

**UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF INDIANA**

ASSOCIATION OF COMMUNITY
ORGANIZATIONS FOR REFORM NOW
(ACORN), et al., for themselves and all other
persons similarly situated,

Plaintiffs,

v.

ANNE W. MURPHY, in her official capacity
as Secretary of the Indiana Family and Social
Services Administration, et al.,

Defendants.

CIVIL ACTION NO. 1:09-CV-0849 WTL
DML

**PLAINTIFFS' MEMORANDUM IN OPPOSITION
TO DEFENDANTS' MOTION TO DISMISS AMENDED COMPLAINT**

Plaintiffs filed this action to remedy the failure of the State of Indiana to carry out its responsibilities under the National Voter Registration Act of 1993 ("NVRA"), 42 U.S.C. § 1973gg et seq., to offer voter registration to public assistance clients in Indiana. Specifically, Section 7 of the Act, 42 U.S.C. § 1973gg-5, requires Indiana officials to offer a voter registration application to individuals when they submit a public assistance application, renew or recertify their public assistance benefits, or notify officials of a change of address in connection with their benefits. As set forth in the Amended Complaint, public assistance offices across the State of Indiana are failing to do this, notwithstanding Indiana's enactment of statutory provisions in the 1990s to implement the NVRA. Plaintiffs now respectfully submit this Memorandum in Opposition to Defendants' Motion to Dismiss.

SUMMARY OF ARGUMENT

Defendants seek to dismiss Plaintiffs' Amended Complaint on four grounds. They assert that: 1) the pre-suit notice letter, sent in January 2009 (more than five months before suit was filed), was insufficient under the NVRA's pre-suit notice provision; 2) the private cause of action established by Congress for NVRA enforcement applies to individuals but not to organizations such as Plaintiffs ACORN and the NAACP; 3) ACORN's and the NAACP's allegations of harm to their members and to the organizations resulting from Defendants' conduct are not sufficiently detailed to grant them standing to sue; and 4) the Co-Directors of the Indiana Election Division and the members of the Indiana Election Commission are not proper defendants in this action,

Defendants' claims have been rejected by every court that has addressed the issues Defendants have raised, and are not supported by the provisions of the NVRA or by any prior court decision. Accordingly, this Court should reject them as well.

The pre-suit notice that Plaintiff ACORN provided state officials in January 2009 gave Indiana officials notice of the precise claim being litigated in this lawsuit – that public assistance offices across the State are failing to offer voter registration to their clients, as required by Section 7 of the NVRA. Although the notice letter was sent on behalf of Plaintiff ACORN but not Plaintiffs Alexander and the NAACP, this does not mean that Alexander's and the NAACP's participation in this suit is premature. The NVRA violation asserted by each of the three Plaintiffs is identical, and the NVRA case law is clear that multiple plaintiffs are not required to send duplicative notices in order for state officials to be advised, prior to litigation, of the alleged violation.

The notice letter also was not lacking in detail, as Defendants claim, since the NVRA requires pre-suit notice of the violation, which the letter provided, not a bill of particulars.

Finally, the notice was not deficient because it did not say why the Co-Directors of the Indiana Election Division and the members of the Indiana Election Commission are legally liable for the violation. The NVRA requires notice of the violation, not notice of all the parties legally responsible for the violation. Moreover, these Defendants' responsibility for Section 7 compliance is set forth in the NVRA itself (as implemented through state law), and so the letter did not need to tell them something they already should know. Lastly, the Co-Directors and the Commissioners now disclaim any responsibility for Indiana's implementation of Section 7, so discussing their responsibility in the notice letter would have been a fruitless and futile act.

The NVRA's private enforcement provision broadly applies to organizations, such as ACORN and the NAACP, as well as to individuals. Defendants' claim to the contrary has been rejected by the only court that has addressed this issue, the Fifth Circuit Court of Appeals, which concluded that the language, structure, and legislative history of the NVRA demonstrate that organizations have a cause of action to enforce NVRA compliance.

Likewise, ACORN's and the NAACP's allegations of harm to their members and to themselves as organizations, resulting from Defendants' conduct, are sufficient at the pleading stage to grant them standing to sue. Defendants do not dispute that the injuries alleged are of the type that the Supreme Court has determined give organizations standing to sue. Their claim that the allegations are insufficiently detailed and somehow implausible misconstrues the notice pleading requirement of Rule 8 of the Federal Rules of Civil Procedure, and Defendants do not explain why the allegations of injury – which flow directly from the core missions of these organizations – are implausible.

Finally, the Co-Directors of the Indiana Election Division and the members of the Indiana Election Commission are proper defendants in this action. The NVRA assigns liability for

Section 7 compliance in each state to, among others, the state's chief NVRA election official, who in Indiana are the Election Division Co-Directors. The Co-Directors, in turn, partner with the members of the Election Commission in overseeing NVRA compliance in the State.

LEGAL AND FACTUAL BACKGROUND

1. The National Voter Registration Act

Recognizing that “the right of citizens of the United States to vote is a fundamental right,” Congress enacted the NVRA in 1993 “to establish procedures that will increase the number of eligible citizens who register to vote in elections for Federal office.” 42 U.S.C. § 1973gg. The enacted procedures include “motor voter” registration simultaneous with applications for driver’s licenses and state identification cards (Section 5, 42 U.S.C. § 1973gg-3), voter registration by mail (Section 6, 42 U.S.C. § 1973gg-4), and voter registration through state agencies, including all offices that provide public assistance benefits (Section 7, 42 U.S.C. § 1973gg-5).¹

To promote compliance by the states, the NVRA requires each state to designate “a chief State election official” who is “responsible for coordination of State responsibilities under [the NVRA].” 42 U.S.C. § 1973gg-8. The NVRA also provides a cause of action to private plaintiffs to file suit to remedy NVRA violations. 42 U.S.C. § 1973gg-9(b) (an “aggrieved person may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation”). Finally, to promote resolution of compliance disputes without

