

SC97470

IN THE SUPREME COURT OF MISSOURI

PRIORITIES USA, ET AL.,

Plaintiffs-Respondents,

v.

STATE OF MISSOURI, ET AL.,

Defendants-Appellants.

RESPONDENTS' BRIEF

Appeal from the Circuit Court of Cole County, Missouri
Honorable Richard G. Callahan

Marc E. Elias*
Uzoma N. Nkwonta*
PERKINS COIE LLP
700 Thirteenth St., N.W., Suite 600
Washington, D.C. 20005-3960
(202) 654-6200
MElias@perkinscoie.com
UNkwonta@perkinscoie.com
**Pro Hac Vice* Application Pending

Don M. Downing, #30405
GRAY, RITTER & GRAHAM, P.C.
701 Market Street, Suite 800
St. Louis, Missouri 63101
(314) 241-5620
DDowning@grgpc.com
Charles W. Hatfield, No. 40363
Jeremy Root, No. 59451
STINSON LLP
230 W. McCarty Street
Jefferson City, Missouri 65101
(573) 636-6263
Chuck.Hatfield@stinson.com
Jeremy.Root@stinson.com

ATTORNEYS FOR PLAINTIFFS-
RESPONDENTS

TABLE OF CONTENTS

	Page
I. INTRODUCTION	7
II. BACKGROUND	10
A. Procedural History	10
B. Missouri’s General Assembly Enacted a Voter ID Law That Provided Three Options for Voting, Including Two Options for Voting Without Photo ID.	11
C. Testimony from Several Witnesses Demonstrated That the Option 2 Affidavit is False, Misleading, and Confusing.	12
D. Voters and Election Officials Were Confused About the Identification Requirements.	15
E. The False and Misleading Affidavit Imposed a Burden on the Rights to Vote of Potentially Hundreds of Thousands of Missourians.	17
F. The Trial Court Order and Judgment.	19
III. STANDARD OF REVIEW	21
IV. ARGUMENT	21
A. The Trial Court Correctly Enjoined the Use of the Affidavit and Select Advertisements Because They Misstate the Law and Mislead the Public by Suggesting That Photo ID Is Required to Vote. (<i>Points Relied On I, IV</i>).....	21
1. Defendants Failed to Preserve Any Argument That the Affidavit Accurately Describes the Voter ID Law Because They Conceded (and Argued) at Trial That Missouri Law Does Not Require Photo ID to Vote. (<i>Point Relied On I</i>).....	22
2. The Voter ID Law Does Not Require Photo ID to Vote and the Affidavit Mischaracterizes Its Provisions. (<i>Point Relied On I</i>).....	25
3. The Trial Court Correctly Enjoined the State’s Misleading Advertisements That Suggest Photo ID is Required to Vote. (<i>Point Relied On IV</i>).....	33
B. The Affidavit is Unconstitutional. (<i>Point Relied On I</i>).....	37
1. The Affidavit is Subject to Strict Scrutiny Because it Impinges on the Constitutional Right to Vote.	37

TABLE OF CONTENTS
(continued)

	Page
2. The Affidavit Requirement Significantly Burdens the Right to Vote.	39
3. The State Advances no Compelling or Even Legitimate Government Interest in Enforcing a False and Misleading Affidavit.....	43
C. The Missouri Constitution Does Not Authorize the State to Mislead Voters by Mischaracterizing Its Voter ID Laws. (<i>Point Relied On I</i>).	48
The Secretary of State Has No Authority to Re-Write the Affidavit. (<i>Point Relied On II</i>).....	51
The Trial Court Appropriately Severed the Affidavit From the Statute. (<i>Point Relied On III</i>).....	53
V. CONCLUSION	58

TABLE OF AUTHORITIES

Cases	Page
<i>Akin v. Director of Revenue</i> , 934 S.W.2d 295 (Mo. banc 1996).....	57
<i>Ambers-Phillips v. SSM DePaul Health Ctr.</i> , 459 S.W.3d 901 (Mo. banc 2015).....	44, 48
<i>Aziz v. Mayer</i> , No. 11AC-CC00439, slip op.	51
<i>Bensieck v. Cook</i> , 19 S.W. 642 (Mo. banc 1892).....	23
<i>Blaske v. Smith & Entzeroth, Inc.</i> , 821 S.W.2d 822 (Mo. 1991).....	38
<i>Burg v. Dampier</i> , 346 S.W.3d 343 (Mo. App. W.D. 2011).....	19
<i>Bush v. Gore</i> , 531 U.S. 98 (2000).....	43
<i>City of N.Y. v. W. Heritage Ins. Co.</i> , 98 F. Supp. 3d 557 (E.D.N.Y. 2015).....	26
<i>Collier’s Estate v. W. Paving & Supply Co.</i> , 79 S.W. 947 (Mo. 1904).....	27
<i>Desai v. Seneca Specialty Ins. Co.</i> , --- S.W.3d ---, 2019 WL 2588572 (Mo. banc June 25, 2019).....	27
<i>Edmunds v. Sigma Chapter of Alpha Kappa Lamda Fraternity, Inc.</i> , 87 S.W.3d 21 (Mo. App. W.D. 2002).....	19
<i>Etling v. Westport Heating & Cooling Servs., Inc.</i> , 92 S.W.3d 771 (Mo. 2003).....	36
<i>Fugate v. Jackson Hewitt, Inc.</i> , 347 S.W.3d 81 (Mo. App. W.D. 2011).....	53
<i>Golinski v. U.S. Office of Pers. Mgmt.</i> , 824 F. Supp. 2d 968 (N.D. Cal. 2012).....	48

TABLE OF AUTHORITIES

(continued)

Cases	Page
<i>Grimes v. Smith</i> , 776 F.2d 1359 (7th Cir. 1985)	33
<i>Indianapolis Life Ins. Co. v. U.S.</i> , 115 F.3d 430 (7th Cir. 1997)	49
<i>League of Women Voters of Fla., Inc. v. Detzner</i> , 314 F. Supp. 3d 1205 (N.D. Fla. 2018).....	37
<i>League of Women Voters of Ind. v. Rotika</i> , 929 N.E.2d 758 (Ind. 2010).....	46
<i>McKittrick v. Bode</i> , 113 S.W.2d 805 (Mo. 1938).....	49
<i>N.L.R.B. v. Winchell Processing Corp.</i> , 451 F.2d 306 (9th Cir. 1971)	36
<i>Noel v. Bd. of Educ.</i> , 465 S.W.3d 88 (Mo. App. E.D. 2015)	35
<i>Obama for Am. v. Husted</i> , 697 F.3d 423 (6th Cir. 2012)	37
<i>Vacca v. Mo. Dep't of Labor & Indus. Relations</i> , --- S.W.3d ---, 2019 WL 1247074 (Mo banc, Mar. 19, 2019)	22
<i>Rizzo v. State</i> , 189 S.W.3d 576 (Mo. banc 2006).....	19
<i>Romer v. Evans</i> , 517 U.S. 620 (1996).....	48
<i>State Auditor v. Joint Comm. on Legislative Research</i> , 956 S.W.2d 228 (Mo. banc 1997).....	49
<i>State ex rel. Hillman v. Beger</i> , 566 S.W.3d 600 (Mo banc. 2019).....	29
<i>State ex rel. Ideker, Inc. v. Grate</i> , 437 S.W.3d 279 (Mo. App. W.D. 2014)	36

TABLE OF AUTHORITIES

(continued)

Cases	Page
<i>State ex rel. KCP & L Greater Mo. Operations Co. v. Cook</i> , 353 S.W.3d 14 (Mo. App. W.D. 2011).....	29
<i>State ex rel. Webster v. Areaco Inv. Co.</i> , 756 S.W.2d 633 (Mo. App. E.D. 1988)	35
<i>State v. Clay</i> , 481 S.W.3d 531 (Mo. banc 2016).....	49
<i>State v. Davis</i> , 348 S.W.3d 768.....	21
<i>State v. Rowe</i> , 63 S.W.3d 647 (Mo. banc. 2002).....	30, 31
<i>State v. Williams</i> , 334 S.W.3d 177 (Mo. App. W.D. 2011)	23
<i>State v. Williams</i> , 548 S.W.3d 275 (Mo banc. 2018).....	29
<i>Thompson v. Comm. on Legislative Research</i> , 932 S.W.2d 392 (Mo. 1996).....	50
<i>Toledo Area AFL-CIO v. Pizza</i> , 154 F.3d 307 (6th Cir. 1998)	39
<i>Veasey v. Abbott</i> , 265 F. Supp. 3d 684 (S.D. Tex. 2017)	33
<i>Walters v. State Farm Mut. Auto Ins. Co.</i> , 793 S.W.2d 217 (Mo. App. S.D. 1990).....	28
<i>Weinschenk v. State</i> , 203 S.W.3d 201 (Mo. banc 2006).....	passim
 STATUTES	
RSMo § 116.175.....	50
RSMo § 115.427.....	1, 9
RSMo § 115.427.1.....	passim

TABLE OF AUTHORITIES
(continued)

Cases	Page
RSMo § 115.427.2.....	passim
RSMo § 115.427.2(3)	27
RSMo §115.427.3.....	passim
RSMo § 115.427.4.....	10, 17, 25, 29
RSMo. § 115.427.4(1)(b).....	26, 27
RSMo. § 115.427.5.....	34
RSMo. § 115.427.6.....	53
RSMo. § 115.427.8.....	44, 56
 OTHER AUTHORITIES	
Mo. Const. Art. VIII, § 11	8, 48, 50
Rule 84.06(b).....	60

I. INTRODUCTION

The fundamental right to vote and the right to equal protection of the laws are “at the core of Missouri’s constitution,” and provide even greater protection than their federal counterparts. *Weinschenk v. State*, 203 S.W.3d 201, 204 (Mo. banc 2006). If these rights have any meaning, at the very least they prohibit the State from introducing a misleading and confusing affidavit into the polling place that compels certain voters to attest, under penalty of perjury, to an outright misstatement of law. Yet that is precisely what the enjoined provisions of § 115.427, RSMo (the “voter ID law” or “HB 1631”) seek to do. Although Missouri law does not and never has required voters to present government-issued photo identification (“photo ID”) in order to vote—under the current law, eligible Missourians have three equally-valid options for voting, two of which do not require photo ID—those who attempted to vote with other forms of non-photo identification were confronted with a sworn statement (the “Affidavit”) that inexplicably forced them to attest, under penalty of perjury, that photo ID was “required . . . in order to vote,” among other confusing and inconsistent averments, followed by a second reminder that signing falsely subjected the voter to possible criminal prosecution. §§ 115.427.2 and 115.427.3, RSMo.

