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 FIRST AMENDED COMPLAINT

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 Plaintiff's First Amended Complaint.[1]

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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)."[2]

Plaintiff alleges that these statutes suffer from two "infirmities"[3]:

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"

[1] Doc. 39.
[2] Doc. 39, para. 4.
[3] Doc. 39, para. 5.

by prohibiting anyone from assisting with the delivery of more than one absentee ballot and criminalizes the same.[4]

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.[5]

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:

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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~~[6] 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	18:1461.7(A)	A. No person shall knowingly, willfully, or intentionally:

[4] Doc. 39, para. 6.
[5] Doc. 39, para. 7
[6] Stricken text indicates deletions from existing law.

Effective May 28, 2024		*** (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.[7]
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.[8]

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Plaintiff contends that these laws "contain new restrictions on absentee voting that impose

[7] Underlined text indicates additions to existing law.
[8] 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."

criminal penalties on certain forms of assistance for absentee voters, including absentee voters 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."[9]

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."[10] 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.[11] 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"[12] as well as an order to issue corrective instructions that voters who require assistance "due to blindness, disability, or inability to read or write"[13] 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.

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[9] Doc. 39, para. 39.
[10] This prayer for relief is not limited to disabled voters, nor is it limited to absentee by mail ballots.
[11] 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).
[12] Request not limited to disabled voters and also not limited to mail ballots.
[13] No allegations made in the Complaint regarding blind or illiterate individuals.

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 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 allege that the requirements for a class action are met, failed to state a claim for relief against Secretary Landry, and 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)

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The burden of proof for a Rule 12(b)(1) Motion to Dismiss lies with the party asserting jurisdiction.[14] 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.[15] "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."[16]

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

[14] *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)).
[15] *In re: FEMA Trailer Formaldehyde Prods. Liab. Litig.*, 668 F.3d 281, 286 (5th Cir. 2012).
[16] *Ramming v. United States*, 281 F.3d 158, 161 (5th Cir.2001).

remedies or approaches to ensure the protection of, and the advocacy for, the rights of individuals with disabilities,"[17] 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."[18] DRLA further avers that "[a]ll Louisiana voters with disabilities are constituents of DRLA."[19] DRLA's purported status as the P&A for Louisiana is not sufficient to confer standing to bring the instant suit.[20] DRLA must still demonstrate standing under Article III.

To demonstrate standing, organizational plaintiffs such as DRLA must satisfy 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."[21]

The "injury-in-fact" requirement can be established by an organization through either associational standing or organizational standing.[22]

> 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.[23]

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[17] Doc. 39, para. 18.
[18] *Id* at ¶18.
[19] Doc. 39, para. 19.
[20] *Oregon Advoc. Ctr. v. Mink*, 322 F.3d 1101, 1109–10 (9th Cir. 2003).
[21] *OCA-Greater Houston v. Texas*, 867 F.3d 604, 609–10 (5th Cir.2017).
[22] *Id.*
[23] *Id.*

Here, DRLA contends that it "has associational standing to bring this suit"[24] However, as shown below, DRLA lacks standing to assert this action.

a. Associational standing

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

Plaintiff contends that it has associational standing because "DRLA is the functional equivalent of a voluntary membership organization" whose "constituents possess sufficient indicia of membership in order for DRLA to represent them in this suit."[25] 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.[26] Here, however, whether DRLA's constituents possess an "indicia of membership" is of no moment because according to its Articles of Incorporation filed with the Louisiana Secretary of State, DRLA is a membership organization whose members consist exclusively of its Board of Directors.[27] Thus, as a traditional membership organization, the "indicia of membership" test does not apply to DRLA.[28]

To establish associational standing, a membership organization must identify at least one member "who has sustained or is immediately in danger of sustaining some direct injury as a result of the challenged official conduct."[29] The requirement to name at least one affected member is mandatory, and the court cannot merely "accept[] the organization's self-description of the activities of its members" and determine that "there is a statistical probability that some of those

