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

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

Plaintiffs,

v.

CATHY COX, *et al.*,

Defendants.

CIVIL CASE NO.
1:06-CV-1891-JTC

O R D E R

Pending before the Court is the Motion for Preliminary Injunction [# 2] filed by Plaintiffs Association of Community Organizations for Reform Now ("ACORN"), Project Vote/Voting for America, Inc.("Project Vote"), Georgia Coalition for the People's Agenda, Inc. ("People's Agenda"), Georgia State Conference of the NAACP Branches ("Georgia NAACP"), and Dana Williams (collectively "Plaintiffs"). Plaintiffs bring this action against Defendants Cathy Cox, Claud L. McIver, III, J. Randolph Evans, David J. Worley, and Jeffrey K. Israel (collectively "Defendants" or the "State") challenging a rule adopted by the State Election Board requiring an applicant to seal a completed registration application prior to submitting it to any person other than a registrar or deputy registrar and prohibiting the copying of completed registration applications (the "Regulation"). Plaintiffs contend that the

Regulation is unlawful under the First Amendment and the National Voter Registration Act ("NVRA"). After considering the argument of counsel and reviewing the evidentiary record, the Court **GRANTS** Plaintiffs' motion for preliminary injunction [# 2].

I. Procedural Background

Plaintiffs filed this action on August 14, 2006. Contemporaneously, Plaintiffs filed a motion for preliminary injunction and a motion to expedite consideration of Plaintiffs' motion for preliminary injunction. On August 21, 2006, the Court held a hearing in order to determine a briefing schedule for the preliminary injunction. The Court adopted a limited discovery schedule, and set a hearing on Plaintiffs' motion for a preliminary injunction. (Order, Aug. 28, 2006.) On September 13, 2006, both parties appeared at a hearing, and the Court heard evidence and oral argument on Plaintiffs' motion. The motion for a preliminary injunction is now properly before the Court.

II. Factual Background

The following facts are taken from the evidence submitted by the parties at the preliminary injunction hearing, as well as the additional evidence contained in the record.

A. The parties involved in this dispute

Plaintiffs ACORN, Project Vote, People's Agenda, and the Georgia

NAACP are nonprofit charitable corporations involved in voter registration activities in Georgia. (Compl. ¶ 3, 4, 6; Butler Decl. ¶ 2.) Plaintiff Dana Williams is the Chairperson of Georgia ACORN. (Williams Aff. ¶ 1.)

Defendant Cathy Cox is the Secretary of State of Georgia and the chief election official for Georgia. (Compl. ¶ 8.) Secretary Cox also serves as Chairperson of the Georgia State Election Board. (Rogers Aff. ¶ 4.) Defendants Claud L. McIver, III, J. Randolph Evans, David J. Worley, and Jeffrey K. Israel are all current members of the State Election Board. (Compl. ¶ 9.)

B. The Plaintiffs' voter registration activities in Georgia

Plaintiffs engage in voter registration drives, voter education, and get-out-the-vote programs in Georgia. (Williams Aff. ¶ 2; Butler Decl. ¶ 3; DuBose Decl. ¶ 3.) Of particular importance to this action are the voter registration drives conducted by Plaintiffs and their subsequent activities that use information collected during the drives. During these voter registration drives, trained registration workers attempt to register individuals who are eligible to vote but have not registered or who need to update their registration. (Butler Decl. ¶ 5; DuBose Decl. ¶ 5; Moore Aff. ¶ 3.) The registration workers encourage individuals to register to vote and, if necessary, assist the individual in completing the registration form. (Id.)

The federal and Georgia registration applications contain a variety of personal information, including the registrant's name, address, telephone number, date of birth, and race or ethnicity. (Ex. A to Rogers Aff.; Ex. B. To Rogers Aff.) The Georgia application also requests that an individual provide his or her social security number. (Rogers Aff. § 6; Ex. A to Rogers Aff.) Beginning in early 2007, Georgia will switch to a new system that does not contain a voter's full social security number. (Id.)

