IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

MISSOURI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,	)	
Plaintiffs,	)	
v.	)	No. 20AC-CC00169-01
STATE OF MISSOURI, et al.,	)	
Defendants.	)	

FINDINGS OF FACT, CONCLUSIONS OF LAW, AND FINAL JUDGMENT

INTRODUCTION

1. Plaintiffs in this case challenge the notarization requirement for absentee and mail-in ballots for the upcoming November 2020 general election. After trial on the merits, the Court holds that Plaintiffs have failed to prove their case and enters judgment for Defendants, for five reasons. *First*, Plaintiffs' Count I, which presents a question of statutory interpretation, fails as a matter of law, because Plaintiffs who are not ill or disabled are not "confine[d] due to illness of disability" under the plain and ordinary meaning of Section 115.277.1(2), RSMo. *Second*, Plaintiffs' claim in Count II that the notarization requirement poses unconstitutional health risks is unsupported by evidence, because Plaintiffs' expert concedes that social distancing and other prudent precautions are consistently effective in preventing the spread of Covid-19, and Plaintiffs provided no evidence of any instance of transmission of Covid-19 during a notarization. *Third*, Plaintiffs' attempt to inject a whole series of new claims and theories into the case after the close of evidence must be rejected, and their new theories are meritless and unsupported by evidence in any event. *Fourth*, the organizational plaintiffs lack standing to sue. *Fifth*, Plaintiffs seek to change the rules for a procedure of voting-by-mail that commenced on September 22 and is already underway. As of September 22, any Missouri voter could request and obtain an absentee or mail-in ballot, cast their vote, have the envelope notarized, and return the ballot. The ballot envelope—which, by statute, had to be finalized by September 22—advises most absentee and all mail-in voters in bold and all caps that they must have their ballot envelope notarized. Invalidating the notarization requirement, and re-printing thousands of ballot envelopes, during a process that is already underway threatens to create confusion among voters and local election authorities, and it would subject Missouri voters to different legal standards during the same election, depending on when they cast their absentee or mail-in ballot.

FINDINGS OF FACT

After reviewing hours of expert testimony, the Court concludes that the competing experts offered valid criticisms of the other's methodologies and conclusions while at the same time attempting to reframe the issue into what they wanted to talk about. Accordingly, their testimony was not extremely helpful to the Court. The Court does find the following facts to be established by credible evidence.

1. The risk 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.
2. SB 631 removes the notary requirement for a large segment of the recognized at-risk population.
3. 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.
4. 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.
5. The grave health risks asserted by Plaintiffs were not realized in the recent primary election.
6. The threat of mail-in ballot fraud is real, but cannot be easily quantified due to the variety of definitions used.
7. More people are interested in using the mail-in ballot process in the upcoming general election.

8. Absent the notary requirement, no third party verifies the identity of the signer on a mail-in ballot envelope.
9. Notaries are available throughout the state and the six week interval for mail-in and absentee voting provides extra time to find and utilize the services of a notary.
10. 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.
11. Failure to comply with the notary provision during the recent election was not a significant basis for ballot rejection in the recent primary election.
12. The time and effort burdens of locating and getting one's ballot envelope notarized were not dissimilar to those of in person voting.
13. The notarization requirement for mail-in ballots does not present a substantial or severe burden upon the right to vote.
14. The real burden upon the voting process at issue herein is the COVID-19 pandemic which, regardless of one's opinion as to the sufficiency of the government's response, was not a product of state action. The creation of and the SB 631 expansion of the special privilege of voting, not in person and not on election day, represents a legitimate effort by the Missouri General Assembly to reduce that burden.

The Court makes other findings of fact which are referenced in the conclusions of law presented below as they are relevant. All facts not specifically referenced are found to be consistent with and supportive of the judgment entered herein.[1]

[1] 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.

CONCLUSIONS OF LAW

I. Defendant Are Entitled to Judgment on Count I of the Amended Petition.

2. Count I of the Amended Petition contends that Plaintiffs who do not themselves have Covid-19, but who fear contracting or spreading Covid-19 if they go to a notary or the polls, are "confined due to illness" under Section 115.277.1.(2), RSMo, and thus authorized to cast an absentee ballot without a notary seal. Am. Pet. ¶¶ 144-152. As this Court previously ruled in its Order and Judgment of May 18, 2020, *see id.* ¶¶ 7-17, this claim fails as a matter of law[2].

3. Section 115.277.1(2) provides that "any registered voter of this state may vote by absentee ballot for all candidates and issues for which such voter would be eligible to vote at the polling place if such voter expects to be prevented from going to the polls to vote on election day due to … [i]ncapacity or confinement due to illness or physical disability, including a person who is primarily responsible for the physical care of a person who is incapacitated or confined due to illness or disability." § 115.277.1(2), RSMo.

4. In Missouri, the "primary rule of statutory interpretation is to give effect to legislative intent as reflected in the plain language of the statute at issue." *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. banc 2009). Plaintiffs contend that a voter who is not ill or disabled has an "illness" or "disability" under § 115.277.1(2). But in ordinary English, someone who is not ill or disabled does not have an "illness" or "disability."

5. Plaintiffs' interpretation of the phrase "confined due to illness" also contradicts the plain and ordinary meaning of that phrase. When a person states that she is "confined due to illness," everyone understands that she herself is sick. In ordinary English, no one would say that they are "confined due to illness" simply because they want to avoid catching an illness that *someone else*

[2] The analysis used by the Court in its ruling on the request for a preliminary injunction is repeated here so that this judgment does not have to incorporate that ruling by reference.

has. 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." § 115.277.1(2), RSMo.

