

Washington University Journal of Law & Policy

Volume 42 *Privilege Revealed: Past, Present, & Future*

2013

A Tale of Two States: Challenges to Voter ID Ballot Measures in Missouri and Minnesota

Veronica Harwin
Washington University School of Law

Follow this and additional works at: https://openscholarship.wustl.edu/law_journal_law_policy



Part of the [Law Commons](#)

Recommended Citation

Veronica Harwin, *A Tale of Two States: Challenges to Voter ID Ballot Measures in Missouri and Minnesota*, 42 WASH. U. J. L. & POL'Y 203 (2013),
https://openscholarship.wustl.edu/law_journal_law_policy/vol42/iss1/15

This Note is brought to you for free and open access by the Law School at Washington University Open Scholarship. It has been accepted for inclusion in Washington University Journal of Law & Policy by an authorized administrator of Washington University Open Scholarship. For more information, please contact digital@wumail.wustl.edu.

A Tale of Two States: Challenges to Voter ID Ballot Measures in Missouri and Minnesota

Veronica Harwin*

INTRODUCTION

Voter Identification (Voter ID) requirements, and specifically photo ID requirements for voting, have become prevalent in the news as more and more states consider and pass legislation requiring voters to prove their identity in order to vote. Since the first photo ID laws were passed in 2005, and especially in the last two years, voter ID requirements have spread like wildfire across the country.¹ Proponents claim photo ID measures are necessary to prevent voter fraud, while opponents argue that such requirements could prevent millions of eligible voters from casting a ballot.²

Over the course of 2011 and 2012, Missouri and Minnesota followed two different paths on the issue of voter ID, but in the end neither state enacted a new photo ID requirement. Missouri has been dealing with voter ID since 2006,³ and because it was found to be unconstitutional based on the state constitution,⁴ the Missouri Constitution must be amended in order to require photo ID for voting. Minnesota, on the other hand, more recently attempted to pass a voter ID law in 2011, which was then vetoed by the Governor.⁵ The state

* J.D. (2013), Washington University School of Law; B.A. (2010), Washington University. I would like to thank Denise Lieberman for her help with this project, and Jeanne Harwin and Matthew Potter for their patience and support.

1. See *2003–2012 Legislative Action*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx> (last updated Mar. 7, 2013).

2. Wendy R. Weiser & Lawrence Norden, *Voting Law Changes in 2012*, BRENNAN CTR. FOR JUST., 4 (2011), available at http://brennan.3cdn.net/92635ddafbc09e8d88_i3m6bjdeh.pdf.

3. Missouri passed its first photo ID requirement in 2006. See S.B. 1014, 93d Gen. Assemb., 2d Reg. Sess. (Mo. 2006).

4. See *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006).

5. See S. File No. 509, 87th Legis. Sess. (Minn. 2011).

legislature then attempted to bypass the gubernatorial veto with a direct vote of the people on a constitutional amendment.⁶

Though the background facts differ, both states were in a position that led legislators to present photo ID requirements directly to voters.⁷ Both measures were then challenged on the basis of the language presented to voters on the ballot (a ballot title or ballot question challenge, generally referred to in this Note as a ballot language challenge).⁸ Missouri's challenge was upheld, and the measure was never presented to voters.⁹ In Minnesota, the challenge was rejected,¹⁰ and the measure went before voters on the November 2012 ballot. The proposed amendment failed in the election, receiving only a little over 46 percent of the vote in support.¹¹

This Note will look at the issues surrounding voter ID through the lens of the proposed amendments in Missouri and Minnesota. Both states offer important lessons to opponents of voter ID. Ballot summaries¹² are crucial in a direct election, as they provide the only information voters will generally see for a measure.¹³ This Note will examine the ballot language challenges in Missouri and Minnesota and suggest that this model be followed elsewhere, as more states introduce both state constitutional amendments and initiative measures to override gubernatorial vetoes of voter ID legislation.

Part I of this Note discusses the history of voter ID laws nationwide, before focusing on the proposed laws in Missouri and Minnesota and the lawsuits brought to challenge them. Part II looks

6. See H.R. File No. 2738, 87th Legis. Sess. (Minn. 2012).

7. See *infra* notes 63–75 and accompanying text; see *infra* notes 116–23 and accompanying text.

8. See *infra* notes 9–10.

9. See *Aziz v. Mayer*, No. 11-AC-CC00439 (Cole Cnty. Cir. Ct. Mar. 27, 2012).

10. See *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636 (Minn. 2012).

11. *Results for Constitutional Amendments*, OFFICE OF THE MINN. SEC'Y OF STATE, <http://electionresults.sos.state.mn.us/ENR/Results/AmendmentResultsStatewide/1> (last updated Dec. 12, 2012).

12. Ballot summary refers to the language voters see on their ballots; different states use different terms, such as ballot title or ballot question. This Note will use more general terms of ballot summary or ballot language interchangeably to refer to ballot questions and ballot titles.

13. See Roger Gafke & David Leuthold, *The Effect on Voters of Misleading, Confusing, and Difficult Ballot Titles*, 43 PUB. OPINION Q. 394, 394 (1979); see also Craig M. Burnett & Vladimir Kogan, Paper, Am. Political Sci. Ass'n 2010 Annual Meeting, *The Case of the Stolen Initiative: Were the Voters Framed?*, available at papers.ssrn.com/sol3/Delivery.cfm/SSRN_ID2143158_code1356421.pdf?abstractid=1643448&mirid=2 (last updated Sept. 7, 2012).

at voter ID trends nationwide and the effects of voter ID, specifically the effects of strict photo ID requirements, on both the state and the voter. Part III examines the importance of the ballot language challenge and proposes opponents of voter ID consider ballot language challenges as a way to combat the enactment of new strict voter ID laws.

I. HISTORY OF VOTER ID

A. *Voter ID Requirements and Federal Law*

After the debacle of the 2000 election, Congress passed the Help America Vote Act (HAVA) with the goal of reforming voter registration and the voting process in order to increase voter turnout.¹⁴ While Congress implemented some voter identification mandates in HAVA,¹⁵ it was left to the states to decide what type of voter identification to require.¹⁶ States still remain split on what types of identification to require from voters.¹⁷ Voter ID requirements generally fall into one of four categories: no ID required, non-photo ID required, photo ID required, and strict photo ID required (generally limited to forms of government-issued photo ID).¹⁸

Indiana was the first state to pass a law requiring photo ID to vote.¹⁹ In 2008, challenges to Indiana's voter ID law²⁰ rose through

14. *Help America Vote Act of 2002 (HAVA): An Overview*, LEGAL INFO. INST., <http://www.law.cornell.edu/background/HAVA.html> (last visited Mar. 7, 2013).

15. See *Help America Vote Act of 2002*, Pub. L. No. 107-252, 116 Stat. 1666. HAVA requires that voters who register to vote by mail and have not previously voted in that state present an acceptable form of voter ID in order to vote. *Id.* Section 303(a) of HAVA allows an individual to vote if that person:

(I) presents to the appropriate State or local election official a current and valid photo identification; or (II) presents to the appropriate State or local election official a copy of a current utility bill, bank statement, government check, paycheck, or other government document that shows the name and address of the voter.

Id. (codified at 42 U.S.C. § 15483).

16. See Spencer Overton, *Voter Identification*, 105 MICH. L. REV. 631, 639 (2007).

17. *Id.*; see also Weiser & Norden, *supra* note 2 (discussing the differences in voter ID requirements approaching the 2012 election).

18. *Voter Identification Requirements*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx#> (last updated Mar. 7, 2013).

19. Weiser & Norden, *supra* note 2, at 4.

20. S. Enrolled Act No. 483, 114th Gen. Assemb., 1st Reg. Sess. (Ind. 2005).

the federal courts, and the U.S. Supreme Court decided these challenges in *Crawford v. Marion County Election Board*.²¹ The challenges to the voter ID law alleged that it violated the Fourteenth Amendment by substantially burdening the right to vote and disenfranchising qualified voters.²² The Court held the Indiana voter ID law constitutional based on the federal Constitution.²³ In previous cases, the Court applied a strict standard to voting regulations that were unrelated to voter qualifications, finding that they invidiously discriminate.²⁴ But in *Crawford*, the Court adopted a balancing approach, evaluating the interests put forward by the State as justification for the burden the regulation placed on voters.²⁵

Indiana claimed several interests were furthered by its voter ID law, including deterring and detecting voter fraud, modernizing elections, and safeguarding voter confidence.²⁶ The Court recognized that electoral modernization is a valid interest in line with recent federal statutes, though these statutes did not require Indiana's enactment of a photo ID requirement.²⁷ Despite the lack of evidence of in-person voter impersonation fraud,²⁸ the Court still found the State's interest in preventing voter fraud to be legitimate.²⁹

The burdens to be weighed against these interests are those "imposed on persons who are eligible to vote but do not possess a current photo identification that complies with the requirements."³⁰

21. *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181 (2008).

22. *Id.* at 187 ("The complaints in the consolidated cases allege that the new law substantially burdens the right to vote in violation of the Fourteenth Amendment; that it is neither a necessary nor appropriate method of avoiding election fraud; and that it will arbitrarily disenfranchise qualified voters who do not possess the required identification and will place an unjustified burden on those who cannot readily obtain such identification.").

23. *Id.* at 204.

24. *Id.* at 189; see also *Harper v. Virginia Bd. of Elections*, 383 U.S. 663 (1966).

25. *Crawford*, 553 U.S. at 190 ("Rather than applying any 'litmus test' that would neatly separate valid from invalid restrictions, we concluded that a court must identify and evaluate the interests put forward by the State as justifications for the burden imposed by its rule, and then make the 'hard judgment' that our adversary system demands.").

26. *Id.* at 191.

27. *Id.* at 192–93 (discussing the National Voter Registration Act of 1993 and the Help America Vote Act of 2002).

28. *Id.* at 194.

29. *Id.* at 196 ("There is no question about the legitimacy or importance of the State's interest in counting only the votes of eligible voters.").

30. *Id.* at 198.

