IN THE 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-RK
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.	)	

PLAINTIFFS' SUGGESTIONS IN OPPOSITION TO DEFENDANT ASHCROFT'S MOTION TO DISMISS

TABLE OF CONTENTS

TABLE OF AUTHORITIES

Cases

Statutes

INTRODUCTION

Section 208 of the Voting Rights Act of 1965 ("VRA") provides that "[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. Section 208 ensures meaningful access to the franchise by permitting voters with a disability or who have limited English proficiency to have assistors they trust help them cast their votes. Missouri election law also ensures the right to assistance in voting. Mo Rev. Stat. § 115.445.3.

In contrast to the federal mandate and Missouri statute guaranteeing voters the right to assistance, however, Missouri election law imposes the voting assistance restriction that "[n]o person, other than election judges and members of such voters' immediate families, shall assist more than one voter at one election." Mo. Rev. Stat. § 115.445.3. Missouri election law criminalizes voting assistance, categorizing violation of § 115.445 as a third-degree election offense and a misdemeanor. Mo. Rev. Stat. § 115.635.8. This limitation upon voting assistance from an assistor of the voter's choice violates the Supremacy Clause because it conflicts with Section 208 of the VRA, harming Plaintiffs and others similarly situated.

Plaintiffs assert that the voting assistance restrictions violate the Supremacy Clause of the U.S. Constitution (Count I) and Section 208 of the Voting Rights Act (Count II). Plaintiffs seek relief prohibiting Defendants, including John R. Ashcroft, in his official capacity as Missouri Secretary of State, and his officials, employees, and agents, from implementing or enforcing the assistance limitation in Mo. Rev. Stat. § 115.445.3 and granting such other and further relief as this Court deems just and proper under the circumstances. Because Plaintiffs have plausibly alleged their claims, we respectfully request the Court deny Defendant Ashcroft's Motion to Dismiss.

LEGAL STANDARD

In ruling on a 12(b)(6) motion, the Court must "assume the truth of all factual allegations in the complaint and make all reasonable inferences in favor of the nonmoving party." *Delker v. MasterCard Int'l, Inc.*, 21 F.4th 1019, 1024 (8th Cir. 2022). A complaint need not contain detailed factual allegations, merely "sufficient factual matter . . . to 'state a claim to relief that is plausible on its face.'" *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)); *see also Delker*, 21 F.4th at 1024 ("a plaintiff need only allege sufficient facts to provide 'fair notice' of the claim and its basis" (citation omitted)). A claim is facially plausible when it "allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged." *Iqbal*, 556 U.S. at 678.

BACKGROUND

Plaintiffs challenge the voter assistance restriction under Mo. Rev. Stat. § 115.445.3, which provides that "[n]o person, other than election judges and members of such voters' immediate families, shall assist more than one voter at one election." Plaintiffs' Complaint also identifies the accompanying portions of Missouri law that establish criminal penalties and consequences for ballots "voted with unlawful assistance." *See* Mo. Rev. Stat. § 115.635.8 (making "[e]ntering a voting booth or compartment except as specifically authorized by law" a class three election offense and a misdemeanor); Mo. Rev. Stat. § 115.115.5 (providing that "polling place[s] shall otherwise be staffed and operated in accordance with law, especially as provided in . . . of section 115.445[.3]"); Mo. Rev. Stat. § 115.447.2(2) (defining a rejected ballot to include "any ballot on which no votes are counted because . . . the ballot was voted with unlawful assistance"); Mo. Rev. Stat. § 115.291.1 (providing that if "it is ascertained that any absentee ballot was voted with unlawful assistance, the ballot shall be rejected"). Together, these

voting assistance restrictions prohibit individuals from providing assistance to voters with disabilities or limited English proficiency, under penalty, and deprive such voters of their right to choose the assistors who will help them cast their ballots when those assistors have already helped another voter.

As alleged in the Complaint, Plaintiffs Mo P&A and VozKC support populations who need voting assistance, including via specific support with obtaining and providing voting assistance for voters at the polls. (*See* Compl. ¶¶ 57–89.) Plaintiff Mo P&A advocates for voting participation by individuals with disabilities and supports voters with disabilities with Election Day activities. (*See* Compl. ¶¶ 58–70 (describing Mo P&A's advocacy and assistance activities)). Plaintiff VozKC provides voter education and advocacy, particularly targeting the Latino community, and assists limited-English-proficient voters. (*See* Compl. ¶¶ 71–78 (describing VozKC's advocacy and assistance activities)). The voting assistance restrictions frustrate the missions of Plaintiffs Mo P&A and VozKC and cause them to divert resources away from other important activities to comply. (Compl. ¶¶ 58–78.)

