

IN THE MISSOURI SUPREME COURT

No. SC98536

Missouri State Conference of the National Association
for the Advancement of Colored People, et al.,
Appellants,

v.

State of Missouri, et al.,
Respondents,

On Appeal from the Circuit Court of Cole County
Case No. 20AC-CC00169
Honorable Jon E. Beetem

Brief of Appellants

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JURISDICTIONAL STATEMENT

Article V, § 3 of the Missouri Constitution provides that this Court has exclusive jurisdiction over “the validity . . . of a statute or provision of the constitution of this state[.]”

Appellants seek review of the final order and judgment of the Circuit Court of Cole County, entered on May 18, 2020, dismissing their four-count petition for declaratory judgment and injunctive relief. They filed their notice of appeal on May 19, 2020.

This action presents two questions regarding the validity of statutes.

First, whether § 115.277,¹ which permits some voters, but not others, to vote absentee by mail, violates Article I, § 25 and Article VIII, § 2 of the Missouri Constitution during the COVID-19 pandemic. Many voters are not permitted to vote absentee by mail under one of the enumerated excuses listed in § 115.277 and must instead vote in person in contravention of prevailing public health guidance that people confine themselves and practice social distancing on Election Day to avoid spreading or contracting the virus that causes COVID-19.² Hence, this case involves the validity of a

¹ All statutory citations are to Missouri Revised Statutes (2016), as updated, unless otherwise noted.

² In Count I of the Petition, Appellants contend that when § 115.277 is correctly construed, those voters who expect to confine themselves and practice social distancing on Election Day to avoid spreading or contracting the virus that causes COVID-19 *are* permitted to vote by absentee ballot; however, the trial court rejected this interpretation by dismissing Count I with prejudice for failure to state a claim.

statute. This claim was raised in Count III of the Petition, which the trial court dismissed with prejudice for failing to state a claim.

Second, this action is one involving the question of whether statutory provisions that permit some persons who vote by mail to do so without a notary seal, but not others, violate Article I, § 25 and Article VIII, § 2 of the Missouri Constitution during the COVID-19 pandemic. Under the challenged statutes, many voters are required to secure a notary seal on their mail ballots, in contravention of prevailing public health guidance that people should confine themselves and practice social distancing to avoid spreading or contracting the virus that causes COVID-19. This case therefore involves the validity of a statute and falls within the exclusive appellate jurisdiction of the Supreme Court. This claim was raised in Count IV of the Petition, which the trial court dismissed with prejudice for failing to state a claim.

In addition, this Court has jurisdiction over this matter pursuant to Article V, § 10 of the Missouri Constitution, which permits this Court to transfer a case before opinion “because of the general interest or importance of a question involved in the case.” Because the time-sensitive questions about how Missourians may exercise their fundamental right to vote in the midst of a pandemic are of interest and important to voters, poll workers, and notaries, the exercise of jurisdiction is warranted. *Rodriguez v. Suzuki Motor Corp.*, 996 S.W.2d 47, 54 (Mo. banc 1999).

INTRODUCTION

As of May 27, 2020, the COVID-19 pandemic has claimed the lives of 99,783 Americans and 969 Missourians, while 1,691,342 Americans and 12,492 Missourians have been infected.³ With no vaccine or treatment for COVID-19 in sight, D2 pp. 15–16, social distancing measures (coupled with consistent hygiene practices and wearing a mask) are the only way to keep people safe.⁴ These social distancing measures include maintaining at least six feet of space from other people, not gathering in groups, not going to crowded places, and avoiding large gatherings of people. D2, pp. 2–3, 16, 20–22. Unfortunately, the “painful new reality is that we are constantly at risk of contracting a deadly virus and are experiencing previously unimagined safety measures to stop its spread.” *Thakker v. Doll*, 1:20-CV-480, 2020 WL 1671563, at *7 (M.D. Pa. Mar. 31, 2020).

³ Ctr. for Systems Science and Engineering, COVID-19 Dashboard, JOHNS HOPKINS UNIVERSITY, <https://bit.ly/2zbvI9d> (last visited May 27, 2020); Missouri COVID-19 Dashboard, Mo. Dep’t of Health & Senior Servs., <http://mophep.maps.arcgis.com/apps/MapSeries/index.html?appid=8e01a5d8d8bd4b4f85add006f9e14a9d> (last visited May 27, 2020).

⁴ Marc Lipsitch, Seasonality of SARS-CoV-2: Will COVID-19 go away on its own in warmer weather?, CENTER FOR COMMUNICABLE DISEASE DYNAMICS <https://bit.ly/3bHKce3>; Patrick Ercolano, *A Coronavirus Vaccine Is In The Works—But It Won’t Emerge Overnight*, JOHNS HOPKINS UNIVERSITY (APRIL 16, 2020) <https://bit.ly/3bHKi5p>; John Wagner, Mike DeBonis, Yasmeen Abutaleb and, Laurie McGinley, *Fauci warns Senate that reopening U.S. too quickly could lead to avoidable ‘suffering and death’*, WASH. POST (May 12, 2020), <https://wapo.st/2Zrg84b>; Lisa Lockerd Maragakis, *Coronavirus, Social and Physical Distancing and Self-Quarantine*, JOHN HOPKINS MEDICINE, <https://bit.ly/2TgLqqm>; Ctrs. for Disease Control & Prevention, *How to Protect yourself and Others* <https://bit.ly/3bJmy0X> (last visited May 18, 2020).

To limit the spread of COVID-19, the Centers for Disease Control and Prevention (the “CDC”) has recommended that state officials “[e]ncourage mail in voting.”⁵ D2 pp. 3, 17–18. This advice, echoed by numerous health officials, has led numerous states to expand their eligibility requirements for voting by mail, D2 pp. 3–4, and has also led courts to suspend mail ballot requirements that force voters to risk their health, such as requirements that mail ballots be signed by a witness.

Respondents ignore this guidance and instead claim that Missouri law, as it currently stands, should be interpreted to permit only voters who can show that they are infected with the virus responsible for COVID-19 the opportunity to vote by mail without having to physically appear before a notary public to have the ballot notarized. According to Respondents, uninfected or undiagnosed voters who expect to confine themselves on Election Day to avoid contracting or spreading the virus that causes the COVID-19 illness are not included in this group. Respondents would force these voters to face the impossible dilemma of jeopardizing their health and the health of others; voting by mail and foregoing the notary requirement with the risk that their vote will not be counted or that they will face a felony prosecution, or both; or foregoing their fundamental right to vote entirely. This choice is particularly untenable for voters like Kamisha D. Webb, who face their own severe health issues, D2 pp. 8–9; or voters like Cecil E. Wattree and Javier

⁵ Ctrs. for Disease Control & Prevention, Recommendations for Election Polling Locations, <https://bit.ly/3dTzN0v> (last updated March 27, 2020).

A. Del Villar, who live with loved ones who are at a higher risk for complications and possible death should they contract COVID-19, D2 p. 9.

Respondents' stance is contrary to Missouri law and, if correct, would place a severe burden on Missourians' fundamental right to vote in violation of the Missouri Constitution. Unless the Court enters judgment in favor of Appellants pursuant to Rule 84.14,⁶ they and an untold number of voters in a similar position will reasonably choose to stay at home on Election Day to protect their health and the health of their families and communities. Forcing them into this Hobson's choice means they will be disenfranchised in violation of Article I, § 25 and Article VIII, § 2 of the Missouri Constitution.

FACTUAL BACKGROUND AND PROCEDURAL HISTORY

A. Factual Background

The United States is the epicenter of the global COVID-19 pandemic and has far more confirmed COVID-19 cases than any other nation.⁷ D2 p. 2. It has disrupted daily life in the United States and in Missouri on an extraordinary scale. *See* D2 pp. 2–3, 20–

⁶ “Reliance on Rule 84.14 is particularly appropriate for judgments where the salient facts are not in dispute, but the only dispute is the legal significance of the facts.” *Am. Civil Liberties Union of Mo. v. Ashcroft*, 577 S.W.3d 881, 899 (Mo. App. W.D. 2019) (quotation and citation omitted). Here the circumstances of the pandemic are ubiquitous and well-known, so this Court should apply the law to the present circumstances. If this Court believes further fact-finding is necessary, then remand should be accompanied by an order granting interim relief because there is too little time to conduct a trial in the COVID-19-burdened circuit court and allow the unsuccessful party to mount a new appeal to this Court. In the alternative, this Court should appoint a special master to promptly gather and report any factual information this Court needs to resolve this question of law. *See* Rule 68.03.

⁷ *See* Ctr. for Systems Science and Engineering, COVID-19 Dashboard, JOHNS (continued...)

22.

The novel coronavirus that causes COVID-19 is highly contagious. *Id.* It spreads mainly from person-to-person through close contact with one another and through respiratory droplets when, for example, an infected person coughs or sneezes.⁸ *Id.* According to the CDC, the virus may be detectable in a person's upper and lower respiratory tract for weeks after illness onset. D2 p. 14. Recent studies, moreover, indicate that people infected with the virus may transmit it to others even without showing symptoms themselves, either because they are asymptomatic or pre-symptomatic.⁹ *Id.* Further, even those who develop an immune response to the virus after an infection are not necessarily safe from reinfection. D2 p. 17. There is no cure, vaccine or herd immunity. *Id.* Without a vaccine, treatment, or herd immunity, the virus that causes COVID-19 will remain in circulation and individuals will remain at risk of infection, particularly in large or small public gatherings. D2 pp. 15–16.

COVID-19 can cause severe consequences, including long-term impairment and death. D2 p. 15. It can severely damage lung tissue, cause a permanent loss of respiratory capacity, and also damage tissues in the kidney, heart, and liver.¹⁰ D2 pp. 13–14. The

HOPKINS UNIVERSITY.

⁸ Ctrs. for Disease Control and Prevention, *How COVID-19 Spreads*.

⁹ Ctrs. for Disease Control and Prevention, *How COVID-19 Spreads*, <https://bit.ly/3cKKO3Z> (last visited May 27, 2020).

¹⁰ *Interim Clinical Guidance for Management of Patients with Confirmed Coronavirus Disease (COVID-19)*, Ctrs for Disease Control and Prevention, <https://www.cdc.gov/coronavirus/2019-ncov/hcp/clinical-guidance-management-> (continued...)

World Health Organization (“WHO”) estimates that approximately 20 percent of those infected with the COVID-19 virus require hospitalization.¹¹ *Id.* COVID-19 is far deadlier than the seasonal flu, including in countries with advanced health care systems.¹² D2 p. 14.

The COVID-19 virus threatens to infect any individual no matter their age. D2 p. 15. Members of all age groups have contracted and died from the disease.¹³ *Id.* However, some individuals are at higher risk of complications from COVID-19 and are thus at a higher risk for severe illness or death. *Id.* Groups that are particularly vulnerable to severe symptoms include: people 65 years and older, people who live in a nursing home or long-term care facility, and people (of all ages) with an underlying medical condition. *Id.* Some of the identified underlying medical conditions that can lead to severe illness from COVID-19 are: chronic lung disease, moderate to severe asthma, heart conditions, being immunocompromised (e.g., cancer treatment, smoking, bone marrow or organ transplantation, immune deficiencies, poorly controlled HIV or AIDS, prolonged use of

patients.html.

