IN THE MISSOURI SUPREME COURT

No. SC98744

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-CC00169-01
Honorable Jon E. Beetem

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Table of Contents

TABLE OF AUTHORITIES

Cases

Constitutional Provisions

Statutes

JURISDICTIONAL STATEMENT

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

On September 24, 2020, the trial court entered judgment against Appellant on both counts of the Amended Petition. Count I seeks declaratory judgment that § 115.277.1(2) permits registered voters who expect to confine themselves on Election Day due to COVID-19 to vote absentee without a notary seal.[1] Count II challenges enforcement of statutes that prevent voters from casting an absentee or mail-in ballot without a notary seal because requiring a notary seal during the COVID-19 pandemic violates the fundamental right to vote guaranteed by the Missouri Constitution.

These issues relate to the fundamental right to vote under the Missouri Constitution and its application during a pandemic. Thus, this case therefore involves the validity of a statute and falls within the exclusive appellate jurisdiction of this Court.

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

INTRODUCTION

The trial court erroneously upheld a notarization requirement that imposes myriad burdens on Missouri citizens seeking to vote during a global pandemic. The decision, issued just days after a highly compressed bench trial conducted entirely on papers, is perhaps best understood in light of the court's admission that the "robust" record "presented a nearly unmanageable task for the court to parse into the actual facts which support the judgment." D164 p. 4, n1. Indeed, the judgment stands unsupported by both the facts and the law.

The court committed multiple legal errors when it:

- misconstrued an unambiguous statutory command exempting from the notary requirement any voter prevented from going to the polls "due to illness," including COVID-19;
- wrongly denied a conditional motion to conform the pleadings and thereby dismissed or gave short shrift to evidence Respondents were fully apprised of, which showed the notary requirement confused, burdened, and disenfranchised voters;
- incorrectly presumed mail-in balloting during a pandemic is a mere privilege such that the Legislature could impose any restriction whatsoever, regardless of the burden imposed and without judicial scrutiny;
- needlessly and incorrectly held the organizational Appellants lacked standing when there is no dispute that individual Appellants have standing

sufficient to sustain the suit regardless, and both the Missouri State Conference of the National Association for the Advancement of Colored People and the League of Women Voters of Missouri have associational standing; and

- misapplied a federal case that has never been applied in Missouri and failed to analyze the simple and realistic remedy requested, acceptance of ballots with or without notarization.

This is not a case of a court carefully weighing record evidence and arguments in light of precedent. This is a case of a court "rubber-stamping" State action that burdens Missourians; forces them to choose between the vote, their health, and the health of their loved ones; and disenfranchises them—as notary publics are demanding would-be voters first provide government-issued photo identification. To uphold that ruling and preserve a notary requirement that has been proven to burden voters during a pandemic, but *not* proven tailored to any state interest in preventing fraud (much less necessary given existing safeguards), would "place[] into jeopardy" Missourians "fundamental right to vote." *Weinschenk v. State*, 203 S.W.3d 201, 213 (Mo. banc 2006). There is no cause to imperil that fundamental right when a simple remedy is readily available: election officials need only count ballots, regardless of notarization, for the November election.

STATEMENT OF FACTS

Procedural History

This appeal if from a trial court that indicated the "robust" record "presented a nearly unmanageable task for the court to parse into the actual facts which support the judgment." D164 p. 4, n1. Accordingly, it is unclear if the court read, much less grappled with, the full record.

In April, the Missouri State Conference of the National Association for the Advancement of Colored People ("MoNAACP"), League of Women Voters of Missouri ("MoLWV"), and individual voters sued the State, Secretary of State John Ashcroft, and local officials. *MoNAACP v. State*, 20AC-CC00169. The Petition sought declaratory and injunctive relief with respect to § 115.277. The court dismissed with prejudice. In June, this Court reversed. D3 p. 9.

Also in June, SB631 became law, temporarily adding an "at-risk" category for absentee voting and creating a mail-in ballot regime.

On remand, Appellants filed a two-count amended petition for declaratory and injunctive relief. D5; D9. In Count I, they sought declaratory judgment that § 115.277.1(2) permits voters who expect to confine themselves on Election Day due to COVID-19 to vote absentee. D10 pp. 34-35. In Count II, they allege that statutes that prevent voters from casting an absentee or mail-in ballot *without a notary seal* during the COVID-19 pandemic violates the fundamental right to vote under the Missouri Constitution. D10 pp. 35-38.

The trial proceeded on papers. D90; D91. Before the case was submitted, Appellants filed a condition Rule 55.33 motion.[2]

On September 24, the trial court denied the Rule 55.33 motion and, describing an "unmanageable" record, entered judgment denying relief. D164 p. 4 n1; p. 35.

Appellants are voters, and organizations representing voters, whose ability to vote is burdened by the notarization requirement.

MoNAACP is a nonpartisan membership organization. D138 pp. 10:13-20, 11:1-4, 12:2-4, 13:3-6, 100:18-101:18, 161:5-162:5. As the Missouri Chapter recognizes, the NAACP was founded "to secure for [Black citizens] impartial suffrage." D110 p. 24, ¶92. To further this purpose, the MoNAACP participates in litigation, marches, and legislative efforts. D138 pp. 14:6-15:16, 162:24-163:12.

MoNAACP members include eligible voters who seek to vote by mail without having to appear before a notary public in the November election because they expect to confine themselves to avoid contracting or spreading the COVID-19 virus and do not otherwise meet a permissible reason to vote absentee without having to satisfy the notary requirement.

MoNAACP members, including Cheryl Avant and Romello Blackmon, are also concerned about risk to their health and the health of their loved ones if they must appear in person before a notary to have their mail-in or absentee ballot envelopes notarized. Avant has asthma, and Blackmon suffers decreased lung function. D138 pp. 13:14-17,

[2] All rule references are to Missouri Supreme Court Rules, as updated, unless otherwise noted.

15:17-16:9, 19:12-23:19, 63:21-64:4. MoNAACP's membership also includes individuals "most at risk as recognized by leading medical information." D138 p. 24:7-17.

MoNAACP members face additional burdens and risks of disenfranchisement, including challenges finding a notary; having to pay for notary services in order to vote; lacking internet or printer access to obtain ballots; lacking transportation to reach a notary; and lacking the forms of photo identification that notaries are unlawfully demanding. D138 pp. 29:17-30:5, 30:20-34:25, 35:20-36:16, 38:23-39:6, 54:12-55:17, 55:21-57:15, 73:13-74:16; 157:3-19.

MoLWV is a non-partisan membership organization whose mission is to educate and empower voters. Nearly all members are eligible voters. D139 p. 23:8-14. To further its mission, the MoLWV litigates to defend its members rights to vote.

Members include eligible voters seeking to vote by mail without having to appear before a notary public because they expect to confine themselves to avoid contracting or spreading the COVID-19 virus and do not otherwise meet a permissible reason to vote absentee without having to satisfy the notary requirement.

MoLWV members are concerned that they will contract COVID-19 while voting in person or visiting a notary in person for the purpose of getting a ballot notarized. D139 pp. 31:6-19, 190:13-191:4. Many members are over the age of 50. D139 p. 22:4-11. Members include voters at severe risk of complications relating to COVID-19 under recognized CDC standards who do not otherwise qualify to vote absentee without

notarization. D139 p. 26:9-24. MoLWV members have died from COVID-19 complications. D139 p. 63:10-22.[3]

Meredith Langlitz is a voter in St. Louis County. D140 pp. 7:9-18, 13:18-20. A MoLWV member, Langlitz serves on the board of the St. Louis League of Women Voters. D140 pp. 12:18-13:17. She lives with her husband, who is immunocompromised, and her newborn son and two-year-old daughter. D140 pp. 11:3-4, 14:16-22, 16:20-21. Both Langlitz and her husband are working from home with no planned return to their offices. D140 p. 12:3-17.

To avoid the risk of exposure to COVID-19, Langlitz and her family have drastically changed their lifestyle and are confining themselves as much as reasonably possible. D140 pp. 18:15-24:16, 25:19-26-7, 82:3-15.

Langlitz voted absentee in the June election using the "confined due to illness" exception because she was pregnant and close to her due date. The ballot did not have to be notarized and was dropped off, not returned by mail. D140 pp. 29:25-31:21. Langlitz voted using the mail-in ballot method for the August election. She chose this option because she thought she did not qualify for any of the absentee excuse categories, but she did not feel safe going to her polling place in person. Langlitz, serendipitously through a

[3] MoLWV also has members who are notaries and who have stopped performing notary services because of health risks involved with performing notarization services to the public during the pandemic. D139 p. 21:18-20.

neighbor, learned she could get her ballot notarized outside a local church. She does not know if this option will be available for November. D140 pp. 32:17-37:7, 112:17-113:8.

For November, Langlitz is concerned about the health risks associated with voting in person at her busy polling location. Living with her newborn baby and immunocompromised husband, she is worried about being unable to find a safe notary option for a mail-in ballot.

Javier Del Villar is a twenty-nine-year-old voter in Lee's Summit. D147 p. 7:1-10. He is a member of the MoNAACP and an essential worker. D147 pp. 21:11-15, 22:11-13. Del Villar limits his contact with others and tries to reduce risks that could expose himself, his family, or others to COVID-19. The family members with whom he lives are also taking precautions to avoid contracting or spreading COVID-19, including limiting how often they leave the house. D147 pp. 32:8-33:13, 67:9-18. For safety, Del Villar will vote either absentee or by mail-in ballot in November and, if possible, without interacting with a notary. D147 pp. 48:12-17. Del Villar's polling place is a crowded middle school. D147 pp. 23:14-25:9.

Del Villar voted absentee in August because he was working outside the jurisdiction. D147 pp. 38:23-39:9. Thanks to his sister, who is an attorney, Del Villar was able to find a notary. He then was able to return the ballot in person, while wearing a mask, to an office where "no one was there." D147 pp. 39:10-40:3, 46:24-47:3, 47:9-16. Del Villar used a bank drive-through for his notarization, where he was required to show his driver's license. D147 pp. 40:12-41:15, 45:22-46:4. Del Villar had to take the day off

work to get his ballot notarized, and he does not believe that he will be able to take a day off for November. D147 pp. 41:16-42:1, 87:23-88:1, 92:14-21.

COVID-19 poses a significant risk to a large portion of Missouri's population that is not exempted from the notarization requirement.

Without discussing the evidence demonstrating serious the health risks imposed by the notary requirement, the trial court felt that the risk falls "somewhere between zero (maintaining a quarantine status) and that of in person voting on election day." D164 p. 3.

At trial, there was no dispute regarding the extensive spread of COVID-19 in the United States and Missouri. The United States has roughly 25 percent of the world's COVID-19 cases despite having just 4 percent of the population. D142 pp. 44:6-46:10. As of September 8, there were nearly 6.3 million reported cases in the United States, includingover 188,000 deaths. Plt. Ex. 108 (Klausner Ex. 24). Scientific evidence shows ongoing community spread of COVID-19 throughout Missouri's rural and urban areas. D142 p. 46:11-25.

Missouri's COVID-19 problem is accelerating. As of trial, Missouri had 114,307 confirmed cases and 1,807 deaths. Missouri set records for new cases on two days in late August. Plt. Ex. 041 (Babcock Ex. 17). The rate of new cases and hospitalizations is much higher than in the spring. D142 pp. 56:1-21; D152 pp. 150:15-151:8, 151:19-22. D142 pp. 48:9-19. The positivity rates are currently around 13-14 percent. D142 pp. 46:14-19, 53:25-54:19; Plt. Ex. 040 (Babcock Ex. 16). Recognizing the deteriorating situation, the White House Coronavirus Task Force recently put Missouri in its "red zone" for the highest-risk states. Plt. Ex. 039 (Babcock Ex. 15); D142 pp. 51:5-52:12.

The trial court did not conclude that obtaining a notary acknowledgment is without risk. D164 p.3. And Respondents did not dispute that the safest way to vote in the November election is remotely without a notary. D142 pp. 68:2-12. Rather, they thought, Dr. Hillary Babcock, "failed to provide any informative opinion about the health risks *from notarization*." D.164 p. 13. But, in fact, Dr. Babcock testified about the risks associated with exposure to individuals outside of a voter's bubble, including interactions with notaries and others during the notarization process.

Dr. Babcock testified that when an individual interacts with a person outside the individual's bubble, that individual faces increased risk of infection, a risk they pass on to others. For that reason, epidemiologists encourage limiting the number of places people visit and the number of people they interact with as much as possible. D142 pp. 68:13-70:9; *see generally* Plt. Ex. 073 (Babcock Demonstrative Ex. 4). Dr. Babcock testified about the multiple ways the notarization process exposes a voter to individuals outside of the voter's bubble, risking exposure to COVID-19. Considering the multiple potential touchpoints with third parties, Dr. Babcock concluded it is "not likely" a voter would avoid interacting with other people, even beyond the notary, when fulfilling the notary requirement. D142 p. 85:10-15; D137 pp. 71:19-74:4. Epidemiologist Dr. Klausner, hired by Respondents, acknowledged that the notarization process would bring voters in contact with others and that there are scenarios in which notarization would take 15 minutes or more. D152 p. 130:6-12.

Still the trial court minimized these health risks, noting that "social distancing and other prudent precautions such as mask-wearing and hand hygiene are 'consistently effective' in preventing the spread of Covid-19." D164 at p. 12-13. While voters and notaries can *reduce* the risk associated with notarizing ballots, such precautionary measures are neither mandated in Missouri nor practiced by all notaries. There are no statewide mask or social distancing requirements for voters, poll workers, notaries, or people appearing before registered notaries, and Governor Parson does not intend to institute any such requirements for the election. D142 pp. 51:21-52:19, 56:23-57:1.

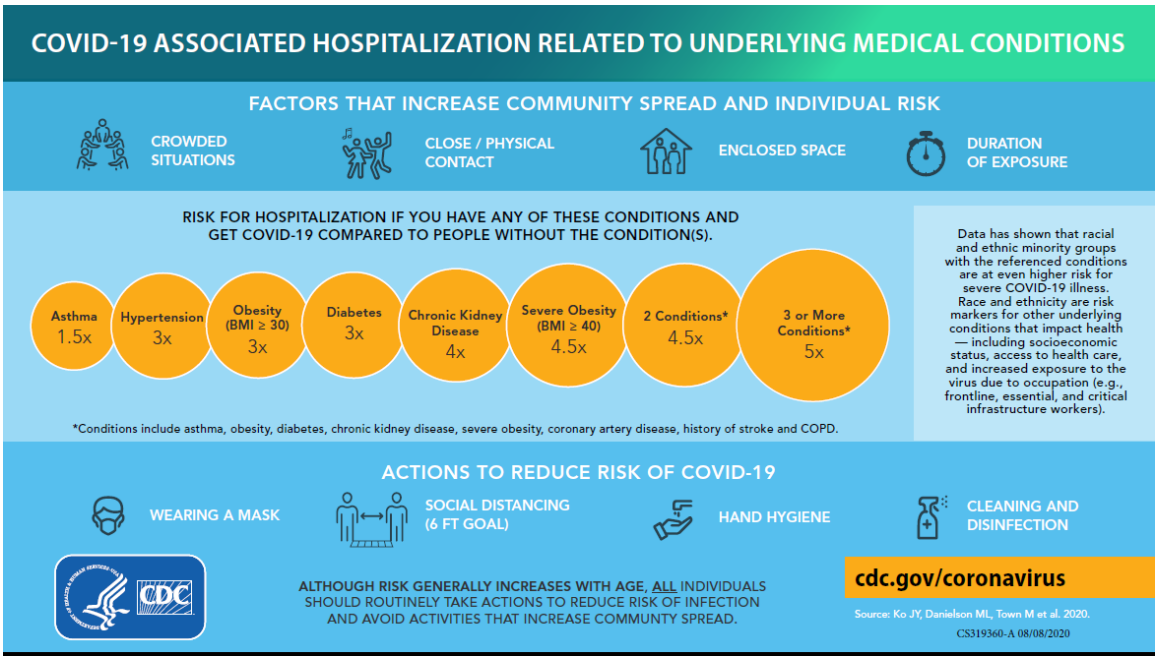
The evidence shows that even if voters wear masks, there is no guarantee the people they come into contact with before, during, and after the notarization process will wear a mask or take other recommended precautions. For example, voters may need to enter public buildings, lobbies, elevators, and office spaces to reach a notary. People in these spaces need not be masked. D142 pp. 71:19-72:2; *see also* D137 pp. 73:23-74:4. Others may await notarization in the same space or in a line without masks, social distance, or hand sanitizer. D142 p. 71:10-18. Voters who rely on public transportation must expand their bubble, and exposure, to get to and from the notary. D142 p. 72:3-10.

Unrebutted evidence further showed the notary requirement itself contradicts the precautionary measure of mask wearing. Missouri notaries follow the Secretary of State's guidance to check photo ID before notarizing any document, including ballot envelopes, requiring voters to doff their masks. D137 p. 67:1-14; *see also* D137 pp. 72:23-74:22; D142 pp. 80:9-81:5, 81:6-14.

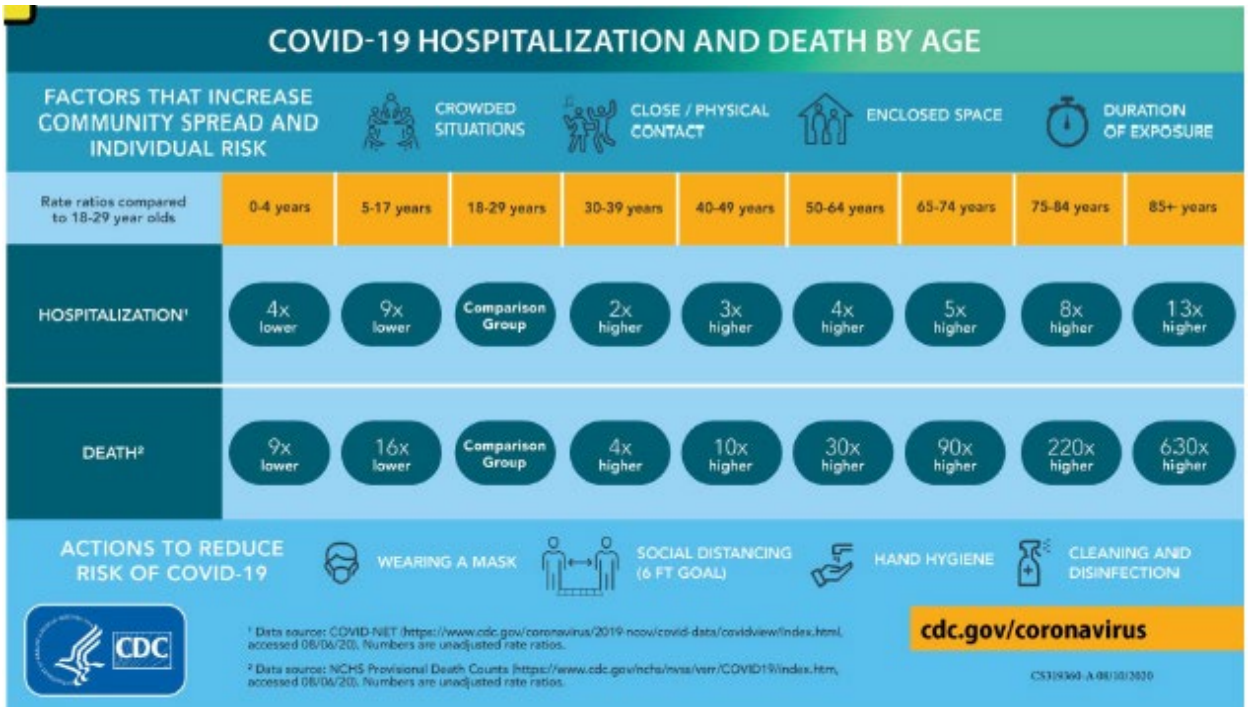
The temporary expansion of absentee-ballot eligibility by SB 631 is at odds with expert guidance and leaves voters at risk. The trial court thought "SB 631 removes the notary requirement for a large segment of the recognized at-risk population." D164 p. 3. But uncontroverted evidence shows several categories of voters, including African American voters, obese voters, voters with hypertension, and voters over the age of 50 but under 65, remain subject to the notarization requirement, even though the CDC has identified each group as at elevated risk for hospitalization and death due to COVID-19.

SB 631 provided for absentee voting eligibility if a "voter has contracted or is in an at-risk category for contracting or transmitting severe acute respiratory syndrome coronavirus 2." § 115.277.1(7). Voters in this category are exempt from the notary requirement. § 115.291.1. But voters are deemed "in an at-risk category for contracting or transmitting severe [COVID-19]" *only* if they: "1) [a]re 65 years of age or older, 2) [l]ive in a long-term care facility, 3) [h]ave chronic lung disease or moderate to severe asthma, 4) [h]ave serious heart conditions, 5) [a]re immunocompromised, 6) [h]ave diabetes, 7) [h]ave chronic kidney disease and are undergoing dialysis, or (8) [h]ave liver disease." § 115.277.6. A significant way the Legislature deviated from CDC assessment of risk is by failing to include voters with severe obesity—even though at least 35 percent of adult Missourians are obese. Plt. Ex. 033 (Babcock Ex. 9). Also excluded are the nearly one-third of Missouri residents with hypertension, even though the CDC says they are at heighten risk. Plt. Ex. 033 (Babcock Ex. 9). Obesity and hypertension are serious risk factors for COVID-19-related hospitalization. D142 pp. 29:7-24, 31:24-32:4; D152 pp.

34:14-35:9, 128:1-5. CDC data show an obese persons and persons with hypertension are three times more likely to be hospitalized if they contract COVID-19. People with severe obesity are 4.5 times more likely to be hospitalized if they contract COVID-19. Plt. Ex. 034 (Babcock Ex. 10); Plt. Ex. 099 (Klausner Ex. 14).



