

**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**

**PLAINTIFF'S RESPONSE BRIEF IN OPPOSITION
TO DEFENDANTS' MOTION TO COMPEL AND IN SUPPORT OF
PLAINTIFFS' CROSS-MOTION FOR PROTECTIVE ORDER**

Pursuant to Rules 26 and 37 of the Federal Rules of Civil Procedure and the local rules of this Court, Plaintiffs submit the following brief in opposition to Defendants' Motion to Compel and in support of Plaintiff's cross-motion for protective order.

INTRODUCTION AND BACKGROUND

As the Court will recall, the scope of this voting rights case is quite narrowly focused. 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 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. Plaintiffs have sought declaratory and injunctive relief to invalidate the challenged regulation. Plaintiffs have also asserted claims for damages against the defendant state officials for their knowing violations of clearly established law. The Regulation at issue (1) requires completed voter registration applications to be separately sealed by each applicant 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) (the “Regulation”).

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 their claim that the Regulation infringed upon Plaintiffs’ First Amendment rights. (*See* Order of Sep. 28, 2006 [Dkt # 37].)¹

¹ The Court did not find, in its preliminary injunction order, that Plaintiffs had a substantial likelihood of success on the merits of their NVRA claim. However, on October 11, 2006, Plaintiffs timely filed a motion to reconsider the

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Plaintiffs noted in their proposed preliminary report and discovery plan, filed in November 2006, that most, if not all, of the relevant discovery in this case had already taken place in connection with the preliminary injunction proceedings. [Doc. 46] Accordingly, Plaintiffs have not sought to take any additional discovery and had originally planned to move fairly quickly for summary judgment. However, in their preliminary report and discovery plan, Defendants objected to a shortened discovery period and claimed that they needed to have additional discovery, given the Court's findings in its preliminary injunction order that Defendants lacked any evidence of identity theft and fraud in connection with third-party voter registration drives to support their claimed basis for enacting the Regulation.² (Defs' Br. at 9; Prelim. Inj. Ord. at 15-16.) In order to avoid a squabble with Defendants over the

Court's rulings on the NVRA claims. By Order dated March 9, 2007, the Court denied that motion without prejudice, with leave for Plaintiffs to renew it after the conclusion of discovery, and noted that it would consider the arguments raised in Plaintiffs' motion to consider in connection with summary judgment briefings in the case. [Doc. 60]

² Defendants apparently mistook the Court's evidentiary findings as a veiled invitation to them to try to find additional evidence to submit in support of the Regulation, rather than as a definitive ruling on the adequacy of the State's claimed justifications for enacting the Regulation. However, as discussed in

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discovery period, Plaintiffs consented to allow Defendants time to conduct discovery.

Instead of taking the time to conduct reasonable discovery on the limited questions that arise in this lawsuit, Defendants have sought to turn this case from a simple challenge to an election regulation into a full frontal assault on third-party voter registration groups. They have sought intrusive and irrelevant discovery regarding when, where, and how Plaintiffs conduct their voter registration activities; whom they are registering; and the nature and extent of their efforts to monitor election officials' activities, as well as the activities of their own volunteers and employees. Defendants have even sought discovery on meritless and unfounded allegations of alleged voter registration fraud and identity theft by some of the Plaintiffs and/or employees of Plaintiffs that have arisen in other states and that have nothing to do with the copying and sealing of voter registration applications. Defendants have asked for everything from Plaintiffs' archival copies of voter registration applications and constituent sign-in sheets to all of Plaintiffs' correspondence with actual and potential funders,

greater detail later in this brief, Defendants' perceptions in this regard are fundamentally flawed.

and among each other, regarding voter registration — in Georgia and across the United States.

Plaintiffs have rightfully objected to such expansive, burdensome, overly broad, irrelevant, oppressive, and intimidating requests. The requests are neither relevant to nor likely to lead to the discovery of relevant evidence in connection with any claim related to the validity of the SEB Regulation at issue. Nor, given Defendants' admissions that they had no basis for enacting the Regulation in the first place, are Defendants' requests likely to lead to the discovery of evidence relating to their defense. Defendants' requests are likewise well beyond the scope necessary to determine the issue of Plaintiffs' Article III standing to sue — which is already clear as a matter of law, based on the existing record — or to elucidate the nature and extent of Plaintiffs' claimed constitutional injuries arising out of the Regulation.

