IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF WEST VIRGINIA

FOUNDATION AGAINST INTOLERANCE & RACISM, INC.,

Plaintiff,

v.

MARY JANE PICKENS, in her official capacity as Executive Director of the West Virginia State Bar; DAVID AMSBARY, in his official capacity as President of the West Virginia State Bar Board of Governors; and ROBBY ALIFF, in his official capacity as President-Elect of the West Virginia State Bar Board of Governors,

Defendants.

Case No. 1:24-cv-115
Judge Thomas Kleeh

PLAINTIFF'S MEMORANDUM IN OPPOSITION TO DEFENDANTS' RENEWED MOTION TO DISMISS AMENDED COMPLAINT

INTRODUCTION

The West Virginia State Bar and its Board of Governors impose unconstitutional, racially discriminatory qualifications for a seat on the Board and in the election processes for that seat. *See* WV R BAR BYLAWS art. 5.02(d); 5.06(b); and 5.07. One Board seat is set aside solely for an African American attorney, and only African American attorneys may vote for candidates for that seat. Attorneys of all other races are categorically excluded from consideration for that seat and from participation in every step of the election for the seat. *Id.*

Plaintiff Foundation Against Intolerance & Racism (FAIR) counts as its members multiple West Virginia lawyers who were recently excluded from running—and voting—for the racially

exclusive seat. To vindicate its members' constitutional guarantees of equal protection, citizenship, and equal voting rights, FAIR brought this case against the State Bar's Executive Director, President, and President-Elect.[1] The Bar and Board's race-based set-aside and discriminatory election procedure cannot—and does not—survive constitutional scrutiny. The Board does not even attempt to argue otherwise.

Instead, Defendants hope to prevent this Court from ruling on the plainly unconstitutional nature of their Board and elections. They move to dismiss under Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) for lack of subject-matter jurisdiction and failure to state a claim, respectively. Specifically, Defendants claim that FAIR lacks associational standing and that the U.S. Constitution does not reach State Bar elections. Defendants also assert that FAIR has named improper parties, and that Defendants are immune from suit. Additionally, Defendants claim that FAIR has failed to comply with the notice requirements of Federal Rule of Civil Procedure 5.1. None of these arguments have merit. Racially exclusive elections have no place in America, full stop. Citizens who are qualified to vote and run in those elections—*but for their race*—plainly have standing to challenge them. For the reasons that follow, Defendants' motion to dismiss should be denied.

STANDARD OF REVIEW

A defendant may challenge the pleadings for subject-matter jurisdiction in two ways: facially or factually. *Kerns v. United States*, 585 F.3d 187, 192–93 (4th Cir. 2009). The first, relevant here, entails a defendant contending that the complaint "simply fails to allege facts upon

[1] Pursuant to Federal Rule of Civil Procedure 25(d), when a public officer ceases to hold office, the officer's successor is automatically substituted. The annual Board of Governors election concluded in March 2025. As a result, David Amsbary is substituted for Shannon Smith as President, and Robby Aliff is substituted for David Amsbary as President-Elect. The State Bar's Executive Director remains unchanged.

which subject matter jurisdiction can be based." *Id.* (citing *Adams v. Bain*, 697 F.2d 1213, 1219 (4th Cir. 1982)). In that case, the plaintiff receives "the same procedural protection" as provided by Rule 12(b)(6) analysis. *Id.* The alleged facts are "taken as true," and the motion must be denied if the facts alleged are sufficient to invoke jurisdiction. *Id.*

When considering a motion to dismiss, the court must "assume all [well-pled facts] to be true" and "draw all reasonable inferences in favor of the plaintiff." *Nemet Chevrolet, Ltd. v. Consumeraffairs.com, Inc.*, 591 F.3d 250, 253 (4th Cir. 2009). A plaintiff's general factual allegations are sufficient, for courts must accept that "general allegations embrace those specific facts that are necessary to support the claim." *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 561 (1992).

