

**THE SUPREME COURT OF MISSOURI**

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**JACKSON COUNTY, et al.,**

Respondents

vs.

**STATE OF MISSOURI**

Appellant

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**No. SC 88038**

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

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**BRIEF OF RESPONDENTS**

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## STATEMENT OF JURISDICTION

The State claims that this Court has jurisdiction under Article V, section 3 of the Missouri Constitution, as this is an appeal of a challenge to the validity of a statute. If this were an appeal of a final judgment of the circuit court, there would be no question that this Court has jurisdiction. As set out in the respondents' Motion to Dismiss or Hold Appeal in Abeyance, however, the judgment in this case will not be final until at least October 16, 2006. In addition, the respondents presently have pending a motion to amend the judgment before the circuit court. *See* Exhibit 2 to Respondents' Motion to Dismiss or Hold Appeal in Abeyance (filed on September 27, 2006). According to Supreme Court Rule 81.05, the judgment entered by the circuit court is not final.

This Court has long held that the right of appeal is statutory, and requires a final judgment disposing of all issues and all parties. *State ex rel. Crites v. Sho-Me Dragways*, 719 S.W.2d 785, 786 (Mo. 1986). If the trial court's judgment is not final, this Court "lacks jurisdiction and the appeal must be dismissed." *Fowler v. Fowler*, 984 S.W.2d 508, 512 (Mo. 1999). Accordingly, until the judgment is final "jurisdiction remains in the trial court, despite the filing of a notice of appeal." *Coleman v. Coleman*, 187 S.W.3d 331, 333 (Mo.App. E.D.2006).

The State also lacks standing to appeal. Section 512.020 requires one to be "aggrieved" by a final judgment of the trial court in order to seek appellate review. This Court has held that "[a] party is aggrieved when the judgment operates prejudicially and directly on his personal or property rights or interests and such effect is immediate and not merely a possible remote consequence." *Ameristar Jet Charter, Inc. v. Dodson Int'l*

*Parts, Inc.*, 155 S.W.3d 50, 57 (Mo. 2005). Further, “[a] party cannot appeal from a judgment wholly in his favor.” *Page v. Hamilton*, 329 S.W.2d 758, 762 (Mo. 1959).

The State’s points relied on challenge “conclusions” and “findings” of the trial court that Senate Bill 1014 violated Article X, section 21 of the Missouri Constitution. App’t Br. 15-16. A close reading of the circuit court’s judgment, however, reveals that Respondents were granted no relief whatsoever. The trial court did indicate that it found “specific and credible *evidence* from three jurisdictions as to substantial increased costs associated with provisional balloting” in its order. L.F. 67 (emphasis added). But, it went on to state that it would not provide any relief. L.F. 67-70. The court refused to enjoin enforcement of Senate Bill 1014 in any county based on a Hancock violation and entered judgment in favor of the State and against the respondents. L.F. 67-70.

While finding “evidence” of a violation is certainly not the same thing as finding a violation, even if it were, this does not necessarily make the State an aggrieved party. The court of appeals has held that mere language indicating a violation of a law does not render a party “aggrieved” under section 512.020 in the absence of any other relief. *Wright v. Rankin*, 109 S.W.3d 696, 699 (Mo.App. S.D.2003). *Wright* involved a challenge under the Sunshine Law. *Id.* at 697. The plaintiffs contended that the defendants intentionally violated the law and requested that the court impose civil penalties. *Id.* The trial court found that the defendants had failed to comply with the law but also found that their failure was not intentional. *Id.* at 698. Accordingly, the court did not grant any of the relief requested by the plaintiffs. *Id.* On appeal, the defendants argued that the court’s finding that they had violated the Sunshine Law made them an

aggrieved party. *Id.* The court of appeals held that the language complained of merely prefaced an adjudication favorable to the defendants, and that, despite the unfavorable language, “[t]he judgment that was rendered was, in effect, a judgment for defendants.” *Id.*

The present case is essentially the same. The respondents requested specific relief from the court, all of which was denied.<sup>1</sup> Despite any language indicating that the State violated the Hancock Amendment, the judgment was, in fact, wholly in its favor because the respondents were denied any relief. Because the State lacks standing, this Court does not have jurisdiction to review this case. *See Healthcare Services of the Ozarks, Inc. v. Copeland*, 198 S.W.3d 604, 612 (Mo. 2006) (stating that “[s]tanding is a jurisdictional matter antecedent to the right to relief” and “[i]f a party lacks standing, the court must dismiss the case because it does not have jurisdiction of the substantive issues presented.”).

