UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF LOUISIANA

DISABILITY RIGHTS LOUISIANA,	:	
	:	CASE NO.: 3:24-cv-00554-JWD-SDJ
vs.	:	
	:	Judge: John W. DeGravelles
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	:	Magistrate: Scott D. Johnson

MEMORANDUM IN OPPOSITION OF ATTORNEY GENERAL ELIZABETH MURRILL'S MOTION TO DISMISS FOR LACK OF JURISDICTION

NOW INTO COURT comes Plaintiff, Disability Rights Louisiana ("DRLA"), who files this Memorandum in Opposition to Attorney General Elizabeth Murrill's Motion to Dismiss. (R. Doc. 46). *First*, Plaintiff has standing to bring this action. *Second*, Plaintiff's claim is not barred by sovereign immunity and the Attorney General is a valid defendant under the doctrine of *Ex parte Young*. *Third* and finally, Plaintiff can pursue declaratory relief, which is held to a lower standard than a suit for injunctive relief.

I. BACKGROUND

Plaintiff is the designated protection-and-advocacy organization for persons with disabilities in the State of Louisiana, pursuant to federal statutes that include the Developmental Disabilities Assistance and Bill of Rights Act (the "DD Act" or "PADD"), 42 U.S.C. § 15001, et seq.; the Protection and Advocacy for Individuals with Mental Illness Act ("PAIMI"), 42 U.S.C. § 10801, et seq.; and the Protection and Advocacy for Individual Rights Act ("PAIR"), 29 U.S.C. § 794e, (collectively, the "P&A Acts"). Plaintiff sues over the passage of Louisiana laws that affect the voting rights of persons with disabilities. These laws are Louisiana Act No. 380, Louisiana Act. No. 317, Louisiana Act No. 302, Louisiana Act No. 712, and R.S. 18:1306(E)(2)(a), collectively referred to as the "Statutes at Issue." *See* First Am. Compl. ("FAC") ¶¶ 52-65. Louisiana Act No.

380 and Louisiana Act No. 317 amount to a one-delivery restriction while Louisiana Act No. 302, Louisiana Act No. 712 and R.S. 18:1306(E)(2)(a) amount to a one-witness restriction. FAC ¶ 52, 58.

Louisiana Act No. 380 and Louisiana Act No. 317 prohibit an individual from delivering more than one absentee ballot application or absentee ballot and criminalizes the same. FAC ¶ 52. These statutes also restrict individuals from getting help with submitting a ballot or ballot application from anyone other than "immediate family of the voter." FAC ¶¶ 53-4. These statutes violate Section 208 of the Voting Rights Act, which gives voters the right to have help from a person of their choice. FAC ¶ 57.

Louisiana Act No. 302, Louisiana Act No. 712, and R.S. 18:1306(E)(2)(a) prohibit anyone from serving as a witness on more than one ballot or assisting more than one individual with their absentee ballot. FAC ¶ 58. Louisiana Act No. 302 provides teeth to R.S. 18:1306(E)(2)(a) and prohibits assisting and providing a certificate to more than one voter and creates a criminal penalty to witness the certificate of more than one voter, with an exception only for immediate family of a voter and employees of the registrar of voters or the election division of the Department of State. FAC ¶ 61. Louisiana Act. No. 712 makes it a criminal act to witness more than one certificate of a voter who is not an immediate family member in violation of R.S. 18:1306. FAC ¶ 62. All three of these statutes conflict with Section 208 of the Voting Rights Act which entitles individuals with disabilities to assistance by a person of their choice. FAC ¶ 63.

The Statutes at Issue restrict the voting rights of individuals with disabilities in Louisiana and put their caretakers at risk of criminal prosecution. Plaintiff's complaint sets forth facts showing how its constituents are affected by these new laws. Ashley Volion is one of the constituents of DRLA who is affected by the Statutes at Issue. FAC ¶ 66. She votes absentee due

to work obligations on election day and because of the logistical difficulty of voting in person as a power wheelchair user who relies on others to drive her. FAC ¶¶ 70-1. Ms. Volion relies on a personal care attendant (PCA) to sign as a witness to her absentee ballot and assist her with placing the absentee ballot in the outgoing mailbox at the post office. FAC ¶¶ 75-8. Ms. Volion's PCAs work with multiple clients and may be asked to assist more than one of their clients, including Ms. Volion, with witnessing and delivering their absentee ballots. FAC ¶ 80. The Statutes at Issue restrict who will be able to assist Ms. Volion with her ballot, because the individual she desires to help her with witnessing and delivering her ballot may break the law by providing this assistance. FAC ¶ 83. Without the assistance of one of her PCAs, Ms. Volion may not be able to vote at all. *Id*. If one of Ms. Volion's PCAs faces criminal punishment for violating the Statutes at Issue, Ms. Volion's health and safety will be at risk without a PCA available to assist with her care. FAC ¶ 84.

Individuals who are inpatient residents at Eastern Louisiana Mental Health System ("ELMHS"), a state hospital in Jackson, Louisiana, that provides treatment for mental illness, are also DRLA constituents. Many ELMHS patients retain the right to vote and are now subject to impermissible restriction and disenfranchisement of their voting rights as a result of the Statutes at Issue. FAC ¶ 85. Individuals at ELMHS, such as Raymon Dupas, must vote absentee and have someone else deliver their ballot due to their inpatient status at the facility. FAC ¶¶ 86-91. ELMHS staff will be committing a crime if they individually assist more than one patient with delivering their absentee ballot. FAC ¶ 97. Mr. Dupas is concerned that he will not be able to vote because the ELMHS staff he will need to rely on for assistance with the process will be deterred from helping him out of fear of criminal penalty. FAC ¶¶ 98-9.

