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CONSTITUTIONAL LAW-SUFFRAGE AND THE STATE'S INTEREST IN PREVENTING FRAUD-THE CONSTITUTIONALITY OF TENNESSEE'S PHOTO IDENTIFICATION REQUIREMENT UNDER STRICT SCRUTINY

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CONSTITUTIONAL LAW—SUFFRAGE AND THE
STATE’S INTEREST IN PREVENTING FRAUD—
THE CONSTITUTIONALITY OF TENNESSEE’S
PHOTO IDENTIFICATION REQUIREMENT UNDER
STRICT SCRUTINY

City of Memphis v. Hargett, 414 S.W.3d 88 (Tenn. 2013).

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I.	INTRODUCTION	929
II.	ISSUE BEFORE THE COURT	931
	A. <i>The Development of the State’s Interest in Safeguarding Electoral Ballots</i>	932
	B. <i>Federal Development of the State’s Interest in Safeguarding its Ballots and the Use of Celebrezze’s More Flexible Standard of Review</i>	933
	C. <i>Development of Political Franchise in Tennessee and the Use of Strict Scrutiny</i>	936
III.	ANALYSIS OF <i>CITY OF MEMPHIS V. HARGETT</i>	939
IV.	CONSEQUENCES OF <i>CITY OF MEMPHIS V. HARGETT</i>	945
V.	CONCLUSION.....	948

I. INTRODUCTION

In 2012, the Tennessee Voter Identification Act (the “Act”)¹ went into effect, requiring voters to present valid photographic identification (photo ID)² to cast an election ballot.³ In August 2012 two senior citizens, Daphne Turner-Golden and Sullistine Bell (the plaintiffs), attempted to vote in the general election by using a library card issued by the City of Memphis Public Library (the

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1. TENN. CODE ANN. § 2-7-112 (2012).

2. *Id.* § 2-7-112(c). Valid forms of identification are a Tennessee driver license, an identification card issued by the state of Tennessee or the United States, an identification card issued by an institution of higher education, a United States passport, an employee identification card issued by the state of Tennessee or the United States, a military identification card, or an employee identification card for retired state employees. *Id.*

3. *City of Memphis v. Hargett*, 414 S.W.3d 88, 92 (Tenn. 2013).

“Library”).⁴ Voting officials told the plaintiffs their library cards were invalid forms of photo ID, turned them away, and had them cast provisional ballots⁵ requiring a valid photo ID.⁶

The plaintiffs sued the Tennessee State Coordinator of Elections Mark Goins and Tennessee’s Secretary of State Tre Hargett.⁷ The plaintiffs were joined in the action by the City of Memphis (the “City”).⁸ The suit alleged violations of the plaintiffs’ rights under the Equal Protection Clause⁹ of the Fourteenth Amendment and sought a declaration that the Library’s photo ID qualified as a valid identification for voting purposes.¹⁰ During the suit, the plaintiffs filed motions for a temporary restraining order and preliminary injunction, both of which were denied.¹¹

After the August 2012 primary, the plaintiffs voluntarily dismissed their federal suit and filed a new complaint in Davidson County Chancery Court against Mr. Goins, Mr. Hargett, and Tennessee Attorney General Robert Cooper, Jr. (collectively, the defendants).¹² The complaint sought injunctive relief, asserting that the plaintiffs could not obtain a photo ID prior to the November general election date.¹³ The chancery court held that: 1) none of the plaintiffs had standing; 2) the complaint did not assert an as-applied constitutional challenge to the Act; 3) the case was not a class action; 4) the statute was not unconstitutional; and 5) the Library was not

4. *Id.* at 94.

5. A person is entitled to cast a provisional vote if a voter is unable to present evidence of identification and his or her name appears on the computerized voter signature list or the electronic poll book. TENN. CODE ANN. § 2-7-112(e). Provisional ballots will only be counted if valid identification is provided to the administrator of elections or administrator’s designee by the close of the second business day. *Id.* § 2-7-122(e)(5).

6. *Hargett*, 414 S.W.3d at 94.

7. *Id.*

8. *Id.*

9. The Equal Protection clause prohibits states from denying people the equal protection of the laws. U.S. CONST. amend. XIV, § 1.

10. Plaintiffs allege that requiring photographic identification serves as a qualification that undermines the Fourteenth Amendment. Brief for Appellant at 34, *City of Memphis v. Hargett*, 414 S.W.3d 88 (2013) (No. M2012-02141-COA-R3-CV), 2012 WL 5381929, at *34; *see also Hargett*, 414 S.W.3d at 94.

11. *Hargett*, 414 S.W.3d at 94.

12. *Id.*; *see also Turner-Golden v. Hargett*, 2012 U.S. Dist. LEXIS 109009, *4 (M.D. Tenn. Aug. 3, 2012).

13. *City of Memphis v. Hargett*, 2012 Tenn. App. LEXIS 742, *10 (Tenn. Ct. App. Oct. 25, 2012), *aff’d*, *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013).

an entity authorized to issue photo identification.¹⁴ The trial court entered judgment reflecting these holdings.¹⁵

On appeal, the Tennessee Court of Appeals for the Middle Section affirmed in part and reversed in part, holding: 1) the plaintiffs had standing; 2) the Act met the facial constitutional standard; and 3) the photo ID cards issued by the Library qualified as valid proof of identification.¹⁶ After this decision, the Tennessee General Assembly amended the Act. The General Assembly replaced the contested requirement that photo ID cards be issued by any of the state's entities to instead require that photo ID cards be issued only by Tennessee itself or by the United States.¹⁷ On certiorari to the Tennessee Supreme Court, *held*, affirmed.

Because of the Act's 2013 amendment, the Tennessee Supreme Court held that issues pertaining to the validity of the Library-issued photo IDs were moot.¹⁸ The plaintiffs, with the exception of the City, have standing to file a declaratory judgment.¹⁹ The Act, on its face and as-applied, is constitutional and passes a strict scrutiny analysis.²⁰ Furthermore, the requirement of providing a valid photo ID is not an additional qualification abridging the privileged rights of the plaintiffs under Article IV, section 1 of the Tennessee Constitution. Additionally, the differences between in-person voters and absentee voters are not constitutional infringements under Article XI, section 8.²¹ *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013).

