

MEMORANDUM OF LAW

TO: INTERESTED ELECTION AUTHORITIES AND VOTERS

**Re: Absentee Voting in the COVID-19 Pandemic:
When Voters Can Apply for and Use for Absentee Ballots
Because of “Confinement Due to Illness”**

Dated: April 23, 2020

Introduction

Question: If a voter determines that the prospect of being exposed to COVID-19 at an in-person polling place puts the voter at risk of illness or death – or that the voter could expose others to the risk of illness or death – is it valid to vote absentee under the “confinement due to illness” reason set forth in Missouri law?

The medical answer, simply put, is yes, as set forth in the letter of Victoria Fraser, MD, which accompanies this Memorandum.¹ The legal analysis, as detailed in this Memorandum of Law, conclusively affirms the medical answer.

Missouri law for many years has protected the fundamental right to vote for those who are unable to show up in person at their polling places on election day by offering absentee ballots in advance of election day. Interpretation of the absentee voter laws is guided by the principle that the Missouri Constitution establishes “with unmistakable clarity” that Missourians have a constitutionally protected fundamental right to vote. *Priorities USA v. State*, 591 S.W.3d 448 (Mo. banc 2020); *Weinschenk v. State*, 203 S.W.3d 201 (Mo. banc 2006).

Absentee voters must state the reason for their expected absence when they apply for a ballot and when they submit their votes. The most common reason is that the voter expects to be out of the county on election day. Another substantial reason for which absentee voting is allowed is that the person is unable to go to the polls due to “Incapacitation or confinement due to illness or disability....”² The

¹ Dr. Fraser is Adolphus Busch Professor of Medicine and Chair of the Department of Medicine at Washington University School of Medicine. She provides her opinion as an individual and not on behalf of the university. The letter is quoted throughout this Memorandum without further attribution. The letter is attached to this Memorandum.

² Section 115.277, RSMo 2016. In its entirety, Section 115.277 provides:

1. Except as provided in subsections 2, 3, 4, and 5 of this section, any registered voter of

latter provision on illness is the focus of this Memorandum, which is accompanied by the letter from Dr. Fraser; she is a prominent internal medicine and infectious diseases physician, whose opinions are to a reasonable degree of medical certainty based on her professional experience, training, and review of relevant medical literature.

The Absentee Voting Process

this state may vote by absentee ballot for all candidates and issues for which such voter would be eligible to vote at the polling place if such voter expects to be prevented from going to the polls to vote on election day due to:

- (1) Absence on election day from the jurisdiction of the election authority in which such voter is registered to vote;
- (2) 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;
- (3) Religious belief or practice;
- (4) Employment as an election authority, as a member of an election authority, or by an election authority at a location other than such voter's polling place;
- (5) Incarceration, provided all qualifications for voting are retained;
- (6) Certified participation in the address confidentiality program established under sections 589.660 to 589.681 because of safety concerns.

2. Any covered voter, as defined in section 115.275, who is eligible to register and vote in this state may vote in any election for federal office, statewide office, state legislative office, or statewide ballot initiatives by submitting a federal postcard application to apply to vote by absentee ballot or by submitting a federal postcard application at the polling place even though the person is not registered. A federal postcard application submitted by a covered voter pursuant to this subsection shall also serve as a voter registration application under section 115.908 and the election authority shall, if satisfied that the applicant is entitled to register, place the voter's name on the voter registration file. Each covered voter may vote by absentee ballot or, upon submitting an affidavit that the person is qualified to vote in the election, may vote at the person's polling place.

3. Any interstate former resident, as defined in section 115.275, may vote by absentee ballot for presidential and vice presidential electors.

4. Any intrastate new resident, as defined in section 115.275, may vote by absentee ballot at the election for presidential and vice presidential electors, United States senator, representative in Congress, statewide elected officials and statewide questions, propositions and amendments from such resident's new jurisdiction of residence after registering to vote in such resident's new jurisdiction of residence.

5. Any new resident, as defined in section 115.275, may vote by absentee ballot for presidential and vice presidential electors after registering to vote in such resident's new jurisdiction of residence.

(Emphasis added - underlined.)

