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.	)	

REPLY IN SUPPORT OF MOTION TO DISMISS

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INTRODUCTION

In 1977, the Missouri General Assembly passed § 115.445, including subsection 3 of that statute. 1977 Mo. Laws 207. Five years later, in 1982, Congress passed VRA § 208. 1982 VRA Amendments, Pub. L. No. 97-205, § 5, 96 Stat. 134 (1982). These laws have coexisted peacefully for 40 years, until this challenge. Not only are there no reported decisions in which a private party challenged § 115.445.3, RSMo, as violating VRA § 208—no private parties have challenged *any state's* restrictions as violating VRA § 208 until 2008. If § 115.445, RSMo, in fact violated VRA § 208, one would have expected a lawsuit within the first five years of VRA § 208's passage by the United States—not one filed by private plaintiffs 40 years later. And if there was a private right of action to sue for violations of VRA § 208, one would have expected multiple federal suits to be filed within the first few years of VRA § 208's passage—not 20+ years down the road. The explanations for this are simple: private parties have no right to sue for violations of VRA § 208, and VRA § 208 does not preempt states from implementing reasonable restrictions on who may assist disabled voters. For these reasons—and because there is no standing and no private right of action to enforce the Supremacy Clause—this Court should grant the motion to dismiss.

ARGUMENT

I. Count I should be dismissed because the Supremacy Clause has no private right of action.

Tellingly, the United States's Statement of Interest does not argue that the Supremacy Clause can form the basis for Count I of the Complaint. Instead, Plaintiffs continue their misguided campaign to turn the Supremacy Clause into a source for their cause of action. The Supreme Court has foreclosed that argument. The Supremacy Clause is not the "source of any federal rights, and certainly does not create a cause of action." *Armstrong v. Exceptional Child Ctr., Inc.*, 575 U.S. 320, 324–25 (2015) (cleaned up). Nothing in the Clause's text suggests otherwise, and no history

nor prior precedents suggest it was ever understood as conferring a private right of action. Instead, as Plaintiffs' rightly acknowledge, the Clause provides a rule of decision instructing "courts what to do when state and federal law clash, but is silent regarding who may enforce federal laws in court, and in what circumstances they may do so." *Id.*; Opp. at 11 (Dkt. #38).

Plaintiffs' Suggestions in Opposition to Defendant's Motion to Dismiss ("Opposition") cites inapposite authorities in their effort to take the Supremacy Clause several steps beyond the furthest boundaries construed by the courts. Neither of the two companion *Arkansas United v. Thurston* cases held that the challenged state laws violated the Supremacy Clause. Instead, at most, they considered whether a state law was preempted by a federal law, using the Supremacy Clause as an interpretative tool. *See Ark. United v. Thurston*, No. 5:20-CV-5193, 2022 WL 3584626 (W.D. Ark. Aug. 19, 2022) (making clear that the challengers' Supremacy Clause claim "is known as preemption" and analyzing whether an Arkansas law conflicts with § 208 of the VRA); *Ark. United v. Thurston*, 517 F. Supp. 3d 777, 790 (W.D. Ark. 2021) (merely summarizing the challengers' claim as seeking a declaratory judgment that four Arkansas statutes "violate the Supremacy Clause of the Constitution). Finally, *Verizon Maryland, Inc. v. Pub. Serv. Comm'n of Maryland*, 535 U.S. 635, 642 (2002), also merely summarizes a preemption claim by referring to the Supremacy Clause as the interpretive rule to govern the preemption analysis.

Of course, here, Plaintiffs' Count II seeks declaratory relief that Missouri's statutes conflict with § 208 of the VRA. Count I cannot stand on its own, and it should be dismissed.

II. Count II should be dismissed because VRA § 208 has no private right of action.

Neither Plaintiffs nor the U.S. Department of Justice (DOJ) in its Statement of Interest (Dkt. #44) claim that VRA § 208 itself contains a private right of action. Rather, they claim that other VRA sections provide or evince one, relying on VRA §§ 3, 12(f), and 14(e).

Not so. In order to find a private right of action under VRA § 208, this Court must find both a private right and a private remedy. Sugg. in Supp. ("Sugg.") p.3 (Dkt. #34). Plaintiff and DOJ do not dispute that the only persons who have a private *right* under VRA § 208 are "voter[s] who require[] assistance to vote by reason of blindness, disability, or inability to read or write." 52 U.S.C. § 10508. Thus, the only party who plausibly could have a private right (irrespective of whether there is a private remedy) under VRA § 208 is Sheinbein. But as discussed in the Suggestions in Support pp.6-8 ("Suggestions") and Part III, *infra*, Sheinbein lacks standing. Thus, this Court should dismiss Count II.

