IN THE MISSOURI SUPREME COURT

No. SC98536

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

v.

State of Missouri, et al.,
Respondents,

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

Reply Brief of Appellants

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INTRODUCTION

Respondents' opposition brief amounts to one continuous attempt to recast the issue in this case. But no matter how many times Respondents insist otherwise, the question in this case is not whether, in the abstract, all eligible Missouri voters can vote absentee by mail without notarization under Missouri law or the Missouri Constitution in perpetuity. Rather, the question is whether, when voting in-person or obtaining a notary seal in person forces voters to risk spreading or contracting a deadly, once-in-a-lifetime illness that has already killed more than 110,000 Americans and another 123 Missourians since Appellants' opening brief, the State can force voters to undertake that risk to health and life in order to exercise the franchise. Respondents' position is yes. But that is wholly inconsistent with Missouri law and the fundamental right to vote as guaranteed by the Missouri Constitution.

While the State has laudably taken some steps to ensure that Missouri voters can exercise their right to vote safely in passing SB631, which Governor Parson signed into law on June 4, 2020, this new law fails to provide the full relief Appellants seek: the ability to vote without risking their health, the health of their loved ones or those they live with, or the health of their fellow citizens. Specifically, as Respondents acknowledge, SB631 still requires voters whom the legislature did not deem "at risk," like Appellants Wattree, Del Villar, and similarly situated members of Plaintiff organizations, or those caring for at-risk individuals, to jeopardize their health to satisfy the in-person notary requirement to vote by mail. Accordingly, Appellants' claim for declaratory relief that all

voters who expect to confine themselves on Election Day due to COVID-19 are eligible to vote absentee under § 115.277.1(2), which is exempt from the notary requirement, remains a live issue before this Court, as does Appellants' alternative claim that the in-person notary requirement for mail-in ballots during the ongoing COVID-19 pandemic unconstitutionally burdens the right to vote.

ARGUMENT

I. Section 115.277.1(2) permits all voters who expect to confine themselves on Election Day due to COVID-19 to vote absentee without notarization

Although SB631 does not purport to exempt all voters from the notary requirement for voting absentee, § 115.277.1(2) allows anyone to vote absentee without notarization if they "expect[]" to be "confine[d] due to illness or physical disability," or are caring for someone who is. By its plain terms, that applies broadly during the current pandemic. Respondents urge this Court to interpret § 115.277.1(2) to exclude those who expect to confine themselves on Election Day due to the COVID-19 virus—and their desire to avoid spreading or contracting the virus to protect themselves or at-risk family members, poll workers, and voters—from voting absentee without notarization. Their arguments are animated by their belittling characterization of those voters self-quarantining as solely motivated by "fear." Resp. 31. This Court should reject Respondents' head-in-the-sand approach to public health. Unanimous public-health advice is to avoid going in public and to places where groups of people will be congregating, like at the polls on Election Day,[1] and to self-quarantine to the extent

[1] Respondents take issue with the reliance on the CDC advice that authorities "[e]ncourage mail-in method of voting if allowed in the jurisdiction." The CDC's guidance demonstrates that it is reasonable for Appellants to want to confine themselves, rather than go to a public polling place, to avoid contracting or spreading the virus. The purpose of this case is to determine whether voting under § 115.277.1(2) is allowed under this circumstance. Respondents suggest Appellants should seek relief from the legislature, but that is unnecessary because in § 115.277.1(2) properly construed the legislature has already provided for absentee voting without notarization for those confining themselves because of illness or disability.

possible.[2] Applied to the current circumstances, the statute's plain language permits those voters who, in their judgment, expect to confine themselves because of the virus to vote absentee.

Respondents frequently quote the circuit court; however, that court made no factual findings and is entitled to no deference.[3] In reviewing questions of law, this Court "reviews the trial court's determination independently, without deference to that court's conclusions." *Pearson v. Koster*, 367 S.W.3d 36, 43–44 (Mo. banc 2012) (quotation and citation omitted).

As Appellants previously explained, *see* Opening Br. 23–28, the plain language of § 115.277.1(2) supports their view of how the provision applies to the current circumstances. Respondents resort to contorting Appellants' argument in an effort to discredit it. Resp. 37. Appellants do not suggest that they "suffer" from an illness or disability. Indeed, a feature of the virus is many voters who will be carrying the virus on Election Day will not know, much less know it by the deadline for requesting an absentee ballot. Section 115.277.1(2) does not include a "suffering" requirement. It is much simpler: a voter need only expect to be confined due to an illness or disability. "Due to"

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[2] This medical advice is the reason this Court is hearing this case remotely rather than gathering the court and attorneys in a courtroom.

