

A12-0920

**STATE OF MINNESOTA
IN SUPREME COURT**

League of Women Voters Minnesota;
Common Cause, a District of Columbia nonprofit corporation;
Jewish Community Action, a Minnesota nonprofit corporation;
Gabriel Herbers; Shannon Doty; Gretchen Nickence;
John Harper Ritten; and Kathryn Ibur,

Petitioners,

vs.

Mark Ritchie, in his capacity as Secretary of State of the
State of Minnesota, and not in his individual capacity,

Respondent.

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AMICUS CURIAE BRIEF AND APPENDIX**

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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).

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Citizens for Election Integrity Minn. & Common Cause Minn., <i>Minnesota’s Elections—Transparent, Verifiable, and Accurate</i> 25 (Feb. 25, 2010).....	24, 25
Citizens for Election Integrity Minnesota, <i>Substantially Equivalent Eligibility Verification: The Impact of the Proposed Amendment on Election Day Registration</i> (June 2012).....	passim
Common Cause Minn. & Citizens for Election Integrity Minnesota, <i>The High Cost of Voter Mandates</i> (Mar. 2011).....	12, 21, 22, 23
Letter from S. Dzieduszycka-Suinat, President and CEO, Overseas Vote Foundation, to J. Peppin , Minn. House of Representatives Gov’t Operations & Elections Cmte., Mar. 8, 2012	17
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Minnesota Management & Budget (“MMB”), <i>Consolidated Fiscal Note – 2011-12 Session: Voter ID Req. Const. Amendment</i> (March 13, 2012), available at http://www.mmb.state.mn.us/bis/fnts_leg/2011-12/S1577_2E.pdf	21

Minnesota State Senate, Senate Media Services, 2012 Archive Video Collection,
Senate Floor Session, Apr. 4, 2012, *available at*
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Office of the Minn. Sec’y of State, 2010 Election Results, Federal and State
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Office of the Minn. Sec’y of State, *2012 Mail Voting Guide* (2012) 15

Office of Minn. Sec’y of State, Voter Registration Application 10

Office of the Revisor of Statutes, State of Minnesota, *H.F. No. 2738, 2nd
Unofficial Engrossment – 87th Legislative Session (2011–2012)*, posted on
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STATEMENT OF THE ISSUES

1. Does omitting any reference to the proposed amendment’s “substantially equivalent identity and eligibility verification” requirement, which threatens to eliminate Election Day Registration and materially change mail-in and absentee voting, render the ballot question unconstitutionally misleading?

2. Does omitting any reference to the proposed amendment’s creation of an unprecedented, costly, and complicated new provisional voting system in Minnesota render the ballot question unconstitutionally misleading?

*

*Pursuant to Rule 129.03 of the Minnesota Rules of Civil Appellate Procedure, the undersigned counsel certifies that this brief was authored by counsel for Citizens for Election Integrity – Minnesota (“CEI-MN”). No person or entity, other than CEI-MN, its members, or its counsel, made any monetary contribution to the preparation or submission of the brief.

STATEMENT OF THE CASE

Section 1 of Chapter 167, House File 2738, of the 2012 Session Laws (“the Act”) proposes an amendment of article VII, section 1 of the Minnesota Constitution to add the following constitutional requirements (“the proposed amendment”):

(b) All voters voting in person must present valid government-issued photographic identification before receiving a ballot. 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. A voter unable to present government-issued photographic identification must be permitted to submit a provisional ballot. A provisional ballot must only be counted if the voter certifies the provisional ballot in the manner provided by law.

(c) 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.

Section 2 of the Act designates that the following question be submitted to Minnesota voters on November 5, 2012 (“the ballot question”):

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 identification to eligible voters, effective July 1, 2013?

Citizens for Election Integrity – Minnesota (“CEIMN”) submits this brief with leave of the Supreme Court as *amicus curiae* in support of Petitioners’ petition urging this Court to strike the ballot question from the November 2012 election ballot because it is unconstitutionally misleading.

STATEMENT OF THE FACTS

CEIMN is a nonprofit, nonpartisan organization that advocates for verifiable, transparent, and accurate elections in Minnesota and across the country. CEIMN’s interest in this action is public in nature. It was formed shortly after the 2004 election

after learning of reports in Ohio of electronic voting problems, the disenfranchisement of minority voters, discarded ballots, and other voting irregularities. Its initial program was the observation of the Ohio presidential recount.

Since 2004, CEIMN has:

- advocated for post-election audits in Minnesota and across the United States;
- organized six statewide, non-partisan observations of post-election audits and recounts in Minnesota;
- written a report – *Facts About Ineligible Voting and Voter Fraud in Minnesota* – based on data from Minnesota County Attorneys (November 2010) that determined that a photo ID requirement will not improve the integrity of Minnesota’s elections; and
- advocated against the implementation of a photo ID requirement.

