

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

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

Plaintiffs,)

v.)

CATHY COX, et al.,)

Defendants.)

**CIVIL ACTION NO.
1:06-CV-1891-JTC**

**DEFENDANTS’ PRELIMINARY PLANNING REPORT
AND DISCOVERY PLAN
CONSOLIDATED WITH PLAINTIFFS’ PLAN**

COME NOW CATHY COX, CLAUD L. (“TEX”) MCIVER III, J. RANDOLPH EVANS, DAVID J. WORLEY and JEFFREY K. ISRAEL, Defendants herein, and, by and through their undersigned counsel, Thurbert Baker, the Attorney General of Georgia, and, having not received a draft of “Plaintiffs’ Preliminary Report and Discovery Plan,” hereby supplement that report, showing as follows:

1. Description of Case:

(a) Describe briefly the nature of this action.

This is a voting rights case wherein Plaintiffs have asserted claims for

declaratory and injunctive relief, compensatory and punitive damages, and attorneys' fees, arising out of Defendants' interference with Plaintiffs' rights secured under the constitution and laws of the United States, specifically the National Voter Registration Act of 1993, as amended, 42 U.S.C. §§ 1973gg *et seq.* ("NVRA"), and the First and Fourteenth Amendments to the U.S. Constitution. The action was filed on August 14, 2006. The District Court has original subject matter jurisdiction pursuant to 28 U.S.C. §§1331 and 1367.

DEFENDANTS' RESPONSE

Defendants agree with Plaintiffs' response.

(b) Summarize, in the space provided below, the facts of this case. The summary should not be argumentative nor recite evidence.

PLAINTIFFS' RESPONSE

Plaintiffs claim that a regulation recently adopted by the Georgia State Election Board unlawfully interferes with their rights (and the rights of other third-party voter registration groups) to engage in organized voter registration activity as permitted by federal law. The Regulation at issue (1) requires completed voter registration applications to be separately sealed by each voter before being handed to a private voter registration worker (the "sealing requirement"); and (2) prohibits the copying of completed voter registration applications (the "copying ban"). *See* Ga. Comp. R. & Regs. r. 183-1-6-.03(3)(o)(2) (as amended eff. Jan. 17, 2006) (the

"Regulation"). Plaintiffs contend that Defendants' Regulation violates their rights under the NVRA and the First Amendment, and that it is specifically contrary to the District Court's and the Eleventh Circuit's holdings in another NVRA case involving third-party voter registration groups, *Charles H. Wesley Educ. Found. v. Cox*, 324 F. Supp. 2d 1358 (N.D. Ga. 2004) ("*Wesley Foundation I*"), *affd*, 408 F.3d 1349 (11th Cir. 2005) ("*Wesley Foundation II*").

On September 28, 2006, this Court issued a preliminary injunction prohibiting enforcement of the Regulation, holding that Plaintiffs had shown a substantial likelihood of success on the merits of its claim that the Regulation infringed upon Plaintiffs' First Amendment rights. (*See* Order of Sep. 28, 2006 [Dkt # 37].)

DEFENDANTS' RESPONSE

Defendants agree with Plaintiffs' response.

In addition, Defendants claim that the Regulation was lawfully enacted and is a reasonable, narrowly tailored, exercise of the State's lawful power to protect its citizens and encourage voter registration, as well as protecting the elective franchise, and it does not violate the NVRA or the First Amendment. In addition, Defendants deny that the Regulation has infringed on Plaintiffs' rights under the NVRA of First Amendment and deny that the Plaintiffs or some of them have been injured by the Regulation.

(c) The legal issues to be tried are as follows:

PLAINTIFFS' RESPONSE

- Whether the Regulation in question violates Plaintiffs' rights under the NVRA and/or the First Amendment.
- Whether and what type of declaratory and injunctive relief is appropriate to remedy Defendants' violation of federal law.
- Whether compensatory and punitive damages are appropriate in light of Defendants' violations of federal law.
- The amount of attorneys' fees and costs that should be awarded in light of Defendants' violation of federal law.