[3] It is no coincidence that the circuit court's decision matches Respondents' arguments so neatly. The court adopted their proposed order verbatim. *See Tribus, LLC v. Greater Metro, Inc.*, 589 S.W.3d 679, 699 (Mo. App. E.D. 2019) (gathering cases expressing concern about courts acting as a rubber stamp). Given the standard of review, the concerns are not as paramount; however, nothing in the circuit court's judgment should be treated as a factual finding.

means "because of."[4] "Words and phrases shall be taken in their plain or ordinary and usual sense." § 1.090. It is the COVID-19 virus and the deadly illness it causes, and Appellants' lack of immunity to it, that is the cause of their expected confinement.[5] They are confined "because of," or "due to," the COVID-19 illness.

In the absence of ambiguity, this Court does not employ any other rule of construction. *Bosworth v. Sewell*, 918 S.W.2d 773, 777 (Mo. banc 1996). Given the lack of ambiguity in § 115.277.1(2), it should be construed without resort to other considerations.[6] Nevertheless, the sundry tools of statutory construction trotted out by

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[4] "Due to." *Merriam-Webster.com Dictionary*, Merriam-Webster, https[]://www.merriam-webster.com/dictionary/dueto. (last visited June 5, 2020).

[5] Respondents point to a Texas decision holding that "a voter's lack of immunity to COVID-19, without more, is not a 'disability' as defined by the Election Code." Texas' provision differs from Missouri's. There, "[a] qualified voter is eligible for early voting by mail if the voter has a sickness or physical condition that prevents the voter from appearing at the polling place on election day without a likelihood of needing personal assistance or of injuring the voter's health." Tex. Elec. Code § 82.002(a). Section 115.277.1(2) does not require a voter to "ha[ve] a sickness or physical condition," nor does the illness or disability have to "prevent" someone from voting in person, nor must being forced to vote in-person result in a "likelihood of needing personal assistance or of injuring the voter's health." Missouri's provision merely requires confinement; the legislature did not adopt these additional requirements.

[6] Some courts have found "[t]he phrase 'due to' is ambiguous." *Kimber v. Thiokol Corp.*, 196 F.3d 1092, 1100 (10th Cir. 1999). In their view, "'[t]he words do not speak clearly and unambiguously for themselves. The causal nexus of "due to" has been given a broad variety of meanings in the law ranging from sole and proximate cause at one end of the spectrum to contributing cause at the other.'" *Id.* (quoting *Adams v. Dir., OWCP,* 886 F.2d 818, 821 (6th Cir.1989)). There is no ambiguity here, however, because whether "due to" is defined as the "sole or proximate cause" or "a contributing cause," the relationship between the two clauses—confinement, on the one hand, and illness or disability, on the other—remains the same. *See Johnson v. Gen. Am. Life Ins. Co.*, 178 F. Supp. 2d 644, 652 (W.D. Va. 2001). Moreover, if the legislature had intended to limit the (continued…)

Respondents, *see* Resp. 37–42, cannot alter the conclusion that § 115.277.1(2) authorizes voters who expect to confine themselves because of COVID-19 to vote absentee.

Appellants' application of § 115.277.1(2) to the general medical advice given to the public about COVID-19 does not require adding words to the statute. Respondents claim otherwise by inserting additional words into Appellants' claim, suggesting that their confinement is due to "fear" of the illness. This case is not about some unreasonable, wholly subjective fear, but instead involves conscientious voters who—acting based on guidance and instruction from public health experts and top Missouri officials, D2 pp. 2, 16, 21–22, 29–30—do not want to spread or contract a particular, highly contagious virus that causes a serious and potentially fatal illness. Of course, one could always insert additional words to more precisely describe the connection between the confinement and the illness or disability. For instance, one might expect to be confined because of "immobility" of an illness or disability, or "nausea" of an illness or disability, or "medical advice" related to illness or disability, or "contagiousness" of an illness or disability, or "weakness" from an illness or disability, or "agoraphobia" due to an illness or disability, or "anxiety" related to an illness or disability, or "malaise" of an illness or disability, or any number of other reasons due to an illness or disability. The legislature chose broad language to encompass all circumstances when a voter expects to

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causal relationship, it would have done so. *See, e.g.*, § 213.010 (defining "**Because"** or **"because of"**, as it relates to the adverse decision or action, the protected criterion was the motivating factor).

be incapacitated or confined because of illness or disability. Correctly construing § 115.277.1(2) does not require grafting words to the statute.

There is nothing unreasonable or absurd about interpreting § 115.277.1(2) to permit those confining themselves due to the COVID-19 pandemic to vote absentee. Resp. 38–39. Respondents posit Appellants' position would create absurd results because it would allow any voter to vote absentee in any future election, ignoring that Appellants' claim is limited to the application of § 115.277.1(2) in this pandemic. They also overlook that voters would have to actually expect to *confine themselves* because of the illness or disability to qualify. And they disregard entirely the constant, widespread general medical advice given to the public about avoiding public places when possible during this pandemic. Section 115.277.1(2) applies to those who reasonably expect based on medical advice to confine themselves on Election Day rather than go to a public polling place where the decision is due to COVID-19, for which there is no vaccine or herd immunity. *See* D2 p. 15. If this Court's holding is limited to the current unprecedented public health emergency, there is no risk that its interpretation of § 115.277.1(2) will be so boundless as to apply to illnesses that have never appeared in Missouri or that do not pose a risk of death, as Respondents fear. *See* Resp. 39.

