United States District Court
Western District of Missouri
Central Division

MISSOURI PROTECTION & ADVOCACY SERVICES; VozKC; Susana Elizarraraz; Manuel Rey Abarca IV; and Barbara Sheinbein;	)	
Plaintiffs,	)	
v.	)	Case No. 2:22-cv-04097
JOHN R. ASHCROFT, in his official capacity as the Missouri Secretary of State; Kansas City Board of Election Commissioners; St. Louis County Board of Elections; and Boone County Clerk;	)	
Defendants.	)	

MOTION TO DISMISS

Defendant John R. Ashcroft hereby requests that this Court dismiss Plaintiffs' complaint in its entirety pursuant to Rule 12(b)(6), stating as follows.

1. "To survive a motion to dismiss [under Rule 12(b)(6)], a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up).

2. Here, Plaintiffs fail to state a claim on which relief can be granted because there is no private right of action in VRA § 208, *see* 52 U.S.C. § 10508, or under the Supremacy Clause of the U.S. Constitution. U.S. Const., art. VI, § 2.

3. Plaintiffs also fail to state a claim on which relief can be granted because they lack standing.

4. Plaintiffs further fail to state a claim on which relief can be granted because both Plaintiffs' counts fail on the merits, as a matter of law.

WHEREFORE, Defendant Ashcroft respectfully requests that this Court dismiss the complaint in its entirety and issue any other relief that is just and proper.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 23, 2022, a true and correct copy of the foregoing and any attachments were filed electronically through the Court's CM/ECF system, to be served on counsel for all parties by operation of the Court's electronic filing system.

/s/ Maria A. Lanahan

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INTRODUCTION

Since at least 1977, Missouri voters have cast ballots in secret to prevent voters from being coerced to vote a certain way. § 115.445; 1977 Mo. Stat. 274 (attached hereto as "Exhibit 1"). There are few exceptions. *Id*. One exception is section 115.445.3, RSMo, also adopted in 1977, which permits people who cannot read or write, or who are blind or physically disabled, to have another person assist them in casting their ballots. *See* Exhibit 1. But section 115.445.3 also limits persons other than election judges and members of voters' immediate families from assisting more than one voter at any one election ("One-Assist Rule"). *Id*. Plaintiffs Missouri Protection & Advocacy Services (Missouri "P&A"), VozKC, Susana Elizarraraz, Manuel Rey Abarca IV, and Barbara Sheinbein (collectively "Plaintiffs") allege that the One-Assist Rule violates the Supremacy Clause, U.S. Const., art. VI, § 2, and § 208 of the Voting Rights Act ("VRA"), 52 U.S.C. § 10508. They request this Court issue a declaratory judgment that the One-Assist Rule is unconstitutional and illegal and enjoin the Defendants from enforcing it. Complaint p.25 (Docket No. 1). This Court should dismiss the complaint under Rule 12(b)(6) because there is no private right of action in § 208, because Plaintiffs lack standing, and because the claims fail on the merits.

ARGUMENT

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (cleaned up). "A claim has facial plausibility when the plaintiff pleads factual content that allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Id*. The allegations pleaded must show "more than a sheer possibility that a defendant has acted unlawfully." *Id*. And a court need not credit conclusory statements or "naked assertion[s] devoid of further factual enhancement." *Retro Television Network, Inc. v. Luken*

Commc'ns, LLC, 696 F.3d 766, 768 (8th Cir. 2012) (quoting *Iqbal*, 556 U.S. at 678).

"When interpreting a [federal] statute, [courts] begin by analyzing the statutory language, assuming that the ordinary meaning of that language accurately expresses the legislative purpose." *Beal v. Outfield Brew House, LLC*, 29 F.4th 391, 394 (8th Cir. 2022) (cleaned up). In determining statutory meaning, courts consider the whole statute. *Id*. When interpreting a Missouri statute, courts apply Missouri's rules of statutory construction. *See Wireco WorldGroup, Inc. v. Liberty Mut. Fire Ins. Co.*, 897 F.3d 987, 991 (8th Cir. 2018). In Missouri, "[t]he primary goal of statutory interpretation is to give effect to legislative intent, which is most clearly evinced by the text of the statute." *Cooperative Home Care, Inc. v. City of St. Louis*, 514 S.W.3d 571, 583 (Mo. 2017). "[A] word not defined in a statute is given its ordinary meaning pursuant to the dictionary." *Gross v Parson*, 624 S.W.3d 877, 884 (Mo. 2021). Missouri statutes are interpreted "as a whole." *See Roland v. St. Louis City Bd. of Elec. Comm'rs*, 590 S.W.3d 315, 323 (Mo. 2019).

