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

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INTRODUCTION

From Subsection 1 to Subsection 12, the Voter ID Law creates then repeatedly alludes to a personal identification "requirement" for voting. § 115.427, RSMo. Plaintiffs offer no reason for the Court to ignore the plain text and read this requirement out of the statute. As explained in the opening brief, the common meaning of a "requirement" is a simple statutory imperative (Plaintiffs offer no alternative definition), and imperative requirements often can and do have exceptions. Subsection 1 governs what is required in order to vote, while Subsections 2-4 provide exceptions to that requirement. Plaintiffs do not offer any reason for reading Subsection 3's reference to that requirement (in the Option Two affidavit) differently than the statute's other subsections. Thus, the Court should avoid the constitutional questions raised by the trial court's reading and hold that (1) voters are required to present personal identification in order to vote, as Subsections 1, 2, 3, 5, and 6 all say; but that (2) voters who do not have personal identification may vote using one of the statute's exceptions, as Subsections 2-4 say.

Alternatively, and consistent with the statutory language, the Court should narrow the remedy and reinstate some version of the affidavit by approving the State's proposed "substantially similar" affidavit, severing only unconstitutional statutory text, or some combination of the two.

ARGUMENT

1. Defendants have consistently maintained that the Voter ID Statute structures its three options for voting as a non-strict requirement with flexible exceptions.

Defendants have consistently maintained throughout this litigation that Missouri's Voter ID Law both (1) advances the State's compelling interests by requiring voters to present photo identification at the polls; and (2) makes every effort to ensure that all registered voters can vote by creating two flexible exceptions to this requirement. Plaintiffs, on the other hand, have advanced an oversimplified reading of the statute that assumes these two claims are somehow "inconsistent"—and their preservation and estoppel arguments, Resp. Br. 22-24, are the latest example of this. Neither the record nor the statutory language supports Plaintiffs' position.

First, in both the trial court and this Court, the State has consistently explained that the law creates a general personal identification requirement at the polls. § 115.427.1, RSMo. "The statute's voter-identification *requirements* and exceptions," Mot. to Dismiss at 9-11 (emphasis added), parallel the structure of the Voter ID Amendment, Mo. Const. art. VIII, § 11, which authorizes a photo ID requirement "that includes 'exceptions.'" Def. Post-trial Br. at 23. Upwards of 95 percent of voters can and do "fall under option 1" because they are able to present "one of the types of photo ID that are *required* under Option 1." Tr. (10/1) at 72-73 (State's closing argument;

emphasis added).[1] "Nudging" all these voters "to pull out their photo ID if they have it with them imposes no additional cost . . . while advancing important state interest in preventing fraud, instilling voter confidence, and even decreasing lines at polling locations." Def. Post-Trial Br. at 29; *see also id.* at 33 (explaining that Option 2 is limited to those "'who appear at a polling place without' a valid photo ID"). The affidavit accurately reflects that Option Two voting is limited to "any voter who does not have photo identification on their person." *Id.* at 38. Indeed, "[b]y requiring voters to acknowledge the ID requirement in writing when they come to the polling place without a primary form of identification, the new statute addresses *Weinschenk*'s [educational] concerns." Mot. to Dismiss at 19-20. All of these statements—and many more—belie Plaintiffs' incorrect assertion that this is "the first time" the State has made the argument that Subsection 1 creates a personal identification "requirement" for voting. Resp. Br. 22.

Second, the State has consistently explained that this is not a "strict" if-and-only-if, exceptionless requirement. The statute states that a photo ID is required in order to vote, but it "does not say that photo ID is the *only* way to

[1] Plaintiffs now suggest that there are 400,000 Missourians without photo ID, Resp. Br. 17, but they did not rely on that number at trial because it included, for example, persons who had moved or died but were still registered to vote. Plaintiffs' own expert conceded that an earlier estimate of 220,000 was "probably high" by "30 percent, maybe 40." Tr. (9/25) at 65-66.

vote." Def. Post-trial Supp. Br. at 7. "For those who are not in possession of one of the types of photo ID that are required under option 1, they have two options for voting." Tr. (10/1) at 73. "It is not a strict photo ID law at all." *Id.* at 74. In fact, the General Assembly went to great lengths "to ensure that every voter has the full opportunity to cast his or her ballot." Def. Post-trial Br. at 1. Option 2 ensures that anyone who could have presented identification under the old law prior to HB 1631 can present identification and vote under Option 1 or Option 2. *Id*. at 33-34. Option 3 "provides much . . . broader access to the franchise than existed before." Tr. (10/1) at 73.[2]

Plaintiffs' own examples, Resp. Br. 23-24, demonstrate the State's preservation and consistency on this issue. State's counsel, in cross-examining Dr. Mayer, distinguished between a requirement "in a strict sense" and a requirement with exceptions. *See* Trial Tr. (9/25) at 121 (disputing Dr. Mayer's claim that Missouri's law would have the same effect as "strict photo ID" laws that do not have exceptions).