ARGUMENT

I. FAIR has Article III Standing

Article III's standing requirement is fulfilled where a plaintiff-organization asserts the standing of its members. *Summers v. Earth Island Institute*, 555 U.S. 488, 494 (2009). To establish associational standing, plaintiff-organizations must show that (1) one or more of its members "would otherwise have standing to sue in their own right"; (2) the interests of the suit "are germane to the organization's purpose"; and (3) the individual members' participation is not required. *Friends of the Earth, Inc. v. Laidlaw Env't Servs. (TOC), Inc.*, 528 U.S. 167, 181 (2000). FAIR's Amended Complaint includes allegations sufficient to satisfy all three of these prongs.

a. Members A and B have standing to sue in their own right

To establish standing in their own right, FAIR's members must demonstrate that they "suffered a concrete and particularized injury that is fairly traceable to the challenged conduct, and is likely to be redressed by a favorable judicial decision." *Carney v. Adams*, 592 U.S. 53, 58 (2020).

Defendants argue that their racially exclusive elections do not injure Members A and B, and also that any constitutional injury is not caused by their discriminatory elections. Mot. to Dismiss, Dkt 36 at 15–20.

i. Members A and B suffered an injury-in-fact

An injury-in-fact must be "concrete and particularized" as well as "actual or imminent." *Carney*, 592 U.S. at 58. In Fourteenth Amendment Equal Protection cases, the "denial of equal treatment resulting from [a discriminatory] barrier," is the injury-in-fact. *Ne. Fla. Chapter of the Associated Gen. Contractors of Am. v. City of Jacksonville*, 508 U.S. 656, 666 (1993). Members A and B have a constitutionally protected right "to be considered for public service *without the burden* of invidiously discriminatory qualifications." *Turner v. Fouche*, 396 U.S. 346, 362 (1970) (emphasis added).

Here, Defendants do not really dispute the Fifteenth Amendment injury FAIR's members recently suffered and will necessarily continue to suffer in every Board election. The Board recently held a racially exclusive election, and FAIR's members were not allowed to vote in that election because of their race. Am. Compl., Dkt 27 ¶¶ 25–26. A more straightforward case of standing is hard to envision. *See Gill v. Whitford*, 585 U.S. 48, 49 (2018) ("[t]he right to vote is individual and personal in nature, and voters who allege facts showing disadvantage to themselves as individuals have standing to sue") (internal citations omitted).

Instead, Defendants focus on denying that Members A and B have suffered an injury stemming from Defendants' violation of the Fourteenth Amendment. Mot to Dismiss, Dkt 36 at 15–20. But this also fails. The denial of equal treatment here is concrete and particularized because Members A and B were able and ready to be considered for candidacy but were prevented from running due to their race. Am. Compl., Dkt 27 ¶¶ 9–10, 28–31; *infra* pp. 6–7. And this harm is

actual, having already occurred when they were excluded from past elections, such as the 2025 election cycle. Am. Compl., Dkt 27 ¶¶ 25–26, 28, 30, 32. Given the four-year frequency of the elections for this seat—and without relief from this Court—this harm is also imminent since it will inevitably occur again no later than 2029. Am. Compl., Dkt 27 ¶¶ 27, 29, 31, 32.

At this stage of the proceedings, Members A and B need only allege that they are ready, willing, and able to be nominated and elected to the challenged Board seat. *See Gratz v. Bollinger*, 539 U.S. 244, 260–62 (2003) (holding that whether a plaintiff "actually applied" was not relevant to her standing to seek relief). The Supreme Court is clear that where there is an uncontested "obstacle to [one's] candidacy," there is no difficulty showing "an actual case or controversy" under Article III. *Clements v. Fashing*, 457 U.S. 957, 962 (1982). FAIR has plainly made such allegations, and Defendants do not contest them. Am. Compl., Dkt 27, ¶¶ 9–10, 28–30. Individuals who are deterred—or in this case, flatly excluded—from applying because of racially discriminatory barriers are still injured by those barriers. *Int'l Bhd. of Teamsters v. United States*, 431 U.S. 324, 365 (1977).

Time and again, the Supreme Court has recognized the right of individuals to challenge racial barriers to public office. In *Turner v. Fouche*, the Supreme Court considered a Georgia school-board and jury selection scheme that was alleged to have a racially discriminatory effect. The Court explained that citizens have a "federal constitutional right to be considered for public service without the burden of invidiously discriminatory disqualifications." 396 U.S. at 362. Here, FAIR's members are not even alleging a discriminatory *effect* that excludes them from consideration; the challenged bylaws are *facially* discriminatory and exclusionary. "The State may not deny to some the privilege of holding public office that it extends to others on the basis of

distinctions that violate federal constitutional guarantees." *Id.* at 362–63. Put simply, there is no need to fulfill a futile application where there is an express racial barrier to office. *Id.* at 362 n.23.

