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

O R D E R

Plaintiffs brought this action challenging the constitutionality of a rule adopted by the State Election Board (the "Board") requiring an applicant to seal a completed registration application prior to submitting it to any person other than a registrar or deputy registrar and prohibiting the copying of completed registration applications (the "Regulation"). This case has come before the Court on twenty-two motions, eight of which related to discovery. After conducting two hearings on the present discovery motions, and after reviewing numerous briefs, the Court entered an Order granting in part Defendants' motion to compel [# 92]. The case is now before the United States Court of Appeals for the Eleventh Circuit on Plaintiffs' Petition for a Writ of Mandamus seeking review of this Court's Order compelling discovery.

The Eleventh Circuit directed this Court to enter an order clarifying whether the Court had considered Plaintiffs' claims of associational privilege in ruling on the motion to compel. This Order is in response to the direction of the Eleventh Circuit.

I. Background

A. Factual Background

Plaintiffs conduct voter registration drives in Georgia. During these drives, Plaintiffs' workers attempt to register individuals who are eligible to vote. The workers set up a booth or table in areas of high pedestrian traffic, such as shopping centers, to attract passers by. When an individual consents to complete an application to register to vote, the individual completes the application, which contains some private information. Prior to the enactment of the challenged regulation, Plaintiffs' workers either made a photocopy of the registration application or utilized a sign-in sheet to record the information on the application. Plaintiffs then would submit the completed applications to the State of Georgia.

In 2005, the State Election Board adopted the following regulation:

> No person may accept a completed registration application from an applicant unless such application has been sealed by the applicant. No copies of completed registration applications shall be made. This paragraph shall not apply to registrars and deputy registrars.

Ga. Comp. R. & Regs. r. 183-1-6-.03(3)(o)(2). According to the State Election Board, the Regulation was adopted primarily to protect the privacy of an applicant's personal information, prevent the theft and misuse of a registrant's personal information, and prevent voter registration fraud.[1]

Plaintiffs initiated this action to challenge the Regulation. Specifically, Plaintiffs contend that the Regulation is an unconstitutional deprivation of their rights of association and free speech protected by the First Amendment and is preempted by the National Voter Registration Act ("NVRA"), adopted in 1993 and popularly known as the "Motor-Voter Act." See 42 U.S.C. §§ 1973gg *et seq*. Plaintiffs contend that by prohibiting the copying of the registration applications and by requiring the registrant to seal the application, the Regulation burdens Plaintiffs' ability to conduct voter registration drives, in part, because the process of filling out sign-in sheets is more cumbersome than photocopying the registering voter's application. In contrast, Defendants contend that the Regulation is a lawful exercise of the State of Georgia's right to regulate the voter registration process and

[1] No political motive behind the adoption of the Regulation has been alleged against the State Election Board, which is bi-partisan and whose members represent a broad range of the political spectrum. For example, the Board contains a former chair of the State Democratic Party and the general counsel for the State Republican Party. Defendant Cathy Cox, former chair of the Board, was a Democratic candidate for Governor in the most recent gubernatorial race.

necessary to prevent fraud and the misuse of the personal and private information of registrants. In addition, Defendants contend that the burden the Regulation imposes on Plaintiffs is minimal compared to the competing interests of the State.

B. Procedural Background

When Plaintiffs initiated this action, they requested an expedited hearing and a preliminary injunction enjoining enforcement of the Regulation. The Court held an evidentiary hearing on the motion for preliminary injunction on September 13, 2006, and entered an Order [# 37] enjoining the enforcement of the Regulation as it relates to preventing Plaintiffs from copying completed registration applications. The Court's preliminary injunction order was based on the limited evidence presented during a one day hearing, prior to the parties having an opportunity to flesh out their positions during discovery. Defendants' failure to present any evidence of identity theft or other fraud was an important element in the Court's balancing of Plaintiffs' asserted injury with the State's interest in protecting the integrity and reliability of the electoral process. The current discovery disputes have prevented any progress towards a final

determination as to the constitutionality of the Regulation. Thus, the preliminary injunction remains in full force.[2]

C. The Discovery Dispute

The present dispute arose when Defendants served Plaintiffs with a number of interrogatories and requests for production of documents. In response to Defendants' requests, Plaintiffs asserted a number of objections and produced surprisingly few documents responsive to the requests. The parties were unable to resolve the discovery dispute, and Defendants filed a motion to compel. Plaintiffs filed a cross-motion for protective order.

