

**IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION**

ORGANIZATION FOR BLACK
STRUGGLE, ST. LOUIS A. PHILIP
RANDOLPH INSTITUTE, GREATER
KANSAS CITY A. PHILIP RANDOLPH
INSTITUTE, NATIONAL COUNCIL OF
JEWISH WOMEN ST. LOUIS SECTION,
and MISSOURI FAITH VOICES,
Plaintiffs,

v.

JOHN R. ASHCROFT,
in his official capacity as the Missouri
Secretary of State, and

GREENE COUNTY CLERK'S OFFICE;
JACKSON COUNTY ELECTION BOARD;
ST. CHARLES COUNTY ELECTION
AUTHORITY; and ST. LOUIS COUNTY
BOARD OF ELECTIONS, and all others
similarly situated,
Defendants.

No. 2:20-cv-4184-BCW

**SUGGESTIONS OF AMICI CURIAE AARP AND AARP FOUNDATION
IN SUPPORT OF PLAINTIFFS' MOTION FOR A TEMPORARY
RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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CORPORATE DISCLOSURE STATEMENT

The Internal Revenue Service has determined that AARP is organized and operated exclusively for the promotion of social welfare pursuant to Section 501(c)(4) of the Internal Revenue Code and is exempt from income tax. The Internal Revenue Service has determined that AARP Foundation is organized and operated exclusively for charitable purposes pursuant to Section 501(c)(3) of the Internal Revenue Code and is exempt from income tax. AARP and AARP Foundation are also organized and operated as nonprofit corporations under the District of Columbia Nonprofit Corporation Act.

Other legal entities related to AARP and AARP Foundation include AARP Services, Inc., and Legal Counsel for the Elderly. Neither AARP nor AARP Foundation has a parent corporation, nor has either issued shares or securities.

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STATEMENT OF INTEREST OF AMICI¹

AARP is the nation's largest nonprofit, nonpartisan organization dedicated to empowering Americans 50 and older to choose how they live as they age. With nearly 38 million members and offices in every state, the District of Columbia, Puerto Rico, and the U.S. Virgin Islands, including (as of August 2020) over 719,000 members in Missouri, AARP works to strengthen communities and advocate for what matters most to families, with a focus on financial stability, health security, and personal fulfillment. AARP's charitable affiliate, AARP Foundation, works to end senior poverty by helping vulnerable older adults build economic opportunity and social connectedness.

AARP and AARP Foundation litigate and file amicus briefs on issues that impact various concerns of older adults, including laws affecting their right to vote. This work has included advocating for older Missouri voters. *See Weinschenk v. State*, 203 S.W. 3d 201 (Mo. 2016).

Amici are alarmed by Missouri officials' failure to adjust remote voting rules enough to assure safe and effective voting options for older (and younger) voters for the November general election. The State law provisions at issue pose especially grave risks to persons with serious medical conditions and/or disabilities—disproportionately older adults—who must leave social isolation to appear in-person to correct trivial errors with remote ballots, thereby defeating the purpose of the remote balloting reforms passed by the State Legislature for the COVID-19 crisis.

Amici support plaintiffs' motion to enjoin, for the upcoming general election, rules that "mail-in" and "absentee" ballot applications, and ballots themselves, be disqualified or rejected due to various "immaterial" errors under state law provisions enacted for the precise purpose of

¹ This brief was not authored in whole or in part by any party or their counsel, and no person other than amici, their members, or their counsel contributed any money intended to fund the preparation and submission of this brief.

assuring safe voting options during the COVID-19 crisis. Amici also support plaintiffs' request that such rules be modified to conform to the Due Process Clause of the Fourteenth Amendment to the U.S. Constitution, to permit correction of such immaterial errors by means assuring the health and safety of medically vulnerable voters—a disproportionate share of whom are older voters, the nation's and Missouri's most reliable participants in the electoral process.

INTRODUCTION AND SUMMARY OF ARGUMENT

The consequences for those who become infected with COVID-19, especially those who are older and/or have serious underlying medical conditions, are severe, even life threatening. Indeed, that is the premise of recent enactments in Missouri expanding grounds for submitting “absentee” ballots and permitting a new regime of “mail-in” balloting.

Yet, Missouri's recent primary election revealed serious flaws in these efforts to address the impact of the coronavirus on its elections. The combined force of greater numbers of remote ballots and the great variety and complexity of remote ballot rules and remote ballot envelope designs, among other factors, resulted in many voters being disenfranchised by disqualifying errors. Another major defect revealed in the primary is voters being required to appear in-person to correct minor ballot deficiencies ballots, thereby requiring social interaction and posing dangers of COVID-19 infection, illness, and even death. Health risks due to COVID-19 also will be great in November, when more Missourians vote remote ballots. The dangers of contracting coronavirus when appearing in-person to correct minor ballot errors also will be greater.

