IN THE UNITED STATES DISTRICT COURT
FOR THE MIDDLE DISTRICT OF LOUISIANA

VOICE of the EXPERIENCED, on behalf of itself and its members; POWER COALITION for EQUITY and JUSTICE, on behalf of itself and its members; and LEAGUE of WOMEN VOTERS of LOUISIANA, on behalf of itself and its members

Case: 3:23-cv-00331-JWD-SDJ

v.

R. KYLE ARDOIN, in his official capacity as Secretary of State of Louisiana

DEFENDANT'S REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

NOW INTO COURT, through undersigned counsel, comes Defendant, R. Kyle Ardoin in his official capacity as Secretary of State of Louisiana, who submits the following Reply Memorandum in Support of his Motion to Dismiss.[1]

I. LACK OF SUBJECT MATTER JURISDICTION UNDER F.R.CP. 12(B)(1)

a. Secretary Ardoin is entitled to sovereign immunity as to Plaintiffs' claims arising under the Equal Protection Clause of the Fourteenth Amendment.

Plaintiffs argue that the *Ex Parte Young* exception to sovereign immunity applies in this case because Defendant "is statutorily tasked with enforcing laws related to voter registration," including La. R.S. 18:177.[2] However, none of the statutes cited by Plaintiffs charge the Secretary of State with enforcement of the documentation requirement of La. R.S. 18:177. In fact, enforcement is unequivocally the responsibility of the registrars of voters: "[T]he registrar in each parish shall be responsible…for the administration and enforcement of the laws and the rules and regulations of the secretary of state relating to the registration of such voters."[3]

[1] R. Doc. 32.
[2] R. Doc. 58, p. 11 of 32.
[3] La. R.S. 18:58(A) (emphasis added).

Plaintiffs further argue that Defendant "has repeatedly demonstrated his willingness to exercise his duties by compelling denials of voter registrations and constraining registration without the paperwork," but that is patently incorrect.[4] The examples of purported enforcement cited by Plaintiffs in Exhibit 5 to their Complaint demonstrate "direction and assistance" by the Secretary of State, not enforcement. The cited communications, none of which were sent to Plaintiffs, "do not make a specific threat or indicate that enforcement was forthcoming," nor do the communications state that Plaintiffs, the registrars, or any suspended voters have violated any law.[5] Thus, these communications do not provide a sufficient connection to enforcement of La. R.S. 18:177.

Plaintiffs also claim that Defendant has the requisite connection to enforcement of La. R.S. 18:177 because he was tasked with developing the reinstatement documentation. Plaintiffs claim that the present case is similar to *Texas Democratic Party v. Abbott,* in which the court held that the Texas Secretary of State was not entitled to sovereign immunity because, *inter alia,* she was responsible for the design of the application form for mail-in ballots, which required applicants to indicate whether they were entitled to a mail-in ballot based on their age.[6] The court stated, "a finding that the age-based option denies or abridges younger voters' rights to vote might lead to prohibiting the Secretary from using an application form that expressed an unconstitutional absentee-voting option." Here, unlike in *Abbott,* Plaintiffs do not take issue with the design of the

[4] R. Doc. 58, p. 12 of 32. Defendant maintains that voter registration and reinstatement of registration are separate processes under Louisiana law, and voter registration is not at issue in the present case.
[5] *See Texas Democratic Party v. Abbott*, 978 F.3d 168, 181 (5th Cir.2020)("[T]he Attorney General's letter in this case was sent to judges and election officials, not to the plaintiffs. The letter did not make a specific threat or indicate that enforcement was forthcoming. Nor did it state that the Texas Democratic Party or the other plaintiffs had violated any specific law…As a result, we conclude that the letter here did not intimate that formal enforcement was on the horizon." Internal citations omitted).
[6] 978 F. 3d 168 (5th Cir. 2020).

reinstatement documentation;[7] rather, Plaintiffs take issue with the very requirement that documentation be presented for reinstatement.[8] Thus, on this point, *Abbott* is inapposite to the present case.

For these reasons and for the reasons stated in his Memorandum in Support, Defendant lacks the requisite connection to enforcement of the documentation requirement of La. R.S. 18:177. As such, the *Ex Parte Young* exception to sovereign immunity does not apply, and Defendant is entitled to sovereign immunity as to Plaintiffs' claims of equal protection.[9]

b. Plaintiffs do not have Article III standing.

