SC98536

IN THE SUPREME COURT OF MISSOURI

MISSOURI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, *et al.*,

Appellants,

v.

STATE OF MISSOURI, *et al.*,

Respondents.

Appeal from the Circuit Court of Cole County, Missouri
The Honorable Jon E. Beetem

BRIEF OF RESPONDENTS STATE OF MISSOURI AND SECRETARY OF STATE JOHN R. ASHCROFT

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INTRODUCTION

The Missouri Constitution confers on the legislature, not the courts, the authority to expand access to absentee voting during a global pandemic. *See* MO. CONST. art. VIII, § 7. Missouri's General Assembly has exercised that authority by passing Senate Bill 631, which grants robust options for absentee and mail-in voting for elections during 2020. If the Governor signs SB 631, all claims raised by Plaintiffs-Appellants ("Plaintiffs") will become moot during 2020, except their claim that voters who are not "in an at-risk category" for Covid-19 should be exempt from the notarization requirement for mail-in ballots.

Regardless of whether SB 631 is enacted, Plaintiffs' claims fail as a matter of law. In Count I of the Petition, Plaintiffs claimed that any voter who "fears" contracting an illness at the polls is "confined due to illness or disability" and thus authorized to vote absentee under § 115.277.1(2), RSMo. This interpretation violates the statute's plain language and well-established principles of interpretation. A voter who is not ill or disabled does not have an "illness" or "disability."

In Count III, Plaintiffs claimed that every Missouri voter has an unqualified constitutional right to cast an absentee ballot in any election for any reason. But Article VIII, § 7 of the Constitution provides that the legislature "may" authorize absentee voting—not that it is required to. Both Missouri and federal cases reject such an unqualified right to cast an absentee ballot for any reason.

In Count IV, Plaintiffs claimed that every Missouri voter has an unqualified constitutional right to cast an absentee ballot in any election for any reason, without having the voter's signature on the ballot notarized. D2, at 33-34. Again, this claim contradicts the plain language of the Missouri Constitution and decades of case law recognizing that the legislature has broad authority to control the scope and manner of voting by mail. Missouri cases emphasize that the legislature's safeguards on absentee voting are essential to preventing fraud and abuse, and that strict compliance with them is mandatory.

On appeal, Plaintiffs concede that the claims that they actually pled in Counts III and IV are meritless as a matter of law, but they ask this Court to assume facts not in evidence and grant them final relief on re-characterized claims that they never pled. The Court should decline to join Plaintiffs in this jurisprudential misadventure.

Like the circuit court, Respondents State of Missouri and Secretary of State Ashcroft ("the State") "take very seriously the health concerns regarding the Covid-19 pandemic that Plaintiffs allege in their Petition." Appellants' Appendix ("Appx.") at A001; D17, at 1. But the Missouri Constitution confers on the legislature, not the courts, the authority to address such concerns. By enacting SB 631, the legislature has shown that it is fully competent to do so during the Covid-19 pandemic.

STANDARD OF REVIEW

Plaintiffs are correct that the trial court's judgment granting the State's motion to dismiss is subject to *de novo* review. *See, e.g.*, *Lynch v. Lynch*, 260 S.W.3d 834, 836 (Mo. banc 2008). But Plaintiffs fail to acknowledge the well-established legal standards governing motions to dismiss under Rule 55.27(a)(1) and (6), and their brief repeatedly violates those standards.

Dismissal is proper if the court lacks subject-matter jurisdiction or the pleadings fail to state a claim upon which relief can be granted. Mo. Sup. Ct. R. 55.27(a)(1), (6); *Fox v. White*, 215 S.W.3d 257, 259-60 (Mo. App. W.D. 2007). In considering whether to grant a motion to dismiss, the court "considers the grounds raised in the defendant's motion to dismiss and does not consider matters outside the pleadings." *Gray v. Missouri Dep't of Corr.*, 577 S.W.3d 866, 867 (Mo. App. 2019). "In determining whether a motion to dismiss should [be] granted," this Court "reviews the petition in an almost academic manner, to determine if the facts alleged meet the elements of a recognized cause of action, or of a cause that might be adopted in that case." *Gray*, 577 S.W.3d at 867. Missouri is a fact-pleading state, which means that, in order to survive a motion to dismiss, plaintiff "must allege facts" supporting each element of his claim. *ITT Commercial Fin. Corp. v. Mid-Am. Marine Supply Corp.*, 854 S.W.2d 371, 376-77 (Mo. banc 1993); *Fox*, 215 S.W.3d at 260. Where a petition "contains only conclusions and neither the ultimate facts

nor any allegations from which to infer those facts, [a] motion to dismiss is properly granted." *ITT Commercial Fin. Corp*., 854 S.W.2d at 379.

Plaintiffs' brief repeatedly violates these well-established standards by relying on extra-record materials to argue "facts" that were not alleged in the Petition. Plaintiffs' brief cites over 50 secondary sources, including news articles, opinion pieces, press releases, and so forth—many of which are not cited in the Petition and include extensive opinion and hearsay. App. Br. vii-xii. Plaintiffs do not, and cannot, argue that all the "facts" in these materials are subject to legitimate judicial notice. To be sure, such materials may be cited in limited circumstances—such as in arguing whether a statutory provision satisfies rational-basis review, which allows the Court to consider any conceivable justification for the provision. *See, e.g.*, *Kansas City Premier Apartments, Inc. v. Mo. Real Estate Comm'n*, 344 S.W.3d 160, 170 (Mo. banc 2011). But Plaintiffs' citation of these materials goes far beyond any justifiable purpose in considering a motion to dismiss.

For example, though the Petition contains no allegations relating to the risks of fraud and abuse from absentee voting, Plaintiffs cite news articles and opinion pieces to argue that absentee voting presents no meaningful risks of fraud or abuse, and they urge this Court to conclude as a matter of law that no such risks exist. App. Br. 40-41 & nn.61-64; *id.* at 47. This usage of non-record materials is plainly improper in considering a motion to dismiss, which concerns solely the adequacy of

the pleadings. And Plaintiffs' improper reliance on these materials forces the State to respond in kind, by citing its own secondary sources demonstrating that fraud and abuse are ongoing risks for absentee voting. Similarly, Plaintiffs cite extensive extra-record materials to argue that in-person voting creates risks of contracting or spreading Covid-19, making factual allegations that go far beyond those presented in the Petition. *See, e.g.*, App. Br. 9-10 & nn.14-19.

Plaintiffs' citation of such materials for these inappropriate purposes is improper, and the Court should strike both these extra-record materials and the arguments that rely on them from Plaintiffs' brief. *See Cope v. Parson*, 570 S.W.3d 579, 582 n.2 (Mo. banc 2019).

STATEMENT OF FACTS

As noted above, Appellants' Statement of Facts improperly relies on materials outside the pleadings, and thus is neither "accurate" nor "complete" under Rule 84.04(f). The State provides its own Statement of Facts pursuant to that Rule.

I. Allegations in the Petition.

Because this case was resolved on a motion to dismiss, this appeal concerns the sufficiency of the facts and legal claims alleged the Petition.

A. Factual allegations relating to Plaintiffs' claims.

On April 17, 2020, Plaintiffs filed their "Class Action Petition for Declaratory and Injunctive Relief." D2, at 1. The Petition contained many general allegations about Covid-19, the health risks that it poses, and the public response of authorities to the pandemic. *Id.* at 2-5, ¶¶ 2-19; *id.* at 12- 23, ¶¶ 64-110. But it contained no specific allegations relating to (1) the health risks of in-person voting while following CDC recommendations of disinfecting and social distancing; (2) the health risks of having an absentee ballot notarized while following prudent social distancing practices; or (3) the risks of fraud and abuse, and the threat to the integrity of elections, that would arise if Missouri were to adopt Plaintiffs' proposed regime of universal absentee balloting with no signature notarization.

First, the Petition failed to provide any specific allegations about the health risks of in-person voting while following reasonable precautions. In particular, the

Petition failed to allege that in-person voting cannot be conducted safely with prudent disinfection and social distancing measures, such as those recommended by the CDC. If anything, the Petition conceded that prudent "social distancing" measures can prevent the spread of the disease: "Without widespread testing, people, including asymptomatic individuals, will continue to spread the disease *unless they practice social distancing*." D2, at 16, ¶ 83 (emphasis added). Moreover, the Petition quoted extensively from the Center for Disease Control's recommendations for polling locations and incorporated those recommendations in a footnote. *Id.* at 17-18, ¶¶ 85-86 & n.16. But those recommendations do not call for universal mail-in voting; on the contrary, they provide detailed guidance for making *in-person* voting safe during the pandemic. Centers for Disease Control, Recommendations for Election Polling Locations (March 27, 2020), at https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html. In fact, the Petition alleged that "the CDC has many recommendations related to safety at polling places." D2, at 18, ¶ 86.

To be sure, the Petition alleged that a tiny number of poll workers *had* Covid-19 during recent in-person elections. D2, ¶¶ 88-89. But the Petition failed to allege that anyone *contracted* Covid-19 from in-person voting, *see id.*, and the Petition made no allegations about whether or to what extent prudent social distancing

measures—like those recommended by the CDC—were observed during those out-of-state elections. *See id.*

Likewise, the Petition made no allegations at all about the alleged health risks of ballot notarization during the Covid-19 pandemic. *See id.* Because it made no allegations of any kind about the putative health risks of notarization, the Petition also did not make any allegations about whether prudent social distancing measures could eliminate any such risk of contracting Covid-19 during notarization. *See id.* In fact, the Petition specifically alleged that brief personal interactions that involve handling the same paper document—such as in-person mail deliveries—*can* be conducted safely, provided that the participants exercise ordinary precautions like "step[ping] back to a safe distance" during the interaction and "practic[ing] hand hygiene frequently." *Id.* at 18, ¶ 86-87. The Petition alleged that such person-to-person interactions that merely involve handling the same paper items present "relatively minimal risks" that do not impose an unconstitutional burden on anyone's right to vote. *Id.* at 18, ¶ 86.

Furthermore, though Plaintiffs make extensive arguments about the risks of fraud and abuse from absentee balloting in their brief, App. Br. 40-41, 47, the Petition made no allegations whatsoever about the risks of absentee voter fraud and other abuses, and the threat to the integrity of elections presented by those abuses,

that would arise if Plaintiffs' demand for universal mail-in voting with no signature notarization were adopted. *See* D2.

B. Count I of the Petition claimed that § 115.277.1(2) authorizes any voter who "fears" contracting Covid-19 through in-person voting to cast an absentee ballot.

The Petition contained four Counts. *See* D2, at 29-34. Plaintiffs have abandoned Count II on appeal, so only Counts I, III, and IV are still at issue. *See* App. Br. 16 n.32. Of those three Counts, only Count I relied on the alleged health risks of in-person voting during Covid-19. Counts III and IV, as actually pleaded, were not limited to Covid-19 and sought relief that went far beyond the current pandemic.

In Count I, Plaintiffs alleged that "Section 115.277.1(2), RSMo, permits a registered voter who is afraid of contracting or spreading COVID-19, to vote absentee in Missouri without a notary seal required." D2, at 29. Count I recited that, under § 115.277.1(2), a voter who is experiencing "incapacity or confinement due to illness or physical disability" is authorized to cast an absentee ballot without a notary seal. D2, at 30, ¶¶ 155-156 (citing §§ 115.277.1(2) and 115.283.7, RSMo). Plaintiffs alleged that they "wish to vote absentee because they reasonably fear that they may contract or spread COVID-19 if they vote in person at their local polling location." D2, at 30, ¶ 158. But Count I did not allege that any Plaintiff actually has Covid-19, and neither did any other allegation in the Petition. D2, at 29-31.

In the Prayer for Relief, Count I requesting that the trial court enter a declaratory judgment and permanent injunction holding that "confining oneself to vote from home to avoid contracting or spreading COVID-19 is a valid justification to vote absentee under § 115.277.1(2), RSMo, without the requirement of a notary seal." D2, at 30, ¶¶ A, B.

C. Count III of the Petition claimed that every Missouri voter has a constitutional right to cast an absentee ballot for any reason in every future election.