CEIMN’s activities include the following:

- educating others about election systems;
- researching and reporting concerns connected to its mission;
- encouraging citizen participation in the election process;
- partnering with other election-integrity groups; and
- advocating for election reform that will improve the system and not disenfranchise voters.

CEIMN’s efforts are part of a national voting-rights movement committed to restoring the integrity of our electoral system through:

- the implementation of voter-verified paper ballots as the legal ballot of record for all elections;
- accurate recording, counting, and reporting of all votes properly cast;
- consistent enforcement of election procedures to ensure that all eligible voters can vote without difficulty;
- public oversight and nonpartisan administration of the election system; and
- random hand counts of ballots that are part of post-election audits.

CEIMN has been on the front line addressing issues raised by the proposed amendment since the Minnesota Legislature first considered legislation to require that voters present photo identification at the polling place. Its executive director testified before the Senate Committee on Local Government and Elections, as well as the House Government Operations and Elections Committee, concerning the proposed amendment. CEIMN has been active in researching whether the proposed amendment would improve the integrity of Minnesota's elections, what effects the proposed amendment would have on voters in Minnesota, and what effects similar voter-identification requirements have had in other states.

SUMMARY OF THE ARGUMENT

The proposed ballot language fails to inform voters of two key provisions of the proposed amendment: the requirement that all voters be subject to “substantially equivalent identification and eligibility verification” and the creation of a provisional balloting system. Both of these provisions constitute substantial and material changes to Minnesota's current election system. Based on the present phrasing of the ballot

question, voters of common intelligence cannot understand the meaning and effect of the amendment, and therefore they cannot effectively exercise their right to accept or reject the proposed amendment. The question is deficient, among other reasons, because it fails to provide notice that the proposed amendment will impose a new requirement that all voters be subject to a substantially equivalent identification and eligibility verification. This new requirement threatens to eliminate Minnesota's Election Day Registration system and significantly impact mail-in and absentee voters. The ballot question is also deficient because it fails to provide notice that the proposed amendment creates an unprecedented, costly, and provisional balloting system. By not referencing either of these provisions, the ballot question fails to fairly express the proposed amendment and is therefore unconstitutionally misleading. To safeguard the integrity of Minnesota's election process, CEIMN urges this Court to grant Petitioners' petition and enjoin Respondents from presenting this misleading and constitutionally infirm ballot question to the Minnesota electorate.

ARGUMENT

I. STANDARD OF REVIEW.

CEIMN adopts and incorporates the standard of review discussed in Petitioner's brief.

II. THE OMISSION FROM THE BALLOT LANGUAGE OF THE PROPOSED AMENDMENT’S “SUBSTANTIALLY EQUIVALENT IDENTITY AND ELIGIBILITY VERIFICATION” REQUIREMENT, A CRITICAL FEATURE OF THE PROPOSED AMENDMENT, RENDERS THE BALLOT QUESTION UNCONSTITUTIONALLY MISLEADING.

Section 1(c) of the proposed constitutional amendment would require

“substantially equivalent identity and eligibility verification” before voting occurs. The ballot question, however, omits any reference to this “substantially equivalent” requirement. This omission is important because the “substantially equivalent” requirement is ambiguous and vague, is likely to eliminate or substantially change Election Day Registration, and would materially change mail-in and absentee voting.

This omission of a material provision that introduces a new constitutional requirement into Minnesota’s voting system renders the ballot language “so unreasonable and misleading as to be a palpable evasion of the constitutional requirement to submit the law to a popular vote.” *See Breza v. Kiffmeyer*, 723 N.W.2d 633, 636 (Minn. 2006). Minnesota law requires that the language of a ballot question proposing a constitutional amendment not be “so unclear and misleading that voters of common intelligence cannot understand the meaning and effect of the amendment.” *Id.* This overly simplified ballot question, which fails to include any reference to the “substantially equivalent” requirement, is just the kind of unclear and misleading question that this Court has warned against. The ballot question gives a voter of common intelligence no indication that the proposed amendment adds an entirely new and important constitutional requirement to Minnesota’s voting system.

A. The language of the ballot question impermissibly hides the “substantially equivalent” requirement.

Rather than inform voters of the proposed amendment’s requirement that all voters be subject to substantially equivalent identity verification, the ballot question affirmatively hides that requirement. The ballot question asks voters to decide whether “all voters” should be required “to present valid photo identification to vote.” The proposed amendment, however, requires only in-person voters, not “all voters,” to present photo ID. Those not voting in person and those in-person voters who are not pre-registered, groups which comprise a significant portion of the electorate, are subject to a new and different requirement—“substantially equivalent identity and eligibility verification”—that is not even mentioned in the ballot question. For this reason alone, the ballot language is unconstitutionally misleading.

