

IN THE UNITED STATES DISTRICT COURT  
FOR THE SOUTHERN DISTRICT OF INDIANA  
INDIANAPOLIS DIVISION

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW ("ACORN"), <i>et al.</i> , on behalf of themselves and all persons similarly situated,	)	
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	)	
Plaintiffs,	)	
	)	
v.	)	No. 1:09-CV-849 WTL-DML
	)	
ANNE W. MURPHY, in her official capacity as Secretary of the Indiana Family and Social Services Administration, <i>et al.</i> ,	)	
	)	
	)	
Defendants.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF  
THEIR MOTION FOR CLASS CERTIFICATION

A. Background.

Plaintiffs Paris Alexander, ACORN, and the Indiana State Conference of the NAACP ("NAACP") have filed this lawsuit alleging that the defendants, the Secretary of the Indiana Family and Social Services Administration ("FSSA"); the director of the Indiana Family and Social Services Administration Division of Family Resources ("DFR"); the co-directors of the Indiana Election Division; and the chair, vice-chair, and the members of the Indiana Election Commission, have failed to fulfill their obligations under the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C §1973gg-5 ("Section 7").

The NVRA was adopted by Congress in 1993 to "increase the number of eligible citizens who register to vote in Federal elections," 42 U.S.C. §1973gg(b)(1), including "the poor and persons with disabilities who do not have driver's licenses and will not come into contact with the other principal place to register under this Act [motor vehicle agencies]." H.R.Con.Rep.No.103-66, at 19 (1003). To that end, Section 7 of the NVRA mandates that all state offices that provide public assistance: (1) distribute a voter-registration application form with each application for assistance, and with each recertification, renewal, or request for a

change of address relating to the receipt of benefits; (2) distribute a voter-notice form that asks each client who seeks public assistance whether s/he is registered to vote at his/her current address and if not, whether the client "would like to register to vote here today," and informs the client of certain information relating to an application for voter registration (*e.g.*, that the decision whether or not to register "will not affect the amount of assistance that you will be provided by the agency"); and (3) provide assistance in completing the voter registration application to the same degree that assistance is provided in completing public assistance forms (unless the client declines to register or refuses such assistance).

The FSSA administers public-assistance programs subject to the requirements of Section 7, and the DFR is the division of the FSSA responsible for these public-assistance programs. The defendant co-directors of the Indiana Election Division are jointly designated under Section 10 of the NVRA, 42 U.S.C. §1973gg-8, as the chief state-election officials responsible for the coordination of state responsibilities under the NVRA. Ind. Code §3-7-11-1.<sup>1/</sup> As such they are responsible for a variety of coordination and educational requirements under the Indiana Election Code. Ind. Code §3-7-11-2. Defendants chair, vice-chair, and members of the Indiana Election Commission are responsible for administering Indiana election laws, including their registration requirements, and for adopting rules to implement and administer the NVRA. Ind. Code §3-6-4.1-14.

Plaintiff Alexander is an Indiana citizen who (1) has been eligible and has applied for public-assistance benefits at FSSA offices since March 2009 and is currently receiving those benefits; (2) meets all of the requirements to register to vote in Indiana, but is not registered where she currently resides; and (3) was not provided by FSSA either a voter-registration application or a voter-notice form when she applied for her benefits. Plaintiffs ACORN and the NAACP are organizations that expend substantial resources assisting low-income Indiana citizens in registering to vote and whose membership includes Indiana citizens who have applied

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1. As explained in ¶22 of the complaint and the amended complaint, §3-7-11-1 states that the officials jointly designated for this purpose are the "co-directors of the [Indiana Election] commission"; however, the Indiana Secretary of State has advised that the officials so designated actually are the co-directors of the Indiana Election Division. *See* Exh. 1 to the complaint and the amended complaint.

for public assistance and either are eligible to vote but are unregistered or who need to update their voter registration because they have moved.

