

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

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

Plaintiffs,

v.

J. KENNETH BLACKWELL, in his official
capacity as Secretary of State, and BARBARA
RILEY, in her official capacity as Director of
the Department of Job and Family Services,

Defendants.

CIVIL ACTION NO. 1:06-cv-2284

JUDGE PATRICIA A. GAUGHAN

MAGISTRATE JUDGE NANCY A.
VECCHIARELLI

**MEMORANDUM OF LAW IN SUPPORT
OF PLAINTIFFS' MOTION FOR RECONSIDERATION**

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Plaintiffs Carrie Harkless, Tameca Mardis and the Association of Community Organizations for Reform Now (“ACORN”) respectfully submit this memorandum of law in support of their motion for reconsideration of this Court’s December 28, 2006 Memorandum of Opinion and Order (the “Opinion”), which granted defendants’ motions to dismiss the Complaint in this action, or in the alternative for leave to file an Amended Complaint that will cure the perceived deficiencies in plaintiffs’ initial pleading.

Argument

POINT I

**THE COURT SHOULD GRANT RECONSIDERATION
AND DENY DEFENDANTS’ MOTIONS TO DISMISS**

“A court may grant a motion for reconsideration for one of three reasons: because of an intervening change in controlling law, because evidence not previously available has become available, or because it is necessary to correct a clear error of law or prevent manifest injustice.” Boler Co. v. Watson & Chalin Mfg., Inc., 372 F. Supp. 2d 1013, 1025 (N.D. Ohio 2005), see also Braxton v. Scott, 905 F. Supp. 455, 457 (N.D. Ohio 1995); Elliott Co. v. Liberty Mut. Ins. Co., ___ F. Supp. 2d ___, 2006 WL 3505856 (N.D. Ohio 2006) (Gaughan, J.); Hart v. United States, 2003 WL 1950247 (N.D. Ohio 2003) (Gaughan, J.).

As demonstrated below, plaintiffs’ motion for reconsideration should be granted because the Court committed clear error by misapplying the standard of review under Federal Rule of Civil Procedure 12(b)(6) and in applying and interpreting federal law concerning ACORN’s associational and organizational standing and because facts concerning Defendant Riley were unavailable at the time of the prior motion.

A. The Secretary Of State Is A Proper Party To This Action

Plaintiffs respectfully submit that the Court committed clear error by holding that the Ohio Secretary of State is not a proper party to the instant action because the Court improperly

accepted defendant Blackwell's assertions that he has complied with his NVRA-related voter registration duties rather than accept plaintiffs' allegations that the Secretary of State has not done so. See Opinion at 12-21. The Opinion appears to focus on whether the Secretary of State has the duty under Ohio law to enforce compliance with the NVRA by various county DJFS offices across the state, and concludes (incorrectly, plaintiffs respectfully submit) that he does not have such duties. In so holding, the Court overlooks the fact that the Secretary of State indisputably has his own direct responsibilities under the NVRA and Ohio law, and the Complaint clearly alleges that he has not fulfilled those direct duties and obligations for NVRA compliance.

Specifically, the Complaint alleges, and the Opinion notes, that the Secretary of State is required to provide training to employees at NVRA designated agencies as to their voter registration duties, to prepare and transmit written instructions on the implementation of voter registration at the agencies and to prepare and cause to be displayed in a prominent location a notice that identifies the person designated to assist with voter registration. See Ohio Rev. Code at § 3503.10(A), (F) & (I); Opinion at 13-14 (quoting Subsection 3503.10(A)). Those duties are direct responsibilities of the Secretary of State, not duties of county DJFS offices. Indeed, even the Secretary of State acknowledges that he has at least some NVRA-related responsibilities. See Opinion at 17 n.1.

The Complaint further alleges that the Secretary of State has not complied with those obligations. Among other things, the Complaint alleges that the Secretary of State "has not fulfilled his responsibilities for implementing voter registration opportunities" in DJFS offices (Compl. ¶ 3). It further alleges that the Secretary "does not provide ongoing training to DJFS offices on voter registration," "does not require each DJFS office to report which employee is the designated registration official," and "does not monitor whether the required signage is in fact

posted in each DJFS office.” Compl. ¶ 25. The Court was required to accept these factual allegations as true for purposes of the motion to dismiss. See Evans-Marshall v. Board of Educ. of Tipp City Exempted Village Sch. Dist., 428 F.3d 223, 228 (6th Cir. 2005) (holding that, in considering a motion to dismiss pursuant to Federal Rule of Civil Procedure 12(b)(6), a court must “construe the complaint in the light most favorable to the plaintiff, accept its allegations as true, and draw all reasonable inferences in favor of the pleader”). These factual allegations are plainly sufficient to state a cause of action against the Secretary of State for violation of the NVRA.