¹¹ World Health Organization, Q&A on Coronaviruses (COVID-19), *Should I Worry About COVID-19?*, <https://bit.ly/3fZ3KOz> (last visited May 18, 2020).

¹² Betsy McKay, *Coronavirus vs. Flu Which Virus is Deadlier*, Wall St. J. (Mar. 10, 2020, 12:49 PM), <https://www.wsj.com/articles/coronavirus-vs-flu-which-virus-is-deadlier-11583856879>; *see also* *Castillo v. Barr*, No. 20-00605, 2020 WL 1502864, at *2 (C.D. Cal. Mar. 27, 2020) (“COVID-19 is highly contagious and has a mortality rate ten times higher than influenza.”).

¹³ Ctrs. for Disease Control & Prevention, *Weekly Updates by Select Demographic and Geographic Characteristics*, <https://bit.ly/2yZXqWw> (last visited May 21, 2020).

corticosteroids and other immune weakening medications), severe obesity, diabetes, chronic kidney disease/dialysis, and liver disease.¹⁴ *Id.*

Public Health Guidance Regarding COVID-19

With no known effective treatment and vaccines likely at least a year away,¹⁵ D2 pp. 15–16, public health officials have explained that social distancing measures, including maintaining at least six feet of space between people, staying home as much as possible, and avoiding crowded places (as well as consistent hygiene practices and wearing a mask) are the only known effective measures for protecting against transmission of the COVID-19 virus.¹⁶ *See* D2 pp. 2–3, 15–16. Based on these virtually unanimous recommendations from public health experts, government agencies and officials at all levels have imposed social distancing measures and similar guidance in order to “flatten the curve” of the COVID-19 outbreak. D2 pp. 15–18.

While these measures may slow the spread of the virus, they will not end the pandemic. *See* D2 p. 16. No vaccine currently exists and, will likely not for at least

¹⁴ Ctrs for Disease Control and Prevention, Coronavirus Disease 2019 (COVID-19), *Information for People who are at Higher Risk for Severe Illness*, <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/groups-at-higher-risk.html>.

¹⁵ Ercolano, *A Coronavirus Vaccine Is In The Works—But It Won’t Emerge Overnight*.

¹⁶ Maragakis, *Coronavirus, Social and Physical Distancing and Self-Quarantine*; Ctrs. for Disease Control & Prevention, *Use of Cloth Face Coverings to Help Slow the Spread of COVID-19*, <https://bit.ly/2LHmcgs> (last visited May 18, 2020); Ctr for Disease Control, *Interim Guidance for Coronavirus Disease 2019 (COVID-19)*, (March 15, 2020), [https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-\(continued...\)](https://www.cdc.gov/coronavirus/2019-ncov/community/large-events/mass-(continued...))

another 12–18 months—well into 2021—at least for the public at large. D2 pp. 15–16. COVID-19 will remain a health risk through the rest of 2020. *See id.*

Voting During the COVID-19 Pandemic

The medical risks of widespread in-person voting during a pandemic are increasingly clear. *See* D2 pp. 18–19. In Florida, which conducted in-person voting in March, multiple poll workers contracted COVID-19.¹⁷ *Id.* In Chicago, officials reported that a poll worker for the city’s March 17 election died of COVID-19, prompting officials to send letters notifying voters, poll workers, field investigators, and cartage companies who were present at the same polling site.¹⁸ *Id.* And elections held on April 7 in Wisconsin saw multi-hour waits and long lines of voters stretching blocks upon blocks in places like Milwaukee and Green Bay.¹⁹ *Id.*

gatherings-ready-for-covid-19.html.

¹⁷ David Smiley & Bianca Padra Ocasio, *Florida Held Its Primary Despite Coronavirus. Two Broward Poll Workers Tested Positive*, MiamiHerald.com (Mar. 26, 2020), <https://www.miamiherald.com/news/politics-government/article241539451.html>.

¹⁸ *See* Mary Ann Ahern, *Poll Worker at Chicago Voting Site Dies of Coronavirus, Election Officials Say*, 5 Chicago (Apr. 13, 2020), <https://www.nbcchicago.com/news/local/chicagopolitics/poll-worker-at-chicago-voting-site-dies-of-coronavirus-election-officials-say/2255072/>.

¹⁹ Kati Anderson, *Green Bay Voters Wait in Line Past Midnight to Cast Ballot in Primary Election*, WBAY-TV (Apr. 7, 2020), <https://bit.ly/369FVIt>. By April 29, health officials in Wisconsin had identified more than fifty-two people “who voted in person or worked the polls during the state’s presidential primary” who “tested positive [for COVID-19] in the two weeks after the election.” Scott Bauer, *52 Who Worked or Voted in Wisconsin Election Have COVID-19*, WUWM (Apr. 29, 2020), <https://bit.ly/3bHdBoI>. On May 5, the Milwaukee County COVID-19 Epidemiology Intel Team issued a report stating they were able to identify fifty-four county residents who had voted curbside, voted in-person, or who had worked at a polling site during the (continued...)

Recognizing the health risks posed by the COVID-19 outbreak to voters (and the public) if large numbers of voters must appear in person to vote at polling locations in order to cast a ballot, the CDC issued interim guidance concerning Election Polling Locations. D2 pp. 16–17. As part of that guidance, the CDC recommends “[e]ncourag[ing] voters to use voting methods that minimize direct contact with other people and reduce crowd size at polling stations.” *Id.* The first voting method the CDC endorses to minimize such direct contact is “encourag[ing] mail-in methods of voting.”²⁰ *Id.* This is because there is no evidence that the virus that causes COVID-19 can be spread through the mail, and the U.S. Postal Service has both changed their policies to “eliminate the requirement that customers sign . . . Mobile Delivery Devices for delivery” and asked that customers “step back a safe distance or close the screen door/door so that [postal workers] may leave the item in the mail receptacle or appropriate location by the customer[‘s] door.”²¹ D2 p. 18.

April 7 primary election who “ha[d] symptom onset or lab report confirmation dates indicating that they could have been infectious or infected at the time of voting.” Milwaukee County COVID-19 Epidemiology Intel Team, *Descriptive Analysis of COVID-19 Infections in Milwaukee County after the Wisconsin Election and Easter/Passover Holidays*, 4 (May 5, 2020), <https://bit.ly/2Zf2IYQ>. And of those individuals, twenty-nine “did not have any other known potential exposures to COVID-19.” *Id.* at 5. The report also cautioned that “[d]ue to limitations in testing and asymptomatic cases, it is likely that there are individuals with COVID-19 who participated in the election and are not reflected in the numbers presented here.” *Id.* at 4.

²⁰ Ctrs. for Disease Control & Prevention, Recommendations for Election Polling Locations.

²¹ U.S. Postal Service, USPS Statement on Coronavirus (April 30, 2020), <https://bit.ly/2ZeLJWt> (citing guidance from World Health Organization, CDC, and (continued...))

The majority of states do not require an excuse to vote by mail. D2 p. 23. In accordance with the CDC’s guidance, several of the minority of states that do require an excuse as Missouri does, including Alabama, Arkansas, Delaware, Massachusetts, New Hampshire, Virginia, and West Virginia, have interpreted their “disability or illness” basis for absentee voting eligibility to cover all voters during this ongoing pandemic, at least for elections taking place over the next several months.²² See D2 p. 4; D13 pp. 2–3.

The Effect and Consequences of COVID-19 in Missouri

The COVID-19 pandemic has deeply affected the Show Me State. On March 13, 2020, Governor Parson declared that a state of emergency exists in Missouri. D2 p. 20; D3; App. 018. Governor Parson subsequently issued a statewide stay-at-home order on April 6, which was in full effect until May 3, 2020.²³ D2 p. 21; D5, D6. On April 24,

Surgeon General).

²² See Press Release, Alabama Secretary of State, *100 Days Left to Apply for Absentee Ballot for the Primary Runoff Election* (Mar. 31, 2020), <https://www.sos.alabama.gov/newsroom/100-days-left-apply-absentee-ballot-primary-runoff-election>; Governor of Arkansas, Exec. Order No. 20-08, (Mar. 20, 2020), <https://bit.ly/2TheWwc>; Governor of Delaware, Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat (Mar. 24, 2020), <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Sixth-Modification-to-State-of-Emergency-03242020.pdf>; S.B. 2608, An Act Granting Authority to Postpone 2020 Municipal Elections in the Commonwealth and Increase Voting Option in Response to the Declaration of Emergency to Respond to COVID-19, chap. 45 (Ma. 2020), <https://malegislature.gov/Bills/191/S2608>; Memorandum, State of New Hampshire, *Election Operations During the State of Emergency* (Apr. 10, 2020), https://www.nhpr.org/sites/nhpr/files/202004/covid-19_elections_guidance.pdf; *Absentee Voting*, Va. Dep’t of Elections, <https://bit.ly/3dU4YbW> (last visited May 18, 2020); W. Va. Code R. §§ 153-53-1–153-53-3.

²³ Press Release, Missouri Governor Michael L. Parson, *Governor Parson Extends* (continued...)

2020, Governor Parson extended the state of emergency until June 15, 2020. App. 021. He postponed the municipal elections previously scheduled from April 7 to June 2, D2 pp. 20–21; D4; App. 019–020, on the ground that “postponing Missouri’s municipal elections is a necessary step to help combat the spread of the virus and protect the health and safety of Missouri voters,”²⁴ D2 pp. 20–21. He closed the schools.²⁵ D2 pp. 2–3, 22. Many counties and municipalities issued their own stay-at-home orders,²⁶ and the stay-at-home orders for St. Louis City and St. Louis County have been extended indefinitely.²⁷ D2 p. 22.

Statewide “Stay Home Missouri” Order Through May 3, Announces Initial COVID-19 Recovery Plan (Apr. 16, 2020), <https://governor.mo.gov/press-releases/archive/governor-parson-extends-statewide-stay-home-missouri-order-through-may-3>.

²⁴ Press Release, Missouri Secretary of State John R. Ashcroft, *Parson, Ashcroft Announce April 7 Municipal Elections Postponed Until June 2 in Response to COVID-19* (March 18, 2020), <https://www.sos.mo.gov/Parson-Ashcroft-Announce-April-7-Municipal-Elections-Postponed-Until-June-2-Response-COVID-19>.

²⁵ Press Release, Missouri Governor Michael L. Parson, *Governor Parson Orders Schools Remain Closed for Remainder of Academic Year, Emphasizes State’s Aggressive Action to Combat COVID-19 Are Working* (Apr. 9, 2020), <https://governor.mo.gov/press-releases/archive/governor-parson-orders-schools-remain-closed-remainder-academic-year>.

