UNITED STATES DISTRICT COURT
WESTERN DISTRICT OF KENTUCKY
LOUISVILLE DIVISION

KENTUCKIANS FOR THE COMMONWEALTH, *Plaintiff*, v. MICHAEL ADAMS, in his official capacity as the Secretary of State for Kentucky and Chair of the Kentucky State Board of Elections, *et al*. *Defendants*.	)	Case No. 3:24-cv-00387 Judge Benjamin J. Beaton

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THE STATE BOARD OF ELECTIONS' MOTION TO DISMISS[1]

"Federal courts do not possess a roving commission to publicly opine on every legal question."[2] Because Kentuckians for the Commonwealth (the "Association") cannot demonstrate standing to invoke this Court's Article III power, the State Board of Elections, by counsel, moves the Court to dismiss the Complaint, under Rule 12(b)(1), for lack of subject matter jurisdiction. Because the Complaint also fails to state a claim upon which relief may be granted, the Board also moves the Court to dismiss the Complaint under Rule 12(b)(6).

INTRODUCTION

By some estimates, "24 million voter registrations in the United States—about one in eight—are either invalid or significantly inaccurate. And about 2.75 million people are said to be

[1] The Association sues the State Board of Elections' members in their official capacities. Because "a suit against a state official in his or her official capacity is not a suit against the official but rather is a suit against the official's office,' *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 (1989), this motion collectively refers to the Boards' members sued in their official capacities as the "State Board of Elections" or "Board."

[2] *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021).

registered to vote in more than one State."[3] The National Voter Registration Act (NVRA) was enacted "to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office" while "ensur[ing] that accurate and current voter registration rolls are maintained."[4] Yet, as recently as 2018, Kentucky had 48 counties with registration rates exceeding 100% of their age-eligible citizens.[5] And a federal lawsuit alleged that the Commonwealth "had more registered voters than age-eligible citizens."[6] Ultimately, the Commonwealth entered into a consent decree requiring it to clean up its voter rolls.[7]

Since then, a lot has changed. The State Board of Elections, the independent agency that administers Kentucky's election laws and that supervises registration and purgation of voters within the Commonwealth,[8] has diligently worked to comply with federal law, including the NVRA, and to clean up the voter rolls. Consistent with the NVRA's purposes "to protect the integrity of the electoral process" and "to ensure that accurate and current voter registration rolls are maintained,"[9] the State Board of Elections has, since 2019, removed over 400,000 ineligible voter registrations from the voter rolls.[10] In 2021, the Kentucky General Assembly amended KRS 116.113 to require the Board, "[u]pon receipt of notification from a local or state jurisdiction that a voter has registered to vote in the new local or state jurisdiction outside of the

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3 *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 760 (2018).

4 52 U.S.C. 20501(b)(1), (4).

5 *Jud. Watch, Inc. v. Adams*, 485 F. Supp. 3d 831, 834 (E.D. Ky. 2020). Judicial Watch initially sued former Secretary of State Alison Lundergan Grimes. Michael Adams, who succeeded Ms. Grimes, was automatically substituted as a party by operation of Rule 25(d).

6 *Jud. Watch, Inc.*, 485 F. Supp. 3d at 834.

7 *Jud. Watch, Inc. v. Adams*, Case No. 3:17-cv-00094-GFVT, Doc. No. 39.

8 The Association incorrectly alleges that the "Secretary of State's Office engages in large-scale voter roll maintenance, such as the recent cancellation of approximately 127,000 registrants in February 2023." Compl. ¶ 49. Under Kentucky state law, it is the State Board of Elections that is charged with the registration and purgation of voters in the Commonwealth.

9 52 U.S.C.A. § 20501(b)(3), (4).

10 State Board of Elections, Kentucky Election Integrity Process (KEIP), https://perma.cc/DW6P-WKEK.

Commonwealth," to remove "the name of that person from the voter registration records that it maintains" within five days.[11] Thus, voters registered elsewhere are ineligible to be registered, and thus vote, in Kentucky.

ARGUMENT

Although the Association would like to challenge the Board's enforcement of KRS 116.113(5), it lacks standing to do so. And even if it had standing, its claim is unsupported by the NVRA's text and the Complaint should be dismissed for failure to state a claim.

I. Because the Association lacks standing to sue in its own right and on behalf of its members, the Court should dismiss the Complaint.

Article III of the United States Constitution limits federal courts to hearing "Cases" and "Controversies."[12] To have standing, a plaintiff must have "such a personal stake in the outcome of the controversy as to warrant his invocation of federal-court jurisdiction and to justify exercise of the court's remedial powers on his behalf."[13] That means, a plaintiff must show that it "(1) suffered an injury in fact, (2) that is fairly traceable to the challenged conduct of the defendant, and (3) that is likely to be redressed by a favorable judicial opinion."[14] Each element is an "irreducible constitutional minimum."[15]

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The standing inquiry is an important one. It is "not [a] mere pleading requiremen[t]."[16] "[E]ach element must be supported in the same way as any other matter on which the plaintiff

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11 KRS 116.113(5). The Complaint interchangeably references KRS 116.113(4), *see, e.g.* Compl. ¶ 28, 30, 32, and KRS 116.113(5), *see, e.g.* Compl. ¶ 29, 44, and even asks this Court to declare subsection (4) unlawful as inconsistent with 52 U.S.C. § 50507(d). Subsection 4 addresses the registration of "a person [who] has been convicted of a felony offense." Yet, subsection (5) addresses "out-of-state registration"—the statutory provision the Association challenges here. Thus, this motion references KRS 116.113(5).

