IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO,
EASTERN DIVISION

LEAGUE OF WOMEN VOTERS OF OHIO, et al.,	:	
Plaintiffs,	:	Case No. 1:23-cv-2414
v.	:	JUDGE BRIDGET M. BRENNAN
FRANK LAROSE, et al.,	:	
Defendants,	:	
and	:	
REPUBLICAN NATIONAL COMMITTEE, et al.,	:	
Intervenor-Defendants.	:	

MEMORANDUM IN OPPOSITION TO
DEFENDANT O'MALLEY'S MOTION FOR SUMMARY JUDGMENT

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INTRODUCTION

Even though the Cuyahoga County Prosecutor's Office (CCPO), led by Michael O'Malley, has discretion to determine what conduct violates R.C. 3599.21(A)(9),(10), 3509.05(C)(1) (Challenged Provisions) and a statutory duty to prosecute alleged violations occurring in Cuyahoga County, CCPO argues that it is too far removed to be a proper party to this matter. *See* CCPO Mem. in Support of Mot. for Summ. J. (Cnty. Br.) 3-7. In so doing, CCPO erroneously raises two defenses more frequently associated with challenges to jurisdiction by officials not directly responsible for enforcement. As a matter of law, these doctrines cannot shield CCPO from liability for Plaintiffs' injuries. The Court should deny CCPO's Motion for Summary Judgment.

ARGUMENT[1]

I. CCPO Enforces the Challenged Provisions, Causing Plaintiffs' Continuing Injuries.

CCPO is charged with enforcing the Challenged Provisions. *See* R.C. 109.95, 309.08(A). Because "[t]he harm caused by the enforcement of a statute is fairly traceable to the executive officer doing the enforcing," *Brown v. Yost*, __ F.4th __, 2024 WL 2746016, at *7 (6th Cir. May 29, 2024), it is axiomatic that Plaintiffs' claims regarding CCPO's enforcement of the Challenged Provisions involve injuries CCPO causes. Accordingly, Plaintiffs have established causation—the only element of standing CCPO contests—and CCPO's arguments to the contrary lack merit.

Once a plaintiff makes a "threshold" showing of a "causal connection between the injury and the conduct complained of," and the absence of "independent action of some third party not before the court," the burden to establish causation is "relatively modest." *Brown*, 2024 WL 2746016, at *6 (quotations omitted). "Any harm flowing from the defendant's conduct, even

[1] CCPO adopts Ohio Secretary of State Frank LaRose (SOS) and Ohio Attorney General Dave Yost's (AG) summary-judgment arguments regarding the merits of Plaintiffs' claims, Cnty. Br. 5, so Plaintiffs incorporate their responses as set forth in Plaintiffs' Memorandum in Opposition to State Defendants' Motion for Summary Judgment (Pl. St. Opp.).

indirectly, is said to be fairly traceable" to, and caused by, the defendant. *Id.* (quotation omitted).

A. CCPO enforces the Challenged Provisions.

The Sixth Circuit has recently made clear that causation is not in doubt where a defendant plays a role in administering and enforcing challenged laws. In *Kareem v. Cuyahoga County Board of Elections*, a voter sued CCPO, the Cuyahoga County Board of Elections, and the SOS, seeking to enjoin enforcement of state election laws barring her from displaying her marked ballot to others. 95 F.4th 1019, 1020-21 (6th Cir. 2024). Finding that all the defendants, including CCPO, "play a role in enforcing" the challenged laws, the court held that the plaintiff's injuries were "'fairly traceable' to each" of them. *Id.* at 1027. So too here. And although CCPO is correct that it "does not write or enact the law," Cnty. Br. 6, that was also true for CCPO in *Kareem*—and just as irrelevant to the Sixth Circuit's causation inquiry. What matters is not that the Ohio Legislature passed the Challenged Provisions, but that CCPO plays a role in enforcing them.

The record contains ample evidence of CCPO's role in enforcing the Challenged Provisions. As in *Kareem*, the law provides for it. *See* R.C. 309.08(A). Deposition testimony confirms that the AG refers investigations into violations of the Challenged Provisions to county prosecutors, who have "discretion" to interpret the Challenged Provisions; the AG can proceed with the prosecution if the county prosecutor declines to do so. ECF 42-23 (Kollar Dep.) 35:25-39:1. Indeed, the SOS confirmed by letter that "determination of criminal liability" rests with "the relevant county prosecutor where the alleged offense might have occurred." ECF 42-16 (SOS Letter to ACLU); *see also* Kollar Dep. 58:10-61:24.

