IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT KENTUCKY
LOUISVILLE DIVISION

KENTUCKIANS FOR THE COMMONWEALTH,

Plaintiff,

v.

MICHAEL G. ADAMS, in his official capacity as the Secretary of State for Kentucky, *et al.*,

Defendants.

Civil Action No. 3:24-cv-387-BJB

DEFENDANT SECRETARY OF STATE MICHAEL G. ADAMS' REPLY IN SUPPORT OF HIS MOTION TO DISMISS COMPLAINT

Plaintiff Kentuckians for the Commonwealth ("KFTC") has still failed to plausibly allege that it or any of its members personally have suffered an actual injury-in-fact. It has failed to identify even one member who has been wrongfully removed from the Kentucky voter rolls or prevented from voting. Under Supreme Court and Sixth Circuit caselaw, it has failed to meet its burden to establish its standing to sue. This suit therefore must be dismissed for lack of jurisdiction.

I. KFTC cannot hide its lack of a particularized injury-in-fact behind the procedural posture.

KFTC seems to be under the misapprehension that *Conley v. Gibson*, 355 U.S. 41 (1957), is still good law and that "notice pleading" is still a thing. No one disputes the general proposition that at the motion to dismiss stage a plaintiff's allegations are presumed to be true. But KFTC ignores the seismic shift in this standard following the Supreme Court cases of *Twombly* and *Iqbal*.

KFTC proposes that the Court accept all its factual allegations in their Complaint as true, but the Court is not "bound to accept as true a legal conclusion couched as a factual allegation." *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009). After *Twombly* and *Iqbal*, KFTC has an affirmative "obligation" to provide more than "labels and conclusions, and a formulaic recitation of a cause of actions elements" to survive a motion to dismiss. *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 555 (2007) (internal citations omitted). Consequently, the procedural posture does not save KFTC because it has not *plausibly* alleged enough to establish that it has standing.

KFTC misstates the Sixth Circuit's plausibility standard by seizing upon language from *Parsons v. U.S. Department of Justice* stating that general allegations are presumed to "embrace those specific facts that are necessary to support the claim." *See* Dkt. 24 at 3 (quoting *Parsons v. U.S. Dep't of Just.*, 801 F.3d 701, 710 (6th Cir. 2015)) (cleaned up). However, the Sixth Circuit explicitly "retired this lenient test" in deference to the current "plausibility" test as discussed above. *Ass'n of Am. Physicians & Surgs v. United States FDA*, 13 F.4th 531, 543 (6th Cir. 2021) (quoting *Twombly*). "Should *Twombly*'s plausibility test apply to a motion to dismiss on standing grounds too? We think so." *Id.* The Court must determine the plausibility of Plaintiff's claims based on the Court's "judicial experience and common sense." *Iqbal*, 556 U.S. at 679.

This Court need not look beyond KFTC's Complaint to see the implausibility of its alleged injury-in-fact.[1] KFTC's Complaint alleges a cancellation of 127,000 Kentucky voter registrants in February of 2023, yet fails to list any member of KFTC's organization who was allegedly improperly removed from the voter rolls because of the enforcement of KRS 116.113. Dkt. 1 at ¶

[1] A 12(b)(1) motion may attack a claim on a jurisdictional basis either facially or factually, with the latter allowing the Court to "weigh evidence" outside of the four corners of the complaint to evaluate whether KFTC's factual assertions prove that jurisdiction exists. *DLX, Inc. v. Kentucky*, 381 F.3d 511, 516 (6th Cir. 2004). The Court has "broad discretion" to decide whether subject matter jurisdiction exists, "including evidence outside the pleadings," to determine the "effect of that evidence on the court's authority to hear the case." *Zynda v. Arwood*, 175 F. Supp. 3d 791, 798 (E.D. Mich. 2016) (quoting *Cartwright v. Garner*, 751 F.3d 752, 759-60 (6th Cir. 2014)).

49. KFTC takes great umbrage that the Secretary pointed out that the correct approximation was 20,000 not 127,000.[2] This, according to KFTC, is "improperly premising Defendants' motions to dismiss on facts outside the Complaint while improperly denying KFTC access to public records that would have shed light on the voter list maintenance scheme at issue." Dkt. 24 at 2. The 20,000 correction is not essential to the Secretary's Motion to Dismiss.[3] The Court can disregard the number if it so chooses. Nonetheless, the Secretary is entitled to provide not just the Court but the public with the accurate context; no good comes from letting the public incorrectly think that KRS 116.113 is causing 127,000 people to be improperly removed. And there is the timing of this suit. The Kentucky statute has been on the books for three (3) years. And yet KFTC chose to bring suit now, shortly before a divisive election. The Secretary took the responsible step of calling KFTC's exaggerated numbers and fear mongering the nonsense that it is.