Instead of accepting the truth of those allegations, however, the Court accepted as true Blackwell’s argument that he in fact had performed the duties he is alleged to have shirked and therefore granted his motion to dismiss. The Court cited a document prepared by the Secretary of State’s office as somehow disproving the allegation that the Secretary of State has failed to perform his duties properly. See Opinion at 13 (citing Compl. Ex. C (May 26, 2006 letter from Judy Grady of the Secretary of State’s Office)). The letter, a copy of which had been provided by the Secretary of State’s office to plaintiffs’ counsel, was attached to the Complaint for purposes of demonstrating plaintiffs’ compliance with the NVRA’s notice requirement.

Plaintiffs allege that the Secretary of State’s assertions in that letter of complying with his duties under the NVRA are not true. See Compl. ¶¶ 25, 35-37. Thus, in considering the motion to dismiss, the Court must accept plaintiffs’ allegations about the disputed facts of the Secretary’s NVRA compliance, and cannot deem to be true or draw inferences based on the assertions contained in the Secretary of State’s self-serving letter. See, e.g., Hishon v. King & Spaulding, 467 U.S. 69, 73 (1984) (plaintiff’s allegations must be accepted as true in ruling on motion to dismiss); In re Sofamor Danek Group, Inc., 123 F.3d 394, 400 (6th Cir. 1997) (all factual allegations in the complaint must be deemed admitted, and district court cannot grant a Rule

12(b)(6) motion on the basis of disbelief of such allegations). Accepting the Secretary of State's factual assertions rather than plaintiffs' allegations constituted clear error.

Plaintiffs respectfully submit that the Court further erred in holding as a matter of law that the Secretary of State's responsibilities for ensuring compliance with the NVRA are limited to those specific duties -- providing training, providing written instructions on the implementation of voter registration at the agencies and causing agencies to display a notice of the person available to assist with voter registration -- that the Secretary of State acknowledges that he has. Section 3501.05 of the Ohio Revised Code provides that the Secretary of State has the obligation to investigate the administration of the election laws. See Ohio Rev. Code at § 3501.05(N)(1). Ohio's NVRA-implementing laws are election laws, as is evident by their inclusion in Article XXXV ("Elections") of Ohio's Revised Code. Thus, the Secretary of State has the obligation to investigate and attempt to correct their inadequate implementation. To perform those duties, the Secretary of State's powers include the authority to "administer oaths, issue subpoenas, summon witnesses, compel the production of books, papers, records, and other evidence, and fix the time and place for hearing any matters relating to administration and enforcement of the election laws." Ohio Rev. Code at § 3501.05.

Contrary to the Court's holding (see Opinion at 21), nothing in Section 3501.05(N)(1) restricts the Secretary of State's powers and obligations to the investigation of "election officers," i.e., employees of the Secretary of State's Office and of the county boards of election. Compare Ohio Rev. Code at § 3501.05(N)(1) with Ohio Rev. Code at § 3501.05(M) (obligations specifically limited to election officers). Indeed, in considering an action to enforce compliance with the agency-based requirements of the NVRA, another federal district court in Ohio held that "Ohio's *Secretary of State . . . has the duty and authority* to implement the provisions of the NVRA," even though the lack of compliance at issue there did not arise at local boards of

elections. National Coalition for Students with Disabilities Educ. & Legal Defense Fund v. Taft, Civ. No 00-1300, 2001 WL 1681115, at *3 (S.D. Ohio Sept. 24, 2001) (emphasis added). That case involved voter registration at disability services offices of public colleges and universities in Ohio. Even after the Secretary of State “designated” the disabilities services offices as voter registration agencies under the NVRA and represented to the Court that he was in the process of ensuring compliance with the NVRA by those agencies, the Court issued a preliminary injunction requiring the Secretary of State to provide notice to disabled students who had used or were likely to use the assistance of those offices of their rights under the NVRA. See National Coalition for Students with Disabilities v. Taft, Civ. No 00-1300, 2002 WL 31409443, at *7 (S.D. Ohio Aug. 2, 2002).

Finally, the NVRA requirement that notice of a violation be given to the “chief election officer” further confirms that that chief election officer has the power and responsibility to ensure NVRA compliance. The Sixth Circuit has held that the congressional purpose of the notice requirement is to “provide states in violation of the Act an opportunity to attempt compliance before facing litigation.” ACORN v. Fowler, 129 F.3d 833, 838 (1997) (citing Senate Comm. On Rules and Admin., National Voter Registration Act of 1993, S.Rep. No. 6, 103d Cong., 1st Sess. 41 (1993)). It would be meaningless for the NVRA to require an aggrieved person to give notice to the Secretary of State – but not local county officials – prior to bringing an action if the only person who could then be sued to effect compliance was the local county official.