DEFENDANTS' RESPONSE

- Whether the Regulation in question violates Plaintiffs' rights under the NVRA and/or the First Amendment.
- Whether the Plaintiffs suffered any injury in fact due to the enactment of the Regulation
- If the Regulation in question violates Plaintiffs' rights under the NVRA and/or the First Amendment, whether and what type of declaratory and injunctive relief is appropriate.

(d) The cases listed below (include both style and action number) are:

(1) Pending Related Cases: Not applicable.

(2) Previously Adjudicated Related Cases: Not applicable.

2. This case is complex because it possesses one (1) or more of the features listed below (please check):

- (1) Unusually large number of parties**
- (2) Unusually large number of claims or defenses**
- (3) Factual issues are exceptionally complex**
- (4) Greater than normal volume of evidence**
- (5) Extended discovery period is needed**
- (6) Problems locating or preserving evidence**
- (7) Pending parallel investigations or action by government**
- (8) Multiple use of experts**
- (9) Need for discovery outside United States boundaries**
- (10) Existence of highly technical issues and proof**

Neither Plaintiffs nor Defendants contend this case is complex.

3. Counsel:

The following individually-named attorneys are hereby designated as lead counsel for the parties:

For Plaintiffs: Bradley E. Heard
Georgia Bar No. 342209
MOLDEN HOLLEY FERGUSON
THOMPSON & HEARD, LLC
34 Peachtree Street, NW, Suite 1700
Atlanta, GA 30303-2337
Tel.: 404-324-4500
Fax: 404-324-4501
Email: bheard@rnoldenholley.com

For Defendants: Stefan E. Ritter
Senior Assistant Attorney General
Georgia Bar No. 606950
GEORGIA DEPARTMENT OF LAW
40 Capital Sq SW
Atlanta, GA 30334
Tel.: 404-656-7298
Fax: 404-657-9932
Email: sritter@law.ga.gov

4. Jurisdiction:

Is there any question regarding this Court's jurisdiction?

Yes No.

If "yes," please attach a statement, not to exceed one (1) page, explaining the jurisdictional objection. When there are multiple claims, identify and discuss separately the claim(s) on which the objection is based. Each objection should be supported by authority.

5. Parties to this Action:

(a) The following persons are necessary parties who have not been joined:

Neither Plaintiffs nor Defendants contend that there are any necessary persons who have not been joined.

(b) The following persons are improperly joined as parties:

Neither Plaintiffs nor Defendants contend that any persons are improperly joined.

(c) The names of the following parties are either inaccurately stated or necessary portions of their names are omitted: None.

(d) The parties shall have a continuing duty to inform the Court of any contentions regarding unnamed parties necessary to this action or any contentions regarding misjoinder of parties or errors in the statement of a party's name.

6. Amendments to the Pleadings:

Amended and supplemental pleadings must be filed in accordance with the time limitations and other provisions of Rule 15, Federal Rules of Civil Procedure. Further instructions regarding amendments are contained in LR 15.

(a) List separately any amendments to the pleadings which the parties anticipate will be necessary: None.

(b) Amendments to the pleadings submitted LATER THAN THIRTY (30) DAYS after the preliminary report and discovery schedule is filed, or should have been filed, will not be accepted for filing, unless otherwise permitted by law.

7. Filing Times For Motions:

All motions should be filed as soon as possible. The local rules set specific filing limits for some motions. These times are restated below. All other motions must be filed WITHIN THIRTY (30) DAYS after the preliminary report and discovery schedule is filed or should have been filed, unless the filing party has obtained prior permission of the Court to file later. Local Rule 7.1A(2).

(a) Motions to Compel: Before the close of discovery or within the extension period allowed in some instances. Local Rules 37.1.

(b) Summary Judgment Motions: Within twenty (20) days after the close of discovery, unless otherwise permitted by Court order. Local Rule 56.1.

