
United States Court of Appeals

for the

Sixth Circuit

COPY OF
ORIGINAL
WITH PROOF OF
SERVICE

Case Nos. 07-3829, 07-4165

CARRIE HARKLESS; TAMECA MARDIS; ASSOCIATION OF
COMMUNITY ORGANIZATIONS FOR REFORM NOW,

Plaintiffs-Appellants,

— v. —

JENNIFER BRUNNER, Secretary of State; HELEN E. JONES-KELLEY,
Director of the Department of Job and Family Services,

Defendants-Appellees.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

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There is no dispute that Plaintiffs' Complaint alleged widespread, systemic and statewide violations of the NVRA's requirements for offering voter registration to Ohio public assistance clients. By attempting to shift the blame for Ohio's shortcoming to local officials, Defendants' argument misses the point: Regardless of any claims Plaintiffs may have against additional parties, Plaintiffs have claims under the NVRA against both the Secretary -- for failure to fulfill her duty to coordinate Ohio's compliance with the NVRA -- and the Director -- for failure, as the head of the "single state agency" that administers public assistance in Ohio, to supervise compliance by local offices.¹

Both Defendants make the same basic argument in support of their dismissal: that Ohio law somehow immunizes them from suit under Section 7 of the NVRA by depriving them of authority to implement or oversee the NVRA's requirements. This argument depends on two assertions: first, that the NVRA places no responsibility on state officials to implement the NVRA (and thus Ohio law alone controls the allocation of responsibilities for NVRA compliance); and second, that Ohio has placed responsibility for Section 7 compliance solely on county officials. The Secretary makes the additional argument that she can be sued only in state court, not federal court, for failing to comply with the limited NVRA-

¹ Capitalized terms not otherwise defined herein have the same meaning given them in the Brief for Appellants ("Opening Br.").

related responsibilities she acknowledges she may have. Each of these arguments is deeply flawed and should be rejected.

Defendants' argument unravels because the federal government has clear authority under the Elections Clause of the United States Constitution to compel state level officials to comply with requirements for voter registration for federal elections, and the federal government has exercised that authority. The subsidiary argument -- that the NVRA should be read to permit states to assign all state responsibility for complying with the NVRA to local officials -- ignores the plain language of the NVRA, as well as federal regulations implementing the NVRA and case law. All of these mandate that although the precise mechanics of implementation may involve state discretion, state-level officials must ensure that the "State responsibilities" set forth in the statute are met. *See Point I infra.*

These "State responsibilities" are "coordinated" by a "State officer or employee" designated by the State as its "chief election official." 42 U.S.C. § 1973gg-8 (2007). Ohio has designated the Secretary as the coordinator of its NVRA responsibilities. The Secretary's role as Ohio's coordinator for NVRA compliance clearly means that she bears some responsibility for overseeing Ohio's responsibilities under the NVRA. *See Point I(A) infra.* Moreover, federal regulations and federal case law make clear that the head of the "single state agency" for public assistance programs -- in Ohio, the Director -- has oversight

responsibilities concerning the operations of those programs, which include complying with Section 7 of the NVRA. Indeed, contrary to her assertion in this Court and below that Ohio has a decentralized system in which the Director has no power over purportedly independent county offices, *the DJFS's own pronouncements* acknowledge that the Director supervises the county public assistance offices with respect to the administration of benefits programs -- programs that include the obligation to offer voter registration. *See* Point I(B) *infra*.

Even if the federal government had left it entirely up to Ohio to determine who would have responsibility for Section 7 compliance (which it did not), Ohio law does not preclude a suit under the NVRA against the Secretary or the Director. Ohio's NVRA implementing legislation, as well as other election laws, makes clear that the Secretary and Director have substantial authority and responsibilities for ensuring proper implementation. In addition to the Secretary's general responsibilities that are pertinent, the Secretary has specific duties related to NVRA compliance, including designing training, developing written instructions on voter registration implementation at voter registration agencies, preparing a notice that provides clients at each agency with voter registration information and causing that agency to post that notice. *See* Point I(A) *infra*; Opening Br. at 40-43. In addition to the Director's general authority to take action against county public

assistance agencies who are receiving federal grants under programs that require NVRA compliance, the DJFS and its component parts have the responsibility under the Ohio Revised Code to administer the NVRA. *See* Point I(B) *infra*; Opening Br. at 43-48.

Perhaps because Ohio law so clearly refutes the Secretary's claim that she has no responsibility for NVRA compliance, the Secretary presents a wholly contradictory fall-back argument. She acknowledges that state law *does* impose obligations on her to carry out NVRA responsibilities, but that the Eleventh Amendment requires Plaintiffs to sue in state court to redress noncompliance with those obligations. That argument rests on a misunderstanding of *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984), and cannot be reconciled with the NVRA's private right of action provision.

The Complaint alleged a single claim for relief, for violation of the NVRA against both defendants. That Ohio's legislation implementing the NVRA gave the Secretary the power to carry out her coordination obligations does not insulate the Secretary from federal suit by somehow transforming her NVRA violations into a state law claim for failure to exercise her enforcement powers. If it did, the NVRA's private right of action would be rendered meaningless. Federal court redress for federally secured voting rights cannot be nullified through such sleights of hand.