In its Amended Complaint, FAIR properly alleges that both of its identified members,[2] Members A and B, meet every eligibility criterion for nomination and election to the African American governor seat, save for the racially discriminatory qualification. Am. Compl., Dkt 27 ¶¶ 9–10, 28–31. FAIR also attests that both these members meet every eligibility criterion to vote in the election for this seat, save for the racially discriminatory qualification. *Id.* ¶¶ 9–10, 32–33. Members A and B are both members of the West Virginia State Bar. *Id.* ¶¶ 9–10. Members A and B both reside in and have their principal offices for the practice of law in West Virginia. *Id.* Members A and B are not of the preferred race, nor are they registered as such with the State Bar. *Id.* And Members A and B allege their interest in applying. *Id*. at ¶¶ 9–10, 28–31 (to be "ready" and "willing" necessarily encompasses intent).

These general allegations "embrace those specific facts that are necessary to support" the claim of ability and readiness, as required at this procedural posture.[3] *Lujan*, 504 U.S. at 561. The

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[2] Defendants object to FAIR's method of pseudonymously identifying its members. Mot. to Dismiss, Dkt 36 at 10 n.10. Defendants' focus on anonymous parties to litigation is misplaced. The plaintiff in this case, FAIR, is not anonymous. In associational standing cases, circuit courts agree that legal names of pseudonymously-identified members are not required. *Advocs. for Highway & Auto Safety v. FMCSA*, 41 F.4th 586, 594 (D.C. Cir. 2022) ("[A]nonymity is no barrier to standing" because "[n]aming members adds no essential information."); *Nat'l Council of La Raza v. Cegavske*, 800 F.3d 1032, 1041 (9th Cir. 2015) (finding no purpose in requiring an organization to identify its members by legal name), *overruled on other grounds by Arizona All. for Retired Americans v. Mayes*, 117 F.4th 1165, 1177 (9th Cir. 2024); *Hancock Cnty. Bd. of Sup'rs v. Ruhr*, 487 F. App'x 189, 198 (5th Cir. 2012) (an association need not provide legal names of particular members in its complaint to survive a Rule 12(b)(1) motion to dismiss); *Speech First, Inc. v. Shrum*, 92 F.4th 947, 951 (10th Cir. 2024) ("[O]rganizational standing is proper even when the qualifying member of the plaintiff organization is anonymous"); *Am. All. for Equal Rts. v. Fearless Fund Mgmt., LLC*, 103 F.4th 765, 773 (11th Cir. 2024) (holding that the organization's pseudonymous identification of its affected members poses no bar to standing).

[3] Discounting FAIR's allegations and ignoring the proper pleading standard, Defendants assert that a "fact-intensive inquiry" is necessary. Mot. to Dismiss, Dkt 36 at 16–17 (citing *Carney*, 592 U.S.

Amended Complaint even identifies with specificity the timelines and frequency for nomination and election for the challenged seat. Am. Compl., Dkt 27 ¶¶ 25, 27. Short of actually applying to the discriminatory process—which they are categorically precluded from doing—it is hard to imagine what more could be alleged that would not exceed the applicable pleading standard: "a short and plain statement of the claim showing that the pleader is entitled to relief[.]" Federal Rule of Civil Procedure 8(a)(2).

Defendants further question the standing of Members A and B, on the grounds that they have not applied for *other* seats for which they are eligible. Mot. to Dismiss, Dkt 36 at 17–20. Defendants attempt to draw parallels by invoking a district court's contention that "when there exist ten paths to the same destination, an individual is not 'steered away' from that destination[.]" *Id.* at 18–19 (citing *Opiotennione v. Bozzuto Mgmt. Co.*, Civ. No. 20-1956, 2021 WL 3055614, at *5 (D. Md. July 20, 2021), *aff'd*, 130 F.4th 149 (4th Cir. 2025)). However, providing an available "alternative" for a litigant to pursue does not excuse the government of liability for violating the litigant's constitutional rights. *Fed. Election Comm'n v. Cruz*, 596 U.S. 289, 298 (2022) ("[d]emanding that the [litigant] comply with the Government's 'alternative' would therefore require it to forgo [its constitutional right that the court] must assume it has").