I. Count I should be dismissed because there is no private right of action under the Supremacy Clause.

This Court should dismiss Plaintiffs' Count I, which alleges a violation of the Supremacy Clause, because there is no private right of action under the Supremacy Clause. *See Armstrong v. Exceptional Child Center, Inc.* 575 U.S. 320, 326 (2015) ("[T]he Supremacy Clause does not confer a right of action[.]"). Thus, Count I fails to state a claim on which relief can be granted.

II. Count II should be dismissed because there is no private right of action under VRA § 208.

This Court should dismiss Plaintiffs' § 208 claim because there is no private right of action for enforcing it, meaning it fails to state a claim under Rule 12(b)(6). *See also Cross v. Fox*, 23 F.4th 797, 803 (8th Cir. 2022) (lack of a cause of action is jurisdictional defect). "[P]rivate rights of action to enforce federal law must be created by Congress." *Alexander v. Sandoval*, 532 U.S.

275, 286 (2001). Courts must "interpret the statute Congress has passed to determine whether it displays an intent to create not just a private right but also a private remedy." *Id.* "Without statutory intent" for both, "a cause of action does not exist and courts may not create one." *Horne v. Flores*, 557 U.S. 433, 456 n.6 (2009) (cleaned up). "In determining whether statutes create private rights of action, . . . legal context matters only to the extent it clarifies text," and courts begin (and end) with the text. *Alexander*, 532 U.S. at 288. In general, courts only hold that a statute "create[s] a private cause of action" if Congress "explicit[ly]" creates one.

Here, there is no private right of action to enforce VRA § 208, which provides:

> [a]ny 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.

52 U.S.C. § 10508. First, there is no private *right* for anyone but "voter[s] who require[] assistance." Because the first four named plaintiffs do not require assistance, they have no private right of action. Second, there is no private *remedy* for any Plaintiff. Neither § 208 nor any other section in Chapter 105 state that private parties may enforce § 208. Unlike other VRA sections, which expressly provide private remedies, *see* 52 U.S.C. §§ 10308(d), 10504, 20105(a), § 208 is enforced differently. Under 52 U.S.C. § 20104(c), the "chief election officer of each State" must "provide public notice . . . of the availability of . . . assistance under section [208]." Section 20105(a) expressly provides a remedy for failing to abide by § 20104 by allowing the "United States Attorney General or a person who is personally aggrieved" by noncompliance with § 20104 to "bring an action for declaratory or injunctive relief." 52 U.S.C. § 20105(a). Congress further limited such causes of action by requiring notice and forbidding fee-shifting. *Id.* § 20105(b)-(c). VRA ensures voters know their options under § 208, which in turn enables them to assert any alleged rights when voting and rely on such rights as defenses to actions brought against them.

The existence of this enforcement scheme "suggests that Congress intended to preclude others." *Sandoval*, 532 U.S. at 290; *cf. Watt v. GMAC Mortg. Corp.*, 457 F.3d 781, 783 (8th Cir. 2006) ("[W]e do not lightly assume that Congress has omitted…requirements that it…intends to apply," especially when "Congress has shown elsewhere in the same statute that it knows how to make such a requirement manifest."). Because there is no textual evidence that Congress intended to make § 208 privately enforceable, because it expressly made other sections privately enforceable, and because it provided other means for enforcing § 208, this Court should dismiss Count II.

