

IN THE SUPREME COURT OF MISSOURI

No. SC88039

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

Respondents,

v.

STATE OF MISSOURI,

Appellant.

**Appeal from the Circuit Court of Cole County, Missouri
The Honorable Richard Callahan**

APPELLANT'S BRIEF

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Jurisdictional Statement

In this action, Respondents allege that the provisions of § 115.427, RSMo, as enacted by Senate Bill 1014 of 2006 is unconstitutional in that they violate the right of suffrage, due process and equal protection. The trial court held that the law: (1) violated the qualifications to vote, Art. VIII, § 2; (2) interfered with the “free exercise of right of suffrage” and the requirement that “all elections shall be free and open,” Art. I, § 25; (3) required payment of money to vote and violated Equal Protection, Art. I, § 2; and (4) imposed an undue burden on right to vote, and violated the Due Process and Equal Protection rights of voters, Art. I, §§ 2, 10. Therefore, this action involves the validity of statutes of the State of Missouri, and jurisdiction is proper in the Supreme Court. Mo. Const. Article V, § 3.

Statement of Facts

Senate Bill 1014, known as the “Missouri Voter Protection Act. of 2006,” was signed into law by the Governor on June 14, 2006. [Appendix, A-58; LF 314, ¶ 14] The bill went into effect on August 28, 2006.

Senate Bill 1014 amended § 115.427, RSMo, to require that a person, before voting, must demonstrate that he or she meets the qualifications to vote by presenting certain forms of nonexpired or nonexpiring photographic identification (“Photo ID”). This requirement applies to all elections held after August 28, 2006. [Ex. 2, A-74-5]

The acceptable Photo ID’s under the new law are: (1) a nonexpired Missouri driver’s license; (2) a nonexpired or nonexpiring Missouri nondriver’s license; (3) identification with a photographic or digital image issued by the Missouri National Guard, the United States armed forces, or the United States Department of Veteran Affairs that does not have an expiration date; or, (4) another acceptable document. To fit into this fourth category, a document must: (a) contain the individual’s name (which substantially conforms to the most recent signature in the individual’s voter registration record); (b) contain their photographic or digital image; (c) have an expiration date and is not expired, or if expired, expired not before the date of the most recent general election; and (d) have been issued by the United States or the state of Missouri. [Ex. 2; A-75]

The new § 115.427.7 provides that those wanting a nondriver's license for the purpose of voting may obtain such a license without paying a fee. [Ex. 2; A-77, 78] The Missouri Department of Revenue waives the state's amount of \$6.00 and the Department reimburses the local fee offices their \$5.00 charge. [Ex. 2; A-78]

For those who arrive at the polls without proper Photo ID, Senate Bill 1014 provides that the voter may cast a provisional ballot by executing an affidavit either (1) stating that they are the person listed in the precinct register and that they are unable to obtain a current and valid Photo ID due to physical or mental disability or handicap of the voter; or a sincerely held religious belief against the forms of personal identification; or they were born on or before January 1, 1941, or (2) as to their identify. [A-76-77; 79-80]. This type of provisional voting is permitted through November 1, 2008. [*Id.*]

Senate Bill 1014 also amended § 115.430, RSMo, concerning provisional ballots. Under the new law, a provisional ballot is now a "full" ballot, containing all federal, state, and local candidates and issues, rather than the previous provisional ballot which only contained federal and statewide candidates and issues. [Ex. 2; A-81] Senate Bill 1014 requires the election authorities, before counting a provisional ballot, to verify the identity of the individual by comparing their signature to the signature on file with the election authority, and to determine that the individual was eligible to

cast a ballot at the polling place where the ballot was cast. [Ex. 2; A-83-4]

The previous identification requirements of § 115.427, RSMo, adopted in 2002, required voters to identify themselves with their voter ID card, or by using their driver's or nondriver's licenses, utility bill, bank statement, government check, paycheck, along with any ID issued by the U.S. Government, the state of Missouri, an agency of the state or a local election authority. [§ 115.427.1, RSMo Cum. Supp. 2005).

Procedural Background

Two suits were filed over the new law. The first, *Jackson County, et al. v. State of Missouri*, Cole County Cir. No. 06AC-CC00587, claimed that Senate Bill 1014 violated Article X, § 21 of the Missouri Constitution (the Hancock Amendment). That case is before this Court, No. SC88038.

In this, the second suit, *Kathleen Weinschenk, et al. v. State, et al.*, Cole County Cir. No. 06AC-CC00656, the plaintiffs reiterated the Hancock challenge. But they also claimed that Senate Bill 1014 violated various sections of the Missouri Constitution. Specifically, that the bill: (1) violated the qualifications to vote, Art. VIII, § 2; (2) interfered with the “free exercise of right of suffrage” and that “all elections shall be free and open,” Art. I, § 25; (3) required payment of money to vote and violated Equal Protection, Art. I, § 2; (4) imposed an undue burden on right to

vote, and violated their Due Process and Equal Protection rights, Art. I, §§ 2, 10; (5) disparately impacted registered voters in suspect classes, Art. I, § 2; and (6) discriminated between in-person voters and absentee voters, Art. I, § 2. [LF 9]

The individually named plaintiffs in the *Jackson County* case were county executives – Katheryn J. Shields of Jackson County, Charlie A. Dooley of St. Louis County – or a mayor, Francis G. Slay of St. Louis. [A-17; LF 312, ¶ 7-9] Each individual plaintiff in the *Weinschenk* case was found to be a Missouri taxpayer. [A-17; LF 312, ¶ 10].

The two cases were consolidated by the trial court. [LF 59] A hearing for oral testimony was held on August 21, 2006. [LF 5] The parties also submitted as exhibits various documents and affidavits. The trial court granted a Motion to Intervene as a Defendant filed by a Missouri voter, Dale Morris, and Missouri State Senator Delbert Scott, the sponsor of Senate Bill 1014. [LF 6]

On September 1, 2006, the trial court heard argument as to the relevancy and admissibility of various exhibits. [Transcript, 9/1/06]¹ The court heard additional oral

¹ There are two transcripts in this case. Oral testimony was taken on August 21, 2006, and arguments as to documentary and affidavit testimony was heard on September 1, 2006. Unless otherwise noted, references to the Transcript are to the oral testimony on August 21, 2006.

argument on September 6, 2006. [LF 7]

The trial court issued its Judgment and its Findings of Fact and Conclusions of Law on September 14, 2006 for both cases. [LF 296, A-1; LF 309, A-14] The court found that there was a Hancock violation, but denied any relief on that claim as the relief requested was for a state-wide injunction, rather than county-by-county relief. [A-11; LF 306]

On the remaining constitutional claims, the trial court held that Senate Bill 1014 did violate the Missouri Constitution. The court held that the law: (1) violated the qualifications to vote, Art. VIII, § 2; (2) interfered with the “free exercise of right of suffrage” and that “all elections shall be free and open,” Art. I, § 25; (3) required payment of money to vote and violated Equal Protection, Art. I, § 2; and, (4) imposed an undue burden on right to vote, and violated their Due Process and Equal Protection rights, Art. I, §§ 2, 10. [A-11-12; LF 306-307] The court enjoined § 115.427, RSMo. [*Id.*]

Evidentiary Background

The parties entered into a stipulation as to various facts and documents, while retaining their right to argue relevancy, admissibility, and hearsay. [Ex. 10] Some of the documents were affidavits of various persons, and such affidavits were submitted in lieu of live testimony.

