

**IN THE CHANCERY COURT OF HINDS COUNTY, MISSISSIPPI
FIRST JUDICIAL DISTRICT**

HARRIETT OPPENHEIM, DAVE
MILLER, JOY PARIKH, MARTIN
CLAPTON, MARY HARWELL,
MICHELLE COLON,

Plaintiffs,

v.

MICHAEL D. WATSON JR., in his
official capacity as the Mississippi
Secretary of State; ZACK WALLACE, in
his official capacity as the Hinds County
Circuit Clerk; BECKY BOYD, in her
official capacity as the Rankin County
Circuit Clerk,

Defendants.

Civil Action No. 25CH1:20-cv-00961

TRIAL BRIEF OF PLAINTIFFS

Introduction

Plaintiffs in this case seek declaratory judgment regarding Miss. Code Ann. § 23-15-713 that (1) an underlying physical condition that places a voter at a higher risk of severe illness from COVID-19 is a “physical disability” that “could reasonably cause danger to [the voter] or others” and therefore the voter can vote absentee, (2) guidance from the Mississippi Department of Health (“MDH”), the U.S. Centers for Disease Control and Prevention (“CDC”), or other physicians who are public health experts to avoid public gatherings and community events qualifies as a “physician-imposed quarantine” that voters can follow and therefore vote absentee, and (3) that anyone who is being cared for constitutes a “dependent,” and therefore anyone providing care or

support to someone under a “physician-imposed quarantine” may vote absentee. Along with this brief, Plaintiffs submit various exhibits in support of this request as part of a separate filing.

In deciding whether to attend any public gathering, particularly a polling place on Election Day, voters are required to consider, and are permitted to follow, public health guidance. They have the right to follow that guidance without surrendering the right to vote. The MDH states that people “with a chronic illness such as heart disease, diabetes, or lung disease” and people who otherwise are “in poor health” should “stay home as much as possible.” Ex. A (Miss. State Dep’t of Health, COVID-19 Guidance and Prevention for Individuals and the Community). The CDC has also directed those at risk of COVID-19 to “[l]imit [their] interactions with other people as much as possible.” Ex. P (CDC, People at Increased Risk). Moreover, MDH advises that all people, including those in good health, must “[a]void large social gatherings and community events” and “[f]ollow restrictions on indoor and outdoor gathering sizes.” *Id.* These restrictions prevent attendance at indoor gatherings where more than ten people are present. Many polling places have more than ten people present during much of the day. *See* Ex. B, ¶¶ 3-4 (Affidavit of Toni Johnson). Thus, 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.” Ex. A (linking to CDC Guidelines); Ex. C (CDC, Considerations for Election Polling Locations); *see also* Ex. D (Report of Dr. Rathel Linwood Nolan, III) ¶ 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.”); Ex. E (Curriculum

vitae of Dr. Nolan). Community transmission of COVID-19 is likely to continue throughout 2020 and into 2021. Ex. D, ¶¶ 15-16.

The most relevant provision of Mississippi’s absentee ballot law is § 23-15-713, which 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.” If voters have an underlying physical condition that places them at a higher risk of severe illness and death from COVID-19, that condition is a “physical disability” that “could reasonably cause danger to himself or herself or others” by exposing the voter to COVID-19 through “attendance at the voting place.” This is especially true due to the severity of the pandemic in Mississippi.¹

The second sentence of Section 23-15-713(d) was added this summer when the Legislature expanded the section by passing 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.” The language and legislative history of this expansion makes it clear that a “physician-imposed quarantine” does not require a doctor’s

¹ As of today, adjusted for population, Mississippi had the highest number of deaths and second highest number of cases in the last seven days of any state in the country. *At Least 176,000 People Have Died from Coronavirus in the U.S.*, Wash. Post (updated Aug. 27, 2020, 10:05 AM), https://www.washingtonpost.com/graphics/2020/national/coronavirus-us-cases-deaths/?itid=sn_coronavirus_2/. Mississippi is also currently first of any state in both hospitalizations and ICU occupancy per capita for COVID-19 cases. *Id.*

guidance given individually to the voter, but would also include guidance from MDH and CDC, whose directors are physicians, and other public health officials and experts who are physicians.