The record also shows that CCPO has investigated an alleged violation of the Challenged Provisions. After a phone conversation regarding the alleged violation with the AG's office, CCPO "requested [that the AG] provide [CCPO] with a copy of the . . . case file for review." ECF 51-4 (Stephens Investigative Rpt.) at 18. A month later, CCPO informed the AG that CCPO was

"declin[ing] at this time" to prosecute the matter, but that it would "be happy to review" its decision based on "any new or different information." Kollar Dep., Ex. 16. CCPO does not and cannot dispute these facts.

B. CCPO's potential enforcement of the Challenged Provisions against Plaintiffs and Plaintiffs' assistors threatens their rights.

CCPO argues that "Plaintiffs cannot offer any facts" to show that CCPO "plac[ed] the Plaintiffs' rights in jeopardy or otherwise threaten[ed] any rights they seek to vindicate." Cnty. Br. 7. The undisputed record shows otherwise.

First, CCPO's potential enforcement of the Challenged Provisions against Plaintiff Jennifer Kucera's assistors works to deny her the assistance she is entitled to under the Voting Rights Act (VRA). *See* Pl. Mem. in Support of Mot. for Partial Summ. J. (Pl. Br.) 2-3, 7, 9-11, 16 n. 7. Other courts have reached similar conclusions. *See, e.g.*, *Ark. United v. Thurston*, 626 F. Supp. 3d 1064, 1081 (W.D. Ark. 2022) (finding that plaintiff's injuries in Section 208 case were fairly traceable to the "parties that enforce" the challenged provisions); *Carey v. Wis. Elections Comm'n*, 624 F. Supp. 3d 1020, 1029 (W.D. Wis. 2022) (concluding that a similar harm was fairly traceable to defendants even though their "involvement in the enforcement process comes later"). It also works a violation of Ms. Kucera's rights under the Americans with Disabilities Act (ADA) and the Rehabilitation Act (RA). *See* Pl. Br. 14-19.

Second, the harm Plaintiff League of Women Voters of Ohio (LWVO) and its members suffer is traceable to CCPO's enforcement of the Challenged Provisions against League members, as well as CCPO's undisputed discretion to arbitrarily choose what the Challenged Provisions mean in Cuyahoga County. *See Ark. United*, 626 F. Supp. 3d at 1081. Among others, Cuyahoga County resident and LWVO member Janice Patterson is unable to aid her neighbors with disabilities in delivering their absentee ballots because she is unable to determine whether doing

so would violate CCPO's interpretation of the Challenged Provisions. *See* ECF 42-6 (Patterson Dec.) ¶8; Pl. St. Opp. Sec. III.

II. CCPO's Attempt to Invoke Ohio's Eleventh Amendment Immunity Fails.[2]

Although the Eleventh Amendment ordinarily bars suits against state officials in their official capacities, U.S. Const. amend. XI; *see T.M. v. DeWine*, 49 F.4th 1082, 1087 (6th Cir. 2022), this state sovereign immunity "is not limitless," *Skatemore, Inc. v. Whitmer*, 40 F.4th 727, 733 (6th Cir. 2022), and CCPO cannot rely on it here. There are three exceptions to the doctrine, all of which apply here: "(1) when the state has waived immunity by consenting to the suit; (2) when Congress has expressly abrogated the states' sovereign immunity, and (3) when the doctrine set forth in *Ex Parte Young*, 209 U.S. 123[] (1908), applies." *Boler v. Earley*, 865 F.3d 391, 410 (6th Cir. 2017). CCPO cannot shield itself from liability because Congress has validly abrogated Ohio's immunity as to the VRA; Ohio has waived immunity as to the RA; and Plaintiffs' claims for prospective relief easily satisfy *Young*'s requirements.

A. Sixth Circuit precedent on abrogation and waiver forecloses CCPO's Eleventh Amendment defense against Plaintiffs' VRA and RA claims.

First, the Sixth Circuit has made clear that Congress validly abrogated states' sovereign immunity when it enacted the VRA. *Mixon v. Ohio*, 193 F.3d 389, 398-99 (6th Cir. 1999); *see also OCA-Greater Houston v. Texas*, 867 F.3d 604, 614 (5th Cir. 2017) (concluding that "[t]he immunity from suit that [the defendant] otherwise enjoy[s] in federal court offers it no shield" against a Section 208 claim for prospective relief); *Ark. United*, 626 F. Supp. 3d at 1084 ("The VRA, including § 208, was 'passed pursuant to [Congress's] Fifteenth Amendment enforcement power'

[2] CCPO also references prosecutorial immunity and attorneys' fees. Cnty. Br. 4-5. To the extent CCPO argues that prosecutorial immunity precludes suits for prospective relief, the Supreme Court has held that "prosecutorial immunity does not prevent prosecutors from being sued under § 1983 for injunctive relief." *Penland v. Deters*, 2013 WL 2424375, at *4 (S.D. Ohio June 4, 2013) (citing *Supreme Ct. of Virginia v. Consumers Union of U.S., Inc.*, 446 U.S. 719, 736 (1980)). To the extent CCPO argues that it cannot be liable for attorneys' fees, its argument is premature.

and 'validly abrogated state sovereign immunity.'" (quoting *OCA*, 867 F.3d at 614)).

