**IN THE SUPREME COURT OF MISSISSIPPI**
**NO. 2020-CA-00983-SCT**

MICHAEL D. WATSON, JR., in his official capacity as the Mississippi Secretary of State, *et al.*,

*Defendants-Appellants*

v.

HARRIET OPPENHEIM, *et al.*,

*Plaintiffs-Appellees*

On Appeal from the Chancery Court
of Hinds County, Mississippi

# BRIEF OF PLAINTIFFS-APPELLEES–CROSS-APPELLANTS

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## CERTIFICATE OF INTERESTED PERSONS

The undersigned counsel of record certifies that the following listed persons have an interest in the outcome of this case. These representations are made so that the justices of the Mississippi Supreme Court may evaluate possible disqualification or recusal:

1. Secretary of State Michael Watson, Appellant/Cross-Appellee;

2. Kristi H. Johnson, Krissy C. Nobile, Justin L. Matheny, and Douglas T. Miracle, Mississippi Attorney General's Office, Counsel for Appellant/Cross-Appellee Secretary of State Watson;

3. Harriett Oppenheim, Dave Miller, Joy Parikh, Martin Clapton, Mary Harwell, and Michelle Colon, Appellees/Cross-Appellants;

4. Robert B. McDuff and Reilly Morse, Mississippi Center for Justice, Counsel for Appellees/Cross-Appellants;

5. Joshua Tom, Landon Thames, Jonathan Topaz, Theresa Lee, and Dale Ho, ACLU of Mississippi, Counsel for Appellees/Cross-Appellants;

6. Rankin County Circuit Clerk Becky Boyd, Appellant/Cross-Appellee;

7. William Trey Jones, III and Jacob A. Bradley, Brunini, Grantham, Grower & Hewes, PLLC, Counsel for Appellant/Cross-Appellee Boyd;

8. Hinds County Circuit Clerk Zack Wallace, Defendant-below;

9. Tony R. Gaylor and Rayford G. Chambers, Chambers & Gaylor, PLLC, Counsel for Defendant-below Wallace; and

10. Hon. Denise S. Owens, Hinds County Chancery Court Judge.

This the 9th day of September, 2020.

/s/ Landon Thames
Landon Thames

## TABLE OF CONTENTS

## TABLE OF AUTHORITIES

### Cases



### Statutes



### Other Authorities

Emily Zemler, *In Quarantine, Love Is Finally Prioritizing My Family*, Glamour (May 21, 2020), https://www.glamour.com/story/in-quarantine-love-is-finally-liking-my-family .....12

Kathy Katella, *Quarantine 15? What to Do About Weight Gain During the Pandemic*, Yale Medicine (July 1, 2020), https://www.yalemedicine.org/stories/quarantine-15-weight-gain-pandemic/ .....12

Luke Ramseth, *Many states are allowing anyone to vote by mail during the pandemic. Not Mississippi*. Clarion-Ledger (July 17, 2020), *available at* https://www.clarionledger.com/story/news/politics/2020/ 07/17/heres-how-mississippi-plans-run-its-election-during-pandemic/5358060002/. .....3

*Quarantine*, Merriam-Webster, https://www.merriam-webster.com/dictionary/quarantine (last visited Aug. 25, 2020).....11, 12

## INTRODUCTION

In his brief, the Secretary of State correctly observes that the medical conditions of four of the Plaintiffs, and those in their shoes, qualify as "physical disabilit[ies]" for purposes of the absentee ballot statute. "Admittedly, as the Chancery Court found, four individual plaintiffs proved their current health conditions constitute a 'physical disability' for purposes of Section 23-15-713(d)." Appellant's Br. at 23. Moreover, the Secretary does not address, and does not challenge, the Chancery Court's finding that because of these disabilities, "attendance at the voting station" could "reasonably cause danger" to these four Plaintiffs and others. [ROA.543-547]. The fact that these "physical disabilities" could "reasonably cause danger" through attendance at the polling location is clear from the Mississippi Department of Health's ("MDH") specific warning that "those with a chronic illness such as heart disease, diabetes, or lung disease" and "anyone receiving treatments which may compromise their immune system" and people who otherwise are "in poor health" are at a greater "risk for serious illness from COVID-19" and should therefore "stay home as much as possible." [ROA.139, 141].