²⁶ Summer Ballantine & Margaret Stafford, *Smaller Missouri Communities Issuing Stay-at-Home Orders*, Associated Press (Apr. 2, 2020), <https://apnews.com/96e7f48ea53544e48acd2137d39947f2>.

²⁷ Jeremy Kohler, *Stay at Home, St. Louis: Page, Krewson Extend Their Orders*, St. Louis Today (Apr. 17, 2020), https://www.stltoday.com/news/local/metro/stay-at-home-st-louis-page-krewson-extend-their-orders/article_011d0294-d6f6-5308-979c-635ed00f50ff.html.

As of May 27, 2020, the State had over 12,492 reported cases and 696 deaths related to the COVID-19 virus.²⁸ But testing capacity in Missouri, as is the case nationally, remains limited, especially outside major metropolitan areas. D2 pp. 22–23. In Missouri, testing is largely available only to individuals who are already symptomatic, even though asymptomatic individuals can spread the virus. D2 pp. 14, 22–23. As has been the case nationally, Missourians of all ages have tested positive for COVID-19.²⁹ D2 pp. 2, 15. The pandemic has had a particularly devastating impact on African American communities in Missouri. As of May 27, 2020, although African Americans comprise just 12% of the population of Missouri, they account for more than a third of COVID-19 cases for which demographic data was reported and nearly 37 percent of COVID-19 related deaths.³⁰ See D2 pp. 16, 20.

Missouri's Upcoming Elections

The primary election is August 4, 2020. Local election authorities begin sending out absentee ballots on June 23. The last day to request an absentee ballot by mail is July 22. The general election is November 3. Local election authorities begin sending out absentee ballots on September 22. The last day to request an absentee ballot by mail is October 21.

²⁸ Missouri COVID-19 Dashboard, Mo. Dep't of Health & Senior Servs. For reference, on April 17, 2020, when this case was filed, there had been 152 deaths and a week before that only 77. D2 p. 2.

²⁹ Missouri COVID-19 Dashboard, Mo. Dep't of Health & Senior Servs.

³⁰ *Id.*

Voting by Mail in Missouri

Missouri law allows for limited absentee voting by mail. § 115.658. Registered voters may request and submit an absentee ballot “if such voter expects to be prevented from going to the polls to vote on election day due to” one of the following six enumerated circumstances:

- (1) Absence on election day from the jurisdiction of the election authority in which such voter is registered to vote;
- (2) Incapacity or confinement due to illness or physical disability, including a person who is primarily responsible for the physical care of a person who is incapacitated or confined due to illness or disability;
- (3) Religious belief or practice;
- (4) Employment as an election authority, as a member of an election authority, or by an election authority at a location other than such voter’s polling place;
- (5) Incarceration, provided all qualifications for voting are retained;
- (6) Certified participation in the address confidentiality program established under sections 589.660 to 589.681 because of safety concerns.

§ 115.277.1 (1)–(6).

While some ballots that are cast by mail must be notarized, absentee ballots cast pursuant to § 115.277.1(2) are not required to have a notary seal. § 115.283.7. However, making a false statement on the absentee ballot envelope, where voters indicate the basis of their eligibility to vote absentee, is a Class One election offense, a felony connected with the right of suffrage, with penalties including fine, potential jail time, and permanent loss of the right to vote. *See* §§ 115.304, § 115.133.2(3), 115.631.

Secretary of State John Ashcroft has not issued rules or provided guidance to local election authorities on whether confining oneself at home to avoid contracting or spreading the COVID-19 virus constitutes a valid excuse to cast an absentee ballot by mail under § 115.277.1(2). D2 pp. 5, 24. In the absence of authoritative determination, interpretation, and application of § 115.277.1(2), each of Missouri’s 116 local election authorities is left to decide whether § 115.277.1(2) permits voters to cast an absentee ballot by mail so that they may confine themselves to avoid and prevent COVID-19 infection at their polling places. D2 pp. 24–25. There is no agreement or consensus amongst Missouri’s 116 local election authorities as to whether a person can cast an absentee ballot under § 115.277.1(2) to avoid contracting or spreading the COVID-19 virus. D2 pp. 24–25. Thus, the application of § 115.277.1(2) varies from one election jurisdiction to another.³¹

B. Procedural History

On April 17, 2020, Missouri State Conference of the National Association for the Advancement of Colored People (“MO NAACP”), League of Women Voters of Missouri (“the League”), and three Missouri registered voters, Webb, Wattree, and Del Villar, filed a four-count petition for injunctive and declaratory relief in the Circuit Court of Cole

³¹ For instance, the director of the Jackson County Election Board has stated that “fear of contracting or spreading the COVID-19 virus is not a legal reason to vote absentee in Missouri.” D2 p. 25. On the other hand, the director of the St. Louis County Board of Election Commissioners has indicated that “[i]f a voter expects to be prevented from going to polls because of this virus then that probably qualifies them for absentee voting” under § 115.277.1(2). D2 p. 25.

County against State of Missouri, Ashcroft, and local officials. D2. Under Count I, they asserted that § 115.277(2) permits registered voters in Missouri who expect to confine themselves to avoid contracting or spreading COVID-19 to vote absentee without a notary seal. D2 pp. 29–31. Under Count II, they alleged that, because Ashcroft refused to provide guidance to local election authorities and because local election authorities in different counties publicly announced different interpretations of § 115.277(2) with regard to those who want to vote absentee to avoid contracting or spreading COVID-19, these differing policies violates the Equal Protection Clause of the Missouri Constitution.³² D2 pp. 31–32. Under Count III, they maintained that during the COVID-19 pandemic, if the statute excludes voters who expect to confine themselves to avoid spreading or contracting COVID-19 from casting an absentee ballot by mail, that violates the Right to Vote under the Missouri Constitution. D2 pp. 32–33. Under Count IV, Plaintiffs submitted that during the COVID-19 pandemic the statutory requirement that voters must obtain a notary seal to vote by mail violates the Right to Vote under the Missouri Constitution. D2 pp. 33–34.³³

³² In the case *sub judice* certain Respondents urged dismissal of Count II on the basis that local election authorities have discretion to decide whether § 115.277(2) allows those voters confining themselves to avoid spreading or contracting the virus responsible for COVID-19. This Court’s determination of the proper construction and application of § 115.277(2) and the constitutional questions raised here will eliminate the disagreement among local election authorities. It is therefore unnecessary for this Court to address the propriety of the dismissal of Count II.

³³ Appellants filed their Petition as a putative bilateral class action and had moved for certification. This was necessary because the State has occasionally asserted it maintains sovereign immunity against suit for prospective relief to enforce state law. *See* (continued...)

On May 18, 2020, after some Respondents moved for dismissal, the Circuit Court dismissed with prejudice. D17; App. 001–017. The notice of appeal was filed the next day. D21.

Church v. Missouri, 913 F.3d 736 (8th Cir. 2019). Because the State did not assert immunity here, class certification is not needed.

POINTS RELIED ON

Point I: The trial court erred in dismissing Count I for failure to state a claim for declaratory and injunctive relief because Appellants sufficiently alleged that eligible Missouri voters—including the named Plaintiffs and members of the Appellant organizations—who are self-quarantining due to COVID-19 are able to vote absentee pursuant to § 115.277.1(2) because they expect to be prevented from voting in person because of “[i]capacity or confinement due to illness,” in that a limitation should not be read into the statute that would require a voter to have tested positive for COVID-19 where Appellants expect to confine themselves to avoid spreading or contracting the virus and doing so is objectively reasonable.

- § 115.277, RSMo
- § 115.283, RSMo
- *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660 (Mo. banc 2010)

Point II: The trial court erred in dismissing Count III for failure to state a claim for declaratory and injunctive relief because Appellants sufficiently alleged that, under the current circumstances related to COVID-19, the statutes impermissibly excluding voters who seek to confine themselves to avoid contracting or spreading the COVID-19 from voting absentee burdens the fundamental right to vote guaranteed by Article I, § 25 and Article VIII, § 2 of the Missouri Constitution by forcing voters to risk their and their community’s health and potential criminal liability in order to exercise their right to vote,

in that Count III incorporated all previous allegations, including those related to COVID-19, and therefore sufficiently pleaded a claim that denying Missourians the right to vote absentee during this pandemic gravely threatens their ability to access their fundamental right to vote.

- Mo. Const. art. I, sec. 25
- Mo. Const. art. VIII, sec. 2
- *Weinschenk v. State*, 203 S.W.3d 201 (Mo. banc 2006)
- *St. Louis County Board of Election Commissioners v. McShane*, 492 S.W.3d 177 (Mo. App. E.D. 2016)

Point III: The trial court erred in dismissing Count IV for failure to state a claim for declaratory and injunctive relief because Appellants sufficiently alleged that the statutes that require notarization of absentee ballots during the COVID-19 pandemic present an unconstitutional burden on the fundamental right to vote as guaranteed by Article I, § 25 and Article VIII, § 2 of the Missouri Constitution, in that, the novel COVID-19 virus is easily spread person-to-person, can cause serious illness and death, and has resulted in guidance from public health officials to take precautions that include social distancing.

- Mo. Const. art. I, sec. 25
- Mo. Const. art. VIII, sec. 2
- *Weinschenk v. State*, 203 S.W.3d 201 (Mo. banc 2006)

- *League of Women Voters of Virginia v. Virginia State Board of Elections*, No. 6:20-CV-00024, 2020 WL 2158249 (W.D. Va. May 5, 2020)

Point IV: The trial court erred in finding that Missouri State Conference of the NAACP and League of Women Voters of Missouri lack standing because both organizations sufficiently pleaded associational standing, in that they are membership organizations comprised at least in part of eligible voters who wish to vote by mail without a notary because they expect to confine themselves on Election Day to avoid contracting or spreading COVID-19 and promoting safe voting is germane to the purpose of both organizations; and organizational standing, in that both organizations have been and will continue to shift resources to provide assistance to and educate their members on the specific issue of absentee voting during the COVID-19 pandemic.

- *Missouri Outdoor Advertising Association v. Missouri State Highways & Transportation Commission*, 826 S.W.2d 342 (Mo. banc 1992)
- *Eastern Missouri Coalition of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield*, 386 S.W.3d 755 (Mo. banc 2012)
- *Home Builders Association of Greater St. Louis, Inc. v. City of Wildwood*, 32 S.W.3d 612 (Mo. App. E.D. 2000)
- *National Federation of the Blind of Missouri v. Cross*, 184 F.3d 973 (8th Cir. 1999)

Point V: Recently passed legislation providing a new basis for voting absentee for voters who have or are “at risk” of COVID-19 and providing a new system of mail voting for others voters does not moot Appellants’ claims because the legislation does not provide Appellants the full relief they seek, in that the new legislation (i) does not address, alter, or clarify the scope of § 115.277.1(2) during this pandemic; (ii) does not address whether voters who expect to confine themselves to avoid spreading or contracting the virus can cast an absentee ballot pursuant to § 115.227.1(2); (iii) requires voters who use the new mail-in voting provisions to vote to have their ballots notarized—a ballot requirement that impermissibly infringes on the right to vote during this pandemic, and (iv) as of the filing of this brief, has not been signed into law and is not currently in effect.

