

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF MISSISSIPPI  
NORTHERN DIVISION

CYNTHIA PARHAM, ET AL.

PLAINTIFFS

VS.

CIVIL ACTION NO. 3:20cv572-DPJ-FKB

Registrars in Mississippi





challenges each fail on their own terms, some of plaintiffs' claims also are not justiciable. First, the League of Women Voters Mississippi ("LWVMS") and the Mississippi State Conference of the NAACP ("MS NAACP") have failed to demonstrate either organizational or associational standing and should be dismissed as plaintiffs. Second, none of the claims asserted against

anyone who must be at work during polling hours on election day;

anyone age 65 or over;

anyone who has a qualifying permanent or temporary physical disability; and/or

anyone who is a parent, spouse, or dependent of a person with a qualifying permanent or temporary disability who is hospitalized (within certain geographical parameters), and will be with that disabled person on election day.

*See* MISS. CODE ANN. § 23-15-713.<sup>1</sup> Several excuses obligate electors to appear in-person to vote absentee. MISS. CODE ANN. § 23-15-715(a). Only the following categories of voters may cast their absentee ballots in-person or by mail:

voters temporarily residing outside of their home county;

voters age 65 or over;

voters who with a permanent or temporary physical disability; and

voters who are parents, spouses, or dependents of persons who are hospitalized with a qualifying permanent or temporary physical disability, and will be with the disabled person on election day.

*See* MISS. CODE ANN. § 23-15-715(b).

In addition to its limited absentee excuses, the Election Code also establishes the processes, time lines, deadlines, and other requirements associated with obtaining, casting, returning, and counting absentee ballots. *See, e.g.*, MISS. CODE ANN. § 23-15-621 *et seq.*, § 23-15-717, § 23-15-719, § 23-15-721.

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Separate unique state and federal laws govern balloting and procedures for absentee voting by military and overseas voters. *See* 52 U.S.C. § 20301 *et seq.*; MISS. CODE ANN. § 23-15-671 *et seq.*

## The Legislature's Limited Extension of Mail-in Absentee Voting

On July 2, 2020, the Mississippi Legislature passed 2020 House Bill 1521 ("HB 1521"), which amended the physical disability absentee excuse in Code Section 23-15-713(d) to provide:

(d) 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, herself or others, or whose attendance at the polling place could reasonably cause danger to himself, herself or others. 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.

MISS. CODE ANN. § 23-15-713(d) (Rev. 2020). Voters qualifying under Section 23-15-713(d) may vote absentee in-person or by mail. *See* MISS. CODE ANN. § 23-15-715(b). However, HB 1521 and other laws passed by the Legislature did not expand mail-in voting for the November election any further.

On August 11, several individuals filed a lawsuit in Hinds County Chancery Court against the Secretary of State, and the Hinds and Rankin County Circuit Clerks. *See generally Watson v. Oppenheim*

from public health authorities or other physicians to avoid unnecessary public gatherings during the COVID-19 pandemic or if he or she is caring or supporting a voter. *Id.* at \*1.

On September 18, the Mississippi Supreme Court rejected the state-court plaintiffs' interpretation of state law. The Supreme Court held:

We find that the chancery court's order erred to the extent it declared that Section 25-15-713(d) "permits any voter with pre-existing conditions that cause COVID-19 to present a greater risk of severe illness or death to vote by absentee ballot during the COVID-19 pandemic." Having a preexisting



notarization requirement applicable to certain categories of mail-in voters

court's resolution of disputed facts. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981)).<sup>2</sup> Rule 12(b)(1) is the appropriate vehicle for dismissal because the organizational plaintiffs lack standing; the Eleventh Amendment bars all claims asserted against the Attorney General; and all plaintiffs otherwise lack standing as to their claims asserted against the Attorney General.

## ARGUMENT

### I. LWVMS and MS NAACP Lack Standing and should be D







efforts." *See Clark*, 2020 WL 3415376, at \*13. "It cannot follow that every change in voting laws that causes voting advocacy groups to 'check and adjust' is an injury." *See id.*

Even if the injury-in-fact requirement was satisfied, any alleged injury might be fairly traceable *to the COVID-19 pandemic*—but it isn't traceable to the defendants' conduct. Instead of "counteract[ing]" defendants' conduct, *see City of Kyle*, 626 F.3d at 238, LWVMS and MS NAACP have simply revised their programming to meet the needs of voters under the unprecedented circumstances created by the pandemic. In fact, MS NAACP flatly admits that its diversion of resources is "[d]ue to the COVID-19 pandemic." [Doc. 10-8 ¶ 10].

