SC97470

IN THE SUPREME COURT OF MISSOURI

PRIORITIES USA, ET AL.

Plaintiffs-Respondents,

v.

STATE OF MISSOURI, ET AL.

Defendants-Appellants.

From the Circuit Court of Cole County, Missouri
The Honorable Richard G. Callahan, Circuit Judge

BRIEF OF APPELLANTS

ERIC S. SCHMITT
Attorney General

D. John Sauer, No. 58721
Solicitor General
Peter T. Reed, No. 70756
Zachary M. Bluestone, No. 69004
Deputy Solicitors General
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102
(573) 751-8870
John.Sauer@ago.mo.gov

ATTORNEYS FOR DEFENDANTS-APPELLANTS STATE OF MISSOURI AND SECRETARY ASHCROFT

Frank Jung, No. 38261
General Counsel
Khristine A. Heisinger, No. 42584
Deputy General Counsel
Secretary of State John R. Ashcroft
PO Box 1767
Jefferson City, MO 65102
573-751-4875
Frank.Jung@sos.mo.gov
Khristine.Heisinger@sos.mo.gov

ATTORNEYS FOR DEFENDANT-APPELLANT SECRETARY OF STATE JOHN R. ASHCROFT

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

Other Authorities

INTRODUCTION

Backed by a constitutional amendment ("Voter ID Amendment") and the overwhelming support of Missouri voters, the State adopted its current voter identification law in 2016. § 115.427, RSMo (the "Voter ID Law"). Responding directly to this Court's prior concerns, the new Voter ID Law gives voters three easy options for voting. The law requires voters to present a "form of personal identification" if they bring one to the polls, but it has two flexible exceptions for voters who do not: (1) A voter shall present a "form of personal identification" if they have one with them ("Option One"); (2) a voter may sign an affidavit and present any form of non-photo identification utilized under the prior law if they do not have personal identification with them ("Option Two"); or (3) a voter may cast a provisional ballot verified through signature matching ("Option Three"). The new law makes voting easier, not harder, while also responding to voter concerns about the security of the ballot box. As a result, the circuit court largely upheld the law and rejected Plaintiffs' claims. But it entirely enjoined the affidavit used for Option Two. This was error.

First, the circuit court failed to read the Option Two affidavit in its statutory context. The court said the affidavit misstated the law by saying that a "form of personal identification" is required for voting. But the statute says voters "shall" establish identity and eligibility by presenting a form of personal identification, and it defines the forms of personal identification that satisfy

these "requirements." Option Two and Option Three voting are certainly flexible exceptions, but they are phrased in conditional and permissive language. Even "significant" exceptions do not make mandatory statutory language any less mandatory. The court also thought the affidavit required voters to say "they do not possess a form of personal identification approved for voting while simultaneously presenting the election authority a form of personal identification." But the court misused a defined term. "Form of personal identification" is carefully defined, and consistently used no less than thirteen times in the statute, to refer to Option One identification. A voter signing the Option Two affidavit has *already* said that they do not have a form of personal identification with them, and a voter who does present a form of personal identification does not sign the affidavit.

Second, the circuit court erred in *entirely* enjoining the affidavit requirement. The affidavit only needs to be "substantially" similar to the text in the statute. § 115.427.3, RSMo. The court did not find that a "substantially" similar affidavit would be unconstitutional, so its injunction should have allowed the Secretary of State to rewrite the affidavit.

Third, the circuit court erred by severing far more text than necessary. The court severed even those parts of the affidavit that it expressly found to be constitutional. Instead, the court should have severed only the small part of the affidavit that it held to be unconstitutional (and part of Subsection 2).

Fourth, the court separately erred by enjoining certain advertisements on similar grounds. The statute expressly requires public notice about the "personal identification requirements of subsection 1." § 115.427.5, RSMo.

STATEMENT OF FACTS AND OF THE CASE

I. With the overwhelming support of Missouri voters, the General Assembly adopted a flexible voter identification law that generally requires photo identification but contains flexible exceptions for verifying identity through other means.

In 2006, the bipartisan Commission on Federal Election Reform, co-chaired by former President Jimmy Carter, undertook a sweeping examination of election security in the United States. *See* Def. Ex. 6 ("Carter-Baker Report"). Quoting from the Carter-Baker Report, the U.S. Supreme Court highlighted a State's compelling interests in voter ID laws: "'The electoral system cannot inspire public confidence if no safeguards exist to deter or detect fraud or to confirm the identity of voters. Photo [identification cards] currently are needed to board a plane, enter federal buildings, and cash a check. Voting is equally important.'" *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 194 (2008) (quoting Carter-Baker Report, § 2.5).

This Court recognized Missouri's compelling interests in voter identification in the past, but it struck down an earlier photo identification law based on concerns that the law was too strict. *Weinschenk v. State*, 203 S.W.3d

201 (Mo. banc 2006). Responding to this Court's concerns, the General Assembly, and the people of Missouri, took a significantly revised approach.

In 2016, the people of Missouri expressed their overwhelming support for voter identification laws, including photo identification laws, by amending the Missouri Constitution to authorize them expressly. *See* MO. CONST. art. VIII, § 11 (the "Voter ID Amendment"). The General Assembly passed HB 1631, now codified as § 115.427, RSMo (the "Voter ID Law"), contingent on voter approval of the Voter ID Amendment. Thus, when 63 percent of Missouri voters approved the Amendment, HB 1631 became law.

The Voter ID Law advances the State's compelling interests while going out of the way to ensure that every registered voter can vote. The Law provides voters three different options to verify their identity and eligibility to vote. § 115.427, RSMo. It frames those options as a general requirement followed by two flexible exceptions. *Id.* "Option One" voting requires a voter to present a "form of personal identification," defined to include a Missouri driver's license, nondriver's license, passport, or military or veteran's ID. § 115.427.1, RSMo. A voter "shall" verify their identity using one of these forms of personal identification. *Id.* Upon doing so, a voter can vote. *Id.* If a voter does not have any of these forms of identification, he or she is eligible to receive a free nondriver's license for the purpose of voting. § 115.427.6(1), RSMo. If a voter needs supporting documentation to get a nondriver's license for the purpose of

voting—such as a birth certificate—he or she is eligible for free supporting documentation as well. § 115.427.6(2), RSMo.

Voters also may verify their identity with non-photo ID under "Option Two." § 115.427.2(1), RSMo. Option Two voting is limited to those who "appear[ ] at a polling place without a form of personal identification described in subsection 1" (Option One) and who are "otherwise qualified to vote." *Id.* Such voters may vote using any of the forms of non-photo identification allowed under the previous law. *Id.* Voters using "Option Two" must sign an affidavit verifying their identity and acknowledging that free photo identification is available. *Id.* That affidavit must be "substantially" in the following form:

> 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 Two Affidavit").

As an additional safeguard, the Voter ID Law created a new provisional-balloting procedure that allows voters to vote without presenting any form of identification at all. §§ 115.427.2(3) & .4, RSMo. Under "Option Three," a

provisional ballot will be counted *either* if the voter returns with a valid form of personal identification (photo ID) *or* if the election authority determines that the voter's signature on the provisional ballot envelope matches the signature on file. § 115.427.4, RSMo. Under the old law, provisional ballots counted only if two election judges attested to knowing the voter.

II. The circuit court rejected all of Plaintiffs' broader challenges to Missouri's flexible Voter ID Law because Plaintiffs were unable to identify a single voter who was unable to vote.

Recognizing the new law's flexibility, the circuit court largely rejected Plaintiffs' claims. The court found "that the voting scheme adopted by [the] General Assembly in HB 1631 is within its constitutional prerogative under the Missouri Constitution," with "one important exception" (discussed below). LF Doc. 77 at 1. The Voter ID Law, the court said, "poses no burden whatsoever" for "the vast majority of Missouri citizens." *Id.* at 2. In fact, it poses no burden for the "approximately 95% of likely voters" who already possess photo identification. *Id.*[1]

It also poses no burden (with one exception) for the small percentage of remaining voters, who have many choices for voting. The court recognized that

[1] The precise percentage is disputed by the parties, but all agree it is very high. In the August 2018 primary election, for example, about 96.6% of voters presented Option One identification. Def. Ex. 191. A study examining earlier elections found rates closer to 98%. Tr. (9/26) at 122 (discussing Anthony and Kimball study). The 95% number comes from an early estimate by former Secretary of State Kander about the effects of an earlier bill. *Id.* at 123-24.

voters who do not already have photo ID can acquire a nondriver's license for voting, and any underlying documentation needed to get one, "at no expense." *Id.* at 2-3. Or such voters can utilize Option Two, which allows voters to use any form of non-photo identification they used under the prior law. § 115.427.2(1), RSMo. The only difference is the Option Two affidavit. *Id.* The court expressly found an "affidavit requirement reasonable" because of "the different forms of identification being presented by Option Two voters." LF Doc. 77 at 4. Generally speaking, an affidavit requirement poses no "unreasonable burden" on the right to vote. *Id.* Finally, the court recognized that Option Three made it easier to vote, not harder. Option Three "allows for individuals who show up at the polls without any of the prescribed forms of identification one more opportunity to have their vote counted rather than simply turning them away." *Id.* at 6.

