

**IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION**

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

Plaintiffs,)

v.)

CATHY COX, et al.,)

Defendants.)

**CIVIL ACTION NO.
1:06-CV-1891-JTC**

**PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW
BY DEFENDANTS**

COME NOW CATHY COX, CLAUD L. (“TEX”) MCIVER III, J.
RANDOLPH EVANS, DAVID J. WORLEY and JEFFREY K. ISRAEL,
Defendants herein in their official and individual capacities, and, pursuant to this
Court’s order of August 25, 2006, show that the following facts and law govern
this case and should be adopted by the Court:

I. FACTUAL AND PROCEDURAL BACKGROUND

1.

This case involves a challenge to a subsection of a Georgia State Election
Board (“SEB”) regulation which prohibits unauthorized copying of completed
voter registration applications and requires that after completion they be sealed.

Ga. Comp. R. & Regs. r. 183-1-6-.03(3)(o)(2).

2.

The regulatory subsection in question provides as follows:

No person may accept a completed registration application from an applicant unless such application has been sealed by the applicant. No copies of completed registration applications shall be made. This paragraph shall not apply to registrars and deputy registrars.

Ga. Comp. R. & Regs. r. 183-1-6-.03(3)(o)(2).

3.

Although it is not challenged in this action, the regulation also provides:

Notwithstanding any provision of this rule to the contrary, a valid registration application that is timely received by the Secretary of State or the registrars shall be accepted.

Ga. Comp. R. & Regs. r. 183-1-6-.03(3)(o)(4). Thus, this case does not a regulation that is preventing any person from registering to vote, since the Secretary of State or local Georgia registrars are required to register people even if the regulation is violated. The regulation, rather, limits what can be done with private voter registration applications.

4.

The State Election Board, by and through the counsel for the Defendants and the SEB's representative at its 30(b)(6) deposition, has also stipulated that the regulation does not prohibit copying of applications if that is voluntarily done or permitted by the registrant. Thus, the only question in this case is whether copying

of an application without permission violates the rights of the Plaintiffs. (Affidavit of Kathy Rogers at ¶ 9; *see also* deposition of Kathy Rogers at pp. **92-93**, where this was stipulated.)

5.

None of the Plaintiffs in this action has sued as a voter who has been denied the right to register to vote. (Complaint.) Each Plaintiff sues claiming that they have a right to conduct voter registration drives which is infringed if they cannot copy voter registration applications without permission or they are required to seal the applications after they receive them. (*Id.*; *see* deposition of Kathy Rogers.)

6.

Under the National Voter Registration Act (“NVRA”) persons registering to vote may use either a State form or a federal form. 42 U.S.C. 1973gg-4(a)(2). Georgia has its own form tailored to Georgia law and its accepts the federal form, which has instructions tailoring it to federal law. (Exhibits 12 and 13 to deposition of Kathy Rogers.)

7.

The forms -- both State and federal -- expressly call for confidential information. The federal form has a box calling for the “I.D. Number” which is defined in the instructions accompanying the form to mean, for Georgia, the registrant’s social security number. (Deposition of Kathy Rogers at p. 79, and

Exhibit 13 thereto; affidavit of Kathy Rogers ¶ 6 and Exhibit B thereto.) The State of Georgia's application expressly calls for social security number. (Deposition of Kathy Rogers at pp. 78-79 and Exhibit 12 thereto; affidavit of Kathy Rogers ¶ 6 and Exhibit A thereto.)

8.

The forms also contain other information that many people consider private, such as their address, their date of birth, their telephone number, their race or ethnicity, their former addresses and names, and their political party (federal form only). (Deposition of Kathy Rogers and Exhibits 12 and 13 thereto; affidavit of Kathy Rogers and Exhibits A and B thereto.) This information, like social security numbers (and the future identifying number) is used to identify prospective voters and see if they qualify to vote. (*Id.*)

9.