The trial court correctly enjoined the Affidavit, along with advertisements that similarly suggested that photo ID was a prerequisite for voting, because it is “contradictory and misleading” on its face, and the requirement that a voter execute such an affidavit “impermissibly infringes on a citizen’s right to vote as guaranteed under the Missouri Constitution.” D77 at 5. Defendants (collectively, “the State”) now seek to reverse this ruling by advancing a tortured reading of the voter ID law that was never raised in the

proceedings below, and which squarely contradicts the arguments that the State did assert at trial. For instance, the State contends that the Affidavit correctly describes the law and that photo ID is required to vote; yet at trial it claimed the opposite both in court, *see, e.g.*, Tr. (9/25) at 121 (“Do you recall . . . the State of Missouri does not require presentation of a photo ID in order for a voter to cast a ballot . . . [d]o you agree with me that’s still correct.”) (Cross-examination of Dr. Kenneth Mayer), and in its written submissions, *see* D61 at 27 (“[T]he Voter ID Law offers *three* alternative methods of voting, not all of which require photo ID—it does not simply mandate any one method.”); *see also id.* at 12 (“Patrick . . . acknowledged that the poster correctly stated that [the] new law did not require photo ID in order to vote.”). In another example, the State now claims that the “statute’s text does not make the [three alternatives] *equal* options for voting.” Br. of Appellants (May 1, 2019) [hereinafter “State’s Br.”] at 33. But at trial, the State again argued the opposite, claiming that all three voting options are “equally valid ways to vote and all of those ballots count just the same,” and that an election authority is “not required to” ask for photo ID first because “all [three] methods of voting are equally valid.” Tr. (10/1) at 64. Having advanced these arguments to convince the trial court that the voter ID law did not burden the right to vote, the State not only failed to preserve its present arguments, but should be estopped from asserting its new position on appeal.

Inconsistent arguments aside, the trial court’s ruling should be upheld as the State’s points of error have no merit. First, in arguing that the voter ID law requires photo ID to vote, the State misreads the plain language of the three options by conflating the process of establishing identity with the act of voting itself, and ignores portions of the statute that

expressly grant voters the right to cast a provisional ballot without any identification. The plain meaning and common usage of the word “require” make clear that the Affidavit’s statement is false, and the trial court was correct to enjoin it as well as any advertisements that made similar assertions. (*Points Relied On I, IV*). Second, the trial court correctly declined the State’s invitation to have the Secretary of State assume the role of the legislature and rewrite the Affidavit to address its constitutional defects. The State points to no authority that suggests the Secretary has the power to delete substantive portions of the Affidavit, including the misleading clause stating that photo ID is required for voting. (*Point Relied On II*). Third, the trial court properly adhered to the severance statute by striking the entire Affidavit while leaving the rest of the law intact. Excising all offending clauses and phrases individually would have left behind only an incomplete, meaningless, and redundant statement of the voter’s name and address that merely duplicates the precinct register. (*Point Relied On III*).

Finally, the trial court’s limited injunction required no inquiry into the appropriate interpretation of the recent constitutional amendment on voter identification. *See* Mo. Const. Art. VIII, § 11. Removing false and misleading statements from the voting process—particularly when presented to voters at the polls, in the form of an affidavit, just moments before receiving and casting their ballots—has little to do with the scope of legislative authority to pass voter ID requirements. Rather, it recognizes the common-sense principle that a State cannot lawfully misrepresent its own laws, or force its citizens to agree to outright misstatements of law in order to exercise the constitutional right to vote.

II. BACKGROUND

A. Procedural History

Plaintiffs filed this lawsuit to enforce the constitutional right to vote, in the face of increased burdens imposed by the State’s recently-enacted voter ID law, HB 1631. Plaintiffs alleged that HB 1631 impermissibly burdened the fundamental right to vote by forcing Missourians to either obtain and present photo ID, sign an Affidavit filled with confusing, incorrect, and threatening language, or cast a provisional ballot and risk having their ballots rejected for perceived discrepancies in their signatures, all in violation of the constitutional rights to vote, art. I, § 25, and to equal protection of the laws, art. I, § 2, among other provisions. *See, e.g.*, D50 at ¶¶ 86-87. Plaintiffs specifically challenged the Affidavit’s statement that photo ID was required to vote on the grounds that it was “confusing, inaccurate, and internally inconsistent,” *see, e.g.*, D50 at ¶ 70, and that it misled voters to believe they needed to obtain photo ID in order to vote. *Id.* at ¶¶ 86-87. Thus, Plaintiffs requested an order from the trial court “specifically enjoining the use of the [Affidavit] in all elections and ordering the State to take necessary steps to clarify to voters, poll workers, and election officials that photo ID is not required to vote . . .” among other relief. *Id.* at ¶ 107.

Following a trial on the merits, the circuit court granted in part Plaintiffs’ request for a permanent injunction by enjoining the enforcement of the Affidavit. Although the court found that a photo ID requirement would impose practical problems on the hundreds of thousands of voters who lacked photo ID, the court left the remainder of the law intact because, consistent with the State’s concessions, the law did not require Missourians to

present photo ID to vote. D77 at 4, 5-6. On October 11, 2018, the State filed an Emergency Motion for Partial Stay of Injunction Relief, which this Court denied.

B. Missouri’s General Assembly Enacted a Voter ID Law That Provided Three Options for Voting, Including Two Options for Voting Without Photo ID.

In 2016, the General Assembly passed HB 1631, which amended the pre-existing voter identification requirements for voters who cast their ballots in-person as set forth in § 115.427, RSMo. The new voter ID law allows eligible Missourians to vote by either presenting one of the forms of identification accepted under the prior law, or by presenting no identification at all and casting a provisional ballot. The law created three avenues for voting depending on the type of identification (or lack thereof) provided. Voters can either: (1) present government-issued photo identification and vote a regular ballot, § 115.427.1, RSMo (“Option 1”); (2) present other forms of accepted identification set forth in § 115.427.2, RSMo, including, for example, a bank statement or utility bill, and sign an Affidavit that states:

I do solemnly swear (or affirm) that my name is; that I reside at; that I am the person listed in the precinct register under this name and at this address; and that, under penalty of perjury, I do not possess a form of personal identification approved for voting. As a person who does not possess a form of personal identification approved for voting, I acknowledge that I am eligible to receive free of charge a Missouri nondriver’s license at any fee office if desiring it in order to vote. I furthermore acknowledge that I am required to present a form of personal identification, as prescribed by law, in order to vote.

I understand that knowingly providing false information is a violation of law and subjects me to possible criminal prosecution.

§115.427.3, RSMo (“Option 2”); or (3) present *no* identification and vote a provisional ballot, which will be counted if the voter returns to the polling place on Election Day with a form of photo ID, or if election officials determine that the voter’s signature on the provisional ballot envelope matches her signature on file with election authorities. § 115.427.4, RSMo (“Option 3”). While the voter ID law limits Option 2 to voters who do not “possess” photo ID, the statute imposes no limitations on who can vote under Option 3, providing in part: “[a] voter *shall* be allowed to cast a provisional ballot . . . *even if* the election judges cannot establish the voter’s identity under this section.” § 115.427.4, RSMo (emphasis added). Citing these three options for voting, the State argued, and the trial court agreed, that the voter ID law did not require photo ID in order to vote. *See, e.g.*, D61 at 13, 27; D77 at 5.

C. Testimony from Several Witnesses Demonstrated That the Option 2 Affidavit is False, Misleading, and Confusing.

The trial court heard unrefuted testimony from several witnesses, and arguments from both parties, which confirmed that the Affidavit created for Option 2 misstates the law and confuses voters.

First, Plaintiffs established that the plain language of the Affidavit misstates the law and burdens the right to vote by commanding voters to swear falsely, “under penalty of perjury” and “subject[] . . . to possible criminal prosecution,” that they are “required to present [photo ID] . . . in order to vote.” § 115.427.3, RSMo. Witnesses testifying on behalf of the Secretary of State’s Office acknowledged that photo ID is not required to vote, and, at most, it is only required for Option 1. *See* Tr. (9/26) at 15-19, 22, 24. As did the State in

its submissions to the Court. *See* D61 at 27 (“[T]he Voter ID Law offers *three* alternative methods of voting, not all of which require photo ID—it does not simply mandate any one method.”); *see id.* at 13 (“Patrick . . . acknowledged that the poster correctly stated that new law did not require photo ID in order to vote.”). The State at no point argued that the Affidavit’s language was correct in stating photo ID was required in order to vote—not even in response to specific questioning from the trial court. *See* Tr. (9/26) at 53-61.

Second, Plaintiffs demonstrated that the Affidavit uses inconsistent and contradictory language such that voters are unable to determine whether they can lawfully sign it under penalty of perjury. The first substantive clause, immediately following the voter’s name and address, states: “under penalty of perjury, I do not possess a form of personal identification approved for voting.” § 115.427.3, RSMo. It is anyone’s guess, however, what it means to “possess” a form of personal identification—whether on your person, constructive possession, or something in between—and guessing is not an option when signing “under penalty of perjury” and “subject[] . . . to criminal prosecution.” *Id.* The Secretary of State’s Office’s (“the Secretary”) interpretation merely compounds the confusion. According to the Secretary’s Director of Elections, Brandon Alexander, the word “possess” as used in that clause means in the voter’s immediate possession at the polling place. Tr. (9/26) at 31-34. But in the very next sentence (“As a person who does not *possess* a form of personal identification approved for voting, I acknowledge that I am eligible to receive free of charge a Missouri nondriver’s license”) the same word, “possess,” takes on a different meaning, and refers more broadly to any form of possession. *See id.* Unlike the Secretary, voters cannot simply define the terms in the Affidavit however

they please. So despite the Secretary’s unofficial interpretation—which the Secretary disclosed not by any formal regulations but by word of mouth, *id.* at 35-36—voters must still determine with little guidance from the Affidavit’s plain language whether they sufficiently meet the qualifications to sign it under threat of possible criminal sanction.

Making that decision is no easy task, as Plaintiffs’ expert witness, Dr. Kenneth Mayer, established. Dr. Mayer testified that the Affidavit is incomprehensible because it uses inconsistent language and technical jargon, and its readability score of 17 on the Flesch Kincaid Grade Level Index—which measures the readability of documents or text—indicates that one would need up to a year of post-graduate education to understand it. Tr. (9/25) at 86, 90-91. Fully comprehending this Affidavit and all of its clauses is a tall order for voters when “they are standing in line . . . [with] people waiting behind them,” and no opportunity to study and think about its terms. *See id.*

Another example of the Affidavit’s internal contradictions, as highlighted by several witnesses, is the requirement that voters swear that they do not have a form of personal identification approved for voting, while at the same time presenting a form of personal identification approved for voting. *See* D77 at 5; Tr. (9/25) at 90-91 (Dr. Mayer Testimony). Ms. Gutierrez, for instance, testified that she would have concerns about agreeing to such a statement in the future because she “had all kinds of forms of identification” including a birth certificate, social security card, utility bill, and more. Tr. (9/24) at 49. She further explained that she had concerns about signing that statement under threat of criminal penalty: “I definitely have a problem with that. Under perjury, yes, I have

a problem.” *Id.* Mx. Patrick¹ testified that they were similarly confused by the same phrase, stating “I actually have that. I have that identification as it is listed on the poster.” Deposition of R. Patrick (“PX 131”) at 36, A357. They, too, indicated that they would not sign the Affidavit in the future. *Id.* at 67-68, 71. And most notably, the Secretary’s director of elections also acknowledged that the forms of non-photo identification listed under Option 2 are indeed approved for voting with a signed Affidavit. *See* Tr. (9/26) at 28-30.

These conflicting and confusing statements naturally impose burdens on voters who are required to swear to them under penalty of perjury. Although Ms. Gutierrez and Mx. Patrick may have signed the Affidavit in the past, they both testified that they did not read the Affidavit carefully at the polling place, which is hardly surprising given the limited time to process its contradictory terms, *see* Tr. (9/25) at 90 (“There’s a process, there are people waiting behind them . . . you probably have in the order of less than a minute to try to understand this.”) (Dr. Mayer Testimony), and, again, neither of them are willing to sign it in the future. *See* Tr. (9/24) at 49, 59; PX 131 at 71, A392.