Nursing home residents are also affected. The Activities Director at the Chateau de Notre Dame Community Care Center ("Chateau"), a nursing home in New Orleans, assists disabled residents with voting as part of their job responsibilities. FAC ¶¶ 102-3. In the past the Activities Director has collected and delivered residents' absentee ballots either to a representative from the registrar of voters or by handing the ballots to the receptionist who hands them to the postal worker who collects mail at the facility. FAC ¶¶ 108-9. There are not enough staff members at Chateau to assist every resident who needs assistance and does not have immediate family available to provide it. FAC ¶ 114. If the Activities Director cannot locate enough staff to assist all the individuals who need assistance with voting, some residents of Chateau may not be able to vote. FAC ¶ 116. Additionally, some residents of Chateau may have to rely on an individual who they do not know or trust, rather than the Activities Director with whom they have an existing relationship. FAC ¶ 117.[1]

Adrian Bickham is another constituent of DRLA who will have his voting rights restricted by the Statutes at Issue. FAC ¶ 119. Mr. Bickham has always relied on his PCA for assistance with voting by mail. FAC ¶¶ 120-2. Mr. Bickham's PCA has other clients who may also need assistance with voting activities. FAC ¶ 125. If Mr. Bickham's PCA assists him in completing and delivering his absentee ballot, his PCA could risk criminal charges. FAC ¶ 126. The Statutes at Issue will not allow Mr. Bickham to vote in the way that he needs to or to receive assistance from a person of his choosing. FAC ¶ 129.

[1] Testifying in favor of the legislation before a state legislative committee, the Louisiana Secretary of State, who is a co-defendant in this case, testified that one purpose of the legislation was to provide for a means for criminal prosecution of individuals who may take mail-in ballots of nursing home residents to the post office if the residents are not an immediate family member. La. House of Rep., House & Gov't Affairs Cmtee., 3/26/24, available at https://house.louisiana.gov/H_Video/VideoArchivePlayer?v=house/2024/mar/0326_24_HG (minutes 11:06 to 12:44).

Plaintiff alleges that the responsibilities of the Louisiana Attorney General's Office include investigation of violations of criminal laws, prosecution of criminal cases, providing assistance to district attorneys in criminal cases, and maintaining "integrity in government[.]" FAC ¶ 29. Plaintiff alleges that the Defendants have been involved with the passing, implementation, and/or enforcing the Statutes at Issue. FAC ¶ 131. Plaintiff alleges that the Louisiana Attorney General's Office prosecutes claims of election fraud. FAC ¶ 147. Plaintiff provides an example of an instance in January of 2021, where the Attorney General's Office investigated Emanuel Zanders "in conjunction with" the Secretary of State's Office. FAC ¶ 147. Plaintiff alleges that the Attorney General arrested Mr. Zanders for eight counts of election fraud. FAC ¶ 148. As another example, Plaintiff further alleges that in April of 2024, the Louisiana Attorney General's Office obtained a 36-count grand jury indictment on Christina Sam in Evangeline Parish. FAC ¶ 149. Accordingly, Plaintiff alleges that "[t]he actions of Defendants make it highly probable that violations of the Statutes at Issue will be pursued with zeal by Defendants." FAC ¶ 150. Plaintiff further alleges that Defendants have established an "enforcement regime" and that it is foreseeable and probable that individual with disabilities, and those assisting them, will change their behavior and that individuals with disabilities will have a smaller pool of individuals to obtain assistance from during voting and balloting. FAC ¶ 152.

II. LAW AND ARGUMENT

Defendant Attorney General Murrill's motion to dismiss should be denied. Plaintiff has standing to bring this action. Plaintiff's claims are not barred by sovereign immunity and the Attorney General is a valid defendant under the doctrine of *Ex parte Young*. Finally, Plaintiff can pursue declaratory relief, which is held to a lower standard than a suit for injunctive relief.

1. Plaintiff Has Associational Standing.

The Attorney General argues that DRLA lacks Article III standing to bring claims on behalf of voters with disabilities. The standing requirement "tends to assure that the legal questions presented to the court will be resolved, not in the rarified atmosphere of a debating society, but in a concrete factual context conducive to a realistic appreciation of the consequences of judicial action." *Friends of the Earth, Inc. v. Chevron Chem. Co*., 129 F.3d 826, 827 (5th Cir. 1997) (quoting *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc*., 454 U.S. 464, 472 (1982).) An organizational plaintiff may satisfy Article III by demonstrating "associational standing" through a showing that "(1) one or more of the organization's members would have standing in his or her own right; (2) the interests which the organization seeks to protect in the lawsuit are germane to the purposes of the organization; and (3) the nature of the case does not require the participation of the individual affected members as plaintiffs to resolve the claims or prayers for relief at issue." *Friends of the Earth, Inc.*, 129 F.3d at 827–28.

In turn, an organization's standing is not limited strictly to official members but may also assert claims on behalf of others who have sufficient indicia of membership in the organization. This "indicia of membership" test was laid out by the Supreme Court in *Hunt v. Washington State Apple Advertising Commission*, where the Court held that a state trade association had sufficient standing to challenge advertising regulations, even though the association itself had no members. 423 U.S. 333 (1977). The Court noted that the association was a state agency and though it lacked formal members, it performed the functions of a traditional trade association, and its purpose was the protection and promotion of the Washington apple industry. *Id*. at 344. Moreover, while apple growers and dealers were not "members" of the organization, they had all the indicia of membership in the organization. *Id*. at 345.