The Secretary of State's witness affirmed that the Voter ID Law "requires" photo identification, but not in the sense that there are no "other

[2] In August 2018, for example, about 80% of Option 3 provisional ballots were counted. Def. Ex. 63. More detailed data from Kansas City suggests that, of the remaining 20%, the vast majority were rejected for reasons unrelated to signature matching, such as "voting at the wrong poll" or simply not registering to vote. Tr. (9/25) at 128.

options." Trial Tr. (9/26) at 22. "There is an option 1 requirement of a photo ID," he explained, so poll workers generally "are going to ask for a photo ID." Trial Tr. (9/26) at 16. But "[i]f they don't have a photo ID, there are subsequent options for them to vote." *Id.* "So there is an Option 1 photo requirement but there are other options that allow them to cast a ballot." *Id.*

During closing argument, counsel explained to the court that the vast majority of voters comply with the law by presenting "one of the types of photo ID that are required under option 1," and those who cannot satisfy that general requirement "have two options for voting." Tr. (10/1) at 73. These three options "are all equally valid ways to vote" in the sense that "all of those ballots count just the same," *id.* at 64, but it is also true that those three options are structured as a personal identification requirement that is then subject to exceptions for those without personal identification.

Accordingly, Appellants have preserved, and consistently argued, that the Voter ID Law creates a personal identification requirement that is subject to exceptions.

2. Subsection 1 sets out a "personal identification requirement," the Option Two affidavit refers to that "requirement," and Plaintiffs present no serious argument to the contrary.

The word "shall" in Subsection 1 creates an imperative requirement that "persons seeking to vote in a public election shall" present personal identification (defined as government-issued photo ID) to establish "their voter

identity and eligibility to vote." § 115.427.1, RSMo. After insisting that any argument about a "personal identification requirement" was not preserved, Plaintiffs all but admit that the statute contains such a requirement and refer to it in the imperative. *E.g.*, Resp. Br. 26 (Subsection 1 explains "how a voter must go about establishing her identity while at the polling place"), 34 ("voters shall establish their identity at the polling place by presenting photo ID").

Nor could Plaintiffs dispute this. The statute itself repeatedly refers to Subsection 1 as a personal identification "requirement[]," *e.g.*, § 115.427.1, .2. .3, .5, .6(3)-(4), .12, RSMo, and the statute frames Option 2 and Option 3 as exceptions to that requirement, § 115.427.2-.4, RSMo. Instead, Plaintiffs draw an artificial distinction between "the act of establishing one's qualifications to vote" and "the act of voting itself." *Id.* As explained below, that distinction does not hold up on closer inspection, but more importantly, it misses the point.

Regardless of the purpose of Subsection 1's requirement, it is plainly the "requirement" referenced in the affidavit and in other subsections of the statute. Plaintiffs isolate one of the law's many references to Subsection 1's personal identification requirement—the Option Two Affidavit in Subsection 3—and label it "misleading" and "inaccurate" because personal identification is not a "prerequisite" to voting. Statutory provisions must be read together, not in isolation. *Dickemann v. Costco Wholesale Corp.*, 550 S.W.3d 65, 68 (Mo. banc 2018) ("The provisions of a legislative act must be construed and

considered together"). Plaintiffs make no attempt to reconcile Subsection 3 with the many similar references throughout the Voter ID Law. Those statutory references to Subsection 1's requirements do not misstate the law: they *are* the law, and they must be read accordingly. *Id.*; *State v. Burnau*, 642 S.W.2d 621, 623 (Mo. banc 1982) (holding state statutes "[c]annot be held unconstitutional if they are susceptible to any reasonable construction supporting their constitutionality").

