

Agenda

Item #4



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: January 18, 2010
Re: Petition by NOM for Stay of Investigation

Background

The National Organization for Marriage (NOM) contributed \$1.93 million to the Stand for Marriage Maine political action committee (PAC), which initiated and promoted the November 3, 2009 people's veto referendum. This funding provided 62.6% of the PAC's resources for its successful public relations effort to persuade voters to reject the 2009 same-sex marriage law. NOM did not register as a PAC or as a ballot question committee, and did not file any campaign finance reports.

The Commission received a request that the Commission investigate whether NOM should have registered and filed campaign finance reports because of its financial activities in support of the people's veto referendum. The request included e-mail and newsletter solicitations that mentioned NOM's activities to influence an election in Maine. NOM responded that no registration or reporting was required under Maine law because it did not solicit or receive more than \$5,000 to initiate or promote the people's veto referendum. Rather, NOM claimed that the vast majority of donations received by NOM are not designated for activities in any particular state. NOM's counsel, Barry A.

Bostrom, stated that “with a few exceptions ..., [NOM] did not solicit or accept designated contributions for Maine.” (Letter by Barry Bostrom dated 9/21/09, at 2) Unpersuaded by NOM’s factual contentions, the Commission decided on October 1, 2009 to investigate whether NOM was required to register and file campaign finance reports as a ballot question committee under 21-A M.R.S.A. § 1056-B because it solicited or received contributions for the purpose of initiating or promoting the people’s veto referendum.

On October 21, 2009, NOM and another plaintiff organization brought suit in U.S. District Court challenging the constitutionality of 21-A M.R.S.A. § 1056-B. (NOM v. McKee, Civil No. 1:09-cv-00538-DBH) As part of that suit, NOM sought a temporary restraining order enjoining the Commission from enforcing the statute. On October 28, 2009, the court denied the temporary restraining order. The court’s Decision and Order is attached for your discussion and reference at the January 28, 2010 meeting. On December 3, 2009, NOM enlarged the scope of the suit by challenging other campaign finance statutes not related to ballot questions, citing its intention to send communications to voters in 2010 concerning candidates for office.

The lawsuit is currently in the discovery phase, and the District Court anticipates holding a hearing on the merits of NOM’s claims sometime in May, 2010. The plaintiffs will be seeking to collect reimbursement from the Commission for their legal fees under federal civil rights statutes if they prevail in the litigation.

Staff's December 11, 2009 Request for Documents and Information

On December 11, 2009, the staff sent to NOM its First Request for Documents and Information. Among other things, we requested information concerning major donors who gave more than \$5,000 to NOM in 2009, NOM's solicitations to those donors, and the identities of those who solicited funds for NOM. The request notified NOM that the staff would keep certain financial and campaign information confidential, as required by 1 M.R.S.A. § 1003(3-A) (attached). The request also notified NOM that the staff would review documents provided by NOM in response to the defendants' discovery requests in NOM v. McKee.

The material requested by the staff is highly relevant to whether NOM solicited or received funding for the purpose of initiating or promoting the people's veto referendum in Maine within the scope of section 1056-B. We seek to discover the sources of the \$1.93 million that NOM provided to Stand for Marriage Maine PAC, how NOM solicited those donations, and what was NOM's purpose in soliciting those funds. The requested evidence will allow the Commission to test NOM's claim that the vast majority of donations it received were not designated for activities in any particular state, which is NOM's factual basis for arguing that it was not required to register or file reports in Maine.

NOM's Petition for a Stay of the Investigation

NOM has submitted a petition, on January 8, 2010, requesting that the Commission "stay its present investigation of these matters until the Federal Courts have reached a final

decision on the constitutionality and/or proper interpretation of the statutory provisions regulating ballot question committees in the State of Maine.” (page 11) The petition is attached for your consideration.¹

In summary, NOM objects to the staff’s First Request for Documents and Information because it seeks information concerning donations that NOM claims are not regulable under Buckley v. Valeo, 424 U.S. 1, 23 (1076). NOM also asserts what it refers to as a First Amendment Privilege, arguing that disclosure of the requested documents concerning contributors and solicitors would burden the freedom of association of persons affiliated with NOM by discouraging their participation. (Petition, at 6-10.)

Staff Recommendation

The staff recommends that the Commission deny NOM’s petition for a stay. The investigation should move forward. NOM contributed \$1.93 million to influence an election concerning a recently enacted law. It is the Commission’s job to determine whether NOM’s fundraising did – or did not – require it to file campaign finance reports with the State of Maine. The fact that NOM spent such a very large sum to influence a Maine election with no financial reporting has been the subject of considerable public discussion in the press and other forums. The public deserves to know that the Commission will conduct a thorough investigation to determine whether reporting was required.

¹ Please note that, in support of NOM’s petition, NOM’s counsel has included some lengthy declarations filed in litigation in other states. For purposes of compiling the packet for your January 28, 2009 meeting, the staff has enclosed those declarations as an addendum to the packet.

The requested stay could delay the investigation for months, if not years. NOM is represented by legal counsel, which has a national practice in challenging states' campaign finance laws in the federal trial and appellate courts. There is no reason to believe that NOM would decline to seek a remedy in the U.S. Circuit Court of Appeals if it receives an unfavorable decision in the District Court. Granting a stay until a final decision in the federal courts could delay a factual determination by the Commission for well over a year. By then, evidence concerning NOM's 2009 political fundraising activities pertaining to the people's veto referendum campaign will have grown stale. The purpose of this investigation is to gather facts that will assist the Commission in determining how the relevant campaign finance statutes apply to NOM's activities in the recent referendum campaign. The time to gather those facts is now, while information and recollections are relatively fresh.

NOM had an opportunity to stop the Commission's proceedings in October, 2009, when it asked the U.S. District Court to grant a temporary restraining order prohibiting the Commission and a variety of other state officials from enforcing the ballot question committee reporting statute against NOM. The District Court denied that motion on the grounds that NOM had not demonstrated a likelihood of success on the merits of its constitutional claims. The court did so with full knowledge that the Commission would be going forward with an investigation between November, 2009 and March, 2010. No action or decision by the court since then suggests any reason to suspend the Commission's proceedings.²

² NOM's request for a preliminary injunction has been consolidated with the permanent injunction request that will be addressed at the final hearing on the merits in May, 2010.

The legal arguments that NOM raises in the first part of its petition for stay (pp. 2-5) concerning the constitutionality and permissible scope of Maine's regulatory requirements are, indeed, arguments that NOM is raising in the federal court litigation, but that does not support staying the Commission's investigation into the facts pertaining to applicability of those requirements. Although it is not the Commission's job to determine whether Maine's ballot question committee statute is constitutional, it is the primary role of the Commission to interpret the statute and determine whether and how it applies to NOM's activities in the 2009 referendum election. If the investigation goes forward, NOM will still be able to press all of its constitutional arguments in federal court, as well as on appeal from any final determination by the Commission following the investigation.

Finally, NOM's assertion of a First Amendment privilege does not support granting a stay in this case, nor does it justify NOM's refusal to produce the information requested by staff. NOM's petition for a stay ignores entirely that the Commission staff is statutorily required to keep confidential certain financial and campaign information that it receives in the course of an investigation (21-A M.R.S.A. § 1003(3-A)). This statute enables the Commission staff to advance the state's interest in verifying compliance with campaign finance laws, while safeguarding the First Amendment rights of individuals associated with NOM. The professional staff of the Ethics Commission will take the confidentiality requirements very seriously while conducting the investigation and thereby protect the identity of individual donors from public disclosure during the

investigation. NOM's claim that production of the requested documents and other requested information could result in potential harassment or threat to a NOM supporter is thus resolved. Moreover, if the Commission ultimately determines that NOM must register and file reports as a ballot question committee under section 1056-B, NOM will have the opportunity to appeal that decision and to seek a stay pending appeal in order to avoid disclosing the names of its contributors pending final judicial review.

The Commission staff's receipt of information during the investigation about NOM's contributors and fundraising activities, which the staff is statutorily required to keep confidential, will harm no one.

For the above reasons, the staff recommends denying NOM's request for a stay of the investigation.

21-A M.R.S.A. § 1003. Investigations by Commission

1. Investigations. The commission may undertake audits and investigations to determine the facts concerning the registration of a candidate, treasurer, political committee or political action committee and contributions by or to and expenditures by a person, candidate, treasurer, political committee or political action committee. For this purpose, the commission may subpoena witnesses and records and take evidence under oath. A person or political action committee that fails to obey the lawful subpoena of the commission or to testify before it under oath must be punished by the Superior Court for contempt upon application by the Attorney General on behalf of the commission.

2. Investigations requested. A person may apply in writing to the commission requesting an investigation concerning the registration of a candidate, treasurer, political committee or political action committee and contributions by or to and expenditures by a person, candidate, treasurer, political committee or political action committee. The commission shall review the application and shall make the investigation if the reasons stated for the request show sufficient grounds for believing that a violation may have occurred.

2-A. Confidentiality. (REPEALED)

3. State Auditor. The State Auditor shall assist the commission in making investigations and in other phases of the commission's duties under this chapter, as requested by the commission, and has all necessary powers to carry out these responsibilities.

3-A. Confidential records. Investigative working papers of the commission are confidential and may not be disclosed to any person except the members and staff of the commission, the subject of the audit or investigation, other entities as necessary for the conduct of an audit or investigation and law enforcement and other agencies for purposes of reporting, investigating or prosecuting a criminal or civil violation. For purposes of this subsection, "investigative working papers" means documents, records and other printed or electronic information in the following limited categories that are acquired, prepared or maintained by the commission during the conduct of an investigation or audit:

- A. Financial information not normally available to the public;
- B. Information belonging to a party committee, political action committee, ballot question committee, candidate or candidate's authorized committee, that if disclosed, would reveal sensitive political or campaign information;
- C. Information or records subject to a privilege against discovery or use as evidence; and
- D. Intra-agency or interagency communications related to an audit or investigation.

4. Attorney General. Upon the request of the commission, the Attorney General shall aid in any investigation, provide advice, examine any witnesses before the commission or otherwise assist the commission in the performance of its duties. The commission shall refer any apparent violations of this chapter to the Attorney General for prosecution.

UNITED STATES DISTRICT COURT

DISTRICT OF MAINE

**NATIONAL ORGANIZATION FOR)
MARRIAGE AND AMERICAN)
PRINCIPLES IN ACTION,)**

PLAINTIFFS)

v.)

CIVIL No. 09-538-B-H

**WALTER F. McKEE, in his official)
capacity as member of the)
Commission on Government Ethics)
and Election Practices, ET AL.,)**

DEFENDANTS)

**DECISION AND ORDER ON PLAINTIFFS'
MOTION FOR TEMPORARY RESTRAINING ORDER**

This case assesses Maine’s attempt to strike the proper balance between the right to free expression enshrined in the First Amendment and Maine’s interest in having its voters informed as they make their decisions at the polls this November (or earlier, if they vote absentee) on a particular ballot initiative.

INTRODUCTION

Under Maine law, any person or entity that solicits and receives contributions or makes expenditures over \$5,000 “for the purpose of initiating, promoting, defeating or influencing in any way a ballot question” must register and file reports with the Maine Commission on Governmental Ethics and Election Practices. Maine’s November 3 ballot asks Maine voters to decide whether to veto a recent Maine statute that permits gay marriage. The plaintiffs here are two

nonprofit corporations that operate nationwide. One describes itself as “dedicated to preserving the traditional definition of marriage,” and says that it has been receiving contributions connected in part to the Maine November 3 election. The other says that it is “dedicated to promoting equality of opportunity and ordered liberty,” and that it proposes to make expenditures in connection with television commercials about the Maine ballot question. State election officials recently have begun an investigation of one of the two plaintiff nonprofits to determine whether it has illegally failed to register and report. As a result, the plaintiffs have filed this lawsuit against a variety of state officials, asking me to declare that the First Amendment makes the Maine registration and reporting statute unconstitutional. They have asked for the emergency relief of a temporary restraining order against enforcement because the election is imminent, and they wish to make solicitations and expenditures that exceed the \$5,000 threshold without registering or reporting. I conducted an expedited hearing on Monday, October 26, 2009.

The critical question on a request for a temporary restraining order is the likelihood of success on the merits. Notably for First Amendment purposes, the challenged Maine statute does not limit contributions or expenditures in connection with ballot initiatives. Instead, it requires that they be reported when they exceed a certain threshold. Although these requirements impose some burden on the plaintiffs in pursuing their First Amendment rights of association and speech, Maine has a very strong interest in providing its voters with information about the source of the money that funds the campaign on either side of a ballot issue. To achieve that goal, it imposes only a minimal burden on

persons or entities that contribute money or make expenditures. I conclude that the plaintiffs have failed to show a likelihood of success on their claim that the Maine statute violates the First Amendment. I therefore **DENY** the motion for a temporary restraining order.¹ The case will proceed in the ordinary course.

