

No. SC88039

IN THE SUPREME COURT OF MISSOURI

KATHLEEN WEINSCHENK, *et al.*,

Plaintiffs-Respondents,

v.

STATE OF MISSOURI, *et al.*,

Defendants-Appellants.

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

INTERVENOR-APPELLANT'S OPENING BRIEF

James B. Deutsch (27093)
BLITZ BARDGETT & DEUTSCH, L.C.
308 E. High Street, Suite 301
Jefferson City, Missouri 65101
(573) 634-2500 Fax: (573) 573-3358

Mark F. (Thor) Hearne, II (37707)
LATHROP & GAGE L.C.
The Equitable Building, Suite 1300
10 South Broadway
St. Louis, Missouri 63102-1708
(314) 613-2500 Fax: (314) 613-2550

Alok Ahuja (43550)
LATHROP & GAGE L.C.
2345 Grand Blvd.
Kansas City, MO 64108-2684
(816) 292-2000 Fax: (816) 292-2001

ATTORNEYS FOR INTERVENOR-APPELLANTS

Dated: September 28, 2006

TABLE OF CONTENTS

	<u>Page</u>
TABLE OF AUTHORITIES	6
JURISDICTIONAL STATEMENT	10
STATEMENT OF FACTS	11
A. Missouri Voter Identification Requirements Before Adoption of the MVPA.....	13
B. Missouri’s Voter Identification Requirements After the Adoption of the MVPA	14
C. The Consolidated Cole County Challenge To Voter Identification	20
D. The Plaintiff’s Evidence In Opposition To (Section) ?? Voter Identification Requirements.	22
E. The Defendants and Intervenors Evidence In Support of The (§ 115.427) Voter Identification Requirements.	23
F. The Circuit Court’s Decision	31
POINTS RELIED ON.....	35
ARGUMENT	37

I.	The Circuit Court Applied the Wrong Standard of Review is that the Challenged MVPA Provisions Are not Subject to Strict Scrutiny, but Are Lawful Because they Impose Reasonable, Non-Discriminatory Restrictions Furthering Important State Regulatory Interests.....	38
A.	Application of Strict Scrutiny is Inconsistent with a Long Line of Missouri Election-Law Decisions.....	39
B.	Strict Scrutiny Is Inapplicable Here Under Federal Law.....	47
C.	The State Need not Identify Past Cases of Actual Fraud the that Photo ID Requirements Prevent; the Legislature Is Entitled to Enact Restrictions to Prevent Fraud and Increase Voter Confidence in the Electoral Process.....	53
D.	The Legislature Need not Address All Possible Sources of Voter Fraud in the Same Enactment.	55
E.	The Fact that Particular, Hypothetical Voters May not Be Able To Comply with the Photo ID Requirement Is not Ground for Invalidating the Law.....	57
II.	The Missouri Legislature Adopted The Voter Identification Provisions of the Missouri Voter Protection Act In Pursuit Of Compelling State Interests, In Preventing Vote Fraud and Increasing Voter Confidence.....	60
A.	Missouri Has An Unfortunate History Of Actual Vote Fraud.....	61

B.	Missouri’s Voter Rolls Are Currently Bloated With Names Of Duplicate, Dead And Ineligible Voters and This Makes Missouri Elections Susceptible To Vote Fraud.....	66
C.	Restoring Public Confidence In Missouri Elections Is A Compelling State Interest.....	69
D.	Voter Photo Identification Requirement Enjoys Broad Public Support As A Measure To Build Confidence In The Election Process.....	70
1.	Voter Identification Requirements Enjoy Broad Bi-Partisan Consensus.....	72
2.	As the Trial Court Found, The Voter Identification Provisions Of The MVPA Did Not Have A Purposeful Disparate Impact On Any Protected Group And Was Not Motivated By Any Partisan Or Invidious Race-Based Agenda.....	74

III.	Voter ID not an undue burden	80
A.	The MVPA provides a 2-year transition period for voters to obtain a free photo ID.....	80
B.	The Experience of Indiana Voters With That State’s Stricter Photo Identification Requirements Demonstrates That Photo Identification Requirements Do Not Impose A Burden On Legitimate Voters	82
C.	Only about 19,000 Missourians Do Not Already Possess State- Issued Photo Identification.....	83
IV.	The Cost Of Obtaining A Certified Birth Certificate Is Not A “Poll Tax” And This Argument Has Been Rejected By Every Court To Consider The Argument	84
V.	Voter ID not An Additional Qualification To Vote	90
VI.	No Remedy is Available, Under the Hancock Amendment, for Boone, Jackson, and St. Louis Counties Because Such a Remedy Would Violate Federal Equal Protection Requirements by Establishing Different Voter Identification Requirements in Different Counties.	93

A. Even if it Were Otherwise Sufficient, Evidence Concerning
 Supposedly Increased Administrative Costs in Boone, Jackson,
 and St. Louis Counties Could only Justify Relief *in those*
Counties, not State-Wide.....94

B. The Equal Protection Clause of the Federal Constitution
 Prohibits Missouri Courts from Implementing a Remedy which
 Would Have the Effect of Imposing Different Voter
 Identification Requirements in Different Counties.....96

CONCLUSION.....99

TABLE OF AUTHORITIES

<u>Cases</u>	<u>Page</u>
<i>ACORN v. Bysiewicz</i> , 413 F. Supp.2d 119 (D. Conn. 2005).....	52, 58
<i>Anderson v. Celebrezze</i> , 460 U.S. 780 (1983).....	52
<i>Ayres-Schaffner v. DiStefano</i> , 37 F.3d 726 (1st Cir. 1994).....	90
<i>Bay County Democratic Party v. Land</i> ,	
347 F. Supp.2d 404 (E.D. Mich. 2004)	52, 58
<i>Brooks v. State</i> , 128 S.W.2d 844 (Mo.banc 2004)	93, 94, 95
<i>Bullock v. Carter</i> , 405 U.S. 134 (1972)	52
<i>Burdick v. Takushi</i> , 504 U.S. 428 (1992).....	36, 47, 48, 50, 52
<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	97, 98
<i>City of Jefferson v. Missouri Department of Natural Resources</i> ,	
863 S.W.2d 844 (Mo. banc 1993)	93, 94
<i>Clingman v. Beaver</i> , 544 U.S. 581 (2005).....	36, 50, 51, 59
<i>Common Cause v. Billips</i> , 439 F.Supp.2d 1294 (N.D. Ga. 2006).....	81, 84, 86, 87
<i>Division of Employment Security v. Taney County Dist. R-III</i> ,	
922 S.W.2d 391 (Mo. banc 1996)	94
<i>Dunn v. Blumstein</i> , 405 U.S. 330 (1972).....	97
<i>Federal Election Comm’n v. National Right to Work Comm.</i> ,	
459 U.S. 197 (1982).....	54

<i>Gilmore v. Gonzales</i> , 440 F.3d 1168 (9th Cir. 2005)	88
<i>Gonzalez v. Arizona</i> , 435 F Supp. 2d 997 (D. Ariz. 2006).....	91, 92
<i>Gray v. Sanders</i> , 372 U.S. 368 (1963).....	98
<i>Greidinger v. Davis</i> , 988 F.2d 1344 (4th Cir. 1993)	58, 89
<i>Griffin v. Roupas</i> , 384 F.3d 1128 (7th Cir. 2004), <i>cert. denied</i> , 544 U.S. 923 (2005).....	57, 58, 66
<i>Indiana Democratic Party v. Rokita</i> , 2006 WL 1005037 (S.D. Ind.).....	79, 86, 87, 88
<i>League of Women Voters v. Blackwell</i> , 340 F. Supp.2d 823 (N.D. Ohio 2004)	52, 58
<i>McConnell v. Federal Election Comm'n</i> , 540 U.S. 93 (2003)	54
<i>McdONALD V. Board of Election Com'rs of Chicago</i> , 394 U.S. 802 (1969).....	56
<i>McKay v. Thompson</i> , 226 F.3d 752 (6th Cir. 2000)	58, 89
<i>Miller v. Director of Revenue</i> , 719 S.W.2d 787 (Mo. banc 1986)	94
<i>Munro v. Socialist Workers Party</i> , 479 U.S. 189 (1986).....	54, 59
<i>Nance v. Kearbey</i> , 251 Mo. 374, 158 S.W. 629 (Mo. banc 1913)	41
<i>Rosario v. Rockefeller</i> , 410 U.S. 752 (1973)	59, 90
<i>Semler v. Oregon State Board of Dental Examiners</i> , 294 U.S. 608 (1935).....	57

<i>State ex rel. Bush-Cheney 2000 v. Baker,</i>	
34 S.W.3d 410 (Mo. App. E.D. 2000).....	44, 45
<i>State ex rel. Bushmeyer v. Cahill,</i>	
575 S.W.2d 229 (Mo. App. E.D. 1978).....	43
<i>State ex rel. Dunn v. Coburn,</i> 260 Mo. 177, 168 S.W. 956 (1914).....	36, 42, 43
<i>State ex rel. Kirkpatrick v. Board of Election Commissioners,</i>	
686 S.W.2d 888 (Mo. App. W.D. 1985)	43
<i>State ex rel. McClellan v. Kirkpatrick,</i>	
504 S.W.2d 83 (Mo. banc 1974)	36, 40, 41, 42
<i>State v. Williams,</i> 729 S.W.2d 197 (Mo. banc 1987).....	39
<i>Stiles v. Blunt,</i> 912 F.2d 260 (8th Cir. 1990)	38
<i>Storer v. Brown,</i> 415 U.S. 724 (1974)	47, 51, 59
<i>Tashjian v. Republican Party of Conn.,</i> 479 U.S. 208 (1986).....	50
<i>Timmons v. Twin Cities Area New Party,</i> 520 U.S. 351 (1997).....	51, 53, 59
<i>Totton v. Murdock,</i> 482 S.W.2d 65 (Mo. banc 1972).....	43
<i>U.S. v. State of Missouri, et al.,</i>	
No. 2:05-cv-04391-NKL (W.D. Mo. filed Nov. 22, 2005).....	66, 68
<i>Weber v. Shelley,</i> 347 F.3d 1101 (9th Cir. 2003)	52
<i>Wexler v. Andersen,</i> 452 F.3d 1226 (11th Cir. 2006).....	52
<i>Williamson v. Lee Optical of Okla., Inc.,</i> 348 U.S. 483 (1955).....	56

Statutes and Constitutional Provisions

§ 115.117, RSMo45

§ 115.193, RSMo45

§ 115.427, RSMo *passim*

§ 115.430, RSMo15, 18, 19

§ 115.439, RSMo45

§ 115.480(2), RSMo.....14

§ 115.631(25), RSMo80

§ 115.631(26), RSMo80

Federal REAL ID Act of 2005, Pub. L 109-13, Title II88

Help America Vote Act (“HAVA”),

 Pub. L. No. 107-252, 116 Stat. 166612, 18

Missouri Const., Art. VIII, § 2..... 10, 21, 32, 35, 37, 40, 46

Missouri Const., Art. I, § 2510, 21, 32, 36, 37

Missouri Const., Art. I, § 2 21, 32, 35, 36, 37, 38

Missouri Const., Art. I, § 1021, 32, 36, 37, 38

Missouri Const., Art. V, § 3.....11

Missouri Const., Art. X.....20

National Voter Registration Act (“NVRA”), 42 U.S.C. §§1973 et seq.91

Senate Bill 1014 (2006) 10, 11, 25, 60, 61, 73, 80

JURISDICTIONAL STATEMENT

These consolidated cases involve challenges to the constitutionality of the Missouri Voter Protection Act (“MVPA”), Senate Bill 1014 (2006), which amends the provisions of § 115.427, RSMo; concerning the identification voters must present to vote in Missouri elections.

On September 14, 2006, the Circuit Court of Cole County, Missouri entered its Judgment finding that § 115.427, RSMo, as amended by Senate Bill 1014, violated multiple provisions of the Missouri Constitution, because it allegedly:

- imposes impermissible additional qualifications to vote in violation of Article VIII, § 2 of the Missouri Constitution;
- interferes with and unduly burdens the free exercise of the right of suffrage under Article I, § 25 and Article VIII, § 2 of the Missouri Constitution; and
- requires the payment of money to vote, and unduly burdens to the right to vote, in violation of the due process and equal protection clauses of Article I, §§ 2 and 10 of the Missouri Constitution.

LF303-04.¹ The Circuit Court’s Judgment permanently enjoined the State and the Secretary of State “from implementing and enforcing the changes to Section

¹ Intervenors cite the Legal File of the *Weinschenk* case (No. SC88039) as “LF” and the Legal File of the *Jackson County* case (No. SC88038) as “LFJC”.

115.427 enacted in the Missouri Voter Protection Act, including the Photo ID Requirement.” LF306-08.

Notices of Appeal were timely filed on September 21 and 22, 2006. LF358.

This appeal falls within this Court’s exclusive appellate jurisdiction under Article V, § 3 of the Missouri Constitution, because it involves “the validity * * * of a statute * * * of this state * * *.”

STATEMENT OF FACTS

The Missouri General Assembly ended the 2006 legislative session by passing one of the most sweeping election reform bills in Missouri history. This election reform, Senate Bill 1014 and 730, the MVPA, was passed by significant majorities of both the Missouri Senate and the Missouri House and signed by Governor Blunt. The MVPA is codified at Chapter 115 of Missouri Statutes. The MVPA contains at least ten election reforms that were recommended by the bipartisan Commission on Federal Election Reform co-chaired by former President Jimmy Carter and former Secretary of State James A. Baker, Jr. (the “Carter-Baker Commission”).² The MVPA also contains a number of provisions that Missouri must adopt to be in conformity with the federal Help America Vote Act

² The full Carter-Baker report is attached as Exhibit “B” to the affidavit of Kay James and the Legal File at 220 through 223 summarizes the ten recommendations of the Carter-Baker Commission adopted by the MVPA.

(“HAVA”). Pub.L.No. 107.252, 116 Stat. 1666 (codified in scattered sections of 2, 5, 10, 36, and 42 U.S.C. § 15481 *et. seq.*).

