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IN THE SUPREME COURT OF MISSOURI

JACKSON COUNTY, MISSOURI, et al., )  
Respondents, )  
vs. ) No. SC 88038  
STATE OF MISSOURI, et al., )  
Appellants. )

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

JACKSON COUNTY, MISSOURI, et al., )  
Plaintiffs, )  
vs. ) Case No.  
STATE OF MISSOURI, et al., ) 06AC-CC00587  
Defendants. )

TRANSCRIPT ON APPEAL

REPORTED BY:

MINDY S. HUNT, CSR, CCR #840  
19th Judicial Circuit  
Division II, Cole County

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APPEARANCES

FOR THE PLAINTIFFS WEINSCHENK, ET AL.,:

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1                   AUGUST 28, 2006

2                   HEARING

3           THE COURT: Let the record show we're in  
4 open court. We're here on -- to hear argument on  
5 the motion to intervene filed on behalf of -- I  
6 don't even have your motions -- Senator Scott  
7 and --

8           MR. DEUTSCH: Dale Morris.

9           THE COURT: -- and Dale Morris.

10          MR. DEUTSCH: And if it pleases the court,  
11 I just got off the phone with Michael Payne, the  
12 attorney for the Election Commission. He has filed  
13 a motion, but could not be here today. So I would  
14 like the Court to consider that motion also, if  
15 possible, along with the motions of Scott and  
16 Morris. He could separately notice it up, but I  
17 don't know how many times Don wants to come down  
18 here.

19          MR. DOWNING: No objection, your Honor.  
20 And just for the record, Burt Newman, counsel for  
21 the Jackson County plaintiffs, had surgery. He's  
22 not able to make it today. And instead, Tony --

- 23 MR. ROTHERT: Rothert.
- 24 MR. DOWNING: -- Rothert is here.
- 25 THE COURT: What kind of surgery or --

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1 MR. ROTHERT: Arthroscopic surgery on his  
2 shoulder, so it will be okay.

3 MR. DOWNING: He'll be better by Friday.

4 THE COURT: I don't know if some of you  
5 heard, that Clyde Angle was killed last night.

6 MR. DEUTSCH: I heard that this morning.  
7 Very tragic.

8 THE COURT: Mr. Deutsch?

9 MR. DEUTSCH: Your Honor, during the  
10 course, we had attempted to intervene on the day of  
11 hearing for the preliminary injunction, then the  
12 Court refused to consider at that time, but denied  
13 the request without prejudice. We are asking the  
14 Court to reconsider granting intervention to the  
15 two intervening parties for the purposes of  
16 presenting evidence that we feel almost certainly  
17 will not be presented unless these parties are  
18 allowed to intervene. And evidence which I think  
19 is necessary to adjudication of the case.

20 I'm authorized to represent that the  
21 intervenors both realized that this case has  
22 proceeded ahead as cases like this often do in Cole

23 County on an expedited basis; that they were not  
24 early certainly in filing their motion to  
25 intervene. But we, as I stated in my motion, take

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1 the case as it is. We are not here to contest any  
2 of the evidence that's been heard, raise any  
3 further objections that haven't already been raised  
4 by the parties to each other's evidence. And  
5 although what we proceed to do is offer the  
6 evidence that we have affirmatively to support the  
7 Attorney General and defendants' position in  
8 defense of the act.

9 In addition, we are certainly willing to  
10 accept any condition that the Court wants to attach  
11 to intervention. We are willing to present our  
12 case based solely on affidavits. And for the most  
13 part, those affidavits would simply be to  
14 authenticate documents that are public records.  
15 For instance, the legislative history. And we have  
16 two -- one, I know of, perhaps, two reports by  
17 expert witnesses that we would think that the Court  
18 would benefit from, which would simply be perceived  
19 by affidavit without the Court having to hear the  
20 witnesses testify, unless the Court would like to  
21 hear the testimony.