SUMMARY OF MAINE ELECTION LAWS FOR BALLOT INITIATIVES

According to § 1056-B of Maine's election statute, "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" register as a Ballot Question Committee with the Maine Commission on Governmental Ethics and Election Practices (the "Commission") and file reports with the Commission.² A "contribution" includes:

- 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

¹ At oral argument, the plaintiffs agreed that the scheduling of the TRO hearing had granted their motion for expedited relief and that no further action on that motion is necessary.

² 21-A M.R.S.A. § 1056-B. A "person" is defined as "an individual, committee, firm, partnership, (continued on next page)

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

The registration form requires the Ballot Question Committee to name its “Treasurer,” “Principal Officer,” “Primary Fundraisers and Decision Makers,” and requires a “Statement of Support or Opposition,” indicating “whether the committee supports or opposes a candidate, political committee, referendum, initiated petition or campaign.”⁴ The registration form also instructs that a report must be filed at registration, and that a Ballot Question Committee must report “all contributions and expenditures” including “expenditures such as those associated with the collection of signatures, paid staff time, travel reimbursement, and fundraising expenses.”⁵ Thereafter, Ballot Question Committees must file quarterly reports according to the statute’s regular schedule for reporting,⁶ listing the name, mailing address, occupation and employer⁷ of any “contributor” donating more than \$100.⁸ The report also requires the documentation of all expenditures “to support or oppose” made to “a single payee or creditor aggregating in excess of \$100,” identified according to categories provided by the

corporation, association, group or organization.” 21-A 1 M.R.S.A. § 1001.

³ 21-A M.R.S.A. § 1056-B(2-A).

⁴ Registration: Ballot Question Committees: For Persons and Organizations Other Than PACs Involved in Ballot Question Elections (Ex. 7 to Verified Compl. (Docket Item 1)).

⁵ *Id.*

⁶ 21-A M.R.S.A. § 1059.

⁷ The report requires the listing of employer whereas the statute makes reference to the “principal place of business.” 21-A M.R.S.A. § 1056-B(2).

⁸ 2009 Campaign Finance Report – Ballot Question Committees: For Persons and Organizations Involved in Ballot Question Elections (Other Than PACs) (Ex. 8 to Verified Compl.).

Commission, with “remarks” for “expenditures” for “Campaign consultants,” “Professional services,” and those reported as “Other.”⁹ Records must be kept for four years, and Ballot Question Committees must “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” and “retain a vendor invoice or receipt stating the particular goods or services purchased for every expenditure in excess of \$50.”¹⁰

The failure to register as required under § 1056-B is punishable by a \$250 fine.¹¹ The failure to make the initial registration, or file the required reports, is punishable by a maximum fine of \$10,000.¹² A person who fails to file a report as required within 30 days of the filing deadline is guilty of a Class E Crime.¹³

FACTS

For purposes of this preliminary motion only, the parties have agreed that I should accept as true the allegations of the plaintiffs’ verified complaint and the defendants’ affidavit.

The National Organization for Marriage (“NOM”) is a nonprofit 501(c)(4)¹⁴ issue advocacy corporation incorporated in Virginia. It is dedicated to preserving the traditional definition of marriage.¹⁵ Between May 6, 2009 and September 4,

⁹ *Id.*

¹⁰ 21-A M.R.S.A. § 1056-B(4).

¹¹ 21-A M.R.S.A. § 1062-A(1).

¹² 21-A M.R.S.A. § 1062-A(4).

¹³ 21-A M.R.S.A. § 1062-A(8). The State may not, however, prosecute a violation of the filing requirements if the Committee has assessed and collected a penalty. See 21-A M.R.S.A. § 1062-A(8-A).

¹⁴ 501(c)(4) refers to a provision of the Internal Revenue Code denoting the type of non-profit organization.

¹⁵ Verified Compl. ¶ 6.

2009, NOM distributed e-mails to its subscribers discussing efforts to oppose same-sex marriage in various states, including Maine.¹⁶ Each of the e-mails contained a hyperlinked “Donate” button which sent potential donors to the donations screen at a website.¹⁷ The donations screen at the website stated that “[n]o funds will be earmarked or reserved for any political purpose.”¹⁸ In addition, the July 2009 newsletter that NOM distributed to its subscribers included an article that described NOM’s efforts to preserve the traditional definition of marriage in Maine. It stated: “Your support of NOM is critical to the success of this effort.”¹⁹ The newsletter included a contribution card and return envelope for donations to NOM.²⁰ NOM says that it has received at least \$4,909 in donations as a result of the e-mails soliciting support for repealing the Maine law.²¹

American Principles In Action (“APIA”) is a nonprofit 501(c)(4) issue advocacy organization incorporated in the District of Columbia.²² It is dedicated to promoting equality of opportunity and ordered liberty.²³ APIA has filmed two short video advertisements opposing same-sex marriage in Maine, at a cost of approximately \$3,000.²⁴ APIA intends to buy television time in Maine to air these advertisements before the November ballot, and to solicit donations for this purpose, but says that it fears that in doing so it will be deemed a Ballot Question

¹⁶ Id. ¶¶ 26-40 and E-Mail Updates from NOM (Ex. 5 to Verified Compl.).

¹⁷ Verified Compl. ¶ 39.

¹⁸ Id.

¹⁹ Id. ¶ 40 and NOM July 2009 Newsletter at 3 (Ex. 6 to Verified Compl.).

²⁰ Verified Compl. ¶ 40 and NOM July 2009 Newsletter (Ex. 6 to Verified Compl.).

²¹ Verified Compl. ¶¶ 26, 27, 29, 32-35, 37.

²² Id. ¶ 7.

²³ Id.

²⁴ Id. ¶¶ 47-49.

Committee under § 1056-B, and therefore will not proceed.²⁵ Both NOM and APIA operate throughout the United States.²⁶

Stand for Marriage Maine (“SMM”) is the registered Political Action Committee (“PAC”) that successfully qualified the people’s veto referendum concerning the 2009 same-sex marriage law for the November 3, 2009, election ballot.²⁷ NOM’s Executive Director, Brian S. Brown, is a member of SMM’s Executive Committee and is listed on SMM’s PAC Registration as one of its primary decision-makers and fundraisers.²⁸ As SMM’s largest contributor, NOM has provided a total of \$1,600,000 to SMM, 63% of all monetary contributions received by SMM through October 20, 2009.²⁹ In the first two weeks of October 2009, NOM made three contributions to SMM totaling \$1,100,000.³⁰

On August 13 and 24, 2009, Fred Karger of Californians Against Hate sent e-mail correspondence to the Commission requesting that the Commission investigate whether SMM and NOM had violated Maine’s campaign finance laws by concealing their contributors.³¹ On August 27, 2009, the Commission invited SMM and NOM to respond and they did so.³² On October 1, 2009, the Commission conducted a preliminary fact gathering proceeding on the

²⁵ *Id.* ¶¶ 50-51.

²⁶ *Id.* ¶ 23; Pls. Mot. for Temporary Restraining Order at 2. I note that the Verified Complaint does not state that APIA operates in all 50 states.

²⁷ Aff. of Jonathan Wayne ¶ 43 (Docket Item 19) and SMM PAC Registration (Ex. 7 to Wayne Aff.).

²⁸ Wayne Aff. ¶ 44.

²⁹ *Id.* ¶ 45.

³⁰ *Id.* ¶¶ 46-47. NOM’s 2008 Tax return indicates that it received contributions and grants totaling \$2,967,495. NOM’s 990 Return of Organization Exempt from Income Tax (Ex. 9 to Wayne Aff.).

³¹ Wayne Aff. ¶ 51; E-Mail of Fred Karger to Maine Comm’n on Governmental Ethics dated August 13, 2009 (Ex. 9 to Verified Compl.); E-Mail of Fred Karger to Maine Comm’n on Governmental Ethics dated August 24, 2009 (Ex. 10 to Verified Compl.).

³² Wayne Aff. ¶ 51. NOM and SMM responded through two letters and NOM provided a follow-up
(continued on next page)

allegations.³³ After considering the evidence and legal argument submitted by NOM and SMM, the Commission decided to authorize its staff to conduct an investigation into whether NOM had violated § 1056-B by failing to register and file campaign finance reports as a Ballot Question Committee.³⁴ To date, the investigation has not started and the Commission has not yet made any requests for information or documents to NOM.³⁵ The Commission staff anticipate that the investigation will end no earlier than March 31, 2010.³⁶ After the Commission completes the investigation, the Commission staff will consider whether to recommend any finding of violation against NOM for failing to register and file campaign finance reports as a Ballot Question Committee.³⁷ Thus, the Commission will not take any enforcement action against NOM before the November 3, 2009 election.³⁸

ANALYSIS

The plaintiffs challenge four aspects of the Maine ballot question statute. First, they say that the overall registration and reporting requirements are unconstitutional under existing caselaw. Second, they say that the statute and regulations cannot constitutionally apply to them because influencing the Maine election is not their major purpose. Third, they say that parts of the statute are unconstitutionally vague and do not give fair notice of what is, and what is not,

affidavit from Mr. Brown. *Id.* ¶ 52.

³³ *Id.* ¶ 54.

³⁴ *Id.*; Verified Compl. ¶ 42 and Letter from the Maine Comm'n on Governmental Ethics dated October 2, 2009 (Ex. 11 to Verified Compl.).

³⁵ Wayne Aff. ¶ 55.

³⁶ *Id.* ¶ 56.

³⁷ *Id.*

³⁸ *Id.*

included under the reporting requirements. Fourth, they say that the requirement that they report every contribution or expenditure over \$100 (once they meet the \$5,000 threshold) is constitutionally too burdensome.

In response, the defendants say that I should refuse to decide the case because the dispute is not “ripe,” or that I should abstain and leave the entire matter to the state election authorities and the state courts. If I reject those arguments and do reach the merits, the defendants say that I should decide that the statute is constitutional under the First Amendment.

(A) Ripeness

The defendants argue that the plaintiffs’ claims are not ripe since neither organization has yet been threatened with prosecution for failing to register and to make the disclosures required by Section 1056-B.³⁹ Moreover, the defendants suggest that any threat of prosecution is highly attenuated, since the Commission will not even consider enforcement action against NOM until March 2010 at the earliest.⁴⁰ In other words, the defendants contend that the plaintiffs have not yet suffered an injury and do not expect an imminent injury, and therefore they do not present a “case or controversy” giving federal jurisdiction over their constitutional challenges.⁴¹

When plaintiffs allege that they will engage in conduct “arguably affected with a constitutional interest, but proscribed by [a] statute, and there exists a

³⁹ Defs.’ Opp’n to Pls.’ Mot. for Temporary Restraining Order at 7-8 (Docket Item 18).

⁴⁰ Wayne Aff. ¶ 56.

⁴¹ See Ramirez v. Ramos, 438 F.3d 92, 97 (1st Cir. 2006) (“[W]hen a litigant wishes to pursue a claim in a federal court, justiciability principles require the existence of an actual case or controversy. (citing U.S. Const. art. III, § 2, cl. 1)).

credible threat of prosecution,”⁴² or when plaintiffs are “chilled” from exercising First Amendment rights out of fear of “enforcement consequences,”⁴³ they need not wait for actual harm before seeking relief.⁴⁴ A credible threat of prosecution for protected political expression *is* actual harm because it presents a constitutionally unacceptable dilemma: “either to engage in the expressive activity, thus courting prosecution, or to succumb to the threat, thus forgoing free expression.”⁴⁵ Here, APIA has said that it will not run its commercials because donations solicited for the purpose of airing the advertisements might be considered “contributions” triggering Ballot Question Committee status.⁴⁶ To be sure, the threat of prosecution must be credible,⁴⁷ but “the evidentiary bar that must be met is extremely low.”⁴⁸ Here, NOM and APIA certainly have more than a “subjective and irrational fear of prosecution.”⁴⁹ The Commission decided to investigate NOM after reviewing information alleging that NOM had violated Section 1056-B as well as information submitted by NOM and NOM’s representatives’ statements at a meeting on October 1, 2009.⁵⁰ The Commission plans to review NOM’s activities to see if it has violated laws that provide for

⁴² Id. at 99 (quoting Babbitt v. United Farm Workers Nat’l Union, 442 U.S. 289, 298 (1979)).

⁴³ Id. (quoting New Hampshire Right to Life PAC v. Gardner, 99 F.3d 8, 14 (1st Cir. 1996)).

⁴⁴ Id.

⁴⁵ New Hampshire Right to Life PAC, 99 F.3d at 14.

⁴⁶ Pls.’ Mot. for Temporary Restraining Order at 5. The plaintiffs’ Verified Complaint does not state explicitly that APIA will not run its advertisements in Maine, but it does say that APIA intends to buy television time but is “chilled” from doing so by the prospect of registration. Verified Compl. ¶ 50.

⁴⁷ Mangual v. Rotger-Sabat, 317 F.3d 45, 57 (1st Cir. 2003) (“Courts will assume a credible threat of prosecution in the absence of compelling contrary evidence.” (quoting New Hampshire Right to Life PAC, 99 F.3d at 15)).

⁴⁸ Id.

⁴⁹ Id.

