UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF NORTH CAROLINA

NORTH CAROLINA ALLIANCE FOR RETIRED AMERICANS,

Plaintiff,

v.

ALAN HIRSCH, in his official capacity as Chair of the North Carolina State Board of Elections; JEFF CARMON, in his official capacity as Secretary of the North Carolina State Board of Elections; STACY EGGERS IV, KEVIN N. LEWIS, and SIOBHAN O'DUFFY MILLEN, in their official capacities as members of the North Carolina State Board of Elections; KAREN BRINSON BELL in her official capacity as Executive Director of the State Board of Elections,

Defendants,

and

PHILIP E. BERGER, in his official capacity as President Pro Tempore of the North Carolina Senate, and TIMOTHY K. MOORE, in his official capacity as Speaker of the North Carolina House of Representatives,

Intervenors.

CASE NO. 1:23-cv-837

INTERVENORS' REPLY IN SUPPORT OF THEIR MOTION TO DISMISS AMENDED COMPLAINT OR, ALTERNATIVELY, TO TRANSFER

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES

Cases **Page**

Codes & Statutes

INTRODUCTION

Plaintiff waited two decades to challenge North Carolina's long-standing voter-qualification law. Despite that inexcusable delay, Plaintiff insists laches cannot bar the organization's claims and refuses to identify any member who has been or will be injured by the law. Plaintiff's VRA claim misreads the statute, and its constitutional claim fails to account for the Supreme Court's *Anderson-Burdick* framework. This Court should dismiss the amended complaint or, alternatively, transfer the case to the Eastern District, where all parties reside.

ARGUMENT

I. The Alliance Failed To Establish Subject-Matter Jurisdiction.

Plaintiff failed to establish this Court's jurisdiction. The Alliance initially protests that its conclusory statements about standing must be "taken as true," Resp. 9, because Intervenors bring only a facial challenge to jurisdiction. Not so. Intervenors *did* challenge the idea that both the state and precinct qualifications "will inevitably injure the Alliance's members," Resp. 10, or the organization itself. *See, e.g.*, Memo. 8-13. Intervenors even presented Plaintiff's Articles of Incorporation to show how Plaintiff "overstates its corporate purpose." Memo. 10 (quoting *S. Walk at Broadlands Homeowner's Ass'n v. OpenBand at Broadlands, LLC*, 713 F.3d 175, 183 n.3 (4th Cir. 2013)). Regardless, this Court has "an independent obligation to assure" that subject-matter jurisdiction exists. *Summers v. Earth Island Inst.*, 55 U.S. 488, 499 (2009).

A. The Alliance lacks standing.

1. The Alliance lacks representational standing.

The Alliance failed to carry its burden of identifying a particular member who—when Plaintiff filed the amended complaint on January 2, 2024—had standing to sue in his own right. *See S. Walk*, 713 F.3d at 184. The state and precinct qualifications will not impact all the Alliance's members. Plaintiff's allegation, for instance, that its members reside only "across North Carolina," Am. Compl. ¶¶ 16-17, makes it particularly difficult to see how any of them had standing to challenge the state qualification in an election more than 30 days out. *See Rosario v. Rockefeller*, 410 U.S. 752, 757 n.9 (1973).[1] Intervenors have demanded and continue to demand that Plaintiff identify at least one particular member who had standing to sue in his own right.

Refusing to do so, Plaintiff asserts that "[n]o such member-identification requirement applies," Resp. 11, and that the only basis for such an idea is supposed "dicta" from *Southern Walk*," Resp. 12-13. *Contra* Resp. 10 (citing *Outdoor Amusement Bus. Ass'n v. DHS*, 983 F.3d 671, 683 (4th Cir. 2020) (itself imposing member-identification requirement)). Putting aside Plaintiff's faulty assertion that this Court should ignore the Fourth Circuit's views, this requirement comes directly from the Supreme Court. *See Summers*, 555 U.S. at 499 (requiring "plaintiffs claiming an organizational standing to

[1] Standing focuses on Plaintiff's members when it amended its complaint. To the extent Plaintiff attempts to represent unidentified non-members who are "unnamed voters in North Carolina" or who might move into North Carolina, Plaintiff also cannot do so because it lacks a "close relationship" with such potential voters. *Democracy N.C. v. N.C. State Bd. of Elections*, 476 F. Supp. 3d 158, 190 (M.D.N.C. 2020).