It would be perverse, as well as legally unsound, for Missouri to be allowed to take away with one hand what it has strived to provide with the other. That is, election officials should not be permitted to arbitrarily disqualify “absentee” and “mail-in” ballots—permitted in the first place to reduce risks of voting in-person due to the COVID-19 crisis—where voters, because of physical frailty, illness, age, disability, poverty, lack of transportation, or other causes, cannot

appear in person to correct such errors. The supposed harms invoked thus far to justify such casual disenfranchisement are sorely lacking. Thus, the Supreme Court’s decisions in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992), demand a better balancing of individual rights and election officials’ supposed interest in prohibiting trivial ballot errors so as not to undermine the votes of affected, mostly older voters.

ARGUMENT

I. To Assure that Medically Vulnerable Missourians, including a Disproportionate Share of Older Persons, Will Be Able to Vote Safely in November, the State Must Limit High-Risk, Interpersonal Contact in the Election.

A. Maintaining Health and Safety in the Upcoming General Election Will Require Rigorous Adherence to Expert Medical Guidance on the Coronavirus.

The U.S. Centers for Disease Control and Prevention (the “CDC”) has laid out basic principles for minimizing risk of contracting COVID-19 illness. These principles stress that the coronavirus is spread “[b]etween people who are in close contact with one another (within about [six] feet),” “[t]hrough respiratory droplets produced when an infected person coughs, sneezes or talks,” because “[t]hese droplets can land in the mouths or noses of people who are nearby or possibly be inhaled into the lungs.”² The CDC adds: “Avoid close contact”; in explanation, it says: “some people without symptoms may be able to spread [the] virus”; “[k]eeping distance from others is especially important for people who are at higher risk of getting very sick”; and a “cloth face cover [presumably, whether worn by oneself or by another] is not a substitute for social distancing.”³ Overall, the CDC emphasizes that “Older adults and people who have certain

² CDC, *Protect Yourself* (updated Sept. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/prevention.html>.

³ *Id.* (“Avoid close contact” and “Cover your mouth and nose with a cloth face cover when around others”) (emphasis in original).

underlying conditions like heart or lung disease or diabetes are at increased risk of severe illness from COVID-19 illness.”⁴

Based on these precepts, the CDC has developed guidance for the conduct of elections.⁵ In it, the agency observes that “[t]he more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread.”⁶ Accordingly, the CDC endorses “a wide variety of . . . options” beyond just in-person voting.⁷ In summary, the agency states:

Elections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times. Lower risk election polling settings include those with: . . . any other feasible options for reducing the number of voters who congregate indoors in polling locations at the same time.⁸

In effect, the CDC acknowledges that the risks of voting in person depend on the actions of many strangers, including other voters, election officials, and poll workers. Thus, voters generally will have little idea how safe it will be to vote in person, before deciding whether to do so.

Hence, it is unsurprising that the CDC advises individual voters to

Consider voting alternatives available in your jurisdiction that minimize contact [since] [v]oting alternatives that limit the number of people you come in contact with or the amount of time you are in contact with others can help reduce the spread of COVID-19.⁹

In short, the agency suggests weighing the option of *not* voting in-person, if it exists.

⁴ *Id.* (providing a link for “More information on Are you at higher risk for serious illness.”).

⁵ CDC, *Considerations for Election Polling Locations and Voters* (updated June 22, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/community/election-polling-locations.html>. The CDC observes that “[t]he more an individual interacts with others, and the longer that interaction, the higher the risk of COVID-19 spread.”

⁶ *Id.*

⁷ The agency also recommends extensive measures to render in-person voting safe. *Id.* (“Guiding principles to keep in mind”) and (“Recommendations for Election Officials and Poll Workers,” “Maintaining healthy environments”).

⁸ *Id.*

⁹ *Considerations for Election Polling Locations and Voters*, *supra* note 5 (“Recommendations for voters”) (emphasis in original).

Yet, under Missouri’s current rules, remote voters—at least those who err in filling out their remote voting envelope—will have no greater assurance of minimizing contact with strangers to stay safe. Rather, they must appear in person, at public facilities, to correct such errors. In November, under current rules, they will likely endure long waits, amidst crowds of others who had hoped to vote remotely, in private, without any interaction with strangers. And they will have to do so no matter how minor or inadvertent their error, and regardless whether they have already provided the information at issue (perhaps multiple times) before.

B. This Case Addresses a Serious Defect in Missouri’s Alternatives to In-Person Voting in Response to COVID-19: Failure to Minimize Contact Between Remote Voters and Others and, Thus, to Reduce the Spread of the Coronavirus.

Missouri has taken steps to facilitate remote voting during the COVID-19 crisis. These include S.B. 631, which expanded grounds for voting “absentee” and established a “mail-in” ballot regime. *See* Mo. Rev. Stat. §§ 115.277.1(7), 115.277.6, 115.302.1. As Governor Parsons declared upon signing the bill into law, its twin goals are “to safeguard the election process and protect Missouri voters during COVID-19. *Any Missourian affected by COVID-19 should still be able to vote, including those who are sick or considered at-risk*” (emphasis supplied).¹⁰

S.B. 631 “added an additional reason to vote absentee, allowing a voter to request an absentee ballot if ‘the voter has contracted or is in an at-risk category for contracting or transmitting’ COVID-19.”¹¹ It defined the “at-risk category for contracting or transmitting” COVID-19 as “voters who (1) Are sixty-five years of age or older; (2) Live in a [State-licensed] long-term care facility . . . ; (3) Have chronic lung disease or moderate to severe asthma; (4)

¹⁰ Twitter, @GovParsonMO, June 4, 2020, quoted in *Gov. Parson signs legislation on absentee ballots*, KFVS12, June 4, 2020, <https://www.kfvs12.com/2020/06/04/more-than-k-tested-covid-mo/>.