Count III of the Petition did not allege injuries related to Covid-19 or seek relief limited to Covid-19. In Count III of the Petition, Plaintiffs claimed that "[r]efusing to allow voters to cast an absentee ballot by mail is a violation of the Right to Vote under the Missouri Constitution." D2, at 32. Other than the generic recital that "Plaintiffs incorporate by reference all preceding allegations," Count III contained no reference to Covid-19 or the putative health risks of in-person voting. *See id.* at 32-33. Instead, Count III merely alleged that "Section 115.277, RSMo, permits some voters, but no others, to vote absentee by mail," *id.* at 32, ¶ 166; and that "[v]oters who are not entitled to cast an absentee ballot … must appear in person at a specified polling place during specific election hours on Election Day in order to cast a ballot," *id.* at 33, ¶ 167. Count III then alleged that "[v]oting on Election Day can generate crowds and long lines at the polls and can often require waiting for poll workers and a voting booth to become available." *Id.* at 32, ¶ 168. Count

III did not allege any other burdens from in-person voting, and in particular (unlike Count I) it did not allege that the health risks of Covid-19 placed an unconstitutional burden on in-person voting. *Id.* Rather, Count III specifically alleged that any limitation of absentee voting to certain classes of persons is unconstitutional, stating: "Missouri has no adequate justification to permit some voters, but not others, to vote absentee by mail." *Id.* at 32, ¶ 169.

Count III's Prayer for Relief confirmed the breadth of this claim. In the Prayer for Relief, Count III requested that the trial court enter a declaratory judgment stating "that § 115.277, RSMo's, limitations on which voters may vote absentee by mail violates Article I, § 25 of the Missouri Constitution," and grant a permanent injunction "prohibiting Defendants and anyone acting in concert with them from limiting the availability of absentee voting," without further qualification. *Id.* at 33, ¶¶ A, B. Count III did not limit its request for relief to those voters who felt burdened by the alleged health risks of in-person voting during the Covid-19 pandemic. Rather, it asked for a declaratory judgment and permanent injunction holding that Missouri has no "adequate justification" to prevent *any* voter from casting an absentee ballot, *id.* at 32, ¶ 169; that all of Missouri's statutory "limitations on which voters may vote absentee by mail" are categorically unconstitutional, *id.* at 33, ¶ A; and thus that every Missouri voter has a constitutional right to cast an absentee ballot, for any reason, in every future election. *See id.*

D. Count IV of the Petition claimed that every Missouri voter has a constitutional right to cast an absentee ballot without a notarized signature for any reason in every future election.

Like Count III, Count IV of the Petition did not allege injuries or seek relief limited to Covid-19. In Count IV of the Petition, Plaintiffs claimed that "[r]efusing to allow voters to cast an absentee ballot by mail without a notary seal is a violation of the Right to Vote under the Missouri Constitution." D2 at 33. Count IV recited that Missouri law "permits some voters, but not others, to vote absentee by mail without a notary seal." D2 at 33, ¶ 172. Count IV alleged that "[o]btaining a notary seal imposes costs on the voter, including time and transportation," in addition to "requir[ing] voters to leave their homes in conflict with social distancing guidelines during the COVID-19 pandemic." D2 at 33, ¶ 174. Count IV alleged that "Missouri has no adequate justification to permit some voters, but not others, to vote absentee by mail" without a notary seal. D2 at 33, ¶ 175.

Likewise, Count IV's Prayer for Relief was not limited to Covid-19. In the Prayer for Relief, Count IV requested a declaratory judgment holding that Missouri's statutory "limitations on which voters may vote absentee by mail without an notary seal violate Article I, § 25 of the Missouri Constitution." *Id.* at 34, ¶ A. Count IV requested "preliminary and permanent injunctions prohibiting Defendants and anyone acting in concert with them from limiting the availability of absentee voting without a notary seal." *Id.* at 34, ¶ B. Again, the Prayer for Relief contained no

limitation to Covid-19, or even any reference to Covid-19. Instead, Plaintiffs requested an order holding that all Missouri voters have a constitutional right to cast absentee ballots for any reason without notarization in any election. *See id.*

II. Procedural History.

As noted, Plaintiffs filed their Petition on April 15, 2020. D2. On May 5, 2020, the State filed a motion to dismiss the Petition. D11. After expedited briefing with a response and a reply brief, D13, D14, the circuit court held a hearing on the motion to dismiss on May 12, 2020. D15.

After the hearing, the trial court granted the State's motion to dismiss and entered final judgment for Defendants on all Counts in the Petition. App. A001-017; D17, at 1-17. With regard to Count I, the circuit court held that Plaintiffs' statutory-interpretation claim failed to state a claim for relief because "someone who is not ill or disabled does not have an 'illness' or 'disability'" under § 115.277.1(2), RSMo. App. A003; D17, at 3. The circuit court held that Plaintiffs' arguments contradicted well-settled principles of statutory interpretation. App. A003-A005; D17, at 3-5.

The circuit court also held that Plaintiffs' Count III failed to state a claim for relief. App. A009-A011; D17, at 9-11. The circuit court observed that Count III claimed that "every Missouri voter has a constitutional right to cast an absentee ballot for any reason in any election," App. A009; D17, at 9, and the circuit court concluded that this sweeping claim contradicted the plain language of Article VIII,

§ 7 of the Missouri Constitution, as well as Missouri and federal case law recognizing that there is no freestanding constitutional right to cast an absentee ballot for any reason. App. A009-011; D17, at 9-11.

For similar reasons, the circuit court held that Plaintiffs' Count IV failed to state a claim for relief. App. A011-A012; D17, at 11-12. In Count IV, "Plaintiffs claim 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," and that "the relief Plaintiffs seek in Count IV is not limited to Covid-19 and goes far beyond their asserted health concerns." App. A011; D17, at 11. The circuit court held that, under Article VIII, § 7 and Missouri case law, "there is no constitutional right to cast an absentee ballot in Missouri. *A fortiori*, there is no constitutional right to cast an absentee ballot without signature verification." App. A011; D17, at 11.

In addition, the circuit court held that the organizational Plaintiffs "have not alleged facts supporting associational standing, direct standing or organizational standing to challenge the statutes at issue." App. A014; D17, at 14. The circuit court also dismissed Count II and Plaintiffs' class allegations, but Plaintiffs have not challenged those rulings on appeal. App. Br. 16-17, nn. 32-33.

III. Passage of Senate Bill 631.

On May 15, 2020, the General Assembly truly agreed and finally passed Senate Bill 631, which currently awaits the Governor's signature. *See* Senate Bill

No. 631, 100th Gen. Ass. (2020), at A048-A074 ("SB 631"); *available at* https://legiscan.com/MO/bill/SB631/2020. If enacted, SB 631 will make two major changes relevant here: (1) it will authorize voters who have Covid-19 or are "in an at-risk category" for Covid-19 to cast an absentee ballot without having their signature notarized; and (2) it will create a new process of "mail-in voting," open to all voters, that does require signature notarization. Both of these changes will be effective only through the year 2020.

First, SB 631 creates a new subdivision (7) in paragraph 1 of section 115.277. This new subdivision provides that, "[f]or an election that occurs during the year 2020," a voter who "expects to prevented from going to the polls to vote on election day" may obtain an absentee ballot if "the voter has contracted or is in an at-risk category for contracting or transmitting severe acute respiratory syndrome coronavirus 2 [*i.e.*, Covid-19]." SB 631, at 7 (Appx. 054). "This new subdivision shall expire on December 31, 2020." *Id.* SB 631 defines "voters who are in an at-risk category for contracting or spreading severe acute respiratory syndrome coronavirus 2" to include eight categories of people, *i.e.*, those who: "(1) Are sixty-five years of age or older," SB 631, at 8 (Appx. 055); "(2) Live in a long-term care facility licensed under chapter 198," *id.*; "(3) Have chronic lung disease or moderate to severe asthma," *id.*; "(4) Have serious heart conditions," *id.*; "(5) Are

immunocompromised," *id.*; "(6) Have diabetes," *id.*; "(7) Have chronic kidney disease and are undergoing dialysis," *id.*; or "(8) Have liver disease," *id.*

SB 631 also provides that, during the year 2020, voters who have Covid-19 or are "in an at-risk category" for Covid-19 may cast an absentee ballot without notarizing their signature, just like voters who are confined due to illness or disability. SB 631 amends section 115.291.1 to provide that, "for an election that occurs during the year 2020," an absentee voter is exempt from the notarization requirement if "the voter has contracted or is in an at-risk category for contracting or transmitting severe acute respiratory syndrome coronavirus 2, as defined in section 115.277." SB 631, at 14 (Appx. A061). SB 631 specifies that voters who are "in an at-risk category" for Covid-19 under section 115.291.1 include the same eight categories of voters identified in section 115.277. SB 631, at 15 (Appx. A62).

Second, in addition to permitting voters who have contracted or are at risk for Covid-19 to cast absentee ballots without notarization during 2020, SB 631 also creates a new process for *any* Missouri voter to cast a mail-in ballot during 2020. This new process includes several additional safeguards against fraud and abuse. SB 631 creates a new section 115.302, which provides: "Any registered voter of this state may cast a mail-in ballot as provided in this section." SB 631, at 15 (Appx. A062). The new section permits any voter to apply for a mail-in ballot in the jurisdiction of registration, either in person or by mail, at any time up to "the second

Wednesday immediately prior to the election." SB 631, at 15-16 (Appx. A063-A063). "Upon receiving a mail-in ballot by mail, the voter shall mark the ballot in secret, place the ballot in the ballot envelope, seal the ballot envelope and fill out the statement on the ballot envelope." SB 631, at 18 (Appx. A065). "If the voter is blind, unable to read or write the English language, or physically incapable of voting the ballot, the voter may be assisted by a person of the voter's own choosing." SB 631, at 18 (Appx. A065). "All votes on each mail-in ballot received by an election authority at or before the time fixed by law for the closing of the polls on election day shall be counted." SB 631, at 18 (Appx. A065).

The new section 115.302 includes many safeguards to prevent mail-in ballot fraud, voter coercion or influence, ballot harvesting, and other abuses. Each application for a mail-in ballot shall be signed by the applicant or the applicant's guardian or relative applying on his or her behalf. SB 631, at 16 (Appx. A063). "Knowingly making, delivering, or mailing a fraudulent mail-in-ballot application is a class one election offense." *Id.* The mail-in voter must sign a notarized statement attesting to their qualification to vote under penalty of perjury. SB 631, at 16-17 (Appx. A063-A064). This statement "shall be subscribed and sworn to before a notary public or other officer authorized by law to administer oaths." *Id.* at 18 (Appx. A065). "The false execution of a mail-in ballot is a class one election offense." *Id.* at 19 (Appx. A066).

In addition, SB 631 carefully limits the classes of people who may assist a voter in executing a mail-in ballot. "Upon receiving a mail-in ballot by mail, the voter shall mark the ballot in secret, place the ballot in the ballot envelope, seal the envelope and fill out the statement on the ballot envelope." *Id.* at 18 (Appx. A065). "If the voter is blind, unable to read or write the English language, or physically incapable of voting the ballot, the voter may be assisted by a person of the voter's own choosing." *Id.* "Any person who assists a voter an in any manner coerces or initiates a request or suggestion that the voter vote for or against, or refrain from voting on, any question or candidate, shall be guilty of a class one election offense." *Id.* In addition, "any person providing assistance to the mail-in voter shall include a signature on the envelope identifying the person providing such assistance under penalties of perjury." *Id.* at 16 (Appx. A063).

The new process for mail-in ballots is valid only during 2020. "The provisions of this section [*i.e.*, section 115.302] shall apply only to an election that occurs during the year 2020, to avoid the risk of contracting or transmitting severe acute respiratory syndrome coronavirus 2." *Id.* at 19 (Appx. A066). "The provisions of this section [*i.e.*, section 115.302] terminate and shall be repealed on December 31, 2020, and shall not apply to any election conducted after that date." *Id.*

ARGUMENT

I. If Signed Into Law, Senate Bill 631 Will Render Plaintiffs' Claims Moot During 2020, Except Plaintiffs' Claim That Voters Who Are Not In an At-Risk Category for Covid-19 Should Be Exempt From Notarization (Addresses the Issue Raised by the Court).

In its Order of May 22, 2020, this Court directed that "the parties shall brief the issue of whether SB631 renders this case moot in the event it is signed into law." If enacted, SB 631 will render moot Plaintiffs' central claims for relief, and the remainder of the relief sought will be unripe and plainly meritless. If enacted, SB 631 will authorize voters "in an at-risk category" for Covid-19 to cast absentee ballots without notarization, and it will authorize all other Missouri voters to cast "mail-in" ballots that do require signature notarization, during the election year 2020. Thus, all Missouri voters will have a full opportunity to vote by mail during 2020, and the only issue in dispute for 2020 will be whether voters who are *not* in an "at-risk" category for Covid-19 should be exempt from having their mail-in ballots notarized. And, to the extent Plaintiffs seek relief for future election years beyond 2020, their claims are either unripe or plainly meritless.