This places a heavier burden on some, including the elderly and disabled, who have difficulty obtaining the necessary form of identification.³¹ However, this burden is mitigated by the ability to cast provisional ballots.³² The Court concludes that it cannot find “that the statute imposes ‘excessively burdensome requirements’ on any class of voters.”³³ Therefore the State’s interests are sufficient to overcome the challenge to the statute.³⁴

1. Recent Developments Across the Country

After Indiana, Georgia, and Missouri legislatures passed the first photo ID laws in 2006, no state legislature passed a photo ID requirement until 2011.³⁵ However in the wake of the Supreme Court’s approval of photo ID requirements in *Crawford* and the increase in Republican-controlled state legislatures after the 2010 election,³⁶ legislators in thirty-four states introduced bills in 2011 to require voters to present photo ID to vote.³⁷ In 2012, thirty-two state legislatures considered new voter ID measures, including both laws to require voter ID in states where no identification had previously

31. *Id.* at 199.

32. *Id.*

33. *Id.* at 202 (internal citation omitted).

34. *Id.* at 203 (“The ‘precise interests’ advanced by the State are therefore sufficient to defeat petitioners’ facial challenge to SEA 483.”).

35. See Weiser & Norden, *supra* note 2, at 4–5. However, Oklahoma voters did approve a ballot measure in 2010 that required voters to present identification at the polls, though this requirement was far less onerous than those of 2006 or the several laws passed in 2011. *Id.* at 14.

36. *Id.* at 9. A change in party control of state legislatures is among the main reasons behind the increased number of photo ID bills introduced. Other reasons behind the surge are that legislators made this cause a priority, and the conservative group the American Legislative Exchange Council (ALEC) lent its support to the movement. *Id.* at 9–11. However, in response to objections by some of its corporate members, ALEC disbanded its Public Safety and Elections Task Force, which had drafted and promoted the voter ID laws. Adam Sorensen, *ALEC Scraps Gun-Law, Voter-ID Task Force*, TIME: SWAMPLAND (Apr. 17, 2012), <http://swampland.time.com/2012/04/17/alec-scraps-gun-law-voter-id-task-force/>. Though due to the widespread saturation of voter ID requirements, the primary work of the Task Force had already been accomplished. *Id.*

37. Weiser & Norden, *supra* note 2, at 5. For a complete breakdown of all proposed laws as of September 2011, see *Appendix: Summary of State Laws and Bills*, BRENNAN CTR. FOR JUST. (Sept. 2011), http://brennan.3cdn.net/d4b3cfe23771173d16_r7m6iv642.pdf; see also *Voter ID: 2011 Legislation*, NAT’L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections-campaigns/voter-id-2011-legislation.aspx> (last updated Jan. 26, 2012).

been required to vote and laws to strengthen existing voter ID laws to require photo ID.³⁸ These laws generally vary as to what types of identification are acceptable.³⁹ As of the November 2012 election, eleven states require voters to present some form of photo ID: Georgia, Indiana, Tennessee, Kansas, Florida, Hawaii, Idaho, Louisiana, South Dakota, Michigan, and New Hampshire.⁴⁰ Five other states have passed some form of photo ID requirement, but it was not in effect for the November 2012 election: Mississippi, Pennsylvania, Texas, Wisconsin, and Alabama.⁴¹

However, some states require review and approval by the Department of Justice, called pre-clearance, for proposed changes to existing election law.⁴² The Department of Justice denied South Carolina's request for pre-clearance, finding the law discriminatory because minority voters were 20 percent more likely to lack a photo ID than white voters.⁴³ However after South Carolina sued, a federal court granted the law pre-clearance.⁴⁴ Texas was denied pre-clearance by both the Department of Justice and a federal court.⁴⁵ Virginia and

38. *Voter ID: 2012 Legislation*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id-2012-legislation.aspx> (last updated Jan. 10, 2013).

39. *Details of Voter Identification Requirements*, NAT'L CONF. OF STATE LEGISLATURES, <http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx#Details> (last updated Mar. 7, 2013).

40. *States that Have Enacted Voter ID Laws*, NAT'L CONF. OF STATE LEGISLATURES, http://www.ncsl.org/legislatures-elections/elections/voter-id.aspx#State_Reqs (last updated Mar. 7, 2013) [hereinafter *Enacted Voter ID Laws*].

41. *Id.*

42. For a discussion of Section 5, see *Section 5 of the Voting Rights Act*, DEP'T OF JUST., http://www.justice.gov/crt/about/vot/sec_5/about.php (last visited Mar. 7, 2013). Section 5 of the Voting Rights Act of 1965 requires the Department of Justice to review and approve any new election law in any "covered jurisdiction." *Id.* These jurisdictions must show that the proposed change does not "deny or abridge the right to vote on account of race, color, or membership in a language minority group." *Id.* Section 5 remains in effect until 2031. *Id.* However, the Supreme Court heard arguments on February 27, 2013 in *Shelby County v. Holder*, a case challenging Section 5 of the VRA. Transcript of Oral Argument, *Shelby Cnty. v. Holder*, No. 12-96 (U.S. argued Feb. 27, 2013), available at http://www.supremecourt.gov/oral_arguments/argument_transcripts/12-96.pdf.

43. Letter from Thomas E. Perez, Assistant Attorney Gen., Dep't of Just., to C. Havird Jones, Jr., Assistant Deputy Attorney Gen., S.C. (Dec. 23, 2011), available at http://brennan.3cdn.net/594b9cf4396be7ebc8_0pm6i2fx6.pdf.

44. See *Voter Identification Requirements*, *supra* note 18. The federal district court delayed implementation of South Carolina's voter ID law until 2013. *Id.*

45. *Enacted Voter ID Laws*, *supra* note 40.

New Hampshire were both granted pre-clearance by the Department of Justice.⁴⁶

Other states have taken a different approach, submitting voter ID requirements directly to voters. In Mississippi, a ballot initiative amended the state constitution to require voters to present a government-issued photo ID in order to vote.⁴⁷ Voters approved this amendment after multiple bills requiring photo ID failed in the legislature.⁴⁸ However, that amendment will require enabling legislation, which will also require pre-clearance from the Department of Justice.⁴⁹ Missouri and Minnesota, which are discussed in greater detail below, have also attempted this route.⁵⁰

B. History of Voter ID in Missouri

Prior to the passage of the HAVA⁵¹ by Congress in 2002, Missouri did not require a voter to show any form of identification to vote in state or national elections.⁵² In 2002, Missouri passed a law requiring voters to present one of many forms of identification in order to vote;⁵³ these requirements were largely the same as those in HAVA.⁵⁴ This law allowed numerous forms of both photo and non-

46. *Voter Identification Requirements*, *supra* note 18.

47. *Enacted Voter ID Laws*, *supra* note 40. For the text of the initiative, along with the ballot title and summary, see *Voter Identification*, MISS. SEC'Y OF STATE, <http://www.sos.ms.gov/elections/initiatives/InitiativeInfo.aspx?Id=27> (last visited Mar. 7, 2013).

48. *Voter ID: 2011 Legislation*, *supra* note 37.

49. *Enacted Voter ID Laws*, *supra* note 40.

50. See *infra* notes 75–85 and accompanying text; see *infra* notes 122–31 and accompanying text.

51. Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666.

52. MO. REV. STAT. § 115.427 (2000). This statute required that “[i]n counties using binders as precinct registers, before receiving a ballot, each voter shall identify himself and write his address and sign his name on a certificate furnished to the election judges by the election authority,” *id.* § 115.427.1, and “[i]n counties using computer printouts as the precinct register, before receiving a ballot, each voter shall present his voter identification card as provided in section 115.163.” *Id.* § 115.427.2. Section 115.163, as identified in this section, required the election authority to mail voter identification cards at least ninety days before the primary in any year in which a primary and general election would be held. *Id.* § 115.163.3 (2000).

53. S.B. No. 675, 91st Gen. Assemb., 2d Reg. Sess (Mo. 2002) (codified at MO. REV. STAT. § 115.427).

54. See Help America Vote Act of 2002, Pub. L. No. 107-252, 116 Stat. 1666; MO. REV. STAT. § 115.427 (2002).

photo IDs, including: Missouri driver's licenses and non-driver's licenses, passports, school IDs, utility bills, paychecks, and out-of-state driver's licenses.⁵⁵

In 2006, Missouri became one of the first states⁵⁶ to require voters to present a photo ID in order to cast a ballot.⁵⁷ This law, Senate Bill (SB) 1014, allowed only a few specific forms of identification to serve as voter identification, including an unexpired Missouri driver's or non-driver's license, or another unexpired government-issued document that features the voter's name and photo, such as a passport or military ID.⁵⁸ SB 1014 contained exceptions for persons without photo ID due to a mental or physical disability, a sincerely held religious belief, or a birth date before January 1, 1941.⁵⁹ Voters in these categories were allowed to cast a provisional ballot that would

55. MO. REV. STAT. § 115.427 (2002). This statute allowed for the following forms of ID: an ID issued by the state of Missouri, an agency of the state, or an election authority; an ID issued by the federal government; an ID from any institution of higher education in Missouri; a copy of a current utility bill, bank statement, paycheck, or government document with the voter's name and address; an out-of-state driver's or nondriver's license; other forms of ID approved by the Secretary of State; or the affidavit of two election judges. *Id.*

56. Indiana and Georgia both passed photo ID requirements to vote in 2005. Evan D. Montgomery, Note, *The Missouri Photo-ID Requirement for Voting: Ensuring Both Access and Integrity*, 72 MO. L. REV. 651, 655, 662 (2007).

