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## Hindsight 20/20: Missouri's Use of Statutory Interpretation as a Key Insight for Future Litigation Missouri State Conference of Nat'l Ass'n for the Advancement of Colored People v. State, 607 S.W.3d 728 (Mo. 2020).

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## NOTE

### **Hindsight 20/20: Missouri's Use of Statutory Interpretation as a Key Insight for Future Litigation**

*Missouri State Conference of Nat'l Ass'n for the Advancement of Colored People v. State*, 607 S.W.3d 728 (Mo. 2020).

Mackenzie L. Stout\*

#### I. INTRODUCTION

In *Missouri State Conference of Nat'l Ass'n for the Advancement of Colored People v. State* (hereinafter "*NAACP v. State*"), the Supreme Court of Missouri interpreted a Missouri statute that expanded the right to vote absentee in response to the COVID-19 pandemic.<sup>1</sup> The new provision allowed *all* registered Missouri voters to vote absentee during the 2020 elections but required most absentee voters to have their ballots notarized.<sup>2</sup> Voters who were "confined due to illness" or qualified as part of an "at-risk" category, however, were not required to have their ballots notarized.<sup>3</sup> Appellants challenged the bill, claiming that voluntarily confining oneself as a precautionary measure and in accordance with social distancing guidelines was a form of "confinement due to illness," which would permit valid absentee voting without requiring the certification of a notary.<sup>4</sup> Appellants also argued that requiring notarization for individuals that do not fall into the enumerated categories infringed on their fundamental right to vote under the Missouri Constitution.<sup>5</sup> The Supreme Court of Missouri employed various methods

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<sup>1</sup> *Missouri State Conf. of Nat'l Ass'n for the Advancement of Colored People v. State*, 607 S.W.3d 728, 734 (Mo. 2020) (en banc) [hereinafter *NAACP v. State*].

<sup>2</sup> *Id.* at 731.

<sup>3</sup> *Id.* at 731.

<sup>4</sup> *Id.* at 732.

<sup>5</sup> *Id.* at 734.

of statutory interpretation to determine when individuals are “confined due to illness” and how enacted safety and social distancing measures affect the Constitutional right to vote.<sup>6</sup> The decision in *NAACP v. State* provides insight into the Supreme Court of Missouri’s interpretation of legislative action in response to emergency situations.<sup>7</sup>

This Note analyzes the Supreme Court of Missouri’s approach to statutory interpretation and provides insight into the value the Court places on different canons of interpretation. Part II describes the facts and holding of *NAACP v. State*. Part III analyzes various states’ voting statutes and legislative responses to the COVID-19 Pandemic. Additionally, Part III details the canons of interpretation the Supreme Court of Missouri has previously used in its decisions. Part IV explains the decision in *NAACP v. State*. Finally, Part V comments on the newfound clarity this decision provides and explains the court’s preferences regarding statutory interpretation revealed in this holding – a finding that will be valuable for future litigation.

## II. FACTS AND HOLDING

Missouri voting laws have long recognized the importance of absentee voting for individuals who cannot – or should not – be present at the polls on Election Day.<sup>8</sup> However, the law historically limited the ability to vote absentee to categories of individuals enumerated in Mo. Rev. Stat. § 115.277.<sup>9</sup> Relevant here, § 115.227.1(2) permits a registered Missouri voter to vote by absentee ballot if such 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.”<sup>10</sup>

In March 2020, a novel virus, COVID-19, swept the United States.<sup>11</sup> The state of Missouri had high rates of infection, which increased during the spring of 2020.<sup>12</sup> As a result, Missouri voters became concerned about their ability to vote in the highly anticipated and strongly contested

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<sup>6</sup> *Id.* at 732.

<sup>7</sup> *Id.* at 732.

<sup>8</sup> *Id.* at 733–34.

<sup>9</sup> *Id.*

<sup>10</sup> MO. REV. STAT. § 115.277.1 (2020). Under § 115.277.1, Missouri voters may also vote absentee if expected to be prevented from being able to vote at the polls due to: Absence from voting jurisdiction on Election Day; Religious belief or practice; Employment as an election authority; Incarceration, provided that all qualifications for voting are retained; or certified participation in address confidentiality program. *Id.*

<sup>11</sup> *NAACP v. State*, 607 S.W.3d at 734.

<sup>12</sup> *Id.*

presidential election in November 2020.<sup>13</sup> In response to this growing concern, the Missouri Senate passed Senate Bill 631, which expanded eligibility for absentee voting *without the requirement of a notary certification*.<sup>14</sup> This bill, § 115.277.1(7), permitted absentee voting without a notary's signature “[f]or an election that occurs during the year 2020,” when “the voter *has contracted or is an at-risk category* for contracting or transmitting severe acute respiratory syndrome coronavirus.”<sup>15</sup> Section 115.277 further defined the “at-risk” categories of individuals to include voters who:

- (1) Are sixty-five years of age or older; (2) Live in a long-term care facility licensed under chapter 198; (3) Have chronic lung disease or moderate to severe asthma; (4) Have serious heart conditions; (5) Are immunocompromised; (6) Have diabetes; (7) Have chronic kidney disease and are undergoing dialysis; or (8) Have liver disease.<sup>16</sup>

In addition to expanding eligibility for absentee voting without a notary's acknowledgment under § 115.277.1(7), Senate Bill 631 also created a new section, § 115.302.1, which allowed any registered Missouri elector to vote absentee for any remaining 2020 election if a notary or other official authorized their ballot.<sup>17</sup>

Despite the expansion of absentee voting during the 2020 elections, Appellants in *NAACP v. State* argued the notary or public authorization requirement created a public health risk during the COVID-19 pandemic because it required close contact between prospective voters and authorizing agents.<sup>18</sup> Doctors and professors of epidemiology filed an amicus brief which explained the infectiousness of COVID-19, the risks the virus posed to all individuals – especially those in a high-risk category

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<sup>13</sup> *Id.* at 729.

<sup>14</sup> S.B. 631, 100th Leg., 2nd Spec. Sess. § 7 (Mo. 2020).

<sup>15</sup> MO. REV. STAT. § 115.277(7) (2020) (emphasis added).

