SC98744

IN THE SUPREME COURT OF MISSOURI

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

Appellants,

v.

STATE OF MISSOURI, *et al.*,

Respondents.

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

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

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INTRODUCTION

Voting by mail is safe in Missouri. As the Circuit Court found, "Local election authorities, supported by the Secretary of State, were able to provide a safe voting experience and will continue to do so in the upcoming general election." D164, at 3, ¶ 4. "The grave health risks asserted by Plaintiffs were not realized in the recent primary election." *Id.* ¶ 5. This "safe voting experience" includes the notarization of absentee and mail-in ballots. "Plaintiffs have failed to identify any known instance of transmission of Covid-19 during an in-person notarization, whether in Missouri or elsewhere," *id.* at 12, ¶ 29, even after thousands of ballot notarizations during Missouri's August 2020 primary. And Appellants concede that ordinary precautions like social distancing, mask-wearing, and hand hygiene—all of which are routinely and easily followed during notarizations—are "consistently effective" in preventing the spread of Covid-19.

Voting by mail for the November 3 general election commenced on September 22. Hundreds of thousands of Missouri voters have already requested and received absentee and mail-in ballots, with envelopes containing clear and emphatic instructions to notarize their ballots. Tens of thousands of Missouri voters had already cast such ballots by September 30. Granting the relief Appellants request, two weeks after voting by mail commenced, would cause confusion and

disruption, and would require the reprinting of hundreds of thousands of ballot envelopes and accompanying instructions.

Plaintiffs-Appellants Missouri State Conference of the NAACP, et al. ("Plaintiffs") have not identified any "severe restriction" or "heavy burden" on the right to vote. Substantial evidence supports the Circuit Court's finding that the health risks of in-person notarization are minimal and can be further mitigated through ordinary precautions like social distancing and mask-wearing. Missouri's notary requirement satisfies rational-basis review or any other level of scrutiny, because it is carefully tailored to prevent fraud in voting by mail. Plaintiffs' various other arguments fail. This Court should affirm the judgment of the Circuit Court.

STANDARD OF REVIEW

"The judgment in a court-tried civil case will be sustained 'unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law.'" *Lollar v. Lollar*, No. SC 97984, 2020 WL 5201213, at *2 (Mo. Sept. 1, 2020) (quoting *Murphy v. Carron*, 536 S.W.2d 30, 32 (Mo. banc 1976)). "The same standard of review applies in all types of court-tried cases regardless of the burden of proof at trial." *Ivie v. Smith*, 439 S.W.3d 189, 199 (Mo. banc 2014).

"Substantial evidence is evidence that, if believed, has some probative force on each fact that is necessary to sustain the circuit court's judgment." *Ivie*, 439

S.W.3d at 199 (citing *In re K.A.W.*, 133 S.W.3d 1, 9 (Mo. banc 2004)). "When reviewing whether the circuit court's judgment is supported by substantial evidence, appellate courts view the evidence in the light most favorable to the circuit court's judgment and defer to the circuit court's credibility determinations." *Id.* at 200 (citing *In re J.A.R.*, 426 S.W.3d at 626, 631–32 & n.14). "Appellate courts 'accept as true the evidence and inferences ... favorable to the trial court's decree and *disregard all contrary evidence*.'" *Id.* (emphasis added) (quoting *Zweig v. Metro. St. Louis Sewer Dist.*, 412 S.W.3d 223, 231 (Mo. banc 2013)). "[T]his Court has made clear that *no contrary evidence need be considered on a substantial-evidence challenge*," regardless of the burden of proof at trial. *Id.* (emphasis added). "Circuit courts are free to believe any, all, or none of the evidence presented at trial." *Id.* "In addition, Rule 73.01(c) provides that 'all fact issues upon which no specific findings are made shall be considered as having been found in accordance with the result reached.'" *Id.*; *see also* D164, at 4 ("All facts not specifically referenced are found to be consistent with and supportive of the judgment entered herein.").

In sum, "[t]o prevail on the substantial-evidence challenge, [Plaintiffs] must demonstrate that there is *no evidence in the record tending to prove a fact* that is necessary to sustain the circuit court's judgment as a matter of law." *Ivie*, 439 S.W.3d at 200 (emphasis added). Plaintiffs' brief persistently disregards this substantial-evidence standard, which is deferential to the Circuit Court's factual

findings. In their entire 116-page brief, Plaintiffs never attempt to satisfy this rigorous standard for overturning any of the Circuit Court's factual findings; instead, they invariably point to other evidence that they contend supports their preferred facts. *See, e.g.*, App. Br. 9-29. But, in a substantial-evidence challenge, "[a]ppellate courts … disregard all contrary evidence," and "no contrary evidence need be considered on a substantial evidence challenge." *Id.* As in *Ivie*, Plaintiffs have "ignored this Court's standard of review" for factual findings in court-tried cases. *Id.* This Court should take the trial court's factual findings as established on appeal.

Plaintiffs concede that the substantial-evidence standard applies in this case, though they otherwise ignore it. *See* App. Br. 49, 59-60. Instead, Plaintiffs make a more limited argument that this Court should not defer to the trial court's *credibility determinations* because the trial witnesses supposedly "did not appear before the court." App. Br. 59 (citing *Isom v. Dir. of Revenue*, 705 S.W.2d 116, 117 (Mo. App. W.D. 1986)). This argument is meritless. To accommodate *Plaintiffs'* request for an accelerated resolution of the case, the Circuit Court permitted the parties to submit *videotaped* deposition testimony in lieu of live testimony, which included many hours of direct and cross-examination. The Circuit Court explicitly noted in its judgment that it had reviewed the videotaped testimony. D164, at 3 ("After reviewing hours of expert testimony…").

In *Isom*, the case was tried solely on stipulations without testimony of any kind, and thus "there was no assessment of credibility because the witnesses did not appear, there was no cross-examination and no opportunity for the trial court to observe the demeanor of the witnesses." *Isom*, 705 S.W.2d at 117. The opposite is true here—the witnesses did "appear" through videotaped testimony, there was extensive cross-examination, and there was a full "opportunity for the trial court to observe the demeanor of witnesses." *Id.* *Isom* thus confirms that this Court should defer to the trial court's credibility determinations, consistent with black-letter law that applies in court-tried cases. *See Ivie*, 439 S.W.3d at 200; *see also In re J.A.R.*, 426 S.W.3d 624, 626 (Mo. banc 2014) ("Appellate courts will defer to the trial court's credibility assessments. When the evidence poses two reasonable but different inferences, this Court is obligated to defer to the trial court's assessment of the evidence.").

STATEMENT OF FACTS

Appellants' Statement of Facts is neither accurate nor complete. Mo. Sup. Ct. R. 84.04(f). In particular, Plaintiffs' presentation of the facts persistently ignores this Court's well-established standard of review in substantial-evidence challenges.

A. Facts Relating to the Health Risks of In-Person Notarization.

First, Plaintiffs offer their preferred "facts" regarding the health risks of in-person notarization. App. Br. 9-15. But in its Judgment, the Circuit Court made its

own series of factual findings regarding the health risks of voting, especially in-person notarization, during the Covid-19 pandemic. "The risks of contracting COVID-19 from getting one's mail-in ballot notarized is somewhere between zero (maintaining a quarantine status) and that of in person voting on election day." D164, at 3, ¶ 1. "The employment of mitigation measures such as social distancing, wearing of masks and hand hygiene are practically achievable, not burdensome and will significantly reduce whatever health risk there is in getting one's mail-in ballot notarized." *Id.* ¶ 3. "Local election authorities, supported by the Secretary of State, were able to provide a safe voting experience and will continue to do so in the upcoming general election." D164, at 3, ¶ 4. "The grave health risks asserted by Plaintiffs were not realized in the recent primary election." *Id.* ¶ 5.

"Plaintiffs have failed to identify any known instance of transmission of Covid-19 during an in-person notarization, whether in Missouri or elsewhere." *Id.* at 12, ¶ 29. "The representative of the National Notary Association is also unaware of any known case of transmission of Covid-19 through notarization." *Id.*

"Plaintiffs' health evidence suffers from … critical deficiencies." *Id.* at 12, ¶ 30. "Plaintiffs' expert, Dr. Babcock, concedes that social distancing and other prudent precautions such as mask-wearing and hand hygiene are 'consistently effective' in preventing the spread of Covid-19." *Id.* at 12-13, ¶ 30. "There is no evidence that any voter would be prevented from pursuing such prudent precautions

in their brief interactions with a notary, which the evidence shows would last 5 minutes or less." *Id.* at 13, ¶ 30. "[I]t is not a 'severe' burden to observe social distancing, mask-wearing, and hand hygiene during one's interaction with a notary." *Id.* "Plaintiffs' expert, Dr. Babcock, did not demonstrate any significant familiarity with the notarization process," and thus "failed to provide any informative opinion about the health risks *from notarization*." *Id.* at 13, ¶ 31. Further, "notaries have the same interests in reducing the risk of acquiring COVID-19 as their client population and are likely to employ mitigation measures as well." *Id.* at 4, ¶ 10.

In light of these facts, the Circuit Court found that "[t]he notarization requirement for mail-in ballots does not present a substantial or severe burden upon the right to vote." *Id.* at 4, ¶ 13.

Substantial evidence in the record supports all these factual findings. Plaintiffs admit that there is no "evidence documenting a specific transmission of COVID-19 from an in-person notarization." App. Br. 66. Plaintiffs' expert, Dr. Babcock, also admitted that she is not aware of any evidence of Covid-19 transmission during the August 2020 primary election. D142, Babcock Dep. 185:23-186:6.

Dr. Babcock did not dispute that social distancing, mask-wearing, and hand hygiene can easily be practiced by the applicant during the interaction required to notarize a ballot envelope. Def. Ex. 17 (Babcock Ex. 25) at 28:18-29:12. On June

8, 2020, Dr. Babcock filed an amicus brief in this Court in the prior appeal in this case arguing that social distancing is a "consistently effective method" of preventing the spread of Covid-19, that Covid-19 "can be effectively prevented only through social distancing," and that "social distancing and related strategies are … known effective measures for preventing the spread of the virus." Def. Ex. 15 (Babcock Ex. 21), at 4, 5, 10. Her amicus brief clearly defined "social distancing" as "maintaining at least six feet of distance between individuals." *Id.* at 13.

In her trial testimony, Dr. Babcock agreed that she adheres to the opinions stated in her amicus brief that social distancing measures are "consistently effective" in preventing the spread of Covid-19. D142, Babcock Dep. 113:7-13. She agreed that social distancing, understood as "wearing a mask and keeping six feet of distance from other people," is effective in preventing the spread of Covid-19, and that she "agree[s] with the sentence" in her amicus brief that such measures are effective in preventing the spread of Covid-19. *Id.* 114:3-7, 114:22-115:4.

Dr. Babcock had only one personal notarization experience, D142, Babcock Dep. 146:21-147:1, and she admitted that the process of notarizing one document "only took a couple of minutes for each piece of paper," *id.* 148:1-2, and identity verification took "probably about a minute," *id.* 149:2. She admitted that she "actually do[es] not know if [notaries] are required to look at the document that is being put in in the envelope," *id.* 155:12-14, and she was "not entirely positive . . .

what pieces of the process the notary has to observe and confirm and what – so it's hard to give an estimate of exactly what time that would be." *Id.* 223:3-7. Moreover, Plaintiffs' expert Dr. Barreto admitted that notarizing a document takes "probably around five minutes." D143, Barreto Dep., 260:17.

Defendants' expert, Dr. Klausner, also provided testimony supporting the Circuit Court's factual findings. Addressing Plaintiffs' concern of spreading Covid-19 by touching common surfaces during notarization, Dr. Klausner testified that the spread of Covid-19 through surfaces and other non-respiratory spread is not well-documented and "is not thought to be the main way the virus spreads." Def. Ex. 85 (Klausner Ex. 2). Further, based on the data Dr. Klausner reviewed, the reproduction number of Covid-19 for the St. Louis metropolitan area as of September 9, 2020 was 1.02, which represents "that the epidemic is steady, it is not increasing, it is not decreasing, and the curve of hospitalizations would be flat." D152, Klausner Dep., 61:5-7.

Unlike Dr. Babcock, Dr. Klausner is very familiar with the standard requirements for notarization: personal appearance, identity verification, signing the document, the notary's application of the stamp, and signing the notary's logbook. D152, Klausner Dep., 104:22-106:17. Dr. Klausner testified that the average notary experience is about 5 to 10 minutes. *Id.* 106:20-23. Based on his medical knowledge, his testimony, his own personal experiences of notarization, and his

review of Missouri's notarization process, Dr. Klausner provided the expert medical opinion that "*the risk of contracting Covid-19 in the notarization experiences would be very low*." *Id.* 107:3-5 (emphasis added). The Circuit Court was entitled to credit this opinion.

Further, Bill Anderson, the representative of the National Notary Association, testified that his professional association provides detailed guidance to notaries about Covid-19 mitigation measures to follow during notarization, and that he was not aware of any reported cases of Covid-19 transmitted from notarization anywhere in the United States. D141, Anderson Dep. 41:5-8, 42:13-16; Def. Ex. 13, 14 (Anderson Ex. 2, 3).

B. Facts Regarding the Availability of Notaries.

Next, Plaintiffs offer "facts" suggesting that notaries are scarce during the Covid-19 pandemic. App. Br. 16-17. Regarding the availability of notaries, the Circuit Court found that "[n]otaries are available throughout the state and the six week interval for mail-in and absentee voting provides extra time to find an utilize the services of a notary." D164, at 4, ¶ 9. "There are tens of thousands of notaries available in Missouri to notarize absentee ballots—including 23,000 fully available, and 44,000 with at least partial availability, based on Plaintiffs' own estimates—including hundreds of volunteers in the Secretary of State's volunteer program, as well as free notarization offered by local election authorities, public libraries, and

other government offices throughout the State." D164, at 25-26, ¶ 68. "[N]o named plaintiff alleges that he or she had difficulty locating an available notary." *Id.* at 26, ¶ 69. "The Secretary of State's office has arranged for hundreds of free volunteer notaries across the State, including notaries at over 60 public libraries and many government offices in every significant population center across the State." *Id.* "Moreover, as the LEA representatives testified, 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." *Id.* Based on Plaintiffs' evidence, "the lowest 'notary access' county in Missouri (McDonald County) has 126 notaries in a single rural county—hardly a crisis of unavailability." *Id.*

Substantial evidence supports all these factual findings. Dr. Barreto agreed that "the Secretary of State maintains a free notary list on its website," which had "around 240" free notaries who had volunteered to notarize ballot envelopes without charge at the time of Dr. Barreto's deposition. D143, Barreto Dep., 152:21-153:4. Dr. Barreto agreed that free notarization of absentee and mail-in ballots is available at public libraries across the State of Missouri, including during regular business hours and evening hours, but he did not ask any questions about free notarization at libraries in his survey of voters. *Id.* 237:23-239:24, 241:5-16. The Secretary of

State's list then included at least 60 public libraries across the State, and it includes many more now.[1]

Dr. Barreto agreed that, even on the basis of his own estimates, there are about 23,000 notaries in Missouri who are operating at full capacity, will take increased clients, and will notarize absentee ballots. D143, Barreto Dep., 300:7-12. Dr. Barreto also agreed that, based on his own estimates, there are another 15,800 notaries in Missouri who are willing to notarize absentee ballots on "some limited capacity basis." *Id.* at 300:13-23. He also agreed that there are another 5,000 notaries, based on his estimates, who will notarize ballot envelopes for select clients. *Id.* at 306:3-13. Thus, even based on Dr. Barreto's estimates, there are at least 44,000 notaries in Missouri who are available to notarize ballot envelopes in some capacity, including 23,000 who are willing and available to do it at full capacity. *Id.* at 307:14-25.

Seventy-four percent of the voters in Dr. Barreto's survey stated that they already knew where notary public services were available in their community without doing any research. *Id.* at 267:24-268:16; Def. Ex. 118 (Barreto Ex. 1),

[1] As the Circuit Court noted, the number of volunteer free notaries in the Secretary of State's program grows on a daily basis. As of October 1, 2020, there were 390 free volunteer notaries in the Secretary of State's program, including many public libraries and government offices across Missouri. *See* Mo. Sec'y of State, *Free Mail-In and Absentee Ballot Notary Information* (visited Oct. 1, 2020), *at* https://www.sos.mo.gov/elections/MailinNotary.

appx. B.1, Q19. Dr. Barreto testified that there was "low access" to notaries in rural counties, but even the lowest access counties had on average 137 notaries per 18,000 people. D143, Barreto Dep. 336:22-339:7. The lowest access county, under Dr. Barreto's calculations, is McDonald County, which has 126 notaries. *Id.* at 343:19-344:1.

Moreover, it is common practice for election jurisdictions to notarize ballots for voters. D148, Fey Dep., 129:10-13. The St. Louis County Board of Elections and Boone County Clerk's Office have notaries on staff who are able to notarize absentee and mail-in ballots. *Id.* at 102:8-19; D153, Lennon Dep., 72:19-73:10. The St. Louis County Board of Elections' staff notarized hundreds of ballots for the June and August 2020 elections. D148, Fey Dep., 102:20-103:10. In addition, many private and civic organizations—including Plaintiff the League of Women Voters—are providing free, accessible notary services. *See, e.g.*, Dugan Dep. 153:10-154:12 (describing the LWV's free notarization services that observe CDC precautions regarding social distancing).