The Secretary disputes whether all conditions that create a greater risk for serious illness from COVID-19 constitute "physical disabilit[ies]" and cites the particular example of smoking. Appellant's Br. at 23 & n.9. We discuss that disagreement below. But suffice it to say, for now, that there appears to be agreement from the parties that the type of higher-COVID-risk underlying conditions that afflict those four Plaintiffs, and that are described by the MDH, constitute "physical disabilities" under § 23-15-713(d). And the Secretary does not dispute the proposition that because of the risk of danger posed by these disabilities in the current factual context, people afflicted by them may vote absentee. Thus, for purposes of the first issue in this

case, the disagreement is fairly narrow. With that understanding, the issues in this case are as follows:

## STATEMENT OF THE ISSUES

*The Issue on the Secretary's Appeal*

Do physical conditions that create a heightened risk for serious illness and death from COVID-19 constitute "physical disabilit[ies]" that "could reasonably cause danger" to the voter and others if they are in "attendance at the voting place" as specified in the first sentence of Miss. Code § 23-15-713(d)?

*The Issue on the Plaintiffs' Cross-Appeal*

Does the phrase "physician-imposed quarantine" in the second sentence of Miss. Code § 23-15-713(d) include directives from MDH and the U.S. Centers for Disease Control and Prevention ("CDC") to avoid community events, congregate settings, or unnecessary public gatherings?

## STATEMENT OF THE CASE

Section 23-15-713 lists the conditions under which voters are permitted to vote absentee. Subsection (d) of that statute is relevant here. The first sentence of that provision has existed for many years and states that the following people are among the groups of those eligible to vote absentee: "Any person who has a temporary or permanent physical disability and who, because of such disability, is unable to vote in person without substantial hardship to himself or herself or others, or whose attendance at the voting place could reasonably cause danger to himself or herself or others." The second sentence of Section 23-15-713(d) was added this summer when the Legislature passed House Bill 1521. It reads: "For purposes of this paragraph (d), 'temporary physical disability' shall include any qualified elector who is under a physician-imposed

quarantine due to COVID-19 during the year 2020 or is caring for a dependent who is under a physician-imposed quarantine due to COVID-19 beginning with the effective date of this act and the same being repealed on December 31, 2020."[1]

H.B. 1521 also amended Miss. Code § 23-15-627, which sets out the form of the absentee ballot application including the list of boxes from which the voter must check at least one in order to vote absentee. With respect to the "temporary or permanent disability" excuse, H.B. 1521 added the following underlined language to the box: "I have a temporary or permanent physical disability, *which may include, but is not limited to*, a physician-imposed quarantine due to COVID-19 during the year 2020. Or, I am caring for a dependent that is under a physician-imposed quarantine due to COVID-19 beginning with the effective date of this act and the same being repealed on December 31, 2020." H.B. 1521 § 5, 2020 Leg., Reg. Sess. (Miss. 2020) (new language underlined in original, emphasis added in italics).

H.B. 1521 was passed by the legislature on July 2. Not long after, the *Clarion-Ledger* reported that Secretary of State Michael Watson said he was seeking an opinion from the Attorney General on how election officials should interpret the new language.[2] Plaintiffs' counsel hoped that the opinion might obviate the need for litigation or at least narrow the focus. On multiple occasions, one of the undersigned contacted the Attorney General's office seeking an estimate of when the opinion might be released. Understandably, the Attorney General's office was not in a position to give an estimate. Finally, on August 11, counsel concluded they could not wait any longer and filed this case. (The filing of the case has apparently meant the

[1] The parties have no dispute as to the meaning of "dependent," which includes anyone being cared for by another such as a spouse, grandparent, child, or neighbor. *See* ROA.600-601, 615.