B. The omission of the “substantially equivalent” requirement from the ballot question misleads voters as to the proposed amendment’s effects on Election Day Registration, mail-in voting, and absentee voting.

The proposed amendment’s “substantially equivalent” requirement, though not mentioned in the ballot language, will have drastic effects on Minnesota’s voting system. Specifically, the introduction of a “substantially equivalent” requirement will result in the elimination of—or at the very least material changes to—Minnesota’s long-standing Election Day Registration (EDR) system. It will also materially change the state’s mail-in and absentee-voting systems.

i. EDR has ensured that, for more than 40 years, Minnesota enjoys the highest voter turnout in the nation.

CEIMN has studied how EDR works in Minnesota, who uses it, and how it benefits the State. EDR is widely used in Minnesota and bolsters the State's traditionally high voter turnout. In the 2008 presidential election, for example, nearly 20% of Minnesota voters registered on Election Day.¹ And, in 2010, voters registered on Election Day in more than 90% of Minnesota's precincts.²

Precincts with two specific populations use EDR at a high rate: renters and college students.³ In the 2010 Election in Ramsey and Hennepin Counties, the precincts with EDR rates of 35% or more typically have at least a 70% rental rate.⁴ In greater Minnesota, some precincts near colleges and universities including the University of Minnesota at Mankato, the University of Minnesota at Duluth, Winona State University, St. Cloud State University, St. Olaf College, Gustavus Adolphus College, and St. John's University reported high rates of EDR.⁵ In 2010, for example, when almost 11% of

¹ Citizens for Election Integrity Minnesota, *Substantially Equivalent Eligibility Verification: The Impact of the Proposed Amendment on Election Day Registration* (June 2012) [hereinafter *SEEV Report*], CEIMN App. at 010.

² See Office of the Minn. Sec'y of State, 2010 Election Results, Federal and State Results by Precinct, available at <http://www.sos.state.mn.us/index.aspx?page=1570> [hereinafter 2010 Election Results].

³ *SEEV Report*, CEIMN App. at 010–11.

⁴ *Id.*

⁵ *SEEV Report*, CEIMN App. at 011. The proposed amendment will have another effect on college students. Presently, students at private colleges and universities can use their school photo identification to participate in EDR. (*Id.*) The proposed amendment requires the presentation of "government-issued" photo identification, although the ballot question does not specify the ID must be "government-issued." A private college student

voters statewide used EDR, more than 40% of voters in precincts near some colleges and universities registered to vote on Election Day.⁶

ii. Minnesota reaps many benefits from EDR.

In the nearly 40 years that EDR has been in place in Minnesota, the state has enjoyed many benefits from the system. Minnesota has the highest voter turnout in the nation, which leads to election results where “those who are elected into office truly represent the people of the state and not just those able to get around unnecessary barriers” to casting votes.⁷ EDR typically boosts voter turnout by 5 to 7%. For example, in the 2008 presidential election, four of the five states with the highest voter turnout—Minnesota among them—had EDR.⁸ Moreover, EDR corrects mistakes by permitting voters who were wrongly purged from the voting rolls to re-register and cast a valid ballot on Election Day.⁹

Young voters and students, who move and change their addresses often, may use EDR more than any other age group.¹⁰ Thanks in large part to EDR, in 2010, Minnesota had the highest turnout in the United States of voters in the 18–29 age bracket.¹¹ EDR is

voting in 2012 after presenting her college ID and registering on Election Day would not be informed by the ballot measure that her school ID would no longer be acceptable for voter-registration purposes in future elections if the amendment passes.

⁶ *Id.*

⁷ *SEEV Report*, CEIMN App. at 002.

⁸ *SEEV Report*, CEIMN App. at 008.

⁹ *Id.*

¹⁰ *Id.*

¹¹ *SEEV Report*, CEIMN App. at 009.

administratively simpler than other systems because it makes expensive, cumbersome provisional balloting (discussed further below) unnecessary.¹² Finally, EDR eliminates the unnecessary rejection of provisional ballots cast by eligible voters because votes cast through the EDR system are valid votes—not provisional votes subject to later verification.¹³

iii. How Minnesota’s EDR system works.

