

**IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI**

KATHLEEN WEINSCHENK,
WILLIAM KOTTMAYER, ROBERT
PUND, AMANDA MULLANEY,
RICHARD VON GLAHN and GIVE
MISSOURIANS A RAISE, INC.,

Plaintiffs,

v.

No.

STATE OF MISSOURI,

and

ROBIN CARNAHAN, SECRETARY
OF STATE,

Defendants.

**MEMORANDUM IN SUPPORT OF
MOTION FOR PRELIMINARY INJUNCTION**

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

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

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

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

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

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

“Who are to be the electors of the Federal Representatives? Not the rich more than the poor; not the learned more than the ignorant; not the naughty heirs of distinguished names, more than the humble sons of obscure and unpropitious fortune. The electors are to be the great body of the people of the United States.”

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

“Suffrage is the pivotal right.”

- *Susan B. Anthony*

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

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

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“Republicans have been accused of abandoning the poor. It’s the other way around. They never vote for us.”

- *Vice-President Dan Quayle*

“For too long, the Republican Party wrote off the African-American community, and many African-Americans wrote off the Republican Party.”

- *President George W. Bush* (July 20, 2006, in a speech to the NAACP)

On June 14, 2006, Governor Blunt signed into law substantial revisions to Missouri’s election law. One of those revisions requires Missouri voters, for the first time in Missouri history, to present an unexpired personal photographic identification (a “Photo ID”) before being provided a regular ballot. These revisions are contained in Senate Bill Numbers 1014 and 730, misnamed the “Missouri Voter Protection Act” (the “MVPA”).

Far from protecting the rights of qualified Missouri voters, the MVPA imposes an unnecessary, unauthorized and undue burden on the fundamental right to vote of at least 170,000 registered Missouri voters who do not currently possess a Photo ID. It places a particularly heavy burden on those most disadvantaged in our society -- the poor, the elderly, minorities and the disabled.

For these and other reasons set forth in the Petition for Declaratory and Injunctive Relief and below, the Photo ID Requirement violates multiple provisions of the Missouri Constitution:

- (a) It constitutes an impermissible additional qualification to vote in violation of Article VIII, Section 2 (Count I);
- (b) It violates the prohibition on interference with the “free exercise of the right of suffrage” and the requirement that “all elections shall be free and open” contained in Article I, Section 25 (Count II);
- (c) It requires the payment of money to vote, in violation of the Due Process and Equal Protection Clauses in Article I, Sections 10 and 2, respectively (Count III);
- (d) It constitutes an undue burden on the fundamental right to vote that is not narrowly tailored to meet a compelling state interest, in violation of the Due Process and Equal Protection Clauses in Article I, Sections 10 and 2, respectively (Count IV);
- (e) It was designed to, and does, disparately impact registered voters in suspect classes, including African-Americans, in violation of the Equal Protection Clause in Article I, Section 2 (Count V);
- (f) It improperly discriminates between in-person voters, who are required to show a Photo ID, and absentee voters, who are not required to show a Photo ID, in

violation of the Equal Protection Clause in Article I, Section 2 (Count VI); and

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

Unless enjoined, the Photo ID and other challenged provisions of the MVPA will become effective August 28, 2006. This motion seeks a preliminary injunction prior to that time to maintain the status quo until this action can be finally decided. *See e.g. Dodson v. City of Wentzville*, 133 S.W.3d 528, 537 (Mo. Ct. App. 2004) (“An injunction is the appropriate remedy to preserve the status quo and prevent irreparable injury to the plaintiff pending disposition of the case on the merits.”)

All factors to be considered weigh heavily in favor of issuance of a preliminary injunction:

- There is a high probability that plaintiffs will be successful on the merits on one or more of their claims;
- Plaintiffs will suffer irreparable harm if the preliminary injunction is not granted;
- The balance between this harm and the harm that issuance of the preliminary injunction would have on other interested parties (which is none) tips strongly in favor of issuance; and
- Issuing a preliminary injunction would be in the public interest.

See State ex rel. Director of Revenue v. Gabbert, 925 S.W.2d 838, 839 (Mo. 1996)

(setting forth factors to be considered in determining whether to issue a preliminary injunction.)

For the reasons expressed below, plaintiffs' motion for preliminary injunction should be granted.¹

Statement of Facts and Pertinent Legal Considerations²

A. There Was No Identification Requirement Prior to 2002.

Prior to 2002, voters in Missouri, like voters in a majority of other states, were generally not required to present any form of identification as a condition of voting. *See e.g.*, Exhibit A (copy of pertinent statutes prior to 2002). Rather, they were required only to identify themselves to the election judges, write their addresses and sign their names on certificates furnished to the election judges by the election authorities. Mo. Rev. Stat. § 115.427 (1993).³

B. Under Current Law, Numerous Forms Of Identification Readily Available To Virtually All Registered Voters Are Acceptable.

In 2002, the legislature adopted the current version of Section 115.427, Mo. Rev. Stat. It requires that some form of identification be presented, but

¹ Plaintiffs in this case also are seeking a preliminary injunction based on the MVPA's violation of the Hancock Amendment. It is Plaintiffs' understanding that the plaintiffs in the recently filed case of *Jackson County v. State of Missouri*, Cause No. 06AC-CC00587 (Cole County Circuit Court) will soon be moving for such relief based on Hancock violations. Because Plaintiffs expect that this case will be consolidated with *Jackson County* for purposes of the preliminary injunction hearing, plaintiffs do not wish to burden the Court with duplicative briefing on this issue, but simply incorporate herein by this reference the briefing of the Jackson County plaintiffs.

² Plaintiffs expect that most, if not all, of the material facts will be undisputed. Plaintiffs nonetheless have included citations to supporting materials where appropriate. Additional evidence in support of the motion will be presented through supplementary supporting materials and/or at the preliminary injunction hearing. *See State ex rel. Eagleton v. Cameron*, 384 S.W.2d 627 (Mo. 1964) (It is not required, at a hearing on show cause order pertaining to temporary injunction that plaintiff present all of its evidence on the merits).

³ In counties using computer printouts as the precinct register, voters were required to show the voter identification card mailed to the voter from the election authorities or some other form of identification acceptable to the local election authorities. *Id.*

deems acceptable any one of numerous forms of identification readily available to virtually all registered voters:

- (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.

Personal knowledge of the voter by two supervising election judges, one from each major political party, shall be acceptable voter identification upon the completion of a secretary of state-approved affidavit that is signed by both supervisory election judges and the voter that attests to the personal knowledge of the voter by the two supervisory election judges. The secretary of state may provide by rule for a sample affidavit to be used for such purpose.

Mo. Rev. Stat. § 115.427.1 (2002).

While a Photo ID is permissible under current law, it is not required.

Voters are free to use many other forms of identification, including such commonly available documents as a utility bill, bank statement, government check, paycheck, student identification card, any identification issued by the

United States government, the State of Missouri, an agency of the state or a local election authority. Mo. Rev. Stat. § 115.427.1 (2002). The latter form of identification can include the voter identification cards and notices of election mailed to registered voters. Personal knowledge of the voter by two supervising election judges is also acceptable under current law. Mo. Rev. Stat. § 115.427.1 (2002).

While current law requires some form of personal identification and is therefore more restrictive than prior Missouri law, no widespread concerns have been raised that the forms of identification required by current law are unduly burdensome or have resulted in registered voters being discouraged from voting. The likely reason is simple; many of the forms of identification permitted under current law are provided to virtually all registered voters. Under current law, registered voters are not required to take any **affirmative steps** to obtain acceptable identification; they already have such identification.

C. The MVPA Imposes a Mandatory Photo ID Requirement.

The MVPA, which will go into effect on August 28, 2006 unless enjoined by this court, imposes a mandatory Photo ID Requirement as a precondition to receiving a regular ballot.⁴

The Photo ID Requirement under the MVPA provides:

⁴ A copy of the MVPA is Exhibit B. As explained below, *provisional* ballots would be provided to narrow categories of voters without Photo IDs under defined circumstances in certain elections. In addition, and also as explained below, for certain elections held prior to November 1, 2008, other voters would be permitted to cast *provisional* ballots in certain elections under certain defined circumstances. The availability of *provisional* ballots for certain voters in certain narrow circumstances in certain elections does not save the Photo ID requirement from constitutional invalidity as explained below.

Before receiving a ballot, voters **shall** establish their identity and eligibility to vote at the polling place by presenting a form of personal identification. "Personal identification" shall mean **only** one of the following:

- (1) Nonexpired Missouri driver's license showing the name and a photograph or digital image of the individual; or
- (2) Nonexpired or nonexpiring Missouri nondriver's license showing the name and a photographic or digital image of the individual; or
- (3) A document that satisfies all of the following requirements:
 - (a) The document contains the name of the individual to whom the document was issued, and the name substantially conforms to the most recent signature in the individual's voter registration record;
 - (b) The document shows a photographic or digital image of the individual;
 - (c) The document includes an expiration date, and the document is not expired. or if expired, expired not before the date of the most recent general election; and
 - (d) The document was issued by the United States or the state of Missouri;
or
- (4) Any identification containing a photographic or digital image of the individual which is issued by the Missouri National Guard, the United States armed forces, or the United States Department of Veteran Affairs to a member or former member of the Missouri National Guard or the United States armed forces and that does not have an expiration date. (emphasis added).

D. Photo ID Is Required Only For Voters Who Vote In-Person; Voters Who Vote Absentee by Mail Are Not Required to Present a Photo ID.

Significantly, the MVPA did not revise the identification requirement to register or to vote absentee by mail, neither of which currently requires a Photo ID. After the effective date of the MVPA, the identification requirements to register and to vote absentee by mail -- two areas in which concerns about voting fraud have been raised more often than identification fraud in in-person voting -- will be far more lenient than with respect to in-person voting.

