



STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS
AND ELECTION PRACTICES
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AUGUSTA, MAINE
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To: Commissioners
From: Jonathan Wayne, Executive Director
Date: May 16, 2014
Re: National Organization for Marriage (NOM) – Staff Reply to NOM’s Response to
Investigative Report and Recommendations

In a May 6, 2014 letter-memorandum submitted by NOM’s attorney, Joseph A. Vanderhulst of the ActRight Legal Foundation (referred to below as the “NOM letter-memo”), NOM raises a number of legal and factual arguments in response to the Investigative Report and Recommendations by Commission Staff, dated April 9, 2014, that warrant a response.

First, to set this matter in context, what is at stake here is whether Maine voters receive information concerning who is spending money to influence their vote in a ballot question election. Maine law does not restrict in any way who may donate money to promote a referendum, or how much money may be donated. But the law does state that if an advocacy group promoting or opposing a ballot question raises or spends more than \$5,000 for the purpose of influencing the voters’ decision on that ballot question, it must disclose the sources of those funds. This disclosure provides critical information to Maine voters, as the courts have recognized.

In 2009, the NOM had ample opportunity to comply with this law, had it wanted to. It had a sophisticated staff with bookkeeping and database capabilities. Its legal counsel had examined Maine law. As of the summer of 2009, there was no doubt that it was going to spend at least \$1 million to promote the Maine campaign. With relatively little effort by its staff, NOM could have registered a ballot question committee with the Commission, identified the sources of funds used for the Maine campaign, and filed a couple of financial reports – but it chose not to. At its core, NOM’s legal theory was that, as long as it mixed all its donations together in a general

bank account, did not allow donors to earmark their funds for any particular purpose, and never told any donor with certainty how NOM would spend that particular donor's dollars, NOM could keep the identity of its donors secret. A finding of violation would communicate to NOM and to others that this arrangement is not acceptable under Maine law.

General Statements of NOM's 2009 Policies Should Not Defeat the Actual Words Used by NOM in Corresponding with Donors

Most of NOM's solicitations to its major donors were made orally, but the staff obtained some of NOM's written communications with 2009 donors during the investigation. As discussed below, these communications would *objectively* lead anyone reading them to believe that part or all of their donations would be spent to promote the Maine campaign.

NOM seeks to rebut this specific evidence with general statements of NOM's 2009 policies from its fundraising consultant Steve Linder, its employees Justin and Mary Haas, and an affidavit from Donor #11. The Commission should give these affidavits little, if any, weight. They are merely conclusory statements of NOM's policies regarding the earmarking of contributions and provide no new or detailed information to the Commission about the messages NOM conveyed to its major donors. The statement by Mary Haas makes clear that, in 2009, she had nothing to do with soliciting contributions from any donors. Justin Haas' affidavit merely states that he communicated to donors NOM's policy of not allowing donors to earmark their donations – i.e., to control exactly how their money would be spent. The affidavits by Mr. Linder and Donor #11 are equally conclusory and simply track NOM's legal arguments and its internal policy on earmarking.¹ Moreover, it is reasonable to question how reliably Mr. Linder, Mr. Haas, or Donor #11 could recall conversations after the passage of five years.²

¹ The affidavits of Donor #11, Mary Haas and Justin Haas were not even executed until after NOM had submitted its letter-memorandum in response to the Commission staff's Investigative Report.

² As further proof that it did not allow its donors to earmark contributions for particular projects, NOM relies on its return of a contribution that it received in mid-September 2009. (NOM letter-memo, at 7) Contributions earmarked *by the donor* are not the basis for the staff's recommendations to the Commission, however, so this example proves nothing. Moreover, the Commission should be aware that NOM received this contribution during the time period in which NOM's attorneys were actively responding to Fred Karger's allegations by stating that NOM did not accept contributions designated to influence the Maine referendum. (See letter from NOM's prior counsel, dated September 21, 2009).

In its 2009 communications to donors, NOM described the Maine referendum campaign as a critical project in which NOM was taking a leadership role and had made a financial commitment of \$1 million. (See pages 7-8 and 27 of the National Strategy for Winning the Marriage Battle, dated August 11, 2009 (Doc. ##117-118, 137)) Any donor or potential donor reading those sections of the strategy document would reasonably believe that part or all of his or her donation to NOM would be used for the Maine campaign.