Accordingly, this Court lacks jurisdiction over the case.

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<sup>1</sup> The State concedes in its brief that the respondents were denied any relief. App’t Br. 14.

## STATEMENT OF FACTS<sup>2</sup>

Senate Bill 1014, known as the Missouri Voter Protection Act, was signed by Government Blunt on July 14, 2006, and became effective on August 28, 2006. L.F. 23. According to the Act, individuals may vote in elections only if they can present an acceptable form of nonexpired or non-expiring photographic identification, such as an unexpired or nonexpiring Missouri nondriver's license. Mo. Rev. Stat. § 115.427. Individuals who wish to vote but lack proper photo identification may cast a "provisional" ballot if they meet certain conditions. A voter may cast a provisional ballot if the voter attests that he or she is the person listed in the precinct register and that he or she is unable to obtain a current and valid photo identification because of:

- A physical or mental disability or handicap of the voter, if the voter is otherwise qualified to vote under Missouri law;
- A sincerely held religious belief against the forms of personal identification required by the Act; or
- The voter being born on or before January 1, 1941.

Mo. Rev. Stat. § 115.427.3. For any election held on or before November 1, 2008, individuals may vote provisionally if they execute an affidavit affirming their identity and

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<sup>2</sup> The State's statement of facts is incomplete, inaccurate, and omits evidence that is favorable to the respondents and which supports the judgment. Therefore, the respondents elect to provide this Court with a separate statement of facts pursuant to Rule 84.04(f).

possessed a form of identification acceptable under the prior law such as copy of a bank statement bearing the voter's name and address. Mo. Rev. Stat. § 115.427.13.

The constitutionality of the Act was challenged in two lawsuits. In *Jackson County, et al. v. State of Missouri* (Cole County Cir. Ct. No. 06AC-CC00587), the plaintiffs contended the Act violated Article X, §§ 16-22 of the Missouri Constitution (the Hancock Amendment). L.F. 8. Each of the individual plaintiffs was a Missouri taxpayer. L.F. 9-10, 22. The second lawsuit is *Kathleen Weinschenk, et al. v. State of Missouri, et al.* (Cole County Cir. Ct. No. 06AC-CC00656). In *Weinschenk*, the plaintiffs claimed that the Act violated the Hancock Amendment and other sections of the Missouri Constitution. The *Jackson County* and *Weinschenk* cases were consolidated by the circuit court.

An evidentiary hearing was conducted on August 21, 2006. The plaintiffs presented testimony from several election officials that the Act will require local governments to expend funds to perform new or additional activities.

Robert Nichols is a Director of Elections for Jackson County. Tr. 51.<sup>3</sup> He has served continuously as the Democrat Director of Elections for the Jackson County Board of Elections for over twenty years, and has participated in approximately five elections every year. Tr. 51. Mr. Nichols is employed by the Board of Elections pursuant to Mo. Rev. Stat. § 115.045 and, with Charlene Davis, his Republican counterpart, carries out

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<sup>3</sup> Unless otherwise indicated, all transcript references are to the transcript of the August 21, 2006, hearing.

the day-to-day management of the Board of Elections with regard to the registration of voters and the conduct of elections within Jackson County. Tr. 53-54. According to Mr. Nichols, Jackson County has approximately 216,000 registered voters, over 450 precincts, and 297 polling places. Tr. 62.

Mr. Nichols and Ms Davis together prepared and submitted a fiscal note to the legislature concerning the economic impact the Act would have on Jackson County. Tr. 57, 73; Ex. 4. They prepared the fiscal note using the same methodology they used to prepare estimated election costs for every election, as required by Mo. Rev. Stat. § 115.077. Tr. 55-56. They estimated that the Act would require Jackson County to incur additional expenses of \$470,308 per year for five elections as a result of the new and additional services and duties required of the Board of Elections by the Act. Tr. 65. Specifically, the fiscal note identified the following additional expenses that the Act will impose on Jackson County over the course of a year in which five elections are conducted:

- \$16,800 for ten additional telephone lines;
- \$2,500 for ten additional wire drops for computers;
- \$14,500 for ten additional computers;
- \$30,108 for 193 additional cell phones for polling places;
- \$1,250 for election clerk training;
- \$4,500 for ten additional election clerks;
- \$315,000 for training and employing 600 additional election judges;

- \$28,750 for employing and training ten additional verification board clerks to process the anticipated increase in provisional ballots;
- \$54,000 for postage; and
- \$2,000 to process Notification Cards.