[2] Luke Ramseth, *Many states are allowing anyone to vote by mail during the pandemic. Not Mississippi*. Clarion-Ledger (July 17, 2020), *available at* https://www.clarionledger.com/story/news/politics/2020/07/17/heres-how-mississippi-plans-run-its-election-during-pandemic/5358060002/.

Attorney General could no longer issue an opinion now that the provision was the subject of litigation).

As noted in the introduction to this brief, the MDH, in response to the unprecedented worldwide pandemic that we are living through, warns that "those with a chronic illness such as heart disease, diabetes, or lung disease" and "anyone receiving treatments which may compromise their immune system" and people who otherwise are "in poor health" are at a greater "risk for serious illness from COVID-19." Accordingly the MDH has directed that these high-risk people "stay home as much as possible." [ROA.139, 141]. Further, the CDC has also directed those with a heightened risk to "[l]imit [their] interactions with other people as much as possible." [ROA.227].

In addition, the MDH directs all people, including those in good health, to "[a]void large social gatherings and community events" and "[f]ollow restrictions on indoor and outdoor gathering sizes." [ROA.138-39]. These restrictions prevent attendance at indoor gatherings where more than ten people are present. [ROA.142].

Many polling places have more than ten people present during much of the day. [ROA.151 ¶¶ 3-4]. Both MDH and the CDC have recognized that "[e]lections with only in-person voting on a single day are higher risk for COVID-19 spread because there will be larger crowds and longer wait times" and have recommended "alternatives to in-person voting." [ROA.143 (linking to CDC Guidelines); ROA.154-59]. [*See also* ROA.166 ¶ 16 ("As polling locations are generally indoor spaces where a significant number of individuals congregate and touch common surfaces, we can expect transmission of COVID-19 in those spaces. In light of COVID-19, absentee voting is a substantially safer option for voters than going to the polling

places.")]. This is particularly true during a presidential election year, where turnout is routinely higher than for other elections.

The Chancery Court issued a declaratory judgment that people with medical conditions that pose a higher risk of severe consequences from COVID-19 may vote absentee—as their underlying conditions constitute physical disabilities, and because of the increased risk these disabilities cause for those who become infected with COVID-19, "attendance at the polling place could reasonably cause danger to himself, herself or others." The Court denied the Plaintiffs' request for a declaratory judgment that the phrase "physician-imposed quarantine" permits people to vote absentee who are following directives from the MDH and the CDC (whose directors are physicians) to avoid community events, congregate settings, and unnecessary public gatherings. [ROA.550-551].[3]

## SUMMARY OF ARGUMENT

*Regarding the Appeal*

The Chancery Court and all parties seem to agree that during this dangerous pandemic, there are some physical conditions which allow a voter to vote absentee under the first sentence of 713(d) because they are "physical disabilit[ies]" that "could reasonably cause danger" to the voter and others if they are in "attendance at the voting place." This position is consistent with the statements issued by the MDH and the CDC to the effect that people with conditions that increase the possibility of severe consequences from COVID-19 should stay at home and avoid interaction with others as much as possible. It also is corroborated by the dictionary definition of "disability" and case law applying the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. Moreover, the MDH and CDC statements, the dictionary definition, and the federal case

[3] The Court also denied the injunction requested by the Plaintiffs but that decision is not being appealed.

indicate that all physical conditions that increase the risk of severe COVID consequences should be treated as "physical disabilit[ies]" that permit a voter to vote absentee under the first sentence of Section 713(d).