Therefore, because the constitutional rights of Members A and B are violated due to their preclusion from the African American seat election processes, the alternative seats and elections Defendants offer are irrelevant. And for all of Defendants' words spent outlining how State Bar

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at 64) (cleaned up). Defendants' authorities rely on both *Lujan* and *Carney*, which were before the Supreme Court on a summary judgment record. In *Carney*, the Court emphasized the importance of the case's posture and the particular record before it. 592 U.S. at 61–64. When comparing *Carney*'s summary judgment record to precedent, the Court focused on previous cases either on motion for summary judgment or preliminary injunction. *Id.* at 64–66. Both standards are inapplicable at this stage. *Supra* pp. 2–3.

members may file a grievance or avail themselves of another administrative remedy, Mot. to Dismiss, Dkt 36 at 6, 11, 18–20, "federal courts cannot require exhaustion under § 1983." *Patsy v. Bd. of Regents of State of Fla.*, 457 U.S. 496, 512 (1982).

ii. FAIR established causation between Defendants' conduct and the injury

When a government enactment denies a plaintiff equal protection, that injury-in-fact is caused by it. *See Ne. Fla. Chapter*, 508 U.S. at 666 n.5 (finding that it flows from the injury-in-fact analysis that a city's ordinance was "the cause" of injury). Causation is established if it is "likely that the injury was caused by the conduct complained of[.]" *Friends of the Earth, Inc. v. Gaston Copper Recycling Corp.*, 204 F.3d 149, 154 (4th Cir. 2000).

The West Virginia State Bar requires that its members be a specific race to be eligible for nomination and election to a particular seat, and to be eligible to vote in that election. WV R BAR BYLAWS art. 5.06(b) and 5.07. This necessarily disqualifies anyone who is not of that favored race. Defendants do not argue this self-evident point. Rather, Defendants claim that all of their duties and responsibilities as outlined by the State Bar Bylaws and Administrative Rules are not sufficient to establish causation simply because they did not enact the Bylaws and Rules and cannot unilaterally change them. Mot. to Dismiss, Dkt 36 at 20. But as discussed fully below, *infra* at 15–17, all that matters in an action brought against public officials under *Ex parte Young*, 209 U.S. 123 (1908) is whether the official is responsible for enforcing the challenged provision.[4] Here, FAIR properly complained of the actions Defendants are required to take pursuant to the Bylaws and Rules causing FAIR's members injury. Am. Compl., Dkt 27 ¶¶ 20–23, 33. And unless

[4] Imagine for a moment it were otherwise. A government official tasked with enforcing an unconstitutional law could shift blame to the legislature or the executive. That is not how civil rights litigation works. "Just following orders" is not a defense where an official is tasked with violating constitutional guarantees.

Defendants are arguing that they do *not* comply with the Bylaws and Rules, then Defendants have engaged in "the conduct complained of." *Friends of the Earth*, 204 F.3d at 154.

b. The interests of this suit are germane to FAIR's purpose

"Germaneness is often found without difficulty." 5B Charles Alan Wright & Arthur R. Miller, *Federal Practice and Procedure* § 3531.9.5 (3d ed. 2004). The germaneness requirement has no stricter standard than being "pertinent or relevant" to a plaintiff-organization's purposes. *Nat'l Constructors Ass'n v. Nat'l Elec. Contractors Ass'n, Inc.*, 498 F. Supp. 510, 521 (D. Md. 1980), *affirmed as modified*, 678 F.2d 492 (4th Cir. 1982). The requirement is considered "temperate," "modest," and "undemanding." *Humane Soc'y of the U.S. v. Hodel*, 840 F.2d 45, 53–59. (D.C. Cir. 1988). Courts will generally find a plaintiff-organization's interests not germane only if those interests are "truly unrelated." *Am. Ins. Ass'n v. Selby*, 624 F. Supp. 267, 271 (D.D.C. 1985).

FAIR's purposes include the defense of equal protection and equal rights for all, the enforcement of non-discrimination in diversity and inclusion efforts, and the protection of its members' constitutional rights. Am. Compl., Dkt 27 ¶ 8. The interests of this suit go right to the heart of FAIR's purposes. FAIR's Amended Complaint alleges that Defendants, through their enforcement of Bylaws 5.02(d), 5.06(b), and 5.07, have violated both the Equal Protection Clause and the Citizenship Clause of the Fourteenth Amendment, and the Fifteenth Amendment's categorical prohibition against racial qualifications for voting. Am. Compl., Dkt 27 ¶¶ 20–24, 33. Should FAIR prevail in this case, its members' constitutional rights will necessarily be vindicated, as it will achieve an injunction precluding Defendants from enforcing the challenged Bylaws in a discriminatory race-based manner, as well as a declaration that the race-based Bylaws enforced by Defendants violate the Constitution's demands for equal treatment.

