

**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

**PLAINTIFFS' SUGGESTIONS IN REPLY TO PLAINTIFFS' MOTION FOR A
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

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INTRODUCTION

Missouri voters are seeking to participate in this November's federal election in the midst of a global pandemic, the likes of which has not been felt in approximately a century. As Missouri's August primary forecast, and as the start of remote voting for November has made clear, more Missouri voters will be participating in November's election remotely (i.e., by mail-in or absentee ballot) than ever before. However, Missouri's remote voting scheme creates obstacles that will disenfranchise thousands in the absence of court intervention.

Plaintiffs—organizations that have had to divert resources in order to assist Missouri voters in navigating the remote voting process and whose members experienced problems voting remotely in the August 2020 election and are seeking to vote remotely this November—ask this Court for measured, injunctive relief that will prevent qualified Missouri voters from being denied their fundamental right to vote this November.

BACKGROUND

Defendant Ashcroft's Suggestions in Opposition to Plaintiffs' Motion for a Temporary Restraining Order and Preliminary Injunction (Doc. #46), is filled with contradictions and diversions. Plaintiffs do not reiterate all the facts already presented in their opening brief (Doc. #27), but will address the issues raised by Defendant Ashcroft in turn as, notably, three of the four local election authorities ("LEAs") who are party to this case have not filed briefs opposing Plaintiffs' request for injunctive relief. (*See* Doc. #55 (Greene County Clerk's Office opposing Plaintiffs' request by stating in their one paragraph opposition that they "incorporate by reference the response suggestions filed by" Defendant Ashcroft.)).

Throughout their brief, Defendant Ashcroft downplays the harm that Plaintiffs will suffer if relief is not granted, pointing to what he claims are minimal number of ballot rejections.

Defendant ignores reality. As of the end of September, Missouri voters had requested almost 300,000 remote ballots, approximately 290,000 had been sent, and approximately 60,000 had been cast for the November elections.¹ (Doc. #46, at 1.) The numbers of voters submitting requests for remote ballots to their local election officials “has increased significantly in 2020 compared to previous election cycles.” (Fey Decl., Doc. #42-1, ¶ 5.)² This means that even if the rate of rejections for remote ballots remains approximately the same as in previous years (Doc. #46, at 6), the *quantity* (or raw number) of ballots that are rejected will be far higher.³ And studies show higher rates of rejection for first-time remote voters, which will be the case for thousands of

¹ Voters may request remote ballots be sent to them by mail until 5 p.m. October 21, 2020. Mo. Rev. Stat. §§ 115.302.2, 115.279.3. The relief Plaintiffs seek with respect to methods for requesting and returning ballots is critical for those voters who have yet to request ballots and submit their applications later in the month. Further, Plaintiffs Counts II and III are vital to preventing disenfranchisement of Missouri voters, including the 60,000 who have already cast their remote ballots and the thousands of others who have yet to do so.

² See, e.g., John Renaud, *20% of St. Louis County Voters Have Sought Absentee Ballots so Far*, St. Louis Post Dispatch, Oct. 6, 2020, https://www.stltoday.com/news/local/govt-and-politics/20-of-st-louis-county-voters-have-sought-absentee-ballots-so-far/article_b51ec379-f14f-5fa4-a06e-17236a83869b.html#utm_source=stltoday.com&utm_campaign=%2Fnewsletter-templates%2Fpolitical-fix&utm_medium=PostUp&utm_content=626b139f508dc50d8e80a93d9df2d1728c74784b (describing the number of absentee ballots issued and cast by voters in seven Missouri election jurisdictions as of October 5, 2020).

³ Data analyzing only absentee (not mail-in) ballot rejection reasons for the August 2020 election indicates that of the 4,697 absentee ballots rejected, 1,801 (38%) were rejected because they were received late. Notably, this means that even when people were not restricted to returning their ballots purely by U.S. mail, nearly 2000 ballots were still rejected because they were not received before polls closed on Election Day. While some counties had low numbers of ballots rejected, there are 9 counties where 100 percent of the ballots rejected were rejected because they were late. In Cape Girardeau and Platte over 90 percent of the absentee ballots rejected were rejected because they were late. And 20 percent, 52 percent, 70 percent, and 24 percent of absentee ballots rejected in Greene, Jackson, St. Charles, and St. Louis counties were rejected because they were late, respectively. See Exh. A (The data attached as Exhibit A was referenced as being provided as Attachment 4 to the Peters Declaration (Doc. #46-1, ¶ 11), but was not submitted. Members of Plaintiffs’ co-counsel team had received this data previously and are attaching it as Exhibit A here. A key to reading this report was submitted by Defendant Ashcroft (Doc. #46-4).).

Missouri voters who will be casting ballots remotely for the first time in 2020.⁴ Without Court intervention, therefore, the number of Missouri voters who will be subject to disenfranchisement in the November 2020 election stands to be significantly higher.

Additionally, the fact that in previous years everyone who cast a remote ballot could request them in-person or by mail, fax, or email, and return them in person or by a through different mail delivery systems (i.e., U.S. mail or overnight express services provided by FedEx or UPS), Mo. Rev. Stat. § 115.291.1-2, while this year mail-in ballot voters are limited to requesting a ballot by mail⁵ or in person and returning the ballot by U.S. mail, §§ 115.302.1, 115.302.12, creates a stark difference from the previous numbers on which the Secretary relies. (*See, e.g.*, Peters Decl., Doc. #47 ¶ 60(a) (looking at 2018 general election data).) Requiring that ballots, which take longer to request and return, be requested and returned by the same deadline for both absentee and mail-in voters lengthens the voting process for mail-in voters and increases the risk that mail-in voters will be disenfranchised in the November 2020 election. The Secretary’s assertion that “[t]he procedures for absentee and mail-in ballots are similar, with few relevant differences,” (Doc. #46, at 4), glosses over this fact. Further, the Secretary does not even acknowledge that the only other type of voter that may be required to return a ballot by mail—uniformed and overseas (“UOCAVA”) voters—are subject to a different ballot receipt deadline, Mo. Rev. Stat. § 115.920.1, presumably to account for mail delays, and does not track how many remote ballots

⁴ *See, e.g.*, Caitlin Huey-Burns & Adam Brewster, *Why Some Mail-in Ballots are Rejected and How to Make Sure Your Vote Counts*, CBS News, Aug. 4, 2020, <https://www.cbsnews.com/news/why-mail-in-ballot-rejected-voting-counts/>.

⁵ Voters are not provided with consistent information on how mail-in ballot applications can be submitted via mail (i.e., by U.S. mail or via other mail carriers). (*See, e.g.*, Doc. #47-10 (“[m]ail-in ballots can be requested . . . by US Mail”); Doc. #47-7 (mail-in ballot applications can be submitted “by mail”); Doc.#47-5 (mail-in ballot applications can be submitted “by U.S. mail”); Doc. #47-14 (mail-in ballot applications can be submitted “by mail”).)

that are rejected for being late were received by the UOCAVA deadline, (Peters Decl., Doc. #47 ¶ 59).