Accordingly, for the reasons discussed in greater detail below, Plaintiffs request that Defendants' motion to compel be denied in all respects and that Plaintiffs' cross-motion for a protective order be granted.

ARGUMENT AND CITATION OF AUTHORITY

A. *Plaintiffs Timely Served Their Objections and Responses to Defendants' Requests and, Therefore, Did Not Waive Their Right to Object.*

Plaintiffs are quite surprised to see Defendants argue that Plaintiffs have waived their objections by not responding to discovery in a timely manner. This is simply not the case. Defendants' requests were originally served via mail on January 12, 2007. Thus, Plaintiffs' responses were originally due 33 days later, on February 14, 2007. On February 12, 2007, Plaintiffs' counsel wrote to Defendants' counsel and requested an extension. On February 14, 2007, Defendants' counsel responded via email and specifically consented to an extension, but indicated he wished to discuss the particulars further by voice.

In that follow-up telephone call on February 14, counsel discussed the issue of whether the discovery period had even commenced yet, given that the Court had not entered a Scheduling Order in the case. Because of the confusion over that issue, counsel agreed that they would submit a consent order (which was to be drafted by Defendants) extending discovery generally, and that they would agree on a specific date for Plaintiff's responses once that consent order had been drafted.

On February 27, Defendants' counsel sent his draft consent order extending discovery for review and approval by Plaintiffs' counsel. However, he did not mention the issue of Plaintiffs' discovery responses. Plaintiffs' counsel approved the draft consent order the same day and suggested a response date of April 2, 2007, for the discovery responses. Defendants' counsel replied via email and said he would prefer to have the responses and any responsive documents hand-delivered by March 27, 2007, so that he would have them to review prior to his departure for a planned vacation. Plaintiffs did, in fact, respond to the requests on March 27, 2007 [Doc. 61]; however, since they had objected to producing any additional documents, they elected to save the time and expense of hand-delivery and, instead serve the responses instantaneously, via electronic mail and regular mail, so that Defendants' counsel would have them as agreed on that date.

Thus, as described above, there has been no waiver of Plaintiffs' right to object to Defendants' discovery requests. The email trail between Plaintiffs' counsel and Defendants' counsel (which Plaintiffs are happy to produce for the

Court) satisfies the technical Rule 29 requirement of a written stipulation.

Therefore, Defendants' waiver claims should be disregarded.³

B. Plaintiffs' Standing to Sue is Already Clear From the Record, and No Additional Discovery is Needed on This Question.

Throughout their motion to compel, Defendants claim that they need to have detailed information concerning Plaintiffs' voter registration activities (including copies of all flyers and handouts used, all locations at which they have conducted voter registration drives, all sign-in sheets and archival copies of voter registration applications, etc.) to establish their contention that some or all Plaintiffs lacked the standing to challenge the Regulation at issue in this lawsuit. Defendants' arguments in this regard ignore the law of this case, which already

³ Even in the absence of a formal written stipulation, or to the extent any technical waiver could arguably arise from serving timely responses via email or mail, rather than hand-delivery, courts have held that good cause would exist to excuse a waiver under such circumstances — particularly where important privileges are sought to be protected. *See, e.g.,* *Coker v. Duke & Co.*, 177 F.R.D. 682, 685 (M.D. Ala. 1998) (excusing party's failure to serve timely written objections and responses where party demonstrated that he had not ignored opposing party's requests and had made some attempt to timely advise opposing party of objections); *USW v. Ivaco, Inc.*, 2003 U.S. Dist. LEXIS 10008, *13 (N.D. Ga. 2003) (waiver of objections, particularly privileged objections, is an extreme sanction that should be reserved only for cases of unjustifiable delay, inexcusable conduct, or bad faith in responding to discovery requests); *RDM Holdings v. Equitex*, 277 B.R. 415, 424 (Bankr. N.D. Ga 2002) (same; also noting

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establishes that Plaintiffs have standing, and go well beyond the very minimal threshold-level type of an inquiry that standing is.