As Dr. Mayer explained, confusing, incomplete, and inconsistent information imposes burdens on voters that depress their turnout in elections, Tr. (9/25) at 61-62, and “frequently . . . registrants who do possess a qualifying ID mistakenly believe that they don’t, and they don’t even bother voting.” Tr. (9/25) at 69.

D. Voters and Election Officials Were Confused About the Identification Requirements.

Not surprisingly, the evidence at trial demonstrated that voters and election officials

¹ Plaintiff Ri Jayden Patrick, who is transgender, uses the pronouns “they” and “them.”

alike were woefully misinformed and thoroughly confused about what type of identification is (and is not) required to vote in Missouri, as well as who is entitled to a free ID for voting purposes and under what circumstances—all of which are key elements of the Affidavit. Although the State cites “voter education” as one of the interests advanced by the Affidavit, its blatant misrepresentation of what the law actually says serves to exacerbate, rather than alleviate, the rampant confusion about the law. Plaintiff Mildred Gutierrez, for instance, was nearly turned away from the polls during the November 2017 special election after election officials informed her that she could not vote with the several forms of Option 2 identification that she brought with her. Tr. (9/24) at 35-36. And when the election officials eventually allowed Ms. Gutierrez to complete an Affidavit and vote, they informed her that she would need to obtain photo ID in order to vote in the next election. *See id.* at 40. Plaintiffs’ witness, David King, was turned away outright during the August 2018 primary after leaving his driver’s license at home, even though he presented his voter registration card, which is an accepted form of identification under Option 2. Tr. (9/25) at 7-8. If not for Mr. King’s determination—and access to transportation—to return to the polling place that day, he would have been disenfranchised based solely on the election official’s erroneous conclusion that photo ID was a pre-requisite for voting. *See id.* at 11.

These are not isolated incidents by any means. The trial record is replete with evidence of election judge training materials, local election authority (“LEA”) websites, and Secretary of State advertisements that relay or imply the same misinformation parroted in the Affidavit: that photo ID is required to vote. *See* Plaintiffs’ Exhibits (“PX”) 007 –

013; A10-18 (records of newspaper ads published in every LEA jurisdiction in Missouri stating: “When you vote, you will be asked for a photo ID,” and to call the Secretary’s Office “[i]f you don’t have a photo ID to vote”); PX 014 at KCEB000046; A66 (LEA training materials instructing election officials that “you must present a valid government issued photo ID to vote in Missouri”); PX 120 at 5 of 11; A189 (Jefferson County website instructing voters that they “need picture or photo ID in order to vote”). Recognizing the outright misstatements, the Secretary of State’s Office’s director of elections assured the trial court that the office would follow-up with election officials in these jurisdictions to ensure accuracy in their online and training materials, *see* Tr. (9/26) at 86, and yet, inexplicably, the State seeks to reintroduce these same misleading statements to voters.

E. The False and Misleading Affidavit Imposed a Burden on the Rights to Vote of Potentially Hundreds of Thousands of Missourians.

Despite the State’s attempt to downplay the scope of the burden imposed by HB 1631’s Affidavit, records of the Secretary’s most recent attempt (in January 2017) to estimate of the number of registered voters who lack Missouri driver or nondriver licenses—the most common forms of photo ID—indicate that up to 400,000 or more registered voters may not already have those forms of identification. Deposition of Joseph Plaggenberg (“PX 130”) at 67-82, A262-277; PX 107, A176. This includes 137,723 registered voters who did not have any record of a driver or nondriver license on file with the Department of Revenue (“DOR”), 140,073 registered voters whose licenses have expired (only “nonexpired” driver licenses and nondriver licenses qualify as photo ID), 124,114 registered voters whose licenses are in “surrender” status, meaning that they may

not have licenses at all, and 2,040 voters who have forfeited their licenses. *See* PX 107, A176; PX 130 at 76-82, A271-277. The number of registered voters who lack Missouri driver and nondriver licenses is unlikely to have decreased by a significant amount in the 15-16 months between HB 1631’s enactment and the date of the trial below because, as the court found, DOR license offices had only issued approximately 1,390 free IDs for voting as of September 2018, more than half of which came from a single downtown St. Louis license office, due to the efforts of a nonprofit organization, St. Francis Xavier College Church, in assisting individuals with low incomes and limited resources to obtain photo ID. PX 19, A173-74; PX 109, A177-179; PX 130 at 40, A235 (DOR representative testifying that “there is an organization in St. Louis that is actually taking people in large numbers to [the downtown St. Louis license office] to obtain the non-driver for voting.”).

Evidence at trial further demonstrated that if voters who lack photo ID heeded the Affidavit’s misleading warning (and the Secretary’s misleading advertisements) and decided to obtain photo ID to vote, they would be forced to: (1) incur the practical and ancillary costs of obtaining photo ID, including obtaining the underlying records required to apply for a driver or nondriver license, visiting a DOR license office and waiting in some cases for hours in line, and (2) incur the fee to renew the license when it expires because HB 1631 limits voters to **only one** free ID. *See, e.g.*, PX 130 at 92-93, A287-288; PX 112 at DOR_3_001065, A183. As a result, if photo ID were indeed required to vote, with the exception of Missourians over 70 years of age whose licenses do not expire, every Missouri voter would, at some point, be required to pay a fee (for photo ID) just to vote. *See id.*

Finally, although the law provides an equally valid provisional ballot option even

for voters whose identities cannot be verified, § 115.427.4, RSMo, voting by provisional ballot presents a risk of erroneous rejection. A provisional ballot is counted only if the voter returns to the polls with photo ID, or if election officials are able to match the voter's signature on the provisional ballot envelope with the signature on file with the local election authority. § 115.427.4, RSMo. There are no uniform standards that election officials follow, nor is there *any* training for HB 1631's signature-matching process. Tr. (9/26) at 47-48 (Brandon Alexander Testimony). As Plaintiffs' expert, Dr. Linton Mohammed, explained, lay-person signature comparison, without some process for following up with a voter whose signature is flagged for rejection, is "inherently unreliable" and results in a high rate of error that skews towards the over-rejection of legitimate signatures. *See* Tr. (9/24) at 231. Furthermore, an individual who votes provisionally may have to wait up to two weeks or more to verify that their vote was counted. *See* Tr. (9/24) at 201 (Rachel Youn testimony). Thus, while the court held that provisional ballots were inclusive and allowed for more individuals to vote, D77 at 6, the court did not find that this process cured the constitutional defects inherent in subsection 2's Affidavit.

F. The Trial Court Order and Judgment.

On October 9, 2018, the trial court issued an Order and Judgment, which it amended on October 16, 2019, enjoining the State from enforcing the Affidavit requirement in subsections 2 and 3 of the voter ID law, §§ 115.427.2, 115.427.3, and from disseminating materials showing that voters will be asked for photo ID, without specifying other forms of acceptable, non-photo identification. D77 at 6-7.

The trial correctly found that the Affidavit was “on its face, contradictory and misleading,” and cited trial testimony from Plaintiff Mildred Gutierrez evidencing the confusion caused by the Affidavit’s terms. *Id.* at 5. The court determined that the Affidavit requirement compelled voters to sign a statement under penalty of perjury that was “an outright misstatement of law,” because, “*as the state concede[d]*, a photo identification card is not a requirement for voting. *Id.* (emphasis added). The court also acknowledged the “equally vexing issue” of the Secretary’s interpretation of the word “possess” as having different definitions in consecutive sentences within the Affidavit—an interpretation “not heretofore shared with affiants or the public.” *Id.* at n.1. Ultimately, the court found that the Affidavit infringed on the constitutional right to vote and could not survive any level of scrutiny. *Id.* at 4-5.

The court also found the content of the State’s print advertising misleading because it strongly implied that photo ID was required for voting. Because the advertisements “could clearly lead voters to believe that they would be unable to cast a ballot without presenting photo ID” (as some local election authorities had already been led to believe) the court enjoined the misleading advertisements, finding that no government interest is served by misleading the public “into believing that photo ID is required to vote.” *Id.* at 6.

Finally, although the court recognized the burdens and “practical problems” that confront voters who seek to obtain photo ID, *id.* at 2-4, it nonetheless left the rest of HB 1631 intact based on its understanding that the voter ID law provides multiple options for voting, consistent with the State’s concession that photo ID is not required to vote.

III. STANDARD OF REVIEW

The Court reviews constitutional challenges to statutes de novo. *Rizzo v. State*, 189 S.W.3d 576, 578 (Mo. banc 2006). However, the “issuance of injunctive relief, along with the terms and provisions thereof, rests largely within the sound discretion of the trial court.” *Edmunds v. Sigma Chapter of Alpha Kappa Lamda Fraternity, Inc.*, 87 S.W.3d 21, 30 (Mo. App. W.D. 2002). The trial court “is vested with a broad discretionary power to shape and fashion relief to fit the particular facts, circumstances and equities of the case before it.” *Burg v. Dampier*, 346 S.W.3d 343, 357 (Mo. App. W.D. 2011).

IV. ARGUMENT

A. **The Trial Court Correctly Enjoined the Use of the Affidavit and Select Advertisements Because They Misstate the Law and Mislead the Public by Suggesting That Photo ID Is Required to Vote. (Points Relied On I, IV)**

The challenged law, while providing three “equally valid” options for voting, Tr. (10/1) at 64-65 (State’s closing argument), required voters who utilized Option 2 to sign an Affidavit, under penalty of perjury, stating among other averments that: (1) the voter does not possess a form of personal identification approved for voting; (2) that the individual is eligible to receive a Missouri license free of charge for the purpose of voting; and (3) that the voter is required to present photo ID in order to vote. The trial Court correctly enjoined this Affidavit requirement because it was plainly misleading and confusing on its face, but also, importantly, the State conceded at trial that photo ID was not required to vote as stated in the Affidavit. *See* D77 at 5 (“As the state concedes, a photo identification card is not a requirement for voting . . .”). Not only is it far too late for the State to walk-back those concessions, their attempt to recast the Affidavit as an accurate

summary of the law, raised for the first time on appeal, misreads the statute's plain language and provides no basis to challenge the trial court's ruling.

1. Defendants Failed to Preserve Any Argument That the Affidavit Accurately Describes the Voter ID Law Because They Conceded (and Argued) at Trial That Missouri Law Does Not Require Photo ID to Vote. (*Point Relied On I*).

Despite numerous opportunities to refute Plaintiffs' claim that the Affidavit misstates the law, the State made no attempt to convince the trial court that photo ID is required to vote—likely because it was clear to everyone that the law provided three options for voting—and instead employed this fact for tactical gain by arguing essentially that *the absence* of a photo ID requirement meant that HB 1631 did not burden the right to vote. The State now claims for the first time on appeal that photo ID is indeed required to vote (while claiming elsewhere in their brief that anyone can vote without it, State's Br. at 35), but this argument “was never presented to . . . the trial court [and] is not preserved for appellate review.” *State v. Davis*, 348 S.W.3d 768, 770 (Mo. banc 2011). As this Court has previously explained:

An appellate court is not a forum in which new points will be considered, but is merely a court of review to determine whether the rulings of the trial court, as there presented, were correct, [and] a party seeking the correction of error must stand or fall on the record made in the trial court, thus . . . only those objections *or grounds of objection* which were urged in the trial court, without change and without addition, will be considered on appeal.

