

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

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW (ACORN), et al.)	
)	
Plaintiffs,)	Cause No.:1:09-cv-0849 WTL-DML
)	
v.)	
)	
ANNE W. MURPHY, in her official capacity As Secretary of the Indiana Family and Social Services Administration, et al.)	
)	
Defendants.)	

**DEFENDANTS' MEMORANDUM OF LAW IN OPPOSITION TO
PLAINTIFFS' MOTION FOR CLASS CERTIFICATION**

Come now Defendants, by counsel, and submit their opposition and response to the Plaintiffs' Motion for Class Certification.

I. INTRODUCTION

On July 9, 2009, Plaintiffs, Association of Community Organizations for Reform Now ("ACORN"), the Indiana State Conference of the National Association for the Advancement of Colored People ("NAACP"), and Paris Alexander, filed suit against Defendants alleging some of Indiana's FSSA offices had not fulfilled their voter registration obligations pursuant to Section 7 of the National Voter Registration Act ("NVRA"), including distributing voter registration applications and providing assistance in completing those applications to persons who apply for public assistance, or who submit a recertification, renewal, or change of address form relating to public assistance. Preceding the filing of this suit, on January 29, 2009, the Director of Project Vote's NVRA Implementation Project on behalf of ACORN sent a letter addressed to J. Bradley King and Pamela Potesta in their capacities as the Co-Directors of the Indiana Election Division.

The letter alleged that there had been a statistical decrease in the number of registration applications at voter assistance agencies in 2005-2006 compared to a similar period in 1995-1996. The letter further alleged that Project Vote conducted an investigation of unidentified FSSA agency offices in November 2008 and purportedly found instances of noncompliance occurring at the agency offices. After Project Vote did not receive a response to the letter, Plaintiffs filed this action.

On September 14, 2009, Plaintiffs amended their complaint to add class allegations and contemporaneously filed a motion for class certification. Plaintiffs' allegations in support of their motion for class certification essentially track those of the amended complaint. However, Plaintiffs' motion for class certification fails to demonstrate that Plaintiffs have met their burden of establishing the prerequisites of Federal Rule of Civil Procedure 23.

On September 28, 2009, Defendants filed a motion to dismiss. In their motion to dismiss, Defendants do not contest that Indiana's designated public assistance offices are obligated to comply with voter registration responsibilities set forth in both the Indiana law and the NVRA. Rather, Defendants contest whether Plaintiffs may seek declaratory or injunctive relief to enforce the NVRA because of lack of standing and failure to provide the mandatory pre-suit notice. Additionally, the Co-Directors of the Indiana Election Division ("IED") and the members of the Indiana Election Commission ("IEC") are not proper defendants, as neither of these governmental bodies can redress the claims advanced by Plaintiffs.

II. ARGUMENT

A. Standard for Certification of Class Action Status

Certification of a class action requires the action meet the requirements of a two-step test. First, the action must satisfy all four of the prerequisites mandated by Federal Rule of Civil

Procedure 23(a). These prerequisites are: (1) numerosity of the parties; (2) commonality of legal and factual issues; (3) claims or defenses of the representative party is typical of the claims or defenses of the class; and (4) adequacy of representation. *Eisen v Carlisle & Jacquelin*, 417 U.S. 156, 162, 94 S.Ct. 2140, 40 L.Ed. 2d 732 (1974). If it is determined that the four prerequisites contained in Rule 23(a) are met, the second step demands the action fit within one or more of the subsections of Rule 23(b). *Harriston v. Chicago Tribune Co.*, 992 F.2d 697, 703 (7th Cir. 1993). The party seeking certification bears the burden of establishing that all prerequisites are met. *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d 584, 596 (7th Cir. 1993). Failure to meet any of the requirements of Rule 23(a) precludes class certification. *Oshana v. Coca-Cola Co.*, 472 F.3d 506, 513 (7th Cir. 2006).

