IN THE MISSOURI SUPREME COURT

No. SC98744

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

v.

State of Missouri, et al.,
Respondents,

On Appeal from the Circuit Court of Cole County
Case No. 20AC-CC00169-01
Honorable Jon E. Beetem

Reply Brief of Appellants

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I. Relief Remains Realistic and Available.

Respondents suggest that if this Court finds a proven constitutional violation of the fundamental right to vote or that Respondents misinterpret § 115.277.1(2), that it must nevertheless sit idly by as the rights of tens of thousands of Missouri voters are violated. Simple relief is both realistic and available: the counting of all absentee and mail-in ballots, regardless of notarization.

Counting all ballots will ameliorate the constitutional violation. Respondents introduce a strawman, insisting that ballot envelopes would have to be reprinted, and, thus, it is too late for this Court to afford relief. But no reprinting is needed. Unlike the ballot title cases the trial court relied on, the challenge here does not target the contents of the ballot. While some voters might continue to believe their ballots must be notarized—just as some voters continued to believe photo ID was required after *Weinschenk* and *Priorities*—that does not render relief ineffective or unavailable. In any event, there is no dispute that *fewer* Missourians would suffer the burdens of the notary requirement if ballots are counted with or without it. Plus, the requested relief would cure perhaps the greatest burden of all: disenfranchisement because of failure to comply with an unconstitutional requirement. The record shows the requested relief would have protected hundreds of Missouri voters, including the witness Linda Casebolt and her husband, during the August election.[1] It would safeguard the right to vote for more now.

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[1] Respondents' arguments regarding confusion and disruption potentially caused by information regarding notarization on other materials fail for the same reasons.

Respondents complain that voters will be confused if the envelopes are not reprinted. But even *Purcell* notes voter confusion is not a free-standing concern; it matters where the requested change results in confusion that contributes to disenfranchisement. 549 U.S. 1, 4–5 (2006) (affirming denial of relief to avoid "voter confusion and consequent incentive to remain away from the polls"). There is no evidence or argument here that any confusion caused by *counting* ballots would disenfranchise or disincentivize voters.

Respondents invoke *Purcell* as if its principles are an inviolate command against any changes near to an election. But *Purcell* articulates merely one set of principles that a court may balance in considering an election change close in time to an election, and does not on its own mandate a particular result. *See* Op. Br. 115–16.

Respondents' cited cases illustrate the case-by-case nature of the inquiry. In *Dotson v. Kander*, a statutory challenge to ballot language, the case was moot because a statute prohibited the requested relief. 435 S.W.3d 643, 645 (Mo. banc 2014) (per curium) (also noting alternative relief remained available after the election). And, in staying a preliminary injunction in *Republican National Committee v. Democratic National Committee*, the Supreme Court noted "the critical point that the plaintiffs themselves did not ask for" the relief that was stayed. 140 S. Ct. 1205, 1206–07 (2020). Other cited cases involve preliminary relief or a stay pending appeal, where factors that do not apply here—such as the preliminary determination that could be reversed later—weigh heavily. *See, e.g., Veasey v. Perry*, 769 F.3d 890 (5th Cir. 2014) (granting stay where State showed likelihood of success on the merits and other factors weighed in

favor of stay); *Crookston v. Johnson*, 841 F.3d 396 (6th Cir. 2016) (same, stating that "first and most essential" reason for granting stay "is that Crookston offers no reasonable explanation for waiting so long to file this action" against 1996 law). This also applies to cases where Respondents presume *Purcell* was a driving issue despite the court providing no reasons. *See, e.g., Raysor v. DeSantis*, 140 S. Ct. 2600 (2020) (Mem.) (denying application to vacate stay without explanation); *Veasey v. Perry*, 135 S. Ct. 9 (2014) (Mem.) (same); *Frank v. Walker*, 574 U.S. 929 (2014) (Mem.) (vacating stay of injunction without explanation).[2] In this case, unlike those relied upon by Respondents, the request is timely and the case is resolved by the Court of last resort.

Finally, the requested relief would not subject different voters to different standards. All voters would exercise their fundamental right under the same standard: having their ballots counted regardless of notarization.

II. This Is Not a Substantial-Evidence Challenge.

Respondents pretend Appellants claim there was no substantial evidence to support the trial court's decision on Count II. While in a substantial-evidence challenge, "courts view the evidence in the light most favorable to the circuit court's judgment and

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[2] *League of Women Voters of Michigan v. Secretary of State* is also inapposite. There, the court denied mandamus because of its interpretation of the relevant statutes, not timing. The cited concurrence references a *Purcell* concurrence for a completely different proposition, No. 353654, 2020 WL 3980216, at *16 (Mich. Ct. App. July 14, 2020) (Riordan, J., concurring), namely that when factual issues are unresolved, proceeding without enjoining the challenged provisions "provide[s] the courts with a better record," *Purcell*, 549 U.S. at 6 (Stevens, J., concurring).

defer to the circuit court's credibility determinations[,]" *Ivie v. Smith*, 439 S.W.3d 189, 200 (Mo. banc 2014); this case is different for two reasons.