12 U.S. Const. art. III, § 2.

13 *Warth v. Seldin*, 422 U.S. 490, 498–99 (1975) (cleaned up).

14 *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016).

15 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560 (1992).

16 *Kentucky v. Fed. Highway Admin.*, --- F.Supp.3d ----, No. 5:23-CV-162-BJB, 2024 WL 1402443, at *2 (W.D. Ky. Apr. 1, 2024) (quoting *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992)).

bears the burden of proof, i.e., with the manner and degree of evidence required at the successive stages of the litigation."[17]And federal courts must dismiss a suit for lack of jurisdiction if the plaintiff fails to meet any of those elements.[18] This requirement "ensures that federal courts decide only 'the rights of individuals,' and that federal courts exercise 'their proper function in a limited and separated government.'"[19]

An association may attempt to claim standing in two ways. An "association may have standing in its own right to seek judicial relief from injury to itself and to vindicate whatever rights and immunities the association itself may enjoy."[20] Alternatively, under current law, "[e]ven in the absence of injury to itself, an association may have standing solely as the representative of its members."[21] In that case, "an association has standing to bring suit on behalf of its members when: (a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization's purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit."[22]

The Association, as the party invoking federal jurisdiction, has the burden to establish standing.[23] Yet it cannot meet that burden under either formulation on which it claims standing.[24] For that reason, its Complaint should be dismissed.

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17 *Id*.

18 *Steel Co. v. Citizens for a Better Env't*, 523 U.S. 83, 94–95 (1998).

19 *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021) (quoting *Marbury v. Madison*, 1 Cranch 137, 170 (1803); Roberts, Article III Limits on Statutory Standing, 42 Duke L. J. 1219, 1224 (1993)).

20 *Warth v. Seldin*, 422 U.S. 490, 511 (1975).

21 *Warth*, 422 U.S. at 511.

22 *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc*., 517 U.S. 544, 553 (1996).

23 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992).

24 Compl. ¶ 5 ("It sues herein on its own behalf and on behalf of its of its members.").

A. Because the Association cannot demonstrate standing in its own right, the Court should dismiss the Complaint.

To invoke standing, the Association reaches for a theory now rejected in the Sixth Circuit and by the United States Supreme Court: the alleged diversion of unspecified resources to nebulous and various outreach efforts. The "diversion-of-resources" theory originated in *Havens Realty Corp. v. Coleman*.[25] Under it, an organization could "sometimes establish its standing if the organization shows both that the defendant's challenged conduct has caused 'a drain' on its 'resources' and that the organization would have used those resources in another way."[26] Yet the Sixth Circuit has held that two recent developments have clarified *Havens*' "narrow domain."

In *Tennessee Conference of the National Association for the Advancement of Colored People v. Lee*, the NAACP invoked the NVRA to challenge a "Documentation Policy" that Tennessee election officials use to distinguish between felons who may be eligible to vote.[27] To satisfy the elements for standing, the NAACP invoked the "diversion-of-resources" theory of standing. As the Court observed, the challenged policy "neither required nor forbid any action on its part," and the NAACP could not "establish its standing merely through its 'legal, moral, ideological, or policy' disagreement with this state requirement."[28] Instead, the Court explained, the NAACP was required to "show that the Documentation Policy cause[d] it to suffer a concrete injury that its requested remedy would redress."[29] Under the *Havens*' diversion theory, the NAACP could not do that.

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25 455 U.S. 363 (1982).

26 *Tennessee Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Lee*, 105 F.4th 888, 903 (6th Cir. 2024) (collecting Sixth Circuit cases).

27 *Id.* at 890.

28 *Id.* at 902 (quoting *All. for Hippocratic Med*., 602 U.S. at 381).

29 *Id.* at 902.

In *Alliance for Hippocratic Medicine*, the Supreme Court recognized other limits on *Havens*. There, the Supreme Court clarified that Havens' "'unusual' facts did not support a categorical rule allowing standing whenever 'an organization diverts its resources in response to a defendant's actions.'"[30] In *Havens*, the plaintiff had "operated a housing counseling service" and Havens Realty had "directly" harmed HOME's business by giving its employees false information about apartment complexes. For that reason, the Court "compared HOME to a 'retailer who sues a manufacturer' (Havens) 'for selling defective goods to the retailer.'"[31] To the contrary, the medical associations in *Alliance for Hippocratic Medicine* had not alleged that the FDA had caused them a similarly "direct informational injury; rather, they alleged only that they had made the decision to spend money to minimize the alleged harms from the FDA's regulations."[32]

Even before *Alliance for Hippocratic Medicine*, the Sixth Circuit had recognized other limits on Havens. As the Sixth Circuit has explained, the "Supreme Court decided *Havens* at a time when a complaint's 'general allegations' sufficed to state a claim,"[33] and the Sixth Circuit has "granted summary judgment against similar nonprofit entities that failed to back up their diversion-of-resources allegations with adequate proof."[34] Beyond that, "*Havens* addressed HOME's standing to seek damages—not its standing to seek an injunction."[35] *Havens* said nothing about the types of future injuries that the plaintiffs must allege when they pursue diversion-of-resources theories, and the Sixth Circuit has "held that organizations cannot establish their standing by diverting resources to eliminate a risk of harm to third parties that is not imminent."[36]

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30 *Lee*, 105 F.4th at 903 (quoting *All. for Hippocratic Med.*, 602 U.S. 367).