The Complaint alleges that the Secretary failed to take any action to coordinate the State's responsibilities under Section 7 of the NVRA (and included a non-exhaustive list of things she could have done but did not) and that her failure to coordinate resulted in widespread violations of the NVRA throughout Ohio, with most local public assistance agencies failing to offer the opportunity to register to vote. The Complaint's allegations that the Secretary has not fulfilled her responsibilities state a cause of action against her. (R.1, Complaint, ¶ 3, JA 9; *see also id.* ¶¶ 25, 26, 37, 54). Likewise, the Complaint alleged that the Director has failed to meet her responsibilities to ensure agency compliance with the NVRA. (*Id.* ¶ 3; *see also id.* ¶¶ 24, 26, 37, 54). Those allegations are more than sufficient to state a claim under Rule 8 of the Federal Rules of Civil Procedure.

Nor is there merit to Defendants' argument that Plaintiffs lack standing. Defendants admit that the individual Plaintiffs have standing under controlling precedent in this Court even though they relied on ACORN's notice letter rather than providing their own separate notices of violations. And ACORN has standing because the only reasonable reading of the factual allegations of the Complaint -- that ACORN would not have expended time or resources on voter registration outside public assistance offices but for the NVRA violations and that ACORN has members who are not registered to vote and were not offered the opportunity to

register during visits to the public assistance offices -- suffices to plead both associational standing and organizational standing. *See* Point II *infra*.

Finally, although “magic words” are not required at the pleading stage, to the extent that the Complaint failed to recite any words or allegations deemed necessary to state a claim, Plaintiffs should have been permitted an opportunity to amend the Complaint rather than facing dismissal with prejudice of their first pleading. *See* Point III *infra*.

ARGUMENT

POINT I

THE SECRETARY AND THE DIRECTOR ARE PROPER DEFENDANTS AND THE COMPLAINT STATES A CLAIM AGAINST EACH

The NVRA imposes obligations on the State, not its political subdivisions, and Defendants are the state officials responsible for the violations. *See* Opening Br. at 27-40. Specifically, as required by the NVRA, Ohio appointed the Secretary its “chief election official” charged with coordinating Ohio’s responsibilities under the NVRA. And the Director is responsible for supervising the county DJFS offices, through which Ohio administers federally funded public assistance programs covered by Section 7 of the NVRA.

Each Defendant argues that the Complaint does not state a claim against it because the county DJFS offices have sole responsibility for the NVRA violations.

This argument is meritless. Merely because the county DJFS offices have violated the NVRA does not mean that the Secretary and the Director are not also liable under the NVRA. Nor do the other arguments raised by either Defendant foreclose a claim against it.

A. The Secretary Is A Proper Defendant

The Secretary admits that she is the chief election official in Ohio, that she is responsible for coordinating Ohio's NVRA responsibilities and that the Complaint alleges widespread and statewide violations of Section 7 of the NVRA. *See* Brief of Defendant-Appellee Jennifer Brunner, Ohio Secretary of State ("Secretary Br.") at 2, 6. The Secretary nevertheless argues that principles of federalism preclude enforcement of the NVRA against her because Congress did not sufficiently define her "coordination" responsibilities and because the Ohio legislature purportedly determined that compliance with Section 7 of the NVRA should be left solely to the county DJFS offices.

The Secretary's invocation of federalism fails. As a threshold matter, this Court held in *ACORN v. Miller*, 129 F.3d 833 (6th Cir. 1997), that it has always been Congress's domain to set the requirements for voting in federal elections and qualifying to vote, even if voter registration and elections are carried out at the state level. *See id.* at 836. And in her brief, the Secretary concedes that the voter registration program must be "*administered*" by her office. *See* Secretary Br. at 5.

The Secretary's reliance almost exclusively on *Gregory v. Ashcroft*, 501 U.S. 452 (1991), is entirely misplaced. *Gregory* involved interpretation of the Age Discrimination in Employment Act, enacted under Congress's Commerce Clause power, and specifically addressed whether state court judges were covered "employees" or were, like other high level state officials, excluded from coverage as "appointee[s] at the policymaking level." In resolving the ambiguity in the statute, the Supreme Court noted that including judges under the Act might have run afoul of limitations on Congress's power under the Commerce Clause by encroaching on an area traditionally "firmly within a State's constitutional prerogatives." *See id.* at 467. To avoid the potential constitutional issue, the Court concluded that judges were not covered. *See id.* at 469.

No such constitutional limitation applies to congressional authority under the Elections Clause. *See, e.g., Miller*, 129 F.3d at 836; *ACORN v. Edgar*, 56 F.3d 791, 796 (7th Cir. 1995). In *Miller*, this Court contrasted Congress's expansive Elections Clause power with its more limited power under the Commerce Clause:

Article I section 4 explicitly grants Congress the authority either to "make" laws regarding federal elections (similar to the authority granted in the Commerce Clause), or to "alter" the laws initially promulgated by the states. Thus, *unlike the Commerce Clause* Article I section 4 specifically grants Congress the authority to force states to alter their regulations regarding federal elections.