*Regarding the Cross-Appeal*

The phrase "physician-imposed quarantine" encompasses both mandatory and non-mandatory directives from the state health officer to avoid community events just as it encompasses similar communications from voters' own personal physicians, whose directives can only be non-mandatory since they have no authority to issue mandatory orders. Nothing in the statutory language suggests that non-mandatory directives by one group of physicians (private physicians) qualifies, while only mandatory directives by another physician (Dr. Dobbs) qualify. Not every person has an established relationship with a particular physician. Even for those who do, they may not be visiting their physicians between now and the time they will need to act to obtain an absentee ballot. Additionally, because of the widespread and unanimous public health pronouncements, the average Mississippian has no need to consult their personal physician—they have been told time and again by the physicians at the CDC and MDH to avoid indoor congregate settings. People are entitled to rely on and follow the directives of the State Health Officer and the CDC regarding an infectious disease like COVID-19. Moreover, this is consistent with the dictionary definition and popular usage of the word "quarantine."

## ARGUMENT

*Regarding the Secretary's Appeal*

### I. THOSE PHYSICAL CONDITIONS THAT THE STATE HEALTH OFFICER HAS IDENTIFIED AS CREATING A HEIGHTENED RISK OF SERIOUS ILLNESS FROM COVID-19 ARE WITHIN THE SCOPE OF THE "PHYSICAL DISABILITIES" THAT "COULD REASONABLY CAUSE DANGER" TO THE VOTER AND OTHERS IF THEY ARE IN "ATTENDANCE AT THE VOTING

**PLACE" AS SPECIFIED IN THE FIRST SENTENCE OF MISS. CODE § 23-15-713(D).**

When the first sentence of subsection 713(d) regarding "physical disabilit[ies]" was adopted many years ago, no one knew a pandemic would strike in 2020. But infectious disease epidemics have been a part of human history throughout the ages, including the flu pandemic of 1918. The second sentence of 713(d) was added in July but nothing about its language indicates that it supplanted the applicability of the first sentence to this outbreak of infectious diseases. Instead, it supplements the first sentence as demonstrated by a separate provision of the relevant bill, H.B. 1521, that amended the form of the absentee ballot application to add the underlined language to the "physical disability" box: "I have a temporary or permanent physical disability, *which may include, but is not limited to,* a physician-imposed quarantine due to COVID-19 during the year 2020. Or, I am caring for a dependent that is under a physician-imposed quarantine due to COVID-19 beginning with the effective date of this act and the same being repealed on December 31, 2020." H.B. 1521 § 5, 2020 Leg., Reg. Sess. (Miss. 2020) (new language underlined in original, emphasis added in italics).

Indeed, the Chancery Court and all parties seem to be in agreement that during this pandemic, there are some physical conditions which allow a voter to vote absentee under the first sentence of 713(d) because they are "physical disabilit[ies]" that "could reasonably cause danger" to the voter and others if they are in "attendance at the voting place." As mentioned in the introduction to this brief, the Secretary's brief states: "Admittedly, as the Chancery Court found, four individual plaintiffs proved their current health conditions constitute a 'physical disability' for purposes of Section 23-15-713(d)." Appellant's Br. at 23.[4] The Secretary does

[4] As detailed by the Chancery Court, those conditions include lupus, chronic kidney disease, kidney transplants (and presumably other organ transplants), cancer (current or previous bout), tumors, severe asthma, and diabetes. [ROA.543-547]. Clearly, these are just some of the conditions that are "physical

not address or dispute the Chancery Court's finding that because of these disabilities, "attendance at the voting station" could "reasonably cause danger" to these four plaintiffs and others. [ROA.543-547]. Moreover, the fact that these "physical disabilities" could "reasonably cause danger" is demonstrated by the MDH's specific warning that "those with a chronic illness such as heart disease, diabetes, or lung disease" and "anyone receiving treatments which may compromise their immune system" and people who otherwise are "in poor health" are at a greater "risk for serious illness from COVID-19" and should therefore "stay home as much as possible. [ROA.139, 141].