<sup>16</sup> S.B. 631, 100th Leg., 2nd Spec. Sess. § 115.277 (Mo. 2020) (“115.302. 1. Any registered voter of this state may cast a mail-in ballot as provided in this section. Nothing in this section shall prevent a voter from casting an absentee ballot, provided such person has not cast a ballot pursuant to this section. Application for a mail-in ballot may be made by the applicant in person, or by United States mail, or on behalf of the applicant by his or her guardian or relative within the second degree of consanguinity or affinity.”).

<sup>17</sup> See MO. REV. STAT. § 115.302.11 (2020) (“The statement . . . shall be subscribed and sworn to before a notary public or other officer authorized by law to administer oaths”).

<sup>18</sup> *NAACP v. State*, 607 S.W.3d at 732; *Social Distancing*, CDC (Nov. 17, 2020), <https://www.cdc.gov/coronavirus/2019-ncov/prevent-getting-sick/social-distancing.html> [<https://perma.cc/9PQC-BE2Y>].

– and the fear that that in-person voting on Election Day could cause an increase in the spread of the virus.<sup>19</sup>

The Supreme Court of Missouri heard the case pursuant to Article V § 3 of the Missouri Constitution.<sup>20</sup> The NAACP, the League of Women Voters of Missouri, Meredith Langlitz, and Javier A. Del Vilar (collectively “Appellants”) appealed the circuit court’s denial of declaratory and injunctive relief.<sup>21</sup> Appellants filed their original claim in April 2020.<sup>22</sup> The State of Missouri moved to dismiss for failure to state a claim upon which relief could be granted.<sup>23</sup> The circuit court granted the State’s motion,<sup>24</sup> and Appellants timely appealed.<sup>25</sup> While the appeal was pending, Senate Bill 631 passed the Missouri Legislature.<sup>26</sup> In light of the new bill, the Supreme Court of Missouri remanded the case to the circuit court.<sup>27</sup> The parties exchanged discovery, and the case was tried on the merits to consider the effect of the new legislation.<sup>28</sup> The circuit court entered judgment on two counts.<sup>29</sup> First, the court found, under Count I, as a matter of statutory interpretation, voters who voluntarily choose to confine themselves on Election Day due to fear of contracting COVID-19 are not “confine[d] due to illness or disability” within the plain and ordinary meaning of Mo. Rev. Stat. § 115.277(2).<sup>30</sup> Second, under Count II, the circuit court held that Appellants’ argument that the notary requirement presented unconstitutional health risks was unsupported by law and evidence.<sup>31</sup>

Appellants raised challenges to the circuit court’s ruling on Counts I and II.<sup>32</sup> First, regarding Count I, Appellants argued § 115.277(2) “permits registered voters who expect to confine themselves on Election Day due to COVID-19 to vote absentee in Missouri without a notary seal.”<sup>33</sup>

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<sup>19</sup> Brief for Doctors and Professors of Epidemiology as Amici Curiae Supporting Appellants at 26–27, *NAACP v. State*, 607 S.W.3d 728 (No. SC98744) 2020 WL 7260901.

<sup>20</sup> MO. CONST. art. V, § 3 (“The supreme court shall have exclusive appellate jurisdiction in all cases involving the validity of ... a statute or provision of the constitution of this state”).

<sup>21</sup> *NAACP v. State*, 607 S.W.3d at 729.

<sup>22</sup> *Id.* at 730.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Id.*

<sup>26</sup> *Id.*

<sup>27</sup> *Id.* at 731.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.*

<sup>30</sup> *Id.*

<sup>31</sup> *Id.*

<sup>32</sup> *Id.* at 731, 734.

<sup>33</sup> *Id.* at 731.

Appellants claimed that confinement due to illness during the COVID-19 pandemic includes voters who voluntarily stay home to avoid spreading or contracting the virus regardless of whether the voter expects to be ill or actually have contracted the virus on Election Day.<sup>34</sup> Therefore, Appellants argued that since these voters are “confined due to illness” within the meaning of § 115.277.1(2), they should be permitted to vote absentee without the requirement of a notary acknowledgement.<sup>35</sup> The State responded by arguing that voters who voluntarily choose to confine themselves, but do not actually expect to be ill on Election Day, are not “confined” within the meaning of § 115.277.1(2); therefore, voters who voluntarily confine themselves would require a notary acknowledgment for their ballot.<sup>36</sup> To support its conclusion, the State explained the plain and ordinary meaning of the words “illness” and “confinement” as stated in § 115.277.1(2) would not include voluntary confinement.<sup>37</sup> The State argued a person would not say they are “confined” due to illness if they were not actually ill; instead, the individual would say they are “confined due to the *fear of illness*.”<sup>38</sup> Further, the State pointed out this additional phrase is omitted from the statute, evidencing the legislature’s intent to require an actual illness.<sup>39</sup> Similarly, the State argued Webster’s dictionary definition of “confinement” required “restraint.”<sup>40</sup> This “restraint” element means that the illness must cause the confinement, not an individual’s willing decision.<sup>41</sup>

The State also argued the “expectation” requirement did not apply to voluntary confinement under a separate statute, § 115.287.2, which provides for situations where an individual “becomes confined due to illness or injury, an election authority will deliver a ballot, witness the signing, and return the absentee ballot.”<sup>42</sup> Finally, the State argued that permitting voluntary confinement to constitute “confinement due to illness” would render § 115.277.1(7), enacted under Senate Bill 631, superfluous.<sup>43</sup> The State argued § 115.277.1(7) addressed situations where “at-risk” individuals could vote absentee, without a notary, in order to protect themselves from significant health risks.<sup>44</sup> Therefore, if §

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<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 734.

<sup>37</sup> Brief for Respondents at 39, *NAACP v. State*, 607 S.W.3d 728 (No. SC98536).

<sup>38</sup> *NAACP v. State*, 607 S.W.3d at 730.

<sup>39</sup> *Id.* at 38.

<sup>40</sup> Brief for Respondents, *supra* note 37, at 59.

<sup>41</sup> *Id.*

<sup>42</sup> *Id.* at 66.

<sup>43</sup> *Id.* at 67.

