

Agenda

Item #2



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
135 STATE HOUSE STATION
AUGUSTA, MAINE
04333-0135

To: Commissioners

From: Jonathan Wayne, Executive Director

Date: June 18, 2014

Re: Draft Determination for Your Consideration/National Organization for Marriage

I have attached for your consideration a draft determination, which is intended to memorialize your decision at the May 28, 2014 meeting. It was prepared by the Commission staff in consultation with your Counsel. We would be pleased to make any changes you would like.

Thank you for your consideration.



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DRAFT

IN THE MATTER OF:

National Organization for Marriage

COMMISSION DETERMINATION

I. Introduction and Procedural History

In 2009, advocates for traditional marriage waged a \$3 million political campaign in support of a people's veto referendum to suspend a recently enacted Maine law that would have allowed same-sex marriage ("the Maine referendum"). A coalition political action committee, named Stand for Marriage Maine, was formed to promote the November 3, 2009 referendum.

The National Organization for Marriage (NOM) is a national organization dedicated to preserving the institution of marriage as between one man and one woman. NOM made contributions of roughly \$2 million to Stand for Marriage Maine. Cash provided by NOM paid for around two-thirds of the political campaign in support of the 2009 referendum. NOM was also a chief organizer of the campaign. Its Executive Director, Brian Brown, was one of three individuals who comprised the executive committee for Stand for Marriage Maine.

In spite of NOM's primary role in funding the pro-referendum campaign, NOM did not register or file financial reports with the Ethics Commission as a ballot question committee pursuant to 21-A M.R.S.A. § 1056-B. Accordingly, it did not publicly report its donors or any expenditures it made to influence the referendum (other than by contributions to Stand for Marriage Maine), and did not fulfill other key obligations of ballot question committees, such as disclosing officers and decision-makers and certifying that its financial reports were complete.

Beginning on August 13, 2009, the Commission received correspondence from California activist Fred Karger alleging that NOM and other organizations were concealing the sources of their political funding by not registering and filing campaign finance reports with the

Commission. NOM responded to the allegations through written submissions dated September 21 and 26, 2009 and an October 1, 2009 presentation to the Commission, arguing that it was not required to register as a ballot question committee because all donations it made in support of the Maine campaign were from the organization's general treasury, and the vast majority of the donations it had received were not "designated" for any particular state campaign. On October 1, 2009, the Commission decided to investigate NOM's 2009 activities to determine whether NOM was required to register and file financial reports as a ballot question committee.

The Commission's investigation of NOM was significantly delayed by two lawsuits initiated by NOM. On October 21, 2009 (roughly two weeks before the people's veto referendum), NOM challenged the constitutionality of Maine's campaign finance laws in the U.S. District Court for the District of Maine (*Nat'l Org. for Marriage, Inc. v. McKee*, Civil No. 1:09-cv-00538). NOM initially sought relief from the statute requiring registration and financial reporting by ballot question committees, and later expanded the suit to challenge PAC reporting requirements for candidate elections, as well as the attribution and disclaimer law and independent expenditure reporting requirements. During the litigation, NOM claimed that compelled disclosure of NOM's donors (even for purposes of discovery) would have a substantial negative effect on NOM's ability to raise funds and asserted a "First Amendment privilege" not to disclose any information concerning its donors in discovery. Although this federal litigation took more than three years to be resolved, all of the statutes challenged by NOM ultimately were upheld as constitutional, including the ballot question committee reporting statute.¹

In the course of the federal lawsuit challenging the constitutionality of Maine's campaign finance laws, NOM provided deposition testimony through its executive director Brian Brown on

¹ The District Court found that a regulation of the Commission requiring 24-hour disclosure of all independent expenditures greater than \$250 in candidate elections was unconstitutionally burdensome. The Commission did not appeal this ruling and promptly amended the regulation. Also, the U.S. Court of Appeals interpreted the term "influence" in the campaign finance statutes narrowly, consistent with the Commission's guidance to PACs and BQCs, in order to avoid constitutional due process concerns of vagueness. *Nat'l Org. for Marriage v. McKee*, 666 F. Supp. 2d 193 (D. Me. 2009) (denying plaintiffs' request for a temporary restraining order); *Nat'l Org. for Marriage, Inc. v. McKee*, 723 F. Supp. 2d 245 (D. Me. 2010) (upholding the challenged PAC provisions as constitutional, except for uses of "influence"); *Nat'l Org. for Marriage, Inc. v. McKee*, 765 F. Supp. 2d 38 (D. Me. 2011) (upholding constitutionality of ballot question committee statute) (attached); *Nat'l Org. for Marriage, Inc. v. McKee*, 649 F.3d 34 (1st Cir. 2011), *cert denied*, 132 S. Ct 1635 (2012) (upholding all challenged statutes related to candidate elections, after narrowing the term "influence"); *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34 (1st Cir. 2012), *cert denied*, 133 S. Ct 163 (2012) (upholding constitutionality of ballot question committee statute) (attached).

May 26 and June 23, 2010.² The Commission also received documents relating to NOM's financial activities in 2009. For roughly three years, the Commission was precluded from using this information for purposes of the Commission's investigation, under Section 5(a) of a Consent Confidentiality Order issued by the U.S. District Court on February 16, 2010. In 2013, after NOM's federal lawsuits had been fully adjudicated and all appeals exhausted, the District Court granted the Commission limited permission to use the relevant discovery documents for the Commission's investigation.

As part of its investigation, on January 28, 2010, the Commission issued subpoenas to obtain documents and deposition testimony from NOM and Brian Brown. NOM, Stand for Marriage Maine and Brian Brown filed petitions with the Commission, raising a number of legal objections, including that the subpoenas sought information that was privileged under the First Amendment of the U.S. Constitution and that disclosure of personal donor information could subject donors to harassment and other negative consequences which could have a chilling effect on NOM's donations and activities. After considering petitioners' arguments, on February 25, 2010, the Commission declined to modify or vacate the subpoenas.

On March 3, 2010, NOM (along with Stand for Marriage Maine and Brian Brown) initiated a proceeding in the Superior Court of Maine under Rule 80C of the Maine Rules of Civil Procedure, requesting that the court review the Commission's decision not to vacate or modify the investigative subpoenas. NOM continued to argue that it had a First Amendment privilege not to disclose its donors to the Commission as part of its investigation. On March 31, 2010, NOM moved the Superior Court to stay the Commission's enforcement of its investigative subpoenas. On June 10, 2010, the Superior Court ordered the Commission to stay its *entire* investigation and enforcement proceeding while the court was considering NOM's Rule 80C petition. In January 2011, the court modified the stay to allow the investigation to move forward, but ordered the Commission not to enforce its subpoenas to the extent that the subpoenas sought information that would reveal NOM's donors. This prevented the Commission from seeking information that was highly relevant to the investigation.

Ultimately, on June 27, 2012, the Superior Court upheld the Commission's subpoenas, finding that the information sought was rationally and substantially related to important public

² References to the combined transcript for the deposition of NOM's executive director and corporate designee, Brian Brown, held on May 26 and June 23, 2010, are abbreviated as "Brown Dep." followed by the page and line reference (e.g., as "Brown Dep. 56:11"). Bank account numbers in the transcript have been redacted.

interests, and that the Commission had a compelling need for the information. *Nat'l Org. for Marriage v. Comm'n on Governmental Ethics and Election Practices*, 2012 WL 7992438 (Me. Super. June 27, 2012). On May 30, 2013, the Maine Supreme Judicial Court reached the same conclusion in response to petitioners' appeal. *Nat'l Org. for Marriage v. Comm'n on Governmental Ethics and Election Practices*, 2013 ME 53, ¶¶ 4-5, 66 A.3d 579 (2013).

During 2013, the Commission staff made several requests to NOM's legal counsel for information and documents concerning NOM's financial activities in 2009, including expenditures made from NOM's general fund and income received by NOM based on email solicitations. After considering the responses from NOM's counsel, the Commission staff compiled and analyzed the relevant information in an investigative report dated April 9, 2014. The report recommended concluding that NOM was required to register and file campaign finance reports in 2009 as a ballot question committee and assessing penalties against NOM totaling \$50,250. NOM was given 30 days to respond.

NOM responded through a letter-memorandum from its legal counsel dated May 6, 2014. Among its arguments, NOM contended that funds received by NOM in response to email solicitations should be pro-rated based on the proportion of the email that discussed the Maine referendum, and that the Commission staff had improperly counted revenues from at least one of NOM's emails that did not mention the 2009 people's veto referendum. NOM argued that the evidence presented by the Commission staff was insufficient to show that major donations received by NOM were "contributions" as defined by Maine law. NOM maintained that major donors did not designate contributions for any specific purpose such as the Maine referendum, and NOM did not reserve donations for that purpose. In support of its arguments, NOM submitted affidavits from one of its fundraising consultants, two office staff members and one donor. The Commission staff prepared a memo in reply, dated May 16, 2014.