B. The Director Of DJFS Is A Proper Party To This Action

In the Opinion, the Court accepted defendant Riley’s argument that the Director of DJFS is not a proper party to this action because the state-level DJFS is purportedly not specifically required to ensure administration of the NVRA voter registration provisions at the county level

and is therefore restricted from taking any action to effect compliance by Section 3503.10(L) of the Ohio Revised Code. See Opinion at 21-24.

Shortly before the Opinion was issued, however, Defendant Riley served her Mandatory Initial Disclosures, dated December 15, 2006 (the “Disclosures”) (a copy of which is annexed hereto as Exhibit A), which contained information contradicting her arguments before this Court. In the Disclosures, defendant Riley admits that she possesses “correspondence with county department of job and family services informing/reminding them of their voter registration obligations.” Disclosures at 2. This correspondence, which purportedly seeks to effect NVRA compliance by the counties, belies her argument that she is prohibited by Ohio law from taking any action to effect NVRA compliance at the county level.

The Disclosures confirm that defendant Riley’s argument concerning Ohio law is a hollow, *post-hoc* argument asserted in order to avoid this lawsuit. Indeed, Section 3503.10(L) does not prevent the state-level DJFS from ensuring adequate administration of the NVRA at the county level. Rather, Section 3503.10(L) acknowledges the state-level DJFS’s responsibilities in the counties, but prevents the state-level DJFS from going beyond the *requirements of the NVRA* in ensuring administration of voter registration services. See Opposition Brief at 13-14. The letters described in the Disclosures show that, prior to the initiation of this action, defendant Riley understood that she had a responsibility to take steps to ensure NVRA compliance at the county-level DJFS.¹ The Complaint alleges that she failed to fulfill those responsibilities, and therefore states a claim against her.

¹ Given the letters described in the Disclosures, there is a reasonable probability that additional documents exist that show the Director of DJFS attempting to ensure adequate administration of the NVRA at the county-level. At the very least, plaintiffs should be given the opportunity to conduct discovery concerning the powers of the Director of DJFS.

Moreover, as discussed in the Opposition Brief, defendant Riley's NVRA responsibilities arise not just from state law, but from federal law, as well. A state agency responsible for administering federal public assistance programs, like the state-level DJFS, cannot avoid its responsibilities by delegating those responsibilities to county offices. See Opposition Brief at 14 (citing cases). Since the NVRA requires that voter registration services be provided in conjunction with, inter alia, Food Stamps, Medicaid, and TANF, the Director of DJFS cannot escape her responsibilities under the NVRA and Ohio law by pointing at other officials who may also have some responsibility for voter registration. See id. (citing the NVRA Conference Report 7-19).

C. Acorn Has Standing To Bring This Action

1. ACORN has standing to sue on its own behalf

As the Court explained in the Opinion, to establish standing on its own behalf, a plaintiff must show:

(1) it has suffered an 'injury in fact' that is (a) concrete and particularized and (b) actual or imminent, not conjectural or hypothetical; (2) the injury is fairly traceable to the challenged action of the defendant; and (3) it is likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.

Sandusky County Democratic Party v. Blackwell, 387 F.3d 565, 573 (6th Cir. 2004) (citations omitted). The Complaint in this action alleges 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...*

Compl. ¶ 4 (emphasis added). The Complaint also alleges that ACORN's voter registration efforts specifically include:

collecting voter registration applications from individuals outside of DJFS offices in those counties *who were not offered the opportunity to register to vote during visits to the DJFS offices.*

Compl. ¶ 39 (emphasis added).

The reasonable inference to be drawn from these factual allegations, which plaintiffs explained in their Opposition Brief, is that ACORN would not have undertaken activities it deemed “unnecessary” and therefore would not have expended funds on voter registration activities *outside DJFS offices* had defendants complied with the NVRA. Thus, ACORN has alleged that it undertook activities and spent money that it would not have had the NVRA been enforced in Ohio. This expenditure of funds, caused by defendants’ failure to enforce the NVRA, is an injury in fact suffered by ACORN. See ACORN v. Fowler, 178 F.3d 350, 360-61 (5th Cir. 1999). Instead of accepting plaintiffs’ factual allegation and drawing this reasonable inference, the Court chose to accept Defendant Riley’s assertion that even if the NVRA was enforced, ACORN would have undertaken activities it deemed “unnecessary.” See Opinion at 8 (“While plaintiffs allege that their efforts would have been “unnecessary” absent defendants’ noncompliance with the NVRA, the law requires that plaintiffs allege that ACORN would not have spent these resources if defendants had not violated the NVRA.”). This was clear error. See, e.g., In re Sofamor, 123 F.3d at 400.

