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

MICHAEL WATSON, in his official capacity
as Secretary of State of Mississippi, ET AL. DEFENDANTS

DEFENDANTS' MOTION TO DISMISS
FOR LACK OF SUBJECT MATTER JURISDICTION

COME NOW Michael Watson, in his official capacity as Secretary of State of Mississippi, and Lynn Fitch, in her official capacity as Attorney General of the State of Mississippi (collectively, "defendants"), and file their Motion to Dismiss pursuant to Federal Rules of Civil Procedure 12(b)(1) as follows:

1. In light of COVID-19 concerns, the Secretary of State's Office and state and local election officials recognize the pressing need to ensure all voters are provided with an opportunity to safely cast their ballots in the upcoming November 3, 2020 general election. In furtherance of that goal, state and local officials are taking extensive steps to ensure the safety of voters and working diligently to preserve the integrity of the November general election by safeguarding in-person voting.

2. Protecting the integrity of elections is among the State's highest and most profound interests. To advance that interest, Mississippi's Election Code establishes, as a whole, a comprehensive in-person voting system, with a few absentee balloting exceptions.

Registrars in Mississippi began distributing absentee ballots for mail-in voting on September 19, 2020, and in-person absentee voting began on September 21, 2020.

3. In the midst of the State's election cycle, and while absentee voting is underway, plaintiffs challenge three components of Mississippi's election laws. While those 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 Attorney General Lynn Fitch, in her official capacity, may go forward. The Eleventh Amendment bars all the claims asserted against the Attorney General, and plaintiffs otherwise lack Article III standing to sue the Attorney General.

4. Accordingly, LWVMS and MS NAACP should be dismissed as plaintiffs, and the Attorney General should be dismissed as a defendant.

5. In support of their motion, the defendants rely on their memorandum in support of this motion.

THIS, the 8th day of October, 2020.

Respectfully submitted,

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DEFENDANTS' MEMORANDUM OF AUTHORITIES SUPPORTING MOTION TO DISMISS FOR LACK OF SUBJECT MATTER JURISDICTION

INTRODUCTION

In light of COVID-19 concerns, the Secretary of State's Office and state and local election officials recognize the pressing need to ensure all voters are provided with an opportunity to safely cast their ballots in the upcoming November 3, 2020 general election. In furtherance of that goal, state and local officials are taking extensive steps to ensure the safety of voters and are working diligently to preserve the integrity of the November general election by safeguarding in-person voting.

Protecting the integrity of elections is among the State's highest and most profound interests. To advance that interest, Mississippi's Election Code establishes, as a whole, a comprehensive in-person voting system, with a few absentee balloting exceptions. Registrars in Mississippi began distributing absentee ballots for mail-in voting on September 19, 2020, and in-person absentee voting began on September 21, 2020.

In the midst of the State's election cycle, and while absentee voting is underway, plaintiffs challenge three components of Mississippi's election laws. While those

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 Attorney General Lynn Fitch, in her official capacity, may go forward. The Eleventh Amendment bars all the claims asserted against the Attorney General, and plaintiffs otherwise lack Article III standing to sue the Attorney General. Accordingly, LWVMS and MS NAACP should be dismissed as plaintiffs, and the Attorney General should be dismissed as a defendant.

FACTS

The State's Absentee Voting Laws

Mississippi's modern Election Code, originally enacted in 1986, governs all elections in the State, including the mechanics of voting, such as ballot-building, voting systems, absentee balloting, and the conduct of elections. *See* MISS. CODE ANN. § 23-15-1 *et seq.* § 23-15-331 *et seq.*, § 23-15-391 *et seq.*, § 23-15-541 *et seq.*, § 23-15-621 *et seq.* When viewed as a whole, the Code sets a process requiring all voters to cast their ballots in-person on election day, unless a voter meets one of the narrow statutory excuses for casting an absentee ballot.

The Code's absentee excuses extend to:

- students, teachers, or their spouses who will be absent from their home county on election day;
- members of Mississippi's congressional delegation, their spouses, and employees;
- anyone who will be away from their home county on election day;

- 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.[1] 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.

[1] 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*, 2020 WL 5627095 (Miss. 2020). The plaintiffs sought declaratory relief concerning who may vote by absentee ballot under Section 23-15-713(d).