A. VRA § 3 does not provide or evince a private remedy.

Plaintiffs and DOJ contend that VRA § 3 allows private parties to recover for VRA § 208 violations. VRA § 208 contains three subsections—(a), (b), and (c)—none of which state that a private party may sue for any particular VRA section, much less VRA § 208. All three subsections describe what remedies are available **if** "the Attorney General or an aggrieved person institutes a proceeding under any statute to enforce the voting guarantees of the fourteenth or fifteenth amendment." 52 U.S.C. § 10302(a); *see also id.* § 10302(b)-(c) (similar).

The best way to understand the phrase "or an aggrieved person" and its intent is historically. Congress passed the VRA in 1965, which contained § 3 without the phrase "or an aggrieved person," meaning that courts could only utilize the remedies discussed in VRA § 3 when the Attorney General prevailed. VRA, Pub. L. No. 89-110, § 3, 79 Stat. 437, 437-38 (1965). In 1969, the Supreme Court acknowledged that VRA § 5 did not expressly include a private right of action, but it created an implied one anyway for policy reasons. *Allen v. State Board of Elections*, 393 U.S. 544, 554-57 (1969). Thus, after 1969, when private parties prevailed under VRA § 5, VRA § 3 would not allow courts to impose the same broad remedies as if the Attorney General prevailed.

This changed when the 1975 amendments added the phrase "or an aggrieved person" to VRA § 3(a), (b), and (c). 1975 VRA Amendments, Pub. L. No. 94-73 § 401, 89 Stat. 400 (1975). This change does not imply that Congress believed that private plaintiffs should be able to sue under any particular provision of the VRA—it simply implies that Congress believed that **if** private parties could bring suit and prevail (as *Allen* allowed), **then** courts may impose the same remedies as if the Attorney General prevailed. Even if the change *did* imply that Congress agreed that private parties may sue (it does not), the *most* it could have implied is that Congress agreed that private parties may sue under VRA § 5. The 1975 amendments certainly did not make other VRA sections privately enforceable—especially not VRA § 208, which did not even exist yet.

Congress added VRA § 208 later, in 1982, and did not provide a private cause of action for enforcing it. Pub. L. No. 97-205, § 5, 96 Stat. 134. When Congress passes a law without a private enforcement mechanism, the Supreme Court treats that law as enforceable only by the federal government. *See, e.g.*, *California v. Sierra Club*, 451 U.S. 287, 297 (1981) (in general); *United States v. Berks Cnty., Pennsylvania*, 277 F. Supp. 2d 570, 580 (E.D. Pa. 2003) (United States suing for VRA § 208 violation). This is especially true here because *other sections of the same bill* allowed enforcement by "aggrieved part[ies]" and "aggrieved person[s]." *See* Pub. L. No. 97-205, § 2(b)(4), (b)(5)(B), (b)(9) (currently codified in 52 U.S.C. § 10303(a)(4), (a)(5), (a)(9)); *Russello v. United States*, 464 U.S. 16, 23 (1983) ("[W]here Congress includes particular language in one section of a statute but omits it in another section of the same Act, it is generally presumed that Congress acts intentionally and purposely in the disparate inclusion or exclusion."). Similarly, a related statute passed two years later expressly provided for enforcement by "person[s] who [are] personally aggrieved." *See* Voting Accessibility for the Elderly and Handicapped Act, Pub. L. No. 98-435, § 6, 98 Stat. 1678 (1984) (currently codified in 52 U.S.C. § 20105(a)).

This Court should not invent a private right of action for VRA § 208 violations using the same reasoning as *Allen* (VRA § 5) and *Morse v. Republican Party of Virginia*, 517 U.S. 186 (1996) (VRA § 10), as DOJ suggests, Statement p.7, because the Supreme Court expressly disavowed this reasoning in *Ziglar v. Abbasi*, 137 S. Ct. 1843, 1855-56 (2017), and because doing so violates *Alexander v. Sandoval*, 532 U.S. 275, 286-88 (2001), *see* Sugg. pp.2-3.

B. VRA § 12(f) does not provide or evince a private remedy.

VRA § 12(f) currently states:

> The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to [VRA § 12] and shall exercise the same without regard to whether a person asserting rights under the provisions of chapters 103 to 107 [52 U.S.C. § 10301 to § 10702] shall have exhausted any administrative or other remedies that may be provided by law.

52 U.S.C. § 10308(f). This section was included in the original, 1965 VRA bill, which read:

> The district courts of the United States shall have jurisdiction of proceedings instituted pursuant to this section and shall exercise the same without regard to whether a person asserting rights under the provisions of this Act shall have exhausted any administrative or other remedies that may be provided by law.