Respondents' assertion that Appellants' interpretation of § 115.277.1(2) would allow anyone to vote absentee overlooks that it would apply only to those who expect to confine themselves due to COVID-19. Here, Respondents implicitly acknowledge the general medical advice to the public is to avoid going to public places and to self-

quarantine to the extent possible. Respondents are correct that, *this year*, the prevailing public health guidance would make it reasonable for almost any voter to expect to confine herself on Election Day rather than go to a polling place. But Missouri's absentee voting scheme already contemplates that any voter can elect to make herself eligible for absentee voting; indeed, any voter can request an absentee ballot if they expect to be "[a]bsen[t] on election day from the jurisdiction of the election authority in which such voter is registered to vote" for *any* reason, even if the reason is that the voter wants to be able to vote absentee. § 115.277.1(1). If Missouri law already permits any individual to be eligible to vote absentee just by having some expectation of being out of town on Election Day, surely permitting Missourians who seek to confine themselves this year to avoid spreading or contracting a deadly illness does not undermine Missouri's absentee voting scheme.

Respondents' *in pari materia* argument suffers from the same flaws. Resp. 40–41. They speculate that absentee voting would become the predominant method of voting in Missouri if this Court interprets § 115.277.1(2) as applying to those who expect to confine themselves on Election Day due to COVID-19. *Id.* This argument overlooks that SB631 already makes all Missouri voters eligible for some form of remote voting. Section 115.277.1(2) would still apply only to voters confining themselves, not to every voter, and certainly not to every voter outside the context of the current pandemic. While it is clear now that most voters should be self-quarantining as much as possible due to this public health crisis, there is no basis for believing that such widespread confinement

will continue once the crisis is over. The presumed preference in Missouri law for voting in-person on Election Day is not somehow upended by the inherent flexibility in § 115.277.1(2) to account for a public health crisis that has upended every aspect of public life in this country and the world. And, even during this pandemic, in-person voting remains an important voting method for certain groups of voters. D2, p. 3.

Urging this Court to apply the principle of *noscitur a sociis*, Respondents suggest that the other reasons for voting absentee are objective and narrow while Appellants' interpretation of § 115.277.1(2) is not. Resp. 41–42. Whether a voter confines herself on Election Day is no less objective or verifiable than whether she is absent from the jurisdiction.[7] If anything, voters confining themselves due to COVID-19 are doing so based on more objective and verifiable guidance. This year, the general medical advice to avoid public places as much as possible due to COVID-19 applies to nearly every voter uniformly, while voters confining themselves due to other illnesses or disabilities make their medical decisions individually. Moreover, religious beliefs are a basis for voting absentee, but they are not objective or verifiable. *Burwell v. Hobby Lobby Stores, Inc.*, 573 U.S. 682, 724 (2014) (observing that government cannot ascertain the sincerity of a religious belief); *Thomas v. Review Bd. of Ind. Employment Sec. Div.*, 450 U.S. 707, 714 (1981) ("religious beliefs need not be acceptable, logical, consistent, or comprehensible to others"). The legislature has left to voters' judgment whether they qualify to vote

[7] Respondents suggest Appellants argue that "fear" is what makes someone eligible to voter under § 115.277.1(2). Resp. 31, 37. It is confinement, not fear, that is (continued…)

absentee for the "excuses" provided. Applying § 115.277.1(2) to those who confine themselves to avoid spreading or contracting COVID-19 is consistent with Missouri's absentee voting scheme.

Respondents' final refuge, arguing that applying § 115.277.1(2) during the pandemic would make the other reasons for absentee voting meaningless, fairs no better. As noted above, even if most voters are self-quarantining as much as possible during this year's elections, this will not be the case in elections once the public health crisis ends. Additionally, some Missourians may not expect to confine themselves due to the virus on Election Day and, thus, would not be eligible under § 115.277.1(2), but could still qualify to vote absentee under a different provision.[8] Furthermore, the fact that people might qualify under two provisions—for example, they have a religious belief that prevents voting in person *and* will be out of town on Election Day—does not render one or the other provision meaningless. There is no indication the legislature sought to discourage or limit absentee voting by those who qualify.

After the parties filed their opening briefs, a Tennessee court determined that failing to provide universal mail-in voting during the pandemic violates the state constitution. *Demster v. Hargett*, No. 20.-0435-1(III) (Tenn. Chancery Ct., June 4, 2020)[9]

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operative.

[8] Under the new § 115.277.1(7) voters in some, but not all, of the categories at high risk of death if they contract COVID-19 may vote by absentee regardless of whether they confine themselves.

[9] The decision is provided in the Appendix to Reply Brief. Reply App. 001-032.