129 F.3d at 836 (emphasis added). Similarly, in *Edgar*, the Court explained why *Gregory* does not apply when Congress acts under the Elections Clause, as it did in enacting the NVRA:

[I]n *Gregory* the Court did use it [the presumption that federal statutes “are presumed not to regulate areas of traditional state prerogative”] to hold that the federal age discrimination law does not apply to state judges; and in this case Illinois advances the related notion that to make a state administer federal elections fatally compromises state sovereignty. That particular “fatal compromise,” however, is built into the Constitution, precisely in Article I section 4, the first sentence of which places the burden of administering federal election laws on the states.

56 F.3d at 796.

Regardless, there could be nothing more plain or straightforward than Congress’s mandate that each State designate “a *State* officer or employee as the chief State election official to be responsible for coordination of *State responsibilities*.” And the Ohio legislature was neither equivocal nor unclear when it designated the Secretary as Ohio’s chief election official who was responsible for coordination of Ohio’s NVRA responsibilities.

The Seventh Circuit’s decision in *Edgar* -- misleadingly cited by the Secretary for the proposition that an injunction against her would go “beyond the NVRA’s text and trample[] the principles of federalism,” Secretary Br. at 26 -- is instructive. Far from vacating the injunction entered against the state officials by

the district court, the Seventh Circuit upheld it in virtually all respects, striking down only one repetitive paragraph as unnecessary and potentially harmful because the injunction already “require[d] compliance with all provisions of the” NVRA:

The decree made in this case declares that the State of Illinois is not complying with the “motor voter” law;² declares that all provision of Illinois law that conflict with the law are invalid; and enjoins the state officials who are the individual defendants, together with all persons acting in concert with them, from failing or refusing to comply with the law. *So far, so good.*

56 F.3d at 797 (emphasis added). The court then vacated one paragraph of the injunction, out of concern that the paragraph’s largely repetitive provisions would invite interpretive disputes and potentially expand the state’s obligations beyond the requirements of the NVRA. *Id.* As an example, the court remarked that language relating to the election czar’s powers could imply an impermissible delegation of legislative power. *Id.* at 797-798. Such an example is far different than a determination that the Secretary cannot be held responsible to ensure compliance with the law. Indeed, the Seventh Circuit explicitly left open the possibility that reinstating more detailed injunctive relief would be appropriate if

² The *Edgar* court reviewed, *inter alia*, both the “motor voter” requirements of Section 5 and the public assistance provisions of Section 7. *See id.* at 793.

the state officials failed to honor the injunction mandating compliance with the NVRA. *See id.* at 798.³

The Secretary's assertion that she cannot be held liable when Ohioans are systematically denied the opportunity to register to vote at public assistance offices throughout Ohio because Congress did not specify exactly what steps she was required to take to "coordinate" Ohio's responsibilities is specious. There can be no dispute that the Secretary was required to do *something* to coordinate; the Complaint alleges she did *nothing*. Indeed, the Complaint identifies at least five specific actions that the Ohio legislature either required or permitted her to take to carry out her coordination responsibility that she failed to do.⁴

³ The Secretary's attempt to distinguish *United States v. New York*, 255 F. Supp. 2d 73 (E.D.N.Y. 2003), *National Coal. for Students with Disabilities v. Taft*, No. 2:00-CV-1300, 2002 U.S. Dist. LEXIS 22376 (S.D. Ohio Aug. 2, 2002) and *Condon v. Reno*, 913 F. Supp. 946 (D.S.C. 1995) on the ground that none of those courts considered federalism principles in connection with the NVRA (presumably because none of the defendants in those cases even raised such a challenge) shows how far-fetched the Secretary's federalism argument is.

⁴ The Secretary disingenuously argues that the Complaint failed to allege that the Secretary failed to fulfill her obligation "to provide training to employees at NVRA designated agencies as to their voter registration duties" because the Complaint alleged that she failed to "provide *ongoing* training to DJFS offices on voter registration." Secretary Br. at 29 (emphasis added). There can be little doubt that the factual allegations of the Complaint gave the Secretary fair notice of the claim against her, which is all that Rule 8 requires. The same is true with respect to the Secretary's assertion that Plaintiffs failed to allege her failure to "prepare and cause to be displayed in a prominent location in each designated agency [the relevant] notice" because the Complaint alleged her failure to

Nor is the Secretary insulated from suit in federal court under *Pennhurst State Sch. & Hosp. v. Halderman*, 465 U.S. 89 (1984), simply because the Complaint references the actions required or permitted by the Ohio legislature. As this Court recognized in *Cassidy v. Adams*, 872 F.2d 729, 732 (6th Cir. 1989), a claim based on federal law may be adjudicated in federal court without running afoul of *Pennhurst*, even when resolution of the claim requires extensive analysis of state law bearing on the matter.

