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

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

**PLAINTIFFS' REPLY BRIEF IN SUPPORT OF THEIR MOTION FOR PRELIMINARY INJUNCTION**

Defendants fail in their attempts to cast the challenged Regulation's sealing requirement and copying ban as lawful under the First Amendment and National Voter Registration Act ("NVRA"). Defendants effectively concede that Plaintiffs' voter registration drives involve First Amendment-protected speech and association; however, they erroneously suggest that Plaintiffs' First Amendment rights should be analyzed by commercial speech standards instead of the more stringent standards that apply to non-commercial core political speech.

Defendants also ignore the Eleventh Circuit's express holding in the *Wesley Foundation* case, which recognized that the NVRA confers upon private entities a legally protected right to engage in voter registration activity and that the State of Georgia cannot abridge that right by imposing additional restrictions on the manner and method by which private entities may collect and submit voter registration applications. The Regulation is simply untenable under either the First Amendment or the NVRA; consequently Plaintiffs' Motion for a Preliminary Injunction should be granted.

## ARGUMENT AND CITATION OF AUTHORITY

### I. DEFENDANTS HAVE NOT SHOWN THAT THE CHALLENGED REGULATION IS CONSTITUTIONALLY PERMISSIBLE OR COMPORTS WITH THE NVRA.

#### A. Defendants' Argument that the Regulation Does Not Burden Plaintiffs' First Amendment Rights Misstates the Legal Standard and Ignores the Facts.

In *Meyer v. Grant*, 486 U.S. 414, 420 (1988), the Supreme Court held that restrictions on core political speech are subject to strict scrutiny. Alternatively, in *Anderson v. Celebreeze*, 460 U.S. 780 (1982), and its progeny, the Court held that when analyzing constitutional challenges to state election laws, a court must consider the character and magnitude of the injury, and then the state must identify its interest and the extent to which the interest justifies the law. 460 U.S. at 789.

Under either the *Meyer* or *Anderson* standard, the Regulation at issue in this case would fail.[1] The Regulation significantly impairs Plaintiffs' core political speech and associational rights under the First Amendment by restricting Plaintiffs' ability to assist citizens with registering to vote and to engage citizens in political dialogue concerning the importance of voting and civic participation. At the same time, Georgia's purported interest in preventing identity theft from voter registration applications is not supported by any objective evidence of actual harm and, in any event, is certainly not narrowly tailored to address any such harm. Even if there were any evidence of such identity theft, numerous state statutes in effect already address it. (*See* Pltfs' Br. in Supp. of Mot. for Prelim. Inj. at 34-35.)

Defendants' argument that the Court should analyze Plaintiffs' First Amendment claim under the standard set forth in commercial speech cases is plainly erroneous.[2] (Opp. at 20). In *League of Women Voters v. Cobb*, Case No.

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[1] Indeed, as Justice Thomas noted in his concurring opinion in *Buckley v. American Constitutional Law Foundation*, 525 U.S. 182 (1999), the scrutiny applied to regulations burdening core political speech interests would usually be the same under either *Meyer* or *Anderson*. "When core political speech is at issue, we have ordinarily applied strict scrutiny without first determining that the State's law severely burdens speech … because restrictions on core political speech so plainly impose a 'severe burden.'" 525 U.S. at 207-08 (Thomas, J., concurring).

[2] In *Mainstream Marketing Services, Inc. v. F.T.C.*, 358 F.3d 1228 (10th Cir. 2004), cited by Defendants, the court held that the "do-not-call" list was a valid regulation because it only restricted commercial speech and directly advanced the government's interest. *Id*. at 1232-33. (Footnote Continued … )

06-21265-CIV-SEITZ/MCAILILEY, 2006 U.S. Dist. LEXIS 61070 (S.D. Fla. Aug. 28, 2006) (hereinafter "*LWV*"), a case directly analogous to this one, a district court in Florida recently enjoined on First and Fourteenth Amendment grounds a state statute that imposed restrictions (including severe civil fines and criminal penalties) on private voter registration groups. In so doing, the court applied the standards for analyzing non-commercial core political speech and election regulations set forth in *Anderson* and *Meyer*. *LWV*, at ** 56-57. The same standards would, of course, apply to Georgia's copying and sealing Regulation in this case.