Defendants' argument that FAIR lacks standing because it failed to allege "background circumstances" showing a "pattern of discrimination against white members of the State Bar" is inapplicable.[5] Mot. to Dismiss, Dkt 36 at 22. Background circumstances were found lacking in *Ames v. Ohio Department of Youth Services*, a Sixth Circuit case which the Supreme Court now seems poised to overturn. 87 F.4th 822 (6th Cir. 2023), *cert. granted*, 145 S. Ct. 118 (2024). But *Ames* was a Title VII case examining whether the individual plaintiff had enough evidence to establish a prima-facie case for her claim based on sexual orientation. *Id.* It did not analyze germaneness or associational standing at all and therefore has no applicability here.

The case before this Court requires no background circumstances as evidence. The State Bar imposes a facially discriminatory race requirement on elections and voting. WV R BAR BYLAWS art. 5.02(d), 5.06(b), and 5.07. And its policies and procedures for Defendants to carry out these elections are also explicitly discriminatory. Am. Compl., Dkt 27 ¶¶ 20–23, 33. It is not even clear how the existence or nonexistence of background circumstances is relevant to the germaneness requirement. Nor do Defendants make any effort to connect the dots.

c. Individual members' participation is not required

The participation of an individual member of an association is only required "when conflicts of interest among members of the association require that the members must join the suit individually in order to protect their own interests." *Md. Highways Contractors Ass'n, Inc. v. Maryland*, 933 F.2d 1246, 1252 (4th Cir. 1991). In *Maryland Highways*, the Fourth Circuit found that the Maryland Highways Contractors Association was not "in a position to speak for its members" on whether a law violated the constitutional and statutory rights of its members because

[5] Defendants focus on evidence of discrimination against *white* members of the State Bar, however the discriminatory barrier enforced by Defendants is not against *white* members of the State Bar. The barrier is enforced against *every* member of the State Bar who is not African American.

some of them had too diverse of statuses and interests. *Id.* at 1252–53. In fact, some members would have stood to benefit from the challenged program. *Id.* That is not at all the case here and Defendants make no effort to show that it is. *See* Mot. to Dismiss, Dkt 36 at 23.

First, as enumerated above, *supra* p. 9, FAIR's purposes include the defense of equal protection and equal rights for all, the enforcement of non-discrimination in diversity and inclusion efforts, and the protection of its members' constitutional rights. Am. Compl., Dkt 27 ¶ 8. Membership in FAIR, which is voluntary, is thus predicated on shared convictions regarding the significance of equal protection and non-discrimination. Because the Board's racially discriminatory election processes for the challenged seat are an affront to these convictions, the interests of *all* its members may be presumed to be vindicated in successful litigation to protect those principles and prevent further rights violations of Members A and B. This is distinct from *Maryland Highways*, where the organization at issue did not have such an ideological mission, but rather was made up of contracting firms that regularly bid—sometimes against each other—on highway construction projects. 933 F.2d at 1248.

Second, nothing about FAIR's legal claims and requested relief require the individual participation of its members. FAIR seeks only prospective declaratory and injunctive relief against the enforcement of the State Bar's Bylaws that discriminate on the basis of race in elections for the seat reserved for an African American attorney on the Board of Governors. Am. Compl., Dkt 27 at 10–11. FAIR does not seek to have a specific member placed on the Board or seek any relief specific to any individual member. Instead, should FAIR prevail on the merits, all of its members—indeed, all West Virginia attorneys—will be able to receive equal consideration for the Board seat currently reserved for members of a single preferred race.

Third, and as discussed above, FAIR alleges that Members A and B have been and will continue to be excluded from candidacy and voting in the African American seat election solely because of their race. *Supra* pp. 5–6. These allegations sufficiently establish the Members' injury and interest in this case.

At this stage, the only appropriate presumption for this Court is that FAIR's general allegations that it seeks to vindicate its members' constitutional rights "embrace those specific facts necessary to support" its claims. *Bennett v. Spear*, 520 U.S. 154, 168 (1997). Therefore, FAIR adequately stands in its members' shoes to bring this case and the motion to dismiss must be denied. *See supra* pp. 2–3; *Kerns*, 585 F.3d at 193.

