

ACT RIGHT LEGAL FOUNDATION

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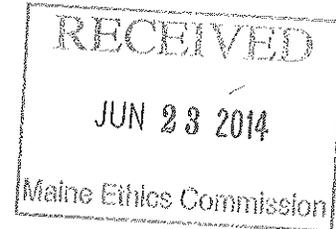
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June 23, 2014

(via USPS and e-mail: Jonathan.Wayne@maine.gov)

Maine Commission on Governmental Ethics
and Election Practices
135 State House Station
Augusta, Maine 04333-0135



Re: Request for Waiver or Reduction of Penalty

Members of the Commission,

Pursuant to 21-A M.R.S.A. § 1062-A(2), the National Organization for Marriage, Inc. ("NOM"), by and through counsel, hereby requests a waiver or reduction of the assessed penalties in the Commission's proposed determination against NOM to be voted on at its June 25, 2014 meeting.

The determination states that NOM should pay penalties for failure to register and file reports as a Ballot Measure Committee. The order states that a \$250.00 penalty must be paid for failure to register and then \$50,000.00 in penalties must be paid for failure to file reports.

The Commission may waive or reduce penalties due to (1) a valid emergency, (2) error by the Commission, (3) upon demonstration of a bona fide effort to file, or (4) inexperience, provided that there is no harm to the public. Only (2) applies here.

According to the rule of lenity, the Commission should waive or reduce the penalty because NOM could not know that it was in violation of Maine law until the determination was made by the Commission. NOM was engaged in the same conduct that many other groups were engaged in, including political party committees as well as groups opposing Measure No. 1 in 2009. The Commission staff, as well as two Commissioners, advocated against an investigation of NOM, stating that NOM's structure in 2009 complied with Maine law. These statements were not disputed by the other three members of the Commission. They proceeded merely because the complaint filed against NOM presented "more question than answers." Minutes of October 9, 2009 Commission meeting. As a result, the accrual of penalties should be tolled by the opening of the investigation, at the latest. NOM could in no way be expected to register and file reports simply because a contentious investigation had been opened.

Furthermore, the computation of penalties by the Commission includes the entirety of the investigation when determining how many days late NOM's alleged filings are. It cannot be that

penalties mount higher and higher while a party under investigation seeks proper and legal judicial review of agency action. In fact, the Commission could have proceeded with the investigation starting in January 2011, but declined to do so because the Maine Superior Court lifted its stay in every respect *except for* donor identifying information. As a result, NOM's penalties are higher because of the length of time taken by the investigation. During the investigation, NOM consistently responded promptly and timely to the Commission's requests.

For these reasons, the penalties resulting from late filing of reports should be recalculated to begin accruing at the date of the deadline imposed by the determination, or, at the very least, adjusted so that the accrual of penalties is tolled during the investigation process.

Sincerely,

/s/

Joseph A. Vanderhulst
jvanderhulst@actrightlegal.org

cc: Phyllis Gardiner (via E-mail: Phyllis.Gardiner@maine.gov)

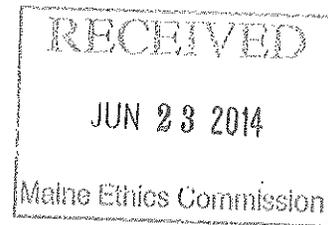
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Re: Application for Stay Pending Resolution of Appeal

Members of the Commission,

Pursuant to 5 M.R.S.A. § 11004, the National Organization for Marriage, Inc. ("NOM"), by and through counsel, hereby submits this application for a stay of the effect of the Commission's determination finding NOM in violation of Maine law. The Commission's determination orders NOM to register and report as a Ballot Question Committee and imposes monetary penalties for failure to do so in the past.

NOM intends to file a petition for review of the Commission's determination with the Kennebec Superior Court. While that review is pending, NOM requests that the Commission stay the effect of its determination. Absent a stay, NOM will be irreparably harmed. Furthermore, NOM has a significant likelihood of success on the merits of its appeal and a stay will not result in substantial harm to either the Commission or the general public.

First, NOM will be irreparably harmed if it is successful in its appeal and the Commission does not stay the effect of its determination against NOM during the pendency of that appeal. NOM will have to pay a substantial penalty and register and report as a ballot measure committee. If the Commission is reversed on appeal, NOM will have paid a substantial penalty that will have to be returned. More significantly, NOM will have filed reports disclosing many of its donors who would not otherwise have been disclosed and whose association with NOM is protected by the U.S. Constitution and federal law. This disclosure cannot be undone and, if the Commission is reversed, the associational rights of these donors will have been irreparably violated through illegitimate forced disclosure. Federal courts have documented the harassment, reprisals, and retaliation that have been suffered by supporters of traditional marriage across the country. *See, e.g. Citizens United v. FEC*, 558 U.S. 310, 481-82 (2010) (Thomas, J., dissenting in part); *Doe v. Reed*, 561 U.S. 186, 205 (2010) (Alito, J., concurring); Thomas M. Messner, *The Price of Prop 8*, Heritage Foundation Backgrounder, No. 2328 (Oct. 22, 2009), available at www.heritage.org/research/family/bg2328.cfm.

Second, NOM has a strong likelihood of success on the merits of its petition for review to the Maine Superior Court. The Superior Court may reverse the Commission's determination under 5 M.R.S.A. § 11006 if the decision is found to be:

- (1) In violation of constitutional or statutory provisions;
- (2) In excess of the statutory authority of the agency;
- (3) Made upon unlawful procedure;
- (4) Affected by bias or error of law;
- (5) Unsupported by substantial evidence on the whole record;
- (6) Arbitrary or capricious or characterized by abuse of discretion;

There is strong likelihood of success in reversing the decision based, at least, on all bases except perhaps for (3). First, the Commission's interpretation and application of the Ballot Measure Committee definition in 21-A M.R.S.A. § 1056(B) regarding NOM's activities in 2009 violates the U.S. Constitution and violates the plain language of the statute itself. The Commission's application stretches beyond the confines of what was upheld by the United States Court of Appeals for the First Circuit. It also ignores the express language of the statute, including as upheld by the First Circuit, which requires donations to be made "specifically" to be used in Maine and for context to be based on actual conduct. Second, the Commission does not have the authority to extend the definition in new and novel ways to conduct like NOM's in 2009. Third, the record in the proceeding betrays bias on the part of the Commission. Also, the Commission committed an error of law in applying the Ballot Measure Committee definition to include NOM's conduct. Fourth, by the Commission's own intimation, there is not substantial evidence showing that NOM raised \$5,000 or more under 21-A M.R.S.A. § 1056(b) to trigger registration. The culmination of these facts demonstrates that the Commission abused its discretion in finding NOM in violation of Maine law. Indeed, what NOM did was no different from what many groups have done in Maine in the past and was in compliance with Maine law, as observed by two past Commissioners and the Commission staff itself in October 2009. The Commission opened an investigation with a 3-2 vote and against the recommendation of the staff.

Third, a stay by the Commission will not harm either the Commission or the general public. Because Constitutional rights and potential harassment is at stake here, it is important to preserve the status quo to ensure that the parties are not harmed while the determination is reviewed. Because the election has passed, the general public will not be harmed if registration and reporting are delayed.

Sincerely,

/s/

Joseph A. Vanderhulst
jvanderhulst@actrightlegal.org

cc: Phyllis Gardiner (via E-mail: Phyllis.Gardiner@maine.gov)