Plaintiffs briefly argue that the State's reading of "required" is contrary to its plain meaning and common usage. Resp. Br. 28. But a word's plain and ordinary meaning is that "'typically found in the dictionary.'" *Dickemann*, 550 S.W.3d at 68 (citation omitted). As explained in the State's opening brief, the first definition of "requirement" reflects the simple imperative sense of the word; it does not impose an if-and-only-if exceptionless condition. Apt. Br. at 22, 33-34 (quoting *BLACK'S LAW DICTIONARY* (10th Ed. 2014) (def. 1)). Plaintiffs do not dispute the State's dictionary definitions or offer any alternative dictionary definitions. To be sure, a "requirement" can be an if-and-only-if requirement with no exceptions. But that is not the case here. As the U.S. Supreme Court has explained, statutory requirements are no less mandatory even if they have "significant" statutory exceptions. *Ross v. Blake*, 136 S. Ct. 1850, 1856-57 (2016). Here, only a few voters qualify for the exceptions. The

statute's general requirement governs some 95 percent of voters in a typical election. *See* Def. Ex. 191.

The statutory context dictates this interpretation of "requirement" as an imperative that is subject to exceptions, not an exceptionless condition. To be sure, a "requirement" *can* be an if-and-only-if condition, and some "requirements" do admit of no exceptions. But here, the statutory context makes perfectly clear that the more flexible meaning of "requirement" is intended, because the statute itself provides for the flexible exceptions. As Plaintiffs' own examples from trial show, both parties distinguished between a requirement "in a strict sense," and a requirement that is subject to exceptions. *See* Trial Tr. (9/25) at 121; *see also, e.g.*, Tr. (9/26) at 16, 22 (affirming that Missouri law "requires" personal identification, but not in the sense that there are no other options).

Context also prevents any risk of confusion at the polling place from the affidavit's use of "required." A voter who is in the process of voting *without* personal identification would not read the Option Two affidavit to mean that personal identification is an if-and-only-if exceptionless condition of voting. Plaintiffs could not and cannot identify a single voter who was actually confused by the affidavit's language *in context* at the polling place. Plaintiffs Gutierrez and Patrick both signed the Option Two affidavit and voted without personal identification, Tr. (9/24) at 39-40, 59; Patrick Depo. at 34, 42, and

many other Missouri voters did as well.[3] Plaintiffs produced no evidence of a single voter who misunderstood the affidavit's use of "requirement" or who was otherwise dissuaded from voting under Option Two by any part of the affidavit's language.

3. Plaintiffs are mistaken to say that Subsection 1's requirement is not "for voting."

Rather than argue that Subsection 1 does not create a personal identification requirement, Plaintiffs primarily argue that Subsection 1's personal identification requirement does not specify what "is required to *vote*" but rather "the means by which one establishes identity at the polling place." Resp. Br. 25-28 (emphasis original); *see also id.* at 27 (arguing subsection 1 does not "impose[ ] an identification requirement for voting"). That artificial distinction contradicts the statutory text, and it certainly does not make the affidavit misleading or inaccurate.

By its express terms, Subsection 1's requirement applies to persons seeking "to vote." It says: "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 . . . ." § 115.427.1. The "shall" language creates a requirement, and that requirement applies to persons "seeking to

[3] Even confusion unrelated to the affidavit was limited. The circuit court described it as a few "individual problems" in the law's infancy, not the kind of "larger record" that would support "void[ing] a statute." Tr. (10/1) at 23-25.

vote." As the rest of the statute shows, persons must establish identity and eligibility in order to cast a valid in-person vote.

Subsection 2 confirms that Subsection 1's requirement is "to vote." By its terms, Subsection 2 provides a way that an "individual may cast a regular ballot" if the individual cannot comply with Subsection 1 because he or she came to the polls without personal identification. § 115.427.2(1), RSMo. This confirms that the requirement in Subsection 1 and the exception in Subsection 2 provide two options *for voting—i.e.*, two ways to cast a regular ballot. *Dickemann*, 550 S.W.3d at 68 ("The provisions of a legislative act must be construed and considered together."). In addition, Subsection 2 requires individuals using Option 2 to acknowledge "that the individual is required to present a form of personal identification, as described in subsection 1 of this section, in order to vote." *Id.* (noting a free nondriver's license is available to those desiring it "to vote"). This language reinforces Subsection 1's "to vote" language, connecting both Subsection 1's requirement and Subsection 2's exception to the act of casting a regular ballot.

The affidavit language in Subsection 3 accurately repeats this "to vote" language. It says: "I furthermore acknowledge that I am required to present a form of personal identification, as prescribed by law, in order to vote." The affidavit's language is so similar to the language of Subsections 1 and 2 that Plaintiffs themselves later argue that the affidavit cannot be rewritten. Resp.

