

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

**PLAINTIFFS' MEMORANDUM OF LAW
IN OPPOSITION TO DEFENDANTS' MOTIONS TO DISMISS**

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Plaintiffs Carrie Harkless, Tameca Mardis and the Association of Community Organizations for Reform Now (“ACORN”), through their undersigned counsel, respectfully submit this memorandum of law in opposition to the motions to dismiss of defendants J. Kenneth Blackwell and Barbara Riley.

Preliminary Statement

“No right is more precious in a free country than that of having a voice in the election of those who make the laws under which, as good citizens, we must live. Other rights, even the most basic, are illusory if the right to vote is undermined.” Wesberry v. Sanders, 376 U.S. 1, 17 (1964). Defendants are systematically preventing Ohio’s poorest citizens from exercising this fundamental right by depriving them of the opportunity to register to vote at the time of application or recertification for Food Stamps, Medicaid and other public assistance programs, notwithstanding the clear mandate of the National Voter Registration Act of 1993 (the “NVRA”) that voter registration be offered during such visits.

Defendants do not dispute that Ohio’s record in registering voters at public assistance agencies is abysmal. But, in a game of legal “hot potato,” each defendant argues that responsibility for NVRA compliance lies elsewhere. According to defendant Blackwell, it is either defendant Riley or the individual directors of the County Department of Job and Family Services (“CDJFS”) in each of Ohio’s 88 counties who are responsible for ensuring that voter registration is offered to applicants for public assistance. Defendant Riley, on the other hand, argues that she does not control the CDJFS directors, and that either they or defendant Blackwell is responsible. In fact, under the NVRA and the Ohio statutes implementing it, both defendants Blackwell and Riley are responsible; whether the 88 county directors also bear responsibility does not relieve defendants Blackwell and Riley of their obligations. See Point I infra.

Defendants also err in arguing that ACORN lacks standing to bring a claim. ACORN has standing in its own right because it has suffered a concrete injury -- spending thousands of dollars to register voters outside of Department of Job and Family Services ("DJFS") offices that it would not otherwise have spent -- as a result of defendants' NVRA violations. ACORN also has associational standing to bring the instant claim because it has members who rely on public assistance, are not registered to vote, and have not been offered the opportunity to register to vote during visits to DJFS offices, and because ACORN's effort to enforce the NVRA is clearly germane to the organization's purpose of working towards social justice and stronger communities for low- and moderate-income families through, inter alia, their participation in the electoral process. See Point II infra.

Finally, defendants make the frivolous argument that Ms. Harkless and Ms. Mardis cannot pursue their claims because they failed to give individual notice of their claims to the defendants prior to bringing this lawsuit. But controlling Sixth Circuit precedent excuses notice where, as here, notice would have been futile because the defendants refused to take corrective action in response to a prior notice by another party. See Point III infra.

Statement Of Facts

A. Parties

Plaintiff Carrie Harkless is an Ohio citizen residing in Lorain, Ohio, who receives public assistance benefits, including Food Stamps, Medicaid, and TANF, which are administered by the DJFS. She meets all of the qualifications to register to vote in Ohio, and was previously registered to vote in Ohio. However, Ms. Harkless has moved since registering to vote and, as of the date of the complaint, had not changed her voter registration address. She has not been offered the opportunity to register to vote or change her voter registration address on any of her visits to the DJFS. Compl. ¶¶ 5, 41-45.

Plaintiff Tameca Mardis is an Ohio citizen residing in Cleveland, Ohio, who also receives public assistance benefits, namely Food Stamps and Medicaid, which are administered by the DJFS. Ms. Mardis meets all of the qualifications to register to vote in Ohio, but, as of the date of the complaint, was not registered to vote. Like Ms. Harkless, Ms. Mardis has not been offered the opportunity to register to vote on any of her visits to the DJFS. Compl. ¶¶ 6, 46-52.

Plaintiff ACORN is a non-profit organization incorporated in Louisiana. ACORN has offices in Akron, Cincinnati, Columbus, Dayton, and Toledo, Ohio, with its main Ohio office located in Cleveland. Compl. ¶ 7. ACORN is the nation's largest community organization of low- and moderate-income families, working together for social justice and stronger communities. Currently, ACORN has more than 175,000 member families, including more than 5,600 members in its six Ohio chapters. Id.

ACORN is a strong advocate for voter participation, which it views as an important means of building stronger communities. Compl. ¶ 38. In addition to participating in local meetings and actively working on public policy campaigns, ACORN members strive to elect their own leaders from their neighborhoods to local, state and federal office. Compl. ¶ 7. Although ACORN encourages its members to vote, some of its members (including members who receive public assistance benefits) are unregistered. Compl. ¶ 38.