First, the decision was *against the weight of the evidence*—particularly in light of several legal errors.

Second, no deference should be given to the trial court's findings because this Court has the *exact same* record to review as the trial court.[3] Thus, Appellants are *not*

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[3] Respondents rely heavily on an assertion that the trial court implied it reviewed some video evidence. In the judgment, the lower court noted that "[a]fter hours of reviewing expert testimony," it reached certain conclusions regarding the experts' presentation of evidence. D164 p. 3; A002. This notation does not make clear whether the trial court even reviewed the videos, as opposed to cold deposition transcripts, but in either case this Court can review both from the same vantage point. And, as the trial court noted at the close of argument on September 18 when discussing the parties' proposed findings of fact and conclusions of law: "Now, understand, I don't have a whole lot of time to edit this stuff. I try to, and I thought last time I went through and addressed the issues that I was unwilling to sign off on and made the comments that I thought were pertinent, but whatever I sign[] is going to look an awful lot like the person who submitted it only because we're trying to get this out the door." Tr. at 94. The trial court also noted: "The record before the trial court is best described as robust. Both parties submitted proposed findings of fact which are better described as a transcript of all the evidence submitted interspersed with argument. While that might suffice for an appellate brief, it presented a nearly unmanageable task for the court to parse into the actual facts which support the judgment." D164 p.4; A004.

A large record was presented to the trial court for review quickly. However, a trial court's adoption of a party's proposed findings has been "routinely criticized" and this Court "has called verbatim adoption of 'significant portions of a proposed order' a 'troublesome practice.'" *Nolte v. Wittmaier,* 977 S.W.2d 52, 57 (Mo. App. E.D. 1998) (quoting *Massman Const. Co. v. Missouri Highway & Transp. Com'n,* 914 S.W.2d 801, 804 (Mo. banc 1996)); *see also Neal v. Neal*, 281 S.W.3d 330, 337 (Mo. App. E.D. 2009). This is because, "[t]he judiciary is not and should not be a rubber-stamp for anyone." *State v. Griffin*, 848 S.W.2d 464, 471 (Mo. banc 1993); *see also Tribus, LLC v. Greater Metro, Inc.*, 589 S.W.3d 679, 699 (Mo. App. E.D. 2019) (gathering cases expressing concern about courts acting as rubber stamp).

required to show a complete lack of evidence in the record supporting the trial court's judgment, and this Court should not disregard contrary evidence.

Respondents contend that some unspecified, unquoted passage on pages 49 and 59–60 of Appellants' brief concedes that the substantial-evidence standard applies, but no such concession appears. Page 49 includes the "standard of review" section for Point II and notes the general standard of review for bench-tried cases, but Point II raises a claim related to the trial court's *legal* error in failing to consider burden evidence. On pages 59–60, Appellants cite the "standard of review" for Point III, and Point III claims the trial court misapplied the law and reached a decision that is against the weight of the evidence.

This appeal turns on legal errors and the *weight* of the evidence. "'[A] claim that the judgment is against the weight of the evidence presupposes that there is sufficient evidence to support the judgment.'" *Ivie*, 439 S.W.3d at 205–06 (quoting *In re J.A.R.*, 426 S.W.3d 624, 630 (Mo. banc 2014)). "In other words, 'weight of the evidence' denotes an appellate test of how much persuasive value evidence has, not just whether sufficient evidence exists that tends to prove a necessary fact." *Id.* at 206; *see also White v. Dir. of Revenue,* 321 S.W.3d 298, 309 (Mo. banc 2010) (stating that "weight" denotes probative value, not the quantity of the evidence). Respondents want to reframe the appellate issues so this Court ignores the powerful weight of the evidence *against* them.

Where live witnesses testify at a trial, "[w]hen reviewing the record in an against-the-weight-of-the-evidence challenge, this Court defers to the circuit court's findings of fact when the factual issues are contested and when the facts as found by the circuit court

depend on credibility determinations." *Id.*; *see Pearson v. Koster,* 367 S.W.3d 36, 43–44 (Mo. banc 2012); *White,* 321 S.W.3d at 307–09. But the circumstances here are different. Typically, this deference is given in a weight-of-the-evidence challenge "because the circuit court is in a better position to weigh the contested and conflicting evidence in the context of the whole case." *Ivie*, 439 S.W.3d at 206. "The circuit court is able to judge directly not only the demeanor of witnesses, but also their sincerity and character and other trial intangibles that the record may not completely reveal." *Id.* Because this Court has the *same record* as the trial court, it can judge the demeanor of the witnesses and other trial intangibles at least as well, so no deference should be given the trial court's credibility determinations. Moreover, "[e]vidence not based on a credibility determination, contrary to the circuit court's judgment, can be considered in an appellate court's review of an against-the-weight-of-the-evidence challenge." *Id.* A trial court's judgment is against the weight of the evidence if that "court could not have reasonably found, from the record at trial, the existence of a fact that is necessary to sustain the judgment." *Id.* Here, particularly when the burdens evidence the trial court improperly ignored is meaningfully considered, the probative value of the evidence does not support the trial court's judgment.

