

No. A12-0920

---

STATE OF MINNESOTA  
IN SUPREME COURT

---

LEAGUE OF WOMEN VOTERS MINNESOTA, *et al.*,

*Petitioners,*

vs.

MARK RITCHIE,  
In his capacity as Secretary of State of the State of Minnesota,

*Respondent.*

---

*AMICUS CURIAE BRIEF OF AARP SUPPORTING PETITIONERS*

---

Timothy P. Griffin (MN Bar. No. 0285717)  
Liz Kramer (MN Bar. No. 0325089)  
LEONARD, STREET AND DEINARD  
*Professional Association*  
150 South Fifth Street, Suite 2300  
Minneapolis, MN 55402  
Telephone: 612-335-1500  
Facsimile: 612-335-1657

Daniel B. Kahrman  
AARP FOUNDATION LITIGATION  
Michael Schuster (MN Bar No. 0098048)  
AARP  
601 E Street NW  
Washington, DC 20049  
Telephone: 202-434-2060  
Facsimile: 202-434-6424

Attorneys for *Amicus Curiae* AARP

**TABLE OF CONTENTS**

TABLE OF AUTHORITIES..... iii

INTEREST OF *AMICUS CURIAE* ..... 1

SUMMARY OF THE ARGUMENT ..... 2

ARGUMENT ..... 3

**I. THE BALLOT LANGUAGE PROMISING “FREE” PHOTO ID TO ALL ELIGIBLE VOTERS IS “SO UNREASONABLE AND MISLEADING AS TO BE A PALPABLE EVASION OF THE [STATE] CONSTITUTIONAL REQUIREMENT TO SUBMIT THE LAW TO A POPULAR VOTE.” ..... 3**

*a. Ballot Language Is A “Palpable Evasion” of State Constitutional Referenda Requirements If It Is “So Unclear [and] Misleading that Voters of Common Intelligence Cannot Understand” Its “Meaning and Effect.” ..... 3*

*b. The Ballot Language is Misleading Because it Promises “Free” Voter ID, Whereas the Proposed Amendment Promises Voter ID “At No Charge.” ..... 5*

*c. The Ballot Language is Misleading Because It Implies That Voters Will Not Have to Spend Money in Order to Obtain Voter ID..... 7*

**II. THE BALLOT QUESTION WHETHER “TO REQUIRE ALL VOTERS TO PRESENT VALID PHOTO IDENTIFICATION” IS “SO . . . MISLEADING AS TO BE A PALPABLE EVASION OF THE [STATE] CONSTITUTIONAL REQUIREMENT TO SUBMIT THE LAW TO A POPULAR VOTE.” ..... 12**

*a. Failure to Make Clear That the Proposed Amendment Limits Acceptable Proof of Voter Eligibility to Valid Photographic Identification That Is “Government-Issued” Renders the Ballot Language Misleading, and Does So in Ways Likely to Have Serious Negative Effects on Older Voters..... 12*

b. *The Ballot Language Is Misleading Because It Does Not Make Clear Whether “Valid” Photographic Identification Includes Expired Photographic Identification*..... 14

**III. THE BALLOT QUESTION IS UNCONSTITUTIONALLY MISLEADING BECAUSE OF THE UNDISCLOSED AMENDMENT REQUIREMENT THAT “ALL VOTERS, INCLUDING THOSE NOT VOTING IN PERSON, MUST BE SUBJECT TO SUBSTANTIALLY EQUIVALENT IDENTITY AND ELIGIBILITY VERIFICATION,” WHICH THREATENS ELECTION DAY REGISTRATION AND ABSENTEE BALLOTING, TO THE DETRIMENT OF MANY VOTERS, INCLUDING IN PARTICULAR, OLDER VOTERS**..... 16

a. *The likelihood that the “substantially equivalent” clause would end Election Day Registration means that failing to disclose it in ballot language renders that text unconstitutionally misleading and especially likely to harm older voters* ..... 16

b. *The likelihood that the “substantially equivalent” clause would end absentee balloting or subject it to a photo ID requirement means that nondisclosure of the clause renders the ballot question unconstitutionally misleading and especially harmful to older voters*..... 20

**CONCLUSION**..... 22

**ADDENDUM**

The appendix to this brief is not available for online viewing as specified in the *Minnesota Rules of Public Access to the Records of the Judicial Branch*, Rule 8, Subd. 2(e)(2).

## TABLE OF AUTHORITIES

### Cases

<i>Breza v. Kiffmeyer</i> , 723 N.W. 2d 633 (Minn. 2006) .....	2, 3, 4, 10, 11, 13
<i>Brown v. Bd. of Educ.</i> , 347 U.S. 483 (1954) .....	9
<i>Crawford v. Marion County Election Bd.</i> , 553 U.S. 181 (2008) .....	7, 9, 10, 11, 14
<i>Erlandson v. Kiffmeyer</i> , 659 N.W.2d 724 (Minn. 2003).....	5
<i>Harper v. Virginia Bd. of Elections</i> , 383 U.S. 663 (1966).....	11
<i>League of Women Voters Education Network, Inc. v. Walker</i> , No. 11 CV 4669 (Circuit Court, Dane County), <i>certification denied</i> , 2012 WI 45, 811 N.W.2d 821 (Apr. 16, 2012).....	21
<i>Milwaukee Branch of the NAACP v. Walker</i> , No. 11 CV 5492 (Circuit Court, Dane County) (March 12, 2012), <i>certification denied</i> , 2012 WI 45, 811 N.W.2d 821 (Apr. 16, 2012).....	21
<i>State v. Duluth &amp; N. Minn. Ry. Co.</i> , 102 Minn. 26, 112 N.W. 897 (1907).....	3, 4, 5
<i>State ex rel. Marr v. Stearns</i> , 72 Minn. 200, 75 N.W. 210 (1898), <i>rev'd on other grounds</i> , 179 U.S. 223 (1900).....	4

