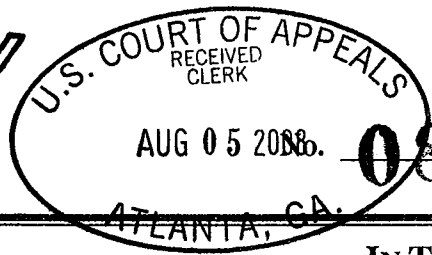
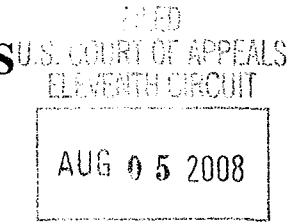


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08-14419J

IN THE
**UNITED STATES COURT OF APPEALS
FOR THE ELEVENTH CIRCUIT**



AUG 05 2008

**IN RE: ASSOCIATION OF COMMUNITY ORGANIZATIONS
FOR REFORM NOW, et al, Petitioners.**

THOMAS K. KAHN
CLERK

On Review from the United States District Court for the
Northern District of Georgia, Atlanta Division
ACORN, et al. v. Cox, et al.
Civil Action No. 1:06-cv-1891-JTC
Hon. Jack T. Camp, Chief Judge

**RENEWED PETITION FOR WRIT OF MANDAMUS,
PROHIBITION, AND OTHER APPROPRIATE RELIEF**

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**CERTIFICATE OF INTERESTED PERSONS
AND CORPORATE DISCLOSURE STATEMENT**

Pursuant to 11th Cir. Rules 21-1(b) and 26.1-1, the undersigned counsel of record for Plaintiffs/Petitioners hereby certifies that the following persons or entities have an interest in the outcome of this appeal:

Association of Community Organizations for Reform Now – Plaintiff

Thurbert Baker – Attorney General of Georgia

Jack T. Camp – United States District Judge for the Northern District of Georgia

Cathy Cox – Defendant, Former Secretary of State of Georgia

Dennis Dunn – Deputy Attorney General of Georgia

J. Randolph Evans – Defendant, Member of the State Election Board of Georgia

Georgia Coalition for the People’s Agenda, Inc. – Plaintiff

Georgia State Conference of NAACP Branches – Plaintiff

Karen Handel – Defendant, Current Secretary of State of Georgia

Bradley E. Heard – Counsel for Plaintiffs

Jeffrey K. Israel – Defendant, Member of the State Election Board of Georgia

Claud L. McIver, III – Defendant, Member of the State Election Board of Georgia

Brian W. Mellor – Counsel for Plaintiffs

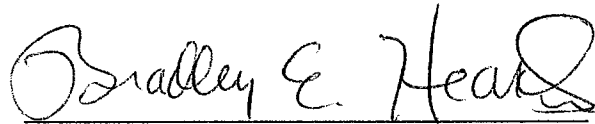
Project Vote/Voting for America, Inc. – Plaintiff

Stefan Ritter, Senior Assistant Attorney General of Georgia

Elizabeth S. Westfall – Counsel for Plaintiffs

Dana Williams – Plaintiff

Further, the undersigned counsel of record for Plaintiffs/Petitioners hereby certifies that Association of Community Organizations for Reform Now, Georgia Coalition for the People’s Agenda, Inc., Georgia State Conference of NAACP Branches, Project Vote/Voting for America, Inc., and Mr. Dana Williams (“Petitioners” before this Court), are either not-for-profit organizations or individuals. As such, none of the Plaintiffs/Petitioners have issued stock or other securities. Necessarily, the Corporate Disclosure Statement contemplated by 11th Cir. Rule 26.1 is inapplicable to Plaintiffs/Petitioners.

A handwritten signature in black ink that reads "Bradley E. Heard". The signature is written in a cursive style with a large, stylized initial 'B' and a long, sweeping underline.

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I. RELIEF REQUESTED AND INTRODUCTION

Following this Court's partial grant of Petitioners' earlier mandamus petition on February 27, 2008, in Case No. 07-15688-C (App. ¹ Tab 24 ["Mandamus Order"]), and the district court's subsequent entry of its order of clarification on June 20, 2008 (App. Tab 25 ["Clarification Order"]), as directed by this Court's Mandamus Order, Petitioners 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") and the Georgia State Conference of NAACP Branches ("Georgia NAACP") (collectively, "Petitioners" or "Plaintiffs") file this renewed petition seeking the issuance of a writ of mandamus or prohibition from this Court, pursuant to 28 U.S.C. § 1651.²

In this renewed petition, as in the previous petition, Petitioners seek an order from this Court directing the United States District Court for the Northern District of Georgia (Hon. Jack T. Camp, Chief Judge): (1) to vacate those portions of its Order of October 26, 2007 in the *ACORN v. Cox* case, Civil Action No. 1:06-CV-1891-JTC, granting the Georgia State Election Board ("SEB")

¹ "App." references herein refer to the Appendix to Petition for Writ of Mandamus, Prohibition, and Other Appropriate Relief filed contemporaneously herewith.

² This Court's Mandamus Order specifically granted Petitioners leave to file this renewed petition after the district court had entered its Clarification Order.

Defendants’³ motion to compel production of various documents and interrogatory responses that impinge upon Plaintiffs’ fundamental First Amendment rights and privileges and which are wholly irrelevant to any issue in the case, denying Plaintiffs’ cross-motion for protective order, and granting Defendants’ motion for extension of time to complete discovery (*see* App. Tab 20 [“Discovery Order”] at ¶¶ 1, 2, 4, 6, 8, and 9); (2) to enter an appropriate protective order prohibiting or limiting discovery, consistent with that requested by Plaintiffs (*see* App. Tab 10, Plaintiffs’ Cross-Motion For Protective Order [“Pltfs’ Prot. Ord.”]); (3) to enter an appropriate order outlining the time for completion of discovery and submission of dispositive motions that is not inconsistent with the above-referenced relief; and (4) to take such other actions as this Court deems necessary and in the interest of justice to protect Petitioners’ interests as outlined herein.⁴

The Discovery Order requires Plaintiffs – non-profit groups which organize and sponsor voter registration, education, and get-out-the-vote activities in minority and low-income communities in Georgia – to disclose detailed and

³ The Defendants in this case are Karen Handel, current Secretary of State of Georgia and Chair of the State Election Board, in her official capacity; Cathy Cox, former Secretary of State of Georgia and former Chair of the State Election Board, in her individual capacity; and current State Election Board members Claud L. “Tex” McIver, III, J. Randolph Evans, David J. Worley, and Jeffrey K. Israel in their individual and official capacities (“Defendants” or “State”).