- § 115.277, RSMo
- § 115.283, RSMo
- *Kennedy Building Associates. v. Viacom, Inc.*, 375 F.3d 731 (8th Cir. 2004)

ARGUMENT

Standard of Review and Preservation of Error³⁴

The trial court entered judgment in this matter based on certain Respondents' motion to dismiss. A timely notice of appeal was filed thereby preserving all alleged errors raised below for review. "The standard of review for a trial court's grant of a motion to dismiss is *de novo*." *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008), *as modified on denial of reh'g*, (Aug. 26, 2008).

Appellants challenge the as-applied constitutional validity of § 115.277.1. "The constitutional validity of a statute is a question of law, which this Court reviews *de novo*." *Willbanks v. Dep't of Corr.*, 522 S.W.3d 238, 241 (Mo. banc 2017).

³⁴ The standard of review and preservation of error in this appeal is identical for each Point Relied On and is therefore not repeated below each point.

Point I: The trial court erred in dismissing Count I for failure to state a claim for declaratory and injunctive relief because Appellants sufficiently alleged that eligible Missouri voters—including the named Plaintiffs and members of the Appellant organizations—who are self-quarantining due to COVID-19 are able to vote absentee pursuant to § 115.277.1(2) because they expect to be prevented from voting in person because of “[i]ncapacity or confinement due to illness,” in that a limitation should not be read into the statute that would require a voter to have tested positive for COVID-19 where Appellants expect to confine themselves to avoid spreading or contracting the virus and doing so is objectively reasonable.

Section 115.277.1 (2) permits absentee voting without notarization for any voter who “expects to be prevented from going to the polls to vote on election day due to . . . [i]ncapacity or confinement due to illness or physical disability, including a person who is primarily responsible for the physical care of a person who is incapacitated or confined due to illness or disability.” Appellants are confining themselves as much as possible to avoid spreading or contracting the novel virus that causes COVID-19, and they expect to be doing so even as this elections approach. The ordinary and expected meaning of the words used in § 115.277.1(2) applies to Appellants. Voters who apply for absentee ballots on the ground that they are self-quarantining due to COVID-19 are experiencing “[i]ncapacity or confinement due to illness,” and they can reasonably assert that they “expect” to be so confined during upcoming elections. *Id.* This is especially true for voters that are particularly vulnerable to COVID-19.

This interpretation of § 115.277.1(2) is not novel. Other states have interpreted their “illness or disability” statutory basis for absentee-voting eligibility to apply broadly

during the ongoing COVID-19 pandemic.³⁵ New Hampshire, for instance, allows absentee voting by “[a]ny person . . . who is unable to vote there in person by reason of physical disability[.]” N.H. Rev. Stat. Ann. § 657:1. The state has determined this applies to “any circumstance where the voter is under medical advice – whether it is individualized advice or general advice to the public – to avoid being in places like a polling place,” and “[i]n light of the current public health advisories related to COVID-19, any voter who in the voter’s judgment is being advised by medical authorities to avoid going out in public, or to self-quarantine, would qualify to vote by absentee ballot.”³⁶ Alabama has instructed voters that:

any qualified voter who determines it is impossible or unreasonable to vote at their polling place shall be eligible to check the box on the absentee ballot application that is most applicable to that individual. In the case none of the boxes are appropriate, voters can check the box which reads as follows: “I have a physical illness or infirmity which prevents my attendance at the polls.”³⁷

In Delaware and Massachusetts—unlike in Missouri—the state *constitutions* limit who may vote by absentee ballot. Delaware’s constitution permits absentee voting by a

³⁵ So too have several jurisdictions in Missouri. For example, the director of the St. Louis County Board of Election Commissioners has indicated that “[i]f a voter expects to be prevented from going to polls because of this virus then that probably qualifies them for absentee voting” under § 115.277.1(2). D2 p. 25.

³⁶ Memorandum, State of New Hampshire, *Election Operations During the State of Emergency*.

³⁷ Press Release, Alabama Secretary of State, 100 Days Left to Apply for Absentee Ballot for the Primary Runoff Election (Mar. 31, 2020), <https://www.sos.alabama.gov/newsroom/100-days-left-apply-absentee-ballot-primary-runoff-election>

voter “who shall be unable to appear to cast his or her ballot at any general election at the regular polling place of the election district in which he or she is registered . . . because of his or her sickness or physical disability,” DE CONST, Art. 5, § 4A. Delaware has interpreted this provision to:

apply to and include any such voter who is asymptomatic of COVID-19 infection and otherwise abiding by CDC and DPH guidelines by exercising self-quarantine or social distancing to avoid potential exposure to (and community spread of) COVID-19, and who herself or himself freely chooses to use such qualification to vote by absentee ballot.³⁸

Massachusetts’ constitution allows absentee voting by those “unable by reason of physical disability to cast their votes in person at the polling places.” Mass. Const. Amend. Art. 45. Yet in Massachusetts,

any person taking precaution related to COVID-19 in response to a declared state of emergency or from guidance from a medical professional, local or state health official, or any civil authority shall be deemed to be unable by reason of physical disability to cast their vote in person at a polling location.³⁹

Arkansas, West Virginia, and Virginia have also interpreted their “illness or disability” statutory basis for absentee-voting eligibility to apply broadly during the ongoing COVID-19 pandemic.⁴⁰

³⁸ Governor of Delaware, Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat .

³⁹ S.B. 2608, (Ma. 2020)

⁴⁰ Governor of Arkansas, Exec. Order No. 20-08; *Absentee Voting*, Va. Dep’t of Elections, ; W. Va. Code R. §§ 153-53-1–153-53-3. In addition to this administrative clarification that was triggered by the ongoing pandemic, the Virginia General Assembly amended Virginia’s election laws to permanently allow for no-excuse absentee voting (continued...)

This Court should reject Respondents' invitation to take a different path. Respondents urge this Court to interpret § 115.277.1(2) to mean that voters may cast absentee ballots only when they are subject to "incapacity or confinement due to actual illness of themselves or those in their direct care." D11 p. 3. But the phrase "actual illness of themselves or those in their direct care" appears nowhere in the statute, and this Court cannot write it in. *See, e.g., Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 668 (Mo. banc 2010). Had the legislature intended to limit § 115.277.1(2) to the voters' own illness or those in their direct care, it could have easily done so. *Compare with* Conn. Stat. § 9-135(a) (providing that a person may vote absentee for one of six reasons, including "if he or she is unable to appear at his or her polling place during the hours of voting" because of "his or her illness" or "his or her physical disability").⁴¹ The legislature has elected not to do so.

Respondents' cramped interpretation of § 115.277.1(2) ignores the current reality: given the lengthy asymptomatic period during which individuals have (and can spread) the virus causing COVID-19 without knowing it, most Missourians will have to decide

starting with the November 2020 general election. 2020 Virginia Laws Ch. 1149 (H.B. 1).

⁴¹ Despite its more restrictive statute, voters in Connecticut will not have to make the choice between health and voting that Respondents want Missouri voters to make. *See* Governor of Conn., Exec. Order No. 7QQ (May 20, 2020), <https://portal.ct.gov/-/media/Office-of-the-Governor/Executive-Orders/Lamont-Executive-Orders/Executive-Order-No-7QQ.pdf> ("a person shall be permitted to lawfully state he or she is unable to appear at a polling place because of COVID-19 if, at the time he or she applies for or casts an absentee ballot for the August 11, 2020 primary election, there is no federally approved and widely available vaccine for prevention of COVID-19.").

whether to head to the polls without knowing whether they (or those with whom they come in contact with) are contagious.⁴² This is precisely the type of situation the CDC and other public health officials instruct us to avoid if possible. It is the reason that conscientious Missourians are canceling gatherings of ten people or more and practicing social distancing in smaller gatherings. Polling places should be avoided, if possible, and doing so is possible if § 115.277.1(2) is properly interpreted.

Appellants' interpretation is entirely consistent with the legislative purpose behind § 115.277.1(2). The legislature anticipated that voters might expect to confine themselves, rather than vote in person, because of illness. The legislature also reasonably concluded that a subset of voters ought not venture out to obtain a notary seal on the ballot, § 115.283.7, because doing so would defeat the purpose of allowing people to confine themselves. The statute is intended to protect poll workers, notaries, voters, and all of those with whom they live from contracting illness by coming into contact with contagious individuals. COVID-19 is a respiratory disease that spreads easily from person to person and may result in serious illness or death; it is possible to transmit COVID-19 even before a person shows symptoms and through aerosol transmission. Section 115.277.1(2) should be interpreted according to its plain language and original intent to apply to those voters who expect to confine themselves to avoid spreading or

⁴² Respondents admit "that a person who has Covid-19 and fears 'spreading' the illness is 'confined due to illness' within the meaning of the statute." D11 p. 3 n.1. They neglect to account for a unique attribute of COVID-19: individuals can contract the virus and spread it to others without experiencing symptoms for up to two weeks. They also (continued...)

contracting the virus that causes COVID-19.

ignore the limited availability of testing, especially outside major metropolitan areas.

Point II: The trial court erred in dismissing Count III for failure to state a claim for declaratory and injunctive relief because Appellants sufficiently alleged that, under the current circumstances related to COVID-19, the statutes impermissibly excluding voters who seek to confine themselves to avoid contracting or spreading the COVID-19 from voting absentee burdens the fundamental right to vote guaranteed by Article I, § 25 and Article VIII, § 2 of the Missouri Constitution by forcing voters to risk their and their community’s health and potential criminal liability in order to exercise their right to vote, in that Count III incorporated all previous allegations, including those related to COVID-19, and therefore sufficiently pleaded a claim that denying Missourians the right to vote absentee during this pandemic gravely threatens their ability to access their fundamental right to vote.

1. Count III raises a constitutional claim as applied in the context of the COVID-19 pandemic

“Two constitutional provisions establish ‘with unmistakable clarity’ that Missouri citizens have a fundamental right to vote”—Article I, § 25, and Article VIII, § 2 of the Missouri Constitution. *Priorities USA v. State*, 591 S.W.3d 448, 452 (Mo. banc 2020) (quoting *Weinschenk*, 203 S.W.3d at 211). “Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution,” the Missouri Constitution “provides greater [voting rights] protection than its federal counterpart.” *Weinschenk*, 203 S.W.3d at 212. In evaluating claims involving the constitutional right to vote, this Court evaluates the burden on the right to vote vis-à-vis the State’s justification for imposing that burden. A law that heavily burdens the right to vote must satisfy strict scrutiny, while a law that does not need only be rationally related to a legitimate state interest. *Id.* at 215–16.

