Ex. A

Hon. Tiffany M. Cartwright

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON

WASHINGTON STATE ALLIANCE FOR RETIRED AMERICANS,

Plaintiff,

v.

STEVE HOBBS, in his official capacity as Washington State Secretary of State, MARY HALL, in her official capacity as Thurston County Auditor, and JULIE WISE, in her official capacity as King County Elections Director,

Defendants.

JIM WALSH and MATT BEATON,

[Proposed] Intervenor-Defendants.

No. 3:23-cv-06014-TMC

[PROPOSED] MOTION TO DISMISS

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I. Introduction

This Court was faced with a challenge to an ancient state constitutional requirement and its more recent legislative enforcement. Supposedly, a local organization dedicated to protecting the voting rights of retired Washingtonians needed the Court to strike down the law (and therefore effectively void the state constitutional clause) because Washington's Constitution violated the federal constitution (including the 14th Amendment) as well as a 50 plus year old provision of the federal Voting Rights Act. Weighty issues, to be sure.

And yet, without even a dollop of briefing, and despite blatant, facial flaws in the First Amended Complaint, the cadre of state defendants simply conceded that the nominal plaintiff was completely correct in all respects, and joined the Washington State Alliance for Retired Americans in securing this Court's Order voiding the state constitution's residency duration requirement for voter registration, together with its accompanying statutes.

But the Alliance as wrong—to the extent it cares at all, as opposed to lending itself out as a tool for a partisan elections lawyer to roam the country voiding laws he perceives as detrimental to the electoral prospects of candidates he favors. And the state defendants were wrong to concede without raising any of the plain challenges to the Alliance. Indeed, both because the Alliance lacks standing, and because the case plainly lacked genuine adversity, this Court did and still does lack Article III jurisdiction over the matter. It must either dismiss with prejudice, or re-open the matter and void the settlement to allow actual, contested litigation of the issues.

II. Relevant Facts And Procedural History.

Plaintiff, the Washington State Alliance For Retired Americans, filed this suit on October 7, 2023, and filed a First Amended Complaint on October 20, 2023. Plaintiff's FAC alleges that the requirement in Washington's Constitution that a voter "have lived in the state, county, and precinct thirty days immediately preceding the election at which they offer to vote," Wash. Const. art. VI, § 1, violates Section 202 of the Voting Rights Act and the First and Fourteenth Amendments to the United States Constitution. It similarly alleged that the corresponding sections of the Revised Code of Washington, RCW 29A.08.230, and Washington Administrative Code,

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WAC 434-230-015, violate the same federal laws and constitutional provisions. FAC, Doc. 16 ¶¶ 7–10 (Oct. 20, 2023). Plaintiff sought a declaration that the challenged requirement is invalid and a permanent injunction forbidding its enforcement. *Id.* at 20-21. Plaintiff's complaint named as defendants the Secretary of State and two county elections officials, the Thurston County Auditor and King County Director of Elections. *Id.* ¶¶ 19-20.

The County Defendants filed Answers on December 8, 2023, and the Secretary of State filed an Answer on January 4, 2024. Two months later, after nothing at all had happened in the case, the parties notified the Court that they had resolved the matter, and on March 8, 2024, filed a motion for consent judgment voiding the state Constitution. The Court entered that order on March 15, 2024 and closed the case.

III. Argument.

Plaintiff, which filed in this Court and therefore selected the federal forum, now bears the burden of establishing this Court's subject-matter jurisdiction. "The party invoking federal jurisdiction bears the burden of establishing the elements of standing, and each element must be supported in the same way as any other matter on which the plaintiff bears the burden of proof, *i.e.*, with the manner and degree of evidence required at the successive stages of the litigation." *Stavrianoudakis v. United States Fish & Wildlife Serv.*, 108 F.4th 1128, 1136 (9th Cir. 2024) (cleaned up, quoting *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 561 (1992)). *See also Yang v. Mayorkas*, No. C24-0066-KKE, 2024 WL 4068890, at *3 (W.D. Wash. Sept. 5, 2024) ("The plaintiff bears the burden, as the party invoking federal jurisdiction, to establish the elements of standing through all stages of federal judicial proceedings because it is not enough that a dispute was very much alive when suit was filed. Without an extant controversy through all stages of review, a case will become moot because proceedings not of a justiciable character are outside the contemplation of the constitutional grant.") (cleaned up).

