UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DISABILITY RIGHTS LOUISIANA **CIVIL ACTION NO. 3:24-CV-00554 JWD-SDJ**

VERSUS

NANCY LANDRY, in her official capacity as Secretary of State of Louisiana; and ELIZABETH MURRILL, in her official capacity as Attorney General of the State of Louisiana

MEMORANDUM IN SUPPORT OF MOTION TO DISMISS

MAY IT PLEASE THE COURT:

Defendant, Nancy Landry, in her official capacity as Secretary of State of Louisiana, submits the following Memorandum in Support of her Motion to Dismiss.

I. BACKGROUND

Plaintiff, Disability Rights of Louisiana ("DRLA" or "Plaintiff"), alleges that certain legislation enacted during the 2024 Regular Session of the Louisiana Legislature violates Section 208 of the Voting Rights Act ("VRA"), 52 U.S.C.A. § 10508, and the Supremacy Clause of the Constitution. Plaintiff contends that "[t]he four new Louisiana statutes at issue are Louisiana Act No. 302 (formerly SB 155), Act No. 317 (formerly SB 218), Act No. 380 (formerly HB 476), and Act No. 712 (formerly HB 581)."[1]

Plaintiff alleges that these statutes suffer from two "infirmities"[2]:

1. Language from Act No. 380 and Act No. 317 violates the requirement of Section 208 of the VRA entitling individuals with disabilities to assistance "by a person of the voter's choice" by prohibiting anyone from assisting with the delivery of more than one absentee ballot and

[1] Doc. 1, para. 4.
[2] Doc. 1, para. 5.

criminalizes the same.[3]

2. Language from Act 712 and Act 302 and R.S. 18:1306(E)(2)(a) violate the text of the VRA which entitles individuals with disabilities to assistance "by a person of the voter's choice" by prohibiting anyone from serving as a witness on more than one ballot or assisting more than one individual with their absentee ballots and criminalizes same.[4]

Plaintiff, however, does not specify which language or even which provisions of these four acts violate Section 208 and the Supremacy Clause, nor does Plaintiff specify for which statutory provisions it seeks declaratory and injunctive relief. The following chart sets forth which provisions of law Defendant believes to be at issue in the present suit:

Act and Effective Date	**Revised Statute Amended**	**Text of Amendment**
Alleged "Infirmity #1" – delivery of absentee ballots		
Section 1 of Act 380 of 2024 *Effective August 1, 2024*	18:1308(B)(1)	B.(1)...No person except the immediate family of the voter, as defined in this Code, shall ~~hand deliver~~[5] submit by any means or send for delivery by the United States Postal Service or commercial carrier more than one marked ballot per election to the registrar.
Section 1 of Act 317 of 2024 *Effective January 1, 2025*	18:1307(B)(1)(a)(i)	B.(1)(a)(i) An application to vote by mail may be delivered to the registrar by any means, including the United States Postal Service, commercial delivery service, hand delivery, or facsimile. No person except the immediate family member of the voter, as defined in this Code, shall submit by any means or send for delivery by the United States Postal Service or commercial courier more than one marked ballot application per election to the registrar of voters.
Section 2 of Act 317 of 2024 *Effective May 28, 2024*	18:1461.7(A)	A. No person shall knowingly, willfully, or intentionally: ***

[3] Doc. 1, para. 6.
[4] Doc. 1, para. 7
[5] Stricken text indicates deletions from existing law.

		(6) Facilitate the distribution and collection of absentee by mail ballot applications or absentee by mail ballots in violation of this Title.
Alleged "Infirmity #2" – witness requirements for absentee ballots		
Section 1 of Act 210 of 2020 *Effective June 11, 2020*	18:1306(E)(2)(a)	E.(2)(a)...No person except the immediate family member of the voter, as defined in this Code, shall witness more than one [witness] certificate of a voter.[6]
Section 1 of Act 302 of 2024 *Effective August 1, 2024*	18:1310(C)(1)	C.(1) Any person who assists a voter in voting absentee by mail shall execute the acknowledgment on the certificate prepared by the secretary of state, verifying that the person providing the assistance has marked the ballot in the manner dictated by the voter, and the signature on the acknowledgment by the person providing assistance may serve as the signature of the witness required by R.S. 18:1306(E)(2)(a). No person except the immediate family member of the voter, as defined in this Code, or an employee of the registrar of voters or the election division of the Department of State shall assist with the certificate of more than one voter.
Section 2 of Act 302 and Section 1 of Act 712 of 2024 *Effective July 1, 2025*	18:1461.7(A)	A. No person shall knowingly, willfully, or intentionally: *** (7) Witness the certificate of more than one voter who is not an immediate family member in violation of R.S. 18:1306.[7]

Plaintiff contends that these laws "contain new restrictions on absentee voting that impose criminal penalties on certain forms of assistance for absentee voters, including absentee voters

[6] Underlined text indicates additions to existing law.
[7] Section 1 of Act 712 reads, "(7) Witness more than one certificate of a voter who is not an immediate family member in violation of R.S. 18:1306."

with disabilities. These restrictions will cause some people with disabilities to be unable to receive assistance with voting from the person of their choice that they trust, causing them to be disenfranchised."[8]

Plaintiff asserts claims under Section 208 of the Voting Rights Act and under 42 U.S.C. § 1983, alleging a violation of the rights protected by Section 208, seeking declaratory and injunctive relief. Plaintiff seeks a declaration that "Louisiana Act No. 302, Act No. 317, Act No. 380, Act No. 712, and R.S. 18:1306(E)(2)(a) violate Section 208 of the Voting Rights Act, 52 U.S.C. §10508, and the Supremacy Clause and are thereby preempted to the extent of their conflict with federal law."[9] Plaintiff seeks injunctions enjoining Defendants from implementing and enforcing, and from issuing any instructions to implement or enforce the Acts and statute cited above to the extent or in a manner that they conflict with federal statutes or federal law.[10] Plaintiff seeks an order that Defendant rescind any instruction "indicating that voters may not seek assistance from any person of their choice with the completion and delivery of absentee ballots by mail"[11] as well as an order to issue corrective instructions that voters who require assistance "due to blindness, disability, or inability to read or write"[12] may continue to seek assistance from the person of their choice. Plaintiff also seeks other remedial relief "based on the timing of the injunction" and attorney fees and costs.