Under the current EDR system in Minnesota, when a person not registered to vote arrives at a polling place, election judges undertake the following steps:

- a. A judge reviews the election roster to confirm that the voter is not already registered to vote at her current address.
- b. The judge then verifies that the voter is at the correct polling place based on her address, and if so, provides a voter registration form to the voter.¹⁴
- c. Once the voter has completed the registration form, she signs it, attesting that she is eligible to vote. Giving false information on the voter registration form is “a felony punishable by not more than 5 years imprisonment or a fine of not more than \$10,000, or both.”¹⁵

¹² *Id.*

¹³ *Id.*

¹⁴ If the voter is at the wrong precinct, the judge directs the voter to the correct precinct.

¹⁵ Office of Minn. Sec’y of State, Voter Registration Application, CEIMN App. at 023.

- d. The judge reviews the voter's completed form to ensure that all necessary information has been provided. The voter must also provide one of 7 alternative forms of identification or another person must vouch for her identity and residency.¹⁶

At that point, the voter can cast her vote just like any other voter who registered before Election Day. Voter-registration applications for EDR voters are then subject to the same verification procedures as the applications of voters who pre-register.¹⁷

iv. How the proposed amendment will affect EDR.

Although the ballot language contains no reference to it, and voters will not be given the opportunity to vote on it, the implementation of the substantially equivalent provision of the proposed amendment is likely to eliminate EDR in Minnesota. An eligible voter is a person who is at least eighteen years old, has been a U.S. citizen for at

¹⁶ The current EDR systems permits the following kinds of identification:

1. A valid Minnesota driver's license, permit, ID card, or receipt, with the voter's current name and address.
2. A valid student photo ID card.
3. A valid voter registration in the same precinct under a different name or address.
4. A valid notice of late voter registration.
5. If the voter is registered in the same precinct under a different address, the voter can sign an oath confirming the address.
6. If the voter resides in a residential facility, an employee can verify the voter's address by signing an oath.
7. A photo ID with an old address plus a current utility bill with a current address.

(*SEEV Report*, CEIMN App. at 006–07.)

¹⁷ *SEEV Report*, CEIMN App. at 007.

least three months, has lived in the precinct for at least 30 days, has not been convicted of treason or a felony, is not under guardianship, and is not insane or mentally incompetent. Minn. Const. art. VII § 1(a). The proposed amendment does not change these eligibility requirements, but does impose a new requirement that every voter be subject to substantially equivalent eligibility verification *before* her vote is cast or counted. Proposed Am. § 1(c). Therefore, for EDR to survive the proposed amendment, a complex, expensive, and most likely unmanageable system of checks would need to be implemented in every precinct to enable an Election Judge to verify an EDR registrant's eligibility to vote in a "substantially equivalent" manner (however the Legislature ultimately defines the term) to those voters whose eligibility was verified in advance of Election Day. One study has conservatively concluded that on-site electronic voter rosters used to verify eligibility could cost Minnesota as much as \$58.8 million.¹⁸

Even if EDR is not eliminated, it will be materially and substantially changed. The Legislature may decide that EDR voters can cast provisional ballots on Election Day, to be counted later after verification of eligibility can take place. As discussed further below, provisional voting is unfamiliar to Minnesota voters, costly, and complicated to administer. Provisional balloting would require county election administrators to track provisional ballots separately until a registrant's eligibility is verified through a "substantially equivalent" verification process, when her ballot then would be counted.¹⁹

¹⁸ Common Cause Minn. & Citizens for Election Integrity Minnesota, *The High Cost of Voter Mandates* (Mar. 2011) [hereinafter *High Cost*], CEIMN App. at 060–61.

¹⁹ *SEEV Report*, CEIMN App. at 012.

Such a system impairs a voter's right to cast an anonymous ballot. Alternatively, the Legislature could require a costly shift from paper voter rosters to electronic rosters with "real-time connectivity to the State Voter Registration System."²⁰ This alternative, however, is not presently feasible because many Minnesota precincts lack internet connectivity and because no provision has been made to protect the highly sensitive private information contained in the State Voter Registration System, which would be disseminated to thousands of private, volunteer Election Judges.²¹

Significantly, Minnesota's EDR system exempts it from the arcane requirements of the National Voter Registration Act (NVRA), which mandates that states without EDR follow certain vote processing procedures.²² Were Minnesota to lose its exemption, some of the procedures it would be subject to include the following:

- Minnesota presently removes voters who have not voted in four years from its voter registration roster; these voters are not notified in advance of their removal because EDR allows them to reregister on Election Day if they arrive at a polling place to discover they have been removed. The NVRA would require the State to send advance notice letters to each of these voters prior to removing them from the roster and to make a list of removed voters available at each precinct on Election Day in the event a removed voter appears and has been removed from the roster.

²⁰ *SEEV Report*, CEIMN App. at 013.