Although SB 631 does not provide absentee ballots for voters ages 50 to 64, buy they are at increased risk for severe illness and death from COVID-19. According to the CDC, compared to 18-29-year-olds, voters in this age group are 30 times more likely to die and four times likelier to be hospitalized from COVID-19. Similarly, according to the CDC, people aged 40-49 are three times more likely to be hospitalized and ten times likelier to die from COVID-19. Plt. Ex. 070 (Babcock Demonstrative Ex. 1); D152 pp. 199:16-19, 200:2-21; D142 pp. 36:2-37:1.

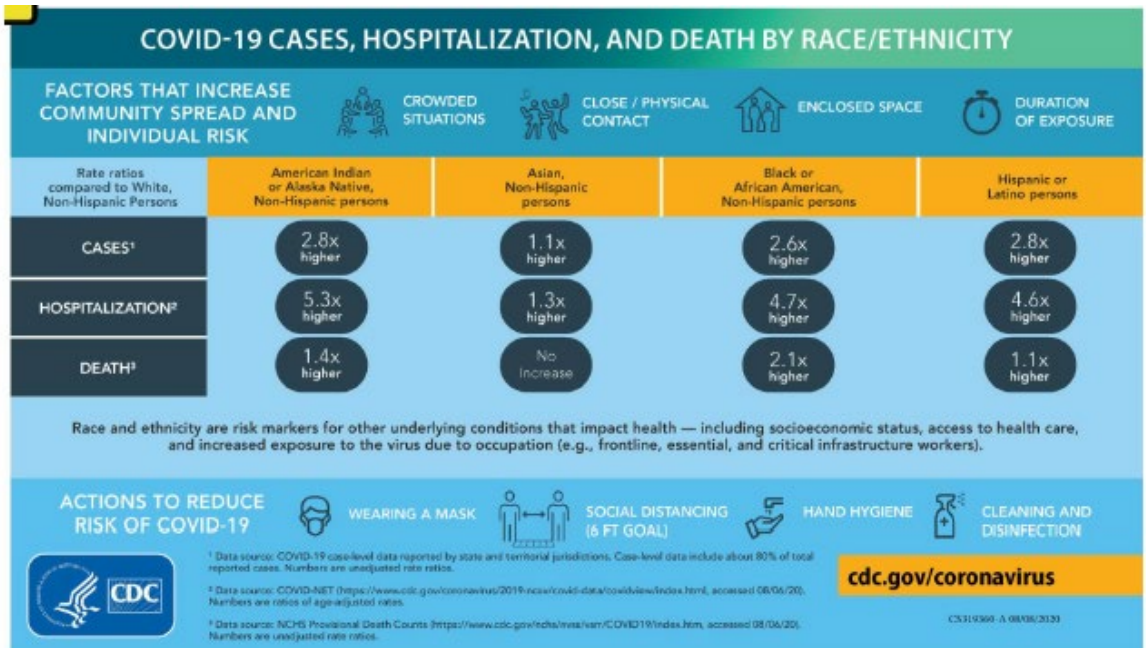


Plt. Ex. 100 (Klausner Ex. 15).

Advanced age places individuals at elevated risk. According to the Missouri Department of Health and Senior Services, as of August 11, 2020, there were more than 20,000 COVID-19 cases for Missourians aged 40-64. D142 pp. 36:14-37:1; Plt. Ex. 070 (Babcock Demonstrative Ex. 1). There is no epidemiological basis to conclude people are at low risk from COVID-19 until they turn 65, or that their risk suddenly jumps at 65. D142 pp. 36:14-37:1; Plt. Ex. 070 (Babcock Demonstrative Ex. 1). Even Respondents' expert agreed a 64-year-old with hypertension and obesity is at greater risk of severe illness or death from COVID-19 than a healthy 65-year-old. D142 p. 99:6-23; D152 pp. 153:24-154:6, 154:12-155:1.

There are significant racial disparities in COVID-19 outcomes, both in Missouri and throughout the United States. Nationally, Black Americans have been infected by

COVID-19 at 2.6 times the rate of white Americans, hospitalized at 4.7 times the rate of white Americans, and killed at 2.1 times the rate of white Americans. Plt. Ex. 037 (Babcock Ex. 13); D142 pp. 37:21-38:17; D152 pp. 201:20-24, 202:4-15, 202:19-22.



Plt. Ex. 101 (Klausner Ex. 17). In Missouri, Black people make up just 12 percent of the population but account for 27 percent of COVID-19 cases and 32 percent of COVID-19 deaths. Plt. Ex. 042 (Babcock Ex. 18); D142 pp. 59:10-60:6.

The notarization requirement creates a severe burden during the pandemic.

During the pandemic, the notary requirement carries health risks for voters and notaries. In April, Governor Parson signed Executive Order 20-08, which allowed for electronic notarization to protect the health and safety of both notaries and the public, though the approval of remote notarization does not extend to ballots. D146 pp. 66:5-11, 67:6-11; Plt. Ex. 053 (Clark Ex. 5); Plt. Ex 054 (Clark Ex. 6). Missouri notaries, too, testified to concerns about being able to safely notarize ballots. For example, Amber

Hodgson is not providing services during the pandemic because notaries "have to witness someone signing a paper and that cannot be done from a social distance." D150 pp. 19:13-20:9. To properly witness a signature, a notary should be "within a few feet of someone to watch them sign their signature on the document." D150 pp. 51:20-52:11; *see also* D139 pp. 37:24-38:25, 40:2-22; D151 pp. 18:21-23, 18:24-19:10, 44:22-24, 48:15-18, 50:16-51:3. Notarization can also be a lengthy process, taking typically 15 minutes, according to Bill Anderson, a witness from the National Notary Association. D141 pp. 27:7-15. This does not include time individuals may spend on public transportation to get to the notary; D142 pp. 72:3-10; D137 pp.75:12-20; or in line or in building lobbies or elevators with others, or both, each of which increases the health risks. D142 pp. 71:10-18; D142 pp. 83:23-84:12.

More Missouri voters will be voting by mail-in ballots that require notarization than ever before; however, during the pandemic, fewer notaries are offering their services. A study of Missouri by survey and voter behavior expert Dr. Barreto shows that 18.7 percent of Missouri voters will need ballot notarization for November. D143 p. 62:6-22; Plt. Ex. 009 (Barreto Ex. 1); Plt. Ex. 010 (Barreto Ex. 4); Plt. Ex. 012 (Barreto Ex. 6); Plt. Ex. 015 (Barreto Ex. 9); Plt. Ex. 016 (Barreto Ex. 10); Plt. Ex. 017 (Barreto Ex. 11). Using 2016 Missouri general election voter turnout data, Dr. Barreto projected roughly 523,600 voters needing notaries in the short time between when ballots are received by voters and must be returned. D143 p. 62:6-22; Plt. Ex. 009 (Barreto Ex. 1); Plt. Ex. 010

(Barreto Ex. 4); Plt. Ex. 012 (Barreto Ex. 6); Plt. Ex. 015 (Barreto Ex. 9); Plt. Ex. 016 (Barreto Ex. 10); Plt. Ex. 017 (Barreto Ex. 11).

At this moment of unprecedented need, many notaries have shuttered operations or drastically scaled back; only 34.6 percent of responding notaries are fully open, accessible, and willing to notarize ballots for November. D143 p. 131:13-14; Plt. Ex. 009 (Barreto Ex. 1); Plt. Ex. 022 (Barreto Ex. 17); Plt. Ex. 11 (Barreto Ex. 5); Plt. Ex. 13 (Barreto Ex. 7); Plt. Ex. 079 (Barreto Ex. 18). Notary scarcity is likely even more pronounced because "three-quarters" of the notaries contacted never responded to queries regarding notary services. D143 pp. 126:5-16, 356:11-24 (testifying that only "a very small fraction of all the notaries" are taking calls and notarizing ballots).

Dr. Barreto's testimony is corroborated by independent calls tracked by Kelsey Matusak and her colleagues in mid-August. D154 pp. 12:15-13:2 (testifying that approximately 75 percent of the notaries" either did not answer a call, or indicated no notary services were available); Plt. Ex. 079 (Barreto Ex. 18); Plt. Ex. 080 (Barreto Ex. 19); D154 pp. 12:21-13:2, 15:23-16:3; Plt. Ex. 079 (Barreto Ex. 18); Plt. Ex. 080 (Barreto Ex. 19).

The evidence also revealed that notaries are enforcing a photo ID requirement before agreeing to notarize absentee or mail-in ballots. There are several forms of acceptable identification for voting in Missouri, including military IDs, passports, Missouri drivers' licenses and non-driver licenses, voter registration cards, IDs from a Missouri university, utility bills, and paychecks. Plt. Ex. 018 (Barreto Ex. 12). Notaries,

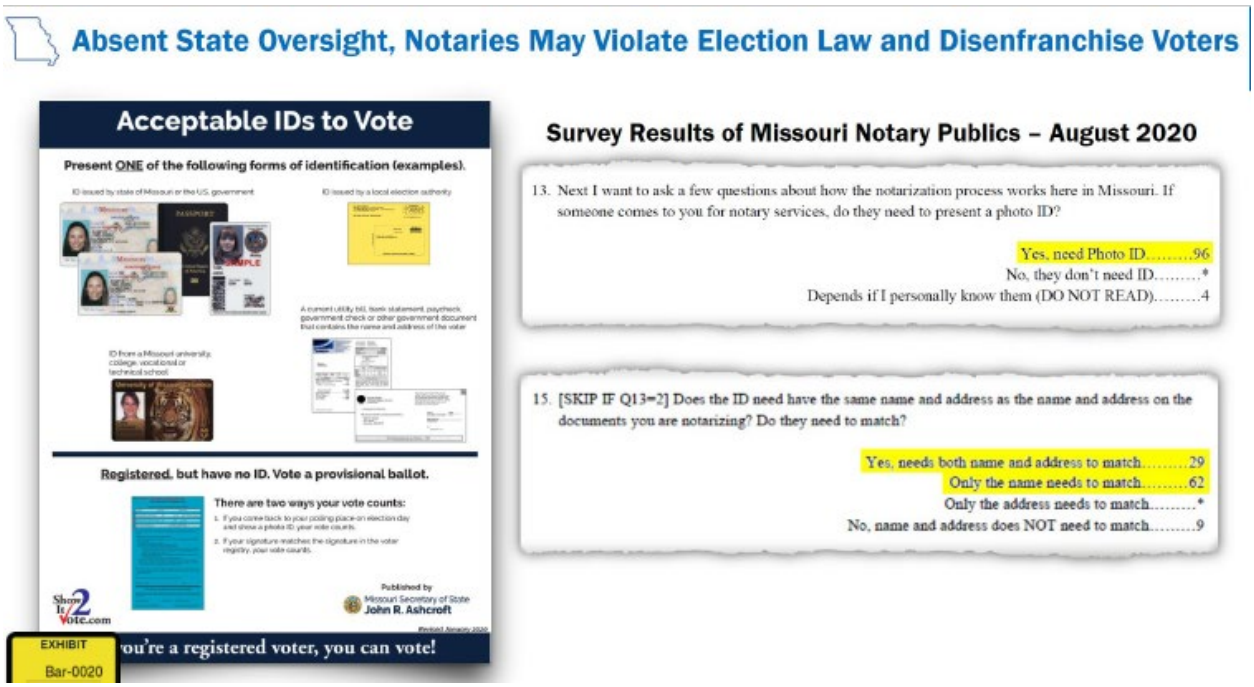
however, have been trained by the Secretary of State to require valid photo identification and have *not* received any training related to voting, ballot notarization or the forms of identification that must be accepted from would-be voters. D151 pp. 38:18-39:6, 39:19-24; D137 p. 64:11-15; D142 pp. 28:15-29:8, 43:5-14, 43:24-44:8, 45:12-46:4, 140:24-141:12.

The Missouri notary public handbook, created by the Secretary of State and provided to notaries during their training, includes instructions on the forms of identification notaries should require from individuals. Plt. Ex. 084 (Clark Ex. 2); D151 p. 106:2-8. According to the handbook, "[t]he best form of identification is one that includes a photograph and signature. A valid driver's license is a good source of identification." Plt. Ex. 084 (Clark Ex. 2). The Secretary of State updated the Notary Handbook in August 2020 to identify the revised Missouri statutes impacting notaries effective August 28, 2020. In the revised statute, "satisfactory evidence" is defined as "evidence of identification of an individual based on: (a) [a]t least one current document issued by a federal, state, or tribal government in a language understood by the notary and bearing the photographic image of the individual's face and signature and a physical description of the individual, or a properly stamped passport without a physical description . . . ." § 486.600(21).

Amidst these shifting standards, Dr. Barreto's notary survey results show that 96 percent of responding notaries would require a would-be voter to provide photo identification to receive notary services. D143 pp. 157:22-158:3; Plt. Ex. 009 (Barreto

Ex. 1); Plt. Ex. 011 (Barreto Ex. 5); Plt. Ex. 013 (Barreto Ex. 7); Plt. Ex. 018 (Barreto Ex. 12); Plt. Ex. 023 (Barreto Ex. 20). This corresponds with uniform testimony from Missouri notaries and voters. D144 pp. 15:18-16:17; D137 pp. 66:21-67:1 ("I ask for a photo ID."); D150 p. 22:13-16 ("Q. If you were to notarize a ballot in the future, what forms of ID would you require? A. I would require a government-issued picture ID."); *see also* D147 p. 45:14-21 (Del Villar testifying a notary required a Missouri driver's license to notarize his affidavit); D140 p. 41:13-22 (Langlitz testifying a notary required her to show a photo ID to notarize her ballot).

Additionally, 62 percent of notaries requiring photo ID further require that the names on an individual's identification must match the document being notarized. Twenty-nine percent stated that both the name and address must match. D143 pp. 159:6-160:4; Plt. Ex. 009 (Barreto Ex. 1); Plt. Ex. 009 (Barreto Ex. 1); Plt. Ex. 011 (Barreto Ex. 5); Plt. Ex. 013 (Barreto Ex. 7); Plt. Ex. 018 (Barreto Ex. 12). Respondents allow public notaries to demand government-issued photo IDs, permitting them to reject valid forms of identification and refuse to notarize a ballot.



Plt. Ex. 023 (Barreto Ex. 20).

When asked about different types of identification, including legally sufficient forms of voter ID such as a utility bill or paychecks, notaries testified that they would "turn [voters] away" and not notarize their ballots based on the guidance from the Secretary of State. D144 pp. 16:18-17:8, 17:14-25, 18:1-5. Scott Clark, designated to testify on behalf of the Secretary of State, admitted Secretary of State has not provided guidance on the acceptable forms of identification for ballot notarization. D146 pp. 82:25-83:6. The evidence showed that a notary could refuse to notarize a ballot if a voter presented "an ID issued by a local election authority," even though such a form of ID is acceptable to vote. D146 p. 92:7-10.

Voters will be burdened, and some even disenfranchised, because they have a different type of ID than the one required by notaries. Appellants' survey expert, Dr.

Matthew Barreto conducted two surveys in this case—one of Missouri voters and one of Missouri notaries. Dr. Barreto's survey results indicate that 3-4 percent of Missouri voters lack photo ID. D143 pp. 86:8-87:11; Plt. Ex. 009 (Barreto Ex. 1); Plt. Ex. 010 (Barreto Ex. 4); Plt. Ex. 012 (Barreto Ex. 6); Plt. Ex. 019. Between 5-20 percent of Missouri voters would be unable to obtain ballot notarization from notaries demanding up-to-date photo identification. D143 pp. 88:14-89:8.

The evidence also demonstrates the notary requirement imposes on voters a bevy of direct and indirect burdens, such as monetary costs for notarization, transportation, and loss of work time as well as non-monetary costs associated with voter confusion and lack of knowledge. While Missouri notaries cannot charge to notarize absentee ballots, there is no similar bar regarding mail-in ballots, and the resultant fee imposes a burden for low-income Missouri voters. D138 pp. 29:17-30:5, 30:20-34:25, 35:20-36:16, 38:23-39:6, 54:12-55:17, 55:21-57:15, 73:13-74:16; 157:3-19. Additionally, voters face ancillary costs including transportation to and from the notary, time off work (often without pay), and the costs associated with obtaining the correct type of identification to present to the notary. D138 pp. 27:13-28:16; D143 p. 98:17-22; D147 85:1-3 (Del Villar testifying: "Q. If you take a day off [to get your ballot notarized], you go without pay; is that right? A. Right").

Numerous voters are confused by the differences between absentee ballots and mail-in ballots, as well as by the notary requirement itself. D143 pp. 65:19-66:5 ("[V]oters are unsure of what exact rules apply to each of those and what they need to do

to comply with them. They sound very similar in the mind of voters."); Plt. Ex. 009 (Barreto Ex. 1); Plt. Ex. 010 (Barreto Ex. 4); Plt. Ex. 012 (Barreto Ex. 6). Most voters do not know the process for returning an absentee ballot (54 percent) or for returning a mail-in ballot (56 percent). D143 pp. 66:6-67:8; Plt. Ex. 009 (Barreto Ex. 1); Plt. Ex. 010 (Barreto Ex. 4); Plt. Ex. 012 (Barreto Ex. 6). For example, 17 percent of voters surveyed responded, incorrectly, that mail-in ballots can be submitted in person, when the law actually requires they be returned by mail. D143 pp. 66:6-67:8; Plt. Ex. 009 (Barreto Ex. 1); Plt. Ex. 010 (Barreto Ex. 4); Plt. Ex. 012 (Barreto Ex. 6).

Linda Casebolt testified she was confused by the inconsistent procedures governing absentee and mail-in ballots, and as a result was disenfranchised during the August primary. D145 pp. 15:8-18:17, 19:9-17; Plt. Ex. 024 (Casebolt Ex. 1). As a voter over the age of 65, Casebolt understood that she need not get her ballot notarized. D145 pp. 15:8-18:17, 19:9-17, 20:17-23; Plt. Ex. 024 (Casebolt Ex. 1). However, when requesting her ballot, Casebolt mistakenly requested a "mail-in ballot," instead of the "absentee ballot" that temporarily allows voters 65 and older to vote without getting notarized. D145 pp. 15:8-18:17; Plt. Ex. 024 (Casebolt Ex. 1). When she received her ballot, she contacted the Jackson County Board of Elections but could not reach an individual who could help her. D145 pp. 20:24-22:16. Not wanting to risk exposure to a notary during the pandemic, she submitted her mail-in ballot without the requisite notarization. D145 pp. 25:22-26:6. Casebolt does not know of any notaries that she could

have gone to. D145 p. 26:7-9. Her unnotarized mail-in ballot was rejected, so her votes did not count. D145 pp. 23:10-25:21.

Voters like Casebolt are burdened and ultimately disenfranchised by the notary requirement. For the August election, lack of notarization was the most frequent reason election authorities rejected both absentee and mail-in ballots. D143 p. 105:11-24; Plt. Ex. 015 (Barreto Ex. 9); D153 p. 67:18-20. Dr. Barreto created the following table based on the State's data regarding the number of absentee and mail-in ballots rejected for lack of notarization in August 2016 and August 2020, respectively, in Missouri's eight largest counties. D143 pp. 106:4-108:7; Plt. Ex. 016 (Barreto Ex. 10).

	Aug-16		Aug-20		16 to 20 Change		Aug-20 (+mail)		16 to 20 Change	
County	No-Not	Total	No-Not	Total	raw	pct	No-Not	Total	raw	pct
Kansas City	24	114	27	380	3	13%	80	472	56	233%
Jackson	9	78	26	146	17	189%	50	183	41	456%
St. Louis	70	363	116	659	46	66%	142	746	72	103%
STL Co	20	479	219	2391	199	995%	258	2,493	238	1190%
St. Charles	10	77	6	209	-4	-40%	59	311	49	490%
Green	5	75	29	104	24	480%	93	175	88	1760%
Clay	1	6	5	57	4	400%	6	63	5	500%
Jefferson	1	56	2	80	1	100%	3	83	2	200%

Plt. Ex. 74; Plt. Ex. 75; Plt. Ex. 77; Plt. Ex. 78 (Barreto Ex. 16).

The rate of rejection due to a lack of notarization increased "1990 percentage points." D143 pp. 106:4-107:15; Plt. Ex. 015 (Barreto Ex. 9). Many mail-in ballots and absentee ballots were cast in the August 2020 primary and hundreds were rejected for failure to comply with the notary requirement alone. According to political science literature, presidential elections involve more first-time voters, less-experienced voters, and more voters overall. D143 pp. 113:3-114:5. Thus, the rate and volume of ballots

rejected due to the notary requirement is likely to increase for the November election. D143 pp. 107:10-108:7 ("We would expect thousands and thousands of ballots will be rejected for not having notarization in the November 2020 [election]"). Indeed, voter turnout and the rate of ballot rejection due to the notarization requirement will "increase" in November "because voters who participate in a primary tend to be a little but more politically informed." D143 pp. 169:5-170:13.

The August 2020 data on the number of ballots rejected for lack of notarization undercounts the magnitude of the disenfranchisement. For example, the tabulated number of ballots rejected due to lack of notarization alone does not include "voters [who were] discouraged about the process not able to meet the burdens . . . so they may not vote at all." D143 pp. 167:25-169:4. Dr. Barreto also found that 29% of voters are somewhat or very unlikely to go interact with a notary public in person due to concerns of coronavirus. D143 pp. 102:15-103:10. These findings show that many voters who request mail-in or absentee ballots will conclude that the risk of contracting COVID-19 is too great and will therefore be unable to complete the in-person notarization step of the voting process. The number of ballots rejected in August also does not include ballots that may not have arrived on time due to the time it took the voter to comply with the notary requirement. It also may not include ballots that were rejected for more than one reason, including lack of notarization.

These burdens of notarization have a cumulative and compound effect on voters. Dr. Barreto's survey results indicate that "a majority of voters in the state of Missouri, 56

percent, say they would face at least one burden in getting their ballot notarized. And 43 percent say they would face two or more burdens in having to get their ballots notarized." D143 pp. 96:12-97:8; Plt. Ex. 009 (Barreto Ex. 1); Plt. Ex. 010 (Barreto Ex. 4); Plt. Ex. 012 (Barreto Ex. 6).

Absentee ballot fraud is exceedingly rare.