Tr. 60-65; Ex. 4. Mr. Nichols attributed each of these additional costs to the new duties and services required by the Act. Tr. 60-65.

Based on his review of the Act and his experience as an election official, Mr. Nichols believed that if the Act were to go into effect voters would cast a greater number of provisional and absentee ballots and that the county would incur additional costs to process these ballots. Tr. 72-73. Mr. Nichols testified:

Q. And that assumption [that more voters will vote provisionally] is based upon the fact that individuals who don't have a photo ID can ask for a provisional ballot, correct?

A. Correct.

Q. Okay. As far as absentee ballots are concerned, if you vote absentee, you do not need a photo ID, correct?

A. Correct.

Q. Is that part of anticipating that more people will vote absentee than previously?

A. Yes.

Q. And both of those instances there are additional costs as you have testified involved in personnel and training and so forth so that the

election will be able to encompass the additional absentee and additional provisional ballots[,] correct?

A. Yes.

Tr. 92-93.

Mr. Nichols reviewed the plaintiffs' petition and testified that most of the unfunded mandates alleged were included in the fiscal note. Tr. 65-70. In addition, he testified that some of the Act's requirements will impose yet more costs upon Jackson County. Tr. 65-70. Specifically, Mr. Nichols testified that the Act's requirements for new affidavits for voters not possessing a type of identification acceptable under § 115.427(1), the new "clear and conspicuous" notices required by § 115.427(2), and the expense of photocopying provisional ballot envelopes. Tr. 65-70. The court found that Mr. Nichols's "testimony as to the costs imposed on Jackson County by new and additional services and duties required by the Act was credible and persuasive." L.F. 87. The court further found that the costs identified by Mr. Nichols "would be more than *de minimis*." L.F. 87.

Judy Taylor is the Director of Elections for St. Louis County. Tr. 132. Ms Taylor has been continuously employed by the St. Louis County Board of Election Commissioners for thirty years, working her way up from clerk to Democrat Director, a position she has held since 1998. Tr. 132-33. From 1992 to 1998, she was an assistant director. Tr. 133. In her long career as an election official, Ms Taylor has conducted more than one hundred elections in St. Louis County. Tr. 134.

Ms Taylor is familiar with all aspects of the election process. As a director, she is responsible for the day-to-day operations of the Board of Election Commissioners Office, the registration of voters, and the conduct of all public elections in St. Louis County. Tr. 134. St. Louis County is the largest county in the state and has over 650,000 registered voters, over 1,500 precincts, 448 polling places. Tr. 134. Ms Taylor has extensive experience estimating the anticipated costs of elections in compliance with Mo. Rev. Stat. § 115.077. Tr. 135.

Ms Taylor identified many unfunded mandates in the Act that, absent an appropriation from the state, will require St. Louis County to divert general revenue funds reserved for basic services such as schools, fire protection, and water works. Tr. 138, 144. Ms Taylor testified that St. Louis County would have to pay \$50,000 to design and send voter notification cards to newly registered voters as required by § 115.163.3. Tr. 139-40. Redesigning and reprinting election notification cards to include the new photo identification requirements would cost \$125,000. Tr. 148. Ms Taylor testified that St. Louis County trains election judges annually and election supervisors before every election. Tr. 154. Implementation of the Act would require the county to print election manuals for its election judges explaining the Act's new affidavit and provisional balloting requirements. Tr. 140-41. Ms Taylor estimated that the cost of printing the election manuals would be \$150,000. Tr. 141. Ms Taylor also identified expenses associated in complying with § 115.427's requirement that each polling place display a clear and conspicuous notice of the new identification requirements. Tr. 142. Ms Taylor anticipated that the county would have to purchase 500 signs at a cost of \$5,000. Tr. 142.

