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.

Appellants/Cross-Appellees

v.

HARRIETT OPPENHEIM, ET AL.

Appellees/Cross-Appellants

On Appeal from the Chancery Court
of Hinds County, Mississippi

RESPONSE/REPLY BRIEF OF APPELLANT/CROSS-APPELLEE SECRETARY OF STATE MICHAEL WATSON

ORAL ARGUMENT NOT REQUESTED

LYNN FITCH
Attorney General of Mississippi

MISSISSIPPI ATTORNEY GENERAL'S OFFICE
P.O. Box 220
Jackson, Mississippi 39205-0220
Telephone: (601) 359-3680
Email: *kristi.johnson@ago.ms.gov*
krissy.nobile@ago.ms.gov
justin.matheny@ago.ms.gov
doug.miracle@ago.ms.gov

Kristi H. Johnson (Bar No. 102891)
Solicitor General
Krissy C. Nobile (Bar No. 103577)
Deputy Solicitor General
Justin L. Matheny (Bar No. 100754)
Assistant Solicitor General
Douglas T. Miracle (Bar No. 9648)
Assistant Attorney General

Counsel for Appellant/Cross-Appellee Secretary of State Michael Watson

STATEMENT REGARDING ORAL ARGUMENT

The Secretary of State submits oral argument is unnecessary. This appeal can be decided on the parties' briefs because it involves straightforward statutory interpretation issues that are pure questions of law, and time is of the essence in reaching a decision given that absentee voting is already underway for the November 3rd general election.

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RESPONSE/REPLY ARGUMENT

In Mississippi, and elsewhere, voting by mail has long been a subject of intense political debate. Even more so amongst legislators this year, as prognostications and concerns about COVID-19's possible impact on the upcoming November 3 election became an issue.

The Secretary of State is not asking this Court to take a side in the mail-in balloting debate, or decide what options best suit Mississippi voters if COVID-19 presents public health risks two months from now. Rather, the Secretary is only asking this Court to exercise its authority and responsibility "not to decide what a statute should provide, but to determine what it does provide." *Newsome v. Peoples Bancshares*, 269 So. 3d 19, 26 (¶15) (Miss. 2018) (quotes omitted). Contrary to plaintiffs' position, Mississippi Code Section 23-15-713(d)'s narrow absentee excuse does not stretch to voters without an underlying "physical disability" just because they have a fear of contracting COVID-19 at the polls, or the voters are voluntarily following public health guidance.

I. Any Voter With an Underlying Condition, Which Is Not Alone a "Physical Disability," Cannot Vote by Mail Under Section 23-15-713(d) Based on Subjective Concerns About Contracting COVID-19 at the Polls.

Plaintiffs' response begins by pointing to the Secretary's statements about the Chancery Court's determination that four of the individual plaintiffs have a "physical disability" for purposes of Section 23-15-713(d)'s absentee excuse. Plaintiffs' Br. at 1, 7. As the Secretary's first brief already mentioned, plaintiffs never asked the Chancery Court to make a plaintiff-by-plaintiff assessment of their physical

conditions or absentee eligibility. Secretary's Br. at 13-14; *see also* [ROA.113, 503]. Because no proof in the record shows otherwise, nobody disputes the Chancery Court's individualized findings that two plaintiffs have a "permanent physical disability" and two others have a "temporary or permanent physical disability." [ROA544-47, RE 2]. The Chancery Court did not explain how anyone can have a "permanent physical disability" by relying on the temporal possibility of catching COVID-19 somewhere. But none of that is the real issue here.

In the court below, plaintiffs demanded a declaration that Section 23-15-713(d) allows "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." [ROA.113, 503]. That is what frames the real issue on appeal: whether "any voter" with merely an underlying health condition, which is not alone a "physical disability," and a subjective concern that COVID-19 might make voting in-person this November dangerous, qualifies for Section 23-15-713(d)'s absentee excuse.

Section 23-15-713(d)'s "physical disability" provision has two parts. To vote absentee by mail, a voter must have an actual "temporary or permanent physical disability, and because of such disability…[the voter's] attendance at the polling place could reasonably cause danger to himself, herself or others." Miss. Code Ann. § 23-15-713(d) (Rev. 2020). The conjunction "and" joins the two parts, thus a voter must establish the "physical disability" and the causation requirement to qualify. *See Village of Myrtle, Union County v. St. Louis-San Francisco Ry. Co.*, 121 So. 717, 719 (Miss. 1960) ("The conjunction 'and' when used to connect phrases or sentences binds

together and relates the one to the other."). Section 23-15-713(d)'s text plainly means voters cannot show simply a "physical disability" or that voting in-person could be dangerous, they must show both, and a showing of one does not substitute for the other.