Id. (emphasis added). Not only did the State fail to make an appropriate objection, the trial court proceedings are replete with testimony, arguments, and briefing from the State that confirms—and in some instances argues affirmatively—that photo ID is not required to vote. For instance, when confronted with language from the Affidavit, witnesses testifying

on behalf of the Secretary of State's Office stated unequivocally that Missouri did not require voters to show a photo ID in order to vote:

Q: There is an Option 2. But it also says that Missouri law requires voters to show a valid government-issued identification from the State of Missouri or federal government when checking in to vote. Is that correct, that Missouri law requires voters to show a valid government-issued photo identification?

A: It does not require them to show just a photo ID. There are other options that they can show.

Trial Tr. (9/26) at 22. And during the cross-examination of Plaintiffs' expert, Dr. Ken Mayer, the State's counsel pointed to the absence of any photo ID requirement in an attempt to discredit Dr. Mayer's opinions on the burden imposed by voter ID laws. *See* Trial Tr. (9/25) at 121 (“[W]ould you agree with me that the State of Missouri does not require a presentation of photo ID in order for a voter to cast a ballot . . .”).

Even more telling is the State's counsel's response to the trial court's questions during closing arguments. The court identified specific concerns with the Affidavit and the Secretary of State's advertisements, including specifically the “suggest[ion] that photo ID was a requirement” because “[a] requirement by definition is something that's needed in order to vote.” Trial Tr. (10/1) at 54. The court further explained that “to the extent [the Secretary of State's] ads gave th[e] impression [that photo ID was required to vote], that simply isn't true,” since “Option 2 is an equally valid method for voting,” and invited the State to respond to those concerns. *Id.* At no point did the State's counsel advance the position that photo ID was in fact required or that the Affidavit's (or advertisements') statements to that effect were correct. To the contrary, the State admitted that all methods of voting, with or without photo ID, “are equally valid,” and that a LEA is not even required

to ask for photo ID first. *Id.* at 64. And finally, lest there be any doubt, the State’s post trial brief explained: “the Voter ID Law offers three alternative methods of voting, not all of which require photo ID—it does not simply mandate any one method,” D61 at 27, and that a poster at Ri Jayden Patrick’s polling place “*correctly stated* that [the] new law did not require photo ID in order to vote,” *id.* at 12, which is a far cry from the interpretation the State now advances on appeal.

The State has not only failed to preserve its latest theory, the doctrine of judicial estoppel, which “prohibit[s] parties from deliberately changing positions according to the exigencies of the moment,” should bar any argument that the Affidavit or the enjoined advertisements accurately describe the law. *Vacca v. Mo. Dep’t of Labor & Indus. Relations*, --- S.W.3d ---, 2019 WL 1247074, at *8 (Mo banc, Mar. 19, 2019); *Bensieck v. Cook*, 19 S.W. 642, 644 (Mo. banc 1892) (“Parties litigant are not allowed to assume inconsistent positions in court; to play fast and loose; to blow hot and cold. Having elected to adopt a certain course of action, they will be confined to that course which they adopt.”). Having consciously avoided characterizing photo ID as a requirement to vote, and portrayed the three alternatives for voting as “equal options” in order to downplay the burden imposed by the voter ID law as a whole, the State “cannot now argue for reversal based on an argument it never presented to the trial court,” *State v. Williams*, 334 S.W.3d 177, 183 (Mo. App. W.D. 2011), nor should it be heard to challenge an interpretation of the law that it helped to advance.

2. The Voter ID Law Does Not Require Photo ID to Vote and the Affidavit Mischaracterizes Its Provisions. (*Point Relied On I*).

Had the State preserved its argument that the Affidavit is accurate, it would fail nonetheless because the State's interpretation of the voter ID laws misreads, and in some cases ignores, the plain language of each of the three options for voting. These provisions simply do not impose any photo ID requirement for voting; instead, the State has conflated the act of establishing one's qualifications to vote with the act of voting itself, and that distinction is fatal to the State's first point of error.

a. The State's textual analysis misreads subsection 1, ignores subsection 4 entirely, and does not refute the fact that the Affidavit is misleading.

The State argues that the Affidavit accurately describes the voter ID law because subsection 1 (§ 115.427.1, RSMo or Option 1) states that voters "shall establish their identity and eligibility . . . by presenting [photo ID]," and the use of the word "shall" is mandatory and imperative. The problem with this argument is that establishing identity and voting are two different acts. The Affidavit says that photo ID is required to *vote*, while subsection 1 refers to photo ID as the means by which one establishes identity at the polling place. In other words, the two provisions are addressing two different stages of the voting process.

Subsection 1 sets forth the forms of identification (or government-issued photo ID) that affirmatively establish a voter's identity and eligibility at the polling place. § 115.427.1, RSMo. It states that "[p]ersons seeking to vote in a public election shall establish their identity and eligibility to vote at the polling place by presenting a form of

personal identification to election officials.” *Id.* Presenting photo ID, as used in that phrase, explains how a voter must go about establishing her identity while *at the polling place*. Nothing in the language of subsection 1 precludes a voter who lacks such ID from voting, nor does the statute even require voters to establish their identity at the polling place before voting. The next sentence in subsection 1 clarifies this distinction, stating: “No form of personal identification other than the forms listed in this section shall be accepted *to establish a voter’s qualifications to vote.*” *Id.* (emphasis added). The consequence of a voter’s failure to provide any identification is that her identity and eligibility will not be established at the polling place at the time she casts her ballot; but establishing one’s identity is not by any means a requirement for voting under the current law. *See id.*

This is made plain in subsection 4, which states that “[a] voter *shall be allowed to cast a provisional ballot . . . even if the election judges cannot establish the voter’s identity under this section.*” §115.427.4, RSMo (emphasis added).² In that instance, the election authority can verify an individual’s identity by comparing the signature on the provisional ballot envelope with the individual’s signature on file *after* the individual has already voted. § 115.427.4(1)(b), RSMo. And while the State points to the use of the word “shall” in subsection 1 to highlight its “mandatory imperative,” it ignores similar language in subsection 4, which provides a clear directive that—unlike subsection 1—specifically

² The phrase “even if the election judges cannot establish the voter’s identity” is expansive, not restrictive, and ensures that a voter’s right to cast a provisional ballot under HB 1631 includes, but is not limited to, instances in which the election judge is unable to verify the voter’s eligibility. *See, e.g., City of N.Y. v. W. Heritage Ins. Co.*, 98 F. Supp. 3d 557, 564 (E.D.N.Y. 2015) (holding that the phrase “even if” clarifies, but does not limit, the breadth of the clause)

governs the act of voting. Subsection 4 makes clear that a Missouri voter is entitled to cast a provisional ballot, and to have that ballot counted if the election authority later determines that the voter was eligible, with or without photo ID. *See id*; *see also* § 115.427.2(3), RSMo (mandating that a voter’s “provisional ballot *shall be counted*, provided that it meets the requirements of subsection 4”) (emphasis added).

To further illustrate the difference between statutory language that imposes an identification requirement for voting, and the language in subsection 1 which does nothing of the sort, the Court need look no further than the pre-existing 2002 voter ID law. Under the pre-existing statute, subsection 1 stated that “[b]efore receiving a ballot, voters shall identify themselves by presenting a form of personal identification” from an exhaustive list and did not include a provisional ballot option. § 115.427.1, RSMo (2002) (emphasis added). The General Assembly removed this clear mandate when it enacted the current statute, which provides three options for voting, and expressly entitles Missourians to vote without photo ID. *See* Trial Tr. (9/25) at 24 (Brandon Alexander Testimony). In other words when the General Assembly sought to require presentment of specific forms of identification *to vote*, it did so with a clear, unmistakable directive, and the subsequent removal of that language from the current voter ID law is telling. *See Desai v. Seneca Specialty Ins. Co.*, --- S.W.3d ---, 2019 WL 2588572, at *3 (Mo. banc June 25, 2019) (recognizing that the court may construe the prior version and new version of a statute to arrive at legislative intent); *Collier’s Estate v. W. Paving & Supply Co.*, 79 S.W. 947, 951 (Mo. 1904) (“It is always allowable, in interpreting statutes, to consider the prior law, as compared with the present”). The State’s attempt to graft onto subsection 1 an implicit

photo ID requirement for voting is irreconcilable with the plain language of the statute.

b. The State’s interpretation of “require” defies its plain meaning and common usage.

Having found no specific language in HB 1631 that requires photo ID in order to vote, the State resorts to an implausible interpretation of the Affidavit—also asserted for the first time on appeal—that would treat the word “required” as a non-mandatory request. State’s Br. at 22. But even that counterintuitive explanation falls short because, as explained above, subsection 1 seeks to identify the forms of identification that establish eligibility at the polling place, but does not dictate who can or cannot vote. *See* § 115.427.1, RSMo; State’s Br. at 21. An even bigger problem with this argument is that it defies common usage of everyday terms. “The word ‘required’ implies something mandatory,” *Walters v. State Farm Mut. Auto Ins. Co.*, 793 S.W.2d 217, 219 (Mo. App. S.D. 1990), and even the State’s trial counsel and witnesses adopted that same interpretation in acknowledging that photo ID was not required to vote, *see, e.g.*, Trial Tr. (9/26) at 22, (9/25) at 121, all of which is strong indication that the natural meaning and common understanding of the phrase “I am required to present [photo ID] in order to vote,” is that photo ID is mandatory. The State’s interpretation is nothing more than a semantic exercise that would allow election officials to mislead the public by treating photo ID as a pre-requisite for voting, even though every voter can cast a ballot without it. No legitimate government interest can justify such an absurd result.

c. The State’s reading of the statute and Affidavit ignores and misapplies rules of statutory construction.

Finally, the State’s interpretation turns well-settled rules of statutory construction

on their head by suggesting that the trial Court can set aside the plain language of the statute and Affidavit in order to avoid conflicts among its provisions or advance the legislature's preference for photo ID. It is well settled that a conflict between provisions should be resolved by "determin[ing] which should take precedence . . . using canons of construction, e.g., by applying the more specific . . . provision." *State v. Williams*, 548 S.W.3d 275, 280 n.5 (Mo banc. 2018); *see also State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 606 (Mo banc. 2019) (resolving conflict in favor of more specific provision over a "statute [that] deals with the subject in general terms"). The Affidavit, which does not proscribe or regulate any conduct but rather attempts (incorrectly) to summarize the law, is clearly the more general provision and must give way to the specific, substantive sections of the statute that actually govern the acts of voting and establishing voter qualifications. *See Berger*, 548 S.W.3d at 606 (finding that statute providing specific restrictions on a subset of probationers should prevail over conflicting statute providing general framework for determining terms of probation). No rule of interpretation requires the Court to harmonize on one hand an Affidavit that demands voters to swear that photo ID is required to vote, with provisions that state the exact opposite, e.g. § 115.427.4, RSMo.