The trial record also establishes three critical points. First, Plaintiffs did not identify a single voter who was unable to vote under the new law. To be sure, Plaintiffs presented a few instances of putative voter confusion. Mildred Gutierrez, for instance, thought she had brought her voter registration card with her to the polls, when in fact she had brought a mailer labeled "not a valid ID." Tr. (9/24) at 55; Pl. Ex. 3. Rachel Youn cast a "yellow" provisional ballot under the Help America Vote Act, because she thought she had registered at her new address prior to election day, but in fact she had not, so she had to file

a change of address at the polling place. Tr. (9/24) at 208-210; 212-213 (explaining that Youn's confusion arose from HAVA, not the Voter ID Law, which uses a "blue" provisional ballot). There were also a few instances of poll workers getting the law wrong, as noted by Mildred Gutierrez and William King. Tr. (9/24) at 40-41; Tr. (9/25) at 12. But in every instance, the voter was able to vote using one of the law's three options. Tr. (9/24) at 36 (Gutierrez); *id.* at 205 (Youn); Patrick Depo. at 34 (Patrick);[2] Tr. (9/25) at 11 (King).

Second, any voter confusion was entirely unrelated to the Option Two affidavit. Plaintiffs did not identify a single voter who found that affidavit confusing or contradictory while they were at the polling place. Moreover, there is no evidence of any voter who refused to sign the affidavit. In fact, both individual Plaintiffs, Mildred Gutierrez and Ri Jayden Patrick, testified that they *did* sign the affidavit in November 2017 and that, if they read it at all, they did not find it confusing or contradictory at the time. Tr. (9/24) at 39-40, 59 (Gutierrez explaining that she did not read the affidavit until she was contacted about this lawsuit); Patrick Depo. at 34, 42 (Patrick voted using Option Two but did not remember seeing the affidavit until joining this lawsuit).

[2] Designations from Patrick's deposition were played at trial, but were not taken down verbatim in the trial transcript. Thus, the deposition transcript was submitted as part of the Legal File alongside the trial transcript.

Third, evidence at trial demonstrated that Missouri's law is less strict than those of many other states. *See* Def. Ex. 103, Nat'l Conf. on State Legis. (NCSL), *Voter Identification Laws*. The NCSL classifies voter identification laws by strictness. The State's expert witness, Dr. Jeffrey Milyo, explained that Missouri's law cannot be classified as a "strict photo ID" law because it provides multiple options for voting without photo ID. Tr. (9/26) at 100, 110. Indeed, even among those states that provide multiple options, Missouri's law is among the least strict. The Indiana law upheld by the U.S. Supreme Court, for example, required an affidavit of indigency to vote without using photo ID. *Crawford*, 553 U.S. at 186. Thus, Dr. Milyo explained, the testimony of Plaintiffs' expert, Dr. Kenneth Mayer, that "strict photo ID" laws decrease voter turnout, reveals little about Missouri's Voter ID Law or the impact of that law on Missouri elections. Tr. (9/26) at 104-05 (explaining that Dr. Mayer's studies assume a strict photo ID law); *id.* at 119, 121 (same), 129 (noting Dr. Mayer failed to compare the current law to the previous law). Although the circuit court found Dr. Mayer's testimony "credible" it agreed that his testimony was limited to "a strict government photo identification requirement (as in Option One)." LF Doc. 77 at 3. Missouri's law, obviously, is not limited to Option One. Dr. Milyo also testified that academic literature shows that the effect of even strict photo ID laws on turnout is ambiguous. Tr. (9/26) at 151-153.

III. But the circuit court permanently enjoined the State from using any form of affidavit during Option Two voting because it believed the current statement inaccurately summarized the statute, and it enjoined certain advertising for similar reasons.

The circuit court noted "one important exception" to its ruling, LF Doc. 77 at 1, and that exception regarded the court's interpretation of the Option Two affidavit. The court enjoined the affidavit requirement in its entirety. *Id.* at 7. The court explained:

> The affidavit plainly requires the voter to swear that they do not possess a form of personal identification approved for voting while simultaneously presenting to the election authority a form of personal identification that is approved. If, as the State argues, the form of personal identification refers to an 'Option One Identification', the latter part of the affidavit which requires the voter to acknowledge that an 'Option One Identification' is now a prerequisite for voting is an outright misstatement of law.

Id. at 5. This burdened the right to vote, the court said, under any constitutional standard. *Id.* In a footnote, the court also suggested that the affidavit's use of the word "possess" was confusing. *Id.* at 5 n.1. It did not find that this language burdened the right to vote. *Id.*

Separately, but for related reasons, the court criticized and enjoined certain print advertising put out by the Secretary of State. "[I]n addition to announcing the availability of state-issued ID cards," the court explained, some advertising "strongly implied that a photo identification card was [] required for voting." *Id.* at 5 (citing Pl. Ex. 7 – Pl Ex. 13). This was misleading, it said, because voters can vote without a photo identification card. *Id.* at 5-6.

POINTS RELIED ON

I. The circuit court erred in entirely enjoining the use of an affidavit during Option Two voting, because the current affidavit is constitutional, in that it accurately summarizes the statute, does not burden the right to vote, and is narrowly tailored to advance compelling state interests.

- § 115.427, RSMo.
- *Dickemann v. Costco Wholesale Corp.*, 550 S.W.3d 65 (Mo. banc 2018).
- *Pestka v. Missouri*, 493 S.W.3d 405 (Mo. banc 2016).

II. The circuit court erred in entirely enjoining the use of an affidavit during Option Two voting, because a narrower remedy was available and appropriate, in that the statute only requires a "substantially" similar affidavit, and the court barred the Secretary of State from exercising its power to draft an affidavit addressing the court's concerns.

- § 115.427.3, RSMo.
- *Bates v. Webber*, 257 S.W.3d 632 (Mo. App. S.D. 2008).

III. The circuit court erred in entirely enjoining the use of an affidavit during Option Two voting, because it should have severed statutory text sparingly, in that the court instead broadly severed the affidavit's entire text.

- § 1.140, RSMo.

- *Dodson v. Ferrara*, 491 S.W.3d 542 (Mo. banc 2016).

IV. The circuit court erred in enjoining the Secretary of State from disseminating materials indicating that photo identification is required to vote, because such materials accurately reflect the law's requirements, in that the law requires a form of personal identification to vote but also provides flexible exceptions.

- § 115.427.5, RSMo.

JURISDICTION AND STANDARD OF REVIEW

The circuit court granted permanent injunctive relief finding parts of the law unconstitutional. This Court has exclusive appellate jurisdiction over cases challenging the constitutional validity of a statute. MO. CONST. art. V, § 3. In a court-tried case, the trial court's decision should be affirmed "unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Guyer v. City of Kirkwood*, 38 S.W.3d 412, 413 (Mo. banc 2001). "Challenges to a statute's constitutional validity are questions of law, which this Court reviews *de novo*." *City of Normandy v. Greitens*, 518 S.W.3d 183, 190 (Mo. banc 2017). "A statute is presumed to be constitutional and will not be held to be unconstitutional unless it clearly and undoubtedly

contravenes the constitution." *United C.O.D. v. State*, 150 S.W.3d 311, 313 (Mo. banc 2004).

ARGUMENT

I. The circuit court erred in entirely enjoining the use of an affidavit during Option Two voting, because the current affidavit is constitutional, in that it accurately summarizes the statute, does not burden the right to vote, and is narrowly tailored to advance compelling state interests.

To vote using secondary identification under Option Two, voters must also sign an affidavit. § 115.427.2(1). RSMo. The circuit court held that the affidavit requirement was unconstitutional and enjoined the State from using any affidavit during Option Two voting. LF Doc. 77 at 5, 7. The circuit court erred on the merits in three ways. *First*, the court should have read the affidavit's text in light of the statute as a whole. *Second*, the court largely ignored the Voter ID Amendment that authorizes the Voter ID Law. *Third*, the court should have found that the Voter ID Law as a whole did not burden the right to vote, and, at any rate, was narrowly tailored to advance compelling state interests. These arguments are fully preserved. LF Doc. 51 (Motion to Dismiss) at 3-21; LF Doc. 61 (Post-Trial Brief) at 19-56; LF Doc. 63 (Supplemental Post-Trial Brief) at 1-3.