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[24] Doc. 39, para. 21.
[25] Doc. 39, para. 21.
[26] *Hunt v. Washington State Apple Advert. Comm'n,* 432 U.S. 333, 344–45 (1977).
[27] 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).
[28] *See Students for Fair Admissions, Inc. v. Univ. of Texas at Austin*, 37 F.4th 1078, 1085 (5th Cir. 2022) (the Fifth Circuit found "no occasion to apply the indicia-of-membership test" to a traditional membership organization.").
[29] *Funeral Consumers All., Inc. v. Serv. Corp. Int'l*, 695 F.3d 330, 344 (5th Cir. 2012).

members are threatened with concrete injury."[30]

Here, Plaintiff alleges generally that its Board of Directors "is composed of members who themselves have disabilities," but Plaintiff does not identify a single member in its First Amended Complaint or allege that any member is aggrieved by the challenged laws or an alleged violation of the Voting Rights Act.[31] Although Plaintiff identifies three individuals in its First Amended Complaint, Ashley Volion, Raymon Dupas, and Adrian Bickham, who are allegedly aggrieved by the challenged laws, none of these individuals are alleged to be members of DRLA's Board of Directors.

Since DRLA has members, i.e., its Board of Directors, it must identify at least one member, not purported constituents, who allegedly suffered an injury-in-fact in order to establish associational standing.[32] Plaintiff's general and conclusory allegation that its board members allegedly have disabilities is insufficient to allege a concrete, particularized, actual and imminent injury to any of its members. Therefore, Plaintiff has failed to establish associational standing.

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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. In *Hunt v. Washington State Apple Advert. Comm'n,* the Supreme Court found that apple growers and dealers represented by a non-membership organization "possess[ed] all the indicia of membership in [the] organization." "They

[30] *Summers v. Earth Island Inst.*, 555 U.S. 488, 497–98, 129 S. Ct. 1142, 1151, 173 L. Ed. 2d 1 (2009).
[31] Doc. 39, para. 22.
[32] *See Students for Fair Admissions, Inc. v. Univ. of Texas at Austin*, 37 F.4th 1078, 1085 (5th Cir. 2022) (the Fifth Circuit found "no occasion to apply the indicia-of-membership test" to a traditional membership organization.").

alone elect the members of the Commission; they alone may serve on the Commission; they alone finance its activities, including the costs of this lawsuit, through assessments levied upon them."[33] Plaintiff's First Amended Complaint lacks allegations sufficient to show that its constituents have an "indicia of membership" as in *Hunt.*

Plaintiff contends that its constituents, "all Louisiana voters with disabilities,"[34] "possess sufficient indicia of membership" in DRLA, namely, "the role of members of the disability community in DRLA's governance."[35] Plaintiff alleges that DRLA's board of directors "is composed of members who themselves have disabilities," including "members who have received or are receiving mental health services."[36] Plaintiff does not allege how many of its board members would be considered "constituents" of DRLA and whether any board members are eligible to vote absentee by mail by virtue of disability.[37] Plaintiff also does not allege the qualifications for serving on the board or how board members are chosen, nor does Plaintiff allege what role, if any, its constituents have in financing DRLA's activities. In short, Plaintiff's general allegation that its board of directors "is composed of members who themselves have disabilities" does not satisfy the "indicia of membership" test.

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Plaintiff also alleges that "DRLA also maintains a Protection & Advocacy for Individuals with Mental Illness Advisory Council (hereinafter 'PAIMI Council') in guiding its work and priorities" and that "[a]t least sixty percent of these PAIMI Council members have received or are receiving mental health services or are family members of such individuals."[38] The alleged PAIMI Council, however, is not germane to the present suit. While Plaintiff alleges generally that "[m]any

[33] *Hunt v. Washington State Apple Advert. Comm'n*, 432 U.S. 333, 344–45 (1977) (emphasis added).
[34] Doc. 39, para. 19.
[35] Doc. 39, para. 22.
[36] Doc. 39, paras. 22 and 23.
[37] *See* La. R.S. 18:1303(I).
[38] Doc. 39, para. 23.

individuals with mental health disabilities need assistance with voting," Plaintiff's First Amended Complaint sets forth no specific allegations regarding individuals with mental illness.[39]

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 conjectural or hypothetical."[40]

DRLA has identified three purported "constituents" who will allegedly be negatively impacted by the challenged laws: Ashley Volion, Raymon Dupas, and Adrian Bickham. The Complaint also mentions unidentified residents at the Eastern Louisiana Mental Health System and unidentified 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.[41] 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, Raymon Dupas, and Adrian Bickham

