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

ORGANIZATION FOR BLACK STRUGGLE, *et al.*, Plaintiffs, v. JOHN R. ASHCROFT, in his official capacity as Secretary of State of the State of Missouri, *et al.*, Defendants.	)	Case No. 2:20-CV-4184-BCW

DEFENDANT SECRETARY OF STATE'S EMERGENCY MOTION FOR STAY PENDING APPEAL OF PRELIMINARY INJUNCTION AND TEMPORARY RESTRAINING ORDER AND FOR TEMPORARY ADMINISTRATIVE STAY

Under Federal Rule of Appellate Procedure 8(a)(1) and the Federal Rules of Civil Procedure, State Defendant Missouri Secretary of State respectfully moves this Court to stay pending appeal its order granting a temporary restraining order and preliminary injunction in part against the enforcement of state election laws. Doc. 65. The Missouri Secretary of State also moves for a temporary administrative stay of the TRO and injunction to allow this Court and the Eighth Circuit to consider a stay pending appeal. Doc. 65.

A motion for stay of injunction pending appeal is governed by the same four equitable factors that govern the decision whether to grant a preliminary injunction, except that likelihood of success on appeal is the focus of the first factor. *Hilton v. Braunskill*, 481 U.S. 770, 776-78 (1987). A stay is warranted when the appeal presents "serious" legal issues and the balance of

equities favors the stay applicant. *James River Flood Control Ass'n v. Watt*, 680 F.2d 543, 545 (8th Cir. 1982). This standard is met here.

Voting by mail in Missouri commenced on September 22, 2020, and the process is already in full swing. As of September 30, 2020, Missouri voters had requested almost 300,000 absentee and mail-in ballots, and about 290,000 had been sent to voters. Declaration of Chrissy Peters, ¶¶ 41-42 (attached as Exhibit 1 to PI Br., *see* Doc. 46-48). Almost 60,000 Missourians had already voted by absentee ballot, either in-person or remotely. *Id.* ¶ 41. This process follows months of careful preparation, training, and voter outreach by the Missouri Secretary of State and Missouri's 116 Local Election Authorities (LEAs).

This Court has now transformed the rules for this process by changing the methods of returning mail-in ballots, and adopting new standards for accepting and rejecting ballots submitted by mail. Plaintiffs' own evidence shows that Missouri's LEAs lack the staff and resources to implement a new process midway through voting-by-mail. This attempt to change the rules for voting-by-mail weeks after it started is like asking the Court to change the rules for in-person voting at noon on Election Day, after hundreds of thousands of voters have already cast their ballots. The relief far exceeds the proper role and authority of the federal courts.

In support of this request, the State Defendants incorporate by reference and reassert all the evidence and arguments submitted in their prior filings, including their filings opposing the entry of a preliminary injunction and motion to dismiss on this issue, *see* Doc. 45-49, 55, 56. The State Defendants highlight the following points, while also relying on their earlier evidence and arguments:

I. Plaintiffs Seek Disruptive Relief that Would Transform Missouri's Voting-By-Mail Procedures in the Middle of the Voting Process.

This Court did not merely order changes "on the eve of an election" – it ordered changes to election laws in the middle of the voting-by-mail portion of Missouri's election, which has been underway since September 22. Under Missouri law, every Local Election Authority printed and made available absentee and mail-in ballots for the November 3, 2020 general election by September 22, 2020, and these ballots include clear, emphatic instructions that contradict the relief granted in the Court's Order. Mo. Rev. Stat. §§ 115.281.1, 115.302.5. On September 22, any Missouri voter could request an absentee or mail-in ballot, fill out, execute, and return that ballot to the local election authority. *Id*. As of September 30, 2020, over 264,000 absentee ballots had been requested, and over 258,000 had been sent to Missouri voters, and almost 20,000 had been returned. Ex. 1, Peters Decl., ¶ 41. Likewise, over 30,500 mail-in ballots had been requested, and over 30,000 sent to voters. *Id*. ¶ 42. "These numbers will increase daily." *Id*. ¶ 41. Staff at all 116 Local Election Authorities have already been trained on the existing procedures. The Missouri Secretary of State and Local Election Authorities have already provided extensive guidance to Missouri voters, including pre-printed instructions on the ballot envelopes themselves or in instructions accompanying the ballots, hundreds of thousands of which have already been sent to Missouri voters. *See* Ex. 1, Peters Decl., ¶¶ 27-38 & atts. 9-18. Missouri law requires the ballot envelopes to be finally printed by six weeks prior to the election. Mo. Rev. Stat. §§ 115.281.1, 115.302.5. As noted, many thousands of Missouri voters have already received ballot envelopes containing clear, emphatic instructions on how to return their absentee and mail-in ballots.