C. Facts Regarding the Use of Photo ID During Notarization.

Next, Plaintiffs offer "facts" regarding the use of photo ID during notarization. App. Br. 17-19. The Circuit Court made factual findings on this point as well. The Court found that "96 percent of respondents to Dr. Barreto's voter survey stated that they have a photo ID with signature." D164, at 23, ¶ 61. "None of the named

plaintiffs in this case alleges that they lack a photo ID, and they have no standing to assert the interests of other, unidentified Missouri voters." *Id.* "[T]he Missouri statute governing notarizations provides three alternative methods of verifying identification to a notary for someone who lacks a photo identification: (1) personal knowledge of the notary, (2) attestation of someone who knows both the notary and the individual, and (3) attestation of two persons who do not know the notary but know the individual." *Id.* (citing § 486.600(21), (23), RSMo). "Dr. Barreto asked no questions about these alternative methods of verifying identity in his notary and voter surveys, and Plaintiffs have submitted no evidence about any putative burdens or difficulties that these alternative methods might of notarization impose on voters who lack a photo identification—indeed, they submitted no evidence on this point at all." D164, at 23, ¶ 62.

Again, substantial evidence supports all these findings. In response to Questions 26 and 27 of the voter survey, 93 percent of voters stated that they had a state-issued photo ID card, and another 3 percent of voters stated that they had another form of photo identification the included photo and signature, for a total of 96 percent of voters who had a photo ID of some kind. D143, Barreto Dep. 269:18-270:23; Def. Ex. 118 (Barreto Ex. 1), appx. B.1, Q26-Q27. Missouri law provides for multiple alternative avenues to notarize a document for an individual who does not have a photo ID, including attestation of identity by persons who personally

know the individual and personal knowledge of the notary. § 486.600(21), (23), RSMo. Dr. Barreto did not ask voters any questions about their ability to obtain notarization through those alternative avenues. Def. Ex. 118 (Barreto Ex. 1), appx. B.1, Q25-Q29. Plaintiffs' questions to notary witnesses, likewise, referred generally to the request for photo identification which occurs in the vast majority of notarizations, but they asked no questions to notaries about the availability of alternative methods of notarization for voters who lack a photo ID. App. Br. 17-19.

D. Facts Regarding Financial Burdens of Notarization.

Plaintiffs offer their own "facts" regarding the alleged financial burdens of notarization. App. Br. 21. Again, the Circuit Court made factual findings on this point. "No named plaintiff alleges or claims that he or she faces any financial difficulty from notarization." D164, at 25, ¶ 67. "The evidence demonstrates that the Secretary of State has arranged for free notary services of ballot envelopes from hundreds of notaries across the State of Missouri, including dozens of public libraries and government offices widely distributed across the State of Missouri, many of which offer extended hours." *Id.* "There were 240 free notaries in the Secretary of State's program at the time of Dr. Barreto's expert report, the number had grown to 289 by the date of his deposition, and the number was 311 on September 18, 2020." *Id.* "Further, the LEA witnesses attested that it is common practice for local election authorities to provide notarization of ballot envelopes,"

which is done free of charge. *Id.* "Plaintiffs have provided no evidence that any individual voter will face any undue burden in accessing these widespread, free notarization services." *Id.* Again, substantial evidence supports all these factual findings. *See supra*, Statement of Facts, Part D.

E. Facts Regarding Time and Transportation for Notarization.

Plaintiffs also claim that voters place burdens from finding time and transportation to obtain notarization. App. Br. 21. The Circuit Court made factual findings on this issue too.

"[N]o named plaintiff alleges that he or she faces any undue difficulty in finding time and transportation to a notary." D164, at 25, ¶ 68. "The time and transportation costs of going to a notary are, at most, directly comparable to the time and transportation costs of going to the polls to vote in-person on Election Day, and thus they cannot possibly constitute a "severe" burden on the right to vote." *Id.* "[T]he evidence in this case demonstrates that the time and transportation burdens are lesser for notarization than for in-person voting." *Id.* "There are tens of thousands of notaries available in Missouri to notarize absentee ballots—including 23,000 fully available, and 44,000 with at least partial availability, based on Plaintiffs' own estimates—including hundreds of volunteers in the Secretary of State's volunteer program, as well as free notarization offered by local election authorities, public libraries, and other government offices throughout the State." *Id.*

"Voters have a six-week window in which to notarize their absentee or mail-in ballots, as opposed to the one-day window for in-person voting on Election Day." *Id.* "It is easier to find time and arrange for transportation to a notary during a six-week window of time than during a one-day window of time on Election Day." *Id.*

Moreover, Plaintiffs' evidence of time and transportation burdens "rests on the responses to Dr. Barreto's Question 30(A)-(H) in the voter survey, which engaged in transparent double-counting and triple-counting of such 'burdens.' The Court does not credit Dr. Barreto's testimony and calculations" on this point. *Id.* at 28, ¶ 72. "Voters have a six-week window in which to notarize their absentee or mail-in ballots, as opposed to the one-day window for in-person voting on Election Day. It is easier to find time and arrange for transportation to a notary during a six-week window of time than during a one-day window of time on Election Day." D164, at 25-26, ¶ 68. "The time and effort burdens of locating and getting one's ballot envelope notarized are not dissimilar to those of in person voting." D164, at 4, ¶ 12.

Substantial evidence supports all these factual findings. *See supra* Statement of Facts, Part D. Of the seven "burdens" of notarization that Dr. Barreto asked voters about, three related to difficulties of obtaining transportation to the notary's office, and three related to the difficulties of getting time to visit the notary during working hours. D143, Barreto Dep. 241:17-248:22; Def. Ex. 118, Barreto Ex. 1, appx. B.1,

Q30(A)-(H). For example, Question 30(B) asked if "getting a ride to the notary public" would be a burden; Question 30(D) asked if "having to travel over 20 miles to the nearest notary public in your community" would be a burden (asked of all respondents, regardless of whether they actually lived more than 20 miles from a notary); and Question 30(E) asked if "using or paying for public transit, such as a bus to get there" would be a burden. *Id.* All these questions directly related to whether it would be a burden to obtain transportation to a notary, yet Dr. Barreto counted a "yes" answer to each of those sub-questions as a separate "burden" on that voter. D143, Barreto Dep. 248:23-249:22. This involved "transparent double-counting and triple-counting of such 'burdens,'" as the Circuit Court found.

Likewise, Question 30(C) asked if "getting time off from work or school to visit the notary" would be a burden; Question 30(F) asked if "making it to the notary office during their normal business hours such as 8am to 5pm only" would be a burden; and Question 30(G) asked whether "making it to the notary office during their normal business hours Monday through Friday only" would be a burden. Def. Ex. 118, Barreto Ex. 1, appx. B.1, Q30. Obviously, all three of these questions seek essentially the same information, yet Dr. Barreto counted a "yes" answer to any of these sub-questions as a separate "burden" on that voter. D143, Barreto Dep. 250:21-253:18.

F. Facts Regarding Alleged Voter Confusion About Notarization.

Relying heavily on Dr. Barreto's testimony, Plaintiffs offer extensive "facts" concerning putative voter confusion about the notarization requirement. App. Br. 21-25. The Circuit Court made its own factual findings on this issue. "Failure to comply with the notary provision … was not a significant basis for ballot rejection in the recent primary election." D164, at 4, ¶ 11. "[N]o named plaintiff contends that they are confused by or fail to understand the notarization requirement." D164, at 27, ¶ 70. "The State provides instructions regarding the notarization requirement through many avenues, including guidance from the Secretary of State's office and from local election authorities, as well as clearly printed instructions in bold and all caps on the ballot envelope itself." *Id.* "LEAs provide useful guidance to Missouri voters on this process." *Id.* "Plaintiffs do not contend that any of the State's instructions is inaccurate or misleading." *Id.* "Plaintiffs presented no evidence about the clarity of these instructions or their availability to voters, except for Dr. Barreto's survey, which referred to them only indirectly and obliquely." *Id.*

Again, substantial evidence supports all these factual findings. The Circuit Court explicitly credited the critique of Dr. Barreto's survey evidence on putative voter confusion offered by the State's expert, Dr. Milyo. "[T]he Court does not credit the conclusions Dr. Barreto draws from his survey on this point [*i.e.* voter confusion], and instead credits Dr. Milyo's criticisms of this survey as failing to provide useful information about voters' ability to navigate the voting-by-mail

process." *Id.* ¶ 70. "As Dr. Milyo observed, the vast majority of voter-respondents to Dr. Barreto's survey stated that they did not intend to vote by mail, and so one would have no reason to expect that they would have useful information about how to vote by mail." *Id.* "As Dr. Milyo also explained, for all respondents, the survey erroneously presumed that voters' ability to recite the details of the voting-by-mail process on the phone during a cold call of a 39-question survey (not counting numerous question sub-parts) accurately reflects voters' ability to figure out the process when they need to." *Id.* "In fact, only 4.5 percent of voters in Dr. Barreto's survey could even identify notarization as a requirement for mail-in ballots on the phone, but when it came to actually voting, 97 percent of Missouri voters casting mail-in ballots came understood that notarization is required for mail-in ballots." *Id.* "This result dramatically illustrates the severe limitations of Dr. Barreto's 'voter survey' approach to assessing the risks of voter confusion from the notarization requirement." *Id.*

Additional substantial evidence in the record supports these findings as well. Both the Secretary of State and Local Election Authorities have provided guidance on the notarization requirement through websites, flyers, and other materials throughout the State. Def. Ex. 79, 80, 81, 82, 83. Dr. Barreto admitted that instructions regarding absentee and mail-in voting, including the notarization requirement, are publicly available from the Secretary of State and from local

election authorities such as the Jackson County Board of Elections, and he did not identify anything in those instructions that was incorrect or misleading. D143, Barreto Dep. 308:9-23, 309:8-17, 311:23-315:5, 316:10-13, 317:9-318:24, 319:25-321:22; Def. Exs. 80, 81, 82, 83 (Barreto Exs. 27, 28, 29, 30). Dr. Barreto did not make any direct reference to these materials in his survey, other than to ask voters if they had seen any guidance from the government. Def. Ex. 118, Barreto Ex. 1, Appx. B.1.

Defendants' expert, Dr. Milyo, criticized Dr. Barreto's survey of voters by observing that it is commonly understood that voters are "rationally ignorant" of the details of absentee and mail-in voting until they need to actually learn the process to cast a vote, when they are readily able to follow instructions and learn the requirements. Thus, cold-calling voters in a survey and quizzing them about those requirements on the phone does not provide useful information about the ability of voters to navigate the process of voting by mail. D155, Milyo Dep. 117:15-119:15; Def. Ex. 98 (Milyo Ex. 2). Dr. Milyo provided a "folksy and compelling" example of calling voters and asking them to recite the recipe for "oatmeal raisin cookies." *Id.* 288:1-3. Very few voters would be able to recite the recipe on the phone, but that does not mean that voters cannot bake oatmeal raisin cookies when they want to. D155, Milyo Dep. 118:5-119:4. A more informative approach to assessing voters' capacity to follow instructions in voting by mail would be to conduct an

"induced valuation" study, where voters are given incentives to understand the instructions and asked to follow them. *Id.* at 119:18-120:19. Such a study would illuminate whether voters can learn the requirements of voting by mail when they have a need to do so, which Dr. Barreto's survey did not address. *Id.*

Dr. Milyo explained that the large majority of respondents to Dr. Barreto's survey of voters stated that they did not intend to vote by mail at all, and one would expect "rational ignorance" of those voters, in the sense that one "would not expect those 70 percent to be informed about absentee or mail-in requirements." D155, Milyo Dep. 124:13-15. "If you're not planning to vote by mail … you wouldn't be seeking out that information, because it's irrelevant to you." *Id.* at 124:23-125:3. Dr. Milyo observed that only about 75 of 780 respondents to Dr. Barreto's survey stated that they intended to vote absentee, and only about 120 stated that they intended to vote by mail. *Id.* at 125:4-16. These low numbers of respondents who actually had informative information undermined "the representativeness of the survey," because the remainder was "a very small sample size." *Id.* at 125:17-126:4, 126:13-16.

Dr. Milyo's "oatmeal raisin cookies" example illustrates "whether any of these voters," including those that intend to vote by mail, "would have cause to be informed on a cold call, when they are not actually engaged in the attempt to vote by mail or absentee, and for many of them, they don't plan to." *Id.* at 126:17-22.

Dr. Milyo pointed out that Dr. Barreto's survey asked a long series of "hypothetical" questions about how voters would vote by mail, and that these questions were posed to voters who had stated that they did not intend to vote by mail, yielding "purely hypothetical" responses. *Id.* at 126:23-128:17.

In response to Questions 13 and 14 of Dr. Barreto's voter survey, only 4.5 percent of respondents were able to correctly identify notarization as a requirement for mail-in ballots. Only 10 percent stated in response to Question 13 that "there are extra steps required," and only 45 percent of that 10 percent identified notarization as the extra step, for a total of 4.5 percent of respondents. D143, Barreto Dep. 217:13-219:7. Thus, 95.5 percent of respondents were not able to identify notarization as a requirement for mail-in ballots in the survey. Yet, when it came to actual voting in the August primary, only 3.16 percent of mail-in ballots were rejected for lack of notarization, implying that at least 97 percent of voters became aware of the notarization requirement when the time came to vote by mail. D143, Barreto Dep. 222:5-23, 223:11-15; *id.* at 283:15-284:1.

G. Facts Regarding the Risk of Absentee Ballot Fraud.

Plaintiffs offer their own "facts" regarding the incidence of fraud in voting by mail and the efficacy of notarization in preventing fraud. App. Br. 25-29. Relying heavily on Dr. Minnite's testimony, Plaintiffs contend that mail-in ballot fraud is "exceedingly rare" and that notarization does not prevent or deter fraud. *Id.*

The Circuit Court made contrary factual findings on these issues. "The threat of mail-in ballot fraud is real, but cannot easily be quantified due to the variety of definitions used." D164, at 3, ¶ 6. "Absent the notary requirement, no third party verifies the identity of the signer on a mail-in ballot envelope." *Id.* at 4, ¶ 8.

"The U.S. Supreme Court, the Missouri Supreme Court, the U.S. Department of Justice, the Carter-Baker Commission, and many other authorities recognize that absentee ballot fraud is a real and recurring problem that has the potential to affect the outcome of elections, and that voting by mail presents unique opportunities for election fraud." D164, at 15-16, ¶ 39; *see also id.* at 16, ¶¶ 40-43 (citing and quoting the U.S. Supreme Court's opinion in *Crawford*, this Court's opinion in *Weinschenk*, the U.S. Department of Justice's manual *Federal Prosecution of Election Offenses*, and the report of the Carter-Baker Commission on Election Reform).

The Circuit Court further found that the specific, recent cases of absentee ballot fraud "discussed in the testimony have several have several common features that persist across multiple recent cases: (1) close elections; (2) perpetrators who are candidates, campaign workers, or political consultants, not ordinary voters; (3) common techniques of ballot harvesting, (4) common techniques of signature forging, (4) fraud that persisted across multiple elections before it was detected, (5) massive resources required to investigate and prosecute the fraud, and (6) lenient criminal penalties." *Id.* at 17, ¶ 44. "As Dr. Milyo credibly explained, cases such

as these demonstrate that fraud in voting by mail is a recurrent problem, that it is hard to detect and prosecute, that there are strong incentives and weak penalties for doing so, and that it has the capacity to affect the outcome of close elections." *Id.* "In addition, these cases demonstrate that a significant amount of absentee ballot fraud likely goes undetected, contradicting Dr. Minnite's unsupported opinion that undetected fraud is likely 'miniscule.'" *Id.* at 17, ¶ 44.

In addition, the Circuit Court found that "Plaintiffs contend that Missouri statutes provide alternative security measures to prevent absentee and mail-in ballot fraud, but they do 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." *Id.* at 17, ¶ 45. "Dr. Milyo credibly testified that the notarization requirement would make the common techniques of ballot-harvesting and signature-forging employed in absentee ballot fraud cases harder to employ and easier to detect." *Id.* "The Court finds that the notarization requirement is precisely tailored to advance the State's compelling interest in combating election fraud and protecting the integrity of Missouri elections." *Id.*

Once again, substantial evidence supports all these findings. In *Crawford*, the U.S. Supreme Court's controlling opinion held that fraudulent voting "perpetrated using absentee ballots" demonstrates "that not only is the risk of voter fraud real but that it could affect the outcome of a close election." *Crawford v. Marion County*

Election Bd., 553 U.S. 181, 195-96 (2008); Def. Ex. 74 (Minn. Ex. 25). In *Weinschenk v. State*, this Court held that "absentee ballot fraud" is one of the "types of voter fraud and opportunities for voter fraud that persist in Missouri." 203 S.W.3d 201, 218 (Mo. banc 2006) (Def. Ex. 67). *Weinschenk* also stated that "the type of fraud that has been shown to exist in Missouri" is "fraud in registration and *in absentee ballots*." *Id.* (emphasis added).

In 2005, the Carter-Baker Commission—a bipartisan commission on election reform co-chaired by former President Jimmy Carter—determined that "States … need to do more to prevent absentee ballot fraud"; that "vote by mail … increases the risk of fraud;" that "safeguards to protect ballot integrity, including signature verification" are important to avoid "the risks of fraud" in voting by mail; that "absentee balloting in other states has been one of the major sources of fraud;" that "[a]bsentee ballots remain the largest source of potential voter fraud;" and that "absentee balloting is vulnerable to abuse in several ways." Def. Ex. 68 (Minn. Ex. 18), at v, 35, 46.

The U.S. Department of Justice's manual, *Federal Prosecution of Election Offense*s, reports that "[a]bsentee ballots are particularly susceptible to fraudulent abuse." Def. Ex. 69 (Minn. Ex. 20), at 28. The same manual reports that there are many challenges of time and resources in investigating and prosecuting election frauds, describing them as "labor-intensive investigations," and that "local law

enforcement often is not equipped to prosecute election offenses. Def. Ex. 69 (Minn. Ex. 20), at 7-8.

