

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

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

Plaintiffs,

v.

DEBORAH E. SCOTT, et al.,

Defendants.

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

**REPLY MEMORANDUM OF LAW IN FURTHER SUPPORT
OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION**

Plaintiffs, by their undersigned counsel, submit this Reply Memorandum in further support of their motion for a preliminary injunction.

I. INTRODUCTION

Regarding in-person transactions, Defendants Scott and Luck agree, to a large extent, with Plaintiffs on what Section 7 of the National Voter Registration Act (“NVRA”) requires from the Missouri Department of Social Services (“DSS”), through its subunit Family Support Division (“FSD”). To comply with Section 7, DSS has set forth a policy that DSS personnel must provide clients voter registration opportunities, as part of all applications, recertifications, reinvestigations, and changes of address.

The parties disagree about whether DSS has followed the NVRA and its own policy. In its Suggestions in Opposition to Plaintiffs’ Motion for Preliminary Injunction of Defendants Scott and Luck (“DSS Opp.”), DSS claims it is offering voter registration as required by the NVRA and DSS policy.

The facts indicate otherwise. In the Memorandum of Law Supporting Plaintiffs' Motion for Preliminary Injunction (Plaintiffs Memo.) at 4, plaintiffs provided evidence showing that the number of registrations from Missouri public assistance agencies had decreased dramatically over time in contrast to Motor Vehicle registrations that have remained constant. Plaintiffs also provided declarations from DSS clients indicating that they had not been provided with voter registration opportunities by DSS personnel during recent in-person client interviews. Plaintiffs Memo at 6-7.

Since then, plaintiffs have had the opportunity to obtain discovery from DSS and documents from Missouri's Secretary of State (the "SoS"). This information demonstrates without a doubt that DSS has not provided voter registrations consistent with the NVRA and its own policies. Had DSS conducted voter registration consistent with the NVRA and its own policies, it would have required more than 1,630,000 registration forms for Food Stamp clients alone from July 2003 to April 2008. Instead, during that time, DSS used less than 620,000 registration forms. Thus, DSS has violated the NVRA and its own policies more than one million times in the last five years.

Discovery has also revealed why DSS's compliance is so poor. DSS management has taken a laissez faire approach toward NVRA compliance. Nobody has the responsibility, either centrally or locally, for monitoring compliance. Though voter registration is contained within DSS training materials, it is a small component of a lengthy training. Although DSS caseworkers must enter information from interviews into a database, they are not required to enter information regarding voter registration. In addition, compliance with the NVRA is not incorporated into the reviews of the case workers or their supervisors.

This reply will also address why DSS's failure to provide voter registration for remote transactions violates the NVRA and why DSS's new arguments that plaintiffs lack standing fail.¹

The equities clearly favor preliminary relief. Granting relief will merely require DSS to comply with a federal mandate and develop a system for ensuring that its employees comply with that mandate; denying relief will deprive hundreds of thousands of poor Missourians of the opportunity to register to vote at DSS offices in the coming months.

II. DSS IS NOT COMPLYING WITH THE NVRA

A. Contrary to the NVRA and DSS Policy, DSS is not Providing Voter Registration for all In-Person Transactions

Missouri law provides that the SoS must provide the voter registration form used by public assistance agencies. Mo. Ann. Stat. § 115.162.1. The Agency Voter Registration form has two sides. One side has the voter registration application; the other has the NVRA-required "declination." 42 U.S.C. § 1973gg-5(a)(6)(B); Mo. Ann. Stat. § 115.162.3. The declination includes, *inter alia*, the question, "If you are not registered to vote where you are now, would you like to register to vote here today?", check boxes to answer the question yes or no, and a request that individuals that indicate "no" sign the declination. 42 U.S.C. § 1973gg-5(a)(6)(B).

Under the policies contained in DSS's Income and Maintenance Manual, one voter registration form should be used for every in-person interview. Clients who want to register to

¹ With respect to the Defendant Local Election Authorities from Kansas City, St. Louis, and Jackson County ("Defendant LEAs), Plaintiffs and Defendant LEAs essentially agree that their liability comes down to the legal question of whether the LEAs bear any responsibility for DSS compliance with Section 7. The LEAs admit that they have done nothing to comply with the Section 7 as it relates to DSS beyond collecting forms from DSS and answering an occasional question, *see* Plaintiffs' Proposed Findings of Fact and Conclusions of Law (Pls. Prop. Findings) at ¶¶ 155-159, and the performance of the DSS offices in their jurisdictions has been abysmal. *See id.* at ¶¶ 45-47. Plaintiffs addressed the legal issue of LEA responsibility in opposing the motions to dismiss of each LEA. *See* Plaintiffs' Memorandum of Law in Opposition to Defendants St. Louis City Election Board of Election Commissioners and Scott Leiendecker, Mary Wheeler-Jones, Carol A. Wilson, Eileen M. McCann, Jack Lary And Clarence E. Dula Joint Motion To Dismiss ("Pls. Opp. to St.L Motion"), at 3-6 and Plaintiffs' Memorandum Of Law In Opposition To Motions Of Defendants Kansas City Election Board And Jackson County Election Board To Dismiss, Or In The Alternative, For Judgment On The Pleadings, at 3-7.

