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ELECTION LAW ON THE GROUND: CHALLENGES IN MISSOURI

DENISE LIEBERMAN*

Voter misinformation and intimidation are on the rise across America, causing negative consequences for American Democracy.

The fact is that we have always had a loose relationship with the truth when it comes to voting in America. From the Framers extoling the virtues of democracy while intentionally omitting an affirmative right to vote in the U.S. Constitution, to court decisions over the years lauding the fundamental nature of the right to vote while states around the country upended that very right in discriminatory voting practices from Reconstruction to the Civil Rights Movement,¹ to the current use of false claims of voter fraud to justify additional restrictive voting measures—the truth is better told through the stories of those left behind by such measures than the laudable language courts use in upholding them.

Today, truth has become all the more elusive as misinformation has become a source of deterrence through voter confusion and intimidation, as well as through false narratives used to justify restrictions on the right to vote—which in turn, generate even further voter confusion, intimidation, and deterrence. As

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1. *See, e.g.*, *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886) (Voting is “regarded as a fundamental political right, because [it is] preservative of all rights”); *Reynolds v. Sims*, 377 U.S. 533, 555 (1964) (“The right to vote freely for the candidate of one’s choice is of the essence of a democratic society, and any restrictions on that right strike at the heart of representative government.”); *Gray v. Sanders*, 372 U.S. 368, 379–80 (1963) (“Every voter is equal to every other voter”).

the Missouri Supreme Court recently opined, misleading information about voting leads to decreased voter participation.²

For two centuries, Missouri has been at the crossroads of voting rights debates in this country—indeed, was born out of it. Antebellum tensions over slavery played out in the two Missouri Compromises. Shortly before the Civil War, the Supreme Court decided *Dred Scott*, a case originating in Missouri, which held that African-Americans were not considered citizens so the privileges and immunities clause did not apply to them or grant them civil rights.³ The resulting ripple effect across the nation continued to exclude African-Americans from civil rights, including the right to vote. Later, Virginia Minor, after attempting to vote in St. Louis, Missouri, brought a case unsuccessfully arguing that the Fourteenth Amendment required the franchise extend to female citizens.⁴ Yet, during Reconstruction, Missouri became one of two pioneer states to establish an explicit, affirmative constitutional right to vote in the strongest of terms, one that now requires any law that significantly burdens the right to vote to be subject to strict scrutiny, the highest level of judicial review, a standard that has been re-affirmed by the Missouri Supreme Court in its two cases involving photo ID requirements to vote.⁵

And, Missouri has been at the forefront of modern barriers to the ballot box, particularly for its role solidifying the voter fraud myth that has been a lynchpin of efforts to justify voting regulations in the 21st Century.⁶ I was one of just a handful of attorneys observing the elections at the St. Louis City Board of Elections during the November 2000 elections, and witnessed the impact of what turned out to be a massive improper voter purge of some 50,000 voters, disproportionately African-American, as hundreds of voters filled the lobby of the St. Louis City Election Board that day. Even with my assistance and the help of others, it took wrongly purged voters hours to restore their rights.⁷ I began

2. See, e.g., *Priorities USA v. State of Missouri*, No. SC97470, 2020 WL 203129, at *5, *7–9 (Mo. Jan. 14, 2020) [hereinafter “*Priorities USA*” or “*Priorities*”].

3. See *Dred Scott v. Sandford*, 60 U.S. 393 (1857).

4. *Minor v. Happersett*, 88 U.S. 162, 165, 178 (1875) (holding that the right to vote was not among the constitutionally protected privileges and immunities of the Constitution).

5. *Weinschenk v. State*, 203 S.W.3d 201, 204 (Mo. 2006); *Priorities USA*, *supra* note 2, at *5–6, *17 n.18 (holding the right to vote is fundamental under the Missouri Constitution). Both the right to vote and right to equal protection under the Missouri Constitution are “even more extensive than those provided by the federal constitution.” *Id.*

6. See LORRAINE MINNITE, *THE MYTH OF VOTER FRAUD*, 99–102 (Cornell University Press 2010) (citing the role of the St. Louis elections in 2000 in development of the voter fraud myth). See Art Levine, *The Republican War on Voting*, AM. PROSPECT (March 19, 2008), <http://prospect.org/article/republican-war-voting> [<https://perma.cc/M6SM-YU79>] (“That election night gave birth to the new right-wing voter-fraud movement, while Missouri became a proving ground for the voter-suppression campaigns that later spread to other key states.”).

7. See ARI BERMAN, *GIVE US THE BALLOT: THE MODERN STRUGGLE FOR VOTING RIGHTS IN AMERICA*, 214–15 (2015).

interviewing voters and drafting affidavits, which were later used in an election day lawsuit in which St. Louis Circuit Judge Evelyn Baker ordered the polls kept open late to ensure time for voters to get their rights restored, an order that was overturned by the court of appeals. That night, Missouri Senator Christopher “Kit” Bond raised the specter of voter fraud to a national stage, with accusations of widespread illegal attempts to vote in St. Louis.⁸ That election kicked off a national dialogue on so-called voter fraud that led to calls for voter ID and other regulations on voting.⁹ Voter ID laws are among the most pernicious of such barriers enacted over the last decade in the United States.¹⁰ Today, some thirty-five states have laws requesting or requiring voters to show some form of ID at the polls.¹¹

Missouri was among the first, and as a voting rights lawyer from Missouri, I’ve had a front row seat to this story, the misinformation that has accompanied it, and the courts’ responses. In this Article, I’ll track the saga of Missouri’s fight to implement photo ID requirements to vote, the misinformation accompanying those fights, and the most recent efforts to address the negative consequences of misinformation— including voter deterrence and confusion—that continue to make Missouri’s promise of a fundamental right to vote elusive to far too many.

I. MISSOURI’S VOTER ID LAWS

Missouri was one of the first states (along with Indiana and Georgia) to pass a strict photo ID requirement in 2006.¹² The law, which required voters to present a Missouri- or federally-issued non-expired photo ID to vote (with some exceptions), was challenged in court. The Missouri Supreme Court struck the 2006 photo ID requirement, finding it constituted “a heavy and substantial burden on Missourians’ free exercise of the right of suffrage” in violation of the Missouri Constitution.¹³ Every year since, for the next decade, Missouri

8. Carolyn Tuft, *Bond Wants Federal Investigation of Problems at City Polls; He Accuses Democrats of ‘Criminal Enterprise’ in Keeping Polls Open Late; Democrats Criticize Election Board*, ST. LOUIS POST-DISPATCH (November 10, 2000).

9. See, e.g., Denise Lieberman, *What’s Wrong With This Picture? New Photo ID Proposals Part of a National Push to Turn Back the Clock on Voting Rights*, ADVANCEMENT PROJECT (2011), https://b3cdn.net/advancement/04b36eb4438666daac_ijm6bt0wf.pdf [https://perma.cc/32LY-P7UE].