Pub. L. No. 89-110, § 12(f), 79 Stat 444. The Supreme Court has never relied on VRA § 12(f) as establishing a private right of action to sue for violations of any VRA section. In *Allen*, the Supreme Court noted that "[w]hile this argument has some force, the question is not free from doubt." 393 U.S. at 555 n.18. Since then, the Supreme Court has expressly disavowed finding a cause of action on the basis of the evidence in *Allen*. *Ziglar*, 137 S. Ct. at 1855-56 (stating that *Allen* implied a cause of action "not explicit in the statutory text itself" and that it is "logical…to assume that Congress will be explicit if it intends to create a private cause of action"). At least one other district court has concluded that VRA § 12(f) does not provide a private right of action. *See Arkansas State Conf. NAACP v. Ark. Bd. of Apportionment*, --- F. Supp. 3d ---, 2022 WL 496908, *13 (E.D. Ark. 2022) (holding that "the 'person asserting rights' language in § 12(f) is

not describing a hypothetical private plaintiff" but "referencing a person on whose behalf the Attorney General…brings suit under § 12(e)"). Thus, VRA § 12(f) does not provide or evince a private remedy.

C. VRA § 14(e) does not provide or evince a private remedy.

It states that "[i]n any action or proceeding to enforce the voting guarantees of the fourteenth or fifteenth amendment, the court, in its discretion, may allow the prevailing party, *other than the United States*, a reasonable attorney's fee." 52 U.S.C. § 10310(e). Because prevailing parties other than United States could include States, municipalities, or officials sued *by* the United States, prevailing parties need not reference private parties. But even if "prevailing party, other than the United States" had to include private parties (it does not), VRA § 14(e)'s text does not require that *every* VRA section (or VRA § 208 specifically) be enforceable by private parties. Thus, this Court should dismiss Count II because there is no private right of action to enforce VRA § 208.

D. Private parties may not enforce VRA § 208 through 42 U.S.C. § 1983.

In a footnote, DOJ argues that the case should not be dismissed because Plaintiffs have a § 1983 claim even if there is no private right of action under VRA § 208. The only person who is arguably granted a "right" by VRA § 208, as required for a § 1983 claim, *see Gonzaga University v. Doe*, 536 U.S. 273, 283 (2002), is Sheinbein, as the other Plaintiffs are not "voter[s] who require[] assistance." Sugg. p.3. But as discussed *infra* and in the Suggestions, Sheinbein lacks standing. Sugg. pp.6-8. Thus, the case should be dismissed. Further, Plaintiffs cannot use § 1983 to enforce a VRA § 208 claim because "the express provision of one method of enforcing a [statute's] substantive rule suggests that Congress intended to preclude other[] [methods]," *City of Rancho Palos Verdes, Cal. v. Abrams*, 544 U.S. 113, 121 (2005), and the VRA and related statutes

expressly provide complex methods for their own enforcement. *See* 52 U.S.C. §§ 10301-10314 (titling chapter 103 "Enforcement of Voting Rights"); *see also id*. §§ 10504, 10505, 10701, 20105(a).

III. Both counts should be dismissed because there is no standing.

For two principal reasons Plaintiffs' Opposition does not demonstrate that any of the named plaintiffs have standing to bring either of the two counts in the Complaint. First, Plaintiffs have not articulated a sufficient injury-in-fact through an alleged diversion of organizational resources to support Missouri P&A and VozKC's standing, threatened criminal prosecution to support plaintiffs Elizarraraz's and Abarca's standing, or limit to the universe of individuals able to assist Plaintiff Sheinbein to support her standing. Second, Plaintiffs have not meaningfully addressed how any alleged injury is actual or imminent.

To the first point, none of the Plaintiffs have asserted a sufficient injury in fact. As to the organizational plaintiffs' diversion-of-resources theory, all of the challenged Missouri statutes here were first enacted in 1977. *See* Mo. Rev. Stat. §§ 115.445.3; 115.635.8; 115.115.5; 115.447.2(2); 115.291.1. To argue that Plaintiffs are now suddenly diverted a sufficient amount of organizational resources for standing purposes when these statutes have been on the books for over 40 years strains credulity. Their barebones pleading allegations do not allege with sufficient specificity how any changes to these laws causes them to divert spending away from their core mission. At most, they have alleged that they must recruit, train, and compensate additional assistors, which is fully supportive of their mission to provide voting assistance. The cases Plaintiffs cite on pages 21 and 22 of their Opposition are inapposite here, because to the extent those cases hold that a third party can have standing if they are within the "zone of interests" to be protected by a challenged law, Plaintiffs here have not alleged in their Complaint that they are

within the zone of interests of the challenged Missouri laws. As discussed more below, the Supreme Court has recently cautioned against the expansion of this very type of broad third-party standing. And here, the challenged Missouri laws are designed to benefit certain disabled individuals, not organizations and assistors themselves.