6. "[T]he 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); *see also 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).

7. Plaintiffs' interpretation also contradicts the immediate context of the statute. *See, e.g., Krysl v. Treasurer of Missouri*, 591 S.W.3d 13, 15-16 (Mo. App. E.D. 2019) (holding that, "when interpreting statutes," courts "consider the words in context"). Subdivision (2) of § 115.277.1 provides that a voter may cast an absentee ballot if he or she expects to be prevented from going to the polls 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). 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.

8. Courts presume that the Legislature does not enact meaningless and superfluous provisions. *Caplinger v. Rahman*, 529 S.W.3d 326, 332 (Mo. App. S.D. 2017) (en banc); *State ex rel. Lavender Farms, LLC v. Ashcroft*, 558 S.W.3d 88, 92 (Mo. App. W.D. 2018). Thus, the immediate context of the statute directly confirms that "confined due to illness" has its ordinary and natural meaning—it refers to people who are confined because they are sick themselves, not because some third parties are sick.

9. Plaintiffs' interpretation would also render the major provisions of Senate Bill 631 meaningless and superfluous. SB 631 added a new subdivision (7) to Section 115.277.1, which provides that, "for an election that occurs during the year 2020," that a voter may cast an absentee ballot if "the voter … is in an at-risk category for contracting or transmitting severe acute respiratory syndrome coronavirus 2," *i.e.*, the virus that causes Covid-19. § 115.277.1(7), RSMo (emphasis added). But, on Plaintiffs' view, every voter who fears "contracting or transmitting" Covid-19 was already authorized to cast an absentee ballot under subdivision (2), which means that subdivision (7) would be meaningless and superfluous, in violation of well-established principles of interpretation. *Caplinger*, 529 S.W.3d at 332.

10. Plaintiffs' interpretation would also render superfluous the entirety of Section 115.302, which establishes the new procedure of mail-in ballots open to all Missouri voters for elections in 2020. If any Missouri voter who feared contracting or spreading Covid-19 was already authorized to cast an absentee ballot under Section 115.277.1(2), there would have been no need to enact an entire new statutory section authorizing mail-in voting for that same set of people. Plaintiffs' interpretation of Section 115.277.1(2) would render Section 115.302 meaningless and superfluous.

11. 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." *Id.* If Plaintiffs' interpretation were correct, then a voter who feared catching *any* illness at the polls, in any future election, would be entitled by the statute to cast an absentee ballot. No court or election authority has ever adopted this broad interpretation.

12. In addition, this Court interprets the statute as a whole, rather than reading the absentee-voting exception in isolation. *See Cosby v. Treasurer of State*, 579 S.W.3d 202, 207 (Mo. banc 2019). Missouri's voting laws demonstrate more than just a preference for in-person voting; they

require voting to take place in person unless the voter meets one of the enumerated exceptions in § 115.277.1, with an exception for elections during 2020 due to the current pandemic. By adopting an interpretation that would permit virtually anyone to cast an absentee ballot, Plaintiffs fail to read § 115.277 "as a whole." *Cosby*, 579 S.W.3d at 207.

13. Furthermore, Plaintiffs' interpretation violates the well-established principle that items listed together in a statute should be interpreted with similar meanings, *i.e.*, *noscitur a sociis*. *Union Elec. Co. v. Dir. of Revenue*, 425 S.W.3d 118, 122 (Mo. banc 2014). Here, the exception for illness and incapacity appears in a list of six enumerated exceptions for receiving an absentee ballot, all of which provide objective and verifiable grounds. *See* § 115.277.1(1)-(6). By contrast, Plaintiffs would interpret paragraph (2) to create a ground for absentee voting based on a subjective, unverifiable criterion—*i.e.*, "fear" of a catching an illness.

II. Defendants Are Entitled to Judgment on Count II of the Amended Petition.

14. Count II of the Amended Petition challenges the notarization requirement for absentee and mail-in ballots. It contends that requiring Plaintiffs who are *not* in the SB 631 at-risk category for Covid-19 to have their absentee or mail-in ballots notarized constitutes an unconstitutional burden on the right to vote under Article I, § 15 of the Missouri Constitution. Am. Pet. ¶¶ 154-168.

A. Article VIII, § 7 of the Missouri Constitution forecloses Plaintiffs' claims.

15. Plaintiffs urge this Court to apply strict scrutiny to the notarization requirement under the general right to vote in Article I, § 25, but they ignore the more specific provision of the Missouri Constitution that directly addresses voting by mail, Article VIII, § 7.

16. Article VIII, § 7 of the 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).

17. 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)).

18. 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.* As this Court stated in its previous Order and Judgment, "the plain language of the Missouri Constitution provides that there is no constitutional right to cast an absentee ballot." May 18, 2020 Order and Judgment, at 9, ¶ 27. "[U]nder the plain language of Article VIII, § 7, the Legislature 'may' permit absentee voting, but it is not obligated to provide it." *Id.* ¶ 28.

19. 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).

20. 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 (emphasis added). 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). 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.