On the Hancock challenge, the Plaintiffs submitted testimony from Jackson County, St. Louis County, St. Louis City, and Boone County as to the expected financial impact of Senate Bill 1014. Robert Nichols, Director of Elections for Jackson County, testified that voter impersonation fraud is not a problem in Jackson County. [T. 96] He also testified to costs that would be associated with the increased number of provisional and absentee ballots that he estimated would be cast because of Senate Bill 1014. [T. 59]. Mr. Nichols helped prepare a fiscal note that submitted to the legislature concerning the fiscal impact of the Act on Jackson County; the note estimated that the Jackson County Board of Elections would have to spend \$470,308 per year for five elections as a result of the new and additional services and duties required by the Act. [T. 65]

Judy Taylor, Director of Elections for St. Louis County, testified that voter impersonation fraud is not a problem in her county. [T. 150-151] Ms. Taylor testified to costs that St. Louis County is the largest county in the state and has over 650,000 registered voters, 1,500 precincts, and 448 polling places. [T. 132, 134] Based on her experience in preparing election costs estimates, Ms. Taylor estimated an increase in the overall cost of St. Louis County elections by \$215,000 for each election. [T. 157]

Carol Signaigo, former Assistant Director of Elections for the City of St. Louis, Missouri and a consultant to the St. Louis City Election Board, testified that voter

impersonation fraud is not a problem in the City of St. Louis. [T. 120] She also opined as to increased costs she estimated would be caused by an increased number of provisional ballots. [T. 106], but the trial court found her testimony lacked the required specificity. [A-33; LF 328]

Wendy Noren, Boone County Clerk, testified that voter impersonation fraud is not a problem in Boone County. [T. 194] Ms. Noren testified that there have been problems in the State of Missouri with absentee ballot fraud. [T. 194-195]

Ms. Noren had submitted a fiscal note to the legislature indicating that implementation of the Act would cause new and additional expenditures by Boone County in the amounts of \$21,000 for postage and printing and \$10,275 for employee training. [T. 204]

Betsy Byers, is the Co-Director of Elections in the Missouri Secretary of State's Office. [T. 228] Since 2000 she has not received any reports of voter impersonation fraud in the State of Missouri. [T. 231-232] During the same time period, Ms. Byers testified that she has received reports of absentee ballot fraud. [T. 232]

There was contrary evidence offered as to the alleged costs. Specifically, the Defendant-Intervenors submitted the testimony of John Diehl, Chairman of the St. Louis County Board of Election Commissioners, and Scott Leiendecker, Director of

the Board of Election Commissioners for St. Louis City, who testified to the lack of cost that would be incurred by the passage of Senate Bill 1014, and even cost savings. [Affidavit of Diehl; Affidavit of Leiendecker] Similarly, the fiscal note for Senate Bill 1014 noted that several counties, including St. Louis County, reported to the legislature no anticipated costs associated with Senate Bill 1014, or even savings. [Ex. 20, p. 17]

The parties presented statistical evidence to the court. The total population of Missouri was 5,800,310 on July 1, 2005, and the number of Missourians 18 years of age and older on that date was 4,422,078. [Ex. 10, ¶ 33] The number of registered voters in Missouri on August 8, 2006 was 3,983,542. [Ex. 10, ¶ 34] As of August 16, 2006, the number of Missourians with a driver's or nondriver's license, excluding permits, was 4,421,900. [Ex. B, Affidavit of Pearson, ¶ 5] The number of individuals in Missouri prisons was 30,881, on probation was 49,734, and on parole was 16,433. [Ex. 10, ¶ 45]

The State of Missouri submitted affidavits from the Deputy Director of the Department of Revenue, Lowell Pearson. Therein, Mr. Pearson detailed the requirements for obtaining a driver's or nondriver's license. [Ex. B, ¶ 26-29] He listed the Department's efforts to distribute free nondriver's licenses through use of mobile units. [Ex. B, ¶ 12-25; Ex. C, ¶ 3-5]

Census statistics for Missouri were also submitted, such as twenty-five percent of African-Americans live in poverty versus ten percent for whites. [Ex. 34; Ex. 10, ¶ 3]. The average per capita income for African-Americans is \$15,099 compared to \$23,583 for whites. [Ex. 34; Ex. 10, ¶ 4]. Seventeen and nine-tenths percent of African-Americans over the age of 25 have less than a high school education; only thirteen and one tenth percent of whites do. [Ex. 34; Ex. 10, ¶ 5]. More than 21% of Missouri's African-American households have no car, which is over four times the percentage of whites who have no car. [Ex. 34; Ex. 10, ¶ 2].

At the time of the hearing, Missouri's Secretary of State had already began an informational campaign directed at notifying voters of the change in the law. [Ex. 10, ¶ 36; Ex. 46] Similarly, the Department of Revenue's website contained information on obtaining driver's and nondriver's licenses, and the Department had started its mobile operation to go to Chapter 198 facilities to assist with issuing nondriver's licenses. [Ex. 10, ¶ 22; Ex. B, ¶ 20-25] As of August 30, 2006, the Missouri Department of Revenue has issued 1,601 free nondriver licenses for voting purposes. [Ex. C, ¶ 3]

The trial court also had evidence from the named plaintiffs in the *Weinschenk* case that they did not possess the type of Photo ID required by the new § 115.427 provisions, and that they would need to spend time and effort to obtain the necessary

documents to get the required identification.

All of the named plaintiffs were found to be U.S. citizens, and Missouri residents, although two possessed driver's licenses from another state. (Mullaney: Kentucky, Ex. 13; von Glahn: Illinois, Ex. 15) Four of the plaintiffs were born in another state and claimed that they did not have a copy of their birth certificates. (Hughes, Mullaney, von Glahn, and Weinschenk; Exs. 11, 13, 15 and 16).

Plaintiff Kathleen Weinschenk has a Missouri identification card, issued to her in the 1980's, that contains no expiration date. [T. 269] Due to cerebral palsy, she is unable to make a consistent signature. [Ex. 16; T. 272].

Plaintiff William Kottmeyer had not driven in over ten years, and claimed that he would have difficulty in gathering documents necessary to obtain a nondriver's license and standing in line at the fee office. [Ex. 12].

Plaintiff Robert Pund, due to a physical condition, must arrange transportation to and from a fee office and employ an attendant to assist him in order to obtain a nondriver's license. [Ex. 14].

Plaintiff Amanda Mullaney was born in Kentucky and her current name does not match the name on her birth certificate. [Ex. 13].

Plaintiff Richard von Glahn attempted to obtain a free nondriver's license in late

June 2006 at a fee office. He was told it would cost him \$11.00 to obtain the non-driver's license. [Ex. 15].

Plaintiff Maudie Mae Hughes was born in Mississippi, and that state does not have any record of her birth. [Ex. 11].

In addition to the State of Missouri, the Missouri Secretary of State was named as a Defendant in the *Weinschenk* case. The Secretary, Robin Carnahan, is the chief election official for the State of Missouri and is responsible for administering all statewide elections, including those for state and federal office. She assists the 116 local election authorities in interpreting and administering the state election laws, and promulgates rules governing elections and electronic voting systems. Defendant Carnahan designs and provides to local election authorities the envelopes and forms necessary to carry out provisional voting throughout Missouri. [A-18; LF 313]

The Secretary of State is also responsible for producing various election materials including instructions for poll workers, training videos and a manual for election authorities. [A-18; LF 313] She is also responsible for maintaining a computerized statewide voter registration database, known as the "Missouri Voter Registration System," for use by the local election authorities in Missouri. [*Id.*] The Secretary is the chief state election official responsible for the administration and

coordination of state responsibilities pursuant to Help American Vote Act of 2002 and the coordination of state responsibilities under the National Voter Registration Act of 1993. [T. 240].