As set forth below, this Court lacks subject matter jurisdiction over Plaintiff's claims. Plaintiff lacks standing to bring its claims. Alternatively, Secretary Landry is entitled to sovereign

[8] Doc. 1, para. 29.
[9] This prayer for relief is not limited to disabled voters, nor is it limited to absentee by mail ballots.
[10] This request for injunctive relief is vague and overbroad. F.R.C.P. Rule 65(d)(1) requires an "injunction to be specific in terms, [and] describe in reasonable detail, and not by reference to the complaint or other document, the act or acts sought to be restrained." See prayer for injunctive relief for "to the extent they conflict with federal statutes; and "in a manner that conflicts with federal law." See *OCA-Greater Houston v. Texas*, 867 F.3d 604, 616 (5th Cir. 2017).
[11] Request not limited to disabled voters and also not limited to mail ballots.
[12] No allegations made in the Complaint regarding blind or illiterate individuals.

immunity for Plaintiff's claims arising under 42 U.S.C. § 1983, and Plaintiff's claims related to the witness requirements for absentee by mail voting (alleged "infirmity #2") are not ripe. Alternatively, Plaintiff failed to state a claim for relief against Secretary Landry, and Plaintiff has likewise failed to state a claim for preemption. Therefore, all of Plaintiff's claims against Secretary Landry should be dismissed.

II. LAW AND ARGUMENT

Secretary Landry submits that Plaintiff's Complaint should be dismissed for lack of subject matter jurisdiction, or alternatively, for failure to state a claim for relief against her.

A. Lack of subject matter jurisdiction pursuant to F.R.C.P. 12(b)(1)

The burden of proof for a Rule 12(b)(1) Motion to Dismiss lies with the party asserting jurisdiction.[13] A claim is properly dismissed pursuant to F.R.C.P. 12(b)(1) for lack of subject matter jurisdiction when the court lacks statutory authority or constitutional power to adjudicate the claim.[14] "When a Rule 12(b)(1) motion is filed in conjunction with other Rule 12 motions, the court should consider the Rule 12(b)(1) jurisdictional attack before addressing any attack on the merits."[15]

1. Plaintiff does not have Article III standing.

Plaintiff, Disability Rights Louisiana ("DRLA"), is a nonprofit corporation and claims to be the protection and advocacy agency ("P & A") for Louisiana. DRLA contends that, as the P & A for Louisiana, it is "specifically authorized to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and the advocacy for, the rights of individuals

[13] *Hall v. Louisiana*, 983 F. Supp. 2d 820, 828 (M.D. La. 2013) (citing *Celestine v. TransWood, Inc.*, 467 F. App'x 317, 318 (5th Cir. 2012)).
[14] *In re: FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 286 (5th Cir. 2012).
[15] *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir.2001).a

with disabilities."[16] DRLA cites 42 U.S.C. § 15043(a)(2)(A)(1) as authority for this contention.[17] DRLA further avers that "[a]ll Louisiana voters with disabilities are constituents of DRLA."[18]

DRLA lacks standing to assert this action. Organizational plaintiffs such as DRLA must demonstrate standing under Article III, which requires satisfaction of the *Lujan* requirements.

> First, the plaintiff must have suffered an "injury in fact"—an invasion of a legally protected interest which is (a) concrete and particularized; and (b) "actual or imminent, not 'conjectural' or 'hypothetical.' " Second, there must be a causal connection between the injury and the conduct complained of—the injury has to be "fairly ... trace[able] to the challenged action of the defendant, and not ... th[e] result [of] the independent action of some third party not before the court." Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision."[19]

The "injury-in-fact" requirement can be established by an organization through either associational standing or organizational standing.[20]

> Associational standing is derivative of the standing of the association's members, requiring that they have standing and that the interests the association seeks to protect be germane to its purpose. By contrast, organizational standing does not depend on the standing of the organization's members. The organization can establish standing in its own name if it meets the same standing test that applies to individuals.[21]

Here, DRLA fails to establish both associational and organizational standing.

a. Associational standing

i. Plaintiff failed to allege that its members have suffered an injury-in-fact.

According to its Articles of Incorporation filed with the Louisiana Secretary of State,

[16] Doc. 1, para. 16.
[17] Id.
[18] Doc. 1, para. 17.
[19] *OCA-Greater Houston v. Texas*, 867 F.3d 604, 609–10 (5th Cir.2017).
[20] *Id.*
[21] *Id.*

DRLA is a membership organization whose members consist exclusively of its Board of Directors.[22] The only allegation made herein with respect to DLRA's Board of Directors is merely that the board "oversees [DRLA's] goals and priorities in fulfilling its mandate."[23] Plaintiff does not identify any of its members in its Complaint, nor does Plaintiff allege that its members, i.e., its Board of Directors, are aggrieved by the challenged laws or an alleged violation of the Voting Rights Act. Without an alleged "injury-in-fact" to its members, DRLA fails to establish associational standing on behalf of its members.