In pertinent part, the plaintiffs asked the state court to declare: (i) that Section 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; and (ii) that Section 23-15-713(d) permits any voter to vote absentee if he or she wishes to avoid voting in-person at a polling place due to generalized guidance

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 condition that puts a voter at a higher risk does not automatically create a temporary disability for absentee-voting purposes.

Oppenheim, 2020 WL 5627095, at *3. Additionally, as to the statutory language concerning who may vote by absentee ballot because they are under a "physician-imposed quarantine," the Court held that "the plain meaning of 'physician-imposed quarantine' requires a directive issued by a duly authorized physician that orders a voter to quarantine, not mere 'guidance' or a 'recommendation.'" *Id.*

Plaintiffs' Lawsuit

On August 27, while the *Oppenheim* litigation was ongoing, three individuals and two organizations filed the instant federal lawsuit against the Secretary of State and the Attorney General, in their official capacities. [Doc. 1].

Plaintiffs' complaint asserts six counts that essentially challenge three components of Mississippi's election laws "in the context of the COVID-19 pandemic." [Doc. 1 at 3 (¶8)]. First, plaintiffs allege the Election Code's limited absentee excuses violate their fundamental right to vote because they "unconstitutionally burden[ ] the right to vote by denying voters who reasonably fear that voting in-person will increase their risk of exposure to COVID-19." [Doc. 1 at 49 (¶133)]. Second, plaintiffs contend the Code's

notarization requirement applicable to certain categories of mail-in voters unconstitutionally burdens their fundamental right to vote because it forces them to engage in "face-to-face contact, putting them in danger of contracting and potentially dying from the coronavirus." [Doc. 1 at 52 (¶149)]. Third, plaintiffs assert the defendants' "failure to provide absentee voters with notice and an opportunity to cure perceived signature-related deficiencies with their absentee ballot" violates their right to vote and procedural due process rights. [Doc. 1 at 53-54 (¶153)].

FEDERAL RULE 12(b)(1) STANDARD

"A case is properly dismissed for lack of subject matter jurisdiction [under Federal Rule 12(b)(1)] when the court lacks the statutory or constitutional power to adjudicate the case." *Home Builders Ass'n of Miss., Inc. v. Madison*, 143 F.3d 1006, 1010 (5th Cir. 1998) (citation omitted). "[T]he requirement that a claimant have standing is an essential and unchanging part of the case-or-controversy requirement of Article III." *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 733 (2008) (quotations omitted). Further, "[m]otions to dismiss based on Eleventh Amendment immunity are decided under Rule 12(b)(1) of the Federal Rules of Civil Procedure." *Hope v. Bryant*, No. 3:15-cv-234-DPJ-FKB, 2016 WL 380128, at *1 (S.D. Miss. 2016). The party invoking the jurisdiction of the federal court bears the burden of demonstrating its existence. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

A court may base its disposition of a motion to dismiss for lack of subject matter jurisdiction on the complaint alone, the complaint supplemented by undisputed facts evidenced in the record, or the complaint supplemented by undisputed facts plus the

court's resolution of disputed facts. *Williamson v. Tucker*, 645 F.2d 404, 413 (5th Cir.), *cert. denied*, 454 U.S. 897 (1981)).[2] 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 Dismissed as Plaintiffs.

Plaintiffs LWVMS and MS NAACP argue that they have both organizational and associational standing [Doc. 10-1 at p. 10]. An organization can demonstrate Article III standing through associational or organizational standing. *See Am. Civil Rights Union v. Martinez-Rivera*, 166 F. Supp. 3d 779, 787 (W.D. Tex. 2015). Contrary to plaintiffs' claims, LWVMS and MS NAACP cannot establish either. As a result, these plaintiffs lack standing to sue and should be dismissed as parties to this lawsuit.

A. LWVMS and MS NAACP Cannot Establish Organizational Standing.

An organization "can establish standing in its own name if it meets the same standing test that applies to individuals." *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017) (citation omitted). "[T]he irreducible constitutional minimum of standing contains three elements:" an (1) injury in fact (2) that is fairly traceable to the

[2] On September 24, 2020, plaintiffs served defendants with a motion for preliminary injunction. [Doc. 10, 11]. Plaintiffs submitted declarations from the individual and organizational plaintiffs that echo their complaint allegations with respect to their standing. *See* [Doc. 10-2, 10-5, 10-6, 10-8, 10-9]. The Court may treat their complaint allegations and declarations as true, for purposes of this motion only.

challenged conduct (3) that would be redressed by a favorable decision. *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992).