⁴ Plaintiffs have already complied with and therefore are not herein challenging paragraphs 3, 5, and 7 of the Discovery Order.

voluminous information regarding the nature and extent of their protected political and civic associational and speech activities over a three-year period (2004 through 2007) to the State of Georgia, which has articulated no compelling need for the information and which has indicated that it intends to use the information for purposes of subjecting Plaintiffs' activities to increased and unwarranted scrutiny. Plaintiffs believe that Defendants have sought this irrelevant and constitutionally invasive information in retaliation for Plaintiffs' having chosen to file the instant lawsuit challenging the SEB's regulation prohibiting anyone other than a registrar or deputy registrar (including the applicant) from copying completed voter registration applications (the "copying ban") and prohibiting anyone other than a registrar or deputy registrar from accepting a completed voter registration application from someone else unless the application is sealed (the "sealing requirement"). *See* Ga. Comp. R. & Regs. r. 183-1.6-.03(3)(o)(2) (as amended eff. Jan. 17, 2006) (the "Regulation").

Specifically, the Discovery Order requires Plaintiffs to produce: (1) any archival copies of completed voter registration applications that they may have collected and maintained in connection with their voter registration drives in Georgia (*see* Discovery Order at ¶¶ 1-2); (2) any sign-in sheets, logs, and registers collected and maintained by Plaintiffs during their voter registration drives in Georgia (*see* Discovery Order ¶ 6); and (3) any documents and information

relating to complaints made against or received by Plaintiffs *anywhere in the United States* related to the conduct of Plaintiffs' workers in "forging voter registration application information, using the information on the applications, or copying the information" (*see* Discovery Order ¶¶ 4, 8).

After initially refusing to provide any explanation of its reasoning in its Discovery Order, despite extensive briefing by the parties regarding the associational privilege and relevance issues and two lengthy hearings in open court lasting over five hours combined, the district court ultimately explained in its Clarification Order that Plaintiffs were not entitled to make a claim of associational privilege because they could not meet their *prima facie* burden of establishing a reasonable probability that production of the challenged records would interfere with and chill Plaintiffs' associational activities. (Clarification Order at 12-17.), Therefore, in the district court's judgment, Defendants were not required to show a compelling interest in the challenged records, or to demonstrate that there was any substantial relationship between the information sought by the state and its asserted compelling interest. (*Id.* at 16.)

In arriving at the determination that Plaintiffs had not established a *prima facie* case of interference with associational rights, the district court ignored the undisputed evidence in the record — including several admissions of the Defendants — which reflected not only Defendants' longstanding general hostility

toward Plaintiffs' and other non-governmental entities' voter registration activities in Georgia, but also Defendants' specific intent to use the challenged records to subject Plaintiffs' associational activities to heightened and unwarranted scrutiny, including but not limited to possibly contacting individuals with whom Plaintiffs associated during the course of their voter registration, education, and get-out-the-vote (GOTV) activities. That evidence was plainly sufficient to meet the minimal threshold standard of a *prima facie* case of associational interference.

The district court's Discovery Order, entered under such circumstances, constitutes a clear abuse of discretion. Plaintiffs have no other adequate means at their disposal to challenge the Discovery Order. Accordingly, they have brought this renewed Petition for a Writ of Mandamus, Prohibition, and other Relief.

II. STATEMENT OF THE ISSUE

Whether the district court abused its discretion by compelling Plaintiffs to respond to constitutionally invasive discovery requests, which significantly compromise Plaintiffs' First Amendment associational and speech rights, and which are also overly broad, unduly burdensome, and irrelevant to any issue in this case.

III. STATEMENT OF FACTS

Plaintiffs' Complaint specifically alleges that the SEB Regulation, which imposes a copying ban and sealing requirement upon private-entity voter registration groups, unlawfully interferes with Plaintiffs' rights to engage in

organized voter registration activity as permitted by the National Voter Registration Act of 1993, as amended, 42 U.S.C. §§ 1973gg *et seq.* (“NVRA”), and the First and Fourteenth Amendments of the U.S. Constitution. (*See* App. Tab 2, Complaint With Jury Demand.)

On September 28, 2006, the district court granted Plaintiffs’ Motion for Preliminary Injunction, concluding that Plaintiffs had shown a substantial likelihood of success on the merits of their claim that the Regulation infringed upon Plaintiffs’ First Amendment rights. (*See* App. Tab 5, Order Granting Plaintiffs’ Motion for Preliminary Injunction [“Prelim. Inj. Ord.”]).

Guided by *Anderson v. Celebrezze*, 460 U.S. 780 (1982), and its progeny, the district court concluded that the Regulation imposed severe burdens on Plaintiffs’ political, associational, and speech activities because it prevented them from reviewing voter registration “applications for completeness, accuracy, and fraud,” limited their “ability to monitor election officials,” interfered “with Plaintiffs’ ability to obtain funding,” and impaired their ability to “maintain ongoing contact with individuals they encounter during their voter registration drives.” (*See* Prelim. Inj. Ord. (App. Tab 5) at 6, 7, and 14.)