It makes no difference to this Motion to Dismiss whether the number removed under KRS 116.113 is 20,000 or 127,000. KFTC's belief that the Kentucky statute "has harmed thousands" does not prove its standing unless it adequately shows that it is 'among the injured.'" *Ass'n of Am. Physicians & Surgeons*, 13 F.4th at 543 (cleaned up). The only relevant number here is zero: the number of members KFTC has alleged to be improperly removed pursuant to KRS 116.113.

II. KFTC'S alleged injuries are speculative and hypothetical.

KFTC relies on the older Supreme Court Case, *Spokeo*, without acknowledging how *TransUnion* tightened it. Under *Spokeo*, a plaintiff needed only prove that it "suffered an injury-in-fact." Dkt. 24 at 5 (quoting *Spokeo, Inc. v. Robins*, 578 U.S. 330, 338 (2016)). The Supreme

[2] There are many ways for voters to be purged. The 127,000 were purged through the NVRA 8(d)(2) process, which is not relevant here. *See* https://www.kentucky.gov/Pages/Activity-stream.aspx?n=SOS&prId=464

[3] The State Board track the types of removals on their website: https://elect.ky.gov/Resources/Pages/List-Maintenance.aspx

Court later fleshed that out. Now, the injury-in-fact must be "concrete, particularized, and actual or imminent." *TransUnion LLC v. Ramirez*, 594 U.S. 413, 423 (2021). *TransUnion* clarified that *Spokeo* did *not* hold that mere risk of harm without more can constitute an injury-in-fact. *Id.* at 433. KFTC ignores *TransUnion* altogether. It's a glaring omission, given the similarity between the harm alleged in *TransUnion* and here. Like KFTC, the *TransUnion* plaintiffs feared they would be harmed by mistaken identity, having the same name as someone else, that might be disseminated in the future. That fear is not cognizable. *Id.*

The Sixth Circuit applied this heightened injury standard in *Association of American Physicians & Surgeons*, where a third-party and associational plaintiff failed to meet their burden to show standing for Rule 12(b)(1). The Association of American Physicians & Surgeons sued the FDA regarding restrictions on the use of hydroxychloroquine to treat COVID-19. *See generally Ass'n of Am. Physicians & Surgs v. United States FDA*, 13 F.4th 531, 535 (6th Cir. 2021). The court reiterated the longstanding principle that a "case" is established when a plaintiff shows that it "has suffered an injury" stemming from a defendant's conduct that "likely caused the injury, and the relief sought will likely redress the injury." *Id.* at 537 (citing *TransUnion*, 594 U.S. at 423). To that point, separation of powers principles "should make it obvious" that a plaintiff does nothing "to establish an Article III 'case' merely by criticizing the wisdom or legality" of the defendant's actions. *Id.* So too here: KFTC's belief that Defendants have "engaged in wrongdoing" does not prove its standing because of its "disagreement" with Defendants, and it "is not an injury, no matter how 'sharp and acrimonious' [the disagreement] may be." *Id.* (citing *Hollingsworth v. Perry*, 570 U.S. 693, 704 (2013)). This remains true even if, *arguendo*, Defendants violated the NVRA: a statutory violation by itself does not constitute injury-in-fact. *TransUnion*, 594 U.S. at 414; *Hagy v. Demers & Adams*, 882 F.3d 616, 621 (6th Cir. 2018).

Moreover, standing is "substantially more difficult to establish" when –as here– a third-party organizational plaintiff pleads injuries on behalf of its members. *FDA v. All. for Hippocratic Med.*, 602 U.S. 367, 382 (2024). KFTC has failed to identify a single member who was unlawfully purged from the Kentucky voter rolls resulting from the Defendants' enforcement of KRS 116.113. KFTC blames this shortcoming on Defendants because its Open Records Requests did not lead it to discover any injured members. There are several problems with KFTC trying to foist its lack of a legitimate plaintiff on others. First, the Office of the Secretary of State responded to KFTC's Open Records Request that it did not have any responsive documents. Dkt. 17 at Exhibit 17-3. The Secretary's Office told KFTC that it should ask the State Board of Elections. *Id.* By statute, the Secretary of State does not store or have access to the voter records KFTC seeks. *See* KRS 116.112. In any event, the State Board of Elections did provide documents to KFTC. Dkt. 26-1. Second, KFTC must be presumed to know the names of its own members; Defendants do not. This goes to plausibility: if KFTC's members were being injured – and if it were really diverting resources to monitor and correct their status – it would not need an Open Records Request to know their names. Common sense and basic logic provide that KFTC has suffered no injury-in-fact and thus has no standing.[4]

