

In The Matter Of:

*ASSOCIATION OF COMMUNITY ORGANIZATIONS v.
CATHY COX, et al.*

*KATHY A. ROGERS
September 1, 2006*

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

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

Plaintiffs,

vs.

CATHY COX, et al.,

Defendants.

CIVIL ACTION NO.

1:06-CV-1891-JTC

RULE 30(b)(6) DEPOSITION OF
GEORGIA STATE ELECTION BOARD BY
KATHY A. ROGERS

September 1, 2006

1:13 p.m.

40 Capitol Square, S.W.
Room 332
Atlanta, Georgia

Karla T. Pittman, RPR, GA CCR-B-1987

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APPEARANCES OF COUNSEL

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On behalf of the Plaintiff:
Association of Community Organizations for
Reform Now :

BRADLEY E. HEARD, Esq.
Molden, Holley, Fergusson,
Thompson & Heard, LLC
34 Peachtree Street, N.W.
Suite 1700
Atlanta, Georgia 30303

On behalf of the Plaintiff:
Advancement Project:

ESTELLE H. ROGERS, Esq.
Advancement Project
1730 M Street, N.W.
Suite 910
Washington, DC 20036

On behalf of the Defendants:

STEFAN E. RITTER, Esq.
Georgia Department of Law
40 Capitol Square, S.W.
Atlanta, Georgia 30334

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1 (Reporter disclosure made pursuant to
2 Article 8.B. of the Rules and Regulations of the
3 Board of Court Reporting of the Judicial Council
4 of Georgia.)

5 MR. HEARD: Good afternoon. This will be
6 the deposition of the State Election Board,
7 pursuant to Federal Rule of Civil Procedure
8 30(B)(6), and pursuant to notice and agreement
9 of counsel as to the date and location. The
10 designee for the State Election Board is Ms.
11 Kathy Rogers. Good morning or good afternoon.

12 THE WITNESS: Good afternoon.

13 MR. HEARD: And at this time if the court
14 reporter will swear in the witness.

15 KATHY A. ROGERS,
16 having been first duly sworn, was examined and
17 testified as follows:

18 MR. HEARD: And, Stefan, I assume Kathy
19 Rogers will read and sign?

20 MR. RITTER: We will read and sign. And I
21 understand you will be using it and will --

22 MR. HEARD: Right. We'll be using it for.

23 MR. RITTER: Well, if we have corrections,
24 we'll let you know.

25 MR. HEARD: All right.

1 MR. RITTER: And are you going to expedite
2 the completion of this transcript?

3 MR. HEARD: I will be expediting the
4 completion of the transcript, and we had
5 stipulated for the previous deposition that we
6 would -- we would use all the depositions for
7 the preliminary injunction hearing --

8 MR. RITTER: Right.

9 MR. HEARD: -- subject to each deponent's
10 right to correct their deposition.

11 MR. RITTER: Right. We won't have
12 originals to file with the Court, and I think we
13 will probably have to just file copies. So --

14 MR. HEARD: I'm sorry?

15 MR. RITTER: We won't have originals to
16 file with the clerk, so I think we're going to
17 have to serve copies to the Court.

18 MR. HEARD: That's fine.

19 And I guess as you did yesterday, we'll
20 reserve the right to recall this witness.

21 MR. RITTER: Of course. Well, that's
22 fine. This is a preliminary injunction
23 deposition and we haven't even answered yet,
24 so. . .

25 MR. HEARD: Okay.

1 (Plaintiff's Exhibit 1 was marked for
2 identification.)

3 Q. (By Mr. Heard) Just for the record, I
4 have interacted with Ms. Rogers on several occasions
5 at this point, and we do know each other, so I may
6 slip back and forth between Kathy and Ms. Rogers, if
7 that's all right with you?

8 A. That's all right. Kathy is fine.

9 Q. All right. Kathy, I'm handing you what's
10 been marked as Plaintiff's Exhibit 1. If you would
11 -- can you confirm that that is the 30(B)(6) notice
12 for the State Election Board's deposition?

13 A. It is.

14 Q. All right. And have you read and reviewed
15 that 30(B)(6) notice?

16 A. Yes, I have.

17 Q. Okay. And you're able today to testify
18 competently and fully as to the matters designated
19 therein?

20 A. Some of it was unclear to me exactly what
21 you were asking, but I think with clarification, I
22 will be able to do.

23 Q. Okay. Fair enough. We will try to
24 clarify as we move along.

25 You're the director of the elections

1 division for the office of Secretary of State,
2 correct?

3 A. That's correct.

4 Q. All right. And I believe you have some
5 sort of certification, CERA?

6 A. Certified Elections Registration
7 Administrator through Auburn University Election
8 Center.

9 Q. And what is that certification?

10 A. It's a program that was developed through
11 Auburn University for election administrators;
12 everything from the history of elections, to
13 budgeting, and modernization of elections. It's a
14 program that takes a couple of years to complete.