Plaintiffs allege that defendants have failed, *inter alia*, (1) to distribute voter-registration application forms with each application for public assistance as well as each recertification, renewal, or change of address relating to public assistance; and (2) to distribute voter-notice forms that comply with the requirements of the NVRA. Plaintiffs seek declaratory and injunctive relief on behalf of themselves and a class of persons similarly situated to redress these ongoing violations of the obligations imposed by the NVRA.

Plaintiffs seek to represent a class of all persons defined as:

all residents of the State of Indiana, past, present, and future, who are eligible to register to vote in Indiana, are not registered to vote at their current residence address, have applied for public assistance through an FSSA office or have requested recertification or renewal or sought a change of address relating to public assistance through an FSSA office, and in that transaction were not provided by the FSSA with a voter-registration application, were not offered assistance in completing a voter-registration application by the FSSA to the same degree that the FSSA provides assistance in completing public-assistance forms, were not provided such assistance (unless refused) by the FSSA, and/or were not provided with a voter-notice form by the FSSA.

B. Plaintiffs and the class they seek to represent comfortably meet the requirements of Rule 23.

Plaintiffs are not required to prove their case at the class certification stage. *Eisen v. Carlisle and Jacquelin*, 417 U.S. 156, 177 (1974); *Caridad v. Metro-North Commuter R.R.*, 191 F.3d 283, 291 (2nd Cir. 1999); *Eggleston v. Chicago Journeymen Plumbers' Local Union N. 130, U.A.*, 657 F.2d 890, 895 (7th Cir. 1981); *DuPree v. E.J. Brach & Sons, Division of American Home Products Corp.*, 77 F.R.D. 3, 8 (N.D.Ill. 1977). Indeed, plaintiffs' allegations, as they pertain to the merits, are to be deemed true. *Eggleston*, 657 F.2d at 895; *National Organization of Women v. Scheidler*, 172 F.R.D. 351, 356 (N.D.Ill. 1997).

Furthermore, Rule 23 must be "liberally interpreted," and "[i]ts policy is to favor maintenance of class actions." *King v. Kansas City Southern Industries, Inc.*, 519 F.2d 20, 25, 26 (7th Cir. 1975). Indeed, voting-related claims, including claims under the NVRA, are

routinely litigated as class actions. *Wilson v. United States*, 878 F.Supp. 1324, 1328 (N.D.Cal.) (certifying a class in a similar challenge to the NVRA); *Barnett v. City of Chicago*, 969 F.Supp. 1359, 1370 (N.D.Ill. 1997), *vacated and remanded in relevant part*, 141 F.3d 699 (7th Cir 1998); *McGhee v. Granville County, N.C.*, 860 F.2d 110 (4th Cir. 1988); *McMillan v. Escombia County*, 748 F.2d 1037 (5th Cir. 1984); *Gingles v. Edmisten*, 590 F.Supp. 345 (E.D.N.C. 1984) (three-judge court), *aff'd in part*, 478 U.S. 30 (1986); *Hernandez v. Woodord*, 714 F.Supp. 693 (N.D.Ill. 1989); *Bradford County NAACP v. City of Stark*, 712 F.Supp. 1523 (M.D.Fla. 1984); *Dollard v. Crenshaw County*, 640 F.Supp. 1347, 1372-73 (M.D.Ala. 1986); *Ramos v. State of Illinois*, 781 F.Supp. 1353 (N.D.Ill. 1991); *Ashe v. Board of Elections of City of New York*, 124 F.R.D. 45 (E.D.N.Y. 1989). This is so because, by their very nature, they satisfy the requirements of Rule 23(b)(2) since the relief they seek is injunctive and declaratory, and their claims lend themselves to classwide relief. *See Fed.R.Civ.P. 23*, Advisory Committee Notes to 1966 Amendment, Subdiv. (b)(2) ("[i]llustrative [of Rule 23(b)(2) class actions] are various actions in the civil-rights field where a party is charged with discriminating unlawfully against a class, usually one whose members are incapable of specific enumeration").

This case, like those, is appropriate for class certification. Each of the Rule 23 requirements is satisfied here.