²¹ *Id.*

²² *Id.*

- Presently, if a voter moves and completes a National Change of Address form, her address for voter-registration purposes is automatically updated. The NVRA would allow the automatic updating of a voter's registration only if she moved within the same county. For voters who move out of a county, Minnesota would need to implement a new system whereby voters are sent a new voter-registration form, and an update would occur only if a voter returned the form.
- The NVRA also requires that a state provide voter-registration forms with each application for assistance, for recertification or renewal of assistance, and for notification of change of address, and the State must track the number of people who complete voter-registration forms.²³

None of these significant and material changes will be placed before Minnesota voters with the ballot language, which is therefore constitutionally infirm.

- v. **While not indicated in the ballot language, the proposed amendment's "substantially equivalent" provision—which permits no exceptions—threatens Minnesota's mail-in and absentee voters.**

The proposed amendment mandates that “[a]ll 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.” Proposed Am. § 1(c). This ambiguous mandate is not included in the ballot language, which means that voters will not be given a constitutionally meaningful opportunity to vote on the undefined limitations it imposes

²³ *Id.*

on mail-in and absentee voting. Rural Minnesotans, military personnel, and the elderly will be particularly affected by this provision, although the ballot language gives them no indication of this fact.

Minnesota statute permits precincts with fewer than 400 registered voters to conduct elections by mail; voters who want to vote in person can still do so at the county auditor's office, but they will have no in-precinct polling place.²⁴ As of 2008, nearly 12% of Minnesota's precincts had abandoned the traditional polling place in favor of mail-in balloting, a more cost-effective, flexible, and voter-friendly method of voting.²⁵ In 2010, that number had increased to 12.5%, demonstrating that precincts are trending in favor of this alternative system.²⁶ It is unclear how the proposed amendment's requirement that the identity and eligibility of all voters be verified will affect mail-in voting—and the ballot language omits this ambiguity. As with EDR, the amendment might eliminate the option altogether.

The “substantially equivalent” requirement is particularly significant because Minnesota's proposed amendment is much more restrictive than other states that have imposed similar requirements. The proposed amendment states that **all** voters are subject to substantially equivalent identity and eligibility verification. No other state to enact a voter photo ID requirement has done so without providing for exceptions. Indiana, for

²⁴ Office of the Minn. Sec'y of State, *2012 Mail Voting Guide* (2012), CEIMN App. at 029.

²⁵ See Bill McAuliffe, *For Voting by Mail, Campaign is History*, Star Tribune, Oct. 26, 2008, CEIMN App. 051–52.

²⁶ See 2010 Election Results.

example, exempts the indigent, those with a religious objection to being photographed, those living in state-licensed facilities, and absentee voters.²⁷ Georgia exempts absentee voters.²⁸ Tennessee’s exemptions are broad: absentee voters, residents of licensed facilities, hospitalized voters, voters with a religious objection to being photographed, and indigent voters.²⁹ Kansas exempts disabled voters who cannot comply with the requirement, service members, and voters who object on religious grounds to being photographed.³⁰ And Pennsylvania does not hold indigent, religiously-objecting, or absentee voters to its photo ID requirement.³¹

On the face of the proposed amendment, and in contrast to past practice, Minnesota exempts no such groups. Presently, absentee and mail-in voters in Minnesota do not have to show photo ID. And, under Minnesota’s present EDR regime, nursing-home employees can vouch for the identity and eligibility of residents of their homes. Although the ballot language states that all voters must show photo ID to vote, it does not reflect the fact that this requirement changes the status quo in Minnesota for thousands of voters in rural precincts, in residential facilities including battered women’s shelters, and serving in the armed forces overseas—all of whom face potential disenfranchisement if the proposed amendment is enacted.

²⁷ CEIMN, *Voter Photo ID Exemptions* (June 4, 2012), CEIMN App. at 053–54.

²⁸ *Id.*

²⁹ *Id.*

³⁰ *Id.*

³¹ *Id.*

Minnesota is a leading state in ensuring that overseas military personnel have the opportunity to cast meaningful, counted absentee votes.³² Deployed military personnel will be significantly impacted by the proposed amendment. Although all military personnel have government-issued ID, that ID does not necessarily reflect a serviceperson's current Minnesota address, and such ID is unattainable for overseas servicepersons.³³ In addition, if the substantially equivalent requirement is ultimately enacted by the Legislature in a way that requires overseas servicepersons to provide photocopies of their IDs to cast absentee ballots, this requirement will be both administratively challenging for remotely deployed soldiers and potentially in violation of the Military and Overseas Voter Empowerment Act of 2009.³⁴ In short, the result of the proposed amendment is the potential disenfranchisement of deployed Minnesota soldiers—a result not even hinted at in the ballot language.