II. ISSUE BEFORE THE COURT

Suffrage is the bedrock of political enterprise within a constitutional republic.²² Throughout the sordid history of political

14. *Id.* at *11.

15. *City of Memphis v. Hargett*, 414 S.W.3d 88, 95 (Tenn. 2013).

16. *Id.* at 95.

17. *Id.*

18. *Id.*

19. *Id.*

20. *Id.* at 92.

21. *Id.* at 108–11.

22. "It is beyond cavil that 'voting is of the most fundamental significance under our constitutional structure.'" *Burdick v. Takushi*, 504 U.S. 428, 433 (1992) (citing *Illinois Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 184 (1979)); see also *Reynolds v. Sims*, 377 U.S. 533, 561–62 (1963) (stating that the right of suffrage is a fundamental matter in a free and democratic society); *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (stating that the political franchise of voting is regarded as a fundamental political right because it is preservative of all others).

franchise within the United States, the American political system has overcome numerous barriers²³ to universal suffrage.²⁴ Despite the paramount importance of an individual's right to vote, that right has at times been at odds with the state's interest in safeguarding its ballot against fraud.²⁵ The questions before the Tennessee Supreme Court that caused it to grant certiorari were whether Tennessee's photo ID requirement²⁶ created an undue burden on would-be voters and whether the Act was unconstitutional.²⁷ In *City of Memphis v. Hargett*,²⁸ the Tennessee Supreme Court held that the photo ID requirement did not unduly burden would-be voters²⁹ and found no basis for invalidating the Act on constitutional grounds under a strict scrutiny standard of review, either facially or as-applied.³⁰ Neither did the court find that the Act constituted an additional qualification under the Tennessee Constitution, nor did it find that the Act violated equal protection by favoring absentee voters over in-person voters.³¹

A. The Development of the State's Interest in Safeguarding Electoral Ballots

Although the United States Supreme Court considers the right to vote vital to a functioning democracy, it does not consider it absolute.³² Political franchise may be privileged, but states are permitted latitude to conduct elections as they see fit provided their conduct is within constitutional confines.³³ In general, the United

23. U.S. CONST. amend. XXVI (no abridgment for citizens eighteen years or older); U.S. CONST. amend. XXIV (no abridgment for failure to pay poll tax or other tax); U.S. CONST. amend. XIX (no abridgment on account of sex); U.S. CONST. amend. XV (no abridgment on account of race, color, or previous servitude).

24. See generally *Wesberry v. Sanders*, 375 U.S. 1, 17–18 (1961) (stating that the United States Constitution leaves no room for classification of people in a way that unnecessarily abridges the right to vote).

25. See *Burdick*, 504 U.S. at 433 (stating that both common sense and constitutional law compels the conclusion that the government must play an active role in structuring elections).

26. TENN. CODE ANN. § 2-7-112 (2012).

27. *City of Memphis v. Hargett*, 414 S.W.3d 88, 96 (Tenn. 2013).

28. *Id.*

29. *Id.* at 106.

30. *Id.* at 111.

31. *Id.*

32. *Dunn v. Blumstein*, 405 U.S. 330, 336 (1972).

33. See generally *Smith v. Allwright*, 321 U.S. 649, 657 (1944) (stating that Texas is free to conduct and limit its elections within the United States Constitution).

States Constitution empowers a state to determine the time, place, and manner of holding elections.³⁴ The right to vote can be diminished in many ways, including by debasement of an individual's vote.³⁵ The Court has held that for democratic elections to be fair and honest, substantial regulation of them is required.³⁶ Consequently, the state has a compelling interest in preventing fraud that would otherwise debase or undermine a citizen's vote.³⁷

B. Federal Development of the State's Interest in Safeguarding its Ballots and the Use of Celebrezze's More Flexible Standard of Review

One of the first instances in which the United States Supreme Court weighed the state's interest in regulating its ballot while eschewing a strict scrutiny standard of review occurred in *Anderson v. Celebrezze*.³⁸ The *Celebrezze* Court addressed whether Ohio's early filing deadline impermissibly burdened the plaintiff's voting and associational rights under the First and Fourteenth Amendments, respectively.³⁹ The district court held that the deadline imposed an impermissible burden on the plaintiff's First Amendment rights and, because it required an independent to declare his candidacy without requiring a similar action from a major party candidate, also violated the plaintiff's right to equal protection under the Fourteenth Amendment.⁴⁰ The district court indicated that the state had advanced particular reasons for the early deadline but rejected the state's defense concerning political stability and did not uphold the deadline.⁴¹ The Sixth Circuit Court of Appeals reversed, holding that the early deadline was supported by a reasonable administrative reason by "ensuring that voters making the important choice of their next president have the opportunity for a careful look at the candidates."⁴²

Reversing the decision of the appellate court, the Supreme Court held that the early filing deadline was not justified by Ohio's interest

34. U.S. CONST. art. I, § 4, cl. 1.

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

36. *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983) (quoting *Storer v. Brown*, 415 U.S. 724, 730 (1974)).

37. *Reynolds*, 377 U.S. at 555; see also *Burson v. Freeman*, 504 U.S. 191, 199 (1992).

38. 460 U.S. 780.

39. *Id.* at 782.

40. *Id.* at 783.