The voting assistance restrictions also limit the much-needed assistance that Plaintiffs Elizarraraz and Abarca could otherwise provide to their community members, as they risk criminal prosecution and penalties for assisting multiple voters. (Compl. ¶¶ 90–100.) Plaintiff Elizarraraz will be available to help her community members who are limited-English-proficient voters and need help with reading, translating, marking, and casting their ballots in future elections but will be prohibited from assisting more than one voter outside of her immediate family. (Compl. ¶¶ 90–92.) Plaintiff Abarca has previously provided assistance at the polls to multiple voters with limited English proficiency and disabilities who are not immediate family members. (Compl. ¶¶ 93–99.) Because of Missouri's voter assistance restrictions, Plaintiff

Abarca risks criminal prosecution and penalties if, as he intends, he assists more than one voter outside of his immediate family in future elections, as he would like to do. (Compl. ¶¶ 98–99.)

Plaintiff Sheinbein, a registered voter of St. Louis County, Missouri, requires assistance getting to the voting station as well as being set up with an accessible machine with headphones and voice prompts in order to cast a secret ballot, but she cannot obtain assistance from her chosen assistor if that person has already helped another non-family member with voting. (Compl. ¶¶ 101–108.) Plaintiff Sheinbein previously required assistance with reading and marking the ballot when the accessible machine at her precinct was not working and will need similar assistance in the future if the accessible machine is non-functioning or lacks headphones. (Compl. ¶¶ 103–105.) She has previously obtained assistance from a friend as her chosen assistor, who is a volunteer with the League of Women Voters, and wishes to continue to work with the assistor of her choice. (Compl. ¶ 104.)

ARGUMENT

I. Plaintiffs Have Plausibly Alleged Their Claims

A. Supremacy Clause

Defendant Ashcroft briefly asserts that the Supremacy Clause does not contain a private right of action. However, it is "beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights." *Shaw v. Delta Air Lines, Inc.*, 463 U.S. 85, 96 n.14 (1983) (citing *Ex parte Young*, 209 U.S. 123, 160–62 (1908)). "The Supremacy Clause is not the direct source of any federal right, but 'secures federal rights by according them priority whenever they come in conflict with state law.'" *Lankford v. Sherman*, 451 F.3d 496, 509 (8th Cir. 2006) (citing *Golden State Transit Corp. v. City of Los Angeles*, 493 U.S. 103, 107 (1989). The Supremacy Clause "instructs courts what to do when state and federal law clash."

Armstrong v. Exceptional Child Ctr., Inc., 575 U.S. 320, 325 (2015). "To say that the Supremacy Clause does not confer a right of action is not to diminish the significant role that courts play in assuring the supremacy of federal law." *Id*. at 326.

Plaintiffs' Supremacy Clause claim appropriately seeks that this Court use its authority to assess the state voting assistance restrictions for conflict with federal law. *See Ark. United v. Thurston*, No. 5:20-CV-5193, 2022 WL 3584626 (W.D. Ark. Aug. 19, 2022) (finding that state statutory six-assistor limit and accompanying criminal penalties are preempted by § 208 of the VRA); *see also Ark. United v. Thurston*, 517 F. Supp. 3d 777, 790 (W.D. Ark. 2021) (denying motion to dismiss and holding that "officer suits pursuant to *Ex parte Young* are an appropriate method of enforcing the VRA"); *see also Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 642 (2002) (in a case where corporation sought relief from a regulation allegedly preempted by federal statute by virtue of the Supremacy Clause, "[w]e have no doubt that federal courts have jurisdiction under § 1331 to entertain such a suit").

B. Section 208 of the VRA

"The judicial task when assessing whether a statute creates a private cause of action is 'to 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.'" *La Unión del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, 2022 WL 2706116, at *17 (W.D. Tex. July 12, 2022) (quoting *Alexander v. Sandoval*, 532 U.S. 275, 286 (2001)). Courts have uniformly agreed that § 208 of the VRA carries a private right of action—and remedy—for aggrieved parties like Plaintiffs. *Fla. State Conf. of NAACP v. Lee*, 576 F. Supp. 3d 974, 990 (N.D. Fla. 2021) (explaining that "every court that has considered the issue—and the Attorney General of the United States—agree that private parties may enforce section 208. And even setting that consensus aside, the VRA's plain text provides that private parties may enforce section 208.").

First, § 208 is a statute codifying and enforcing the voting guarantees of the Fourteenth Amendment. *Lee*, 576 F. Supp. 3d at 990 ("Congress clearly designed section 208 to enforce the Fourteenth Amendment's guarantees."). The Supreme Court has instructed that a remedial statute permitting a right of action will typically "be phrased in terms of the persons benefited." *Cannon v. Univ. of Chicago*, 441 U.S. 677, 690 n.13 (1979); *accord Gonzaga Univ. v. Doe*, 536 U.S. 273, 284 (2002). Section 208 is phrased in just that way, applying to the discrete class of voters who require assistance "by reason of blindness, disability, or inability to read or write." 52 U.S.C. § 10508.