The Secretary of State did an analysis of her computerized database versus the database of the those with Missouri driver's or nondriver's licenses and estimated that some 240,000 registered Missouri voters may not have acceptable Photo ID's. [Ex. 21; Ex. 10, ¶ 46]. But that report also acknowledged that it might not be accurate, due to the differing information used by the Secretary and the Department. [*Id.*] The Department of Revenue examined the Secretary's findings, and found a number of people who actually had the proper Photo ID. [Ex. C, ¶ 6-9] Two University of Missouri professors examined the available data and estimated that around 8,000 Missourians might need a Photo ID. [Affidavits of L. Marvin Overby and Jeffrey Milyo]

From the Department of Revenue, the trial court was informed of the steps necessary to obtain a Missouri driver's or nondriver's license, and the costs associated with obtaining a birth certificate, passport, or other documents. [Ex. 10, ¶ 22]

To obtain a Missouri driver's or nondriver's license, since June of 2005, a person must present proof of lawful presence, proof of identity, and proof of

residency. [Ex. 22; Ex. 10, ¶ 11, 22]. For proof of lawful presence, a certified birth certificate or a U.S. Passport is used. [*Id.*]. For someone born in another country, to establish lawful presence they must present a Certificate of Citizenship, Certificate of Naturalization or a Certificate of Birth Abroad. [Ex. 22; Ex. 10, ¶ 11].

To obtain a certified birth certificate, a person born in Missouri after January 1, 1910 must request it from the Department of Health and Senior Services or a local health department, pay \$15, and allow six to eight weeks for delivery. [Ex. 23; Ex. 10, ¶ 12, 23]. Over 1.6 million Missouri residents were born in another state. [Ex. 26; Ex. 10, ¶ 26]. For someone born in another state, that person must contact his or her state of birth to obtain a certified birth certificate. [Ex. 10, ¶ 14]. The fees for birth certificates in other states range from \$5.00 to \$30.00. [Ex. 41; Ex. 10, ¶ 15]. Some states (including Illinois and Oklahoma) require photographic identification to obtain certified birth certificates. [Ex. 24; Ex. 10, ¶ 24].

Passports issued by the United States Department of State require an application, and payment of \$97.00 for delivery within six weeks, or \$236.00 for delivery through private agencies within seven to ten days. [Ex. 27; Ex. 10, ¶ 16]. Passports also require submission of a birth certificate or prior passport. [Ex. 27]

For those whose name has changed since birth, to establish proof of lawful

presence, they must present a certified marriage license, a certified divorce decree, a certified court order, certified adoption papers, or amended birth certificate. [Ex. 22; Ex. 10, ¶ 17]. The cost for a certified copy of a marriage license ranges from \$5.00 to \$30.00. [Ex. 41; Ex. 10, ¶ 18].

For proof of identity, the person must present their Social Security card or Medicare card. If the name on the Social Security card or Medicare card does not match that person's current name, additional documents must be presented to supply proof of the name change. [Ex. 22]. A Social Security card requires an application and other documents, including (a) proof of U.S. citizenship (U.S. birth certificate, U.S. passport, Certificate of Naturalization or Certificate of Citizenship); (b) proof of age (birth certificate, U.S. passport); and (c) proof of identity (U.S. driver's license; state-issued nondriver ID card or U.S. passport; other documents are also listed if the person does not have one of these). [Ex. 29; Ex. 10, ¶ 20].

If a person's name changed due to marriage or change of name, and they seek a new Social Security card, the person must apply to the local Social Security office and must submit documents to show U.S. Citizenship, legal name change and identity. [Ex. 29; Ex. 10, ¶ 21].

Proof of residency for a Missouri driver's or nondriver's license is established

by using the most recent utility bill, voter registration card, bank statement, government check, pay check, property tax receipt or an official letter by state or local governmental agency on its letterhead issued within the last 30 days. [Ex. 22].

The Judgment and the Findings of Fact and Conclusions of Law

In its Judgment, the trial court held that due to the anticipated increase in provisional ballots, that § 115.427 of Senate Bill 1014 violated the Hancock Amendment to the Missouri Constitution. [A-10; LF 305] However, as the relief requested was statewide, rather than county by county, the Court declined to order any relief based on the Hancock violation. [A-11; LF 306]

The trial court also held that § 115.427 of Senate Bill 1014 violated various provisions of the Missouri Constitution. The court held that the law: (1) violated the qualifications to vote, Art. VIII, § 2; (2) interfered with the “free exercise of right of suffrage” and that “all elections shall be free and open,” Art. I, § 25; (3) required payment of money to vote and violated Equal Protection, Art. I, § 2; and, (4) imposed an undue burden on right to vote, and violated their Due Process and Equal Protection rights, Art. I, §§ 2, 10. [A-11-12; LF 306-307]

Based upon its Judgment, the trial court enjoined § 115.427, RSMo, as enacted by Senate Bill 1014. [A-11-12; LF 306-307]

The trial court also issued Findings of Fact and Conclusions of Law. [A-14; LF 309] Generally, the Findings and Conclusions support the Judgment. However, there are areas where the Findings conflict with the Judgment itself.

In the Judgment, the trial court specifically found that Senate Bill 1014 was not a pretext for discrimination. [A-8; LF 303] The trial court therefore rejected the claims that the new law disparately impacted registered voters in suspect classes, and, that it discriminated between in-person voters and absentee voters. [A-8; LF 303]

However, the Findings of Fact contain several instances where the court found that the financial and other burdens imposed by the Photo ID Requirement disproportionately affect African-Americans [A-27, ¶ 45; LF 322], and that the reason for the law – combating fraud – was a pretext [A-51, ¶ 38; LF 346; A-55, ¶ 44; LF 350].

The Appeal

Both the State of Missouri and the Defendant-Intervenors Dale Morris and Delbert Scott filed timely notices of appeal. [LF 358; LF 421] This Court has ordered this case to be expedited on appeal.

Points Relied On

I. The trial court erred in finding that § 115.427 created unconstitutional additional qualifications to vote under Article VIII, § 2 of the Missouri Constitution, because newly enacted § 115.427 RSMo, does not violate the provisions of Article VIII, § 2 of the Missouri Constitution, in that the State of Missouri is permitted to require a person, before they cast a ballot, to provide documentation that the person possesses the constitutional qualifications to vote.

Nance v. Kearbey, 156 S.W. 629 (Mo. banc 1913)

State ex rel. McClellan v. Kirkpatrick, 504 S.W.2d 83 (Mo. banc 1974)

Burson v. Freeman, 504 U.S. 191 112 S. Ct. 1846 (1992)

II. The trial court erred in finding that § 115.427 required the payment of money to vote and thereby violated Equal Protection rights under Article I, § 2 of the Missouri Constitution by creating a “poll tax,” because newly enacted § 115.427 RSMo, does not require the payment of any money to exercise the right to vote, in that the new law merely requires that voters not possessing proper identification to obtain such identification or cast an absentee or provisional ballot.

Harper v. Virginia Bd. of Elections, 383 U.S. 663, 86 S.Ct. 1079 (1966)

Common Cause/Georgia v. Billups, 439 F.Supp.2d 1294 (N.D.Ga. 2006)

Indiana Democratic Party v. Rokita, 2006 WL 1005037 (S.D. Ind. Apr. 14, 2006)

III. The trial court erred in finding that § 115.427 created an undue burden on the right to vote, thereby violating the Equal Protection and Due Process guarantees of Article I, § 2 and § 10 of the Missouri Constitution, because newly enacted § 115.427 RSMo, does not create an undue burden on the right to vote, in that the State of Missouri may attempt to prevent fraud in its election, and is permitted to require a person, before they cast a ballot, to provide documentation that the person possesses the constitutional qualifications to vote.

Burdick v. Takuski, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992)

Burson v. Freeman, 504 U.S. 191, 112 S. Ct. 1846 (1992)

Adams Ford Belton, Inc. v. Missouri Motor Vehicle Commission, 946 S.W.2d 199 (Mo. banc 1997)

IV. The trial court erred in finding that § 115.427 violated the constitutional right of suffrage and guarantee that “all elections shall be free and open” under Article I, § 25 of the Missouri Constitution, because newly enacted § 115.427 RSMo, does not

unconstitutionally infringe on the right of qualified voters to vote, nor alter the form of elections held in Missouri, in that the State of Missouri is permitted to require a person, before they cast a ballot, to provide documentation that the person possesses the constitutional qualifications to vote.