Ashley Volion is alleged to be a registered voter with a disability.[42] It is alleged that Volion votes absentee because she works phone lines for Disability Rights Louisiana on election day,

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[39] Although Plaintiff identifies Raymon Dupas, a resident of the Crossroads Rehabilitation Unit at Eastern Louisiana Mental Health System, as one of its "constituents," Plaintiff merely alleges that he is "an individual with a disability." *See* Doc. 39, para. 91.
[40] *Paxton v. Dettelbach*, 105 F.4th 708, 711 (5th Cir. 2024) (internal citations omitted).
[41] Doc. 39, p. 14-23.
[42] Doc. 39, para. 67 and 69.

allegedly making her unable to vote on election day.[43] Volion's alleged injury is "fear[] that she will be restricted in who will be able to assist her with her absentee ballot."[44] "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."[45] 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.[46] "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."[47] If one of Ms. Volion's PCA's did face criminal charges[48] with possible jail time, it would put Ms. Volion's health and safety at risk by not having a PCA available for her care.[49] "Ms. Volion would then have to decide between her right to vote[50] and her right to receive necessary medical care to keep her safe and live independently in the community."[51]

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Raymon Dupas is alleged to be "an individual with a disability who is a resident of Crossroads Rehabilitation Unit ('CRU') of the Eastern Louisiana Mental Health System in Jackson, Louisiana."[52] Dupas allegedly "wants to vote during upcoming elections," but "[a]s a patient residing at CRU," "[t]he only option available to Mr. Dupas is to vote by mail-in absentee ballot."[53] It is alleged that staff members at ELMHS are the only persons who can assist him with his ballot.[54] Dupas is allegedly "concerned that the employees at the ELMHS will be deterred from

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[43] Doc. 39, para. 70. 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.
[44] Doc. 39, para. 80.
[45] Doc. 39, para. 83. This is double speculation: *if* and *may not*.
[46] Doc. 39, para. 80.
[47] (Emphasis added); Doc. 39, para. 81.
[48] The witness criminal statute, La. R.S. 18:1461.7(A)(7), does not take effect until July 1, 2025.
[49] This is conjecture and speculation. Doc. 39, para. 84.
[50] 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.
[51] Doc. 39, para. 84.
[52] Doc. 39, para. 91.
[53] Doc. 39, paras. 92, 94, 95.
[54] Doc. 39, para. 96.

collecting and delivering[55] his ballot because doing so could be a criminal offense and subject said staff members to criminal punishment."[56] It is further alleged that Dupas "is concerned that he will not be able to vote in upcoming Louisiana elections because the employees will be deterred from handling and mailing his ballot out of fear of criminal penalties."[57]

Adrian Bickham is, likewise, a registered voter with a disability.[58] He allegedly intends to vote absentee in the future.[59] The alleged injury to Bickham is that he "could be restricted in who is able to assist him with his absentee ballot."[60] 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.[61] 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.[62] 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.[63] 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.[64]

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The alleged injuries to Volion, Dupas, 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, Dupas, and Bickham – *if*, *could, may, may not* – but the alleged injuries to Volion, Dupas, and Bickham are based upon the occurrence of hypothetical events to third

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[55] La. R.S. 18:1461.7(A)(6) prohibits the facilitation of the distribution and collection of absentee by mail ballots, not the collection and delivery of any such ballots.
[56] Doc. 39, para. 98.
[57] Doc. 39, para. 99.
[58] Doc. 39, para. 120.
[59] *Id*.
[60] Doc. 39, para. 126.
[61] *Id*.
[62] Doc. 39, para. 129 and 121.
[63] Doc. 39, para. 130.
[64] *Id.*

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, Dupas, or Bickham.[65] Moreover, any fear or concern allegedly suffered by Volion, Dupas, 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."[66]

"[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."[67] 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."