ACORN has spent hundreds of thousands of dollars each year on voter registration activities in the state of Ohio, where ACORN regularly conducts voter registration drives. These efforts specifically include, inter alia, collecting voter registration applications from individuals outside of DJFS offices who were not offered the opportunity to register to vote during visits to the DJFS offices. On average, six ACORN employees or volunteers have participated in voter registration efforts outside of public assistance agencies each day. Compl. ¶ 39.

Defendant J. Kenneth Blackwell is the Secretary of State of Ohio and, as such, is the chief election official in the state of Ohio. Among other things, Secretary Blackwell is responsible for overseeing the elections process and is required to “prepare rules and instructions for the conduct of elections” and to “investigate the administration of election laws.” Compl. ¶ 20 (internal quotation marks omitted). As Ohio’s chief election official, defendant Blackwell has been vested with responsibility for designing, implementing, administering and enforcing a program for registering voters at agencies that provide public assistance, including the DJFS. Compl. ¶¶ 8, 20-22.

While admitting a role in overseeing voter registration services at public assistance agencies, defendant Blackwell’s office has limited its activities to the maintenance of a toll-free telephone number that county DJFS offices may call to receive additional voter registration application forms. Moreover, defendant Blackwell does not enforce any obligations by the county offices to comply with NVRA requirements or take any other action in his oversight role to enforce compliance. Compl. ¶¶ 3, 25.

Defendant Barbara Riley is the Director of Ohio’s Department of Job and Family Services. The DJFS administers certain public assistance programs, including Food Stamps, Medicaid, Ohio Works First (Ohio’s Temporary Assistance for Needy Families program), the Prevention, Retention and Contingency Program, and Disability Financial Assistance, all of which are subject to the requirements of the NVRA. Compl. ¶ 9. Defendant Riley has continually denied any legal responsibility for ensuring that voter registration services are available at public assistance agencies it oversees. Rather, defendant Riley previously asserted that the sole responsibility lies with the Secretary of State’s office, and now argues that the local CDJFS offices are the responsible parties. Compl. ¶ 24.

B. The NVRA And Ohio's Statutes Implementing The NVRA

Congress passed the NVRA as part of its efforts to increase voter participation by making voter registration more readily available. Section 7 of the NVRA was aimed at ensuring the registration of “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].” NVRA Conference Report (H.Rept. 103-66); Compl. ¶ 2. Section 7 requires states to “designate as voter registration agencies . . . all offices in the State that provide public assistance.” 42 U.S.C. § 1973gg-5(a)(2) (West 2006). “Public assistance” includes, among other programs, Food Stamps, Medicaid, and Temporary Aid for Needy Families (“TANF,” formerly AFDC). NVRA Conference Report 7-19. Under Ohio law, the DJFS is a “designated agency” under the NVRA, and each DJFS office must therefore offer the voter registration services prescribed by the NVRA. See Ohio Rev. Code § 3501.01(X) (West 2006); Ohio Rev. Code § 3503.10 (West 2006); Compl. ¶ 21.

Each such voter registration agency must (1) distribute mail voter registration application forms, (2) assist applicants in completing the forms, and (3) accept completed forms and forward them to the appropriate State election official. See 42 U.S.C. § 1973gg-5(a)(4)(A); Compl. ¶ 16. Furthermore, with each application for service or renewal of service, or change of address form, the agency must distribute a mail voter registration application, and ask the applicant in writing whether he or she would like to register to vote. Id. at § (a)(6); Compl. ¶ 17.

C. Ohio's Continued Failure To Comply With The NVRA

Ms. Harkless’s and Ms. Mardis’s experiences in not being offered the opportunity to register to vote during any of their visits to DJFS offices are hardly unique. Because defendants have failed to monitor NVRA compliance by DJFS offices or enforce the mandates of Section 7 of the NVRA in such offices, the State’s noncompliance with Section 7 requirements in DJFS

offices is widespread. Compl. ¶¶ 23, 26.¹ For example, a survey of individuals leaving DJFS facilities found that out of the 103 people interviewed who had gone to DJFS for transactions covered under the NVRA, only *three* reported that they were offered a form that asked them whether they wanted to register to vote. Compl. ¶ 28. That is hardly surprising, since spot-checks at DJFS offices in numerous counties have revealed that voter registration forms are typically not available to those seeking public assistance. Compl. ¶ 27.

Statistical evidence also shows that the DJFS is failing to comply with the NVRA. Registration rates at DJFS offices are shockingly low. For example, DJFS offices in ten Ohio counties did not register a single voter in the 2002-2004 reporting period; DJFS offices in another 17 counties collected fewer than ten voter registrations; and DJFS offices in 32 additional counties submitted fewer than 100 registrations during the same time period. Compl. ¶ 30. In the aggregate, during 2003 and 2004, DJFS offices statewide processed approximately 4.7 million applications and/or recertifications for Food Stamps, yet processed less than one half of one percent (0.5%) of that number of voter registration application forms. Compl. ¶ 31.