This Court's order underscores the intrusive nature of its injunction changing this process. It provides that "Defendants their respective agents, officers employees, successors, and any and all acting together or under the direction or control of the Secretary of State shall not reject or

otherwise fail to count any otherwise valid remote ballot – whether absentee or mail-in – that is returned by mail, or in person by the voter, or through a relative of the voter who is within the second degree of consanguinity or affinity, at or before the close of polls on Election Day." Doc. 65 at 19-20. This requires changing the methods of sending and receiving mail-in ballots. The Order also provides that the defendants "shall immediately and as soon as practicable implement this Order through distribution to all LEAs, and shall otherwise take steps to inform the voting public that any ballot received through the mail can be returned by mail or in person or through a close relative, i.e. the same manners in which absentee ballots are cast." Doc. 65 at 20. This Order could include revising extensive voter-education materials, including reprinting every LEA's ballot envelope and accompanying instructions, hundreds of thousands of which have already been sent to voters—a task that is impracticable or even impossible at this late stage.

Equity dictates that this Court should not grant such disruptive relief. The U.S. Supreme Court has repeatedly emphasized that last-minute changes to any election laws are strongly disfavored, especially given "the imminence of the election." *Purcell v. Gonzalez*, 549 U.S. 1, 5 (2006). Missouri's voting-by-mail procedures are not only "imminent," but already well underway. Consistent with these principles, the U.S. Supreme Court has stayed at least seven pre-election injunctions in the current election cycle alone. *See, e.g.*, *Andino v. Middleton*, No. 20A55, 2020 WL 5887393 (U.S. Oct. 5, 2020); *Republican Nat'l Comm.v. Democratic Nat'l Comm.*, 140 S. Ct. 1205 (2020); *Merrill v. People First Of Ala.*, No. 19A1063, 2020 WL 3604049 (July 2, 2020); *Little v. Reclaim Idaho*, 140 S. Ct. 2616 (2020); *Clarno v. People Not Politicians*, No. 20A21, 2020 WL 4589742 (Aug. 11, 2020); *Thompson v. DeWine*, No.19A1054, 2020 WL 3456705 (June 25, 2020); *Tex. Democratic Party v. Abbott*, 140 S. Ct. 2015 (2020).

The Eighth Circuit and other Courts of Appeals have stayed many pre-election injunctions as well. *See, e.g.*, *Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905 (8th Cir. 2020); *Miller v. Thurston*, 967 F.3d 727 (8th Cir. 2020) (reversing the district court's grant of an preliminary injunction, motion for stay consolidated with appeal after the grant of an administrative stay); *Democratic Nat'l Comm. v. Bostelmann*, No. 20-2844, 2020 WL 5951359, at *1 (7th Cir. Oct. 9, 2020) (agreeing "first, that a federal court should not change the rules so close to an election; [and] second, that political rather than judicial officials are entitled to decide when a pandemic justifies changes to rules that are otherwise valid."); *Thompson v. Dewine*, 959 F.3d 804 (6th Cir. 2020); *Arizona Democratic Party v. Hobbs*, No. 20-16759, 2020 WL 5903488 (9th Cir. Oct. 6, 2020); *Texas Alliance for Retired Americans v. Hughs*, No. 20-40643, 2020 WL 5937868 (5th Cir. Sept. 30, 2020); *New Georgia Project v. Raffensperger*, No. 20-13360-D, 2020 WL 5877588 (11th Cir. Oct. 2, 2020).