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In contrast, here, Plaintiff's purported "constituents" are not in a position to "comply with 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;"[68] "No person except…shall submit by any means…"[69]; "No person except…shall assist with the

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[65] *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.").
[66] *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 416(2013).
[67] *Hays v. City of Urbana, Ill.*, 104 F.3d 102, 103 (7th Cir. 1997).
[68] La. R.S. 18:1306(E)(2)(a).
[69] La. R.S. 18:1308B(1).

certificate of more than one voter."[70] 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"[71] or who "witness[es] more than one certificate of a voter…in violation of La. R.S. 18:1306"[72] 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.[73] 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

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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.[74] A voter 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.[75]

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[70] La. R.S. 18:1310(C)(1).
[71] La. R.S. 18:1461.7A(6).
[72] La. R.S. 18:1461.7, effective July 1, 2025.
[73] La. R.S. 18:1315.
[74] *See* La. R.S. 18:1333.
[75] La. R.S. 18:1333(G).

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 85-90 and 100, Plaintiff speaks of unidentified individuals, in addition to Dupas, 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"[76] Neither this "staff" nor the "individuals housed at ELMHS," including Dupas, are parties to this lawsuit or alleged to be members of DRLA.

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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 102-118, Plaintiff describes the actions of the "Activities Director" at Chateau de Notre Dame Community at Chateau de Notre Dame Community Care Center in assisting residents with voting.[77] 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.[78]

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

[76] Doc. 39, para. 100.
[77] 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.
[78] Doc. 39, para. 118.

was caused or likely will be caused by the defendant's conduct."[79] Plaintiff purports to represent all Louisiana voters with disabilities.[80] 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."[81]

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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. Plaintiff alleges that "[t]he actions of Defendant Landry further suggest to members of the public, including members of the disability community, that any deviations from strict compliance with election laws will result in criminal prosecution for the third party assisting them."[82] However, the Secretary of State does not prosecute violations of criminal law, including alleged violations of the Election Code. "Subject to the supervision of the attorney general, as provided in Article 62, the <u>district attorney</u> has entire charge and control of <u>every criminal prosecution</u> instituted or pending in his district and determines whom, when, and how he shall prosecute."[83]

[79] *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 382–83 (2024).
[80] Doc. 39, para. 19.
[81] *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.").
[82] Doc. 39, para. 143.
[83] La. C. Cr. P. art. 61 (emphasis added). *See also* La. Const. Art. V, § 26(B) and Art. IV, § 8 (Attorney General;

Thus, Plaintiff has failed to allege causation between the alleged injuries and the conduct of Secretary Landry. Therefore, the Court lacks subject matter jurisdiction over Plaintiff's claims against Secretary Landry.

b. 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."[84] "[T]his type of self censorship must arise from a fear of prosecution that is not 'imaginary or wholly speculative.'"[85] The Fifth Circuit requires the plaintiff to establish a "serious intention to engage in conduct prescribed by law."[86]

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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, Raymon Dupas, 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.

Powers and Duties), *cf.* § 7 (Secretary of State; Powers and Duties).

[84] *Babbitt v. United Farm Workers Natl'l Union*, 442 U.S. 289, 298 (1979).

[85] *Ctr. for Individual Freedom v. Carmouche,* 449 F.3d 655, 660 (5th Cir. 2006) *quoting Babbitt*, 442 U.S. at 302.

[86] *Zimmerman v. City of Austin, Texas*, 881 F.3d 378, 389 (5th Cir. 2018).

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.[87] This jurisdictional bar applies regardless of the nature of the relief sought.[88] 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,[89] and "Congress has not abrogated states' sovereign immunity from suit for § 1983 claims."[90]

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."[91] "[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."[92]

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The Supreme Court, however, has recognized a limited exception to the general rule of sovereign immunity.[93] The *Ex Parte Young* exception 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.[94]

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[87] U.S. CONST. amend. XI.
[88] *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)).
[89] *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).
[90] *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).
[91] *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989) [internal citations omitted].
[92] *Pennhurst State Sch. & Hosp, supra,* at 101–02.
[93] *Raj v. Louisiana State Univ.*, 714 F.3d 322, 328 (5th Cir. 2013).
[94] *Ex Parte Young,* 209 U.S. 123 (1908); See generally, *Pennhurst, State School and Hospital v. Halderman*, *supra*,

To be a defendant under *Ex Parte Young*, "the state official must have 'some connection with the enforcement of the act' in question."[95] 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.'"[96] "If the official does not compel or constrain anyone to obey the challenged law, enjoining that official could not stop any ongoing constitutional violation."[97] The analysis is "provision-by-provision: The officer must enforce 'the particular statutory provision that is the subject of the litigation.'"[98] Discretionary authority to act, on its own, is insufficient to give rise to a particular duty to act, *i.e.*, a 'sufficient connection [to] enforcement.'"[99]

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. Plaintiff contends that Secretary Landry "has pushed that the Statutes at Issue be enacted, employs a team of law enforcement officers to investigate statutory violations, maintains a tip line where members of the public can report an alleged violation, provides training on what constitutes a violation of the law, and makes determinations of individuals who have violated the law. These actions, taken together,

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at 102.