The registration workers also engage the individuals in political discussions regarding the importance of specific issues or legislation that the organizations support in the targeted community. (Id.) Once an individual completes the voter registration form, the registration worker ordinarily performs a preliminary onsite review of the application in the applicant's presence to ensure that it is complete and accurate. (Butler Decl. ¶ 8; DuBose Decl. ¶ 8.) Some of the Plaintiffs pay registration workers a fee for each completed registration application obtained.

After the conclusion of a voter registration drive, some of the Plaintiffs utilize additional quality control and monitoring measures to ensure that the individuals whom they assist are added to the voter rolls. (Moore Aff. ¶¶ 4-7; Butler Dep. 42:22-43:13.) These additional measures include reviewing the registration applications to ensure that they are complete. (Id.) If Plaintiffs

discover an error or omission on a form, they attempt to contact the registrant in order to correct the form prior to submitting the application. (Id.) Plaintiffs also review the registration applications to determine if the registration workers submitted fraudulent cards. (Moore Aff. ¶¶ 4-7.)

Typically, Plaintiffs also make a photocopy of the registration application so that they can later contact the potential voters to encourage them to vote, inquire if they need transportation to the polls, advocate the organizations' position on candidates and issues, and to solicit new members. (Butler Dep. 11:2-21, 43:11-13; Williams Dep. 34:3-18, 47:3-22; DuBose Decl. ¶ 6; Moore Aff. ¶ 9.) In order to facilitate these post-registration drive activities, as well as their internal quality control and monitoring functions, Plaintiffs maintain copies of completed voter registration applications that they collect. (Butler Decl. ¶ 6; DuBose Decl. ¶¶ 6-7; Moore Aff. ¶¶ 4, 8.)

C. The State Regulation at issue in this dispute

The Regulation at issue in this case provides that:

> 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).

The Regulation also provides that:

> 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 State Election Board first adopted the Regulation as an emergency rule on September 9, 2004, and then as a permanent rule on September 14, 2005. (Rogers Dep. 18:8-12, 20:17-24.) The Regulation became effective on January 17, 2006. (Rogers Dep. 27:3-7.) The primary purpose behind the State Election Board's adoption of the Regulation was to protect the privacy of an applicant's personal information and prevent the theft and misuse of a registrant's personal information. (Rogers. Aff. ¶ 10; Rogers Dep. 46:7-48:20, 83:13-23.) During the 2004 election, the State received calls from citizens expressing a general concern with the potential disclosure or misuse of their personal information contained on the mail-in registration applications. (Rogers Dep. 46:19-47:14.) The Regulation was intended to address these concerns. (Rogers. Aff. ¶ 10; Rogers Dep. 46:7-48:20, 83:13-23.)

D. The impact of the Regulation on Plaintiffs

The requirement that a registrant seal their completed application prior to turning it over to Plaintiffs prohibits Plaintiffs from later reviewing the individual's application for completeness, accuracy, and fraud. (DuBose Decl. ¶ 9; Butler Decl. ¶ 9.) Moreover, the copying and sealing restrictions

limit Plaintiffs' ability to monitor election officials. (Id.) Because of the inability for some of the Plaintiffs to continue their internal quality control measures, including reviewing the applications gathered by the workers for fraud or incompleteness, the Regulation will interfere with these Plaintiffs' ability to obtain funding for their voter registration programs. (Gage Decl. ¶¶ 4-10; Kieschnick Decl. ¶¶ 5-11; Moore Aff. ¶ 11.) Finally, the Regulation impairs Plaintiffs' ability to maintain ongoing contact with the individuals they encounter during their voter registration drives because the Regulation makes it more difficult for Plaintiffs to obtain the contact information for a registrant. (Butler Decl. ¶ 6; DuBose Decl. ¶¶ 6-7; Butler Dep. 46:10-47:10.)