Article III of the Constitution limits federal jurisdiction to actual “cases” and “controversies.” U.S. Const. Art III § 1. Thus, in order to invoke federal jurisdiction, a plaintiff must demonstrate that he or she has suffered or is about to suffer a cognizable injury in fact that is fairly traceable to the actions of the named defendant(s), and that the injury is remediable by a favorable decision in the litigation. *Lujan v. Defenders of Wildlife*, 504 U.S. 555, 560-61 (1992); *Charles H. Wesley Educ. Found. v. Cox*, 408 F.3d 1349, 1352 (11th Cir. 2005). “Any concrete, particularized, non-hypothetical injury to a legally protected interest is sufficient” to confer standing. *Wesley Foundation*, 408 F.3d at 1352.

As the Supreme Court has just recently reiterated, “Congress has the power to define injuries and articulate chains of causation that will give rise to a case or controversy where none existed before.” *Massachusetts v. EPA*, 127 S. Ct. 1438, 1453 (2007) (quoting *Lujan*). Indeed, when Congress affords a specific right to a litigant to challenge governmental compliance with a specific federal law (as

court has discretion not to compel discovery that is “patently improper” irrespective of waiver).

it has, for example, in the NVRA), the litigant need not even meet all the traditional standing requirements like immediacy and redressability. *Id.* at 1453; *Wesley Foundation*, 408 F.3d at 1352. All that is required is that there be “some possibility that the requested relief will prompt the injury-causing party to reconsider the decision that allegedly harmed the litigant.” *Id.* An organization may sue in its own right and on its own behalf if it can meet the above test for standing. *Havens Realty Corp. v. Coleman*, 455 U.S. 363, 378-79 (1982); *Ass’n of Cmty. Orgs. for Reform Now v. Fowler*, 178 F.3d 350, 356 (5th Cir. 1999).⁴

In this case, Plaintiffs are challenging Defendants’ copying and sealing Regulation under both the NVRA and the First Amendment. Plaintiffs claim — and this Court, in its preliminary injunction order, has already determined — that as a direct and proximate result of the Regulation, Plaintiffs have suffered and would, in the absence of injunctive relief, continue to suffer clearly

⁴ In addition to the constitutional requirements for standing, federal courts generally recognize three other prudential requirements for standing: a general prohibition against a litigant’s raising another’s legal rights; a disfavoring of resolving generalized grievances more appropriately addressed to another branch of government; and a requirement that the litigant’s claim fall within the zone of interests protected by the law invoked. *See Granite State Outdoor Adver., Inc. v. City of Clearwater*, 351 F.3d 1112, 1116 (11th Cir. 2003). None of these prudential concerns are impacted by this litigation.

cognizable injuries, in the form of deprivations of their rights under the Constitution and laws of the United States. Specifically, the Court has found, based on the evidence already in the record, that the Regulation “prohibits Plaintiffs from later reviewing the individual’s application for completeness, accuracy, and fraud”; “limit[s] Plaintiffs’ ability to monitor election officials”; “interfere[s] with ... Plaintiffs’ ability to obtain funding for their voter registration programs”; “impairs Plaintiffs’ ability to maintain ongoing contact with the individuals they encounter during their voter registration drives because the Regulation makes it more difficult for Plaintiffs to obtain the contact information for a registrant”; and subjects them to hefty civil and criminal penalties. (Prelim. Inj. Ord. [Doc. 37] at 6-8.)

All of these noted injuries are complete, particularized, and non-hypothetical, and they impact Plaintiffs’ legally protected interests in engaging in privately organized voter registration activity and other associational activity without undue interference from the government. The preliminary injunction has effectively provided redress to the situation, by temporarily invalidating the Regulation and allowing Plaintiffs to conduct their voter registration, education, get-out-the-vote, and other associational activities in peace, without undue interference by the State of Georgia and without fear of reprisal in the form of

draconian civil and criminal penalties for non-compliance. Permanent injunctive relief would, of course, provide additional remedies and redress to Plaintiff. Accordingly, all Plaintiffs meet the requirements for Article III standing in this case, and Defendants should not be allowed to conduct intimidating and intrusive discovery for the alleged purpose of gathering information on this already-settled inquiry.

C. Defendants' Expansive and Overreaching Requests for Information Relating to Plaintiffs' Internal Associational Activities Infringe Upon Plaintiffs' First Amendment Associational Privileges.

