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

ASSOCIATION OF COMMUNITY ORGANIZATIONS FOR REFORM NOW, *et al.*,	)	
Plaintiffs,	)	CIVIL ACTION NO.
v.	)	1:06-CV-1891
CATHY COX, *et al.*,	)	JTC
Defendants.	)	

BRIEF IN SUPPORT OF PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

I. INTRODUCTION

Plaintiffs seek to enjoin Georgia's most recent effort to restrict voter registration by private, non-deputized entities. This time, Defendants have adopted a regulation that (1) requires completed voter registration applications to be separately sealed by each voter before being handed to a private voter registration worker (the "sealing requirement"); and (2) prohibits the copying of completed voter registration applications (the "copying ban"). Ga. Comp. R. & Regs. r. 183-1-6-.03(3)(o)(2) (as amended eff. Jan. 17, 2006) (the "Regulation"). The

Regulation closely resembles previous attempts by Georgia election officials to restrain private entities from engaging in organized voter registration activity as permitted by federal law --- even though this Court and the Eleventh Circuit invalidated and enjoined those previous restrictions, and even though a consent decree was entered with respect to those restrictions a few months ago. *See Charles H. Wesley Educ. Found. v. Cox*, 324 F. Supp. 2d 1358 (N.D. Ga. 2004) (*Wesley Foundation I*), *aff'd*, 408 F.3d 1349 (11th Cir. 2005) (*Wesley Foundation II*), *and consent decree and final judgment entered*, No. 1:04 CV 1780 WCO (N.D. Ga. March 2, 2006) (*Wesley Foundation III*).

As the *Wesley Foundation* litigation decided with respect to the state's last round of restrictions, the new Regulation violates the Plaintiffs' rights under the National Voter Registration Act of 1993, as amended, 42 U.S.C. §§ 1973gg *et seq.* ("NVRA"). By restricting the Plaintiffs' ability to register eligible voters, to ensure that the registration applications they collect are accurate and complete, and to encourage those voters to participate in the elective process, the Regulation directly conflicts with the stated goals of, and is preempted by, the NVRA.

Equally, the Regulation violates the First Amendment by hindering Plaintiffs' ability to communicate their political message and to associate with

fellow citizens to increase voter participation. The sealing requirement and the copying ban unreasonably burden Plaintiffs' associational and speech activities in registering Georgia voters, and in communicating with newly registered voters during get-out-the-vote (GOTV) drives, by (i) increasing the costs of voter registration, and (ii) preventing the use of well-established procedures to conduct voter registration efficiently and screen out erroneous or fraudulent registrations. Because Georgia cannot state a rational basis for the challenged restrictions, much less a compelling interest, they should be enjoined.

Plaintiffs seek a preliminary injunction so they may immediately begin voter registration drives in Georgia for the 2006 election cycle. Because the deadline for registering voters for the November 7, 2006, general election is set for October 10, 2006 (less than two months away), voter registration efforts must begin very soon. Based on Plaintiffs' substantial likelihood of success on the merits of their claims, coupled with the irreparable harm Plaintiffs are facing and will continue face and the substantial public interest in protecting voting, speech, and associational rights, a preliminary injunction should issue.

II. FACTUAL STATEMENT

A. Plaintiffs' Activities

ACORN[1] conducts voter registrations drives around the nation, including in Georgia, and has successfully registered more than a million voters since the beginning of 2004 --- approximately 20,000 of which were in Georgia. (Kettenring Aff. ¶¶ 7, 10.) Project Vote[2] has also conducted voter registration drives in Georgia and has provided substantial funding and technical assistance to ACORN and other voter registration groups for nonpartisan voter registration drives in communities throughout the country. Likewise, the Georgia Coalition for the People's Agenda ("GCPA")[3] and the Georgia State Conference of NAACP

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[1] Plaintiff ACORN is the nation's largest organization of low- and moderate-income families, working together for social justice and stronger communities. Since its founding in 1970, ACORN has grown to more than 175,000 member families, organized in 850 chapters in 75 cities in the United States and other countries. (**Affidavit of Brian Kettenring** [hereinafter "Kettering Aff."] ¶¶ 2-3 (attached as **Exhibit 1** to this Brief).) Plaintiff Deacon Williams is responsible for supervising ACORN's activities in Georgia. (**Affidavit of Dana Williams** [hereinafter "Williams Aff."] ¶ 1) (attached as **Exhibit 2** to this Brief.)

[2] Plaintiff Project Vote provides funding, professional training, management, evaluation, and technical services for voter engagement and voter participation activities in low- and moderate-income communities, including those conducted by ACORN. Since its founding in 1982, Project Vote has registered and turned out to vote millions of low-income and minority citizens nationwide and has provided registrants with nonpartisan voter education.

[3] Plaintiff Georgia Coalition for the People's Agenda is a coalition of civil rights, human rights, and peace and justice advocacy groups formed to improve the quality of governance in Georgia, help create a more informed and active electorate, and have more responsive and accountable (Footnote Continued …)

Branches ("State Conference" or "Georgia NAACP")[4] actively and regularly conduct voter registration drives in Georgia and, in 2004, registered tens of thousands of people throughout the state. (Butler Decl. ¶ 4; DuBose Decl ¶ 4.)

Under Plaintiffs' ordinary voter registration procedures, registration workers are taught how to determine voter eligibility, how to fill out voter registration cards, and how to comply with all federal and state rules for registering voters. (**Affidavit of Stephanie L. Moore** [hereinafter "Moore Aff."] ¶ 3 (attached as **Exhibit 5** to this Brief); Butler Decl. ¶¶ 3, 5; DuBose Decl. ¶ 5.) These registration workers typically seek out individuals who are eligible to vote but have not yet registered to do so, or who need to update their registration with a change of name or address. (*Id.*) When a registration worker encounters an eligible voter, he or she discusses Plaintiffs' philosophy that all individuals should register to vote and then should actually vote on Election Day. (*Id.*) The registration worker

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elected officials. (**Declaration of Helen Butler** [hereinafter "Butler Decl."] ¶ 2 (attached as **Exhibit 3** to this Brief).)