The Court held a hearing on the motions, and directed the parties to confer in an attempt to narrow the issues before the Court. (Mot. Hr'g Tr. 93-96, July 24, 2007.) The Court also directed Defendants to file a brief specifically outlining the documents they seek and why such documents are discoverable. (Id.) The Court instructed Plaintiffs to file a response specifying why such information was not subject to discovery. (Id.) As a

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[2] This Court may have misapplied the standard, which requires a balancing of the burden upon Plaintiffs with the State's interest in protecting the integrity and reliability of the election process, in view of the Supreme Court's recent opinion in Crawford v. Marion County Election Bd., 128 S. Ct. 1610 (2008). This Court's preliminary injunction order partly relied on the lack of evidence of actual identity theft and voter fraud in weighing the State's interest. See Crawford, 128 S. Ct. at 1618-19.

result, Defendants withdrew a number of their discovery requests. Plaintiffs, however, made no concessions.

The Court held a second hearing since the parties refused to resolve certain issues. Based on the briefs filed, argument at the hearings, and representations of counsel, as well as the record, the Court entered an order compelling Plaintiffs to produce certain documents. Counsel for Plaintiffs, however, represented at the hearing that no responsive documents existed as to a number of the categories compelled, including copies of documents discussing steps taken by Project Vote to maintain the privacy and confidentially of specific information, and copies of correspondence between Plaintiffs and Michael Kieschnick related to voter registration activities in Georgia. (Hr'g Tr. 31, 35, Oct. 17, 2007; Pl.'s Certification at 1-3.)

Accepting counsel's representation, the remaining dispute primarily involved the production of copies in Plaintiffs' possession of voter registration applications collected by Plaintiffs in Georgia and sign-in sheets used at voter registration drives conducted by the Georgia State Conference of the NAACP Branches and the Georgia Coalition for the People's Agenda, Inc. Plaintiffs argued at length during both hearings and in their briefs that production of these documents would violate their freedom of association protected by the First Amendment. The Court overruled Plaintiffs' objections and compelled

production of the copies of voter registration applications and the sign-in sheets. The Court, however, granted Plaintiffs' request for a protective order.

Rather than comply and present an appropriate protective order, Plaintiffs applied for a Writ of Mandamus seeking a review of this Court's discovery order. Of course, Plaintiffs' petition further delays resolution of this case and continues in full force the preliminary injunction obtained by Plaintiffs.

III. Analysis

Parties are entitled to discovery regarding any non-privileged matter that is relevant to any claim or defense. Fed. R. Civ. P. 26(b)(1). The party seeking the discovery has the burden of showing that the requested material is relevant, although the requested material need not be admissible at trial. Id.; Carnes v. Crete Carrier Corp., 244 F.R.D. 694, 696 (N.D. Ga. 2007) (Camp, J.) "The overall purpose of discovery under the Federal Rules is to require the disclosure of all relevant information so that the ultimate resolution of disputed issues in any civil action may be based on a full and accurate understanding of the true facts, and therefore embody a fair and just result." Hunter's Ridge Golf Co. v. Georgia-Pacific Corp., 233 F.R.D. 678, 680 (M.D. Fla. 2006); see also Burns v. Thiokol Chemical Corp., 483 F.2d 300, 307

(5th Cir. 1973) ("[O]pen disclosure of all potentially relevant information is the keynote of the Federal Discovery Rules."). District courts have broad discretion in managing the discovery process and fashioning discovery rulings. See Adkins v. Christie, 488 F.3d 1324, 1331 (11th Cir. 2007).