E. At least 170,000, and Likely Far More, Registered Missouri Voters Do Not Currently Have an Acceptable Photo ID, the Vast Majority of whom are Poor, Minorities, Elderly and Disabled.

The Missouri Department of Revenue has estimated that the number of qualified Missouri Voters without an acceptable Photo ID is 169,215. Mo. Dept. of Rev., Fiscal Note: 4947-01, Bill Number SB1014. Plaintiffs expect to offer evidence at or before the preliminary injunction hearing that the correct number is substantially higher.

Whatever the precise number, the people without an acceptable Photo ID, by definition, are those who do not have a "[n]onexpired Missouri driver's license." The group of qualified voters who do not have a current driver's license unquestionably are comprised primarily of the poor, minorities, elderly and disabled. For example, more than 21% of Missouri's African-American household's have no automobile, and therefore have no need for a

driver's license.⁵ This is over four times the percentage of Missourians who do not have an automobile.⁶ Eleven percent of Missouri's elderly do not have a current driver's license.⁷ In 1999, 419,355 Missouri citizens over 18 were living below the poverty line.⁸ Citizens living in poverty obviously are less likely to have an automobile, and need a driver's license, than other citizens. Many, if not most, disabled voters are not able to drive and therefore have no need for a driver's license.

These categories of qualified Missouri voters - - the poor, minorities, the elderly and the disabled - - are the least mobile members of our society, but the very ones who will be required under the MVPA to take burdensome affirmative steps (including paying money) to obtain a Photo ID.

F. Qualified Voters Who Will Need to Obtain a Photo ID Under the MVPA Will Be Required to Pay Money and Incur Substantial Burdens.

If the Photo ID Requirement is permitted to go into effect, those without a Photo ID will be required to pay money to vote. That in and of itself is a violation of the Equal Protection Clause as the United States Supreme Court made clear under the United States Constitution forty years

⁵ See U.S. Bureau of the Census, 2004 American Community Survey, tbl. S0201 (Selected Population Profile: Missouri) available at <http://factfinder.census.gov>.

⁶ *Id.*

⁷ See Mo. Dept. of Rev. Info. Sys. Bureau, Total Drivers By Class, Gender and Age, available at http://www.dor.mo.gov/publicreports/drivers_class_sex_age_report.txt; U.S. Bureau of the Census, 2004 American Community survey, tbl. S0201 (Selected Population Profile: Missouri), available at <http://factfinder.census.gov>.

⁸ See U.S. Census Bureau, American FactFinder, 2000 Census, Poverty Status in 1999 by Age.

ago in *Harper v. Virginia Board of Elections*, 383 U.S. 663 (1966). The fee held to be unconstitutional in that case was \$1.50. The same analysis and result would apply under the Equal Protection Clause of the Missouri Constitution.

The legislature apparently recognized that requiring any payment of money to vote would be unconstitutional. It provided in the MVPA that the state “shall pay the legally required fee” for any applicant who requests a nondriver’s license for voting purposes and who executed an affidavit showing that the applicant does not have any other Photo ID acceptable under the MVPA. Mo. Rev. Stat. § 115.427.7 (2006). The fee, absent this provision, would be \$11.⁹

What the legislative did not do, -- intentionally, through oversight or otherwise -- is agree to pay the fee required to obtain the underlying documents necessary to obtain a nondriver’s license. For example, a person wishing to obtain a nondriver’s license must provide “Proof of Lawful Presence,” which most commonly is a certified birth certificate or passport. For someone who was born in Missouri, the cost to obtain a certified birth certificate is \$15.¹⁰ If requested by mail, additional postage costs must be paid for the transmittal of the request and for the self-addressed, stamped envelope required for the return of the certificate. For someone who was born in another state, that person must contact his or her state of birth to

⁹ Missouri Department of Revenue’s website at <http://www.dor.gov/mvdl/drivers/license.htm#newndl>.

¹⁰ State of Missouri Department of Health and Senior Services’ website, available at <http://www.dhss.mo.gov/BirthAndDeathRecords/applications.html#fees>.

obtain a certified birth certificate. The required fee in other states range from \$5.00 to \$30.00.¹¹ To obtain a passport, the fee ranges from \$97.00 through the United States Department of State and its passport agencies and facilities for receipt within six weeks to \$236.00 through private agencies for 7-10 days processing.¹²

For those whose name has changed since birth, like the vast majority of married women in this state, additional certified documents showing any name changes since birth, such as marriage licenses, divorce decrees and court orders reflecting name changes, also must be obtained and provided.¹³ For women who were born, married and divorced in other states, obtaining these certified documents - - in addition to obtaining a certified birth certificate - - will be a time-consuming and burdensome process. These documents also cost money. To obtain a certified copy of a marriage license, for example, the fee ranges from \$5.00 to \$30.00.¹⁴

To the person needing to obtain a nondriver's license to vote, being required to pay a fee (or multiple fees) to obtain an underlying document (or multiple documents) is no different than being required to pay a fee to obtain

¹¹National Center for Health Statistics' website, *Where to Write for Vital Records*: <http://cdc.gov/nchs/data/misc/07-07-06.w2w.pdf>.

¹² United States Department of State website at http://travel.state.gov/passport/get/fees/fees_837.html; see also, <http://www.americanpassport.com>.

¹³ Missouri Department of Revenue's website: <http://www.dor.mo.gov/mvdl/drivers/idrequirements.pdf>.

¹⁴ National Center for Health Statistics' website, *Where to Write for Vital Records*: <http://cdc.gov/nchs/data/misc/07-07-06.w2w.pdf>.

the nondriver's license itself - - both violate the Equal Protection Clause because they make payment of a fee an electoral qualification.

**The Photo ID Requirement Imposes an Undue Burden on
The Fundamental Right to Vote on All Qualified Missouri Voters
Who Do Not Have an Acceptable Photo ID**

The requirement to pay a fee to vote (for those without Photo ID), along with the other time-consuming tasks that must be performed simply to establish "Proof of Lawful Presence," alone constitute an undue burden on the fundamental right to vote. For many qualified voters these requirements will require multiple trips to various government offices, standing in long lines and other significant burdens. There can be no reasonable question that imposition of these financial and other burdens will inevitably prevent or discourage many eligible voters from voting.

But those are not the only burdens that would be imposed by the Photo ID Requirement. For example, according to the Missouri Department of Revenue Driver Guide, (Revised May 2006), available at <http://www.dor.mo.gov/mvdl/drivers/dlguide/dlguide.pdf>, in addition to being required to pay a fee (or multiple fees) and being required to take necessary steps to obtain the underlying documents necessary to provide "Proof of Lawful Presence," a person applying for a nondriver's license also must provide "Proof of Lawful Identity," which is a Social Security number. An applicant *may* be required to submit proof of his or her Social Security number. Acceptable proof includes:

- Social Security Card;
- Recent payroll stub containing the SSN;
- Military Identification Card containing the SSN;
- IRS/state tax forms (NOT a form W-2); or
- Financial statement, on company form or letterhead, containing the SSN.

If an applicant does not have a Social Security number, he or she must sign an affidavit stating that he or she does not have a Social Security number.

However, any person whose name has changed since birth must also provide "Proof of Name Change," which may include a U.S. Passport (valid or expired), certified marriage license, certified divorce decree, certified court order, certified adoption papers or amended birth certificate, or, most commonly, a Social Security card with the applicant's current name.

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

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

- iii) health insurance card (not a Medicare card)
- iv) U.S. military ID; or
- v) adoption decree.

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

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

- a) U.S. citizenship (if not previously established with Social Security) or immigration status;
- b) Legal name change: marriage document; divorce decree specifically stating person may change her name; or court order for a name change;
- c) Identity: U.S. driver's license; state-issued nondriver identification card or U.S. passport (document must be current (not expired) and show name, identifying information (date of birth or age) and preferably a recent photograph).

(If documents do not give date of birth, age or recent photograph, person will need to produce one document with old name and a second document with the new legal name containing the identifying information (date of birth or age) or a recent photograph.)

See, Social Security Online at <http://www.ssa.gov/pubs/10002.htm#how>.

Finally, an applicant for a Missouri nondriver's license must submit "Proof of Residency," which includes the following (a Post Office Box will not be allowed as a resident address):

- Utility bill, most recent (phone, water, gas, electric, trash or sewer, etc.);

- Voter registration card, most recent;
- Bank statement, most recent;
- Government check, most recent;
- Pay check, most recent;
- Property tax receipt, most recent;
- Housing rental contract of current residence;
- Mortgage documents of current residence;
- An official letter or document from another state or local government agency, not previously listed, which is on the agency's letterhead or contains the official seal of the issuing agency issued within the previous 30 days;
- Letter or other documentation issued by the postmaster within the previous 30 days; or
- Other government document that contains the name and address of the applicant issued within the previous 30 days.

Missouri Department of Revenue Driver Guide.