After balancing the “character and magnitude” of Plaintiffs’ injuries against the “precise interests” offered by the State as justification for the Regulation – i.e., to prevent the misappropriation and misuse of an applicant’s private information,

particularly his or her social security number – the district court found that the Regulation could not withstand constitutional scrutiny.⁵ (*See id.* at 17-18.) In particular, the district court noted that the State had offered no evidence of identity theft arising out of a private-entity voter registration drive and, therefore, had not shown that that the Regulation was necessary to address a real, rather than a conjectural, problem. (*Id.* at 15.)⁶ The district court also found that the State had

⁵ The district court’s conclusions are buttressed by the reality that Georgia is prohibited by federal law from requiring voters to include their full Social Security numbers (“SSN”) on voter registration applications and that Georgia no longer asks voters to supply the full SSN. *See Schwier v. Cox*, 412 F. Supp. 2d 1266 (N.D. Ga. 2005), *aff’d*, 439 F.3d 1285 (11th Cir. 2006); *see also* Excerpts from Transcript of Rule 30(b)(6) Deposition of Georgia State Election Board by Kathy A. Rogers (Sept. 1 2006) (App. Tab 4 [“Rogers Depo.”]) at 48-49, 76-78. Likewise, all the information contained on a voter registration application is required by federal and state law to be made available for public inspection and copying, except for the Social Security number and the place of registration – neither of which is contained on the mail registration applications used by third party voter registration drive organizers. 42 U.S.C. § 1973gg-6(i); O.C.G.A. § 21-2-225(b)-(c); Rogers Dep. at 76-78

⁶ In its Clarification Order, the district court suggests that it may have applied the wrong standard in granting the preliminary injunction to Plaintiffs, in light of the Supreme Court’s recent decision in *Crawford v. Marion County Election Bd.*, 128 S. Ct. 1610 (2008), because the district court’s conclusion was based, in part, on the finding that the state’s asserted interest in protecting against identity theft in connection with private-entity voter registration was conjectural, inasmuch as there was no evidence of any such identity theft having taken place in Georgia or anywhere else. (*See* Clarification Order at 5 n.2.) In fact, the district court applied the correct standard at the preliminary injunction stage of this case, notwithstanding *Crawford*. *Crawford* involved a weighing of the balance of Indiana’s asserted interest in protecting against in-person voter fraud (despite the lack of evidence of any such fraud actually occurring in Indiana) against the

(Cont’d...)

not shown why the Regulation was necessary given that Georgia already had existing criminal laws prohibiting identity theft and misappropriation. (*Id.* at 15-16; O.C.G.A. § 16-9-121.)

After entry of the preliminary injunction, Defendants filed their Answer, asserting several affirmative defenses, on October 16, 2006. (*See App. Tab 6, Answer*). On January 12, 2007, Defendants served extensive document requests and interrogatories on Plaintiffs. (*See App. Tab 8, Defendants' Notices of Filing of Original Interrogatories and Requests for Production.*) Plaintiffs timely objected and responded to Defendants' requests and produced all nonprivileged responsive documents in accordance therewith, except for those that are the subject of the instant dispute. (*See App. Tab 9, Plaintiffs' Notices of Filing of Original and*

burden of a photo ID requirement on all in-person voters. The Court found, based on the evidence presented in that case, that Indiana's photo ID requirement did not appear to impose a severe burden on voters as a whole, and that the state's asserted conjectural interest in protecting against voter fraud was therefore sufficiently weighty to support the photo ID requirement against a facial challenge, because the statute had a "plainly legitimate sweep." *Crawford*, 128 S. Ct. at 1623. In this case, by contrast, the district court found that the SEB Regulation's copying ban and sealing requirement imposed *severe* burdens on private-entity voter registration groups such as Plaintiffs. (Prelim. Inj. Order at 14-15.) Thus, under *Anderson*, the state's interests must be not merely "plainly legitimate," but rather *compelling*, and its chosen remedy must be *narrowly tailored* to the interest. As the district court correctly found, Defendants' conjectural interest in protecting against identity theft is not sufficiently compelling to justify a copying ban and sealing requirement on private-entity voter registration groups — particularly given the existing criminal laws that already exist to deter such activity.

Amended Responses to Defendants' Interrogatories and Requests for Production.)
Plaintiffs have also responded to the district court's directive to explain their efforts to search for documents they previously stated did not exist.

On June 4, 2007, Defendants filed a Motion to Compel Responses to Discovery (App. Tab 7 ["Mot. to Compel"]). After extensive briefing⁷ and two lengthy hearings regarding the First Amendment and relevance issues that Plaintiffs had raised, Defendants abandoned several of their technical and procedural arguments (e.g., waiver, absence of verifications, etc.) and agreed to limit the scope of their original discovery requests; however, the Defendants still were seeking the discovery of privileged and irrelevant information, as set forth above.⁸ On October 26, 2007, the district court entered the Discovery Order challenged by way of this Petition.⁹

⁷ See Mot. to Compel (App. Tab 7); Resp. to Mot. to Compel (App. Tab 11); Defendants' Reply Brief in Support of Motion to Compel (App. Tab 14 ["Repl. to Mot. to Compel"]); Plaintiffs' Reply Brief in Support of Motion for Protective Order (App. Tab 16 ["Pltfs' Repl. Prot. Ord."]); Plaintiffs' Report of Post-Hearing Conference Regarding Pending Discovery Disputes (App. Tab 17 ["Pltfs' Report"]); Defendants' Supplemental Brief Per Court's Order (App. Tab 18 ["Defs' Supp. Br."]); Plaintiffs' Supplemental Status Report of Parties' Post-Hearing Conference Regarding Discovery Disputes (App. Tab 19 ["Pltfs' Supp. Report"]).

⁸ The district court seems to lament, in its Clarification Order, that Plaintiffs refused to make any concessions as to these remaining privilege issues. (Clarification Order at 6.) It also suggests that Plaintiffs are unnecessarily delaying the ultimate resolution of the case by filing mandamus petitions challenging the

(Cont'd...)

