

Nos. 07-3829, 07-4165

IN THE UNITED STATES COURT OF APPEALS
FOR THE SIXTH CIRCUIT

CARRIE HARKLESS, *et al.*,

Plaintiffs-Appellants

v.

JENNIFER BRUNNER, *et al.*,

Defendants-Appellees

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF OHIO

BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE*
SUPPORTING APPELLANTS AND URGING REVERSAL

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INTEREST OF THE UNITED STATES

The United States submits this *amicus curiae* brief pursuant to Federal Rule of Appellate Procedure 29.

The National Voter Registration Act of 1993 (NVRA), 42 U.S.C. 1973gg *et seq.*, was passed to “increase the number of eligible citizens who register to vote in elections for Federal office,” “protect the integrity of the electoral process,” and “ensure that accurate and current voter registration rolls are maintained.” 42

U.S.C. 1973gg(b). The Attorney General is charged with enforcement of the NVRA. 42 U.S.C. 1973gg-9(a). Accordingly, the United States has a significant interest in ensuring that the scope of its enforcement authority – and, in particular, its ability to hold state officials responsible for NVRA violations – is not improperly circumscribed.

STATEMENT OF THE ISSUES

1. Whether a statewide public-assistance agency is liable for NVRA violations committed by its local branch offices.
2. Whether a state’s chief election official is a proper defendant in a lawsuit alleging NVRA violations by a statewide public-assistance agency.

STATEMENT OF THE CASE

1. Statutory Background

This case involves a claim arising under Section 7 of the NVRA, 42 U.S.C. 1973gg-5. Section 7 requires, *inter alia*, that (1) each state designate as “voter registration agencies” (VRAs) all state offices “that provide public assistance,” 42 U.S.C. 1973gg-5(a)(2)(A); and (2) all VRAs distribute voter-registration applications, assist applicants in completing such applications, and accept completed applications, 42 U.S.C. 1973gg-5(a)(4)(A). VRAs that provide public

assistance must distribute voter-registration applications in response to any transaction involving public assistance. 42 U.S.C. 1973gg-5(a)(6).

2. *Factual Allegations*

On September 21, 2006, plaintiffs filed a one-count complaint in the Northern District of Ohio alleging that Ohio's secretary of state and the director of Ohio's Department of Job and Family Services (DJFS) failed to fulfill their obligations under Section 7. Specifically, the complaint alleges widespread NVRA failures, as evidenced by the following: (1) random visits to DJFS offices in several counties that revealed the offices had no voter-registration applications on hand (R. 1, Complaint, pp. 8-9 ¶ 27); (2) a survey of people leaving DJFS facilities revealing that only three of 103 were asked if they wished to register to vote (R. 1, Complaint, p. 9 ¶ 28); (3) during the 2002-2004 reporting period, ten county DJFS offices failed to register any voters, 17 other county offices registered fewer than ten voters, and another 32 county offices registered fewer than 100 voters (R. 1, Complaint, p. 10 ¶ 30); and (4) although DJFS offices processed approximately 4.7 million requests for assistance between 2003 and 2004, the number of voter-registration applications processed during that period amounted to less than one-half of one percent of that number (R. 1, Complaint, pp. 10-11 ¶ 31).

3. *Proceedings Below*

Defendants moved to dismiss plaintiffs' complaint pursuant to Rules 12(b)(1) and 12(b)(6) of the Federal Rules of Civil Procedure, arguing that (1) the two individual plaintiffs failed to provide notice prior to filing suit, as required by 42 U.S.C. 1973gg-9(b); (2) one of the plaintiffs – the Association of Community Organizations for Reform Now (ACORN) – lacked Article III standing; and (3) the complaint failed to state a claim against either defendant. The district court rejected defendants' argument regarding the individual plaintiffs' alleged failure to provide proper notice, see *Harkless v. Blackwell*, 467 F. Supp. 2d 754, 761-762 (N.D. Ohio 2006), but otherwise granted defendants' motions and dismissed the case. Specifically, the court held that ACORN lacked standing to sue either on its own or on behalf of its members. *Id.* at 759-761. It then dismissed the complaint, concluding that failures by local officials could not serve as the basis for NVRA claims against the secretary of state or the director of DJFS. *Id.* at 762-769.

