

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF OHIO  
EASTERN DIVISION**

CARRIE HARKLESS, <i>et al.</i> ,	:	
	:	CASE NO. 1:06CV2284
Plaintiffs,	:	
	:	JUDGE PATRICIA GAUGHAN
v.	:	
	:	MAGISTRATE JUDGE
J. KENNETH BLACKWELL, <i>et al.</i> ,	:	VECCHIARELLI
	:	
Defendants.	:	

---

**DEFENDANT BARBARA RILEY'S REPLY IN SUPPORT OF HER  
MOTION TO DISMISS PLAINTIFFS' COMPLAINT**

---

**JIM PETRO** (0022096)  
Attorney General

**ANNE LIGHT HOKE** (0039204)  
**REBECCA L. THOMAS** (0066650)  
Trial Attorneys for Defendant Barbara Riley  
Assistant Attorneys General  
Health & Human Services Section  
30 East Broad Street, 26<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 466-8600  
Facsimile: (614) 466-6090  
ahoke@ag.state.oh.us  
rthomas@ag.state.oh.us

## I. INTRODUCTION

Defendant Riley argued in her Motion to Dismiss that ACORN lacks standing to bring its claims. ACORN lacks organizational standing because it did not allege any concrete, direct injury to the organization, and ACORN lacks associational standing because it failed to allege that any of its members could sue in their own right and show that the subject of this action is germane to ACORN's purposes. Defendant Riley also argued that Plaintiffs Harkless and Mardis are barred from bringing their claims because they failed to give the required notice to the Secretary of State of their allegations of NVRA violations prior to filing suit.

In their opposition to the Motion to Dismiss, Plaintiffs argue that the allegations in the Complaint are sufficient to show ACORN's standing and that notice by Plaintiffs Harkless and Mardis was unnecessary. As explained below, Plaintiffs have failed to overcome Defendants' arguments on these points, and their claims must be dismissed for that reason, if not for others.

Furthermore, as Defendant Riley demonstrated in her Memorandum in Support of her Motion to Dismiss, the National Voter Registration Act ("NVRA") does not create an oversight role in the Ohio Department of Job and Family Services ("ODJFS") to ensure NVRA compliance by Ohio county departments of job and family services agencies ("County Departments").

Ohio's statutory scheme establishes ODJFS *and* the 88 "County Departments" as voter registration agencies ("VRA"). See Ohio Rev. Code 3501.01(X) and 329.051. ODJFS must be *required* to oversee voter registration matters with the County Departments in order to be *permitted* to do such overseeing. Since Ohio law does not mandate such oversight, ODJFS lacks voter-registration authority over the County Departments. See Ohio Rev. Code 3503.10(L). Ohio Rev. Code 5101.24 gives ODJFS a permissive oversight role over the County Departments

*only* with respect to family services, but it does not imbue ODJFS with oversight authority in the area of voter registration matters, which requires a mandatory grant of oversight authority.

Plaintiffs allege no NVRA claims against Defendant Riley, director of ODJFS, based upon actions by ODJFS. All the claims brought against Director Riley are based upon actions by County Departments. Since Defendant Riley has no ability to enforce the NVRA against the County Departments, Plaintiffs' claims against Defendant Riley are without merit.

**II. ACORN LACKS STANDING TO BRING THIS SUIT, AND THE CLAIMS BY PLAINTIFFS HARKLESS AND MARDIS ARE BARRED FOR LACK OF REQUIRED PRIOR NOTICE.**

ACORN argues that it has both organizational standing and associational standing, and points to its allegations in the Complaint for support. But, although ACORN correctly asserts that the Court may make reasonable inferences based on the allegations in the Complaint, what ACORN is really doing here is asking the Court to take unwarranted leaps where ACORN has simply failed to include allegations that would have been necessary to support ACORN's standing arguments. The Complaint supports neither organizational nor associational standing, and for that reason (if not for others), ACORN's claims must be dismissed.