### WEBSITES

<i>Birth Certificates</i> , MINNESOTA DEPARTMENT OF HEALTH (last visited June 16, 2012), <a href="http://www.health.state.mn.us/divs/chs/osr/birth.html">http://www.health.state.mn.us/divs/chs/osr/birth.html</a> .....	7
<i>Marriage Certificates and Divorce Decrees</i> , MINNESOTA DEPARTMENT OF HEALTH (last visited June 16, 2012) <a href="http://www.health.mn.us/divs/chs/osr/registrars.html">http://www.health.mn.us/divs/chs/osr/registrars.html</a> ....	7
<i>Registering to Vote</i> (last visited June 17, 2012) <a href="http://www.sos.state.mn.us/index.aspx?page=204">http://www.sos.state.mn.us/index.aspx?page=204</a> .....	15
<i>Vital Statistics Fee</i> , ITASCA COUNTY, MN (last visited June 16, 2012) <a href="http://www.co.itasca.mn.us/Home/Departments/Recorders/Pages/Vital-Statistics-Fee.aspx">http://www.co.itasca.mn.us/Home/Departments/Recorders/Pages/Vital-Statistics-Fee.aspx</a> .....	7

## CONSTITUTION AND STATE STATUTES

Minnesota Constitution, Article IX, section 1.....	2
Ga. Code Ann. § 21-2-417 (West).....	14
Ind. Code Ann. § 3-5-2-40.5 (West) .....	14
Minn. Stat. § 204B.44 (2012).....	2
Tex. Elec. Code Ann. § 63.0101 (West) .....	14
Voter Identification and Provisional Ballot Amendment, 2012 Minn. Sess. Law Serv. Ch. 167 (H.F. 2738) (West) .....	passim
Wis. Stat. Ann. § 5.02.....	14
2011-2012 Wisc. Legis. Serv. Act 23 (2011 A.B. 7) §6.87(1) (West).....	21

## FEDERAL STATUTES

Help American Vote Act of 2002 (HAVA) .....	17
42 U.S.C. § 1573gg-2(b) .....	17
42 U.S.C. § 15482 .....	17
42 U.S.C. §§ 15482(a).....	17

## MISCELLANEOUS

AARP Public Policies 2011-2012 (2011) .....	1, 17
Ari Houser, “Community Mobility Options: The Older Person’s Interest,” AARP Public Policy Institute, August 2005 .....	15
Provisional Voting: Fail-Safe Voting or Trapdoor to Disenfranchising Voters? Advancement Project (September 2008), available at <a href="http://www.advancementproject.org/sites/default/files/publications/Provisional-Ballot-Report-Final-9-16-08.pdf">www.advancementproject.org/sites/default/files/publications/ Provisional-Ballot-Report-Final-9-16-08.pdf</a> (last visited June 16, 2012) .....	18

Scott Nowalowski, "A Fallible 'Fail-Safe': An Analysis of Provisional Balloting Problems in the 2006 Election," Demos (2007), available at [www.votetrustusa.org/pdfs/Demos/provisionalballot.pdf](http://www.votetrustusa.org/pdfs/Demos/provisionalballot.pdf) (last visited June 16, 2012)..... 18

**EXHIBITS (Attached hereto)**

1. *Applewhite v. Comm. of Pennsylvania*, No. 330M.D. 2012 (Pa. Cmwlth.) (Petition for Review, filed May 1, 2012)..... 7, 9

2. Affidavit of Robert Letich, June 15, 2012 ..... 8

3. Affidavit of Evelyn Collier, June 15, 2012 ..... 9, 12

4. Affidavit of Bea Arrett, June 15, 2012..... 18, 21

5. Letter from Toby Pearson, Vice President of Advocacy, Care Providers of Minnesota, and Kari Thurlow, Vice President Of Advocacy, Aging Services of Minnesota, to Representative Kiffmeyer and Senator Newman, February 7, 2012 ..... 20

## INTEREST OF *AMICUS CURIAE*\*

AARP is a nonpartisan, nonprofit organization dedicated to assuring that older Americans have independence, choice and control in ways beneficial and affordable to them and to society as a whole. AARP advocates, including in state and federal courts, for adoption and implementation of public policies of benefit to older Americans.

In AARP's view, "states should not impose unreasonable identification requirements that discourage or prevent citizens from voting." AARP, *AARP PUBLIC POLICIES 2011-2012*, page 1-8 (2011). As an *amicus curiae*, AARP has opposed "photo ID" voting laws enacted in Missouri, Michigan and Indiana. AARP Foundation Litigation attorneys, acting as co-counsel for plaintiffs, also have challenged such laws enacted in Georgia and Arizona.

Further, AARP has long advocated "election day registration," such as the system now in place in Minnesota, as an effective approach to encourage exercise of the franchise. *Id.* at page 1-9. And AARP supports absentee voting – without photo ID requirements, as is now permitted in Minnesota – as a device facilitating electoral participation, including by older voters for whom in-person voting is difficult or impossible.

AARP believes the Voter Identification and Provisional Ballot Amendment, 2012 Minn. Sess. Law Serv. Ch. 167 (H.F. 2738) (West 2012) ("Amendment"), which the State Legislature has approved for the ballot in November 2012, threatens to undermine longstanding AARP policies to the detriment of many older voters, including most of the more than 640,000 AARP members who live in Minnesota. In particular, AARP considers the ballot language approved by the State Legislature highly misleading in ways likely to

---

\* Pursuant to Rule 129.03 of the Minn. R. Civ. App. P., the undersigned counsel certifies that this brief was authored by counsel for AARP. No person or entity, other than AARP, its members, or its counsel, made any monetary contribution to the preparation or submission of the brief.

deceive many voters, including disproportionate numbers of older voters. Hence, *amicus* AARP urges the Court to disapprove a referendum on the photo ID Amendment.<sup>1</sup>

### SUMMARY OF ARGUMENT

*Amicus Curiae* AARP respectfully submits that the ballot language promising “free” photo ID to all eligible voters is “so unreasonable and misleading as to be a palpable evasion of the [state] constitutional requirement to submit the [actual law at issue in a constitutional referendum] to a vote of the people.” *Breza v. Kiffmeyer*, 723 N.W. 2d 633, 636 (Minn. 2006). That is, the proposed ballot language squarely conflicts with amendment language pledging that the State only will provide the specific photo ID document necessary to cast a ballot in-person “at no charge.” To secure a photo ID, obtaining needed underlying documents, such as a birth certificate (and for women who took a husband’s surname, a marriage license), has a real cost, measured in dollars as well as time and effort. This can render quite onerous, if not impossible, the task of obtaining photo ID for many voters. Such challenges are especially great for older voters, whose underlying documents themselves are aged, and may be unobtainable. On this basis alone, the proposed referendum is unconstitutional.