15 Q. Okay. And have --

16 A. And I have completed that.

17 Q. And if I remember correctly, you're one of
18 the few folks in Georgia who is so certified?

19 A. I was -- I was the first in Georgia. I
20 think there are now about maybe four or five of us.

21 Q. Okay. Tell me about your professional
22 experience in the area of elections administration.

23 A. Uh-huh. I first began elections as a poll
24 worker back in the eighties. A long time ago.

25 Q. Indeed.

1 A. And from there, I went on to work
2 part-time in the elections office, staffing polls; I
3 then became a clerk; and then became supervisor of
4 elections for Chatham County in Savannah; installed
5 the new voting systems; was supervisor of elections
6 there for about five years; and then in 2002, I came
7 to the State of Georgia as director of elections
8 administration, spearheaded the implementation of the
9 Georgia Statewide Uniform voting system; in 2005, I
10 assumed the duties of director of elections.

11 Q. Okay. And that director of elections is
12 the official that's principally responsible for
13 managing the Secretary of State duties in regards to
14 elections; is that --

15 A. Correct.

16 Q. -- correct?

17 Okay. Now, Kathy, you're familiar with
18 the allegations of the ACORN versus Cox lawsuit that
19 we're in now; is that correct?

20 A. Uh-huh. Correct.

21 Q. Describe your understanding of what the
22 allegations are in the complaint.

23 A. My understanding is that ACORN/Project
24 Vote have concerns over requirements for sealing and
25 the prohibition against copying voter registration

1 forms when those forms are collected by third-party
2 entities.

3 Q. Okay. And that was -- those requirements
4 were State Election Board regulations that were
5 enacted back in September of '05, correct?

6 A. Correct.

7 Q. All right. Now, have you read the
8 complaint in the case?

9 A. Yes.

10 Q. Okay. Have you read the other pleadings
11 that have been filed thus far in the case?

12 A. I've read some of them. I can't tell you
13 I've read them all, but I have read some of them.

14 Q. I understand. Now, in addition to the
15 ACORN versus Cox lawsuit, you're also familiar with
16 the Wesley Foundation versus Cox lawsuit, correct?

17 A. The Wesley 1, Wesley 2?

18 Q. Same case, different decisions, right?

19 A. Yeah.

20 Q. Well, the Wesley 1 filed in federal court.

21 A. Yes, I am.

22 Q. Okay. What was that lawsuit about?

23 A. That was the one regarding the acceptance
24 of bundled applications from third-party entities.
25 For -- prior to that ruling, the Secretary of State's

1 office, under -- under counsel, did not accept
2 bundled applications. And after that ruling, we do
3 accept bundled applications from third-party
4 entities.

5 Q. And you also accept single applications
6 from third-party entities?

7 A. Oh, yes. Uh-huh.

8 Q. All right. If you will give me just an
9 overview of what the SEB does. What it is and what
10 it does.

11 A. Let me -- let me give you a code book,
12 Bradley, and enter it in, too.

13 The State Election Board and Secretary of
14 State's office both have certain defined duties.
15 Some of them are commingled, some of them are -- are
16 fairly separate, but the State Election Board
17 oversees investigations, they oversee matters that
18 anyone who files a complaint related to the elections
19 process in any county, we have an investigator who
20 investigates that complaint. The findings are
21 brought back to the State Election Board. The State
22 Election Board reviews the findings, and then they
23 decide whether to send the findings to an
24 administrative law judge or, you know, whether to
25 close the case.

1 And then the case comes back from the
2 administrative law judge, and they at that time can
3 issue a civil penalty. They have no criminal
4 authority but they do have civil penalty authority.

5 Q. Okay. And then the State Election Board
6 obviously does rulemaking, correct?

7 A. They have rulemaking authority, they have
8 the authority for some voter education efforts under
9 photo ID, they have the authority to promulgate
10 rules. Without getting the code book out, I mean,
11 there's a litany of --

12 Q. No, that's fine. And I think you have hit
13 on most the ones that at least I had on my checklist.

14 And I believe you also said they do have
15 the power to hold hearings and to subpoena witnesses
16 and necessary people for those hearings, correct?

17 A. (Witness nods head affirmatively.)

18 Q. "Yes"?

19 A. Yes.

20 Q. Okay.

21 A. Sorry.

22 Q. All right. And am I correct in my
23 understanding that the elections division, your
24 office, is responsible for providing administrative
25 support to the State Election Board?

1 A. Well, we don't work for the State Election
2 Board, but we do perform duties that the State
3 Election Board requires in the performance of its
4 duties.

5 Q. Right.

6 A. But our staff does not per se report
7 directly to the State Election Board. They do not
8 have an administrative staff. They're very quick to
9 point out that we are not their staff; however, we do
10 perform duties at the request of the State Election
11 Board, such as pulling together the State Election
12 Board meetings, investigations, presenting them the
13 case files.

14 Q. Uh-huh. And you do report to the
15 Secretary of State?

16 A. Correct.

17 Q. Who is the chair of the State Election
18 Board?

19 A. I do.

20 Q. Okay. And at least in the Secretary of
21 State's regulations for the elections division, it at
22 least says that you're supposed to provide
23 administrative support to the State Election Board,
24 is that your understanding?

25 A. I don't know where that is defined at. I

1 really don't, by statute or code. It -- it occurs,
2 but I do not know where it is defined.