Defendants have requested detailed information relating to the ways in which Plaintiffs conduct their voter registration, education, get-out-the-vote, and civic participation activities, including: (1) copies of voter registration applications or sign-in sheets collected by Plaintiffs during the course of their voter registration drives; (2) detailed descriptions, correspondence, and other documents (over and above those already submitted during the preliminary injunction phase) describing and or relating to Plaintiffs' voter registration activities in Georgia; (3) copies of flyers and hand-outs used to advertise Plaintiffs' voter registration drives; (4) documents describing Plaintiffs' procedures for training their volunteers, employees, and officers in the areas of conducting voter registration drives, collecting and submitting voter registration

applications, securing and maintaining the confidentiality of completed applications, preventing voter registration fraud, and following up on completed applications; and (5) information relating to prior complaints regarding Plaintiffs' voter registration activities and conduct.

As discussed below, courts typically apply strict scrutiny to any governmental inquiry into the First Amendment-protected associational and political activities of private persons and organizations. Such requests are not to be permitted except upon a showing that the government has a compelling need for the information and that the information requested is narrowly drawn and substantially related to the identified compelling need. Because Defendants cannot meet their burden on either ground, their motion to compel such information should be denied, and Plaintiffs' cross-motion for a protective order prohibiting discovery in these areas should be granted.

1. **Three-Part Standard for Determining Whether the Associational Privilege Protects Material from Disclosure.**

To establish a *prima facie* case for assertion of the associational privilege, the party seeking to prevent disclosure must show that the government's request for information would "work a significant interference with the [party's] freedom of association." *Bates v. City of Little Rock*, 361 U.S. 516, 523 (1960). Once

the court determines that the plaintiff 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. Finally, if the government succeeds in demonstrating that its interest is compelling, the court determines whether there is a substantial relation between the information sought and the compelling interest. *Id.* at 525. “[G]overnmental action does not automatically become reasonably related to the achievement of a legitimate and substantial governmental purpose by mere assertion.” *Id.*

Under this three-part standard, courts have held that the First Amendment protects private parties from disclosing a wide variety of documents relating to their associational and political activities.⁵

⁵ See, e.g., *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981), *cert. denied*, 454 U.S. 897 (1981) (volunteer lists); *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 95 (1982) (contributor lists); *U.S. v. Garde*, 673 F. Supp. 604 (D.D.C. 1987) (client identities); *U.S. v. Church of World Peace*, 775 F.2d 265 (10th Cir. 1985) (marriage records); *DeGregory v. N.H. Atty. Gen.*, 383 U.S. 825, 827 (1966); *Familias Unidas v. Briscoe*, 544 F.2d 182, 192 (5th Cir. 1976) (past political activities).

2. **Plaintiffs Have Demonstrated a *Prima Facie* Case for Assertion of the Associational Privilege.**

The standard for establishing a *prima facie* showing of First Amendment infringement is quite lenient. *See In re Grand Jury Proceeding*, 842 F.2d 1229, 1235-36 (11th Cir. 1988) (noting that in *Buckley v. Valeo*, 424 U.S. 1 (1976), 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).⁶

Here, all of the information requested and now sought to be compelled by Defendants relates to Plaintiffs’ previous political and associational activities — specifically those related to voter registration, education, GOTV, and civic participation.⁷ Whenever the government makes such requests, an implicit

⁶ 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. Service Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1460 (9th Cir. 1991) (internal quotations omitted).

⁷ Such activity unquestionably “is worthy of First Amendment protection” as political and associational speech because it involves “persuad[ing] others to vote, educat[ing] potential voters about upcoming political issues, communicat[ing]...political support for particular issues, and otherwise

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presumption arises “that the party seeking protection has made his *prima facie* showing,” given that requests for such information typically have the effect of chilling 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).⁸

The record in this case, coupled with the State of Georgia’s well-documented history of interfering with and/or prohibiting third-party voter registration activities in this state⁹ clearly gives Plaintiffs reasonable grounds upon which to fear threats, harassment, and fear of reprisal if Defendants’ motion to compel is granted. Defendants readily admit in their brief that they

enlist[ing] likeminded citizens in promoting shared political, economic and social positions,” all of which contributes to the “total quantum of speech...and association.” *League of Women Voters v. Cobb*, 447 F. Supp. 2d 1314, 1332-33 (S.D. Fla. 2006).

⁸ 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.