Plaintiffs Harkless and Mardis are barred from bringing their claims because they failed to follow a statutory prerequisite prior to bringing suit under the NVRA—namely, notice to the state's chief election officer of the alleged NVRA violation. Their claims also must be dismissed.

A. ACORN lacks organizational standing.

ACORN argues that it has standing to bring claims on its own behalf because it has alleged that Defendants' purported violations of the NVRA have resulted in a drain on ACORN's resources. See Plaintiffs' Memo. in Opp., pp. 15-17. But, as Director Riley pointed out in her Motion to Dismiss (pp. 9-10), the problem is that ACORN has alleged no such thing.

To be sure, ACORN alleged that it spent time and money on voter registration drives outside of Ohio's public-assistance offices (i.e., the County Departments) that would have been "unnecessary" if those offices had offered voter-registration materials. See, *e.g.*, Complaint, ¶ 4. But ACORN's burden was not to allege that expenditures would have been "unnecessary," but rather that ACORN *would not have spent* those resources in the absence of the alleged NVRA violations. See, *e.g.*, *Assoc'n of Community Orgs. For Reform Now v. Fowler*, 178 F.3d 350, 360 (5<sup>th</sup> Cir. 1999) (holding that ACORN's voter-registration activities that likely would have been conducted anyway and/or were conducted along with ACORN's normal activities was insufficient to confer standing on ACORN to sue on its own behalf for alleged NVRA violations). There is no indication in the Complaint that ACORN would not still have conducted the same voter registration drives regardless of the County Departments' actions.

Nor does it make sense to infer such a fact, contrary to ACORN's suggestion. See Plaintiffs' Memo. in Opp., p. 15 (stating that, if the Defendants comply with the NVRA, ACORN will not have to conduct registration drives outside of those offices because registration opportunities will have been offered inside the offices). First, in insisting that suing to enforce the NVRA is germane to ACORN's purposes, ACORN points to the fact that it regularly conducts registration drives outside the County Departments. See Plaintiffs' Memo. in Opp., p. 19. See also Complaint, ¶ 39. Clearly, these drives are part of ACORN's regular activities, and the only reasonable inference is that ACORN would be conducting those same drives anyway—if not because of suspected NVRA violations, then surely for the purposes of monitoring NVRA compliance and also to convince people coming out of those offices that they should register to vote (and possibly that they should become members of ACORN). Doubtless many people who are offered the opportunity to register by a County Department decline to do so, and ACORN

would presumably want to convince those same people of the merits of registering. After all, the County Departments would have merely offered the materials, and would not have tried to convince people to register, like ACORN would.

ACORN describes its activities as organizing low- and moderate-income families, and states that it encourages them to vote in order to strengthen their communities. See Complaint, ¶ 38; Plaintiffs' Memo. in Opp., p. 19. It stands to reason that ACORN would still conduct registration drives outside of County Departments, where ACORN would have access to a number of low- and moderate-income individuals, in order to convince those people to join ACORN and/or register to vote. ACORN has not explained how a higher percentage of those people saying "yes" to ACORN's offer of voter registration would increase ACORN's costs, and such a conclusion is hardly self-evident. Thus, it can only be concluded (based on the Complaint) that ACORN would still be staffing the same drives in order to sign up members and/or register voters, and that ACORN's costs of doing so are not appreciably higher merely because County Departments are allegedly not offering registration materials themselves.

ACORN argues that its organizational standing is supported by *Fowler*. See Plaintiffs' Memo. in Opp., p. 16. But, in that case, the court found it significant that ACORN showed that it concentrated its efforts in areas where there were relatively low percentages of unregistered public-assistance recipients, in order to counteract alleged NVRA violations. See *id.* at 361. Here, there are no such allegations—just statements about ACORN's general registration-drive costs in places where ACORN would apparently be conducting drives in any event, which the *Fowler* court found insufficient. See *id.* at 360.