Br. 51. Plaintiffs argue that "the specific clauses that the court found unconstitutional *are mandated by a different provision of the statute*, § 115.427.2." *Id.* (emphasis added). Both of Plaintiffs' argument cannot be true: *either* the affidavit's language accurately summarizes the statute and is constitutional, *or* its language is not mandated by the statute and may be rewritten. This Court construes statutes as a whole precisely to avoid such illogical outcomes. *Dickemann*, 550 S.W.3d at 68.

Plaintiffs suggest the provisional ballot language in Subsection 4 says something different, Resp. Br. 26-28, but that subsection only confirms that the Option Two affidavit accurately reflects Subsection 1's personal identification requirements. Like Subsection 2, the language in Subsection 4 is contingent and permissive: a voter "shall be *allowed* to cast a provisional ballot under section 115.430 even if the election judges cannot establish a voter's identity under this section." § 115.427.4, RSMo (emphasis added). The word "allowed" shows the provision is permissive, and the "even if" phrase shows that Option Three serves as a safety valve that allows even voters with no identification whatsoever to cast a ballot and verify their identity and eligibility later.[4] Option Three does not somehow sever the link between voting

[4] The "even if" clause expands on § 115.430.2(1), RSMo, *see* Resp. Br. 26 n.2, which says a provisional ballot will be provided only if election workers have already verified a voter's identity. If a voter's identity has already been established through Option One or Option Two, then the voter will cast a

and verifying identity and eligibility: a provisional ballot "shall not be counted" unless the person's identity, § 115.427.4(1), and eligibility, § 115.430.2(1), are verified. Voting goes together with establishing identity and eligibility. In these ways, Subsection 4 confirms the Voter ID Law's overall structure. Persons seeking to vote "shall" present personal identification, § 115.427.1, RSMo, but the statute also provides flexible exceptions to that requirement to ensure eligible voters are able to vote.

In essence, Plaintiffs argue that the personal identification requirement is not "for voting" because it is possible to cast a provisional ballot under Subsection 4 and verify identity "after the individual has already voted." Resp. Br. 26. This argument is mistaken for two reasons. First, the State agrees that persons can vote using the exceptions in Option Two or Option Three without complying with Option One, but the statute still creates a personal identification "requirement" for persons seeking to vote. Subsection 4 does not change that. To the contrary, Subsection 4's language assumes that provisional voting will operate as a backstop. *See* Cir. Ct. Order at 6 ("[Subsection 4] 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 turning them away."). Second, Subsection 4's language

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regular ballot under one of those options, not a provisional ballot under Option Three (absent an unrelated question of eligibility like Rachel Youn's).

re-emphasizes that a person cannot cast a valid vote without establishing identity and eligibility. That link remains regardless of whether a voter fills out the ballot and then verifies identity and eligibility, or verifies identity and eligibility and then fills out the ballot. The signature matching process is used to verify identity. § 115.427.4(1)(b), RSMo.

Finally, Plaintiffs' reliance on the language of the 2002 voter ID law, Resp. Br. 27, undermines their position. Plaintiffs do not mention or address the language added to replace the phrase that was removed. Consistent with the rest of the statute, the General Assembly amended Subsection 1 to make clear that the personal identification requirement is for voting:

> **Previous language**: "*Before receiving a ballot*, voters shall establish their identity and eligibility to vote at the polling place by presenting a form of personal identification" (the previous law defined this term differently). § 115.427.1, RSMo (2002) (emphasis added).
>
> **Current language**: "*Persons seeking to vote in a public election* shall establish their identity and eligibility at the polling place by presenting a form of personal identification to election officials." § 115.427.1, RSMo (2017) (emphasis added).

The General Assembly replaced the "receiving a ballot" language quoted by Plaintiffs with language explicitly applicable to "[p]ersons seeking to vote." That change made clear that, even after adding a provisional ballot option, the

law's personal identification requirement is for persons seeking to vote, not just for persons receiving a ballot. Plaintiffs acknowledge that the old version of § 115.427.1 (2002) "require[d] presentment of specific forms of identification *to vote*." Resp. Br. 27 (emphasis original). So they must concede that the new language—expressly adding the words "to vote"—is also a requirement for voting. And that makes sense. The rest of § 115.427, RSMo, including the Option Two affidavit, contains numerous references to a personal identification requirement for voting. That requirement is simply subject to exceptions.