¹ The registration requirements of the NVRA apply to voter registration for federal elections, consistent with Congress’ plenary authority under the Constitution to regulate the times, places, and manner of conducting federal elections. *See, e.g., ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995) (upholding the constitutionality of the NVRA). In response, Indiana (like all other states) has chosen to maintain a unitary voter registration system and thus has statutorily applied the NVRA’s registration requirements to registration for all elections in the State. *See generally* Ind. Code Title 3, Art. 7.

litigation, the NVRA specifies that aggrieved persons generally must provide written notice of the NVRA violation to the state's chief NVRA election official prior to filing suit. *Id.* If the state does not correct the violation within 90 days (or 20 days if a federal election is to occur within four months), the aggrieved persons may proceed with litigation. *Id.*

The obligations the NVRA imposes on Indiana and other states to offer voter registration to public assistance clients are straightforward. Indiana must distribute a voter registration application with each application for benefits, each recertification and renewal of benefits, and each change of address relating to benefits. Applicants and recipients must be provided assistance in completing the registration application to the same degree that the State provides assistance in completing state benefits forms (unless assistance is declined). Applicants and recipients also must be provided a "voter notice form" that asks if the client would like to register to vote and provides certain information relevant to the voter registration process. 42 U.S.C. § 1973gg-5(a)(6).

2. Indiana's Statutory Implementation of the NVRA

Indiana has provided for implementation of Section 7 of the NVRA through its state public assistance offices. Ind. Code § 3-7-15-1 et seq. These offices include all offices of the Division of Family Resources ("DFR") – a subunit of the Indiana Family and Social Services Administration ("FSSA") – that administer the Temporary Assistance for Needy Families program, the Medicaid program, and/or the Food Stamps program. Ind. Code § 3-7-15-2.

Indiana has designated the Co-Directors of the Indiana Election Division as its chief state election officials for NVRA implementation. Ind. Code § 3-7-11-1.² As such, the Co-Directors

² Section 3-7-11-1 actually provides that the designated officials are the "co-directors of the [Indiana Election] commission," however, the Indiana Secretary of State has advised that the

are required to “[p]rotect the fundamental rights of voters,” Ind. Code § 3-7-11-2(3), and “to oversee the implementation and administration of [the] NVRA by the state, county, municipal, and nongovernmental offices designated as registration sites.” Ind. Code § 3-7-11-2(1). The Co-Directors also are assigned a number of other specific NVRA-related duties. Ind. Code § 3-7-11-2.

The Division Co-Directors share this responsibility with the Indiana Election Commission. The Co-Directors are required to “[c]oordinate with the commission to oversee the implementation and administration of [the] NVRA by the state, county, municipal, and nongovernmental offices designated as registration sites.” Ind. Code § 3-7-11-2(1). The Election Commission has responsibility to adopt “[r]ules (including joint rules with other agencies when necessary) to implement and administer [the] NVRA.” Ind. Code § 3-6-4.1-14(a)(2)(A)(ii). The Election Commission also is responsible for prescribing the design of the registration form used by public assistance offices. Ind. Code § 3-7-15-4.

3. Pre-Suit Notice

On January 29, 2009, Project Vote (whose attorneys are among the co-counsel representing Plaintiffs in this action) wrote to the Co-Directors of the Indiana Election Division, on behalf of Project Vote and ACORN, to provide the pre-suit notice required by the NVRA, 42 U.S.C. § 1973gg-9(b)(1). Par. 48.³ The letter stated that the FSSA is failing statewide to offer voter registration to its public assistance clients, in violation of Section 7 of the NVRA. The letter also described the results of Project Vote’s November 2008 investigation of FSSA offices,

officials so designated actually are the Co-Directors of the Indiana Election Division. See Exhibit 1 to the Corrected Amended Complaint.

³ All paragraph citations are to Plaintiffs’ Corrected Amended Complaint, filed on October 6, 2009. Also, all references in this Memorandum to the Amended Complaint are to the Corrected Amended Complaint.

and discussed the very low number of persons who are registering to vote in Indiana through the state's public assistance offices. (The letter is attached as Exhibit 2 to the Corrected Amended Complaint.) The letter advised state officials that Project Vote would be "happy to meet with you at your earliest convenience to assist in the development of a comprehensive plan for compliance." Jan. 29, 2009 letter, at 2. The FSSA was copied on the letter.

The January 29, 2009 letter actually was the second notice provided to the State. Project Vote and ACORN initially sent a notice letter to the Indiana Secretary of State, however, the Secretary's office replied that it is the Co-Directors of the Indiana Election Division, rather than the Secretary, that are the State's chief NVRA election officials. The Secretary's Office also forwarded the initial notice letter to the Co-Directors and the FSSA, as well as to the Indiana Attorney General, on or about January 26, 2009. See Exh. 1 to the Corrected Amended Complaint.

Defendants did not respond to the notice letter. Par. 50; Defendants' Memorandum in Support of Motion to Dismiss, at 2. Plaintiffs then filed suit on July 9, 2009, which was over five months after the notice letter was sent and well after the NVRA-prescribed 90-day notice period had expired.

4. The Parties in this Lawsuit

Plaintiffs include an individual, Paris Alexander, and two organizations, ACORN and the Indiana Conference of the NAACP. They seek to represent "the class of all residents of the State of Indiana, past, present, and future, who are eligible to register to vote in Indiana, are not registered to vote at their current residence address," and are public assistance applicants and recipients who have been denied the voter registration opportunity mandated by Section 7 of the NVRA Par. 61.

Ms. Alexander is a United States citizen and Indiana resident who is eligible to vote in Indiana, but is not registered to vote at her current address. Par. 19. She also is a current recipient of public assistance (Food Stamps). *Id.* She applied for Food Stamps in March and April of 2009 but, contrary to the NVRA, was not offered the opportunity to register to vote in connection with her application for benefits. Pars. 51-53.

ACORN is a non-profit organization which seeks to promote political participation and community involvement. Pars. 13, 55-56. Its members include public assistance applicants and recipients in Indiana who are not registered to vote at their current address. Pars. 13, 55. These individuals are being denied the opportunity to register to vote through the public assistance process. Par. 54. As an organization, ACORN conducts voter registration drives in Indiana, particularly aimed at low-income individuals. Par. 14. ACORN has been forced to expend resources to offer voter registration to individuals who should have been offered voter registration by Indiana through the state's public assistance offices. Pars. 15, 55-56.