Ms Taylor also testified that complying with § 115.105.6 would require the county to install twenty additional telephone lines at a cost of \$30,000 to handle challenges to voters' identification. Tr. 144-45, 159. Photocopying provisional ballot envelopes as required by § 115.430.5(2) would cost the county about \$200. Tr. 145. Ms Taylor further testified that the county would have to hire and train more poll workers to process the anticipated increased number of provisional and absentee ballots. Tr. 142-43, 146, 148.

Based on her experience in preparing election costs estimates, Ms Taylor projected that the new and additional duties and services required by the Act would require St. Louis County to spend an additional \$215,000 to conduct the election in November, 2006. Tr. 157, 160. The court found Ms Taylor's testimony "as to the costs imposed on St. Louis County by new and additional services and duties required by the Act was credible and persuasive." L.F. 89.

Wendy Noren was elected as County Clerk of Boone County in 1982 and has served continuously in that position during the intervening twenty-four years. Tr. 178. As county clerk, Ms Noren is the chief election official for the county. Tr. 178. Ms Noren has conducted about one hundred elections in Boone County. Tr. 178. She has worked with the Secretary of State's office and other local election authorities across the state in conducting, administering, and certifying elections. Tr. 179, 181. For fifteen years, Ms Noren served on the legislative committee for the Association of Missouri State County Clerks and Election Authorities. Tr. 180.

In response to a request by the Missouri General Assembly Ms Noren submitted a fiscal note concerning the financial impact of the Act. Tr. 201. She explained in the fiscal note that implementation of the Act would cause new and increased expenditures by Boone County in the amounts of \$21,000 for postage and printing and \$10,275 for training election judges for the November, 2006, election. Tr. 203; Ex. 4. Ms Noren testified that the Act requires additional and substantial expenditures for printing provisional ballots for each ballot style in a jurisdiction. As a consequence of the Act, all election authorities in the state will be required to print provisional ballots in every ballot style in their jurisdictions, regardless of whether they are used or not. Tr. 209-210. Prior to the Act, provisional ballots were only needed in one style for federal and statewide offices. Tr. 207. Ms Noren described the change caused by the Act:

Senate Bill 1014 is increasing the level of what I have to do. . . . [I]f 1014 did not exist, I would order one kind of ballot in November that would cover every provisional voter in the county, one ballot face. I will have to order multiple ballot faces and have them available for this November. That will increase my costs no matter whether I have an increase in the number [of provisional voters], it will increase the order that I have to put in, in about three or four weeks.

I can't say today how many I will have to do. That will depend on if I have school districts that participate, if I have fire districts [that] participate. Each one of those will increase the number of different ballot styles I have throughout the county. Before this bill, I only had one ballot

style. After this bill, I will have multiple ballot styles for provisional ballots.

Tr. 209-210. If the Act had been in effect during the primary election conducted in August, 2006, Boone County would have had to print provisional ballots in 412 different styles. Tr. 206. Ms Noren testified that the minimum order for provisional ballots is one hundred per ballot style. Tr. 206, 209. The bulk of the \$21,000 in printing costs referred to in the fiscal note will be consumed printing full provisional ballots. Tr. 203.

On cross-examination, the State asked Ms Noren whether Boone County could avoid printing increased numbers of provisional ballots by simply stamping the regular ballots “provisional.” Tr. 208. Ms Noren testified that the county’s ballot counting system requires distinct provisional ballots that can “be coded in such a way that it can be counted two weeks later.” Tr. 207. Ms Noren indicated that she could replace the county’s existing ballot counting system and stamp regular ballots as “provisional” but that doing so “would increase the cost even more.” Tr. 208. The court found Ms Noren’s testimony regarding “the costs imposed on Boone County by new and additional services and duties required by the Act was credible and persuasive.” L.F. 92.

Betsy Byers has served as co-director of elections for the Secretary of State’s office since 2001, and has substantial experience in elections. Tr. 228. From 1999 until 2001, she was the Deputy Secretary of State for elections. Tr. 228. Before joining the Secretary of State’s Office, Ms Byers served as the Shelby County Clerk for six years. Tr. 229. Ms Byers present duties include reviewing, studying, and implementing changes in election laws. Tr. 230. She is responsible for assisting local election officials throughout

the state in interpreting and administering election laws, and she supervises the training of election officials in all of the counties in the state. Tr. 230, 244-45, 260-62.