4. Plaintiffs refuse to read the statute as a whole and ignore the principle of constitutional avoidance.

The statute as a whole confirms that Subsection 1 contains personal identification requirements that are "for voting." Apt. Br. 24-29. "'[I]f possible, all provisions must be harmonized and every clause given some meaning.'" *Dickemann*, 550 S.W.3d at 68 (citation omitted). This means, first, that the Court "must attempt to harmonize the provisions, giving effect to each." *State v. Williams*, 548 S.W.3d 275, 280 n.5 (Mo. banc. 2018). Only if "this is not possible" should the Court determine which takes precedence, such as "by applying the more specific or more recently enacted provision." *Id.*

Plaintiffs do not attempt to harmonize the Voter ID Law's provisions, even though Subsection 2 and Subsection 3 are perfectly consistent with the

statute's many other times references to a personal identification requirement. Apt. Br. at 27-28 (listing examples). Plaintiffs instead jump to step two and argue that the specific provisions in Subsection 1 and Subsection 4 should govern the general provisions in Subsection 2 and Subsection 3. Resp. Br. at 29. But the general/specific canon simply does not apply here, and if it did, then the *specific* exceptions in Subsection 2-4 would govern the *general* requirement in Subsection 1. Even if the canon applied in the way Plaintiffs argue, the outcome would be the same. "[T]he general/specific canon does not mean that the existence of a contradictory specific provision voids the general provision." Scalia & Garner, READING LAW 184 (Thomson/West 2012). Instead, the general provision is construed in light of the specific provision. *State ex rel. Hillman v. Beger*, 566 S.W.3d 600, 606 (Mo. banc 2019). By Plaintiffs' own analysis, then, Subsection 2 and Subsection 3 should be read as an exception to the personal identification requirement created by Subsection 1. *Id.*

The principle of constitutional avoidance counsels the same outcome as the contextual rules of interpretation. Apt. Br. 31-32. This Court will adopt any reasonable interpretation of the statute that harmonizes its provisions and avoids striking down part of the statute. State statutes "cannot be held unconstitutional if they are susceptible to any reasonable construction

supporting their constitutionality." *Burnau*, 642 S.W.2d at 623. Plaintiffs ignore this well-establish principle entirely.[5]

5. A substantially similar affidavit could have addressed all of the circuit court's concerns.

As Plaintiffs acknowledge, "the sample Affidavit in subsection 3 need not be adopted verbatim," Resp. Br. 51, because the statute expressly authorizes use of a "substantially similar" affidavit, § 115.427.3, RSMo. Thus, the circuit court also erred by entirely enjoining the use of *any* affidavit during Option Two voting. *Bates v. Webber*, 257 S.W.3d 632, 636 (Mo. App. S.D. 2008) (noting an injunction should not "interfere with legitimate and proper action). The Secretary of State can exercise its statutory discretion and draft a "substantially similar" affidavit" by making minor changes to the affidavit, adopted from other subsections of the statute, that will resolve all of the circuit court's concerns. *See* Apt. Br. 47-49.

Plaintiffs argue that the affidavit cannot be rewritten because "the specific clauses that the court found unconstitutional are mandated by a different provision of the statute." Resp. Br. 51. Again, this argument only shows that the circuit court *either* erred by failing to harmonize the statute's

[5] Plaintiffs also argue that Amendment 6 has *no meaning* whatsoever, and that the Voter ID Law burdens the right to vote even though they did not put on a single voter who was unable to vote. Resp. Br. 37-51. The opening brief responds to these points and the State does not address them here.

provisions, *or* erred by not allowing the affidavit to be rewritten. If the affidavit summarizes the statute poorly, then the Secretary of State can fix the affidavit by replacing the allegedly imprecise summary with the statute's precise language. If the affidavit's text is "mandated by a different provision of the statute," *id.*, then the circuit court erred by refusing to harmonize the statute's provisions. That Plaintiffs attempt to make both arguments demonstrates that their reading of Subsection 1 conflicts with both the sample affidavit text in Subsection 3 and the text of Subsections 2, 4, 5, and 6.

But even if this Court were to find that parts of both Subsection 2 and Subsection 3 were irreparably unconstitutional, it could sever the unconstitutional portions and direct the Secretary of State to draft a "substantially similar" affidavit once those lines were removed. § 115.427.3, RSMo. The statute permits the Secretary to redraft the language by authorizing a "substantially similar" affidavit, the Court may sever unconstitutional statutory language, or some combination of the two.