41. *Id.*

42. *Id.* at 784–86 (quoting *Anderson v. Celebrezze*, 664 F.2d 554, 563 (6th Cir. 1981)).

in protecting political stability.⁴³ The Court maintained that no one de facto test can separate valid restrictions from invalid restrictions concerning a state's law regulating election.⁴⁴ Instead, the Court stated that a court must use an analytical method similar to the litigative process by "consider[ing] the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments . . . [and] then [the court] must identify and evaluate the precise interests put forward by the State as justifications for the burden imposed by its rule."⁴⁵

The Supreme Court in *Burdick v. Takashi*⁴⁶ followed *Celebrezze's* precedent, opting for a more flexible standard rather than strict scrutiny, stating that "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently."⁴⁷ In *Burdick*, the plaintiff claimed that Hawaii's prohibition on write-in voting unreasonably violated his rights as protected under the First and Fourteenth Amendments.⁴⁸ Relying on *Celebrezze*, the Court stated that the more flexible standard was the appropriate standard by which to evaluate Hawaii's regulation.⁴⁹ Additionally, the Court noted that "the right to vote is the right to participate in an electoral process that is necessarily structured to maintain the integrity of the democratic system" and held that Hawaii's prohibition did not impose an unconstitutional burden.⁵⁰

The extent that a regulation burdens a fundamental right will affect how a court decides whether to apply strict scrutiny or *Celebrezze's* more flexible standard. Strict scrutiny requires that a regulation be narrowly tailored to advance a compelling state interest, whereas *Celebrezze's* test merely requires a balancing test between the state's interest and the involved burdened right.⁵¹ When a right derived under the First or Fourteenth Amendment is subjected to a severe restriction by a regulation, strict scrutiny is appropriate, and "the regulation must be 'narrowly tailored to

43. *Id.* at 806.

44. *Id.* at 789.

45. *Id.*

46. 504 U.S. 428 (1992).

47. *Id.* at 433.

48. *Id.* at 430.

49. *Id.* at 438. "The appropriate standard for evaluating a claim that a state law burdens the right to vote is set forth in *Anderson*." *Id.*

50. *Id.* at 441.

51. *Id.* at 433-34.

advance a state interest of compelling importance.”⁵² However, in instances where the regulation “imposes only ‘reasonable, nondiscriminatory restrictions’ . . . [then] ‘the State’s important regulatory interests are generally sufficient to justify’ the restrictions,” and the *Celebrezze* standard should be applied.⁵³

In *Timmons v. Twin Cities Area New Party*,⁵⁴ the plaintiff political party claimed that Minnesota’s fusion candidacy ban⁵⁵ preventing candidates from appearing on an electoral ballot as a representative of more than one political party, infringed upon its associational rights under the First and Fourteenth Amendments.⁵⁶ Echoing *Celebrezze*, the Court held that no bright-line rule existed for separating permissible election-related regulations from impermissible ones.⁵⁷ Instead, the plaintiff’s burdens must be reconciled with the compelling interest being advanced by the state.⁵⁸ A lesser burden on the voter can be justified by “reasonable, nondiscriminatory restrictions” created by the state.⁵⁹ Furthermore, these restrictions do not require an “empirical verification of the weightiness of . . . [its] asserted justifications.”⁶⁰ The Court held that the fusion ban did not unconstitutionally burden the plaintiff, and that the state’s restrictions were “correspondingly weighty’ valid state interests in ballot integrity and political stability.”⁶¹

The Court continued to sustain the significance of the state’s interest in maintaining its election ballots in *Crawford v. Marion County Election Board*⁶² by holding that a voter ID requirement⁶³ was constitutional and relevant to preventing voter fraud.⁶⁴ In its decision, the Court again noted that any burden on a citizen voter “must be justified by relevant and legitimate state interests

52. *Id.* at 434 (quoting *Norman v. Reed*, 502 U.S. 279, 289 (1992)).

53. *Id.* (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 788 (1983)).

54. 520 U.S. 351 (1997).

55. MINN. STAT. § 204B.04. No individual can run for office as a candidate for more than one political party. *Id.*

56. *Timmons*, 520 U.S. at 355.

57. *Id.* at 359.

58. *Id.* at 358.

59. *Id.* at 358–59.

60. *Id.* at 364.

61. *Id.* at 369–70.

62. 553 U.S. 181 (2008).

63. IND. CODE § 3-11-8-25.1 (LexisNexis 2013). Voters would have to provide identification prior to casting a ballot at a voting location. *Id.*

64. *Crawford*, 553 U.S. at 186. Rather than use a clear-cut rule, “a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the ‘hard judgment’ that our adversary system demands.” *Id.* at 190.

'sufficiently weighty to justify the limitation.'⁶⁵ The Court reiterated that no litmus test existed, and that each court must examine the particular interests of the state as well as the particular rights of the voter. The Court went on to hold that Indiana's state interests were sufficiently strong to maintain constitutional soundness.⁶⁶ Furthermore, the Court clarified that even if providing a voter ID was only debatably effective at preventing voter fraud, it was nonetheless still proper for Indiana to institute such a requirement.⁶⁷

In fact, the state's interest in protecting the purity of its electoral ballot is so important that it is allowed to act proactively, instead of merely reactively, as stated in *Munro v. Socialist Workers Party*.⁶⁸ In *Munro*, the plaintiff alleged that a Washington statute requiring that a political party receive at least 1% of the vote before being placed on the primary election ballot violated his First and Fourteenth Amendment rights.⁶⁹ The Court noted that it has "never required a State to make a particularized showing of the existence of voter confusion, ballot overcrowding, or the presence of frivolous candidacies prior to the imposition of reasonable restrictions on ballot access."⁷⁰ The practical purpose behind not requiring a state to show voter fraud is to allow it to escape court battles premised on whether the fraud itself rises to the level of requiring restrictions.⁷¹

C. Development of Political Franchise in Tennessee and the Use of Strict Scrutiny

In Tennessee, the right to vote is guaranteed by the Constitution of the State of Tennessee.⁷² All persons who are both eighteen years of age and registered to vote are eligible to do so without further qualification attached to the right of suffrage.⁷³ Furthermore, equal protection is guaranteed under article XI, section 8 of the Tennessee constitution.⁷⁴ The constitution also provides that the General

65. *Id.* at 191 (quoting *Norman v. Reed*, 502 U.S. 279, 288–89 (1992)).

66. *Id.* at 190.

67. *Id.* at 196.

68. 479 U.S. 189, 196 (1986).

69. *Id.* at 190–91.

70. *Id.* at 194–95.

71. *Id.* at 195.

