

IN THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF MISSOURI
CENTRAL DIVISION

ASSOCIATION OF COMMUNITY
ORGANIZATIONS FOR REFORM NOW, et al.,

Plaintiffs,

v.

DEBORAH E. SCOTT, et al., ,

Defendants.

Case No. 08-4084-CV-C-NKL

**PLAINTIFFS' MEMORANDUM OF LAW IN OPPOSITION
TO DEFENDANTS ST. LOUIS CITY ELECTION BOARD
OF ELECTION COMMISSIONER AND SCOTT LEIENDECKER, MARY
WHEELER-JONES, CAROL A. WILSON, EILEEN M. MCCANN, JACK LARY
AND CLARENCE E. DULA JOINT MOTION TO DISMISS**

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PRELIMINARY STATEMENT

Plaintiffs, by their undersigned counsel, submit this Memorandum in opposition to the joint motion, pursuant to Rules 12(b)(1) and 12(b)(6), of Defendants St. Louis City Board of Election Commissioners and Scott Leiendecker, Mary Wheeler-Jones, Carol A. Wilson, Eileen M. McCann, Jack Lary and Clarence E. Dula , in their official capacities (jointly referred to as the “Election Board” or “STLEB”) to dismiss Plaintiffs’ Complaint for the alleged failure to state a claim upon which relief can be granted, alleged lack of standing of Plaintiff Association of Community Organizations for Reform Now (“ACORN”), and alleged inadequacy of the pre-suit notice provided by Plaintiffs as required by the NVRA. STLEB’s entire argument is premised on its contention that it has no responsibility under Section 7 of the NVRA.

As set forth below, and as admitted by the STLEB (see STLEB Br. at 5)¹, the State of Missouri is responsible for establishing and implementing practices and procedures for compliance with the National Voter Registration Act of 1993 (“NVRA”). Prior to enactment of the NVRA, Missouri’s suffrage and election laws required local election authorities, such as the Election Boards, to “instruct and direct” deputy registration officials in the performance of their duties. Subsequent to enactment of the NVRA and pursuant thereto, Missouri amended its suffrage and election laws to establish procedures for implementing the NVRA. One of these amendments added the requirement that local election authorities also “instruct and direct” “agencies mandated and optional . . . under the [NVRA]” in the performance of their duties.² The Missouri Department of Social Services (“DSS”) and its local offices provide public assistance benefits, and thus, are mandated voter registration agencies under NVRA Section 7, 42 U.S.C. § 1973gg-5. Plaintiffs have pleaded that the duties of the STLEB include

¹ References to “STL. Br.” are to the “Memorandum of Law in Support of Defendants St. Louis City Board of Election Commissioners and Scott Leiendecker, Mary Wheeler-Jones, Carol A. Wilson, Eileen M. McCann, Jack Lary and Clarence E. Dula’s Joint Motion to Dismiss.”

² In setting forth Missouri legislation enacted for implementing the NVRA, the STLEB failed to discuss, or even mention, this amended statute. (*See generally*, STL Br.).

instructing and directing these voter registration agencies in the performance of their duties (Comp. ¶ 19), that Defendants have failed to carry out their responsibilities to prevent and correct the violations of Section 7 of the NVRA described in the complaint, (*id.* ¶ 47) and that these violations have caused Plaintiffs harm (*id.* ¶¶ 8-10). Therefore, Plaintiffs' have stated a claim for which relief can be granted.

Moreover, Plaintiffs have satisfied the notice provisions of Section 11 of the NVRA, 42 U.S.C. § 1973gg-9, and have sufficiently pleaded allegations to demonstrate that Plaintiff ACORN has standing. Therefore, the Court should deny the STLEB joint motion in its entirety.

STATEMENT OF FACTS

For purposes of the present motion, Plaintiffs respectfully refer the Court to the facts alleged in Plaintiffs' Complaint and the letters attached thereto as Exhibits A and B.