57. S.B. No. 1014, 93d Gen. Assemb., 2d Reg. Sess (Mo. 2006) (codified at MO. REV. STAT. § 115.427).

58. *Id.* The 2006 statute read:

1. Before receiving a ballot, voters shall establish their identity and eligibility to vote at the polling place by presenting a form of personal identification. "Personal identification" shall mean only one of the following: (1) Nonexpired Missouri driver's license showing the name and a photograph or digital image of the individual; or (2) Nonexpired or nonexpiring Missouri nondriver's license showing the name and a photographic or digital image of the individual; or (3) A document that satisfies all of the following requirements: (a) The document contains the name of the individual to whom the document was issued, and the name substantially conforms to the most recent signature in the individual's voter registration record; (b) The document shows a photographic or digital image of the individual; (c) The document includes an expiration date, and the document is not expired, or if expired, expired not before the date of the most recent election; and (d) The document was issued by the United States or the state of Missouri; or (4) Any identification containing a photographic or digital image of the individual which is issued by the Missouri National Guard, the United States armed forces, or the United States Department of Veteran Affairs to a member or former member of the Missouri National Guard or the United States armed forces and that does not have an expiration date.

Id.

59. MO. REV. STAT. § 115.427.3 (Supp. 2006).

only be counted if the election authority verified that the voter's signature on the ballot matched the signature on file and determined that the voter cast the ballot at the proper polling location.⁶⁰ Voters without valid photo ID who did not fall into one of the above-mentioned exceptions would also be allowed to cast a provisional ballot, but it would only be counted if the voter returned to his or her polling place with a valid form of photo ID during polling hours.⁶¹ SB 1014 also contained provisions waiving the fee normally associated with the issuance of a non-driver's license if the voter requesting signed an affidavit that he or she did not have any other form of identification with which to vote, and provisions creating mobile units to issue IDs to the elderly and disabled who would otherwise be physically unable to obtain a non-driver's license.⁶²

1. *Weinschenk v. State*

The Missouri photo ID requirement was short-lived. The Governor signed SB 1014 on June 14, 2006,⁶³ and the Missouri Supreme Court held SB 1014 unconstitutional in *Weinschenk v. State* on October 16, 2006.⁶⁴ Immediately after its passage, many parties brought challenges to the photo ID requirement in SB 1014, claiming that it violated both the Missouri and United States Constitutions by interfering with the right to vote.⁶⁵

The Court found that SB 1014 impinged on a fundamental right because the right to vote is expressly guaranteed in the Missouri Constitution,⁶⁶ and SB 1014 placed a substantial burden on that

60. *Id.*

61. *Id.* § 115.427.5 (Supp. 2006).

62. *Id.* § 115.427.7 (Supp. 2006).

63. *Activity History for SB 1014*, MO. SENATE, http://www.senate.mo.gov/06info/BTS_Web/Actions.aspx?SessionType=R&BillID=83706 (last visited Mar. 7, 2013).

64. *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006).

65. *Id.* at 204.

66. *Id.* at 211. In undertaking an equal protection analysis, the Court first determines if the law "implicates a suspect class or impinges upon a fundamental right explicitly or implicitly protected by the Constitution." *Id.* at 210 (internal citations omitted). If it does, the Court applies strict scrutiny. *Id.* at 211. For the law to survive strict scrutiny review, the state must show that the law serves "compelling state interests and [is] narrowly tailored to meet those interests." *Id.* (internal citation omitted).

right.⁶⁷ Therefore the court applied a strict scrutiny test.⁶⁸ While the State's interest in combating voter fraud is "significant, compelling, and important,"⁶⁹ the photo ID requirement of SB 1014 was not narrowly tailored to achieve the State's interest in preventing voter fraud.⁷⁰ A photo ID requirement will only combat in-person voter impersonation fraud, which does not exist to a substantial degree in Missouri.⁷¹ SB 1014 would also not prevent absentee ballot or voter registration fraud.⁷² Because in-person voter impersonation is not a major problem in Missouri, the photo ID requirement was not necessary to achieve the compelling state interest of preventing voter fraud.⁷³ Thus, the photo ID requirement failed to meet the standard of strict scrutiny, and the court held that it unconstitutionally interfered with the right to vote as protected by the Missouri Constitution.⁷⁴

The Missouri Constitution contains several provisions that expressly protect the right to vote, guaranteeing "all elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage," MO. CONST. art. I, § 25, and setting forth an exclusive list of qualifications necessary to vote. MO. CONST. art. VIII, § 2. The Court distinguishes this from the protection of voting rights under the United States Constitution. *Weinschenk*, 203 S.W.3d at 211. While the right to vote has been consistently held as fundamental, it is not expressly guaranteed in the federal Constitution as it is under the Missouri Constitution. *Id.* Furthermore, voter qualifications are also not constitutionally set, but are instead left to legislative determination. *Id.* at 211–12. Because of this distinction, the court rested its decision primarily on the right to vote as protected by the Missouri Constitution. *See id.* at 212.

67. *Weinschenk*, 203 S.W.3d at 215 ("This Court agrees with the trial court that the Photo-ID Requirement of SB 1014 represents a heavy and substantial burden on Missourians' free exercise of the right of suffrage."). The court recognized several findings of fact from the lower court that supported their finding that SB 1014 placed a substantial burden on voters, including: that between 3 and 4 percent of Missouri citizens (between 169,215 and 240,000 persons) lacked the required photo ID, *id.* at 212–13, that even though Missouri waived the fee for a nondriver's license for those without ID, it still required these individuals to spend money to obtain the necessary documents required by the *Real ID Act* to get a license, *id.* at 208, and this cost was directly connected to the exercise of the right to vote, *id.* at 214, and that voters were required to spend time and effort navigating bureaucracies to obtain the required documents and license. *Id.*

68. *Id.* at 215. The court also noted that had strict scrutiny not applied, SB 1014 would have been upheld because "reasonable regulation of the voting process and of registration procedures is necessary to protect the right to vote." *Id.* (footnote omitted).

69. *Id.* at 217.

70. *Id.*

71. *Id.*

72. *Id.*

73. *Id.*

74. *Id.* at 221–22 ("SB 1014's Photo-ID Requirement creates a heavy burden on the right to vote and is not narrowly tailored to meet a compelling state interest, so it falls afoul of the

2. Senate Joint Resolution No. 2

Because the Missouri Supreme Court held that a photo ID requirement violates the right to vote as specifically enshrined in the Missouri Constitution,⁷⁵ the only way to implement a photo ID requirement is to amend the state constitution. Article XII of the Missouri Constitution allows for the state legislature to propose amendments to the state constitution, which must then be approved by voters.⁷⁶ The Missouri legislature sought to do just that in passing Senate Joint Resolution No. 2 (SJR 2) on May 9, 2011.⁷⁷ SJR 2 would have placed an amendment to the state constitution on the November 2012 ballot that would allow the state to pass photo ID requirements.⁷⁸ The relevant portion of SJR 2 reads:

Section 9. A person seeking to vote in person in public elections may be required by general law to identify himself or

Missouri Constitution's equal protection clause, *Mo. Const. art. I, sec. 2*, and of Missourians' specific constitutional protection of the right to vote. *Mo. Const. art. I, sec. 25*.”)

75. *Weinschenk*, 203 S.W.3d at 221–22.

76. MO. CONST. art. XII, § 2(b). The same procedure applies to both amendments proposed by the legislature and those introduced through initiative:

All amendments proposed by the general assembly or by the initiative shall be submitted to the electors for their approval or rejection by official ballot title as may be provided by law, on a separate ballot without party designation, at the next general election, or at a special election called by the governor prior thereto, at which he may submit any of the amendments. No such proposed amendment shall contain more than one amended and revised article of this constitution, or one new article which shall not contain more than one subject and matters properly connected therewith. If possible, each proposed amendment shall be published once a week for two consecutive weeks in two newspapers of different political faith in each county, the last publication to be not more than thirty nor less than fifteen days next preceding the election. If there be but one newspaper in any county, publication for four consecutive weeks shall be made. If a majority of the votes cast thereon is in favor of any amendment, the same shall take effect at the end of thirty days after the election. More than one amendment at the same election shall be so submitted as to enable the electors to vote on each amendment separately.

Id.

77. Jason Hancock, *Lawmakers Put Photo ID Amendment on Mo. Ballot*, ST. LOUIS POST-DISPATCH, May 10, 2011, available at http://www.stltoday.com/news/local/govt-and-politics/lawmakers-put-photo-id-amendment-on-mo-ballot/article_d7cbfcac-3902-5e8f-87a9-8e4900bb651e.html.

78. S.J. Res. No. 2, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011). The measure sought to amend Article VIII of the Missouri Constitution and also allow the legislature to provide for advance voting. *Id.*

herself and verify his or her qualifications as a citizen of the United States of America and a resident of the state of Missouri by providing election officials with a form of identification, which may include requiring valid government-issued photo identification. Exceptions to the identification requirement may also be provided for by general law.⁷⁹

If it were approved, this constitutional amendment would alter the fundamental right to vote found in the Missouri Constitution, thus overruling the Missouri Supreme Court's holding in *Weinschenk*.⁸⁰ However, photo ID requirements would not immediately take effect, but would require the legislature to pass an enabling measure.⁸¹

79. *Id.*

80. *See Weinschenk*, 203 S.W.3d at 221–22.

81. Weiser & Norden, *supra* note 2, at 14. The Missouri Legislature passed Senate Bill No. 3 as an enabling measure. S.B. No. 3, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011). The relevant portion of the bill enacting a photo ID requirement reads:

1. 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. No form of personal identification other than the forms listed in this section shall be accepted to establish a voter's qualifications to vote. Forms of personal identification that satisfy the requirements of this section are any one of the following:

- (1) Nonexpired Missouri driver's license;
- (2) Nonexpired or nonexpiring Missouri nondriver's license;
- (3) A document that satisfies all the following requirements:
 - (a) The document contains the name of the individual to whom the document was issued, and the name substantially conforms to the most recent signature in the individual's voter registration record;
 - (b) The document shows a photograph of the individual;
 - (c) The document includes an expiration date, and the document is not expired or if expired, the document expired after the date of the most recent general election; and
 - (d) The document was issued by the United States or the state of Missouri; or
- (4) Any identification containing a photograph of the individual which is issued by the Missouri national guard, the United States armed forces, or the United States Department of Veteran Affairs to a member or former member of the Missouri national guard or the United States armed forces and that does not have an expiration date.