This analysis is, therefore, necessarily a fact-based, context-specific inquiry that does not require courts to facially invalidate a statute. In *St. Louis County Board of*

Election Commissioners v. McShane, for example, the Court of Appeals concluded that a statute designating the hours of voting at polling places violated the constitutional right to vote under circumstances where voters were unable to vote during designated times due to the unavailability of ballots. 492 S.W.3d 177, 180–85 (Mo. App. E.D. 2016). As the Court acknowledged, “[t]here is a difference between a statute that is wholly unconstitutional, and thus void *ab initio*—for instance, one that cannot be constitutionally applied in any circumstance—and a statute that is otherwise constitutional but rendered unconstitutional when applied to a particular person or group of people.” *Id.* at 183–84.

This analysis is comparable to what other courts have done in similar cases. In the federal context, courts have recently analyzed as-applied challenges to absentee ballot and signature-gathering requirements during the COVID-19 pandemic under the analogous sliding-scale, fact-intensive *Anderson-Burdick* standard. As here, plaintiffs in those cases did not allege that these laws are *facially* unconstitutional, but rather that the laws unconstitutionally burden their right to vote during the public health crisis. *See, e.g., Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at *16 (D.S.C. May 25, 2020) (determining standard of review either as strict scrutiny or *Anderson-Burdick* in “as-applied challenge” to witness requirement during public health crisis); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) (“In ordinary times, Virginia’s witness signature requirement may not be a significant burden on the right to vote. But these are not ordinary times.”); *Esshaki v. Whitmer*, No. 2:20-CV-10831-TGB, 2020 WL 1910154,

at *1 (E.D. Mich. Apr. 20, 2020) (noting that Plaintiff not challenging “the constitutionality of the State’s ballot access laws” generally but rather the burden they create on right to vote during COVID-19).⁴³

This Court should disregard Respondents’ invitation to misconstrue Appellants’ constitutional claim in Count III to avoid providing relief to voters. Just as the Court of Appeals in *McShane* declared the polling place hours unconstitutional as applied to the specific circumstances at issue, Appellants here assert that Missouri’s absentee ballot laws are unconstitutionally burdensome during this once-in-a-century pandemic. This requires an analysis of the burden that Missouri’s absentee-ballot scheme has on Appellants’ ability to exercise their fundamental right to vote during the COVID-19 pandemic, as they alleged in detail. D2 pp. 2–3, 5–26, 32–34.⁴⁴

⁴³ Courts across the country have in the past also conducted similar analyses where voting laws were facially constitutional but imposed unconstitutional burdens on the right to vote during natural disasters or unforeseen events. *See, e.g., Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1257 (N.D. Fla. 2016) (“Florida has the ability to set its own deadlines and has an interest in maintaining those deadlines. But it would be nonsensical to prioritize those deadlines over the right to vote” where a hurricane foreclosed a week of voter registration); *Ga. Coal. for the Peoples’ Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345–46 (S.D. Ga. 2016) (granting preliminary injunction to extend statutory voter registration deadline for a Georgia county after a hurricane); *New Va. Majority Educ. Fund v. Va. Dep’t of Elections*, No. 1:16-cv-01319-CMH-MSN, No. 10 (E.D. Va. Oct. 20, 2016) (granting preliminary injunction extending Virginia’s statutory voter registration deadline after state voter registration website crashed on the final day of registration).

⁴⁴ In adopting Respondents’ proposed judgment, the trial court mistakenly viewed Appellants’ claim as a non-cognizable *facial* attack on the constitutionality of the excuse regime, suggesting that “Plaintiffs contend that every Missouri voter has a constitutional right to cast an absentee ballot for any reason in any election,” apparently only because (continued...)

Appellants’ Count III incorporates all preceding allegations in the Petition, D2 p. 32 ¶ 164—which includes all allegations concerning the current COVID-19 pandemic, D2 pp. 2, 12–17, 19–23; the health risks threatened by in-person voting during the pandemic, D2 pp. 3, 17–19, 29–30; and the fact that Appellants sought relief only for the 2020 elections on behalf of those who seek “to avoid contracting or spreading the virus that causes COVID-19,” D2 p. 5. As Appellants further made clear in subsequent filings, D13 pp. 15–18, Appellants do not allege that § 115.277.1 (2) *on its own* is unconstitutional, or that there is a freestanding constitutional right to vote absentee in *any* election, unrestricted by the current public health situation. Rather, Appellants advance a much more specific proposition: that in the particular context of the unprecedented COVID-19 pandemic, failing to allow otherwise eligible, registered voters to vote absentee violates their fundamental right to vote because it forces them to risk their health, the health of their loved ones and fellow citizens, and potential criminal liability in order to exercise their fundamental right to vote. Even where the “right to an absentee ballot is not guaranteed” constitutionally, “in the context of the as-applied challenge . . . concerning a privilege that so intimately effects the fundamental right to vote,” the court must conduct an analysis “under a normative constitutional rights framework.” *Thomas*, 2020 WL 2617329, at *18. As this Court outlined in *Weinschenk*, the evaluation of whether a restriction imposes an unconstitutional burden on the right to vote is a fact-based analysis that weighs the burden on the right to vote against the state’s justification.

“Count III does not refer to Covid-19 at all.” D17 p. 9; App. 009.

This Court should conduct the burdens analysis that the trial court failed to do. Rule 84.14 (“The appellate court shall . . . give such judgment as the ought to give” and “[u]nless justice otherwise requires, the court shall dispose finally of the case.”).⁴⁵

2. *Preventing voters who expect to confine themselves to avoid spreading or contracting COVID-19 from voting absentee constitutes a severe burden on their right to vote, in violation of the Missouri Constitution*

If this Court were to conclude that § 115.277.1 (2) does not extend to voters who expect to confine themselves on Election Day so that they may avoid contracting or spreading COVID-19, such a restriction would violate Appellants’ fundamental right to vote in the upcoming August and November 2020 elections amid this pandemic.

The restrictions on absentee voting constitute a severe burden on Appellants’ right to vote because, in light of the COVID-19 pandemic, denying uninfected or asymptomatic individuals the ability to vote absentee will force them into an unacceptable choice: either sacrifice their right to vote or risk contracting or spreading a deadly and highly infectious disease in order to vote in person. The COVID-19 virus is highly infectious and spreads readily from person to person by respiratory droplets,

⁴⁵ “Reliance on Rule 84.14 is particularly appropriate for judgments where the salient facts are not in dispute, but the only dispute is the legal significance of the facts.” *Am. Civil Liberties Union of Missouri*, 577 S.W.3d at 899 (quotation and citation omitted). Here the circumstances of the pandemic are ubiquitous and well-known, so this Court should apply the law to the present circumstances. If this Court believes further fact-finding is necessary, then remand should be accompanied by an order granting interim relief because there is too little time to conduct a trial in the COVID-19-burdened circuit court and allow the unsuccessful party to mount a new appeal to this Court. In the alternative, this Court should appoint a special master to promptly gather and report any factual information this Court needs to resolve this question of law. *See* Rule 68.03.

including by asymptomatic individuals. D2 pp. 13–15. Although some people are more vulnerable than others to complications from COVID-19, anyone can develop serious symptoms, including death, and anyone can transmit the disease. D2 pp. 2, 15. There is no cure or herd immunity, and a vaccine will not be available for 12–18 months—at best, well into 2021. D2 p. 15. Further, public health experts warn that the warmer summer months are “unlikely to stop transmission.” D2 p. 17.

Appellants’ desire to confine themselves as much as possible because of COVID-19 is objectively reasonable. Based on virtually unanimous recommendations from public health experts, including the CDC, government agencies and officials at all levels are imposing social and physical distancing measures in order to “flatten the curve” of the COVID-19 outbreak. *See, e.g.*, D2 pp. 2, 16, 21–22, 29–30. These measures include staying at least six feet apart from other people, avoiding large and small public gatherings, and staying at home as much as possible. *See id.* While these measures may slow the spread of the virus, they will not end the pandemic. D2 p. 16. As recently as May 25, the State’s chief medical officer warned that “COVID-19 is still here, and social distancing needs to continue to prevent further spread of infections,” and that “we still have new cases of COVID-19 being detected each day in Missouri. The virus can be transmitted even among those young and healthy who aren’t experiencing symptoms.”⁴⁶

⁴⁶ Statement from Dr. Randall Williams, Director of Missouri Department of Health and Human Services (May 25, 2020) [https://health.mo.gov/news/newsitem/uuid/5e54a9ed-d816-466f-b19f-780edd138b23/statement-from-dr-randall-williams-director-of-missouri-department-of-\(continued...\)](https://health.mo.gov/news/newsitem/uuid/5e54a9ed-d816-466f-b19f-780edd138b23/statement-from-dr-randall-williams-director-of-missouri-department-of-(continued...))

And anticipating the continuing need to address ongoing illness due to the pandemic, the federal Families First Coronavirus Response Act requires certain employers to provide employees with paid sick leave or expanded family and medical leave for specified reasons related to COVID-19 through December 31, 2020.⁴⁷ Unfortunately, the “painful new reality is that we are constantly at risk of contracting a deadly virus and are experiencing previously unimagined safety measures to stop its spread.” *Thakker*, 2020 WL 1671563, at *7.

Traditionally, most Missourians have voted in person on Election Day. D2 p. 3. But so long as the COVID-19 pandemic persists, voting cannot proceed as usual. *Id.* While in-person voting remains critical to some voters, having most eligible voters during this pandemic physically line up with others at their traditional polling places, touch the same equipment, have face-to-face interactions with poll workers, and more is not possible without contravening the advice of public health experts and threatening public safety as well as the health of election workers, individual voters, and their families. D2 pp. 3, 17–19. Indeed, the CDC is encouraging mail voting as much as possible as an alternative to in-person voting. D2 pp. 17–18. And elections officials in Missouri and across the country are not only encouraging voters to vote by mail but have

health-and-senior-services.

⁴⁷ See U.S. Dep’t of Labor, Wage & Hour Division, Families First Coronavirus Response Act: Employee Paid Leave Rights, <https://www.dol.gov/agencies/whd/pandemic/ffcra-employee-paid-leave> (last visited May 8, 2020).

also taken numerous affirmative steps to ensure access to mail voting. D2 pp. 3, 25. In St. Louis County, election officials have already sent absentee ballot applications for both the August and November 2020 elections to *all* registered over 60 years old.⁴⁸ And at least 12 of the 17 states that do not already offer mail voting to all registered voters have done so for some, if not all, of the affected elections in 2020 because of the pandemic:

Alabama	Alabama has allowed “any qualified voter who determines it is impossible or unreasonable to vote at their voting place” as a result of COVID-19 to vote by mail in primary runoff elections being held in July by reason that “a physical illness or infirmity [] prevents [the voter’s] attendance at the polls.” ⁴⁹
Arkansas	Arkansas has determined that Ark. Code Ann. §§ 7-5-402, which only allows absentee voting for people who are “absent or unable to attend an election due to illness or physical disability,” should be read “so that all eligible qualified electors currently entitled to vote in the March 31, 2020 election may request the appropriate absentee ballots from their county of residence.” ⁵⁰
Connecticut	The Governor of Connecticut has issued an executive order modifying Conn. Gen. Stat. Ann. § 9-135 to allow any eligible voter to vote by absentee ballot in the August 11, 2020 primary if “he or she is unable to appear at his or her polling place . . .because of the sickness of COVID-19.” ⁵¹
Delaware	A Delaware executive order provides that for upcoming primary and

⁴⁸ Mark Schlinkmann & Jack Suntrup, *Absentee ballot applications for June 2 election soar amid coronavirus worries*, St. Louis Post-Dispatch (May 20, 2020) https://www.stltoday.com/news/local/govt-and-politics/absentee-ballot-applications-for-june-2-election-soar-amid-coronavirus-worries/article_3f6ca295-9a36-523e-9122-5b3198d8e3f0.html.