III. Evidence of Burdens the Notary Requirement Imposes Is Relevant to Count II and Burdens Have Always Been Alleged in This Case.

Appellants' opening brief demonstrated how the weight of the evidence requires reversal of the trial court's judgment. In response, Respondents urge this Court to "disregard" perhaps the most critical evidence in the case—proof of the burdens the

notary requirement imposes during the pandemic. *See* Opp. Br. 87, 89, 91, 93 (urging this Court to ignore "notary scarcity," notaries unlawfully "requiring photo ID to notarize ballot[s]," the "financial costs of notarization," and "time and transportation" burdens). Respondents recognize they cannot win if the Court considers the record evidence.

In Count II, Appellants claim that enforcement of statutes preventing voters from casting an absentee ballot without a notary seal during the COVID-19 pandemic violates the fundamental right to vote under our Constitution. D10 p. 35. The burdens the notary requirement imposes are central to this claim because courts weigh the burdens imposed by the restriction on the right to vote to evaluate this claim. *See, e.g.*, *Weinschenk v. State*, 203 S.W.3d 201, 212 (Mo. banc 2006) ("[T]he extent of the burden [a] statute imposes on the right to vote *must be evaluated* before determining the level of scrutiny it will receive.") (emphasis added). Evidence of such burdens is thus necessarily relevant because "it logically tends to prove or disprove a fact in issue," *McGuire v. Kenoma, LLC*, 375 S.W.3d 157, 185 (Mo. App. W.D. 2012)—here, whether the burden the notary requirement imposes is a severe or heavy one. D10 p. 38, ¶168. This is not Respondents' first right-to-vote case, but they try to cast *evidence* of this central issue in any right-to-vote as new claims or legal theories.

The two Counts at issue on appeal are precisely the same Counts presented in the Amended Petition. *Compare* D10 p. 33-38 (identifying the two claims) *with* App. Br. at 1 (appealing those same claims).

Appellants specifically alleged, "[t]he notary requirement imposes additional burdens on the right to vote, including information, time, and transportation costs." D10

p. 38, ¶167. They pleaded facts showing "[t]he enforcement of statutes that prevent all eligible voters from voting absentee and/or by mail without having to obtain a notary seal during the COVID-19 pandemic imposes a severe burden on the fundamental right to vote." D10 p. 38, ¶168. And Appellants then presented ample evidence showing that these burdens are real: both notaries and voters lack sufficient information, voters are burdened by the time and travel it takes to visit a notary, and a substantial number of Missouri voters lack the photo ID that notaries are unlawfully demanding. Op. Br. 50–52. Such burdens are both relevant and dispositive. *Weinschenk,* 203 S.W.3d at 206, 208 (holding the photo ID requirement unconstitutional based on evidence that some "Missouri citizens lack the requisite photo ID," struggle with a "[l]ack of funds or time to undertake the sometimes laborious process of obtaining a proper photo ID," and face "additional practical costs, including … travel to and from … government agencies").

Respondents next misdirect the Court by imagining that Appellants somehow shifted positions regarding the notary requirement's race-based disparate impact to justify the trial court turning a blind eye to the disproportionate burdens the notary requirement places on Black Missourians. Appellants are *not* raising a race-based, disparate impact claim. D95 p. 11. Uncontested evidence of severe, disproportionate burdens on Black Missourians is nonetheless evidence of the notary requirement's burdens and is particularly relevant to the standing of MoNAACP, which Respondents challenge. In any event, Respondents "agree[] that … the Amended Petition fairly alleged disparate *health risks* to minority voters from Covid-19," Resp. Br. 77. There is, accordingly, no dispute that this Court can and should consider this burden evidence.

Respondents were on notice of every issue in this case and had ample opportunity to meet Appellants' evidence.[4] *See* Op. Br. 54-56. Respondents had ample notice and suffered no surprise or prejudice. *Id.* Their failure to meet this evidence with their own shows Appellants' entitlement to relief, not grounds to ignore it.

Unable to rebut Appellants' burdens evidence, Respondents invoke inapposite cases for the unremarkable—but inapplicable—proposition that issues that were *not* part of a case through pleadings or discovery can be treated as irrelevant. *See Kopff v. Miller*, 501 S.W.2d 532, 536 (Mo. App. 1973) (describing party seeking to introduce mid-trial, an entirely new defense, switching from a "lack of consideration" claim to a "proof of payment" claim); *Drury v. City of Cape Girardeau*, 66 S.W.3d 733, 740 n.24 (Mo. banc 2002) (holding party could not win summary judgment on a claim where he "concedes that this claim was never raised in the pleadings"); *Melton v. Padgett*, 217 S.W.3d 911, 913 (Mo. App. W.D. 2007) (holding evidence that came up only "during settlement negotiations" could not be relied on in divorce trial).

Here, by contrast, at every stage, the case has always been about the burdens the notary requirement imposes during the pandemic. The trial court ignored or failed to weigh the burdens evidence. Nothing in Respondents' brief demonstrates this Court should repeat that error.