Plaintiff's complaint seems to suggest that DRLA has associational standing to pursue this action on behalf of its "constituents" due to its purported authority to pursue legal remedies on behalf of Louisianians with disabilities pursuant to 42 U.S.C. § 15043(a)(2)(A)(1). [24] Non-member organizations may have standing to pursue claims on behalf of individuals that are not their members when those individuals possess an "indicia of membership" in the organization.[25] Here, however, the purported standing of DRLA's constituents and whether they possess an "indicia of membership" is of no moment because DRLA has members, i.e., its Board of Directors. By failing to allege an injury-in-fact to its members, Plaintiff has failed to establish associational standing.

ii. Alternatively, Plaintiff failed to allege that its purported constituents have "indicia of membership" in DRLA.

In the event the Court wishes to consider the standing of DRLA's purported constituents, Plaintiff has still failed to establish associational standing because Plaintiff failed to allege an "indicia of membership" for any of its alleged constituents. An "indicia of membership" was found

[22] Ex. 1 – Articles of Incorporation for Advocacy Center for the Elderly and Disabled, Article 6, "The membership shall consist of the board of directors exclusively." (p. 4); with March 11, 1998 name change to Advocacy Center (p. 7), and February 15, 2020 name change to Disability Rights Louisiana (p. 15).
[23] Doc. 1, para. 17.
[24] Doc. 1, para. 16.
[25] *Hunt v. Washington State Apple Advert. Comm'n,* 432 U.S. 333, 344–45 (1977).

in *Hunt v. Washington State Apple Advert. Comm'n* because the represented group had a role in directing the Commission through election of Commission members, service as Commission members, and financing the Commission's activities through assessments.[26] There are no such allegations in Plaintiff's Complaint.

Plaintiff contends that all Louisiana voters with disabilities are constituents of DRLA.[27] DRLA alleges it is "specifically authorized to pursue legal, administrative, and other appropriate remedies or approaches to ensure the protection of, and advocacy for, the rights of individuals with disabilities," citing 42 U.S.C. §15043(a)(2)(A)(1), which provides for a "system to protect and advocate the rights of individuals with developmental disabilities."[28]

Plaintiff alleges that its Board of Directors (which are its members according to the corporate records) directs its operations and oversees its goals and priorities.[29] DRLA does not allege that its "constituents," i.e., Louisiana disabled voters, have any role in directing the organization or participate in any advisory council for DRLA. The "voters with disabilities" in this matter have no alleged indicia of membership with DRLA; thus, Plaintiff lacks standing to pursue this matter on behalf of them.

iii. Plaintiff failed to allege an "injury-in-fact" to its constituents.

In the alternative, should this court disagree with the arguments set forth above for failure to assert associational standing, the purported injuries to the "voters with disabilities" are too speculative. "To establish injury in fact, a plaintiff must show that he or she suffered an invasion of a legally protected interest that is concrete and particularized and actual or imminent, not

[26] *Id*.
[27] Doc. 1, para. 17.
[28] *Id* at ¶16.
[29] *Id*.

conjectural or hypothetical."[30]

DRLA has identified two purported "constituents" who will allegedly be negatively impacted by the challenged laws: Ashley Volion and Adrian Bickham. The Complaint also identifies residents at the Eastern Louisiana Mental Health System and residents at the Chateau de Notre Dame Community Care Center in New Orleans, Louisiana as persons who will allegedly be negatively impacted or subject to harm as a result of the challenged laws.[31] Plaintiff does not allege that any of these persons are members of DRLA or its Board of Directors. Iny any event, the purported injuries to these persons are too speculative and conjectural and not actual and imminent so as to allege an injury-in-fact.

a. Ashley Volion and Adrian Bickham

Volion is alleged to be a registered voter with a disability.[32] It is alleged that Volion votes absentee because she works phone lines for Disability Rights Louisiana on election day, allegedly making her unable to vote on election day.[33] Volion's alleged injury is "fear[] that she will be restricted in who will be able to assist her with her absentee ballot."[34] "If Ms. Volion is unable to receive assistance from a person of her choice, she may not be able to have anyone to assist her with submitting her absentee ballot."[35] "Ms. Volion does not wish to put any of her attendants at risk of criminal charges."[36]

Volion has two personal care attendants (hereinafter, "PCA"s), one of whom has more than one client and may be assisting other clients with absentee ballots.[37] Volion does not know how

[30] *Paxton v. Dettelbach*, 105 F.4th 708, 711 (5th Cir. 2024) (internal citations omitted).
[31] Doc. 1, p. 11-18.
[32] Doc. 1, para. 57 and 59.
[33] Doc. 1, para. 60. This is not a ground for voting absentee by mail. *See* La. R.S. 18:1303. Plaintiff does not allege that Volion intends to vote absentee for the upcoming election.
[34] Doc. 1, para. 70.
[35] Doc. 1, para. 73. This is double speculation: *if* and *may not*.
[36] Doc. 1, para. 73.
[37] Doc. 1, para. 70.

many individuals for whom her other PCA may serve as witness or provide assistance.[38] "If Ms. Volion asks said personal care attendant to witness the absentee ballot, it could put the personal care attendant at risk of criminal charges."[39] If one of Ms. Volion's PCA's did face criminal charges[40] with possible jail time, it would put Ms. Volion's health and safety at risk by not having a PCA available for her care.[41] "Ms. Volion would then have to decide between her right to vote[42] and her right to receive necessary medical care to keep her safe and live independently in the community."[43]