These are substantial and undue burdens on the right to vote on all Missouri citizens who do not have a Photo ID, particularly given that vast majority of these citizens do not have a driver's license and therefore do not drive. These citizens, who primarily are the poor, the elderly, handicapped and minorities, are the least mobile members of the electorate and will have the greatest difficulty in complying with the requirements of the statute.¹⁵

The Photo ID Requirement is Particularly Burdensome on Certain Groups of Qualified Missouri Voters

Compliance with the new Photo ID Requirement will present an especially high obstacle for registered voters who are (a) poor, do not own a

¹⁵ "Asked whether the state would help disabled people cover transportation costs for assembling the necessary documents, Blunt said: 'We're not going to reimburse people who are driving to fulfill a civic obligation. That's an absurd suggestion.'" Governor Matt Blunt, 6/14/06 St. Louis Post Dispatch article. Ironically, the people who are burdened by the Photo ID requirement are not "*driving* to fulfill a civic obligation." By definition, those without a Photo ID who will be burdened by this requirement do not have a valid driver's license and therefore are not permitted to drive. In addition, voting is not a mere "civic obligation," but is a fundamental right with which the legislature cannot constitutionally interfere or unduly burden. (Exh. C).

car, and were born in other states; (b) elderly and no longer drive¹⁶; (c) visually or physically impaired and are unable to drive¹⁷; (d) persons born in other states who do not have an acceptable Photo ID¹⁸; and (e) students without automobiles who have driver's licenses from other states, but who cannot vote in Missouri because they do not have an unexpired Missouri driver's license.¹⁹

The burden is particularly acute and has a disparate impact on qualified voters who are African-American. Twenty-four percent of Missouri African-Americans live in poverty; only nine percent of whites do.²⁰ The average per capita income for Missouri African-Americans is \$14,021 compared to \$20,957 for Missouri whites.²¹ Twenty-six percent of Missouri African-Americans over the age of 25 have less than a high school education; only sixteen percent of whites do.²² As pointed out above, African-Americans are four times more likely not to have an automobile than whites.²³ Given

¹⁶ See Affidavit of William Kottmeyer (Exh. E).

¹⁷ See Affidavit of Kathleen Weinschenk (Exh. F); Affidavit of Robert Pund (Exh. D).

¹⁸ See Affidavit of Richard von Glahn (Exh. G).

¹⁹ See Affidavit of Amanda K. Mullaney. (Exh. H).

²⁰ U.S. Census Bureau, American Factfinder, 2000 Census.

²¹ *Id.*

²² *Id.*

²³ The state recently said that it will not make any extra effort with mobile units to go into low-income areas to help the poor obtain Photo IDs. Trish Vincent, Missouri's Department of Revenue Director, recently stated: "The law is clear. We are to work with older folks, the seniors and the disabled, not the low-income." St. Louis Post-Dispatch, July 25, 2006. "Missouri May Face Voter Identity Crisis in Fall." (Exh. I).

these facts, the financial and other burdens imposed by the Photo ID Requirement disproportionately affect African-Americans.

The Photo ID Requirement also has a disparate impact on qualified voters who are women. As explained above, to obtain a Photo ID, a person must produce a certified birth certificate and certified documents showing any name changes since birth, such as certified marriage license, divorce decrees, and court orders reflecting name changes.²⁴ These requirements will have a disproportionate and disparate impact on women due to the widespread custom of women taking their husband's surname. The Missouri Department of Revenue's website recognizes this unequal burden by including a separate section instructing women what additional certified documents are required for them to prove their identity. For example, to obtain a Photo ID for voting, a woman who has married, divorced and married again will have to produce and pay for at least three certified documents in addition to a similarly situated man who will be required to produce only his birth certificate. Putting additional burdens on a fundamental right in a discriminatory manner -- without any compelling reason -- is directly inconsistent with the Equal Protection Clause in the Missouri Constitution.

The Photo ID Requirement also places a difficult and undue burden on Missouri's elderly, at least 11% of whom do not have a current driver's

²⁴ Missouri Department of Revenue Driver Guide, (Revised May 2006), available at <http://www.dor.mo.gov/mvdl/drivers/dlguide/dlguide.pdf>.

license. For example, it is impossible for registered voters who were born in Missouri before 1910 to obtain a certified birth certificate because the state does not maintain a record of births before 1910. In addition, many older and less affluent registered voters cannot obtain a Photo ID because they do not have birth certificates on file for a variety of reasons: (a) because they were born before such records were recorded and maintained, (b) because they were born at home and no official record of their births were filed, or (c) because of the passage of time and other reasons, those birth records are no longer available.

G. It Will Be Virtually Impossible For Some Qualified Voters to Obtain a Photo ID.

It will be virtually impossible for some registered voters to obtain the documents necessary to vote. For example, some states (California, Colorado, Connecticut, Florida, Georgia, Illinois and Oklahoma, to name a few) require a Photo ID to obtain a certified birth certificate. As explained above, Missouri residents without Photo ID's born in those states will be unable to obtain birth certificates in those states and, therefore, will not be able to obtain the nondriver's license that will be necessary to vote in Missouri under the MVPA.

Some registered Missouri voters will not be able to obtain certified birth certificates in sufficient time to vote in Missouri. For example, it takes one to three months to obtain a certified birth certificate from the state of Michigan. It takes eight to ten weeks to obtain a certified birth certificate

from the state of Louisiana (assuming the records still exist after Hurricane Katrina). Over 1.6 million Missouri residents were born in another state.²⁵ For those without a Photo ID who were born in other states, and who learn of the Photo ID Requirement within a month or less of the November election, many will not be able to obtain a Photo ID in time to cast a regular ballot in the November election.

H. There is No Need - - Compelling or Otherwise - - For the Photo ID Requirement; There Has Been No Evidence of Widespread or Significant Voter Identification Fraud by In-Person Voters Under Current Law or Under the Law As It Existed Prior to 2002.

The Photo ID Requirement is truly a solution in search of a problem. The proponents of the Photo ID Requirement have attempted to justify it on the ground that it will prevent election fraud. The type of election fraud that could be prevented by the Photo ID Requirement - - voter impersonation fraud at the polls - - is virtually non-existent in Missouri. It is statistically more likely for a Missourian to be struck by a bolt of lightning than to have his or her vote cancelled by someone posing as another voter to cast a ballot. There have been few, if any, documented instances of election fraud in recent Missouri history that the Photo ID Requirement could have prevented. There have been **no** such reported incidents since the 2002 changes requiring some form of personal identification have been in effect.

Given these facts, it is hardly surprising that Missouri voters overwhelmingly see no need - - compelling or otherwise - - for a Photo ID

²⁵ MCDC Detailed Profiles for Missouri, <http://mcdc2.missouri.edu/data/sf32000>.

requirement. In a June 2006 poll of Missouri voters on statewide issues, 54% of respondents stated that they opposed the Photo ID requirement, while only 18% favored such a requirement. "June 2006 poll of Missouri voters, statewide issues" St. Louis Post-Dispatch 6/24/06. (Exh. J.)

To attempt to create a need where none exists, proponents of the Photo ID Requirement have trumpeted a report by Missouri Secretary of State Matt Blunt describing the 2000 St. Louis election. See, *Mandate for Reform: Election Turmoil in St. Louis November 7, 2000* by Secretary of State Matt Blunt (July 24, 2001) (Exh. K). Obviously, the subject of that report -- activities concerning voting in St. Louis in the 2000 election -- occurred **before** the 2002 changes went into effect, and therefore does not -- and cannot -- raise any legitimate concerns about voter identification fraud under the 2002 law which, as explained above, for the first time generally required some form of voter identification to be presented for in-person voting.

That report likewise does not document any widespread voter identification fraud before the 2002 changes became effective. The report identified 114 alleged votes by convicted felons (not solved by Photo ID); 79 voters allegedly registered with vacant-lot addresses (not solved by Photo ID); 45 people who allegedly voted twice (not solved by Photo ID); and 14 votes allegedly by deceased persons (potentially solved by photo ID, but also solved by HAVA's new database provisions.) Even if these allegations proved true -- and most were debunked upon further investigation as explained

below – at most 0.01% of the ballots cast in the City of St. Louis - - and less than 0.0006% in the State of Missouri - - were tainted by the kind of election fraud that might have been prevented by Photo ID Requirement.²⁶ But even to address these miniscule percentages, Photo ID is an unnecessary response, as the problems will already be remedied simply by implementing existing federal law.

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

The United States' Complaint alleges that the placement of eligible voters on inactive status by the Board of Election Commissioners for the City of St. Louis, when combined with the election-day procedures that inactive voters were required to follow in order to restore their active voter status and vote during the November 2000 and March 2001 elections,

²⁶ By contrast, the odds of being struck by lightning in a person's lifetime is .02%. ("Medical Aspects of Lightning; National Weather Service) That is 33 times greater than the odds of a Missourian in the 2000 election having his or her vote cancelled by someone posing as another voter. The odds of being struck by lightning are infinitely greater than the odds of a Missourian in elections since 2000 having his or her vote cancelled by someone posing as another voter; not a single documented instance - - in over 5 million votes cast in statewide elections since 2000 - - has been reported.

constituted a removal of those voters from the voter registration rolls in violation of Section 8 of the NVRA.

Stipulation of Facts and Consent Order, August 14, 2002, in the case of *The United States of America v. Board of Election Commissioners for the City of St. Louis, et al.*, Civil Action No. 4:02CV001235. (Exh. L). Although the Department investigated the allegations raised in a report by Secretary of State Blunt, it did not make any findings on those allegations or require any corrective action related to those allegations. No one was convicted of any voting fraud. No one was even charged with voting fraud.

In an investigation of 2000 election activities in the City of St. Louis performed by Secretary of State Rebecca McDonnell Cook, Secretary of State Cook found, like the Department of Justice, that “there were many people who registered to vote prior to the October 11, 2000 statutory deadline whose names did not appear in the proper precinct registers on election day.” *Analysis and General Recommendations Report of the Office of the Secretary of State Regarding the November, 2000 General Election on the City of St. Louis* at p. 9. (Exh. M). It also found that “[m]any qualified, registered voters were turned away from the polls because their names could not be found in the precinct rosters and their qualifications could not be verified by the election judges.” (p. 2 of first attachment to report). Also like the Department of Justice, the report by Secretary of State Cook documented no evidence of voter impersonation fraud.