The Commission met on May 28, 2014 to consider the evidence and legal arguments. On behalf of NOM, the Commissioners received a presentation from John C. Eastman of the ActRight Legal Foundation (also the Chair of NOM's Board of Directors) and NOM's Executive Director, Brian Brown. Mr. Eastman argued that because NOM has a policy of not allowing donors to earmark their contributions for any specific purpose, all of the funds NOM contributed to the Maine campaign should be treated as coming from NOM's general treasury – just as if the funds had been sitting in NOM's bank account before the Maine referendum campaign began in

May 2009. He also raised, for the first time, an argument that because certain major donors had made multi-year pledges to NOM before the Maine referendum campaign began, their donations could not have been for the specific purpose of influencing the Maine referendum.³

At the conclusion of the presentations, the Commission voted to adopt the conclusions of law set out below and directed the staff to draft findings of fact and an order for the Commission's consideration at its next regular meeting on June 25, 2014.

II. Legal Requirements for Ballot Question Committees under 21-A M.R.S.A. § 1056-B

Under 21-A M.R.S.A. § 1056-B, organizations which do not meet the definition of political action committee (PAC) are required to file campaign finance reports with the Commission as a "ballot question committee" if they receive contributions totaling more than \$5,000 for the purpose of initiating, promoting, defeating or influencing in any way a ballot question. During the 2009 election season, the following version of § 1056-B was in effect:⁴

21A § 1056-B. Ballot question committees

Any person not defined as a political action committee who receives contributions or makes expenditures, other than by contribution to a political action committee, aggregating in excess of \$5,000 for the purpose of initiating, promoting, defeating or influencing in any way a ballot question must file reports with the commission in accordance with this section. Within 7 days of receiving contributions or making expenditures that exceed \$5,000, the person shall register with the commission as a ballot question committee. For the purposes of this section, expenditures include paid staff time spent for the purpose of influencing in any way a ballot question. The commission must prescribe forms for the registration, and the forms must include specification of a treasurer for the committee, any other principal officers and all individuals who are the primary fund-raisers and decision makers for the committee. In the case of a municipal election, the registration and reports must be filed with the clerk of that municipality.

1. Filing requirements. A report required by this section must be filed with the commission according to the reporting schedule in section 1059. After completing all financial activity, the committee shall terminate its campaign finance reporting in the same manner provided in section 1061. The committee

³ NOM also argued, in writing on May 6 and orally on May 28, that several organizations advocating against the 2009 referendum should have registered and filed as ballot question committees under the staff's interpretation of §1056-B(2-A). The Commission noted that if NOM wishes to request an investigation into whether other organizations complied with Maine's campaign finance laws, it may do so, but that is not grounds for reaching a different statutory interpretation here.

⁴ The version of § 1056-B set out below reflects statutory changes in P.L. 2009, Chapter 190 that took effect September 12, 2009.

shall file each report required by this section through an electronic filing system developed by the commission unless granted a waiver under section 1059, subsection 5.

2. Content. A report must contain an itemized account of each expenditure made to and contribution received from a single source aggregating in excess of \$100 in any election; the date of each contribution; the date and purpose of each expenditure; the name and address of each contributor, payee or creditor; and the occupation and principal place of business, if any, for any person who has made contributions exceeding \$100 in the aggregate. The filer is required to report only those contributions made to the filer for the purpose of initiating, promoting, defeating or influencing in any way a ballot question and only those expenditures made for those purposes. The definitions of "contribution" and "expenditure" in section 1052, subsections 3 and 4, respectively, apply to persons required to file ballot question reports.

2.A. Contributions. For the purposes of this section, "contribution" includes, but is not limited to:

- A. Funds that the contributor specified were given in connection with a ballot question;
- B. Funds provided in response to a solicitation that would lead the contributor to believe that the funds would be used specifically for the purpose of initiating, promoting, defeating or influencing in any way a ballot question;
- C. Funds that can reasonably be determined to have been provided by the contributor for the purpose of initiating, promoting, defeating or influencing in any way a ballot question when viewed in the context of the contribution and the recipient's activities regarding a ballot question; and
- D. Funds or transfers from the general treasury of an organization filing a ballot question report.

3. Forms. A report required by this section must be on a form prescribed and prepared by the commission. A person filing this report may use additional pages if necessary, but the pages must be the same size as the pages of the form.

4. Records. A person filing a report required by this section shall keep records as required by this subsection for four years following the election to which the records pertain.

- A. The filer shall keep a detailed account of all contributions made to the filer for the purpose of initiating, promoting, defeating or

influencing in any way a ballot question and all expenditures made for those purposes.

- B. The filer shall retain a vendor invoice or receipt stating the particular goods or services purchased for every expenditure in excess of \$50.

Campaign finance law contains a penalty provision (21-A M.R.S.A. § 1062-A) that applies when a ballot question committee or PAC has failed to file a campaign finance report required by § 1056-B or § 1059. Under this provision, the Commission staff notifies the committee of the amount of the late-filing penalty that may be assessed, calculated according to a formula in § 1062-A(3). The formula considers three factors, multiplied together: (1) the number of days after the deadline on which the report was filed, (2) the total amount of contributions or expenditures that were not reported on time (whichever is greater), and (3) a percentage that increases if the committee has filed late reports on more than one occasion during a two-year period:

§ 1062-A(3) 3. Basis for penalties. The penalty for late filing of a report required under this subchapter is a percentage of the total contributions or expenditures for the filing period, whichever is greater, multiplied by the number of calendar days late, as follows:

- A. For the first violation, 1%;
- B. For the 2nd violation, 3%; and
- C. For the 3rd and subsequent violations, 5%.

Any penalty of less than \$10 is waived.

Violations accumulate on reports with filing deadlines in a two-year period that begins on January 1st of each even-numbered calendar year. Waiver of a penalty does not nullify the finding of a violation.

A report required to be filed under this subchapter that is sent by certified or registered United States mail and postmarked at least two (2) days before the deadline is not subject to penalty.

A required report may be provisionally filed by transmission of a facsimile copy of the duly executed report to the commission, as long as an original of the same report is received by the commission within five calendar days thereafter.

One of the factors in the formula is the number of days after the filing deadline on which the report was filed. So, the amount of the penalty increases over time unless a maximum penalty applies. Through September 11, 2009, sections 1062-A(4) & (8-A) contained maximum

penalties that applied to PACs that were late in filing reports under § 1059, but contained *no* maximum penalty for ballot question committees that were late in filing campaign finance reports required under § 1056-B.

On September 12, 2009, an amendment took effect which established a uniform \$10,000 maximum penalty for all reports filed late by PACs *and* ballot question committees. (P.L. 2009, c. 190, §§ A-30 & A-31) This \$10,000 maximum remained in effect until 2011, when the Legislature determined that if the amount of financial activity reported late exceeds \$50,000, the maximum late-filing penalty is 1/5 of the amount reported late. (P.L. 2011, c. 389, § 49) (eff. June 20, 2011).

III. Findings of Fact

1. NOM's Organization and Revenues

NOM is a non-profit corporation currently headquartered in northern Virginia. Its published mission is "to protect marriage and the faith communities that sustain it." It advocates for a traditional view of marriage as being between one man and one woman, and it is opposed to same-sex marriage. (Brown Dep. 47:1-15)

NOM was founded in June 2007 in Princeton, New Jersey. Brian Brown has been its first and only executive director. Prior to becoming the executive director of NOM, Mr. Brown was the executive director of The Family Institute of Connecticut and the treasurer of that institute's PAC.

In 2009, Mr. Brown was a member of NOM's "executive committee," which made the operational decisions for the organization. (Brown Dep. 166:7-12) The executive committee consisted of Mr. Brown and three members of NOM's board of directors:

- Maggie Gallagher, syndicated columnist and President of NOM in 2009
- Robert ("Robbie") George, a professor at Princeton University, who was the Chair of NOM in 2009
- Luiz Tellez, the president and founder of the Witherspoon Institute, a research and educational organization based in Princeton, New Jersey.

(Brown Dep. 54:5-21)

In 2009, Mr. Brown reported to NOM’s board of directors, which consisted of 10 members. (Brown Dep. 52:20-53:10) As of 2009-2010, the board met annually in July. (Brown Dep. 53:15-20) The board established NOM’s strategic focus on a broad scale, leaving to Brian Brown and the executive committee the task of determining NOM’s involvement in specific projects or activities. (Brown Dep. 59:2-22) In 2010, Mr. Brown became a member of NOM’s board of directors and President of the organization. (Brown Dep. 51:25-52:1)

In 2009, the executive committee held a weekly telephone conference on Mondays. Other board members were welcome to participate, but most did not have the time. (Brown Dep. 67:10-13) Political consultants hired by NOM also participated in the weekly calls. (Brown Dep. 87:12-17)

NOM is tax-exempt under Section 501(c)(4) of the Internal Revenue Code. This designation allows NOM to be involved in a range of electoral projects, including advocating for the election or defeat of candidates. NOM has a separate, affiliated organization, the NOM Education Trust, which has a different tax status (exempt under Section 501(c)(3)). The trust works on “educational outreach” on marriage issues. According to testimony from Mr. Brown, the NOM Education Trust is not involved in electioneering. (Brown Dep. 108:22-23)

NOM’s revenues grew quickly in the first three years of its existence from mid-2007 to 2010. It has posted filings with the Internal Revenue Service (Form 990s) on its website showing the following total revenues and the amounts received from “major donors” who gave NOM \$5,000 or more in a calendar year:⁵

Year	Total Receipts	Total Received from Major Donors (number of major donors)	Major Donations as Percent of Total Receipts
2007	\$518,667	\$492,500 (15)	95%
2008	\$2,968,880	\$2,171,000 (52)	73%
2009	\$7,372,981	\$5,540,805 (14)	75%
2010	\$9,566,255	\$8,427,500 (22)	88%

⁵ NOM provided a copy of its Form 990 for 2009 with a version of Schedule B prepared by NOM in which the names of major donors have been redacted and replaced with John Doe numbers. The Commission agreed not to identify donors by name in its final determination and has used these numerical designations instead.