The definition of “quarantine” that most accurately reflects the 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). Thus, guidance from the MDH and the CDC to “avoid community events” qualifies as a “physician-imposed quarantine” that a voter could invoke as a “temporary physical disability” in order to avoid the grave health risks posed by going to the polls and encountering groups of people during this pandemic. Moreover, the legislative history confirms that a voter must make his or her own judgment as to what is a “physician-imposed quarantine.” If a voter is following public health guidance, he or she is justified in choosing absentee voting.

Unfortunately, despite these statutory grounds for voting absentee, there is a potential for confusion regarding Section 713(d) that requires this Court to issue a declaratory judgment. There is no written definition of “physician-imposed quarantine.” There is likewise no written definition of who qualifies as a “dependent” under the Section. And in early June, even before passage of the amendment, Secretary of State Michael Watson said it would be up to each local circuit clerk to determine whether a voter could vote absentee under the temporary physical disability provision.²

These potential uncertainties regarding who can vote absentee and what standard will be imposed by different clerks require judicial clarification through a declaratory judgment. The

² Bobby Harrison, *Secretary of State Says Existing Law Allows Mail-In Voting Expansion during Coronavirus Pandemic. Is that Enough?*, Miss. Today (June 3, 2020) (submitted as Exhibit L).

Mississippi Constitution enshrines the right to vote. Miss. Const. art. XII, § 240. In complying with this constitutional mandate during this unprecedented pandemic, this Court should issue a declaratory judgment that (1) an underlying physical condition that places a voter at a higher risk of severe illness from COVID-19 is a “physical disability” that “could reasonably cause danger to [the voter] or others” and therefore a voter with such a condition is permitted to vote absentee, (2) guidance from the MDH, the CDC, or other physicians who are public health experts to avoid public gatherings and community events qualifies as a “physician-imposed quarantine” and, if such guidance exists during the period for absentee voting, a voter following that guidance may choose to rely on it and vote absentee, and (3) anyone who is being cared for constitutes a “dependent,” and anyone providing care or support to someone under a “physician-imposed quarantine” may vote absentee. Further, for reasons explained in this brief, this Court should also declare (4) that it is up to each voter to decide, in good faith, whether the voter qualifies to vote absentee under this provision.

The Plaintiffs

The Plaintiffs are Harriett Oppenheim, who is Black and has Lupus, has had a kidney transplant, and has chronic kidney disease; Mary Harwell, who has diabetes and lives in a household with her autistic child who has cerebral palsy and multiple auto-immune disorders and with her mother who is 77; Dave Miller, who previously had stage 3 malignant melanoma and had radiation treatment and surgery to remove the tumor and 80 nodes and more recently had spots identified on his lungs, but they were biopsied and were not found to be cancerous; Joy Parikh, who has severe asthma; Martin Clapton, who has no underlying conditions but who has been caring during the COVID-19 pandemic for his wife, who has partial kidney failure, must take medication that leaves her immune-compromised, and has undergone two hip replacements due to the

medication prescribed to her; and Michelle Colon, who is Black and has no specific underlying conditions.³

All of them are registered to vote and all of them wish to vote in this election, but they are concerned about the health consequences. As Ms. Harwell explains:

I am concerned that my diabetes, my son's medical vulnerabilities, and my mother's age place us all at a higher risk of severe illness or death if any of us contracts COVID-19. I am concerned that if I contract COVID-19, I will transmit it [to] other members of my family. As my son's primary caregiver, I am concerned about the toll it will take on him if I contract COVID-19 and cannot take care of him for a significant period of time.