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[4] Respondents mistakenly assert Dr. Barreto was refused for deposition until after discovery closed. His deposition was scheduled before then and moved by consent only after discovery was extended and, even then, was before discovery closed. Respondents should correct this misrepresentation. Furthermore, Appellants provided Dr. Barreto's supplemental opinions pursuant to the parties' agreement for disclosing supplemental opinions.

IV. Respondents' Efforts to Buttress the Trial Court's Flawed Findings Fail.

A. The trial court's findings regarding health-related burdens were against the weight of the evidence.

In a case that turns on the "severe" burdens imposed by the notary requirement the circuit court failed to acknowledge the severity of COVID-19's spread in Missouri. To fill this gaping hole in the trial court's decision, Respondents invoke widely discredited opinions from Dr. Jeffrey Klausner—who was not even mentioned, much less credited, by the trial court. Klausner cannot save the trial court's judgment.

First, Klausner is unqualified—his specialty is not respiratory illness; it is sexually transmitted diseases. D152 pp. 112:19-23, 113:4-19. This ill-fitting background likely shaped his inapplicable methodology, which wrongly focused on *solely* on the risks from one-to-one personal interaction, ignoring the risks of traveling to and from, and waiting in, a notary's office; underestimates the period of time in which individuals with COVID-19 are contagious; and considers only the risk of hospitalization to conclude that transmission risk because of the notary requirement is "very low." D152 p. 107:3-5. Klausner's purported basis for his opinions is his simplistic and unrealistic calculation that a person's risk of infection from interacting with another person can be quantified by multiplying the alleged prevalence of COVID-19 in the general population (1 in 25) by the assumed risk of transmission (1 in 5), which implies that the risk of infection is "less than 1 percent." D152 p. 76:1-5. Far from enjoying general acceptance in the field, Klausner's methodology has not been adopted by the CDC, the Missouri Department of Health, or any peer-reviewed study. D152 pp. 161:6-9, 164:10-17, 164:23-165:5; D142 p.

95:7-12. Rather, public health officials have deemed his methodology "badly flawed," "misleading and not helpful," and "meaningless." Plt. Exs. 093-094 (Klausner Exs. 8-9); D152 pp. 165:15-166:20, 167:5-15. Yet, this is Respondents' sole basis for contending that the health burdens the notary requirement imposes are neither heavy nor severe.

Second, Klausner's approach to COVID-19 has led him to conclusions about the coronavirus's scope and severity that have proven wildly wrong. His opinions have included the following:

- February 19: Americans "should be optimistic" the "epidemic will go down in size," Plt . Ex. 103 (Klausner Ex. 19);
- March 3: COVID-19 will not be "a major, widespread epidemic," and a maximum of 100,000 United States cases would be "our wildest estimate," D152 pp. 217:23-218:1;
- March 21: Americans would return to normal life "by the mid to the end of April," and any summer outbreaks would be "unlikely," Plt. Ex. 111 (Klausner Ex. 27); D152 pp. 225:18-21, 227:3-228:19;
- March 31: Statements by Dr. Anthony Fauci, Director of the National Institute of Allergy and Infectious Diseases and a member of the White House Coronavirus Task Force, that 100,000-200,000 Americans could die of COVID-19, left Klausner "highly skeptical" and are "misleading," Plt Ex. 112 (Klausner Ex. 28); D152 pp. 230:7-231:22;

With 7.4 million cases—and over 210,000 reported deaths— in the United States Klausner's opinions regarding COVID-19 have proven unreliable. This Court should not rely on his COVID-19 opinions now.

But that is not all Klausner has been wrong about. He has also been consistently wrong about COVID-19's severity:

- March 7: Claimed "influenza is a much more serious condition" than COVID-19, Plt. Ex. 115 (Klausner Ex. 31); D152 p. 212:14-16;

- March 16: Stated that for otherwise healthy people under the age of 65, COVID-19 is like a "mild cold," D152 pp. 224:10-225:2,

- June 26: Recommended "practical measures, that might include allowing younger people to get infected and stop worrying about that as much," Plt. Ex. 114 (Klausner Ex. 30).

These outlier positions are neither generally accepted nor safe. Respondents cannot find a reliable expert to refute the evidence that health risks imposed by the notary requirement heavy and severe.

Third, Appellants' epidemiological expert Dr. Babcock, Professor of Medicine at Washington University and co-chair of the CDC's Healthcare Infection Control Practices Advisory Committee, carefully explained the notary requirement's health risks.[5] *See* Op. Br. 10-11; 63-68. Her testimony is not refuted by Klausner, who (1) *disclaimed* that his opinion addressed in-person notarization, as opposed to single-person contacts generally, *see* D152 pp. 156:10-14; (2) assumed that notaries and voters would adopt social distancing, mask-wearing, and hygiene guidelines while the State provided notaries *no* such guidelines and nearly one-third of notaries surveyed indicated they would serve