Plaintiffs have pointed to multiple individuals who experienced problems voting a remote ballot during the August 2020 elections, the only election thus with the new mail-in provisions. Some individuals never received their remote ballots, (Morgan Decl., Doc. #27-16 ¶¶ 6, 9), or experienced mail delays and were only able to return an absentee ballot on time because they were not limited to returning their ballot by U.S. mail, as are mail-in voters, (Marantz Decl., Doc. #27-15, ¶¶ 25-26). Another Missouri voter noted that, despite returning her ballots earlier than the timeline that USPS and the Secretary are promoting, (Doc. #46, at 6-7), her ballots took much longer to return, (Gaither Decl., Doc. #27-14 ¶¶ 7, 9 (noting that she put her ballot in the mail on July 22 and it was not received by local election officials until August 3—the day before the election); *see also* Newman Decl., Doc. #27-17 ¶¶ 7, 18 (noting that it took one month from the time her ballot application was submitted until she received her ballot—too late to complete the mail-in voting process)).⁶ Voters experienced these problems despite the fact that the state uses First-Class Mail. (*See* Doc. #46, at 7-8.)

⁶ The Secretary notes that the Postal Service sent a card to all Missouri postal customers recommending that they request their ballots at least fifteen day before Election Day. (Doc. #46, at 7; *see also* Doc. #48-4.) If USPS’s recommendation that voters should “place their ballot in the mail *at least* one week before Election Day,” (Doc. #46, at 7 (emphasis added); *see also* Doc. #48-4), is to be followed this means that voters should budget for election mail take at least 7 days to transport between locations. So, if a mail-in voter submits their application fifteen days before an election by mail, at least three weeks will be needed to for all of the mailings (ballot application to LEA, ballot to voter, ballot completed and sent back to LEA). If a voter submits their mail-in ballot application in person, they still must budget for at least 2 weeks to complete the mailing process (mailing the ballot to the voter, return of the ballot by mail to the LEA.) This does not even account for the fact that time needs to be built into the process for remote ballot applications to be processed and for mail-in voters to complete their ballot and get their ballot envelope notarized.

Further, Plaintiffs’ claim that errors on ballot envelopes have disenfranchised Missouri voters is not “focused on an isolated issue” in St. Louis County, (Doc. #46, at 1-3), and the fact that St. Louis County has adjusted its ballot envelope, (*Id.* at 3; Fey Decl. Doc. #42-1, ¶¶ 9, 11-14, Exh. 1), does not resolve the issues Plaintiffs have raised. (*See, e.g.*, Doc. #27, at 11 (noting that the address issues problems arise not only with the failure to mark a checkbox like the one that was present on the St. Louis County ballot envelopes in August 2020 (and that are still present on other jurisdictions’ envelopes), but also “if a voter fails to fill out their address on their ballot envelope”). Ballot envelopes vary widely from election jurisdiction to election jurisdiction, (*see, e.g.*, Ballot Affidavit Images, Doc. #27-23; *see also* Doc. #46-9; Doc. #46-10; Doc. #46-11; Doc. #46-12; Doc. #46-14; Doc. #47-2; Doc. #47-3),⁷ as do the number of Missouri voters who have their remote ballots rejected based on incomplete information (i.e., no address) regardless of envelope design. For example, state data of the absentee ballots received in the August 2020 election shows that of the 4,697 ballots rejected, 1,077 (22.9 percent) were rejected for incomplete information.⁸

⁷ Notably, many of these ballot envelopes only indicate on the envelopes themselves that the voter’s signature is required—a number of them do not indicate on the ballot envelope that address is a required field. Instructions provided by some jurisdictions place a significant emphasis on the need to sign the ballot; though they instruct the voter to complete the envelope, voters are not informed that failure to provide an address will result in their ballot being rejected. (*See* Doc. #46-10, at 3; Doc. #46-9, at 3 (noting emphasis on signature, notary, and selecting a reason for voting absentee); Doc. #46-13.)

⁸ As noted by Chrissy Peters, data collected by the state shows the reasons that absentee ballots are not counted, with being incomplete (i.e., no address) being categorized separately than ballots that were not counted for missing signatures or because they were not notarized. (Peters Decl., Doc. #47 ¶ 12); *see also* (Doc. #46-4, at 5).

At least 20 percent of the absentee ballots rejected in August 2020 were rejected because of incomplete info in the following counties: Callaway (20%), Crawford (75%), Holt (33%), Linn (100%), Phelps (30%), St. Charles (21%), St. Louis (41%), Taney (79%). Exh. A.

As the Suggestions of Defendant St. Louis County Board of Election Commissioners stated, Missouri law requires that remote ballots be rejected “[i]f the statements on any ballot envelopes have not been completed.” (Doc. #42, at 2 (citing Mo. Rev. Stat. § 115.295).) In the absence of court intervention, LEAs are bound to follow election laws even if they believe they unduly burden voters. (*Id.* (referencing *State ex rel. Wulfing v. Mooney*, 247 S.W.2d 722, 725 (Mo. banc 1951); *see also* Doc. #48-14, ¶¶ 5-7, 10-11 (noting that Greene County Clerk’s Office rejects ballot applications if a voter selects more than one reason for voting absentee, even if under both reasons the voter would qualify to vote a no-notary absentee ballot, because of state law restrictions).)⁹

While Missouri law mandates that voters whose remote ballot *applications* are rejected are provided notice and a process to challenge the rejection of their application, Mo. Rev. Stat. § 115.279.2, § 115.302.8, state law does not require that Missourians be notified of any errors on their ballot envelope and provided an opportunity to correct those errors before their ballot is rejected and they are deprived of their right to vote, (Doc. #46, at 5). The Secretary posits, contradictorily, that problems resulting in mail-in and absentee voters being disenfranchised due to errors on their ballot envelopes are few and far between, (*see, e.g., id.* at 6), or isolated in nature, (*id.* at 1), but then also alleges that “[f]ew LEAs, if any, would have sufficient staff and temporary

⁹ While Greene County has pre-printed envelopes for different categories of ballots, (Doc. #48-14, at 11-19), the reason it appears that they cannot resolve issues when voters select two reasons for voting absentee (including two reasons that could, in fact, overlap—i.e., incapacity or confinement due to an illness or disability *or* having contracted or being at risk for COVID-19), (*Id.* at 3-5), is because it views state law as restricting it from doing so (*Id.* ¶¶ 5-7, 10-11). To comply with state law, the office sends voters an “Absentee Ballot Request Acknowledgement” form letting them know why their ballot is being rejected and instructing the voter to “make the necessary correction(s)” prior to the ballot request deadline. (*Id.* ¶ 5; *id.* at 5.)

workers or election judges to both process the absentee and mail-in ballot envelopes for tabulation and contact voters whose ballots are rejected,” (Peters Decl. Doc. #47, ¶ 40).

Plaintiffs seek relief that makes use of processes and procedures already in place or asks for back-end changes on rules applied by election administrators when determining whether to reject a ballot. While the Secretary notes that efforts have been taken—or are planned—to educate the public about absentee and mail-in voting procedures, (Peters Decl., Doc. #47 ¶ 58), he does not acknowledge the means for disseminating information about any changes to voting practices ordered by this court that LEAs could easily administer, (*see* Doc. #42, at 3 (noting that St. Louis County “could utilize . . . news media and its social media platforms to help announce any ordered changes to the voting requirements” and would “immediately comply with” “any order of the relief requested by Plaintiffs” issued by this Court)).

ARGUMENT

I. Plaintiffs Have Standing to Bring this Legal Challenge.

Defendant Ashcroft perplexingly argues that Plaintiffs lack standing to bring the present lawsuit, relying on the doctrine of third-party standing. (Doc. #46, at 11-15.) He fails to acknowledge long-standing doctrines of organizational and associational standing that this Court and others have regularly held allow Plaintiffs—like those here—to bring voting rights and other challenges.