To prove the first element of standing, a plaintiff's alleged injury in fact must be "concrete, particularized, and actual or imminent." *Monsanto Co. v. Geertson Seed Farms*, 561 U.S. 139, 149 (2010). In other words, the injury must be "certainly impending," *Lujan*, 504 U.S. at 564, and "[a]llegations of possible future injury" will not suffice, *Whitmore v. Ark.*, 495 U.S. 149, 158 (1990). "Federal courts consistently deny standing when [the] claimed anticipated injury has not been shown to be more than uncertain potentiality." *Prestage Farms v. Bd. of Sup'rs of Noxubee Cty.*, 205 F.3d 265, 268 (5th Cir. 2000). "The possibility, that maybe, in the future, if a series of events occur, [a plaintiff] might suffer some injury, is clearly too impalpable to satisfy the requirements of Article III." *Trinity Indus. v. Martin*, 963 F.2d 795, 799 (5th Cir. 1992).

Nonprofit organizations can suffer an Article III injury when a defendant's actions frustrate their missions and force them to "divert[ ] significant resources to counteract the defendant's conduct." *N.A.A.C.P. v. City of Kyle*, 626 F.3d 233, 238 (5th Cir. 2010). Organizational standing based on diversion of resources arises when "the defendant's conduct significantly and perceptibly impaired the organization's ability to provide its activities—with the consequent drain on the organization's resources." *Id.* at 238 (cleaned up). Such an injury must be "concrete and demonstrable." *Id.* Thus, "[n]ot every diversion of resources to counteract the [defendants'] conduct . . . establishes an injury in fact." *Id.*

To establish this type of injury in fact, an organization must do more than allege simply a setback to its abstract social interests. *See Sierra Club v. Morton*, 405 U.S. 727,

729 (1972). "It must instead show that it would have suffered some other injury if it had not diverted resources to counteracting the problem." *La Asociacion de Trabajadores de Lake Forest v. City of Lake Forest*, 624 F.3d 1083, 1088 (9th Cir. 2010).

And the second and third elements of standing are self-explanatory. For example, an injury is not "fairly traceable" to a defendant's conduct if its existence depends on people or forces outside of the court's control. *See Little v. KPMG LLP*, 575 F.3d 533, 540 (5th Cir. 2009); *see also Clark v. Edwards*, Nos. 20-203; 20-283, 2020 WL 3415376, at *14 (M.D. La. June 22, 2020). Similarly, to establish redressability, a plaintiff must demonstrate that an order against the defendants would remedy the harm about which they complain. *See Fusilier v. Landry*, 936 F.3d 447, 467 (5th Cir. 2020) (Duncan, J., dissenting in part and concurring in the judgment in part).

Neither LWVMS nor MS NAACP have established organizational standing because neither has suffered a "concrete and demonstrable" injury in fact. *See City of Kyle*, 626 F.3d at 238. Even if they had alleged facts in support of an Article III injury (and they have not), both organizations trace that injury *to the pandemic*—rather than the conduct of the defendants. *See Clark*, 2020 WL 3415376, at *13-14. And, because LWVMS and MS NAACP cannot establish the requisite traceability, redressability is lacking.

To be sure, LWVMS and MS NAACP both cite a diversion of resources as the basis for their alleged injury in fact. Specifically, both organizations have diverted resources away from their typical voter-registration efforts to educating voters about the requirements of Mississippi's absentee-voting laws. [Doc. 1 ¶¶ 34, 39-40; Doc. 10-8 ¶¶ 8-14; Doc. 10-9 ¶¶ 13-25]. But both organizations candidly admit that their respective

missions were focused on voter registration and education [Doc. 1 ¶¶ 25, 35; Doc. 10-8 ¶¶ 6-7; Doc. 10-9 ¶ 6]—long before the pandemic raised the purported need to address allegedly widespread absentee voting.