[4] The NAACP is the nation's oldest civil rights organization, founded in 1909. Its work in Georgia is carried out through its State Conference branches. The mission of the NAACP is to ensure political, educational, social, and economic equality for all persons and to eliminate racial hatred and discrimination. (**Declaration of Edward DuBose** [hereinafter "DuBose Decl."] ¶ 2 (attached as **Exhibit 4** to this Brief).)

encourages the individual to register and, if necessary, helps the individual fill out a registration form. (*Id.*)

Plaintiffs intend to conduct voter registration efforts in Georgia this year and desire to follow those same procedures. (Moore Aff. ¶¶ 5-12; Butler Decl. ¶¶ 3, 10-11; DuBose Decl. ¶¶ 10-11.) Plaintiff Dana Williams is a Georgia resident and member of ACORN's board, who has worked and wishes to continue working with ACORN's 2006 voter registration drives in Georgia. (Williams Aff. ¶¶ 1-5.)

Project Vote, which solicits funds from major foundations to conduct nonpartisan voter registration drives throughout the United States, has developed exacting quality control procedures for their voter registration drives. (Moore Aff. ¶ 4.) Project Vote requires ACORN and the other organizations with which it contracts to perform voter registration programs to use these quality control procedures in their drives. (*Id.*) After each day of the registration drive, the completed voter registration forms are to be checked for accuracy and completeness and are then photocopied. A sampling of persons who have provided phone numbers is called to confirm the information on the application. After the forms have been checked and any corrections made (with the applicant's permission), Project Vote and ACORN deliver the original voter registration forms

to the appropriate election offices for processing. Plaintiffs then monitor whether the applications submitted through the voter registration drive are actually added to the official lists of eligible voters. (Moore Aff. ¶ 4.) GCPA's and the NAACP's quality control procedures, while not as extensive as ACORN's and Project Vote's, are likewise designed to ensure that voter registration applications are reviewed for accuracy and completeness, that a record is made of the persons whom it has assisted with registration, and that the applications are timely and regularly delivered to election officials, to facilitate their timely entry onto the voter rolls. (Butler Decl. ¶¶ 6-8; DuBose Decl. ¶¶ 6-8.)

Many organizations that provide funding for nonpartisan voter registration drives and GOTV activities require fund recipients to employ the types of quality control and monitoring measures that Plaintiffs traditionally implement. (**Declaration of Michael Kiechnick** [hereinafter "Kieschnick Decl."] ¶¶ 4-9 (attached as **Exhibit 6** to this Brief); **Declaration of Margaret E. Gage** [hereinafter "Gage Decl."] ¶¶ 3-8 (attached as **Exhibit 7** to this Brief).) If Plaintiffs are unable, because of the Regulation, to implement those procedures, they face the real probability that they will not qualify for such funding --- which would render them significantly less able to organize voter registration drives in

Georgia. (Moore Aff. ¶¶ 10-11; Kieschnick Decl. ¶¶ 10-11; Gage Decl. ¶¶ 9-10; Kettenring Aff. ¶ 11.)

To encourage their newly-registered voters to vote on Election Day, Plaintiffs make follow-up calls to those persons in the days prior to Election Day, using the contact information they obtained from the individuals during the voter registration drive. (Moore Aff. ¶¶ 4, 8; Bulter Decl. ¶ 6.) This is an essential component of Plaintiffs' overall GOTV efforts.

For voter registration drives planned for Georgia this year, Plaintiffs ordinarily would follow the steps outlined above, but for the Regulation. Plaintiffs' inability to employ their normal voter registration and quality control procedures will significantly hamper their voter registration, education, and get-out-the-vote activities and, in some instances, will render them unable to engage in such activity within Georgia. Because the voter registration deadline for the November 7, 2006, general election is scheduled for October 10, 2006 (less than two months from now), Georgia voter registration efforts should begin as soon as possible. (Moore Aff. ¶ 12; Butler Decl. ¶¶ 9-11; DuBose Decl. ¶ 10.)

B. Georgia's Regulations and Restrictions on Registering Voters

In June 2004, the Charles H. Wesley Education Foundation, Inc. ("Wesley Foundation") and others brought suit against Secretary Cox and other state election officials to challenge Georgia's illegal restriction of the rights of private entities to engage in voter registration activity. *See Charles H. Wesley Education Foundation, Inc. v. Cox*, Civil Action No. 1:04 CV 1780 WCO (N.D. Ga. Filed Jun. 18, 2004). At issue in that case was Georgia's requirement that only authorized registrars and deputy registrars could collect and submit completed voter registration applications and that prevented the submission of bundled applications.

This Court and the Eleventh Circuit ruled that Georgia's restrictions on private voter registration activity violated the NVRA.[5] Both courts held that private entities have a federally protected right to collect and submit voter registration applications to election officials in Georgia; that election officials must accept and timely process all such applications; and that the State's restrictions unreasonably interfered with private entities' right to engage in organized voter

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[5] This Court determined that, given its findings with respect to the NVRA, it was unnecessary to reach the Wesley Foundation's First Amendment claims. *See Wesley Foundation I*, 324 F. Supp. 2d at 1364 n. 2.

registration activity. *See Charles H. Wesley Educ. Found. v. Cox*, 324 F. Supp. 2d 1358 (N.D. Ga. 2004), *aff'd*, 408 F.3d 1349 (11th Cir. 2005), *and consent decree and final judgment entered*, No. 1:04 CV 1780 WCO (N.D. Ga. March 2, 2006).