Plaintiffs concede that they can collect the relevant information garnered from the voter's completed registration application by using sign in sheets or manually copying the information while the voter fills out the registration application. (Pls.' Proposed Finds of Fact and Conclusions of Law ¶ 15.) Plaintiffs can obtain much of the information from public election rolls, later, including the ability to monitor whether the applicants were registered. These methods, however, are not as convenient and allow more possibility for error. (Butler Decl. ¶ 6; DuBose Decl. ¶¶ 6-7; Butler Dep. 37:3-38:23, 46:10-47:10.)

Although the State has not prosecuted anyone for alleged violations of

the Regulation (Rogers Aff. ¶ 9), a violation could subject Plaintiffs to civil and criminal sanctions. These sanctions include a public reprimand and/or a fine of up to $5,000 for each violation of the Regulation. O.C.G.A. § 21-2-33.1(a). Additionally, an individual convicted of violating a provision of the Georgia Election Code may be subject to a criminal fine of between $100 and $1,000 and/or imprisonment for up to a year. O.C.G.A. §§ 21-2-598 to 21-2-599.

III. Preliminary Injunction Standard

Plaintiffs seek to enjoin the enforcement of the Regulation so that they may begin voter registration drives for the November 7, 2006 general election. In order to obtain a preliminary injunction, Plaintiff must demonstrate 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 Plaintiff outweighs whatever damage the proposed injunction may cause Defendant; and

(4) if issued, the injunction would not be adverse to the public interest.

BellSouth Telecomms., Inc. v. MCIMetro Access Transmission Servs., LLC, 425 F.3d 964, 968 (11th Cir. 2005); Braswell v. Board of Regents, 369 F. Supp. 2d 1362, 1366 (N.D. Ga. 2005) (Thrash, J.); Bluecross Blueshield of S. C. v. Carillo, 372 F. Supp. 2d 628, 638 (N.D. Ga. 2005) (Murphy, J.). "The chief

function of a preliminary injunction is to preserve the status quo until the merits of the controversy can be fully and fairly adjudicated." Northeastern Fla. Chapter of Ass'n of Gen. Contractors of Am. v. City of Jacksonville, Fla., 896 F.2d 1283, 1285 (11th Cir. 1990). Moreover, the issuance of a preliminary injunction is an extraordinary remedy which a district court should not grant unless the moving party clearly carries the burden of persuasion as to the four elements. Id. The Eleventh Circuit, however, will not disturb a district court's decision to grant or deny a preliminary injunction absent a clear abuse of discretion. Solantic, LLC v. City of Neptune Beach, 410 F.3d 1250, 1253-54 (11th Cir. 2005); BellSouth, 425 F.3d at 968.

IV. Analysis

Plaintiffs contend the sealing and copying restriction violate the NVRA. Additionally, they contend that the Regulation violates the First Amendment by hindering their ability to communicate political messages and associate with fellow citizens in order to increase voter participation.

A. The Regulation does not violate the NVRA

Congress enacted the NVRA in order to establish procedures to increase the number of citizens who register to vote, enhance the participation of eligible voters in elections, protect the integrity of the electoral process, and ensure accurate and current voter registration rolls. 42 U.S.C. § 1973gg(b).

In order to promote these goals, Congress made it mandatary for the states to accept voter registration applications by mail. 42 U.S.C. § 1973gg-4(a)(1); Charles Wesley Educ. Found., Inc. v. Cox, 324 F. Supp. 2d 1358, 1367 (N.D. Ga. 2004) (O'Kelley, J.) ("Wesley Found. I"). By requiring that states accept applications by mail, Congress facilitated the use of private registration drives as a mode of registering individual voters. Charles Wesley Educ. Found., Inc. v. Cox, 408 F.3d 1349, 1353 (11th Cir. 2005) ("Wesley Found. II"). Although the NVRA "impliedly encourages" voter registration drives, it does not regulate how private entities may collect registration applications. Wesley Found. II, 408 F.3d at 1353. Rather, the provisions of the NVRA *only* regulate the voter registration form's final content and the method for its delivery. Id. Regulating voter registration has traditionally been the responsibility of the states.