Plaintiffs are membership organizations engaged in civic engagement work, including voter education and engagement efforts. (Rogers Decl., Doc. #27-1 ¶¶ 12-14, 17-19); (Robinson Decl., Doc. #27-2 ¶¶ 10-12); (Jones Decl., Doc. #27-3 ¶¶ 10-12); (Alper Decl., Doc. #27-4 ¶¶ 7-10); (Gould Decl., Doc. #27-5 ¶¶ 9-19). In order to educate voters on the processes for voting mail-in and absentee ballots and assist voters in navigating the hurdles that exist in these processes, Plaintiffs have had to divert time, labor, and financial resources from other work core to their

missions. (Rogers Decl., Doc. #27-1 ¶¶ 17-19, 35-41); (Robinson Decl., Doc. #27-2 ¶¶ 17-23); (Jones Decl., Doc. #27-3 ¶¶ 14-20, 22-24); (Alper Decl., Doc. #27-4 ¶¶ 17, 27-31); (Gould Decl., Doc. #27-5 ¶¶ 23, 30-31, 42).

Plaintiffs have established organizational standing because they have suffered injuries that are cognizable, traceable to the defendants, and able to be redressed if injunctive relief is entered by this Court. *See Sierra Club v. Kimbell*, 623 F.3d 549, 556 (8th Cir. 2010). Plaintiffs have each diverted resources from other activities crucial to their missions in order to help their members and other Missouri voters navigate the mail-in and absentee voting systems, thus suffering an injury for purposes of standing. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (noting that where defendant's conduct causes an organization to drain resources from their other priorities "there can be no question that the organization has suffered injury in fact"); *see also Metro. St. Louis Equal Hous. Opportunity Council v. Lighthouse Lodge, LLC*, No. 2:09-CV-04019-NKL, 2009 WL 1576735, at *3 (W.D. Mo. June 4, 2009).

In addition, Plaintiffs' members and constituencies they serve are impacted by the barriers alleged in this case. Many of Plaintiffs' members and the individuals they serve have traditionally voted in person, (Rogers Decl., Doc. #27-1 ¶ 24), (Robinson Decl., Doc. #27-2 ¶¶ 17, 24), (Jones Decl., Doc. #27-3 ¶ 25), (Alper Decl., Doc. #27-4 ¶ 13), (Gould Decl., Doc. #27-5 ¶ 26), but because of COVID-19 are planning to use the mail-in and absentee ballot processes for the first time this year, (Rogers Decl., Doc. #27-1 ¶¶ 25-26), (Robinson Decl., Doc. #27-2 ¶¶ 25-26), (Jones Decl., Doc. #27-3 ¶¶ 26-27), (Alper Decl., Doc. #27-4 ¶¶ 15-16), (Gould Decl., Doc. #27-5 ¶ 26). Plaintiff organizations' members have already experienced problems voting remote ballots in Missouri's August 2020 election, (Rogers Decl., Doc. #27-1 ¶ 35), (Robinson Decl., Doc. #27-2 ¶ 28), (Jones Decl., Doc. #27-3 ¶ 28), (Alper Decl., Doc. #27-4 ¶ 25), (Gould Decl., Doc. #27-5 ¶

30), and they and others are at risk of being unable to navigate the remote voting process or have their ballots counted in November, *see, e.g.*, (Rogers Decl., Doc. #27-1 ¶ 25), (Jones Decl., Doc. #27-3 ¶¶ 21, 29-30), (Alper Decl., Doc. #27-4 ¶ 18), (Gould Decl., Doc. #27-5 ¶ 24); *see also* (Robinson Decl., Doc. #27-2 ¶ 27), (Newman Decl., Doc. #27-17 ¶¶ 7-10, 18).

Plaintiffs, therefore, establish associational standing by demonstrating that “(a) [their] members would otherwise have standing to sue in their own right; (b) the interests [they] seek[] to protect are germane to the[ir] organization’s purpose; and (c) neither the claim[s] asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Wash. State Apple Advert. Comm’n*, 432 U.S. 333, 343 (1977).

In our democracy “[n]o right is more precious . . . than that of having a voice in the election of those who make the laws under which, as good citizens, we must live.” *Wesberry v. Sanders*, 376 U.S. 1, 17 (1964) (noting also that “[o]ther rights, even the most basic, are illusory if the right to vote is undermined”). To that end, “[a]ny burden on the right to vote” constitutes an injury. *See Common Cause of Colo. v. Buescher*, 750 F. Supp. 2d 1259, 1271 (D. Colo. 2010); *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005) (stating that a plaintiff “need not have the franchise wholly denied to suffer injury”). Here, Plaintiff members have, and plan to, use Missouri’s remote voting process during the November 2020 elections. Plaintiff members already had problems navigating the obstacles of the remote voting process in August 2020. (*See, e.g.*, Robinson Decl. ¶ 28, Doc. #27-2 (noting that one member had her remote ballot rejected for an error on the envelope and had to go vote in person to avoid being disenfranchised).) As this Court has previously held, “any additional barrier to voting imposed” that “would have been unnecessary had [the defendants] followed the law, satisfies any requirement of a concrete injury[.]” *ACORN v. Scott*, No. 08-cv-4084, 2008 WL 2787931, at *7 (W.D. Mo. July 15, 2008).

Because these injuries are germane to Plaintiff organizations' missions, organizational members do not need to individually be party to this suit in order to have these injuries effectively addressed. Plaintiff organizations have, therefore, established both organizational and associational standing.

II. Plaintiffs Are Likely to Succeed on the Merits of their Claim that Missouri's Process for Requesting and Casting a Mail-In Ballot Places an Undue Burden on the Right to Vote in Violation of the First and Fourteenth Amendments of the U.S. Constitution.

Under the *Anderson-Burdick* framework, Missouri's arbitrary, discriminatory, and burdensome restrictions on the means by which voters can request and return mail-in ballot applications and mail-in ballots imposes an unconstitutional burden on the fundamental right to vote for which Defendants lack any sufficiently weighty governmental justification. (*See* Doc. #27, at 25-28.). The right to vote remotely, in the context of the COVID-19 pandemic, is coextensive with the right to vote generally, under normal circumstances. *See Thomas v. Andino*, No. 3:20-cv-01552, 2020 WL 2617329, at *18 (D.S.C. May 25, 2020) (finding that the "privilege" to vote absentee "so intimately [a]ffects the fundamental right to vote" as to require the court to determine that the plaintiffs' challenge is to be examined under a "normative constitutional rights framework"); *see also Obama for America v. Husted*, 697 F.3d 423, 430-31 (6th Cir. 2012) (noting that "Plaintiffs did not need to show that they were legally prohibited from voting, but only that 'burdened voters have few alternative means of access to the ballot'").