72. TENN. CONST. art. I, § 5.

73. TENN. CONST. art. IV, § 1. "All such requirements shall be equal and uniform across the state, and there shall be no other qualification attached to the right of suffrage." *Id.*

74. TENN. CONST. art. XI, § 8. "The Legislature shall have no power to suspend

Assembly is able to safeguard the integrity of its ballot,⁷⁵ with the Tennessee Code Annotated containing similar provisions.⁷⁶

As early as 1909, the Tennessee Supreme Court began navigating what it considered to be a qualification attached to the right of suffrage under the state constitution by stating that legislative acts to register citizens as voters did not constitute an additional qualification on the right to vote.⁷⁷ Instead, requiring citizens to register constituted a reasonable regulation, which was distinguishable from the prohibitory additional qualification of the Tennessee constitution.⁷⁸ Furthermore, Tennessee courts have recognized that the legislature can determine the qualifications of voters and regulate elections,⁷⁹ but that right cannot go beyond the powers vested in the state by the Tennessee constitution.⁸⁰

In *Bemis Pentecostal Church v. State*,⁸¹ the Tennessee Supreme Court stated, similarly to the United States Supreme Court in its cases concerning political franchise, that Tennessee had the authority to control the conduct of its elections.⁸² The *Bemis* plaintiffs claimed that a legislative act requiring them to file disclosure statements regarding their contributions to political campaigns violated their First and Fourteenth Amendment rights.⁸³ Even when held to a strict scrutiny standard, the court stated that not only did the state have a compelling interest in protecting its electoral ballots, but that the Tennessee Constitution guaranteed the authority of the General Assembly to protect its ballots.⁸⁴ The *Bemis* court noted that “the effective exercise of the right to vote is

any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land . . .” *Id.*

75. TENN. CONST. art. IV, § 1. “[T]he General Assembly shall have power to enact . . . laws to secure the freedom of elections and the purity of its ballot box.” *Id.*

76. TENN. CODE ANN. § 2-1-102 (2012). The purpose “is to regulate the conduct of all elections by the people so that: (1) the freedom and purity of the ballot is secured.” *Id.*

77. See *State v. Weaver*, 122 S.W. 465, 465–66 (Tenn. 1909) (quoting *Madison v. Wade*, 16 S.E. 21 (Ga. 1892)) (stating that registration added no qualification but merely served to identify voters).

78. See, e.g., *Moore v. Sharp*, 16 S.E. 21 (Ga. 1896); *Trammell v. Griffin*, 207 S.W. 726 (Tenn. 1918).

79. See *Trotter v. Maryville*, 235 S.W.2d 13, 18 (Tenn. 1950); see also *Cook v. State*, 16 S.W. 471 (Tenn. 1891).

80. *Trotter*, 235 S.W.2d at 18.

81. 731 S.W.2d 897 (Tenn. 1987).

82. *Id.* at 901.

83. *Id.* at 898–99.

84. *Id.* at 901.

essential to the continued existence of democratic institutions.”⁸⁵ The court ultimately held the Campaign Financial Disclosure Act to be constitutional.⁸⁶

Generally, claims that arise under the United States Constitution involving a First Amendment or Fourteenth Amendment right are subject to the more flexible standard of analysis crafted in *Celebrezze*.⁸⁷ However, in *Planned Parenthood of Middle Tenn. v. Sundquist*,⁸⁸ the Tennessee Supreme Court stated that just because the United States Supreme Court has adopted a less rigorous standard for cases involving the United States Constitution did not mean that Tennessee’s highest court was required to adopt that same standard in analogous cases arising under the Tennessee Constitution.⁸⁹ In *Sundquist*, the plaintiff sought declarative and injunctive relief against certain portions of Tennessee’s criminal abortion statute, some of which were struck down while other portions were upheld by the Tennessee Court of Appeals.⁹⁰ Both the trial court and court of appeals used the undue burden standard promulgated by the United States Supreme Court.⁹¹

When the Tennessee Supreme Court granted certiorari, it applied a strict scrutiny standard because the claims arose under the Tennessee Constitution.⁹² The court noted that the right to privacy was fundamental in nature⁹³ and received special protection.⁹⁴ Furthermore, the court stated that “Tennessee courts have adopted this ‘strict scrutiny’ approach in regard to fundamental rights without exception.”⁹⁵ As a result, the *Sundquist* court held that the right to terminate was fundamental to the right of privacy and did not pass a strict scrutiny analysis.⁹⁶ Concordant with *Sundquist*’s holding that strict scrutiny applied to rights protected

85. *Id.*

86. *Id.* at 907.

87. 460 U.S. 780. *See, e.g., Crawford v. Marion Cnty. Election Bd.*, 533 U.S. 181 (2008); *Timmons v. Twin Cities Area New Party*, 520 U.S. 351 (1997).

88. 38 S.W.3d 1 (Tenn. 2000).

89. *Id.* at 14–15.

90. *Id.* at 3.

91. *See Planned Parenthood v. Casey*, 505 U.S. 833, 878 (1992) (holding that the strict scrutiny standard of review was abandoned and adopting the undue burden standard).

92. *Sundquist*, 38 S.W.3d at 4.

93. *Id.* at 11.

94. *Id.*

95. *Id.*

96. *Id.* at 25 .

by the Tennessee Constitution, the court of appeals stated in *City of Memphis v. Hargett*⁹⁷ that “[a] burden on a fundamental right, under Tennessee jurisprudence, must be subjected to strict scrutiny.”⁹⁸

Other state supreme courts have likewise chosen to use the strict scrutiny standard when analyzing claims that arise from a fundamental right enumerated in both the state constitution and the United States Constitution. In *Weinschenk v. Missouri*,⁹⁹ a 2006 Missouri statute required voters to present a state or federally issued photo ID. The plaintiff claimed this requirement interfered with the right to vote as protected under the Missouri and United States constitutions.¹⁰⁰ The Supreme Court of Missouri noted that strict scrutiny was proper involving statutes that impugn upon a fundamental right protected by the United States Constitution and would also be proper for violations under the Constitution of Missouri, as the burden on the voter would be severe.¹⁰¹ In the decision, the court stated that the statute could be upheld only if “it can survive strict scrutiny . . . by showing it is necessary to accomplish a compelling state interest or that it is ‘narrowly drawn to express the compelling state interest at stake.’”¹⁰² The court held that the photo ID requirement was not narrowly tailored because other verification methods, such as providing a utility bill or bank statement, were less restrictive and equally effective.¹⁰³