"When an event occurs that makes a court's decision unnecessary or makes granting effectual relief by the court impossible, the case is moot and generally should be dismissed." *Byrne & Jones Enterprises, Inc. v. Monroe City R-1 Sch. Dist.*, 493 S.W.3d 847, 856 (Mo. banc 2016) (quoting *State ex rel. Reed v. Reardon*,

41 S.W.3d 470, 473 (Mo. banc 2001)). "A case is moot when the question presented for decision seeks a judgment upon some matter which, if the judgment was rendered, would not have any practical effect upon any then existing controversy." *D.C.M. v. Pemiscot Cty. Juvenile Office*, 578 S.W.3d 776, 780 (Mo. banc 2019) (internal quotations omitted) (quoting *State ex rel. Gardner v. Boyer*, 561 S.W.3d 389, 394 (Mo. banc 2018)). Where "the relief requested" in a Point Relied On "would have no practical effect," that Point should be "denied as moot." *Washington v. State*, No. ED 107683, -- S.W. --, 2020 WL 1522585, at *1 n.2 (Mo. App. E.D. Mar. 31, 2020).

Here, the circuit court dismissed Plaintiffs' class allegations, and Plaintiffs have not challenged that ruling on appeal, App. Br. 16-17 n.33, so the Court should consider mootness as it pertains to the three named Plaintiffs, Del Villar, Webb, and Wattree. In addition, Plaintiffs have abandoned Count II on appeal, so the Court need only consider mootness as to Counts I, III, and IV. App. Br. 16 n.32.

A. If enacted, SB 631 will render Count I moot as to "at-risk" voters.

In Count I, Plaintiffs contend that any voter who fears contracting Covid-19 at the polls may cast an absentee ballot because he or she is supposedly "confine[d] due to illness or physical disability" under § 115.277.1(6), RSMo. D2, at 30, ¶ 158. Voters who are authorized to cast an absentee ballot due to "illness or disability" are

exempt from the requirement of notarizing their signature on the absentee ballot. § 115.291.1, RSMo.

If enacted, SB 631 will permit (1) "at-risk" voters with any of eight co-morbidities for Covid-19 to cast an absentee ballot without notarization during 2020; and (2) any voter to cast a "mail-in" ballot, which will require notarization, during 2020. *See supra*. Plaintiff Webb alleges that she has severe asthma and hereditary angioedema, and so she would qualify as an "at-risk" voter under SB 631 and would qualify to cast an absentee ballot without notarization during 2020. SB 631, at 8 (Appx. 055). Plaintiffs Del Villar and Wattree, however, do not allege facts indicating that they fall into an "at-risk" category, so they would be authorized by SB 631 to cast "mail-in" ballots, which do require signature notarization, during 2020. Thus, as to Count I, SB 631 would render Plaintiff Webb's claim moot, at least during the current election year. SB 631 would render the claims of Plaintiffs Del Villar and Wattree partially moot, because it would authorize them to vote by mail, but it would still require notarization of their ballot. So the limited question whether those two not-at-risk Plaintiffs may cast an absentee ballot *without notarization* under § 115.277.1(2) would remain a live issue for elections in 2020.

B. SB 631 will render Count III entirely moot during 2020.

In Count III, Plaintiffs sought a declaratory judgment and permanent injunction holding that any Missouri voter may cast an absentee ballot for any reason

in any Missouri election. *See* D2 at 33, ¶¶ A, B. Plaintiffs do not dispute that prevailing on Count I would moot their claim under Count III. Because SB 631 would render moot Plaintiff Webb's claim under Count I, it would also effectively moot her claims under Count III, at least for relief requested during 2020.

SB 631 will also render moot the other named Plaintiffs' claims under Count III during 2020. SB 631 creates a reasonable process by which any Missouri voter may cast a "mail-in" ballot during 2020. To be sure, those mail-in ballots must be notarized, but Plaintiffs did not challenge the notarization requirement in Count III—they challenged that requirement in Count IV. *See id.* And Plaintiffs do not contend that the mail-in balloting process created by SB 631 will be unconstitutionally burdensome or inadequate in any way other than the notarization requirement. Accordingly, granting Plaintiffs relief under Count III "would not have any practical effect upon any then existing controversy" raised by Count III, because SB 631 would effectually grant them complete relief on that claim, at least during 2020. *Pemiscot County*, 578 S.W.3d at 780.

C. SB 631 will render Count IV entirely moot as to "at-risk" voters during 2020, but not moot as to voters who are not at-risk but seek to evade the notarization requirement.

In Count IV, Plaintiffs claimed that any Missouri voter may cast an absentee ballot without signature notarization for any reason in any future election. D2 at 34, ¶¶ A, B. For the reasons discussed above, SB 631 will render Count IV moot in

2020 for voters such as Webb who fall into an "at-risk" category identified in SB 631, because SB 631 authorizes those voters to cast an absentee ballot without notarization. However, for Plaintiffs who do not qualify as "at-risk" under SB 631, such as Del Villar and Wattree, SB 631 will authorize those Plaintiffs to cast a "mail-in" ballot during 2020 that does require notarization. Because Plaintiffs specifically challenge the notarization requirement in Count IV, SB 631 will not moot the claims of Plaintiffs Del Villar and Wattree under Count IV—though those claims will be plainly meritless for the reasons discussed below.

In sum, if SB 631 is enacted, the only issue that would remain in dispute for elections during 2020 is whether voters who do *not* fall into an "at-risk" category for Covid-19 (such as Del Villar and Wattree) may cast an absentee or mail-in ballot without signature notarization. Plaintiffs requested this relief on statutory grounds in Count I and on constitutional grounds in Count IV. If SB 631 is enacted, Count III will be entirely moot during 2020.

D. To the extent that Plaintiffs rely on alleged health risks from in-person voting and ballot notarization due to Covid-19, their claims for relief beyond election year 2020 are plainly unripe.

Finally, because SB 631 is limited to elections occurring in the year 2020, SB 631 would not render any Plaintiffs' claims moot as to future election years, such as 2022 and 2024. However, to the extent that Plaintiffs' claims rely on the alleged health risks of in-person voting during the Covid-19 pandemic, those claims are

currently unripe as to such future election years. No one can predict at this time what the public-health situation with respect to Covid-19 will look like over two years and four years from now. No one can predict what health risks in-person voting or notarization might present that far in the future. For this reason, any claims seeking relief based on the health risks due to Covid-19 from in-person voting or notarization in election years after 2020 are unripe at this time. *See, e.g., S.C. v. Juvenile Officer*, 474 S.W.3d 160, 163 (Mo. 2015) (holding that claim based on future facts that are inherently "uncertain" at the time of litigation are unripe); *Forrest v. State*, 290 S.W.3d 704, 718 (Mo. banc 2009) (holding that, where the "future facts" that underlie a claim are "unknown," the claim is not ripe).

As discussed in detail below, the claims that Plaintiffs actually pled in Counts III and IV did *not* seek relief limited to the Covid-19 pandemic. On appeal, however, Plaintiffs urge this Court to re-characterize those claims as resting entirely upon health risks from Covid-19, and seeking relief narrowly limited to the Covid-19 pandemic. App. Br. 29-33, 42-43. This Court should not accept Plaintiffs' belated re-characterization of those claims, and if it does not, those claims will be plainly meritless for the reasons discussed below. But if it were to accept Plaintiffs' re-characterization of those claims, those claims will also be unripe as to elections occurring in future election years.

II. Count I Fails to State a Claim for Relief Because a Voter Who Is Not Ill or Disabled Does Not Have an "Illness" or "Disability" Under the Plain Meaning of § 115.277.1(2), RSMo (Responds to Appellants' First Point Relied On).

In Count I of their Petition, Plaintiffs sought a declaratory judgment and injunction holding that all voters who "reasonably fear that they may contract or spread COVID-19 if they vote in person" are authorized by statute to cast an absentee ballot under § 115.277.1(2), RSMo. D2 ¶ 158. This Count fails to state a claim for relief because a voter who is not ill or disabled does not have an "illness" or "disability" within the plain meaning of § 115.277.1(2). Plaintiffs' arguments contradict numerous well-established principles of statutory interpretation.

A. Voters who are not ill are disabled do not have an "illness" or "disability" under the plain meaning of § 115.277.1(2).

The "primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009). Here, § 115.277.1(2) provides that a voter may cast an absentee ballot if he or she "expects to be prevented from going to the polls to vote on election day due to: … 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." § 115.277.1(2), RSMo (emphasis added). Plaintiffs contend that a voter who is not ill or disabled suffers from an "illness" or

"disability" under § 115.277.1(2). As the circuit court correctly noted, Appx. A003-A005; D17, at 3-5, Plaintiffs' proposed interpretation contradicts the plain text and many fundamental principles of statutory interpretation.

First, Plaintiffs' proposed interpretation contradicts the plain and ordinary meaning of the statutory language. As noted above, "[t]he primary rule of statutory construction is to ascertain the intent of the legislature from the language used, to give effect to that intent if possible, and to consider the words used in their *plain and ordinary meaning*." *Dickemann v. Costco Wholesale Corp.*, 550 S.W.3d 65, 68 (Mo. 2018) (emphasis added) (quoting *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988)). "Absent express definition, statutory language is given its plain and ordinary meaning." *Id.* Here, the statute authorizes absentee voting by voters who are "confine[d] due to illness or physical disability." § 115.277.1(2), RSMo. Plaintiffs contend that voters who are not ill or disabled suffer from "illness" or "physical disability" under the statute. *See* App. Br. 23. This interpretation violates the "plain and ordinary meaning" of the statute. *Dickemann*, 550 S.W.3d at 68. In ordinary English, one would not say that a person who is not ill or disabled is "confined due to illness or physical disability." One might say that they are "confined due to ***fear of*** illness," but that is not what the statute says.

Second, as the circuit court correctly noted, Appx. A004; D17, at 4, Plaintiffs improperly seek to engraft language onto the statute that it does not contain. This

Court holds that "the Court cannot supply what the legislature has omitted from controlling statutes." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 668 (Mo. banc 2010). "[C]ourts cannot transcend the limits of their constitutional powers and engage in judicial legislation supplying omissions and remedying defects in matters delegated to a coordinate branch of our tripartite government." *Bd. of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo. banc 2001). "We cannot engraft language onto a statute that was not provided by the legislature." *State ex rel. Koster v. Cowin*, 390 S.W.3d 239, 244 (Mo. App. W.D. 2013). As the circuit court correctly held, "[s]omeone who is not ill is not 'confined due to illness'; they are 'confined due to ***fear of*** illness.' But the statute does not say 'fear of illness'—it just says 'illness.'" Appx. A004, ¶ 10 (bold in original) (quoting § 115.277.1(2), RSMo); D17, at 4. Thus, Plaintiffs seek to engraft the words "fear of" onto the statute, even though this language "was not provided by the legislature." *Cowin*, 390 S.W.3d at 244. Though Plaintiffs may believe that engrafting the words "fear of" onto the statute would create a better policy, "it is not within the Court's province to question the wisdom, social desirability, or economic policy underlying a statute as these are matters for the legislature's determination. The Court must enforce the law as it is written." *Turner*, 318 S.W.3d at 668 (citations and quotation marks omitted).

Third, Plaintiffs' interpretation would lead to unreasonable and absurd results by authorizing virtually every Missouri voter to cast an absentee ballot in every

future election, regardless of Covid-19. In general, "[t]his Court will not assume the legislature intended an absurd or unreasonable construction of the statutes." *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 669 (Mo. banc 1999). Here, Plaintiffs contend that they seek relief for voters who are self-quarantining due to fears of Covid-19, App. Br. 23. But, as the circuit court noted, "no limiting principle would restrict Plaintiffs' interpretation of the statute to the current Covid-19 pandemic. Section 115.277.1(2) does not refer to 'Covid-19' or 'coronavirus.' It refers to 'illness.'" Appx. A003; D17, at 3. The word "illness" does not refer only to coronavirus—it also encompasses an entire range of maladies from SARS, to Ebola, to influenza, to the common cold. "If Plaintiffs' interpretation were correct, then any voter who feared catching any illness at the polls, in any future election, would be entitled by the statute to cast an absentee ballot." *Id.* No court or election authority has ever adopted such a broad reading of the statute, and for good reason. This interpretation would upend the statutory scheme by effectively transforming absentee voting from a limited exception into the predominant method of voting in Missouri. This Court should not adopt such an "unreasonable" interpretation. *Dierkes*, 991 S.W.2d at 669.