Plaintiffs have demonstrated that, given the ongoing delays in mail delivery and the health risks of voting in person due to the COVID-19 pandemic, requiring voters who cast mail-in ballot applications to only submit the ballots by mail or in person, and requiring these voters to mail back those ballots *only* by U.S. mail, when similarly situated voters submitting absentee ballots may request and return their ballots by a host of other means, places a significant burden on the right to vote Plaintiff organization's members and Missouri voters. (Doc. #27, at 2-10, 25-28.) This conclusion is in line with the conclusions reached by courts in other Circuits holding that under

the *Anderson-Burdick* framework, barriers to remote voting during the COVID-19 pandemic, even if the voter is not *particularly* susceptible to deadly consequences from the virus, constitute at least a moderate burden on the right to vote. *Andino*, 2020 WL 2617329, at *19 (Plaintiffs challenged absentee ballot voting laws as violating the First and Fourteenth Amendments during COVID-19 pandemic and Court found at preliminary injunction stage it was not necessary to decide whether strict scrutiny or more flexible standard applied because “Plaintiffs have identified burdens inflicted by the Witness Requirement, which are at least of sufficient magnitude to warrant the injunction.”); *Memphis A. Phillip Randolph Institute v. Hargett*, No. 3:20-cv-00374, 2020 WL 5412126, at *20 (M.D. Tenn. Sept. 9, 2020) (“[T]he Court agrees that the burden, during the pendency of the COVID-19 pandemic, upon voting rights of a law that requires in-person voting for those not especially vulnerable to COVID-19 (or those caring for them) is not severe, but rather is moderate.”); *League of Women Voters of Va. v. Va. State Bd. of Elections*, No. 6:20-cv-24, 2020 WL 2158249 (W.D. Va. May 5, 2020) (addressing an as-applied constitutional challenge to a witness-signature requirement for absentee ballots during COVID-19). Plaintiffs have also demonstrated that Missouri lacks any sufficiently weighty interest in imposing these restrictions, because the state already allows absentee ballot applications to be submitted by email or fax and absentee ballots themselves to be submitted in person by the voter or a close relative, making any administrative burden in also accepting mail-in ballots through these methods slight. (Doc. #27, at 2-10, 25-28.) In fact, mirroring the methods for requesting and returning mail-in ballots with those in place for absentee ballots is likely to reduce the burden experienced by election administrators. Accordingly, Plaintiffs have demonstrated a high likelihood of success on the merits of Count I.

Defendant Ashcroft’s arguments to the contrary are unavailing.¹⁰ Defendant Ashcroft incorrectly asserts that Plaintiffs argue these restrictions constitute a “severe” burden on voters of the kind that would entail strict judicial scrutiny and can only be justified by a compelling governmental interest. (Doc. #46, at 15-19.) Rather, Plaintiffs argue these restrictions impose a significant burden on voters that cannot be justified by any sufficiently weighty governmental interest. (Doc. #27 at 25-28; Doc. #1, ¶ 78); *Andino*, 2020 WL 2617329, at *19.

Defendant Ashcroft also mischaracterizes the *Anderson-Burdick* analytical framework as binary—either demanding strict scrutiny or rational basis scrutiny. (Doc #46, at 19.) To the contrary, and as Defendant Ashcroft appears to admit, the *Anderson-Burdick* framework is a “flexible” sliding scale, in which the “rigorousness of [the Court’s] inquiry” increases with the significance of the burden. *Burdick v. Takushi*, 504 U.S. 428, 434 (1992); (see Doc. #46, at 16 (citing same)); see also *Crawford v. Marion Cnty. Elec. Bd.*, 553 U.S. 181, 191 (2008) (Stevens, J., plurality opinion) (“However slight [the burden on the right to vote] may appear . . . it must be justified by relevant and legitimate state interests ‘sufficiently weighty to justify the limitation’”). This mischaracterization of the *Anderson-Burdick* framework appears to be an attempt to avoid having to meet his burden of showing that state’s interest in imposing these arbitrary restrictions is sufficiently weighty to justify the significant burden on mail-in voters—an argument on which Defendant Ashcroft cannot prevail. See *Burdick*, 504 U.S. at 434 (court must “tak[e] into consideration ‘the extent to which those interests make it *necessary* to burden the plaintiff’s rights.’” (emphasis added) (quoting *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)).

¹⁰ Defendant Greene County Clerk’s Office incorporated by reference Defendant Ashcroft’s arguments in opposition. (Doc. #55). Defendant St. Louis County Board of Election Commissioners explicitly took no position on the merits of Plaintiffs’ claims. (Doc. #42, at 1). Defendants Jackson County Election Board and St. Charles County Election Authority fail to dispute and therefore concede Plaintiffs’ claims, because they have not filed a response.

As briefed, more remote ballots will be cast in the state than any year previously, and Missouri can expect a significant number of voters to be affected by the state’s remote voting laws and restrictions.¹¹ And, Plaintiffs have demonstrated that their members—and the communities they serve—have been affected by the challenged restrictions on the right to vote, and will be impacted by the mail-in ballot restrictions in the November election. *See Part I, supra.*

Defendant Ashcroft also argues that the restrictions on request and return of mail-in ballots only minimally burden mail-in voters because mail-in voters presumably are voting by mail to avoid voting in person, and allowing them to drop off their ballot in person would defeat that purpose. (Doc. #46 at 24.) But dropping off an already-completed ballot presents a significantly lower risk of exposure to COVID-19 than does waiting in line, moving through a polling place together with hundreds of other voters, interacting face-to-face with election officials, and filling out a ballot in a voting booth and casting it using equipment shared with potentially thousands of other voters. Furthermore, mail-in voters who justifiably rely on Missouri making remote voting available to them, but who do not receive their ballot until it is too late to mail it back to be received by the Election Day Receipt Deadline, are forced to choose between the risk of voting in person and simply not voting at all when the readily-available alternative of dropping off their completed

¹¹ *See* Kayla Drake, *Missouri Voter Registrations Soar in 2020; Here’s How to Sign Up Before Wednesday Deadline*, St. Louis Public Radio, Oct. 6, 2020, <https://www.kcur.org/politics-elections-and-government/2020-10-06/missouri-voter-registrations-soar-in-2020-heres-how-to-sign-up-before-wednesday-deadline> (“As of Friday, about 133,000 more Missourians had registered to vote than around that time in 2016, according to data from the Secretary of State’s office.”); Mike Genet, *Local Election Officials See Large Increase in Ballot Requests*, The Examiner, Sept. 16, 2020, <https://www.examiner.net/story/news/politics/elections/2020/09/17/jackson-county-election-officials-see-large-increase-ballot-requests/5820402002/> (Corey Dillon, co-director for Jackson County Elections Board stated “At this point, seven weeks before the election, it’s twice the number we’ve had before” of the increase in remote ballot requests ahead of the November 2020 primary.).

ballot is already provided to absentee voters. This is the very definition of an undue burden on the right to vote, as Plaintiffs have amply demonstrated.

Defendant Ashcroft suggests—in passing—that the Court must consider these restrictions on mail-in voters in the context of Missouri’s entire election system, suggesting that because Missouri provides “multiple options for voters casting their ballots” that the restrictions on mail-in voters are not burdensome. (Doc. #46, at 19.) Defendant Ashcroft fails to explain which other voting options supposedly mitigate the burden on mail-in voters resulting from the state subjecting them to additional process and weeks of waiting to cast their ballot. This is because there are none. Voters who qualify to cast a mail-in ballot are given only two options if they want to cast a ballot: vote by mail and be subjected to potentially-disenfranchising burdens, or vote in person on Election Day and risk exposure to or transmission of the coronavirus. The only other alternative, as Governor Parson made clear earlier this year, is to not vote at all. K.C. Star Editorial Board, *Missouri Gov. Mike Parson: If You Don’t Feel Safe, Just Don’t Vote. That’s Democracy?*, K.C. Star (May 29, 2020), <https://www.kansascity.com/opinion/editorials/article243081151.html>. Moreover, the only authority Defendant Ashcroft offers in support of his assertion that the Court must consider other voting options in evaluating Missouri’s restrictions on mail-in voting is a recent ruling from the Northern District of Ohio. (Doc. #46, at 19.) Ohio, unlike Missouri, offers no-excuse early voting,¹² which the Court in that case relied on heavily in its determination that other options mitigated the burden on mail-in voters from the challenged restrictions. *See League of Women Voters of Ohio v. LaRose*, No. 2:20-CV-3843, 2020 WL 5757453, at *1, 10 (S.D. Ohio Sept. 27, 2020).