III. ANALYSIS OF *CITY OF MEMPHIS V. HARGETT*

In *City of Memphis v. Hargett*,¹⁰⁴ the Supreme Court of Tennessee, in a 4-1 decision, held that the photo ID requirement mandated by Tennessee Code Annotated section 2-7-122 did not unconstitutionally violate the plaintiff's rights under the Fourteenth Amendment, either facially or as-applied.¹⁰⁵ Neither did the Act constitute an additional qualification under article IV, section 1, nor did it violate equal protection under article XI, section 8 of the Tennessee Constitution.¹⁰⁶

97. 2012 Tenn. App. LEXIS 742 (Tenn. Ct. App. 2012), *aff'd*, *City of Memphis v. Hargett*, 414 S.W.3d 88 (Tenn. 2013).

98. *Id.* at 25 (citing *Sundquist*, 38 S.W.3d at 15).

99. 203 S.W.3d 201 (Mo. 2006).

100. *Id.* at 204.

101. *Id.* at 210–11, 216.

102. *Id.* at 217 (quoting *In re Norton*, 123 S.W.3d 170, 173 (2003)).

103. *Id.*

104. 414 S.W.3d 88 (Tenn. 2013).

105. *Id.* at 103–09.

106. *Id.* at 108–12.

The court based its decisions concerning the facial and as-applied constitutional challenges on these grounds: 1) the state has a compelling interest in maintaining the integrity of its election ballot;¹⁰⁷ 2) the photo ID requirement is narrowly tailored to achieve that integrity and it is not impermissibly intrusive;¹⁰⁸ and 3) the plaintiffs' time and travel burdens are insufficient to sustain an as-applied challenge.¹⁰⁹ Concerning the plaintiffs' allegations that the photo ID requirement constituted both an additional qualification and also violated equal protection by differentiating between in-person and absentee voters, the court based its response as follows: 1) the requirement is not an additional voting qualification, but is instead a regulation related to an existing voting qualification¹¹⁰ and 2) essential differences exist between in-person and absentee voters, which does not give rise to equal protection issues of identity verification.¹¹¹

Justice Gary Wade wrote the majority opinion and first considered whether the issues before the court were justiciable.¹¹² The 2013 amendment to the photo ID act (the "Amendment") rendered moot the plaintiffs' claim that photo IDs issued from the Library were valid forms of ID and thus the claim was no longer a justiciable issue.¹¹³ However, the plaintiffs' constitutional claims still presented a legal controversy and thus were justiciable.¹¹⁴

The opinion next discussed whether the plaintiffs had standing, stating that, to establish constitutional standing, the plaintiffs must satisfy three elements: 1) an injury that is "distinct and palpable" and not conjectural or hypothetical; 2) a causal connection tracing the plaintiff's injury to the defendants' conduct; and 3) the injury is capable of being righted by the court.¹¹⁵ The court determined that the plaintiffs satisfied each of the elements: 1) their assertions concerning infringements on their right of suffrage were palpable and not conjectural or hypothetical; 2) the defendants' enforcement of the Act established a causal connection between the defendants' conduct and plaintiffs' alleged injuries; and 3) if the court were to rule in the plaintiffs' favor, their injuries could be cured.¹¹⁶

107. *Id.* at 104.

108. *Id.* at 104–05.

109. *Id.* at 108.

110. *Id.* at 109.

111. *Id.* at 111.

112. *Id.* at 96.

113. *Id.* at 97.

114. *Id.* at 96–98.

115. *Id.* at 98.

116. *Id.* at 99.

Consequently, the court held that the plaintiffs had standing and that the defendants' contentions to the contrary were without merit.¹¹⁷ Nonetheless, the court simultaneously stated that the City of Memphis was restricted to asserting only its own rights, not the rights of its co-plaintiffs, and thus the city lacked standing.¹¹⁸

Next, the court considered which standard of review was proper and determined that, because the plaintiffs and defendants had agreed in the lower courts that strict scrutiny would be proper, it would assume strict scrutiny to be the correct standard.¹¹⁹ The court also stated that a more flexible standard—the *Celebrezze* standard—was available, in which “a showing of important governmental regulatory interests may justify lesser restrictions,”¹²⁰ but because the parties were in agreement concerning the standard of review, it was reluctant to expand the standard.¹²¹ Nonetheless, even to satisfy strict scrutiny, the court stated that “the [d]efendants must demonstrate that any burden on the right to vote is justified by a compelling state interest.”¹²²

After determining the proper standard of review to be used, the court addressed the plaintiffs' allegations of facial and as-applied constitutional violations.¹²³ As to the former, the court found unpersuasive the plaintiffs' argument that preventing voter fraud did not constitute a compelling governmental interest that justified the burdening of their right of suffrage.¹²⁴ Instead, the court held that the “protection of the integrity of the election process empowers the state to enact laws to prevent voter fraud,”¹²⁵ and that such an interest manifesting as a voter ID requirement was not only narrowly tailored to maintain the integrity of the state's electoral ballot,¹²⁶ but also was “a logical method of protecting the integrity of elections . . . [against] in-person voter fraud.”¹²⁷

117. *Id.*

118. *Id.* at 100 (citing 56 AM. JUR. 2d *Municipal Corporations, Counties, and Other Political Subdivisions* § 734 (2010)). “A political subdivision of the state . . . ‘is limited to asserting rights that are its own,’ meaning that it cannot merely ‘assert the collective individual rights of its residents.’” *Id.*

119. *Id.* at 102.

120. *Id.*

121. *Id.*

122. *Id.* (citing *Bemis Pentecostal Church v. State*, 731 S.W.2d 897, 903 (Tenn. 1987)).