2011	\$7,207,412	\$5,257,425	(17)	73%
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In 2009, NOM controlled three state-based PACs in California, New York and New Jersey. Brian Brown was the treasurer for the New York and New Jersey PACs, and the chairman for the California PAC. These positions gave him the authority to make decisions about the PACs' activities. (Brown Dep. 119:4-23) Rhode Island also had a PAC run by NOM employee Christopher Plante. NOM did not have corporate control over the activities of the Rhode Island PAC. (Brown Dep. 117:11-118:2)

In 2009, NOM was a highly sophisticated political advocacy organization with experienced communication, fundraising, and record-keeping capabilities. It received advice from attorneys who specialize in campaign finance law and who had examined Maine Law. (Brown Dep. 116:2-11)

2. NOM's Critical Leadership Role in the 2009 Referendum Campaign

NOM and its executive director Brian Brown had critical leadership roles in the Maine referendum, and NOM clearly conveyed that leadership role to its donors. As noted by the U.S. Court of Appeals, "the relationship between NOM and Stand for Marriage Maine was extremely close during the 2009 campaign," which the court found significant in evaluating donations to NOM. *Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d 34, 49 (1st Cir. 2012).

During the 2009 legislative session, the 124th Maine Legislature considered L.D. 1020, An Act to End Discrimination in Civil Marriage and Affirm Religious Freedom, which would have allowed same-sex couples to marry. In April 2009, the bill received a public hearing and was reported out of committee. L.D. 1020 was enacted and signed into law by Governor John Baldacci on May 6, 2009, as P.L. 2009, Chapter 82.

On May 6, 2009, NOM announced that it would join a coalition of advocates for traditional marriage to begin organizing a people's veto referendum that would suspend the law from taking effect and refer it for a vote by the people of Maine. A PAC named Stand for Marriage Maine was formed on May 29, 2009 to finance the petition signature-gathering effort

and the political campaign to support the referendum. The PAC's petition effort was successful,⁶ and a vote was scheduled for November 3, 2009.

The Stand for Marriage Maine PAC ("Stand for Marriage Maine") was led by an "executive committee" made up of three individuals:

- Brian Brown, the executive director of NOM,
- Marc Mutty, the former director of the Public Policy Office of the Roman Catholic Diocese of Portland (on leave during the campaign), and
- Pastor Bob Emrich, the chairman of the Christian Civic League of Maine.

When Stand for Marriage Maine registered, it listed Mr. Brown as one of the PAC's primary fundraisers and decision-makers.

Political consultants close to NOM had critical positions within the Maine referendum campaign. The campaign manager for Stand for Marriage Maine was Frank Schubert, a principal in a public affairs consulting firm that provided services to NOM, including purchasing advertising time. (Brown Dep. 88:12 – 89:9) Mr. Schubert managed the 2008 political campaign in support of Proposition 8 in California, a state constitutional amendment to limit marriage to one man and one woman. He sometimes participated in the weekly telephone calls of NOM's executive committee. (Brown Dep. 87:14-17) The finance director for Stand for Marriage Maine was Steve Linder, a partner in a Michigan political consulting firm, Sterling Corporation. Mr. Linder raised money for NOM in 2009 and 2010. He was "in constant contact" with NOM during 2009 and also participated in the weekly telephone calls of NOM's executive committee. (Brown Dep. 284:7-8)

NOM was by far the largest donor to Stand for Marriage Maine. In total, NOM donated \$2,017,580 to Stand for Marriage Maine, which represented 64% of the total amount spent by the PAC. (NOM provided \$1,993,411 in cash to Stand for Marriage Maine, and NOM provided services or made expenditures totaling \$24,169 that constituted in-kind contributions.)⁷

Stand for Marriage Maine spent a total of \$3,152,073 in support of the Maine referendum (including expenditures in 2010 and 2011 to retire campaign debts). On November 3, 2009, the

⁶ On July 31, 2009, organizers of the petition drive submitted a sufficient number of valid signatures to the Secretary of State's office to suspend the effect of the law, and on September 2, 2009, the people's veto referendum was officially approved for placement on the November ballot.

⁷ These contribution totals include \$63,511.33 in cash that NOM provided to Stand for Marriage Maine in May 2010 and May 2011 to discharge campaign debts of Stand for Marriage Maine.

referendum passed by a vote of 300,848 to 267,828, thereby vetoing the law authorizing same-sex couples to marry.

During the investigation, NOM stated that it made no expenditures to promote the Maine referendum other than by contributions to Stand for Marriage Maine. Documents produced by NOM in the spring of 2013, however, revealed that in May 2009 one of NOM's regular political vendors, ccAdvertising, prepared a script for a very large automated telephone call campaign to households in Maine, in which the recorded voice of Brian Brown would discuss the Maine referendum and raise money for NOM. According to the script, recipients of the automated calls who indicated a willingness to contribute to NOM to support the Maine referendum would later receive information from NOM by direct mail. Around May 6, 2009, ccAdvertising prepared an invoice for NOM listing an amount due of \$29,966.76, for 461,027 calls to Maine households. NOM paid this invoice on July 22, 2009 as part of a larger payment to ccAdvertising for telephone campaigns in multiple states.

NOM maintains that the firm did not actually conduct the telephone survey in Maine and that there were no subsequent direct mail solicitations. Mr. Eastman contended in his May 28 presentation that the survey was abandoned, based on the advice of legal counsel that all expenditures should be made through the Maine PAC (i.e., Stand for Marriage Maine). In the summer of 2013, the Commission staff interviewed ccAdvertising personnel who referred to the invoice as a billing mistake. Both NOM and ccAdvertising have stated that they could find no record of any phone calls made to Maine voters. Nevertheless, the plans for the telephone campaign indicate an intention by NOM to be significantly involved in the Maine referendum, as early as the first week of May 2009.

3. The Importance of the 2009 Maine Referendum for NOM

Many of NOM's 2009 communications – both to donors and internally among its board members – show that beginning in the spring of 2009, NOM viewed winning the Maine referendum in November as a critical project for the organization in the coming year. As of 2009, no state electorate had chosen to adopt same-sex marriage through a ballot measure. Thus, if NOM had lost the 2009 referendum in Maine, it would have been the first time that the voters of a state – not the legislature or the courts – chose to make same-sex marriage legal. NOM made it clear to the public and to major donors that the Maine referendum was a “must-win”

campaign, because NOM needed to demonstrate that no political majority for same-sex marriage existed anywhere in the country. Throughout 2009, NOM never wavered in its commitment to the Maine campaign.

The critical nature of this effort to NOM's national strategy is demonstrated by the proportion of NOM's 2009 total spending that was devoted to the Maine campaign. NOM's 2009 contributions to Stand for Marriage Maine represent 32% (roughly one-third) of NOM's expenses for program services that year.⁸ NOM exhausted its financial resources to win the Maine campaign, according to NOM's own statements to the public in the days following the election:

The importance of the win in Maine nationally can not be overstated. ... *From the beginning NOM saw how high the stakes were for Maine. That's why we devoted such resources to the effort. We are the single largest donor to Stand for Marriage Maine. We gave nearly \$1.8 million, emptying our bank account because of the serious needs in Maine.* (Nov. 4, 2009 email, Doc. ##1189-90)

The National Organization for Marriage has again, because of your support and work, played a key role in changing the course of history on marriage. As the largest contributor to the Yes on 1 effort in Maine, *NOM spent almost all that it had (literally), a total of \$1.8 million dollars, because we know the singular importance of a victory in Maine.* (Nov. 6, 2009 email, Doc. ##1118-20)

While funds for our New Jersey campaign have already been set aside, we need your help to replenish our emergency fund for the days ahead. *We poured everything we had into Maine* (and would do it again in an instant) to assure victory there. (Nov. 24, 2009 email, Doc. ##1191-92)

In Maine, NOM played a pivotal role ... NOM stepped forward, ultimately contributing more than half the Maine campaign budget of \$3 million. *We literally emptied our coffers to make victory possible*—at the end of August we had exactly \$1,000 in the bank. (Direct mail solicitation letter, Doc. ##6-10)

Indeed, from the initial phases of the referendum through the final days of the campaign and beyond, Brian Brown and NOM made many statements that winning the Maine referendum was "important" or "critical" to NOM's national strategy of stopping same-sex marriage. NOM underscored the priority of the Maine campaign in a report of planned activities dated August 11,

⁸ NOM's contributions to Stand for Marriage Maine during calendar year 2009 totaled \$1,954,169. NOM reported spending \$6,093,670 for program services in Part IX of its Form 990 for 2009. (In the form, program spending refers to total spending minus management and fundraising expenses.)