⁵⁰ Wayne Aff. ¶¶ 51-54.

criminal and civil penalties. In effect, then, NOM is on notice of potential prosecution. The Commission is not investigating and has not threatened to investigate APIA, but APIA is aware of the Commission's interest in NOM and can have little doubt that § 1056-B "is aimed directly" at entities like APIA.⁵¹ APIA had planned to buy television time to air commercials supporting Question 1 in advance of the November 3 election but has said without contradiction that it will not engage in protected speech unless I find the statute unconstitutional. Under these circumstances, NOM and APIA face a credible threat of prosecution or enforcement consequences and accordingly the case is ripe.

(B) Abstention

The defendants also urge me to abstain from hearing this case because it involves a complex state administrative scheme and requires me to resolve issues of state law that state agencies should have an opportunity to construe in the first instance.⁵² If this case involved registration and disclosure of information from utility companies or from lumber companies seeking permits without First Amendment overtones,⁵³ that argument might be persuasive. But this case involves potential harm to those who wish to speak out on a ballot question, freedoms guaranteed by the First Amendment. If I were to abstain, NOM and APIA would have to wait for the State of Maine to address their concerns after the election. In the context of an impending election, this delay "might itself effect the

⁵¹ Virginia v. Am. Booksellers Ass'n, 484 U.S. 383, 392 (1988) (holding that where there is no indication that a law will not be enforced and there is "actual and well-founded fear that the law will be enforced," the harm of self-censorship "can be realized even without an actual prosecution").

⁵² See New Orleans Pub. Serv., Inc. v. New Orleans, 491 U.S. 350, 361-64 (1989).

⁵³ See, e.g., Burford v. Sun Oil Co., 319 U.S. 315 (1943) (oil drilling permits).

impermissible chilling” of the very constitutional rights at issue.⁵⁴ In view of this danger, the Supreme Court has held that in the context of colorable facial challenges to state law based on the First Amendment, abstention is inappropriate.⁵⁵

(C) Standards For Assessing The Plaintiffs’ Claims

To obtain a temporary restraining order, NOM and APIA must show: (1) a likelihood of success on the merits; (2) a significant risk that they will suffer irreparable harm if I do not enjoin the State of Maine from enforcing Section 1056-B; (3) that the harm they will suffer outweighs any harm to the interests of the State of Maine that the temporary restraining order will cause; and (4) that the temporary restraining order is in the public interest.⁵⁶ The most important factor is likelihood of success on the merits.⁵⁷

On the merits, in assessing the constitutionality of a registration and reporting statute in an election law context, the Supreme Court has articulated certain principles and standards for the level of scrutiny. Compelled disclosures, like the registration and reporting requirements in § 1056-B, can “seriously infringe on privacy of association and belief guaranteed by the First

⁵⁴ Houston v. Hill, 482 U.S. 451, 468 (1987) (quoting Zwickler v. Koota, 389 U.S. 241, 252 (1967)).

⁵⁵ Id. (“Abstention . . . is inappropriate for cases [where] . . . statutes are justifiably attacked on their face as abridging free expression.” (quoting Dombrowski v. Pfister, 380 U.S. 479, 489-90 (1965)); see also Porter v. Jones, 319 F.3d 483, 493 (9th Cir. 2003) (explaining that abstention is usually inappropriate in First Amendment cases because “guarantee of free expression is always an area of particular federal concern” (quoting Ripplinger v. Collins, 868 F.2d 1043, 1048 (9th Cir. 1989)).

⁵⁶ Winter v. NRDC, Inc., 129 S. Ct. 365, 374 (2008); see also Curnin v. Town of Egremont, 510 F.3d 24, 28 (1st Cir. 2007).

⁵⁷ Wine & Spirits Retailers, Inc. v. Rhode Island, 418 F.3d 36, 46 (1st Cir. 2005) (“The sine qua non of this four-part inquiry is likelihood of success on the merits: if the moving party cannot demonstrate that he is likely to succeed in his quest, the remaining factors become matters of idle curiosity.” (quoting New Comm Wireless Servs., Inc. v. SprintCom, Inc., 287 F.3d 1, 9 (1st Cir.

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Amendment.”⁵⁸ Serious encroachments caused by compelled disclosure must therefore survive “exacting scrutiny,”⁵⁹ but “[e]ven a ‘significant interference’ with protected rights of political association may be sustained if the State demonstrates (1) a sufficiently important interest and (2) employs means closely drawn to avoid unnecessary abridgment of associational freedoms.”⁶⁰ Accordingly, I must “closely scrutinize” the requirements of § 1056-B to ensure that they are justified by more than a “mere showing of some legitimate governmental interest.”⁶¹ As the Supreme Court recently explained in Davis v. FEC, to pass constitutional muster there must be “a ‘relevant correlation’ or ‘substantial relation’ between the governmental interest and the information required to be disclosed,”⁶² and “the strength of the governmental interest must reflect the seriousness of the actual burden on First Amendment rights.”⁶³

2002)).

⁵⁸ Buckley v. Valeo, 424 U.S. 1, 65 (1976).

⁵⁹ Davis v. FEC, 128 S. Ct. 2759, 2775 (2008) (quoting Buckley, 424 U.S. at 64). Other courts have struggled over whether “strict scrutiny,” which requires the state to prove that a regulation “furthers a compelling interest and is narrowly tailored to achieve that interest,” FEC v. Wis. Right to Life, Inc., 551 U.S. 449, 465 (2007), should apply to review of disclosure requirements. See, e.g., Canyon Ferry Rd. Baptist Church of East Helena, Inc. v. Unsworth, 556 F.3d 1021, 1031 (9th Cir. 2009) (noting uncertainty as to the proper standard of review created by McConnell v. FEC, 540 U.S. 93 (2003), and “assum[ing] without deciding that ‘heightened’—not ‘strict’—scrutiny applies”). In Davis, the Court reviewed disclosure requirements in the Bipartisan Campaign Reform Act of 2002 and clearly laid out the standard that I apply here. The difference between exacting scrutiny and strict scrutiny does not alter my analysis of NOM’s and APIA’s challenge to Section 1056-B. It plays no part, for example, in the question of constitutional overbreadth and vagueness, and as explained below, I find that Maine’s disclosure and registration requirements are narrowly tailored to the state’s compelling informational interest.

⁶⁰ Buckley, 424 U.S. at 26 (citing Cousins v. Wigoda, 419 U.S. 477, 488 (1975); NAACP v. Button, 371 U.S. 415, 438 (1963); Shelton v. Tucker, 364 U.S. 479, 488 (1960); see also McConnell, 540 U.S. at 311 (Kennedy, J., concurring and dissenting in part).

⁶¹ Davis, 128 S. Ct. at 2775 (citing Buckley, 424 U.S. at 64).

⁶² Id.

⁶³ Id. (citing Buckley, 424 U.S. at 68).

(D) Reporting Requirements For Issue-Only Elections

It is important to emphasize that the Maine statute does not *prohibit* contributions or expenditures. Instead, it is a registration and reporting statute. The plaintiffs recognize that the Supreme Court and other courts have held uniformly that states can constitutionally require some reporting of contributions and expenditures in issue-only elections. The line of cases began with one involving the regulation of a federal election for candidates. In Buckley v. Valeo, the Supreme Court recognized that disclosure and reporting requirements serve the state's important informational interest in helping voters define the constituencies of candidates. Accordingly, the Court upheld as constitutional the recordkeeping, reporting, and disclosure provisions of the Federal Election Campaign Act of 1971 ("FECA") in candidate elections.⁶⁴ Later, in Citizens Against Rent Control v. Berkeley, the Court held that disclosure of contributions for a municipal ballot measure (ballot measure disclosures are at the heart of this case) can help to protect the "integrity of the political system."⁶⁵ Still later, in Buckley v. American Constitutional Law Foundation, while striking down a number of Colorado regulations concerning that state's petition process, the Court reiterated that a state has an interest in informing the public "where political campaign money comes from."⁶⁶ It said that a state could require the sponsors of ballot initiatives to disclose the identities of those paying petition circulators and how

⁶⁴ Buckley, 424 U.S. 1, 82, 84 (1976).

⁶⁵ Berkeley, 454 U.S. 290, 299-300 (1981).

⁶⁶ Buckley v. American Constitutional Law Found., 525 U.S. 182, 202 (1999) (quoting Buckley, 424 U.S. at 66).

much they paid.⁶⁷ In Volle v. Webster, I concluded that these precedents were “an unequivocal declaration” that public filing requirements in issue-only elections are not “wholly prohibited.”⁶⁸ And in the years since then, the Supreme Court has continued to uphold disclosure and registration requirements because of the government’s important interest in making the information available to voters.⁶⁹

The Ninth Circuit has spoken more recently to the importance of such disclosures in the particular context of ballot initiatives. In California Pro-Life Council, Inc. v. Getman, that court rejected the argument that the California Political Reform Act could not impose disclosure and reporting requirements on ballot-measure advocacy. It reasoned that “[v]oters act as legislators in the ballot-measure context, and interest groups and individuals advocating a measure’s defeat or passage act as lobbyists; both groups aim at pressuring the public to pass or defeat legislation . . . and that voters as lawmakers, have an interest in knowing who is lobbying for their vote, just as members of Congress may require lobbyists to disclose who is paying for the lobbyists’ services and how much.”⁷⁰ In California Pro-Life Council, Inc. v. Randolph, the Ninth Circuit said that the “government’s interest in providing the electorate with information related to election and ballot issues is well-established” and cited empirical data tending to show that the government’s interest has a sound basis.⁷¹ Most recently, in

⁶⁷ Id. at 205.

⁶⁸ Volle, 69 F. Supp. 2d 171, 174 (D. Me. 1999).

⁶⁹ See, e.g., McConnell, 540 U.S. at 202.

⁷⁰ California Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1106 (9th Cir. 2003).

⁷¹ California Pro-Life Council, Inc. v. Randolph, 507 F.3d 1172, 1179 n.8 (9th Cir. 2007) (Researcher “conducted a telephone survey from June 23-26, 2001], and found that:] “[M]ore than seven of ten California voters (71%) state that it is important to know the identity of the source and
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Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth, the Ninth Circuit found that Montana could constitutionally require some disclosure in the context of ballot campaigns in order to prevent “the wolf from masquerading in sheep’s clothing” and to give voters “a pretty good idea of who stands to benefit from the legislation.”⁷² The court rejected the argument that since Montana’s political system appeared open and functional, the state’s informational interest in disclosure was not compelling.⁷³

With that background uniformly supporting the principle of reporting requirements, I turn to the plaintiff’s specific objections to Maine’s ballot question statute.⁷⁴

amount of campaign contributions to the ballot measure by both supporters and opponents, including unions, businesses or other interest groups.’ Fifty seven percent (57%) of California voters state that endorsements by interest groups, politicians or celebrities are important in helping them make up their own mind on how to vote on ballot measures.’ A majority of California voters (57%) state they would be less likely to vote for a proposition to build senior citizen housing if the proposition was supported by a well-known and respected senior activist who was discovered to have been paid by developers to promote the proposition. Only one-third (34%) stated that this information would not make any difference in their vote.”).

⁷² Canyon Ferry, 556 F.3d at 1032 (quoting Getman, 328 F.3d at 1106 n.24, 1106).

⁷³ Id.

⁷⁴ I observe that the plaintiffs have not made a colorable claim that their First Amendment rights of free association are threatened by harassment that might follow disclosure. The state’s strong interest must give way if there is a “reasonable probability” that compelled disclosure would subject contributors “to threats, harassment, or reprisals from either Government or private parties.” Buckley, 424 U.S. at 74 (holding that minor parties may be exempt from disclosure requirements by showing that members could be harassed); see also NAACP v. Alabama ex rel. Patterson, 357 U.S. 449, 462 (1958) (same). NOM and APIA, however, have not claimed that disclosure would subject their contributors to danger or harassment, nor is there a record here indicating a pattern of threats or specific manifestations of public hostility towards them or showing that individuals or organizations holding similar views have been threatened or harmed. See Buckley, 424 U.S. at 74; see also McConnell, 540 U.S. at 199 (Stevens and O’Connor, JJ) (affirming district court finding that an exemption from disclosure requirements due to concern with harassment was inappropriate absent specific evidence about the basis for such fears); Cal. Pro-Life Council, 507 F.3d at 1189 (holding that a disclosure requirement was not unconstitutionally overbroad without a showing that contributors could be injured by public disclosure).

(E) The Plaintiffs' Attacks on the Maine Statute and Regulations

(1) Registration

Although the plaintiffs recognize that First Amendment cases consistently hold that states can require disclosure of the source of money spent on ballot questions, they say that Maine has gone too far. The plaintiffs argue that Maine treats them too much like PACs (registration, required treasurer, records maintenance, recurrent reporting),⁷⁵ and say that a number of cases have said that states cannot treat issue-only organizations and individuals like PACs. They contend that Maine is entitled to demand only "one-time" disclosure of the contributions and expenditures.