Bickham is, likewise, a registered voter with a disability.[44] He allegedly intends to vote absentee in the future.[45] The alleged injury to Bickham is that he "could be restricted in who is able to assist him with his absentee ballot."[46] It is alleged that if Bickham asks his PCA to assist him, it could put the PCA at risk of criminal charges in the future, if the PCA has assisted another client.[47] It is alleged that Bickham is concerned that if his PCA is unable to assist him, he would be unable to vote at all, as his immediate family members are allegedly not a reliable option.[48] It is further alleged that if his PCA did face criminal charges with possible jail time, it would put Mr. Bickham's health and safety at risk by not having an attendant available for his care.[49] It is alleged that Mr. Bickham's decision would be between his right to vote and his right to receive necessary care to keep him safe and live independently in the community.[50]

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[38] *Id*.
[39] (Emphasis added); Doc. 1, para. 71..
[40] The witness criminal statute, La. R.S. 18:1461.7(A)(7), does not take effect until July 1, 2025.
[41] This is conjecture and speculation. Doc. 1, para. 74.
[42] Votes are not challengeable because of any of the statutes at issue. *See* La. R.S. 18:1315(A)-(D) and LAC 31:I.301-305.
[43] Doc. 1, para. 74.
[44] Doc. 1, para. 97.
[45] *Id*.
[46] Doc. 1, para. 103.
[47] *Id*.
[48] Doc. 1, para. 106 and 98.
[49] Doc. 1, para. 107.
[50] *Id.*

The alleged injuries to Volion and Bickham are too speculative and conjectural to establish standing. Not only does Plaintiff use conditional language to describe the anticipated alleged injuries to Volion and Bickham – *if*, *could, may, may not* – but the alleged injuries to Volion and Bickham are based upon the occurrence of hypothetical events to third parties. That is, *if the person of their choice* assists more than one individual with an absentee ballot, *that person could risk* criminal charges *in the future* and *possible* jail time. None of this suggests actual or imminent harm to Volion or Bickham.[51] Moreover, any fear or concern allegedly suffered by Volion and Bickham is not sufficient to establish injury-in-fact. It is well-established that plaintiffs "cannot manufacture standing merely by inflicting harm on themselves based on their fears of hypothetical future harm that is not certainly impending."[52]

"[A] person who must comply with a law or face sanctions has standing to challenge its application to him, even if the threat of prosecution is not imminent."[53] In *Carey v. Wisconsin Elections Commission*, 624 F.Supp.3d 1020, 1027 (W.D. Wisc. 2022), voters with disabilities suing under Section 208 of the Voting Rights Act were held to have standing because "Plaintiffs risk an imminent injury regardless of what they do. If they chose to comply with §6.87(4)(b)1, they will have to forfeit their right to vote or attempt to vote in person with great difficulty and perhaps even at risk to their health and safety…. But if plaintiffs violate §6.87(4)(b)1 by obtaining assistance to vote absentee, their vote could be rejected, and they could be sanctioned for violating the law."

In contrast, here, Plaintiff's purported "constituents" are not in a position to "comply with

[51] *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 564, 112 S. Ct. 2130, 2138, 119 L. Ed. 2d 351 (1992) ("Such 'some day' intentions—without any description of concrete plans, or indeed even any specification of *when* the some day will be—do not support a finding of the 'actual or imminent' injury that our cases require.").
[52] *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416(2013).
[53] *Hays v. City of Urbana, Ill.*, 104 F.3d 102, 103 (7th Cir. 1997).

the law or face sanctions." The laws at issue here are prohibitions directed at the witness or the assistor, not the voter. "No person except … shall witness more than one certificate of a voter;"[54] "No person except…shall submit by any means…"[55]; "No person except…shall assist with the certificate of more than one voter."[56] Similarly, the criminal statutes do not criminalize any action of the voter, but rather, make the action of the one who facilitates "the distribution and collection of absentee by mail ballot applications or absentee by mail ballots"[57] or who "witness[es] more than one certificate of a voter…in violation of La. R.S. 18:1306"[58] a miscellaneous election offense. Unlike in *Carey,* the disabled voters are not subject to sanctions for violations of the challenged laws. Moreover, unlike in *Carey,* a violation of any of these laws does not serve as grounds for challenging or invalidating an absentee by mail ballot.[59] Therefore, Plaintiff failed to allege that its purported "constituents" will suffer actual and imminent injury as a result of the challenged statutes.

b. ELMHS and Chateau de Notre Dame

Plaintiff's allegations regarding Eastern Louisiana Mental Health System (ELMHS), a state-owned mental health hospital, and Chateau de Notre Dame Community Care Center are insufficient to allege an injury-in-fact. Residents in nursing homes and those with physical disabilities "who reside[] in a hospital for an extended period of time by reason of a physical disability that makes it improbable that he will be able to vote in person at the polls on election day or during early voting" are eligible to vote at the facility by participating in the Special Program for Voters Residing in Nursing Homes conducted by the registrar of voters.[60] A voter

[54] La. R.S. 18:1306(E)(2)(a).
[55] La. R.S. 18:1308B(1).
[56] La. R.S. 18:1310(C)(1).
[57] La. R.S. 18:1461.7A(6).
[58] La. R.S. 18:1461.7, effective July 1, 2025.
[59] La. R.S. 18:1315.
[60] *See* La. R.S. 18:1333.

participating in this program submits his absentee by mail ballot directly to the registrar, so no witness signature is required, and the registrar is available to assist any voters requesting assistance, without a limit to the number of voters to whom the registrar may provide assistance.[61] Plaintiff does not challenge the assistance provisions of the Special Program for Voters Residing in Nursing Homes.

