No. 23-60463

**IN THE UNITED STATES COURT OF APPEALS**
**FOR THE FIFTH CIRCUIT**

DISABILITY RIGHTS MISSISSIPPI; LEAGUE OF WOMEN VOTERS OF MISSISSIPPI; WILLIAM EARL WHITLEY; MAMIE CUNNINGHAM; YVONNE GUNN,
*Plaintiffs-Appellees*,

*v.*

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,
*Defendants-Appellants*.

Appeal from the United States District Court
for the Southern District of Mississippi
No. 3:23-cv-350

**DEFENDANTS-APPELLANTS' MOTION TO CANCEL ORAL ARGUMENT AND HOLD APPEAL IN ABEYANCE**



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## CERTIFICATE OF INTERESTED PERSONS

Under this Court's Rule 28.2.1, governmental parties need not furnish a certificate of interested persons.

*s/ Justin L. Matheny*
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## INTRODUCTION

In accordance with Federal Rule of Appellate Procedure 27, defendants respectfully move this Court to cancel the oral argument tentatively scheduled in this appeal and to hold the appeal in abeyance because it will soon be moot. Defendants intend to file with this Court, in due course, a suggestion of mootness and a request to dismiss this appeal.

## BACKGROUND

1. This lawsuit challenges 2023 Mississippi Senate Bill 2358, a law enacted to address the harms caused by ballot harvesting. S.B. 2358, which is codified at Miss. Code Ann. § 23-15-907, provided that: "A person shall not knowingly collect and transmit a ballot that was mailed to another person." S.B. 2358 § 1(1). The law included exceptions for: "[a]n election official while engaged in official duties as authorized by law"; "[a]n employee of the United States Postal Service while engaged in official duties"; "[a]ny other individual who is allowed by federal law to collect and transmit United States mail while engaged in official duties as authorized by law"; "[a] family member, household member, or caregiver of the person to whom the ballot was mailed"; and "[a] common carrier." *Id.* § 1(1)(a)-(e).



On May 31, 2023, two organizations and three individuals filed this suit. They claimed that S.B. 2358 conflicted with and was preempted by

Section 208 of the Voting Rights Act of 1965, a federal law that allows blind, disabled, and illiterate voters to receive assistance with voting. Section 208 provides that a blind, disabled, or illiterate voter "who requires assistance to vote" "may be given assistance by a person of the voter's choice, other than the voter's employer or agent of that employer or officer or agent of the voter's union." 52 U.S.C. § 10508. Plaintiffs argued that Section 208 gives covered voters the "right to seek assistance" with "deliver[ing]" a mail-in ballot "from anyone" other than a voter's employer or union officials. ROA.34. They maintained that S.B. 2358 "reverse[d] the rule created by Section 208" by "prohibiting almost all assistance with only specific exceptions" for (for example) "family members, household members, or caregivers." ROA.34. And "by impermissibly narrowing the universe of people who may assist in the voting process," plaintiffs argued, S.B. 2358 "directly conflict[ed] with" and was preempted by Section 208. ROA.22.



The organizational plaintiffs are Disability Rights Mississippi (DRMS) and the League of Women Voters of Mississippi (LWV-MS). ROA.23-27. DRMS is a non-profit protection and advocacy agency that said that it "[p]rotect[s] the voting rights of individuals with disabilities ... by assisting Mississippi voters in every step of the voting process." ROA.24. LWV-MS is a non-profit advocacy group that said that it "conducts voter service and education activities." ROA.25. LWV-MS

alleged that it has "at least one member who has assisted [disabled or illiterate] voters ... with the return of their mail-in absentee ballot and intends to do [so] in the future." ROA.25. It also claimed to have "at least one member who voted absentee by mail in a prior election." ROA.25.

The individual plaintiffs are Mamie Cunningham, Yvonne Gunn, and William Earl Whitley. ROA.23-27. Ms. Cunningham and Ms. Gunn alleged that they have assisted members of their communities (including disabled or illiterate voters) with mail-in voting in past elections. They wish to continue doing so but claimed to fear prosecution under S.B. 2358. ROA.26. Mr. Whitley claimed that he is a disabled voter who wishes to receive assistance with mailing his absentee ballot from Ms. Cunningham and Ms. Gunn. ROA.26-27. Mr. Whitley alleged that S.B. 2358 deprived him of his preferred voting assistants because neither Ms. Cunningham nor Ms. Gunn fell within S.B. 2358's exceptions for family members, household members, or caregivers. *See* ROA.32-33, 98.



2. On July 25, 2023, the district court issued an "Abbreviated Order" holding that S.B. 2358 likely conflicted with and was preempted by Section 208. ROA.332-338. The court stated that Section 208 guarantees "voters who require assistance with voting due to physical disabilities, blindness, or language barriers" the "right to seek assistance from 'any person they want,' with only two specific exceptions [for a voter's employer and union]." ROA.335. The court also said that S.B.