Second, § 3 of the VRA explicitly refers to a private cause of action through which Plaintiffs can enforce the private right afforded to them by Section 208 and obtain a judicial remedy. *See* 52 U.S.C. § 10302(a) (describing certain actions courts may take when "an aggrieved person institute[s] a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendments"); *see also Lee*, 576 F. Supp. 2d at 990 ("Section 3, therefore, plainly provides that a private plaintiff may initiate a lawsuit under any statute that enforces the Fourteenth and Fifteenth Amendments.").

"While the judicial procedures prescribed by § 3 may not include an express right of action on their own, they do evince Congress's intent for private parties to be able to sue under the VRA." *Arkansas United*, 2022 WL 3584626, at *10 n.11. "The Supreme Court has long found—consistent with § 3 and the VRA's remedial purpose—that a right of action exists for private parties to enforce the VRA's various sections." *Id.* (collecting cases allowing private parties to sue under the VRA); *see also Ala. State Conf. of Nat'l Ass'n for the Advancement of Colored People v. Alabama*, 949 F.3d 647, 653 (11th Cir. 2020) ("the language of the [VRA] . . . clearly indicates that both the Attorney General and aggrieved persons may institute

proceedings against a State"), *judgment vacated as moot sub nom. Alabama v. Ala. State Conf. of NAACP*, 141 S. Ct. 2618 (2021).

"[S]ince § 208 is, by its terms, a statute designed for enforcement of the guarantees of the Fourteenth Amendment, 'Congress must have intended it to provide private remedies.'" *La Unión Del Pueblo Entero v. Abbott*, No. 5:21-CV-0844-XR, 2022 WL 3045657, at *32 (W.D. Tex. Aug. 2, 2022) (quoting *Morse v. Republican Party of Va.*, 517 U.S. 186, 234 (1996)) (finding that "Section 208, therefore, creates a private cause of action" and that organizational plaintiffs stated claims for relief). *See also Disability Rights N.C. v. N.C. State Bd. of Elec.*, --- F. Supp. 3d ---, 2022 WL 1410712 (E.D.N.C. May 4, 2022) (denying motion to dismiss and holding that plaintiff organization plausibly stated claim that state statute limiting congregate-care workers from assisting residents with voting conflicted with § 208).

The Supreme Court no longer endorses implied rights and remedies absent Congressional intent signaled by the text itself. *Sandoval*, 532 U.S. at 286 (explaining that the prior approach had been "abandoned" in *Cort v. Ash*, 422 U.S. 66 (1975)). The VRA explicitly displays such intent. *See Morse*, 517 U.S. at 233 (explaining that the 1975 amendments to the VRA recognized that private rights of action were available to enforce the VRA); *see also id.* at 289 (Thomas, J., dissenting) ("As appellants accurately state, § 3 explicitly recognizes that private individuals can sue under the [Act]."). Earlier this year, the D.C. District Court took up the question of the continued vitality of *Morse* after *Sandoval*. *Michigan Welfare Rights Organization v. Trump,* No. 20-CV-3388 EGS, 2022 WL 990704, at *11 (D.D.C. Apr. 1, 2022). The court concluded that the text of the VRA, including § 3, supported the conclusion that a private litigant could sue to enforce a different provision of the statute. Since that provision was, "by its terms, a statute designed for enforcement of the guarantees of the Fourteenth and Fifteenth Amendments, . . . it

me[t] the *Sandoval* test for an intent to create a private remedy." *Id.* at 12. Likewise, here, as to § 208 of the VRA, as every court to consider the issue has concluded. *See, e.g.*, *OCA-Greater Hous. v. Texas*, 867 F.3d 604, 609–614 (5th Cir. 2017); *Ark. United v. Thurston*, 517 F. Supp. 3d at 790, 798; *La Unión del Pueblo Entero*, 2022 WL 2706116, at *17, *Fla. State Conf. of NAACP*, 576 F. Supp. 3d at 990; *New Ga. Project v. Raffensperger*, 484 F. Supp. 3d 1265, 1301 (N.D. Ga. 2020); *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 233–36 (M.D.N.C. 2020).