22 And then with regard to the Hancock issues

23 that Mr. Payne was particularly interested in, too,  
24 has advised me he's willing to offer all of the  
25 testimony into evidence that he has by affidavits,

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1 so we are willing to complete all of that according  
2 to the statutes the Court has outlined.

3 I believe the Court has scheduled another  
4 proceeding on September 1st, and we are willing to  
5 meet that deadline. And anything that we can't get  
6 before the Court or with the Court on that date or  
7 determines what you don't want, we are willing to  
8 accept the judgment of the Court because we do  
9 recognize without a question with all the sincerity  
10 to the other parties, they need to move this  
11 ahead. We need to move it ahead. We know it's  
12 going to move ahead with or without us. We are  
13 willing to accept whatever burdens are imposed upon  
14 us if we are allowed to intervene in order to meet  
15 the schedules that have been worked out previously.

16 THE COURT: All right. Thank you.

17 Mr. Downing?

18 MR. DOWNING: Your Honor, I have a lot of  
19 respect for Mr. Deutsch. And certainly I would say  
20 his representation as to what they would abide by.  
21 I know in their papers they said they would take  
22 the cases as is, raises some question in my mind

23 exactly what that means. But if he's saying they

24 would agree to all the stipulations and all the

25 evidence, no objections, that's all --

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1 THE COURT: Well, there's going to be  
2 objections, but not as to foundation. I'm sure  
3 they will reserve the right to material relevance  
4 and double hearsay.

5 MR. DOWNING: Double hearsay.

6 MR. DEUTSCH: I think the Attorney General  
7 has raised all those.

8 MR. DOWNING: But we still have some  
9 concerns, your Honor. And maybe Mr. Deutsch can  
10 clarify on that issue. If they come in as a party,  
11 and, again, I'm certainly not casting any aspersion  
12 on any intention by Mr. Deutsch or anybody else,  
13 but as a party they would have a right to make a  
14 change of judge, they would have a right to --

15 THE COURT: Is that an argument for or  
16 against letting them in?

17 MR. DOWNING: If this all goes in context,  
18 it will slow it down, your Honor, or could slow it  
19 down. And I don't know if they are waiving all  
20 those rights that they would have as a party.

21 MR. DEUTSCH: I certainly waive any right  
22 to disqualify the Judge.

23 THE COURT: I would make that as a

24 condition anyway.

25 MR. DEUTSCH: Absolutely.

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1 MR. DOWNING: Let me go on to a few of the  
2 other issues since Mr. Deutsch has helped clarify  
3 those. Your Honor, we are concerned about delay.  
4 And we're also concerned about having multiple,  
5 multiple parties now in a case that's on a very  
6 fast track. They have offered no reason why the  
7 Attorney General of the State of Missouri does not  
8 adequately represent their interests. If they have  
9 particular witnesses or affidavits that they would  
10 like to offer, there's no showing that the Attorney  
11 General couldn't offer them. I mean, if that's  
12 what they are here for.

13 They had mentioned -- I believe Mr. Hearne  
14 mentioned in the previous hearing that they wanted  
15 to put on maybe by way of affidavit or live  
16 testimony the Indiana Secretary of State. With all  
17 due respect to Mr. Hearne, I don't understand the  
18 relevance of the testimony of the Indiana Secretary  
19 of State about a less restrictive photo ID law  
20 under Indiana law that has been applied in a  
21 primary. I don't know what that has to do with  
22 constitutional issues that are presented in this

23 case under Missouri constitutional law.

24 This really isn't public policy. This is

25 not a public policy forum. This is a court of

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1 law. And what the Indiana Secretary of State has  
2 to offer factually that relates to this photo ID  
3 law in Missouri, I don't see the relevance of  
4 that.

5       They also talked about a statistician. I  
6 don't know exactly what they want to offer from the  
7 statistician. Again, it makes me wonder if it's  
8 going to be a general presentation. I've looked at  
9 some of his work on the internet and it's just sort  
10 of general presentations on who votes and who  
11 doesn't and what various laws may affect who votes  
12 and who doesn't.