Among the recommendations of the Carter-Baker Commission was that,

2.5.1 To ensure that persons presenting themselves at the polling place are the ones on the registration list, the Commission recommends that states require voters to use the REAL ID card, which was mandated in a law signed by the President in May 2005. The card includes a person’s full legal name, date of birth, a signature (captured as a digital image), a photograph, and the person’s Social Security number. This card should be modestly adapted for voting purposes to indicate on the front or back whether the individual is a U.S. citizen. States should provide an EAC-template ID with a photo to non-drivers free of charge.

2.5.2 The right to vote is a vital component of U.S. citizenship, and all states should use their best efforts to obtain proof of citizenship before registering voters.

2.5.3 We recommend that until January 1, 2010, states allow voters without a valid photo ID card (Real or EAC-template ID) to vote, using a provisional ballot by signing an affidavit under penalty of perjury. The signature would then be matched with the digital image

of the voter's signature on file in the voter registration database, and if the match is positive, the provisional ballot should be counted. Such a signature match would in effect be the same procedure used to verify the identity of voters who cast absentee ballots. After January 1, 2010, voters who do not have their valid photo ID could vote, but their ballot would count only if they returned to the appropriate election office within 48 hours with a valid photo ID.

A. Missouri Voter Identification Requirements Before Adoption of the MVPA

Under Missouri law, prior to the adoption of the MVPA, §115.427 required a person to provide one of the following forms of identification before casting a ballot:

- (1) Identification issued by the state of Missouri, an agency of the state, or a local election authority of the state;
- (2) Identification issued by the United States government or agency thereof;
- (3) Identification issued by an institution of higher education, including a university, college, vocational and technical school, located within the state of Missouri;

- (4) A copy of a current utility bill, bank statement, government check, paycheck or other government document that contains the name and address of the voter;
- (5) Driver's license or state identification card issued by another state; or
- (6) Other identification approved by the secretary of state under rules promulgated pursuant to subsection 3 of this section other identification approved by federal law.

Prior to adoption of the MVPA provisional ballots were available only for state-wide candidates and issues and candidates for federal office. §115.480(2), RSMo. Missouri had no provision to issue free photo identification and charged \$11.00 for a state non-drivers photo identification card. Affidavit of Lowell Pearson, ¶14.³

B. Missouri's Voter Identification Requirements After the Adoption of the MVPA

The MVPA changed these provisions of Missouri election law in the following manner. It provided that provisional ballots would be available in all

³ Exhibits were admitted into evidence at the Circuit Court from various parties, but were not numbered. These exhibits have been deposited with the Court, pursuant to Rule 81.16, and are cited in this Brief by title.

elections and for all races and issues. §§ 115.430, 115.427(5), (13), RSMo. It also provides that the Missouri Department of Revenue would issue photo identification cards to any person seeking one to vote and the State of Missouri is required to pay the “legally required fees.” §115.427(7), RSMo. The provisions for issuance of photo identification without cost were implemented immediately upon Governor Blunt signing the MVPA under an “emergency clause.”

The Deputy Director of the Missouri Department of Revenue, Lowell Pearson, testified that the Department of Revenue began immediately providing free photo identification on June 15, 2006, and that, as of August 16, 2006, “had issued 1,237 free non-drivers licenses for voting purposes.” Affidavit of Lowell Pearson, ¶3. Additionally, the Missouri Department of Revenue provided free photo identification at all of its 183 contract offices and at offices directly managed by the Department of Revenue. Affidavit of Lowell Pearson.

The MVPA required that the Missouri Department of Revenue provide “at least nine mobile units” to provide free photo identification to residents of nursing facilities and in “other public places accessible to and frequented by disabled and elderly persons.” §115.427(7), RSMo.

The MVPA required that, “before receiving a ballot, voters shall establish their identity and eligibility to vote at the polling place by presenting a form of

personal identification.” *Id.* The specified forms of personal identification are one of the following:

(1) A nonexpired Missouri driver’s license showing the name and 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.

§ 115.427(1), RSMo.

The MVPA exempted the following three categories of voters from the requirement of providing photo identification: Those individuals who do not have photo identification because of “(1) a physical or mental disability or handicap of the voter, if the voter is otherwise competent under Missouri law; or (2) a sincerely held religious belief against the forms of personal identification [specified in §115.427]; or (3) The voter being born on or before January 1, 1941.”

§ 115.427(3), RSMo.

The MVPA further provided for a transition period until the 2006 General Election for any person to obtain the free photo identification. All voters lacking the specified photo identification before November 2006 are still able to cast a ballot that will be counted. Specifically, Section 115.427(13) provides:

For any election held on or before November 1, 2008, an individual who appears at a polling place without identification in the form described in subsection 1 of this section, and who is otherwise qualified to vote at that polling place, may cast a provisional ballot

after [executing the specified form of affidavit]. Such provisional ballot shall be entitled to be counted, provided the election authority verifies the identity of the individual by comparing that individual's signature to the current signature on file with the election authority **

The MVPA did not change Missouri law concerning the availability of absentee ballots.

Before the MVPA became effective, Section 115.430 provided that a provisional ballot was only available in state-wide races and issues and federal races. Provisional balloting was adopted by Missouri in 2002 in response to the mandate of HAVA, 42 U.S.C. §15482, which required that states provide a “fail-safe” procedure for voting so a person whose name was not on the voter roll could still cast a ballot. HAVA only mandated a provisional ballot be available in federal elections and the original Missouri provisional ballot law only provided for a provisional ballot in state-wide and federal general and primary elections.

Section 115.430, before the MVPA, did provide that a provisional voter who was found to be an eligible voter opportunity could vote in these limited races. The eligible provisional voter was nonetheless denied opportunity to vote in “down-ticket” races, including races for state senate and representative and also denied opportunity to vote in local issues. Further, a provisional vote was not available in elections other than primary and general elections. In the 2004 general

election, several thousand provisional ballots were cast by eligible voters. Each of these voters were found to be an eligible voter with the right to cast a ballot. Yet, under the existing limited availability of provisional ballots, they were denied opportunity to cast a vote in these other important races and issues. The Missouri legislature corrected this situation by making a provisional ballot available in every race and every election. To wit: (1) Section 115.430 (1) was amended by deleting the limitation that provisional ballots be only for state-wide and federal candidates and was expanded to every issue and candidate on the ballot, and, (2) Section 115.427 (13) provides that during the transition period that “[f]or **any** election ***” a person lacking the photo identification may cast a provisional ballot “that shall be counted” once eligibility is verified, (3) Section 115.427 (3) mandates that in **any** election, before and after 2008, a voter born in 1941 or before, disabled or with religious objection “may cast a provisional ballot. Such provisional ballot shall be counted ***.” This access to a provisional ballot provided in Section 115.427 (3) is in no way conditioned or limited to only general or primary elections.

The MVPA greatly expanded the rights of Missouri voter to participate in all elections and cast ballots in all races. This increased availability of provisional ballot “fail-safe” voting is available to those who do not have the requisite

identification until 2008 and to all those Missouri voters who are elderly, disabled, or with a religious objection before and after 2008.

C. The Consolidated Cole County Challenge To Voter Identification.

On July 17th Jackson County, Missouri, Katheryn J. Shields, County Executive for Jackson County, in her official and individual capacity, The City of St. Louis, Missouri Francis G. Slay, Mayor of the City of St. Louis in his individual and official capacity, and Charlie Dooley, the County Executive for St. Louis County in his individual capacity filed a “Declaratory Judgment, Injunction and Class Action” in Cole County. Cause Number 06-AC-CC00587. Subsequently, the City of St. Louis and Jackson County withdrew as parties. (These plaintiffs have been referred to as the “Jackson County” plaintiffs and this case as the “Jackson County” case.) The Jackson County plaintiffs sought to invalidate Section 115.427 of the MVPA, the section providing for the state to issue free photo identification and requiring voters to present specified forms of photo identification before casting a ballot as a prohibited “unfunded mandate” in violation of Article X of the Missouri Constitution (the “Hancock Amendment”). LFJC8-20.⁴

⁴ Other than this reference, all references to the Legal File should be to the Weinschenk Legal File.

On August 3, 2006, Kathleen Weinschenk, William Kottmeyer, Robert Pund, Amanda Mullaney, Richard VonGlahn and Give Missourians a Raise, Inc. filed a separate action in Cole County challenging Section 115.427 of the MVPA (the “Weinschenk Case”). Cause Number 06-AC-CC000656. LF9-54. The Weinschenk Plaintiffs sought to invalidate Section 115.427 of the MVPA under seven legal theories. To wit, the Weinschenk Plaintiff’s contend that Section 115.427 is (1) an “improper additional qualification to vote in violation of Article VIII, Section 2 of the Missouri Constitution;” (2) an “Interference with free exercise of the right of suffrage violation (sic) in Article I, Section 25 of the Missouri Constitution;” (3) an “improper requirement of payment of money to vote in violation of the equal protection clause (Article I, Section 2) of the Missouri Constitution;” (4) an “undue burden on the right to vote in violation of due process and the equal protection clause of the Missouri Constitution, Article I, Sections 10 and 2, Respectfully (sic);” (5) a “Disparate impact upon qualified voters in suspect classes in violation of the equal protection clause in Article I, Section 2 of the Missouri Constitution;” and, (6) “discrimination between absentee voters and in-person voters in violation of the equal protection clause in Article I, Section 2 of the Missouri Constitution.” The Weinschenk Plaintiffs also brought a Hancock Amendment challenge to Section 115.427 that mirrored the Hancock challenge asserted by the Jackson County Plaintiffs.

On August 16, 2006, the Board of Election Commissioners for the City of St. Louis sought to intervene. LF3. Delbert Scott, the Missouri State Senator from the 28th Senate district sought to intervene in his individual capacity as a taxpayer, registered voter and citizen. LF4, 107-12. Senator Scott is Chair of the Financial & Governmental Organizations, Veterans Affairs, and Elections Committee. Senator Scott was also one of the Senators that (along with Senate Majority Leader Gibbons) introduced SB 1014. LF107-12. Dale Morris is an elderly St. Louis County resident who is disabled and lives on a fixed income. LF107-12. Ms. Morris is a taxpayer and citizen of Missouri and a registered voter. She also sought to intervene. LF107-12.

On August 18, 2006, the Circuit Court denied Senator Scott and Ms. Morris's motion to intervene. LF4. On August 28, 2006, the Court reconsidered this motion and granted Senator Scott and Ms. Morris's' motion to intervene. LF6. The Court denied the City of St. Louis Board of Election Commissioners' renewed motion to intervene. LF 6.

D. The Plaintiffs' Evidence In Opposition To Section 115.427 Voter Identification Requirements.

On August 21, 2006, the Circuit Court held a hearing in which the Weinschenk and Jackson County Plaintiffs' presented testimony in support of their claim. The Jackson County Plaintiffs offered the testimony of Robert Nichols, the

Democrat Director of Elections for Jackson County Board of Election Commissioners, Tr. 50,⁵ Carol Signaigo, a former worker with the City of St. Louis Board of Election Commissioners, Tr. 101, Judith Taylor, the Democrat Director of Elections for St. Louis County, Tr. 132, Wendy Noren, the County Clerk for Boone County, Missouri, Tr. 178, and Betsy Byers, the Democrat Director of Elections for the Secretary of State's office, Tr. 228. The Weinschenk Plaintiffs presented the testimony of the named Plaintiff, Kathleen Weinschenk. Tr. 266.

This was the only testimony presented in this case. All other evidence was presented by stipulation or exhibits and affidavits.

E. The Defendants and Intervenors Evidence In Support of The Section 115.427 Voter Identification Requirements.

The Intervenors presented evidence in support of the MVPA including:

1. Affidavit of Lowell Pearson.

Lowell Pearson is the Deputy Director of the Missouri Department of Revenue. Attorney General Nixon submitted Mr. Pearson's affidavit in support of the voter identification provisions of §115.427. Mr. Pearson supervised the Missouri Department of Revenue's implementation of the free photo identification

⁵ Intervenors refer to the transcript as "Tr." The transcripts were filed in both cases, but appear only in the Jackson County Legal File, LFJC.

program. He noted that the Department of Revenue began providing free photo identification immediately upon Governor Blunt signing the MVPA on June 14th. The Department of Revenue purchased and deployed 25 mobile photo identification teams and dedicated employees to operate these mobile units. In addition, the Department of Revenue made free photo identification available in all 183 of its contract offices located through out the state. As of August 16th, the Missouri Department of Revenue had issued 1237 free photo identification cards.

Mr. Pearson also testified that Secretary of State Carnahan's estimate of Missourians without photo identification inaccurately overstates the number of Missourians without photo identification. Mr. Pearson stated that according to the Missouri Department of Revenue records 4,458,726 Missourians age 18 or older have been issued a drivers license, non-drivers license or permit. (Pearson Affidavit, para 4.) This does not include the number of Missourians that possess one of the other forms of federal photo identification specified by §115.427.

2. Affidavit of Senator Scott.

Senator Scott stated that the MVPA was introduced for the purpose of protecting the right of all Missourians to participate in Missouri state and federal elections and that it was not introduced in pursuit of any partisan objective. To the contrary, the objective of the MVPA was to protect the right of all Missourians to vote and to increase all Missouri voters' confidence in the state's election process.

The MVPA also intended to bring Missouri into compliance with HAVA. As to the provisions of the MVPA concerning voter identification, Senator Scott stated that the Senate considered, *inter alia*, the “best practice” recommendations of the bi-partisan Carter-Baker Commission, including the requirement that a person provide government-issued photo identification before casting a ballot.

Senator Scott stated that between introduction and final passage, the photo identification requirement of SB 1014 was made more lenient than originally proposed by exempting Missourians born before 1941. Going even further, the Senate amended SB 1014 to also delay the effective date for a voter having photo identification from November 2006, until November 2008. Finally, Senator Scott testified that the state-funded resources available to provide free photo identification to any Missourian were dramatically increased from those in the original proposal.