2009 (“National Strategy for Winning the Marriage Battle,” Doc. ##110-143B) that NOM distributed to major donors and other friends of the organization:

Maine is *strategically important* because it presents the only opportunity in 2009 to use a ballot measure to nullify a legislatively-enacted same-sex marriage law passed this spring and thus demonstrate—contrary to what the national press would have us believe—that once again, when the people are allowed to decide, they support traditional marriage (Doc. ##117-118, emphasis added)

A victory in 2009 in Maine is *critical* to stopping the momentum of the same-sex marriage movement in the Northeast. The total budget for Maine is \$3.5 million. We cannot designate any money given to NOM to the Maine effort because of disclosure requirements. But we do plan to contribute a total of \$1 million to the campaign. (Doc. #118, emphasis added)

This report – referred to below as the “8/11/2009 National Strategy document” – explained and justified an ambitious fundraising goal of \$20 million for late 2009 and 2010.

NOM expressed the importance of the Maine referendum to a wider audience in national newsletters and fundraising solicitations distributed by email. NOM tried to use Maine as an opportunity to rebut the sense that same-sex marriage was inevitable.

- “It’s going to be a big fight in Maine; we understand that. But if you will help, together we can show the naysayers and the doomsday predictors that even in blue states like Maine, the American people do not want judges and politicians messing around with marriage.” (7/10/2009, Email from Brian Brown, Doc. ##959-63)
- “Maine is about more than Maine,” and “[w]hat Maine will prove to the doubting Thomases and the politicians standing on the sidelines is that there is no majority for gay marriage anywhere in these United States.” (7/31/2009, Email from Brian Brown, Doc. ##992-1004)
- “Maine is our number one priority” and “Maine is crucial” (NOM Marriage News: October 9, 2009, Doc. ##1174-79)
- “If we lose marriage in Maine, we risk losing marriage everywhere.” (10/15/2009, NOM Emergency Alert, Doc. ##1180-81)
- “The importance of the win in Maine nationally can not be overstated. (11/04/2009, Email from Brian Brown, Doc. ##1189-90)
- Yet we won in Maine by an even larger margin than in California. And understand this: If we can win in Maine, WE CAN WIN ANYWHERE! (11/06/2009, Email from Brian Brown, Doc. ##1118-1120)

In his 2010 deposition, Brian Brown acknowledged that during the period of September – October 2009, the Maine referendum was “the most important issue to NOM.” (Brown Dep. 278:8 - 279:16) Mr. Brown stated that when Stand for Marriage Maine asked NOM’s executive committee to increase funding for the Maine referendum from \$1,000,000 to \$1,800,000, “[t]here was complete consensus that this was an important fight and that we should increase what we originally thought we were going to give.” (Brown Dep. 195:18-22) When acknowledging that NOM mentioned the Maine referendum in conversations with its major donors, Mr. Brown stated “There’s obviously no way not to have – Maine was going to be discussed *because the whole nation was looking at Maine.*”⁹ (Brown Dep. 279:11-13) (italics added)

The above communications and testimony leave no doubt that the Maine referendum was a strategically important issue for NOM, Brian Brown and other members of NOM’s executive committee in the latter half of 2009. Through its strategy documents, blog posts and fundraising emails, NOM conveyed to its donors, constituent groups and members its belief regarding the importance of the Maine referendum to NOM’s mission and the defense of traditional marriage.

4. NOM’s Financial Commitment to Stand for Marriage Maine

NOM made a specific financial commitment to spend a very significant amount on the Maine referendum – a commitment which never wavered during 2009. This establishes that part of NOM’s purpose in soliciting and raising money from its donors in 2009 was to promote the Maine referendum.

NOM’s Initial Commitment of \$1 Million

Brian Brown, NOM’s executive director, was a member of the executive committee of Stand for Marriage Maine, which functioned as the fundraising committee for the PAC. (Brown Dep. 191:25-192:3) Mr. Brown shared the responsibility to raise money for the PAC’s projected expenditures of \$3.5 million. It was understood that Mr. Brown would provide funds from NOM to partially fund Stand for Marriage Maine. “One of the functions I had was to have – you know,

⁹ NOM’s pre-election views concerning the strategic importance of a victory in Maine were repeated in a retrospective report of the organization’s accomplishments prepared for its July 2010 meeting of its board of directors, entitled the 2009-2010 Board Update. Doc. ##266-280 (“Given the critical nature of this race, NOM put everything we had on the line (literally!) to ensure that we did not lose Maine due to lack of funding at the last minute. The institutional risks for NOM were substantial – but the risks of losing the marriage vote in Maine were even more crucial.”) Doc. #267.

to have NOM give money to Stand for Marriage Maine when it was – when it was needed and to also make sure that there was other fundraising going on.” (Brown Dep. 195:2-13)¹⁰ Mr. Brown asserted in his presentation on May 28 that NOM did not control the Stand for Marriage Maine PAC, but he did not refute that he was a key fundraiser and decision-maker for the PAC as well as for NOM as the PAC’s major funder. These were roles that he carried out simultaneously, as NOM’s salaried chief executive.

At his deposition, Brian Brown testified that early on, NOM made a financial commitment to make a “very substantial gift to give a million dollars to [the Maine campaign].” (Brown Dep. 194:4-9) This \$1 million commitment is confirmed in the 8/11/2009 National Strategy document, which was prepared for NOM’s major donors and other close friends of the organization. (Doc. ##110-143) The purpose of this national strategy document was to describe NOM’s national strategy in 2009 and to justify a fundraising pitch to raise \$20 million in late 2009 and 2010. The document contains a description of 18 projects and the projected cost of each project to NOM. NOM describes the Maine referendum and NOM’s leadership role on pages 7-8 of the 8/11/2009 National Strategy document, and states that “we do plan to contribute a total of \$1 million to the campaign.” That amount is highlighted in a gray bar on page 8. NOM’s projected contribution of \$1 million is also mentioned on page 27 in a table entitled “Budget & Fundraising.” The table indicates that NOM had allocated \$100,000 for the Maine campaign of moneys already received or pledged. Of future revenues expected for the latter part of 2009, NOM indicated that it planned to allocate an additional \$900,000 for the Maine campaign:

Project	Raised July 2009	July – December 2009
NOM Maine 501(c)(4)	\$100,000	\$900,000

Decision by NOM to Increase Donation

During the summer of 2009, NOM found that it was being “greatly out spent in Maine,” similar to its experience in the 2008 Proposition 8 campaign in California. (Brown Dep. 194:11-13). The campaign manager of Stand for Marriage Maine, Frank Schubert, told the PAC that it

¹⁰ As early as June 1, 2009, Stand for Marriage Maine expected that NOM would provide financial support. That day, Marc Muttu, the chair of Stand for Marriage Maine, emailed Brian Brown in emphatic terms that “WE ARE DESPERATE AND NEED FUNDS TRANSFERRED TO STAND FOR MARRIAGE MAINE ASAP.” Mr. Brown replied that “We will be transferring \$60,000 today.” Doc. ##199-202.

needed to raise more money. (Brown Dep. 194:22-195:2). So, the expectation that NOM would contribute \$1,000,000 changed. Mr. Brown testified “In order to keep up and get our message out, we had to do more—there had to be more money.” (Brown Dep. 194:7-15) In the late summer or fall of 2009, Stand for Marriage Maine turned to NOM for funding “repeatedly,” according to Mr. Brown. (Brown Dep. 207:2-5) When asked as to frequency, Mr. Brown responded: “Well, I mean, it was clear – it was clear that extra money was needed so I don’t know that there was every week an ask. It was just always there.” (Brown Dep. 207:20-22)

In light of the urgent financial needs of Stand for Marriage Maine, the executive committee of NOM decided to increase its donation to the PAC. “There was a complete consensus [among NOM’s executive committee] that Maine was an important fight and that we should increase what we originally thought we were going to give. (Brown Dep. 195:18-22)

By the time of the election on November 3, 2009, NOM had donated a total of \$1,954,169 in cash and in-kind contributions to Stand for Marriage Maine – a doubling of its initial commitment. NOM ultimately donated a total of \$2,017,580 in cash and in-kind to Stand for Marriage Maine (including \$63,511.33 contributed in 2010-11 to retire campaign debt incurred by Stand for Marriage Maine). This amount represented 64% of the total amount spent by Stand for Marriage Maine.

Moreover, the results of this investigation show that NOM did not have all of these funds in its general treasury at the start of the Maine campaign. It had to raise the funds that it ultimately paid to Stand for Marriage Maine for the purpose of initiating and promoting the Maine referendum. (*See, e.g.*, references (infra at 13) to “emptying [NOM’s] bank account because of the serious needs in Maine.”)

5. NOM’s Policy on Protecting Anonymity of its Donors

In 2009, NOM reassured its major donors that NOM would not publicly disclose their names in campaign finance reports. In the 8/11/2009 National Strategy document, NOM asserted that state donor disclosure laws were a “serious hurdle” in obtaining funds needed for candidate and ballot initiative campaigns in states such as Maine, California, Iowa, and New Hampshire, because of alleged threats of intimidation received by donors who supported traditional marriage in California in 2008. (Doc. #112) NOM promised donors that if they gave

to NOM and did not designate their donation for a specific project, NOM would not disclose their names publicly:

Given the threats of intimidation to donors who support marriage in California and nationwide, we face a serious hurdle in getting state ballot initiatives and candidate campaigns funded because donors must be disclosed. However, if NOM makes a contribution from its own resources that are not specifically designated for one of these efforts, donor identities are NOT disclosed.

