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The Missouri Photo-ID Requirement for Voting: Ensuring Both Access *and* Integrity

I. INTRODUCTION

The 2000 presidential election and the controversy surrounding its administration, particularly in the state of Florida, sparked a nationwide movement to reform the voting process.¹ As a result, the Help America Vote Act (HAVA) was passed in 2002.² HAVA included a requirement that voters show some form of identification, something many states, including Missouri, did not require prior to its passage.³

At the state level, the movement to reform voting procedures has been marked by intense partisan and ideological debate.⁴ Some commentators have framed the debate as one between the competing values of “access” and “integrity,” with Democrats more focused on increasing access to the polls, and Republicans more concerned about preventing fraud and protecting the integrity of the electoral process.⁵ One manifestation of this conflict has been the passage of legislation requiring voters to present a form of photo identification at the polls as a prerequisite to voting in several states with Republican-controlled legislatures.⁶ These measures are arguably designed to prevent in-person voter fraud at the polls, but critics allege that they unduly and unconstitutionally burden the fundamental right to vote.⁷

This law summary will look at Missouri’s short-lived Photo ID requirement which was struck down by the Missouri Supreme Court in *Weinschenk v. Missouri*, as well as two similar measures that were the subject of litigation

1. Daniel P. Tokaji, *The New Vote Denial: Where Election Reform Meets the Voting Rights Act*, 57 S.C. L. REV. 689 (2006).

2. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666 (codified as amended in scattered sections of 36 and 42 U.S.C.).

3. Tokaji, *supra* note 1, at 695-96; *Weinschenk v. State*, No. 06AC-CC00656, slip op. at 2 (Cir. Ct. Cole County Sep. 14, 2006). HAVA’s ID requirement is limited in that it “allows various documents that show the voter’s name and address, such as a utility bill, bank statement, or government document,” and “does not require voters to show photo identification.” Tokaji, *supra* note 1, at 695-96. HAVA also required states to permit provisional voting, which allows a voter to cast a ballot even if his or her eligibility can not be determined by the election official. *Id.* at 696. The provisional ballot is then counted if the voter is later found to have been eligible. *Id.*

4. *Id.* at 695-96.

5. *Id.* at 695; Siobhan Morrissey, *Provisional Ballots Add to Tally Confusion*, 43 A.B.A. J. E-REPORT 3 (2004).

6. Tokaji, *supra* note 1, at 699.

7. See *generally* *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d 1326 (N.D. Ga. 2006); *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775 (S.D. Ind. 2006); *Weinschenk v. State*, 203 S.W. 3d 201 (Mo. 2006) (*per curiam*).

in federal courts in Georgia and Indiana. Each of these cases employs a test that represents a balance between a Democratic focus on access and a Republican focus on integrity.

II. MISSOURI'S PHOTO-ID REQUIREMENT

After HAVA was passed in 2002, the Missouri General Assembly adopted the first version of section 115.427, which required voters to present some kind of identification in order to vote.⁸ The section closely tracked the minimum requirements established by HAVA, allowing a regular (non-provisional) ballot to be cast when a voter presented one of several types of identification.⁹

In 2006, the Missouri General Assembly passed Senate Bill 1014 (SB 1014), amending section 115.427 to restrict the forms of identification that would be acceptable at the polls.¹⁰ The new section 115.427 required voters to provide a Missouri driver's or nondriver's license, or another form of identification issued by either the United States or the State of Missouri containing the voter's name, an image of the voter, and an expiration date before receiving a regular ballot.¹¹ The section contained exceptions for voters who

8. *Weinschenk v. State*, No. 06AC-CC00656, slip op. at 2 (Cir. Ct. Cole County Sep. 14, 2006); MO. REV. STAT. § 115.427 (Supp. 2005).

9. MO. REV. STAT. § 115.427 (2000) (current version at MO. REV. STAT. § 115.427 (Supp. 2006)). Permissible forms of identification included identification issued by the state of Missouri, the United States government or an agency thereof, and institutions of higher learning. *Id.* If potential voters could not produce any of these forms, they could, instead, use other documents that contained the name and address of the voter, including bank statements, government checks, and a “[d]river’s license or state identification card issue by another state.” *Id.* Further, even if a voter was unable to provide any of these forms of identification, “personal knowledge of identity of the voter [by] two supervising election judges” was sufficient to allow the voter to cast a valid ballot. *Id.*

10. *Weinschenk v. State*, No. 06AC-CC00656, slip op. at 4 (Cir. Ct. Cole County Sep. 14, 2006).

11. MO. REV. STAT. § 115.427.1 (Supp. 2006). The statute reads:

1. 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

did not have and could not obtain photo identification by virtue of being disabled, having religious objections to photo identification, or being born before 1941.¹² Voters falling into one these excepted categories could cast provisional ballots after signing affidavits stating that they were registered to vote.¹³ These provisional votes would be counted only if election officials could verify the voters' identity by comparing the signature on the affidavit to a signature on file.¹⁴ A voter without photo identification who did not fall into one of the excepted categories could cast a provisional ballot, as required by HAVA,¹⁵ but these ballots would not be counted unless they returned with

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.

Id.

12. *Id.* The statute reads:

3. 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 provisional 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.

Id.

13. *Id.*

14. *Id.*

15. 42 U.S.C. § 15483 (Supp. II 2002).

the required identification before the polls closed.¹⁶ The new section 115.427 also included a subsection making Missouri driver's or nondriver's licenses free if a voter "execute[d] an affidavit averring that [they did] not have any other form of photographic personal identification that [met] the requirements of subsection 1" of the new 115.427.¹⁷ That same subsection provided for the creation of a "mobile processing system" to issue Missouri nondriver's licenses to disabled and elderly Missourians who were eligible to vote but physically unable to travel to obtain photo identification.¹⁸

Subsection 13 of the new section 115.427 created a "phase-in" so that voters who did not have the photo ID required by the bill but who did have one of the types of identification that had been acceptable prior to the amendment would be able to cast a provisional ballot in any election prior to the 2008 general election.¹⁹ As of the 2008 general election, voters without the Photo ID required by the bill would not have been able to cast even a provisional ballot, unless they met the requirements for one of the three exceptions contained in new section 115.427.3.²⁰

Soon after SB 1014 was signed into law by Governor Blunt, two lawsuits were filed, challenging the bill's constitutionality.²¹ The plaintiffs alleged that the bill violated various provisions of the Missouri Constitution, including its Due Process and Equal Protection clauses. The circuit court granted the plaintiffs' request for an injunction against the enforcement of SB 1014, holding that "the voting restrictions . . . impermissibly infringe[d] on core voting right[s] guaranteed by the Missouri Constitution."²² Specifically, the court found the bill to be unconstitutional in four ways. First, SB 1014 "constitute[d] an impermissible additional qualification to vote in violation of Article VIII, Section 2." Second, the bill "violated the prohibition on interference with the 'free exercise of the right of suffrage' and the requirement that

16. MO. REV. STAT. § 115.427.5.

17. *Id.* § 115.427.7.

18. *Id.* The statute provided that

any disabled or elderly person otherwise competent to vote shall be issued a nondriver's license photo identification through a mobile processing system operated by the Missouri department of revenue upon request if the individual is physically unable to otherwise obtain a nondriver's license photo identification. The department of revenue shall make nondriver's license photo identifications available through its mobile processing system only at [convalescent, nursing, and boarding homes] licensed under chapter 198, RSMo, and other public places accessible to and frequented by disabled and elderly persons.

Id.

19. *Id.* § 115.427.13.

20. *Id.* §§ 115.427 & 115.430.2.

21. Weinschenk v. State, No. 06AC-CC00656, slip op. at 1-2 (Cir. Ct. Cole County Sep. 14, 2006).

22. *Id.* at 9.

‘all elections shall be free and open’ contained in Article I, Section 25.” Third, the bill “require[d] the payment of money to vote.” Finally, for the circuit judge, the bill “constitute[d] an undue burden on the fundamental right to vote that [was] 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,” of the Missouri Constitution.²³ The court’s ruling was appealed to the Missouri Supreme Court, which ultimately held that the new identification requirements had unconstitutionally burdened Missourians’ right to vote.²⁴

III. LEGAL BACKGROUND

A. Federal Cases on Voting Rights and Photo ID Requirements

Three recent federal cases addressed constitutional challenges to Photo ID requirements in Georgia and Indiana that were very similar to the requirements of Missouri SB 1014. The district courts analyzed the constitutional issues presented by these requirements in similar ways, but reached different conclusions about the constitutionality of the requirements.