In reaching the latter conclusion, the district court held that no claim could be brought against the secretary of state because Ohio law placed the responsibility for implementing the relevant NVRA provisions on local DJFS offices, and failings by those offices could not be imputed to the secretary. *Harkless*, 467 F. Supp. 2d at 762-763. To support this conclusion, the district

court relied in part on the summary judgment ruling in *United States v. Missouri*, No. 05-4391, 2006 WL 1446356 (W.D. Mo. May 23, 2006), which currently is on appeal before the Eighth Circuit. As in *Missouri*, the district court in this case concluded the secretary of state lacked authority to control the actions of local officials. *Harkless*, 467 F. Supp. 2d at 767. The district court similarly dismissed the claims against the director of DJFS, concluding that although state law permitted DJFS to oversee local offices with regard to the provision of family services, it did not *require* DJFS to oversee NVRA compliance at the local level. *Id.* at 768-769.

Plaintiffs filed a motion for reconsideration, which the district court construed as a motion to alter or amend judgment under Federal Rule of Civil Procedure 59(e). The district court denied the motion for substantially the same reasons it granted summary judgment to defendants. (R. 36, August 9, 2007, Order, pp. 2-4). This appeal followed.

SUMMARY OF ARGUMENT

Both the director of DJFS and the secretary of state are proper defendants in this case. The district court's holding to the contrary therefore should be reversed.

DJFS is designated under Ohio law as a voter-registration agency (VRA). As such, the NVRA requires DJFS to provide voter-registration applications and related services to those seeking public assistance from it. The complaint in this case alleges DJFS offices across the state systematically failed to fulfill this obligation. The director of DJFS plainly has the authority under state law to remedy these problems, and her assertions that she is not liable for the failures of her own offices cannot be squared either with the text of the NVRA or existing precedent. Accordingly, the district court erred in dismissing the claims against the director.

The secretary of state also is a proper defendant. DJFS – the VRA at issue here – is a state entity. Consequently, DJFS's responsibilities under the NVRA are those of the State. Because the secretary of state is "responsible for coordination of State responsibilities" under the NVRA, 42 U.S.C. 1973gg-8, the secretary is therefore liable for, at a minimum, coordinating the efforts of DJFS and other state VRAs to come into compliance with the NVRA. The district court therefore erred in dismissing the secretary of state as a party.

ARGUMENT

I

THE HEAD OF A STATE AGENCY DESIGNATED AS A VRA IS LIABLE FOR NVRA VIOLATIONS RESULTING FROM FAILURES BY THE AGENCY'S LOCAL OFFICES

A. Standard Of Review

Dismissals pursuant to Rules 12(b)(1) and 12(b)(6) are subject to *de novo* review. *Board of Trs. of Painesville Twp. v. City of Painesville*, 200 F.3d 396, 398 (6th Cir. 1999). “The court must construe the complaint in the light most favorable to plaintiffs, accept all well-pled factual allegations as true and determine whether plaintiffs undoubtedly can prove no set of facts consistent with their allegations that would entitle them to relief.” *League of United Latin American Citizens v. Bredesen*, 500 F.3d 523, 527 (6th Cir. 2007) (citing *Kottmyer v. Maas*, 436 F.3d 684, 688 (6th Cir. 2006)).

B. Constitutional And Statutory Background

Congress enacted the NVRA pursuant to its authority under the Elections Clause. See S. Rep. No. 6, 103d Cong., 1st Sess. 3-4 (1993). Although the Elections Clause does not specifically mention voter registration, it is well settled that the Clause gives Congress authority to regulate registration procedures that affect federal elections. See *Smiley v. Holm*, 285 U.S. 355, 366 (1932);

Association of Cmty. Org. for Reform Now (ACORN) v. Miller, 129 F.3d 833, 836 n.2 (6th Cir. 1997).

The Elections Clause grants state legislatures authority to prescribe “[t]he Times, Places and Manner of holding Elections for Senators and Representatives,” but specifies that Congress may “make or alter such Regulations.” U.S. Const. Art. I, § 4, Cl. 1. “The Clause is a default provision; it invests the States with responsibility for the mechanics of congressional elections, but only so far as Congress declines to preempt state legislative choices.” *Foster v. Love*, 522 U.S. 67, 69 (1997) (citations omitted).