The Secretary *does* dispute the notion that all conditions that create a greater risk for serious illness from COVID-19 constitute "physical disabilit[ies]" and cites the particular example of smoking. Appellant's Br. at 23 & n.9. But it is the very risk inherent in public exposure to COVID-19 for people with those conditions that has caused the MDH to explain that people should "stay home as much as possible," [ROA.139], and the CDC to state that they should "[l]imit [their] interactions with other people as much as possible." [ROA.227]. Those consequences are the very reason that these conditions meet the definition of the first sentence of 713(d). And even if those conditions did not already meet the dictionary definition of "disability" set forth in the Secretary's brief, they certainly do "impair[], interfer[e] with, or limit[] a person's ability to engage in certain tasks or actions or participate in typical daily activities and interactions" now that COVID-19 is here. Appellant's Br. at 20-21 (providing this definition).

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disabilit[ies]" in this context. Moreover, there is a legion of case law to confirm these are "disabilit[ies] under the Americans with Disabilities Act, 42 U.S.C. § 12101 *et seq*. *See, e.g.*, *Haschmann v. Time Warner Entertainment Co., L.P.,* 151 F.3d 591, 593, 599-600, 605 (7th Cir. 1998) (lupus); *Jordan v. City of Baton Rouge*, No. 98-30989, 1999 U.S. App. LEXIS 40433, at **7-9 (5th Cir. 1999) (severe asthma).

As explained in *Harry B Silver v. City of Alexandria*, No. 1:20-CV-00698, 2020 U.S. Dist. LEXIS 119359 (W.D. La. July 6, 2020), the realities of COVID-19 shape the analysis of whether a "disability" exists under the Americans with Disabilities Act:

> We find easily that [the plaintiff] has a qualifying disability. That results, in substantial part, from the existence of the COVID-19 pandemic in our nation, and the existence of his obvious co-morbidities [advanced age plus aortic valve disease and systolic heart failure]. Defendants argue that he is not entitled to claim those disabilities BECAUSE they are only COVID-related. In other words, because his disabilities are only situational, he cannot avail himself of the accommodations provided for by the ADA/RA. Such an argument fails, however, because of the simple and logical explanation of things the way they are. Neither the ADA nor the Rehabilitation Act contain any language to limit application to certain environmental or health-related situations. It makes complete sense to say that any application of these laws to these facts must be based upon a factual analysis that considers the totality of [the plaintiff's] health circumstances in conjunction with one's social circumstances. Call it a totality of the circumstances evaluation. The determination of a qualifying disability in this case cannot be looked at in a vacuum. . .. In sum, consideration of [the plaintiff's] documented serious underlying medical situation, in light of the pandemic's existence, is the proper way to make the disability determination here.

*Id*. at **9-10.

Of course, to the extent the Court agrees with the Secretary's position that "smoking" should not be considered a "physical disability," the Court can specifically excise it from any declaratory judgment on the ground that it not a "physical disability" but instead an action (albeit it one that often carries grave physical consequences).

Given the potential confusion that exists among the voters, any declaratory judgment issued by this Court should be as clear as possible. The Secretary's brief suggests that the Court "confirm that a voter's 'underlying condition' must itself constitute a 'physical disability' to qualify under Section 23-15-713(d)'s absentee excuse." Appellant's Br. at 23-24. The Plaintiffs agree. Voters have had to apply the phrase "physical disability" for many years when determining if they can vote absentee under subsection (d), and while the COVID-19 pandemic makes things more complicated, voters are free to consult the MDH website and make their

decision accordingly. As the Secretary explains, "[a]ll voters and election officials are expected to abide by the law, and there is no reason to believe they will not during this November's election." Appellant's Br. at 18.

> In its decision, the Chancery Court noted definitively that:
>
> It is not up to the Clerk to decide whether any individual's physical condition or ailments rise to the level of a disability nor is it the Clerk's responsibility to determine whether a person is at a severe risk of illness or death if they were to contract COVID-19. Any such determination shall be made by the elector in good faith.

