

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

DISABILITY RIGHTS MISSISSIPPI, LEAGUE  
OF WOMEN VOTERS OF MISSISSIPPI,  
WILLIAM EARL WHITLEY, MAMIE  
CUNNINGHAM, and YVONNE GUNN,

*Plaintiffs,*

v.

Civil Action No.

LYNN FITCH, in her official capacity as  
Attorney General of the State of Mississippi;  
MICHAEL D. WATSON, JR., in his official  
capacity as Secretary of State of Mississippi;  
GERALD A. MUMFORD, in his official capacity  
as Hinds County Attorney; and ELIZABETH  
AUSBERN, in her official capacity as Chickasaw  
County Attorney;

*Defendants.*

**MEMORANDUM OF LAW IN SUPPORT OF PLAINTIFFS' URGENT AND  
NECESSITOUS MOTION FOR PRELIMINARY INJUNCTION**

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## **INTRODUCTION**

Unless this Court intervenes, Senate Bill 2358 (“S.B. 2358”) will unlawfully prevent voters

Declaration of Polly Tribble on behalf of Disability Rights Mississippi (“DRMS Dec.”) ¶¶ 13-18. S.B. 2358’s limitation on voters’ choice is in direct conflict with Section 208 and therefore preempted under the Supremacy Clause of the U.S. Constitution. *Gade v. Nat’l. Solid Wastes Mgmt. Ass’n*, 505 U.S. 88, 98 (1992).

The ability to vote absentee by mail is critical to Mississippi voters experiencing a condition that prevents them from voting in person. In recent elections, over 100,000 Mississippians have voted absentee by mail.<sup>1</sup> Many voters with disabilities require assistance with the return of their completed ballot, which must be physically mailed to election officials in order to be counted. *See, e.g.*, DRMS Dec. ¶ 14.

Plaintiffs include both voters in need of assistance and organizations and individuals who work to provide that assistance in their communities. For example, Plaintiff William Earl Whitley—an Army veteran—is a voter who has relied and wants to continue to rely on Plaintiff Yvonne Gunn to assist him in the return of his b





## **FACTUAL BACKGROUND**

### **I. ABSENTEE VOTING IN MISSISSIPPI**

An estimated one in five adults in Mississippi, over 850,000 people, have a disability.<sup>2</sup> In general, people with disabilities disproportionately rely upon absentee voting because of difficulties with mobility, limited access to transportation, risks associated with in-person voting,

parent or child of a candidate whose name appears on the absentee ballot being marked or the voter's employer, an agent of that employer or a union representative. . . .” *Id.* at § 23-15-631(f). The ballot must be placed in the provided envelope, which is to be sealed, with the voter’s and the witness’s signatures placed along the flap. *Id.* at § 23-15-719(3).

“After the absentee voter has sealed the envelope, he or she shall subscribe and swear to an affidavit and mail the ballot to the address” provided by the county registrar (*i.e.*, circuit clerk). *See id.* at § 23-15-719(1). Under Mississippi law, those ballot envelopes must be delivered to and inspected by the circuit clerks before they can be cc

Any violation of S.B. 2358 shall be subject to a criminal charge that includes imprisonment of up to one year in county jail and or a fine up to \$3,000. Miss. Code Ann. § 97-13-37. The County Attorney Defendants have “full responsibility” for prosecuting such offenses within their respective jurisdictions. *Id.* at § 19-23-11. S.B. 2358 creates a reality where a voter can rely on “anyone of [their] choice” to help them fill out the ballot, but then cannot have that same person assist with an equally critical part of the voting process—returning the ballot—if they do not fit within narrow categories.

## **II. IMPACT OF S.B. 2358 ON PLAINTIFFS**

S.B. 2358 will disenfranchise some voters altogether. Other voters will be unable to rely on the person they most trust and would choose first to return their ballot. Potential assisters will face prosecution or be chilled from assisting because of the risk of prosecution. For example, Mr. Whitley relies on Ms. Gunn to assist him with returning his ballot. Whitley Dec. ¶ 17. Mr. Whitley has prosthetics but often suffers from phantom pain that makes it too unbearable for him to put them on. *Id.* ¶ 7. His legs also often become too swollen to fit in the prosthetics. *Id.* ¶ 8. On these days, Mr. Whitley cannot leave his home. *Id.*

Mr. Whitley recently received new prosthetics, and it will take him a while to get used to



assisted her with returning her absentee ballot. *Id.* Ms. Gates now lives in a nursing home but still relies on Ms. Gunn to assist her to vote because of the trust that was built. *Id.*