In addition to this argument, not a focus of petitioners’ brief, *amicus curiae* AARP presents additional support for several other compelling grounds addressed by petitioners. AARP explains that the undisclosed requirement that if the referendum is approved, voters must present a “valid government-issued” photo ID, is highly misleading. In addition to the

---

<sup>1</sup> *Amicus curiae* AARP concurs with petitioners that the Amendment violates Article IX, section 1, of the Minnesota Constitution, and that this violation is within the Court’s jurisdiction to remedy, pursuant to Minn. Stat. § 204B.44 (2012).

reasons cited by petitioners, many voters, including disproportionate numbers of older voters, have expired photo IDs now permitted by the State for use to register to vote. Yet under the Amendment, these very likely no longer will support eligibility to vote.

AARP also demonstrates that the Amendment's undisclosed "substantially equivalent" requirement is unconstitutional because, among other reasons, it is likely to have serious adverse impact on older voters. Such voters, because of physical limitations and great difficulty accessing ancient records, now rely heavily on Election Day Registration and absentee balloting, both of which are likely to be eliminated or rendered far more onerous if the proposed constitutional referendum is allowed to proceed and prevails.

### ARGUMENT

**I. THE BALLOT LANGUAGE PROMISING "FREE" PHOTO ID TO ALL ELIGIBLE VOTERS IS "SO UNREASONABLE AND MISLEADING AS TO BE A PALPABLE EVASION OF THE [STATE] CONSTITUTIONAL REQUIREMENT TO SUBMIT THE LAW TO A POPULAR VOTE."**

*a. Ballot Language Is A "Palpable Evasion" of State Constitutional Referenda Requirements If It Is "So Unclear [and] Misleading that Voters of Common Intelligence Cannot Understand" Its "Meaning and Effect."*

Ballot language representing proposed amendments to Minnesota's Constitution is unconstitutionally flawed when the words chosen are so misleading that central features of the amendment at issue are concealed from citizens whose responsibility it is to take on the role of legislators. When deciding whether divergence between ballot language and amendment text is so serious as to be unlawful, the mere "possib[ility] that some voters may misinterpret" the former is insufficient. *Breza v. Kiffmeyer*, 723 N.W.2d 633, 636 (Minn. 2006). Nor is it fatal if the State Legislature chose language "'not phrased in the best or fairest terms.'" *Id.* (quoting *State v. Duluth & N. Minn. Ry. Co.*, 102 Minn. 26, 30, 112

N.W. 897, 898 (1907)). To require nothing more from a petition to strike a constitutional referendum would “invade the province of the legislature.” *Id.* (citing *Duluth*, 102 Minn. at 30, 112 N.W.2d at 899).

However, this Court also has recognized that when legislators delegate legislative authority to the citizenry, it must be done within reasonable bounds. Thus, the State Legislature violates its duty to inform voters of the nature of the choice entrusted to them, in passing on a proposed constitutional amendment, when the legislature’s choice of “[ballot] language is so unclear or misleading that voters of common intelligence cannot understand the meaning and effect of the amendment.” *Breza*, 723 N.W.2d at 636.

Likewise, this Court has declared that the discretion of the legislature to prescribe “the form and manner of submitting the question of a constitutional amendment to the people,” while broad, is limited. *Breza*, 723 N.W.2d at 636 (quoting *State ex rel. Marr v. Stearns*, 72 Minn. 200, 218, 75 N.W. 210, 214 (1898), *rev'd on other grounds*, 179 U.S. 223 (1900)). Hence, the way in which an amendment is presented to citizen legislators must not be distinctly “unreasonable and misleading.” *Id.* If it is, this constitutes a profound deprivation of the rights and prerogatives of the people – of their power, when authorized by the State Legislature, to speak directly regarding the proper content of the State Constitution – the fundamental law governing all Minnesotans. In that case, as here, ballot language is “so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote.” *Id.* This Court also has explained that when it considers a claim that the difference between ballot language and amendment text rises to the level of a “palpable evasion” of the rights of the people, the key question is

whether the “question submitted” can be said to “fairly express[]” the “clear and essential purpose” of the proposed amendment. *Id.* (citing *Duluth*, 102 Minn. at 30, 112 N.W.2d at 899).

Before turning to flaws in the ballot language at issue, it bears emphasis that this case presents a unique context: a constitutional vote on a major rewrite of state voting law. The Amendment puts at issue the voters’ own ability to affect the future course of public affairs through the electoral process. This context calls for the Court to exercise a heightened degree of attention to its oversight role in assuring the State’s voters have been properly informed regarding their role as citizen legislators. As this Court has recognized,

[n]o right is more precious in a free country than that of having a voice in elections . . . . Other rights, even the most basic, are illusory if the right to vote is undermined [because that right is a] fundamental and personal right essential to the preservation of self-government . . . .

*Erlandson v. Kiffmeyer*, 659 N.W.2d 724, 729-30 (Minn. 2003). A referendum regarding voter qualifications presents a uniquely delicate circumstance in which voters are deciding who may vote in the future. In this setting, the need for clear ballot language is especially great, as is the Court’s duty to assure the integrity of proposed electoral processes.

b. *The Ballot Language is Misleading Because it Promises “Free” Voter ID, Whereas the Proposed Amendment Promises Voter ID “At No Charge.”*

In ballot language accompanying the proposed Amendment, the State Legislature chose to describe as “free” the ID that must be provided to give effect to the requirement that voters produce “valid photo identification to vote.”<sup>2</sup> Meanwhile, the language of the

---

<sup>2</sup> The ballot language asks voters: “Shall the Minnesota Constitution be amended to require all voters to present valid photo identification to vote and to *require the state to provide free*

actual amendment to the State Constitution pledges only State-supplied photo identification to be provided “at no charge.”<sup>3</sup>

The terms “free” and “at no charge” are only superficially similar. As employed by the State Legislature they convey dramatically different information. As a result, “voters of common intelligence” are very likely to be misled, and thus, to “[mis]understand the meaning and effect of the amendment.”