31 *Id.* at 903.

32 *Id.*

33 *Id.*

34 *Id.*

35 *Id.*

36 *Id.* at 904.

For these reasons, the *Lee* Court stayed an injunction because "Tennessee ha[d] identified 'serious questions' about how the Supreme Court's decision in *Alliance for Hippocratic Medicine* affect[ed] the NAACP's standing."[37] The court was clear: the NAACP could "no longer rely on Havens to support its standing given that case's 'unusual' facts."[38] The NAACP had not pointed to any evidence that the Documentation Policy "directly" injured it, as the policy did not apply to the NAACP at all, and although the NAACP had alleged an indirect "pocketbook injury" from the policy, this was the same sort of harm the Supreme Court held was insufficient to gain standing in *Alliance for Hippocratic Medicine*."[39] At a minimum, the Sixth Circuit observed that "*Alliance for Hippocratic Medicine* creates uncertainty over when a plaintiff's own choice to spend money can give it standing to challenge a government action that allegedly caused the expenditure."[40] But the Court went further. It assessed the "generic declaration" by the NAACP's president to conclude that it "likely fail[ed] to identify specific facts, as opposed to general allegations, to prove the [diversion-of-resources] theory."[41]

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Here, the Association has not suffered a "concrete and particularized" injury.[42] As in *Lee*, the Association "may no longer be able to rely on *Havens* to support its standing given that case's 'unusual' facts."[43] Like the medical associations in *Alliance for Hippocratic Medicine* and the NAACP in *Lee*, the Association can point to no evidence that the KRS 116.113(5) has "directly" injured it. Here, the association has not even alleged direct harm. Since 2021, the State Board of

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37 *Lee*, 105 F.4th at 904.

38 *Id*.

39 *Id.* at 904–05.

40 *Id.* at 905.

41 *Id.*

42 *Id.* at 902.

43 *Id.* at 904; *Food & Drug Admin. v. All. for Hippocratic Med*., 602 U.S. at 396 ("*Havens* was an unusual case, and this Court has been careful not to extend the Havens holding beyond its context.").

Elections has used the provisions of KRS 116.113(5) to maintain the accuracy of the Commonwealth's voter rolls.[44] Yet the Complaint does not identify even one voter who was improperly removed from the voter rolls and who would otherwise be eligible to vote despite the challenged conduct. Even if the Association could, *Havens* addressed "standing to seek damages—not . . . standing to seek an injunction."[45] Here, the Association seeks only injunctive relief. For these reasons, *Havens* is no help to the Association.

The deficiencies do not end there. Whereas in *Lee* the NAACP at least provided a "generic declaration," the Association's Complaint is unverified and attached no affidavit. But even if it had, courts routinely refuse to find standing based on the "conclusory allegations of an affidavit."[46] That would be all the more true here, where the Association's alleged speculative harm is based on conclusory allegations. "Standing is not an ingenious academic exercise in the conceivable," but requires a "factual showing of perceptible harm."[47] "No concrete harm, no standing."[48] And an "organization that has not suffered a concrete injury caused by a defendant's action cannot spend its way into standing simply by expending money to gather information and advocate against the defendant's action. An organization cannot manufacture its own standing in that way."[49]

Moreover, the Association, like the NAACP in *Lee*, merely alleges an "indirect 'pocketbook' harm."[50] The Association claims that the challenged statutory provision "frustrates" its "civic mission and causes it to expend its limited financial resources and staff time, to "expand

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44 Exhibit A to Compl., PageID #: 20.

45 *Lee*, 105 F.4th at 903.

46 *Lujan v. National Wildlife Federation*, 497 U.S. 871, 888 (1990).

47 *Lujan*, 504 U.S. at 566.

48 *TransUnion LLC v. Ramirez*, 594 U.S. at 417.

49 *Food & Drug Admin. v. All. for Hippocratic Med*., 602 U.S. 367, 394.

50 *Lee*, 105 F.4th at 905.

its voter registration education," and require it to "monitor their voter registration status."[51] Such claims are insufficient after *Alliance for Hippocratic Medicine*, which the Sixth Circuit confirmed in *Lee*. There the Court confronted a strikingly similar claim: that the challenged policy had made the NAACP's "voter-registration efforts more costly."[52] As the Sixth Circuit asked in *Lee*, if the allegations in *Alliance for Hippocratic Medicine* that "the FDA regulations had rendered their public-education efforts more costly by forcing them to devote extra time and expense to informing the public about the risks of the abortion drug" were insufficient to establish standing, "why should the NAACP's expenditures suffice in this one?"[53] The "pocketbook injuries" in those cases did not establish standing. They don't work here either.