123. *Id.* at 103–08.

124. *Id.* at 103–04.

125. *Id.* at 104.

126. *Id.*

127. *Id.* at 104–05 (citing *City of Memphis v. Hargett*, 2012 App. LEXIS 742, at *10 (Tenn. Ct. App. 2012)).

Moreover, in response to the plaintiffs' claims that the effort to gain a proper photo ID effectively acted as a constructive poll tax, the court stated that the Act's many exceptions¹²⁸ ameliorated those burdens and that, even with such burdens, the interest of protecting the ballot still justified such inconveniences.¹²⁹ As a result, the court held that the Act did not constitute a poll tax, and the plaintiffs were not entitled to relief based on their facial claims.¹³⁰

The court next addressed the plaintiffs' as-applied constitutional claims. The plaintiffs claimed that even if the photo ID requirement is constitutional in general, it is nonetheless unconstitutional given the plaintiffs' particular circumstances.¹³¹ Similar to its analysis concerning the plaintiffs' facial challenge, the court stated that the plaintiffs failed to establish that the effort required to gain a proper photo ID was sufficient to sustain an as-applied challenge.¹³² The court maintained that the plaintiffs' burden in having to drive to the DMV amounted to an inconvenience that did not rise to the exacting standard of an impermissibly burdensome condition on their right to vote.¹³³ Consequently, the state's interest in safeguarding its electoral ballots by requiring a photo ID was not unconstitutional as applied to the particular circumstances of the plaintiffs.¹³⁴

The court's final analysis concerning the plaintiffs' claims involved the allegations that the Act created an additional qualification,¹³⁵ and that the allowances the Act made for provisional and absentee voters, but not for in-person voters, constituted a violation of equal protection.¹³⁶ Both are protected against under the

128. The Act provides exceptions for indigent and religious voters. Additionally, voters can cast provisional votes. *Id.* at 93.

129. *Id.* at 106.

130. *Id.*

131. *Id.* at 107.

132. *Id.* at 108.

133. *Id.*

134. *Id.*

135. Under the Tennessee Constitution, the only qualifications are that one must be at least eighteen years of age, a United States citizen, a Tennessee resident for a period of time as prescribed by the General Assembly, and registered to vote in the county of residence for a period of time prescribed by the General Assembly. No further qualifications are attached to the right of suffrage. TENN. CONST. art. IV, § 1.

136.

The Legislature shall have no power to suspend any general law for the benefit of any particular individual, nor to pass any law for the benefit of individuals inconsistent with the general laws of the land; nor to pass any law granting to any individual or individuals, rights, privileges, immunitie[s] or exemptions other than such as may be, by the same law

Tennessee constitution.¹³⁷ The plaintiffs claimed that the photo ID requirement was an additional qualification attached to the right to vote.¹³⁸ The court, relying upon the persuasive authority of similarly-reasoned Indiana and Georgia cases,¹³⁹ reasoned that the photo ID requirement cannot be fairly characterized as an additional voting qualification.¹⁴⁰ Instead, the court stated that Tennessee's photo ID requirement was "more properly classified as a regulation pertaining to an existing voting qualification."¹⁴¹ Accordingly, the court held that the photo ID requirement did not amount to an impermissible additional qualification, and therefore the plaintiffs were not entitled to relief on those grounds.¹⁴²

Regarding the plaintiffs' claims that the Act violated their right to equal protection, the court considered whether the classes involved, i.e., in-person voters and absentee voters, were similarly situated.¹⁴³ The court stated that if they are "not similarly situated, then there is no basis for finding a violation of the right to equal protection."¹⁴⁴ The court held that the essential differences between in-person and absentee or provisional voters were sufficient to undermine claims that the two were so similarly situated as to constitute a violation of equal protection.¹⁴⁵ Instead, the classes of in-person voters and absentee voters were not entitled to equal protection before the law concerning identity verification.¹⁴⁶

extended to any member of the community, who may be able to bring himself within the provisions of such law.

TENN. CONST. art. XI, § 8.

137. *Hargett*, 414 S.W.3d at 108–11.

138. *Id.* at 108.

139. See *Democratic Party of Ga., Inc. v. Perdue*, 707 S.E.2d 67 (Ga. 2011) (stating that the state's photo ID requirement did not violate the state constitution because it fell within the legislature's wide latitude in determining how a qualification is constituted); *League of Women Voters of Ind., Inc. v. Rokita*, 929 N.E.2d 758 (Ind. 2010) (stating that requiring a government-issued photo ID card is regulatory in nature); see also *State v. Weaver*, 122 S.W. 465, 466 (Tenn. 1909) (stating that requiring a party to be registered is not an additional qualification, but merely a matter of proof to ascertain whom the voter is).

140. *Id.* at 109.

141. *Hargett*, 414 S.W.3d at 109.

142. *Id.*

143. *Id.* at 110.

144. *Id.* (citing *Posey v. City of Memphis*, 164 S.W.3d 575, 579 (Tenn. Ct. App. 2004)).

145. *Id.* at 111.

146. *Id.*

Justice Wade concluded by confirming that Tennessee's photo ID law was constitutional under the Tennessee Constitution.¹⁴⁷ The majority noted that although the plaintiffs' claims were justiciable, no sufficient basis existed for invalidating the photo ID act.¹⁴⁸ The state government's interest in protecting the sanctity of its electoral ballot was sufficient to resist the plaintiffs' facial and as-applied allegations of unconstitutionality as well as the plaintiffs' claims concerning additional qualifications and equal protection.¹⁴⁹

Justice Koch authored the concurring opinion in which he questioned the standard of review conceded to and adopted by the majority.¹⁵⁰ While the majority assumed that the standard of review would be strict scrutiny because of the parties' agreement to it, the concurrence contended that the proper standard should be definitively decided upon and settled before future challenges to the Act arise.¹⁵¹ Generally, the concurrence noted, allegations involving the right to vote under the United States Constitution are analyzed using the balancing approach in *Celebrezze*, which weighs the state's interest with the burdened right, provided the regulation is not "excessively burdensome."¹⁵²