In *Priorities USA v. Nessel*, 628 F.Supp.3d 716, 731 (E.D. Mich. 2022), the court found plaintiffs' vague assertion that they represent the interests of voters who may be affected by the absentee ballot law insufficient to allege a concrete injury. Here, in paragraphs 75-81, Plaintiff speaks of unidentified individuals who are inpatient in ELMHS and complains that "if the Statutes at Issue take effect, staff would not be able to assist more than one patient in completing or submitting their absentee ballot"[62] Neither this "staff" nor the "individuals housed at ELMHS" are parties to this lawsuit or alleged to be members of DRLA.

Plaintiff also alleges that the challenged statutes will negatively impact unidentified "nursing home residents" who "may end up being unable to vote," none of whom are named plaintiffs or alleged to be members of the Board of Directors of DRLA. In paragraphs 83-96, Plaintiff describes the activities of the "Activities Director" at Chateau de Notre Dame Community at Chateau de Notre Dame Community Care Center in assisting residents with voting.[63] Since the Activities Director is not a plaintiff, nor alleged to be a member or "constituent" of DRLA, her unwillingness "to be put at risk of criminal charges for helping residents vote" is not sufficient to establish standing in this case.[64]

[61] La. R.S. 18:1333(G).
[62] Doc. 1, para. 81.
[63] As discussed above, residents of nursing homes are able to vote under the Nursing Home Program, set forth in the Election Code at La. R.S. 18:1333.
[64] Doc. 1, para. 95.

iv. Plaintiff failed to allege that any alleged injury was or will be caused by the challenged conduct of Secretary Landry.

To establish standing, "[t]he plaintiff must also establish that the plaintiff 's injury likely was caused or likely will be caused by the defendant's conduct."[65] Plaintiff purports to represent Louisiana voters with disabilities.[66] As discussed above, the laws challenged by Plaintiff are prohibitions directed at the witnesses or the assistants, not the voters. "When the plaintiff is an unregulated party, causation ordinarily hinges on the response of the regulated (or regulable) third party to the government action or inaction—and perhaps on the response of others as well. Yet the Court has said that plaintiffs attempting to show causation generally cannot rely on speculation about the unfettered choices made by independent actors not before the courts. Therefore, to thread the causation needle in those circumstances, the plaintiff must show that the third parties will likely react in predictable ways that in turn will likely injure the plaintiffs."[67]

Here, as an "unregulated" party, Plaintiff is not able to establish that the alleged actions of Secretary Landry have caused or will cause the alleged injuries to its members or purported "constituents." As discussed above, the alleged injuries identified by Plaintiff depend upon the behavior of third parties, i.e. the would-be witnesses or assistants to disabled voters. Critically, Plaintiff has not alleged Secretary Landry's role, if any, in causing the alleged anticipated (albeit speculative) response of these third parties to the challenged laws. The only allegation against Secretary Landry is that she is "responsible to prepare and certify the ballots for all elections, promulgate all election returns, and administer election laws, except those relating to voter

[65] *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 382–83 (2024).
[66] Doc. 1, para. 17.
[67] *All. for Hippocratic Med., supra (*"[W]hen (as here) a plaintiff challenges the government's unlawful regulation (or lack of regulation) of *someone else*, standing is not precluded, but it is ordinarily substantially more difficult to establish.").

registration and custody of voting machines."[68] Furthermore, as discussed below, the Secretary of State is not responsible for the enforcement of any of the challenged criminal statutes, as Plaintiff acknowledges.[69] Since Plaintiff has failed to allege causation between the alleged injuries and the conduct of Secretary Landry, the Court lacks subject matter jurisdiction over Plaintiff's claims against Secretary Landry.

b. Organizational standing

In the event Plaintiff contends it asserted organizational standing, such contention is without merit. Plaintiff describes itself as "a non-profit corporation … accountable to all members of the disability community …authorized under federal law to represent the interests of all Louisiana citizens with disabilities …".[70] Plaintiff alleges it effectuates its mission of protecting the voting rights of individuals with disabilities "by assisting Louisiana voters with the steps of the voting process, from voter registrations to monitoring polling accessibility."[71] Plaintiff avers it "has and continues to operate a voting hotline where those who have trouble voting due to a disability may call and obtain assistance."[72] Plaintiff made no allegations of any injury or harm to it as a result of the passage of the challenged laws. Thus, Plaintiff has failed to allege an injury-in-fact and it fails to establish organizational standing.

Since Plaintiff failed to establish Article III standing, either under the theory of associational standing or organizational standing, all claims must be dismissed for lack of subject matter jurisdiction.

[68] Doc. 1, para. 19.
[69] *See* Doc. 1, para. 20-21.
[70] Doc 1, paras. 15, 17.
[71] Doc. 1, para. 18.
[72] Id.

c. Regardless of theory of standing, Plaintiff has failed to allege standing to establish a pre-enforcement challenge.

In order to establish a pre-enforcement challenge, such as the case presented here, seeking to enjoin enforcement of two criminal statutes (one effective May 28, 2024; the other not effective until July 1, 2025), a plaintiff satisfies the injury-in-fact requirement of standing when he alleges "an intention to engage in a course of conduct arguably affected with a constitutional interest, but proscribed by a statute, and there exists a credible threat of prosecution thereunder."[73] "[T]his type of self censorship must arise from a fear of prosecution that is not 'imaginary or wholly speculative.'"[74] The Fifth Circuit requires the plaintiff to establish a "serious intention to engage in conduct prescribed by law."[75]

Here, Plaintiff has not expressed any intention to engage in the course of conduct prohibited by either criminal statute (i.e. facilitation of distribution and collection of absentee by mail ballot applications or ballots or witnessing more than one certificate of a voter in violation of La. R.S. 18:1306), nor have any of its members, its board of director members. Nor have its alleged "constituents," Ashley Volion or Adrian Bickham. Accordingly, Plaintiff, either as an organization or on behalf of its members, has not shown it has standing to maintain the pre-enforcement challenge to either of the criminal statutes.