Indeed, Plaintiffs “may use state law, and evidence of State defendant’s liability under it, to prove that State defendant is in violation of federal law,” without converting their claim into one under state law. *See, e.g., Henrietta D. v. Giuliani*, 81 F. Supp. 2d 425, 431 (E.D.N.Y. 2000). In *Henrietta D.*, the court determined that the Eleventh Amendment posed no bar to the plaintiffs’ claims under the Americans with Disabilities Act even though the claim in part was predicated upon the state defendants not ensuring compliance with state laws that governed access to public services required by the federal law. *Id.* at 430. Likewise, the Secretary’s refusal here to exercise the authority that Ohio law provides to facilitate NVRA compliance underscores her violation of the *federal* statute -- her failure to coordinate the State’s responsibilities as required by the

“monitor whether the required signage is in fact posted in each DJFS office.”
Secretary Br. at 31.

NVRA. *See id.* at 431; *see also Mont v. Heintz*, 849 F.2d 704, 710 (2d Cir. 1988) (Eleventh Amendment not implicated where compliance with federal law entails addressing violations of state law); *Everett v. Schramm*, 772 F.2d 1114, 1119 & n.14 (3d Cir. 1985) (state officer's violation of state law does not insulate officer from liability for concurrent violations of federal law).

The Supreme Court in *Pennhurst* itself presumed that the federal court had power to enjoin violations of federal law, even if the same conduct also gave rise to a state law violation over which the Court could not exercise supplemental jurisdiction, and therefore remanded the case to the Court of Appeals for a determination whether there was a private right of action under the applicable federal statute and if so whether the complaint stated a claim for relief under that statute. 465 U.S. at 28-30; *see also, e.g., Frew v. Hawkins*, 540 U.S. 431, 439 (2004) (holding that federal court had jurisdiction to enforce consent decree implementing Texas's compliance with Medicaid program because the "decree reflects a choice among various ways that a State could implement the Medicaid Act. As a result, enforcing the decree vindicates an agreement that the state officials reached to comply with federal law."). *Pennhurst* clearly is inapposite.

Finally, and perhaps most incredibly, the Secretary argues that the District Court properly determined, on a motion to dismiss, that the Secretary had in fact fulfilled the NVRA obligations she admits she has, even though the factual

allegations of the Complaint allege the opposite. According to the Secretary, the District Court was permitted to accept as true the self-serving assertions made in a May 26, 2006 letter from Judy Grady to the Greater Cleveland Voter Coalition concerning NVRA-related efforts the Secretary purportedly made, *even though the Complaint alleged that Ms. Grady's self-serving assertions were false*, because the Complaint attached a copy of the letter containing the false assertions. *See* Secretary Br. at 32.

As support for this ridiculous proposition, the Secretary relies primarily on a 1940 decision from the Fifth Circuit, *Simmons v. Peavy-Welsh Lumber Co.*, 113 F.2d 812 (5th Cir. 1940). *Simmons* involved a breach of contract claim where the plaintiff alleged that the letters attached to the complaint constituted the contract; in fact, they showed the absence of a contract. The Court therefore held that the letters could be considered as part of the complaint in deciding the motion to dismiss. *See id.* at 813. That is a far cry from the instant case, where the Grady letter is cited as evidence that the Secretary received notice, and is specifically alleged to misrepresent what actions the Secretary has taken on NVRA compliance. (*See* R.1, Complaint, ¶¶ 34-35, JA 18). Documents attached to the complaint for this purpose should *not* be considered proof that the disputed statements contained in the letter are true. *See, e.g., City of Monroe Employees Ret. Sys. v. Bridgestone Corp.*, 399 F.3d 651, 659 n.6 (6th Cir. 2005) (considering

defendant's publicly filed annual reports for fact that statements contained therein and alleged to be false were made, not as evidence that the allegedly false statements were true); *see also Northern Ind. Gun & Outdoor Shows, Inc. v. City of S. Bend*, 163 F.3d 449, 455 (7th Cir. 1998) ("Rather than accepting every word in a unilateral writing by a defendant and attached by a plaintiff to a complaint as true, it is necessary to consider why a plaintiff attached the documents, who authored the documents, and the reliability of the documents.").

None of the Secretary's arguments change the simple facts, as alleged in the Complaint, that Congress mandated that each State appoint a single official or employee to be responsible for coordination of the State's NVRA responsibilities, the state of Ohio appointed the Secretary, the Secretary failed to do anything to coordinate the Ohio responsibilities, and there were widespread NVRA violations in Ohio that were not remedied after the Secretary was given notice. These facts give rise to a claim against the Secretary for violation of the NVRA and, accordingly, the District Court's order dismissing the action should be reversed.