3. Affidavit of Dale Morris.

Dale Morris is a disabled, elderly voter who currently lives in St. Louis County, Missouri. Ms. Morris lives on a modest fixed income. Ms. Morris previously lived in the City of St. Louis and, in her capacity as a current St. Louis County resident and a previous St. Louis City resident and voter, is concerned that fraudulently or illegally cast ballots will nullify her legally cast ballot. Ms. Morris testified in support of the MVPA in the Missouri House and stated that the photo

identification requirement provided her greater confidence that her vote would be accurately counted. Further, Ms. Morris noted that, despite her limited income, age and disability, she was able to obtain government-issued photo identification even prior to the provisions of the MVPA which made it free.

4. Affidavit of John J. Diehl, Jr. – Chairman of St. Louis County Election Board.

John Diehl is the Chairman of the St. Louis County Board of Election Commissioners (“St. Louis County Board”). Mr. Diehl stated that the requirements of the MVPA will not impose any additional cost on the St. Louis County Board and that, if anything, it may bring a cost savings to the St. Louis County Board. To the extent that the MVPA requires any actions of the St. Louis County Board, such actions simply “replace or mirror” actions required of the Board under prior law. Further, the budget adopted by the Board is consistent with the position that the MVPA achieves a cost savings for the Board.

Chairman Diehl attached a Fiscal Note analysis submitted by the St. Louis County Board to the Missouri Department of Revenue that is consistent with his testimony finding that the requests of the MVPA impose no additional cost to the Board.

5. Affidavit of Scott Leindecker – Director of Elections St. Louis City Election Board.

Director of Elections of the City of St. Louis Election Board, Mr. Leindecker, affirmed that he is responsible for and familiar with the operation of the City Election Board. Mr. Leindecker is also familiar with the requirements and provisions of the MVPA. Mr. Leindecker stated that the MVPA does not impose any additional cost upon the City of St. Louis Election Board and that the Board does not anticipate any additional expense in the conduct of elections by reason of the MVPA. Mr. Leindecker then went through each provision of the MVPA and explained how the respective provision was an item already required of the City Board or was a matter that did not require additional expense.

6. Affidavit of Indiana Secretary of State Todd Rokita.

Secretary of State Todd Rokita, the chief election official for the state of Indiana affirmed that Indiana enacted a photo identification law. The requirements of the Indiana voter identification law, Senate Enrolled Act 483, are more rigorous than those in Section 115.427.

Secretary of State Rokita testified that it is his responsibility as Indiana's chief election official to monitor Indiana elections, and particularly the honesty, fairness and accessibility of Indiana elections for all Indiana voters. Secretary Rokita affirmed that after the Indiana voter identification law was adopted, it was

challenged in federal court and upheld. After being upheld, Indiana has conducted several elections – including a recent state-wide election – in which these photo identification provisions have been in force. Secretary Rokita found that there was no valid complaint that any eligible Indiana voter was prevented from voting by reason of the photo identification requirement. Further, Secretary Rokita found that the photo identification requirement increased confidence in the election process and did not impose any financial burden upon local election officials.

7. Affidavit of University of Missouri Professors, Dr. Overby and Dr. Milyo.

Marvin Overby is a professor of Political Science at the University of Missouri Columbia with a doctorate in political science and Jeffery Milyo is a professor of Economics and Public Affairs with a doctorate in Economics from Stanford University.

These two professors have studied the effects of the voter identification provisions of Section 115.427 and concluded that based upon their research, they reached three essential conclusions.

First, the best estimate of the number of eligible Missouri voters that do not possess a Missouri Department of Revenue-issued photo identification and that are not residents of a facility licensed under chapter 198 is about 19,000 persons. Of

these, fewer than 6,000 are likely to desire a photo identification for the purpose of voting, based upon historic voter participation patterns.

Second is that the existing scholarly literature strongly suggests that voter photo identification requirements are not likely to have a significant effect on either voter participation or the outcome of elections, nor is such a photo identification requirement likely to have a significant or differential impact on poor, less educated, or minority voters.

Finally, the existing scholarly literature does demonstrate that a significant percentage of citizens – in Missouri and nationally – lack confidence in the election process, are concerned about vote fraud, and that significant majorities of voters from all political parties and racial groups support the requirement that a person provide a government-issued photo identification before casting a ballot.

8. Affidavit of Dr. John Lott.

Dr. John Lott has a PhD in Economics from the University of California Los Angeles and was, among his other accomplishments, a resident scholar at Yale University School of Law.

Dr. Lott has undertaken a national study into the effect of voter identification (including photo identification) requirements. He has studied the effect that voter identification requirements have upon voter participation and vote fraud. Dr. Lott concluded that there is evidence of vote fraud in U.S. general elections.

Regulations that prevent fraud are shown to actually *increase* the voter participation rate. Dr. Lott was unable to identify any credible evidence that voting regulations such as voter identification requirements differentially harm minorities, the elderly, or the poor. Dr. Lott's study examined a broad range of voting regulations and concluded that it is still too early to evaluate any possible impact of mandatory photo identifications on U.S. elections. However, what can be said is that the non-photo identification regulations that are already in place have not had the negative impacts that opponents predicted.

9. Affidavit of Kay Cole James.

The Honorable Kay Cole James is the former Director of the U.S. Office of Personnel Management. In that capacity, Mrs. James oversaw the work of federal election observers. Mrs. James was a member of the Carter-Baker Commission. Mrs. James testified before the U.S. House of Representatives and noted her particular interest in election reform as an African-American woman that came of age in the South.

Mrs. James testified in support of photo identification requirements and noted that,

[s]ome have mistakenly suggested that requiring voters to use a photo identification will be a poll tax. It is nothing of the sort. The vast majority of citizens already have a form of the required photo

identification. Others should be able to easily obtain the identification. States should take steps to assure the opportunity of all voters to obtain an identification. *** My friend on the Commission, former Democrat Congressman Lee Hamilton, has noted that this recommendation of Photo identification will increase the confidence of voters, especially minorities and low income voters, to participate in the election with confidence and that they will be allowed to vote. In our post 9-11 society where identification is required to enter a federal building, to cash a check or board a plane it is good public policy to provide photo identification free to low income and minority persons. It is also good public policy to safeguard our elections with the requirement of photo identification [which is supported by] Democrat statesmen such as President Carter, Lee Hamilton, and civil rights advocates such as Juan Williams and former Atlanta mayor, Andrew Young.

F. The Circuit Court's Decision.

On September 14, 2006, Cole County District Court Judge Callahan denied the Jackson County Plaintiffs relief under the Hancock Amendment and granted the Weinschenk Plaintiffs' request for an injunction on their first four counts but denied the Weinschenk Plaintiffs' relief on Counts 5, 6, and 7. Specifically the

Court held, that Section 115.427 is: (1) an improper additional qualification to vote in violation of Article VIII, Section 2 of the Missouri Constitution.; (2) an interference with free exercise of the right of suffrage in violation of Article I, Section 25 of the Missouri Constitution; (3) an improper requirement of payment of money to vote in violation of the equal protection clause of the Missouri Constitution; and (4) an undue burden on the right to vote in violation of due process and the equal protection clause of the Missouri Constitution, Article I, Sections 2 and 10. LF306-08.

The essence of the Circuit's Courts analysis turned upon the cost of obtaining documents needed to obtain the free photo identification. Specifically, the Circuit Court found that,

[u]nder the revised 2005 drivers license law, three different forms of proof must now be presented by all citizens seeking or renewing a driver or nondriver license for the first time under the new law. Those are: Proof of Lawful Presence, Proof of Identity, and Proof of Residence. For someone born in the United States, Proof of Lawful Presence can only be established by a U.S. passport (cost \$97 to \$236), or birth certificate certified with an embossed or raised seal by the state or municipality (cost \$15 to \$30). For U.S. citizens born in another country, the documentation for Proof of Lawful Presence is

more expensive and requires a Certificate of Citizenship, a Certificate of Naturalization, or a certificate of Birth Abroad. *** The second category of proof required by the Missouri Department (sic) of Revenue is Proof of Identity. To satisfy this category, an individual must present a U.S. passport, a Social Security card, or a Medicare card. For most citizens to establish Proof of Identity this will mean obtaining a Social Security card.

LF300-01.

The Circuit Court then detailed the requirements for obtaining a Social Security Card and noted particularly the requirement that people whose names have changed – especially women whose name has changed by reason of marriage or divorce – must obtain and submit original documents validating the name change. This, the Circuit Court found, “will have a greater disparate effect on women rather than men, regardless of their affluence. However, an even greater disparate effect will occur on poor women because of the financial burden entailed in acquiring certified copies of all the supporting documents.” LF300-01.

Given this, the Circuit Court found that, “The fact that the state does not charge for the nondriver 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 government documents to get the ‘free’ photo identification to qualify for the privilege of voting.” LF301.

The District Court denied the Jackson County and Weinschenk Plaintiffs’ request for relief for a purported Hancock Amendment violation because the Circuit Court found that it did not have the authority to certify the Hancock challenge to be a state-wide class action applicable to all Missouri election jurisdictions and that the “relief sought by plaintiffs is beyond the power of this court to grant.” LF304-06.

The Circuit Court held that “the State’s interest in establishing a person’s identity as the person who is registered to vote is a legitimate government goal” and “[t]he court does not question the motives of the proponents of the photo identification requirements and acknowledges the benefits of an identification system which increases voter confidence in the integrity of the electoral system. Differing perceptions and opinions about the effect of a strict photo identification system on suspect classes do not constitute proof of purposeful discrimination and [the] court rejects plaintiffs’ proof and arguments in support of its claims on Counts V and VI.” LF301.

Thus, the Circuit Court held, that Section 115.427 did not have a disparate impact upon qualified voters in suspect classes in violation of the equal protection clause in Article I, Section 2 of the Missouri Constitution and that it did not

discriminate between absentee voters and in-person voters in violation of the equal protection clause in Article I, Section 2 of the Missouri Constitution. LF304-05.

The Defendant, State of Missouri, and Senator Scott and Ms. Morris filed a notice of appeal in both the Jackson County and Weinschenk cases. Senator Scott and Ms. Morris subsequently dismissed their appeal of the Jackson County case.

POINTS RELIED ON

The Circuit Court erred in entering a declaratory judgment that § 115.427, RSMo of the Missouri Voter Protection Act, including its Photo identification requirement, is unconstitutional, and in entering a permanent injunction restraining the State and the Secretary of State from implementing and enforcing § 115.427, because:

(a) the statute does not impose additional voter qualifications in violation of Article VIII, § 2 of the Missouri Constitution, in that the statute merely establishes procedures for the conduct of Missouri elections, and for the verification of a particular voter's qualification to vote, in the exercise of the Legislature's recognized police power authority to regulate Missouri elections to assure the honesty and integrity of the electoral process, and does not itself establish any substantive qualification or criterion conditioning the right to vote (Plaintiffs' Count I);

(b) the statute does not interfere with the free exercise of the right to vote under Article I, § 25 of the Missouri Constitution, or constitute an undue burden on the right to vote in violation of Article I, §§ 2 and 10 of the Missouri Constitution, in that the statute constitutes a reasonable, non-discriminatory regulation of the right to vote in furtherance of the State's important regulatory interest in ensuring that Missouri elections are (and are perceived by the public to be) fair, honest, and fraud-free, and the State's important regulatory interest in fostering public confidence in the electoral process (Plaintiffs' Counts II and IV); and

(c) the statute does not make payment of a fee an electoral standard in violation of Article I, §§ 2 and 10 of the Missouri Constitution, in that the statute does not impose any mandatory, direct fee or cost on voters as a necessary condition of their exercising their right to vote (Plaintiffs' Count III).

- *State ex rel. McClellan v. Kirkpatrick*, 504 S.W.2d 83 (Mo. banc 1974)
- *State ex rel. Dunn v. Coburn*, 260 Mo. 177, 168 S.W. 956 (1914)
- *Burdick v. Takushi*, 504 U.S. 428 (1992)
- *Clingman v. Beaver*, 544 U.S. 581 (2005)
- § 115.427, RSMo

ARGUMENT

The Circuit Court erred in entering a declaratory judgment that § 115.427, RSMo of the Missouri Voter Protection Act, including its Photo identification requirement, is unconstitutional, and in entering a permanent injunction restraining the State and the Secretary of State from implementing and enforcing § 115.427, because:

(a) the statute does not impose additional voter qualifications in violation of Article VIII, § 2 of the Missouri Constitution, in that the statute merely establishes procedures for the conduct of Missouri elections, and for the verification of a particular voter's qualification to vote, in the exercise of the Legislature's recognized police power authority to regulate Missouri elections to assure the honesty and integrity of the electoral process, and does not itself establish any substantive qualification or criterion conditioning the right to vote (Plaintiffs' Count I);

(b) the statute does not interfere with the free exercise of the right to vote under Article I, § 25 of the Missouri Constitution, or constitute an undue burden on the right to vote in violation of Article I, §§ 2 and 10 of the Missouri Constitution, in that the statute constitutes a reasonable, non-discriminatory regulation of the right to vote in furtherance of the State's important regulatory interest in ensuring that Missouri elections are (and are

perceived by the public to be) fair, honest, and fraud-free, and the State's important regulatory interest in fostering public confidence in the electoral process (Plaintiffs' Counts II and IV); and

(c) the statute does not make payment of a fee an electoral standard in violation of Article I, §§ 2 and 10 of the Missouri Constitution, in that the statute does not impose any mandatory, direct fee or cost on voters as a necessary condition of their exercising their right to vote (Plaintiffs' Count III).

I. The Circuit Court Applied the Wrong Standard of Review in that the Challenged MVPA Provisions Are not Subject to Strict Scrutiny, but Are Lawful Because they Impose Reasonable, Non-Discriminatory Restrictions Furthering Important State Regulatory Interests.

The appropriate standard of review is not a mere technicality here. To the contrary, the Circuit Court itself recognized that, “[w]hen a classification is subject to strict scrutiny, it is almost always found unconstitutional.” LF348 (quoting *Stiles v. Blunt*, 912 F.2d 260, 263 n.5 (8th Cir. 1990); see also Findings LF348 (citing constitutional law treatise for the proposition that “strict scrutiny review is ‘strict’ in form but usually ‘fatal’ in fact”).

The Circuit Court held that any regulation of election procedure which could have the effect of preventing any Missouri voter from casting a ballot was subject

to strict scrutiny, a standard the Circuit Court itself observed was “‘fatal’ in fact.” LF348. Application of the Circuit Court’s analysis would have the effect of making *any* State regulation of the time, place, and manner of conducting elections unlawful. But besides its absurd consequences, the Circuit Court’s analysis is wrong as a matter of law.

