

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

ORGANIZATION FOR BLACK)	
STRUGGLE, ST. LOUIS, <i>et al.</i> ,)	
)	
Plaintiffs,)	
)	No.: 2:20-cv-4184-BCW
vs.)	
)	
John R. Ashcroft, et al.,)	
)	
)	
Defendants.)	

**SUGGESTIONS OF DEFENDANT ST. LOUIS COUNTY BOARD OF ELECTION
COMMISSIONERS IN RELATION TO THE PLAINTIFFS' MOTION FOR A
TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION**

Defendant St. Louis County Board of Election Commissioners (“Election Board”) by and through the undersigned Counsel submits its suggestions in relation to Plaintiffs’ pending Motion for a Temporary Restraining Order and Preliminary Injunction.

Introduction

In accordance with Sections 115.015 and 115.023 of the Revised Statutes of Missouri (“RSMo”), the Election Board is the election authority responsible for administering elections in St. Louis County, Missouri. As discussed herein, the Election Board does not take a position on the merits of Plaintiffs’ Motion. The Election Board’s primary interest is that in the event relief is granted to Plaintiffs in connection with the case at bar, that the relief not impact the Election Board’s ability to conduct a free, fair, safe and secure election.

Discussion

I. The Election Board must conduct the election in conformity with State Law.

Section 115.295 RSMo provides that “[i]f the statements on any ballot envelope have not been completed, the absentee ballot in the envelope shall be rejected.” Further, “a failure to follow the specific requirements of absentee voting laws is enough to find legal fraud.” *Franks v. Hubbard*, 498 S.W.3d 862, 868 (Mo. App. E.D. 2016).

The Missouri Supreme Court has long recognized that a board charged with ministerial duties would be usurping the functions of the Court if it was to refuse to follow a statute on the basis that it believed it to be unconstitutional. *See State ex rel. Wulfig v. Mooney*, 247 S.W.2d 722, 725 (Mo. banc 1951):

In considering this subject, we ought to keep in mind the difference between the act of a ministerial officer in obeying the mandate of a statute and his act in disobeying it. *If he yields obedience to the law, it can never be said that he has assumed the judicial function of passing judgment on its validity; but, if he refuse to obey it on the ground that, in his opinion, it is unconstitutional, he lays himself liable to the imputation of assuming a judicial function.*”

Quoting State ex rel. Missouri & N. A. R. Co. v. Johnston, 137 S.W. 595 (Mo. 1911) (italics added by the Court in *Wulfig*).

As discussed in the Complaint and the evidence submitted by the Plaintiffs in support of the instant Motion, the Election Board received absentee ballots with incomplete statements. *See e.g. Declaration of Jennifer S. Lohman*, Doc. # 27-6. In some instances the required checkmark boxes related to the voters’ addresses had not been completed. *See e.g. Declaration of Jennifer S. Lohman*, Doc. # 27-6. The rejection of such ballots was consistent with Section 115.295 RSMo. As also discussed by Plaintiffs, efforts were made where possible to contact voters whose ballots were rejected for a failure to complete the necessary statements so that they could be corrected. *See e.g. Declaration of Jennifer S. Lohman*, Doc. # 27-6.

Furthermore, in order to reduce such instances during the November 2020 Election cycle, the Election Board has changed the ballot return envelope to remove the check mark box, and incorporate the necessary statement as to the voter's current address into the text of the affidavit. *See Declaration of Eric Fey*, attached hereto as Exhibit 1 and incorporated herein by reference.

Until, and unless, this Court grants relief to Plaintiffs the Election Board cannot disregard the mandate set forth in Section 115.295 RSMo. *See Franks and State ex. Rel. Wulfing, supra*. Of course if this Court does order any of the relief requested by Plaintiffs, the Election Board will immediately comply with any such order.

II. Any relief that would require the revising of ballot envelopes or additional mailings would likely jeopardize the November 2020 election.

As of the date of filing, the election is a little more than thirty days away and absentee and mail-in voting is well underway. (*See* Section 115.302 RSMo, absentee and mail-in ballots, and envelopes, are to be made available not later than the sixth Tuesday prior to the election). As established in the submittals from the Plaintiffs, the Election Board has received a significantly higher number of requests for absentee ballots than in prior election cycles. *See e.g. Declaration of Jennifer S. Lohman*, Doc. # 27-6. This, coupled with the ongoing global pandemic, makes the conducting of the upcoming election even more administratively challenging than usual.

If the Plaintiffs were to prevail, and this Court were to order any relief that would require the revising of ballot envelopes or the preparation of any additional mailing to voters, such requirements would be virtually impossible to be achieved without jeopardizing the election, in light of the fact that voting has already begun. The Election Board could utilize other methods, including news media and its social media platforms, to help announce any ordered changes to the voting requirements.

III. In the event the Plaintiffs prevail, fees should not be assessed against the Election Board.

Plaintiffs seek an award of attorneys' fees against Defendants, which if the Plaintiffs prevail would include the Election Board. The Election Board is not taking a position as to the merits in this case and is not undertaking any action to cause the Plaintiffs to incur additional time and costs.

The Election Board recognizes that attorney fees have been awarded against county officials in relation to invalidated state statutes, *see Carhart v. Sternberg*, 192 F.3d 1142 (8th Cir. 1999). However, the case at bar is readily distinguishable. In *Carhart*, this Court found that a County Attorney (in his official capacity) was liable for attorneys' fees even though he had not actively participated in defending a statute found to be unconstitutional, where he "made it clear that he would prosecute under the statute" and "[h]e relied on his codefendants to present their defenses of the constitutionality of the [statute]." *Id.* at 1152. Accordingly, the Eighth Circuit found that the County Attorney could not avoid paying the prevailing party's attorneys' fees in *Carhart*. *Id.* Crucially in reaching its conclusion this Court, in *Carhart*, recognized that the County Attorney "has the discretion to choose when to prosecute." *Id.*

Carhart, thus, is distinguishable from the case at bar as for the reasons discussed *supra*, as the Election Board is not vested with the discretion to elect not to follow the statutory directives related to absentee voting. *See Franks and State ex. Rel. Wulfig, supra.*

Conclusion

As discussed above, the Election Board does not take a position on the merits in this case, and will comply with any order of this Court to the fullest extent possible in the event the Plaintiffs are granted the requested relief. However, the Election Board does not believe that an award of attorneys' fees and costs against it would be proper if the Plaintiffs were to prevail.

Respectfully submitted,

CURTIS, HEINZ, GARRETT & O'KEEFE, P.C.

/s/ Steven W. Garrett

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CERTIFICATE OF SERVICE

A copy of the above and foregoing was electronically filed using the CM/ECF filing system, and a copy was made available to all electronic filing participants this 1st day of October, 2020.

/s/ Steven W. Garrett