Like the text itself, which displays Congressional intent to supply a cause of action to private litigants, the purpose and legislative history of the VRA in general—and § 208 in particular—support the conclusion that Congress intended § 208 to be enforceable by aggrieved parties like Plaintiffs. *See, e.g.*, *Chisom v. Roemer*, 501 U.S. 380, 403 (1991); *South Carolina v. Katzenbach*, 383 U.S. 301, 316 (1966); S. Rep. No 97–417, at 62 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 240 (Senate Report) (Committee Report confirming intention to ensure assistance for "[c]ertain discrete groups of citizens are unable to exercise their rights to vote without obtaining assistance in voting including aid within the voting booth"); H.R. Rep. No. 227, 97th Cong., 1st Sess. 14 (1981); *Hillman v. Maretta*, 569 U.S. 483, 496 (2013) (citation omitted) ("Where Congress explicitly enumerates certain exceptions to a general prohibition, additional exceptions are not to be implied, in the absence of evidence of a contrary legislative intent.").[1] To the extent uncertainty remains, discovery should be permitted.

[1] In debating § 208, Congress specifically considered whether to restrict who could serve as an assistor and chose to exclude two categories of persons: employers and union representatives. In creating these two categories of excluded individuals, Congress chose to allow all others to serve as assistors.

II. Plaintiffs Have Standing

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). "In a multi-plaintiff suit, only one plaintiff need satisfy the constitutional standing requirements." *Ark. United v. Thurston*, 517 F. Supp. 3d at 792 (citing *Horne v. Flores*, 557 U.S. 433, 446–47 (2009)). Nonetheless, all Plaintiffs easily satisfy the low burden for standing at this early stage. *See Villa Lara v. LG Elecs. U.S.A., Inc*., No. 17-CV-5222 (JRT/KMM), 2018 WL 3748177, at *2 (D. Minn. Aug. 7, 2018) ("given the early stage of litigation, the plaintiff need only plead 'general factual allegations of injury resulting from the defendant's conduct'" to successfully bear his burden of establishing standing" (citation omitted)).

Plaintiffs satisfy the requirements for standing. An injury in fact requires an actual or soon-to-be invasion of a concrete, particular legal interest. *Kuehl v. Sellner*, 887 F.3d 845, 850 (8th Cir. 2018). As discussed *infra*, the voting assistance restrictions subject all Plaintiffs to an injury in fact, including: (1) restricting the assistance that Plaintiff Sheinbein is entitled to receive by not allowing her to use the assistor of her choice; (2) the threat of criminal prosecution and sanctions and limitation of assistance activities of Plaintiffs Elizarraraz and Abarca, and (3) the diversion of resources of Plaintiffs Mo P&A and VozKC. These injuries are fairly traceable to Defendants, including Defendant Ashcroft, who is responsible for implementing the voter assistance restrictions. *See OCA-Greater Houston v. Texas*, 867 F.3d 604, 613 (5th Cir. 2017) ("The facial invalidity of a Texas election statute is, without question, fairly traceable to and redressable by the State itself and its Secretary of State, who serves as the 'chief election officer of the state.'"). Plaintiffs' claims seeking declaratory and injunctive relief

related to statutory provisions are also redressable, because a court decision enjoining Defendants, including Ashcroft, from implementing and enforcing the restrictions would provide the sought-after relief and redress in future elections. *See Arkansas United*, 2022 WL 3584626, at *12.

A. Plaintiff Sheinbein Has Standing

Plaintiff Sheinbein is a "voter who requires assistance to vote by reason of blindness, disability, or inability to read or write," and is therefore covered directly by § 208 of the VRA. *See* 52 U.S.C. § 10508; *see also* Compl. ¶¶ 101–107. She has "suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not conjectural or hypothetical," *Spokeo*, 578 U.S. at 339 (internal quotation marks and citation omitted), in that she has a legally protected interest in voting assistance created by § 208 and will imminently be unable to select "a person of [her] choice" to assist her in reading, marking, and casting her ballot. The person she has selected in the past and whose assistance she wishes to obtain in the November 2022 election is a non-immediate family member who is a volunteer with the League of Women Voters who works to advance the League's mission of ensuring voters can vote. (Compl. ¶ 104.) A reasonable inference could be drawn that this assistor, as a League volunteer, would assist other voters. *See Harriet Tubman Freedom Fighters Corp. v. Lee*, No. 4:21-CV-242, 2021 WL 7083360, at *7 (N.D. Fla. Oct. 8, 2021) (holding that there was an injury-in-fact to a voter with a disability who "wishe[d] to have his hired caregiver assist him in marking and submitting his vote-by-mail ballot" but where that caregiver would be "unable to help him without committing a crime under [Florida's] challenged provision" "if she assist[ed] more than one other person who [wa]s not an immediate family member"); *see also Lujan v. Defenders of Wildlife*, 504 U.S. 555, 572 n.7 (1992) ("The person who has been accorded a procedural right to

protect his concrete interests can assert that right without meeting all the normal standards for redressability and immediacy.").