ACORN's statement that, "[i]n the cases relied on by defendants, \* \* \* *not one* of the plaintiffs alleged a drain on resources or any other concrete injury \* \* \*" (see Plaintiffs' Memo.

in *Opp.*, p. 17, emphasis added), is untrue. In *Greater Cincinnati Coalition for the Homeless v. City of Cincinnati*, 56 F.3d 710 (6<sup>th</sup> Cir. 1995), the plaintiff organization alleged that the challenged ordinance would cause it to incur greater expenditures of funds to help the homeless and the destitute. See *id.* at 717. And in *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428 (D.C. Cir. 1995), the plaintiff organization alleged that the challenged new tax rates would cause a decrease in donations to the organization. See *id.* at 1433-34. In those cases, contrary to ACORN's statement, the plaintiff organizations tried but failed to reasonably allege a concrete injury based on a claimed drain (or claimed future drain) on resources. ACORN's claim that the expenditure of resources on registration drives would not have been necessary had the County Departments not been allegedly violating the NVRA is simply not enough to show that ACORN would not still have spent those same resources in the same way.

In short, ACORN has not alleged that it has spent more resources than it otherwise would have spent as a result of Defendants' alleged noncompliance with the NVRA, or that any extra expenditures were significant enough to be a drain on its resources so as to "perceptibly impair" ACORN's ability to further its goals of organizing low-and moderate-income families. See *Greater Cincinnati Coalition* at 716 (citing *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 379 (1982)). See also *Fowler* at 360. Rather, ACORN has merely articulated an abstract social interest that cannot support organizational standing. Thus, ACORN has failed to show that it may bring its claims on its own behalf.

B. ACORN lacks associational standing.

ACORN asserts that it has associational standing—that is, that it may bring the claims on behalf of its members—because, according to ACORN, the Complaint alleges that ACORN members have been harmed by the alleged noncompliance with the NVRA. See Plaintiffs’ Memo. in Opp., p. 18. According to ACORN, the allegations found in paragraph 38 of the Complaint lead to the inference that unregistered ACORN members have been to County Departments and were not offered registration materials required by the NVRA. See *id.*

Generally, when addressing a motion to dismiss, a court accepts well-pleaded allegations as true and draws all reasonable inferences in favor of the plaintiff. But reasonable inferences do not include assuming unalleged facts that might merely be *consistent* with the allegations. Rather, a plaintiff must allege the facts upon which it bases its case, and ACORN does not allege in the Complaint that any unregistered ACORN member has attended a County Department appointment and been harmed by a failure to be offered voter-registration materials.

ACORN concedes that its associational standing depends on alleged harm to its members. See Plaintiffs’ Memo. in Opp., p. 18. But ACORN failed to allege such harm. ACORN appears to argue that such a fact is to be inferred from the allegations in paragraph 38 of the Complaint. See Plaintiffs’ Memo. in Opp., p. 18. But in that paragraph, ACORN alleges only that: (1) many ACORN members receive public assistance, (2) such members should be offered registration materials by County Departments, and (3) some ACORN members are unregistered, even though ACORN encourages its members to register. The fact that many ACORN members receive public assistance and that some members have declined to register does not add up to an allegation that any ACORN member has been harmed by a County Department’s failure to offer

registration materials.<sup>1</sup> If that is what ACORN believes has happened, ACORN should have alleged it in the Complaint. See also *Fowler* at 365-66 (the fact that some ACORN members are unregistered and *may* not have been offered registration materials as required does not establish a direct injury to members so as to support representational standing).

It appears, however, that ACORN originally believed that its associational standing could be derived from the alleged interest of its members in *other people* being registered to vote, which is not a qualifying interest. Now, apparently realizing that its members have no such interest and that, therefore, other people not being registered cannot be a “harm” to ACORN’s members, ACORN tries belatedly to inject an allegation into its Complaint that is simply not there—either facially or inferentially. But ACORN cannot introduce new allegations in a response to a motion to dismiss. The allegations must be in the Complaint. Allegation of harm to its members is simply not there. See, e.g., *Northeast Coalition for the Homeless v. Blackwell*, Nos. 06-4412 & 06-4421, 2006 U.S. App. Lexis 27049 (6<sup>th</sup> Cir., Oct. 31, 2006), \*26-28 (concluding that two organizations lacked standing to challenge voter-identification requirements, having failed to alleged harm to members and instead having merely alleged that they conducted voter-registration activities for members and for target populations).