<sup>44</sup> *Id.* at 61.

115.277.1(2) already included voluntary confinement, this new provision would have been redundant.<sup>45</sup>

Regarding Count II, Appellants argued the circuit court erred when it held that requiring voters to obtain a notary acknowledgement during the COVID-19 pandemic was not a constitutional violation.<sup>46</sup> The circuit court initially questioned whether any level of scrutiny applied to the alleged constitutional violation and then determined the notary requirement was “subject, *at most*, to rational-basis scrutiny.”<sup>47</sup> Appellants argued the enforcement of statutes that prevent all voters from casting an absentee ballot without acknowledgment by a notary during the COVID-19 pandemic created a severe burden on their fundamental right to vote because of the health risks created by the close interaction between voters and notaries.<sup>48</sup> Additionally, as additional burdens, Appellants pointed to the length of waiting time required to see a notary, taking transportation to get to the notary, and the low number of notaries offering services.<sup>49</sup> Further, Appellants argued the photo identification requirement required by a notary is much more stringent than that of poll voting.<sup>50</sup> Due to the allegedly severe burden imposed by requiring a notary for all individuals voluntarily confining themselves to avoid spreading or contracting COVID-19, Appellants believed strict scrutiny should apply.<sup>51</sup> Applying strict scrutiny, Appellants asserted the notary provision was not narrowly tailored to achieve a compelling state interest and was therefore unconstitutional.<sup>52</sup>

To counter these arguments, the State claimed that requiring all voters who do not qualify under an enumerated “at-risk” category – including those voluntarily confining themselves – to receive a notary acknowledgement does not impose a severe burden on Missouri citizens’ fundamental right to vote.<sup>53</sup> The State asserted the alleged health risks of requiring a notary during the COVID-19 pandemic did not impose a severe burden and cited the circuit court’s factual finding that the risk of

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<sup>45</sup> *Id.* at 60–61.

<sup>46</sup> *NAACP v. State*, 607 S.W.3d at 734.

<sup>47</sup> Brief for Appellants at 61, *NAACP v. State*, 607 S.W.3d 728 (No. SC98744).

<sup>48</sup> *NAACP v. State*, 607 S.W.3d at 734.

<sup>49</sup> Brief for Appellants, *supra* note 47, at 17. Appellants cited that only 34.6 percent of responding Missouri notaries are available for the month of November. *Id.*

<sup>50</sup> *Id.* at 18. For example, the Missouri notary public handbook, created by the Secretary of State, states “[t]he best form of identification is one that includes a photograph and signature. A valid driver’s license is a good source of identification.” *Id.* at 17–18. Comparatively, acceptable identification for poll voting includes military IDs, passports, Missouri driver’s licenses and non-driver licenses, voter registration cards, IDs from a Missouri university, utility bills, and paychecks. *Id.*

<sup>51</sup> *NAACP v. State*, 607 S.W.3d at 734.

<sup>52</sup> Brief for Appellants, *supra* note 47, at 61.

<sup>53</sup> *NAACP v. State*, 607 S.W.3d at 734.

contracting COVID-19 from getting a ballot notarized is very low.<sup>54</sup> Mitigation measures such as social distancing, masks, and hand hygiene could reduce any remaining risks present from requiring voters to secure a notary acknowledgement.<sup>55</sup> Further, the State argued that the “alleged notary scarcity” did not create a severe burden because there were tens of thousands of notaries available throughout the state during a six-week interval.<sup>56</sup> The State also claimed that Appellants misrepresented the photo ID requirement because notaries permit alternatives to photo identification, including verification by others who know the voter.<sup>57</sup>

Lastly, because the State claimed the statutory notary requirement did not impose a “severe burden,” it argued the court should defer to the legislature and examine the law using a rational-basis review.<sup>58</sup> However, should the court decide to employ strict scrutiny, the State presented evidence proving the notary requirement was still valid because it was “precisely tailored to advance the State’s compelling interests in preventing election and voter fraud and protecting the integrity of Missouri elections.”<sup>59</sup>

Reviewing the lower court’s judgment *de novo*, under Count I, the Supreme Court of Missouri held that the plain and ordinary meaning of § 115.277.1(2) does not include individuals who voluntarily confine themselves to avoid contracting or spreading the virus. Under Count II, the court held the statute was constitutional because absentee voting is a privilege, not a fundamental right. Legislatures, therefore, may pass provisions, such as Senate Bill 631, which create special conditions to protect this privilege.<sup>60</sup>

### III. LEGAL BACKGROUND

This Part discusses two distinct matters which combined to influence the court’s decision in *NAACP v. State*. First, subpart A discusses various changes to voting procedures states employed for the 2020 election season in response to the COVID-19 pandemic. Second, subpart B explains how

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<sup>54</sup> Brief for Respondents, *supra* note 37, at 84–85.

<sup>55</sup> *Id.* at 87–88.

<sup>56</sup> *Id.* at 88–93 (highlighting that no named Plaintiffs alleged he or she had difficulty locating a notary and none claimed that the time and transportation to obtain a notary presented a severe burden).

<sup>57</sup> *Id.* at 27–28.

<sup>58</sup> *Id.* at 97.

<sup>59</sup> *Id.* at 100–02. To support its compelling interest of preventing voter fraud, Respondent cites several sources which claim fraud is common among absentee ballots including, but not limited to former United States and Missouri case precedent; United States Department of Justice Public Integrity Manual; Federal Bureau of Investigation task force documents; trial presentation of fraud investigators. *Id.*

<sup>60</sup> *NAACP v. State*, 607 S.W.3d at 731–34.



the Supreme Court of Missouri has applied the rules of statutory interpretation in its prior decisions.