As a P&A organization, DRLA is designated and funded pursuant to federal statute to advocate for the rights of individuals with disabilities. *See Disability Rights Texas v. Hollis,* 103 F.4th 1058, 1060 (5th Cir. 2024) (explaining the purpose of P&A organizations); *Ind. Protection & Advocacy Servs. Comm'n v. Ind. Family & Soc. Servs. Admin.*, 630 F. Supp. 3d 1022, 1029 (S.D. Ind. 2002) (noting that P&A organizations "were created by Congress to vindicate the rights of their constituents."). DRLA is thus "sufficiently identified with and subject to the influence of those it seeks to represent as to have a personal stake in the outcome of the controversy." *Or. Advoc. Ctr. v. Mink,* 322 F.3d 1101, 1111 (9th Cir. 2003).

Additional facts support that conclusion. As Louisiana's P&A organization, DRLA is empowered under the P&A Acts to protect, empower, and advocate for the rights of persons with disabilities throughout the State of Louisiana. Under these governing statutes, P&As are granted certain rights and responsibilities, including the authority to "pursue legal, administrative, and other appropriate remedies" on behalf of individuals with disabilities. 42 U.S.C. § 15043(a)(2)(A)(i), *id.* § 10805(a)(1)(B), and 29 U.S.C. §794e (f)(3). Here, DRLA has received requests from or on behalf of voters with disabilities due to concerns about how the Statutes at Issue will disenfranchise them. These individuals have "standing to present, in [their] own right, the claim (or the type of claim) pleaded by" DRLA here. *United Food and Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 555 (1996).

The fact that these individuals are "constituents" rather than "members" does not deprive DRLA of associational standing. DRLA satisfies the first prong of the *Hunt* test for many of the same reasons the trade association in *Hunt* did. As alleged in the Amended Complaint, DRLA, as a P&A organization, is authorized by Congress to protect and advocate for its Louisiana constituents, which include voters with disabilities. Those constituents possess many indicia of

membership. P&As are statutorily required to implement procedures that facilitate the participation of individuals with disabilities in setting priorities. 42 U.S.C. § 15043(a)(2)(D)(i), id. §10805(a)(6)(A), and 29 U.S.C. §794e (f)(5). PADD requires that a majority of the members of a P&A's governing board (for nonprofits, or for state agencies with governing boards) or advisory council (for state agencies without governing boards) be either individuals with disabilities who are eligible for or receiving services (or have received them in the past); or family members, advocates, guardians, or authorized representatives of such individuals. 42 U.S.C. § 15044(a)(1)(B)(i)-(ii), (5)(B)(i)-(ii). The regulations clarifying these requirements are in place "to provide a voice for individuals with developmental disabilities." 45 C.F.R. § 1386.21(g). Under PAIMI, the chair and sixty percent of the members of the P&A's advisory council must be "individuals who have received or are receiving mental health services or who are family members of such individuals." 42 U.S.C. § 10805(a)(6)(B)-(C). Both PADD and PAIMI regulations require that the public be given the opportunity to review and comment on the decisions made by a P&A's governing authority and council. 42 C.F.R. § 51.24(a)-(b) (2007); 45 C.F.R. §1326.30(a). To that end, all procedures for public comment must provide notice "in a format accessible to individuals with mental illness" and developmental disabilities. 42 C.F.R. § 51.24(b); 45 C.F.R. §1326.30(a). P&As must also "establish a grievance procedure . . . to ensure that individuals with developmental disabilities have full access to services of the system." 42 U.S.C. § 15043(a)(2)(E); see also 42 C.F.R. §51.25(a)(1) ("The P&A system shall establish procedures to address grievances from [c]lients or prospective clients of the P&A system to assure that individuals with mental illness have full access to the services of the program ....").

Consistent with these requirements, "DRLA has a governing board of directors, which is composed of members who themselves have disabilities and who broadly represent and who are

knowledgeable about the needs of individuals with developmental disabilities, mental illness, and other disabilities."[2] DRLA also publishes annually its Priorities and Objectives and invites its constituents to comment on the relative importance of the Priorities and Objectives in all of its programs.[3] Members of the disability community have the right to file grievances if they disagree with actions taken by DRLA or are wrongly denied services by DRLA.[4]

Accordingly, DRLA's constituents possess the means to influence DRLA's priorities and activities, and "[i]n a very real sense," as in *Mink*, DRLA "represents [individuals with disabilities] and provides the means by which they express their collective views and protect their collective interests." 322 F.3d at 1112 (quoting *Hunt*, 432 U.S. at 345). DRLA is answerable to the organization's constituents. *See also*, 42 U.S.C. §15043 (detailing program requirements); 34 C.F.R. § 381.10(a) (detailing program requirements). DRLA's constituents thus possess sufficient indicia of membership in the organization to permit DRLA to assert claims on their behalf.

2. <u>Plaintiff Has Adequately Alleged an "Injury-in-Fact" by its Constituents.</u>

Constituents of DRLA risk committing criminal conspiracy by asking their caretakers, aides, or others for help with absentee voting, which opens them up to criminal punishment. Additionally, constituents are injured in fact due to violation of their statutory rights by the Statutes at Issue.

a. Plaintiff's constituents are injured-in-fact by the risk of committing criminal conspiracy if they ask their caretakers for assistance with voting.