ACORN fails likewise to show that the subject matter of this action is “germane” to ACORN’s purposes. ACORN describes itself as an organization devoted to organizing low- and moderate-income families to work toward social justice and stronger communities. ACORN’s interests are not alleged (and cannot simply be inferred) to be “primarily related to election or

---

<sup>1</sup> If ACORN encourages its members to register to vote and some still choose to remain unregistered, as ACORN alleges (see Complaint, ¶ 38), then it appears that no mere offer (without encouragement) of registration materials at a County Department would have made a difference to those members. ACORN has not alleged that these members suffered a direct injury, or that they remain unregistered, as a result of the County Departments’ alleged noncompliance.

voters' rights issues." See *Northeast Coalition for the Homeless* at \*28 (finding—in two organizations' challenge to voter-identification requirements—that neither organization's purposes met this description, although they may have conducted voter-registration activities for their members and/or target populations).

In light of the above, the allegations in the Complaint are insufficient to show that ACORN has standing to bring its claims on behalf of its members.

C. Plaintiffs Harkless and Mardis failed to give the required notice before suing.

Plaintiffs accuse Defendants of making the “frivolous” argument that Plaintiffs Harkless and Mardis failed to provide the requisite notice prior to bringing suit. But Plaintiffs' accusation is poorly supported. First, Plaintiffs assert that notice letters by Harkless and Mardis would not have provided “more” notice to Ohio of the alleged violations. See Plaintiffs' Memo. in Opp., p. 21. But Plaintiffs point to no authority providing that a notice letter is required only if it will provide “more” notice than someone else's notice. The applicable statute, 42 U.S.C. § 1973gg-9, requires that an aggrieved person give notice to the state's chief election officer of a violation of the NVRA prior to bringing suit. See *id.*

An exception to the statutory requirements is futility of notice, as the court concluded in *ACORN v. Miller*, 129 F.3d 833 (6<sup>th</sup> Cir. 1997), after finding that the State of Michigan had “already made clear its refusal to comply with the Act until ‘federal funds [were] made available to fully fund’ the program.” See *id.* at 838. Ohio did not “make clear its refusal to comply,” nor is there any reasonable allegation to that effect in the Complaint. Plaintiffs' allegation that a May 26, 2006, letter from the Secretary of State's Office “suggested that compliance with the NVRA was unnecessary” is belied by the letter itself, a copy of which is attached to the Complaint as Exhibit C. That letter disputes some of the conclusions of a non-party, and also points to ongoing

improvements designed to ensure Ohio's compliance with the NVRA. This is hardly a *Miller*-esque "refusal to comply." Plaintiffs' best arguments in their Memorandum in Opposition are that (1) the May 26, 2006, letter contains "no indication that Ohio would attend to the [alleged] violations" and (2) Plaintiffs doubt that there would have been any attempt by defendants to register Ms. Harkless and Ms. Mardis." See *id.* at 22. Surely futility of notice cannot be divined from either an absence of any indication one way or the other, or from Plaintiffs' subjective "doubt" that any action would have been taken in response to notice.

Plaintiffs have made the very serious accusation that Defendants' arguments about notice are "frivolous." But Defendants are merely putting forth reasonable arguments—supported by argument and case law—that Plaintiffs Harkless and Mardis were obligated to follow the statutory requirements absent a showing of futility, which Plaintiffs have failed to show. Plaintiffs are free to disagree with Defendants on this, and may insist that Defendants are wrong. But there is nothing "frivolous" about Defendants' position.