The word “free” – which the ballot language applies generally to *all* “identification” the state will “provide . . . to eligible voters” – is unlimited in its breadth. Thus, AARP submits, it communicates without reservation, to “voters of common intelligence,” that the process of securing whatever “identification” is required to satisfy the new photo ID requirement will impose no cost whatever for affected voters. Indeed, the ballot language expressly distinguishes between – by addressing in separate clauses – the broad category of ID that will be “free,” and the specific form of “valid photo identification to vote” that must be produced at the polls. By contrast, the amendment itself refers narrowly and specifically to “photographic identification” that the State will provide “at no charge.” In particular, the amendment language solely refers to the cost of ID required to be produced at the polls: *i.e.*, to “a form of identification meeting the requirements of this section.” Pet. Add. at 1, §§ 1-2.

This difference is not merely a trivial matter of semantics. Rather, it has profound practical implications. The cost of obtaining ID may determine whether many voters vote.

---

*identification to [all] eligible voters, effective July 1, 2013?” (emphasis supplied). Ch. 167, § 2(a) (Petitioners’ Brief, Addendum (hereafter “Pet. Add.”) at 1).*

<sup>3</sup> The underlying legislation declares: “The state must issue photographic identification at no charge to an eligible voter who does not have a form of identification meeting the requirements of this section.” Ch. 167, § 1(b) (Pet. Add. at 1).

c. *The Ballot Language is Misleading Because It Implies That Voters Will Not Have to Spend Money in Order to Obtain Voter ID.*

In virtually all states in which photographic voter ID requirements have been adopted in recent years, and thus, in all likelihood in Minnesota, if the Amendment is approved, voters needing to secure a new photo ID have had to secure other forms of identification first – usually a birth certificate, and for women who took their husband’s surname when they married, a marriage certificate as well.<sup>4</sup> Thus, the fact that the actual new photo ID needed at the polls is provided “at no charge” masks the reality that unless voters have underlying forms of ID readily available, it costs money, and for some voters it can be quite costly, to pay fees typically imposed by federal and state authorities to obtain underlying identification needed to secure “valid photo identification to vote.”<sup>5</sup> Nothing in the Amendment indicates that Minnesota will require anything less.<sup>6</sup>

---

<sup>4</sup> See *Crawford v. Marion County Election Bd.*, 553 U.S. 181, 198 n.17 (2008) (“To obtain a photo identification card a person must present at least one ‘primary’ document, which can be a birth certificate, certificate of naturalization, U.S. veterans photo identification, U.S. military photo identification, or a U.S. passport” (citations omitted).). *Accord Applewhite v. Comm. of Pennsylvania*, No. 330 M.D. 2012 (Pa. Cmwlth.) (Petition for Review, filed May 1, 2012) (challenging Act 18, “the Photo ID law,” enacted March 14, 2012) (hereafter “PA Petition for Review”) (Exhibit 1 hereto), at 10, 12-14 (recounting difficulties petitioner Marsh encountered seeking PA birth certificate, and petitioner Block had using marriage certificate to verify her name change from the name on her birth certificate).

<sup>5</sup> See *Crawford*, 553 U.S. at 198 n.17 (“Indiana, like most States, charges a fee for obtaining a copy of one’s birth certificate. This fee varies by county and is currently between \$3 and \$12. . . . Some States charge substantially more. . . .” (citations omitted)).

<sup>6</sup> A Minnesota birth certificate costs \$26, see *Birth Certificates*, MINNESOTA DEPARTMENT OF HEALTH (last visited June 16, 2012), <http://www.health.state.mn.us/divs/chs/osr/birth.html>, and most counties, which are in charge of issuing marriage licenses, see *Marriage Certificates and Divorce Decrees*, MINNESOTA DEPARTMENT OF HEALTH (last visited June 16, 2012), <http://www.health.mn.us/divs/chs/osr/registrars.html>, charge \$9 for that service, see, e.g., *Vital Statistics Fee*, ITASCA COUNTY, MN (last visited June 16, 2012), <http://www.co.itasca.mn.us/Home/Departments/Recorders/Pages/Vital-Statistics-Fee.aspx>.

In 2011 older residents (and voters) at Minneapolis' Camden Care Center assisted living, and the staff caring for them, discovered just how expensive, time-consuming and difficult it can be to get documentation required to secure photo ID for older Minnesotans. *See* Affidavit of Robert Letich, June 15, 2012 (Exhibit 2 hereto). The Center, in arranging for its residents to take a trip by air, effectively conducted a trial-run of steps that might be necessary if the proposed referendum is allowed to go forward and is approved. Center staff found that getting photo ID for 13 residents took many hours over nine months, in which they “gathered a very long paper trail and filled out many applications” at costs ranging from \$9 to \$39 for each supporting document, and more for persons needing multiple documents. *Id.* One resident had to file eight marriage license applications at \$9 each “to get the right date”; records for another resident could not be located at all. *Id.*

To be sure, it is possible that the State of Minnesota will decide – via legislation, regulation or executive order – to waive some State fees for underlying ID documentation needed to secure a photo ID. But the State has made no commitment to do so at this point. Moreover, the State has no control over many other governmental entities with whom Minnesota voters likely will have to contend to secure underlying ID documentation needed to secure “valid photographic ID to vote.” Obviously, the federal government does not waive fees related to obtaining or renewing a passport in order to permit applicants to qualify to vote under state law. Nor does the State of Minnesota have any ability to guarantee free provision of birth certificates or marriage licenses by state or local authorities

outside Minnesota.<sup>7</sup> Likewise, the State cannot guarantee provision of underlying ID documentation by foreign governments for citizens born or married in foreign countries.

AARP respectfully submits that to most Minnesota “voters of common intelligence” the ballot language reference to “free” ID will mean that voters needing a new photo ID will not have to spend any money to obtain one. That is, voters could easily read the ballot language as promising voter IDs as free as the phone book. This misimpression is likely to significantly mitigate qualms many voters may have about requiring other voters without “valid photo ID” to pay to secure one, even if the State imposes no fee for the specific document it has pledged to provide (eventually) “at no charge” for use in casting a ballot. That is, some Minnesota voters might favor a stricter voting regime if it costs nothing to would-be voters lacking photo ID. The same voters might oppose such a rule, however, if they were to learn that it would impose significant new costs on voters without photo ID.