IV. ARGUMENT AND CITATION OF AUTHORITY

A. A Writ of Mandamus Is the Proper Procedure To Obtain Appellate Review.

Although not a substitute for an appeal, the use of the writ of mandamus or prohibition to confine an inferior court to the lawful exercise of its jurisdiction is appropriate “when there is a ‘usurpation of judicial power’ or a clear abuse of discretion” with respect to a court’s interlocutory ruling on a discovery matter.

Schlagenhauf v. Holder, 379 U.S. 104, 109-10 (1964); *In re Fink*, 876 F.2d 84, 84 (11th Cir. 1989). This Court has also expressly recognized that mandamus is an appropriate vehicle for interlocutory review of a discovery order:

Mandamus is often an appropriate method of review of orders compelling discovery.... In the context of discovery orders which will compromise a claim of privilege or invasion of privacy rights, mandamus has been found appropriate due to [1] the importance of the privilege, [2] the seriousness of the injury if discovery is obtained, and [3] the difficulty of obtaining effective review once the privileged information has been made public. Therefore, if there has been a clear abuse in discretion, mandamus is an appropriate remedy.

Discovery Order. (*Id.* at 7.) With all due respect to the district court, Plaintiffs simply cannot compromise their good-faith claims of associational privilege, because, as discussed below, doing so would result in a waiver of the privilege and would result in irreparable harm to Plaintiffs. Plaintiffs remain committed to resolving the merits of this case as quickly as possible after these important discovery issues are resolved.

⁹ The district court has stayed proceedings in this case pending the resolution of these issues. (App. Tab 26, Order Staying Case.)

876 F.2d at 84. *See also In re Ford*, 345 F.3d 1315, 1316 (11th Cir. 2003)

(same).¹⁰ Thus, as required by 11th Cir. R. 26-1(a), Plaintiffs have no other means to obtain relief.¹¹

B. The District Court Abused its Discretion by Ordering Discovery that Invades Plaintiffs' First Amendment Rights and is Irrelevant and Unduly Burdensome.

Although possessing discretion to manage cases and order discovery, a federal district court's "discretionary choices are not left to a court's 'inclination, but to its judgment; and its judgment is to be guided by sound legal principles'" and is not "unfettered by meaningful standards or shielded from thorough appellate review.'" *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 416 (1975) (Marshall, J.) (internal quote omitted). *See also Klay v. United Healthgroup, Inc.*, 376 F.3d 1092, 1096 (11th Cir. 2004) (court can abuse its discretion by "applying the law in an unreasonable or incorrect manner") (internal citation omitted). Here, the court

¹⁰ Other circuit courts have articulated a similar standard for issuance of a writ of mandamus to review discovery orders involving claims of privilege. *See e.g., In re Long Island Lighting Co.*, 129 F.3d 268, 270 (2d Cir. 1997); *In re Seagate Tech., LLC*, 497 F.3d 1360, 1367 (Fed. Cir. 2007); *In re Burlington Northern, Inc.*, 822 F.2d 518, 522 (5th Cir. 1987); *In re Bieter*, 16 F.3d 929, 932 (8th Cir. 1994).

¹¹ By granting Petitioners' prior mandamus petition in part and specifically allowing leave for Petitioners to file this amended mandamus petition, this Court has implicitly acknowledged that mandamus is the appropriate way to raise the instant challenge to the district court's Discovery Order. Therefore, Petitioners have eliminated in this brief the extensive arguments as to the appropriateness of mandamus relief that were present in their previous mandamus petition.

abused its discretion by failing to find that Plaintiffs had established a *prima facie* case of associational privilege and by ordering discovery that infringes upon Plaintiffs' fundamental First Amendment rights and privileges and that is wholly irrelevant.

1. The District Court Abused its Discretion By Requiring Production of Voter Registration Applications and Associational Sign-In Sheets.

The district court abused its discretion by granting Defendants virtually unrestricted access to full, unredacted copies of: (1) voter registration applications made or collected by the Plaintiff organizations during any of their voter registration drives from 2004 to 2007 (*see* Discovery Order (App. Tab 20) ¶¶ 1, 2); and (2) any sign-in logs that Plaintiffs may have maintained during their voter registration drives from 2004 to 2007 (*see id.* ¶ 6). The Supreme Court has consistently recognized that compulsory disclosure of organizational ties can constitute a significant infringement on the freedom of association. *E.g., Buckley v. Valeo*, 424 U.S. 1, 64 (1979); *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 544 (1963); *Shelton v. Tucker*, 364 U.S. 479, 485-86 (1960). *See also, Adolph Coors Co. v. Movement Against Racism & the Klan*, 777 F.3d 1538, 1542 (11th Cir. 1985) (concluding that the First Amendment associational privilege comes in to play when a request asks for a list of a group's anonymous members, or similar information that goes to the heart of an

organization's associational activities, and such disclosure could infringe associational rights.).

Courts employ a well-established test when determining whether disclosure of material regarding a private party's associational activities is required. *NAACP v. Alabama*, 357 U.S. 449 (1958). Plaintiffs must first make a *prima facie* case for assertion of the associational privilege. *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). The party seeking to prevent disclosure can make this showing by demonstrating that the government's request for information would "work a significant interference with the [party's] freedom of association." *Id.* Once the court determines that the party has made such a *prima facie* showing, the burden shifts to the government to show that its interest in the information is compelling. *Id.* at 524-25. If the government can show a compelling interest, the court determines whether there is a substantial relation between the information sought and the government's asserted compelling interest. *Id.* at 525.

a) *Plaintiffs Established a Prima Facie Showing of First Amendment Infringement.*

The standard for establishing a *prima facie* showing of First Amendment infringement is quite low. *See In re Grand Jury Proceeding*, 842 F.3d 1229, 1235-36 (11th Cir. 1988) (noting that in *Buckley*, 424 U.S. at 73-74, the Supreme Court "recognized the difficulties of formally proving the evils of chill and harassment...and accordingly required only [a showing of] a reasonable

probability that the compelled disclosure...will subject [parties] to threats, harassment or reprisals from either Government officials or private parties.”) (internal quotations omitted). The fears of reprisal need not even be “objectively reasonable,” so long as they would have the “practical effect of discouraging the exercise of constitutionally protected political rights.” *Dole v. Serv. Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1460 (9th Cir. 1991) (internal quotations omitted).