Moreover, four of Ohio's most highly populated counties (Franklin, Hamilton, Montgomery, and Summit counties), each of which has more than 500,000 residents, registered a combined total of just 1,686 voters at DJFS offices; by contrast, Athens and Marion counties registered more than 2,000 voters during that same period despite having a combined population of only approximately 125,000 residents. Compl. ¶ 29.

D. Defendants Had Notice Of Ohio's Non-Compliance With The NVRA

Defendant Blackwell has been notified repeatedly of Ohio's non-compliance with the requirements of Section 7 of the NVRA. On February 23, 2006, the Greater Cleveland Voter

¹ Section 7 of the NVRA is the only federally mandated program available at the agencies that is not subject to reporting or monitoring by the state. Compl. ¶ 26.

Coalition sent a letter to defendant Blackwell outlining the State's failure to comply with Section 7 and requesting that steps be taken to bring Ohio into compliance. Compl. ¶ 32 & Ex. A. Then, on May 12, 2006, counsel for ACORN sent a letter to defendant Blackwell to “provide written notice of the violation to the chief election official of the State,” as required by the NVRA, see 42 U.S.C. §§ 1973gg-9 (West 2006), and provided a copy of that letter to defendant Riley. The letter stated that in the absence of a plan to remedy Ohio's failures to implement the NVRA, ACORN would have no choice but to commence litigation. Compl. ¶ 33 & Ex. B.

On May 26, 2006, Judy Grady of defendant Blackwell's office responded to the Greater Cleveland Voter Coalition letter, asserting that NVRA compliance was not the responsibility of the Ohio Secretary of State. Ms. Grady also suggested that compliance with the NVRA was unnecessary because Ohio has a relatively high voter registration rate. Rather than respond to ACORN's letter, Ms. Grady simply copied ACORN on the response letter to the Greater Cleveland Voter Coalition. Compl. ¶ 34 & Ex. C.

On July 17, 2006, counsel for ACORN again wrote to defendant Blackwell offering to meet with him to address specific steps Ohio could take to ensure NVRA compliance. Compl. ¶ 35 & Ex. D. Defendant Blackwell simply ignored the July 17 letter. Id.

Argument

It is well settled that a court may dismiss a complaint pursuant to Federal Rule of Civil Procedure 12(b)(6) “only if it is clear that no relief could be granted under any set of facts that could be proved consistent with the allegations.” Evans-Marshall v. Board of Educ. of Tipp City Exempted Village Sch. Dist., 428 F.3d 223, 228 (6th Cir. 2005) (citation omitted). In making this determination, 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.” Id. (citations omitted).

POINT I

**THE COMPLAINT STATES
A CLAIM FOR RELIEF AGAINST BOTH DEFENDANTS**

The NVRA requires each state to “designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under [the NVRA].” 42 U.S.C. § 1973gg-8 (West 2006); Compl. ¶ 19. The “State responsibilities” imposed by the NVRA are responsibilities of the states, and not of their counties or political subdivisions. See 42 U.S.C. § 1973gg-6(a) (West 2006) (in administering federal elections, “each State shall . . .”); id. at § 1973gg-6(b) (“Any State program or activity . . .”); id. at § 1973gg-6(c)(1) (“A State may meet the requirements . . .”); id. at § 1973gg-6(c)(2)(A) (“A State shall complete . . .”); id. at § 1973gg-6(d)(1) (“A State shall not remove . . .”).

The NVRA provides that any person aggrieved by an NVRA violation may give notice to the chief election official of the state involved, and, if that violation is not corrected within the time limitations imposed by the NVRA, may bring a civil action in an appropriate district court for declaratory or injunctive relief. See id. at § 1973gg-9. Defendants are proper defendants to this action because both the Office of the Secretary of State and the DJFS are responsible for ensuring Ohio’s compliance with Section 7 of the NVRA.

A. Blackwell Is A Proper Defendant Because He Is Responsible For Enforcing Ohio’s Election Laws, Including Ohio’s Laws Implementing The NVRA

Defendant Blackwell argues that he is not a proper defendant to this action because he allegedly has no duty to enforce the obligations of the NVRA.² See Memorandum in Support of Motion to Dismiss of Defendant J. Kenneth Blackwell, Secretary of State, dated October 16,

² Ironically, defendant Blackwell argues that had he received notice of Ms. Harkless’s and Ms. Mardis’s complaints prior to the commencement of litigation, he would have investigated and remedied the alleged NVRA violations against them -- implicitly conceding that he has some power to enforce the NVRA. See Blackwell Br. at 7-8.