Second, the Sixth Circuit has held that "Ohio unambiguously waived Eleventh Amendment immunity against [RA] claims when it agreed to accept federal funds pursuant to that Act." *Carten v. Kent State Univ.*, 282 F.3d 391, 398 (6th Cir. 2002); *see Nihiser v. Ohio E.P.A.*, 269 F.3d 626, 628-29 (6th Cir. 2001). Because Ohio has waived its Eleventh Amendment immunity as to the RA, CCPO cannot invoke it. *See Carten*, 282 F.3d at 398 (applying Ohio's waiver of the RA to Kent State University).[3]

B. Plaintiffs' VRA, ADA, RA, and Fourteenth Amendment claims against CCPO all satisfy the requirements of *Ex parte Young*.

Separately, *Young* independently ensures federal-court jurisdiction over claims, like Plaintiffs', that allege "an ongoing violation of federal law and seek[] relief properly characterized as prospective." *Verizon Md., Inc. v. Pub. Serv. Comm'n of Md.*, 535 U.S. 635, 645 (2002); *Price v. Medicaid Dir.*, 838 F.3d 739, 746-47 (6th Cir. 2016) ("[F]ederal courts must . . . ensure that state officers meet their obligations under federal law," so they "may, without violating the Eleventh Amendment, issue a prospective injunction against a state officer to end a continuing violation of federal law"). Additionally, the defendant state official, by virtue of his office, must have "some connection with the enforcement" of the challenged law. *Young*, 209 U.S. at 157. Plaintiffs' claims against CCPO meet this standard.

CCPO does not contest that Plaintiffs seek only prospective relief for claims rooted in

[3] And even if Ohio's acceptance of federal funds were insufficient to waive immunity, CCPO has also accepted federal funding. ECF 42-20 (CCPO Press Release); *see* Pl. Br. 15 & n.6.

Relatedly, CCPO argues in a footnote that "Plaintiffs do not allege and there is no evidence" it "receives federal financial assistance" and that, therefore, it is not subject to the RA, waiver of immunity or not. Cnty. Br. 4 n.1. But, as noted, CCPO *does* receive federal funding. And an entity's duties under the RA attach when it receives any federal funding; the funding need not be related to the challenged conduct. 29 U.S.C. 794(b) (the RA applies to "all of the operations of . . . [an] instrumentality of a State or local government[,] . . . any part of which is extended Federal financial assistance"); *see Stevens v. Mich. Dep't of Corr.*, 2020 WL 6597564, at *3 (W.D. Mich. June 10, 2020). The RA thus applies to CCPO.

Defendants' continuing violations of federal law. Nor could it. Plaintiffs' claims assert that CCPO, along with the AG and SOS, continue to administer and enforce the Challenged Provisions in violation of three federal statutes and the Due Process Clause of the Fourteenth Amendment. And Plaintiffs ask the Court to declare the Challenged Provisions unlawful and preempted as applied to voters with disabilities, and to enjoin their enforcement against such voters and their chosen assistors; that relief is quintessentially prospective.

There is a "realistic possibility [that CCPO] will take legal or administrative actions against the [P]laintiff[s'] interests." *Doe v. DeWine*, 910 F.3d 842, 848-49 (6th Cir. 2018) (quoting *Russell v. Lundergan-Grimes*, 784 F.3d 1037, 1048 (6th Cir. 2015)). As discussed in Section I.A, *supra*, the record conclusively establishes that CCPO is "actively involved with administering the alleged violation." *McNeil v. Cmty. Prob. Servs., LLC*, 945 F.3d 991, 995 (6th Cir. 2019) (quotation omitted).

CCPO's argument that there is not a realistic possibility of enforcement, Cnty. Br. 8-9, fails for two independent reasons. First, there is no Sixth Circuit precedent that a local official directly involved in the enforcement of a statute must enforce or threaten to enforce the statute for a "realistic possibility" to exist. Second, the record demonstrates a "realistic possibility" of enforcement by CCPO. CCPO's protestation that it has not "undertaken or even contemplated" enforcement specifically "against people assisting disabled voters" is irrelevant.