vote will check the “yes” box on the declination and complete the voter registration. Clients who do not want to register will check the “no” box on the declination and sign their name. If the client keeps the form blank, the case worker is supposed to record information on the declination indicating that the client declined voter registration. Pls. Prop. Findings at ¶¶ 23-27.

The number of in-person interviews over the past five years far exceeds the number of forms used by DSS. The largest public assistance program is Food Stamps. A client has to reapply for Food Stamps every six months and must interview in person at DSS offices once a year, absent special circumstances necessitating a waiver for a phone or in-home interview. Pls. Prop. Findings at ¶¶ 48-49, 66. From July 2003 to April 2008, DSS received 3,262,532 applications and reapplications for Food Stamps. *See id.* at ¶ 66; *see also id.* at ¶¶ 62-65. Conservatively assuming an even split between telephone interviews and in-person plus in-home interviews, DSS conducted 1,631,266 face-to-face interviews for Food Stamps. Voter registration should also have been offered and a voter registration form should have been used under the NVRA and DSS policy in other cases, such as in-person interviews for assistance other than Food Stamps.²

DSS’s liaison to the Secretary of State, Bob Hall, testified that he did not know how many voter registration forms DSS had used in recent years and that if he wanted to know, he would ask the SoS. Pls. Prop. Findings at ¶ 51. After his deposition, plaintiffs sent a public records request to the SoS regarding the number of voter registration forms it had ordered for DSS. *Id.* at ¶ 52. According to the documents produced by the SoS, from January 2003 to April

² For example, in 2007, DSS received 933,787 “unduplicated” applications for Medicaid, Child Care, Food Stamps, and TANF (meaning that if a client applied for more than one service in the same month it was counted as one application) compared to 691,950 applications for Food Stamps. *see* Pls. Proposed Findings at ¶¶ 64, 67.

2008 the SoS ordered 620,000 public assistance agency forms,³ which includes forms not only to be used by DSS but also by the Department of Health and Senior Services (“DHSS”).

As a result, from July 2003 to April 2008, when Plaintiffs’ complaint was filed, DSS would have used more than 1,630,000 forms if it was complying with the NVRA and its own policies and it actually used less than 620,000 forms.⁴ DSS’s failure to carry out its NVRA responsibilities could not be clearer.

The non-compliance emanates from DSS’s failure to institute a program to evaluate and ensure NVRA compliance. No employee has responsibility for agency-wide NVRA compliance. In his deposition, Charles Bentley suggested that Bob Hall has that responsibility. Pls. Prop. Findings at ¶¶ 82-83. Mr. Hall’s testimony makes clear that he does little more than receive orders for voter registration forms from the DSS field offices and communicate with the Secretary of State’s office regarding voter registration form issues. *Id.* at ¶¶ 84-90. He has only initiated contact with a DSS field office once regarding voter registration – when the office requested forms directly from the Secretary of State instead of him. *Id.* at ¶ 86. He does not even know how many voter registration forms the DSS warehouse has or how many forms the DSS’s field offices have unless an office tells him that they have run out of forms. *Id.* at ¶ 87.

The deposition testimony of DSS representatives from the Kansas City and St. Louis metropolitan areas also revealed that nobody in those jurisdictions has the local responsibility for

³ In June 2008, DSS ordered 150,000 forms. The order was increased by 75,000 on June 16, the week after the depositions of Mr. Hall and other DSS employees were taken. Pls. Prop. Findings at ¶ 58.

⁴ This discrepancy cannot be explained on the ground that DSS had an extremely large number of forms in storage at the beginning of 2003. In 2005, the Secretary of State informed DSS that it was using outdated forms that needed to be destroyed once revised forms that reflected changes in voter registration requirements were sent and DSS communicated this to its field offices. Pls. Prop. Findings at ¶¶ 70. In September 2007, the Secretary of State notified DSS that the voter registration forms had changed again and superseded forms should not be used. *Id.* at ¶ 71.

ensuring NVRA compliance and they do not track the number of declination forms to see whether it matches the number of in-person interviews. Pls. Prop. Findings ¶¶ at 92-93.⁵