(c) Other Limited Motions: Refer to Local Rules 7.2A; 7.2B, and 7.2E, respectively, regarding filing limitations for motions pending on removal, emergency motions, and motions for reconsideration.

(d) Motions Objecting to Expert Testimony: Daubert motions with regard to expert testimony no later than the date that the proposed pretrial order is submitted. Refer to Local Rules 7.2F.

8. Initial Disclosures:

The parties are required to serve initial disclosures in accordance with Fed.R.Civ.P. 26. If any party objects that the initial disclosures are not appropriate, state the party and basis for the party's objection.

Initial disclosures have already been filed.

9. Request for Scheduling Conference:

Does any party request a scheduling conference with the Court? If so, please state the issues which could be addressed and the position of each party.

Plaintiffs do not request a scheduling conference at this time. Defendants likewise do not request a scheduling conference but reserve the right to seek one at a future date should it prove necessary.

10. Discovery Period:

The discovery period commences thirty (30) days after the appearance of the first defendant by answer to the complaint. As stated in LR 26.2A, responses to initiated discovery must be completed *before* expiration of the assigned discovery period.

Cases in this Court are assigned to one of the following three (3) discovery tracks: (a) zero (0)-months discovery period, (b) four (4)-months discovery period, and (c) eight (8)-months discovery period. A chart showing the assignment of cases to a discovery track by filing category is contained in Appendix F. The track to which a particular case is assigned is also stamped on the complaint and service copies of the complaint at the time of filing.

Please state below the subjects on which discovery may be needed:

PLAINTIFFS' RESPONSE

Plaintiffs submit that most, if not all, of the discovery necessary to this case has already taken place, in connection with the preliminary injunction proceedings. Thus, Plaintiffs intend to move fairly quickly for summary judgment as to liability on the entirety of their Complaint. Generally, discovery has *been* taken on the nature of Plaintiffs' claims, as alleged in their Complaint and in the preliminary injunction proceedings, and on Defendants' defenses thereto.

DEFENDANTS' RESPONSE

Almost no discovery has yet taken place in this case. Despite the numerous Plaintiffs and affidavits filed by the Plaintiffs, by Court order Defendants were limited to two depositions, which necessarily were taken on a shortened timetable. Defendants anticipate that full depositions will be necessary from each of the Plaintiffs and each of the affiants put forward by the Plaintiffs, as well as other witnesses identified, and that experts more likely than not will be identified in the case (given the Court's finding in the preliminary injunction order that evidence is necessary on the harm from identity theft and voter fraud) and, if so, expert discovery will be necessary. Defendants will serve interrogatories, requests for production of documents, and requests for admissions, and will need to review the documents prior to deposing the Plaintiffs. In addition, discovery may be stayed while Defendants motion to dismiss or for summary judgment on qualified

immunity grounds is adjudicated, and Defendants will discuss this with the Plaintiffs.

If the parties anticipate that additional time beyond that allowed by the assigned discovery track will be needed to complete discovery, please state those reasons in detail below:

11. Discovery Limitation:

What changes should be made in the limitations on discovery imposed under the Federal Rules of Civil Procedure or Local Rules of this Court, and what other limitations should be imposed.

PLAINTIFFS' RESPONSE

Given that substantial discovery has already been undertaken in connection with the preliminary injunction proceedings, Plaintiffs submit that an expedited discovery period (e.g., 45-60 days) may be in order. In any event, as previously stated, Plaintiffs intend to move relatively quickly for summary judgment — probably in advance of the close of the discovery period.

DEFENDANTS' RESPONSE

No changes are necessary. Defendants will move for summary judgment at the completion of discovery. In addition, discovery may be stayed while Defendants motion to dismiss or for summary judgment on qualified immunity grounds is adjudicated, and Defendants will discuss this with the Plaintiffs.

12. Other Orders:

What other orders do the parties think that the Court should enter under Rule 26(c) or under Rule 16(b) and (c)?

PLAINTIFFS' RESPONSE None.