Missouri caselaw does not apply the strict scrutiny standard which the Circuit Court adopted. Instead, Missouri courts have recognized that regulation of elections to ensure that they are conducted fairly and honestly falls within the Legislature’s inherent police power and regulations adopted by the State are constitutional, so long as they are rationally related to legitimate governmental objectives. Further, federal courts - which consider these questions with greater frequency – do not apply the Circuit Court’s strict scrutiny standard, and are consistent with Missouri’s election-law precedent.

A. Application of Strict Scrutiny Is Inconsistent with a Long Line of Missouri Election-Law Decisions.

The Circuit Court suggested that, under Missouri law, it was required to apply strict scrutiny because the Photo identification requirement “impinges upon a fundamental right to vote.” LF344 (citing *State v. Williams*, 729 S.W.2d 197 (Mo. banc 1987)). Further, the Court held that the Photo identification requirement imposed an impermissible, “additional qualification” on Missouri voters, even

though – according to the Circuit Court – “[t]he Missouri Constitution does not permit the legislature to add qualifications or disqualifications [on the right to vote] not specifically mentioned” in Art. VIII, § 2, LF338; *see also* LF334 (stating that Article VIII, § 2 “gives the legislature authority to make one, and only one, determination on qualifications to vote” – namely, whether persons convicted of certain crimes are disabled from voting).

The Circuit Court’s reasoning misreads the scope of the Legislature’s power to regulate the manner in which Missouri elections are conducted and to impose reasonable procedures on the exercise of the right to vote to safeguard the integrity of the electoral process. A series of Missouri decisions, discussed *infra*, including multiple decisions of this Court, hold that such regulations are enforceable, and do not constitute impermissible, non-constitutional voter “qualifications.” The challenged provisions of the MVPA are constitutional under this established Missouri caselaw – those provisions merely regulate the manner in which a voter must identify himself or herself at the polls. This plainly furthers the legitimate governmental purpose of insuring that only qualified voters in fact cast ballots.

This Court upheld the Legislature’s power to regulate election procedures is *State ex rel. McClellan v. Kirkpatrick*, 504 S.W.2d 83 (Mo. banc 1974). In *McClellan*, local election officials challenged a statutory provision that required a voter to inform an election judge of the voter’s choice of primary ballot, rather than

selecting a particular party's ballot in the secrecy of the voting booth. *Id.* at 87. The local election officials argued that requiring a voter to publicly declare which party's primary ballot he or she wished to vote violated Article I, § 25, and Article VIII, § 2. *Id.* This Court rejected the challenge:

In *Nance v. Kearbey*, 251 Mo. 374, 158 S.W. 629 (Mo. banc 1913), this court held that the right to vote is a constitutional right in those citizens possessed of the enumerated constitutional qualifications and that it may be regulated by statute although not lightly denied or abrogated. * * *

The preservation of the integrity of the electoral process is a legitimate and valid state goal.

McClellan, 504 S.W.2d at 88. The Court also held that, whatever the Legislature's *actual* motivations for enacting the requirement that a voter announce their ballot preference, the statute was constitutional so long as the Court could conceive of a legitimate objective to which the statute rationally related:

The requirement that an election official deliver the primary ballot to the voter may have been considered by the legislature to be a *mild inhibitor* to crossover primary "raiding," which is a legitimate state interest * * * or to help prevent election fraud in some other respect, or to be a regulation that would be conducive to orderly elections.

The spectrum of possible reasons behind this requirement is wide-ranging. However, *identifying the exact rationale is not of decisive importance in this case.* The legislature has the right and duty to make laws regulating the conduct of elections. These legal regulations must be enforced unless their application offends against the constitutional rights of the people to exercise their right to vote. ***The requirement*** that a primary voter receive the ballot he selects from an election official which necessarily requires the voter to make his ballot preference known to the election official ***is not an additional qualification for voting. Rather it is a procedure that is deemed appropriate to uniform and orderly elections where balloting is done at numerous polling places on election day throughout this state.***

Id. at 89 (emphasis added) (internal citations omitted).

Similarly, in *State ex rel. Dunn v. Coburn*, 168 S.W. 956 (Mo. 1914), this Court upheld that constitutionality of a Missouri statute that prohibited a candidate from appearing on the ballot as the nominee of more than one party. The challengers, in *Dunn*, cited to the same constitutional provisions on which Plaintiffs rely here. *Id.* at 958. This Court emphatically rejected the claim that the

constitutional mandate that elections be “free and open” prevented the Legislature from enacting regulations to prevent fraud, corruption, or undue advantage:

That all elections shall be “free and open” does not mean that there cannot be reasonable regulations of elections in the interest of good citizenship and honest government.

Id. (emphasis added). The challenged statute, this Court said, “is a proper regulation of the elective franchise, well-calculated to avoid and prevent corruption and fraudulent practices, as well as undue advantage to one candidate over another.” *Id.* at 960; *see also Totton v. Murdock*, 482 S.W.2d 65, 67-68 (Mo. banc 1972) (recognizing that the Legislature’s police power authorizes it to enact “[s]tatutes regulating primary elections”); *State ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229 (Mo. App. E.D. 1978) (recognizing that, under this Court’s decisions, “the right to vote may be regulated by statute,” and that “the preservation of the integrity of the electoral process is a legitimate and valid state goal”).

Consistent with these cases, *State ex rel. Kirkpatrick v. Board of Election Commissioners*, 686 S.W.2d 888 (Mo. App. W.D. 1985), recognizes that “regulations governing the[] [electoral] process may be enacted in the exercise of the state’s police power,” and that such regulations “will be sustained *if they bear a rational relationship to an articulable state purpose.*” *Id.* at 895 (emphasis added) (upholding statutory requirements that, in primary elections, voter announce ballot

selection, ballots be color-coded, and voting booths be clearly marked with party affiliation).

The Court of Appeals also emphasized the Legislature's legitimate role in regulating election procedure to prevent fraud or unfairness in *State ex rel. Bush-Cheney 2000 v. Baker*, 34 S.W.3d 410 (Mo. App. E.D. 2000), which enforced the statutes establishing hours of operation for polling places. *Id.* at 412.

[C]ommendable zeal to protect voting rights must be tempered by the corresponding duty to protect the integrity of the voting process. Courts should not hesitate to vigorously enforce the election laws so that every properly registered voter has the opportunity to vote. But *equal vigilance is required to ensure that only those entitled to vote are allowed to cast a ballot. Otherwise, the rights of those lawfully entitled to vote are inevitably diluted.*

Id. at 413 (emphasis added).

By stating, broadly and without qualification, that the Legislature had no power to regulate election procedures, the Circuit Court ignored this established caselaw, and erroneously and severely limited the Legislature's right – and responsibility – to enact regulations to insure the fairness and integrity of Missouri elections. Under the Circuit Court's decision, any regulation of the manner in which elections are conducted would be subject to attack as impermissible,

additional “qualifications” on the right to vote. Thus, voters could challenge regulations establishing any of the following, each of which might, in an individual case, prevent an individual voter from casting a ballot:

- the location of polling places;⁶
- the hours during which polls remain open;⁷
- the requirement that voters notify election authorities of a change of residence in advance of election day;⁸
- the language and format of ballot forms, and the manner in which a voter express his or her vote on such ballot forms;⁹
- the requirement that voters identify themselves to election judges, and verify relevant information concerning their residence and registration status;¹⁰ or
- the requirement that voters provide any form of identification whatsoever.¹¹

⁶ See §115.117, RSMo.

⁷ See *Bush-Cheney 2000*, 34 S.W.3d at 412 (“It is obviously within the Legislature’s power to specify the hours in which voters are to cast their ballots.”)

⁸ §115.193, RSMo.

⁹ See, e.g., §115.439, RSMo.

¹⁰ Former §115.427, RSMo.

The Circuit Court’s decision obviously sweeps far too broadly, since it fails to acknowledge any legitimate scope for the Legislature’s regulation of the time, place, and manner in which Missouri elections are conducted. Indeed, even the identification requirements specified in prior law (which the Circuit Court acknowledged were “readily available to virtually all registered voters,” and therefore apparently unobjectionable, see LF297-98) would not survive the Circuit Court’s analysis – those requirements could also have the potential to prevent particular individuals from voting, and no requirement to present any identification is expressly mentioned in Article VIII, § 2.

Contrary to the Circuit Court’s sweeping and irrational analysis, this Court and other Missouri appellate courts have long recognized that the Legislature has broad police powers to regulate elections, in order to safeguard the fairness and integrity of Missouri elections. Those decisions recognize that the Legislature’s election regulations must be enforced if they are rationally related to a conceivable governmental objective, without specific evidence of actual misconduct to which the regulations respond. Under that established caselaw, the Photo identification requirements of the MVPA are plainly constitutional, and the Circuit Court’s contrary conclusion must be reversed.

¹¹ Former §115.427, RSMo.

B. Strict Scrutiny Is Inapplicable Here Under Federal Law.

The result that is required by Missouri law – namely, that the Legislature has authority to enact reasonable, non-discriminatory election regulations to preserve the integrity of, and public confidence in, Missouri elections, is confirmed by federal caselaw. United States Supreme Court decisions recognize a reality the Circuit Court ignored: “as a practical matter, there must be substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic process.” *Storer v. Brown*, 415 U.S. 724, 730 (1974). By helping ensure that elections are fair and honest, such regulations protect, rather than interfere, with the right to vote and help maintain an election free of fraud.

In *Burdick v. Takushi*, 504 U.S. 428 (1992), the Supreme Court emphasized the necessary flexibility of the standard for reviewing State regulation of election procedure. *Burdick* rejected a challenge to Hawaii’s total ban on write-in voting. The Court found that the ban on write-in voting imposed only a limited burden on voters’ rights to make free choices and to associate politically through the vote and, therefore, had only to further important state interests. *Id.* at 433-34. In reaching this result the Court generally described the level of scrutiny to which election regulation would be subject. Recognizing the necessity of State regulation of election procedures in the interest of orderly, fair, and honest voting, *Burdick*

rejected the strict scrutiny approach applied by the Circuit Court here, in favor of a “more flexible standard.” *Id.* Justice White summarized the Court’s analysis of election regulation as follows:

[T]o subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest * * * would tie the hands of States seeking to assure that elections are operated equitably and efficiently. * * * Instead, * * * [a] court considering a challenge to a state election law must weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications 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.”

It is beyond cavil that “voting is of the most fundamental significance under our constitutional structure.” It does not follow, however, that the right to vote in any manner and the right to associate for political purposes through the ballot are absolute. * * * Common sense, as well as constitutional law, compels the conclusion that government must play an active role in structuring elections; “as a

practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.”

Election laws will invariably impose some burden upon individual voters. Each provision of a code, “whether it governs the registration and qualifications of voters, the selection and eligibility of candidates, or the voting process itself, inevitably affects-at least to some degree-the individual’s right to vote and his right to associate with others for political ends.” Consequently, to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest, as petitioner suggests, would tie the hands of States seeking to assure that elections are operated equitably and efficiently. Accordingly, the mere fact that a State’s system “creates barriers * * * tending to limit the field of candidates from which voters might choose * * * does not of itself compel close scrutiny.”

* * *

Under this standard, * * * when [voting] rights are subjected to “severe” restrictions, the regulation must be “narrowly drawn to advance a state interest of compelling importance.” But when a state

election law provision imposes only “reasonable, nondiscriminatory restrictions” upon the First and Fourteenth Amendment rights of voters, “the State’s important regulatory interests are generally sufficient to justify” the restrictions.

Id. (internal citations omitted). Under the “flexible standard” described in *Burdick*, “reasonable, nondiscriminatory restrictions will ordinarily be sustained if they serve important regulatory interests.” *Clingman v. Beaver*, 544 U.S. 581, 603 (2005) (O’Connor, J., concurring).

In the years since the *Burdick* decision, the United States Supreme Court has continued to explain that reasonable, nondiscriminatory restrictions on voting rights are subject to this flexible standard of review, under which they will be upheld if they serve important State interests. In its most recent extended discussion of the subject, the Court explained:

[N]ot every electoral law that burdens associational rights is subject to strict scrutiny. Instead, as our cases since *Tashjian* [*v. Republican Party of Connecticut*, 479 U.S. 208 (1986),] have clarified, strict scrutiny is appropriate only if the burden is severe.

Clingman, 544 U.S. at 592 (internal citations omitted).

Clingman upheld Oklahoma’s semiclosed primary system, holding that it did not violate the right to freedom of association of the Libertarian Party of Oklahoma

or of individual voters. *Id.* With respect to the standard of review, the Court explained:

These minor barriers between voter and party do not compel strict scrutiny. To deem ordinary and widespread burdens like these severe would subject virtually every electoral regulation to strict scrutiny, hamper the ability of States to run efficient and equitable elections, and compel federal courts to rewrite state electoral codes. The Constitution does not require that result, for it is beyond question “that States may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder.” *Timmons* [*v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)]; *Storer v. Brown*, 415 U.S. 724, 730 (1974). * * *

When a state electoral provision places no heavy burden on associational rights, “a State’s important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.”

Clingman, 544 U.S. at 592 (some internal certain citations omitted).

The Circuit Court suggested that the *Burdick* analysis was inapplicable here, because the challenged law in *Burdick* “did not impinge or interfere with a qualified voter’s fundamental right to cast a ballot,” but instead “limited the

potential candidates whose names would appear on the ballot.” LF349-50. But *Burdick* itself rejected this argument, observing that its precedents had “minimized the extent to which voting rights cases are distinguishable from ballot access cases * * *. [T]he rights of voters and the rights of candidates do not lend themselves to neat separation.” 504 U.S. at 437-38. The Court stressed that it has accepted the common-sense notion that restrictions on ballot access infringes on some of a voters’ rights to vote for the candidate of their choosing, implicating the same analysis in both contexts. See *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (stating that every election law “inevitably affects – at least to some degree – the individual’s right to vote”); *Bullock v. Carter*, 405 U.S. 134, 143 (1972).