The Seventh Circuit has further determined that a plaintiff's proposed class definition must be ascertainable in that it "indeed [be] identifiable as a class." *Id.* The class definition must be (1) sufficiently precise to enable a court to ascertain the identity of class members by reference to objective criteria; and (2) that the named representative be a member of the proposed class. *See Alliance to End Repression v. Rochford*, 565 F.2d 975, 977 (7th Cir. 1977). A class definition that meets these criteria enables the court to weigh whether trying the lawsuit through the class mechanism would be burdensome and inefficient for both the court and the parties. *Simer v. Rios*, 661 F.2d 655, 670 (7th Cir. 1981). Furthermore, a class definition of sufficient precision ensures that only individuals who have experienced harm receive the benefits of relief. *Id.*

B. The Merits of Defendants' Motion to Dismiss Should Be Determined Prior to Determining Whether to Certify a Class

The outstanding issues presented in Defendants' motion to dismiss and reply in support of the motion to dismiss are intertwined with Plaintiffs' motion for class certification. First,

none of the plaintiffs have complied with the statutory prerequisite of furnishing the state with notice prior to commencing a civil action for declaratory and injunctive relief. (Defendants' Motion to Dismiss p. 3-8). Without a resolution of the notice requirements, it is entirely speculative to presume any of the named representatives are appropriate.

Resolution as to whether plaintiffs, ACORN and the NAACP, have associational or organizational standing to sue in their own right under the NVRA will further effect whether the named plaintiffs are appropriate. Nowhere in the language of the NVRA is there any clear indication that Congress intended to provide organizations with a cause of action to secure compliance with the procedural elements of an individual's right to vote. (Defendants' Motion to Dismiss p. 9-16). Plaintiffs' motion for class certification is premature until the resolution of Defendants' motion to dismiss.

C. Plaintiffs Cannot Meet Their Burden of Proving the Prerequisites for Class Certification per Federal Rule of Civil Procedure 23(a).

1. Plaintiff Cannot Satisfy the "Numerosity" Requirement of Federal Rule of Civil Procedure 23(a)(1)

Rule 23(a)(1) requires that the class be "so numerous that joinder of all members is impracticable." Fed.R.Civ.P. 23(a)(1). In general, joinder is considered impractical when a class consists of at least forty members. *See Swanson v. Am. Consumer Indus.*, 415 F.2d 1326, 1333 (7th Cir.1969). A plaintiff is not required to specify the exact number of proposed class members. *See Marcial v. Coronet Ins. Co.*, 880 F.2d 954, 957 (7th Cir. 1989). However, they cannot simply rely on conclusory allegations that joinder is impractical or upon speculative allegations as to the size of the class to satisfy numerosity. *Id.*

ACORN and the NAACP have relied on statistical probabilities and conclusory allegations to establish numerosity. Plaintiffs Memo. in Support of Motion for Class Cert., pp. 4-

5. Both ACORN and the NAACP allege that they have members in Indiana. ¶¶ 13, 16 Corr. Amend. Comp. They both further allege that some unspecified percentage of those members are unregistered to vote. *Id.* These plaintiffs also allege that some unspecified percentage of those members not registered to vote are applicants for public assistance. *Id.* It is speculative to presume that there are unregistered members of ACORN or the NAACP who were not provided registration assistance or opportunities during their interactions with a public assistance office when the sole named individual is not a member of either organization.

With regard to individuals who are not members of ACORN or the NAACP, discrete allegations of NVRA noncompliance in Marion County and Lake County cannot serve as the basis to alleged statewide noncompliance. Moreover, the allegations of Paris Alexander, the only individual named, involve only Marion County public assistance offices. ¶¶ 51, 52 Corr. Amend. Comp. It is entirely speculative to presume joinder is impracticable based upon a single individual whose allegations are confined to offices in one county.

2. Plaintiff Cannot Satisfy the “Typicality” Requirement of Rule 23(a)(3)

The typicality requirement contained in Rule 23(a)(3) is closely related to the question of commonality. *Rosario v. Livaditis*, 963 F.2d 1013, 1018 (7th Cir. 1992). The commonality requirement of Rule 23(a)(2) requires that there exist “questions of law or fact common to the class.” *Keele v. Wexler*, 149 F.3d 589, 594 (7th Cir. 1998). “A common nucleus of operative fact is usually enough to satisfy the commonality requirement of Rule 23(a)(2).” *Id.* The existence of some factual variations among class grievances will not defeat a class action. *Rosario v. Livaditis*, 963 F.2d 1013, 1017 (7th Cir. 1992). Claims arising from a defendant's standardized conduct towards members of the proposed class may present a case appropriate for treatment as a

class action. *Keele*, 149 F.3d at 594 (citing *Kleiner v. First Nat'l Bank of Atlanta*, 97 F.R.D. 683, 691 (N.D.Ga.1983)).

