

Different Rules for Excuse-Based Absentee Voting and Pandemic-Related Mail Voting

Organization for Black Struggle v. Ashcroft
(Brian C. Wimes, W.D. Mo. 2:20-cv-4184)

A district judge determined that it was not proper to require voters who were voting by mail because of social distancing made necessary by an infectious pandemic to mail in their ballots while allowing voters voting absentee because of another excuse to hand-deliver their ballots. The judge did not enjoin rejection of mailed-in ballots with errors even without notice and opportunities to cure the errors. The court of appeals stayed the district judge's injunction, finding reasonable a decision not to expand opportunities for hand-delivering ballots before election day during a pandemic.

Subject: Absentee and early voting. *Topics:* Early voting; absentee ballots; equal protection; Covid-19; interlocutory appeal; class action.

At a time when opportunities to vote by mail in Missouri were expanded because of social distancing made necessary by the global Covid-19 infectious pandemic, five organizations filed a federal complaint on Thursday, September 17, 2020, in the Western District of Missouri against state and county election officials challenging (1) electronic acceptance of excuse-based absentee-ballot requests but not pandemic-related mail-ballot requests, (2) rejection of ballots for immaterial technicalities, and (3) lack of mandatory opportunities to cure technical defects.¹ With their complaint, the plaintiffs filed a motion to certify a class of 116 local election authorities.² Two days later, the plaintiffs filed a motion for a temporary restraining order and a preliminary injunction.³

On Monday, Judge Brian C. Wimes set the case for a telephonic status conference on the following Thursday, providing contact information to counsel by email.⁴

Judge Wimes granted the plaintiffs some relief on October 9.⁵

The Court recognizes Plaintiffs' argument is somewhat counter-intuitive. Plaintiffs are seeking the opportunity for remote voters, who were

1. Complaint, *Org. for Black Struggle v. Ashcroft*, No. 2:20-cv-4184 (W.D. Mo. Sept. 17, 2020), D.E. 1; *Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790, 795 (W.D. Mo. 2020); see Kurt Erickson, *With Early Voting Underway, Missouri Facing a Trio of Lawsuits Over Mail-In Ballots*, St. Louis Post-Dispatch, Sept. 24, 2020, at A6.

2. Class-Certification Motion, *Org. for Black Struggle*, No. 2:20-cv-4184 (W.D. Mo. Sept. 17, 2020), D.E. 5.

3. Injunction Motion, *id.* (Sept. 19, 2020), D.E. 23; see *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603, 605 (8th Cir. 2020).

4. Docket Sheet, *Org. for Black Struggle*, No. 2:20-cv-4184 (W.D. Mo. Sept. 17, 2020) [hereinafter W.D. Mo. Docket Sheet] (D.E. 26).

5. *Org. for Black Struggle*, 493 F. Supp. 3d 790; see Kurt Erickson, *Federal Court Orders Change to Mail-In Voting While Missouri's High Court Affirms Law*, St. Louis Post-Dispatch, Oct. 10, 2020, at A1.

hoping to avoid exposure to the coronavirus by voting remotely, to go to the polling places those voters were trying to avoid. However, allowing all remote voters to deliver his or her completed ballot in person to the [local election authority (LEA)] provides for all remote voters, and not just those eligible to vote absentee, to avoid the potential risk of coronavirus that they might otherwise not be able to avoid at their polling place on election day.

In sum, considered alone, requiring a remote voter to put a ballot in a mailbox does not sound like a particularly arduous or severe burden. However, Defendants have presented no reasonable justification for different treatment of remote voters. On this basis, because the right to vote is at issue and the risk is total disenfranchisement even if the voter does everything right, and because the Defendants already have a scheme in place to accommodate remote ballots, the Court finds Plaintiffs likely to succeed on the merits of Count I as it relates to the manner in which remote ballots can be returned to the election authority.⁶

But Judge Wimes denied relief from requirements that mailed ballots be submitted without errors, because voters do not have a constitutionally protected right to vote by mail.⁷

Because of the nearness of the November 3 election, he required Missouri's election officials to accept remote ballots in person but not remote-ballot applications.⁸

He stayed his injunction pending appellate review,⁹ and the court of appeals stayed the injunction on October 23 by a vote of two to one.¹⁰ The majority concluded that it was reasonable for the state to grant expanded opportunities to vote by mail while limiting personal contact between voters and election officials.¹¹ The court of appeals granted a joint motion to dismiss the appeal a month after the election.¹²

In 2021, Judge Wimes dismissed an amended complaint in large part because the election was over.¹³

6. *Org. for Black Struggle*, 493 F. Supp. 3d at 801–02.

7. *Id.* at 802–05.

8. *Id.* at 805–06.

9. W.D. Mo. Docket Sheet, *supra* note 4 (D.E. 68); *see Federal Judge Delays Order on Missouri's Mail-In Ballots While Ashcroft Appeals*, St. Louis Post-Dispatch, Oct. 11, 2020, at A2.

10. *Org. for Black Struggle v. Ashcroft*, 978 F.3d 603 (8th Cir. 2020); *see Kurt Erickson, Missouri Voters Must Return Mail-In Ballots Via the Postal Service Under New Court Ruling*, St. Louis Post-Dispatch, Oct. 23, 2020, at A6.

11. *Org. for Black Struggle*, 978 F.3d at 608.

12. Judgment, *Org. for Black Struggle v. Ashcroft*, No. 20-3121 (8th Cir. Dec. 4, 2020).

13. Judgment, *Org. for Black Struggle v. Ashcroft*, No. 2:20-cv-4184 (W.D. Mo. Sept. 28, 2021), D.E. 121; Opinion, *id.* (Sept. 28, 2021), D.E. 120; W.D. Mo. Docket Sheet, *supra* note 4 (noting permission to join a dismissal motion by Greene County's clerk granted to St. Charles County and St. Louis County election officials, D.E. 116); Opinion, *Org. for Black Struggle*, No. 2:20-cv-4184 (W.D. Mo. Mar. 12, 2021), D.E. 113 (allowing Jackson County election officials to join the Greene County motion); Opinion, *id.* (Mar. 9, 2021), D.E. 112, 2021 WL 1318011 (granting a dismissal motion by Missouri's secretary of state); *see Amended Complaint, id.* (Dec. 9, 2020), D.E. 84.