Secretary of State Blunt himself recognized in 2004 that “Missouri’s problems in November 2000 were a result of problems in St. Louis City relating to mishandling the City’s inactive voter list, improper voting through the abuse of court orders to vote, and an attempt to keep the City polls open in violation of state law.”²⁷ Importantly, Secretary of State Blunt in the same letter specifically rejected the notion that any significant type of voter fraud - - voter impersonation or otherwise - - has occurred since the 2002 election law changes: “Furthermore, subsequent statewide elections (the November 2002 general election and the February 2004 presidential primary) were two of the cleanest and problem-free elections in recent history.”²⁸ In another letter in March, 2004 to the St. Louis Post-Dispatch Governor Blunt characterized these elections as “fraud-free.”²⁹

Secretary of State Robin Carnahan expressly pointed out in a May 11, 2006 letter to Governor Blunt that there is no legitimate need for the Photo ID Requirement:

In short, the problem with Missouri’s 2000 General Election was not widespread voter impersonation or fraud, but that many Missourians were denied their right to vote.

In addition, following the November 2002 General Election, overseen by your administration, you commended the local

²⁷ See March 23, 2004 letter from Secretary of State Blunt to Governor Bob Holden, p. 2. (Exh. N). Prosecutorial authorities, who investigated the matter, including the United States Department of Justice under Attorney General John Ashcroft, found no evidence of any violations of law with respect to the alleged “attempt to keep the City polls open.”

²⁸ *Id.*

²⁹ March 3, 2004 letter to St. Louis Post-Dispatch from Governor Matt Blunt. (Exh. O).

election authorities for conducting an election that was “free of fraud.” No new circumstances arose under the 2004 November election, also under your supervision, or since, which would necessitate making it harder for thousands of Missourians to vote.

As you know, Missouri’s voter identification requirements are already among the strictest in the nation and have proven an effective safeguard to prevent wrongful voting.

Rather than solve any real problems, Senate Bill 1014 will jeopardize the integrity of our elections by getting in the way of 170,000 Missourians’ right to vote and have their votes counted.

(Exh. P).

I. The Purported Justification For the Photo ID Requirement - - Preventing Election Fraud - - Is a Mere Pretext.

The stated purpose of the Photo ID Requirement is to prevent election fraud.

“‘The right to vote is the cornerstone of our democracy,’ Blunt said at the Capitol bill signing ceremony. ‘That right is undermined whenever fraud occurs. A system that the people do not trust is a system that undermines the people’s trust in their elected government.’”

Governor Matt Blunt, 6/15/06 Associated Press article regarding his decision to sign the MVPA (Exh. Q).

This stated purpose - - preventing voter fraud - - was not the true purpose of the Photo ID Requirement, but was a pretext to conceal the requirement’s actual purpose, which was to suppress voting by African-Americans, other minorities, the poor, the handicapped, the elderly, and others by increasing the difficulty of voting. As indicated by the quotes on page 2 above from Vice-President Quayle and President George W. Bush,

and as is commonly known, these categories of voters, particularly the poor and African-American voters, typically vote overwhelmingly for Democrats.³⁰

As pointed out above, there was no need -- compelling or otherwise -- to impose a drastic Photo ID Requirement that impinges upon a fundamental right. That is particularly true when the alleged purpose of the Photo ID Requirement is to combat a problem -- election fraud -- that even Governor Blunt admits has not existed in Missouri's elections within the last six years. But if election fraud was an actual problem and if the true purpose of the Photo ID Requirement had been to prevent election fraud, the MVPA, among other things, would have imposed the Photo ID Requirement for absentee voting. That it did not again demonstrates that the purported "election fraud" justification for the Photo ID Requirement was merely a pretext.

Ironically, the MVPA changes the requirements for "personal identification" to vote in person, but not to register or to vote absentee ballot. "Personal identification" for voting in person is now more stringent than "personal identification" to register or to vote absentee ballot. Those Missouri citizens who take the time and make the effort to go to the polls to vote are more burdened under the MVPA than those who vote absentee. Given that fraud in connection with registration and voting absentee are for more documented and frequent problems than voter identification fraud at

³⁰ For example, in the 2004 General Election race for Governor, exits polls show that 88% of African-Americans voted for the Democratic Candidate Claire McCaskill, while only 11% voted for the Republican Candidate Matt Blunt. MSNBC exit polls, MSNBC website at <http://www.msnbc.msn.com/id/5297125/>. Similarly in the same election, African-Americans voted overwhelming -- by a 15 to 1 margin -- for Democratic Presidential Candidate John Kerry over Republican Presidential Candidate George Bush. See, CBSNEWS.com at http://election.cbsnews.com/election2004/poll/poll_p_u_s_all_us0.shtml.

the polls, the fact that the MVPA was directed only at preventing the latter undermines any argument that minimizing election fraud was the actual purpose of the legislation.

The pretextual nature of the purported justification for the burden which the Photo ID Requirement imposes on the right to vote is also shown by the following facts:

- (a) Fraudulent voting is already prohibited by existing Missouri law without unduly burdening the right of a citizen to vote.
 - (i) Fraudulent voting is already prohibited as a crime under Section 115.631 Mo. Rev. Stat., punishable by a fine of up to ten thousand dollars (\$10,000.00) or imprisonment for up to five (5) years, or both.
 - (ii) Voter registration records are updated periodically by the Secretary of State and local election officials to eliminate people who have died, have moved, or are no longer eligible to vote in Missouri for some other reason. Federal law, 42 U.S.C. § 15483, now mandates that this be done.
 - (iii) Existing Missouri law also requires election officials in each precinct to maintain a list of names and addresses of registered voters residing in that precinct, and to check off the names of each person from that official list as they cast their ballots. Mo. Rev. Stat. §§ 115.431, 115.433, 115.435.
 - (iv) Registered voters are also required by existing Missouri law to present at least one of several forms of documentary identification to election officials who are required, before issuing the voter a ballot, to match the name and address shown on the document to the name and address on the official roll of registered voters residing in the particular precinct. Mo. Rev. Stat. §115.427 (2002).
- (b) There is no evidence that the existing Missouri law has not been effective in deterring or preventing fraudulent in-person voting

by impersonators – the only kind of fraudulent voting that might be prevented by the Photo ID Requirement.

- (c) If the true intention of the General Assembly had been to prevent fraudulent voting by imposters, the General Assembly would have imposed the same restrictions on the casting of absentee ballots.
- (d) Fraudulent in-person voting is unlikely, would be easily detected if it had occurred in significant numbers, and would not be likely to have a substantial impact on the outcome of an election because:
 - (i) Many people vote at a local neighborhood polling place where they are likely to be known to and recognized by neighbors or poll workers.
 - (ii) Voters are required by existing Missouri law to provide one of the several means of identification to election officials.
 - (iii) Election officials are required, before issuing the ballot to the voter, to check off the name of either voter from an up-to-date list of the names and addresses of every registered voter residing in the precinct. If an imposter arrived at a pole and was successful in fraudulently obtaining a ballot before the registered voter arrived at the poll, a registered voter, who having taken the time to go to the polls to vote, would undoubtedly complain to elections officials if he or she were refused a ballot and not allowed to vote because his or her name had already been checked off the list of registered voters as having voted. Likewise, if an imposter arrived at the polls after the registered voter had voted and attempted to pass himself off as someone he was not, the election official would instantly know of the attempted fraud, would not issue the imposter a ballot and allow him to vote, and presumably would have the imposter arrested or at least investigate the attempted fraud and report the attempt to the local election authority or the Secretary of State.

Additional evidence that the Photo ID Requirement is pretextual is the requirement that the Photo ID be “nonexpired.” If the purpose of the Photo

ID Requirement is simply to identify the voter, it makes no difference whether the Photo ID is expired or unexpired. An expired Photo ID still would identify the voter. This is additional evidence that the purpose of the Photo ID Requirement was in reality to suppress voting by those who are most likely to have expired Photo ID's - - the elderly, the poor, minorities, and the handicapped.

J. The Photo ID Requirement Is Overbroad and Not Narrowly Tailored.

Even if the Photo ID Requirement had been truly intended to prevent fraudulent voting by imposters, it is still unconstitutional because it places an undue burden on a fundamental right and is not narrowly tailored to meet a compelling governmental interest. For example, the Photo ID Requirement is:

- (i) Overbroad because it applies to and burdens the right to vote of at least 170,000 (or more) registered voters who do not have a Photo ID to supposedly prevent a hypothetical miniscule number of people from fraudulently casting ballots by misrepresenting their identities to poll workers.
- (ii) Not narrowly tailored to prevent the primary source of fraudulent voting that does exist - namely fraudulent voting by absentee ballots.
- (iii) Not narrowly tailored because less restrictive means could be used - - and have been used in the current law - - to accomplish the same objective.

K. The Availability of Provisional Ballots in Certain Elections for Narrow Categories of Voters and For Other Voters Prior to November 1, 2008 in Certain Defined Circumstances Does Not Cure the Unconstitutionality of the Photo ID Requirement.

Under the MVPA certain limited categories of individuals without a Photo ID may cast a **provisional** ballot in certain elections if they sign an affidavit swearing that they are “unable”³¹ to obtain a current and valid Photo ID because of:

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

Also, for certain elections held before November 1, 2008, voters without Photo ID’s may cast a **provisional** ballot if they sign an affidavit affirming identity and present one of the forms of identification permitted under the current law.

These provisional ballots may be counted only if all of a series of requirements have been met (none of which are required to count regular ballots):

- (a) The election authority must verify the identity of the individual by comparing that individual’s signature on file with the election authority;
- (b) The election authority must determine that the individual was eligible to cast a ballot at the polling place where the ballot was cast;

³¹ The word “unable” is not defined, is ambiguous, and will undoubtedly lead many in each category to be hesitant or unwilling to make the required statement under oath to obtain a provisional ballot.