Plaintiffs' view of Section 23-15-713(d) takes the "physical disability" requirement out of the statute. A non-disability plus concerns attendant to possibly contracting COVID-19 does not prove a voter is physically disabled. Plaintiffs lean heavily on the fact that the Mississippi Department of Health's ("MDH") and the Centers for Disease Control's ("CDC") websites list some specific health conditions that might lead to increased risk of complications due to COVID-19, and recommends persons with such conditions should "stay home as much as possible." Plaintiffs' Br. at 8. "Those consequences," according to plaintiffs, "are the very reason that these conditions meet the definition of the first sentence of 713(d)." Plaintiffs' Br. at 8. Plaintiffs' theory does not comport with the statute's text.

Some voters who may have a COVID-19-susceptible underlying condition, which is independently a "physical disability" irrespective of whether COVID-19 might be a danger or not, should have no trouble satisfying the statute. But "any voter" with a condition on the list cannot make that claim. The statute says a "physical disability" and "because of" that disability, voting in-person could be a danger. It does not say that "because of" voting in-person could be a danger (which everyone is working to ensure is not the case with COVID-19 this November, as pages 2-4 of the Secretary's opening brief explained at length) any voter has a "physical

disability." Plaintiffs' theory reverse-engineers the text and would make voters' subjective concerns about polling places alone the test. That is not what the law provides.

The Americans with Disabilities Act ("ADA") does not shed any light on the meaning or proper application of Section 23-15-713(d), for the reasons the Secretary of State has already identified. *See* Secretary's Br. at 20 & n.7. Relying on federal cases applying the ADA, plaintiffs suggest that four of the plaintiffs' particular health conditions are *per se* "physical disabilities," and thus *per se* disabilities for every voter for purposes of Section 23-15-713(d). Plaintiffs' Br. at 7-8 & n.4. The four plaintiffs' health conditions are not *per se* disabilities under the ADA. To prove an ADA disability, an individual plaintiff must generally show a recognized impairment, identify a major life activity, and prove his or her impairment substantially limits that major life activity. *See Griffin v. United Parcel Service, Inc.*, 661 F.3d 216, 222 (5th Cir. 2011). Federal courts "are to make an individualized determination of whether an employee's impairment constitutes a disability, taking into consideration measures taken by the employee to mitigate the effects of the impairment." *Id.* And federal courts have recognized the underlying health conditions of the plaintiffs here may or may not be disabilities, but they certainly are not *per se* disabilities under the ADA.[1] Plaintiffs' attempt to measure their conditions by ADA standards to then

[1] Diabetes. *See Griffin*, 661 F.3d at 224 (no); *Miller v. Verizon Comm., Inc.*, 474 F. Supp. 2d 187, 194-98 (D. Mass. 2007) (case-by-case basis). Lupus. *See Carpenter v. Wal-Mart Stores*, 614 F. Supp. 2d 745, 762-63 (W.D. La. 2008) (no); *Lyman v. The City of New York*, 2003 WL 22171518, at *5-6 (S.D. N.Y. Sept. 19, 2003) (yes). Asthma. *See Faircloth v. Duke Univ.*, 267 F. Supp. 2d 470, 473 (M.D. N.C. 2003) (case-by-case basis). Cancer. *See Ellison v. Software Spectrum, Inc.*, 85 F.3d 187, 191-93 (5th Cir. 1996) (no); *Spelke v. Gonzales*, 516 F. Supp. 2d 76, 81-82 (D. D.C. 2007) (no).

create an inference that all voters with similar conditions are "physically disabled" goes nowhere under the ADA, and is irrelevant to Section 23-15-713(d).

Closing out their response on the first issue, plaintiffs assert that local officials "should not be in the business of second-guessing voters' own determinations about their health." Local officials also cannot get "in the business" of handing out absentee ballots to anyone who asks for one.