B. The Director Is A Proper Defendant

The Director, as the head of the "single state agency" in Ohio responsible for administration of public assistance programs that are required to provide voter registration services, has responsibility to ensure that DJFS offices comply with Section 7 of the NVRA. *See* Opening Br. at 34-40, 43-48. Like the Secretary, the

Director argues that she should be dismissed because Plaintiffs could have instead sued local officials in each non-complying county office.⁵ Here, too, the argument fails because liability for NVRA violations is not “either/or”; the Director can be held accountable for her failures, even if the Secretary and individual county offices may also be responsible for the noncompliance. *See, e.g., National Coal. for Students with Disabilities v. Bush*, 170 F. Supp. 2d 1205, 1210-11 (N.D. Fla. 2001) (rejecting argument that county officials were indispensable parties and stating “[i]f plaintiffs prove violations by [the state] defendants with respect to matters within their control, plaintiffs presumably will be entitled to relief.”) (citation omitted).

In any case, the Director is responsible to ensure that the local agencies provide voter registration services under directly applicable federal law regarding federal public assistance programs. *See Robertson v. Jackson*, 972 F.2d 529 (4th Cir. 1992); *Woods v. United States*, 724 F.2d 1444 (9th Cir. 1984), *Henrietta D. v. Bloomberg*, 331 F.3d 261 (2d Cir. 2003). Section 7 of the NVRA makes voter registration services a requirement of the provision of federal public assistance programs. *See* Opening Br. at 35-36. And, as the Director concedes, the benefits

⁵ The NVRA’s permission to allow states to designate “local government offices” as voter registration agencies in addition to the mandatory voter registration agencies required by the NVRA is irrelevant, since *all* DJFS offices are mandatory voter registration agencies.

programs expressly grant broad powers to ensure compliance. See Brief of Helen Jones-Kelley, Director of ODJFS (“Director’s Br.”) at 27.

The Director does not cite any authority for her purported lack of control over the county DJFS offices (Director Br. at 10, 11), and her repeated protestations certainly do not make it so. To the contrary, Ohio law gives the Director broad discretion to supervise county DJFS offices and to compel compliance with those offices’ “family services duties,” one of which is to provide voter registration services to public assistance clients. In stark contrast to her representations to this Court, publication after publication distributed by the Director’s office touts her supervisory authority over the county DJFS offices:

- The Department of Job and Family Services (ODJFS) develops and oversees programs that provide health care, employment and economic assistance, child support, and services to families and children. . . . The administration and funding of these programs represent a cooperative partnership between federal, state, and local governments. *Most programs are supervised by the department* and administered locally by a combination of county offices, which include 88 county department of job and family services, 26 separate public children services agencies, and 26 separate child support enforcement agencies. The department provides funding to local agencies to develop programs that respond to local needs and *provides technical assistance and support to ensure compliance with federal and state regulations*. . . . The department is led by a director, appointed by the Governor, who manages approximately 4,000 employees and a budget of approximately \$17.1 billion. See, e.g. *Executive Budget for FYs 2008 and 2009* (emphasis added), available at

http://www.obm.ohio.gov/budget/operating/executive/0809/e_jfs.pdf, at 1;

- A major responsibility of the department is supporting county departments of job and family services (CDJFS), county child support enforcement agencies (CSEAs), and county public children's services agencies (PCSAs) in the development and administration of social service programs. . . . The department's state fiscal year 2006 budget of more than \$17.7 billion represents the largest budget of any state agency. About 65 percent of the funding comes from the federal government. *Program Guide 2007*, available at <http://www.odjfs.state.oh.us/forms/file.asp?id=47109>, at 1;
- Ohio operates a state-supervised, county-administered human service delivery system. . . . The Ohio Department of Job and Family Services (ODJFS) establishes program policy, provides technical assistance, defines performance standards, requires continuous improvement activities, collects data, and monitors all 88 County Departments of Job and Family Services. *State of Ohio Work Verification Plan (2007)*, available at http://jfs.ohio.gov/ofam/pdf/Work_Verification_%20Plan_%20Aug_%202007.pdf; and
- In Ohio, the county departments of job and family services (CDJFS) manage the Food Stamp Program. The Ohio Department of Job and Family Services supervises the CDJFS. *Ohio's Food Stamp Program*, The Ohio Department of Job and Family Services, available at <http://www.odjfs.state.oh.us/forms/file.asp?id=50942>.

See also, e.g., Pfautz v. Ohio Dep't of Job & Family Servs., No. 0-06-62, 2007 WL 4225502, at *3 (Ohio Ct. App. Dec. 3, 2007) (holding that ODJFS supervises administration of Ohio's Medicaid program). The Director cannot overcome the

force of such repeated affirmations of her authority for administration and support of local agencies or her management of more than “4,000 employees” simply because it is more convenient for purposes of litigation to deny that she has authority to ensure compliance with federal law. Because the Director cannot establish as a matter of law that she has no control over county DJFS offices, any factual issue as to the scope of her supervisory powers is inappropriate for resolution on a motion to dismiss. *See, e.g., Westside Mothers v. Olzewski*, 454 F.3d 532, 537 (6th Cir. 2006) (holding that on a motion to dismiss, “[o]ur function is not to weigh the evidence or assess the credibility of witnesses, but rather to examine the complaint and determine whether the plaintiff has pleaded a cognizable claim.”) (citations omitted).