Id. The bill would also have provided for free photo IDs for voting for those who cannot afford them and for exceptions for certain individuals who could not obtain proper ID, due to religious objections, indigence, or age. These individuals would be allowed to cast a provisional ballot that would only be counted if the signature on the provisional ballot matched the signature on

When the legislature proposes a constitutional amendment, it is submitted to the voters to approve or reject based on the ballot title.⁸² The ballot title is the official summary statement of the amendment that appears on the ballot itself, instead of the full text of the proposed amendment.⁸³ The official ballot title for SJR 2 is “[s]hall the Missouri Constitution be amended to adopt the Voter Protection Act and allow the General Assembly to provide by general law for advance voting prior to election day, voter photo identification requirements, and voter requirements based on whether one appears to vote in person or by absentee ballot?”⁸⁴ This summary is what voters would have seen on the November 2012 ballot.⁸⁵

3. Ballot Title Challenge: *Aziz v. Mayer*

However, voters never saw SJR 2 on the November 2012 ballot because a Missouri circuit court held that the ballot title language was insufficient and unfair.⁸⁶ Missouri law allows any citizen to bring a challenge against the official ballot title.⁸⁷ Such a challenge against the ballot title of SJR 2 was brought on July 7, 2011.⁸⁸ In order to

the voter’s registration. *Id.* This bill was vetoed by Governor Jay Nixon. Jason Hancock, *Nixon Vetoes Missouri Photo ID Legislation*, ST. LOUIS POST-DISPATCH, June 19, 2011, available at http://www.stltoday.com/news/local/metro/nixon-vetoes-missouri-photo-idlegislation/article_1219dc24-9908-11e0-bf91-0019bb30f31a.html (“‘This [photo ID] mandate would disproportionately impact senior citizens and persons with disabilities, among others, who are qualified to vote and have been lawfully voting since becoming eligible to do so, but are less likely to have a driver’s license or government-issued photo ID,’ Nixon said in a letter explaining his veto. ‘Disenfranchising certain classes of persons is not acceptable.’”).

82. MO. CONST. art. XII, § 2(b).

83. MO. REV. STAT. § 116.155 (2011). When a ballot initiative is proposed by the legislature, the legislature will also draft the ballot title, which “shall contain no more than fifty words, excluding articles,” and “be a true and impartial statement of the purposes of the proposed measure in language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.” *Id.*

84. S.J. Res. No. 2, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011).

85. Mo. S.J. Res. No. 2 (setting the amendment for the ballot at the general election to be held the first Tuesday after the first Monday in November 2012).

86. *Aziz v. Mayer*, No. 11-AC-CC00439, slip op. at 5 (Cole Cnty. Cir. Ct. Mar. 27, 2012).

87. Section 116.190.1 of the Missouri Revised Statutes provides “[a]ny citizen who wishes to challenge the official ballot title . . . prepared for a proposed constitutional amendment submitted by the general assembly . . . may bring an action in the circuit court of Cole County.” MO. REV. STAT. § 116.190.1.

88. Pet. to Challenge Official Ballot Title, *Aziz v. Mayer*, No. 11AC-CC00439 (Cole Cnty. Cir. Ct.), available at <http://www.aclu-em.org/downloads/PetitionAziz.pdf> (last visited

challenge a ballot title, the challenger must give reasons why the ballot title is insufficient or unfair.⁸⁹ The applicable test to determine the validity of a ballot title is “whether the language fairly and impartially summarizes the purposes of the measure, so that the voters will not be deceived or misled.”⁹⁰ The circuit court also has the authority to revise a summary statement that they find to be insufficient and unfair.⁹¹

The plaintiffs in the case challenging SJR 2, *Aziz v. Mayer*,⁹² alleged that the ballot title was insufficient and unfair, in violation of Mo. Rev. Stat. § 116.155.2,⁹³ because it would deceive and mislead voters.⁹⁴ The plaintiffs claimed that the ballot title would be misleading, insufficient, and unfair because it led voters to believe it would establish the Voter Protection Act, but in reality it would neither adopt any such act nor protect voter rights.⁹⁵ They also

Mar. 7, 2013) [hereinafter Petition]; see also *Aziz et al. v. Mayer et al.*, ACLU OF EASTERN MO. (July 7, 2011), <http://www.aclu-em.org/legal/legaldocket/currentcases/azizetalvmayeretal.htm>.

89. MO. REV. STAT. § 116.190.3. In previous challenges to the language of ballot titles, the Missouri Supreme Court has defined insufficient and unfair as “[i]nsufficient means ‘inadequate; especially lacking adequate power, capacity, or competence.’ The word ‘unfair’ means to be ‘marked by injustice, partiality, or deception.’ Thus the words insufficient and unfair . . . mean to inadequately and with bias, prejudice, deception and/or favoritism state the [consequences of the initiative].” *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. Ct. App. 2006) (quoting *Hancock v. Secretary of State*, 885 S.W.2d 42, 49 (Mo. Ct. App. 1994)).

90. *Bergman v. Mills*, 988 S.W.2d 84, 92 (Mo. Ct. App. 1999) (citing *Union Elec. Co. v. Kirkpatrick*, 678 S.W.2d 402, 405 (Mo. 1984) (en banc)).

91. See *Cures Without Cloning v. Pund*, 259 S.W.3d 76, 82 (Mo. Ct. App. 2008).

92. *Aziz v. Mayer*, No. 11-AC-CC00439 (Cole Cnty. Cir. Ct. Mar. 27, 2012).

93. Section 116.155.2 of the Missouri Revised Statutes reads:

The official summary statement approved by the general assembly shall, taken together with the approved fiscal note summary, be the official ballot title and such summary statement shall contain no more than fifty words, excluding articles. The title shall be a true and impartial statement of the purposes of the proposed measure in language neither intentionally argumentative nor likely to create prejudice either for or against the proposed measure.

MO. REV. STAT. § 116.155.2.

94. Suggestions in Supp. Of Mot. For Summ. J. of Pls., *Aziz v. Mayer*, No. 11AC-CC00439, at 5 (Cole Cnty. Cir. Ct. Feb. 2, 2012).

95. *Id.* The name “Voter Protection Act” appears nowhere in SJR 2 and furthermore under a common understanding of “protection” and “protect,” the act actually has the opposite effect on voters. *Id.* at 5–7. It is more likely to disenfranchise many voters than to protect their right to vote. *Id.* at 7.

claimed that the ballot title would mislead voters as to the photo ID requirements because it did not make clear that this amendment would allow legislators to create extremely strict photo ID requirements that had previously been found to violate the Missouri Constitution.⁹⁶

The Circuit Court of Cole County, Missouri concluded that the ballot title language is insufficient and unfair for a number of reasons.⁹⁷ First, the title states that passing the amendment would enact the “Voter Protection Act,” which is insufficient and unfair because the proposed amendment does not contain the language “voter protection act,” or even the word “protection.”⁹⁸ Further, the title is insufficient and unfair because it suggests to the voter that the proposed amendment would grant new powers to the state legislature to allow for early voting and change absentee voting requirements, when in fact the legislature already has such powers.⁹⁹ Finally, it is also insufficient and unfair because the title refers to the legislature’s ability to require photo ID for voting, when the Act actually allows the legislature to require government-issued photo ID, which is a much more restricted class of identification.¹⁰⁰

The court further vacates the ballot title language rather than revise the ballot title.¹⁰¹ Vacating the ballot title removes the proposed amendment from the ballot until the legislature can rewrite the ballot title in a way that is not insufficient and unfair.¹⁰² The court vacated the ballot title rather than revise it because “significant changes are required.”¹⁰³

4. Voter ID post-*Aziz*

Shortly after the decision was issued and the court allowed the legislature to rewrite the ballot title of SJR 2, Missouri House

96. *Id.* at 10. This is more misleading because the legislature already has the ability to require, and has in fact required, voters to present reasonable forms of identification to vote. *Id.*

97. *Aziz*, 11AC-CC00439, at 5.

98. *Id.*

99. *Id.*

100. *Id.* at 5–6.

101. *Id.* at 6.

102. *Id.*

103. *Id.*

Speaker Shane Schoeller introduced House Concurrent Resolution (HCR) 53,¹⁰⁴ which rewrote SJR 2's summary statement to read: "[s]hall the Missouri Constitution be amended to create standards for enacting general laws that authorize advance voting, require the use of government-issued photo identification in order to vote, and govern voting procedures based on whether an individual is voting in person or by absentee ballot?"¹⁰⁵ Though the bill was discussed,¹⁰⁶ the legislature failed to pass HCR 53 or any other legislation revising SJR 2's ballot title in time, and therefore the measure did not appear on the November 2012 ballot.¹⁰⁷ Legislators have already introduced another constitutional amendment in 2013.¹⁰⁸

C. History of Voter ID in Minnesota

1. Senate File No. 509 and Gubernatorial Veto

Minnesota never had and does not currently have a law requiring voters to present identification in order to vote.¹⁰⁹ In 2011, legislators sought to change that, and they introduced a law that would require voters to present a government-issued photo ID in order to vote.¹¹⁰

104. H. Con. Res. No. 53, 96th Gen. Assemb., 2d Reg. Sess. (Mo. 2012); see also Jason Hancock, *Court Strikes Down Proposed Missouri Voter ID Amendment*, KANSAS CITY STAR, Mar. 29, 2012, available at <http://www.kansascity.com/2012/03/29/3523436/court-strikes-down-proposed-missouri.html>.

105. Mo. H. Con. Res. 53.

106. See *Activity History for HCR 53*, MO. HOUSE OF REPRESENTATIVES, <http://www.house.mo.gov/BillActions.aspx?bill=HCR53&year=2012&code=R> (last visited Mar. 7, 2013).

107. See *Voter ID kept off ballot in Missouri*, KANSAS CITY STAR, May 22, 2012, available at 2012 WLNR 10824722; see also *No photo ID amendment on the November ballot*, LINCOLN CNTY. J., May 21, 2012, available at <http://www.lincolncountyjournal.com/?p=4794>.