Absentee ballot fraud are exceedingly rare, both nationally and in Missouri. Dr. Lorraine Minnite conducted a comprehensive analysis of numerous quantitative, qualitative, and archival sources, in addition to her own two decades of research into voter fraud, to reach the conclusion that absentee ballot fraud is exceedingly rare. *See* D156 pp. 25:3-20, 31:1-19, 62:3-14. Dr. Minnite reviewed numerous Missouri-specific materials, including all evidence of alleged fraud produced by Respondents, over 5,000 news articles dating back to the 1980s, and various databases and court records related to alleged fraud in the absentee ballot process. *See* D156 pp. 55:15-24, 61:25-62:14, 335:9-336:6; *see also* D155 pp. 198:24-199:15.

Based on this review of a 40-year period, there have been only *six* incidents of any type of election fraud associated with absentee ballots in Missouri. D156 68:1-11. This sum includes every instance of alleged fraud regardless of the perpetrator (whether an individual voter or political operative engaged in "ballot harvesting") and includes every allegation of fraud in the State's possession, in addition to charges, prosecutions, or convictions. *See* D156 pp. 334:9-25, 25:3-20, 31:1-19, 62:3-14; D157 p. 82:4-7. Respondents identified not a single case of illegal voting in Missouri (regardless of the

definition of voter fraud or election fraud) that Dr. Minnite failed to address. D155 p. 270:6-20.

In analyzing all allegations of absentee ballot fraud in Missouri, Dr. Minnite reviewed all complaints the State received through its Elections Integrity Unit, which accepts even unsupported suspicions or allegations of fraud from any member of the public. *See* D156 pp. 25:3-20, 31:1-19, 62:3-14; D157 p. 82:4-7. Among all complaints, Dr. Minnite identified just 14 complaints involving the absentee voting process. *See* D156 p. 78:23-24. Of these 14 complaints, there was only one ongoing complaint related to absentee voter fraud—one that she had already identified in her research, five unresolved complaints, and eight irregularities that were due to clerical errors or mistakes, not fraud. *ee*, *e.g.*, Plt. Ex. 007, (Deponent Ex. 5)); D156 pp. 79:4-80:3, 80:10-16. The unresolved allegations mainly came from candidates who stood for local elections and were dissatisfied with election outcomes. D156 p. 80:10-16.

The evidence also shows that Missouri is an outlier—one of three states that requires notarization of an absentee or mail-in ballot. D155 p. 197:5-9. Dr. Minnite reviewed the incidence of absentee ballot fraud in states that do not require a witness or a notary to vote by mail. D156 p. 97:6-10. The data revealed little evidence of absentee ballot fraud anywhere in the country. D156 pp. 98:16-99:6. Even though few states require notarization of absentee ballots, most states do not have a problem with absentee ballot fraud. D156 pp. 98:16-99:6 According to the data compiled by the Heritage Foundation, a conservative think-tank, nationally there have been 206 cases of

"Fraudulent Use of Absentee Ballot," or roughly six or seven cases per year, since 1988. *See* D156 p. 54:3-13. Over this same period, voters cast about 1.6 billion votes in federal elections alone. *See* D156 p. 54:14-19. The Heritage Foundation found a single incident of absentee ballot in Missouri over the last fifteen years. D156 pp. 64:4-11. That incident involved a man casting a vote on behalf of his recently deceased mother. D156 p. 64:4-9; 93:5-8.

This evidence is not disputed. *See*, *e.g.*, D92 pp. 21-27. At the trial court, Respondents instead argued the State is justified in burdening and potentially disenfranchising voters because there could be some amount of invisible, "unobserved" absentee ballot fraud. *See* D92 pp. 25-27. No evidence suggests the State has measured—or even attempted to measure—the extent of absentee ballot fraud, whether observed or unobserved. *See* D155 pp. 271:7-16, 272:12-19. For example, Respondents' employed Dr. Milyo, who testified that to measure unobserved fraud, social scientists could use a "proxy" such as news reports or public opinion polls indicating voter concern by generating a "Corruption Reflections Index." D155 pp. 37:22-39:4. But he did not create such an Index and could not offer any opinion about the extent of unobserved fraud. *See, e.g.*, D155 pp. 38:10-39:2, 82:15-83:10.

Furthermore, Dr. Milyo challenged the premise of his "Corruption Reflections Index," testifying that he was unsure whether news reports would be a "good proxy" for measuring absentee ballot fraud. D155 pp. 38:20-39:4. Even after acknowledge that reports may not be a "good proxy," the only additional evidence of voter fraud was

anecdotal hearsay evidence such as media and tabloid reports about incidents of alleged voter fraud from New York, New Jersey, and North Carolina. *See*, *e.g.*, D92 pp. 21-25; *see also* D155 pp. 53:16-23, 58:4-12, 82:15-83:10. No discernable methodology was used to select the news stories. Def. Exs. 98; 99.

Missouri's other safeguards effectively deter and detect absentee ballot fraud.

There is no evidence suggesting the notary requirement reduces the incidence of absentee ballot fraud. *See* D155 pp. 271:7-16, 272:12-19. Respondents offered unsupported *ipse dixit*, a mere assertion that the notary requirement would incrementally increase the costs of committing absentee ballot fraud by corrupt enterprises. *See* D92 p. 27. The evidence, however, establishes that Missouri already has robust security measures in place to verify voters' identities and prevent corrupt enterprises from engaging in ballot harvesting.

For example, the State requires absentee-ballot voters to provide personal identification information on their applications (including their name, address, and either the last four digits of their social security number, birth date, or driver's license number) and to sign applications under the penalty of perjury. *See* D157 pp. 115:5-15; D148 pp. 63:4-69; *see also* § 115.279.2; § 115.279.4; § 115.302.2; § 115.302.4. Local Election Authorities verify voters' information by checking applications against records in Missouri Central Voter Register ("MCVR"), a statewide voter-registration database. *See* D153 pp. 31:25-32:20. Bipartisan teams then assess applications and send ballots to

voters only when satisfied that the applications are complete and signed and that the voters are eligible. § 115.287; *see also* D153 pp. 30:6-32:16, 33:17-34:4.

That is not the end of the safeguards. Once voters receive their ballots, they must complete the affidavit on the mailing envelope, again under the penalty of perjury and subject to criminal penalties. §§ 115.291.1, 115.302.6-.7. By signing their affidavits under oath, voters again verify their identity and address. *See* D148 pp. 44:21-46:6; D153 p. 37:6-23; D156 pp. 99:21-100:15. Election officials can cross-reference voters' signatures on file in the MCVR with the signatures on voters' applications and ballots. D148 p. 38:11-15. Some election jurisdictions always perform such checks. *See* D148 pp. 51:20-52:22; *see also* D153 pp.31:25-41:20. All jurisdictions can perform signature verification, as the law requires them to do when a provisional ballot is cast because a voter is registered to vote but appears at the polls without ID. *See* § 115.427 4(b); D157 p. 114:6-16; D148 pp. 39:24-40:11.

Missouri also has stringent regulations aimed at ballot harvesting. Only a voter or close relative can return a mail-in or absentee ballot application. §§ 115.279.1, 115.302.2. Only voters themselves can return mail-in ballots, and only a voter or close relative may return an absentee ballot. §§ 115.291.1; 115.302.12. These regulations come with teeth. It is a class-one election offense to fraudulently make, deliver, or mail a fraudulent absentee or mail-in ballot and/or application. §§ 115.279(4); 115.302(4); § 115.302 (19). Aiding, abetting or advising another person to vote illegally, or knowingly alter any ballot after it has been voted, are also class-one election offenses. § 115.631.

POINTS RELIED ON

I. The trial court erred and erroneously applied the law in entering judgment against Appellants on Count I because "any registered voter of this state may vote by absentee ballot for all candidates and issues for which such voter would be eligible to vote at the polling place if such voter expects to be prevented from going to the polls to vote on election day due to … [i]ncapacity or confinement due to illness or physical disability, including a person who is primarily responsible for the physical care of a person who is incapacitated or confined due to illness or disability" allows persons who expect to confine themselves on election day because they do not want to contract or spread COVID-19 to vote absentee without a notary under § 115.277.1(2), in that the statute is plain and unambiguous and, even if it were not, tools of statutory construction support the conclusion that Missouri voters who expect to confine themselves because of COVID-19 are permitted to vote absentee under § 115.277.1(2) during this health crisis.

- § 115.277.1, RSMo
- *Kieffer v. Kieffer*, 590 S.W.2d 915 (Mo. banc 1979)
- *Short v. S. Union Co.*, 372 S.W.3d 520 (Mo. App. W.D. 2012)
- *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822 (Mo. banc 1991)

II. The trial court erred by failing to consider evidence of all the burdens associated with notarization of ballots, because burdens on which evidence was adduced—including health risks, voter confusion, issues with photo identification, notary availability, and disparate burdens on minority voters—are relevant to the constitutional claim challenging voting restrictions as applied during a pandemic, were properly pleaded, and the burden evidence was therefore not a surprise to Respondents, in that Appellants' Amended Petition explicitly alleged the notary requirement imposes additional burdens on the right to vote, none of the burdens evidence was a surprise to Respondents, Respondents were not prejudiced by the evidence, evidence regarding the many burdens faced by voters are relevant in a lawsuit that would invalidate a voting requirement for all voters if successful, and Appellants were prejudiced by exclusion of burdens evidence because proving burdens advanced their constitutional claim.

- Mo. Const. art. I, sec. 25
- Mo. Const. art. VIII, sec. 2
- § 115.277.1, RSMo
- § 115.302, RSMo
- *Weinschenk v. State*, 203 S.W.3d 201 (Mo. banc 2006)
- *Priorities USA v. State*, 591 S.W.3d 448 (Mo. banc 2020)

III. The trial court erred and entered a ruling against the weight of the evidence in denying Count II, because Appellants established that the notarization requirement for absentee and mail-in ballots creates a severe burden during the pandemic requiring strict scrutiny, in that Appellants were *not* required to show that any person has tested positive for COVID-19 after an in-person notarization and Appellants presented sufficient record evidence that if given the proper weight by the trial court demonstrates the severe burdens notarization places on voters in violation of the fundamental right to vote.

- Mo. Const. art. I, sec. 25
- Mo. Const. art. VIII, sec. 2
- § 115.277.1, RSMo
- § 115.302, RSMo
- *Weinschenk v. State*, 203 S.W.3d 201 (Mo. banc 2006)
- *Priorities USA v. State*, 591 S.W.3d 448 (Mo. banc 2020)
- *Common Cause R.I. v. Gorbea*, 970 F.3d 11 (1st Cir. 2020)
- *League of Women Voters of Va. v. Va. State Board of Elections*, No. 6:20-cv-00024, 2020 WL 4927524 (W.D. Va. Aug. 21, 2020)

IV. The trial court erred and erroneously applied the law in entering judgment against Appellants on Count II because Article VIII, § 7 does not foreclose Appellants' claims under Article I, § 25, in that Article I, § 25 applies under the circumstances of this case to Appellants' challenges to voting requirements as applied during the COVID-19 pandemic, Article VIII, § 7 is not related to mail-in voting, and the court's position that the law is unreviewable and the state has unlimited discretion related to the requirements associated with absentee and mail-in voting cannot be reconciled with Missouri law.

- Mo. Const. art. VIII, sec. § 11
- *Weinschenk v. State of Missouri*, 203 S.W.3d 201 (Mo. banc 2006)
- *Priorities USA v. State*, 591 S.W.3d 448 (Mo. banc 2020)
- *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329 (D.S.C. May 25, 2020)
- *League of Women Voters of Va. v. Va. State Board of Elections*, No. 6:20-cv-00024, 2020 WL 4927524 (W.D. Va. Aug. 21, 2020)

V. The trial court erred in finding that the organizational Appellants lack standing, because there is no dispute that the individual appellants have standing and the organizational Appellants also have associational standing, in that their members would have standing to bring suit, voting interests are germane to each organization, and the relief sought does not require participation of individual members.

- *St. Louis Ass'n of Realtors v. City of Ferguson*, 354 S.W.3d 620 (Mo. banc 2011)
- *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333 (1977)
- *Mo. Bankers Ass'n v. Dir. of Mo. Div. of Credit Unions*, 126 S.W.3d 360 (Mo. banc 2003)
- *Committee for Educ. Equality v. Missouri*, 294 S.W. 3d 477 (Mo. banc 2009)

VI. Relief is realistic and actually available, and *Purcell* is no barrier.

- *Weinschenk v. State of Missouri*, 203 S.W.3d 201 (Mo. banc 2006)
- *Priorities USA v. State*, 591 S.W.3d 448 (Mo. banc 2020)
- *Thomas v. Andino*, No. 3:20-CV-01552-JMC, 2020 WL 2617329 (D.S.C. May 25, 2020)

ARGUMENT

I. The trial court erred and erroneously applied the law in entering judgment against Appellants on Count I because "any registered voter of this state may vote by absentee ballot for all candidates and issues for which such voter would be eligible to vote at the polling place if such voter expects to be prevented from going to the polls to vote on election day due to … [i]ncapacity or confinement due to illness or physical disability, including a person who is primarily responsible for the physical care of a person who is incapacitated or confined due to illness or disability" allows persons who expect to confine themselves on election day because they do not want to contract or spread COVID-19 to vote absentee without a notary under § 115.277.1(2), in that the statute is plain and unambiguous and, even if it were not, tools of statutory construction support the conclusion that Missouri voters who expect to confine themselves because of COVID-19 are permitted to vote absentee under § 115.277.1(2) during this health crisis.

Standard of Review and Preservation of Error[4]

"Statutory interpretation is an issue of law that this Court reviews *de novo*." *State v. Richey*, 569 S.W.3d 420, 423 (Mo. banc 2019).

Argument

In § 115.277.1, the legislature set forth several reasons that a voter may elect to vote by absentee ballot rather than appearing in person to vote on Election Day. The reasons are not mutually exclusive, and each reason relies on the voter's judgment to predict whether circumstances will prevent her from going to her polling place on Election Day. When properly construed and applied to current circumstances in Missouri,

[4] The trial court entered final judgment in this case on September 24, 2020, in favor of Defendants/Respondents and against Plaintiffs/Appellants on both counts in the Amended Petition. Plaintiffs/Appellants' Rule 55.33 Conditional Motion to Conform was also denied. All errors for all points have been preserved for the purposes of appeal.

§ 115.277.1(2) allows each voter to determine whether she expects to be prevented from going to her polling place on November 3 because she will instead confine herself due to COVID-19.

Section 115.277.1(2) permits absentee voting without notarization for any voter who "expects to be prevented from going to the polls to vote on election day due to . . . [i]ncapacity or confinement due to illness or physical disability, including a person who is primarily responsible for the physical care of a person who is incapacitated or confined due to illness or disability." Appellants are voters—and organizations with members who are voters—who during the current pandemic have made efforts to confine themselves to home as much as possible because they face risks should they contract the coronavirus. Like all Missourians, their risks are unique to each of them, based on their own and their family members' health conditions and corresponding likelihood to suffer severe effects from COVID-19. Voters who expect to confine themselves on Election Day because they are avoiding unnecessary gatherings with strangers in confined, indoor places due to COVID-19 are amongst those the legislature intended to be able to vote under § 115.277.1(2). There is no dispute here that COVID-19 is an illness within the meaning of § 115.277.1(2). If a voter expects to confine herself on Election Day and the reason she expects to do so is COVID-19, then she expects to confine "due to" an illness. "Due to" means "because of."[5] "Words and phrases shall be taken in their plain or ordinary and usual sense." § 1.090.

[5] "Due to." *Merriam-Webster Dictionary*, Merriam-Webster.

The trial court, however, surmised that in the current context § 115.277.1(2) applies only when the voter is confined on Election Day because she has been diagnosed with COVID-19. This conclusion cannot be squared with the ordinary and expected meaning of the statute's text or with undisputed evidence about COVID-19. The trial court's interpretation of § 115.277.1(2) ignores that the legislature made eligibility for absentee voting contingent on voter expectation about what circumstances will be on Election Day and the fact that, while applications for absentee ballots by mail must be submitted at least two weeks before Election Day, most voters who will have COVID-19 on Election Day will not know this two or more weeks in advance and those with COVID-19 might no longer need to confine themselves come Election Day. Indeed, under the trial court's reading of § 115.277.1(7), a voter who contracted COVID-19 in April and has fully recovered may vote absentee without notarization for the November 3 election whereas a voter who contracts the virus the week before the election must choose between breaking their confinement to go to their polling place on Election Day or forfeiting their right to vote. This is not what the legislature intended.

The plain language of § 115.277.1(2) permits Appellants and other voters to vote by absentee ballot "due to" COVID-19 because they expect that they will confine themselves on Election Day. Their expectation is their judgment—made weeks in advance—that based on their own conditions or characteristics, or those of family members with whom they reside, they are at heightened risk of contracting COVID-19 or suffering particularly dangerous effects if they do. The medical evidence in this case is

unrefuted that voting at a polling place on Election Day carries more risk from COVID-19 than voting by absentee ballot while confining at home. COVID-19 is not just another sickness; it is easily transmitted, and its effects can be deadly, cause tremendous suffering, or both.

"Th[e] 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). "Other rules of statutory interpretation, which are diverse and sometimes conflict, are merely aids that allow [courts] to ascertain the legislature's intended result." *Id.* Here, the legislature intended that voters may chose to vote absentee when they anticipate that they will confine themselves on Election Day because of an illness and, thus, be prevented from going to their polling place.

To the extent § 115.277.1(2) is ambiguous, its inclusion of persons who are not themselves ill or disabled amongst those who are "prevented from going to the polls to vote on election day due to … [i]ncapacity or confinement due to illness or disability" demonstrates that the legislature did not intend to limit § 115.277.1(2) to voters who are themselves currently ill or disabled at the time an absentee ballot is requested. Although applications for absentee ballots are accepted now, most who will be suffering the effects of (and contagious with) COVID-19 on Election Day do not know it now. That is why the legislature expanded the definition of those eligible to vote under § 115.277.1(2) to third parties beyond those who expect to be suffering from an illness on their application

date that will persist through Election Day.

The definition of individuals who may vote absentee because they "expect[] to be prevented from going to the polls to vote on election day due to … [i]ncapacity or confinement due to illness or physical disability" *includes* "a person who is primarily responsible for the physical care of a person who is incapacitated or confined due to illness or disability." *See* Include, *Black's Law Dictionary* (11th ed. 2019) ("To contain as a part of something. The participle including typically indicates a partial list."). A caregiver need not be ill or disabled to be included in the category of those incapacitated or confined due to illness or disability, and if the phrase "due to illness" meant "due to current illness of the voters themselves," then the statute would have used the disjunctive "or" to extend independent eligibility for those providing care to others rather than including such voters as ones confined due to illness or disability. *See* Conjunctive/Disjunctive Canon, *Black's Law Dictionary* (11th ed. 2019) ("or joins a disjunctive list to create alternatives").

The trial court reached the opposite conclusion by overlooking how the term "including" functions in Missouri statutes. "[G]enerally the term is one of enlargement rather than limitation." *Kieffer v. Kieffer*, 590 S.W.2d 915, 918 (Mo. banc 1979); *Short v. S. Union Co.*, 372 S.W.3d 520, 532 (Mo. App. W.D. 2012) ("Our research reveals that 'include' in the context of statutes has almost universally been construed by Missouri courts as a term of enlargement, as providing an illustrative, non-exclusive, example, or as both." (collecting cases)). Here, use of the term "including" evidences the legislative

intent to enlarge the definition of those who may vote absentee to individuals who are not themselves sick and to use caregivers as an illustrative, non-exclusive example.

While Respondents have opined that application of § 115.277.1(2) to a voter not herself ill or disabled by COVID-19 would require adding words to the statute, this is incorrect. To the contrary, Respondents' interpretation engrafts additional words onto the statute, or at least requires removal of the "including" enlargement. Had the legislature intended to limit § 115.277.1(2) to a voter's own illness, it could have easily done so. *Compare with* Conn. Stat. § 9-135(a) (providing that a person may vote absentee for one of six reasons, including "if he or she is unable to appear at his or her polling place during the hours of voting" because of "his or her illness" or "his or her physical disability"). The legislature elected not to do so, and, in construing a statute, a "court[] cannot add statutory language where it does not exist." *Peters v. Wady Indus., Inc*., 489 S.W.3d 784, 792 (Mo. banc 2016).[6] "[T]he Court cannot supply what the legislature has

[6] The legislature's decision not to limit § 115.277.1(2) eligibility to cases of a voter's own illness is especially notable here because, during the pendency of this litigation, the legislature amended § 115.277.1 without making any change to § 115.277.1(2). If the legislature had any concern about a court adopting the interpretation advanced by Appellants, it could have easily added the statutory language that Respondents ask this Court to impute. Instead, the legislature left § 115.277.1(2), evidencing that this Court should interpret it as it would have before the legislative action. *Citizens Bank & Tr. Co. v. Dir. of Revenue*, 639 S.W.2d 833, 835 (Mo. 1982) ("[W]here a statute is amended only in part, or as respects only certain isolated and integral sections thereof and the remaining sections or parts of the statute are allowed and left to stand unamended, unchanged, and apparently unaffected by the amendatory act or acts, it is presumed that the Legislature intended the unamended and unchanged sections or parts of the original statute to remain operative and effective, as before the enactment of the amendatory act." (quotation and citation omitted)).

omitted from controlling statutes." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 668 (Mo. banc 2010); *see also Bd. of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo. banc 2001).

The legislature further demonstrated its intent that confinement "due to illness" is not limited to those who have *contracted* COVID-19 with its choice of different wording for § 115.277.1(7), than utilized in § 115.277.1(2). Section 115.277.1(7) specifies that if a "voter has contracted" COVID-19, she may vote by absentee ballot. If the legislature wished to limit absentee voting under § 115.277.1(2) to voters confining due to an illness they had themselves contracted, then the legislature would have done so. "When different statutory terms are used in different subsections of a statute, appellate courts presume that the legislature intended the terms to have different meaning and effect." *Nelson v. Crane*, 187 S.W.3d 868, 870 (Mo. banc 2006).