3 Q. That's fine. That's fine.

4 And I think you have -- you were
5 describing some of the things, you set up the
6 meetings, you do other things that the board asks of
7 you?

8 A. Uh-huh.

9 Q. And the board -- why don't you just tell
10 us for the record how the board is comprised.

11 A. The board is comprised of an appointee of
12 the House, an appointee of the Senate, one of the
13 Democratic Party, one of the Republican Party, and
14 then the Secretary of State serves as chair.

15 Q. By virtue of her office?

16 A. Yes.

17 Q. All right. And is it fair to say that the
18 State Election Board relies, from time to time, on
19 the professional advice of your office in election
20 matters?

21 A. That's a fair statement.

22 Q. Okay. Do you have occasion, from time to
23 time, to draft rules for the State Election Board's
24 consideration?

25 A. We have. We generally use the I won't say

1 powers, we use Jeff Lanier in legislative counsel,
2 because he is very good at drafting rules, he can
3 make them consistent so that all the rules look the
4 same rather than different people drafting them.

5 So typically, we will get guidance from
6 the State Election Board, take an outline or draft to
7 legislative counsel, they will prepare a draft of
8 rules for the review of the State Election Board for
9 our office.

10 Q. Jeff Lanier is a lawyer, correct?

11 A. Uh-huh. He is also former state election
12 director.

13 Q. One of your predecessors, correct?

14 A. He has experience in this area.

15 Q. Absolutely.

16 Do you yourself do any drafting of rules
17 for the election board?

18 A. No. I do not do any drafting of the
19 rules. We -- we only have ever drafted, our office
20 ourselves, one set, and that was the photo
21 identification set of rules. We drafted those
22 because legislative counsel was so busy earlier this
23 year. In the end, we wound up taking them to
24 legislative counsel because there was so much
25 numbering in them that, you know, we went back to

1 them and they cleaned them up.

2 So we really don't draft the rules, we sit
3 down with them, go over a list of what we think the
4 State Election Board might be looking for, and we go
5 from there. The same way almost with working with
6 legislation drafting a bill. You know, we don't
7 write our own legislation, we just might work with a
8 legislator on what the ideas are, and then take it to
9 legislative counsel.

10 Q. Now, tell me how legislative counsel is
11 appointed.

12 A. I honestly do not know. I don't know how
13 legislative counsel comes into play.

14 Q. Is it an office in the capitol or, I
15 mean --

16 A. Uh-huh.

17 Q. Okay. Do you know who it reports to?

18 A. I really don't. Sewell Brumby is the head
19 of legislative counsel, but I don't -- I don't know
20 the hierarchy of legislative counsel in the
21 government. I sure don't.

22 Q. And it just is happenstance that Jeff
23 Lanier right now is in the office as -- they don't
24 always have an election official?

25 A. Oh, no. No, when Jeff left from his

1 duties as state election director, he took other
2 employment.

3 Q. Okay.

4 A. And it just so happened to be as
5 legislative counsel.

6 Q. Okay. Cliff Tatum is the legal affairs
7 assistant?

8 A. Assistant director of legal affairs,
9 correct.

10 Q. And in the process when you interface with
11 legislative counsel, is he one of the folks that does
12 that?

13 A. Sometimes he's there with me, and
14 sometimes he's not, sometimes it's just him. So it
15 depends on our schedules and who's available.

16 Q. Okay.

17 A. Sometimes it's both of us.

18 Q. All right. I'm going to go through a
19 series of documents and try to identify -- get them
20 identified and ask you some questions about them.

21 A. (Witness nods head affirmatively.)

22 Q. And hopefully, that will be a relatively
23 quick and painless process.

24 (Plaintiff's Exhibit 2 was marked for
25 identification.)

1 Q. (By Mr. Heard) Ms. Rogers, I'm handing
2 you what has been marked as Plaintiff's Exhibit 2.
3 And if you'll review that and let me know what that
4 is.

5 A. (Reviews document) This appears to be the
6 submission to the Department of Justice regarding the
7 emergency rules enacted by the State Election Board
8 on -- I'm not sure of the date -- it's in September
9 of '04.

10 MR. RITTER: Uh-huh.

11 Q. (By Mr. Heard) I think it says
12 September 9th, if you flip over to that (indicating).

13 A. Okay.

14 Q. Sort of in the middle of that exhibit
15 there.

16 A. (Reviews document.)

17 MR. RITTER: This is Exhibit 2?

18 MR. HEARD: Exhibit 2.

19 Q. (By Mr. Heard) And attached to this
20 exhibit is a copy of that emergency rule 183-1-6-.06?

21 A. Uh-huh.

22 Q. And that deals with the copy prohibition
23 and the sealing requirement as well, correct?

24 A. (Witness nods head affirmatively.)

25 Q. "Yes"?

1 A. Correct.

2 Q. Okay.

3 All right. So in that exhibit, this
4 includes the State law department's preclearance
5 submission as well as a copy of the rule, correct?

6 A. Correct.

7 Q. All right.

8 (Plaintiff's Exhibit 3 was marked for
9 identification.)

10 Q. (By Mr. Heard) All right. I've handed
11 you Exhibit 3, Plaintiff's Exhibit 3. If you'll --
12 and this is -- this is an excerpted exhibit, but if
13 you'll identify what this exhibit is.