Thus, the alleged diversion of resources does not represent a significant diversion away from either organization's stated original mission. *Clark*, 2020 WL 3415376, at *13. In other words, LWVMS and MS NAACP "have not alleged that the diversion of resources concretely and 'perceptibly impaired' [their] ability to carry out their purpose." *Miller v. Hughs*, No. 1:19-CV-1071-LY, 2020 WL 4187911, at *5 (W.D. Tex. July 10, 2020) (quoting *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). And neither LWVMS nor MS NAACP have specifically identified what activities they diverted resources *from* in order to combat the defendants' alleged misconduct. *Compare Jacobson v. Fla. Sec'y of State*, No. 19-14552, 2020 WL 5289377, at *9 (11th Cir. Sept. 3, 2020) (requiring plaintiffs claiming organizational standing "explain[ ] what activities [they] would divert resources away *from* in order to spend additional resources on combatting" the challenged harms) (emphasis in original) *with* [Doc. 10-8 ¶ 10] (describing "[v]oter registration and education campaigns"); [Doc. 10-9 ¶ 26] (describing a "normal program of voter services").

The fact that the content of voter education and outreach is related to Mississippi's absentee-voting requirements, rather than in-person-voting requirements, is insufficient to demonstrate an injury in fact. "To hold otherwise would be to hold tha[t] any change in state election law gave nonprofit organizations like [these] standing to sue, simply because they were forced to incorporate the new legal landscape into their education and outreach

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-08, 2020 WL 4218227, at *4 (W.D. Tex. July 22, 2020) (citing *Hunt v. Wash. State Apple Adver. Comm'n*, 432 U.S. 333, 343 (1977)).

To satisfy the first element, at least one member of the association must be able to satisfy the ordinary standing inquiry. *Hancock Cty. Bd. of Sup'rs v. Ruhr*, 487 F. App'x 189, 195 (5th Cir. 2012). As with other standing analyses, the injury in fact in support of associational standing cannot "merely amount to generalized grievances about the government." *See Martinez-Rivera*, 166 F. Supp. 3d at 787 (concluding that an organization lacked associational standing based on its generalized allegations of undermined voter confidence and potential vote dilution). Without a particularized injury in fact, an association's members lack standing to sue. *See id.*; *accord Miller*, 2020 WL 4187911, at *5 ("Committee Plaintiffs' allegations merely suggest, in the abstract, that some members . . . may be harmed in the 2020 general election. Such allegations are insufficient for associational standing because the alleged injury is neither concrete nor imminent.").

The third element is typically satisfied only when the association's interests are "identical" to the interests of its members. *See Tex. Democratic Party v. Benkiser*, 459 F.3d 582, 588 (5th Cir. 2006). To demonstrate this congruity of interest, LWVMS and MS NAACP must establish that their claims are not fact-specific to individual members. *See Ruhr*, 487 F. App'x at 198 (citing *Friends for Am. Free Enter. Ass'n v. Wal-Mart Stores, Inc.*, 284 F.3d 575, 577 (5th Cir. 2002)). If "individualized assessments and fact-intensive

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 members is required to provide evidence critical to both standing and the merits of their claims.

In fact, the individual plaintiffs listed as named plaintiffs further proves the particularized nature of the inquiry. Plaintiff Cynthia Parham contends that "[b]ecause of her and her husband's health conditions, she will need to vote by absentee ballot during the COVID-19 pandemic, including the November election." [Doc. 1 ¶ 22]. Similarly, plaintiff Jed Oppenheim states that "[b]ecause of the severe risk that voting in person poses to his wife's life and his mother-in-law's health, Mr. Oppenheim must vote by absentee ballot." [Doc. 1 ¶ 23]. And, while plaintiff Cheryl Goggin may vote by absentee ballot because of her age, she nonetheless takes issue with the fact that her ballot application and ballot envelope must be notarized. [Doc. 1 ¶ 24]. Because of Goggin's "age and medical conditions," she does not wish to "leave her home" and "engage with the public at a location that provides notary services or signatures for absentee ballot materials." [Doc. 1 ¶ 24].

It is axiomatic that individual participation is required, meaning the interests of the individual plaintiffs are not "fully represented by" LWVMS and MS NAACP. *See Benkiser*, 459 F.3d at 588. Moreover, the claim to associational standing crumbles entirely when considering the individualized evidence presented in conjunction with plaintiffs' Motion for Preliminary Injunction. [Doc. 10]. Accordingly, because "individualized proof" is necessary for the resolution of this case, associational standing is lacking. *See Warth*, 422 U.S. at 515-516.