The Indiana Conference of the NAACP includes all branches of the national NAACP located in Indiana (numbering approximately 35). Par. 16. The NAACP seeks to ensure that all persons enjoy equal rights and to combat racial discrimination and hatred; in particular, the NAACP works to promote full and equal participation in our country's political system. Pars. 17, 57. As is true with ACORN, Plaintiff NAACP's membership includes public assistance recipients who are not registered to vote at their current address. Par. 16. These individuals have been injured by Defendants' failure to comply with the NVRA's public-assistance registration requirements. Par. 54. The NAACP also conducts voter registration drives in Indiana and, as a result of Defendants' Section 7 violation, has allocated greater resources to registering individuals who are public assistance applicants and recipients. Pars. 17-18, 57-58.

Defendants are the Indiana officials responsible for implementing the public-assistance registration requirements of Section 7 of the NVRA. These include the Co-Directors of the Indiana Election Division, the four members of the Indiana Election Commission, the Secretary of the Indiana Family and Social Services Administration, and the Director of the Division of Family Resources. Pars. 21-24.

5. Indiana's Violation of Section 7 of the NVRA

Contrary to Section 7 of the NVRA, FSSA and DFR are not offering public assistance clients the opportunity to register to vote in connection with each benefits application, each benefits renewal or recertification, and each change of address for benefits. Pars. 39 & 46. The FSSA and DFR also are not distributing the required voter notice form with each such transaction. *Id.* The named Plaintiffs and the Plaintiff class members all assert precisely the same course of conduct by Defendants in violation of the NVRA.

A pre-suit investigation by Project Vote of seven FSSA offices in the State's metropolitan areas found that staff admitted that they were not providing clients with voter registration applications. Indeed, only one of the seven offices even had voter registration applications on hand. The offices also did not distribute voter notice forms with each benefits transaction covered by Section 7 of the NVRA. Pars. 43-45.

The failure of the State to implement Section 7 also is demonstrated by the diminishing and vanishing number of individuals who are registering to vote in Indiana through a public assistance office. In 2007 and 2008, the State averaged a mere 105 public assistance clients registering to vote each month. In 2005 and 2006, the monthly average was 251, and in 2003 and 2004 the monthly average was 628. This constant decrease is occurring despite the fact that the number of public assistance clients is increasing (as evidenced by a steady rise in the number

of persons on the state's Food Stamps rolls), and despite the fact that a large number of low income residents of Indiana still are not registered to vote (41% of adult citizens in households with an income of less than \$25,000 a year). Par. 42.

ARGUMENT

In ruling on a motion to dismiss, it is well established that a court must accept as true all factual allegations contained in the complaint. In addition, a court must construe the factual allegations in the complaint in the light most favorable to the plaintiff. *Thompson v. Ill. Dep't of Prof'l Regulation*, 300 F.3d 750, 753 (7th Cir. 2002).

Defendants' Motion to Dismiss should be denied in its entirety. Plaintiffs fully complied with the NVRA's notice requirement, the NVRA grants ACORN and the NAACP a private right of action, ACORN and the NAACP have made the requisite allegations to support their standing to sue, and all defendants are proper parties to this action.

I. PLAINTIFFS FULLY COMPLIED WITH THE NVRA'S NOTICE REQUIREMENT

A. Plaintiff ACORN Provided the Requisite Pre-Suit Notice on Behalf of All Plaintiffs Litigating the Violation Identified in ACORN's Notice Letter

ACORN's pre-suit notice informed state officials of the NVRA violation alleged in the Amended Complaint and so fulfilled the notice requirement for Plaintiffs Alexander and the NAACP. Contrary to Defendants' assertion, Alexander and the NAACP were not required to send pre-suit letters to state officials that simply reiterated the notice ACORN previously had provided in order for Alexander's and the NAACP's participation in this suit to ripen. The NVRA does not require repetitive notices that serve no practical purpose.

ACORN's January 2009 notice letter notified Indiana officials that, on a statewide basis, they are failing to offer public assistance clients with the opportunity to register to vote mandated by Section 7 of the NVRA. This is the same violation that Plaintiffs Alexander and the NAACP

assert in the Amended Complaint. Accordingly, it would have been entirely duplicative and a futile act for Alexander and the NAACP to have sent their own separate notice letters. This is particularly so since Indiana officials chose not to respond at all to ACORN's letter. Defendants do not explain why additional letters that noticed the same violation would have provided them with any meaningful additional information or would have yielded a different result.

The courts uniformly have held that where plaintiffs all allege the same NVRA violation, a pre-suit notice letter sent by one plaintiff provides the requisite pre-suit notice for all plaintiffs. *ACORN v. Miller*, 129 F.3d 833, 838 (6th Cir. 1997); *ACORN v. Scott*, 2008 U.S. Dist. LEXIS 51671, at 9-12 (W.D. Mo. 2008); *Harkless v. Blackwell*, 467 F. Supp. 2d 754, 761-62 (N.D. Ohio 2006), *rev'd on other grounds sub. nom., Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008).

In *Miller*, one plaintiff (ACORN) provided pre-suit notice to the State of Michigan of the State's NVRA violations while other plaintiffs did not, and the State argued that the latter group should be dismissed for this reason. The Sixth Circuit rejected this argument, holding that requiring each plaintiff to each give notice "would have been unnecessary with regard to the purpose of the notice requirement." 129 F.3d at 838. The court observed that "Congress structured the notice requirement in such a way that notice would provide states in violation of the Act an opportunity to attempt compliance before facing litigation." *Id. citing* Senate Comm. on Rules and Admin., National Voter Registration Act of 1993, S. Rep. No. 6, 103d Cong., 1st Sess. 41 (1993). Michigan had responded to ACORN's notice letter by denying that the State was violating the NVRA (Michigan claimed that the statute was unconstitutional). *Id.* at 834-36. The Sixth Circuit concluded, therefore, that "requiring these plaintiffs to file individual notice

where Michigan had already ignored ACORN's actual notice amounts to requiring performance of futile acts.” *Id.* at 838.

