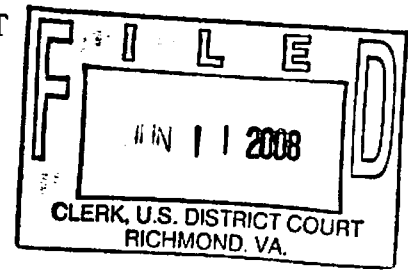


IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF VIRGINIA
Richmond Division



BETTY J. OSTERGREN,)
)
Plaintiff,)
)
v.)
)
ROBERT F. McDONNELL, in his official)
capacity as Attorney General of Virginia,)
)
Defendant.)
_____)

Civil No. 3:08cv 362

VERIFIED COMPLAINT

Preliminary Statement

1. This is a challenge under 42 U.S.C. § 1983 and the First Amendment to a recently enacted Virginia statute that prohibits individuals from disseminating public records containing Social Security Numbers. Although the documents in question are available on the Internet through various government websites to anyone who wishes to see them, the statute prohibits individuals such as the plaintiff from using those same documents for public information and advocacy purposes.

Jurisdiction

2. This action arises under the First and Fourteenth Amendments to the United States Constitution and 42 U.S.C. § 1983. This Court has jurisdiction pursuant to 28 U.S.C. § 1331. Declaratory relief is authorized by 28 U.S.C. §§ 2201 and 2202.

Parties

3. Plaintiff Betty J. Ostergren (“Ms. Ostergren”) is a resident of Hanover County, Virginia.

4. Defendant Robert F. McDonnell is the Attorney General of Virginia and, as such, is charged with the enforcement the state laws of Virginia, and, specifically, with enforcement of the Virginia Consumer Protection Act, Va. Code Ann. § 59.1-196, *et seq.* At all times relevant, the defendant has acted and continues to act under color of state law. He is sued in his official capacity.

Factual Allegations

Plaintiff's Advocacy Work

5. Ms. Ostergren is a staunch advocate of privacy rights in Virginia and nationwide. In particular, Ms. Ostergren has expressed alarm about the online availability through government websites of public records containing sensitive personal information such as Social Security Numbers (SSNs), birth dates, mother's maiden names, financial account numbers and signatures.

6. In furtherance of her advocacy work, Ms. Ostergren lobbies legislators, writes letters and makes telephone calls to public officials, and has made numerous media appearances. She has also contacted thousands of individuals across the country whose personal identifying information is available online through government websites.

7. Ms. Ostergren established the website www.TheVirginiaWatchdog.com in 2003. On this website, she has posted examples of online public records containing SSNs to alert members of the public that their own personal information may be online somewhere. Ms. Ostergren does not sell any products or advertisements or otherwise generate any revenue from or for the website.

8. Because of her work, many government agencies nationwide have taken public records containing SSNs off their websites or have redacted SSNs from such documents.

The Virginia Statutes

9. Virginia law requires that circuit court clerks make all land records available on the Internet by “secure remote access,” by July 1, 2008. Va. Code Ann. §§ 17.1-279 (D), 17.1-294. Such land records, including deeds and divorce decrees that affect real property, often include SSNs.

10. Under the “secure remote access” system, any person may, for a nominal fee, obtain online access to all of the land records for a given locality.

11. Virginia law does not require clerks to redact SSNs or other personal information from land records prior to making them available by secure remote access. (The legislature did pass such a requirement in 2007, but the provision did not go into effect because funding was not appropriated. *See* Va. Code. Ann. 17.1-294, Historical and Statutory Notes; Acts 2007, ch. 548.)

12. As an object lesson in the dangers of making such documents available online, Ms. Ostergren has obtained the land records of various public officials through Virginia’s secure remote access systems and posted them on her website. She has focused on the records of legislators and clerks because, in her view, they are principally responsible for the online availability of millions of records containing SSNs.

13. Virginia’s Personal Information Privacy Act (PIPA) provides, *inter alia*, that no person shall “[i]ntentionally communicate an individual's social security number to the general public.” Va. Code. Ann. § 59.1-443.2 (A) (1). Until this year, however, the statute contained an exception for “records required by law to be open to the public.” § 59.1-443.2 (D). Under this exception, Ms. Ostergren’s posting of public land records with SSNs on her website for advocacy purposes was lawful.

14. In its 2008 session, in direct response to Ms. Ostergren's website, the General Assembly eliminated the public records exception from § 59.1-443.2, making it unlawful for individuals to disseminate public records containing SSNs. Acts 2008, ch. 562. The change goes into effect on July 1, 2008.