It is true that a number of cases have criticized the PAC-style regulatory model that Maine seems to be approaching, when that regime is applied to those who do not support candidates, but simply take positions on issues, as here.⁷⁶ Issue advocacy is the classic heart of First Amendment protection and should be burdened as little as possible.⁷⁷ Regulation tends to grow and to develop requirements appropriate for large organizations (like these plaintiffs) and to ignore the burdensome effects on the speech of individuals and small organizations. I reached that very conclusion in Volle, a case involving an individual asserting his First Amendment rights. Volle provoked the initial version of this legislation in 2000. In response to Volle, Maine adopted financial

⁷⁵ They also challenge the requirement that they "use a designated account," Pls.' Mot. for Temporary Restraining Order at 7, but I see no such requirement in the statute or regulations.

⁷⁶ Volle, 69 F. Supp. 2d 171 (D. Me. 1999)(ballot question case); Emily's List, 581 F.3d 1 (D.C. Cir. 2009)(candidate case); Cal. Pro-Life Council, 507 F.3d 1172 (9th Cir. 2007)(ballot question case).

⁷⁷ Volle, 69 F. Supp. 2d at 172.

reporting-requirement legislation and did not impose the other layers of regulation. They emerged in only the 2007 amendments.

Nevertheless, I conclude that the plaintiffs cannot show a likelihood of success on their claim.

The registration requirements here are much less burdensome and more narrowly tailored than those I confronted in Volle. The person or organization who exceeds the \$5,000 threshold must register, identify a treasurer (these corporations already have one; an individual can identify himself), and identify other important actors (if any). All that can be done on a simple 2-page form, with help from the Commission staff. Bureaucratic perhaps, but burdensome not. This is unlike the regime I struck down in Volle where, once the monetary threshold was passed, the individual automatically became a political action committee with the attendant requirements to disclose the names, addresses and account numbers of the depositories in which committee funds were kept. Moreover, the State has identified its compelling reason for imposing the registration requirement—namely, to provide important information to Maine voters about the interest groups that are attempting to influence the outcome of a ballot question in a climate where the number of ballot questions Maine voters face is steadily increasing.⁷⁸

⁷⁸ The state asserts, and I agree, that each registration requirement is narrowly tailored to its compelling informational interest. For example, the treasurer requirement simply provides a contact person and the registration statement “provides the public with essential background about who is trying to influence their vote.” Def.’s Opp’n to Pls.’ Mot. for Temporary Restraining Order at 13. Registration serves the additional purpose of providing a list for the public with the names of individuals or entities most interested in the ballot question on a schedule aligned with those times that the public and the press are most likely to seek the information. Id. 13-14.

Recent cases support my conclusion that this is not constitutionally burdensome. In Alaska Right to Life Committee v. Miles, the Ninth Circuit considered provisions of Alaska's campaign laws requiring entities to register before spending money to support or oppose a candidate.⁷⁹ Alaska's registration form was 2 pages and asked for basic information, including the entity's name and purpose, the names and contact information of its officers, its campaign plans, and banking information if the entity anticipated raising more than \$5,000.⁸⁰ The court concluded that such requirements were "not significantly burdensome in themselves."⁸¹ Similarly, in Human Life of Washington, Inc. v. Brumsickle, registration requirements survived strict scrutiny because they were, in themselves, "not particularly onerous," and incorporated \$5,000 contribution and expenditure threshold requirements that avoided "unduly burdening the smaller or less active organizations that might be more likely to self-censor their speech rather than comply with the state's requirements."⁸²

I also conclude that the plaintiffs cannot show a likelihood of success on their challenge to Maine's recurrent reporting requirement. Maine's compelling interest in ensuring that the electorate knows who is financially supporting the views expressed on a particular ballot question cannot be satisfied by one-time

⁷⁹ Alaska Right to Life Comm. v. Miles, 441 F.3d 773, 789 (9th Cir. 2006).

⁸⁰ Id.

⁸¹ Id.

⁸² Human Life of Wash., Inc. v. Brumsickle, 2009 U.S. Dist. LEXIS 4289, at *34-35 (W.D. Wash. Jan. 8, 2009) (quoting Alaska Right to Life, 441 F.3d at 791) (finding constitutional registration requirements including appointment of a treasurer, designation of a bank account, filing a statement of organization and disclosure requirements for groups intending to raise or spend more than \$ 5,000 or to raise more than \$500 from any one contributor); see also Canyon Ferry, 556 F.3d at 1035 (finding disclosure requirements unconstitutional where no dollar threshold but explicitly withholding judgment as to whether the requirements, which the court described as "not
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reporting. Instead, Maine is entitled to conclude that its electorate needs to know, *on an ongoing basis*, the source of financial support for those who are taking positions on a ballot initiative. It will not do to say that a one-time disclosure in the week before the election is sufficient. That would not give the opposing viewpoint the opportunity to point out the source of the financing and seek to persuade the electorate that the source of support discounts the message.⁸³ Here, the Maine statute requires reports on the following schedule: (1) an initial report upon registration as a Ballot Question Committee;⁸⁴ (2) quarterly reports on January 15th, April 15th, July 15th, and October 15th;⁸⁵ (3) certain disclosures about expenditures made close to the election;⁸⁶ and (4) a final report.⁸⁷ That is an appropriate, not burdensome, schedule. Its predictability makes it easy for the news media to follow and to cover the story for the public, and for opponents to inquire and spread the word as they see patterns develop. The extra reporting requirement for the period immediately preceding the election ensures that people will not avoid disclosure by scheduling their contributions and expenditures late.

Recordkeeping is essential to enforcement. The pace of activities leading up to an election means that careful investigation must often be delayed (as here). The Commission may have a variety of people and organizations to investigate, which takes time. The four-year requirement certainly seems to be at the outer

exceedingly onerous," might pass constitutional muster with protection for small donors).

⁸³ Maine's current flexibility in absentee voting accentuates this need for ongoing disclosure, since Maine citizens now are not limited to voting on Election Day.

⁸⁴ 21-A M.R.S.A. § 1059.

⁸⁵ 21-A M.R.S.A. § 1059(2)(A).

⁸⁶ 21-A M.R.S.A. § 1059(2)(C).

⁸⁷ 21-A M.R.S.A. § 1061.

limit, however. It is hard to envision, given election frequency, that a Commission concerned with elections would still be seriously investigating four years after an election. But the plaintiffs have not made any credible argument that if records must be kept for two years, there is a measurable incremental burden in keeping them for four years.

I conclude that the plaintiffs cannot show that it is likely that these regulations and reporting requirements fail the exacting scrutiny test.

(2) Major Purpose

The plaintiffs assert that Section 1056-B is unconstitutional because it imposes PAC-style requirements on them even though neither organization has as its major purpose the initiation, promotion, or defeat of a ballot measure.⁸⁸ They claim that “to protect [the right of freedom of association] and to assure that registration requirements do not chill core political speech, Buckley v. Valeo established the ‘major purpose’ test, which is used to determine whether a particular group must register as a political committee under federal election law.” They say that “[t]he purpose of the test is to reduce the burden on First Amendment speech by groups that are only incidentally involved in advocating the election or defeat of a candidate.”⁸⁹ They argue that the major purpose test should apply to void the application of Maine’s PAC-like registration requirements to them, because passage or defeat of the ballot measure is *not* their major purpose.

⁸⁸ Pls.’ Mot. for Temporary Restraining Order at 10.

⁸⁹ Id.

Buckley did hold that only entities “under the control of a candidate or the major purpose of which is the nomination or election of a candidate” could be regulated as political committees under the Federal Election Campaign Act of 1971.⁹⁰ The Supreme Court thereby sought to reduce FECA’s burden on First Amendment political speech by groups that are only incidentally involved in advocating the election or defeat of a candidate. The Court distinguished general political debate from expression directed at the election of candidates.⁹¹ But although the Buckley Court found that the major purpose test alleviated its overbreadth concerns in that context of federal regulation of candidate elections, the Supreme Court has never suggested that the major purpose test applies everywhere—as, for example, in this case involving state regulation of ballot questions only. Federal ballots, unlike state ballots, *only* have candidate elections, and that is all that the FECA could legitimately regulate. It made sense, therefore, for Buckley to distinguish general issue advocacy and to protect it, under the First Amendment, from regulation directed at candidate elections and, in doing so, to limit the federal regulation of political committees to committees that were candidate-controlled or whose major purpose was the nomination or election of a candidate. The plaintiffs urge me to import the major purpose test into this quite different area of state regulation of ballot questions where there are *no* candidates and where the entire focus is on disclosing who is behind the

⁹⁰ 424 U.S. at 79.

⁹¹ See Fed. Election Comm’n v. Mass. Citizens for Life, Inc., 479 U.S. 238, 263 (1986) (holding that an organization that “only occasionally engage[d] in independent spending on behalf of candidates” could not be subjected to PAC-style disclosure requirements).

funding of a particular issue on which the electorate will be voting.⁹² They give me no reason for doing so.⁹³ Instead, I observe that the Supreme Court has permitted certain kinds of state regulation in such cases (as I discuss above under Reporting Requirements for Issue-Only Elections), without referring to the major purpose test. Accordingly, I assess the state interest and the burdens on speech as to each of the challenged requirements, applying the level of scrutiny identified in Davis, without imposing a separate “major purpose” test.⁹⁴ I do not find that the Maine statute’s PAC-style reporting requirements are overbroad simply because they are imposed on organizations⁹⁵ whose major purpose is not the promotion or defeat of a ballot initiative in Maine.⁹⁶

(3) *Vagueness*

The plaintiffs challenge the contribution definitions⁹⁷ as unconstitutionally vague both on their face and as applied.⁹⁸ The statute requires a person or

⁹² Judge Coughenour explores this difference in Human Life of Washington, 2009 U.S. Dist. 4289, at *51-53.

⁹³ The argument might be more persuasive if the arena were one of candidate elections, and the laws pertinent to that arena were being applied to these organizations engaged in issue advocacy. See, e.g., Colorado Right to Life Comm., Inc. v. Coffman, 498 F.3d 1137 (10th Cir. 2007).

⁹⁴ See Alaska Right To Life Comm., 441 F.3d at 789-92. The Ninth Circuit upheld the imposition of PAC-style requirements without regard to a corporation’s “major purpose,” noting that the requirements were “not particularly onerous” and were justified by the state’s strong informational interests in disclosure that the Supreme Court recognized in Buckley and McConnell. *Id.* at 790. The Alaska Right to Life Committee was subject to the PAC-style requirements as a “nongroup entity . . . the major purpose of which is to influence the outcome of an election,” *id.* at 779, even though it described its major purpose as promoting “a pro-life consensus in Alaska’s public through the presentation of its pro life message,” *id.* at 776.

⁹⁵ This is also not a case like Massachusetts Citizens for Life, 479 U.S. 238, or Austin v. Michigan Chamber of Commerce, 494 U.S. 652 (1990), both of which challenged extra burdens imposed because corporations were involved. Maine’s ballot question regulations do not depend on the use of the corporate form.

⁹⁶ The major purpose test would be especially pernicious if applied here. An organization could have the major purpose of affecting ballot initiatives all over the country, but because of its wide-ranging scope avoid the finding that its role in any single state’s ballot initiative was its major purpose.

⁹⁷ At the hearing, they confirmed that they do not challenge the expenditure definitions for
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organization to report each contribution over \$100 (once the \$5,000 threshold is met). It defines "contribution" as including, but not limited to⁹⁹:

- 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.¹⁰⁰

I see no vagueness in subsection A.¹⁰¹ When a contributor *specifies* that funds are "given in connection with a ballot question," there is no room for confusion. The plaintiffs agreed with this conclusion at the hearing.

vagueness.

⁹⁸ A "facial challenge must fail where the statute has a 'plainly legitimate sweep.'" Wash. State Grange v. Wash. State Republican Party, 552 U.S. 442 (2008) (quoting Washington v. Glucksberg, 521 U.S. 702, 739-40 (1997) (Stevens, J., concurring in judgments)).

⁹⁹ Neither party has addressed the phrase "not limited to." Since the Commission has not in its regulatory materials tried to enlarge the definition of "contribution" through that phrase, I do not address it further.

¹⁰⁰ 21-A M.R.S.A. § 1056-B(2-A).

¹⁰¹ A statute is unconstitutionally vague if it "fails to provide a person of ordinary intelligence fair notice of what is prohibited, or is so standardless that it authorizes or encourages seriously (continued on next page)

I also see no vagueness in subsection B. The plaintiffs argue that they cannot know what was in their contributors' minds. But the definition here is an objective standard tied to what the *plaintiffs* said in obtaining the funds, and they are in control of what they say. If their solicitation "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," then it is proper to conclude that the resulting gift was for such a purpose. That is the ordinary way in which language and communication work. Any other answer would allow the solicitor to propose all the relevant limitations and conditions in the solicitation, then argue unfairly that the resulting gift that did not expressly repeat those limitations and conditions could not be characterized as to purpose.

There is also no vagueness in subsection D, as the plaintiffs agreed at the hearing. It is straightforward to determine what funds or transfers came from the organization's general treasury.