21. In 2016, in *Franks v. Hubbard*, the Court of Appeals reaffirmed that "*the opportunity to vote by absentee ballot is clearly a privilege and not a right*. Compliance with the statutory requirements is mandatory." *Franks v. Hubbard*, 498 S.W.3d 862, 868 (Mo. App. E.D. 2016). *Id.* (emphasis added) (quoting *Barks*). 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).

22. Because there is no constitutional right to vote by mail at all, *a fortiori* there is no constitutional right to vote by mail without undergoing the notary requirement to verify the identity of the voter. The broad access to voting by mail that the Legislature provided in SB 631 exceeds the requirements in the Missouri Constitution.

23. Moreover, the Missouri Supreme Court and Court of Appeals have frequently emphasized that the procedural safeguards surrounding voting by mail—such as the notarization requirement for absentee and mail-in ballots—are "mandatory" and "strict compliance" with them is required. *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) (stating 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").

24. Plaintiffs' reliance on the more general protection of the right to vote in Article I, § 25 is misplaced. The more specific provision of the Missouri Constitution that specifically addresses "Absentee voting" governs Plaintiffs' claims, and it expressly confers on the Legislature discretion as to whether to allow voting by mail at all. MO. CONST. art. VIII, § 7.

B. Plaintiffs fail to establish a "severe" burden on the right to vote, so the notarization requirement is subject, at most, to rational-basis scrutiny.

25. Moreover, even if any scrutiny applies under Article I, § 25 to voting by mail, the notarization requirement would be subject to rational-basis scrutiny, which it easily satisfies.

26. 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. The Supreme 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 (emphasis added). "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 (emphasis added).

27. The notarization requirement imposes a quintessential "reasonable nondiscriminatory restriction" on the process of voting by mail. *Id.* It involves an ordinary, reasonable method of verifying the identity of the person signing and executing the absentee or mail-in ballot envelope, thus preventing election fraud and protecting the integrity of Missouri's elections. The notarization requirement is also "nondiscriminatory" because it is generally applicable without regard to race or any other protected class, and the exceptions to the notarization requirement are based on obvious differences in circumstances.

28. Count II of the Amended Petition identifies only one supposedly "severe" burden from the notarization requirement: the putative health risks of in-person notarization. Amended Petition ¶¶ 158, 160-164, 168; *see also id.* ¶ 162 (alleging that, "[d]uring the COVID-19 pandemic, the notary requirement presents significant health risks both to voters and notaries alike"). The evidence does not support Plaintiffs' claim that these putative health risks impose a "severe" burden on the right of any voter.

29. As discussed in detail above, the health evidence in this case does not support Plaintiffs' argument that notarization poses a "severe" burden on the right to vote. In all the evidence in this case, Plaintiffs have failed to identify any known instance of transmission of Covid-19 during an in-person notarization, whether in Missouri or elsewhere. The representative of the National Notary Association is also unaware of any known case of transmission of Covid-19 through notarization.

30. In addition, Plaintiffs' health evidence suffers from two critical deficiencies. First, 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. There is no evidence that any voter would be prevented from pursuing such prudent precautions in their brief interaction with a notary, which the evidence shows would last 5 minutes or less. Thus, there is no basis in the evidence to conclude that this poses any "severe" health risk to Missouri voters. And it is not a "severe" burden to observe social distancing, mask-wearing, and hand hygiene during one's interaction with a notary.

31. Second, Plaintiffs' health expert, Dr. Babcock, did not demonstrate any significant familiarity with the notarization process. Thus, she failed to provide any informative opinion about the health risks *from notarization*, which is the sole claim at issue in Count II. In its Order of July 10, 2020, this Court noted that "Dr. Babcock did not know a notary," and "had no real experience to testify from" about the health risks of notarization, and thus "any credible evidence of the relative risk of going to a notary to have one's ballot envelope notarized was sorely lacking." July 10, 2020 Order at 9 n.3. These observations remain equally true after Dr. Babcock's trial testimony.

32. 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." Am. Pet. ¶ 167. The forty-page petition includes no other allegations relating to these supposed "additional burdens," *id.*, and so the Court finds that Plaintiffs have not adequately pled any claim based on them. 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.

33. In any event, the "burdens" in "time and transportation" of locating and traveling to a notary are categorically similar to the "burdens" of time and transportation from traveling to the polls to vote in-person on Election Day, and thus they cannot plausibly constitute as "severe

restriction" on the right to vote. In fact, as the evidence in this case demonstrates, the burdens on time and transportation from notarization are less than for in-person voting, because in-person voting has a one-day window to travel to a single location, while mail-in and absentee voting have a six-week window to obtain a ballot and get it notarized. Further, voters have many different options of location when seeking notarization—including free notarization of ballot envelopes at public libraries and government offices across the State. Indeed, the Secretary of State has publicized as list of hundreds of notaries willing to provide free services for ballot envelopes across the State, many of whom will travel to the voter.

C. The notarization requirement easily satisfies rational-basis review, and it would satisfy strict scrutiny if higher scrutiny were applicable.

34. Because it does not impose a "severe restriction" or "heavy burden" on the right to vote, the notarization requirement is subject to rational-basis review. It easily satisfies that most deferential standard of review. In fact, the 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.

35. Rational-basis review is the most deferential standard of judicial review. 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.

36. Under rational-basis review, the State has no burden to justify the legislative classification. Instead, 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. Further, the actual motivation of the legislature is irrelevant. Under rational-basis review, "it is entirely irrelevant for constitutional purposes whether the conceived reason for the challenged distinction actually motivated the legislature." *Id.* at 315.