Individuals with disabilities in Louisiana who rely on caretakers to assist them with applying for, filling out, and delivering absentee ballots may commit criminal conspiracy in light of the Statutes at Issue. In Louisiana, criminal conspiracy is the "agreement or combination of two

[2] R. Doc. 39, ¶ 22.
[3] *Id*. at ¶ 23.
[4] R. Doc. 39, ¶ 24.

or more persons for the specific purpose of committing any crime." La. R.S. 14:26(A). An individual who is "party to a criminal conspiracy to commit any crime shall be fined or imprisoned, or both, in the same manner as for the offense contemplated by the conspirators." La. R.S. 14:26(C). One or more of the parties must act in furtherance of the object of the agreement or combination. *State v. Passaniti*, 49,075 (La. App. 2 Cir. 6/27/14), 144 So. 3d 1220, 1232, *writ denied*, 2014-1612 (La. 3/6/15), 161 So. 3d 14. If the intended crime is consummated, the individuals who conspired can be charged with conspiracy or the completed offense, or both. *Id*. Specific intent is an essential element of criminal conspiracy. *Id.*

Plaintiff's constituents may not be conspiring to commit a crime as obvious as murder or armed robbery, but lack of knowledge of the crime they may be committing will not shield them from criminal liability. *State v. West*, 33,133 (La. App. 2 Cir. 3/1/00), 754 So. 2d 408, 411 ("Ignorance of the provisions of the criminal code or any criminal statute is not a defense to any criminal prosecution").

An injury-in-fact may be the allegation of future injury, for the purposes of Article III standing. *Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 158 (2014). Where a "threatened injury is 'certainly impending,' or there is a 'substantial risk' that the harm will occur," that future injury is sufficient to establish standing. *Id*. (quoting *Clapper v. Amnesty Intern. USA*, 568 U.S. 398, n.5 (2013)). In *Driehaus*, the Supreme Court found that a political advocacy group had sufficiently alleged threatened injury where a state law prohibiting false statements was credibly going to be enforced, resulting in criminal prosecution. *Id*. at 161.

It is reasonable to believe that an individual with a disability and their caretaker will commit conspiracy to violate the Statutes at Issue. As described above, an individual like Ashley Volion intends to ask one of her PCAs to assist her with voting absentee, as is her express right

under the Voting Rights Act. If this PCA has already assisted another client by witnessing a ballot or delivering a ballot, an individual like Ms. Volion and their caretaker will be committing criminal conspiracy to violate the Statutes at Issue. An individual with a disability asking a PCA to assist with witnessing a ballot or delivering a ballot, where that PCA has already assisted another individual with one of those tasks, would constitute the specific intent to violate the Statutes at Issue. By following through with witnessing or delivering a ballot, as may be required as part of their job, that PCA would be acting in furtherance of the object of the agreement. Particularly at a facility such as ELMHS or Chateau, where there are staffing issues that may preclude providing one person for each individual resident who needs help with voting absentee, it is highly possible that a resident will ask a staff member for assistance with witnessing or delivering their absentee ballot, when that staff member has already assisted someone else. At that point, the staff member will have to decide between fulfilling their job obligations of assisting a patient, possibly facilitating that patient's disenfranchisement if they decline, or committing a crime and opening both themselves and their patients up to criminal liability in the process.

Plaintiff's constituents who will open themselves up to criminal prosecution for conspiracy to violate the Statutes at Issue by asking a PCA or other caretaker or staff member to assist them with the absentee voting process. Without question, this would constitute a concrete and particularized injury as a result of the enforcement of these statutes. Even though the injuries-in-fact may not have occurred yet, they still constitute a threatened injury for the purposes of standing, as there is a credible threat of enforcement of the Statutes at Issue in the form of criminal prosecution. *Driehaus*, 573 U.S. at 161.

b. Plaintiff's constituents are injured in fact due to violation of their statutory rights by the existence of the Statutes at Issue.

According to the Supreme Court, an "injury in fact" is "an invasion of a legally protected interest which is (a) concrete and particularized[]; and (b) 'actual or imminent, not 'conjectural' or 'hypothetical[.]'" *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992). By particularized, the Supreme Court "mean[s] that the injury must affect the plaintiff in a personal and individual way." *Id.* at 560 n.1. The injury alleged as an Article III injury-in-fact need not be substantial; "it need not measure more than an 'identifiable trifle.'" *Ass'n of Cmty. Organizations for Reform Now v. Fowler*, 178 F.3d 350, 358 (5th Cir. 1999) (quoting *United States v. Students Challenging Regulatory Agency Procedures*, 412 U.S. 669, 689 n.14 (1973). Further, the injury can be actual or threatened. *Valley Forge Christian Coll. v. Americans United for Separation of Church & State, Inc.*, 454 U.S. 464, 472 (1982) (standing requires that the plaintiff "'personally has suffered some actual or threatened injury'") (quoting *Gladstone, Realtors v. Village of Bellwood*, 441 U.S. 91, 99 (1979)).