*A. Changes to State Voting Laws and Procedures for the 2020 Elections*

The 2020 election season brought unique challenges as states adjusted voting procedures to encourage safe voter participation.<sup>61</sup> Individual states enacted special policies to expand absentee voting while still ensuring the integrity of the process.<sup>62</sup> For example, states employed varying procedures to authenticate signatures on absentee ballots.<sup>63</sup> Thirty-one states used a “signature verification” process where election officials compared the signature on the ballot with a signature already on file for the individual, typically, the voter registration record.<sup>64</sup> Six states verified that a signature was present on an absentee or mailed ballot but did not conduct a separate signature verification.<sup>65</sup> Eight states required the signature of a witness who was present when the voter signed the absentee ballot.<sup>66</sup> Missouri, along with Mississippi and Oklahoma, required the absentee ballot to be notarized.<sup>67</sup> Arkansas mandated that a copy of the voter’s ID must be returned with the mailed absentee ballot, and Alabama required a copy of the voter’s ID along with signatures from a notary or two witnesses.<sup>68</sup>

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<sup>61</sup> Elizabeth Williams, Annotation, *COVID-19 Related Litigation: Challenges to Election and Voting Practices During COVID-19 Pandemic*, 54 A.L.R. Fed. 3d Art. 3 (2020).

<sup>62</sup> *Voting Outside the Polling Place: Absentee, All-Mail and other Voting at Home Options*, NAT’L CONF. OF STATE LEGISLATURES, <https://www.ncsl.org/research/elections-and-campaigns/absentee-and-early-voting.aspx#permit> [<https://perma.cc/L57H-4AT3>] (last visited Mar. 3, 2021).

<sup>63</sup> *Id.*

<sup>64</sup> *Id.* States using signature verification included: Arizona, California, Colorado, Delaware, Florida, Georgia, Hawaii, Idaho, Illinois, Indiana, Kansas, Kentucky, Maine, Massachusetts, Michigan, Montana, Nebraska, Nevada, New Hampshire, New Jersey, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Texas, Utah, Washington, and West Virginia. *See id.*

<sup>65</sup> *Id.* (Connecticut, District of Columbia, Iowa, Maryland, New Mexico, Vermont, and Wyoming).

<sup>66</sup> *Id.* A witness signature was required in Alaska (witness or notary), Louisiana, Minnesota (witness or notary), North Carolina (two witnesses or a notary), Rhode Island (two witnesses or a notary), South Carolina, Virginia, and Wisconsin. *Id.* *See also* League of Women Voters of Va. v. Va. State Bd. of Elections, 458 F. Supp. 3d 442 (W.D. Va. 2020) (injunction issued to override signature requirement for 2020 election).

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*

Across the country, states used varying approaches to adjust their voting procedures in response to COVID-19.<sup>69</sup> While some states retained their traditional, stringent requirements,<sup>70</sup> other states tailored voting laws for the COVID-19 pandemic.<sup>71</sup> For example, Delaware reinterpreted its absentee ballot-statute to clarify that “sick or physically disabled” as used in that provision included any voter who was “asymptomatic with COVID-19 or otherwise abiding by Center for Disease Control recommendations and voluntarily quarantining.”<sup>72</sup> Additionally, West Virginia adopted a clarifying regulation which stated, “in light of the COVID-19 crisis, ‘confined’ means ‘a person who is restricted to a specific location for reasons beyond that person's control, including a recommendation by state or federal authorities for the person to self-quarantine, avoid public places or contact with other persons.’”<sup>73</sup>

### *B. The Supreme Court of Missouri's Preferred Canons of Interpretation*

The Missouri Legislature passed Senate Bill 631 but did not specify how the phrase “confined due to illness” would apply to voluntary confinement based on CDC recommendations or attempts to prevent the spread of COVID-19.<sup>74</sup> This ambiguity required the Supreme Court of Missouri to interpret and clarify the language in the statute.<sup>75</sup> Historically, the Supreme Court of Missouri has favored certain canons of statutory construction to resolve disputes.<sup>76</sup> First, the court looks to legislative intent as reflected in the “plain and ordinary language” of the statute.<sup>77</sup> Emphasizing its preference for this mode of interpretation, the court has

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<sup>69</sup> *Id.*

<sup>70</sup> *See, e.g.,* *Griswold v. Ferrigno Warren*, 462 P.3d 1081, 1086 (Colo. 2020) (explaining that Colorado required Senate candidates to receive the same number of petition signatures despite limits due to quarantine guidelines and social distancing).

<sup>71</sup> *NAACP v. State*, 607 S.W.3d at 744 (Stith, J., concurring) (citing *Sixth Modification of the Declaration of a State of Emergency for the State of Delaware Due to a Public Health Threat* (Mar. 24, 2020), <https://governor.delaware.gov/wp-content/uploads/sites/24/2020/03/Sixth-Modification-to-State-of-Emergency-03242020.pdf> [<https://perma.cc/B9F7-XWMN>]).

<sup>72</sup> *Id.*

<sup>73</sup> W. VA. CODE § 15-53-2 (2020).

<sup>74</sup> Brief for Respondents, *supra* note 37, at 37.

<sup>75</sup> *NAACP v. State*, 607 S.W.3d at 731–34.

<sup>76</sup> *See infra* notes 77–83 and accompanying text.

<sup>77</sup> *Parktown Imports, Inc. v. Audi of Am., Inc.*, 278 S.W.3d 670, 672 (Mo. 2009) (en banc); *Dickemann v. Costco Wholesale Corp.*, 550 S.W.3d 65, 68 (Mo. 2018) (en banc) (quoting *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. 1988) (en banc)).

referred to other methods as “merely an aid” in interpretation.<sup>78</sup> Second, the court has looked to the historical interpretation of a word as determined by other Missouri courts.<sup>79</sup> If the reading of a statute is a “close call,” and one interpretation violates the Constitution while the other does not, the court favors the constitutionally valid interpretation.<sup>80</sup> The court refrains from inserting words into a statute to protect the separation of powers between the judiciary and the legislature.<sup>81</sup> Further acknowledging this necessary separation of power, the court has recognized that the legislature does not enact superfluous provisions and instead has endeavored to give effect to each word.<sup>82</sup> Lastly, the court recognizes the importance of reading a contested statute as a whole and construing individual portions together.<sup>83</sup>

#### IV. INSTANT DECISION

Part IV describes the court’s analysis in reaching its decision regarding the interpretation of § 115.277.1.<sup>84</sup> It explains the per curiam decision in addition to Judge Wilson’s concurrence and Judge Stith’s concurrence in part and dissent in part.