37. As Plaintiffs' witnesses including Dr. Barreto concede, the notarization requirement is an identity-verification requirement that serves to verify that the person finally executing an absentee or mail-in ballot is, in fact, the voter who is entitled to cast that vote. 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.

38. The State's interests in preventing fraud in voting by mail and protecting the integrity of elections are compelling state interests. *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…").

39. 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.

40. In *Crawford*, the U.S. Supreme Court held that fraud "perpetrated through absentee ballots … demonstrate[s] 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) (opinion of Stevens, J.).

41. In *Weinschenk*, the Missouri Supreme Court held that "the types of voter fraud and opportunities for voter fraud that persist in Missouri" include "absentee ballot fraud," and that "fraud … in absentee ballots" "has been shown to exist" in Missouri. *Weinschenk*, 203 S.W.3d at 218.

42. In its manual *Federal Prosecution of Election Offenses*, the U.S. Department of Justice's Public Integrity Section states that "[a]bsentee ballots are particularly susceptible to fraudulent abuse because … they are marked and cast outside the presence of election officials." U.S. Dep't of Justice, *Federal Prosecution of Election Offenses* (8th ed. Dec. 2017), at 28, *available at* https://www.justice.gov/criminal/file/1029066/download (Minn. Ex. 20).

43. The bipartisan Carter-Baker Commission on Election Reform, co-chaired by former President Jimmy Carter, reported that (1) "States … need to do more to prevent voter registration and absentee ballot fraud;" (2) "vote by mail … increases the risk of fraud;" (3) States should employ "safeguards for ballot integrity," including "signature verification," to prevent fraud during voting by mail; (4) "absentee balloting … has been one of the major sources of fraud" in elections; and (5) "[a]bsentee ballots remain the largest source of potential voter fraud." BUILDING CONFIDENCE IN U.S. ELECTIONS: REPORT OF THE COMMISSION ON FEDERAL ELECTION REFORM, at v, 35, 46 (Sept. 2005) (Minn. Ex. 18).

44. The cases discussed in the testimony 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. 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. 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."

45. 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. 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. 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.

46. Plaintiffs argue that the notarization requirement is not precisely tailored because a few subsets of voters are exempt from it—including (1) permanently disabled voters, (2) voters incapacitated due to illness of disability, (3) military/overseas voters, and (4) voters who are in an at-risk category for Covid-19. *See* § 115.291.1, RSMo. As the Court held in its prior May 18,

2020 Order, there are strong reasons for each of these exceptions because notarization would be particularly difficult for those classes of voters, and thus "the Legislature's decision to exempt those classes of voters from the notarization requirement … is eminently reasonable." *Id.* at 12, ¶ 37. Indeed, these exceptions make the notarization requirement narrower, not broader, so Plaintiffs argument that they prevent the requirement from being narrowly tailored is not convincing.

47. For all these reasons, this Court upholds the validity of the notarization requirement.

III. The Court Rejects Plaintiffs' Attempt to Inject Entirely New Claims Into This Case After the Close of Discovery.

A. Plaintiffs' attempts to add entirely new theories and claims to the case at the last minute is procedurally improper.

48. Plaintiffs seek to interject new claims and theories of relief that do not relate to the parties in this case, do not relate to the claims pled in the petition, and seek statewide relief on factual theories that were not raised until at or near the conclusion of discovery. These novel theories include claims of voter confusion, alleged notary scarcity, alleged lack of photo IDs to obtain notarization, alleged disparate impact on rural voters, and alleged disparate impact on minority voters.

49. The Court rejects these attempts to introduce new claims and theories of relief at this late stage as a matter of law, for at least three reasons. *First*, this case is not a class action, and Plaintiffs lack standing to assert the rights and interests of persons who are not parties to the case. *Second*, Plaintiffs cannot meet the demanding standard for *facial* invalidation of the notarization requirement based on any of the novel theories they raise, and thus the Court can grant only as-applied relief to the plaintiffs in this case. *Third*, the evidence relating to these theories has no bearing on the claims actually pled in the Petition, and thus it is legally irrelevant. And these

claims were raised far too late to permit an amending the Petition to conform to the evidence, especially given the extremely compressed discovery schedule and short deadlines in this case. Any such amendment would plainly inflict unfair prejudice on Defendants and would be improper.

50. This case is not a class action. The Amended Petition contains no class allegations, Plaintiffs never sought class certification on the Amended Petition, and they cannot do so now. Plaintiffs' initial Petition, filed in April, did contain class allegations. But this Court dismissed Plaintiffs' class allegations in its Judgment of May 18, 2020, and Plaintiffs failed to challenge this ruling on appeal. *See* May 18, 2020 Order and Judgment, at 12-14, ¶¶ 38-45. Plaintiffs have thus abandoned their class allegations. *See Mo. State Conf. of the NAACP v. State*, No. SC98536, Slip Op. (June 23, 2020), at 2 n.1 ("Petitioners' petition also alleged bilateral class resolution of this case was appropriate, proposing both plaintiff and defendant classes. Dismissal of these claims has not been raised on appeal.").

51. By its plain terms, the Missouri Supreme Court's remand order extended only to "claims not abandoned on appeal." *Id.* at 9. Thus, Plaintiffs cannot transform this case into a class action raising putative grievances on behalf of unidentified voters across Missouri, because their prior attempt to raise a class action was abandoned on appeal and cannot be renewed on remand.