Respondents' contention that interpreting § 115.277.1(2) to permit absentee voting by those who expect that, because of COVID-19, they will confine themselves on Election Day rather than go to a polling place would render § 115.277.1(7) superfluous lacks merit. Section § 115.277.1(7) authorizes voters who know they have contracted COVID-19 and those who are in some (but not nearly all) of the high-risk categories identified by the CDC for developing severe illness or dying from COVID-19 to cast absentee ballots. Respondents think that Appellants' proposed construction of § 115.277.1(2) means that all of those voters described in § 115.277.1(7) were already authorized to cast absentee ballots under § 115.277.1(2), rendering subdivision (7)

meaningless and superfluous. This is simply inaccurate. Unlike § 115.277.1(2), § 115.277.1(7) does not require a voter to expect that she will confine herself on Election Day. Thus, a voter who has contracted COVID-19 may vote absentee under § 115.277.1(7) regardless of whether she is confining. A non-confining voter with COVID-19 cannot vote absentee under § 115.277.1(2). Far from rendering § 115.277.1(7) meaningless, this interpretation of § 115.277.1(2) gives effect to the legislature's burgeoning recognition of the danger posed by the pandemic. Allowing those voters who have contracted COVID-19 or are at the most heightened risk of doing so to vote by absentee ballot without a notary *regardless of whether they are confining themselves* protects public safety.[7] Section 115.277.1(7) shields notaries, poll workers, and other voters visiting polling places or notaries from contracting COVID-19 from voters who have it or are more likely to have it. The legislature decided to treat COVID-19 more expansively—by not requiring confinement in many cases—because of its seriousness and how easily it can be spread in brief indoor interactions with strangers. The legislature's encouragement of voters at high risk from COVID-19 to stay away from polling places and notaries regardless of whether they expect to confine themselves on

[7] The plain language of § 115.277.1(7) extends the opportunity to vote by absentee ballot to any voter who has contracted COVID-19. It is not limited to those who currently have COVID-19, meaning that thousands of Missouri voters who have contracted COVID-19, but fully recovered, are eligible to vote by absentee ballot without a notary regardless of whether they still confine themselves due to COVID-19. This legislative choice demonstrates the intent that absentee voting without a notary be widely available during the pandemic and recognition that the legislature, like experts, does not fully understand the implications of having contracted COVID-19.

Election Day is not made superfluous by recognition that § 115.277.1(2) affords voters who do expect to confine because of COVID-19 to also vote by absentee ballot.[8]

Respondents also mistakenly suggest that allowing absentee voting by those voters who expect to confine themselves on Election Day would render superfluous § 115.302. Section 115.302 is a temporary law that authorizes any voter to cast a "mail-in ballot" for the November 3 election.[9] Unlike §§ 115.277.1(2) and 115.277.1(7), voting under § 115.302 is open to all voters—regardless of their particular COVID-19-related risk or expectation of confinement on Election Day. Only confining voters are eligible to vote under § 115.277.1(2), and only voters who have contracted COVID-19 or are in certain risk groups may vote under § 115.277.1(7). Thus, while *every* voter may vote under § 115.302, only certain subgroups of voters may voter under § 115.277.1(2) or § 115.277.1(7). Those qualified under the narrower §§ 115.277.1(2) or 115.277.1(7) face fewer barriers, but everyone who meets the narrow requirements *could* vote under the more burdensome § 115.302.

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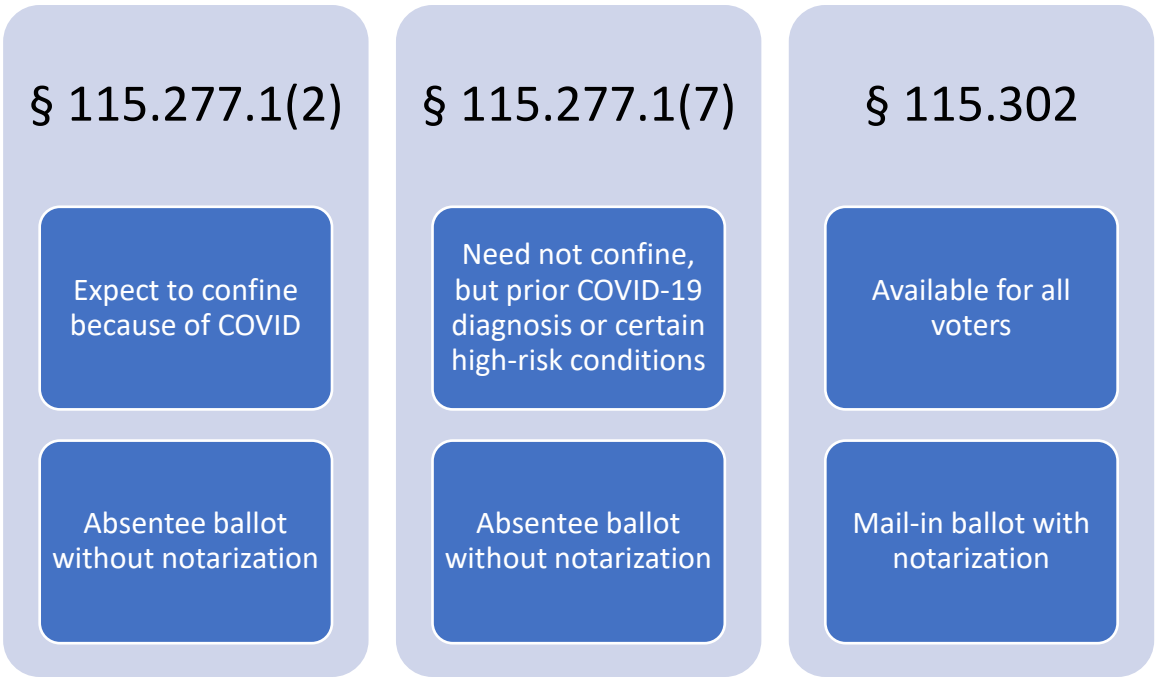
[8] Under the trial court's interpretation, a candidate for office who contracted COVID-19 before the application deadline could vote by absentee ballot without notarization regardless of his health or confinement status on Election Day, but his opponent in the election who confines herself on Election Day because she contracted the coronavirus after the application deadline, is uncertain whether she carries the virus, or wishes to follow the prevailing medical advice to avoid gatherings of strangers, would be forced to choose between voting in person, undertaking the more burdensome mail-in ballot process—which would require breaking confinement, or forfeiting her vote. The legislature did not intend such an absurd result.

[9] Voting by "mail-in ballot" requires voters to overcome barriers not mandated of absentee voters under §§ 115.277.1(2) or 115.277.1(7), including but not limited to those associated with getting a ballot envelope notarized in person.

Respondents miss this distinction by misconstruing Appellants' argument as one that § 115.277.1(2) would allow any voter who does not want to contract COVID-19, without more, to vote absentee without a notary. Section 115.277.1(2) requires a voter to expect to be prevented from going to her polling place on Election Day because she expects to confine herself due to COVID-19; an abstract desire to avoid the coronavirus is not enough to vote absentee under § 115.277.1(2). There are many voters authorized to vote by mail-in ballot under § 115.302 who are not permitted to vote absentee under § 115.277.1(2), including voters—regardless of whether they have COVID-19 and know it, have COVID-19 but are asymptotic, or do not have COVID-19—who are *not* confining themselves due to COVID-19. Here, the legislature made plain its intent to encourage all voters to vote remotely.[10]

The following chart demonstrates the significant differences among the three provisions in the COVID-19-pandemic context:

[10] If in this pandemic § 115.277(2) permitted only those with COVID-19 or with illnesses that put them at higher risk from COVID-19 to vote absentee, as Respondents suggest, then the bulk of § 115.277.1(7) was unnecessary and superfluous. Those who have COVID-19, chronic lung disease, moderate to severe asthma, serious heart conditions, an immunocompromised condition, diabetes, chronic kidney disease, liver disease, or an illness requiring them to undergo dialysis could already vote absentee under § 115.277(2) if they expected to confine themselves on Election Day, so there was no purpose in also authorizing them to vote absentee under § 115.277(7). The difference, of course, is that § 115.277(2) requires an expectation of confinement while § 115.277(7) does not.



In short, voters who expect to confine themselves on Election Day due to COVID-19 may vote by absentee ballot under § 115.277.1(2), or, as any voter, by mail-in ballot pursuant to § 115.302. Voters who have contracted COVID-19 or have an underlying illness or disability that puts them at risk from COVID-19 but who do not expect to confine themselves on Election Day, may vote by absentee ballot under § 115.277(7), or, as any voter, by mail-in ballot pursuant to § 115.302. Voters who have contracted COVID-19 or have an underlying illness or disability that puts them at risk from COVID-19 and who do expect to confine themselves on election day may vote an absentee ballot under §§ 115.277.1(2) or 115.277.1(7) or cast a mail-in ballot under § 115.302. The fact that voters might qualify under more than one of these three provisions—or other subsections of § 115.277.1—does not make any of them superfluous. Indeed, even under Respondents' interpretation, there is overlap in that a voter who has contracted COVID-

19 and confining because of it may vote under all three provisions. And, as always, voters might qualify under more than one of the traditional § 115.277.1 excuses.

To the extent that interpretation of how § 115.277.1(2) applies during this pandemic is a close call, the evidence and arguments adduced at trial tip in favor of Appellants' interpretation. "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). "When a constitutional and an unconstitutional reading of a statute are equally possible, [Missouri courts] must choose the constitutional one." *Spradlin v. City of Fulton*, 924 S.W.2d 259, 263 (Mo. banc 1996). Here, the evidence and arguments on Count II draw into question the constitutionality of the trial court's interpretation of the state's remote voting scheme. Interpreting § 115.277.1(2) as Appellants suggest permits this Court to avoid unnecessarily finding legislative acts unconstitutional.

Applications for absentee ballots may be submitted by mail through October 21 and applications to vote absentee by other means through November 2. Confusion persists over how to shield oneself from COVID-19 and vote without putting lives at risk. This Court should "give such judgment as the [trial] court ought to give" and, "[u]nless justice otherwise requires, the court shall dispose finally of the case." Rule 84.14. The trial court should have entered declaratory judgment on Count I that § 115.277.1(2)

eligibility extends to each voter who determines that she expects to be prevented from going to her polling place on November 3 because she will instead confine herself due to COVID-19.

Moreover, because the legislature intends for each voter to make an individualized determination, generally weeks in advance, as to her expected circumstances on November 3, this Court should declare that the legislature has assigned to each voter responsibility to gauge conditions and certify, or not, eligibility to vote absentee under § 115.277.1(2).[11] Respondents adduced no evidence suggesting that voters who do not expect to confine due to illness make misrepresentations on their absentee ballot applications. Indeed, election authorities should have high confidence about the truthfulness of voters' representations because they are sworn and voters who misrepresent their intentions or circumstance could face prosecution under § 115.304.

[11] There is nothing foreign about the legislature giving voters discretion to make decisions that determine whether they may vote absentee. Indeed, Missouri's absentee voting scheme already contemplates that any voter can elect to make herself eligible for absentee voting in that 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). 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 absentee for most of the "excuses" provided by § 115.277.1. Deferring to a voter's expectation that they will confine themselves due to COVID-19 is consistent with Missouri's absentee-voting scheme.

II. The trial court erred by failing to consider evidence of all the burdens associated with notarization of ballots, because burdens on which evidence was adduced—including health risks, voter confusion, issues with photo identification, notary availability, and disparate burdens on minority voters—are relevant to the constitutional claim challenging voting restrictions as applied during a pandemic, were properly pleaded, and the burden evidence was therefore not a surprise to Respondents, in that Appellants' Amended Petition explicitly alleged the notary requirement imposes additional burdens on the right to vote, none of the burdens evidence was a surprise to Respondents, Respondents were not prejudiced by the evidence, evidence regarding the many burdens faced by voters are relevant in a lawsuit that would invalidate a voting requirement for all voters if successful, and Appellants were prejudiced by exclusion of burdens evidence because proving burdens advanced their constitutional claim.

Standard of Review

In a bench-tried case, "[t]he judgment of the trial court will be affirmed unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law." *Pearson v. Koster*, 367 S.W.3d 36, 43 (Mo. banc 2012) (per curiam) (quotation and citation omitted). "A trial court's ruling on the admission or exclusion of evidence is reviewed for an abuse of discretion." *Emerson v. Garvin Grp., LLC*, 399 S.W.3d 42, 44 (Mo. App. E.D. 2013). "However, the issue of whether the trial court applied the correct legal standard is a question of law that [is] review[ed] de novo." *Id*. (citing *Kesler–Ferguson v. Hy–Vee, Inc.*, 271 S.W.3d 556, 558 (Mo. banc 2008)).

Argument

The starting point for analyzing a claim that a voting requirement violates the

fundamental right to vote guaranteed by the Missouri Constitution is an evaluation of the burdens the requirement imposes. *See, e.g.*, *Weinschenk*, 203 S.W.3d at 212 ("[T]he extent of the burden [a] statute imposes on the right to vote must be evaluated before determining the level of scrutiny it will receive.").

Here, the trial court erred from the start by declining to consider in any meaningful way the myriad burdens the notary requirement imposes. The court erroneously found a purported attempt to inject "new claims and theories … must be rejected." D164 p. 2. But Appellants did not inject new "claims" or "theories" into the case; instead, the *burdens* were always an essential aspect of the case. Indeed, the Amended Petition squarely alleged that "[t]he notary requirement imposes additional burdens on the right to vote, including information, time, and transportation costs." D164, pp. 13-14 (*quoting* D10 p. 38). Appellants provided relevant evidence on multiple burdens, all of which fit within the pleaded claims, and the trial court failed to consider that evidence.

Appellants pleaded—and produced ample evidence showing—that both voters and notaries lacked sufficient, reliable "information." *See* D10 p. 38. For example, Executive Director of MoLMV, Jean Dugan, testified how the limited information available about the current voting options confused members who were trying to determine (a) which ballots they should use, (b) whether they needed a notary, and (c) where they could find a notary. D139 pp. 25-26, 33. Voter Linda Casebolt testified that misinformation caused her vote being being left uncounted in the August election because "the Missouri legislature had said that people could vote by mail and a notary was not required." D145

p. 15:15-21.

Evidence further showed that notaries also lack accurate information. For example, in addition to Dugan, herself a notary, four other Missouri notaries—Johnda Boyce, Nigel Holloway, Amber Hodgson, and Melanie Busse—testified that they received little or no training from the state regarding ballot notarization or the forms of identification they could demand from would-be voters. D137 p. 64:11-15; D151 pp. 38:18-39:6, 39:19-24; D144, p. 21:18-21; D150, p. 23:22-25. The evidence shows that 96 percent of notaries demand government-issued photo ID. D143 pp. 157:22-158:3; *see also* D144 pp. 15:18-16:17; D137 pp. 66:21-67:1 ("I ask for a photo ID."); D150 p. 22:13-16 ("Q. If you were to notarize a ballot in the future, what forms of ID would you require? A. I would require a government-issued picture ID."). As Appellants alleged this specific demand is a pernicious burden because "a valid photo ID … may not be available to all eligible voters." D10, p.33; D143, p. 86:8-87:11 (Dr. Barreto reporting survey results showing that 3-4 percent of voters do not have a form of photo identification that would be accepted by a notary); Tr. 67:7-11 (Respondents' counsel admitting that the demand for photo identification not possessed by a substantial number of Missourians "would . . . affect 4 percent of the voters in Missouri."). The evidence also shows that voters believe that they are required to show photo ID for notarization. D140 pp. 40:20-43:18 (Langlitz testifying that based on her experience, including with her August mail-in ballot, she had to show photo ID); D147 pp. 40:12-41:15, 45:22-46:4 (Del Villar testifying he was required to show photo ID when having an absentee ballot

notarized for August 2020). The trial court made a legal error when it ignored evidence related to what notaries actually require and instead concluded that notaries theoretically *could*, under statutory law, accept other forms of identification. D164 p. 23, ¶63.

The trial court also ignored evidence of "time and transportation" burdens of the notary requirement, which were also pleaded. D164 p. 13, ¶ 32 (*quoting* D10 p. 38). MoNAACP President Chapel testified "there are ballots where people are going to seek notaries and not be able to find them. There are people who are not going to be able to take off work because they can't afford to miss a day's pay." D138 p. 73:22-25. Del Villar testified that, as an essential worker, he is burdened by having to take unpaid time from work in order to visit a notary. D147 pp. 31:3-5, 41-42. Dugan similarly testified, "we learned from our local league leaders that several counties only had one notary listed on the Secretary of State's list of free notaries. So that includes Warren, Webster, and Cass counties, which are quite large and might involve a lot of travel to get to that one notary." D139 p. 35:2-7. Boyce testified to the transportation and financial burdens imposed by the notary requirement on individuals living in poverty. D137 pp. 75:12-17; 19:20-20:24.

The court erroneously thought "the evidence relating to these theories has no bearing on the claims actually pled in the Petition, and thus it is legally irrelevant." *See* D164 p. 18, ¶49. Not only are burdens in addition to health risks obvious in a case challenging "burdens" associated with voting laws, but here they were explicitly alleged. The evidence was potent proof of burdens.

Further, Appellants pleaded that exemptions to the notary requirement fail "Black Missourians, whose communities have been especially devastated by COVID-19" and, thus, will be disparately impacted. D10 p. 5, ¶10; *see also* ¶71& ¶109.

After pleading burdens, Appellants then produced ample evidence showing this disparate impact as pleaded—not as any new or separate claim, but as evidence of standing as well as burden. For example, Chapel testified that "the impact of [SB] 631 has a disproportionate impact on African-Americans and people of color" and that it is "African-American members who are going to bear the brunt of that disenfranchisement." D138 pp. 44:2-11, 74:14-16. Dr. Matthew Barreto also broke down his survey results by race, finding Black voters more likely to face multiple burdens to accessing a notary, and testified accordingly. D143 pp. 49:18-51:2 ("Black voters, in particular, might face additional burdens and have lower levels of familiarity with things like the notary services and voter identification so that they may face additional burdens beyond those that all voters across the state report"); Plt. Ex. 014 (Barreto Ex. 8). Epidemiological expert Dr. Babcock provided unchallenged testimony on the racial disparities of the notary requirement. She opined, "Black Americans are disproportionately burdened by COVID-19 compared with white Americans," Plt. Ex. 086 (Babcock Ex. 3), and testified regarding these "racial disparities." D142 pp. 37:3-38:17 (testifying to, and introducing CDC materials demonstrating, COVID-19's "disproportionate impact … among African Americans"); D142 pp. 39:9-40:24 (testifying that complying with "Missouri's notary requirement" imposes "risk [that] is

higher" for black Americans "than others in the community"); D142 pp. 59:6-60:6 (addressing COVID Tracking Project's database demonstrating "the disproportionate impact that COVID-19 has on black Americans in Missouri"). There is no legal reason to entirely ignore this evidence.

Evidence of burdens was no surprise. Dr. Barreto's expert report containing survey data and opinions on each of these burdens was served on August 10. D96 p. 4, ¶9 (disclosing that the Scope of Work includes "any potential burdens that voters report facing with regard to fulfilling the requirement that they notarize mail-in ballots and certain absentee ballots in-person"); D96 pp. 6-7, ¶¶17-19 (addressing lack of "guidance" State provided notaries and dearth of available free notaries); D96 p. 7, ¶21 (noting widespread voter confusion, "misinformation and incorrect answers about mail-in ballots procedures"); D96 p. 8-9 ¶¶22-23 (reporting, among other things, "burdens related to transportation" and "reduced [notary] availability" in a time of high demand and low supply); D96 pp. 21-22, ¶56 (explaining burden on voters "being required to show a photo identification with signature"). Respondents had the opportunity to respond through their own experts. Indeed, Respondents' expert's rebuttal report *did* challenge Dr. Barreto's findings on the "information" burdens but said *nothing* about the other burdens. D107. If Respondents were not surprised.

On August 24, Appellants served a Rule 57.03(b)(4) deposition notice, identifying matters on which the Secretary of State's office would be examined. Those matters included the burdens of the notary requirement, including the availability of "notaries …

in each election jurisdiction," actions to ensure notaries "accept all forms of identification allowed for voting," and actions "to inform notaries or train notaries on the legally permissible and impermissible steps associated with notarizing a ballot." D99 pp. 4-6. Respondents designated a witness to testify about each of these matters on behalf of the Secretary. *See* D164 p. 22, ¶59. They were not surprised or prejudiced.

On August 24, all parties disclosed potential trial witnesses, and, in a description disclosing the topic of each witness' testimony, disclosed again that testimony would be provided on the multiple burdens of notarization. D97. Appellants disclosed *four* Missouri notaries would "testify about the burdens associated with the in-person notarization requirement for absentee and mail-in ballots, the unavailability of notaries for ballot notarization, as well as about the lack of training from the State for notaries on the procedures for notarizing ballots." D97 pp. 3-4. Appellants also disclosed a witness would testify "about the voter confusion with respect to absentee and mail-in ballots as well as the burdens on voters associated with the in-person notarization requirement for absentee and mail-in ballots." D97 p. 4. The same day, Respondents disclosed their own witness to discuss notarization during the pandemic. D.98 p. 3. This case was tried on papers, so no testimony was a surprise. All witnesses' depositions were cross noticed, and Respondents took the opportunity to question each witness.

Testimony at the earliest depositions described these burdens. od Chapel testified at length burdens of information, time, and transportation experience by MoNAACP members. *See* D138 p. 26:14-18 ("One of our members, Webster Davis, has tried to find

a free notary, can't find one in his county. So in order for him to cast his ballot, his mail-in ballot, he's going to have to pay money, and he doesn't want to pay any money."); D138 pp. 29:17-30:5 (testifying to MoNAACP members that lack "valid driver's licenses such that it may be problematic for them to have their ballot notarized," including a member named Catherine from St. Louis, "who does not have a driver's license"); D138 p. 73:22-25 ("there are ballots where people are going to seek notaries and not be able to find them. There are people who are not going to be able to take off work because they can't afford to miss a day's pay").