10. *Significant Voting Restrictions in America Since 2010*, BRENNAN CTR. FOR JUSTICE, (Nov. 18, 2019), <https://www.brennancenter.org/new-voting-restrictions-america> [https://perma.cc/VJ88-WZKT].

11. *Voter Identification Laws in Effect in 2020*, NAT’L CONF. STATE LEGISLATURES (Jan. 1, 2020), <http://www.ncsl.org/research/elections-and-campaigns/voter-id.aspx> [https://perma.cc/PL36-QP72].

12. *Voter ID History*, NAT’L CONF. STATE LEGISLATURES (May 31, 2017), <https://www.ncsl.org/research/elections-and-campaigns/voter-id-history.aspx> [https://perma.cc/YAP2-KA2M]; see also S. 1014, 93rd Gen. Assemb., 2d Reg. Sess. (Mo. 2006).

13. *Weinschenk v. State*, 203 S.W.3d 201, 215 (Mo. 2006).

lawmakers introduced legislation to require voters to present state-issued photo ID to vote, along with a proposed constitutional amendment to account for the constitutional infirmities *Weinschenck* presented to such a requirement. During that time, I coordinated efforts of the Missouri Voter Protection Coalition, which lobbied against such measures.

A pair of measures passed the legislature in 2011.¹⁴ Missouri Governor Jay Nixon vetoed the statutory photo ID requirement, SB3, finding that it would disenfranchise eligible voters without advancing the voting process.¹⁵ I served as counsel on behalf of Advancement Project, which, along with the ACLU of Missouri, challenged the summary statement of the proposed ballot measure contained in SJR2—which had been titled a “Voter Protection Act”—as deceptive and misleading to voters. The Cole County Circuit Court agreed and invalidated the summary language for the proposed constitutional amendment, and the ballot measure never made to voters in the 2012 elections.¹⁶ In an editorial, the *St. Louis Post Dispatch* called the ballot proposal “one falsehood built upon another.”¹⁷

Similar proposals were reintroduced in the Missouri General Assembly each passing year. And with each passing year, the purported justifications were further undermined. Missouri law already required all voters to produce some form of ID at the polls, though it could include non-photo IDs. There had never been any prosecution for voter impersonation in Missouri—the only type of election irregularity a photo ID requirement could address—and increasingly, study after study showed voter impersonation fraud to be exceedingly rare.¹⁸

14. S. 3, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011); SJR. 2, 96th Gen. Assemb., 1st Reg. Sess. (Mo. 2011).

15. JEREMIAH W. (JAY) NIXON, LETTER TO SECRETARY OF STATE VETOING SB 3, (June 17, 2011), <https://static.votesmart.org/static/vetotext/39794.pdf> [<https://perma.cc/NX88-FKHK>].

16. *Aziz v. Mayer*, No. 11AC-CC00439, at *5–6 (Cole Cnty. Ct. Mar. 27, 2012), <https://www.colecounty.org/ArchiveCenter/ViewFile/Item/308> [<https://perma.cc/HA7B-4MM7>].

17. Editorial Board, *It's Pitch Perfect that Voter ID Measure Tossed as a Fraud*, ST. LOUIS POST DISPATCH (Apr. 2, 2012), http://www.stltoday.com/news/opinion/columns/the-platform/editorial-it-s-pitch-perfect-that-voter-id-measure-tossed/article_44afed8c-d617-5f65-a205-e8e037a610e0.html#ixzz1qwZZOMzB [<https://perma.cc/S78A-UQH4>].

18. See MINNITE *supra* note 6, at 93 (showing that allegations of widespread voter impersonation fraud at the polls are unsupported by empirical evidence). See also Justin Levitt, *A Comprehensive Investigation of Voter Impersonation Finds 31 Credible Incidents out of One Billion Ballots Cast*, WASH. POST (Aug. 6, 2014), <https://www.washingtonpost.com/news/wonk/wp/2014/08/06/a-comprehensive-investigation-of-voter-impersonation-finds-31-credible-incidents-out-of-one-billion-ballots-cast/> [<https://perma.cc/KQA4-76A5>].

Nevertheless, after ten years of debate,¹⁹ in 2016, Missouri lawmakers passed the current voter ID legislation, HB 1631,²⁰ and an accompanying proposed constitutional amendment for voter approval, SJR 53,²¹ which appeared as Amendment 6 on the ballot.

Saying the legislative mandate “purports to solve a problem that does not exist,” Governor Jay Nixon vetoed HB 1631, but lawmakers overrode his veto.²² Nevertheless, the law could not go into effect without the constitutional amendment. In November of 2016, Missouri voters overwhelmingly passed Amendment 6,²³ which amended the state constitution’s voting provisions to allow lawmakers to require voters to prove identity at the polls, including through a voter ID requirement, opening the door to implementation of the legislation.²⁴ Notably, the amendment approved by voters does not mandate photo ID but instead provides constitutional permission to lawmakers to enact legislation relating to voter ID—which they did with the passage of HB 1631.

With the enactment of Amendment 6, HB 1631 went into effect on June 1, 2017. The law replaced Missouri’s prior voter ID requirements set forth in

19. Ari Berman, author of *Give us the Ballot*, wrote that as “one of the most racially divided states in the country,” Missouri’s “ten-year voter-ID push has more to do with the intersection of race and political power” than election integrity. Ari Berman, *One of the Most Racially Divided States in the Country Just Passed a New Voter-ID Bill*, THE NATION (May 13, 2016), <https://www.thenation.com/article/one-of-the-most-racially-divided-states-in-the-country-just-passed-a-new-voter-id-bill/> [https://perma.cc/39YY-BK8R].

20. H.B. 1631, 98th Gen. Assemb., 2nd Reg. Sess. (Mo. 2016), <http://house.mo.gov/billtracking/bills161/billpdf/truly/HB1631T.PDF> [https://perma.cc/D7X4-UDMN].

21. H.J.R. 53, 98th Gen. Assemb., 2nd reg. Sess. (Mo. 2016), <http://www.house.mo.gov/billtracking/bills161/hlrbillspdf/4553s.07t.pdf> [https://perma.cc/F2KJ-HWVG].

22. Missouri Governor Jay Nixon vetoed HB 1631 in July 2016, calling it “an affront to Missourians’ fundamental right to vote.” In his veto letter, he wrote that the law “purports to solve a problem which does not exist,” and was “motivated by an attempt to suppress voter turnout among certain classes of voters.” He further wrote, “[m]aking voting more difficult for qualified voters and disenfranchising certain classes of people is wrong.” Letter from Jay Nixon, Missouri Governor, to Missouri Secretary of State (July 7, 2016), <http://www.house.mo.gov/billtracking/bills161/rpt/HB1631v1.pdf> [https://perma.cc/Q5D5-MSYT]. In September 2016, lawmakers overrode the veto, allowing the measure to be implemented following passage of Amendment 6. Tim Curtis, *General Assembly Votes to Override Veto on Photo Voter ID*, THE MISSOURI TIMES (Sept. 14, 2016), <https://themissouritimes.com/house-votes-override-veto-photo-voter-id-senate-come/> [https://perma.cc/C7Q4-GPCE].