Ex. F, ¶ 2 (Affidavit of Mary Harwell). They all believe they are entitled to vote absentee under the wording of the law but they are not sure. Ms. Harwell's explanation is similar to that of the other Plaintiffs:

I believe I can vote absentee but I'm not positive. I believe my diabetes is a "physical disability." I believe that my "attendance at the polling place could reasonably cause danger to" me or my family by possibly exposing me to COVID-19 which I could pass on to my family. It is particularly dangerous for me, my son, and my mother because of the higher risk of severe illness or death that exists due to our underlying conditions and my mother's age.

I am also trying to follow guidance from the Mississippi Department of Health and the Centers for Disease Control. Dr. Dobbs is the director of MDH. The director of CDC is a doctor. They advise people to stay home as much as possible and to avoid community events. I am trying to do that. So I think I can say I am following a "physician imposed quarantine" for me and my son. But I am not positive about this. The law is not completely clear to me. I know there are penalties for falsely claiming to be able to vote absentee and I do not want to subject myself to that.

Id. ¶¶ 4-5.

Plaintiff Martin Clapton is somewhat different. As he explained:

³ Racial and ethnic minority groups are at increased risk of getting sick and dying from COVID-19. Ex. M (CDC, Health Equity Considerations and Racial and Ethnic Minority Groups). In Mississippi, Black individuals constitute 49.5% of COVID-19 deaths, Ex. N (MDH, COVID-19 Deaths by Race/Ethnicity), and 51.8% of COVID-19 cases, Ex. O (MDH, COVID-19 Cases by Race/Ethnicity), despite comprising around 39% of the state's population. *See also* Ex. D, ¶ 8 ("Additionally, racial and ethnic minority communities, particularly African Americans, have higher infection rates than white communities and, if infected, are also at a higher risk of severe cases, long-term impairment, and death.").

I believe I can vote absentee but I'm not sure. Both my wife and I are trying to follow guidance from the Mississippi Department of Health and the Centers for Disease Control. I know that Dr. Thomas Dobbs, the director of MDH, is a physician. I am aware that the director of CDC is also a physician. They have said that people should avoid community events and stay in place as much as they can. I believe I am adhering to a "physician imposed quarantine" when I follow their advice.

My wife's doctor has specifically warned her about the dangers of COVID-19 in light of her condition and the importance of staying in place and avoiding the public. I am caring for her. She is not my "dependent" for tax return purposes but she does depend on me to help care for her during this pandemic.

I believe I can vote absentee for these reasons. However, I am not completely sure and the law does not seem totally clear. I understand there are penalties for making a false statement in trying to vote absentee and I do not want to violate that law.

Ex. G, ¶¶ 4-6 (Affidavit of Martin Clapton); *see* Miss. Code § 23-15-753(1) (swearing falsely on an absentee ballot is a criminal offense under Mississippi law, punishable by five years in prison or a fine of up to \$5,000, or both). Each of the Plaintiffs has similarly testified based upon their own particular circumstances. *See* Ex. H (Affidavit of Harriett Oppenheim); Ex. I (Affidavit of Dave Miller); Ex. J (Affidavit of Joy Parikh); Ex. K (Affidavit of Michelle Colon).

The Need for a Declaratory Judgment

In this situation of uncertainty, a declaratory judgment is appropriate. This Court has the authority to issue declaratory relief, as in this action such "a judgment will . . . remove an uncertainty." Miss. R. Civ. P. 57(b)(4). The Court "may declare rights, status, and other legal relations regardless of whether further relief is or could be claimed." Miss. R. Civ. P. 57(a). The issuance of such relief rests within the sound discretion of the Court. *See Oak Grove Marketplace, LLC v. Lamar Cty. Sch. Dist.*, 287 So. 3d 924, 927 (Miss. 2020). "Declaratory judgments are meant to 'serve a useful purpose in clarifying and settling the legal relations in issue' and 'afford[ing] relief from the uncertainty, insecurity, and controversy giving rise to the proceeding.'"

Poindexter v. S. United Fire Ins. Co., 838 So. 2d 964, 968 (Miss. 2003). Plaintiffs seek just this relief from uncertainty.