DSS treats voter registration as an afterthought. The system that DSS caseworkers use to complete all benefits applications, FAMIS, does not have a field(s) for caseworkers to check regarding voter registration. Pls. Prop. Findings at ¶¶ 106-107.⁶ As a result, DSS cannot generate reports regarding the offering of voter registration. *Id.* at ¶ 107. In 2004, the reference to voter registration services was removed from the Food Stamp Manual's list of forms to be provided during an interview; the reference was returned to the manual following filing of this lawsuit. *Id.* at ¶ 129. In addition, a county office's compliance with the NVRA is not included in management evaluations, because DSS is "required to follow the Food and Nutrition Service objectives for the year, and the National Voter Act is not one of the objectives." *Id.* at ¶ 121. Moreover, voter registration services are not necessarily included in an employee's appraisal because failure to provide the service does not amount to a "quality error."⁷ *Id.* In that vein, DSS's "Overview of Voter Registration Procedures" states that "the Eligibility Specialist Supervisor Case Reading Guide lists voter registration as one of the [sic] documentations the supervisor should look for when reading a case; the absence of a notation indicating voter registration was offered is not an error, but is used as a training tool." *Id.* at ¶ 105.⁸

⁵ Documents produced by DSS revealed the degree of chaos relating to voter registration in local DSS offices including one office that held onto completed voter registration forms for a year. *Id.* at ¶¶ 131-139.

⁶ On a separate screen within FAMIS known as EUMEMROL, a caseworker can enter additional notes that are not prompted by the application's questions. However, there is no requirement that a case worker enter notes in EUMEMROL, and even if a caseworker entered comments in EUMEMROL, there is no way to track it on FAMIS. *Id.* at ¶ 107.

⁷ While DSS has submitted deposition testimony of some its local managers which suggests that they check to see whether caseworkers offer voter registration during interviews, other managers testified that they do not. *Id.* at ¶¶ 111-117. Moreover, review for non-probationary employees is extremely limited. *Id.* at 111-112

⁸ After the plaintiffs took the depositions of DSS employees, DSS produced an "Interactive Interview Observation Checklist" dated May 2008, a month after the Complaint was filed, which added "Offers Voter Registration" as the last checklist item in the General/Technical portion of the Body of Interview portion of the checklist.

In its Opposition, DSS emphasizes that voter registration is covered during training of new employees. But the testimony and documents DSS submitted in support, as well as additional documents and testimony, only serve to demonstrate the perfunctory treatment voter registration is given – voter registration is always a small component of a larger training and nowhere in any of the training materials is there a step-by-step instruction as to how to handle voter registration training. Pls. Prop. Findings at ¶¶ 94-104.⁹

In sum, Plaintiffs have demonstrated that DSS has failed to provide voter registration for all in-person interviews as required by the NVRA and DSS policy.

B. Section 7 Applies to Remote Transactions

DSS does not offer clients voter registration for “remote” transactions, and it admits that many of the transactions it conducts are by mail or telephone. Pls. Prop. Findings at ¶¶ 140-153.

Section 7 requires voter registration agencies to distribute a voter registration form “with *each* application for such service or assistance, and with *each* recertification, renewal, or change of address form relating to such service or assistance.” 42 U.S.C. § 1973gg-5(a)(6)(A)(emphasis added). In addition, the Missouri Secretary of State’s NVRA “Implementation Guide for Missouri Public Assistance Agencies” specifies that “[t]he opportunity to register should be offered whether the contact is made in person, by telephone, by mail, by e-mail or during a home visit.” Pls. Prop. Findings. at ¶ 141. To exempt remote transactions, particularly as they become more frequent with technological advances, would undermine the first purpose for the NVRA mentioned by Congress: “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-(b)(1).

⁹ Although training was one of the topics of Plaintiffs’ 30(b)(6) depositions, DSS never produced any employee from its training department for deposition and no training department employee from DSS is scheduled to testify at the hearing. None of the DSS employees who were deposed or who DSS has indicated may testify at trial have much knowledge regarding training.

III. PLAINTIFFS HAVE STANDING

In their opposition papers, DSS and the St. Louis City Board of Election Commissioners contend that Plaintiffs lacks standing to bring suit. Plaintiffs have previously addressed several of these arguments, including but not limited to those the germaneness of this action to ACORN's organizational purpose and Defendants' misguided reliance on *Sierra Club v. Morton*, 405 U.S. 727 (1972), *Harkless v. Blackwell*, 467 F. Supp. 2d 754 (N.D. Ohio 2006), and *ACORN v. Fowler*, 178 F.3d 350 (5th Cir. 1999). See Pls. Opp. to St.L Motion to Dismiss, at 10-16. Plaintiffs hereby incorporate those arguments as if fully stated herein and will proceed to address new arguments made by DSS.

