UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DISABILITY RIGHTS LOUISIANA Plaintiff, v. NANCY LANDRY, in her official capacity as Secretary of State of the State of Louisiana; and ELIZABETH MURRILL, in her official capacity as Attorney General of the State of Louisiana Defendants.	CIVIL ACTION NO. 3:24-cv-554-JWD-SDJ JUDGE DeGRAVELLES MAG. JUDGE JOHNSON

ATTORNEY GENERAL'S MEMORANDUM IN SUPPORT OF MOTION TO DISMISS FOR LACK OF JURISDICTION

MAY IT PLEASE THE COURT:

Plaintiff brings a challenge to four Acts of the 2024 Regular Session of the Louisiana Legislature and one statute, as amended by one of the challenged Acts. The Acts that are subject to the suit are Acts 302, 317, 380, and 712. The statute alleged to be ineffective in the Amended Complaint is La. R.S. 18:1306(E(2)(a). Plaintiff alleges that the subject state statutes are preempted by 52 USC §10508 pertaining to assistance for disabled voters. Plaintiff claims to represent the class of "all individuals with disabilities in Louisiana who need assistance with voting or with the submission or mailing of their ballot." Compl. ¶ 19, 26.

Named as defendants are Nancy Landry, in her official capacity as Louisiana Secretary of State, and Elizabeth Murrill, in her official capacity as Louisiana Attorney General. Conspicuously absent

from the litigation, and without whom complete relief cannot be granted, are the District Attorneys of the State who have the "entire charge and control of every criminal prosecution instituted or pending in his district, and determines whom, when, and how he shall prosecute," in accordance with La. Code Crim. P. art. 61. Also missing are those election officials who determine the validity of absentee by mail ballots in accordance with La. R.S. 18:1313, 1313.1, 1315, and other applicable provisions of the Election Code. Most of the conduct prohibited by the challenged Acts and the contested statute have been in Louisiana law for some time. However, the Acts challenged here added a criminal sanction for engaging in the prohibited conduct so that the persons who violate the law by giving prohibited assistance may be subject to prosecution. Nothing in the Acts expressly requires the invalidation of a ballot.

Pursuant to Rule 12(b)(1) Liz Murrill, as Attorney General, submits that the plaintiffs' claims against her should be dismissed because the plaintiffs are unable to establish this Court's jurisdiction to hear their claim as to the Attorney General.

Jurisdiction. The case against the Attorney General cannot be brought in this Court for three fundamental reasons:

A. The plaintiffs have not shown that a case or controversy exists between plaintiffs and the Attorney General for lack of standing under the *Lujan* standard.

B. Any order that may be issued against the Attorney General would not redress the plaintiff's injury.

C. The claims of the plaintiffs against the Attorney General are barred by sovereign immunity.

I. JURISDICTION

Without jurisdiction a federal court cannot proceed at all in any cause. Jurisdiction is the power to declare the law, and when it ceases to exist, the only function remaining to the court is

that of announcing the fact and dismissing the cause." *Ex parte McCardle,* 7 Wall. 506, 514, 19 L.Ed. 264 (1868). On every writ of error or appeal, the first and fundamental question is that of jurisdiction. This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it." *Great Southern Fire Proof Hotel Co. v. Jones,* 20 S.Ct. 690, 692. The requirement that jurisdiction be established as a threshold matter "spring[s] from the nature and limits of the judicial power of the United States" and is "inflexible and without exception." *Mansfield, C. & L.M.R. Co. v. Swan,* 111 U.S. 379, 382, 4 S.Ct. 510, 511, 28 L.Ed. 462 (1884); *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94, 118 S. Ct. 1003, 1012, 140 L. Ed. 2d 210 (1998). It is the party seeking to establish subject-matter jurisdiction bears the burden of demonstrating its existence, else the case cannot proceed. *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir. 2001).