1. Rule 23(a)(1) -- Numerosity. "It ordinarily is not difficult to ascertain if a class approach would be useful to avoid the practical problems of trying to join many named plaintiffs or otherwise clog the docket with numerous individual suits." *Eggleston*, 657 F.2d at 895. "[A]s few of 25-30 class members should raise a presumption that joinder would be impracticable and thus the class should be certified." 1 Newberg, *Class Actions*, 1105(b) at 174 (1977). Here, however, there can be no question that the class approach is useful since the class likely numbers in the thousands throughout the State of Indiana, and joinder of all members is impracticable. While the exact number is unknown, it is believed to be in the thousands. For example, according to statistics released by the United States Department of Agriculture, approximately 286,000 Indiana adult citizens participated per month, on average, in fiscal year 2007 in the

Indiana food stamp program, which is just one of the public-assistance programs subject to Section 7 of the NVRA. U.S. Dep't of Agriculture, *Characteristics of Food Stamp Households: Fiscal Year 2007* (2008), available at <http://www.fns.usda.gov/ora/menu/Published/SNAP/FILES/Participation/2007Characteristics.pdf>. At approximately the same time, 41% of adult citizens in Indiana households making less than \$25,000.00 per year were not registered to vote. U.S. Census Bureau, *Current Population Survey, November 2008 Voting and Registration Supplement*.

2. Rule 23(a)(2) -- Commonality. The second requirement for class certification, the presence of questions of fact or law common to the class as a whole, is easily determined and plainly met. A common nucleus of facts is found to exist when defendants have engaged in standardized conduct toward members of the proposed class. *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). It is satisfied "even though there may be differences in the details of individual claims." *Eggleston*, 657 F.2d at 895-96. The common legal issue in this case is whether defendants have complied with their responsibilities under Section 7 of the NVRA. The common factual questions include, for example, whether the State of Indiana is (a) maintaining voter-registration application forms and voter-notice forms at its FCCA offices; (b) providing applicants for public-assistance benefits, and applicants for recertification, renewal, or change of address relating to the receipt of public assistance, with proper voter-registration applications and voter-notice forms; and (c) assisting public-assistance applicants in filling out the voter-registration application, collecting the completed applications, and transmitting the completed applications to the appropriate state-election officials. These issues, and the question of what form relief should take, implicate questions of both fact and law that are common to all class members. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992); *Armstrong v. Chicago Park District*, 117 F.R.D. 623, 628-29 (N.D.Ill. 1987); *Paxton v. Union National Bank*, 688 F.2d 552, 561 (8th Cir. 1982), *cert. denied*, 460 U.S. 1083 (1983); *Resnick v. American Dental Association*, 90 F.R.D. 530, 538-39 (N.D.Ill. 1981).

3. Rule 23(a)(3) -- Typicality. Plaintiffs' individual claims are plainly typical of their class claims. "This simply requires a showing, not unrelated to commonality, that others suffer

from similar alleged grievances." *Eggleston*, 657 F.2d at 896. "A plaintiff's claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory." *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983) (citations and internal quotation omitted). Here, the named plaintiffs are pursuing claims identical to those of the class in that the claims of all members of the class depend on a showing of acts and omissions of defendants responsible for the implementation, administration, and coordination of Indiana's responsibilities under the NVRA, and the named plaintiffs present exactly those claims. Plaintiffs allege that they have suffered the precise harm that forms the basis of their class claims. Since plaintiffs' individual claims challenge the same practices applied across the class, those claims "fairly encompass" their class claims and are therefore "typical." *General Telephone Co. of the Northwest v. EEOC*, 446 U.S. 316, 329 (1977); *Resnick v. American Dental Association*, 90 F.R.D. at 539.