Fourth, Plaintiffs' interpretation violates the rule that the Court must interpret the statute "as a whole," rather than reading a single provision in isolation. *Cosby v. Treasurer of State*, 579 S.W.3d 202, 207 (Mo. banc 2019). Plaintiffs also violate

the related principle that "[t]he provisions of a legislative act must be construed and considered together and, if possible, all provisions must be harmonized." *Dickemann*, 550 S.W.3d at 68 (quoting *Wollard v. City of Kan. City*, 831 S.W.2d 200, 203 (Mo. banc 1992)). As the circuit court correctly noted, "Missouri's voting laws demonstrate more than just a preference for in-person voting; they require voting to take place in person unless the voter meets one of the enumerated exceptions in § 115.277.1." Appx. A004; D17, at 4. By adopting an interpretation of the statute that would "permit virtually anyone to cast an absentee ballot," *id.*, Plaintiffs fail to read § 115.277.1(2) along with the other provisions of Chapter 115 "as a whole," *Cosby*, 579 S.W.3d at 207; and they fail to "harmonize" § 115.277.1(2) with the rest of the statute. *Dickemann*, 550 S.W.3d at 68.

Fifth, Plaintiffs' interpretation violates the principle that § 115.277.1(2) should be interpreted *in pari materia* with the other sections in Chapter 115. Appx. A004-A005; D17, at 4-5. "If the meaning of a word is unclear from consideration of the statute alone, a court will interpret the meaning of the statute *in pari materia* with other statutes dealing with the same or similar subject matter." *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 122 (Mo. 2014). Chapter 115 sets forth a comprehensive scheme for in-person voting in Missouri, and § 115.277.1 provides a narrow set of exceptions to that rule. Plaintiffs' interpretation would turn Chapter

115 on its head by making absentee voting the predominant method of voting in Missouri.

Sixth, Plaintiffs' interpretation would violate the principle of *noscitur a sociis* by giving one item on a six-item list—*i.e.*, the exception for illness or disability in paragraph (2)—a radically different and more expansive reading than the other five items on the same list. *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 122 (Mo. banc 2014); Appx. A004; D17, at 4. When a provision "appears in the statute within a list," the Court "will apply the principle of statutory construction known as *noscitur a sociis*—a word is known by the company it keeps." *Union Electric*, 425 S.W.3d at 122. "Under this principle, a court looks to the other words listed in a statutory provision to help it discern which of multiple possible meanings the legislature intended." *Id.* Here, § 115.277.1 provides a list of six enumerated bases for absentee voting, including: "(1) Absence on election day from the jurisdiction of the election authority in which such voter is registered to vote," "(3) Religious belief or practice" preventing one from going to the polls on election day, "(4) Employment as an election authority … at a location other than such voter's polling place," "(5) Incarceration," and "(6) Certified participation in the address confidentiality program established under sections 589.660 to 589.681 because of safety concerns." § 115.277.1(1), (3)-(6), RSMo. Notably, the other five items on this list of enumerated exceptions provide narrow, "objective and verifiable grounds" for

absentee voting. Appx. A004; D17, at 4. By contrast, Plaintiffs' interpretation of item (2) of the same list is "based on a subjective, unverifiable criterion—*i.e.*, 'fear' of catching an illness." *Id.* This interpretation of the list violates the doctrine of *noscitur a sociis*. *Union Electric*, 425 S.W.3d at 122.

Seventh, Plaintiffs' proposed interpretation contradicts the principle that "[t]he legislature is presumed not to enact meaningless provisions." *Dickemann*, 550 S.W.3d at 68 (citation omitted). "Courts never presume that our legislature acted uselessly and should not construe a statute to render any provision meaningless." *Caplinger v. Rahman*, 529 S.W.3d 326, 332 (Mo. App. S.D. 2017) (en banc); *see also State ex rel. Lavender Farms, LLC v. Ashcroft*, 558 S.W.3d 88, 92 (Mo. App. W.D. 2018). As the circuit court correctly noted, "Plaintiffs' interpretation of paragraph (2) would render the other grounds for absentee voting effectively meaningless," Appx. A005; D17, at 5, because it would create a virtually boundless exception that virtually any voter could invoke. *Id.*

B. Plaintiffs provide no convincing argument to support their unreasonable interpretation of § 115.277.1(2).

Plaintiffs provide no convincing support for their implausible interpretation of § 115.277.1(2). *See* App. Br. 23-28.

First, Plaintiffs argue that their interpretation is consistent with the "ordinary and expected meaning of the words used in § 115.277.1(2)." App. Br. 23. But

Plaintiffs provide no analysis of the statutory language; they cite hardly any Missouri case law; and they do not argue that any voter, court, or election authority ever "expected" that any voter who "fears" catching any illness may cast an absentee ballot. Most fundamentally, they never explain how a voter who is not ill or disability could be construed to have an "illness" or "disability" under the "ordinary" meaning of § 115.277.1(2). For all the reasons discussed above, *supra* Part II.A, the "ordinary and expected meaning" of the statute does not authorize voters who merely *fear* catching an illness to cast an absentee ballot. Plaintiffs' interpretation "contradicts the plain language of the statute." Appx. A003; D17, at 3.

Second, Plaintiffs contend that the State seeks impermissibly to engraft language onto the statute by arguing that § 115.277.1(2) extends only to those who are subject to "incapacity or confinement due to actual illness of themselves or those in their direct care." Pl. Br. 26 (citing *Turner*, 318 S.W.3d at 668). Notably, Plaintiffs' citation of *Turner* in this argument is the only Missouri case (or Missouri authority of any kind) cited in their entire argument under this Point Relied On. *See* App. Br. 23-28. For the reasons discussed above, *Turner* supports the State, and contradicts Plaintiffs' position. "Illness" means "illness"—it does not mean "fear of illness." By urging this Court to interpret "illness" to mean "*fear of* illness," Plaintiffs ask the Court disregard *Turner*'s guidance and "supply what the legislature has omitted from controlling statutes" and "engage in judicial legislation supplying

omissions and remedying defects in matters delegated to a coordinate branch of our tripartite government." *Turner*, 318 S.W.3d at 668 (quotation omitted). "The Court must enforce the statute as written." *Id.*

Third, Plaintiffs argue that their interpretation is "consistent with the legislative purpose behind § 115.277.1(2)." App. Br. 27. But the best evidence of any statute's "legislative purpose" is the plain and objective meaning of the statute that the legislature actually enacted—not a series of policy arguments masquerading as a "legislative purpose" to change the statute's plain meaning. *See, e.g., Bank of Crestwood v. Gravois Bank*, 616 S.W.2d 505, 510 (Mo. banc 1981) ("To aid in ascertaining the legislative purpose, the Court should … *attribute to the words used their plain meaning*.") (emphasis added). In fact, Plaintiffs' vague invocation of the statute's "purpose" at a high level of vagueness and generality illustrates the perils of such reliance on "legislative purpose" to alter the statute's plain language. In enacting § 115.277.1(2), the legislature evidently struck a balance between at least two competing purposes—the purpose of allowing voters who are ill or disabled to cast absentee ballots, and the purpose of applying restrictions and safeguards on absentee balloting to prevent fraud and abuse. By focusing exclusively on the former purpose, and wholly disregarding the latter, Plaintiffs distort both the statute's plain language and its objective purposes. As the U.S. Supreme Court has frequently stated, "no legislation pursues its purposes at all costs. Deciding what competing

values will or will not be sacrificed to the achievement of a particular objective is the very essence of legislative choice—and it frustrates rather than effectuates legislative intent simplistically to assume that whatever furthers the statute's primary objective must be the law." *Rodriguez v. United States*, 480 U.S. 522, 525-26 (1987).

Fourth, Plaintiffs cite the Centers for Disease Control's recommendations for conducting elections, implying that the CDC has called for universal mail-in voting during the Covid-19 pandemic. App. Br. 27; *see also* App. Br. 4, 10. As the circuit court correctly held, "[t]he CDC guidelines provide policy recommendations that shed no light on this Court's task of statutory interpretation." Appx. A005; D17, at 5. In any event, the CDC recommendations do not support for Plaintiffs' position. Plaintiffs argue that the CDC "encourage[s] mail-in voting," App. Br. 4, 10, but The CDC actually recommended that absentee voting should be governed by the law of the jurisdiction, and that authorities should "[e]ncourage mail-in methods of voting *if allowed in the jurisdiction*." Centers for Disease Control, Recommendations for Election Polling Locations (March 27, 2020), at https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html (emphasis added). The CDC did not recommend changing election statutes by fiat to authorize absentee voting that was not already "allowed in the jurisdiction." *Id.*

Moreover, this recommendation was only one of six items on a bullet-point list of precautions to take against spreading Covid-19 at the polls. *See id.* Far from demanding universal absentee voting, the vast majority of the CDC's recommendations addressed reasonable precautions to render *in-person* voting safer—such as "cleaning and disinfection of polling location areas and associated voting equipment," *id.*; "[e]ncourag[ing] voters planning to vote in-person on election day to arrive at off-peak times," *id.*; "relocating polling places from nursing homes, long-term care facilities, and senior living residences," *id.*; "[p]ractic[ing] hand hygiene frequently," *id.*; using "alcohol-based hand-sanitizer" at polling stations, *id.*; and "[i]ncorporat[ing] social distancing strategies" during in-person voting, *id.* In other words, the CDC explicitly contemplated that in-person voting would continue as the predominant method of voting, and the CDC provided best-practice precautions to employ during such in-person voting. *Id.* And the CDC emphasized that its recommendations are "interim" and "[b]ased on what is currently known about SARS-CoV-2 and about similar coronaviruses," as of March 27. *Id.*

Finally, in the absence of any Missouri authority supporting them, Plaintiffs rely heavily on decisions from other States. *See* App. Br. 23-26. But these decisions do not support them, and in fact they undercut Plaintiffs' position, because they demonstrate that the relief Plaintiffs seek should be obtained from the legislature or executive officials, not the courts.

Plaintiffs' out-of-state authorities are distinguishable for at least four reasons. First, none of them addressed or discussed Missouri law in any way, so they are plainly not controlling here. Second, none of them engaged in any serious analysis of the out-of-state statutory language, so they have no persuasive value for the question of statutory interpretation raised in Count I. Third, none of these out-of-state decisions issued from a court interpreting and applying that state's law. Rather, all of them issued from political branches, such as executive officials and state legislatures, and thus they emphasize the State's contention here that the relief Plaintiffs seek should be requested from the legislature. In fact, some involved executive orders by state governors who explicitly invoked their emergency powers to *suspend* statutory requirements. As the circuit court held, "[t]his Court is not an executive agency, and it does not suspend statutes—it interprets and applies them." Appx. A006; D17, at 6. Fourth, as the circuit court held, "all of these decisions provided relief that was time-limited and specifically addressed to the Covid-19 pandemic, but Plaintiffs' proposed interpretation would apply to fear of any 'illness' in any future election." Appx. A006; D17, at 6.

All four of these distinctions apply to each and every one of the out-of-state authorities cited by Plaintiffs. The New Hampshire memorandum cited by Plaintiffs issued from New Hampshire's executive officials, did not discuss Missouri law, did not engage in a detailed statutory-interpretation analysis, and was limited to elections

conducted in 2020. *See* Memorandum of New Hampshire's Secretary of State and Attorney General re: Election Operations During the State of Emergency, at 4 (April 10, 2020), *at* https://www.nhpr.org/sites/nhpr/files/202004/covid-19_elections_guidance.pdf. Alabama's statement issued from its Secretary of State (not its courts), did not discuss Missouri law, did not engage in any analysis of Alabama's statutory language, and was limited to a primary election on July 14, 2020. *See* Press Release, Alabama Secretary of State, *100 Days Left to Apply for an Absentee Ballot for Primary Runoff Election* (March 31, 2020), *at* https://www.sos.alabama.gov/newsroom/100-days-left-apply-absentee-ballot-primary-runoff-election. Virginia's statement issued from executive officials (its Department of Elections), did not address Missouri law, engaged in no analysis of Virginia's statutory language, and was explicitly limited to "the June 2020 election." Virginia Department of Elections, *Absentee Voting*, at https://www.elections.virginia.gov/casting-a-ballot/absentee-voting/.