¹² In Ohio, all voters qualify to vote a no-excuse, no-notary needed absentee ballot, *see, e.g.*, Oh. Rev. Code § 3509.02(a), which can be cast in person, § 3509.051, or by mail, § 3509.05.

The interests Defendant Secretary Ashcroft cites for the burdensome restrictions Missouri law places on mail-in, but not absentee, ballots are the interests of “clarity, uniformity, ballot security, preserving limited state resources, reducing administrative burdens, and avoiding voter confusion.” (Doc. #46, at 20.) In creating the mail-in voting process, Secretary Ashcroft claims, Missouri had to impose “some sort of order, rather than chaos,” (Doc. #46, at 20 (quoting *Burdick*, 504 U.S. at 433)), and that the restrictions it chose are “clear [and] uniform.” (*Id.*) But clarity and uniformity, in and of themselves, are not sufficient justifications for imposing any law, but by no means justify laws that make it harder for qualified eligible voters to cast a ballot that will count. Moreover, as Plaintiffs have shown, the restrictions on request and return of mail-in ballots are anything but clear and uniform. (*See* Doc. #27, at 5-10.) Requiring mail-in, but not absentee voters who apply in person at their local election office to leave and wait to receive their ballot by mail instead of being handed the ballot by the election official who just accepted their application, and requiring mail-in, but not absentee voters who have their ballot notarized at their election office to mail their ballot by U.S. mail rather than the means available to absentee voters (i.e., leaving it with an election official at the office they had their ballot notarized at), creates standards for remote voting that are anything but clear and uniform.

Nor are these restrictions “nondiscriminatory.” By subjecting mail-in voters to significant burdens and weeks of waiting for the mail while allowing similarly situated absentee voters to avoid these burdens and delays entirely. Indeed, Defendant Ashcroft concedes that Missouri subjects mail-in and absentee voters to different process, but argues this is justified because “absentee voters are not similarly situated to mail-in voters when it comes to the anticipated administrative burdens of mail-in voting.” (Doc. #46, at 19.) Similarly situated is not determined from the prospective of Defendant’s convenience, but rather reflects an analysis of whether two

groups are factually similar as a legal matter. The two classes of persons seeking to vote remotely as a result of the COVID-19 pandemic are only different *because* Missouri subjects these two groups of remote voters to different processes, not the other way around. Missouri chose to create an entirely new remote voting process called “mail-in” voting, as compared to other absent, at risk, or unavailable voters who are eligible to cast absentee ballots. This imposes significant additional burdens on one category of remote voters and *increases* the burden on administrators by requiring that they administer a two-track remote voting process.¹³

Plaintiffs have demonstrated that the arbitrary differences in request and return processes between the two classes of remote ballots have substantially *increased*, not decreased, voter confusion.¹⁴ (Doc. #27, at 7-10.) Plaintiffs’ proposed remedy—allowing all remote voters to use the same processes to request and return their ballot, (Doc. # 23 at 4)—would better achieve the state’s interests in clarity, uniformity, and avoiding voter confusion.

Moreover, the burden of allowing in-person drop-off of mail-in ballots up to the Election Day Receipt Deadline is likely to be minimal. In contrast, voting *in person* takes significantly more time and administrative resources, and increases the risk of exposure to the coronavirus for both voters and election officials. Allowing mail-in voters who would otherwise be forced to vote in person due to the late arrival of their ballot to instead drop off their already-completed ballot would therefore decrease administrative burdens. Multiplied by the large number of voters expected to

¹³ Notably, only one of the Defendant Class representatives, Defendant Greene County Clerk’s Office, has argued that this two-track process alleviates, rather than exacerbates, administrative burdens, and only by reference to Defendant Ashcroft’s arguments. (See Doc. #55.)

¹⁴ Defendant Ashcroft asserts, but fails to explain how, providing the same options to request a ballot for all remote voters would result in “confusion and chaos.” (Doc. #46, at 21.) Defendant Ashcroft similarly asserts that allowing mail-in voters to also submit their ballot applications via email and fax would “forc[e] [election officials] to monitor four different informal channels for requesting mail-in ballots, (*id.*), despite the fact that election officials must already monitor these same four channels for the submission of absentee ballot applications.

cast mail-in ballots in the November 3 election, this represents a significant savings in time and resources for election officials and voters alike. Likewise, allowing mail-in voters to submit their applications via email or fax would streamline and speed up the administrative process. Further, alleviating election officials of the need to administer a two-track process—and inform anxious voters about the differences in process—would itself reduce administrative burdens. For all of these reasons, Plaintiffs’ proposed remedy would *decrease*, not increase the cost and administrative burdens related to mail-in voting, thereby better achieving the state’s interest than the status quo.

While Plaintiffs recognize that the state legitimately concerns itself with protecting ballot security and preventing fraud, Defendant Ashcroft fails to explain *how*, or offer evidence establishing that, limiting the methods for the request and return of mail-in—but not absentee—ballots advances this interest in any way. (*See* Doc. #46, at 22-24.) Missouri requires mail-in ballot applications to be signed by the voter and verified by election officials before the voter receives a ballot. Mo. Rev. Stat. §§ 115.302.4, 115.302.8. This signature and verification process is no different for absentee voters, §§ 115.279.4, 115.287.1, who may submit their application by email or fax—nor would it be for mail-in voters who choose to do so under Plaintiffs’ proposed remedy. Prohibiting the in-person return of an already-notarized mail-in ballot therefore does nothing to ensure that that ballot “reflect[s] the voter’s actual choices,” (Doc. #46, at 23), and thereby fails to advance this interest. Defendant Ashcroft offers scant evidence of absentee ballot fraud in Missouri, (Doc. #46-1, at 43-46), and no evidence to support the proposition that mail-in ballots are more susceptible to fraud than absentee ballots based on the way they are requested and

received.¹⁵ Under the *Anderson-Burdick* framework, it is not enough for the state to merely *assert* that a restriction advances a certain state interest, the state must *demonstrate* that that precise interest makes it *necessary* to impose that restriction. *Burdick*, 504 U.S. at 434; *see also, e.g., Fish v. Schwab*, 957 F.3d 1105, 1133 (10th Cir. 2020), *petition for cert. filed*, (U.S. Aug. 3, 2020) (No. 20-109) (holding that, while the state clearly has an interest in preventing voter fraud, there must be evidence “that such an interest made it necessary to burden voters’ rights” (citing same)). In short, in light of the identical rules in place for processing absentee and mail-in ballot applications and returned ballots, requiring more burdensome ways to request and return different mail-in ballots compared to absentee ballots does nothing to promote the integrity or security of those ballots.

Finally, even though Defendant Ashcroft argues that because Missouri is not itself responsible for delays in mail delivery, it is not responsible for ensuring its mail-in voting process is constitutionally compliant in light of those delays, that framing mischaracterizes Plaintiffs’ claim of harm. (Doc. #46, at 24-25.) Plaintiffs are not alleging that the Secretary of State is responsible for mail delays at the U.S. Postal Service; Plaintiffs allege that inasmuch as Defendants implement and enforce laws which forbid mail-in voters, including Plaintiff organizations’ members, but not others (absentee voters) who are similarly situated, from lawfully submitting their ballots (and applications) by any other means but U.S. mail (or for mail-in applications, by mail or in person), when mail service is demonstrably and predictably strained due to the worldwide COVID-19 pandemic and when all ballots must be received by close of polls Election

¹⁵ All absentee ballots may be requested by mail or fax and returned in person by the voter or a close relative, Mo. Rev. Stat. § 115.279.1, and some do not require notarization, § 115.283.