14 MR. RITTER: What do you mean "it's an
15 accepted exhibit"?

16 THE WITNESS: Excerpted.

17 MR. HEARD: Excerpted.

18 MR. RITTER: Yes. What did you mean by
19 that?

20 MR. HEARD: I don't -- all of the
21 attachments that aren't relevant to the lawsuit,
22 attachment of former complaints and everything,
23 is not there. The full text of the submission
24 letter is there, along with exhibits that I'm
25 going to go through with her.

1 MR. RITTER: Okay.

2 THE WITNESS: Okay. This document are the
3 submission of request for preclearance on rules
4 which were adopted by the State Election
5 Board -- and I do not know the date of the
6 meeting, -- of the rules adopted on
7 September 14th, 2005.

8 Q. (By Mr. Heard) Okay. All right.

9 And among the rules that was adopted on
10 September 14th, 2005, is the copying and sealing rule
11 that's the subject of this lawsuit, correct?

12 A. Correct.

13 Q. Okay. And a copy of that rule is attached
14 as Exhibit A-1 to this exhibit, correct?

15 A. Correct.

16 Q. All right. And then if you flip right
17 past the Exhibit A-1 in this Exhibit 3, the next
18 exhibit that you find is Exhibit E-1 to the
19 preclearance submission. And those are the minutes
20 of the State Election Board meeting on
21 September 14th, correct?

22 A. That's correct.

23 Q. If you flip over to Page 4 of those
24 minutes, under Roman numeral 5, with the heading
25 "Adoption of SEB Rules."

1 A. Uh-huh. Yes.

2 Q. The first entry there states -- well, why
3 don't you read it for the record.

4 A. "Chairperson Cox called for discussion,"
5 is that the one you're talking about?

6 Q. Yes, ma'am.

7 A. -- "of SEB Rule 183-1-6-.03(3)(0). After
8 discussion between the board, Mr. Evans made a motion
9 to adopt said rule, Mr. McIver seconded, motion
10 passed four to one with Mr. Worley casting the
11 dissenting vote."

12 Q. And that is the entry with respect to the
13 copying and sealing rule that we're talking about in
14 the lawsuit, correct?

15 A. Correct.

16 Q. All right.

17 MS. ESTELLE ROGERS: Let the record
18 reflect that it's three-oh and not three-zero.

19 MR. HEARD: Thank you.

20 MS. ESTELLE ROGERS: Thank you.

21 Q. (By Mr. Heard) Now, if you flip over to
22 Page 9 of that same exhibit, are these the minutes of
23 the July 27th SEB meeting?

24 A. They are.

25 Q. All right. And if you flip to Page 11 of

1 that, toward the bottom under Roman numeral 6, topic
2 number 3 is another entry that states -- I'll read it
3 this time -- "Chairperson Cox called for discussion
4 of SEB rule 183-1-6-.03(3)(o)," and it says, "Mr.
5 McIver made a motion of intent to adopt SEB rule" --
6 the same rule we just referenced -- "as presented.
7 Mr. Worley seconded; motion passed unanimously. The
8 rule will be posted for 30 days prior to adoption."

9 This is the entry that reflects the
10 posting of the rule that was passed on
11 September 14th, correct?

12 A. Correct.

13 Q. All right. Oh, I know why my notes are
14 incorrect, I forgot to do an exhibit. Okay.

15 (Plaintiff's Exhibit 4 was marked for
16 identification.)

17 Q. (By Mr. Heard) Okay. You've been handed
18 Exhibit 4, and if you will just confirm that these
19 are the minutes of the specially-called State
20 Election Board meeting via telephone conference on
21 September 9th, 2004, where the emergency rule related
22 to copying and sealing that we just discussed were
23 adopted, correct?

24 A. Correct.

25 Q. All right. And on the first and second

1 page, beginning toward the bottom of the first page
2 and then the full second page almost, are the minutes
3 related to the passage of that rule, correct?

4 A. Correct.

5 Q. Now, the emergency rules, were they --
6 were they posted for public comment at all?

7 A. If required by law, they were, Bradley,
8 but I -- I can't remember what the requirements are
9 regarding emergency rules and the 30-day requirement.
10 I would have to go back and -- and look at that.

11 Q. I don't know either --

12 A. I don't know. So I know we would have --
13 I know we would have followed the statute, you know,
14 as far as under APA, but I -- I don't recall what
15 that time period was for emergency rules.

16 Q. Well, I would imagine with emergency
17 rules, I don't know if you have to post them for 30
18 days, but I'm just wondering whether they were posted
19 for any period of time prior to their adoption?

20 A. I'm sure they were.

21 Q. Okay.

22 A. I would have to go back and confirm the
23 time they were posted, but I feel very confident that
24 they were posted.

25 Q. And do you know or recall how far in

1 advance this September 9th special-called meeting of
2 the State Election Board by conference call was
3 posted for the public?

4 A. I do not recall the amount of time. I
5 do -- I can tell you that it was a sufficient amount
6 of time. I know that you can enact special rules to
7 call an emergency meeting of the board, but it was
8 not -- I do not recall this as being an emergency
9 meeting. I recall it adopting emergency rules, but I
10 do not recall there being a shortened time frame for
11 posting the notice. We generally give 24 hours at
12 least.

