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

REPLY MEMORANDUM IN SUPPORT OF MOTION TO DISMISS BY DEFENDANT NANCY LANDRY

NOW INTO COURT, through undersigned counsel, comes Defendant, Nancy Landry, in her official capacity as Secretary of State of Louisiana (hereinafter "Defendant" or "Secretary Landry"), who respectfully submits the following Reply Memorandum in Support of Motion to Dismiss.

I. OBJECTION TO REQUEST FOR JUDICIAL NOTICE

Secretary Landry objects to Plaintiff's request in footnote 1 that the Court take judicial notice of her testimony regarding HB 476. The link to the testimony has not been authenticated. Moreover, any testimony that Secretary Landry may have provided in connection with the challenged laws is not relevant pursuant to *In re Paxton,* 60 F.4th 252 (5th Cir. 2023), so judicial notice is unnecessary. In the event that the Court is inclined to take judicial notice, Secretary Landry respectfully requests an opportunity to be heard on the propriety of taking judicial notice pursuant to F.R.E. 201(e).

II. F.R.C.P. 12(B)(1) OBJECTION TO SUBJECT MATTER JURISDICTION

a. Plaintiff lacks standing.

Plaintiff does not deny that Disability Rights of Louisiana ("DRLA") is a membership

organization.[1] Rather, Plaintiff urges the Court to disregard its members and look instead to its "constituents" to determine that it has associational standing, a tacit acknowledgment that Plaintiff's members themselves do not have standing. Citing a case from another circuit, Plaintiff encourages the Court to "follow the 'universal practice' of other federal courts and apply the indicia of membership test to determine whether DRLA can assert standing for its nonmember constituents."[2]

The "universal practice" in the Fifth Circuit, however, is to apply the "indicia of membership" analysis only in cases where the organization does not have members. In *Friends of the Earth, Inc. v. Chevron Chemical Co.,* the Fifth Circuit applied the "indicia of membership" analysis to an organization that did not have any legal members.[3] In *Students for Fair Admissions, Inc. v. University of Texas at Austin,* the Fifth Circuit held that the plaintiff was a "traditional membership organization" and thus, there was "no occasion to apply the indicia-of-membership test."[4] A year later, the Supreme Court affirmed this approach, holding that "[t]he indicia of membership analysis employed in *Hunt* has no applicability" in cases where the plaintiff "is indisputably a voluntary membership organization with identifiable members."[5]

Here, DRLA is indisputably a voluntary membership organization with identifiable members, its Board of Directors.[6] As such, the "indicia of membership" test does not apply to determine Plaintiff's standing. Instead, the Court must look to the standing of DRLA's members, its Board of Directors. Aside from a conclusory and self-serving affidavit that "DRLA's board of directors reflects the diversity of the disability community and includes members who themselves

[1] Doc. 58, p. 3.
[2] Doc. 58, p. 6, citing *In re Financial Oversight and Management Board for Puerto Rico,* 110 F. 4th 295, 312 (1st Cir. 2024).
[3] *Friends of the Earth, Inc. v. Chevron Chem. Co.*, 129 F.3d 826, 828 (5th Cir. 1997).
[4] *Students for Fair Admissions, Inc. v. Univ. of Texas at Austin*, 37 F.4th 1078, 1085 (5th Cir. 2022).
[5] *Students for Fair Admissions, Inc. v. President & Fellows of Harvard Coll.*, 600 U.S. 181, 201, (2023).
[6] Doc. 51-2.

identify as persons with a disability or are a parent, guardian, or caretaker of a person with a disability," Plaintiff sets forth no concrete allegations that its members have suffered an injury-in-fact as a result of the challenged laws or an alleged violation of the Voting Rights Act.