##### *A. The Court’s Interpretation of § 115.277.1(2)*

The court recognized the arguments presented by Appellants and the State regarding the meaning of “confinement due to illness” as stated in § 115.277.1(2) and whether Appellants’ voluntary confinement due to the potential spread or contraction of COVID-19 fell within the meaning of the phrase.<sup>85</sup> To begin its analysis of the meaning of the disputed provision, the court acknowledged the ultimate goal of statutory interpretation is to

<sup>78</sup> *Parktown Imports, Inc.*, 278 S.W.3d at 672; *Dickemann*, 550 S.W.3d at 68 (quoting *Wolff Shoe Co.*, 762 S.W.2d at 31).

<sup>79</sup> *Kieffer v. Kieffer*, 590 S.W.2d 915, 918 (Mo. 1979) (en banc); *Short v. S. Union Co.*, 372 S.W.3d 520, 532 (Mo. Ct. App. 2012) (researching how word “including” has been used in prior Missouri cases).

<sup>80</sup> *Spradlin v. City of Fulton*, 924 S.W.2d 259, 263 (Mo. 1996) (en banc).

<sup>81</sup> *See, e.g., Turner v. Sch. Dist. Of Clayton*, 318 S.W.3d 660, 668 (Mo. 2010) (en banc) (“[T]he Court cannot supply what the legislature has omitted from controlling statutes.”).

<sup>82</sup> *Alberici Constructors, Inc. v. Dir. Of Revenue*, 452 S.W.3d 632, 638 (Mo. 1993) (en banc) (quoting *Hyde Park Hous. P’ship v. Dir. Of Revenue*, 850 S.W.2d 82, 84 (Mo. 1993) (en banc); *Mantia v. Missouri Dep’t of Transp.*, 529 S.W.3d 804, 809 (Mo. 2017) (en banc); *see also In re Verified Application & Petition of Liberty Energy (Midstates) Corp.*, 464 S.W.3d 520, 525 (Mo. 2015) (en banc).

<sup>83</sup> *Dickemann*, 550 S.W.3d at 68 (quoting *Wollard v. City of Kan. City*, 831 S.W.2d 200, 203 (Mo. 1992) (en banc)).

<sup>84</sup> MO. REV. STAT. § 115.277.1 (2020).

<sup>85</sup> *NAACP v. State*, 607 S.W.3d at 732–33.

“ascertain the intent of the legislature from the language used [and] to give effect to that intent if possible[.]”<sup>86</sup> To decipher the legislature’s intent, the court stated it must “consider the words used in their plain and ordinary meaning.”<sup>87</sup>

The court determined the plain and ordinary meaning of the statute did not include voters who voluntarily confine themselves to avoid contracting or spreading COVID-19.<sup>88</sup> The court looked to the definition of “illness” and “confinement” in Webster’s dictionary.<sup>89</sup> Webster’s defines “illness” as “an unhealthy condition of body or mind.”<sup>90</sup> Utilizing this definition, the court determined “illness” means a person who *actually* has a diagnosis or is experiencing symptoms, not a person under *threat* of such conditions.<sup>91</sup> The court stated Appellant’s definition of “confinement due to illness” would require the court to read in “confinement due to the *fear of illness*,” which violates a clear guideline of statutory interpretation – the court cannot insert words or express meaning beyond what is stated in the statute.<sup>92</sup> The court cited its precedent of limiting its own power when reviewing statutes to uphold the separation of powers among the branches of government.<sup>93</sup> The court reiterated this commitment, concluding, “This Court should not second-guess the wisdom or policy of a legislative enactment.”<sup>94</sup>

The court turned to another canon to solidify its determination – a court must presume legislatures did not enact meaningless provisions.<sup>95</sup> As explained by the court, Appellants’ argument failed in two ways.<sup>96</sup> First, Appellants’ interpretation of “confinement due to illness” would render the second portion of § 115.277.1(2) superfluous.<sup>97</sup> If “confinement due to illness” already included those voluntarily confining for fear of contracting or spreading an illness, there would be no purpose

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<sup>86</sup> *Id.* at 732 (citing *Wolff Shoe Co. v. Dir. of Revenue*, 762 S.W.2d 29, 31 (Mo. 1988) (en banc)).

<sup>87</sup> *Id.* at 732 (citing *Dickemann*, 550 S.W.3d at 68).

<sup>88</sup> *Id.* at 732–33.

<sup>89</sup> *Illness*, Merriam-Webster’s New Int’l Dictionary (3d ed. 2002); *NAACP v. State*, 607 S.W.3d at 732.

<sup>90</sup> *NAACP v. State*, 607 S.W.3d at 732–33.

<sup>91</sup> *Id.*

<sup>92</sup> *Id.* at 733.

<sup>93</sup> *Id.* at 732–33. *See also* *Turner v. Sch. Dist. of Clayton*, 318 S.W.3d 660, 668 (Mo. 2010) (en banc); *Bd. of Educ. of City of St. Louis v. State*, 47 S.W.3d 366, 371 (Mo. 2001) (en banc).

<sup>94</sup> *NAACP v. State*, 607 S.W.3d at 733; *State ex rel. Voss v. Davis*, 418 S.W.2d 163, 169 (Mo. 1967) (Courts may not “inquire into the motive, policy, wisdom, or expediency of legislation.”).

<sup>95</sup> *NAACP v. State*, 607 S.W.3d at 733.