The Association will likely point to the Seventh Circuit decision in *Common Cause Indiana v. Lawson*.[54] There, the Seventh Circuit fully embraced the *Haven*'s diversion-of-resources theory because, it reasoned, "[n]othing in the Supreme Court's later standing jurisprudence has undermined the holding[] of *Havens*."[55] Post *Alliance for Hippocratic Medicine*, that is no longer true. Moreover, while the Seventh Circuit "explicitly recognize[d] this 'diversion-of-resources' theory in *Crawford v. Marion County Election Board*,"[56] even before *Alliance for Hippocratic Medicine*, the Sixth Circuit had cabined the holding in *Havens*.[57] *Alliance for Hippocratic Medicine* resolved these disagreements about the reach of *Havens*, and it did so in favor of Sixth Circuit's precedent.[58] Thus, *Common Cause* does not help the Association here.

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51 Compl. ¶ 8.

52 *Lee*, 105 F.4th at 905.

53 *Id.* (citations omitted).

54 The court in *League of Women Voters of Indiana, Inc. v. Sullivan*, 5 F.4th 714 (7th Cir. 2021), did not address standing.

55 *Common Cause Indiana v. Lawson*, 937 F.3d 944, 950 (7th Cir. 2019).

56 *Common Cause Indiana v. Lawson*, 327 F. Supp. 3d 1139, 1151 (S.D. Ind. 2018).

57 *Lee*, 105 F.4th at 903.

58 *All. For Hippocratic Medicine*, 602 U.S. at 396.

For these reasons, the Association lacks standing. The Court therefore lacks subject matter jurisdiction over the claims the Association makes on its own behalf.

B. Because the Association cannot establish associational standing, the Court should dismiss the Complaint.

The Association's Complaint must be dismissed for another reason. Even under an associational-standing theory, the Association lacks standing. Current precedent calls the Supreme Court's associational-standing precedent into doubt.[59] To begin with, "[a]ssociational standing raises constitutional concerns by relaxing both the injury and redressability requirements for Article III standing," and runs "roughshod over this traditional understanding of the judicial power."[60] That is because the "party who needs the remedy—the injured member—is not before the court."[61] "Article III does not allow a plaintiff to seek to vindicate someone else's injuries."[62] Born out of "judicial thinking" in a "paragraph-long opinion citing cases on different subjects," the Supreme Court has more recently "reinvigorated standing as a core part of the separation of powers," and rendered associational standing "nothing more than an outdated relic[.]"[63] The problem is compounded by the context in which the Association's claim such standing: a facial challenge. "Because federal courts are bound by Article III's case-or-controversy requirement, holding a statute unconstitutional as applied to nonparties is not simply disfavored—it exceeds the authority granted to federal courts."[64] In light of the shaky precedent on which associational

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59 *Food & Drug Admin. v. All. for Hippocratic Med*., 602 U.S. at 403 (Thomas, J. concurring) ("I am particularly doubtful of associational-standing doctrine because the Court has never attempted to reconcile it with the traditional understanding of the judicial power. Instead, the Court departed from that traditional understanding without explanation, seemingly by accident. To date, the Court has provided only practical reasons for its doctrine . . . . Despite its continued reliance on associational standing, the Court has yet to explain how the doctrine comports with Article III.").

60 *Id.* at 399 (Thomas, J. concurring).

61 *Id.* at 400 (Thomas, J. concurring).

62 *Id*. (Thomas, J. concurring).

63 *Ass'n of Am. Physicians & Surgeons v. United States Food & Drug Admin*., 13 F.4th 531, 539 (6th Cir. 2021).

64 *Moody v. NetChoice, LLC*, 144 S. Ct. 2383, 2421–22 (2024) (Thomas, J. concurring).

standing rests, it is unclear how this Court may satisfy its "independent obligation to assure that standing exists."[65] Because associational standing is inconsistent with Article III, the Court should dismiss the Association's claims purportedly brought on behalf of persons not before the Court.

Still, the Court might choose to "stick to . . . directly on-point precedent even if the logic from other cases has called that precedent into doubt."[66] Even under that doubtful precedent, however, the Association cannot meet its burden to demonstrate associational-standing. For that reason, the Court should dismiss, for lack of subject matter jurisdiction, those claims the Association purports to bring on behalf of its members.

The Supreme Court's "more recent guidance on the 'irreducible constitutional minimum' of standing clarifies what an organization must plead to establish the first element of associational standing—that its members have Article III standing in their own right."[67] To sue on behalf of its members, the Association must prove that its members would "otherwise have standing to sue in their own right."[68] That requires showing a "concrete and particularized" injury,[69] one that is "actual or imminent, not conjectural or hypothetical."[70] And "a yet-to-happen injury must be certainly impending to constitute injury in fact; the mere possibility that the injury will arise in the future does not suffice."[71] Instead, the Association "must instead identify a member who has suffered (or is about to suffer) a concrete and particularized injury from the defendant's conduct."[72]

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65 *Lee*, 105 F.4th at 902 (quoting *Summers v. Earth Island Inst.*, 555 U.S. 488, 493 (2009)) (cleaned up).

66 *See, e.g.*, *Ass'n of Am. Physicians & Surgeons v. United States Food & Drug Admin.*, 13 F.4th at 539 ("More fundamentally, federal courts have yet to justify associational standing with this (or any other) historical practice—as the Supreme Court's recent cases suggest they must. Instead, the Court's foundation for allowing an uninjured association to sue is a paragraph-long opinion citing cases on different subjects.").

67 *Id.* at 542–43.

68 *United Food & Com. Workers Union Loc. 751 v. Brown Grp., Inc.*, 517 U.S. 544, 553 (1996).