2006 (“Blackwell Br.”), at 5-6. But defendant Blackwell has admitted to another Court in this district that, at a minimum, he “is responsible for preparing and requiring the designated agency to display in a prominent location a notice that identifies the person designated to help with registrations, the person’s duties, and when that person is available to assist with voter registration duties. R.C. § 3503.10(I).” Motion of Defendants J. Kenneth Blackwell, Jim Petro, and Sherri Bevan-Walsh To Dismiss The Plaintiffs’ Complaint And Memorandum In Opposition To Plaintiffs’ Motion For A Preliminary Injunction dated Aug. 14, 2006, at 5.³ As alleged in the Complaint, defendant Blackwell has failed to comply with even these minimal duties. Compl. ¶ 25. Thus, there can be no doubt that the Complaint alleges a claim against defendant Blackwell.

Indeed, Ohio’s statutes implementing the NVRA give defendant Blackwell far greater obligations and responsibilities for enforcing compliance with the NVRA than he has already admitted. In compliance with the NVRA’s mandate that a chief election official be appointed to oversee Ohio’s implementation of the NVRA, Ohio has designated the Secretary of State as “the chief election officer of the state[.]” Ohio Rev. Code § 3501.04 (West 2006). As the chief election officer of Ohio, the Secretary of State is required to “[p]repare rules and instructions for the conduct of elections,” Ohio Rev. Code § 3501.05(C) (West 2006), and to “prescribe a program of distribution of voter registration forms through [designated NVRA agencies].” *Id.* at § 3501.05(R). In addition to his acknowledged duties to prepare notices to be prominently displayed at each agency identifying the person responsible to assist with voter registration, the nature of his or her duties, and where and when that person is available for providing voter registration assistance, Ohio’s statutes implementing the NVRA require defendant Blackwell to provide training to employees at NVRA designated agencies as to their voter registration duties

³ This brief, a copy of which is annexed hereto as Exhibit A, was filed in an action entitled Project Vote, et al. v. Blackwell, et al., 1:06-CV-01628 (N.D. Ohio) (J. O’Malley).

and to prepare and transmit written instructions on the implementation of voter registration at the agencies. See Ohio Rev. Code at § 3503.10(A), (F) & (I). As alleged in the Complaint, defendant Blackwell has failed to fulfill any of these obligations.

Contrary to defendant Blackwell's suggestion that he is powerless to compel compliance by a recalcitrant county official, Ohio statutes specifically require defendant Blackwell to *enforce* the administration of Ohio's election laws in all of Ohio's 88 counties and give him the powers necessary to do so. See id. at § 3501.05. Section 3501.05(N)(1) states that the Secretary of State "shall":

. . . investigate the administration of election laws, frauds, and irregularities in elections in any county, and report violations of election laws to the attorney general or prosecuting attorney, or both, for prosecution.

Id. at § 3501.05. In performing these duties, the Secretary of State:

. . . may 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 the administration and enforcement of the election laws.

Id.

The specific responsibilities placed on defendant Blackwell by Ohio law place this case on all fours with United States v. New York, 255 F. Supp. 2d 73 (E.D.N.Y. 2003). In New York, two state public assistance agencies argued that they could not be held responsible for the failures of county and city level agencies to comply with the NVRA. They argued that the state agencies had delegated their responsibilities to county and city-run offices and that "the NVRA does not explicitly require that state agencies ensure NVRA compliance by county or city-run district offices." Id. at 79. In denying defendants' motion to dismiss, the Court explained that "[i]t would be plainly unreasonable to permit a mandatorily designated State agency to shed its

NVRA responsibilities because it has chosen to delegate the rendering of services to local municipal agencies.” Id. (citations omitted).

The same is true here. The NVRA requires Ohio to designate a state official as the chief election official to be responsible for overseeing Ohio’s implementation of the NVRA. Ohio has designated the Secretary of State as its chief election official and has specifically assigned to him the task of enforcing the State’s election laws, including those laws implementing the NVRA. Blackwell cannot “shed” these responsibilities by pointing the finger at county-level agencies. See id.

Defendant Blackwell’s reliance on United States v. Missouri, No. 05-4391-CV-C-NKL, 2006 WL 1446356 (W.D. Mo. May 23, 2006) is misplaced. In Missouri -- which was decided on a motion for summary judgment, not a motion to dismiss -- the district court dismissed claims against Missouri’s secretary of state alleging that Missouri was not complying with the NVRA because under Missouri’s statutory scheme implementing the NVRA, “the Secretary of State was not given any authority by the Missouri legislature to enforce those statutes.” 2006 WL 1446356 at *7. By contrast, as discussed above, defendant Blackwell has not only the authority, but the duty, to enforce Ohio’s NVRA implementation statutes.