23. Amendment 6 passed by a margin of 63 percent to 37 percent. See State of Missouri, Official Results, General Election, Nov. 8, 2016, MO. SECRETARY OF STATE (Dec. 12, 2016), <https://enrarchives.sos.mo.gov/enrnet/default.aspx?eid=750003949> [https://perma.cc/85S8-S3ZS].

24. The Amendment 6 Official Ballot Title read: “Shall the Constitution of Missouri be amended to state that voters may be required by law, which may be subject to exception, to verify one’s identity, citizenship, and residence by presenting identification that may include valid government-issued photo identification?” 2016 Ballot Measures, Nov. 8, 2016 General Election, <https://www.sos.mo.gov/petitions/2016BallotMeasures> [https://perma.cc/XL2G-CLNY].

Section 115.427 of the Missouri Revised Statutes.²⁵ It lays out three different options for voting, which were later modified by a court injunction in *Priorities USA v. State of Missouri*.²⁶

Option 1, subsection 1 of the Voter ID Law, sets forth limited forms of ID for voters to cast a regular ballot that require a photo and are issued by the State of Missouri or the federal government. In most cases, they must also contain an expiration date and be non-expired, or be non-expiring. Option 1 IDs most typically include a non-expired Missouri driver or non-driver license, a U.S. passport, or military ID.²⁷

Option 2, subsection 2 of the Voter ID Law, provided alternative ways to vote without official non-expired state-issued photo ID, allowing voters who present one of the listed alternate forms of non-photo ID (such as a voter notification card, student ID from a college or university located in Missouri, a current utility bill or bank statement, or other government document with the voter's name and current address) to cast a regular ballot upon signing an affidavit under penalty of perjury stating, among other things, that he or she does not possess a photo ID and acknowledging that such is required to vote.²⁸

25. See MO. REV. STAT. § 115.427 (2017).

26. *Priorities USA v. State of Missouri*, No. 18AC-CC00226 (Mo. Cir. Ct. Cole Cnty., Oct. 23, 2018), *aff'd* by *Priorities USA v. State of Missouri*, No. SC97470, 2020 WL 203129 (Mo. Jan. 14, 2020).

27. Subsection 1 of the voter ID law requires voters to provide one of the following:

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

MO. REV. STAT. § 115.427.1 (2017).

28. MO. REV. STAT. § 115.427.2(1) (2017). The criteria included (a) a sworn statement, under penalty of perjury, that the voter does not possess approved identification, and (b) the ability to prove identity by presenting a form of identification from a secondary list of approved documents (e.g., a utility bill or identification issued by a university located in the state). *Id.*; H.B. 1631, 98th Gen. Assemb., 2nd Sess. (Mo. 2016), paras. 2–3. In October 2018, Judge Richard Callahan enjoined use of the affidavit, a ruling that was upheld by the Missouri Supreme Court in January 2020 in *Priorities USA v. State of Missouri*, No. SC97470, 2020 WL 203129 (Mo. Jan. 14, 2020). See, e.g., *Priorities USA v. State of Missouri*, No. SC97470, 2020 WL 203129, at *5, *7–9 (Mo. Jan. 14, 2020) [hereinafter "*Priorities USA*" or "*Priorities*"].

The law also provides that voters without any of the listed Option 1 or Option 2 forms of ID may cast a provisional ballot, but those ballots will be counted only if the voter returns to the polling place before close of polls on Election Day with a valid form of Option 1 ID or if the election authority determines that the voter's signature on the provisional ballot affidavit matches the signature on file with their voter registration.²⁹

Under the law, the state must provide one form of valid state-issued ID (a non-driver state ID) without cost to voters who request one for purposes of voting, and to cover the cost of obtaining underlying documentation (e.g., a birth certificate, adoption decree) needed to obtain a state-issued ID.³⁰

Importantly, the law requires that the Secretary of State provide advance notice to the public generally of the law's requirements.³¹ Under the advance notice provisions, the Secretary of State must, "at a minimum," provide this notice of the law via "the use of advertisements and public service announcements in print, broadcast television, radio, and cable television media, as well as the posting of information on the opening pages of the official state internet websites of the secretary of state and governor."³² And, consistent with the common-sense understanding that voters should receive notice before an election for the advance notice requirement to have meaning, the statute makes clear that "[i]f there is not a sufficient appropriation of state funds, then the personal identification requirements [of the Voter ID Law] shall not be enforced."³³ This is a basis of our requested relief in the subsequent lawsuit we filed, detailed below. The legislature's Joint Committee on Legislative Research, Oversight Division analysis estimated that the cost of implementing HB 1631 could exceed \$2 million in the fiscal year 2017, \$11 million in the fiscal year 2018, and \$1.7 million in the fiscal year 2019.³⁴

29. See MO. REV. STAT. § 115.427.4 (2017).

30. See, e.g., MO. REV. STAT. § 115.427.6(1) (2017) (requiring the State to provide one nondriver's license without cost to voters who do not already possess such a document); MO. REV. STAT. § 115.427.6(2) (2017) (guaranteeing one copy without cost to the voter of a birth certificate, marriage license, divorce decree, certificate of adoption, court order changing name, Social Security card, or naturalization papers); MO. REV. STAT. § 115.427.6(4) (2017) (requiring the State to provide a free nondriver's license for purposes of voting).

31. The state must (a) provide sufficient advance notice to voters of the requirements of the law, MO. REV. STAT. § 115.427.5, and (b) facilitate the receipt of and payment for the underlying documents necessary for voters to obtain an approved identification, MO. REV. STAT. § 115.427.6(2) (2017). It also requires the Department of Revenue to issue free nondriver's licenses and prepare an affidavit to obtain such a free nondriver's license. MO. REV. STAT. § 115.427.6(4) (2017).

32. MO. REV. STAT. § 115.427.5 (2017).

33. MO. REV. STAT. § 115.427.6(3) (2017).

34. The fiscal note for HB1631, prepared by the House Budget & Oversight Office, estimated that more than \$15 million would be needed to implement the law over three years, with ongoing

I helped organize groups affiliated with the Missouri Voter Protection Coalition to advocate with the Secretary of State for effective implementation of the law—particularly urging the Secretary to undertake a robust effort to educate voters and poll workers about the law’s provisions, and that he request a sufficient budget to provide effective advance notice of the law.³⁵ Ultimately, there were zero appropriations to the Secretary of State to cover the law’s implementation until after July 2017—after one special election had occurred, and after absentee voting in a July 2017 special election was already underway.³⁶ Lawmakers allocated just \$1.5 million for the 2018 fiscal year, and the budget was slashed further during the 2019 fiscal year when midterm elections took place.³⁷

Advance notice is critical to the ability of voters to understand the law’s provisions and be able to comply. Notice that fails to reach voters, is incomplete, or sends inadequate or confusing messages about how to comply directly impacts the ability of voters to exercise their fundamental right to vote.³⁸

II. CHALLENGES TO THE CURRENT VOTER ID LAW

From the start, as described further below, the information coming from the State about the new law was inadequate, misleading, and confusing. When we saw that the legislature failed to allocate sufficient funds to notify all voters, and when the first round of special elections began without any funding to implement the law, we decided to bring a challenge.

costs. SS #2 SCS HB1631 Fiscal Note, June 2, 2016, <https://www.house.mo.gov/billtracking/bills/161/fiscal/fispdf/4554-18T.ORG.pdf> [<https://perma.cc/9FEY-EK95>].