[95] *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).

[96] *Texas All. for Retired Americans v. Scott*, 28 F.4th 669, 672 (5th Cir.2022) (internal citations omitted).

[97] *Id.*

[98] *Mi Familia Vota v. Ogg*, 105 F.4th 313, 327 (5th Cir. 2024), citing *Texas All. For Retired Ams. v. Scot,* 28 F. 4th 669 (5th Cir. 2022).

[99] *Id.,* citing *City of Austin v. Paxton,* 943 F. 3d 993 (5th Cir. 2019). In *Mi Familia Vota,* the Fifth Circuit found that a district attorney lacked sufficient connection to enforcement of challenged election laws in the absence of a statute *commanding* her "to prosecute Texas Election Code violations." Although the district attorney had "the *discretionary* authority to bring criminal prosecutions within her jurisdiction, including for violations of the Texas Election Code," a "general duty to see that justice is done" was not sufficient. (emphasis added).

suggest that enforcement of the Statutes at Issue is important for Defendant Landry, will occur during upcoming elections, and is (at least in part) conducted by Defendant Landry."[100]

These allegations do not establish that Secretary Landry has the particular duty to enforce the challenged laws. It is immaterial whether Secretary Landry allegedly "pushed" for the challenged laws to be enacted by the legislature. The question for purposes of *Ex Parte Young* is whether the state official has a particular duty to *enforce* the laws in question. Secretary Landry does not.

The Department of State does, indeed, maintain an Election Compliance Unit ("ECU"), which is authorized to investigate allegations of election irregularities.[101] However, the ECU does not give the Secretary of State enforcement authority for the challenged laws. Any findings by the ECU of possible violations of criminal law or the Election Code are required to be "turned over to the appropriate prosecutorial agency for further investigation or prosecution."[102] As stated above, the Secretary of State does not prosecute violations of criminal law, including alleged violations of the Election Code.

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The Fifth Circuit has repeatedly held that "the ability to *investigate* election code violations…does not rise to the level of compulsion or constraint needed" to constitute enforcement for purposes of *Ex Parte Young*.[103] In *Ostrewich v. Tatum,* the Texas attorney general was authorized to investigate complaints of criminal conduct upon referral by the secretary of state.[104] The Fifth Circuit found that this did not constitute enforcement authority of the challenged election laws because the attorney general "has no independent authority to prosecute election-

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[100] Doc. 39, para. 142.
[101] La. R.S. 18:49.1.
[102] La. R.S. 18:49.1(D).
[103] *Mi Familia Vota v. Ogg*, 105 F.4th 313, 332 (5th Cir. 2024).
[104] *Ostrewich v. Tatum*, 72 F.4th 94 (5th Cir. 2023), *cert. denied sub nom. Ostrewich v. Hudspeth*, 144 S. Ct. 570 (2024).

related criminal offenses."[105] Since the attorney general "does not have the ability to 'compel or constrain local officials' to enforce the electioneering laws, nor can he bring his own proceedings to prosecute election-law violators," the Fifth Circuit held that "the *Young* exception does not strip the Attorney General of his sovereign immunity."[106]

In *Lewis v. Scott,* the Fifth Circuit held that that the Texas Secretary of State lacked connection to enforcement of the act in question when local prosecutors, not the Secretary of State, were "specifically charged with enforcement of the criminal prohibition on possessing a voter's mail-in ballot."[107] Recently, in *Mi Familia Vota v. Ogg*, the Fifth Circuit held that *discretionary* authority to prosecute violations of Texas' Election Code was insufficient to establish connection to the enforcement of the laws in question.[108] It follows that *no authority* to prosecute is likewise insufficient, as the Fifth Circuit held in *Lewis.* Here, while the ECU is authorized to investigate allegations of election irregularities, the Secretary of State does not have *any* authority to prosecute alleged crimes, including violations of the challenged laws.[109] Therefore, Secretary Landry lacks connection to enforcement of the laws in question.