A. Reading the statute as a whole, the affidavit describes the Voter ID Law consistently and accurately.

The circuit court enjoined the affidavit requirement because it found the affidavit language in § 115.427.3, RSMo, to be "an outright misstatement of

law" and "contradictory and misleading." LF Doc. 77 at 5. That holding misreads the statute's plain text, disregards this Court's principles of statutory interpretation, discards the General Assembly's intent, and invites rather than avoids constitutional questions.

1. The Law's plain text requires Option One voting, but has two flexible exceptions.

When analyzing a statute, this Court starts with the plain and ordinary meaning of the text. *Dickemann v. Costco Wholesale Corp.*, 550 S.W.3d 65, 68 (Mo. banc 2018). The affidavit, found in Subsection 3, states in relevant part:

> "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 (emphasizing language the circuit court found problematic). This language is internally consistent and accurately reflects the rest of the statute. Contrary to the circuit court's holding, the plain text shows that the Voter ID Law requires "Option One" voting using a form of personal identification. Option Two and Option Three voting then operate as flexible

exceptions to this general requirement for those who appear "at a polling place without a form of personal identification." § 115.427.2(1), RSMo.

Subsection 1 demonstrates this reading in three ways. First, "Persons 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." § 115.427.1, RSMo (emphasis added). The statute does not say that voters "may" present a form of personal identification. The use of "shall" instead of "may" shows that presenting a "form of personal identification" is mandatory and imperative. "'It is the general rule that in statutes the word 'may' is permissive only, and the word 'shall' is mandatory.'" *State ex rel. Robison v. Lindley-Myers*, 551 S.W.3d 468, 474 n.4 (Mo. banc 2018) (quoting *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 672 (Mo. banc 2010)); *Bauer v. Transitional Sch. Dist. of City of St. Louis*, 111 S.W.3d 405, 408 (Mo. banc 2003) ("Generally, the word 'shall' connotes a mandatory duty.").

Second, Subsection 1 lists the "*[f]orms of personal identification* that satisfy the *requirements* of this section." § 115.427.1, RSMo (emphasis added). This sentence describes establishing identity and eligibility as "requirements," and it again says that the way to satisfy those requirements is by presenting one of the listed "forms of personal identification." *Id.* The word "required" in the affidavit in Subsection 3 and the word "requirements" in Subsection 1 have a consistent, uniform meaning. "'Absent express definition, statutory language

is given its plain and ordinary meaning, as typically found in the dictionary.'" *Dickemann*, 550 S.W.3d at 68 (citation omitted). The first dictionary definition of a "requirement" is in the imperative sense: "[s]omething that must be done because of a law or rule; something legally imposed, called for, or demanded; an imperative command." BLACK'S LAW DICTIONARY (10th ed. 2014) (def. 1). Subsection 1 and Subsection 3 use "requirements" and "required" in this simply imperative sense. As explained below, although "requirement" *can* mean an if-and-only-if condition, the statute does not use the word in that way.

Subsection 1 then provides an exhaustive list of all the "forms of personal identification." § 115.427.1, RSMo. A statutorily defined term is limited to its statutory definition. *Dickemann*, 550 S.W.3d at 68; *McDaris v. State*, 843 S.W.2d 369, 373 (Mo. banc 1992) ("terms of art . . . have only the meaning given them by . . . statute"). There are only four forms of personal identification that satisfy Subsection 1's requirements: (1) a nonexpired Missouri driver's license; (2) a nonexpired or nonexpiring Missouri nondriver's license; (3) a document with a photograph that satisfies certain statutory requirements; and (4) a photo identification from the Missouri National Guard, United States Armed Forces, or Department of Veteran Affairs. § 115.427.1, RSMo. This list carefully defines the statutory term "form of personal identification."

Subsection 2 shows that Option Two and Option Three voting operate as flexible exceptions. Subsection 2 explains that a voter "may" vote using Option

Two if an individual "appears at a polling place without a form of personal identification described in subsection 1." § 115.427.2(1), RSMo. This conditional language, coupled with the permissive "may," shows that Option Two voting functions as an exception to the general requirement of Option One voting. *See Hertel ex rel. Hertel v. Nationsbank N.A.*, 37 S.W.3d 408, 413 (Mo. App. E.D. 2001) (distinguishing "conditional language, such as the word 'may'" from mandatory "shall" language). Option Three voting by provisional ballot is an option for "[a]ny individual who chooses not to execute the statement" for Option Two voting, § 115.427.2(3), RSMo, or in cases where "the election judges cannot establish the voter's identity under this section," § 115.427.4, RSMo. Here, too, the statute uses permissive and conditional language. Both Option Two and Option Three voting, then, are exceptions to the general rule and requirement laid out in Subsection 1.

Next, the plain text of Subsection 2 says Option Two voters must sign a statement "averring that the individual does not possess a form of personal identification described in Section 1 of this section" and "acknowledging that the individual is required to present a form of personal identification, as described in subsection 1 of this section, in order to vote." § 115.427.2(1), RSMo. This reinforces that Option One voting is required and that Option Two voting is an exception designed for voters who come to the polls without a form of personal identification.

The affidavit text in Subsection 3 consistently and accurately reflects this plain-text reading of Subsection 1 and Subsection 2. The circuit court objected to two sentences in the affidavit. LF Doc. 77 at 4-5. The affidavit requires a voter to attest: "I do not possess a form of personal identification approved for voting" and later "I furthermore acknowledge that I am required to present a form of personal identification, as prescribed by law, in order to vote." § 115.427.3, RSMo. But both attestations refer back to Subsection 1's "shall" statement and its explanation that "forms of personal identification" satisfy those "requirements." Both attestations also mirror Subsection 2's description of what the affidavit must say. All three subsections are consistent.

The affidavit is also internally consistent. Subsection 2 says that Option Two voting is only available to a voter "who appears at a polling place without a form of personal identification." § 115.427.2, RSMo. So it is both consistent and accurate to require Option Two voters, who present a *different* form of identification, to attest that they do not possess a "form of personal identification." § 115.427.3, RSMo.

2. Context shows the phrase "form of personal identification" means Option One identification.

The circuit court also overlooks this Court's traditional rules of statutory interpretation. Statutory language is read in context not in isolation. "'The provisions of a legislative act must be construed and considered together and,

if possible, all provisions must be harmonized and every clause given some meaning.'" *Dickemann*, 550 S.W.3d at 68 (citation omitted); *Lane v. Lensmeyer*, 158 S.W.3d 218, 226 (Mo. banc 2005) ("[T]he statute is read as a whole and in pari materia with related sections. . . ."). If the circuit court thought the affidavit language conflicted with the rest of the statute, either internally or in summarizing other subsections, then the court should have tried to harmonize the affidavit language in § 115.427.3, RSMo, with the rest of the statute. *See S. Metro. Fire Prot. Dist. v. City of Lee's Summit*, 278 S.W.3d 659, 666 (Mo banc. 2009). "When two provisions appear to conflict, this Court has no authority to side with the provisions it deems the most prudent." *State v. Williams*, 548 S.W.3d 275, 280 n.5 (Mo. banc 2018). Instead, a court "must attempt to harmonize [the two provisions] and give them both effect." *S. Metro. Fire*, 278 S.W.3d at 666; *see also Dickemann*, 550 S.W.3d at 68; *Williams*, 548 S.W.3d at 280 n.5.

But the circuit court made no attempt to read the statute as a whole or give effect to the affidavit's language. *See* LF Doc. 77 at 4-5. It simply found the statute's affidavit language inconsistent with the rest of the statute, enjoined the affidavit, and upheld the rest of the law. *Id.* It had no authority to "side with" some provisions of the law—or at least the meaning it chose to give those other provisions—and enjoin other provisions. *Williams*, 548 S.W.3d at 280 n.5.