35. See Missouri Voter Protection Coalition, *Letter from Missouri Voter Protection Coalition to Missouri Secretary of State Jay Ashcroft* (May 31, 2018), <https://advancementproject.org/resources/letter-missouri-voter-protection-coalition/> [<https://perma.cc/FLZ4-WGGD>].

36. The Secretary of State was quoted as saying that the state “won’t get free IDs to everyone who wants them before the St. Louis city special election” on May 31, 2017. See Kevin McDermott & Celeste Bott, *St. Louis Will Get Early Preview of New Photo ID Voting Law*, ST. LOUIS POST DISPATCH, June 1, 2017, at A1, A4. There was no appropriation of funds to the SOS until after July 1, more than two weeks after in-person absentee voting began for that election. *Id.* at A4.

37. For Fiscal Year 2017, \$100,000 was appropriated to the Department of Revenue; no funds were appropriated to the Secretary of State for implementation of Section 115.427 for that fiscal year. Lawmakers appropriated \$1.5 million to the Secretary of State for implementation of the photo ID law for Fiscal Year 2018, and no supplemental funds were appropriated. Second Amended Petition For Injunctive and Declaratory Relief at ¶ 23, NAACP v. Missouri, No. 17AC-CC00309 (Mo. Cir. Ct. Cole Cnty. Nov. 22, 2017). For the Fiscal Year 2019, \$250,000 was appropriated to the Secretary of State’s office. Pl. Transcript Ex. P2, NAACP v. Missouri, (Vincent Depo. Ex. 98) on ASH_0008056.

38. The Missouri Supreme Court agreed, stating in its *Priorities* ruling, “[M]aterials that are incomplete and fail to describe all of the forms of identification permitted by [the Voter ID law] cause voter confusion and decrease voter turnout.” *Priorities USA v. State of Missouri*, No. SC97470, 2020 WL 203129, at *19 (Mo. Jan. 14, 2020).

On June 8, 2017, Missouri State Conference of the National Association for the Advancement of Colored People (“NAACP”) and League of Women Voters of Missouri (“LWV”) filed a complaint for declaratory and injunctive relief in Cole County Circuit Court. I am part of the legal team that brought this suit (including Advancement Project, ACLU of Missouri, ACLU Voting Rights Project, along with Covington & Burling LLP), arguing that the State’s messaging mislead voters and violated its advance notice obligations under the law; and that the insufficient appropriations effectively starved implementation of the law and contributed to the confusing, misleading, and inadequate notice voters received.³⁹ Christine Dragonette, a Missouri taxpayer who oversees an ID acquisition program at St. Francis Xavier College Church in St. Louis and regularly confronts the barriers her clients face in obtaining state ID’s, was later added as an individual taxpayer plaintiff.

Cole County Circuit Court Judge Jon Beetem denied an emergency restraining order we sought in advance of the Summer 2017 Special Elections. In December 2017 and January 2018, he granted without prejudice the State’s motions to dismiss the First and Second Amended Complaints respectively and for Judgment on the Pleadings, concluding they “fail[] to state a claim for which relief can be granted.”⁴⁰

On October 30, 2018, the Missouri Court of Appeals reversed, concluding that “that the sufficiency of appropriations to cover the costs of implementing the Voter ID Law presents a ripe controversy.”⁴¹ The court found that plaintiffs had “adequately pleaded a claim alleging insufficient appropriation” for the implementation of the law, including providing advance notice to voters.⁴² The case was remanded for trial. A weeklong trial was held in August 2019 before Judge Jon Beetem in Cole County Circuit Court.⁴³ A ruling is pending as of this writing.

39. At the time of the filing of the First Petition, the State had appropriated \$0 for the Secretary of State and just \$100,000 to the Department of Revenue for the implementation of the Voter ID Law. Plaintiffs subsequently filed First Amended and Second Amended Complaints. The Second Amended Petition set forth an additional approach to measuring the insufficiency of an appropriation under Subsection 6(3) by alleging an established failure of the State to conduct implementation activities expressly mandated by the statute, including the advance notice provisions. The Petition alleges that this measurable failure has been caused by the insufficiency of the appropriation itself. Second Amended Petition For Injunctive and Declaratory Relief at ¶¶ 21-29, NAACP v. Missouri, No. 17AC-CC00309 (Mo. Cir. Ct. Cole Cnty. Nov. 22, 2017).

40. Judgment, NAACP v. Missouri, No. 17AC-CC00309 (Mo. Cir. Ct. Cole Cnty. Dec. 6, 2017); Judgment, NAACP v. Missouri, No. 17AC-CC00309 (Mo. Cir. Ct. Cole Cnty. Jan. 2, 2018).

41. NAACP v. Missouri, No. WD81484, at *13 (Mo. Ct. App. W.D. Oct. 30, 2018).

42. *Id.* at *18.

43. See Kyreon Lee and the Associated Press, *Coalition of Voter Advocates Headed to Trial to Challenge Missouri’s Voter ID*, KRCG (Aug. 17, 2019), <https://krcgtv.com/news/local/coalition-of-voter-advocates-headed-to-trial-to-challenge-missouris-voter-id> [<https://perma.cc/PS2W-WVU5>].

In a second case, filed in June 2018, a year after the *NAACP* filing, *Priorities USA* and Mildred Gutierrez, a voter from Lee's Summit, Missouri, filed suit in Cole County Circuit Court, alleging that the ID law was unconstitutional, created "undue burden" for voters who lack or would face significant hurdles in obtaining the required photo ID, and suppressed voter turnout among "vulnerable populations."⁴⁴ In an injunction issued on October 9, 2018, and amended on October 23, 2018, Circuit Court Judge Richard Callahan blocked a portion of the law, based in part, on the way it mislead voters regarding its requirements.⁴⁵ In particular, the court enjoined use of the sworn statement required under Option Two, finding that it mislead voters that photo ID is mandatory to vote.⁴⁶ According to the court:

The affidavit plainly requires the voter to swear that they do not possess a form of personal identification approved for voting while simultaneously presenting to the election authority a form of personal identification that is approved. If, as the State argues, the form of personal identification refers to an "Option One Identification", then the latter part of the affidavit which requires the voter to acknowledge that an "Option One Identification" is now a prerequisite for voting is an outright misstatement of law.⁴⁷

Finding that the "affidavit is, on its face, contradictory and misleading," the court concluded that a valid photo or non-photo ID (Option 1 or Option 2) "shall be sufficient to enable any registered voter to cast a regular ballot and no affidavit shall be required."⁴⁸

The court also barred State advertisements and notices from suggesting that photo ID is required,⁴⁹ explaining:

No compelling state interest is served by misleading local election authorities and voters into believing a photo ID card is a requirement for voting; in the case of the former it results in qualified voters being turned away at the polls; in the case of the latter it results in qualified voters not even showing up at the polls. As desirable as a Missouri-issued photo ID might be, unlike an American Express Card, you may leave home without it, at least on election day.⁵⁰

44. Pet. for Declaratory and Injunctive Relief at 28, *Priorities USA v. Missouri*, No. 18AC-CC00226 (Mo. Cir. Ct. Cole Cnty. June 13, 2018).