Plaintiffs have pleaded compliance with the notice provisions of Section 11 of the NVRA. (Comp. ¶¶ 44-45.) Plaintiffs have pleaded that the duties of the Election Boards include instructing and directing voter registration agencies in the performance of their duties (*id.* ¶¶ 15, 17), that Defendants are responsible for assuring public assistance agency compliance with Section 7 of the NVRA within their respective jurisdictions (*id.* ¶ 46), and that Defendants have failed to carry out their responsibilities to prevent and correct the violations described in the Complaint, (*id.* ¶ 47). Plaintiffs have pleaded that they have been harmed by the violations of Section 7 of the NVRA. (*Id.* ¶¶ 8-10, 51-53). Plaintiffs have pleaded ACORN's mission; that Defendants' violations have hampered and impeded ACORN's mission; that but for or due to Defendants' violations ACORN would not have expended substantial resources; and that Defendants' violations are depriving ACORNs members from exercising their rights to vote and having a voice in government. (*Id.* ¶¶ 48-53.)

ARGUMENT

In determining the STLEB motion the Court must accept as true, the factual allegations in Plaintiffs' Complaint, and grant all reasonable inferences from the pleadings in favor of Plaintiffs. *County of St. Charles v. Missouri Family Health Council*, 107 F.3d 682, 684 and n. 3 (8th Cir. 1997). Application of this standard compels the result that this motion must be denied in its entirety.

I. PLAINTIFFS HAVE STATED A CLAIM UPON WHICH RELIEF CAN BE GRANTED

Local election authorities, such as Defendants STLEB, have more than a passive role in implementing the NVRA, and Section 7 in particular. As Congress found in enacting the NVRA, "it is the *duty* of the Federal, State, and local governments to *promote* the exercise of [the fundamental right of United States citizens to vote]." 42 U.S.C. § 1973gg (a)(2) (emphasis added). Indeed, among the stated purposes of the law is "(1) to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office; and (2) to make it possible for Federal, State and local governments to implement this subchapter in a manner that enhances the participation of eligible citizens as voters in elections for Federal office." 42 U.S.C. § 1973gg (b)(1),(2). Toward this end, the NVRA mandated that "each State establish procedures to register to vote in elections for Federal office . . . at a Federal, State, or nongovernmental office designated under section 1973gg-5" 42 U.S.C. § 1973gg-2(a)(3)(B). The State of Missouri responded to this mandate by enacting and amending provisions of its suffrage and elections laws to implement the NVRA.

A. The Election Board Has a Duty to Instruct and Direct the DSS Offices in the Performances of Their Voter Registration Duties

The registration duties of local election authorities, such as Defendants STLEB, under Missouri state law, as amended to implement the NVRA, are set forth in section 115.145 of Missouri's Suffrage and Elections Law. Those duties include:

To instruct and direct each deputy registration official in the performance of his or her duties *including those agencies mandated and optional, including as optional any institution of higher education located in the state, under the National Voter Registration Act of 1993* and to supply each deputy with the proper registration forms and other necessary supplies.

Mo. Ann. Stat. § 115.145 (2) (West 2008) (emphasis added). The italicized language above was inserted into subdivision 2 by amendment in 1994, subsequent to the 1993 enactment of the NVRA. Mo. Ann. Stat. § 115.145 Historical and Statutory Notes (West 2008). Pursuant to this 1994 amendment to Missouri law establishing procedures to implement the NVRA as the federal law mandates, *see* 42 U.S.C. § 1973gg (b)(2); 42 U.S.C. § 1973gg-2(a)(3)(B), local election authorities have the duties of instructing and directing agencies mandated under the NVRA in the performance of their duties. That the STLEB are election authorities subject to the provisions of section 115.145 is undeniable. However, in its discussion of Missouri's implementation of the NVRA by "enactment of HB 1411 which amended Missouri's statutory scheme and incorporated provisions of the NVRA into state law," (STL Br. at 5), the STLEB limits its discussion to sections 115.136 and 115.162. The STLEB neglects to even mention the section 115.145 that was contained in HB 1411. (See *id.* 5-13.) However, by arguing that the NVRA and Missouri's statutory scheme place responsibility for implementing the NVRA on the Department of Social Services ("DSS") and the Secretary of State ("SOS") (see *id.*), the STLEB implicitly admits that it is not instructing or directing the DSS, an agency mandated by Section 7 of the NVRA, in the performance of its voter registration duties.

This Court has instructed that Missouri has amended its voter registration scheme such that "Missouri law is now consistent with the NVRA. Missouri law requires [Election Boards] to do exactly what is required by the NVRA." *United States v. Missouri*, No. 05-4391-CV-C-NKL, 2007 WL 1115204, at *2 (W.D.Mo. April 13, 2007). This Court also has instructed that the Election Boards "are the proper party under Federal Rule of Civil Procedure 17," in a suit to enforce the NVRA against them. *Id.* at *11. Therefore, in failing to instruct and direct agencies mandated by Section 7 of the

NVRA, such as the DSS, in the performance of their voter registration duties, as required by Mo. Ann. Stat. § 115.145, the STLEB is violating the NVRA because it is violating the state law that was amended to establish procedures for implementing the NVRA.