[ROA.549, RE 2]. Late in his brief, in response, the Secretary states:

> Voters are required to make a good faith determination that they qualify before executing their absentee paperwork. Local officials are likewise obligated to act in good faith when ensuring that only authorized voters apply for and cast absentee ballots. There is no reason to believe that plaintiffs and the local officials in this case will not discharge those good faith obligations without incident in the coming weeks.

Appellant's Br. at 37. The Chancery Court's statement does not contradict the Secretary's position. Unlike the fixed criterion of age, the word "disability" does not create a clear line. While circuit clerks have some duties regarding absentee ballots, they should not be in the business of second-guessing voters' own determinations about their health.[5]

[5] While the Secretary is correct that Miss. Code § 23-15-629 states that if voters with *permanent* physical disabilities submit a doctor's note, they can automatically receive absentee ballots in the future, SOS br. at 8-9, that does not mean a failure to submit such a note would prevent such a voter from being able to vote absentee in a particular election if he or she submits an otherwise proper application. Federal law mandates that the voter still be allowed to vote. Pursuant to the Voting Accessibility for the Elderly and Handicapped Act, a voter with disabilities is not required to provide "medical certification . . . with respect to an absentee ballot or an application for such ballot, except that medical certification may be required when the certification establishes eligibility, under State law – (1) to automatically receive an application or a ballot on a continuing basis . . . ." 52 U.S.C. § 20104(b). Consequently, under federal law, the clerk cannot ask a voter applying to vote via absentee ballot for medical proof of their disability. At any rate, whatever the applicability of Section 23-15-629 in cases of voters with *permanent* disabilities, voters seeking absentee ballots because of the impact of COVID-19 are necessarily invoking *temporary* disabilities and no documentation is required. This language also makes clear that when the legislature wants to require documentation, they do so.

Accordingly, a declaratory judgment should be issued stating that voters with physical conditions that create a heightened risk of severe consequences from COVID-19 may vote absentee under Section 23-15-713(d).

*Regarding the Plaintiffs' Cross-Appeal*

## II. THE PHRASE "PHYSICIAN-IMPOSED QUARANTINE" ENCOMPASSES BOTH MANDATORY AND NON-MANDATORY DIRECTIVES FROM THE STATE HEALTH OFFICER TO AVOID COMMUNITY EVENTS JUST AS IT ENCOMPASSES SIMILAR COMMUNICATIONS FROM VOTERS' OWN PERSONAL PHYSICIANS, WHOSE DIRECTIVES CAN ONLY BE NON-MANDATORY SINCE THEY HAVE NO AUTHORITY TO ISSUE MANDATORY ORDERS.

The text of Miss. Code § 23-15-713(d) itself supports Plaintiffs' understanding of the statute. This Court, first and foremost, will look to the plain meaning of words to interpret a statute's commands. *See, e.g.*, *Palermo v. LifeLink Found., Inc*., 152 So. 3d 1099, 1105 (Miss. 2014) ("[W]ords and phrases contained in a statute are to be given their common and ordinary meaning."); *see also* Miss. Code. § 1-3-65. The text of the statute compels the relief Plaintiffs seek. *See Davis v. Pub. Employees' Ret. Sys.*, 750 So. 2d 1225, 1233 (Miss. 1999) ("[P]opular words in statutes, must be accepted in their popular sense and we must attempt to glean from the statutes the legislative intent.").

The definition of the noun "quarantine" that most accurately reflects the factual context as used in the statute is "a restraint upon the activities or communication of persons or the transport of goods designed to prevent the spread of disease or pests." *Quarantine*, Merriam-Webster, https://www.merriam-webster.com/dictionary/quarantine (last visited Aug. 25, 2020) [hereinafter *Quarantine*]. While the statute uses "quarantine" as a noun, the dictionary definition of the transitive verb "quarantine" means "to isolate from normal relations or communication." *Id.* These definitions both support the interpretation that the statute covers electors that are following public health guidance to avoid congregate settings, and also comport with the now-

colloquial meaning—*i.e.*, "popular sense," *Davis*, 750 So. 2d at 1233—of quarantine, a word that perhaps never has had as much use in the lives of ordinary Americans as it now has in the face of the COVID-19 pandemic. The word is frequently used in today's normal discourse to indicate the general practice of spending more time at home during the pandemic.[6] *See PPG Architectural Finishes, Inc. v. Lowery*, 909 So. 2d 47, 50 (Miss. 2005) ("It is well established that this Court must review a statute through common use of words and meanings.").