108. H.J. Res. 5, 97th Gen. Assemb., 1st Reg. Sess. (Mo. 2013). HJR 5 was passed by the Missouri House on February 14, 2013. *Activity History for HJR 5*, MO. HOUSE OF REPRESENTATIVES, <http://www.house.mo.gov/BillActions.aspx?bill=HJR5&year=2013&code=R> (last visited Apr. 5, 2013). See also Elizabeth Crisp, *Missouri House Passes Voter ID Measures*, ST. LOUIS POST-DISPATCH, Feb. 15, 2013, available at http://www.stltoday.com/news/local/govt-and-politics/political-fix/missouri-house-passes-voter-id-measures/article_dd9b21ff-ce33-55af-9356-50b5bd3bec4c.html.

109. *Voter Identification Requirements*, supra note 18. The exception is first-time voters who registered to vote by mail, who are required to show a photo ID, a utility bill, or bank statement to verify their identity, which is required nationwide under HAVA. 42 U.S.C. § 15483(b)(2) (2011). Voters who have voted in prior elections need only sign the voter roster. MINN. STAT. § 204C.10(a).

110. S. File No. 509, 87th Legis. Sess. (Minn. 2011).

Senate File (S.F.) No. 509 would limit acceptable forms of identification for voting to: an unexpired Minnesota driver's license with the voter's current address, an unexpired state identification card with the voter's current address, or an unexpired voter identification card with the voter's current address.¹¹¹ An expired form of any of these IDs would also be allowed if it were accompanied by the original receipt for its renewal.¹¹² Tribal identification cards are allowed if they contain the same information as the above forms of identification.¹¹³ The limited number of acceptable IDs would have made this the strictest voter ID law in the country, as other photo ID requirements allow for passports, military IDs, or student IDs.¹¹⁴ The state legislature passed S.F. No. 509 on May 21, 2011,¹¹⁵ and Governor Mark Dayton vetoed it five days later.¹¹⁶

The Governor issued a letter stating his reasons for vetoing S.F. No. 509.¹¹⁷ He stated that the law would create a barrier to accessing the fundamental right to vote under both the federal and Minnesota Constitutions.¹¹⁸ He went on to state that widespread voter fraud does not exist in Minnesota, and that the law would not address the issue of felons voting illegally because felons can still obtain driver's licenses.¹¹⁹ In addition, S.F. No. 509 would affect Minnesota's ability to comply with the Military and Overseas Voter Empowerment Act and would create an unfunded mandate on local governments to provide free voter IDs.¹²⁰ Finally, the lack of bipartisan support in the

111. Minn. S. File. No. 509, § 24. If a voter lives in a residential facility, like transitional housing or a nursing home, he or she may also present any of these forms of ID and certification of residence in the facility as proof of a current address. *Id.*

112. Minn. S. File. No. 509.

113. *Id.*

114. Ari Berman, *Minnesota's War on Voting*, THE NATION, Mar. 26, 2012, available at <http://www.the.nation.com/blog/167042/minnesotas-war-voting#>.

115. *SF 509 Status in the Senate for the 87th Legislature (2011-2012)*, MINN. STATE LEGISLATURE, <https://www.revisor.mn.gov/bills/bill.php?view=chrono&f=SF0509&y=2011&ssn=0&b=senate#actions> (last visited Jan. 12, 2012).

116. Letter from Governor Mark Dayton of Minnesota to The Honorable Michelle L. Fischbach, President of the Senate (May 26, 2011), available at <http://mn.gov/governor/multi-media/pdf/Ch-69-SF509.pdf>.

117. *Id.*

118. *Id.*

119. *Id.*

120. *Id.*

bill's passage in the legislature also led Governor Dayton to veto the bill.¹²¹

2. Proposed Constitutional Amendment: H.F. No. 2738

The legislature responded to Governor Dayton's veto by placing an amendment to the state constitution that would require photo ID for voting on the November 2012 ballot.¹²² The proposed amendment, passed as House File (H.F.) No. 2738, would change Article VII, section 1 of the Minnesota Constitution, which sets out the qualifications for voting.¹²³ H.F. No. 2738, if passed by voters, would require all voters to present a government-issued photo ID prior to receiving a ballot.¹²⁴ The amendment would also require the state to provide free voter IDs to those who cannot afford an ID.¹²⁵ In addition, it would require all voters to be subject to substantially the same identification requirements and that a provisional ballot be provided for voters without ID.¹²⁶

Getting a constitutional amendment on the ballot requires no involvement from the governor, though Governor Dayton did issue a symbolic veto of the amendment, urging voters to vote against the measure.¹²⁷ Dayton called the amendment a "wolf in sheep's

121. *Id.*

122. H. File No. 2738, 87th Sess. (Minn. 2012); *see also* Tim Pugmire, *House Passes Final Voter ID Amendment Bill*, MINN. PUB. RADIO NEWS (Apr. 4, 2012), http://minnesota.publicradio.org/collections/special/columns/polinaut/archive/2012/04/house_passes_fi.shtml.

123. Minn. H. File No. 2738. The current language of Article VII, section 1 sets eligibility for voting as such:

Every person 18 years of age or more who has been a citizen of the United States for three months and who has resided in the precinct for 30 days next preceding an election shall be entitled to vote in that precinct. The place of voting by one otherwise qualified who has changed his residence within 30 days preceding the election shall be prescribed by law. The following persons shall not be entitled or permitted to vote at any election in this state: A person not meeting the above requirements; a person who has been convicted of treason or felony, unless restored to civil rights; a person under guardianship, or a person who is insane or not mentally competent.

MINN. CONST. art. VII, § 1.

124. Minn. H. File No. 2738.

125. *Id.*

126. *Id.*

127. Letter from Governor Mark Dayton of Minnesota to The Honorable Kurt Zellers, Speaker of the House (Apr. 9, 2012), *available at* http://mn.gov/governor/images/ch_167_hf_

clothing” and claimed that it would dismantle Minnesota’s successful election system.¹²⁸ Dayton also emphasized the lack of bipartisanship in the proposed election reform.¹²⁹

For a proposed amendment to become law in Minnesota, it must be approved by a majority of the voters voting in the election, including voters who abstain from casting a ballot on the amendment.¹³⁰ When H.F. No. 2738 appeared on the November 2012 ballot, the title of the measure was “Photo Identification Required for Voting,” and the question presented to voters was: “[s]hall the Minnesota Constitution be amended to require all voters to present valid photo identification to vote and to require the state to provide free identification to eligible voters, effective July 1, 2013?”¹³¹

3. Ballot Question Challenge: *League of Women Voters Minnesota v. Ritchie*

In 2012, several non-profit groups and individuals brought a lawsuit challenging the fairness of the ballot question¹³² of H.F. No. 2738.¹³³ The petitioners claimed that the ballot question violated Article IX, section 1 of the Minnesota Constitution because it did not accurately describe the proposed amendment.¹³⁴ Though the proposed amendment would make four substantive changes to election law, the petitioners claim that the ballot question only describes two of them: the question does not cover the provisional ballot requirement or the requirement that all voters be subject to substantially the same

2738_veto_letter.pdf; see also Tom Scheck, *Dayton Calls Voter ID Amendment “A Wolf in Sheep’s Clothing,”* MINN. PUB. RADIO NEWS (Apr. 9, 2012), http://minnesota.publicradio.org/collections/special/columns/polinaut/archive/2012/04/dayton_calls_vo.shtml.

128. Letter from Governor Mark Dayton, *supra* note 127.

129. *Id.*

130. MINN. CONST. art. IX; Marshall Tanick, *Amending Minnesota’s Constitution: Here We Go, Again . . . and Again*, BENCH & BAR OF MINN., July 2012, at 30, 31.

131. Minn. H. File No. 2738.

132. In Minnesota, the text describing the proposed amendment is known as the “ballot question,” rather than the “ballot title,” as it is known in Missouri.

133. Petitioners’ Brief and Addendum at 3, *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636 (Minn. 2012) (No. A12-920) [hereinafter Petitioners’ Brief]. The Supreme Court of Minnesota has original jurisdiction to hear cases challenging ballot questions that are brought pursuant to MINN. STAT. §§ 204B.44(a), (b), and (d).

134. Petitioners’ Brief, *supra* note 133, at 1.

identification requirement.¹³⁵ Further, petitioners claim the question misstates the language of the proposed amendment by saying that all voters will be required to show photo ID, when the amendment merely requires voters voting in person to show such identification.¹³⁶ Another key point the petitioners make is that the question only asks if voters should be required to present photo ID, whereas the language of the amendment specifies government-issued photo ID, a much more limited category.¹³⁷ Petitioners argue that these discrepancies between the language of the proposed amendment and the ballot question make the ballot question unconstitutionally misleading.¹³⁸

The Minnesota Supreme Court rejected the petitioners' arguments and upheld the ballot question.¹³⁹ The court held that removal of the amendment from the ballot would be unprecedented and refused to grant the relief sought by petitioners.¹⁴⁰ Precedent required the court to give the legislature a great deal of deference in determining the validity of a ballot question; their review was limited to "whether the ballot question as framed is 'so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote.'"¹⁴¹ The court reaffirmed this standard of review and indicated that the petitioners bear the burden of meeting "this rigorous standard."¹⁴² The petitioners failed to meet this standard because the ballot question simply summarizes the various provisions

135. *Id.* at 6–7. The four substantive changes that the petitioners claim the proposed amendment will implement are: (1) all in-person voters will be required to present government-issued photo ID, (2) the government will issue free photo ID to voters without such identification, (3) a system of provisional ballots, and (4) all voters will be subject to substantially equivalent identification requirements. *Id.* Unlike most other states, Minnesota does not have any kind of provisional ballot because it has election day registration, where a voter may register and vote all at the same time (which exempts it from the HAVA provisional ballot requirement). *Id.* at 14. Petitioners also claim that leaving the "substantially equivalent" language out of the ballot question goes so far as to evade the constitutional requirement that the amendment be approved by popular vote. *Id.* at 25.

136. *Id.* at 8.

137. *Id.* at 9.

138. *Id.* at 19.

139. *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 640 (Minn. 2012).

140. *Id.* at 646.