Moreover, reasonable voters might support the Amendment expecting – mistakenly, based on ballot language – that the State will reimburse them for costs related to obtaining

---

<sup>7</sup> See *Crawford*, 553 U.S. at 199 (“Both evidence in the record and facts of which we may take judicial notice . . . indicate that a somewhat heavier burden may be placed on a limited number of persons. They include elderly persons born out of state, who may have difficulty obtaining a birth certificate”). See Affidavit of Evelyn Collier, June 15, 2012 (Exhibit 3 hereto) (describing unsuccessful efforts of a 79-year-old African-American voter – who claims to “have voted in nearly every election” since she “moved to Minnesota in the 1980’s – to secure her birth certificate from state and local officials in Mississippi; both simply reported “no record found” for Ms. Collier, who was born “on a farm by a mid-wife” more than twenty years before *Brown v. Bd. of Educ.*, 347 U.S. 483 (1954)). Accord PA Petition for Review (Ex. 1), at 7-11 (recounting, *inter alia*, inability of older longtime voters and petitioners Lee, Freeland, Cuttino and Barksdale to obtain birth certificates from, respectively, States of Georgia, New York, South Carolina and Virginia).

underlying identification required to receive a government-issued photo ID.<sup>8</sup> Yet plainly, no reasonable voter could understand the actual text of the proposed amendment as having any such implication. Rather, the Amendment indicates – by specifying that only “photographic identification” constituting “a form of identification meeting the requirements of this section” can be obtained “at no charge” – that the State will provide no other identification cost-free. Thus, the ballot language fosters hope that the state will waive or reimburse the cost of obtaining the records needed to get a photo ID. Meanwhile, the Amendment itself offers no basis for such optimism. In short, this stark contrast – between the limited pledge that a voting ID itself can be obtained “at no charge” and the sweeping promise that “the state [will] provide free ID to [all] eligible voters” – presents a powerful case of ballot language “so unclear [and so] misleading that voters of common intelligence cannot understand the meaning and effect of the amendment.” *Breza*, 723 N.W.2d at 636.

This Court has prohibited Minnesota voters from being presented with one law – *e.g.*, one promising “free” IDs, the ratification of which would actually put into force another law – *i.e.*, one forcing many voters to incur substantial and possibly unaffordable costs to qualify for a photo ID for use at the polls (itself provided “at no charge”). And after *Crawford v. Marion County Election Board*, there is doubt that the cost of a photo ID is a significant component of the choice the State Legislature has placed in the hands of the voters.

---

<sup>8</sup> Neither the proposed amendment nor the ballot language explains what underlying documentation, if any, would be required to secure the voter ID promised for those Minnesotans currently lacking valid photo identification. This omission, while unfortunate, would be of little significance were it not for the sweeping ballot language suggesting no cost impediment will block a voter from securing a new photo ID. The open-ended promise of “free” ID hides from voters the actual uncertain cost impact of the proposed amendment.

In *Crawford* the U.S. Supreme Court made clear that a state's failure to make available "free of charge" the photo ID actually needed to vote constitutes a likely constitutional infirmity. *See* 553 U.S. at 198.<sup>9</sup> Thus, photo ID voting requirements are premised on, *inter alia*, the existence of state-provided free photo ID. It follows that the word "free" in the ballot language addresses a material term of the photo ID requirement. Since this key provision of the ballot language has a fundamentally different meaning than parallel text in the actual proposed amendment, the variation constitutes a "palpable evasion" of the constitutional requirement that the actual proposed amendment – not a crude approximation – be presented to the voters. *Breza*, 723 N.W.2d at 636. Such divergence fails the test requiring a constitutional referendum in Minnesota to "put to a popular vote" the actual material terms of a proposed amendment, rather than "unreasonable and misleading" ballot language that does not "fairly express[]" the "clear and essential purpose" of a proposed amendment. *Id.*

For older Americans, obtaining these underlying documents often involves greater trials than for the rest of the population. For older persons, key ID documents are more likely to be older themselves, and thus, to become lost or to be expensive to retrieve. Cost and logistical burdens, in obtaining such records, are likely to be even more significant for older persons of color. For instance, an older African-American born in the Deep South, especially in a rural area where home births were common, might not have been issued a

---

<sup>9</sup> "The fact that most voters already possess a valid driver's license, or some other form of acceptable identification, would not save [Indiana's photo ID voting] statute under our reasoning in *Harper*[v. *Virginia Bd. of Elections*, 383 U.S. 663 (1966)], if the State required voters to pay a tax or a fee to obtain a new photo identification. But just as other States provide free voter registration cards, the photo identification cards issued by Indiana's B[ureau of]M[otor]V[ehicles] are also free."

birth certificate. *See* Affidavit of Evelyn Collier (Ex. 3 hereto). Such an individual thus would be unable to produce an official government document from any jurisdiction at any cost, and the documents necessary to stand in their place might be expensive and time consuming to obtain. Similarly, many older married or widowed women may incur greater difficulty and expense than younger counterparts getting a marriage license documenting a change from the surname on their birth certificate.

**II. THE BALLOT QUESTION WHETHER “TO REQUIRE ALL VOTERS TO PRESENT VALID PHOTO IDENTIFICATION” IS “SO . . . MISLEADING AS TO BE A PALPABLE EVASION OF THE [STATE] CONSTITUTIONAL REQUIREMENT TO SUBMIT THE LAW TO A POPULAR VOTE.”**

- a. *Failure to Make Clear That the Proposed Amendment Limits Acceptable Proof of Voter Eligibility to Valid Photographic Identification That Is “Government-Issued” Renders the Ballot Language Misleading, and Does So in Ways Likely to Have Serious Negative Effects on Older Voters.*

In the present case, the ballot language at issue asks whether the Minnesota Constitution should be “amended to require all voters to present *valid photo identification* to vote....” Ch. 167, § 2(a) (Pet. Add. at 1) (emphasis supplied). The proposed amendment, however, specifically requires non-absentee voters to present “*valid government-issued photographic identification.*” *Id.*, § 1(b) (emphasis emphasis).