Moreover, Ohio’s state plans for federal public assistance benefits explicitly require the provision of voter registration services. For example, pursuant to federal regulations, Ohio’s Medicaid state plan must give “assurance that it will be administered in conformity with the specific requirements of title XIX, *the regulations in this Chapter IV*, and other applicable official issuances of the Department.” 42 C.F.R. § 430.10 (emphasis added). One such regulation requires that “the agency must distribute voter information and registration materials as specified in NVRA.” 42 C.F.R. § 431.307(d); *see also* 45 C.F.R. § 205.50(a) & (a)(4)(iv) (defining state plan requirements for Social Security Act Title IV-A

programs, including TANF, to include “distribut[ion of] voter information and registration materials as specified in NVRA.”). Thus, the Director, as the head of the single state agency for Ohio’s provision of federal public assistance benefits, bears responsibility for the problems alleged here -- systemic and widespread failures in administration of the NVRA-mandated voter registration services.

The Director’s efforts to distinguish *Robertson, Woods, Henrietta D.*, and *Reynolds v. Guiliani*, 118 F. Supp. 2d 352 (S.D.N.Y. 2000), *vacated*, 506 F.3d 183, 2007 U.S. App. LEXIS 25463 (2d Cir. 2007), on the grounds that those cases all involve federally funded public assistance programs, is unavailing. Those cases are on all fours with this case precisely because the NVRA-mandated voter registration services are part of, and funded through, the covered public assistance programs.

With respect to Section 7 of the NVRA -- unlike the motor voter provisions of Section 5 -- federal regulations provide that the agency must distribute voter registration materials and that those materials “are directly related to the administration of [federal public assistance] program[s],” which means that the federal program funds the cost of implementation. *See* 45 C.F.R. § 205.50(a)(4); *see also* 42 C.F.R. § 431.307; Exec. Order No. 12,926, 59 Fed. Reg. 47,227 (Sept. 12, 1994); S. Rep. No. 103-6, at 28 (1993) (“Costs for registration application assistance for these [public assistance] offices should be considered matchable

under the current Federal match rate for these programs.”); H. R. Rep. No. 103-66, at 11 (1993) (Conf. Rep.) (same). In fact, by transferring federal funds for public assistance programs, DJFS *does* provide funds to the county DJFS offices for the NVRA-mandated voter registration services.⁶

The Director’s arguments based on Ohio statutes fare no better. Under the statute in effect at the beginning of this case, Section 5101.24 directly gave enforcement power to the Director for, *inter alia*, a county agency’s failure to comply with a family service duty established by the department or by federal or state law.⁷ The Director does not dispute that providing voter registration services required by Section 7 of the NVRA is a family services duty because it is a “general administrative dut[y]” that “state law requires or allows a county family

⁶ Contrary to the Director’s argument, this Court’s decision in *Miller*, which upheld the constitutionality of the “motor voter” provisions of Section 5 of the NVRA, does not support the Director. *Miller* held that the NVRA was a proper exercise of Congress’s authority under the Elections Clause and accordingly was binding on the States by virtue of the Supremacy Clause, even though federal funding was not provided to comply with the motor voter provisions. The Court did not consider whether the public assistance provisions of Section 7 of the NVRA, for which federal funding is provided through the federal assistance programs, could additionally be enforced under contractual theories applicable to Spending Clause cases.

⁷ The Director faults Plaintiffs for using the term “responsible entity” instead of “responsible county grantee” to describe the entities against which the Director is authorized to take action pursuant to Ohio Rev. Code § 5101.24. (Director Br. at 18 n.4.) Plaintiffs’ brief correctly quoted the statute as it existed at the time this action was commenced, but the relevant provisions were entirely rewritten on September 29, 2007. The new statute, however, is also clear that the Director has enforcement power against county DJFS offices.

services agency to assume.” Ohio Rev. Code § 307.981(A)(1)(b). Hence, the Director had enforcement power over the county agency as a responsible entity.

The revised statute does not remove the Director’s authority to oversee NVRA compliance by DJFS offices. Under the revised statute, “county grantee” includes the board of county commissioners, which, according to the Director, controls the county department of job and family services. *See* Ohio Rev. Code §§ 329.01, 5101.21. Effective July 1, 2008, the DJFS may provide grants to county grantees only pursuant to a written grant agreement. The county grantee may enter into a subgrant agreement to award the grant to another entity (such as a DJFS office), but only pursuant to a written agreement that ensures the subgrantee’s compliance with all of the terms of the grant and monitors the subgrantee’s compliance. *See* Ohio Rev. Code § 5101.21.