13 Q. At least 24 hours?

14 A. Uh-huh.

15 Q. All right. If you look on Exhibit 4, it
16 does say "special conference call," I mean, does
17 special equate with emergency or --

18 A. Well, no. Anytime we do a meeting that's
19 other than a regularly called -- the SEB schedules
20 four regular meetings a year.

21 Q. I see.

22 A. Any meeting outside of those four would be
23 called a special meeting.

24 Q. Okay. And do you recall whether in the
25 notice that went out for this meeting there was

1 anything specific as to the nature of the rules that
2 were going to be discussed at the meeting?

3 A. I do not recall what the notice stated.

4 Q. Okay. I couldn't find it online, so --

5 A. It's probably not there anymore.

6 Q. Okay.

7 All right. With respect to the emergency
8 rule, now that I've gone back here, were there any
9 other documents, records or other things that would
10 constitute the administrative record with respect to
11 that rule?

12 A. Not that I am aware of.

13 Q. Okay. The meeting wasn't transcribed or
14 videotaped or otherwise recorded, was it?

15 A. I don't believe so. We're currently
16 recording meetings; I can't remember the date that we
17 began recording meetings, but I can recall where this
18 meeting occurred, and I do not remember there being
19 audio equipment in the room at that time.

20 Q. Okay. This meeting occurred over in the
21 Capitol, Room 110?

22 A. A conference room in the Capitol.

23 Q. Okay. And how are the meetings recorded
24 at this time?

25 A. Currently they're recorded, we bought new

1 audio recording equipment that records it onto a CD.

2 Q. Okay. Now, you said you don't recall
3 when?

4 A. I do not recall when we began recording
5 the meetings. We've had, today's meeting I think is
6 like the 18th SEB meeting in the last year.

7 Q. Okay.

8 A. So honestly --

9 Q. It's been quite a few.

10 A. -- they -- they have become a blur.

11 Q. I understand. All right.

12 And other than the summary provided in the
13 minutes, you're not aware of any other official
14 summaries of board action on this rule?

15 A. No, I am not.

16 Q. All right. Now, if you'll go back to
17 Exhibit 3, I just wanted to identify a couple of more
18 things in that exhibit.

19 Exhibit E-2 of the preclearance
20 submission --

21 A. Where are you at? Oh, E-2, it's on the
22 bottom.

23 Q. Towards the back at the --

24 A. Sorry.

25 Q. Yeah.

1 A. (Reviews document) Uh-huh.

2 Q. All right. What is this document?

3 A. It appears to be a document that was sent
4 by John Sullivan, who is the Fulton County registrar,
5 to Pam Fowler, who's an administrative assistant --

6 Q. Why don't you go back to John Sullivan. I
7 think it's a different John Sullivan.

8 MS. ESTELLE ROGERS: Yeah.

9 THE WITNESS: Oh, I'm sorry.
10 You're right. I just automatically
11 thought it was John Sullivan over in Fulton. I
12 apologize.

13 MR. HEARD: That's all right.

14 MS. ESTELLE ROGERS: And it's Washington
15 John Sullivan.

16 THE WITNESS: Yeah.

17 Okay. It's from John Sullivan, SEIU, and
18 he forwarded a document to Pam Fowler, who is
19 administrative assistant in the Secretary of
20 State elections division, regarding comments on
21 the proposed amended rule.

22 Q. (By Mr. Heard) The copying and sealing
23 rule that was adopted on the 14th?

24 A. Correct.

25 Q. Okay.

1 All right. And the following exhibit in
2 the last part of Exhibit 3, which is Exhibit E-3 to
3 the preclearance submission, can you identify that
4 document?

5 I hope so or somebody is going to be very
6 mad.

7 A. Yes. I will read this one correctly this
8 time. Don't assume that it's somebody else. I
9 apologize. I get so many e-mails from John Sullivan
10 in Fulton, I just was sure that was him.

11 This one is from Estelle Rogers with
12 Advancement Project, and it was sent to Pam Fowler,
13 administrative assistant, on Monday, September 12th,
14 and it concerned comments from Advancement Project
15 regarding the proposed rules.

16 Q. And these are comments both from
17 Advancement Project and Project Vote; is that
18 correct?

19 A. Correct.

20 Q. Okay. In opposition to the copying and
21 sealing rule?

22 A. Correct.

23 Q. Okay. Now, other than letters or other
24 comments that may have generated from my office, did
25 you receive any other written comments in regard to

1 this rule?

2 A. I -- I do not recall any.

3 Q. All right. And that permanent rule that
4 was passed on September 14th of '05 was indeed
5 precleared in January of '06, and effective on the
6 17th of January of '06?

7 A. Yes.

8 Q. I think you testified you didn't receive
9 any other written comments, but let me just clarify.
10 Did you receive any comments in support of that rule,
11 the copying and the sealing rule, any public
12 comments?

13 A. I would have to go back, we -- and review
14 minutes. Well, we've got the minutes. I don't
15 recall if we had a tape of that meeting or not, but
16 frequently there are election officials who are at
17 the meetings. They're generally quite vocal, and
18 would have provided comments, if the public comment
19 period was available. But I -- I don't recall
20 whether they did or not.