A. Article III Courts Are Courts of Limited Jurisdiction Whose Authority Extends Only To Cases and Controversies. The Plaintiff In This Case Has Not Shown That a Case or Controversy Exists With Respect to the Attorney General

Article III of the Constitution limits federal courts' jurisdiction to certain "Cases" and "Controversies." As we have explained, "[n]o principle is more fundamental to the judiciary's proper role in our system of government than the constitutional limitation of federal-court jurisdiction to actual cases or controversies." *DaimlerChrysler Corp. v. Cuno,* 547 U.S. 332, 341, 126 S.Ct. 1854, 164 L.Ed.2d 589 (2006) (internal quotation marks omitted); *Raines v. Byrd,* 521 U.S. 811, 818, 117 S.Ct. 2312, 138 L.Ed.2d 849 (1997) (internal quotation marks omitted); see, *e.g., Summers v. Earth Island Institute,* 555 U.S. 488, 492–493, 129 S.Ct. 1142, 173 L.Ed.2d 1 (2009). "One element of the case-or-controversy requirement" is that plaintiffs "must establish that they have standing to sue." *Raines, supra,* at 818, 117 S.Ct. 2312.

1. The Courts Have Long Held That Proof of Standing Requires the Plaintiff to Show a Concrete Injury Traceable To A Defendant's Conduct That Can Be Redressed By an Order Against that Defendant

At an irreducible minimum, Art. III requires the party who invokes the court's authority to show that (1) he personally has suffered some actual or threatened injury as a result of the putatively illegal conduct of the defendant, (2) that the injury fairly can be traced to the challenged action and (3) is likely to be redressed by a favorable decision." *Lujan v. Defenders of Wildlife,* 504 U.S. 555, 560 (1992).

First, the injury alleged must be ... "'distinct and palpable,"' and not 'abstract' or 'conjectural' or 'hypothetical. *Allen v. Wright,* 468 U.S. The Supreme Court has thus refused to entertain a variety of suits premised only upon "the value interests of concerned bystanders," *United States v. SCRAP,* 412 U.S. 669, 687 (1973), or upon "'the right, possessed by every citizen, to require that the Government be administered according to law."' *Valley Forge Christian College v. Americans United for Separation of Church and State,* 454 U.S. 464, 472 (1982). (The exercise of judicial power, which can so profoundly affect the lives, liberty, and property of those to whom it extends, is … restricted to litigants who can show 'injury in fact' resulting from the action which they seek to have the court adjudicate.")

Thus, the injury-in-fact alleged in a plaintiff's complaint "must *affect the plaintiff* in a personal and individual way." *Lujan v. Defenders of Wildlife,* 504 U.S. at 560 n.1 (emphasis added); *see also id.* at 581 (Kennedy, J., concurring in part and concurring in the judgment) ("[T]he party bringing suit must show that the action injures him in a concrete and personal way.").

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." *Simon v. Eastern Ky. Welfare Rights Organization*, 426 U.S. 26, 41–42, (1976).

Third, it must be "likely," as opposed to merely "speculative," that the injury will be "redressed by a favorable decision." *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560–61 (1992). Plaintiffs must show that an order against the defendant would give relief to the plaintiff.

Standing is an issue upon which the party invoking federal jurisdiction, the plaintiff, bears the burden of persuasion. *Friends of the Earth, Inc. v. Crown Cent. Petroleum Corp.*, 95 F.3d 358, 361–62 (5th Cir. 1996).

2. Disability Rights of Louisiana Has Not Shown That the Standing Requirements of *Lujan* Exist With Respect to the Attorney General

The plaintiffs' allegations against the Attorney General are too remote and conjectural to establish a plausible claim that they have standing. The general theory of injury is not that the organization will be harmed by the Acts nor that a disabled person's ballot might be invalidated by the prohibited conduct. But, even if the ballot were determined to be invalid, the Attorney General would not be implicated because she does not make determinations as to whether an absentee ballot should be counted. Plaintiff's theory is much more attenuated than that. Plaintiff alleges that a person providing assistance with a disabled voter's ballot *might* be prosecuted under the subject Acts, which *might* in turn discourage assistance in the event a prosecution should occur. This is two "mights" too many for the kind of concrete and particularized allegation of injury necessary to sustain a claim under *Lujan*. See, *Associated Gen. Contractors of Am., Inc. v. Fed. Acquisition Regul. Council*, No. 24-00037, 2024 WL 1078260, at *6 (W.D. La. 3/12, 2024).

The allegations of harm by "plaintiff must demonstrate standing for each claim he seeks to press and for each form of relief that is sought." *Town of Chester. v. Laroe Estates, Inc.*, 137 S.

Ct. 1645, 1650 (2017). "That a suit may be a class action . . . adds nothing to the question of standing[.]" *Lewis*, 518 U.S. at 357. That is because — at least prior to class certification — only the named putative class representatives are parties. *See Fontenot*, 777 F.3d at 748–49.

