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.	)	**CIVIL ACTION NO. 1:06-CV-1891-JTC**
CATHY COX, et al.,	)	
Defendants.	)	

DEFENDANTS' RESPONSE AND OPPOSITION
TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

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 respond to Plaintiffs' Motion for Preliminary Injunction, showing that motion should be denied.

SUMMARY

This case involves a challenge to a subsection of a regulation which prohibits unauthorized copying of completed voter registration applications and requires that after completion they be sealed. *See* Ga. Comp. R. & Regs. r. 183-1-6-.03(3)(o)(2). The registration applications contain social security numbers and

other private information, and the importance of protecting this private information cannot be reasonably doubted. Against this the Plaintiffs place their administrative inconvenience in contacting voters after the drive is completed; they want copies of the applications so they can make these contacts to bring people to the polls and contact people about their organizations' goals. (*See* Affidavits submitted with Plaintiffs' brief.) Copying and sealing, per the regulation, occur after an application is completed. It has nothing to do with the completion of the application. And, indeed, the regulation also provides that the violation of the rule does not prevent registration of the elector. Ga. Comp. R. & Regs. r. 183-1-6-.03(3)(o)(2).

In enacting the National Voter Registration Act ("NVRA") Congress made plain that state regulations designed to address fraud were not pre-empted. *See, e.g.,* H.R. Rep. 103-9 at p. 114. As discussed in the argument below, this is consistent with other district court decisions addressing the issue and with the long standing authority of state's to regulate the voter registration process. Nor is this situation altered (or even addressed) by the decision in *Charles H. Wesley Educ. Found., Inc. v. Cox*, 408 F.3d 1349 (11th Cir. 2005) (hereinafter "*Wesley Foundation*"). *Wesley Foundation* involved a practice of not accepting mailed bundled applications; the court interpreted this as a restriction on mailing and

violative of the NVRA. The copying at issue here does not limit or prevent mailing, and, indeed, as noted above the forms are processed regardless.

As discussed in the evidentiary record before this court (and as stipulated by the Defendants' counsel both at the status conference and during a deposition), the copying prohibition is not interpreted to prohibit copying that is done by the registrant or with the registrant's voluntary and knowing consent. The regulation is understood -- consistent with common sense understanding of its terms -- to apply only to unauthorized copying. There have been no complaints or administrative actions for alleged violations of this regulation; the Plaintiffs are not under any threat of prosecution.

Thus, in addition to the fact that the Defendants are likely to succeed on the merits -- for the regulation does not violate the NVRA or the Constitution -- the Plaintiffs are not under threat of any irreparable injury. There is nothing preventing them from conducting voter registration drives; there is nothing that prevents them from registering voters; and there is nothing that prevents voters from being registered that is at issue in this case. As discussed above, Plaintiffs' claims derive from a desire to obtain access to a base of constituents, not from a colorable injury. And, in fact, that access could be obtained anyway by simply keeping their own list of people they register. Their own testimony establishes they can do and do do that; it also establishes that some people do not like to sign

such a list, perhaps because they do not want the organization to have their name and contact them.

The lack of injury to the Plaintiffs is evident that they waited until the "eleventh hour" to bring this action. They waited for almost a year from when the regulation was first passed and eight months from when the Justice Department approved it and five and a half months from when the *Wesley Foundation* case was resolved. There is no justification for this delay. The "emergency" that supposedly exists is totally manufactured by them. It alone requires denial of their preliminary injunction motion.

Finally, with all due respect to the Plaintiffs, it cannot be seriously contended that *de minimis* interest they have, if any, in obtaining unsealed copies of others' voter registration applications outweighs the substantial interest of the Defendants and the public in protecting private and personal information such as social security numbers and in the integrity of Georgia's voter registration system. Indeed, the Plaintiffs want to be able to make unauthorized copies of the unsealed applications precisely so they can have the registrants' private information.

The Plaintiffs' Motion for Preliminary Injunction is meritless and should be denied.

STATEMENT OF FACTS

This case arises from a complaint filed on August 14, 2006 by the Plaintiffs challenging the validity of Ga. Comp. R. & Regs. r. 183-1-6-.03(3)(o)(2), a subsection of a State Election Board regulation that was adopted in September 2005 and became effective in January 17, 2006 upon approval by the Justice Department. (Dkt. 1 (Complaint); *see also* deposition of Kathy Rogers (to be filed; her testimony discusses the history of the subsection.)[1]

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).

Following this subsection, the regulation goes on to provide:

> 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).

The reason for subsection (o)(2) is not in dispute. The regulation was enacted by the State Election Board to prevent misappropriation and misuse of the

[1] This regulatory subsection is also referred to as the "Regulation" through out this brief, although the Court should note that only specific subsection (3)(o)(2) of Ga. Comp. R. & Regs. r. 183-1-6-.03 is challenged.

personal information on the voter registration forms. As stated by Kathy Rogers in her affidavit (filed herewith):

> 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.)

