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

THE STATE BOARD OF ELECTIONS' REPLY IN SUPPORT OF ITS MOTION TO DISMISS[1]

Congress enacted the NVRA "to protect the integrity of the electoral process," "increase the number of eligible citizens who register to vote in elections for Federal office," and "ensure that accurate and current voter registration rolls are maintained."[2] Under the NVRA, Kentucky must "conduct a general program that makes a reasonable effort to remove the names of ineligible voters from the official lists of eligible voters."[3] The flexibility of the "general program" requirement recognizes the central role of the States "as laboratories for devising solutions to difficult legal problems."[4] While the NVRA's specific provisions must be followed where they

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 brief collectively refers to the Board's members sued in their official capacities as the "State Board of Elections" or "Board."

2 52 U.S.C. § 20501(b).

3 52 U.S.C. § 20507(a)(4).

4 *See Arizona State Legislature v. Arizona Indep. Redistricting Comm'n*, 576 U.S. 787, 817 (2015) (Ginsburg, J. collecting cases).

apply, the NVRA also provides flexibility to the States, and thus the "general program" mandate has "real and substantial effect."[5] KRS 116.113(5) is a lawful part of Kentucky's general program of voter list maintenance and is consistent with the provisions of the NVRA. For these reasons, and because the Association has failed to meet its burden to demonstrate standing to challenge KRS 116.113(5), the Court should dismiss the Complaint with prejudice.

The Association lacks standing in its own right. The Association claims it has alleged "general factual allegations of injury resulting from the defendant's conduct," and that those allegations suffice. Yet as the party seeking to invoke federal jurisdiction, it has the burden to establish standing.[6] And standing is "substantially more difficult" to establish where, as here, the Association is not the object of the challenged government action.[7] Even so, the Association doubles down on its diversion of resources theory, which has been rejected in the Sixth Circuit and by the United States Supreme Court.

In *Tennessee Conference of the National Association for the Advancement of Colored People v. Lee*, the Sixth Circuit expressed significant doubt about the validity of the standing theory on which the Association bases its claim. At most, however, the Association tries to distinguish this case based on its posture and claims that it "pleads organizational injuries that are sufficient." In doing so, it avoids serious discussion of *Alliance for Hippocratic Medicine*, and instead relies on *Online Merchants Guild v. Cameron*, which itself was decided before *Lee* and *Alliance for Hippocratic Medicine*. Moreover, *Lee* cast considerable doubt on the continued force of the reasoning in *Online Merchants Guild*. There, the Sixth Circuit explained that the Kentucky Attorney General "had issued subpoenas and civil investigative demands to Kentucky members of

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5 *Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 772 (2018) ("Our reading, on the other hand, gives the new language added to the Failure–to–Vote Clause 'real and substantial effect.'").

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

7 *Id.* at 562.

the Guild," that the "Guild had standing because it spent resources to help these merchants respond to [an] investigation and would continue to do so because of the investigation's ongoing nature," but noted that "this reasoning may (or may not) survive *Alliance for Hippocratic Medicine*."[8]

It does not. In *Alliance for Hippocratic Medicine*, the medical associations claimed that an FDA regulation had "'forced' the associations to 'expend considerable time, energy, and resources' drafting citizen petitions to FDA, as well as engaging in public advocacy and public education."[9] The Supreme Court was clear, however, that "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."[10] Yet the Association here fails to explain how its alleged standing is materially different from that claim. For that reason, its theory runs the very risk the Supreme Court warned about: "that all the organizations in America would have standing to challenge almost every federal policy that they dislike, provided they spend a single dollar opposing those policies."[11]

Thus, the reasoning in *Online Merchants Guild* does not survive *Alliance for Hippocratic Medicine*.[12] Even if that reasoning had any continued currency, the Association still fails under Rule 12 because, at most, it contains a "threadbare recital of the elements of a cause of action, supported by mere conclusory statements," and the district court must dismiss under Rule 12(b)(6).[13] The Association has not alleged a "concrete and particularized" injury beyond "mere

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8 *Tennessee Conf. of the Nat'l Ass'n for the Advancement of Colored People v. Lee*, 105 F.4th 888, 906 (6th Cir. 2024).

9 *Food & Drug Admin. v. All. for Hippocratic Med.*, 602 U.S. 367, 394 (2024).

10 *Id.*

11 *Id.*

12 *Lee*, 105 F.4th at 906.