69 *Lee*, 105 F.4th at 902.

70 *Sandusky Cnty. Democratic Party v. Blackwell*, 387 F.3d 565, 573 (6th Cir. 2004).

71 *Ass'n of Am. Physicians & Surgeons v. United States Food & Drug Admin.*, 13 F.4th at 545.

72 *Id.* at 543.

Consider *Association of American Physicians & Surgeons*, where a medical association "sought declaratory and injunctive relief against the FDA's restrictions on the use of hydroxychloroquine to treat COVID-19 patients.[73] The medical association alleged that two of its members could not prescribe a certain drug to their patients and that, if they did, they might face state-level sanctions. That was not enough to establish an injury in fact. According to the Court, the association had identified "nothing but speculation that a state medical board might pursue discipline against one of its physician members for prescribing hydroxychloroquine to treat COVID-19."[74]

The same is true here. The Association asserts that KRS 116.113(5) "creates the real and immediate risk that some of Plaintiff's members will be deprived of their right to vote."[75] The Association also claims that this provision is "frustrating KFTC's voter registration program and forcing it to divert resources and staff time to re-register improperly purged voters and expand its voter registration education for staff, members, and prospective voter registrants."[76] But in the three years since Kentucky's General Assembly amended this statute, the Association has been unable to identify "a member who has suffered (or is about to suffer) a concrete and particularized injury from the defendant's conduct." Not one. The Association's unverified Complaint contains nothing to suggest the alleged injury is "certainly impending" or anything more than "conjectural" and "hypothetical." The Association merely relies on its bare assertions. That is not enough for standing.[77]

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73 *Id.* at 535, 542.

74 *Ass'n of Am. Physicians & Surgeons v. United States Food & Drug Admin*., 13 F.4th 531, 545 (6th Cir. 2021).

75 Compl. ¶ 47.

76 Compl. ¶ 47

77 *Ass'n of Am. Physicians & Surgeons v. United States Food & Drug Admin*., 13 F.4th 531, 543 (6th Cir. 2021) ("The [Supreme] Court has also made clear that a complaint must 'clearly . . . allege facts demonstrating' standing.").

For these reasons, the Association lacks standing to sue on behalf of its unnamed members.[78]

II. The Complaint fails to state a claim because KRS 116.113(5) conforms to the text and requirements of the NVRA.

The Association's Complaint also fails to state a claim upon which relief may be granted because KRS 116.113(5) conforms to the text of the NVRA. States have an "interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials."[79] Under *Ex Parte Siebold*, state and federal regulations affecting federal elections must be treated as one harmonious system of rules adopted by the same legislature.[80] More particularly, the NVRA is "a complex superstructure of federal regulation atop state voter-registration systems."[81] This Court is therefore obligated to interpret election laws "as a harmonious whole rather than at war with one another."[82] That said, "as originally understood, the Times, Places and Manner Clause grants Congress power only over the 'when, where, and how' of holding congressional elections, not over the question of who can vote."[83] The Clause "does not

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78 The Association makes a half-hearted attempt at a claim under 42 U.S.C. § 1983 claim. *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009) ("A pleading that offers "labels and conclusions" or "a formulaic recitation of the elements of a cause of action will not do."). That is likely because the Association knows the NVRA is the exclusive remedy for violations of its own terms. *See, e.g.*, *Assoc. of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 367 n.11 (5th Cir. 1999) (rejecting plaintiff's claim that it had "standing to pursue its [NVRA] claims under 42 U.S.C. § 1983" in part because "'section 1983 . . . is not an available for deprivation of a statutory right when the statute, itself, provides an 'exclusive remedy for violations of its own terms' ") (citations omitted); *Nat'l Coal. of Students with Disabilities Educ. & Legal Def. Fund v. Allen*, 961 F. Supp. 129, 132 (E.D. Va. 1997) (*reversed on other grounds*) ("NCSD has failed to assert any rights under . . . the NVRA to support a cause of action under Section 1983. The NVRA provides a detailed method of enforcement which is exclusive, and as a result private persons cannot support a Section 1983 claim based upon an alleged violation of the NVRA."). On this basis, the 1983 claim, if any, must be dismissed.

79 *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 364 (1997) (collecting cases).

80 100 U.S. 371 (1879) (abrogated on other grounds).

81 *Arizona v. Inter Tribal Council of Arizona, Inc*., 570 U.S. 1, 5 (2013).

82 *See Epic Sys. Corp. Jacob Lewis Ernst & Young Stephen Morris Nat'l Lab. Rels. Bd. v. Murphy Oil USA*, 584 U.S. 497, 502 (2018)

83 *Husted v. A. Philip Randolph Inst*., 584 U.S. 756, 781 (2018) (Thomas, J. concurring).

give Congress the authority to displace state voter qualifications or dictate what evidence a State may consider in deciding whether those qualifications have been met."[84]

A. KRS 116.113(5) conforms to the text and requirements of the NVRA.

The Association challenges KRS 116.113(5) on its face.[85] Fundamentally at "odds with Article III,"[86] a facial challenge to a statute "is, of course, the most difficult challenge to mount successfully, since the challenger must establish that no set of circumstances exists under which the Act would be valid."[87] The reviewing court must resort to "every reasonable construction" to save a statute's validity and avoid a construction that is constitutionally suspect.[88] Yet the Association proposes a construction of the NVRA that is just that.