15. Thus, while allowing and even requiring public agencies to make public records containing SSNs available online, the new legislation will make it unlawful for individuals to do so.

16. A violation of § 59.1-443.2 constitutes a prohibited practice under the Virginia Consumer Protection Act (VCPA) § 59.1-196 *et seq.*

17. The defendant Attorney General has substantial authority to enforce the VCPA. Specifically:

- He may obtain a civil investigative order, requiring a person who is the subject of an investigation for a VCPA violation to turn over information relevant to the investigation, Va. Code Ann. § 59.1-201;
- He may issue a civil investigative demand to witnesses "by which he may (i) compel the attendance of such witnesses; (ii) examine such witnesses under oath before himself or a court of record; (iii) . . . require the production of any books or papers that he deems relevant or material to the inquiry; and (iv) issue written interrogatories to be answered by the witness served . . ." Va. Code Ann. §§ 59.1-201.1; 59.1-9.10.
- He may initiate an action in circuit court to enjoin violations of the VCPA, Va. Code Ann. § 59.1-203;
- He may recover from the violator \$2,500 per violation, plus costs of up to \$1,000 per violation, and attorney's fees. Va. Code. Ann. § 59.1-206.

18. When the change to PIPA goes into effect on July 1, 2008, the statute, along with these extensive enforcement powers, will severely chill Ms. Ostergren from posting public documents to her website.

Claim for Relief
42 U.S.C. § 1983 – Deprivation under Color of State Law
of Rights under the First Amendment

19. As applied to public records, Va. Code Ann. § 59.1-443.2 prohibits the publication of truthful information lawfully obtained from the government.

20. As applied to public records, Va. Code Ann. § 59.1-443.2 is a content-based restriction on free speech.

21. As applied to public records, Va. Code Ann. § 59.1-443.2 is not narrowly tailored to serve any governmental interest.

22. As applied to public records, Va. Code Ann. § 59.1-443.2 violates the First Amendment to the United States Constitution.

Requests for Relief

The plaintiff respectfully requests the following relief:

- A. A preliminary and permanent injunction prohibiting the enforcement of Va. Code Ann. § 59.1-443.2 as applied to public records;
- B. A declaration that Va. Code Ann. § 59.1-443.2 is unconstitutional as applied to public records;
- C. Plaintiff's attorney's fees and costs pursuant to 42 U.S.C. § 1988; and
- D. Such other relief as the Court deems just and proper.

Dated: June 11, 2008

Respectfully submitted,

BETTY J. OSTERGREN

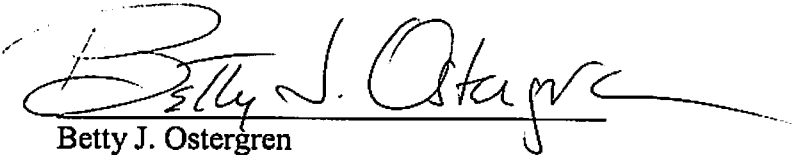
By counsel:



Rebecca K. Glenberg (VSB No. 44099)
American Civil Liberties Union of Virginia
Foundation, Inc.
530 E. Main Street, Suite 310
Richmond, Virginia 23219
(804) 644-8080
(804) 649-2733 (FAX)
rglenberg@acluva.org

VERIFICATION

I, Betty J. Ostergren hereby verify that the foregoing is true and correct to the best of my knowledge and ability.



Betty J. Ostergren

Payne
3:08cv362

JS 44 (Rev. 12/07)

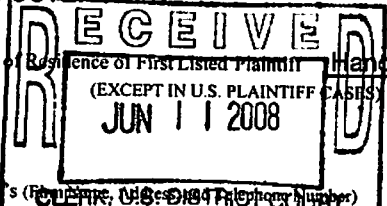
CIVIL COVER SHEET

The JS 44 civil cover sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by law, except as provided by local rules of court. This form, approved by the Judicial Conference of the United States in September 1974, is required for the use of the Clerk of Court for the purpose of initiating the civil docket sheet. (SEE INSTRUCTIONS ON THE REVERSE OF THE FORM.)

I. (a) PLAINTIFFS

BETTY J. OSTERGREN

(b) County of Residence of First Listed Plaintiff Manover



(c) Attorney's (Filing Office) Telephone Number

ACLU of Virginia, 540 E. Main St., Suite 310, Richmond, VA 23219
804-644-8080

DEFENDANTS

ROBERT F. McDONNELL

County of Residence of First Listed Defendant
(IN U.S. PLAINTIFF CASES ONLY)

NOTE: IN LAND CONDEMNATION CASES, USE THE LOCATION OF THE LAND INVOLVED.