After losing in *Wesley*, Defendants moved quickly to evade the central holdings in that litigation. At its public meeting on September 14, 2005, the State Election Board adopted the sealing requirement and the copying ban. Several organizations, including the Wesley Foundation and Project Vote, submitted comments opposing the Regulation because it violated the NVRA and other federal voting rights laws. Nonetheless, the Board voted 4-1 to adopt the Regulation, with Defendant Worley casting the dissenting vote.[6] As adopted, the Regulation reads:

> No person may accept a completed registration application from an applicant unless such application has been sealed by the applicant. No copies of completed

[6] In March 2006, following this Court's entry of the *Wesley Foundation* Consent Decree and in response to another petition by the Wesley Foundation, the SEB again amended its regulations to include a provision that states: "Nothing in this rule shall be construed to prohibit any voter registration activity that is permitted pursuant to the National Voter Registration Act of 1993, 42 U.S.C. §§ 1973gg et seq., or any other federal or state law or regulation." *See* Proposed Amendments to Rule 186-1-6-.03 (State Election Bd. May 24, 2006), *available at* http://www.gaseb.org/notice_183_1_6_03.pdf. That recent amendment has not been submitted to the U.S. Department of Justice for preclearance pursuant to Section 5 of the Voting Rights Act and is therefore not currently effective. The SEB specifically declined to adopt that portion of the Wesley Foundation's March 2006 petition that urged the repeal of the sealing requirement and copying ban. *See* Wesley Foundation Petition to SEB (Mar. 3, 2006), *available at* http://www.chwef.org/Downloads/Cathy_Cox_03-03-06.pdf. The SEB evidently believes that neither the sealing requirement nor the copying ban violates the NVRA.

> 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) (as amended eff. Jan. 17, 2006).[7]

Any violation of Defendants' new restrictions on voter registration by private groups may be punished under the Georgia Election Code. *See* O.C.G.A. § 21-2-33.1. In enforcing those requirements, the State Election Board may impose "a civil penalty not to exceed $5,000.00 . . . for each failure to comply with any . . . rule or regulation promulgated under this chapter," *id.* at § 21-2-33.1(a)(2), and may "publicly reprimand any violator found to have committed a violation." *Id.* at § 21-2-33.1(a)(3). Criminal sanctions may also be a possibility. *See* O.C.G.A. §§ 21-2-598 to 21-2-599.

The Wesley Foundation provided written notice to Defendants on September 14, 2005 (the same day the Regulation was adopted), pursuant to 42 U.S.C. § 1973gg 9(b)(1), that the Regulation violated Plaintiffs' rights under the NVRA. The Wesley Foundation's notice was given on behalf of all persons aggrieved by the violations described therein, including Plaintiffs. The Wesley Foundation

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[7] This Court's Consent Decree in the *Wesley Foundation* case explicitly declined to rule on the legality or enforceability of the Regulation, because it arose after the events giving rise to that litigation. *See Wesley Foundation III*, slip op. at 4 n. 1.

requested that Defendants remedy the noted violations within 90 days, pursuant to 42 U.S.C. § 1973gg 9(b)(2). The Wesley Foundation specifically requested that Defendants repeal or rescind the recently-adopted amendments to the Regulation.

More than 90 days have passed, and Defendants have not corrected their violations of the NVRA.

III. ARGUMENT[8]

A. Preliminary Injunction

This Court should issue a preliminary injunction if Plaintiffs demonstrate (1) a substantial likelihood of success on the merits; (2) that irreparable injury will be suffered unless the injunction issues; (3) the threatened injury to the movant outweighs whatever damage the proposed injunction may cause the opposing party; and (4) if issued, the injunction would not be adverse to the public interest. *Wesley Foundation II*, 408 F.3d at 1354; *Four Seasons Hotels And Resorts. B.V. v. Consorcio Barr. S.A.*, 320 F.3d 1205, 1210 (11th Cir. 2003); *This That and the Other Gift and Tobacco. Inc. v. Cobb County. Georgia*, 285 F.3d 1319, 1321-22 (11th Cir. 2002). This challenge to Ga. Comp. R. & Regs. r. 183-1-6-.03(3)(o)(2) satisfies each criterion.

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[8] All Plaintiffs have standing to bring these claims. *See Wesley Foundation I*, 324 F. Supp. 2d at 1363-65, *aff'd Wesley Foundation II*, 408 F.3d at 1353-54.

B. The Plaintiffs Have a Substantial Likelihood of Success on the Merits of their Claims

1. Plaintiffs' NVRA Claims Have a Substantial Likelihood of Success

To establish nationwide standards and practices for voter registration, Congress in the NVRA mandated the use of a uniform voter application form in all states. The statute directs that every state must make the forms available to both governmental and private entities, "with particular emphasis on making them available for organized voter registration programs" such as the ones at issue in this case. 42 U.S.C. § 1973gg-4(b). To implement this requirement, Congress specifically preempted inconsistent state laws and regulations. "Congress explicitly noted that the states must follow the NVRA 'notwithstanding any other Federal or State law.' 42 U.S.C. § 1973gg-2(a)." *Wesley Foundation I*, 324 F. Supp. 2d at 1367. This Court and the Eleventh Circuit have held that "[i]f Georgia law is inconsistent with the NVRA, the former must give way to the latter." *Wesley Foundation I*, 324 F. Supp. 2d at 1366-67; *Wesley Foundation II*, 408 F.3d at 1354-55.

Essential to the Court of Appeals' decision in *Wesley Foundation II* was a recognition and judicial determination that, by enacting the NVRA, Congress

bestowed upon private entities a federally-protected right to engage in organized voter registration activity (including the conducting of voter registration drives, the dissemination of voter registration applications to eligible citizens wherever they may live and wherever they may be found, and the collection and submission of completed voter registration applications to the appropriate election officials), as a means of facilitating voter registration by mail, one of the three modes of voter registration specifically mandated by the NVRA. *See Wesley Foundation II*, 408 F.3d at 1353-54. Consequently, the NVRA bars state regulations imposing additional restrictions on the dissemination, collection, and submission of voter registration forms by private entities. *Wesley Foundation I*, 324 F. Supp. 2d at 1368; *Wesley Foundation II*, 408 F.3d at 1354.