### **III. PLAINTIFFS FAIL TO STATE A CLAIM AGAINST DIRECTOR RILEY REGARDING THE COUNTY DEPARTMENTS' ALLEGED NON-COMPLIANCE WITH THE NVRA.**

Plaintiffs assert that Defendant Riley is playing legal "hot potato" by not admitting that she controls voter registration undertaken by the County Departments. However, the NVRA and Ohio's implementing statutes do not grant Director Riley the authority to force the County Departments to follow the NVRA.

Plaintiffs cite numerous NVRA sections that discuss the role of a State regarding voter registration in public-assistance offices. However, no NVRA section requires the director of a

State's public-assistance agency, such as ODJFS, to ensure NVRA compliance by County Departments.<sup>2</sup>

Furthermore, Ohio statutes do not require ODJFS to ensure the County Departments comply with the NVRA. The Ohio statute that defines the authority of ODJFS in the voter registration area is Ohio Rev. Code 3503.10(L).

The department of job and family services and its departments, divisions, and programs ***shall limit administration 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.

(Emphasis added.)

ODJFS is statutorily limited in its administration of the voter registration program. Unless ODJFS is ***required*** by law to administer this program in a certain way, it is unable to do so. See *id.* Since neither the secretary of state, Ohio Rev. Code 3503.10(L), nor the NVRA requires ODJFS to oversee the administration of the voter registration program in the County Departments, then ODJFS is ***prevented*** from such oversight of the County Departments.

Plaintiffs turn the meaning of the statute on its head. They declare that, since ODJFS is not prevented from administering voter registration matters at the county level, it therefore must administer it at the county level. However, Ohio Rev. Code 3503.10(L) plainly states that ODJFS must be ***required*** to administer NVRA matters at the county level before it can do so.

This language of Ohio Rev. Code 3503.10(L), which limits ODJFS's oversight of County Departments in voter registration matters, makes the ruling in *United States v. New York*, 255 F. Supp. 2d 73 (E.D.N.Y. 2003), inapplicable here. *United States v. New York* says that a voter-

---

<sup>2</sup> The State is defined as "a state of the United States," so State responsibilities imposed by the NVRA are responsibilities of a State and not of the director of the State's public-assistance program. See 42 U.S.C. 1973gg-1(4).

registration-designated State agency cannot shed its NVRA responsibilities by choosing to delegate to local agencies. See *id.* at 79. Since Ohio law does not **require** ODJFS to administer the NVRA at the local level, ODJFS cannot have any NVRA responsibilities over County Departments. See Ohio Rev. Code 3503.10(L).

Plaintiffs cite to Ohio Rev. Code 5101.24, which is codified in Title 51 (“Public Welfare”) of Ohio’s Revised Code, as giving ODJFS the ability to enforce NVRA compliance. Ohio Rev. Code 5101.24(B) states 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 \*\*\*.

(Emphasis added.)

Ohio Rev. Code 307.981(A)(1)(b) defines “family services duty” as a “duty state law requires or allows a county family services agency to assume, including financial and general administrative duties.”

This language gives ODJFS **permissive** authority to oversee the County Departments if the County Departments are not complying with a “family services” duty. Even if one construes the voting registration duty to be a family services duty, which Defendant Riley does not concede, Ohio Rev. Code 3503.10(L) provides that ODJFS must be **required** to administer NVRA matters at the county level before it can do so. So the permissive authority granted ODJFS in the family services area is not sufficient to give ODJFS oversight over County Departments in voter registration matters.

Under Ohio law, “specific statutory provisions prevail over conflicting general statutes.” *Hughes v. White*, 388 F. Supp. 2d 805, 819 (S.D. Ohio 2005), citing with approval *Trumbull*

*County Bd. Of Health v. Snyder*, 74 Ohio St. 3d 357 (Ohio 1996), citing *Springdale v. CSX Ry. Corp.*, 68 Ohio St. 371 (Ohio 1994).