[5] Respondents claim 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." Resp. Br. 21. That is incorrect. Nowhere in the cited document does she say. And she testified specifically that it would be *difficult* for a voter to ensure these precautions because social distancing will be hard to maintain as documents need to be passed back and forth, masks have to be removed for the notary to verify the voters' identity against the photo ID, and even if the *voter* is wearing a mask COVID-19 health risks arise from the mask compliance of others the voter comes into contact with, and mask compliance in Missouri is relatively low. D142 pp.80:9-81:14; 88:7-17; 86:87:23; 89:23-90:23. Even strict compliance with these measures, moreover, would not eliminate the risk of contracting COVID-19; the only way to do so is to stay home and not interact with others. D142 pp. 87:24-88:6.

voters *without* masks, D152 pp. 191:4-24, 192:11-12, 192:14, 192:16-193:13, 194:6-16; Plt. Ex. 009 (Barreto Ex. 1); and (3) unlike Dr. Babcock, has neither lived in Missouri, addressed COVID-19 specifically in Missouri; or had—or even talked to anyone other than counsel who has had—documents notarized here, D152 pp. 115:22-117:1, 117:13-16.

B. The trial court's findings regarding the state's photo ID requirement were against the weight of the evidence

Respondents' arguments regarding alternatives to the photo ID requirement for notarization are contrary to the uncontroverted evidence of what happens in real life.

First, Respondents note that three alternatives to the photo ID requirement exist and fault Dr. Barreto for purportedly failing to ask notaries about these alternative methods of identity verification. Resp. Br. 89. Respondents' premise is wrong, as are any lower court findings based on that argument. Dr. Barreto's notary survey asked: "Next I want to ask a few questions about how the notarization process works here in Missouri. If someone comes to you for notary services, do they need to present a photo ID?" Plt. Ex. 009 (Barreto Ex. 1) p. 50. While 96 percent of notaries said yes, only 4 percent answered that a voter could verify their identity another way. *Id. None* of the hundreds of notaries surveyed identified two of the alternative methods—attestation of someone who knows both the notary and the individual or attestation of two persons who do not know the notary but know the individual. *Id.* Dr. Barreto's survey did not foreclose knowledge of other methods of verifying identity; rather, notaries' responses revealed that they were trained by the State to require photo ID.

Second, Missouri notaries' testimony corroborates Dr. Barreto's findings. Moreover, the Secretary of State's representative, Clark, testified that a notary must follow these "key steps" when notarizing a document: "So, first, identify the individual in front of you who is seeking a notarization, whether that is personal knowledge. So, if I *personally know the individual or ask for their ID*.[6] Most of the time I ask for photo ID." D145 pp. 32:11-33:16 (emphasis added). Similarly, Missouri notary Boyce responded to these open-ended questions, "Have you had training as a notary on how to confirm the identification of the person whose document you're notarizing?" and "And what are you required to do?" by testifying she "ask[s] for a photo ID." D137 p. 66:21-67:3. Unless an individual is "personally known" to her, "like [her] mother or [her] child," she would need to verify a would-be voter's identity by asking for a photo ID. D137 p. 67:4-14. Missouri notary Hodgson testified similarly: "If I don't personally know the person well, I require ID." D150 p. 18:1-3. Additionally, Respondents' witness from the National Notary Association testified that his association recommends asking for an "ID that has an individual's photo" and signature. D141 p. 80:2-9.

Third, Respondents' suggestion that Missourians use more burdensome, riskier "alternative methods" of identity verification—such as bringing *more* people to the notary to vouch for their identity—ignores voter and notary concerns about COVID-19. Thirty-four percent of all voter respondents, and 29 percent of those requiring notarization, indicated they would be somewhat or very unlikely to interact with a notary

[6] Clark's testimony indicates that even he was unaware of the alternatives that Respondents rely on.

in-person "[g]iven the current rate of coronavirus infection and spread in [their] community." Plt. Ex. 009 (Barreto Ex. 1) p. 45; D143 pp. 102:15-104:21. Voters with reasonable concerns about transmission cannot reasonably be expected to flood a notary's office with additional attestors, and notaries would not embrace this "alternative," because it magnifies the risk of contracting and spreading COVID-19. D142 pp. 83:23-84:12 ("[T]he more people that you come in contact with, your risk isincreased.").

C. The trial court's findings regarding the necessity of the notary requirement were against the weight of the evidence.

Respondents dispute none of the facts Appellants presented, which establish the rarity of absentee ballot fraud. For example, there is no dispute that over the last 40 years there have been just six incidents of any type of election misconduct involving absentee ballots in Missouri. D156 p. 68:1-11. Nor do Respondents dispute the Heritage Foundation's database showing just one incident in Missouri in fifteen years.[7] Op. Br. 26-27.