Attorneys (If Known)

Office of the Attorney General, 900 E. Main St., Richmond, VA 23219

II. BASIS OF JURISDICTION (Place an "X" in One Box Only)

- 1 U.S. Government Plaintiff
- 2 U.S. Government Defendant
- 3 Federal Question (U.S. Government Not a Party)
- 4 Diversity (Indicate Citizenship of Parties in Item III)

III. CITIZENSHIP OF PRINCIPAL PARTIES (Place an "X" in One Box for Plaintiff and One Box for Defendant)

- | | | | | | |
|---|----------------------------|----------------------------|---|----------------------------|----------------------------|
| Citizen of This State | <input type="checkbox"/> 1 | <input type="checkbox"/> 1 | Incorporated or Principal Place of Business In This State | <input type="checkbox"/> 4 | <input type="checkbox"/> 4 |
| Citizen of Another State | <input type="checkbox"/> 2 | <input type="checkbox"/> 2 | Incorporated and Principal Place of Business In Another State | <input type="checkbox"/> 5 | <input type="checkbox"/> 5 |
| Citizen or Subject of a Foreign Country | <input type="checkbox"/> 3 | <input type="checkbox"/> 3 | Foreign Nation | <input type="checkbox"/> 6 | <input type="checkbox"/> 6 |

IV. NATURE OF SUIT (Place an "X" in One Box Only)

CONTRACT	TORTS	FORFEITURE/PENALTY	BANKRUPTCY	OTHER STATUTES	
<input type="checkbox"/> 110 Insurance <input type="checkbox"/> 120 Marine <input type="checkbox"/> 130 Miller Act <input type="checkbox"/> 140 Negotiable Instrument <input type="checkbox"/> 150 Recovery of Overpayment & Enforcement of Judgment <input type="checkbox"/> 151 Medicare Act <input type="checkbox"/> 152 Recovery of Defaulted Student Loans (Excl. Veterans) <input type="checkbox"/> 153 Recovery of Overpayment of Veteran's Benefits <input type="checkbox"/> 160 Stockholders' Suits <input type="checkbox"/> 190 Other Contract <input type="checkbox"/> 195 Contract Product Liability <input type="checkbox"/> 196 Franchise	PERSONAL INJURY <input type="checkbox"/> 310 Airplane <input type="checkbox"/> 315 Airplane Product Liability <input type="checkbox"/> 320 Assault, Libel & Slander <input type="checkbox"/> 330 Federal Employers' Liability <input type="checkbox"/> 340 Marine <input type="checkbox"/> 345 Marine Product Liability <input type="checkbox"/> 350 Motor Vehicle <input type="checkbox"/> 355 Motor Vehicle Product Liability <input type="checkbox"/> 360 Other Personal Injury CIVIL RIGHTS <input type="checkbox"/> 441 Voting <input type="checkbox"/> 442 Employment <input type="checkbox"/> 443 Housing/Accommodations <input type="checkbox"/> 444 Welfare <input type="checkbox"/> 445 Amer. w/Disabilities - Employment <input type="checkbox"/> 446 Amer. w/Disabilities - Other <input checked="" type="checkbox"/> 440 Other Civil Rights	PERSONAL INJURY <input type="checkbox"/> 362 Personal Injury - Med. Malpractice <input type="checkbox"/> 365 Personal Injury - Product Liability <input type="checkbox"/> 368 Asbestos Personal Injury Product Liability PERSONAL PROPERTY <input type="checkbox"/> 370 Other Fraud <input type="checkbox"/> 371 Truth in Lending <input type="checkbox"/> 380 Other Personal Property Damage <input type="checkbox"/> 385 Property Damage Product Liability PRISONER PETITIONS <input type="checkbox"/> 510 Motions to Vacate Sentence <input type="checkbox"/> 530 General Habeas Corpus: <input type="checkbox"/> 535 Death Penalty <input type="checkbox"/> 540 Mandamus & Other <input type="checkbox"/> 550 Civil Rights <input type="checkbox"/> 555 Prison Condition	<input type="checkbox"/> 610 Agriculture <input type="checkbox"/> 620 Other Food & Drug <input type="checkbox"/> 625 Drug Related Seizure of Property 21 USC 881 <input type="checkbox"/> 630 Liquor Laws <input type="checkbox"/> 640 R.R. & Truck <input type="checkbox"/> 650 Airline Regs. <input type="checkbox"/> 660 Occupational Safety/Health <input type="checkbox"/> 690 Other LABOR <input type="checkbox"/> 710 Fair Labor Standards Act <input type="checkbox"/> 720 Labor/Mgmt. Relations <input type="checkbox"/> 730 Labor/Mgmt. Reporting & Disclosure Act <input type="checkbox"/> 740 Railway Labor Act <input type="checkbox"/> 790 Other Labor Litigation <input type="checkbox"/> 791 Empl. Ret. Inc. Security Act IMMIGRATION <input type="checkbox"/> 462 Naturalization Application <input type="checkbox"/> 463 Habeas Corpus - Alien Detainee <input type="checkbox"/> 465 Other Immigration Actions	<input type="checkbox"/> 422 Appeal 28 USC 158 <input type="checkbox"/> 423 Withdrawal 28 USC 157 PROPERTY RIGHTS <input type="checkbox"/> 820 Copyrights <input type="checkbox"/> 830 Patent <input type="checkbox"/> 840 Trademark SOCIAL SECURITY <input type="checkbox"/> 861 HIA (1395f) <input type="checkbox"/> 862 Black Lung (923) <input type="checkbox"/> 863 DIWC/DIWW (405(g)) <input type="checkbox"/> 864 SSID Title XVI <input type="checkbox"/> 865 RSI (405(g)) FEDERAL TAX SUITS <input type="checkbox"/> 870 Taxes (U.S. Plaintiff or Defendant) <input type="checkbox"/> 871 IRS—Third Party 26 USC 7609	<input type="checkbox"/> 400 State Reapportionment <input type="checkbox"/> 410 Antitrust <input type="checkbox"/> 430 Banks and Banking <input type="checkbox"/> 450 Commerce <input type="checkbox"/> 460 Deportation <input type="checkbox"/> 470 Racketeer Influenced and Corrupt Organizations <input type="checkbox"/> 480 Consumer Credit <input type="checkbox"/> 490 Cable/Sat TV <input type="checkbox"/> 810 Selective Service <input type="checkbox"/> 850 Securities/Commodities/Exchange <input type="checkbox"/> 875 Customer Challenge 12 USC 3410 <input type="checkbox"/> 890 Other Statutory Actions <input type="checkbox"/> 891 Agricultural Acts <input type="checkbox"/> 892 Economic Stabilization Act <input type="checkbox"/> 893 Environmental Matters <input type="checkbox"/> 894 Energy Allocation Act <input type="checkbox"/> 895 Freedom of Information Act <input type="checkbox"/> 900 Appeal of Fee Determination Under Equal Access to Justice <input type="checkbox"/> 950 Constitutionality of State Statutes