Dr. Milyo, whom the Circuit Court expressly credited, explained that Dr. Minnite's definition of "voter fraud" is "overly narrow" if you are "interested in election fraud or illegal or invalid voting more broadly." D155, Milyo Dep. 14:2-8. Under Dr. Minnite's definition, fraud committed by "election officials or politicians or even political operatives, campaign workers would not be considered examples of voter fraud." *Id.* at 15:11-16. Dr. Minnite also focuses on criminal convictions to determine whether intentional fraud occurred, and discounts even strong evidence of election fraud when no criminal conviction has yet occurred. *Id.* at 14:15-15:5.

Dr. Milyo further testified that the notary requirement "would make it more difficult to forge a signature, and logistically it would probably make it more difficult to engage in ballot harvesting." *Id.* at 30:16-20. The notarization requirement "would make [ballot harvesting] logistically more difficult, and make it more difficult to engage in large scale ballot harvesting operations." *Id.* at 32:20-22. In addition, Dr. Milyo agreed with the Government Accountability Office's report that "crimes of fraud, in particular, are difficult to detect, as those involved are engaged in intentional deception." *Id.* at 36:8-37:6.

Dr. Milyo also commented on a series of recent cases of absentee ballot fraud. In May 2020, according to news reports, the local NAACP leader in Paterson, New

Jersey called for an election to be invalidated after more than 20 percent of mail-in ballots were invalidated amid allegations of widespread mail-in ballot fraud. Def. Ex. 62 (Minn. Ex. 12). Dr. Milyo testified that news reports about absentee ballot fraud in the invalidated election in Paterson, New Jersey in May 2020 provide a reasonable proxy for social scientists to conclude that absentee ballot fraud likely occurred in that community. D155, Milyo Dep. 55:11-15; Def. Ex. 104 (Milyo Ex. 8). He also testified that the notarization requirement would have made the reported absentee ballot fraud in Paterson, New Jersey more difficult to perpetrate. D155, Milyo Dep. 54:22-25.

In 2019, news reports indicated that Mayor Ted Hoskins of Berkeley, Missouri, was indicted on five felony counts of election fraud arising from an absentee ballot fraud scheme that involved collecting absentee ballots from local voters by deceit and altering the ballots before they were submitted to the election board. Def. Ex. 58, 59. The charging document for Mayor Hoskins included a probable cause statement sworn by an FBI task force officer that described evidence that Mayor Hoskins had committed undetected absentee ballot fraud in prior elections before the 2018 election fraud for which he was charged. Def. Ex. 59 (Minn. Ex. 9), at 6-7. The charging document attested that "in past Berkeley elections, a number of suspect absentee ballots have been received by the board of election commissioners," and cited evidence that Mayor Hoskins had committed

similar fraud, undetected, in those prior elections, which were decided by very narrow margins. Def. Ex. 59 (Minn. Ex. 9), at 6-7.

Dr. Milyo attested that the news reports and charging documents regarding Mayor Hoskins' absentee ballot fraud scheme provide a reasonable proxy for concluding that absentee ballot fraud occurred in that case. D155, Milyo Dep. 65:9-11; Def. Ex. 106 (Milyo Ex. 10). He also opined that applying a notarization requirement would have made it more difficult for Mayor Hoskins and his associates to engage in the ballot harvesting and absentee ballot fraud that Mayor Hoskins was charged with. D155, Milyo Dep. 69:18-70:8; Def. Ex. 107 (Milyo Ex. 11).

In 2016, a Missouri State House primary election between Bruce Franks and Penny Hubbard was invalidated due to absentee ballot irregularities. News reports indicated that, in previous elections involving the incumbent (Hubbard) and her husband, there has been an "extraordinarily high number of absentee ballots" and that the absentee ballots "were breaking for the Hubbards by very large percentages" in those previous elections. Def. Ex. 61 (Minn. Ex. 11). That trend continued in the invalidated election, as Hubbard won 78.4 percent of absentee ballots cast, which overcame Franks' lead in in-person ballots and flipped the election for Hubbard. Def. Ex. 61 (Minn. Ex. 11). When the election was invalidated and a special election was held, Hubbard's lead in absentee ballots became much less lopsided. *Id.* Mr. Franks alleged that it was widely known in the community that the Hubbards

engaged in election fraud through absentee ballots, stating to Hubbard, "Everybody's told me about your absentee game." Def. Ex. 61 (Minn. Ex. 11).

Dr. Milyo testified that the news reports regarding potential absentee ballot fraud in the Franks-Hubbard election—including reports of extraordinarily high absentee ballot returns breaking heavily for the incumbents across multiple election cycles, in elections decided by "razor-thin" margins, and community awareness of absentee ballot fraud—provide a reasonable proxy for social scientists to conclude that absentee ballot fraud is a major concern in that community. D155, Milyo Dep. 76:1-77:17, 82:15-83:10; Def. Ex. 108, 109 (Milyo Exs. 12, 13).

In 2016 and 2018, there was an ongoing criminal investigation of absentee ballot fraud committed by Republican operatives in Bladen County, North Carolina. Def. Ex. 70 (Minn. Ex. 21), at 2. The lead investigator testified that the investigation was "a continuous case" over two election cycles, and that the scheme involved collection of absentee ballots from voters, altering the absentee ballots, and forging witness signatures on the absentee ballots (which did not need to be notarized under North Carolina law). *Id*. at 2-3. According to the investigators' trial presentation, the investigation of absentee ballot fraud in the 2018 North Carolina congressional election involved 142 voter interviews, 30 subject and witness interviews, and subpoenas of documents, financial records, and phone records. Def. Ex. 71 (Minn. Ex. 22), at 3. The congressional election at issue was decided by very close margin

of less than 1,000 votes. *Id.* at 4. The perpetrators collected absentee ballots and falsified ballot witness certifications outside the presence of the voters. *Id.* at 10, 13. The scheme involved the submission of over 1,000 fraudulent absentee ballots and request forms. *Id.* at 11. The perpetrators took extensive steps to conceal the fraudulent scheme, which lasted over multiple election cycles. *Id.* at 14.

Dr. Milyo testified that it was reasonable to conclude that this fraudulent scheme had persisted undetected across multiple election cycles. D155, Milyo Dep. 86:18-22; Def. Ex. 110, 111 (Milyo Ex. 14, 15). He also testified that a notarization requirement would have made it "certainly more difficult" to perpetrate the absentee ballot fraud in the North Carolina election, both because "the forgeries [of signatures on ballot envelopes] would certain be more difficult," and because ballot harvesting is more difficult "if you're picking up ballots that have already been signed … you'd have to wait until this individual goes to a notary and has that done." D155, Milyo Dep. 87:5-13. "It's the entire purpose of a notarization, to make sure the person signing the document is that person, so of course it would make [forging signature on ballot envelopes] more difficult." *Id.* at 87:25-88:3.

Dr. Milyo also testified that the sort of intensive investigation that was required to prosecute the North Carolina fraud scheme is rare and difficult for local authorities to prosecute. It is "generally well known, and recognized among scholars, as well, that investigations of public corruption involve a lot of resources

and time." *Id.* at 92:19-23; Def. Ex. 111 (Milyo Ex. 15), at 3 (reporting that the North Carolina investigation involved 142 interviews of voters and 30 subject interviews, as well as subpoenas); Def. Ex. 100 (Milyo Ex. 4) (US DOJ manual reporting that local law enforcement frequently lacks resources to investigate election crimes).

According to news reports, in 2016, a politician in the Bronx, Hector Ramirez, was indicted and pled guilty to 242 counts of election fraud based on an absentee ballot fraud scheme. Def. Ex. 64 (Minn. Ex. 14). Despite pleading guilty to numerous felonies involving absentee ballot fraud, the defendant received no jail time. Def. Ex. 64 (Minn. Ex. 14). Dr. Milyo testified that the news report of the Bronx politician, Hector Ramirez, convicted on 242 counts of absentee ballot fraud in 2016 provides a reasonable proxy for concluding that absentee ballot fraud occurred. D155, Milyo Dep. 95:16-96:19; Def. Ex. 112 (Milyo Ex. 16). A notarization requirement would have made the fraud committed by Ramirez "definitely more difficult" to commit. D155, Milyo Dep. 96:25-97:5. In addition, the public report that Ramirez received no jail time for 242 felonies of absentee ballot fraud shows that "there's a limited deterrence effect if there's no jail time, so … knowledge about lenient sentences or no jail time would certainly be relevant to the cost-benefit calculation" of those tempted to commit fraud in voting by mail. *Id.* at 98:6-13.

All these authorities and cases provide ample evidence supporting the Circuit Court's factual findings. Moreover, these cases are just representative examples of known instances of fraud in voting by mail. Plaintiffs' expert, Dr. Minnite, testified that the News 21 database, which she consulted in creating, contains "491 cases that they coded absentee ballot fraud" over a twelve-year period—or about 41 cases per year. D156, Minnite Dep. 58:4-15. That is hardly "exceedingly rare." App. Br. 35.

ARGUMENT

I. Invalidating the Notary Requirement Is Not Realistic or Available Relief Because Voting by Mail Commenced on September 22, and Changing the Rules Midway Through the Process Would Cause Confusion and Disruption, Subject Missouri Voters to Different Legal Requirements During the Same Election Cycle, and Require Reprinting of Absentee and Mail-In Ballot Envelopes Across the State (Responds to the Court's Sept. 25 Order and Appellants' Point VI).

In its Order of September 25, 2020, this Court directed that, "[a]s part of their briefs, the parties are ordered to address what relief they believe is realistically and actually available at this time." Sept. 25, 2020 Order, at 1. The Circuit Court made detailed findings and conclusions on this point, D164, 31-35, ¶¶ 83-95, yet Plaintiffs address the issue only in cursory fashion. App. Br. 114-116.

Standard of Review. The Circuit Court made clear that its ruling on this issue rested on equitable principles. D164, at 32, ¶ 86 ("Last-minute changes to any election laws are strongly disfavored under equitable principles long recognized by many state and federal courts, and that principle applies in full force here."). The decision whether to grant an injunction "rests in the sound discretion" of the trial court. *State ex rel. Ellis v. Creech*, 259 S.W.2d 372, 374 (Mo. banc 1953). The Circuit Court's refusal to grant injunctive relief on this ground, therefore, is reviewed

for abuse of discretion. *Gilliland v. Missouri Athletic Club*, 273 S.W.3d 516, 524 (Mo. banc 2009); *Newmark v. Vogelgesang*, 915 S.W.2d 337, 339 (Mo. App. E.D. 1996). The Circuit Court did not abuse that discretion here.

The Circuit Court identified several considerations that weighed against changing the rules for voting by mail in the middle of that process, and Plaintiffs fail to address any of them. First, as the Circuit Court correctly noted, "[v]oting by mail commenced on September 22, and it will have been underway for weeks before appellate review in this case can be concluded." D164, at 31, ¶ 83. "Any voter in Missouri may request an absentee or mail-in ballot up to six weeks prior to election, and the voters can begin casting their ballots by mail at that time." D164, at 31, ¶ 84; *see also* §§ 115.281.1, 115.302.5, RSMo. "Plaintiffs, therefore, ask this Court to change the rules in the middle of a process that is already commenced and well underway." *Id.* ¶ 83. "As of September 22, absentee and mail-in voting is … already in full swing in Missouri." *Id.* at 32, ¶ 84.[2]

Because the voting-by-mail process is already well underway, the Circuit Court found that invalidating the notarization requirement would cause disruption

[2] Evidence in a parallel case in federal court demonstrates that, as of September 30, 2020, almost 300,000 Missouri voters had requested absentee or mail-in ballots, over 290,000 ballots had been delivered to voters, and about 60,000 Missourians had already cast their votes. Declaration of Chrissy Peters, Doc. 46-1, *in Organization for Black Struggle, et al. v. Ashcroft, et al.*, No. 2:20-cv-04184-BCW (W.D. Mo.) (filed Oct. 1, 2020), ¶¶ 41-42. "These numbers will increase daily." *Id.* ¶ 42.

and confusion. First and foremost, the Circuit Court correctly found that, if the notarization rules were changed mid-stream, "the official ballot envelope for all absentee and mail-in ballots would have to be re-printed." D164, at 34, ¶ 94 (citing Def. Ex. 79). The official ballot envelope template, which is provided to all 116 local election authorities for printing of the envelopes of all absentee and mail-in ballots, "instructs most absentee and all mail-in voters in bold and all caps to have their ballots notarized." *Id.* (citing Def. Ex. 79). The ballot envelope template states: "**Absentee Ballot (NOTARY REQUIRED UNLESS SPECIFICALLY NOTED BELOW)**," and "**Mail-In Ballot (NOTARY REQUIRED FOR ALL MAIL-IN BALLOTS)**." *Id.* (quoting Def. Ex. 79 (bold and capitalization in original)). The template also provides a Certificate of Notarization which states: "**For all Mail-In Ballots and Absentee Ballots unless noted above.**" *Id.* (quoting Def. Ex. 79 (bold in original)). The Circuit Court correctly found that, "[i]f the Court were to invalidate the notarization requirement, these instructions would become both incorrect and confusing, and the ballot envelope would have to be re-printed." *Id.*

The Circuit Court also correctly noted that "[t]he statutory deadline to print these ballot envelopes was September 22, six weeks prior to the November 3 general election." D164, at 35, ¶95 (citing §§ 115.281.1, 115.302.5, RSMo). The Circuit Court was "unwilling to grant declaratory and injunctive relief that would violate this statutory deadline," *id.*, and that holding was plainly not an abuse of discretion.

In a directly analogous context, this Court held that "the courts of this state consistently have interpreted [§ 115.125.2, RSMo] to prohibit court-ordered modifications to a ballot title within six weeks of an election." *Dotson v. Kander*, 435 S.W.3d 643, 645 (Mo. 2014). "The legislature's decision to establish a 'bright line' rule prohibiting court-ordered changes to the ballot within six weeks of an election was not arbitrary. It coincides with the printing and availability of absentee ballots, which is to begin six weeks prior to an election." *Id.* This "bright line" rule is necessary, *Dotson* noted, because "[i]f ballot titles are modified after the six-week pre-election time frame, local election authorities would have to reprint ballots." *Id.*; *see also, e.g., Pippens v. Ashcroft*, No. WD 83962, 2020 WL 5105036, at *7 n.4 (Mo. App. W.D. Aug. 31, 2020) (citing *Dotson* for this six-week "bright line" rule); *Bradshaw v. Ashcroft*, 559 S.W.3d 79, 82 (Mo. App. W.D. 2018) (same); *Shoemyer v. Missouri Sec'y of State*, 464 S.W.3d 171, 173 n.2 (Mo. banc 2015). The Circuit Court followed precisely this reasoning here.

In response to the Circuit Court's concern, Plaintiffs merely assert, without citing any evidentiary or legal support, that "no ballot envelopes need to be reprinted or altered." App. Br. 114. This *ipse dixit* is insufficient to address the Circuit Court's concern. As the Circuit Court noted, regardless of its decision, Missouri voters casting absentee and mail-in ballots are currently facing and will continue to face clear, emphatic instructions on the face of the ballot envelope itself to have their

ballot envelope notarized. D164, at 34-35, ¶¶ 95. To avoid this confusion, the Court would have to order hundreds of thousands of ballot envelopes to be reprinted, in violation of a statutory deadline. Further, the LEAs would have to either delay sending ballot envelopes and accompanying instructions to voters while they were being re-printed, or else continue to send incorrect instructions to voters during the process. No evidence shows that this process could be accomplished a few weeks before the election without causing mass confusion and disruption, and introducing indefinite delays in the delivery of absentee and mail-in ballots to voters. This relief is neither "realistic" nor "actually available."

In a footnote, Plaintiffs contend that the Secretary of State "can also provide notification of this Court's ruling on [its] websites and conduct other outreach" to advise voters of the invalidation of the notarization requirement. App. Br. 114 n.26. This argument is surprising, because Plaintiffs and their expert, Dr. Barreto, vigorously contended in the trial court that the Secretary of State's previous "outreach" was entirely ineffective in advising voters of the notary requirement in the first place. In any event, it is hard to see how postings by the Secretary of State on "Facebook, Instagram, Twitter," App. Br. 114 n.26, could effectively counter the extremely clear message confronting every voter in bold and all caps on the ballot envelope itself or its accompanying instructions. Def. Ex. 79. In any event, this argument fails to address the trial court's separate concern, *i.e.*, that confronting

voters with two sets of directly conflicting official instructions about notarization will inevitably generate voter confusion and uncertainty. D164, at 35, ¶ 94.

The Circuit Court raised other compelling equitable concerns as well, which Plaintiffs fail to address. The Circuit Court noted that invalidating the notarization requirement "would entail that Missouri voters would be subject to different standards depending on whether they cast their absentee or mail-in ballot before or after the final judgment of the Court." D164, at 35, ¶ 95. By the time this Court rules, tens or hundreds of thousands of Missouri voters will have already had their absentee and mail-in ballots notarized according to statutory requirements and returned them. Changing the ballot-verification rules halfway through the process would be akin to changing the rules for in-person voting at noon on Election Day—it will inevitably subject some voters to different legal requirements than others. Treating similarly situated individuals differently offends basic principles of equity, as well as the Missouri Constitution. *See Doe v. Phillips*, 194 S.W.3d 833, 845 (Mo. banc 2006) (holding that the law "may not treat similarly situated persons differently unless such differentiation is adequately justified"); *Coyne v. Edwards*, 395 S.W.3d 509, 518 (Mo. banc 2013) (same); *Cooper v. Missouri Bd. of Prob. & Parole*, 866 S.W.2d 135, 137 (Mo. banc 1993). The Circuit Court did not abuse its discretion by finding that this unequal treatment weighed heavily against granting equitable relief.