Dugan testified the burdens witnessed by the MoLWV . *See* D139 p. 25:9-19 ("So there's a lot of confusion this year. And the application is actually very confusing too because it has all of these reasons listed. So it's -- we found some voters checked two different options and that actually negates the absentee ballot request and there's currently no guidance from the Secretary of State saying that you need to make sure that people whose ballot -- absentee ballot application was rejected know that."), D139 p. 33:6-11 ("So people are not understanding what they're eligible for, first off. Which type of absentee ballot they should pick if they don't want to have to have -- find an in person notary. There's also been very little education about the state's list of free notaries"); D139 p. 35:2-7. ("[W]e learned from our local league leaders that several counties only had one notary listed on the Secretary of State's list of free notaries. So that includes Warren, Webster, and Cass counties, which are quite large and might involve a lot of travel to get to that one notary").

Evidence of burdens is essential to and common in challenges to voting regulations. The trial court legally erred by ruling that such evidence should be "reject[ed]" or ignored because "this case is not a class action." D164 p. 18, ¶49. But, "[c]lass certification is unnecessary" where "the nature of the [voting] rights asserted … require that any declaratory or injunctive relief run to all persons similarly situated." *Cromwell v. Kobach*, 199 F. Supp. 3d 1292, 1313–14 (D. Kan. 2016). Here Appellants seek "declaratory judgment 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) without the requirement of a notary seal, during the COVID-19 pandemic" and a "declaratory judgment that § 115.277 and § 115.302 which may require certain voters to satisfy the notary requirement to vote by mail, violates Article I, § 25 of the Missouri Constitution and Article VIII, § 2 as applied during the COVID-19 pandemic." D10 p. 35, 38.

In *Weinschenk*, for example, plaintiffs were a few registered voters, not a certified class. 203 S.W.3d at 204. Yet the Court considered evidence about the impact of the election restriction on plaintiffs *and* other Missouri voters and provided relief to all Missouri voters. *Id.* at 205-06; *see also id.* at 214 (citing burdens on plaintiffs and "[a]dditionally … substantial number of other otherwise qualified Missouri voters"). Courts a grant broad prospective relief in cases that ae not class actions. *See Priorities USA v. State*, 591 S.W.3d 448, 459-61 (Mo. banc 2020) (broadly declaring voting requirement unconstitutional where plaintiffs did not bring a class action yet the court

weighed evidence regarding other "prospective voters, in future elections" in making its decision); *see also Fla. Democratic Party v. Scott*, 215 F. Supp. 3d 1250, 1258 (N.D. Fla. 2016); *Ga. Coal. for the Peoples' Agenda, Inc. v. Deal*, 214 F. Supp. 3d 1344, 1345–46 (S.D. Ga. 2016).

Amidst the pandemic, multiple courts have addressed constitutional challenges to requirements—as applied during the pandemic—and issued orders that run to all voters. *See Thomas v. Andino*, No. 3:20-cv-01730, 2020 WL 2617329 (D.S.C. May 25, 2020) (eliminating the witness requirement for all voters during the pandemic)*; Middleton v. Andino*, No. 3:20-cv-01730, 2020 WL 5591590 (D.S.C. Sept. 18, 2020) (same)*; Harding v. Edwards*, No. 20-495, 2020 WL 5543769 (M.D. La. Sept. 16, 2020) (granting injunctive relief to all voters because of burdens imposed by COVID-19). The trial court deviated from these precedents to conclude evidence considered, and relief awarded, must be limited named parties. D164 p. 20, ¶55. This legal erred caused the trial court to ignore most of Appellants' evidence of burdens.

Appellants were prejudiced by the trial court's failure to consider evidence of burdens. This evidence proves that the notary requirement burdens voters, and the trial court's decision could not be sustained if the evidence is considered.[12]

[12] The trial court overruled Appellants' conditional motion to amend the pleadings to conform with the evidence. The motion was not necessary, as explained in this point. But, if it was needed, then the trial court erred in denying it. Rule 55.33. "A court should be liberal in permitting amendments to conform to the evidence." *McCord v. Gates*, 159 S.W.3d 369, 375 (Mo. App. W.D. 2004); Rule 55. 33(b). Courts properly and routinely permit such amendment "where the opposing party was aware of the evidence and had an (continued…)

III. The trial court erred and entered a ruling against the weight of the evidence in denying Count II because Appellants established that the notarization requirement for absentee and mail-in ballots creates a severe burden during the pandemic requiring strict scrutiny, in that Appellants were *not* required to show that any person has tested positive for COVID-19 after an in-person notarization and Appellants presented sufficient record evidence that if given the proper weight by the trial court demonstrates the severe burdens notarization places on voters in violation of the fundamental right to vote.

Standard of Review

While the trial court is typically "in a better position to determine factual issues than an appellate court reviewing only the record on appeal[,]" that is not the case where, as here, no live witnesses testified at trial and the reviewing court has the exact same record as the trial court. *Pearson*, 367 S.W.3d at 43; *see Isom v. Dir. of Revenue*, 705 S.W.2d 116, 117 (Mo. App. W.D. 1986) (noting that where trial court did not assess witnesses' credibility because they did not appear before the court, there was "no opportunity for the trial court to observe the demeanor of the witnesses"). This Court has precisely the same vantage as the lower court, including access to the same videotaped testimony.

Ordinarily in a bench-tried case, "[t]he judgment of the trial court will be affirmed 'unless there is no substantial evidence to support it, it is against the weight of the evidence, or it erroneously declares or applies the law.'" *Pearson*, 367 S.W.3d at 43 (quotation and citation omitted).

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opportunity to prepare to meet it." *Davis Estates, L.L.C. v. Junge*, 394 S.W.3d 436, 440–41 (Mo. App. S.D. 2013).

"A claim that there is no substantial evidence to support the judgment or that the judgment is against the weight of the evidence necessarily involves review of the trial court's factual determinations." *Id.* "A claim that the judgment erroneously declares or applies the law, on the other hand, involves review of the propriety of the trial court's construction and application of the law." *Id.*

Deference should not be given to credibility determinations here because this Court has the exact same record before it as the trial court and can read and view the same testimony at least as well. In fact, here, the trial court likely did *not* review all the evidence provided or look much, if at all, beyond the testimony of expert witnesses. *See* D164 p. 3 ("After reviewing hours of expert testimony, the Court concludes…)

> "The record before the trial court is best described as robust. Both parties submitted proposed findings of fact which are better described as a transcript of all the evidence submitted interspersed with argument. While that might suffice for an appellate brief, it presented a nearly unmanageable task for the court to parse into the actual facts which support the judgment.".

D164 p. 4 n.1

Argument

To evaluating the constitutionality of a restriction on the right to vote, courts must determine the applicable level of scrutiny by considering "the extent of the burden imposed by the statute." *Priorities*, 591 S.W.3d 448 at 452-53; *see Peters v. Johns*, 489 S.W.3d 262, 273 (Mo. banc 2016) ("[I]t is the *severity of the burden* on the asserted constitutional rights that produces the level of scrutiny ….") (emphasis in original)."If a statute severely burdens the right to vote, strict scrutiny applies, which means the law will

be upheld only if it is narrowly tailored to serve a compelling state interest." *Priorities*, 591 S.W.3d at 453; *Weinschenk*, 203 S.W.3d at 303 (recognizing Missouri courts "have uniformly applied strict scrutiny to statutes impinging on the right to vote" and collecting cases); *see Komosa v. Komosa*, 939 S.W.2d 479, 483 (Mo. App. E.D. 1997) ("Any state restriction which significantly interferes with the exercise of a fundamental right is subject to strict scrutiny and cannot be upheld unless it is supported by sufficiently important state interests and is closely tailored to effectuate only those interests.").

The trial court questioned whether "any scrutiny applied" here and wrongly opined that the notary requirement was "subject, *at most*, to rational-basis scrutiny." D164 p. 11 (emphasis added). That underwhelming approach drove the court's decision. The court did, in passing, assert the notary requirement "would" satisfy strict scrutiny, but conducted little (and certainly not strict) analysis to support that opinion. D164 p. 11 (merely reciting that notary requirement was "precisely tailored," without any indication of how conclusion was reached). The court erred in applying "at most … rational-basis scrutiny" to the notary requirement.

The trial court's outcome-determinative analysis ignored heavy burdens the notary requirement imposes. The court: (1) disregarded health risks and found that Plaintiffs were required to prove transmission through notarization (well before the November election) with a known positive test; (2) failed to adequately assess the cumulative burdens of the notary requirement in light of current circumstances; and (3) failed to

properly assess the evidence related to the state's purported interests in enforcing the notary requirement during the COVID-19 pandemic.

A. The Trial Court Did Not Properly Assess the Burden the Notary Requirement Imposes on Voting During the COVID-19 Pandemic.

This case challenges Missouri's absentee and mail-in voting requirements as applied during the COVID-19 pandemic. The requirements—which "in ordinary times … might not constitute an onerous burden rising to the level of a constitutional violation"—must be evaluated in that light, as "these are not ordinary times." *League of Women Voters of Va. v. Va. State Bd. of Elections* ("*LWV Va. I*"), No. 6:20-CV-00024, 2020 WL 2158249, at *8 (W.D. Va. May 5, 2020).

Appellants provided specific evidence of the multitude of burdens the notary requirement imposes on Appellants and other Missouri voters during the pandemic. Indeed, the requirement has already disenfranchised, at a minimum, hundreds of voters whose ballots were rejected in the August election for lack of notarization. D143 p. 105:11-24. The notary requirement threatens to disenfranchise tens of thousands more in the upcoming election. These burdens, addressed below, weigh heavily and require strict scrutiny, not "at most … rational-basis" review.

i. The notary requirement severely burdens Missourians by requiring them to choose between their health and their vote.

When evaluating absentee voting requirements during COVID-19, "every potential exposure is a risk—even when taking appropriate precautions …. Such risks may be necessary to obtain food and other necessities, but the burden one might be forced

to accept to feed oneself differs in kind from the burden the [Constitution] tolerate(s) on the right to vote." *League of Women Voters of Va. v. Va. State Board of Elections* ("*LWV Va. II*"), No. 6:20-cv-00024, 2020 WL 4927524, at *9 (W.D. Va. Aug. 21, 2020) (suspending enforcement of a witness requirement).

The notary requirement imposes a severe burden on Appellants, Appellants' members, and other voters who cannot cast an absentee or mail-in ballot without notarization by forcing them to choose between visiting a notary in person, which poses significant health risks, voting in person, which also poses significant risks to their health, or foregoing their fundamental right to vote. "[The] Constitution does not permit a state to force such a choice on its electorate." *LWV Va. I*, 2020 WL 2158249, at *8.

The trial court critically erred in ignoring and downplaying substantial evidence documenting this risk, relying instead on theoretical ideal-world constructs unsupported by the record.

First, the trial court disregarded unrebutted medical evidence demonstrating serious health risks from in-person notarization. The court nowhere even mentioned, much less addressed the steadily worsening spread of COVID-19 in Missouri. With respect to notarization, as Dr. Babcock testified that every interaction outside an individual's "bubble"—here with a notary with whom the individual would otherwise have no reason to interact, and everyone encountered on their way to and from the notary—increases the risk of exposure to a serious, potentially deadly virus that the individual can spread to others. D142 pp. 68:13-70:9; 73:10-20; *see also Middleton*, 2020

WL 5591590, at *10 (crediting expert testimony that "a voter will reduce his or her risk of catching or transmitting COVID-19 by minimizing their contacts with individuals outside of the home."). The Secretary of State has acknowledged as much in suspending of in-person notarization to "protect[] the health and safety of both notaries public as well as Missourians who otherwise would have been required to have close contact with the notary. " D10 p. 3; D11 p. 2; D146 pp. 66:5-11, 67:6-11; Plt. Ex. 053 (Clark Ex. 5); Plt. Ex 054 (Clark Ex. 6). That suspension, since codified, is not feasible for ballots, as the notary's seal must physically appear on the ballot envelope. *See* D157 pp. 122:24-123:4; Plt. Ex. 063 (Peters Ex. 14).

As the record establishes, this health risk is especially acute for voters who are, or who live with individuals who are, particularly vulnerable to COVID-19. That includes non-exempt Black voters and non-exempt individuals who live with family members who have serious underlying conditions, like hypertension, obesity and smoking. *See* Plt. Ex. 034 (Babcock Ex. 10) (severe obesity and hypertension increase the likelihood of hospitalization 4.5 times and 3 times, respectively); Plt. Ex. 037 (Babcock Ex. 13); Plt. Ex. 101 (Klausner Ex. 17) (Black individuals are 2.6 times likelier to contract COVID19, 4.7 times likelier to be hospitalized, and 2.1 times likelier to die from COVID-19 than white Americans). *See, e.g.*, *Thomas*, 2020 WL 2617329, at *24 ("[A]dherence to the Witness Requirement in June would only increase the risk for contracting COVID-19 for members of the public with underlying medical conditions, the disabled, and racial and ethnic minorities").

The evidence further establishes that this group of non-exempt yet vulnerable voters is substantial. Nearly half American adults have hypertension, at least one-third (35 percent) of Missouri adults are obese, and roughly one-in-five adult Missourians smoke. D142 p. 31:1-13; Plt. Exs. 033, 046 (Babcock Exs. 9, 22). Many voters who anticipate voting by mail-in ballot this November due to COVID-19 concerns—perhaps more than 120,000 Missourians—reported having one of these underlying conditions, such as hypertension and obesity, that are *not* included in SB 631's exemptions. D143 pp 61:6-62:5, 62:23-63:23, 64:10-65:4; Plt. Exs. 009, 010, 012, 015, 016, 017 (Barreto Exs. 1, 4, 6, 9, 10, 11).

Evidence shows these are tangible burdens, particularly for those who live on the edge—recognized as high risk by the CDC, but unprotected by Missouri law. For example, Del Villar is a Black man who lives with his elderly, vulnerable father. D147 pp. 7:1-7:10, 27:25-28:3; Langlitz lives with her husband, who has the autoimmune condition lupus, and their newborn child. D140 pp. 11:3-4, 14:16-22, 15:20-16:21. Fact witness Shauna Alexander's young daughters (ages 5 and 6) have an incurable genetic condition that affects muscle development, and fact witness Johnda Boyce's partner is 64. D136 pp. 12:22-14:15; D137 pp. 24:21-22, 25:11-27:14. Fact witness Mark Hensel is medically obese and has also been diagnosed with mild—but not moderate to severe—asthma. D149 pp. 13:13-14:24, 28:18-29:13. All face serious health risks imposed by the notary requirement upon themselves and/or family members.

The trial court erroneously dismissed this evidence, eschewing a rational

recognition of risk and presuming the notary requirement must pose no burden because there has yet to be, weeks before the November election, clear evidence documenting a specific transmission of COVID-19 from an in-person notarization. This ignores the relevant burden and risk, overlooks the challenges of contact tracing, and mistakenly concludes that the absence of direct proof of COVID-19 transmissions from notary visit is proof that no transmission has occurred. The trial court's finding also mistakenly overlooks the many Missouri voters who, due to their personal health circumstances, will conclude that visiting a notary (or crowded polling places) during the pandemic are not acceptable health risks and are thus kept from voting in the first place. D143 pp. 102:15-103:10 (29 percent of voters are somewhat or very unlikely to interact with a notary due to COVID-19 concerns). *See LWV Va. I,* 2020 WL 2158249, at *8 ("In our current era of social distancing-where … all Americans, have been instructed to maintain a minimum of six feet from those outside their household-the burden [imposed by a witness requirement] is substantial").

The trial court's position that Appellants are required to *prove* someone has already contracted COVID-19 from a notary would mean voters like Langlitz or Alexander would have to contract COVID-19 and bring it home to their seriously immunocompromised family members in order for Appellants to succeed. This is not legally required, in part because it would set a dangerous precedent.

Second, the trial court assumed, based on Respondents' bare assertions, that "prudent precautions" govern notary interactions. The record evidence, which the trial

court nowhere addresses, establishes that the real-world notary experience is far riskier than the unlikely picture Respondents sought to portray. Missouri has no statewide mask requirement for citizens, much less voters or notaries, ant the State has provided *no* guidance, assistance, or supplies to ensure notaries practice social distancing, disinfectant procedures, or even basic hygiene. D142 pp. 73:21-74:3; D146, pp. 78:13-79:14.

Appellants' expert Dr. Barreto's survey results indicate 30 percent of notaries would still provide notary services for individuals not wearing masks, while an additional 17 percent were undecided or unsure. Plt. Ex. 009 p. 28 (Barreto Ex. 1); D142 pp. 75:16-76:7. Thirty percent of voters requiring ballot notarization, meanwhile, reported they would still go to a notary to get their ballot notarized with COVID-19 illness or symptoms, while an additional 26 percent did not know or were unsure. Plt. Ex. 009 pp. 20-21 (Barreto Ex. 1); D142 p. 77:7-25. This means that roughly one-third to one-half of this voting population, while likely contagious, would visit a notary who had received no training whatsoever on how to limit the spread of COVID-19.

Moreover, mask use in Missouri is low, notwithstanding significant, ongoing community spread. D142 pp. 85:16-87:23; Plt. Ex. 044 (Babcock Ex. 20). It is not enough that some individuals appearing before the notaries wear a mask. D142 pp. 89:23-90:2. The voter is best protected when those around them are also masked. D142 pp. 89:23-90:6. As the record establishes, a voter may have to come into contact with other individuals *in addition to* the notary in order to get their ballot notarized. That includes, other patrons of the libraries, banks, and local elections offices where Respondents

suggest voters may obtain services. There may also be other individuals awaiting notarization in the same space—any of whom may be unmasked. D142 p. 71:10-18. Waiting in line—particularly if it is not possible to socially distance, if others in line are not wearing masks, or if the line is indoors—also increases the risk of COVID-19 transmission. D142 pp. 83:23-84:12. Voters may have to take public transportation to and from the notary, again multiplying exposure to others, who may not be masked, over substantial periods. D142 p. 72:3-10; D138 pp. 29:14-30:5 (MoNAACP President Chapel testifying about voters who lack their own transportation and specifically identifying MoNAACP member who does not have a car in order to travel to a notary); D143 pp. 97:23-98:22 (Dr. Barreto testifying about the transportation burden voters face).

Fact witness testimony further confirmed the difficulty of following best practices throughout the course of an in-person notarization transaction. For example, notary Amber Hodgson testified there was no way to notarize a document and maintain a six-foot distance from the voter. D150 pp. 19:13-20:9, 51:20-52:11. Dugan and notary Nigel Holloway also raised concerns about the safety of notarizing ballots, including the inability to socially distance and the need for voters to touch, and sign, the notary ledger. D139 pp. 37:24-38:25, 40:2-22; D151 pp. 18:21-19:10, 44:22-24, 48:15-18, 50:16-51:3. Contrary to the trial court's unfounded opinion notarization would be safe and swift, lasting "would last 5 minutes or less," D164 p. 13, testimony uniformly showed otherwise. Missouri voter and notary Ms. Boyce testified that a recent notarization included a wait of roughly ten minutes, contact with a security guard, the need to touch

and sign the notary ledger, and the impossibility of social distancing. D137 pp. 71:19-74:22. Dr. Babcock's recent notary experience took almost a half-hour. D142 pp. 209:21-212:8. Even the State's witness, Vice President of the National Notary Association Bill Anderson, testified notarization typically takes 15 minutes. D141 p. 27:7-15.

Even if a voter could somehow ensure that all precautions were followed at all stages of the notarization process to decrease the risks of contracting COVID-19, that does not, as the trial court incorrectly concluded, mean that the burden of the notary requirement is somehow not a heavy one. "Although a determined and resourceful voter intent on voting" might "manage to work around these impediments … [t]aking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote." *Common Cause R.I. v. Gorbea ("CC-RI")*, 970 F.3d 11, 15 (1st Cir. 2020).

Third, the court, erroneously resting on stale findings from an earlier proceeding, suggests that Dr. Babcock did not demonstrate any significant familiarity with the notarization process. Dr. Babcock testified explicitly that since that prior hearing, she personally had to get several documents notarized and that she had observed other people getting their documents notarized. D142 pp. 135:20-139:23, 208:12-212:8. Moreover, Dr. Babcock's opinions regarding the health risks from a requirement that makes voters leave home, travel, and interact with strangers is firmly rooted in her extensive experience with COVID-19 safety response protocols, and further supported by fact witness testimony. D142 pp. 11:5-12:2, 135:20-139:23, 208:12-212:8.

ii. The weight of the evidence establishes that the process of obtaining in-person notarization during the pandemic is a substantial burden.

The notary requirement puts notaries in high demand, just as the pandemic renders them in short supply. Securing such services in this time of scarcity is itself a substantial burden that requires significant investments of time and money. *See Weinschenk*, 203 S.W.3d at 215 (holding a voting requirement that involved a cumbersome procedure and advance planning for some voters imposed a substantial burden); *Reynolds*, 377 U.S. at 555. Under these circumstances, the notary requirement creates "'an onerous procedural requirement which effectively handicaps exercise of the franchise.'" *Weinschenk*, 203 S.W.3d at 215 (quoting *Lane v. Wilson*, 307 U.S. 268, 275 (1939)); *see also Harman v. Forssenius*, 380 U.S. 528, 541-42 (1965) (rejecting what the Court described as "plainly a cumbersome procedure").

Evidence establishes that nearly two-thirds of Missouri notaries are either working reduced hours, refusing to notarize ballots, or not notarizing at all. D143 pp. 125:1-126:2, 126:5-16, 356:11-24. Indeed, the notary survey team called notaries regarding notarization and got no answer or response from approximately three-quarters of all the notaries solicited. D143 pp. 125:1-126:2, 126:5-16. A separate set of calls, conducted by a separate group, achieved similar results, as nearly 75 percent of calls to over 600 Missouri notaries either went unanswered, or reached notaries unavailable to notarize ballots. D154 pp. 12:15-13:2.

The burden imposed from lack of notary availability will be compounded for the November election. The evidence shows and the trial court acknowledged that demand

for mail-in ballots and absentee ballots has increased substantially this year, D164 p. 3, and will balloon for the upcoming election. As of early September, two months before the election, Eric Fey, one of the Directors of the St. Louis County Board of Elections, testified that absentee ballot requests had already surpassed the total from the last presidential election. D148 pp. 24:17-25:19 (20,070 absentee ballots requested in August 2018 compared to 96,632 absentee ballots requested in August 2020); *see also* Plt. Ex. 017 (Barreto Ex. 11).

