workers.

(ii) Not narrowly tailored to prevent the primary source of fraudulent voting that does exist – namely fraudulent voting by absentee ballots.

(iii) Not narrowly tailored because less restrictive means could be used - - and have been used in the current law - - to accomplish the same objective.

The Photo ID Requirement in the MVPA is not narrowly tailored because under existing Missouri law, less restrictive means have already been used to accomplish the same objective. For example:

- The legislature has made fraudulent voting a felony, punishable by a fine of up to ten thousand dollars ($10,000.00) or imprisonment for up to five (5) years, or both, Mo. Rev. Stat. § 115.631.
- HAVA now mandates that voter registration records be updated to eliminate those who have died, moved or who are no longer eligible to vote.
- Election officials in each precinct are required to maintain a list of names and addresses of registered voters residing in that precinct, and to check off each person's name as he

casts his ballot, Mo. Rev. Stat. §§ 115.431, 115.433, 115.435[14].

- Registered voters are required to present at least one of several forms of documentary identification to election officials who are required to match the name and address shown on the document to the name and address on the official roll of registered voters before issuing a ballot. Mo. Rev. Stat. §115.427 (2002).

For these reasons, fraudulent in-person voting is unlikely and would be easily detected if it had occurred in significant numbers. (Ex. 51, ¶ 9)

[14] Therefore, if an imposter arrived at a pole and was successful in fraudulently obtaining a ballot before the registered voter arrived at the poll, a registered voter, who having taken the time to go to the polls to vote, would undoubtedly complain to elections officials if he or she were refused a ballot and not allowed to vote because his or her name had already been checked off the list of registered voters as having voted. Likewise, if an imposter arrived at the polls after the registered voter had voted and attempted to pass himself off as someone he was not, the election official would instantly know of the attempted fraud, would not issue the imposter a ballot and allow him to vote, and presumably would have the imposter arrested or at least investigate the attempted fraud and report the attempt to the local election authority or the Secretary of State.

Even if some types of voting fraud were still a significant concern, the Photo ID law is overbroad and not narrowly tailored to address the most prevalent types of voting fraud in Missouri, absentee ballot and registration fraud.

Ironically, the MVPA changes the requirements for "personal identification" to vote in person, but not to register or to vote absentee ballot. "Personal identification" for voting in person is now more stringent than "personal identification" to register or to vote absentee ballot. Those Missouri citizens who take the time and make the effort to go to the polls to vote are more burdened under the MVPA than those who vote absentee. Given that fraud in connection with registration and voting absentee are far more documented and frequent problems than voter identification fraud at the polls, the fact that the MVPA was not directed at addressing those problems highlights the fact that it was not narrowly tailored to address any problem that actually exists.

For these reasons, the Photo ID Requirement is an undue burden on a fundamental right, is not necessary to accomplish any compelling state interest, is not narrowly tailored, and is unconstitutional.

V. THE AVAILABILITY OF PROVISIONAL BALLOTS IN CERTAIN ELECTIONS FOR NARROW CATEGORIES OF VOTERS IN CERTAIN DEFINED CIRCUMSTANCES DOES NOT CURE THE UNCONSTITUTIONALITY OF THE PHOTO ID REQUIREMENT.

(Additional argument in support of judgment not directly raised by any of Appellants' or Intervenor-Appellants' points relied on.)

Intervenors have suggested that the availability of provisional ballots in limited

circumstances for certain voters in certain elections somehow cures the unconstitutionality of the Photo ID Requirement. It does not. As the trial court expressly found, the "provisional balloting provided by SB1014 does not solve or ameliorate any of the constitutional issues raised by the Photo ID Requirement." (L.F. at 352, ¶ 49; L.F. at 338, n. 1)

Under the MVPA, certain limited categories of individuals without a Photo ID may cast a provisional ballot in certain elections if they sign an affidavit swearing that they are "unable" to obtain a current and valid Photo ID "because of:"

> (1) A physical or mental disability or handicap of the voter, if the voter is otherwise competent to vote under Missouri law; or
>
> (2) A sincerely held religious belief against the forms of personal identification described in subsection 1 of this section; or
>
> (3) The voter being born on or before January 1, 1941.

(Ex. 2 at p. 19, ¶ 3(1)-(3))

Many voters in these categories will not be able to swear that they are "unable" to obtain a Photo ID "because of" their disability, religious belief or being born before 1941. As the trial court found:

> Even the "exemption" for people born before 1941 is largely illusory as it requires the completion of an affidavit that the person is <u>unable</u> to obtain a Photo ID <u>because</u> of their age: an oath to which many elderly persons would not or could not attest.

(L.F. at 304 (emphasis in original); *See also* Tr. at 271-272)

But this is only one of many problems with provisional balloting under the MVPA.[15] For example, provisional ballots are not utilized in Missouri in local elections. While certain provisions of the MVPA purport to allow those without Photo ID's to cast provisional ballots under certain circumstances, that right is limited by Mo. Rev. Stat. § 115.430, the provision governing provisional ballots. That provision makes clear that provisional ballots are to be used only in "primary and general elections where candidates for federal or statewide offices are nominated or elected and any election where statewide

[15] For certain elections held before November 1, 2008, voters without Photo ID's may cast a provisional ballot if they sign an affidavit affirming identity and present one of the forms of identification permitted under the current law. (Ex. 2, pp. 22-23 at ¶ 13) For the reasons in the text and as the trial court found, this transitional provision suffers from the same constitutional defects as the permanent provisions. Even if it did not, it still must be stricken because it clearly was not intended to stand on its own, and therefore cannot be severed from the permanent Photo ID provisions contained in the new Section 115.427, Mo. Rev. Stat, also found unconstitutional by the trial court. See Section 1.140, Mo. Rev. Stat. (stating that remaining provisions of a statute found in part to be unconstitutional cannot be severed and survive if the "valid provisions of the statute are so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provision without the void one.") For these reasons, there is no need to analyze the transitional provisions separately.