In his deposition, Brian Brown confirmed that NOM provided this strategy document to major donors in the course of raising funds from them. (Brown Dep. 105:14 – 106:12) The Commission should place greater weight on contemporaneous documents such as these, rather than general assurances by NOM’s fundraiser and staff five years later that they never would have used any language that would lead the donor to believe that the funds would be used specifically for the Maine campaign.³

Another contemporaneous document that conflicts with NOM’s affidavits is the proposed budget that Brian Brown prepared for Donor #11 and that Mr. Brown conveyed to Luiz Tellez in July 7, 2009. The email is entitled “Rough Draft of Budget for [Donor #11.]” This document is important because it demonstrates an intention by NOM’s Executive Director to tell NOM’s largest donor *specifically* how NOM would spend a *future* donation of \$2 million.⁴ The Maine campaign is the first project on the list. Regardless whether Mr. Tellez forwarded some version of this budget to Donor #11 by email or conveyed the information to Donor #11 by telephone, it certainly undercuts NOM’s affidavits that major donors were not told how their contributions would be used.

³ During discovery in the federal litigation, the Commission received copies of two direct mail solicitation letters to donors from March 2010 in which NOM used its national strategy documents to explain to donors how their funds would be used. These “major donor direct mail packages” (Doc. ##6-10, 770-774) are among the documents you have received. At his 2010 deposition, Brian Brown described how NOM and its fundraising agent Steve Linder would create a list of potential major donors and would send them the major donor direct mail package. (Brown Dep. 285:12 – 286:9)

⁴ Cash provided by Donor #11 accounted for roughly one-third of NOM’s total receipts in 2009.

The significance of Brian Brown’s thank you letter to Donor #2 is that it is contemporaneous evidence of the conversation that took place between Steve Linder and Donor #2. The information provided by Mr. Linder to Donor #2 concerning NOM’s leadership role and financial commitment to the Maine campaign was

- part of a solicitation that is relevant under 21-A M.R.S.A. § 1056-B(2-A)(B), and
- part of the “key contextual” information that is relevant under 21-A M.R.S.A. § 1056-B(2-A)(C) and that may constitutionally be used by the State of Maine in its standards for what is a reportable contribution, according to the U.S. Court of Appeals for the First Circuit.⁵

Applying the Term “Specifically” in 21-A M.R.S.A. § 1056-B(2-A)(B)

Under 21-A M.R.S.A. § 1056-B(2-A)(B), the definition of contribution includes:

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;

NOM places considerable weight on the word “specifically” in arguing that its 2009 receipts were outside the reach of 21-A M.R.S.A. § 1056-B. NOM’s legal counsel uses the term on page 2 of his letter-memo, and it is repeated in the affidavits of Steve Linder, Justin and Mary Hass, and Donor #11.

“Specifically” does not mean “exclusively” or “only.”⁶ Reading § 1056-B as a whole, there is no indication that the Maine Legislature intended a ballot question committee to report a contribution *only if* the contribution was received exclusively for purposes of a Maine campaign. “Specifically” does not appear in subsection 2 (describing the contents of required campaign finance reports) or paragraphs (2-A)(A) or (2-A)(C) (other categories of donations defined as “contributions”).

Thus, if the language of a solicitation objectively would lead a listener/reader to believe that funds would be used – in part or in whole – to promote a specific Maine ballot question *and*

⁵ *Nat’l Org. for Marriage v. Comm’n on Governmental Ethics and Election Practices*, 669 F.3d 34, 49 (1st Cir. 2012)

⁶ A standard dictionary definition of “specific” is “explicit, particular or definite;” “relating to a specified or particular thing.” *Collins English Dictionary - Complete & Unabridged* (10th Ed. 2009).

other specific activities of the recipient organization, the resulting donation is a contribution under 21-A M.R.S.A. § 1056-B(2-A)(B). That is how the U.S Court of Appeals for the First Circuit applied § 1056-B(2-A)(B) when reviewing emails dated May 6 and 8, July 10, August 28, and September 4, 2009. *Nat'l Org. for Marriage v. Comm'n on Governmental Ethics and Election Practices*, 669 F.3d 34, 45-49 (1st Cir. 2012). All of these emails indicated that any donated funds would be used specifically for the Maine campaign and for other activities of NOM described in the emails. Nevertheless, the court had no difficulty concluding that “A reasonable contributor could not help but believe that donations made in response to these and similar solicitations ‘would be used specifically for the purpose of initiating or influencing a [Maine] campaign.’” (*Id.* at 46)

The Commission Should not Apply a Subjective Standard

Application of § 1056-B depends on the purpose for which the organization is receiving contributions or making expenditures, as reflected in the organization’s own conduct and communications. It does not require the organization to know how their donors *actually* thought their donations would be used – that would be a subjective standard that is unnecessary and likely disfavored by the courts. The U.S. Court of Appeals for the First Circuit upheld § 1056-B because it can be applied objectively.