The State's appeal to the legislature's preference for photo ID similarly misconstrues the Court's role in interpreting the law. Courts "do not have license to ignore the plain language [of the voter ID requirements] in deference to a legislative intent which is wholly unmoored from the words of the statute itself." *State ex rel. KCP & L Greater Mo. Operations Co. v. Cook*, 353 S.W.3d 14, 27 (Mo. App. W.D. 2011). The purported legislative preference that the State seeks to invoke must yield to the statute's plain

language, which unambiguously entitles voters to cast a ballot without presenting photo ID. *State v. Rowe*, 63 S.W.3d 647, 650 (Mo. banc. 2002) (“Courts do not have authority to read into a statute a legislative intent that is contrary to its plain and ordinary meaning.”).

The Court should also reject the State’s invitation to inject additional terms into subsection 1 in order to make voting conditional on providing photo ID, and at the same time ignore subsection 4’s mandate that all voters “shall be allowed” to cast a provisional ballot, all in an effort to harmonize the statute with an Affidavit that mischaracterized the law to begin with. This is entirely backwards, because it is the Affidavit’s description of the voter ID law that must conform to the statute’s specific substantive provisions, not the other way around. The trial court correctly found that the Affidavit misstates the law, and because only the legislature can rewrite its offending elements, the trial court was correct in enjoining the Affidavit entirely. *See Rowe*, 63 S.W.3d at 649 (refusing to construe statute to achieve alleged legislative intent, stating, “this Court, under the guise of discerning legislative intent, cannot rewrite the statute”).

d. The State’s remaining criticisms of the trial court’s analysis are misguided and fail to refute the fact that the Affidavit is misleading.

Beyond the State’s misreading of subsection 1, its remaining criticisms of the trial court’s ruling fail to resolve the internal contradictions, inconsistencies, and ambiguous language in the Affidavit that mislead and deter Missourians from exercising their constitutional right to vote. For instance, the State argues at length that the phrase “form of personal identification” as used in the Affidavit refers to photo ID under subsection 1; yet this does nothing to resolve the inherent conflict that the trial court identified. The Affidavit

requires voters to attest that they “do not possess a form of personal identification approved for voting,” and that they are “required to present a form of personal identification, as prescribed by law, in order to vote.” D77 at 5. If “form of personal identification” means any accepted ID—which is how Ms. Gutierrez interpreted the phrase—then, as the trial court correctly noted, the Affidavit is contradictory because it forces voters to swear under oath that they do not possess approved ID while simultaneously presenting ID approved for voting. *See id.* If, on the other hand, the phrase “form of personal identification” means photo ID, then the third sentence of the Affidavit, which instructs and forces voters to acknowledge that photo ID is required in order to vote, “is an outright misstatement of law.” *Id.* By either definition, a voter would be required to sign a false statement, under oath and subject to threat of criminal prosecution, in order to vote under Option 2.

The State also argues that inconsistent definitions of the word “possess” are harmless because they lead to more voting, but at no point does the State explain how a voter presented with the Affidavit could possibly know that the term “possess” has two different meanings in two consecutive sentences, or would know which definition to use in order to avoid swearing falsely amid threats of criminal prosecution embedded within the Affidavit. It is anyone’s guess, for instance, whether a voter who has previously obtained photo ID but appears at the polls without it can vote under Option 2. Notably, the Secretary has issued no clarifying regulations on this issue, opting to advance its interpretation of “possess” by word-of-mouth, Tr. (9/26) at 33-34, which apparently did not make its way to the Proebel Elementary School polling place where Plaintiffs’ witness David King was turned away even after presenting his voter registration card, all because

he left his driver's license at home. Tr. (9/25) at 7-8; D77 at 6. That the Secretary of State's Office and its employees may have resolved all contradictions in their own minds provides no relief to the voters who must grapple with the Affidavit's terms before proceeding under Option 2.

Finally, to suggest, as the state does, that these contradictions and misstatements confused no one, State's Br. at 32, ignores the testimony of multiple witnesses, and fundamentally misunderstands the effect of misleading, inaccurate, and unclear rules on the voting process. The trial court heard testimony from Plaintiffs Mildred Gutierrez and Ri Jayden Patrick, both of whom found the Affidavit confusing and stated that they would not sign it again, particularly given the threat of criminal penalty. Tr. (9/24) at 49, 59; PX 131 at 71, A392; *see also id.* at 36-37. The court also heard from Plaintiffs' expert Dr. Ken Mayer, whose testimony the trial court found credible, D77 at 3, who concluded that the Affidavit was incomprehensible in part because of its technical and contradictory language, Tr. (9/25) at 90-91, and that, based upon his extensive experience studying voter ID laws, the confusing, incomplete, and inconsistent information provided to voters regarding HB 1631 has a depressive effect on turnout. Tr. (9/25) at 61-62. Indeed, even the State's counsel acknowledged during closing arguments that portions of the Affidavit were confusing. Tr. (10/1) at 57. The only thing clear about the Affidavit's contradictory language and misstatements of law is its repeated reminder that any voter who signs it risks criminal prosecution.

As the State admits, voters generally do not see the Affidavit until they arrive at the polling place and present Option 2 identification. State's Br. at 34. They have neither the

time to place its contradictory terms in context, even assuming that were possible, nor the access to the various untenable interpretations of “require” or “possess” advanced by the State before deciding whether the Affidavit is worth the trouble. Tr. (9/25) at 90 (Dr. Mayer Testifying: “It’s not as if someone is given this and say, well, go home and study this . . . you probably have in the order of less than a minute to try to understand this.”). It is precisely under these conditions that the threat of constitutional injury is at its apex. Missourians must decide on-the-spot how to exercise their constitutional right to vote—again, under looming threat of criminal penalties—and the Affidavit’s confusing, misleading, and inaccurate statements present voters with an impermissible choice. *See Veasey v. Abbott*, 265 F. Supp. 3d 684, 695 (S.D. Tex. 2017) (noting “persons untrained in the law and who are subjecting themselves to penalties of perjury may take a restrictive view” of the circumstances under which they may vote); *see also Grimes v. Smith*, 776 F.2d 1359, 1367 n.13 (7th Cir. 1985) (recognizing that the attempts to mislead voters can “seriously impair[]” the right to vote, “even though more alert and informed voters would not be misled.”) (citation omitted). The trial court, thus, correctly enjoined an Affidavit that misleads voters in these critical moments, and the State provides no reason to disturb that ruling.

3. The Trial Court Correctly Enjoined the State’s Misleading Advertisements That Suggest Photo ID is Required to Vote. (Point Relied On IV).

The State carries its misunderstanding of subsection 1 into its objection to the trial court’s injunction against misleading advertisements suggesting that photo ID is required to vote. For the reasons explained above, photo ID is clearly not required to vote, and any

publication that suggests as much misstates the law.

Moreover, contrary to the State's claims, no statutory provision requires it to instruct, or even suggest to, the public that they need photo ID to vote. Subsection 5 of the voter ID law states that "[t]he secretary of state shall provide advance notice of the personal identification requirements of subsection 1 of this section in a manner calculated to inform the public generally of the requirement for forms of personal identification as provided in this section," then goes on to set forth the mediums through which the secretary shall provide such notice. § 115.427.5, RSMo. The "personal identification requirement" referred to in subsection 5 points to subsection 1's statement that voters shall establish their identity at the polling place by presenting photo ID, and not that photo ID is required to vote. *See supra* § III.A.2. Complying with subsection 5 neither requires the State to tell voters that showing photo ID is a pre-requisite for voting, nor prevents it from identifying other permissible alternatives to provide a complete and accurate description of the voting requirements.

The examples that the trial court singled out in its Order, set forth in Plaintiffs' trial exhibits 7-12, illustrate this. They consist of flyers published in newspapers in every LEA jurisdiction in Missouri, *see* PX 13; A16-18, employing language that misleadingly suggests that voters need to present photo ID to vote, but provides no other information about the voter process. Each flyer states:

Missouri's new Voter ID law is now in effect. When you vote, you will be asked for a photo ID. A Missouri driver or nondriver license works but there are other options, too. If you don't have a photo ID to vote, call 866-868-3245 and we can help.

Pls. Exs. 7-12. The first instruction to voters—that they will be asked for a photo ID—is not mandated by the language of subsection 1 or any other provision in the statute. While election officials may request such identification, “they are not required to . . . all [three] methods of voting are equally valid.” *See* Tr. (10/1) at 63-65 (State’s closing argument). Nor does the next sentence relay any subsection 1 requirement. It states that a “Missouri driver or nondriver license works,” but does not state what for, and alludes to “other options,” but does not state what they are.

Furthermore, because the advertisement only mentions photo ID, and says nothing about the other forms of acceptable identification or options for voting, it leaves reasonable observers with the inescapable impression that: (1) a voter needs to present photo ID to vote; (2) that a driver or nondriver license works *as a form of photo ID*; and (3) that there are other options, meaning other forms of photo ID. *See* Tr. (9/25) at 77 (Dr. Mayer explaining voter confusion likely caused by incomplete county website that failed to describe types of ID acceptable for voting). The advertisement is thus misleading on its face, and the trial court properly exercised its discretion in enjoining such publications. *See State ex rel. Webster v. Areaco Inv. Co.*, 756 S.W.2d 633, 636-37 (Mo. App. E.D. 1988) (finding no abuse of discretion in trial court finding that company’s mailers included misleading descriptions).

It is no defense, moreover, that the enjoined advertisements were technically correct (which they were not) or facially complied with subsection 5 (which they did not) because they omit key, relevant information—including the fact that Missourians can vote without photo ID. *Cf. Noel v. Bd. of Educ.*, 465 S.W.3d 88, 93 (Mo. App. E.D. 2015) (finding

summary statement misleading by defining affected entities in broad terms, the scope of which a reasonable person would not understand); *see also N.L.R.B. v. Winchell Processing Corp.*, 451 F.2d 306, 308 (9th Cir. 1971) (“Many assertions are literally true, yet may still be potentially misleading because important qualifying facts have been omitted.”). The advertisements that fall within the scope of the court’s injunction highlight the use of photo ID but say nothing about the other two options for voting, the omission of which misleadingly suggests that presenting photo ID is mandatory. Not coincidentally, the trial court heard evidence of confusion among election authorities in applying the voter ID laws, most of which emanated from their mistaken belief that photo ID was a pre-requisite for voting. *See* D77 at 5-6.

Having found the advertisements misleading, the scope of necessary relief is a matter uniquely within the trial court’s discretion. *See, e.g., State ex rel. Ideker, Inc. v. Grate*, 437 S.W.3d 279, 287 (Mo. App. W.D. 2014) “[W]hether an injunction should be granted is a matter of the trial court's discretion in balancing the equities,” and “molding an appropriate injunctive decree rests largely in the sound discretion of the trial court, which is vested with a broad discretionary power to shape and fashion relief to fit the particular facts, circumstances and equities of the case before it.” *Id.* (quoting *Burg*, 346 S.W.3d at 357). The trial court’s findings are well-supported by the evidence, *see, e.g., Tr. (9/25)* at 73-75 (Dr. Mayer reviewing misleading websites), and the State’s charitable description³ of its own advertising efforts is hardly sufficient to demonstrate an abuse of

³ The State describes its “massive public relations campaign” at length but fails to mention that it conducts no advertising until just 5 weeks before an election. *Tr. (9/26)* at 14.

discretion.

B. The Affidavit is Unconstitutional. (*Point Relied On I*).

It should go without saying that misrepresenting the requirements for voting, in a statement to be executed by voters under penalty of perjury, at a polling place, moments before casting a ballot, substantially burdens the right to vote. Even so, this common-sense proposition was also supported by ample, unrefuted evidence upon which the trial court correctly relied in determining that the Affidavit cannot survive any level of scrutiny.