45. Amended Order and J. at 7, *Priorities USA v. Missouri*, No. 18AC-CC00226 (Mo. Cir. Ct. Cole Cnty. Oct. 23, 2018).

46. *Id.* at 5.

47. *Id.* at 5.

48. *Id.*

49. *Id.* at 7. The injunction ordered: "The Defendants and all other persons acting in concert with Defendants in administering and certifying elections within the State of Missouri, including local election authorities, are permanently enjoined from disseminating materials with the graphic that voters will be asked to show a photo identification card without specifying other forms of identification which voters may also show." *Id.*

50. *Id.* at 6 (emphasis added) (footnote omitted).

On January 14, 2020, the Missouri Supreme Court affirmed and permanently enjoined that portion of the law.⁵¹ Giving a nod to the heightened scrutiny demanded by Missouri's constitutional right to vote for significant deprivations, the court nevertheless concluded that the measure failed to meet even rational basis.⁵² The Supreme Court concluded that print advertisements disseminated by the Secretary of State inaccurately mislead voters that a photo ID was the only option available to them for voting.⁵³ The Supreme Court affirmed the circuit court's finding that the affidavit required for Option Two voting in Section 115.427.2 of the Voter ID Law (the form of which is set forth in Section 115.427.3) is contradictory and misleading. Consequently, it enjoined the affidavit requirement for Option Two voting.⁵⁴ As a result, because voters can now provide an Option 2 ID and vote without executing an affidavit, Missouri voters can equally cast a regular ballot upon presentation of a photo (Option 1) or non-photo (Option 2) ID specified in Section 115.427.2(1).⁵⁵

III. NOTICE REQUIREMENTS—AND THE INJURY OF MISINFORMATION

Underlying both cases is the harm to voters of misinformation—and the importance of sufficient and accurate notice to voters about the voting process. The potential harm to voters of a voter ID law extends beyond the numbers of

51. *Priorities USA v. State of Missouri*, No. SC97470, 2020 WL 203129 (Mo. Jan. 14, 2020). The dissenting justices argued that the trial court should have severed Section 115.427.2 (subsection 2) in its entirety, not just the affidavit language. *Id.* at *4 (Fischer and Powell, JJ. dissenting). The majority rejected this, as it would in effect, create the very kind of strict photo ID requirement that was rendered unconstitutional in *Weinschenck*. *Id.* at *16 (majority opinion).

52. *See id.* at *5–6. (“This Court need not evaluate the extent of the burden imposed by the affidavit requirement because the requirement does not satisfy even rational basis review.”).

53. *See id.* at *19.

54. *See id.* at *7–10. (“Although the State has an interest in combatting voter fraud, requiring individuals voting under option two to sign a contradictory, misleading affidavit is not a reasonable means to accomplish that goal.”).

55. Within a week of the *Priorities* ruling invalidating the affidavit used with Option 2 IDs, a Missouri legislative committee heard testimony on proposed legislation that would, among other things, eliminate Option 2 (non-photo IDs) (imposing a strict photo ID requirement), and eliminate the law's advance notice requirements and attendant appropriation mandate. Secretary of State Ashcroft testified in favor of the bill; I testified in opposition to the legislation. As of this writing, the measure has passed the House and is pending in the Missouri Senate. *See* H.B. 1600 (Mo. 2020), <https://house.mo.gov/billtracking/bills201/hlrbillspdf/3088H.011.pdf> [<https://perma.cc/NC84-7WDA>]. *See also* Summer Ballentine, *Missouri Lawmakers Try Again with Voter ID After Court Loss*, JOPLIN GLOBE (Jan. 22, 2020), https://www.joplinglobe.com/news/missouri-lawmakers-try-again-with-voter-id-after-court-loss/article_eaad2f7e-3d5e-11ea-a48c-0b8e99425b4f.html [<https://perma.cc/273T-QW7J>]; Alisa Nelson, *Ashcroft: Battle is not Over on Missouri's Voter ID Law*, OZARK FIRST (Jan. 17, 2020), <https://www.ozarksfirst.com/local-news/regional-news/ashcroft-battle-is-not-over-on-missouris-voter-id-law/> [<https://perma.cc/XFD7-ZLMN>] (“Missouri Secretary of State Jay Ashcroft wants the Legislature to fight a Supreme Court ruling this week about the state's voter ID law”).

eligible voters who lack a state-issued photo ID,⁵⁶ but also to voters who are confused about the rules and then deterred from voting, and to poll workers who are confused and then misapply the law at the polls and improperly send voters away. Both of these harms of misinformation have occurred in Missouri since the implementation of Missouri's voter ID law.

Indeed, education was strained from the get-go. Voter advocates, including myself, met with Secretary Ashcroft and his staff just days after he took office in January 2017 to make the case for a robust public outreach campaign. Despite multiple efforts requesting information on the outreach plan,⁵⁷ none was forthcoming to our partners.⁵⁸

The voter ID law mandates that the public be given "advance notice" of its personal ID requirements.⁵⁹ Specifically:

The secretary of state shall provide advance notice of the personal identification requirements of subsection 1 of this section in a manner calculated to inform the public generally of the requirement for forms of personal identification as provided in this section. Such advance notice shall include, at a minimum, the use of advertisements and public service announcements in print, broadcast television, radio, and cable television media, as well as the posting of information on the opening pages of the official state internet websites of the secretary of state and governor.⁶⁰

First, this language suggests it must mean more than cursory notice. The requirement that the notice be done "in a manner calculated to inform" makes clear that it must be sufficient to ensure that the voters are not misled and that they understand the law.

Second, the requirement that the notice be done "in a manner calculated to inform" also implies that the State's outreach efforts must be calculated with a

56. A February 2017 no-match analysis conducted at the request of the Secretary of State comparing the voter rolls against those with state IDs on file with the Department of Revenue found: 137,723 registered voters in Missouri did not have a Department of Revenue ID (*i.e.*, a driver's license, non-driver's license, or instruction permit); 140,073 registered voters had an expired Department of Revenue ID (*i.e.*, a driver's or non-driver's license); and 2040 registered voters had forfeited their driver's licenses. The results of the February 2017 No Match Analysis are set forth in Transcript of Trial at 1138-1139, 1192, NAACP v. Missouri, No. 17AC-CC00309-01 (Mo. Cir. Ct. Cole Cnty. Aug. 19-23, 2019).