III. This Court should dismiss the case because Plaintiffs lack the injury-in-fact required for standing.

Article III of the U.S. Constitution limits federal courts to hearing "Cases" and "Controversies," without which plaintiffs lack standing and federal courts must dismiss. *Hollingsworth v. Perry*, 570 U.S. 693, 700-01 (2013); *Glow In One Mini Golf, LLC v. Walz*, 37 F.4th 1365, 1371 (8th Cir. 2022). To establish 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." *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). "The plaintiff, as the party invoking federal jurisdiction, bears the burden of establishing these elements." *Id*. "Where, as here, a case is at the pleading stage, the plaintiff must 'clearly…allege facts demonstrating each element." *Id*. "To establish injury in fact, a plaintiff must show that he or she suffered 'an invasion of a legally protected interest' that is 'concrete and particularized' and 'actual or imminent, not conjectural or hypothetical.'" *Id*. at 339.

Artificial entities have two options for establishing standing: (1) associational standing or (2) organizational standing. *OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017). Associational standing exists when "[a]n association has standing to bring suit on behalf of its members" because it meets three elements: [1] its members would otherwise have standing to sue

in their own right, [2] the interests at stake are germane to the organization's purpose, and [3] neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit." *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). An entity has organizational standing when "there is a concrete and demonstrable injury to an organization's activities which drains its resources and is more than simply a setback to its abstract social interests." *Nat'l Fed'n of the Blind of Mo. v. Cross*, 184 F.3d 973, 979 (8th Cir. 1999) (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)).

Here, the first four named plaintiffs fail to establish standing because they have not alleged facts establishing an "invasion of a legally protected interest" or an injury that is "particularized." *See Spokeo*, 578 U.S. at 339. All five Plaintiffs fail to establish standing because they have not alleged facts establishing an "actual or imminent" injury. *See id*.

A. The first four named plaintiffs have failed to plausibly allege an "invasion of a legally protected interest" or an injury that is "particularized."

The first four named plaintiffs—Missouri Protection & Advocacy Services ("Missouri P&A"), VozKC, Susana Elizarraraz, and Manuel Rey Abarca IV—have not alleged facts establishing that they have a legally protected interest invaded by section 115.445.3 or that they have suffered a "particularized" injury. *See Spokeo*, 578 U.S. at 339. This is because VRA § 208 does not create an interest for associations or individuals who wish to help disabled individuals fill out ballots—only rights for disabled voters. 52 U.S.C. § 10508. "For an injury to be particularized, it must affect the plaintiff in a personal and individual way." *Spokeo*, 578 U.S. at 339. For instance, in *Vaughan v. Lewisville Independent School District*, a white voter alleged that African American, Hispanic, and/or Asian voters suffered race-dilution under the VRA. 475 F.Supp.3d 589, 595 (E.D. Tex. 2020). The court in *Vaughan* held that, because the "right to vote is individual and personal in nature," the white voter did not have standing to bring a claim to

enforce others' voting rights. *Id*. (citing *Gill v. Whitford*, 138 S. Ct. 1916, 1920 (2018)).

So too here. None of the first four named plaintiffs are disabled individuals. Missouri P&A is a nonprofit law firm. Compl. ¶ 19. VozKC is an organization, Compl. ¶¶ 22-23, 41-45, and a political action committee.[1] And neither Elizarraraz nor Abarca are disabled. Compl. ¶¶ 23-25, 41-47, 90 ("If asked, Plaintiff Elizarraraz will assist limited English proficient voters throughout the check-in process."), 96 ("Plaintiff Abarca intends to assist voters obtain, interpret, read, and submit their ballots in Missouri's upcoming Primary and General elections in 2022."). Other courts have come to similar conclusions that an interested party does not have standing because they wish to help someone else assert or use their rights. *See Semler v. Piper*, 2017 WL 1082286, *1 (D. Minn. 2017) (holding that an inmate who wished to act as a "jailhouse lawyer" had no injury and therefore no standing even though he was prevented from helping other inmates prepare their cases). Thus, VRA § 208 does not create an interest for the first four named plaintiffs.

B. None of the Plaintiffs have plausibly alleged an injury that is "actual or imminent."

None of the Plaintiffs have plausibly alleged an injury that is "actual or imminent." *See Spokeo*, 578 U.S. at 339.