Another example is how Ms. Cunningham assists Mae Francis Collins who lives in Okolona and is homebound. Cunningham Dec. ¶ 11. Ms. Collins uses a walker and wheelchair but is almost entirely trapped in her home, due to the lack of an accessible path, and cannot reach her mailbox across the street without assistance. *Id.* Ms. Collins relies on others to bring her the mail because of her physical disabilities. *Id.* Ms. Cunningham most recently assisted Ms. Collins with the return of her absentee ballot in the 2022 election. *Id.* Ms. Collins trusts Ms. Cunningham to assist her with voting and cannot rely on anyone who meets the narrow exceptions under S.B. 2358 to help her. *Id.* Both Ms. Cunningham and Ms. Gunn want to assist voters like Ms. Collins and Ms. Gates in the upcoming elections but fear prosecution by Defendants under S.B. 2358. Gunn Dec. ¶¶ 10, 18. Their fear is based on a credible threat of prosecution—state officials have publicly touted the passage of S.B. 2358 and cast it as a top political priority.<sup>5</sup>

LWV-MS has a member who previously assisted voters returning their ballots in a detention facility. LWV-MS Dec. ¶ 14. The member wishes to continue to assist absentee voters in the 2023 elections but fears prosecution by Defendants and does not know if she can continue. *Id.* LWV-MS is also injured by S.B. 2358 because the organization now has to expend resources to create new voter education materials to warn its members and Mississippi voters about the law. *Id.* ¶ 13. LWV-MS also has to spend time and money to warn its members to not ask unauthorized persons to return ballots and to not return ballots themselves—even if they may be authorized—because S.B. 2358 does not clearly define who is permitted to return a ballot. *Id.*

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<sup>5</sup> See Kayode Crown, *Mississippi Bans Handling Other Voters' Mail Absentee Ballots*, Mississippi Free Press (Mar. 23, 2023), <https://www.mississippifreepress.org/32098/mississippi-bans-handling-other-voters-mail-absentee-ballots>.

Lastly, DRMS constituents include every voter in Mississippi with disabilities because of their status as a P&A. DRMS Dec. ¶¶ 4-8. Voters with disabilities who need assistance will not be able to select the person they want to provide it. Some of these voters are at risk of disenfranchisement because they cannot rely on the few categories of individuals who are authorized under S.B. 2358. *Id.* ¶¶ 13-18. As some examples, people with mobility disabilities who rely upon friends, neighbors, or other community members for help with sending mail will be deprived of their choice of assistor or prevented from voting. *Id.* ¶ 14. Residents of congregate facilities who rely on facility staff to handle all of their mail will be disenfranchised altogether. *Id.* ¶¶ 15-16. DRMS is also injured by S.B. 2358 because it has to divert resources from other critical work such as responding to disability discrimination, promoting educational access, and investigating instances of nursing home abuse and neglect in order to develop and present new trainings to warn voters with disabilities about the law. *Id.* ¶¶ 24-25.

## **ARGUMENT**

### **I. PLAINTIFFS HAVE STANDING TO SEEK A PRELIMINARY INJUNCTION**

To satisfy Article III standing, a plaintiff must have: (1) suffered an injury in fact; (2) that is fairly traceable to the challenged conduct of the defendant; and (3) that is likely to be redressed by a favorable judicial decision. *OCA-Greater Houston*, 867 F.3d at 610 (citing *Lujan v. Defenders of Wildlife*, 504 U.S. 55, 56-61 (1992)). The “presence of one party with standing is sufficient to satisfy Article III’s case or controversy requirement.” *Rumsfeld v. Forum for Academic and Institutional Rights, Inc.*, 547 U.S. 53, 52 n.2 (2006); see *Arlington Heights v. Metropolitan Housing Development Corp.*, 429 U.S. 252, 264, n.9 (1977).

Organizations can establish standing through associational standing. *OCA-Greater Houston*, 867 F.3d at 610. An organization has associational standing when it brings a suit on

behalf of its members if “(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 in the lawsuit of each of the individual members.” *Hunt v. Wash. State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977) (citation omitted).