Had the court attempted to harmonize the affidavit with the rest of the statutory text, it would have been clear that the affidavit uses the phrase "form of personal identification" to refer only to the Option One identification listed in Subsection 1. If so, then there is nothing inconsistent or inaccurate in the affidavit that would in any way burden the right to vote. Not only does the statute define the term "form of personal identification" in Subsection 1, the affidavit's use of the term is consistent with the eleven other times the term is used in the statute:

- "Persons 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." § 115.427.1, RSMo.
- "No *form of personal identification* other than the forms listed in this section shall be accepted to establish a voter's qualifications to vote." § 115.427.1, RSMo.
- "*Forms of personal identification* that satisfy the requirements of this section are any one of the following: [listing types]." § 115.427.1, RSMo.
- "An individual who appears at a polling place without a *form of personal identification* described in subsection 1 of this section. . . ." § 115.427.2(1), RSMo.

- ". . .averring that the individual does not possess a *form of personal identification* described in subsection 1 of this section." § 115.427.2(1), RSMo.
- ". . . acknowledging that the individual is required to present a *form of personal identification*, as described in subsection 1 of this section, in order to vote." § 115.427.2(1), RSMo.
- "For any individual who appears at a polling place without a *form of personal identification* described in subsection 1 of this section. . . ." § 115.427.2(2), RSMo.
- Affidavit: "I do not possess a *form of personal identification* approved for voting." § 115.427.3, RSMo.
- Affidavit: "I furthermore acknowledge that I am required to present a *form of personal identification*, as prescribed by law, in order to vote." § 115.427.3, RSMo.
- ". . . provides a *form of personal identification* that allows the election judges to verify the voter's identity as provided in subsection 1 of this section." § 115.427.4(1)(a), RSMo.
- ". . . advance notice of the personal identification requirements of subsection 1." § 115.427.5, RSMo.

- ". . . calculated to inform the public generally of the requirement for *forms of personal identification* as provided in this section." § 115.427.5, RSMo.
- ". . . free of charge, if needed by an individual seeking to obtain a *form of personal identification* described in subsection 1 of this section in order to vote." § 115.427.6(2), RSMo.

By contrast, the statute never uses the term "form of personal identification" to describe the secondary identification used for Option Two voting—or any form of identification other than those listed in Subsection 1.

Thus, context reaffirms that the affidavit in Subsection 3 accurately summarizes the rest of the law. Subsection 3 requires voters to attest that a "form of personal identification" is "required" for voting because that is precisely what Subsection 1 says. § 115.427.1, RSMo ("Forms of personal identification that satisfy the requirements of this section are any one of the following. . ."). Similarly, voters must acknowledge that a "form of personal identification" is available for free if needed for voting, § 115.427.3, RSMo, because the statute prefers Option One voting and thus offers a form of personal identification for free, § 115.427.6, RSMo. There is no "misstatement."

Context also reaffirms that the affidavit is internally consistent. The circuit court said the affidavit was "contradictory and misleading" because it

"requires the voter to swear that they do not possess a form of personal identification approved for voting while simultaneously presenting to the election authority a form of personal identification that is approved." LF Doc. 77 at 5. But that is simply incorrect. Option Two voters who sign the affidavit have *not* presented a "form of personal identification"—they have presented a form of secondary identification. Again, § 115.427, RSMo uses the statutory term "form of personal identification" thirteen different times, and every time it means a form of primary identification under Option One, not a form of secondary identification under Option Two. The statute and the affidavit consistently use the defined term to avoid confusion or ambiguity. The circuit court, however, creates confusion by using "form of personal identification" to mean a form of secondary identification under Option Two.

The court's argument also proves too much. A voter does not see the affidavit until they (a) have told a poll worker they do not have a form of personal identification with them, and (b) have presented a form of secondary identification for voting. In that context, voters are unlikely to be confused. Indeed, Plaintiffs failed to identify a single voter who found the affidavit confusing at the time of voting. Tr. (9/24) at 39-40, 59 (Gutierrez); Patrick Depo. at 34, 42. The affidavit plainly refers to the personal identification the voter did not have with them, rather than the identification they just showed to the poll worker.

3. The General Assembly plainly intended to distinguish between Option One voting and Option Two voting, but the circuit court conflated the two.

In misreading the text, the circuit court also discarded legislative intent. "In interpreting statutes, this Court determines the intent of the legislature, giving the language used its plain and ordinary meaning." *Lane*, 158 S.W.3d at 226; *Garland v. Dir. of Revenue*, 961 S.W.2d 824, 830 (Mo. banc 1998) ("'our polestar is the intent of the legislature'" so statutory construction must "'seek to find and further that intent'") (citation omitted).

As discussed in more detail below, photo identification is safer and faster than other forms of identification. Trial Tr. (9/25) at 246-47 (testimony of Election Director Brandon Alexander); *see also* LF Doc. 77 at 4 (finding "the affidavit requirement reasonable because of the different forms of identification being presented by Option Two voters"). Missouri's law implements a preference in favor of photo identification while fully providing for every possible contingency raised by this Court in *Weinschenk*.

The circuit court, however, removed the General Assembly's intentional distinction between Option One voting and Option Two voting, both in its analysis and its relief. In its analysis, the court treated the affidavit's reference to a "form of personal identification,"—i.e., Option One identification—as if it meant *any* form of identification. The statute, however, does not consider all forms of identification to be interchangeable. §115.427.2(1), RSMo. In its

relief, the court entirely removed the affidavit requirement, thereby conflating Option One voting and Option Two voting, and frustrating the law's preference for, and encouragement of, Option One identification. LF Doc. 77 at 7. Doing so was plainly contrary to legislative intent.

4. The circuit court read the statute to create constitutional problems rather than to avoid them.

The court also read the affidavit and the statute to create constitutional problems rather than to avoid them.

Statutes should be read to avoid creating constitutional questions. "This court will not interpret a statute in a manner that leads to an unconstitutional result." *Bateman v. Platte Cty.*, 363 S.W.3d 39, 43 (Mo. banc 2012); *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838–39 (Mo. banc 1991). Thus, when faced with competing reading of a statute where "one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional," this Court will presume that the constitutional interpretation was "intended." *Blaske*, 821 S.W.2d at 838–39; *Cascio v. Beam*, 594 S.W.2d 942, 946 (Mo. banc 1980) ("[A] court should avoid a construction which would bring a statute into conflict with constitutional limitations.").

The circuit court found a constitutional violation only because it believed the affidavit was a "misstatement of law" and "contradictory and misleading."

LF Doc. 77 at 5. Indeed, it generally found an "affidavit requirement reasonable because of the different forms of identification being presented by Option Two voters." *Id.* at 4. The court did not find that the affidavit requirement burdened the right to vote in any other way. *Id.* at 4-5. And, as noted above, Plaintiffs failed to produce evidence of a single voter who was actually confused by the affidavit at the polls, despite the affidavit's use during multiple election cycles before trial.

Thus, the alleged constitutional error derives entirely from the court's construction of the statute and the affidavit. Under those circumstances, the court should have adopted any reasonable construction of the statute that harmonized its provisions and avoided striking down part of the statute. State statutes "cannot be held unconstitutional if they are susceptible to any reasonable construction supporting their constitutionality." *State v. Burnau*, 642 S.W.2d 621, 623 (Mo. banc 1982); *State ex rel. McClellan v. Godfrey*, 519 S.W.2d 4, 8 (Mo. banc 1975) (noting that this Court is "reluctant to declare statutes unconstitutional" and must "resolve all doubts in favor of . . . validity"). The State's reading of the statute harmonizes any possible inconsistencies within the affidavit and with the rest of the statute. If the statute and affidavit are even "susceptible" to that "reasonable construction," *Burnau*, 642 S.W.2d at 623, the Court should adopt the State's position and reverse.

5. The circuit court's contrary arguments are mistaken.

The circuit court's contrary reasoning lacks merit. The court relies on the Secretary of State's "three options for voting" framework to say that "a photo identification card [Option One identification] is not a requirement for voting." LF Doc. 77 at 5. This is mistaken for textual, legal, and definitional reasons.

Textually, the statute does create three options for voting, but the statute's text does not make them *equal* options for voting. Option One voting is required for all voters who come to the polls with a form of personal identification (over 95%). Option Two voting is only available to those voters who come without personal identification. § 115.427.2(1), RSMo.

Legally, § 115.427.1, RSMo, uses mandatory language to indicate that Option One voting is required. Statutory requirements are no less mandatory because they have statutory exceptions—even "significant" ones. *Ross v. Blake*, 136 S. Ct. 1850, 1856-57 (2016) (finding mandatory language no less mandatory just because it contains a "significant qualifier"); *I.N.S. v. Doherty*, 502 U.S. 314, 331 (1992) (noting mandatory obligation despite four enumerated exceptions). In the typical Missouri election, fewer than 5% of voters will use one of the exceptions. Def. Ex. 191; *see supra* fn. 1.