1. Sheinbein's alleged injury is not "actual or imminent."

The fifth plaintiff, Barbara Sheinbein, is the only plaintiff claiming to require assistance in casting a ballot, but she has no standing because she does not allege an "actual or imminent" injury. Sheinbein alleges that she needs an accessible machine with headphones and voice prompts in order to cast her ballot. Compl. ¶ 26. She alleges that during the April 2022 municipal elections in St. Louis County, she obtained assistance from her friend—a volunteer with the League of

[1] *See* VozKC.org (last visited August 11, 2022) ("VozKc is a PAC . . . .").

Women Voters—to gain access to a working machine and headphones. *Id*. She wishes to continue working with this friend in future elections. *Id*. She alleges that this assistance could include "ensuring an accessible machine is available and properly set up, being directed to the machine, being provided headphones, and, if no accessible machine can be made available, assistance reading and marking the ballot." *Id*. Sheinbein alleges she has been injured by section 115.445.3 because it would "prohibit [her] from working with her friend . . . [if the friend] has helped someone else, and expose her [friend] to criminal prosecution and penalties for assisting more than one person." Compl. ¶ 26.

First, section 115.445.3's plain text does not prohibit Sheinbein's friend from assisting multiple persons by ensuring an accessible machine is available and properly set up, directing them to an accessibility machine, or providing headphones to them. The context of section 115.445 clarifies that subsection 3 is an exception to the general rule that "no one other than the voter shall be permitted in any voting booth or be permitted to be in any position where he may see how a voter is voting." *See* § 115.445.1. Thus, when subsection three says that "any voter . . . that cannot read or write, is blind or has any other physical disability [who] cannot vote his ballot . . . may be assisted . . . by any person of his own choice," "assisted" means assisted in a way causing the assistant to be in the voting booth or in a position to see how the voter is voting. Setting up an accessibility machine, directing people to it, or providing them with headphones would not cause the assistant to be in the voting booth or to be in a position to see how the voter is voting, and so would not violate section 115.445.3's prohibition on persons assisting more than one voter at one election. Sheinbein also cannot claim that she is actually or imminently injured by the fact that her friend could face criminal penalties for helping more than one person, as this is not an injury *to Sheinbein*. *Vaughan*, 475 F.Supp.3d at 595 (white voter had no injury and therefore no standing

when asserting that voters' of other races experienced vote dilution).

Sheinbein's final alleged injury—that her friend may not be able to assist her in voting—is hypothetical and so cannot constitute an actual or imminent injury. First, Sheinbein alleges that the only reason she would need assistance from her friend is if she cannot use an accessibility machine. Compl. ¶ 26. But Sheinbein does not explain why she believes she will not be able to use one. Second, she does not allege why she believes her friend will be unable to assist her. She does not allege that her friend intends to help another person or, if so, who that other person is. Third, in fact, we do not even know that Sheinbein's friend intends to assist anyone with voting, and nothing in section 115.445.3 suggests that those needing assistance may force assistance from people who do not wish to assist. Fourth, Sheinbein fails to allege that her friend fits neither exception to the One-Assist rule—for election judges or immediate family members. For these four independent reasons, Sheinbein's alleged injury is hypothetical, not actual or imminent. *See Spokeo*, 578 U.S. at 339.

2. The other four plaintiffs fail to allege "actual or imminent" injury.

Neither Elizarraraz nor Abarca have alleged facts sufficient to demonstrate a plausible actual or imminent injury. *See id*. Elizarraraz alleges that she "has assisted and will assist voters who are limited English proficient to vote in the upcoming 2022 Primary and General Elections." Compl. ¶ 44. She claims that she has several friends who are Missouri registered voters with limited English proficiency, that many people in her community are not English proficient and need assistance casting a ballot, and that she is one of the only people in her community proficient in English. Compl. ¶ 90. She alleges that she *may* help her community "if asked." *Id.* She further claims that her mother is a Missouri registered voter who is limited English proficient, cannot read or write, is deaf, and did not vote in the April 2022 municipal elections in Missouri because no

one was available to assist her to vote and Elizarraraz was out of town for a work conference. *Id*. ¶ 92. But Elizarraraz does not claim that she has been asked to assist more than one person who is not an immediate family member in any election. Nor does she allege that she will not be an election judge. Thus, she fails to plead an "actual or imminent" injury. *See Spokeo*, 578 U.S. at 339. Her alleged injury is purely hypothetical and therefore insufficient for standing.