The forms -- both State and federal[2] -- call for confidential information. The federal form has a box calling for the "I.D. Number" which is defined in the definitions accompanying the form to mean, for Georgia, the registrant's social security number. (Deposition of Kathy Rogers and Exhibit 13 thereto; affidavit of Kathy Rogers ¶ 6 and Exhibit B thereto.) The State of Georgia's application

[2] Pursuant to the express provisions of the NVRA, Georgia, like most states, has a state voter registration form tailored to Georgia law but voters may also use a uniform federal form. *See* 42 U.S.C. 1973gg-4(a)(2) (state forms may be used).

expressly calls for social security number. (Deposition of Kathy Rogers and Exhibit 12 thereto; affidavit of Kathy Rogers ¶ 6 and Exhibit A thereto.)

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).) 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 collects social security numbers now and does so consistent with a court order permitting it. There is no question that the overwhelming majority of registrants provide their social security number when registering. (Affidavit and deposition of Kathy Rogers.) There is also no question that they 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. ___.) They have expressed these concerns to the Secretary of State's Office. (*Id.*)

And, indeed, the forms -- State and federal -- necessarily 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.*)

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[3] as well as their affidavits. As, instance, stated by Stephanie L. Moore in her affidavit (she is the National Voter Registration Field Director for Plaintiff Association of Community Organizations for Reform Now ("ACORN")):

> 8. ACORN attempts to contact the individuals it has assisted to register and to encourage them to vote on Election Day. ACORN and Project vote make follow-up calls to those persons in the days prior to Election Day, based on information from the photocopied voter registration forms.
>
> 9. ACORN attempts to contact the individuals it has assisted to register to vote to encourage them to become members of ACORN and to participate politically and actively in their community.

(Dkt. 2 (Affidavit of Stephanie L. Moore ¶¶ 8, 9).)

[3] Defendants were permitted to take two depositions prior to the preliminary injunction hearing (Dkt. no. 16), and so could not depose all of the Plaintiffs. The deposition testimony taken, however, would seem representative.

So, too, Helen Butler (the Executive Director for Plaintiff Georgia Coalition for the People's Agenda, Inc.):

> We also keep track of the individuals whom we assist with voter registration by requesting those individuals to fill out a sign-in sheet. As part of GCPA's get-out-the-vote efforts, we use the contact information provided on the sign-in sheets to make follow-up calls to those individuals, encouraging them to go out and vote on Election Day. Instead of using the sign-in sheets to collect contact information, we would prefer simply to make copies of the original voter registration forms that we collect, because that makes the voter registration assistance process more efficient for our registration workers in the field and also enhances our ability to collect more complete and accurate information on the persons whom we register. The only reason we do not currently make photocopies of the forms is that we were under the impression that we could not legally copy the voter forms. We confirmed with Secretary of State Cathy Cox's office that this was correct.

(Dkt. 2 (Affidavit of Helen Butler at ¶ 6); *see also* deposition of Helen Butler (to be filed on receipt) at pp. ___.) Note, of course, that Ms. Butler admits that they can keep a sign-in sheet, they just would prefer not to since they think it's less reliable for their purposes. (*Id.*) So, too, the testimony of Edward DuBose in his declaration on behalf of the Georgia State Conference of NAACP Branches, who offers a variety of reasons for wanting voter registration applications, including contacting them and taking to the polls.[4] (Dkt. 2.)

[4] The Defendants do not assert herein that taking voters to the polls is improper; the point is that it is not a justification to garner their privileged information.

At his deposition Dana Williams (who is both the only individually named Plaintiff and the Chairman of Georgia Acorn), made plain, at length, that ACORN sought the information to contact voters so it could follow-up with them, and take them to the polls. (Deposition of Dana Williams (to be filed on receipt) at pp. ___.)

The Plaintiffs have also testified that they want the voter registration applications so that they can check the quality of their voter registration work -- ignoring the fact that by law it is the duty of the local board of registrars and/or the Secretary of State's Office to follow-up with the voter to obtain or correct missing or erroneous information. O.C.G.A. § 21-2-220(d). They have also claimed that they (particularly Georgia Acorn) will lose grants to conduct voter registration drives due to the regulation; the testimony instead, however, was that Georgia Acorn has not applied for grants this year or last and stopped their voter registration efforts immediately after the 2004 election. (Deposition of Dana Williams at pp. ___.)