A. First Amendment Associational Privilege in the Context of Civil Discovery

The Supreme Court has interpreted the First Amendment to the Constitution as protecting against the compelled disclosure of membership and affiliation with groups engaged in political and social advocacy where disclosure would interfere with the freedom of association of their members. See NAACP v. Alabama ex. rel. Patterson, 357 U.S. 449, 462, 78 S. Ct. 1163, 1171 (1958) (membership list); Bates v. City of Little Rock, 361 U.S. 516, 523-24, 80 S. Ct. 412, 416-17 (1960) (membership lists and financial contributions); Gibson v. Fla. Legislative Investigation Comm., 372 U.S. 539, 570, 83 S. Ct. 889, 906 (1963) (membership lists); Buckley v. Valeo, 424 U.S. 1, 66 (1976) (campaign contributor lists); see also Adolph Coors Co. v. Movement Against Racism and the Klan, 777 F.2d 1538, 1541 (11th Cir. 1985). The Supreme Court has applied the First Amendment in the context of civil discovery where an organization relying on the associational privilege shows that compelled disclosure will lead to threats, harassment, or reprisals

against the organization or its members. See NAACP, 357 U.S. at 454, 78 S. Ct. at 1167. This threat would, of course, deter association with such an organization.

The seminal cases in this area are older cases decided at the height of the Civil Rights Movement when tensions were high and the hostility of local governments to certain groups was a proven concern. The Supreme Court recognized that compelled disclosure of affiliation with groups engaged in advocacy of unpopular causes might constitute an effective restraint on freedom of association. See NAACP, 357 U.S. at 462, 78 S. Ct. at 1171; Bates, 361 U.S. at 523-24, 80 S. Ct. at 416-17 (1960). "The privilege is designed to protect members of groups from harassment and intimidation . . . and to prevent the 'chilling effect' that disclosure may have on the willingness of individuals to associate with the group." Int'l Soc'y for Krishna Consciousness, Inc. v. Lee, No. 75 Civ. 5388 (MJL), 1985 WL 315, at *8 (S.D.N.Y. Feb. 28, 1985) (internal citations omitted).

The Supreme Court originally applied the associational privilege in the context of civil discovery in NAACP v. Alabama, 357 U.S. 449, 78 S. Ct. 1163 (1958). In NAACP, Alabama brought suit against the NAACP seeking to enjoin it from conducting further activities in the state. Id. at 452, 78 S. Ct. at 1167. Subsequently, the district court granted Alabama's motion for

production of documents and ordered the NAACP to produce the names and addresses of its members and agents. Id. at 453, 78 S. Ct. at 1167. The NAACP refused to disclose its membership list. Compelled disclosure of its membership list, the NAACP asserted, infringed the rights of its members to associate in support of their beliefs because of the dangers of harassment and intimidation. Id. at 454, 78 S. Ct. at 1167.

The Supreme Court agreed, holding that compelled disclosure of the NAACP's membership list was likely to act as a restraint on its members' freedom of association because in the past revealing the membership of the NAACP had "exposed these members to economic reprisal, loss of employment, threat of physical coercion, and other manifestations of public hostility." Id. at 462, 78 S. Ct. at 1172. Compelled disclosure would likely induce members of the NAACP to withdraw and dissuade other individuals from joining the NAACP due to fears of "exposure of their beliefs shown through their associations and of the consequences of this exposure." Id. at 462-63, 78 S. Ct. at 1172.