Abarca alleges that he "has assisted and will assist limited English proficient voters in casting their ballots in the upcoming 2022 Primary and General Elections." Compl. ¶ 45. He gives two examples of instances where he helped limited-English-proficiency voters vote. But in neither case did he encounter a situation in which more than one voter asked him to assist in the same election. Abarca does not state that he has been asked to help more than one voter at any one election, much less that those voters are not part of his immediate family or that he will not be an election judge. *See* § 115.445.3. Thus, Abarca's allegations do not raise a plausible claim that he will be injured. His alleged injury is purely hypothetical, based on conduct that he may or may not take, underscored by his allegation that he merely "intends to assist voters" in upcoming elections. Compl. ¶ 96.

Neither Missouri P&A nor VozKC have alleged a plausible "actual or imminent" injury under organizational or associational standing. *See Spokeo*, 578 U.S. at 339. With respect to associational standing, neither entity plausibly alleged facts establishing elements (1) or (3). They cannot establish the first element—that their members would have standing to sue in their own right—for three independent reasons: they have not alleged (1) whether they have members, (2) who their members are, or (3) why those members have been or are likely to be injured. *See* Compl. ¶¶ 19-23, 41-47; *Hunt v. Washington State Apple Advertising Com'n*, 432 U.S. 333, 342 (1977); *Laidlaw*, 528 U.S. at 181. Missouri P&A and VozKC also cannot establish the third

element—that neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit. The members' injury under VRA § 208 would require individualized proof to show that it is "actual or imminent." *See Higgins Elec., Inc. v. O'Fallon Fire Prot. Dist.*, 813 F.3d 1124, 1128-29 (8th Cir. 2016); *see also Spokeo*, 578 U.S. at 339; *see supra* (addressing whether plaintiffs satisfy the "actual or imminent" requirement in an individualized manner). Thus, neither Missouri P&A nor VozKC have associational standing.

Missouri P&A and VozKC also lack organizational standing because they have not alleged facts that plausibly show that enforcement of section 115.445.3 "drains [their] resources and is more than simply a setback to its abstract social interests." *See Cross*, 184 F.3d at 979. Missouri P&A and VozKC claim that section 115.445.3's One-Assist Rule will drain their resources, but this, by itself, is a conclusory allegation, not a fact that must be credited as true. *Retro Television Network*, 696 F.3d at 768 (quoting *Iqbal*, 556 U.S. at 678). This claim is not plausible because Missouri P&A and VozKC failed to allege how many people they expect to help this year, how many people they have helped in the past, and how section 115.445.3 will drain their resources.

The closest the organization plaintiffs come to meeting their pleading burden is identifying activities in which they allegedly must engage because of Missouri's law that are *consistent* with their organizational mission. These purportedly new activities are "additional staff time to its voter assistance work" and "locating additional assistors outside of the agency" for Missouri P&A, *see* Compl. ¶ 70, and "activities such as canvassing, phone banking, and other direct work with voters" for VozKC, *see* Compl. ¶ 77. But redirecting resources to areas that the organization already handles and that are consistent with their existing activities is insufficient. *See Fair Employment Council of Greater Wash., Inc. v. BMC Mktg. Corp.*, 28 F.3d 1268, 1276-77 (D.C. Cir. 1994); *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d 977, 982 (6th Cir. 2020) (dismissing

organizational defendant for lacking standing because "spending its resources to address the voting inequities and irregularities throughout the county [does] not divert resources from its mission. That is its mission.") (quotations and internal citations omitted).

Without this information, Missouri P&A and VozKC have not plausibly alleged organizational standing.

IV. This Court should dismiss the case because § 115.445.3, RSMo, does not violate, conflict with, or interfere with VRA § 208.