The circuit court also held the State to a mistaken definition of "requirement." The statute uses "requirements" and "required" to indicate an

imperative—something "legally imposed, called for, or demanded" by the statute. BLACK'S LAW DICTIONARY (10th ed. 2014) (def. 1). That kind of requirement is subject to exceptions. The circuit court used "requirement" to mean an if-and-only-if condition—something "set[] as a necessary qualification; a requisite or essential condition." *Id.* (def. 3).[3] But the statutory context plainly indicates that photo identification is not an if-and-only-if condition for voting in Missouri. A voter signing the statement would know this too. A voter does not see the affidavit until they (a) have told a poll worker they do not have Option One identification with them, and (b) have presented a form of Option Two identification. Thus, a voter would know Option One identification is not an if-and-only-if condition because he or she would be in the process of voting without one.

Separately, a footnote in the court's opinion criticizes the affidavit's uses of the term "possess." LF Doc. 77 at 5 n.1. The affidavit states, in relevant part,

---

[3] *See, e.g.*, LF Doc. 77 at 5 ("[T]he latter part of the affidavit which requires the voter to acknowledge than an 'Option One Identification' is now a prerequisite for voting is an outright misstatement of law."); *id.* at 5 ("[T]he advertising strongly implied that a photo identification card was [] required for voting" but "[a]s the state concedes, a photo identification card is not a requirement for voting."); *id.* at 6 ("No compelling state interest is served by misleading local election authorities and voters into believing a photo ID card is a requirement for voting."); *id* at 6 ("As desirable as a Missouri-issued photo ID might be, unlike an American Express Card, you may leave home without it, at least on election day.").

> 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.

§ 115.427.3, RSMo. Plaintiffs suggested to the circuit court that these two uses of "possess" mean two different things. In the first instance, it plainly means "appear[ing] at a polling place without a form of personal identification described in subsection 1 of this section." § 115.427.2(1), RSMo. In the second instance, it may mean not having a form of personal identification at all. § 115.427.6(1), RSMo ("[T]he state and all fee offices shall provide one nondriver's license at no cost to any otherwise qualified voter who does not already possess such identification and who desires the identification in order to vote.").

This apparent tension does not burden the right to vote in any way. *Weinschenk*, 203 S.W.3d at 215-16 & n.25. Again, a voter signing the affidavit has just affirmed that they do not have a form of personal identification in their possession. So they know the affidavit refers back to that. The statute expressly says any registered voter "who appears at the polling place without a form of personal identification" can vote using Option Two or Option Three. § 115.427.2(1), RSMo. Reading "possess" in the affidavit in harmony with that statutory language allows for *more* voting, not less. Tellingly, the circuit court did not find that the use of the word "possess" in any way burdened the right

to vote, or that it violated the constitution. LF Doc. 77 at 5 n.1. If the second use of "possess" takes the same meaning—showing up at the polls without a form of personal identification—then there is still no constitutional issue. Providing *more* personal IDs than necessary does no one constitutional harm.

And there is no actual contradiction. The affidavit suggests that a voter who signs the affidavit is "eligible" for free personal identification ("fit and proper to be selected or to receive a benefit"), not "entitled" to free personal identification ("to grant a legal right to or qualify for"). *See* BLACK'S LAW DICTIONARY (10th ed. 2014). The affidavit's prompting is rooted in this Court's concern in *Weinschenk* that voters may not know that free identification is available, or may not have time to get one before the next election. *Weinschenk*, 203 S.W.3d at 215.

If the circuit court did find a potential contradiction of constitutional dimensions, however, then it should have applied this Court's usual framework for interpreting statutory text: harmonize apparent contradictions, *Dickemann*, 550 S.W.3d at 68, and avoid unconstitutional readings, *Burnau*, 642 S.W.2d at 623. The key language in Subsection 2 says that a voter who "appears at a polling place without a form of personal identification" may sign the affidavit and vote using Option Two. The word "possess" should be given this meaning throughout the statute. This reading would avoid constitutional questions and allow for more voting, not less.

B. The Voter ID Amendment means, as a matter of law, that a voter ID requirement does not substantially burden the right to vote.

The circuit court also erred by overlooking the Voter ID Amendment. The statute's voter identification requirements are expressly authorized by the Missouri Constitution. *See* MO. CONST. art. VIII, § 11.

The enactment of Article VIII, § 11 forecloses Plaintiffs' argument that the Voter ID Law unduly burdens the right to vote. "'The fundamental rule of constitutional construction is that courts must give effect to the intent of the people in adopting the amendment.'" *Pestka v. Missouri*, 493 S.W.3d 405, 411 (Mo. banc 2016) (citation omitted). The text of the Voter ID Amendment leaves no doubt that the people of Missouri intended to make photo-identification requirements constitutional. Specifically, Article VIII § 11 of the Missouri Constitution authorizes the General Assembly to require Missouri voters to identify themselves and verify their qualifications by presenting a "form of identification, which may include valid government-issued photo identification." *Id.* The general authorization to require a form of identification includes the specific authorization to require a government-issued photo identification. The final clause of the sentence further confirms this reading by referring to such a statute as "the identification requirement." *Id.* (emphasis added).

The history of the amendment directly confirms this reading. *See Pestka*, 493 S.W.3d at 409 (reading changes to Article III, § 32 in light of the history of that provision). The unambiguous history and purpose of the Voter ID Amendment was to supersede the holding of *Weinschenk* that some voter identification laws "substantially burden" the right to vote. *State ex rel. Unnerstall v. Berkemeyer*, 298 S.W.3d 513, 519 (Mo. banc 2009) (noting that courts may "'consider the problem that the statute was enacted to remedy'" (citation omitted)). Even if the plain text of the amendment were ambiguous, which it is not, this background would resolve any possible ambiguity in the text of Article VIII, § 11 against Plaintiffs' counter-textual interpretation. *Pestka*, 493 S.W.3d at 411 ("Amendments are presumed to have intended to effect some change in the existing law.").

Given that the Voter ID Amendment authorizes a strict law requiring a photo ID to vote without any exceptions, it is difficult to see how *this* Law's flexible exceptions could substantially burden the right to vote. This means rational basis review should apply. *Weinschenk*, 203 S.W.3d at 215-16 & n.25 (explaining that rational basis applies to reasonable regulations of the voting process). "Rational basis review is 'highly deferential,'" and in applying it, "courts do not question 'the wisdom, social desirability or economic policy underlying a statute.'" *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 378 (Mo. banc 2012).

Yet the circuit court engaged in precisely the kind of judicial second-guessing long deemed inappropriate for this deferential standard of review. *See Collins v. Dir. of Revenue*, 691 S.W.2d 246, 250 (Mo. banc 1985) (emphasizing that, under the rational-basis test, a court "need only examine whether the statutes bear any rational relationship to a legitimate state interest" and must "not sit as a 'super legislature' to rule on the wisdom of . . . legislative determinations"). Imagining a better version of the affidavit or critiquing the General Assembly's work simply was not the court's role in conducting this constitutional inquiry. Instead, the court should have considered whether "*any set of facts* can be reasonably conceived to justify [the Statement]." *See Mo. Prosecuting Attorneys & Circuit Attorneys Ret. Sys. v. Pemiscot Cty.*, 256 S.W.3d 98, 102–03 (Mo. banc 2008) (emphasis added). As explained below, that deferential standard is met here.

C. The Voter ID Law does not substantially burden the right to vote and, under any level of scrutiny, is narrowly tailored to advance compelling interests.

Even setting the Voter ID Amendment aside, the circuit court did not find that the Voter ID Law—with three options for voting and flexible exceptions—substantially burdens the right to vote (although it implies the affidavit does). Indeed, Plaintiffs failed to identify a single Missouri voter who was unable to vote as a result of the Voter ID Law. Accordingly, the law is only subject to rational basis review. Under any standard, however, the Voter ID

Law passes constitutional muster. It is narrowly tailored to advance compelling state interests.

1. The Voter ID Law does not substantially burden the right to vote.

Unlike in *Weinschenk*, the current Voter ID Law's flexible exceptions ensure that all registered voters can vote.