In addition, the Circuit Court held that changing the rules midway through the process would cause confusion and disruption in other ways. "As the State's evidence demonstrates, both the Secretary of State and Local Election Authorities have provided guidance on the notarization requirement through websites, flyers, and other materials throughout the State." D164, at 34, ¶ 93 (citing Def. Ex. 80, 81, 82, 83). "All these materials would have to be changed in the middle of the voting process." *Id.*

Furthermore, the Circuit Court correctly held that changing the rules while voting by mail is already underway "would inevitably cause confusion among voters and the 116 local election authorities." D164, at 31, ¶ 83. The risk of voter confusion from conflicting official instructions on notarization is self-evident. As the Circuit Court held, "changing the rules so close to Election Day *creates* voter confusion—it does not cure it." *Id.* at 34, ¶ 92. "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to stay away from the polls. As an election draws near, that risk will increase." *Id.* (quoting *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006)).

Plaintiffs argue that "*Purcell* has never before been applied by Missouri courts," App. Br. 114, but the Court need not rely on *Purcell* to uphold the trial court's judgment here. This Court's own opinion in *Dotson v. Kander* is more than sufficient. In any event, *Purcell* rests on universal principles of equity shared by all

federal and state courts. As the trial court observed, "[c]ourts routinely refuse to impose changes to election procedures just weeks before an election—let alone changing procedures that are already in process," and "[t]he courts of many other states, when confronted with last-minute changes to state election laws, have applied this principle and declined to grant injunctive relief shortly before elections." D164, at 32-33, ¶¶ 88, 91; *see also, e.g., Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020); *Frank v. Walker*, 574 U.S. 929 (2014); *Veasey v. Perry*, 135 S. Ct. 9 (2014)); *Raysor v. DeSantis*, No. 19A1071, 2020 WL 4006868 (U.S. July 16, 2020); *Veasey v. Perry*, 769 F.3d 890, 981 (5th Cir. 2014); *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016) ("Call it what you will—laches, the *Purcell* principle, or common sense—the idea is that courts will not disrupt imminent elections absent a powerful reason for doing so."); *Chicago Bar Ass'n v. White*, 386 Ill. App. 3d 955, 961 (2008) ("The Attorney General argues, and we agree, that there are too many obstacles at this late date [three months prior to the election] to alter the method of voting. . ."); *Dean v. Jepsen*, No. CV106015774, 2010 WL 4723433, at *7 (Conn. Super. Ct. Nov. 3, 2010) ("Thus, by filing her action so close to the election, the plaintiff risks injecting impermissible confusion and disruption in the electoral process."); *Liddy v. Lamone*, 398 Md. 233, 250 (2007) ("[I]njunctive relief may be inappropriate in an elections case if the election is too close for the State, realistically, to be able to implement the necessary changes before

the election."); *League of Women Voters of Michigan v. Sec'y of State*, No. 353654, 2020 WL 3980216, at *16 (Mich. Ct. App. July 14, 2020) (Riordan, J., concurring). The trial court cited all these cases, and Plaintiffs address none of them.

Plaintiffs argue that in *Weinschenk*, this Court invalidated voter identification requirements on October 16, 2006, about three weeks before Election Day; and in *Priorities USA*, the trial court issued its judgment invalidating the affidavit requirement for Option Two voters on October 9, 2018, four weeks before Election Day. App. Br. 114 n.28. But *Weinschenk* and *Priorities USA* addressed identification requirements for voters voting in-person on Election Day, so those cases would be equivalent to changing the rules for voting-by-mail three or four weeks before September 22, *i.e.*, around August 25 or September 1. That is quite different from changing the rules weeks *after* in-person voting has begun.

Finally, Plaintiffs argue that one federal district court "recently enjoined enforcement of South Carolina's witness requirement for absentee ballots just two weeks before a primary." App. Br. 116 (citing *Thomas*, 2020 WL 2617329, at *30). But Plaintiffs do not contend that *Thomas* involved anything like the evidence of disruption that the Circuit Court weighed in this case. *See id.* In fact, *Thomas* did not consider or address any similar argument, so it has no persuasive value here.

II. Count I Fails As a Matter of Law Because Voters Who Are Not Ill or Disabled Are Not Suffering From "Confinement Due to Illness" Under the Plain Meaning of Section 115.277.1(2) and Relevant Principles of Statutory Interpretation (Responds to Appellants' Point I).

In Count I of their Petition, Plaintiffs claimed that Section 115.277.1(2), RSMo, authorizes Plaintiffs, who do not have Covid-19 but wish "to avoid contracting or spreading the virus that causes COVID-19," to cast an absentee ballot without notarization. D10, at 35, ¶¶ 150-152. Plaintiffs alleged that "confining oneself to vote from home to avoid contracting or spreading COVID-19 is a valid justification to vote absentee under § 115.277.1(2), RSMo, without the requirement of a notary seal, during the COVID-19 pandemic." D10, at 35, ¶ A. In other words, Plaintiffs contend that any Missouri voter who is not ill, but who wishes to avoid "contracting" illness, is experiencing "confinement due to illness of disability" under Section 115.277.1(2). Plaintiffs' argument lacks merit.

Standard of Review. Statutory interpretation presents a question of law subject to *de novo* review. *State v. Knox*, 604 S.W.3d 316, 320 (Mo. banc 2020).

A. Voters Who Are Not Ill Are Not "Confined Due to Illness."

Section 115.277.1(2) provides that a voter may cast an absentee ballot if he or she "expects to be prevented from going to the polls to vote on election day due to:

… Incapacity or *confinement due to illness* or physical disability, including a person who is primarily responsible for the physical care of a person who is incapacitated or confined due to illness or disability." § 115.277.1(2), RSMo (emphasis added). Plaintiffs contend that a voter who is not ill, but who fears "contracting or spreading the virus that causes COVID-19," is experiencing "confinement due to illness" under Section 115.277.1(2). This is incorrect for several reasons.

First, Plaintiffs' proposed interpretation contradicts the plain and ordinary meaning of the statutory language. "The primary rule of statutory construction is to ascertain the intent of the legislature from the language used … and to consider the words used in their plain and ordinary meaning." *Dickemann v. Costco Wholesale Corp.*, 550 S.W.3d 65, 68 (Mo. 2018) (quoting *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. banc 1988)). "Absent express definition, statutory language is given its plain and ordinary meaning." *Id.*

Here, Plaintiffs' interpretation contradicts the plain and ordinary meaning of the words "illness," "confinement," and the phrase "confinement due to illness." First, their interpretation is inconsistent with the plain meaning of "illness." Plaintiffs contend that voters who are not ill or disabled suffer from "illness" under the statute. But in ordinary English, one would not say that a person who is not ill is "confined due to illness." One might say that they are "confined due to *fear of*

illness," but that is not what the statute says. This interpretation violates the "plain and ordinary meaning" of the statute. *Dickemann*, 550 S.W.3d at 68.

Likewise, Plaintiffs' interpretation contradicts the plain and ordinary meaning of the word "confinement." When used in connection with "illness," "confinement" has a specific meaning: "restraint within doors by sickness." WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 476 (2002) (defining "confinement" as "restraint within doors by sickness"); *see also id.* (defining "confine" as "to keep from leaving accustomed quarters (as one's room or bed) under pressure of infirmity"). Thus, both definitions of "confine" and "confinement" that are specific to *illness* specify that the individual's illness itself is causing the confinement. *Id.*

Similarly, Plaintiffs' interpretation contradicts the ordinary and natural use of the phrase "confinement due to illness." Consistent with the definitions of "confinement" cited above, the phrase "confinement due to illness" entails that the person suffering such "confinement" is herself ill. For example, if one were to invite a friend to a party, and she declined by saying, "unfortunately I cannot come because I am *confined due to illness*," everyone would understand that the friend has an *actual illness* that prevents her from leaving home. No one would think that she is perfectly well but she is afraid of catching an illness from someone else at the party. Plaintiffs' interpretation, therefore, contradicts the ordinary and natural meaning of the statutory phrase.

Second, Plaintiffs' interpretation violates the principle that courts should not insert language onto the statute that it does not contain. As the Circuit Court held, "Plaintiffs are not 'confined due to illness'; they are confined due to *fear of* illness. But the statute does not say 'fear of illness'—it just says illness." D164, at 6 (quoting § 115. 277.1(2), RSMo). Plaintiffs thus seek to insert the phrase "fear of" into the statute. This Court holds that "the Court cannot supply what the legislature has omitted from controlling statutes." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 668 (Mo. banc 2010). "[C]ourts cannot transcend the limits of their constitutional powers and engage in judicial legislation supplying omissions and remedying defects in matters delegated to a coordinate branch of our tripartite government." *Bd. of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo. banc 2001). "We cannot engraft language onto a statute that was not provided by the legislature." *State ex rel. Koster v. Cowin*, 390 S.W.3d 239, 244 (Mo. App. W.D. 2013). Though Plaintiffs may believe that engrafting the words "fear of" onto the statute would create a better policy, "it is not within the Court's province to question the wisdom, social desirability, or economic policy underlying a statute as these are matters for the legislature's determination. The Court must enforce the law as it is written." *Turner*, 318 S.W.3d at 668 (citations and quotation marks omitted).

Third, Plaintiffs' interpretation ignores the immediate context of the statute, and it would other significant provisions—including the major provisions of Senate

Bill 631—unnecessary and superfluous. Plaintiffs contend that any Missouri voter who fears contracting or spreading Covid-19 is already authorized to cast an absentee without notarization under Section 115.277.1(2). But Section 115.277.1(7) separately authorizes any Missouri voter who "is in an at-risk category for contracting or transmitting" Covid-19 to cast an absentee ballot without notarization. § 115.277.1(7), RSMo. If all those voters were already authorized to cast an absentee ballot without notarization under subdivision (2), subdivision (7) of the same statutory section would be meaningless and superfluous. D164, at 7, ¶ 9.

Likewise, as the Circuit Court held, "Plaintiffs' interpretation would also render superfluous the entirety of Section 115.302." D164, at 7, ¶ 10. Section 115.302 creates a new procedure for mail-in voting for every Missouri voter during the elections occurring in 2020. *See* § 115.302.1, RSMo ("Any registered voter of this state may cast a mail-in ballot as provided in this section."). The express purpose of this new mail-in option is to allow voters to avoid contracting or spreading Covid-19: "The provisions of this section shall apply only to an election that occurs during the year 2020, *to avoid the risk of contracting or transmitting severe acute respiratory syndrome coronavirus 2*." § 115.302.20, RSMo (emphasis added). But on Plaintiffs' view, every Missouri voter who wishes to vote by mail due to concerns about contracting or spreading Covid-19 is already authorized to cast an absentee

ballot under Section 115.302, and the new mail-in procedure would be entirely superfluous.

As the Circuit Court held, an interpretation that renders major provisions of the same statute unnecessary and superfluous violates a basic principle of statutory interpretation. D164, at 7, ¶¶ 9-10. "This Court presumes 'that the legislature did not insert idle verbiage or superfluous language in a statute.'" *Alberici Constructors, Inc. v. Dir. of Revenue*, 452 S.W.3d 632, 638 (Mo. banc 2015) (quoting *Hyde Park Housing Partnership v. Dir. of Revenue*, 850 S.W.2d 82, 84 (Mo. banc 1993). "This Court presumes every word, sentence, or clause in a statute has effect, and the legislature did not insert superfluous language." *Mantia v. Missouri Dep't of Transportation*, 529 S.W.3d 804, 809 (Mo. banc 2017); *see also In Matter of Verified Application & Petition of Liberty Energy (Midstates) Corp.*, 464 S.W.3d 520, 525 (Mo. banc 2015) (same); *Wehrenberg, Inc. v. Dir. of Revenue*, 325 S.W.3d 366, 367 (Mo. banc 2011) (same).

Fourth, Plaintiffs' interpretation contradicts the principles that statutory provisions should not be read in isolation, but that the statute should be read "as a whole." *Cosby v. Treasurer of State*, 579 S.W.3d 202, 207 (Mo. banc 2019). Plaintiffs also violate the related principle that "[t]he provisions of a legislative act must be construed and considered together and, if possible, all provisions must be harmonized." *Dickemann*, 550 S.W.3d at 68 (quoting *Wollard v. City of Kan. City*,

831 S.W.2d 200, 203 (Mo. banc 1992)). In addition to rendering other provisions unnecessary and superfluous, Plaintiffs' interpretation conflicts with Missouri's statutory voting scheme. The vast majority of Chapter 115 establishes procedures for in-person voting, while providing carefully limited and enumerated exceptions for absentee voting. By adopting an interpretation of one enumerated exception that would authorize virtually every Missouri voter to vote by mail in every future election, Plaintiffs fail to read the statute "as a whole," and they fail to harmonize Section 115.277.1(2) with the rest of the statutory scheme. *Id.*

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

Sixth, Plaintiffs' interpretation would violate the principle of *noscitur a sociis* by giving one item on a six-item list—*i.e.*, the exception for illness or disability in paragraph (2)—a radically different and more expansive reading than the other five

items on the same list. *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 122 (Mo. banc 2014). When a provision "appears in the statute within a list," the Court "will apply the principle of statutory construction known as *noscitur a sociis*—a word is known by the company it keeps." *Union Electric*, 425 S.W.3d at 122. "Under this principle, a court looks to the other words listed in a statutory provision to help it discern which of multiple possible meanings the legislature intended." *Id.* Here, § 115.277.1 provides a list of seven enumerated bases for absentee voting. § 115.277.1(1)-(7), RSMo. Notably, the other six items on this list of enumerated exceptions provide narrow, "objective and verifiable grounds" for absentee voting. D164, at 8, ¶ 13. By contrast, Plaintiffs' interpretation of item (2) of the same list is "based on a subjective, unverifiable criterion—*i.e.*, fear of catching an illness." *Id.* This interpretation of the list violates the doctrine of *noscitur a sociis*. *Union Electric*, 425 S.W.3d at 122.

Seventh, Plaintiffs' interpretation would lead to unreasonable and absurd results by authorizing virtually every Missouri voter to cast an absentee ballot in every future election, regardless of Covid-19. In general, "[t]his Court will not assume the legislature intended an absurd or unreasonable construction of the statutes." *Dierkes v. Blue Cross & Blue Shield of Mo.*, 991 S.W.2d 662, 669 (Mo. banc 1999). As the Circuit Court noted, "no limiting principle restricts Plaintiffs' interpretation of the statute to the current Covid-19 pandemic. Section 115.277.1(2)

does not refer to 'Covid-19' or 'coronavirus.' It refers to 'illness.'" D164, at 7, ¶ 11. The word "illness" does not refer only to coronavirus—it also encompasses an entire range of maladies from SARS, to Ebola, to influenza, to the common cold. WEBSTER'S THIRD, at 1127 (defining "illness" as "an unhealthy condition of the body or mind: malady"). "If Plaintiffs' interpretation were correct, then any voter who feared catching *any* illness at the polls, in any future election, would be entitled by the statute to cast an absentee ballot." D164, at 7, ¶ 11. "No court or election authority has ever adopted this broad interpretation," *id.*, and for good reason. It would upend the statutory scheme by effectively transforming absentee voting from a limited exception into the predominant method of voting in Missouri. It is an "unreasonable" interpretation. *Dierkes*, 991 S.W.2d at 669.

B. Plaintiffs' Arguments to the Contrary Have No Merit.

Plaintiffs offer several arguments to the contrary, but none has merit.

First, Plaintiffs argue that "due to" means "because of." App. Br. 37. This is true, but it fails to illuminate whether "confinement because of illness" means "confinement because of *one's own illness*" or "confinement because of *one's fear of catching an illness from someone else*." As noted above, the former interpretation is the only reasonable interpretation because it comports with the plain meaning of "illness," the plain meaning of "confinement" (especially when that word is used in

connection with "illness"), and the plain meaning of the phrase "confinement due to illness" as used by ordinary speakers of the English language. *See supra* Part II.A.

Second, Plaintiffs argue that "the legislature made eligibility for absentee voting contingent on voter expectation about what the 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." App. Br. 38. In other words, Plaintiffs evidently contend that the Legislature *must* have "intended" to include "fear of illness" under Section 115.277.1(2) because many voters will not know that they will be ill on Election Day two weeks beforehand. *Id.* at 38.

This argument fails because it overlooks a separate statute that specifically addresses this very circumstance. Section 115.287.2 provides: "If, after 5:00 p.m. on the second Wednesday before an election, any voter from the jurisdiction has become hospitalized, ***becomes confined due to illness or injury***, or is confined in an intermediate care facility, residential care facility, or skilled nursing facility, … the election authority shall appoint a team to deliver, witness the signing of and return the voter's application and deliver, witness the voting of and return the voter's absentee ballot." § 115.287.2, RSMo (emphasis added). The fact that Section

15.287.2 directly addresses this situation—in specific, clear, and unambiguous terms—provides powerful evidence that Section 115.277.1(2) is *not* intended to address it.