An organization claiming the privilege must first demonstrate that the order compelling discovery will have a chilling effect upon the freedom of association of its members. See NAACP, 357 U.S. at 462-63, 78 S. Ct. at 1172; Bates, 361 U.S. at 523; see also Adolph Coors, 777 F.2d at 1542 (holding

that organization failed to demonstrate an arguable First Amendment infringement); Fed. Election Comm'n v. Fla. for Kennedy Comm., 681 F.2d 1281, 1294 (11th Cir. 1982) (Clark, J., dissenting); see also Ambassador College v. Geotzke, 675 F.2d 622, 665 (5th Cir. Unit B 1982) (holding that the church failed to establish that list of persons who donated land to Ambassador College would chill membership in the church). An organization can satisfy this prima facie showing by demonstrating the likelihood of threats, harassment, or reprisals from Government officials or private parties, which will cause members to leave the organization or prevent prospective members from joining. See NAACP, U.S. at 461-63, S. Ct. at 1163; see also Wyoming v. U.S. Dep't of Agric., 239 F. Supp. 2d 1219, 1238 (D. Wyo. 2002), vacated as moot, Wyoming v. U.S. Dept. of Agric., 414 F.3d 1207 (10th Cir. 2005); Wilkinson v. F.B.I., 111 F.R.D. 432, 436-37 (C.D. Cal. 1986).

If the party asserting this privilege meets this initial burden, then the burden shifts to the state to demonstrate a compelling interest in the information sought. Bates, 361 U.S. at 524; NAACP, 357 U.S. at 463. There must be a substantial relationship between the information sought and the interest asserted by the state. Bates at 525; In re Grand Jury Proceedings, 842 F.2d 1229, 1233 (11th Cir. 1988).

B. The Associational Privilege in this Case

It is important to define the nature of the associational privilege that Plaintiffs assert. Plaintiffs are not asserting the right of their members to associate for the purpose of conducting voter registration drives. They could not because Defendants do not seek their membership lists, names of contributors, or the identify of supporters of Plaintiffs' organizations. The only information sought pertains to individuals whom the organizations have registered. Plaintiffs, however, contend that disclosure of this information will subject them to threats, harassment, and reprisals by the State. (Pls.' Resp. to Mot. to Compel 16.)

Courts have traditionally applied the associational privilege in the context of civil discovery to confidential membership lists and lists of financial contributors. See generally Anderson v. Hale, No. 00C2021, 2001 WL 503045, at *5 (N.D. Ill. 2001) (collecting cases); Wilkinson v. F.B.I., 111 F.R.D. 432, 436-37 (C.D. Cal. 1986). Defendants request copies of the voter registration applications collected by Plaintiffs and previously submitted to the State as well as copies of sign-in sheets used at voter registration drives. Such documents, at most, reveal the individuals who randomly approached one of Plaintiffs' voter registration tables and filled out a voter registration application. In fact, Defendants already have the originals of the applications, and, presumably, the sign-in sheets will identify the same

individuals who filled out applications. Therefore, Plaintiffs' argument must be that disclosure to the State of the names of individuals Plaintiffs registered to vote somehow chills their ability to attract other registrants in the future.

This argument depends on two presumptions. First, that the protective order required by the Court will be ineffective. Second, that the individuals who have not been sufficiently interested in the election process to register will somehow know that in future litigation the State may require Plaintiffs to disclose their name and, therefore, will be afraid to be identified with organizations such as ACORN. Although Plaintiffs contend that the disclosure of the names of these individuals will adversely affect the organizations' ability to advocate, Plaintiffs have presented no evidence to the Court that disclosure of such information may result in harassment or intimidation of registrants.[3] Moreover, the Court sees little likelihood of threats, harassment, or reprisals from Government officials or private parties, and Plaintiffs have presented no such evidence. Any claim of reprisal and harassment from the State if the Court compels disclosure of this information is purely speculation. See generally United States v. Duke

[3] Additionally, Defendants represented at the hearing that they would agree to a protective order prohibiting them from contacting the registrants. (Hr'g Tr. 52.)

Energy Corp., 218 F.R.D. 468, 473 (M.D.N.C. 2003) (holding that conclusory allegations that members will withdraw as a result of enforcement of discovery order is insufficient to demonstrate disclosure would chill party's First Amendment rights).