The Director can take action against a county grantee if “[a] requirement for the family services duty established by the department or any of the following is not complied with: *a federal or state law, state plan for receipt of federal financial participation, grant agreement between the department and a federal agency, or executive order issued by the governor.*” Ohio Rev. Code § 5101.24(B)(3) (emphasis added). This is true “[r]egardless of whether a family services duty is performed by a county family services agency, private or government entity pursuant to a contract . . . or private or government provider of a family service

duty.” *Id.* § 5101.24(B). Authorized actions include “[r]equir[ing the responsible county grantee] to comply with a corrective action plan” and “[r]equest[ing] that the attorney general bring mandamus proceedings” against the county grantee.” *Id.* § 5101.24(C)(1), (6). Thus, for example, if a county department were not providing voter registration services to food stamp applicants -- as expressly required by the NVRA as well as by Section 5101.54(F) of the Ohio Rev. Code -- the Director's options under Section 5101.24(C) would include imposing a corrective action plan or asking the attorney general to initiate mandamus proceedings to compel compliance.⁸

The Director's argument that she is specifically prohibited by Ohio Rev. Code § 3503.10(L) from administering the NVRA likewise fails. Under Section 3503.10(L) the Director is not prohibited from administering the NVRA. *See* Opening Br. at 46-47. Rather, Ohio law simply prevents her from promulgating additional voter registration requirements that go beyond the requirements set forth by the Secretary, by the Ohio statutes or by the NVRA itself. While the Director

⁸ Moreover, the Ohio Revised Code specifically provides that the Director “*shall* administer the Food Stamp program in accordance with the ‘Food Stamp Act of 1977,’ and the Director may adopt rules governing “[a]dministration of the program by county departments of job and family services.” Ohio Rev. Code §§ 5101.54(A) & (A)(8)(e) (emphasis added). And, the Code specifically provides that “Any person who applies for food stamps under this section shall receive a voter registration application under section 3503.10 of the Revised Code.” *Id.* § 5101.54(F).

accurately (except for replacing “Voter” with “Voting” in the NVRA) reproduces Section 3503.10(L) on page 12 of her brief, she ignores entirely the second half of the statute, which limits the Director’s duties, *inter alia*, “to the requirements prescribed by the secretary of state and the requirements of this section and the National Voter Registration Act of 1993.” Only by ignoring those words can the Director make the fanciful argument that Ohio law “prohibits ODJFS from administering the NVRA.” Director Br. at 17-18.

POINT II

ALL PLAINTIFFS HAVE STANDING

There is no dispute that, under this Court’s binding precedent, both individual Plaintiffs have standing to bring this action even though they relied on the notice letter sent by ACORN rather than submitting additional letters on their own behalf. *See* Director Br. at 39 (“ODJFS acknowledges that *Miller* is dispositive and that this Court lacks authority to overrule an earlier panel’s published decision.”).⁹

ACORN also has standing to bring this action, both on its own behalf and on behalf of its members. The District Court erred in concluding otherwise by improperly construing the allegations of the Complaint against Plaintiffs and adding new elements to the test for standing. *See* Opening Br. at 53-60. Although

⁹ The Secretary joined in and adopted the Director’s standing arguments, but did not assert any additional arguments on her own.

the Director correctly recites the legal elements of each type of standing, Director Br. at 31-32, she asks this Court to ignore certain allegations of the Complaint and to follow the District Court's lead in construing other allegations against Plaintiffs in an effort to defeat standing.

For example, the Director's argument that ACORN has no right or immunity that it is seeking to vindicate, *see* Director Br. at 33-34, makes no sense. In *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982), the Supreme Court held that allegations that plaintiff had "to devote significant resources to identify and counteract" the defendants' violations of the Fair Housing Act were sufficient injury to confer organizational standing. *Id.* at 379. Likewise, in *ACORN v. Fowler*, 178 F.3d 350, 360-61 (5th Cir. 1999), the Fifth Circuit in fact held that allegations concerning ACORN's expenditure of funds to conduct voter registration outside of public assistance offices necessitated by defendants' violations of the NVRA *was sufficient* to confer standing.

The Director similarly misconstrues the Complaint in arguing that "ACORN does not allege that its voter-registration activities resulted in a drain on its resources -- i.e., that ACORN would not have conducted the same activities absent the alleged noncompliance." Director Br. at 34. That simply ignores the allegation in paragraph 39 of the Complaint that "ACORN and its members have expended substantial time and resources in an effort to make voter registration available to

these low-income citizens -- *which would have been unnecessary had defendants complied with the law...*". Opening Br. at 53. And the Director's conjecture, accepted by the District Court, that "ACORN would continue to conduct registration drives outside of County Departments 'in order to convince those people to join ACORN and/or register to vote,'" Director Br. at 35-36, finds no support in the record, is not alleged in the Complaint, and is an improper finding of fact on a motion to dismiss. *See In re Sofamor Danek Group, Inc.*, 123 F.3d 394, 400 (6th Cir. 1997) (on a Rule 12(b)(6) motion "[a]ll factual allegations made by the plaintiff are deemed admitted and ambiguous allegations must be construed in the plaintiff's favor") (citations omitted).

Nor is there merit to the Director's arguments that ACORN lacks standing on behalf of its members. First, the Director repeats the inaccurate refrain that ACORN lacks associational standing "because it has failed to allege 'anything except a setback to its abstract social interests,'" Director Br. at 36, even though Plaintiffs' opening brief demonstrated that that was not an element of the test for associational standing. *See* Opening Br. at 59 (citing *Havens Realty*, 455 U.S. at 379).