There are two steps in the absentee voting process – (1) requesting an absentee ballot and (2) receiving and voting that ballot:

(1) On the application form provided online or in a written request requesting an absentee ballot, a voter must check off or list one of the reasons enumerated in section 115.277 that he or she expects to be unable to go to the polls on election day.

(2) The voter also is to check off the reason for voting absentee on the ballot envelope that is provided to the voter with the ballot and that envelope must be used to return the ballot. On the ballot envelope, the voter is required to sign a statement swearing under penalty of perjury that the statements on the envelope are true. When the voter checks off the reason that he or she is confined due to illness, the voter is not required to have the form notarized. (Although not entirely consistent with other parts of the law, section 115.294 prohibits the local election authority from rejecting the ballot if the reason is not stated on the ballot envelope.)

When voting absentee in person at the board of elections or with the county clerk (known as local election authorities), these two steps happen at the same time in front of an election official.

Each absentee ballot application and ballot is processed and evaluated by local election authorities, whether the voter appears at the election authority or mails in the ballot. Absentee ballots cast in-person are deposited in a ballot box. The mail-in absentee ballots remain in their envelopes until just before the election, when the envelopes are opened and the ballots are removed to be counted. At this point there is no longer any way to connect any particular ballot to the individual voter. Any challenged absentee ballots are set aside in their envelopes and are not counted with other absentee ballots.

State law allows voters who register by mail to vote for the first time by a mailed absentee ballot, if they provide a copy of proper identification when they register and when they submit the application for their first ballot. (RSMo. 115.159).³

³ Valid forms of identification, under current law, are: (1) identification issued by the state of Missouri, an agency of the state, or a local election authority of the state; (2) identification issued by the United States government or an agency thereof; (3) identification issued by an institution of higher education, including a university, college, vocational and technical school, located within the state of Missouri; or (4) a copy of a current utility bill, bank statement, paycheck, government check or other government

What Does “Confinement Due to Illness” Mean?

“Confinement due to illness” is not defined anywhere in Chapter 115. There is no case law construing the statutory reasons for voting absentee. There are few cases about reasons for rejecting absentee ballots, most pre-dating modern election laws and thus too old to be helpful. Contemporary Missouri Supreme Court cases about undue burdens on the right to vote, however, can provide guidance about how Missouri courts might rule on the issue.

The answer to this central question would be obvious if all persons infected with the COVID-19 virus were exhibiting symptoms. But they are not. In the absence of widespread testing, even asymptomatic persons are presumed to be carriers of the virus and may transmit the virus to others. Until vaccines and effective treatments are developed, as well as widespread testing, even healthy-appearing persons can spread this highly contagious pathogen. This is the reason local and state authorities are issuing stay-at-home orders for all non-essential workers and banning non-essential travel and gatherings of more than ten persons. These restrictions of course would apply to the kind of close-quarters contact, however brief or extensive, which occurs at polling places even where social-distancing practices are in place, and in travelling to and from polling places.⁴ In this situation, “confined due to illness” cannot be limited to persons who can be shown to have signs or symptoms of the illness.

By the plain meaning of its words, the law does not require specifically that the voter himself or herself be ill, but rather that the voter’s “confinement” be due to illness. That is precisely the situation today, which is described by Dr. Victoria Fraser in her letter that accompanies this Memorandum:

The risk of serious COVID-19 disease varies with the individual’s age, health status, and other risk factors. We in the

document that contains the name and address of the voter. Sections 115.159 and 115.427, RSMo.

⁴ There is a cautionary tale in Milwaukee WI, where voters waited in line for substantial periods of time to vote in person in the state’s April 7 election. State health officials have identified 19 cases thus far of voters and election officials who have tested positive for the virus. <https://abcnews.go.com/Politics/cases-coronavirus-wisconsin-linked-election-activities-state-health/story?id=70264956>. In an earlier report, the Milwaukee health commissioner identified seven persons – six voters and one poll worker – whose COVID-19 infections are traced to election-day activities, according to the Associated Press. <https://news.yahoo.com/officials-7-wisconsin-virus-cases-120207067.html>.

medical and public health community are doing our best to make the public widely aware of risk factors, methods of COVID-19 transmission, symptoms of illness, and the need for symptomatic infected, exposed and other individuals to confine themselves or self-quarantine. Due to limited resources to perform widespread COVID-19 testing, we are not currently able to identify everyone who is COVID-19 positive, exposed, immune or still at risk. Requiring voters to vote in-person at polling places, when Missouri provides a mail-in option, does not align with CDC guidelines and creates an unnecessary risk to individuals and to the public.