- (c) The election authority must determine that the voter did not otherwise vote in the same election by regular ballot, absentee ballot or otherwise;
- (d) The election authority must determine that the information on the provisional ballot envelope is found to be “correct, complete and accurate;”
- (e) If the election authority determines that the provisional voter is registered and eligible to vote in the election, it must provide documentation verifying the voter’s eligibility, which must be noted on the copy of the provisional ballot envelope; and
- (f) No provisional ballot may be counted until all provisional ballots are determined either eligible or ineligible in accordance with these requirements.

Moreover, provisional ballots are not utilized in Missouri in local elections.³²

The availability of a provisional ballot for these limited categories of voters in these limited circumstances in only certain elections does not cure the unconstitutionality of the Photo ID Requirement - - even as to those Missouri voters who fall within these limited categories.

As made clear in Article VIII, Section 2 of the Missouri Constitution, “**All**” Missouri citizens who possess the constitutionality defined qualifications are constitutionally “entitled to vote at **all** elections by the people,” not just some elections. (emphasis added). Because the provisional

³² While certain provisions of the MVPA purport to allow those without Photo ID’s to cast provisional ballots under certain circumstances, that right is limited by Mo. Rev. Stat. § 115.430, the provision governing provisional ballots. That provision makes clear that provisional ballots are to be used only in “primary and general elections where candidates for federal or statewide offices are nominated or elected and any election where statewide issue or issues are submitted to the voters.” Section 115.430.1, Mo. Rev. Stat. The State of Missouri itself is currently warning voters on the Missouri Department of Revenue’s website that “Provisional ballots may not be available in all elections.” Available at <http://www.dor.mo.gov/mvdl/drivers/voterid.htm>. The Missouri Secretary of State’s website likewise makes clear that “provisional ballots are only available in primary and general elections.” Available at <http://www.sos.mo.gov/elections/photo/faq.asp>.

ballot is not available in “all” elections, its potential availability in some elections obviously does not fulfill the constitutional requirement. For this reason alone, the availability of a provisional ballot for a few categories of voters does not cure the unconstitutionality of the Photo ID Requirement even as to these voters. It obviously does not cure the unconstitutionality of the Photo ID Requirement for the vast majority of qualified voters without a Photo ID who do not fall within these limited categories.

With respect to those elections that do permit provisional ballots to be cast, the MVPA imposes many new and burdensome requirements as set forth above, including a requirement that those ballots be subjected to a highly subjective “signature match” requirement. Under the MVPA, unless the election authority can verify that the signature on the provisional ballot affidavit matches the signature on file with the election authority, the provisional ballot will not be counted.

Election authorities are not handwriting experts. Many signatures on file were provided decades ago. It obviously will be difficult, if not impossible, for the election authorities to determine in any objective manner whether the signatures actually match. The legislature has not set forth any standards by which the signature match determination may be judged. As set forth by the United States Supreme Court in interpreting the Equal Protection Clause of the United States Constitution:

The right to vote is protected in more than the initial allocation of the franchise. Equal protection applies as well to the manner of its exercise. Having once granted the right to vote on equal

terms, the State may not, by later arbitrary and disparate treatment, value one person's vote over that of another. See, e.g., *Harper v. Virginia Bd. of Elections*, 383 U.S. 663, 665, 86 S.Ct. 1079, 16 L.Ed.2d 169 (1966).

...

The recount mechanisms implemented in response to the decisions of the Florida Supreme Court do not satisfy the minimum requirement for nonarbitrary treatment of voters necessary to secure the fundamental right.

...

The problem inheres in the absence of specific standards to ensure its equal application.

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

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

Even without the signature match and other rigid requirements in the MVPA set forth above, over 50% of the provisional ballots cast in the last general election were not counted. May 11, 2006 letter from Secretary of State Carnahan to Governor Blunt. (Exh. P); *A Summary of the 2004 Election Day Survey: How We Voted: People, Ballots, & Polling Places*, The United States Election Assistance Commission, September 2005, available at http://www.eac.gov/election_survey_2004/intro.htm (finding that only 40.2% of the provisional ballots cast in 2004 in Missouri were counted). With these additional requirements, an even smaller percentage of provisional ballots will be counted. This undoubtedly will result in the votes of many registered

Missouri voters, who possess the constitutionally dictated qualifications to vote, not being counted simply because they could not present a Photo ID at the polls. As recognized by Secretary of State Carnahan in her May 11, 2006 letter to Governor Blunt:

Supporters of Senate Bill 1014 say the bill will allow seniors and voters with disabilities to cast provisional ballots. As you are aware, provisional ballots require voters to put their ballots in special envelopes and to give up some of their right to a private vote to signing the back of those envelopes. In addition, provisional ballots are not placed in the regular ballot box where every other vote goes and will only be counted if the local election authority determines the voter's signature matches the one they have on file, which in some cases can be decades old. You are also undoubtedly aware that in the 2004 General Election, when you were Secretary of State, over 8,000 provisional ballots were cast, but only 3,000 were actually counted.

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

Preliminary Injunction Factors

In *State ex rel. Director of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. 1996), the Missouri Supreme Court set forth the factors that should be considered in determining whether a preliminary injunction should be issued:

When considering a motion for a preliminary injunction, a court should weigh “the movant’s probability of success on the merits, the threat of irreparable harm to the movant absent the injunction, the balance between this harm and the injury that the injunction’s issuance would inflict on other interested parties, and the public interest.”

As explained below, each of these factors weighs heavily in favor of granting a preliminary injunction in this case.

I. IT IS HIGHLY PROBABLE THAT PLAINTIFFS WILL BE SUCCESSFUL ON THE MERITS ON ONE OR MORE OF THEIR CLAIMS.

A. The Photo ID Requirement Constitutes An Additional Qualification to Vote Under Article VIII, Section 2.

Article VIII, Section 2 of the Missouri Constitution provides:

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

This provision sets forth the exclusive list of qualifications to vote in

Missouri. Those are:

- Citizen of the United States;
- Over the age of eighteen;
- Resident of this state;
- Resident of the political subdivision in which the person offers to vote; and

- Registered within the time prescribed by law.

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

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

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

Article VIII, Section 2 provides that “**all**” persons qualified to vote, not disqualified to vote, and not properly precluded by law from voting, are “**entitled** to vote at **all** elections by the people.” (emphasis added). So important is this right to vote that Missouri voters are constitutionally protected from arrest while “going to, attending, and returning from elections,” except in cases of treason, felony or breach of the peace. Article VIII, Section 4. Section 25, Missouri’s Bill of Rights, Article I, further reinforces that “no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.”

By requiring that registered voters present a Photo ID before being issued a ballot, the MVPA violates Article VIII, Section 2 of the Missouri Constitution in three ways:

- (a) It adds a new qualification to vote - - presenting a Photo ID - - not specified or permitted by Article VIII, Section 2;
- (b) It adds a new disqualification to vote - - not presenting a Photo ID - - not specified or permitted by Article VIII, Section 2; and
- (c) It attempts to exclude by law from voting - - persons not presenting a Photo ID - - persons other than those permitted to be excluded under Article VIII, Section 2.

As a matter of constitutional construction, there can be no reasonable question that the legislature cannot add qualifications that are not specifically enumerated in the Constitution. Courts from around the country have long recognized that when a constitution “undertakes to enumerate and describe . . . that enumeration and description is exhaustive, and the legislature cannot therefore enlarge the list.” *Stewart v. State*, 98 Ga. 202, 205, 25 S.E. 424, 425 (1896); *see also Morris v. Powell*, 25 N.E. 221, 223 (Ind. 1890) (“That when the people by the adoption of the Constitution have fixed and defined in the Constitution itself what qualifications a voter shall possess to entitle him to vote, the legislature can not add an additional qualification, is too plain and well recognized for argument, or to need the citation of authorities. The principle is elementary that when the Constitution defines the qualification of voters, that qualification can not be added to or changed by legislative enactment.”); *Koy v. Schneider*, 110 Tex. 369, 377-78, 218 S.W.

479, 480 (1920) (“All the authorities seem in accord with the statement that ‘where the right of suffrage is fixed in the Constitution of a state, as is the case in most states, it can be restricted or changed by an amendment to the Constitution or by an amendment to the federal Constitution, which, of course, is binding upon the states. But it cannot be restricted or changed in any other way. The legislature can pass no law directly or indirectly either restricting or extending the right of suffrage as fixed by the Constitution.’”) See also *Gerberding v. Munro*, 134 Wash.2d 188, 949 P.2d 1366 (Wash. 1998) (“this general rule has been repeatedly expressed in cases across the United States. . . . [that] where the Constitution establishes specific eligibility requirements for a particular constitutional office, the constitutional criteria are “exclusive.”)

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

In two analogous cases, the Supreme Court held the power of Congress and the states to be similarly limited. In *Powell v. McCormack*, 395 U.S. 486 (1969) the Supreme Court held that although Congress is expressly authorized by Article 1, Section 4 of the Constitution to judge the qualifications of its members, Congress was not authorized to use its power

to refuse to seat a member of the House for reasons other than those expressly set forth in Article 1, Section 2 of the United States Constitution. 395 U.S. at 556.

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

[T]he enumeration of a few qualifications would by implication tie up the hands of the Legislature from supplying omissions . . .

It would seem but fair reasoning upon the plainest principles of interpretation, that when the constitution established certain qualifications, as necessary for office, it meant to exclude all others, as prerequisites. From the very nature of such a provision, the affirmation of these qualifications would seem to imply a negative of all others.