The arguments that the Complaint contains insufficient allegations regarding ACORN's members, *see* Director Br. at 37, again ignore the fair inferences to be drawn from the allegations of the Complaint. The Complaint alleges that some of

ACORN's members are not registered to vote and that many "receive public assistance and should be offered the opportunity to register to vote and/or to change their voter registration address during visits to DJFS offices to apply and/or recertify their eligibility for public assistance." (R.1, Complaint, ¶ 38, JA 19).

Drawing all reasonable inferences in favor of Plaintiffs, as required by Rule 12(b)(6), the Complaint alleges that ACORN's members have suffered or will suffer an injury -- not being able to register to vote or change their voter registration address at DJFS -- traceable to Defendants' violation of the NVRA.

POINT III

LEAVE TO AMEND WAS IMPROPERLY DENIED

The District Court improperly denied leave to amend and dismissed the Complaint with prejudice even though Plaintiffs had not yet had even one opportunity to amend their pleading to correct any perceived deficiency. Contrary to Defendants' assertion of futility, *see* Director Br. at 40; Secretary Br. at 34-35, the proposed Amended Complaint cured the purported shortcomings in the initial Complaint by (i) explicitly alleging that Plaintiffs were injured by the Secretary's failure to comply with the obligations that she admitted were prescribed by the NVRA itself; (ii) adding factual allegations concerning the Director's actual practices concerning supervisory activities over the local DJFS offices concerning NVRA duties; and (iii) explicitly alleging that ACORN would not have expended

funds on voter registration activities outside DJFS offices but for Defendants' NVRA violations (which demonstrates an injury in fact and gives rise to individual standing in its own right) and that ACORN has members who have been injured by Defendants' NVRA violations (which gives rise to associational standing). Therefore, even under the District Court's restrictive pleading requirements, the proposed Amended Complaint stated a claim for violation of the NVRA on behalf of all Plaintiffs against both Defendants, and the District Court abused its discretion by denying leave to amend.¹⁰ See *Foman v. Davis*, 371 U.S. 178, 182 (1962); *E.E.O.C. v. Ohio Edison Co.*, 7 F.3d 541, 546 (6th Cir. 1993).

CONCLUSION

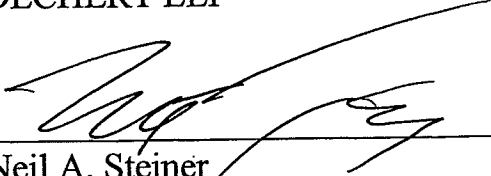
For the foregoing reasons and those set forth in the Brief for Appellants, the judgment of the District Court should be reversed, and the case should be

¹⁰ The Director also argues that leave to amend was properly denied because Plaintiffs did not seek leave to replead until after the Court entered judgment. But the only case on which the Director relied, *Benson v. Morgan Stanley Distribs.*, 420 F.3d 598 (6th Cir. 2005), is inapposite because plaintiff had already been granted two opportunities to amend her complaint prior to the entry of judgment. See *id.* at 613. *Benson* does not apply here because Plaintiffs have not been given any opportunity to amend their pleading. See, e.g., *Laber v. Harvey*, 438 F.3d 404, 427 (4th Cir. 2006) (reversing denial of motion to amend because "a district court may not deny [a motion to amend] simply because it has entered judgment against the plaintiff -- be it a judgment of dismissal, a summary judgment, or a judgment after a trial on the merits"); *Dussouy v. Gulf Coast Inv. Corp.*, 660 F.2d 594, 597 n.1 (5th Cir. 1981) ("Where judgment has been entered on the pleadings, a holding that the trial court should have permitted amendment necessarily implies that [the] judgment...was inappropriate and that therefore the motion to vacate should have been granted.").

remanded for further proceedings whether under the initial Complaint or the Proposed Amended Complaint.

Respectfully submitted,

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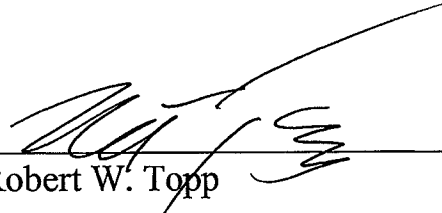
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CERTIFICATE OF COMPLIANCE
WITH FED. R. APP. P. 32(A)(7)

I hereby certify that the foregoing brief complies with the type-volume limitation provided in Federal Rule of Appellate Procedure 32(a)(7)(B). The foregoing brief contains 6,982 words of Times New Roman proportional type in font size 14. The word processing software used to prepare this brief was Microsoft Office Word 2003.



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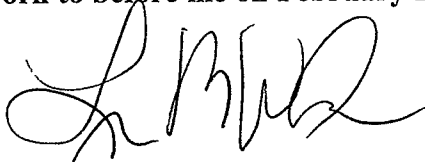
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Sworn to before me on February 15, 2008



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