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

Courts routinely refuse to impose changes to election procedures just weeks before an election—let alone changing procedures already in process. *See, e.g.*, *Veasey v. Perry*, 769 F.3d 890, 981 (5th Cir. 2014) (granting a stay of an injunctive order enjoining Texas's voter ID law under Purcell, and noting that "[t]he Supreme Court has repeatedly instructed courts to carefully consider the importance of preserving the status quo on the eve of an election").

The Supreme Court has—just this week—again made clear that "that federal courts ordinarily should not alter state election rules in the period close to an election." *Andino v. Middleton*, No. 20A55, 2020 WL 5887393, at *1 (U.S. Oct. 5, 2020). In *Andino*, the district court injunction issued eight days ago on September 30, 2020. *Middleton v. Andino*, No. 3:20-cv-001730-JMC, ECF No. 109 (Sept. 30, 2020). The Supreme Court stayed this injunction within a week. As Justice Kavanaugh noted, "a State legislature's decision either to keep or to make changes to election rules to address COVID–19 ordinarily should not be subject to second-guessing by an unelected federal judiciary. . ." 2020 WL 5887393, at *1 (Kavanaugh, J., concurring) (internal quotation marks omitted). And, "for many years, this Court has repeatedly emphasized that federal courts ordinarily should not alter state election rules in the period close to an election." *Id*. (citing *Purcell v. Gonzalez*, 549 U.S. 1 (2006) (per curiam)). "By enjoining South Carolina's witness requirement shortly before the election, the District Court defied that principle and this Court's precedents." *Id*. The injunction entered here, over a week after the injunction in *Andino*, should be stayed as well.

Plaintiffs' claims made various allegations about putative voter confusion, but changing the rules so close to Election Day creates voter confusion—it does not cure it. "Court orders affecting elections, especially conflicting orders, can themselves result in voter confusion and

consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4–5 (2006).

II. The State Defendants Are Likely to Prevail on Appeal.

Preliminary injunctive relief is "an extraordinary remedy," and "the burden of establishing the propriety of an injunction is on the movant." *Watkins Inc. v. Lewis*, 346 F.3d 841, 44 (8th Cir. 2003). The first *Dataphase* factor—"the likelihood of the movant's success on the merits," *id.*—weighs heavily against injunctive relief. Plaintiffs are not likely to succeed on any claim.

First, no relief is appropriate because Section 1983 does not create any ***cause of action*** to assert third-party rights. The Secretary of State emphasized this as his first argument opposing relief on the merits, and Plaintiffs never responded to it. The Court, likewise, acknowledged this argument in its Order, but then failed to address it. Evidently, both Plaintiffs and the Court conflate this argument with the separate question of whether Plaintiffs have ***third-party standing*** here—an entirely distinct inquiry. The existence of ***standing*** and the existence of a ***cause of action*** are different inquiries.

Here, Plaintiffs lack a third-party cause of action under black-letter law in the Eighth Circuit. All Counts in the Complaint purport to assert only third-party rights under 42 U.S.C. § 1983. *See* Doc. 1, ¶¶ 11-40 (identifying only advocacy organizations, and no individual voters, as Plaintiffs); *id*. at 23, 26, 29 (asserting that each of Counts I, II, and III arises under 42 U.S.C. § 1983). Section 1983 creates rights that are personal to the injured party, and no plaintiff can assert third-party rights under Section 1983. *See* 42 U.S.C. § 1983 (conferring a cause of action only on "the party injured"); *see also Garrett v. Clarke*, 147 F.3d 745, 746 (8th Cir. 1998) (holding that a plaintiff "may not base his Section 1983 action on a violation of the rights of third parties"); *Advantage Media, LLC v. City of Eden Prairie*, 456 F.3d 793, 801 (8th Cir. 2006) (holding that