Third, Plaintiffs argue that the immediately following phrase in the statute—"including a person who is primarily responsible for the physical care of a person who is incapacitated or confined due to illness or disability," § 115.277.1(2), RSMo—implies that Section 115.277.1(2) includes any voter who fears catching illness. App. Br. 40-41. On the contrary, as the Circuit Court correctly held, this subsequent clause strongly supports the State's interpretation, not Plaintiffs'. D164, at 6, ¶ 7. "If the illnesses of third parties were *already* included in the phrase 'confinement due to illness' as Plaintiffs contend, then the immediately following clause of section 115.277.1(2) would be unnecessary and superfluous." *Id.* The fact that the Legislature deemed it necessary to include this clause specifying that primary caregivers are included demonstrates that Section 115.277.1(2) is not as broad as Plaintiffs contend. Thus, "Plaintiffs' interpretation … contradicts the immediate context of the statute." D164, at 6, ¶ 7 (citing *Krysl v. Treasurer of Missouri*, 591 S.W.3d 13, 15-16 (Mo. App. E.D. 2019)).

Fourth, Plaintiffs argue that their interpretation of Section 115.277.1(2) would not render Section 115.277.1(7) superfluous because subdivision (7) "does not require a voter to expect that she will confine herself on Election Day." App. Br. 43

(underline in original). This argument is confused and self-contradictory. To impute a very broad meaning to subdivision (2), Plaintiffs interpret "confine" broadly to include anyone who does not want to go to the polls in person to avoid contracting or spreading Covid-19. Any voter in an at-risk category for Covid-19 who has that wish, and thus is "confining herself" on Plaintiffs' definition, is eligible to cast an absentee ballot under subdivision (7). § 115.277.1(7), RSMo. In other words, on Plaintiffs' interpretation, every voter who is qualified to cast an absentee ballot under subdivision (7) was *already* qualified to cast an absentee ballot under subdivision (2). This interpretation renders subdivision (7) "unnecessary" and "superfluous."

Fifth, the same logic applies to Plaintiffs' argument that Section 115.302 would not be superfluous on their interpretation of Section 115.277.1(2). App. Br. 44-45. Again, on their view, any voter who wishes to avoid going to the polls to avoid "contracting or spreading" Covid-19 (or any other illness) is authorized to cast an absentee ballot under Section 115.277.1(2). D10, ¶ 151. If that were true, there would have been no reason for the Legislature to enact Section 115.302 for the express purpose of allowing any voter to cast a mail-in ballot "to avoid the risk of contracting or transmitting severe acute respiratory syndrome coronavirus 2." § 115.302.20, RSMo.

Sixth, Plaintiffs argue that the doctrine of constitutional avoidance supports their interpretation. App. Br. 47. This argument fails for two reasons. First, as

Plaintiffs concede, the canon applies when both rival interpretations of the statute are "equally possible." *Id.* (quoting *Spradlin v. City of Fulton*, 924 S.W.2d 259, 263 (Mo. banc 1996)). Here, Plaintiffs' interpretation is not "equally possible"—it violates the plain language of the statute and every relevant principle of statutory interpretation. *See supra* Part II.A. Second, the canon applies only when one interpretation "results in the statute being unconstitutional." *Id.* (quoting *Blaske v. Smith & Entzeroth, Inc.*, 821 S.W.2d 822, 838-39 (Mo. banc 1991)). Here, the State's interpretation does not "result[] in the statute being unconstitutional," because Plaintiffs' constitutional claim has no merit. *See infra*, Part IV.

III. The Trial Court Did Not Abuse Its Discretion in Declining to Consider Evidence Relating to a "Myriad" of New Claims and Theories Raised at the Last Minute That Were Entirely Irrelevant to the Two Counts Pleaded in the Amended Petition. (Responds to Appellants' Point II).

The Circuit Court rejected Plaintiffs' last-minute attempt to raise new claims and theories asserting *non-health-related* burdens from notarization, because they were irrelevant to the claims actually pleaded in the Amended Petition. D164, at 21, ¶¶ 57-58. "There are no allegations in the Petition regarding voter confusion, alleged notary scarcity, disparate impact on rural voters, disparate impact on minority voters (other than *health*-related disparate impact on minorities from Covid-19), or any of the other issues Plaintiffs may seek to inject into this case at the last minute." *Id.* ¶ 57 (italics in original). "Instead, the Petition's allegations focus exclusively on the alleged health risks of in-person notarization from Covid-19." *Id.* "Because these other alleged non-health-related burdens from notarization have no bearing on the factual allegations and claims raised in the Amended Petition, they are entirely irrelevant, and the Court disregards them." *Id.* ¶ 58.

In Point II, Plaintiffs contend that the trial court abused its discretion in declining to consider this evidence. App. Br. 49-58. This argument has no merit.

Standard of Review. As Plaintiffs concede, "[a] trial court's ruling on the admission or exclusion of evidence is reviewed for an abuse of discretion." App. Br. 49 (quoting *Emerson v. Garvin Group, LLC*, 399 S.W.3d 42, 44 (Mo. app. E.D. 2013)).

First, Plaintiffs never dispute that a trial court properly refuses to consider evidence and testimony that is "irrelevant to the issues raised by the pleadings." *Kopff v. Miller*, 501 S.W.2d 532, 536 (Mo. App. 1973) (holding that the trial court did not abuse its discretion when it refused to admit testimony "irrelevant to the issues raised by the pleadings"). Many authorities support this non-controversial proposition. *See, e.g., Gosnell v. Camden Fire Ins. Ass'n of Camden, N.J.*, 109 S.W.2d 59, 68 (Mo. App. 1937) (same); *Drury v. City of Cape Girardeau*, 66 S.W.3d 733, 740 n.24 (Mo. banc 2002) (holding that a party "ha[d] not cited any authority showing that the trial court is required to decide matters outside the pleadings"); *Melton v. Padgett*, 217 S.W.3d 911, 912 (Mo. App. W.D. 2007) ("The purpose of a pleading is to limit and define the issues to be tried in a case and [to] put the adversary on notice thereof.") (alteration in original); *Sorensen v. Shaklee Corp.*, 31 F.3d 638, 648 (8th Cir. 1994) ("Expert testimony which does not relate to any issue in the case is not relevant and, ergo, nonhelpful.") (citation omitted).

Here, Plaintiffs' new claims and theories alleging non-health-related burdens from notarization—such as voter confusion, lack of photo ID to obtain notarization,

disparate impact on rural and minority voters, notary scarcity, and so forth—were not raised in the Amended Petition filed on July 1, and they were wholly irrelevant to the claims actually raised in the Amended Petition. Count I of the Amended Petition claimed that plaintiffs who "reasonably expect to confine themselves to avoid contracting or spreading COVID-19" are authorized to cast absentee ballots without notarization under Section 115.277.1(2), RSMo. D10, Am. Pet., ¶ 151. Every factual allegation in Count I addressed the alleged *health risks* of notarization from Covid-19. *Id.* ¶¶ 144-152. Likewise, Count II of the Amended Petition claimed that notarization presents a "severe" burden on absentee and mail-in voters under Article I, § 25 of the Constitution because it allegedly "presents significant *health risks* both to voters an notaries alike," arising from Covid-19, and "forces voters to leave their homes in conflict with unanimous social distancing guidelines." *Id.* ¶ 162. Again, every factual allegation in Count II (except one cursory allegation in Paragraph 167, discussed below) addressed the alleged *health risks* of in-person notarization from Covid-19. *Id.* ¶¶ 154-168. The prayer for relief for Count II likewise sought relief "as-applied during the COVID-19 pandemic," and "during the COVID-19 pandemic." *Id.* at 38, ¶¶ A, B.

Furthermore, the entirety of the Amended Petition leading up to the two Counts focused exclusively on the *health risks* of in-person notarization during the Covid-19 pandemic, as well as the State's interests in the notarization requirement.

The Introduction section of the Amended Petition addressed only the alleged health risks from Covid-19 and the notary requirement. *Id.* ¶¶ 1-16. The allegations regarding the organizational plaintiffs repeatedly alleged that their members wish "to avoid contracting or spreading the virus that causes COVID-19," and that they wished to protect their members from the health risks of voting during Covid-19, without any allegations about any non-health-related burdens. *Id.* ¶¶ 21-22, 27-29. The allegations regarding the individual named Plaintiffs exclusively addressed their concerns about the supposed health risks of voting during Covid-19, without raising any other burdens. *Id.* ¶¶ 34-35, 41-44, 48-51. Part A of the "General Factual Allegations," titled "Transmission of the virus that causes COVID-19 and Public Health Guidelines," addressed only the Covid-19 pandemic and the health risks associated with it. *Id.* ¶¶ 55-81. Part B of the General Factual Allegations, titled "COVID-19 in Missouri," addressed only the Covid-19 pandemic in Missouri, the health risks associated with it, and the government's response to it. *Id.* ¶¶ 82-103. Part C of the General Factual Allegations, titled "Missouri's Absentee Voting Process," described Missouri's process for absentee and mail-in voting. *Id.* ¶¶ 104-127. Part D of the General Factual Allegations, titled "Absentee Ballot Fraud," addressed the incidence of absentee ballot fraud in Missouri. *Id.* ¶¶ 128-134. Part E of the General Factual Allegations, titled "Remote Notarization in Missouri,"

alleged that remote notarization is not available for absentee and mail-in ballot envelopes. *Id.* ¶¶ 135-142.

That overview encompasses the entirety of the Amended Petition. The Amended Petition contained no allegations of any kind about supposed voter confusion, notary scarcity or unavailability, voters' lack of photo IDs to present to the notary, disparate burdens on rural or minority voters, or any other issues or claims that Plaintiffs now seek to assert.

Despite all this, Plaintiffs contend that these non-health-related burdens "were always an essential aspect of this case." App. Br. 50. But they cite only two paragraphs of the 40-page Amended Petition to support this argument. First, they cite Paragraph 167, which alleged, in its entirety: "The notary requirement imposes additional burdens on the right to vote, including information, time, and transportation costs." D10, ¶ 167. This one-sentence assertion was embedded in Count II, which exclusively asserted burdens due to health risks, and it did not incorporate by any specific factual allegations in the body of the Amended Petition. *See id.* On the contrary, the Amended Petition included no specific factual allegations to identify these alleged burdens other than this cursory, one-sentence allegation, and the Amended Petition requested no relief on the basis of this allegation, so the Amended Petition did not raise any claim based on this allegation. *See Hendricks v. Curators of Univ. of Mo.*, 308 S.W.3d 740, 747 (Mo. App. W.D.

2010) ("Conclusory allegations of fact … are not considered in determining whether a petition states a claim upon which relief can be granted.") (quoting *Willamette Indus., Inc. v. Clean Water Comm'n*, 34 S.W.3d 197, 200 (Mo. App. W.D. 2000)).

The Circuit Court, in fact, specifically addressed this cursory allegation in its Judgment: "Count II of the Amended Petition also contains a conclusory allegation that '[t]he notary requirement imposes additional burdens on the right to vote, including information, time, and transportation costs.'" D164, at 13, ¶ 32 (citing D10, ¶ 167). "The forty-page petition includes no other allegations relating to these supposed 'additional burdens,' and so ***the Court finds that Plaintiffs have not adequately pled any claim based on them***." *Id.* (emphasis added). "The Amended Petition contains no allegations about putative voter confusion, voters' lack of photo ID, financial burdens, scarcity or unavailability of notaries, disparate impact on rural or minority voters, or any other such burdens." *Id.*

Plaintiffs ignore this specific holding of the trial court and do not address it in their appellate brief. *See* App. Br. 49-58. And the Circuit Court plainly did not abuse its discretion in finding that this cursory, one-line allegation, unsupported by any specific factual assertions in the body of the Amended Petition and untethered to any claim for relief, failed to properly plead any claim. *See Hendricks*, 308 S.W.3d at 747 ("Conclusory allegations of fact … are not considered in determining whether a petition states a claim upon which relief can be granted."); *Willamette*

Indus., 34 S.W.3d at 200; *see also Missouri Mun. League v. State*, 489 S.W.3d 765, 769 (Mo. banc 2016) ("[T]he conclusory allegations in the petition did not state a claim."); *Ocello v. Koster*, 354 S.W.3d 187, 204 (Mo. banc 2011) ("[C]hallengers cannot simply make conclusory generalized allegations in their pleadings."); *Allen v. Bryers*, 512 S.W.3d 17, 35 (Mo. banc 2016) ("These conclusory statements do not meet [the party's] burden."); *McIlvoy v. Sharp*, 485 S.W.3d 367, 373 (Mo. App. W.D. 2016) ("Assertions of bare, conclusory allegations are not sufficient to state a claim."). In their Appellate Brief, Plaintiffs focus heavily on a single word within Paragraph 167, "information," to argue that the Amended Petition fairly raised claims regarding alleged notary scarcity, photo ID, voter confusion, and so forth. App. Br. 50-52. But the mere allegation that the notary requirement involves "information … costs," without more, does not properly plead any claim. *See id.*

Second, Plaintiffs selectively quote a statement in Paragraph 139 of the Amended Petition to argue that the Amended Petition raised a claim about requiring photo ID to notarize absentee and mail-in ballots. App. Br. 51 (quoting D10, at 33, as alleging that "a valid photo ID … may not available to all eligible voters" (ellipsis inserted by Appellants' Brief)). On the contrary, when quoted in full, Paragraph 139 addressed only the use of photo IDs during *remote notarization*, as it stated: "Under Executive Order 20-08 authorizing electronic notarization, the signer must present a valid photo ID, which may not be available to all eligible voters." D10, Am. Pet.

¶ 139. Because the State has not contended in this case that remote or "electronic" notarization is available for absentee or mail-in ballots, any requirements for electronic notarization are not at issue in the case. The Amended Petition did not include any allegations about the use of photo ID during *in-person* notarizations—indeed, it included no other allegations about photo ID of any sort—and it did not request any relief related to any alleged photo ID requirement, so the Amended Petition raised no claim on this ground. *Hendricks*, 308 S.W.3d at 747; *Willamette*, 34 S.W.3d at 200.

Next, Plaintiffs contend that the Amended Petition raised allegations regarding disparate impact on minority voters. App. Br. 53-54. The State agrees that Paragraph 10 (and several other Paragraphs) of the Amended Petition fairly alleged disparate *health risks* to minority voters from Covid-19. And the State agrees that *health risks* of Covid-19 are raised in Count II of the Amended Petition. *See* D10, ¶¶ 144-152. But the Amended Petition does not include any allegations about disparate burdens on minority voters *other than health risks*—such as minority voters' alleged disproportionate lack of photo IDs, greater voter confusion, greater burdens from time and transportation, etc.—and Plaintiffs identify no such allegation.

Moreover, Plaintiffs' current argument that the Amended Petition raised a claim based on race-based disparate impact is surprising, because on September 18,

2020, after the close of discovery, Plaintiffs filed a motion in the trial court advising the Court that they were *not* raising any claims based on race-based disparate impact, and that they had abandoned any such claim. *See* D95, at 11 (advising the Circuit Court that "Plaintiffs *are not introducing a 'disparate impact' claim and did not pursue such a claim in their pretrial brief*") (emphasis added). Plaintiffs' shifting positions on this point are dizzying: (1) they did not raise any non-health-related race-based disparate impact claim in their Amended Petition; then (2) they aggressively injected those issues into the case just before the close of discovery by producing a lengthy "supplemental" expert report providing detailed opinions on this issue at 8:59 a.m. on Labor Day, September 7; then (3) they disavowed any such claim to the Circuit Court in a motion filed after the close of evidence; and now (4) having told the trial court they are *not* raising any such claim, they seek to re-insert it into the case repeatedly in their brief on appeal. This jumble of conflicting positions vividly illustrates the reason for the black-letter rule that claims have to be *pleaded* to place the opposing party and the Court on fair notice of what issues are in dispute in the case.

Finally, Plaintiffs argue their "[e]vidence of [non-health-related] burdens was no surprise" to the State. App. Br. 54. This argument is beside the point, because the Circuit Court was obliged to disregard evidence that was wholly irrelevant to claims and allegations actually raised in the Amended Petition, regardless of whether

any party was "surprised." In any event, the procedural history of this case decisively refutes Plaintiffs' argument, and demonstrates that Plaintiffs' attempt to insert what even they describe as a "myriad" and "bevy" of new issues into the case (App. Br. 2, 21, 50) at the very last minute was calculated to inflict unfair surprise on Defendants.

Plaintiffs contend that they provided notice to the State of these new theories by raising them in a witness list, deposition notices, and deposition questions occurring on or after August 24, 2020. App. Br. 54-56. Plaintiffs neglect to observe that the parties had stipulated that discovery would conclude by September 4, 2020, ten business days later. In other words, Plaintiffs waited until the very end of discovery and then aggressively inserted a whole "myriad" and "bevy" of new factual claims and theories into the case. Moreover, as Plaintiffs' Motion to Conform filed on September 18 made clear, Plaintiffs *intended to raise these issues all along*, even though they did not plead them in the Amended Petition on July 1, and never sought an amendment to the petition at any time before the close of discovery. D95, at 4, 4-13. In fact, they filed a "conditional" motion to amend the pleadings to conform with the evidence—without attaching any proposed Second Amended Petition—shortly after midnight on September 18, the date that the parties had stipulated that the case would be entirely submitted to the Circuit Court. *Id.*

Plaintiffs cite only one instance *before* August 24 in which they claim they gave Defendants notice of the new factual theories—the disclosure of Dr. Barreto's initial opinions on August 10. App. Br. 54. Again, Plaintiffs neglect to mention that they refused to produce Dr. Barreto for deposition until September 8—after the parties had agreed that discovery would close on September 4—and then they disclosed a "myriad" and "bevy" of "supplemental" opinions from Dr. Barreto at 8:59 a.m. on Labor Day, September 7. In light of their admission in their Motion to Conform that they intended to raise these issues all along, their decision to raise all these issues during the massive crunch at the close of highly expedited discovery appears to reflect deliberate tactics. The Circuit Court declined to reward this strategic behavior, and this Court should decline to do so as well. *See Kenley v. J.E. Jones Const. Co.*, 870 S.W.2d 494, 498 (Mo. App. 1994) ("Plaintiffs plainly could have included these counts earlier, as alternative claims at least. Instead, Plaintiffs did not ask leave to amend until all but one of their original counts had been disposed of. Our liberal amendment rules are not meant to be employed as a stratagem of litigation.").