⁴⁹ Ala. Leg. Servs. Agency, *Absentee Voting During State of Emergency*, 17-11-3(e) (Mar. 18, 2020), <https://bit.ly/3cUhOqN>; *see also* Press Release, Alabama Secretary of State, *100 Days Left to Apply for Absentee Ballot for the Primary Runoff Election* (Mar. 31, 2020), <https://bit.ly/2ygoArG>.

⁵⁰ Governor of Arkansas, Exec. Order No. 20-08.

⁵¹ Conn. Exec. Order No. 7QQ (May 20, 2020) <https://bit.ly/2LWF0Zq>.

	special elections, “the qualification of ‘sick or physically disabled’ [in Delaware vote-by-mail provisions] shall apply to and include any such voter who is asymptomatic of COVID-19 . . . and who herself or himself freely chooses to use such qualification to vote by absentee ballot.” ⁵²
Indiana	The Indiana Election Commission issued an order stating that “[a]ll registered and qualified voters are afforded the opportunity to vote no-excuse absentee by mail” ⁵³
Kentucky	The Governor of Kentucky issued an executive order stating that “[a]ll Kentuckians should utilize absentee voting by mail for the June 23, 2020 primary if they are able to do so.” ⁵⁴
Massachusetts	Massachusetts law clarifying that “any person taking precaution related to COVID-19 in response to a declared state of emergency or from guidance from a medical professional, local or state health official, or any civil authority shall be deemed to be unable by reason of physical disability to cast their vote in person,” which is one of the reasons set forth in the state constitution that permits a Massachusetts voter to vote by mail. ⁵⁵
New Hampshire	New Hampshire has interpreted its “physical disability” provision to “appl[y] equally to voters who are experiencing symptoms of COVID-19 . . . and those who are self-quarantining as a preventative measure.” ⁵⁶
New York	The Governor of New York has issued an executive order stating that every eligible voter will receive an application for an absentee ballot with postage paid to return the application. ⁵⁷

⁵² Governor of Delaware, Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat.

⁵³ Ind. Elec. Comm’n. Order No. 2020-37, Concerning Emergency Provisions Affecting the 2020 Indiana Primary Election, March 25, 2020, <https://bit.ly/2yznaJ1>; Steiner Suppl. Decl. Ex. 11; Chris Sikich, *Indiana Election Officials have message for Hoosiers: Please, Please, Please Vote by Mail*, INDYSTAR, (May 15, 2020 7:44 P.M.), <https://bit.ly/2Abpbv8>.

⁵⁴ Ky. Exec. Order 296 (April 24, 2020), <https://bit.ly/3d3jFDj>.

⁵⁵ S.B. 2608, (Ma. 2020).

⁵⁶ Memorandum from the Sec’y of State and Att’y General to New Hampshire Election Officials re: Elections Operations During the State of Emergency 2 (Apr. 10, 2020), <https://bit.ly/2ZdZ8xV>.

⁵⁷ N.Y. Exec. Order No. 202-23 (April 24, 2020) <https://on.ny.gov/3ekb0mj>.

South Carolina	The South Carolina General Assembly passed a bill, which was signed by the Governor and which allows any voter to cite the state of emergency resulting from the COVID-19 pandemic as a recognized reason to request an absentee ballot. ⁵⁸
Virginia	The Virginia Department of Elections issued a statement clarifying that “[v]oters may choose reason ‘2A My disability or illness’” to vote absentee in upcoming elections due to COVID-19. ⁵⁹
West Virginia	<p>West Virginia now permits all registered voters to vote absentee in forthcoming elections due to “[i]llness, injury or other medical reason which keeps [the voter] confined,” defining “other medical reason” as “any threat to a person’s health posed by an epidemic, pandemic, outbreak, disease, virus, or other emergency, which creates potential harm to the public interest, peace, health, safety, or welfare of citizens or voters.”</p> <p>West Virginia construes “confined” as being “restricted to a specific location for reasons beyond that person’s control, including a recommendation by state or federal authorities for the person to self-quarantine, avoid public places or close contact with other persons.”⁶⁰</p>

However, although Missouri allows for absentee voting, it is limited by statute to registered voters who provide one of six reasons enumerated in § 115.277.1. Absentee voters must mark the reason that they are voting absentee on that ballot envelope. Making a false statement on the absentee ballot envelope is a Class One election offense, a felony connected with the right of suffrage, punishable by up to five years’ imprisonment, a fine

⁵⁸ S.C. Act No. 123 (2020), https://www.scstatehouse.gov/sess123_2019-2020/bills/635.htm.

⁵⁹ *Absentee Voting*, Va. Dep’t of Elections. In addition to this administrative clarification that was triggered by the ongoing pandemic, the Virginia General Assembly amended Virginia’s election laws to permanently allow for no-excuse absentee voting starting with the November 2020 general election. 2020 Virginia Laws Ch. 1149 (H.B. 1).

⁶⁰ W. Va. Code R. §§ 153-53-2–153-53-3.

between \$2,500 to \$10,000, or both, and permanent loss of the right to vote. *See* §§ 115.304, 115.133.2(3), 115.631.

These burdens, taken together, severely encumber the right to vote. Absent relief, voters who do not have COVID-19, or who have the virus but are unaware or asymptomatic, are presented with an unconscionable choice between jeopardizing their health and the health of others by going to vote in person; voting absentee with the risk that their vote will not be counted or that they will face a felony prosecution, or both; or foregoing their fundamental right to vote entirely. Further, because Missouri law requires that all absentee ballot applications be submitted nearly two weeks before an election, § 115.279(3), requiring contraction of the virus *prior* to being eligible to vote by absentee ballot will disenfranchise those voters who contract COVID-19 only *after* the absentee ballot request deadline passes—or worse yet drive them to vote in person at their polling place rather than surrender their right to vote.

Under these circumstances, the absentee voting restrictions fail strict scrutiny because they do not serve a compelling governmental interest, nor would they be narrowly tailored to fit that interest. *See Weinschenk*, 203 S.W.3d at 216. The only governmental interest that Respondents have suggested is the need to require “strict compliance with the statutory requirements for absentee voting” because “absentee voting carries unique risks of fraud and abuse.” D17 p. 10; App. 010. Yet, in the context of the right-to-vote analysis, a state law is not necessary or narrowly tailored to accomplish any potential state interest in eradicating voter fraud where, as here, there is

scant evidence of voter fraud. *See Weinschenk*, 203 S.W.3d at 217 (“As the trial court found: No evidence was presented that voter impersonation fraud exists to any substantial degree in Missouri. In fact, the evidence that was presented indicates that voter impersonation fraud is not a problem in Missouri.”) (quotations omitted); *see also Thomas*, 2020 WL 2617329, at *20 (“While states certainly have an interest in protecting against voter fraud and ensuring voter integrity, the interest will not suffice absent ‘evidence that such an interest made it necessary to burden voters’ rights.”) (quoting *Fish v. Schwab*, 957 F.3d 1105, 1132–33 (10th Cir. 2020)). Moreover, the state’s interest in consistent enforcement is insufficient to sustain a burden on a fundamental right. *See Lawson v. Kelly*, 58 F. Supp. 3d 923, 933 (W.D. Mo. 2014) (finding in the context of challenge to Missouri marriage restriction that proffered “interest in promoting consistency, uniformity and predictability” present “a circular argument that probably would not satisfy rational basis review and that certainly fails the level of review required in this case.”).

While incidents of absentee voter fraud do exist, all evidence indicates that absentee voter fraud is exceptionally rare in practice, both in Missouri and the country more broadly. One recent study found fewer than 500 cases of absentee-voter fraud in the United States between 2000 and 2012, a period during which billions of ballots were cast.⁶¹ The conservative Heritage Foundation has only found one instance of absentee-

⁶¹ Richard L. Hasen, *Opinion: Trump is wrong about the dangers of absentee ballots*, Wash. Post (Apr. 9, 2020) (continued...)

ballot fraud in Missouri since 2005.⁶² Indeed, as experts have determined, “[m]isconduct still amounts to only a tiny fraction of the ballots cast by mail.”⁶³ There is also no evidence that increasing absentee ballot voting would correspond to any increase in absentee ballot fraud. In fact, the only evidence available suggests the opposite: “[f]ive states . . . now conduct all elections almost entirely by mail. They report very little fraud.”⁶⁴ Such minimal evidence of voter fraud does not justify restrictions that will cause mass disenfranchisement and exacerbate a public health crisis. *See Tex. Democratic Party v. Abbott*, Civ. A. No. SA-20-CA-438-FB, 2020 WL 2541971, at *4 (W.D. Tex. May 19, 2020) (“[T]he Grim Reaper’s scepter of pandemic disease and death is far more serious than an unsupported fear of voter fraud in this *sui generis* experience.”).

<https://www.washingtonpost.com/opinions/2020/04/09/trump-is-wrong-about-dangers-absentee-ballots/>.

⁶² The Heritage Foundation, *Election Fraud Cases*, Missouri <https://www.heritage.org/voterfraud/search?state=MO>.

⁶³ Robert Farley, *Trump’s Latest Voter Fraud Misinformation*, FactCheck.org (Apr. 10, 2020) <https://www.factcheck.org/2020/04/trumps-latest-voter-fraud-misinformation/> (quoting Justin Levitt, voter fraud expert and professor of law).

⁶⁴ Stephanie Saul & Reid J. Epstein, *Trump is Pushing a False Argument on Vote-by-Mail Fraud. Here Are the Facts*, N.Y. Times (Apr. 11, 2020) <https://www.nytimes.com/article/mail-in-voting-explained.html>.

Point III: The trial court erred in dismissing Count IV for failure to state a claim for declaratory and injunctive relief because Appellants sufficiently alleged that the statutes that require notarization of absentee ballots during the COVID-19 pandemic present an unconstitutional burden on the fundamental right to vote as guaranteed by Article I, § 25 and Article VIII, § 2 of the Missouri Constitution, in that, the novel COVID-19 virus is easily spread person-to-person, can cause serious illness and death, and has resulted in guidance from public health officials to take precautions that include social distancing.