Arkansas's order issued from its Governor, who explicitly invoked his authority to suspend statutory requirements, and it did not address Missouri law, did not analyze Arkansas's statutory language (no doubt because the order was *suspending* Arkansas's statutory requirements for absentee voting), and applied only to elections on March 31, 2020. *See* Governor of Arkansas, Executive Order No. 20-08, at 1-2 (March 20, 2020), *at*

https://governor.arkansas.gov/images/uploads/executiveOrders/EO_20-08._.pdf. Delaware's declaration issued from its Governor, who invoked his power to suspend statutory requirements, and it did not discuss Missouri law, did not engage in any analysis of Delaware's statutory language, and was explicitly limited in duration the life of the Order declaring a state of emergency. *See* Governor of Delaware, Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to Public Health Threat (March 24, 2020), *at* https://governor.delaware.gov/health-soe/sixth-state-of-emergency/.

Finally, in Massachusetts—like Missouri—the *legislature* passed a statute authorizing absentee voting during the Covid-19 pandemic. *See* General Court of the Commonwealth of Massachusetts, 191st Sess., Bill S. 2608, *at* https://malegislature.gov/bills/191/s2608. Plaintiffs neglect to include in their block-quote of this Massachusetts statute, App. Br. 25, the qualification that it applied *only* to "an election held on or before June 30, 2020." *Id.* Similarly, West Virginia—like Missouri—authorized voting by mail through a statute enacted by its legislature. W.Va. Code §§ 153-53-2, 153-53-3.

Notably absent from Plaintiffs' list of out-of-state authorities is any court decision holding that a voter who fears contracting Covid-19 has an "illness" or "disability" under any state statute. In the court below, Plaintiffs relied heavily on a state-court decision from Texas granting a TRO on this ground, but since then, the

Texas Supreme Court has unanimously rejected this position. *In re State of Texas*, No. 20-0394, -- S.W.3d --, 2020 WL 2759629, at *1 (Tex. May 27, 2020) (holding unanimously that "a voter's lack of immunity to COVID-19, without more, is not a 'disability' as defined by the Election Code").

For all these reasons, the circuit court's judgment dismissing Count I should be affirmed.

III. Count III Fails to State a Claim For Relief Because the Missouri Constitution and Decades of Missouri Case Law Hold that the Legislature, Not the Courts, Has the Authority to Decide Whether and How to Authorize Absentee Voting, Including During the Current Pandemic (Responds to Plaintiffs' Second Point Relied On).

Assuming it is not rendered moot by the enactment of SB 631, Plaintiffs Count III is meritless as a matter of law. Count III alleges that every Missouri voter has an unqualified constitutional right to vote by mail in every future Missouri election for any reason. D2, at 32-33. This claim contradicts the plain language of the Missouri Constitution as well as decades of case law holding that absentee voting is not an unqualified right and that the legislature has authority to determine whether and how to authorize absentee voting.

A. Count III pleads that every Missouri voter has a constitutional right to cast an absentee ballot for any reason in every future election.

As discussed above in the Statement of Facts, Count III unambiguously pleads that every Missouri voter has a constitutional right to cast an absentee ballot for any

reason in every future Missouri election. *See* D2, at 33-33, ¶¶ 164-169. Count III pleads that Missouri law "permits some voters, but not others, to vote absentee by mail," *id.* at 32, ¶ 166; that voters who are not entitled to vote absentee "must appear in person at a specified polling place during specific hours on Election Day in order to cast a ballot," *id.* at 32, ¶ 167; that "[v]oting on Election Day can generate crowds and long lines at the polls and can often require waiting for poll workers and a voting booth to become available," *id.* at 32, ¶ 168; and that "Missouri has no adequate justification to permit some voters, but not others, to vote absentee by mail," *id.* at 32, ¶ 169. There is no reference in Count III to Covid-19, or an "as applied" challenge, or a limitation to the current pandemic. Instead, Count III clearly and unambiguously pleads that the *ordinary* inconveniences of in-person voting—*i.e.*, "crowds and long lines at the polls," and "waiting for poll workers and a voting booth to become available," *id.* at 32, ¶ 168—supposedly impose an unconstitutional burden on the right to vote. And Count III pleads that "Missouri has no adequate justification" to prevent *any* voter "to vote absentee by mail"—again, without any reference to Covid-19 or the current pandemic. *Id.* at 32, ¶ 169.

Plaintiffs' Prayer for Relief is similarly unambiguous, and it clearly requests a declaratory judgment holding that all of "§ 115.277, RSMo's limitations on which voters may vote absentee by mail" are unconstitutional. *Id.* at 33, ¶ A. The Prayer for Relief requested a *permanent* injunction "prohibiting Defendants and anyone

acting in concert with them from limiting the availability of absentee voting," without any further limitation. *Id.* at 33, ¶ B. Nowhere in its Prayer for Relief did Count III make any reference to Covid-19 or the current pandemic, or impose any form of time limitation on the relief requested. *See id.*

Notwithstanding the admirable clarity of their pleading in Count III, Plaintiffs now contend that Count III requested narrow, as-applied relief "in the context of the COVID-19 pandemic." App. Br. 29. The claim they now defend on appeal, however, bears no resemblance to the claim actually pled in their Petition. Plaintiffs now argue that Count III "sought relief only for the 2020 elections," App. Br. 32, but their Petition says the exactly the opposite. Count III of their Petition never mentioned "the 2020 elections," *id.*; rather, it expressly sought a "permanent" injunction prohibiting the State "from limiting the availability of absentee voting" for any voter in any way. D2 at 33, ¶ B. Plaintiffs argue that "Count III incorporates all preceding allegations in the Petition, D2 p. 32 ¶ 164." App. Br. 32. But Paragraph 164 merely recites that "Plaintiffs incorporate by reference all preceding allegations." D2, at 32, ¶ 164. Nothing in Count III itself made any reference to Covid-19 or requested any relief other than a sweeping judgment holding that every Missouri voter has a constitutional right to cast an absentee ballot for any reason in any election.

Plaintiffs argue that the circuit court erred by construing their Petition according to its plain meaning, and should instead have accepted their creative re-characterization of their claims. App. Br. 31 & n.44. This argument has no merit. Under black-letter law, in considering the State's motion to dismiss, the circuit court was bound to consider the "four corners" of Plaintiffs' pleading, not a *post hoc* re-characterization of it. "In order to determine the cause of action pleaded in a petition, this court must read the petition 'from its four corners' and in its entirety." *Burns v. Black & Veatch Architects, Inc.*, 854 S.W.2d 450, 457 (Mo. App. W.D. 1993). "A petition must be read from its four corners and a court must give to the language its plain and ordinary meaning …." *Scher v. Gilpin*, 738 S.W.2d 900, 901 (Mo. App. E.D. 1987) (citing *Gover v. Cleveland*, 299 S.W.2d 239, 242 (Mo. App. 1957)). "The ruling on a motion to dismiss is ordinarily confined to the face of the petition." *Matt v. Burrell, Inc.*, 892 S.W.2d 796, 798 (Mo. App. S.D. 1995) (citing *Boyd v. Lane*, 869 S.W.2d 305, 306 (Mo. App. 1994)). "[N]either the trial court nor the appellate court on de novo review may consider matters outside the pleadings when adjudging a motion to dismiss." *Naylor Senior Citizens Hous., LP v. Side Const. Co.*, 423 S.W.3d 238, 241 n.1 (Mo. banc 2014) (citing *City of Lake Saint Louis v. City of O'Fallon*, 324 S.W.3d 756, 759 (Mo. banc 2010)).

Plaintiffs argue that they "made clear in subsequent filings" that they actually wanted to assert a much narrower claim based solely on the circumstances of the

Covid-19 pandemic. App. Br. 32. But that re-characterized claim appears nowhere in their Petition. D2. It would have been error for the circuit court to rely on "subsequent filings" to determine the adequacy of the Petition as pled. "The sufficiency *vel non* of a petition upon a motion to dismiss must be determined by the facts alleged in the petition or an exhibit thereto and not by what plaintiff may have intended to plead as evidenced by suggestions filed in the cause or by plaintiff's briefs upon appeal which form no part of the pleading." *Windle v. Bickers*, 655 S.W.2d 86, 87 (Mo. App. S.D. 1983) (citing *Voelker v. Saint Louis Mercantile Library Ass'n*, 359 S.W.2d 689, 693 (Mo. 1962)).

As the circuit court noted, "Count III does not refer to Covid-19 at all." Appx. A009; D17, at 9. "Instead, Count III alleges that the *ordinary* inconveniences of in-person voting … entail that there is a constitutional right to absentee voting for any reason." *Id.* "Again, the relief sought [in Count III] is not limited to, and does not even refer to, the Covid-19 pandemic." *Id.*

B. Count III as pled is meritless as a matter of law.

Plaintiffs present no argument to defend Count III as it was actually pled in their Petition. In fact, they concede that their "facial attack on the constitutionality" of § 115.277 is "non-cognizable." App. Br. 31 n.44. This concession is correct. Count III contradicts the plain text of the Missouri Constitution and decades of Missouri case law, as well as persuasive authority from federal court.

First, Plaintiffs' argument that the legislature may not impose any limitations on who may vote absentee contradicts the plain language of the Missouri Constitution. As the circuit court held, "the plain language of the Missouri Constitution provides that there is no constitutional right to cast an absentee ballot." Count III contends that any limitation on absentee voting violates Article I, § 25 of the Constitution. D2 at 33, ¶ A. But Article I, § 25 does not refer to absentee voting at all. *See* MO. CONST. art. I, § 25. By contrast, Article VIII, § 7 of the Constitution—entitled "Absentee voting"—specifically addresses absentee voting. MO. CONST. art. VIII, § 7.

Article VIII, § 7 provides in its entirety: "Qualified electors of the state who are absent, whether within or without the state, ***may*** be enabled by general law to vote at all elections by the people." *Id.* (emphasis added). As Missouri courts have often held, "the word 'may' denotes discretion, not an obligation." Appx. A009, D17, at 9; *see also Wolf v. Midwest Nephrology Consultants, PC.*, 487 S.W.3d 78, 83 (Mo. App. W.D. 2016) ("It is the general rule that in statutes the word "may" is permissive only, and the word "shall" is mandatory.") (quoting *State ex inf. McKittrick v. Wymore*, 119 S.W.2d 941, 944 (Mo. 1938)).

Thus, under the plain language of Article VIII, § 7, the Missouri Constitution confers on the legislature the discretion to decide whether, and to what extent, to authorize absentee voting for Missouri voters. *Id.* The more specific language in

Article VIII, § 7 defeats Plaintiffs' attempt to discover an unqualified constitutional right to absentee voting in the more general language of Article I, § 25. *See, e.g., Dieser v. St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 431 n.5 (Mo. banc 2016); *Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 33 (Mo. banc 2015). Section 115.277 is a "general law" that "enable[s]" qualified voters "who are absent, whether within or without the state" to vote by absentee ballot. MO. CONST. art. VIII, § 7. It is thus specifically authorized by Article VIII, § 7 of the Constitution. *Id.*

Consistent with this plain meaning of the Constitution, both this Court and other Missouri appellate courts have repeatedly held that absentee voting is a "special privilege," not a constitutional right. *See, e.g., Straughan v. Meyers*, 187 S.W. 1159, 1163 (Mo. 1916); *Barks v. Turnbeau*, 573 S.W.2d 677, 681 (Mo. App. E.D. 1978); *State ex rel. Hand v. Bilyeu*, 346 S.W.2d 221, 225 (Mo. App. 1961) (opinion vacated by transfer to Missouri Supreme Court, but decision upheld *State ex rel. Hand v. Bilyeu*, 351 S.W.2d 457 (Mo. 1961)); *Elliott v. Hogan*, 315 S.W.2d 840, 848 (Mo. App. 1958). For example, in *Straughan*, this Court stated that absentee voting is a "special privilege" that "under the general laws, could not be exercised." 187 S.W. at 1163, 1164. As *Straughan* held, casting an absentee ballot is not a fundamental right under Missouri law; rather, the absentee ballot statutes merely "provide the means and machinery through which a certain class of citizens might enjoy a privilege which, under the general laws, could not be exercised." *Id.*

at 1163. Likewise, *Barks* held that "the opportunity to vote by absentee ballot is *clearly a privilege and not a right*. Compliance with the statutory requirements is mandatory." *Barks*, 573 S.W.2d at 681 (emphasis added). The "special privilege" of casting an absentee ballot, *Barks* held, "is limited to … statutory grounds." *Id.* Similarly, *Bilyeu* stated that "[t]he casting of vote by absentee ballot at any election is not a matter of inherent right. It is a special privilege conferred and available only under certain conditions." *Bilyeu*, 346 S.W.2d at 225. And *Elliott* emphasized that "the absentee voting statutes with respect to such requirements are mandatory." *Elliott*, 315 S.W.2d at 848.