Defendant maintains that none of the Plaintiffs have organizational standing. Plaintiffs claim that they divert resources to educating and assisting individuals with voter registration due to the "Paperwork Requirement." However, the present case arises out of Louisiana's process for reinstatement of voter registration after suspension for conviction of a felony, La. R.S. 18:177(A), which differs from initial voter registration. Whether Plaintiffs have diverted resources for purposes of initial voter registration is immaterial.

Nevertheless, Plaintiffs assert that their core missions "include increasing electoral participation among people impacted by the criminal legal system."[10] As such, it cannot be said

[7] *See Texas Democratic Party v. Hughs*, 860 Fed.Appx. 874, 878 (5th Cir.2021) ("Plaintiffs did not plead that the voter registration application form designed by the Secretary specifically required a wet signature… Thus, as pleaded, there is no issue with the design of the voter registration application form."). As discussed in Defendant's Memorandum in Support of Motion to Dismiss, the Fifth Circuit held that the Texas Secretary of State was entitled to sovereign immunity because she lacked sufficient connection to the enforcement of the wet signature rule. *See* R. Doc. 32-1, p. 7. The Fifth Circuit did not consider whether Texas Secretary of State's role in designing the voter registration application would constitute sufficient connection to enforcement of the wet signature rule.

[8] This would be akin to the plaintiffs in *Abbott* complaining that an application form is required to obtain a mail-in ballot, which was not the issue in *Abbott.*

[9] Plaintiffs also contend that by seeking the same remedy for their equal protection claims as their NVRA claims, Defendant should be deprived of sovereign immunity for the equal protection claims. *See* R. Doc. 58, p. 11 of 32. Seeking the same relief for alleged violations of federal law and alleged constitutional violations is not an exception to sovereign immunity.

[10] R. Doc. 58, p. 17 of 32.

that Plaintiffs "go out of their way"[11] to assist voters with the documentation required for reinstatement following suspension for conviction of a felony. Nor can Plaintiffs "claim to be expending resources to research, understand, and educate the public" on a new law, as documentation for reinstatement has been required by Louisiana law since 1997.[12] Such activities are, undoubtedly, a part of Plaintiffs' "general activities and mission."[13] Thus, Plaintiffs have failed to allege an injury-in-fact sufficient to show Article III standing.

Defendant likewise maintains that Plaintiff VOTE lacks associational standing because Plaintiffs have not specifically identified members allegedly affected by the documentation requirement of La. R.S. 18:177.[14] VOTE alleges that it "is aware of members who…have been required to provide documentary proof of their eligibility before the State allowed them to register to vote" and that some of these members were unable to vote in a federal election "because they were unable to obtain the required paperwork verifying their eligibility in time to register to vote."[15] Plaintiffs attached to their Opposition the Declaration of VOTE member Eric Demond Calvin.[16] Mr. Calvin's declaration is insufficient to establish associational standing because Mr. Calvin admits that he is not eligible to have his voter registration reinstated.[17] As such, he has not been required to provide documentary proof of eligibility, and crucially, he has not been deprived of the right to vote in a federal election due to the documentation requirement. Therefore, Mr. Calvin's declaration fails to establish associational standing of VOTE.

[11] *Clark v. Edwards*, 468 F.Supp.3d 725, 746 (M.D. La. 2020).
[12] *Clark*, 468 F.Supp.3d at 746–47 (M.D. La.2020). Plaintiff VOTE was not even created until 2016. *See* R. Doc. 58 at FN 3.
[13] *See Clark v. Edwards*, 468 F.Supp.3d 725, 746 (M.D. La.2020).
[14] *See* Defendant's argument below regarding third party standing, which Defendant adopts and incorporates by reference here.
[15] R. Doc. 1, paragraph 14. Again, the issue presented herein is Louisiana's process for reinstatement following suspension for conviction of a felony, not initial voter registration. Plaintiffs' threadbare allegations related to initial voter registration do not establish associational standing for a claim based on the reinstatement process.
[16] R. Doc. 58-2.
[17] *Id.* at paragraph 5.

c. Plaintiff VOTE does not have NVRA standing.

In their Opposition, Plaintiffs did not distinguish (or even discuss) the cases cited by Defendant in support of his contention they failed to comply with the notice requirements of U.S.C. § 20510(b)(1) prior to filing the instant lawsuit. Instead, Plaintiffs cite a case from the Western District of Texas, *Am. C.R. Union v. Martinez-Rivera*, for the general proposition that they must merely give "enough information to diagnose the problem [whereupon Defendants then have the] responsibility to cure the violation."[18] However, this does not excuse the scant details set forth in their letters prior to filing the instant lawsuit. While Plaintiffs attempt to broaden the violations outlined in their purported notice letters to encapsulate the several NVRA claims set forth in their Complaint, the letters speak for themselves and are limited to setting forth violations of 52 U.S.C. §§ 20505(a)(1) and 20507(a)(1).