2358's lack of "definitions" and "guideposts" made it hard to "ascertain" whether assistants like Ms. Cunningham and Ms. Gunn fell within the statute's exception for family members, household members, and caregivers. ROA.336, 337. So the court enjoined defendants "from applying" S.B. 2358 in "the 2023 primary and/or general Mississippi elections" and thereafter "from implementing or enforcing S.B. 2358 to the extent that it would prohibit voters who are disabled or blind or who have limited ability to read or write from receiving assistance from the person of their choice." ROA.338. The court promised to issue "a more detailed Memorandum Opinion and Order, with additional facts and law." ROA.338. No such opinion and order has issued.

3. Defendants appealed. ROA.339-340. The appeal was fully briefed as of February 6, 2024. Dkt. 67. On April 17, this Court tentatively scheduled oral argument in this appeal for the week of July 8. Dkt. 80.

4. On April 22, 2024, while this appeal was pending, Governor Tate Reeves signed into law Senate Bill 2425. *See* Ex. 1. S.B. 2425 amends Miss. Code Ann. § 23-15-907—the provision codifying S.B. 2358—in two ways. First, S.B. 2425 adds definitions for the terms "[c]aregiver," "[f]amily member," and "[h]ousehold member." S.B. 2425 § 1(1)(a)-(c). Second, S.B. 2425 adds the following provision:

> Any voter who requires assistance to vote by reason of blindness, disability, or inability to read or write may be given assistance by a person of the voter's choice, other than the

> voter's employer or agent of that employer or officer or agent of the voter's union, or a candidate whose name is on the ballot, or by a spouse, parent, sibling or child of a candidate whose name is on the ballot, or by a poll watcher who is observing the polling place on election day; however, a candidate for public office or the spouse, parent or child of a candidate may provide assistance upon request of any voter who is related within the first degree.

*Id.* § 1(4). S.B. 2425 will take effect on July 1, 2024. *Id.* § 2.

## ARGUMENT

This Court should cancel oral argument and hold this appeal in abeyance because this appeal will soon be moot. Canceling oral argument would save judicial and other resources. And holding the appeal in abeyance will allow this Court to consider, in due course, defendants' forthcoming suggestion of mootness and a request to dismiss this appeal—to be filed once this appeal becomes moot.

1. On July 1, 2024, this case will be moot.

Under the U.S. Constitution, the judicial power extends only to "Cases" and "Controversies." U.S. Const. Art. III, § 2. For a lawsuit to remain justiciable, "[a]n actual case or controversy must exist at every stage in the judicial process." *Motient Corp. v. Dondero*, 529 F.3d 532, 537 (5th Cir. 2008); *see Lewis v. Cont'l Bank Corp.*, 494 U.S. 472, 477 (1990) ("This case-or-controversy requirement subsists through all stages of federal judicial proceedings, trial and appellate.").

A claim becomes moot if "the issues presented are no longer live or the parties lack a legally cognizable interest in the outcome." *Motient Corp.*, 529 F.3d at 537. That is because the Constitution "denies federal courts the power to decide questions that cannot affect the rights of litigants in the case before them, and confines them to resolving real and substantial controversies admitting of specific relief through a decree of a conclusive character, as distinguished from an opinion advising what the law would be upon a hypothetical state of facts." *Lewis*, 494 U.S. at 477 (internal quotation marks, citations, and brackets omitted). Federal courts thus "cannot give opinions on 'moot questions or abstract propositions.'" *Motient Corp.*, 529 F.3d at 537 (quoting *Calderon v. Moore*, 518 U.S. 149, 150 (1996) (per curiam)). "[W]here, as here, a statute ... is amended or repealed after plaintiffs bring a lawsuit challenging the legality of that statute," "mootness is the default." *Freedom From Religion Foundation, Inc. v. Abbott*, 58 F.4th 824, 832 (5th Cir. 2023) ("*FFRF*"); *see ibid.* (collecting cases); *Board of Trustees of Glazing Health & Welfare Trust v. Chambers*, 941 F.3d 1195, 1199 (9th Cir. 2019) (en banc) (Courts "should presume that the repeal, amendment, or expiration of legislation will render an action challenging the legislation moot.").



Under these principles, this appeal will become moot on July 1, 2024—when S.B. 2425 takes effect. S.B. 2425 amends the statute challenged by plaintiffs in this suit. That amendment eliminates the

injury that plaintiffs alleged. So, when S.B. 2425 takes effect, plaintiffs will "lack a legally cognizable interest in the outcome" of the case, and the appeal will be moot. *Motient Corp.*, 529 F.3d at 537.