Ohio Rev. Code 5101.24 allows ODJFS to take certain corrective actions if a County Department does not comply with a state or federal law. This general provision does not discuss voter registration matters, as does Ohio Rev. Code 3505.10(L), which provides that—unless there is a specific requirement regarding voter registration—ODJFS cannot take action to enforce any voter-registration requirements. Thus, Ohio Rev. Code 3505.10(L) prevents ODJFS from overseeing the County Departments regarding voter registration matters, and the general provision of Ohio Rev. Code 5101.24 is superseded by the more specific law.

Plaintiffs cite numerous cases to defend their argument that Defendant Riley has the authority to oversee the election responsibilities of the County Departments. All the cases involve federal public-assistance programs such as food stamps and Medicaid. ODJFS receives federal moneys for these federal programs, which it disburses to beneficiaries through the County Departments. ODJFS has the statutory authority to take corrective actions to ensure that the County Departments properly spend the federal money. In the election area, ODJFS does not transfer federal money for voter registration material/information to the County Departments to give to eligible people. Furthermore, ODJFS is prevented from overseeing the County Departments in the election area. See Ohio Rev. Code 3505.10. Thus, the cited cases are inapplicable here.

Since Plaintiffs advance claims against Defendant Riley only in her alleged role as an overseer of the County Departments in voter registration matters, and since Ohio law prevents—because the NVRA does not require—such an overseer role regarding voter registration, then Plaintiffs have failed to state an NVRA claim against Defendant Riley.

**IV. CONCLUSION**

For the reasons stated above, as well as those explained in Director Riley's Motion to Dismiss, Plaintiffs' claims should be dismissed.

Respectfully submitted,

**JIM PETRO** (0022096)  
Attorney General

s/Anne Light Hoke  
**ANNE LIGHT HOKE** (0039204)  
**REBECCA L. THOMAS** (0066650)  
Trial Attorneys for Defendant Barbara Riley  
Assistant Attorneys General  
Health & Human Services Section  
30 East Broad Street, 26<sup>th</sup> Floor  
Columbus, Ohio 43215  
Telephone: (614) 466-8600  
Facsimile: (614) 466-6090  
ahoke@ag.state.oh.us  
rthomas@ag.state.oh.us

**CERTIFICATION OF PAGE LENGTH**

I hereby certify that this case is on the standard track and that the Reply adheres to the page limitation established in Loc.R. 7.1(f).

s/Anne Light Hoke  
Anne Light Hoke (0039204)  
Assistant Attorney General

**CERTIFICATE OF SERVICE**

I hereby certify that on December 7, 2006, I electronically filed the foregoing with the Clerk of Court using the CM/ECF system which will send notification of such filing to the following: Counsel for Plaintiffs, Donna Taylor Kollis, FRIEDMAN, DOMIANO & SMITH CO., 1370 Ontario Street, Sixth Floor, Cleveland, Ohio 44113, and Richard Coglianese and Damian Sikora, Constitutional Offices Section, Ohio Attorney General's Office, 30 East Broad Street, Level 17, Columbus, Ohio 43215, Counsel for Defendant, Secretary of State J. Kenneth Blackwell.

I hereby certify that on December 7, 2006 I mailed by U.S. Postal Service, postage prepaid, a copy of the aforementioned to the following counsels for Plaintiffs: (1) Neil Steiner, Robert Topp, Eliot Gardner, and William Gibson, DECHERT LLP, 30 Rockefeller Plaza, New York, New York 10112; (2) Lisa Danetz and Brenda Wright, NATIONAL VOTING RIGHTS INSTITUTE, 27 School Street, Boston, Massachusetts 02108; (3) Jon M. Greenbaum and Benjamin Blustein, LAWYERS' COMMITTEE FOR CIVIL RIGHTS UNDER LAW, 1401 New York Avenue, Suite 400, Washington, D.C. 20005, and (4) Brian Mellor, PROJECT VOTE, 1486 Dorchester Avenue, Dorchester, Massachusetts 02122.

s/Anne Light Hoke  
Anne Light Hoke (0039204)  
Assistant Attorney General