21 I can't say no one did because I don't
22 recall if they did.

23 Q. All right. Well, you have the minutes
24 from that meeting with you?

25 A. Uh-huh.

1 Q. I mean, they're not reflected in the
2 minutes of those meetings?

3 A. It may be that there were no election
4 officials there that day who spoke.

5 Q. Okay. All right.

6 Now, did the board or your office make any
7 response to -- let me back up and have you identify a
8 document and then ask you that question. Have you
9 identify two documents, actually.

10 (Plaintiff's Exhibit 5 was marked for
11 identification.)

12 Q. (By Mr. Heard) All right, Kathy, I'm
13 handing you what's been marked as Plaintiff's
14 Exhibit 5. If you will review that document and
15 identify that for me, please.

16 A. (Reviews document) Is there something
17 missing here?

18 Q. Yeah. Okay.

19 MR. HEARD: Off the record for a second.
20 (Off the record.)

21 MR. HEARD: We are back on the record.

22 Q. (By Mr. Heard) I think we have now gotten
23 the correct exhibit identified as Exhibit 5. If you
24 will go ahead and identify what that document is,
25 please.

1 A. This is a letter from Bradley Heard, to
2 the Secretary of State. It's in regard to notice of
3 violation under the NVRA and request for correction
4 dated September 14, 2005. And it relates to the
5 acceptance of voter registration applications by
6 private entities.

7 Q. Okay. And you're cc'd on this, correct?

8 A. That's correct.

9 Q. Do you recall seeing this document at
10 around the time?

11 A. I recall seeing many documents similar to
12 this. This one in particular, no, but I do recall
13 seeing many on this subject.

14 Q. Yes, ma'am. Fair enough. There was quite
15 a flurry of correspondence --

16 A. Yes.

17 Q. -- around that time. All right.

18 MR. HEARD: Now, I'll mark another
19 document for you here.

20 (Plaintiff's Exhibit 6 was marked for
21 identification.)

22 Q. (By Mr. Heard) Okay. If you will take a
23 look at what's been marked as Plaintiff's Exhibit 6,
24 and identify that document for me.

25 A. This is a response to Mr. John Sullivan

1 with SEIU, in regard to his concerns about the
2 proposed State Election Board rule, and it is my
3 response to Mr. Sullivan on that subject.

4 Q. All right. And do you recall whether any
5 response was made to the public comments submitted by
6 Advancement Project and Project Vote?

7 A. I know that I had conversations with Brian
8 Miller of Project Vote; I don't recall having
9 conversations with the Advancement Project. I -- I
10 would have to check correspondence files to see if
11 there was written communication.

12 I also believe I had written communication
13 with Brian Miller of Project Vote somewhere in the
14 last couple of years, but, there again, I -- I would
15 have to check the files to know.

16 Q. All right. That same question that I
17 asked you with regard to the emergency rule; other
18 than the exhibits we've just been talking about, are
19 you aware of any other written documents or things
20 that would comprise the administrative record with
21 respect to the passage of that rule, of the
22 September 14th copying and sealing rule?

23 A. Nothing immediately comes to mind, no.

24 Q. And you don't recall whether you were
25 taping or recording the meetings at that point?

1 A. I do not. I do not.

2 Q. Okay. And other than the minutes of the
3 meeting, you don't recall any other official written
4 summaries of that meeting?

5 A. Correct.

6 Q. Okay.

7 (Plaintiff's Exhibit 7 was marked for
8 identification.)

9 Q. (By Mr. Heard) All right. Kathy, I'm
10 handing you what's been marked as Plaintiff's
11 Exhibit 7. If you'll review that document and let me
12 know what that is.

13 A. (Reviews document) This is a -- a
14 proposed change to the rules of the State Election
15 Board related to private entities, which was provided
16 by Bradley Heard to the State Election Board for
17 consideration during their March 8th, 2006 State
18 Election Board meeting.

19 Q. Okay. And you were cc'd on that one as
20 well, correct?

21 A. Correct.

22 Q. Okay. And do you recall what, if
23 anything, that your office did in response to this
24 petition?

25 MR. RITTER: You mean her office, the

1 State Election Board, or her office, Secretary
2 of State's office?

3 Q. (By Mr. Heard) Why don't you answer for
4 both.

5 A. Okay. My recollection is that the State
6 Election Board moved to adopt these rules in part,
7 and then they also moved to have the state
8 election -- to have the elections division review
9 these proposed rules in concert with our voter
10 registration and elections unofficial group of task
11 force members, and to invite yourself and Project
12 Vote to that meeting.

13 And then these rules were subsequently
14 discussed the next month with that group of election
15 officials and yourself and Brian Miller from Project
16 Vote.

17 Q. Okay.

18 (Plaintiff's Exhibit 8 was marked for
19 identification.)

20 Q. (By Mr. Heard) All right. I am handing
21 you now Plaintiff's Exhibit 8, and if you will just
22 confirm for me that these are the -- oh, the wrong
23 minutes.