13       Our argument is not here that the photo ID  
14 law necessarily prevents people from voting. Our  
15 constitutional argument is that it's an undue  
16 burden on the right to vote. A lot of these people  
17 will suffer those burdens and vote. So what a  
18 statistician has to say about the likelihood of  
19 these types of laws on the -- on how many people  
20 actually vote, I don't see the relevance of that  
21 either.

22       But the bottom-line point is if these

23 affidavits are relevant, and the Court believes it  
24 would be helpful to your consideration, there's  
25 absolutely no reason that the Missouri Attorney

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1 General can't offer them. At least, I haven't  
2 heard any reason that the Missouri Attorney General  
3 couldn't offer them.

4 And in this state, I think we've always  
5 taken very seriously the fact that the Missouri  
6 Attorney General is the person elected in our state  
7 to defend the constitutionality of Missouri  
8 statutes. And I think that's why in particular the  
9 laws of intervention are restrictive. To come into  
10 a case like this, particularly one at the 11th  
11 hour, the intervenors have to show, not just state,  
12 but they have to show and prove the burden is on  
13 them to prove that existing parties are not  
14 adequately representing their interests. Well, the  
15 intervenors' interest is to defend the  
16 constitutionality of this particular statute.  
17 There's certainly been no showing that the Attorney  
18 General with four assistant AGs on the case are not  
19 adequately defending the constitutionality of the  
20 statute.

21 So the timely nature of the intervention  
22 we contest. There's been no showing that they

23 couldn't have intervened back in late July after  
24 the first one of these cases were filed. And  
25 certainly the portion of the rule that requires

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1 them to show, not just state, that existing parties  
2 don't adequately represent their interest is  
3 another burden that we don't think they've met,  
4 your Honor. Thank you.

5 THE COURT: Now, what was your name  
6 again?

7 MR. ROTHERT: Anthony Rothert on behalf of  
8 the Jackson -- the plaintiffs in the Jackson County  
9 case. We agree with what Mr. Downing said and  
10 adopt what he said. The only thing I would add is  
11 that we have not been able to find in our research  
12 any appellate case that's approved the intervention  
13 of parties other than when the Attorney General is  
14 trying to defend the constitutionality of Missouri  
15 statute.

16 And so there is no test, there is no  
17 appellate court test for when the Attorney General  
18 is not doing an adequate job and intervention  
19 should be allowed. And that would require the  
20 intervenors to create new law. And we don't think  
21 that this case, especially on its expedited  
22 schedule, this case to do that.

23 MR. HARDING: On behalf of the Attorney  
24 General's Office, our position is the same today as  
25 it was at our hearing. We don't oppose it.

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1 Certainly, if the Court were to deny it, we're  
2 prepared to proceed in either instance.

3 THE COURT: Let me note that the -- in  
4 terms of the current balance of the two cases,  
5 Mr. Downing, Mr. Newman, and really one of the  
6 defendants, Ms. Woods from the Secretary of State's  
7 Office, is actually on the plaintiffs' side. And  
8 you have Mr. Long and Mr. Harding on the  
9 defendants' side. I don't believe the Attorney  
10 General's Office is doing an inadequate job. And I  
11 don't believe that the movants are entitled to  
12 intervene as a matter of right.

13 But in the Court's discretion, I am going  
14 to grant the motion to intervene as to Scott and  
15 Morris. I'm going to deny it as to the Board of  
16 Election Commissioners from the City of St. Louis.  
17 It's not because they weren't here or because their  
18 motion wasn't. It seems to me this will even it  
19 up, at least, on three identifiable -- although,  
20 the Attorney General's Office in a sense is one  
21 office, but we do have separate lawyers on the  
22 separate cases, just seems to me I don't see any

23 harm. I don't see any delay. And I think the  
24 courts in Cole County have always been generous in  
25 allowing some intervention on either side of people

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1 who are keenly interested.