Defendants do not dispute that the Regulation's sealing requirement and copying ban have caused Plaintiffs to halt or restrict their voter registration activities. (Opp. at 10; Butler Dep. at 44-45; Kettenring Dec. ¶ 11; DuBose Dec. ¶ 11.) This, in turn, has reduced the quantum of core political speech and association, since Plaintiffs, through their voter registration drives, persuade others to vote, educate prospective voters about upcoming political views, communicate

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Similarly, in *National Coalition of Prayer, Inc. v. Steve Carter*, 455 F.3d 783 (7th Cir. 2006), the court upheld restrictions primarily aimed at curtailing fundraising through professional telemarketers. *Id*. at ** 1-2. Here, Plaintiffs' contact with prospective registrants is not for commercial purposes but rather to encourage their civic participation and educate them on issues. (*See, e.g.*, Affidavit of.Stephanie Moore, ¶ 9; Declaration of Edward Dubose, ¶ 3.)

their political views, and enlist citizens in promoting shared political, economic, and social goals. (Moore Aff. ¶ 9; Du Bose Dec. ¶ 3.)

Defendants' suggestion that Plaintiffs could, hypothetically, communicate and associate with prospective registrants, notwithstanding the Regulation's sealing requirement and copying ban, does not remedy the Regulation's constitutional infirmities and indeed is irrelevant as a matter of law. Here, Plaintiffs' receipt of unsealed applications and the ability to copy them are essential to ensuring the efficacy of their voter registration efforts precisely because their drives are not limited to the mere delivery of completed applications. (Deposition of Helen Butler ["Butler Dep."] at 22; Deposition of Dana Williams ["Williams Dep."] at 47). Plaintiffs use a "comprehensive set of procedures" during their voter registration drives, including copying the voter registration applications "to make up follow up calls to those persons in days prior to Election Day" and encourage them to "participate politically and actively in their community." (*See, e.g.*, Butler Dep.at 10-11, 43; Williams Dep.at 47; Moore Aff. ¶ 4.).

Because submission of unsealed applications and the copying of applications are inextricably intertwined with Plaintiffs' protected speech and association, Defendants' argument that the Regulation does not prohibit Plaintiffs from engaging in First Amendment activities must fail. *See Village of Schaumburg v.*

*Citizens for a Better Env't*, 444 U.S. 620 (1980) (communication and advocacy of causes accompanying plaintiffs' solicitation of charitable donations was protected by the First Amendment, rejecting defendant's attempt to separate plaintiffs' solicitation from the accompanying speech); *LWV*, at **57-60 (collection and submission of voter registration applications is intertwined with speech and association).

Further, it is well established that 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." *Meyer v. Grant*, 486, U.S. 414, 424 (1988); *see LWV*, at *62. Like the statute enjoined in *League of Women Voters*, the Regulation cannot stand because it prevents Plaintiffs from exercising their First Amendment right to use what they have identified as the most effective means for conducting voter registration drives and unnecessarily encroaches upon their ability to deliver messages regarding registration, voting, general civic participation and election-related issues. *Id*. at * 57.

Defendants' assertion that the copying ban prohibits only unauthorized copying is both a post hoc interpretation of the Regulation and contrary to its plain

language.[3] *See* Ga. Comp. R. & Regs. r. 183-1-6-03(e)(o)(2) (as amended eff. Jan. 17, 2006) ("No copies of completed registration applications shall be made."). In any case, Plaintiffs have already obtained the implied consent of applicants who participate in their drives to handle and copy their completed applications, because those applicants have voluntarily chosen to entrust Plaintiffs with their completed voter registration forms. Thus, even if Defendants' interpretation were reasonable, it would only further demonstrate the senselessness of the copying ban.[4]

B. Defendants Have Not Shown That the Regulation is Narrowly Tailored to Serve Any Compelling State Interest.

Defendants do not set forth even a single instance of voter registration fraud or identity theft resulting from unsealed or copied voter registration applications. (*See* Rogers Dep. at 87.) Instead, Defendants cite alleged registration fraud in 2004

[3] While an agency's official interpretation of its own regulation is entitled to substantial deference, a lawyer's post-hoc rationalization advanced during the pendency of litigation on behalf of his client is not. *See Bowen v. Georgetown Univ. Hosp.*, 488 U.S. 204, 212 (1988) ("[W]e have declined to give deference to an agency counsel's interpretation of a statute where the agency itself has articulated no position on the question . . .").