State ex rel. Dunn v. Coburn, 168 S.W. 956 (Mo. 1914)

V. The trial court erred in concluding that the provisions of Senate Bill 1014, allowing the casting of provisional ballots, is a violation of Article X, § 21 of the Missouri Constitution, because said provision is not a new state mandate on local elections authorities, in that provisional balloting is currently permitted under existing election laws and any increased use of this option will be the result of actions by individual voters, not the result of a state mandate with the meaning of the Hancock Amendment; in addition, the trial court failed to delineate which provisions of Senate Bill 1014 imposed a mandate in violation of the Hancock Amendment.

Miller v. Director of Revenue, 719 S.W.2d 787 (Mo. banc 1986)

Brooks v. State, 128 S.W.3d 844 (Mo. banc 2004)

In re The 1984 Budget for the Circuit Court of St. Louis County v. Simon, 687 S.W.2d 896 (Mo. banc 1985)

VI. The trial court erred in finding that provisions of Senate Bill 1014 allowing the casting of provisional ballots is a violation of Article X, § 21 of the Missouri Constitution, because there was no substantial evidence of increased costs resulting from said provision, in that (a) there was no substantial evidence that a significant number of additional provisional ballots would be cast; (2) the Bill does not mandate additional election judges, poll workers, or other personnel; (3) the Bill does not mandate additional training by the election authorities; (4) the Bill does not mandate that local election authorities purchase additional equipment; (5) the Bill does not mandate printing of new poll challenger instructions; and (6) there was no substantial evidence that any peripheral provisions of the Bill, such as affidavits, signs, or notification cards, involved more than *de minimis* costs.

Brooks v. State, 128 S.W.3d 844 (Mo. banc 2004)

City of Jefferson v. Mo. Dept. of Natural Resources, 916 S.W.2d 794 (Mo. banc 1996)

Standard of Review

This was a bench-trying case. The standard of review for a bench-trying case is well-established in Missouri. An appellate court must sustain the decree or judgment of the trial court unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law. *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976).

In reviewing a constitutional challenge, this Court presumes that the statutes are constitutional and the burden to show otherwise rests with the challenger. *Suffian v. Usher*, 19 S.W.3d 130, 134 (Mo. banc 2000). This Court will not invalidate a statute “unless it clearly and undoubtedly contravenes the constitution and plainly and palpably affronts fundamental law embodied in the constitution.” *Smith v. Coffey*, 37 S.W.3d 797, 800 (Mo. banc 2001) (internal citations omitted).

This Court has also stated that “if the law is susceptible of any reasonable and practical construction which will support it, it will be held valid, and . . . the courts must endeavor, by every rule of construction, to give it effect.” *State v. Duggar*, 806 S.W.2d 407, 408 (Mo. banc 1991).

As to the specific constitutional claims touching on the right of suffrage, the U.S. Supreme Court has applied a different standard than strict scrutiny to equal

protection challenges in voting cases. In *Burdick v. Takuski*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), the U.S. Supreme Court noted that it is an “erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny.” 504 U.S. at 432. Instead, the Court applied a much more flexible approach: Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens, however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions. *Id.* at 434, quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983). The standard applied by the U.S. Supreme Court should be applied in this case.

Argument

The primary question in this case is: May the State of Missouri require a person, before they are allowed to vote, to demonstrate that he or she is a person who meets the Missouri Constitution's requirements for a qualified voter: citizenship, over 18 years of age, residency, and registered to vote?

The trial court found that the State could not make such a requirement if it might disenfranchise a registered voter. In short, the decision means that the State may not require a person to demonstrate that they meet the Constitutional requirements to be a voter, if the person must first obtain and produce a document.

A person who does not meet the constitutional requirements to vote has no constitutional right to vote. The only way to verify that a person meets the constitutional requirements is to confirm their citizenship, age, and residency through documentary evidence. But the trial court decision leaves the State virtually powerless to require verification that a person is qualified to vote under the Missouri Constitution. The State, based on this decision, may not require a potential voter to verify citizenship or age, if the person does not already have a certified copy of their birth certificate or other documentation.

The photo ID required by § 115.427, RSMo demonstrates two things about the

person trying to vote: (1) that the person is who they claim to be; and that, (2) if they are registered at that precinct, that the person possesses the constitutional qualifications to vote. Requiring a person to confirm or demonstrate their entitlement to vote is not a denial of their constitutional rights. It is not a violation of equal protection or due process. It is not a poll tax. This court should reverse the trial court and dissolve the injunction.

A. The Constitutional Requirements

The Missouri Constitution at Article I, § 25 states: “That all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” But who actually has “the right of suffrage” is set out in Article VIII, § 2:

All citizens of the United States, including occupants of soldiers' and sailors' homes, over the age of eighteen who are residents of this state and of the political subdivision in which they offer to vote are entitled to vote at all elections by the people, if the election is one for which registration is required if they are registered within the time prescribed by law, or if the election is one for which registration is not

required, if they have been residents of the political subdivision in which they offer to vote for thirty days next preceding the election for which they offer to vote: Provided however, no person who has a guardian of his or her estate or person by reason of mental incapacity, appointed by a court of competent jurisdiction and no person who is involuntarily confined in a mental institution pursuant to an adjudication of a court of competent jurisdiction shall be entitled to vote, and persons convicted of felony, or crime connected with the exercise of the right of suffrage may be excluded by law from voting.

The Constitution also permits the State to set the requirements for registration (Art. VIII, § 5) and permits absentee voting (Art. VIII, § 7). But the Constitution is silent on how the State may confirm entitlement to vote.

B. The Role of the State in Elections

The U.S. Supreme Court has stated: “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, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997).

In Missouri, the General Assembly is vested with all the primary power of the people, unless fettered by the Constitution. This has been described as “the corner stone of our state government.” *Ludlow-Saylor Wire Co. v. Wollbrinck*, 205 S.W. 196, 197 (Mo. 1918). The power of the Legislature is “plenary” – i.e., full, complete and absolute – unless it is limited by some other provision of the constitution. *Board of Educ. of City of St. Louis v. City of St. Louis*, 879 S.W.2d 530, 533 (Mo. banc 1994). Any constitutional limitation is strictly construed in favor of the power of the General Assembly. *Id.*

This Court has recognized that the State may regulate and provide procedures for elections. *State ex rel. McClellan v. Kirkpatrick*, 504 S.W.2d 83 (Mo. banc 1974). In *McClellan*, local election officials challenged a statute requiring a voter to publicly declare which party’s primary ballot they wanted, claiming that the statute violated Article I, § 25 and Article VIII, § 2 of the Missouri Constitution by requiring new qualifications to vote. This Court rejected that challenge, holding that the statute was constitutional so long as the Court could conceive of a legitimate objective to which the statute rationally related:

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 the voter publicly selects the primary ballot] *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; citations omitted). This Court concluded its decision by declaring that a ballot preference “is not an unreasonable burden, if a burden at all, on the right to vote and does not violate the provisions of Art, I, Sec. 25, or Art. VIII, Sec. 2, V.A.M.S., of the Constitution of Missouri 1945.” *Id.*

This Court acknowledges the authority of the Legislature, under its police powers, to regulate elections. *Totton v. Murdock*, 482 S.W.2d 65, 67-68 (Mo. banc 1972). This position was followed in *State ex rel. Kirkpatrick v. Board of Election Commissioners*, 686 S.W.2d 888 (Mo. App. W.D. 1985), where the court noted that such regulations “will be sustained *if they bear a rational relationship to an articulable state purpose.*” *Id.* at 895 (emphasis added). More recently, the courts

have upheld the authority of the Legislature to set polling hours, even if those times are not convenient to some voters. *State ex rel. Bush-Cheney 2000 v. Baker*, 34 S.W.3d 410, 412 (Mo. App. E.D. 2000) (“It is obviously within the legislature’s power to specify the hours in which voters are to cast their ballots.”)