A declaratory judgment would be useful for voters and for those who administer the absentee ballot law. Defendant Michael D. Watson, Jr., who is the Secretary of State, is the chief election officer for the State. His duties include advising elections officials on the law. Hinds County Circuit Clerk Zack Wallace and Rankin County Circuit Clerk Becky Boyd are named as Defendants here since they are the Circuit Clerks in the counties where Plaintiffs live and vote. A declaratory judgment will be useful to them and to circuit clerks throughout the State. Accordingly, in addition to seeking a declaratory judgment, Plaintiffs request that this Court instruct the Secretary of State to distribute this Court's ruling to circuit clerks and county election officials throughout the state and to educate the public accordingly.

The Development of the Current Version of Miss. Code Ann. 23-15-713(d)

As mentioned previously, the statute listing the grounds for absentee voting includes a provision for those with a “temporary or permanent physical disability.” The first sentence of the provision, which existed prior to this summer, permits absentee voting by “[a]ny 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 voting place could reasonably cause danger to himself, herself, or others.” *Id.* § 23-15-713(d).

This summer, the Mississippi Legislature passed H.B. 1521 that added a second sentence to Section 713(d). 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.”

Different bills were passed in the Mississippi House and Senate regarding this provision, and the disagreements were resolved in conference. The Conference Report was passed by both houses and constituted the final version of H.B. 1521. The bill did not include a definition of “physician-imposed quarantine.” However, the meaning of that phrase is clarified by the legislative history. In reporting the Conference Report on the bill to the rest of the House, Representative Jansen Owen indicated that “the voter will have to make that judgement whether or not they think it’s a physician-imposed quarantine.” When asked if a voter would “have to have an actual order from a physician,” Rep. Owen responded “No.” He added that if the “Department of Health and physicians are telling you to stay home and self-quarantine, that would count” under the terms of the newly enacted excuse. Representative Owen was asked if that is “going to count across the state,” and he replied “Yes Sir.”⁴ Representative Owen also made it clear that a person “caring for” someone under a “physician-imposed quarantine” can vote absentee.⁵

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

⁴ Miss. Legis., *MS House Floor*, YouTube (June 28, 2020), https://www.youtube.com/watch?v=JFwOL8_eSC8 (exchange between Representative Jansen Owen and Representative Jarvis Dortch beginning at 42:48).

⁵ *Id.*

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).

The Voter Decides Whether They Can Vote Absentee

As Representative Owen explained on the House Floor, “*the voter* will have to make that judgement whether or not they think it’s a physician-imposed quarantine.”⁶ (Emphasis added). The Mississippi absentee ballot laws do not require a person to provide documents proving their eligibility to vote absentee. More specifically, the statute does not mandate documentary proof that a person suffers from a disability or is under a “physician-imposed quarantine.” No doctors’ notes are required. Indeed, as Representative Owen explained, Department of Health guidance is sufficient. The law does not specify that the voter must state the nature of the disability. While Miss. Code Ann. 23-15-753(1) makes it a crime to “*willfully swear falsely* to any affidavit provided for in Sections 23-15-621 through 23-15-735” in order to obtain an absentee ballot (emphasis added), it is perfectly lawful for a person to obtain an absentee ballot based on a good faith judgment that he or she qualifies.

In the case of *In Re State*, 2020 Tex. LEXIS 452 (Tex. May 27, 2020), the Texas Supreme Court held that the decision about whether a voter qualifies under that state’s disability excuse “is in the hands of the voter.” *Id.* at *28. The Court explained:

[T]he Legislature rejected the requirement of a physician’s proof of disability for mail-in voting applications when it amended the Election Code in 1981. And the application form provided by the Secretary of State requires only that voters check a box indicating whether the reason for seeking a ballot by mail is a disability. The voter is not instructed to declare the nature of the underlying disability. The elected officials have placed in the hands of the voter the determination of whether in-person voting will cause a likelihood of injury due to a physical condition. The [clerks] do not have a ministerial duty, reviewable by mandamus, to look beyond the application to vote by mail.