<sup>96</sup> *Id.*

<sup>97</sup> *Id.* at 733–34.

in including the secondary provision permitting caretakers of those who are “confined due to illness” to vote absentee without notary’s authorization.<sup>98</sup> Second, the court explained, the new statutory provision, § 115.277.1(7), enacted under Senate Bill 631, would also be rendered superfluous.<sup>99</sup> Under Appellants’ interpretation, “at-risk voters” would already be voluntarily confined within the meaning of § 115.277.1(2). Therefore, the court stated Appellants’ interpretation failed because part of subsection (2) and the entirety of subsection (7) would be superfluous.<sup>100</sup> The court emphasized legislative changes as “highly instructive” to the statute’s meaning.<sup>101</sup> The legislature’s amendment to include subsection (7) as an additional provision in response to the COVID-19 pandemic was not only telling, the court stated, it was “dispositive.”<sup>102</sup>

### B. Constitutional Claims

The court identified a key issue in dispute between the parties – whether preventing all absentee voters in Missouri from having the right to vote without a notary acknowledgment on a mail-in ballot violates their fundamental right to vote under the Missouri Constitution.<sup>103</sup> The court acknowledged that under Article I, Section 25 of the Missouri Constitution, the right to vote is fundamental to all Missouri citizens.<sup>104</sup> However, the court distinguished the right to vote from *absentee* voting, holding that the latter does not carry the same fundamental privilege. Pointing to Article VIII, Section 7, the court explained the Missouri Constitution empowers the legislature to “authorize voting for those who are absent.”<sup>105</sup> Notably, Article VIII, Section 7 states that “qualified electors of the state who are absent, whether within or without the state,

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<sup>98</sup> *Id.*

<sup>99</sup> *Id.* at 734.

<sup>100</sup> *Id.*

<sup>101</sup> *Id.*; *Cox v. Dir. of Revenue*, 98 S.W.3d 548, 550 (Mo. 2003) (en banc).

<sup>102</sup> *NAACP v. State*, 607 S.W.3d at 734.

<sup>103</sup> *Id.*

<sup>104</sup> *Id.* at 734–35; MO. CONST. art. I § 25 (“[a]ll elections shall be free and open; and no power, civil or military, shall at any time interfere to prevent the free exercise of the right of suffrage.” Additionally, Article VIII, Section 2 provides, in part, “All citizens of the United States ... over the age of eighteen who are residents of this state and of the political subdivision in which they offer to vote are entitled to vote at all elections by the people. . . .”); *Weinschenk v. State*, 203 S.W.3d 201, 211 (Mo. 2006) (en banc).

<sup>105</sup> MO. CONST. art. VIII § 7 (“Qualified electors of the state who are absent, whether within or without the state, may be enabled by general law to vote at all elections by the people.”); *NAACP v. State*, 607 S.W.3d at 735.

may be enabled by general law to vote at all elections by the people”<sup>106</sup> The court focused on the word “may” and decided, based on the word’s plain and ordinary meaning, the legislature has the discretion to permit absentee voting under conditions it provides.<sup>107</sup> Ultimately, the court concluded Article VIII, Section 7 applies to *both* absentee and mail-in ballots because voters who cast a mail-in ballot are similarly “absent” from the poll.<sup>108</sup>

After concluding the right to vote absentee is not fundamental and is instead provided at the will of the legislature, the court stated the Missouri Legislature exercised its constitutional authority in passing Senate Bill 631.<sup>109</sup> The court affirmed the notary requirement included in the bill as a valid “safeguard to protect the ‘privilege’ of absentee voting.”<sup>110</sup> To bolster this reasoning, the court looked to history and explained that the Missouri Legislature had exercised its discretion to allow absentee voting for more than 100 years, and the safeguards employed for COVID-19 complied with this exercise of constitutional power.<sup>111</sup>

### C. Judge Wilson’s Concurrence

Judge Wilson concurred that § 115.277(2) does not allow Missouri voters who voluntarily confine themselves to cast an absentee ballot without a notary.<sup>112</sup> He added, however, that Senate Bill 631 *should have* provided this right.<sup>113</sup> Judge Wilson emphasized that Appellants focused their attention on the wrong part of § 115.277.1.<sup>114</sup> Appellants, he noted, should have focused on the word “expects,” as stated in the statute, instead of concentrating on the phrase “due to illness.”<sup>115</sup> By focusing on the expectation element, Judge Wilson argued, a voter would need only an “expect[ation]” – a genuine yet entirely subjective belief – that they may be confined on Election Day due to COVID-19, not that they actually *will* be confined.<sup>116</sup> Shifting this focus would allow a Missouri voter who

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<sup>106</sup> *NAACP v. State*, 607 S.W.3d at 735.

<sup>107</sup> *Id.* (citing *State ex rel. Dresser Indus., Inc. v. Ruddy*, 592 S.W.2d 789, 794 (Mo. 1980) (en banc) (“The plain and ordinary meaning of the word ‘may’ is permissive.”)).

<sup>108</sup> *NAACP v. State*, 607 S.W.3d at 735.

<sup>109</sup> *Id.* at 729.

<sup>110</sup> *Id.* at 735.

<sup>111</sup> *Id.* at 735–36. Before dismissing Appellants’ constitutional claim, the court clarified that Appellants specifically stated they do not challenge the new absentee and mail-in ballot statutes on any other constitutional grounds. *Id.* at 736.

<sup>112</sup> *Id.* (Wilson, J., concurring).

<sup>113</sup> *Id.* at 737.

<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 737–38.

“expects” to be confined on Election Day based on a genuinely held, subjective belief to vote absentee without a notary within the meaning of § 115.277.1(2).<sup>117</sup> In addition, Judge Wilson noted the high prevalence of COVID-19 in Missouri at the time of the court’s opinion, which further justified a voter’s belief that they might contract this highly contagious virus, and therefore “expecting to be confined.”<sup>118</sup>

#### *D. Judge Stith’s Concurrence in Part, Dissent in Part*

Judge Stith concurred in the denial of Count II, reiterating that because Missouri citizens’ right to vote absentee is based on statute and not the Missouri Constitution, citizens had not been deprived of a constitutional right by the notary requirement.<sup>119</sup> However, Judge Stith dissented as to Count I and argued § 115.277.1(2) includes individuals, such as the named Appellants, who expect to voluntarily confine themselves on Election Day.<sup>120</sup> With the belief that these individuals fall within the meaning of “confinement due to illness” under § 115.277.1(2), Judge Stith argued they could vote absentee without a notary or other formal authorization.<sup>121</sup>

To bolster her dissent on Count I, Judge Stith provided a detailed statutory interpretation of § 115.277.1(2).<sup>122</sup> Judge Stith, like Judge Wilson, focused on the language of the statute from the perspective of the voter.<sup>123</sup> Notably, Judge Stith focused on the phrase “expects to be prevented from going to the polls due to ... [i]ncapacity or confinement due to illness. . . .”<sup>124</sup> Judge Stith argued that with the high prevalence of COVID-19 in Missouri, voters have a reasonable expectation that they may contract COVID-19 on Election Day or otherwise be required to confine themselves due to contract tracing.<sup>125</sup> Further, Judge Stith argued

<sup>117</sup> *Id.* at 738.