¹¹ *Organization for Black Struggle v. Ashcroft*, No. 2:20-cv-4184-BCW (W.D. Mo.) (“Complaint for Declaratory and Injunctive Relief”) (docket #1, filed Sept. 17, 2020) [hereinafter “Complaint”], at 14 (quoting Mo. Rev. Stat. § 115.277.1(7)).

Have serious heart conditions; (5) are immunocompromised; (6) Have diabetes; (7) Have chronic kidney disease and are undergoing dialysis; or (8) Have liver disease.” Mo. Rev. Stat.

§ 115.277.6. S.B. 631 also enabled “any voter to request and case a ‘mail-in’ ballot in 2020.”¹²

This lawsuit focuses on a serious defect in S.B. 631’s scheme to Missourians “affected by COVID-19,” whether they “are sick or considered at-risk.” “Absentee” ballot voters, whose numbers have grown enormously due to COVID-19, are required to appear in-person to correct what plaintiffs have explained are “immaterial” deficiencies on the face of an “absentee” ballot envelope, *see* Complaint at 22, in order to avoid the further requirement that election officials reject such ballots, if not corrected. *See* Mo. Rev. Stat. §§ 115.283.1, 115.295.2.¹³ Plaintiffs’ evidence also demonstrates this health and safety gap to be a serious one, affecting many older, medically vulnerable voters in the recent State primary election.¹⁴ Yet, why this in-person-correction requirement is the rule, and why it is permitted to prevail in the COVID-19 crisis, contrary to the very purpose of remote voting is unclear. Plaintiffs contend that “[a]t present, there is no mandated notice and cure process for remote ballots in the State of Missouri.”¹⁵ State and local officials’ adherence to unsafe practices without specific legal authority to do so would appear wholly amenable to injunctive relief by this Court.

¹² Complaint at 14 (referencing Mo. Rev. Stat. § 115.302.1).

¹³ *See id.* at 20 n.3 (discussing these “Ballot Error Rejection Laws applicable to “absentee” ballots and noting that while “the mail-in ballot statute does not actually incorporate the requirement that ballots with faulty statements must be rejected[,]” [*c*]ompare Mo. Rev. [Stat.] § 115.302 with § 115.295[.] [n]evertheless, on information and belief, both absentee and mail-in ballots are being rejected under the faulty statement provisions of § 115.295.”)

¹⁴ *Organization for Black Struggle v. Ashcroft*, No. 2:20-cv-4184-BCW (W.D. Mo.) (“Suggestions in Support of Plaintiffs’ Motion for a Temporary Restraining Order and Preliminary Injunction”) (docket #27, filed Sept. 21, 2020) [hereinafter “Suggestions”], at 11-12, 34-36; *see also* Complaint at 21-22.

¹⁵ *Id.* at 33.

Together, “sick or . . . at-risk” voters “affected by COVID-19” who “should still be able to vote” constitute a very large share of the electorate, either older or with medical conditions creating high risk of serious injury (or death) if they contract the coronavirus due to close interpersonal contact. Their attributes are summarized in greater detail immediately below.¹⁶

C. Risks of Serious Harm, Including Death, Due to COVID-19 Are High for Older Missourians and Those of All Ages with Many Underlying Medical Conditions.

The CDC states plainly that “the risk for severe illness from COVID-19 increases with age, with older adults at highest risk.”¹⁷ This means that older adults with COVID-19 are more likely to “require hospitalization, intensive care, or a ventilator to help them breathe, or [to] die.”¹⁸ The reasons for this phenomenon include the increasing incidence of underlying medical conditions as people age, as noted below. But they also include weakening of the immune system as adults age¹⁹ and the fact that “[a]dults 65 & over are at higher risk for flu complications,” which can exacerbate illness related to COVID-19.²⁰

In addition, the CDC lists a daunting variety of “underlying medical conditions” for which significant data indicate that “[p]eople of any age . . . **are at increased risk** for severe

¹⁶ Significantly, the relief sought in this litigation, to remedy inconsistencies in S.B. 631 in protecting vulnerable voters’ health and safety, is quite modest. This lawsuit does not address, for example, the fact that Missouri’s COVID-19-related “absentee” ballot amendments do not protect medically vulnerable persons residing in the same household as others, not themselves medically vulnerable, who will have to endanger their co-residents to vote in-person or to obtain the signature of a notary to cast a “mail-in” ballot.