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 standing requires "that a litigant, ordinarily, 'must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties.'"[3] *Kumar v. Frisco Ind. Sch. Dist.*, 443 F. Supp. 3d 771, 781 (E.D. Tex. Mar. 6, 2020) (quoting *U.S. Dep't of Labor v. Triplett*, 494 U.S. 715, 721 (1990)). This doctrine is supported by two main reasons:

> First, the courts should not adjudicate such rights unnecessarily, and it may be that in fact the holders of those rights either do not wish to assert them, or will be able to enjoy them regardless of whether the in-court litigant is successful or not. . .Second, third parties themselves usually will be the best proponents of their own rights.

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[3] In addition to the rule against pressing the rights of other litigants, the Supreme Court has recognized two additional principles characterizing the judicial construction of prudential standing: (1) "the rule barring adjudication of generalized grievances more appropriately addressed in the representative branches" and (2) "the requirement that a plaintiff's complaint fall within the zone of interests protected by the law invoked." *Lexmark Int'l, Inc. v. Static Control Components, Inc.*, 572 U.S. 118, 126 (2014). Defendants address only the rule against pressing the rights of other litigants because "the first principle—the bar on generalized grievances—is a constitutional strand of standing, not a prudential strand." *See Kumar*, 443 F. Supp. 3d at 780. And "the [second] principle—that a plaintiff's complaint must fall within the zone of interests protected by the law invoked—is a matter of statutory construction, rather than prudential standing." *See id.*

After *Lexmark*, the viability of third-party standing jurisprudence remains uncertain, but the "prudential requirement that a party must assert its own rights" still applies in the Fifth Circuit, *Danos v. Jones*, 652 F.3d 577, 582 (5th Cir. 2011), and this Court is "bound to follow [that] precedent until the Supreme Court squarely holds to the contrary," *see Kumar* 443 F. Supp. 3d at 781 (quoting *Exelon Wind 1, L.L.C. v. Nelson*, 766 F.3d 380, 394 (5th Cir. 2014)).

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

this action demonstrates that fact quite well. Like organizational and associational standing, prudential standing is lacking.

II. The Eleventh Amendment Bars All Claims by All Plaintiffs Asserted Against the Attorney General.

"Federal courts are without jurisdiction over suits against a [S]tate, a state agency, or a state official in his official capacity unless that state has waived its sovereign immunity or Congress has clearly abrogated it." *Moore v. La. Bd. of Elementary & Secondary Educ.*, 743 F.3d 959, 963 (5th Cir. 2014). To overcome the Eleventh Amendment's bar, plaintiffs undoubtedly will argue their claims fit within the narrow exception in *Ex parte Young*, 209 U.S. 123 (1908).

But *Ex parte Young* only applies in a suit challenging a state law if the defendant has "'some connection with the enforcement of the act' in question or [is] 'specifically charged with the duty to enforce the statute' and [is] threatening to exercise that duty." *Morris v. Livingston*, 739 F.3d 740, 746 (5th Cir. 2014) (quoting *Okpalobi v. Foster*, 244 F.3d 405, 414-15 (5th Cir. 2001)).'The required 'connection' is not 'merely the general duty to see that the laws of the state are implemented,' but 'the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty.'" *Id.* (quoting *Okpalobi*, 244 F.3d at 416). Plaintiffs' claims against the Attorney General fail the "some enforcement connection" test.

To be sure, the Attorney General lacks authority to "enforce" Mississippi's absentee ballot rules at issue in plaintiffs' complaint. Indeed, the Fifth Circuit has defined the term "enforce" in this context to involve "compulsion or constraint." *K.P. v. LeBlanc*, 627 F.3d 115, 124-25 (5th Cir. 2010) (*K.P. I*); *see also K.P. v. LeBlanc*, 729 F.3d 427, 436-37 (5th Cir.

2013) (*K.P. II*); *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 behalf of the State and its agencies, and has a duty to "intervene and argue the constitutionality of any statute when notified of a challenge thereto, pursuant to the Mississippi Rules of Civil Procedure." *Id.* Further, the Attorney General also defends lawsuits filed against state officers in their official capacities. MISS. CODE ANN. § 7-5-39. But the Attorney General's general duty and authority to bring or defend lawsuits by or against the State, its agencies, and/or its officers—and argue the constitutionality of any laws—in no sense includes "enforcing" the State's absentee voting laws challenged in plaintiffs' complaint. Nor do plaintiffs ever contend as much.