The phrase “due to illness” includes those who have the virus but are not visibly ill as well as voters who may not know whether they have the virus but wish to avoid exposure to the danger posed by the virus. Those most vulnerable to COVID-19 infections are those over age 60, those with medical conditions that involve compromised immune systems, pregnant women, and those who have had poor health care over the course of their lives. The data from deaths to date in Missouri also show that African Americans make up a disproportionate percentage of fatalities from COVID-19 infections.⁵ Those who suffer are not limited to those in vulnerable categories because, as Dr. Fraser points out: “Death due to COVID-19 has also occurred in some otherwise healthy young people.”

When the legislators wrote the words of the statute, they could have limited the absentee ballots to those who themselves are ill. But they did not do so. Here, as is often the case, legislative drafting must include a variety of situations to which the law will apply. It is clear that the overall purpose of the law is to increase voter participation, and the interpretation we make as to its plain meaning furthers that purpose. In its current truncated session, the legislature could enact an amendment to apply the absentee law explicitly to the present pandemic situation, as two local election authorities – one Republican, one Democrat – have recently suggested.⁶ The current language is sufficient to cover the crisis at hand, however, as local election authorities have asserted. For instance, the St. Louis County Election Board has sent absentee ballot applications to voters for the June

⁵ Jim Salter, Associated Press, “Blacks Disproportionate Percentage of Missouri Virus Deaths,” STL Today, posted April 13, 2020. https://www.stltoday.com/news/state-and-regional/missouri/blacks-disproportionate-percentage-of-missouri-virus-deaths/article_79716fab-5668-5bd1-969f-8fd7b06300dc.html.

⁶ St. Louis Public Radio: “Politically Speaking: 2 County Clerks Chart Path for Missouri Elections Amid Corona Virus.” <https://news.stlpublicradio.org/post/politically-speaking-2-county-clerks-chart-path-missouri-elections-amid-coronavirus>.

Municipal Elections, the August Primary Election, and the November General Election with a letter that says:

The Centers for Disease Control has found that certain groups of people are more at risk for severe reactions to the COVID-19 virus. These groups include the following: people over 60 years of age, those with compromised immune systems; pregnant women; and individuals with asthma. Missouri law allows voters who expect to be prevented from going to their polling place to vote absentee because of illness or physical disability. This also applies to those who are caring for someone with an illness or disability.

The St. Louis County Election Board encourages every voter who fits the above criteria to consider voting by absentee ballot.

(Emphasis added).

While the St. Louis County Election Board's outreach to "high-risk" persons is correct and commendable, even those not in "high-risk" groups are at risk, as Dr. Fraser explains. There is no principled or practical reason an election authority can make a case-by-case assessment of risk groups. The St. Louis County outreach mailing apparently is targeted to all voters over age 60, which is a good start. Notably, the election board sent applications for all three of this year's elections – the June municipal election, the August primary, and the November general election – which is consistent with the developing consensus among experts that the virus will be with us for months while vaccines and treatments are being developed and during successive waves of outbreaks. *See*, Virginia Pitzer, "COVID-19 Is here. How Long Will It Last?" Yale University School of Medicine. <https://medicine.yale.edu/news-article/23446/>

While the focus of the absentee voting law is on the voters, in a pandemic we the risk posed to poll workers – who all are at risk including many who are "high risk" because of age – should not be ignored.

Where health care resources are strained in the current pandemic, it is vital that election authorities accept the voters' descriptions when they apply for and cast absentee ballots. There are no recorded instances where a voter's determination and assertion that he or she is confined due to illness have been second-guessed by election authorities.

Should a voter's judgment be questioned? "The bottom line is simple," as Dr. Fraser explains. "If a voter determines that the prospect of contagion puts the voter at risk of illness, the decision to apply for a mailed-in absentee ballot should be considered a valid 'confinement due to illness.'"