1. Common Cause/Georgia v. Billups I

In April 2005, the governor of Georgia signed into law House Bill 244, which included a photo ID requirement as a prerequisite to voting.²⁵ The new law required citizens to “present proper identification” that met certain specifications in order to be admitted to the polls.²⁶ If a voter could not present “proper identification,” he could still cast a provisional ballot after “swearing or affirming that [he was] the person identified in the . . . voter certificate.”²⁷

23. *Id.* at 11-12.

24. *Weinschenk v. Missouri*, 203 S.W.3d 201, 221-22 (Mo. 2006) (per curiam).

25. *Common Cause/Ga. v. Billups*, 406 F. Supp. 2d. 1326, 1335-36 (N.D. Ga. 2005).

26. *Id.* at 1336. (quoting GA. CODE ANN. § 21-2-417(a) (Supp. 2006)). Proper identification included a Georgia driver’s license, any “valid identification card” containing a photograph of the voter issued by a subdivision of “the State of Georgia, any other state, or the United States authorized by law to issue personal identification,” a United States passport, a “valid employee identification card” issued by any subdivision of the United States or the State of Georgia containing a photo of the voter, valid military identification containing a photo of the voter, and a “valid tribal identification card” including a photograph of the voter. *Id.* (quoting GA. CODE ANN. § 21-2-417(a) (1)-(6)).

27. *Id.* (quoting GA. CODE ANN. § 21-2-417(b)).

The provisional ballot would be counted only if “registrars are able to verify current” proper identification within a day of the election.²⁸

At the same time, the General Assembly increased the fee required to obtain a Photo ID card from \$10 to between \$20 and \$35.²⁹ The General Assembly made an exception with respect to indigent voters attempting to secure a Photo ID card for voting purposes.³⁰ Under this “indigent exception,” the fee for a Photo ID card would be reduced to \$5 for “persons . . . referred by a nonprofit organization which . . . ha[d] entered into an agreement with the [D]epartment [of Driver Services (hereinafter DDS)]” to verify that the voter was indigent.³¹ Further, DDS was prohibited from collecting *any* fees from individuals who (1) presented evidence that they were registered Georgia voters, (2) “sw[ore] under oath that [they were] indigent” and unable to pay the fee, (3) sought an identification for the purpose of voting, and who (4) “[did] not have any other form of [acceptable] identification.”³²

Prior to 1998, Georgia voters were not required to present any identification as a prerequisite to voting.³³ They were permitted, but not required, to identify themselves by presenting a form of photo identification.³⁴ In 1997, the Georgia General Assembly amended section 21-2-417 of the Georgia Code to require voters to present any of seventeen forms of identification before voting, including a Georgia driver’s license and other forms of photo identification, or non-photo identification, including “a birth certificate, a social security card, a copy of a current utility bill, a copy of a current utility bill, a government check, a payroll check, or a bank statement showing the voter’s name and address.”³⁵ Even if voters could not present any of the seventeen acceptable forms of identification, voters were able to be admitted to the polls, to cast a ballot, and to have that ballot counted by “signing a statement under oath swearing . . . that [the voter was] the person identified on the elector’s certificate.”³⁶

28. *Id.* (quoting GA. CODE ANN. § 21-2-417(b)); GA. CODE ANN. § 21-2-419 (Supp. 2006). The Photo ID requirements applied to only to in-person voters, and not to those voting absentee. *Common Cause/Georgia*, 406 F. Supp. 2d at 1337. There was a Photo ID requirement for voters who had registered by mail and who were voting absentee for the first time after registration, but all other absentee voters were free of any requirement to show Photo ID. *Id.* at 1337-38.

29. *Id.* at 1337. The General Assembly increased the fee for a 5-year Photo ID card from \$10 to \$20, and created a new 10-year Photo ID card, for which a fee of \$35 was imposed. *Id.*

30. *Id.*

31. *Id.* (quoting GA. CODE ANN. § 40-5-103(a)).

32. *Id.* (quoting GA. CODE ANN. § 40-5-103).

33. *Id.* at 1331.

34. *Id.*

35. *Id.*

36. *Id.*

On September 19, 2005, plaintiffs filed suit, seeking a preliminary injunction in federal district court to enjoin enforcement of the law by the State of Georgia and its elections officials.³⁷ The plaintiffs alleged that the new Photo ID requirements, in conjunction with the fees charged for Photo IDs by DDS, constituted an unconstitutional poll tax, and that the Photo ID requirement was an undue burden on the “fundamental right to vote.”³⁸

The court first analyzed the plaintiffs’ claim arising under the United States Constitution – that the Georgia Photo ID requirement imposed an undue burden on the right to vote.³⁹ The court found that the United States “Supreme Court ha[d] made it clear that voting is a fundamental right” under the Equal Protection clause of the Fourteenth Amendment.⁴⁰ It recognized that “[t]he equal right to vote . . . is not absolute,” and that states are allowed, under the Constitution, to establish “the time, place and manner of holding elections for Senators and Representatives.”⁴¹ The court, however, noted that states’ voting regulations could not “unduly burden or abridge the right to vote.”⁴²

The court then turned its attention to the appropriate standard of review for voting regulations.⁴³ It noted that the Supreme Court had, in similar cases, employed its strict scrutiny standard of review,⁴⁴ but that it had analyzed these regulations under a less demanding standard in several more recent cases, namely, *Burdick v. Takushi*.⁴⁵ In *Burdick*, the Supreme Court applied a more flexible standard in analyzing state voting regulations, recognizing that since all “[e]lection laws will invariably impose some burden upon individual voters . . . subject[ing] every voting regulation to strict scrutiny and . . . re-

37. *Id.* at 1354-55. There were several organizational plaintiffs in this case, including Common Cause/Georgia, The League of Women Voters of Georgia, and the NAACP. *Id.* at 1329-30. One of the named plaintiffs was an individual, Clara Williams, who was a “duly qualified and registered voter” from Atlanta who did not “possess a Georgia driver’s license, passport, or other form of government-issued Photo ID, and [could] not readily obtain a Photo ID card from the State [DDS].” *Id.* at 1330.

38. *Id.* at 1354.

39. *Id.* at 1359.

40. *Id.* (citing *Burdick v. Takushi*, 504 U.S. 428, 433 (1992); *Kramer v. Union Free Sch. Dist. No. 15*, 395 U.S. 621, 629 (1969); *Wesberry v. Sanders*, 376 U.S. 1 (1964); *Reynolds v. Sims*, 377 U.S. 533 (1964)).

41. *Id.* (citing U.S. CONST. art. I, § 4, cl. 1).

42. *Id.* (citing *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 217 (1986)). And further, the court noted that in *Harper v. Virginia State Board of Elections*, the Supreme Court held that “wealth or the ability to pay a fee [was] not a valid qualification for voting.” *Id.* (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 666-68 (1966)).

43. *Id.* at 1359-60.

44. *Id.* at 1360 (citing *Dunn v. Blumstein*, 405 U.S. 330, 335 (1972); *Kramer*, 395 U.S. at 626; *Hill v. Stone*, 421 U.S. 289, 298 (1975)).

45. *Id.* (citing *Burdick*, 504 U.S. at 433-34; *Tashjian*, 479 U.S. at 213).

quir[ing] that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States,” who were seeking to do no more than provide for equitable and efficient elections.⁴⁶ Ultimately, in *Burdick*, the court established that strict scrutiny was the proper standard of review for more “severe” restrictions, requiring the regulation to be narrowly tailored to serve a compelling state interest. However, the court went on to hold that, for “reasonable, nondiscriminatory restrictions . . . the State’s . . . regulatory interests [would] generally [be] sufficient to justify” restrictions on the right to vote.⁴⁷

In *Billups I*, the court found that the Georgia statute failed under both the strict scrutiny and the (sometimes) more lenient *Burdick* test.⁴⁸ Applying strict scrutiny, the court reasoned that, although the prevention of voter fraud was a “legitimate and important State concern,” the Photo ID requirement was not narrowly tailored to address this interest.⁴⁹ The court noted that the defendants had produced some evidence of voter fraud in Georgia, but none of that evidence was related to the particular type of fraud the Photo ID requirement was designed to prevent: in-person voter-fraud, or voter impersonation.⁵⁰

Next, the court analyzed the Photo ID requirement under the more flexible *Burdick* standard of review.⁵¹ The court determined that the Photo ID requirement would be constitutional only if “narrowly drawn to advance a [compelling] state interest,” because it imposed a “‘severe’ restriction on the right to vote.”⁵² It found that many Georgia voters did not have the necessary forms of Photo ID required, and that many of those voters would likely not be able to spend the time and money necessary to obtain it.⁵³

46. *Id.* (quoting *Burdick*, 504 U.S. at 433).