Moreover, "the actual or threatened injury required by Art[icle] III may exist solely by virtue of 'statutes creating legal rights, the invasion of which creates standing.'" *Wendt v. 24 Hour Fitness USA, Inc.*, 821 F.3d 547, 552 (5th Cir. 2016) (citations omitted). "'Congress may create a statutory right or entitlement the alleged deprivation of which can confer standing to sue even where the plaintiff would have suffered no judicially cognizable injury in the absence of statute.'" *Id.* The "'standing question in such cases is whether the ... statutory provision on which the claim rests properly can be understood as granting persons in the plaintiff's position a right to judicial relief.'" *Id.* The injury-in-fact analysis "for purposes of Article III is directly linked to the question of whether the plaintiff 'has suffered a cognizable statutory injury under the' statute in question." *Id.* Thus, "when a plaintiff grounds a claim on a statute, standing turns on whether the

statutory provision at issue grants the plaintiff a right to judicial relief." *Jungemann v. Dept of State Louisiana*, No. 1:22-CV-02315, 2023 WL 5487390, at *3 (W.D. La. Aug. 24, 2023). Courts must afford due respect to Congress's decision to impose a statutory prohibition or obligation on a defendant, and to grant a plaintiff a cause of action to sue over the defendant's violation of that statutory prohibition or obligation. *Spokeo, Inc. v. Robins*, 578 U.S. 330, 341 (2016). As the Supreme Court said in *Lujan*, Congress may "elevat[e] to the status of legally cognizable injuries concrete, *de facto* injuries that were previously inadequate in law[.]" 504 U.S. at 578. Nonetheless, the plaintiff must still sue over "harm to herself," even if the harm is an intangible harm. *TransUnion LLC v. Ramirez*, 594 U.S. 413, 427 (2021). A plaintiff cannot sue merely "to ensure a defendant's 'compliance with regulatory law[.]'" *Id*.

Plaintiff has alleged that its constituents will suffer cognizable, intangible harm caused by the Statutes at Issue, which will limit their ability to obtain help with voting from any person of their choosing. Section 208 of the Voting Rights Act which affords them the right to obtain assistance from anyone of their choosing, subject to limited exceptions. This Court is obligated to afford Congress' decision to afford these rights "due respect," and Attorney General Murrill does not argue that this Court should deviate from said obligation.

The harm alleged by Plaintiff's constituents is personal and cognizable harm, even if intangible. Each of the threatened constituents would have standing to sue as to threatened "harm to themselves." Ms. Volion, Mr. Bickham, and the ELMHS residents are examples of individuals with disabilities who live in Louisiana, and whose right to choose any person they want to assist them with voting is threatened by the Statutes at Issue. Through DRLA, these individuals are suing because their own intangible right to vote, and right to vote with the assistance of a person they have chosen, is threatened.

As is set forth above, threatened injury is sufficient. *Valley Forge Christian Coll.*, 454 U.S. at 472. In its brief, Defendant Murrill argues that Plaintiff's theory of injury is too "attenuated" because it "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."[5] That misrepresents the injury Plaintiff alleges here because it ignores the chilling effect this will have on Plaintiff's constituents' voting activities and the very real possibility that these Statutes at Issue will result in prosecution of these constituents and their caregivers or assistants. Plaintiff's constituents are injured by the threat of prosecution for themselves and their caretakers or others who assist them with their day-to-day tasks under the Statutes at Issue. The restrictions in the Statutes at Issue will restrict Plaintiff's constituents from choosing the individual who assists them with voting, and it may prevent them from voting altogether if they are unable to find someone to assist them.

Additionally, if Plaintiff's constituents violate these Statutes at Issue by selecting a nonrelative caretaker to assist them with voting, the constituents' health, they will be subject to fear that the caretaker will be prosecuted, which affects their own safety and independence. As stated above, Plaintiff's constituents themselves could be prosecuted with criminal conspiracy for asking a caretaker or assistant to violate the Statutes at Issue.

Far from attenuated, the harm to many of Plaintiff's constituents is certain: either try to comply with the Statutes at Issue by obtaining assistance in voting only from the narrow set of persons permitted under the statute, or else do not vote at all.

A plaintiff can sue over threatened injury. There is nothing hypothetical about the Statutes-at-Issue. The bills were passed by the Louisiana legislature and were signed into law. The Statutes

[5] R. Doc. 46-1, p. 5.

at Issue are reality. Elections occur on a regular and ongoing basis. Those scheduled elections are not "hypothetical."

c. Plaintiff Has Standing to Pursue a Pre-Enforcement Challenge Because the Challenged Laws are Deterring Legal Conduct and Modifying Behavior.

For a pre-enforcement challenge to a statute, the plaintiff must "(1) ha[ve] an intention to engage in a course of conduct arguably affected with a constitutional interest, (2) [their] intended future conduct is arguably proscribed by the policy in question, and (3) the threat of future enforcement of the challenged policies is substantial." *Speech First, Inc. v. Fenves*, 979 F.3d 319, 330 (5th Cir. 2020), *as revised* (Oct. 30, 2020) (*Susan B. Anthony List v. Driehaus*, 573 U.S. 149, 161-64 (2014)).

Here, Plaintiff has standing to pursue a pre-enforcement challenge. Plaintiff's constituents have an intent to engage in a course of conduct affected with a constitutional interest. Voting is a constitutional right. *Reynolds v. Sims*, 377 U.S. 533, 554 (1964) ("[T]he Constitution of the United States protects the right of all qualified citizens to vote, in state as well as in federal elections."). Many, especially those living in congregate facilities that they are unable to leave, will not be able to obtain assistance from one of the limited individuals permitted to assist them under the Statutes at Issue and therefore will have to violate them to exercise their franchise.

Further, the lawful conduct of Plaintiff's constituents is proscribed by the policy in question. Plaintiff's constituents have a federal statutory right to seek to obtain assistance in balloting—both from individuals witnessing ballots and individuals delivering ballots—from whomever they want, whenever they want. That conduct is now made illegal by the Statutes at Issue.