The Constitutional Guide to Reading the Statute

The reading of this law must be guided by constitutional principles. If election authorities are unwilling to accept voters' determinations that they are confined due to illness, it would place an extraordinary burden on the fundamental right to vote.

The two main recent cases discussing burdens on the fundamental right to vote are from the Missouri Supreme Court in 2006, *Weinschenk v. State*, 203 S.W.3d 201, and January of this year, in *Priorities USA v. State*, 591 S.W.3d 448. Both these cases, as noted, recognize that the Missouri Constitution, in Art. I sec. 25 and Art. VIII sec. 2, establishes "with unmistakable clarity" that Missouri citizens have a fundamental right to vote with protections even greater than those inferred from the U.S. Constitution. State and local election authorities must justify restrictions on a fundamental right by showing a compelling need for the restriction; courts will give strict scrutiny to a statute or governmental action that severely burdens the right to vote.

Interpreting the absentee statute in a way that requires voters to jeopardize their health and lives would certainly constitute a severe burden on their right to vote. By contrast, interpreting the statute by its plain meaning to include "confinement" due to illness to include a stay at home regimen (confinement) due to a nationwide (health) emergency would preserve the fundamental right of Missouri citizens to vote.

The state has a strong interest in preserving the integrity of the election process and the absentee ballot statute has sufficient protections to prevent voter fraud, detailed in the next section of this memo. Allowing voters to vote absentee while observing stay-at-home advice resulting from the pandemic spread of a highly contagious illness utilizes a process that has been in place for decades and does not weaken these protections.

Chapter 115 of Missouri Statutes Safeguards the Election Process Where Voters Apply For and Use Absentee Voting

Over the last 25 years, Missouri law has kept in place protections of the ballot while periodically amending absentee statutes to provide easier access to voters who vote absentee for reason of confinement due to illness or disability. These protections include: removing the notary requirement for this category of voters, adding caregivers to the exception, and providing a mechanism to simplify the application process for permanently disabled voters. These provisions eased burdens on the fundamental right to vote. In the current crisis, it would be a cruel

irony if these provisions were read to require a voter to sacrifice his or her health in order to vote.

Protections of the ballot process are embedded in the statutes. The voter's statement on the application is not a sworn statement, whereas on the absentee ballot envelope it is. A person seeking to vote absentee due to illness, however, is not required to obtain notarization. Section 115.283.7.

Under state law, the local election authority cannot reject an absentee *ballot* for failure of the voter to state his reason for voting absentee on the ballot envelope. Section 115.294. The local election authority, however, can reject an incomplete *application* for an absentee ballot. If an election authority is not satisfied that an *applicant* for an absentee ballot is entitled to vote absentee (including the reason given or the lack thereof), the election authority can reject the *application*. The local election authority must notify the voter of the rejection and the reason within three days. Section 115.287. Under this statute, if the voter is unable to resolve the issue with the local election authority, the voter's only recourse is to file a complaint with the Secretary of State under section 115.219.⁷

As distinct from an absentee ballot *application*, an absentee *ballot* may be challenged by election authority personnel or any registered voter. The local election authority is to decide the challenge. Sections 115.303 and 115.429. The local election authority *may* investigate the qualifications of voters, but *shall* investigate material brought to its attention "from any source." Section 115.191.

Making a false statement on the absentee ballot envelope is a Class One election offense, a felony connected with the right of suffrage. Sections 115.304 and 115.631. Historically, issues related to violations of election law have been referred to local prosecutors with minimal investigation by the local election authorities. The the Secretary of State did not assume authority to investigate local matters and referred all allegations to the appropriate local prosecutor. Since 2016, however, the law has provided explicit authority for the Secretary of State to investigate complaints regarding any violation of election law referred to them by any person. If the Secretary finds reasonable grounds that an offense was committed, the Secretary may issue a probable cause statement and refer the offense to the appropriate local prosecuting attorney and assist in the prosecution.

⁷ That may not be an appropriate remedy, however, because section 115.219 is the complaint process for violations of Title III of the federal Help America Vote Act so it is unclear how this remedy would apply to a determination in a state election. See also, section 28.035, RSMo.

Section.115.642. The Secretary of State does not have authority to proceed without the local prosecuting attorney.