Plaintiffs do not dispute that VOTE never provided the notice that is required by U.S.C. § 20510(b)(1).[19] VOTE first appears alongside other plaintiffs in a letter dated March 31, 2023, the purpose of which was merely to address questions raised in regard to prior letters and did not constitute a notice letter itself.[20] Plaintiffs do not even attempt to reconcile VOTE's obvious failure to comply with the notice requirement of U.S.C. § 20510(b)(1) with the Fifth Circuit's holding in *Scott v. Schedler*, finding that "failure to provide notice is fatal" and piggybacking is not allowed.[21]

[18] *Am. C.R. Union v. Martinez-Rivera*, 166 F.Supp. 3d 779, 795 (W.D. Tex 2015)
[19] Notably, Plaintiffs cite *Ferrand v. Schedler*, No. CIV.A. 11-926, 2011 WL 3268700, at *6 (E.D. La. July 21, 2011), though without any comment whatsoever. In that case, two individual plaintiffs had not submitted the notice required under 42 U.S.C. § 1973gg–9(b) (now U.S.C. § 20510(b)(1)). Judge Africk determined that the individual plaintiffs need not send notice because actual notice had already been sent by another plaintiff. In so holding, he was evidently persuaded by the fact the Sixth Circuit, in *Ass'n of Community Org. for Reform Now v. Miller,* 129 F.3d 833, 838 (6th Cir.1997), had determined that duplicate notice was not required. *Ferrand*, at *6, n. 13. Importantly, *Miller* concerned plaintiffs who had intervened in an existing NVRA suit; they were not all original plaintiffs as in the instant case. Most significantly, *Ferrand* predates the Fifth Circuit's decision in *Scott v. Schedler*, 771 F.3d 831 (5th Cir. 2014), which confirmed that a plaintiff cannot piggyback on another plaintiff's notice. *Id*., 836. *Scott* was also critical of the fact the Sixth Circuit's interpretation of the notice requirements of the NVRA in *Miller* had no textual support.
[20] The March 31, 2023, letter was also sent less than 90 days before suit was filed on May 1, 2023. *See* 52 U.S.C.A. § 20510(b)(2).
[21] *Scott v. Schedler*, 771 F.3d 831, 836 (5th Cir. 2014).

At the very least, VOTE must be dismissed under the precedent of *Scott*. Having failed to satisfy the statutory notice requirement, there is no basis for VOTE to seek relief for itself or its members in this proceeding for alleged NVRA violations.

II. FAILURE TO STATE A CLAIM FOR RELIEF UNDER F.R.C.P. 12(B)(6)

a. Plaintiffs have failed to state a claim for relief arising under the NVRA.

Defendant maintains that Plaintiffs have failed to state a claim for relief arising under the National Voter Registration Act ("NVRA"). As Defendant stated in his Memorandum in Support of Motion to Dismiss, it is well established that voting eligibility with regard to felon disenfranchisement is an issue of State law.[22] Indeed, on June 30, 2023, after Defendant filed his Motion to Dismiss, the United States Supreme Court denied certiorari in the matter of *Roy Harness, et al. v. Michael Watson, Mississippi Secretary of State,* No. 22-412, in which Fifth Circuit reaffirmed that felon disenfranchisement is an issue of state law.[23]

Plaintiffs did not address at all within their Opposition the fact their NVRA claims are preempted by state law. Defendant previously noted that the Third Circuit, in *American Civil Rights Union v. Philadelphia City Commissioners*, had affirmed the lower court's decision noting that the NVRA defers to and is preempted by state law.[24] Defendant submits that preemption of the NVRA in the area of felon disenfranchisement is further supported by the First[25], Second[26],

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[22] *American Civil Rights Union v. Philadelphia City Commissioners*, 2016 WL 472118 (E. D. Pa. 2016), citing *Lassiter v. Northhampton City Bd. Of Elections*, 360 U.S. 45, 51 (1959).

[23] *Harness v. Watson*, 47 F.4th 296, 300 (5th Cir.2022), *cert. denied,* 143 S.Ct. 2426 (2023) ("It is uncontested that a state may disenfranchise convicted felons." The court held that Mississippi's felon disenfranchisement law did not violate the Equal Protection Clause.).

