

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

<b>Carrie Harkless, <i>et al.</i>,</b>	:	
	:	
<b>Plaintiffs,</b>	:	<b>Case No. 1:06-cv-2284</b>
	:	
<b>v.</b>	:	<b>Judge Gaughan</b>
	:	
<b>J. Kenneth Blackwell</b>	:	<b>Magistrate Vecchiarelli</b>
<b>Secretary, State of Ohio, <i>et al.</i>,</b>	:	
	:	
<b>Defendants.</b>	:	
	:	

**REPLY IN SUPPORT OF DEFENDANT J. KENNETH BLACKWELL'S  
MOTION TO DISMISS**

**I. INTRODUCTION**

The Secretary of State has fully implemented and adhered to the provisions of Section 7 of NVRA that are his responsibility under Ohio law. He has prescribed a general program for registering voters and prescribed a program of distribution of voter registration forms through such agencies. He has designated an employee to be responsible for voter registration and training. He has adopted rules to implement the program for registering voters at designated agencies. R.C. 3501.05(R), (S), and (T); *see* Ohio Admin. Code 111-10-01, *et seq.* And finally, he has implemented a training program to train agencies how to comply with their responsibilities under the law. *See* Complaint, Ex. C.

Despite the Secretary of State's compliance with the NVRA and Ohio election law, Plaintiffs now seek to hold him responsible for alleged violations of the NVRA committed by local county agencies - agencies over which the Secretary of State has no control. This case should be dismissed and/or the Secretary of State should be dismissed from this case because

Plaintiffs have failed to state a claim against Secretary of State Blackwell and Plaintiff ACORN does not have the requisite standing to bring this claim, either in its own capacity, or on behalf of its members.

### **III. LAW AND ARGUMENT**

#### **A. The Ohio Secretary of State is not a proper party defendant in this litigation.**

Plaintiffs appear to be unwilling to accept the fact that under Ohio law, the responsibility for implementing the voter registration provisions of those receiving public assistance falls squarely upon each local CDJFS offices. Ohio Revised Code § 329.051 clearly states that “the county department of job and family services shall make voter registration applications as prescribed by the secretary of state . . . available to persons who are applying for, receiving assistance from, or participating in” Ohio’s disability financial assistance program; Ohio’s disability medical assistance program; Ohio’s Chapter 5111 medical assistance program; and the Ohio works first program. R.C. 329.051. And the Ohio Administrative Code states “each CDJFS shall provide voter registration applications and assistance in the registration of persons qualified to register to vote.” Ohio Admin. Code 5101:1-2-15

Plaintiffs simply misstate Ohio law when they argue that the Secretary of State has the power to enforce compliance of Ohio’s NVRA laws against a CDJFS. While the Secretary of State has the power to issue Directives and Advisories to the local county boards of elections within the State as to the proper methods of conducting elections, these powers are limited to local boards of elections. No where in the Ohio Revised Code does the Secretary have the power to issue a Directive or Advisory to force county Departments of Jobs and Family Services to comply with their obligations under Ohio law.

As was argued in the Secretary's Motion to Dismiss, *United States of America v. Missouri*, 2006 US Dist. LEXIS 32499 (W.D. Mo. 2006), is directly on point with the case at hand. There, the District Court granted Missouri's summary judgment motion to the extent that the federal government was attempting to hold Missouri legally responsible for the failings of local government officials. *Id.* at \* 28. The District Court observed that the NVRA requires the designated chief election official is "responsible for coordination of state responsibilities..." under the act. *Id.* at \*19, quoting 42 U.S.C. § 1973gg-8. "Coordination means 'harmonious adjustment or interaction.'" *Id.*, citing *The American Heritage Dictionary of the English Language* (4<sup>th</sup> ed. 2000). Enforcement, on the other hand, means to "compel observance or obedience to." *Id.* As a result, the district court found that a responsibility for coordination did not equate to the responsibility to enforce because these roles are not equivalent. *Id.*

Just as the *U.S. v. Missouri* Court refused to hold the State responsible for the alleged failings of local entities, this Court too should reject Plaintiffs' invitation to hold the Secretary of State responsible for the failings of local CDJFS offices. Ohio has passed laws that make it clear that the duties that are the issue of this suit fall upon the CDJFS offices. While it is true that the Secretary has the power to "investigate the administration of election laws, frauds and irregularities in elections in any county," he simply does not have the power to enforce these laws. The Secretary of State has fulfilled his legal responsibility under the NVRA as well as under Ohio law, and Plaintiffs have failed to state a claim against him when they allege that county DJFS offices have failed to comply with their obligations under federal and state law.