While the Missouri Constitution sets up the qualifications to be a voter and the general requirements for elections, it is still up to the State to enact laws to enforce those provisions, and to set up the mechanism by which voting is to take place.

Here, the trial court’s decision limits the power of the State to require persons to demonstrate that they are qualified voters, and to specify procedures governing the election process.

C. Missouri’s History of Fraud

Missouri has not always been associated with fair elections. In the recent past, chaos reigned for a time over voting in St. Louis City during the 2000 general election, with a federal judge finally ordering the polls to close. [Ex. 44, Report of Secretary Cook] St. Louis City’s Board of Election Commissioners agreed to a consent order with the U.S. Department of Justice over its handling of voter registration and voter records. [Ex. 30]

The Intervenors noted the negative press and publicity that Missouri has

generated. [LF 179-180] The Official Manual of the State of Missouri, issued by the Secretary of State, recites Missouri's past voting fraud problems dating back to the Pendergast era. [p. 36, *et seq.*] Even during the hearing on this matter, Judith Taylor of St. Louis County testified that during the recent primary election an election judge was caught trying to cast a vote when they had already voted by absentee ballot. [T. 160]

The Federal District Court in Indiana, although citing Missouri, also noted that fraud is not unknown in other states:

The State cites incidents of reported in-person fraud in recent elections in Florida, Georgia, Missouri, New York, Washington, and Wisconsin as well as reports of individual voters using the names of dead persons, according to published reports in Georgia, Illinois, Maryland, Missouri, Pennsylvania, and Wisconsin. The State also points to the findings of the Barker-Carter Commission which found that “fraud and multiple voting in U.S. elections” occurs and that such fraud “could affect the outcome of close elections.”

Ind. Democratic Party v. Rokita, supra, at p. 37. Any voting fraud, regardless of its level, is intolerable to the concept of free and fair elections.

The trial court repeatedly cited the lack of evidence of voter impersonation fraud. [A-27, ¶ 48; LF 322; A-22-23, ¶ 56-8; LF 330-31] But the State is not required to produce documentation of a certain level of fraudulent activity before it enacts a law. The U.S. Supreme Court has rejected that type of requirement, holding that there is no requirement of “elaborate, empirical verification of the weightiness of the State’s asserted justifications.” *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364, 117 S.Ct. 1364, 137 L.Ed.2d 589 (1997); *See also Munro v. Socialist Workers Party*, 479 U.S. 189, 195-196, 107 S.Ct. 533, 93 L.Ed.2d 499 (1986) (“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 constitutionally protected rights”).

The Missouri Legislature, well aware of Missouri’s election history – including the 2000 general election – and of the experiences of its sister states, could reasonably believe that fraud, be it voter impersonation, registration, or absentee voting, should be addressed. The fact that the Secretaries of State found no voter fraud in the 2002 or 2004 elections is not proof that fraud doesn’t exist. No witness testified that fraud was now non-existent in Missouri.

I. The trial court erred in finding that § 115.427 created unconstitutional additional qualifications to vote under Article VIII, § 2 of the Missouri Constitution, because newly enacted § 115.427 RSMo, does not violate the provisions of Article VIII, § 2 of the Missouri Constitution, in that the State of Missouri is permitted to require a person, before they cast a ballot, to provide documentation that the person possesses the constitutional qualifications to vote.

Prior to the passage of Senate Bill 1014, a person was required to show identification at the polling place to establish that they are, in fact, entitled to vote. The acceptable forms of identification were set out by statute. § 115.427.1, RSMo Cum. Supp. 2005.

After the passage of Senate Bill 1014, the same person is still be required to show identification to establish that they are, in fact, entitled to vote. The only change in the law is what constitutes adequate identification.

The requirement of a person identifying themselves at the polling place is long-standing in Missouri. In 1921, the Missouri General Assembly enacted a law requiring a voter to give their name, and, if required to do so, their residence to the

election judges.² In 1983, a voter (depending on the type of precinct register used by the county) either: identified themselves, wrote their address, and signed their name on a certificate; or, had to show their voter identification card.³ In 2002, the requirement of showing the voter's identification card, or another type of identification, came into existence.⁴ None of these requirements has been found unconstitutional.

Those requirements are consistent with the rule that a person must possess the constitutional requirements in order to have a right to vote. That right is not absolute; that it may be regulated was recognized by this Court in *Nance v. Kearbey*, 156 S.W. 629 (Mo. banc 1913). There, in examining an election contest, this Court stated:

While the right to vote is not a vested, natural right in a strict sense, yet *it is a constitutional right in those citizens possessed of enumerated constitutional qualifications.*

Const. art. 8, § 2. It may be regulated by statute, but not lightly denied or abrogated.

Id. at 631 (emphasis added). Over 60 years later, this position was reiterated by the Court of Appeals in a case concerning whether absentee ballots could be recast where

² Laws of Missouri, 1921, p. 311-12; § 11602, RSMo 1939.

³ § 115.427, RSMo Cum. Supp. 1983.

⁴ § 115.427, RSMo Cum. Supp. 2005

the candidate was disqualified. *State ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229, 234 (Mo.App. 1978).

In carrying out its obligation to regulate elections, the Missouri General Assembly may enact regulations concerning verification that a person meets the qualifications to vote. The General Assembly's authority includes ensuring that the person meets the constitutional requirements: a citizen of the United States, over 18 years of age, a resident, and a registered voter. Preventing unqualified voters from voting promotes the State's interests in preventing fraud and in preserving the integrity of the election process.

This Court has declared that the preservation of the integrity of the electoral process is a legitimate and valid state goal. *State ex rel. McClellan v. Kirkpatrick*, 504 S.W.2d 83, 88 (Mo. banc 1974); accord, *State ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229, 234 (Mo.App. St.L. 1978). The trial court's Judgment stated that establishing the identity as a registered voter is a legitimate state interest. [A-8; LF 303] In its Findings, the court noted that the reason for Senate Bill 1014 was to prevent fraud [A-27, ¶ 46; LF 322], and that preventing election fraud is a legitimate state interest [A-57, ¶ 50; LF 352].

Missouri's commitment to rooting out fraud was cited by this Court over a

hundred years ago in an election contest seeking examination and recounting of the ballots:

Public policy favors the detection and punishment of frauds in elections, but it protects the rights of the honest electors, and requires those who seek only selfish ends in election contests, and who are not seeking to subserve public interests by the exposure of fraud, to have some regard to the rights of the public and the honest voters.

State ex rel. Funkhouser v. Spencer, 63 S.W. 1112, 1117-18 (Mo. 1901). And it has been repeatedly recognized the U.S. Supreme Court.

That court held that a state “indisputably has a compelling interest in preserving the integrity of its election process.” *Burson v. Freeman*, 504 U.S. 191, 199, 112 S. Ct. 1846, 1852 (1992). And that a state has a compelling “interest in assuring the electoral system’s legitimacy, protecting it from the appearance and reality of corruption.” *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 609, 116 S. Ct. 2309, 2313 (1996). The court has confirmed that states may take steps to prevent various acts to avoid even the appearance of unfairness in the election process; and that “the impact of the appearance of corruption” was “[o]f almost equal

concern” to actual corruption. *Buckley v. Valeo*, 424 U.S. 1, 27, 96 S. Ct. 612, 638 (1975). “[T]he avoidance of the appearance of improper influence ‘is also critical . . . if confidence in the system of representative Government is not to be eroded to a disastrous extent.’” 424 U.S. at 27, 96 S. Ct. at 639.

Establishing a person’s identity goes directly to confidence in our electoral system. It confirms that the person is qualified and entitled to vote under Article VIII, § 2. To this end, other Missouri statutes permit challenges to potential voters. Section 115.429.1, RSMo Cum. Supp. 2005 states that: “election judges shall not permit any person to vote unless satisfied that such person is the person whose name appears on the precinct register.” Subsection 2 of § 115.429 permits a challenge to the identity or qualifications (including a registered voter), and the challenged person is not permitted a ballot until they have established their identity and qualifications.