The argument of the STLEB is based on the incorrect assumption that there is no statutory authority that requires them to instruct and direct the DSS in the performance of their voter registration duties. (*See* STL Br. at 9-10) (“Under Missouri law, the responsibility for implementing those provisions regarding voter registration of those receiving public assistance [NVRA Section 7, 42 U.S.C. § 1973gg-5] falls squarely upon the [DSS] and the [SOS]. MO.REV.STAT. § 115.136(1).”) Plaintiffs have demonstrated that there is such statutory authority – section 115.145(2) of the Missouri statutes. The STLEB ignores the 1994 amendments to that section, which requires them to instruct and direct agencies mandated by the NVRA, such as the DSS, an agency mandated by NVRA Section 7, in the performance of their duties. The STLEB fails even to acknowledge that section 115.145(2) is part of Missouri’s statutory scheme for implementing the NVRA. Nonetheless, by amending section 115.145(2) to “include” agencies mandated by the NVRA, the Missouri state Legislature has given those agencies the status of deputy registration officials for purposes of receiving instruction and direction from the election authorities, such as the STLEB. Moreover, even if those NVRA mandated agencies are not deputy registration officials, as the STLEB may contend, the STLEB nevertheless is required to instruct and direct those agencies in the performance of their duties. To read section 115.145(2) any other way would render the 1994 amendment meaningless, as though the state Legislature enacted an amendment without purpose or rationale. For if the amendment does not require that the STLEB instruct and direct NVRA mandated agencies such as the DSS in the performance of their voter registration duties, what else could it possibly require? The STLEB has not even suggested any reason for the

amendment. Nor has it recognized that the amendment mandates any change in, or addition to, their duties.³

Sections 115.136 and 115.162 of the Missouri statutes are not the sole provisions of Missouri law implementing Section 7 of the NVRA, as the STLEB seems to suggest. Nor are Plaintiffs seeking to have the STLEB enforce the NVRA. Consequently, the STLEB's contention that "Missouri's statutory scheme to implement the NVRA does not give any authority to local election officials to enforce the statutes against State agencies." (STL Br. at 13) misses the point. Plaintiffs are seeking an order compelling compliance with Section 7 of the NVRA. To the extent that the STLEB is not instructing and directing the DSS, an agency mandated under Section 7 of the NVRA, in the performance of its voter registration duties as required by Missouri statutes section 115.145(2), the STLEB is in violation of the NVRA.

Plaintiffs have stated a claim upon which this Court can provide relief, that is, compel the STLEB to perform its statutory duties to instruct and direct the DSS. To be sure, the relief sought in Plaintiffs' (Proposed) Order Granting Preliminary Injunction ("Proposed Order") is mainly directed at the DSS. However, the STLEB certainly can "notify each NVRA site coordinator of his or her obligations under the NVRA." Further, Plaintiffs are not seeking to have the STLEB enforce the NVRA or to hold it responsible for the DSS's inactions. Rather, Plaintiffs seek to hold the DSS responsible for its inactions, and the STLEB responsible for performing its duties as prescribed by Missouri law for implementing the NVRA – duties that the STLEB admit it does not perform.

³ Indeed, even if the Missouri legislature had made no amendment to its statutes describing the Election Boards' duty to provide instruction and direction to NVRA agencies, successful implementation of the NVRA would nevertheless require some level of involvement of the Election Boards. For example, if the voter registration applications forwarded to the Boards by DSS offices are consistently lacking required information or are filled out incorrectly, resulting in high rates of rejection, the Election Boards clearly would need to be communicating with those offices to apprise them of the problem, if the purposes of the NVRA are to be achieved. Thus, the Election Boards' admission that they make no effort to assist local DSS offices in properly conducting voter registration only underscores why they are appropriate defendants in this case.