Against this evidence, Respondents feebly argue that a News-21 database showing a total of 491 claims of fraud, including unproven *allegations* of over 12 years *nationwide*—when hundreds of millions of, and perhaps billions of votes were cast—

[7] Respondents attempt to distort the facts by claiming Dr. Minnite excluded electoral fraud and "focused on criminal convictions" in reaching her conclusion that absentee ballot fraud is rare. Resp. Br. 41. This is incorrect. Dr. Minnite uses precise definitions of voter fraud versus electoral fraud in order to match the actor committing the misconduct with the best public policy to address it. D155 pp. 33:24-35:1. However, she did not exclude electoral fraud in reaching her conclusions, and her analysis included every allegation of fraud in the State's possession (and in other sources), in addition to charges, prosecutions, or convictions. *See* Op. Br. 25-27.

somehow proves actual fraud is common in Missouri. *See* Resp. Br. 101. In the absence of real evidence, the trial court cited to court opinions and government reports to conclude that there is a substantial risk of absentee ballot fraud, even though the cited information say no such thing. Rather, they merely acknowledge absentee voter fraud exists and absentee voting might be more susceptible to fraud than in-person voting. *Id.* This does not refute that absentee ballot fraud almost always involves political parties or campaigns, who would not be deterred by the notary requirement, and not individual "ordinary voters" who bear the burdens of the notary requirement. *Id.* at 38. But given the scarcity of the problem and the ill fit of the notary requirement as a "solution," flimsy alternative "evidence" of sparse and unproven accusations cannot justify the burdens the notary requirement imposes.

1. The trial court and Respondents erroneously treat hearsay as substantive evidence.

This Court should decline Respondents' urging that it follow the trial court in crediting hearsay from out-of-state media reports—including an anonymous account in the New York Post—as if it were substantive evidence of "unobserved" absentee ballot fraud. D164 p. 17. To escape this error, Respondents claim, wrongly, that their expert testified that such media reports were "reasonable proxies for concluding that fraud had likely occurred in those communities." Resp. Br. 102. Not so. Milyo testified that *if* a social scientist generated a "Corruptions Reflections Index" as a proxy for unobserved voter fraud, *then* the news reports his counsel showed him *could* theoretically be used as an input into such an index. *See, e.g.*, D155 p. 53:16-23; 76:1-6. Milyo never generated

such an index. He did not testify the articles were in fact proxies of unobserved (*i.e.*, invisible) fraud in those communities. To the contrary, Milyo admitted he had *no idea* whether such accounts were or were not a "good proxy." D155 pp. 38:20-39:4.

Respondents insist the trial court properly relied on media sources as substantive evidence of fraud because "it is common for experts to rely on hearsay sources." Resp. Br. 102. It is elementary that "[a]n expert can rely on [hearsay] information provided that those sources are not offered as independent substantive evidence, but rather serve only as a background for his opinion." *Whitnell v. State*, 129 S.W.3d 409, 416 (Mo. App. E.D. 2004); *Grab ex rel. Grab v. Dillon*, 103 S.W.3d 228, 239 (Mo. App. E.D. 2003) (indicating such sources may serve as background for an expert opinion but not as independent substantive evidence). But Milyo's glancing at such reports—apparently for the first time during his direct examination, as they did not even appear in his written opinions—and reading them into the record does not work any alchemy on the sources.[8] These accounts remain hearsay, not evidence.

2. The trial court committed legal error by wrongly assigning to Appellants the Respondents' burden to show that less-restrictive alternatives are "at least as effective."

To save the trial court's opinion, Respondents misconstrue U.S. Supreme Court precedent and misapply it to this case brought under our state's constitution. Because

[8] Respondents make much of the lower court's passing references to Milyo's testimony as "credible," but these paragraphs were lifted, whole cloth, from Respondents' proposed conclusions of law. *Compare* D164 p. 17, ¶¶44-45 *with* D109 p. 84, ¶¶104-105. The trial court warned the parties it would largely adopt a party's submissions *in toto* and did so here. *See* Tr. 94:6-8.

Respondents introduced no meaningful evidence regarding less burdensome alternatives to the notary requirement, they are left to insist Appellants have the burden to demonstrate that proposed alternatives are "at least as effective" in preventing absentee ballot fraud. Resp. Br. 103. The very cases Respondents misconstrue make clear: it is *Respondents*' burden—not Appellants'—"to show that [the proposed alternative] is less effective" than the regulation at issue:

> The Government's burden is not merely to show that a proposed less restrictive alternative has some flaws; *its burden is to show that it is less effective*. It is not enough for the Government to show that [the regulation] has some effect. Nor [does the party proposing a less restrictive alternative] bear a burden to introduce, or offer to introduce, evidence that their proposed alternatives are more effective.

Ashcroft v. Am. Civil Liberties Union, 542 U.S. 656, 669, (2004) (emphasis added); *Reno v. Am. Civil Liberties Union*, 521 U.S. 844, 846 (1997) (holding Government failed to the demonstrate proposed less restrictive alternatives would be less effective); *see also United States v. Playboy Entm't Grp., Inc.*, 529 U.S. 803, 816, (2000) ("When a plausible, less restrictive alternative is offered [], it is the Government's obligation to prove that the alternative will be ineffective to achieve its goals.").