47. *Id.* (quoting *Burdick*, 504 U.S. at 433).

48. *Id.* at 1366.

49. *Id.* at 1361.

50. *Id.* at 1362. The court further found that the Photo ID requirement was not necessary to accomplish its purported aims, since “a number of significantly less burdensome alternatives exist[ed],” including the regulations in place prior to the Photo ID requirement, and the State’s existing criminal penalties for in-person voter fraud. *Id.*

51. *Id.*

52. *Id.* at 1360, 1365.

53. *Id.* at 1362 (“Many voters who do not have driver’s licenses, passports, or other forms of photographic identification have no transportation to a DDS service center, have impairments that preclude them from waiting in often-lengthy lines to obtain licenses, or cannot travel to a DDS service center during the DDS’s hours of operation because the voters cannot take off time from work.”). Also relevant to the court’s determination was the fact that there were insufficient numbers of offices where voters could obtain the necessary Photo ID, so that it would take a “lengthy drive” for some voters to obtain identification, and that many voters who did not have a driver’s license might not be able to make the trip. *Id.* at 1362-63.

The court found that the availability of a mobile unit for dispensing the Photo IDs did not reduce the restriction on voting rights, since the mobile unit would not likely be able to serve all of the Georgia counties that lacked a licensing office.⁵⁴ Further, the court found that the State had not adequately publicized when and where the mobile unit would be available, making it more difficult for voters to obtain transportation, if it was even available to them.⁵⁵ Finally, because the mobile unit was a bus that was not wheelchair-accessible, the court found that it would not be “a feasible alternative” to the regular licensing offices for those voters who were disabled and did not have Photo IDs, because those voters could not get inside the mobile unit and the licensing equipment could not be moved outside.⁵⁶

The court also found that some voters would not be able to pay the \$20 to \$35 necessary to obtain a Photo ID, even if they did not fall into the “indigent” exception for the payment of those fees.⁵⁷ The defendants argued that even non-indigent Georgia voters could obtain a free Photo ID because the DDS and its offices had a policy of not verifying or asking voters about the information voters were required to execute in order to receive a free Photo ID.⁵⁸ The court found that this “no questions asked” policy did not lessen the burden on the right to vote imposed by the Photo ID requirements, because the state had not publicized the policy, so that voters were not likely to attempt to obtain a free Photo ID after having read the affidavit, which seemingly required the voter be indigent in order for the fees to be waived.⁵⁹

The court also rejected the defendants’ argument that the Photo ID requirements did not impose any burden on the right to vote because “voters [could] vote via absentee ballot without producing any Photo ID at all in most instances.”⁶⁰ The court rejected this argument because it was “unrealistic to expect that most of the voters who lack[ed] Photo IDs [would] take advantage of the opportunity to [cast] an absentee ballot.”⁶¹ First, the court noted that, although Georgia had recently eased the requirements for obtaining an absentee ballot, no evidence was presented that the state had made this information widely available to voters.⁶² Further, because absentee ballots were not counted unless received in the office of the county registrar by 7:00 p.m. on Election Day, many voters without Photo ID would not “plan sufficiently enough ahead to vote via absentee ballot successfully.”⁶³

54. *Id.* at 1363.

55. *Id.*

56. *Id.*

57. *Id.* The \$20 fee applied to the 5-year Photo ID cards, while the \$35 fee applied to the 10-year Photo ID cards. *Id.* at 1339.

58. *Id.* at 1339.

59. *Id.* at 1363-64.

60. *Id.* at 1364.

61. *Id.* at 1365.

62. *Id.* at 1364.

63. *Id.* at 1364-65.

Finally, the court rejected Georgia's argument that the Photo ID requirement did not impose a severe burden on the right to vote because even voters who lacked Photo IDs on Election Day could cast a provisional ballot that would be counted so long as the voter produced the required Photo ID within 48 hours.⁶⁴ Considering how difficult it was to obtain a Photo ID, the court found it very unlikely that voters who had been unable to produce a Photo ID on Election Day would be able to obtain and produce it within 48 hours.⁶⁵ Having found that the Photo ID requirement would "make[] the exercise of the fundamental right to vote extremely difficult for voters . . . without acceptable forms of Photo ID for whom obtaining a Photo ID would be a hardship," the court concluded that the requirement was a "severe" burden on these voters' right to vote.⁶⁶

Next, having found that the state had an "important" interest in preventing election fraud, the court turned its attention to whether the Photo ID requirement was necessary for the state to achieve that interest.⁶⁷ The court found that the Photo ID requirement was not narrowly tailored to address this admittedly important interest in combating fraud, because there had been no documented cases of in-person voter fraud in eight years, and because the Photo ID requirement did not even attempt to regulate in those areas in which there was evidence of voter fraud (absentee voting and registration fraud).⁶⁸ The court concluded that the Photo ID requirement was not necessary or "narrowly tailored to" accomplish the state's interest in preventing voter fraud.⁶⁹ Having found that the Photo ID requirement failed to pass constitutional muster under the *Burdick* test, the court held that the "[p]laintiffs ha[d] a substantial likelihood of succeeding on the merits of their claim that the Photo ID requirement unduly burden[ed] the right to vote."⁷⁰ Finally, the court found that the Plaintiffs would "have a substantial likelihood of succeeding on the merits" of their claim that the Photo ID requirements constituted a poll tax unconstitutional under the 24th and 14th Amendments.⁷¹

64. *Id.* at 1365.

65. *Id.* The court found that many such voters, aware that they wouldn't be able to provide the required identification within the 48 hour time-limit, might not even cast a provisional ballot. *Id.*

66. *Id.* The court noted that the "character and magnitude" of the injury to the "elderly, poor, and African-American voters" who were most likely to be disenfranchised by the requirements of the Photo ID requirement was particularly severe, because these Georgians were "likely to have no other realistic or effective means of protecting their rights." *Id.* at 1365-66.

67. *Id.* at 1366.

68. *Id.*

69. *Id.*

70. *Id.*

71. *Id.* at 1370. The court noted that, under the Supreme Court's ruling in *Harper v. Virginia Board of Elections*, "wealth or affluence or payment of a fee" were impermissible bases upon which a state could "distinguish[] between qualified voters"

Having found that the plaintiffs had demonstrated a “substantial likelihood of success on the merits of their claim” against the state, the court further determined that the plaintiffs had satisfied the other three factors for granting a preliminary injunction, and granted the plaintiffs’ requested preliminary injunction.⁷²

2. *Common Cause/Georgia v. Billups II*

In 2006, the Georgia General Assembly passed new Photo ID requirements, making changes designed to make it easier for voters to bypass DDS offices in securing the necessary Photo ID and eliminating the requirement of the fee waiver affidavit.⁷³ Once again, the district court issued a preliminary injunction against the enforcement of these new Photo ID requirements. However, even though the State had made it much easier to obtain the necessary Photo ID,

the State did not seriously begin to educate its voters concerning the requirements of the 2006 Photo ID Act and the availability of a free . . . ID card until approximately two weeks before the July 18,

under the 24th Amendment’s prohibition of poll taxes for elections involving certain federal officials and *Harper’s* extension of this prohibition of the use of poll taxes in other State and local elections. *Id.* at 1368 (quoting *Harper v. Va. Bd. of Elections*, 383 U.S. 663, 666-67 (1966)). The court found that the fees required for the Photo ID cards constituted an unconstitutional poll tax, even though the DDS had adopted a policy of waiving the fees for anyone who would sign an affidavit claiming to be indigent (whether this was true or not), because voters were unlikely to realize that this was the policy of the DDS, since the state had not publicized these policies. *Id.* at 1369. The court held that “the fact that some individuals avoid paying the cost for the Photo ID card does not mean that the Photo ID card is not a poll tax.” *Id.* at 1370. Finally, the court found that even if the fee waiver affidavit had been publicized and therefore made “realistically available” to all voters, the waiver itself would violate the Constitution’s prohibition on poll taxes, since the Supreme Court has held that “any material requirement imposed upon a voter solely because of the voter’s refusal to pay a poll tax violates the Twenty-fourth Amendment.” *Id.* (citing *Harman v. Forssenius*, 380 U.S. 528, 542 (1965)). Since the court had found that the fee required to obtain a Photo ID was a poll tax, and since the only available option for voters who refused to pay the fee was to execute the fee waiver affidavit, which might be embarrassing and might require them to swear to facts which were untrue, it found that the fee waiver was a material requirement imposed on voters because of their refusal to pay the poll tax, in violation of the 24th Amendment. *Id.* at 1369-70.