Ms Byers testified that the Act imposes unfunded mandates on election officials in every county in Missouri. She identified the following mandates that the Act would impose on every county:

- Section 115.163.3's requirement for the creation of a new voter notification card
- Section 115.427.2's requirement for clear and conspicuous notices in all polling places related to the new identification requirements
- Additional expenses related to the hiring and training of additional staff to process the anticipated significant increase in provisional ballots
- Section 115.105.6's imposition of expenses for redrafting and reprinting challenger and poll worker instructions as well as for additional poll worker training to reflect more stringent identification requirements of § 115.427
- Section 115.430.5(2)'s requirement that local election authorities photocopy each provisional ballot envelope assuming an increase in the number of provisional ballots cast. Ms Byers anticipated that voters would cast an increased number of provisional ballots under the Act.

- Costs related to hiring and training additional staff to process the anticipated increase in absentee ballot applications and absentee ballots assuming more absentee ballots would be cast. Ms Byers anticipated that voters would cast more absentee ballots as a result of the Act.

Tr. 247-49. Ms Byers believed that these additional services, duties, and activities would cause every county to incur new costs that would be more than *de minimis*. Tr. 250, 252.

Ms Byers further testified that each county is required to establish a training curriculum and train its elections judges. Tr. 260. She characterized as “massive” the changes she had to make to her training materials because of the Act’s new photo identification requirements and provisional balloting procedures. Tr. 261. Agreeing that local election officials will face the same type of training changes, Ms Byers anticipated that each local election authority would find it necessary to make similar substantial and significant revisions to their training materials. Tr. 261-62.

The Court found that Ms Byers’ “credibly testified that every county in the state would experience significant increased costs occasioned by the use of provisional ballots required by [the Act] but her testimony was a general assessment of the costs and not county specific as required by the Brooks and City of Jefferson cases.” L.F. 92.

The circuit court entered its Judgment and its Findings of Fact and Conclusions of Law on September 14, 2006. While the court declared the Act unconstitutional based on

several claims brought in the *Weinschenk* case,<sup>4</sup> it denied relief to the *Weinschenk* and *Jackson County* plaintiffs on their Hancock claims.

The State filed separate notices of appeal in the *Weinschenk* and *Jackson County* cases on September 21, 2006. L.F. 115.

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<sup>4</sup> The Court concluded that the Act violated Article I, §§ 2, 10, and 25 and Article VIII, § 2 of the Missouri Constitution. L.F. 68-69.

## ARGUMENT

### Standard of Review

In reviewing a court-tried case, the Supreme Court will affirm the trial court's judgment unless it is not supported by substantial evidence, is against the weight of the evidence, or erroneously declares the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. 1976). The Court views the evidence, and permissible inferences therefrom, in the light most favorable to the judgment and disregards all contrary evidence and inferences. *Farmers' Electric Cooperative, Inc. v. Missouri Department of Corrections*, 59 S.W.3d 520, 522 (Mo. 2001).

#### I.

**Assuming *arguendo* that the State is an aggrieved party, the trial court did not err in finding that the changes the Act made to the existing election laws regarding provisional balloting violated the Hancock Amendment because there was sufficient evidence that the provisional balloting procedures will require local election authorities to perform new or increased activities.**

The citizens of Missouri ratified the Hancock Amendment to the constitution in 1980 to "rein in increases in governmental revenue and expenditures." *Thompson v. Hunter*, 119 S.W.3d 95, 98 (Mo. 2003). The provisions of the Hancock Amendment relevant in this case are Sections 16 and 21 of Article X of the Missouri Constitution. Section 16 prohibits the state from "requiring any new or expanded activities by counties and other political subdivisions without full state financing." Mo. Const. Art. X, § 16. Section 21 prohibits the General Assembly or any state agency from requiring counties or

other political subdivisions to perform “a new activity or service . . . unless a state appropriation is made and disbursed to pay the county or other political subdivision for any increased cost.” Mo. Const. Art. X, § 21. Accordingly, while the legislature may require political subdivisions to perform new or expanded activities, it must make an appropriation to cover the costs of those activities.