Day to be counted, Defendants are responsible as a matter of law for the harm caused to Plaintiff organizations and their members. (Doc. #27 at 25-28.)

Missouri's election laws do not operate in a vacuum, and Missouri cannot seriously maintain that the conditions affecting voters attempting to comply with its voting restrictions are irrelevant to determining whether those restrictions are constitutional as applied to present circumstances. Numerous courts have taken the current conditions created by the pandemic and mail delays into account when evaluating whether a state's election laws constitute an undue burden on the right to vote. *See, e.g., Democratic Nat'l Comm. v. Bostelmann*, No. 20-CV-249-WMC, 2020 WL 1638374, at *13 (W.D. Wis. Apr. 2, 2020) (giving significant weight to the burden on voters choosing between protecting their health in a pandemic and exercising their right to vote); *Gallagher v. New York State Bd. of Elections*, No. 20 CIV. 5504 (AT), 2020 WL 4496849, at *16 (S.D.N.Y. Aug. 3, 2020) (finding burden "exceptionally severe" where voters' mail-in ballots were rejected based on USPS errors "out of the voters' control"); *Common Cause Indiana, et al. v. Lawson, et al.*, No. 1:20-CV-02007, 2020 WL 5798148, at *16 (S.D. Ind. Sept. 29, 2020) ("[T]he State cannot offer absentee voting by mail and then tell voters who choose it and abide by the statutory rules that they should have chosen differently because of delays over which they have no control."). Indeed, the United States Supreme Court has done so as well. *See Republican Nat'l Comm. v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (April 6, 2020) (ruling that mail ballots must be postmarked by Election Day but leaving undisturbed preliminary injunction establishing ballot receipt deadline six days after Election Day in light of the pandemic and mail delays).

III. Plaintiffs Are Likely to Succeed on the Merits of their Claim Under the Materiality Provision of the Civil Rights Act of 1964.

Plaintiffs are likely to succeed on their claims under the Materiality Provision of the Civil Rights Act of 1964, 52 U.S.C. § 10101(a)(2)(B). Not only does a private right of action exist under

the Materiality Provision, but Plaintiffs are able to challenge both Missouri's rejection of remote ballot applications and ballots for immaterial errors under this law.

A. Plaintiffs Have a Private Right of Action Under the Materiality Provision.

Courts routinely find that plaintiffs have a private right of action under the Materiality Provision. Private rights of action were allowed under the Materiality Provision long before a 1957 amendment added in a provision to allow “the Attorney General to bring an enforcement action.” *Tex. Democratic Party v. Hughs*, No. SA-20-cv-08-OD, 2020 U.S. Dist. LEXIS 131768, at * 15 (W.D. Tex. July 22, 2020). In fact, when the 1957 amendment was being considered, it was stated that: “We are not taking away the right of the individual to start his own action. . . . Under the laws amended if this program passes, private people will retain the right they have now to sue in their own name.” Civil Rights Act of 1957: Hearings on S. 83, an amendment to S.83, S. 427, S. 428, S 429, S 468, S 500, S 501, S 502, S 504, S 505, S 508, S 509, S 510, S Con. Res. 5 Before the Subcomm. on Constitutional Rights of the Senate Comm. on the Judiciary, 85th Cong. 73, 203, 1; 60-61, 67-73 (1957) (statement and testimony of the Hon. Herbert Brownell, Jr., Attorney General of the United States).

It has been recognized that adding a provision allowing the Attorney General to bring enforcement actions under the Materiality Provision “was proposed because enforcement purely by private parties was not enough”—that “the intent was to make enforcement stronger without taking anything away.” *Tex. Democratic Party*, 2020 U.S. Dist. LEXIS 131768, at * 15 (referencing *Smith v. Allwright*, 321 U.S. 649, 651 (1944); *Chapman v. King*, 154 F.2d 460, 461 (5th Cir. 1946); *Mitchell v. Wright*, 154 F.2d 924, 925 n.1 (5th Cir. 1946)). This understanding has been adopted many courts, which have continued to recognize that private plaintiffs can sue under

the Materiality Provision. *Schwier v. Cox*, 340 F.3d 1284, 1294-1297 (11th Cir. 2003);¹⁶ *Taylor v. Howe*, 225 F.3d 993, 996 (8th Cir. 2000); *Coal. for Educ. in Dist. One v. Bd. of Elections*, 495 F.2d 1090, 1091 (2d Cir. 1974); *Bell v. Southwell*, 376 F.2d 659, 660 (5th Cir. 1967); *Reddix v. Lucky*, 252 F.2d 930, 933-934 (5th Cir. 1958); *Tex. Democratic Party*, 2020 U.S. Dist. LEXIS 131768, at * 15; *Common Cause/Georgia v. Billups*, 406 F. Supp. 2d 1326, 1370-1372 (N.D. Ga. 2005).

While there is a circuit split on this issue, see *Northeast Ohio Coal. For the Homeless v. Husted*, 837 F.3d 612, 630 (6th Cir. 2016), *pet. for rehearing en banc denied*, No. 16-3603, Dkt. 79 (6th Cir. Oct. 6, 2016), the majority of courts to have considered the issue have recognized a private right of action and the U.S. Supreme Court denied a cert petition to resolve the current circuit split, *Northeast Ohio Coal. For the Homeless v. Husted*, No. 16-1068 (June 19, 2017) (petition denied). Further, the Eighth Circuit has previously entertained a private suit brought under the Materiality Provision, although it did not directly address whether the statute confers plaintiffs with a private right of action. See, e.g., *Hoyle v. Priest*, 265 F.3d 699, 704-05 (8th Cir. 2001).

Additionally, the U.S. Supreme Court has previously found a private right of action to challenge restrictions on the right to vote, even when a statute also provided for enforcement of provisions of the Voting Rights Act by the Attorney General. *Allen v. State Board of Elections*, 393 U.S. 544, 557 (1969); *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (plurality opinion); see also *Schwier*, 340 F.3d at 1297 (noting that the Materiality Provision is also part of the Voting Rights Act).

B. Plaintiffs May Successfully Challenge Requirements Missouri Sets for the Completion of Absentee Ballot Applications and Ballots as Immaterial.

¹⁶ It is notable that, while Defendant Ashcroft references *Schwier v. Cox*, 340 F.3d 1284 (11th Cir. 2003), in his brief, (Doc. #46, at 32), he does not acknowledge that the Eleventh Circuit and other courts have found that private litigants have a right of action under the Materiality Provision.

Plaintiffs challenge rejection of remote ballot applications and ballots for immaterial errors on the applications and ballot envelopes, respectively. (*See, e.g.*, Doc. #27, at 28-31.) Defendant Ashcroft claims that Plaintiffs are likely to be unsuccessful on Claim II, (Doc. #46, at 25), by alleging that the Materiality Provision that applies to applications and registrations to vote but not ballot envelopes, (*id.* at 31), while failing to address the issues raised by Plaintiffs regarding the rejection of remote ballot applications entirely.