relief under Section 1983 is "available only for violations of a party's own constitutional rights"); *Nnebe v. Daus*, 644 F.3d 147, 156 (2d Cir. 2011) ("an organization does not have standing to assert the rights of its members in a case brought under 42 U.S.C. § 1983," because "the rights § 1983 secures [are] personal to those purportedly injured"). For these reasons, and those stated in greater detail in the State's previously filed Suggestions, Doc. 46, at 11-14, Plaintiffs have no statutory cause of action to assert them. Plaintiffs—who are all organizations, not individual voters—seek to assert third-party rights through 42 U.S.C. § 1983. This violates the black-letter law of the Eighth Circuit and every other federal court to consider the issue, and Plaintiffs have cited no authority to the contrary—indeed, they never addressed this argument.

Second, Plaintiffs lack third-party standing to assert the rights of Missouri voters. Plaintiffs lack direct standing because they cannot cast ballots themselves, and they lack organizational standing to assert their members' rights because the Complaint fails "to make specific allegations establishing that at least one identified member had suffered or would suffer harm." *Summers v. Earth Island Inst.*, 555 U.S. 488, 498 (2009) (emphasis added). Thus, to assert third-party rights, they must satisfy the requirements of third-party standing, which requires showing a "close relationship" with third parties and a "hindrance" to the third parties' assertion of their own rights. *Kowalski v. Tesmer*, 543 U.S. 125, 130 (2004). Plaintiffs also lack third-party standing to assert the rights of Missouri voters because they do not allege a "close relationship" or "hindrance" with such voters. The Complaint and evidence contains no factual allegations to support either a "close relationship" or "hindrance." *Id.*; *see also* Doc. 46, at 14-15.

Third, Plaintiffs fail to show a "severe" burden on the right to vote from Missouri's processes for requesting and returning mail-in ballots. *Anderson v. Celebrezze*, 460 U.S. 780, 789-90 (1983); *Burdick v. Takushi*, 504 U.S. 428 (1992). Instead, Missouri's processes constitute

"reasonable, nondiscriminatory" regulations that advance important regulatory interests in clarity, uniformity, ballot security, preserving limited state resources, reducing administrative burdens, and avoiding voter confusion. *Burdick*, 504 U.S. at 434. Moreover, Plaintiffs' theory of injury on Count I hinges on their expectation that the U.S. Postal Service will not deliver election mail on time, and voters will thus experience unusual mailing delays. Regardless of the merits of these allegations, they are not caused by the State of Missouri or any state official. *See Harris v. McRae*, 448 U.S. 297, 316 (1980) ("[a]lthough government may not place obstacles in the path" of a citizen seeking to exercise fundamental rights, the State "need not remove those obstacles not of its own creation"); *Maher v. Roe*, 432 U.S. 464, 474 (1977); Doc. 46, at 15-25.

Fourth, Plaintiffs assert a facial challenge to the provisions of Missouri law, but they plead no facts and show no evidence that could support the claim that any challenged Missouri statute is invalid "in all its applications," *Bucklew v. Precythe*, 139 S. Ct. 1112, 1127 (2019), so they cannot meet the demanding requirements for facial relief. *See* Doc. 46, at 46-48. There is no plausible constitutional concern in the overwhelming majority of applications of Missouri's statutes.

Finally, Plaintiffs did not meet the heavy burden of proving any entitlement to a statewide injunction or any relief that extends beyond the specific parties to this case. Recent Eighth Circuit case law rejects the notion that "a universal injunction is available by default to plaintiffs who are likely to prevail on a First Amendment challenge." *Rodgers v. Bryant*, 942 F.3d 451, 468 (8th Cir. 2019) (Stras, J., concurring and dissenting in part). That is because "[i]njunctive relief should be no more burdensome to the defendant than necessary to provide complete relief to the plaintiffs." *Califano v. Yamasaki*, 442 U.S. 682, 702 (1979). Nothing shows the impracticability of more narrow relief.