These holdings are consistent with the purposes Congress expressed in enacting the NVRA: "(1) to establish procedures that will ***increase the number of citizens who register to vote*** in elections for Federal office; (2) to make it possible for Federal, State, and local governments to implement this subchapter in a manner that ***enhances the participation of eligible citizens as voters*** in elections for federal office; (3) to protect the integrity of the electoral process; and (4) to ensure that accurate and current voter registration rolls are maintained." 42 U.S.C. §

1973gg(b) (emphasis added). This intention was further reinforced in the NVRA's legislative history:

> [The national mail voter registration form] will permit voter registration drives through a regional or national mailing, or for more than one State at a central location, such as a city where persons from a number of neighboring States work, shop or attend events . . . . Subsection (b) requires the chief State election official to make the mail registration forms available for distribution through governmental and private entities, *with a particular emphasis on making such forms available to organized voter registration programs*. Broad dissemination of mail application forms, when coupled with the other procedures of this bill, should reach most persons eligible to register to vote, and is, therefore, a key element of the voter outreach feature of the bill."

S. Rep. No. 103-6, at 24 (1993) (emphasis added).

Through the sealing requirement and copying ban, Defendants seek to do an end-run around the *Wesley Foundation* holding, in violation of the NVRA. A requirement that completed applications be separately sealed before being accepted by private entities inflicts the same burdens on voter registration efforts that a bundling ban does.[9] The sealing requirement also prevents Plaintiffs from being

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[9] Indeed, the sealing requirement can be seen as merely a different iteration of the bundling ban struck down in *Wesley*. Having been told by this Court that they cannot bar the submission by private entities of multiple registration applications in one package ("bundling"), *see Wesley Foundation I* at 1368, Defendants now attempt to create a bundling ban at the front end, by preventing private entities from accepting completed applications unless they are separately sealed by each voter. This Court cannot be fooled by such transparent semantic manipulation.

able to direct completed voter registration forms to the correct state or local election official because, by shrouding the applicant's residential address from Plaintiffs' view, it becomes impossible for Plaintiffs to determine the applicant's county and state of residence.

The sealing requirement also violates the NVRA and poses a financial burden on Plaintiffs by preventing them from utilizing the federal mail registration application ("Federal Form") prescribed by the U.S. Election Assistance Commission ("EAC") pursuant to 42 U.S.C. § 1973gg-4(a)(1). The NVRA requires states to accept and process *all* Federal Forms that they receive from private entities — including those bundled and submitted by private entities on unsealed regular copy paper. *Wesley Foundation I*, 324 F. Supp. 2d at 1368 ("Congress has effectively prevented the states from imposing restrictions on the manner in which applicants (or anyone else) may submit timely voter registration applications to appropriate state officials. Georgia's restrictions to the contrary must fail."); *Wesley Foundation II*, 408 F.3d at 1354 ("By requiring the states to accept mail-in forms, the Act does regulate the method of delivery, and by so doing overrides state law inconsistent with its mandates."). The EAC, in turn, allows private groups to reproduce the Federal Form onto regular copy paper

(which does not have a sealing mechanism); to collect completed registration applications from residents of multiple jurisdictions; and to submit completed forms in bulk to the appropriate election officials. (*See* U.S. Election Assistance Commission, *Frequently Asked Questions About the National Mail Voter Registration Form*, *available at* http://www.eac.gov/register_vote_faq.asp; *see also* S. Rep. No. 103-6, at 24 (1993).)[10]

Neither the NVRA nor the EAC requires applicants to seal their completed applications before handing them to the persons accepting the application. Indeed, as stated previously, doing so would likely prevent the persons accepting the completed applications from being able to determine where to send the forms — particularly if they are collecting completed applications from residents of multiple jurisdictions, as allowed by the NVRA. Given that private entities are allowed to reproduce Federal Forms onto regular copy paper and to collect and submit those forms to the appropriate election authorities, it is inconceivable that Defendants

[10] Congress provided in the NVRA that the Election Assistance Commission "shall provide information to the States with respect to the responsibilities of the States under this Act." 42 U.S.C. § 1973gg-7(a)(4). By detailing the manner in which private entities may reproduce, collect, package, and submit mail-in voter registration applications to election officials, the EAC is carrying out one of its express responsibilities in the statute.

would be allowed to subject the private entities who do so to imposition of a civil fine of up to $5,000, or to imprisonment for up to a year, as provided in the Regulation.

The copying ban equally impedes the efforts of private groups like Plaintiffs to review registration applications for completeness, to verify their accuracy, to ensure that they are properly recorded by the state, and to contact registrants for GOTV efforts. By burdening Plaintiffs' organized voter registration program, the sealing requirement and copying ban conflict with Congress' expressly stated purposes in enacting the NVRA. Simply put, the Regulation is preempted because it burdens Plaintiffs' federally protected right to collect and submit voter registration applications in a manner that is consistent with the NVRA.

For purposes of preemption analysis, it is not sufficient for Defendants to assert that they were motivated by an arguably legitimate or compelling reason for enacting the Regulation. *Wesley Foundation I*, 324 F. Supp. 2d at 1366-67; *Wesley Foundation II*, 408 F.3d at 1354-55. "Under the Supremacy Clause, state law that in effect substantially impedes or frustrates federal regulation, or trespasses on a field occupied by federal law, must yield, no matter how admirable or unrelated the purpose of that law." *Teper v. Miller*, 82 F.3d 989, 995 (11th Cir. 1996).

Moreover, Congress plainly directed in the NVRA that such claimed justifications cannot prevail when the effect of a regulation is to suppress voter registration.