2. Secretary Landry is entitled to sovereign immunity for Plaintiff's claims arising under 42 U.S.C. § 1983.

The Eleventh Amendment to the U.S. Constitution states that the federal judicial power of the United States shall not extend to any suit against any one of its states.[76] This jurisdictional bar

[73] *Babbitt v. United Farm Workers Natl'l Union*, 442 U.S. 289, 298 (1979).
[74] *Ctr. for Individual Freedom v. Carmouche,* 449 F.3d 655, 660 (5th Cir. 2006) *quoting Babbitt*, 442 U.S. at 302.
[75] *Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 389 (5th Cir. 2018).
[76] U.S. CONST. amend. XI.

applies regardless of the nature of the relief sought.[77] Although sovereign immunity may be waived or expressly abrogated by Congress, Louisiana has refused any such waiver of its Eleventh Amendment sovereign immunity regarding suits in federal court,[78] and "Congress has not abrogated states' sovereign immunity from suit for § 1983 claims."[79]

The present suit was brought against Nancy Landry in her official capacity as Secretary of State. It is well-settled that "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office. As such, it is no different from a suit against the State itself."[80] "[A]s when the State itself is named as the defendant, a suit against state officials that is in fact a suit against a State is barred regardless of whether it seeks damages or injunctive relief."[81]

The Supreme Court, however, has recognized a limited exception to the general rule of sovereign immunity in suits for injunctive or declaratory relief against individual state officials alleging an ongoing violation of federal law.[82] This is known as the *Ex Parte Young* exception of sovereign immunity, and it allows an individual to sue a state official for prospective equitable relief, requiring the state official to cease violating federal law, even if the state itself is immune from suit under the Eleventh Amendment.[83]

There are three criteria that must be satisfied for *Ex Parte Young* to apply: (1) the state

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[77] *Lewis v. Univ. of Tex. Med. Branch at Galveston*, 665 F.3d 625, 630 (5th Cir. 2011) (citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101−02 (1984)).
[78] *See* LA. REV. STAT. ANN. § 13:5106(A). *See also* Fireman's Fund Ins. Co. v. Dep't of Transp. and Development, 792 F.2d 1373, 1376 (5th Cir. 1986) (Louisiana statutes make it clear that the state makes no intentional waiver of Eleventh Amendment immunity as to its executive departments).
[79] *Richardson v. Texas*, No. 23-40526, 2024 WL 913380, at *4 (5th Cir. Mar. 4, 2024), *cert. denied,* No. 23-1248, 2024 WL 3089576 (U.S. June 24, 2024), citing *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89, 101–02 (1984).
[80] *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) [internal citations omitted].
[81] *Pennhurst State Sch. & Hosp, supra,* at 101–02.
[82] *Raj v. Louisiana State Univ.*, 714 F.3d 322, 328 (5th Cir. 2013).
[83] *Ex Parte Young,* 209 U.S. 123 (1908); See generally, *Pennhurst, State School and Hospital v. Halderman*, *supra*, at 102.

official must be named as a defendant in his official capacity; (2) "the plaintiff must allege an ongoing violation of federal law;" and (3) the plaintiff must seek relief "properly characterized as prospective."[84] To be a defendant under *Ex Parte Young*, "the state official must have 'some connection with the enforcement of the act' in question."[85] The *Ex Parte Young* exception does not apply in the present case because Secretary Landry does not have the requisite connection to enforcement of the laws in question.

According to the Fifth Circuit, (1) the official "must have more than the general duty to see that the laws of the state are implemented;" (2) "the official must have the particular duty to enforce the statute in question and a demonstrated willingness to exercise that duty;" and (3) "'enforcement' means 'compulsion or constraint.'"[86] "If the official does not compel or constrain anyone to obey the challenged law, enjoining that official could not stop any ongoing constitutional violation."[87]

Plaintiff does not allege how Secretary Landry is responsible for enforcement of the challenged laws. In fact, Plaintiff alleges that another Defendant, Attorney General Elizabeth Murrill, is responsible for enforcement of "the criminal statutes at issue."[88] Indeed, Secretary Landry is not responsible for enforcement of any criminal statutes. "Subject to the supervision of the attorney general, as provided in Article 62, the district attorney has entire charge and control of every criminal prosecution instituted or pending in his district and determines whom, when, and

[84] *Green Valley Special Util. Dist. v. City of Schertz, Texas*, 969 F.3d 460, 471 (5th Cir. 2020).
[85] *Texas Democratic Party v. Hughs*, 860 Fed.Appx. 874, 879 (5th Cir.2021), citing *Ex parte Young*, 209 U.S. 123, 157; 28 S.Ct. 441, 453; 52 L.Ed. 714 (1908) ("In making an officer of the state a party defendant in a suit to enjoin the enforcement of an act alleged to be unconstitutional, it is plain that such officer must have some connection with the enforcement of the act, or else it is merely making him a party as a representative of the state, and thereby attempting to make the state a party." Emphasis added).
[86] *Texas All. for Retired Americans v. Scott*, 28 F.4th 669, 672 (5th Cir.2022) (internal citations omitted).
[87] *Id.*
[88] Doc. 1, para. 21.

how he shall prosecute."[89] The law is clear that the Secretary of State does not prosecute violations of criminal law. Therefore, since the Secretary of State is not responsible for enforcement of any criminal statutes, she lacks the requisite connection to enforcement of the laws in question.