"To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face." *Children's Health Def. v.*

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Meta Platforms, Inc., 112 F.4th 742, 753 (9th Cir. 2024) (cleaned up, quoting *Ashcroft v. Iqbal*, 556 U.S. 662, 678 (2009).

Finally, in "the absence of a genuine adversary issue between the parties … a court may not safely proceed to judgment, especially when it assumes the grave responsibility of passing upon the constitutional validity of legislative action." *United States v. Johnson*, 319 U.S. 302, 304 (1943). "Whenever in the course of litigation such a defect in the proceedings is brought to the court's attention, it may set aside any adjudication thus procured and dismiss the cause without entering judgment on the merits. It is the court's duty to do so where, as here, the public interest has been placed at hazard by the amenities of parties to a suit conducted under the domination of only one of them." *Id.* at 305.

A. This Court Lacks Jurisdiction—Even Today—Over A Case With No Genuine Adversaries.

This Court can, should, and indeed, must, reject participation in a sham case among jointly interested parties, with no adversarial aspect. As the Supreme Court mandated in *Johnson*, "it is the court's duty to do so …" The same rule is of long standing in the Ninth Circuit. *See, e.g.*, *Waialua Agr. Co. v. Maneja*, 178 F.2d 603, 613 (9th Cir. 1949) (remanding a case for fact-finding because "in the absence of real controversy between the actual parties, the stipulation, which practically dictates the judgment, renders the case moot."). More recently, it reaffirmed that "a suit between parties who are not truly adverse cannot satisfy the requirement of Article III of the Constitution that the lawsuit present an actual case or controversy." *Lux EAP, LLC v. Cmty. Action Emp. Assistance Program*, No. 21-56122, 2023 WL 4858130, at *1 (9th Cir. July 31, 2023). In that case, ostensibly a private contract dispute, "plaintiff Lux and defendant CAEAP had been, and were at the time this action was filed, controlled by common management. In actuality, Lux was suing itself. With the suit being friendly, CAEAP did not even oppose Lux's 'demand' for relief." *Id.* Here, the proceedings, especially including that not a single defendant opposed the entirely of Alliance's demanded relief, demonstrate that "common political goals" substituted for "common management" to put all parties to the lawsuit on the same side.

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Such cooperation seeks to use the authority of a federal court to impose a rule on others, as the aligned defendants did here. "The Court should consider that there is no power to render opinions merely advisory or to decide moot questions or to set precedent for future litigation. It is of great importance that the rights of third parties might be prejudiced by a declaratory judgment in this case …" *Waialua Agr. Co.*, 178 F.2d at 613. This is particularly true in the heightened context of political litigation. When the Ninth Circuit once lost sight of this limitation on federal judicial authority, the Supreme Court dismissed the eventual appeal as moot. "In advancing cooperation between Yniguez and the Attorney General regarding the request for and agreement to pay nominal damages, the Ninth Circuit did not home in on the federal courts' lack of authority to act in friendly or feigned proceedings." *Arizonans for Off. Eng. v. Arizona*, 520 U.S. 43, 71 (1997).

Nor can the settlement be salvaged by pointing to the pending motion to intervene, as the Ninth Circuit recently held. In the contract dispute cited above, the plaintiff tried that very trick. "Lux now rests on its argument that the unopposed intervention by the Bruners had resuscitated the district court's subject matter jurisdiction over the action because the Bruners were adverse to Lux, thus presenting a bona fide case or controversy. Lux cites no authority for its postulation that *post hoc* intervention by a third party can reanimate a case over which the court lacks subject matter jurisdiction. Nor does it come to grips with case law suggesting that intervention in such circumstances should not be allowed, much less be held to restore jurisdiction that never existed." Lux EAP, 2023 WL 4858130, at *1. Here, of course, the intervention is not agreed to, and comes after the Court purports to establish a new rule binding Auditor Beaton and all his 36 colleagues who were not party to the initial action. Nonetheless, the key outcome is the same: the Court must void the settlement for lack of a justiciable case or controversy, whether it does so before or after granting the motion to intervene. There is "no authority requiring the district court to follow a particular order in addressing motions or other pleadings." *Leisnoi, Inc. v. United States*, 313 F.3d 1181, 1184 (9th Cir. 2002). And intervention or not, the case as pled lacks the required adversarial disposition to create a case or controversy.