Defendant Ashcroft is the Secretary of State of Missouri, sued in his official capacity. As the chief election official for the state, Ashcroft bears responsibility for the implementation of all voting laws, oversees the state's Election Division, and provides guidance to local election authorities on Mo. Rev. Stat. § 115.445. (Compl. ¶ 27.) The contraction of Sheinbein's right to voting assistance under § 208 is traceable to Ashcroft's implementation of and guidance relating to Mo. Rev. Stat. § 115.445. A judicial decision granting the declaratory and injunctive relief Sheinbein seeks would redress her injury and allow her to fully exercise her right under § 208. *See Massachusetts v. Mellon*, 262 U.S. 447, 488 (1923) (If a statute is declared invalid and enjoined, "the court enjoins, in effect, not the execution of the statute, but the acts of the official.").

B. Plaintiffs Elizarraraz and Abarca Have Standing

Plaintiffs Elizarraraz and Abarca intend to assist limited-English-proficiency voters in upcoming elections. (Compl. ¶¶ 90, 96.) If they assist more than one non-immediate family member in the voting booth, they will violate the voter assistance restrictions and may be subjected to criminal prosecution. The threat of prosecution is an injury-in-fact traceable to the Missouri statute enforced by Defendants, which is likely to be redressed by a favorable judicial decision in this case. Furthermore, the credible threat of prosecution keeps Elizarraraz and Abarca from telling the limited-English-proficiency voters in their community that they are available to assist with voting and from volunteering to do so. That reduces the pool of potential assistors that a voter covered by § 208 has available to assist with casting a ballot and may prohibit a voter needing assistance from relying on "a person of the voter's choice," the very

right protected by the federal statute.

And as the Supreme Court has pointed out, it has "generally permitted plaintiffs to assert third-party rights in cases where the enforcement of the challenged restriction *against the litigant* would result indirectly in the violation of third parties' rights." *June Medical Services LLC v. Russo*, 140 S. Ct. 2103 (2020) (plurality opinion) (cleaned up and collecting eight Supreme Court cases illustrating this principle), *reversed on unrelated grounds in Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2229 (2022). Indeed, "the party upon whom the challenged statute imposes legal duties and disabilities" is "the obvious claimant" and "the least awkward challenger." *Id.* (internal quotation marks and citation omitted). Elizarraraz and Abarca are the parties upon whom a legal disability—the criminal prohibition on assisting all but one other non-immediate-family voter—has been placed by the challenged Missouri statute. *See id.* ("The threatened imposition of governmental sanctions for noncompliance eliminates any risk that their claims are abstract or hypothetical." (internal quotation marks and citation omitted)). Moreover, "when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.'" *Babbitt v. United Farm Workers Nat. Union*, 442 U.S. 289, 302 (1979) (internal citation omitted).

C. Plaintiffs VozKC and Mo P&A Have Standing

"Standing may be found 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." *Org. for Black Struggle v. Ashcroft*, 493 F. Supp. 3d 790, 798 (W.D. Mo. 2020) (quoting *Nat'l Fed. of Blind of Mo. v. Cross*, 184 F.3d 973, 979 (8th Cir. 1999)) ("The Court is thus satisfied Plaintiffs each have standing through diversion of resources from its other

core work and pre-election activities, and that these diversions of resources are more than a minimal setback to an abstract interest."); *see also Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982) (holding in an FHA case that if a challenged practice "perceptibly impaired" a nonprofit organization's ability to carry out its mission, "there can be no question that the organization has suffered injury in fact").

As Plaintiffs alleged and the Court must accept as true at this stage, the voting assistance restrictions injure Plaintiffs Mo P&A and VozKC by frustrating their missions and causing them to divert resources away from other important activities. (*See* Compl. ¶¶ 58–70 (describing Mo P&A's advocacy and assistance activities), ¶¶ 71–78 (describing VozKC's advocacy and assistance activities).

Plaintiff Mo P&A receives federal funding to engage in a variety of voting-related activities to support and ensure full participation for voters with disabilities, including advocacy and assistance leading up to and on Election Day. (Compl. ¶¶ 66–67.) Federal statutes also mandate that Plaintiff Mo P&A provide myriad other legal and advocacy resources beyond voting accessibility to individuals with disabilities in Missouri, including: investigating incidents of abuse, neglect, financial exploitation, and significant violations of individual rights; ensuring equal access to education; and obtaining accommodations in the workplace. (Compl. ¶ 70.) When Plaintiff Mo P&A must divert resources to its voter assistance work because of Missouri's voting assistance restriction, these programs—along with its voter access programs—lose resources. *Id.* Because of Missouri's restrictions on voter assistance, Plaintiff Mo P&A must divert funds and staff which would typically be available for other activities to ensure voting access and assistance for voters with disabilities. (Compl. ¶¶ 69–70.) Because staff are prevented from assisting multiple voters on Election Day, Plaintiff Mo P&A must seek out, recruit, and

train additional assistors to support individuals with disabilities in voting or suspend assistance efforts. *Id.* Thus, Plaintiff Mo P&A has organizational standing.