The evidence also establishes that many voters, including Appellants (despite the trial court's misstatement of the record to the contrary), faced real information burdens in trying to find a notary. *See* D138 p. 26:3-20 (Chapel identifying a member who cannot find a free notary in his county); D140 pp. 32:17-37:7, 112:17-113:8 (Langlitz testifying that only "serendipit[y]" and a neighbor's tip enabled her to she find an outdoor notary in August 2020); D147 pp. 39:10-40:3, 46:24-47:3, 47:9-16 (Mr. Del Villar testifying that but for his attorney-sister, he would start looking online but would not know where to find a notary). Dr. Barreto's voter survey indicates that one-quarter (25%) of voters do know where notary public services are provided in their community, and 25% of voters reported that it would be a burden to find the location of the the nearest notary public. Plt. Ex. 009 (Barreto Ex. 1) pp. 40, 42.

Even for voters able to overcome this initial informational hurdle, the record makes plain they still face substantial burdens from the notary requirement. For example, Del Villar, an hourly employee who does not get paid when he takes time off, testified he

had to take the day off in order to get his August 2020 ballot notarized because he works nearly every day. *See* D147 pp. 31:3-5, 41:16-42:1, 92:14-92:17, 85:1-85:3.

This is no isolated issue. Chapel testified that taking time off work to visit a notary is a concern for the members of the MoNAACP, especially in the middle of a pandemic and economic disruption. D138 pp. 32:22-34:25. Unrebutted expert testimony further established that visiting a notary during business hours would be a burden for 29 percent of voters and that getting time off from work or school to visit a notary would be a burden for 24 percent of voters. Plt. Ex. 009 (Barreto Ex. 1) pp. 43.

The trial court erred in at least three primary ways by disregarding this substantial showing and making factual findings that rest on a wholesale acceptance of Respondents' assertions belied by the record evidence.

First, the trial court's reliance on the state's free notary list to conclude that obtaining notarization during the pandemic is not burdensome ignores major limitations of the notary list.[13] This ignores the basic reality for many Missourians that the free

[13] In finding that obtaining notarization is not a burden, the trial court also apparently relies on its finding that "it is common practice for local election authorities to offer free notarization of ballot envelopes, and that was done extensively in the June and August 2020 elections." D109 pp. 93-94 (failing to cite supporting testimony). That finding misstates the evidence in the record. Two LEA representatives testified as to the practices of their own jurisdiction regarding notarizing absentee ballots. D148 p. 102:20-24; D153 p. 73:8-10. There is no evidence regarding the commonality of this practice. Nor is there any evidence to support the statement that LEA ballot notarization "was done extensively in the June and August 2020 elections." At best, the evidence demonstrates that the St. Louis County Board of Elections notarized a few hundred ballots—as it has on a regular basis pre-dating COVID, and that the Boone County Elections Office has notarized mail-in ballots in 2020. D148 p. 102:20-24; D153 p. 73:8-10.

notary list does not include *any* notaries that serve their county. Trial evidence showed that fewer than half of Missouri's counties were represented on that list and that "several counties only had one notary listed on the Secretary of State's list, of free notaries." D139 p. 35:2-5. There is no reason to believe this scarcity will improve as the Secretary of State's office representative Scott Clark admitted that his office has done nothing to ensure free notaries are available in every county. D146 p. 75:3-6.

Second, the trial court relies on an assertion that even with two-thirds of notaries not operating or operating at reduced capacity, there is no dearth of notaries. But in doing so, the court disregards the record evidence that "normal capacity" is already limited. For example, even many of the working notaries are operating only during regular business hours (or a fraction of those hours), when many voters are working. Def. Ex. 24 (Clark Ex. 3); D139 p. 189:9-25. As discussed below, this creates a burden for many voters, such as Del Villar, who would be forced to take time off work, without pay, in order to visit a notary. D147 pp. 31:3-5, 41:16-42:1, 92:14-92:17, 85:1-85:3. Many notaries, moreover, require voters to plan ahead and to arrange an appointment. Def. Ex. 24 (Clark Ex. 3) (notaries requesting voters to contact for appointments). In addition, Dr. Barreto's notary survey showed that for nearly two-thirds of notaries, notary services comprise fewer than 20 percent of their work, so available appointments are few and far between. Plt. Ex. 009 (Barreto Ex. 1). And this all assumes that voters are able to locate these notaries, but fully 93 percent of notaries are not publicizing or advertising that they are providing absentee or mail-in ballot notarization services. *See* Plt. Ex. 009 (Barreto Ex.

1); *see also, e.g.*, D138 p. 26:3-20 (testimony that a MoNAACP member could not locate a free notary within his county).

Third, the trial court opines that these burdens are not severe by erroneously asserting that voters have six weeks to overcome these burdens. This statement is untethered to both the record and reality, particularly for mail-in ballots. As the Secretary of State admitted, the process of applying for a mail-in ballot, receiving that ballot (by mail, as required), and then returning that completed ballot (by mail, as required), takes several weeks. D157 p. 138:10-13, 138:21-22; Plt. Ex. 065 (Peters Ex. 16). Evidence demonstrates that the USPS has indicated similarly. D157 pp. 129:21-130:1, 133:5-11; Plt. Ex. 064 (Peters Ex. 15). Mail-in ballot voters thus have a substantially tighter window of time in which to get their ballots notarized and back in the mail so that it is received by election day, even if they requested a mail-in ballot at the start of the voting process. As unrebutted expert testimony establishes, this short turnaround time to obtain notarization enhances, and imposes its own, heavy burdens for many Missouri voters. Plt. Ex. 009 (Barreto Ex. 1) (40 percent of voters responding it would be a definite or somewhat of a burden to have their ballot notarized within two weeks, and 49 percent of voters responding it would be a definite or somewhat of a burden to have their ballot notarized within one week before having to mail it in).

iii. The weight of the evidence demonstrates that notaries are enforcing a photo ID requirement, which imposes a substantially burdens voters during the pandemic.

The record evidence also establishes that many notaries are enforcing a photo ID requirement for ballot notarization, which constitutes a heavy burden on the right to vote during the pandemic. The trial court erred in finding otherwise for at least three reasons.

First, the trial court misunderstood Appellants' argument by failing to consider the *raison d'etre* of the mail-in ballot—to provide voters a safer means for voting, as opposed to voting in-person at the polls. For voters for whom in-person voting is not a meaningful option due to health risks notaries' enforcement of a photo ID requirement as onerous as the enforcement of a photo ID requirement at the polls. Under the current circumstances, these voters are forced to comply with a requirement that this Court has held imposes a severe burden and violates the fundamental right to vote guaranteed by the Missouri Constitution. *See Weinschenk*, 203 S.W.3d at 219 (concluding "the Photo–ID Requirement violates the equal protection clause of the Missouri Constitution, article I, section 2"). This Court has "made clear that requiring individuals to present photo identification to vote is unconstitutional." *Priorities*, 591 S.W.3d at 458. At the very least, notaries' enforcement of a photo ID requirement is a heavy burden for voters seeking to vote by mail to avoid COVID-19 exposure (or unwitting transmission) at the polls during the pandemic, for the same reasons it was a heavy burden in *Weinschenk*.

Second, the trial court again made factual findings divorced from the record in finding that notaries are not requiring photo IDs for ballot notarization, under the theory

that Missouri law does not require them to do so. The evidence, however, establishes the vast majority of notaries *are* requiring voters to present a photo ID in order to notarize a ballot envelope. Dr. Barreto testified nearly every notary surveyed (96 percent) required a valid photo ID as a prerequisite for ballot notarization. D143 pp. 157:22-158:3. But 3-4 percent of registered voters lack such ID and many others possess ID that is out-of-date, such that as a result of the notary requirement, between 5 and 20 percent of voters could face ID-based challenges when attempting to vote..[14] D143 pp. 84:24-89:8, 91:8-95:11. The testimony of Ms. Boyce, Ms. Busse, and Ms. Hodgson confirm that as notaries they would require photo ID as a prerequisite for notarization. D137 pp. 66:21-67:1; D144 p. 16:18-22; D150 p. 22:13-16. The record also demonstrates that voters *are being* required to show photo ID to get their ballots notarized. D140, pp. 40:20-43:18 (Langlitz testifying that to have her August 2020 mail-in ballot notarized, she had to show photo ID); D147, pp. 40:12-41:15, 45:22-46:4 (Del Villar testifying he was required to show photo ID when having an absentee ballot notarized for the August 2020 election).

Third, the trial court suggests that enforcement of a photo ID requirement would not constitute a heavy burden because, according to the results of Dr. Barreto's voter survey, 96 percent of voters have a photo ID with a signature. D143 pp. 91:8-95:11. This

[14] The trial court erroneously suggests that Dr. Barreto's survey did not capture the number of notaries who might offer an alternative method of verifying identity because he asked no questions regarding those alternative means. But Dr. Barreto did provide notaries with the option of explaining other forms of verification that they accept (including that they personally know the individual seeking notary services)—just 4 percent of notaries provided such an alternative. D143 pp. 157:22-158:3; Plt. Ex. 009 (Barreto Ex. 1).

Court in *Weinschenk*, however, struck down the photo ID requirement based on almost the same possession rate. 203 S.W.3d at 206 ("The record below reveals that between 3 and 4 percent of Missouri citizens lack the requisite photo ID …").

iv. The weight of the evidence establishes that the notary requirement imposes other substantial direct and indirect costs

The record evidence also clearly establishes a host of other monetary and non-monetary costs of the notary requirement. Individually and cumulatively, these costs likewise prove that the burden imposed by the notary requirement is severe.

First, while Missouri state law requires absentee ballots to be notarized for free, state law does *not* prohibit notaries from charging to notarize a mail-in ballot. Numerous witnesses testified that paying a fee to vote burdens low-income Missourians. Ms. Boyce, for example, testified that even $1.50 is too high a burden for some low-income Missourians who cannot even afford bus fare. D137 p.75:12-20; *see also* D138 pp. 29:17-30:5, 30:20-34:25, 35:20-36:16, 38:23-39:6, 54:12-55:17, 55:21-57:15, 73:13-74:16; 157:3-19 (Chapel testifying about burdens beyond health risks associated with voting absentee or by mail, including the cost of having to pay for notarization). The Secretary of State's compiling a (woefully insufficient) list of free notaries implicitly acknowledges, but fails to alleviate this burden. As this Court has held, "[t]he exercise of fundamental rights cannot be conditioned upon financial expense." *Weinschenk*, 203 S.W.3d at 214 (voiding voter ID law because cost to obtain acceptable ID "is a fee that qualified, eligible, registered voters who lack an approved photo ID are required to pay in order to exercise their right to free suffrage under the Missouri Constitution."). *Id*. at 215.

Second, fact and expert witness testimony demonstrate that voters face the time and money costs of traveling to and from a notary. D137 p.75:12-20; D138 pp. 29:17-30:5, 30:20-34:25, 35:20-36:16, 38:23-39:6, 54:12-55:17, 55:21-57:15, 73:13-74:16; 157:3-19. This is particularly acute in more rural areas of the state where voters have to travel a greater distance in order find a notary. D139 pp. 34:5-35:7; D143 p. 98:10-16; Plt. Ex. 009 (Barreto Ex. 1) (36 percent of voters responding that it would be a definite or somewhat of a burden to travel over 20 miles to the nearest notary public).

Third, fact and expert witness testimony establish that voters are confused about the requirements for voting by mail—indeed the Secretary of State has admitted that "it's confusing to the voters"[15]—in ways that threaten disenfranchisement. Dr. Barreto's survey results demonstrate that voters are confused about the type of ballot they need to request and qualify for, so even correct instructions on ballot envelopes they receive *after* making their decision and application are too little, too late. "[T]hat [type of] information will not help [voters] if [they] have requested the wrong type of ballot." D143 pp. 193:5-194:23. Dr. Barreto's survey results also revealed even those people who "have seen and heard official public service announcements from the State of Missouri about mail-in voting. . . are "just as misinformed, and, in some places, they are more misinformed than the average voter." D143 pp. 193:5-194:23. Thus, individuals exposed to information

[15] *See, e.g.*, Mark Marberry, *Secretary of State Ashcroft covers state voting issues*, Daily Journal Online (June 11, 2020) (Secretary Ashcroft stating "I'm afraid it's confusing to the voters, because we have both absentee ballots and mail-in ballots. Who can apply for them is different, how you can apply for them is different, and how you are allowed to return them is different.").

created by the State "are not necessarily getting the answers right." D143 pp. 193:5-194:23.

Fact witnesses corroborated this confusion. Missouri voter Linda Casebolt and her husband mistakenly applied for and received a mail-in ballot rather than an absentee ballot. D145 pp. 15:8-18:17. As voters over the age of 65, Mr. and Ms. Casebolt, however, understood that they were exempt from the notary requirement. D145 pp. 15:8-18:17, 19:9-17, 20:17-23, 21:18-25. When they received the mail-in ballots, Ms. Casebolt attempted to get clarification from the Jackson County Board of Elections but did not reach an individual who could help, and not wanting to risk exposure to a notary, she and her husband submitted mail-in ballots without notarization. D145 pp. 20:24-22:16, 25:22-26:6. Their unnotarized mail-in ballots were rejected. D145 pp. 23:10-25:21; Plt. Ex. 025 (Casebolt Ex. 2); *see also* D136. pp. 37:2-39:21, 40:17-43:23 (Missouri voter Ms. Alexander testifying to her confusion regarding exemptions from the notary requirement, which was only compounded by the Secretary of State website); D138 p. 60:12-25 (Mo NAACP members are confused about the notary requirement).

The record demonstrates these burdens are not one-off experiences. Fifty-six percent of respondents to Dr. Barreto's voter survey reported they would face at least one burden, such as finding a nearby notary, arranging and paying for transportation, or making it to the notary during normal business hours to get their ballot notarized. D143 pp. 96:12-97:8. Forty-three percent of survey respondents reported facing two or more such burdens in having their ballot notarized. D143 pp. 96:12-97:8.

The record also establishes that the notary requirement has a disproportionally negative impact on minority voters in Missouri. D143 pp. 108:10-15, 108:22-110:9, 110:16-111:7 (Dr. Barreto identifying that Black voters more likely to face more burdens to notarize their ballots due to "having to take time off work, having to visit during normal hours, getting a ride"); D138 pp. 29:17-30:5, 30:20-34:25, 35:20-36:16, 38:23-39:6, 54:12-55:17, 55:21-57:15, 73:13-74:16; 157:3-19 (Chapel testifying about the many burdens of notarization for MoNAACP members, including a disproportionate lack of photo identification, access to the internet or a printer, transportation, funds for postage or the notarization fee, stable housing, ability to take time off work without losing income, and available notaries). Courts across the country have recognized this disproportional burden on minority voters. *See, e.g.*, *Common Cause / Georgia League of Women Voters of Georgia, Inc. v. Billups*, 439 F. Supp. 2d 1294, 1350 (N.D. Ga. 2006) (noting that Georgia's photo ID requirement for voting "is most likely to prevent Georgia's elderly, poor, and African-American voters from voting" and that "for those citizens, the character and magnitude of their injury—the loss of the right to vote—is undeniably demoralizing and extreme, as those citizens are likely to have no other realistic or effective means of protecting their rights"); *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1216 (N.D. Fla. 2018) (disparate impact "matters" in evaluating burdens of voting law); *see also Mich. State A. Philip Randolph Inst. v. Johnson*, 833 F.3d 656, 664 (6th Cir. 2016).

The trial court improperly dismissed these monetary, time, transportation, and information costs, finding they are no burden because they are similar to costs imposed for in-person voting at the polls. In doing so, the trial court erred in failing to consider these burdens in the context of the ongoing public health crisis and against the relevant baseline. The Legislature created a mail-in ballot option specifically to obviate the need for in-person voting during COVID-19. *See* § 115.302.20 (noting that mail-in provisions apply during 2020 elections "to avoid the risk of contracting or transmitting" COVID-19). Thus, the suggestion that voters, could, or should, simply vote in person is neither cognizant of the serious risks that poses for many Missourians, nor faithful to the Legislature's intent. The relevant comparison is between the alternatives that would arise based on the decision in this case—*i.e.*, whether to impose, or enjoin, the notary requirement on Missouri voters seeking to vote safely and remotely. Against that more appropriate comparator, imposing the notarization requirement undoubtedly inflicts substantial burdens.

v. The record establishes that voters are being disenfranchised by the notary requirement.

The record demonstrates that the burdens the notary requirement imposes are exacting the ultimate price: disenfranchisement. It is undisputed that hundreds of Missouri voters were already disenfranchised by the notary requirement in August elections, a number certain to soar in November. *See* D143 pp. 105:11-24, 106:4-108:7, 111:8-116:19. Indeed, lack of notarization was the number one reason that mail-in ballots were rejected in August. D143 p. 105:11-24.

But the lower court dismissed these aspiring voters, summarily opining that the "[f]ailure to comply with the notary provision during the recent election" was not "a significant basis for ballot rejection in the recent primary election." D164 p. 4.

Voting, however, is an individual right. For those Missourians deprived of the franchise in August for failure to comply with the notarization requirement, and the many more facing the same fate in November, the burden is surely "significant." The record further establishes that even if the rejection rate holds constant for the November election, thousands of ballots, if not more, will be rejected for lack of notarization alone. Plt. Ex. 015 (Barreto Ex. 9). This would not even include those voters who gave up and did not vote altogether, or voters whose ballots did not arrive on time at least in part because the voter needed to spend time finding and visiting a notary before returning their ballot. D143 pp. 166:1-170:13; *see also LWVV II*, 2020 WL 4927524, at *9 (noting that "even with the available arsenal of conceivable precautions one could take to reduce risk of contracting the virus, many would be dissuaded from exercising their vote both because of the risk of illness and the efforts involved in mitigating that risk").

Courts have repeatedly recognized that "even rates of rejection well under one percent" are significant in the voting context because they "translate to the disenfranchisement of dozens, if not hundreds, of otherwise qualified voters, election after election." *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 217 (D.N.H. 2018). The Sixth Circuit, for example, found a substantial burden on voters where Ohio rejected wrong-precinct ballots even though they made up less than a quarter of one percent of the ballots

cast in the 2008 election. *Ne. Ohio Coal. For Homeless v. Husted*, 696 F.3d 580, 593 (6th Cir. 2012). Four years later, it upheld a facial challenge to a technical perfection requirement for an address or date of birth despite rejected rates below 0.2 percent. *Ne. Ohio Coal. for the Homeless v. Husted,* 837 F.3d 612, 631–32 (6th Cir. 2016). The "basic truth [is] that even one disenfranchised voter—let alone several thousand—is too many." *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 244 (4th Cir. 2014); *see also Democratic Exec. Comm. of Fla. v. Lee*, 915 F.3d 1312, 1321 (11th Cir. 2019) (same).

B. The Weight of the Evidence also Establishes That the Notary Requirement Cannot Survive Strict Scrutiny.

Given the notary requirement's heavy burdens on the fundamental right to vote, strict scrutiny applies. Accordingly, Respondents must show these restrictions both advance a compelling interest and are "narrowly tailored or necessary to accomplish" it. *Weinschenk*, 203 S.W.3d at 218. The notary requirement cannot survive this scrutiny.

The trial court found State interests in "preventing fraud through absentee and mail-in ballots and protecting the integrity and public confidence in Missouri elections." D164 p. 15. Deterring absentee ballot fraud can be a legitimate interest; however, merely invoking such an interest does not mean the State automatically prevails. A valid interest does not mean that "courts should ignore evidence of whether a specific law advances that interest or imposes needless burdens." *Veasey v. Abbott*, 830 F.3d 216, 275 n.3 (5th Cir. 2016) (citing *Whole Women's Health v. Hellerstedt*, 136 S. Ct. 2292 (2016)); *see also Veasey,* 830 F.3d at 274-75 (holding while "preventing voter fraud and safeguarding

voter confidence are legitimate and important state interests … it does not follow that assertion of those interests immunizes a [voting] law from all challenges"); *League of Women Voters of N.C. v. North Carolina*, 769 F.3d 224, 246 (4th Cir. 2014) (same). This Court must not "blindly accept [the] state's assertion that its interests are enough to outweigh a burden, and instead [] must examine whether [the] particular interest is 'justified by relevant and legitimate state interests 'sufficiently weighty to justify the limitation.'" *Middleton v. Andino*, No. 3:20-CV-01730-JMC, 2020 WL 5591590, at *31 (D.S.C. Sept. 18, 2020) (citing *Crawford v. Marion Cty. Election Bd.*, 553 U.S. 181, 191 (2008)).

Simply asserting a broad regulatory goal allegedly served by voting regulations is generally inadequate to show there is an "incremental interest in the specific regulation at issue." *CC-RI*, 970 F.3d at 15. Even if an interest is significant, if the specific means of promoting that interest are "marginal," they will not survive strict scrutiny. *Middleton*, 2020 WL 5591590, at *31 ("[I]n the abstract, the state has a significant interest in investigating voter fraud. But the specific means of promoting that interest–here, the Witness Requirement–is marginal.").

The evidence, properly weighed, demonstrates that Respondents failed to carry their burden and produce "evidence that such an interest made it necessary to burden voters' rights[.]" *See Fish v. Schwab*, 957 F.3d 1105, 1133 (10th Cir. 2020); *see also N.e. Ohio Coal. for the Homeless v. Husted*, 837 F.3d 612, 632 (6th Cir. 2016) ("Combatting voter fraud perpetrated by mail is undeniably a legitimate concern. Yet some level of

specificity is necessary to convert that abstraction into a definitive interest for a court to weigh.").

i. The State Has Not Demonstrated the Notary Requirement Is "Strictly Necessary" or "Narrowly Tailored" to Achieve Its Asserted Interest.