As a threshold matter, neither the plain language of the NVRA nor the Eleventh Circuit's holding in Wesley Found. II prohibit a state from enacting regulations on the manner in which private groups conduct voter registration drives. Id. ("The only provisions regulating mailed forms are unrelated to the legitimacy of voter drives . . . [these provisions] regulate the forms' final content and method of delivery, but do not regulate the dissemination or collection."). Accordingly, the copying and sealing restrictions are invalid

under the NVRA only if they conflict with the NVRA's regulation of the method of delivery or the form's final content. See Wesley Found. II, 408 F.3d at 1353; Wesley Found. I, 324 F. Supp. 2d at 1366 ("If Georgia law is inconsistent with the NVRA, the former must give way to the latter."). The Regulation, however, restricts the conduct of private parties during the collection of voter registration applications. The State regulations provide that all valid registration applications that are timely received by the Secretary of State or a registrar will be accepted, regardless of whether the private parties fail to comply with the sealing and copying restrictions. See Ga. Comp. R. & Regs. r. 183-1-6-.03(3)(o)(4). Accordingly, the Regulation does not conflict with the NVRA. Thus, Plaintiffs have not shown a substantial likelihood of success on the merits as to their claim under the NVRA, Plaintiffs are not entitled to a preliminary injunction on Count I based on a violation of the NVRA.

B. The Regulation infringes Plaintiffs' First Amendment rights

The Regulation at issue in this case is a provision of the election code which regulates the manner in which private parties conduct voter registration drives. The Supreme Court has repeatedly held that courts should analyze constitutional challenges to a state's election laws pursuant to the framework established in Anderson v. Celebrezze, 460 U.S. 780, 103 S.

Ct. 1564 (1982). Compare McIntyre v. Ohio Elections Comm., 514 U.S. 334, 344-46, 115 S. Ct. 1511, 1518 (1995) (holding that Ohio statute prohibiting the distribution of anonymous campaign literature was a regulation of pure speech and not subject to the ordinary litigation test outlined in Anderson) and Anderson, 460 U.S. at 789-90, 103 S. Ct. 1564 (holding that Ohio's early filing deadline for independent candidates subject to the ordinary litigation test); Burdick v. Takushi, 504 U.S. 428, 433-34, 112 S. Ct. 2059, 2063, (1992) (holding that Hawaii ban on write-in ballots subject to the Anderson ordinary litigation test); Tashjian v. Republican Party of Conn., 479 U.S. 208, 213-14, 107 S. Ct. 544, 548 (1986) (eligibility of independent voters to vote in party primaries). The Court's determination that the Anderson test applies in this case is consistent with the conclusions recently reached by other district courts analyzing the constitutionality of restrictions placed on private voter registration drives. See League of Women Voters of Fla. v. Cobb, No. 06-21265, 2006 U.S. Dist. LEXIS 61070, at *53-54 (S.D. Fla. Aug. 28, 2006); Project Vote v. Blackwell, No. 1:06cv1628, 2006 WL 2600366, at *5 (N.D. Ohio Sept. 8, 2006). Accordingly, the Court finds that the Regulation is most appropriately construed as an election law and shall apply the Anderson test.[1]

[1]Plaintiffs contend that the Regulation should be subject to strict scrutiny and, therefore, narrowly tailored to serve a compelling state interest. This situation, however, is not one in which "a State's election law directly regulates core political speech . . . ." Buckley v. American Constitutional Law

In Anderson, the Supreme Court refused to adopt any litmus-paper test" that would separate valid from invalid election laws. Anderson, 460 U.S. at 789, 103 S. Ct. at 1570. The Supreme Court reiterated the Anderson test in Burdick v. Talushi, 504 U.S. 428, 112 S. Ct. 2059 (1992), and reaffirmed that "to subject every voting regulation to strict scrutiny and to require that the regulation be narrowly tailored to advance a compelling state interest . . . would tie the hands of States seeking to assure that elections are operated equitably and efficiently." Accordingly, the Supreme Court adopted an "ordinary litigation" test whereby the court must first consider the character and magnitude of the asserted injury to the rights protected by the First Amendment. Anderson, 460 U.S. at 789-90, 103 S. Ct. 1564. Next, the court must identify and evaluate the "precise interests" put forward by the state as justifications for the burden imposed by the election law. Id. The Supreme Court further explained that:

> In passing judgment, the Court must not only determine the legitimacy and strength of each of those interests; it also must consider the extent to which those interests make it necessary to burden the plaintiff's rights. Only after weighting all these factors is the reviewing court in a position to decide whether the challenged provision is unconstitutional.

Found., Inc., 525 U.S. 182, 207, 119 S. Ct. 636, 649 (1999) (Thomas, J., concurring). The Regulation does not directly prohibit participation in the political process but has only a tangential effect.

Id. The Eleventh Circuit has described the Anderson test as a "balancing test" that may range from strict scrutiny to a rational basis analysis depending on the circumstances of the case. Fulani v. Krivanek, 973 F.2d 1539, 1543 (11th Cir. 1992).

1. The character and magnitude of Plaintiffs' injury

The Regulation reduces Plaintiffs' participation in voter registration drives and places burdens on Plaintiffs' post-drive activities. Of particular concern is the fact that the Regulation impairs the ability of some of the Plaintiffs to obtain funding for voter registration drives in Georgia because they are unable to utilize their quality control measures to ensure that the workers are not submitting fraudulent registration applications. (Gage Decl. ¶¶ 4-10; Kieschnick Decl. ¶¶ 5-11; Moore Aff. ¶ 11.) ACORN has not conducted any formal voter registration drives in 2006 as a result of the sealing and copying restrictions. (Williams Aff. ¶¶ 3-5.) Moreover, a violation of the Regulation potentially carries civil and criminal penalties. A registration worker who accepts an unsealed application or makes a copy of a completed application could potentially be subject to a fine of up to $5,000 or receive a year in prison. Finally, the Regulation makes it more difficult for Plaintiffs to gather the information necessary to later contact voters to encourage them to vote and advocate their positions on issues.

2. The precise interests offered by the State as justification for the Regulation.

After considering the character and magnitude of Plaintiffs' injuries, the Court must identify and evaluate the precise interests put forward by the State as justification for the burden imposed by the Regulation. Anderson, 460 U.S. at 789, 103 S. Ct. at 1570. Defendants contend that the State Election Board enacted the Regulation in order to prevent the misappropriation and misuse of an applicant's private information, including his or her social security number, address, telephone number, and date of birth. While the State has an interest in preventing identity theft, Defendants have not offered any evidence of identify theft arising out of a third-party registration drive. Moreover, Defendants have not offered any evidence that the Regulation is necessary to prevent voter fraud. In short, Defendants have failed to demonstrate that the Regulation is necessary to address a real rather than a conjectural problem. See Buckley, 525 U.S. at 209, 119 S. Ct. at 651 (Thomas, J., concurring). And Defendants must show more than the possibility of identify theft to warrant the burdens placed on Plaintiffs' constitutional rights.

Finally, identity fraud is already a crime in Georgia. See O.C.G.A. §§ 16-9-120 to 16-9-132. Defendants fail to address why the copying and sealing restrictions are necessary given that Georgia already imposes criminal

penalties on individuals who without authorization or permission obtain or record identifying information of a person with the intent to unlawfully appropriate the resources of another person. O.C.G.A. § 16-9-121.

In balancing the States' asserted interest against the character and magnitude of the burdens the Regulation imposes on Plaintiffs, the Court recognizes the expressed policy of Congress to encourage voter registration drives, see 42 U.S.C. § 1973gg(b), and the traditional protection of participation in the political process required by the Constitution. At this stage of the proceeding, Defendants have not demonstrated why the Regulation is necessary in light of the existing laws addressing identify theft and the lack of any evidence of such fraud occurring in connection with a third-party voter registration drive. Accordingly, based on the evidence currently in the record, Plaintiffs have demonstrated a substantial likelihood of success in showing that the Regulation is an unlawful restraint of Plaintiffs' First Amendment rights.