Under the NVRA, each state must "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters by reason of" death and change in residence.[89] Yet, the text of the NVRA, and our federal system of running elections, provides flexibility in implementing its provisions.[90] For example, "subsection (c) simply provides one way—the minimal way—in which a State 'may meet the NVRA's requirements' for change-of-residence removals. . . . It is not the only way"[91] *Husted* makes clear that in carrying out their "general program," each state has flexibility in addressing the interstices

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84 *Husted v. A. Philip Randolph Inst*., 584 U.S. at 782 (Thomas, J. concurring); *see also Arizona v. Inter Tribal Council of Arizona*, Inc., 570 U.S. 1, 17 (2013) (quoting The Federalist No. 60, at 371 (A. Hamilton)) ("Prescribing voting qualifications, therefore, 'forms no part of the power to be conferred upon the national government' by the Elections Clause, which is 'expressly restricted to the regulation of the times, the places, and the manner of elections.'").

85 Compl. ¶ 30.

86 *Moody v. NetChoice*, LLC, 144 S. Ct. at 2413 (Thomas, J. concurring).

87 *United States v. Salerno*, 481 U.S. 739, 745 (1987).

88 *F.C.C. v. Fox Television Stations, Inc*., 556 U.S. 502, 516 (2009).

89 52 U.S.C. § 20507(a)(4).

90 *See generally* 52 U.S.C. § 20507.

91 *Husted*, 584 U.S. at 777.

in the law. Just as subsection (c) sets forth the "minimal" way to meet the NVRA's requirements, so too does subsection (d) set forth the minimal way by which a State may remove names from the voting rolls following a change in residence. That subsection provides that a "State shall not remove the name of a registrant from the official list of eligible voters in elections for Federal office *on the ground that the registrant has changed residence* unless" one of two requirements are met.[92] Stated another way, "a State may not remove a registrant's name on change-of-residence grounds unless either (A) the registrant confirms in writing that he or she has moved or (B) the registrant fails to return a preaddressed, postage prepaid "return card" containing statutorily prescribed content."[93] The return card must explain "what a registrant who has not moved needs to do in order to stay on the rolls," and, "for the benefit of those who have moved, the card must contain information concerning how the registrant can continue to be eligible to vote."[94] Kentucky's law is entirely consistent with the flexible approach authorized by the NVRA and conforms to its requirements.

In *Husted*, the Supreme Court upheld an Ohio law in a similar challenge brought under the NVRA. In Ohio, voters are required to reside in the district in which they vote, and when they move out of that district, they become ineligible to vote there.[95] Ohio sent a preaddressed, prepaid postage card asking voters who had not voted for two years to verify that they still resided at the same address, using the failure to vote to identify voters who may have moved.[96] Voters who did not return this card and failed to vote in any election for four years were presumed to have moved

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92 52 U.S.C. § 20507(d)(1) (emphasis added).

93 *Husted*, 584 U.S. 756, 762.

94 *Id.* (internal quotations and citations omitted).

95 *Id.* at 761.

96 *Id.* at 760.

and removed from the rolls.[97] As the Court explained, subsection (d) of the NVRA "directly addresses the procedures that a State must follow before removing a registrant from the rolls on change-of-residence grounds," and "[n]ot only are States allowed to remove registrants who satisfy these requirements, but federal law makes this removal mandatory."[98] Addressing the NVRA's "failure-to-vote clause," the Supreme Court explained that the phrase "by reason of" denoted "some form of causation."[99] The Court concluded that sole causation was the only type of causation consistent with the text and held that the NVRA "simply forbids the use of nonvoting as the sole criterion for removing a registrant."[100] Thus, the NVRA only prohibits "removal solely by reason of a person's failure to vote."[101] For that reason, the Ohio law was consistent with the NVRA because it authorized removal when registrants had "failed to vote *and* ha[d] failed to respond to a change-of-residence notice."[102]

Husted is instructive here. The Association challenges what it calls Kentucky's "residency-based removal" under the NVRA removal provisions for change of residence. KRS 116.113 requires that a registrant be removed from the voter rolls "[u]pon receipt of notification from a local or state jurisdiction that a voter has *registered* to vote in the new local or state jurisdiction outside of the Commonwealth."[103] The Association argues that this provision "violates the NVRA's requirement that a voter may be removed from the rolls by reason of change of address only if the registrant—(A) confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered, or if the voter fails to

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97 *Husted*, 584 U.S. 756, 760.

98 *Id.* at 767.

99 *Id.* at 769.

100 *Id.* at 768–69.

101 *Id.* at 770.

102 *Id.* (emphasis added).