The difference between basing eligibility to vote on any “valid” photographic identification and only on “valid” photographic identification *issued by the government* is highly significant. Indeed, AARP agrees with petitioners that this difference is important enough to mislead voters and thus to evade the constitutional requirement that Minnesota voters be presented with the actual substance of a proposed constitutional amendment,

rather than ballot language that fails to convey the true “meaning and effect of the amendment.” *Breza*, 723 N.W.2d at 636; *see* Pet. Br. at 28-29.

General photographic identification is far easier to obtain than government-issued photographic identification, in terms of both cost and effort, and especially for older voters. State, local and federal government entities generally require other identification – often several forms of identification – in order to obtain a government photo ID. Common among these are original or certified copies of a birth certificate, an unexpired passport, immigration papers, and original social security cards. If a person does not have these underlying forms of identification, they generally cannot obtain a government-issued photo ID. Obtaining new or replacing lost underlying identification typically costs money, time, physical effort, and requires at least minimal levels of financial resources, access to means of transportation and physical mobility. Thus, older voters, especially those who are no longer employed, and those who are physically frail, are less likely to have, and more likely to encounter difficulty getting, government-issued photo ID than younger voters.<sup>10</sup> Yet the promise of being required only to obtain any form of “valid” photo ID – whatever that means – may mislead older voters to support the photo ID referendum because it appears to permit forms of photo ID older voters may still have at an advanced age. Obtaining a retirement community ID, for example, requires nothing more than being a member of the community issuing it.<sup>11</sup>

---

<sup>10</sup> For instance, they are less likely to be employed, and thus, to have a government employee photo ID, and also, more likely to have an expired driver’s license or passport.

<sup>11</sup> Given the practices of other states, it would be reasonable for a voter to understand the ballot language as allowing non-government-issued photo ID to qualify to vote in person. For example, Florida’s voter identification statute, allows voters to prove their eligibility by

In addition, a member of that community would not have to travel to obtain such a photo ID, nor would they have to incur costs locating lost or getting new underlying ID. While reasonable voters might differ as to whether only government-issued ID should be allowed to prove eligibility to vote, the significant burdens of obtaining that government-issued ID require that voters be made aware of the proposed amendment's actual requirements. Otherwise, many voters, including many older voters, may be misled into voting based on inaccurate information, and may unknowingly vote against their interests.

b. *The Ballot Language Is Misleading Because It Does Not Make Clear Whether "Valid" Photographic Identification Includes Expired Photographic Identification.*

Limiting acceptable forms of "valid" photographic identification to those issued by the government is also disadvantageous for older voters because they are more likely than younger voters to possess expired forms of government-issued ID, such as an expired driver's license. Neither the ballot language nor the actual proposed amendment explains whether expired IDs are "valid" identification for the purposes of eligibility to vote. This confusion is not clarified by reference to similar laws in other jurisdictions, as some allow expired IDs, while others do not.<sup>12</sup> A reasonable voter could assume that their expired

---

presenting photo identification in the form of debit or credit cards, student IDs, retirement center IDs, and neighborhood association IDs. *Crawford*, 553 U.S. at 239 (Breyer, J., dissenting).

<sup>12</sup> See, e.g., Ga. Code Ann. § 21-2-417 (West 2012) (allowing use of expired Georgia driver's license to prove eligibility to vote); Ind. Code Ann. § 3-5-2-40.5 (West 2012) (accepting use of expired state-issued photo identification as long as the identification expired after the date of the last election); Tex. Elec. Code Ann. § 63.0101 (West 2012) (permitting use of expired Texas driver's license to demonstrate eligibility to vote as long as license expired no more than 60 days prior to presentation); Wis. Stat. Ann. § 5.02 (West 2012) (providing that voters may prove their eligibility to vote by presenting revoked or

driver's license or passport is "valid" under the new photo ID law in that it legitimately identifies the would-be voter even though it no longer allows them to drive a car or travel internationally. Older Minnesotans let their driver's licenses lapse when they stop driving due to physical limitations such as declining eyesight, reaction time and/or physical strength.<sup>13</sup> Similarly, they may not bother to update a passport obtained long ago due to declining physical vigor that discourages them from international travel but which does not preclude them from maintaining a routine of voting in person. Indeed, Minnesota law currently allows voters to register using expired IDs, many of which are government-issued photo IDs.<sup>14</sup> Thus, there is every reason to believe that Minnesotans, including many older Minnesotans, keep expired government-issued ID for voting-related uses and will assume that the same expired ID will allow them to vote in person under the new photo ID law.

The breezy ballot language belies the complexity and uncertainty of its actual meaning regarding expired government-issued ID, and in particular, which photo IDs will be deemed "valid." It follows that voters, including older voters, possessing accurate-though-expired photographic identification are likely to vote for the proposed amendment

---

suspended driver's licenses, or expired driver's licenses that expired after the date of the last general election).

<sup>13</sup> See, e.g., Ari Houser, "Community Mobility Options: The Older Person's Interest," AARP Public Policy Institute, August 2005, at 1-2 "Driving is not a viable alternative for many older persons. Currently, almost 7 million persons age 65 and older do not drive. Almost 80 percent of these older nondrivers are women, and more than half have a medical condition that makes travel difficult." Moreover, "[l]imited income also restricts driving because of the cost of owning, maintaining, and insuring an automobile. . . . In 2001, 42 percent of older households (in which at least one person was 65 or older) with income below \$10,000 per year did not have a vehicle."

<sup>14</sup> See *Registering to Vote* (last visited June 17, 2012), <http://www.sos.state.mn.us/index.aspx?page=24> (stating that forms of expired ID that currently may be used to register to vote include a Minnesota Driver's License or a U.S. passport, as well as a U.S. Military ID card, a Tribal ID card, or a Minnesota university, college or technical college ID).

without realizing that such a vote might prevent them from voting in subsequent elections – unless they obtain new and different photo ID. In these respects, the ballot language simply does not convey information necessary to understand what the “meaning and effect” of the proposed amendment is, and how it will change current law. The proposed referendum is unconstitutionally misleading and ought to be struck from the ballot.