Finally, contrary to Plaintiffs' assertions, this case is readily distinguishable from *United States v. State of New York*, 255 F. Supp.2d 73 (E.D. N.Y. 2003). The difference is that New York law specifically granted the State control over the local offices who failed to comply with

the NVRA. *Id.* at 80, citing *Thomasel v. Perales*, 78 N.Y.2d 561, 570 (1991). Under Ohio law, like the Missouri case, local CDJFS offices “are in no way subordinate or accountable to the Secretary of State.” *United States of America v. Missouri*, 2006 US Dist. LEXIS 32499 (W.D. Mo. 2006). The employees of each CDJFS office are not employees of the Secretary of State, and, unlike county boards of elections, nowhere in Ohio law does the Secretary have the power to issue Directives or Advisories to CDJFS offices.

Ohio law is clear: CDJFS offices are local governmental offices. The director of each county DJFS office is appointed by the board of county commissioners, serves at the pleasure of the commissioners, and oversees a budget approved by the commissioners. R.C. 329.01; R.C. 329.02. As such, the Secretary of State is not a proper party to this action.

**B. ACORN lacks standing to bring its complaint against the Secretary of State.**

An association has standing to bring suit 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 organizations purpose, and neither the claim asserted nor the relief requested requires the participation of individual members of the law suit.” *Friends of the Earth, Inc. v. Laldlaw Envntl. Sevs (TOC), Inc.*, 528 U.S. 167, 181 (2000).

As was explained in the Motion to Dismiss, Plaintiff ACORN has failed to allege anything except a setback to its abstract social interests. Plaintiff ACORN has alleged that it is an advocate for voter participation, that if more people were registered to vote it could encourage more people to vote on election day, and that its members who receive public assistance should be allowed to change their voter registration when they arrive at a CDJFS office. (Complaint at ¶ 38). These allegations do not amount to anything more than a perceived setback to an

organization's general abstract social interests and are not sufficient to allege that ACORN has standing to bring this litigation.

Even more importantly, ACORN has failed to allege any facts demonstrating that any of its members have suffered or will suffer a concrete, actual injury traceable to alleged violations of the NVRA. As the Sixth Circuit has recently recognized, in *Northeast Ohio of the Homeless v. Blackwell*, 467 F.3d 999 (2006), standing cannot exist in the absence of injury. *Id.* at \*28.

ACORN attempts to bypass this requirement by simply alleging that some of its members are unregistered to vote and that “many of ACORN's members receive public assistance and should be offered the opportunity to vote and/or change their voter registration address during visits to DJFS offices to apply and/or recertify their eligibility for public assistance.” Complaint ¶ 38. “These allegations fall far short of asserting that any of plaintiffs' members have suffered or will suffer a concrete, actual injury” traceable to alleged violations of the NVRA. *Id.* at \*27. Thus, ACORN lacks standing to pursue these claims, on its own behalf, on behalf of its members or on behalf of individuals such as Harkless and Mardis.

#### **IV. CONCLUSION**

For the foregoing reasons, this Court should dismiss the Secretary of State as a party to this litigation, or alternatively dismiss the case or the claims of the Plaintiffs.

Respectfully submitted,

Jim Petro  
Attorney General

/s Richard N. Coglianese  
Richard N. Coglianese (0066830)  
Damian W. Sikora (0074225)  
Assistant Attorneys General  
Constitutional Offices Section  
30 East Broad Street, 17<sup>th</sup> Floor  
Columbus, Ohio 43215  
614-466-2872

**Certificate of Service**

This is to certify a copy of the foregoing was served upon all counsel of record by means of the Court's electronic filing system on this 6<sup>th</sup> day of December, 2006.

/s Richard N. Coglianese