These definitions confirm that a "physician-imposed quarantine" includes, due to physician-directed public health guidance, "isolat[ing]" oneself from "normal relations" or "restrain[ing]" one's own activities in order "to prevent the spread of disease." *Quarantine*.

Thus, statements from the MDH, CDC, and one's own physician to avoid unnecessary public gatherings or community events qualifies as a "physician-imposed quarantine" that a voter could invoke in order to avoid the grave health risks posed by going to the polls and encountering groups of people during this pandemic.

The Chancery Court never really addressed the definition of the word "quarantine." The Court did point to the August 4, 2020 Order for the Isolation of Individuals Diagnosed with

[6] For example, in an article discussing mental health impacts of self-isolating, Dr. Brian Fuehrlein, M.D., Ph.D., uses "quarantine" to describe the time people are endeavoring to avoid social gatherings. *See* Adrian Bonenberger, *Falling Through the Cracks in Quarantine*, Yale School of Medicine, https://medicine.yale.edu/news/yale-medicine-magazine/falling-through-the-cracks-in-quarantine/ (article referring to all sheltering in place and distancing efforts as "the coronavirus quarantine"); *see also, e.g.*, David Oliver, *Don't Get Too Much Exercise During Your Coronavirus Quarantine. Here's Why.*, USA Today (Apr. 30, 2020), https://www.usatoday.com/story/life/health-wellness/2020/04/30/coronavirus-dont-exercise-too-much-during-quarantine-heres-why/3048034001/, Kathy Katella, *Quarantine 15? What to Do About Weight Gain During the Pandemic*, Yale Medicine (July 1, 2020), https://www.yalemedicine.org/stories/quarantine-15-weight-gain-pandemic/; Debbie Koenig, *Quarantine Weight Gain Not A Joking Matter*, WebMD (May 21, 2020), https://www.webmd.com/lung/news/20200521/quarantine-weight-gain-not-a-joking-matter; Adrienne Sylver, *Quarantine Drinking: Experts Warn Against Too Many Virtual Happy Hours*, Baptist Health (May 20, 2020), https://baptisthealth.net/baptist-health-news/quarantine-drinking-experts-warn-against-too-many-virtual-happy-hours/; Emily Zemler, *In Quarantine, Love Is Finally Prioritizing My Family*, Glamour (May 21, 2020), https://www.glamour.com/story/in-quarantine-love-is-finally-liking-my-family.

COVID-19 from Dr. Thomas Dobbs, State Health Officer and Executive Director of the Mississippi Department of Health. [ROA.542-43] The order instructed people infected by COVID-19 to remain at home or another suitable residential location for 14 days from the onset of an illness or a positive test if the person is asymptomatic. The order stated that any violation would be a crime punishable by fine and incarceration. *Id*. In his brief in this Court, the Secretary of State also cited this as an example of a "physician-imposed quarantine." Appellant's Br. at 26.

While that certainly is an example of a "physician-imposed quarantine," it is not the only kind. Both the Chancery Court and the Secretary of State acknowledged that the State Health Officer is not the only person who can issue a "physician-imposed quarantine." The Court stated that "[a]n elector may rely on his personal physician or the director of the MDH and its physicians." [ROA.542]. And the Secretary's brief in this Court said the phrase applies "if a voter's personal physician (who has authority over the voter by virtue of their established physician-patient relationship) requires the voter to quarantine." Appellant's Br. at 26. By its plain text, the word "physician" in the statute is not limited to the State Health Officer and clearly encompasses private physicians.