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B. The Alliance Failed To Establish This Court's Subject Matter Jurisdiction.

The Alliance has failed to establish this Court's jurisdiction because (1) the Alliance lacked standing when it filed the amended complaint; and (2) to the extent its claims are based on the possibility of future injury, its claims are unripe. Federal courts "presume" that they "lack jurisdiction unless the contrary appears affirmatively from the record." *Renne v. Geary*, 501 U.S. 312, 316 (1991) (quotation omitted). Here, the Alliance failed to "clearly [] allege facts demonstrating that [it] is a proper party to invoke judicial resolution of the dispute and the exercise of the court's remedial powers." *Id.* In order to establish standing, on its own behalf or that of any member, the Alliance "must establish the three irreducible elements of Article III standing. First, that they suffered an injury in fact that is concrete, particularized, and actual or imminent. Second, that their injury was likely caused by the defendants. And third, that their injury would likely be redressed by judicial relief." *Stavrianoudakis*, 108 F.4th at 1136 (cleaned up).

1. The Alliance Lacks Representational Standing.

"To satisfy associational standing requirements, an organization must demonstrate that (1) ***at least one of its members*** has suffered an injury in fact that is (a) concrete and particularized and (b) actual or imminent, rather than conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action; and (3) it is likely, not merely speculative, that the injury will be redressed by a favorable decision." *California Rest. Ass'n v. City of Berkeley*, 89 F.4th 1094, 1099 (9th Cir. 2024). In other words, the Alliance can 'stand in the shoes' of one of its members for purposes of the same standing requirements, but only if it names and shows that one of its members actually has those shoes to share.

In its amended complaint, the Alliance failed to identify any specific current member presently or imminently injured in fact by either the state or precinct aspects of the qualification law. The Alliance alleged having "approximately 94,000 members across Washington" FAC ¶17. It alleged that "new members are constantly joining its ranks." *Id.* But the Alliance did not identify a specific member who— as of November 20, 2023—either (1) currently resides outside Washington but will imminently move into the State within 30 days of an election and thus be

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prevented from voting due to the residency requirement; or (2) will imminently move to a different address within the State and thus be prevented from voting in all races on the ballot at that new address due to the durational residency oath. The Alliance thus lacks representational standing to challenge the residency duration. *See Rosario v. Rockefeller*, 410 U.S. 752, 759 n.9 (1973) (no standing to challenge "durational residence requirement" when plaintiffs were not "recently arrived residents of the State" and had not "moved from one county to another"). Without the participation of any potential voter, this Court cannot determine the validity of the Alliance's claims or the necessary scope of relief. New Washington residents might prefer to vote one last time in their previous State—as the VRA expressly allows. *See* 52 U.S.C. § 10502(e). And current Washington residents may still vote at their previous registration address, RCW 29A.08.140(2)(b), which could potentially include every single election on the ballot the voter would receive at the new address. This Court cannot determine that the residency duration requirement is facially unlawful without the Alliance identifying a specific member harmed by the law.