In *Weinschenk*, this Court explained that "the extent of the burden [a] statute imposes on the right to vote" will determine "the level of scrutiny it will receive." 203 S.W.3d at 212. Reasonable regulations of the voting process do not substantially burden the right to vote and should be upheld if they are rationally related to a legitimate interest. *Id.* at 215-16 & n.25 (citing cases); *see also Peters v. Johns*, 489 S.W.3d 262, 273–74 (Mo. banc 2016) (explaining that "it is the *severity of the burden* on the asserted constitutional rights that produces the level of scrutiny, and not the nature of the burdened right itself"). Because Plaintiffs brought a facial challenge to the statute, they had to show that the statute substantially burdened the voting rights of Missourians, not those of one or two individuals. *State v. Perry*, 275 S.W.3d 237, 243 (Mo. banc 2009) (explaining that facial relief requires proof that "no set of circumstances exists under which the Act would be valid") (citation omitted); *Bennett v. St. Louis Cty.*, 542 S.W.3d 392, 397 (Mo. App. E.D. 2017) (noting that the remedy

for an as-applied challenge is an injunction barring "'enforcement against a particular plaintiff'" not "'complete invalidation of a law'") (citation omitted).

The circuit court made no finding that the Voter ID Law imposes a "severe" or "substantial" burden on the right to vote. Instead, the court found that the Voter ID Law "poses no burden whatsoever" for the "vast majority" of Missouri citizens. LF Doc. 77 at 2. And the circuit court found that Option Three provisional balloting is "inclusive rather than exclusive as it allows for individuals who show up at the polls without any of the prescribed forms of identification one more opportunity to have their vote counted rather than simply turning them away." *Id.* at 6.

As for Option Two, the circuit court specifically found that the affidavit requirement generally does not burden the right to vote. *Id.* at 4. The Option Two affidavit requirement is "reasonable because of the different forms of identification being presented by Option Two voters." *Id.* "Requiring an affidavit from the voter that they are in fact the person voting is not an unreasonable burden." *Id.* While the circuit court did find the affidavit "much more expansive" than this identity-confirming purpose, it did not find any corresponding burden on voting. *Id.* Instead, the *only* substantial burden it identified came from the affidavit's perceived inconsistencies and misstatements. *Id.* at 5. Because the Court erred on that one point, there is no burden at all.

Indeed, the record does not identify a single voter who was disenfranchised by the new law. Tr. (9/24) at 36 (Gutierrez); *id.* at 205 (Youn); Patrick Depo. at 34 (Patrick); Tr. (9/25) at 11 (King). Plaintiffs did present a few instances of voter and poll worker confusion about the requirements of the new law. But each of those voters ended up voting. *Id.* The two named Plaintiffs, Gutierrez and Patrick, both signed the Option Two affidavit in 2017. Tr. (9/24) at 39-40, 59 (Gutierrez) Patrick Depo. at 34, 42. Plaintiff Gutierrez has also voted using Option One after she acquired a nondriver's license for voting. Tr. (9/24) at 59.

Without a demonstrated substantial burden, the Court should apply rational basis review.

2. The Voter ID Law is narrowly tailored to advance compelling state interests.

At any rate, the statute passes constitutional muster under any test. The statute, including the Option Two affidavit, is narrowly tailored to advance the State's compelling interests.

The Voter ID Law, and the Option Two affidavit, serve to verify a voter's identity and eligibility to vote. *Weinschenk* held that Missouri has not only a legitimate interest, but a compelling interest in "preserving the integrity of the election process and combating voter fraud." 203 S.W.3d at 217; *see also Crawford*, 553 U.S. at 196 ("While the most effective method of preventing

election fraud may well be debatable, the propriety of doing so is perfectly clear."). In fact, the Indiana's law at issue in *Crawford* was partially justified by heavily publicized instances of voter fraud in Missouri. *Id.* at 195 n.12. Among other evidence of illegal voting, the district court in *Crawford* credited a report by the then Missouri Secretary of State that found more than 1,000 fraudulent ballots were cast in two counties in the 2000 election, including at least 68 multiple votes, 14 dead person votes, and 79 vacant-lot voters. *See Indiana Democratic Party v. Rokita*, 458 F. Supp. 2d 775, 794 (S.D. Ind. 2006).[4] Consistent with those findings, some 63 percent of Missouri voters supported

[4] The St. Louis and Kansas City metropolitan areas are no strangers to voter-fraud prosecutions. *See, e.g. United States v. Kevin Kunlay Williams a/k/a/ Kunlay Sodipo*, No. 4:17-cr-00065-RWS (E.D. Mo. Feb. 1, 2017); *United States v. Kevin Kunlay Williams a/k/a/ Kunlay Sodipo*, No. 4:17-cr-00065-RWS (E.D. Mo. Nov. 6, 2017); *United States v. Lleras-Rodriguez*, No. 4:15-cr-00291-DGK (W.D. Mo. Sept. 8, 2015); *United States v. Campbell*, 4:10-cv-00257 (E.D. Mo. May 5, 2010); *United States v. Bland et al.*, 4:07-CR-00763 (E.D. Mo. Dec. 20, 2007); *United States v. Gardner*, No. 4:06-cr-00378-SOW (W.D. Mo. Nov. 1, 2006); *United States v. Franklin*, No. 4:06-cr-00377-GAF (W.D. Mo. Nov. 1, 2006); *United States v. Powell, Lewis, Thomas, Ellis,* and *Johnson*, No. 3:05-cr-30044-GPM (S.D. Ill. Mar. 23, 2005); *United States v. Scott*, No. 3:05-cr-30040-DRH (S.D. Ill. Mar. 22, 2005); *United States v. Nichols*, No. 05-CR-30041-DRH (S.D. Ill. Mar, 22, 2005); *United States v. T. Stith*, No. 3:05-cr-30042-DRH (S.D. Ill. Mar. 22, 2005); *United States v. S. Stith*, No. 3:05-cr-30043-DRH (S.D. Ill. Mar. 22, 2005); *United States v. Jones*, No. 05-CR-00257 (W.D. Mo. July 19, 2005); *United States v. Martin*, No. 4:05-cv-00258 (W.D. Mo. July 19, 2005); *United States v. Scherzer*, No. 04-CR-00401 (W.D. Mo. Dec. 13, 2004); *State v. Clara Moretina*, 1316-CR02002 (Cir. Court of Jackson Cty. 2013); *State v. John Moretina*, 1316-CR02001 (Cir. Court of Jackson Cty. 2013). The testimony of Dr. Mayer and Dr. Milyo also debate the extent of voter fraud and the efficacy of voter identification. Tr. (9/25) at 32-215 (Dr. Mayer); Tr. (9/26) at 154-159.

the Voter ID Amendment, reflecting widespread belief among Missourians that the State's electoral system needed such reform.

The bipartisan Carter-Baker Commission also recognized that illegal voting occurs. Def. Ex. 6 at 18-19. Courts around the country have cited the Carter-Baker Report in concluding that voter fraud is a legitimate state interest and that voter identification laws are a legitimate means to advance that interest. *See, e.g.*, *Crawford*, 553 U.S. at 193-94; *Lee v. Va. State Bd. of Elections*, 843 F.3d 592, 602 (4th Cir. 2016) (upholding Virginia's voter ID law); *League of Women Voters of Indiana, Inc. v. Rokita*, 929 N.E.2d 758, 767 (Ind. 2010); *Democratic Nat'l Comm. v. Reagan*, No. cv-16-1065, 2018 WL 2191664, at *20 (D. Ariz. May 10, 2018) (citing the report for evidence of election fraud, but not in a voter ID case); *South Carolina v. United States*, 898 F. Supp. 2d 30, 42-43 (D.D.C. 2012). All of this confirms what *Weinschenk* already says: Missouri has a compelling state interest in preventing election fraud.

Missouri's Voter ID Law is narrowly tailored to advance that interest—reasonably balancing deterrence and flexibility to maximize fraud prevention *and* to allow all registered voters to vote. The Option Two affidavit exemplifies this narrow tailoring in two ways. First, the Option Two affidavit helps verify the voter's identity when a voter comes to the polls without a form of personal identification. LF Doc. 77 at 4 ("[T]he Court finds the affidavit requirement reasonable because of the different forms of identification being presented by

Option Two voters."). Many states use an affidavit for this purpose. *See, e.g.*, 15 Del. Code Ann. § 4937; Idaho Code § 34-1114; Mich. Comp. Laws § 168.523.

Second, the affidavit plays a voter-education role by advising and encouraging voters to use the preferred Option One voting. In a perfect world, all voters would be able to present secure identification easily. Whether going through airport security or checking in at a polling place, using a driver's license or other personal identification instead of a utility bill is more secure, as the circuit court suggested. LF Doc. 77 at 4. The affidavit helps close that gap by confirming the voter's identity, and also educates voters about Missouri's preference for personal identification and the availability of free nondriver's licenses for voting. In this way, the affidavit's text addresses *Weinschenk*'s concerns by educating voters about the availability of free personal identification, while allowing them to vote using a less secure form of identification in the meantime. *See* 203 S.W.3d at 215.