72. *Id.* at 1376. The court found that the plaintiffs had demonstrated that they would suffer irreparable harm without a preliminary injunction, that this harm outweighed any potential harm that the defendants would experience as a result of the granting of the plaintiffs’ request for the injunction, and that the granting of the injunction was in the public interest. *Id.*

73. *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d. 1294, 1351 (N.D. Ga. 2006).

2006 primary elections . . . [and u]nder these circumstances, the State has failed to allow sufficient time to educate its voters, and has not taken into consideration the hardships that requiring voters to obtain a[n] . . . ID card within such a short time frame will place on many of the voters affected by the 2006 Photo ID Act.⁷⁴

As a result, the court found that the new Photo ID requirement still failed the *Burdick* test.⁷⁵ Plaintiffs continued to argue that the new Photo ID requirement still required the payment of a fee and therefore constituted a “poll tax,” because even though an acceptable form of ID had been made available to voters free of charge, the DDS offices still required certain documents to be provided in order to obtain the necessary ID, including a birth certificate, for which the State charged a fee.⁷⁶ The court held that the plaintiffs did not stand any “substantial likelihood of succ[ess] on their poll tax claim” because they had “failed to demonstrate that the cost of obtaining a birth certificate [was] sufficiently tied to the requirements of voting so as to constitute a poll tax.”⁷⁷ The General Assembly had effectively addressed the court’s 24th Amendment concerns, but its Photo ID requirement would still have imposed an undue burden on Georgians’ right to vote.

3. *Indiana Democratic Party v. Rokita*

In 2005, the Indiana General Assembly passed Indiana Senate Enrolled Act No. 483, Indiana’s Voter ID Law.⁷⁸ The law required citizens to show a form of identification that met certain specifications in order to have their votes counted, both for those voting in person and for those casting absentee ballots.⁷⁹ The proof of identification was required to meet several conditions set out in the Indiana Code, including requirements that the document providing proof of identification contain the name of the voter as that name was listed in the voter registration records, that the document showed a photograph of the voter, that the document contained an expiration date, and was either not expired or expired after the date of the last general election, and that the document was issued by the government of either the United States or Indiana.⁸⁰ Voters could not sign the poll book to receive a ballot without either showing photo ID that met these requirements or signing an affidavit

74. *Id.*

75. *Id.*

76. *Id.* at 1355.

77. *Id.*

78. *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 786 (S.D. Ind. 2006).

79. *Id.* at 786; IND. CODE § 3-11-8-25.1 (Supp. 2006).

80. IND. CODE § 3-5-2-40.5.

averring the voter's identity and right to vote in their precinct.⁸¹ If the voter signed such an affidavit, his vote would be counted only if the voter later appeared before a State circuit judge and at that time proved his or her identity.⁸²

The Voter ID Law also established another procedure for voters without Photo ID to have their provisional votes counted. Following Election Day, voters could appear at their county clerk's office and sign an affidavit averring that they either (1) were indigent and therefore unable to obtain a valid Photo ID, or (2) had religious objections to being photographed.⁸³ Finally, if the election board determined that a provisional ballot was invalid despite the voter's recourse to these procedures, the voter would be allowed to "file a petition for judicial review in the local . . . court," so that "the meaning of any particular term within the Voter ID law [would be] subject to the interpretation of the Indiana Supreme Court."⁸⁴

Prior to 2004, Indiana did not require that a voter show any form of photo identification in order to obtain a ballot.⁸⁵ Voters' identities could be challenged by county and party election officials, and voters fraudulently misrepresenting their identities in order to vote were subject to criminal prosecution.⁸⁶ However, as long as a voter signed a counter-affidavit (to the election official's affidavit challenging the voter's identity), stating that the voter was, in fact, who he said he was, the voter could sign the poll book and cast a regular ballot.⁸⁷ In 2004, pursuant to HAVA, the Indiana legislature provided for provisional balloting for the first time.⁸⁸ From that point on, voters whose identities were challenged were allowed to cast provisional ballots, the validity of which were determined by county election officials after Election Day.⁸⁹

81. *Ind. Democratic Party*, 458 F. Supp. 2d at 786 (citing IND. CODE § 3-11-8-25.1 (Supp. 2006)). There were two exceptions to the requirement to show valid photo ID as a prerequisite to obtaining a ballot. Voters "receiving and . . . casting [a] ballot sent by the county to the voter through the U.S. mail" and voters "who vote[d] in person at a precinct polling place that [was] located at a state licensed care facility where the voter resides" did not have to present a valid Photo ID in order to vote. *Id.* (citing IND. CODE §§ 3-10-1-7.2 & 3-11-8-25.1).

82. *Id.* (citing IND. CODE §§ 3-11-7.5-2.5(a) & 3-11-7.5-5-1). The complaint also alleged that Senate Enrolled Act 482 violated 42 U.S.C. § 1971, the Voting Rights Act. *Id.* at 787.

83. *Id.* (citing IND. CODE § 3-11-7.5-1).

84. *Id.*

85. *Id.* at 788.

86. *Id.*

87. *Id.*

88. *Id.* (citing IND. CODE § 3-11-7.5-2).

89. *Id.* (citing IND. CODE § 3-11-7.5-2).

Shortly after enactment of the Indiana Voter ID Law, two groups of plaintiffs in Indiana brought suit in federal court to prevent its enforcement.⁹⁰ One group consisted of the Indiana Democratic Party and Marion County Democratic Central Committee, and the other was made up of elected officials and non-profit organizations, all represented by the Indiana Civil Liberties Union.⁹¹ The plaintiffs requested an injunction against enforcement and a declaratory judgment, alleging that SEA 483 was an unconstitutional burden on the right to vote and an unconstitutional poll tax.⁹²

The district court seemed to view the suit largely as a political and “partisan legislative disagreement” that had “spilled out of the state house into the courts.”⁹³ Because of this, the court admonished the parties (particularly the plaintiffs) for not adequately transforming their political arguments into legal ones.⁹⁴ Specifically, the court found that the plaintiffs had not introduced any evidence to show that any Indiana voter would be either disenfranchised or unduly burdened by the requirements of the Indiana Voter ID Law’s requirements.⁹⁵

The court examined the requirements for obtaining the federally or state issued photo identification required by Indiana’s Photo ID Law.⁹⁶ First-time applicants for Indiana driver’s licenses or non-license identification-cards were required to visit a Bureau of Motor Vehicles office and produce proof of identity and Indiana residency.⁹⁷ Additionally, applicants were required to

90. *Id.* at 782-83.

91. *Id.*

92. *Id.* at 782.

93. *Id.* at 783.

94. *Id.*

95. *Id.*

96. *Id.* at 789-92. The Court focused on “identification cards issued by the” Bureau of Motor Vehicles (BMV), because both “parties agree[d] that the most likely source of acceptable identification” were these cards, and because “the text of SEA 483 focuses on identification cards issued by the BMV.” *Id.* at 789.