identify members who have suffered the requisite harm"). This Court and virtually every circuit court agree that the Supreme Court "has rejected" the idea that representational standing does not require the organization to "identify a specific member who will be harmed." *N.C. State Conf. of NAACP v. N.C. State Bd. of Elections*, 283 F. Supp. 3d 393, 402 n.6 (M.D.N.C. 2017); *see, e.g.*, *Draper v. Healey*, 827 F.3d 1, 3 (1st Cir. 2016) (Souter, J.); *Tenn. Republican Party v. SEC*, 863 F.3d 507, 520-21 (6th Cir. 2017); *Prairie Rivers Network v. Dynegy Midwest Generation, LLC*, 2 F.4th 1002, 1009-10 (7th Cir. 2021); *Ouachita Watch League v. U.S. Forest Serv.*, 858 F.3d 539, 544 (8th Cir. 2017); *Jacobson v. Fla. Sec'y of State*, 974 F.3d 1236, 1249 (11th Cir. 2020).

The Supreme Court has expressly rejected Plaintiff's statistical standing argument. Even if "there is a statistical probability that some of" Plaintiff's "members are threatened with concrete injury," such a "novel approach to the law of organizational standing would make a mockery of [the Supreme Court's] prior cases." *Summers*, 555 U.S. at 497-99; *see also N.C. State Conf. of NAACP*, 283 F. Supp. 3d at 402 n.6 (agreeing that "the alleged statistical likelihood" approach is one the Supreme Court "has rejected"). And the chain of causation here is even longer, as Plaintiff is speculating about the potential for hypothetical *future* members to be injured.

The nonbinding cases Plaintiff points to, Resp. 12, do not help it. In *Alliance for Hippocratic Medicine v. FDA*, the plaintiffs "provided multiple examples of organization members who sustained the exact harm they say will recur" and "explained that the conditions producing that harm remain in place" for those members. 78 F.4th 210, 235 (5th Cir. 2023). Moreover, this Court has previously rejected *National Council of La Raza v.*

Cegavske, 800 F.3d 1032, 1041 (9th Cir. 2015), as inconsistent with *Summers*. *See N.C. State Conf. of NAACP*, 283 F. Supp. 3d at 402 n.6.

Alabama Black Caucus v. Alabama, 575 U.S. 254 (2015), did not cast aside *Summers*. In *Alabama*, the district court "*sua sponte*[] held that the [organization] lacked standing," *id.* at 268, even though the group "filed just such a list" of particular members at the Supreme Court when given a chance to do so, *id.* at 271. Here, however, Plaintiff had ample opportunity to meet Intervenors' demand but simply refuses to do so.[2]

Finally, Plaintiff wrongly asserts, Resp. 10, that Intervenors did not challenge Plaintiff's failure to establish whether the claims or "relief sought require[] the participation of individual members in the lawsuit," *S. Walk*, 713 F.3d at 184—even though Intervenors clearly did, Memo. 8-9. Plaintiff's members, all current residents, do not need relief from the state qualification or under the VRA.

2. The Alliance lacks organizational standing.

Unlike the "voting-rights organization[s]" in *Democracy N.C.*, 476 F. Supp. 3d at 236-37, and *Voto Latino v. Hirsch*, 2024 WL 230931 (M.D.N.C. Jan. 21), the Alliance's stated corporate purpose is not to register voters and challenge election laws. Those may be tactics Plaintiff has chosen to advance its stated mission of "education, communication, and advocacy on issues of importance to older and retired workers and their families." Articles of Incorporation, *available online or at* Doc. 40-1, at 10. But Plaintiff's "own budgetary choice[]" to use those tactics does not make the tactics its mission. *Lane v.*

[2] *Democratic Party of Virginia v. Brink*, 599 F. Supp. 3d 346 (E.D. Va. 2022), misreads *Alabama*. Even so, Plaintiff is a 501(c)(4), not a "state-wide political organization." *Id.*

Holder, 703 F.3d 668, 675 (4th Cir. 2012).

Plaintiff protests that its Articles of Incorporation say the Alliance's purposes "are not limited to" the ones it chose to delineate. Resp. 14. The Fourth Circuit does not allow an organization to "exaggerat[e]" its corporate purposes for litigation. *S. Walk*, 713 F.3d at 183 n.3. If Plaintiff's "mission" truly has a "particular emphasis on safeguarding [retirees'] right to vote," Am. Compl. ¶16, then its Articles of Incorporation would mention that.