Respondents cannot escape—or shift to Appellants—this burden they made no effort to meet. They offered no evidence that alternative safeguards, including the other safeguards already in place, would be less effective than the notary requirement. Their expert conceded he did not consider any of the safeguards Missouri has in place to prevent absentee ballot fraud. *See* D155 pp. 206:5-19; 209:24-210:5; 211:10-23; 212:4-

214:2. He further admitted he was not aware of any evidence that the notary requirement has *any* efficacy in reducing the incidence of fraud. *See* D155 p. 271:7-16, 272:12-19.

Evidence also establishes that proposed alternatives such as signature matching, which many states employ, are at least equally effective at preventing any purported fraud.[9] All LEAs have the capabilities to conduct signature matching, indeed all already do so to verify identity in the provisional ballot context, and some already do so for absentee and mail in ballots. Op. Br. 29, 97.

V. The Notary Requirement Is Subject to the *Weinschenk* Burdens Analysis and Tiers of Scrutiny.

The notary requirement's enforcement during the pandemic is a voter restriction, so it cannot evade review simply because absentee voting may be viewed as a privilege, not a right.

While Respondents would prefer this Court ignore *Weinschenk* and *Priorities*, their lack of reference to Article VIII, § 7, does not make them irrelevant. To the contrary, both cases establish that the use of the term "may" in the Missouri Constitution does not exempt the legislature's acts that implicate the fundamental right to vote from scrutiny. *See* Op. Br. 102-05.

Respondents' reliance on *McDonald v. Board of Election Commissioner*, 394 U.S. 802, 807 (1969), is misplaced. *McDonald* addressed the *federal* right to vote, not the more expansive and concrete protections under the Missouri Constitution. *Weinschenk*,

[9] Signature matching may operate even more effectively than the notary requirement because while the notary requirement exempts arbitrary classes of voters, LEAs can apply signature matching evenly to all voters.

203 S.W.3d at 204. Nor are the cases factually alike. In *McDonald*, "nothing in the record [indicated] that the Illinois statutory scheme has an impact on appellants' ability to exercise the fundamental right to vote." 394 U.S. at 807. But the right to vote absentee is protected, even in federal court, where there is proof that *meaningful* alternative means of voting are unavailable and absentee voting is the only realistic means for certain voters to exercise the franchise. *See O'Brien v. Skinner*, 414 U.S. 524, 529 (1974) (stressing that "the Court's disposition of the claims in *McDonald* rested on failure of proof" that alternative means of voting were unavailable); *Am. Party of Tex. v. White*, 415 U.S. 767 (1974) (striking down discriminatory absentee ballot law); *Goosby v. Osser*, 409 U.S. 512, 521 (1973) (permitting claim by Philadelphia pretrial detainees seeking absentee ballots to proceed); *see also Obama for Am. v. Husted*, 697 F.3d. 423, 430–31 ("[t]he *McDonald* plaintiffs failed to make out a claim for heightened scrutiny because they had presented no evidence to support their allegation that they were being prevented from voting."). Here there is no "failure of proof" regarding the current absence of meaningful alternatives to remote voting during this pandemic, particularly for voters who are especially vulnerable to COVID-19 under CDC guidelines but not exempt from the notary requirement under Missouri law. *O'Brien*, 414 U.S. at 529.

VI. The Trial Court Misinterpreted § 115.277.1(2).

With over 220,000 dead Americans, our Governor quarantined, and our President hospitalized, few would still pretend that COVID-19 is akin to the flu. Undeterred, Respondents insist the legislature could not have intended § 115.277.1(2) to apply to any illness or else voters who confine themselves to avoid influenza would be permitted to

vote absentee. Respondents overlook that Appellants seek a narrow declaration as to § 115.277.1(2)'s application during this pandemic.

In this context, where generally accepted medical advice recommends as few interactions with others as possible, this Court should reject Respondents' effort to constrict the meaning of "confinement." As a baseline matter, dictionary definitions consistently recognize self-imposed restrictions as a form of confinement. *See, e.g.*, https://dictionary.cambridge.org/us/dictionary/english/confine ("to limit an activity, person, or problem in some way," for example "*Let's confine our discussion* to the matter in question"). Yet Respondents insist that voters who responsibly self-confine due to COVID-19 are doing so based on purely subjective, and thus uncognizable, fears.[10] Under Respondents' interpretation, a voter who self-isolates because she came into close contact with someone diagnosed with COVID-19 cannot vote absentee and must go to the polls or, at perhaps at the last minute attempt to obtain a ballot and visit a public notary at considerable risk to all. That cannot be what the legislature intended.