Insofar as Plaintiff challenges the non-criminal aspects of the statutes at issue, Secretary Landry lacks the requisite connection to enforcement of the laws at issue. Plaintiff's sole allegation against Secretary Landry is that as the chief election official in Louisiana, she "is responsible to prepare and certify the ballots for all elections, promulgate all election returns, and administer election laws, except those relating to voter registration and custody of voting machines."[90] For *Ex Parte Young* to apply, Secretary Landry "must have more than the general duty to see that the laws of the state are implemented."[91] Yet, Plaintiff's complaint contains no allegations that Secretary Landry has "a particular duty to enforce the statute[s] in question," or that she has "demonstrated a willingness to exercise that duty."[92]

As discussed below regarding Plaintiff's claim of preemption, violations of the challenged statutes will not invalidate a voter's ballot. Nevertheless, should any statute at issue herein be grounds for a challenge of an absentee by mail ballot (which it should not), the validity of challenges to absentee by mail ballots are determined by the Parish Board of Election Supervisors.[93] While the Secretary of State provides "security or technical assistance, including advice, analysis, diagnosis or repair for voting machines,"[94] she plays no role in determining the validity of absentee by mail ballots. Pursuant to La. R.S. 18:423(G), the attorney general is the attorney and legal advisor to each parish board of election supervisors. Therefore, the Secretary of

[89] La. C. Cr. P. art. 61 (emphasis added). *See also* La. Const. Art. V, § 26(B) and Art. IV, § 8 (Attorney General; Powers and Duties), *cf.* § 7 (Secretary of State; Powers and Duties).
[90] Doc. 1, para. 19.
[91] *Texas All. for Retired Americans, supra.*
[92] *See id.*
[93] La. R.S. 18:1313(A)-(G). See also La. R.S. 18:423 regarding parish board of election supervisors.
[94] La. R.S. 18:1313D(2).

State lacks the requisite connection to enforcement of the laws in question, and the *Ex Parte Young* exception to sovereign immunity does not apply.

3. Plaintiff's claims are not ripe for adjudication.

The ripeness doctrine "originate[s] in Article III's case or controversy language."[95] "A court should dismiss a case for lack of ripeness when the case is abstract or hypothetical. The key considerations are the fitness of the issues for judicial decision and the hardship to the parties of withholding court consideration. A case is generally ripe if any remaining questions are purely legal ones; conversely, a case is not ripe if further factual development is required. However, even where an issue presents purely legal questions, the plaintiff must show some hardship in order to establish ripeness."[96]

With respect to the plaintiff's second claim regarding the witness requirements for absentee ballots[97], the criminal penalty that Plaintiff challenges does not take effect until July 1, 2025.[98] As previously discussed, Act 712 and Section 2 of Act 302 of the 2024 Regular Session amended La. R.S. 18:1461.7 by adding Section 1461.7A(7) to make it a criminal offense to knowingly, willfully or intentionally…(7) "witness more than one certificate of a voter who is not a family member in violation of R.S. 18:1306." However, since June 11, 2020,[99] La. R.S. 18:1306E(2)(a)[100] has provided that "[n]o person except the immediate family member of the voter, as defined in this Code, shall witness more than one certificate of a voter."

Plaintiff's allegation in Paragraph 51 that Act 302 "provides teeth to R.S. 18:1306(E)(2)(a) and now…makes it a criminal penalty to witness the certificate of more than one voter" is

[95] *Choice Inc. of Texas v. Greenstein*, 691 F.3d 710, 714–15 (5th Cir. 2012).
[96] *Id.,* (internal citations omitted).
[97] Doc. 1 , para. 7.
[98] Act 712 of 2024 Regular Session; Section 2 of Act 302 of 2024 Regular Session.
[99] Act 210 of 2020.
[100] La. R.S. 18:1306(E) relates to the signature of the witness on an absentee by mail ballot.

incorrect. The criminal penalty of which Plaintiff complains does not take effect until July 1, 2025, thus making the issues set forth in Plaintiff's second claim not ripe for consideration by this Court.[101] The state will hold at least four elections prior to July 1, 2025, on November 5, 2024, December 7, 2024, March 29, 2025 and May 3, 2025. Plaintiff has not shown hardship in order to challenge these provisions now. Therefore, Plaintiff's claims related to the witness requirements for absentee ballots are not ripe for this Court's consideration.

For the foregoing reasons, the Court lacks subject matter jurisdiction over Plaintiff's claims.

B. Failure to state a claim pursuant to F.R.C.P. 12(b)(6)

In the event that the Court determines that it has subject matter jurisdiction, Plaintiff has failed to state a claim for relief against Secretary Landry. To survive a Rule 12(b)(6) motion to dismiss, the plaintiff must plead enough facts "to state a claim to relief that is plausible on its face."[102] A claim is facially plausible when the plaintiff pleads facts that allow the court to "draw the reasonable inference that the defendant is liable for the misconduct alleged."[103] "A court must accept all well-pleaded facts as true and must draw all reasonable inferences in favor of the plaintiff."[104] The court is not, however, bound to accept as true legal conclusions couched as factual allegations.[105]

1. Plaintiff is not entitled to relief from Secretary Landry.

For the reasons stated above regarding standing (II(A)(1)(a)(iv)) and the *Ex Parte Young* exception to sovereign immunity (II(A)(2)), Plaintiff has failed to state a claim for relief against Secretary Landry. Secretary Landry is not responsible for enforcement of the challenged laws, nor

[101] Act 712 likewise does not take effect until July 1, 2025.
[102] *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)).
[103] *Iqbal,* 129 S.Ct. at 1949.
[104] *Lormand v. U.S. Unwired, Inc.,* 565 F .3d 228, 232-33 (5th Cir.2009); *Baker,* 75 F.3d at 196 (5th Cir.1996).
[105] *Iqbal,* 129 S.Ct. at 149-50; *Anderson v. Law Firm of Shorty Dooley & Hall,* 2009 WL 3837550, 2(E.D. La., 2009).

has she caused or will cause any of the injuries alleged by Plaintiff. Therefore, Plaintiff is not entitled to relief against Secretary Landry.