Alternatively, a plaintiff has organizational standing when it brings a suit on its own behalf. Organizational injuries include “drain[s] on its resources resulting from [the organization] counteracting the effects of the defendant’s actions.” *La. ACORN Fair Hous. v. LeBlanc*, 211 F.3d 298, 305 (5thAldqt 2000df (our)( ne)4 (i)-2 (t)-6 (a)4 (t)-2 (i)- omtit-2 (it-2 (i)-4 (dd[(3e)4 (;)4 ( )]TJ/TT1 1

in this district and others have held that P&A's have associational standing to pursue claims on behalf of individuals with disabilities. *See, e.g., Advoc. Ctr. for Elderly & Disabled v. La. Dep't of Health & Hosps.*, 731 F. Supp. 2d 583, 595 (E.D. La. 2010); *Disability Rts. N.C.*, 2022 WL 2678884, at \*2; *Dunn v. Dunn*, 219 F. Supp. 3d 1163, 1171 (M.D. Ala. 2016). LWV-MS has at least one member who wants to assist voters returning their ballots, but fears prosecution from the Defendants. LWV-MS Dec. ¶ 14. The interest LWV-MS seeks to protect is germane to its voter outreach work, and the member need not participate as an individual plaintiff in this lawsuit.

Regarding organizational standing, both DRMS and LWV-MS are and will have to divert and spend additional time, effort, and money to create new materials to educate its members and other Mississippi voters about S.B. 2358. *See* DRMS Dec. ¶¶ 20-26; LWV-MS Dec. ¶ 13; *see OCA-Greater Houston*, 867 F.3d at 612. LWV-MS also has to divert resources to warn its members to not assist voters—even if they may be authorized—because S.B. 2358 does not clearly define the categories of persons permitted to return ballots. LWV-MS Dec. ¶ 13.

Additionally, Plaintiffs have standing to bring this claim against both state officials. Defendant Lynn Fitch is the Attorney General of the State of Mississippi and is responsible for “interven[ing] [and arguing] the constitutionality of any statute when notified of a challenge thereto.” Miss. Code Ann. § 7-5-1. Defendant Michael Watson, as Secretary of State of Mississippi, is the

that voters may still seek assistance, and to rescind any instructions that prevents it. Thus, Plaintiffs have standing to bring this injunction against all the Defendants.

**II. S.B. 2358 CONFLICTS WITH SECTION 208 OF THE VRA AND SHOULD BE ENJOINED.**

A preliminary injunction should issue because Plaintiffs are likely to succeed in showing that Section 208 preempts S.B. 2358; Plaintiffs are likely to suffer multiple forms of irreparable harm, including potential disenfranchisement, inability to receive assistance from individuals of their choice, and inability to provide assistance to voters; the public interest favors allowing voters to return their completed ballots and removing unlawful barriers to voting; and the balance of the equities favors maintaining the status quo that allows voters to vote using methods that have been available for decades. *See Janvey v. Alguire*, 647 F.3d 585, 595 (5th Cir. 2011).

**a. Plaintiffs are likely to succeed on the merits of the claim that S.B. 2358 is preempted by Section 208 of the VRA.**

The Supremacy Clause of the United States Constitution “invalidates state laws that ‘interfere with or are contrary to’ federal law.” *Hillsborough Cnty., v. Automated Med. Lab’ys, Inc.*, 471 U.S. 707, 712 (1985) (quoting *Gibbons v. Ogden*, 22 U.S. 1, 82 (1824)). Here, by sharply limiting who can collect or delis1 (ha)4



voter). *Id.* at 608-09. The Fifth Circuit accordingly held that the state’s restriction on who may provide language assistance “impermissibly narrow[ed] the right guaranteed by Section 208 of the VRA” and is preempted. *Id.* at 615. In reaching that decision, the Fifth Circuit adopted the plaintiffs’ “unambiguous” textual interpretation: that “Section 208 guarantees to voters [the] right to choose *any person they want*, subject only to employment-related limitations, to assist them throughout the voting process.” *Id.* at 614 (emphasis added); see *La Union del Pueblo Entero*, 604 F. Supp. 3d at 533-34 (applying *OCA-Greater Houston*).

If S.B. 2358 goes into effect, it would “impermissibly narrow” the right guaranteed by Section 208 in a similar way—but to an even greater degree than the Texas law struck down in *OCA-Greater Houston*. Just as the voter in *OCA-Greater Houston* preferred to receive assistance from her son, Mr. Whitley and other voters want to rely on people they trust, like Ms. Gunn and

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of the voter may mail their absentee ballot. 2022 WL 2678884, at \*6. In general, “[f]ederal courts have shown little tolerance for any narrowing of the Section 208 right to assistance with the voting process.” *Disability Rts. II*, 602 F. Supp. 3d at 878 (“Congress only included two categories of excluded assistants in the statutory text, and if Congress intended to exclude more categories, or to allow states to exclude more categories, it could have said so.”). That reluctance to narrowly construe a remedial, civil rights statute applies equally here. *See also Democracy II*, 476 F. Supp. 3d at 234 (enjoining similar absentee ballot provision as preempted by Section 208).