Lower federal courts have consistently applied the *Burdick* analysis to cases like this one, in which plaintiffs challenge election procedures claiming that they burden the right to vote. See, e.g., *Wexler v. Andersen*, 452 F.3d 1226, 1232-33 (11th Cir. 2006) (applying *Burdick* analysis to equal-protection challenge to voting machine technology); *Weber v. Shelley*, 347 F.3d 1101 (9th Cir. 2003) (same); *ACORN v. Bysiewicz*, 413 F. Supp.2d 119, 143 (D. Conn. 2005) (employing *Burdick* analysis in challenge to state requirement that voters register at least seven days before election); *Bay County Democratic Party v. Land*, 347 F. Supp.2d 404 (E.D. Mich. 2004) (applying *Burdick* analysis in challenge to HAVA’s identification requirements); *League of Women Voters v. Blackwell*, 340 F.

Supp.2d 823 (N.D. Ohio 2004) (same). Thus, *Burdick* is applicable to the Plaintiffs' allegation that Section 115.427 burdens the right to vote.

C. The State Need not Identify Past Cases of Actual Fraud that the Photo identification Requirements Prevent; the Legislature Is Entitled to Enact Restrictions to Prevent Fraud and Increase Voter Confidence in the Electoral Process.

The Circuit Court held that the MVPA was unconstitutional because the Legislature did not have evidence of actual fraud which the Photo identification requirement would prevent: “There is no evidence that existing law is insufficient to deter and prevent voter impersonation fraud, the only type of fraud the Photo identification Requirement could prevent.” LF346.¹²

Once again, the Circuit Court's analysis imposes an unjustifiably high burden on the Legislature. There is no requirement that the Legislature have evidence of actual voter fraud in order to enact legislation designed to prevent the possibility of such fraud. To the contrary, under the “flexible standard” of review which applies here, there is no need for the Legislature to have had admissible, empirical evidence to support its legislative determination that a photo identification requirement was warranted. *See, e.g., Timmons*, 520 U.S. at 364

¹² We note, *infra*, that this is also wrong as a matter of fact. There is significant evidence of actual voter fraud in Missouri.

(“Nor do we require elaborate, empirical verification of the weightiness of the State’s asserted justification.”).

The Circuit Court’s focus on the purported absence of documented cases of Missouri voter-impersonation fraud also ignored that, with respect to electoral regulations as elsewhere, legislatures may act to address a *potential* problem on a prophylactic basis, and need not wait until it becomes a full-fledged crisis.

Legislatures * * * should be permitted to respond to potential deficiencies in the electoral process with foresight rather than reactively, provided that the response is reasonable and does not significantly impinge on constitutional rights.

Munro v. Socialist Workers Party, 479 U.S. 189, 195-96 (1986); *see also Federal Election Comm’n v. National Right to Work Comm.*, 459 U.S. 197, 210 (1982) (“Nor will we second-guess a legislative determination as to the need for prophylactic measures where corruption is the evil feared.”). The Legislature, in other words, need not wait until the house is robbed to begin locking the door.

Moreover, legislative action is appropriate to avoid the appearance of fraud, as well as its actual occurrence. *See, e.g., McConnell v. Federal Election Comm’n*, 540 U.S. 93, 143 (2003) (“Our cases have made clear that the prevention of corruption or its appearance constitutes a sufficiently important interest * * *.”); *National Right to Work Comm.*, 459 U.S. at 208 (observing “the importance of

preventing * * * the eroding of public confidence in the electoral process through the appearance of corruption”).

D. The Legislature Need not Address All Possible Sources of Voter Fraud in the Same Enactment.

The Circuit Court’s Judgment acknowledges that “the State’s interest in establishing a person’s identity as the person who is registered to vote is a legitimate government goal” and emphasized that the Court “does not question the motives of the proponents of the photo identification requirements and acknowledges the benefits of an identification system which increases voter confidence in the integrity of the electoral system.” LF308. Yet in its Findings of Fact and Conclusions of Law – issued on the same day as its Judgment – the Circuit Court adopted an inconsistent statement, proposed by the Plaintiffs and suggested that because the Photo identification requirement did not “address the most prevalent types of voting fraud in Missouri, absentee ballot and registration fraud,” the Circuit Court stated that “the stated purpose of the Photo identification requirement – preventing election fraud – could not rationally have been its true purpose, but was mere pretext.” LF108.

Besides being inconsistent with its own Judgment, the Circuit Court’s statement in its Findings of Fact and Conclusions of Law that prevention of fraud was a “mere pretext” – because the Photo identification requirement is purportedly

underinclusive – reflects a fundamental misunderstanding of the standards which a court applies in reviewing legislation. The order in which to address actual or potential problems in the electoral system (or in other areas) are quintessentially legislative judgments that will not be interfered with by the courts absent a constitutional violation. *McDonald v. Board of Election Com'rs of Chicago*, 394 U.S. 802, 809 (1969). As the United States Supreme Court explained in upholding the Illinois absentee voter law that denied the right of pretrial detainees to vote by absentee ballot:

With this much discretion, a legislature traditionally has been allowed to take reform “one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind,” and a legislature need not run the risk of losing an entire remedial scheme simply because it failed, through inadvertence or otherwise, to cover every evil that might conceivably have been attacked.

Id. (internal citations omitted); *see also Williamson v. Lee Optical of Okla., Inc.*, 348 U.S. 483, 489 (1955) (“Evils in the same field may be of different dimensions and proportions, requiring different remedies. Or so the legislature may think. Or the reform may take one step at a time, addressing itself to the phase of the problem which seems most acute to the legislative mind. The legislature may select one phase of one field and apply a remedy there, neglecting the others. The

prohibition of the Equal Protection Clause goes no further than the invidious discrimination.”); *Semler v. Oregon State Board of Dental Examiners*, 294 U.S. 608, 610 (1935) (“The state was not bound to deal alike with all these classes, or to strike at all evils at the same time or in the same way.”).

E. The Fact that Particular, Hypothetical Voters May not Be Able To Comply with the Photo Identification Requirement Is not Ground for Invalidating the Law.

It is also clear that photo identification requirements are nondiscriminatory and do not significantly burden Missouri’s electorate as a whole. “Discriminatory” in this context cannot refer simply to a difference in treatment, since virtually every regulation treats some people differently from others. As the Seventh Circuit has recognized, “any such restriction [on voting] is going to exclude, either de jure or de facto, some people from voting; the constitutional question is whether the restriction and resulting exclusion are reasonable given the interest the restriction serves.” *Griffin v. Roupas*, 385 F.3d 1128, 1130 (7th Cir. 2004) (upholding Illinois law allowing only certain persons to vote by absentee ballot). “[S]triking the balance between discouraging fraud and other abuses and encouraging turnout is quintessentially a legislative judgment with which we judges should not interfere unless strongly convinced that the legislative judgment is grossly awry.” *Id.* at 1131.

Focusing on whether a regulation might prevent particular individuals from voting would lead to absurd consequences. Thus, requiring voters to vote in public at a specified polling place acts as, among other things, a means to prevent fraud. Yet there may well be a class of people who do not qualify to vote absentee but for whom the burden of getting to the polls to vote is simply too much. *Griffin*, 384 F.3d at 1129-30. For them, requiring ballots to be cast at a specific polling place operates as a disenfranchisement. Similarly, the requirement to register in advance of an election may disenfranchise persons who fail to meet the requirement. *ACORN*, 413 F. Supp.2d at 148 (holding that, even if plaintiff's were correct that same-day registration would increase voter participation by 5.5%, or 130,000 voters, pre-election registration deadline was not an unconstitutional severe burden on right to vote). Various forms of identification requirements – including the Missouri identification requirements in place before the MVPA – could also have this effect on particular individuals. *League of Women Voters*, 340 F. Supp.2d at 828-29 (upholding requirement that first-time voters who registered by mail provide acceptable proof of identity even though some voters may be disenfranchised); *accord Bay County Democratic Party*, 347 F. Supp.2d at 404; *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) (upholding Tennessee statute requiring disclosure of Social Security number as condition for voter registration); *Greidinger v. Davis*, 988 F.2d 1344, 1352-55 (4th Cir. 1993) (same).

The United States Supreme Court has regularly upheld statutes that have a different impact on voters as long as they are reasonable and serve important government interests, even though such regulations would inevitably operate to deny the right to vote to particular persons who fail to comply. *See, e.g., Rosario v. Rockefeller*, 410 U.S. 752, 757-58 (1973) (applying rational basis scrutiny to state law conditioning right to vote in a party primary on voter's registering as a party member thirty days prior to previous general election); *Clingman*, 544 U.S. at 581 (upholding Oklahoma's semiclosed primary law, under which a party may invite only its own members and voters registered as Independents to vote in its primary); *cf. Storer*, 415 U.S. at 724 (upholding California law requiring candidates seeking ballot positions as independents to have been politically disaffiliated for at least one year prior to the immediately preceding primary election and imposing voter nomination requirements); *Munro*, 479 U.S. at 189 (upholding Washington's law requiring minor-party candidate to receive at least 1% of votes cast in a primary election before his name could be placed on the general election ballot); *Timmons*, 520 U.S. at 351 (upholding Minnesota antifusion law that prohibits candidates from appearing on ballot as candidates of more than one party).

II. The Missouri Legislature Adopted The Voter Identification Provisions of the Missouri Voter Protection Act In Pursuit Of Compelling State Interests, Preventing Vote Fraud and Increasing Voter Confidence.

Missouri State Senator Delbert Scott was chair of the Missouri Senate committee that conducted hearings into the MVPA. Senator Scott identified several compelling state interests that underlie the general Assembly's adoption of the MVPA, including the General Assembly's intention to "protect the right of every eligible Missouri voter (of whatever political affiliation, race or gender) to participate in fair and honest elections and to be confident that their vote was fairly, accurately and honestly counted." Affidavit of Senator Scott. Senator Scott stated that the Senate had, "considered testimony from local election officials concerning the history and experience of vote fraud in Missouri," *id.*, and Senator Scott noted that:

Deliberations in the Senate over SB 1014 included, *inter alia*, statements by various Senators supporting the need for protecting the right of all Missourian's to vote, preventing voters casting legally cast ballots from being disenfranchised by illegally cast fraudulent ballots

*** It is further my intention and hope that by increasing Missouri voter's confidence in our state's election process that Missouri voters

will be more likely to participate in our election process and that overall voter participation will increase.”

Id. at ¶21. Senator Scott stated his belief that, “each of these considerations represented a compelling state interest that supported adoption of SB 1014.” *Id.*

The Circuit Court rightly held that “the State’s interest in establishing a person’s identity as the person who is registered to vote is a legitimate government goal” and noted that “[t]he court does not question the motives of the proponents of the photo identification requirements and acknowledges the benefits of an identification system which increases voter confidence in the integrity of the electoral system.” LF303.

A. Missouri Has An Unfortunate History Of Actual Vote Fraud.

St. Louis has a “miserable tradition” of vote fraud. So wrote the *St. Louis Post Dispatch* this past December.¹³ In his book, *Deliver the Vote:*¹⁴ *A History of Election Fraud, An American Political Tradition – 1742- 2004*, University of

¹³ Editorial, *Miserable Tradition*, ST. LOUIS POST DISPATCH, Dec. 11, 2000, at B2.

¹⁴ Tracy Campbell, DELIVER THE VOTE: A HISTORY OF ELECTION FRAUD, AN AMERICAN POLITICAL TRADITION – 1742- 2004 (Carroll & Graf 2005); *see also*, Fund, John, STEALING ELECTIONS: HOW VOTER FRAUD THREATENS OUR DEMOCRACY (Encounter Books 2004).

Kentucky Professor Tracey Campbell devotes two of the twelve chapters to his account of Missouri vote fraud. Vote fraud has been such an unfortunate institution in Missouri that no less than the Official Missouri State Manual published by former Secretary of State Rebecca McDowell Cook opens with an account of Missouri's legacy of vote fraud. Official Manual, State of Missouri, 36-37 (1999-2000); LF268-69.

The Official Manual states:

Pendergast's ability to turn out the vote was phenomenal. Not only did many of the poorest people in Kansas City vote regularly, but did so frequently at each election. Indeed, in some wards voter turnout often approached one hundred percent, when it did not exceed it. Even more miraculously, the dead would rise at each election in numbers that would astonish an expectant Christian. These dead, however, were of a decidedly Democratic persuasion. As one wag put it at the time of the 1936 election, "Now is the time for all good cemeteries to come to the aid of the party." In rigging the vote Pendergast pioneered little new territory. His minions switched ballot boxes, mobilized the flop-houses, beat up voters supporting machine opponents (with and without police assistance), used machine employees for election judges who filled out vote tallies in advance,

and similar sorts of shenanigans. Not that their opponents did not give them trouble. As one tired machine worker complained, “Some of these damn Republicans marked their ballots so hard it was all I could do to rub them out.

LF268.

And the Official Manual devotes a page to reprinting the St. Louis Post Dispatch cartoon by Fitzpatrick “Dead Men and Vacant Lots” depicting a line of dead men waiting to cast their ballots at a polling place. LF270.

Unfortunately, vote fraud is not limited to the archives of Missouri history. The *Wall Street Journal* lead national editorial after the 2000 presidential election noted that,

In Missouri the recent presidential election featured the registration of dead people and most probably a coordinated effort by the Gore-Lieberman campaign to improperly keep polling places open in the swing state of Missouri *** Comprehensive reform has to include efforts to weed out fraud and get to the bottom of efforts to manipulate the system such as the Gore-Lieberman lawsuits. Otherwise, valid voters will continue to be at risk of having their ballots cancelled out by error or skullduggery.¹⁵

¹⁵ Editorial, WALL ST. J., *Manufacturing Votes*, May 8, 2001, at an earlier

LF275. This problem was similarly noted by the *Los Angeles Times*.¹⁶

Wall street Journal editorial noted:

Voter fraud isn't confined to St. Louis. In fact, once the networks clean up voting in St. Louis, they can move on to San Francisco, Philadelphia, and even Miami where the local newspapers have already done the reporting on past scandals. But just now, all the elements of a good story await the national media in St. Louis: legal chicanery, colorful characters, angry voters, even the Rev. Jackson. Your Emmy is waiting.

