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 IN OPPOSITION
TO PLAINTIFFS' MOTION FOR RECONSIDERATION

ARGUMENT AND CITATION OF AUTHORITY

PLAINTIFFS' MOTION FOR RECONSIDERATION RAISES ON ISSUES THAT HAVE BEEN PREVIOUSLY BRIEFED TO AND ADDRESSED BY THE COURT AND IS INCORRECT ON THE LAW

The Plaintiffs' rehearing argument regarding the NVRA is that the regulation at issue is subject to conflict pre-emption, a legal issue already fully briefed and argued to the Court (indeed, if any issue was fully briefed and argued it was this one). There is no field pre-emption applicable in this case (Congress did not explicitly state that it was preempting the field but rather explicitly left wide latitude to the States), and there is no express preemption: the plain language NVRA does not address, anywhere, copying of completed voter registration

applications by private individuals nor whether applications should be sealed when mailed.

Regarding this point the Plaintiffs assert:

> Section 8(i) of the NVRA requires states to maintain and make available for public inspection and copying records related to the implementation of voter registration programs designed to ensure the accuracy and currency of voter registration rolls. 42 U.S.C. § 1973gg-6(i). Completed voter registration applications plainly fall within this category of records.

(Plaintiffs' Motion for Reconsideration at p. 10.)

Plaintiffs' assertion is simply wrong. Here's what the NVRA provides:

> (i) Public disclosure **of voter registration activities**
>
> (1) Each State shall maintain for at least 2 years and shall make available for public inspection and, where available, photocopying at a reasonable cost, **all records concerning the implementation of programs and activities conducted for the purpose of ensuring the accuracy and currency of official lists of eligible voters**, except to the extent that such records relate to a declination to register to vote or to the identity of a voter registration agency through which any particular voter is registered.
>
> (2) The records maintained pursuant to paragraph (1) shall include lists of the names and addresses of all persons to whom notices described in subsection (d)(2) of this section are sent, and information concerning whether or not each such person has responded to the notice as of the date that inspection of the records is made.

42 U.S.C. § 1973gg-6(i) (emphasis added).

This Code section concerns voter registration activities of the governmental agency, not private actors. If this is not clear by its express reference to "implementation of programs and activities" and "official lists of eligible voters," it is explicitly clear by the title of the Code section: "**Requirements with respect to administration of voter registration**." 42 U.S.C. § 1973gg-6. The Plaintiffs would find a "right" to copy by taking this Code section completely out of context.

As it was Congress did clearly express its intent regarding the NVRA and the protection of confidential information, as well as deference to State laws to prevent fraud, in the House Report accompanying passage of the law:

> Since some of the reasons for declining to register to vote may involve matters of personal privacy, such as ineligibility under State law due to mental incompetence or a criminal conviction, an individual who declines to register to vote shall not be questioned as to the reasons for such action. If an individual reveals such information, it must be treated as confidential and may not be used for any other purpose. As discussed later, the Act contains a general prohibition against a State or entity from revealing any information relating to a declination to register or to the particular location or agency where a person registered.

H.R. Rep. 103-9 at p. 8. Likewise:

> States are permitted to employ any other fraud protection procedures which are not inconsistent with this bill.

Id. at p. 10.

The intent of Congress accompanying the passage of the NVRA was explicitly not to preempt state law, as is evident throughout the entire House and Senate Reports on the subject. *See* H.R. Rep. 103-9 *passim*; S. Rep. 103-6 *passim*. 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).

The Plaintiffs assert at length that there is a fundamental right to vote -- which is not disputed by the Defendants and not interfered with here -- that they have a right to conduct voter registration drives -- Defendants have never contended that they do not. They also claim that the *Wesley* case gave them broad

powers to conduct voter registration drives as they see fit and free from State regulation, but *Wesley* did no such thing. (Again, this issue has previously been thoroughly briefed to the Court.) *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. It does not state or imply that States cannot regulate copying of voters personal information. It des hold that private individuals or groups have standing to assert claims under the NVRA -- and the Defendants do not dispute this in this case (if Plaintiffs can show an actual injury). None of the Plaintiffs' assertions in this regard, which stretch over many pages, are relevant to the issue of whether conflict pre-emption occurred by the passage of the NVRA such that the States may not have a regulation limiting copying of completed voter registration applications.

Indeed, while the Plaintiffs' ignore it, 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). The regulation expressly requires that no form be 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). Thus, what is at issue in this case is not the ability of private individuals to register to vote. The Plaintiffs would rewrite the NVRA to protect their own interests (which are not mentioned in the NVRA) and essentially put to the side those of voters.

Here it is critical that the Court recognize that the ability of private individuals and groups to have unfettered access to the private information of registrants, such as their social security numbers, inhibits rather than furthers the registration of voters. It may be common sense to recognize that some people will not register if they fear that their private and confidential information will be disclosed. And, indeed, the unrebutted testimony was that just these types of complaints were brought to the Secretary of State's attention, prompting the regulation. (Deposition of Kathy Rogers at pp. 86-87.)

Concern that some people would not register if their private information is subject to disclosure was explicitly addressed by the House in its report. Again, as quoted above: "**Since some of the reasons for declining to register to vote may involve matters of personal privacy . . . [i]f an individual reveals such information, it must be treated as confidential and may not be used for any other purpose.**" H.R. Rep. 103-9 at p. 8.

The Plaintiffs' brief in support of their motion for reconsideration also contains a series of diatribes against the State asserting that the regulations in this case are intended for an "intimidating and coercive effect on private voter registration organizers" and that the regulation is part of an organized effort since 2002 by Georgia and other states to inhibit voter registration. There is no evidence to support either of these assertions. to the contrary, the undisputed evidence is that the regulation was passed to protect registrant's privacy.

At its core this case involves a conflict between the indisputably confidential information of registrants, such as their social security numbers, and the desire of the Plaintiffs to have unfettered access to such information. There is no dispute that the Plaintiffs can have access to non-confidential information, and there is no dispute that they can have access to confidential information if they seek the registrant's permission (which they evidently do not want to do). The NVRA,

however, was intended, first and foremost, to protect and further the interest of citizens in registering not in protecting some inchoate right of private organizations to obtain confidential information about registrants.

The Plaintiffs' Motion for Reconsideration raises no law that was not previously addressed to the Court and no facts that the Court overlooks. It should be denied.

CONCLUSION

For the foregoing reasons the Defendants respectfully request that the Plaintiffs' Motion for Reconsideration be denied.

Respectfully submitted,

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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 IN OPPOSITION TO PLAINTIFFS' MOTION FOR RECONSIDERATION** 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 30th day of October, 2006.

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