Respondents have not, and cannot, demonstrate that the notary requirement is "strictly necessary" and "narrowly tailored" to accomplish any interest in preventing absentee ballot fraud. *See Weinschenk*, 203 S.W.3d at 217. As the following sections show: (1) the record evidence establishes absentee ballot fraud is exceedingly rare; (2) Missouri has other stringent safeguards to deter and detect absentee ballot fraud that render the notary requirement redundant and unnecessary (not to mention unwise during the COVID-19 state of emergency); (3) the notary requirement is not tailored to fit the asserted concern or justification; and (4) the notary requirement irrationally exempts swaths of voters, rendering impermissibly over and underinclusive.

ii. Absentee ballot fraud is exceedingly rare.

The record evidence establishes that while absentee ballot fraud exists, it is "exceedingly rare," both nationally and in Missouri. The rarity of the problem purportedly addressed by the notary requirement weighs powerfully in determining whether its heavy burdens are "strictly necessary." *Weinschenk*, 203 S.W.3d at 217; *see also, e.g.*, *Fish v. Kobach,* 309 F. Supp. 3d 1048, 1112 (D. Kan 2018) (holding that minimal evidence of non-citizen voter registration could not justify requiring documentary proof of citizenship, that burdens thousands of voters), *aff'd sub nom*, *Fish v. Schwab*, 957 F.3d 1105, 1126 (10th Cir. 2020) (collecting cases holding the court must

not only determine the legitimacy and strength of each interest; it also must consider "the extent to which those interests make it necessary to burden the plaintiff's rights.").

Dr. Lorraine Minnite, a pre-eminent scholar and recognized expert on election fraud, evaluated the incidence of absentee ballot fraud in Missouri and throughout the United States. D156 pp. 24:8-25:2, 25:21-26:2; Plt. Ex. 005 (Minnite Ex. 3). Dr. Minnite relied on numerous quantitative, qualitative, and archival sources to form her opinions. These sources include her own two decades of research into voter fraud and election fraud more broadly, as well as additional materials about absentee balloting, supplemented by Missouri-specific information from thousands of news reports, various databases and compilations, court opinions, and various documents produced by Respondents. D156 pp. 25:3-20, 30:23-31:19, 62:3-14. She also relied on reports of electoral fraud in Missouri, including every instance of alleged fraud Respondents identified. D156 pp. 30:23-31:19; D157 p. 82:4-7.

Dr. Minnite employed a "mixed methods" empirical analysis in which data from multiple sources are triangulated to identify patterns across the sources, which provides a more reliable basis for drawing inferences from the data. D.156 p. 31:21-32:24; *see also* D156 p. 42:14-18. This methodology is generally accepted in her field and is the method of analysis she utilized in her academic research on fraud in elections and in the many cases where she has testified as an expert. D156 pp. 32:19-33:2, 60:22-61:3; *see also, e.g.*, *Kobach*, 309 F. Supp. 3d at 1084 (concluding Dr. Minnite's '"mixed methods" "research approach" is reliable under *Daubert*). This methodology shows that Dr.

Minnite evaluated both the incidence of voter fraud and electoral fraud more broadly; she did not, as Respondents suggest (D92 p. 25), focus solely on fraud committed by voters, or solely on convictions. *See* D156 pp. 55:9-24 62:3-20; 334:9-25 335:9-14.

Based on this comprehensive review, Dr. Minnite concluded that incidence of absentee ballot fraud in the United States and Missouri is exceedingly rare. *See* D156 pp. 30:23-31:19, 61:10-14; 334:9-335:14. Specifically, in forty (40) years there have only been a handful of incidents of fraud involving absentee ballots in Missouri: one scheme involving absentee ballots, one instance of improper handling of in-person absentee ballots by election officials, three instances of notary misconduct associated with absentee ballots, and one ongoing prosecution of alleged absentee ballot fraud by an elected official. *See* D156p. 68:1-11; *see also* D156 pp. 65:22-66:4; 66:10-25; 67:1-16; 75:4-10. Over six years, the Secretary of State has received only 14 complaints (which can be leveled with *no* support whatsoever) related to the absentee voting process, one related to the ongoing prosecution, eight irregularities due to clerical errors, and five unresolved, and apparently unsubstantiated, complaints from failed campaigns. According to the Heritage Foundation, a conservative think tank focused on purported election fraud, Missouri has had a total of one (1) case of election fraud tied to absentee ballots *in the past fifteen years*. Such little evidence of absentee ballot fraud cannot justify the burdens the notary requirement places on voters during the pandemic.

Instead of considering this unrefuted expert evidence, the trial court erred by relying on a grab-bag of anecdotal hearsay about other states and unsupported testimony

from Respondents' expert to opine that the problem of absentee ballot fraud is more substantial than the evidence shows.

First, the trial court's conclusion that fraud in mail voting is "a recurrent problem" is largely based on purported "cases," that are actually nothing more than anecdotal hearsay, largely from *outside* Missouri, including media reports about allegations in Virginia and North Carolina and tabloid reports from New York and New Jersey. Treating this hearsay as truth is legal error. *See Wilson v. ANR Freight Sys., Inc.,* 892 S.W.2d 658, 664–65 (Mo. App. W.D. 1994) (holding that "articles are not admissible as independent, substantive evidence … because if the articles were asserted as substantive evidence, they would be hearsay offered to prove the truth of the matter asserted."), *overruled on other grounds by Hampton v. Big Boy Steel Erection*, 121 S.W.3d 220 (Mo. banc 2003).

Second, the trial court wrongly credited testimony of Respondents' expert Dr. Jeffrey Milyo (who did not appear in court).[16] The weight of evidence shows Dr. Milyo's testimony and opinions comprise no discernible methodology, but only a hodgepodge of observations gleaned from sources cherry-picked by Respondents' counsel. [Cite Facts] His testimony about a few purported cases of absentee ballot fraud refers to situations he

[16] This Court should hesitate to lend deference to the lower court's view of Dr. Milyo's testimony given that the lower court itself noted that both parties experts offered "valid criticisms of the other's methodologies and conclusions," and that the resulting testimony "was not extremely helpful to the Court." D 164 p. 3.

neither analyzed nor cited in his reports and merely parrots curated content of articles with no independent analysis. *See*, *e.g.*, D155 pp. 52:19-53:15, 58:4-25; 85:11-86:22.

Unlike Dr. Minnite's comprehensive empirical analysis of thousands of documents across four decades, Dr. Milyo did no empirical or comparative analysis of any sort. *See*, *e.g.*, D155 pp. 271:7-16, 272:12-19. Respondents' expert did not conduct or cite to any academic or scientific research on notary requirement in Missouri or elsewhere. D155 pp. 239:4-239:14. He could have compared the occurrence of absentee ballot fraud in states with and without broad mail-in provisions but did not. D155 p. 198:6-11. He could have compared the frequency of election fraud in states before and after adoption of widespread mail-in provisions (or notary requirements), but he did not. *See* D155 pp. 196:23-197:1. Though Dr. Milyo is purportedly an expert in statistical and empirical analysis, here he performed neither.

Rather than provide helpful expert testimony, Dr. Milyo simply walked through hearsay articles provided by Respondents, as if that process could transform Respondents' arguments into creditable "expert" testimony. Indeed, the crux of Dr. Milyo's untested and untestable opinion was that the State's interest was in preventing undetectable, unknowable quantities of voter fraud—but he could not point to *any* incident of voter fraud *anywhere* that had escaped Dr. Minnite's empirical, evidentiary analysis, D155 p. 270:6-20.

Third, the trial court used the same unreliable sources to opine, contrary to the evidence, that a substantial amount of undetected absentee ballot fraud reigns. The basis

for this notion comes almost exclusively from unanalyzed snippets from cherry-picked sources and hearsay, including out-of-state media reports.[17] Even Respondents' expert was unsure whether the news reports he testified about would be a "good proxy" for measuring unobserved absentee ballot fraud.

Nor did Respondents provide any evidence that there is significant undetected absentee ballot fraud in Missouri. Respondents did not attempt to determine the rate of absentee ballot fraud, detected, or not, in Missouri, or elsewhere. The trial court erred treating a hypothetical possibility of unobserved absentee ballot fraud as evidence that justifies the burdens imposed by the notary requirement during the pandemic. As this Court has stated, "where the fundamental rights of Missouri citizens are at stake," more than "mere perception of fraud" "is required for their abridgment." *Weinschenk*, 203 S.W.3d at 218. Here the interest is even more intangible; it is a *presumption* that *unperceived* fraud must be out there somewhere, an approach that, if credited, would eviscerate the need for actual evidence to justify such measures. *Id.* ("[I]f this Court were to approve the placement of severe restrictions on Missourians' fundamental rights owing to the mere perception of a problem in this instance, then the tactic of shaping public misperception could be used in the future as a mechanism for further burdening the right to voter or other fundamental rights.").

[17] The trial court also mischaracterized the record in stating that Dr. Minnite's opinion that undetected fraud is likely "miniscule" is unsupported. D164 p. 17. To the contrary, Dr. Minnite testified that her opinion as to the incidence of fraud in elections—detected or otherwise—is informed by nearly two decades of empirical research mining a multiplicity of sources to address precisely this question. D156 pp. 25:3-20, 31:1-19, 62:3-14.

Simply put, the record demonstrates that there is little evidence that ballots cast by mail have or will result in fraudulent voting. *See Paher v. Cegavske*, No. 3:20-cv-00243, 2020 WL 2089813, at *1 (D. Nev. Apr. 30, 2020) (identifying Oregon, Washington, Colorado, Utah, and Hawaii as conducting elections entirely by mail "with no reported incidents of election fraud"); *see also Fish,* 309 F. Supp. 3d 1048 at 1112. Where the evidence shows election fraud is an exceedingly slight problem, the notary requirement is a misguided, burdensome, ill-fitting solution.

iii. Missouri has stringent safeguards in place to deter absentee ballot fraud.

The record establishes the notary requirement is not "strictly necessary" to further any interest in deterring absentee ballot fraud because Missouri has in place numerous safeguards to protect the absentee and mail-in ballot process—including provisions to verify voters' identities. *See Weinschenk*, 203 S.W.3d at 217 (holding HAVA requirements sufficient to prevent in-person voter impersonation); *see also, e.g.*, *Paher*, 2020 WL 2089813, at *3 (discussing safeguards in the voter registration process that prevent voter fraud and mirror Missouri's processes); D111, *NAACP Minnesota-Dakotas Area State Conf. v. Minnesota*, No. 62-CV-20-3625, at 11 (Minn. Dist. Ct. Aug. 3, 2020) (rejecting contentions that failed to "demonstrate[] *how* the waiver of the witness requirement … would undermine electoral integrity" when "nothing in the record … suggests that … would result in fraud" and "there are safeguards in place to prevent such fraud, which is punishable as a felony"); *Greidinger v. Davis*, 988 F.2d 1344, 1355 (4th Cir. 1993) (holding that voting restriction imposed an unconstitutional "intolerable

burden on [the] fundamental right to vote" because "the same state interest [in preventing voter fraud] could be achieved" by other means, including "the use of a voter registration number").

Missouri's safeguards include requirements that a voter must apply for an absentee or mail-in ballot in writing and sign the application, attesting, under oath, they are who they say they are, subject to criminal penalties. *See* § 115.279 (2), (4); § 115.302 (2), (4); Section IX(D), *supra* at 117-118. In addition, upon receiving the ballot, a voter must attest to their identity again on the ballot envelope, subject to the penalty of perjury. *See id; see also* § 115.291.1; §115.302 (6)-(7). Moreover, only the voter can return a mail-in ballot and only a voter or close relative may return an absentee ballot. §§ 115.291 (2); 115.302 (12).

In addition to these safeguards, Missouri criminalizes a broad range of fraudulent behavior associated with remote voting. For example, it is a class-one election offense to fraudulently make, deliver, or mail a fraudulent absentee or mail-in ballot and/or application; aid, abet, or advise another person to vote illegally; or alter any ballot that has been voted. §§ 115.279(4); 115.302(4); § 115.302 (19).

Given the efficacy of such safeguards, Missouri is one of just three states to impose a notary requirement. Yet there is no appreciable difference in the rarity of absentee ballot fraud in states that do, or not, require notarization. Most states, including those with far more remote voting, do not have a notary requirement and still have "no reported incidents of election fraud." *Paher,* 2020 WL 2089813, at *1. The anecdotal

hearsay reports of absentee ballot fraud, which the trial court erroneously relied on, are largely accounts from other states with different remote voting regimes and, thus, tell us little about any need for a notary requirement in Missouri. Tellingly, Respondents presented no evidence about notary requirements or the other safeguards to prevent fraud in the states from which they drew their tales. Indeed, Dr. Milyo admitted he had no knowledge whatsoever of Missouri's abundant, existing safeguards. D155 pp. 206:5-19; 212:12-214:2.

In wrongly concluding the notary requirement is a "necessary" security measure, the trial court accepted wholesale Respondents' representation that Appellants could "not identify any other statute that serves the critical function of verifying the identity of the person who actually finalizes and submits the filled-out ballot." D164 p.17. This overlooks significant evidence. Local election authorities testified that the affidavit that the voter must sign when submitting an absentee or mail-in ballot attests to their identity and verifies that the person submitting the completed ballot is the voter. Indeed, this is the form of identity verification used for remote ballot applications. D157 p. 115:5-15; D148 p. 63:4-69:25; *see also* § 115.279.2; § 115.279.4; § 115.302.2; § 115.302.4. It is also the form of identity verification the State has deemed adequate for the enormous number of voters exempted from the notary requirement. And to even get a ballot in the first instance, the voter needs to provide personal identifying information that LEAs verify against the voter's record in the MCVR to ensure that the voter is eligible. D157

pp. 115:5-15; 108:12-24, 109:3-10; D148 pp. 35:21-37:11; 63:4-69:25; D153 pp. 30:6-32:16; 33:1-34:4.

The weight of the record evidence establishes that the State's "incremental interest in … (the [] notary rule) is marginal at best." *CC-RI*, 970 F.3d at 15. As Respondents' designated corporate witness conceded, the notary requirement is merely "*another layer of protection* for the voters so that the voter and the person … requesting the ballot is, in fact, the person that is receiving the ballot that is, in fact, the person that is casting the ballot.… *[I]t's just another layer of protection*." D157 pp. 75:17-23, 76:15-23 (emphasis added). The mere contention that a voting requirement "may provide some additional protection against" fraud does not make it "necessary" to deter fraud. *Weinschenk*, 203 S.W.3d at 217. The notary requirement's heavy burdens during the ongoing state of emergency is not justified by an unnecessary function that even Respondents' witness likens to belts-and-suspenders.

iv. The record establishes that the notary requirement does not match the State's purported interest in combatting absentee ballot fraud.

Even for the exceedingly rare instances of absentee ballot fraud that have occurred in Missouri, the evidence shows that the notary requirement is not a solution. As Respondents concede, almost all actual occurrences of absentee ballot fraud feature "perpetrators who are candidates, campaign workers, or political consultants, not ordinary voters." D164 p. 17; *see also* D156 pp. 48:16-49:2.

Yet, the State's response to fraud by *non-voters* is to require *voters* to undergo notarization during a pandemic, not to target corrupt political actors. The notary

requirement is no deterrent for these "corrupt politically motivated actors." For example, in the 1980 case of Sorkis Webb, a political campaign employed corrupt notaries to notarize ballots. D156 pp. 68:21-69:14.[18] Missouri's notary requirement is impotent against a political campaign motivated to target vulnerable populations, such as the elderly or those incapacitated due to illness or disability who are *exempt* from the notary requirement. *See* § 115.277 (2),(7). In any event, as one local election authority representative testified, where campaigns are motivated to commit election fraud, "based on my experience, an -- an unscrupulous notary would have been used." *See* D148 pp. 69:7-10, 79:9-18.

Despite this evidence, the trial court nevertheless erroneously concluded that the notary requirement is "precisely tailored" to the State's interests in combating election fraud, accepting Respondents' unproven premise that the "notarization requirement would make techniques of ballot-harvesting and signature-forging employed in absentee ballot fraud cases harder to employ and easier to detect." D164 p. 17. The trial court relied on Dr. Milyo, but the record demonstrates, and the expert admits, his opinion is based on no analysis. Indeed, the record contains not a scintilla of statistical or empirical evidence that the notary requirement reduces voter fraud.

[18] The lower court's opinion made no reference to the ongoing prosecution of Ted Hoskins, so that is of no relevance here. Respondents' heavy reliance on that matter is misplaced in any event, because it concerned elderly voters who were exempt from the notary requirement under § 115.277.1(2) because they are incapacitated, and who would also be exempt under § 115.277.1(7).

Respondent's expert admitted he failed to compare the incidence of election fraud in states that have a notary requirement versus states that do not. *See* D155 p. 198:6-11. He also confirmed that he had not conducted or cited to any research showing that the notary requirement reduces incidence of illegal voting. D155 p. 271:7-16; *see also* D155 p. 272:12-19; *see also* D155 pp. 204:13-205:10, 239:4-14. Nor did he consider any of the other safeguards against absentee voter fraud Missouri has. D155 p. 206:5-19; *see also* D155 pp. 212:12-214:2. The trial court erred in accepting Dr. Milyo's assertion that the notary requirement furthers the goal of reducing absentee ballot fraud by corrupt politically motivated actors because nothing in the record supports it.

Even were the trial court correct that the notary requirement furthers the goal of reducing absentee ballot fraud, such benefit is—given Missouri's own history—marginal at best. As discussed, such a marginal benefit cannot justify the severe burdens that the notary requirement places on voters during the ongoing pandemic.

This is especially true given that the trial court itself identified measures that would be both less burdensome for voters and much more "precisely targeted" at the political actors, who Respondents concede perpetrate "virtually all" absentee ballot fraud. D92 p. 25. These include imposing heavier criminal penalties and devoting more resources to investigating and prosecuting fraud. The availability of these more tailored alternatives that would not burden voters is further evidence that the notary requirement is not narrowly tailored.

v. The notary requirement is not narrowly tailored because it is both too restrictive and not restrictive enough.

The record also establishes that the notary requirement is not narrowly tailored because it is "'both too restrictive and not restrictive enough to prevent voter fraud.'" *LWV Va. I*, 2020 WL 2158249, at *8 (quoting *N.C. State Conf. of NAACP v. McCrory*, 831 F.3d 204, 235 (4th Cir. 2016)).

First, Missouri has alternative measures to further its interest in providing "another layer" of identity verification that it could have adopted that are substantially less burdensome on voters during the pandemic. *See, e.g.*, *Republican Party of Minn. v. White*, 416 F.3d 738, 751 (8th Cir. 2005) ("A narrowly tailored regulation is one that … could be replaced by no other regulation that could advance the interest as well with less infringement" on the right."). For example, the record shows that every LEA can verify voters' identities by cross-referencing the voter's signature on file in the MCVR with the signature on a voter's application or ballot.[19] Indeed, the record establishes that at least some LEAs already do this for absentee and mail in ballots, and that all LEAs perform a signature match when assessing provisional ballots cast due to lack of identification.

In addition, because the MCVR contains a wide range of voters' personal identification information, such as their name, address, date of birth, last four digits of

[19] Unlike the notary requirement, signature verification of this sort would have the added benefit of verifying the identity of the individual signing the ballot affidavit against the signatures in the voter's voter file in MCVR, which a notary does not have access to.

their social security number and drivers' license number, Missouri LEAs could readily cross-reference that information.

Second, the notary requirement is also underinclusive in that it does not apply to all voters seeking to vote by mail, exempting large classes of voters, including those voting under the confinement-due-to-illness-or-disability and the new "at risk" bases for voting absentee. § 115.277. Respondents offer no explanation how the notary requirement is "strictly necessary" to advance the State's interest preventing absentee ballot fraud when it exempts from the requirement hundreds of thousands of voters. The lower court suggests that exemptions wide enough to drive a truck through somehow make the notary requirement *more* narrowly tailored. Respondents, however, offered no evidence, or plausible explanation, to demonstrate that voters who are exempted from the notary requirement are somehow much less likely to commit absentee ballot fraud than those voters subject to the requirement.

To be sure, the State asserts, and the trial court accepted, that there is rational basis for exempting such voters—namely that the notary requirement is more difficult for those voters to satisfy. But, putting aside the fact that the continuing transmission of COVID-19 renders the notary requirement difficult for *all* voters, this explanation says nothing about why the requirement is thus *necessary* for fraud prevention. If anything, these exemptions to the requirement show that other measures are sufficient to protect the State's interest.

vi. The notary requirement does not increase voter confidence in the election process.

While not a State interest clearly asserted by Respondents, the trial court thought the notary requirement also furthers a state interest of increasing public confidence in the election process. *See* D164 p.15. There is, however, no evidence in the record to support that conclusion.

Respondents identified no empirical evidence that the notary requirement increases voter confidence. *See* D155 pp. 281:6-282:11. Nor did Respondents or their expert conduct a survey or interview voters to determine whether Missouri's notary requirement increases voter confidence. *See* D155 pp. 281:6-282:11. Indeed, Dr. Milyo suggests that voters are "rationally ignorant" of the notary requirement, which further undermines any suggestion that voters have increased confidence because of its existence.[20] *See* D155 pp. 117:22-118:16.