The trial court concluded that “[t]he provisional balloting and its implementation provided for in SB 1014 does constitute a new and expanded activity imposed on local government which must be funded if there are increased costs.” L.F. 67. With respect to Jackson, St. Louis, and Boone Counties, the court concluded that there was “specific and credible evidence as to substantial increased costs associated with provisional balloting.” L.F. 67. These findings are supported by the record and should be affirmed.

The State contends the trial court’s finding is erroneous because any increase in provisional voting will not be due to a mandate of the Act. The State specifically argues: “If there is an increase in the number of provisional ballots[,] it is the result of the actions of the individual voters (in not obtaining or not showing a photo ID) and their personal decision to exercise the option to cast a provisional ballot.” App’t Br. 22. The State’s claim is without merit.

The State’s argument does not address the evidence that the Act requires local election authorities to provide precinct-specific provisional ballots. Ms Noren provided un rebutted testimony that the Act will require local election authorities to increase a significantly greater number of provisional ballots. Prior to the Act, only federal and

statewide contests were included on provisional ballots.<sup>5</sup> The Act modified the existing law by requiring local election authorities to list *all* races in each precinct on provisional ballots.<sup>6</sup> As Ms Noren explained, more provisional ballots will have to be printed to provide for the many variations of ballots as opposed to previous years in which one provisional ballot style could be used in every precinct. Even if no individual in a given precinct votes provisionally, the full provisional ballots required by the Act must be printed and available for use in every precinct in the state because it is impossible to know in advance in which precincts they will be used. Ms Noren testified that the cost of printing full provisional ballots for each of the precincts in Boone County represented the majority of the \$21,000 in printing and postage expenses identified in the fiscal note she submitted to the legislature. Tr. 203. The court found that every county would bear the additional cost of providing full provisional ballots and that this cost “would be more than *de minimis*.” L.F. 92.

The State is wrong in its assertion that the Act places no mandate on the local election authorities with respect to provisional balloting.

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<sup>5</sup> Prior to the passage of the Act, the provisional ballot was limited to “statewide candidates and issues, and federal candidates.” Mo. Rev. Stat. § 115.430 Supp.2005.

<sup>6</sup> The Act provides that “[t]he provisional ballot provided to a voter under this section shall be the ballot provided to a resident of the voter’s precinct.” Mo. Rev. Stat. § 115.430.

The plaintiffs also presented substantial evidence that local election authorities will have to perform new or additional activities to accommodate the projected increased number of provisional ballots that will be cast if voters have to produce the photo identification required by the Act. All the election officials who testified expressed their belief that the Act will cause more voters to vote provisionally. To accommodate these provisional voters the local election authorities will have to expend funds from general revenue to expand their infrastructure and to hire and train additional workers to process provisional votes. Mr. Nichols testified that Jackson County would add ten telephone lines (\$16,800) and ten computers with wire drops (\$17,000). This equipment will be assist poll workers “process provisional ballots” by allowing them access to the voter registration database “to find registered voters and compare the signatures to provisional envelopes.” Tr. 60, 81; Ex. 4. Jackson County would also supply 193 cell phones at a cost of over \$30,000. Tr. 61; Ex. 4. Mr. Nichols testified that the cells phones are important in facilitating provisional voting because they allow “the polls to be able to get in contact with our office on election day to determine eligibility of voters.” Tr. 61. Jackson County also provided \$28,750 to employ and train ten verification clerks to process the anticipated increased number provisional ballots. Tr. 61-62; Ex. 4.

Like Jackson County, Ms Taylor stated that the Act will require St. Louis County to hire additional poll workers to process the increased number of provisional ballots she expects voters to cast if the Act goes into effect. Tr. 142-43, 146, 148. Ms Taylor also testified that the changes the Act makes to provisional balloting will require St. Louis County to revise the election manuals it issues to its election judges at a cost of \$150,000.

Tr. 140-41. The county also will be required to photocopy all provisional ballot envelopes pursuant to § 115.430.5(2). Tr. 145.