The *ACORN v. Scott* and *Harkless v. Blackwell* cases presented the same issue of multiple plaintiffs and one notice letter, differing from *Miller* only with respect to how the states responded to the pre-suit notice. In *Scott*, a Missouri state official responded by claiming that the State was properly implementing Section 7 of the NVRA, “attributing declining registration numbers in Missouri's public agencies to increased use of on-line services.” 2008 U.S. Dist. LEXIS 51671, at 3. In *Harkless*, the Ohio Secretary of State “responded by letter that NVRA compliance was not its responsibility and suggested that compliance with the NVRA was unnecessary due to Ohio's relatively high voter registration rate.” 467 F. Supp. 2d at 758. On these facts, the district courts in both cases ruled that it would have been futile for the plaintiffs to have sent duplicative notice letters, and therefore it was of no consequence that they had not.

In their Memorandum, Defendants disregard the *Scott* and *Harkless* decisions, and attempt, unsuccessfully, to distinguish *Miller* from this case. They contend that the Sixth Circuit held that multiple, duplicative notices are futile only when a state expressly refuses to comply with the NVRA.

Defendants’ argument both misstates the Sixth Circuit’s holding and is nonsensical. The Sixth Circuit premised its holding on the fact that Michigan officials had “ignored [the] actual notice,” 129 F.3d at 838, and nowhere stated or suggested that the underlying reason why Michigan had “ignored” the notice was in any way relevant. Defendants likewise fail to explain why it matters – for notice purposes – that Michigan’s response was to expressly deny any violation while Indiana’s response was a non-response. In both cases state officials “ignored” the notice one plaintiff provided, and thus sending multiple notices of the same violation would

have been futile. Indeed, in *Scott* the state official did not claim in her response to the notice letter that Missouri did not need to comply with the NVRA, but the district court still concluded that multiple notices would have been futile.⁴

Defendants fail to cite any case in which a court has held that multiple plaintiffs must each, individually, send a notice letter when each plaintiff alleges the very same violation of the NVRA. Defendants cite three NVRA decisions in addition to *Miller*, but none of these other cases dealt with the issue presented here.⁵

For these reasons, Defendants' assertion that Plaintiffs Alexander and the NAACP were required to send separate, duplicative notice letters is without merit.⁶

⁴ Defendants go so far as to assert that every class member would need to provide notice, even though each notice would refer to the same violation. Memorandum in Support of Motion to Dismiss, at 8. Defendants thus apparently believe that the NVRA requires that thousands of duplicative notice letters be sent to state officials. Their argument also could suggest that Congress, without saying so, used the NVRA notice requirement to override Rule 23 of the Federal Rules of Civil Procedure since, as a practical matter, it would be impossible for the class representatives in an NVRA lawsuit to procure notice letters from all or most class members.

⁵ In *Nat'l Coal. for Students with Disabilities Educ. & Legal Defense Fund v. Allen*, 152 F.3d, 283, 286 n.2 (4th Cir. 1998), the court simply observed in passing that the NVRA has a pre-suit notice requirement. In *Broyles v. Texas*, 618 F. Supp. 2d 661, 692 (S.D. Tex. 2009), none of the plaintiffs provided pre-suit notice. In *Condon v. Reno*, 913 F. Supp. 946, 960 (D. S.C. 1995), there was a single plaintiff who did not provide notice, but the court excused this on the ground that the State of South Carolina had announced that it would not comply with the NVRA and therefore notice would have been futile.

⁶ Defendants also apparently try to intimate, incorrectly, that none of Plaintiffs in this case sent a pre-suit notice. See Memorandum in Support of Motion to Dismiss, at 2 (“[t]he letter [sent by Project Vote] did not refer to any other interested or aggrieved group or individual.”). In fact, the letter was crystal clear that it was sent on behalf of both Project Vote and ACORN. Jan. 29, 2009 letter, at 1 (“On behalf of Project Vote and the Association of Community Organizations for Reform Now (ACORN), we write to notify you that the Indiana Family and Social Services Administration is not in compliance with the National Voter Registration Act of 1993.”).

B. The Pre-Suit Notice Properly Identified the Nature of the NVRA Violation

The January 2009 pre-suit notice letter informed Indiana officials of the specific violation alleged in the Amended Complaint: on a statewide basis, the State is failing to provide public assistance clients with a voter registration application and the other registration services required by Section 7 of the NVRA. Accordingly, the letter properly placed Indiana officials on notice of the NVRA violation.

Defendants claim that the letter lacked sufficient detail, specifically that “the letter should have identified which FSSA offices were allegedly non-compliant.” Defendants’ Memorandum in Support of Motion to Dismiss, at 9. However, the violation set forth in the notice letter and in the Amended Complaint is not limited to particular FSSA offices. While the Amended Complaint (but not the notice letter) mentions specific offices where the pre-suit investigation identified a violation of Section 7, these problems are alleged to illustrate the statewide violation, not to limit the scope of the violation.

It follows, therefore, that proper notice did not require any office-by-office enumeration. The notice provided Indiana officials with “an opportunity to attempt compliance before facing litigation,” which is all that is required. *ACORN v. Miller*, 129 F.3d at 838. Notice does not require a bill of particulars. And certainly, if state officials had questions based on the notice, they easily could have contacted the Project Vote attorney who signed the notice letter, but they chose not to and instead waited until litigation was commenced.⁷

⁷ The notice letter, in fact, mentioned the pre-suit investigation that focused on particular FSSA offices, but did not identify the offices involved. Thus, if state officials’ interest was piqued by the letter, they could have telephoned the Project Vote attorney and asked which FSSA offices were the subject of the pre-suit investigation.

C. Plaintiffs Were Not Required, Pre-Suit, to Inform the Indiana Election Division and the Election Commission That They Share Responsibility for Section 7 Compliance

Defendants' last objection to the January 2009 notice letter is that it did not inform the Co-Directors of the Election Division and the members of the Indiana Election Commission that they share responsibility, along with FSSA and DFR, for the State's compliance with Section 7 of the NVRA. The result, Defendants say, is that "the letter leaves these parties in the dark as to the nature of any alleged violation." Defendants' Memorandum in Support of Motion to Dismiss, at 9. Defendants assert that this prevents Plaintiffs from naming the Co-Directors and the Commissioners as defendants in this lawsuit until a new notice letter is sent to them that informs them of their legal responsibilities.