52. Likewise, Plaintiffs cannot meet the demanding standard for a facial challenge for any of these new claims and theories raised late in discovery.

53. "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.*

54. It is clear that Plaintiffs cannot demonstrate that there is "no set of circumstances under which" the notarization requirement can be validly applied, for any of these novel theories. For example, they claim that some voters may be confused about the notarization requirement, but the evidence shows that only three percent of voters failed to notarize their mail-in ballots during the August primary, indicating that the vast majority of voters were not confused about the notarization requirement. They claim that some voters may lack photo ID to obtain notarization, but their own evidence indicates that at least 96 percent of Missourians have photo ID (and they overlook entirely the other methods of obtaining notarization without photo ID). They claim that notaries are scarce in some communities, but the evidence shows that free notarization is widely available at public libraries, in government offices, and through the Secretary of State's volunteer program throughout the State of Missouri. They claim that there may be disparate burdens on rural and minority voters, but they do not contend that *all* rural and minority voters face any undue difficulty from notarization. None of these theories comes anywhere near demonstrating that the notarization requirement is an unconstitutional burden to *all* voters, and thus none supports a facial challenge.

55. Because only an as-applied challenge is available, the Court can grant relief only as applied to the individual parties and their circumstances that are actually before the Court. But none of the individual Plaintiffs specifically contends that they are confused about whether to notarize their mail-in ballot, or that they live in a rural area far from a notary, or that they lack a photo ID and cannot obtain notarization, or that they suffer from unconstitutional burdens from time and travel to the nearest notary. Thus, neither facial nor as-applied relief is available under the new theories.

56. In addition, the evidence that Plaintiffs submit relating to these new theories of alleged voter confusion, notary scarcity or unavailability, lack of photo ID, and disparate impact on rural

and minority voters is legally irrelevant because it has no bearing on the claims actually raised in the Amended Petition.

57. This case has been pending since April 17, 2020, and the Amended Petition was filed on July 1, 2020. Plaintiffs have had months to consider what claims to raise, and they raised two claims. Count I is a statutory claim that contends that plaintiffs who fear contracting or spreading Covid-19 are authorized to vote as "confined due to illness or disability" under Section 115.277.1(2). Am. Pet. ¶¶ 144-152. Count II contends that the notarization requirement is unconstitutional as applied to plaintiffs because of the alleged health risks of notarization due to Covid-19. Am. Pet. ¶¶ 154-168. 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 in this case at the last minute. *See id.* Instead, the Petition's allegations focus exclusively on the alleged health risks of in-person notarization from Covid-19. *Id.*

58. 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. *See, e.g., 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"); *Gosnell v. Camden Fire Ins. Ass'n of Camden, N.J.*, 109 S.W.2d 59, 68 (Mo. App. 1937) (same); *see also 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).

59. Permitting the Plaintiffs to raise entirely new claims in the midst of trial, when there is no opportunity for any continuance to conduct further discovery, would plainly prejudice the State. *See* Mo. Sup. Ct. R. 55.33(b) (instructing that amendments to the pleadings to conform with the evidence should not be granted where the objecting party shows that "the admission of such evidence would cause prejudice in maintaining the action or defense upon the merits"). By consent of the parties, this case is litigated on an extremely compressed schedule on very short timeframes. To force Defendants to defend a battery of new claims at the last minute, when they had no reason to seek discovery on those claims or identify fact or expert witnesses on those claims, and there is no time in the schedule for a continuance to re-open discovery, would plainly "cause prejudice in maintaining … defense upon the merits." *Id.*; *see also, e.g., Steenrod v. Klipsch Hauling Co.*, 789 S.W.2d 158, 166 (Mo. Ct. App. 1990) ("Here, [the plaintiff] had sufficient opportunity to conduct discovery and include an allegation concerning a missing safety catch in his petition … To allow [the plaintiff] to amend his petition … would have caused unnecessary delay and resulting hardship to [the defendant]. Thus, the trial court properly refused to grant leave to amend."); *St. Louis Cty. v. Taggert*, 809 S.W.2d 476, 478 (Mo. Ct. App. 1991) ("The [defendants] would have been prejudiced if the County had been allowed to amend at that point, because they would have been forced into the defense of an action different from that which they were prepared to meet.").

B. Even if the Court were to reach the merits of the new claims and theories, they are meritless and unsupported by the evidence, and an amendment of the Petition to include these claims would be futile.

60. Even if the Court were to reach the merits of the new claims presented by Plaintiffs, these new claims are all meritless and unsupported by competent evidence. Thus, they do not provide any alternative basis for a judgment in favor of Plaintiffs, and any last-minute amendment of the Amended Petition to include these claims would be futile.

61. For example, Plaintiffs claim that the notarization requirement will disenfranchise voters who lack a photo ID. But 96 percent of respondents to Dr. Barreto's voter survey stated that they have a photo ID with signature. 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.

62. Moreover, 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. § 486.600(21), (23). 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.

63. Plaintiffs contend that Missouri's notaries are committing "violations of election law" by requesting photo IDs to notarize ballot envelopes, but this is plainly incorrect. Section 115.427, which they cite, establishes the identity-verification requirements for *in-person* voting, not for notarization of absentee or mail-in ballots. § 115.427.1, RSMo ("Persons seeking to vote in a public election shall establish their identity and eligibility to vote *at the polling place* by presenting a form of personal identification to election officials.") (emphasis added). As Plaintiffs note, Section 115.427 provides options for personal identification that do not require photo identification for in-person voting, all of which remain live options for the vast majority of Missouri voters who indicate that they plan to vote in-person in the November election. As noted above, persons seeking to notarize their ballot envelopes also have a set of options to obtain notarization without photo identification.