There are really only two vagueness issues: first, how to count contributions that are made for, or that respond to solicitations for, ballot initiatives in more than one state; second, what subsection C adds to subsections A and B.

Some of NOM's solicitations were as follows:

discriminatory enforcement." United States v. Williams, 128 S. Ct. 1830, 1845 (2008) (citing Hill v. Colorado, 530 U.S. 703, 732 (2000)). A plaintiff engaging in clearly proscribed conduct cannot complain about vagueness, but in the First Amendment context, a plaintiff may argue that a statute is "overbroad because it is unclear whether it regulates a substantial amount of protected speech." Id. (citing Hoffman Estates v. Flipside, Hoffman Estates, Inc., 455 U.S. 489, 494-95, and nn.6 and 7 (1982)). A statute is unconstitutionally overbroad only if its overbreadth is "substantial not only in an absolute sense, but also relative to the statute's plainly legitimate sweep." Id. at (continued on next page)

- “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?”¹⁰²
- “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?”¹⁰³
- “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.”¹⁰⁴
- “To help us in Maine and all 50 states, can you make a monthly donation?”¹⁰⁵
- “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?”¹⁰⁶
- “Use this hyperlink to help support NOM’s work not only in Maine but around the country, wherever the need arises.”¹⁰⁷
- “Help us fight to protect marriage in Iowa, Maine and everywhere across this great land donate today!”¹⁰⁸

When I pressed the defendants’ 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

1838 (citing Bd. of Trs. of State Univ. of N.Y. v. Fox, 492 U.S. 469, 485 (1989)).

¹⁰² Verified Compl. ¶ 26 and NOM e-mail at 2-3 (Ex. 5 to Verified Compl.).

¹⁰³ Verified Compl. ¶ 27 and NOM e-mail at 4 (Ex. 5 to Verified Compl.).

¹⁰⁴ Verified Compl. ¶ 28 and NOM e-mail at 7 (Ex. 5 to Verified Compl.).

¹⁰⁵ Verified Compl. ¶ 30 and NOM e-mail at 11 (Ex. 5 to Verified Compl.).

¹⁰⁶ Verified Compl. ¶ 32 and NOM e-mail at 14 (Ex. 5 to Verified Compl.).

¹⁰⁷ Verified Compl. ¶ 35 and NOM e-mail at 23 (Ex. 5 to Verified Compl.).

¹⁰⁸ Verified Compl. ¶ 37 and NOM e-mail at 28 (Ex. 5 to Verified Compl.).

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 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.

Identifying the meaning of subsection C is somewhat more difficult, and even the defendants' lawyer had trouble at the hearing specifying what contributions subsection C would cover that are not already within subsections A and B. Subsection A covers contributions that are "earmarked" specifically for a ballot purpose. Subsection B covers contributions that are not themselves "earmarked," but are in response to solicitations that make clear that the funds will be used for a ballot purpose, and thus are "earmarked" because the solicitor established that premise for the contribution. Subsection C seeks to cover still other contributions. Presumably the statute's drafters were concerned that those who solicit contributions might find devious ways to avoid coverage by keeping the language of both the solicitation and the donation clean of any suggestion of earmarking, even though everyone knew what was going on. The language that

they chose to capture this category is clumsy. But as the plaintiffs agreed at the hearing, the vagueness question is evaluated only from the perspective of the person or organization required to report, and it is perfectly clear to tell them, as this subsection does, that if they reasonably should know from the entire context of what they are doing that a particular contribution is designed to influence a particular ballot, then they should treat it as such.¹⁰⁹ I conclude that they are unlikely to be able to prove that it is unconstitutionally vague or substantially overbroad.

(4) The \$100 Threshold

Once a person or entity reaches the \$5,000 (more than) threshold, it must report each expenditure to, and each contribution, from a single source if, in aggregate, they exceed \$100. The plaintiffs say that the \$100 limit is not narrowly tailored to Maine's interest in providing voters with information about who supports a proposition.¹¹⁰ They contend that information about small, individual donors has "little, if any" value to voters and that, therefore, disclosure of small donors' names, addresses, occupations, and employers is a burden wholly out of proportion to the state's interest.¹¹¹

I disagree. Buckley held that disclosure of contributions to candidates can help "voters to define more of the candidates' constituencies."¹¹² Buckley's logic holds here. As the Ninth Circuit explained in Getman, "[k]nowing which

¹⁰⁹ In response to my questions at the hearing, they agreed that vagueness, although an objective standard, should be measured from the perspective of the reporting person or organization, not from the perspective of the once-removed contributor.

¹¹⁰ Pls.' Mot. for Temporary Restraining Order at 18.

¹¹¹ Id. at 18-19.

interested parties back or oppose a ballot measure is critical, especially when one considers that ballot-measure language is typically confusing, and the long-term policy ramifications of the ballot measure are often unknown. At least by knowing who backs or opposes a given initiative, voters will have a pretty good idea of who stands to benefit from the legislation.”¹¹³ The public has an interest in knowing, for example, that a ballot measure has been supported by a multitude of gifts, even small gifts, from a particular state or from a specific profession.¹¹⁴ Such information could be crucial in the context of ballot measures involving public works projects or regulatory reform. The issue is thus not whether voters clamor for information about each “Hank Jones” who gave \$100 to support an initiative. Rather, the issue is whether the “cumulative effect of disclosure ensures that the electorate will have access to information regarding the driving forces backing and opposing each bill.”¹¹⁵ Like the Protectmarriage.com court, I conclude that the state’s interest to provide this information to voters is “not only compelling but critical” to the proper functioning of the system of direct democracy.¹¹⁶ The \$100 threshold in § 1056-B is narrowly tailored to the state’s interest. It protects from public disclosure those small donors who offer a campaign de minimis support, and focuses voters on those backers of a measure most likely to represent the referendum’s constituency. Under Buckley, I cannot require the Maine legislature

¹¹² Buckley, 424 U.S. at 81.

¹¹³ Getman, 328 F.3d at 1106.

¹¹⁴ ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197, 1211 (E.D. Cal. 2009) (“Surely California voters are entitled to information as to whether it is even citizens of their own republic who are supporting or opposing a California ballot measure.”).

¹¹⁵ Id. at 1211.

¹¹⁶ Id.

to show that it has chosen the “highest reasonable threshold.”¹¹⁷ The precise threshold required to trigger disclosure “is necessarily a judgmental decision, best left in the context of this complex legislation” to the Maine legislature.¹¹⁸ It is not apparent to me that the \$100 threshold is “wholly without rationality.”¹¹⁹ Instead, the threshold is substantially related to Maine’s compelling interest in informing voters and narrowly tailored to avoid unnecessary impositions on associational rights.

(5) Other Requirements for a Temporary Restraining Order

Because I conclude that the plaintiffs have not shown a likelihood of success on the merits as to any of their challenges to the Maine statute, I do not need to address the other factors for awarding a temporary restraining order.

CONCLUSION

I **DENY** the plaintiffs’ request for a temporary restraining order because I conclude that the defendants are likely to succeed on the merits of this dispute. In doing so, I do not underestimate the strength of the First Amendment interests of individuals or groups that take positions on issues in the general run of political discourse, but without supporting or opposing candidates for election. Some of the regulatory measures here seem to approach the limit of what can be permitted before unconstitutionally burdening their speech or association. As I noted a decade ago in Volle, ballot measures, unlike candidate elections, typically do not

¹¹⁷ Buckley, 424 U.S. at 83.

¹¹⁸ Id.

¹¹⁹ Id.; see also Vote Choice v. DiStefano, 4 F.3d 26, 33 (1st Cir. 1993) (“[S]o long as legislatively imposed limitations are not ‘wholly without rationality,’ courts must defer to the legislative will.” (quoting Buckley, 424 U.S. at 83)); Protectmarriage.com, 599 F. Supp. 2d. at 1220-24.

implicate concerns about corruption or the appearance of corruption resulting from some sort of quid pro quo between a candidate and an interest group.¹²⁰ Ballot questions present the voters with a choice on the merits of the ballot issue, regardless of who is supporting or opposing it. Maine has a strong and even compelling interest in helping the electorate assess the particular issue on its merits by providing voters with information about where the money supporting a measure has come from and therefore whose interest it serves. But given the heartland First Amendment interests at stake for individuals or groups involved in issue advocacy, the caselaw makes clear that Maine cannot impose all the extensive impositions and PAC-style burdens used in regulating candidate elections.

SO ORDERED.

DATED THIS 28TH DAY OF OCTOBER, 2009

/s/D. BROCK HORNBY

D. BROCK HORNBY

UNITED STATES DISTRICT JUDGE

¹²⁰ Volle, 69 F. Supp. 2d at 176.

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January 8, 2010

Mr. Jonathan Wayne
Executive Director
Commission on Governmental Ethics
135 State House Station
Augusta, ME 04333-0135

RECEIVED

JAN 11 2010

MAINE ETHICS COMMISSION

PETITION FOR STAY OF INVESTIGATION

Dear Mr. Wayne:

This is Respondent National Organization for Marriage's (NOM's) Petition for Stay of Investigation. The Commission's First Request for Documents and Information requests information for which any response requires NOM to address legal issues that have been raised and First Amendment rights that have been asserted and which are currently pending in the U.S. District Court in *National Organization for Marriage v. McKee*, Civ. No. 1:09-cv-00538 (D. Maine 2009).

Request #1: All documents containing a *solicitation* which NOM transmitted to *major donors* on or after January 1, 2009.

The Commission's definition of "Major Donor" in the First Request states: "any person which (a) provided to NOM money with a total value of \$5,000 or more on or after January 1, 2009, or (b) NOM *solicited* on or after January 1, 2009 and which NOM anticipated might provide to NOM money with a total value of \$5,000 or more.

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Request #1 and the “Major Donor” definition raise the legal issue of what donations should be counted as “contributions” in Section 1056-B. Although the Commission uses the word “donors” instead of “contributors,” the issue raised for Respondent is determining what funds are “donations” or “contributions” that are proper subjects of its response. That raises exactly the issues addressed in the Federal lawsuit.

The definition of “contribution” contained in § 1056-B is unconstitutional, both facially and as applied to NOM. In *Buckley*, the Supreme Court recognized that “[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity.” *Buckley v. Valeo*, 424 U.S. 1, 41, n.48 (1976) (citation omitted). Accordingly, *Buckley* limited “contributions” to “funds provided to a candidate or political party or campaign committee”¹ or specifically “*earmarked for political purposes*,” by which *Buckley* clearly meant *regulable* political purposes, i.e., express-advocacy “independent expenditures” or “contributions,” *Id.* at 23 n.24 (“So defined, ‘contributions’ have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign.”). That the Court meant “for political purposes” to include only *regulable* activities was recognized by the Second Circuit in *FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995) (“*SEF*”).

In *SEF*, the Second Circuit noted that “[t]he only contributions ‘earmarked for political purposes’ with which the *Buckley* Court appears to have been concerned are those that will be converted to expenditures subject to regulation under FECA.” 65 F.3d at 295. *See also id.* (“*Buckley*’s definition of independent expenditures that are properly within the purview of FECA provides a limiting principle for the definition of contributions”). “Accordingly,” the court noted, “disclosure is only required under [2 U.S.C.] § 441d(a)(3) for solicitations of contributions that are earmarked for activities or ‘communications that expressly advocate the election or defeat of a clearly identified candidate.’” *Id.* (quoting *Buckley*, 424 U.S. at 80).

The Second Circuit also addressed the “earmarked” requirement in *SEF*, ruling that if a communication does not itself contain express advocacy but “*contains solicitations clearly indicating* that the contributions will be targeted to the election or defeat of a clearly identified candidate for federal office,” or, in this context, a ballot measure in Maine, it “may still fall within the reach of [regulation].” 65 F.3d at 295 (emphases added).

This is in keeping with the well-established doctrine that the constitution requires that a would-be speaker must know, *based on the meaning of the words he is using in his communication*, whether or not his communication is regulable; a regulation of speech that instead relies on

¹ The first *Buckley*-approved definition of “contribution” is not at issue here. NOM is not a candidate, political party, or a committee formed to elect a candidate or pass or defeat a ballot measure.

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surmising the intent or effect suffers a constitutional defect. *Thomas v. Collins*, 323 U.S. 516 (1945); see also *Buckley*, 424 U.S. at 43; *McConnell v. FEC*, 540 U.S. 93, 192 (2003). In *FEC v. Wisconsin Right to Life, Inc.*, the Supreme Court confirmed that determining the regulability of political speech on the basis of its intent and effect was rejected as impermissibly vague and overbroad more than thirty years ago, as such an approach “would afford no security for free discussion.” 551 U.S. 449, 467 (2007) (“*WRTL I*”) (internal quotations omitted). And the Court in *WRTL II* also confirmed that “*McConnell* did not purport to overrule *Buckley* on this point—or even address what *Buckley* had to say on the subject.” *Id.* at 467. A test delineating regulable political speech “should provide a safe harbor for those who wish to exercise First Amendment rights,” and “should also reflect our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Id.* (internal quotations omitted).