The State also argues that because the court did not specify which sections of the Act imposed a mandate in violation of the Hancock Amendment the judgment should be reversed and remanded for further proceedings. This argument is without merit. In its findings of fact the court accepted the testimony of the plaintiffs' witnesses that the following activities associated with provisional balloting would constitute unfunded mandates:

- Providing new affidavits for provisional voters. L.F. 87, 88.
- Hiring and training additional staff to process the anticipated increased number of provisional ballots. L.F. 87, 88
- Photocopying each provisional ballot envelope. L.F. 89.
- Printing provisional ballots for each ballot style. L.F. 91-92.

The import of these findings is that no county would be required to offer provisional ballots to its voters until the state appropriates funding for these activities. L.F. 67.<sup>7</sup>

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<sup>7</sup> The circuit court concluded that the *Jackson County* plaintiffs' petition sought only a statewide injunction and ruled that such relief was not available under *City of Jefferson* and *Brooks*. On September 27, 2006, the plaintiffs filed a motion to amend the judgment, claiming, *inter alia*, that the circuit court misconstrued the relief requested and erred in not enjoining the state from enforcing the Act in Jackson, St. Louis, and Boone Counties.

## II.

**Assuming *arguendo* that the State is an aggrieved party, the court did not err in finding that the provisional balloting requirements of the Act violated Article X, § 21 of the Missouri Constitution because there was sufficient evidence that the Act requires the local election authorities to perform new and increased activities at a substantial cost.**

A Hancock violation requires proof that the cost associated with the new or expanded duties is more than *de minimis*. *City of Jefferson v. Missouri Department of Natural Resources*, 916 S.W.2d 794, 795 (Mo. 1996). While increased costs will not be presumed from increased mandated activity, “plaintiffs need only show that the increased costs will be more than *de minimis*.” *Brooks v. State*, 128 S.W.3d 844, 849 (Mo. 2004). Previous decisions issued by this Court make clear that an unfunded mandate need not be large to constitute a Hancock violation. In *Boone County Court v. State*, 631 S.W.2d 321 (Mo. 1982), the Court declared that an unfunded mandate of just \$100 violated the Hancock Amendment. In *Brooks*, an expenditure of as little as \$38 to conduct fingerprint analysis “for more than a few” applicants for a concealed-carry permit would contravene the Hancock Amendment. 128 S.W.3d at 849.

The State claims that the Act will not imposed additional costs on election authorities to provide provisional balloting because there was no substantial evidence that there will be an increase in the number of provisional voters. This contention is without merit. The plaintiffs presented substantial and competent evidence that more voters would cast provisional ballots as a result of the enactment of Senate Bill 1014. Based on

his twenty years of experience conducting elections in Jackson County, Mr. Nichols estimated that more voters would vote provisionally because they could do so without a photo ID. Tr. 92. Ms Taylor anticipated that St. Louis County would experience a twenty per cent increase in provisional voting due to the passage of the Act. Tr. 153. In Boone County Ms Noren expected voters to cast up to 3,000 more provisional ballots. Tr. 211-12; Ex. 4. The circuit court found the testimony of these witnesses credible and persuasive. Accordingly, this factual determination must be resolved against the State under the applicable standard of review. The State does not claim the court's finding of a Hancock violation is against the weight of the evidence.

Regardless, the court's conclusion that provisional balloting constitutes an unfunded mandate does not depend on an increase in the number of provisional ballots cast. The State ignores the evidence that the Act will require every local election authority to print precinct-specific provisional ballots, not just a single ballot style required by the prior law. These costs will be borne by election authorities even without an increase in provisional voting. As Ms Byers testified, although election officials pray for the best, they must be prepared for the worst. Tr. 253. Election authorities cannot forego printing precinct-specific provisional ballots in the hope that every voter who appears will possess proper photo identification.

The State further argues that the cost of hiring and training poll workers and purchasing equipment cannot constitute Hancock violations because the Act does not compel local election authorities to hire and train personnel or to purchase computers,

telephones, or other equipment.<sup>8</sup> This argument is specious. The legislature overhauled Missouri’s election law when it enacted Senate Bill 1014. Yet the State insists that the local election authorities have no obligation to hire or train poll workers deemed necessary to implement the Act, and that if they do, it must be at their expense. But a local election authority, whether a county clerk or board of elections, is entitled to hire such employees as necessary to “correctly and promptly” conduct elections, Mo. Rev. Stat. §§ 115.045 & .051, and are required to train election judges. Mo. Rev. Stat. § 115.103. The testimony of election officials from Jackson, St. Louis, and Boone Counties establishes that additional personnel, training, and equipment will be needed to conduct future elections in an efficient manner. The State’s contention that “[t]here is nothing in the Act that is any different from what has routinely occurred in the past” is refuted by Ms Byers’s testimony that the Act caused “massive” changes to the existing identification requirements and provisional balloting procedure. Tr. 261.