Editorial, *Dead Man Voting*, WALL ST. J., February 16, 2001; LF277.

¹⁶ Stephanie Simon, *National Prospective: Politics*, L.A. TIMES, February 28, 2001, at 5. The article stated:

The dearly departed seem to have quite a constituency around here. At least three dead aldermen registered to vote in Tuesday's mayoral primary. So did one alderman's deceased mother. And, a dead man was listed as the chief plaintiff in a lawsuit filed on election day last November. He was having trouble voting, the suit said, due to long lines at his polling station. So he petitioned a judge - successfully - to keep city ballot boxes open late.

Id.

The 2000 Presidential election in St. Louis became a matter of national attention and local embarrassment¹⁷ and prompted a series of investigations into the 2000 general election. Both the outgoing Democrat Secretary of State, Rebecca McDowell Cook, and incoming Republican Secretary of State, Matt Blunt, investigated the 2000 Missouri general election.¹⁸ Both found significant instances of vote fraud and irregularities.

In the report by Secretary of State Cook, it was noted that, of the 1,366 votes which she reviewed, “135 people who were not registered to vote were permitted to vote at a polling place without a court order and without apparent authorization from [Election] Board Official.” Cook Report at 8-9. The Report of then

¹⁷ *St. Louis Magazine* writes, “[t]here are times when I stood back, not claiming St. Louis: When the downtown voting was snafued in the 2000 election and we were all suspect.” Diani Losciale, *Gatecrashers*, ST. LOUIS MAGAZINE, June 2006, at 45.

¹⁸ Cook, Rebecca McDowell, *Analysis and General Recommendation Report Regarding the November, 2000 General Election in the City of St. Louis* [hereinafter Cook Report], January 4, 2001. *See also*, Blunt, Matt, *Mandate for Reform: Election Turmoil in St. Louis*, July 2001; *see also*, Barondeau, Katharine Hickel and Terry M. Jarrett, *The Florida Election Debacle: Can it Happen in Missouri?*, J. MO. BAR, Nov-Dec 2001, at 294-300.

Secretary of State Blunt noted, as even the Weinschenk Plaintiff's acknowledged, 79 voters registered from vacant lots, 45 people who voted twice, and 14 votes cast by the "dead." LF82.

Furthermore, "[v]oting fraud is a serious problem in [all] U.S. elections." *Griffin v. Roupas*, 384 F.3d 1128, 1130-31 (7th Cir. 2004), *cert. denied*, 544 U.S. 923 (2005); *see also*, U.S. Department of Justice Announcement of "Ballot Access and Voting Integrity Symposium," in which the DOJ reports an increase in election fraud. www.USDOJ.gov/OPA/PR/2005/05-AG-404.htm. *See also*, Barone, Michael, Message to the Secretaries of State: 1679 and 2006, U.S. News and World Report, Feb. 6, 2006, *Developments in the Law*, Harv. L. Rev., Vol. 119:1127, Feb. 2006; and *Securing the Integrity of American Elections: The Need for Change*, 9 *Tex. Rev. L. Pol.* 277, 288-289 (2005). All of the foregoing discuss the emerging trend in favor of voter identification requirements.

B. Missouri's Voter Rolls Are Currently Bloated With Names Of Duplicate, Dead And Ineligible Voters and This Makes Missouri Elections Susceptible To Vote Fraud

Missouri's voter rolls remain bloated with dead and fictional voters. The U.S. Department of Justice sued Secretary of State Carnahan in November because Missouri has some of the most inflated voter rolls in the nation. *U.S. v. State of Missouri, et al.*, No. 2:05-cv-04391-NKL (W.D. Mo. filed Nov. 22, 2005). In this

federal lawsuit the U.S. Justice Department noted that some Missouri election jurisdictions had more than 150% of their voting age population registered to vote.

The U.S. Department of Justice found that a stunningly large number of duplicate and ineligible voter registrations.

“[A] Comparison of State voter registration data posted on the website of the Missouri Secretary of State with data from the United States Census Bureau indicates that at least 34 (nearly one-third) of the election jurisdictions in Missouri had more registered voters in November 2004 than there were persons of voting age in those jurisdictions under July 2003 Census estimates (released September 2004), and that 29 election jurisdictions in the State had more registered voters in November 2004 than there were persons of voting age in those jurisdictions under July 2004 Census estimates (released August 2005). Indeed, the State’s data indicates that the local election jurisdiction with the highest ratio, Reynolds County, had 153% of its 2003 Census voting age population, and 151% of its 2004 Census voting age population, registered to vote in the November 2004 federal election. This State’s data further indicates that, statewide, Missouri had voter registration totals in November 2004 amounting to 98 percent of the state’s voting age population according to July 2003

Census estimates and 96 percent of the state's voting age population according to July 2004 Census estimates.

On March 17, 2005, the Attorney General of the United States wrote the State of Missouri, noting that there were numerous election jurisdictions in the State that had more registered voters than persons of voting age, based on a comparison of the State's own voter registration data and United States Census population data, and expressing concern whether the State was complying with its list maintenance obligations under Section 8 of the NVRA.

U.S. v. State of Missouri, Paragraphs 19 and 20 of Justice Department Complaint.

When Missouri voter rolls are so clearly inaccurate and contain such significant numbers of ineligible voters, it is a legitimate, indeed necessary, safeguard for the General Assembly to require a person to present photo identification before casting a ballot in order to establish that the individual casting the ballot is, in fact, the individual who is registered to vote.

Clearly, just because a name is on the voter rolls does not mean that the person is eligible to vote, alive, or even a person. Absent photo identification, any person could present them selves to the election officials pretending to be Ritzy Meckler and even present a utility bill with the name Ritzy Meckler on the utility bill. Absent a photo identification requirement, such a person would be allowed to

fraudulently cast a ballot in the name of Ritzy Meckler, the springer spaniel. Similar fraudulent votes could (and have been) cast in the name of dead, or duplicate registrations.

C. Restoring Public Confidence In Missouri Elections Is A Compelling State Interest.

After the 2000 Presidential election the *St. Louis Riverfront Times* ran the front page cover story, “Dead Man Voting: St. Louis elections are a national joke. Trouble is, it’s not funny anymore.” LF279. This article was consistent with the *Wall Street Journal*, *Los Angeles Times*, and *St. Louis Post Dispatch* articles referenced, *supra*, that also report sweeping concerns about vote fraud in Missouri elections.

Totally apart for the actual incidents of vote fraud referenced in these (and other) press reports and investigations of Missouri elections, this press coverage demonstrates the extent to which there is a well-established perception in Missouri and, indeed nationally, that Missouri elections are tainted by vote fraud.

Senator Scott identified the Senate’s concern for increased public confidence as one of the reasons that the voter photo identification provisions were included in the MVPA. This concern about restored public confidence in the election process

is not unique to Missouri but, as is highlighted by the discussion above, it is a significant concern in Missouri.¹⁹

D. Voter Photo Identification Requirement Enjoys Broad Public Support As A Measure To Build Confidence In The Election Process

University of Missouri political science, economics and public affairs professors Overby and Milyo conducted research into the MVPA voter identification provisions. These professors concluded that,

The existing scholarly literature does demonstrate that a significant percentage of citizens – in Missouri and nationally – lack confidence in the election process, a significant percentage of voters are concerned about vote fraud, and that significant majorities of voters from all political parties and racial groups support the requirement that a person provide a government-issued photo identification before casting a ballot.”

Affidavits of Professors Overby and Milyo.

Professors Overby and Milyo referred to an April 2006 *Wall Street Journal*/NBC News Poll that found 81% of Americans nationally favor or strongly

¹⁹ The Carter-Baker Commission concluded “Americans are losing confidence in the fairness of our elections.” Affidavit of Kay James.

favor the requirement that voter's provide "valid photo identification" before casting a ballot. *Id.* They also cited the more recent Rasmussen poll of August 28, 2006. *Id.* The Rasmussen poll found that support for a requirement that a person provide photo identification to vote "ranged from 60% in Vermont to 92% in Florida *** Maine was the only other state [other than Vermont] to register below the 73% level of support for requiring photo identification's". *Id.*

In Missouri a statewide survey, conducted for the American Center for Voting Rights by American Viewpoint, in September 2005, with a margin of error of 3.5% found that "87% of self-identified Democrats, 94% of self-identified Republican, and 87% of self-identified Independents support a photo identification requirement. Men and women support the requirement at 87% and 91%, respectively. *** 89% of whites and 83% of African-Americans agree with the measure." LF224.²⁰

Dr. John Lott, of the Department of Economics, SUNY, Binghamton has conducted extensive national research into voter identification requirements and, on the basis of this research he concluded that, "Regulations means to prevent

²⁰ The two page "exhibit 1" was inadvertently omitted when the Legal File was originally copied and assembled. That exhibit should be between LF225 and LF226, it is attached at the end of this brief.

fraud can actually *increase* the voter participation rate.” Affidavit of Dr. John Lott. (emphasis added)

1. Voter Identification Requirements Enjoy Broad Bi-Partisan Consensus

Kay Cole James, as a member of the Carter-Baker Commission testified before the U.S. House of Representatives in support of photo identification requirements for voting. Affidavit of Kay James. In addition to former Democrat President Jimmy Carter and former Republican Secretary of State James A. Baker, Jr., the Carter-Baker Commission included a number of prominent Democrat members including Congressman Lee Hamilton of Florida, Democrat candidate for the U.S. Senate, Betty Castor, and Former Arkansas Democrat Secretary of State, Sharon Priest. *Id.*

The Carter Baker Commission recommended that states adopt a photo identification requirement in order to vote. The Carter-Baker Commission recommended voter identification that is stricter than that of Section 115.427 and does not contain any of the exceptions provided those who are disabled or elderly.²¹

²¹ During trial, the Weinschenk Plaintiff’s introduced a letter from President Jimmy Carter to Secretary of State Carnahan. They offered this letter for the proposition that President Carter himself contended that the voter identification

provisions of Section 115.427 were inconsistent with the recommendation of the Carter-Baker Commission.

In President Carter's letter to Secretary Carnahan President Carter wrote, [I]f SB 1014 does not have such an active and comprehensive plan to register voters who are not now registered or who do not now have voter IDs, and if it does not provide them with free voter IDs, than it is quite different from our report and we could not support that. Also, if the new system would require the use of IDs as early as this year, that would not provide the kind of transition envisaged (sic) in our report.

This letter makes it clear that President's Carter's statements about SB1014 were premised upon misinformation. Specifically, President Carter was misinformed about the provisions of SB 1014. From the text of his own letter President Carter indicates that he believed SB 1014 did not provide free IDs and that no provision was made for distribution of free IDs. SB 1014 always provided for the issuance of free photo identification and, since the date of President Carter's letter, SB 1014 was amended to provide for significantly expanded mobile teams to provide increased access to free photo identification. Additional background in the Legal File at 234-67 is an e-mail exchange between Secretary of state Carnahan and President Carter's son. This makes clear that President Carter

Ms. James, explained why she, as an African American woman and a member of the Carter-Baker Commission, supported this requirement. Ms. James noted that she grew up in

Richmond, Virginia at a time when voting was a risky endeavor in some places in the South. *** This background has given [her] a particular appreciation for the right to participate as a voter in our local, state and national elections. While all voters should be certain of their right to participate in elections free from violence and intimidation and to be certain that their vote is fairly counted, this right is especially appreciated by members of the African American community.”

Affidavit of Kay James. Ms. James went on to note her support for photo identification requirements and noted the reasons for the bi-partisan support for this proposition.

2. As the Trial Court Found, The Voter Identification Provisions Of The MVPA Did Not Have A Purposeful Disparate Impact On Any Protected Group And Was Not

wrote his letter in response to Secretary Carnahan’s solicitation and in reliance upon her representations of what was contained in SB 1014.

Motivated By Any Partisan Or Invidious Race-Based Agenda.

a. There Was No Evidence of A Disparate Impact On Any Protected Group.

The Weinschenk Plaintiffs contended that “Photo identification Requirement (sic) would have a disparate impact on the right of registered voters who are African-American, as compared to voter who are white, because, according to recent data published by the U.S. Census Bureau, more than 21% of Missouri’s African-American households have no car, and therefore have no need for a driver’s license.” LF46.

This contention was flatly rejected by the trial court. Judge Callahan wrote, [T]he court does not question the motives of the proponents of the photo identification requirements and acknowledges the benefits of an identification system which increases voter confidence in the integrity of the electoral system. Differing perceptions and opinions about the effect of a strict photo identification system on suspect classes do not constitute proof of purposeful discrimination and [the] court rejects plaintiffs’ proof and arguments in support of its claims on Counts V and VI.

LF303.

b. Affirmative Evidence Finds That Voter Identification Requirements Do Not Have a Disparate Impact On Any Protected Group.

Professor Lott's research concluded that, "It is hard to see any evidence that voting regulations [including voter identification requirements] differentially harm minorities, the elderly or the poor." Affidavit of Dr. John Lott. Unlike the Plaintiff's, Dr. Lott did conduct extensive research into the effect that voter identification requirements have upon the poor, elderly, or low income. *Id.* Dr. Lott found no evidence to support the proposition that voter identification requirements post any disparate impact on these groups. *Id.*

Similarly, professors Overby and Milyo of the University of Missouri found that research "strongly suggests that voter photo identification requirements are not likely to have a significant effect on either voter participation or on the outcome of elections, nor is such a photo identification requirement likely to have a significant or differential impact on poor, less educated or minority voters." Affidavits of Professors Overby and Milyo.

c. The Federal Court In Indiana Found No Evidence OF A Disparate Impact Of Indiana's Stricter Voter identification Law On Minorities, The Elderly or the Poor.

The federal district court in Indiana did not find any credible evidence that voter identification requirements in Indiana (a stricter requirement than Missouri's) had any disparate impact upon minorities, the elderly or the poor.