97. *Id.* at 789-90. Applicants were required to present either “one primary document, one secondary document, and one proof of Indiana residency requirement, or two primary documents and one proof of Indiana residency.” *Id.* Primary and secondary documents under the rules were those used to verify the applicant’s identity. *Id.* at 790-91. “Primary documents” were those “used to verify identity, date of birth, and citizenship” and included U.S. Birth Certificates and passports. *Id.* at 790. “Secondary documents” encompassed a wide variety of documents used as evidence of the identity of the applicant, including bank statements, school Photo ID cards, academic transcripts, insurance cards, and out-of-state driver’s licenses or Photo ID cards. *Id.* at 790-91. Applicants could show proof of residency through a “primary or secondary document that contain[ed] the applicant’s name and residential address” as well as other documents that included the same information, such as a US Postal Service change of address form, voter registration card, or child support check containing the applicant’s name and address. *Id.* at 791. Applicants who could not produce a current

pay a \$14 fee for a driver's license or a \$10 fee for an ID card.⁹⁸ The Indiana Voter ID Law waived these fees for any individual who would be 18 or older at the next election, and who did not already have a valid license or ID card.⁹⁹

The court next examined evidence of purported voter fraud in Indiana.¹⁰⁰ It pointed out that there *was* documentation of "significantly inflated" voter registration rolls in Indiana, that there was evidence of "in-person voter fraud in several other states," and that voters nationwide were less confident in the electoral system as a result of perceived instances of fraud.¹⁰¹ Examining the effect of the Indiana Voter ID Law on Indiana voters, the court noted plaintiffs' concerns that the law might possibly have a negative effect on "homeless, low-income, elderly, disabled, and minority" voters.¹⁰² However, as the court observed, voter turnout had actually increased in three municipal elections during which the Voter ID Law had been in effect.¹⁰³

Ultimately, the district court entered summary judgment in favor of the defendants on each of the plaintiffs' claims.¹⁰⁴ The court was not persuaded by the plaintiffs' First and Fourteenth Amendment "right to vote" claim, finding that the plaintiffs had erred in assuming that a standard of strict scrutiny was required whenever the right to vote was at issue, and that plaintiffs had failed to show that strict scrutiny was appropriate in this case, having provided no "evidence establishing that any actual voters [would] be adversely impacted by" the Voter ID Law.¹⁰⁵ The court cited *Burdick's* proclamation that, although "'voting is of the most fundamental significance under our constitutional structure,'" the Constitution "'compels the conclusion that gov-

license or ID card and those whose licenses or ID cards had been expired for 10 years were considered "first time applicants" for the purposes of these rules. *Id.* at 790 n.15.

98. *Id.* at 791. Indiana driver's licenses and photo ID cards expire, so applicants would be required to pay these fees each time they are renewed. *Id.* Indiana Photo ID cards are valid for four years, while driver's licenses are valid for six years. *Id.*

99. *Id.* (citing IND. CODE § 9-24-16-10 (Supp. 2006)). However, as the plaintiffs pointed out to the court, these applicants were still required to provide the documentation required by BMV rules, and there had been reports of individuals "who have tried to obtain a driver's license or identification card [who were] turned away because they [did] not have an original birth certificate or because they [did] not have the required secondary documentation or proof of Indiana residency." *Id.* The court further noted that in order to acquire a birth certificate, a primary document for purposes of obtaining an Indiana driver's license or photo ID card, one had to contact "either the Indiana Department of Health ("IDOH") or the Department of Health of the county of birth [for those born in Indiana]" and pay at least \$10 for a "birth-certificate search," and further "present a combination of non-photo identification documents." *Id.* at 792.

100. *Id.* at 792-94.

101. *Id.* at 793-94.

102. *Id.* at 795.

103. *Id.*

104. *Id.* at 845.

105. *Id.* at 820.

ernment must play an active role in structuring elections,' since, 'as a practical matter, there must be a substantial regulation of elections if they are to be fair and honest and if some sort of order, rather than chaos, is to accompany the democratic processes.'"¹⁰⁶

Unconvinced by the plaintiffs' evidence which purported to show that particular individuals or groups would face substantial burdens in attempting to vote, the court found that the *Burdick* test was appropriate to evaluate the constitutionality of this voting regulation and that strict scrutiny was not warranted in this case.¹⁰⁷ The court determined that the plaintiffs had not demonstrated that the restrictions on the right to vote imposed by the photo ID requirement constituted "severe burdens on the rights of voters."¹⁰⁸ The court was particularly concerned that the plaintiffs had not been able to provide evidence that *any* Indiana voter would be prevented from voting as a result of the Voter ID Law, and concluded that "[p]laintiff's lack of evidence confirm[ed] that [the Photo ID requirement was] narrowly tailored because every hypothetical individual who Plaintiffs assert[ed] would be adversely affected by the law actually benefit[ed] from one of its exceptions."¹⁰⁹ Because the restrictions did not amount to a "severe" burden, the court found that, under the *Burdick* test, the regulation would be upheld if the "restriction and resulting exclusion [were] reasonable given the interest the restriction serve[d]."¹¹⁰

Applying this more lenient standard of review, the court deferred to the Indiana legislature's judgment in enacting the photo ID requirements, holding that the State had an interest in combating voter fraud, and that "the balance between discouraging fraud and other abuses and encouraging turnout' is a 'legislative judgment' which 'judges should not interfere [with] unless strongly convinced that the legislative judgment is grossly awry.'"¹¹¹ The court held that it could not find that the Indiana "General Assembly's legislative judgment . . . was grossly awry" in seeking to "advance the interest of combating voter fraud by requiring that in-person voters present a form of photo identification that virtually all registered voters already possess," and was persuaded by the State's evidence of the danger and possibility of voter

106. *Id.* at 820-21 (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

107. *Id.* at 821.

108. *Id.* at 822. The court was persuaded by evidence submitted by both the defendants and the plaintiffs in this case that "the vast majority of Indiana's voting age population already appears to possess a driver's license or identification card." *Id.* at 824. An expert witness for the plaintiffs produced a report which said that "up to 99% of Indiana's registered voters" already had a driver's license or identification card. *Id.* Further, unlike the court in *Common Cause/Georgia v. Billups*, the district court here found that there was "no evidence that voting absentee would be a burden or a hardship for any of the[] individuals" identified by the plaintiffs. *Id.* at 823 n.71.

109. *Id.*

110. *Id.* at 822.

111. *Id.* at 825 (quoting *Griffin v. Rovpas*, 385 F.3d 1128, 1131 (7th Cir. 2004)).

fraud in Indiana.¹¹² The court therefore found that the photo ID provisions were “reasonable, nondiscriminatory restrictions” that advanced an “important regulatory interest in combating voter fraud,” and were not unconstitutionally restrictive of the rights to vote under the First and Fourteenth amendments.¹¹³

The court also rejected plaintiffs’ argument that the photo ID requirement constituted an unconstitutional poll tax under the Fourteenth Amendment’s Equal Protection Clause because it required the payment of fees to the BMV for a driver’s license or ID card, and required voters to incur expenses in obtaining the necessary documentation required to obtain those forms of photo ID.¹¹⁴ It held that the photo ID requirement could not be considered a poll tax because the Voter ID Law provided for free photo ID for those without a driver’s license who would be eligible to vote in the following election.¹¹⁵ It further held that the incidental expenses associated with obtaining the documents necessary to receive a photo ID could not constitute a poll tax because every election law “impose[s] some burden on individual voters,” but “the imposition of tangential burdens does not transform a regulation into a poll tax.”¹¹⁶ Further, because the court did not believe that any individual would actually have to obtain a photo ID in order to vote, it was unconvinced that the costs associated with obtaining a photo ID could be considered a poll tax.¹¹⁷

B. *Weinschenk v. Missouri*

Along with the sponsor of SB 1014, Missouri State Senator Delbert Scott, the State of Missouri appealed Judge Callahan’s decision to the Missouri Supreme Court.¹¹⁸ After engaging in a detailed, *de novo* review, the court affirmed the circuit court’s holding that the Photo ID requirements of SB 1014 were unconstitutional.¹¹⁹ The plaintiffs in *Weinschenk* made claims only under the Missouri Constitution, not the U.S. Constitution.¹²⁰ Nevertheless, in evaluating the claims under the appropriate provisions of the Missouri

112. *Id.* The court noted that the State was not required to provide documentation of the need for particular regulations, but said that even if this were the case, the State’s evidence of voter fraud in other jurisdictions, including Missouri, as well as the fact that “without a photo identification requirement it [would be] nearly impossible to detect in-person voter impersonation,” the State’s evidence would be sufficient to “empirically substantiate its justification” for the photo ID requirements. *Id.* at 826.

113. *Id.* (citations omitted).

114. *Id.*

115. *Id.* at 827.

116. *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 433 (1992)).

117. *Id.*

118. *Weinschenk v. State* 203 S.W. 3d 201, 204 (Mo. 2006) (per curiam).

119. *Id.* at 210.

120. *Id.* at 216.