DSS contends that ACORN does not meet the first and third prongs of associational standing because, according to DSS, ACORN does not have any member who would have standing to sue in their own right and Plaintiffs' NVRA claim "requires individualized proof and the participation in the suit of an individual who has suffered a redressable injury." DSS Opp. at 18-19. DSS then claims that because Plaintiff O'Neal does not have standing, ACORN cannot satisfy either prong. Even if Plaintiff O'Neal lacked standing (as discussed below, she has standing), ACORN meets the standard. ACORN has submitted uncontroverted testimony that there are ACORN members in Missouri, other than Ms. O'Neal, that would have standing because they are not registered to vote at their current address, are receiving public assistance, and were not offered voter registration by DSS. Declaration of Jeff Ordower at ¶ 8. Regarding the third prong, individualized proof is usually not needed where declaratory and injunctive relief is requested as opposed to damages, see *United Food & Commercial Workers Union Local 751 v. Brown Group, Inc.*, 517 U.S. 544, 556 (1996). Moreover, unlike the plaintiffs in cases cited by DSS, *Missouri Protection and Advocacy Services, Inc. v. Carnahan*, 499 F.3d 803, 810 (8th

Cir. 2007) and *Community Stabilization Project v. Cuomo*, 199 F.R.D. 327, 333 (D. Minn. 2001), ACORN has provided evidence regarding members that have been injured by DSS's policy.

With respect to organizational standing, DSS makes several arguments as to why ACORN has not suffered an injury in fact but none of them are availing. The Fifth Circuit decision in *ACORN v. Fowler*, 178 F.3d 350 (5th Cir. 1999), answers two DSS arguments: (1) that ACORN's attempts to register voters outside of DSS offices "are but a small fraction of a voter registration drive," DSS Opp. at 13-14; and because ACORN's budget for voter registration for 2008 is already set and is separate from its other activities in 2008, conducting voter registration outside of the DSS offices does not affect ACORN's bottom line. DSS Opp. at 12. The court held that ACORN had standing even though its voter registration drive outside of public assistance agency offices was small – 400 voters registered. It also held that ACORN was injured because it could have registered other voters if Louisiana had complied with the Act:

A portion of the resources ACORN has spent and currently spends on voter registration drives counteracts Louisiana's alleged failure to implement the Act. It is these wasted resources, which ACORN could have put to use registering voters that the NVRA, even properly implemented, would not have reached (or which ACORN could have put toward any other use it wished), that provide ACORN with standing.

Id.

DSS also argues that ACORN would attempt to register voters outside of DSS offices anyway because some of those offices are located in buildings with other service providers, DSS Opp. at 12-13. This argument is not only speculative but it is contradicted by the affidavit of Missouri State Head Organizer, who averred that DSS's failure to offer registration led to ACORN registering voters outside of DSS offices. Declaration of Jeff Ordower at ¶ 14-16.

The other arguments made by DSS – that ACORN will not attempt to register voters in 2009 because it will not have money to do so, DSS Opp. at 14; and ACORN only considers the

registration drive of the Missouri Pro Vote Coalition, and not consider governmental efforts to register voters in planning its voter registration efforts in Missouri – rely on mischaracterizations of Jeff Ordower’s testimony. Though he said that ACORN would not have dedicated money for voter registration in 2009, in the same sentence he said that ACORN would conduct voter registration anyway. Ordower Dep. at 111:2-3. And he testified that, "In Missouri, the only other organization doing significant registration is Missouri Pro Vote, Progressive Vote Coalition," *Id.* at 104:24-105:1, not that ACORN disregarded government efforts in its planning.

DSS also asserts that Plaintiff O’Neal has not suffered an injury because, based on Mo. Ann. Stat. § 115.165, a registered voter like Ms. O’Neal who has moved within an election authority jurisdiction may "go to a polling place, update her residence information, and then vote." DSS Opp. at 17. In fact, Ms. O’Neal has been injured. She is currently an “inactive” voter, which means that she can be purged from the registration list if she does not vote, Mo. Ann. Stat § 115.193.1(2), and if she votes, she has to “complete additional administrative steps prior to casting a ballot if [she] remain[s] designated as inactive on election day.” City of St. Louis, *Voter Information: Inactive List*, <http://stlcin.missouri.org/bdelection/inactivelist/search.cfm> (last visited July 7, 2008); Mo. Ann. Stat. § 115.165. If DSS had provided Ms. O’Neal with the opportunity to register to vote at her current address, she would not be inactive. So she has suffered an injury.

IV. CONCLUSION

For the reasons set forth above, Plaintiffs request this Court grant their Motion for Preliminary Injunction.

Respectfully submitted,

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