Maine law imposes BQC status on any individual or non-PAC that “solicits and receives contributions or makes expenditures . . . aggregating in excess of \$5,000 for the purpose of initiating, promoting, defeating or influencing in any way a ballot question” (emphasis added). The definition of “contribution” provided in § 1056-B(2-A) includes: (1) “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”; and (2) “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.” 21-A M.R.S.A. § 1056-B.

The practical necessity of *Buckley*’s constitutional requirement is obvious here. How can NOM know whether a particular solicitation did or would “lead the contributor to believe” that her donation will be used to expressly advocate for the passage or defeat of a ballot question in Maine? Or how can either know whether Maine will, after the fact, “reasonably determine[],” “in the context of the contribution and the recipient’s activities regarding a ballot question” that donations were “provided by the contributor” to expressly advocate for or against a ballot question in Maine? Some of NOM’s solicitations mentioned Maine. Given that some would-be donors might be aware of the current ballot question in Maine, is that enough to make all funds donated as a result of all those solicitations “contributions” in Maine? Would the mention of Maine in the context of a solicitation discussing same-sex marriage allow Maine to “reasonably . . . determine[]” “when viewed in the context of . . . recipient’s activities” that the funds resulting from that solicitation were, in fact, “for the purpose of” expressly advocating the passage or defeat of a ballot question in Maine? If NOM solicits donations to be used in activities that included but are not limited to airing ads in Maine, or in other states, does that mean that the funds received are “contributions” for purposes of imposing Maine BQC status? Facing an investigation and possible enforcement action if it fails to correctly predict Maine’s contextual, intent-and-effect conclusion that donations were, in fact “earmarked,” certainly “afford[s]

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‘[NOM] no security for free discussion.’” *WRTL II*, 551 U.S. at 467 (citations omitted). Maine’s definition of “contribution” for BQCs is unconstitutionally vague and overbroad. It must, but does not, limit regulation as a BQC to organizations that have received a threshold amount of funds earmarked for regulable political purposes.

In *Volle*, this Court noted and apparently accepted Maine’s argument that the phrases “for the purpose of” and “to influence in any way” in Maine’s definition of a PAC “apply only to monies raised or spent for the express advocacy of the passage or defeat of a specific ballot measure and thereby comply with the language of *Buckley*.” *Volle v. Webster*, 69 F. Supp. 2d 171, 175 (D.C. Me. 1999) (finding Maine’s registration statute violates First Amendment).

Even assuming, arguendo, that the construction proffered by Maine in *Volle* is binding on those phrases and the phrase “in connection with” in the definitions of BQC and “contribution” here,² Maine considers amorphous and subjective contextual factors in determining whether donations to an organization are *earmarked* for regulable activities and trigger registration and reporting as a BQC for the organization receiving them. Maine defines donations to an organization as “contributions” triggering BQC status if they are (1) “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”; or if those donations (2) *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.” 21-A M.R.S.A. § 1056-B(2-A)(B, C) (emphases added). Because it does not limit regulation as a BQC to organizations that have received a threshold amount of funds earmarked for regulable political purposes, § 1056-B’s contribution definition is unconstitutionally vague and overbroad.

Maine’s definition of “contribution” is far broader and murkier than the federal definition and plainly extends beyond its reach as limited by the Second Circuit. It exponentially expands

² “[Maine] is not forever bound, by estoppel or otherwise, to the view of the law that it assert[ed] in th[at] litigation.” *Vermont Right to Life, Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000). *See also id.* at 383-84 (collecting cases with similar holdings). If the Commission does not adhere to the construction of these terms accepted as authoritative in *Volle*, then § 1056-B’s definition of BQC, and “contribution” are unconstitutionally vague and overbroad as a matter of law because they target non-express advocacy for or against a ballot question. *See Volle*, 69 F. Supp. 2d at 174 n.4 (explaining that under *Buckley* and *MCFL*, regulation of core political speech in elections must be limited to “express advocacy of the election or defeat” and pointing out the countervailing lack, in the ballot measure context, of a compelling government interest in averting corruption).

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the reach of the “political purpose” prong by including funds donated for the purpose of “influencing in any way” a ballot question, and is not readily susceptible to the construction given the federal definition in *Buckley* or by the Second Circuit in *SEF*. And it considers donations “earmarked” if Maine decides the solicitation “would lead the contributor to believe that the funds would be used” for a regulable purpose or it “can reasonably be determined to have been provided by the contributor” for a regulable purpose. §§ 1056-B(2-A)(B),(C). Further, before contributions may be regulated, they must actually be *used for* express advocacy: the only donations “earmarked for political purposes” of concern are those “that *will be converted* to expenditures subject to regulation under FECA.” *FEC v. Survival Education Fund*, 65 F.3d 285, 295 (2d Cir. 1995) (emphasis added).

The definition of contribution circumvents the requirement that regulation be limited to express advocacy by triggering BQC status based on subjective, context-based factors that do not limit regulation to funds earmarked or used for a regulable purpose. These broad definitions virtually guarantee that the Commission could find that any donation to NOM was given or used for “initiating, promoting, defeating or influencing in any way” a ballot question. At the least, this invites an intrusive investigation into an organization’s inner workings that “constitutes a severe burden on political speech.” *WRTL II*, 551 U.S. at 468 n.5.

Request #2: All documents which describe NOM’s planned or actual activities in Maine to initiate or promote the people’s veto referendum and which contain a *solicitation*.

The use of the word “solicitation” in this request raises the issue of what constitutes a solicitation under the law. As stated above, Maine statute 21-A M.R.S.A. § 1056-B is unconstitutionally vague and overbroad, sweeping in more speech for regulation than the First Amendment precedents of the U.S. Supreme Court permits.

Request #3: Please provide an itemized list of “major donations” received by NOM on or after January 1, 2009, including the date of NOM’s receipt or deposit of funds, the amount received, and the *donor*.

The definition of “Major donations” provided by the Commission in its First Request states “money which NOM received on or after January 1, 2009 from a *major donor*. The use of the word “donor” in the request and the phrase “major donor” in the definition raises the same objections discussed above.

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Request #4: Please identify those *donations* listed in response to Request #3 for which NOM solicited the *donor* by telephone or in person. Specify the representative of NOM who made the *solicitation*, the individual receiving the request, and whether the *solicitation* was made by telephone or in person.

The use of the words “donations,” “donor,” and “solicitation,” in the request raises the same objections discussed above.

Request #5: Please identify those donations listed in response to Request #3 for which the donors reside in Maine or conduct their primary commercial, religious, or charitable activities in Maine.

The use of the words “donations” and “donors” in the request raises the same objections discussed above.

Request #6: Please provide the total amounts received by NOM for each *solicitation* provided in response to Request #2.

The use of the word “solicitation” in the request raises the same objections discussed above.

Request #7: Please identify all persons who have been involved in *soliciting* funds on behalf of NOM since January 1, 2009. Provide the name, telephone, physical location, and mailing address for these persons. Describe the person’s involvement in *solicitations* on behalf of NOM.

The use of the words “soliciting” and “solicitations” raises the same objections discussed above.

First Amendment Privilege

In addition to the above objections, NOM asserts the First Amendment Privilege to Requests ##1-7. These requests encompass, among other things, NOM’s internal campaign communications concerning strategy and messaging, identities of contributors, and identities of persons soliciting on their behalf.

NOM objects to these requests as irrelevant, unduly burdensome, and privileged under the First Amendment. NOM’s internal campaign communications, including draft versions of communications never actually disseminated to the electorate at large, identities of contributors, and identities of persons soliciting on NOM’s behalf, are privileged under the First Amendment.

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Disclosure of internal communications, contributors, and solicitors would burden political association rights by discouraging individuals from participating as a board member or officer of NOM, contributing to NOM, or soliciting for NOM. *See, e.g., FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981) (denying enforcement of FEC subpoena). The documents being requested are irrelevant and/or immaterial to the issues in the investigation, and even if they are relevant and material, the First Amendment interests at stake outweigh the Commission's need for the information.

First, there is no question that participation in campaigns is a protected activity. *See San Francisco County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 827 (9th Cir. 1987) (“[T]he right of individuals to associate for the advancement of political beliefs’ is fundamental.”) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). Compelled disclosure of internal campaign information can deter that participation. *See Buckley*, 424 U.S. at 68 (“It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute.”); *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 407, 414 (D. Kan. 2009) (Holding that disclosure of “trade associations’ internal communications and evaluations of their members’ positions on contested political issues” might reasonably “interfere with the core of the associations’ activities by inducing members to withdraw . . . or dissuading others from joining”).³

Second, disclosure of internal campaign information can have a deterrent effect on the free flow of information within campaigns. Implicit in the right to associate with others to advance one’s shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private.⁴ Compelling disclosure of internal campaign communications

³In addition to discouraging individuals from joining campaigns, the threat that internal campaign communications will be disclosed in civil litigation can discourage organizations from joining the public debate over an initiative. *See Perry v. Schwarzenegger*, D.C. No. 3:09-cv-02292 (N.D. Cal. 2009), Letter Brief of Amicus Curiae American Civil Liberties Union of Northern California, at 2 (explaining that the ACLU’s internal campaign information had been subpoenaed in that case).

⁴This conclusion may be derived from cases that have recognized the right of associations to be free of infringements in their internal affairs. The freedom of members of a political association to deliberate internally over strategy and messaging is an incident of associational autonomy. This right has been recognized in *San Francisco County Democratic Central Committee v. Eu*, where the Ninth Circuit Court of Appeals said that “the right of association would be hollow without a corollary right of self-governance,” 826 F.2d at 827; “[T]here must be a right not only to form political associations but to organize and direct them in the way that will make them most effective,” *id.* (quoting *Ripon Soc’y Inc. v. Nat’l Republican Party*, 525 F.2d

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can chill the exercise of these rights.

The specific test set out by the United States Supreme Court regarding associational privacy was articulated in *Bates v. Little Rock*, 361 U.S. 516 (1960), a case involving compulsory disclosure of local branches of the NAACP:

Decision in this case must finally turn, therefore, on whether the [State has] demonstrated so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures will affect. Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.

Id. at 524 (quoted in *Savola v. Webster*, 644 F.2d 743, 747 (8th Cir. 1981)).

It is well accepted that compelled disclosure of financial records or of the members of an association “can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). Once it is established that such disclosure will have an adverse effect on NOM and its contributors’ freedom of association, the extent of the burden must be weighed against the interest of the State. *Id.* at 68.

“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” *NAACP v. Alabama*, 357 U.S. 449 (1958); see also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (“An individual’s freedom to speak,

567, 585 (D.C. Cir. 1975) (en banc) (internal quotation marks omitted)); see also *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986) (“The Party’s determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution”); and *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 N.21 (1989) (“By regulating the identity of the parties’ leaders, the challenged statutes may also color the parties’ message and interfere with the parties’ decisions as to the best means to promote that message.”). The government may not “interfere with a [political] party’s internal affairs” absent a “compelling state interest.” *Eu*, 489 U.S. at 231. Associations, no less than individuals, have the right to shape their own messages. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342, 348 (1995) (striking down a state law prohibiting anonymous pamphleteering in part because the First Amendment includes a speaker’s right to choose a manner of expression that she believes will be most persuasive); *AFL-CIO v. FEC*, 333 F.3d 168, 177 (D.C. Cir. 2003) (“[E]xtensive interference with political groups’ internal operations and with their effectiveness . . . implicate[s] significant First Amendment interests in associational autonomy.”).

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worship, and to petition the government for redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”). Thus, the “First Amendment protects political association as well as political expression,” *Buckley*, 424 U.S. at 15, and the “freedom to associate with others for the common advancement of political beliefs and ideas is . . . protected by the First and Fourteenth Amendments.” *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). “The right to associate for expressive purposes is not, however, absolute.” *Roberts*, 468 U.S. at 623. “Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Id.*

The government may abridge the freedom to associate directly, or “abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.” *NAACP*, 357 U.S. at 461. Thus, the government must justify its actions not only when it imposes direct limitations on associational rights, but also when governmental action “would have the practical effect ‘of discouraging’ the exercise of constitutionally protected rights.” *Id.* (quoting *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 393 (1950)). Such actions have a chilling effect on, and therefore infringe upon, the exercise of fundamental rights. Accordingly, they “must survive exacting scrutiny.” *Buckley*, 424 U.S. at 64.

The compelled disclosure of political associations can have just such a chilling effect. *See id.* (“[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”); *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) (“The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation.”).⁵ Disclosures of political affiliations and activities that have a “deterrent effect on the exercise of First Amendment rights” are therefore subject to this same “exacting scrutiny.” *Buckley*, 424 U.S. at 64-65. A party who objects to a discovery request as an infringement of the party’s First Amendment rights is in essence asserting a First Amendment privilege. *See, e.g., Black Panther Party v. Smith*, 661 F.2d 1243, 1264 (D.C. Cir. 1981), *cert. granted and vacated as moot*, 458 U.S. 1118 (1982) (cited in *Perry v. Schwarzenegger*, ___ F.3d ___ (9th Cir., Dec. 11, 2009).