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Plaintiff also contends that the Secretary of State is responsible to notify and train the parish registrars of voters regarding changes to election law, including the challenged statutes herein.[110] The Fifth Circuit, however, has repeatedly held that training, guidelines, and assistance do not give rise to sufficient connection to enforcement of the challenged laws.

In *Ostrewich, supra,* the Texas secretary of state "adopt[ed] standards of training in election

[105] *Id.*
[106] *Id.*
[107] *Lewis v. Scott,* 28 F. 4th 659 (5th Cir. 2022).
[108] *Mi Familia Vota v. Ogg*, 105 F.4th at 332 (5th Cir. 2024).
[109] Moreover, in *Mi Familia Vota, supra,* the Fifth Circuit held that *discretionary* authority to prosecute violations of Texas' Election Code was insufficient to establish connection to the enforcement of the laws in question. It follows, therefore, that *no authority* to prosecute is likewise insufficient.
[110] Doc. 39, para. 144, 146, referencing the Declaration of Sherri Hadskey, Commissioner of Elections, Doc. 19-1.

law and procedure[]s for presiding and alternate judges," but the Fifth Circuit found that this "interpretive guidance" did not constitute direct enforcement of the challenged laws.[111] "[B]ecause 'offering advice, guidance, or interpretive assistance does not compel or constrain' presiding judges in fulfilling their duties, *Young* does not operate to strip the Secretary of her sovereign immunity."[112] Similarly, in *Richardson v. Flores,* the Fifth Circuit found that the "various advisories to local officials about ballot verification" issued by the secretary did not constitute enforcement authority for purposes of *Ex Parte Young*.[113] "Offering advice, guidance, or interpretive assistance does not compel or constrain local officials in fulfilling their duty to verify mail-in ballots."[114] The same is true in this case.

Finally, Plaintiff alleges that "Defendant Landry can take steps to ensure that the Secretary of State's employees comply with Court Orders, including by issuing directives to her employees to comply with the Court's Orders, taking remedial action against individuals who are recalcitrant, and using the monetary and policing powers available to Defendant Landry to ensure compliance."[115] Plaintiff does not specify how or the type of "remedial action" Secretary Landry can allegedly take against the unidentified "individuals who are recalcitrant," nor does Plaintiff identify the "monetary and policing powers available" to her "to ensure compliance." 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."[116] Nevertheless, the laws at issue in the present suit concern absentee by mail voting. The Secretary of State does not conduct absentee by mail voting[117], nor does she

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[111] *Id.*
[112] *Id.,* citing *Richardson v. Flores,* 28 F. 4th 649, 655 (5th Cir. 2022).
[113] *Richardson v. Flores*, 28 F.4th 649, 653 (5th Cir. 2022), *cert. denied sub nom. Weisfeld v. Scott*, 143 S. Ct. 773, 215 L. Ed. 2d 45 (2023).
[114] *Id.*
[115] Doc. 39, para. 28.
[116] *Texas All. for Retired Americans, supra.*
[117] La. R.S. 18:58(B)(1) ("The registrar shall be responsible for conducting absentee by mail and early voting in the parish he serves.").

play a role in determining the validity of absentee by mail ballots.[118] Therefore, the Secretary of 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."[119] "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."[120]

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With respect to the plaintiff's second claim regarding the witness requirements for absentee ballots[121], the criminal penalty that Plaintiff challenges does not take effect until July 1, 2025.[122] Since June 11, 2020,[123] La. R.S. 18:1306E(2)(a)[124] 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 incorrect. The criminal penalty of which Plaintiff complains does not take effect until

[118] La. R.S. 18:1313(H)(5). As discussed below, violations of the challenged statutes will not invalidate a voter's ballot, as such violations are not grounds for challenge. *See* La. R.S. 18:1313(G)(3) ("The board shall determine the validity of challenges filed in accordance with R.S. 18:1315."); La. R.S. 18:1315 (Challenge of absentee by mail or early voting ballot); and La. R.S. 18:565(A)("Grounds for challenge…(1) The applicant is not qualified to vote in the election; (2) The applicant is not qualified to vote in the precinct; or (3) The applicant is not the person whose name is shown on the precinct regisgter.").
[119] *Choice Inc. of Texas v. Greenstein*, 691 F.3d 710, 714–15 (5th Cir. 2012).
[120] *Id.,* (internal citations omitted).
[121] Doc.39, para. 7.
[122] Act 712 of 2024 Regular Session; Section 2 of Act 302 of 2024 Regular Session.
[123] Act 210 of 2020.
[124] La. R.S. 18:1306(E) relates to the signature of the witness on an absentee by mail ballot.