In a footnote at the end of Point II, *see* App. Br. 58 n.12, Plaintiffs argue in the alternative that the Circuit Court erred in denying their motion to amend the pleadings to conform with the evidence under Rule 55.33, which was filed after the close of discovery on September 18, 2020. D95. Plaintiffs did not challenge this

ruling in a separate Point Relied On, so the issue is waived. *Johnson v. State*, 580 S.W.3d 895, 908 (Mo. banc 2019). Moreover, this contention is meritless for the many reasons stated in the State's response to that motion. D158. Among other reasons, Plaintiffs did not file a proposed Second Amended Petition with their motion to amend the petition, instead requiring the Court to devise a Second Amended Petition for them. *See, e.g., Doran v. Chand*, 284 S.W.3d 659, 666 (Mo. App. 2009) (affirming the denial of leave to amend where the amending party did not "recite any new or additional facts or claims that they wished to assert in an amended petition *nor attach a proposed amended petition to their response*") (emphasis added); *Gross v. A New Missouri, Inc.*, 591 S.W.3d 489, 494–95 (Mo. App. W.D. 2019) (affirming denial of leave to amend where plaintiff "failed to identify any new claims or factual allegations he would present if permitted to file a Second Amended Petition").

Further, Plaintiffs' Motion to Conform made abundantly clear that they were aware of and intended to raise the new claims all along, and yet they waited until after the conclusion of discovery and trial to raise them. D95, at 3-13. *See Ben Brower Prop. Co., LLC v. Evella*, LLC, 554 S.W.3d 504, 511 (Mo. App. S.D. 2018) ("[T]here was no hardship to Evella in being denied leave to amend to raise an affirmative defense about which Evella had known for months before trial."); *Eckel v. Eckel*, 540 S.W.3d 476, 488 (Mo. App. W.D. 2018) (affirming denial of leave

when movant "did not … identify any facts that were unknown when the Petition was filed"); *World Wide Tech., Inc. v. Office of Admin*., 572 S.W.3d 512, 523 (Mo. App. W.D. 2019) ("[W]e cannot say the court abused its discretion in denying the motion for leave to amend where all of World Wide's proposed Second Amended Petition claims were [previously] known to World Wide."); *Dibrill v. Normandy Assocs., Inc*., 383 S.W.3d 77, 92 (Mo. App. 2012) ("There is no abuse of discretion in denying the amended pleadings of parties who fail to show the pleadings include any facts that were unknown when the original pleading was filed."); *Kenley*, 870 S.W.2d at 498 ("Plaintiffs plainly could have included these counts earlier, as alternative claims at least. Instead, Plaintiffs did not ask leave to amend until all but one of their original counts had been disposed of. Our liberal amendment rules are not meant to be employed as a stratagem of litigation."); *Tisch v. DST Systems, Inc*., 368 S.W.3d 245, 258 (Mo. App. 2012) (finding that "the trial court did not abuse its discretion in denying ... leave to amend" because allowing "the amendment would impliedly condone the adding of additional counts at the last minute"); *see also* Sheehan v. Nw. Mut. Life Ins. Co., 44 S.W.3d 389, 394 (Mo. App. E.D. 2000) (identifying the factors that govern motions to amend to conform pleadings with the evidence).

IV. The Circuit Court Correctly Entered Judgment for Defendants on Count II of the Amended Petition Because Plaintiffs Failed to Establish That the Notary Requirement Imposes a "Severe Restriction" or "Heavy Burden" on the Right to Vote, and the Requirement Satisfies Both Rational-Basis Review and Strict Scrutiny Because It Is Precisely Tailored to Prevent Election Fraud in Voting by Mail (Addresses Appellants' Point III).

The Circuit Court held that Plaintiffs had failed to establish the notarization requirement imposes a "severe" burden on the right to vote, and that the notarization requirement satisfies rational-basis review and would satisfy strict scrutiny if that were applicable. D164, at 11-18. Plaintiffs' challenges to these holdings lack merit.

Standard of Review. "The judgment in a court-tried civil case will be sustained unless there is no substantial evidence to support it, unless it is against the weight of the evidence, unless it erroneously declares the law, or unless it erroneously applies the law." *Lollar*, 2020 WL 5201213, at *2.

A. Plaintiffs Did Not Establish Any "Severe" Burden.

Assuming that *Weinschenk*'s tiers of scrutiny apply to a challenge to procedures for voting by mail, *but see infra*, Part V, in order to trigger strict scrutiny under Article I, § 25, the challenged statute must impose a "heavy burden" and a

"severe restriction" on the fundamental right to vote. *Weinschenk*, 203 S.W.3d at 216. In *Weinschenk*, this Court recognized that "reasonable regulation of the voting process and of registration procedures is necessary to protect the right to vote." *Id.* at 215. "So long as those regulations do not impose a heavy burden on the right to vote, they will be upheld provided they are rationally related to a legitimate state interest. If the regulations place a heavy burden on the right to vote, … our constitution requires that they be subject to strict scrutiny." *Id.* at 215-16. "When those rights are subject to 'reasonable nondiscriminatory restrictions,' rational basis scrutiny applies. When those rights are subject to 'severe restrictions,' … strict scrutiny applies." *Id.* at 216.

1. The alleged health risks do not present a "severe" burden.

First, Plaintiffs contend that the alleged health risks of notarization from Covid-19 present a "severe" burden on the right to vote. App. Br. 62-69. In doing so, they disregard the Circuit Court's factual findings and repeatedly cite their own preferred "facts" and evidence. *See id.* Their argument thus violates well-established Missouri law. *Ivie*, 439 S.W.3d at 199-200.

As discussed above in the Statement of Facts, the Circuit Court made specific factual findings on the alleged health risks of notarization. "The risks of contracting COVID-19 from getting one's mail-in ballot notarized is somewhere between zero (maintaining a quarantine status) and that of in person voting on election day."

D164, at 3, ¶ 1. "SB 631 removes the notary requirement for a large segment of the recognized at-risk population." *Id.* ¶ 2. "The employment of mitigation measures such as social distancing, wearing of masks and hand hygiene are practically achievable, not burdensome and will significantly reduce whatever health risk there is in getting one's mail-in ballot notarized." *Id.* ¶ 3. "Local election authorities, supported by the Secretary of State, were able to provide a safe voting experience and will continue to do so in the upcoming general election." D164, at 3, ¶ 4. "The grave health risks asserted by Plaintiffs were not realized in the recent primary election." *Id.* ¶ 5.

"Plaintiffs have failed to identify any known instance of transmission of Covid-19 during an in-person notarization, whether in Missouri or elsewhere." *Id.* at 12, ¶ 29. "The representative of the National Notary Association is also unaware of any known case of transmission of Covid-19 through notarization." *Id.*

"Plaintiffs' expert, Dr. Babcock, concedes that social distancing and other prudent precautions such as mask-wearing and hand hygiene are 'consistently effective' in preventing the spread of Covid-19." *Id.* at 12-13, ¶ 30. "There is no evidence that any voter would be prevented from pursuing such prudent precautions in their brief interactions with a notary, which the evidence shows would last 5 minutes or less." *Id.* at 13, ¶ 30. "[I]t is not a 'severe' burden to observe social distancing, mask-wearing, and hand hygiene during one's interaction with a notary."

Id. "Plaintiffs' expert, Dr. Babcock, did not demonstrate any significant familiarity with the notarization process," and thus "failed to provide any informative opinion about the health risks *from notarization*." *Id.* at 13, ¶ 31. Further, "notaries have the same interests in reducing the risk of acquiring COVID-19 as their client population and are likely to employ mitigation measures as well." *Id.* at 4, ¶ 10. In light of these facts, the Circuit Court found that "[t]he notarization requirement for mail-in ballots does not present a substantial or severe burden upon the right to vote." *Id.* at 4, ¶ 13.

Every one of these facts is supported by substantial evidence in the record, as discussed in detail above. *See supra*, Statement of Facts, Part A. Accordingly, the Circuit Court did not err in finding that the health risks of notarization are minimal—especially when one observes prudent precautions such as social distancing, mask-wearing, and hand hygiene—and that neither notarization nor observing such precautions presents a "severe restriction" or "heavy burden" on the right to vote.

In any event, even Plaintiffs' selective presentation of their own "facts" is unconvincing. Plaintiffs cite extensive evidence indicating that there are serious health risks to someone who *actually contracts Covid-19*, especially if they have pre-existing risk factors—which no one disputes. App. Br. 64-66. Plaintiffs cite little or no evidence to quantify the risk of contracting Covid-19 during the brief interaction with a notary, and they cite no evidence that would undermine the Circuit

Court's specific factual findings on this point. *See id.* Likewise, Plaintiffs argue that Missouri does not mandate mask usage for notaries, and that some notaries would serve customers who were not wearing masks. App. Br. 66-67. But Plaintiffs cite no evidence that any *notary* refuses to engage in social distancing and other reasonable precautions during notarization, or that any notary would refuse to observe those precautions if asked, and they cite no evidence that any voter could not do so during their notarization. *Id.* In fact, notary witnesses repeatedly testified that they do engage in reasonable precautions during notarization, and the representative of the National Notary Association attested to detailed guidelines for avoiding Covid-19 transmission distributed to notaries throughout the country. Plaintiffs also argue that the trial court ignored "the steadily worsening spread of COVID-19 in Missouri," App. Br. 63, but again, they overlook specific evidence from Defendants' expert contradicting this point. D152, Klausner Dep. 61:5-7.

2. Alleged notary scarcity does not present a "severe" burden.

The Court need not address Plaintiffs' arguments regarding notary scarcity, since they were never raised in the Petition. *See supra* Part III. But if it does, Plaintiffs arguments have no merit. Again, Plaintiffs attempt to re-argue the evidence *de novo* while cherry-picking evidence supporting them while ignoring the Circuit Court's well-supported factual findings. *See* App. Br. 70-74.

As the Circuit Court found, "[n]otaries are available throughout the state and the six week interval for mail-in and absentee voting provides extra time to find an utilize the services of a notary." D164, at 4, ¶ 9. "There are tens of thousands of notaries available in Missouri to notarize absentee ballots—including 23,000 fully available, and 44,000 with at least partial availability, based on Plaintiffs' own estimates—including hundreds of volunteers in the Secretary of State's volunteer program, as well as free notarization offered by local election authorities, public libraries, and other government offices throughout the State." D164, at 25-26, ¶ 68. "[N]o named plaintiff alleges that he or she had difficulty locating an available notary." *Id.* at 26, ¶ 69. "The Secretary of State's office has arranged for hundreds of free volunteer notaries across the State, including notaries at over 60 public libraries and many government offices in every significant population center across the State." *Id.* "Moreover, as the LEA representatives testified, 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." *Id.* Based on Plaintiffs' evidence, "the lowest 'notary access' county in Missouri (McDonald County) has 126 notaries in a single rural county—hardly a crisis of unavailability." *Id.*

Substantial evidence supports all these findings. *Supra*, Statement of Facts, Part B. In light of these facts—that there are tens of thousands of notaries in

Missouri available to notarize ballot envelopes, and free notarization offered by hundreds of volunteers and at public libraries, government offices, and local election authorities throughout the State—the Circuit Court plainly did not err in finding no "severe" burden from the putative "scarcity" of notaries.

3. The alleged photo ID requirement for notarization does not present a "severe" restriction.

Plaintiffs argue that notaries are allegedly requiring photo ID to notarize ballot envelopes, and that this photo ID requirement allegedly presents a "severe" burden on voters. App. Br. 75-77. Again, this issue was not raised in the Amended Petition, and the Circuit Court properly disregarded it. *Supra* Part III. The Circuit Court correctly held that this argument rests on a legal mistake, and that Plaintiffs had presented no evidence about alternative methods of notarization that do *not* require photo ID—evidently because they were unaware of them. D164, at 23-24, ¶ 62-66.

As the Circuit Court noted, "the Missouri statute governing notarizations provides three alternative methods of verifying identification to a notary for someone who lacks a photo identification: (1) personal knowledge of the notary, (2) attestation of someone who knows both the notary and the individual, and (3) attestation of two persons who do not know the notary but know the individual." D164, at 23, ¶ 62 (citing § 486.600(21), (23), RSMo). "Dr. Barreto asked no questions about these alternative methods of verifying identity in his notary and voter surveys, and Plaintiffs have submitted no evidence about any putative burdens

or difficulties that these alternative methods might of notarization impose on voters who lack a photo identification—indeed, they submitted no evidence on this point at all." *Id.*

Plaintiffs cite various questions about whether notaries typically require photo ID when notarizing documents, App. Br. 76, but none of these questions ever referred to the alternative methods of notarization available under § 486.600. It is wholly unsurprising that notaries responded that they require photo ID during notarizations in situations where there was no reference to alternative methods, because photo ID is used to verify identity in the vast majority of notarizations. No notary ever stated or testified that he or she would be unwilling to notarize documents using the alternative methods provided by Missouri law, and no voter ever testified that it would be burdensome to find one or two persons to attest to their identity in lieu of a photo ID—because they were never asked. D164, at 23, ¶ 62.

Finally, the Circuit Court correctly held that Plaintiffs' contention that notaries were violating *Priorities USA* and *Weinschenk* by requiring photo ID is baseless. *Weinschenk* and *Priorities USA* addressed the use of photo IDs for in-person voting, not in notarizing absentee ballots. D164, at 23-24, ¶¶ 63-65. *Weinschenk* did not purport to invalidate the notarization requirement for requiring photo ID, even though it existed for most absentee ballots at the time. Both *Weinschenk* and *Priorities USA* addressed the validity of provisions of Section

115.427, which provides identification requirements for in-person voting, not absentee voting. The first sentence of *Weinschenk* notes that the case addresses the validity of "a 2006 statute [that] was enacted requiring registered voters to present certain types of state- or federally-issued photographic identification in order to cast *regular ballots*." *Weinschenk*, 203 S.W.3d at 204 (emphasis added). *Weinschenk* emphasized that this requirement for in-person voting would "not affect absentee ballot … fraud." *Id.* at 204-05. Likewise, *Priorities USA v. State*, 591 S.W.3d 448 (Mo. banc 2020), addressed the validity of an affidavit that was required under Section 115.427 to be signed by *in-person* voters who failed to present a form of photo identification. *Id.* at 452-55. The notarization requirement for most absentee ballots was in effect at the time of *Priorities USA*, yet the Court never mentioned it (or mentioned absentee ballots in any way) in its opinion. *See id.*

4. The alleged financial cost of notarization does not present a "severe" burden.

Next, Plaintiffs contend that the alleged financial cost of notarization presents a "severe" burden. App. Br. 77. This was not raised in the Amended Petition, and it is irrelevant to the claims in the pleadings. *Supra* Part III. It is also meritless, and it disregards the Circuit Court's factual findings, which are well supported by substantial evidence. *See supra*, Statement of Facts, Parts D-E.

"No named plaintiff alleges or claims that he or she faces any financial difficulty from notarization." D164, at 25, ¶ 67. "The evidence demonstrates that

the Secretary of State has arranged for free notary services of ballot envelopes from hundreds of notaries across the State of Missouri, including dozens of public libraries and government offices widely distributed across the State of Missouri, many of which offer extended hours." *Id.* "There were 240 free notaries in the Secretary of State's program at the time of Dr. Barreto's expert report, the number had grown to 289 by the date of his deposition, and the number was 311 on September 18, 2020." *Id.* "Further, the LEA witnesses attested that it is common practice for local election authorities to provide notarization of ballot envelopes," which is done free of charge. *Id.* "Plaintiffs have provided no evidence that any individual voter will face any undue burden in accessing these widespread, free notarization services." *Id.*

Plaintiffs fail to show that any of these factual findings was unsupported by substantial evidence. App. Br. 77. They cite evidence to show that even a small notary fee could prevent a significant burden to a low-income voter, *id.*, but they cite no evidence that any such voter has actually been required to pay such a fee. They criticize the Secretary of State's free volunteer program as having "major limitations," *id.* at 72, even though it currently has 390 participants, and the number grows daily. And Plaintiffs overlook the other potential sources of free notarization, such as public libraries, Local Election Authorities (which are located in every county in the State), and tens of thousands of notaries in every community who are

not on the Secretary of State's list. In short, absent evidence that any voter anywhere in Missouri was actually forced to pay a fee for notarization, the Circuit Court did not err in holding that the fee for notarization did not present a severe burden. Moreover, as the Circuit Court correctly observed, even if the fee presented a severe burden, "the proper remedy would be to invalidate the requirement of *paying the fee* to have one's ballot notarized, not to invalidate the entire notarization requirement." D164, at 25, ¶ 67. Plaintiffs do not address this point.

5. **Time and transportation do not present "severe" burdens.**

Plaintiffs briefly contend that finding time and transportation to a notary present "severe" burdens. App. Br. 78. Again, Plaintiffs did not raise any claim on this issue in the Amended Petition, and it is meritless anyway. The Circuit Court made well-supported factual findings on this point.