In any event, the affidavit *can* be altered to make it unquestionably consistent with the statutory text of both Subsection 1 and Subsection 2. Plaintiffs say the State's proposed alterations, Apt. Br. at 48, contain "significant departures from the statutory language," Resp. Br. at 52. But this is incorrect. The State's proposed changes are adopted directly from the

statutory language, with only a few minor transitions added (*e.g.*, "appeared" instead of "appear"). Each of Plaintiffs' three criticisms fall short.

First, Plaintiffs say that Subsection 2 and Subsection 6 are inconsistent on what "possess" means, and that the revised affidavit "implicitly" incorporates that inconsistency. There is no inconsistency, however, because Subsection 2 addresses eligibility for free identification, while Subsection 6 addresses entitlement to such identification. Besides, Plaintiffs' complaint addresses the statute, not the revised affidavit. Plaintiffs do no argue that the suggested revised affidavit somehow inaccurately summarizes the statute or is not "substantially similar" to it.

Second, Plaintiffs say the second sentence of the revised affidavit is plural while Subsection 2 uses the singular. This minor change falls well within the bounds of a "substantially similar" affidavit. At any rate, the concern is fixed by replacing "any" with "an":

> …I acknowledge that an 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.

See § 115.427.6(1), RSMo (underlined language).

Third, Plaintiffs criticize the State's proposed alterations because they still include the words "in order to vote." Resp. Br. at 53. As explained above, the circuit court held that the putative risk of confusion centered on the word

"required." But the Secretary of State could omit the words "in order to vote" as well by simply replacing it with text from Subsection 1. For example:

> I furthermore acknowledge that a person seeking to vote in a public election shall ~~I am required to~~ present a form of personal identification, as prescribed by law~~, in order to vote~~.

See § 115.427.1-.2, RSMo. This replaces the language Plaintiffs find confusing with its parallel language in Subsection 1.

These minor revisions follow the same principle as the revisions in the opening brief. All parties agree the affidavit is meant to summarize other statutory provisions. If the circuit court were correct in holding that the Option Two affidavit's language inaccurately summarizes the rest of the statute, which it was not, then the circuit court additionally erred by not allowing the State to replace the imprecise language with language that directly reflects the statute. "'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*, 257 S.W.3d at 636 (citation omitted).

6. The circuit court did not find that the entire affidavit was unconstitutional, so it should not have invalidated the entire affidavit.

The circuit court also erred by invalidating the affidavit in its entirety, rather than severing the valid portions from the invalid portions. Apt. Br. 50-

54. The opening brief pointed out 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.

This severed version eliminates the two putative sources of potential confusion identified by the circuit court. Option Two voters supposedly confused by the term "personal identification" would no longer have to confirm that they do not have one, so the later sentence saying personal identification is "required" will not be misleading even to those voters. Voters supposedly confused by the two uses of "possess" would no longer have to confirm that personal identification was not in their possession, and the remaining acknowledgement only alerts the voter of their eligibility for, not their entitlement to, a free nondriver's license.

Plaintiffs acknowledge that the Court should sever the affidavit to preserve as much of the statutory language as possible, *see* § 1.140, RSMo, but they argue that *every* line of the affidavit is unconstitutional except the opening

clause and the last sentence, and that even those lines should be invalidated. Resp. Br. 54-58. This argument fails for at least three reasons.

First, Plaintiffs' analyze the personal identification clauses in isolation rather than together. As explained in the opening brief, removing the first clause about personal identification resolves any confusion from the later sentence discussing the personal identification requirement. An Option Two voter who thinks "personal identification" refers to *any* form of identification will have no problem signing a statement saying that they are "required to present a form of personal identification, as prescribed by law, in order to vote." A voter who knows "personal identification" refers to Option One identification—as they should, since Option Two is limited to voters who do not have personal identification with them—will understand that they are voting under an exception to Option One's general rule. Plaintiffs' only response is to repeat their argument that the personal identification requirement is not "to vote." Resp. Br. 54. Even if they were right (which they are not), then the circuit court should have only severed the words "in order to vote." The statute unmistakably "prescribes" a personal identification requirement—so the rest of the sentence accurately advises voters about the law.