July 1, 2025, thus making the issues set forth in Plaintiff's second claim not ripe for consideration by this Court.[125] 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)

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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."[126] 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."[127] "A court must accept all well-pleaded facts as true and must draw all reasonable inferences in favor of the plaintiff."[128] The court is not, however, bound to accept as true legal conclusions couched as factual allegations.[129]

1. Plaintiff failed to allege that the requirements of F.R.C.P. 23 are met to bring a class action.

Plaintiff alleges that it "brings this suit as an associational plaintiff on behalf of all individuals with disabilities in Louisiana who need assistance with voting or with the submission or mailing of their ballot."[130] To the extent that Plaintiff is attempting to bring a class action

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[125] Act 712 likewise does not take effect until July 1, 2025.
[126] *Ashcroft v. Iqbal,* 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 547 (2007)).
[127] *Iqbal,* 129 S.Ct. at 1949.
[128] *Lormand v. U.S. Unwired, Inc.,* 565 F .3d 228, 232-33 (5th Cir.2009); *Baker,* 75 F.3d at 196 (5th Cir.1996).
[129] *Iqbal,* 129 S.Ct. at 149-50; *Anderson v. Law Firm of Shorty Dooley & Hall,* 2009 WL 3837550, 2(E.D. La., 2009).
[130] Doc. 39, para. 26.

through this and other allegations, it does not meet the requirements of F.R.C.P. 23. "The Supreme Court has roundly rejected the equation of Rule 23 and associational standing because such a view 'fails to recognize the special features…that distinguish suits by associations on behalf of their members from class actions.'"[131]

F.R.C.P. 23(a) sets forth the prerequisites to a class action:

> One or more members of a class may sue or be sued as representative parties on behalf of all members only if:
> (1) the class is so numerous that joinder of all members is impracticable;
> (2) there are questions of law or fact common to the class;
> (3) the claims or defenses of the representative parties are typical of the claims or defenses of the class; and
> (4) the representative parties will fairly and adequately protect the interests of the class.

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Plaintiff's First Amended Complaint sets forth no allegations to show that these prerequisites are met. Moreover, since DRLA is not, itself, an individual with a disability, it would not be a member of the purported class and thus, could not serve as class representative.[132] Therefore, Plaintiff has failed to allege that the prerequisites for a class action are met, and any allegations of class action should be dismissed or stricken.

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

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[131] *Tellis v. LeBlanc,* No.18-cv-0541 (W.D. La. 4/3/19), 2019 WL 1474777, citing *UAW v. Brock,* 477 U.S. 274, 289 (1986).
[132] In the event that the Court denies Defendant's Motion to Dismiss Plaintiff's class action allegations, Defendant reserves her right to bring additional argument that Plaintiff's claims do not meet the requirements of F.R.C.P. 23.

3. 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…".[133]

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.[134] In paragraph 51, 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]enies 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.[135]

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, 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

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[133] *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372–73 (2000) (internal citations omitted).
[134] Doc. 39, para. 49-51.
[135] Emphasis added.

disenfranchise "Louisiana's most vulnerable citizens" (individuals with disabilities).[136] 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. "Except as provided in R.S. 18:1308.1(C) and 1311(D)(1) and (5), all ballots received by the registrar by 4:30 pm on the day before election day shall be counted."[137] 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. 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.

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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[138] 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

[136] Doc. 39, para. 11.
[137] La. R.S. 18:1308(C). *See also* La. R.S. 18:1312(B)("All absentee by mail ballots which are received timely…shall be delivered to the parish board of election supervisors to be counted and tabulated as provided in R.S. 18:1313.").
[138] 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.[139]

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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

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[139] 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 4th day of October, 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