Ohio’s statutes implementing Section 7 of the NVRA are clearly election laws. Indeed, the primary statute concerning Section 7 of the NVRA, Section 3503.10, is codified in Article XXXV (“Elections”) of Ohio’s Revised Code. Defendant Blackwell is obliged to enforce those laws, and has all of the powers enumerated in Section 3501.05 at his disposal. Accordingly, defendant Blackwell is a proper party to this action. Because he has not complied with his duties, the Complaint states a claim for violation of Section 7 of the NVRA against him.

B. Riley Is A Proper Defendant Because She Is Responsible Under Ohio Law For Ensuring That DJFS Offices Comply With Section 7 Of The NVRA

Like defendant Blackwell, defendant Riley argues that she cannot be held liable for the county-level DJFS offices' failure to comply properly with the requirements of Section 7 of the NVRA because she does not have the power to enforce the county-level DJFS offices' compliance with the NVRA. See Memorandum in Support of Defendant Barbara Riley's Motion to Dismiss Plaintiffs' Complaint, dated October 16, 2006 ("Riley Br."), at 12-15. And like defendant Blackwell, defendant Riley erroneously attempts to downplay her powers and responsibilities.

Ohio law provides that the DJFS is a "designated agency" under the NVRA and that each DJFS office must therefore offer the voter registration services prescribed by the NVRA. See Ohio Rev. Code § 3501.01(X); Ohio Rev. Code § 3503.10. Ohio law also requires compliance with Section 7 of the NVRA by county-level DJFS offices, but that does not relieve the state agency from its responsibilities. See Ohio Rev. Code § 329.051.; Ohio Admin. Code § 5101:1-2-15 (West 2006). Rather, under Ohio law, the ability to enforce NVRA compliance remains squarely within the duties of the state DJFS.

Section 5101.24 of the Ohio Revised Code provides that:

Regardless of whether a family services duty is performed by a county family services agency . . . the department of job and family services may take action under division (C) of this section against the responsible entity if the department determines any of the following are the case: . . . (3) 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 . . .

Ohio Rev. Code § 5101.24(B)(3) (West 2006).⁴ Subsection (C), in turn, enumerates the actions the state DJFS may undertake. Pursuant to that section, defendant Riley may, inter alia:

- (i) “Require the responsible entity to comply with a corrective action plan pursuant to a time schedule specified by the department . . .” -- Ohio Rev. Code § 5101.24(C)(1) & (2);
- (ii) “Impose an administrative sanction issued by the department against the responsible entity. . .” -- Ohio Rev. Code § 5101.24(C)(4);
- (iii) “Perform, or contract with a government or private entity for the entity to perform, the family services duty until the department is satisfied that the responsible entity ensures that the duty will be performed satisfactorily. . .” -- Ohio Rev. Code § 5101.24(C)(5); and
- (iv) “Request that the attorney general bring mandamus proceedings to compel the responsible entity to take or cease the action that causes division (B)(1), (2), (3), or (4) of this section to apply. . .” -- Ohio Rev. Code § 5101.24(C)(6).⁵

Ignoring the above-cited statutes, defendant Riley argues that Ohio law “prevents [the state DJFS] from administering NVRA voter registration provisions in local County Department offices.” Riley Br. at 13 (citing Ohio Rev. Code § 3503.10(L)). In fact, Section 3503.10(L) imposes no such limitation on defendant Riley, and merely states that:

[T]he department of job and family services and its departments, divisions, and programs shall limit administration of the aspects of the voter registration program for the department to the requirements prescribed by the secretary of state and the requirements of this section and the National Voter Registration Act of 1993.

⁴ “Family services duty” is defined by Ohio statutes as a “duty state law requires or allows a county family services agency to assume, including financial and general administrative duties,” Ohio Rev. Code § 307.981(A)(1)(b) (West 2006).

⁵ Other Ohio statutes also provide the state DJFS with the means of controlling the county-level offices. For example, the state DJFS may “establish performance and other administrative standards for the administration and outcomes of family services duties” at the county level. Ohio Rev. Code § 5101.22.

Id. As a plain reading of subsection (L) indicates, the DJFS is not prevented from administering at the county level; to the contrary, that subsection acknowledges the state DJFS's role in administering the voter registration program at the county level.

As with defendant Blackwell, defendant Riley's duty and ability under Ohio law to enforce the county-level DJFS offices' compliance with the NVRA makes her reliance on Missouri unavailing, and places her squarely within the holding of New York. See New York, 255 F. Supp. 2d at 79; Missouri, 2006 WL 1446356, at *7; Point I(A) supra.