¹⁷ CDC, *Older Adults* (updated Sept. 11, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/older-adults.html> [hereinafter *Older Adults*]. *See id.* (“people in their 50s are at higher risk for severe illness than people in their 40s . . . people in their 60s or 70s are, in general, at higher risk for severe illness than people in their 50s. The greatest risk for severe illness from COVID-19 is among those aged 85 or older.”).

¹⁸ *Id.*

¹⁹ *See, e.g.,* Veronique Greenwood “How the Aging Immune System Makes Older People Vulnerable to COVID-19,” *New York Times* (Sept. 8, 2020), <https://www.nytimes.com/2020/09/08/health/covid-aging-immune-system.html>.

²⁰ CDC, *Older Adults*, *supra* n. 14.

illness from COVID-19” (emphasis in original).²¹ The CDC also has set forth nearly as troubling a list of conditions for which more limited data indicate that people of any age “**might be at an increased risk** for severe illness from COVID-19.”²²

When the CDC says that persons with various conditions are at “increased risk of severe [or serious] illness,” it means COVID-19 may require, in the near-term, “hospitalization, intensive care, [or] a ventilator” and may “even die.”²³ Yet, another serious possibility is long-term dysfunction and/or disability for those who recover.²⁴ Such effects may include “damage [to] the lungs, heart and brain, which increases the risk of long-term health problems[,]” especially for “older people and people with many serious medical conditions.”²⁵

Myriad data show that older persons constitute a disproportionate share of individuals who experience most of the high-risk conditions identified by the CDC.²⁶ This applies to CDC

²¹ CDC, *People with Certain Medical Conditions* (updated Aug. 14, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/need-extra-precautions/people-with-medical-conditions.html> [hereinafter Underlying Medical Conditions].

²² *Id.* (emphasis in original).

²³ CDC, *Older Adults*, *supra* n. 14.

²⁴ See, e.g., Mark W. Tenforde, M.D., Ph. D., et al., *Symptom Duration and Risk Factors for Delayed Return to Usual Health for Outpatients with COVID-19 in a Multistate Health Care Systems Network – United States, March-June 2020*, CDC, *Morbidity and Mortality Weekly Report* (July 24, 2020) (“Older age and presence of multiple chronic medical conditions have previously been associated with illness severity among adults hospitalized with COVID-19 (8,9); in this study, both were also associated with prolonged illness in an outpatient population.”), <https://www.cdc.gov/mmwr/volumes/69/wr/mm6930e1.htm>; Joseph Guzman, *90 percent of coronavirus patients experience side effects after recovery, study says*, *The Hill.Com* (Sept. 29, 2020) (“An online survey of 965 recovered COVID-19 patients conducted by the Korea Disease Control and Prevention Agency (KDCA) found more than 90 percent of respondents reported experiencing side effects associated with the disease, such as fatigue, loss of sense of taste and smell and psychological effects.”), <https://thehill.com/changing-america/well-being/longevity/518751-90-percent-of-coronavirus-patients-experience-side>.

²⁵ Mayo Clinic Staff, *COVID-19 (coronavirus): Long-term effects*, Mayo Clinic (Aug. 18, 2020), <https://www.mayoclinic.org/diseases-conditions/coronavirus/in-depth/coronavirus-long-term-effects/art-20490351>.

²⁶ The CDC also emphasizes that disproportionate numbers of COVID-19-related deaths occur among older persons. “8 out of 10 COVID-19 deaths in the United States have been in adults over the age of 65.” CDC, *Older Adults*, *supra* n. 14.

high-risk conditions such as cancer,²⁷ chronic kidney disease,²⁸ COPD (chronic obstructive pulmonary disease),²⁹ obesity (i.e., body mass index (“BMI”) of 30 or higher),³⁰ “serious heart conditions, such as heart failure, coronary artery disease, or cardiomyopathies,”³¹ and Type 2 diabetes mellitus.³² The same is true of entries on the list of conditions due to which people of

²⁷ The estimated nationwide incidence of “invasive” cancers (2017, all ages, including children 0-17) is between 1.4 and 1.7%. CDC, *United States Cancer Statistics, Data Visualizations*, <https://gis.cdc.gov/Cancer/USCS/DataViz.html> (“Prevalence”; “All Types of Cancer, Estimated Prevalence Percentages, by Age, Race, and Sex, 5-year Limited Duration, United States, Invasive Cancers only, on January 1, 2017”). The incidence exceeds 1% for all groups age 40 and above and is much less than 1% for age groups 20-29 (0.1712%) and 30-39 (0.4347%). *Id.*

²⁸ CDC, *Chronic Kidney Disease (CKD) Surveillance System*, <https://nccd.cdc.gov/CKD/FactorsOfInterest.aspx?type=Age> (“CKD becomes more common with increasing age. After the age of 40, kidney filtration begins to fall by approximately 1% per year. In addition to the natural aging of the kidneys, many conditions that damage the kidneys are more common in older people including diabetes, high blood pressure, and heart disease.”).