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

The Missouri Constitution does not permit the legislature to add any qualifications or disqualifications not specifically mentioned. The Photo ID Requirement does just that. Voters without a photo ID, with certain narrow exceptions, are not qualified to vote.³³ Unlike the identification options under

³³ The primary exception is contained in the new Section 115.427.3, which states:

the current statute which require no action by the voter to obtain identification, the Photo ID Requirement requires, for those without an unexpired Photo ID, affirmative steps. If the voter does not take those steps, the voter is not qualified to vote under the MVPA.

Because the Photo ID Requirement plainly violates Article VIII, Section 2, it is unconstitutional.

B. The Photo ID Requirement Interferes With the Free Exercise of the Right of Suffrage in Violation of Article I, Section 25.

Article I, Section 25 of the Missouri Constitution provides:

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

The General Assembly, in imposing the Photo ID Requirement, violated the express prohibition in Article I, Section 25 against interference with the free exercise of the right of suffrage.

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 execute an affidavit averring that the voter is the person listed in the precinct register and that the voter does not possess a form of identification specified in this section and is unable to obtain a current and valid form of personal identification because of:

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

Upon executing such affidavit, the individual may cast a provisional ballot. Such provision ballot shall be counted, provided the election authority verifies the identity of the individual by comparing that individual's signature to the signature on file with the election authority and determines that the individual was eligible to cast a ballot at the polling place where the ballot was cast.

In addition, any election held before November 1, 2008 that permits the casting of provisional ballots (provisional ballots are not permitted in local elections), qualified voters may cast a provisional ballot under specified circumstances. The availability of a provisional ballot for these narrow categories of voters and for other voters before November 1, 2008, does not cure the unconstitutionality of the Photo ID requirement as explained above.

In numerous ways set forth above, the Photo ID Requirement unconstitutionally interferes with the free exercise of the right of suffrage as to those without a photo ID, including:

- (a) It requires the payment of money to vote; and
- (b) It imposes burdensome and time consuming hurdles that must be overcome before receiving a ballot.
- (c) For some, it will make it impossible to vote.

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

For these reasons, the Photo ID Requirement violates Article I, Section 25.

C. The Requirement of a Photo ID Makes Payment of a Fee an Electoral Standard and Therefore Violates the Due Process and Equal Protection Clause, Article I, Sections 10 and 2, Respectively.

Missouri’s Equal Protection Clause is contained in Article I, Section 2, which provides in pertinent part:

[T]hat all persons are created equal and are entitled to equal rights under the law.

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

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

(emphasis added).

The right to vote under the Missouri constitution, unlike under the United States Constitution, is given explicit protection. Article VIII, Section 2; Article I, Section 25. Missouri cases uniformly make clear that the right to vote is a fundamental right. *See, e.g. Etling v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d at 774; *Mullenix-St. Charles Properties, L.P. v. City of St. Charles*, 983 S.W.2d 550, 559 (Mo. Ct. App. 1998); *Blaske v. Smith & Entozeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. 1991); *Nguyen v. Nguyen*, 882 S.W.2d

176, 177-78 (Mo. Ct. App. 1994). Therefore, under Missouri constitutional law, strict scrutiny is required.³⁴

There can be no question that under any strict scrutiny analysis, the state cannot impinge upon the fundamental right to vote by directly or indirectly requiring payment of a fee as a precondition to voting. As the United States Supreme Court made clear forty years ago, it is a violation of the Equal Protection Clause of the United States Constitution to require payment of any fee to vote. *Harper v. Virginia Bd of Elections*, 383 U.S. 663 (1966). For those registered Missouri voters who do not already possess a photo ID, that is precisely what the State has done. To obtain a photo ID, one must first provide three forms of documents. The first is typically a birth certificate. To obtain a birth certificate, one must pay the State of Missouri \$15. For those who were not born in the State of Missouri, one must pay a fee that varies state to state. This fee obviously is far greater than the \$1.50 fee that was held unconstitutional in *Harper*.

To the person needing to obtain a nondriver's license to vote, being required to pay a fee (or multiple fees) to obtain an underlying document (or multiple documents) is no different than being required to pay a fee to obtain the nondriver's license itself - - both violate the Equal Protection Clause because they make payment of a fee an electoral qualification. In language directly applicable here, the Supreme Court concluded:

³⁴ An identical analysis is used when determining the constitutionality of a statute under the Due Process Clause. See *Casualty Reciprocal Exchange v. Missouri Employers Mutual. Ins. Co.*, 956 S.W.2d 249 (Mo. 1997).

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

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

Harper held that legislation that attempts to put a price on the right to vote can never pass the strict scrutiny test because “wealth or fee paying has . . . no relation to voting qualifications; the right to vote is too precious, too fundamental to be so burdened or conditioned.”³⁵ *Id.* at 670; *see also Jenness v. Little*, 306 F. Supp. 925, 929 (N.D. Ga. 1969) (holding that prohibiting candidates from being listed on the ballot unless they post a certain amount of money is illegal and unconstitutional).

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

It is argued that a State may exact fees from citizens for many different kinds of licenses; that if it can demand from all an equal fee for a driver’s license, it can demand from all an equal poll tax for voting. But we must remember that the interest of

³⁵ The state’s purported justification for imposing the Photo ID requirement and related fees on Missouri’s voters (to prevent voter fraud) is pretextual, and for the reasons discussed above do not survive any level of scrutiny in equal protection analysis. In *Harper*, however, the Court specifically ruled that any qualification to voting based on wealth or fee paying is unconstitutional, and no justification asserted by the state would be sufficient to allow such a qualification to stand. 383 U.S. at 670; *see also United Mine Workers v. Illinois State Bar Ass’n*, 389 U.S. 217, 222 (1967) (“We have therefore repeatedly held that laws which actually affect the exercise of these vital rights cannot be sustained merely because they were enacted for the purposes of dealing with some evil within the state’s legislative competence, or even because the laws do in fact provide a helpful means of dealing with such an evil.”)

the State, when it comes to voting, is limited to the power to fix qualifications. Wealth, like race, creed, or color, is not germane to one's ability to participate intelligently in the electoral process. Lines drawn on the basis of wealth or property, like those of race are traditionally disfavored. **To introduce wealth or payment of a fee as a measure of a voter's qualifications is to introduce a capricious or irrelevant factor. The degree of the discrimination is irrelevant.**

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

There can be no doubt, therefore, that the Photo ID Requirement is unconstitutional under Missouri's Equal Protection Clause.

D. The Photo ID Requirement Constitutes an Undue Burden on the Fundamental Right to Vote that is Not Narrowly Tailored to Meet a Compelling State Interest in Violation of the Due Process and Equal Protection Clause of the Missouri Constitution, Article I, Sections 10 and 2, Respectively.

Even if the Photo ID Requirement did not require the payment of money to vote, it still would be unconstitutional under Missouri's Due Process and Equal Protection Clauses. As pointed out above, the Missouri Supreme Court requires that strict scrutiny be applied under Missouri's Equal Protection Clause to any law that "impinges upon a fundamental right." *Etling v. Westport Heating and Cooling Systems, Inc.*, 92 S.W.3d at 774.³⁶ Under strict scrutiny, the Court must determine whether the challenged provision "is necessary to accomplish a compelling state interest." *Id.* See also *Komosa v. Komosa*, 939 S.W.2d 479, 482 (Mo. Ct. App. 1997) ("Any state restriction which significantly interferes with the exercise of a

³⁶ An identical analysis is used when determining the constitutionality of a statute under the Due Process Clause. See *Casualty Reciprocal Exchange v. Missouri Employers Mutual. Ins. Co.*, 956 S.W.2d 249 (Mo. 1997).

fundamental right is subject to strict scrutiny and cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.”); *State v. Williams*, 729 S.W.2d 197 (Mo. banc 1987)(when a statutory scheme impinges upon a fundamental right explicitly or implicitly protected by the Constitution it receives strict judicial scrutiny to ascertain whether the classification is necessary to a compelling state interest); *Kahn v. Griffin*, 701 N.W.2d 815 (Minn. 2005)(the right to vote is a fundamental right and that potential infringements are analyzed using strict scrutiny).³⁷

There can be no question that the Photo ID Requirement cannot survive strict scrutiny. It impinges on the fundamental right to vote of at least 170,000 registered voters in Missouri. It is not necessary to promote any compelling state interest which was not already being adequately protected by existing criminal laws and election procedures, or which could not have been accomplished in other, less restrictive alternatives without interfering with their right to vote in person.

As explained above, for a registered voter to secure a nondriver’s license, he or she must provide, among other things, “Proof of Lawful Presence,” which typically requires the voter to obtain a certified copy of the voter’s birth certificate from the state in which the voter was born, and

³⁷ With respect to Missouri’s Equal Protection Clause, the Missouri Supreme Court “has long recognized it provides ‘equal security or burden under the laws to every one similarly situated; and that no person or class of persons shall be denied the same protection of the laws which is enjoyed by other persons or classes of persons in the same place and under like circumstances.’” *Care and Treatment of Bernat v. State*, --- S.W.3d ---, 2006 WL 1882947 (Mo. 2006) (quoting *Ex parte Wilson*, 48 S.W.2d 919, 921 (Mo. 1932)); see also *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. banc 1991).

“Proof of Lawful Identity,” which most commonly is a Social Security card with the applicant’s current name, and “Proof of Residency,” which can be a voter ID card, utility bill, or government check showing the voter’s address. As set forth above, the expense, time and effort required to obtain the underlying documents to satisfy these three requirements will place a substantial and undue burden - - and certainly “impinge” - - on the fundamental right to vote of 170,000 registered Missouri voters who do not currently possess a valid Photo ID.