"[N]o named plaintiff alleges that he or she faces any undue difficulty in finding time and transportation to a notary." D164, at 25, ¶ 68. "The time and transportation costs of going to a notary are, at most, directly comparable to the time and transportation costs of going to the polls to vote in-person on Election Day, and thus they cannot possibly constitute a 'severe' burden on the right to vote." *Id.* "[T]he evidence in this case demonstrates that the time and transportation burdens are lesser for notarization than for in-person voting." *Id.* "There are tens of thousands of notaries available in Missouri to notarize absentee ballots—including

23,000 fully available, and 44,000 with at least partial availability, based on Plaintiffs' own estimates—including hundreds of volunteers in the Secretary of State's volunteer program, as well as free notarization offered by local election authorities, public libraries, and other government offices throughout the State." *Id.* "Voters have a six-week window in which to notarize their absentee or mail-in ballots, as opposed to the one-day window for in-person voting on Election Day." *Id.* "It is easier to find time and arrange for transportation to a notary during a six-week window of time than during a one-day window of time on Election Day." *Id.*

In the face of these findings, Plaintiffs cite only subjective responses of voters in the survey of Dr. Barreto. App. Br. 78. But the Circuit Court expressly discredited Dr. Barreto's survey evidence on this point, holding that his survey regarding voter burdens "engaged in transparent double-counting and triple-counting of such 'burdens.' The Court does not credit Dr. Barreto's testimony and calculations" on this point. *Id.* at 28, ¶ 72. Plaintiffs claim that time and transportation are more difficult for "rural" voters, App. Br. 78, but they did not include any "rural" voters as Plaintiffs or witnesses to this case, so there is no direct evidence to support that contention, other than Dr. Barreto's discredited survey. Moreover, for urban and rural voters alike, "[t]he time and effort burdens of locating and getting one's ballot envelope notarized are not dissimilar to those of in person voting." D164, at 4, ¶ 12. Thus, they cannot possibly constitute a "severe" burden,

since in-person voting—going to the polls on Election Day—has been the predominant method of voting throughout Missouri's history.

In fact, "[v]oters have a six-week window in which to notarize their absentee or mail-in ballots, as opposed to the one-day window for in-person voting on Election Day. It is easier to find time and arrange for transportation to a notary during a six-week window of time than during a one-day window of time on Election Day." D164, at 25-26, ¶ 68.

6. Putative voter confusion does not present a "severe" burden.

Finally, Plaintiffs contend that there is voter confusion about the notarization requirement, which they contend imposes a "severe" burden. App. Br. 78-81. Again, this issue was not pled in the Amended Petition and should be disregarded. It is also meritless. The Circuit Court made well-supported findings on this point, which are supported by substantial evidence. *See supra* Statement of Facts, Part E.

"Failure to comply with the notary provision … was not a significant basis for ballot rejection in the recent primary election." D164, at 4, ¶ 11. "[N]o named plaintiff contends that they are confused by or fail to understand the notarization requirement." D164, at 27, ¶ 70. "The State provides instructions regarding the notarization requirement through many avenues, including guidance from the Secretary of State's office and from local election authorities, as well as clearly printed instructions in bold and all caps on the ballot envelope itself." *Id.* "LEAs

provide useful guidance to Missouri voters on this process." *Id.* "Plaintiffs do not contend that any of the State's instructions is inaccurate or misleading." *Id.* "Plaintiffs presented no evidence about the clarity of these instructions or their availability to voters, except for Dr. Barreto's survey, which referred to them only indirectly and obliquely." *Id.*

In their appellate brief, Plaintiffs once again rely heavily on Dr. Barreto's survey evidence to claim voter confusion. App. Br. 79. But the Circuit Court held that it "does not credit the conclusions Dr. Barreto draws from his survey on this point, and instead credits Dr. Milyo's criticisms of this survey as failing to provide useful information about voters' ability to navigate the voting-by-mail process." *Id.* ¶ 70. "As Dr. Milyo observed, the vast majority of voter-respondents to Dr. Barreto's survey stated that they did not intend to vote by mail, and so one would have no reason to expect that they would have useful information about how to vote by mail." *Id.* "As Dr. Milyo also explained, for all respondents, the survey erroneously presumed that voters' ability to recite the details of the voting-by-mail process on the phone during a cold call of a 39-question survey (not counting numerous question sub-parts) accurately reflects voters' ability to figure out the process when they need to." *Id.* "In fact, only 4.5 percent of voters in Dr. Barreto's survey could even identify notarization as a requirement for mail-in ballots on the phone, but when it came to actually voting, 97 percent of Missouri voters casting mail-in ballots came

understood that notarization is required for mail-in ballots." *Id.* "This result dramatically illustrates the severe limitations of Dr. Barreto's 'voter survey' approach to assessing the risks of voter confusion from the notarization requirement." *Id.*

Other than Dr. Barreto's survey, Plaintiffs cite only a small handful of anecdotes—including hearsay anecdotes from the NAACP's corporate representatives—to allege that some voters were confused. App. Br. 79. The Circuit Court was free to give little or no weight to such evidence, and in fact, it did not credit or give weight to anecdotal hearsay evidence. D164 at 30, ¶ 79. Plaintiffs argue that "lack of notarization was the number one reason that mail-in ballots were rejected in August," App. Br. 81, but they fail to argue or cite any evidence that the rate of absentee and mail-in ballot rejections was any higher in August 2020 than it was in prior elections in 2018 before the pandemic.

B. The Notary Requirement Satisfies Rational-Basis Review.

Because the notary requirement does not impose a "heavy burden" or "severe restriction" on the right to vote, it is subject to rational-basis review, assuming *Weinschenk* applies. 203 S.W.3d at 215-16; *but see infra*, Part V. As the Circuit Court held, the requirement "easily satisfies that most deferential standard of review." D164, at 14, ¶ 34.

Under rational basis review, a statute must be upheld if there is any "reasonably conceivable state of facts that ... provide a rational basis for the classification[s]." *Kansas City Premier Apartments, Inc. v. Mo. Real Estate Comm'n*, 344 S.W.3d 160, 170 (Mo. banc 2011) (quoting *FCC v. Beach Commc'ns, Inc.*, 508 U.S. 307, 313 (1993)). "Rational basis review is 'highly deferential,' and courts do not question 'the wisdom, social desirability or economic policy underlying a statute.'" *Estate of Overbey v. Chad Franklin Nat'l Auto Sales N., LLC*, 361 S.W.3d 364, 378 (Mo. 2012) (quoting *Comm. for Educ. Equal. v. State*, 294 S.W.3d 477, 491 (Mo. banc 2009)). "Instead, all that is required is that this Court find a plausible reason for the classification in question." *Kansas City Premier Apartments*, 344 S.W.3d at 170. "This standard of review is a paradigm of judicial restraint." *Beach*, 508 U.S. at 314.

Under rational-basis review, the statute has "a strong presumption of validity," and "those attacking the rationality of the legislative classification have the burden to negative every conceivable basis which might support it." *Id.* at 314-15 (citation omitted). Under rational-basis review, "a legislative choice is not subject to courtroom fact-finding and may be based on rational speculation unsupported by evidence or empirical data." *Id.* at 315.

Applying this deferential standard in light of its well-supported factual findings, the Circuit Court held that "the notarization requirement is an identity-

verification requirement that serves to verify that the person finally executing the absentee or mail-in ballot is, in fact, the voter who is entitled to cast that vote." D164, at 15, ¶ 37. "The requirement thus advances the State's interests in preventing fraud through absentee and mail-in ballots and protecting the integrity and public confidence in Missouri elections." *Id.*

The Circuit Court's factual findings strongly support this conclusion. As noted above, the Circuit Court found that the risk of fraud through absentee and mail-in ballots is real, if difficult to quantify, and it is likely that a significant amount of such fraud goes undetected. The Circuit Court found that there was substantial evidence that fraud in voting by mail has the potential to affect the outcome of close elections. The Circuit Court found that fraudulent schemes involving absentee or mail-in ballots are typically perpetrated by candidates, campaign officials, or political operatives who engage in signature-forging, ballot harvesting, and similar techniques exploit the fact that, unlike in-person voting, for mail-in voting there is no direct verification of the identity of the voter at the time they are casting the ballot. The Circuit Court found that the notary requirement—which requires the voter to verify his or her identity through reliable means through to a sworn public official at the time they are finalizing their ballot for submission—is "precisely tailored" to address this critical problem. For all these reasons, the notary requirement easily satisfies rational-basis review.

C. The Notary Requirement Would Satisfy Strict Scrutiny.

For similar reasons, as the Circuit Court held, the notary requirement would also satisfy strict scrutiny, if it applied. "[T]he notarization requirement satisfies any higher standard of review, including strict scrutiny, because it is precisely tailored to advance the State's compelling interests in preventing election and voter fraud and protecting the integrity of Missouri's elections." D164, at 14, ¶ 34. As this Court held in *Weinschenk*, Missouri's interest in preventing fraud and protecting the integrity of elections is a "compelling state interest." *Weinschenk*, 203 S.W.3d at 204 ("[T]his Court fully agrees with Appellants that there is a compelling state interest in preventing voter fraud…"). And *Weinschenk* emphasized that fraud in absentee ballots had been shown to exist in Missouri, and that legislative initiatives to combat absentee ballot fraud should be encouraged. *Id.* at 216, 218. As the Circuit Court held, the notary requirement is "precisely tailored" to advance these compelling state interests, because it provides a highly effective method of identity verification at the most critical moment in the voting process—execution of the ballot. It makes thus makes ballot harvesting, ballot tampering, and signature forging much more difficult to perpetrate and easier to detect.

Plaintiffs argue that the notary requirement is not narrowly tailored to advance the State's compelling interests, but their arguments have no merit. And again, their

arguments disregard the Circuit Court's factual findings and improperly seek to substitute their own findings based on their own selective review of the evidence.

First, they argue that "absentee ballot fraud is exceedingly rare," App. Br. 85-85-91, but this argument is based entirely on Dr. Minnite's testimony, whose conclusions the Circuit Court explicitly refused to credit. *See supra* Statement of Facts, Part G. The Circuit Court repeatedly credited Dr. Milyo's contrary testimony regarding the reality of the risk of fraud in voting by mail, and its conclusions are thus supported by substantial evidence. *Id.* Moreover, Plaintiffs ignore that Dr. Minnite conceded that the News 21 database contains 491 instances of absentee ballot fraud over a 12-year period, or 41 instances per year, which is very hard to square with her claim that such fraud is "exceedingly rare." Plaintiffs argue that the Circuit Court relied on "a grab-bag of anecdotal hearsay" to support its conclusion, App. Br. 87, but they fail to observe that the Circuit Court relied on sources such as (1) the U.S. Supreme Court's opinion in *Crawford*, (2) this Court's opinion in *Weinschenk*, (3) the U.S. Department of Justice – Public Integrity Section's manual on *Federal Prosecution of Election Offenses*, (4) the conclusions and recommendations of the Carter-Baker Commission, (5) the charging documents and sworn affidavit of the FBI task force officer who investigated Mayor Hoskins of Berkeley (which Dr. Minnite relied on in her expert reports), (6) the trial presentation of fraud investigators who investigated the multi-year absentee ballot fraud scheme

in North Carolina (which Dr. Minnite relied on in her expert reports), and (7) Dr. Minnite's own News 21 database—all in addition to (8) many well-documented news articles that Dr. Milyo credibly testified provided reasonable proxies for concluding that fraud had likely occurred in those communities. In any event, it is common for experts to rely on hearsay sources so long as they are reasonable relied upon by experts in the field, and Dr. Milyo repeatedly and credibly testified that reasonable social scientists would rely on such news reports and similar sources in trying to ascertain the incidence of fraud in voting by mail.

Second, Plaintffs argue that the notary requirement is unnecessary because Missouri has other statutory safeguards to prevent fraud in voting by mail. App. Br. 91-94. Again, the Circuit Court made well-supported findings to the contrary. "Absent the notary requirement, no third party verifies the identity of the signer on a mail-in ballot envelope." D164, at 4, ¶ 8. Plaintiffs cite other statutory safeguards, but they never cite any statutory safeguard that requires an independent third party to verify that the person executing the ballot is actually the person who is entitled to cast the vote. *See* App. Br. 91-92. That is what a notary does at the critical moment at which virtually all absentee ballot fraud occurs, and thus the notary requirement plays a critical role in preventing and deterring absentee ballot fraud.

Third, Plaintiffs argue that the notary requirement will not deter "corrupt campaign workers," because they will supposedly recruit corrupt notaries to evade

the requirement. App. Br. 94-95. But Plaintiffs cannot identify any case where a notary has been corrupted—in Missouri or elsewhere—in the last 40 years. They rely solely on an extraordinary case from 1980 that involved a massive election-fraud conspiracy committed by organized crime that involved violence, intimidation, and several corrupt notaries. App. Br. 94-95. No similar case has occurred in the 40 years since then. None of the recent cases discussed in the expert testimony offered in this case involved corruption of notaries. As Dr. Milyo credibly explained, the need to suborn a notary—a sworn public official—greatly increases the costs of committing fraud, and thus it makes it harder to perpetrate and easier to detect.

Fourth, Plaintiffs argue that the State could pursue its anti-fraud interest by supposedly less intrusive means, such as "imposing heavier criminal penalties and devoting more resources to investigating and prosecuting fraud." App. Br. 96. Plaintiffs submitted no evidence on the efficacy of these proposed alternatives and have raised them for the first time on appeal, so the Circuit Court did not err in failing to consider them. Moreover, it is well-established that a party proposing a less restrictive alternative must demonstrate that the alternative would be "*at least as effective* in achieving the legitimate purpose that the statute was enacted to serve." *Reno v. ACLU*, 521 U.S. 844, 874 (1997) (emphasis added). If "the proposed alternatives will not be as effective as the challenged statute," the statute is narrowly

tailored. *Ashcroft v. ACLU*, 542 U.S. 656, 665 (2004). If the State "could not achieve its compelling interest to the same degree" through Plaintiffs' alternative proposal, the statute is valid. *United States v. Anderson*, 854 F.3d 1033, 1037 (8th Cir. 2017) (quotation omitted). Here, Plaintiffs presented no evidence to support their implausible argument that these after-the-fact remedies of increased investigation and stiffer penalties would be "at least as effective" in preventing fraud as the *proactive* safeguard of verifying voters' identities at the time they cast their ballots. Because Plaintiffs raised this argument for the first time on appeal, no such evidence exists. The same argument refutes Plaintiffs' proposal that Missouri could engage in signature-matching instead of notarization to verify the identities of those who had cast ballots by mail. App. Br. 97. Plaintiffs offered no evidence that signature-matching would be "at least as effective" in preventing and deterring fraud as notarization, *Reno v. ACLU*, 521 U.S. at 874, because their only evidence on signature-matching was a proposal of Dr. Minnite, who admitted that she had no expertise in signature-matching. D156, Minnite Dep. 254:19-23. The record in this case is therefore devoid of evidence on the efficacy of signature-matching to verify voters' identities, and the notion that it is "at least as effective" as notarization in verifying identities is not plausible.

Fifth, Plaintiffs argue that the notary requirement is underinclusive because it supposedly exempts "large classes of voters" who vote absentee. App. Br. 98. In

fact, the limited classes of absentee voters who are exempt from the notary requirement—*i.e.*, voters who are permanently incapacitated, those who are confined due to illness or disability, military/overseas voters, and (in 2020 only) voters who are in an at-risk category for Covid-19—exempt only a small minority of voters casting ballots by mail. These exemptions are narrow and carefully targeted to include only those voters for whom notarization would present significant difficulties. *See* § 116.291.1, RSMo. As the Circuit Court held, "there are strong reasons for these exceptions because notarization would be particularly difficult for these classes of voters," and thus "the Legislature's decision to exempt those classes of voters from the notarization requirement … is eminently reasonable." D164, at 17-18, ¶ 46. Moreover, courts have frequently given little weight to such "underinclusiveness" arguments in the context of applying strict or heightened scrutiny to statutes, on the ground that they involve challengers arguing that the statute was *not strict enough*. For example, both the U.S. Supreme Court and the en banc D.C. Circuit have held, in applying strict scrutiny: "[T]he First Amendment imposes no freestanding 'underinclusiveness limitation.' A State need not address all aspects of a problem in one fell swoop; policymakers may focus on their most pressing concerns. We have accordingly upheld laws—even under strict scrutiny—that conceivably could have restricted even greater amounts of speech in service of

their stated interests." *Wagner v. Fed. Election Comm'n*, 793 F.3d 1, 27 (D.C. Cir. 2015) (quoting *Williams-Yulee v. Florida Bar*, 135 S. Ct. 1656,1668 (2015)).

Consistent with this reasoning, the Circuit Court in this case held, "these exceptions make the notarization requirement narrower, not broader, so Plaintiffs' argument that they prevent the requirement from being narrowly tailored is not convincing." D164, at 18, ¶ 46.

D. Plaintiffs Did Not Meet the Standard for Facial Invalidation.

Furthermore, as the Circuit Court held, Plaintiffs did not "meet this Court's demanding standard for *facial* invalidation of the notarization requirement" based on any of the theories they raised, and thus the Court can grant as-applied relief to the plaintiffs in this case." D164, at 18, ¶ 49.

"A facial challenge to a legislative Act is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid." *State v. Perry*, 275 S.W.3d 237, 243 (Mo. banc 2009) (quoting *United States v. Salerno*, 481 U.S. 739, 745 (1987)). So long as there are any "circumstances in which [the statute] can be applied constitutionally, it is not facially invalid." *Id.* Moreover, this case is not a class action, because the trial court previously denied class certification, Plaintiffs abandoned that issue in the previous appeal, and Plaintiffs never asserted class allegations or class certification on remand. D164, at 19, ¶ 50. Accordingly, "only

an as-applied challenge is available," and "the Court can grant relief only as applied to the individual parties and their circumstances that are actually before the Court." *Id.* at 20, ¶ 55.