III. The Balance of Harms and the Public Interest Favor a Stay.

The other three equitable factors also strongly favor a stay of injunction pending appeal. The other *Dataphase* factors include "(2) the threat of irreparable harm to the movant in the absence of relief; (3) the balance between that harm and the harm that the relief would cause to other litigants; and (4) the public interest." (citing *Dataphase Sys., Inc. v. C.L. Sys., Inc.*, 640 F.2d 109, 114 (8th Cir. 1981) (en banc)). All these factors decisively favor the State.

A. The Balance of Harms and Public Interest Favor the State.

Plaintiffs have identified no plausible violation of the U.S. Constitution or federal law. Without this showing, a preliminary injunction blocking enforcement of Missouri statutes in the middle of an election would directly contradict the public interest. As the Eighth Circuit recently reaffirmed, "it is in the public interest to uphold the will of the people, as expressed by acts of the state legislature, when such acts appear harmonious with the Constitution." *Pavek v. Donald J. Trump for President, Inc.*, 967 F.3d 905, 909 (8th Cir. 2020) (granting a stay of injunction pending appeal of election procedures). Moreover, "any time a State is enjoined by a court from effectuating statutes enacted by representatives of its people, it suffers a form of irreparable injury." *Maryland v. King*, 567 U.S. 1301 (2012) (Roberts, C.J., in chambers) (quoting *New Motor Vehicle Bd. of Calif. v. Orrin W. Fox Co.*, 434 U.S. 1345, 1351 (1977) (Rehnquist, J., in chambers)). "When courts declare state laws unconstitutional and enjoin state officials from enforcing them," the "ordinary practice is to suspend those injunctions from taking effect pending appellate review." *Strange v. Searcy*, 135 S. Ct. 940, 940-41 (2015) (Thomas and Scalia, JJ., dissenting from denial of the application for a stay) (collecting cases).

B. The Threat of Irreparable Injury to Plaintiffs Is Minimal to Non-Existent.

The threat of irreparable injury to Plaintiffs, by contrast, is non-existent. The Court acknowledges in its Order that Plaintiffs have no constitutional right to vote by mail *at all* under

either the federal or Missouri Constitutions. Yet the Court held that the Constitution mandates that Missouri provide an in-person return procedure for mail-in ballots as a fallback option if Missouri voters fear the mail is too slow. But Missouri already provides an alternative option—voting in person at the polls, which is all that the Constitution requires. Voting in person is safe in Missouri. In fact, the Secretary of State's unrefuted evidence in this case demonstrates that Missouri did not experience a single reported case of Covid-19 transmission during in-person voting during the August 2020 election. Senate Bill 631 created a reasonable procedure to allow all Missouri voters to cast ballots by mail during the 2020 elections if they desire to do so. It inflicted no irreparable injury on Plaintiffs or any Missouri voter. On the contrary, it greatly expanded Missourians' options for voting during the Covid-19 pandemic. As the Court's Order acknowledges, it was reasonable for the Missouri Legislature to presume that voters who sought a "mail-in" ballot because they fear contracting or spreading Covid-19 would not then desire to return that ballot *in person*. No irreparable injury is suffered by any voter from the Missouri Legislature's decision to *expand* their voting options.

CONCLUSION

The Missouri Secretary of State respectfully requests that this Court stay its injunction pending appeal and issue an immediate temporary administrative stay to allow this Court and the Eighth Circuit to rule on a request for a stay pending appeal. The Missouri Secretary of State also respectfully requests a ruling on this Motion within 24 hours, as the injunction orders Missouri state officials to take immediate actions to contradict the extensive guidance they have already provided Missouri voters, and the Secretary of State intends to seek an immediate stay of injunction from the U.S. Court of Appeals for the Eighth Circuit.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 9, 2020, the above was filed electronically through the Court's electronic filing system to be served electronically on counsel for all parties.

/s/ D. John Sauer