Accordingly, Plaintiffs have a substantial likelihood of success of establishing that the Regulation frustrates the essential purpose of the NVRA, as expressed in its preemption provisions: to provide additional, easier, and alternative means by which qualified citizens can register to vote.

2. Plaintiffs' First Amendment Claims Have a Substantial Likelihood of Success

Plaintiffs' voter registration, education, and GOTV efforts implicate both protected core political speech interests and protected associational interests. Defendants' sealing requirement and copying ban, as set forth in the Regulation, clearly impose substantial burdens on both of those interests, without being narrowly tailored to serve any compelling interest. Accordingly, Plaintiffs have a substantial likelihood of success on their claim that the Regulation violates the First Amendment.

(a) The Regulation Burdens Plaintiffs' Core Political Speech Rights.

During a voter registration drive, Plaintiffs express to potential voters a clear political and civic message that registering to vote and voting are essential

responsibilities of American citizenship and that all citizens should be actively engaged in the elective process. To bolster their message, Plaintiffs also circulate voter registration applications, which they ask potential voters to complete on the spot and return to them. Plaintiffs assist the potential voters with completing the applications, if needed, and then review the information supplied by the applicants, to ensure that the forms are completely and correctly filled out. They then make a record of the applications (e.g., by photocopying them), so that they will know the individuals with whom they have been in contact, and then forward the original applications to the appropriate election officials for further processing. After they submit the original applications to the appropriate election officials, they use the records they compiled from those originals to verify that the registrants have been timely added to the voter rolls and also to conduct GOTV drives closer to the time of an election.

As the Supreme Court has recognized in similar contexts, Plaintiffs' right to communicate their message of civic and political engagement through voter registration and GOTV drives is a core First Amendment right entitled to the highest forms of protection. *See, e.g., Roth v. United States*, 354 U.S. 476, 484 (1957) (First Amendment "was fashioned to assure unfettered interchange of ideas

for the bringing about of political and social changes desired by the people."). Voter registration and GOTV drives involve "the type of interactive communication concerning political change that is appropriately described as 'core political speech,'" because it involves the "communication of information, the dissemination and propagation of views and ideas, and the advocacy of causes." *Myer v. Grant*, 486 U.S. 414, 422 & n.5 (1988); *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182, 186 (1999).

Both *Buckley* and *Meyer* struck down state restrictions on the circulation of ballot initiative petitions, ruling that individuals and organizations have a First Amendment right to enlist the public's participation in the political process. For example, in *Meyer*, the Supreme Court found that Colorado's ban on compensating petition circulators violated the First Amendment, in part, because it had the effect of limiting the number of voices who were available to convey the plaintiffs' message and, thereby, limiting the size of the audience they could reach. 486 U.S. at 422-23. Similarly, in *Buckley*, the Court invalidated Colorado's requirements that petition circulators be registered voters and that they wear identification badges, on the grounds that such restrictions chill core political speech and reduce the number of available petition circulators. 486 U.S. at 194-95, 198-200. Voter

registration and GOTV drives are no less deserving of core political speech protection.

The Supreme Court has repeatedly noted that whenever a state regulation implicates core political speech interests, the importance of First Amendment protections is "at its zenith," and the state's burden of justifying such regulations is "well-nigh insurmountable." *Meyer*, 486 U.S. at 425. "When a State's election law directly regulates core political speech, we have always subjected the challenged restriction to strict scrutiny and required that the legislation be narrowly tailored to serve a compelling government interest…. Even when a State's law does not directly regulate core political speech, we have applied strict scrutiny" whenever core political speech interests are "at issue." *Buckley*, 525 U.S. at 207-08 (Thomas, J., concurring).

The degree of protection of core political speech is not dependent upon whether the underlying form of speech is itself independently constitutionally protected. For example, in *Meyer*, the Supreme Court found that it was immaterial that the State of Colorado had no obligation under the U.S. Constitution to afford its citizens the right to enact legislation or constitutional amendments by way of ballot petitions; however, "Having decided to confer that right, the State was

required to do so in a manner consistent with the Constitution." *Meyer*, 486 U.S. at 420.

Neither does the degree of protection of core political speech depend on whether there are other means by which a party could conceivably communicate the same message to its audience. Thus, in *Meyer*, the Supreme Court found that Colorado's ban on paid petition circulators was no less subject to scrutiny simply because there were other ways for the plaintiffs in that case to communicate their political advocacy message concerning the ballot question at issue. *Meyer*, 486 U.S. at 436. **"The First Amendment protects [plaintiffs'] right not only to advocate their cause but also to select what they believe to be the most effective means for so doing."** *Id.* (emphasis added).

Taking the *Meyer* and *Buckley* factors into consideration, it is clear that the sealing requirement and copying ban at issue in this case impose a significant burden on Plaintiffs' core political speech interests. First, the provisions impose additional and unnecessary financial constraints (both direct and indirect) on Plaintiffs' voter registration and GOTV activity. As discussed earlier, to comply with Defendants' sealing requirement, Plaintiffs would be required either to purchase and provide to potential voters separate envelopes along with each voter

registration application printed on plain paper, or to spend the necessary funds to procure professionally printed cardstock forms with sealing strips --- costs which would not be required under Plaintiffs' ordinary voter registration and GOTV procedures.

Second, by not permitting Plaintiffs to employ their usual quality control processes (i.e., reviewing applications for accuracy and completeness, copying applications for recordkeeping, monitoring, and GOTV purposes, etc.), the Regulation inhibits Plaintiffs' ability to secure funding from third parties for their voter registration and GOTV efforts --- which, of course, "limits the number of voices who will convey Plaintiffs' message and … limits the size of the audience they can reach." *Meyer*, 486 U.S. at 422-23. The threat of civil penalties and possible criminal sanctions for accepting an unsealed application or copying an application likewise has a chilling effect that reduces the number of people willing to participate in privately organized voter registration and GOTV activity.