Here, Plaintiffs possess objectively reasonable grounds for fearing threats and reprisals should Defendants obtain unredacted voter registration applications and sign-in sheets from the Plaintiffs. Defendants’ discovery requests relate directly to Plaintiffs’ political and associational activities, including their registration, education, get-out-the-vote, and general civic participation activities. Complying with the Discovery Order would require Plaintiffs and the individuals who associated with them to abandon the anonymity to which they are entitled under the First Amendment.¹² When the government requests information

¹² See *Watchtower Bible & Tract Soc. Of N.Y., Inc. v. Stratton*, 536 U.S. 150, 166 (2002) (“[T]here are a significant number of persons who support causes anonymously. ‘The decision in favor of anonymity may be motivated by fear of economic or official retaliation, by concern about social ostracism, or merely by a desire to preserve as much of one’s privacy as possible.’”) (quoting, in part, *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 341-42 (1995)). The right of Plaintiffs and their constituents to free, unmonitored association preclude after-the-fact and unconsented-to disclosure of that affiliation to the State of Georgia.

regarding these types of activities, an implicit presumption arises “that the party seeking protection has made his *prima facie* showing,” because such requests typically chill associational freedom. *Wyoming v. U.S. Dept. of Agr.*, 239 F. Supp. 2d 1219, 1237 (D. Wyo. 2002), *vacated as moot*, 414 F.3d 1207 (10th Cir. 2005).¹³

The fear of threats and reprisal in this case is particularly well-founded because Defendants have essentially admitted that they seek this information for the purpose of subjecting Plaintiffs’ voter registration activities to increased and unwarranted scrutiny. *See e.g.*, Mot. to Compel (App. Tab 7) at 6-7 (questioning whether Plaintiffs’ quality and monitoring activities in connection with voter registration “really work, and whether they are a substantial First Amendment Right of Plaintiffs”); *id.* at 16-17 (seeking to discover whether Plaintiffs had express permission from applicants to copy forms); and *id.* at 30-31 (seeking to confirm their unsupported speculation that “there are numerous instances of misconduct on some or all of [Plaintiffs’] parts”). Plaintiffs’ fears are further buttressed by the State of Georgia’s documented history of interfering with and/or

¹³ In *Wyoming v. U.S. Dept. of Agr.*, 414 F.3d 1207 (10th Cir. 2005) the district court’s opinion was vacated as moot solely due to the Forest Service’s intervening adoption of a new regulation. There was no suggestion by the Court of Appeals that the district court’s underlying analysis was incorrect.

prohibiting private-entity voter registration activities in violation of clearly established federal law.¹⁴

In finding that Plaintiffs had not established a *prima facie* case, the district court first ignored the presumption that arises whenever a governmental entity requests detailed information relating to a private entity's associational activity. *See Wyoming v. USDA*, 239 F. Supp. 2d at 1237. Next, by dismissing Plaintiffs' articulated fear of reprisals as "purely speculation" (*see* Clarification Order at 13), the district court ignored the principle articulated by the Supreme Court in *Buckley* and noted with approval by this Court *In re Grand Jury Proceeding*, that formal proof of "the evils of chill and harassment" is both difficult and unnecessary to establish a *prima facie* case.

The district court also ignored the undisputed evidence in the case and apparently relied instead on Defendants' erroneous arguments and/or substituted its own discounted perception of the threat to Plaintiffs' associational interests

¹⁴ Until the state was sued in 2004, Georgia categorically prohibited private groups from collecting and submitting voter registration applications during their voter drives, in violation of the NVRA. *See Charles H. Wesley Educ. Found. v. Cox*, 324 F. Supp. 2d 1358, 1366 (N.D. Ga. 2004). Once the Eleventh Circuit upheld the injunction against the ban, *see* 408 F.3d 1349 (11th Cir. 2005), the State Election Board passed the Regulation at issue in the present lawsuit, in order to re-impose cumbersome restrictions on private-entity voter registration groups. *See* Rogers Depo. (App. Tab 4) at 15-18, 48, and Ex. 3 attached thereto (Ltr. Dated Dec. 7, 2005 Fr. Atty. Gen. Baker to J. Tanner at p.2).

resulting from the production of the challenged records in place of the Plaintiffs' reasonably articulated fears of harassment and reprisal.¹⁵ Such conclusions, in contravention of the evidence, likewise constitute an abuse of discretion, particularly where (as here) the information unquestionably would reveal detailed information regarding Plaintiffs' associational ties and political activities.¹⁶ By

¹⁵ Part of the district court's downplaying of the threat was based on its clearly erroneous conclusion that Defendants are already in possession of the original voter registration applications at issue. (*See* Clarification Order at 12-13.) In fact, voter registration in Georgia is primarily a *county* function, and the appropriate county registrar is the custodian of original voter registration applications. *See, e.g.*, O.C.G.A. §§ 21-2-220, 21-2-226, 21-2-236. Thus, Defendants' *do not* have the original records in their possession currently. Defendants' counsel conceded as much during oral argument in the district court. (App. Tab 23 [Tr. of Oct. 17, 2007 Motions Hearing] at 52 (voter registration forms "are submitted to local governments in the state").) Even if the state had the original forms in its possession, there is no evidence to suggest that Defendants would be able to identify which of those forms were submitted by Plaintiffs, absent Plaintiffs being required to reveal their private associational activities. The mail-in voter registration forms used in private-entity voter registration drives were not designed to collect such information, since it is completely irrelevant to the voter registration process whether the mail-in application was submitted directly by the voter, through a government agency, or through a third party, such as a private-entity voter registration group. Either way, officials are required to accept and timely process all such forms. *Wesley*, 408 F.3d at 1353.