[24] *American Civil Rights Union v. Philadelphia City Commissioners*, 872 F.3d 175 (3d Cir. 2017).

[25] *Simmons v. Galvin*, 575 F.3d 24, 37 (1st Cir. 2009) ("Congress could not have intended to create a cause of action under § 2 of the VRA against disenfranchisement of incarcerated felons while saying explicitly elsewhere that it did not intend to proscribe any such laws.").

[26] *Hayden v. Pataki*, 449 F.3d 305, 321 (2d Cir. 2006) ("There is no question that incarcerated persons cannot 'fully participate in the political process'—they cannot petition, protest, campaign, travel, freely associate, or raise funds. It follows that Congress did not have this subpopulation in mind when the VRA section at issue took its present form in 1982.").

and Eleventh[27] Circuits' recognition that a related law, the Voting Rights Act of 1965 ("VRA"), also does not apply to the area of felon disenfranchisement. The same legal basis for finding that the VRA is preempted by a state's ability to determine whether felons should be eligible voters similarly supports preemption as to the NVRA.

b. Plaintiffs have failed to state a claim for relief arising under the Equal Protection Clause of the Fourteenth Amendment.

Defendant maintains that he is entitled to sovereign immunity for Plaintiffs' claims arising under the Equal Protective Clause of the Fourteenth Amendment. Nevertheless, Plaintiffs have failed to state a claim for relief arising under the Equal Protection Clause.

i. Plaintiffs do not have third-party standing to assert equal protection claims on behalf of others.

Plaintiff VOTE contends that it has third party standing to assert the equal protection claims of its members, citing *Memphis A. Philip Randolph Inst. v. Hargett.*[28] In that case, the plaintiff organization identified, by name, its affected member upon whose behalf suit was filed.[29] In contrast, Plaintiffs' Complaint does not specifically identify any members of VOTE upon whose behalf Plaintiffs filed suit. Plaintiffs note in their Opposition that, since Defendant's Motion to Dismiss was filed, they have provided Defendant with a list of allegedly affected members and also attached to their Opposition an additional declaration from an allegedly affected member of VOTE.[30] Defendant objects to Plaintiffs' attempt to present matters outside the pleadings in

[27] *Johnson v. Governor of State of Fla.*, 405 F.3d 1214, 1234 n. 39 (11th Cir. 2005) ("Congress did not intend to sweep felon disenfranchisement laws within the scope of the VRA.").
[28] *Memphis A. Philip Randolph Inst. v. Hargett,* 2 F. 4th 548 (6th Cir. 2021).
[29] The court determined that the plaintiff organization's claim was moot because the affected member "no longer had an actual, ongoing stake in the litigation." *See* 2 F. 4th at 558-559.
[30] R. Doc. 58, p. 26 of 32. Plaintiffs also note that they attached the Declaration of VOTE Member Gregory Finney to their Motion for Preliminary Injunction. However, Mr. Finney is not an affected VOTE member for purposes of the relief sought by Plaintiffs, as he admits that his voter registration was reinstated prior the instant suit being filed. Like the affected member in *Memphis, supra,* Mr. Finney does not have "an actual, ongoing stake in the litigation" and cannot be used to establish associational standing of VOTE. Similarly, as discussed above, the declaration of Eric Demond Calvin cannot be used to establish associational standing of VOTE.

response to Defendant's Rule 12(b)(6) motion and requests that the Court exclude this material pursuant to F.R.C.P. 12(d).[31] Nevertheless, Defendant maintains that Plaintiffs' failure to specifically identify any affected individuals in the Complaint, whether members of VOTE or not, precludes a finding that any of the Plaintiffs have the requisite close relationship to assert an equal protection claim on behalf of third parties.

Moreover, Plaintiffs' Opposition fails to identify a hindrance to these third parties' ability to protect their own constitutional interests. The two cases cited by Plaintiffs, *Singleton v. Wulff* and *Carey v. Population Servs., Int'l,* are examples of third-party standing based upon enforcement of the challenged restriction against the litigant resulting indirectly in violation of third-party rights.[32] Here, as discussed in Defendant's Memorandum in Support, the documentation requirement challenged by Plaintiffs cannot be enforced against Plaintiffs because they are organizations, not voters.