2 So as a matter of discretion, I will -- if

3 they end up exercising their right of

4 disqualification, so be it. Although, I would note

5 that that only be on the permanent injunction. I

6 think the temporary injunction is under

7 consideration of the Court. I don't think there

8 would be a motion -- I don't think you can

9 disqualify on something the Court already has under

10 advisement. But in the end whatever they do, they

11 do. I don't believe it is for a delay.

12 And so that's going to be my docket entry

13 that it's sustained as to Morris and Scott and

14 denied as to City Board of Election Commissioners.

15 My hope -- and I assume I don't have -- is the 1st

16 this Friday?

17 MR. DOWNING: Yes, your Honor.

18 MR. ROTHERT: Yes.

19 THE COURT: My hope on that day is I'd

20 like -- is because a lot of this evidence is by

21 affidavit and reports, is to give parties a chance

22 to give plaintiffs a chance to say here's what our

23 exhibits show, and point out to me the key -- what  
24 you think the important evidence is in the  
25 affidavits and the like. And then I want to have a

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1 chance to hear the evidentiary objections from the  
2 other side to what's being offered and then a vice  
3 versa and do it that way. And I hope -- well, the  
4 first of that process I hope to get a very solid  
5 notion of what everybody's evidence is. And then I  
6 also hope for you folks to get it, if not that day,  
7 relatively soon, but I am hoping that day the  
8 matters of evidence would seem to be I ought to be  
9 able to rule on pretty much. There may be some  
10 expert testimony or the like I won't have a good  
11 handle on right away.

12       So everybody has a good notion of what I  
13 consider to be admissible evidence, and what I  
14 would consider on basic judgment on and what I  
15 won't. And so that's all I wanted to cover on the  
16 1st and leave it up to the date reflected for the  
17 6th. If we can finish all the evidence -- and I  
18 wasn't clear whether somebody would still want to  
19 have evidence to present on the 6th or not. I  
20 wasn't precluding that because of the fast track.  
21 But I was hoping that we could finish everything on  
22 the 1st, so then on the 6th we can leave it just to

23 arguments on the ultimate merits of the question.

24 MR. HARDING: Your Honor, just to inform

25 the Court, we had sent an e-mail before in regard

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1 should the case spill over onto the 7th our  
2 conflict from the Tuohey ballot initiative cases.  
3 We had suggested possibly taking a late lunch and  
4 going down to the Supreme Court in order to do  
5 those and resume here, if possible. Those as of  
6 Friday was sent back to the Western District. The  
7 Western District indicated they preferred to stay  
8 on the same schedule. So I believe at least for  
9 Mr. Presson and I the 7th, should anything spill  
10 over, will be more difficult now than it will be  
11 before, because we'll have to be in Kansas City as  
12 opposed to here in town. So I just wanted to let  
13 the Court know about that. It sounds like if we  
14 can submit everything by the 1st, that the 6th was  
15 to be reserved for argument and it might not be an  
16 issue.

17 THE COURT: Right. I'm hoping that the  
18 6th is just legal argument and the merits. I  
19 forget what time, but we'll make time. All right.

20 MR. DEUTSCH: Could I get clarification of  
21 what matter, your Honor, Mr. Downing generously  
22 suggested that the Attorney General could represent

- 23 the interest? I take it that your ruling to deny
- 24 intervention to the Election Commission would not
- 25 preclude the Election Commission working with

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1 either -- I would suggest the Attorney General's  
2 Office or with one of the other parties to present  
3 any evidence they had, and that you're not  
4 prohibiting them -- I mean, you're prohibiting  
5 them --

6 THE COURT: I don't think I could  
7 prohibit.

8 MR. DEUTSCH: Yeah. I just wanted to  
9 clarify.

10 THE COURT: And I wouldn't prohibit them  
11 if they wanted to file an amicus brief.

12 MR. DEUTSCH: Thank you, your Honor.

13 THE COURT: Just for shortness, I don't  
14 think I have to expand on that, but that's --

15 MR. DEUTSCH: I understand.

16 THE COURT: Okay. All right. Thank  
17 you-all very much. See you on the 1st.

18 (OFF THE RECORD.)

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