Defendant Ashcroft notes that Plaintiffs submitted evidence related to the rejection of ballot applications, (*id.* at 35), but does not describe why rejection of ballot applications when voters indicate (1) multiple qualifying reasons to vote a no-notary absentee ballot, (Doc. #27-21), is material; or (2) why failure to indicate whether the request is for an absentee or mail-in ballot should result in the rejection of an application when, at minimum, all Missouri voters qualify to cast a mail-in ballot this November, Mo. Rev. Stat. § 115.302.1.¹⁷

Further, arguments that the Materiality Provision should not be applied to the rejection of remote ballots due to errors on ballot envelopes, (Doc. #27, at 30-31), are disingenuous. The Materiality Provision provides that: “No person acting under color of law shall deny the right of any individual to vote in any election because of an error or omission on any record or paper relating to any application, registration, or other act requisite to voting, if such error or omission is not material in determining whether such individual is qualified under State law to vote in such election.” 52 U.S.C. § 10101(a)(2)(B). The Secretary tries to argue that “other act requisite to voting” does not relate to the completion of a ballot envelope, (Doc. #27, at 30-31)—the very thing

¹⁷ Plaintiffs recognize that absentee ballots themselves will not be rejected if a voter fails to indicate the reason they are casting an absentee ballot on the ballot envelope. *See* Mo. Rev. Stat. § 115.294.

that *must* be completed in order for a voter's remote ballot to be counted. *See, e.g.*, Mo. Rev. Stat. § 115.283.1 (“Each ballot envelope *shall* bear a statement on which the voter shall state the voter's name, the voter's voting address, the voter's mailing address and the voter's reason for voting an absentee ballot. . . . On the form, the voter *shall* also state under penalties of perjury that the voter is qualified to vote in the election, that the voter has not previously voted and will not vote again in the election, that the voter has personally marked the voter's ballot in secret or supervised the marking of the voter's ballot if the voter is unable to mark it, that the ballot has been placed in the ballot envelope and sealed by the voter or under the voter's supervision if the voter is unable to seal it, and that all information contained in the statement is true.”) (emphasis added). It is, therefore, hard to imagine how a remote ballot envelope could be construed as something that is not a requisite for voting. Not only have ballot envelope rules been analyzed under the Materiality Provision, *Martin v. Crittenden*, 347 F. Supp. 3d 1302, 1308-09 (N.D. Ga. 2018); *Democratic Party of Ga., Inc. v. Crittenden*, 347 F. Supp. 3d 1324, 1339-41 (N.D. Ga. 2018), but the Eighth Circuit applied the Materiality Provision when analyzing the legality of an Arkansas statute that restricted who could sign an initiative petition to qualified electors, *Hoyle*, 265 F.3d at 704-05— an act more removed from being a “requisite for voting.”¹⁸

Defendant Ashcroft provides a limited quotation from *Martin v. Crittenden*, 347 F. Supp. 3d 1302, to assert the idea that courts have found that errors with an address on a ballot envelope

¹⁸ Further, Defendant Ashcroft cites *Schwier*, 340 F.3d at 1294, to insinuate that the Materiality Provision does not apply to ballot envelopes, (Doc. #46, at 32 (quoting language stating that the Materiality Provision “was intended to address the practice of requiring unnecessary information for voter registration with the intent that such requirements would increase the number of errors or omissions on application forms, thus providing an excuse to disqualify potential voters”). However, the Defendant fails to note that the issue before the Court in *Schwier* related to registration applications and that the Court did not consider or analyze what “other acts requisite to voting” entailed. *See, e.g.*, *Schwier*, 340 F.3d at 1297.

are material, justifying the rejection of a remote ballot. (Doc. #46, at 34.) Defendant Ashcroft's excerpt fails to explain that the court in *Martin* noted that it was denying relief on Plaintiffs' claim that "a missing signature, incorrect address, or other clerical errors are immaterial pursuant to the Civil Rights Act" *because* the "Plaintiffs offer[ed] only conclusory statements and no supporting authority for" that portion of their materiality claim. *Martin*, 347 F. Supp. 3d at 1308 n.4. The *Martin* court did, however, find that the Materiality Provision prohibited the rejection of absentee ballots because of a missing or incorrect year of birth, noting that "with respect to the absentee ballots rejected solely on a year of birth error or omission in Gwinnett County, *the qualifications of the absentee voters are not at issue because Gwinnett County elections officials have already confirmed such voters' eligibility through the absentee ballot application process.*" *Id.* at 1309 (emphasis added). Such is the case here, where Plaintiffs have noted that Missouri already requires voters to submit their addresses as part of their ballot application—which the election authority verifies and uses to assess eligibility prior to sending the voter their ballot. Mo. Rev. Stat. §§ 115.279.2, 115.302.2. Further, the voter's omission of address information on ballot envelopes that often already have their address printed on it, where the voter's address has also been verified in the statewide voter registration database, seemingly did not prevent election workers from identifying the voter whose ballot was missing that information and contacting them to alert them of their ballot omission, (*see, e.g.*, Lohman Decl., Doc. #27-6 ¶¶ 23, 28-29), meaning that despite the omission of address the voter who cast the ballot was able to be properly identified.¹⁹

¹⁹ This counters Defendant Ashcroft's assertion that the address is necessary to identify the voter. Further, while the Declaration of Chrissy Peters notes the number of people with like first and last names, (Doc. #47, ¶ 26), it does not account for the fact that these people are registered across Missouri's 116 local election jurisdictions, many may not request to vote by remote ballot (and the local election authorities track the remote ballot applications they have processed and who has been sent a remote ballot), that people have different middle initials, and that the address where

Lastly, Defendant does not address the substance of Plaintiffs' claim that, for those election jurisdictions that use a combined ballot envelope for mail-in and absentee ballots, the rejection of a ballot for selecting mail-in when a voter is clearly eligible to vote absentee without a notary (i.e., is over the age of 65) violates the Materiality Provision. The fact that voters may be disenfranchised for such mistakes is explained in the materials submitted by Plaintiffs in their opening brief. (Lohman Decl., Doc. #27-6 ¶ 27.)²⁰

For the foregoing reasons, Plaintiffs are likely to prevail on their claims under the Materiality Provision of the Civil Rights Act.

IV. Plaintiffs Are Likely to Succeed on the Merits of their Procedural Due Process Claim.

Defendants' arguments against Plaintiffs' procedural due process claim, based on a state-created liberty interest in having their remote ballots count, are all meritless. First, while Defendants may be right that Missouri voters do not have a *state* constitutional right to vote by remote ballot (Doc. #46, at 36-39), that is a red herring. Plaintiffs do not claim to have such a state constitutional right; they claim only to have a *federal* liberty interest that arises from the state statutory scheme that allows them to vote by remote ballot.

the ballot was sent or the voter is registered is often times already present on the ballot. Further, some jurisdictions have ballot tracking systems that may assist election officials in identifying the voter who submitted a ballot if it is called into question. *See, e.g.*, (Doc. #46-10, at 4); *see also* Abbey Llorico, *How to Track Your Ballot*, ksdk.com, Sept. 30, 2020, <https://www.ksdk.com/article/news/politics/elections/know-to-vote/how-to-track-ballot-missouri-illinois/63-88c6d59b-f26a-414e-9fab-386348efca63>.

²⁰ While it is true that St. Louis County has adjusted its ballot envelope design to try to reduce these sorts of errors, (Doc. #42-1, at 4), many other jurisdictions still have confusing checkboxes or other confusing designs, and others use a shared ballot envelope. (*See, e.g.*, Doc. #47-2 (Cole County shared ballot envelope); Doc. #47-3 (Webster County shared ballot envelope); Doc. #42-1, at 4 (St. Louis County shared ballot envelope)). More importantly, while Plaintiffs have not requested changes to the remote ballot envelopes used in Missouri, they note that Defendant Ashcroft has the authority to prescribe uniform regulations for ballot envelopes and mailing envelopes, Mo. Rev. Stat. § 115.285, but has failed to do so, meaning that these issues may arise in multiple other jurisdictions.