Plaintiff VozKC relies on volunteers to carry out its mission and daily activities. (Compl. ¶ 74.) Plaintiff VozKC depends solely on donations that are used specifically for their programming activities such as public service campaigns, advocacy efforts, and voter education. (Compl. ¶ 77.) Volunteers are key to Plaintiff VozKC's ability to provide assistance to limited-English-proficient voters in casting their ballots at the polling place. *Id.* Because of the state law restriction on voter assistance, in order to assist limited-English-proficient voters in casting their votes at the polling place, Plaintiff VozKC has to divert its leadership volunteer staff and recruit volunteers who would normally be dedicated to other activities such as canvassing, phone banking, education, and other direct work, as well as recruit and train one volunteer for each limited-English-proficient voter that requires assistance. (Compl. ¶¶ 77–78.) Thus, Plaintiff VozKC has organizational standing.

Courts have routinely found that nonprofit voting-rights organizations have standing where they have had to divert resources to comply with restrictions on how they may assist voters.[2] *See Arkansas United*, 2022 WL 3584626, at *12 (finding that minority-rights organization was "well within the 'zone of interests'" of the VRA's mandate to eliminate discrimination against minority groups in voting and, more specifically, § 208's mandate that LEP voters receive the assistor of their choice"); *see also OCA-Greater Houston v. Texas*, 867 F.3d 604, 610 (5th Cir. 2017); *Fla. State Conf. of NAACP v. Browning*, 522 F.3d 1153, 1165–66

[2] The organizational plaintiffs also have associational standing under *Heartland Acad. Cmty. Church v. Waddle*, 427 F.3d 525, 532–33 (8th Cir. 2005) (concluding that a school, which was a nonmembership organization, had associational standing and could assert the rights of its students where the students would have standing to sue in their own right, the interests the school sought to protect were germane to its interests, and "because [the school sought] only declaratory and prospective injunctive relief, the participation of the individual students . . . [was] not required."). Each of these requisite conditions for the assertion of associational standing is present here.

(11th Cir. 2008); *Common Cause Ind. v. Lawson*, 937 F.3d 944, 952 (7th Cir. 2019); *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1039 (9th Cir. 2015); *Scott v. Schedler*, 771 F.3d 831, 837 (5th Cir. 2014). As the U.S. District Court for the Eastern District of Arkansas remarked in *Arkansas United*, "[t]he law is clear that an organization may establish organizational standing when it is forced to divert resources to respond to a state's alleged violation of federal law." 2022 WL 3584626, at *12.[3]

III. Plaintiffs' Claims Succeed as a Matter of Law

At the Rule 12(b)(6) motion-to-dismiss stage, the Court must "assume the truth of all factual allegations in the complaint and make all reasonable inferences in favor of the nonmoving party." *Delker*, 21 F.4th at 1024. Taking all reasonable inferences as true in favor of Plaintiffs, as the non-movants, they succeed on the merits of their claims at this stage.

"Conflict preemption exists where a party's compliance with both federal and state law would be impossible or where state law would pose an obstacle to the accomplishment of congressional objectives." *Pet Quarters, Inc. v. Depository Tr. & Clearing Corp.*, 559 F.3d 772, 780 (8th Cir. 2009). By limiting a right created by the federal Voting Rights Act, Missouri's voting assistance restrictions "create[] a conflict with the plan Congress put in place." *Ariz. v. U.S.*, 567 U.S. 387, 403 (2012). The state voter assistance restriction "stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress." *Keller v. City of Fremont*, 719 F.3d 931, 940 (8th Cir. 2013); *see supra* Part I.B.