Second, the remaining text accurately advises voters about the availability of free photo ID 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." Plaintiffs acknowledge that this eliminates any confusion about the meaning of "possess." Resp. Br. 54. But they say the text is still a "misstatement of law" because *some* Option Two voters will already have a photo ID (that they did not bring with them) and *those* voters are not eligible for a free nondriver's license. *Id.* But the "in order to vote" language excludes voters who already have a photo ID, because those voters do not need a nondriver's license "in order to vote." Further, Subsection 2 and Subsection 6 demonstrate that a voter may be "eligible" for free ID without being entitled to it. §§ 115.427.2 (describing eligibility) & 115.427.6(1), RSMo (describing who is entitled to free ID). The affidavit does not say that all Option Two voters are entitled to free ID under all circumstances; it says they are "eligible" for free ID only if the free ID is "in order to vote." That is accurate.

Third, Plaintiffs incorrectly argue that the first and last clause of the affidavit serve no function apart from the sentences in between. Resp. Br. 55-57. The circuit court disagreed. In fact, it expressly found that such an Option Two affidavit would satisfy even strict scrutiny. Cir. Ct. Order at 4. "[T]he Court finds the affidavit requirement reasonable because of the different forms of identification being presented by Option Two voters." *Id.* "An example of an affidavit closely tailored to effectuate the state's interest would be substantially as follows: 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." *Id.* Even Plaintiffs' counsel agreed with this. Tr. (10/1 at 85-86) ("that portion of the sworn statement itself would be constitutional"). Indeed, because the constitution requires the State to establish a voter's qualifications to vote, these parts of the affidavit are vital to ensuring constitutional compliance. MO. CONST. art. VIII, §§ 2, 11.

Those parts of the affidavit also advance the General Assembly's goals by serving two important functions independent of the precinct register.

Their first function is to mark the practical difference between Option One and Option Two. A voter can present Option Two identification only if he or she (a) "appears at a polling place without a form of personal identification" and (b) signs the affidavit. § 115.427.2(1), RSMo. The practical connection between these two conditions is illustrated by the circuit court's order. Although the circuit court's analysis only found the affidavit unconstitutional, its injunction may have enjoined both Option Two conditions. *See* Cir. Ct. Order at 7 ("The presentation of an Option One or Option Two form of identification at any polling location shall be sufficient to enable any registered voter to cast a regular ballot and no affidavit shall be required"). This Court should expressly reinstate both conditions to protect the statute's structure and to encourage voting under Option One.

The affidavit's second function is to serve as an additional safeguard to verify identity and eligibility. Many states use an affidavit in this way when

processing less secure identification. Some voters may not even remember signing the precinct register, and, at any rate, may be registered at an address where they no longer reside. Asking voters who present a less secure form of identification to sign an affidavit serves the State's "legitimate interest in preserving the integrity of the election process," Cir. Ct. Order at 4, by reminding voters that they can only vote in their own name (not for others) and can only vote in the precinct in which they reside (not where they used to reside). The provisional ballots contain similar language serving a similar purpose. *See* Def. Ex. 124.

Finally, Plaintiffs incorrectly argue that the General Assembly would have enacted the Voter ID Law without any Option Two affidavit but would not have enacted the Voter ID Law with a narrower affidavit. Resp. Br. 56-57. Plaintiffs have not carried their burden to overcome the presumption that the legislature "intended to give effect to" the constitutional portions of the affidavit. *City of Normandy v. Grietens*, 518 S.W.3d 183, 197 n.19 (Mo. banc 2017). Plaintiffs suggest the legislature would have enacted the statute with no affidavit at all because such a statute would be virtually indistinguishable from the voter identification laws in place for the previous fifteen years. Resp. Br. at 57. But this argument actually undermines Plaintiffs' position. When the General Assembly passes a new statute, this Court presumes that it intended to effect some change in the existing law. *E & B Granite, Inc. v. Dir.*

of Revenue, 331 S.W.3d 314, 317 (Mo. banc 2011). Here, as Plaintiffs note, the principal change to the law was to distinguish Option One identification from Option Two identification by limiting the latter to voters who (a) appear without a form of Option One identification, and (b) sign the affidavit. Since this was the principle change made by HB1631, there is every reason to assume the General Assembly intended to give effect to those two conditions.

7. The Secretary of State's advertising gave notice of the "personal identification requirements" of Subsection 1.

Finally, the same errors also led the circuit court to enjoin certain newspaper advertising that the Secretary of State used to give the public notice of the personal identification requirements of Subsection 1, as required by § 115.427.5, RSMo.