Indeed, the follow-up calls the Plaintiffs claim they wish to make with the copies are the type of contact that has repeatedly been the subject of fraud -- a form of phone scam (sometimes called "phishing" or "spoofing") to get the person on

the other end to reveal confidential information.[5] *See, e.g.*, news.zdnet.com/2100-1009_22-5627631.html; business.timesonline.co.uk/article/0,,31089-2278797,00.html; www.usatoday.com/tech/news/2006-03-01-caller-id_x.htm. Thus, Dana Williams testified that ACORN called prospective voters and asked for them to give their social security number to see if it was correct. (Deposition of Dana Williams at pp. ___.) Any calls to "verify" the information on voter registration forms by private individuals raise similar concerns about the misuse of this information. Indeed, this type of conduct has led to legislation such as the federal "no-call list." *See, e.g.,* 47 U.S.C.A. § 227 (Telephone Consumer Protection Act).

The testimony also establishes, without dispute, that, contrary to Plaintiffs' assertions in their Complaint and at the prior status conference in this case, 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 pp. ___; deposition of Dana Williams at pp. ___.) It also 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

[5] The Defendants do not allege that the Plaintiffs have engaged in this conduct. There is no dispute that others have. (See cites in text.)

application is finally completed. (*Id.*; *see also* deposition of Kathy Rogers at pp. ___.)

Finally, it is also without dispute that the regulation is only interpreted by the State Election Board to prohibit unauthorized. Copying by the registrant of his or her own application is, of course, permitted, and so is copying by someone else if that is done with the registrant's voluntary and knowing consent. (Affidavit of Kathy Rogers at ¶ 9; *see also* deposition of Kathy Rogers at pp. ___, where this was stipulated.) As Ms. Rogers testified:

> The Secretary of State's Office interprets the prohibition on copying in Ga. Comp. R & Reg. r. 189-1-6-.03(3)(o)(2) to only prohibit copying that is not authorized by the registrant. A registrant may make a copy of his or her own application and may distribute that copy (or the information on that copy) as he or she sees fit. The restriction on copying applies to copying that is not done voluntarily and knowingly by or for the registrant.

(Affidavit of Kathy Rogers at ¶ 9)

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.

ARGUMENT AND CITATION OF AUTHORITY

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). As discussed below, the Plaintiffs have shown none of these.

I. THE DEFENDANTS HAVE A LIKELIHOOD OF SUCCESS ON THE MERITS SINCE (1) THE REGULATION DOES NOT VIOLATE THE NVRA, (2) IS NOT ONLY RATIONAL BUT SUPPORTED BY A COMPELLING INTEREST, AND (3) DOES NOT VIOLATE THE FIRST AMENDMENT.

At the heart of this is case is a disregard by the Plaintiffs for the privacy interest of third persons who they help register to vote. They would justify this by claiming that the NVRA is violated by protecting those privacy interests, and, if not, then the First Amendment is allegedly violated. there are a host of reasons -- starting with the law of the NVRA and the First Amendment, respectively -- why that is not so.

A. The Regulation is Consistent with the State's Legitimate Powers Exercised by the State Election Board and Does Not Violate the NVRA.

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.

So, similarly, 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."

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. No one would suggest 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. 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).

But, in fact, 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.

There is not one word in the NVRA, however, saying that the states have lost power over voter registration. It provides limits on what the state can do, but it does not address at any point, explicitly or implicitly, the copying of voter registration applications. Copying and sealing of applications is not a subject the NVRA addresses.

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).

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). In the resent case none of these forms of pre-emption exist. 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. yet, 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.

The fact is the 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).

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.

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

B. The Regulation is Not Only Rational but Narrowly Tailored to the Compelling Interest of Preventing Fraud and Misuse of Registrants' Private Information.

As discussed in detail in the Statement of the Facts, above, 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.

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.

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.

The regulation in question is narrowly tailored to achieve this end.[6] 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. (*Cf.* deposition of Kathy Rogers at pp. __.)

C. The Regulation Does Not violate the First Amendment.

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.

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. 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

[6] It need not be more than rational, it should be noted, since it does not conflict

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.

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.

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.

The Regulation in the present is narrowly tailored to protect voter

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with the NVRA to begin with.

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.

II. THE PLAINTIFFS HAVE NOT ESTABLISHED AN IRREPARABLE INJURY

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.

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.

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.

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.

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.

III. THE INTEREST OF THE PUBLIC AND THE DEFENDANTS OUTWEIGHS THE ALLEGED INJURY OF THE PLAINTIFFS.

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.

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.

CONCLUSION

For the foregoing reasons the Defendants respectfully request that the Plaintiffs' motion for preliminary injunction be denied.

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SIGNATURE CERTIFICATION

I certify that the originally executed document contains the signatures of all filers indicated herein and therefore represents consent for filing of this document.

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CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing **DEFENDANTS' RESPONSE AND OPPOSITION TO PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION** 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 1st day of September, 2006.

/s/Stefan Ritter
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