The decision's reasoning is persuasive when construing similar provisions of the Missouri Constitution. This provides an additional reason for adopting Appellants' proposed application of § 115.277.1(2): it allows this Court to avoid a constitutional question. "This Court will avoid deciding a constitutional question if the case can be resolved fully without reaching it." *Lang v. Goldsworthy*, 470 S.W.3d 748, 751 (Mo. banc 2015). "It is a well[-]accepted canon of statutory construction that if one interpretation of a statute results in the statute being constitutional while another interpretation would cause it to be unconstitutional, the constitutional interpretation is presumed to have been intended." *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838–39 (Mo. banc 1991).

II. Appellants state a claim that Missouri's notary requirement, as-applied to voters during the COVID-19 pandemic, violates the fundamental right to vote enshrined in the Missouri Constitution

A. Appellants properly pled an as-applied constitutional challenge for purposes of the COVID-19 public health crisis

Once again, Respondents misconstrue Appellants' constitutional claim, asserting that "[Appellants] contend that requiring signature notarization for absentee ballots is *per se* unconstitutional." Resp. 70. Yet the Petition makes clear that Appellants challenge the notary requirement as an unconstitutional burden on the right to vote *as-applied* to the 2020 elections during the pandemic. In Count IV, the Petition asserts that the notary requirement "requires voters to leave their homes in conflict with social distancing guidelines during the COVID-19 pandemic," D2 p. 33, and incorporates by reference all preceding allegations, *id.*, including:[10]

- allegations related to the severity of the deadly COVID-19 outbreak in the United States, D2 pp. 2, 12–17, and in Missouri specifically, D2 pp. 2, 7–11, 19–23, 29–30;
- allegations that the COVID-19 virus is highly infectious and spreads through in-person contact through respiratory droplets and among asymptomatic individuals, leading public health officials to unanimously call for adherence to social distancing guidelines, D2 pp. 2–3, 12–23;
- allegations that Governor Parson signed several executive orders declaring a state of emergency due to the COVID-19 pandemic, postponing

[10] Appellants include citations to secondary sources in their opening brief, the vast majority of which are merely support for well-known facts concerning COVID-19 that had previously been cited in their Petition, *compare* D2 p.14 n.6, *with* Opening Br. 7 n.12, updated, but consistent, information about COVID-19 developments and state or CDC official statements or guidance on public health regarding the same since Appellants filed their Petition, *see, e.g.* Opening Br. 3, n.3, 34 n.46.

municipal elections, and issuing and extending a stay-at-home order that instructs citizens to avoid leaving their homes and to practice social distancing, D2 pp. 20–22; and

- a request for "an authoritative [judicial] determination that all eligible voters who wish to confine themselves to vote absentee to avoid contracting or spreading the virus that causes COVID-19 are eligible to vote absentee—pursuant to § 115.277.1(2), RSMo—without a notary seal," D2 p. 5.

These allegations, taken as true as they must at this stage, are more than adequate to state a claim that the notary requirement is an unconstitutional burden on the right to vote *as-applied* to the 2020 elections during the pandemic, a claim which Respondents acknowledge is not moot. Resp. 12.

B. Respondents misstate the proper legal standard for evaluating right-to-vote claims under the Missouri Constitution

As addressed in Appellants' opening brief, this Court has articulated clearly that a claim alleging a violation of the fundamental right to vote under the Missouri Constitution is evaluated under its tiers-of-scrutiny framework. Opening Br. 29; *see Priorities USA v. State*, 591 S.W.3d 448, 453 (Mo. banc 2020); *Weinschenk v. State*, 203 S.W.3d 201, 210 (Mo. banc 2006). Appellants allege that the notary requirement, as-applied to the 2020 elections during the pandemic, violates their constitutional right to vote. The proper standard in evaluating this claim is to 1) determine whether the notary requirement, under these pandemic circumstances, constitutes a heavy burden on the right to vote, and then 2) apply strict scrutiny if it does or rational-basis scrutiny if it does not. *See id.*

Nevertheless, Respondents assert, from thin air, that because the Missouri Constitution provides the legislature with discretion to restrict absentee voting, "*Weinschenk*'s tiers of scrutiny under Article I, § 25 are inapplicable" to this claim and that the notary requirement "is subject to, at most, rational-basis review." Resp. 73–74. But nothing in *Weinschenk*, or anywhere else, supports Respondents' argument that rational-basis review automatically applies.[11] To the contrary, *Priorities* applied the *Weinschenk* tiers-of-scrutiny framework when invalidating the affidavit requirement in the state's voter identification law, 591 S.W.3d at 453, even though the Missouri Constitution provides virtually the *same* discretion to the legislature to pass voter identification laws as it does for passing absentee balloting restrictions, Mo. Const. Art. VIII, § 11 ("A person seeking to vote in person in public elections may be required by general law to identify himself or herself and verify his or her qualifications … by providing election officials with a form of identification, which may include valid government-issued photo identification."). Respondents' argument that rational-basis scrutiny should apply to Appellants' constitutional claim, without considering the burden on voters, is irreconcilable with *Priorities*.

