IN THE CIRCUIT COURT OF COLE COUNTY
STATE OF MISSOURI

MISSOURI STATE CONFERENCE OF THE NATIONAL ASSOCIATION FOR THE ADVANCEMENT OF COLORED PEOPLE, et al.,	)	
Plaintiffs,	)	
v.	)	No. 20AC-CC00169-01
	)	Div. 1
STATE OF MISSOURI, et al.,	)	
Defendants.	)	

ORDER DENYING REQUEST FOR PRELIMINARY INJUNCTION

This matter comes before the Court on Plaintiffs' Motion for Preliminary Injunction on Count I of the Amended Petition. No issues relating to Count II of the Amended Petition are currently before the Court. For the reasons stated, Plaintiffs' Motion for Preliminary Injunction on Count I of the Amended Petition is DENIED.

Since the last time this cause was before the Court, the issues before the Court have narrowed significantly in at least two ways. First, the Legislature has enacted Senate Bill 631 ("SB 631"), which created two new methods of voting by mail during the Covid-19 crisis. SB 631 authorized all voters who are "in an at-risk category" for Covid-19 to cast absentee ballots without notarization during elections in 2020[1]. § 115.277.1(7), RSMo. And SB 631 authorized *any* Missouri voter to cast a mail-in ballot, which must be notarized, during elections in 2020. § 115.302, RSMo. Thus, no Missouri voter is required to go to the polls to vote in-person during the current election year. The option of mail-in voting is available to all voters. Plaintiffs' request

[1] The Court acknowledges that since the original hearing in this cause, the CDC has altered the "at-risk" categories for Covid-19, but as set forth below, those changes are immaterial to the Court's analysis.

for relief, therefore, focuses solely on the requirement of notarization for the mail-in ballots of voters who are *not* in "an at-risk category" for Covid-19.

Second, in the current motion, Plaintiffs have requested preliminary relief based exclusively on Count I of the Amended Petition. Unlike Count II, Count I does not assert any constitutional right or argue that requiring mail-in ballots to be notarized unconstitutionally burdens the right to vote. Instead, Count I raises what Plaintiffs correctly describe as a "straightforward question of statutory interpretation." Count I contends only that a preexisting provision of the statute, § 115.277.1(2), authorizes any Missouri voter who fears contracting or spreading Covid-19 to cast an absentee ballot without notarization.

ANALYSIS

I. Plaintiffs Are Not Entitled to a Preliminary Injunction on Count I.

1. The parties agree that, in considering whether to grant a preliminary injunction on Count I, this Court should apply the four-factor test set forth in *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996).

2. "When considering a motion for a preliminary injunction, a court should weigh [1] the movant's probability of success on the merits, [2] the threat of irreparable harm to the movant absent the injunction, [3] the balance between this harm and the injury that the injunction's issuance would inflict on other interested parties, and [4] the public interest." *State ex rel. Dir. of Revenue v. Gabbert*, 925 S.W.2d 838, 839 (Mo. banc 1996) (citation omitted).

3. *Gabbert* places the burden on the plaintiff seeking the injunction to submit evidence to support findings under each of the *Gabbert* factors. "In order for the reviewing court to adequately balance these [*Gabbert*] factors, the party seeking [an injunction or stay] must provide the court with *evidence* supporting *each* of these assertions." *Id.* (emphases added).

4. In addition, to be entitled to a preliminary injunction, Plaintiffs must show that the balancing of the *Gabbert* factors weighs "decidedly" in their favor: "The movant must show that the probability of success on the merits and irreparable harm decidedly outweigh any potential harm to the other party or to the public interest if a stay is issued." *Id.*

5. For the reasons discussed below, the Court concludes that each of the four *Gabbert* factors favors Defendants.

A. Plaintiffs have failed to demonstrate a probability of success on the merits.

6. The first *Gabbert* factor requires "[a] petitioner to make some showing of probability of success on the merits before a preliminary injunction will be issued" *Id.*

7. Count I of Plaintiffs' Amended Petition seeks declaratory and injunctive relief holding that Plaintiffs who do not have Covid-19 but who wish to "avoid contracting or spreading COVID-19" are authorized to cast an absentee ballot without a notary seal under § 115.277.1(2), RSMo. Am. Pet., at 35, ¶ A, B.

8. Section 115.277.1(2) provides that a voter may cast an absentee ballot if that voter "expects to be prevented from going to the polls to vote on election day due to … Incapacity or ***confinement due to illness*** or physical disability, including a person who is primarily responsible for the physical care of a person who is incapacitated or confined due to illness or disability." § 115.277.1(2), RSMo (emphasis added).