The trial court, holding that § 115.427 put an unacceptable burden on the right to vote, entered an uncharted realm. The court rejected § 115.427 as a practical and – under existing Missouri law and precedent – permissible way to confirm that a person is, in fact, qualified to vote under Missouri law. Under the trial court’s rationale, the State can take no steps to regulate elections by requiring that potential voters demonstrate the constitutional qualifications.

The trial court's Judgment might make sense if § 115.427 imposed qualifications beyond those contained in Article VIII, § 2. But Senate Bill 1014 does not create new qualifications (nor disqualifications) on who is qualified to vote. It merely changes what is considered the adequate and acceptable method for a person to verify themselves as a registered and qualified voter. Enacting laws verifying that a person is qualified to vote under Article VIII, § 2, falls within the General Assembly's constitutional authority. The trial court's decision should be reversed.

II. The trial court erred in finding that § 115.427 required the payment of money to vote and thereby violated Equal Protection rights under Article I, § 2 of the Missouri Constitution by creating a “poll tax,” because newly enacted § 115.427 RSMo, does not require the payment of any money to exercise the right to vote, in that the new law merely requires that voters not possessing proper identification to obtain such identification or cast an absentee or provisional ballot.

There is no requirement in Senate Bill 1014 that any sum be paid in order to vote. It does not create a poll tax, nor does it require any sum be paid for the privilege of voting. What it does presents a stark contrast with poll taxes addressed by courts in the past.

The U.S. Supreme Court addressed such a tax in *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 86 S.Ct. 1079 (1966). Virginia required every voter to pay every year a flat fee (not exceeding \$1.50 on every resident 21 years of age and over) before they were permitted to vote. The Court stated: “[A] State violates the Equal Protection Clause of the Fourteenth Amendment whenever it makes the affluence of the voter or payment of any fee an electoral standard.” *Id.* at 666. The court then referred to voter qualifications: “Voter qualifications have no relation to wealth nor to paying or not paying this or any other tax.” *Id.* at 666. It is the “voter qualifications” where the trial court’s decision in this case erred.

No court has found that any financial burden associated with establishing a person’s “voter qualifications” is a poll tax. Federal district courts in Georgia and Indiana, while reaching opposite decisions on those states’ voter ID laws earlier this year, agreed that any costs associated with obtaining documentation for an ID were not poll taxes. In both *Common Cause/Georgia v. Billups*, 439 F.Supp.2d 1294 (N.D.Ga. July 14, 2006), and *Indiana Democratic Party v. Rokita*, 2006 WL 1005037 (S.D. Ind. Apr. 14, 2006), the courts rejected the argument that the costs associated with obtaining a Voter ID (and specifically a birth certificate) are the equivalent of a “poll tax.” As the Georgia District Court stated:

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,” . . . Thus, the imposition of tangential burdens does not transform a regulation into a poll tax. Moreover, the cost of time and transportation cannot plausibly qualify as a prohibited poll tax because those same “costs” also result from voter registration and inperson voting requirements, which one would not reasonably construe as a poll tax. Plaintiffs provide no principled argument in support of this poll tax theory. The Court therefore finds that Plaintiffs do not have a substantial likelihood of success on their poll tax claim.

Common Cause/Georgia, 439 F.Supp.2d at 1354-1355 (internal citations, including to the *Ind. Democratic Party* case, omitted). The Georgia court further noted that a birth certificate is only one of many documents that may be accepted for a Voter ID card. *Id.* at 1355.

Missouri, too, provides mechanisms for person who are unable to produce a birth certificate. The person may provide to the Missouri Department of Revenue a certified "No Record Statement" from the state of birth plus 2 supporting documents

(including, but not limited to): military records, child's birth certificate, baptismal record, insurance policy, social security numident, school records, or employment records. These supporting documents should list the applicant's name, place of birth, date of birth or age at the time the document was issued, and must contain information sufficient to establish place and date of their birth. The documents submitted by the applicant are reviewed by the Missouri Show Me Proof Review Panel.⁵

That some voters will be required to expend time, energy, and even small amounts of money to obtain the proper identification does not arise to a monetary charge to vote. Although Senate Bill 1014 no longer permits a potential voter to use some types of identification at the polling place, such as a bank statement or utility bill, those same items can be used to obtain a driver's or nondriver's license, which can in turn be used to vote. This has been Missouri law since July of 2005.⁶ And Senate Bill 1014 reduces the cost of such licenses, providing that a nondriver's license is free for any person needing it to vote. § 115.427.7, RSMo.

To buttress their claim of financial hardship, individual Respondents added to the cost of a birth certificate the time and expense of going to the Revenue office to

⁵ <http://www.dor.mo.gov/mvdl/drivers/idrequirements.htm>. See also, 12 CSR 24.448(3)

⁶ Section 302.171, RSMo Cum. Supp. 2005.

obtain a nondriver's license. They claim that even that expense is an undue burden on their right to vote. But the same transportation problems in going to the Revenue office would be the same problems faced by that same voter in going to the polls.

Beyond the "poll tax" issue, the Respondents also claimed a more traditional equal protection violation. But under Senate Bill 1014, every voter appearing at the polling place is required to submit the same type of identification. The burden is therefore the same on all voters. As the law neutrally applies to all voters, and all voters are required to meet the same requirements at the polling place, Senate Bill 1014 is not facially deficient, nor does it violate the Equal Protection and Due Process rights of Article I, § 2 and § 10 of the Missouri Constitution.

III. The trial court erred in finding that § 115.427 created an undue burden on the right to vote, thereby violating the Equal Protection and Due Process guarantees of Article I, § 2 and § 10 of the Missouri Constitution, because newly enacted § 115.427 RSMo, does not create an undue burden on the right to vote, in that the State of Missouri may attempt to prevent fraud in its election, and is permitted to require a person, before they cast a ballot, to provide documentation that the person possesses the constitutional qualifications to vote.

It cannot be an “undue burden” to require a person to demonstrate that they meet the qualifications to vote. That obtaining the required documents might take time or money does not make the burden undue, nor does it create a wealth-based test for voting. The State of Missouri has an indisputable right – in fact, a constitutional obligation – to ensure that only those qualified to vote are allowed to vote.

As noted above in Point I, p. 45-46, the State has a compelling interest in preserving the integrity of its election process, and is assuring that the electoral system’s legitimacy, protecting it from the appearance and reality of corruption. *Burson v. Freeman*, 504 U.S. 191, 199, 112 S. Ct. 1846, 1852 (1992); *Colorado Republican Federal Campaign Committee v. FEC*, 518 U.S. 604, 609, 116 S. Ct. 2309, 2313 (1996).

That interest was not sufficiently protected by the former § 115.427. Under that law, if a person appeared at the poll with a voter ID card, utility bill, or bank statement matching the name on the registration roll, that person was permitted to vote. The Missouri Legislature could reasonably believe that such a system is inadequate, as there is no way to determine if the person holding the voter ID card, utility bill, or bank statement is really the registered voter.

While the trial court noted that the concern of the election authorities was over

registration or absentee voter fraud [A-22, ¶ 56; LF 330; A-51, ¶ 38; LF 346], the legislature was not limited to addressing their concerns. The legislature can also address more general concerns with fraudulent voting. And the type of identification system in the old law is not going to uncover fraudulently registered voters. Boone County Clerk Wendy Noren candidly admitted that she does not check if the person registering is qualified to vote or has a birth certificate; she registers them if they take the oath. [T. 214] Such a system does not establish that the person is qualified under Article VIII, § 2.