1. Count IV raises a valid constitutional claim in the context of COVID-19

This Court should again decline Respondents’ invitation to misconstrue this claim and apply an incorrect legal standard. This case is rooted in the particularized context of the current pandemic and its burdens on in-person voting and notarization. Respondents responded only to their misstatement of Appellants’ claim as one that “every Missouri voter has a constitutional right to cast an absentee ballot in any election for any reason without having his or her ballot notarized.” D17 p. 11; App. 011. As in Count III, Appellants incorporated all their preceding allegations in the Petition, D2 p. 33 ¶ 170, and explicitly challenge the notary requirement as an unconstitutional burden on the fundamental right to vote for purposes of the 2020 elections taking place during the COVID-19 pandemic, D2 p. 5, D13 p. 19 (“refusing to allow all voters who are permitted vote by absentee ballot to do so without a notary seal during the COVID-19 pandemic violates the fundamental right to vote under the Missouri Constitution.”); *see also* D2 p. 33 (stating violation of “social distancing guidelines” as a burden imposed by notary requirement).

From this classic straw man argument, Respondents rely on two incorrect legal standards for evaluating Appellants' claim. As noted *supra*, this Court has already determined that courts evaluating a right-to-vote claim must first determine the severity of the burden a given law places on Appellants' right to vote; if the burden is severe, the Court must apply strict scrutiny. *Weinschenk*, 203 S.W.3d at 215–16. Yet Respondents urge that rational-basis review applies to Appellants' claim in Count IV *without* investigating the alleged severity of the burden that the notary requirement imposes on their right to vote. D17 p. 11; App. 011. Only by this misdirection can Respondents plausibly suggest that the legislature made an “eminently reasonable” classification in allowing certain individuals to be exempt from the notary requirement and not others. D17 pp. 11–12; App. 011–012. But Count IV is *not* about whether the legislature's classification was in accordance with equal protection, but rather whether the law unconstitutionally burdens the right to vote for those who must have their ballots notarized during the public health crisis where social distancing is recommended by every credible public health official and where in-person notarization would conflict with those health recommendations. As properly construed, Appellants have shown that *during the COVID-19 pandemic*, the notary requirement for ballots fails constitutional muster.

2. *Requiring Missouri voters to have their ballots notarized in person constitutes a severe burden on their right to vote, in violation of the Missouri Constitution*

The burden analysis for Missouri's notary requirement is similar to the burden analysis discussed in Count III. COVID-19 is a highly infectious and deadly disease that

is spread primarily through contact with individuals, who can be asymptomatic for up to two weeks after transmission. D2 pp. 2, 13–17. With a vaccine and herd immunity essentially ruled out for the rest of this year, public health experts are unanimously encouraging individuals to socially distance and avoid even small public gatherings. D2 p. 16. As noted *supra*, the Missouri Department of Health and Senior Services as of May 25, 2020 was still warning against “close contact,” stating that “social distancing needs to continue to prevent further spread of infections,” and noting that Missouri “still [has] new cases of COVID-19 being detected every day.” Requiring voters to have their ballots notarized in person contravenes public health guidance in many of the same ways as voting in person does. Just as in Count III, the notary requirement asks voters to risk their health and the health of their loved ones and fellow citizens in order to exercise their fundamental right to vote. Indeed, when the Governor suspended the physical appearance requirement for the notarization of official documents like wills and mortgages, which was recently extended until June 15, App. 022–023, the Secretary of State’s Office stated that the suspension of in-person notarization was “vital” to “protecting the health and safety of both notaries public as well as Missourians who otherwise would have been required to have close contact with the notary.”⁶⁵ Requiring individuals to have someone they are not otherwise being exposed to come into close enough proximity to witness or

⁶⁵ Press Release, Missouri Secretary of State, Governor Parson Signs Executive Order 20-08 Regarding Notary Public in Response to COVID-19 (April 6, 2020), <https://www.sos.mo.gov/default.aspx?PageID=9835>; *see also* Executive Order 20-08 (April 6, 2020). This was recently extended until June 15, 2020. Executive Order 20-10 (continued...)

notarize their ballot places individuals at an increased risk of infection. In the current context, continuing to require in-person notarization of mail ballots amounts to a severe burden on the fundamental right to vote that is subject to strict scrutiny. *Weinschenk*, 203 S.W.3d at 215–16.

Indeed, even in the less-protective context of the federal right to vote, *see id.*, at 211–212, courts have recently determined that *election* requirements that require individuals to be in close physical proximity amount to an unconstitutional burden on the right to vote during the COVID-19 pandemic, even where those interactions take place in a more intimate one-on-one setting *and even if they would be constitutional under normal circumstances*. For example, two federal courts have recently recognized that a witness requirement imposes an unconstitutional burden on the right to vote for upcoming elections. A federal court in Virginia recently approved a partial consent decree suspending a requirement, analogous to the notary requirement at issue here, that absentee ballots be completed in the presence of a witness and the envelope signed by that witness for voters who believe the requirement would put their health at risk in the upcoming June primary. *See League of Women Voters of Va.*, 2020 WL 2158249. The court noted that while “[i]n ordinary times, Virginia’s witness signature requirement may not be a significant burden on the right to vote . . . these are not ordinary times. In our era of social distancing—where not Virginians, but all Americans, have been instructed to maintain a minimum of six feet from those outside their household—the burden is

(May 4, 2020), App. 022–023.

substantial” *Id.* at *8. As the court observed, the requirement would “force a large class of Virginians to face the choice between adhering to guidance that is meant to protect not only their own health, but the health of those around them, and undertaking their fundamental right—and, indeed, their civic duty—to vote in an election. The Constitution does not permit a state to force such a choice on its electorate.” *Id.* (citing *Harper v. Va. State Bd. of Elections*, 383 U.S. 663, 670 (1966)). A federal court also recently granted a preliminary injunction enjoining South Carolina’s requirement that a witness be present when a voter signs their absentee ballot, determining that the law “require[d] [Plaintiffs] to expose themselves to other people in contravention of maintaining safe social distancing practices.” *Thomas*, 2020 WL 2617329, at *19.

Other courts have likewise determined that laws requiring candidates to gather signatures in person to secure a position on the ballot amount to an unconstitutional burden on the right to vote during the COVID-19 pandemic. *See Esshaki*, 2020 WL 1910154, at *6 (“Absent relief, Plaintiff’s lack of a viable, alternative means to procure the signatures he needs means that he faces virtual exclusion from the ballot”); *Faulkner v. Va. Dep’t of Elections*, No. CL 20-1456, 2020 Va. Cir. LEXIS 70, at *3 (Cir. Ct. Mar. 25, 2020). In this unprecedented public health crisis, it is unconstitutional to require individuals to engage in dangerous personal contact as a prerequisite either for ballot access or exercising one’s fundamental right to vote.

Missouri’s notary requirement during the COVID-19 pandemic fails strict scrutiny because it does not serve a compelling governmental interest, nor is it narrowly tailored

to fit that interest in the context of the severe burden this requirement imparts on the right to vote during this pandemic. The only interest in the notary requirement that Respondents have offered was “preventing fraud and abuse in absentee voting.” D17 p. 11; App. 011. As noted *supra*, there is no meaningful evidence of absentee voter fraud in Missouri or the United States more broadly. *See League of Women Voters of Va.*, 2020 WL 2158249, at *9 (finding that “the record does not demonstrate that [the witness requirement] is especially effective in preventing voter fraud” and that “there is no evidence in the record at this time that even suggests that permitting some voters to opt-out of the witness signature requirement would increase voter fraud in a meaningful way”); *see also Thomas*, 2020 WL 2617329, at *19–*21.

Further, Missouri already has many other safeguards against fraudulent absentee voting. An individual affirmatively needs to request an absentee ballot. § 115.279(1). The voter must sign a legal statement under penalty of perjury on the ballot envelope attesting to their identity and reason for voting absentee. §§ 115.290; 115.291. Absentee ballots are scrutinized by bi-partisan teams. §115.299. If the statements on any ballot envelope have not been completed, the absentee ballot in the envelope must be rejected. § 115.295(2). First-time voters must include a copy of personal identification unless they provided a copy with their registration application.⁶⁶ It is a felony to violate § 115.277.1, or “any provision of law pertaining to absentee voting,” a conviction for which is

⁶⁶ Missouri Secretary of State, Elections & Voting, How to Vote, <https://www.sos.mo.gov/elections/goVoteMissouri/howtovote> (last visited May 27, (continued...))

punishable by up to five years in prison or a fine up to \$10,000. § 115.631(23). Making a false statement on the absentee ballot envelope is a Class One election offense, a felony connected with the right of suffrage. §§ 115.304, 115.631. It is a felony offense to “knowingly [furnish] false information to an election authority or election official engaged in any lawful duty or action in such a way as to hinder or mislead the authority or official in the performance of official duties.” § 115.631(1). Missouri has more than enough mechanisms to deter absentee ballot fraud and hold those who would commit it accountable. *See League of Women Voters of Va.*, 2020 WL 2158249, at *9 (finding state’s argument that witness requirement important to combat voter fraud particularly weak “when considering all of the other means of combatting voter fraud integrated into the absentee-voting system.”); *see generally Zablocki v. Redhail*, 434 U.S. 374, 389 (1978) (holding that a state law is far less important to furthering a governmental interest when “the State already has numerous other means for exacting compliance . . . that are at least as effective”).

Finally, Missouri *already* exempts large groups of people from the notary requirement—including permanently disabled voters, overseas or military voters, and those who are incapacitated by illness or disability. § 115.291. It strains credulity for Respondents to insist that the notary requirement is necessary or is narrowly tailored to serve a compelling governmental interest when the state has already determined it is not necessary to enforce that requirement for large swaths of voters.

2020).

Because the imposition of the notary requirement during this pandemic is not justified by any interest advanced by Respondents, this Court should enter judgment finding that it is unconstitutional. *See* Rule 84.14; *see also* n.6, *supra*. If this Court believes further fact-finding is necessary, then remand should be accompanied by an order granting interim relief or a special master should be appointed to provide the necessary facts directly to this Court.

Point IV: The trial court erred in finding that Missouri State Conference of the NAACP and League of Women Voters of Missouri lack standing because both organizations sufficiently pleaded associational standing, in that they are membership organizations comprised at least in part of eligible voters who wish to vote by mail without a notary because they expect to confine themselves on Election Day to avoid contracting or spreading COVID-19 and promoting safe voting is germane to the purpose of both organizations; and organizational standing, in that both organizations have been and will continue to shift resources to provide assistance to and educate their members on the specific issue of absentee voting during the COVID-19 pandemic.

MO NAACP and the League each have both associational and organizational standing. Respondents do not challenge the standing of Individual Appellants.