This argument is disingenuous for several reasons. The notice letter fully identified the violation, which is the failure of the State of Indiana to provide voter registration forms and related registration services to public assistance clients, as required by Section 7 of the NVRA. And the letter was sent to the State's chief NVRA election officials – the Co-Directors of the Election Division – as is required by the NVRA, 42 U.S.C. § 1973gg-9(b)(1). While the letter did not list all the responsible state officials in describing the violation, the NVRA's notice provision does not require that. As the court in *ACORN v. Scott* held in rejecting the same claim (made, in that case, by local election officials who were not identified in the pertinent notice letter), the NVRA "notice statute only requires the aggrieved party to inform the state chief election official of the *violation*, not of the specific agency or agencies which may play a part in the violation." 2008 U.S. Dist. LEXIS 51671, at 11 (emphasis in original). Defendants cite no authority to the contrary.

In addition, the notice letter did not need to spell out the responsibility of the Division Co-Directors and the Election Commissioners for assuring Section 7 compliance since their responsibility is expressly set forth in the NVRA and state law. As is discussed in greater detail below (*infra* at 26-28), the Division Co-Directors are responsible for Section 7 compliance because they have been designated by the State, pursuant to 42 U.S.C. § 1973gg-8, as the chief state election official for NVRA compliance. *See Harkless v. Brunner*, 545 F.3d 445, 451-55 (6th Cir. 2008). The members of the Election Commission likewise are responsible because state law requires that the Co-Directors carry out their role as the State's chief NVRA election officials in partnership with the Election Commission. Ind. Code §§ 3-6-4.1-14(a)(2)(A)(ii), 3-7-11-2(1), 3-7-15-4. The notice letter did not need to inform the Co-Directors and the Commissioners of the responsibilities they should already be well aware of.

Lastly, it would have been a futile act to inform the Co-Directors and the Commissioners in the notice letter of their NVRA responsibilities since now, in this lawsuit, they are expressly disclaiming any responsibility for the State's compliance with Section 7 (see *infra* at 28). In *ACORN v. Scott*, the district court ruled that local election officials in that case were not entitled to pre-suit notice not only because the NVRA requires notice of the violation and not notice of all the responsible parties, but also because sending notice to the local officials would have been futile. Just like the state officials here, the local officials in *Scott* took the position in the lawsuit that they had no responsibility for NVRA compliance by public assistance offices. 2008 U.S. Dist. LEXIS 51671, at 11-12.

For all these reasons, it is irrelevant that the January 2009 notice letter did not specifically advise the State that the Division Co-Directors and the Election Commissioners share responsibility for the Section 7 violation.

II. THE NVRA GRANTS ACORN AND THE NAACP A PRIVATE RIGHT OF ACTION

The NVRA grants a cause of action to organizations, such as ACORN and the NAACP, to file suit to enforce compliance with the Act. The NVRA states that “aggrieved person[s] may bring a civil action in an appropriate district court for declaratory or injunctive relief with respect to the violation.” 42 U.S.C. § 1973gg-9(b)(2). The language, structure, and legislative history of the Act make clear that by using the term “aggrieved person,” Congress gave organizations a cause of action.

Only one court has addressed this issue, and that court – the Fifth Circuit – unambiguously held that § 1973gg-9(b)(2) allows organizations, as well individuals, to file suit to remedy NVRA violations. *ACORN v. Fowler*, 178 F.3d 350, 365 (5th Cir. 1999) (ruling that ACORN may file suit to enforce the NVRA, so long as it has Article III standing to sue).⁸ In reaching its decision, the Fifth Circuit undertook a detailed study of this issue, and set forth a series of reasons why the NVRA must be read as granting organizations the right to file suit.

First, the Fifth Circuit noted that the terms “party aggrieved” and “person aggrieved” – terms almost identical to the “aggrieved person” language of the NVRA – have been broadly construed by the Supreme Court and circuit courts, in the context of other statutes, to generally allow any plaintiff that satisfies Article III standing requirements to file suit. *Id.* at 363-64 *citing* *Federal Election Commission v. Akins*, 524 U.S. 11 (1998) (Federal Election Campaign Act); *Bloom v. NLRB*, 153 F.3d 844, 849 (8th Cir. 1998), *vacated on other grounds sub. nom.*, *Office & Prof’l Employees Int’l Union, Local 12 v. Bloom*, 525 U.S. 1133 (1999) (National Labor

⁸ The Fifth Circuit said the question presented was whether organizations have prudential standing, rather than a “cause of action,” under the NVRA. However, the label used by the Fifth Circuit is irrelevant since the issue the court addressed was whether organizations qualify as an “aggrieved person” within the meaning of the NVRA.

Relations Act); *Ozonoff v. Berzak*, 744 F.2d 224, 228 (1st Cir. 1984) (discussing the “person aggrieved” language in general).

Second, the Fifth Circuit observed that Congress provided in 1 U.S.C. § 1 that “in determining the meaning of any Act of Congress, unless the context indicates otherwise . . . the words ‘person’ and ‘whoever’ include corporations, companies, associations, firms, partnerships, societies, and joint stock companies, as well as individuals.” *Id.* at 364.