64. Plaintiffs argue that *Weinschenk* and *Priorities USA* held that Missouri cannot require photo ID for notarization of absentee or mail-in ballot envelopes, but this argument is incorrect, for at least two reasons. First, as noted above, Missouri does not require a photo ID for notarization of ballot envelopes. Based on the plain language of Missouri statutes, any voter who seeks to verify their identity to a notary, but lacks a photo ID, has three alternative methods to do so: personal knowledge of the notary, attestation of a witness who knows both the notary and the voter, or attestation of two witnesses who know the voter. § 486.600(21), (23), RSMo. As noted above, Plaintiffs presented no evidence to show that any of these alternative methods is either unavailable or presents an undue burden to any voter.

65. Second, Plaintiffs misinterpret *Weinschenk* and *Priorities USA*. Both of those cases addressed the 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. The notarization requirement for most absentee ballots was in effect at the time of *Weinschenk*, but the Court never addressed the methods for verifying identity during a notarization of an absentee ballot—only for voting *in person*.

66. 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 already in effect at the time of *Priorities USA*, yet the Court never mentioned it (or mentioned absentee ballots in any way) in its opinion.

67. Plaintiffs' claim that the notarization requirement will impose financial burdens on voters is also meritless. No named plaintiff alleges or claims that he or she faces any financial difficulty from notarization. The evidence demonstrates that the Secretary of State has arranged for free notarization 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. In fact, the availability of these services grows on a daily basis. 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. Further, the LEA witnesses attested that it is common practice for local election authorities to provide notarization of ballot envelopes. Plaintiffs have provided no evidence that any individual voter will face any undue burden in accessing these widespread, free notarization services. In any event, even if the notarization requirement imposed an unconstitutional 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.

68. Plaintiffs' claim that voters will face a "severe" burden from the time and transportation costs of accessing a notary is likewise meritless. Again, no named plaintiff alleges that he or she faces any undue difficulty in finding time and transportation to a notary. 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. Indeed, the evidence in this case demonstrates that the time and transportation burdens are lesser for notarization than for in-person voting. 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. 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.

69. The evidence also refutes Plaintiffs' claim that there is a scarcity of notaries in Missouri such that notaries are unavailable to notarize absentee and mail-in ballot envelopes. Again, no named plaintiff alleges that he or she had difficulty locating an available notary. 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. 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. In addition, even by Plaintiffs' own estimates, there are about 23,000 notaries with full availability offering full-time notarization services to the public, and about 44,000 offering notarization services on at least a part-time or limited basis. Dr. Barreto contends that there is less notary availability in rural counties, but he admitted that the lowest "notary access" county in Missouri (McDonald County) has 126 notaries in a single rural county—hardly a crisis of unavailability. Against this overwhelming evidence of notary availability, Plaintiffs offered only anecdotal, hearsay testimony of a single voter, not a party to this case, who claimed difficulty in finding a notary.

70. Plaintiffs' claim that the notary requirement is unconstitutionally confusing to voters is also meritless and unsupported by their own evidence. Again, no named plaintiff contends that

they are confused by or fail to understand the notarization requirement. 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. The LEA witnesses subpoenaed by Plaintiffs testified that LEAs provide useful guidance to Missouri voters on this process. Plaintiffs do not contend that any of the State's instructions is inaccurate or misleading. In fact, 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.

71. Plaintiffs' claims of a disparate impact on minority voters also fails as a matter of law. Plaintiffs do not allege any intentional discrimination on the basis of race by any state official, and they have cited no evidence of intentional discrimination. Instead, they allege race-based disparate burdens from the health risks of Covid-19, and race-based disparate burdens in time and travel to notaries. Plaintiffs do not contend that the State of Missouri *caused* these alleged disparate burdens in any way, and they do not contend and provide no evidence that any Missouri official has engaged in intentional discrimination on the basis of race. Thus, under black-letter law, they fail to make out any violation of equal protection based on this disparate-impact theory. *See State v. Whitfield*, 837 S.W.2d 503, 510 (Mo. 1992) (holding that, where "there is no intention to discriminate, the disproportionate impact on minorities and women is not sufficient to violate the equal protection clause of the Fourteenth Amendment, nor Article I, § 2 of the Missouri Constitution"); *see also Washington v. Davis*, 426 U.S. 229, 239 (1976) ("[O]ur cases have not embraced the proposition that a law … without regard to whether it reflects a racially discriminatory purpose, is unconstitutional Solely because it has a racially disproportionate impact.").

72. In addition, Plaintiffs' contention that minorities face more "burdens" in finding time and transportation to notaries 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 of these supposedly disparate burdens.

73. Furthermore, the burdens of time and transportation in going to a notary are comparable to, and undoubtedly less than, the burdens in time and transportation in going to the polls on Election Day. Because these ordinary inconveniences do not present a "severe" burden to any voter identified by Plaintiffs—including any minority voter—the notarization requirement is subject to rational-basis scrutiny, which it easily satisfies for the reasons discussed above.