The reasons for subsection (o)(2) are not in dispute. The regulation was enacted by the State Election Board to prevent misappropriation and misuse of the personal information on the voter registration forms. As stated by Kathy Rogers in her affidavit:

The Secretary of State's Office uses social security numbers to determine voter identity and to prevent fraud. The Secretary of State takes numerous measures to prevent the release of these numbers, and, consistent with federal and Georgia law, it does not release social security numbers to private individuals or other agencies unless a court orders it to do so. The information on the federal and

state voter registration forms may be used, if misappropriated for not only voting and registration fraud, but for identity theft and financial crimes, a growing problem in the United States and in Georgia which the Secretary of State and State Election Board recognize and are attempting to prevent. The prior existence of duplicate social security numbers in the State's voter registration database (which has now been purged of such numbers), and the occasional receipt of incorrect and possibly fraudulent social security numbers, suggests that fraud may occur. The Secretary of State's Office has witnessed massive fraud in other areas related to registration, such as the receipt of bundles of thousands of evidently fraudulent applications during the summer of 2004 from Fulton and DeKalb Counties.

(Affidavit of Kathy Rogers ¶ 7.)

10.

In *Schwier v. Cox*, civil action no. 1:00-CV-2820-JEC in the United States District Court for the Northern District of Georgia, the district court held that the State of Georgia could not require that social security numbers be provided (since doing so was not "grandfathered in" under the Privacy Act of 1974, 5 U.S.C. § 552a note), but the State could still seek them on a voluntary basis. See Dkt. 90 in *Schwier* (Consent Decree.)

11.

Georgia's system for voter identification will change by the end of this year -- and the numbers on the new system will still be confidential -- but there is no question that the State currently collects social security numbers now and does so consistent with a court order permitting it. *Id.*

12.

The overwhelming majority of registrants provide their social security number when registering. (Affidavit and deposition of Kathy Rogers **at p. 79.**) Registrants, quite reasonably, are often concerned about the privacy of that number as well as other information on the voter registration form. (Deposition of Kathy Rogers at pp. **86-87.**) They have expressed these concerns to the Secretary of State's Office. (*Id.*)

13.

As shown by Plaintiffs affidavits and deposition testimony, the Plaintiffs' desire to copy completed voter registration applications is based predominantly (if not entirely) on the desire to contact prospective voters at a later date. This is plain both from their deposition testimony as well as their affidavits. (*See, e.g.*, Affidavit of Stephanie L. Moore ¶¶ 8, 9; Affidavit of Helen Butler at ¶ 6; deposition of Helen Butler at pp. 29-30; Deposition of Dana Williams at pp. 34-35, 40.)

14.

There is no dispute that the Plaintiffs can and do keep sign in sheets and other information on voters when conducting their private voter registration drives. (*See, e.g.*, deposition of Helen Butler at pp. 29-30.) They prefer not to keep sign in sheets since they think it's less reliable for their purposes. (*Id.*) No conduct of the Defendants prevents the Plaintiffs from keeping sign in sheets or obtaining

voluntary information from people they register. Indeed, as noted above, Defendants agree that the regulation does not prohibit voluntary and knowing copying of applications, it just prevents copying of the applications, which contain confidential information, without permission.

15.

The Plaintiffs also assert that they want the voter registration applications so that they can check the quality of their voter registration work. While their desire to check information is laudable, it is not required by law; indeed, it is the duty by Georgia statutory law of the local board of registrars and/or the Secretary of State's Office to obtain or correct missing or erroneous information from registrants. O.C.G.A. § 21-2-220(d).

16.

It cannot be disputed that "identity theft" is a significant and growing problem in our society, and that the privacy of social security numbers, as well as other personal information is not necessary to prevent such theft.

17.

Indeed, one form of identity theft involves calling people to see if the caller can elicit personal information from them. Plaintiff Dana Williams admitted to making (albeit innocently) just such calls; he testified that he called the people he

registered and asked for their social security numbers to see if it was correct.

(Deposition of Dana Williams at pp. **46**.)

18.

In addition to having their personal information distributed without permission (and potentially misused) citizens in our society have a right to be free from solicitations and blind calls -- that is, calls without permission. *See, e.g.*, 47 U.S.C.A. § 227 (Telephone Consumer Protection Act). These are the types of contacts Plaintiffs wish to make, however; that is the whole purpose of getting the information on the forms even without the registrants' permission. (*See* citations at ¶¶ 4, 13, *above*.)

19.

The testimony establishes that the State does not require deputy registrars or other governmental officials to be present when voter registration drives are conducted. (*See* Affidavit of Kathy Rogers ¶ 8; deposition of Helen Butler at p. **30**; deposition of Dana Williams at pp. 29, 33-34, 35.)

20.