¹⁶ Courts have long protected information that may reveal an individual's organizational ties. *See Familias Unidas v. Briscoe*, 619 F.2d 391, 399 (5th Cir. 1980) (internal citations omitted) ("Since *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449 (1958), the Supreme Court has applied an exacting scrutiny to compulsory disclosures of membership lists *or associational ties*, upholding them only when the act of disclosure or the information sought is shown to be substantially related to a legitimate and compelling underlying state interest.") (emphasis added) (internal quotations omitted). *See also FEC v. Mechanists Non-*
(Cont'd...)

compelling the production of these forms from specific organizations, the identities of individuals who associate with Plaintiffs will necessarily be revealed.

The district court also erred in finding that production of the documents and information subject to Defendants' proposed protective order would adequately protect Plaintiffs' associational interests.¹⁷ Plaintiffs' principal concern is with the non-voluntary, judicially compelled disclosure to the State of Georgia of virtually all of their associational and political activities in the area of voter registration, education, and civic participation, without any showing of a compelling reason by the State, and the reasonable fear (based on the State's own statements and its prior history of thwarting private-entity voter registration activity in Georgia) that such a

Partisan Political League, 655 F.2d 380, 389 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981) (protecting volunteer lists); *Brown v. Socialist Works '74 Campaign Comm.*, 459 U.S. 87, 95 (1982) (protecting contributor lists); *U.S. v. Garde*, 673 F. Supp. 604, 606-07 (D.D.C. 1987) (protecting client identities); *U.S. v. Church of World Peace*, 775 F. 2d 265, 268 (10th Cir. 1985) (protecting marriage records).

¹⁷ The Clarification Order incorrectly states that the district court granted Plaintiffs' motion for a protective order. (Clarification Order at 7.) Plaintiffs presume that the district court is referring to the portion of its Discovery Order that directed the parties to enter into a protective order "setting forth those terms to which Defendants agreed." (Discovery Order at 3.) Respondents' proposed protective order specifically allows disclosure of Petitioners' associational ties — including but not limited to the names, addresses and telephone numbers of people who attend Petitioners' events — to Respondents' counsel (a State of Georgia employee) and two other "representatives of Respondents" (App. Tab 21, Defendants' Proposed Protective Order at ¶ 3), and contains no provision preventing Respondents from subjecting Petitioners or those who associated with them from increased scrutiny.

disclosure could result in government reprisals and otherwise “work a significant interference with [Plaintiffs’] freedom of association.” *Cf. Bates*, 361 U.S. at 523. Defendants’ proposed protective order (*see* App. Tab 21, at ¶ 3), which allows disclosure of the information to Defendants’ counsel and two other “representatives of Defendants,” does absolutely nothing to allay those concerns.

Finally, Defendants’ unsupported, blanket statement that they do not intend to take action against Plaintiffs’ members, even if true, cannot justify production of these privileged documents.¹⁸ The Supreme Court has made it clear that an infringement of a party’s associational rights does not hinge on governmental

¹⁸ The same holds true for Defendants’ counsel’s unsupported and dubious representation at oral argument, that Defendants “were not going to go contacting these people [voter registrants].” (App. Tab 15, Tr. of Oct. 17 Hearing at 52.) The district court’s Clarification Order appears to rely, in part, on this offhanded representation of Defendants’ counsel at oral argument (*see* Clarification Order at 15), despite a host of evidence submitted by Defendants’ counsel to the contrary. For instance, the proposed protective order submitted by Defendants shortly after the October 17 oral argument contained no such limitation. (*See* App. Tab 21, Defs’ Proposed Prot. Ord., submitted Nov. 9, 2007.) To the contrary, Defendants merely represented that they would not seek to discover whether any of the voter registrants attempted to join any of the Plaintiffs’ organizations as members. Similarly, Defendants claim to need access to Plaintiffs’ archival copies of voter registration applications to discover whether Plaintiffs obtained express permission from applicants to copy their applications. (App. Tab 7 at 16-17.) This implies that Defendants very much intend to “go contacting th[o]se people” to make that determination, because there would be no other way to discover that information, given that it is not reflected on the application itself. (In addition, as discussed below, the inquiry into whether Plaintiffs received express permission from applicants to copy their forms is wholly irrelevant to the lawsuit, since the Regulation prohibits *all* copying, including copying authorized by the applicant.)

intent, but rather on the perceived impact of the interference upon Plaintiffs' associational activities. *See NAACP v. Alabama*, 357 U.S. 449, 461 (1958) (“that Alabama...has taken no direct action to restrict the right of petitioner’s members to associate freely, does not end inquiry into the effect of the production order.”)

b) *Defendants Have Shown No Compelling, or Even Rational, Need for Production of Registration Applications or Sign-In Sheets in This Case.*

In this case, not only do Defendants fail to articulate a compelling need for the discovery, they fail to demonstrate that the documents sought are even relevant to the case. Relevance is the cornerstone of discovery under Fed. R. Civ. P. 26(b)(1), and, as the district court itself noted in another recent case, it is improper to order discovery regarding non-relevant material. *See Carnes v. Crete Carrier Corp.*, 244 F.R.D. 694, 698 (N.D. Ga. 2007) (Camp, J.) (denying discovery requests because party could not carry its burden of demonstrating that requested discovery related to any claim or defense in the litigation).¹⁹

¹⁹ *See also In re Reyes*, 814 F.2d 168, 170 (5th Cir. 1987) (issuing a writ of mandamus to reverse district court’s grant of discovery “as to information which was completely irrelevant to the case before it and . . . that could inhibit petitioners in pursuing their rights in the case because of possible collateral wholly unrelated consequences, because of embarrassment and inquiry into their private lives which was not justified, and also because it opened for litigation issues which were not present in the case”).