The ballot language deprives Minnesotans of the meaningful and constitutionally mandated opportunity to vote on the proposed amendment. The language omits altogether the substantially equivalent requirement, meaning that voters will be unaware that EDR, mail-in, and absentee voting are all threatened by the amendment. The omission of this information renders the ballot language unconstitutionally misleading.

³² Letter from S. Dzieduszycka-Suinat, President and CEO, Overseas Vote Foundation, to J. Peppin, Minn. House of Representatives Gov't Operations & Elections Cmte., Mar. 8, 2012 [hereinafter OVF Letter], CEIMN App. at 116–18.

³³ *Id.*

³⁴ *Id.*

C. Because the proposed amendment itself is vague and ambiguous, even diligent voters will not be able to discover the meaning of the “substantially equivalent” requirement before voting on it.

By necessity, ballot questions often paraphrase the underlying proposed amendment into a simplified yes-or-no questions for voters to consider. But there are legal and constitutional limitations on this simplification process. A ballot question that is so simplified that it omits significant and material facets of the proposed change is constitutionally infirm under Minnesota law because voters are not given a fair opportunity to evaluate the whole amendment. *Kiffmeyer*, 723 N.W.2d at 636.

Given the variations in complexity of proposed amendments, it might be difficult to articulate a bright-line rule as to how much simplification is permitted in a ballot question. Under some circumstances, for example, the omission of collateral aspects of a proposed amendment from the ballot question could be addressed by the political process. Proponents and opponents of the amendment could publicize those aspects not specifically included in the ballot question, as well as the full implications of the proposed amendment. The ballot question before the Court today poses no such circumstance.

Here, the underlying proposed amendment itself is vague and ambiguous, requiring “substantially equivalent identity and eligibility verification” without defining how this verification would take place or what it would constitute, particularly for EDR, mail-in, and absentee voters. Publicizing the language of the proposed amendment will do little to educate voters as to the ballot question they will consider, because the amendment language itself does not explain, specify, or suggest the changes it would

create. Statements by amendment proponents as to what they hope or expect a future legislature might do to clarify the “substantially equivalent” requirement will do nothing to clarify the ballot question now, when voters must decide whether to adopt the amendment.

The Legislature recognized that the word “equivalent” is vague and ambiguous. An early version of the proposed amendment stated that a citizen, at “the time of voting in person, shall present government-issued photographic identification *or the equivalent* as prescribed by law.”³⁵ Senator Newman, the Senate bill’s sponsor, explained that the conference committee did not consider this version of the proposed amendment because “for purposes of a Constitutional amendment if we put in the bill the word equivalent what we are really doing is building in an ambiguity which is exactly what we were trying to avoid.”³⁶ Therefore, the conference committee revised the language of the proposed amendment to read, “All voters voting in person must present valid government-issued photographic identification before receiving a ballot.” The ballot question reflects this revised language.

³⁵ *SEEV Report*, CEIMN App. 003 (citing Office of the Revisor of Statutes, State of Minnesota, *H.F. No. 2738, 2nd Unofficial Engrossment – 87th Legislative Session (2011–2012)*, posted on Mar. 26, 2012, *available at* <https://www.revisor.mn.gov/bin/bldbill.php?bill=ueh2738.2.html&session=ls87>) (emphasis added).

³⁶ *Id.* (citing Minnesota State Senate, Senate Media Services, 2012 Archive Video Collection, Senate Floor Session, Apr. 4, 2012, *available at* http://www.senate.leg.state.mn.us/media/media_list.php?ls=87&archive_year=2012&archive_month=04&category=floor&type=video&ver=new#monthnav).

However, unbeknownst to a voter of common intelligence encountering the ballot question that omits any mention whatsoever of the “substantially equivalent” requirement, the very “confusion, ambiguity, and excess verbiage” formerly created by use of “equivalent” in the presentation of photo ID section of the proposed amendment persists in the “substantially equivalent” requirement section of the proposed amendment.³⁷ Because the requirement does not appear in the ballot question, however, a voter reading the ballot language has no way of knowing that she is casting a vote to introduce such ambiguity into Minnesota’s voting system.

Significantly, the proposed amendment changes the contours of Minnesota’s voting system. The right to vote is a fundamental right. A change to the voting system that even arguably could be seen as restricting the right of some to vote (let alone disenfranchising them) is an issue that requires the highest level of scrutiny for a proposed ballot question. This ballot question omits significant and central tenets of the underlying proposed amendment. In short, it does not submit the proposed amendment to the voters in a meaningful, constitutionally permissible way.