24 MS. ESTELLE ROGERS: Oh, do we already
25 have that one?

1 MR. HEARD: Yes. We'll strike that.

2 Yeah. We've already got these.

3 MS. ESTELLE ROGERS: Well, you have them
4 as attached to something, you didn't have them
5 freestanding.

6 MR. RITTER: Right. They're attached to
7 the submissions.

8 MS. ESTELLE ROGERS: To the preclearance.

9 MR. HEARD: Yes. We don't need to
10 introduce those again, then.

11 MS. ESTELLE ROGERS: No.

12 (Plaintiff's Exhibit 8 was withdrawn.)

13 Q. (By Mr. Heard) I think I had it as an
14 exhibit but I don't appear to have it here with me
15 today. But you do recall that -- I believe you
16 testified that the petition in Exhibit 7 was adopted
17 in part, rejected in part by the State Election Board
18 at its March 8th, 2006 meeting?

19 A. I can't say "rejected in part." They did
20 not consider -- I mean, they didn't -- they didn't
21 understand portions of it. They -- so they asked the
22 task force and the elections division to meet and
23 review those rules and come back.

24 I do recall that they asked you some
25 specific questions regarding voter registration by

1 private entities at places where criminal activity
2 took place or where alcohol was sold. There were
3 some portions of those proposed rules that -- that
4 led them to believe that it was possibly allowing
5 voter registration at those locations. And I seem to
6 recall they gave you the opportunity to also explain
7 your thoughts on those rules at that time.

8 Q. Well, what I'm -- what I mean by "adopt in
9 part and reject in part" is that they did not accept
10 the petition --

11 A. In whole.

12 Q. -- in whole?

13 A. At that time, they did not.

14 Q. Okay.

15 A. At that time, they agreed to put forward
16 the change from 72 hours to 10 days. I -- as I said,
17 I cannot say they rejected the rest of it. I do not
18 believe that they had fully digested it all at that
19 time, either.

20 Q. Okay. In any event, the minutes should
21 reflect what the board action was from that meeting,
22 correct?

23 A. Correct. Yeah. The board will, at a
24 future meeting, be reviewing proposed rules for
25 private entities based upon the outcome of the

1 meeting that we had with the task force.

2 Q. The task force after the March 8th
3 meeting?

4 A. Uh-huh.

5 Q. Okay. All right.

6 (Plaintiff's Exhibit 8 was marked for
7 identification.)

8 MR. RITTER: This one we are just marking
9 as 8?

10 MR. HEARD: 8, right.

11 Q. (By Mr. Heard) Kathy, if you will take a
12 look at the real Exhibit 8, are these the minutes --
13 is this a summary of the -- of the meeting from
14 May 24th, 2006?

15 A. Correct. And it's a summary of an SEB
16 meeting conducted in Savannah on May 24th of 2006.
17 The minutes have not yet been adopted.

18 Q. All right. And way down there on number
19 22, I believe, of that list of actions, is it says,
20 "Mr. McIver made a motion to adopt SEB rule
21 183-1-6-.03 as posted." Those would be the March 8th
22 revisions that they adopted; is that correct?

23 A. That would be the ten-day, moving from --
24 yes, that's correct. The ones that they approved and
25 posted for notice based upon the proposed rules that

1 you gave them on March 8th. That is, changing the
2 72 hours to 10 days.

3 Q. Correct. Okay.

4 A. Don't you like our LISTSERV that gives you
5 all this automatically?

6 Q. Love it. Actually, I got this off line.

7 A. Okay.

8 (Plaintiff's Exhibit 9 was marked for
9 identification.)

10 Q. (By Mr. Heard) All right. Take a look at
11 Exhibit 9, and are these the amendments that were
12 adopted by the State Election Board on the -- on
13 March 8th that were then posted and adopted at the
14 May 24th, 2006 meeting?

15 A. (Reviews document) That is correct.
16 These are the changes to the rules which were adopted
17 by the State Election Board.

18 Q. Okay. All right.

19 Now, I'm -- wait. Oh, one more thing with
20 regard to these rules.

21 (Plaintiff's Exhibit 10 was marked for
22 identification.)

23 Q. (By Mr. Heard) Take a look at Exhibit 10,
24 which is a letter from me to Mr. Ritter in regard to
25 those rules that we've just been discussing. And let

1 me know if you're familiar with that letter.

2 A. (Reviews document) Yes. I am familiar
3 with this letter.

4 Q. And directing your attention to the second
5 paragraph of that letter, we are -- I say "we," me on
6 behalf of a prior client of the Wesley Foundation --

7 A. Uh-huh.

8 Q. -- were requesting written explanations
9 from the board as to why they did not at that time
10 adopt -- or repeal, I should say, the copying and
11 sealing restrictions; is that correct?

12 MR. RITTER: Let me object to the extent I
13 think the letter speaks for itself as to what
14 it's seeking. Ms. Rogers can tell you what her
15 understanding is, I think, in response.

16 THE WITNESS: Without -- I mean, that
17 paragraph, I would assume that's what you're
18 saying here, but --

19 Q. (By Mr. Heard) It does speak for itself,
20 and I'll -- let me ask you, did the State Election
21 Board provide any other written response to the
22 Wesley Foundation, or any other entity, other than
23 what's been noted in the summary of the minutes, as
24 to the reasons for adopting or rejecting portions of
25 that petition for rulemaking?