Third, the Regulation interferes with Plaintiffs' ability and right to "select what they believe to be the most effective means for" conducting their voter registration and GOTV activities. *Meyer*, 486 U.S. at 424. As discussed throughout this brief, Plaintiffs have developed extensive procedures for their voter

registration and GOTV drives. These procedures involve training of their volunteers and paid workers; internal quality controls and monitoring; and extensive targeted follow-up with prospective voters as an election nears. By using these tried and tested methods, Plaintiffs were able successfully to assist tens of thousands of citizens in Georgia with exercising their voting rights, while at the same time furthering Plaintiffs' own goal of increasing civic participation among minority, low income, and disadvantaged communities.

The Regulation makes it much more difficult for Plaintiffs to ensure that would-be voters have properly completed the forms, or that election officials have timely and properly complied with their obligations under the law to place such individuals on the voter rolls. The Regulation further makes it more difficult for Plaintiffs to organize effective and targeted GOTV drives, to encourage the persons whom they assisted with registration to actually vote on Election Day. The fact that Plaintiffs remain free to engage in voter registration and GOTV activities using more burdensome and less effective means does not render the Regulation acceptable for First Amendment purposes. *Meyer*, 486 U.S. at 424.

Although Plaintiffs do not have an independent federal constitutional right to engage in organized voter registration activity (i.e., by disseminating, collecting,

and submitting voter registration applications), Congress has given Plaintiffs that right through its enactment of the NVRA. *Wesley Foundation II*, 408 F.3d at 1353-54. Because Plaintiffs enjoy a federal statutory right to engage in such organized voter registration activity, the State of Georgia is not free to constrain that right in a manner inconsistent with the First Amendment. *Meyer*, 486 U.S. at 420. Because Plaintiffs' voter registration and GOTV activities constitute core political speech, Defendants' restrictions of that activity must past strict scrutiny and, in most cases, Defendants' burden to justify such restrictions will be "well-nigh insurmountable." *Meyer*, 486 U.S. at 425. Therefore, Plaintiffs have a substantial likelihood of success on their claim that Defendants' conduct violates the First Amendment.

(b) The Regulation Burdens Plaintiffs' Associational Rights.

In conducting voter registration and GOTV drives, Plaintiffs also exercise their First Amendment right to associate with each other and with potential voters to engage in political conversations about voting. The Supreme Court has recognized a First Amendment right to associate with others to engage in politically expressive activity. *Roberts v. United States Jaycees*, 468 U.S. 609, 622 (1984); *Osburn v. Cox*, 369 F.3d 1283, 1287 n.2 (11th Cir. 2004). The right of

association is essential to a wide range of expressive activities, including the right to petition the government. *Roberts*, 468 U.S. at 622. When a state regulation of the election process imposes a severe burden on associational or speech rights, the regulation must be *narrowly tailored* to serve a *compelling* government interest. *Burdick v. Takushi*, 504 U.S. 428, 433-34 (1992); *Anderson v. Celebrezze*, 460 U.S. 780, 788-90 (1983). Even lesser burdens on associational and speech rights must be both "reasonable, nondiscriminatory," and justified by "important" regulatory interests. *Id.*

In this case, the Regulation imposes severe burdens on Plaintiffs' associational rights and interests, because it creates unnecessary barriers to Plaintiffs' communication with their intended audience. As discussed earlier, the sealing requirement prevents Plaintiffs from being able to communicate with potential voters concerning their applications, for purposes of determining whether they have filled them out correctly and completely. It also prevents Plaintiffs from assisting registrants with delivering their completed applications to the appropriate election office because, with a sealed application, Plaintiffs have no way of determining the residence address of the applicant. The copying ban inhibits ongoing communication between Plaintiffs and potential voters by eliminating the

easiest way for Plaintiffs to obtain the relevant contact information for the potential voters with whom they interact. Without copies of voter registration applications, Plaintiffs are unable (or, at a minimum, significantly less able) to monitor whether election officials are properly adding voters to the rolls,[11] and they are unable to conduct targeted GOTV drives to encourage the newly registered voters whom they have assisted with voter registration to actually vote on Election Day. Given that the Regulation severely burdens Plaintiffs' speech and associational rights, it should be subject to strict scrutiny.

(c) The Regulation Is Not Narrowly Tailored To Serve a Compelling Government Interest

Defendants readily admit that the Regulation was passed specifically in reaction to this Court's and the Eleventh Circuit's rulings in the *Wesley Foundation* litigation, in order to prevent private entities from being able to engage, interact with, and assist prospective voters with the voter registration process and/or to prevent private entities from verifying both the information

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[11] Congress envisioned an active role by the public in monitoring the performance of state agencies responsible for implementing the NVRA. To that end, Congress directed that states to "maintain for at least 2 years and … make available for public inspection and, where available, photocopying … all records concerning the implementation of programs and activities conducted for the purposes of ensuring the accuracy and currency of official lists of eligible voters." 42 U.S.C. § 1973gg-6(i)(1).

supplied by prospective voters and the election officials' compliance with their obligations under the NVRA. In Georgia's preclearance submission to the U.S. Department of Justice (pursuant to Section 5 of the Voting Rights Act), Georgia Attorney General Thurbert E. Baker described the state's rationale for the Regulation as follows:

> Given that the district court [in the *Wesley Foundation* case] had required the Secretary of State to accept "bundled" voter registration applications that were designed to be mailed in by individual voters, and which contain individual personally identifiable information such as the voter's social security number for identification purposes, the State Election Board adopted the rule in question to help secure that information and to prevent its misuse for purposes other than for voter registration...[T]here was discussion about the passage of the Rule, with the [Wesley Foundation] Plaintiffs and other groups [like Project Vote] opposing the Rule because they wanted to review, verify and possibly correct the information that was to be submitted for voter registration purposes.

(**Letter from T. Baker to J. Tanner dated Dec. 7, 2005**, at 5) (attached as **Exhibit 8** to this Brief).