⁶ *Id.*

Id. (footnotes omitted). Likewise, in Mississippi, the Legislature has not required a physician's proof of disability, the application form requires that only a box be checked (and the contents of the form sworn to), the voter is not required to declare the nature of the disability, and the clerks have no duty imposed by law to look beyond the application.

The Proper Interpretation of Subsection 713(d)

The text of Miss. Code § 23-15-713(d) supports Plaintiffs' understanding of the statute. Our courts 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 statutes, which is supported by the legislative history, 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.”).

Turning then to the statute in question: the first sentence of Miss. Code § 23-15-713(d) expressly permits absentee voting by “[a]ny 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 voting place could reasonably cause danger to himself, herself, or others.”

In light of the COVID-19 global pandemic, individuals with an underlying condition that places them at a higher risk of severe illness or death from COVID-19 “could reasonably cause danger to himself, herself, or others” at a voting precinct. Thus, these conditions constitute a disability that allows a person to vote absentee under Section 713(d). Because COVID-19 is a highly communicable disease that spreads due to physical proximity, and because those with

underlying conditions are at significant risk for severe illness or death, such disabilities are exactly the sort contemplated by Section 713(d).⁷ See Ex. A; Ex. C; Ex. D, ¶¶ 6-10.

Defendant Watson has previously stated, before a legislative committee in early June, that some people will be able rely on an existing section of the law to avoid COVID-19 exposure at the polls. He was referring to the first sentence of Section 713(d). Ex. L.

Mississippi courts “frequently look[] to dictionaries to ascertain the meaning of a word in its common or popular sense.” *Lawson v. Honeywell Int’l, Inc.*, 75 So. 3d 1024, 1028 (Miss. 2011). The dictionary definitions at issue in Section 713(d) all support the interpretation pressed by Plaintiffs. The meaning of “disability” is “a physical . . . condition that impairs, interferes with, or limits a person’s ability to engage in certain tasks or actions or participate in typical daily activities and interactions.” *Disability*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/disability> (last visited Aug. 25, 2020). Mississippians who suffer from underlying conditions that place them at heightened risk for severe illness or death from COVID-19 are all dealing with physical conditions that impair or interfere with their ability to engage in certain tasks or actions.

This disability can “reasonably cause a danger” to the voter and others, including the voter’s family, loved ones, housemates, roommates, caretakers, and neighbors. See Ex. D, ¶ 10 (“Particularly for a voter with health problems and conditions that make that person more susceptible to serious illness and death from COVID-19, going to the polling place can be

⁷ The interpretation Plaintiffs urge also comports with the definition of disabilities in the Americans with Disabilities Act (“ADA”). See 42 U.S.C. § 12102(4)(A) (the definition of disability in the ADA “shall be construed in favor of broad coverage of individuals under this Act, to the maximum extent permitted by the terms of this Act”). Under the definition of the ADA, all of the conditions that increase the risk of serious illness or death from COVID-19 must—in and of themselves—constitute “disabilities” for purposes of the ADA and similar laws.

dangerous. The danger is to that voter, to others at the polling place, and to people who the voter lives with.”).

Therefore, the Court should declare that any elector who has an underlying physical condition that places them at a higher risk for severe illness or death from COVID-19 has a physical disability under the terms of the statute and may vote by absentee ballot under Mississippi Code § 23-15-713(d).

Under the newly passed amendment to this statute, which adds a second sentence to Section 713(d), a “temporary or permanent disability” includes, but is not limited to, “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.”

The statute does not define the contours of a “physician-imposed quarantine,” but the legislative history confirms that this is to be determined by the voter, that it reaches the scenario contemplated by the phrase “self-quarantine,” which has entered common speech during this COVID-19 pandemic, that it does not require direct guidance from a voter’s own doctor, and that it includes guidance from the MDH, the CDC, and other physicians and public health authorities.