⁵*See, e.g., NAACP*, 357 U.S. at 461-64 (prohibiting the compelled disclosure of the NAACP membership lists); *Bates v. City of Little Rock*, 361 U.S. 516, 525-27 (1960) (same); *DeGregory v. Attorney Gen.*, 383 U.S. 825, 828-30 (1966) (prohibiting the state from compelling defendant to discuss his association with the Communist Party); *Buckley*, 424 U.S. at 63-74 (recognizing the burden but upholding the compelled disclosure of campaign contributor information under the “exacting scrutiny” standard).

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In this case, the disclosure of the internal communications of NOM, its contributors, and solicitors, can have a deterrent effect on participation in referendum activity. NOM limits its activities to the promotion and protection of traditional marriage as between one man and one woman. This is a controversial issue that has resulted in targeting of NOM's contributors, officers, board members, volunteers, and others for threats, harassment, and intimidation by same-sex marriage activists.⁶ This has occurred in many states, including Maine. Examples of such activities in Maine include Marc Mutty, of StandforMarriageMaine.com, who received a threatening voice mail message that stated: "You will be dead. Maybe not today, not tomorrow. But soon you'll be dead." A.P., *Threats Made Against Gay Marriage Opponents*, Bangor Daily News, Nov. 9, 2009 (copy attached hereto). Also, Michael Heath, former leader of the Christian Civic League of Maine and its successor, The Maine Family Policy Council, and Rev. Bob Emrich, who worked with Mutty on the Yes on 1 campaign, also received threats. *Id.* Donald Mendell, a Maine school counselor, had a complaint filed against him for violation of ethics by the National Association of Social Workers because he appeared in a commercial and asked voters "to prevent homosexual marriage from being pushed on Maine students." A.P., *Counselor Wants Gay Marriage Complaint Thrown Out*, Bangor Daily News, Nov. 23, 2009 (copy attached hereto). Such threats and intimidation can certainly chill the associational rights of people wishing to be active in NOM. Compelled disclosure of contributors and solicitors for NOM will certainly make people think twice before participating in such activity again.

Thus, it may be concluded that disclosure of internal campaign communications and identities of contributors and solicitors can have such a deterrent effect on the exercise of protected activities. Since there is no compelling State interest in the identity of NOM's contributors making undesigned contributions, and solicitors who are not soliciting designated contributions, the State cannot justify the abridgment of the associational freedom of NOM, its contributors, and solicitors.

⁶See, e.g., the Declaration of Scott F. Bieniek, in *John Doe #1 v. Reed*, U.S. District Court, W.D. Wash., Seattle Div., Case 3:09-cv-05456-BHS, filed 07/28/2009, and the Declaration of Sarah E. Troupis, in *ProtectMarriage.com v. Bowen*, U.S. District Court, E.D. Cal., Sacramento Div., Case 2:09-cv-00058-MCE, filed 01/12/2009, enclosed with this response, that provide numerous examples of threats, harassment, and intimidation by same sex marriage activists. Although these declarations were filed in out of state cases, it is important to note that threats, harassment, and intimidation may arise from anywhere in this age of modern communication.

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Conclusion

Since the Commission's First Request for documents brings into issue exactly those words and phrases being challenged in the Federal lawsuit, and that are subject to U.S. Supreme Court precedent on the Free Speech Clause of the First Amendment to the U.S. Constitution, this investigation should be stayed until such time as those issues have been finally decided.

Further, these issues will be finally decided by the Federal Courts, and Federal rulings will preempt any state court rulings on issues of interpreting and applying the U.S. Constitution. Thus, it would be an unnecessary dissipation of the Commission's and the State Courts' resources to address the same issues which will ultimately be decided by the Federal Courts.

Rather than address these same issues twice, it is reasonable for this Commission to stay its present investigation of these matters until the Federal Courts have reached a final decision on the constitutionality and/or proper interpretation of the statutory provisions regulating ballot question committees in the State of Maine.

Sincerely,

BOPP, COLESON & BOSTROM



Barry A. Bostrom

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UPDATE

Threats made against gay marriage opponents in Maine

By The Associated Press



Michael Heath



AUGUSTA, Maine (AP) — Police are investigating a pair of threats against gay marriage opponents in Maine.

Marc Mutty from Stand for Marriage Maine says a threatening voice mail message was discovered Monday morning at campaign headquarters in which a female caller said, “You will be dead. Maybe not today, not tomorrow. But soon you’ll be dead.” Police in Yarmouth are investigating.

Augusta police say a separate voice mail threat targeted Michael Heath, former leader of the Christian Civic League of Maine and its successor, the Maine Family Policy Council. Heath wasn’t actively involved in the gay marriage campaign, but he fought against a gay rights law in campaigns in 1998, 2000 and 2005.

The incident follows voters’ decision last week to scuttle Maine’s gay marriage law. Mutty says the campaign is taking the threats seriously.

While threats have been made before, Mutty said in a phone interview Monday, they were not direct as was the one left Monday.

“We’ve had threats and comments that were nasty and vulgar,” Mutty said. “They’ve said, ‘I hope you burn in hell,’ and that sort of thing, but there was never any direct death threat alluded to.”

He said that the campaign office would be shut down by the end of the week.

The Rev. Bob Emrich, who worked with Mutty on the Yes on 1 campaign, said he had received phone calls at his home in Palmyra throughout the campaign. He said they did seem to escalate as the election drew nearer.

“Sunday or Monday of last week I got a call from someone who said they hoped I died before Election Day so I wouldn’t know the results,” Emrich said Monday. “I’ve had people ask me where my next meeting was because they were going to make sure I didn’t make it there.”

He said he also has had people he does not know but who recognize him from press coverage stop him in store parking lots and restaurants to thank him for his work in support of traditional marriage.

Monday's incident isn't the only backlash after the vote, according to The Associated Press.

On Sunday, same-sex marriage supporters protested outside the Roman Catholic Cathedral of the Immaculate Conception in Portland. WGME-TV says people taped their mouths shut in the silent protest. Bishop Richard Malone had urged Catholics to reject gay marriage.

A similar peaceful protest that did not include taped mouths was held about 10 a.m. Sunday in Bangor, Greg Music of Bangor said Monday. About 40 people gathered at the Williams Park on Newbury Street, then walked about two blocks to stand across the street from St. John Catholic Church on York Street.

"We want people to know how much hurt was caused [by the repeal of same-sex marriage]," Music said.

The march was planned so people would see the group as they went into the church for 10:15 a.m. Mass.

The Roman Catholic Diocese of Portland gave more than \$550,000 to the campaign to repeal the law, including more than \$150,000 from its general treasury, between Oct. 1 and 23, the last reporting deadline before the election. The Portland diocese also collected more than \$200,000 for Stand for Marriage Maine from bishops and dioceses outside Maine.

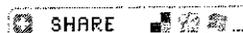
"People felt we needed to be seen by the institution that gave so much money to the campaign," Music said.

Drivers honked their horns in support of the group, he said. Others told protesters they disagreed with the Catholic Church's stand and supported same-sex marriage, according to Music.

At least one man crossed the street to tell protesters why he had voted to repeal the same-sex marriage law.

"It was a very gentle kind of discussion and respectful," Music said.

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11/23/09 | 250 comments

QUESTION 1

Counselor wants gay marriage complaint thrown out

By The Associated Press

NEWPORT, Maine — A Maine school counselor wants a state board to toss out a complaint filed against him because he appeared in a television commercial opposing gay marriage.

Donald Mendell of Palmyra, a counselor at Nokomis High School, calls the complaint against him "frivolous."

During the run-up to this month's gay marriage vote, Mendell appeared in a commercial and asked voters "to prevent homosexual marriage from being pushed on Maine students." The Nov. 3 vote overturned Maine's gay marriage law.

The Kennebec Journal says Ann Sullivan of Newport complained Mendell violated a code of ethics set by the National Association of Social Workers that says social workers should not publicly condone discrimination on the basis of sexual orientation.



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

December 11, 2009

By E-Mail and Regular Mail

Barry A. Bostrom, Esq.
Bopp, Coleson & Bostrom
1 South Sixth Street
Terre Haute, Indiana 47807-3510

FIRST REQUEST FOR DOCUMENTS AND INFORMATION

Dear Mr. Bostrom:

At their meeting on October 1, 2009, the members of the Maine Commission on Governmental Ethics and Election Practices directed the Commission staff to investigate whether the National Organization for Marriage (NOM) violated Maine campaign finance laws by not filing campaign finance reports required as a ballot question committee under 21-A M.R.S.A. § 1056-B. This letter is to request information and documents from NOM in connection with the investigation. To avoid duplication by NOM, the Commission will review any documents provided by NOM in response to Defendants' First Request for Production of Documents by the Plaintiffs dated December 10, 2009 in National Organization for Marriage v. McKee, Civil No. 1:09-cv-00538 (D. Maine 2009).

Factual Issues to be Considered

In the course of the investigation, the Commission staff will seek evidence relevant to the following factual issues:

1. Did NOM solicit or receive funds for the purpose of initiating or promoting the people's veto referendum to prevent the 2009 same-sex marriage law (P.L. 2009, Chapter 82) from taking effect?
2. Have donors or other funders provided funds to NOM for the purpose of initiating or promoting the people's veto referendum, including contributions referred to in § 1056(B)(2-A)?
3. Has NOM made expenditures other than by contribution to the Stand for Marriage Maine PAC for the purpose of initiating or promoting the people's veto referendum?

OFFICE LOCATED AT: 242 STATE STREET, AUGUSTA, MAINE
WEBSITE: WWW.MAINE.GOV/ETHICS

PHONE: (207) 287-4179

FAX: (207) 287-6775

Confidentiality of Investigation

The Maine Election Law authorizes the Commission to keep certain categories of information and records (“investigative working papers”) confidential in the course of conducting an investigation. (21-A M.R.S.A. § 1003(3-A)) These categories include:

- financial information not normally available to the public, and
- information belonging to a political action committee or ballot question committee that, if disclosed, would reveal sensitive political or campaign information.

The Commission staff will keep information and records provided by NOM in these categories confidential.

Deadline for Response (Production Date)

The Commission staff requests that Maine Leads provide the requested information and documents no later than 5:00 p.m. on January 11, 2010.

Definitions

“Document” means any written, recorded, or graphic material of any kind containing written, printed or digitally or electronically stored material (translated, if necessary, into reasonably usable form).

“Major donations” means money which NOM received on or after January 1, 2009 from a major donor.

“Major donor” means any person which

- (a) provided to NOM money with a total value of \$5,000 or more on or after January 1, 2009, or
- (b) NOM solicited on or after January 1, 2009 and which NOM anticipated might provide to NOM money with a total value of \$5,000 or more.

“NOM” means National Organization for Marriage and its board of directors, officers, executive director, employees, agents, and attorneys.

“Person” means any natural person, corporation, company, partnership, joint venture, firm, association, proprietorship, agency, board, authority, commission, office or other business or legal entity, whether private or governmental.

"Solicitation" means any oral or written request for donation of funds including, but not limited to, requests made by telephone, electronic mail, or internet.

Instructions

These requests are continuing in character. The Commission requests that NOM amend or supplement any response to this request for which NOM learns that the response is in some material respect incomplete or incorrect.

If NOM fails to produce a document on the basis of a claim of privilege, please identify each such document, the type of privilege claimed, and sufficient facts concerning the nature of each such document to enable the Commission to determine whether it is within the scope of such privilege.

If NOM does not have possession, custody, or control of any requested documents but has information about where such documents may be located, the Commission requests that NOM provide such information as soon as possible and in no event later than the production date.

If NOM has any questions or concerns about the interpretation or scope of these requests, the Commission requests that any such questions or concerns be raised with the Commission Counsel as soon as possible so that any such issues can be addressed and resolved prior to the production date.

Requests for Documents

Request #1: All documents containing a solicitation which NOM transmitted to major donors on or after January 1, 2009. To avoid duplication by NOM, please do not include in the response any documents provided in response to Defendants' First Request for Production of Documents by Plaintiffs.

Request #2: All documents which describe NOM's planned or actual activities in Maine to initiate or promote the people's veto referendum and which contain a solicitation. To avoid duplication by NOM, please do not include in the response any documents provided in response to Request #1 or Defendants' First Request for Production of Documents by Plaintiffs.

Requests for Information

Request #3: Please provide an itemized list of major donations received by NOM on or after January 1, 2009, including the date of NOM's receipt or deposit of funds, the amount received, and the donor.

Barry A. Bostrom, Esq.
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December 11, 2009

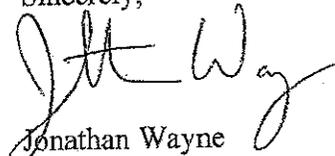
- Request #4: Please identify those donations listed in response to Request #3 for which NOM solicited the donor by telephone or in person. Specify the representative of NOM who made the solicitation, the individual receiving the request, and whether the solicitation was made by telephone or in person.
- Request #5: Please identify those donations listed in response to Request #3 for which the donors reside in Maine or conduct their primary commercial, religious, or charitable activities in Maine.
- Request #6: Please provide the total amounts received by NOM for each solicitation provided in response to Request #2.
- Request #7: Please identify all persons who have been involved in soliciting funds on behalf of NOM since January 1, 2009. Provide the name, telephone, physical location, and mailing address for these persons. Describe the person's involvement in solicitations on behalf of NOM.