Consequently, the Attorney General's general representation of the State of Mississippi—and even specifically representing the Secretary of State in this litigation—does not satisfy *Ex parte Young*. *See Ex parte Young*, 209 U.S. at 157 (rejecting argument that constitutionality of an act could be challenged by suit against attorney general simply

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) ("Nothing in GA-09 tasks the Attorney General with enforcing it."); *Texas Democratic Party v. Abbott*, No. 20-50407, 2020 WL 5422917, at *6 (5th Cir. Sept. 10, 2020) ("A general duty to enforce the law is insufficient for *Ex parte Young*."); *see also McLemore v. Hosemann*, 414 F. Supp. 3d 876, 884–85 (S.D. Miss. 2019) ("[The Attorney General's] general duty to intervene and defend challenges to Mississippi laws does not establish that he has the requisite 'connection[.]'"); *Campaign for S. Equality v. Miss. Dep't of Human Servs.*, 175 F. Supp. 3d 691, 701–03 (S.D. Miss. 2016) ("The duty to defend the state in litigation is not the same thing as the power to enforce a statute.").

III. Plaintiffs Lack Article III Standing for the Claims Asserted Against the Attorney General.

The "Article III . . . and *Ex parte Young* analys[es] 'significantly overlap.'" *City of Austin v. Paxton*, 943 F.3d 993, 1002 (5th Cir. 2019) (quoting *Air Evac*, 851 F.3d at 520). Both require a determination "that an official *can* act" and a "significant possibility that he or she *will* act to harm [the] plaintiff." *Id.* (emphasis supplied) (citing *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1047 (6th Cir. 2015)). The Article III and *Ex parte Young* questions are, however, distinct.

As discussed, the Article III standing requirements are familiar. First, plaintiffs must have suffered an injury in fact—that is—and an invasion of a legally protected interest which is concrete and particularized, and actual or imminent, not conjectural or hypothetical. Second, there must be a causal connection between the alleged injury and

the conduct complained of—the injury has to be fairly traceable to the challenged action of the defendant, and not the result of the independent action of some third party not before the court. Third, plaintiffs must show that it is likely, as opposed to merely speculative, that the alleged injury will be redressed by a favorable decision. *Id.* at 560-61.

Further, Article III requires an adversarial interest existing across the two opposing parties to the lawsuit. *Muskrat v. United States*, 219 U.S. 346, 357, 362 (1911). "In its constitutional dimension, standing imports justiciability: whether the plaintiff has made out a 'case or controversy' between himself and the defendant within the meaning of Art[icle] III." *Warth v. Seldin*, 422 U.S. 490, 498 (1975). Thus, in a suit against state officials, a plaintiff does not have Article III standing with respect to those officials who are powerless to remedy the alleged injury. *Linda R.S. v. Richard D.*, 410 U.S. 614, 616–18 (1973); *Okpalobi*, 244 F.3d at 426-27 (en banc).

For purposes of this motion only, the defendants assume that the individual plaintiffs have an alleged injury. But the plaintiffs nonetheless fail to satisfy the causation and redressability prongs of the standing analysis with respect to the claims asserted against the Attorney General.

Causation. Plaintiffs cannot establish a causal connection between their alleged injury and the actions, if any, of the Attorney General. The Attorney General does not possess the statutory authority to enforce any of the absentee voting statutes challenged by plaintiffs. And plaintiffs' alleged claims against the Attorney General thus fall squarely into *Okpalobi*'s prohibitions. An examination of each cause of action proves the point:

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—let alone authority to offer public advice contrary to the Mississippi Supreme Court.

Count Two. Plaintiffs' next claim is brought in the alternative. According to the complaint, the Election Code's "Excuse Requirement unconstitutionally burdens the right to vote by denying voters who reasonably fear that voting in-person will increase their risk of exposure to COVID-19." [Doc. 1 ¶ 133]. The Attorney General does not disburse applications for absentee ballots and has no authority to decide whether an individual meets the requirements to vote by absentee ballot.