The fact that DRLA is allegedly the designated Protection and Advocacy ("P&A") organization for Louisiana does not automatically confer standing upon DRLA. Plaintiff encourages the Court to look to another out of circuit case, *Doe v. Stincer,* for guidance.[7] In *Doe,* the Eleventh Circuit found that despite being authorized by congress "to protect and litigate the rights of individuals with mental illness," the P&A was still required to meet all three elements of standing: injury-in-fact, causation, and redressability.[8] The court ultimately concluded that the P&A did not establish standing because it could not "show that any of its clients suffered a concrete injury that is traceable to the challenged statute and could be redressed by a favorable decision in this action."[9] Here, regardless of DRLA's alleged status as the P&A for Louisiana, DRLA does not meet the elements of standing.

Regarding injury-in-fact, Plaintiff claims that its purported constituents have suffered "de facto injuries" due to the alleged violation of Section 208 of the Voting Rights Act.[10] While "[i]t is true that [t]he actual or threatened injury required by Art. III may exist solely by virtue of statutes creating legal rights, the invasion of which creates standing,"[11] the injury must still be concrete, particularized, and actual or imminent. Plaintiff admits in its Opposition that its purported constituents "do not yet know if the individuals who they will seek assistance from will (or will not) be legally barred from assisting them."[12] This admission demonstrates the speculative nature

[7] *Doe v. Stincer,* 175 F. 3d 879 (11th Cir. 1999).
[8] *Id.* at 886.
[9] *Id.* at 887.
[10] Doc. 58, p. 10.
[11] *Wendt v. 24 Hour Fitness USA, Inc.*, 821 F.3d 547, 552 (5th Cir. 2016) (internal citations omitted).
[12] Doc. 58, p. 17.

of the alleged injuries to Plaintiff's purported constituents.

Plaintiff also asserts a new alleged injury – deterrence.[13] Since deterrence is not alleged as an injury in Plaintiff's First Amended Complaint, Secretary Landry objects to Plaintiff's attempt to amend the pleadings through its Opposition. "A party cannot amend pleading through opposition memoranda. The law is well-settled that arguments in a brief are not a substitute for properly pleaded allegations: 'it is axiomatic that a complaint cannot be amended by briefs in opposition to a motion to dismiss.'"[14] Nevertheless, deterrence has only been recognized as an injury-in-fact for purposes of an ADA claim.[15] To sue under the ADA, "a plaintiff must simply allege that he or she has become aware of discriminatory conditions existing at a public accommodation, and is thereby deterred from visiting or patronizing that accommodation" because "the ADA does not require a person with a disability to engage in a futile gesture."[16] Not only is deterrence not alleged as an injury-in-fact in Plaintiff's First Amended Complaint, but deterrence has not been recognized as an injury-in-fact in the context of an alleged violation of the Voting Rights Act.

Regarding causation, Plaintiff contends that its purported constituents are, indeed, individuals regulated by the statutes at issue because "there is a very real and credible possibility that individuals with disabilities in Louisiana may commit criminal conspiracy in light of the Statutes at Issue."[17] These allegations are new, and Secretary Landry again objects to Plaintiff's attempt to amend the pleadings through its Opposition. Nevertheless, these allegations only further

[13] Doc. 58, p. 17.
[14] *Harris v. Louisiana Through Louisiana Dep't of Pub. Safety & Corr.*, No. CV 22-897-SDD-RLB, 2024 WL 1834370, at *2 (M.D. La. Apr. 26, 2024), citing *Becnel v. St. Charles Par. Sheriff's Off.*, 2015 WL 5665060, at *1 n.3 (E.D. La. Sept. 24, 2015).
[15] In fact, the two cases cited by Plaintiff in support of its assertion that "deterrence constitutes an actual injury" are ADA cases.
[16] *Equal Rts. Ctr. v. Uber Techs., Inc.*, 525 F. Supp. 3d 62, 76 (D.D.C. 2021), citing 42 U.S.C. § 12188(a).
[17] Doc. 58, p. 12.

highlight Plaintiff's inability to show that Secretary Landry caused or will cause the alleged injuries to Plaintiff's members or purported constituents.