**ii. Section 208’s legislative history confirms that Congress intended to grant voters the right to seek assistance from any person of their choice.**

To the extent that there is any doubt, the legislative history behind Section 208 confirms the textual interpretation above. *See* *Section 208’s Legislative History* (2020) (noting that the bill’s purpose was to “ensure that voters who are unable to appear at the polls in person have the opportunity to cast their ballot by mail”).



632, 663 (W.D. Tex. 2014), *aff'd sub nom. De Leon v. Abbott*, 791 F.3d 619 (5th Cir. 2015); *Democracy II*, 476 F. Supp. 3d at 236 (Section 208 injunction).

Beyond the risk of complete disenfranchisement, Plaintiffs who are voters with disabilities face irreparable harm even if they ultimately find a way to vote, but experience additional burdens to doing so. *Cf.*

without the threat of imprisonment. The law also frustrates LWV-MS's and DRMS's missions by diverting resources. Thus, Plaintiffs they will face irreparable harm if S.B. 2358 takes effect.

**c. A preliminary injunction will serve the public interest.**

An injunction would ensure that Mississippi voters with a disability or literacy impairment can nonetheless exercise their fundamental right to vote and would prevent voter confusion before S.B. 2358 goes into effect. *Obama for Am. v. Husted*, 697 F.3d 423, 437 (6th Cir. 2012) (holding that public interest favors “permitting as many qualified voters to vote as possible”); *League of Women Voters of Fla., Inc., v. Detzner*, 314 F. Supp. 3d 1205, 1224 (N.D. Fla. 2018) (“Quite simply, allowing for easier and more accessible voting for all segments of society serves the public interest.”). “The fundamental right to vote is one of the cornerstones of our democratic society . . . [t]he threatened deprivation of this fundamental right can never be tolerated.” *Murphree v. Winter*, 589 F. Supp. 374, 382 (S.D. Miss. 1984) (finding that granting a preliminary injunction requiring access to absentee ballot would “clearly . . . not disserve the public interest.”); *see also Ingebretsen on behalf of Ingebretsen v. Jackson Public Sch. Dist.*,

unlawful statute. *Giovani Carandola, Ltd. v. Bason*, 303 F.3d 507, 521 (4th Cir. 2002) (holding that the “state is ‘in no way harmed by the issuance of a preliminary injunction which prevents the state from enforcing restrictions likely to be found unconstitutional.’” (citation omitted)). Rather, the balance of the equities “favors Plaintiffs where, as here, the injunction is intended to foreclose application of restrictions likely to be found contrary to preeminent federal statutory law designed to help the neediest of this state's citizens.” *Planned Parenthood Gulf Coast, Inc. v. Kliebert*, 141 F. Supp. 3d 604, 651 (M.D. La. 2015), *aff'd sub nom. Planned Parenthood of Gulf Coast, Inc. v. Gee*, 837 F.3d 477 (5th Cir. 2016), *opinion withdrawn and superseded*, 862 F.3d 445 (5th Cir. 2017), and *aff'd sub nom. Planned Parenthood of Gulf Coast, Inc. v. Gee*, 862 F.3d 445 (5th Cir. 2017).

Moreover, Plaintiffs’ motion does not raise any *Purcell* concerns. If anything, the relevant considerations favor a preliminary injunction. As the Supreme Court and the Fifth Circuit have explained, *Purcell* aims to prevent voter confusion by “preserving the status quo on the eve of an election.” *Veasey v. Perry*, 769 F.3d 890, 892 (5th Cir. 2014). That principle does not bar relief three reasons: (i) a preliminary injunction here would preserve the longstanding status quo that a voter may receive assistance from an individual of their choice, (ii) voting in Mississippi does not commence until August, and (iii) neither S.B. 2358 nor its injunction poses logist (m)-2 ( dl7-10 (a)4a1-2 ( (et



injunction under *Purcell* because the state needed to “adequately train its 25,000 polling workers

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**CERTIFICATE OF SERVICE**

I hereby certify on this 31st day of May, 2023, a true and correct copy of the foregoing was filed electronically and is available for viewing and downloading from the Court's ECF System. Notice of this filing will be sent to all counsel of record by operation of the ECF System.

/s/ Leslie Faith Jones  
Leslie Faith Jones

Dated: May 31, 2023