Plaintiffs do not contend, and the evidence does not support, that the various "burdens" they assert—such as alleged health risks, voter confusion, notary scarcity, financial burdens, time and transportation burdens, etc.—present a "severe restriction" or "heavy burden" to every voter in Missouri. In fact, the evidence demonstrates that they do not present such a burden in *any* case. At very least, there is no reason to conclude that these issues present a severe burden to voters in the vast majority of instances. Thus, Plaintiffs come nowhere near showing that there is "no set of circumstances exists under which the [notary requirement] would be valid." *Perry*, 275 S.W.3d at 243.

V. The Plain Language of Article VIII, § 7 of the Missouri Constitution and a Century of Missouri Case Law Bar Plaintiffs' Count II (Responds to Appellants' Point IV).

Plaintiffs' Count II fails for another reason: it erroneously presumes that Missouri recognizes a constitutional right to vote by mail. As the Circuit Court correctly held, D164, at 8-11, Article VIII, § 7 of the Missouri Constitution "expressly confers on the Legislature discretion as to whether to allow voting by mail." D164, at 11, ¶ 24 (citing MO. CONST. art. VIII, § 7). A century of Missouri case law—from 1916 to 2016—have consistently reaffirmed this conclusion. Plaintiffs dispute this holding in their Fourth Point Relied On, App. Br. 103-108, but their arguments lack merit.

Standard of Review. This issue presents a question of constitutional interpretation, which this Court reviews *de novo*. *Schweich v. Nixon*, 408 S.W.3d 768, 773 (Mo. banc 2013).

A. Article VIII, § 7 Confers Discretion on the Legislature to Authorize Voting by Mail.

Article VIII, § 7 of the Missouri Constitution—entitled "Absentee voting"—specifically addresses voting by mail. MO. CONST. art. VIII, § 7. Article VIII, § 7 provides, in its entirety: "Qualified electors of the state who are absent, whether within or without the state, *may* be enabled by general law to vote at all elections by

the people." *Id.* (emphasis added). As Missouri courts have often held, the word "may" denotes discretion, not an obligation. *See, e.g., Wolf v. Midwest Nephrology Consultants, PC*, 487 S.W.3d 78, 83 (Mo. App. W.D. 2016) ("It is the general rule that in statutes the word "may" is permissive only, and the word "shall" is mandatory.") (quoting *State ex inf. McKittrick v. Wymore*, 119 S.W.2d 941, 944 (Mo. 1938)).

Thus, under the plain language of Article VIII, § 7, the Missouri Constitution confers on the legislature the discretion to decide whether, and to what extent, to authorize voting by mail for Missouri voters. *Id.* The more specific language in Article VIII, § 7 defeats Plaintiffs' attempt to discover a constitutional right to voting by mail using certain specific procedures in the more general language of Article I, § 25. *See, e.g., Dieser v. St. Anthony's Med. Ctr.*, 498 S.W.3d 419, 431 n.5 (Mo. banc 2016); *Earth Island Inst. v. Union Elec. Co.*, 456 S.W.3d 27, 33 (Mo. banc 2015). The various statutes that Plaintiffs challenge are "general law[s]" that "enable[]" qualified voters "whether within or without the state" to vote by mail. MO. CONST. art. VIII, § 7. Those statutes are thus specifically authorized by Article VIII, § 7 of the Constitution. *Id.*

Consistent with this plain meaning of the Constitution, Missouri appellate courts have repeatedly held that voting by mail is a "special privilege," not a constitutional right. *See, e.g., Straughan v. Meyers*, 187 S.W. 1159, 1163 (Mo.

1916); *Barks v. Turnbeau*, 573 S.W.2d 677, 681 (Mo. App. E.D. 1978); *State ex rel. Hand v. Bilyeu*, 346 S.W.2d 221, 225 (Mo. App. 1961) (opinion vacated by transfer to Missouri Supreme Court, but decision upheld *State ex rel. Hand v. Bilyeu*, 351 S.W.2d 457 (Mo. 1961)); *Elliott v. Hogan*, 315 S.W.2d 840, 848 (Mo. App. 1958). For example, in *Straughan*, this Court stated that absentee voting is a "special privilege" that "under the general laws, could not be exercised." 187 S.W. at 1163, 1164. As *Straughan* held, casting a vote by mail is not a constitutional right under Missouri law; rather, the absentee ballot statutes merely "provide the means and machinery through which a certain class of citizens might enjoy a privilege which, under the general laws, could not be exercised." *Id.* at 1163. Likewise, *Barks* held that "the opportunity to vote by absentee ballot is clearly a privilege and not a right. Compliance with the statutory requirements is mandatory." *Barks*, 573 S.W.2d at 681 (emphasis added). The "special privilege" of casting an absentee ballot, *Barks* held, "is limited to … statutory grounds." *Id.* Similarly, *Bilyeu* stated that "[t]he casting of vote by absentee ballot at any election is not a matter of inherent right. It is a special privilege conferred and available only under certain conditions." *Bilyeu*, 346 S.W.2d at 225. And *Elliott* emphasized that "the absentee voting statutes with respect to such requirements are mandatory." *Elliott*, 315 S.W.2d at 848.

In 2016, the Court of Appeals reaffirmed these principles in *Franks v. Hubbard*, 498 S.W.3d 862, 868 (Mo. App. E.D. 2016). Citing *Straughan*, *Elliott*,

and *Barks*, the Court of Appeals held that "the opportunity to vote by absentee ballot is clearly a privilege and not a right. Compliance with the statutory requirements is mandatory." *Id.* Emphasizing that "the legislature has provided safeguards to prevent abuse of the privilege," *id.* (quoting *Elliott*, 315 S.W.2d at 878), the Court of Appeals in *Franks* reaffirmed that "[t]o vote by absentee ballot is not a matter of inherent right but rather a special privilege available only under certain conditions." *Id.* (quoting *State ex rel. Bushmeyer v. Cahill*, 575 S.W.2d 229, 234 (Mo. App. E.D. 1978)). The Court of Appeals held that "[t]his precedent is drawn directly from the Missouri Supreme Court which established that the casting of an absentee ballot is 'a special privilege ... available only under certain conditions' and 'until these conditions are complied with, the privilege cannot be exercised.'" *Id.* (quoting *Straughan*, 187 S.W. at 1164).

Federal law, likewise, holds that there is no constitutional right to vote by mail. In *McDonald v. Board of Election Commissioners*, 394 U.S. 802 (1969), the U.S. Supreme Court held that there was no constitutional right to cast an absentee ballot, and it upheld Illinois' statute that prevented inmates from obtaining absentee ballots. *Id.* at 807-09. Notably, the voter-plaintiffs in McDonald—inmates housed in Cook County jails—were incarcerated and thus could not vote at all without an absentee ballot. *See id.* They asserted that Illinois' failure to provide them absentee ballots violated their fundamental right to vote. *Id.* The U.S. Supreme Court rejected

this argument, distinguishing the right to vote from the privilege of voting by mail, and holding that "there is nothing in the record to indicate that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote. It is thus not the right to vote that is at stake here but a claimed right to receive absentee ballots." *Id.* at 807. The Court recognized Illinois' "wide leeway" to set policy, applied rational-basis review, and upheld Illinois' statutory limitations on absentee voting, which were far more restrictive than Missouri's highly permissive regime here. *Id.* at 808.

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

Under the plain language of Article VIII, § 7 of the Constitution, the Legislature had no obligation to provide voting by mail at all. MO. CONST. art. VIII, § 7. Accordingly, the broad access to voting by mail that the Legislature did provide in SB 631 far exceeds constitutional requirements. Moreover, as noted above, Missouri's cases have repeatedly emphasized that the procedural safeguards surrounding voting by mail are "mandatory" and have required "strict compliance" with them. *Straughan*, 187 S.W. at 1164 (holding that, without "proper safeguards,"

absentee voting is "capable of being made an instrument of fraud"); *Elliott*, 315 S.W.2d at 848 (holding that the "special privilege" of absentee voting is "strictly limited" by "safeguards to prevent an abuse of the privilege," and compliance with those statutory safeguards is "mandatory"); *Franks*, 498 S.W.3d at 868; *see also Weinschenk v. State*, 203 S.W.3d 201, 218 (Mo. banc 2006) (noting that "opportunities for voter fraud … persist in Missouri," including "absentee ballot fraud"); *id.* at 218 (noting that "fraud in registration and in absentee ballots" is "the type of fraud that has been shown to exist in Missouri") (emphasis added).

B. Plaintiffs' Arguments to the Contrary Are Unconvincing.

Plaintiffs offer several arguments to resist the plain meaning of Article VIII, § 7 of the Missouri Constitution, but none are convincing.

First, Plaintiffs argue that this Court applied strict scrutiny to restrictions on voting in *Weinschenk* and *Priorities USA*. App. Br. 103-104. Both *Weinschenk* and *Priorities USA* involved restrictions on *in-person* voting, not voting by mail, so neither case raised or considered the question of the Legislature's discretion over voting by mail under Article VIII, § 7, *Straughan*, and subsequent cases. *See Weinschenk*, 203 S.W.3d at 204 (noting, in its first sentence, that the case considered a photo-ID requirement for voters "to cast regular ballots"); *Priorities USA v. State*, 591 S.W.3d 448, 451 (Mo. banc 2020) (similar).

Second, Plaintiffs argue that *Priorities USA* "applied the *Weinschenk* tiers-of-scrutiny framework" to a photo-ID law, even though Article VIII, § 11 states that the Legislature "may" require photo ID for in-person voting. App. Br. 106. On the contrary, *Priorities USA* did not reach this question because it held that the affidavit requirement fails rational-basis scrutiny, which applies to all Missouri laws. *Id.* at 453 ("This Court need not evaluate the extent of the burden imposed by the affidavit requirement because the requirement does not satisfy even rational basis review."). Moreover, *Priorities USA* did not cite or discuss Article VIII, § 11 of the Constitution, so it provides no support for Plaintiffs' argument.

Third, Plaintiffs argue that the title of Article VIII, § 7 is "Absentee voting," so it should not be interpreted to extend to the "mail-in" voting authorized by Section 115.302. App. Br. 104. Plaintiffs make this argument one page after accusing the Circuit Court of being "formalistic." App. Br. 103. In any event, the argument has no merit. The *title* of Article VIII, § 7 addresses "Absentee voting," which is unsurprising because absentee voting was the only kind of voting by mail until June 4, 2020. But the *substance* of Article VIII, § 7 is not limited to absentee voting. It addresses voting by mail for any "qualified elector" in the State of Missouri: "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." MO. CONST. Art. VIII, § 7.

Fourth, Plaintiffs argue that the current "public health crisis" calls for application of *Weinschenk*'s tiers of scrutiny to their claims. App. Br. 104-105. But Plaintiffs cite no case law supporting the notion that the Missouri Constitution's plain and ordinary meaning changes during public health crises. "Words used in constitutional provisions are interpreted to give effect to their plain, ordinary, and natural meaning." *Schweich v. Nixon*, 408 S.W.3d 769, 776 (Mo. banc 2013) (quoting *Wright–Jones v. Nasheed*, 368 S.W.3d 157, 159 (Mo. banc 2012)). They do not shift in meaning according to the policy needs that Plaintiffs perceive at the time.

Finally, Plaintiffs rely heavily on federal district court cases. App. Br. 107-108. But these cases do not address the Missouri Constitution or the decades of Missouri case law interpreting the Missouri Constitution, and so they have little or no persuasive value here.

VI. The Organizational Plaintiffs Missouri NAACP and League of Women Voters Lacked Associational Standing Because Individual Members' Participation Was Necessary to Evaluate Standing and the Merits of Their Claims, and Plaintiffs Failed to Provide Convincing Evidence of Members' Standing (Responds to Plaintiffs' Point V).

The Circuit Court correctly held that the organizational Plaintiffs, NAACP and the League of Women voters, lacked standing to sue. D164, at 28-31.

Standard of Review. Standing presents a legal question that is subject to *de novo* review. *Comm. for Educ. Equality v. State*, 294 S.W.3d 477, 484 (Mo. banc 2009). In a bench-tried case, the trial court's factual findings that relate to standing are subject to substantial-evidence review. *Ivie*, 439 S.W.3d at 199-200.

The Circuit Court held that the organization plaintiffs lacked standing on four grounds: (1) they lacked direct standing because they cannot vote themselves, D164, at 28, ¶ 76; (2) they lacked associational standing because they provided only "conclusory allegations" and "a handful of hearsay anecdotes" to establish standing of their members," *id.* at 29-30, ¶¶ 78, 79; (3) they lacked associational standing because "Plaintiffs' theory of injury rests on subjective states of mind," so that the "participation of the individual member is essential," *id.* at 30, ¶¶ 80-81; and (4) they

lacked organizational standing on a "diversion of resources" theory because Missouri courts have not accepted this "liberalized" rule of standing, *id.* at 31, ¶ 82.

On appeal, Plaintiffs present no argument to challenge the trial court's first and fourth grounds cited above. *See* App. Br. 109-113 & n.23. They argue only that they have associational standing based on the standing of their members. *See id.* This argument fails for two reasons.

First, the third prong of associational standing requires that "neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Mo. Bankers Ass'n v. Dir. of Mo. Div. of Credit Unions*, 126 S.W.3d 360, 363 (Mo. banc 2003). The Circuit Court held that Plaintiffs could not satisfy this factor because both Plaintiffs' theory of injury-in-fact and their claims for relief "rest on a subjective state of mind," so that "the participation of individual members would be required to provide evidence critical *to both standing and the merits of their claims.*" D163, at 31, ¶ 81 (emphasis added). In other words, Plaintiffs assert claims on behalf of people who fear contracting or spreading Covid-19 in voting at the polls. Any voter who is not concerned about contracting or spreading Covid-19 lacks standing to assert such a claim, and also has no plausible argument that they suffer a "severe" burden from the notarization requirement. So each voter's subjective state of mind—*i.e.*, their level of fear of contracting or spreading Covid-19—provides "evidence critical to both standing and the merits of their claims." *Id.*

That is why the State cross-examined every voter witness in detail about their actual practices of social distancing and self-isolation—to assess their state of mind about Covid-19. A voter who frequently ventures forth into public and routinely fails to take precautions against Covid-19 lacks a credible claim that they are burdened by the alleged health risks of notarization.

Plaintiffs do not address this point, and so their argument fails. Instead, they merely assert that "the organizational Appellants seek a prospective remedy only, so the participation of individual members is not needed." App. Br. 112. This statement is beside the point. The Circuit Court did not hold that individual participation was necessary to grant complete *relief*. Rather, the Circuit Court held that individual members' subjective states of mind were critical to assessing both their standing and the merits of their claims. D164, at 30-31, ¶ 81. Plaintiffs' failure to establish the third prong of membership standing is fatal to the claim of associational standing.

The Circuit Court also correctly ruled that Plaintiffs lacked associational standing because they had not made specific allegations or produced credible or persuasive evidence of individual members' harm. D164, at 29-30, ¶¶ 77-80. The Circuit Court noted that "plaintiff-organizations" are required to "make *specific* allegations establishing that at least one *identified* member had suffered or would suffer harm." *Id.* at 29, ¶ 78 (quoting *Summers v. Earth Island Institute*, 555 U.S.

488, 498 (2009)). Plaintiffs did not make any such specific allegations in their Amended Petition, and they attempted to avoid the question at trial by providing "a handful of hearsay anecdotes about their alleged members through the testimony of their corporate representatives." *Id.* at 30, ¶ 79. The Circuit Court held that there was no "direct, admissible evidence" to support associational standing on this ground, and that Plaintiffs bore the burden of establishing standing. *Id.* Accordingly, the Circuit Court declined to give any weight to Plaintiffs' "hearsay anecdotes" and held that Plaintiffs had not carried their burden of proving standing based on the claims of their members. *Id.*

Plaintiffs argue that the Circuit Court erred in refusing to find standing based on the testimony of their corporate representatives, App. Br. 110-111, but they cite no authority holding that the Circuit Court abused its discretion in refusing to give weight to inadmissible hearsay in a bench-tried case. *See State v. Taylor*, 298 S.W.3d 482, 495 (Mo. banc 2009) (holding that it was not an abuse of discretion to exclude inadmissible hearsay testimony). On the contrary, in a bench-tried case, the trial court was entitled to give this evidence whatever credibility and weight it deemed appropriate. *Ivie*, 439 S.W.3d at 199. "Circuit courts are free to believe any, all, or none of the evidence presented at trial," *id.*, regardless of whether a party objects to its admission. The Court's Judgment makes clear that it gave no weight or credibility to the hearsay anecdotes provided by the organizational Plaintiffs'

corporate representatives, and it was entitled to do so. *See* D164, at 30, ¶¶ 80-81; *see also id.* at 4 ("All facts not specifically referenced are found to be consistent with and supportive of the judgment entered herein."). In fact, Plaintiffs themselves insist that the trial court erred in giving weight to "a grab-bag of anecdotal hearsay" in the context of considering *expert* testimony, where hearsay evidence is plainly permissible. App. Br. 87. But to establish facts supporting associational standing, they relied heavily on their own "grab-bag of anecdotal hearsay." *Id.* Plaintiffs fail to identify a reversible error on this basis, and so the Circuit Court's judgment on this point may be affirmed on this alternative ground as well.

CONCLUSION

For the reasons stated, the Circuit Court's judgment should be affirmed.

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Respectfully submitted,

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CERTIFICATE OF COMPLIANCE AND SERVICE

I hereby certify that a copy of the above was filed electronically and served by operation of the electronic filing system through Missouri CaseNet on October 2, 2020, on all counsel of record.

The undersigned also certifies that the foregoing brief complies with the limitations in Missouri Supreme Court Rule 84.06(b) and 84.06(c)(1)-(4), and that the brief contains 27,203 words, excluding the portions exempted from the word count under Supreme Court Rule 84.06(b).

/s/ D. John Sauer