3. Plaintiffs are entitled to a preliminary injunction on their First Amendment claim

Plaintiffs have demonstrated a substantial likelihood of success on the merits of their First Amendment claim. In order for preliminary injunction to issue, however, Plaintiffs must also establish that they will suffer an irreparable injury if the injunction does not issue, that the injury outweighs

any harm that might result to the Defendants, and that the injunction will not be adverse to the public interests.

The record demonstrates that the Regulation limits Plaintiffs' ability to conduct voter registration drives and engage in political speech. As the Supreme Court has explained, the loss of First of Amendment freedoms, even for a short period of time, constitute an irreparable injury. See Elrod v. Burns, 427 U.S. 347, 373, 96 S. Ct. 2673, 2690 (1976).

The remaining two factors also favor Plaintiffs. Defendants have not demonstrated that the Regulation is necessary to further the State's interest in preventing identity theft. Moreover, an election is a single event incapable of being repeated, and any deprivation of Plaintiffs' rights cannot be remedied after the election is over. Finally, an injunction is not adverse to the public interest. The public's interest is advanced by registering as many eligible voters as possible. Accordingly, the Court finds that Plaintiffs have met the requirements for injunctive relief. The Court **GRANTS** Plaintiffs' request for preliminary injunction [# 2].

C. Plaintiffs' motion to strike

Plaintiffs also filed a Motion to Strike portions of Defendants' Proposed Findings of Fact and Conclusion of Law [# 31]. Specifically, Plaintiffs contend that portions Defendants' proposed facts are unsupported by evidence in the

record, and portions of the proposed conclusions of law are unsupported by any decisional or statutory law. In its prior Order, the Court directed the parties to file proposed findings of fact and conclusions of law. Additionally the Court directed that "[t]o the extent possible, each proposed finding of fact shall cite with particularity the evidence supporting such fact" and "each proposed conclusion of law shall cite applicable legal authority." (Order, Aug. 28, 2006.)

To the extent that Plaintiffs seek to strike the portions of Defendants' Proposed Findings of Fact that contain argument or legal conclusions, the motion is **DENIED**. The Court is capable of distinguishing the pertinent facts from legal argument and conclusions. To the extent Plaintiffs seek to strike the portions of Defendants' Proposed Findings of Fact and Conclusions of Law that are unsupported by citations to the record or applicable legal authority, the Court **GRANTS** the motion. Accordingly, for purposes of the preliminary injunction, the Court has not considered any of Defendants' Proposed Findings of Fact and Conclusions of Law that are unsupported by citations to the record or applicable legal authority.

V. Conclusion

The Court **GRANTS** Plaintiffs Motion for Preliminary Injunction [# 2]. Pending a full trial on the merits of this matter, Defendants are

RESTRAINED, ENJOINED AND PROHIBITED from enforcing Ga. Comp. R. & Regs. r. 183-1-6-.03(3)(o)(2) as it relates to the sealing and copying of completed registration applications. The Court **ENJOINS** the State from bringing enforcement actions against any individual or entity for a violation of Ga. Comp. R. & Regs. r. 183-1-6-.03(3)(o)(2). Pursuant to Rule 65(c) of the Federal Rules of Civil Procedure, this injunction will issue upon Plaintiffs providing security acceptable to the Clerk of Court in the sum of $1,000.00.

Additionally, the Court **DENIES** as moot Plaintiffs' Motion to Quash [# 15] and Motion for a Protective Order [# 15]. The Court **GRANTS in part** and **DENIES in part** Plaintiffs' Motion to Strike [# 31]. Finally, the Court **GRANTS** Plaintiffs' motion for leave to file excess pages [# 3] and Motion to Expedite [# 3].

SO ORDERED, this 27th day of September, 2006.

JACK T. CAMP
UNITED STATES DISTRICT JUDGE