Constitution, the Supreme Court of Missouri engaged in a constitutional analysis substantially similar to that employed by the federal district courts in Georgia and Indiana.¹²¹ Because the court found that SB 1014 was not necessary to accomplish its purported aim of reducing in-person election fraud, and because it found that the right to vote was fundamental in Missouri, the court held that SB 1014's Photo ID requirements could not survive strict scrutiny review.¹²²

Unlike the plaintiffs in the Indiana and Georgia cases described above, the plaintiffs in *Weinschenk* provided concrete evidence that the requirements of the Photo ID provisions would substantially burden particular Missourians' rights to vote.¹²³ Specifically, the *Weinschenk* plaintiffs provided evidence that "between three and four percent of Missouri citizens lack[ed]" the required Photo ID and would therefore have to obtain such ID in order to vote.¹²⁴ They also produced evidence of the costs imposed on voters by the state of Missouri (as well as other states and the federal government) in order to obtain the required Photo ID.¹²⁵ Six individual plaintiffs also submitted evidence that substantial obstacles would be placed in the way of exercising their right to vote due to the new Photo ID requirements.¹²⁶

Individual plaintiffs testified that they did not currently have a form of ID acceptable under SB 1014's amendment to Section 115.427, and that they had or would experience obstacles in obtaining an ID.¹²⁷ Obtaining a birth certificate would have presented problems for some of the plaintiffs.¹²⁸ Other plaintiffs had been informed by the Department of Revenue that because they were not over 65, they would have to be charged \$11 for the ID.¹²⁹

Finally some plaintiffs claimed that although they could have obtained a photo ID, they were burdened by old age or physical disabilities that would

121. MO. CONST. art. I §§ 2, 10, 25; MO. CONST. art. VIII, § 2.

122. *Weinschenk*, 203 S.W. 3d at 204.

123. *Id.* at 209.

124. *Id.* at 206.

125. *Id.* at 208. Plaintiffs submitted evidence that a "certified, embossed copy of a birth certificate required by the *Federal REAL ID Act* to obtain a non-driver's license" costs \$15 in Missouri, and anywhere from \$5 to \$30 in other states where Missourians may have been born. *Id.* Plaintiffs also submitted evidence that additional documentation that is required to obtain the necessary Photo ID for a voter whose name has changed could present additional costs to voters, and that, for example, "the cost of a certified copy of a marriage license ranges from \$5 to \$30." *Id.*

126. *Id.* at 209.

127. *Id.*

128. *Id.* Some plaintiffs would have to have paid a fee to their state of birth in order to obtain the birth certificate required to obtain a Photo ID and others had learned that their state of birth had no record of their birth, making it difficult or impossible to obtain the birth certificate required to obtain a Photo ID. *Id.* Some plaintiffs claimed that their names did not match the names on their birth certificates. *Id.*

129. *Id.*

make it very difficult to take the steps necessary to obtain a Photo ID.¹³⁰ Plaintiffs also produced evidence that in-person voter fraud had not been a major problem in Missouri, but that other kinds of voter fraud had been a problem, particularly registration and absentee ballot fraud.¹³¹ Although the defendants produced some evidence at trial tending to show that in-person voter fraud or voter impersonation were problems in Missouri, the trial court considered the plaintiff's witnesses more credible, and the court "consider[ed] the record in the light most favorable to the judgment of the trial court."¹³²

In analyzing the plaintiffs' equal protection claims under the Missouri Constitution, the court first determined that voting was a fundamental right in Missouri.¹³³ The court found that, unlike the United States Constitution, the Missouri Constitution expressly guaranteed a fundamental right to vote to qualified Missouri voters.¹³⁴ The court held that Article I, section 25 of the Missouri Constitution, which provides in part that "no power . . . shall at any time interfere to prevent the free exercise of the right of suffrage," and Article VIII, section 2, which provides "an exclusive list of qualifications necessary to vote in Missouri," establish "that the right to vote is fundamental to Missouri citizens."¹³⁵

Having found a fundamental right to vote, the court next determined that the Photo ID requirement posed a significant burden on the right to vote of Missouri citizens.¹³⁶ It recognized that "some regulation of the voting process is necessary to protect the right to vote itself . . . and [that] the Missouri Constitution . . . specifically delegates to the legislature the right to regulate regis-

130. *Id.* Some plaintiffs claimed that they were unable because of old age or disability to make a consistent mark, such that any provisional ballot cast by them could not be verified through the signature match provisions of SB 1014. *Id.* Others complained that their disabilities required them to "arrange transportation to and from the Department of Revenue and to employ an attendant to assist [them] in order to obtain a non-driver's license." *Id.*

131. *Id.* at 209-10. Plaintiffs submitted letters from two Secretaries of State, Matt Blunt and Robin Carnahan, to two Governors, Bob Holden and Matt Blunt, stating voter impersonation fraud was not a problem in Missouri and that "Missouri's statewide elections in 2002 and 2004," after the amendment of section 115.427 to reflect the minimum voter ID requirements imposed by HAVA, were "two of the cleanest and problem free elections in recent history." *Id.* at 210.

132. *Id.*

133. *Id.* at 211.

134. *Id.* The Supreme Court of Missouri noted that, under the U.S. Constitution, the fundamental right to vote was "only by implication, not by express guarantee," and that "qualifications for voting under the federal system are left to legislative determination, not constitutionally enshrined," as in the Missouri Constitution, and that the protections of the right to vote in the Missouri Constitution were overall "more expansive and concrete" than under the U.S. Constitution. *Id.* at 211-12.

135. *Id.* at 211 (quoting MO. CONST. art. I § 25; MO. CONST. art. VIII, § 2).

136. *Id.* at 212.

tration.”¹³⁷ Regulations that would have only a tangential effect on voting, which would impose only a *de minimis* burden on Missourians’ right to vote, would not trigger as high a level of scrutiny as those that imposed a direct and significant or substantial burden on the right to vote.¹³⁸

The court found that the plaintiffs’ evidence had established that the Photo ID requirements effectively rendered several of the plaintiffs and perhaps many more Missourians ineligible to “cast a regular ballot (or after 2008 any ballot at all) unless they undert[ook] to obtain one of the requisite photo IDs.”¹³⁹ According to the court, this “denial of the right to vote to these Missourians is more than a *de minimis* burden on their suffrage.”¹⁴⁰ Two particular aspects of the Photo ID requirements were particularly distasteful to the court, and imposed a substantial burden on the right to vote: the fact that the Photo ID provisions required Missourians without acceptable ID to pay money in order to exercise their right to vote, and the fact that the provisions required “time and ability to navigate bureaucracies in order to vote.”¹⁴¹ The court asserted that the provisions making non-driver’s licenses “free” to Missourians in need of such ID to vote did not make that ID truly “free” to the potential voter, because that voter “would [likely] have to, at the very least, expend money to obtain a birth certificate” and would have to engage in “substantial planning in advance of an election to preserve [their] right to vote.”¹⁴² It stated that the cost of a Missouri birth certificate alone (ordinarily \$15) was more than a *de minimis* cost, and as plaintiffs’ evidence demonstrated, many Missourians would have to obtain other forms of documentation to receive the official birth certificates necessary for obtaining an acceptable form of Photo ID.¹⁴³ Citing *Harper v. Virginia Board of Elections*, it found that “all fees that impose financial burdens on eligible citizens’ right to vote, not merely poll taxes, [were] impermissible, under federal law,” and that “[t]here [could] be no lesser requirement under Missouri law.”¹⁴⁴

The court rejected the defendants’ argument that it should apply the same type of analysis to this poll tax issue as was applied in the Indiana and Georgia federal district court cases that found that the incidental costs associated with obtaining a Photo ID were not “sufficiently tied” to the Photo ID

137. *Id.* (citing MO. CONST. art. VIII, § 5).

138. *Id.* at 212-13.

139. *Id.* at 213.

140. *Id.*

141. *Id.* at 213-15.

142. *Id.* The Court found that the process of obtaining all of the documents necessary to obtain a Photo ID was a “cumbersome procedure,” noting particularly that evidence in the record demonstrated that it took six to eight weeks to obtain some birth certificates, so that some voters without Photo ID would have to plan that far ahead in order to vote. *Id.* at 214.

143. *Id.* at 213.