Even if Plaintiffs had standing to sue and causes of action, the Court nevertheless should dismiss the case on the merits because § 115.445, RSMo,[2] does not violate, conflict with, or interfere with VRA § 208. In Count I, Plaintiffs allege that VRA § 208 preempts § 115.445.3, RSMo, because the Missouri statute conflicts and interferes with that section of the VRA. Compl. p.24. In Count II, Plaintiffs allege that § 115.445.3 violates VRA § 208 because VRA § 208 "establishes the right of a voter with disabilities or [] limited English proficien[cy] [] to bring a person of their choice to assist them in voting even if that assistor has assisted another voter." Compl. pp.24-25. On both counts, Plaintiffs are wrong, as VRA § 208 does not prohibit States from placing reasonable restrictions on who can help the most vulnerable vote.

A. VRA § 208 does not preempt § 115.445.3.

[2]Throughout, we refer to § 115.445.3 as the challenged statute. This Missouri statute is the only one Plaintiffs reference in their prayer for relief. Compl. pp. 25-26. Plaintiffs technically allege that additional Missouri statutes, including §§ 115.635.8, 115.115.5, 115.447.2, and 115.291.1, RSMo, violate the Supremacy Clause and VRA § 208, but they provide no explanation why. Compl. pp.24-25. Nor do they request any relief on the basis of these claims. Thus, this Court should dismiss both counts with respect to these claims. Further, these additional sections do not appear to conflict with, interfere with, or violate VRA § 208, so all counts should be dismissed with respect to these provisions because they fail on the merits (as well as for the reasons set forth *supra*). Plaintiffs also fail to state plausible facts suggesting any plaintiff has standing to challenge these sections with respect to actual-or-imminent injury, particularized injury, or invasion of a legally protected interest.

VRA § 208 does not preempt § 115.445.3. "Federal preemption of state law can occur" in three ways: express preemption, field preemption, or conflict preemption. *Soo Line R.R. Co. v. Werner Enter.*, 825 F.3d 413, 420 (8th Cir. 2016). Here, Plaintiffs claim that § 115.445.3 conflicts with and interferes with VRA § 208, thus invoking conflict preemption. *See Soo Line*, 825 F.3d at 420. "Conflict preemption occurs where either compliance with both state and federal law is impossible or the state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Id*. (cleaned up). With respect to the second type of conflict preemption, what constitutes "a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Id*.

"When determining whether federal law preempts state-law causes of action, [courts] start with the assumption that the historic police powers of the States were not to be superseded by the Federal Act unless that was the clear and manifest purpose of Congress." *Id*. (cleaned up). The Supreme Court "require[s] Congress to enact exceedingly clear language if it wishes to significantly alter the balance between federal and state power." *Alabama Ass'n of Realtors v. Dep't of Health & Hum. Servs.*, 141 S. Ct. 2485, 2489 (2021). Historically, regulating elections and voting, particularly in State and local elections, is a core aspect of traditional state sovereignty. *Shelby Cnty., Alabama v. Holder*, 570 U.S. 529, 543 (2013) ("States have broad powers to determine the conditions under which the right of suffrage may be exercised."). The federal and State laws at issue here relate to State and local elections, so preempting State law requires "exceedingly clear language." *See Alabama Ass'n of Realtors*, 141 S. Ct. at 2489. But even if it did not, VRA § 208 does not conflict preempt § 115.445.3.

The first type of conflict preemption does not exist here because Plaintiffs fail to show that "compliance with both state and federal law is impossible." *See Soo Line*, 825 F.3d at 420.

Plaintiffs suggest that compliance with both federal and state law is impossible because VRA § 208 allows a voter requiring assistance "to bring a person of their choice to assist them in voting even if that assistor has assisted another voter," whereas § 115.445, RSMo, limits an assistor to assisting only one person outside her immediate family unless she is an election judge. Compl. pp.24-25.