Plaintiff relies on speculation to show that disabled persons may also be subject to criminal liability, not just the would-be witnesses or assistants. For example, Plaintiff writes,"[i]f 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."[18] Even more speculative, Plaintiff contends that "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."[19]

Any alleged injury to Plaintiff's members or purported constituents in those hypothetical scenarios depends upon the behavior of third parties, not the actions of Secretary Landry.[20] Even if these alleged hypothetical behaviors constitute criminal conspiracy, Secretary Landry does not prosecute violations of criminal law.[21] "[F]ederal courts are skeptical of 'standing theories that require guesswork as to how independent decisionmakers will exercise their judgment.'"[22] Here, Plaintiff's allegations are too speculative to establish standing under Article III against Secretary Landry.

[18] Doc. 58, p. 12-13 (emphasis added).
[19] Doc. 58, p. 13 (emphasis added).
[20] This hypothetical staff member is not alleged to be a member of DRLA or a purported constituent, so any alleged injury to this staff member does not give rise to an injury-in-fact to Plaintiff.
[21] Since Secretary Landry does not prosecute violations of criminal law, she takes no position as to whether these alleged hypothetical behaviors would, in fact, constitute "criminal conspiracy to violate the statutes at issue."
[22] *Attala Cnty., Mississippi Branch of NAACP v. Evans*, 37 F.4th 1038, 1042 (5th Cir. 2022), citing *Clapper v. Amnesty Int'l USA*, 568 U.S. 398, 413 (2013).

b. Even if Declaratory Relief is available, Plaintiff lacks standing to obtain a declaratory judgment.

In Section 7 of its Opposition, Plaintiff argues that "…the Court should rule that Plaintiff may pursue declaratory relief against the Louisiana Attorney General."[23] Plaintiff further asserts that "Plaintiff's claims against Attorney General Murrill constitute a substantial controversy" and that "[t]he Louisiana Attorney General has not disavowed any intention of invoking the criminal penalty provision against individuals who violate Louisiana election laws."[24] Plaintiff makes no mention of Secretary Landry, much less any argument regarding the availability of declaratory relief against Secretary Landry. Nevertheless, for the reasons previously discussed, Secretary Landry maintains that Plaintiff lacks standing under Article III to obtain a declaratory judgment.[25]

c. Secretary Landry is entitled to sovereign immunity for Plaintiff's 42 U.S.C. § 1983 claim.

Secretary Landry is entitled to sovereign immunity for Plaintiff's 42 U.S.C. § 1983 claim because she lacks sufficient connection to the enforcement of the challenged laws. First, Plaintiff fails to show that Secretary Landry has a particular duty to enforce the challenged laws.[26] While Plaintiff acknowledges that Secretary Landry "does not have a 'specific statutory command'" to enforce the challenged laws, Plaintiff claims that "a 'specific command' is not necessary," citing *Computer & Commc'ns Indus. Ass'n v. Paxton* as support.[27] In *Computer,* however, the district court found that the Texas attorney general had a particular duty to enforce the law in question,

[23] Doc. 58, p. 33.
[24] Doc. 58, p. 35.
[25] *See Se. Louisiana Bldg. & Const. Trades Council, AFL-CIO v. State of Louisiana ex rel. Jindal Constr. Trades Council ex rel. Jindal*, No. CIV.A. 13-370, 2013 WL 6709750, at *5 (E.D. La. Dec. 18, 2013) ("As with injunctions, courts have long held that parties bringing the declaratory judgment action must be proper parties; thus, there must be a substantial controversy, between parties having adverse legal interests, of sufficient immediacy and reality to warrant the issuance of a declaratory judgment.") (internal citations omitted); *see also Bauer v. Texas*, 341 F.3d 352, 357–58 (5th Cir. 2003).
[26] *Texas All. for Retired Americans v. Scott*, 28 F.4th 669, 672 (5th Cir.2022).
[27] Doc. 58, p. 24.

noting that it expressly vested the attorney general with "sole power to take enforcement action under the law."[28]