144. *Id.* at 213-14.

requirements to be considered unconstitutional poll taxes.¹⁴⁵ Ultimately, it distinguished this case from the two federal cases because the plaintiffs in this case had presented “specific evidence of voters who were required to bear . . . costs in order to exercise their right to vote.”¹⁴⁶

Missouri case law had established that, where “regulations do not impose a heavy burden on the right to vote,” they are held to be constitutional so long as the regulations are “rationally related to a legitimate state interest.” However, where “regulations place a heavy burden on the right to vote . . . [the Missouri Constitution] requires that they be subject to strict scrutiny,” such that they will be unconstitutional unless the regulation serves a “compelling state interest” and is “necessary and narrowly tailored to accomplish that interest.”¹⁴⁷ Because the court found that the Photo ID provisions presented a “substantial burden” on a fundamental right to vote, it applied strict scrutiny analysis to the Photo ID provisions.¹⁴⁸

With little more than one sentence of analysis, the court found that Missouri had a compelling state interest in preventing voter fraud, holding that “Missouri’s broad interest in preserving the integrity of the election process and combating voter fraud are significant, compelling and important.”¹⁴⁹ Having found a compelling state interest, the court looked at whether the Photo ID requirements were necessary and narrowly tailored to accomplish that interest.¹⁵⁰ In completing this analysis, it noted that “the only type of voter fraud that the Photo-ID Requirement prevents is in-person voter impersonation fraud at the polling place.”¹⁵¹ The Photo-ID requirements did not prevent fraud in either registration or in absentee voting, and no evidence had been presented to show that “voter impersonation fraud exist[ed] to any substantial degree in Missouri.”¹⁵² Because in-person fraud was all that was at stake, and because the only instance of voter impersonation fraud defendants provided had occurred before the 2002 amendment of section 115.427 to conform to the minimum voter ID standards required by HAVA, the court held that the Photo ID requirements were not “strictly necessary or narrowly tailored to accomplish the State’s asserted interests.”¹⁵³ In rejecting the de-

145. *Id.* at 214; *Common Cause/Ga. v. Billups*, 439 F. Supp. 2d 1294, 1355 (N.D. Ga. 2006); *Ind. Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 826-27 (S.D. Ind. 2006).

146. *Weinschenk*, 203 S.W. 3d at 214.

147. *Id.* at 215-16 (quoting *Komosa v. Komosa*, 939 S.W.2d 479, 482 (Mo. App. E.D. 1997)).

148. *Id.* at 215.

149. *Id.* at 217.

150. *Id.*

151. *Id.*

152. *Id.*

153. *Id.* The court determined that although “[t]he Photo-ID [r]equirement [would] assist[] in prevention of voter impersonation . . . the evidence reveals that the 2002 requirements, which are much less restrictive on the right to vote, have been

defendants' argument that it should apply the more flexible *Burdick* test, the court explained that, because the instant case arose under the Missouri Constitution rather than the U.S. Constitution, the *Burdick* test did not apply.¹⁵⁴ However, the court argued in dicta that it would have reached the same result even if it had applied the *Burdick* test, because under that standard, where "restrictions on the right to vote are severe, strict scrutiny would . . . adhere under . . . federal constitutional provision[s]."¹⁵⁵ Because the court here dealt with a "direct" and "substantial" burden on the right to vote, the court concluded that federal courts applying the *Burdick* test would have employed the same (strict) standard of review the court employed here.¹⁵⁶

Finally, the court rejected the defendants' argument that the state had "compelling interests in combating perceptions of voter fraud" which could withstand strict scrutiny.¹⁵⁷ It recognized that the state had an interest in fighting perceptions that its electoral system was riddled with fraud, but held that "more than mere perception is required" for the abridgement of fundamental rights.¹⁵⁸ It concluded that, if fighting the perception of fraud were found to be a compelling enough interest to justify the abridgement of the right to vote, "the tactic of shaping public misperception could be used in the future as a mechanism for further burdening of the right to vote or other fundamental rights."¹⁵⁹

IV. COMMENT

The Missouri Supreme Court made the correct decision in *Weinschenk v. Missouri*. With a record demonstrating that a number of Missourians' rights to vote would be adversely affected by the requirements of SB 1014, the court found that a Photo ID requirement designed to prevent *potential* in-person voter impersonation fraud and the *possibility* of the *appearance* of voter fraud was not narrowly tailored to serve the state's admittedly compelling interest in the integrity of its elections. Although the *Burdick* test used in the federal court cases did not control the constitutionality of the Photo ID provisions under the Missouri Constitution, the court analyzed the provisions under the *Burdick* test in dicta, and found that the test would have resulted in

sufficient to prevent this type of fraud," making the Photo ID requirements of SB 1014 by definition unnecessary to accomplish the "compelling state interest" asserted – the prevention of voter impersonation fraud. *Id.*

154. *Id.* at 216.

155. *Id.*

156. *Id.*

157. *Id.* at 218.

158. *Id.*

159. *Id.* The Court held that "[t]he protection of our most precious state constitutional rights must not founder in the tumultuous tides of public misperception." *Id.* at 219.

the application of strict scrutiny.¹⁶⁰ Further, its analysis of the voting restrictions under the Missouri Constitution seems to be substantially similar, if not identical, to that of the federal courts applying the *Burdick* test.

The court noted that the Missouri cases which did not apply strict scrutiny to restrictions on voting rights were simply recognizing the importance of the state's interest in protecting the integrity of the electoral process, and held that under Missouri law, voting regulations that "do not impose a heavy burden on the right to vote . . . will be upheld provided they are rationally related to a legitimate state interest," while those that impose a "heavy burden" on the right to vote will "be subject to strict scrutiny."¹⁶¹ The only difference between this analysis and the *Burdick* test seems to be that under the *Burdick* test, a "severe restriction" on the right to vote triggers strict scrutiny, whereas under the test employed by the Supreme Court of Missouri in *Weinschenk*, strict scrutiny is triggered by regulations that impose a "heavy burden" on the right to vote.¹⁶² It is possible that the Missouri Supreme Court believes that there is something between a "heavy burden" and a "severe restriction" on the right to vote, but barring that the court seems to be employing a version of the *Burdick* test when looking at restrictions on the right to vote.

The Missouri Supreme Court, like the federal courts that have addressed the issue, essentially found a balance between the constitutional right to vote and the State's legitimate interest in preserving the integrity of the electoral process. When a restriction imposes a "heavy" or "severe" burden on the right to vote, the courts will strictly scrutinize the restriction to ensure that the State's interest is sufficiently compelling and that the restriction burdens access to the polls only so much as is necessary to satisfy that compelling interest. When a restriction is less burdensome on the right to vote, the courts will give the States more deference in regulating to preserve the integrity of the electoral system. Applying either strict scrutiny or the rational basis test to all voting regulations regardless of the nature of burden imposed on the right to vote would necessarily impose a constitutional preference for either access or integrity, while the *Burdick* test and the test employed by the court in *Weinschenk* recognize that both of these interests are important and should be taken into account.

Access to the polls is an important value, but so is the integrity of the electoral process. States cannot and should not protect one of these values to the absolute exclusion of the other. Even *universal* access to the polls is of little value in a system in which rampant fraud causes voters to doubt the legitimacy of elections and in which illegitimate votes negate legitimate ones. Integrity of the electoral system is obviously important, but if the state imposes impossible requirements on voters before they may cast a ballot, we

160. *Id.* at 216.

161. *Id.* at 215-16.

162. *Id.* at 216.

will have a system of unquestionable integrity in which very few voters will be able to vote.

Both courts and legislatures have an important role in striking an appropriate balance in this area. The Missouri General Assembly and other state legislatures have and should exercise the power to ensure the integrity of elections, so long as the fundamental right to vote is not infringed. Where the legislature's regulation would impose a "heavy" or "severe" burden on the right to vote, the courts will strictly scrutinize the regulation; where the regulation would impose a less substantial burden, the courts will be more deferential to the legislature. This ensures that the legislature will take steps to ensure that when it regulates in this area, it does so in a way that does not unduly burden the right to vote.