⁹ As discussed in the *Wesley Foundation* litigation, prior to 2004, Georgia flatly prohibited private groups from collecting and submitting voter registration applications during their voter drives. *See Charles H. Wesley Educ. Found. v. Cox*, 324 F. Supp. 2d 1358, 1366 (N.D. Ga. 2004). *See also* Tr. of Prelim. Inj. Hr’g (Sep. 13, 2006) at 73-74 (Kathy Rogers testimony). Once the Eleventh Circuit handed down its ruling upholding the injunction against that ban, *see* 408 F.3d 1349 (11th Cir. 2005), the SEB admits that it moved quickly to enact the Regulation at issue in this lawsuit, in order to again impose restrictions on third-party voter registration groups. (Rogers Dep. at 15-18, 48 & Exs. 2-3.)

seek this information in order to scrutinize Plaintiffs' prior voter registration activities.¹⁰

Defendants' bald assertion that they do not intend to take action against Plaintiffs' members, even if true (which Plaintiffs highly doubt), is also irrelevant. (*Cf.* Defs' Br. at 19). In *NAACP v. Alabama*, the Supreme Court explicitly states that an infringement of a party's association rights does not hinge on governmental intent. 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").¹¹ Thus,

¹⁰ See, e.g., Defs' Br. 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"); 16-17 (seeking to discover whether Plaintiffs had express permission from the applicants to copy forms and whether they may have failed to submit any applicants' forms); 30-31 (seeking information on previous complaints against Plaintiffs, substantiated or not, "regarding voter registration or conduct *anywhere in the United States* in 2005, 2006, and/or 2007" based on some unspecified, unsubstantiated belief by Defendants that "there are numerous instances of misconduct on some or all of [Plaintiffs'] parts").

¹¹ Defendants cite *In re Roberts*, 650 F. Supp. 159 (N.D. Ga. 1987), to support their contention that "numerous cases...have declined to follow [the *NAACP v. Alabama* line of cases]." (Defs' Br. at 19.) *Roberts* is inapplicable for two reasons. First, unlike the Plaintiffs here, the plaintiff organization in *Roberts* engaged in both advocacy and commercial speech, which does not merit the same level of First Amendment protection. *Id.* at 162. Since Plaintiffs' speech at issue is not

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Defendants' intent has no bearing on the analysis of the disclosure's effect on Plaintiffs.

Obviously, having their political activities placed under a microscope has an intimidating effect on Plaintiffs and on any individuals who would seek to associate with Plaintiffs. Allowing Defendants to have access, for example, to all copies of voter registration applications and all sign-in sheets over a three-year period gives Defendants and unbridled opportunity to call each and every person whose identity would necessarily be disclosed, poll them about how and why they submitted their voter registration applications to Plaintiffs, and try to discover some damaging information on Plaintiffs or their volunteers and employees, which they could then use to tarnish Plaintiffs' good name and/or otherwise harass Plaintiffs. The persons whose names are listed in the

commercial, this reasoning does not apply. Second, *Roberts* involved an effort to quash a grand jury subpoena, which was issued as part of an investigation into possible criminal tax violations. In affirming the lower court decision, the Eleventh Circuit emphasized this circumstance, explaining that “[t]here is no doubt that this case implicates a compelling governmental interest. The government is investigating possible criminal violations of the tax laws.... A good-faith criminal investigation into possible evasion of reporting requirements...is a compelling interest.” *In re Grand Jury Proceeding*, 842 F.2d 1229, 1236 (11th Cir. 1988). By contrast, no criminal investigation of Plaintiffs is at issue in this case, and Defendants admittedly have no good-faith basis for commencing any such investigation.

registration applications, logs, sign-in sheets and registers collected at the plaintiffs' voter registration drives would not have anticipated that their affiliation with the plaintiffs would be disclosed in such a manner.

“It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute [an] effective . . . restraint on freedom of association....” *NAACP v. Alabama*, supra at 462. Thus, Defendants' request for such information presents, at a minimum, a reasonable probability that the associational rights of the plaintiffs and the persons listed on the documents will be chilled. *Cf. International Action Center v. U.S.*, 207 F.R.D. 1, 3-4 (D.D.C. 2002) (denying government's request for the names, addresses, and telephone numbers of “all individuals who attended, planned to attend, or otherwise manifested any intent to attend” any of the plaintiff organization's Presidential Inauguration protests, on the grounds that such disclosure would “thrust them into the harsh glare of the limelight” and was “calculated to chill future political dissent and discourage participation in other protest activity”).