In demanding more than the legislature's rational concern for voter identification, the trial court found that the new law imposed an undue burden and did not meet strict scrutiny standard. But as discussed above, this new law is not subject to strict scrutiny. The U.S. Supreme Court established the "strict scrutiny" equal protection review standard in *Kramer v. Union Free School District*, 395 U.S. 621, 89 S.Ct. 1886, 23 L.Ed.2d 583 (1969) (voting schemes based upon the ownership of real property). But Missouri courts have sometimes applied rational basis review to voting restrictions. See, *State ex rel. Kirkpatrick v. Bd. of Election Commissioners*, 686 S.W.2d 888 (Mo. App. W.D. 1985); *State ex rel. McClellan v. Kirkpatrick*, 504 S.W.2d 83 (Mo. banc 1974). That level of scrutiny is consistent with modern U.S. Supreme Court jurisprudence.

As delineated in *Burdick v. Takuski*, 504 U.S. 428, 112 S.Ct. 2059, 119 L.Ed.2d 245 (1992), the U.S. Supreme Court has applied a different analysis to equal protection challenges in voting cases. The Court's reasoning was that:

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.

Id. at 433, quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 1569-1570, 75 L.Ed.2d 547 (1983). Instead of strict scrutiny, the Court now applies a much more flexible approach: Regulations imposing severe burdens on plaintiffs' rights must be narrowly tailored and advance a compelling state interest. Lesser burdens,

however, trigger less exacting review, and a State's important regulatory interests will usually be enough to justify 'reasonable, nondiscriminatory restrictions.

Id. at 434, quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788, 103 S.Ct. 1564, 1570, 75 L.Ed.2d 547 (1983).

The *Burdick* Court specifically stated that it is an "erroneous assumption that a law that imposes any burden upon the right to vote must be subject to strict scrutiny." 504 U.S. at 432. The Supreme Court, following this reasoning, has stated that "no bright line separates permissible election-related regulations from unconstitutional infringements on First Amendment freedoms." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 359 (1997) (internal citation omitted).

Even the recent Georgia case, where a federal district court enjoined that state's new Photo ID law, recognized that the appropriate standard of review is that articulated by the U.S. Supreme Court in *Burdick*. *Common Cause/Georgia v. Billups*, 439 F.Supp.2d at 1345.

This Court should follow the *Burdick* rationale and ask whether requiring a Photo ID is a severe burden on the right to vote. And in doing so, the Court must recognize that Senate Bill 1014 authorizes free nondriver's licenses; that if a person cannot obtain their birth certificate in order to obtain a license that there is a procedure

for declaring that no certificate can be produced; and that if a voter cannot produce a Photo ID when they arrive at the polls, they may still cast a provisional ballot which will be counted once their identify is verified through means not appreciably different from those already in use.

And the Court must recognize that the State may take steps to combat fraud or the perception of fraud. Although the trial court noted the lack of evidence as to voter identification fraud at the polls, the State is entitled to enact laws to prevent fraud in any form. The State may decide to prevent fraud by assuming that if voters are fraudulently registered, fraud at the polls is 1) already occurring and 2) is likely to occur in the future. As demonstrated in the Baker-Carter Commission report, fraud with respect to the registration of voters is a common issue throughout the United States. [Affidavit of James, Ex. A] The trial court noted that absentee and registration fraud were the most prevalent types of fraud in Missouri. [A-51, ¶ 38; LF 346].

Missouri has a legitimate interest, if not an obligation, in ensuring fair elections. The State is not required to wait for future elections to be tainted with fraud before enacting reasonable regulations as to voting. Moreover, the State is not required to wait for a certain number of fraudulent acts to occur before legislation may be enacted. Senate Bill 1014 is consistent with the State's interest and the Constitutional requirements for voters. By requiring a potential voter to provide a Photo ID, the

State ensures that the voter is who they claim to be.

As to the overall burden on the voters of Missouri, that is hard to ascertain. The trial court was given the number of registered voters, but there was no breakdown by age, sex, wealth, ethnicity, or any other category. Even the Secretary of State's attempts to quantify the number of registered voters who do not have the required Photo ID fails to identify those persons as elderly, poor, women, or African-American. It merely identifies them by county. [Ex. 21]

The evidence is that there are more people with Missouri driver's or nondriver's licenses than there are registered voters. [Ex. 10, ¶ 34 vs. Ex. B, ¶ 4] While the focus of the Respondents' arguments concerned the poor, elderly, infirm, and African-Americans, there was no specific statistical evidence that these categories of people are more likely to not have a birth certificate or other documentation. Instead, Respondents' concentrated on the alleged difficulty and cost in obtaining the proper documents to obtain the Photo ID.

Likewise, there was no evidence as to how many registered voters have no Social Security card. The use of a person's Social Security number for Medicaid, Medicare, hospital records, income taxes, bank loans, and similar situations makes its use commonplace in today's society. Even the trial court noted that a person must

present their birth certificate, passport or naturalization papers to get a Social Security Card. [A-25, ¶ 37; LF 320; Ex. 29]

The record in this case does not definitively establish how many Missourians are unable to get the required identification. It does not establish how many of that number are elderly, poor, women, or African-American. What the evidence does establish is that there are people who cannot demonstrate that they meet the Missouri Constitutional requirements to be a voter.

Even if strict scrutiny were applied to this situation, Senate Bill 1014 would be constitutional. The State has a compelling interest in conducting free, fair, and fraud-free elections, and to insure that only those qualified to vote do so. The Senate Bill 1014 requirements are narrowly tailored to ensure that only qualified persons voter: they require a Missouri driver's or nondriver's license, and the requirements for such a license, are consistent with the Missouri Constitution's requirements for voting: citizenship, age, and residency.

The state may proceed step-by-step to ameliorate a perceived evil or it may perceive evils in the same field to be of different dimensions and proportions, requiring different remedies. *Adams Ford Belton, Inc. v. Missouri Motor Vehicle Commission*, 946 S.W.2d 199, 202 (Mo. banc 1997). While Respondents' evidence

was that voter registration or absentee ballot fraud was of greater concern, combatting fraudulent registration by amending the registration requirements would require the same types of identification needed for the Photo ID. The Photo ID requirement is far more narrowly tailored than requiring re-registration, and acts as a barrier to those who have illegally registered in the past as well as those attempting to impersonate a lawfully registered voter. Attacking fraud by requiring every voter to re-register (almost 4 million people), would be much more burdensome on voters and the election authorities than the requirements of Senate Bill 1014.

Accordingly, even if strict scrutiny is applied, the compelling state interest of preventing fraud is narrowly tailored to achieve those ends and does not unduly burden a fundamental right.

IV. The trial court erred in finding that § 115.427 violated the constitutional right of suffrage and guarantee that “all elections shall be free and open” under Article I, § 25 of the Missouri Constitution, because newly enacted § 115.427 RSMo, does not unconstitutionally infringe on the right of qualified voters to vote, nor alter the form of elections held in Missouri, in that the State of Missouri is permitted to require a person, before they cast a ballot, to provide documentation that the person possesses the constitutional

qualifications to vote.

Unless a person establishes that they possess the qualifications to vote under Article VIII, § 2 of the Missouri Constitution, there can be no infringement on the right of suffrage. Therefore, requiring identification that establishes the qualification to vote does not infringe on Article VIII, § 2, and thereby does not interfere with the “free exercise of right of suffrage”

That logic is similar to the rationale in *State ex rel. Dunn v. Coburn*, 168 S.W. 956 (Mo. 1914), where this Court rejected a challenge to a statute prohibiting a candidate from appearing on the ballot as the nominee of more than one party. This Court found that the law did not violate the requirement of Article I, § 25:

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. at 958. Of particular interest herein is the Court’s statements that the law was “well-calculated to avoid and prevent corruption and fraudulent practices.” *Id.* at 960.

While the Missouri Constitution provides that “all elections shall be free and open,” no court has interpreted that provision of Article I, § 25 to mean that the State

is unable to confirm the qualifications of a person to vote. Senate Bill 1014 does not change the basic qualifications to vote: citizenship, residency, age, and registration. It does not change the hallmarks of the American election system: a secret ballot, right to vote for the candidate of your choice, and freedom from harassment or intimidation as to a person's vote.