The concurrence contended that the Tennessee Supreme Court is now at a constitutional crossroads in which a decisive standard of review should be adopted.¹⁵³ If the Tennessee Constitution's protection of the right to vote is sufficiently similar to the United States Constitution's protections, the Tennessee Supreme Court could adopt *Celebrezze's* balancing approach as its standard of review.¹⁵⁴ Furthermore, Justice Koch continued, the Tennessee Supreme Court in *Cook v. State*¹⁵⁵ produced a standard that was similar to the United States Supreme Court's. The *Cook* court stated that a legislative act related to the right of suffrage "must not impose impossible or oppressive conditions," which Justice Koch considered analogous to *Crawford's* excessively burdensome language.¹⁵⁶ Consequently, Justice Koch reasoned that the plaintiffs

147. *Id.*

148. *Id.*

149. *Id.*

150. *Id.* (Koch, J., concurring).

151. *Id.* (Koch, J., concurring).

152. *Id.* at 113 (Koch, J., concurring) (citing *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202 (2008)).

153. *Id.* at 114 (Koch, J., concurring).

154. *Id.* (Koch, J., concurring).

155. 16 S.W. 471 (Tenn. 1981).

156. *Hargett*, 414 S.W.3d. at 115 (Koch, J., concurring) (citing *Cook*, 16 S.W. at 473).

in *Hargett* had failed to assert a valid constitutional claim because they did not adduce evidence that the Act amounted to an impossible or oppressive condition on their right to vote.¹⁵⁷

IV. CONSEQUENCES OF *CITY OF MEMPHIS V. HARGETT*

The Tennessee Supreme Court's decision in *City of Memphis v. Hargett* is symptomatic of the struggle between the right to vote and the state's interest in safeguarding its electoral ballot against would-be fraudulent activities.¹⁵⁸ The thread that began in *Celebrezze* at the federal level by balancing two equally important but conflicting interests further unspooled in *Hargett* at the state level.¹⁵⁹ Although the *Hargett* court chose to maintain the strict scrutiny standard that the plaintiff and defendant agreed upon in the lower court, it still had to reconcile the state's interest with the citizen's right to political franchise.¹⁶⁰ The court's rationale in *Hargett* suggests that the right to vote's importance is parallel to the ballot's integrity, and that the veracity of the latter gives legitimacy to the former.¹⁶¹

The court correctly determined that case law supports the state's interest in protecting the integrity of its ballot.¹⁶² In addition, the court rightly held that the photo ID requirement itself did not present so great a burden upon a citizen as to render the requirement unconstitutional, either facially or as-applied.¹⁶³ Like the photo ID requirement in *Crawford*,¹⁶⁴ Tennessee's photo ID

157. *Id.* at 115 (Koch, J., concurring).

158. Article I section 5 of the Constitution of the State of Tennessee guarantees that elections shall be free and equal and that the right of suffrage will be denied to no one. TENN. CONST. art. 1, § V. Article IV section 1 guarantees that no further qualification will be attached to the right to vote. TENN. CONST. art. IV, § 1. However, the Tennessee Supreme Court has previously noted that the Tennessee constitution has "surrounded the right of suffrage with some inconveniences, and authorized the legislature to attach more." *Hargett*, 414 S.W.3d at 105 (quoting *Cook*, 16 S.W. at 473 (Tenn. 1891)). Furthermore, Article IV, section 1 of the Tennessee Constitution authorizes the State to protect the purity of the ballot box. TENN. CONST. art. IV, § 1.

159. *Hargett*, 414 S.W.3d 88. See generally *Anderson v. Celebrezze*, 460 U.S. 780 (1983).

160. *Hargett*, 414 S.W.3d at 102.

161. *Id.* at 103.

162. *Id.* at 104. See generally *Munro v. Socialist Workers Party*, 479 U.S. 189, 194–95 (1986) (stating that the state did not have an evidentiary burden of proving voter fraud prior to regulating elections).

163. *Hargett*, 414 S.W.3d at 105, 111.

164. See *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008) (holding that even if the photo ID requirement was debatably effective, the propriety of the

requirement contained exceptions allowing absentee voters to submit a ballot by mail with verification provided by a signature comparison.¹⁶⁵ Additionally, the court correctly relied on precedent that did not require the state to provide evidence of voter fraud prior to establishing regulations to curb its threat.¹⁶⁶

Nonetheless, the *Hargett* court erred with its application of the strict scrutiny standard as to the facial constitutionality of the Act. According to the court itself, to satisfy strict scrutiny, a burden on a voter that manifests as a regulation must be justified by a compelling state interest.¹⁶⁷ Furthermore, the regulation must be narrowly tailored to achieve the compelling state interest.¹⁶⁸ However, and most importantly, the regulation is not narrowly tailored if the state's interest can be achieved by other, less invasive means.¹⁶⁹

The court stated that the photo ID requirement was narrowly tailored because it was a logical method in preventing voter fraud,¹⁷⁰ and that the use of a photo ID to verify an individual is standard practice in other situations.¹⁷¹ However, whether a regulation is narrowly tailored is not satisfied by the logical rigor of the regulation, nor is it satisfied by analogizing the method from one circumstance to another, particularly wherein the analog does not involve a privileged right. The right to board a plane is not comparable to the right to vote in terms of significance to the democratic tradition. Instead, a state's interest is narrowly tailored if no other means exist by which the interest can be achieved that are less intrusive and comparably effective.¹⁷²

Other, less intrusive means by which the state can ensure that voters are the ones whom they allege themselves to be is as simple as requiring official documentation containing a voter's name and

state to institute one was self-evident in protecting its electoral ballots).

165. *Hargett*, 414 S.W.3d at 93, 110–11.

166. *Id.* at 104.

167. *Id.* at 102.

168. *Id.*

169. *Id.* at 102–03. “A regulation cannot qualify as narrowly tailored if there are alternative means of achieving the state interest that would be less intrusive and comparably effective.” *Id.*

170. *Id.* at 105 (citing *City of Memphis v. Hargett*, 2012 App. LEXIS 742, at *10 (Tenn. Ct. App. 2012z)).