Third, the Fifth Circuit determined that the NVRA’s legislative history clearly indicates Congress’ intent that organizations, as well as individuals, have a private right of action. An earlier version of the legislation allowed a cause of action only for an aggrieved “individual,” but this was changed to aggrieved “person” specifically in order to allow organizations to file suit. 178 F.3d at 364 *citing* 138 Cong. Rec. S6329 (daily ed. May 7, 1992) (statement of Sen. Ford) (“[T]he modification will permit organizations as well as individuals . . . to bring suits under the act.”). *Id.*

Finally, the Fifth Circuit cited the inclusion in the NVRA of a provision awarding attorneys’ fees, litigation expenses, and costs to successful plaintiffs as evidencing Congress’ intent to allow organizations to sue under the Act. The court explained that Congress’ purpose in enacting such provisions generally is to broadly allow private attorneys general to sue to enforce statutory requirements. *Id.*

While other courts have not yet ruled on this issue, it has been routine practice for courts to hear NVRA challenges filed by organizations. *See e.g. Harkless v. Brunner*, 545 F.3d 445 (6th Cir. 2008); *Nat’l Coal. for Students with Disabilities Educ. and Legal Defense Fund v. Gilmore*, 152 F. 3d 283 (4th Cir. 1998); *ACORN v. Miller*, 129 F.3d 833 (6th Cir. 1997); *ACORN v. Edgar*, 56 F.3d 791 (7th Cir. 1995); *ACORN v. Scott*, 2008 U.S. Dist. LEXIS 51671 (W.D.

Mo. 2008); *ACORN v. Cox*, 2006 U.S. Dist. LEXIS 87080 (N.D. Ga. 2006); *Nat'l Coal. for Students with Disabilities Educ. and Legal Defense Fund v. Scales*, 150 F. Supp. 2d 845 (D. Md. 2001); *ACORN v. Ridge*, 2000 U.S. Dist. LEXIS 310 (E.D. Pa. 2000).

Defendants cite only one NVRA decision on this issue, the Fifth Circuit's ruling in *ACORN v. Fowler*. Remarkably, however, Defendants fail to advise this Court that the Fifth Circuit's holding is exactly contrary to the position they are advocating.⁹

Defendants also note that the word "person" is used elsewhere in the NVRA to refer only to individuals. However, as the Fifth Circuit found in *Fowler*, resolution of the "right to sue" issue requires an examination of Congress' use of the specific term "aggrieved person" in the context of the provision authorizing private enforcement of the NVRA. Finally, Defendants cite other statutes, and court decisions dealing with other statutes, but do not explain how these in any way indicate that the Fifth Circuit's interpretation of the NVRA is incorrect.

Accordingly, this Court should rule that ACORN and the NAACP have a cause of action to enforce Section 7 of the NVRA pursuant to 42 U.S.C. § 1973gg-9(b)(2).

III. ACORN AND THE NAACP HAVE PROPERLY PLED STANDING TO SUE

Under Article III of the Constitution, a plaintiff has standing to sue in federal court when the plaintiff has suffered a "concrete and particularized" injury, caused by the defendant's actions, which is redressable by a favorable court decision. *Lujan v. Defenders of Wildlife*, 504

⁹ Defendants quote one sentence fragment from *Fowler*, without explanation or elaboration. That fragment is part of a sentence in which the Fifth Circuit states its conclusion that organizations *do* have a right to sue to remedy NVRA violations. The full sentence in *Fowler* is as follows: "We conclude that although Congress did not explicitly define what it meant by an aggrieved person under the NVRA, it intended to extend standing under the Act to the maximum allowable under the Constitution." 178 F.3d at 363. The fragment Defendants misleadingly quote is the following: "Congress did not explicitly define what it meant by an aggrieved person under the NVRA." Defendants' Memorandum in Support of Motion to Dismiss, at 10.

U.S. 555, 560-61 (1992). This general test for standing applies whether the plaintiff is an individual or an organization. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982).

Here, where the standing issue is presented through a motion to dismiss, the Court must consider as true ACORN's and the NAACP's factual allegations regarding injury, causation, and redressability. On the other hand, should Defendants at a later point in time move for summary judgment on the standing issue, or if the issue is addressed at trial, this Court would then determine standing by analyzing the evidence submitted by the parties. *See Lujan*, 504 U.S. at 561 (discussing the difference between addressing standing on a motion to dismiss and on a motion for summary judgment); *ACORN v. Fowler*, 178 F.3d at 357 (same).

As is demonstrated below, Plaintiffs ACORN and the NAACP properly have pled standing on two bases. They have pled associational standing to sue on behalf of their members and organizational standing to sue on their own behalf.

A. ACORN and the NAACP Have Associational Standing

As set forth in the Amended Complaint, ACORN and the NAACP clearly meet the prerequisites for associational standing. An organization has standing to sue on behalf of its members when “(a) its members would otherwise have standing to sue in their own right; (b) the interests it seeks to protect are germane to the organization’s purpose; and (c) neither the claim asserted nor the relief requested requires the participation of individual members in the lawsuit.” *Hunt v. Wash. State Apple Advertising Comm’n*, 432 U.S. 333, 343 (1977).

Plaintiffs’ allegations satisfy all three of these tests. First, both ACORN’s and the NAACP’s members would have standing to sue in their own right. As described above, the Amended Complaint asserts that ACORN’s and the NAACP’s members include recipients of public assistance in Indiana who are not registered to vote at their current address, and who have

been denied the opportunity to register to vote in connection with their application for and receipt of public assistance benefits. Thus, these members have suffered a concrete injury caused by Defendants, which is redressable by entry of an appropriate injunction requiring Defendants to comply with the NVRA. Second, both organizations are committed to promoting political participation and community involvement in low-to-moderate income communities that include a large number of public assistance recipients, and therefore the interests both seek to protect in this lawsuit are germane to each organization's purposes. Finally, neither the claim asserted nor the relief sought requires the individual participation of each organization's members. This case involves a statewide violation of the NVRA affecting all public assistance clients, in the same manner, who were not offered the opportunity to register to vote, as mandated by the NVRA.

Defendants do not dispute that the Amended Complaint satisfies the second and third requirements. With regard to the first requirement, however, Defendants claim that the allegations regarding the injury suffered by the organizations' members are not sufficiently detailed, citing two recent Supreme Court decisions, *Ashcroft v. Iqbal*, 129 S. Ct. 1937 (2009), and *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544 (2007).