Here, as Plaintiff acknowledges, the laws in question contain no such command to the Secretary of State. Yet, Plaintiff maintains that Secretary Landry has "some connection with the enforcement" of the challenged because she (1) "provides the rules, regulations, forms, and instructions which are used in elections;"[29] (2) "is tasked with providing education to voters on Louisiana laws, including balloting procedures for voting by absentee by mail;"[30] and (3) is "mandated to maintain an elections integrity unit that must investigate purported irregularities in absentee voting by mail and must refer any findings for prosecution."[31] None of these alleged responsibilities, however, constitute enforcement for purposes of the *Ex Parte Young* exception to sovereign immunity.

The Fifth Circuit has repeatedly held that providing advice, guidance, or interpretive assistance regarding election law and procedures does not constitute enforcement because it does not compel or constrain anyone to obey the challenged laws.[32] The Fifth Circuit has likewise 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*.[33]

Second, Secretary Landry's testimony regarding HB 476 and her purported intention "to

[28] *Computer & Commc'ns Indus. Ass'n v. Paxton*, No. 1:24-CV-849-RP, 2024 WL 4051786, at *7 (W.D. Tex. Aug. 30, 2024).
[29] Doc. 58, p. 21.
[30] Doc. 58, p. 21. The Secretary of State does not provide voter education. La. R.S. 18:18(8)(a) requires the Secretary of State to "[p]rescribe uniform rules, regulations, forms, and instructions as to standards for effective nonpartisan voter education, which shall be approved by the attorney general and thereafter shall be implemented uniformly by each registrar of voters in the state."
[31] Doc. 58, p. 24.
[32] *See Ostrewich v. Tatum*, 72 F.4th 94 (5th Cir. 2023), *cert. denied sub nom. Ostrewich v. Hudspeth*, 144 S. Ct. 570 (2024); *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).
[33] *Mi Familia Vota v. Ogg*, 105 F.4th 313, 332 (5th Cir. 2024); *see also Ostrewich, supra.*

investigate and refer individuals for prosecution if they violate these new election laws"[34] is not relevant to determine Secretary Landry's connection to the enforcement of the challenged laws. In *In re Paxton,* the Fifth Circuit held that sovereign immunity "turns principally on whether [the state official] is 'statutorily tasked with enforcing the challenged law'" and not on the state official's statements.[35] The state official's "personal 'thoughts and statements' have no bearing on his office's legal authority to enforce" a particular law.[36] As discussed in Defendant Landry's Memorandum in Support of her Motion to Dismiss, Secretary Landry is not statutorily tasked with enforcing the challenged laws because she is not authorized to prosecute alleged violations of the Election Code.[37] Since Secretary Landry lacks sufficient connection to the enforcement of the laws in question, the *Ex Parte Young* exception does not apply, and she is entitled to sovereign immunity.

III. F.R.C.P. 12(B)(6) OBJECTION FOR FAILURE TO STATE A CLAIM

a. Plaintiff waived opposition to its failure to properly allege a class action under F.R.C.P. 23.

Secretary Landry argued in her Motion to Dismiss that to the extent that Plaintiff attempts to allege a class action on behalf of "all individuals with disabilities in Louisiana who need assistance with voting or with the submission or mailing of their ballot," Plaintiff's claims fail to meet the requirements of F.R.C.P. 23.[38] Plaintiff does not address this argument whatsoever in its Opposition. Therefore, Defendant Landry's motion to dismiss Plaintiff's class action allegations should be granted on the grounds of waiver.[39]

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[34] Doc. 58, p. 23.
[35] *In re Paxton*, 60 F.4th 252, 257 (5th Cir. 2023), citing *City of Austin v. Paxton,* 943 F. 3d 993, 998 (5th Cir. 2019).
[36] *Id.*
[37] *See Lewis v. Scott,* 28 F. 4th 659 (5th Cir. 2022); *Mi Familia Vota v. Ogg*, 105 F.4th 313, 332 (5th Cir. 2024).
[38] *See* Doc. 51-1, p. 24-25.
[39] *Garig v. Travis*, No. CV 20-654-JWD-RLB, 2021 WL 2708910, at *27 (M.D. La. June 30, 2021) (deGravelles, J.) ("Consequently, because Plaintiff failed to meaningfully oppose Defendants' motions on these claims, the Court will grant Defendants' motions on those issues on the grounds of waiver.").

b. The challenged laws are not preempted by the Voting Rights Act.