(Doc. #112) As Brian Brown explained, NOM did not allow its donors to expressly designate funds for any particular purpose.¹¹ Thus, NOM intentionally set up its fundraising strategy to avoid donor disclosure laws under a theory of not designating contributions. Maine's BQC law is not limited to earmarked donations, however.¹²

In his oral presentation to the Commission on May 28, NOM's counsel raised the possibility of harassment as grounds for protecting the anonymity of NOM's donors, and he referenced examples of problems that occurred in California during the Prop 8 referendum campaign in 2008. When asked, Mr. Eastman could not identify any such incidents of harassment occurring in Maine. The Commission has previously found in this matter that the affidavits and newspaper accounts submitted by NOM with its objections to the Commission's subpoenas were insufficient to support a finding of reasonable probability that disclosure of contributors' names will subject them to threats, harassment, or reprisals, which is the legal standard set forth in the case law cited by Mr. Eastman. *See Brown v. Socialist Worker's '74 Campaign Committee*, 459 U.S. 87, 100 (1982); *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 462 (1958). Federal courts in California and Washington state have likewise concluded that these same affidavits and newspaper articles were insufficient to support such a finding.¹³ NOM's arguments that donor anonymity is required either have been made by NOM and rejected in the litigation described above as part of the procedural history of this matter, or could have

¹¹ The affidavits of NOM's fundraising consultant and office staff reiterate this policy -- see Exhibits G, H and I to NOM's letter-memorandum of May 6, 2014 -- and Donor #11's affidavit indicates that he was told this as well.

¹² The First Circuit Court of Appeals rejected NOM's argument that a state may regulate only explicitly earmarked funds, noting that "[s]uch a limitation would allow entities to easily evade disclosure requirements by guiding the content of donors' messages, defeating the State's compelling interest in informing voters." 669 F.3d at 47, n. 13.

¹³ *Protectmarriage.com v. Bowen*, 830 F.Supp.2d 914 (E.D.Cal 2011), *aff'd in part, dismissed in part*, 2014 WL 2085305 (9th Cir. 2014), and *Doe v. Reed*, 823 F.Supp.2d 1195 (W.D.Wash. 2011), *appeal dismissed*, *Doe No. 1 v. Reed*, 697 F.3d 1235 (9th Cir. 2012).

been made and were not. *See National Org. for Marriage v. McKee*, 666 F.Supp. 2d 193, 206, n.74 (D. Me. 2009) (noting that NOM did not make a “colorable claim” of First Amendment harm due to threats of harassment, in its as applied challenge to the constitutionality of Maine’s BQC law). In any event, the Commission finds no basis on this record to support exempting NOM from Maine’s BQC law.

6. NOM Qualified as a Ballot Question Committee through Contributions from Major Donors (those giving \$5,000 or more)

A. In 2009, NOM Raised 75% of its Revenue from 14 Major Donors – through Solicitations made by telephone and in person

During 2009, the largest share of NOM’s revenue (75%) came from 14 major donors (defined here as donors who gave \$5,000 or more to NOM during a calendar year) who contributed a total of \$5,540,805 to NOM, as shown on the Form 990 tax filing.¹⁴ NOM’s total revenue in 2009 was \$7,372,981.

In his deposition, Mr. Brown explained that NOM developed relationships with major donors through phone calls, visits, and events held at a person’s home or at a hotel. (Brown Dep. 244:24-245:19) The NOM officers primarily responsible for fundraising in 2009 were the four members of NOM’s executive committee: Brian Brown, Maggie Gallagher, Luiz Tellez, and Robert George. In 2009 and 2010, major donors to NOM were also approached by fundraising consultant Steve Linder. Mr. Linder typically participated in the weekly telephone conferences of NOM’s executive committee. (Brown Dep. 284:7-8)

In 2009, NOM’s solicitations to major donors were made orally – by telephone or in person. (Brown Dep. 248:21-249:15) Mr. Brown testified that 70%-80% of the solicitations to major donors were made by telephone. (Brown Dep. 248:5-9) Because the solicitations to major donors were not made in writing, it is not possible to confirm the exact language that NOM used to communicate with individual donors.

Nevertheless, the basic elements of NOM’s communications are known, and they indicate that NOM told major donors in 2009 about NOM’s activities in support of the Maine

¹⁴ The total amounts given by each of these 14 major donors in 2009 are listed in a redacted version of Schedule B to NOM’s Form 990, attached (Doc. ##191-194). In the Schedule B, donors’ names have been replaced with John Doe numbers. In addition, NOM’s counsel provided the specific dates and amounts of each 2009 donation from a major donor in Attachment B to an April 3, 2013 letter.

referendum and NOM's *specific* commitment to financially support the Maine referendum. NOM transmitted written strategy documents to major donors and close friends of the organization that detailed NOM's financial commitment to partially fund the Maine campaign. Thus, any major donor receiving these communications would reasonably believe that part or all of his or her donation would be used to support the referendum in Maine.

B. Donor #2 (Married Couple in Maine)

In mid to late July 2009, NOM received a \$50,000 donation from a married couple living in Maine, whom NOM designated as Donor #2 in documents provided to the Commission. (Doc. ##213 and 214.) This large donation was solicited for NOM by its fundraising consultant Steve Linder. The funds were received during the phase of the referendum in which signatures were being gathered on petitions to place the referendum on the ballot.

On July 30, 2009, Brian Brown wrote a thank you note to the couple, addressed to them by first name, that highlights NOM's planned activities in support of the Maine referendum. (Doc. #220) The language of the thank you note demonstrates that the couple had *already* discussed NOM's commitment to spend money in the upcoming Maine campaign with Mr. Linder (italics added):

Thank you so much for your most generous contribution of \$50,000 to the National Organization for Marriage of July 15, 2009. As you know, *NOM* is leading the fight to protect marriage nationally and *is also committed to helping key states like Maine.*

As you know from your discussions with Steve Linder, NOM has already contributed over \$250,000.00 in the effort to project marriage in Maine. Happily, NOM's support of the effort in Maine is already bearing fruit. We are excited to announce that this week Stand for Marriage Maine will turn in signatures far beyond the necessary state requirement to place a People's Veto on the ballot: over 100,000 signatures of Mainers devoted to protecting our most basic institution in just a few weeks. Amazing!

We have a major fight on our hands in Maine and throughout our nation to protect God's vision of marriage. With supporters like you, we are confident that we will be victorious.

NOM's commitment to spend money on the Maine referendum was clearly conveyed to the couple: with money from "supporters like you," NOM would stop same-sex marriage in Maine – the donors' home state. The references to the couple's discussions with Steve Linder also strongly suggest that the solicitation was made in a way that would reasonably lead the couple to

believe that their donation would be used, at least in part, specifically for the purpose of promoting the Maine referendum campaign.

The check for \$50,000 from Donor #2 was deposited in NOM's principal bank account on Friday, August 10, 2009. (Doc. #419) *On the very next business day*, August 13, 2009, NOM transferred \$50,000 from that account to Stand for Marriage Maine. (Doc. #420)

In his affidavit of May 5, 2014, submitted by NOM in response to the staff's investigative report, Mr. Linder asserts as a general matter that "in his communications with major donors in 2009, [he] did not use any language that would lead the donor to believe that the funds would be used specifically for the purpose of initiating or influencing a ballot question election in Maine." *See* Exh. G to letter-memorandum of May 6, 2014. This generic statement, made nearly five years after the fact, accurately states NOM's policy and legal position, but it is not persuasive factual evidence. The Commission agrees with the staff (*see* May 16 reply memorandum at 2-3), that we should give greater weight to contemporaneous documents prepared by NOM for its donors in 2009, which communicated to any reasonable contributor that their donated funds would be used, in full or in part, to promote passage of the ballot question in Maine.

Applying the objective test, the Commission finds that this donation of \$50,000, given in response to the communications and in the context described above, meets the definition of "contribution" in §1056-B(2-A)(C). A majority of the Commission also finds that it meets the definition in §1056-B(2-A)(B).¹⁵ This donation, *by itself*, qualified NOM as a ballot question committee by mid to late July, 2009.

C. Donor #11 (NOM's Largest Contributor for 2009)

Donor #11 is a long-standing major donor to NOM who was NOM's largest contributor in 2009. (Brown Dep. 274:3-22) At some point during 2009 (by July at the latest), Donor #11 pledged \$2 million to NOM. One million dollars was pledged as an outright gift, and another \$1,000,000 was pledged contingently, based on NOM's success in raising money from other donors.

Ultimately, Donor #11 gave a total of \$2,475,000 during 2009, including two large contributions in the last month before the November 3, 2009 referendum election:

¹⁵ Commissioner Healy joins the finding with respect to paragraph C but not paragraph B.