V. ORIGIN

(Place an "X" in One Box Only)

- 1 Original Proceeding
- 2 Removed from State Court
- 3 Remanded from Appellate Court
- 4 Reinstated or Reopened
- 5 Transferred from another district (specify)
- 6 Multidistrict Litigation
- 7 Appeal to District Judge from Magistrate Judgment

VI. CAUSE OF ACTION

Cite the U.S. Civil Statute under which you are filing (Do not cite jurisdictional statutes unless diversity):
42 U.S.C. Sec. 1983

Brief description of cause:
First Amendment Challenge to Va. Code Sec. 59.1-443.2

VII. REQUESTED IN COMPLAINT:

CHECK IF THIS IS A CLASS ACTION UNDER F.R.C.P. 23 DEMAND \$ _____
CHECK YES only if demanded in complaint:
JURY DEMAND: Yes No

VIII. RELATED CASE(S) IF ANY

(See instructions):

JUDGE _____

DOCKET NUMBER _____

DATE

06/11/2008

SIGNATURE OF ATTORNEY OF RECORD

FOR OFFICE USE ONLY

RECEIPT # _____ AMOUNT _____ APPLYING IFP _____ JUDGE _____ MAG. JUDGE _____

Court Name: EASTERN DISTRICT OF VIRGINIA
Division: 3
Receipt Number: 300605301
Cashier ID: sbartos
Transaction Date: 06/11/2008
Payer Name: AMERICAN CIVIL LIBERTIES UNION

CIVIL FILING FEE
For: AMERICAN CIVIL LIBERTIES UNION
Amount: \$350.00

CHECK
Check/Money Order Num: 9241
Amt Tendered: \$350.00

Total Due: \$350.00
Total Tendered: \$350.00
Change Amt: \$0.00

FILING FEE 3:00CV362