**III. THE BALLOT QUESTION IS UNCONSTITUTIONALLY MISLEADING BECAUSE OF THE UNDISCLOSED AMENDMENT REQUIREMENT THAT “ALL VOTERS, INCLUDING THOSE NOT VOTING IN PERSON, MUST BE SUBJECT TO SUBSTANTIALLY EQUIVALENT IDENTITY AND ELIGIBILITY VERIFICATION,” WHICH THREATENS ELECTION DAY REGISTRATION AND ABSENTEE BALLOTING, TO THE DETRIMENT OF MANY VOTERS, INCLUDING IN PARTICULAR, OLDER VOTERS.**

The Amendment states that “all voters, including those not voting in person, must be subject to substantially equivalent identity and eligibility verification prior to a ballot being cast or counted.” Ch. 167, § 1(c) (Pet. Add. at 1). This clause not only is ambiguous, but also is not addressed in the ballot language. AARP agrees with petitioners that it unlawfully authorizes the State Legislature to enact laws on subject matter that the voters will not have had a chance to approve in the associated referendum. In particular, AARP is concerned that if the Amendment is approved, the “substantially equivalent” clause will mandate an end to Election Day Registration (EDR) and drastic modifications to absentee balloting, *see* Pet. Br. at 26, neither of which are suggested in the ballot language and both of which would have especially negative implications for the voting rights and opportunities of older voters.

- a. *The likelihood that the “substantially equivalent” clause would end Election Day Registration means that failing to disclose it in ballot language renders that text unconstitutionally misleading and especially likely to harm older voters.*

Petitioners make a very strong case that the “substantially equivalent” clause is at best opaque,<sup>15</sup> and at worst, likely to force dramatic changes in Minnesota election law, none of which are disclosed in ballot language. Chief among these potentially momentous alterations is “eliminating same-day election registration” because “Minnesota does not currently have a system that permits verifying the eligibility of Election Day registrants in the same manner as those registering in advance.” Pet. Br. at 26. While “[s]uch a system may be technologically possible . . . it would be expensive.” *Id.*

Moreover, the undisclosed requirement that if the Amendment is approved, the Legislature must enact a system of provisional voting, *see* Pet. Add. at 1, § 1(b), is utterly at odds with a system of Election Day Registration. Provisional voting is required under the Help American Vote Act of 2002 (“HAVA”) to address various problems with voter registration (among other issues). *See* Pet. Br. at 14 (discussing 42 U.S.C. § 15482(a)). But

[w]ith EDR, if an eligible voter shows up at the polls, and is not on the registration rolls, whether because the voter never registered, has moved since the last election, has not voted in four years, or simply because of an administrative error, the voter can register at the polling place and still vote.

*Id.* at 13. In short, “Minnesota does not [now] have a provisional voting system, because it permits Election Day Registration.” *Id.* at 30 (citing 42 U.S.C. §§ 15482(a), 1573gg-2(b)).

AARP has a longstanding commitment to reforms in “voting systems and registration procedures” because of its experience that “older citizens,” no less than their younger counterparts, “are vitally interested in making certain that their votes and views are given appropriate consideration in the deliberations of government.” AARP PUBLIC POLICIES

---

<sup>15</sup> *See* Pet. Br. at 26: “No one knows how this vague constitutional provision would be implemented by the legislature or the Secretary of State, or how it would be interpreted in the courts.”

2011-2012, at page 1-1. “Voting participation,” after all, “is highest among older age groups,” and as a result, AARP has strived to support “[t]echnical and procedural innovations such as . . . election-day registration, and universal registration [as means] to maximize voting and improve voting systems.” *Id.* AARP also favors Election Day Registration as an approach to foster political participation and limit voter disenfranchisement. *Id.* at pages 1-8 to 1-9.

Many studies, including some cited by petitioners, document difficulties with provisional voting systems. These include: eligible registered voters erroneously issued provisional ballots only to have those ballots rejected, eligible voters directed by poll workers to the wrong precincts, where they are forced to use provisional ballots that are eventually rejected, and provisional ballots rejected because of administrative errors such as incomplete envelopes and missing signatures. *See, e.g.*, “Provisional Voting: Fail-Safe Voting or Trapdoor to Disenfranchising Voters?”, Advancement Project (September 2008), *available at* [www.advancementproject.org/sites/default/files/publications/Provisional-Ballot-Report-Final-9-16-08.pdf](http://www.advancementproject.org/sites/default/files/publications/Provisional-Ballot-Report-Final-9-16-08.pdf); Scott Nowalowski, “A Fallible ‘Fail-Safe’: An Analysis of Provisional Balloting Problems in the 2006 Election,” Demos (2007), *available at* [www.votetrustusa.org/pdfs/Demos/provisionalballot.pdf](http://www.votetrustusa.org/pdfs/Demos/provisionalballot.pdf). These problems often have a disproportionate impact on minorities, the frail elderly, and people with disabilities.

The case of an 83-year-old Minnesotan who resides in an assisted living facility in the city of Moorhead provides an example of the probable adverse impact on older voters, including those with disabilities, of the undisclosed changes that would likely result from approval of the Amendment. *See* Affidavit of Bea Arrett, June 15, 2012 (Exhibit 4 hereto).

Ms. Arrett recently moved to “Eventide” at Fairmount Assisted Living in Moorhead, and so, the ID she possesses does not have her current address. She is concerned that this will impede her ability to vote in the next election. Previously she served as “an election judge for 35 years and . . . voted in nearly every election.” *Id.*

In particular, Ms. Arrett is concerned that she will not be able to obtain a valid ID with her correct address in time for the election because of health issues. And in that event, she worries that she will not be able to rely on Election Day registration, which permits persons who know her to “vouch” for her identity at the polls. In her building, Ms. Arrett states, like her, “most of the residents do not have current and valid photo IDs.” She indicates that many of the other persons in her building “have had to be vouched for in order to vote because they moved [into assisted living] and their address changed.” *Id.*

Ms. Arrett acknowledges that she has relied on absentee voting “[i]n the last few years” so that she does “not have to worry about inclement weather” or “the possibility of having a health crisis.” She explains that she knows others who did not plan to vote absentee, “had such a crisis – like a broken hip,” and then “wanted to vote absentee but [were unable to do so because] they did not order one [an absentee ballot] in time.” Such persons, like Ms. Arrett, would “need to use Same Day Registration” to vote. *Id.*

Plainly, the outcome of the proposed referendum poses high stakes for older voters like Ms. Arrett, who face a serious risk of disability, do not have current, valid photo ID, and cherish the option of Election Day Registration. Indeed, Minnesota nursing homes and assisted living providers have stated similar concerns to state legislators on behalf of their

many older-voter residents.<sup>16</sup> Yet the ballot language does not suggest to such voters that such a problem exists. For this reason among others, it is dangerously misleading.