Complying with both laws is possible. VRA § 208 does not prevent States from enacting reasonable restrictions on who may assist. For instance, it is absurd to read VRA § 208 to require that States allow felons convicted of voter fraud to assist the most vulnerable, but that is the natural consequence of Plaintiffs' reading. The State's reading is more reasonable and better comports with the plain language. Under the State's reading, a voter requiring assistance "*may* be given assistance by a person of the voter's choice" other than the voter's employer, employer's agent, or union's officer or agent. 52 U.S.C. § 10508 (emphasis added). "May" does not mean "must"—the U.S. Supreme Court "has repeatedly observed that the word 'may' *clearly* connotes discretion." *Biden v. Texas*, 142 S. Ct. 2528, 2541 (2022) (cleaned up). Here, that discretion means that the voter may indicate who they would choose to assist them, and they "may" (or may not) "be given" assistance by that person in the discretion of both *the person chosen* and *the State*. Another strong textual indicator supporting the State's reading is the statute's use of the indefinite article "a" in the phrase "may be given assistance by **a** person of the voter's choice" rather than the definite article, "the." Use of the indefinite article demonstrates that the voter may indicate who they wish to assist them, but not that all potential assistors can or must assist. As noted, the statute does not allow the voter to force an unwilling assistor to assist and does not require the State to allow felons convicted of voter fraud to assist. It is also possible to abide by both the State and federal statute because § 208 does not say that States *must* allow assistance beyond that allowed by Missouri law. In fact, § 208 does not require particular types of assistance but gives States discretion about what

is appropriate assistance versus inappropriate coercion. Because § 208 does not completely displace State law, "[i]t is certainly possible to comply with both" statutes. *See Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1168 (11th Cir. 2008).

Plaintiffs also fail to state a claim under the second type of conflict preemption—that "state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *See Soo Line*, 825 F.3d at 420 (cleaned up). To make this determination, courts consider what constitutes "a sufficient obstacle," which "is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects." *Id*. VRA § 208's purpose is to give voters who need assistance options for who may assist them to vote. *See supra*. Nothing about § 115.445.3 denies voters *options* for choosing an assistor. Rather, § 115.445.3 strengthens the VRA's purpose. Congress enacted the VRA to ensure citizens could exercise their right to vote. *Brnovich v. Democratic Nat'l Comm.*, 141 S. Ct. 2321, 2230-31 (2021). Section 115.445.3's One-Assist rule strengthens that purpose by making sure that the same person does not assist dozens or hundreds of vulnerable citizens. *See* Commission on Federal Election Reform, *Building Confidence in U.S. Elections: Report of the Commission on Federal Election Reform* ii, 46 (Sept. 2005)[3] ("*Carter-Baker Report*") (noting in bipartisan commission report led by Jimmy Carter and James A. Baker III that "States should consider new legislation to minimize fraud" including "to prevent abuse by third-party organizations"). Though the *Carter-Baker Report* discussed the dangers of election fraud by third-party organizations in the voter-registration context, *id*., allowing the same person to help many vulnerable persons vote similarly creates the risk for election fraud and abuse. This is especially true when the voter is blind or cannot read or

[3]This report may be found online at https://ucdenver.instructure.com/courses/3034/files/378056?module_item_id=188418) (last visited August 23, 2022).

speak English. *See* § 115.445.3, RSMo; 52 U.S.C. § 10508.

The Senate and House Judiciary Committee Reports relating to the Voting Rights Act Amendments of 1982 (the bill in which VRA § 208 was passed) noted the same thing. It stated that voters who need assistance "are more susceptible than the ordinary voter to having their vote unduly influenced or manipulated." S. Rep. 97-417, 62, 1982 U.S.C.C.A.N. 177, 240 (May 25, 1982) ("Senate Report"). The House Judiciary Committee decried not only "failure to provide . . . assistance" but also "abusive manipulation of assistance." H. Rep. 92-227, 14 (Sept. 15, 1981). Thus, Congress left room for States to protect voters from intimidation and coercion. It did not interfere with "the legitimate right of any State to establish necessary election procedures" so long as those procedures are "designed to protect the rights of voters." Senate Report at 63. Congress did not create a uniform standard for what assistance is appropriate in various circumstances. The Senate Judiciary Committee recognized that States did not provide the same types of assistance across the country, and it did not do anything to displace the status quo. *See id*. ("[A]ll States now provide some form of voting assistance for handicapped voters[.]") Thus, § 115.445 does not stand as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress, and this Court should dismiss Count I for failure to state a claim on the merits.