9. Neither the Amended Petition nor Plaintiffs' affidavits allege that any Plaintiff actually has Covid-19. But Plaintiffs allege that they wish to cast absentee ballots without notarization—as opposed to mail-in ballots, which must be notarized—to avoid the risk of "contracting or spreading COVID-19." Am. Pet., at 35, ¶ 151. Because they fear contracting or

spreading Covid-19, Plaintiffs contend that they are "confin[ed] due to illness" under § 115.277.1(2).

10. Count I of Plaintiffs' Amended Petition is indistinguishable from Count I of Plaintiffs' original Petition. *See* April 17, 2020 Petition, at 29-31. It raises the same question of statutory interpretation—*i.e.*, whether a voter who does not have Covid-19 but fears contracting or spreading Covid-19 suffers from "confinement due to illness or disability" within the meaning of § 115.277.1(2). *See id.*

11. In its prior Order and Judgment in this case, issued on May 18, 2020, this Court addressed this same question of statutory interpretation and concluded that Plaintiffs' interpretation of the statute is erroneous because it contradicts the plain and ordinary meaning of the statutory language, as well as several other principles of statutory interpretation. *See* May 18, 2020 Order and Judgment, at 2-6, ¶¶ 6-17. The Court incorporates the analysis of this prior ruling by reference.

12. The Supreme Court's intervening opinion in this case does not cast doubt on this Court's prior ruling on this question. The Supreme Court's opinion held that this Court should not have addressed the merits at all in ruling on a motion to dismiss in a declaratory judgment action. *See* June 23, 2020 Slip Opinion, at 8 (citing *Transp. Mfg. & Equip. Co. v. Toberman*, 301 S.W.2d 801, 805 (Mo. banc 1957)). The Supreme Court's opinion made no statement about the merits of this question of statutory interpretation, because it held that no "analysis of the merits" should have occurred on a motion to dismiss. "The circuit court should have overruled the motion to dismiss and should not have undertaken any analysis of the merits of petitioners' claims in ruling on that motion. … [T]he merits of the petition were not before the circuit court on the state's motion to dismiss…." *Id.* at 9. Thus, the Supreme Court's opinion casts no doubt upon this Court's prior

analysis of "the merits" of this question of statutory interpretation. It merely held that this analysis of the merits was premature.

13. The question is no longer premature. Plaintiffs' motion for preliminary injunction requires this Court to engage in a preliminary analysis of "the merits." *See Gabbert*, 925 S.W.2d at 839 ("When considering a motion for a preliminary injunction, a court should weigh the movant's probability of success on *the merits*….") (emphasis added).

14. Plaintiffs have presented no new arguments regarding this question of statutory interpretation to the Court. Accordingly, the Court adheres to the reasoning of its prior order on this issue and concludes that Plaintiffs' statutory interpretation is incorrect as a matter of law. The Court adds only a few observations to its prior ruling on this question.

15. As the Court noted in its prior order, no limiting principle would restrict Plaintiffs' interpretation of the statute to the current Covid-19 pandemic. Section 115.277.1(2) does not refer to "Covid-19" or "coronavirus." It refers to "illness." If Plaintiffs' interpretation were correct, then a voter who feared catching *any* illness at the polls, in any future election, would be entitled by the statute to cast an absentee ballot. No court or election authority has adopted this sweeping interpretation.

16. Plaintiffs' interpretation of the phrase "confined due to illness" violates the plain and ordinary meaning of that phrase. Plaintiffs themselves are not ill. They claim that they want to self-isolate because *other* people in the community have an illness that they want to avoid contracting. But, in ordinary English, if one says "I am confined due to illness," that means that the speaker is unable to leave home due to his or her *own* illness. As the Court ruled previously, Plaintiffs are not "confined due to illness"—they are confined due to *fear of* illness. Thus, their interpretation seeks to engraft new language on the statute that it does not contain. "[T]he Court

cannot supply what the legislature has omitted from controlling statutes." *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 668 (Mo. banc 2010); *see also Bd. of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo. banc 2001).

17. The plain and ordinary meaning of "confine" also supports the Court's interpretation. To "confine" means "to shut or keep in; prevent from leaving a place because of imprisonment, illness, discipline, etc." *Confine*, DICTIONARY.COM (visited July 9, 2020), *at* https://www.dictionary.com/browse/confine#. Plaintiffs' own evidence demonstrates that their health situation does not "shut or keep [them] in," or "prevent them from leaving" their homes. *Id.* Plaintiffs' affidavits attest that they leave home for other purposes. Accordingly, they are not "confined due to illness" within the ordinary meaning of "confine."

