**IN THE CIRCUIT COURT OF ST. LOUIS COUNTY**

**STATE OF MISSOURI**

PAUL BERRY, III, )

 ) Case No. 20SL-CC06090

 Contestant, ) Div. 9

 )

SAM PAGE, )

 ) Date: January 19, 2021

 Contestee. )

**ORDER AND JUDGMENT**

This matter is before the Court on Constestee [[1]](#footnote-1) Sam Page’s (Dr. Page) motion to dismiss for failure to state a claim, as electronically filed on December 23, 2020. This motion was heard and submitted via teleconference hearing on January 7, 2021, pursuant to the Supreme Court of Missouri’s operational directives regarding Covid-19, with Contestant Paul Berry, III (Mr. Berry) appearing pro se and Dr. Page appearing through and by his counsel, Attorneys Matthew B. Vianello and Bradley Ketcher. The Court, being advised in the premises, enters its order and judgment as follows:

**The First Amended Petition**

On December 17, 2020, Mr. Berry filed his first amended petition for election challenge pursuant to section 115.553 RSMo., challenging “the certification of the St. Louis County Executive General Election held on November 3, 2020 (hereinafter 2020 General Election), and certified by the Board of Election Commissioners of St. Louis County pursuant to [Section] 115.507 of the Missouri Revised Statutes on November 17, 2020.”

In his first amended petition, Mr. Berry avers that there were alleged irregularities during the 2020 General Election that were of sufficient magnitude to cast doubt on its validity and would require a new election, specifically claiming irregularities for: (1) the certification of 2020 St. Louis County General Election which did not include a categorization of the number of regular and absentee votes cast in the election and how those votes were cast, as required by § 115.507 RSMo. (election certification); (2) no excuse mail-in ballots authorized by § 115.302.1 RSMo as being unconstitutional (no excuse mail-in ballots); (3) St. Louis County voters’ privacy rights which were violated when required to place their unfolded paper ballots in ballot boxes, potentially exposing selections or votes for St. Louis County Executive (St. Louis County voters’ privacy rights); (4) the Board of Election Commissioners consolidation of polling places that violated Missouri law by permitting registered voters to cast votes at any polling place, instead of “a single polling place” as required by Missouri law (consolidated polling places); and (5) the election authority’s failure to remove Dr. Page from the general election ballot because Dr. Page failed to properly file a personal financial disclosure statement (personal financial disclosure statement).

**Missouri Law**

 Under Missouri’s Comprehensive Election Act, § 115.593 RSMo. provides in pertinent part that “[i]f the court . . . trying a contested election determines there were irregularities of sufficient magnitude to cast doubt on the validity of the initial election, it may order a new election for the contested office[.]”

Mr. Berry, in his first amended petition, is requesting that this Court order a new election. However, ordering a new election is a very drastic measure and should be used sparingly. *Garrard v. Board of Election Commissioners*, 913 S.W.2d 88, 90 (Mo. App. E.D. 1995). Even if an election has irregularities, they nonetheless seldom result in a new election because of the drastic nature of ordering a new election. Id. “Only when the trial court is firmly convinced irregularities affected the outcome of the election should an election be voided.” Id., citing *Board of Election Commissioners v. Knipp*, 784 S.W.2d 797, 798 (Mo. banc 1990).

Also, for Mr. Berry’s amended petition to state a cause of action, his allegations in the amended petition must assert sufficient facts to demonstrate how the alleged violations affected the outcome of the election. If the facts asserted in the amended petition are not sufficient to demonstrate how the alleged violation affected the outcome of the 2020 General Election, Mr. Berry’s amended petition does not state a cause of action and must be dismissed. See Id.

**Analysis**

 After reviewing Mr. Berry’s first amended petition, his allegations do not sufficiently demonstrate how his alleged violations affected the outcome of the 2020 General Election.

Mr. Berry’s first allegation regarding election certification does not show how the election authority’s alleged technical failure to identify the number of absentee ballots affected the outcome of the election. This *technical failure,* as alleged in this matter,is not the type of conduct that is sufficient for a new election and nothing in the statute, based on this allegation, renders the election void. Also, this allegation should not be able to frustrate St. Louis County voters’ rights to have their ballots counted. See, e.g., *State ex rel. Nichols v. Schmoutey*, 418 S.W.2d 385, 387 (Mo. App. 1967).