2. The Alliance Lacks Organizational Standing.

"An organization has direct standing to sue where it establishes that the defendant's behavior has frustrated its mission and caused it to divert resources in response to that frustration of purpose. Of course, organizations cannot manufacture the injury by incurring litigation costs or simply choosing to spend money fixing a problem that otherwise would not affect the organization at all, but they can show they would have suffered some other injury had they not diverted resources to counteracting the problem." *E. Bay Sanctuary Covenant v. Biden*, 993 F.3d 640, 663 (9th Cir. 2021). Alliance fails this test. The Alliance formed in Washington state in 2016, with the following stated purpose:

> The purpose of the Washington State Alliance for Retired Americans Educational Fund is to create a statewide network of organizations in order to educate and inform the membership, the public, and elected officials about issues that affect the well-being of senior citizens, so that they may all work towards advancing and achieving just and equitable living conditions for senior citizens within the state and the nation, within the meaning of Section 501(c)(4) of the Internal Revenue Code.

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See Exhibit 1, WSAFRA Articles of Incorporation.[1] This is a far cry from the claim put forward in the FAC, that "The mission of the Alliance and its nationwide affiliate is to ensure social and economic justice and full civil rights for retirees, with particular emphasis on safeguarding their right to vote." The actual purpose of WSAFRA has nothing at all to do with "social and economic justice," nor "civil rights for retirees." Its stated mission has no emphasis at all, and certainly not "particular emphasis on safeguarding their right to vote." Baldly misrepresenting the organization's purpose—a falsehood willingly accepted by Defendant Hobbs despite that his own agency held the contradictory evidence—does not serve to manufacture Article III standing. The Alliance can continue to fulfill its actual, genuine, stated mission "to educate and inform the membership, the public, and elected officials about issues that affect the well-being of senior citizens" whether that "issue" is the Washington State Constitution's residency requirement or fluoridation of water, without engaging in this litigation. Lending itself out to be used as a cat's paw for partisan, ideologically driven litigation interests is not germane to its organizational purpose.

3. The Alliance Failed To Show That Its Claims Were Ripe.

"The constitutional component of the ripeness inquiry is often treated under the rubric of standing and, in many cases, ripeness coincides squarely with standing's injury in fact prong. Sorting out where standing ends and ripeness begins is not an easy task. Indeed, because the focus of our ripeness inquiry is primarily temporal in scope, ripeness can be characterized as standing on a timeline." *Thomas v. Anchorage Equal Rts. Comm'n*, 220 F.3d 1134, 1138 (9th Cir. 2000). Here, however treated, the Alliance also fails to demonstrate, as it must, that its claims are ripe.

The Alliance's representational claims challenging the state qualification turn on the idea that, within 30 days of some unspecified future federal election, some unspecified individual will move to Washington, join the Alliance, and then be prohibited by the law from registering to vote and voting in that election. FAC ¶17. However, the Ninth Circuit has "held that neither the mere

[1] The Court is asked to take judicial notice of this document, available on the website of Defendant Hobbs through the search function available at https://ccfs.sos.wa.gov/#/BusinessSearch/BusinessFilings.

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existence of a proscriptive statute nor a generalized threat of prosecution satisfies the 'case or controversy' requirement." *Thomas*, 220 F.3d at 1139.

The Alliance certainly has not shown that it (or any unnamed member) would "face a realistic danger of sustaining a direct injury as a result of the statute's operation or enforcement …" *Id.* (quoting *Babbitt v. United Farm Workers Nat'l Union*, 442 U.S. 289, 298 (1979)). The Alliance has not demonstrated that withholding consideration of its claims would harm its current members, all allegedly Washington residents. The challenged law cannot impact their ability to vote in presidential or statewide elections, and Plaintiff has not identified any specific election where the ability to vote in all local elections at an old address would cause harm to a person who recently moved within the state.

C. Any Claims Alliance Brought On Its Own Behalf Were Barred By Laches.

Even if the Alliance would otherwise have a cause of action to bring claims on its own behalf, the doctrine of laches would bar such claims. "Where the elements of laches are apparent on the face of the complaint, it may be asserted on a motion to dismiss for failure to state a claim upon which relief can be granted." *Russell v. Thomas*, 129 F. Supp. 605, 605–06 (S.D. Cal. 1955). Laches applies when a defendant can prove "(1) lack of diligence by the party against whom the defense is asserted, and (2) prejudice to the party asserting the defense." *Costello v. United States*, 365 U.S. 265, 282 (1961).