Plainly, Defendants' stated rationale for enacting the Regulation does not pass constitutional muster as a "compelling" state interest. As an initial matter, there can be no legitimate state interest in "securing" the personally identifiable information contained on a voter registration application when federal and Georgia law already require all of that information (except for an applicant's full social

security number and other information not relevant to the instant dispute) to be made available to the public for inspection *and copying*. *See* 42 U.S.C. § 1973gg-6(i); O.C.G.A. § 21-2-225(b) and (c). Further, the Eleventh Circuit has already held that Georgia is prohibited by federal law from requiring the full social security number on the voter registration application. *Schwier v. Cox*, 439 F.3d 1285 (11th Cir. 2006). Thus, the presence of an applicant's social security number should not be an issue.

Likewise, by making voter registration list data available for public inspection and purchase by anyone at any time, Georgia law already provides for the use of such information for a variety of non-commercial purposes other than voter registration. The only restriction that Georgia law has on the use of voter registration data is that it cannot be used for any *commercial* purpose. *See* O.C.G.A. § 21-2-225(c).[12] Thus, Defendants have no legitimate state interest in restricting the use of voter registration application information only to voter registration purposes.

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[12] Indeed, civic leagues, professional associations, neighborhood associations, political parties, and charities such as the Red Cross, community theatres, and the like routinely purchase or are provided the statewide voter registration list, which they use for purposes of charitable or campaign solicitations, legislative advocacy, membership drives, action alerts, etc. — none of which has to do with voter registration.

In addition, the stated goal of the Regulation is to prevent private entities like Plaintiffs from engaging in core political speech, in the manner that they determine to be most expedient and effective, concerning the value of registering to vote and voting. Defendants further aim to restrict Plaintiffs' associational rights by limiting the range of constitutionally permissible interactions between private persons and by restricting the use of information **voluntarily exchanged between private parties**[13] during the voter registration process. The Regulation's requirement that individuals and groups who accept completed voter registration applications from concerned citizens cannot use the information contained on those

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[13] It is important to emphasize that participation in a privately organized voter registration drive is a **completely voluntary** act on the part of both the registrant and private registration drive organizers like Plaintiffs. Plaintiffs voluntarily decide when, where, how, and for how long to engage in voter registration activity. Private citizens likewise make a voluntary choice to stop at one of Plaintiffs' voter registration tables, or to entertain one of Plaintiffs' door-to-door canvassers. Citizens then voluntarily decide to complete a voter registration application and leave it with Plaintiffs' registration workers for submission to the appropriate election official. If private citizens had a privacy concern with entrusting their personally identifiable information to Plaintiffs, they could simply refuse to come to Plaintiffs' registration table at all, refuse to entertain Plaintiffs' door-to-door canvassers, or refuse to leave the completed application with Plaintiffs' registration workers. *Cf. Watchtower Bible & Tract Society of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 168 (2002) (town's claimed interest in protecting privacy of its residents did not justify town's permitting requirement on door-to-door canvassers, because residents' "unquestioned right to refuse to engage in conversation with unwelcome visitors" provided them with ample self-protection from unwelcome invasions of privacy without trampling on canvassers' First Amendment rights). Citizens can always choose to avail themselves of one of the other myriad ways of registering to vote, including going to the county registrar's office, picking up an application at a designated governmental agency, or simply downloading and printing off an application from the internet and mailing it to an election official.

applications for any purpose other than voter registration --- and, in actuality, not even fully for voter registration purposes --- cannot be regarded as a "compelling" governmental interest, because such a rule expressly advocates the chilling of private citizens' protected First Amendment activity.[14]

If, for example, Plaintiffs wished to use the information contained on completed voter registration applications in their possession to invite those persons whom they had assisted with registration to an informational candidate forum, Defendants' Regulation would prohibit that use. Likewise, if Plaintiffs wished to solicit charitable contributions from those individuals who had benefited from their voter registration services (by being afforded a convenient opportunity to register to vote), the Regulation would not allow for such use. As stated earlier, the Regulation also would prohibit Plaintiffs from effectively organizing targeted get-

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[14] The Regulation also impermissibly targets a particular form of speech --- that connected with voter registration activity --- to the exclusion of other types of speech wherein the exchange of the same type of personally identifiable name, address, identification number, and birth date information is voluntarily made between private citizens. For example, the Regulation does not (and could not reasonably) seek to prohibit *all* voluntary disclosures of personally identifiable information, such as those that are made in connection with making purchases by check; signing up for gymnasium memberships, church memberships, or neighborhood associations; obtaining tax or accounting advice; preparing office or family birthday and contact lists; or gathering names on a petition to nominate a candidate, repeal an officer, annex unincorporated land into a municipality, etc. The Regulation's prevention of such voluntary disclosures of personally identifiable information solely in the context of voter registration is, therefore, arbitrary and capricious and an irrational and impermissible content-based restriction on speech.

out-the-vote programs or from verifying and monitoring election officials' compliance with their obligations under the NVRA to add new registrants to the voter rolls in time for the next election.

Because Defendants' stated rationale conflicts with federal and Georgia law (which already designates voter registration data as public information) and itself establishes a prior restraint on core political speech and severely burdens Plaintiffs' associational rights, Defendants cannot use such a rationale to justify the Regulation.

Even assuming that the Regulation were adopted for proper state purposes, such as the prevention of voter registration fraud or identity theft,[15] it is nonetheless invalid because it is not narrowly tailored to serve those interests. As the Supreme Court has explained, a state cannot justify a First Amendment restriction simply by showing that it was intended to serve valid state interests:

> In pursuing [any] important [state] interest, the State cannot choose means that unnecessarily burden or restrict constitutionally protected activity. Statutes affecting constitutional rights must be drawn with precision. . . and

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[15] It is important to note that prevention of voter registration fraud and identity theft were *not* actually advanced by Defendants as rationales for enacting this specific Regulation, although Defendants have previously asserted these rationales in support of their broader belief that there should be no private voter registration at all.