Likewise, the testimony establishes that the Regulation does not prohibit those conducting voter registration drives from assisting the registrants with completion of their applications. (*Id.*) It prohibits only copying and requires

sealing when the application is finally completed. (*Id.*; *see also* deposition of Kathy Rogers at pp. 91-97.)

21.

There have been no civil or criminal complaints of prosecutions for alleged violations of the Regulation. (*Id.*) The Plaintiffs' claims of alleged injury are claims of inconvenience; they have suffered no actual injury that is not self imposed.

II. STANDARD GOVERNING PRELIMINARY INJUNCTION

It is well established that A preliminary injunction may only be granted "only if the moving party shows that: (1) it has a substantial likelihood of success on the merits; (2) irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause to the moving party; and (4) if issued, the injunction would not be adverse to the public interest." *Siegel v. LePore*, 234 F.3d 1163, 1176 (11th Cir. 2000) (en banc).

III. CONCLUSIONS OF LAW

Each of the four prongs of the test governing preliminary injunctions is discussed in turn.

A. SUBSTANTIAL LIKELIHOOD OF SUCCESS ON THE MERITS

Plaintiffs make two claims that the Regulation in question is invalid. First,

they claim that it violates the NVRA by allegedly infringing on their ability to conduct “private voter registration drives.” Second, they claim it infringes their First Amendment rights to speech and association. They do not have a substantial likelihood of success on either of these claims.

The NVRA

1.

When Congress enacted the NVRA it did not preempt the states’ long recognized rights to regulate voter registration. This, it should be noted, is evident from the text of the NVRA itself. In § 1973gg-2, rather than preempting the State’s regulatory powers, the federal law calls for the State’s to establish such procedures, and limits the application of the federal law based on the nature and extent of those procedures. The federal law is creating a floor for procedures not preempting State regulatory power.

2.

Numerous places in the NVRA reflect that Congress did not preempt the State’s power to regulate the voter registration process. For example, at § 1973gg-3, which governs voter registration at driver’s license offices (leading to the NVRA often being called the “motor voter” law), the NVRA establishes guidelines -- a floor -- for regulations that the various states will enact. At § 1973gg-4 the NVRA expressly permits states to adopt their own voter registration forms. At § 1973gg-5

the NVRA calls upon the states to designate voter registration agencies, and provides open ended alternatives for them. At § 1973gg-6 the NVRA provides minimum requirements for voter registration agencies -- a floor -- it does not provide the specifics or preempt state laws except to the extent that state laws might be inconsistent with the floor the NVRA sets. And at § 1973gg-7 the NVRA gives regulatory power to the Election Assistance Commission, but it expressly requires that it be exercised “in consultation with the chief election officers of the States.”

4.

The intent of Congress accompanying the passage of the NVRA was explicitly not to preempt state law, as is evident throughout the entire House Report on the subject. *See* H.R. Rep. 103-9. As a practical matter, of course, the Congress would not and could not have preempted state law on the subject since states must govern and regulate their own elections. It cannot be suggested that the power of the various states over their own elections could be dictated by the federal government (as long as they are consistent with the floor of requirements demanded by the Fourteenth And Fifteenth Amendments); the power of states over their own elections is a fundamental aspect of federalism.

5.

In passing the NVRA congress made plain, however, that the NVRA was

not intended to preempt state laws and regulations addressing fraud. The House Report on the NVRA discusses fraud at some length. It concludes: “States are permitted to employ any other fraud protection procedures which are not inconsistent with this bill.” H.R. Rep. 103-9 at p. 114 (emphasis added).

6.

If the NVRA had attempt to preempt state laws on this subject it would have necessitated that every state have two registration and election schemes since no state could have its own law govern federal elections (and, as above, federal law could not *ipso facto* govern state elections). *Cf. Young v. Fordice*, 520 U.S. 273, 275 (1997) (NVRA applies only to federal elections, provides for states to adopt regulations).

7.

The states have long had power over the regulation of voters, albeit that power has always been subject to the restraints of the United States Constitution (and the states have not always adhered properly to those constraints). *See, e.g.,* Dana L. Cunningham, *Who are the Electors? A Reflection on the History of Voter Registration in the United States*, 9 YALE LAW & POL. REV. 370 (1991). If Congress had intended to remove this authority completely from the states at any stage of the process it would have done so -- indeed, it would have been required to do so -- explicitly and unmistakably.