Plaintiffs also allude to the confidentiality concerns set forth in their Motion for Protective Order[33] as a hindrance to the third parties' ability to assert their own interests. This argument is without merit. Not only is the right at issue herein (i.e., the right to vote) not within a sensitive area of personal privacy,[34] but as Plaintiffs admit, the persons comprising their target communities (upon whose behalf they claim to have filed suit) are already identified on lists that are public record.[35] Thus, confidentiality concerns do not constitute a sufficient hindrance to a third-party's ability to protect his own constitutional interests.

[31] If the Court is not inclined to exclude this material, Defendant respectfully requests an opportunity to present material pertinent to the motion pursuant to F.R.C.P. 12(d).
[32] *See Kowalski v. Tesmer*, 543 U.S. 125 (2004).
[33] R. Doc. 30-1.
[34] *Carey v. Population Servs., Int'l*, 431 U.S. 678, FN4 (1977) (the issue in *Carey* was distribution of contraceptives).
[35] *See* R. Doc. 58, p. 26 of 32.

For these reasons and for the reasons stated in Defendant's Memorandum in Support, Plaintiffs have failed to demonstrate prudential standing to assert the rights of third parties and thus, have failed to state a claim for relief arising under the Equal Protection Clause of the Fourteenth Amendment.

ii. *Anderson/Burdick* vs. Rational Basis/Heightened Scrutiny analysis

In their Opposition, Plaintiffs did not distinguish (or even discuss) the cases cited by Defendant in support of his contention that they failed to state a claim against him under both the *Anderson/Burdick* framework and the Rational Basis/Heightened Scrutiny test. While Defendant maintains that the *Anderson/Burdick* test is the appropriate framework for analyzing Plaintiffs' claims, Plaintiffs' claims fail to survive scrutiny under either framework.

Plaintiffs ignore the recent Fifth Circuit precedent cited by Defendant that stands for the proposition that the *Anderson/Burdick* analysis should be utilized for "constitutional challenges to specific provisions of a State's election laws."[36] In this case, Plaintiffs are challenging Louisiana's election laws, specifically Louisiana Revised Statute 18:177(A), alleging that it violates their equal protection rights, or that of their members. Thus, the Fifth Circuit has stated that such a challenge should be analyzed under the *Anderson/Burdick* framework.

Plaintiffs state that Defendant ignores their pleadings in insisting that the *Anderson/Burdick* framework applies; however, Plaintiffs cannot dictate in their pleadings which framework the Court will apply to their claims. Plaintiffs have raised a constitutional challenge to Louisiana's election law and Plaintiffs claim the law in contention "imposes unnecessary burdens on the right

[36] *Richardson v. Texas Sec'y of State*, 978 F.3d 220, 233 (5th Cir. 2020). (As several Justices have noted, "[t]o evaluate a law respecting the right to vote—whether it governs voter qualifications, candidate selection, *or the voting process*—we use the approach set out in *Burdick v. Takushi*." *Crawford*, 553 U.S. at 204, 128 S.Ct. 1610 (Scalia, J., concurring) (emphasis added), *Id* at 234.

to vote."[37] The *Anderson/Burdick* rubric requires examination of Louisiana's felony reinstatement procedure under the following lens: (1) whether the process poses a 'severe' or instead a 'reasonable, nondiscriminatory' restriction on the right to vote and (2) whether the state's interest justifies the restriction.[38] As discussed in Defendant's memorandum in support of motion to dismiss, the alleged burden in this case is not severe and the state's interest justifies the restriction. For the reasons cited by Defendant in his memorandum in support of motion to dismiss, Plaintiffs failed to state a claim for relief arising under the Equal Protection Clause of the Fourteenth Amendment because Plaintiffs' claim fail to survive scrutiny under both the Anderson/Burdick and the Rational Basis/Heightened Scrutiny frameworks.

CONCLUSION

For the reasons explained herein and in Defendant's Memorandum in Support of Motion to Dismiss, Defendant respectfully requests that his Motion to Dismiss be granted, and that all claims filed by Plaintiffs be dismissed.

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[37] Doc. 1, ¶2.;
[38] *Burdick*, 504 U.S. at 434, 112 S.Ct. 2059 (cleaned up); *see also Richardson* at 235.

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CERTIFICATE OF SERVICE

I HEREBY CERTIFY that on the 19th day of July, 2023, a copy of the foregoing has on this date been served upon all counsel of record via CM/ECF system and has been filed electronically with the Clerk of Court using the CM/ECF system.

/s/ Caroline M. Tomeny
Caroline M. Tomeny