In *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996), the Supreme Court considered whether a federal statute that allowed national banks to sell insurance in small

[3] Plaintiffs assert that they have properly asserted standing. However, if the Court is inclined to dismiss for lack of standing, Plaintiffs seek the opportunity to amend. *See* Fed. R. Civ. P. 15(a)(2).

towns had pre-empted a Florida state statute that prohibited a bank employee in a small town from acting as an insurance agent. The Court held that Congress had not explicitly expressed an intent to pre-empt state law and that complying with both laws was not a "physical impossibility," nor one that imposed "directly conflicting duties." *Id.* at 31. Nonetheless, the Court concluded that the "Federal Statute authorizes national banks to engage in activities that the State Statute expressly forbids," which seemed to be an "obstacle to the accomplishment of one of the Federal Statute's purposes." Like Defendant Ashcroft does here, the State of Florida argued that the state law presented no obstacle to Congress's purpose because that purpose had been to convey "only a very *limited* permission . . . *to the extent that state law also grants permission to do so*." *Id.* But the Court was unpersuaded by this argument. The federal statutory language "suggest[ed] a broad, not a limited, permission" and precedent led to the conclusion that "normally Congress would not want States to forbid, or to impair significantly, the exercise of a power that Congress explicitly granted." *Id.* at 32, 33.

So too here. The VRA is a broad, remedial statute whose language and purpose was aimed directly at contrary state law and practice. *See, e.g.*, S. Rep. No 97–417, at 62 (1982), reprinted in 1982 U.S.C.C.A.N. 177, 240 (Senate Report); H.R. Rep. No. 227, 97th Cong., 1st Sess. 14 (1981). Like in *Barnett Bank*, there is nothing in § 208's language suggesting that its drafters intended to grant only a right to voting assistance if each state also gave its permission. *See also Pet Quarters*, 559 F.3d at 780 (summarizing *Barnett Bank* as holding that "conflict preemption applies where state law forbids conduct that federal law authorizes"). Moreover, "[t]he preemption inquiry is driven by 'congressional purpose,' not the purpose of the state legislature." *Arkansas United*, 2022 WL 3584626, at *16 (quoting *In re Aurora Dairy Corp. Organic Milk Mktg. & Sales Pracs. Litig.*, 621 F.3d 781, 791 (8th Cir. 2010) and dismissing

State's argument that six-voter limit served interests in "election integrity, fighting voter fraud, and easing burdens on poll workers").

Missouri's voting assistance restrictions conflict with and are preempted by Section 208 of the VRA and thus violate the Supremacy Clause. U.S. Const. art IV, para. 2. Section 208 provides that "[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[.]" 52 U.S.C. § 10508. There are only two limitations under the VRA: a voter may not be assisted by (1) the voter's employer, or (2) an officer or agent of the voter's union. The VRA defines the terms "vote" and "voting" to include:

> [A]ll action necessary to make a vote effective in any primary, special, or general election, including, but not limited to, registration, listing pursuant to this chapter, or other action required by law prerequisite to voting, casting a ballot, and having such ballot counted properly and included in the appropriate totals of votes cast with respect to candidates for public or party office and propositions for which votes are received in an election.

52 U.S.C. § 10310.

By contrast, Missouri election law imposes restrictions not found in federal law, in violation of the right to voting assistance. Mo. Rev. Stat. § 115.445.3 denies voters, including those with disabilities and limited English proficiency, the right to use assistors of their choice to vote when those assistors have already helped another voter who is not an immediate family member. Plaintiff Sheinbein requires assistance with voting but will not be able to use her chosen assistor if that individual has already assisted someone who is not an immediate family member. Plaintiffs Elizarraraz and Abarca must either limit the number of voters whom they help to one or risk criminal prosecution and penalties. Additionally, the limitation prevents Plaintiffs Mo P&A and VozKC from operationalizing their mission to assist eligible voters to exercise their

right to vote and organizing efforts to help voters who may need assistance—as any assistor would have to stop after helping just one voter or risk violating the law.

Courts have consistently held that less restrictive limitations upon voter assistance are preempted by and in violation of the VRA. Recently, in *Arkansas United v. Thurston*, No. 5:20-CV-5193, 2022 WL 3584626 (W.D. Ark. Aug. 19, 2022), the United States District Court for the Western District of Arkansas found that a six-voter assistance limit under Arkansas state law and criminal provisions imposing penalties for violations of the voting restrictions were preempted by § 208 of the VRA. Dismissing several state arguments similar to those presented by Defendant Ashcroft here, the court held that "the one thing states cannot do is disallow voters the assistor of their choice—precisely what the six-voter limit does." *Id.* at *17. Missouri's more restrictive one-voter limit likewise "impermissibly conflicts with federal law." *Id.*

The Fifth Circuit, in striking down a Texas limitation on voting assistance as preempted by the VRA, compared the "unambiguous language" of § 208 of the VRA to the challenged provision in the Texas Election Code and concluded that "[Texas'] limitation on voter choice . . . impermissibly narrows the right guaranteed by Section 208 of the VRA." *OCA-Greater Houston v. Texas*, 867 F.3d 604, 614–15 (5th Cir. 2017) (invalidating state law requirement that an interpreter chosen by the voter must be registered to vote in the same county as the voter).