> must be tailored to serve their legitimate objectives. . . . And if there are other, reasonable ways to achieve those goals with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference. If it acts at all, it must choose less drastic means.

Dunn v. Blumstein, 405 U.S. 330, 343 (1972) (internal citations and quotations omitted). In particular, when criminal laws already protect against voter fraud and other undesirable conduct affecting voting rights, additional restrictions are not necessary. *Id.* at 353-54.

In Georgia, a variety of criminal laws already protect against voter fraud, interference with the electoral process, and identity theft, without imposing unreasonable restraints on private citizens' legitimate First Amendment rights. *See, e.g.*, O.C.G.A. §§ 21-2-561 (false registration); 21-2-562 (altering, tampering with, or refusing to deliver election documents); 21-2-567 (intimidation of voters); 21-2-600 and 21-2-601 (use of election lists for commercial purposes); 21-2-602 (payment of compensation for solicitation of persons to register to vote, based on the number of persons solicited); and 16-9-121 (identity theft). In addition, federal and Georgia law also contain more useful and specific anti-registration fraud provisions which specifically require first-time registrants by mail to supply identification with their applications or when they first vote. *See* 42 U.S.C. §

15483(b)(2); O.C.G.A. § 21-2-220(c). The sealing requirement and copying ban do no more than these existing laws to prevent the noted abuses.

Moreover the sealing requirement and copying ban have the perverse effect of eliminating Plaintiffs' ability to engage in quality control measures, thereby increasing the opportunity for irregularities in the elective process. The Regulation effectively prohibits Plaintiffs from reviewing applications to ensure that they are complete. It also prevents them from placing telephone calls to individuals who have completed applications, so Plaintiffs cannot ensure that the identified applicant is the individual who completed the voter registration application and that the information the registrant provided is accurate.

For at least these reasons, Plaintiffs have a substantial likelihood of success in establishing that the Regulation unreasonably burdens their First Amendment rights without being narrowly tailored to serve any legitimate and compelling governmental interest.

C. Plaintiffs Are Being and Will Continue to Be Irreparably Harmed Without a Preliminary Injunction

Defendants' interference with Plaintiffs' rights under the NVRA constitutes irreparable injury for which monetary remedies are insufficient. *See Wesley Foundation II*, 408 F.3d at 1355. Additionally, irreparable harm is presumed

where, as here, First Amendment rights are at risk. *Elrod v. Burns*, 427 U.S. 347, 373 (1976) ("The loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury."); *New York Times*, 403 U.S. 713 (1971). Plaintiffs are already being irreparably harmed each day of this federal election campaign season that they are unable, due to the Regulation, to conduct their voter registration drives in the manner that they deem appropriate and most effective. If immediate injunctive relief is not granted by this Court, Plaintiffs' opportunity to conduct voter registration programs and GOTV programs in Georgia for the 2006 general election will be irrevocably lost.

D. The Balance of Harms Favors a Preliminary Injunction

A preliminary injunction will prevent the substantial public harms of reducing voter registration efforts and suppressing voter participation. The public interest in favor of broad voter participation is reflected in the NVRA, which requires that each state "shall ensure that any eligible applicant is registered to vote in an election . . . if the valid voter registration form of the applicant is received by the appropriate State Election official." 42 U.S.C. § 1973gg; *see also Wesley Foundation I*, 324 F. Supp. 2d at 1368.

Defendants can point to no countervailing harm that an injunction would impose. To the extent the State claims that the sealing requirement and copying ban are intended to protect the state against fraud, other statutes already protect against and bar the fraudulent registration of voters (and do so more directly and effectively) but do not deny the constitutional rights of Plaintiffs in the process. Indeed, as explained above, the challenged restrictions prevent Plaintiffs from completing their quality control reviews, and thereby increase significantly the risk that incomplete or illegible voter registration applications will be submitted. An injunction would decrease this harm, as well.

The harms that Plaintiffs will suffer if an injunction is not granted far outweigh any harm that Defendants might suffer should an injunction issue.

E. The Public Interest

Finally, the public interest strongly favors granting a preliminary injunction in this case. As this Court recently held, "[t]he public has an interest in seeing that the State of Georgia complies with federal law, especially in the area of voter registration. Ordering the state to comply with a valid federal statute is most assuredly in the public interest." *Wesley Foundation I*, 324 F. Supp. 2d at 1369. Additionally, Plaintiffs' activities seek to register to vote Georgia residents who

are eligible to do so, but have not registered. The public interest categorically favors actions that make it easier for those who are eligible to vote to be able to do so. *Dunn*, 405 U.S. at 330; *Harper v. Va. State Bd. of Elections*, 383 U.S. 663 (1966); *Reynolds*, 373 U.S. at 533; *Baker v. Carr*, 369 U.S. 186 (1962). Moreover, Plaintiffs', Defendants', and the public's interests in preventing fraud and other voter irregularities are, in this case, aligned. Indeed, the sealing requirement and copying ban actually frustrate those interests by preventing the implementation of Plaintiffs' quality control procedures. Accordingly, the public interest favors granting an injunction so that Plaintiffs may proceed with effective voter registration activities.

IV. CONCLUSION

For all of the foregoing reasons, Plaintiffs pray that their motion for preliminary injunction will be granted.

[Signatures Contained on Following Page]

This 14th day of August, 2006.

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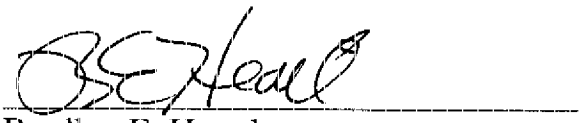
CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 5.1

The undersigned hereby certifies that the foregoing document has been prepared in accordance with the font type and margin requirements of Local Rule 5.1 of the Northern District of Georgia, using a font type of Times New Roman and a point size of 14.



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