Further, Plaintiff's allegations about diverting resources still fail to explain "what activities the" Alliance is "divert[ing] resources away *from* in order to spend additional resources on combatting" the qualifications. *Jacobson*, 974 F.3d at 1250; *see* Am. Compl. ¶18 (saying merely that Plaintiff "would otherwise spend [resources] in other ways").

B. The Alliance's claims are otherwise unripe.

Plaintiff cannot carry its burden to show that its claims are fit for judicial decision and need "prompt adjudication." Resp. 17. Neither Plaintiff nor any of its members felt the need to challenge this supposed "sword of Damocles" during the first two decades of the Alliance's existence. Resp. 18 (quoting *Guilford Coll. v. McAlee*, 389 F. Supp. 3d 377, 390 (M.D.N.C. 2019) (claims ripe where new policy "present[ed] an immediate threat and burden on Individual Plaintiffs" that would stop them from reentering the country)). Plaintiff itself asserts that its "facial challenge" does not depend on the qualification's "actual application to any particular election," Resp. 16, so there is no harm in not addressing its claims now. Nor will a court "have to decide" future claims within 30 days of an election. Resp. 17; *see Nelson v. Warner*, 12 F.4th 376, 384-85 (4th Cir. 2021).

When Plaintiff filed its amended complaint, any impact on the Alliance and its members would be "unpredictabl[e]" at best, Resp. 32, and nonexistent at worst, Memo. 12. Plaintiff's claims, therefore, are not ripe. No specific Alliance member urgently needs relief, unlike the cases Plaintiff cites. *See Edgar v. Haines*, 2 F.4th 298, 311 (4th Cir. 2021); *Miller v. Brown*, 462 F.3d 312, 319 (4th Cir. 2006). Unidentified future members' speculative future claims were not ripe as of January 2024, and Plaintiff lacks the "close relationship" with them that it would need to assert their interests anyway. *Democracy N.C.*, 476 F. Supp. 3d at 190.

II. The Alliance Failed to Establish That Venue Is Proper in This District.

Plaintiff's sweeping version of venue would transform this "defendant-focused statute," *Res. Room SI, Inc. v. Borrero*, 2022 WL 17407968, at *5 (E.D.N.C. Dec. 2), into one focusing on Plaintiff's unidentified members. The Alliance has not shown that any of "the official duties" Defendants "performed relevant to this action occurred anywhere other than in Raleigh." *Moore v. Circosta*, 2020 WL 6591307, at *2 (E.D.N.C. Sept. 30). The location of a plaintiff's injury, or injury to one of its members, is irrelevant when, as here, the conduct giving rise to the injury occurred outside the district. *See, e.g.*, *Leroy v. Great W. United Corp.*, 443 U.S. 173, 185-86 (1979); *Taylor v. City & Cnty. of Honolulu*, 2017 WL 3526660, at *3 (E.D.N.C. Aug. 16); *accord Ciena Corp. v. Jarrard*, 203 F.3d 312, 317-18 (4th Cir. 2000) (venue appropriate where both the plaintiff's harm *and the defendant's conduct* occurred). *Mitrano v. Hawes* does not help Plaintiff because, when a plaintiff seeks to enforce a payment owed, the plaintiff's performance is "the event that

allegedly entitle[s] the plaintiff to the payment sought under the contract." 377 F.3d 402, 406 (4th Cir. 2004).

Moreover, Plaintiff's refusal to identify a specific member harmed in the Middle District means it failed to establish that "a substantial portion of the events or omissions giving rise to the claim[s] occurred" here. 28 U.S.C. §1391(b)(2). Raleigh-based Plaintiff brings facial claims against Raleigh-based Defendants that do not depend on the law's "application to any election" or to any specific member. Resp. 16. Plus, the VRA presidential-election issue and the state qualification cannot affect current residents.

III. Laches Bars the Alliance's Claims Brought on Its Own Behalf.

The Alliance makes no attempt whatsoever to dispute, Resp. 31, that it "delayed inexcusably or unreasonably in filing suit" or that, accordingly, Intervenors "need not show the degree of prejudice that would be required if the delay had been less aggravated," Memo. 15-16 (quoting *White v. Daniel*, 909 F.2d 99, 102-03 (4th Cir. 1990)).