[11] Respondents all but ask this Court to hold that all challenges to laws relating to absentee voting should be dismissed as a matter of law because even rational-basis review may be too much. This argument is absurd and would render courts powerless to perform their central task: to review constitutional issues and remedy constitutional violations. "[I]f there is no doubt that a statute … is in conflict with the Constitution, then it is the duty of any court, whose duty it is to decide, to declare the conflict and declare the statute void." *Watts v. Lester E. Cox Med. Ctrs.*, 376 S.W.3d 633, 645 (Mo. banc 2012) (quotation and citation omitted).

Respondents also argue that lesser scrutiny is warranted because "there is no constitutional right to cast an absentee ballot under Missouri … law." Resp. 72. As an initial matter, while Respondents misleadingly suggest otherwise, whether there is a constitutional right to vote absentee and the contours of that right remain open questions in Missouri.[12] But even assuming without conceding that Respondents' claim is true, it is entirely irrelevant. Indeed, cases Respondents cite, Resp. 58 n.1, illustrate this very point. In *Obama for America v. Husted*, for example, plaintiffs challenged the absentee voting deadline for non-military voters as an undue burden on the right to vote. 697 F.3d 423 (6th Cir. 2012). The Sixth Circuit found that the deadline imposed a substantial burden and applied heightened scrutiny under the sliding-scale *Anderson-Burdick* test in ruling

[12] The cases Respondents cite do not support their claim that there is no constitutional right to vote absentee under Missouri law. Missouri courts have never decided whether the state constitution allows the legislature to limit absentee voting based on the reason for the absence or to put different rules in place for different classes of people who will be absent. The principal case on which Respondents rely was decided before the Missouri Constitution provided for absentee voting, as it does now. *Straughan v. Meyers*, 268 Mo. 580 (1916). *Elliot v. Hogan* simply quotes *Straughan* without further comment. 315 S.W.2d 840, 848 (Mo. App. 1958). In *Barks v. Turnbeau*, 573 S.W.2d 677, 681 (Mo. App. 1978), the Court of Appeals stated that absentee voting is a privilege, but was not called upon to rule on the issue. *See State v. Russell*, 598 S.W.3d 133, 143 (Mo. 2020) ("There is no doctrine better settled than that the language of judicial decisions must be construed with reference to the facts and issues of the particular case, and that the authority of the decision as a precedent is limited to those points of law which are raised by the record, considered by the court, and necessary to a decision") (quoting *State ex rel. Baker v. Goodman*, 274 S.W.2d 293, 297 (Mo. banc 1954)). And *State ex rel. Hand v. Bilyeu*, 346 S.W.2d 221 (Mo. App. 1961), was vacated by this Court in large part because the Court of Appeals opined on that issue which "was not before the Court of Appeals and is not now in the case before us." 351 S.W.2d 457, 459 (Mo. 1961). As explained above, this Court need not decide this issue to resolve Appellants' claims.

for Plaintiffs.[13] *Id.* at 429–36. And in *Price v. New York State Board of Elections*, plaintiffs challenged absentee ballot restrictions in elections for party county committees. 540 F.3d 101, 103–04 (2d Cir. 2008). Even though the Second Circuit explicitly noted that it was "not hold[ing] that there is a general constitutional right to obtain absentee ballots," *id.* at 112, it still applied *Anderson-Burdick* and found it would be "incorrect" to apply "pure rational basis review" to a right-to-vote claim without investigating the burden on voters, *id.* at 108–09.

As in those cases, Appellants here do not allege that the notary requirement restricts any constitutional right to cast an absentee ballot. Rather, Appellants allege that the notary requirement, as-applied in the context of a public health crisis when individuals reasonably avoid close contact with others because they wish to avoid spreading or contracting a deadly illness, constitutes a severe burden on their constitutional right to vote. *See Thomas v. Andino*, No. 3:20-cv-01730-JMC, 2020 WL 2617329, at *17–*18 (D.S.C. May 25, 2020) (determining that even though "under South Carolina law, absentee voting is a privilege," court must apply *Anderson-Burdick* or strict scrutiny because under the circumstances of the pandemic the "privilege … so intimately effects the fundamental right to vote"); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-CV-00024, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020) ("In ordinary times, Virginia's witness signature requirement may not be a significant burden

[13] The *Anderson-Burdick* burdens analysis is analogous to the *Weinschenk* burdens analysis—albeit the right to vote under the Missouri Constitution is "even more (continued…)

on the right to vote. But these are not ordinary times."); *see also*, Reply App. 001-032, *Demster*, No. 20-0435-I(III), at Reply App. 008, 023 (while Tennessee legislature allowed absentee voting "only for a limited set of circumstances," law restricting mail-voting constituted a "severe" and unconstitutional burden during pandemic). Because Missourians reasonably seek to avoid person-to-person contact with individuals with whom they are not otherwise in contact during the pandemic, otherwise constitutional restrictions on absentee voting, including the notary requirement, rise to the level of a severe burden on Appellants' constitutional right to vote because it is difficult for them to exercise that right otherwise. As *Obama for America*, *Price*, and the cases discussed in Appellants' opening brief make clear, the sliding-scale test is appropriate, and constitutional violations are often found, even if no constitutional right to absentee balloting exists. *See* Opening Br. 29–33, 42–43.