1. The Affidavit is Subject to Strict Scrutiny Because it Impinges on the Constitutional Right to Vote.

The State has demanded an unprecedented level of deference in implementing the voter identification laws. As the State sees it, the Affidavit cannot burden the right to vote because the legislature *could have* passed a photo ID requirement under the State Constitution, suggesting that the State has unfettered discretion in implementing permissive rules that are not constitutionally mandated. Putting aside for now the State's flawed assessment of the legislature's authority, its argument lacks merit and has been rejected repeatedly by courts around the country. *See, e.g., Obama for Am. v. Husted*, 697 F.3d 423, 431 (6th Cir. 2012) (affirming holding that new restrictions on early voting—which legislatures are not required to provide in the first place—burdened the right to vote); *League of Women Voters of Fla., Inc. v. Detzner*, 314 F. Supp. 3d 1205, 1217 (N.D. Fla. 2018) (citations omitted) (holding that although early voting statute “authorize[d] early voting as a ‘convenience to the voter’ . . . [o]nce a unit of government has decided to administer a benefit or impose a burden, it must do so rationally and equitably, without

offense to independent constitutional prohibitions.”). That a voting procedure is not constitutionally mandated does not give the legislature carte blanche to trample constitutional rights when implementing it—in this case, by demanding voters’ endorsement of a false, misleading statement, under threat of criminal penalty, that tells voters that the law is more restrictive than it actually is.

The State also ignores “past decisions of Missouri courts, which have uniformly applied strict scrutiny to statutes impinging upon the right to vote.” *Weinschenk*, 203 S.W.3d at 215. This Court has recognized that “[d]ue to the more expansive and concrete protections of the right to vote under the Missouri Constitution, voting rights are an area where our state constitution provides greater protection than its federal counterpart,” *id.*, and has acknowledged repeatedly that the right to vote is a fundamental right, the impingement of which requires a strict scrutiny analysis. *See, e.g., Etling v. Westport Heating & Cooling Servs., Inc.*, 92 S.W.3d 771, 774 (Mo. 2003); *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 829 (Mo. 1991). Applying rational basis review here would mean that Missouri’s Constitution affords even less protection to the right to vote than federal law. *But see Weinschenk*, 203 S.W.3d at 216 (acknowledging, but rejecting, the “flexible test” applied in federal courts and noting that “[h]ere, the issue is constitutionality under Missouri’s Constitution, not under the United States Constitution.”)

Finally, the State’s argument for rational basis review proves too much because it would allow a legislature to impose just about any hurdle to vote under Option 2 simply because the legislature was not required to offer that option to begin with. If a legislature replaced the Affidavit with a literacy test or poll tax, for instance, the State’s reasoning

would find that only rational basis review is appropriate under the Missouri Constitution simply because Option 2 is “permissive.” Fortunately for Missourians, that theory is plainly wrong, as it is well settled that “the government can[not] place conditions on the receipt of state-created benefits that have the effect of dissuading people from exercising a constitutional right” even when the State has absolute discretion in adopting the procedure. *Toledo Area AFL-CIO v. Pizza*, 154 F.3d 307, 321 (6th Cir. 1998). The State is similarly bound to comply with its laws as enacted—even if the legislature was not required to pass the law in the first place—and no authority entitles the State to demand maximum deference while imposing burdens on fundamental constitutional rights.

2. The Affidavit Requirement Significantly Burdens the Right to Vote.

Both individual plaintiffs testified that the Affidavit was confusing and inconsistent, and expressed that they would not sign it in the future particularly given the threat of criminal penalty for perjury. Tr. (9/24) at 36, 49, 59; PX 131 at 71, A392; *see also id.* at 36-37. The trial court also heard extensive evidence—including from Plaintiff Mildred Gutierrez, who, after voting in the 2017 special election, was led to believe that she was required to obtain photo ID to vote in the next election—of the time, expense, and administrative hurdles that await voters who take heed of the Affidavit’s misleading command (and the Secretary of State’s advertising) and are led believe they need to obtain photo ID, all of which substantially burdens the right to vote.

Evidence at trial established that a photo ID, even for the purpose of voting, is by no means costless because HB 1631’s promise of “free” Missouri nondriver’s licenses and assistance with obtaining underlying documents is largely illusory. Ms. Gutierrez testified

that she was denied a free nondriver license when she attempted to obtain photo ID for voting—after she was wrongfully informed that she needed one to vote—and was charged \$11, which she barely scrapped together from her limited fixed income. Tr. (9/24) at 46. So, too were other Missourians while attempting unsuccessfully to obtain free nondriver licenses for voting. *See* Tr. (9/24) at 78-83 (Christine Dragonette Testimony). At the time of trial, over fifteen months after HB 1631 took effect, 157 out of the 177 Licensing Offices in the State had issued no more than five free licenses for voting. And 83 Licensing Offices had issued *zero* free licenses.⁴ Moreover, for everyone under the age of 70, the “free” licenses expire after every three to six years, and the replacement comes with a fee. *See, e.g.,* PX 130 at 92-93, A287-288; PX 112 at DOR_3_001065, A183. That means if photo ID were required, as the Affidavit leads voters to believe, the vast majority of Missourians at some point would have to pay money to exercise the right to vote. *See Weinschenk*, 203 S.W.3d at 206 (noting that payment of fees to obtain ID required for voting “presents a legal problem”).

Compounding the burdens of applying for photo ID is the convoluted process for obtaining the underlying documents required to complete the application. The trial court heard testimony from Plaintiff Ri Jayden Patrick who is transgender and lacks appropriate documentation to obtain a birth certificate or nondriver license that reflects their correct

⁴ The downtown St. Louis License Office was an outlier as it had issued 863 free license for voting. However, as the circuit court recognized, it became apparent during trial that Plaintiffs’ witness Christine Dragonette and St. Francis Xavier College Church, which helps thousands of Missouri residents to obtain identification each year, was largely responsible for this spike. *See* D77 at 3.

gender marker. *See* PX 130 at 33-37, A228-232; PX 131 at 54, A375. A photo ID requirement would mean that Mx. Patrick must go before a court, present proof of gender confirmation surgery, obtain an amended birth certificate and then apply for a nondriver license. *See* PX 130 at 33-37, A228-232. Even for others who do not need to update their vital records, the practical costs of obtaining underlying documents, including the costs of transportation and the time expended gathering necessary documents and waiting in long lines imposed significant hurdles, notwithstanding the Secretary of State’s purported assistance.⁵ *See Weinschenk*, 203 S.W.3d at 209 (acknowledging the practical costs of navigating state and federal bureaucracies). And to make matters worse, many states, including Missouri, request a form of identification to be submitted with an application for vital records, which subjects voters to an endless bureaucratic loop that requires birth certificates, for example, to obtain photo ID, and photo ID to obtain birth certificates. Tr. (9/24) at 71 (Christine Dragonette Testimony).

This process of obtaining underlying documents and photo ID imposes the same “cumbersome procedure” that this Court properly rejected in *Weinschenk*, noting that “[t]hose things that require substantial planning in advance of an election to preserve the right to vote can tend to eliminate from the franchise a substantial number of voters who did not plan so far ahead.” *Weinschenk*, 203 S.W.3d at 215 (quoting *Harman v. Forssenius*, 380 U.S. 528, 539-40 (1965)). It is plainly incorrect to suggest that the Affidavit would

⁵ In the 15 months between the passage of HB 1631 and the trial, the Secretary of State’s Office had assisted just 29 individuals to complete the process of obtaining underlying vital records from out-of-state. Tr. (9/26) at 57-58.

impose no significant burden on voters, and the State's argument misses the point that misleading voters to believe they need to present photo ID to vote has real consequences for the up to 400,000 or more voters who lack driver or nondriver licenses—the most common forms of photo ID.

Finally, the provisional ballot option, while an equally-valid method of voting, does not lessen the burden imposed by the Affidavit. Plaintiffs' expert, Dr. Linton Mohammed, a forensic document examiner with extensive academic and professional experience in handwriting and signature identification, testified that a number of factors, including age and illness, are likely to impact a voter's signature, Tr. (9/24) at 237-38; that one-to-one signature comparisons conducted by laypersons without training is highly error-prone; and that such errors skew toward rejecting authentic signatures as non-genuine. *See, e.g., id.* at 231, 235-241. Indeed, Mildred Gutierrez is a prime example of the type of voter whose provisional ballot would be at risk for erroneous rejection because of a medical condition that at times makes it difficult to create a consistent signature. At trial, Ms. Gutierrez testified:

[Y]ou can't count on my signature being the same from one day to the next because of my essential tremors or the Dupuytren's contracture, both conditions, because one day my signature might be like this, scribbly, or one day it might just be beautiful, you know. It's just from one day to the next. So I can recognize my signature, but there is no way that an ordinary person could look at that and match it.

Id. at 51. The process for matching signatures on provisional ballots is also entirely subjective, lacking any formal standards, guidelines or procedures, and conducted by officials without any training at all. Tr. (9/26) at 76 (Brandon Alexander Testimony). Each

LEA may have different procedures for verifying signatures, each with varying levels of accuracy, *id.*, and whether a provisional ballot is counted may depend to a large extent on the county in which the voter cast her ballot, *see id.* at 75-76. This voting option, thus, presents its own unique challenges and would not cure any burden on the right to vote imposed by the Affidavit. *See Bush v. Gore*, 531 U.S. 98, 104-05 (2000) (“Having once granted the right to vote on equal terms, the State may not, by later arbitrary and disparate treatment, value one person’s vote over another.”).

The extensive evidence of these burdens more than supports the trial court’s finding that the Affidavit, particularly when injected into the voting process, violates the constitutional right to vote. And it is only by severing the misleading Affidavit, and the burdens that its message could impose upon the rights of hundreds of thousands of Missouri voters, that the trial court was able to leave the rest of the voter ID law intact.

3. The State Advances no Compelling or Even Legitimate Government Interest in Enforcing a False and Misleading Affidavit.

To the extent there is any valid government objective that can lawfully be advanced by misstating the law and misleading its electorate, which is doubtful, the State has not identified what that might be. Instead, the State hypothesizes government interests that have nothing to do with the specific averments in the Affidavit that the trial court found unconstitutional.

The State first argues that the Affidavit verifies a voter’s identity and eligibility to vote and cites the prevention of voter fraud as a compelling interest, yet the State makes no attempt to explain how swearing that photo ID is required to vote, or any of the other

averments that the trial court found objectionable, are even rationally related, let alone narrowly tailored, to advancing that goal. *See Ambers-Phillips v. SSM DePaul Health Ctr.*, 459 S.W.3d 901, 912 (Mo. banc 2015) (citation omitted) (noting that a statutory classification fails rational-basis review when it “rests on grounds wholly irrelevant to the achievement of the state’s objective.”) The only portion of the Affidavit that even references the voter’s identity appears in the first few lines, where the voter enters her name and address. § 115.427.3, RSMo. But even those averments simply duplicate the voter certificate and precinct register that every voter is required to sign even before receiving the Affidavit, and which already requires voters to affirm their name and address and even includes a warning that attempting to vote without a lawful right is against the law. *See* § 115.427.8, RSMo. The Affidavit, therefore, consists of statements that are entirely unrelated to verifying a voter’s identity, and two introductory lines that set forth the voter’s name and address, which merely duplicates the statement that the voter signed in the precinct register moments earlier; no part of the Affidavit is necessary to advance any interest in preventing voter fraud.