To be sure, many of Plaintiff's constituents may not yet know if the individual who they will seek assistance from will (or will not) be unavailable. But it is well established that deterrence

itself constitutes an actual injury. See, e.g., *Pickern v. Holiday Quality Foods Inc.*, 293 F.3d 1133, 1138 (9th Cir. 2002) ("We hold that a disabled individual who is currently deterred from patronizing a public accommodation due to a defendant's failure to comply with the ADA has suffered 'actual injury.'"); *Disabled Americans For Equal Access, Inc. v. Ferries Del Caribe, Inc.*, 405 F.3d 60, 64 (1st Cir. 2005) ("[A] disabled individual who is currently deterred from patronizing a public accommodation due to a defendant's failure to comply with the ADA and who is threatened with harm in the future because of existing or imminently threatened noncompliance with the ADA suffers actual or imminent harm sufficient to confer standing.").

Here, as just one example, Ms. Volion fears that, because of the Statutes at Issue, she will be restricted in who will be able to assist her with her absentee ballot.[6] Ms. Volion only has two PCAs.[7] Ms. Volion does not wish to put any of her PCAs at risk of criminal charges.[8] If one of Ms. Volion's PCAs did face criminal charges due to a violation of the Statutes at Issue with a possibility of jail time, it would put Ms. Volion's health and safety at risk by not having a personal care attendant available for her care.[9] Ms. Volion's intended future conduct—obtaining unfettered assistance from her PCA—is proscribed by the policy in question. Ms. Volion is deterred from obtaining voting assistance in the manner she prefers. Given Defendant Murrill's interest in the Statutes at Issue, the threat of future enforcement of the challenged policies is substantial. Thus, Ms. Volion is suffering an injury-in-fact in the form of deterrence because the Statutes at Issue do not allow her to vote in the way that she needs to or to receive assistance from a person of her choice.[10]

[6] *See* R. Doc. 39, ¶ 80.
[7] *See Id.*
[8] *See* R. Doc. 39, ¶ 83.
[9] *See* R. Doc. 39, ¶ 84.
[10] *See Id.*

3. Plaintiff's Claim Against the Attorney General is not Barred by Sovereign Immunity

Based on the allegations in the Amended Complaint, the Attorney General has strayed from her general supervisory role of Louisiana law enforcement and is actively enforcing Louisiana's election laws. As such, Plaintiff has alleged that the Attorney General has "some involvement" with the enforcement of the Acts at Issue and can sue for injunctive relief pursuant to the doctrine of *Ex parte Young*.

The legal fiction of *Ex parte Young*, however, provides an "exception to Eleventh Amendment sovereign immunity" in the subset of cases to which it applies. *City of Austin v. Paxton*, 943 F.3d 993, 997 (5th Cir. 2019). The exception permits federal courts to enjoin prospective unconstitutional conduct by "individuals who, as officers of the state, are clothed with **some duty** in regard to the enforcement of the laws of the state, and who threaten and are about to commence proceedings, either of a civil or criminal nature." *Ex parte Young*, 209 U.S. at 155–56 (emphasis added). To assess whether an official has the requisite connection to the enforcement action, the Fifth Circuit has provided three guideposts, which "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.* (quotation marks and citation omitted)." *Mi Familia Vota v. Ogg*, 105 F.4th 313, 325 (5th Cir. 2024).

a. The Attorney General Has Assumed a Duty to Enforce Louisiana's Election Laws.

Plaintiff alleges that the Attorney General and the Secretary of State have established an "enforcement regime," and Plaintiff provides two exemplars of recent election enforcement actions pursued by the Attorney General. Taken together, Plaintiff alleges that the Attorney

General has a political interest in enforcing Louisiana's election laws and has assumed a duty to enforce Louisiana's election laws, which would include the Statutes at Issue.

Attorney General Murrill argues that she is the wrong defendant here because she does not have control over which laws are prosecuted by local district attorneys pursuant to La. Code Crim. P. art. 61.[11] Attorney General Murrill ignores the subsequent provision which provides that "[t]he attorney general shall exercise supervision over all district attorneys in the state[ ]" and "has authority to institute and prosecute, or to intervene in any proceeding, as he may deem necessary for the assertion or protection of the rights and interests of the state." La. Code Crim. P. art. 62(A-B).

In Louisiana, a duty can arise because of a statutory obligation or through assumption of a duty. "Under Louisiana law, one who does not owe a duty to act may assume such a duty by acting." *Hebert v. Rapides Par. Police Jury*, 06-2001, p. 9 (La. 4/11/07), 974 So.2d 635, 643. Louisiana governmental agencies can assume a duty. *Long v. State ex rel. Dep't of Transp. & Dev.*, 2004-0485 (La. 6/29/05), 916 So.2d 87, 103 (overruling two prior cases that held the DOTD automatically assumed a duty for unmodified railroad crossings, but not abrogating the underlying principle that the DOTD can assume a duty). The determination of whether a particular duty should be imposed on a particular governmental agency is a policy question. *Faith in Farming Co., L.L.C. v. State through Dep't of Transportation & Dev.*, 55,011 (La. App. 2 Cir. 4/19/23), 361 So. 3d 1132, 1137, *writ denied*, 2023-00708 (La. 9/26/23), 370 So. 3d 477. While the above cases were litigated in the tort context, they shed light on the fact that, in Louisiana, government entities can bear a duty either due to statutory requirement or because of the acts they actually perform.

[11] R. Doc. 46-1, p. 1-2.