1 A. No. I mean, they stated that day at the
2 meeting that they were fully supportive of moving the
3 72 hours to 10 days. And I'd also like to point out
4 that during the emergency rule, when the emergency
5 rule was adopted back in September of '04, one of the
6 provisions there that made it 72 hours -- it had been
7 24 hours -- and at that time, it was changed from 24
8 to 72. So they had been increasingly moving toward a
9 greater expansion of time, since back in September.

10 But as I said previously, I do not recall
11 them rejecting the remainder of your proposed
12 revisions to the rules, merely that they would like
13 for someone who dealt with this every day in an
14 administrative fashion to review them with you and go
15 over them and see what worked for election officials
16 and get some feedback from the folks who actually did
17 registration. So I -- there again, I don't think
18 they rejected them but merely deferred them for
19 discussion at a later point.

20 Q. All right. Now, do you recall whether the
21 board meetings were being recorded at that time?

22 A. That was March of this year?

23 Q. Of this year.

24 A. I believe so. I -- I feel fairly
25 confident they were.

1 Q. All right. Okay.

2 Now, I'm going to get back to my confusion
3 I alluded to a minute ago. The rules that are in
4 Exhibit 9 -- yes, Exhibit 9 -- is it your
5 understanding that those rules have been submitted
6 for preclearance?

7 A. Yes.

8 Q. Okay. Do you know when that happened?

9 A. These were transmitted from our office to
10 the Attorney General's office sometime after the
11 conclusion of the meeting. It would have been one of
12 the action items from the meeting.

13 Q. Uh-huh.

14 A. And the Attorney General's office would at
15 that time submit it to the Department of Justice for
16 preclearance. We have not yet received preclearance
17 notice back.

18 Q. You have not received the preclearance?

19 A. (Witness shakes head negatively.)

20 Q. Okay. All right.

21 (Plaintiff's Exhibit 11 was marked for
22 identification.)

23 Q. (By Mr. Heard) Now, Exhibit 11 might give
24 you the reason for my confusion there. If you'll
25 look at this exhibit, this appears to be the -- I can

1 represent to you that it's a rule I pulled off the
2 Web site.

3 A. Off the APA, correct.

4 Q. From --

5 A. It would have gone into effect 20 days
6 after adoption, under the APA rules.

7 Q. Okay.

8 A. However, let me explain to you what we
9 typically do, because of DOJ preclearance on all of
10 these rules and procedures.

11 Q. All right.

12 A. It's very similar to legislation.
13 Legislation is adopted, legislation is signed by the
14 governor and it's enacted, and it may even be printed
15 into, you know, the new Lexis book, of which the
16 election officials will obtain. But until it's
17 actually been precleared, it's not considered to be,
18 you know, 100 percent in effect.

19 Now, the same thing with these rules.
20 Under the APA, the rules are adopted within 20 days
21 after they are finalized, after the posting and the
22 final adoption by the SEB. And at that time, the
23 rules may still be waiting on preclearance.

24 We mail them out to the election officials
25 during the comment period for their comment.

1 Whenever rules are posted, they go out to all of the
2 elections and registration officials. Then, once the
3 rule is adopted, we mail it out again, we tell them
4 it is adopt -- we mail notice that the board has
5 adopted it. We don't send the rule again.

6 Q. Okay.

7 A. And then when it is finally approved by
8 DOJ, I send another memo with the rule again and say,
9 "Here it is in its final form. It's now received DOJ
10 preclearance and is in full effect."

11 Q. Okay.

12 MR. RITTER: Brad, can I add something to
13 this that might be helpful to you? If you don't
14 want me to --

15 MR. HEARD: You can, yeah. Yeah.

16 MR. RITTER: I'll be happy to offer a
17 comment to you.

18 MR. HEARD: Right.

19 MR. RITTER: The rules in this specific
20 case, and we're talking about an edition of
21 (1)(b), and then we're changing 72 hours to 10
22 days, our expansive rules rather than
23 restrictive rules probably have no racial or
24 voter impact at all other than broadening
25 powers, and, frankly, I think that B -- (1)(b)

1 just states what was already understood.
2 Because of that, I think it's questionable
3 whether they even needed justice department
4 approval in this case. But we would certainly
5 treat these rules, when they were adopted and
6 the way that they are, as in effect. We're not
7 claiming that these rules somehow would not go
8 into effect until we get justice department
9 approval.

10 And when we get that back, we would just
11 consider that to be retroactive in this case, to
12 the extent it has any legal effect at all.

13 THE WITNESS: And that -- that's correct.
14 If an election official called me today and
15 asked, you know, "Has that ten-day rule been
16 precleared yet?" We would say, While it's not
17 been precleared, it's pretty much like when they
18 have to move a polling place" --

19 MR. RITTER: Right.

20 THE WITNESS: -- and they go ahead and
21 move the polling place and hold the election and
22 preclearance comes 60 days later afterwards.

23 Q. (By Mr. Heard) All right.

24 A. And --

25 MR. RITTER: And just so that it's crystal