Determination of “typicality” focuses on “whether the named representatives’ claims have the same essential characteristics as the claims of the class at large.” *Retired Chicago Police Ass'n v. City of Chicago*, 7 F.3d at 596-597. “A plaintiff’s claim is typical if it arises from the same event or practice or course of conduct that gives rise to the claims of other class members and his or her claims are based on the same legal theory.” *De La Fuente v. Stokely-Van Camp, Inc.*, 713 F.2d 225, 232 (7th Cir. 1983).

ACORN and the NCAAP do not have typical claims as compared to individuals such as Paris Alexander unless ACORN and the NAACP were proceeding under associational standing, which Defendants have argued they cannot do. As articulated in Defendants’ motion to dismiss and response, ACORN and the NAACP may purport to have associational standing but have not met the requirements of associational standing. Namely, ACORN and the NAACP have failed to identify particular members who have suffered a concrete, particularized injury and rely upon the statistical possibility that some of its members might have been affected by the State’s alleged noncompliance with the NVRA.

If ACORN and the NAACP seek to proceed in their own capacity, neither asserts a direct injury. Individuals such as Paris Alexander have alleged a direct injury because compliance with Section 7 of the NVRA during a covered transaction at a public assistance office occurs on a person by person basis. ACORN and the NAACP nevertheless assert a theory of injury premised on the professed willingness of their organizations to step forward to volunteer to expend resources, including staff time and volunteer allocation, in response to the alleged failure of the State of Indiana to offer registration to individuals during covered transactions. As highlighted

in Defendants' motion to dismiss, it is entirely speculative whether such relief is afforded to organizational plaintiffs under the NVRA.

D. Plaintiff has Failed to Satisfy the Requirements of Class Certification under Federal Rule of Civil Procedure 23(b).

Assuming *arguendo* that the Court determines Plaintiff has proven each of the four elements required to maintain a class action under Federal Rule of Civil Procedure 23(a), Plaintiffs' request for class certification remains inadequate, as they have not satisfied any of the elements of Federal Rule of Civil Procedure 23(b), at least one of which must be met for class certification.

1. Plaintiff has not met the Requirements of Federal Rule of Civil Procedure 23(b)(1).

Rule 23(b)(1) provides for class certification when it is determined that separate actions would create a risk of inconsistent adjudication and incompatible standards of conduct for the party opposing the class, or where individual adjudication would be dispositive of the interests of other members not parties to the individual action. In the instant case, Plaintiffs have not alleged that class certification is appropriate under this subsection; therefore, Defendants assume Plaintiffs concede its inapplicability.

2. Plaintiff has not met the Requirements of Federal Rule of Civil Procedure 23(b)(2).

Plaintiffs have claimed that class certification is proper in this matter pursuant to the terms of Rule 23(b)(2), whereby a plaintiff must demonstrate that the defendant "has acted or refused to act on grounds generally applicable to the class" so that final injunctive or declaratory relief will be appropriate for the class as a whole. *See* Fed.R.Civ.P. 23(b)(2). Defendants do not contest that they are obligated to comply with voter registration responsibilities set forth in both the Indiana law and the NVRA. However, the pre-suit notice failed to provide Indiana with the

opportunity to investigate or cure any problem with the administration of FSSA's NVRA obligations. Since Alexander and any other individuals similarly situated have not properly fulfilled the pre-suit notice requirements as contemplated by the NVRA prior to initiating suit, the State cannot be deemed to have refused to act because the State has not explicitly disavowed its obligations under the NVRA, nor has the period to cure expired.¹

Pre-suit notice failed to provide Indiana with the opportunity to investigate or cure any alleged problems with the administration of FSSA's NVRA obligations. First, the letter sent "on behalf of ACORN" did not make any mention or reference to the other organizational plaintiff, the Indiana State Conference of the NAACP. Second, Paris Alexander did not provide notice for the obvious reason that the events giving rise to the allegations relating to her grievances had not yet occurred. Finally, the pre-suit notice is insufficient as to ACORN because the letter did not provide the State of Indiana with sufficient information which would allow it a meaningful opportunity to cure the alleged noncompliance with the NVRA.