II. The 15th Amendment Applies to State Bar Elections

The Fifteenth Amendment broadly prohibits "any state" from "den[ying] or abridg[ing]" the right of any citizen to vote "on account of race [or] color." U.S. Const. amend. XV, § 1. It is "simple in command" and "comprehensive in reach." *Rice v. Cayetano*, 528 U.S. 495, 512 (2000). State responsibility is implicated when "somewhere, somehow, to some extent," an official, vested with State power, is involved in the denial of voting rights solely due to race. *Terry v. Adams*, 345 U.S. 461, 468 (1953) (Frankfurter, J., concurring).

The Fifteenth Amendment includes, but is not limited to, "any election in which public issues are decided or public officials are selected." *Rice*, 528 U.S. at 523 (citing *Terry*, 345 U.S. at 468 (plurality opinion)). The meaning of "vote" is not qualified in any way, and given the "unique importance" of the Amendment, it is prudent to "err on the side of inclusiveness." *Davis v. Guam*, 932 F.3d 822, 830 (9th Cir. 2019). "All citizens . . . have an interest in selecting officials who make policies on their behalf[.]" *Rice*, 528 U.S. at 523. Federal courts owe no deference to state courts or state law when determining whether the elections in question concern public issues or public

officials. *Smith v. Allwright*, 321 U.S. 649, 662 (1944) (declaring that the state supreme court's determination was irrelevant and that "[f]ederal courts must for themselves appraise the facts").

U.S. Supreme Court precedent reveals that the Fifteenth Amendment's reach is extensive: even pre-primaries run by self-governing private groups implicate the Fifteenth Amendment. *See generally Terry*, 345 U.S. 461. The State Bar Board of Governor elections thus solidly fall within the qualification of "any election in which public issues are decided or public officials are selected." *Id.* at 468.

In *Terry*, the Court was faced with "pre-primary" elections run by the Jaybird Democratic Association—a private group whose membership was limited to white voters. 345 U.S. at 463. Candidates who were successful in the pre-primary did not automatically gain entry into the local Democratic primaries. *Id.* The Jaybirds contended that their elections were not held under state regulation, nor were they regulated by the state at all, and thus fell outside the Fifteenth Amendment's purview. *Id.* at 462–63. However, the Court's plurality reasoned that these elections held by an alleged "mere private group" were a perfunctory end-run around the Fifteenth Amendment. *Id.* at 466. It concluded that a state which permitted any "device" which resulted in the equivalent of a prohibited election—and the device itself—still violated the Fifteenth Amendment. *Id.* at 469. The Court recognized that "no election machinery could be sustained if its purpose or effect" was to deny on account of race someone's "effective voice in the governmental affairs of their country, state, or community." *Id.* at 466.

The State Bar is the agency of the West Virginia Supreme Court tasked with advancing the administration of justice and upholding the standards of its 9,000 members throughout the State of West Virginia. WV R BAR CONST art. I. Being an agent of the state supreme court makes the State Bar, its Board, and its decisions explicitly regulated by the State. But for the establishment

of the State Bar by the West Virginia Supreme Court, there is no Board nor its elections. This level of state endorsement far exceeds the standard applied in *Terry*, where the Jaybird Association hid behind a complete lack of regulation. 345 U.S. at 462–66.

The State Bar's duties include receiving and investigating complaints of unlawful practice, grievances against attorneys, and imposing discipline. WV R BAR CONST art. IV; WV R BAR BYLAWS art. 8 and 9. Those duties are supervised and undertaken by committees whose members are selected by the Board, including Defendants Amsbary and Aliff. In addition, Defendant Pickens also identifies African American attorneys, notifies them of the nominating process, and then receives their nominating petitions. Am. Comp., Dkt 27 ¶¶ 20–21. If there are no nominating petitions, Defendant Amsbary is required to appoint a committee to make such racially exclusionary nominations. *Id.* ¶ 22. Defendant Amsbary and Defendant Aliff are required to faithfully endeavor to execute the State Bar's objects, aims, and purposes, including the challenged election. *Id.* ¶¶ 22–23. And there are no exceptions. *Id.* ¶ 33. Defendants' conduct far exceeds a bare standard that "somewhere, somehow, to some extent," they were involved in the denial of the voting rights of Members A and B. *See Terry*, 345 U.S. at 468 (Frankfurter, J., concurring).