Rather, the Election Code authorizes county registrars "to disburse applications for absentee ballots to any qualified elector within the county where he serves," MISS. CODE ANN. § 23-15-625(2), and registrars are "responsible for furnishing an absentee ballot application form to any elector authorized to receive an absentee ballot." MISS. CODE ANN. § 23-15-627. During the process, voters applying for an absentee ballot are responsible for completing the application form, which requires the voter to select an absentee excuse and "fill in the application as is appropriate for his particular situation." MISS. CODE ANN.

§ 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 (MISS. CODE ANN. § 23-15-721); and the Attorney General has no authority to reject an absentee ballot if it is found to be legally insufficient (MISS. CODE ANN. § 23-15-641).

Counts Five and Six. Plaintiffs' final claims concern the requirement of signature matching between signatures on a voter's absentee application and the signature on the voter's absentee ballot envelope for absentee by mail ballots. [Doc. 1 ¶¶ 119, 152-156, 159-161]. Mississippi law requires local election officials to compare the signature on the application for an absentee ballot with the signature on the back of the envelope

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.

Additionally, plaintiffs also sue the Attorney General because she "gives written opinion to the Secretary of State and other state and local officials," and Secretary Watson previously requested an opinion from the Attorney General regarding the requirements to vote by absentee ballot. [Doc. 1 ¶ 45]. This contention is equally unavailing. First, the Attorney General did not provide any such opinion because plaintiffs filed suit in state court concerning who may vote by absentee ballot, and the Mississippi Supreme Court authoritatively answered that question. *See generally Oppenheim*, 2020 WL 5627095. Second, even in cases where the Attorney General has issued an opinion relating to an issue in the pertinent litigation, this Court has rejected the argument that such conduct somehow manufactures Article III standing. *Campaign for Southern Equality*, 175 F. Supp. 3d at 702-703.

Lastly, plaintiffs' complaint not only seeks injunctive relief against the Attorney General. Plaintiffs also seek declaratory relief in subsections (b), (c), and (d) of their prayer for relief. [Doc. 1 pp. 55-56]. Yet seeking relief in the form of a declaration instead of an injunction does not get plaintiffs around Article III's requirements. "If courts may simply assume that everyone (including those who are not proper parties to an action) will honor the legal rationales that underlie their decrees, then redressability will always exist." *Franklin v. Massachusetts*, 505 U.S. 788, 825 (1992) (Scalia, J., concurring in part and concurring in the judgment).[4]

[4] A federal court cannot "pronounce any statute, either of a state or of the United States, void, because irreconcilable with the constitution, except as it is called upon to adjudge the legal rights *of litigants* in actual controversies." *Baker v. Carr*, 369 U.S. 186, 204 (1962) (emphasis supplied); *Marine Equipment Management Co. v. U.S.*, 4 F.3d 643, 646 (8th Cir. 1993) ("The case or controversy requirement of Article III applies with equal force to actions for declaratory judgment as it does to actions seeking traditional coercive relief.");

In short, plaintiffs lack Article III standing because they seek relief that the Attorney General cannot provide for an alleged injury the Attorney General did not cause.

CONCLUSION

For the foregoing reasons, defendants request that the Court dismiss LWVMS and MS NAACP as plaintiffs because they have failed to demonstrate either organizational or associational standing. Separately, Mississippi Attorney General Lynn Fitch, in her official capacity, should be dismissed as a defendant. The Eleventh Amendment bars all the claims asserted against the Attorney General, and plaintiffs otherwise lack Article III standing to sue the Attorney General.

THIS, the 8th day of October, 2020.

Respectfully submitted,

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Digital Recognition Network, Inc. v. Hutchinson, 803 F.3d 952, 958-59 (8th Cir. 2015) (reasoning that "[a] declaration of the Act's unconstitutionality would provide [plaintiff] with a favorable judicial precedent on an abstract legal issue under the First Amendment. But if that measure of relief were sufficient to satisfy Article III, then the federal courts would be busy indeed issuing advisory opinions that could be invoked as precedent in subsequent litigation."); *Sullo & Bobbitt, PLLC v. Abbott*, 2012 WL 2796794, at *5 (N.D. Tex. July 10, 2012) (dismissing claim for lack of standing, and noting that declaratory relief cannot be an advisory opinion—instead a "judicial pronouncement" has to settle "some dispute *which affects the behavior of the defendant towards the plaintiff* and not of a third party.") (internal quotations and citations omitted) (emphasis in original).

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