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). While the statute uses “quarantine” as a noun, the dictionary definition of the transitive verb quarantine also supports the interpretation of the statute that electors may vote by absentee ballot under this excuse if they are following public health guidance to avoid congregate settings. The definition is “to isolate from normal relations or communication.” *Id.* These dictionary definitions comport with

the now-colloquial meaning 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 to indicate the general practice of spending more time at home during the pandemic.⁸ 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.” *Id.*

Thus, guidance from the MDH, CDC, or other physician to avoid unnecessary public gatherings or community events or other congregate settings qualifies as a “physician-imposed quarantine” that a voter could invoke as a “temporary physical disability” in order to avoid the grave health risks posed by going to the polls and encountering groups of people during this pandemic. Moreover, as the legislative history confirms a voter must make his or her own judgment as to what is a “physician-imposed quarantine,” and voters have the right to follow public

⁸ 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>.

health guidance in determining whether to vote absentee. If a voter is following public health guidance, he or she is justified in choosing absentee voting.

Therefore, this Court should issue a declaratory judgment that a voter may vote absentee if he or she wishes to avoid voting in-person at a polling place due to guidance from the MDH, the CDC, and other physicians or public health authorities to avoid unnecessary public gatherings and community events during the COVID-19 pandemic.

The statute also does not define who constitutes a “dependent” under the second sentence that was added this summer. The problem is that the word “dependent” is often used as a term of art in the context of tax returns. Plaintiff Martin Clapton is caring for his wife, who is dealing with serious health problems and has been warned by her doctor to stay in place as much as possible. As Mr. Clapton explained: “She is not my ‘dependent’ for tax return purposes but she does depend on me to help care for her during this pandemic.” Ex. G, ¶ 5. The common definition of the noun “dependent” is “one that is dependent especially: one who relies on another for support.” *Dependent*, Merriam-Webster, <https://www.merriam-webster.com/dictionary/dependent> (last visited Aug. 25, 2020).

Therefore, this Court should issue a declaratory judgment that that the phrase “caring for a dependent who is under a physician-imposed quarantine due to COVID-19” includes any voter who provides care or support to any other individual who is considered to be under a physician-imposed quarantine.

The Canon of Constitutional Avoidance Supports This Interpretation

The Mississippi Constitution enshrines the right to vote. Miss. Const. art. XII, § 240. And it is universally acknowledged that the right to vote is a “fundamental political right,” as it is “preservative of all rights.” *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). It has long been the

rule in Mississippi jurisprudence that when interpreting a statute, courts must do so in a way that “avoid[s] seriously endangering its constitutionality.” *Gentry v. Town of Booneville*, 199 Miss. 1, 4, 24 So. 2d 88, 89 (1945); *see also Tolbert v. Southgate Timber Co.*, 943 So. 2d 90, 97 (Miss. Ct. App. 2006) (citing *Estate of Smiley*, 530 So. 2d 18, 22 (Miss. 1988)) (“The constitutionality of a statute is presumed, and it should be interpreted in a manner to avoid constitutional defect if that is possible without doing violence to the language.”)

The Supreme Court has repeatedly held that the right to vote by absentee ballot is protected where meaningful alternative means are unavailable. *See Am. Party of Tex. v. White*, 415 U.S. 767, 794-95 (1974); *O’Brien v. Skinner*, 414 U.S. 524, 529, 531 (1974); *Goosby v. Osser*, 409 U.S. 512, 522 (1973). Demanding that a voter risk contraction of a potentially fatal illness is not a meaningful alternative.⁹ The declaratory judgment that the Plaintiffs seek, based on the