Responsibility for regulating the legal profession on behalf of the state supreme court is a matter that obviously concerns public issues, and for the reasons discussed below, State Bar officials like Defendants are "public officials." All West Virginia attorneys, including Members A and B, undeniably have an interest in the selection of Governors who make policies on their behalf. *See Rice*, 528 U.S. at 523. And even if this Court concludes that the State Bar's elections do not involve "public issues," or "public officials," the Fifteenth Amendment's self-executing prohibition on racial eligibility for voting does not qualify the elections in which the voting takes place. This constitutional command prohibits state action that would restrict voting based on race.

Defendants' required duties constitute state action and those required duties deny the voting of Members A and B because of their race.

Defendants rely on an inapposite state law *defamation* case to claim that elected members of the State Bar's Board of Governors are not "public figures"—a term of art unique to defamation claims.[6] Mot. to Dismiss, Dkt 36 at 7–8. (citing *Hinerman v. Daily Gazette Co.*, 188 W. Va. 157 (1992)). However, a state law defamation case does not provide the correct standard for a Fifteenth Amendment claim. That standard is set out explicitly in the Constitution itself and in *Terry*, 345 U.S. 461. As discussed above, this provides sufficient basis for FAIR's Fifteenth Amendment claim.

State bars, their policies, and the actions taken by their officials to implement those policies are subject to constitutional scrutiny when they violate their members' constitutional rights. *Keller v. State Bar of California*, 496 U.S. 1, 11–13 (1990) (holding both that the state supreme court's determination of the state bar's governmental status was not binding in determining if the bar violated its members' First Amendment rights and that the bar did violate the constitution); *Konigsberg v. State Bar of Cal.*, 353 U.S. 252, 273 (1957) (holding that a state may not exercise its power through the state bar in a way that violated the First Amendment); *Schware v. Bd. of Bar Exam. of State of N.M.*, 353 U.S. 232, 238 (1957) (declaring that a state bar's policies may not violate the Fourteenth Amendment). The West Virginia State Bar's violation of the Fifteenth Amendment is not uniquely excused.

[6] Being a public figure for defamation does not make one a public official, and not being a public figure does mean there is a lack of state action. Under Defendants' reasoning Brad Pitt, being a public figure, would be a state actor. Conversely, the municipal recorder in a small West Virginia town would not be engaged in state action because she is not a "public figure" under defamation law. This is nonsense.

III. FAIR Has Named Proper Parties

The proper party in an action arising under 42 U.S.C. § 1983 includes "[e]very person who, under the color of any statute, ordinance, regulation, custom, or usage, of any State" deprives a person of their civil rights. 42 U.S.C. § 1983. A state official sued in his or her official capacity, when prospective relief is sought, is a person under § 1983. *Will v. Michigan Dep't of State Police*, 491 U.S. 58, 71 n.10. (1989). *See also Lytle v. Griffith*, 240 F.3d 404, 408 (4th Cir. 2001). To identify proper defendants, plaintiffs must allege "some connection" between the state official and the enforcement of "an act alleged to be unconstitutional." *Id.* (citing *Ex parte Young*, 209 U.S. at 157. This connection may be "specially created by the act itself[.]" *Id.* Therefore, "implementation of state policy or custom may be reached" by § 1983 official-capacity actions for prospective relief. *Kentucky v. Graham*, 473 U.S. 159, 167 n.14 (1985).

FAIR has adequately established the required connection between Defendants and the enforcement of Bylaws 5.02(d), 5.06(b), and 5.07. For example, Defendant Pickens identifies African American attorneys, notifies them of the nominating process, and then receives their nominating petitions. Am. Comp., Dkt 27 ¶¶ 20–21. In the event Defendant Pickens does not receive nominations, Defendant Amsbary must appoint a committee to make those nominations. *Id.* ¶ 22. Defendant Amsbary and Defendant Aliff are tasked with faithful execution of the State Bar's objects, aims, and purposes, including the racial exclusion in the challenged election. *Id.* ¶¶ 22–23. In arguing that FAIR has not named the proper parties, Defendants fundamentally misunderstand FAIR's claims. FAIR does not seek to compel Defendants to promulgate, or otherwise make changes, to the State Bar's Bylaws or Administrative Rules. *See* Mot. to Dismiss, Dkt 36 at 23–25. Rather, FAIR's Amended Complaint seeks to enjoin Defendants from enforcing the complained-of Bylaws and requests a declaration that they are unconstitutional. Am. Compl.,

Dkt 27 at 10–11. Because Defendants are the officials delegated the authority to enforce the Bylaws in the manner that FAIR complains of, FAIR's Request for Relief would fully redress their claimed injury. FAIR has named proper parties and has sufficiently stated its claims.