issue or issues are submitted to the voters." Section 115.430.1, Mo. Rev. Stat. (Tr. at 237) Prior to the date the trial court declared the Photo ID Requirement unconstitutional, the State of Missouri itself was warning voters on the Missouri Department of Revenue's website that "Provisional ballots may not be available in all elections." (Ex. 45; Ex. 10, ¶ 36) The Missouri Secretary of State's website likewise made clear that "provisional ballots are only available in primary and general elections." (Ex. 46; Ex. 10, ¶ 36)

As made clear in Article VIII, Section 2 of the Missouri Constitution, "**All**" Missouri citizens who possess the constitutionality defined qualifications are constitutionally "entitled to vote at **all** elections by the people," not just some elections. (emphasis added). Because provisional ballots are not available in "**all**" elections, its potential availability in **some** elections obviously does not fulfill the constitutional requirement. For this reason alone, the availability of a provisional ballot for a few categories of voters (or even more voters prior to November 1, 2008) does not cure the unconstitutionality of the Photo ID Requirement even as to these voters. It obviously does not cure the unconstitutionality of the Photo ID Requirement for the vast majority of qualified voters without a Photo ID after November 1, 2008 who do not fall within these limited categories.

With respect to those elections that do permit provisional ballots to be cast, the MVPA imposes many new and burdensome requirements. Most notably, provisional ballots may be counted only if all of a series of requirements have been met (none of which are required to count regular ballots):

(a) The election authority must verify the identity of the individual by

comparing that individual's signature on file with the election authority;

(b) The election authority must determine that the individual was eligible to cast a ballot at the polling place where the ballot was cast;

(c) The election authority must determine that the voter did not otherwise vote in the same election by regular ballot, absentee ballot or otherwise;

(d) The election authority must determine that the information on the provisional ballot envelope is found to be "correct, complete and accurate;"

(e) If the election authority determines that the provisional voter is registered and eligible to vote in the election, it must provide documentation verifying the voter's eligibility, which must be noted on the copy of the provisional ballot envelope; and

(f) No provisional ballot may be counted until all provisional ballots are determined either eligible or ineligible in accordance with these requirements.

(L.F. at 86, ¶ 64; Ex. 2 at pp. 26-30)

The first requirement is that each provisional ballot be subjected to a highly subjective "signature match" requirement. Under the MVPA, unless the election authority can verify that the signature on the provisional ballot affidavit matches the signature on file with the election authority, the provisional ballot will not be counted.

Election authorities are not handwriting experts. (Tr. at 192, Ex. 51) Many signatures on file were provided decades ago, and signatures can and do change over time. Some, like Plaintiff Weinschenk, are physically incapable of making a consistent signature. (Ex. 16, ¶ 8, Tr. at 272-273) The legislature has not set forth any standards by which the signature match determination may be judged. It obviously will be difficult, if not impossible, for the election authorities to determine in any objective manner whether the signatures actually match. As set forth by the United States Supreme Court in interpreting the Equal Protection Clause of the United States Constitution:

> The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. *See, e.g., Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, 86 S. Ct. 1079, 16 L.Ed.2d 169 (1966).
>
> . . .
>
> The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right.
>
> . . .
>
> **The problem inheres in the absence of specific standards to ensure its equal application**.

Bush v. Gore, 531 U.S. 98, 104-06 (2000) (emphasis added).

To make matters worse, this subjective signature verification process under the MVPA will not occur until the day after the election when the results from all non-provisional ballots are known. Thus, the signature match requirement not only provides an undue risk of disparate treatment, it opens the door to a substantial risk of true election fraud and corruption.

Even without the signature match and other rigid requirements in the MVPA set forth above, over 50% of the provisional ballots cast in the last general election were not counted. (Exs. 33 and 47) With these additional requirements, an even smaller percentage of provisional ballots will be counted. This undoubtedly will result in the votes of many registered Missouri voters, who possess the constitutionally dictated qualifications to vote, not being counted simply because they could not present a Photo ID at the polls.

As recognized by Secretary of State Carnahan in her May 11, 2006 letter to Governor Blunt:

> Supporters of Senate Bill 1014 say the bill will allow seniors and voters with disabilities to cast provisional ballots. As you are aware, provisional ballots require voters to put their ballots in special envelopes and to give up some of their right to a private vote to signing the back of those envelopes. In addition, provisional ballots are not placed in the regular ballot box where every other vote goes and will only be counted if the local election authority determines the voter's signature matches the one they have on

file, which in some cases can be decades old. You are also undoubtedly aware that in the 2004 General Election, when you were Secretary of State, over 8,000 provisional ballots were cast, but only 3,000 were actually counted.

For all these reasons, the availability of provisional ballots in certain elections for narrow categories of voters does not begin to cure the constitutionality of the Photo ID Requirement.

CONCLUSION

For the reasons expressed above, the judgment of the trial court should be affirmed.

Respectfully submitted,

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CERTIFICATE

The undersigned certifies that the foregoing brief complies with the limitations contained in Rule No. 84.06(b), and that the brief contains 22,554 words according to the word count of Microsoft Word for Windows.

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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APPENDIX

TABLE OF CONTENTS