"To determine whether a suit is barred by laches, a court must consider two factors: the diligence of the party against whom the defense is asserted and the prejudice to the party asserting the defense. A determination of whether a party exercised unreasonable delay in filing suit consists of two steps. First, the Court assesses the length of the delay, which is measured from the time the plaintiff knew or should have known about its potential cause of action. Second, the Court decides whether the plaintiff's delay was reasonable. The Court also considers whether the plaintiff has proffered a legitimate excuse for its delay." *Arizona Minority Coal. for Fair Redistricting v. Arizona Indep. Redistricting Comm'n*, 366 F. Supp. 2d 887, 908 (D. Ariz. 2005) (cleaned up).

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The Alliance has existed as a 501(c)(4) organization since 2016. Plaintiff has inexcusably and unreasonably delayed filing suit until well after the 2016, 2018, 2020, and 2022 general elections and other elections during that period. Washington constitutional qualification clause, to put it mildly, predates even the Alliance's existence. The Alliance expressed no qualms in 2016, a presidential election year, nor in the following presidential election year. And although it filed suit before the recent Washington legislative session, the conduct of the parties in quietly settling the litigation without seeking a legislative remedy during that session, and purporting to bind Beaton and other auditors, some of whom have held office since prior to the Alliance's existence, was designed to prevent them from having any voice in gutting the state Constitution.

D. The Alliance Failed To Allege A Plausible Violation Of The Voting Rights Act.

The Alliance failed to plausibly allege that the Washington durational residency requirement violates the VRA because the VRA amendments squarely allow Washington to limit "registration" or voting "qualification" for its presidential electors to citizens who reside in Washington at least "thirty days immediately prior to any presidential election" and impose no restriction on qualifications for other elections. 52 U.S.C. §10502(d). "[T]he words of a statute must be read in their context and with a view to their place in the overall statutory scheme." *King v. Burwell*, 576 U.S. 473, 492 (2015).

Section 10502(a) expresses Congress's legislative findings. Congress made findings only about "the imposition and application of the durational residency requirement as a precondition to voting for the offices of President and Vice President." 52 U.S.C. §10502(a). Congress sought to protect "the inherent constitutional right of citizens to enjoy their free movement across State lines" to vote in presidential elections. Id. §10502(a)(2). Next, §10502(b) "declares" Congress's overarching plan "to completely abolish the durational residency requirement as a precondition to voting for President and Vice President." The Alliance latches on to this declaratory language, FAC ¶50, and mixes it with subsequent mandatory language, *id.* ¶37. But the rest of §10502, not §10502(a)-(b), provides the rules for States to accomplish Congress's policy objective.

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No citizen "otherwise qualified to vote in any election for President and Vice President" except for a "failure" to "comply with any durational residency requirement," "shall be denied the right to vote for electors for President and Vice President," §10502(c), because Congress expressly provides that citizens who move to a new State "after the thirtieth day next preceding such election and, for that reason, do[] not satisfy the registration requirements of such State" can vote in-person or by absentee ballot in their previous state of residence, §10502(e). By requiring the previous state of residence to allow the outgoing resident to vote in the presidential election, Congress protects the federal right to vote somewhere in the United States for presidential electors.

Congress has not commanded States to refer to such a qualification solely as "a registration requirement." FAC ¶5. Instead, §10502(d) states that "each State shall provide by law for the registration or other means of qualification of all duly qualified residents of such State who apply, not later than thirty days immediately prior to any presidential election, for registration or qualification to vote for the choice of electors for President and Vice President." (Emphases added.) Tellingly, the Alliance completely ignores that §10502(d) expressly allows 30-days' residency as a "qualification to vote." Even if such a distinction made a difference, the Alliance readily concedes that the 30-day qualification is also a requirement "[i]n order to register to vote." FAC ¶32.