13 *Scott v. Haier US Appliance Sols., Inc.*, No. 3:21-CV-141-BJB, 2021 WL 4822835, at *8 (W.D. Ky. Oct. 15, 2021) (quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009)) (cleaned up).

conclusory statements." Since 2021, the State Board of Elections has used the provisions of KRS 116.113(5) to maintain the accuracy of the Commonwealth's voter rolls.[14] Yet the Complaint does not identify *any* specific expenditures that it claims were required following enactment of KRS 116.113(5). At the outset of this litigation, the Association must demonstrate its standing to challenge the provisions of KRS 116.113(5),[15] and it has failed to do that.

The Association has failed to establish associational standing. To sue on behalf of its members, the Association must "identify a member who has suffered (or is about to suffer) a concrete and particularized injury from the defendant's conduct."[16] It has not done that.

The Association merely 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."[17] Three years have passed since Kentucky's General Assembly amended KRS 116.113 to include the provision the Association challenges here. Even so, the Association's Complaint does not identify "a member who has suffered (or is about to suffer) a concrete and particularized injury from the defendant's conduct." Not one. Presumably, if it were true the Association has had to "divert resources and staff time to re-register" voters,[18] the Association could meet its burden and identify those voters.

Rather than identify *even one* member improperly affected by KRS 116.113(5), as it must, the Association's only response is to claim that the Defendants have "blocked" its efforts to learn the names of the people purged under KRS 116.113(5). Not so. First, the Association's allegation

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

15 *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc*., 528 U.S. 167, 180 (2000) (Ginsburg, J.) ("[W]e have an obligation to assure ourselves that FOE had Article III standing at the outset of the litigation.").

16 *Ass'n of Am. Physicians & Surgeons v. United States Food & Drug Admin*., 13 F.4th 531, 543 (6th Cir. 2021); *see also Summers v. Earth Island Inst*., 555 U.S. 488, 498 (2009) (requiring plaintiff-organizations "to make specific allegations establishing that *at least one* identified member had suffered or would suffer harm." (emphasis added)).

17 Compl. ¶ 47.

18 *Id*.

on this point is nowhere stated in its Complaint, which itself is unverified. Even if this Court "read the complaint generously, [it does] not presume facts not alleged therein."[19] Second, the NVRA includes a record-keeping requirement,[20] Kentucky state law provides for inspection of those records,[21] and the State Board gave those records to the Association in October 2023.[22]

The Association fails to state a claim under the NVRA. The State Board's motion relies on the NRVA's text to demonstrate why the Association's Complaint fails to state a claim. Yet the Association responds only to the Secretary of State's arguments and fails to meaningfully engage with NVRA's text or any of the cases on which the State Board relied—including *Bell* and *Husted*.

The omission is glaring. *Bell* and *Husted* recognize the flexibility Congress granted to the States in conducting the "general program" of voter list maintenance. They also recognize the limits of the NVRA's text and the risk of "overextending [the NVRA's] pre-emptive reach" beyond "the strict requirements of the statutory command."[23] To rewrite the NVRA according to the Association's preference "would seriously interfere with the States' constitutional authority to set and enforce voter qualifications."[24] The "Elections Clause empowers Congress to regulate how federal elections are held, but not *who* may vote in them."[25] The State Board's motion urged this Court to avoid the Constitutional question, and presented a textual path for how to do that. The Association's response avoids the issue and re-embraces an a-textual reading of the NVRA that raises serious concerns under the Elections Clause.

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19 *Schwamberger v. Marion Cnty. Bd. of Elections*, 988 F.3d 851, 856 (6th Cir. 2021).

20 52 U.S.C. § 20507(i).

21 KRS 61.872.

22 *See* October 4, 2024, correspondence, attached as **Exhibit 1.**

23 *Arizona v. Inter Tribal Council of Arizona, Inc.*, 570 U.S. 1, 21 (2013) (Kennedy, J. concurring in part and concurring in the judgment).

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

25 *Arizona v. Inter Tribal Council of Arizona, Inc*., 570 U.S. at 16.

The Association's challenge is a facial one.[26] Thus, it can only succeed by "establish[ing] that no set of circumstances exists under which the Act would be valid[.]"[27] Even putting aside the textual argument for why there is no cause of action stated, the Association dooms its own claim when it admits, as it must, that there are circumstances in "which an out-of-state official might notify Kentucky officials based on reliable evidence."[28] With that admission, the Association's facial challenge must fail.

CONCLUSION

For these reasons, the Board asks the Court to dismiss the Complaint with prejudice.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I certify that on October 4, 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

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26 Resp. at 19 ("Plaintiff alleges that the language of Ky. Rev. Stat. § 116.113(5) on its face violates the NVRA[.]").

27 *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) (internal quotations omitted).

28 Resp. at 17.