IV. Defendants Are Not Immune

With this lawsuit, FAIR seeks prospective declaratory and injunctive relief against Defendants Pickens, Amsbary, and Aliff. Am. Compl., Dkt 27 at 10–11. All Defendants are sued in their official capacities only. Am. Compl., Dkt 27 ¶¶ 11–13. In a case such as this one, the only immunity defense available to a defendant is sovereign immunity. *Kentucky*, 473 U.S. at 167; *Felder v. Casey*, 487 U.S. 131, 139 (1988) (federal civil rights law preempts state immunities); *see Ridpath v. Bd. of Governors Marshall Univ.*, 447 F.3d 292, 306 (4th Cir. 2006) (qualified immunity defense is precluded in official-capacity suit).

In pressing for immunity, Defendants again fundamentally misunderstand FAIR's Amended Complaint. *See* Mot. to Dismiss, Dkt 36 at 13–14, 25. FAIR's complaint rightfully details the way that Defendants' conduct effectuates the racially discriminatory Bylaws. *Supra* p. 16; Am. Compl., Dkt 27 ¶¶ 20–23, 33. It does not complain about the promulgation, approval, or amendment of those Bylaws as Defendants imply. Mot. to Dismiss, Dkt 36 at 25. The complaint focuses on the connection between Defendants' conduct and the *enforcement* of the unconstitutional Bylaws, which are one in the same. *Ex parte Young*, 209 U.S. at 157.

Defendants cite the Board's Bylaws immunizing officials from suit for all conduct performed in the course of their official duties. Mot. to Dismiss, Dkt 36 at 6 (citing WV R BAR BYLAWS art. 8.08). Defendants also rely on state and federal qualified immunity defenses. Mot. to Dismiss, Dkt 36 at 13–14, 25 (citing *W. Va. Div. of Corrs. & Rehab. v. Robbins*, 248 W. Va. 515 (2023); *Harlow v. Fitzgerald*, 457 U.S. 800 (1982); and *Saucier v. Katz*, 533 U.S. 194 (2001)).

However, the only immunity defense that Defendants could have raised is sovereign immunity and they failed to so do. *See Ridpath,* 447 F.3d at 306; *Kentucky*, 473 U.S. at 167.

In any case, a "well-recognized exception" to Eleventh Amendment sovereign immunity "allows suits against state officers for prospective equitable relief from ongoing violations of federal law." *Lytle*, 240 F.3d at 408 (citing *Ex parte Young*, 209 U.S. at 156). Defendants are not immune from FAIR's claims.

V. FAIR Did Not Fail to Comply with FRCP 5.1

Federal Rule of Civil Procedure 5.1, in relevant part, requires a plaintiff to file a notice of constitutional question if "a state statute is questioned and the parties do not include the state, one of its agencies, or one of its officers or employees in an official capacity[.]" Fed. R. Civ. P. 5.1(a)(1)(B). Rule 5.1 does not apply to this case for the simple reason that FAIR has not challenged the constitutionality of any state statute. Instead, it has challenged various Bylaws of the State Bar. Am. Compl., Dkt 27 at 7–10. Even if the challenged Bylaws could be construed as state statutes, and notice under Rule 5.1 is thus necessary, that notice was provided because Defendants are sued in their official capacity as officers of a West Virginia state agency. Am. Compl., Dkt 27 ¶¶ 11–13. *See also supra* pp. 15–16. Moreover, failure to provide notice under Rule 5.1 is not grounds for a dismissal. "[F]ailure to file and serve the notice . . . does not forfeit a constitutional claim[.]" Fed. R. Civ. P. 5.1(d). However, should this Court hold that notice is required in this case, then FAIR will promptly comply and file such notice.

CONCLUSION

For the foregoing reasons, Defendants' motion to dismiss should be denied.

DATED: May 13, 2025.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on May 13, 2025, I electronically filed the foregoing with the Clerk of the U.S. District Court for the Northern District of West Virginia using the CM/ECF system, which will send notification of such filing to all counsel of record.

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