Start with Mr. Whitley, the sole individual plaintiff-voter who claimed to need assistance with mailing his absentee ballot. He alleged that S.B. 2358 would harm him because his preferred voting assistants—plaintiffs Ms. Cunningham and Ms. Gunn—would not fall within the statute's exceptions for family members, household members, or caregivers. ROA.98. Under S.B. 2425, however, disabled voters like Mr. Whitley are not limited in their choice of assistant to the specific categories included in S.B. 2358. Rather, such voters may receive assistance from "a person of [their] choice" "other than" their "employer" or "union" officials, "a candidate whose name is on the ballot," certain family members of candidates, or "a poll watcher who is observing the polling place on election day." S.B. 2425 § 1(4). Employers and union officials are also excluded from providing voting assistance under Section 208. *See* 52 U.S.C. § 10508. And plaintiffs have not alleged that either Ms. Cunningham or Ms. Gunn are candidates, family members of candidates, or poll watchers such that they would be prevented from assisting Mr. Whitley under the newly enacted S.B. 2425.

For similar reasons, when July 1 arrives Ms. Cunningham and Ms. Gunn will also no longer face injury from S.B. 2358. They wish to provide

assistance with mail-in voting to blind, disabled, or illiterate voters and feared injury (in the form of prosecution) from S.B. 2358 for doing so. ROA.26. But plaintiffs have made no allegations that they would face injury if such voters may receive assistance from "a person of [their] choice" within the range of voting assistants permitted by S.B. 2425. *See* S.B. 2425 § 1(4).

Nor will the organizational plaintiffs have any continuing claim of injury from S.B. 2358. Plaintiffs claim that S.B. 2358 would "disenfranchise[ ]" some of the organization's unidentified "constituents." ROA.35; *see* Pls. Br. 41. For example, plaintiffs claimed that S.B. 2358's "vagueness" and lack of definitions for the caregiver exception would "chill[ ] staff members from assisting" disabled voters in "nursing homes and long-term care facilities." Pls. Br. 41. S.B. 2425 eliminates any such claim of injury. It allows disabled voters to receive assistance from an even broader universe of individuals than S.B. 2358. And plaintiffs have never pointed to any member or constituent of the organizational plaintiffs who could be denied their choice of assistant under S.B. 2425.



Because plaintiffs' "asserted injur[ies]" are "tied to the existence" of provisions of Mississippi's ballot-harvesting law that will no longer exist on July 1, this case will imminently be moot. *FFRF*, 58 F.4th at 832.

2. Because this case will soon be moot, this Court should cancel the tentatively scheduled oral argument and hold this appeal in abeyance.

This case will be moot by the time for which this Court has tentatively scheduled argument—the week of July 8. Cancelling oral argument would save the considerable judicial and other resources (including taxpayer-funded resources) required for preparing for and conducting oral argument.

And holding the appeal in abeyance would allow for an orderly disposition of this case. Although this appeal will soon be moot, it is not yet moot. Defendants intend to file, when the appeal does become moot, a suggestion of mootness and a request for this Court to dismiss the appeal. Holding the appeal in abeyance will allow this Court to await that request and to rule on it at the proper time.

## REQUEST FOR RELIEF

This Court should cancel oral argument and hold this appeal in abeyance.

Respectfully submitted,

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*Counsel for Defendants-Appellants*

April 26, 2024

## CERTIFICATE OF CONFERENCE

On April 25, 2024, counsel for defendants conferred with counsel for plaintiffs on this motion. *See* Fifth Circuit Rule 27.4. Counsel for plaintiffs were unable to provide plaintiffs' position on the motion or state whether an opposition will be filed.

Dated: April 26, 2024

*s/ Justin L. Matheny*
Justin L. Matheny
*Counsel for Defendants-Appellants*

## CERTIFICATE OF SERVICE

I, Justin L. Matheny, hereby certify that the foregoing motion has been filed with the Clerk of Court using the Court's electronic filing system, which sent notification of such filing to all counsel of record.

Dated: April 26, 2024

*s/ Justin L. Matheny*
Justin L. Matheny
*Counsel for Defendants-Appellants*



## CERTIFICATE OF COMPLIANCE

This motion complies with the word limitations of Fed. R. App. P. 27(d)(2)(A) because, excluding the exempted parts of the document, it contains 2,040 words. This motion complies with the typeface requirements of Fed. R. App. P. 32(a)(5) and the type-style requirements of Fed. R. App. P. 32(a)(6) because it has been prepared in proportionally

spaced typeface, including serifs, using Microsoft Word 2016, in Century Schoolbook 14-point font.

Dated: April 26, 2024

*s/ Justin L. Matheny*
Justin L. Matheny
*Counsel for Defendants-Appellants*