The Election Code's absentee excuses are narrow, objective, and limited, as the Legislature intended. The Chancery Court's decision below suggests that local election officials cannot question anyone who wants to vote by mail under any circumstances. That is not what the Code says. *See* Miss. Code. Ann. § 23-15-627. Local officials must do their part, in good faith, to ensure that only qualified absentee voters cast ballots by mail. And if they have no good faith basis to do so, voters must not seek to vote by mail. Whatever this Court determines Section 23-15-713(d) means, everyone must follow its ruling in conducting the absentee voting process that is already well-underway for the November election. When that ruling is issued, no voters or local officials will have a good faith basis to conduct themselves contrary to what this Court says the law provides—that is the Secretary of State's point here.

II. The Phrase "Under a Physician-imposed Quarantine" Does Not Include Voters Voluntarily Following General Public Health Guidance.

Two months ago, the Legislature amended Section 23-15-713(d)'s absentee excuse to include voters "under a physician-imposed quarantine." [ROA.311, RE 3]. Plaintiffs' stated "position" is that "under a physician-imposed quarantine" extends to any voter who "is following the directive of the State Health Officer or their

physician to avoid community events and the like." Plaintiffs' Br. at 15. Stated differently, plaintiffs believe the Legislature tethered absentee voting to generalized public health guidance—meaning that everybody can vote by mail, as long as they claim (truthfully or not) to be following non-binding suggestions. [2]

The plain meaning of "under a physician-imposed quarantine" undercuts plaintiffs' creative push for widespread mail-in voting this Fall. By its terms, the phrase only extends an absentee excuse to a voter who has been compelled to quarantine due to COVID-19 by an authorized physician.

Plaintiffs' counter-argument at page 12 of their brief obscures the definition of "quarantine" to suggest the term encompasses voluntary restraints derived from non-binding directives. It is true, as plaintiffs mention, that Merriam-Webster defines the noun "quarantine" as "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://merriam-webster.com/dictionary/quarantine> (visited Sept. 10, 2020). However, plaintiffs' brief fails to acknowledge that their dictionary also says "quarantine" means "a state of enforced isolation." *Id.*

Either way, by definition a "quarantine" is "a restraint upon activities" or "a state of enforced isolation." No fair reader can say that non-binding guidance—which

[2] Sprinkled throughout their brief, plaintiffs repeatedly call the MDH's non-binding guidance "directives" and apparently suggest that term has both voluntary and involuntary implications. Plaintiffs' Br. at n.7 (quoting the dictionary definition of "'directive'" as "'serving or intended to guide, govern, or influence' and 'something that serves to direct, guide, and usually impel toward an action or goal.'") Repeatedly mischaracterizing non-binding guidelines as "directives," and insinuating that they require persons to take certain actions does not help plaintiff's case. If the State Health Officer had ever intended for the MDH's generalized guidelines to be enforceable mandates, he would have issued them in an order, such as the August 4 quarantine order at issue in this case. [ROA.462-64, RE 4].

anyone obviously may follow at their whim—restrains anyone's activities or forces someone to isolate.

The historical and common usage of "quarantine" also conflicts with plaintiffs' interpretative theory. As Merriam-Webster explains, the "quarantine" refers to "a period of 40 days," correlating with "a term during which a ship arriving in port and suspected of carrying contagious disease is held in isolation from the shore," "a regulation placing a ship in quarantine," or "a place where a ship is detained during quarantine." *Id.* And common present examples of "quarantine" used in sentences include "the infected people were put into quarantine," "the cows will be kept in quarantine another week," and "the dog was put under quarantine." *Id.* Whether referring to vessels, animals, or people, the term "quarantine" historically and today describes forcing them into isolation. And the purpose for a "quarantine" proves what it means: to guard against the possibility that certain persons, animals, or things might carry a disease, and if not forced into "quarantine," they might unwittingly spread the disease in the community.[3]

[3] COVID-19 has not changed the common meaning of "quarantine." Plaintiffs can point to as many internet links as they wish in *Glamour* magazine, and catch-phrases for articles about weight loss which pair "quarantine" with "fifteen" because they rhyme. *See* Plaintiffs' Br. at n.6. But the fact of the matter is that, like the Mississippi Legislature, when governments have used the term "quarantine" in reference to COVID-19 lately, it has been exactly in the term's normal and common sense of isolation compelled by force of law—such as when state and local governments have compelled arriving travelers to "quarantine" for a period of time upon arrival in their jurisdiction. *See*, *e.g.*, Order Instituting a Mandatory 14-Day Quarantine Requirement for Travelers Arriving in Massachusetts (July 24, 2020), accessible on-line at: <https://www.mass.gov/doc/july-24-2020-travel-order-pdf/download> (visited Sept. 10, 2020); State of Hawaii Order for Self-Quarantine (Mar. 21, 2020), accessible on-line at: <https://governor.hawaii.gov/wp-content/uploads/2020/03/20-03-21-Order-for-Self-Quarantine.pdf> (visited Sept. 10, 2020).