Plaintiff ignores Secretary Landry's argument that Plaintiff failed to allege an 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 and instead, largely concentrates it argument on other cases in which the plaintiffs allege that state law violates Section 208.

Plaintiff contends that the "Fifth Circuit's preemption analysis in *OCA-Greater Houston* controls here."[40] Importantly, contrary to Plaintiff's assertion, it was the plaintiff in *OCA* who argued that "Section 208 guarantees to voters [the] right to choose any person they want, subject only to employment-related limitations, to assist them throughout the voting process;" this was not the court's holding. Rather, the holding in *OCA* was much narrower. Similar to the present case, the plaintiffs in *OCA* sought a declaration that "a certain provision of the Texas Election Code conflicted with, and was therefore preempted by, Section 208" of the Voting Rights Act. However, the particular issue in *OCA* was "how broadly to read the term 'to vote' in Section 208 of the VRA."[41] The Fifth Circuit held that "to vote" "plainly contemplates more than the mechanical act of filling out of the ballot sheet."[42] Here, since the definition of "to vote" under Section 208 is not challenged, *OCA* is of limited application to the present case.

Plaintiff also contends that the present case is similar to *Disability Rights Mississippi v. Fitch,* in which the plaintiffs challenged Mississippi's law prohibiting the knowing collection and transmission of a ballot of another person.[43] Although the plaintiffs argued that the law conflicted with and frustrated the purpose of Section 208, the court made no such finding in granting

[40] Doc. 58, p. 28, citing *OCA-Greater Houston v. Texas,* 867 F. 3d 604 (5th Cir. 2017).
[41] *Id.* at 614.
[42] *Id.*
[43] *Disability Rights Mississippi v. Fitch,* 684 F. Supp. 3d 517 (S.D. Miss. 2023).

emergency injunctive relief.[44] Instead, the court was "sorely concerned with the effect of this statute upon [disabled voters], due to the statute's broad and vague nature," which "vests prosecuting authorities with broad discretion in relying upon their own definitions of these vital terms."

The challenged laws are not preempted by the Voting Rights Act. As set forth in Secretary Landry's supporting memorandum, the challenged statutes pose no "obstacle to the accomplishment and execution of the full purposes and objectives of Congress" because they do not disenfranchise individuals with disabilities. In Section 6 of its Opposition, Plaintiff writes that "Defendant Landry claims that the laws do not criminalize submission of more than one ballot by mail, merely the distribution or collection of more than one ballot."[45] Plaintiff misstates the law and Secretary Landry's argument. Section 2 of Act 317 prohibits the knowing, willful, or intentional facilitation of "the distribution and collection of absentee by mail ballot applications or absentee by mail ballots in violation of this Title."[46] The criminal offense is the facilitation of the distribution *and* collection of absentee by mail ballots, not mere collection *or* mere distribution of ballots. Therefore, Plaintiff's argument in Section 6 should be disregarded.

WHEREFORE, for the foregoing reasons and for the reasons set forth in Secretary Landry's Memorandum in Support, Secretary Landry prays that this Honorable Court grant her Motion to Dismiss and dismiss all claims against her with prejudice and for all other general and equitable relief.

Respectfully submitted:

s/Celia R. Cangelosi
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[44] *Id.* at 521-522.
[45] Doc. 58, p. 32 (emphasis added).
[46] Emphasis added.

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CERTIFICATE OF SERVICE

I hereby certify that on the 12th day of November, 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