Moreover, by drawing an unwarranted distinction between pleading that expenditure of funds would have been unnecessary and pleading that the funds would not have been spent, the Court has applied a “magic words” standard in contravention of the Federal Rules of Civil Procedure’s notice pleading regime.² See, e.g., Minger v. Green, 239 F.3d 793, 799 (6th Cir.

² Plaintiffs’ proposed Amended Complaint (annexed hereto as Exhibit B) includes the explicit allegation that ACORN would not have spent money on these unnecessary activities if the NVRA was enforced.

2001) (“As this court has stated, ‘the fundamental tenor of the Rules is one of liberality rather than technicality, and it creates an important context within which we decide cases under the modern Federal Rules of Civil Procedure.’ Therefore, the Rules require that we not rely solely on labels in a complaint, but that we probe deeper and examine the substance of the complaint.”) (quoting Miller v. American Heavy Lift Shipping, 231 F.3d 242, 248 (6th Cir. 2000)).

2. ACORN has standing to sue on behalf of its members

An organization has standing to sue on behalf of its members when “its members would otherwise have standing to sue in their own right, the interests at stake are germane to the organization’s purpose, and neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” Friends of the Earth, Inc. v. Laidlaw Env’tl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000) (citations omitted).

The Court’s Opinion misapplies this test by adding a fourth element – a requirement that the association allege more than a “setback to its abstract social interests.” Opinion at 10. But that is not an element of associational standing, nor is it relevant to whether an organization has standing to sue on behalf of its members. Rather, that is a part of the test for whether the organization has individual standing in its own right. As shown above, ACORN has standing to sue in its own right because it suffered an injury in fact – the expenditure of funds it would not otherwise have spent – and not a mere setback to its social interests.

The Court concluded that ACORN also lacked standing to sue on behalf of its members because it has not alleged facts that demonstrate that its members have suffered, or will suffer, a concrete injury traceable to defendants’ violations of the NVRA. Opinion at 10. Under the standard for deciding a motion under Federal Rule of Civil Procedure 12(b)(6), however, ACORN has clearly alleged that its members have suffered a concrete injury. The Complaint alleges that Ohio is not complying with Section 7 of the NVRA and that “persons receiving

public assistance are not being offered the opportunity to register to vote that federal law requires.” Compl. ¶ 37; see also Compl. ¶ 4, 23, 26-31, 36. Further, 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.”³ Compl. ¶ 38.

Instead of construing these allegations in the light most favorable to plaintiffs and drawing the reasonable inference that unregistered ACORN members have been harmed by not being offered the right to register to vote, the Court again erroneously accepts defendants’ assertions that there was no injury. See Opinion at 10-11. Instead of accepting defendants’ assertion that ACORN members may have “declined” to register to vote, the Court, under the 12(b)(6) standard, was required to infer that ACORN’s members were harmed by not being offered the federally mandated opportunity to register at DJFS offices.

POINT II

IN THE ALTERNATIVE, THE COURT SHOULD GRANT LEAVE TO SERVE AN AMENDED COMPLAINT

Leave to amend the pleadings shall be “freely given” by the court “when justice so requires.” Fed. R. Civ. P. 15(a); General Electric Co. v. Advance Stores Co., Inc., 285 F. Supp.2d 1046, 1048 (N.D. Ohio 2003). Plaintiffs’ proposed Amended Complaint erases any potential doubt that plaintiffs allege that the Secretary of State has not carried out his acknowledged NVRA-related obligations, that the Director of DJFS in fact is not limited to the

³ In fact, ACORN has members who are on public assistance, who have moved since registering but have not changed their voter registration addresses, and who would be interested in changing their voter registration addresses at DJFS offices if given that opportunity, as the NVRA requires.

specific duties enumerated in Ohio statutes and that ACORN has both associational and organizational standing to assert its claim.

The proposed Amended Complaint leaves absolutely no doubt that plaintiffs are alleging that the Secretary of State's Office has not complied with its acknowledged NVRA-obligations. Likewise, the proposed Amended Complaint adds factual allegations based on the Director of DJFS' Disclosures concerning her correspondence with county DJFS offices, which show that in practice she is not limited to the specific NVRA duties enumerated in the statute. And, the proposed Amended Complaint specifically alleges 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). Thus, to the extent the motion for reconsideration is denied, the proposed Amended Complaint cures the perceived defects in the initial Complaint and states a claim for violation of the NVRA on behalf of all plaintiffs against both defendants. Accordingly, leave to amend should be granted. See General Electric, 285 F. Supp. 2d at 1048.

Conclusion

For the foregoing reasons, plaintiffs respectfully request that the Court grant their motion for reconsideration and deny defendants' motion to dismiss, or, in the alternative, grant leave to file the proposed Amended Complaint.

Dated: Cleveland, Ohio
January 12, 2007

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