3. Defendants Have Neither Identified a Compelling Need Nor Demonstrated How Their Requests Would Be Narrowly Drawn and Substantially Related Thereto.

Many courts combine the second and third prongs of the burden-shifting standard related to the associational privilege, emphasizing that where First

Amendment rights are at stake, the material must “be crucial to the party’s case... Mere speculation that information might be useful will not suffice.” *Black Panther Party v. Smith*, 661 F.2d 1243, 1268 (D.C. Cir. 1981) (emphasis added), *vacated as moot*, 458 U.S. 1118 (1982).¹² To meet this standard, the informational request must be narrow. *See, e.g., In re Primus*, 436 U.S. 412, 432 (1978) (government must show that means are closely drawn to avoid unnecessary infringement of associational rights); *Shelton v. Tucker*, 364 U.S. 479, 488 (1960) (“Even though the governmental purpose be legitimate and substantial, that purpose cannot be pursued by means that broadly stifle fundamental personal liberties when the end can be more narrowly achieved. The breadth of ... abridgment must be viewed in the light of less drastic means for achieving the same basic purpose”). In addition, the information sought must be otherwise unavailable. *U.S. v. Garde*, 673 F. Supp. 604, 607 (D.D.C. 1987) (government “cannot cast with such a wide net when constitutional freedoms are at stake. Alternatives minimizing the intrusion on associational rights must be carefully and conscientiously explored before resort may be had to the court's process”).

¹² Here again, although the *Black Panther* decision was later vacated as moot, there is no suggestion that the Supreme Court rejected the reasoning or analysis in the opinion.

Often, courts require the party seeking the information to demonstrate that it has been unable to obtain the information elsewhere. *See, e.g., Wyoming v. U.S. Dept. of Agriculture*, 208 F.R.D. 449 (D.D.C. 2002).

In the case at bar, Defendants cannot show that they have a compelling need for the sweeping and expansive information that they have requested from Plaintiffs because they cannot show that the material is “crucial to [their] case.” *Black Panther Party*, 661 F.2d at 1268. “[L]itigants seeking to compel discovery must describe the information they hope to obtain and its importance to their case with a reasonable degree of specificity [and show] that [they have] exhausted every reasonable alternative source of information.” *Id.* (internal citations omitted).

Defendants fail to meet each of these criteria. Far from being “crucial” to their case, Defendants’ asserted reasons for requesting detailed information concerning the mechanics of plaintiffs’ voter registration drives (including the identities of all persons associated therewith) demonstrate that the requested material is, at best, only tangentially relevant to this case. (See Defs’ Br. at 16-17.) Defendants have not describe[d] the information sought with any degree of specificity, and the sheer breadth of their requests, combined with their refusal to accept Plaintiffs’ offer of an *in camera* inspection of a representative sample of the

applications with names redacted to protect individuals' privacy (*Cf. Defs' Br. at 20-21*), reveals Defendants' true motives for making their requests: to harass, intimidate, and oppress Plaintiffs. *See Citizens State Bank*, 612 F.2d 1091, 1094 (8th Cir. 1980) (concluding that a limited subpoena requiring only "blind records" would likely serve government's needs in an IRS investigation); *International Action Center v. U.S.*, *supra* at 2-4 ("The breadth of information sought by the government is, to say the least, extraordinary.... There can be little doubt that such public identification of individuals...is calculated to chill future political dissent . . .").¹³

¹³ A closer examination of the specific reasons asserted by Defendants for their requests highlights the truly specious nature of their requests. (*Cf. Defs' Br. at 16-17.*) Defendants do not need copies of all of Plaintiffs' voter registration applications or their sign-in logs to establish whether or not Plaintiffs copied applications before filing the lawsuit, or to argue the issue of whether using sign-in sheets is more or less burdensome than simply copying applications. There was *extensive* testimony as to both of these issues both in the affidavits filed prior to the preliminary injunction hearing, as well as at the hearing itself. (*See, e.g., Tr. of Prelim. Inj. Hr'g* (Sep. 13, 2006) at 22-23 (Edward DuBose testimony), 39-40 (Nayana Miller testimony); Butler Decl. ¶ 6; DuBose Decl. ¶¶ 6-7; Moore Aff. ¶¶ 4,8; Butler Dep. at 37-38, 42-43, 46-47.) The forms and sign-in sheets themselves do nothing to advance or detract from either of those arguments, and indeed the Court has already determined, based on the evidence, that maintaining separate sign-in logs is more burdensome and prone to error. (Prelim. Inj. Ord. at 7.) Likewise, there is nothing on the face of the photocopied applications that would reveal whether applicants gave their permission for Plaintiffs to copy applications. Moreover, Defendants have already examined Plaintiffs about this