Moreover, it is well-settled that a state agency responsible for administering federal public assistance programs cannot avoid its responsibilities by delegating some or all of those responsibilities to county, city or other local offices. See, e.g., Robertson v. Jackson, 972 F.2d 529, 534 (4th Cir. 1992) (holding that state cannot escape its obligations under the Food Stamp program by choosing to operate the program through local social services agencies); Woods v. United States, 724 F.2d 1444, 1447 (9th Cir. 1984) (same); Hillburn v. Maher, 795 F.2d 252, 260 (2d Cir. 1986) (holding that state cannot diminish its responsibility under Medicaid program by delegating those responsibilities to an agency); Morel v. Giuliani, 927 F. Supp. 622, 627 (E.D.N.Y. 1995) ("Accordingly, this Court determines that implicit in the State's obligations to administer the Food Stamp Act, Medicaid Act, and cash assistance programs is a duty to oversee the City defendants' administration of the programs to ensure compliance with federal law."). The NVRA requires that voter registration services must be provided in conjunction with, among other programs, Food Stamps, Medicaid, and TANF. See NVRA Conference Report 7-19. Defendant Riley cannot escape her responsibilities under the NVRA and Ohio law simply because other officials may also have some responsibility for voter registration.

POINT II

ACORN HAS STANDING TO ASSERT ITS CLAIM

The complaint demonstrates that ACORN has standing, both on its own behalf and associationally on behalf of its members, to assert its claim against defendants. “When a court considers whether a plaintiff has standing to pursue preliminary relief or whether a plaintiff has standing pursuant to a motion to dismiss, standing is determined by analyzing the material allegations in the complaint, which must be accepted as true.” Miller v. Blackwell, 348 F. Supp. 2d 916, 920 (S.D. Ohio 2004) (citations omitted).

A. ACORN Has Standing To Sue On Its Own Behalf

To establish standing on its own behalf, ACORN 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 allegations of the complaint easily meet this standard: (1) ACORN has expended thousands of dollars and volunteer and staff hours on registering voters outside of public assistance agencies (Compl. ¶ 39); (2) these expenditures would not have been necessary but for defendants’ failure to comply with Section 7 of the NVRA (Compl. ¶ 4); and (3) defendants and the state of Ohio have not complied with Section 7 of the NVRA (Compl. ¶¶ 19-31, 36-37, 44, 51 & 54). Moreover, if defendants and the state of Ohio comply with Section 7 of the NVRA, which the relief sought by plaintiffs aims to ensure, there will be no need for ACORN to conduct voter registration drives outside of public assistance agencies because people exiting those agencies will have already been afforded the opportunity to register to vote.

Nonetheless, defendants challenge ACORN's standing on its own behalf in three regards. First, defendant Riley argues that ACORN cannot show that it has suffered an injury because "it is not seeking to vindicate a right or immunity that ACORN enjoys." Riley Br. at 9. But defendant Riley misstates the law. The injury suffered by a plaintiff need not necessarily arise from a violation of a right or immunity enjoyed by the plaintiff. In Havens Realty Corp. v. Coleman, 455 U.S. 363, 378-79 (1982), the Supreme Court held that an organization called HOME had standing to sue on its own behalf for injury caused to it by defendants' violation of the Fair Housing Act. HOME, whose purpose was "to make equal opportunity in housing a reality in the Richmond Metropolitan Area," did not itself enjoy a right to fair housing. Id. at 368. Nevertheless, the Supreme Court held that "there can be no question that the organization has suffered injury" because defendants' violations of the act "impaired HOME's ability to provide counseling and referral services" and "HOME has had to devote significant resources to identify and counteract" defendants' improper conduct. Id. at 379; see also ACORN v. Fowler, 178 F.3d 350, 360-61 (5th Cir. 1999).

Havens is directly on point. ACORN has suffered a concrete injury, the expenditure of money and time, as a result of defendants' violations of the NVRA. This injury alone is enough to afford ACORN standing to assert its claim. Indeed, in the Fowler case (cited in the Riley Br. at 9-10), the Fifth Circuit held that the exact injury alleged here (expenditures on voter registration drives) by the exact same plaintiff (ACORN) as a result of a defendant's failure to comply with the exact same law (the NVRA) was sufficient to confer standing. See Fowler, 178 F.3d at 360-61.