Intervenors easily clear that low bar. In *North Carolina State Conference of NAACP v. McCrory*, the Fourth Circuit had to determine the proper remedy provision-by-provision. 831 F.3d 204, 238-42 (4th Cir. 2016). It surely would have been important for the Fourth Circuit to know that enjoining the provision terminating same-day registration, *id.* at 239, itself violated the VRA and Constitution, as Plaintiff belatedly claims. Moreover, the General Assembly has passed numerous election laws in the past two decades with the understanding that it can enforce its 30-day qualification to dissuade "would-be fraudulent voters" who "would remain in a false locale for" a short time before an election. *Dunn v. Blumstein*, 405 U.S. 330, 351-52 (1972). The Alliance never complained about that law

before suddenly asking this Court to circumvent North Carolina's democratic process by eliminating the qualification, not the registration provisions.

The equities here are not at all comparable to *FTC v. Pukke*, where a Central American land developer "conceal[ed]" his violation of permanent injunctions "through misrepresentations and aliases" and then complained about being held in contempt. 53 F.4th 80, 109 (4th Cir. 2022). North Carolina's laws are no secret. Plaintiff slept on its rights, so laches now bars the organization's claims.[3]

IV. The Alliance Failed To Plausibly Allege a VRA Violation.

The VRA amendments, in Plaintiff's words, "provide[] a floor: states must let voters register for presidential elections until at least 30 days before election day." Resp. 23 (citing 52 U.S.C. §10502(d)). North Carolina allows that, so there is no violation. Nor does §10502(c) require states to allow a new resident who moved within 30 days of a presidential election to vote in his new state. As long as the citizen can vote somewhere in the presidential election "for electors for President and Vice President" there is no violation. §10502(c).

That is exactly what Congress enabled with §10502(e) allowing a late mover to vote "in the State or political subdivision in which he resided immediately prior to his removal." Plaintiff makes much of §10502(e) using the word "registration." However, as Plaintiff has acknowledged, new North Carolina residents can "vote for President and Vice President in

[3] Because laches is a litigant-specific inquiry, the 30-day qualification is not forever "immuniz[ed]" from suit by everyone. Resp. 32. Nor can Plaintiff dodge the application of laches to claims brought on behalf of the organization by lumping them together with claims brought representing members.

their old jurisdiction" if they move within 30 days of the presidential election through this provision, just as Congress has provided. PI Memo, Doc. 34, at 12. If there were any question whether these new residents can fully receive the protections of §10502(e), the 30-day qualification is also a requirement "[i]n order to register to vote," Am. Compl. ¶24, so a new resident "does not satisfy the registration requirements" if he moves into North Carolina within 30 days of a presidential election, §10502(e).

Intervenors' reading of §10502(c)-(e) in tandem makes sense of the statute. Plaintiff's reading—that §10502(c) absolutely requires states to allow new residents who move up to 1 day before the presidential election to vote in their new state, even though §10502(d) allows states to prevent qualification and registration for 30 days before the election, and despite §10502(e) providing a mechanism for citizens who move to a new state within 30 days of the presidential election to vote in their previous state—leaves §10502(c) in conflict with §10502(d)-(e). North Carolina complies with the proper reading of §10502's mandatory provisions.

Plaintiff proclaims that it is "meaningless" that §10502(a)-(b) are not mandatory in nature. Resp. 22. But that is a crucial distinction for determining whether they create an individual right enforceable through 42 U.S.C. §1983. Subsections 10502(a)-(b) do not allow private parties "to seek redress through §1983" because those provisions are not "couched in mandatory, rather than precatory, terms." *Blessing v. Freestone*, 520 U.S. 329, 340 (1997); *see Gonzaga Univ. v. Doe*, 536 U.S. 273, 283 (2002) ("requiring an unambiguously conferred right to support a cause of action brought under §1983").

Further, "Congress must have intended that the provision in question benefit the plaintiff." *Blessing*, 520 U.S. at 340. But Congress did not intend §10502 to protect 501(c)(4) organizations without voting rights, so the Alliance on its own behalf "is not within the class of persons Congress sought to protect in enacting" this law. *Peters v. Jenney*, 327 F.3d 307, 324-25 (4th Cir. 2003). True, courts sometimes allow organizations to bring §1983 suits in a *representational* capacity on behalf of members' rights. However, even on a representational basis, all of Plaintiff's members already live in North Carolina and can vote there in presidential elections. Section 10502 does not create a federal right enforceable through §1983 for individuals traveling intrastate or voting in non-presidential elections. Memo. 19. Congress wanted §10502 to be enforced by the U.S. Attorney General in the name of the United States and in front of a three-judge court, 52 U.S.C. §10504, not by a 501(c)(4) with unaffected members.