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Because Defendants have not satisfied their burden of showing a compelling reason for detailed information related to Plaintiffs' internal operating procedures and past political activity and, in addition, have not shown that their expansive discovery requests are narrowly drawn and substantially related to any such compelling need, Defendants' motion to compel should be denied, and Plaintiffs' cross-motion for protective order should be granted.

D. Defendants' Behemoth Requests for Information Are Irrelevant, Overly Broad, Unduly Burdensome, Harassing, and Duplicative.

Throughout their brief, Defendants throw out a number of reasons why they claim their requests are relevant in this lawsuit:

topic. (See, e.g., Tr. of Prelim. Inj. Hr'g at 31-32, 36-38; Williams Dep. at 42.) The issue of whether Plaintiffs timely submitted all original applications they collected to election officials has absolutely no relation to whether they should be allowed to maintain photocopies of them, or to collect them from applicants unsealed, which are the relevant issues in this lawsuit. Likewise, the efficacy of Plaintiffs' quality control, security, and monitoring procedures is not relevant to the First Amendment issue asserted in the lawsuit — i.e., whether Plaintiffs should have the right to engage in such procedures if they believe that is the most effective way of running their drives. *Cf. Meyer v. Grant*, 486, U.S. 414, 424 (1988) (First Amendment protects Plaintiffs' "right not only to advocate their cause but also to select what they believe to be the most effective means for so doing"). Thus, Defendants' desire to "impeach" Plaintiffs' witnesses on that topic is of no consequence, since it is not a material issue in this case. Finally, as discussed elsewhere in this brief, Defendants do not need this information to argue the standing issue.

- Plaintiffs’ “[p]rior registration activity is... in issue by the allegations in the Complaint.” (Defs’ Br. at 6.)
- “Whether Plaintiffs’ ‘fraud’ or ‘quality control’ activities really work, and whether they are a substantial First Amendment right of Plaintiffs, are obviously issues in this case.” (Defs’ Br. at 5.)
- “This case is about Plaintiffs’ copying of completed voter registration applications. Copies of the applications are obviously relevant to this case.” (Defs’ Br. at 16.)
- “They relate to potential failure to file [voter registration forms] by Plaintiffs...” (Defs’ Br. at 17.)
- “They relate to standing.” (Defs’ Br. at 17.)
- “They allow impeachment of Plaintiffs’... hearing testimony.” (Defs’ Br. at 17.)

Fairly stated, Defendants’ claims as to the relevant scope of this litigation overstate the claims and defenses at issue here. As an initial matter, it bears noting that Defendants have asserted absolutely no claims against Plaintiffs in this case. Thus, Plaintiffs’ activities are simply not on trial in this case. As stated in the beginning of this brief, this case is simply about a challenge to a State Election Board Regulation. Specifically, this case presents the very limited question of whether the challenged Regulation complies with the First Amendment and the NVRA.

In evaluating the First Amendment claim, this Court has held that the balancing test set forth in *Anderson v. Celebrezze*, 460 U.S. 780 (1983), applies. *Anderson* requires a court to weigh “the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments that the plaintiff seeks to vindicate” against “the precise interests put forward by the State as justifications for the burden imposed by its rule,” taking into consideration “the extent to which those interests make it necessary to burden the plaintiff’s rights.” *Anderson*, 460 U.S. at 789; *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (following *Anderson*).