Here, the Louisiana Attorney General has gone beyond a general duty and assumed a duty to enforce Louisiana's election laws. In the Amended Complaint, Plaintiff alleges that the Louisiana Attorney General and the Secretary of State have established an "enforcement regime," and Plaintiff highlights two recent election enforcement actions pursued by the Attorney General. In one of those cases, in January of 2021, the Attorney General "in conjunction with" the Secretary of State, investigated Emanuel Zanders, a councilman from Amite, Louisiana.[12] Following this investigation, the Attorney General arrested Mr. Zanders for eight counts of election fraud.[13] Plaintiff provides a second example where in April of 2024 the Attorney General obtained a 36-count grand jury indictment of Christina Sam in Evangeline Parish.[14] These cases show that, as to election-related offenses, the Louisiana Attorney General's Office has moved beyond having a generalized "duty," and has affirmatively assumed a duty to investigate, enforce, and prosecute election offenses.

Plaintiff's theory comports with case law on this issue from the Fifth Circuit and this Court. The Attorney General cites *City of Austin v. Paxton* to support the proposition that a discretionary role in criminal prosecutions is insufficient to give rise to a particular duty to act.[15] The Attorney General's citation is misplaced.

In *City of Austin v. Paxton*, the plaintiff-City sued to enjoin the Texas Attorney General's enforcement of a state law which prevented municipalities and counties from adopting ordinances that restrict landlords' rights to refuse to rent to voucher recipients. 943 F.3d 993, 996 (5th Cir. 2019). The plaintiff argued that the Texas Attorney General had a "habit" of suing or intervening

[12] R. Doc. 39, ¶ 147.
[13] R. Doc. 39, ¶ 148.
[14] R. Doc. 39, ¶ 149.
[15] R. Doc. 46-1, p. 9.

in litigation against the City involving municipal ordinances and policies to "enforce the supremacy of state law." *Id*. at 1000. In ruling that the Texas Attorney General lacked sufficient connection to the enforcement of the statute at issue, the Fifth Circuit found that the Texas Attorney General had enforced different statutes under different circumstances, which did not necessarily show that he was likely to do the same in this circumstance. *Id*. at 1002. The court also found that the City faced "no consequence" if the Attorney General did attempt to enforce the statute because there was "no threat of criminal prosecution[.]" *Id*. at 1002.

In *Paxton* the court did not find any allegation that the Texas Attorney General had previously enforced in a consistent manner the type of statute at issue. *Id*. at 1000. Here, in contrast, the Louisiana Attorney General has recently brought at least two election related criminal prosecutions. Given that the scope of what constitutes a "criminal act" has been substantially expanded by the Statutes at Issue, it is likely that the Louisiana Attorney General will continue to expand upon its election offense prosecution. Additionally in *Paxton*, as is noted above, the City faced "no consequence" if the Attorney General did attempt to enforce the statute because there was "no threat of criminal prosecution[.]" *Id*. at 1002. Here, in contrast, if the Statutes at Issue are enforced against individuals with disabilities and their caretakers or assistants, it will result in criminal prosecution with possible incarceration.

This Court's ruling in *White Hat v. Landry* dismissing Louisiana Attorney General in the context of *Ex parte Young* is not a bar to Plaintiff's claim. 475 F. Supp. 3d 532, 549 (M.D. La. 2020). In *White Hat*, environmentalists sued to enjoin the enforcement of La. R.S. 14:61, which related to redesignation of criminal conduct as to pipelines and the associated criminal penalties. *Id*. at 537-38. Plaintiffs sued the Louisiana Attorney General and argued that he had requisite connection with the pipeline statute because he was the "chief legal officer" of Louisiana. *Id*. at

545-46. The plaintiffs did not allege that the Louisiana Attorney General had ever brought any criminal charges related to pipeline protesting, or that the Louisiana Attorney General had established an enforcement regime with a related Louisiana governmental agency. *Id*. at 549. Quite simply, in *White Hat*, there was no evidence that the Louisiana Attorney General had "more than a scintilla of a connection with the enforcement" of the statute. *Id*.

Nor is the possibility that the Louisiana district attorneys could initiate criminal prosecutions related to election offenses a bar to Plaintiff pursuing relief against the Louisiana Attorney General. In *White Hat*, this Court stated "absent some showing that the Attorney General has been asked to assist in the criminal prosecution of the Statute, or has instituted, prosecuted, or intervened for cause when authorized by a court having original jurisdiction over the criminal prosecution, the general obligation of the Attorney General as the chief legal officer of Louisiana in prosecuting cases under the statute is indirect and remote." *Id*. Unlike in *White Hat*, DRLA alleges the Louisiana Attorney General has developed an enforcement regime related to election offenses.[16] The Attorney General has recently brought at least two criminal cases related to election offenses.[17] It is reasonable and foreseeable that the Louisiana Attorney General will enforce the newly expanded Louisiana election laws. Based on these allegations, the Louisiana Attorney General has the enforcement authority necessary for liability under *Ex parte Young*.

b. The Attorney General Has a Demonstrated Willingness to Exercise Her Assumed Duty.

As is set forth above, the Louisiana Attorney General is alleged to have assumed a duty to enforce Louisiana election offenses. Two such examples are provided in the Amended Complaint.[18] In its moving papers, the Louisiana Attorney General claims that there are no

[16] R. Doc. 39, ¶ 151.
[17] R. Doc. 39, ¶¶ 147-49.
[18] R. Doc. 39, ¶¶ 147-49.

allegations in the Amended Complaint that she has "demonstrated a willingness to exercise the specific duty to enforce the Election Code in general or the challenged Acts particularly."[19] This is simply inaccurate. Based on the allegations in the Amended Complaint, the Louisiana Attorney General has plainly demonstrated a willingness to exercise her assumed duty to enforce Louisiana election offenses.[20]

The lack of enforcement as to the Statutes at Issue is not surprising. No election has occurred since the statutes became law, and thus no enforcement actions could be brought yet. The Fifth Circuit has held that "[a] history of prior enforcement is not required… [though] the Plaintiffs must allege *some* action taken by [the official] to show a demonstrated willingness to enforce." *Ogg*, 105 F.4th at 330.

c. The Attorney General, Through Her Conduct, Compels or Constrains Individuals to Obey Louisiana's Election Laws.