Second, defendant Riley argues that ACORN does not have standing to assert a claim on its own behalf because, she claims, ACORN does not allege that it "would not have conducted its

activities absent the alleged noncompliance.” Riley Br. at 9. The Complaint, however, makes precisely that allegation:

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).⁶

Finally, both defendants argue that ACORN lacks standing because ACORN purportedly has not alleged that the defendants’ conduct has resulted in more than a setback to ACORN’s “abstract social interests.” Blackwell Br. at 8-9; Riley Br. at 10. This argument, too, was rejected by the Supreme Court in Havens. As noted above, the complaint alleges that ACORN has been forced to expend time and money as a result of defendants’ conduct. As the Supreme Court recognized in Havens, “[s]uch concrete and demonstrable injury to the organization’s activities -- with the consequent drain on the organization’s resources -- constitutes far more than simply a setback to the organization’s abstract social interests.” 455 U.S. at 379. In the cases relied on by defendants, on the other hand, not one of the plaintiffs alleged a drain on resources or any other concrete injury, leading those Courts to conclude that the organization was pursuing a mere interest in the subject of the litigation. See Sierra Club v. Morton, 405 U.S. 727, 738-40 (1972); Greater Cincinnati Coalition for the Homeless v. City of Cincinnati, 56 F.3d 710, 716-17 (6th Cir. 1995); National Taxpayers Union Inc. v. United States, 68 F.3d 1428, 1433 (D.C. Cir. 1995); American Legal Foundation v. Federal Communication Commission, 808 F.2d 84, 91-92 (D.C. Cir. 1987). Because ACORN has alleged a drain on its resources, it has standing to bring this action on its own behalf.

⁶ Later in her brief, defendant Riley acknowledges this factual allegation. See Riley Br. at 11 (“ACORN’s allegation is merely that it has conducted voter-registration activities that would have been unnecessary absent the County Departments’ alleged noncompliance with the NVRA.”).

B. ACORN Has Standing To Sue On Behalf Of Its Members

ACORN also has standing to bring this action on behalf of its members. An organization has “associational” standing 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 Envtl. Servs. (TOC), Inc., 528 U.S. 167, 181 (2000)

(citations omitted). ACORN meets all three criteria for “associational” standing.

1. ACORN’s Members Would Have Standing

The complaint specifically 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.” Compl. ¶ 38. Construing these allegations in the light most favorable to ACORN, as the Court must, the complaint alleges that unregistered ACORN members have not been offered the right to register to vote in violation of Section 7 of the NVRA. See Evans-Marshall, 428 F.3d at 228.⁷ ACORN members injured by Ohio’s noncompliance would have standing to sue, themselves, because their injury is concrete and imminent, is a result of defendants’ violations of the NVRA, and would be redressed by the relief ACORN seeks. See, e.g., Lujan v. Defenders of Wildlife, 504 U.S. 555, 560-61 (1992).

⁷ This allegation belies defendant Riley’s bald assertion that the complaint fails to allege that ACORN members were harmed by Ohio’s noncompliance with Section 7 of the NVRA. See Riley Br. at 11.

2. The Claim Is Germane To ACORN's Purpose

ACORN's claim for violations of the NVRA is clearly germane to the organization's purpose. As the Complaint alleges, ACORN is the largest community organization of low- and moderate-income families in the United States, working together for social justice and stronger communities. See Compl. ¶ 7. And ACORN expends significant resources in Ohio conducting voter registration drives, which "specifically include, among other things, 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.

ACORN's interest in voter registration of low- and moderate-income citizens is far from a passing interest. Rather, voter participation is an important means of building stronger communities, and therefore is an important part of accomplishing ACORN's goals of social justice and stronger communities. See Compl. ¶ 38. Not only do ACORN members participate in local meetings and actively work on public policy campaigns, they strive to elect their own leaders from their neighborhoods to local, state and federal office. See Compl. ¶ 7. These allegations are sufficient to establish that defendants' violations of the NVRA are germane to ACORN's organizational purpose. See, e.g., American Civil Liberties Union of Ohio v. Ashbrook, 375 F.3d 484, 490 (6th Cir. 2004) (finding associational standing in a suit challenging display of the Ten Commandments because it is "germane to the ACLU-Ohio's stated purpose, the preservation of the constitutional separation of church and state"); Sandusky, 387 F.3d at 574 (finding associational standing in a suit brought by political parties and labor unions alleging violations of the Help America Vote Act); Interfaith Comty. Org v. Honeywell Int'l Inc., 399 F.3d 248, 258 (3rd Cir. 2005) (finding associational standing in a suit requesting an injunction requiring environmental cleanup where organization's purpose was "the improvement of the

quality of life in Hudson County, New Jersey, where all of the individual plaintiffs live and [where] the Site is located").

Defendants' reliance on Greater Cincinnati, 56 F.3d at 716, for the proposition that an "organization must show that its ability to further its goals have been perceptively impaired so as to constitute far more than simply a setback to the organization's abstract social interests" is irrelevant to the issue of germaneness. Blackwell Br. at 8-9 (also citing Havens, 455 U.S. at 379; Sierra Club, 405 U.S. at 739) (internal quotation marks omitted); Riley Br. at 11. That proposition relates only to the question of individual standing, and has no bearing upon a determination of "associational" standing.⁸

3. The Participation Of ACORN's Members Is Not Required

Lastly, this lawsuit does not require the participation of ACORN's members because (i) only defendants' conduct and the conduct of DJFS offices is at issue in this lawsuit, (ii) ACORN only seeks declaratory and injunctive relief, and (iii) ACORN does not seek any legal or equitable relief that is individually tailored to any particular members. See Sandusky, 387 F.3d at 574 ("The individual participation of an organization's members is not normally necessary when an association seeks prospective or injunctive relief for its members.") (internal quotation marks omitted).