Federal law, likewise, holds that there is no constitutional right to cast an absentee ballot. In *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), the U.S. Supreme Court held that there was no constitutional right to cast an absentee ballot, and it upheld Illinois' statute that prevented inmates from obtaining absentee ballots. *Id.* at 807-09. Notably, the voter-plaintiffs in *McDonald*—inmates housed in Cook County jails—were incarcerated and thus could not vote at all without an absentee ballot. *See id.* They asserted that Illinois' failure to provide them absentee ballots violated their fundamental right to vote. *Id.* The U.S. Supreme Court rejected this argument, distinguishing the right to vote from the privilege of obtaining absentee ballots, and holding that "there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the

fundamental right to vote. *It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots*." *Id.* at 807 (emphasis added). Rejecting the claim that there is a constitutional right "to receive absentee ballots," *id.*, the Court recognized Illinois' "wide leeway" to set policy under rational-basis scrutiny and upheld Illinois' statutory limitations on absentee voting, which were far more restrictive than Missouri's here. *Id.* at 808.

Other federal courts have followed *McDonald* in holding that there is no constitutional right to cast an absentee ballot: "States may regulate absentee voting and determine who qualifies to vote absentee. The right to receive an absentee ballot is not the same as the right to vote, and will not receive the same constitutional protection." *Zessar v. Helander*, 2006 WL 642646, at *6 (N.D. Ill. Mar. 13, 2006). Many other cases are in accord.[1]

[1] *See, e.g., Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 209 (2008) (Scalia, J., concurring) ("That the State accommodates some voters by permitting (not requiring) the casting of absentee or provisional ballots, is an indulgence—not a constitutional imperative that falls short of what is required."); *Price v. New York State Bd. of Elections*, 540 F.3d 101, 112 (2d Cir. 2008) ("We do not hold that there is a general constitutional right to obtain absentee ballots."); *Obama for Am. v. Husted*, 697 F.3d 423, 439 (6th Cir. 2012) (White, J., concurring in part and dissenting in part) ("There is no constitutional right to an absentee ballot."); *Prigmore v. Renfro*, 356 F. Supp. 427, 431 (N.D. Ala. 1972), *aff'd*, 410 U.S. 919 (1973) (noting "the cardinal difference between the right to vote and the right to vote absentee clearly established by" *McDonald*); *Eber v. Bd. of Elections of Westchester Cty.*, 80 Misc. 2d 334, 336 (N.Y. Sup. Ct. 1974) ("While there is a constitutional right to vote, there is no such constitutional right to an absentee ballot."); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1338 (N.D. Ga. 2018), *appeal dismissed sub nom.*

Because the Missouri Constitution explicitly confers discretion on the legislature to decide whether and when to authorize absentee voting, any limitation on absentee voting in § 115.277 is subject, at most, to rational-basis scrutiny. *See* Appx. A010-A011, D17, at 10-11 (holding that "Missouri's interest in preventing absentee ballot fraud provides a rational basis for the Legislature to decide not to grant absentee voting to every voter"); *see also Weinschenk v. State*, 203 S.W.3d 201, 216 (Mo. banc 2006) (holding that "reasonable regulation[s] of the voting process" are subject to rational-basis scrutiny). Plaintiffs have never argued, either in the circuit court or in their brief on appeal, that § 115.277 fails to satisfy rational-basis scrutiny, so they have waived any argument on this point.

In any event, § 115.277 easily satisfies rational-basis review. Rational-basis review is the most deferential form of judicial review. Under rational basis review, a statute must be upheld if there is any "reasonably conceivable state of facts that ...

Martin v. Sec'y of State of Georgia, No. 18-14503-GG, 2018 WL 7139247 (11th Cir. Dec. 11, 2018) ("Defendants correctly note that there is no federal constitutional right to vote by absentee ballot."); *Democratic Nat'l Comm. v. Reagan*, No. CV-16-01065-PHX-DLR, 2018 WL 10455189, at *3 (D. Ariz. May 25, 2018) ("[T]here is no blanket constitutional or federal statutory right to vote by absentee ballot."); *Griffin v. Roupas*, No. 02 C 5270, 2003 WL 22232839, at *4 (N.D. Ill. Sept. 22, 2003), aff'd, 385 F.3d 1128 (7th Cir. 2004) ("Despite the established principle that the right to vote is a fundamental one, there is no corresponding fundamental right to vote by absentee ballot.").

provide a rational basis for the classification[s]." *Kansas City Premier Apartments, Inc. v. Mo. Real Estate Comm'*n, 344 S.W.3d 160, 170 (Mo. banc 2011) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). Under rational-basis review, courts do not question the "wisdom, fairness, or logic of legislative choices." *Kansas City Premier Apartments*, 344 S.W.3d at 170 (quoting *Beach*, 508 U.S. at 313). "Instead, all that is required is that this Court find a plausible reason for the classification in question." *Kansas City Premier Apartments*, 344 S.W.3d at 170. Where rational basis-review applies, a statutory classification must be upheld "if there is any reasonably conceivable state of facts that could provide a rational basis for the classification." *Beach*, 508 U.S. at 313.

Here, Missouri appellate courts have repeatedly recognized that legislative limitations on absentee voting serve important interests in safeguarding the integrity of elections and protecting against voter fraud, coercion, undue influence, ballot harvesting, and other abuses associated with absentee voting. *See Straughan*, 187 S.W. at 1164 (holding that, without "proper safeguards," absentee voting is "capable of being made an instrument of fraud"); *Elliott*, 315 S.W.2d at 848 (holding that the "special privilege" of absentee voting is "strictly limited" by "safeguards to prevent an abuse of the privilege," and compliance with those statutory safeguards is "mandatory"); *see also Weinschenk v. State*, 203 S.W.3d 201, 218 (Mo. banc 2006) (stating that "opportunities for voter fraud … persist in Missouri," including

"absentee ballot fraud"); *id.* at 218 (noting that "fraud in … absentee ballots" is "the type of fraud that has been shown to exist in Missouri"). *See also infra* Part II.D (discussing recent empirical reports of absentee voter fraud both in Missouri and elsewhere). Thus, Missouri cases from *Straughan* through *Weinschenk* "emphasize that, because absentee voting carries unique risks of fraud and abuse, strict compliance with the statutory requirements for absentee voting is mandatory." Appx. A010; D17, at 10.

Thus, the claim Plaintiffs actually pleaded in Count III fails as a matter of law, and the circuit court's decision to dismiss that claim should be affirmed.

C. Even if Count III were limited to voters who fear contracting Covid-19 during the current pandemic, it would still fail as a matter of law.

Moreover, even if Count III were narrowly circumscribed to voters who fear contracting or spreading Covid-19 during the current pandemic, the claim would still fail to state a claim for relief. Plaintiffs contend that refusing to allow such voters to cast absentee ballots would constitute a "severe" burden on the right to vote under Article I, § 25 and *Weinschenk*. App. Br. 39. But Plaintiffs fail to address either Article VIII, § 7 of the Constitution, or the Missouri cases from *Straughan* to *Barks* holding that there is no constitutional right to cast an absentee ballot—even though these authorities formed the principal basis of the trial court's decision dismissing Count III. *See* Appx. A009-A011; D17, at 9-11. Under Article VIII, § 7, the

legislature "may" authorize absentee voting, but it is not required to, even if some voters would be unable to vote without an absentee ballot. MO. CONST. art. VIII, § 7; *see also McDonald*, 394 U.S. at 807-09 (holding that failing to provide an absentee ballot to detainees in county jails did not violate the fundamental right to vote, even though those eligible voters would be completely unable to vote without an absentee ballot). In short, for all the reasons discussed above in Part II.B, the Missouri Constitution confers on the legislature—not the courts—the authority to consider whether and how to expand access to absentee or mail-in voting during the current Covid-19 pandemic. And the Missouri legislature has done so by passing SB 631, which will effectively grant Plaintiffs the majority of the relief they sought in this lawsuit if it is signed into law.

Plaintiffs, lacking support in Missouri law for their claim, once again rely heavily on out-of-state authorities and policy arguments. *See* App. Br. 36-38. But the twelve out-of-state authorities that Plaintiffs cite on pages 36-38 of their brief do not include a single court decision requiring the expansion of mail-in voting during the Covid-19 pandemic. *See id.* Without exception, the relief granted in each of those instances issued from either the legislature or executive officials. *Id.* Plaintiffs' out-of-state authorities include five executive orders from Governors (Arkansas, Connecticut, Delaware, Kentucky, and New York); two orders from other statewide executive officials (Alabama and New Hampshire), two decisions

from state elections commissions (Indiana and Virginia), and three actions of the state legislature (Massachusetts, South Carolina, and West Virginia). *See id.* And the only court decision on which Plaintiffs relied below—a Texas trial court decision granting a TRO—has been unanimously rejected by that State's Supreme Court. *In re State of Texas*, No. 20-0394, -- S.W.3d --, 2020 WL 2759629, at *1 (Tex. May 27, 2020). Accordingly, to the extent these out-of-state authorities are persuasive at all, they directly undermine Plaintiffs' position and confirm that the relief Plaintiffs seek should come from the political branches, not the courts.

D. Plaintiffs' request for a judgment under Rule 84.14 is meritless.

Even if this Court were to disagree with all the State's arguments above—which it should not—the Court should still reject Plaintiffs' extraordinary and meritless request for a final judgment on Count III under Rule 84.14, or for interim relief on remand. This case was resolved in the circuit court on a motion to dismiss, and the State has never had an opportunity to present evidence on critical factual issues that would be disputed if Plaintiffs' claims were allowed to proceed.

Plaintiffs contend that "[t]his Court should conduct the burdens analysis that the trial court failed to do," and enter judgment on Counts III and IV under Rule 84.14. App. Br. 33 (citing Rule 84.14); *see also id.* at 33 n.45. But it is black-letter law that an appellate court requires "a record and evidence" to dispose of a case under Rule 84.14 if the case does not raise purely legal questions. "[A]n appellate

court should not use its authority under Rule 84.14 unless there is a record and evidence upon which it can render final judgment with some degree of confidence in the reasonableness, fairness and accuracy of the outcome…." *Cent. Bank of Kansas City v. Costanzo*, 873 S.W.2d 672, 675 (Mo. App. W.D. 1994) (citing *State ex rel. Mayfield v. City of Joplin*, 485 S.W.2d 473, 475 (Mo.App. 1972)). "Of course, our duty to make final disposition of the case on appeal presupposes a record and evidence upon which we can perform this function with some degree of confidence in the reasonableness, fairness and accuracy of our conclusion; and, when such record and evidence are not presented, reversal and remand necessarily follow." *Capoferri v. Day*, 523 S.W.2d 547, 558 (Mo. App. 1975) (citations omitted) (emphasis added). Here, there is no such "record and evidence" because the case was resolved on a motion to dismiss.

If the Court were to reverse the trial court's judgment dismissing Plaintiffs' claims, numerous factual issues would have to be determined on remand. First, though Plaintiffs contend that in-person voting during the Covid-19 pandemic presents a "severe" burden on the right to vote, Plaintiffs submitted no evidence regarding the actual health risks from in-person voting from Covid-19. In fact, they made no specific allegations about those health risks in their Petition. *See supra*, Statement of Facts. The CDC guidelines cited in the Petition provide extensive recommendations for rendering in-person voting safer during the pandemic, and

Plaintiffs apparently conceded that persons can avoid contracting or spreading the disease if they "practice social distancing." D2 at 16, ¶ 83. Moreover, any risks from in-person voting from Covid-19 might change dramatically between June and November 2020. The factual questions surrounding the nature and risks of in-person voting from Covid-19, under a voting regime that involves reasonable and prudent precautions like those recommended by the CDC, would require the creation of "a record and evidence" in the circuit court if Plaintiffs' claims were allowed to proceed.

In addition, Plaintiffs contend that the State has no legitimate interest in placing limits and safeguards on absentee voting because "there is no meaningful evidence of absentee voter fraud in Missouri or the United States more broadly." App. Br. 47; *see also id.* at 40-41. This assertion is highly ironic, because the very same day that the NAACP filed its brief in this Court, the NAACP's affiliate in New Jersey called for an election to be overturned due to widespread absentee ballot fraud. *See* Jonathan Dienst et al., *NJ NAACP Leader Calls for Paterson Mail-In Vote to Be Canceled Amid Corruption Claims*, NBC NEW YORK (May 27, 2020). "A Paterson [NJ] NAACP leader said the recent city council vote-by-mail election was allegedly so flawed that the results should be thrown out and a new election ordered. 'Invalidate the election. Let's do it again,' [the NAACP leader] said amid reports more that 20 percent of all ballots were disqualified, some in connection with

voter fraud allegations." *Id.*; *see also id.* (noting that observers called for "in-person voting machines with social distancing" instead of mail-in voting).