"[I]f the class representative[s] lack[] standing, then there is no Article III suit to begin with[.]" *Flecha v. Medicredit, Inc.*, 946 F3d 762, 769 (5th Cir. 2020) (citing *Rivera v. Wyeth-Ayerest Labs*, 283 F.3d 315, 319 n.6 (5th Cir. 2002); *Ford v. NYLCare Health Plans*, 301 F.3d 329, 333 (5th Cir. 2002)); *see also O'Shea v. Littleton*, 414 U.S. 488, 494 (1974) ("[I]f none of the named plaintiffs purporting to represent a class establishes the requisite case or controversy with the defendants, none may seek relief on behalf of himself or any other member of the class."); Fed R. Civ. P. 82 ("These rules do not extend . . . the jurisdiction of the district courts[.]"). Plaintiffs cannot hope that a plaintiff class member somewhere down the line may have some link to the Attorney General that might support standing to sue her. Jurisdiction must exist at the time suit is filed. *Stringer v. Whitley*, No. 18-50428, 942 F. 3d 715, 724 (5th Cir. 11/13/19).

In *N.A.A.C.P. v. City of Kyle, Tex*, 626 F. 3d 233, (5th Cir. 2010), the Court rejected theories of associational and organizational standing similar to the claims of jurisdiction in this case. With respect to organizational standing, the Court found no concrete injury directly impacting the organizational plaintiff. Like the plaintiff here, NAACP did not show that resources that it had diverted significant resources to counteract the defendant's conduct. The injury complained of was not concrete and demonstrable as required by the jurisprudence. *Id*. 238. Rather, plaintiffs merely conjectured that its resources might have been spent on other activities. Plaintiff in this case has not made any serious allegation of harm in terms of resources diverted by reason of the Attorney General's conduct and cannot seriously argue organizational standing.

As to associational standing, there is no allegation that a specific member of Disability Rights Louisiana has been unable to cast a ballot or could not find someone to assist them in casting a ballot either in the past, presently, or in the future. *N.A.A.C.P. v. City of Kyle, Tex.*, 626 F.3d 233, 237 (5th Cir. 2010). Instead, plaintiff claims that he represents a class of disabled voters, who themselves cannot allege harm or injury stemming from the Attorney General's conduct. Allegations suggestive of associational standing are lacking in the Amended Complaint.

In a recent stay ruling, the Fifth Circuit reviewed standing in connection with a Texas election statute and concluded that Vote.org lacked prudential standing. *Vote.Org v. Callanen*, 39 F.4th 297, 303 (5th Cir. 2022), noting that the Supreme Court has not looked favorably on third party standing. *Id*. 304. The court found that Vote.Org cannot rest its claim to relief on the rights and interests of third parties, i.e. Texas voters. The same is true here, and a basis for the claim of associational standing is wholly lacking.

B. An Order Against the Attorney General Cannot Effectively Redress Plaintiff's Grievance

An essential component of standing under is that the injury has to be fairly traceable to the challenged action of the defendant and not the result of the independent action of some third party not before the court. *Lujan*, 560. Additionally, *Lujan* requires that it must be likely as opposed to merely speculative that the injury will be redressed by a favorable decision. *Lujan,* 561. As in *Lujan*, redressability is sorely lacking here.

Remedies ordinarily operate with respect to specific parties. *Murphy v. National Collegiate Athletic Assn*, 584 U.S. 453 489 (2018) (THOMAS, J. concurring). In the absence of a specific party, remedies do not simply operate on legal rules in the abstract. *California v. Texas*, 593 U.S. 659, 672 (2021). "If a case for preventive relief be presented, the court enjoins, in effect, not the execution of the statute, but the acts of the official, the statute notwithstanding."

Commonwealth of Massachusetts v. Mellon, 262 U.S. 447, 488, 43 S. Ct. 597, 601, 67 L. Ed. 1078 (1923).

In *Luja*n, itself, the Court found that the agencies funding the projects contested by the plaintiffs were not parties to the case with the result that an order against those who were parties, the Secretary of the Interior, would not effectively redress the plaintiff's grievance. The plaintiffs sued the Secretary of the Interior who could be ordered to do no more than revise a regulation requiring consultation for foreign projects, but such an order would not remedy plaintiffs' injury. *Lujan*, 568. The Court concluded that such an order would not redress the only injury complained of, which was funding by the agencies absent from the suit. *Id*. 570.