Respondents' reliance on *McDonald v. Board of Election Commissioners* in arguing for a more lenient standard is also misplaced for several reasons. *First*, there are important factual differences between this case and *McDonald*. In *McDonald*, the Supreme Court came to its decision because "nothing in the record [indicated] that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote." 394 U.S. 802, 807 (1969). In other words, "the Court's disposition of the claims in *McDonald* rested on failure of proof." *O'Brien v. Skinner*, 414 U.S. 524 (1974) (distinguishing *McDonald* and *requiring* absentee ballots for voters in jail); *see also*

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extensive" than that under the federal constitution. Opening Br. 29–30.

Obama for Am., 697 F.3d. at 430–31 ("[t]he *McDonald* plaintiffs failed to make out a claim for heightened scrutiny because they had presented no evidence to support their allegation that they were being prevented from voting."). By contrast, Appellants here plead that the notary requirement gravely burdens Missourians' ability to access their fundamental right to vote during this pandemic. *See infra*.

Second, *McDonald* involved a different claim. The *McDonald* appellants alleged that the legislature drew irrational classifications when determining who was legally entitled to vote absentee. *McDonald*, 394 U.S. at 806. By contrast, Appellants here allege a violation of their fundamental right to vote enshrined in the Missouri constitution. D2, p. 33.

Finally, the claim in *McDonald* was brought under *federal* constitutional law while the claim here is under the *state* constitutional right to vote. "Due to the more expansive and concrete protections of the right to vote under the Missouri Constitution," it "provides greater [voting rights] protection than its federal counterpart," *Weinschenk*, 203 S.W.3d at 204.

Ultimately, Respondents cannot mischaracterize Appellants' claim as a facial challenge to avoid the proper legal standard for right-to-vote claims as outlined in *Weinschenk*. Under this correct legal framework and the correct as-applied framing, Appellants have successfully alleged that Missouri's notary requirement cannot pass constitutional muster.

C. Missouri's notary requirement, in the context of the COVID-19 pandemic, constitutes a severe burden on Appellants' fundamental right to vote, prompting strict scrutiny

As noted in Appellants' Petition, *see supra*, and opening brief, Opening Br. 33–35, 38–39, 43–45, Appellants have pled that COVID-19 is a silent, invisible, highly infectious and deadly illness passed primarily through contact with other individuals who can be asymptomatic for up to two weeks. Public health experts have issued unanimous guidance calling on Americans to socially and physically distance from one another, including staying at least six feet apart from other people, avoiding large and small gatherings, and staying at home as much as possible. D2, pp. 2, 16, 21–22, 29–30.

Crucially, Missouri officials themselves have issued repeated guidance acknowledging this unprecedented public health crisis and urging Missourians to socially distance and stay at home as much as possible. Governor Parson declared a state of emergency, stating that "COVID-19 poses a serious health risk for Missouri residents." D2, p. 20. Days later, he issued another executive order postponing municipal elections and stating that the "[CDC] recommends cancellation or suspension of gatherings and limiting close contacts via social distancing to limit the spread of the Coronavirus." *Id.* The following month, Governor Parson issued a stay-at-home order instructing residents to stay in their homes and practice social distancing as much as possible—an order that was later extended. D2, p. 21. And Missouri is still under an executive order that suspended the physical appearance requirement for the notarization of official documents, which was extended because "COVID-19 continues to pose a serious health

risk for the citizens and visitors of the State of Missouri" and because COVID-19 "is spread through close contact between persons and respiratory transmissions." App. 022–023. This in-person suspension for notarization, however, does not apply to mail-in ballots, and Respondents do not explain how in-person notarization of ballots is somehow free from these health risks.

For these reasons, requiring individuals to leave their homes, travel, and come into close contact with individuals with whom they are not otherwise in contact constitutes a severe burden on the right to vote in the context of the pandemic. The notary requirement forces Appellants to risk their health and the health of others to exercise their right to vote. *See Thomas*, 2020 WL 2617329, at *17–*18; *League of Women Voters of Va.*, 2020 WL 2158249, at *8. Although the ongoing pandemic makes the notary requirement a significant burden for all voters, the burden is particularly acute for those individuals at heightened risk of severe illness or death, including at least one group of voters—those who are severely obese—that the CDC has identified as particularly vulnerable to COVID-19 but who are not covered by SB631's notary exemption for "at-risk" voters.[14] The burden is also particularly severe for those who live with such at-risk individuals.