Next, none of the first four named plaintiffs can attain standing through actually disabled individuals who may be afforded protections by the challenged statutes. The organizational plaintiffs are corporate entities, and Plaintiffs Elizarraraz and Abarca are not disabled or unable to read or write. In effect, their standing is premised on *some other person's* inability to use a specific person for voting person. This standing-by-proxy theory is insufficient to grant these four plaintiffs standing on their own. In fact, just this summer, the Supreme Court cautioned the dilution of traditional third-party standing principles. *Dobbs v. Jackson Women's Health Org.*, 142 S. Ct. 2228, 2275 (2022). As a general rule, a plaintiff "must assert his own legal rights and interests, and cannot rest his claim to relief on the legal rights or interests of third parties." *Warth v. Seldin*, 422 U.S. 490, 499 (1975). The Supreme Court in *Dobbs* reaffirmed that general rule, specifically noting that the Court's recent abortion cases—including *June Medical Services, L. L. C. v. Russo*, 140 S. Ct. 2103 (2020), which Plaintiffs cite in their Opposition (p.19) as *support* for their standing in this case—"have ignored the Court's third-party standing doctrine." *Dobbs*, 142 S. Ct. at 2275. Even if *June Medical*'s broader third-party standing holding is still sound after *Dobbs*, which it likely is not, Plaintiffs have not cited to cases applying that type of broader standing outside the abortion context. Plaintiffs Missouri P&A, VozKC, Elizarraraz, and Abarca have not alleged they are qualifying voters with disabilities to entitle them to any of the protections of the challenged statutes. They cannot rest their claim to relief on the rights of those who may be so affected.

Finally, Plaintiff Sheinbein also has not met her burden to sufficiently allege she has standing. Plaintiffs' Opposition fails to meaningfully respond to Defendant's argument that Sheinbein's alleged injury is not actual or imminent, save for a quotation from the Supreme Court's decision in *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016). But Plaintiffs do not argue how her alleged injury is actual or imminent. The pleadings contain no plausible facts suggesting that Sheinbein's unnamed friend will even be available to assist voters in any future election, much less that she will be asked by voters other than Sheinbein, who are not related to her, to help them vote. Any injury is purely hypothetical. Plaintiffs have the burden to allege and prove standing, and they have failed to do so here.

IV. Both counts should be dismissed because § 115.445.3, RSMo, does not violate, conflict with, or interfere with VRA § 208.

Plaintiffs and DOJ claim that VRA § 208 preempts state statutes limiting who may assist a disabled person, but they cite no precedent binding on this Court. They also fail to address their interpretation's absurd results—preventing states from barring persons convicted of voter fraud from assisting disabled persons to vote. This Court should adopt the more sensible reading that under VRA § 208 "the protection afforded the voter by Section 208 is simply that the voter is not required to accept *another person's* choice." *Ray v. Texas*, Civil Action No. 2-06-CV-385 (TJW), 2008 WL 3457021, *7 (E.D. Tex. 2008); *see also Qualkinbush v. Skubisz*, 826 N.E.2d 1181, 1196 (Ill. App. 2004) (holding that Illinois statute restricting who may deliver absentee ballots for disabled voters did not violate VRA § 208, and citing 3 McQuillin Municipal Corporations § 12.16, at 163 (3d ed. 2001) for the same); *DiPietrae v. City of Philadelphia*, 666 A.2d 1132, 1135-36 (1995) (Pa. App. 1995) (same, allowing restriction that assistor cannot be an agent for persons living in more than one household).

Plaintiffs suggest that *Barnett Bank of Marion County, N.A. v. Nelson*, 517 U.S. 25 (1996),

controls here. But unlike in *Barnett Bank*, Defendant's proposed VRA § 208 reading does not conflict with—but rather assists—VRA's purpose: allowing voters to vote their conscience without coercion. It is Plaintiffs' proposed interpretation that would allow non-incarcerated felons convicted of voter fraud to assist buses full of disabled and non-English-speaking voters. These contrasting readings clarify that the language in VRA § 208 was intended to prevent states from *prescribing* who must help vulnerable voters—it was not intended to prevent states from *proscribing* certain persons from assisting vulnerable voters. Because VRA § 208 does not preempt § 115.445.3, RSMo, this Court should dismiss the suit.

CONCLUSION

For the reasons stated *supra* and in the Suggestions in Support of Defendant's Motion to Dismiss, this Court should grant Defendant's Motion to Dismiss.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that, on October 5, 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