B. Section 115.445.3 does not violate VRA § 208.

For the reasons noted in Part IV.A, § 115.445.3 does not violate VRA § 208 because the two do not conflict. Thus, this Court should dismiss Count II because Plaintiffs' legal theory fails to state a claim on the merits.

CONCLUSION

This Court should dismiss all Plaintiffs' claims because no plaintiff has standing and because Plaintiffs' claims fail to state a claim upon which relief can be granted.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on August 23, 2022, a true and correct copy of the foregoing and any attachments were filed electronically through the Court's CM/ECF system, to be served on counsel for all parties by operation of the Court's electronic filing system.

/s/ Maria A. Lanahan

1977, Missouri Session Laws, Part I, Regular Session ...

Missouri Session Laws

leaving the voting booth, place his ballot card in the ballot envelope. Where ballot cards with stubs are used, the voter shall, immediately after leaving the voting booth, hand his ballot card or envelope containing his ballot card to an election judge. The election judge shall remove the stub from the ballot card and, where ballot envelopes are used, replace the ballot card in the envelope and return the ballot card or envelope containing the ballot card to the voter. The voter shall place the ballot card or envelope containing the ballot card in the ballot box and leave the polling place immediately. Where ballot cards without stubs are used, the voter shall, immediately after leaving the voting booth, place the ballot card or ballot envelope containing the ballot card in the ballot box and leave the polling place immediately.

3. Where voting machines are used, the voter shall register his vote as directed in the instructions for use of the machine and leave the polling place immediately.

11.095. No one but voter in booth, exception.—1. Except as provided in subsections 2 and 3 of this section, no one other than the voter shall be permitted in any voting booth or permitted to be in any position where he may see how a voter is voting.

2. If any voter, after entering a voting booth, asks for further instructions concerning the manner of voting, two election judges of different political parties shall give such instructions. Such judges shall not enter the voting booth unless it is impossible to give the instructions otherwise. After giving the instructions, the judges shall leave the area and take all necessary measures to insure that the voter casts his vote in secret.

3. If any voter declares under oath to the election judges that he cannot read or write, is blind or has any other physical disability and cannot vote his ballot, he may be assisted by the election judges or by any person of his own choice other than a judge. If the voter asks for the assistance of election judges, two judges of different political parties shall go to the voting booth and cast his vote as he directs. If the voter asks for the assistance of someone other than election judges, the assistant shall go to the voting booth with the voter and cast his vote as he directs. No person, other than election judges and members of such voters' immediate families, shall assist more than one voter at one election.

12.001. Definitions.—1. As used in this chapter, unless the context clearly implies otherwise, the following terms shall mean:

(1) "Counting judges" are the two judges, one from each major political party, who read each vote received by all candidates and each vote for and against all questions at a polling place;

(2) "Receiving judges" are the two judges, one from each major political party, who initial each voter's ballot at a polling place;

(3) "Recording judges" are the two judges, one from each major political party, who tally the votes received by each candidate and for and against each question at a polling place. These terms describe functions rather than individuals, and any election judge may perform more than one function at a polling place on election day.

2. As used in this chapter, unless the context clearly implies otherwise, the following terms shall mean:

(1) "Defective ballot" is any ballot card on which the total number of write-in votes and votes cast on the ballot card for any office exceed the number allowed by law, and any ballot card which is bent or damaged so that it cannot be properly counted by automatic tabulating equipment;

(2) "Rejected ballot" is any ballot on which no votes are counted because the ballot fails to have the initials of the proper election judges, because the number of votes for all offices and on all questions exceeds the number authorized by law, because the voter is deemed by the election judges to be unqualified, because it is an absentee ballot not accompained by a completed and signed affidavit, or because the ballot was voted with unlawful assistance;

(3) "Spoiled ballot" is any ballot accidentally spoiled by a voter and replaced by

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