18. Further, Plaintiffs' interpretation would render other major provisions of the statute entirely meaningless and superfluous. "[T]his Court presumes that the General Assembly does not enact meaningless provisions." *Weeks v. State*, 140 S.W.3d 39, 46 (Mo. banc 2004). Most notably, § 115.277.1(7) authorizes voters who are in an at-risk category for Covid-19 to cast absentee ballots without notarization. § 115.277.1(7), RSMo. On Plaintiffs' interpretation, all of those voters were already authorized to cast absentee ballots under § 115.277.1(2), and so the new subdivision (7) would be entirely meaningless and superfluous.

19. Similarly, § 115.302 authorizes all Missouri voters who are not in an at-risk category for Covid-19, but who fear contracting or spreading Covid-19, to cast mail-in ballots during elections in 2020. § 115.302, RSMo. On Plaintiffs' interpretation, all of these voters were already authorized to cast absentee ballots under § 115.277.1(2), RSMo, so the new section 115.302 would be entirely meaningless and superfluous. There would be no reason for the General

Assembly to adopt an entirely new form of voting in light of the Covid-19 pandemic if all Missourians were already authorized to cast an absentee ballot under § 115.277.1(2).

20. Plaintiffs have failed to show that they have a probability of success on the merits, because their statutory interpretation of § 115.277.1(2) defies traditional canons of construction and is erroneous as a matter of law. The first *Gabbert* factor favors Defendants.

B. Plaintiffs have failed to make a showing of irreparable injury.

21. Plaintiffs contend that they will suffer irreparable injury if they are forced to cast mail-in ballots that require notarization, because they will be forced to take unreasonable health risks to have their mail-in ballots notarized[2].

22. Plaintiffs presented the testimony of Dr. Hilary Babcock, an epidemiologist at the Washington University School of Medicine, to testify about the risks of voting during Covid-19. However, the majority of Dr. Babcock's testimony addressed the risks of *in-person voting at the polls* during Covid-19, and thus it had little relevance to the issue before the Court. Section 115.302, enacted in SB 631, authorizes every Missouri voter to cast a mail-in ballot rather than voting in-person at the polls during elections in 2020. *See, e.g.*, § 115.302.1, RSMo ("Any registered voter of this state may cast a mail-in ballot as provided in this section."). Thus, no Missouri voter is required to engage in in-person voting at the polls during 2020.

23. Plaintiffs conceded at oral argument that, for purposes of the present motion, the only relevant difference between an absentee ballot under § 115.277.1(2), which Plaintiffs wish to cast, and a mail-in ballot under § 115.302, which Plaintiffs are authorized to cast, is that the latter requires notarization, while the former does not. Thus, the relevant question before the Court is

[2] The Court notes that no quantification of the risk was presented and that Plaintiffs' evidence established that there were mitigation strategies which were not unreasonable to employ.

whether requiring Plaintiffs to have their mail-in ballots notarized imposes health risks that rise to the level of irreparable injury.

24. Plaintiffs' expert, Dr. Babcock, previously submitted an amicus brief to the Missouri Supreme Court in this case. In that amicus brief, Dr. Babcock and the other amici asserted that, other than self-isolation, "social distancing measures offer[] the only *consistently effective* method of preventing the spread of the disease." Def. Ex. A, at 5 (emphasis added). Dr. Babcock stated that "social distancing and related strategies are the only known effective method for preventing the spread of the virus." *Id.* at 10. Dr. Babcock defined "social distancing" as "maintaining at least six feet of distance between individuals." *Id.* at 13. Dr. Babcock also recommended that social distancing be combined with "other measures such as the wearing of masks, handwashing, and the cleaning and disinfecting of surfaces." *Id.* at 10.

25. On cross-examination before this Court, Dr. Babcock reaffirmed that social distancing—*i.e.*, maintaining six feet of distance between individuals—is "consistently effective" in preventing the spread of Covid-19, especially when combined with other reasonable precautions such as mask-wearing and hand hygiene. And Dr. Babcock did not dispute that social distancing, mask-wearing, and hand hygiene can easily be practiced by the applicant during the interaction required to notarize a ballot envelope.