<sup>118</sup> *Id.* at 728 (majority opinion) (this opinion was published on October 9, 2020). Judge Wilson cited Missouri’s “COVID-19 infection rates: more than 1,500 new cases per day and projected that by election day, the number of Missourians infected by COVID-19 was expected to reach 160,000. *Id.* at 738 (Wilson, J., concurring).

<sup>119</sup> *Id.* at 739 (Stith, J., concurring).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.* at 739.

<sup>122</sup> *Id.* at 739–40.

<sup>123</sup> *Id.* at 740.

<sup>124</sup> *Id.*

<sup>125</sup> *Id.* Contract tracing occurs when an individual is informed, they may have been exposed to COVID-19 and they are required to monitor their health for signs and symptoms, get tested, and self-isolate until the individual is certain they are not infected due to this exposure. *Contact Tracing*, CENTER FOR DISEASE CONTROL (Feb. 25, 2021), <https://www.cdc.gov/coronavirus/2019-ncov/daily-life-coping/contact-tracing.html> [<https://perma.cc/955D-WA4C>] (select “Testing” from the left side navigational tool bar; then select “Contact Tracing”).

the plain language of § 115.277.1(2) would include individuals required to quarantine because of personal illness or exposure, along with those who are voluntarily confining due to the prevalence of the virus in the community.<sup>126</sup>

In addition to the plain language of the statute, Judge Stith argued the legislative history of § 115.277.1(2) proves the statute was meant to include those who voluntarily confine themselves on Election Day.<sup>127</sup> Although the legislature could not have precisely planned for the COVID-19 pandemic, Judge Stith argued the history of the statute shows the legislature anticipated situations where an individual could not vote due to the elector's risk of contracting an illness.<sup>128</sup> First, citing back to the first absentee voting provision in Missouri enacted in 1917, Mo. Rev. Stat. § 471, the statute permitted absentee voting if the voter was otherwise occupied by business or duties, without any mention of an illness.<sup>129</sup> In 1939, the statute was amended to allow absentee voting if the voter "expects" to be absent from their county on Election Day.<sup>130</sup> Then, in 1944, for the first time, the absentee statute mentioned "personally" being prevented from going to the polls "through illness or disability."<sup>131</sup> Finally, in 1982, the legislature removed the clause which required the elector to be *personally* prevented from going to the polls.<sup>132</sup> Judge Stith argued that if the legislature wanted to limit the power to vote absentee, it would have done so in the various iterations of the statute.<sup>133</sup> Then, rather than continue to amend § 471, the legislature enacted § 115.277.1(7), which specifically identifies the situation where a voter is at-risk for contracting, or has contracted, COVID-19.<sup>134</sup> Judge Stith argued this provision includes only the at-risk voters, separate from those covered by § 115.277.1(2).<sup>135</sup> Therefore, she stated, individuals who voluntarily confine themselves fall under subsection two.<sup>136</sup> Judge Stith acknowledged that some individuals qualify under both § 115.277.1(2) and (7), but argued that these provisions should be read *in pari materia* –

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<sup>126</sup> *NAACP v. State*, 607 S.W.3d at 740 (Stith, J., concurring).

<sup>127</sup> *Id.* at 741.

<sup>128</sup> *Id.*

<sup>129</sup> *Id.*

<sup>130</sup> *Id.*

<sup>131</sup> *Id.* ("Any ... qualified elector ... who expects to be absent ... or any person who through illness or physical disability expects to be prevented from personally going to the polls . . .").

<sup>132</sup> *Id.*

<sup>133</sup> *Id.* at 741–42. Compare MO. REV. STAT. § 115.277 (1986), with MO. REV. STAT. § 115.277 (2016).

<sup>134</sup> *NAACP v. State*, 607 S.W.3d at 742 (Stith, J., concurring).

<sup>135</sup> *Id.*

<sup>136</sup> *Id.* at 745.



in light of each other – to achieve their common purpose.<sup>137</sup> Lastly, to support her argument that the statute includes voluntary confinement, Judge Stith noted several other states with similar provisions that, unlike Missouri, enacted emergency regulations or executive orders expressly declaring “confined due to illness” included individuals who voluntarily confine themselves based on recommended guidelines, personal avoidance, or attempts to reduce the spread of COVID-19.<sup>138</sup>

## V. COMMENT

The COVID-19 pandemic swept the country by storm and demanded prompt action by states and the nation as a whole. States took various approaches to provide their citizens with the ability to vote absentee in a manner that struck a balance between safe participation and election integrity.<sup>139</sup> Although one can only hope the hardships caused by COVID-19 are an anomaly and will not recur in the future, the reality is our nation is constantly facing new challenges that require adaptation. The decision in *NAACP v. State* provides a roadmap for future litigation because the factors set forth by the court provide guidance for future decisions where the outcome depends on nuances contained in a statutory phrase.<sup>140</sup>

### A. Missouri’s Gold Standard for Statutory Interpretation

The court articulated, first and foremost, that its gold standard for the interpretation of a statute is to look at the “plain and ordinary meaning” of the words.<sup>141</sup> Although all three opinions clearly identified this method as the preferred canon of interpretation – each judge separately beginning his or her analysis with this principle – this technique provided little value when the “plain” meaning seemingly differed from one judge to another. The per curiam opinion went as far as citing Webster’s Dictionary to prove the plain language.<sup>142</sup> Further, by a simple shift in focus to a different section of the statutory provision, this “plain and ordinary” meaning is subject to manipulation and contrary interpretations.<sup>143</sup> While the “plain and ordinary” meaning of the words in a statute is likely the best place for litigators to begin their analysis since this is what the court seemingly

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<sup>137</sup> *Id.* Judge Stith explained that if one statute is not listed as an exclusive remedy, then both can be used. *Id.* at 743 (citing *Director of Revenue v. Westinghouse Credit Corp.*, 787 S.W.2d 715, 717–18 (Mo. 1990) (en banc)).