²⁹ “Chronic obstructive pulmonary disease, or COPD, refers to a group of diseases that cause airflow blockage and breathing-related problems. It includes emphysema and chronic bronchitis.” CDC, *Chronic Obstructive Pulmonary Disease (COPD)*, <https://www.cdc.gov/copd/index.html> (“Basics About COPD”; “What is COPD?”). People aged 65 and above were “more likely to report COPD in 2013.” *Id.* (“Basics About COPD”; “Who has COPD?”). Missouri is in the top twenty states in COPD prevalence. COPD affects 6.5 to 7.5% of Missourians at or over age 18. *Id.* fig. 3 (“Data and Statistics”; “COPD Prevalence in the United States”).

³⁰ As of 2019, the CDC reports, the incidence of self-reported obesity among adult Missourians (age 18 or over) was an estimated 34.8% higher than just twelve other states in the U.S. CDC, *Overweight and Obesity/Data & Statistics/Data, Trends and Maps/Adult Obesity Prevalence Maps*, <https://www.cdc.gov/obesity/data/prevalence-maps.html>.

³¹ Underlying Medical Conditions, *supra* note 21. CDC data from 2015-17 show that 16.8% of Missourians at or over age 45 had coronary heart disease (“CHD”), or had had a stroke, or both. CDC, NAT’L ASS’N OF CHRONIC DISEASE DIRS., CORONARY HEART DISEASE, MYOCARDIAL INFARCTION, AND STROKE — A PUBLIC HEALTH ISSUE 5 fig. 3 (2019), <https://www.cdc.gov/aging/agingdata/docs/Coronary-Stroke-Brief-508.pdf>. Significantly, over 30% of such individuals reported living alone. *Id.* at 5. Only about 3% of Coronary artery disease (CAD) cases occur in individuals under age 40. Lloyd W. Klein & Sandeep Nathan, *Coronary Artery Disease in Young Adults*, 41 J. AM. C. CARDIOLOGY 529, 529 (2003).

³² An estimated 10.2% of the population of Missouri has either “Type 2” or “Type 1” diabetes. CDC, *National and State Diabetes Trends* (data as of 2016), <https://www.cdc.gov/diabetes/pdfs/library/Diabetes-Report-Card-2019-508.pdf>. Ninety-to ninety five percent of these individuals are Type 2. See CDC, NATIONAL DIABETES STATISTICS REPORT 2020 1 (2020). Diabetes incidence (diagnosed and undiagnosed, combined) varies by age: from 26.8% for those at or over age 65, to 17.5% for those between 45-64 and 4, 2% for those 18-44. *Id.* at 2 tbl.1a.

any age “might be at an increased risk of severe illness“ due to COVID-19.³³ These conditions include hypertension/high blood pressure and neurologic conditions, such as dementia.³⁴

The prevalence of the two remaining high-risk factors³⁵ is more difficult to assess. Persons in an “immunocompromised state” encompasses a great many conditions with diverse features and affected populations.³⁶ “[S]ickle disease,” while relatively rare in the U.S., afflicts a very high proportion of African Americans: 1 in 365.³⁷

All told, as much as (or more than) one-half of the Missouri electorate is affected by the conditions the CDC has identified as posing high-risk of severe illness or even death for those who contact COVID-19: these include, principally, obesity (34.8% of Missouri adults), diabetes (10.2%), heart disease/stroke 16.8% of those >45), and lung disease/COPD (~7%). The share of older voters at still greater risk because they are affected by more than one of these scourges is significant. Considering the CDC’s list of conditions that “may” portend at least some degree of elevated health risk, the share of the electorate affected overall almost certainly exceeds 50%, and the share of AARP-member-age voters (50+) affected likely reaches well over a majority.

The health risks Missouri voters face due to COVID-19 are unacceptably high. Both the potential consequences of unsafe in-person voting and the uncertainty inherent in voting in-person—i.e., requiring voters to trust in the adequacy of safety measures that *may* (or may not) be taken at the polls *by others*—demands robust further steps to assure true access to real “voting

³³ Underlying Medical Conditions, *supra* note 21.

³⁴ *Id.* Hypertension is quite common: “During 2015–2016, the prevalence of hypertension was 29.0% and increased with age: age group 18–39, 7.5%; 40–59, 33.2%; and 60 and over, 63.1%.” NAT’L CTR. FOR HEALTH STATISTICS, CTR. FOR DISEASE CONTROL, NO. 289, HYPERTENSION PREVALENCE AND CONTROL AMONG ADULTS: UNITED STATES, 2015–2016 1 (2017).

³⁵ Underlying Medical Conditions, *supra* note 21.

³⁶ *Id.*

³⁷ CDC, *Sickle Cell Disease (SCD)*, <https://www.cdc.gov/ncbddd/sicklecell/data.html> (“Data & Statistics on Sickle Cell Disease,” “In the United States”).

alternatives,” such as absentee voting. Only such measures can avoid the specter of deadly risks for medically vulnerable Missourians in November.

D. The COVID-19 Crisis—and Dangers Due to Voting Methods Involving a High Likelihood of Interpersonal Contact—Will Still Be Present in November.