POINT III

THE NVRA'S NOTICE REQUIREMENT HAS BEEN MET

Defendants' last-ditch effort to derail the litigation by arguing that Ms. Harkless and Ms. Mardis failed to give proper notice under the NVRA is frivolous and directly undermined by

⁸ Moreover, as discussed above, see Point II(A) supra, these cases are inapposite here because ACORN has alleged a concrete injury sufficient to give it individual standing, not merely a social interest in the outcome of this litigation.

controlling Sixth Circuit authority. The letters sent to defendant Blackwell prior to the filing of the complaint satisfy the NVRA's notice requirement as to all three plaintiffs. The NVRA requires that, in certain circumstances, written notice of noncompliance be sent to the Secretary of State before an action may be filed. See 42 U.S.C. § 1973gg-9(b)(2). At least three separate letters were sent to defendant Blackwell prior to the filing of the complaint: (i) the Greater Cleveland Voter Coalition's February 23, 2006 letter; (ii) ACORN's May 12, 2006 letter; and (iii) ACORN's July 17, 2006 letter. See Compl. ¶¶ 32-33, 35 & Exs. A, B & D.

Although the above-referenced letters were not sent by Ms. Harkless or Ms. Mardis, the letters still satisfy the NVRA's notice requirement as to them. See ACORN v. Miller, 129 F.3d 833, 838 (6th Cir. 1997). In Miller, the individual plaintiffs did not send notice letters to the secretary of state -- only the organizational plaintiff, ACORN, sent a letter. Defendants sought the dismissal of the individual plaintiffs on this ground. The Sixth Circuit refused, holding that "[r]equiring these plaintiffs to give actual notice would have been unnecessary with regard to the purpose of the notice requirement," which was to provide states with an opportunity to attempt compliance before litigation was instituted. Id. Miller is exactly on point here. Ohio received actual notice three times. No additional notice by the individual plaintiffs was necessary.

Defendant Blackwell argues that Michigan's blanket refusal to comply with the NVRA prior to the initiation of the complaint in Miller distinguishes Miller from the instant case. See Blackwell Br. at 7-8. That argument fails for two reasons. First, the three notice letters identified in the complaint all provided Blackwell with notice of exactly the same NVRA violations alleged by Ms. Harkless and Ms. Mardis. Additional letters from them individually would not have provided Ohio with any more actual notice of its noncompliance.

Second, as in Miller, a notice letter from the individual plaintiffs would have been futile. Judy Grady's May 26, 2006 letter in response to the Greater Cleveland Voter Coalition makes no indication that Ohio would attend to the violations noted in the notice letters defendant Blackwell had received. Instead, Ms. Grady states that Ohio is in compliance with the NVRA and dismisses the allegations contained in the notice letters. See Compl. ¶ 34 & Ex. C. Defendant Blackwell suggests that had either individual sent a notice letter, "their individual claims could have been investigated and steps taken to be sure they were registered to vote." Blackwell Br. at 7-8. But merely registering Ms. Harkless and Ms. Mardis would not have "corrected the violation" -- the failure to provide voter registration services in connection with the receipt of benefits -- as required by the statute. See 42 U.S.C. §1973gg-9(b). And, in any event, it is doubtful that there would have been any attempt by defendants to register Ms. Harkless and Ms. Mardis. Although defendant Blackwell contends that he would have investigated Ms. Harkless's and Ms. Mardis's claims had he received notice prior to commencement of this action, there is absolutely no indication (and defendant Blackwell does not assert any) that after receiving the complaint he took any action to investigate their claims and remedy the NVRA violations prior to the deadline for voter registration passing.

Conclusion

For the foregoing reasons, plaintiffs respectfully request that defendants' motions to dismiss be denied in their entirety.

Dated: Cleveland, Ohio
November 16, 2006

FRIEDMAN, DOMIANO & SMITH CO., L.P.A.

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Certificate of Compliance with Local Civil Rule 7.1(f)

I hereby certify that the parties have agreed that this action should be assigned to the standard case track, that the parties have agreed and the Court has approved an extension of the page limit for Plaintiffs' Memorandum Of Law In Opposition To Defendants' Motions To Dismiss to a single brief of not more than twenty-five (25) pages, and that this brief adheres to that page limitation.

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