4/6/09	\$100,000
5/14/09	\$80,000
5/15/09	\$45,000
7/9/09	\$750,000
10/5/09	\$1,000,000
10/13/09	\$500,000
<i>Total</i>	\$2,475,000

Cash provided by this donor accounted for 34.8% (or roughly one-third) of NOM’s total receipts in 2009.

On July 7, 2009, Brian Brown sent to NOM board member Luiz Tellez an email containing a draft of a proposed budget to be provided to Donor #11 for a proposed \$2 million gift. (Doc. ##424-426) The draft budget breaks down, in specifics, how NOM would spend the \$2,000,000 to be received from Donor #11:

\$200,000	promoting the Maine referendum
\$300,000	influencing legislative elections in Iowa, with the goal of “flip[ping] the Legislature”
\$600,000	“killing” a same-sex marriage bill anticipated to arise in a lame duck session of the New Jersey Legislature in November 2009
\$300,000	defeating Governor John Lynch of New Hampshire and to flip both houses of the New Hampshire Legislature
\$300,000	for a grass roots recruitment project of developing 2 million activists and 50,000 donors by the election of 2010
\$250,000	creating a reserve fund which could be used for future projects in different states
Unspecified ¹⁶	donation to the American Principles Project – a separate nonprofit corporation that was chaired by Robert George in 2009 that promoted “founding principles.”

The July 7, 2009 email clearly conveyed that NOM would be spending a sizeable amount to promote the Maine referendum. The email also conveys the critical importance of blocking same-sex marriage in Maine: “A victory in 2009 in Maine is critical to stopping the momentum of the same-sex marriage movement in the Northeast. The total budget for Maine is \$3 million. We cannot designate any money given to NOM to the Maine effort because of disclosure

¹⁶ Brian Brown clarified in a follow-up email the next day that this amount was \$250,000, which Donor #11 should send directly to the American Principles Project. All other amounts listed in this table were to go directly to NOM. Doc. #425.

requirements. But we do plan on contributing at least \$200,000 ... over the next few months.” This email demonstrates a willingness by NOM’s executive director to provide very specific information to NOM’s largest donor concerning how NOM would use the donation to fund projects such as the Maine referendum.

Two days after Brian Brown sent the draft budget, Donor #11 gave \$750,000 to NOM. (A thank you letter from Brian Brown, attached, refers to the contribution with the date of July 9, 2009.) The donation was deposited into NOM’s bank account on July 15, 2009. (Doc. #412)

The text of Brian Brown’s July 7 email is consistent with the messages conveyed in the national strategy documents that Brown testified were distributed to major donors and other close friends of the organization. (Brown Dep. 206:11-12) As noted above, the National Strategy document dated August 11, 2009, set forth a *specific financial commitment* to contribute \$1 million to promote the Maine referendum (later increased to close to \$2 million). A detailed \$3.5 million budget for Stand for Marriage Maine was attached to the 8/11/2009 National Strategy document. As NOM’s largest donor and the source of one-third of NOM’s 2009 revenue, Donor #11 would have received this strategy document, along with oral communications from NOM consistent with the strategy document.¹⁷

Brian Brown testified that he discussed NOM’s national strategy with Donor #11 during a phone call that occurred earlier in 2009. NOM’s President Maggie Gallagher and Chair Robbie George also participated in the telephone call. Based on the telephone call, NOM understood that a \$1 million gift was “coming in October.” (Brown Dep. 275:1-4; 278:2-7) This expectation was fulfilled when, on October 5, 2009, Donor #11 transferred \$1,000,000 to NOM. (Doc. #344) Email communications from members of NOM’s executive committee on October 6, 2009 reveal that Donor #11 expressed a willingness to provide an additional \$500,000 if needed. (Doc. ##427-429) A week later, on October 13, 2009, the same donor gave NOM another \$500,000. (Doc. #346) NOM *transferred the entire amount of this gift to Stand for Marriage Maine* on the very next day (October 14, 2009).¹⁸ (Doc. #347) Over the course of the

¹⁷ NOM prepared other documents during 2009 and 2010 describing its national strategy and its accomplishments, such as a document entitled “Marriage: \$20 Million Strategy for Victory.” Doc. ## 97-109. This document also strongly suggests that NOM intended specific amounts of money to be devoted to the Maine referendum. *See also* Doc ##100-101 (“Amount of this pledge to be devoted to Maine [(c)(4)]: \$200,000... Amount raised for Maine to date [(c)(4)]: \$500,000”)

¹⁸ This October 13, 2009 donation of \$500,000 was one of five which NOM received from major donors on one day, and then wired to Stand for Marriage Maine on the same or next business day.

next two weeks, NOM transferred an additional \$340,000 to Stand for Marriage Maine. (*See* chart of contributions reported by Stand for Marriage Maine.)

Based on this evidence, the Commission finds that one of NOM's purposes in soliciting and receiving Donor #11's contributions in the summer and fall of 2009 was to influence the Maine referendum. NOM had made a specific financial commitment to make a sizeable donation to Stand for Marriage Maine. As NOM's executive committee members were soliciting and receiving contributions from major donors during the summer and fall of 2009, they knew that significant portions of those contributions would be spent to support the Maine referendum.

The communications concerning NOM's role in leading and funding the Maine referendum campaign were sufficient to lead Donor #11 to believe that his donations (or at least a substantial portion of them) would be used to promote the Maine referendum. The affidavit from Donor #11, dated May 7, 2014 (after NOM had submitted its legal arguments to the Commission), expresses the donor's understanding of NOM's policies not to allow earmarking of donations and not to make any binding promises to donors regarding how their funds would be used. The donor also asserts that "no representative of NOM used any language that would lead me to believe that the funds would be used specifically for the purpose of initiating or influencing a ballot question in Maine." The Commission gives little weight to these general conclusory statements, made five years after the fact. They do not refute that NOM was raising funds from this donor specifically for the purpose of promoting the Maine referendum campaign.¹⁹

The funds provided to NOM by Donor #11 under the circumstances described above meet the definition of "contribution" in § 1056-B(2-A)(C). While the Commission cannot determine exactly what was said in telephone conversations with Donor #11, five years after those conversations occurred, the language of NOM's written communications discussed above supports a finding that funds contributed by Donor #11 in the latter part of 2009 also meet the definition of "contribution" in § 1056-B(2-A)(B).

¹⁹ NOM places considerable weight on the use of the word "specifically" in §1056-B(2-A)(B) in arguing that the funds it solicited, received and spent in Maine in 2009 do not constitute "contributions" under the BQC statute. The Commission agrees with the staff's analysis of this issue, as presented in the staff's reply memorandum of May 16, 2014.

The July and October 2009 donations from Donor #11, in themselves, qualified NOM as a ballot question committee, requiring it to register and to file campaign finance reports with the Commission.

D. Cash Received from Donors #9, #10, and #12 Transferred Directly by NOM to Stand for Marriage Maine

Between September 4 and October 13, 2009, NOM received funds from three additional major donors which NOM promptly transferred to Stand for Marriage Maine on the same day or the next business day after receipt.

- On September 4, 2009, NOM received a wire transfer of \$150,000 from Donor #10, which was NOM's second largest donor for 2009. That same day, NOM transferred \$140,000 to Stand for Marriage Maine. (Doc. #337)
- On October 1, 2009, NOM received a wire transfer of \$300,000 from Donor #9, who was NOM's third largest donor. That same day, NOM transferred \$300,000 to Stand for Marriage Maine. (Doc. ##343-44)
- On October 9, 2009, NOM received a wire transfer of \$400,000 from Donor #12. The very same day, NOM wired \$300,000 to Stand for Marriage Maine. (Doc. ##346-47)

The circumstances suggest that NOM solicited and received these contributions exceeding more than \$5,000 for the purpose of promoting the Maine referendum.

NOM argued for the first time on May 28, through Mr. Brown and Mr. Eastman, that some of these donors were fulfilling multi-year pledges to NOM and thus could not have given specifically for the purpose of the Maine referendum campaign. NOM did not produce any documentation to this effect, however, and Mr. Brown acknowledged that NOM had not received pledges from all of these donors and that the pledges were not made in writing. He also was not certain which of the above donors were "recurring" donors. The possibility that some of these major donors had given to NOM in the past and/or anticipated giving again in the future, does not prove that they did not make "contributions" as defined in §1056-B(2-A) in 2009 for purposes of the Maine referendum campaign.

7. NOM Received “Contributions” as Defined in 21-A M.R.S.A. §§ 1056-B(2-A)(B) & (C) through Email Solicitations

In 2009, NOM raised funds by email in weekly updates, newsletters, or “alerts” sent to NOM’s members or subscribers on NOM’s email list.²⁰ The emails discussed current projects or activities of NOM (such as the Maine referendum) and invited members or subscribers to help support these activities.

The text of these email solicitations contained one or more hyperlinks to the fundraising page on NOM’s website. Members of the public could enter their credit card numbers on this “Donate” page to make a donation to NOM’s general fund. For example, in a May 8, 2009 email about NOM’s efforts in Maine, New Hampshire, and other areas, the email contained a paragraph about the Maine referendum concluding “(You can fight back! Can you help defend marriage in Maine and across the country, by donating \$5, \$10, or even, if God has given you the means, \$100 or \$500?)” (Doc. ##879-881) The underlined text was a link to the Donate page on NOM’s website.