II. PLAINTIFFS HAVE SATISFIED THE NOTICE PROVISIONS OF NVRA SECTION ELEVEN

Section 11 of the NVRA provides for a private right of action for declaratory or injunctive relief with respect to a violation of the NVRA if the violation is not corrected within 90 days after the chief election official of the State receives notice of the violation by a person aggrieved by the violation. 42 U.S.C. § 1973gg-9(b). The Election Boards acknowledge that Missouri's SOS is its designated chief election official. (STL Br.at 6)

A. Notice By Plaintiff ACORN

ACORN provided the SOS with notice of the violation of Section 7 of the NVRA on August 23, 2007, (Comp. ¶ 44 and Ex. A), and requested that the SOS notify any additional state or local entities that have a role in implementing Section 7 of the NVRA:

Pursuant to 42 U.S.C. 1973gg-9(b), the [ACORN] is obligated to notify you that the [DSS] is in violation of Section 7 of the [NVRA]. The enclosed letter to the Department sets forth those violations.

We respectfully request that pursuant to your duties to coordinate the NVRA, you notify any additional state *or local* entities that have a role in implementing Section 7 of the NVRA.

(Comp., Ex. A at 2 of 5) (emphasis added.) Plaintiffs' notice letter to the SOS satisfies the NVRA pre-suit notice provision, which *only* requires that the SOS be provided with notice of "the violation," 42 U.S.C. § 1973gg-9(b)(1). The STLEB does not cite to any authority that supports its contention that the Plaintiffs' claims should be dismissed because "Plaintiffs have failed to allege that any notice was provided to the [STLEB]," (STL Br. at 14). Nor does the STLEB cite to any authority that supports its contention that the failure of the DSS or SOS to notify the STLEB "prohibit[s] Plaintiffs' from pursuing their claims against the [STLEB]," (*Id.* at 15). If Congress intended such a prerequisite, it would have expressly drafted the NVRA notice provision to require it, as it has done in other federal legislation that includes pre-suit notice provisions. For example, the pre-suit notice provisions in the federal Resource Conservation and Recovery Act ("RCRA"), 42 U.S.C. § 6972(b)(1), and the Federal Water Pollution

Control Act (“FWPCA”), 33 U.S.C. § 1365(b)(1), require a plaintiff to give sixty days notice of the violation or alleged violation “to the Administrator, the State in which the alleged violation occurs, *and to any alleged violator.*” 42 U.S.C. § 6972(b)(1); 33 U.S.C. § 1365(b)(1) (internal numbering omitted) (emphasis added). The absence of such language in the NVRA notice provision indicates that Congress intended only that the SOS, as the chief election official, be provided with notice of the violation, and nothing more.

B. Notice By Plaintiff Dionne O’Neal

The SOS already had notice of NVRA Section 7 violations from ACORN and the violations were not corrected within 90 days of receipt. Therefore, notice by Plaintiff Dionne O’Neal, or any other ACORN members who also may have joined in ACORN’s action and sought identical relief as ACORN, as did Plaintiff O’Neal, would have been a futile act. In such circumstances, courts have not required actual notice and denied motions to dismiss for failure to provide notice. *Harkless v. Blackwell*, 467 F. Supp. 2d 754, 761-62 (N.D. Ohio 2006) (“notice sent by ACORN of the same NVRA violation alleged by the individual plaintiffs satisfies the notice requirement.”); *see also ACORN v. Miller*, 129 F.3d 833, 837-38 (6th Cir. 1997) (non-ACORN plaintiffs were not required to perform the futile act of giving notice when State already had actual notice from ACORN, had already made clear its refusal to comply with the Act, and its failure to come into compliance despite ACORN’s complaints).

Harkless involved a complaint by ACORN, and individual plaintiffs Carrie Harkless and Tameca Mardis seeking declaratory and injunctive relief for widespread ongoing noncompliance with the requirements of NVRA Section 7 at Ohio’s public assistance offices. *Harkless*, 467 F. Supp. 2d at 756-58. Just like Plaintiff O’Neal in the present action, Harkless and Mardis were recipients of public assistance for several years and despite numerous visits to the public assistance offices, neither had been offered the

opportunity to register to vote. *Id.* at 758. The complaint in *Harkless*, as in the present case, set forth one claim for relief – “Violation of Section 7 of the NVRA.” *Id.*; (Comp. at 14-15, ¶¶ 54-56). Defendants in *Harkless* moved to dismiss the individual plaintiffs’ claims for failure to follow “the necessary prerequisites prior to filing a lawsuit under the NVRA.” *Harkless*, 467 F. Supp. 2d at 761. For the reasons indicated above, the *Harkless* court determined that dismissal on this ground was not warranted. *Id.* at 762.