 Mr. Berry’s second allegation regarding “no excuse” mail-in ballots, specifically claiming that § 115.302.1 RSMo is unconstitutional, is conclusory in nature and not supported by Missouri law. Contrary to Mr. Berry’s assertion, recently and prior to the election the Missouri General Assembly passed and Governor Michael L. Parson signed Senate Bill 631 into law. This senate bill also created § 115.302.1 RSMo. that authorized the use of “no excuse” mail-in ballots. The Supreme Court of Missouri recognized the constitutionality of this law in *NAACP v Missouri*, 607 S.W.3d 728 (Mo. banc 2020) by ruling that “[t]he legislature exercised its constitutional authority by passing SB 631, which expanded absentee voting in Missouri in response to the COVID-19 pandemic.” Id., at p 735.

 Mr. Berry’s third allegation that St. Louis County voters’ privacy rights were violated is speculative. Mr. Berry essentially bases this allegation on the *possibility* that others may be enabled to see “how any voter votes or has voted when utilizing each ballot box machine . . .” This allegation, however, does not show how the votes were impacted, and therefore fails to demonstrate how the alleged privacy right violation, technical in nature, affected the outcome of the 2020 General Election. Also, this *technical violation,* as alleged in this matter,is not the type of conduct that is sufficient for a new election, and it should not be able to frustrate St. Louis County voters’ rights to have their ballots counted. See *Nichols*, infra.

 Mr. Berry’s fourth allegation regarding consolidated polling places is not sufficient to justify a new election. Mr. Berry may not have the legal standing to raise this issue in this lawsuit because this allegation challenges the consolidation of polling places and not the correctness of vote return pursuant to § 115.553.1 RSMo. See *Royster v. Rizzo*, 326 S.W.3d 104, 118 (Mo. App. W.D. 2010). Even assuming legal standing, there is no allegation that any voter “was required to go to more than one polling place to vote on the same day.” § 115.115.3 RSMo. To the extent that this allegation is claiming a violation of a technical procedure, it still does not show how the votes were impacted, and therefore fails to demonstrate how the alleged violation, technical in nature, affected the outcome of the 2020 General Election. This *technical violation,* as alleged in this matter,is also not the type of conduct that is sufficient for a new election and should not be able to frustrate St. Louis County voters’ rights to have their ballots counted. See *Nichols*, infra.

 Mr. Berry’s fifth and final allegation that Dr. Page should have been removed from the general election ballot because he failed to properly file a personal financial interest statement is not an election “irregularity” that may be considered for a new election under § 115.553.1 RSMo., but instead this allegation is a challenge of a candidate’s qualification. See, e.g., *Miller v. Frank*, 519 S.W.3d 472, 477 (Mo. App. E.D. 2017).

 Additionally, Mr. Berry’s first amended petition does not allege any irregularity, such as allegations of voting fraud, the unlawful prevention of voting, improperly completed ballots, or votes submitted by unqualified voters, that would cast doubt on the election results. There is nothing in his allegations that would call into doubt the accuracy of the results of the 2020 General Election. Id.

**Order and Judgment**

ACCORDINGLY, because of the above foregoing reasons, this Court is not firmly convinced that the alleged irregularities affected the outcome of the 2020 General Election and therefore Contestee Sam Page’s motion to dismiss is granted and sustained. Contestant Paul Berry, III’s first amended petition is dismissed with prejudice at Contestant’s costs.

 **So Ordered:**

**Date: January 19, 2021 \_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_\_**

 **David Lee Vincent, III**

 **Circuit Judge, Division 9**

cc: Mr. Paul Berry, III, Contestant, pro se

 Attoneys of Record

1. It is noted that Sam Page is designated as Contestee in this matter. § 115.526.3 RSMo., however, defines contestee as “the candidate whose declaration of candidacy or qualifications are challenged.” In his lawsuit, Mr. Berry, as a candidate, is not challenging Dr. Page’s declaration of candidacy or qualifications but is challenging the St. Louis County election results pursuant to § 115.553.1 RSMo., and that many of his first amended petition’s allegations are directed against the St. Louis County Counselor and the Board of Election Commissioners of St. Louis County. It is also noted that subsection 2 of § 115.553 RSMo, for voters challenging election questions, the election authority is considered the contestee. [↑](#footnote-ref-1)