The Louisiana Attorney General, through her conduct, compels or constrains individuals to obey Louisiana's election laws. The specter of criminal prosecution is clearly a deterrent against violation of a state law. Given that the Louisiana Attorney General has arrested individuals before for election related offenses—and has issued press release to that effect—the general public is undoubtedly aware that they are within the crosshairs of the Attorney General.

Given the importance of elections and the national conversation about election fraud that has been present for the last four years, Louisiana residents are certainly deterred from infringing Louisiana election laws because of the threat of prosecution from the Louisiana Attorney General's Office.

[19] R. Doc. 46-1, pg. 10.
[20] R. Doc. 39, ¶¶ 147-49.

4. Plaintiff Can Pursue Declaratory Relief Even if Injunctive Relief is Unavailable.

Even if this Court were to hold that Plaintiff cannot pursue injunctive relief, the Court should rule that Plaintiff may pursue declaratory relief against the Louisiana Attorney General. The Declaratory Judgment Act, 28 U.S.C. § 2201, provides a mechanism for pre-enforcement review of a statute. *See Steffel v. Thompson*, 415 U.S. 452, 478 (1974) (Rehnquist, J., concurring) ("[M]y reading of the legislative history of the Declaratory Judgment Act of 1934 suggests that its primary purpose was to enable persons to obtain a definition of their rights before an actual injury had occurred ..."). Here, Plaintiff seeks declaratory relief in their Amended Complaint.[21]

In determining whether Plaintiff has standing to bring its claim pursuant to the Declaratory Judgment Act the basic inquiry is whether there exists, under the facts alleged, "a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment." *Maryland Cas. Co. v. Pac. Coal & Oil Co.*, 312 U.S. 270, 273 (1941). Declaratory relief may be appropriate where there is no pending state prosecution, and a plaintiff is stuck "between the Scylla of intentionally flouting state law and the Charybdis of forgoing what he believes to be constitutionally protected activity in order to avoid becoming enmeshed in a criminal proceeding." *Steffel*, 415 U.S. at 462.

In *Steffel v. Thompson*, the Supreme Court analyzed the appropriateness of declaratory relief, specifically the existence of an actual controversy, independently from deciding whether to issue an injunction. 415 U.S. at 469–70. The plaintiff in *Steffel* sought to distribute handbills on the sidewalk near a local shopping center in protest of the United States' involvement in the Vietnam War. The plaintiff was asked to leave repeatedly and was eventually threatened with

[21] R. Doc. 39, p. 29 (prayer for relief requesting that the Court declare that the Statutes at Issue 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).

arrest for criminal trespass. *Id*. at 454–56. The plaintiff sought declaratory relief that the state trespassing statute, as applied, interfered with the exercise of his constitutional rights. *Id*. at 454–55. The Supreme Court held that the plaintiff demonstrated an actual controversy because the plaintiff suffered threats of injury that were not "imaginary or speculative" and had not been rendered moot. *Id*. at 458–60 (contrasting *Younger v. Harris*, 401 U.S. 37, 41 (1971) and *Golden v. Zwickler*, 394 U.S. 103 (1969)). Since the plaintiff faced a genuine threat of injury absent a declaration by the Court, an "actual controversy" existed and declaratory relief was appropriate. *Id*. at 452-53.

In *Babbitt v. United Farm Workers National Union*, the Supreme Court allowed a union to challenge the constitutionality of a state statute regulating election procedures, consumer publicity, and criminal sanctions, even though no elections or prosecutions had yet occurred. 442 U.S. 289, 302 (1979). The Court said that "…when fear of criminal prosecution under an allegedly unconstitutional statute is not imaginary or wholly speculative a plaintiff need not 'first expose himself to actual arrest or prosecution to be entitled to challenge [the] statute.'" *Id*. (quoting *Steffel*, 415 U.S. at 459).

Plaintiff's claims against Attorney General Murrill constitute a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment. The Louisiana Attorney General has not disavowed any intention of invoking the criminal penalty provision against individuals who violate Louisiana election laws. Plaintiff thus has reason to fear that its constituents and their caretakers or assistants will be prosecuted pursuant to the Statutes at Issue. There is an election currently underway, with early voting commenced on October 18, 2024, and absentee ballots actively being completed and

delivered in advance of the November 5, 2024 election date.[22] This case could not be more immediate or real, in terms of the limbo position the Statutes at Issue create for Plaintiff's constituents and those who work with them as they seek to complete and deliver absentee ballots at present. In the event that this Court declines to grant injunctive relief, Plaintiff requests that this Court grant declaratory relief, vindicating the voting rights of Plaintiff's constituents.

III. CONCLUSION

Defendant Attorney General Murrill's motion to dismiss should be denied for the foregoing reasons. Plaintiff should be allowed to proceed with this case in order to vindicate their constituents' rights under federal law.

By:/s/ *Garret S. DeReus*
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CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of October, 2024, the foregoing pleading has been or will be delivered to counsel of record for all parties via ECF filing.

By: /s/ Garret S. DeReus
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