26. In her testimony, Dr. Babcock identified several features of in-person voting that she contended create risks of transmission: (1) large numbers of people, (2) close proximity to each other, (3) waiting time creating lengthier times of exposure to others, and (4) numerous common surfaces touched by many people. On cross-examination, she admitted that these risk

factors would be much lower during a typical brief in-person interaction with a notary, and she conceded that in-person notarization is thus significantly less risky than in-person voting[3].

27. Dr. Babcock testified that she was not aware of any evidence or any public reports of transmission of Covid-19 during grocery shopping which would seem to involve more risk of exposure.

28. Absent evidence that the "consistently effective social distancing and related strategies to prevent the spread of Covid-19" could not be employed in the notary circumstances, the Court concludes that Plaintiffs have not made a convincing showing of irreparable harm from the notarization requirement for mail-in ballots. The second *Gabbert* factor supports the Defendants.

C. The balancing of harms favors the State.

29. The third *Gabbert* factor directs the Court to consider "the balance between this harm [to plaintiffs] and the injury that the injunction's issuance would inflict on other interested parties." *Gabbert*, 925 S.W.2d at 839.

30. In its prior Order, this Court cited several Missouri cases recognizing the State's strong interest in strictly enforcing the legislative safeguards that apply to absentee and mail-in ballots. *See* May 18, 2020 Order and Judgment, at 10, ¶ 31.

31. Plaintiffs, who bear the burden of proof, presented no evidence to dispute or refute the State's well-recognized interest in enforcing statutory safeguards for absentee and mail-in

[3] Quite frankly, any credible evidence of the relative risk of going to a notary to have one's ballot envelope notarized was sorely lacking. Dr. Babcock did know a notary, but had no real experience to testify from. While she might admit facts related to notarization, she lacks foundation to know one way or the other which diminishes the weight of her testimony. Mr. Sauer's assertion that it was a nominal event of only 30 seconds (based upon the fact that his assistant was a notary and he had spoken with her) does not constitute evidence either. Other that the assumption that there would neither be crowds or line standing at a notary event, the actual exchange was not much different than attending the polls for in-person voting where one also presents an ID and signs a register. Nonetheless, Plaintiffs bear the burden of showing this Court that the notarization requirement still creates substantial risk of Covid-19 exposure which the Court finds they failed to prove.

voting. In fact, they presented no evidence to address this factor at all. Accordingly, the Court concludes that the State's interest in enforcing its safeguards for mail-in voting remains important here, and that an injunction against them would interfere with the State's interest in enforcing its laws.

32. The Court concludes that a preliminary injunction would interfere with the State's interest in the enforcement of duly enacted laws and preventing the State from enforcing legislative safeguards for mail-in voting, and that this harm to Defendants outweighs the minimal showing of harm made by Plaintiffs under the second *Gabbert* factor.

D. The public interest disfavors a preliminary injunction.

33. The fourth *Gabbert* factor direct this Court to consider "the public interest." *Gabbert*, 925 S.W.2d at 839.

34. Plaintiffs and Defendants both contend that the public interest favors enforcing Missouri statutes as written, and this Court agrees. The Court has concluded that § 115.277.1(2), as written, does not authorize persons who are not ill or disabled to cast absentee ballots on the ground that they are "confined due to illness or disability." The public interest favors enforcing this statute as written.

35. This public interest is even stronger after the enactment of SB 631. SB 631 created two entirely new avenues for voting by mail during the Covid-19 pandemic: Voters who are "in an at-risk category" for Covid-19 may cast an absentee ballot without notarization under § 115.277.1(7); and voters who are not "in an at-risk category" for Covid-19 may cast a mail-in ballot under § 115.302, which must be notarized. SB 631 reflects a careful and reasonable balancing of interests between legitimate public-health concerns and the State's concerns in protecting the integrity and orderly process of elections. Plaintiffs ask this Court to disrupt that

legislative balance by effectively invalidating the notarization requirement for mail-in ballots for voters who are not "in an at-risk category" for Covid-19. The Court finds that the public interest favors leaving that legislative policy intact. The fourth *Gabbert* factor favors Defendants.

36. In sum, after carefully considering and weighing all four *Gabbert* factors together, the Court concludes that the equities favor denying a preliminary injunction on Count I.

CONCLUSION

For the reasons stated, the Plaintiffs' motion for preliminary injunction on Count I is DENIED.

The matter is set on the 7-17-2020 law day at 9:00 am for further scheduling. The parties are encouraged to schedule a phone conference at a mutually convenient time (not on law day) for this purpose.

SO ORDERED this 10th day of July, 2020.

Jon E. Beetem, Circuit Judge – Division I