<sup>138</sup> *Id.* at 744–45.

<sup>139</sup> *See id.*

<sup>140</sup> *Id.* at 728 (majority opinion).

<sup>141</sup> *Id.* at 732.

<sup>142</sup> *Id.* at 733 (citing *Illness*, Webster’s New Int’l Dictionary 1127 (3d ed. 2002)).

<sup>143</sup> *Id.*

values the most, this canon may create more confusion if the words' plain meaning can be interpreted in various ways.<sup>144</sup>

The court also emphasized providing value to each provision the legislature enacts, recognizing that legislators do not include meaningless provisions.<sup>145</sup> Taking this canon in a broader context, the court is likely to find recent enactments not only persuasive for future interpretations but “dispositive” of a statute's meaning. This principle becomes especially important during periods of crisis when new legislation is enacted in response to an emergency.<sup>146</sup> While the plain and ordinary meaning might not always be clear, courts find legislators' actions – creating and implementing amendments – highly instructive for the purpose of deciphering these new and existing provisions.<sup>147</sup> Further, as the court implied in its opinion and as Judge Stith expressly stated in her concurrence in part and dissent in part, newly enacted provisions must be interpreted in harmony with existing provisions.<sup>148</sup> However, as shown by the stark contrast between the per curiam ruling and the decision reached by Judge Stith's dissent in part, this harmonious interpretation is not always helpful because judges dispute whether statutory provisions can encompass overlapping categories.<sup>149</sup>

Perhaps most importantly, underlying the per curiam's decision in *NAACP v. State* was the consideration of future implications from the court's decision.<sup>150</sup> The per curiam opinion mentioned in passing, while critiquing Appellants' broad interpretation of the provision, that allowing individuals who voluntarily confine themselves to vote absentee could result in a future where almost any Missouri registered voter could vote absentee without a notary's acknowledgement for the simple fear of contracting the common cold.<sup>151</sup> This passing remark cannot be understated. Decisions by courts of any level have sweeping impacts, let alone those of the highest court in the state. While fighting over the interpretation of individual words, phrases, and enacted provisions is helpful to decipher meaning, it is essential to understand the claims and frame arguments in a way that will result in a positive impact for the future. The legal system is based on precedent, and decisions interpreting state

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<sup>144</sup> *Id.*

<sup>145</sup> *Id.*

<sup>146</sup> *See, e.g., id.* at 734.

<sup>147</sup> Missouri State Conference of Nat'l Ass'n for the Advancement of Colored People v. State, 607 S.W.3d 728, 731 (Mo. 2020).

<sup>148</sup> *Id.* at 734, 743 (majority opinion) (Stith, J. concurring).

<sup>149</sup> *Id.* at 743 (Stith, J., concurring).

<sup>150</sup> *Id.* at 733–34 (majority opinion).

<sup>151</sup> *Id.* at 733.

statutes have far-reaching, rippling effects beyond the interpretation of provisions in a specific dispute.<sup>152</sup>

### B. “Ability” to Vote Absentee in Missouri

The court quickly decided the constitutional claims, which were thoroughly briefed and argued by Appellants and the State by finding – in unanimous agreement – Missouri citizens do not have a constitutional right to vote absentee.<sup>153</sup> Without any fundamental right, the court gave immense deference to the legislature, as provided in § 115.302, to enact measures to safeguard the voting process away from the polls.<sup>154</sup> The court’s narrow interpretation of absentee voting rights may have increasing impacts on the future as the electorate ages. An aging population creates more “at-risk” individuals who cannot obtain an absentee ballot outside of the narrow Senate Bill 631 provision.<sup>155</sup> Courts may face challenges as Missouri’s aging population raises similar concerns and argues for the need to vote absentee based on health concerns caused by crowded Election Day polling.<sup>156</sup> The decision in *NAACP v. State* indicates the court’s preference to respect the separation of powers and grant broad discretion to the Missouri Legislature in order to protect the integrity of elections. Safeguarding and authenticating votes clearly comes at a cost. Individuals may expose themselves to vulnerable situations, comprising their health for the sake of their right to vote. It is an imperfect solution to the problem of balancing compelling rival concerns. Nonetheless, if future disputes arise surrounding the expansion of absentee voting provisions based on aging populations or unexpected health crises, the court has guided litigants on ways to interpret these provisions along with decisively ruling that the “right” to vote absentee is best termed as the “ability” to vote absentee—a privilege conferred at the discretion of the legislature.

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<sup>152</sup> See, e.g., *id.* at 733–34.

<sup>153</sup> *Id.* at 735.

<sup>154</sup> MO. REV. STAT. § 115.302 (2020).

<sup>155</sup> S.B. 631, 100th Leg., 2nd Spec. Sess. § 115.277 (Mo. 2020) (“115.302. 1. Any registered voter of this state may cast a mail-in ballot as provided in this section. Nothing in this section shall prevent a voter from casting an absentee ballot, provided such person has not cast a ballot pursuant to this section. Application for a mail-in ballot may be made by the applicant in person, or by United States mail, or on behalf of the applicant by his or her guardian or relative within the second degree of consanguinity or affinity.”).

<sup>156</sup> See *Policy Academy State Profile*, CMTY. LIVING (JUNE 18, 2012), <https://acl.gov/sites/default/files/programs/2016-11/Missouri.pdf> [<https://perma.cc/5GKE-6XWP>] (estimating that by 2030, 25% of Missouri’s population will be above 60 years old).

## VI. CONCLUSION

So, what now? What importance does this opinion serve beyond the context of voting in a pandemic? In *NAACP v. State*, the Supreme Court of Missouri provided a clear explanation regarding the canons it uses to interpret a statute. Recognizing and understanding which canons the court finds most persuasive can help resolve future disputes and allow attorneys to successfully advocate for their clients. Further, this decision clarifies that Missouri voters do not have a constitutional right to vote absentee. Instead, legislators hold the power to confer or restrict this privilege. As the power to vote absentee without a notary's authorization is clearly within the discretion of the legislature, it is now more important than ever for litigants recognize and apply the canons of interpretation the Supreme Court of Missouri finds most persuasive to prevail in future disputes.