Turning to causation, KFTC incorrectly uses *Parsons* again to state that the "nexus between a plaintiff's injuries and a defendant's unlawful acts or omissions need not be proximate and may be indirect." Dkt. 24 at 10 (quoting *Parsons*, 801 F.3d at 713). KFTC claims that the enforcement of KRS 116.113 has "directly increased the costs with KFTC's voter registration process",

[4] *Online Merchants Guild v. Cameron*, 995 F.3d 540 (6th Cir. 2021), is distinguishable. Members of the trade association in that case had suffered actual injuries in the form of subpoenas and civil investigative demands. *Id.* at 548. That gave the organization representative standing. *Online Merchants Guild*'s language on diversion of resources to establish organizational standing is therefore dicta. It also was decided before the Supreme Court opinions of *TransUnion* and *Alliance for Hippocratic Medicine*.

"increase[ed] associated costs for registering a voter", "expend[ing] additional funds and staff resources… [along with] additional training for its staff, additional education to staff, members, and registrants on how to monitor voter registration status, and re-registering improperly purged voters." Dkt. 24 at 7-9. Yet KFTC does not allege a single expenditure relating to these efforts or any facts to link the alleged expenditures to KRS 116.113. Again, KFTC cites broad and speculative legal conclusions couched as factual allegations in a formulaic fashion in an attempt to satisfy the standing elements. This is an exercise in vagueness, not adequate pleading. Even at the motion to dismiss stage, it is not enough to meet KFTC's burden.

The Supreme Court's opinion in *Alliance for the Hippocratic Medicine* compels the conclusion that KFTC has not suffered a "concrete injury" and cannot "spend its way into standing simply by expending money to gather information and advocate against" Defendants' enforcement of KRS 116.113. *All. for Hippocratic Med.*, 602 U.S. at 394. KFTC's theory of standing alludes to unparticularized organizational expenditures relating to its unnamed, unaccounted for, and allegedly illegally purged members. If that were enough, "all the organizations in America would have standing to challenge almost every policy they dislike, provided they spend a single dollar opposing these policies." *Id.* at 395. KFTC apparently has not even done that. KFTC's effort to distinguish *Alliance for Hippocratic Medicine* falls flat. The Alliance for Hippocratic Medicine did more than "activism and opposition" to the FDA rule, as KFTC claims. Dkt. 24 at 9. The Alliance for Hippocratic Medicine also incurred costs to conduct its own studies on mifepristone, because it did not trust the FDA to get it right. *All. for Hippocratic Med.*, 602 U.S. at 394. KFTC similarly alleges (albeit with no specific facts) that it is incurring costs to monitor its members' voter registration status, because it does not trust the government to get it right. Dkt. 24 at 6-7; Dkt. 1 at ¶ 8.

Alliance for Hippocratic Medicine also precludes speculation to establish causation between the so-called injury and Defendants' conduct. The Supreme Court warned against causation theories that "rely on speculation about unfettered choices made by independent actors not before the Court." *Alliance for Hippocratic Med.*, 602 U.S. at 383 (cleaned up). Here, however, KFTC speculates about the unfettered choices of independent actors with wild abandon. It hypothesizes that Kentucky election officials might rely on "unreliable information from out-of-state officials." Dkt. 24 at 16. Then KFTC jumps the shark: it warns that "a Texas official could notify a Kentucky official that a Kentucky voter has registered in Ohio or Arizona based on an unreliable interstate cross-check or inaccurate information provided by a third party." Dkt. 24 at 17.[5] That theory "rests on pure guesswork about the decisions of parties not before the court." *Ass'n of Am. Physicians & Surgs.*, 13 F.4th at 546. KFTC's subjective fear of individual mistakes by election officials "does not create a cognizable risk of imminent harm." *Shelby Advocates for Valid Elections v. Hargett*, 947 F.3d. 977, 981 (6th Cir. 2020) (per curiam). Without alleging particularized injuries, KFTC cannot be allowed to stack inference on inference that it will eventually find unlawfully purged members and thus eventually be required to spend money in an effort to counteract allegedly erroneous purgation.

Plaintiff similarly fails to distinguish *Tennessee Conference of the NAACP v. Lee*, 105 F.4th 888 (6th Cir. 2024) (per curiam). The best KFTC can come up with is that *Tennessee Conference of the NAACP* had proceeded to summary judgment, when more facts are expected than at the motion to dismiss stage. Dkt. 24 at 8. The problem here is not that KFTC has yet to adduce evidence to prove its allegations; the problem is that those allegations in and of themselves do not establish standing.

[5] The reference to Cross-Check is a complete red herring. The system no longer exists. Even KFTC acknowledges on the page before that the Interstate Cross Check System is "now-defunct." Dkt. 24 at 16.