Throughout their briefing and oral argument on this discovery dispute, Defendants failed to offer any rational, let alone compelling, justification for the requested discovery. The underlying issue in this litigation is narrow – whether the SEB’s Regulation imposing a copying ban and sealing requirement on private-entity voter registration groups and other private persons who sponsor voter registration drives or otherwise handle completed voter registration applications violates the NVRA or the First and Fourteenth Amendments of the Constitution. In its Preliminary Injunction Order, the district court acknowledged, pursuant to *Anderson* and *Burdick*, that it must weigh the benefits and burdens of the Regulation to make this determination; however, Defendants’ apparent assertion that production of voter registration forms and/or sign-in sheets will shed light on any of the *Anderson/Burdick* factors belies logic.

Defendants erroneously contend that discovery of completed voter registration applications and sign-in logs are relevant to the following issues: (1) the State’s need for the regulation and how it can be easily administered; (2) the minimal burden placed on Plaintiffs (and other registration groups) by requiring adherence to the Regulation; (3) whether Plaintiffs requested permission from registrants to copy voter registration forms; (4) standing; and (5) potential impeachment of testimony from Plaintiffs’ witnesses regarding Plaintiffs’ quality control checks. *See* Mot. to Compel (App. Tab 7) at 16-17. Contrary to

Defendants' assertions, however, it is clear that completed, unredacted voter registration applications and sign-in sheets will not provide Defendants any substantive information regarding any of the above issues.

As to Defendants' first issue (the State's need for the Regulation), the evidence is undisputed that the Regulation was motivated solely by the State's alleged desire to prevent identity theft and misappropriation in connection with private-entity voter registration drives. (*See* Rogers Depo. (App. Tab 4) at 46:7-13; 85:19-21; and 88:8-9).²⁰ Blank voter registration forms, which are already in Defendants' possession, and blank sign-in logs, which Plaintiffs have already offered to produce, would reveal the categories of information typically collected by Plaintiffs, without compromising the privacy and associational rights of Plaintiffs or their constituents. Copies of completed registration applications and sign-in logs would add nothing more to this issue.

As to Defendants' second issue, the completed forms provide nothing more than blank forms to illustrate the alleged minimal burden on Plaintiffs in

²⁰ The district court acknowledged this during oral argument. (App. Tab 23 [Tr. of Oct. 17, 2007 Motions Hearing] at 15-16 ("I think that the argument made by the Defendants previously, at the initial [preliminary injunction] hearing, was that the justification and need for the Regulation was identity theft, pretty much just identity theft.... If all you can say is we are concerned about identity fraud, that certainly narrows both the argument and the discovery. And what I am telling you is, when [Defendants] presented this before, that was my impression...."))

complying with the Regulation. Indeed, Defendants cannot tell from the face of either a blank or a completed registration form or the sign-in sheets whether it is easy for Plaintiffs to comply with the Regulation. Moreover, the district court has already rejected Defendants' contention, based on the common-sense notion (bolstered by extensive evidence) that is easier and less prone to error for Plaintiffs' volunteers and voter registrants alike simply to provide their contact information once – on the actual voter registration form – and then to copy that form, rather than having to manually rewrite the information onto a second piece of paper. (*See* Prelim. Inj. Ord. (App. Tab 5) at 7.)

Likewise, there is no justification for Defendants' assertion that non-redacted copies of completed voter registration forms and/or sign-in sheets are relevant to whether Plaintiffs received permission to copy individual registrants' applications. The completed forms and sign-in sheets do not indicate whether Plaintiffs requested permission from registrants to copy forms – and indeed, Defendants already know the answer to this question, from prior testimony: some of the Plaintiffs did, and some did not. *See* Resp. to Mot. to Compel (App. Tab 11) at 22-23 & n.13 (citing to testimony). More importantly, though, the issue of whether Plaintiffs requested permission to copy forms is wholly irrelevant to the issues in this case. The Regulation prohibits all copying of completed registration applications by persons who are not registrars or deputy registrars, and does not

allow for applicants to authorize Plaintiffs or any other third party to copy the forms. (See Ga. Comp. R. & Regs. r. 183-1.6-.03(3)(o)(2) (as amended eff. Jan. 17, 2006)).

The completed forms and sign-in sheets are also utterly irrelevant to Defendants fourth issue – whether Plaintiffs have standing to challenge the Regulation. Defendants fail to acknowledge that standing does not depend on whether Plaintiffs conducted voter registration activity in Georgia during 2004 or 2006; but, rather whether they intend to conduct voter registration activities in the future. Plaintiffs previously filed affidavits attesting to this intent. (See Plaintiffs’ Brief in Support of Motion for Preliminary Injunction (App. Tab 3), Exhibit 1 thereto, Affidavit of Brian Kettenring (“ACORN’s plans for 2006 include conducting a voter registration drive in Georgia which would aim at the registration of 5,000 to 10,000 new voters.”).) Furthermore, to the extent the registration forms provide useful information regarding Plaintiffs’ voter registration activities in Georgia during the relevant time period, Plaintiffs already have agreed to an *in camera* inspection of a sample of registration applications with appropriate redaction of identifying information. (See Resp. to Mot. To Compel (App. Tab 11) at 21-22.)

Finally, Defendants’ fifth issue – potential impeachment of Plaintiffs’ testimony regarding quality control and monitoring – also misses the mark.

Contrary to Defendants' assertions, the ultimate efficacy of Plaintiffs' previous quality control and monitoring efforts (or, in Defendants' parlance, whether they "really work") is not at issue in this case. The relevant issue is whether the Regulation interferes with Plaintiffs' *ability* to conduct quality control and election official monitoring in the future by eliminating Plaintiffs' access to the information contained on the voter registration forms that they collect and submit.