Requiring Plaintiff O’Neal, an ACORN member (Comp. ¶ 12), to file an individual notice where the violation had not been corrected at all subsequent to ACORN’s notice amounts to requiring performance of a futile act. *Harkless*, 467 F. Supp. 2d at 761-62. In these circumstances ACORN’s notice is sufficient and notice by Plaintiff O’Neal should be waived.

Plaintiffs have pleaded compliance with the notice provisions of Section 11 of the NVRA. (Comp. ¶¶ 44-45.) Plaintiffs have pleaded that the duties of the STLEB include instructing and directing voter registration agencies in the performance of their duties (*Id.* ¶¶ 19), that Defendants are responsible for assuring public assistance agency compliance with Section 7 of the NVRA within their respective jurisdictions (*id.* ¶ 46), and that Defendants have failed to carry out their responsibilities to prevent and correct the violations described in the Complaint, (*id.* ¶ 47). Plaintiffs have pleaded that they have been harmed by the violations of Section 7 of the NVRA. (*id.* ¶¶ 8-10, 51-53). A fair reading of Plaintiffs’ Complaint with respect to the Defendants STLEB is that the STLEB has failed to perform its duties to instruct and direct, in violation of the NVRA. An order compelling the STLEB to comply with its duties to instruct and direct the DSS offices as required by Mo. Ann. Stat. § 115.145(2) is relief that may be granted by this Court. Therefore, Plaintiffs’ Complaint states a claim against the Election Boards for which relief can be granted. Accordingly, the motions of the Election Boards should be dismissed.

III. PLAINTIFF ACORN HAS SUFFICIENTLY ALLEGED STANDING TO SUE IN THIS ACTION

Although no other Defendant in this case joins this argument, the STLEB Defendants alone allege that ACORN has failed to plead facts sufficient to satisfy Article III standing requirements. (STLEB Br. at 16-20.) An organization may have standing in an action either on its own behalf or on behalf of its members. ACORN has pleaded facts sufficient to meet standing requirements under either test.

A. ACORN Has Standing In Its Own Right

An association satisfies the Article III standing requirements to sue in its own right when it meets the same standing test applicable to individuals. *See Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *ACORN v. Fowler*, 178 F.3d 350, 356 (5th Cir. 1999); *National Taxpayers Union, Inc. v. United States*, 68 F.3d 1428, 1433 (D.C. Cir. 1995). That standard requires that plaintiff demonstrate that it has suffered an injury or the imminent threat thereof; that the injury is “fairly traceable” to the defendant’s actions; and that the injury or threat thereof is likely redressable by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61, 112 S. Ct. 2130, 2136, 119 L. Ed. 2d 351 (1992); *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1159 (11th Cir. 2008). ACORN has pleaded facts in the Complaint satisfying each of these requirements, and has thus established a basis for standing at this stage of the litigation.

Specifically, ACORN has alleged that the State of Missouri has failed to provide voter registration opportunities at the offices of public service agencies as required by the NVRA and Missouri law (Comp. ¶ 6) (and, by clear inference, the STLEB has failed to “instruct and direct” the public service agencies to do the same); that this unlawful failure has caused harm to Plaintiff O’Neal, an ACORN member (Comp. ¶ 12), and numerous ACORN members by denying them their rightful opportunity to register to vote (Comp. ¶ 8); that it has also caused harm to ACORN by hampering and impeding ACORN’s mission, because ACORN has been forced, due to Defendants’ failures, to devote

significant time and resources away from its other goals and programs and toward conducting voter registration outreach to clients of Missouri public assistance agencies (Comp. ¶¶ 9-10); and that ACORN's voter registration efforts directed specifically at clients of public assistance agencies, such as voter registration drives outside agency offices, would not be necessary – and would not have been spent – but for Defendants' unlawful conduct (Comp. ¶¶ 51-52).

Numerous courts have held that an organization has standing to sue on its own behalf where “the defendant's illegal acts impair [plaintiff's] ability to engage in its projects by forcing the organization to divert resources to counteract those illegal acts.” *Browning*, 522 F.3d at 1165; *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982); *Fowler*, 178 F.3d at 360-62.

In another case in which ACORN was a plaintiff, and which involved an issue identical to the one at bar – whether ACORN's expenditure of resources to counteract a state's failure to properly implement the NVRA by facilitating voter registration at public aid offices could establish standing – the Fifth Circuit found at the summary judgment stage that ACORN had met the constitutional requirements for standing.