Moreover, the State’s reliance on voter fraud to justify the Affidavit “necessarily requires [the Court] to look at what kinds of fraud in voting have been shown to exist and what kinds of fraud in voting [HB 1631] will ameliorate.” *Weinschenk*, 203 S.W.3d at 217 n.27. It is still true today as it was when this Court decided *Weinschenk* that voter impersonation at the polls—the only type of fraud addressed by voter ID laws—is virtually nonexistent in Missouri. At trial, the State was unable to identify a single instance of voter impersonation that occurred since Missouri adopted the pre-existing voter ID law in 2002.

See also Weinschenk, 203 S.W.3d at 217 (“[T]he 2002 requirements, which are much less restrictive on the right to vote, have been sufficient to prevent [voter impersonation]”). And among the list of voter fraud prosecutions in Missouri identified by the State, none involved voter impersonation at a polling place. State’s Br. at 43 n.4.

All that is left of the voter fraud justification is what the State refers to as a “widespread belief” among voters that the election system needed reform, which purportedly led voters to adopt a recent constitutional amendment authorizing the legislature to enact voter identification laws (“Voter ID Amendment”). But that, too, is a stretch because the Amendment merely confirmed that the legislature has authority to adopt a voter ID law, and not that the State needed a new one. In any event, as this Court recognized, “perceptions are malleable,” and “where the fundamental rights of Missouri citizens are at stake, more than mere perception is required for their abridgment.” *Weinschenk*, 203 S.W.3d at 218. Missouri already has a voter ID law that seeks to verify voter identity and eligibility, the vast majority of which was undisturbed by the trial court’s ruling. The State’s inability to show that voter impersonation at the polls is anything other than a largely imaginary problem demonstrates that the offending portions of the Affidavit—which again are entirely unrelated to verifying voter identity and eligibility—are neither necessary nor even rationally related to preventing voter fraud.

The State’s reliance on the Carter-Baker Commission (the “Commission”) report and voter ID cases from other jurisdictions is also misplaced here, just as it was when the State first attempted to invoke the report in *Weinschenk*. *See Weinschenk*, 203 S.W.3d at 218 n.28 (finding that the Commission’s endorsement of general concept of photo ID

requirement did not support finding that Missouri’s photo ID law was unconstitutional). Plaintiffs’ expert, Dr. Mayer, testified that the Commission’s report, which was issued nearly 14 years ago, is not a source commonly referenced or relied upon by political scientists studying the effects of voter ID, and the prevailing view, based on the literature and commentary among political scientists, is that the Commission’s recommendations on voter ID are not well grounded. Tr. (9/25) at 110-111. The State has also ignored the Commission’s accompanying recommendations that states reach out to non-drivers by providing mobile offices to obtain ID, and provide IDs free of charge, neither of which the State has fully adopted. *See id.*; *see also*, PX 130 at 92-93, A287-288; PX 112 at DOR_3_001065, A183. Furthermore, because Missouri’s Constitution confers an express right to vote “that provides greater protection than its federal counterpart,” and because Plaintiffs have presented specific evidence of the unconstitutional burdens that the Affidavit and enjoined advertisements would impose on voters who are exposed to them, *see supra* § B.2, cases applying the federal implied right are not controlling here.⁶ *Weinschenk*, 203 S.W.3d at 212, 214 (distinguishing the trial court ruling that was eventually affirmed in *Crawford* because the plaintiffs in *Weinschenk* offered testimony from Missouri voters who would have been required to incur the burdens of the photo ID

⁶ The State reliance on *League of Women Voters of Ind. v. Rotika*, 929 N.E.2d 758 (Ind. 2010) is particularly unpersuasive here since that case not only involved a different constitution but did not consider whether the voter ID law unduly burdened the right to vote. The issue before the Indiana court was whether the legislature had authority to require voters to provide identification at the polls, *see id.* at 762, and the court, citing *Weinschenk*, made clear that its ruling did not foreclose similar claims grounded in the specific burdens imposed by the law. *See id.* at 773.

law). Finally, even if the State's characterizations of the Commission's report and non-binding decisions from other jurisdictions were correct, at most those authorities would address the need for voter ID laws generally; none provide any explanation why an Affidavit that misstates the law and misleads voters could ever be considered lawful.

Voter education and quicker processing times as rationales fare no better. The State points to no authority that has found that such interests justify imposing such burdens on voters, yet the biggest problem with the State's argument is that the Affidavit does just the opposite of what the State claims it was designed to do. It misinforms, rather than educates, voters by stating that photo ID is required to vote when it is clearly not. It also improperly suggests to voters that they can no longer use the forms of identification listed under Option 2, and, depending on how a given voter interprets the term "possess," it misleads some voters into believing either that they are eligible for a free photo ID when they are not, or that they are ineligible to execute the Affidavit and vote under Option 2. Forcing voters to sign these statements under oath serves no voter education interest.

Adding the Affidavit to the voting process, moreover, is all but certain to increase processing times as voters grapple with its contents and determine whether they will incur the risk of agreeing to its terms, which, as Dr. Mayer testified, consist of confusing and contradictory language that require up to one year of post bachelor's degree education to comprehend fully. *See* Tr. (9/25) at 86-90. The State suggests that certain counties that use electronic poll pads will benefit from quicker processing if voters switch to photo IDs, but even if that were true, any efficiency gains in these counties are more than offset by approximately half of all counties that *do not* use electronic poll pads, *see* Tr. (9/26) at 42,

and for which wait times will surely increase to accommodate the review of Affidavits, without any offsetting improvements in processing speed.

In sum, the State's arguments fail to resolve the clear discrepancies between the purported justifications of the Affidavit and what the Affidavit actually says, which is a clear indication that no legitimate purpose, under any level of scrutiny, can be served by misstating the law, or misleading Missourians to believe that they fail to meet the requirements to vote. *See Romer v. Evans*, 517 U.S. 620, 632 (1996) (noting that even under "the most deferential of standards," the court insists on knowing the relation between the law and its purpose, and a law inexplicable by anything other than an unlawful purpose lacks a rational relationship to legitimate state interests); *see also Ambers-Phillips*, 459 S.W.3d at 912 (Mo. banc 2015); *Golinski v. U.S. Office of Pers. Mgmt.*, 824 F. Supp. 2d 968, 996 (N.D. Cal. 2012).

C. The Missouri Constitution Does Not Authorize the State to Mislead Voters by Mischaracterizing Its Voter ID Laws. (*Point Relied On I*).

The Court should also reject the State's suggestion that the Affidavit, false statements and all, should have been upheld anyway because the legislature is authorized to pass a stricter voter ID law. In support of this unprecedented expansion of legislative power, the State cites Article VIII, Section 11 of the Missouri Constitution, a recent constitutional amendment that authorizes the legislature to require voters to establish their identity and qualifications by presenting identification while voting. Yet this provision cannot save the Affidavit because it is one thing to authorize a voter ID law, and quite another to demand that voters acknowledge and adhere to a requirement that the legislature

never passed to begin with. *See Indianapolis Life Ins. Co. v. U.S.*, 115 F.3d 430, 434 (7th Cir. 1997) (“What [the legislature] might have done, it did not do; only what Congress actually enacted is the law.”). Thus, the Court need not resolve questions about the scope of legislative authority to pass voter ID laws in order to dispense with this appeal.

In any event, the State’s interpretation of the Voter ID Amendment is legally flawed because by acknowledging that the legislature may adopt voter identification laws, the Amendment confers no new authority that the General Assembly did not already have under its plenary power. *State Auditor v. Joint Comm. on Legislative Research*, 956 S.W.2d 228, 230-31 (Mo. banc 1997) (legislature has plenary power “to make, amend and repeal laws for Missouri and to have the necessary power to accomplish its law-making responsibility . . . subject only to the restraining clauses of the constitutions of the state and nation”). This Court has repeatedly affirmed that “the Constitution is not a grant but a *restriction* upon the powers of the legislature.” *State v. Clay*, 481 S.W.3d 531, 537 (Mo. banc 2016) (emphasis added) (*quoting Liberty Oil Co. v. Dir. of Revenue*, 813 S.W.2d 296, 297 (Mo. banc 1991)). And no Missouri court has ever held categorically that the legislature cannot adopt a voter ID law. The constitutional limits on the legislature’s power to enforce photo ID requirements are not for want of authority, but rather are imposed by the bill of rights, which includes the fundamental right to vote, art. I, § 25, and the right to equal protection of the laws, art. I, § 2. New constitutional amendments do not simply displace these rights—especially not by implication, as would be the case here since the Voter ID Amendment makes no reference to the right to vote—but instead must be read in harmony with pre-existing provisions whenever possible. *State ex inf. McKittrick v. Bode*,

113 S.W.2d 805, 808 (Mo. 1938) (“A new constitutional provision adopted by a people already having well-defined institutions and systems of law should not be construed as intended to abolish the former system[.]”). In this case, that means that the legislature is free to adopt voter ID laws, provided they do not unduly burden the right to vote or any other fundamental rights protected by the Missouri constitution. *See id.*

The plain language of the Voter ID Amendment, moreover, would not authorize a strict photo ID law that significantly burdened the right to vote—even if the legislature had enacted one. The Amendment states that a voter “may be required . . . to identify himself or herself . . . by providing election officials with a form of identification, *which may include* valid government-issued photo identification.” Mo. Const. Art. VIII, § 11 (emphasis added). The phrase “which may include valid government-issued photo identification” refers to the phrase immediately before it and describes one form of identification that the voter *may provide* to establish her identity. *Thompson v. Comm. on Legislative Research*, 932 S.W.2d 392, 395 n.3 (Mo. 1996) (holding “qualifying phrases are applied to the phrase immediately preceding” them and not to phrases that are more remote) *superseded on other grounds by* Mo. Rev. Stat. § 116.175. It does not authorize the legislature to demand only photo ID.

The un-intuitive phrasing of this Amendment was no accident and its history suggests that its framers sought to avoid any explicit reference to a photo ID requirement. In a prior unsuccessful attempt to amend the constitution, the General Assembly adopted a proposed amendment that stated, in part, that a voter “may be required . . . to identify himself or herself . . . by providing election officials with a form of identification, which

may include *requiring* government-issued photo identification.” See S.J.R. 2, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011) (emphasis added). This version was struck down following a legal challenge in the Cole County Circuit Court because the accompanying summary statement simply asserted that the amendment would allow the General Assembly to set voter photo identification requirements and did not make clear that it would authorize the General Assembly to *require* photo ID. See *Aziz v. Mayer*, No. 11AC-CC00439, slip op. at 5-6.

Following the lesson of *Aziz*, the next time the General Assembly placed a constitutional amendment on the ballot, it opted to delete the word “requiring” from the phrase “which may include [deleted] government-issued photo identification,” thus avoiding any further obligation to clarify in the summary statement that the Amendment would authorize the General Assembly to “*require* photo identification” to vote. The State’s attempt to now expand the reach of the Voter ID Amendment in ways that the General Assembly opted *not* to make explicit in its text (and in the summary statement) is a bait and switch that seeks to inject terms that Missouri voters never approved. The Voter ID Amendment therefore provides no basis to challenge the ruling below.