V. The Alliance Failed To Plausibly Allege a Constitutional Violation.

Plaintiff fails to make any response to two crucial arguments that undermine the validity of its constitutional claims. Resp. 26-31. *First*, Plaintiffs do not contest that there is no constitutional "'right to intrastate travel' at all," Memo. 20 (quoting *Willis v. Town of Marshall*, 426 F.3d 251, 265 (4th Cir. 2005)), "and even if such a right existed, it would protect no more 'than the right of *movement* from place to place' within a State," Memo. 20 (quoting *Willis*, 426 F.3d at 268 (Williams, J., concurring)). Thus, none of Plaintiff's current members—all North Carolina residents—has any constitutional claim against the State's law. *Second*, "this claim must be dismissed to the extent the Alliance attempts to plead it on behalf of the organization itself because no 501(c)(4) has the right to vote in

any North Carolina election." Memo. 22. The qualification does not violate any of Plaintiff's own constitutional rights.

To the extent Plaintiff has any claim left, it cannot find a case after the Supreme Court announced its *Anderson-Burdick* framework in which a court has applied strict-scrutiny to a voter qualification requirement no longer than 30 days. Election laws like North Carolina's are commonplace. Still, the only on-point federal case applied less exacting review under *Anderson-Burdick* and upheld Wisconsin's 28-day qualification law for all non-presidential elections, *Luft v. Evers*, 963 F.3d 665, 671-72, 675-76 (7th Cir. 2020) (Easterbrook, J.), even though Wisconsin otherwise allows election-day registration, Wis. Stat. Ann. §6.55.

Ignoring *Luft*, Plaintiff insists *Dunn*'s strict scrutiny for longer qualifications controls for all 30-day-or-shorter qualifications. Resp. 27 (quoting *Greidinger v. Davis*, 988 F.2d 1344, 1350-51 (1993), without noting *Greidinger* was explaining the historical development of caselaw). The laws in *Dunn* were a yearlong state-residency requirement and a three-month county-residency requirement. 405 U.S. at 333. A significantly shorter month-long qualification, in contrast, is not a severe burden under *Anderson-Burdick*. *See 6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 402 (4th Cir. 2019); *Greidinger*, 988 F.2d at 1352. That Plaintiff insists the qualification would be constitutional if current residents also could not register within that 30-day period gives the lie to the idea that a 30-day qualification is a severe burden.

Finally, because Plaintiff insists its claims are facial ones, this Court must dismiss the claim against the precinct qualification because sets of circumstances exist "under

which the statute would be valid." *United States v. Hansen*, 599 U.S. 762, 769 (2023) (cleaned up). Because (1) current residents have no right to intrastate travel, and (2) current residents in at least some instances would vote in the same elections at both their old and their new precincts, the precinct qualification would be valid in some circumstances, even under Plaintiff's conception of the law.

CONCLUSION

The Court should dismiss the amended complaint or, alternatively, transfer the case to the Eastern District of North Carolina.

Dated: February 20, 2024

Respectfully submitted,

/s/ Nicole J. Moss
Nicole J. Moss (State Bar No. 31958)
COOPER AND KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
nmoss@cooperkirk.com

Local Civil Rule 83.1 Counsel for Legislative Defendants-Intervenors

David H. Thompson
Peter A. Patterson
John D. Ohlendorf
Clark L. Hildabrand
COOPER AND KIRK, PLLC
1523 New Hampshire Avenue, NW
Washington, D.C. 20036
(202) 220-9600
dthompson@cooperkirk.com

Counsel for Legislative Defendants-Intervenors

CERTIFICATE OF WORD COUNT

Pursuant to Local Rule 7.3(d)(1), the undersigned counsel hereby certifies that the foregoing Reply, including body, headings, and footnotes, contains 3,125 words as measured by Microsoft Word.

/s/ Nicole J. Moss
Nicole J. Moss
Counsel for Intervenors

CERTIFICATE OF SERVICE

The undersigned counsel hereby certifies that, on February 20, 2024, I electronically filed the foregoing Response with the Clerk of the Court using the CM/ECF system which will send notification of such to all counsel of record in this matter.

/s/ Nicole J. Moss
Nicole J. Moss
Counsel for Intervenors