*b. The likelihood that the “substantially equivalent” clause would end absentee balloting or subject it to a photo ID requirement means that nondisclosure of the clause renders the ballot question unconstitutionally misleading and especially harmful to older voters.*

The ballot question says “all voters,” absentee voters apparently included, must show a photo ID; the amendment language requires only “voters voting in person” to do so; and the “substantially equivalent clause” covers “[a]ll voters including those not voting in person.” Ch. 167, §§ 2(a), 1(b), 1(c). The legislative record contains protestations that photo ID does not apply to absentee ballots. *See* Pet. Br. at 22. AARP concurs with petitioners that the Amendment and its enactment record is confusing and contradictory, and thus, the referendum language is “materially misleading” with regard to absentee voting. *Id.*

In any event, there are two possible effects of the “substantially equivalent” clause that would disrupt the current system of absentee balloting in Minnesota, and thus, could have serious deleterious effect on voting rights, including those of many older voters. As the “substantially equivalent” requirement does not appear in ballot language, the failure of that text to suggest either result renders the proposed ballot question unconstitutional. The photo ID voting law recently enacted in Wisconsin (and for now enjoined by two state

---

<sup>16</sup> *See* Letter from Toby Pearson, Vice President of Advocacy, Care Providers of Minnesota, and Kari Thurlow, Vice President of Advocacy, Aging Services of Minnesota, to Representative Kiffmeyer and Senator Newman, February 7, 2012 (Exhibit 5 hereto) (noting that “[u]nder current law,” such residences “have facilitated absentee voting and same day voting as a service” to “[i]ndividuals that we care for [many of whom] no longer have photo identification and have no means to obtain it.” The authors urge changes to the photo ID Amendment permitting current practice to continue, whereby a “nursing home administrator or [aging residence] housing manager” may “certify” (*i.e.*, “vouch”) for residents’ identity.

courts) requires absentee voters to produce photo ID. 2011-2012 Wisc. Legis. Serv. Act 23 (2011 A.B. 7) §6.87(1) (West).<sup>17</sup> A person voting absentee, who does not qualify for an exemption, is required to submit a copy of a valid photo ID, along with either their application for an absentee ballot, or with the ballot itself. *Id.* Surely requiring Minnesota absentee voters to provide proof of photo ID would come closer to “substantially equivalent identity and eligibility verification” than exempting them or demanding something less. Yet requiring photo ID from absentee voters would be a dramatic change likely to disrupt the longstanding practices of many voters, including many older voters, especially those with physical limitations rendering voting in-person difficult or impossible. *See* Affidavit of Bea Arrett (Exhibit 4 hereto). The nondisclosure of such potential drastic harm to voting rights underlines the misleading nature of the ballot question and demonstrates it is constitutional.

An alternative result of applying the “substantially equivalent” requirement might be elimination of absentee balloting altogether. This is so because making absentee voters submit a photocopy of an ID with their application or ballot arguably would fall far short of assuring “substantially equivalent identity and eligibility verification” by comparison with requiring photo ID for in-person voting. First, a copy of a photo ID might be altered without detection, while a poll-worker might more likely discover similar deception. Second, a photocopy sent with a mail-in vote does not permit direct questioning of the voter, as in-person voting does, if it is deemed necessary, by an election judge or poll worker.

---

<sup>17</sup> *League of Women Voters Education Network, Inc. v. Walker*, No. 11 CV 4669 (Circuit Court, Dane County) (granting preliminary injunction), *certification denied*, 2012 WI 45, 340 Wis.2d 546, 811 N.W.2d 821 (Apr. 16, 2012) ; *Milwaukee Branch of the NAACP v. Walker*, No. 11 CV 5492 (Circuit Court, Dane County) (March 12, 2012) (granting temporary restraining order), *certification denied*, 2012 WI 45, 340 Wis.2d 546, 811 N.W.2d 821 (Apr. 16, 2012).

Finally, for voters with disabilities, a disproportionate share of whom are older, eliminating absentee voting would be even more onerous than a new absentee ballot photo ID rule. The stories of Bea Arrett and petitioner Gabriel Herbers, both of whom have relied on absentee voting, dramatize the likely widespread disenfranchisement, especially of older and disabled voters, that such an undisclosed outcome of the Amendment would cause.

### CONCLUSION

For the foregoing reasons *amicus curiae* AARP urges the Court to grant the relief sought in the Petition, *i.e.*, that the Secretary of State be directed not to place the ballot question on the ballot in the November 2012 election.

Respectfully submitted this 18th day of June, 2012.



Tim Griffin (MN Bar. No. 0285717)  
Liz Kramer (MN Bar. No. 0325089)  
LEONARD, STREET AND DEINARD  
*Professional Association*  
150 South Fifth Street, Suite 2300  
Minneapolis, MN 55402  
Telephone: 612-335-1500  
Facsimile: 612-335-1657

Daniel B. Kohrman  
AARP FOUNDATION LITIGATION  
Michael Schuster (MN Bar No. 0098048/non-resident)  
AARP  
601 E Street NW  
Washington DC 20049  
Telephone: 202-434-2060  
Facsimile: 202-434-6424

Attorneys for *Amicus Curiae* AARP

## CERTIFICATION AS TO WORD LENGTH

I hereby certify that the *Amicus Curiae* Brief of AARP Supporting Petitioners conforms to the requirements of Minn. R. Civ. App. P. 132.01, subds. 1 and 3, for a brief produced with a proportional font (Times New Roman 13). The length of this brief is 6,874 words. This brief was prepared using Microsoft Office Word 2003.

Dated: June 18, 2012.

  
Liz Kramer