[4] As Defendants concede, applicants are not required to leave their forms with private voter registration groups in order to register to vote and, indeed, need not interact with Plaintiffs at all; instead, they could download the form from the internet and mail it into the appropriate election office, or they could register in person at the county registrar's office or at an official state agency such as a public library. (Rogers Dep. at 95-96; *see* Pltfs' Br. in Supp. of Mot. for Prelim. Inj. at 31 n.13 (citing *Watchtower Bible & Tract Soc'y of New York, Inc. v. Village of Stratton*, 536 U.S. 150, 168 (2002).) Defendants also concede that nothing requires Plaintiffs to obtain any type of documented consent from a voter registration applicant. (Rogers Dep. at 95.)

that is entirely unrelated to copying and sealing of applications. (Opp. at 5-6). Ironically, the discovery of those questionable applications actually supports Plaintiffs' position, because the Secretary of State was alerted to them by a third-party group through its quality control measures – including inspection of unsealed applications. (Rogers Dep. at 66-69).

It is well established that "if there are other, reasonable ways to achieve [a state's legitimate objectives] with a lesser burden on constitutionally protected activity, a State may not choose the way of greater interference." *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972). While the Regulation was being discussed for the first time in the form of an "emergency rule" by a 33-minute conference call meeting of the State Election Board on September 9, 2004, the Board did not consider a single alternative to the instant Regulation, much less discuss whether there might be a less burdensome option. According to Kathy Rogers, the Board did not consider whether existing criminal laws might be sufficient to combat identity theft and voter fraud, or whether eliminating the full Social Security number from the application,[5] requiring additional documentation of identity, or

[5] As noted, infra, Georgia's requirement that applicants include the full SSN has since been invalidated by this Court.

offering training programs for third-party registration workers, for example, might provide more protection to applicants. (Rogers Dep. at 101-105).

Defendants cannot bootstrap their now-optional request for full Social Security Numbers ("SSN") on voter registration applications to justify their requirement that applications must be sealed and cannot be copied. As Defendants acknowledge, this court and the Eleventh Circuit have prohibited Georgia from requiring disclosure of the full SSN as a prerequisite to successful registration. *Schwier v. Cox*, 412 F. Supp. 2d 1266 (N.D. Ga. 2005), *aff'd*, 439 F.3d 1285 (11th Cir. 2006). However, Defendants have not yet changed their voter registration forms or Georgia's state-specific instructions for the federal form to remove the language which purports to demand the disclosure of an applicant's full SSN. (Rogers Dep. at 48-49, 78-80.)[6] Defendants' decision to wait an entire calendar year before bringing their forms and instructions into compliance with federal law casts significant doubt on their professed concern for applicants' privacy, thereby undermining their own argument in support of the Regulation. (Opp. at 7.) Defendants have consistently ignored their obligation to employ a narrowly

[6] Under the terms of a consent order, Defendants have until January 2007 to make these changes; nevertheless, they could have made them earlier if they truly had privacy concerns. Further, Defendants continue to communicate with the Election Assistance Commission to urge the use of the full SSN. (Rogers Dep. at 105.)

tailored approach to advancing their stated goal of preventing identity theft.[7] Instead, they expect Plaintiffs to surrender their First Amendment rights in order to effectuate Defendants' choice to collect an identification number that is immaterial for determining the applicant's eligibility. This Court should reject this overly broad and constitutionally problematic approach.

C. The Regulation is Preempted by the NVRA and the Courts' Prior Holdings in the *Wesley Foundation* Case.

Defendants argue that because the NVRA does not completely foreclose the ability of states to regulate voter registration, they were permitted to enact the Regulation challenged in this case. Remarkably, Defendants contend that (a) the NVRA permits states to enact voter registration regulations that would "limit the application of" the NVRA (Opp. at 14), and that (b) because the NVRA does not specifically address the issues of copying and sealing voter registration applications, Georgia is free to enact whatever regulations it wishes in that area, regardless of the impact of those regulations (Opp. at 16).