The question asked is whether the words spoken—the "solicitation"—would lead a contributor to believe that the funds will be used to initiate or influence a campaign. The answer does not require an assessment of what any particular contributor actually believed, an inquiry that could turn on the hearer's education, culture, or other background factors. Rather, whether a communication is covered depends on the objectively reasonable meaning of the language of the solicitation; hence, the only relevant hearer is the hypothetical "reasonable person."

Id. at 46-47 (discussing subsection B). What § 1056-B requires of NOM and other organizations is they be aware of the language of their communications with donors in determining whether a reasonable listener/reader would be led to believe that their contribution would be used for a Maine ballot question campaign.⁷ As the First Circuit stated in upholding § 1056-B(2-A)(B) against NOM’s vagueness challenge, “organizations like NOM...can be fairly required by Maine

⁷ Apparently, NOM is interpreting one or two sentences in the staff’s April 9, 2014 investigative report as a suggestion that you make factual findings concerning what NOM’s 2009 donors *actually* believed. That is not necessary and we do not recommend any such factual findings.

law to determine whether a reasonable listener would understand their advocacy as an invitation to contribute to a specific ballot question campaign.” 669 F.3d at 47.

Contrary to NOM’s assertion (at p. 10, part D of NOM’s letter-memo), the language of the solicitation is not the only relevant factor in determining whether a donation is a contribution under § 1056-B(2-A). Subsection C allows consideration of the context of the contribution and the recipient organization’s activities, “in circumstances where there is no explicit request from the solicitor (covered by subsection B) or express earmarking by the donor (covered by subsection A).” 669 F.3d at 48.

NOM’s Pro-Rating Argument

On pages 4-5 of its letter-memo, NOM suggests if the Commission counts any donations NOM received in response to the email solicitations as “contributions” under 21-A M.R.S.A. § 1056-B(2-A), then the Commission must pro-rate them to reflect the percentage of the solicitation devoted to a discussion of the Maine campaign.

Nothing in Maine Election Law, or in relevant case law, requires the Commission to adopt this approach. In October 2009, when considering whether to grant NOM a temporary restraining order, the U.S. District Court for the District of Maine (Judge D. Brock Hornby) expressed skepticism that pro-rating was statutorily or constitutionally required. Rather, the court suggested that Maine law required the *entire* contribution to be counted toward the \$5,000 and \$100 disclosure thresholds⁸ in Maine Election Law, even though part of the contribution might be used for purposes unrelated to a Maine election:

When I pressed the [government’s] lawyer at the hearing how those should be calculated for reporting purposes (the \$5,000 or the \$100 threshold) and pointed her to the California model where pro rating among states occurs, she conceded that pro rating might be a fair approach. But in fact the Maine statute does not mention pro rating and the Maine Commission on Governmental Ethics and Election Practices has not, by regulation or form, created a pro rating regime. The clear language of the statute requires reporting the entire amount, even though some of that contribution might ultimately be devoted to other states. The

⁸ Under § 1056-B(2), ballot question committees must report any contributions received from a single source aggregating more than \$100.

language is neither vague or substantially overbroad. One might argue that including the entire amount given in response to a multi-purpose solicitation is excessive, but that approach might also be defended as a legitimate tool to corral those who seek to escape the statute by clever wording in their solicitations. In any event, the plaintiffs have not identified any constitutional defect in considering the entire amount of such contributions as attributable to Maine.

Nat'l Org. for Marriage v. Comm'n on Governmental Ethics and Election Practices, 666 F. Supp. 2d 193, 216 (D. Me. 2009).⁹

Judge Hornby correctly identified circumvention as a potential outcome of allowing contributions to be pro-rated for purposes of the \$5,000 threshold. If the Commission were to accept the pro-rating of contributions based on the wording of solicitations (the policy view urged by NOM on pages 4-5 of its letter-memo), an organization could easily avoid triggering PAC or ballot question committee status simply by mentioning dozens of possible projects in its solicitations. Maine voters would lose out on critical information about who is trying to influence their vote.

To pro-rate contributions equally among all the campaigns mentioned in a particular email solicitation, as NOM suggests, also would ignore the reality that NOM reserved the right to spend the entire amount of any contribution it received on the Maine campaign. NOM “literally emptied [its] coffers” and “poured everything [it] had into Maine” to “assure victory” in the people’s veto campaign. (See quotes on p. 14 of staff investigative report.) During that time, all of the contributions NOM received may have been spent in Maine. To allocate only 33% to Maine because two other jurisdictions were mentioned in a particular solicitation, when 100% of the money may in fact have been spent in Maine, would be absurd.