4. Rule 23(a)(4) -- Adequacy of Representation. Finally, plaintiffs are fully adequate representatives of the interests of the class. There is no conflict between any named plaintiff and other members of the class with respect to this action or the claims for relief set forth in the complaint, and plaintiffs are qualified and capable of fully pursuing the common goals of the class. In addition, their attorneys are experienced and competent in the representation of classes in all manner of class actions,<sup>2/</sup> have extensive experience in handling litigation asserting violations of the NVRA<sup>3/</sup> and other voting-rights violations,<sup>4/</sup> and will devote adequate staff and

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2. *Davis v. Chiles*, 139 F.3d 1414 (11th Cir. 1998); *Jenkins v. Red Clay Consolidated School Dist.*, 4 F.3d 1103 (3rd Cir. 1993); *Mays v. Motorola*, 18 EPD §8903 (N.D.Ill. 1979); *Thompson v. Roudebush*, 74 C 3719 (N.D.Ill. 1979); *DuPree v. E.J. Brach & Sons, Division of American Home Products Corp.*, 77 F.R.D. 3 (N.D.Ill. 1977); *Resnick v. American Dental Association*, 90 F.R.D. 530 (N.D.Ill. 1981).

3. *Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008); *ACORN v. Scott*, 2008 WL 2787931, (W.D.Mo. July 15, 2008); *Valdez v. Herrera*, Case No. 09-668 (D.N.M. filed July 9, 2009).

4. *Northwest Municipal Austin Utility District No. 1 v. Holder*, 129 S.Ct. 2504 (2009); *Randall v. Sorrell*, 126 S.Ct. 2479 (2006); *Reno v. Bossier Parish School Board*, 520 U.S. 471 (1997); *Young v. Fordice*, 520 U.S. 273 (1997); *League of Women Voters of Ohio v. Brunner*, 548 F.3d 463 (6th Cir. 2008); *Project Vote v. Madison County Board of Elections*, No. 1:08-cv-2266-JG, 2008 WL 4445176 (N.D. Ohio, Sept. 29, 2008); *Porter v. Jones*, 496 F.3d 1009 (9th Cir. 2007); *Flint v. Dennison*, 488 F.3d

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other resources to the case. *Eggleston*, 657 F.2d at 896; *Hohmann v. Packard Instrument Co.*, 399 F.2d 711 (7th Cir. 1968); *Wetzel v. Liberty Mut. Ins. Co.*, 508 F.2d 239, 247 (3rd Cir. 1975); *Long v. Thornton Township High School Dist.*, 82 F.R.D. 186, 190 (N.D.Ill. 1979).

5. Plaintiffs satisfy Rule 23(b)(2). Plaintiffs seek class certification under Rule 23(b)(2), which requires that the challenged conduct be generally applicable to the class such that final injunctive or declaratory relief will be appropriate with respect to the class as a whole. Since relief from defendants' actions is necessarily classwide in scope, Rule 23(b)(2) is plainly satisfied.

### CONCLUSION

For the reasons set forth above, plaintiffs urge that their motion for class certification be granted.

Respectfully submitted,

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816 (9th Cir. 2007); *Belitskus v. Pizzigrilli*, 343 F.3d 632 (3rd Cir. 2003); *United States v. Charleston County Council*, 316 F.Supp.2d 268 (D.S.C. 2003), *aff'd*, 365 F.3d 341 (2004), *cert. denied*, 543 U.S. 999 (2004); *Hastert v. State Board of Elections*, 777 F.Supp. 634 (N.D.Ill. 1991) (Illinois congressional remap); *Barnett, et al. v. City of Chicago, et al.*, 835 F.Supp. 1063 (N.D.Ill. 1993), *rev'd*, 32 F.3d 1196 (7th Cir. 1994), *on remand*, 969 F.Supp. 1359 (N.D.Ill. 1997), *vacated and remanded in relevant part*, 141 F.3d 699 (7th Cir.), *cert. denied*, 118 S.Ct. 2372, *on remand*, 17 F.Supp.2d 753 (N.D.Ill. 1998); *In re Congressional Remap*, 81 C 3915 (N.D.Ill. 1981).

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\* Motion to appear *pro hac vice* pending

\*\* *Pro hac vice* applications to be filed

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CERTIFICATE OF SERVICE

Lisa Mecca Davis certifies that she caused a copy of the foregoing Memorandum to be served upon all counsel of record, by this Court's electronic-filing system, this 14<sup>th</sup> day of September, 2009.

/s/ Lisa Mecca Davis  
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