Put differently, just because LWVMS and MS NAACP have adjusted their already-voter-related content to address Mississippi's absentee-voting requirements does not by itself satisfy the causation requirement for demonstrating standing. It must be shown that the organizations' alleged injuries were attributable to the defendants' conduct, rather than "a global pandemic that has caused resources to be diverted by nearly every individual and organization in society." *See Clark*, 2020 WL 3415376, at \*14. LWVMS and MS NAACP cannot make this showing. Their organizational standing is therefore lacking.

#### **B. LWVMS and MS NAACP Cannot Establish Associational Standing.**

"An organization that establishes associational standing can bring suit on behalf of its members even in the absence of injury to itself." *Martinez-Rivera*, 166 F. Supp. 3d at 787 (citation omitted). "An association has standing to bring suit on behalf of its members when [1.] its members would otherwise have standing to sue in their own right; [2.] the interests it seeks to protect are germane to the organization's purpose; and [3.] neither the

claim asserted nor the relief requested requires the participation of the individual members of the lawsuit." *Tex. Democratic Party v. Hughs*, No. SA-20-CV-

inquiries into each member's claims" are "necessary for the proper adjudication of this case," the third element of associational standing is not satisfied. *Doe v. Bailey*, No. H-14-2985, 2015 WL 5737666, at \*5 (S.D. Tex. Sept. 30, 2015); accord *Warth v. Seldin*, 422 U.S. 490, 515-516 (1975) (holding that associational standing is not available when the alleged injuries require "individualized proof"). In other words, LWVMS and MS NAACP must demonstrate that nothing about this lawsuit requires the participation of individual members. See *Benkiser*, 459 F.3d at 588.

Assuming for purposes of this motion only that LWVMS and MS NAACP can establish the first and second elements, their claim to associational standing fails on the final prong. That is, the interests that LWVMS and MS NAACP seek to advance through this litigation are not "identical" to the interests of their members. The organizational plaintiffs seek to advance their generalized missions of voter information [Docs. 10-8, 10-9], while the individual plaintiffs seek to protect their personal voting rights based on their respective personal circumstances and their respective personal "fear of exposure to COVID-19." [Docs. 10-2, 10-5, 10-6, 1 ¶ 13].

For example, plaintiffs' complaint requests that the Court order the defendants to "allow[ ] voters who reasonably fear that voting in-person will put them or others at risk of contracting the coronavirus and suffering from COVID-19, or who follow the guidance of public health officials to quarantine themselves, to vote absentee." [Doc. 1 ¶ 127]. Because the organizational plaintiffs' asserted basis for qualification for associational standing rests on the particularized circumstances of a particular voter, such as the alleged burdens of voting on a particular voter, and on a particular voter's subjective state



of mind (*i.e.*, "fear" of "contracting the coronavirus"), the participation of individual

### C. LWVMS and MS NAACP Cannot Establish Prudential Standing.

In addition to proving organizational and associational standing (which LWVMS and MS NAACP cannot do), organizational plaintiffs must clear a final jurisdictional hurdle—demonstrating prudential, or third-party, standing. *See St. Paul Fire & Marine Ins. Co. v. Labuzan*, 579 F.3d 533, 539 (5th Cir. 2009) (“Prudential standing requirements exist in addition to the immutable requirements of Article III as an integral part of judicial self-government.”). Prudential standin

*Singleton v. Wulff*, 428 U.S. 106, 113-14 (1976).

The general rule against the enforcement of a third-party's legal rights can only be overcome where: (1) the suing party "has a close relationship" with the possessor of the right; and (2) "there is a hindrance to the possessor's ability to protect its own interests." *Kowalski v. Tesmer*, 543 U.S. 125, 129-130 (2004) (internal quotation marks omitted). The quintessential "close relationship" is that of a physician asserting the rights of his patients in the abortion context. *See Doe v. Bolton*, 410 U.S. 179, 188-89 (1973).

LWVMS and MS NAACP lack prudential standing because they seek simply to invalidate laws and policies that allegedly violate the rights of unspecified Mississippians—"third parties who are strangers to this action." *Democracy North Carolina v. North Carolina State Bd. of Elec.*, No. 1:20-cv-457, 2020 WL 4484063, at \*19-20 (M.D.N.C. Aug. 4, 2020) ("The court finds Organizational Plaintiffs may not assert third-party standing on behalf of unnamed voters in North Carolina with regard to Plaintiffs' Fourteenth Amendment right-to-vote claims."). But LWVMS and MS NAACP have done nothing to overcome the general rule that the possessor of a right must seek to enforce it himself. *See Kumar*, 443 F. Supp. 3d at 781.