Both organizations have associational standing. An organization has associational standing if “(a) its members would otherwise have standing to bring suit . . .; (b) the interests [they] seek[] to protect are germane to the organization[s]’ purpose[s]; and (c) neither the claim[s] asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Mo. Outdoor Advert. Ass’n v. Mo. State Highways & Transp. Comm’n*, 826 S.W.2d 342, 344 (Mo. banc 1992); *see also, e.g., E. Mo. Coal. of Police, Fraternal Order of Police, Lodge 15 v. City of Chesterfield*, 386 S.W.3d 755, 759 (Mo. banc 2012). Associational standing is established because both MO NAACP and the League (a) have members who seek clarity on whether they may vote by absentee ballot because they expect to confine themselves, rather than vote in person, to avoid spreading or contracting the COVID-19 virus, like the individual Appellants whose standing Respondents do not dispute, and (b) work to protect voting rights in Missouri. D2 pp. 6–

8.⁶⁷ They meet the third criterion because this case seeks a prospective remedy only, so the participation of their individual members is not needed. *See, e.g., Home Builders Ass'n of Greater St. Louis, Inc. v. City of Wildwood*, 32 S.W.3d 612, 615 (Mo. App. E.D. 2000).

MO NAACP and the League both have organizational standing as well. Organizational “[s]tanding may be found when there is a concrete and demonstrable injury to an organization’s activities which drains its resources and is more than simply a setback to its abstract social interests.” *Nat’l Fed’n of the Blind of Mo. v. Cross*, 184 F.3d 973, 979 (8th Cir. 1999); *see, e.g., Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982). Their interest in this case is more than the generalized interest of many Missourians in seeing that voters do not have to choose between exercising the franchise and putting the health and lives of other Missourians unnecessarily at risk. Both organizations have been and will be required to shift their resources to provide assistance and educate their members on individual local election authorities’ varying policies on absentee voting because of COVID-19 as well as what precautions their members should take if they elect to risk their health and the health of others by going to a polling place to cast a ballot. D2 pp. 7–8

⁶⁷ In particular, their members include registered voters in Missouri who wish to vote absentee in upcoming elections in Missouri to avoid contracting or spreading the COVID-19 virus, are unsure whether § 115.277.1(2) allows them to vote absentee under this circumstance, are otherwise not eligible to cast an absentee ballot, and who are concerned that their ballots will not be counted, that they could face criminal prosecution if they wrongly submit an absentee ballot, or both. D2 pp. 6–8.

Moreover, the organizations' claims, like those of the individual Appellants, are ripe. It has been observed that, "[w]hile elegant-sounding in theory, judicial ripeness often proves something of a cantaloupe." *Neb. Pub. Power Dist. v. MidAmerican Energy Co.*, 234 F.3d 1032, 1038 (8th Cir. 2000). This case is ready to be picked from the vine. "A ripe controversy exists if the parties' dispute is developed sufficiently to allow the court to make an accurate determination of the facts, to resolve a conflict that is presently existing, and to grant specific relief of a conclusive character." *Mo. State Conf. of the NAACP v. Missouri*, 563 S.W.3d 138, 148 (Mo. App. W.D. 2018) (internal quotation marks and citations omitted). "To be ripe for judicial determination, a controversy must be 'of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.'" *Id.* (quoting *Mo. Health Care Ass'n v. Atty. Gen. of the State of Mo.*, 953 S.W.2d 617, 621 (Mo. banc 1997)).

Applications for absentee ballots for the August and November elections are already being submitted by voters and received by local election authorities. The primary election is August 4, and local election authorities begin sending out absentee ballots on June 23, 2020. The last day to request an absentee ballot by mail for the August primary is July 22. For the November 3 general election, absentee ballots will be sent beginning on September 22, 2020. The last day to request an absentee ballot by mail for the general election is October 21. As noted *supra*, election officials in St. Louis County have already mailed absentee ballot applications for these upcoming elections to all registered voters aged 60 or older. The elections are not so far in the future that we have to guess

whether it is reasonable for voters to expect to confine themselves rather than vote in person. This dispute is ripe for adjudication.

Point V: Recently passed legislation providing a new basis for voting absentee for voters who have or are “at risk” of COVID-19 and providing a new system of mail voting for others voters does not moot Appellants’ claims because the legislation does not provide Appellants the full relief they seek, in that the new legislation (i) does not address, alter, or clarify the scope of § 115.277.1(2) during this pandemic; (ii) does not address whether voters who expect to confine themselves to avoid spreading or contracting the virus can cast an absentee ballot pursuant to § 115.227.1(2); (iii) requires voters who use the new mail-in voting provisions to vote to have their ballots notarized—a ballot requirement that impermissibly infringes on the right to vote during this pandemic, and (iv) as of the filing of this brief, has not been signed into law and is not currently in effect.

Senate Bill 631 passed both houses of the Missouri Legislature on the final day of session. CCCS SCS SB 631 (2020) (“Senate Bill 631”); App. 048-074, which establishes two new provisions for absentee voting: a new “excuse” under § 115.277.1(7) and for mail-in voting under new SECTION 115.302. Both provisions are effective this year only. Under § 115.277.1(7), voters who have or who fall into eight specifically enumerated categories would be considered “at-risk” of contracting or transmitting the COVID-19 virus and would be eligible to vote absentee in the August and November 2020 elections without having their ballots notarized. The categories cover individuals most likely to experience death if they contract COVID-19, specifically, voters who are:

- (1) Sixty-five years of age or older;
- (2) Live in a long-term care facility licensed under chapter 198;
- (3) Have chronic lung disease or moderate to severe asthma;
- (4) Have serious heart conditions;
- (5) Are immunocompromised;

- (6) Have diabetes;
- (7) Have chronic kidney disease and are undergoing dialysis; or
- (8) Have liver disease.

§§ 115.277.6, 115.291.1; App. 055. The legislation achieves this by creating a new “excuse” justifying a request for an absentee ballot, to be codified as § 115.277.1(7). Absentee voting for all the other existing reasons remains available. In addition, the legislation establishes a new system for mail-in voting to be codified as § 115.302. Under this provision, any registered voter would be eligible for an entirely new system of voting by mail for elections during 2020. Under this new system, any registered voter can apply for, receive, and return a ballot by mail, but that ballot must be notarized and can be requested and returned by mail only. § 115.302.12; App. 065. Like absentee ballots, false execution of a mail-in ballot is a class one election offense. §115.302.19. The legislature did not make any changes to § 115.277.1(2).

At present, the legislation has no bearing upon this case because the Governor has not signed it. Should the Governor sign the bill, however, the claims of only one Appellant would be moot. Appellant Webb would be permitted to vote by absentee ballot under § 115.277.1(7); App. 054, which provides to her the relief she sought in this litigation. Appellant Wattree, who lives with his young, immunosuppressed daughter but does not himself qualify under § 115.277.1(7); App. 054, does not get from Senate Bill 631 the relief he sought in this litigation: the opportunity to vote by absentee ballot without a notary seal. Likewise, Appellant Del Villar, who lives with a parent who is 65

years old, does not himself qualify under § 115.277.1(7); App. 054, and, thus has not secured the relief he sought. The claims of Wattree, Del Villar, and other members of MO NAACP and the League are not moot.

Senate Bill 631 does not provide the relief sought to voters who fail to qualify under the narrow provisions of the new § 115.277.1(7). The bill makes no change to § 115.277.1(2), which still applies to those confining themselves because of COVID-19. The new § 115.277.1(7) complements § 115.277.1(2) by extending the right to vote by absentee without a notary to persons most at risk of dying from COVID-19 *without* requiring that they expect to be confining themselves because of illness. It also does not include provisions for caretakers, as § 115.277.1(2) does. This provision evidences the legislature's desire that those most likely to experience severe complications from COVID-19 stay away from polling places on Election Day even if they are not otherwise confining themselves to avoid contracting the virus. Likewise, the new vote by mail program is available to any voter, including to those voters who are not confining themselves and, thus, not burdened by that program's obligation that their ballot be notarized, to the same degree that voters who are confining themselves would be. The creation of this temporary program shows the legislature's intent that all voters, regardless of whether they are confining themselves because of COVID-19, have an option to vote without appearing in person on Election Day. But the addition of § 115.277.1(7) does not answer whether § 115.277.1(2) is available for voters who *do* expect to confine themselves because of COVID-19.

Appellants' Count I claim that § 115.277.1(2) applies to those voters who expect to confine themselves due to COVID-19 to avoid spreading or contracting the virus is unaltered by Senate Bill 631. While the legislature was well aware of this litigation, it made no changes to § 115.277.1(2), knowing that doing so left application of the statute in light of the current pandemic to this Court.

Furthermore, Counts III and IV also remain live. Under Senate Bill 631, all eligible voters who do not fall into one of the categories exempt from the notary requirement will have to have their ballots notarized, including voters who vote under the Senate Bill 631's new mail voting system. Nothing in the new legislation changes the nature of the requirement or the health risk it imposes on those who must satisfy it. And Appellants' Count III claim also remains live insofar as the legislature did not extend absentee voting to voters like Wattree, Del Villar, and other members of MO NAACP and the League but relegated them instead to a more limited mail voting system.

Not only if, but *when* the Governor signs the legislation, also affects the mootness analysis—at a minimum with respect to the August 4, 2020 primary election. The Governor could sign the legislation as late as July 15. The processing of absentee ballots and mail ballots for the primary election begins on June 23. Because Senate Bill 631 creates a new “excuse” for absentee voting that does not exist on existing absentee ballot applications as well as an entirely *new* mail voting system, it is not clear whether, as a practical matter, the State and local elections authorities will have sufficient time to implement the new provisions for the primary election, including creating new ballot

applications and new statements on ballot envelopes. Indeed, both absentee ballots, and under the new legislation, all mail ballot requests for the primary election must be received by July 22, 2020, §§ 115.279(3), 115.302.3; App. 063, while the Governor need not even sign this legislation until one week prior, § 21.270. But even an earlier effective date for the new legislation may prevent the new legislation from offering meaningful relief. Much work would need to be done. For example, election authorities are required to adjust absentee ballot forms and envelopes to reflect the new reason for absentee voting, and the new mail-in ballot option added by the new legislation, § 115.283.6. They are also required to have printed and available a “sufficient quantity” of ballot envelopes by the 6th Tuesday before the election, § 115.302.5; App. 063. It is Respondents’ obligation to demonstrate that the relief provided by Senate Bill 631 will be available to voters. *See Kennedy Bldg. Assocs. v. Viacom, Inc.*, 375 F.3d 731, 745 (8th Cir. 2004) (“The ‘heavy’ burden of proving mootness falls on the party asserting the case has become moot.”).

CONCLUSION

For the foregoing reasons, Appellants respectfully request that this Court reverse the Circuit Court's Order dismissing the Petition and enter judgment declaring that § 115.277.1(2) provides the opportunity to vote absentee to those voters who expect to confine themselves to avoid spreading or contracting the virus responsible for COVID-19. In the alternative, judgment should declare that the statutes that exclude such voters from casting ballots by mail without notarization as applied during the current pandemic violate Article I, § 25 and Article VIII, § 2 of the Missouri Constitution. If further fact-finding is necessary, the case should be remanded with an order granting Appellants interim relief or a special master appointed to gather evidence and submit factual findings to this Court.

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on May 28, 2020, the foregoing brief was filed electronically and served automatically on counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 17,421 words, as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus free.

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