In its order preliminarily enjoining the Regulation, the Court identified the categories of evidence in this case that are pertinent to the *Anderson* standard. As to the character and magnitude of Plaintiffs’ injury under *Anderson*’s first prong, the Court cited evidence concerning the Regulation’s effects on Plaintiffs’ ability to conduct quality control, secure funding for their voter registration activities, conduct voter registration without funding, contact their registrants about their issues and encourage their registrants to vote. (Prelim. Inj. Ord. at 6-8, 14.) See also *League of Women Voters of Florida v. Cobb*, 447 F. Supp. 2d 1314, 1332-35 (S.D. Fla.2006) (testimony of voter registration plaintiffs that if they continued to collect the voter registration applications that they helped registrants complete,

they would risk heavy, strict, and joint and several liability penalties under Florida election code, whereas if they stopped collecting applications altogether, success of their drives would be severely compromised was relevant to character and magnitude of plaintiffs' injury under *Anderson*); *Project Vote v. Blackwell*, 455 F.Supp. 2d 694, 705 (N.D. Ohio 2006) (affidavits of individual plaintiffs who had stopped participating in voter registration drives out of fear of criminal prosecution under an amendment to Ohio's election code were relevant to character and magnitude of plaintiffs' injury under *Anderson*).

Under the second prong of *Anderson*, the Court considered evidence related to Defendants' contention that the Regulation is intended to prevent unauthorized use of confidential information on voter registration applications and fraud. (Prelim. Inj. Ord. at 15-16.) The Court explained that to satisfy the second prong of *Anderson*, Defendants must show that their justifications for the Regulation (i.e., prevention of fraud and identity theft arising from third-party voter registration) are real and not conjectural problems. *Id.* (citing *Buckley v. American Constitutional Law Found., Inc.*, 525 U.S. 182, 207, 209 119 S. Ct. 636, 651 (1999) (Thomas, J., concurring)); *see also Project Vote v. Blackwell*, 455 F. Supp. 2d at 704 (affidavits in which election officials "perceive[d]" that compensated registration workers are more likely to engage in fraud than non-compensated

workers were insufficient as a matter of law to justify law that imposed burdens on the First Amendment rights of compensated workers and the organizations for which they work).

Defendants have already conclusively admitted that they have no reasonable basis for believing that fraud and identity theft in connection with third-party collection and submission of voter registration applications is an issue in Georgia and that their concerns as to voter registration fraud and identity theft were based on nothing but speculation and conjecture. They admit that they have not attempted to discern whether applications collected or submitted by private entities were any more or less accurate, free from fraud, or susceptible to identity theft than applications collected and submitted by deputy registrars, and they concede that they have not received *even one* report of an alleged instance of identity theft or other misuse of Social Security numbers arising out of the collection and submission of voter registration applications by private entities. (Rogers Dep. at 54-55, 64-65, 86-87.)

Moreover, Georgia is prohibited by federal law from requiring voters to include Social Security numbers on voter registration applications, and Georgia no longer asks voters to supply the full SSN. *Schwier v. Cox*, 412 F. Supp. 2d 1266 (N.D. Ga. 2005), *aff'd*, 439 F.3d 1285 (11th Cir. 2006); Rogers Dep. at 48-49.

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. Thus, Defendants’ confidentiality concerns are objectively unreasonable, and no amount of discovery is going to change these facts.

CONCLUSION

For all of the foregoing reasons, Plaintiffs submit that Defendants’ motion to compel should be denied, that Plaintiffs’ cross-motion for protective order should be granted, and that the parties should be directed to conduct their post-discovery settlement conferences and submit dispositive briefs in this matter.

Respectfully submitted this 21st day of June, 2007.

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*** Admitted Pro Hac Vice**

CERTIFICATE OF COMPLIANCE WITH LOCAL RULE 5.1

The undersigned hereby certifies that the foregoing document has been prepared in accordance with the font type and margin requirements of Local Rule 5.1 of the Northern District of Georgia, using a font type of Book Antiqua and a point size of 13.

/s Bradley E. Heard, Esq.
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CERTIFICATE OF SERVICE

This will certify that I have this day electronically filed the within and foregoing Plaintiff's Response Brief In Opposition To Defendants' Motion to Compel and in Support of Plaintiffs' Cross-Motion for Protective Order with the Clerk of Court using the CM/ECF system, which will automatically send email notification of such filing to the following attorneys of record:

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This 21st day of June, 2007.

Respectfully Submitted,

	<u>s/ Bradley E. Heard, Esq.</u> Georgia Bar No. 342209
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