In addition to these hyperlinks contained in the text of emails, NOM’s emails also contained a bright red oval-shaped Donate button at the top of the electronic message. This button, which was prominent due to its color and position, also took the member or subscriber to the Donate page on NOM’s website.

In the October 21, 2009 Verified Complaint filed by NOM in the U.S. District Court to initiate *Nat’l Org. for Marriage, Inc. v. McKee*, NOM identified 12 emails sent out during the period of May 6 - September 4, 2009 that discussed the Maine referendum. See Verified Complaint, ¶¶ 26-35 and 36-38. These emails discussed the referendum and invited NOM’s members and subscribers to make financial donations. NOM claimed that it intended to distribute additional emails “mentioning Maine and soliciting donations which will exceed \$5,000,” but that it “fear[ed] enforcement under section 1056-B based on any such future activities” (Verified Complaint, ¶44) The 12 emails are listed in a table beginning on page 27 of this determination, which includes the date of the email, the text within the email which solicits a donation, and the amount that NOM has indicated it received in response to the email.

²⁰ NOM considers all donors of \$5 or more to be members of NOM. (Brown Dep. 93:18-21) NOM also sends some email communications (e.g., newsletters) to other members of the public who have provided their email address as part of taking an action on NOM’s website (e.g., sending an email to a legislator). (Brown Dep. 97:4-17))

In *Nat'l Org. for Marriage, Inc. v. McKee*, the U.S. District Court upheld the constitutionality of the ballot question committee statute, 21-A M.R.S.A. § 1056-B. 765 F.Supp.2d 38, 49-52 (D. Me. 2011). The court found that the law was not vague or overbroad in requiring ballot question committees to disclose two different categories of donations, which the statute defined as “contributions.” *Id.* at 49-52, upholding § 1056-B(2-A)(B) &(C). On appeal, NOM argued that these two categories of contributions were unconstitutionally vague, leaving NOM and other political groups unsure which donations they would need to disclose in campaign finance reports filed with the Commission.

The U.S. Court of Appeals for the First Circuit rejected this argument and found that Paragraphs 2-A(B) & (C) of Section 1056-B provided NOM with “fair warning” of those donations which NOM would be required to report as “contributions.” 669 F.3d at 50 (attached). In reaching this holding, the court analyzed the solicitation language in six of NOM’s emails which discussed the Maine referendum.²¹ The court found that the solicitations in all six emails were clearly covered by Section 1056-B(2-A)(B) & (C) and that those categories were not unconstitutionally vague. *Id.* at 45-49.

Applying the same analysis used by the U.S. Court of Appeals for the First Circuit, the Commission finds that NOM received “contributions” as defined by Section 1056-B(2-A)(B) & (C) from fundraising emails it sent discussing the Maine referendum. The total amount collected as a result of these 12 emails apparently cannot be determined. NOM states that due to technical limitations in its ability to track responses to specific emails, it is unable to determine how much money it received in response to the emails it sent on June 12 and September 4, 2009.²²

²¹ The emails analyzed by the Court of Appeals were dated May 6, May 8, July 10, July 31, August 28, and September 4, 2009.

²² When Brian Brown was deposed for the federal litigation, he explained that NOM used software provided by its vendor, Kintera, to distribute emails, updates, newsletters, and alerts. He said that NOM had the capability through the Kintera software to track the amount of donations received in response to each email through codes included in the emails (Brown Dep. 162:8-11). Nevertheless, when responding to investigative requests in 2013, NOM stated in April 2013 letters from its legal counsel that amounts of money received in response to certain of its emails “were not tracked” due to technical limitations in the Kintera software (April 3, 2013 letter, at 3; April 12, 2013 letter, at 2, both attached). NOM explained that it ultimately developed its own tracking system, but that system was not fully implemented in 2009.

NOM Solicitation Emails dated May 6 - Sept. 4, 2009			
Analyzed by the U.S. Court of Appeals for the First Circuit in <i>Nat'l Org. for Marriage v. McKee</i>			
Date	Solicitation Language	Amount Raised	Contribution under § 1056-B(2-A)
5/6/09 (Doc. ## 877-78)	Your support today will allow us to start the referendum process immediately when the law is signed, ensuring that the measure does not take effect before the people of Maine have had their say. Can you afford a gift of \$35, \$50 or \$100 today to help stop same-sex marriage not just in Maine, but in New Hampshire, Iowa, and other states as well? Please use this hyperlink to make a secure online donation today!	\$2,469	(B)
5/8/09 (Doc. ## 879-81)	You can fight back! Can you help defend marriage in Maine and across the country, by donating \$5, \$10, or even, if God has given you the means, \$100 or \$500?	\$1,055	(B)
7/10/09 (Doc. ## 967-68)	The National Organization for Marriage worked hard with StandforMarriageMaine to make this happen. But it could not have happened without your help! You are the ones who made this happen... and we need you to help secure this victory. Can you help us with \$10, \$25, or \$100 so that Maine – and our country – can recover the true meaning of marriage?	\$350	(B)
7/31/09 (Doc. ## 992-1004)	Thanks to you, NOM was able at very short notice to go to Maine and help Maine leaders put together this extraordinary effort. NOM helped with our expertise, experience and relationships, but it is your financial sacrifices which have made our initial victory possible. When you donate to NOM, you're creating the next round of good news! Can you give \$5, \$25, or even \$100 today to win the next victory for marriage?	\$255	(B) & (C)
8/28/09 (Doc. ## 1041-47)	Help us fight to protect marriage in Iowa, Maine and everywhere across this great land – <u>donate today!</u>	\$395	(B)
9/4/09 (Doc. ## 1166-68)	Money is going to be critical to getting the message out; the campaign needs to make ad buys <i>this</i> week, so if you can possibly spare just \$10 or \$100 this week, do not give it to me – go to StandforMarriageMaine.com and fight back! ... We are going to fight hard to protect marriage and religious liberty in Maine and throughout this great country. Thank you for all you do to make the Truth heard loud and clear!	Not recorded	(B) & (C)

	(And don't forget to donate what you can to StandforMarriageMaine at this crucial time!)		
Other NOM Email Solicitations from May 6 to Sept. 4, 2009			
Date	Solicitation Language	Amount Raised	Contribution under § 1056-B(2-A)
5/15/09 (Doc. ## 886-88)	If it's Tuesday this must be Maine. I know it's Maine because I saw a moose! We will fight to be your voice in New Hampshire, Maine (more on that next week) Iowa, New York, New Jersey, D.C. and all across this great and God-blessed country of ours.	\$570	(C)
5/22/09 (Doc. ## 893-97)	I'm back in Maine today – we'll keep you updated on progress in building the coalition to push back gay marriage in Maine. We will need your help – all the help you can spare!	\$285	(B)
6/12/09 (Doc. ## 926-30)	To help us in Maine and all 50 states, can you make a monthly donation? Whether it's as little as \$5 a month or, if God has given you the means, \$100 a month, your money makes a difference in the battles ahead.	Not recorded	(B)
7/8/09 (Doc. ## 967-68)	This spring, out of touch politicians in Maine pushed a same-sex marriage bill through the legislature – ignoring the will of constituents. ... With your help, the people of Maine will have the chance to vote up or down on the same-sex marriage bill this November Make an online donation at StandforMarriageMaine.com to make sure we have the resources needed for collecting tens of thousands of signatures in a short window of time. Your donation of \$20, \$35, or \$50 or more will help ensure success!	\$0	(C)
7/17/09 (Doc. ## 967-73)	If we want really good news to come out of Maine, we'll need your help – all the help you can give us. We'll need your prayers, your vocal support, and your financial sacrifices. I know these are tough times...but we have tough battles ahead. Whether you can spare \$5 or \$500, we will work to turn your money into positive, pro-marriage headlines.	\$40	(B)
8/7/09 (Doc. ## 1010-14)	Will you stand with us today? Use this hyperlink to help support NOM's work not only in Maine but around the country, wherever the need arises.	\$60	(B)

NOM continued to send emails to its subscribers during September and October 2009, updating them on the organization’s efforts to support the Maine referendum. During the period of September 11 – October 30, 2009, NOM sent another six emails discussing the Maine referendum. After the Commission voted on October 1, 2009 to investigate NOM’s fundraising, the organization’s emails discussing the Maine referendum directed potential donors to the fundraising website of Stand for Marriage Maine, rather than NOM.