Plaintiffs have testified as to their beliefs that their quality control and monitoring procedures are beneficial and effective for a variety of reasons (e.g., ensuring that applications are accurate and timely processed by election officials, and monitoring employee and volunteer productivity and compliance). The First Amendment specifically protects Plaintiffs' rights to "select what they *believe* to be the most effective means" for organizing voter registration drive efforts. *Myer v. Grant*, 486 U.S. 414, 524 (1988) (emphasis added). Thus, absent some compelling asserted interest (which has not been shown), the State should simply not be allowed to undertake expansive and intrusive discovery at Plaintiffs' expense for purposes of intruding upon, testing, attempting to debunk, or otherwise interfering with Plaintiffs' chosen methods of organizing their associational and political activities.

2. The District Court Abused Its Discretion by Compelling Production of Irrelevant Complaints That Chill Plaintiffs' Protected Voter Registration Efforts.

Paragraphs 4 and 8 of the district court's Discovery Order require Plaintiffs to produce information and documents related to complaints (both formal and informal) lodged against their organizations and their workers concerning the: (1) forging of voter registration applications; (2) use of the information provided on the applications; or (3) copying of such information. Production of this information will chill Plaintiffs' considerable voter registration and GOTV activities, thereby causing significant harm to Plaintiffs' speech and associational rights. This injury would confer absolutely no benefit to the State in this litigation because the information and documents captured by the Discovery Order either do not exist, or are wholly irrelevant to the claims and defenses of the parties.²¹

²¹ Again, the district court's acknowledgment of this irrelevance at the prior oral argument is instructive. *See* App. Tab 23 at 15-16 ("So if [preventing identity theft] is going to be the only position, and is the only position of Defendants, then why would you need [discovery] about... other things that [Plaintiffs] may have been charged with or complained about? ... If all you can say is we are concerned about identity fraud, that certainly narrows both the argument and the discovery. And what I am telling you is, when [Defendants] presented this before, that was my impression...."), 17 ("Let me be a little more specific, Mr. Ritter. If we are talking even a rational basis test here, maybe any kind of fraud out there, which includes identity [fraud], to me is not a rational basis [for Defendants' discovery requests]. In other words, you are going to have to tell me that there may be fraud, and tell me what kind of fraud there may be out there before I see any reasonable rational basis [or] nexus between the Regulation that you are defending and the discovery you want in the case."), 59-60 (explaining how, if Defendants' only
(Cont'd...)

Therefore, disclosure of the complaints is also improper under *Bates*. 361 U.S. at 525.

Plaintiffs have repeatedly informed Defendants that they know of no complaints with respect to theft of registrants' identities or other illegal uses of information in the registration forms. (*See* Pltfs' Supp. Report (App. Tab 19) at 9.) Further, Defendants' own Fed. R. Civ. P. 30(b)(6) witness testified that the State Election Board received *no complaints* of identity theft regarding private-entity registration efforts. (*See* Rogers Depo. (App. Tab 4) at 86 ("Q. Have you gotten any calls that . . . third-party voter registration groups had been misusing their Social Security number? A. No.")) This same witness testified that "[t]he purpose of the copying and sealing rule was that they [members of the State Election Board] were extremely concerned about the privacy of an applicant's personal information," and that the regulation was driven "largely by a concern about identity theft." (*Id.* at 46, 85, and 88-89.) Given these undisputed facts, it was an abuse of discretion for the district court to order Plaintiffs to produce the information required in Paragraphs 4 and 8 of the district court's Discovery Order, inasmuch as production of such information would serve no other conceivable

asserted rationale and defense for the Regulation was preventing identity theft, "I think there is some basis for an objection to... issues not created in the Answer to the Complaint.")

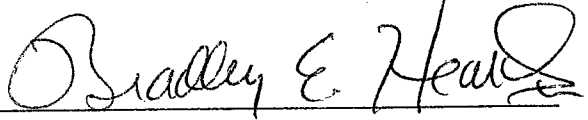
purpose than to besmirch the reputation of Plaintiffs and thereby chill their associational and political activities.

V. CONCLUSION

For all the above reasons, this Court should issue a writ of mandamus, prohibition, or other appropriate relief, directing the district court to vacate paragraphs 1, 2, 4, 6, 8, and 9 of its October 26, 2007 Discovery Order, and further instructing the district court to enter an order: (1) prohibiting or limiting discovery, consistent with the Protective Order requested by Plaintiffs; (2) outlining the time for completion of discovery and submission of dispositive motions that is not inconsistent with the above-referenced relief; and (3) taking all other action this Court deems necessary to protect Petitioners' interests as outlined above.

Respectfully submitted this 4th day August, 2008.

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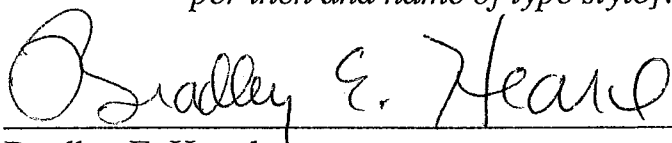
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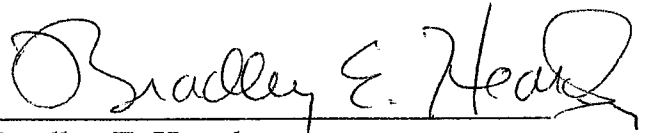
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This will certify that I have this day caused to be served a copy of the within and foregoing **Renewed Petition for Writ of Mandamus, Prohibition, and Other Appropriate Relief** upon the following parties by placing the same in the United States Mail, postage prepaid, addressed to:

Stefan E. Ritter, Esq.
Senior Assistant Attorney General
Georgia Department of Law
40 Capital Square, SW
Atlanta, GA 30334

The Honorable Jack T. Camp
Chief U.S. District Judge
U.S. District Court for the Northern
District of Georgia
75 Spring Street, SW, Room 2142
Atlanta, GA 30303

This 4th Day of August, 2008



Bradley E. Heard
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