In *City of Jefferson*, the Court stated that “the need to hire additional staff” and “increased administrative costs” caused by legislation may constitute Hancock violations if the costs are more than *de minimis*. 916 S.W.2d at 796. This is precisely what the state

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<sup>8</sup> The State does not argue in this point relied on that the record does not contain substantial evidence of increased costs associated with hiring and training poll workers or purchasing computers and telephones. App’t Br. 24. The point relied on asserts that there were no increased costs that would support a Hancock violation because the Act does not specifically require the local election authority to incur these expenses. App’t Br. 24.

has done here. In enacting Senate Bill 1014 without an appropriation of funds, the state has foisted the additional expenses necessary to implement the Act and administer elections on local governments. In requiring local election authorities to assume increased activities at a substantial cost, the State has violated the Hancock Amendment.

In Paragraph F of Point II, the State maintains that certain activities mandated by the Act will impose no more than a *de minimis* cost. Only two of these activities pertain to provisional balloting: the provisional voter affidavit and photocopying the envelope of each provisional ballot.<sup>9</sup> Sections 115.427.3(3) and 115.427.13-.14 require local election authorities to produce new affidavit forms for individuals casting provisional ballots. According to Mr. Nichols, these affidavits were not required prior to the passage of the Act. Tr. 66-67. Ms Taylor stated that the new affidavit forms were required because provisional voters are treated differently under the Act. Tr. 140. Mr. Nichols testified that in furnishing provisional voter affidavits local election authorities would incur design and printing costs. Tr. 67. The circuit court found that the cost of providing the new affidavits would be more than *de minimis*. L.F. 87.

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<sup>9</sup> The other “peripheral provisions” of the Act the State mentions in Section II.F. of the its brief have no bearing on whether the provisional balloting procedure established by the Act violates the Hancock Amendment—the ruling from which the State has appealed. While the plaintiffs believe that these provisions will impose significant costs on local election authorities, these provisions are not pertinent to this appeal and will not be addressed in this brief.

The costs associated with photocopying the provisional ballot envelopes are not *de minimis*. Ms Taylor testified that approximately 2,400 provisional ballots would be cast in St. Louis County and that the cost of photocopying the provisional ballots envelopes would be \$200. Although Jackson and Boone Counties did not specifically estimate the cost of photocopying the provisional ballot envelopes, these costs can be ascertained based on the number of provisional ballots anticipated in each county. Mr. Nichols projected that there would be 10,000 provisional ballots cast in Jackson County. In Boone County Ms Noren expects about 3,000 provisional voters. As both counties anticipate greater numbers of provisional voters than St. Louis County, their photocopying costs will exceed the photocopying costs expected in St. Louis County. The State's bare assertion that "[c]opying all provisional ballot envelopes amounts to no more than a *de minimis* increase" should be rejected. *See Boone County Court*, 631 S.W.2d at 324 (holding that a statute requiring a county court to pay an additional \$100 in salary to the collector violated the Hancock Amendment).

## CONCLUSION

The judgment of the circuit court should be affirmed for the reasons stated herein.

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## **CERTIFICATE OF COMPLIANCE**

The undersigned counsel hereby certifies that pursuant to Rule 84.06(c), this brief (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06(b); and (3) contains 6,470 words, exclusive of the sections exempted by Rule 84.06(b), determined using the word count program in Microsoft Word 2003. The undersigned counsel further certifies that the accompanying floppy disk has been scanned and was found to be virus free pursuant to Rule 84.06(g).

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## CERTIFICATE OF SERVICE

The undersigned hereby certifies that two hard copies of this brief and one copy of the brief on a floppy disk filed pursuant to Rule 84.06 were served on counsel identified below via U.S. Mail, postage prepaid, on October 2, 2006:

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# APPENDIX

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