Also as explained above, the Photo ID requirement is far from necessary to accomplish any compelling state interest. There is no evidence that existing state law is insufficient to deter and prevent voter impersonation fraud, the only type of fraud the Photo ID Requirement actually could prevent. In fact, the evidence is to the contrary. Since the 2002 change in Missouri election laws requiring some form of identification, there have been no reported instances of voter impersonation fraud. Governor Blunt himself recognized that the two statewide elections held after these changes were implemented were “fraud-free” and “were two of the cleanest and problem-free elections in recent history.” Secretary of State Carnahan has made the same point.

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

purpose of the Photo ID Requirement - - preventing election fraud - - could not rationally have been its true purpose, but was mere pretext. The Photo ID Requirement certainly was not necessary to accomplish any compelling state interest.

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

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

Reynolds v. Sims, 377 U.S. 533, 561-62 (1964); see also *Kramer v. Union Free School District*, 395 U.S. 621 (1969)(statute limiting voting rights to owners or lessees of taxable realty was not necessary to promote a compelling state interest and denied equal protection to persons excluded); see *Morgan v. City*

of *Florissant*, 147 F.3d 772 (8th Cir. 1998)(outlining differences between election laws that provide for the redrawing of political subdivisions, which are analyzed under a rational basis test, and election laws imposing restrictions on voters based on characteristics such as wealth and race, which “affect more significant rights and constitutional concerns, meriting strict-scrutiny review.”); *Antonio v. Kirkpatrick*, 453 F.Supp. 1161, 1163 (W.D. Mo. 1978)(If the classification affects a fundamental right or is based on a “suspect” criterion, then it will be strictly scrutinized, and “the state must demonstrate a clear showing that the burden imposed is necessary to protect a compelling and substantial government interest.”).

Even though a governmental purpose may be legitimate and substantial (here, as explained above, the stated purpose -- preventing election fraud -- is pretextual), that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly reached. *Antonio v. Kirkpatrick*, 453 F.Supp.1161, 1167 (W.D. Mo. 1978). “When a classification is subjected to strict scrutiny, it is almost always found unconstitutional.” *Stiles v. Blunt*, 912 F.2d 260, 263 fn5 (8th Cir. 1990)(citing Gunther, *The Supreme Court, 1971 Term-Forward: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 Harv.L.Rev. 1, 8 (1972)(strict scrutiny review is “strict” in form but usually “fatal” in fact)).³⁸

³⁸ In *Burdick v. Takushi*, 504 U.S. 428 (1992), the United States Supreme Court applied a somewhat more flexible test in holding that Hawaii’s prohibition on write-in voting did not unreasonably infringe upon its

Recently, the United States District Court for the Northern District of Georgia found that the State of Georgia's recently passed Photo ID Act was unconstitutional in part because it unduly burdened the fundamental right to vote:

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

See Common Cause/Georgia v. Billings, Case No. 4:05-CV-0201-HLM, slip op. at p. 167 (N.D. Ga. July 14, 2006).

For these reasons, the Photo ID Requirement in the MVPA violates the Equal Protection Clause of the Missouri Constitution.

citizens' rights under the United States Constitution's First and Fourteenth Amendments. That case is not applicable here. Under the Missouri Constitution, the Missouri Supreme Court uniformly has required strict scrutiny of any law that impinges on fundamental constitutional rights, like the right to vote. *See* cases cited *supra*. There can be no question that the Photo ID requirement impinges on the right to vote, and that strict scrutiny is required under controlling Missouri Supreme Court precedent. In addition the law challenged in *Burdick* did not impinge or interfere with a qualified voter's fundamental right to cast a ballot. Rather, it limited the potential candidates whose names would appear on the ballot. Under this limited circumstance, *Burdick* did not apply strict scrutiny but instead used a somewhat more flexible standard: "A court considering a state election law challenge must weigh the character and magnitude of the asserted injury to the First and Fourteenth Amendment rights that the plaintiff seeks to vindicate against the precise interests put forward by the State as justification for the burden imposed by its rule, taking into consideration the extent to which those interests make it necessary to burden the plaintiff's rights." *Id.* at 434. The Court explained that the reason it used a lesser standard was because "it [could] hardly be said that the laws at issue here unconstitutionally limit access to the ballot by party or independent candidates or unreasonably interfere with the right of voters to associate and have candidates of their choice placed on the ballot." *Id.* at 434 (emphasis added). The MVPA, unlike the law challenged in *Burdick*, unreasonably interferes with the right to vote of thousands of qualified voters in Missouri. Therefore, *Burdick* is factually distinguishable and would not apply even if it was a decision by the Missouri Supreme Court interpreting the Missouri Constitution, which it is not. Even if this Court were to apply the *Burdick* standard here, the Photo ID requirement in the MVPA would still be found unconstitutional. That was the conclusion reached by the Georgia court in *Common Cause/Georgia v. Billups*, 406 F.Supp.2d 1326 (N.D. Ga. 2005). The "character and magnitude" of the asserted injury - - an undue burden on a fundamental constitutional right - - is significant and irreparable. The precise interests put forward by the state as justification for the burden imposed by the Photo ID Requirement - - preventing voter fraud - - are pretextual and fictitious as explained above. Thus, under any scrutiny - - strict, flexible or otherwise - - the Photo ID Requirement is unconstitutional.

E. The Photo ID Requirement Was Designed to, and Does, Disparately Impact Registered Voters in Suspect Classes, Including African-Americans, in Violation of the Equal Protection Clause, Article I, Section 2 of the Missouri Constitution,

The Photo ID Requirement also violates Missouri's Equal Protection Clause because it has a disparate impact on qualified voters who are African-American. More than 21% of Missouri's African-American households have no car, and therefore have no need for a driver's license. This is over four times the percentage of white Missourians who have no car. Twenty-four percent of Missouri African-Americans live in poverty; only nine percent of whites do. The average per capita income for Missouri African-Americans is \$14,021 compared to \$20,957 for Missouri whites. Twenty-six percent of Missouri African-Americans over the age of 25 have less than a high school education; only sixteen percent of whites do. Given these facts, the financial and other burdens imposed by the Photo ID Requirement disproportionately affect African-Americans.

The Photo ID Requirement also has a disparate impact on qualified voters who are women. As explained above, to obtain a Photo ID, a person must produce a certified birth certificate and certified documents showing any name changes since birth, such as certified marriage license(s), divorce decrees, and court orders reflecting name changes. While these requirements are gender neutral on their face, they will have a disparate and disproportionate impact on women due to the widespread custom of women taking their husband's surname. The Missouri Department of Revenue's

website recognizes this unequal burden by including a separate section instructing women what additional certified documents are required for them to prove their identity. For example, to obtain a Photo ID for voting, a woman who has married, divorced and married again will have to produce and pay for at least three certified documents in addition to a similarly situated man who will be required to produce only his birth certificate.

In imposing the Photo ID Requirement, the General Assembly was informed and knew that the Photo ID Requirement would have a disparate impact on African-Americans and women but chose to impose the requirement anyway with discriminatory purpose, thereby depriving qualified African-Americans and women voters equal protection of the law in violation of Article I, Section 2. Further, the Republican majority in the Missouri House and Senate and the Governor, Republican Matt Blunt, had a strong incentive to enact a bill that purposefully discriminates against African Americans, for African Americans vote disproportionately for Democrats.

Laws imposing restrictions on voters based on characteristics such as wealth or race are subject to strict scrutiny review. *Morgan v. City of Florissant*, 147 F.3d 772 (8th Cir. 1998).³⁹ Because citizens have a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction, any restrictions on such right must

³⁹ Laws imposing restrictions based on gender must meet intermediate scrutiny and must be substantially related to important governmental objectives. *See Craig v. Boren*, 429 U.S. 190, 197 (1976). For the reasons expressed above, the Photo ID Requirement cannot pass that test either.

meet close constitutional scrutiny. *Dunn*, 405 U.S. 330; *Kramer*, 395 U.S. 621; *Reynolds*, 337 U.S. at 561-62; *Antonio*, 453 F.Supp. 1161.

For these reasons, the Photo ID Requirement violates the Equal Protection Clause of the Missouri Constitution because it disparately impacts registered voters in suspect classes.

F. The Photo ID Requirement Improperly Discriminates Between In-Person Voters, Who are Required to Show a Photo ID, and Absentee Voters, Who are not Required to Show a Photo ID, in Violation of the Equal Protection Clause, Article I, Section 2, of the Missouri Constitution.

The Photo ID Requirement also violates Missouri's Equal Protection Clause because it improperly discriminates between similarly situated voters. In-person voters are required to show a Photo ID; absentee voters by mail are not. This discrimination is unconstitutional.

The right to vote is a fundamental right. *Burdick v. Takuski*, 504 U.S. 428, 433 (1992); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *State v. Williams*, 729 S.W.2d 197 (Mo. Banc 1987); *Etlung v. Westport Heating & Cooling Services, Inc.*, 92 S.W.3d at 774. In contrast, the opportunity to vote by absentee ballot is a privilege and not a right. *Barks v. Turnbeau*, 573 S.W.2d 677, 681 (Mo. Ct. App. 1978). In Missouri, this "privilege" is limited to five statutory grounds:

- (1) absence on election day from the jurisdiction where registered;
- (2) incapacity or confinement due to illness or physical disability, including a person who is primarily responsible for the physical care of a person who is incapacitated or confined due to illness or disability;
- (3) religious belief or practice;

(4) employment as or by an election authority at a location other than the registered polling place; and

(5) incarceration, provided all qualifications for voting are retained.

Id.; Mo. Rev. Stat. § 115.277. In order to register to vote absentee by mail, voters must submit a Request for Absentee Ballot. This request is made to the voter's local election authority and can be made in person or by fax. In making this request, voters must provide the last four digits of their social security number, the reason they are requesting an absentee ballot, the address under which they are registered to vote, the address where the ballot is to be sent, and a telephone number. Relatives within the first degree (parents and children) may complete an absentee ballot application, in person, on behalf of the voter who wishes to vote absentee.