57. See Letter from Missouri Voter Protection Coalition to Jay Ashcroft, Missouri Secretary of State, (May 11, 2017), <http://advancementproject.org/resources/letter-to-missouri-secretary-of-state-jay-ashcroft-stop-endangering-voters-access-to-ballot/> [<https://perma.cc/GVH9-Q4SC>].

58. When the attendees at the January 2017 meeting with Secretary of State Jay Ashcroft asked him what the implementation and voter education plan was, they were told that there was not a plan in place and that the State was, instead, looking at groups like the MoNAACP to provide notice to Missourians about the law. Transcript of Trial at 68:4-20, NAACP v. Missouri, No. 17AC-CC00309 (Mo. Cir. Ct. Cole Cnty. Aug. 19-23, 2019).

59. MO. REV. STAT. § 115.427.5 (2017).

60. MO. REV. STAT. § 115.427.5 (2017) (emphasis added).

realistic prospect that the non-misleading information will actually *reach* voters who need it most.

But both the State's substantive messaging campaign and the outreach efforts fell short. Even after the legislature's paltry allocation of \$1.5 million for the 2018 fiscal year,⁶¹ the Secretary's office cut its budget for the ID law in half (to \$750,000) for the 2019 fiscal year—a year that included high turnout federal midterm elections when many voters would experience the law for the first time—and ultimately ended up with just 250,000.⁶² State officials testified that one way they did so was by eliminating costs for direct mail to voters about the law.⁶³

Instead, more than two-thirds of the State's advertising budget for the voter ID law was used to run ads on unsold air time—often late at night and in limited media markets—through a contract with the Missouri Public Education Program (“MO-PEP”), a program of the Missouri Broadcaster's Association that offers unsold and commercially unwanted airtime at a discount for public service messages.⁶⁴ Those ads ran in disproportionately smaller markets and less in larger urban areas where there was less likely to be unsold air time.⁶⁵ These ads did not target voters most in need of the information—such as seniors, low

61. Second Amended Petition For Injunctive and Declaratory Relief, *NAACP v. Missouri*, No. 17AC-CC00309 (Mo. Cir. Ct. Cole Cnty. Nov. 22, 2017). For Fiscal Year 2017, \$100,000 was appropriated to the Department of Revenue and no funds (\$0) were appropriated to the Secretary of State for implementation of Section 115.427 for that fiscal year. Transcript of Trial at 893:21-25, *NAACP v. Missouri*, No. 17AC-CC00309-01 (Mo. Cir. Ct. Cole Cnty. Aug. 19-23, 2019), Lawmakers appropriated \$1.5 million from the State's General Revenue Fund to the Secretary of State for implementation of the photo ID law for Fiscal Year 2018, and no supplemental funds were appropriated. *Id.* at 916:7-14, 947:16-22, 948:1-10. For the 2019 fiscal year, \$250,000 was appropriated to the Secretary of State's office. Deposition of Vincent at 128:9-129:4, *NAACP v. Missouri*, No. 17AC-CC00309-01 (Mo. Cir. Ct. Cole Cnty. June 19, 2019).

62. After submitting the halved budget, the Secretary of State's office then put in a budget request for an even lower amount—just \$250,000, which was ultimately the amount appropriated. Deposition of Vincent at 128:9-129:4, 129:15-23, *NAACP v. Missouri*, No. 17AC-CC00309-01 (Mo. Cir. Ct. Cole Cnty. June 19, 2019); Transcript of Trial at 928:6-8, 14-17, *NAACP v. Missouri*, No. 17AC-CC00309-01 (Mo. Cir. Ct. Cole Cnty. Aug. 19-23, 2019).

63. Deposition of Vincent at 34:20-23, 84:22-85:3, *NAACP v. Missouri*, No. 17AC-CC00309-01 (Mo. Cir. Ct. Cole Cnty. June 19, 2019). In addition, Secretary Ashcroft himself testified that his office would not have sufficient funds for television advertising during the February 7, 2017. *See id.*

64. *See* Transcript of Trial at 775:21-776:3, *NAACP v. Missouri*, No. 17AC-CC00309-01 (Mo. Cir. Ct. Cole Cnty. Aug. 19-23, 2019). The non-commercial sustaining announcements (“NCSAs”) the Secretary of State's office received were entirely donated, unsold airtime. *Id.* at 819:4-24.

65. *See* MO-PEP billing summaries. Over fourteen percent of all television advertising in the state—more than on any other station statewide—occurred on KBNS-CD's The Vacation Channel, a television station geared specifically to out-of-state tourists visiting Branson. Transcript of Trial at 814:17-25, *NAACP v. Missouri*, No. 17AC-CC00309-01 (Mo. Cir. Ct. Cole Cnty. Aug. 19-23, 2019).

income voters, and voters of color—voters who are statistically more likely to lack a non-expired state photo ID. And not only did the State not send written notice to registered voters, but it did not send information to the more limited list of registered voters who lacked a state-issued photo ID with the Department of Revenue, despite conducting an analysis of these voters in February 2017.⁶⁶

The messaging was confusing and misleading.

The messaging that was put out by the State itself sowed confusion. The State's messaging to voters was at once misleading and contradictory, asserting both that "the new photo ID law is in effect," leading voters to believe that a photo ID was required to vote, but also stating that "if you are registered you can vote," while not actually providing any information about their voting options if they lacked a state-issued photo ID.⁶⁷

The Secretary of State's campaign was designed to communicate three messages. The first message emphasized the photo ID provision of the law. The bulk of the State's broadcast ads focused on the message that that "the Photo ID Law is now in effect."⁶⁸ Newspaper ads similarly instructed: "When you vote, you will be asked for a Photo ID" and "The next time you head to the ballot box, you'll be asked to show a photo ID."⁶⁹ The second message advised that the Secretary of State's office could help voters obtain a photo ID, further emphasizing the photo ID provision of the law, without mentioning the non-

66. The Secretary of State's office did not send direct mailings to (i) the 137,723 registered voters who were determined through the February 2017 No Match Analysis as not having a driver's license, non-driver's license, or instruction permit; (ii) the 140,073 registered voters who were determined through the February 2017 No Match Analysis as having an expired driver's license or non-driver's license; or (iii) any of the approximately 355,007 newly registered voters. Transcript of Trial at 1141:20–1142:4, NAACP v. Missouri, No. 17AC-CC00309-01 (Mo. Cir. Ct. Cole Cnty. Aug. 19–23, 2019).

67. *Priorities USA v. State of Missouri*, 591 S.W.3d 448, 460 (Mo. banc 2020).

The advertisement promulgated by the secretary of state that the circuit court found problematic provided:

"Voters: Missouri's new Voter ID law is now in effect. When you vote, you will be asked for a photo ID. A Missouri driver or nondriver license works but there are other options, too. If you don't have a photo ID to vote, call 866-868-3245 and we can help."