[7] The Help America Vote Act asks only for the last four digits of the SSN, and only in the event that an applicant does not have a state driver's license number. Further, HAVA recognizes that use of the last four digits of the SSN "shall not be considered to be a social security number for purposes of Section 7 of the Privacy Act of 1974." 42 USCS §15483(a)(5)(i)(II) and (c).

Both of Defendants' arguments turn the concept of federal preemption squarely on its head. The preemption doctrine exists precisely *to prevent* a state from invalidating, frustrating, or otherwise limiting the applicability of a federal law by enacting its own laws or regulations. Defendants' arguments also ignore the previous holdings of this Court and the Eleventh Circuit in the *Wesley Foundation* case, which expressly provide that a state may not impose additional restrictions on private entities' federally protected right to engage in organized voter registration activity, including the collection and submission of completed voter registration applications. Therefore, as explained below, Plaintiffs have a substantial likelihood of success on the merits of their NVRA claim.

Contrary to Defendants' assertions in its response brief, the NVRA in fact reflects both express and conflict preemption principles. The express language of the Act provides that states are required to establish additional voter registration procedures for federal elections *"notwithstanding any other Federal or State law [and] in addition to any other method of voter registration provided for under state law."* 42 U.S.C. § 1973gg-2(a) (emphasis added). In addition, Congress specifically directed states to provide federal mail registration applications to governmental *and private* entities, particularly for their use in organized voter registration programs. 42 U.S.C. § 1973gg-4(b). "If Georgia law is inconsistent

with the NVRA, the former must give way to the latter." *Wesley I*, 324 F. Supp. 2d at 1366 (citing *ACORN v. Edgar*, 56 F.3d 791, 795 (7th Cir. 1995)).

As the Eleventh Circuit explains in *Wesley Foundation*, by mandating that states disseminate, accept, and use a national mail-in voter registration form and explicitly encouraging the use of that form by private entities in organized voter registration programs, Congress has created a federally protected and legally enforceable right for private entities to engage in organized voter registration activity. *Wesley Foundation II*, 408 F.3d at 1353-54. Further, by requiring the states to accept and process *all* privately collected mail registration applications that satisfy the requirements of the NVRA, **"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."** *Wesley Foundation I*, 324 F. Supp. 2d at 1368 (emphasis added); *Wesley Foundation II*, 408 F.3d at 1354. Thus, like the earlier restrictions struck down in the *Wesley Foundation* case, Georgia's copying and sealing Regulation likewise must fail because it interferes with the right of Plaintiffs and other private

entities to collect and submit voter registration applications in a manner allowed by the NVRA. *Wesley Foundation I*, 324 F. Supp. 2d at 1368.[8]

The statement in the legislative history that states are permitted to employ other fraud protection procedures not inconsistent with the NVRA, *see* H.R. Rep. No. 9, 103rd Cong., 1st Sess. 1993, at 10, merely restates the basic conflict preemption principle. It does not justify Defendants' copying and sealing restrictions precisely because they *would* be inconsistent with the NVRA.[9]

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[8] Congress' detailed rules for the administration of voter registration under the NVRA strike a balance among the stated purposes of the Act (i.e., to "increase the number of citizens who register to vote" and "enhance[] the participation of eligible citizens as voters," while preserving the integrity and the effective administration of elections.) *See* 42 U.S.C. § 1973gg(b). For instance, Congress gave states the option to require individuals who register by mail for the first time in a jurisdiction to appear in person the first time they vote. *Id*. at § 1973gg-4(c). Congress also mandated that the federal mail form contain the U.S. citizenship, age, and other eligibility requirements for voting, and that the applicant swear or affirm to the truthfulness of the information contained on the application, under penalty of perjury. *Id*. at § 1973gg-7(b)(2). Under HAVA (which modified the NVRA requirements for the federal form), each mail-in application must contain the applicant's driver's license number, or the last four digits of the applicant's social security number. *Id*. at § 15483(a)(5). In addition, Congress provided felony criminal penalties for any person — including a voter registration drive organizer or applicant — who knowingly procures, submits, or provides false voter registration information. *Id*. at § 1973gg-10. Finally, in Section 8 of the NVRA, Congress directs the states to develop reasonable mechanisms by which ineligible voters are removed from the voter rolls. *Id*. at § 1973gg-6(a)(4). Congress believed that these provisions were sufficient to guard against fraudulent registrations. *See* H.R. Rep. No. 9, 103rd Cong., 1st Sess. 1993, at 10.