By its terms, the NVRA governs only federal elections. 42 U.S.C. 1973gg-2. “Although the registration obligations imposed by the Act will likely affect registration procedures associated with state and local elections, this result will arise as a matter of convenience and not because the Act requires it.” *ACORN*, 129 F.3d at 837. The NVRA does not “prohibit[] a state from adopting separate registration requirements for the election of state officials.” *Ibid.*

C. The Director Of DJFS Is Liable For NVRA Violations Resulting From Failures By Local DJFS Offices

The NVRA requires that, “notwithstanding any other Federal or State law,
* * * each State shall establish procedures to register to vote in elections for

Federal office * * * by application in person * * * at a Federal, State, or nongovernmental office designated under [section 7].” 42 U.S.C. 1973gg-2(a)(3)(B). Such registration occurs at VRAs. The NVRA defines “voter registration agency,” or VRA, as “an office designated under [section 7(a)(1)] * * * to perform voter registration activities.” 42 U.S.C. 1973gg-1(5). Section 7(a)(1), in turn, requires each state to designate certain agencies as VRAs, 42 U.S.C. 1973gg-5(a)(1), including “all offices in the State that provide public assistance,” 42 U.S.C. 1973gg-5(a)(2)(A). As relevant here, agencies designated as VRAs must provide voter-registration applications and related services to those seeking public assistance from such agencies. 42 U.S.C. 1973gg-5(a)(4)(A) & (a)(6).

Ohio law designates DJFS as a VRA. See Ohio Rev. Code 3501.01(X) (defining the term “[d]esignated agency” to “includ[e] the department of job and family services”). As the director conceded below, this designation includes the statewide DJFS. (R. 4, Defendant Riley’s Motion to Dismiss, p. 2). Thus, the statewide DJFS plainly qualifies as a VRA, and is subject to the requirements placed on VRAs by Section 7 of the NVRA. The question is whether the statewide DJFS may shed the obligations – and potential liability – that

accompany this designation by delegating responsibility to its local offices. As explained below, it cannot.

Statutory designees may not avoid liability by delegating responsibility to others, and this principle applies with equal force when the statutory designee is a state attempting to delegate responsibility to local entities. See, e.g., *Henrietta D. v. Bloomberg*, 331 F.3d 261, 286 (2d Cir. 2003) (state cannot avoid its obligations under the Rehabilitation Act by delegating authority to localities to deliver federally-funded social services; instead, the state “is liable to ensure that localities comply with the Rehabilitation Act” in delivering those services), cert. denied, 541 U.S. 936 (2004); *Woods v. United States*, 724 F.2d 1444, 1447 (9th Cir. 1984) (“While the state may choose to delegate some administrative responsibilities [under the Food Stamp Act], ‘the ultimate responsibility for operation of the plan remain[s] with the state.’”) (quoting *California v. Block*, 663 F.2d 855, 858 (9th Cir. 1981)) (citations omitted); *Reynolds v. Giuliani*, 118 F. Supp. 2d 352, 386 (S.D.N.Y. 2000) (“[I]mplicit in the State’s obligation to administer the Food Stamp Act, Medicaid Act, and cash assistance programs is a duty to oversee the City defendants’ administration of the programs to ensure compliance with federal law.”); see also *Stanley v. Darlington County Sch. Dist.*, 84 F.3d 707, 713 (4th Cir. 1996) (“Because the Fourteenth Amendment imposes

direct responsibility on a state to ensure equal protection of the laws ‘to any person within its jurisdiction,’ a state’s delegation to a political subdivision of the power necessary to remedy the constitutional violation does not absolve the state of its responsibility to ensure that the violation is remedied.”). Accordingly, the statewide DJFS, which has been designated as a VRA, cannot avoid its responsibilities under the NVRA by delegating certain tasks to its local offices.

This conclusion is underscored by the fact that, in enacting the NVRA, Congress is presumed to have known that states have ultimate responsibility for administering many public assistance programs. *South Dakota v. Yankton Sioux Tribe*, 522 U.S. 329, 351 (1998) (“[W]e assume that Congress is aware of existing law when it passes legislation.”) (quoting *Miles v. Apex Marine Corp.*, 498 U.S. 19, 32 (1990)). It therefore is logical to assume Congress intended to engraft the NVRA onto this existing structure. Cf. *Lorillard v. Ponds*, 434 U.S. 575, 581 (1978) (“[W]here * * * Congress adopts a new law incorporating sections of a prior law, Congress normally can be presumed to have had knowledge of the interpretation given to the incorporated law, at least insofar as it affects the new statute.”).