141. *Id.* at 647 (quoting *Breza v. Kiffmeyer*, 723 N.W.2d 633, 636 (Minn. 2006)).

142. *Id.* at 648.

of the amendment.¹⁴³ Though the court acknowledged that the ballot question does not use the exact same language as the proposed amendment, none of the issues that the petitioners point out rendered the ballot question so unreasonable and misleading as to be an attempt to avoid the popular vote of the people.¹⁴⁴

4. November 2012 Election Outcome

Because the court upheld the ballot question, the proposed amendment appeared on the November 2012 ballot in Minnesota.¹⁴⁵ Though early polling in May 2011 indicated 80 percent of respondents supported a photo ID requirement, and even polls a few weeks out from Election Day showed the amendment ahead, it was defeated by a fairly wide margin.¹⁴⁶ Only 46.16 percent of all voters who cast a ballot in the election voted for the photo ID measure.¹⁴⁷ A widespread grassroots campaign spent months before the election contacting individual voters to encourage them to vote against the amendment, spreading the word about its effects.¹⁴⁸

II. VOTER ID TRENDS AND EFFECTS

A. *National Trends in Ballot Measures*

Missouri and Minnesota reflect what may become a growing trend in voter ID—both states could not pass general legislation to enact a

143. *Id.*

144. *Id.* at 648–51. One dissent, on the other hand, characterized the ballot question as a “bait and switch.” *Id.* at 651.

145. State General Election Ballot, Nov. 6, 2012, available at <http://www.sos.state.mn.us/index.aspx?page=227> (listed as “Pink Example Ballot (Constitutional Amendment)” under 2012).

146. Paul Demko, *Defeat of Voter ID Was Team Effort*, POLITICS IN MINN., Nov. 14, 2012, available at <http://politicsinminnesota.com/2012/11/defeat-of-voter-id-was-team-effort/>.

147. *Results for Constitutional Amendments*, OFFICE OF THE MINN. SEC’Y OF STATE, <http://electionresults.sos.state.mn.us/ENR/Results/AmendmentResultsStatewide/1> (last updated Dec. 12, 2012).

148. Demko, *supra* note 146. Groups involved in the campaign against the photo ID amendment included: TakeAction Minnesota, interfaith coalition ISAAH, Jewish Community Action, the StairStep Foundation, Service Employees International Union, AARP Minnesota, the Land Stewardship Project, the Minnesota AFL-CIO, The Arc Minnesota, and Neighborhoods Organizing for Change. *Id.*

photo ID requirement and therefore attempted to take the issue before a vote of the people.¹⁴⁹ Though Missouri must amend the state constitution in order to enact a photo ID requirement due to state supreme court precedent,¹⁵⁰ Minnesota's legislature turned to a constitutional amendment as a means to circumvent a gubernatorial veto.¹⁵¹ Other instances of direct appeal to the voters occurred in Mississippi and Oklahoma. Republicans in Mississippi took the issue of voter ID straight to voters with Initiative 27 in November 2011 after multiple bills failed in the state legislature.¹⁵² Initiative 27 passed with a wide margin, and it was supported primarily by white voters.¹⁵³ In 2010, Oklahoma followed the same path of direct democracy, passing voter ID legislation by ballot measure after the then-governor vetoed similar voter ID legislation.¹⁵⁴

Legislation has also been previously vetoed by Democratic governors in Montana, New Hampshire, and North Carolina.¹⁵⁵ It is possible that Republicans in those states could also propose photo ID state constitutional amendments as a way to circumvent the veto, as was done in Minnesota. Other states that fail to pass voter ID measures through the state legislature may also consider a direct appeal to voters through either the initiative/referendum process or a constitutional amendment, as was done in Mississippi and Oklahoma. Already in 2013, Republican legislators in nine states have placed new or more restrictive voter ID measures on their agendas.¹⁵⁶ As more and more states consider voter ID legislation, it is important to

149. See S.J. Res. No. 2, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); H. File No. 2738, 87th Sess. (Minn. 2012).

150. See *Weinschenk v. State*, 203 S.W.3d 201 (Mo. 2006).

151. Berman, *supra* note 114.

152. *Voter ID: 2011 Legislation*, *supra* note 37.

153. Russell C. Weaver, *Pulling Back The Curtain*, LAWYERS COMM. FOR CIVIL RIGHTS UNDER LAW, at 4–5, <http://www.lawyerscommittee.org/admin/site/documents/files/Pulling-Back-the-Curtain.pdf> (last visited Mar. 8, 2013).

154. Weiser & Norden, *supra* note 2, at 14. It should be noted that this legislation was not nearly as restrictive as much of the legislation passed in 2011. *Id.*

155. See *Voter ID: 2011 Legislation*, *supra* note 37; see also *Voter ID: 2012 Legislation*, *supra* note 38.

156. Brian Powell, *Voter ID Resurfaces In State Legislatures, But ALEC Remains Incognito in Media Coverage*, MEDIA MATTERS FOR AM. (Jan. 9, 2013), <http://mediamatters.org/blog/2013/01/09/voter-id-resurfaces-in-state-legislatures-but-a/192119>. The nine states are: Alaska, Arkansas, Missouri, Montana, New York, North Carolina, Virginia, West Virginia, and Wisconsin. *Id.*

discuss the arguments behind this legislation and the effects it will have on voters.

B. Effects of Photo ID Requirements

Voter ID requirements have very tangible effects on the ability of many people to exercise their right to vote, which could in turn affect both voter turnout and election outcomes.¹⁵⁷ Proponents of photo ID requirements generally argue that such requirements are necessary to fight voter fraud.¹⁵⁸ Opponents argue that these laws will disenfranchise thousands of voters who do not have the necessary forms of identification,¹⁵⁹ and that photo ID requirements will only combat voter impersonation fraud, which rarely, if ever, occurs.¹⁶⁰

In 2006, the Brennan Center for Justice estimated that approximately 11 percent of the American population does not have a government-issued photo ID, which amounts to twenty-one million citizens.¹⁶¹ The Commission on Federal Election Reform estimated approximately 12 percent of American citizens over the age of eighteen do not have a driver's license.¹⁶² The elderly, minorities, and those with low incomes are more likely to lack a government-issued ID.¹⁶³

157. For a survey of research done on the effect of voter ID requirements on voter turnout, see Shelley de Alth, *ID at the Polls: Assessing the Impact of Recent State Voter ID Laws on Voter Turnout*, 3 HARV. L. & POL'Y REV. 185, 192 (2009); see also Robert S. Erickson & Lorraine C. Minnite, *Modeling Problems in the Voter Identification—Voter Turnout Debate*, 8 ELECTION L.J. 85, 98 (2009), available at <http://www.columbia.edu/~rse14/erikson-minnite.pdf>. Though it will take more states enforcing strict voter ID laws to truly determine the effect of these laws on voter turnout, even a very small impact on turnout could affect the outcome of elections. Erickson & Minnite, *supra*, at 88–89.

158. Weiser & Norden, *supra* note 2, at 13.

159. *Id.*

160. *Id.* at 37 n.4.

161. *Citizens Without Proof*, BRENNAN CTR. FOR JUST. 3 (2006), http://www.brennancenter.org/page/-/d/download_file_39242.pdf.

162. *Building Confidence in U.S. Elections*, COMM'N ON FED. ELECTION REFORM, 73 n.22 (2005), http://www1.american.edu/ia/cfer/report/full_report.pdf.

163. *Citizens Without Proof*, *supra* note 161, at 3. Survey results show approximately 18 percent of Americans sixty-five or older, 25 percent of African-Americans, and 15 percent of individuals earning less than \$35,000 a year do not possess a current government-issued ID. *Id.* In addition, 18 percent of citizens between the ages of eighteen and twenty-four do not have an ID that reflects their current address and name. *Id.*

Though the Supreme Court's decision in *Crawford v. Marion County Board of Elections* requires states to provide government-issued photo ID free of charge to citizens that need one to vote but otherwise could not afford an ID,¹⁶⁴ voters still face many challenges in obtaining these IDs.¹⁶⁵ The poor, the elderly, and those who live in rural areas face additional hardships in obtaining these IDs.¹⁶⁶ While the ID itself must be provided at no cost to the voter, oftentimes the voter will still need to spend money to obtain the underlying documentation required.¹⁶⁷ Birth certificates and marriage licenses can cost up to \$25 each, which can pose a significant financial burden on low-income individuals.¹⁶⁸ Further, voters have to travel to a government office to obtain these IDs, which may require long trips for those in rural areas, or may be difficult to reach for those without access to a car or public transportation.¹⁶⁹ Many of these offices are open limited hours, with ID-issuing offices in some states only open a few days each month.¹⁷⁰ All these burdens can add up, requiring voters to spend a great deal of time and effort to obtain a proper ID. Jisele Klinecicz, an eighty-seven-year-old Pennsylvania voter, would have been unable to obtain a voter ID without the help of both her son and daughter-in-law, who "spent more than 20 hours making phone calls, writing emails, driving to the DMV and waiting in lines."¹⁷¹

The Commission on Federal Election Reform also indicates that there is "no evidence of extensive voter fraud in the United States,"¹⁷²

164. Keesha Gaskins & Sundeep Iyer, *The Challenge of Obtaining Voter ID*, BRENNAN CTR. FOR JUST. 1, 23 n.2 (2012), http://brennan.3cdn.net/f5f28dd844a143d303_i36m6lyhy.pdf.

165. See generally *id.* (discussing the various challenges voters must overcome and the numbers of voters affected by these challenges).

166. *Id.* at 1.

167. *Id.*

168. *Id.*

169. *Id.* People in need of these voter IDs do not have a driver's license (because otherwise they could use that to vote), so they cannot drive themselves to the designated government office. *Id.* at 3.

170. *Id.* at 1.

171. Amy Bingham, *Pa. Voter ID Law Leads to DMV Trips from 'Hell,'* ABC NEWS (Sept. 11, 2012), <http://abcnews.go.com/Politics/OTUS/voter-id-vote/story?id=17206253> ("Two government offices, three hour-long lines, two 78-mile trips, two week-long waiting periods, four forms of identity and two signed affidavits later, Pennsylvanians will be allowed to vote.")