171. *Id.* “[P]hoto ID verification is a standard requirement for boarding a plane, entering federal buildings, and cashing a check.” *Id.* (citing COMM’N ON FED. ELECTION REFORM, BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM § 2.5, 18 (2005)).

172. *Id.* at 102–03.

address, such as a bank statement or utility bill.¹⁷³ Additionally, other states continue to use signature verification, in which voters' signatures given at the time of voting are matched with their signatures on their registration card.¹⁷⁴ The *Hargett* court even noted that Tennessee itself allowed absentee voters to provide a signature that would be compared with the voter's signature stored in the state's registration record.¹⁷⁵

Signature verification is used for absentee voters because their nonattendance at a voting location forecloses any possibility of verifying their photo ID.¹⁷⁶ In the context of fraud prevention, the concerns are largely logistical because the absentee voter cannot be present at a polling location. As a result, absentee voters are not required to provide a photo ID, yet they can still verify their identity by alternative means—namely signature verification. Allowing in-person voters to use signature verification could potentially be an added burden to voting officials. Nonetheless, logistical reasons alone should not restrict political franchise, particularly if signature or document verification can achieve similar results of curbing electoral fraud at the cost of an added burden on officials, as opposed to an added burden on voters. A voter who is either missing or does not possess a photo ID at the time of voting should be allowed to provide identity verification through a signature or official documents, even though these methods may require more work on behalf of the vote-taker.

Using signature or document verification can provide a less intrusive but comparably effective way of preventing electoral fraud at the time of voting.¹⁷⁷ As such, the requirement that a voter

173. Gilda R. Daniels, *A Vote Delayed is a Vote Denied: A Preemptive Approach to Eliminating Election Administration Legislation that Disenfranchises Unwanted Voters*, 47 U. LOUISVILLE L. REV. 57, 77 (2008).

174. Muhammad At-Tauhidi, *Access v. Integrity: Determining the Constitutionality of Voter ID Laws under Anderson v. Celebrezze*, 17 TEMP. POL. & CIV. RTS. L. REV. 215, 221 (2007); see also FLA. STAT. ANN. § 101.048 (2008) (allowing voters without a voter ID to cast a provisional ballot matching the signature therein with her voter registration signature).

175. *Hargett*, 414 S.W.3d at 110. See also TENN. CODE ANN. § 2-6-202(d)(1), (g) (2012).

176. *Hargett*, 414 S.W.3d at 110.

177. Nineteen states still use non-photo ID—such as a social security card, a utility bill, or a signature—to verify voters. Nat'l Conference of State Legislatures, *Voter Identification Requirement* (2014), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx>. Another nineteen states do not require identification documents to verify voters. Nat'l Conference of State Legislatures, *Voter Verification without ID Documents* (2014), <http://www.ncsl.org/research/elections-and-campaigns/voter-verification-without-id-documents.aspx>.

provide a photo ID at the time of voting is not narrowly tailored, as other means of preventing voter fraud exist that is less burdensome on the voter. The *Hargett* court would have been better served by definitively adopting the more flexible *Celebrezze* standard. Furthermore, it would have satisfied the concurrence's criticism resulting from the majority's failure to conclusively adopt a standard, as opposed to merely conceding to the litigative parties' agreement concerning the propriety of strict scrutiny.¹⁷⁸ As the court has maintained a strict scrutiny standard, it has to resolve the discrepancy between its definition of being narrowly tailored and the availability of comparably effective, less restrictive identification processes.

In *Celebrezze*, the more flexible standard does not require that a state interest be narrowly tailored, but rather that the state's interests are legitimate and that those interests are sufficiently legitimate to burden the voter.¹⁷⁹ By adopting *Celebrezze's* more flexible standard, the Tennessee Supreme Court would have set precedent for the use of that standard in future cases involving a fundamental right protected by the Tennessee Constitution. Additionally, the Tennessee Supreme Court could have adopted the standard created in *Cook v. State*, which used an "impossible or oppressive condition" benchmark to decide whether a regulation was constitutional.¹⁸⁰ Nonetheless, given the significance of the right to vote, and the Tennessee Supreme Court's adherence to a strict scrutiny standard of review for fundamental rights, the Act is not narrowly tailored.

V. CONCLUSION

The Tennessee Supreme Court's decision in *City of Memphis v. Hargett* represents the precarious balance between the right to vote and the interests of the state in safeguarding the practice of that right. In *Hargett*, the court correctly noted the compelling state's interest in safeguarding its electoral ballots by relying on the precedent set by the United States Supreme Court and previous cases from the Tennessee Supreme Court. As Justice Koch's concurrence rightly illustrated, the majority opinion merely conceded to the strict scrutiny standard agreed upon by the parties. However, a strict scrutiny standard of review concerning violations of the Tennessee constitution is an exacting test, under which the

178. *Hargett*, 414 S.W.3d at 111.

179. *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983).

180. *Hargett*, 414 S.W.3d at 115.

Act must be narrowly tailored. However, the availability of equally useful and less restrictive means of verifying a voter's identity means that requiring a photo ID is not narrowly tailored to advance the state's interest.

By maintaining strict scrutiny as the standard of review, the Tennessee Supreme Court erred by holding that the photo ID requirement was narrowly tailored when signature or document verification were available alternatives. Furthermore, the *Hargett* court missed an opportunity to adopt the Supreme Court's *Celebrezze* standard or use the "impossible or oppressive conditions" standard it set forth in *Cook*. Going forward, the court could adopt either standard to circumvent the strict scrutiny requirement that a regulation be narrowly tailored. Otherwise, the court will have to reconcile the appropriateness of how narrowly tailored the Act is when other less restrictive and comparably effective means exist to identify voters.

**TENNESSEE
LAW REVIEW**

**ANNUAL INDEX
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COLLEGE OF LAW**

INDEX TO VOLUME 81

AUTHOR INDEX..... 953
SUBJECT INDEX..... 955
TABLE OF CASES 957

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