8.

It is well established that pre-emption of state law by federal law can arise in three ways: express preemption, field preemption, and conflict pre-emption due to the impossibility of simultaneously complying with both federal and state law.

Teper v. Miller, 82 F. 3d 989, 993 (11th Cir. 1996).

9.

The NVRA patently does not preempt the field of voter registration, nor does it expressly preempt the areas of copying and sealing of applications since it does not mention copying and sealing at all. Thus, the only possibility of preemption would be conflict preemption.

10.

The regulation at issue does not conflict with any of the State's duties under § 1973gg-2 calling for simultaneous applications with driver's license applications, mail applications, and in person registration; nor does it conflict with any of the specific provisions of § 1973gg-3, which governs voter registration at driver's license offices; nor does it conflict with the provisions of § 1973gg-4 allowing the States to adopt its own voter registration forms; nor does it conflict with § 1973gg-5 calling upon the States to designate voter registration agencies and places.

11.

There is no dispute that copying and sealing occur after the application is

completed. The Georgia form calls for such completed applications to be mailed to the Secretary of State's Office (*see also* O.C.G.A. § 21-2-223 (Secretary of State receives the applications and forwards them to local registrars), and no form is rejected for failure of a private party to follow the requirements of the Regulation. Ga. comp. R. & Reg. r. 183-1--03(3)(o)(4).

12.

This situation is different that the situation facing the district court and Eleventh Circuit in *Wesley Foundation*. *Wesley Foundation*, unlike the present case, involved the refusal of the Secretary of State's Office to accept applications at all because they were sent to it in a bundle rather than separately. 408 F.3d at 1351. As the Eleventh Circuit makes plain, the NVRA requires the states to accept mailed applications and the applications in that case were mailed. *Id.* at 1354-55. Thus, the Secretary of State's practice (which was not a regulation) at issue in that case ran expressly foul of the NVRA express terms as well as its intent. *Id.* At no point does the Eleventh Circuit say or imply in *Wesley Foundation* that the states have lost all power over the regulation process before forms have been returned to them. Indeed, if it had so held it would be a landmark decision in federalism; it would also be contrary to the express terms of the NVRA giving the states power to do such things as provide their forms, and the stated intent of Congress that it had not done this.

13.

For the forgoing reasons, in the present case the Regulation is not in conflict with the NVRA, and is not preempted by it.

14.

Moreover, there is no question that the Regulation at issue in this case was intended to prevent fraud and the misuse of the personal and private information of registrants. To prevent this information from going into private hands the regulation prevents copying of the completed applications. And to further than end, it requires that the applications must be sealed. If the applications are not sealed, then they may be copied, if not by the private person collecting them then by somebody in the chain of delivery to the Secretary of State's Office.

15.

As noted above, no one could dispute today that identity theft is a significant and growing problem. (*Cf.* Affidavit and deposition of Kathy Rogers.) It can lead not only to vote fraud, of course, but also to significant financial crimes. The State has a compelling interest in preventing this.

16.

Nor is there any real dispute that social security numbers, as well as dates of birth, residential information, phone information, and so forth, is the very type of information that can lead to fraud and identity theft. This, of course, is the very

type of information that voter registration applications -- State and federal -- contain. It is also, not ironically, the very information that the Plaintiffs want. They want it, among other reasons, to contact the people they have registered; they admit this. But the NVRA does not give them a right to contact the people they have registered, any more than it gives any other third person a right to others' private information. And receipt of this information, via copies and unsealed applications, is not necessary for the Plaintiffs to conduct a voter registration drive.

17.

The regulation in question is narrowly tailored to achieve this end. Any doubts about the scope of the copying prohibited have been resolved by the State Election Board's stipulation that it does not apply to voluntary and authorized copying. The Plaintiffs, of course, do not want to seek authorization for copying or use of this private information. That is because many registrants would refuse.

The First Amendment

1.

The Plaintiffs have no First Amendment right to copy without authorization someone else's private information. The Plaintiffs claim that the Regulation burdens their right to express the views of their organizations. But, of course, preventing them from copying someone else's information or requiring them to receive sealed applications does not prevent them from expressing their

organizations views. They also claim that it burdens their right to association. But restricting copying and requiring sealing does not prevent them from associating with anybody.

2.