Dangers posed by the COVID-19 pandemic have not changed significantly since the August 4 primary. And they show no signs of abating. Rather, there is strong evidence that the virus still will be a serious threat in the first week of November. At the very least, prospects of containing the virus before then, and thereby rendering unnecessary safety measures like those recommended by the CDC and forming the basis for S.B. 631, are highly uncertain. It would be irresponsible to plan on conducting the general election safely without assuming that the coronavirus will remain a serious threat.³⁸

The CDC’s “COVID Data Tracker” shows Missouri ranked 8th among all states in the number of new coronavirus cases (9,099) in the past seven days, behind only a few very large states—California, Texas, Florida and Illinois—and Wisconsin, North Carolina and Tennessee.³⁹ In contrast, Missouri ranks 18th in overall state population and is tied for 21st in the share of its population in the age category most at-risk for contracting COVID-19: age 65 and over.⁴⁰

³⁸ See, e.g., Len Strazewski, *Harvard Epidemiologist: Beware COVID-19’s Second Wave This Fall*, AM. MED. ASS’N: PUB. HEALTH (May 8, 2020), <https://www.ama-assn.org/delivering-care/public-health/harvard-epidemiologist-beware-covid-19-s-second-wave-fall>; Lisa Gutierrez, *COVID-19 could overwhelm hospitals, KC doctors warn, as flu season nears*, KANSAS CITY STAR, Sept. 2, 2020, <https://www.kansascity.com/news/coronavirus/article245433935.html>; Annika Merrilees, *Missouri reports record number of COVID-19 hospitalizations*, STLTODAY.COM, Sept. 26, 2020, https://www.stltoday.com/lifestyles/health-med-fit/coronavirus/missouri-reports-record-number-of-covid-19-hospitalizations/article_f52b9d40-f8dd-53ef-9aaf-ba9f1cddd367.htm. (“[I]f virus numbers remain high and the region has a bad flu season, it could ‘significantly strain’ health care capacity.”).

³⁹ https://covid.cdc.gov/covid-data-tracker/?CDC_AA_refVal=https%3A%2F%2Fwww.cdc.gov%2Fcoronavirus%2F2019-ncov%2Fcases-updates%2Fcases-in-us.html#casesinlast7days (as of Sept. 29, 2020).

⁴⁰ See Ellen Kershner, *The 50 US States Ranked by Population* (June 12, 2020), <https://www.worldatlas.com/articles/us-states-by-population.html>, and Christine L. Himes, et al., *Which U.S.*

E. Missouri Officials' Failure to Address the Danger of COVID-19 Rules for Correcting Trivial Errors in Completing Remote Ballot Envelopes Is Especially Perverse Given the High Levels of Electoral Participation of Older Voters.

Older voters cast ballots at rates out of proportion to their share of the electorate, amplifying the adverse impact of rules putting that population at risk. For instance, a survey of “validated” 2016 voters nationwide showed that voters age 50 and above constituted 57% of the electorate in the immediate prior Presidential Election year, while the same age group represented a much smaller portion (33%) of non-voters; in contrast, voters age 18-49 represented 43% of voters nationwide and 66% of non-voters.⁴¹

Missouri voting data show the same pattern. In 2016, 64.7% of U.S. citizens in Missouri (2.906 million) voted.⁴² This group included a higher percentage of citizens over age 45—72.4%—compared to 48.0% of those ages 18-24, 55.0% of those 25-34, and 60.4% of those 35-44.⁴³ In 2018, these disparities were also significant, in the same direction. Missouri citizens ages 65+ and 45-64 voted at rates of 65.5% and 57.4%, respectively, compared to 41.4% of those between ages 18-24, 48.2% of those 25-34, and 50.9% of those 35-44.⁴⁴

Other nationwide data strongly suggest that Missouri remote voting rules also are especially likely to harm the voting rights of older persons by disadvantaging people with

States Have the Oldest Populations?, Population Reference Bureau (March 16, 2019), <https://www.prb.org/which-us-states-are-the-oldest/#:~:text=States%20Ranked%20by%20Percent%20of%20Population%20Age%2065,%20%2019.4%20%2046%20more%20rows%20>.

⁴¹ PEW RESEARCH CTR., *An Examination of the 2016 Electorate, Based on Validated Voters*, in FOR MOST TRUMP VOTERS, ‘VERY WARM’ FEELINGS FOR HIM ENDURED 10-17 (2018), <https://www.pewresearch.org/politics/2018/08/09/an-examination-of-the-2016-election-based-on-validated-voters/>.

⁴² U.S. Census Bureau, *Voting and Registration in the Election of November 2016*, CENSUS.GOV (May 2017), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-580.html>, (Table 4a).

⁴³ *Id.*, (Table 4c).