Absentee voters are not required to provide proof of identity unless they have registered to vote by mail and are voting absentee the first time they vote. In this case, the voter is required to provide a copy of his identification with his absentee ballot request unless a copy was provided with his voter registration application. Examples of acceptable identification are:

- (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 U.S. government or agency thereof;
- (3) Identification issued by a Missouri institution of higher education, including a university, college, vocational and technical school;

- (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; or
- (5) Driver's license or state identification card issued by another state.

Because registered voters are permitted to submit an absentee ballot without a Photo ID, the MVPA's Photo ID Requirement for in-person voters discriminates between similarly situated absentee voters and in-person voters in violation of the Equal Protection clause of the Missouri Constitution.⁴⁰ Therefore, the MVPA is not narrowly tailored to serve its alleged purpose. As the Georgia court recently held:

Rather than drawing the 2006 Photo ID Act narrowly to attempt to prevent the most prevalent type of voter fraud, the State drafted its Photo ID Requirement to apply only to in-person voters, and to apply only to absentee voters who had registered to vote by mail without providing identification and who were voting absentee for the first time. By doing so, the State, in theory, once again left the field wide open for voter fraud by absentee voting. Under those circumstances, the Photo ID Requirement is not narrowly tailored to serve its stated purposes – preventing voter fraud.

See Common Cause/Georgia v. Billings, Case No. 4:05-CV-0201-HLM, slip op. at p. 166 (N.D. Ga. July 14, 2006); *see also Dunn*, 405 U.S. at 343 (“Statutes affecting constitutional rights must be drawn with ‘precision,’ and must be ‘tailored’ to serve their legitimate objectives. And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater

⁴⁰ As pointed out above, this discrimination also undermines the stated purpose of the Photo ID law -- preventing voter fraud. Fraud in connection with registration and voting absentee are far more documented and frequent problems than voter identification fraud at the polls, however the MVPA does not attempt to reduce fraud in absentee ballots.

interference. If it acts at all, it must choose ‘less drastic means.’”) The Missouri voters who take their valuable time to travel to their local precinct to vote are more burdened than voters who vote absentee. This distinction lacks any rational basis and certainly does not satisfy strict scrutiny.

Therefore, the Photo ID Requirement violates the Equal Protection Clause of the Missouri Constitution because it improperly discriminates between in-person voters and absentee voters.

II. PLAINTIFFS WILL SUFFER IRREPARABLE HARM IF THE PRELIMINARY INJUNCTION IS NOT GRANTED.

As explained above, Plaintiffs would be deprived of constitutional rights guaranteed by the Missouri Constitution if the Photo ID Requirement is permitted to go into effect. Violations of constitutional rights constitute irreparable injury. *Heartland Academy Community Church v. Waddle*, 317 F. Supp. 2d 984, 1107 (E.D. Mo. 2004) citing *Elrod v. Burns*, 427 U.S. 347, 373 (1976)(“loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable harm”); *see also, Planned Parenthood of Minnesota, Inc. v. Citizens for Community Action*, 558 F.2d 861, 867 (8th Cir. 1977)(interference with constitutional rights “supports a finding of irreparable injury”). Interference with one’s right to vote clearly constitutes irreparable harm. *See U.S. v. Berks County, Pennsylvania*, 277 F.Supp.2d 570, 582 (E.D. Pa. 2003)(“The impact of the discouragement of equal participation in the democratic system cannot be redressed by money or any other remedy and constitutes irreparable harm.”)

In a case much like this one, a federal district court in Georgia has twice ruled unconstitutional a similar Photo ID Requirement recently passed by the Georgia legislature. See *Common Cause/Georgia v. Billings*, Case No. 4:05-CV-0201-HLM, slip op. (N.D. Ga. July 14, 2006); *Common Cause/Georgia v. Billings*, 406 F. Supp. 2d 1326 (N.D. Ga. 2005). Both times, the court found that because the Photo ID Requirement “unduly burdens the fundamental right to vote,” irreparable harm had been shown. See 406 F. Supp. 2d at 1375; slip op. at 191. There can be no question that the harm that will be suffered if the Photo ID Requirement is not enjoined will be irreparable.

III. THE BALANCE BETWEEN THE HARM CAUSED TO PLAINTIFFS BY NON-ISSUANCE OF THE PRELIMINARY INJUNCTION AND THE HARM, IF ANY, CAUSED TO OTHER INTERESTED PARTIES BY ISSUANCE OF THE PRELIMINARY INJUNCTION TIPS STRONGLY IN FAVOR OF ISSUANCE.

As pointed out above, the harm to plaintiffs if the preliminary injunction is not granted would be a deprivation of their constitutional rights – harm that courts universally find to be irreparable. By contrast, the harm to the defendants of issuance of the preliminary injunction would be minimal or nonexistent. Issuance of the preliminary injunction would simply maintain the status quo – the current law would remain in effect. No harm would be suffered. No evidence of any voter identification fraud, much less widespread voter identification fraud, has been documented or even alleged under the current law which was enacted in 2002. As explained by then Secretary of State Blunt in a March 23, 2004 letter to Governor Holden:

Furthermore, subsequent statewide elections (the November 2002 general election and the February 2004 presidential primary) were two of the cleanest and problem-free elections in recent history.

As the Eighth Circuit Court of Appeals found in a similar context when it granted a motion for an injunction pending appeal against a Missouri limiting campaign contribution:

Concerning the question of substantial harm to other interested parties if an injunction is granted, we are unable to discern any such harm. An order enjoining enforcement of the challenged Missouri campaign contribution limits merely restores the situation that existed before 1994 when the state did not limit campaign contributions.

Shrink Missouri Government PAC v. Adams, 151 F.3d 763, 765 (8th Cir. 1998).

At most, the State would suffer some minimal inconvenience in providing notice to all election authorities that the prior law will remain in effect. The Georgia federal court in striking down the Georgia Photo ID Requirement found that this inconvenience did not begin to outweigh the denial of fundamental constitutional rights:

The Court certainly appreciates and understands the inconvenience and expense that entering a preliminary injunction may work upon the State and Defendants. The Court, however, is mindful that the right to vote is a fundamental right and is preservative of all other rights. Denying an individual the right to vote works a serious, irreparable injury upon that individual. Given the right at issue and the likely injury caused by not entering a preliminary injunction, the Court finds that the potential injury to Plaintiffs outweighs the harm to the State and Defendants caused by entering a preliminary injunction. This factor therefore counsels in favor of entering a preliminary injunction.

406 F. Supp. 2d at 146.

The balance in this case likewise tips strongly in favor of issuing the preliminary injunction.

IV. ISSUING A PRELIMINARY INJUNCTION WOULD BE IN THE PUBLIC INTEREST.

For the same reasons, issuing a preliminary injunction would be in the public interest. As pointed out above, absent the issuance of a preliminary injunction, at least 170,000 qualified Missouri voters will suffer unconstitutional interference with, and an undue burden on, their fundamental right to vote. While the purported justification -- preventing election fraud -- is a legitimate interest, that purpose is merely a pretext as explained above. Even if it were not a pretext, the State has not -- and cannot -- show any substantial likelihood of significant voter identification fraud under the current law, which was passed in 2002. The statements from then Secretary of State Blunt, quoted above, belie any argument that the 2002 changes have not been effective in minimizing whatever small amount of voter identification fraud may have existed prior to that time. Moreover, the Photo ID Requirement is overbroad in several respects as explained above, and is not narrowly tailored to prevent the most likely types of voting fraud -- fraud in connection with registration and absentee ballots.

For all these reasons, the public interest would be served by the issuance of a preliminary injunction. As the Georgia court recognized,

Finally, the Court must determine whether issuing a preliminary injunction will serve the public interest. Preventing voter fraud serves the public interest by ensuring that those individuals who have registered properly to vote are allowed to

vote and to have their votes counted in any given election. As discussed supra Part III.B., however, the 2006 Photo ID Act's Photo ID Requirement, like its predecessor, unduly burdens the right of many properly registered Georgia voters to vote for the July 18, 2006, primary elections and the corresponding run-off elections, and has the likely effect of causing many of those voters to forego voting or of precluding those voters from voting at the polls. Because the right to vote is a fundamental right, removing the undue burdens on that right imposed by the 2006 Photo ID Act's Photo ID Requirement serves the public interest. This factor therefore counsels in favor of granting Plaintiffs' Motion for Preliminary Injunction.

406 F. Supp. 2d at 192-93.

It would be in the public interest to enjoin the Photo ID Requirement.

CONCLUSION

The right to vote is a delicate franchise. . . . Given the fragile nature of the right to vote, and the restrictions discussed above, the Court finds that the Photo ID Requirement imposed "severe" restrictions on the right to vote. In particular, the Photo ID Requirement makes the exercise of the fundamental right to vote extremely difficult for voters currently without acceptable forms of Photo ID for whom obtaining a Photo ID would be a hardship. Unfortunately, the Photo ID Requirement is most likely to prevent Georgia's elderly, poor and African-American voters from voting. For those citizens, the character and magnitude of their injury - - the loss of their right to vote - - is undeniably demoralizing and extreme, as those citizens are likely to have no other realistic or effective means of protecting their rights.

Common Cause/Georgia v. Billings, 406 F. Supp. 2d 1326, 1365 (N.D. Ga. 2005)(emphasis added).

For all these reasons, all four factors weigh strongly in favor of granting a preliminary injunction to maintain the status quo until this case

can be finally decided. Plaintiffs' motion for preliminary injunction should be granted.

Respectfully submitted,

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