The plain language of the NVRA provides a "private right of action" to an "aggrieved person" who must provide written notice and exhaust a ninety day remedial period before filing suit. See 42 U.S.C. §1973gg-9(b). A class action is not the appropriate mechanism for seeking relief under these provisions of the Act. The Plaintiffs' have not met the requirements of Federal Rule of Civil Procedure 23(b)(2).

¹ The only statutory exceptions to the notice requirement of the NVRA are when the alleged violation occurs within thirty days of an election, or if the United States Attorney General commences a civil action pursuant to his authority under 42 U.S.C. § 1973gg-9(a). Neither of these exceptions is applicable here.

3. Plaintiffs have not met the Requirements of Federal Rule of Civil Procedure 23(b)(3).

Rule 23(b)(3) allows class certification when questions of law or fact common to the members of the class predominate over any questions affecting only individual members. In addition, it must be determined that a class action is superior to other available methods for the fair and efficient adjudication of the controversy. *See Szabo v. Bridgeport Machines, Inc.*, 249 F.3d 672, 676 (7th Cir. 2001). The predominance inquiry of Rule 23(b)(3) is more demanding than the commonality requirement contained in Rule 23(a). *Amchem Products Inc. v. Windsor*, 521 U.S. 591, 623-24, 117 S.Ct. 2231, 138 L.Ed.2d 689 (1997). Under Rule 23(b)(3), a class action must also be superior to other available methods for the fair and efficient adjudication of the controversy. In determining whether a class action is superior, Rule 23(b)(3) provides that the court should consider:

- (A) the interest of members of the class in individually controlling the prosecution or defense of separate actions;
- (B) the extent and nature of any litigation concerning the controversy already commenced by or against members of the class;
- (C) the desirability or undesirability of concentrating the litigation of the claims in the particular forum;
- (D) the difficulties likely to be encountered in the management of a class action.

Fed. R. Civ. P. 23(b)(3). In the instant case, Plaintiffs have not alleged that class certification is appropriate under this subsection; therefore, Defendants assume Plaintiffs concede its inapplicability.

E. Plaintiffs have failed to identify a definable class.

As previously noted, a class definition must be ascertainable in that it “indeed [be] identifiable as a class.” *Oshana*, 472 F.3d at 513. The class definition must be (1) sufficiently precise to enable a court to ascertain the identity of class members by reference to objective criteria; and (2) that the named representative be a member of the proposed class. *Rochford*, 565

F.2d at 977. A class definition that meets these criteria enables the court to weigh whether trying the lawsuit through the class mechanism would be burdensome and inefficient for both the court and the parties. *Simer*, 661 F.2d at 670. Furthermore, a class definition of sufficient precision ensures that only individuals who have experienced harm receive the benefits of relief. *Id.*

Plaintiffs propose to define the class as:

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, have applied for public assistance through an FSSA office or have requested recertification or renewal or sought a change of address relating to public assistance through an FSSA office, and in that transaction were not provided by the FSSA with a voter-registration application, were not offered assistance in completing a voter-registration application by the FSSA to the same degree that the FSSA provides assistance in completing public-assistance forms, were not provided such assistance (unless refused) by the FSSA, and/or were not provided with a voter-notice form by the FSSA.

Plaintiffs proposed class definition fails to provide a precise, objective, and presently ascertainable class. The class definition broadly incorporates any individual who has suffered an alleged NVRA violation in any covered transaction without reference to any time, place, or specific geographic location. Such a broad class definition would render the notice requirement meaningless under the NVRA for it includes all past, present, or future persons regardless of whether the State was put on notice of, or provided an opportunity to correct, an individual's alleged grievance.

III. CONCLUSION

Based on the foregoing reasons, Defendants respectfully request that Plaintiffs' proposed class certification be denied.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on October 30, 2009, a copy of the foregoing was filed electronically. Notice of this filing will be sent to the following by operation of the Court's electronic filing system. Parties may access this filing through the Court's system.

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