Similarly, in *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, a North Carolina district court held that plaintiffs were likely to succeed on the merits of their claim that Section 208 preempted a North Carolina law that restricted who may assist voters in hospitals, clinics, nursing homes, or rest homes. No. 1:20CV457, 2020 WL 4484063, at *60 (M.D.N.C. Aug. 4, 2020) (invalidating state law that required voters needing assistance to "rely on either a near relative, a legal guardian, or a [multipartisan assistance team] if they are available before

they may choose any other person to assist them"). The court reasoned that the challenged state statute's limitation on assistance "*does not* allow Plaintiff Hutchins to choose the person who will assist him [and thus] these regulations impermissibly narrow Section 208's dictate that a voter may be assisted '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.'" *Id.* (emphasis in original).

Subsequently, the *Democracy N. Carolina* court denied the State's motion to dismiss the § 208 voting assistance claim, finding that Plaintiff had sufficiently alleged that North Carolina's assistance restrictions violate "[t]he unambiguous language of the VRA." *Democracy N. Carolina v. N. Carolina State Bd. of Elections*, No. 1:20CV457, 2022 WL 715973, at *14 (M.D.N.C. Mar. 10, 2022); *see also DSCC v. Simon*, No. A20-1017, 2020 WL 6302422, at *7 (Minn. Oct. 28, 2020) (finding that the VRA preempted state voting assistance provisions because "[a] plain-language comparison leads to the conclusion that Minnesota's three-voter limit on marking assistance can be read to stand as an obstacle to the objectives and purpose of section 208 because it could disqualify a person from voting if the assistant of choice is, by reason of other completed assistance, no longer eligible . . . ."); *Priorities USA v. Nessel*, 19-13341, 2020 WL 2615766, at *14 (E.D. Mich. May 22, 2020) (denying motion to dismiss a voter assistance lawsuit on the grounds that Plaintiffs had stated a preemption claim under § 208 of the VRA); *League of Women Voters of Fla., Inc. v. Lee*, No. 4:21CV186-MW/MAF, 2022 WL 969538, at *14 (N.D. Fla. Mar. 31, 2022) (denying motion to dismiss regarding challenge to statute making it a crime to solicit voters who are disabled and limited English proficient).

Based upon the allegations in Plaintiffs' Complaint, Missouri's voting assistance restrictions violate the Supremacy Clause and § 208 of the VRA because they "interfere with the

careful balance struck by Congress" in granting voters who need assistance the right to choose their assistor. *Arizona*, 567 U.S. at 406. Plaintiffs' claims should proceed at this stage.

CONCLUSION

For the foregoing reasons, Plaintiffs respectfully request that this Court deny Defendant Ashcroft's Motion to Dismiss.

Respectfully submitted,

/s/ Molly E. Carney
Anthony E. Rothert, #44827MO
Jessie Steffan, #64861MO
Molly E. Carney, #70570MO
Emily Lazaroff, #73811MO
ACLU of Missouri Foundation
906 Olive Street, Ste. 1130
St. Louis, Missouri 63101
Phone: (314) 652-3114
arothert@aclu-mo.org
jsteffan@aclu-mo.org
mcarney@aclu-mo.org

Gillian R. Wilcox, #61278MO
ACLU of Missouri Foundation
406 West 34th Street, Ste. 420
Kansas City, Missouri 64111
Phone: (816) 470-9938
Fax: (314) 652-3112
gwilcox@aclu-mo.org

MISSOURI VOTER PROTECTION COALITION
Denise D. Lieberman, #47013MO
6047 Waterman Blvd.
St. Louis, Missouri 63112
(314) 780-1833
denise@movpc.org

MEXICAN AMERICAN LEGAL DEFENSE AND EDUCATIONAL FUND

Griselda Vega Samuel*
IL State Bar No. 6284538
Susana Sandoval Vargas*
IL State Bar No. 6333298
11 E. Adams, Suite 700
Chicago, Illinois 60603
Phone: (312) 427-0701
Facsimile: (312) 588-0782
Email: gvegasamuel@maldef.org
Email: ssandovalvargas@maldef.org
**Pro hac vice*

MISSOURI PROTECTION AND
ADVOCACY SERVICES
Susan K. Eckles, MoBar #38641
Vincent K. Heitholt, MoBar # 68129
P.O. Box 140195
St. Louis, MO 63114
Email: susan.eckles@mo-pa.org
Email: vincent.heitholt@mo-pa.org
Phone: 314-256-9611 and 314-256-9591
Facsimile: 573-893-4231

Attorneys for Plaintiffs

CERTIFICATE OF SERVICE

I certify that on September 6, 2022, I filed a copy of the foregoing electronically with the Court using the CM/ECF system, which sent notification to counsel.

/s/ Molly E. Carney