⁴⁴ U.S. Census Bureau, *Voting and Registration in the Election of November 2018*, CENSUS.GOV (Apr. 2019), <https://www.census.gov/data/tables/time-series/demo/voting-and-registration/p20-583.html> (Table 4c).

disabilities prone to serious harm from COVID-19 infection. Roughly 20% of Americans have “severe” disabilities.⁴⁵ Of these individuals, a greater than average share are over age 55—41.6% of those age 65+ and 26.1% of those 55-64, while fewer than average are age 18-54—7.7% of those age 18-24, 8.4% of those age 25-34, 12.4% of those 35-44, and 18.6 % of those 45-54.⁴⁶ The most recent data for Missouri show an estimated voting age population with disabilities of 822,312 persons.⁴⁷ Of this cohort, close to half (an estimated 362,649 or 44.1%) were age 65 or above, and greater shares of Missourians age 65-74 (27.1%) and 75+ (47.3%) are in the group with disabilities, compared to those between ages 35-64 (15.3%) or 18-34 (8.1%).⁴⁸

II. Requiring In-Person Correction of Trivial Errors on Remote Ballot Envelopes Imposes an Unconstitutional Burden on the Voting Rights of Medically Vulnerable, Mostly Older Voters.

Evidence submitted by the plaintiffs amply demonstrates the frequency, diversity, and triviality of minor ballot envelope completion errors on which local election officials based their disqualification of remote ballots in the August 4 primary. *See* Suggestions at 6-7, 10-13; *see also, generally*, Dkt. No. 27 (plaintiffs’ declarations and exhibits). Absent the injunctive plaintiffs seek, such errors will cause many more remote ballots to be rejected in November.

Amici concur with plaintiffs that Missouri law “require[ing] that remote ballots be rejected if a voter omits their name, voting address, mailing address, or reason for voting remote[ly[,]]” are not justified as they require rejection “even when Defendants have enough information available to them to confirm the voter’s eligibility.” Motion at 28. Thus, amici also

⁴⁵ DANIELLE M. TAYLOR, U.S. CENSUS BUREAU, No. P70-152, AMERICANS WITH DISABILITIES: 2014 4 tbl.1 (2018), <https://www.census.gov/library/publications/2018/demo/p70-152.html>.

⁴⁶ *Id.*

⁴⁷ U.S. CENSUS BUREAU, AMERICAN COMMUNITY SURVEY tbl. S1810 (2018) (“Disability Characteristics”) (table for Missouri), <https://data.census.gov/cedsci/table?q=S1810&g=0400000US29&tid=ACSST1Y2019.S1810&hidePreview=true>.

⁴⁸ *Id.*

agree that the challenged pattern and practice of remote ballot rejections by local election officials violates 52 U.S.C. § 10101(a)(2)(B), the so-called “Materiality Provision” of the Civil Rights Act of 1964. Suggestions at 28-31.

Likewise, Plaintiffs’ evidence shows the onerous impact of the related widespread practice, apparently without a solid basis in State law, whereby local officials require remote voters whose ballots contain such trivial errors to correct them, if at all, only by appearing *in-person*. Plaintiffs have challenged Missouri law’s failure to afford remote voters sufficient notice and a meaningful opportunity to cure ballot deficiencies as a violation of the Due Process guaranteed by the Fourteenth Amendment to the U.S. Constitution. *See* Suggestions at 31-38.

Amici write to emphasize the unconstitutional, undue burden of the practice of requiring medically vulnerable voters to appear in-person to cure trivial remote ballot deficiencies given the lack of any significant need for such correction and the dangers of mandating such unwarranted social interaction during the COVID-19 crisis. *See Anderson v. Celebrezze*, 460 U.S. 780 (1983), and *Burdick v. Takushi*, 504 U.S. 428 (1992). After all, this creates extreme risk of serious illness or even death for the very medically vulnerable, mostly older “absentee” and “mail-in” voters the State Legislature were intended to aid in enacting S.B. 631.

A. Requiring In-Person Remote Ballot Error Correction Generally Falls Heaviest on Medically Vulnerable, Mostly Older Voters.

In general, the record in this case shows that requiring remote voters to appear in-person to correct errors on their ballot envelope is especially burdensome for older, medically vulnerable voters. Repeatedly, witnesses with personal knowledge testify that a disproportionate share of individuals identified by local election officials as requiring correction of minor errors with their remote ballot envelope, in the August 4 primary were older voters. Dkt. No. 27-6 (Lohman Dec.) at 3 (primary election volunteer supervised by local election officials: “the vast

majority of voters whose [remote] ballots had been rejected were elderly, often extremely so. The oldest . . . over one hundred years old”); Dkt. No. 27-10 (Marek Dec.) at 3 (primary election volunteer supervised by local election officials: “about half” of voters contacted in three hours with rejected remote ballots “were elderly”); Dkt. 27-13 (Washington Dec.) (primary election volunteer supervised by local election officials: “by far the most of the [remote voters with rejected ballots due to envelope completion errors] I reached were older, in their 80s and 90s. I know this because they would tell me when explaining why they could not come to the Board of Elections or go to satellite offices to cure their ballots.”).

Thus far, the most common trivial error leading to ballot disqualification by local election officials, due to voter inability to appear in-person to correct them, appears to be failure to check a box, on the St. Louis County and St. Louis City remote ballot envelope, that expressly suggests there is no need to check it. Older voters seem to be common victims of this defect.