At no point do LWVMS or MS NAACP claim the "close relationship" with voters that would be necessary to support prudential standing. Nor could they: An organization's relationship with a horde of faceless members hardly resembles the proximity of a doctor-patient relationship. And nothing hinders the rights of Mississippians to join this litigation (or bring a lawsuit) to protect their own interests. The presence of individual plaintiffs in



2013) (*K.P. I*); *Air Evac EMS v. Tex. Dep't of Ins.*, 851 F.3d 507, 519 (5th Cir. 2017). Recognizing that the Attorney General has no ongoing role in administering the State's absentee voting laws, and certainly no role similar to those that allowed federal jurisdiction in *K.P. I*, *K.P. II*, and/or *Air Evacuation*, plaintiffs focus instead on the fact that the Attorney General is the "chief legal officer and advisor for the state and is charged with managing all litigation on behalf of the state." [Doc. 1 ¶ 45].

It is of course true that the Attorney General is the "chief legal officer and advisor for the state, both civil and criminal, and is charged with managing all litigation on behalf of the state, except as otherwise specifically provided by law." MISS. CODE ANN. § 7-5-1. And, in this regard, the Attorney General is authorized to bring or defend lawsuits on constitutionality of any statute when notified of a challenge thereto, pursuant to the Mississippi Rules of Civil Procedure# « 1 « # u

because he “might represent the state in litigation involving the enforcement of its statutes”); *Okpalobi*, 244 F.3d at 426 (holding plaintiff must show “power to enforce the complained-of statute”); *In re Abbott*, 956 F.3d 696, 709 (5th Cir. 2020)

the conduct complained of—the injury has to be fairly traceable to the challenged action

*Count One.* Plaintiffs' first claim is that Defendants "fail[ed] to advise the public that the Excuse Requirement allows voters in fear of contracting the coronavirus to vote absentee[.]" [Doc. 1 ¶ 129]. For starters, the Mississippi Supreme Court already has provided an authoritative interpretation of Mississippi's "Excuse Requirement," and the Mississippi Supreme Court rejected the state-court plaintiffs' interpretation of state law. *See Oppenheim*, 2020 WL 5627095, at \*3.

But, even setting that aside, the Attorney General has no state-law duty to "advise the public" on the Excuse Requirement—



§ 23-15-717. "[V]oters are required to make a good-faith determination that they qualify before executing their absentee forms. *Local officials* are likewise obligated to act in good faith when ensuring that only authorized voters apply for and cast absentee ballots in the manner prescribed by law." *Oppenheim*, 2020 WL 5627095, at \*4 (emphasis supplied).

*Count Three.* Claim three is that the Excuse Requirement is unconstitutionally vague. [Doc. 1 ¶¶ 139-147]. This claim has been resolved by the Mississippi Supreme Court's decision providing an authoritative interpretation of who may vote by absentee ballot. *See generally Oppenheim*, 2020 WL 5627095. But, in any event, the Attorney General has no authority to decide who may vote by absentee ballot.

*Count Four.* Plaintiffs' next claim centers on Mississippi law requiring notarization or attestation from an official authorized to administer oaths to apply for an absentee ballot and to vote absentee. [Doc. 1 ¶¶ 14, 148-150]. The Attorney General does not disburse applications for absentee ballots (MISS. CODE ANN. §§ 23-15-625, 23-15-627); the Attorney General does not receive envelopes containing notarized absentee ballots after they are completed (MissreW\* nBT/F2 12 Tf1 0 0 1 184.82 304.13 Tm0 g0 G[(M)] TJET5 TJET@ T

containing an absentee ballot. MISS. CODE ANN. § 23-15-639; MISS. CODE ANN. § 23-15-641. The Attorney General plays no role in comparing signatures and/or accepting or rejecting ballots based on signature matching.

All in all, there exists no “causal connection” between any conduct on the part of the Attorney General and plaintiffs’ claimed injuries tied to the Election Code’s absentee ballot requirements. *Okpalobi*, 244 F.3d at 426. That missing connection is dispositive and requires dismissal of all claims against the Attorney General.

**Redressability.** Plaintiffs’ claims against the Attorney General also fail the redressability prong of the standing analysis. This is because Article III standing—including its “causal connection” and redressability elements—“must exist with respect to each claim the plaintiff ‘seeks to press and for each form of relief that is sought.’” *K.P. II*, 729 F.3d at 436 (citation omitted). Thus, even if plaintiffs could satisfy the first two standing prongs, a declaration or injunction entered against the Attorney General would not relieve plaintiffs’ alleged injuries.

Indeed, plaintiffs merely allege that the Attorney General is the proper defendant because she is the chief legal officer and advisor for the State and responsible for arguing the constitutionality of statutes when notified of a challenge. [Doc. 1 ¶ 45]. That is wholly insufficient. Because the Attorney General does not possess the coercive power with respect to enforcement of the State’s absentee voting laws at issue in plaintiffs’ complaint, an injunction against the Attorney General would not redress plaintiffs’ alleged injuries. In fact, as in *Okpalobi*, ordering injunctive relief against the Attorney General here would, “[f]or all practical purposes,” be “utterly meaningless.” *Okpalobi*, 244 U.S. at 426.





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