To be sure, the election in New Jersey is but one instance of public evidence of absentee ballot fraud and abuse. Other examples abound, including recent fraud and abuse in Missouri. In November 2019, the mayor of Berkeley, Missouri—a municipality in St. Louis County—was indicted on five felony counts of absentee ballot fraud for changing votes on absentee ballots to help him and his political allies to get elected. Brian Heffernan, *Berkeley Mayor Hoskins Charged with 5 Felony Counts of Election Fraud*, ST. LOUIS PUBLIC RADIO (Nov. 21, 2019), *at* https://news.stlpublicradio.org/post/berkeley-mayor-hoskins-charged-5-felony-counts-election-fraud#stream/0. In 2016, a St. Louis judge overturned the results of a primary election for the Missouri legislature after an "election challenge revealed serious irregularities with absentee balloting" that resulted in a 90-vote margin of victory for the incumbent. *See* Sarah Fenske, *Bruce Franks Jr. Beats Penny Hubbard in Special Election Landslide*, RIVERFRONT TIMES (Sept. 16, 2016), *at* https://www.riverfronttimes.com/newsblog/2016/09/16/bruce-franks-jr-beats-penny-hubbard-in-special-election-landslide.

Such reports are by no means isolated to Missouri, and undoubtedly they vastly understate the scope of undetected absentee-ballot abuses. In 2018, a federal Congressional race was overturned in North Carolina, and eight political operatives

were indicted for ballot fraud, in an absentee-ballot fraud scheme that was sufficient to change the outcome of the election. Richard Gonzales, *North Carolina GOP Operative Faces New Felony Charges That Allege Ballot Fraud*, NPR.ORG, at https://www.npr.org/2019/07/30/746800630/north-carolina-gop-operative-faces-new-felony-charges-that-allege-ballot-fraud. Numerous other examples are publicly available, both within and without Missouri.[2]

The Carter-Baker Commission determined that "Absentee ballots remain the largest source of potential voter fraud." BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at 46 (Sept. 2005), *available at* https://www.legislationline.org/download/id/1472/file/

[2] *See, e.g.*, *Man pleads to using dead mother to vote*, COLUMBIA TRIBUNE (Apr. 12, 2008), at https://www.columbiatribune.com/5cdce7f5-91d3-5ff7-bba4-b8098b6fd76d.html; Jonathan Greene, *Rigo Rodriguez and his wife indicted on election fraud and witness tampering*, PATERSON TIMES (Mar. 6, 2014), at https://patersontimes.com/2014/03/06/rigo-rodriguez-and-his-wife-indicted-on-election-fraud-and-witness-tampering/; Ben Kochman, *Bronx politician pleads guilty in absentee ballot scheme for Assembly election*, NEW YORK DAILY NEWS (Nov. 22, 2016), at http://www.nydailynews.com/new-york/nyc-crime/bronx-pol-pleads-guilty-absentee-ballot-scheme-article-1.2884009; Laurence Hammack, *Ex-mayor to plead guilty in vote fraud case*, THE ROANOKE TIMES (Nov. 9, 2006), at https://www.roanoke.com/archive/ex-mayor-to-plead-guilty-in-vote-fraud-case/article_a5bb2cd8-a966-559a-ac3c-ffd955dc520b.html; Greg Phillips, *Lesa Coleman guilty in Dothan voter fraud case*, DOTHAN EAGLE (Nov. 9, 2006), at https://www.dothaneagle.com/news/crime_court/lesa-coleman-guilty-in-dothan-voter-fraud-case/article_381dfe92-de09-11e4-9bed-3b10a7f2d611.html; *88-year-old pleads guilty to casting vote for late husband*, WGIL (June 9, 2017), at https://www.wgil.com/2017/06/09/88-year-old-pleads-guilty-to-casting-vote-for-late-husband/.

3b50795b2d0374cbef5c29766256.pdf. According to the Commission, "[a]bsentee balloting is vulnerable to abuse in several ways," including interception of blank ballots, "pressure" and "intimidation" of elderly and vulnerable voters, "vote buying schemes" that are "far more difficult to detect when citizens vote by mail," and ballot tampering by third-party operatives after a ballot is marked. *Id.* The report noted that "absentee balloting in other states has been a major source of fraud." *Id.* at 35. *Id.* at 46. And the Report recommended that "States … need to do more to prevent voter registration and absentee ballot fraud." *Id.* at v.

In *Weinschenk*, this Court stated that "opportunities for voter fraud," including "absentee ballot fraud," continue to "persist in Missouri," and that "fraud in … absentee ballots" is "the type of fraud that has been shown to exist in Missouri." *Weinschenk*, 203 S.W.3d at 218. There is every reason to believe that these observations remain true today. Plaintiffs' suggestion that "the only evidence available" indicates that there is no absentee ballot fraud, App. Br. 41, is manifestly incorrect. Entry of final judgment under Rule 84.14 would be inappropriate.

IV. Count IV Fails to State a Claim for Relief Because the Missouri Constitution Does Not Confer an Unqualified Right on Every Voter to Cast an Absentee Ballot Without Notarizing the Voter's Signature (Responds to Appellants' Third Point Relied On).

In Count IV, Plaintiffs claimed that every Missouri voter has an unqualified constitutional right to cast an absentee ballot in every future election, for any reason,

without having his or her signature notarized. *See* D2, at 33-34. Like Count III, this claim fails to state a claim for relief.

A. Count IV pleads that every Missouri voter has a constitutional right to cast an absentee ballot without signature notarization for any reason in every future election.

Again, Plaintiffs contend that the claim and the relief requested in Count IV are limited to "the particularized context of the current pandemic," App. Br. 42, but the Petition contradicts this assertion. Count IV alleged that Missouri law "permits some voters, but not others, to vote absentee without a notary seal." D2 at 33, ¶ 172. Count IV alleged that notarization "requires voters to leave their homes in conflict with social distancing guidelines during the COVID-19 pandemic," *id.* at 33, ¶ 174, but the same paragraph also alleged that the *ordinary* inconveniences of notarization posed an unconstitutional burden on voters: "Obtaining a notary seal imposes costs on the voter, including time and transportation." *Id.* Count IV then alleged, without qualification or reference to Covid-19, that "Missouri has no adequate justification to permit some voters, but not others, to vote absentee by mail" without notarization. *Id.* at 33, ¶ 175. In the Prayer for Relief, Count IV requested a declaratory judgment holding that Missouri's "limitations on which voters may vote absentee by mail without a notary seal violates Article I, § 25 of the Missouri Constitution," *id.* at 34, ¶ A; and a permanent injunction "prohibiting Defendants and anyone acting in concert with them from limiting the availability of absentee voting without a notary

seal," *id.* at 34, ¶ B. Count IV never requested any relief that was limited or specific to the current pandemic.

Thus, the circuit court correctly characterized Count IV when it stated: "In Count IV, Plaintiffs claim 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." Appx. A011; D17, at 11. The circuit court was also correct in observing that "[a]s with Count III, the relief Plaintiffs seek in Count IV is not limited to Covid-19 and goes far beyond their asserted health concerns." *Id.*

B. The claim actually pled in Count IV fails as a matter of law.

Count IV as pled is legally meritless. In Count IV, Plaintiffs contend that requiring signature notarization for absentee ballots is *per se* unconstitutional, and that every voter in Missouri has a constitutional right to cast an absentee ballot without signature notarization for any reason in any election. Moreover, Plaintiffs have abandoned any claim of unequal treatment on appeal, App. Br. 43, and they rely solely on the claim that the ordinary inconveniences and alleged health risks of notarization constitute a "severe" burden on the right to vote under Article I, § 25 and *Weinschenk*. *Id.*

Missouri law simply does not recognize this freestanding, absolute right to cast an absentee ballot without notarizing one's signature. As the circuit court held, "there is no constitutional right to cast an absentee ballot in Missouri law. *A fortiori*,

there is no constitutional right to cast an absentee ballot without signature verification." Appx. A011; D17, at 11. For all the reasons discussed above as to Count III, *see supra* Point II.B-C, there is no constitutional right to cast an absentee ballot under Missouri law. Because there is no constitutional right to cast an absentee ballot at all, there is also no constitutional right to cast an absentee ballot without reasonable safeguards to verify one's signature. *See id.*

As noted above, Article VIII, § 7 of the Constitution provides: "Qualified electors of the state who are absent, whether within or without the state, ***may*** be enabled by general law to vote at all elections by the people." *Id.* (emphasis added). Again, "the word 'may' denotes discretion, not an obligation." Appx. A009, D17, at 9; *Wolf v. Midwest Nephrology Consultants, PC.*, 487 S.W.3d 78, 83 (Mo. App. W.D. 2016); *State ex inf. McKittrick v. Wymore*, 119 S.W.2d 941, 944 (Mo. 1938). By its plain terms, Article VIII, § 7, confers on the legislature the discretion to decide whether and how to authorize absentee voting in Missouri. *Id.*

Just as the legislature "may" authorize absentee voting under Article VIII, § 7, so also the legislature may apply reasonable safeguards to prevent fraud and abuse. In fact, Missouri cases repeatedly emphasize that such safeguards are "mandatory" and should be applied "strictly" to prevent fraud and abuse. *Straughan*, 187 S.W. at 1164; *Barks*, 573 S.W.2d at 681 ("Compliance with the statutory requirements is mandatory."); *Elliott*, 315 S.W.2d at 848 (holding that the privilege of absentee

voting is "strictly limited to … statutory grounds"); *Bilyeu*, 346 S.W.2d at 225. To the extent that Plaintiffs believe that such safeguards should be relaxed during the Covid-19 pandemic, the concerns must be addressed to the legislature, not the courts.

C. Plaintiffs' re-characterization of Count IV also fails as a matter of law.

Even if the Court were to accept Plaintiffs' implausible re-characterization of Count IV on appeal, the claim would still be meritless, for at least five reasons.

First, under both the plain language of Article VIII, § 7, and decades of Missouri case law, there is no constitutional right to cast an absentee ballot under Missouri or federal law. *See supra*, Part III.B-C; *see also, e.g.*, MO. CONST. art. VIII, § 7; *Straughan*, 187 S.W. at 1163-64; *Elliott*, 315 S.W.2d at 848; *Bilyeu*, 346 S.W.2d at 225; *Barks*, 573 S.W.2d at 681; *McDonald*, 394 U.S. at 807. The Missouri Constitution confers on the legislature, not the courts, the authority to determine whether and how to authorize voting by mail, including during the current pandemic. As the U.S. Supreme Court held in *McDonald*, this remains true even if the failure to authorize an absentee ballot would effectively prevent a qualified vote from voting at all. *McDonald*, 394 U.S. at 807. Because the legislature has no constitutional obligation to authorize mail-in voting, it likewise has no constitutional obligation to authorize mail-in voting without notarization to verify the voter's signature.

Second, as noted above, Missouri appellate decisions have repeatedly emphasized that statutory safeguards to prevent fraud and abuse in absentee voting

are "mandatory" and should be "strictly" enforced. *See, e.g., Straughan*, 187 S.W. at 1164 (holding that "proper safeguards" for absentee voting prevent it from "being made an instrument of fraud," and that statutory requirements to verify the voter's identity are "essential to guard against fraud and to properly identify the ballot and the voter"); *Barks*, 573 S.W.2d at 681 ("[T]he opportunity to vote by absentee ballot is clearly a privilege not a right. Compliance with the statutory requirements is mandatory."); *Elliott*, 315 S.W.2d at 848 (holding that the legislature "has provided safeguards to prevent an abuse of the privilege" of absentee voting, and that the privilege is "strictly limited to … statutory grounds"); *Bilyeu*, 346 S.W.2d at 225 (holding that the "special privilege" of casting an absentee ballot is "conferred and available only under certain conditions"). Requiring an absentee voter to have his or her signature verified by notarization is a "proper safeguard" for absentee voting that both "guard[s] against fraud" and "properly identif[ies] the ballot and the voter." *Straughan*, 187 S.W. at 1164. Under Missouri's longstanding case law, this requirement is "mandatory," *Barks*, 573 S.W.2d at 681, and it should be applied "strictly," *Elliott*, 315 S.W.2d at 848. Again, the legislature, not the courts, is the proper authority to relax this requirement during the Covid-19 pandemic.