The Photo ID requirements of § 115.427, RSMo do not impinge on the right of suffrage. Nor do those requirements make an election one that is not free and open. The trial court's decision on this point was in error, and should be reversed.

V. The trial court erred in concluding that the provisions of Senate Bill 1014, allowing the casting of provisional ballots, is a violation of Article X, § 21 of the Missouri Constitution, because said provision is not a new state mandate on local elections authorities, in that provisional balloting is currently permitted under existing election laws and any increased use of this option will be the result of actions by individual voters, not the result of a state mandate with the meaning of the Hancock Amendment; in addition, the trial court failed to delineate which provisions of Senate Bill 1014 imposed a mandate in violation of the Hancock Amendment.

The Hancock challenge in this case is commonly described as an “unfunded mandate.” This requires the plaintiffs to establish that “both (1) a new or increased activity or service is required of a political subdivision by the State and (2) the political subdivision experiences increased costs in performing that activity or service.” *Miller v. Director of Revenue*, 719 S.W.2d 787, 788-789 (Mo. banc 1986). The Judgment found that “the provisional balloting and its implementation provided for in S.B. 1014 does constitute a new and expanded activity imposed on local government which must be funded if there are increased costs.” [A-10; LF 305]

But a Hancock challenge requires specific proof of the new and increased duties and the increased costs. *Brooks v. State*, 128 S.W.3d 844, 849 (Mo. banc 2004). This proof cannot be established by mere common sense, speculation or conjecture. *Id.*

The trial court recognized that the bill imposed an obligation on the voter, and “does not constitute a new or expanded activity on local government.” [A-9; LF 304] The court went on to find that Senate Bill 1014 changed the requirements for identification, allowing provisional ballots for those without proper identification. Provisional voting was permitted before the passage of Senate Bill 1014. § 115.430, RSMo Cum. Supp. 2005. But the trial court concluded because it would result in more provisional ballot, Senate Bill 1014 imposed increased duties and costs on local governments. [A-10; LF 305]

The trial court's conclusory holding carries the Hancock Amendment too far – certainly further than prior precedents. Simply having some financial impact on a political subdivision has never been enough to render a statute in violation of Hancock. Likewise, just because existing activities or services become more expensive does not establish a Hancock violation. *In re The 1984 Budget for the Circuit Court of St. Louis County v. Simon*, 687 S.W.2d 896, 900 (Mo. banc 1985).

Nor has any Hancock precedent suggested that the Amendment is implicated when the State does something that merely prompts some local citizens to do something previously allowed. Again, prior to Senate Bill 1014, provisional voting was permitted. The bill does not mandate that voters cast provisional ballots. Instead, it permits a voter to cast a provisional ballot. The bill even seeks to minimize the use of provisional ballots by requiring the Secretary of State and the Department of Revenue to inform voters of the new identification requirements and require the issuance of free nondriver's licenses for voting. [Ex. 2, A-77-8] Any increase use of provisional ballots would be due to a choice by the voters, not a requirement of Senate Bill 1014.

But again, Hancock requires proof. Even if there is a new mandate, a Court cannot presume that increased costs will result. *Brooks*, 128 S.W.3d at 849; *City of Jefferson v. Mo. Dept. of Natural Resources*, 863 S.W.2d 844, 848 (Mo. banc 1993).

Here, the entire evidence was based on estimates by county officials as to the number of people that might cast provisional ballots. But the evidence did not even equivocally establish how many people in Missouri might even be effected. The estimates ranged from 8,000 to 240,000; and there are over 4 million registered voters. Nothing in the record shows how many of those people might cast provisional ballots. The evidence thus falls short of the specificity required to establish increased costs for a Hancock challenge. Assumptions and guesses are not specific proof of new and increased duties or of increased costs. *Brooks v. State*, 128 S.W.3d at 849.

VI. The trial court erred in finding that provisions of Senate Bill 1014 allowing the casting of provisional ballots is a violation of Article X, § 21 of the Missouri Constitution, because there was no substantial evidence of increased costs resulting from said provision, in that (a) there was no substantial evidence that a significant number of additional provisional ballots would be cast; (2) the Bill does not mandate additional election judges, poll workers, or other personnel; (3) the Bill does not mandate additional training by the election authorities; (4) the Bill does not mandate that local election authorities purchase additional equipment; (5) the Bill does not mandate printing of new poll challenger instructions; and (6) there

was no substantial evidence that any peripheral provisions of the Bill, such as affidavits, signs, or notification cards, involved more than *de minimis* costs.

In addition to the lack of a new activity or service, the trial court's Judgment incorrectly held that there was "specific and credible evidence from three jurisdictions as to substantial increased costs associate with provisional balloting." [A-10, LF 305]

But the testimony from the election authorities was based on their estimates and assumptions that there would be more provisional ballots cast. Boone County Clerk Wendy Noren estimated as many as 3,000 provisional ballots, but admitted: "It was just a guess on my part." [T. 212]

Robert Nichols of the Jackson County Board of Elections testified as such [T. 59], estimating 10,000 additional provisional ballots. [T. 62] Although he based this estimate on the number of seniors in residential facilities, he admitted that he did not know whether they had the required ID's, and further assumed that they would all vote.[T. 74, 76]

Judith Taylor, director of elections for St. Louis County, also made her cost estimates based on more provisional ballots; estimating a 20% increase from 2002. [T. 152-3] But a 20% increase was only 380 ballots, and the County has 448 polling

places – resulting in less than one additional provisional ballot per polling place. [T. 152-3]

Assumptions and guesses are not specific evidence. This evidence plainly does not meet the requirements outlined in *Brooks v. State*, 128 S.W.3d at 849.

The evidence does not reflect that local election authorities would have to hire additional election judges or poll workers. Both Mr. Nichols and Ms. Taylor based the need for such additional personnel on the anticipation of increased provisional ballots. [Nichols, T. 62, 64, 71-2, 76-7; Taylor, T. 142-3] Senate Bill 1014 did not require the hiring of additional personnel, and the evidence falls short of demonstrating such a need. Deciding to incur an expense not required by the statute is not a Hancock violation. *City of Jefferson v. Missouri Dept. of Natural Resources*, 916 S.W.2d 794, 797 (Mo. banc 1996).

Similarly, other expenses such as training election judges, purchasing new equipment, and printing challenger instructions were cited as increased costs. But again, Senate Bill 1014 did not require any new training, nor the purchase of any equipment, nor printing any instructions. Training of judges is already required by § 115.103, RSMo Cum. Supp. 2005. Challengers are not employees of the election authorities, they work for political parties. § 115.105, RSMo 2005. That statute does

not require the election authority to print instructions, and Senate Bill 1014 contains no printing requirement. Likewise, the purchasing of additional equipment, not required by the Bill, is not a Hancock violation.

The evidence does not support the finding of a Hancock violation. This Court should so hold, reversing the trial court's decision. The Hancock issues raised in this case are identical to those raised before this Court in *Jackson County, et al. v. State of Missouri*, No. SC88038. This case and *Jackson County* are consolidated for argument. The brief in the *Jackson County* case addresses the Hancock issues in greater detail.

Conclusion

The trial court's judgment should be reversed. The passage of Senate Bill 1014 does not create unconstitutional qualifications to vote. It does not interfere with the "free exercise of right of suffrage" and that "all elections shall be free and open."

Likewise the new law does not require the payment of money to vote, and does not impose an undue burden on right to vote. The law does not violate the Due Process and Equal Protection rights of Missouri citizens.

Finally, the law does not create unfunded mandates and, therefore, does not violate the Hancock provisions of the Missouri Constitution. That declaration by the trial court should be reversed.

Respectfully submitted,

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Certification of Service and of Compliance with Rule 84.06(b) and (c)

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