Plaintiffs' arguments here contradict the unambiguous statutory language. Subsection 5 directs the Secretary of State to notify the public about the "personal identification requirements of Subsection 1." § 115.427.5, RSMo. Plaintiffs do not and cannot dispute that the Secretary is directed to give notice about that personal identification requirement. Plaintiffs' artificial distinction between a personal identification requirement "for voting" and for establishing identity is particularly weak in this context because *either way*, a voter will be expected to present personal identification at the polling place.

The Secretary of State did exactly what the statute directed him to do. Plaintiffs criticize the newspaper advertisement for saying "[w]hen you vote, you will be asked for a photo ID" because the statute does not literally "mandate[]" that poll workers ask this question. Resp. Br. 35. But this advertisement does a good job of conveying Subsection 1's requirement. Voters "shall" present a photo ID, but voters who are unable to comply because they do not have a photo ID with them can instead vote using Option Two or Option Three. § 115.427.2 & .4, RSMo; *see also* Def. Ex. 1 (outlining the statute's structure in visual terms). As the advertisement itself urges voters, "there are other options" so "[i]f you don't have a photo ID to vote," you should contact the Secretary of State's office for help. Pl. Ex. 7 – Pl. Ex. 12. Plaintiffs also misrepresent the State's closing argument on this point. Counsel agreed with the circuit court that a pollworker could in theory ask about Option Two identification first, Tr. (10/1) at 64-65, but that would be misleading, because the voter would still have to present a photo identification if he or she had one with them. It is "good practice" for a pollworker to "ask the photo ID law question first, as the flyer suggests" because the statute's "shall" language and overall structure instruct that photo ID is the preferred option for voting. *Id.*

Plaintiffs next insist that the Missouri Constitution required a broader notice campaign about every provision of the statute because compliance with

Subsection 5 left a "misleading" "impression." Resp. Br. 35-36. This is wrong both factually and legally.

Factually, Plaintiffs misread the newspaper ads and ignore the broader context of both the prior law and the Secretary's other advertising. The very first line of the newspaper ads declares, "If you're registered to vote, you can vote!" to reassure voters that any registered voter who could vote under the old law can also vote under the new law, even those without photo ID. Pl. Ex. 7 – Pl Ex. 12. It then says voters will be asked for a photo ID. This message no more leaves the "impression" that photo ID is an if-and-only-if, exceptionless condition of voting than Plaintiffs' own statement that the advertising should explain "that voters shall establish their identity at the polling place by presenting photo ID." Resp. Br. 34. The newspaper ads also reassure voters that "there are other options too." Pl. Ex. 7 – Pl Ex. 12. So the newspaper ads point out what is new (presenting photo ID), and what remains the same compared to the previous law (there are other options), while encouraging voters to contact the Secretary of State if they do not have photo ID. *Id.* Plaintiffs also ignore the *rest* of the Secretary's notice documents, which explained the law's "other options" and repeatedly reassured voters that "if you're a registered voter, you can vote!" *E.g.*, Def. Ex. 1-4, 38, 79; Pl. Ex. 64. The circuit court described the polling place poster, for example as "near perfect in terms of accuracy." Tr. (10/1) at 31 (Def. Ex. 4). In particular,

Plaintiffs are wrong to suggest election authorities were confused by the newspaper ads. Resp. Br. 36. The materials the Secretary of State provided to election authorities repeatedly explained that the *first* question is whether a voter has a valid government-issued photo ID with them, but if a voter does not have one, they can still "proceed to vote" using Option 2 and Option 3. *See, e.g.*, Def. Ex. 76 at 3-5; Def. Ex. 79 at 1 (emails to election authorities).

Plaintiffs' argument is also meritless as a matter of law. As explained in the opening brief, the statute does not direct the State to give public notice of any subsection other than Subsection 1, and the constitution does not either. Plaintiffs respond that the scope of the injunction is a discretionary matter, but that argument misses the point. The trial court's *analysis* is incorrect because it assumed the State should have given notice that was not required by law; its *injunction*, by contrast, seems to remove the personal identification requirement from the statute altogether. *See* Cir. Ct. Order at 7 ("The presentation of an Option One or Option Two form of identification at any polling location shall be sufficient to enable any registered voter to cast a regular ballot and no affidavit shall be required"). Both the analysis and the injunction were in error. The State gave the notice required by law, and the Court's injunction exceeded the scope of its own analysis.

CONCLUSION

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

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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 16th day of July, 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 7,214 words.

/s/ *D. John Sauer*