2. Plaintiff failed to state a claim for preemption.

"A fundamental principle of the Constitution is that Congress has the power to preempt state law….[S]tate law is naturally preempted to the extent of any conflict with a federal statute. We will find preemption where it is impossible for a private party to comply with both state and federal law, and where under the circumstances of a particular case, the challenged state law stands as an obstacle to the accomplishment and execution of the full purposes and objectives of Congress. What is a sufficient obstacle is a matter of judgment, to be informed by examining the federal statute as a whole and identifying its purpose and intended effects…".[106]

Plaintiff contends that Section 208 of the Voting Rights Act preempts the challenged laws and cites as support the legislative history, particularly the Report of the Senate Judiciary Committee at pages 62-64, of the Voting Rights Act.[107] In paragraph 41, Plaintiff quotes S. Rep. No. 97-417 at 63 alleging that the Committee wrote that "Section 208 of the Voting Rights Act is intended to preempt state law when state law '[d]denies the assistance at some stages of the voting process when assistance was needed'." However, Plaintiff neglected to include the first part of the paragraph quoted from the Senate Report, which provides:

> State provisions would be preempted to the extent that they unduly burden the right recognized in this Section, with that determination being a practical one dependent up on the facts.[108]

Plaintiff has not alleged any undue burden on the right to receive assistance from a person of the voter's choice as required to state a claim for preemption by the Voting Rights Act. Rather,

[106] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) (internal citations omitted).
[107] Doc. 1, para. 39-41.
[108] Emphasis added.

Plaintiff focuses solely on whether the statutes at issue are "an obstacle to the accomplishment and execution of the full purposes and objectives of Congress," claiming that the Statute at Issue will disenfranchise "Louisiana's most vulnerable citizens" (individuals with disabilities).[109] This is inaccurate.

The challenged laws will not disenfranchise any individual with disabilities of his right to vote, because violation of these statutes cannot serve to invalidate his vote. An absentee mail ballot is not subject to challenge if an individual assisted with delivery of more than one absentee ballot or if anyone served as a witness on more than one individual with an absentee ballot. The Louisiana Election Code at La. R.S. 18:1315(A), (B), (C) and (D) sets forth the grounds for challenging an absentee by mail ballot. LAC 31:I.301-305 provides with respect to opportunity to cure deficiencies in absentee by mail ballots. Neither La. R.S. 18:1315 or the rules list the identity of the witness to an absentee ballot, the number of ballots the witness witnessed, nor the number of persons assisted by an individual as an absentee ballot deficiency or a ground for challenging an absentee by mail ballot.

Nor does La. R.S. 18:1461.7(A)(6) (effective May 28, 2024) "criminalize" anyone from "assisting with the delivery of more than one absentee ballot" as plaintiff contends in paragraph 6 of its Complaint. Plaintiff cites Act 380 and Act 317 for this contention. Section 1 of Act 380[110] amended La. R.S. 18:1308(B)(1) to provide:

> No person except the immediate family of the voter, as defined in this Code, shall submit by any means or send for delivery by the United States Postal Service or commercial carrier more than one marked ballot per election to the registrar.

Section 1 of Act 317, effective January 1, 2025, regarding application by mail amended

[109] Doc. 1, para. 11.
[110] Effective August 1, 2024.

Section 1307B(1)(a)(i) to provide

> No person except the immediate family member of the voter as defined in the Code, shall submit by any means or send for delivery by the United States Postal Service or commercial carrier more than one marked ballot application per election to the registrar of voters.

Section 2 of Act 317, effective May 28, 2024, made it a miscellaneous election offense for a person to "knowingly, willfully, or intentionally":

> (6) Facilitate the distribution and collection of absentee by mail ballot applications or absentee by mail ballots in violation of this Title.

While Act 317 amended La. R.S. 18:1461.6(A) to make it an election offense to "facilitate the distribution and collection of more than one absentee by mail ballot application or absentee by mail ballot," it did not "criminalize" the submission "by any means or send for delivery" of more than one marked ballot per election. In other words, the criminal offense is the facilitation of the distribution and collection, not the submission of more than one absentee by mail ballot to the registrar.[111]

Notwithstanding Plaintiff's failure to allege an undue burden on the right to receive assistance from a person of the voter's choice, the challenged statutes pose no "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" and thus, are not preempted by the Voting Rights Act.

III. CONCLUSION

For the foregoing reasons, the Court lacks subject matter jurisdiction over the claims of Plaintiff, Disability Rights of Louisiana. Alternatively, Plaintiff has failed to state a claim for relief against Defendant, Nancy Landry, in her official capacity as Secretary of State of Louisiana and

[111] This is likewise not a ground for challenging an absentee ballot, nor is it a basis for a ballot deficiency. *See* La. R.S. 18:1315 and LAC 31:I.301-305.

failed to allege an "undue burden" in order to state a claim for preemption. Therefore, Plaintiff's claims should be dismissed against her with prejudice.

Respectfully submitted:

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CERTIFICATE OF SERVICE

I hereby certify that on the 22nd day of August 2024, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notice of electronic filing to all counsel of record.

/s/ Caroline M. Tomeny
Caroline M. Tomeny