Third, because Article VIII, § 7 explicitly confers discretion on the legislature to authorize or not authorize absentee voting, *Weinschenk*'s tiers of scrutiny under Article I, § 25 are inapplicable to a claim challenging the notarization of signatures

on absentee ballots. Thus, the legislature's decision to require notarization for absentee ballots for voters who are not ill or disabled (and do not fall into the other exempt categories under § 115.291.1, RSMo) is subject to, at most, rational-basis review, which it easily satisfies. As noted above, rational-basis review is highly deferential and requires only that there exist some conceivable reason for the legislature's decision. *See Kansas City Premier Apartments*, 344 S.W.3d at 170; *Beach Communications*, 508 U.S. at 313. The Missouri cases cited above, as well as the public evidence of ongoing risks of fraud and abuse in absentee voting, provide a rational basis for the legislature to require signature verification by notarization for most absentee voters. As the circuit court held, "[t]o the extent that rational-basis review applies to Missouri's signature-verification requirements for absentee ballots, they easily satisfy that highly deferential standard. Requiring notarization for absentee ballots rationally advances the State's legitimate interest in preventing fraud and abuse in absentee voting, which many Missouri cases have recognized." Appx. A011; D17, at 11.

Fourth, even if *Weinschenk*'s tiers of scrutiny applied to a claim involving absentee voting, Plaintiffs failed to allege facts to support their claim that notarization imposes a "severe" burden on voters who fear contracting Covid-19—especially voters who are not in an at-risk category for Covid-19. As noted above, the Petition contains many general allegations about Covid-19 and its health risks to

society at large, but it contains no specific allegations about the alleged health risks of the signature-notarization process during Covid-19. The Petition does not address, for example, whether notarization may be pursued safely and effectively while observing prudent social-distancing measures—such as wearing masks during the brief interaction with the notary, staying a safe distance apart, washing or disinfecting hands after the brief interaction, and so forth.

On the contrary, the Petition admits that people who "practice social distancing" can avoid spreading Covid-19. D2, at 16, ¶ 83. The Petition also alleges that personal interactions conducted at a distance that merely involve handling the same paper items—such as in-person mail deliveries—do *not* present serious health risks or impose an unconstitutional burden on the right to vote. The Petition alleges that "the only recommendation related to mail-in ballots is for workers handling those ballots to practice hand hygiene frequently," *id.* at 18, ¶ 86; that there are "relatively minimal risks of voting by mail" because "there is no evidence that COVID-19 can be spread through the mail," *id.* at 18, ¶ 87; and that in-person mail deliveries are safe because, during in-person deliveries, the Postal Service requires the customer to "step back to a safe distance or close the screen door/door so that they may leave the item in the mail receptacle or appropriate location by the customer door," *id.* at 18, ¶ 87. The process of notarizing one's ballot signature can be conducted with the same precautions that Plaintiffs claim render in-person mail

deliveries safe—the notary can "step back to a safe distance" while the voter signs the ballot, *id.*; and then the voter can do the same while the notary notarizes his or her signature, resulting in touching the same paper as the only direct interaction between the two persons; and both parties can "practice hand hygiene" by hand-washing or disinfectant after the interaction. *Id.* at 18, ¶ 87. Because the risks of notarization are categorically similar to those of in-person mail deliveries, which the Petition concedes present "relatively minimal risks" that do not unconstitutionally burden anyone's right to vote, the Petition fails to allege a "severe" burden on the right to vote arising from the notarization requirement under *Weinschenk*.

Fifth, Plaintiffs rely heavily on out-of-state authorities, but these do not support their position. Plaintiffs' principal authority is a trial-court decision approving a consent decree among the parties that *agreed* to suspend certain witnessing requirements for absentee ballots. *League of Women Voters of Va. v. Va. State Bd. of Elections*, Case No. 6:20-CV-00024, 2020 WL 2158249 (W.D. Va. May 5, 2020). No such agreement has been reached here. Moreover, like the executive decisions cited above, the relief granted in *League of Women Voters* was narrowly time-limited; it applied only to "Virginia's primaries on June 23, 2020, for voters who believe they may not safely have a witness present while completing their ballot." *Id.* at *1. Plaintiffs here, by contrast, have requested "permanent" injunctions fundamentally altering the methods of voting in Missouri. D2 at 33-34.

Plaintiffs rely on *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329, at *20 (D.S.C. May 25, 2020), but that case is similarly inapt. In *Thomas*, the State election officials had conceded that the witness requirement for signatures on absentee ballots served no useful function in verifying the validity of the voter's signature. *Id.* at *20 (reporting that the director of the state's Election Commission had conceded that "the witness signature offers no benefit to election officials as they have no ability to verify the witness signature"). Election officials conceded that the witness requirement was "ineffective." *Id.* at *21. By contrast, Missouri's statute requires a notary seal, which performs an extremely useful verification function. In addition, the plaintiff-voters in *Thomas* had "individual characteristics or conditions that are regarded by the CDC as placing them at a higher risk for contracting COVID-19, including being over 65 years of age, having underlying medical conditions (including scleroderma, interstitial lung disease, hypertension, gout, history of breast cancer, emphysema, infection)." *Id.* at *19. Here, if SB 631 is signed into law, it will authorize such "at-risk" voters to cast an absentee ballot without a notary seal. Furthermore, because notarization was not at issue in the case, *Thomas* did not address or discuss whether notarization could be conducted safely using prudent social-distancing and hand-hygiene practices, as Plaintiffs' Petition here seems to concede. D2 at 18, ¶¶ 86-87.

D. Plaintiffs' request for final judgment under Rule 84.14 is meritless.

For the reasons discussed above as to Count III, *supra* Part III.D, Plaintiffs' extraordinary request for final judgment under Rule 84.14 or interim injunctive relief on remand as to Count IV should be rejected. As noted above, "an appellate court should not use its authority under Rule 84.14 unless there is a record and evidence upon which it can render final judgment with some degree of confidence in the reasonableness, fairness and accuracy of the outcome." *Central Bank of Kansas City*, 873 S.W.2d at 675. Here, there is no "record and evidence," *id.*, to quantify any putative health risks from notarizing one's signature on an absentee ballot. In fact, as discussed above, the Petition does not even make such specific allegations, and the allegations it does make undercut any such assertion. Similarly, there is no "record and evidence," *id.*, upon which to conclude—as Plaintiffs contend—that the State has no legitimate interest in enforcing the notarization requirement as a safeguard against fraud and abuse. Again, the Petition made no allegations about whether absentee voting without signature notarization presents risks of fraud and abuse, and Plaintiffs' extraordinary contention that this Court may simply infer as a matter of law—without any evidence or even any allegations—that no risks exist, flies in the face of overwhelming public evidence.

V. The NAACP and League of Women Voters Lack Associational Standing, and Missouri Courts Have Not Recognized Their Novel Theory of Organizational Standing. (Responds to Appellants' Fourth Point Relied On).

If the Court decides to reach this issue, the trial court correctly held that the organizational plaintiffs lack standing to maintain this lawsuit. The organizations cannot assert their members' claims under the theory of associational standing when those claims fail as a matter of law, and no Missouri court has adopted the federal courts' doctrine of separate "organizational standing."

First, because all of Plaintiffs' claims fail as a matter of law, the organizational plaintiffs do not have associational standing separately to bring those same claims. It is well-settled in Missouri law that a membership organization's standing to maintain a lawsuit derives from the standing its members would have on an individual basis. "An association that itself has not suffered a direct injury from a challenged activity nevertheless may assert 'associational standing' to protect the interests of its members if certain requirements are met." *St. Louis Ass'n of Realtors v. City of Ferguson*, 354 S.W.3d 620, 623 (Mo. banc 2011). "An organization can sue as a representative for *its members* if (1) its members would otherwise have standing to bring suit in their own right; (2) the interests it seeks to protect are germane to the organization's purpose; and (3) neither the claim asserted nor the relief requested requires the participation of individual members." *Missouri Health*

Care Ass'n v. Attorney Gen. of the State of Mo., 953 S.W.2d 617, 620 (Mo. banc 1997) (emphasis added).

As discussed throughout this brief, Plaintiffs have no injury because decades of Missouri and federal case law have refused to recognize a fundamental right to absentee ballots and SB 631 likely moots a substantial portion of Plaintiffs' claims. "To vote by absentee ballot is not a matter of inherent right but rather a special privilege available only under certain conditions…." *State ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229, 234 (Mo. App. 1978). Any individual members of the organizational plaintiffs would either be covered by the statute or not covered by § 115.277. If they are covered by the statute, they can receive an absentee ballot and thus they have no injury. For the members who are not entitled to receive an absentee ballot but contend they should be due to fear of contracting Covid-19, those members lack standing because any injury they face is purely speculative, if not entirely moot due to SB 631. Because none of their members have standing in their own right, the organizational plaintiffs lack associational standing to maintain this lawsuit.

Section 115.277 has no effect on the organizations sufficient to confer upon them standing to challenge it. "A person does not have standing to challenge the constitutionality of a statute simply because '[the statute] may be subject to the charge of invalidity.' Standing is a prerequisite to such a challenge." *State v.*

Stottlemyre, 35 S.W.3d 854, 861 (Mo. App. W.D. 2001) (quoting *State v. Pizzella*, 723 S.W.2d 384, 387 (Mo. banc 1987)). "A litigant must be adversely affected by the statute he wishes to challenge in order to have standing to do so." *State v. White*, 556 S.W.3d 110, 114 (Mo. App. W.D. 2018).

Thus, simply opposing a statute is not enough to establish an injury. Section 115.277 is not a new statute, and this is not a case where the enactment of a new law compelled the organizations to change their operations and shift their resources, nor would that be enough. The statute does not regulate any of the organizations' activities. The United States Supreme Court addressed a similar issue in *Summers v. Earth Island Institute*, holding that organizations lacked standing because "the regulations under challenge here neither require nor forbid any action on the part of [the organizations]." 555 U.S. 488, 493 (2009). Because the organizational plaintiffs do not have a legally protectable interest affected by § 115.277, they do not suffer an injury in fact to maintain this lawsuit.

Second, the organizational plaintiffs' theory of "organizational standing" is foreclosed by Missouri law. Indeed, Plaintiffs have cited no Missouri case in their one-paragraph discussion of organizational standing in their brief on appeal. *See* App. Br. 51. And they have provided no reason why this Court should, for the first time, recognize this novel theory of standing. Missouri's standing jurisprudence

sufficiently allows parties to bring their disputes to the courts when they have actually suffered an actual or threatened injury.

The organizational standing doctrine was laid out in *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), but even there, the United States Supreme Court set a floor that an organization must rise above; an organization must show "more than simply a setback to the organization's abstract social interests." *Id.* at 379. In applying *Havens*, federal circuit courts of appeal have recognized that organizational standing does not give *carte blanche* to organizations seeking to avail themselves of a court's jurisdiction. *See, e.g., La Associacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010) (discussing *Havens* and holding an organization cannot "manufacture the injury by . . . simply choosing to spend money fixing a problem that otherwise would not affect the organization at all.").

To the extent *Havens* is even applicable under Missouri law, the organizational plaintiffs here failed to show they have organizational standing. They alleged that the League of Women Voters has "advocated for opportunities for all Missouri voters to cast absentee ballots due to the COVID-19 crisis," Pet. ¶ 30, which is nothing more than a setback to its abstract social interests and insufficient under *Havens* to confer standing. They also alleged that both the League of Women Voters and the NAACP have shifted their resources to provide assistance and

education for their members on absentee voting, Pet. ¶¶ 27, 30, but they did not support that vague assertion with sufficient facts. Under Missouri's fact-pleading standards, a mere allegation of diversion of resources must be insufficient to survive a motion to dismiss. And choosing to spend money or shift resources to more voter education is not required by § 155.277. The organizations are not regulated by the statute they challenged and they therefore have no legally protectible interest in it. *See Summers*, 555 U.S. at 493; *City of Lake Forest*, 624 F.3d at 1088. Under *Havens*, the organizational plaintiffs have failed to allege how they have interests in § 115.277 that are "perceptibly impaired," 455 U.S. at 379. The trial court correctly held that they lack standing under any theory.

CONCLUSION

The trial court's judgment should be affirmed.

Dated: June 3, 2020

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that a copy of the above was filed electronically and served by operation of the electronic filing system through Missouri CaseNet on June 3, 2020, on all counsel of record.

The undersigned also certifies that the foregoing brief complies with the limitations in Missouri Supreme Court Rule 84.06(b) and 84.06(c)(1)-(4), and that the brief contains 19,554 words, excluding the portions exempted from the word count under Supreme Court Rule 84.06(b).

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