Other courts have explained that parties cannot hide behind the associational privilege and use it "as a blanket bar to discovery." Wilkinson, 111 F.R.D. at 436; Anderson, 2002 WL 503045, at *7 ("Surely the Patterson Court did not intend to provide publically identified members of dissident organizations with a nearly impenetrable shield . . . to block general discovery requests."). The Eleventh Circuit's opinion in Adolph Coors is instructive. In Adolph Coors, the Movement Against Racism and the Klan (the "Movement") asserted the associational privilege and refused to comply with a district court order compelling the disclosure of the date and state where it showed a slide program styled "Unmasking the Klu Klux Klan." Adolph Coors, 777 F.2d at 1540-42. The Movement argued that complying with the Court order was tantamount to identifying organizations and individuals who sponsored and attended the showings and would likely subject them to the risk of Klan violence. Id. at 1540-41. As the Eleventh Circuit explained, "in order to assert [the associational] privilege effectively, the appellants must first demonstrate at least an 'arguable First Amendment infringement.'" Id. at

1542 (quotations omitted). Because the Movement failed to make this prima facie showing, the Eleventh Circuit held that the associational privilege did not apply. Id.

Plaintiffs' allegations that disclosure of the sign-in sheets and voter registration applications would subject Plaintiffs to the type of harm that concerned the Court in NAACP is too remote and speculative to warrant a finding that the associational privilege applies to this case. See Adolph Coors, 777 F.2d at 1542. In fact, the allegations raised by Plaintiffs are even more speculative and remote than those in Adolph Coors, as the Movement pointed to past cases of bombings, beatings, and harassment of its members by the Klan. Id. at 1540. Disclosure of association with voter registration drives does not implicate any such concerns. Plaintiffs may not use the associational privilege as a shield to legitimate discovery in this case.

Finally, in the Court's order compelling discovery, the Court directed the parties to jointly submit a protective order to the Court. In fact, counsel for Defendants represented at the hearing that Defendants would enter a protective order prohibiting the Defendants from contacting any of the individuals Plaintiffs registered to vote. (Hr'g Tr. 52.) The protective order ensured against the possibility of the disclosure infringing upon the

association rights of Plaintiffs' members. Plaintiffs, however, declined to confer with Defendants and jointly submit an appropriate protective order.

Since Plaintiffs have not met this burden, Defendants do not need to show a compelling interest. See NAACP, 357 U.S. at 462-63, 78 S. Ct. at 1172; Bates, 361 U.S. at 523. However, the State has a significant interest at stake in regulating the election system. "The electoral system cannot inspire public confidence if no safeguards exist to defer or detect fraud or to confirm the identify of voters." Crawford, 128 S. Ct. at 1618 (quotations omitted). Although the State presented no evidence of voter fraud in the record of this case, "flagrant examples of such fraud in other parts of the country have been documented throughout this Nation's history by respected historians and journalists. . . ." Id. at 1619. The information sought by Defendants is relevant to the State's interest in preventing both voter fraud and identity theft. How can the State determine if Plaintiffs are submitting all the applications obtained if they are prevented from obtaining the copies of completed applications in Plaintiffs' possession? How can Defendants know that identify theft occurred with regard to an individual registered by Plaintiffs without knowing who Plaintiffs registered? The State's interest in the information is significant, and the information is relevant to the State's interest.

IV. Conclusion

Because Plaintiffs have not met their burden of demonstrating that the compelled disclosure of the voter registration applications and sign-in sheets will infringe any rights protected by the First Amendment, this Court concluded that Plaintiffs were not entitled to rely on the associational privilege. This Court also considered the information sought by Defendants relevant to the issues in this case. After considering the parties' arguments, including Plaintiffs' claims of associational privilege, the Court entered the Order compelling Plaintiffs to respond to these discovery requests.

SO ORDERED, this 19th day of June, 2008.

JACK T. CAMP
UNITED STATES DISTRICT JUDGE