D. The Secretary of State Has No Authority to Re-Write the Affidavit. (*Point Relied On II*).

The trial court correctly denied the State’s offer to assume the role of the legislature and re-write the Affidavit, because while the sample Affidavit in subsection 3 need not be adopted verbatim, the specific clauses that the court found unconstitutional are mandated by a different provision of the statute, § 115.427.2 (subsection 2), which does not permit

any substantive revision by the Secretary of State.

A review of the State’s proposed alteration to the Affidavit alongside the substantive requirements of subsection 2 reveal significant departures from the statutory language. First, subsection 2 requires that the voter “execute a statement, under penalty of perjury, averring . . . that the individual does not possess a form of personal identification described in subsection 1 of this section; [and] acknowledg[ing] that the individual is eligible to receive a Missouri nondriver’s license free of charge if desiring it in order to vote.” The State’s proposed alteration reads:

I appeared at a polling place without a form of personal identification described in § 115.427.1, RSMo. As a person who appeared at a polling place without a form of personal identification described in § 115.427.1, RSMo, I acknowledge that any otherwise qualified voter who does not already possess such identification may receive free of charge a Missouri nondriver’s license at any fee office if desiring it in order to vote. I furthermore acknowledge that I am required to present a form of personal identification listed in § 115.427.1, RSMo to satisfy the requirements of § 115.427.1, RSMo, in order to vote. I understand that knowingly providing false information is a violation of law and subjects me to possible criminal prosecution.

State’s Br. at 48. Assuming the first sentence of the State’s proposed Affidavit is a permissible interpretation of subsection 2’s limitation to individuals who do not “possess” photo ID, the second sentence takes a sharp turn from the statutory language which makes clear that the individual who is eligible to receive a free nondriver’s license is the same individual who appeared without photo ID. *See* § 115.427.2 (“averring that the individual does not possess a form of personal identification . . . acknowledging that *the individual* is eligible to receive a free Missouri nondriver’s license”). The State thus converts language that purports to address the voter’s specific circumstances and inform the voter

of her eligibility for a free ID into a general statement about “any otherwise qualified” individuals, to which the voter must acknowledge and sign under penalty of perjury. *But see Fugate v. Jackson Hewitt, Inc.*, 347 S.W.3d 81, 87 (Mo. App. W.D. 2011) (noting that the court cannot “defer to an agency's interpretation of a statute that expands, narrows, or is inconsistent with the plain and ordinary meaning of the words of the statute”). The State’s revision, moreover, still incorporates inconsistent definitions of the word “possess,” but does so implicitly. It interprets “possess” in subsection 2 to refer to immediate possession (on the voter’s person) but interprets “possess” in subsection 6 (which authorizes the free nondriver’s license referenced in the Affidavit) more broadly to mean possession anywhere. *See* § 115.427.6, RSMo.

More importantly, the revised Affidavit fails to address the biggest flaw identified by the trial court: the false and misleading statement that “the individual is required to present [photo ID] in order to vote.” State’s Br. at 48. The State’s proposed revision to this clause adds additional jargon which makes the statement nearly incomprehensible yet fails to eliminate the misleading phrase that suggests photo ID is a pre-requisite for voting. This statement, among others, renders the Affidavit plainly unconstitutional, and the State does not even suggest that it can remove the phrase while still complying with the statute. Thus, the State’s claim that it could have addressed the trial court’s objections with a substantially similar affidavit is wholly without merit.

E. The Trial Court Appropriately Severed the Affidavit From the Statute. (*Point Relied On III*).

The trial court was correct to strike the entire Affidavit because its defects are such

that only a rewrite—and not merely a redaction—can address its constitutional flaws, and doing so would exceed the authority of the court and the Secretary of State. While the State argues that the trial court could have saved the Affidavit by severing specific phrases, its own proposal illustrates that retaining any substantive portions of the Affidavit would either introduce more confusion or preserve the same misleading statements that rendered it unconstitutional to begin with. The State suggests, for instance, that the Affidavit could have been severed as follows:

I do solemnly swear (or affirm) that my name is; that I reside at; that I am the person listed in the precinct register under this name and at this address; ~~and that, under penalty of perjury, I do not possess a form of personal identification approved for voting. As a person who does not possess a form of personal identification approved for voting,~~ I acknowledge that I am eligible to receive free of charge a Missouri nondriver’s license at any fee office if desiring it in order to vote. I furthermore acknowledge that I am required to present a form of personal identification, as prescribed by law, in order to vote. I understand that knowingly providing false information is a violation of law and subjects me to possible criminal prosecution.

State’s Br. at 51. But this proposed remedy fails to address the trial court’s well-founded concerns. It still retains the false and misleading statement that photo ID is required to vote, and it trades one point of confusion—the meaning of “possess”—for an outright misstatement of law by implying that all individuals who sign it are eligible to receive a free Missouri nondriver’s license, which, as the Secretary of State’s Office admits, is not true for everyone who appears at the polls without photo ID. Tr. (9/26) at 31-32. Taking the State’s proposed remedy one step further and assuming the court redacted the third and fourth clauses instead, the Affidavit would read as follows:

I do solemnly swear (or affirm) that my name is; that I reside at

.....; that I am the person listed in the precinct register under this name and at this address; and that, under penalty of perjury, I do not possess a form of personal identification approved for voting. ~~As a person who does not possess a form of personal identification approved for voting, I acknowledge that I am eligible to receive free of charge a Missouri nondriver's license at any fee office if desiring it in order to vote. I furthermore acknowledge that I am required to present a form of personal identification, as prescribed by law, in order to vote.~~ I understand that knowingly providing false information is a violation of law and subjects me to possible criminal prosecution.

Again, this would fail to address the constitutional concerns because, as the trial court correctly held, the second clause requires voters “to swear that they do not possess personal identification approved for voting, while simultaneously presenting to the election authority a form of personal identification that is approved,” D77 at 5, and the differing interpretations of the word “possess” make it all the more difficult for a voter to sign such a statement under threat of criminal penalty. *See, e.g.*, Tr. (9/24) at 49 (“So I had all forms of identification. I definitely have a problem with that [statement]. Under perjury, yes, I have a problem.”) (Mildred Gutierrez Testimony).

The only remaining alternative that may have eliminated the Affidavit’s constitutional defects would have been to strike everything but the initial statement of the voter’s name and address, as listed in the precinct register. The trial court was correct not to do so, however, because there is no reason to believe that the legislature would have enacted an Affidavit that simply replicates the affirmation in the precinct register that the voter would have signed just moments earlier and which accomplishes no additional purpose. *See Weinschenk*, 203 S.W.3d at 219 (explaining the appropriate test is whether the remaining provision is one which the legislature “*would have enacted if it had known*

that the excised portions were invalid.") (quoting *State ex rel. Audrain Cty. v. Hackmann*, 205 S.W. 12, 14 (Mo. banc 1918)).

The sequence of events that occur immediately before and after the Affidavit's execution is what establishes the voter's identity and eligibility. First, as noted above, the voter must sign the precinct register, which states: "I hereby certify that I am qualified to vote at this election by signing my name and verifying my address by signing my initials next to my address." § 115.427.8, RSMo ("The precinct register shall serve as the voter identification certificate."). Then the voter must enter her name and address in the Affidavit, swearing that he or she is the same person listed under that name and address in the precinct register. § 115.427.3, RSMo. The remaining substantive averments (i.e. that the voter does not possess photo ID and that photo ID is required in order to vote) are then introduced by the phrase "under penalty of perjury" § 115.427.3, RSMo. After signing the Affidavit, the voter must verify her identity by presenting a form of identification listed in subsection 2 before receiving a ballot. § 115.427.2, RSMo.

The Affidavit's first statement of the voter's name and address, therefore, merely links the specific voter who signed the precinct register to the remaining, unconstitutional averments. It identifies the person who does not "possess" photo ID; is eligible for a free nondriver's license; has been made aware that photo ID is required for voting; and is potentially subject to criminal prosecution for providing false information. Identifying the signer of the Affidavit allows election officials to determine who is bound by its terms, and is "a step towards an end, not an end in itself." *Weinschenk*, 203 S.W.3d at 220 (severing transitional provision along with unlawful photo ID requirement). Simply affirming one's

name and address in the Affidavit, and nothing more, would duplicate the precinct register and would add an entirely unnecessary procedural step to the voting process. *See Akin v. Director of Revenue*, 934 S.W.2d 295, 300 (Mo. banc 1996) (noting that in applying the severability doctrine, General Assembly cannot reasonably be presumed to have intended to enact a provision with a meaningless sentence).

The trial court adhered to the severance statute and the presumption in favor of severability by striking the unlawful Affidavit only while leaving the rest of the statute intact. Missouri law for 15 years prior to the passage of HB 1631 allowed eligible Missourians to vote with the same forms of identification listed in subsection 2. § 115.427.2, RSMo (2002). As the State argued before the trial court, the list of acceptable identification under subsection 2 “is nearly word-for-word identical to the list of non-photo identification accepted before enactment of [HB 1631]” and its Affidavit requirement, D61 at 34, thus there is no reason to believe the legislature would not have permitted Missourians to vote without the Affidavit. It does not follow, however, that the legislature would have enacted *any* portion of the Affidavit on its own. After eliminating all defects identified by the trial court, all that remains is a redundant, introductory clause that previously linked the voter to the severed portions of the Affidavit, but by itself adds nothing more to the voter’s affirmation in the precinct register or to the verification of identity through one of the documents accepted under Option 2. Nothing in the statute suggests that the legislature would have enacted such a provision.

* * *

The trial court’s common-sense ruling enjoined the State from placing before voters

a confusing and misleading Affidavit that blatantly misstates the law and twice threatens criminal penalties as a condition for voting. Under no circumstances should such a document have any place in the voting process, but even less so in Missouri, where the express, constitutional right to vote “provides greater protection than its federal counterpart.” *Weinschenk*, 203 S.W.3d at 212. The trial court’s ruling, therefore, should be upheld because no legitimate purpose is served by misleading or misinforming Missourians about the State’s voting requirements.

V. CONCLUSION

For the reasons stated above, this Court should affirm the trial court’s ruling.

Respectfully submitted,

By: /s/ Jeremy A. Root

Charles W. Hatfield, No. 40363

Jeremy Root, No. 59451

STINSON LLP

230 W. McCarty Street

Jefferson City, Missouri 65101

(573) 636-6263

Chuck.Hatfield@stinson.com

Jeremy.Root@stinson.com

Don M. Downing, #30405

GRAY, RITTER & GRAHAM, P.C.

701 Market Street, Suite 800

St. Louis, Missouri 63101

(314) 241-5620

DDowning@grgpc.com

Marc E. Elias*

Uzoma N. Nkwonta*

PERKINS COIE LLP

700 Thirteenth St., N.W., Suite 600

Washington, D.C. 20005-3960

(202) 654-6200

MElias@perkinscoie.com

UNkwonta@perkinscoie.com

Counsel for Respondents

** Pro Hac Vice Application Pending*

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that one copy of the foregoing was filed electronically on this 1st day of July, 2019, via the Court's electronic filing system, which will send notification of such filing to all counsel of record.

I further certify that this brief complies with the limitations set forth in Rule 84.06(b) and contains 16,614 words, excepting the cover, certificate required by Rule 84.06(c), signature block, and Appendix.

/s/ Jeremy A. Root
Counsel for Respondents