NOM Email Solicitations Discussing the Maine Referendum after September 4, 2009			
Date	Solicitation Language	Amount Raised	Contribution under § 1056-B(2-A)
9/11/09 (Doc. ## 1058-62)	If God has given you the means, can you step forward to help us replenish our coffers? We are the largest single donor to the effort to protect marriage in Maine. We are the only national organization fighting to protect marriage in New York and New Jersey. And we need your help to fight for your values.	Not recorded	(B)
10/2/09 (Doc. ## 1169-73)	If you would like to honor Maggie [Gallagher], and fight back against the Fred Kargers of the world--do not give money to me and Maggie or NOM. Give it to StandforMarriageMaine.com . Maine is the frontline of the battle for marriage and we all need to come together to win. <u>Can you give \$10 today for StandforMarriageMaine.com?</u>	Not recorded	(B) & (C)
10/9/09 (Doc. ## 1174-79)	(To help in Maine, you need to give directly to StandforMarriageMaine.com . Whether you can give \$15, \$150 or, if God has given you the means, even more, know that Stand for Marriage Maine can use <u>all the help you can give them</u> . This is a fight we can win!) ... And I ask you for the sacrifice of your time and your treasure in this great cause--usually for NOM. But not this week. No, as crucial as the fights are in DC, New York, New Jersey, and nationally, Maine is our number one priority. So we are asking: If you have \$5 to spare this week for marriage, do not give it to us. <u>Give it to StandforMarriageMaine.com right here.</u>	Not recorded	(B) & (C)
10/15/09 (Doc. ##	Let me be direct: Unless we act now, marriage will be redefined in Maine.... <u>I'm asking you to read the powerful e-mail below</u>	\$0	(B) & (C)

1180-81)	<u>from my friend, Marc Mutty, chairman of Stand for Marriage Maine, and to think long and hard about what marriage is worth to you...and then to give whatever you can today to Stand for Marriage Maine to protect this precious institution....If we don't act now we risk losing the most important state battle since California.</u>		
10/22/09 (Doc. ## 1182-83)	The other thing that Maine needs is your financial support, if you can afford it in these tough times. Don't give money to NOM today – Give it to Maine. Give \$100 to Maine. Give \$1 to Maine.	\$0	(B) & (C)
10/30/09 (Doc. ## 1184-88)	In Maine, we have a historic chance to demonstrate once again that even in a heavily Democratic and secular state like Maine, the people are not for gay marriage. In Maine the polls are very close. The gay-marriage movement's tactics of intimidation and harassment are stepping up. These tactics are deliberately designed to discourage and punish anyone who speaks up for God's truth about marriage--to misuse the law to treat the millions of good Americans who care about marriage like evil racists and discriminators.	Not recorded	(B)

Although some of NOMs emails after September 4, 2009 did direct readers to the website of Stand for Marriage Maine, it is possible that NOM received funds from these emails if NOM subscribers clicked on the prominent red Donate button at the top of the email, which was linked to NOM's own fundraising page. When asked to disclose how much money NOM received in response to these six emails, NOM replied \$0 for the October 15 and 22, 2009 emails and that amounts could not be ascertained for emails dated September 11, October 2, October 9, and October 30, 2009. (April 3, 2013 letter from NOM's counsel, at 4, 6, attached.) So, the emails sent by NOM after September 4, 2009 may have resulted in NOM's receipt of contributions as defined by 21-A M.R.S.A. §§ 1056-B(2-A)(B) & (C), but the available evidence is inconclusive.

The revenues known to have been generated by the above listed emails total \$5,479, which exceeds the \$5,000 threshold requiring ballot question committee registration and reporting. NOM contends that the email dated May 15, 2009 -- which generated \$570 in donations -- should be excluded because it makes no explicit reference to a Maine referendum campaign. NOM contends, therefore, that the email solicitations did not exceed the \$5,000 threshold. A majority of the Commission finds that the May 15 email, like the August 28, 2009 email discussed by the First Circuit Court of Appeals, contains a message that could lead a

reasonable contributor to believe that donations made in response would be used specifically for the purpose of influencing the Maine referendum campaign. *See Nat'l Org. for Marriage, Inc. v. McKee*, 669 F.3d at 46.²³ Under the objective test as explained by the court, therefore, those donations are contributions under §1056-B(2-A)(C). *Id.* at 46-48.

NOM also argues that the donations received in response to the above-listed emails must be pro-rated to reflect the percentage of the solicitations that discussed the Maine campaign. The Commission rejects the pro-rating argument for the reasons set forth in the staff's reply memorandum of May 16, 2014, at pp. 6-8.

8. Findings relating to penalties

The Commission is unable to determine the precise date on which NOM first raised in excess of \$5,000 for the purposes of initiating or promoting the Maine referendum, but the Commission finds that NOM had an obligation to register as a ballot question committee by at least the end of July 2009. (*See* staff's investigative report at p. 33.) NOM was obligated, therefore, to file an 11-day pre-election and a 42-day post-election campaign finance report, pursuant to 21-A M.R.S. §1056-B(1) and 1059(2)(C). It also should have filed four 24-hour reports of single expenditures due in the last 13 days before the election, pursuant to 21-A M.R.S. § 1059(2)(E).

Ballot question committees are generally required to file quarterly campaign finance reports, in July, October, January and April of each year. For the reasons set forth in the staff's investigative report (at p. 34), the Commission finds that NOM was not required to file a quarterly report on July 15, 2009 or on October 13, 2009. No evidence has been produced in this investigation to show that NOM received more than \$5,000 for purposes of promoting the Maine referendum after the November 2009 election. Contributions to the Stand for Marriage Maine PAC in May 2010 and May 2011, which were used by SMM to retire its debts from the 2009 referendum campaign, appear to have been made by NOM from general treasury funds that were not raised for this purpose. Accordingly, the Commission finds that NOM was not obligated to file quarterly reports in 2010 or 2011.

²³ Commissioner Healy does not join in this finding.

IV. Conclusions of Law²⁴

Based on the above findings of fact, and consideration of all legal arguments presented, the Commission concludes that:

- A. NOM violated 21-A M.R.S. § 1056-B by receiving contributions aggregating in excess of \$5,000 for purposes of initiating or promoting the 2009 people’s veto referendum and failing to register and file campaign finance reports as a ballot question committee.
- B. Donations received by NOM in response to solicitations distributed by electronic mail from NOM to its subscribers and members during the period from May through at least September, 2009 constituted “contributions” under 21-A M.R.S. § 1056-B(2-A)(B) and/or (C).
- C. Donations received by NOM from major donors, such as Donors #2, 9, 10, 11 and 12, during the period from May through November, 2009, constituted “contributions” under 21-A M.R.S. §§ 1056-B(2-A)(B) and/or (C).²⁵
- D. NOM violated 21-A M.R.S. § 1056-B by failing to file the following campaign finance reports when they were due:

Type of Report	Deadline	Report period	Content
11-day pre-election report	10/23/2009	Beginning of campaign - 10/20/2009	All contributions and expenditures to influence the election
24-hour report	10/24/2009	10/23/2009	Expenditure of \$100,000 made on 10/23/2009
24-hour report	10/27/2009	10/26/2009	Expenditure of \$40,000 made on 10/26/2009
24-hour report	10/28/2009	10/27/2009	Expenditure of \$160,000 made on 10/27/2009
24-hour report	10/30/2009	10/29/2009	Expenditure of \$40,000 made on 10/29/2009
42-day post-election report	12/15/2009	10/21/2009 - 12/8/2009	All contributions and expenditures to influence the election

²⁴ The Commission’s conclusions were based on a unanimous vote of Commissioners Walter F. McKee (Chair), Andre G. Duchette, Margaret E. Matheson, and Michael T. Healy, except as noted. Commissioner Jane A. Amero was unable to participate in the May 28, 2014 meeting.

²⁵ Commissioner Healy concurs in this conclusion only as to §1056-B(2-A)(C).

E. NOM was not required to file campaign finance reports during 2010 and 2011.

V. Order

Based on the above findings of fact and conclusions of law, the Commission hereby orders and directs NOM to do the following:

1. Within thirty (30) days of receipt of this determination, register as a ballot question committee for its activities in support of the 2009 people’s veto referendum and to file a consolidated campaign finance report for calendar year 2009. This report must include the name, address, occupation and principal place of business of all contributors who made contributions to NOM exceeding \$100 for purposes of initiating or promoting the people’s veto referendum on same-sex marriage in 2009, including the contributions which the Commission has determined meet the definition of “contribution” in 21-A M.R.S. § 1056-B(2-A). The report must also include all expenditures made for the purpose of initiating or promoting the people’s veto referendum;

2. For failure to register as a ballot question committee in 2009 as required by 21-A M.R.S. § 1056-B, pay a penalty of two hundred and fifty dollars (\$250.00) pursuant to 21-A M.R.S. § 1062-A(1); and

3. For failure to file the following campaign reports as a ballot question committee in 2009, in accordance with 21-A M.R.S. §§ 1056-B, 1059 and 1060, pay the following penalties totaling fifty thousand dollars (\$50,000.00) pursuant to 21-A M.R.S. § 1062-A(3)).

Filing Deadline	Penalty
10/23/2009 (11-day pre-election report)	\$10,000
10/24/2009 (24-hour report)	\$10,000
10/27/2009 (24-hour report)	\$5,000
10/28/2009 (24-hour report)	\$10,000
10/30/2009 (24-hour report)	\$5,000
12/15/2009 (42-day post-election report)	\$10,000

Dated at Augusta, Maine, this ____ day of January, 2014.

Walter F. McKee, Chair
Commission on Governmental Ethics
and Election Practices

NOTICE OF APPEAL RIGHTS: Any person aggrieved by this final determination has a right to seek judicial review by filing a Petition for Review in Superior Court, within 30 days of receipt of the determination, in accordance with 5 M.R.S.A. §§ 11001 & 11002 and Rule 80C of the Maine Rules of Civil Procedure.