III. THE BALLOT QUESTION’S FAILURE TO ADDRESS THE CREATION OF AN UNPRECEDENTED, COSTLY, AND COMPLICATED NEW PROVISIONAL-VOTING SYSTEM IN MINNESOTA IS MISLEADING AND CONSTITUTIONALLY IMPERMISSIBLE.

The ballot question also fails to inform a voter that the proposed amendment creates an unprecedented, costly, and complicated new provisional-voting system in Minnesota. The ballot question’s omission of the creation of a new provisional-voting

³⁷ *See id.*

system is itself unreasonable and misleading enough to constitute a palpable evasion of the constitutional requirement to submit the amendment to a popular vote. *See Kiffmeyer*, 723 N.W.2d at 636; Minn. Const. Art. IX, § 1. A voter of common intelligence will not be informed of—and, thus, will not actually vote on—this fundamental, far-reaching, and costly aspect of the amendment. *See Kiffmeyer*, 723 N.W.2d at 636. To a voter of common intelligence, “provisional voting” would sound unfamiliar, costly, and complicated. In fact, it is. Yet, it is not in the ballot question for consideration.

A. Provisional voting is unfamiliar.

The proposed amendment “requires the establishment of a new provisional ballot system as prescribed by law” and that “Minnesota does not currently have provisional balloting.”³⁸ The fact that provisional voting is new and unfamiliar may be enough for many voters who would support the amendment as it is currently described in the ballot question to reject the proposed amendment if it were fully described. Thus, the omission of any mention of provisional voting is misleading and unconstitutional.

B. Provisional voting is costly.

If voters aren’t turned off by the unfamiliar nature of provisional voting, they might be turned off by its cost. CEIMN co-wrote a briefing paper that analyzed the costs of implementing this new provisional voting system in Minnesota.³⁹ CEIMN has

³⁸ Minnesota Management & Budget (“MMB”), *Consolidated Fiscal Note – 2011-12 Session: Voter ID Req. Const. Amendment* (March 13, 2012), available at http://www.mmb.state.mn.us/bis/fnts_leg/2011-12/S1577_2E.pdf.

³⁹ *High Cost*, CEIMN App. at 058. Although this paper addressed the Legislature’s proposal of two prior versions of the amendment, CEIMN’s analysis of the costs associated with the creation of this new provisional-voting system is still useful here.

identified three major categories of new financial costs imposed by provisional-voting system contained in the amendment. These include (1) equipment and supplies, (2) employment and training, and (3) verification of the provisional ballots.⁴⁰ These costs underscore why the provisional-voting system is a substantial change to Minnesota elections and consequently why it is imperative that the ballot question reference provisional voting to accurately convey the amendment's weighty implications to the voters.

i. Equipment and supplies.

First, with respect to equipment and supplies, there are significant costs that would fall upon local governments and, consequently, upon property taxpayers.⁴¹ For example, precincts will need to procure larger ballot boxes, envelopes in which to secure the provisional ballots, padlocks, and other materials and safeguards to ensure each polling place can provide for provisional voting.⁴² And, as demonstrated by H.F. 210, the Minnesota Legislature may impose further requirements to secure and verify the provisional ballots that will incur more equipment costs for local governments, such as separate provisional-ballot rosters, special provisional-ballot secrecy envelopes, affidavits, and extra supplies to cover any underestimation of voter turnout.⁴³ CEIMN

⁴⁰ *High Cost*, CEIMN App. at 058-060.

⁴¹ *High Cost*, CEIMN App. at 058.

⁴² *High Cost*, CEIMN App. at 058-059.

⁴³ *High Cost*, CEIMN App. at 059.

estimates provisional voting will cost property taxpayers an additional \$445,792 per election for equipment and supplies alone.⁴⁴

ii. Employment and training costs.

Provisional voting also has high employment and training costs. This is because provisional voting “complicates the voting process significantly for voters, election judges, and county auditors and their staff.”⁴⁵ CEIMN estimates that most counties “will need to hire at least two new Election Judges to handle the extra workload.”⁴⁶ Training the new judges and re-training the existing judges will incur additional substantial expense.⁴⁷ CEIMN estimates that these employment and training expenses will cost Minnesota approximately \$1.6 million per election.

iii. Verification of provisional ballots.

CEIMN indentified the “increase in the auditor’s office staff time needed to verify or reject provisional ballots, reconcile the provisional ballot numbers, and send correspondence to provisional voters” as an additional substantial cost of the amendment.⁴⁸ Unfortunately, these costs are unknown because they are too difficult to estimate. However, they will be substantial and significant.