172. *Building Confidence in U.S. Elections*, *supra* note 162, at 18.

but that in a very close election, voter fraud could still affect the outcome.¹⁷³ Also, even if the levels of fraud are extremely low, the perception of fraud leads to low confidence in the integrity of the electoral system.¹⁷⁴ However, other studies emphasize just how few reports of voter fraud have been substantiated.¹⁷⁵ The Supreme Court recognized in *Crawford* that the only type of voter fraud that will be prevented by photo ID requirements is in-person voter impersonation.¹⁷⁶ A Brennan Center Report indicates this type of fraud is “an occurrence more rare than getting struck by lightning.”¹⁷⁷ Voter fraud is made even more unlikely by the penalties attached—fraud in a federal election is punishable by up to five years in prison and a \$10,000 fine, in addition to any applicable state penalties.¹⁷⁸ Many incidents that initially appear to be voter fraud are actually simple clerical errors, upon closer investigation, such as voters signing the wrong line of a poll book or typographical errors in processing registrations.¹⁷⁹ Though the Supreme Court has held that preventing voter fraud is a valid reason to require photo ID,¹⁸⁰ actual reports do not substantiate the claims of widespread voter fraud,¹⁸¹

173. *Id.*

174. *Id.*; see also Andrew N. DeLaney, Note, *Appearance Matters: Why the State Has an Interest In Preventing the Appearance Of Voting Fraud*, 83 N.Y.U. L. REV. 847 (2008) (arguing that the Court should recognize and take into account the states’ interest in preventing the appearance of corruption in the form of voter fraud when weighing interests in photo ID cases, much as the Court has done in recognizing the interest in preventing the appearance of corruption in upholding the Bipartisan Campaign Reform Act of 2002).

175. See Justin Levitt, *The Truth About Voter Fraud*, BRENNAN CTR. FOR JUST. (2007), http://brennan.3cdn.net/c176576c0065a7eb84_gxm6ib0hl.pdf. The appendix of this report also contains a detailed breakdown of allegations of voter fraud in Missouri in the 2000 election, finding that “[n]one of these problems could have been resolved by requiring photo ID at the polls.” *Id.* at 23.

176. *Crawford v. Marion Cnty. Bd. of Elections*, 553 U.S. 181, 194 (2008).

177. Levitt, *supra* note 175, at 6. To give an even starker example of the rarity of voter fraud, “in Kansas, there were far more reports of U.F.O. sightings than allegations of voter fraud in the past decade.” John Lewis, Op-Ed., *A Poll Tax by Any Other Name*, N.Y. TIMES, Aug. 26, 2011, available at http://www.nytimes.com/2011/08/27/opinion/a-poll-tax-by-another-name.html?_r=1.

178. Levitt, *supra* note 175, at 7.

179. *Id.*

180. *Crawford*, 553 U.S. at 196.

181. See generally Levitt, *supra* note 175.

but a photo ID requirement will act as an actual impediment to voters' ability to cast a ballot.¹⁸²

Looking beyond these typical arguments against voter ID, implementing photo ID requirements will also have significant costs for states.¹⁸³ When the Supreme Court held photo ID requirements constitutional, it did so on the condition that states provide free IDs for those who could not otherwise afford one.¹⁸⁴ Estimates vary state to state on the actual cost of implementing free ID requirements, from several hundred thousand to a few million dollars a year.¹⁸⁵ This is a significant portion of many states' operating budgets—for example Missouri's election administration budget for the 2012 fiscal year was \$13.8 million,¹⁸⁶ and implementing a photo ID requirement in Missouri could cost more than \$7 million for the first year, and more than \$3 million per year after that.¹⁸⁷ Though some states estimate spending far less to implement photo ID requirements, the cost tends to be high. Indiana, which implemented its photo ID requirement in 2006, estimated spending \$700,000 providing ID cards, but the cost has actually exceeded \$10 million, with an additional \$2.2 million on voter outreach efforts.¹⁸⁸ There are many reasons to oppose photo ID requirements—not only do they have the potential to disenfranchise

182. See *Citizens Without Proof*, *supra* note 161, at 3.

183. See Vishal Agraharkar, Wendy Weiser & Adam Skaggs, *The Cost of Voter ID Laws: What the Courts Say*, BRENNAN CTR. FOR JUST. (2011), http://brennan.3cdn.net/2f0860fb73fd559359_zzm6bhnd.pdf.

184. *Crawford*, 553 U.S. at 198.

185. Agraharkar et al., *supra* note 183, at 1–2.

186. *Financial Summary*, MO. SEC'Y OF STATE, [http://oa.mo.gov/bp/budg2013/Sec retary.pdf](http://oa.mo.gov/bp/budg2013/Sec%20retary.pdf) (last visited Mar. 8, 2013) (FY2012 Budget Appropriation for “Elections” is \$13,819,180).

187. *Fiscal Note*, COMM. ON LEGISLATIVE RESEARCH OVERSIGHT DIV., <http://www.moga.mo.gov/Oversight/OVER11/fishtm/0283-07T.ORG.htm> (last updated June 7, 2011). The estimated costs in Minnesota were lower but still substantial: S. File No. 509 had an estimated cost of \$1.4 million the first year, and a total cost of over \$7.3 million over four years. Consolidated Fiscal Note—2011–12 Session, Minnesota Management and Budget, Bill #S0509-4E (Apr. 26, 2011), available at http://www.mmb.state.mn.us/bis/fnts_leg/2011-12/S0509_4E.pdf.

188. Nicholaw Anhut, Nina Huntington & Melissa Young, *Voter Identification: The True Costs*, UNIV. OF MINN., 19 (2012), <http://www.mncounties.org/HHH%20Institute%20Final%20voter%20ID%20report%20AMC.pdf>.

thousands of voters who lack proper identification,¹⁸⁹ but they will create a large financial burden on the states.¹⁹⁰

Voter ID has also been an extremely contentious point of partisan debate.¹⁹¹ The dearth of evidence of voter fraud has led to accusations that those in favor of photo ID are not actually motivated to prevent voter fraud, but that they want to “shrink the electorate for partisan gain.”¹⁹² Many of the laws enacted in 2011 were voted for along party lines, with Republicans generally in favor of photo ID requirements and Democrats opposed.¹⁹³ Furthermore, voter ID has been supported by the business-backed, conservative group, the American Legislative Exchange Council.¹⁹⁴ Before photo ID requirements were ever enacted in Texas, the former political director for the Republican Party of Texas, Royal Masset, framed the issue of photo ID in light of the partisan debate as such:

Among Republicans it is an “article of religious faith that voter fraud is causing us to lose elections,” Masset said. He doesn’t agree with that, but he does believe that requiring photo IDs could cause enough of a dropoff in legitimate Democratic voting to add 3 percent to the Republican vote.¹⁹⁵

An even clearer statement of partisan intent came from Pennsylvania State House Majority Leader Mike Turzai.¹⁹⁶ In addressing the Republican State Committee in June 2012, Turzai described the strict voter ID law passed in the state as “going to allow Gov. [Mitt] Romney to win the state of Pennsylvania.”¹⁹⁷ This statement indicates

189. *Citizens Without Proof*, *supra* note 161, at 3.

190. Agraharkar et al., *supra* note 183, at 1–2.

191. Weiser & Norden, *supra* note 2, at 12.

192. *Id.* at 13.

193. *See, e.g., id.* at 12.

194. *Id.* at 11. The American Legislative Exchange Council (ALEC) has created model voter ID legislation, which has served as the basis for many of the voter ID laws proposed in 2011. *Id.* at 11–12. ALEC recently ended its task force on voter ID. Sorensen, *supra* note 36.

195. Kristen Mack, *In Trying to Win, Has Dewhurst Lost a Friend?*, HOUSTON CHRON., May 18, 2007, available at <http://www.chron.com/news/article/In-trying-to-win-has-Dewhurst-lost-a-friend-1815569.php>.

196. *Voter ID Honesty: Rep. Turzai’s Slip Unmasks the Republican Agenda*, PITTSBURGH POST-GAZETTE, June, 28, 2012, available at <http://www.post-gazette.com/stories/opinion/editorials/voter-id-honesty-rep-turzais-slip-unmasks-the-republican-agenda-642268/>.

197. *Id.*

the purpose for passing the voter ID measure was not to prevent voter fraud, but to ensure a Republican win in the presidential election.¹⁹⁸

III. STRATEGIES TO CHALLENGE PHOTO ID LAWS

A. Why Ballot Language Challenges?

Ballot language challenges can be a useful method to combat proposed state constitutional amendments because, as in the Missouri case, the remedy sought is to remove the proposed amendment from the ballot.¹⁹⁹ At the very least, the minimum remedy sought is a fair ballot title that will not mislead voters about the purposes of the proposed amendment.²⁰⁰ Even in cases like Minnesota, where the court upheld the ballot question,²⁰¹ a ballot language challenge can help raise awareness of the proposed measure and its effects on voters.²⁰²

Preventing a photo ID requirement from reaching voters can be crucial to preventing its enactment, as recent polls reveal that 74 percent of U.S. adults approve of voter ID requirements.²⁰³ Election

198. *Id.*

199. Petition, *supra* note 88, at 10.

200. *Id.* at 11.

201. *See League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636 (Minn. 2012).