An order against the Attorney General in this case would not remedy this plaintiff's third party grievance on behalf of all voters with disabilities as a class. The Attorney General neither determines the validity of absentee by mail ballots nor institutes charges against those who violate the terms of the statute. Those responsibilities lie primarily with District Attorneys under La. Code Crim. P. art. 61 and with election officials identified in the Louisiana Election Code, principally, La. R.S. 18:1313, 1313.1, and 1315. Plaintiff may argue that an order against the Attorney General might, in consultation with District Attorneys, result in the District Attorneys withholding prosecution or that the Attorney General might suggest a particular determination on individual ballots, but such an argument would not avail. That very argument was soundly rejected in *Lujan*, at 589, where an order against the Secretary of the Interior would not have effectively ended the funding for the projects complained of by the plaintiffs.

C. **Plaintiff's Claim is Barred By Sovereign Immunity**

Generally, state sovereign immunity precludes suits against state officials in their official capacity. *Texas Democratic Party v. Abbott*, 961 F.3d 389, 400 (5th Cir. 2020). An exception to

the general rule permits federal courts to enjoin prospective unconstitutional conduct by individuals who, as officers of the state, are clothed with a duty in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings. *Ex parte Young*, 209 U.S. 123, 155-156 (1908).

To be a proper defendant under *Ex parte Young*, a state official must have a sufficient connection to the enforcement of the law being challenged. *Mi Familia Vota v. Ogg*, 105 F.4th 313, 325 (5th Cir. 2024). The Fifth Circuit has established "guideposts" to aid in determining what constitutes a sufficient connection. They are: (1) the state official has "more than the general duty to see that the laws of the state are implemented," *i.e.*, a "particular duty to enforce the statute in question"; (2) the state official has "a demonstrated willingness to exercise that duty"; and (3) the state official, through her conduct, "compel[s] or constrain[s persons] to obey the challenged law." *Id*.325.

Examining each factor in turn:

(1) The Attorney General is not charged to conduct front line prosecutions. Louisiana law charges district attorneys with the "entire charge and control of every criminal prosecution instituted or pending in his district, and determine whom, when, and how he shall prosecute." La. Code Crim. P. art. 61. The Attorney General generally has a supervisory role with respect to District Attorneys but do not take a direct role in the prosecution of crimes absent recusal by a District Attorney. The Attorney General has a discretionary role in criminal prosecutions, which is insufficient to give rise to a particular duty to act. *City of Austin v. Paxton*, 943 F.3d 993, 999 (5th Cir. 2019) (evidence that the Attorney General might bring a proceeding to enforce the law is insufficient under *Ex parte Young).*

(2) The Attorney General of Louisiana is not alleged to have demonstrated a willingness to exercise the specific duty to enforce the Election Code in general or the challenged Acts particularly. Again, District Attorneys are front line prosecutors directly assigned to determine who to charge with an offense and what offense to charge. A specific duty charged to the District Attorneys is not a specific duty assigned to the Attorney General. *Mi Familia Vota v. Ogg*, 105 F.4th 313, 327 (5th Cir. 2024). Discretionary authority to act is insufficient to give rise to a particular duty to act, i.e., a sufficient connection to enforcement. *Id.* 327.

(3) The Attorney General has not acted in a way to compel or constrain persons to obey the challenged law. The most the plaintiff alleges in that regard is that the Attorney General could exercise her discretion to enforce the law. That is a far cry from conduct that constrains any third person to obey the challenged Acts or statute.

Murrill is not the proper *Ex parte Young* defendant. She lacks a sufficient enforcement connection to support a case or controversy between her and the plaintiff, who is merely suing as a third person on behalf of others who may or may not want to challenge the Acts or statute. The Amended Complaint's allegations that the Attorney General is poised to enforce the subject provisions are not plausible under Fifth Circuit jurisprudence and *Lujan.*

CONCLUSION

The Court lacks jurisdiction over the claims of the plaintiffs as to the Attorney General for failure of a case or controversy, and the case against her should be dismissed.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I do hereby certify that, on this 4th of October 2024, the foregoing was electronically filed with the Clerk of Court using the CM/ECF system, which gives notice of filing to all counsel of record.

/s/ Carey T. Jones
CAREY T. JONES