The Sixth Circuit took seriously the Supreme Court's recent words that *Havens Realty* is now essentially limited to its facts. *Tennessee Conf. of NAACP*, 105 F.4th at 903-04. That's a big problem for KFTC because its diversion of resources theory of injury is classic *Havens Realty*. It is the cornerstone of KFTC's case. Moreover, the Sixth Circuit noted that even before *Alliance for Hippocratic Medicine*, "we had recognized other limits on *Havens*. For one thing, the Supreme Court decided *Havens* at a time when a complaint's 'general allegations' sufficed to state a claim." *Tennessee Conf. of NAACP*, 105 F.4th at 903 (cleaned up). And directly pertinent: "Even at the pleading stage, the Court has now jettisoned this test." *Id*. (citing *Ass'n of Am. Physicians & Surgeons*, 13 F.4th at 543-44).[6]

III. The NVRA does not preempt KRS § 116.113 because there is no conflict between the state and federal statutes.

The Court need not reach the merits. If it does, the *Twombley* and *Iqbal* plausibility standard will be instructive and this suit should be dismissed under 12(b)(6). Here again, KFTC objects to the Secretary of State explaining in general terms how the federal and state election system works. KFTC complains that this information falls outside the vaunted four corners of its Complaint. But much of it is just common sense. Anyone who has ever registered to vote — anywhere— knows that the voter had to sign something. Although the forms vary by jurisdiction, there is always a signature blank for the voter. The voter always has to provide his or her address. KFTC claims its mission is to register voters; it knows this (or should). And those states then notify Kentucky when a former Kentuckian has moved to the new state and registered there – this too is common sense. Kentucky only knows that a former resident has moved because that person registered to vote and gave his or her previous address to the new jurisdiction. How else would

[6] That observation by the Sixth Circuit could be read to suggest that if *Havens Realty* had been decided after *Twombly* and *Iqbal* and not two decades earlier, the result in *Havens Realty* might well have come out the other way.

Kentucky election officials know this, short of engaging in weird conspiracy theories?

Additionally, KFTC claims that the residency-based removal process of Section 8(d) of the NVRA can be based only on a notice "from the voter." Dkt. 1 at ¶ 27. KFTC conveniently leaves out the portion of the NVRA that allows removal of a name from voting rolls when "the registrant confirms in writing that the registrant has changed residence to a place outside the registrar's jurisdiction which the registrant is registered." Dkt. 17 at 17 (quoting 52 U.S.C.S. § 20507(d)(1)(A)). The term "writing" is not defined within the NVRA and does not impose a requirement that a writing must come directly from the voter to the officials in his or her former state. KFTC is asserting a requirement of the NVRA that is not in its text. Implicitly, KFTC is asking the Court to rewrite the NVRA to suit its preference. That's up to Congress, not the judiciary.

Congress chose to leave the mechanics of the written notice to the states. The plain meaning of the term "writing" is evidenced by the legislative history of the NVRA. *Bay County Democratic Party v. Land*, 347 F. Supp. 2d 404, 427 (E.D. Mich. 2004) (cleaned up). The House of Representatives Committee Report observed that the "request of the registrant" through a writing is satisfied when the voter registers "in another jurisdiction" or provides a "change-of-address notice through the driver's license process that updates the voter registration." Dkt. 17 at 14-15 (quoting National Voter Registration Act of 1993, Report 103-9 U.S. House of Representatives 103rd Cong. 1st Sess. (Feb. 2, 1993)).

KFTC has mischaracterized how KRS 116.113 works. Kentuckians are not being removed from its voter rolls solely because they moved, but rather because they moved out of state and chose to register – by signing a "writing" at their new state of residence. *See Husted v. A. Philip Randolph Inst.*, 584 U.S. 756, 780 (2018) (Thomas, J., concurring).

Finally, finding preemption here would create the constitutional problem of which Justice Thomas warned: the Constitution does not give Congress the authority to dictate what evidence the state may consider in deciding whether its voter qualification requirements have been met. *Husted*, 584 U.S. at 782 (Thomas, J., concurring). This Court should avoid construing the NVRA to create that constitutional issue.

Conclusion

KFTC has not plausibly alleged that it or any of its members have been – or imminently will be – injured in a concrete personal way. It therefore has not established standing and this Court does not have jurisdiction. This suit must be dismissed pursuant to Fed. R. Civ. P. 12(b)(1).

Respectfully Submitted,

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CERTIFICATE OF SERVICE

It is hereby certified by undersigned counsel that the foregoing was filed on this 4th day of October 2024 through the federal Case Management Electronic Case Filing (CM/ECF) system, which will generate a notice of electronic filing (NEF) to all users who have registered in this action:

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