ACORN has presented evidence that it has expended resources registering voters in low registration areas who would have already been registered if the appellees had complied with the requirement under the NVRA that Louisiana must make voter registration material available at public aid offices. . . . It is these wasted resources, which ACORN could have put to use registering voters that the NVRA, even properly implemented, would not have reached (or which ACORN could have put toward any other use it wished), that provide ACORN with standing to pursue its third claim in its complaint . . .

[ACORN's] purpose, according to its summary judgment evidence, is to increase the political power of low- and moderate-income people in the political process. We have no trouble concluding that ACORN has raised a genuine issue of material fact that this purpose is in direct conflict

with Louisiana's alleged failure to facilitate voter registration in voter registration agencies.

Fowler, 178 F.3d at 361.

The STLEB Defendants argue that the facts alleged in the Complaint – namely, that ACORN has been, and, without redress, will continue to be, forced to divert precious time and resources away from other programs central to its mission and toward voter registration efforts aimed specifically at clients of Missouri public assistance agencies, and that ACORN would not have had to do so, and would not do so, if not for the unlawful failure of Defendants to implement the NVRA – amount only to a harm to “abstract social interests,” for which no relief is available. (STLEB Br. at 17-18.) For this proposition, the STLEB Defendants rely upon *Sierra Club v. Morton*, 405 U.S. 727 (1972). Their reliance on *Sierra Club* is misplaced, because ten years later, the Supreme Court decided *Havens Realty Corp. v. Coleman*, 455 U.S. 363 (1982), which distinguished *Sierra Club* on this precise point. *Havens* stands for the proposition that, where the defendant's illegal acts impair an organization's ability to engage in its projects by forcing the organization to divert resources in order to counteract the defendant's illegal acts, that impairment constitutes an injury “sufficiently concrete to be more than the ‘abstract social interests’ not cognizable as injuries under Article III.” *Browning*, 522 F.3d at 1165; *Havens*, 455 U.S. at 379. This is precisely the injury suffered by ACORN here, and *Havens* and other decisions make clear that this injury satisfies the requirements of Article III. Given that Defendants cite *Havens* in their brief, it is particularly odd that they fail to note this crucial holding of *Havens* and its progeny.

The STLEB Defendants also erroneously rely upon *Harkless v. Blackwell*, 467 F. Supp. 2d 754 (N.D. Ohio 2006) and *ACORN v. Fowler*, 178 F.3d 350 (5th Cir. 1999) as somehow establishing that ACORN lacks standing. (STLBE Br. at 18.) STLEB's argument is misguided.

In *Harkless*, the Ohio district court stated that, while the plaintiff had alleged that its efforts would have been “unnecessary” absent defendants’ noncompliance with the NVRA, this was insufficient, because in addition to those expenditures being unnecessary, “the law requires that plaintiffs allege that [plaintiff] would not have spent those resources if defendants had not violated the NVRA.” 467 F. Supp. 2d at 759. In that case, plaintiffs had alleged in their Complaint that they regularly conducted voter registration drives outside the offices in question, and it appears the Court accepted the Defendant’s argument that the plaintiff organization would have done so even absent Defendants’ conduct (even though this argument was advanced on a motion to dismiss and thus should have been disregarded). *Id.* Thus, at worst, *Harkless* implicitly adopts the rule that if an organization’s efforts to counteract defendants’ noncompliance are not only “unnecessary,” but also would not have been performed but for the noncompliance, the standing requirement is met.

Here, by contrast, the Complaint explicitly alleges what the *Harkless* court stated the law requires -- that not only are ACORN’s efforts unnecessary, but that they would not have been performed but for Defendants’ noncompliance. (Comp. at ¶¶ 9-10, 49-52.) *Harkless*, therefore, is implicitly supportive of a finding of standing in this case.

Plaintiffs’ reliance on *Fowler* is similarly unavailing. In that case the court dismissed a number of plaintiff organization’s claims because it had failed to demonstrate that the expenditures at issue were directly caused by the defendants’ noncompliance, “as opposed to part of the normal, day-to-day operations of the group.” 178 F.3d at 359. However, and importantly, the court found standing and allowed the organization to proceed on the one claim for which the court was “convinced that ACORN has raised a genuine issue of material fact that it has expended definite resources counteracting the effects of Louisiana’s alleged failure to implement” the NVRA. *Id.* Therefore, *Fowler* is appropriately read as applying the same principle as *Harkless* – that, where a plaintiff organization must divert resources away from other programs in order to counteract

defendants' noncompliance, and that plaintiff would not have engaged in the activity in question absent defendants' noncompliance, the standing requirement is met.