Because the Legislature has not articulated how the provisional-voting system is to be effectuated, other unknown costs and complications are inevitable. These costs, in

⁴⁴ *Id.*

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ *High Cost*, CEIMN App. at 060.

⁴⁸ *Id.*

addition to the unknown costs that CEIMN has identified in association with provisional voting, are significant enough to impact a voter's choice whether to support the amendment.

C. Provisional voting is complicated.

The omission of provisional voting from the ballot question is also likely designed to mislead ballot voters who would otherwise reject the proposed amendment because it enshrines a layer of uncertainty and complexity into the Minnesota Constitution.

Petitioners' brief comprehensively outlines much of this complexity and uncertainty, so CEIMN will not repeat these arguments. But CEIMN has identified in its research several areas of concern posed by provisional voting that in turn render the omission of this provision of the proposed amendment misleading to voters.

One area of uncertainty and complexity is the fact that this provisional-voting system has yet to be designed by the Legislature. As Petitioners demonstrate, different states take different approaches to the implementation of provisional voting, and these different approaches impact how much time a voter has to verify her identity after casting a ballot, how long officials have to verify the provisional ballots, and whether provisional ballots are even counted. (Pet'rs.' Br. at 14-17.) In fact, CEIMN has found that "[p]rovisional ballots have led to consistently high rejection rates of ballots cast by legitimate, eligible voters" in other states.⁴⁹ Many provisional ballots are rejected because the voter went to the wrong polling place, forgot to sign the provisional ballot, or

⁴⁹ Citizens for Election Integrity Minn. & Common Cause Minn., *Minnesota's Elections—Transparent, Verifiable, and Accurate* 25 (Feb. 25, 2010) [hereinafter *Minnesota's Elections*], CEIMN App. at 092.

improperly completed the provisional-ballot form.⁵⁰ Provisional voting would create new problems and currently unanswered questions that the ballot question wholly omits from the realm of possibilities, thus misleading the voter.⁵¹

CEIMN does not mean to suggest that the ballot question must contain every potential negative aspect of provisional voting to adequately submit the amendment to a popular vote. But the complete omission of any reference to provisional voting prevents the voter from deciding whether a new, unprecedented provisional-balloting system should be created and, consequently, from comprehending the effect and significance of the vote she is casting.

CONCLUSION

The ballot question here is deceptively simple and does not provide enough information for voters to make a fair evaluation of the proposed amendment. Specifically, the ballot question hides from voters the new, exception-free requirement that all voters be subjected to substantially equivalent identity and eligibility verifications, and the unprecedented creation of a provisional-voting system. The simplicity of the ballot question, in light of the threat the amendment poses to EDR, mail-in voting, and absentee voting, and the complexity and cost of a new provisional-voting system in Minnesota, reveals that the ballot question was carefully calculated to be far more appealing to voters than the actual amendment. Reference to these costly,

⁵⁰ *Minnesota's Elections*, CEIMN App. at 093.

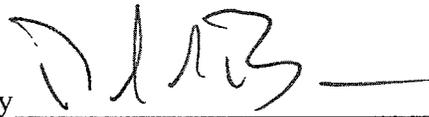
⁵¹ Another layer of complication that Petitioners have not discussed is the fact that provisional voting is only offered to in-person voters. *Compare* Amendment Sec. 1(b) *with* Sec. 1(c).

significant, and complex changes to Minnesota's current election system would likely dissuade many voters from voting for the amendment. A ballot question that omits these essential terms to obtain the support of a voter who would otherwise reject it is per se unreasonable, misleading, and a palpable evasion of the constitutional requirement to submit the proposed amendment to the voters.

For the foregoing reasons, and for those articulated by Petitioners, CEIMN asks the Court to enjoin Respondents from placing this constitutionally misleading ballot question on the November ballot.

DATED: June 18, 2012

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**ATTORNEYS FOR CITIZENS FOR
ELECTION INTEGRITY –
MINNESOTA**

A12-0920

**STATE OF MINNESOTA
IN SUPREME COURT**

League of Women Voters Minnesota;
Common Cause, a District of Columbia nonprofit corporation;
Jewish Community Action, a Minnesota nonprofit corporation;
Gabriel Herbers; Shannon Doty; Gretchen Nickence;
John Harper Ritten; and Kathryn Ibur,

Petitioners,

vs.

Mark Ritchie, in his capacity as Secretary of State of the
State of Minnesota, and not in his individual capacity,

Respondent.

CERTIFICATION OF BRIEF LENGTH

I hereby certify that this brief conforms to the requirements of Minn. R. Civ. App. P. 132.01, subd. 3(c), for a brief produced with a proportional-font format. The length of this brief is 5,877 words. This brief was prepared using Microsoft Word.

DATED: 6/18/12

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