103 KRS 116.113(5) (emphasis added).

respond to a confirmation notice or vote in the statutorily identified timeframe."[104] Again, the NVRA "directly addresses the procedures that a State must follow before removing a registrant from the rolls on change-of-residence grounds," and "[n]ot only are States allowed to remove registrants who satisfy these requirements, but federal law makes this removal mandatory."[105] Just as using the phrase "by reason of" in 52 U.S.C. § 20507(b)(2) "simply forbids the use of nonvoting as the sole criterion for removing a registrant,"[106] subsection (d)(1)'s prohibition on removing a voter from the rolls "on the grounds that the registrant has changed residence" unless one of two criteria are met similarly forbids the use of a voter's change in residence as the "sole criterion" for removing a registrant. Thus, *Husted* is instructive here: the NVRA does not authorize "removal *solely* by reason of" a voter's change in residence apart from the removal procedure.[107]

The Association, however, attempts a sleight of hand. Whereas the NVRA does not authorize "removal *solely* by reason of" a voter's change in residence, the Association challenges what it calls a "residency-based removal." But KRS 116.113(5) requires that a registrant be removed from the voter rolls when that registrant has registered to vote in another state. While a change in residence may be necessary to register to vote elsewhere, that does not render the challenged removal "*solely* by reason of" the voter's change in residence. Instead, the removal is for a different reason: the voter's registration in another jurisdiction confirmed by "notification from a local or state jurisdiction."[108] Despite the Association's claims, subsection (d)(1) has no application here. Of course, if Kentucky would like to remove a registrant from the voter rolls "*on*

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104 Compl. ¶ 45 (internal quotations and citations omitted).

105 *Husted*, 584 U.S. 756, 767.

106 *Id.* at 768.

107 *Id.* at 770.

108 KRS 116.113(5).

the ground that the registrant has changed residence,"[109] it must meet the NVRA's "prior notice obligation."[110] But KRS 116.113(5) only mandates that the Board remove a registrant when he or she registers elsewhere thus making themselves ineligible to vote in Kentucky.

In *Bell v. Marinko*, the Sixth Circuit addressed a similar question to the one presented here in the context of ineligible registrants. In *Bell*, the appellants argued that the NVRA "sets forth the exclusive reasons for which a state may remove a voter from a voting precinct's list of registered voters."[111] There, Ohio removed certain individuals from the voter rolls after it determined that they failed to meet the residence requirements. To borrow the Association's phrase, Ohio engaged in a "residence-based removal." The appellants argued that the NVRA "sets forth the exclusive reasons for which a state may remove a voter from a voting precinct's list of registered voters." But the Court concluded that in "creating a list of justifications for removal, Congress did not intend to bar the removal of names from the official list of persons who were ineligible and improperly registered to vote in the first place."[112] The Court expressly considered the NVRA's removal requirements and concluded that if it found Ohio's removal of those voters had violated the NVRA, it "would [have] effectively grant[ed], and then protect[ed], the franchise of persons not eligible to vote."[113] But "because the Act does not bar the Board's continuing consideration of a voter's residence, and instead encourages the Board to maintain accurate and reliable voting rolls," Ohio's procedures were consistent with the NVRA.[114]

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109 52 U.S.C. § 20507(d)(1).

110 *Husted*, 584 U.S. 756, 762.

111 *Bell v. Marinko*, 367 F.3d 588, 591 (6th Cir. 2004).

112 *Id.* at 591–92.

113 *Id.* at 592.

114 *Id*.

As in *Bell*, the procedure in KRS 116.113(5) does not contravene the NVRA. Instead, KRS 116.113(5) supplements the maintenance of "accurate and reliable voting rolls" endorsed by the NVRA, and which helps to remove ineligible registrants who have registered elsewhere. Under *Bell*, that is permissible. Regardless, if Congress intended to address a specific process in the circumstance addressed by KRS 116.113(5), it could have done so in the text of the NVRA. But "Congress did not write the statute that way."[115]

There is a reason for that. To rewrite the NVRA according to the Association's preference "would seriously interfere with the States' constitutional authority to set and enforce voter qualifications."[116] The "Elections Clause empowers Congress to regulate how federal elections are held, but not *who* may vote in them."[117] In *Arizona v. Inter Tribal Council of Arizona*, the Supreme Court considered whether Arizona could require more proof of citizenship than was prescribed by a form required by the NVRA. According to the Court, it "would raise serious constitutional doubts if a federal statute precluded a State from obtaining the information necessary to enforce its voter qualifications."[118] But the Court side-stepped the issue because the NVRA allowed Arizona to request changes to the form, and concluded that the NVRA preempted Arizona from requesting further proof of citizenship. Of course, "[o]ffering a nonexistent pathway to administrative relief is an exercise in futility, not constitutional avoidance."[119]

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115 *Corley v. United States*, 556 U.S. 303, 315 (2009).

116 *Husted*, 584 U.S. 756, 781 (Thomas, J. concurring).

117 *Arizona v. Inter Tribal Council of Arizona, Inc*., 570 U.S. 1, 16 (2013).

118 *Id.* at 17.

119 *Id.* at 37 (Thomas, J. dissenting); *see also Republican Nat. Comm. v. Mi Familia Vota*, Case No. 24A164, 2024 WL 3893996 (U.S. Aug. 22, 2024) (granting stay of judgment to the extent it enjoined Arizona from enforcing provision of Arizona's proof-of-citizenship law).