The St. Louis County and City remote ballot has a box, adjacent to a line for the voter’s address in the jurisdiction, stating: “Voter *may* check box if address is same on front of envelope.” Dkt. No. 27-23 at 1, 5 (emphasis supplied). That address, of course, usually is the same and was supplied (in a remote ballot application) by a remote voter casting a ballot from their residence. Yet both jurisdictions rejected ballots without the box checked unless corrected in person. *See* Motion at 11-12; Complaint at 21 (discussing rejection for “failure to fill out a box . . . indicating that the voter’s mailing address is the same as their residential address.”). Several volunteers recruited by local election officials to contact voters about remote ballot errors report that the empty box was the most frequent error they saw and older voters were most of those they contacted. Dkt. 27-13 (Washington Dec.) at 2; Dkt. 27-10 (Marek Dec.) at 2; see also Dkt. 27-12 (Stenger Dec.) at 2 (“One elderly woman . . . started quietly sobbing after I explained that her

ballot was going to be rejected because she had not marked a small . . . box indicating her address remained the same unless she could come in person to cure the error before the end of Election Day. The voter said . . . she had no way of getting out.”).

Absent the requested relief, the same pattern will likely emerge in the general election.

B. Requiring an In-Person Appearance to Correct Certain Specific Remote Ballot Errors Is Especially Likely to Harm Medically Vulnerable Older Voters.

A number of the minor errors leading local officials to demand in-person appearances to correct ballot envelopes or applications are exclusively an issue for medically vulnerable, mostly older voters. These, in particular, warrant excusal or more flexible means to be safely corrected.

For instance, “absentee” ballot applications and “absentee” ballots themselves are rejected for an individual specifying more than one ground related to COVID-19 risk entitling them to file. *See* Dkt. No. 27-21 (documenting rejection of “absentee” ballot application in Greene County because applicant indicated they are both “[i]ncapacit[ated] or confine[d]” and have “contracted or a[re] in an at-risk category” for coronavirus); *see also* Motion at 30. As noted above, it is well-documented that many individuals over age 65 are also most likely to have underlying medical conditions justifying an “absentee” ballot. Yet, checking both reasons is a basis for disqualification. It is equally plain that many (especially older) persons at high-risk of serious illness due to COVID-19 have comorbidities, or multiple medical risk factors. And older, medically vulnerable individuals are most likely to be eligible to vote “absentee” because they are “[i]ncapacitated or confined.” Thus, it is wholly arbitrary and baseless for election officials to treat citing more than one statutory COVID-19-related ground for entitlement to vote “absentee” as disqualifying. *See* Dkt. 27-23 at 1, 4,5 (remote ballots from St. Louis and Greene Counties and St. Louis City requiring “absentee” voters, having already submitted valid applications to

vote “absentee,” to check one and only one basis for entitlement to do so).⁴⁹ Such caprice falls with acutest harshness on medically vulnerable voters, most of them older.

No less irrational is rejecting remote ballot applications, or ballots themselves, because they are marked as being both “absentee” and “mail-in” ballots. *See* Motion at 30.⁵⁰ Voters, especially medically vulnerable (mostly older) voters, who successfully applied to vote “absentee” (or “mail-in”), should not be disenfranchised because they fail to also successfully navigate confusing ballot envelope marking requirements presumably designed to allow election officials to use one form for both types of remote voters. *See* Dkt. No. 27-23 at 1, 4 (remote ballot envelopes of St. Louis and Greene Counties, used for both “absentee” and “mail-in” voters, requiring voters to identify which they are and why). Other jurisdictions, after all, presumably reduce these errors (or preclude them altogether) by providing distinct envelopes or forms for each kind of ballot. *Cf. id.* at 2 (Jackson County “Mail-In Ballot” envelope); 3, 5 (St. Charles County and St. Louis City “Affidavit[s]” of “Absentee Voter[s]”).

CONCLUSION

For the reasons set forth above, amici urge the Court to grant plaintiffs’ Motion for a Temporary Restraining Order and Preliminary Injunction.

⁴⁹ Ironically, the inverse problem exists with other remote ballots that do not specify the criteria that render older and other medically vulnerable persons eligible to vote “absentee.” *See* Dkt. No. 27-6 (Lohman Dec.) at 2 (ballot “did not set forth the parameters for the ‘at-risk for COVID’” excuse, so neither ‘65 years or older’ nor any of the other categories/health conditions for being ‘at risk’ appeared on the ballot envelope.”).

⁵⁰ *Id.*: “Voters who qualify for an ‘absentee’ ballot may check the box for ‘mail-in’ ballot—or check a reason for voting both absentee and mail-in ballot—simply because they are requesting or casting a ballot by mail, without understanding that these are two different types of ballots.”

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Respectfully submitted,

/s/ Charles W. Hatfield

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CERTIFICATE OF SERVICE AND FILING

I hereby certify that on October 2, 2020 the foregoing was electronically filed with the Clerk of the Court for the United States District Court for the Western District of Missouri using the CM/ECF system which will send notice of such filing to all registered CM/ECF users.

/s/ Charles W. Hatfield

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