As the circuit court determined, materials like this advertisement mislead individuals into believing photo identification is required to vote. This finding is supported by the record, as Respondents' political science expert, Dr. Kenneth Mayer, testified that materials that are incomplete and fail to describe all of the forms of identification permitted by section 115.427 cause voter confusion and decrease voter turnout.

Id. (emphasis and quotation marks added).

68. This message was conveyed in the Missouri Broadcasters Association advertisements, which stated that the "Photo ID law is now in effect." Transcript of Trial at 1092:16–1093:7, NAACP v. Missouri, No. 17AC-CC00309-01 (Mo. Cir. Ct. Cole Cnty. Aug. 19–23, 2019).

69. Transcript of Trial at 875:20–12, 1012:16–20, NAACP v. Missouri, No. 17AC-CC00309-01 (Mo. Cir. Ct. Cole Cnty. Aug. 19–23, 2019).

photo ID options to vote. And the third message, confusingly, then stated, “if you are registered you can vote,”⁷⁰ without explaining how. These messages continued even after the *Priorities* trial court enjoined part of the law, making clear that photo and non-photo IDs were equally acceptable to vote.⁷¹

In its preliminary injunction ruling in advance of the 2018 Midterm elections, the *Priorities USA* trial court concluded that “the content of the print advertising . . . strongly implied that a photo identification card was a required for voting.”⁷² The Missouri Supreme Court later agreed, stating, “[M]aterials like this advertisement mislead individuals into believing photo identification is required to vote.”⁷³

Even more, the State’s advertising component of the advance notice campaign ended after the November 6, 2018, midterm elections notwithstanding the fact that numerous elections were to be held in calendar year 2019. And with the 2020 presidential elections looming, voter confusion remains, with no further advertising in the works.

The harm of misinformation is real and ongoing. As the Missouri Supreme Court stated in the *Priorities* decision, “[M]aterials that are incomplete and fail to describe all of the forms of identification permitted by [the Voter ID law] cause voter confusion and decrease voter turnout.”⁷⁴

Testimony in both cases revealed that voter confusion was rampant. At trial in the *Priorities* case, Mildred Gutierrez testified that she was told she had to have a photo ID to vote when she went to cast her ballot in November 2017, despite that she brought voter ID card sent by the election authority, her expired Missouri Driver’s License, her birth certificate, social security card, and utility bill with her name and current address to the polling place.⁷⁵ She was lead to

70. Transcript of Trial at 982:11–17, *NAACP v. Missouri*, No. 17AC-CC00309-01 (Mo. Cir. Ct. Cole Cnty. Aug. 19–23, 2019).

71. While some of the ads directed voters to go to the Secretary of State’s website for further information, this is of little help to those who did not know in advance they needed further information, to those who didn’t affirmatively seek out that information, or to the approximately twenty-five percent of Missouri residents who lack regular internet access—disproportionately low income Missourians who are more likely to lack a non-expired state issued ID and need information on how to exercise their right to vote using other forms of ID. See Ian Millhiser, *Voting Rights Advocates Just Won a Small but Important Victory in Missouri*, VOX (Jan. 16, 2020), <http://www.vox.com/2020/1/16/21067110/Missouri-voter-id-supreme-court-priorities-usa-state> [<https://perma.cc/UH7B-HEL5>].

72. Amended Order and Judgment, at 5, *Priorities USA v. Missouri*, No. 18AC-CC00226 (Cir. Ct. Cole Cnty. Oct. 23, 2018). See also *id.* at 6 (“[T]he print message promulgated by the State could clearly lead voters to believe that they would be unable to cast a ballot without presenting a photo identification card.”).

73. *Priorities USA v. State of Missouri*, No. SC97470 at 19 (Mo. Jan. 14, 2020) (majority opinion).

74. *Id.*

75. See *id.* at 9; Record on Appeal, at 35:9–25, *Priorities USA v. State of Missouri*, No. SC97470 (Mo. Cir. Ct. Cole Cnty. Sept. 24, 2018).

believe that she would not be able to vote in the future without photo ID.⁷⁶ The record in that case also revealed that election officials did not understand the law's requirements.⁷⁷

During trial in the *NAACP* case, Evelyn Maddox, President of the Missouri League of Women Voters, testified to high rates of confusion amongst voters and poll workers since the law's inception.⁷⁸ She herself experienced this firsthand when she walked to the polling place about a block from her home to vote in August 2017 without any ID.⁷⁹ Despite understanding that under the new law she should have been allowed to cast a provisional ballot, she was not offered one, and neither the poll worker or site supervisor seemed to know of this option when she requested one.⁸⁰ When finally, after her insistence, she cast the provisional ballot and returned later that day with valid photo ID, which should have converted her provisional ballot to a regular ballot under the law's provisions, poll workers were unable to retrieve the provisional ballot.⁸¹ She was never able to confirm whether her ballot in that election was counted.

While voter ID law always included provisions for voters who lacked a photo ID, after the *Priorities* injunction it was abundantly clear that a photo ID could not be required to vote, nor could poll workers instruct voters that they must present a photo ID.

IV. CONFUSION CONTINUES

The *Priorities* preliminary injunction was finalized just weeks before the November 2018 midterm elections, and many people were unaware of the ruling. The State issued a statement but did not send updated materials or posters to local election officials or provide training instructions for poll workers. In fact, the Missouri Broadcast Association ads continued after the *Priorities* ruling, continuing to reinforce "the photo ID law is in effect," despite the court's ruling that poll workers could not ask voters to present a photo ID. On Election Day, November 6, 2018, reports of confusion were rampant.

76. *Priorities USA v. State of Missouri*, No. SC97470 at 9 (Mo. Jan. 14, 2020) (majority opinion); Record on Appeal, at 40:8–18, *Priorities USA v. State of Missouri*, No. SC97470 (Mo. Cir. Ct. Cole Cnty. Sept. 24, 2018).

77. *Priorities USA v. State of Missouri*, No. SC97470 at 10 (Mo. Jan. 14, 2020) (majority opinion). *Id.*

78. While serving as an Election Protection poll monitor in every general election since implementation of the Voter ID Law, plaintiff Evelyn Maddox asked voters approaching polling locations whether they knew about the new requirements of the Voter ID Law. In the course of her repeated poll monitoring, Ms. Maddox did not recall any person she confronted who understood the law. Trial Transcript, at 324:17–325:5–9, *NAACP v. Missouri*, No. 17AC-CC00309 (19th Mo. Cir. Ct.) (Maddox).

79. *Id.* at 325:15–326:8 (Maddox).

80. *Id.* at 326:9–327:16 (Maddox).

81. *Id.* at 327:13–328:5 (Maddox).