That Washington does not completely cut off registration 30 days before a presidential election does not transform its run-of-the-mill qualification into a VRA violation. If the Alliance's reading of §10502 were correct, then every State that allows registration within 30 days of a presidential election only for individuals who have resided in the State for 30 days prior to the election would be violating the VRA. That includes States as diverse as Illinois, New Jersey, Pennsylvania, Utah, and Northn Carolina, where a similar challenge by a similar organization was summarily dismissed.

Further, the VRA has no bearing on qualifications for any election other than "vot[ing] for electors for President and Vice President, or for President and Vice President," §10502(c), so no

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current Washington resident (including all the Alliance's members) has a VRA claim. Finally, this claim must be dismissed to the extent the Alliance attempts to plead it on behalf of the organization itself because the Alliance is not a "citizen of the United States" and cannot vote in any election. 52 U.S.C. §10502(c).

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

The burden of an election law burdens is "weighed against the state's interests by looking at the whole electoral system." *Luft v. Evers*, 963 F.3d 665, 671-72 (7th Cir. 2020) (Easterbrook, J.) (citing *Burdick v. Takushi*, 504 U.S. 428, 434, 439 (1992)). "Only when voting rights have been severely restricted must states have compelling interests and narrowly tailored rules." *Id.* "Where the burden imposed by the state is not 'severe'—where it is 'lesser'—courts engage in 'less exacting review.'" *6th Cong. Dist. Republican Comm. v. Alcorn*, 913 F.3d 393, 402 (4th Cir. 2019) (quoting *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997)).

Less exacting review is appropriate here. *See Luft*, 963 F.3d at 675-76 (upholding Wisconsin's 28-day qualification for non-presidential elections despite Wisconsin allowing election-day registration, Wis. Stat. Ann. §6.55). The 30-day qualification is not a severe burden and will not "exclude[] many residents." *Dunn v. Blumstein*, 405 U.S. 330, 351 (1972).

There is no federal right to move into or within Washington within 30 days of an election and vote at the new place of residency. *See id.* at 348 (allowing 30-day qualification); *Marston v. Lewis*, 410 U.S. 679, 680 (1973) (upholding 50-day qualification for state and local elections). For current residents, the "Supreme Court has not expressly recognized a fundamental right to intrastate travel" at all, *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, *id.* at 268 (Williams, J., concurring).

Moreover, the ways in which Washington's "election system differs from those of Arizona and Tennessee" in *Marston* and *Dunn*—such as allowing registration within 30 days of an election—"make it easier to vote in" Washington. *Luft*, 963 F.3d at 676; *see* FAC ¶46 (conceding Washington's law would be constitutional if it completely closed registration at 30 days). New

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residents can still vote in presidential elections in their previous state of residence, and current residents who move within Washington can vote at their previous address. "Considering only the statute's broad application to all voters, as the Court must for this facial challenge, the qualification imposes only a limited burden on voters' rights." *Crawford v. Marion Cnty. Election Bd.*, 553 U.S. 181, 202-03 (2008) (plurality) (cleaned up, quoting *Burdick*, 504 U.S. at 439).

Thus, at most, "the State's asserted regulatory interests need only be sufficiently weighty to justify the limitation imposed on the party's rights." *Timmons*, 520 U.S. at 364 (quotations omitted). Washington's law satisfies that standard. This Court should respect the Legislature's "judgment" about what constitutes "an ample period of time for the State to complete whatever administrative tasks are necessary to prevent fraud" with its election laws. *Dunn*, 405 U.S. at 348. The 30-day qualification serves North Carolina's "legitimate purpose to determine whether certain persons in the community are bona fide residents" by dissuading "would-be fraudulent voters" who "would remain in a false locale for" a short time before an election. *Id.* at 351-52 (cleaned up). Plus, because "campaign spending and voter education occur largely during the month before an election," making sure that a voter resided in Washington for that period serves the State's interest in providing for an educated electorate with at least some minimal ties to the State. *Id.* at 358. Finally, 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.

IV. Conclusion.

For the foregoing reasons, the Court should vacate the collusive settlement and dismiss the case. In the alternative, the Court should re-open the case, vacate the settlement, and allow the intervention of Walsh and Beaton for purposes of contesting the issues raised in sections B through E of this Motion.

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