The Plaintiffs' First Amendment claims are remarkably similar to those that have already been rejected in challenges to the federal "do-not-call" registry. There telemarketers and others who wanted to express the views of their organizations and clients and wanted to associate with the people they called, claimed that not only not getting that information but not being permitted to call violated the First Amendment.

3.

In cases such as *Mainstream Marketing Services, Inc. v. F.T.C.*, 358 F.3d 1228 (10th Cir.), *cert. den.* 543 U.S. 812 (2004), *National Coalition of Prayer, Inc. v. Carter*, 455 F.3d 783 (7th Cir. 2006), and *The Broadcast Team, Inc. v. F.T.C.*, 429 F.Supp.2d 1292 (M.D. Fla. 2006), such claims have been rejected. These cases establish, based on a long line of prior precedent that the government may place legitimate restrictions impacting the contact of one person with another; that one of the grounds for such restrictions is protecting the privacy of the third persons who would be contacted; and that the law or regulation will be upheld if it is a legitimate "time, place or manner" restriction.

4.

As stated in *Moser* summarizing its conclusions:

the do-not-call registry targets speech that invades the privacy of the home, a personal sanctuary that enjoys a unique status in our constitutional jurisprudence. . . . [T]he do-not-call registry is an opt-in program that puts the choice of whether or not to restrict commercial calls entirely in the hands of consumers. . . . [T]he do-not-call registry materially furthers the government's interests in combating the danger of abusive telemarketing and preventing the invasion of consumer privacy, blocking a significant number of the calls that cause these problems. Under these circumstances, we conclude that the requirements of the First Amendment are satisfied.

358 F.3d at 1233.

5.

The court made plain in *Moser* that it was not opining on whether the do-not-call registry would be valid when non-commercial speech was involved, *id.*; but in *National Coalition of Prayer, Inc.* the court held that it was. While there is some commercial interest of the “non-profits” in the present case, as they admit they would like to increase their membership and have paying dues, thus arguably making their speech in part commercial, nonetheless, the regulation at issue is a reasonable regulation for the benefit of protecting the people they wish to contact.

6.

The Regulation in the present is narrowly tailored to protect voter registrants. It does not prohibit contact. Indeed, the Plaintiffs can facilitate just as much contact by keeping their own log of the people they register. The Regulation

limits the *manner* in which private voter information is distributed without authorization, it does so reasonably, and is valid.

B. IRREPARABLE INJURY

1.

The Plaintiffs claim is based on their desire to not make their own lists of logs of the voters they register but to make copies of private applications. They can prevent any alleged injury by making their own lists.

2.

Likewise, the Regulation does not prevent them or restrict them in conducting voter registration drives. They can conduct the drives whether they can make copies and whether the applications are sealed or not. Again, they have no irreparable injury from the copying and sealing requirement.

3.

The reality, however, is that they wish to make unauthorized copies because the registrants might not want to give them the information. The fact that the Plaintiffs cannot get unauthorized information is not a cognizable “injury” to the Plaintiffs; they have no right to such unauthorized information in the first place.

4.

And the deposition testimony establishes that the grants that Plaintiffs say they can not get and fear of prosecution they claim are essentially situations they

have created and a description of their relations with other groups, not an injury the state has caused or one which the Plaintiffs could not remedy themselves.

5.

The Plaintiffs have waited until the last minute to come into court and assert their claims. Months have passed without justification while they have failed to assert it. The injury they claim is one resulting in the end from their delay and choice; not an injury arising from the regulation.

C. THE INTEREST OF THE PUBLIC AND THE DEFENDANTS.

1.

In the end, as pointed out above, the Plaintiffs' claim that they are entitled to preliminary injunction rests on the notion that their alleged "right" to make copies of unsealed voter registration applications is more important than the registrants' interest in the privacy of this information and in the State's in the integrity of its election system.

2.

Respectfully, there is little that can be said of that but that it is wrong. As in cases such as *Moser, supra*, the citizens' interest in privacy and their right to this information outweighs the *de minimis* interest, if any, the Plaintiffs have in obtaining it.

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing **PROPOSED FINDINGS OF FACT AND CONCLUSIONS OF LAW BY DEFENDANTS** by hand delivery and filed a corresponding notice with the Clerk of Court using the CM/ECF system, which will send notification of filing to the following CM/ECF participant:

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This **11th** day of September, 2006.

/s/Stefan Ritter
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