IV. The Organizational Plaintiffs Lack Standing to Sue.

74. In its prior Order and Judgment in this case, this Court held that the organizational Plaintiffs—NAACP and the League of Women Voters—lack standing to sue. *See* May 18, 2020 Order and Judgment, at 14-16, ¶¶ 46-52. Neither the allegations in the Amended Petition, nor the evidence presented by Plaintiffs, changes this conclusion.

75. The Missouri Supreme Court's previous opinion in this case expressly declined to reach this question. *See* June 23, 2020 Opinion, at 4 n.7.

76. The organizational plaintiffs lack direct standing because they are not individuals who are authorized to vote in elections themselves, and thus they have no direct injury from any notarization requirement for ballots. As this Court previously stated: "Because they cannot cast ballots, they are not directly injured by the statutes." May 18, 2020 Order and Judgment, at 15, ¶ 50. This remains true today.

77. Plaintiffs also lack associational standing because they fail to identify any member of their organizations who has direct standing to challenge the laws at issue, other than the named Plaintiffs who are already participating in the case. The Amended Petition makes only conclusory, unspecific allegations about the members of the NAACP and the League of Women Voters, and it does not make any specific allegations about any identified individual member(s) who would themselves having standing to assert the claims in Count I and Count II. *See* Am. Pet. ¶¶ 21, 28.

78. Such vague, unspecific, conclusory allegations about the supposedly affected members of the organizational plaintiffs are insufficient to establish standing to sue. The U.S. Supreme Court addressed a similar situation in *Summers v. Earth Island Institute*, 555 U.S. 488 (2009). In *Summers*, the organizational plaintiffs were environmental organizations who sought to enjoin certain U.S. Forest Service regulations permitting the sale of timber from fire-damaged land in California. *Id.* at 490-92. In holding that these plaintiffs lacked standing, the Supreme Court rejected the argument that the "statistical probability that some of those members are threatened with a concrete injury" was sufficient to establish organizational standing. *Id.* at 497. The Supreme Court held that a mere "probable" injury to "some (unidentified) members" of the plaintiff organizations did not grant them associational standing. *Id.* The Court stated: "This novel approach to the law of organizational standing would make a mockery of our prior cases, which have required plaintiff-organizations to make *specific* allegations establishing that at least one *identified* member had suffered or would suffer harm." *Id.* at 498 (emphases added). The allegations of the organizational plaintiffs here suffer from exactly the same defect that was fatal in *Summers*—both the NAACP and the LWV fail to provide any "specific allegations establishing that at least one identified member had suffered or would suffer harm." *Id.*

79. In the trial testimony in this case, Plaintiffs attempted to cure these pleading deficiencies by providing a handful of hearsay anecdotes about their alleged members through the testimony of their corporate representatives, Mr. Chapel and Ms. Dugan. Plaintiffs did not, however, attempt to address the sufficiency of these standing allegations through direct, admissible evidence, such as testimony from the members themselves—other than the members who are already participating as named Plaintiffs in this case. Standing is a constitutional requirement, and Plaintiffs, not Defendants, have the burden of establishing their own standing in this case. The Court finds that Plaintiffs' attempt to establish standing through hearsay anecdotes instead of direct evidence falls short of Plaintiffs' burden of establishing associational standing here.

80. Plaintiffs' theory of associational standing, and their reliance on hearsay anecdotes instead of direct testimony from their members, fails for another reason as well. Plaintiffs' theory of injury to its voter-members rests on subjective states of mind. Plaintiffs plead that the injured voters are those who "wish" to vote absentee without notarization, who fear "contracting or spreading the virus that causes Covid-19," and who "reasonably expect" to confine themselves to avoid contracting or spreading Covid-19. *See* Am. Pet. ¶¶ 150-152. On Plaintiffs' theory, establishing an injury and claim to relief of any plaintiff-voter turns upon what that voter "wish[es]," "expect[s]," intends, and fears to do. *Id.* Wishes, fears, expectations, and intentions are quintessential subjective states of mind.

81. When the individual member's standing and alleged injury rests on such subjective states of mind, the participation of the individual member is essential to establishing standing and redressability, and associational standing does not exist. *See Missouri Health Care Ass'n v. Attorney Gen. of the State of Mo*., 953 S.W.2d 617, 620 (Mo. banc 1997) (holding that the third requirement of associational standing is that "neither the claim asserted nor the relief requested

requires the participation of individual members"). As this Court previously ruled in this case, "because Plaintiffs' asserted basis for qualification rests on a subjective state of mind, … the participation of individual members would be required to provide evidence critical to both standing and the merits of their claims." May 18, 2020 Order and Judgment, at 15, ¶ 49.

82. The organizational Plaintiffs also lack standing on a "diversion of resources" theory. *See* Am. Pet. ¶¶ 24, 27. This "diversion-of-resources" theory of organizational standing fails as a matter of law. As this Court held in its prior Judgment: "Missouri courts have yet to embrace the liberalized federal rule of organizational standing." May 18, 2020 Order and Judgment, at 15, ¶ 51 (quoting Order and Judgment, *Missouri State Conference of the NAACP v. State of Missouri*, Case No. 17AC-CC00309-01, at 3 (Cole Cty. Cir. Ct. Apr. 20, 2020)). Plaintiffs cannot "manufacture the injury by … simply choosing to spend money fixing a problem that otherwise would not affect the organization at all." *La Associacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010).

V. The Imminence of the Election and the Fact That Voting By Mail Commenced on September 22 Weigh Heavily Against Declaratory or Injunctive Relief.