202. There was a great deal of coverage in the media of the lawsuit in Minnesota, both when the case was filed and being litigated, *see, e.g., Lawsuit May Halt November Voter ID Vote*, KSMP-TV (May 30, 2012), <http://www.myfoxtwincities.com/story/18661423/lawsuit-may-halt-november-voter-id-vote>; *Lawsuit Challenging MN Voter ID Amendment*, VALLEYNEWSLIVE.COM (May 30, 2012), <http://www.valleynewslive.com/story/18654077/lawsuit-challenging-mn-voter-id-amendment>; Tim Pugmire, *Supreme Court Hears Voter ID Case*, MINN. PUB. RADIO (July 17, 2012), http://minnesota.publicradio.org/collections/special/columns/polinaut/archive/2012/07/supreme_court_m.shtml; and when the Supreme Court's decision was issued, *see, e.g., Doug Belden, Minnesota Supreme Court Rejects Challenge to Voter ID; Throws Out Ritchie's Rewritten Titles*, PIONEER PRESS, Aug. 27, 2012, available at http://www.twincities.com/ci_21410796/minnesota-supreme-court-rejects-secretary-state-wording-constitutional; Jim Ragsdale, *Legislature Wins Photo ID, Marriage Amendment Cases*, STAR TRIB., Aug. 28, 2012, available at <http://www.startribune.com/politics/statelocal/167637595.html?refer=y>; Leslie Rolander, *High Court: Voter ID, Marriage Amendments on Nov. Ballot*, KSTP.COM (Aug. 27, 2012), <http://kstp.com/news/stories/S2742852.shtml?cat=1>; Bill Keller, *Voter ID Challenge, Wording of Amendment Titles Rejected*, KMSP-TV (Aug. 27, 2012), <http://www.myfoxtwincities.com/story/19387320/minnesota-supreme-court-rejects-wording-of-amendment-titles>.

203. *Fear of Voter Suppression High, Fear of Voter Fraud Higher*, WASH. POST, Aug. 13, 2012, available at <http://www.washingtonpost.com/page/2010-2019/WashingtonPost/2012/08/>

results in Mississippi and Oklahoma support these figures. The voter ID constitutional amendment passed with 62 percent of the vote in Mississippi in 2011,²⁰⁴ and over 74 percent of the vote approved Oklahoma's referendum on voter ID legislation in 2010.²⁰⁵ Initial polling in Minnesota indicated 80 percent approval of a photo ID requirement.²⁰⁶ These figures indicate that opponents to voter ID measures would have a better chance in challenging these laws before they make it to a popular vote.

While public opinion polls reflect widespread support for voter ID requirements, ballot framing, including the language in the ballot title or question, has also been shown to have an influence on voters and can therefore potentially influence outcomes in elections.²⁰⁷ Because the ballot title or summary is the only information about a measure to which all voters are guaranteed to have exposure, the language used is particularly important.²⁰⁸ Controlled experiments have shown that wording of the ballot title or ballot question has an influence on voters and can be very important in close races where a few percentage points may change the outcome.²⁰⁹ Ballot titles that are confusing or misleading can lead voters to vote irrationally—that is to cast their ballot in a way that differs from the views they claim to hold.²¹⁰ The effect of the ballot title seems also to be strongest on the

12/NationalPolitics/Polling/question_6226.xml?uuiid=Nd4PSOTWEeGXOe75nF-yhQ (Margin of Error is +/- 2.5 percentage points).

204. Weaver, *supra* note 153, at 4–5.

205. See *Search State Questions*, OKLA. SEC'Y OF STATE, <https://www.sos.ok.gov/gov/questions.aspx> (Search 746 in “State Question Number”); see also Enrolled S.B. 692, 52d Leg., 1st Reg. Sess. (Okla. 2009), available at <https://www.sos.ok.gov/documents/questions/746.pdf> (State Question 746 requires voters to present a photo ID or a non-photographic voter ID card issued by a county board of elections).

206. Demko, *supra* note 146.

207. See Gafke & Leuthold, *supra* note 13; Burnett & Kogan, *supra* note 13.

208. Burnett & Kogan, *supra* note 13, at 2.

209. *Id.* at 20.

210. Gafke & Leuthold, *supra* note 13, at 400. Voters in the study discussed believed a ballot initiative would provide aid to students in both public and private schools because the ballot title suggested this, when in reality, the initiative would only provide aid to students in private schools. *Id.* at 395–96. Voters were asked their feelings about tax dollars being spent on parochial schools, and about 14 percent of respondents had voted inconsistently with their professed views. *Id.* at 397. This inconsistency was highest (29 percent) with voters who opposed aid to parochial schools, “suggesting that the ballot wording did lead at least some people to support a measure that they would have opposed if they had understood it more accurately.” *Id.* at 398.

least informed voters.²¹¹ The wording itself can also have an effect on public support—polls related to physician-assisted suicide have also shown a large shift in public opinion based solely on the wording used to ask the question.²¹²

Because public opinion polls show broad support for photo ID requirements and the ballot language can influence voters, opponents of photo ID requirements should pay special attention to the ballot title or summary in future proposed initiatives and constitutional amendments.

B. Missouri and Minnesota: Differences and Similarities

There are two key differences between the cases in Missouri and Minnesota that helped lead to their different outcomes; those two differences were the ballot language itself and the standard applied by the courts. In Missouri, the ballot title was far more misleading than that of the ballot question in Minnesota. SJR 2's ballot title purported to enact a "voter protection act," words that are never actually used in the amendment and implied that the amendment would grant the legislature new powers that they in fact already possessed.²¹³ In Minnesota, the ballot question generally paraphrased and summarized the proposed amendment—asking quite straightforwardly if the constitution should be changed to require photo ID in order to vote.²¹⁴ The standards used to judge the ballot language in each case were also drastically different. Missouri's precedent set a much lower bar for the plaintiffs to meet—they had to demonstrate that the ballot title was insufficient and unfair.²¹⁵ Minnesota law sets a much higher standard, requiring that the ballot question be "so unreasonable and misleading as to be a palpable evasion of the constitutional

211. Burnett & Kogan, *supra* note 13, at 20; Gafke & Leuthold, *supra* note 13, at 399.

212. William A. Lund, Note, *What's in a Name? The Battle over Ballot Titles in Oregon*, 34 WILLAMETTE L. REV. 143, 153 (1998) (discussing a Gallup poll that revealed a 17 percent shift in public support for physician-assisted suicide based on the wording of the issue).

213. *See* Mo. S.J. Res. No. 2; *Aziz v. Mayer*, No. 11-AC-CC00439, slip op. at 5 (Cole Cnty. Cir. Ct. Mar. 27, 2012).

214. *See* Minn. H. File No. 2738; *League of Women Voters Minn. v. Ritchie*, 819 N.W.2d 636, 648 (2012) ("The ballot question summarizes these provisions.").

215. *Aziz*, No. 11AC-CC00439; *see also* *Missourians Against Human Cloning v. Carnahan*, 190 S.W.3d 451, 456 (Mo. Ct. App. 2006)

requirement to submit the law to a popular vote.”²¹⁶ This standard is much higher as it essentially requires that the ballot question be so faulty that the voters would not really be voting on the proposed amendment.²¹⁷ Voter ID opponents should keep in mind both the ballot language and the standard of review in their state when bringing a challenge of this sort.

C. Ballot Language Challenge as a Tool for Opposition

Voter ID in Missouri and Minnesota followed very different paths, but ended up in the same place: with no photo ID requirements enacted in either state. In both cases, the ballot language challenge played an important role in reaching that destination. In Missouri, the effect of the ballot title challenge was direct and clear—the court found the ballot title to be unfair and insufficient and removed the measure from the ballot.²¹⁸ Because the Missouri legislature could not pass a new ballot title in time, the photo ID requirement was never presented to voters and therefore could not be enacted. In Minnesota, the effect is less direct, but still present. Though the ballot question challenge failed,²¹⁹ bringing the lawsuit raised greater awareness of the proposed amendment and the effects it would have. A grassroots effort was able to defeat the amendment by speaking directly with individual voters and informing them of the effects of the photo ID requirement.²²⁰ The lawsuit garnered media coverage both when it was filed and when the decision was made.²²¹ These articles and news stories would serve to educate voters in a way similar to the outreach by the grassroots organization, and likely bolstered their efforts. Even a failed ballot language challenge can help educate voters about the presence of a photo ID requirement on the ballot, and it gives opponents an opportunity to speak about the effects of these strict

216. *League of Women Voters Minn.*, 819 N.W.2d at 647.

217. The Minnesota Supreme Court describes this standard as “rigorous.” *Id.* at 648.

218. *Aziz*, No. 11AC-CC00439, slip. op. at 6.

219. *League of Women Voters Minn.*, 819 N.W.2d at 651.

220. Dan Fromkin, *Voter ID: The More You Know, The Less You Like It*, HUFFINGTON POST (Nov. 11, 2012), http://www.huffingtonpost.com/dan-fromkin/minnesota-voter-id_b_2104107.html.

221. *See supra* note 202.

voter ID measures in press coverage.²²² Opponents of photo ID requirements should consider the ballot language challenge lawsuit as one tool to use in a campaign against a proposed measure, but one that can be effective even in failure.

CONCLUSION

Ballot language challenges hold the potential to combat both voter ID constitutional amendments and initiative measures. By bringing suit against misleading and unfair ballot titles, photo ID opponents can hope to get measures removed from the ballot, or at least have a less biased ballot summary crafted by the court.²²³ Even the latter remedy offers photo ID opponents a more level playing field in a general election, as ballot language can be influential to voters.²²⁴ Even a failed ballot language challenge can still serve an important function by raising awareness about the proposed photo ID measure, as well as the effects of voter ID requirements. As more states turn to direct democracy to pass voter ID requirements, either in the form of constitutional amendments or initiatives, the ballot language challenge may serve as a useful tool. Though Missouri and Minnesota may be fairly unique cases today, as direct appeals to voters on voter ID become more prevalent, voter ID opponents in other states should consider a challenge of the ballot title/question, paying attention to the standard in their state for such challenges and the language of the ballot summary itself. Voter ID will continue to be a controversial topic in the years to come. Photo ID requirements will only serve to disenfranchise groups of voters that lack the necessary forms of identification, while only addressing voter fraud in the form of in-person voter impersonation, which has not been shown to exist to any measurable extent in the United States.

222. See, e.g., Ragsdale, *supra* note 202 (“Laura Fredrick Wang of the League of Women Voters said that even in defeat, the court case helped illustrate the complexity of the photo ID issue. ‘At least we got the conversation started,’ she said.”).

223. See Petition, *supra* note 88, at 11.

224. See Gafke & Leuthold, *supra* note 13.