DEFENDANTS' RESPONSE None.

13. Settlement Potential:

(a) Lead counsel for Defendants certifies by his signature below that Plaintiffs, by and through their counsel, made no meaningful attempt to participate in preparing a Rule 26(f) conference nor did they attempt to secure Defendants' counsel's signature on their report before submitting it. No persons participated in actual settlement discussions; no actual settlement discussions (and no settlement meeting) took place.

For Plaintiffs: Lead Counsel

[Plaintiffs' separate plan independently signed by Plaintiffs' lead counsel]

For Defendants: Lead Counsel (signature):

(signature): s/ Stefan Ritter, Esq.

All parties were promptly informed of all offers of settlement and following discussion by all counsel, it appears that there is now:

- () A possibility of settlement before discovery.
- (__) A possibility of settlement after discovery.
- (X) A possibility of settlement, but a conference with the judge is needed.
- () No possibility of settlement.

Defendants move to strike "Plaintiffs' Response" placed at this point in the scheduling order because it is not only inaccurate and misleading (which it is) but also inappropriate at this place in the scheduling order. Defendants deny that any meaningful settlement discussions have taken place.

(c) Counsel (X) do or () do not intend to hold additional settlement conferences among themselves prior to the close of discovery. The proposed date of the next settlement conference is undetermined.

(d) The following specific problems have created a hindrance to settlement of this case:

PLAINTIFFS' RESPONSE

As discussed above, the parties may not be in a position to discuss the possibility of settlement of the entire action until the Court has ruled on the Plaintiffs' pending motion for partial reconsideration of the NVRA claims. It may be possible to resolve the First Amendment portion of this case at this time; however, Defendants have indicated no willingness to do so thus far.

DEFENDANTS' RESPONSE

Defendants believe that it is doubtful that this case will settle since the issues in this case are largely legal and, thus, appellate ruling may be necessary before settlement can occur. Defendants remain willing to discuss settlement at any time, and they deny Plaintiffs suggestion that meaningful settlement discussions have taken place.

14. Trial by Magistrate Judge:

Note: Trial before a Magistrate Judge will be by jury trial if any party is otherwise entitled to a jury trial.

(a) The parties ____ do consent to having this case tried before a magistrate judge of this Court. A completed Consent to Jurisdiction by a United States Magistrate Judge form has been submitted to the Clerk of Court this , ___ day of , 2__.

(b) The parties_X_ do not consent to having this case tried before a magistrate judge of this Court.

Respectfully submitted this 16th day of November, 2006.

THURBERT BAKER 033887
Attorney General

DENNIS DUNN 269350
Deputy Attorney General

/s/Stefan Ritter
STEFAN RITTER 606950
Senior Assistant Attorney General

Office of the Attorney General
40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
(404) 656-3330

SIGNATURE CERTIFICATION

I certify that the originally executed document contains the signatures of all filers indicated herein and therefore represents consent for filing of this document.

/s/Stefan Ritter
STEFAN RITTER 606950
Senior Assistant Attorney General

40 Capitol Square, S.W.
Atlanta, Georgia 30334-1300
Telephone: (404) 656-4666
Fax: (404) 657-9932
E-mail: stefan.ritter@law.state.ga.us

CERTIFICATE OF SERVICE

I do hereby certify that I have this day served the within and foregoing **DEFENDANTS' PRELIMINARY PLANNING REPORT AND DISCOVERY PLAN CONSOLIDATED WITH PLAINTIFFS' PLAN** with the Clerk of Court using the CM/ECF system, which will send notification of filing to the following CM/ECF participant:

Brad Heard, Esq.
bheard@rnoldenholley.com

Brian W. Mellor, Esq.
electioncounsell@projectvote.org

Elizabeth S. Westfall, Esq.
ewestfall@advancementoproject.org

This 16th day of November, 2006.

/s/Stefan Ritter
STEFAN RITTER
Georgia Bar No. 606950
Attorney for Defendants