For example, if a state chooses to participate in the federal Food Stamp program, its designated state agency must submit and comply with a plan of

operation. 7 U.S.C. 2020(d) & (e). Ohio participates in the Food Stamp program, with DJFS serving as its designated state agency. Ohio Rev. Code 5101.54(A).¹ For purposes of the Food Stamp program, the term “state agency” is defined, *inter alia*, as “the agency of State government, including the local offices thereof, which has the responsibility for the administration of the federally aided public assistance programs within such State, and in those States where such assistance programs are operated on a decentralized basis, the term shall include the counterpart local agencies administering such programs.” 7 U.S.C. 2012(n). Accordingly, it is the state – and DJFS in particular – that ultimately is responsible for compliance under the food stamp program even when some administrative responsibilities are delegated to local offices:

Food stamp eligibility and benefit determination (certification) is a state responsibility. Most often it is performed by local welfare agencies who are either semi-autonomous (under general state supervision) or actually part of the state welfare agency. Though actual certification is accomplished at the local level, the state is held responsible for the procedure. In some cases, where local welfare agencies have refused to operate the food stamp program, the state has stepped in and is administering the program on a local basis.

¹ The same provision of Ohio law that designates DJFS as the administrator of the Food Stamp program also mandates that “[a]ny person who applies for food stamps under this section shall receive a voter registration application under [Ohio Rev. Code 3503.10].” Ohio Rev. Code 5101.54(A) & (F).

Robertson v. Jackson, 972 F.2d 529, 534 (4th Cir. 1992) (quoting H.R. Rep. No. 95-464, 95th Cong., 1st Sess. 299 (1977)). Thus, as the Fourth Circuit held in *Robertson*, “[a]lthough the state is permitted to delegate administrative responsibility for the issuance of food stamps, ‘ultimate responsibility’ for compliance with federal requirements nevertheless remains at the state level.” 972 F.2d at 533. The same holds true with respect to the NVRA.²

Indeed, one court expressly has held that state agencies are responsible under Section 7 for ensuring compliance by their local offices. In *United States v. New York*, 255 F. Supp. 2d 73 (E.D.N.Y. 2003), the court addressed the same question at issue here under analogous facts. There, the state of New York designated both the statewide agencies at issue and their local district offices as VRAs. *Id.* at 75-76. As in this case, the defendant state agencies in *New York* claimed they were not liable for NVRA violations committed by their local offices. The district court rejected this argument:

² In addition to the federal statutory provisions for the food stamp program, there also are federal regulations for other federal public-assistance programs administered by DJFS that require that the single state agency administering those programs not delegate to local offices its authority over those programs. See 45 C.F.R. 205.100; 42 C.F.R. 431.10. These regulations likewise note the obligation of such agencies to conduct NVRA voter registration. See 45 C.F.R. 205.50(a)(4)(iv); 42 C.F.R. 431.307(d).

[Defendant state agencies] correctly state that the NVRA does not explicitly require that state agencies ensure NVRA compliance by county or city-run district offices. It matters not. It would be plainly unreasonable to permit a mandatorily designated State agency to shed its NVRA responsibilities because it has chosen to delegate the rendering of its services to local municipal agencies.

Id. at 79. In reaching this conclusion, the court noted that “the burdens that would be imposed upon the Attorney General and those persons seeking enforcement of the NVRA through the private right of action conferred by Congress * * * would be palpable if they had to resort to litigation against multiple local agencies in lieu of holding [state voter-registration agencies] fully accountable for compliance with the NVRA.” *Id.* at 81.

The district court in this case distinguished the holding in *New York* based on its belief that “New York law granted the State control over the local offices,” while Ohio law places local DJFS offices under the control of local officials. *Harkless*, 467 F. Supp. 2d at 765-767. This was error.

The decision in *New York* expressly states that the offices at issue in that case were run by local officials. See *New York*, 255 F. Supp. 2d at 77 (describing both defendant state agencies and noting that both operate through local offices run by local governments). Indeed, the opinion in *New York* notes at the outset that the reason the two state agencies involved in the litigation had not yet settled

with the plaintiffs, as most of the other defendant state agencies had, was because they “differ[ed] from the other defendant State agencies in that they administer[ed] their services through district offices run by local municipal governments.” *Id.* at 74-75. Even the operative language from the ruling, quoted above, recognizes that what is at issue is “NVRA compliance by *county or city-run district offices.*” *Id.* at 79 (emphasis added).

As with the state agency at issue in *New York*, Ohio’s DJFS also has authority under state law to ensure NVRA compliance by local offices. Although local DJFS offices are overseen by the local board of county commissioners, see *Harkless*, 467 F. Supp. 2d at 766-767 (quoting Ohio Rev. Code 329.01 & 329.02), Ohio law requires DJFS to designate a coordinator to be responsible for its voter-registration program, Ohio Rev. Code 3503.10(A), and provides DJFS with authority to take corrective action against both county boards of commissioners and county family services agencies for, *inter alia*, violations of federal law. Ohio Rev. Code 5101.24(A), (B)(3) & (C). The director of DJFS therefore has ample ability to control NVRA compliance by local DJFS offices.³

³ The district court in this case also quotes at length from the decision in *New York* in an effort to demonstrate that the holding in *New York* was based on state law. See *Harkless*, 467 F. Supp. 2d at 765-766. But a fair reading of the decision in *New York* indicates the court reached its ruling based on the analogy to
(continued...)