Had the legislature wished to require a voter to "be continuously totally disabled, confined within the house, not leaving it for any purpose", the legislature would have said

[10] Respondents' argument is misplaced because the legislature does permit absentee voting for purely subjective reasons. A voter expecting to visit his mother in a neighboring county on election day may vote absentee—whether he actually makes the trip or not. § 115.277.1(1). Religious beliefs and practices are also subjective, but they make one eligible to vote absentee under § 115.277.1(3). *See Patrick v. LeFevre*, 745 F.2d 153, 157 (2d Cir. 1984) (noting courts employ "subjective definition of religion, which examines an individual's inward attitudes towards a particular belief system." The legislature defers to individual voters to make these judgments, and § 115.277.1(2) is no different.

so. *See, e.g.*, *Bucher v. Great E. Cas. Co.*, 215 S.W. 494, 495 (Mo. App. 1919) (holding that insurance policy appended further requirements to the term "confinement" by explicitly providing that for the sake of the policy, the confined individual had to be "continually totally disabled, confined with the house, not leaving it for any purpose") *see also Musser v. Great N. Life Ins. Co.*, 266 S.W. 325, 327 (Mo. App. 1924) (recognizing that the phrase 'necessarily and continuously confined to the house" has a distinct "legal meaning"). Here, Respondents seek to rewrite the statute to add conditions that appear nowhere in the statutory text. Plus, Respondents' interpretation would not facilitate fair or reasonable administration. For example, if a person quarantining due to contact with a COVID-19 carrier walks her dog, is she still "confined" under Respondents' definition, or does leaving the house require that would-be voter to visit a notary and imperil the public health? Such judgments are reasonably left to Missourians, not the State, much less the Court.

Respondents' view of the interplay between subsections 2 & 7 would also produce absurd results. Under their view, anyone who ever tested positive for COVID-19 at any time could vote absentee without a notary, even if they are fully healthy, whereas an individual who recently contacted a super-spreader would have to visit the notary. Candidates on Missouri's ballot (and their wives) who test positive for COVID-19 may vote absentee without a notary even if they plan to visit the polls to rally voters on election day—and may do so "because of" COVID-19—while their opponents' responsible decision to self-confine on election day to prevent the spread of COVID-19 would be deemed an insufficient reason to vote absentee.

VII. MoNAACP and MoLWV Have Associational Standing.

Since its founding, the NAACP has advocated in court for its members' voting rights. Such cases have frequently reached the U.S. Supreme Court, from *Nat'l Ass'n for Advancement of Colored People v. State of Ala. ex rel. Patterson*, 357 U.S. 449 (1958), to *Nat'l Ass'n for the Advancement of Colored People v. Trump*, 298 F. Supp. 3d 209 (D.D.C. 2018), *aff'd nom. Dep't of Homeland Sec. v. Regents of the Univ. of California*, 140 S. Ct. 1891 (2020).

Respondents, however, would have this Court shut the courthouse doors to civil rights organizations. This Court looks to the same criteria as federal courts when assessing associational standing, which makes clear that MoNAACP and MoLWV have standing. *See St. Louis Ass'n of Realtors v. City of Ferguson*, 354 S.W.3d 620, 623 (Mo. banc 2011).

"[T]he first element of association standing is satisfied if the organization establishes that its members, *or any one of them*, … [c]ould make out a justiciable case had the members themselves brought suit." *Id.* at 624 (quotation omitted). Both MoNAACP and MoLWV established their members have an individual right to sue.[11] Most obviously, the individual plaintiffs, whose standing is unchallenged, are members. Del Villar is a MoNAACP member, D147 pp. 21:11-15, 22:11-13; Langlitz is a MoLWV member, D140 pp. 12:18-13:17. Each organization further identified additional members who would have

[11] Respondents do not dispute the interests at stake here are germane to MoNAACP and MoLWV's purposes.

standing. *See* D138 pp. 13:14-17, 15:17-16:9, 19:12-23:19, 63:21-64:4, D138 p. 24:7-17 (MoNAACP); D139 p. 26:9-24, pp. 31:6-19, 190:13-191:4.

The trial court's view that participation of individual members was required overlooks that Del Villar is an MoNAACP member and Ms. Langlitz is a MoLWV member. The trial court, moreover, fails to follow this Court's on-point decision holding otherwise:

> Where an association seeks only a prospective remedy, it is presumed that the relief to be gained from the litigation will inure to the benefit of those members of the association actually injured. Accordingly, requests made by an association for prospective relief generally do not require the individual participation of the organization's members. Conversely, where an association seeks a remedy such as money damages, the participation of its individual members is necessary to determine the particular damages to which each affected member is entitled.

Id. at 624–25 (quotations omitted). Appellants seek prospective relief only; they seek no money damages or individualized relief. Where an "association merely seeks prospective relief in the form of a declaratory judgment" and has "not pressed for damages or other relief" the participation of individual members in not required. *Id.* at 625; *Warth v. Seldin*, 422 U.S. 490, 515 (1975) (holding that where "the association seeks a declaration, injunction, or some other form of prospective relief, it can reasonably be supposed that the remedy, if granted, will inure to the benefit of those members of the association actually injured.").

CONCLUSION

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

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CERTIFICATE OF SERVICE AND COMPLIANCE

The undersigned hereby certifies that on October 5, 2020, the foregoing brief was filed electronically and served automatically on counsel for all parties.

The undersigned further certifies that pursuant to Rule 84.06(c), this brief: (1) contains the information required by Rule 55.03; (2) complies with the limitations in Rule 84.06; (3) contains 7,577 words, as determined using the word-count feature of Microsoft Office Word. Finally, the undersigned certifies that electronically filed brief was scanned and found to be virus free.

/s/ *Anthony E. Rothert*