In Indiana the Plaintiff's challenging Indiana's voter identification requirements made a similar argument to that of the Plaintiffs in this case. They argued that few minorities and low-income individuals own cars and, therefore, they are less likely to have a driver's license. Thus, they contended, the requirement of photo identification to vote would fall disparately on these groups. In this case the Plaintiffs did not present any expert testimony to support this contention. They submitted only census reports. In Indiana those challenging photo identification made a more compelling presentation in support of this thesis. In Indiana the Plaintiffs actually presented an expert who had conducted research into the census and drives license data. The Court considered this thesis and rejected it as invalid. Specifically the Court wrote:

“To the extent that [Democrat's challenging the voter ID law's expert] Brace's socioeconomic analysis is accurate, his report revealed no potential disparate impact of SEA 483 based on a voter's race or education level and only a small potential disparate impact based on income level, specifically, in census blocks with median incomes below \$15,000. However, as noted

above, Brace's conclusions with respect to income are even more suspect than his report in general. .*** Finally, to the extent that Brace's socioeconomic analysis is accurate, his report confirms that we should not assume disparate impact based on what “common sense” tells us to be true. In interpreting Brace's results, the Democrats argue: Common experience tells us that the persons without such identification are likely to come from segments of the society that do not drive, including those without the financial ability to afford vehicles. The Brace study confirms what common sense tells us. The Brace study reveals that those registered voters without BMV-issued identification are almost twice as likely to reside in census block groups with a lower median income. *** Brace's report, to the extent it is accurate, actually indicates that voters without photo identification are not significantly more likely to come from low income segments of society. Brace's research establishes that, under any of his criteria, less than 2% of his “unmatched voters” reside in census blocks with median incomes below \$15,000. In fact, under any of Brace's criteria, between 61% and 65% of his unmatched voters live in census blocks with median incomes above \$35,000,

which roughly corresponds to the 63.9% of the voting age population he lists as residing in those areas. Thus, there is scant support in Brace's report supporting the "common sense" observation that low income individuals will be disproportionately impacted by SEA 483's photo identification requirements." *Indiana Democrat Party v. Rokita*, 2006 WL 1005037 (S.D.Ind.) (slip opinion at 21 - 22)

d. The Section 115.427 Voter Identification Provisions were part of a Comprehensive Election Reform Bill that included a number of other provisions.

The Plaintiffs wrongly seek to tar the Missouri General Assembly with an invidious partisan and racial motive. This effort is misplaced and was rightly rejected by the Circuit Court.

Section 115.427 was not a measure adopted in isolation. The voter identification provisions (including the provision of free state-issued photo identification) are part of a comprehensive election reform bill. As noted above, the MVPA included at least ten other recommendations of the Bi-Partisan Carter-Baker Commission. The other recommendations included provisions to assure provisional voters opportunity to cast a full (as opposed to partial) provisional ballot.

Attached to this brief is a chart summarizing the ten recommendations of the Carter-Baker Commission that were included in the MVPA. Among these were two provisions, Sections 115.631(25) and (26), that protect voters from suppression or intimidation. The MVPA included a number of other provisions to expand and protect the right of suffrage, including the increased availability of provisional ballots to cast a vote in all races and in all elections, not just for federal and state-wide races in primary and general elections as under Missouri law before MVPA.

The inclusion of these and other provisions in the MVPA illustrates the specious nature of the Weinschenk's contention that the MVPA was engineered as some invidious race-based effort to obtain a partisan advantage.

III. Voter identification not an undue burden

A. The MVPA provides a 2-year transition period for voters to obtain a free photo identification.

When originally introduced, SB 1014 provided that the photo identification requirement would become effective in November 2006. Affidavit of Senator Scott. This was amended to allow an additional two year transition period for obtaining photo identification. Section 115.427, as enacted, provided that “for any election held on or before November 1, 2008” any otherwise eligible voter lacking the specified photo identification may still cast a provisional ballot that will be

counted. The specified procedures for processing the provisional ballot cast by such a voter lacking photo identification are the same as the procedures that were required to identify a vote's identity before Section 115.427 was adopted. An otherwise qualified voter that appears at their poll without photo identification will have precisely the same right and ability to cast a ballot that will be counted as that voter enjoyed before adoption of Section 115.427.

The only state in which a Court has invalidated its requirement that a person provide photo identification before voting is Georgia. In Georgia, federal Judge Murphy specifically wrote a narrow decision tied to the specific facts of the Georgia Identification Law. Judge Murphy wrote, “the Court does not intend to imply that all Photo identification requirements would be invalid or overly burdensome on voters. Certainly, the Court can conceive of ways that the state could impose and implement a Photo identification requirement without running afoul of the requirements of the Constitution.” *Common Cause v. Billips* 439 F.Supp.2d 1294 (N.D. Ga. 2006). Immediately before this statement the Court noted the reason that it enjoined the Georgia identification law because “[t]he State has failed to allow sufficient time to educate its voters, and has not taken into consideration the hardships that requiring voters to obtain a Voter identification card or a Photo identification card within such a short [two month] time frame will place on many of the voters affected by the 2006 Photo identification Act.” *Id.*

Unlike voters in Georgia, that were only allowed about two months to obtain the photo identification before a statewide election, the MVPA provides Missouri voters until 2008 to obtain the required photo identification that will be issued without charge. Additionally, unlike Georgia, Missouri has devoted considerable resources to make sure photo identification requirements are known to voters and also assuring that free photo identifications are readily accessible.

B. The Experience of Indiana Voters With That State's Stricter Photo Identification Requirements Demonstrates That Photo Identification Requirements Do Not Impose A Burden On Legitimate Voters

The Indiana photo identification law is stricter than Missouri's §115.427 in the following ways: (1) Indiana did not allow a two year transition period to obtain a photo identification. (2) Indiana did not have the broad exception from identification for anyone born before 1941. (3) Indiana did not have the broad exception for anyone with a physical or mental disability. Affidavit of Todd Rokita.

Indiana's law was upheld. *Id.*

Furthermore, the lesson of Indiana is that the extravagant claim that thousands of legitimate voters – especially elderly, minorities and low income – will be “disenfranchised” by a photo identification requirement is proven false.

Todd Rokita, Indiana’s Secretary of State, stated in his Affidavit filed in this case, “That in my capacity as Indiana Secretary of State, I have not received any substantiated complaint that the Indiana voter identification requirements prevented any eligible Indiana citizen from casting a ballot.” *Id.* Secretary of State Rokita further stated, “I do not believe, based upon my experience as Indiana Secretary of State, that the Indiana voter identification requirements reduced voter participation by otherwise eligible voters in the statewide election held since the identification requirements were adopted.” *Id.*

C. Only about 19,000 Missourians Do Not Already Possess State-Issued Photo Identification.

Varying estimates of the number of Missourians who do not currently possess a form of the photo identification have been proposed. The Missouri Department of Revenue prepared a “fiscal note” estimating the potential cost to the state that providing free identification would represent. Affidavit of Lowell Pearson. Importantly, this fiscal note was prepared after the MVPA was initially introduced but before the legislation was amended to exempt anyone born before 1941 from the requirement of providing identification.

When the impact of Section 115.427, as finally amended and enacted, was analyzed by University of Missouri professors Overby and Milyo they found that, “Our best estimate of the number of eligible Missouri voters that do not possess a

Missouri Department of Revenue-issued photo identification and that are not residents of a facility licensed under chapter 198 is about 19,000 persons. Of these, about 6,000 are likely to desire a photo identification for the purpose of voting based upon historic voting participation patterns.” Affidavits of Professors Overby and Milyo.

IV. The Cost Of Obtaining A Certified Birth Certificate Is Not A “Poll Tax” And This Argument Has Been Rejected By Every Court To Consider The Argument

The Weinschenk Plaintiffs argue that the cost of obtaining a birth certificate and other underlying documents constituted an illegal “poll tax.” This argument was not novel.

In *Common Cause*, “the Plaintiffs argue[d] that the 2006 [Georgia] Photo identification Act was a constructive poll tax. The State attempted to address the poll tax concerns by making Voter identification cards available without payment of a fee for the cards themselves. Plaintiffs, however, argue[d] that voters who do not have an approved Photo identification must bear the costs of traveling to a registrar’s office in order to a Voter identification card, as well as the costs for obtaining any documents necessary to obtain a Voter identification card.” 439 F.Supp.2d at 1352.

Judge Murphy in *Common Cause* responded to this “poll tax” argument by noting:

The Court agrees with the United States Court for the Southern District of Indiana’s reasoning in rejecting a similar poll tax claim in a lawsuit concerning Indiana’s Photo identification requirement for voting: This argument represents a dramatic overstatement of what fairly constitutes a “poll tax.” It is axiomatic that “(e)lection laws will invariably impose some burden upon individual voters,” *Burdick*. Thus, the imposition of tangential burdens does not transform a regulation into a poll tax. *** Further, in this case, like *Rokita*, “[t]he only incidental cost which might plausibly approach being a poll tax is the fee assessed to obtain a birth certificate,” which voters, in turn, may use to obtain a Voter identification card. Plaintiffs’ contention that some voters might be required to pay a fee to obtain a birth certificate in order to obtain a Voter identification 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 identification Act and the accompanying rules and regulations adopted by the State Election Board, a birth certificate is only one of many documents that the

registrar may accept to issue a Voter identification 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.

Id. at 1255.

In *Indiana Democratic Party v. Rokita*, 2006 WL 1005037 (S.D. Ind. 2006), that federal court rejected the “poll tax” argument by noting,

[the] only incidental cost which might plausibly approach being a poll tax is the fee assessed to obtain a birth certificate, which in turn is used to obtain a photo identification from the BMV. Even here, however, Plaintiffs’ argument falls short for several reasons. First, 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 in order to vote. Indeed, the evidence suggests to the contrary-that the vast majority of Indiana’s voting age population will not have to obtain a birth certificate since they already possess acceptable photo identification. Second, Plaintiffs’ argument completely ignores the fact that SEA 483 permits individuals desiring to vote in-person to present a valid federal identification, e.g. passport,

whose requirements to obtain, including any incidental fees, are beyond the control of the State. Third, Plaintiffs' argument overlooks the fact that a valid birth certificate is only one of the primary documents acceptable to the BMV; individuals can present various documents for that purpose, some of which are again issued by the federal government whose requirements and incidental fees are beyond the control of the State.

Judge Callahan, however, overlooked the guidance of the court in *Rokita in Common Cause* and did hold that the \$15 to \$30 cost to obtain a certified birth certificate was an impermissible financial burden on the right to vote. *Common Cause*, 439 F.Supp.2d at 130.

It may well be that some Missourian's are required to obtain a copy of their birth certificate in order to obtain or renew their drivers license or nondrivers identification card. Some may even be required to pay between \$15 and \$30 for a certified copy of their birth certificate. However, the cost of obtaining a birth certificate is not a "poll tax." And, to find that it is a "poll tax" is, as the court in *Rokita* held, a "dramatic overstatement of what fairly constitutes a 'poll tax.'" 2006 WL 1005037, at *38.

Further, the requirement of a birth certificate is not tied to the exercise of the right to vote. In Missouri, as in Georgia and Indiana, a birth certificate is only one

of the documents necessary to obtain the required identification. The Federal REAL identification Act of 2005 (Title II, Pub. L 109-13) required all fifty states to adopt certain standards for issuing driver's licenses and other government-issued identification documents. Missouri complied with this Act by adopting S.B. 1233. Affidavit of Lowell Pearson. The requirements for obtaining identification in Missouri are not substantially different than those adopted by other states, including Georgia and Indiana that also adopted legislation to comply with the REAL identification Act. *Id.*

Photo identification complying with the REAL identification Act is required in order to open a bank account, cash a government (or other) check and exercise other fundamental constitutionally protected rights such as that of interstate travel. *See, Gilmore v. Gonzales*, 440 F.3d 1168 (9th Cir., 2005).

The *Rokita* court considered the argument that photo identification was an additional burden on the right to vote that impermissibly added to the cumulative burdens faced by a potential voter seeking to cast a ballot. 2006 WL 1005037, at *39. “This ‘cumulative burdens’ argument resembles the college student ‘wet Kleenex’ prank of yore in which as entertainment, a soggy wet tissue mass is thrown against the dorm room wall to see if it will stick. In the context of this much more serious matter, we fear Plaintiffs are engaged in a similar exercise-throwing facts against the courthouse wall simply to see what sticks.” *Id.* at 40.

Photo identification requirements such as those adopted in Missouri impose, at most, a minor burden on the right to vote. The Circuit Court overstated the burden to present a photo identification. LF297-304. The actual act of presenting photo identification is clearly not a substantial burden; most Americans experience such requirements routinely, at airports, upon entering government offices and many private office buildings, when purchasing tobacco or alcohol products, or when paying for goods or services by check. Nor is the requirement to obtain a photo identification a substantial burden.

As a result, this law can hardly be considered a “severe” burden to exercising the right to vote, such that it could trigger a strict-scrutiny analysis. In this regard it is significant that both federal Courts of Appeals that have considered the issue have stated that requiring a voter to provide a social security number to register to vote does not violate the Constitution, even though obtaining a social security number obviously takes some effort. See *McKay v. Thompson*, 226 F.3d 752, 756 (6th Cir. 2000) (“We reject McKay’s claim that his fundamental right to vote was unconstitutionally burdened by the social security number disclosure requirement.”); *Greidinger v. Davis*, 988 F.2d 1344, 1354 n.10 (4th Cir. 1993) (striking down Virginia law requiring public disclosure of Social Security Number as prerequisite to voter registration; noting that “[i]f the scheme provided for only

the receipt and internal use of the SSN by Virginia, no substantial burden would exist.”). Thus, the Circuit Court’s application of strict scrutiny was inappropriate.

V. Voter identification not An Additional Qualification To Vote.

The Photo identification requirement is fundamentally different from voter-qualification laws, such as age and residency requirements, in that it does not establish any criteria or barrier to voting. The requirement does not impose a new “qualification” – it merely establishes a procedure for verifying a voter’s qualification. This distinction between fraud-prevention procedures and voter qualifications was recognized in *Rosario v. Rockefeller*, 410 U.S. 752, 756-57 (1973), which upheld a New York law requiring voters to register with a political party 11 months prior to voting in that party’s primary. *Rosario* distinguished this pre-registration requirement from substantive voter qualifications such as laws disenfranchising soldiers, creating special electorates, and creating durational residency requirements. *Id.* See also, e.g., *Ayres-Schaffner v. DiStefano*, 37 F.3d 726, 729 n.8 (1st Cir. 1994) (distinguishing between the substantive disqualification of a prior-participation requirement and “structural” regulations, such as registration requirements).