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[20] To the extent voters have any less confidence in the absentee or mail-in voting process, it appears that this is due to Respondents' actions and the confusing nature of the absentee and mail-in ballot regimes adopted by the legislature—not any concerns of purported fraud. Any need to improve voter confidence is an issue of the State's own making and cannot justify imposing unnecessary burdens on voters. *Cf. Kobach*, 309 F. Supp. 3d at 1113 (holding that where law is confusing and results in disenfranchisement of otherwise eligible voters, it "may have the inadvertent effect of eroding, instead of maintaining, confidence in the electoral system").[21] None of the cases the trial court cites reached the question presented in this appeal—whether statutory requirements for absentee or mail-in ballots can, as applied by the State during a public health emergency, impose unconstitutional undue burdens on voters avail themselves of these options for voting after they are allowed by statute. Even a "privilege," once codified in statute, must be administered by the State in a manner that avoids violating the constitutional rights of Missourians. None of the cases cited by the trial court hold otherwise. *Straughan v. Meyers*, 268 Mo. 580 (1916), is the only precedent of this Court cited by the trial court (continued…)

The weight of the evidence establishes that absentee ballot fraud is extremely rare and that Missouri has other security measures in place that successfully detect and deter absentee ballot fraud (solely upon which the State relies for large groups of voters), rendering the State's interest in the notary requirement "marginal" at best. *See Middleton*, 2020 WL 5591590 at *31. As such, the State's interest in the notary requirement is not sufficiently weighty to justify the severe burden it imposes on voters during the COVID-19 pandemic. *Id.*

B. Missouri's Notary Requirement Fails Even Rational Basis Review.

Even if the Court were to conclude the notary requirement does not impose a heavy or severe burden, the notary requirement still could not stand because the requirement is not "rationally related" to the State's proffered interests as '"a reasonable way of accomplishing this goal."' *See Priorities USA,* 591 S.W.3d at 453. As explained, the State imposes the notary requirement on an arbitrary subset of registered voters. The State has not, and cannot, identify any rational basis for requiring ballot notarization for voters who wish to vote by mail but do not qualify for one of the exemptions (*e.g.*,,

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for the proposition that voting by mail-in ballot or absentee ballot is a "privilege." But *Straughan* merely held that a statute providing for absentee voting outside a voter's election jurisdiction was not unconstitutional and that failure to fulfill all statutory requirements would vitiate an absentee ballot. The *Straughan* court was not presented with, and did not decide whether the statutory requirements at issue in that case were unconstitutionally burdensome. All of the other precedents cited by the trial court similarly involved post-election challenges to including (or excluding) from election results absentee ballots that complied with fewer than all of the statutory requirements. None directly or indirectly addressed the question presented here of whether the application of a statutory requirement can constitute an unconstitutional burden in particular circumstances.

exempting a healthy 65-year-old but not a Black, 64-year-old severely obese Missourian with hypertension). *See Ambers-Phillips v. SSM DePaul Health Ctr.*, 459 S.W.3d 901, 912 (Mo. banc 2015) (a statute fails rational basis review if it "rests on grounds wholly irrelevant to the achievement of the state's objective").

The record evidence also demonstrates that the arbitrary distinctions between who does, or does not, have to notarize their ballots are confusing, resulting in the needless disenfranchisement of voters like the Casebolts. D145 pp. 15:8-18:17, 19:9-17, 20:17-22:17, 23:10-26:6; D143 pp. 65:19-66:5 (Dr. Barreto testifying that ""[T]here is a lot of confusion into the differences between absentee and mail-in ballots. They – voters are unsure of what exact rules apply to each of those and what they need to do to comply with them. They sound very similar in the mind of voters."); Plt. Ex. 009 (Barreto Ex. 1); Plt. Ex. 010 (Barreto Ex. 4); Plt. Ex. 012 (Barreto Ex. 6). Such a "confusing" and "ambiguous" mail voting regime cannot survive even rational basis review. *Priorities USA,* 591 S.W.3d at 455 ("Although the State has an interest in combatting voter fraud, requiring individuals … to sign a contradictory, misleading affidavit is not a reasonable means to accomplish that goal").

SB 631 was passed to provide some voters with alternatives to in-person voting on Election Day. The notary requirement, however, continues to require voters to put their health or the health of their loved ones at-risk. Requiring voters to risk such exposures at a notary's office or to return to the crowded, indoor polls to vote in person—defeats the very purpose of providing the alternative. Putting Missouri voters in an impossible

position is not a reasonable way to combat purported fraud, or to instill confidence in the electoral system. *See, e.g.*, D111, *NAACP Minnesota-Dakotas*, No. 62-CV-20-3625, at 21 (holding that a law that requires "voters ... to place their lives and health in danger" to secure a witness to their ballot during the pandemic "in order to exercise their fundamental right to vote … would likely not survive even the lowest level of scrutiny").

IV. The trial court erred in entering judgment against Appellants on Count II because Article VIII, § 7 does not foreclose Appellants' claims under Article I, § 25, in that Article I, § 25 applies under the circumstances of this case to Appellants challenges to voting requirements as applied during the COVID-19 pandemic, Article VIII, § 7 is not related to mail-in voting, and the court's position that the law is unreviewable and the state has unlimited discretion related to the requirements associated with absentee and mail-in voting cannot be reconciled with Missouri law.

Standard of Reivew

"Statutory interpretation is an issue of law that this Court reviews *de novo*." *State v. Richey*, 569 S.W.3d 420, 423 (Mo. banc 2019).

Argument

The trial court erred in concluding that Article VIII, § 7 forecloses Count II. The trial court essentially and erroneously held that in the realm of remote voting, the legislature could impose any restriction whatsoever, free from this Court's scrutiny. D164 pp. 10-11 (opining that "[b]ecause there is no constitutional right to vote by mail at all, *a fortiori* there is no constitutional right to vote by mail" and questioning whether "any scrutiny applies … to voting by mail."). It is not and cannot be Missouri law that once the legislature provides for voters to use absentee or mail-in ballots, that it can then burden that exercise of the franchise however it sees fit, no matter the circumstances.

The trial court's extraordinary, formalistic finding is irreconcilable with this Court's precedent, including *Weinschenk* and *Priorities*. Those and other cases make clear that when the fundamental right to vote is at issue, "Missouri courts first evaluate the extent of the burden imposed by the statute." *Priorities*, 591 S.W.3d at 452-53; *see*

Peters, 489 S.W.3d at 273 ("[I]t is the *severity of the burden* on the asserted constitutional rights that produces the level of scrutiny …."). If a statute imposes a "substantial" or "severe" burden on the right to vote, it is subject to strict scrutiny. *Weinschenk*, 203 S.W.3d at 215-16 (noting that Missouri courts "have uniformly applied strict scrutiny to statutes impinging on the right to vote"). On the other hand, reasonable regulations of the voting process that do not impose a heavy burden on the right to vote are reviewed under a rational basis standard and "will be upheld provided they are rationally related to a legitimate state interest." *Id.*

As an initial matter, Article VIII, § 7 is limited to "absentee voting." By its plain terms, § 7 concerns "absentee" ballots and has no bearing on Appellants' claims insofar as those claims relate not to absentee ballots, but to *mail-in ballots*. Mail-in ballots are *not* "absentee" ballots, and do not require voters to have a reason to be "absent" from the polls; they were provided to enable all Missouri voters to by mail so they could "avoid the risk" of contracting COVID-19. Neither Respondents nor the trial court have offered a persuasive justification as to why the Court should ignore the express terms of § 7 and apply it to what the legislature deemed a completely different type of voting with distinct qualifications and requirements.

More broadly, the trial court's position misapprehends the basis of Appellants' claims. Appellants have not alleged that the notary requirement restricts a free-standing, pre-existing constitutional right to cast an absentee ballot or a mail-in ballot. Rather, Appellants argue that the notary requirement, as applied during this public health crisis,

constitutes a severe burden on their constitutional right to vote, triggering strict scrutiny. *See Weinschenk*, 203 S.W.3d at 215-16; *see also, e.g.*, *Citizens for Legislative Choice v. Miller*, 144 F.3d 916, 921 (6th Cir. 1998) ("[A] law severely burdens voting rights if the burdened voters have few alternate means of accessing the ballot," because it "impermissibly restricts 'the availability of political opportunity.").

Nevertheless, the trial court concluded that Article VIII, § 7 affords the legislature complete discretion over the absentee and mail-in ballot voting processes. In doing so, the trial court appears to hold that all challenges to laws relating to absentee voting are foreclosed as a matter of law because *any* review, let alone the *Weinschenk* tiers-of-scrutiny framework, would be too much—no matter what the context. This conclusion is extraordinary 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).

The trial court's conclusion also cannot be squared with this Court's precedents. In *Priorities*, this Court 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. Both constitutional provisions indicate the Legislature "may" pass certain

forms of legislation; neither provision exempts such legislation from the standard levels of constitutional scrutiny. *Compare* Mo. Const. Art. VIII, § 7 ("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"), *with* 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."). The notion that the word "may" requires Missouri courts to defer entirely to the State here, without considering the burden on voters, is irreconcilable with *Priorities*, and bedrock constitutional law.

The trial court's reliance on the notion that absentee voting is not a constitutional right does not change the analysis.[21] *See, e.g.*, *Fisher v. Hargett*, 604 S.W.3d 381, 401

[21] None of the cases the trial court cites reached the question presented in this appeal—whether statutory requirements for absentee or mail-in ballots can, as applied by the State during a public health emergency, impose unconstitutional undue burdens on voters avail themselves of these options for voting after they are allowed by statute. Even a "privilege," once codified in statute, must be administered by the State in a manner that avoids violating the constitutional rights of Missourians. None of the cases cited by the trial court hold otherwise. *Straughan v. Meyers*, 268 Mo. 580 (1916), is the only precedent of this Court cited by the trial court for the proposition that voting by mail-in ballot or absentee ballot is a "privilege." But *Straughan* merely held that a statute providing for absentee voting outside a voter's election jurisdiction was not unconstitutional and that failure to fulfill all statutory requirements would vitiate an absentee ballot. The *Straughan* court was not presented with, and did not decide whether the statutory requirements at issue in that case were unconstitutionally burdensome. All of the other precedents cited by the trial court similarly involved post-election challenges to including (or excluding) from election results absentee ballots that complied with fewer than all of the statutory requirements. None directly or indirectly addressed the (continued…)

(Tenn. 2020) ("Characterizing absentee voting by mail as a 'privilege' begs the question of whether, under some circumstances, limitations on this lawful method of voting can amount to a burden on the right to vote itself. The answer to that question must be yes."). Numerous courts have held that restrictions on various forms of remote voting can constitute an unconstitutional burden on the right to vote. 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 held that the deadline imposed a substantial burden and applied heightened scrutiny in ruling for plaintiffs. *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 concluded 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.

More recently, courts have found that in the wake of the COVID-19 pandemic, when in-person voting at the polls poses substantial health risks, restrictions on the right to cast a mail-in or absentee ballot are tantamount to a restriction on the fundamental right to vote. *See, e.g.*, *Thomas*, 2020 WL 2617329, at *17 n.20 ("[D]uring this

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question presented here of whether the application of a statutory requirement can constitute an unconstitutional burden in particular circumstances.

pandemic, absentee voting is the safest tool through which voters can use to *effectuate* their fundamental right to vote. To the extent that access to that tool is unduly burdened, then no matter the label, denial of the absentee ballot is effectively an absolute denial of the franchise and fundamental right to vote.") (quotations omitted); *CC-RI*, 970 F.3d at 14-15 ("The burden imposed by these [witness or notary] requirements in the midst of a pandemic is significant. First, many more voters are likely to want to vote without going to the polls and will thus only vote if they can vote by mail. Second, many voters may be deterred by the fear of contagion from interacting with witnesses or a notary. … [T]hese burdens are much more unusual and substantial than those that voters are generally expected to bear. Taking an unusual and in fact unnecessary chance with your life is a heavy burden to bear simply to vote."); *LWV Va. I*, 2020 WL 2158249, at *8 ("In ordinary times, Virginia's witness signature requirement may not be a significant burden on the right to vote. But these are not ordinary times."). The Legislature passed SB 631 explicitly so that all voters could vote by mail and "avoid the risk" of contracting and spreading COVID-19 at the polls. Yet the notary requirement embedded in the remote voting statutes imposes severe burdens on Appellants and many other Missourians, particularly those who (1) face elevated risks from COVID-19 as set forth in CDC guidelines, or who live with others facing such risks but (2) are not exempt from the notary requirement. Contrary to the trial court's opinion, nothing in Missouri's Constitution shields that requirement from the strict scrutiny that always attends severe burdens imposed on Missourians fundamental right to vote.

V. The trial court erred in finding that the organizational Appellants lack standing because there is no dispute that the individual Appellants have standing and MoNAACP and MoLWV also have associational standing, in that their members would have standing to bring suit, voting interests are germane to each organization, and the relief sought does not require participation of individual members.

Standard of Review

"Standing is reviewed *de novo*." *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 484 (Mo. 2009) (quotation omitted). "Standing requires that a party seeking relief has some legally protectable interest in the litigation so as to be affected directly and adversely by its outcome, 'even if that interest is attenuated, slight or remote.'" *Id.*

Argument

Respondents do not dispute that individual Appellants Javier del Villar and Meredith Langlitz have standing as to each claim in this case. *See* D92 pp. 35-38.[22] Because it is undisputed that the two individual appellants have standing, the trial court did not need to reach the issue of organization standing. *See, e.g.*, *Committee for Educ. Equality v. Missouri*, 294 S.W. 3d 477, 486 (Mo. banc 2009) (addressing merits because "at least one plaintiff has standing as to each claim") (citing *Massachusetts v. EPA*, 549

[22] While Respondents take the position that the allegations and relief sought in this case are not "claims" on behalf of all burdened voters but only the Appellants, that position misconstrues the actual claims in this case. If voting laws are declared unconstitutional as applied during a pandemic to either individual Appellant or the members of the organizations, then they are likewise unconstitutional as applied to any voter. *See, e.g.*, *Priorities*, 591 S.W.3d 448 (organizations and individuals, not a class, brought declaratory and injunctive relief case in which this Court affirmed a trial court finding that the affidavit requirement in the Voter ID law was unconstitutional and that ruling applied to all voters going forward).

U.S. 497, 518 (2007)); *see also Cope v. Parson*, 570 S. W.3d 579, 584 (Mo. banc 2019) ("[I]n light of the holding that [an individual plaintiff] has standing to proceed, the question of [] associational standing need not be addressed.") (citing *Mo. Coal. for Env't v. Joint Comm. on Admin. Rules, 948 S.W.2d 125, 132*); *Mo. Coal. for Env'ts*, 948 S.W.2d at 132 (Mo. banc 1997) ("Because we have found that the individual relators have personal standing, the question of whether the coalition can assert such 'associational' standing is moot and need not be addressed." (citation omitted)).

If this Court considers the standing of the two organizational appellants, the trial court erred because both the MoNAACP and the MoLWV have associational standing.[23]

Missouri courts have long recognized that "[a]n 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 "entity has associational standing 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 in the lawsuit." *Hunt v. Washington State Apple Advertising Comm'n*, 432 U.S. 333, 343 (1977); *Mo. Bankers Ass'n v. Dir. of*

[23] The trial court also erred in holding that the organizational appellants lack organizational standing. However, in light of the trial court's clearly erroneous holding with respect to the appellants' associational standing, the issue of organizational standing need not be reached by this Court. Appellants request only that the trial court's decision on the issue of organization standing be vacated.

Mo. Div. of Credit Unions, 126 S.W.3d 360, 363 (Mo. banc 2003). Here, appellants have established associational standing because the record reflects that both the MoNAACP and the MoLWV have members who would otherwise have standing to bring this suit in their own right.[24] It is undisputed that MoNAACP and MoLWV are membership organizations whose members are of voting age and intend to vote in the November election. In addition, both organizations' representatives testified specifically about the burdens their members face related to voting during the pandemic.

MoNAACP President Chapel identified three MoNAACP members who do not fall into one of the "at risk" categories for voting absentee during the upcoming election, who are concerned that their votes will not be counted if they vote by mail without having their ballots envelopes notarized, and who are concerned that appearing in person before a notary in order to have their ballot envelopes witnessed and notarized will compromise their health and the health of their loved ones. D138 pp. 19:11-20:18, 38:18-19:6, 24:1-20, 27:3-12. Jean Dugan, Executive Director of the MoLWV , also identified individual members who fall into these categories. D139 pp. 23:15-24:22, 31:6-32:7, 32:11-34:4, 65:21-66:11.[25] Missouri courts have recognized evidence of this nature as

[24] Appellants note that the individual Appellants, Langlitz and Del Villar, whose standing Respondents do not dispute, are also members of the MoLWV and MoNAACP, respectively. Consequently, as the record reflects that these members have standing here, associational standing is cognizable.

[25] The trial court's decision with respect to Appellants' organizational standing appears to be based, at least in part, on a perceived deficiency in the nature of this evidence as (continued…)

sufficient for satisfying the first prong of the associational standing test. *See, e.g., St. Louis Ass'n of Realtors*, 354 S.W.3d at 624 (finding "the association" had adequately shown associational standing where "the government affairs director of the association testified that there are other owner-members [who would have standing in their own right], although she could not state their number.")

With respect to the second and third prongs of the associational standing test, the record reflects that the purposes and missions of both organizations encompass working to protect voting rights in Missouri, D138 pp. 14:6-15:16, 162:24-163:12; D139 pp. 15:17-16:21, 17:20-18:13, and the organizational Appellants seek a prospective remedy only, so the participation of their individual members is not needed. *See, e.g.*, *Home Builders Ass'n of Greater St. Louis, Inc. v. City of Wildwood*, 32 S.W.3d 612, 615 (Mo.

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hearsay. *See* D164 p. 30 ("Plaintiffs attempted to cure these pleading deficiencies by providing a handful of hearsay anecdotes about their alleged members through the testimony of their corporate representatives, Mr. Chapel and Ms. Dugan. Plaintiffs did not, however, attempt to address the sufficiency of these standing allegations through direct, admissible evidence, such as testimony from the members themselves—other than the members who are already participating as named Plaintiffs in this case.") Appellants note that testimony in question from Mr. Chapel and Ms. Dugan is not hearsay, but rather, reflects their direct knowledge as corporate representatives of the MoNAACP and MooLWV, respectively. Indeed, Mr. Chapel and Ms. Dugan each explained that they were testifying as corporate representatives, and that their testimony was based on their respective organization's knowledge and its business records. *See* Chapel Tr. 11:5-18; Dugan Tr. 12:19-22. Further, as the court itself noted, direct testimony from individual members of both organizations was presented through the individual named appellants. Additionally, no hearsay objection was made to much of this testimony at the time it was introduced, and Respondents cannot belatedly make such an objection for the first time on appeal.

App. E.D. 2000). For each of these reasons, the trial court clearly erred in finding that the organizational appellants lack associational standing.

VI. Relief is realistic and actually available, and *Purcell* is no barrier.

On Count II, this Court should declare the notary requirement unconstitutional as applied during the pandemic, so that neither absentee nor mail-in ballots may be rejected for lack of a notary seal. This simple relief can be readily implemented: local elections authorities cannot begin processing absentee and mail-in ballots before October 30, and the tabulation of ballots does not occur until Election Day. §§ 115.300, 115.302.18, 115.299. While some ballot envelopes may be notarized, no ballot envelopes need to be reprinted or altered, and no voter's ballot will be subject to a different standard, regardless of when she returns her ballot.[26]

The trial court misapplied *Purcell v. Gonzalez*, 549 U.S. 1 (2006), and ignored how this case differs from *Purcell*.[27] *Purcell* has never before been applied by Missouri courts, and it should not be now.[28] Moreover, *Purcell* affirmed a denial of relief to avoid

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[26] Respondents can also provide notification of this Court's ruling on their websites and conduct other outreach. *See Thomas*, 2020 WL 2617329, at *30 (enjoining witness requirement after absentee voting began and ordering defendants to inform voters about elimination of requirement in coordination with local officials, including "providing updated information regarding the instant injunction on all relevant websites and social media outlets (*i.e.*, Facebook, Instagram, Twitter, etc.) as appropriate").

[27] The suggestion Appellants delayed this matter is absurd. This case was filed in April as the COVID-19 pandemic and its effects on voting first emerged. Delay was caused by Respondents' meritless motion to dismiss and the trial court's decision to sustain it.

[28] In Missouri, decisions shortly before an election are not usual. This Court refused to stay an October 9, 2018 order enjoining enforcement of voter identification requirements. *Priorities USA v. State*, No. 18AC-CC00226 (Mo. Cir. Ct.). And, in *Weinschenk*, this Court struck down an earlier voter identification statute on October 16, 2006. *See* 203 S.W.3d at 201. A ruling that enjoins enforcement of the notary requirement would be in line with these precedents.

"voter confusion and consequent incentive to remain away from the polls." *Id*. at 4–5. That is not an issue here because the requested relief imposes no new voter requirements or changes that could push away voters. The requested relief entails *counting* certain ballots rather than discarding them. This would not incentivize voters "to remain away from the polls." *Id.* If anything, the record shows that imposing and enforcing the notary requirement imposes burdens and causes voter confusion and disenfranchisement. By contrast, the requested relief will ensure that any burdens or confusion arising from the notary requirement will not cause the disenfranchisement of would-be voters in Missouri.

Purcell is also distinguishable because that case had no evidentiary record. On appeal from denial of a preliminary injunction, two weeks before the election, the Court of Appeals enjoined the challenged law pending appeal. *See* 549 U.S. at 3. The injunction, however, was entered without factual findings, an evidentiary record, or any explanation. *Id.* at 6-7. In contrast, this Court has a full trial record on which to base relief.

Federal courts addressing similar issues at similar junctures after *Purcell* have repeatedly granted such relief. *See, e.g.*, *Martin v. Kemp*, 341 F. Supp. 3d 1326 (N.D. Ga. Oct. 24, 2018) (ordering new procedures for perceived signature mismatches on absentee ballots and applications 12 days before election), *stay denied sub nom. Georgia Muslim Voter Project v. Kemp*, Nos. 18-14502-GG, 18-14503-GG, 2018 WL 7822108 (11th Cir. Nov. 2, 2018); *U.S. Students Ass'n Found. v. Land*, 585 F. Supp. 2d 925 (E.D. Mich. Oct. 13, 2008) (halting practice of canceling voter registrations 22 days before election), *stay*

denied 546 17.3d 373 (6th Cir. 2008). Of particular relevance, a federal court recently enjoined enforcement of South Carolina's witness requirement for absentee ballots just two weeks before a primary. *See Thomas*, 2020 WL 2617329, at *30. There, as here, absentee voting had already begun. While courts may naturally weigh administrative concerns, *Purcell* does not, legally or logically, justify keeping in place unconstitutional restrictions on voting, particularly as here, where the requested relief is straightforward and effective.

Nor would timing concerns preclude relief on Count I. The deadline to request absentee ballots by mail is October 21, and absentee ballots can be requested and returned by other means through November 2, so relief on Count I also remains realistic and available.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the trial court and enter the judgment the trial court should have entered.

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on September 30, 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 30,473 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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