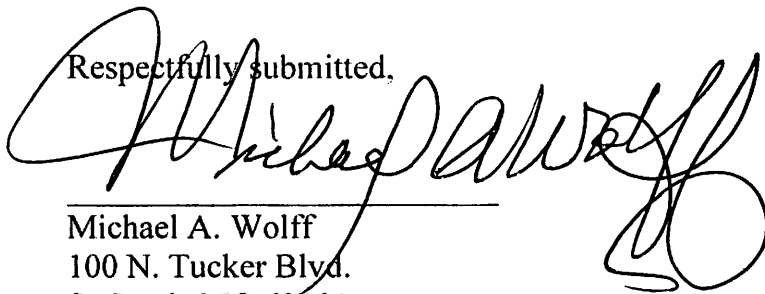
One would assume that the local election authorities and the Secretary of State would move expeditiously on any allegations of voter impropriety. The length of time it would take to litigate rejection of an absentee ballot application or an absentee ballot over allegations that the otherwise qualified voter was not entitled to vote absentee may well stretch beyond the six-week absentee voting window and the election itself.

Conclusion

When a voter applies for an absentee ballot and votes absentee for the reason that he or she is confined due to illness, there is currently no circumstance where the voter's assertion can be considered false. Even in the very rare circumstance that a voter has been tested and the voter knows he or she has antibodies to the infection, the voter will not know the duration of the protection afforded. Under the statutes, the voter is required to give a reason the voter wishes to cast an absentee ballot. The law places no greater burden on the voter than to check off the reason for requesting an absentee ballot and for voting with that ballot. The voter is not required to explain the reason.

The bottom line is the same legally as that supported by expert medical opinion: The government should not ask or require voters "to jeopardize their health or their lives in order to exercise their fundamental right to vote." If a voter determines that the prospect of contagion puts the voter at risk of illness, "the decision to apply for a mailed-in absentee ballot is a valid 'confinement due to illness.'"

Respectfully submitted,



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April 21, 2020

To Whom It May Concern:

The manner in which voters cast their ballots at polling places on Election Day can present a significant threat to the health and safety of much of the voting public. The Centers for Disease Control and Prevention (CDC) coronavirus disease 2019 (COVID-19) recommendations advise people to avoid small and large gatherings in private and public spaces and encourages "mail-in methods of voting if allowed in the jurisdiction."

Missouri's election law allows voters to apply for absentee ballots for a number of reasons and specifically allows a mailed-in absentee ballot when the voter cannot vote in person 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; ..."

We know that some COVID-19 infected people will have few or no symptoms and that some of these asymptomatic carriers may transmit the virus to others. COVID-19 infection can be very serious and fatal particularly in older people and those with underlying health conditions. Death due to COVID-19 has also occurred in some otherwise healthy young people. Especially in the current COVID-19 pandemic, it is very important to continue physical/social distancing to reduce COVID-19 transmission. The risk of serious COVID-19 disease varies with an individuals' age, health status, and other risk factors. We in the medical and public health community are doing our best to make the public widely aware of risk factors, methods of COVID-19 transmission, symptoms of illness, and the need for symptomatic, infected, exposed and other individuals to confine themselves or self-quarantine. Due to limited resources to perform widespread COVID -19 testing, we are not currently able to identify everyone who is COVID-19 positive, exposed, immune or still at risk. Requiring voters to vote in-person at polling places, when Missouri law provides a mail-in option, does not align with CDC guidelines and creates an unnecessary risk to individuals and the public.

The bottom line is simple: If a voter determines that the prospect of being exposed to COVID-19 puts the voter at risk of illness, the decision to apply for a mailed-in absentee ballot should be considered a valid "confinement due to illness." As a public health matter, voters should not be asked to jeopardize their health or their lives in order to exercise their fundamental right to vote.

The facts set forth in this letter are based on my personal knowledge. The opinions in this declaration are my expert opinions as an internal medicine and infectious diseases physician and are based on my education, training, professional experience, and review of relevant medical literature. I hold those opinions to a reasonable degree of medical certainty. I provide this letter in my individual capacity and do not make this submission on behalf of Washington University School of Medicine.

Sincerely,



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