83. The imminence of the election weighs heavily against granting the declaratory and injunctive relief that Plaintiffs request. Voting by mail commenced on September 22, and it will have been underway for weeks before appellate review in this case can be concluded. Plaintiffs, therefore, ask this Court to change the rules in the middle of a process that is already commenced and well underway. This would inevitably cause confusion among voters and the 116 local election authorities, and it would subject voters to different legal standards depending on when they cast their absentee or mail-in ballot.

84. 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. §§ 115.281.1,

115.302.5, RSMo. Six weeks before the November 3 general election is September 22. Thus, as of September 22, any Missouri voter may request and obtain an absentee or mail-in ballot, fill out the ballot, have the envelope notarized, and submit the ballot. As of September 22, absentee and mail-in voting is thus already in full swing in Missouri.

85. In this case, Plaintiffs do not challenge the procedures for *in-person* voting, which occurs only on Election Day, November 3. Rather, they seek to significantly change the procedures for *voting by mail*, which is already underway.

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 that applies in full force here, given "the imminence of the election." *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006).

87. As the U.S. Supreme Court held this year, "By changing the election rules so close to the election date . . . the District Court contravened this Court's precedents and erred by ordering such relief. This Court has repeatedly emphasized that lower federal courts should ordinarily not alter the election rules on the eve of an election." *Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205, 1207 (2020) (allowing Wisconsin's challenged absentee voter statutes to remain in effect immediately before an election and staying lower court's grant of preliminary injunction) (citing *Purcell*, 549 U.S. at 5); *Frank v. Walker*, 574 U.S. 929 (2014); and *Veasey v. Perry*, 135 S. Ct. 9 (2014)); *see also Raysor v. DeSantis*, No. 19A1071, 2020 WL 4006868 (U.S. July 16, 2020) (denying application to vacate Eleventh Circuit's stay of a permanent injunction against enforcement of Florida laws conditioning the restoration of voting rights, thus enabling the laws to remain in effect).

88. Courts routinely refuse to impose changes to election procedures just weeks before an election—let alone changing procedures that are already in process. *See, e.g., Veasy v. Perry*, 769

F.3d 890, 981 (5th Cir. 2014) (granting a stay of an injunctive order enjoining Texas's voter ID law under *Purcell*, and noting that "[t]he Supreme Court has repeatedly instructed courts to carefully consider the importance of preserving the status quo on the eve of an election").

89. This principle is deeply rooted in equitable principles. "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." *Crookston v. Johnson*, 841 F.3d 396, 398 (6th Cir. 2016). These principles guide courts in "balancing the equities" when considering whether to grant an injunction so close to an election. *Burg v. Dampier*, 346 S.W.3d 343, 357 (Mo. App. W.D. 2011).

90. This principle applies with equal force to a state court's consideration of election laws. "'Laches' is neglect for unreasonable and unexplained length of time, under circumstances permitting diligence, to do what in law should have been done." *Rentschler v. Nixon*, 311 S.W.3d 783 (Mo. banc 2010) (quoting *Hagley v. Bd. of Educ. of Webster Groves School Dist.*, 841 S.W.2d 663, 669 (Mo. banc 1992)). The Missouri Supreme Court has recognized the desirability of using laches to bar untimely constitutional challenges—precisely the case here. *See Rentschler*, 311 S.W.3d at 787 n.4.

91. The courts of many other states, when confronted with last-minute challenges to state election laws, have applied this principle and declined to grant injunctive relief shortly before elections. *See, e.g., 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), *appeal denied*, 946 N.W.2d 307 (Mich. 2020) (citing *Purcell* and permitting enforcement of law requiring absentee ballots be received by election authority on election day in order to be counted).

92. Plaintiffs make various allegations about putative voter confusion, but changing the rules so close to Election Day *creates* voter confusion—it does not cure it. "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

93. These principles apply with particular force here, because invalidating the notarization requirement would require significant, disruptive changes in a process that is already underway. 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. Def. Ex. 80, 81, 82, 83. All these materials would have to be changed in the middle of the voting process.

94. More significantly, the official ballot envelope for all absentee and mail-in ballots would have to be re-printed. The ballot envelope instructs most absentee and all mail-in voters in bold and all caps to have their ballots notarized. Def. Ex. 79. The ballot envelope states: "**Absentee Ballot (NOTARY REQUIRED UNLESS SPECIFICALLY NOTED BELOW)**," and "**Mail-In Ballot (NOTARY REQUIRED FOR ALL MAIL-IN BALLOTS)**." *Id.* (bold and capitalization in original). It also provides a Certificate of Notarization which states: "**For all Mail-In Ballots and Absentee Ballots unless noted above**." *Id.* (bold in original). If 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.

95. The statutory deadline to print these ballot envelopes was September 22, six weeks prior to the November 3 general election. §§ 115.281.1, 115.302.5, RSMo. The Court is unwilling to grant declaratory and injunctive relief that would violate this statutory deadline. In fact, doing so would entail that Missouri voters would be subject to different standards depending on whether they decide to cast their absentee or mail-in ballots before or after the final judgment of the Court.

CONCLUSION

Judgment is hereby entered against Plaintiffs and in favor of Defendants on all Counts in the Amended Petition. Plaintiffs' requests for declaratory and injunctive relief are denied. The parties are to bear their own costs.

SO ORDERED this 24th day of September, 2020.

Jon E. Beetem, Circuit Judge – Division I