Second, Defendants' reliance on the "freedom from restraint" limitation on the state-created liberty interests *of prisoners* (Doc. #46, at 39-40) is similarly a red herring. They cite no decision that holds, outside the prison context, that such state-created liberty interests are the only ones that give rise to a procedural due process claim. As discussed in Plaintiffs' opening brief, numerous courts have held that voters have such an interest in their right not to have their remote ballots erroneously rejected. (Doc. #27, at 39-40.)

Third, Defendants' argument that "the weight of authority" is contrary to Plaintiffs' procedural due process claim is demonstrably false. Defendants cite three decisions that rejected a procedural due process claim in the election context. The first, *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008), addressed a procedural due process claim that was based solely on the state's "failure to train" employees adequately; there was no claim related to disallowance of ballots without notice and an opportunity to be heard. 548 F.3d at 471. The court's reasoning consisted entirely of its conclusion that "the League has not alleged a constitutionally protected interest." *Id.* at 479. Nowhere does the *Brunner* court suggest that a voter *never* has a constitutionally protected liberty interest, sufficient to trigger procedural due process rights, in not having her absentee ballot erroneously rejected.

The other two decisions relied upon by Defendant Ashcroft are district court decisions that wrongly cite *Brunner* for the proposition that voters never have a cognizable liberty interest in having their remote ballots counted and therefore cannot assert a procedural due process claim when their ballots are erroneously rejected. *See Memphis A. Philip Randolph Institute v. Hargett*, No. 3:20-cv-00374, 2020 WL 5095459, at *9 (M.D. Tenn. Aug. 28, 2020) (asserting that "the Sixth Circuit has made clear that a plaintiff's right to vote is not a cognizable 'liberty' interest ... for purposes of procedural due process") (appeal pending); *Lecky v. Virginia State Bd. of Elections*,

285 F. Supp. 3d 908, 918 (E.D. Va. 2018) (citing *Brunner* for proposition that mistakes in the administration of an election cannot give rise to a procedural due process claim). But *Brunner* does not stand for anything approaching that broad proposition; it stands only for the proposition that plaintiffs in that case had not properly pleaded a procedural due process claim based on the state's failure to train its election officials. Given this, along with *Brunner*'s brevity and the lack of cited authority in its treatment of the procedural due process claim there, it should not be read to have announced a broad new rule of constitutional law. In short, none of the authority cited by Defendants is persuasive with respect to the issue before this Court.

By contrast, Plaintiffs have cited numerous district court decisions that are directly on point and hold that voters *do* have a constitutionally protected liberty interest and a meritorious procedural due process claim when their remote ballots are disallowed without their being provided notice and an opportunity to be heard. See *Frederick v. Lawson*, No. 1:19-cv-01959-SEB-MJD, 2020 WL 4882696, at *11-15 (S.D. Ind. Aug. 20, 2020); *Democracy North Carolina v. North Carolina State Bd. of Elections*, No. 1:20CV457, 2020 WL 4484063, at *52-55 (M.D. N.C. Aug. 4, 2020); *Self Advocacy Solutions N.D. v. Jaeger*, No. 3:20-cv-00071, 2020 WL 2951012, at *8-10 (D.N.D. June 3, 2020); *Martin v. Kemp*, 341 F. Supp. 3d 1326, 1337-40 (N.D. Ga. 2018); *Saucedo v. Gardner*, 335 F. Supp. 3d 202, 214-22 (D.N.H. 2018). The “weight” of authority is in fact all on one side: Plaintiffs’.

Fourth, Defendants’ discussion of the *Mathews v. Eldridge* factors (Doc. #46, at 43-45) is similarly specious. With respect to the weight of voters’ private interest, they casually dismiss it as an interest “in casting a ballot *without filling out mandatory information required on the ballot envelope.*” (*Id.* at 43 (emphasis in original).) Defendants simply ignore the holdings by numerous courts that voters’ private interest in this context is entitled to “substantial” or “significant” weight

and is “weighty.” *Frederick*, 2020 WL 4882696, at *13; *Democracy North Carolina*, 2020 WL 4484013, at *54; *Self Advocacy Solutions N.D.*, 2020 WL 2951012, at *9; *Martin*, 341 F. Supp. 3d at 1338; *Saucedo*, 335 F. Supp. 3d at 217.

Defendants do not dispute that *thousands* of absentee ballots are likely to be rejected based upon purported errors by the voter in completing the ballot, about which the voter, in most instances, will receive *no notice and no opportunity to be heard*. As in *Self Advocacy Solutions N.D.*, the fact that “[v]oters are simply never notified or afforded an opportunity to respond ... all but ends the inquiry.” 2020 WL 29510102, at *9; *see also Democracy North Carolina*, 2020 WL 4484063, at *54 (finding risk of erroneous rejection where “no procedures [are] in place statewide that would either notify a voter that their absentee ballot has a material error [or] allow a voter to be heard in challenging such a rejection”).

Finally, in making their pleas to the Court about the administrative burdens that would allegedly arise were Plaintiffs granted the relief they seek, Defendants entirely ignore the authorities cited by Plaintiffs holding that such administrative burdens are insufficient to justify the substantial risk to voters that their ballots will be erroneously rejected. *See, e.g., Self Advocacy Solutions N.D.*, 2020 WL 2951012, at *10 (noting that “any fiscal or administrative burden is miniscule when compared to the palpable threat of disenfranchisement”). And Defendants further ignore the numerous authorities that hold that the state’s interests are actually *promoted* by providing remote voters with notice and an opportunity to be heard before their ballots are rejected. *See, e.g., Frederick*, 2020 WL 4882696, at *15 (“[P]roviding mail-in absentee voters notice and the opportunity cure a perceived signature mismatch by confirming their identify in fact *promotes* [the state’s] important governmental interests.”); *Saucedo*, 335 F. Supp. 3d at 220 (“[A]dditional procedures further the State’s interest in preventing voter fraud while ensuring that qualified voters

are not wrongly disenfranchised.”); *Self Advocacy Solutions N.D.*, 2020 WL 2951012, at *10 (“[A]llowing voters to verify the validity of their ballots demonstrably advances—rather than hinders—[the state’s] goals [of preventing voter fraud and upholding the integrity of elections].”). Accordingly, Plaintiffs are likely to succeed on the merits of their Due Process claim.

V. Balancing the Remaining Factors for a Temporary Restraining Order and Preliminary Injunction Favors Granting Plaintiffs the Requested Relief in this Case.

As briefed in Plaintiffs’ Suggestions in Support of their Motion for a Temporary Restraining Order and Preliminary Injunction (Doc. #27), balancing the threat of irreparable harm Plaintiffs would face in the absence of the requested relief, with the harm that would be caused by the other litigants, and the public interest weighs in favor of granting Plaintiffs’ injunctive relief in the present case.

CONCLUSION

For the foregoing reasons, Plaintiffs’ respectfully request this Court grant their motion for a temporary restraining order and preliminary injunction.

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Respectfully submitted,

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** Motion for admission *Pro Hac Vice*
pending

CERTIFICATE OF SERVICE

I certify that on October 6, 2020, I filed the foregoing with the Clerk of the Court using the CM/ECF system, and a copy was made available to all electronic filing participants.

/s/Anthony Rother
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