This is not to say that imposing a Photo ID requirement will *always* have the effect of imposing an undue burden on the right to vote, or that requiring such identification as a prerequisite of having one's vote counted will *always* result in an unsatisfactory balance between the values of access and integrity. It simply means that legislatures need to ensure that, in implementing these requirements, certain classes of voters are not left effectively disenfranchised. In Missouri's case, this might mean a long phase-in period may be required during which forms of identification other than Photo ID are accepted. A longer phase-in would give time for the "mobile processing system" included in SB 1014 to reach elderly and disabled voters, and would give all voters more time to obtain a Photo ID and comply with the identification requirements, reducing the burden imposed on voters by the Photo ID requirement.¹⁶³

In addition to taking action to ensure that reforms are not overly restrictive of the right to vote and are narrowly tailored, legislators and other advocates of Photo ID requirements need to provide evidence that in-person voter fraud is a real problem.¹⁶⁴ Thus far, there has been little empirical evidence that in-person voter fraud is a problem in Missouri or anywhere else, and as a result advocates of Photo ID requirements have been reduced to using anecdotal or "common-sense" arguments for why such requirements are necessary or desirable.¹⁶⁵ While advocates of these requirements argue that such evi-

163. See MO. REV. STAT. § 115.427.7 (Supp. 2006). See also *Developments in the Law – Voting and Democracy*, 119 HARV. L. REV. 1127, 1153 (2006) (arguing that "the constitutional viability of photographic identification provisions might well increase in the future, both as states improve election administration and as voters and election officials grow more aware of their respective responsibilities, thus . . . diminishing the burden of photographic identification requirements").

164. The Missouri Supreme Court in *Weinschenk* was concerned with the lack of substantive evidence of in-person voter fraud. See *supra* note 153.

165. Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 631-38 (2007) (noting that there has, to date, been "[n]o systematic, empirical study of the magnitude of voter fraud . . . at either the national level or in any state . . ." and arguing

dence is unnecessary since “one case of voter fraud is one too many,” such evidence is crucial when one considers that “[d]epending on the magnitude of fraud, a photo-identification requirement could erroneously skew election outcomes to a greater extent than would a lack of such a requirement.”¹⁶⁶ If we knew, for example, that Missouri’s Photo ID requirement would have the twin effects of disenfranchising 200,000 Missourians who were otherwise qualified to vote and stopping 2,000 Missourians who had intended to engage in in-person voter-fraud from doing so, legislators could make better decisions as to whether, as a matter of public policy, this was an acceptable trade-off. Courts would be able to use this information in their narrow-tailoring analyses to determine whether less burdensome requirements could be used to meet the state’s compelling interests in fraud-free elections.¹⁶⁷ Proponents may not be overly enthusiastic about empirically studying voter fraud because such studies would demonstrate that instances of voter fraud are exceedingly rare (possibly accounting for as little as 0.000045% of all ballots cast) and that photo identification could not prevent every instances of voter fraud.¹⁶⁸

Since *Weinschenk* was decided, two bills dealing with voter identification have been introduced in the Missouri General Assembly. The first, introduced by Senator Delbert Scott, the sponsor of SB 1014, is essentially identical to SB 1014.¹⁶⁹ Senator Scott also proposed to send this issue to the voters, sponsoring a Joint Resolution which would allow Missourians to vote on whether or not to amend the Missouri Constitution to overrule *Weinschenk* and specifically allow for a photo ID requirement.¹⁷⁰

that more than anecdotal evidence is necessary to determine whether the benefits of election reforms outweigh their costs).

166. *Id.* at 648.

167. For example, the Missouri Supreme Court found in *Weinschenk* that the Photo ID requirement was not necessary because “the 2002 requirements, which are much less restrictive on the right to vote, have been sufficient to prevent [voter impersonation] fraud.” *Weinschenk*, 203 S.W.3d at 217. If proponents of the Photo ID requirement had been able to provide the court with evidence that significant in-person voter fraud existed in Missouri and that the Photo ID requirement would prevent many more fraudulent votes than less restrictive measures, the court might find that the requirement was necessary to achieve the state’s compelling interest.

168. Overton, *supra* note 165, at 654-55 (noting an Ohio study finding only four instances of known in-person voter fraud out of 9,078,728 votes cast in 2002 and 2004, a voter fraud rate of 0.000044%, and a report finding that “since October 2002, federal officials had charged eighty-nine individuals with casting multiple votes, providing false information about their felon status, buying votes, submitting false voter registration information, or voting improperly as a noncitizen” out of a total “196,139,871 ballots cast between October 2002 and August 2005” representing a voter fraud rate of 0.000045%. The author noted that “not all of the activities charged would have been prevented by a photo-identification requirement.”).

169. S.B. 596, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007).

170. S.J. Res. 28, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007).

There are several problems with this proposal. First, if the voters do not approve the constitutional amendment, Senator Scott's new bill will be no more constitutional than his old one. Second, even if the voters approved of this change to the Missouri Constitution, since the *Weinschenk* court basically adopted the *Burdick* test and the analysis employed by the federal courts, there is reason to believe that SB 1014 would violate the U.S. Constitution as well. Finally, simply amending the Missouri Constitution to allow for this ID requirement will not address the concerns of the plaintiffs in *Weinschenk*.¹⁷¹ This proposal essentially amounts to a policy decision that integrity should trump access, and is unwise.

Representative Bill Deeken has introduced House Bill 1044 (HB 1044), a more reasonable bill, and one that is likely constitutional.¹⁷² This bill would replace section 115.427 with a new section 115.428, which would still require a form of photo ID, but would allow for many forms of photo ID that SB 1014 did not.¹⁷³ Representative Deeken's proposal would consider photo ID issued by "institution[s] of higher education" in Missouri and driver's licenses or "state identification card[s]" issued by other states sufficient to establish a voter's identity.¹⁷⁴

Unlike SB 1014, this proposal would allow individuals falling into one of the "exceptions" to the photo ID requirement to cast regular rather than provisional ballots that would only be counted if election officials would verify the voter's identity by comparing the voter's signature on an affidavit with the one on file with the election authorities.¹⁷⁵ The proposal would also add two additional exceptions to those listed in SB 1014, allowing voters who were unable to obtain ID because of "[t]he cost to obtain the documents required to establish the voter's identity, citizenship, or naturalization, for purposes of obtaining a current and valid form of personal identification" or because of "[t]he length of time required to obtain a current and valid form of personal identification."¹⁷⁶ The addition of these two exceptions would effectively address concerns of the court and some of the plaintiffs in *Weinschenk*.¹⁷⁷

Finally, HB 1044 would direct the Secretary of State to assist voters in obtaining the documents necessary to obtaining a photo ID for the purposes of voting (such as birth certificates or naturalization documents) and would create a "Voter Identification Fund" from which the state would pay the fees

171. *Id.* Although the proposed constitutional amendment would require the state to provide a photo ID at no cost to individuals who did not have such identification, this does not address the concerns of plaintiffs regarding obtaining the prerequisites necessary to obtain a photo ID, such as birth certificates. *Id.*; see also *supra* notes 133-38 and accompanying text.

172. H.B. 1044, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007).

173. *Id.*

174. *Id.*

175. *Id.*; S.B. 596, 94th Gen. Assem., 1st Reg. Sess. (Mo. 2007).

176. Mo. H.B. 1044.

177. *Id.*

required to obtain such documents.¹⁷⁸ This would address the *Weinschenk* court's concern that these fees constituted an unconstitutional poll tax, and some of its concerns relating to the burden imposed on some voters by the lengthy process required to obtain a photo ID. Representative Deeken's proposal expands the acceptable forms of identification required while at the same time making it easier for voters to obtain the required identification, and making exceptions for voters whose right to vote might be significantly burdened by such requirements because of their poverty, old age, or disabilities.

SB 1014 imposed a requirement that voters show Photo ID before exercising their fundamental right to vote. Had the General Assembly taken sufficient care to ensure that voters would actually be able to acquire a Photo ID in time to exercise their right to vote or to demonstrate that the Photo ID requirement actually addressed a real problem in Missouri more effectively than the previous identification requirements, the Photo ID requirement may have been held constitutional. The *Burdick* test and the test applied in *Weinschenk* leave the General Assembly with room to regulate to ensure the integrity of elections in Missouri, and even room to impose a Photo ID requirement like Representative Deeken's that would not have the effect of denying the right to vote to a substantial number of Missourians. The Missouri Supreme Court struck an appropriate balance between voters' constitutional right of access to the polls and Missouri's legitimate interest in the integrity of its elections. The Missouri General Assembly and other states' legislatures should regulate to ensure the integrity of the voting process, but they must do so with an eye to the regulation's effect on the fundamental right to vote, erring on the side of protecting the right to vote. In the end, legislatures must ensure both access *and* integrity in election reform.

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178. *Id.*