Respondents' suggestions that the notary requirement does not constitute a severe burden on the right to vote during the pandemic, *see* Resp. 74–77, fail for several reasons. *First*, every court that has considered whether enforcing witness signature

[14] As the Petition alleges, COVID-19 has also had a particularly devastating impact on Black communities. D2, p. 16.

requirements—which require comparable levels of in-person contact as notary requirements—during the COVID-19 pandemic puts voters' health at risk has concluded that it does. *See Thomas*, 2020 WL 2617329, at *19; *League of Women Voters of Va.*, 2020 WL 2158249, at *8. Respondents cannot meaningfully distinguish these cases. *See* Resp. 76–77. Respondents suggest *League of Women Voters of Virginia* is inapposite because the parties agreed to a consent decree. *See* Resp. 76. But the federal court was still required to find, and did find, a likelihood of a constitutional violation of the right to vote in large part because the requirement forced voters to choose between their health, the health of those around them, and their right to vote. 2020 WL 2158249, at *8. Respondents suggest that *Thomas* does not apply because some officials "conceded that the witness requirement for signatures on absentee ballots served no useful function," unlike here, Resp. 77. Yet that concerns only the state's interest in the law; *Thomas* determined that the burden on voters imposed by the witness requirement was "of sufficient magnitude to warrant the injunction." 2020 WL 2617329, at *19.

Second, Respondents opine that perhaps "notarization may be pursued safely and effectively while observing prudent social-distancing measures." Resp. 75. Yet, they provide no evidence to support this trial balloon—an acknowledgement that at minimum, this case should proceed beyond the motion-to-dismiss phase for any factfinding needed. More importantly, notarization requires close physical contact between individuals, which is unanimously discouraged.

Third, even if Respondents were correct that notarization could, with myriad protective measures, be done in a safe manner, they do not address the fact that Missourians have been instructed on *countless* occasions—including by the Missouri Governor himself—to stay at home, avoid close contact with others, and even avoid in-person notarizing of official documents. Even if Respondents were correct in their evidence-free claim that meeting in-person with a stranger, including in a public setting, to obtain notarization was *objectively* safe, it is extremely burdensome to ask citizens to act against the advice of public health experts and top Missouri officials.

Indeed, mere days ago at a press conference, Governor Parson told Missourians: "I hope people feel safe to go out and vote, but if they don't, you know, the No. 1 thing — their safety should be No. 1. If they don't, then don't go out and vote."[15] The Governor, therefore, has 1) acknowledged that Missourians may not feel safe about leaving their homes to vote, and 2) encouraged Missourians to stay at home instead of voting if they fear contracting or spreading COVID-19. The message from the government has been clear for months, including in this litigation: stay home and avoid person-to-person contact, even if it costs your vote. This is a constitutionally impermissible choice to impose on voters.

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[15] Associated Press, *Missouri governor: Pick safety over voting if concerned about coronavirus*, (May 29, 2019) https[]://www.stltoday.com/news/local/govt-and-politics/missouri-governor-pick-safety-over-voting-if-concerned-about-coronavirus/article_d0975fba-2a52-5544-8db4-ad857adce6ea.html.

Fourth, Respondents suggest that "the risks of notarization are categorically similar to those of in-person mail deliveries … which … do not unconstitutionally burden anyone's right to vote." Resp. 76. In truth, there is no meaningful comparison between these two things. Appellants' Petition notes that "[t]here is no evidence that the virus that causes COVID-19 can be spread through the mail," and that the U.S. Postal Service has eliminated *any* need for personal contact between postal employee and mail recipient, including any signature requirements. D2, p. 18. Vote-by-mail, in other words, does not require any physical contact. The notary requirement, though, necessarily involves close physical contact, in a way that makes it more analogous to in-person voting. *See* Opening Br. 43–45. Governor Parson acknowledged as much when he signed and extended his executive order suspending the physical appearance requirement for the notarization of official documents. App. 022–023.

For the reasons outlined in Appellants' Petition and opening brief, *see* Opening Br. 43–49, the notary requirement constitutes a severe burden on Appellants' fundamental right to vote during the public health crisis. At minimum, Appellants' allegations, taken as true, warrant proceeding beyond the motion to dismiss.

D. Missouri's notary requirement does not serve compelling governmental interests and is not narrowly tailored to meet those interests, such that it fails strict scrutiny with regard to the upcoming 2020 elections

A law that severely burdens the right to vote can survive constitutional scrutiny only if it is "narrowly tailored to serve a compelling state interest." *Priorities*, 591

S.W.3d at 453. The only interest Respondents identify is that the notary requirement serves "as a safeguard against fraud and abuse." Resp. 78.