Plaintiffs' misplaced reading of "quarantine" turns its normal usage on its head. When the MDH or the CDC suggests that people avoid, or take precautions at, "community gatherings" and "social events," those organizations are not forcing a suspected carrier of COVID-19 to stay home to protect the community from catching a disease. They are recommending that persons may isolate to take guard themselves against possible COVID-19 exposure. Those isolated persons' safety from a disease is not the purpose of a "quarantine." Rather, a "quarantine" protects the community from the persons who might have the disease, and are thus forced to "quarantine." The Legislature's use of the term in 2020 House Bill 1521 ("HB 1521") surely does not mean a "quarantine" in any sense other than its normal usage: the forced isolation of a suspected disease-carrier, not a possible disease-catcher.

In addition to muddying up the plain meaning of "quarantine," plaintiffs also distort the fact that only being "under a physician-imposed quarantine" allows a voter to cast a mail-in ballot. A physician's recommendation or guidance, no matter whether it is broadcasted from the MDH, the CDC, elsewhere, is not "physician-imposed." As the Secretary of State pointed out in his principal brief, and plaintiffs' response ignores, the transitive verb "impose" means "to establish or apply by authority" or "to establish or bring about as if by force." *Impose*, Merriam-Webster, <https://merriam-webster.com/dictionary/impose> (last visited Sept. 10, 2020). When the Legislature paired "physician-imposed" with "quarantine," to make "under a physician-imposed quarantine," that phrase can only mean only a voter forced to isolate by an authorized physician. Otherwise, "imposed" is superfluous. The plain

meaning of the phrase alone defeats plaintiffs' mistaken proposition that mere non-binding "statements from the MDH, CDC, and one's own physician to avoid unnecessary public gatherings or community events" can place a voter "under a physician-imposed quarantine." Plaintiffs' Br. at 12.

The plain meaning of "physician-imposed quarantine" also thwarts plaintiffs' attempt to blur the clear distinction between the MDH's August 4 Order requiring persons testing positive for COVID-19 to quarantine (a "physician-imposed quarantine") and the MDH's so-called "non-mandatory directives" that are "widespread and unanimous public health pronouncements" (not a "physician-imposed quarantine"). Plaintiffs' Br. at 14. Plaintiffs' rationale goes like this: a patient's personal physician or the MDH may impose a quarantine upon a patient; but personal physicians may communicate with patients in different ways; therefore "[s]urely, then, similar communications from Dr. Dobbs and the MDH to 'avoid . . . community events' are also physician-imposed quarantine[s]." Plaintiffs' Br. at 14 (alterations in original) (quoting [ROA.138-139]).

Plaintiffs' flawed logic wrongfully assumes everything about taking COVID-19 precautions that the MDH tells the public, or a private physician tells her patient, constitutes a "physician-imposed quarantine." That cannot be true. The MDH has issued an order that specifically requires persons who have tested positive for COVID-19 to quarantine. [ROA.462-64, RE 4]. The MDH has also issued non-binding guidance that suggests everyone should "protect themselves and others" by avoiding "large social gatherings and community events." [ROA.468]. Everyone knows the

difference. A voter subject to the MDH's quarantine order is plainly "under a physician-imposed quarantine," while a voter who elects to follow (or not) its non-binding guidance is not.

The same distinction applies when a voter's personal physician orders her to quarantine. A personal physician's order requiring a patient to quarantine places the patient "under a physician-imposed quarantine." A recommendation, like the MDH's generalized guidance, does not. Plaintiffs make too much of the notion that a physician allegedly has no authority to "compel" a patient to quarantine. That argument might make sense, if only in reality it were true. When a private physician orders a patient to quarantine after determining the patient has contracted COVID-19, or is suspected of having contracted it, the physician must report the case, and notify the MDH when the patient is discharged to quarantine at home or a facility.[4]