In the present case, the Complaint explicitly contains these allegations. (Comp. at ¶¶ 9-10, 49-52.) Even by the standards of cases cited by the STLEB Defendants, then, ACORN has properly alleged facts that satisfy the standing requirements, and ACORN should be allowed to proceed as a plaintiff on its own behalf.

B. ACORN Has Associational Standing On Behalf of Its Members

An organization has associational 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, 120 S. Ct. 693, 704, 145 L. Ed. 2d 610 (2000) (quoting *Florida State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008)). ACORN has pleaded facts in the Complaint which satisfy each prong of this test, and therefore confer associational standing to ACORN to sue on behalf of its members.

STLEB has not challenged the first prong, the right of ACORN members to sue in their own right, beyond their claim that the individual Plaintiff in this case, Ms. O’Neal, failed to provide the required notice – an argument we have addressed *supra*. Further, STLEB has not challenged the third prong of the test; it should be noted that where injunctive relief is sought, the individual participation of an organization’s members is “not normally necessary.” *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 546 (1996) (cited in *Browning*, 522 F.3d at 1160). Thus, the only remaining issue raised by STLEB is their contention that ACORN has not identified an interest at stake in this action germane to ACORN’s purpose.

As the Complaint makes clear on its face, the interests at stake here are fundamentally related to ACORN's mission and purpose. ACORN is "the nation's largest community organization of low and moderate-income families, working together for social justice and stronger communities." (Comp. at ¶ 11.) As part of its efforts to build stronger communities, "ACORN has been a strong advocate for voter participation. More registered voters in a community served by ACORN means that ACORN can encourage more people to vote on Election Day and generate a higher number of voters, all of which strengthens the community." (Comp. at ¶ 48.) That increased voter registration in the areas it serves is germane to ACORN's mission is evidenced by the fact that ACORN itself *conducts* regular voter registration drives in the St. Louis metropolitan area, as well as Kansas City and Springfield, Missouri. (Comp. at ¶ 50.) ACORN has in fact expended hundreds of thousands of dollars on voter registration activities in Missouri at places other than outside public assistance agency offices. It's voter registration efforts in the state have been significantly impeded because ACORN has and now must expend resources conducting such activities outside public assistance agency offices because of the state's failure to provide voter registration opportunities in public assistance agencies. (Comp. at ¶ 51.) It is clear, then, that, construing the factual allegations in the Complaint in favor of Plaintiffs, ACORN has an interest at stake in this litigation germane to its purpose.

Defendants STLEB apparently seek to avoid this clear conclusion by applying an erroneous and opaque definition of the phrase As identified in the Complaint, ACORN's community organizing efforts clearly refer to the word "organize" in the political sense of the term, e.g. "To arrange systematically for harmonious or united action: *organize a strike.*" THE AMERICAN HERITAGE DICTIONARY OF THE ENGLISH LANGUAGE, (Houghton-Mifflin Co. ed., 4th ed. 2004) (italics in original). That the word "organize" was meant in this sense as used in the Complaint is clear from the context, including statements that ACORN "has been a strong advocate for voter participation," that ACORN "seeks to

increase political participation in the communities it serves,” and that it is an organization “working together for social justice and stronger communities.” (Comp. ¶¶ 11, 48, 50.) As such, it is clear that ACORN has an interest at stake in this litigation germane to its purpose. Each prong of the test is therefore satisfied, and ACORN has properly pleaded facts sufficient to confer standing on behalf of its members.

CONCLUSION

For the reasons set forth above, Plaintiffs request this Court deny STLEB’s Motion in its entirety.

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CERTIFICATE OF SERVICE

I hereby certify that on June 6, 2008, the foregoing was filed electronically with the Clerk of the Court to be served by operation of the Court's electronic filing system upon the following counsel of record for all Defendants: Emily A. Dodge, David B. Raymond, Charles Renner, Bradley A. Constance, Michael J. Payne and Mayer S. Klein, Plaintiffs' initial disclosures under Federal Rule of Civil Procedure 26(a)(1) were electronically mailed to counsel of record for all defendants on May 30, 2008.

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