⁹ The case cited by NOM on page 4 of its letter-memorandum fails to support NOM’s argument that pro-rating is required. The FEC regulation struck down by the court in *EMILY’s List v. FEC*, 581, F.3d 1, 17-18 (D.C. Cir. 2009), imposed a \$5,000 cap on individual contributions to the PAC that were given in response to a solicitation indicating that any portion of that contribution would be used to support or oppose a clearly identified federal candidate. In contrast, Maine’s campaign finance laws do not impose caps on contributions to PACs or ballot question committees. If a donation to an advocacy organization is counted as a contribution, the PAC or ballot question committee must merely report the date, donor, and amount. Nobody’s right to donate or spend money or participate in the political process is restricted in any way.

NOM's Claim of Discriminatory Enforcement

NOM argues that it is similarly situated to various organizations that donated money in support of same-sex marriage in Maine's 2009 and 2012 ballot questions, including a national advocacy group, Human Rights Campaign, Inc. NOM states that if the Commission proceeds with its enforcement action against NOM, it "would have no choice but to file complaints against every similarly situated organization that has not been investigated by the Commission." (NOM letter-memo, at 8)

The appropriate time to raise these questions would have been in September 2009 when the Commission was deciding whether to investigate the activities of four organizations opposing same-sex marriage (NOM, the Roman Catholic Diocese of Portland, the Knights of Columbus, and Focus on the Family). The Commission examined the evidence submitted by Fred Karger (who requested the investigation), and found that only NOM's activities merited investigation. Had NOM made a convincing case in September 2009 in favor of investigating the organizations supporting same-sex marriage, those organizations' financial activities and solicitations to donors would have been relatively fresh and susceptible to investigation. Now, nearly five years later (after lengthy litigation initiated by NOM), there would be significant practical challenges to investigating these groups' 2009 fundraising and spending, both with regard to testimonial and documentary evidence. These challenges include the fact that PACs and ballot question committees are required to keep certain records of their contributions and expenditures for only four years.

While NOM claims that these organizations opposing the people's veto were similarly situated, NOM fails to point out that five of the six named organizations had registered with the Commission as either a ballot question committee or political action committee in 2009.¹⁰ These organizations, unlike NOM, disclosed some of their contributors and affirmatively described the remaining assets spent for political purposes as general treasury funds.

¹⁰ Equality Maine, Gay & Lesbians Advocates & Defenders, Maine People's Alliance, and Maine People's Resources Center all formed ballot question committees, and the Human Rights Campaign formed a Maine PAC.

May 15, 2009 Email Mentioning NOM's Activities in Maine

NOM argues that money received by NOM in response to the May 15, 2009 email may not be counted as contributions because the email does not mention the Maine people's veto referendum. The Commission staff concedes that this email is a closer call. The solicitation language in the email,¹¹ however, would objectively lead a reader to believe that some portion of the donation would be spent on NOM's activities in Maine. Based on similar solicitation language referencing the Stand for Marriage Maine PAC, the U.S. Court of Appeals found that NOM's August 28, 2009 email solicitation was covered by 21-A M.R.S.A. § 1056-B(2-A)(B), even though the August 28 email mostly discussed NOM's activities in Iowa and a Washington Post profile of Brian Brown and barely mentioned the people's veto referendum. Also, the Commission may wish to read the May 15 email in connection with the NOM's May 6 and May 8 emails, which were sent to the same recipients and described NOM's activities initiating the people's veto referendum.

Even if the May 15, 2009 were discounted, the total amount of money NOM received from e-mail solicitations describing its upcoming activities in Maine is likely in excess of \$5,000. The May 15 and September 4, 2009 emails contain significant descriptions of NOM's activities in Maine, but NOM cannot say how much it received in response to these emails. It could be in the hundreds or low thousands, judging from the proceeds from NOM's other emails described on pages 21-22 of the staff's investigative report.

Options for the Commission

In closing, the Commission staff appreciates your attention to the large volume of information enclosed. We have brought the information forward to you at this time, because we view the information as sufficient to develop recommendations for the Commission. Nevertheless, under the Commission's rules, you control the investigation. If you believe that further evidence (such as sworn testimony or requests for documents) is necessary for you to reach a decision in this matter, the Commission staff stands ready to take any additional action you would like. Thank you for your consideration of these materials.

¹¹ "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."