The Secretary claims that private physician's communications constitute a "physician-imposed quarantine" only if there is an element of coercion—if the physician "requires" or "compel[s]" the voter to quarantine. *Id.* at 26-27. Of course, private physicians cannot impose threats of criminal penalties on their patients or give them orders with the force of law. The most they can do is advise them. While some physicians may tell their patients, "I am ordering you to stay away from public gatherings," another may use different words to mean the same exact thing, saying "I can't tell you what to do, but I recommend you stay away from public

gatherings." Both communications deliver the same message but in different language. Those physician-patient communications are certainly designed to "restrain" the activities of the patients in order to "prevent the spread of disease" and therefore fit the definition of a "quarantine" that is imposed by a physician.

By conceding the obvious fact that communications from private physicians can be "physician-imposed quarantines," the Secretary necessarily concedes that this phrase can cover non-mandatory directives since private physicians can only issue non-mandatory directives—they do not have the authority to issue mandatory directives.[7] Surely, then, similar communications from Dr. Dobbs and the MDH to "avoid . . . community events" are also "physician-imposed quarantine[s]." [ROA.138-139]. Nothing in the statutory language suggests that non-mandatory directives by one group of physicians (private physicians) qualifies, while only mandatory directives by another physician (Dr. Dobbs) qualify. Not every person has an established relationship with a particular physician. Even for those who do, they may not be visiting their physicians between now and the time they will need to act to obtain an absentee ballot. Additionally, because of the widespread and unanimous public health pronouncements, the average Mississippian has no need to consult their personal physician—they have been told time and again by the physicians at the CDC and MDH to avoid indoor congregate settings. People are entitled to rely on and follow the directives of the State Health Officer and the CDC regarding an infectious disease like COVID-19.

[7] This brief occasionally uses the word "directive." "Directive" is defined as "serving or intended to guide, govern, or influence" and "something that serves to direct, guide, and usually impel toward an action or goal." *Directive*, Merriam-Webster, https://www.merriam-webster.com/dictionary/quarantine (last visited Sept. 2, 2020).

The Secretary points to the legislative evolution of the final language of the second sentence, noting that an earlier version used the language "under a physician-imposed quarantine due to the concern of a COVID-19 public health risk" while the final version used "due to COVID-19." According to the Secretary, this evolution signifies "that the Legislature confirmed that a voter's subjective COVID-19 concerns alone do not qualify him or her to vote absentee." Appellant's Br. at 31. But this argument is misplaced. First, the phrase "due to COVID-19" certainly encompasses "the concern of a COVID-19 public health risk" since that risk is a central feature of COVID-19. Thus, the change in language appears to be irrelevant. Second, even if the language change has some significance, no one is contending that concerns alone qualify a person to vote absentee under the second sentence of Section 713(d). The Plaintiffs' position is that the option to vote absentee exists under the second sentence only if a voter is following the directive of the State Health Officer or their physician to avoid community events and the like.

Accordingly, this Court should issue a declaratory judgment that voters following public health statements from the Mississippi Department of Health to avoid community events, congregate settings, or unnecessary public gatherings may, if they so choose, vote absentee under the second sentence of Miss. Code § 23-15-713(d).

## CONCLUSION

For the foregoing reasons, this Court should issue the requested declaratory judgments or direct the Chancery Court to do so.

September 9, 2020

Respectfully submitted,

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## CERTIFICATE OF SERVICE

I, Landon Thames, hereby certify that simultaneously with its filing, true and correct copies were delivered to all counsel of record via the Court's electronic filing system.

A true and correct copy has also been sent by U.S. Mail to the Honorable Judge Denise Owens, Hinds County Chancery Court, P.O. Box 686, Jackson, Mississippi, 39205-0673.

So certified this the 9th day of September, 2020.

/s/ Landon Thames
Landon Thames