More secure identification has the added advantage of allowing for quicker processing and reduced waiting times. Tr. (9/25) at 246-47 (testimony of Election Director Brandon Alexander). In the many counties that use electronic poll pads, for example, a driver's license can simply be scanned and automatically compared to the registration book and a list of those who have already voted (this works with voter registration cards as well). *Id.* This eliminates the time it takes for a poll worker to manually type in a name or

manually locate the voter in the registration book. *Id.* Most forms of secondary identification, such as a utility bill, have to be looked up manually. *Id.* at 248. Reduced wait times reduce the "cost" of voting for everyone.

The Option Two affidavit advances these goals by expressing a reasonable preference for personal identification under Option One. Missourians may use secondary identification and sign the affidavit whenever they show up at the polls without a form of personal identification. § 115.427.2(1), RSMo. There is no other qualification for Option Two voting. Missouri's law stands in strong contrast to stricter voter identification laws upheld in other states, which often require voters to *prove* that they could not obtain photo identification. *See, e.g.*, *Crawford*, 553 U.S. at 186 (upholding Indiana's law requiring an affidavit of indigency to vote without photo ID); *Veasey v. Abbott*, 888 F.3d 792, 796 (5th Cir. 2018) (upholding Texas's "Declaration of Reasonable Impediment," which compels voters without a photo ID to identify one of seven possible reasons why they were unable to obtain one); *Frank v. Walker*, 768 F.3d 744, 746 (7th Cir. 2014) (upholding Wisconsin's law offering only provisional ballots as an alternative to photo ID).

II. The circuit court erred in entirely enjoining the use of an affidavit during Option Two voting, because a narrower remedy was available and appropriate, in that the statute only requires a "substantially" similar affidavit, and the court barred the Secretary of State from exercising its power to draft an affidavit addressing the court's concerns.

The circuit court also erred in entirely enjoining the use of an affidavit during Option Two voting because the wording of the affidavit is not set in stone by statute. This argument is fully preserved. LF Doc. 61 at 51-56; LF Doc. 63 at 5-8.

In prior elections, the law's proposed affidavit text was used verbatim, but it did not have to be. § 115.427.3, RSMo. Subsection 3 directs that "[t]he statement to be used for voting under subdivision (1) of subsection 2 of this section shall be substantially in the following form. . . ." *Id.* The word "substantial" means "being that specified to a large degree or in the main." WEBSTER'S THIRD NEW INT'L DICTIONARY, at 2280 (1961) (Def. 4a). This gives the Secretary of State discretion to use different language. The Secretary of State could have used this discretion to clarify the affidavit's text.

The Secretary of State could easily address the circuit court's objections by adopting a substantially similar affidavit. § 115.427.3, RSMo. As explained in the previous section, the circuit court read the affidavit in a way that was inconsistent with the statute. The affidavit simplifies statutory language to make it easier for the average voter to understand. But the Secretary of State

could substitute the statute's long-form language to address the Court's concerns. It could, for example, modify it 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 appeared at a polling place without a form of personal identification described in § 115.427.1, RSMo ~~do not possess a form of personal identification approved for voting~~. As a person who appeared at a polling place without a form of personal identification described in § 115.427.1, RSMo~~does not possess a form of personal identification approved for voting~~, I acknowledge that any otherwise qualified voter who does not already possess such identification may~~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 listed in § 115.427.1, RSMo to satisfy the requirements of § 115.427.1, RSMo, ~~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.

All of the underlined text comes directly from other subsections of the statute. In this way, the Secretary of State could clear up any possible confusion about what forms of personal identification are required to vote under § 115.427.1, RSMo. This text also clarifies that only those voters who do not already possess such personal identification are entitled to receive a free Missouri nondriver's license, if desiring it in order to vote, under § 115.427.6, RSMo.

The circuit court did not hold that a "substantially" similar affidavit—like the text above—would suffer from the same perceived constitutional shortcomings as the statute's sample text. Thus, the court could not find that Subsection 3 was unconstitutional in its entirety. § 115.427.3, RSMo. Again,

state statutes "cannot be held unconstitutional if they are susceptible to any reasonable construction supporting their constitutionality." *Burnau*, 642 S.W.2d at 623.

The court thus overreached in entirely enjoining the use of any affidavit during Option Two voting. "'A permanent injunction should be granted sparingly in clear cases only, and the decree should be framed to afford relief to which complainant is entitled and not to interfere with legitimate and proper action by those against whom it is directed.'" *Bates v. Webber*, 257 S.W.3d 632, 636 (Mo. App. S.D. 2008) (quoting *Metmor Fin. Inc. v. Landoll Corp.*, 976 S.W.2d 454, 463 (Mo. App. W.D. 1998)). "An injunction must not be 'broader than necessary to remedy the underlying wrong.'" *Gerlich v. Leath*, 861 F.3d 697, 710 (8th Cir. 2017) (citation omitted). Here, the scope of the injunction exceeded the scope of the alleged constitutional violation.

In sum, the circuit court never found a "substantially" similar affidavit unconstitutional, and legally erred when it enjoined the use of such an affidavit. Since the court believed that the affidavit as written was unconstitutionally confusing (which it was not), the court should have allowed the Secretary of State to craft an affidavit that was "substantially" similar to that provided in the statute but eliminated the possible sources of confusion, rather than enjoining the affidavit requirement in its entirety.

III. The circuit court erred in entirely enjoining the use of an affidavit during Option Two voting, because it should have severed statutory text sparingly, in that the court instead broadly severed the affidavit's entire text.

The circuit court also erred in entirely enjoining the use of an affidavit during Option Two voting because it should have severed only the unconstitutional text, leaving the rest of the affidavit in place. Because the "provisions of every statute are severable," § 1.140, RSMo, statutes "are presumptively severable." *Gen. Motors Corp. v. Dir. of Revenue*, 981 S.W.2d 561, 568 (Mo. banc 1998). Missouri courts apply severance in two steps: (1) separate "the invalid portions" so as to leave the remaining statute "in all respects complete and susceptible of constitutional enforcement;" and (2) uphold the remaining statute so long as it "is one that the legislature would have enacted if it had known that the rescinded portion was invalid." *Dodson v. Ferrara*, 491 S.W.3d 542, 558 (Mo. banc 2016).

This argument is fully preserved. LF Doc. 61 at 51-56; LF Doc. 63 at 8-10.

A. The circuit court severed significantly more than required.

At the first step, the court severs sparingly. "[A]ll statutes should be upheld to the fullest extent possible." *Planned Parenthood of Kansas v. Nixon*, 220 S.W.3d 732, 742 (Mo. banc 2007); *Gen. Motors*, 981 S.W.2d at 568 (same); *Nat'l Solid Waste Mgmt. v. Dir. of Dep't of Nat'l Resources*, 964 S.W.2d 818,

822 (Mo. banc 1998) (same). This directive means that no word should be cut from the statute unless it is absolutely necessary to do so. *Id.*

Applying this rule, the circuit court erred in severing the Option Two affidavit altogether. Again, the circuit court enjoined *all* references to the affidavit required by § 115.427.2(1) and § 115.427.3, RSMo. *See* LF Doc. 77 at 7. But a few pages earlier, the court found that only one sentence of the affidavit was a "misstatement" and "contradictory and misleading" (when compared to another sentence). *Id.* at 4-5. Even taking into account the court's footnote about the word "possess," the court's concerns can be easily addressed by taking only a few words out of the affidavit. For example:

> 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. This solution would also require severing one parallel clause in Subsection 2. § 115.427.2(1), RSMo ("averring that the individual

does not possess a form of personal identification described in subsection 1 of this section").

The resulting text resolves all the circuit court's concerns about the terms "possess" and "form of personal identification." The word "possess" is removed entirely, and any reference to whether the person has a "form of personal identification" is omitted as well.

This Court could go one step further and sever the sentence beginning "I furthermore acknowledge" and the corresponding phrase in Subsection 2. But that is unnecessary. No one would read the proposed text above to suggest that Option Two voting is somehow prohibited. If a voter knows "form of personal identification" refers to Option One identification, then he or she will also understand that they are voting under an exception to that rule. If a voter incorrectly reads "form of personal identification" to refer to *any* form of identification, as the circuit court did, then the voter will believe they were complying with the rule. Either way, the right to vote is not burdened at all.