⁹ Thirty-four states and the District of Columbia already permit absentee voting for any reason, sometimes called “no excuse” absentee voting, or conduct their elections entirely by mail. In the face of the pandemic, most states who ordinarily require an excuse to vote by absentee ballot have either suspended that requirement or created a new excuse that allows any voter to rely upon the existence of the pandemic to vote by absentee ballot. Through their varied actions, these states have all ensured that voters are able to access absentee voting, as otherwise they would have been left without meaningful access to the ballot and thus into the constitutional morass Plaintiffs urge this Court to avoid. *See Ala. Admin. Code* § 820-2-3-.06-.04ER (July 17, 2020) (permits any voter to use illness excuse if voter determines unreasonable to vote at polling location); John Moritz, *Virus OK as excuse for voting absentee in Arkansas*, *Hutchinson says*, *Arkansas Democrat-Gazette* (July 3, 2020) (Governor and Secretary of State announce that “unavoidably absent” excuse reaches any voter who determines they cannot be present at polling location on Election Day); *Conn. Public Act 20-03 July Spec. Sess. (2020)* (creates COVID-19 excuse for use of all voters for 2020 election); *Del. Exec. Order, Sixth Modification of the Declaration of State of Emergency* (Mar. 24, 2020) (among other things allows all voters following public health guidance to social distance to use “sick or physically disabled” excuse); *Ky. Exec. Order 2020-688* (Aug. 14, 2020) (following agreement with Secretary of State and later adopted by Elections Board allows all voters who are concerned about contracting or spreading COVID-19 to vote by absentee ballot); *Mass. ch. 15, Acts of 2020* (July 6, 2020) (allowing all voters to vote by mail during 2020 election); *Mo. S.B. 631* (June 4, 2020) (allows all voters to vote by mail-in ballot during 2020 election); *N.H. Sec’y State & Att’y Gen. Mem.* (Apr. 10, 2020) (interpreting existing disability excuse to reach any voter concerned about COVID-19); *N.Y. S8015D* (enacted Aug. 20, 2020) (defining illness excuse to reach any risk of contracting or spreading a disease causing illness to the voter or to other members of the public); *W.V. Sec’y of State, Eligibility for Absentee Voting In West Virginia* (interpreting “medical reason” excuse to allow all voters to vote absentee due to “concerns of COVID-19”) (updated Aug. 19, 2020); *see also S.C. Act No. 133* (May 14, 2020) (allowing all voters to vote by absentee ballot for June Primary). South Carolina is considering a similar bill for November as it faces a constitutional challenge to the provision in *Thomas v. Andino*, No. 20-cv-1552 (D.S.C.). And the Tennessee Supreme Court has interpreted the existing statutory excuses to reach those at risk of contracting COVID-19. *Fisher v. Hargett*, No. M2020-00831-SC-RDM-CV (Tenn. Aug. 5, 2020); *see also Demster v. Hargett*, No. 20-435-I(III) (Davidson Cty. Chancery Ct. Aug 25, 2020) (ordering state to update absentee ballot applications to make clear risk of COVID excuse).

appropriate interpretation of the statute, would sidestep this constitutional quagmire and prevent “endangering” the constitutionality of Section 713(d). *Gentry*, 199 Miss. at 4.

Relief Requested

In light of the foregoing, this Court should:

- A. Declare that Mississippi Code § 23-15-713(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;
- B. Declare that Mississippi Code § 23-15-713(d) permits any voter to vote absentee due to guidance from the MDH, the CDC, or other physicians or public health authorities to avoid unnecessary public gatherings and community events during the COVID-19 pandemic;
- C. Declare that Mississippi Code § 23-15-713(d) permits any voter to vote absentee if the voter is caring for or supporting a person under a “physician imposed quarantine”;
- D. Declare that each voter is entitled to make their own decision about whether they qualify for an absentee ballot under the disability excuse so long as that decision is made in good faith;
- E. Issue a preliminary and permanent injunction that orders Defendant Secretary of State to instruct county elections officials about the application of Mississippi Code § 23-15-713(d) as declared by this Court and to take steps to educate the public about their right to vote by absentee ballot under Mississippi Code § 23-15-713(d) as declared by this Court during the COVID-19 pandemic.

Dated: August 27, 2020

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that I electronically filed the foregoing with the Clerk of the Court using the MEC system which sent notification of such filing to all counsel of record.

This the 27th day of August, 2020.

/s/ Joshua Tom

Co-Counsel for Plaintiffs