A similar voter identification requirement was adopted in Arizona. In the general election of 2004, Arizona voters approved Proposition 200. That initiative

made significant changes to Arizona's voter registration requirements. Specifically, it changed Arizona law to require that,

[t]he county recorder shall reject any application for registration that is not accompanied by satisfactory evidence of United States citizenship. The statute sets forth what qualifies as satisfactory evidence of United States citizenship: [t]he number of the applicant's driver license or nonoperating identification license, * * * [a] legible photocopy of the applicant's birth certificate, * * * [a] legible photocopy of * * * the applicant's United States passport, * * * [or][a] presentation to the county recorder of the applicant's United States naturalization documents or the number of the certificate of naturalization.

Gonzalez v. Arizona, 435 F Supp. 2nd 997 (D. Ariz, 2006) at 999.

This requirement was challenged in federal court by a group of plaintiffs that contended that, *inter alia*, the proof of citizenship requirement violated the federal National Voter Registration Act ("NVRA") 42 U.S.C. §§1973 *et. seq.* The Arizona plaintiff's argued that Proposition illegally added an additional qualification to register to vote – that of providing documentary proof of citizenship.

Plaintiffs submit that this statutory language sets forth all the requirements a state may require of an individual wishing to register to vote. In Plaintiffs' view, once an individual has fully and accurately completed the federal mail registration form, he or she should be registered to vote; the state may not condition registration on any additional requirements or actions not specifically set forth in the statute. Plaintiffs also contend that the NVRA explicitly bars states from requiring any type of "formal authentication," which they interpret to include a requirement regarding proof of citizenship.

Id. at 1001.

This argument is similar to that made by the Weinschenck Plaintiffs in this case, who contend that for Missouri to require a prospective voter to produce an official document to establish that they satisfy the qualifications to vote is to impose an "additional" qualification. The *Gonzalez* Court rightly rejected this contention, as should this Court. The *Gonzalez* Court held that NVRA did not prohibit a state from requiring proof of citizenship and noted that "[P]roviding proof of citizenship undoubtedly assists Arizona in assessing the eligibility of applicants." *Id.* at 1002. Proof of eligibility is not an additional eligibility requirement.

VI. No Remedy is Available, Under the Hancock Amendment, for Boone, Jackson, and St. Louis Counties Because Such a Remedy Would Violate Federal Equal Protection Requirements by Establishing Different Voter Identification Requirements in Different Counties.

Although the Circuit Court did not enter judgment on this basis, it found that the Plaintiffs in the *Jackson County* case had presented adequate evidence to establish a violation of the Hancock Amendment in three counties: Boone, Jackson, and St. Louis counties. LF304-06. The Circuit Court recognized, however, that under this Court's decisions in *City of Jefferson v. Missouri Department of Natural Resources*, 863 S.W.2d 844 (Mo.banc 1993), and *Brooks v. State*, 128 S.W.2d 844 (Mo.banc 2004), it could not order a State-wide remedy based on Plaintiffs' evidentiary showing, since with respect to the remaining 113 counties, "the evidence of increased costs * * * lacked the specificity required" by this Court's cases. LF305.

Intervenors join in the State's briefing, which demonstrates that Plaintiffs have failed to establish a violation of the Hancock Amendment, even accepting their evidence of purportedly increased costs as true. However, *even if* Boone, Jackson and St. Louis counties had established a violation of the Hancock Amendment violation in their respective jurisdictions, that could not justify relief. Enjoining implementation of the MVPA in only those three counties would itself

violate the Equal Protection Clause of the Fourteenth Amendment to the United States Constitution, because such “county-specific” relief would result in voters in different counties being subject to different identification requirements.

A. Even if it Were Otherwise Sufficient, Evidence Concerning Supposedly Increased Administrative Costs in Boone, Jackson, and St. Louis Counties Could only Justify Relief *in those Counties*, not State-Wide.

This Court has repeatedly held that “Hancock claims require a specific factual showing of both an increased level of activity required by the State, and increased costs in performing that activity.” *Division of Employment Security v. Taney County Dist. R-III*, 922 S.W.2d 391, 395 (Mo.banc 1996).

Under Hancock, a case is not ripe without specific proof of new or increased duties and increased expenses, and these elements cannot be established by mere “common sense,” or “speculation and conjecture.” *Miller v. Director of Revenue*, 719 S.W.2d 787, 789 (Mo. banc 1986). “This Court will not presumed increased costs resulting from increased mandated activity.” *City of Jefferson v. Mo. Dept. of Natural Resources*, 863 S.W.2d 844, 848 (Mo. banc 1993).
Brooks, 128 S.W.3d at 849.

This Court has likewise held that a Hancock remedy can *only* be ordered for those specific counties or political subdivisions which have actually demonstrated their increased costs by “specific proof.” *Id* at 849-850. Thus, in *Brooks*, this Court upheld the finding of a Hancock violation in four counties that presented evidence of their increased costs to process concealed firearm permit applications; but specifically reversed the trial court’s injunction as it applied to counties which had failed to present specific cost evidence:

in the absence of specific proof of increased costs in the remaining Missouri counties, disposition of the case as to those counties is premature. To reiterate, this Court will not presume an increase in costs. Even though the challenge to the statewide mandate may properly be brought in a single unit, ripeness must be determined county by county.

Id (internal citation omitted). For the same reason, this Court in *City of Jefferson* reversed the trial Court’s issuance of a state-wide injunction against a statute requiring certain political subdivisions to submit new or revised solid waste management plans. 916 S.W.2d at 796. This Court held that the injunction could only properly apply to *Jefferson City*, since “there is no evidence that any political subdivision other than Jefferson City experienced increased costs in filing an updated solid waste plan.” *Id*.

As the Circuit Court recognized, LF305, only Boone, Jackson, and St. Louis counties even attempted to present “specific proof” that the MVPA would require them to incur increased costs for the performance of new or increased duties. Intervenor’s join the State’s argument that even those three counties failed to prove a Hancock Amendment violation, *but even if they did*, any remedy could only apply to those three counties, not State-wide.

B. The Equal Protection Clause of the Federal Constitution Prohibits Missouri Courts from Implementing a Remedy which Would Have the Effect of Imposing Different Voter Identification Requirements in Different Counties.

A county-specific remedy would raise *federal* constitutional issues. Enjoining enforcement of the MVPA’s voter-identification requirements *only* in Boone, Jackson, and St. Louis counties would violate the equal protection guarantees of the United States Constitution. If such a “county-specific” remedy were to be ordered, either voters in Boone, Jackson and St. Louis counties would be permitted to vote by presenting the forms of identification required under pre-2006 law, *or* voters in those counties would be subject to the MVPA’s photo identification requirements, but without the option of voting a provisional ballot in the event they did not produce qualifying photo identification. *See* LF305. In

either event, voters in those three counties would be subject to materially different identification requirements than voters in other parts of the State.

Such intra-State disparities in election procedures would violate the federal Equal Protection Clause. As the United States Supreme Court has emphasized, “a citizen has a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction.” *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

The U.S. Supreme Court applied this principle most recently in *Bush v. Gore*, 531 U.S. 98 (2000). That decision invalidated a manual recount in the 2000 presidential election ordered by the Florida Supreme Court, based on the fact that the manual recount would result in different standards being applied in different counties for determining whether a particular voter had cast a “legal vote” entitled to be counted. The Court emphasized:

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. It must be remembered that the right of suffrage can be denied by a debasement or dilution of the

weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.

Id. at 104-05 (internal citations and quotations omitted). The Court also recognized that “[a]n early case in our one-person, one-vote jurisprudence arose when a State accorded arbitrary and disparate treatment to voters in its different counties.” *Id.* at 107 (citing *Gray v. Sanders*, 372 U.S. 368 (1963)).

The Court then held that the standardless manual recount ordered by the Florida Supreme Court would violate equal protection principles in significant part because “each of the counties [whose recounted totals were to be considered] used varying standards to determine what was a legal vote.” *Bush*, 531 U.S. at 107.

A county-specific injunction against the MVPA's voter identification requirements would have the same unconstitutional effect, because it would result in voters in different counties facing materially different identification requirements at the polls. Moreover, the disparity in identification requirements would have *nothing* to do with furthering the State's interest in assuring a free and fair electoral process. Such a result would violate the federal Equal Protection guarantee, and cannot be implemented. Because of these constitutional difficulties, the Hancock Amendment cannot supply an alternate basis for affirming the Circuit Court's broad declaratory judgment and injunction.

CONCLUSION

The Missouri General Assembly adopted the voter photo identification requirements of §115.427 in response to the recommendation of the bi-partisan Carter-Baker Commission. These photo identification provisions were part of a comprehensive election reform bill that was intended to increase Missourians confidence in our state's election process. The Missouri Voter Protection Act devoted substantial resources to assuring that every Missouri voter would have opportunity to obtain a photo identification with out cost and that there was a two year phase-in period during which Missourians lacking the specified photo identification could still cast a vote. Substantial resources were devoted to advising Missouri voters of the requirement and also of the ability to obtain free photo identification. The Missouri Department of Revenue provided more than 200 locations throughout the state – at least one in every county and multiple locations in urban areas where free photo identification can be obtained. Additionally the state has 25 mobile units that travel to locations throughout the state to provide free identification to disabled and elderly.

The requirement of requiring that a person provide photo identification before casting a ballot is a measure that enjoys the support of 89% of Missourians. Substantial majorities of Democrats, Republicans and every racial group in Missouri support this measure to increase confidence in our election process. Civil

rights leaders such as Atlanta Mayor and former UN ambassador Andrew Young support the requirement of issuing free photo identification and requiring that a person present that identification to vote.

The requirement of providing photo identification to vote is one that the Missouri General Assembly believed would decrease actual vote fraud and also restore confidence that Missouri elections were fair and honest. Given Missouri's long and unfortunate history of vote fraud, the interest of the General Assembly in restoring public confidence in the honesty of this state's elections is a compelling interest.

Despite this, the Jackson County and the Weinschenk plaintiffs want the voter identification provisions (including the requirement that the state issue free photo identification) to be invalidated by this Court. Judge Callahan agreed with them on four of their seven counts and enjoined Missouri from implementing §115.427. This judgment also enjoined the provision of free photo identification. Judge Callahan did so because he accepted the Plaintiffs' contention that requiring a voter to establish their citizenship and identity (which is an existing constitutional qualification to vote) is some how a "new" or "additional" qualification to vote. As we have shown above, Judge Callahan was wrong. Secondly, Judge Callahan accepted the Plaintiffs' contention that the nominal \$15 to \$30 cost to obtain a certified copy of a birth certificate – required not to vote but

as one of several documents necessary to obtain the free photo identification - is an unconstitutional “poll tax”. As we note, this argument that nominal incidental costs is some how an impermissible “poll tax” is an argument that has been flatly rejected by every Court to consider the argument. This contention that the incidental cost of a birth certificate is a “poll tax” represents, as federal judge Murphy in Georgia noted, a gross misunderstanding of what constitutes a “poll tax”.

Senator Scott and Ms. Morris request that this Court reverse the erroneous decision of the Circuit Court and uphold §115.427 of the Missouri Voter Protection Act.

The Photo identification requirements of the Missouri Voter Protection Act constitutes a reasonable regulation of the right, to vote in furtherance of the State’s important regulatory interest in ensuring that Missouri elections are (and are perceived by the public to be) fair, honest, and fraud-free. The Circuit Court plainly erred by declaring those provisions to be unconstitutional, and enjoining their enforcement. The Circuit Court’s judgment should be reversed.

Respectfully submitted,

James B. Deutsch (27093)
BLITZ BARDGETT & DEUTSCH, L.C.
308 E. High Street, Suite 301
Jefferson City, Missouri 65101
(573) 634-2500 Fax: (573) 573-3358
jdeutsch@blitzbardgett.com

Mark F. (Thor) Hearne, II (37707)
LATHROP & GAGE L.C.
The Equitable Building, Suite 1300
10 South Broadway
St. Louis, Missouri 63102-1708
(314) 613-2500 Fax: (314) 613-2550
Thornet@ix.netcom.com

Alok Ahuja (43550)
LATHROP & GAGE L.C.
2345 Grand Blvd.
Kansas City, MO 64108-2684
(816) 292-2000 Fax: (816) 292-2001
aahuja@lathropgage.com

ATTORNEYS FOR INTERVENOR-APPELLANTS

Dated: September 28, 2006

CERTIFICATE OF COMPLIANCE WITH RULE 84.06
AND CERTIFICATE OF SERVICE

This brief complies with the type-volume limitation of Rule 84.06 because this brief contains 20,504 words, excluding the parts of the brief exempted by Rule 84.06(b).

This brief complies with the typeface requirements of and type style requirements of Rule 84.06(a) because this brief has been prepared in a proportionally spaced typeface using Microsoft Word 2002 in 13 point Times New Roman.

The diskette filed with the Court has been scanned for viruses and is virus free.

I further certify that on this 28th day of September, 2006, I served a copy of this Brief by e-mail, and two copies of this Brief by U.S. Mail, postage prepaid, on the following:

Don M. Downing
Erica L. Airsman
Gray Ritter & Graham, P.C.
Gateway One on the Mall
701 Market Street, Suite 800
St. Louis, MO 63105-1826
ddowning@grgpc.com
eairzman@grgpc.com

Burton Newman
Burton Newman, P.C.
231 S. Bemiston, Suite 910
St. Louis, MO 63105
Burtnewman44@aol.com

Mark E. Long
Robert Presson
Office of the Attorney General
P.O. Box 899
Jefferson City, Missouri 65102-0899
Mark.Long@ago.mo.gov
Robert.Presson@ago.mo.gov

Barbara Jane Wood
General Counsel
Missouri Secretary of State
600 W. Main Street
Jefferson City, Missouri 65101-4310
barbara.wood@sos.mo.gov

Michael A. Gross
Joseph F. Yeckel
Law Offices of Michael A. Gross
34 North Brentwood Boulevard, Suite 207
St. Louis, MO 63105
mgross@grossbriefs.com

An Attorney for Intervenor-Appellants