The circuit court thus failed to comply with the severance statute, § 1.140, RSMo, despite acknowledging that most of the affidavit's language posed no burden on the right to vote, *see* LF Doc. 77 at 4 (finding an Option Two affidavit posed no "unreasonable burden" simply by requiring a voter to verify that "1) He/she are in fact the person registered to vote; 2) He/she are in fact a citizen; and 3) The address shown is in fact their legal residence"). Most

of the affidavit in Subsection 3 is designed to achieve the goals the circuit court identified, so those parts of the affidavit are undoubtedly constitutional. But the court later enjoined this concededly constitutional text anyway. LF Doc. 77 at 7. That was error. *Planned Parenthood of Kansas*, 220 S.W.3d at 742 ("[A]ll statutes should be upheld to the fullest extent possible.").

B. The circuit court's broad severance was unnecessary.

The court's overbroad severance was not required by step two of the severance analysis either. If the General Assembly would have enacted the Voter ID Law without any affidavit requirement at all (as the circuit court implicitly found), then it certainly would have enacted Option Two voting with a narrower affidavit.

At the second step of the severability analysis, "'courts are to presume'" that severance is the right remedy and that the legislature "'intended to give effect to the other parts of the statute.'" *City of Normandy*, 518 S.W.3d at 197 n.19 (quoting *Dodson*, 491 S.W.3d at 558). The constitutional provisions are valid unless the court finds that they are "'so essentially and inseparably connected with, and so dependent upon, the void provision that it cannot be presumed the legislature would have enacted the valid provisions without the void one.'" *Id.* (quoting § 1.140, RSMo).

By severing the *entire* affidavit, the circuit court implicitly held that the rest of the statute is not "essentially and inseparably connected with" the

affidavit requirement. § 1.140, RSMo. That is, the court made no finding that overcomes the presumption that the legislature would have enacted the Voter ID Law without the affidavit requirement. *City of Normandy*, 518 S.W.3d at 197 n.19. If the legislature would have enacted the Voter ID Law with no affidavit requirement *at all*, then it certainly would have enacted the Voter ID Law with a *narrower* affidavit.

Employing narrow severance to retain the non-problematic portions of the affidavit would advance legislative goals, not undermine them. As explained earlier, the General Assembly plainly intended to distinguish between voting using Option One identification and voting using Option Two identification. That distinction advanced compelling state interests, including: (1) providing an additional safeguard to verify identity and eligibility; and (2) educating and encouraging those voters to get a free nondriver's license for Option One voting, which is safer and faster. By removing the affidavit requirement altogether, the circuit court undermined these goals.

IV. The circuit court erred in enjoining the Secretary of State from disseminating materials indicating that photo identification is required to vote, because such materials accurately reflect the law's requirements, in that the law requires a form of personal identification to vote but also provides flexible exceptions.

Separately, the circuit court permanently enjoined the Secretary of State from "disseminating materials which represent that a photo identification card is required to vote" or "disseminating materials with the graphic that voters

will be asked to show a photo identification card without specifying other forms of identification which voters may also show." LF Doc. 77 at 7. This part of the injunction was also in error, and for similar reasons. This argument is fully preserved. LF Doc. 51 (Motion to Dismiss) at 3-21; LF Doc. 61 (Post-Trial Brief) at 19-56; LF Doc. 63 (Supplemental Post-Trial Brief) at 1-3.

Subsection 5 imposes an advertising duty—the Secretary of State "shall provide advance notice." § 115.427.5, RSMo. The Secretary of State closely follows this command, but the circuit court disregarded it. In fact, the injunction forbids what the statute requires.

The statute requires the Secretary of State to give "notice of the personal identification *requirements* of subsection one of this section." *Id.* (emphasis added). As explained throughout this brief, Subsection 1 sets up an overarching requirement to vote using one of the "forms of personal identification" listed in Subsection 1. The Secretary of State's advertising gives accurate notice of that requirement in Subsection 1. For example, the advertising criticized by the circuit court states:

> Voters: 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.

Pl. Ex. 7 – Pl. Ex. 13. The circuit court criticized this advertising because it "strongly implied that a photo identification card was [ ] required for voting."

LF Doc. 77 at 5. In fact, the advertising says nothing of the sort—it says a voter will be asked for a Photo ID (which is accurate); it says "there are other options, too" (which is accurate); and it explains that the state can help voters get photo ID if they do not have one (which is accurate). The advertisement could have gone further and simply followed the text of Subsection 5: "The Secretary of State hereby gives notice of the personal identification requirements of subsection one, § 115.427.1, RSMo," then listed the forms of photo identification listed in Subsection 1. Such advertising would accurately describe Subsection 1 and satisfy the requirements of Subsection 5.

Subsection 5 also requires that the Secretary of State provide notice in a manner "calculated to inform the public generally of the requirement for forms of personal identification as provided in this section." § 115.427.5, RSMo. As explained above, "forms of personal identification" is a defined term with a specific meaning within § 115.427, RSMo. These "[f]orms of personal identification" are listed in Subsection 1. § 115.427.1, RSMo. Contrary to the express instructions in Subsection 5, the circuit court enjoined the Secretary of State from disseminating materials listing (in graphic form) all the forms of personal identification listed in Subsection 1. It did so because the advertising did not also specify the "other forms of identification which voters may also show," like those listed in Subsection 2. LF Doc. 77 at 7. The circuit court

erred in imposing this additional duty, which neither the statute nor the constitution requires.

In addition to the advertising required by statute, the Secretary of State also launched a massive public relations campaign aimed at educating voters about the Law's flexible exceptions using the "three options for voting" framework. Tr. (9/25) at 236-238 (testimony of Election Director, Brandon Alexander). The Secretary of State's Office utilized various print and broadcast media, micro-targeted advertisements on social media, and creative attempts to reach individuals most in need of assistance, such as ads posted on buses. *Id.* at 236-37. The Secretary of State himself personally traveled across Missouri to create public awareness of the requirements of the new law, and a representative of his Office visited each of Missouri's 116 local election authorities (LEAs). *Id.* at 237-38. The Secretary of State's Office also launched the "Show It 2 Vote" website, established an email account and a toll-free phone number for voter questions, and conducted extensive trainings with the LEAs. *Id.* at 238-41.

The Secretary of State's website, for example, contains a large banner declaring, "If you are registered to vote, you can vote!" *Available at* https://www.sos.mo.gov/showit2vote (last accessed April 19, 2019). On the website, a text box and video explain the three options for voting in detail. *Id.* The website also links to a flyer called "Samples of Acceptable Forms of ID,"

which lists acceptable forms of identification for *each* of the three options. *See* https://www.sos.mo.gov/CMSImages/Elections/ShowIt2Vote/AcceptableIDs.pdf (last accessed April 19, 2019); *see also* Def. Ex. 4 (same). A similar flyer is also displayed as a large poster in every polling place. Tr. 225-226, 230. The Secretary of State not only satisfied its statutory advertising duties, it went above and beyond those duties to ensure that the public knows and understand the three ways Missourians can vote within § 115.427, RSMo's broader framework.

In sum, the circuit court erred by enjoining the Secretary of State from following § 115.427.5, RSMo, based on its earlier misreading of the statutory text.

CONCLUSION

For the reasons stated, this Court should reverse the circuit court's decision.

May 1, 2019

Respectfully submitted,

ERIC S. SCHMITT
Attorney General

/s/ *Frank Jung*
Frank Jung, No. 38261
General Counsel
Khristine A. Heisinger, No. 42584
Deputy General Counsel
Secretary of State John R. Ashcroft
PO Box 1767
Jefferson City, MO 65102
573-751-4875
573-526-4903 (facsimile)
Frank.Jung@sos.mo.gov
Khristine.Heisinger@sos.mo.gov

Attorneys for Secretary of State John R. Ashcroft

/s/ *D. John Sauer*
D. John Sauer, No. 58721
First Assistant and Solicitor
Peter T. Reed, No. 70756
Zachary M. Bluestone, No. 69004
Deputy Solicitors
Missouri Attorney General's Office
P.O. Box 899
Jefferson City, MO 65102
(573) 751-8870
(573) 751-0774 (facsimile)
John.Sauer@ago.mo.gov

Attorneys for Defendants State of Missouri and Secretary of State Ashcroft

CERTIFICATE OF SERVICE AND COMPLIANCE

I hereby certify that a true and correct copy of the foregoing was served electronically via the Court's electronic filing system on the 1st day of May, 2019, to all counsel of record.

I also certify that the foregoing brief complies with the limitations in Rule No. 84.06(b) and that the brief contains 14,266 words.

/s/ *D. John Sauer*