CCPO's reliance on *EMW Women's Surgical Ctr., P.S.C. v. Beshear*, 920 F.3d 421 (6th Cir. 2019), is misplaced. There, an abortion clinic and doctors who worked there sued, among others, Kentucky's then-Attorney General to enjoin enforcement of the state's "Ultrasound Informed Consent Act." *Id.* at 424. On appeal, the Sixth Circuit concluded that the Eleventh Amendment barred suit against the Attorney General only, explaining that "an attorney general's status as the

chief law enforcement officer of the state is not a sufficient connection" to satisfy *Young*. *Id.* at 445. The *EMW* court reached this conclusion because, "in contrast with other statutes, [the challenged law] d[id] not delegate specific enforcement power to any single state actor," like the Attorney General. *Id.* Rather, the court emphasized that "[m]ultiple local prosecutors—the Commonwealth's and county attorneys—ha[d] the duty to enforce it." *Id.* (citations omitted). Further, *EMW*'s holding that *Young* "does not apply when a defendant state official has neither enforced nor threatened to enforce the allegedly unconstitutional state statute," *id.* at 445 (quoting *Children's Healthcare is a Legal Duty v. Deters*, 92 F.3d 1412, 1415 (6th Cir. 1996)), was limited to those not specifically charged with enforcement, presumably because such a charge inherently indicates a "realistic possibility" of enforcement:

> Any imminent threat comes from the Commonwealth's and county attorneys, not the Attorney General. General Beshear has not enforced or even threatened to enforce H.B. 2. Rather, the Kentucky legislature has charged local prosecutors with its enforcement. We therefore hold that the Attorney General is not a proper party to this action.

Id. at 446.

Moreover, the Sixth Circuit has held that local prosecutors were not entitled to sovereign immunity, regardless of whether they had actually enforced or threatened to enforce the statute, because they were charged with enforcement authority.[4] In *Universal Life Church Monastery Storehouse v. Nabors*, 35 F.4th 1021 (6th Cir. 2022), which was authored by the judge who wrote *EMW*, the court concluded that the plaintiffs could maintain *Young* claims against a number of Tennessee district attorneys general because the officials

> have the direct authority (and even duty) to enforce Tennessee's criminal prohibition against false statements made on marriage licenses . . . . Plaintiffs allege

[4] Further, "the Attorney General and all county attorneys [from counties in which the plaintiff's relevant conduct occurs] are proper defendants" under *Young* when a state agency threatens enforcement. *McNeilus Truck & Mfg., Inc. v. Ohio ex rel. Montgomery*, 226 F.3d 429, 437 (6th Cir. 2000). Here, the AG has explicitly threatened to enforce the Challenged Provisions, so CCPO is a proper defendant. *See* Pl. St. Opp. Sec. III.A (citing AG and SOS statements).

> that they want to violate that very law by making the representations that it and § 36-3-301 forbid. And thus they fear that they would be subject to prosecution. This showing readily satisfies *Young*.

Id. at 1040. The court made no mention of any threatened prosecution or actual prosecution—or, for that matter, *EMW*—but nonetheless found "a realistic possibility the official will take legal or administrative actions against the plaintiff's interests." *Id.* (quoting *Doe*, 910 F.3d at 848-49). CCPO's argument that a local prosecutor responsible for enforcing the Challenged Provisions must have threatened or initiated prosecution for Plaintiffs' claims to escape Eleventh Amendment immunity thus cannot survive *Nabors*.

Also fatal to CCPO's argument that *Young* does not apply is the ample evidence of a "realistic possibility" of enforcement. First, like the local prosecutors in *Nabors*, CCPO is statutorily responsible for enforcing the Challenged Provisions. R.C. 309.08; *see also* Kollar Dep. 37:10-39:1. And, according to the SOS and AG, responsibility for deciding what constitutes a violation of the Challenged Provisions rests with county prosecutors. SOS Letter to ACLU; *see also* Kollar Dep., 58:10-61:24. Finally, as detailed in Section I.A, *supra*, CCPO has in fact investigated and considered prosecuting an alleged violation of the Challenged Provisions. *See Russell*, 784 F.3d at 1047 (holding that attorney general was a proper party in part because he "investigated complaints" of violations). With *Young* thus satisfied, CCPO cannot establish entitlement to judgment as a matter of law on its Eleventh Amendment immunity claim.

CONCLUSION

For the foregoing reasons, the Court should deny Defendant O'Malley's Motion for Summary Judgment, grant Plaintiffs' Motion for Partial Summary Judgment, and issue the requested declaration and permanent injunction.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I, Suzan F. Charlton, an attorney admitted to practice pro hac vice before this court, hereby certify that on June 14, 2024, the foregoing Memorandum in Opposition to Defendant O'Malley's Motion for Summary Judgment was filed with the Court. Notice of this filing will be sent by operation of the Court's electronic filing system to all parties for whom counsel has entered an appearance. The parties may access this filing through the Court's electronic filing system.

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CERTIFICATE OF COMPLIANCE

Under Northern District of Ohio Local Civil Rule 7.1(f), I hereby certify that this case has been assigned to the Expedited Track. Scheduling Order, ECF 31. I also certify that this memorandum does not exceed ten (10) pages.

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