So plaintiffs can quibble over whether or not a private physician can "enforce" an order issued to a patient, or "compel" the patient to quarantine because of COVID-19. But the fact is that once the patient's case is reported, the patient is plainly subject to MDH's August 4 order, and the patient is subject to quarantine by law. No matter how plaintiffs characterize their physician-patient "communications," a private physician's order to a COVID-19 patient has the force of law. and thereby places the patient "under a physician-imposed quarantine." A mere recommendation or

[4] *See* MDH Rules and Regulations Governing Reportable Diseases and Conditions, Tit. 15, Part 2, Subpart 11, Ch. 1, Rule 1.1.1 (requiring physicians and other health care providers to report confirmed or suspected cases of communicable diseases), accessible on-line at: <https://www.msdh.ms.gov/msdhsite/_static/resources/1719.pdf> (visited Sept. 10, 2020); MDH Discharge Guidance for Suspected or Confirmed COVID-19 Patients, accessible on-line at: <https://www.msdh.ms.gov/msdhsite/_static/resources/8600.pdf> (visited Sept. 10, 2020).

suggestion to a negative COVID-19 patient does not. Only a voter in the former category may vote absentee by mail for the November election under Section 23-15-713(d).

Finally, "under a physician-imposed quarantine" plainly means what it says. By its terms, the unambiguous phrase only extends Section 23-15-713(d)'s absentee excuse to a voter who has been compelled to quarantine due to COVID-19 by an authorized physician. No resort to statutory construction rules is necessary. *Mississippi Ethics Comm'n v. Grisham*, 957 So. 2d 997, 1001 (¶12) (Miss. 2007).

But if "under a physician-imposed quarantine" could be considered ambiguous or unclear, then it should be interpreted narrowly for the reasons explained at pages 29 to 37 in the Secretary's principal brief. Plaintiffs' brief wisely does not repeat the flawed "legislative history" argument they made to the trial court about floor statements of an individual legislator. But they do wrongly complain about HB 1521's drafting history.

The fact that the Legislature removed the phrase "under a physician-imposed quarantine due to the concern of a COVID-19 public health risk" from the bill's final version refutes plaintiffs' position that merely following general public health guidance self-qualifies someone as being "under a physician imposed quarantine." *Compare* [ROA.339] *with* [ROA.311, RE 3]. By electing to modify "under a physician-imposed quarantine" with "due to COVID-19," as opposed to a broader term, the Legislature confirmed its intent that only persons compelled to quarantine due to contracting COVID-19 fall under the provision. Deleting the modifier "due to the

concern of a COVID-19 public health risk" from the final version eliminated any doubt that generalized guidance addressing concerns about COVID-19 public health risks do not put anyone under a "physician-imposed quarantine."

CONCLUSION

For the foregoing reasons and those set forth in his principal brief, the Secretary of State requests that the Court reverse the findings and conclusions in the Chancery Court's September 2 final order to the extent they are adverse to the Secretary of State, and render a judgment in the Secretary's favor on all issues presented in his appeal and plaintiffs' cross-appeal.

Respectfully submitted,

MICHAEL WATSON,
Mississippi Secretary of State

By: LYNN FITCH
Attorney General of Mississippi

/s/ Justin L. Matheny
KRISTI H. JOHNSON (Bar No. 102891)
Solicitor General
KRISSY C. NOBILE (Bar No. 103577)
Deputy Solicitor General
JUSTIN L. MATHENY (Bar No. 100754)
Assistant Solicitor General
DOUGLAS T. MIRACLE (Bar No. 9648)
Assistant Attorney General
MISSISSIPPI ATTORNEY GENERAL'S OFFICE
P.O. Box 220
Jackson, Mississippi 39205-0220
Telephone: (601) 359-3680
E-mail: *kristi.johnson@ago.ms.gov*
krissy.nobile@ago.ms.gov
justin.matheny@ago.ms.gov
doug.miracle@ago.ms.gov

Counsel for Appellant/Cross-Appellee
Secretary of State Michael Watson

CERTIFICATE OF SERVICE

I hereby certify that the foregoing document has been filed electronically with the Clerk of the Court using the MEC system, which sent notification to all counsel of record, and has also been mailed, via U.S. Mail, postage pre-paid to the following:

Hon. Denise S. Owens
Hinds County Chancery Court Judge
P.O. Box 686
Jackson, MS 39205-0686

THIS, the 10th day of September, 2020.

LYNN FITCH
Attorney General of Mississippi

/s/ Justin L. Matheny
Justin L. Matheny

Counsel for Appellant/Cross-Appellee
Secretary of State Michael Watson