In *Iqbal*, the Supreme Court gave federal district courts somewhat greater latitude in dismissing complaints where the factual allegations of unlawful conduct are completely lacking in substance. The Court held that the substantive allegations must set forth "a claim for relief that is plausible on its face" in order to survive a motion to dismiss. 129 S. Ct. at 1949 (internal quotation marks omitted). Factual allegations which are mere "labels and conclusions" or "[t]hreadbare recitals of the elements of a cause of action, supported by mere conclusory statements" are not actionable. *Id.* (internal quotation marks omitted). The Court explained that

“[t]he plausibility standard is not akin to a ‘probability requirement,’ but . . . asks for more than a sheer possibility that a defendant has acted unlawfully.” *Id.* Further, “[d]etermining whether a complaint states a plausible claim for relief will . . . be a context-specific task that requires the reviewing court to draw on its judicial experience and common sense.” *Id.* at 1950.

In setting forth the plausibility standard, the Court was careful to note the limits of this requirement. The Court reaffirmed that, under Rule 8 of the Federal Rules of Civil Procedure, the law continues to be that complaints in federal court do “not require detailed allegations.” *Id.* at 1949 (internal quotation marks omitted). The Court also reaffirmed “the tenet that a court must accept as true all of the [factual] allegations contained in a complaint.” *Id.*¹⁰

Applying *Iqbal* here, it is important at the outset to emphasize that *Iqbal* (as well as *Twombly*) did not deal with the issue of standing to sue. Instead, both concerned the adequacy of complaint allegations concerning alleged substantive violations.¹¹ The Supreme Court previously has observed that, in the standing context, “general factual allegations of injury resulting from the defendant’s conduct may suffice, for on a motion to dismiss we presume that general allegations embrace those specific facts that are necessary to support the claim.” *Lujan*, 504 U.S. at 561 (internal quotation marks omitted). Accordingly, it is at least an open question whether *Iqbal* (and *Twombly*) have any application to a plaintiff’s allegations regarding standing to sue.

¹⁰ The Court in *Iqbal* gave broader effect to the Court’s prior decision in *Twombly*, which also dealt with the issue of pleading requirements but was more narrowly focused on the requirements for alleging an antitrust violation. As such, it generally is unnecessary to separately discuss the *Twombly* holding in assessing Defendants’ claims as to the application of these decisions to the instant case.

¹¹ In *Iqbal*, the plaintiff alleged that federal officers had violated his constitutional rights. In *Twombly*, the plaintiffs alleged that a telecommunications company had violated antitrust law.

Assuming *arguendo* that these cases apply, ACORN's and the NAACP's allegations that their members have been injured by Defendants' violation of the NVRA satisfy the *Iqbal* plausibility standard. ACORN is a "community organization of low- and moderate-income families," Amended Complaint, at par. 13, and the NAACP "has branches in minority and low-income communities including Gary and East Chicago." *Id.* at par. 16. Furthermore, 41 percent of adult citizens residing in low-income households in Indiana are not registered to vote. *Id.* at par. 42. As such, the allegations in the Amended Complaint – that these organizations include members who have applied for or receive public-assistance and are not registered to vote – are completely plausible, and certainly do not constitute a "sheer possibility."

Defendants offer no explanation as to why Plaintiffs' allegations in this regard are implausible. Instead, they attempt to convert the Supreme Court's holding in *Iqbal* into a requirement of detailed pleading, notwithstanding the Supreme Court's admonition to the contrary. In this regard, Defendants demand that Plaintiffs now identify in the complaint specific individuals who are members of ACORN and the NAACP who have been harmed by Defendants. But this kind of detail, involving answers to the questions of who, when, where, and what, are exactly the items of information that Rule 8 specifies are not required to be set forth at the pleading stage. Instead, these are issues that Defendants may explore through appropriate discovery. *See Fla. State Conference of the NAACP v. Browning*, 522 F.3d 1153, 1160 (11th Cir. 2008) ("In lawsuits seeking a remedy for past violations of an organization's members' rights, it makes sense that, after some discovery, the plaintiff be required to list at least one member who has been injured.")

For these reasons, Plaintiffs ACORN and the NAACP properly have pled associational standing. However, should this Court conclude otherwise, Plaintiffs should be granted leave to

amend their complaint to include additional allegations. *Harkless v. Brunner*, 545 F.3d 445, 459 (6th Cir. 2008) (district court should have allowed plaintiffs to amend their complaint to cure any deficiency in their allegations relative to standing).

B. ACORN and the NAACP Have Organizational Standing

To have standing to sue on their own behalf, ACORN and the NAACP must assert an injury to the organizations themselves that was caused by Defendants' conduct. *Havens Realty Corp.*, 455 U.S. at 379 (fair housing organization properly asserted organizational standing by alleging that it "has had to devote significant resources to identify and counteract the defendant's [sic] racially discriminatory steering practices."); *Fla. State Conference of the NAACP*, 522 F.3d at 1165-66 (NAACP had organizational standing because it was forced to divert resources from registering voters and from election-day activities to addressing the problems experienced by registration applicants due to Florida's new registration procedures); *Crawford v. Marion County Election Bd.*, 472 F.3d 949, 951 (7th Cir. 2007), *aff'd on other grounds*, 128 S. Ct. 1610 (U.S. 2008) (state political party had organizational standing because Indiana's new voter identification law compelled "the party to devote resources to getting to the polls those of its supporters who would otherwise be discouraged by the new law from bothering to vote.").

The allegations set forth by ACORN and the NAACP in the Amended Complaint fully satisfy the requirements of *Havens Realty Corp.*, *Fla. State Conference of the NAACP*, and *Crawford*. As organizations committed to increasing political participation in the communities they serve, both ACORN and the NAACP have been forced to bear the costs of reaching out to potential low-income voters who should have been offered the opportunity to register at public assistance offices. Both groups have expended resources assisting these Indiana citizens in

registering to vote that the organizations would have used for other matters, but for Defendants' violations of the NVRA.

Defendants again seek to rely on *Iqbal* and *Twombly* to urge this Court to reject Plaintiffs' allegations. In so doing, Defendants recognize that a major difficulty with their argument is that ACORN's and the NAACP's allegations of injury and causation closely parallel the allegations which a unanimous Supreme Court found sufficient in *Havens Realty Corp.* In order to get around this problem, Defendants essentially contend that the Supreme Court partially overruled *Havens Realty Corp.* in *Iqbal* and *Twombly*, although the Supreme Court said no such thing in these decisions. This Court should be very reluctant to reject the clear Supreme Court precedent of *Havens Realty Corp.* based on Defendants' conjecture and supposition, and should conclude based on *Havens Realty Corp.*, as well as the Seventh Circuit's holding in *Crawford*, that Plaintiffs have adequately pled organizational standing.