To satisfy strict scrutiny, Respondents must show legitimate evidence of widespread voter fraud. *See Weinschenk*, 203 S.W.3d at 217. In their opening brief, Appellants noted that "[w]hile incidents of absentee voter fraud exist," empirical studies and election experts both strongly indicate that absentee ballot fraud is exceptionally rare in practice. Opening Br. 40–41. As if to prove Appellants' point, Respondents trot out a handful of news articles of isolated absentee ballot fraud allegations in the U.S. from the past 15 years. Resp. 65–68. The closest Respondents come to contesting that there is no meaningful or systemic problem of absentee-ballot voter fraud is pointing to a report from 15 years ago noting that "[a]bsentee ballots remain the largest source of potential voter fraud." *Id.* at 67. This is a little like acknowledging that someone is likeliest to be struck by lightening while sitting on a metal bench or that one's chances of winning the jackpot are doubled by buying two lottery tickets: "[e]lection fraud committed with absentee ballots is more prevalent than in person voting," but "still amounts to only a tiny fraction of the ballots cast by mail."[16] *See generally Fish v. Schwab*, 957 F.3d 1105, 1143 (10th Cir. 2020) ("These anecdotes, even were we to consider them, do not establish that 'substantial' numbers of noncitizens registered to vote in Kansas during a relevant time period and thus are not pertinent to the registration of noncitizen voters in Kansas."). And

[16] Robert Farley, *Trump's Latest Voter Fraud Misinformation*, FactCheck.org (Apr. 10, 2020) https[]://www.factcheck.org/2020/04/trumps-latest-voter-fraud-
(continued…)

even this report does not recommend a notary requirement as a means to deter absentee-ballot fraud but recommends instead a less-burdensome signature match process, which Respondents can utilize even if they are not already (in addition to all the other existing safeguards in place, *see* Opening Br. 47–48).[17] Respondents fail to meaningfully contest Appellants' evidence that absentee-ballot fraud is not a serious problem in practice and fail to offer any other state interest the notary requirement serves. The notary requirement cannot satisfy strict scrutiny.

Further, the notary requirement cannot be narrowly tailored for the purpose of protecting against absentee ballot fraud because, as Respondents argued below, D11, pp. 11–12, the legislature has already exempted from the requirement large groups of people for whom it would be a significant burden, § 115.291. These exemptions, and those in SB631, are a legislative acknowledgement that the notary requirement can be suspended where it would be a significant burden, without regard to whether absentee ballots cast by those groups are less susceptible to fraud.

As the legislature acknowledged, COVID-19 will be with us for the upcoming 2020 elections. This Court has the information it needs to determine that the notary requirement presents an unconstitutional burden on Appellants' fundamental right to vote

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misinformation/.

[17] Comm'n on Fed. Election Reform, *Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform* 20, Ctr. For Democracy & Election Management, Am. U. (Sept. 2005).

during the public health crisis. But at minimum, Appellants' allegations, taken as true at this stage, are sufficient to survive a motion to dismiss.

III. Appellant Organizations Have Standing

Although conceding that two individual Appellants have standing, Respondents persist in their quest to prevent MO NAACP and League of Women Voters from asserting claims on behalf of their members. Resp. 79–83. Both organizations have long fought to secure the voting rights of their members in the face of government efforts to disenfranchise them. They should not be booted from this case.

To suggest that the organizations lack associational standing, Respondents "erroneously conflate[] the issue of standing with deciding the merits." *Byrne & Jones Enterprises, Inc. v. Monroe City R-1 Sch. Dist.*, 493 S.W.3d 847, 853 n.5 (Mo. banc 2016). That is, they urge that the organizations cannot advance claims that their members have a statutory or constitutional right to vote absentee without a notary seal because the members' claims would fail on the merits. Under a theory of associational standing that turns entirely on success on the merits, courts would have to decide the merits of a claim to determine whether standing exists. That is not the law. Successful on the merits or not, members of the organizations who cannot vote absentee without a notary seal have standing to press their claims; so, too, do the organizations on behalf of their members.[18]

[18] The bulk of Respondents' standing argument seeks to establish that opposition to a statute alone does not establish standing. This strawman will not be addressed.

Respondents suggest that organizational standing based on a diversion of resources is "foreclosed by Missouri law," but supply no Missouri law in support. It is not foreclosed; rather, Missouri courts have not yet determined whether to recognize organizational standing. The Court need not decide that here because MO NAACP and the League have associational standing. But should this Court reach the issue, each organization has pleaded sufficient facts to establish standing on this basis too.

CONCLUSION

For the foregoing reasons and those outlined in their opening brief, Appellants respectfully request that this Court reverse the Circuit Court's Order dismissing the Petition and enter judgment declaring that § 115.277.1(2) provides voters who expect to confine themselves to avoid spreading or contracting the COVID-19 virus the opportunity to vote absentee by mail without notarization for the upcoming 2020 elections. In the alternative, judgment should declare that the statutes that exclude such voters from casting ballots by mail without notarization as-applied during the current pandemic violate Article I, § 25 and Article VIII, § 2 of the Missouri Constitution. If further fact-finding is necessary, the case should be remanded with an order granting Appellants interim relief or a special master appointed to gather evidence and submit factual findings to this Court.

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on June 8, 2020, the foregoing brief was filed electronically and served automatically on counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 7,735 words, as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus free.

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