[9] It is also worth noting, as the Eleventh Circuit recognized with respect to the voter registration restrictions in the *Wesley Foundation* case, that the copying and sealing Regulation at issue in this case "does little, if anything, to prevent fraud or assist in the assessment of voter eligibility," since "the risk of exposure and fraud is equal… so long as third-party handling of any kind is allowed." *Wesley II*, 408 F.3d at 1355. Indeed, the copying and sealing restrictions actually *increase* the possibility of fraudulent submission of applications by private voter registration (Footnote Continued … )

For all of these reasons, this Court should find (as it and the Eleventh Circuit did with Georgia's previous restrictions on private voter registration activity) that the challenged Regulation in this case is preempted by the NVRA.

## II. DEFENDANTS CANNOT SHOW THAT PLAINTIFFS WILL NOT SUFFER IRREPARABLE INJURY.

Defendants argue Plaintiffs will not suffer irreparable injury because the Regulation does not entirely prevent registration drives or preclude Plaintiffs from communicating with registrants by keeping lists of people they help to register rather than copying their forms. Defendants also argue that the timing of this lawsuit shows that Plaintiffs will not suffer irreparable injury. (Opp. at 3-4, 22-23.) Both of these argument are meritless. The Supreme Court has repeatedly stated that irreparable harm is presumed to flow from *any* infringement of a First Amendment right. *See,e.g. Elrod vs. Burns*, 427 U.S. 347, 376 (1976); *New York Times Co. v. United States*, 403 U.S 713 (1971). Likewise, interference with Plaintiffs' rights under the NVRA constitutes irreparable harm *per se*. *Wesley Foundation II*, 408 F.3d at 1355.

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groups because they prevent groups from conducting their own reviews of the applications before submitting them. *See, e.g.*, Rogers Dep. at 66-70 (describing how a third-party registration organizer alerted the Georgia Secretary of State's office to potentially fraudulent applications after performing quality control reviews of her group's collected applications).

Defendants' suggestion that Plaintiffs are not entitled to relief simply because they supposedly waited nearly a year from the issuance of the Regulation to file this lawsuit is preposterous. Plaintiffs filed this case at an appropriate time, after making substantial efforts to avoid litigation.[10] This Court granted Plaintiffs' request for expedited consideration of their motion for preliminary injunction, which, if granted, would remedy the harm currently being suffered by Plaintiffs, by allowing them to conduct their voter registration drives in the manner they deem most appropriate and effective to achieve their First Amendment objectives. Defendants' unlawful Regulation should not be allowed to threaten and impair these core freedoms any longer.

## CONCLUSION

For all of the foregoing reasons and those set forth in Plaintiffs' main brief, Plaintiffs pray that their motion for preliminary injunction will be granted.

Respectfully submitted this 8th day of September, 2006.

[10] The Regulation at issue was adopted in September 2005, but was not pre-cleared by the U.S. Department of Justice until January 2006. In March 2006, this Court entered a consent decree in the *Wesley Foundation* case. Also at that time, additional changes to the rules were made and a meeting between counsel for the Wesley Foundation, the Secretary of State's office, and Project Vote/ACORN was directed. In April 2006, the meetings occurred. Plaintiffs made every effort avert litigation but in August 2006, faced with no alternative, filed this lawsuit.

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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.

**s/ Bradley E. Heard, Esq.**
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**CERTIFICATE OF SERVICE**

This will certify that I have this day electronically filed the within and foregoing **Brief in Support of Plaintiffs' Motion for Preliminary Injunction** with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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This 8th day of September, 2006.

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