This Court's obligation is constitutional avoidance.[120] The Association would prefer to apply the NVRA's notice provisions in a circumstance not addressed by the NVRA. As in *Arizona*, this Court should avoid a "serious constitutional" question. Just apply the NVRA's text. That text addresses removal in three circumstances: request by the registrant, criminal conviction or mental incapacity, or change in residency. Those are not exclusive reasons for removal.[121] And the text does not address a specific procedure in the context of a change in registration. Yet, the Association's interpretation risks "overextending [the NVRA's] pre-emptive reach" beyond "the strict requirements of the statutory command."[122]

Even if the NVRA's removal provisions had any application here, the Board complies with those provisions. Under the NVRA, the State may, "on the ground that the registrant has changed residence," remove the registrant if that registrant "confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction in which the registrant is registered."[123] Registering to vote in another jurisdiction is written confirmation that the registrant has changed residence to a place outside the jurisdiction in which the registrant had been registered. In fact, when the NVRA passed, both the United States Senate and House of Representative explained that a "'request' by a registrant would include actions that result in the registrant being registered at a new address, *such as registering in another jurisdiction* or providing a change-of-address notice through the drivers license process that updates the voter registration."[124] According to the Association, the "written confirmation" must come from the registrant to the Board. Nothing

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120 *Jennings v. Rodriguez*, 583 U.S. 281, 296, 138 S. Ct. 830, 842, 200 L. Ed. 2d 122 (2018) ("[I]t is a cardinal principle that this Court will first ascertain whether a construction of the statute is fairly possible by which the question may be avoided.").

121 *Bell*, 367 F.3d 588, 591.

122 *Arizona*., 570 U.S. at 21(Kennedy, J. concurring in part and concurring in the judgment).

123 52 U.S.C. § 20507(d)(1).

124 S. Rep. No. 103–6, at 31 (1993) (emphasis added); H.R. Rep. No. 103–9, at 14–15 (1993).

in the NVRA's text supports such a requirement, and the Court should decline to add one.[125] According to the Supreme Court, it must.[126]

B. The Seventh Circuit's cases are not useful or persuasive.

The Association may again attempt to rely on the Seventh Circuit's opinions in *Common Cause* and *League of Women Voters of Indiana v. Sullivan*. But neither decision sufficiently addressed the standing issue. Second, those decisions equated a change of residence with a change in registration. For the reasons above, those are two different things, and the Court should reject the attempt to conflate them—even if another circuit failed to grasp the difference.

Third, the *Common Cause* court suggested that the "only way to know whether voters want to cancel their registration is to ask them."[127] That is not true. The NVRA provides for removal because of death.[128] And a state may also remove a felon based only on a notice from the United States attorney.[129]

Fourth, neither court meaningfully discussed nor faithfully applied the lessons of *Husted*—the Supreme Court's most recent interpretation of the NVRA.[130] That is a glaring omission that seriously undermines the persuasive value, if any, of those opinions.

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125 *Cf. Combs v. Int'l Ins. Co.*, 354 F.3d 568, 592 (6th Cir. 2004) ("We are 'not at liberty to add or subtract from the legislative enactment nor discover meaning not reasonably ascertainable from the language used.'").

126 *Corner Post, Inc. v. Bd. of Governors of Fed. Rsrv. Sys*., 144 S. Ct. 2440, 2454 (2024) ("This Court has repeatedly stated, the text of a law controls over purported legislative intentions unmoored from any statutory text; the Court may not replace the actual text with speculation as to Congress intent." (cleaned up)).

127 *Common Cause*, 937 F.3d at 960.

128 52 U.S.C. (a)(4)(A).

129 52 U.S.C. (g)(1).

130 At most, the *Common Cause* court cherry picks one phrase to support its conclusion while ignoring its context and the Court's reasoning and conclusions. The Supreme Court did not say "the NVRA's procedures for removal must be followed 'to the letter.'" *Common Cause*, 937 F.3d at 962. After observing the statutory silence on the challenged procedure and reviewing Ohio's "supplemental process," the Court concluded that Ohio "follows subsection (d) to the letter." *Husted*, 584 U.S. at 767. The difference, while subtle, is important because the Court's opinion otherwise recognizes flexibility in applying the NVRA's terms where and when required.

Finally, *Common Cause* relies on a hypothetical voter of its own invention. According to the court, "someone might move to Kansas from Indiana to take a new job, and upon arrival in Kansas immediately register to vote in Kansas. But if her personal circumstances change before Election Day—she flunks a probationary period on the job, a family member becomes sick, a better opportunity arises in Indiana—the person might decide to return to her former residence in Indiana."[131] In that case, the court argued, that "person's Indiana registration, according to the NVRA, is still valid unless the person herself took steps to revoke it."[132] Not so. In Kentucky, only residents are eligible to vote.[133] And a voter loses "his or her residence by removal to another state or county with intention to make his or her permanent residence there, or by removal to and residence in another state, with intention to reside there an indefinite time."[134] "[C]onstitutional text and history both confirm that States have the exclusive authority to set voter qualifications and to determine whether those qualifications are satisfied."[135] To the extent the hypothetical in *Common Cause* suggests Kentucky may not "set and enforce voter qualifications," it "would raise significant constitutional concerns."[136]

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131 *Common Cause Indiana v. Lawson*, 937 F.3d 944, 960.

132 *Id.*

133 KRS 116.025.

134 KRS 116.035(3).

135 *Husted*, 584 U.S. 756, 780 (Thomas, J. concurring).

136 *Id.* at 781 (Thomas, J. concurring).

CONCLUSION

For the reasons above, the State Board of Elections respectfully moves the Court to dismiss the Association's Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on August 26, 2024, I filed this document electronically with the Clerk of this Court using the Court's CM/ECF system, which will send notification of such filing to all parties registered to receive electronic filings.

/s/ Carmine G. Iaccarino
Counsel for Defendants