Finally, the director of DJFS argued below that the authority to force NVRA compliance by local officials was trumped by Ohio Revised Code 3503.10(L), which states that “[t]he department of job and family services and its departments, divisions, and programs shall limit administration of the aspects of the voter registration program for the department to the requirements prescribed by the secretary of state and the requirements of this section and the National Voter Registration Act of 1993.” Specifically, the director took the position that because neither federal nor state law *requires* DJFS to supervise NVRA compliance at the local level, section 3503.10(L) prohibits it from doing so.

This argument fails, not only because it is based on a strained reading of section 3503.10(L), but also because state law is preempted to the extent it conflicts with federal legislation enacted pursuant to the Elections Clause. See *Foster*, 522 U.S. at 69 (“[I]t is well settled that the Elections Clause grants Congress ‘the power to override state regulations’ by establishing uniform rules for federal elections, binding on the States.”) (quoting *U.S. Term Limits, Inc. v. Thornton*, 514 U.S. 779, 832-833 (1995)); *ibid.* (“[T]he regulations made by

³(...continued)
precedent interpreting other federal statutes, and then simply noted that its ruling was consistent with state law. See *New York*, 255 F. Supp. 2d at 79-80 (discussing federal precedent and then noting that “[t]his principle of dominant state accountability is embraced by New York State judicial precedents as well”).

Congress are paramount to those made by the State legislature; and if they conflict therewith, the latter, so far as the conflict extends, ceases to be operative.”)

(quoting *Ex Parte Siebold*, 100 U.S. 371, 384 (1879)); accord *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349, 1354 (11th Cir. 2005) (NVRA’s regulation of method of delivery of voter-registration forms “overrides state law inconsistent with its mandates”); *ACORN*, 129 F.3d at 836 (holding, in an NVRA case, that the Elections Clause “specifically grants Congress the authority to force states to alter their regulations regarding federal elections”). Accordingly, because the NVRA requires VRAs to take certain steps in aid of voter registration, see 42 U.S.C. 1973gg-2(a) & 1973gg-5(a), and because DJFS has been designated as a VRA, it cannot use state law as a shield to avoid compliance with duties imposed by the NVRA. A contrary ruling, if advanced to its logical conclusion, would allow designated statewide agencies to avoid their NVRA obligations through delegation and decentralization – a result Congress could not have intended.

II

**OHIO’S SECRETARY OF STATE IS A
PROPER DEFENDANT IN THIS ACTION**

The district court similarly erred in dismissing the secretary of state from the litigation. The NVRA requires each state to “designate a State officer or employee as the chief State election official to be responsible for coordination of State responsibilities under [the NVRA].” 42 U.S.C. 1973gg-8. As noted in the legislative history, the designated official is “responsible for implementing the state’s functions under the bill.” S. Rep. No. 6, 103d Cong., 1st Sess. 39 (1993). Under Ohio law, the secretary of state serves as the chief state election official for purposes of the NVRA. Ohio Rev. Code 3501.04.

Here, the VRA at issue – Ohio’s DJFS – is a state entity. Consequently, DJFS’s responsibilities under the NVRA are those of the State. Because the secretary of state is “responsible for coordination of State responsibilities” under the NVRA, 42 U.S.C. 1973gg-8, the secretary is therefore liable for, at a minimum, coordinating the efforts of DJFS and other state VRAs to come into compliance with the NVRA. The district court thus erred in dismissing the secretary of state as a party.

CONCLUSION

For the foregoing reasons, this Court should reverse the judgment of the district court.

Respectfully submitted,

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CERTIFICATE OF COMPLIANCE

Pursuant to Federal Rule of Appellate Procedure 32(a)(7)(B), I hereby certify that this brief is proportionally spaced, 14-point Times New Roman font. Per WordPerfect 12 software, the brief contains 3,793 words, excluding those parts exempted by Federal Rule of Appellate Procedure 32(a)(7)(B)(iii).

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DATED: November 6, 2007

CERTIFICATE OF SERVICE

I hereby certify that on November 6, 2007, a copy of the foregoing BRIEF FOR THE UNITED STATES AS *AMICUS CURIAE* was served by first class mail, postage prepaid, on the following counsels of record:

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