Moreover, assuming (once again) that *Iqbal* and *Twombly* apply to allegations of standing to sue, it is fully plausible that, as ACORN and the NAACP allege, these organizations have conducted voter registration drives aimed at low income individuals in Indiana, and that their organizational resources have been negatively affected by Defendants' failure to enforce the NVRA. These allegations are fully consistent with, and flow directly from, the organizational missions of both ACORN and the NAACP. In addition, courts in other jurisdictions have recognized that voter registration drives are a part of ACORN's and the NAACP's organizational activities, and that the conduct of these drives is directly affected by state conduct relating to the administration of the voter registration system. *See Fla. State Conference of the NAACP*, 522 F.3d at 1166 (in Florida, the NAACP planned "to register ten percent of the African-Americans eligible to vote in the upcoming election, and personnel that would otherwise be part of this

registration effort would have to be diverted to resolving [the problems created by Florida's new registration law]"); *ACORN v. Fowler*, 178 F.3d at 360 (in Louisiana, ACORN "expended definite resources counteracting the effects of Louisiana's alleged failure to implement [Section 7 of the NVRA]," according to evidence which raised a genuine issue of material fact in response to state officials' summary judgment motion). On the other hand, Defendants again fail to provide any explanation as to why Plaintiffs' allegations of standing to sue are implausible.

For these reasons, both ACORN and the NAACP properly have alleged organizational standing to sue on their own behalf. However, as noted above, if this Court should determine otherwise, Plaintiffs should be granted leave to amend to include additional standing allegations in the Amended Complaint. *Harkless v. Brunner, supra*.

IV. THE COMPLAINT PROPERLY NAMES THE ELECTION DIVISION CO-DIRECTORS AND THE ELECTION COMMISSIONERS AS DEFENDANTS

The Co-Directors of the Indiana Election Division and the members of the Indiana Election Commission are proper defendants in this lawsuit because they share responsibility for carrying out the duties imposed by Section 10 of the NVRA, 42 U.S.C. § 1973gg-8, which requires that each state have a chief NVRA election official responsible for NVRA compliance. Section 10 mandates that "[e]ach State shall designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under [the NVRA]."

As noted, Indiana law designates the Election Division Co-Directors as the State's chief NVRA election officials. Ind. Code § 3-7-11-1; n.2 *supra*. The Co-Directors are broadly tasked with the responsibility for "oversee[ing] the implementation and administration of [the] NVRA by the state, county, municipal, and nongovernmental offices designated as registration sites" in

Indiana. Ind. Code § 3-7-11-2(1). They also are assigned a number of more narrowly defined NVRA duties. Ind. Code § 3-7-11-2.

Indiana law further provides that the members of the Election Commission are a full partner with the Division Co-Directors in ensuring NVRA compliance in the State. The Co-Directors are required to coordinate with the Commission in “oversee[ing] the implementation and administration of [the] NVRA.” Ind. Code § 3-7-11-2(1). Furthermore, the Election Commission has responsibility to adopt “[r]ules (including joint rules with other agencies when necessary) to implement and administer [the] NVRA.” Ind. Code § 3-6-4.1-14(a)(2)(A)(ii). And the Election Commission has specific responsibility for designing the registration form used by all public assistance offices in the State. Ind. Code § 3-7-15-4.

One court has ruled on whether the NVRA imposes liability on a state’s chief NVRA election official for violations of Section 7 of the NVRA, and held that the NVRA does impose such liability. In *Harkless v. Brunner, supra*, the Sixth Circuit ruled that because the Ohio Secretary of State is that State’s chief NVRA election official, she “is responsible for managing the multiple state responsibilities under the NVRA,” 545 F.3d at 454, including compliance with Section 7 of the NVRA. In support, the Sixth Circuit cited the legislative history of the Act, a guidance document issued by the Federal Election Assistance Commission, and the plain meaning of the statutory requirement that the chief election official is “responsible for coordination of State [NVRA] responsibilities.” *Id.* at 451-52. The court also ruled that even if the NVRA coordination requirement could be construed as being vague, the Ohio Secretary of State was still a proper defendant because Ohio law clearly gave the Secretary the authority to ensure implementation and enforcement of Section 7. *Id.* at 453.

It follows that the Co-Directors of the Indiana Election Division are proper defendants in this action. Section 10 of the NVRA assigns them the responsibility for ensuring implementation and enforcement of Section 7 in Indiana and, in addition, state law does so as well. The members of the Indiana Election Commission also are proper defendants because, under the regulatory scheme chosen by the State, they partner with the Co-Directors in overseeing NVRA implementation and enforcement.

Defendants argue that the Co-Directors and the Election Commissioners are not proper defendants because they purportedly lack authority under state law to affect the enforcement of Section 7 by FSSA and DFR. This argument is faulty for two reasons. First, it entirely misses the point that the primary reason the Co-Directors are proper defendants, and by extension the Election Commissioners as well, is because of the duties imposed by federal law, i.e., Section 10 of the NVRA. Indeed, Defendants fail to discuss the ruling of the Sixth Circuit in *Harkless* in addressing this issue. Secondly, Defendants also are incorrect in describing the authority granted the Co-Directors and Election Commission under state law, which broadly provides that together these officials must “oversee” compliance, may issue rules, and must prescribe the registration form used at public assistance offices.

Therefore, this Court should reject Defendants’ request that the Co-Directors of the Indiana Election Division and the members of the Indiana Election Commission be dismissed from this lawsuit.

CONCLUSION

For the foregoing reasons, Defendants' Motion to Dismiss the Amended Complaint should be denied in its entirety.

DATED: October 13, 2009

Respectfully submitted,

s/ Mark A. Posner

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CERTIFICATE OF SERVICE

Mark A. Posner certifies that he caused a copy of the foregoing document to be served upon all counsel of record, by this Court's electronic-filing system, this 13th day of October, 2009.

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