During the 2018 midterm elections, I coordinated the non-partisan statewide Election Protection efforts in Missouri. The Missouri program, part of the National Election Protection Coalition effort, included hundreds of monitors talking with voters at the polls, and attorneys at our legal command centers in St. Louis and Kansas City fielding calls into the 866-OURVOTE nonpartisan Election Protection hotline from voters across the state of Missouri. Almost immediately after the polls opened, it became clear that poll workers and voters alike were confused about the ID requirements. Voters from across the state called in to the hotline to report that poll workers were telling voters that a photo ID was required to vote.⁸² The elections director at the Secretary of State's office testified that the Secretary's office also received complaints related to misinformation on voter ID being provided to voters by poll workers.⁸³

Our Election Protection hotline volunteers in Missouri received calls from voters who were confused about the law or improperly made to sign the affidavit when presenting a non-photo ID such as a voter notification card. We immediately reached out to election officials in jurisdictions where reports occurred demanding they issue directives to poll workers clarifying the law and instructing them not to request a photo ID. Reports were statewide but were particularly pervasive throughout St. Charles County.

Among the dozens of incidents we fielded from St. Charles County during the 2018 midterm elections was an incident with one of our Election Protection volunteers in St. Charles County who experienced these problems firsthand. During the 2018 midterm elections Susan DuBois served as one of our nonpartisan election protection volunteers at her home polling place in St. Charles County.⁸⁴ Ms. DuBois testified in the *NAACP* case that she was told she must present a photo ID to vote, and that her current voter notification card sent from the election authority would not be acceptable.⁸⁵ After arguing with the poll workers, she ultimately relented. Afterwards, as a volunteer poll monitor, she encountered a number of other voters in the same boat—voters who had

82. Peggy Lowe, *Missouri Voters Report Long Lines, Broken Machines And Confusion Over Photo ID Law*, KWUR (Nov. 6, 2018), <https://www.kcur.org/post/missouri-voters-report-long-lines-broken-machines-and-confusion-over-photo-id-law#stream/0> [<https://perma.cc/4SJK-WB6E>]; Sam Levine, Samantha Storey, & Jessica Huseman, *Voters In Missouri Wrongfully Hassled For Not Having Photo ID*, HUFFINGTON POST (Nov. 6, 2018), https://www.huffpost.com/entry/missouri-photo-id-poll-workers_n_5be2398ae4b0e8438890fc1e [<https://perma.cc/EZ96-GD3W>].

83. Chrissy Peters, Elections Director for the Secretary of State's Office, testified at the *NAACP* trial to voter ID complaints received on November 8, 2018, including that voters "were being asked to or they were being required to have a photo ID." Transcript of Trial, at 1179:18–1180:2, *NAACP v. Missouri*, No. 17AC-CC00309 (2020). According to Ms. Peters, the complaints came in "within the first two hours of the [] polling locations being opened." *Id.* at 1180:5–7. *See also id.* at 1180:14–15.

84. Deposition of Susan DuBois at 86:11–16, *NAACP v. Missouri*, No. 17AC-CC00309 (Mo. Cir. Ct. Cole Cnty. July 10, 2019).

85. *Id.* at 11:8–13:6.

been incorrectly told by poll workers they must present a photo ID even when they had valid Option 2 forms of ID.⁸⁶

As calls from voters in St. Charles County mounted in the first two hours of voting that day, I assigned Jennifer Kovar, a local volunteer attorney, to serve as a point for such complaints coming from St. Charles County. She testified in deposition to documenting dozens of calls from voters in St. Charles County who reported misinformation on the forms of ID that voters were allowed to present at the polls, reflecting a widespread pattern that poll workers in St. Charles County were telling voters they could not vote without a photo ID.⁸⁷ The calls regarding misunderstanding and misapplication of the voter ID law continued throughout the day, despite our multiple calls and emails to St. Charles County Election officials, and despite a directive ultimately issued by St. Charles County Election Officials several hours after our outreach to election officials began.⁸⁸

Myself, on behalf of Advancement Project, along with Ms. Kovar and another Election Protection volunteer attorney, brought an emergency lawsuit, *Dukes v. Chrimer*, on election day against St. Charles County Election officials, asserting that the jurisdiction was in violation of the statewide injunction issued in the *Priorities USA* case prohibiting election officials from representing that photo ID was required to vote or requiring voters presenting non-photo ID to sign an affidavit.⁸⁹ Late in the day, just before the close of polls, the St. Charles County Circuit Court granted a writ of mandamus ordering the jurisdiction to comply with the law and prohibiting election officials from requiring photo ID

86. *Id.*

87. Deposition of Susan DuBois at 86:11–16, *NAACP v. Missouri*, No. 17AC-CC00309 (Mo. Cir. Ct. Cole Cnty. July 10, 2019).

88. Rebecca Rivas, *St. Charles voter sues county election director for denying right to vote – and wins*, THE ST. LOUIS AMERICAN (Nov. 6, 2018), http://www.stlamerican.com/news/local_news/st-charles-voter-sues-county-election-director-for-denying-right/article_7697ed42-e23b-11e8-a06d-afdeb5624ecb.html [<https://perma.cc/TB7K-3X5W>]. See “Emergency Memo,” Rich Chrimer (Nov. 6, 2018), Transcript of Trial at 1182:12–20, *NAACP v. Missouri*, No. 17AC-CC 00309-01 (2019). The Emergency Memo noted:

It has come to my attention that many of our Election Judges are asking voters for a photo ID. This is contrary to my final instructions to you. Please only request an ID from our voters, when they come to vote. Yes, a photo ID is *one* form of identification, however as you know we accept the pink and white registration card, a passport, a utility bill, a bank statement. All are valid IDs accepted to be able to vote. When approached by a voter only ask for an ID. ‘DO NOT ASK FOR A DRIVERS LICENSE OR PHOTO ID’. This form of ID is acceptable of course but is not exclusively required. If a voter presents a photo ID, that is their choice of ID, and go ahead and process them as you would with any form of ID.

D. Tr. Ex. 254 (emphasis in original).

89. *Dukes v. Chrimer*, No. 1811-CC01037 (11th Mo. Cir. Ct. Nov. 6, 2018).

or representing that it was required to vote.⁹⁰ While the litigation successfully resulted in the writ, it came too late to have a meaningful impact on the scores of voters that day who had been provided with misinformation or left the polls without voting.

This is precisely why the advance notice provisions are so important—and why they fail voters if they do not effectively and non-misleadingly educate voters *before* they go to the polls. These cases underscore the important role courts can play in stopping the harm of misinformation and untruths in the voting process before election day. While the *Priorities USA* remedial order prevents further dissemination of the misleading information, it does not affirmatively correct the existing misimpression—the relief that the *NAACP* Plaintiffs continue to seek before the 2020 elections. A lost vote can never be reclaimed, and history shows that the collective legacy of improperly lost votes leaves a lasting scar on democracy for generations. Misinformation is an insidious deterrent, sowing confusion and generating doubt in voters, who lose confidence in their ability to navigate the process. These cases serve as a reminder that of the role of courts as gatekeepers to the harms of misinformation.

90. Order on Emergency Writ of Mandamus, *Dukes v. Chrismer*, No. 1811-CC01037 (Mo. Cir. Ct. St. Charles Cnty. Nov. 6, 2018). *See Rivas, supra* note 88.