Form of Response

The Commission staff requests that a representative of NOM respond to each request under oath separately and fully.

Please telephone the Commission's Counsel, Assistant Attorney General Phyllis Gardiner, at (207) 626-8830 if you have any questions about this request. Thank you.

Sincerely,



Jonathan Wayne
Executive Director

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January 8, 2010

Mr. Jonathan Wayne
Executive Director
Commission on Governmental Ethics
135 State House Station
Augusta, ME 04333-0135

RECEIVED
JAN 11 2010
MAINE ETHICS COMMISSION

**RESPONSE TO FIRST REQUEST
FOR DOCUMENTS AND INFORMATION**

Dear Mr. Wayne:

This is Respondent National Organization for Marriage's (NOM's) Response to the Commission's First Request for Documents and Information.

Request #1: All documents containing a *solicitation* which NOM transmitted to *major donors* on or after January 1, 2009.

NOM objects to Request #1 as overbroad, irrelevant, and immaterial, except as to those solicitations that expressly solicited contributions in support of the Maine referendum or in support of the StandforMarriageMaine.com. As identified in NOM's letter to the Commission, dated September 21, 2009, three emails (7-8-09, 8-7-09, and 9-4-09) solicited contributions directly to StandforMarriageMaine.com. Of course, contributions made in response to those solicitations are irrelevant to this investigation. Two emails (7-17-09 and 7-31-09) may be interpreted to expressly solicit contributions to NOM for the Maine referendum.

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Further, the Commission's definition of "Major Donor" in the First Request states: "any person which (a) provided to NOM money with a total value of \$5,000 or more on or after January 1, 2009, or (b) NOM *solicited* on or after January 1, 2009 and which NOM anticipated might provide to NOM money with a total value of \$5,000 or more.

Request #1 and the "Major Donor" definition raise the legal issue of what donations should be counted as "contributions" pursuant to Section 1056-B. Although the Commission uses the word "donors" instead of "contributors," the issue raised for Respondent is determining what funds are "contributions" that are proper subjects of its response. That raises exactly the issues addressed in the Federal lawsuit.

Further, NOM objects to Request #1 because the definition of "contribution" contained in § 1056-B is unconstitutional, both facially and as applied to NOM. In *Buckley*, the Supreme Court recognized that "[b]ecause First Amendment freedoms need breathing space to survive, government may regulate in the area only with narrow specificity." *Id.* at 41, n.48 (citation omitted). Accordingly, *Buckley* limited "contributions" to "funds provided to a candidate or political party or campaign committee"¹ or specifically "*earmarked for political purposes*," by which *Buckley* clearly meant *regulable* political purposes, i.e., express-advocacy "independent expenditures" or "contributions," *Id.* at 23 n.24 ("So defined, 'contributions' have a sufficiently close relationship to the goals of the Act, for they are connected with a candidate or his campaign."). That the Court meant "for political purposes" to include only *regulable* activities was recognized by the Second Circuit in *FEC v. Survival Education Fund*, 65 F.3d 285 (2d Cir. 1995) ("*SEF*").

In *SEF*, the Second Circuit noted that "[t]he only contributions 'earmarked for political purposes' with which the *Buckley* Court appears to have been concerned are those that will be converted to expenditures subject to regulation under FECA." 65 F.3d at 295. *See also id.* ("*Buckley*'s definition of independent expenditures that are properly within the purview of FECA provides a limiting principle for the definition of contributions"). "Accordingly," the court noted, "disclosure is only required under [2 U.S.C.] § 441d(a)(3) for solicitations of contributions that are earmarked for activities or 'communications that expressly advocate the election or defeat of a clearly identified candidate.'" *Id.* (quoting *Buckley*, 424 U.S. at 80).

The Second Circuit also addressed the "earmarked" requirement in *SEF*, ruling that if a communication does not itself contain express advocacy but "*contains solicitations clearly indicating* that the contributions will be targeted to the election or defeat of a clearly identified

¹ The first *Buckley*-approved definition of "contribution" is not at issue here. NOM is not a candidate, political party, or a committee formed to elect a candidate or pass or defeat a ballot measure.

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candidate for federal office,” or, in this context, a ballot measure in Maine, it “may still fall within the reach of [regulation].” 65 F.3d at 295 (emphases added).

This is in keeping with the well-established doctrine that the constitution requires that a would-be speaker must know, *based on the meaning of the words he is using in his communication*, whether or not his communication is regulable; a regulation of speech that instead relies on surmising the intent or effect suffers a constitutional defect. *Thomas v. Collins*, 323 U.S. 516 (1945); *see also Buckley*, 424 U.S. at 43; *McConnell v. FEC*, 540 U.S. 93, 192 (2003). In *FEC v. Wisconsin Right to Life, Inc.*, the Supreme Court confirmed that determining the regulability of political speech on the basis of its intent and effect was rejected as impermissibly vague and overbroad more than thirty years ago, as such an approach “would afford no security for free discussion.” 551 U.S. 449, 467 (2007) (“*WRTL I*”) (internal quotations omitted). And the Court in *WRTL II* also confirmed that “*McConnell* did not purport to overrule *Buckley* on this point—or even address what *Buckley* had to say on the subject.” *Id.* at 467. A test delineating regulable political speech “should provide a safe harbor for those who wish to exercise First Amendment rights,” and “should also reflect our profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open.” *Id.* (internal quotations omitted).

Maine law imposes BQC status on any individual or non-PAC that “solicits and receives contributions or makes expenditures . . . aggregating in excess of \$5,000 *for the purpose of initiating, promoting, defeating or influencing in any way a ballot question*”(emphasis added). The definition of “contribution” provided in § 1056-B(2-A) includes: (1) “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”; and (2) “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.” 21-A M.R.S.A. § 1056-B.

The practical necessity of *Buckley*’s constitutional requirement is obvious here. How can NOM know whether a particular solicitation did or would “lead the contributor to believe” that her donation will be used to expressly advocate for the passage or defeat of a ballot question in Maine? Or how can either know whether Maine will, after the fact, “reasonably determine[],” “in the context of the contribution and the recipient’s activities regarding a ballot question” that donations were “provided by the contributor” to expressly advocate for or against a ballot question in Maine? Some of NOM’s solicitations mentioned Maine. Given that some would-be donors might be aware of the current ballot question in Maine, is that enough to make all funds donated as a result of all those solicitations “contributions” in Maine? Would the mention of Maine in the context of a solicitation discussing same-sex marriage allow Maine to “reasonably . . . determine[]” “when viewed in the context of . . . recipient’s activities” that the

Mr. Jonathan Wayne
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funds resulting from that solicitation were, in fact, ‘for the purpose of’ expressly advocating the passage or defeat of a ballot question in Maine? If NOM solicits donations to be used in activities that included but are not limited to airing ads in Maine, or in other states, does that mean that the funds received are “contributions” for purposes of imposing Maine BQC status? Facing an investigation and possible enforcement action if it fails to correctly predict Maine’s contextual, intent-and-effect conclusion that donations were, in fact “earmarked,” certainly “afford[s] [NOM] no security for free discussion.” *WRTL II*, 551 U.S. at 467 (citations omitted). Maine’s definition of “contribution” for BQCs is unconstitutionally vague and overbroad. It must, but does not, limit regulation as a BQC to organizations that have received a threshold amount of funds earmarked for regulable political purposes.

In *Volle*, the U.S. District Court noted and apparently accepted Maine’s argument that the phrases “for the purpose of” and “to influence in any way” in Maine’s definition of a PAC “apply only to monies raised or spent for the express advocacy of the passage or defeat of a specific ballot measure and thereby comply with the language of *Buckley*.” *Volle v. Webster*, 69 F. Supp. 2d 171, 175 (D.C. Me. 1999) (finding Maine’s registration statute violates First Amendment).

Even assuming, *arguendo*, that the construction proffered by Maine in *Volle* is binding on those phrases and the phrase “in connection with” in the definitions of BQC and “contribution” here,² Maine considers amorphous and subjective contextual factors in determining whether donations to an organization are *earmarked* for regulable activities and trigger registration and reporting as a BQC for the organization receiving them. Maine defines donations to an organization as “contributions” triggering BQC status if they are (1) “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”; or if those donations (2) *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.” 21-A M.R.S.A. § 1056-B(2-A)(B, C) (emphases added). Because it does not limit

² “[Maine] is not forever bound, by estoppel or otherwise, to the view of the law that it assert[ed] in th[at] litigation.” *Vermont Right to Life, Inc. v. Sorrell*, 221 F.3d 376, 383 (2d Cir. 2000). *See also id.* at 383-84 (collecting cases with similar holdings). If the Commission does not adhere to the construction of these terms accepted as authoritative in *Volle*, then § 1056-B’s definition of BQC, and “contribution” are unconstitutionally vague and overbroad as a matter of law because they target non-express advocacy for or against a ballot question. *See Volle*, 69 F. Supp. 2d at 174 n.4 (explaining that under *Buckley* and *MCFL*, regulation of core political speech in elections must be limited to “express advocacy of the election or defeat” and pointing out the countervailing lack, in the ballot measure context, of a compelling government interest in averting corruption).

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regulation as a BQC to organizations that have received a threshold amount of funds earmarked for regulable political purposes, NOM objects to Request #1 because § 1056-B's contribution definition is unconstitutionally vague and overbroad.

Maine's definition of "contribution" is far broader and murkier than the federal definition and plainly extends beyond its reach as limited by the Second Circuit. It exponentially expands the reach of the "political purpose" prong by including funds donated for the purpose of "influencing in any way" a ballot question, and is not readily susceptible to the construction given the federal definition in *Buckley* or by the Second Circuit in *SEF*. And it considers donations "earmarked" if Maine decides the solicitation "would lead the contributor to believe that the funds would be used" for a regulable purpose or it "can reasonably be determined to have been provided by the contributor" for a regulable purpose. §§ 1056-B(2-A)(B),(C). Further, before contributions may be regulated, they must actually be *used for* express advocacy: the only donations "earmarked for political purposes" of concern are those "that *will be converted* to expenditures subject to regulation under FECA." *FEC v. Survival Education Fund*, 65 F.3d 285, 295 (2d Cir. 1995) (emphasis added).

The definition of contribution circumvents the requirement that regulation be limited to express advocacy by triggering BQC status based on subjective, context-based factors that do not limit regulation to funds earmarked or used for a regulable purpose. These broad definitions virtually guarantee that the Commission could find that any donation to NOM was given or used for "initiating, promoting, defeating or influencing in any way" a ballot question. At the least, this invites an intrusive investigation into an organization's inner workings that "constitutes a severe burden on political speech." *WRTL II*, 551 U.S. at 468 n.5.

Request #2: All documents which describe NOM's planned or actual activities in Maine to initiate or promote the people's veto referendum and which contain a *solicitation*.

NOM objects to Request #2 as overbroad, irrelevant, and immaterial, except as to those solicitations that expressly solicited contributions in support of the Maine referendum or in support of the StandforMarriageMaine.com Committee. When so limited, the response is NOM has no documents responsive to Request #2 other than those cited above.

Further, the use of the word "solicitation" in this request raises the issue of what constitutes a solicitation under the law. NOM objects to Request #2 because, as stated above, Maine statute 21-A M.R.S.A. § 1056-B is unconstitutionally vague and overbroad, sweeping in more speech for regulation than the First Amendment precedents of the U.S. Supreme Court permits.

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Request #3: Please provide an itemized list of "major donations" received by NOM on or after January 1, 2009, including the date of NOM's receipt or deposit of funds, the amount received, and the *donor*.

NOM objects to Request #3 as overbroad, irrelevant, and immaterial, except as to those contributors and contributions given in response to solicitations that expressly solicited contributions in support of the Maine referendum. When so limited, the response is that NOM has not received any "major donations" responsive to this request.

Further, NOM objects to Request #3 because the definition of "Major donations" provided by the Commission in its First Request states "money which NOM received on or after January 1, 2009 from a *major donor*. The use of the word "donor" in the request and the phrase "major donor" in the definition raises the same objections discussed above.

Request #4: Please identify those *donations* listed in response to Request #3 for which NOM solicited the *donor* by telephone or in person. Specify the representative of NOM who made the *solicitation*, the individual receiving the request, and whether the *solicitation* was made by telephone or in person.

NOM objects to Request #4 as overbroad, irrelevant, and immaterial, except as to those contributors of contributions given in response to solicitations that expressly solicited contributions in support of the Maine referendum. When so limited, the response is NOM has not received any major donations responsive to this request.

Further, NOM objects to Request #4 because the use of the words "donations," "donor," and "solicitation," in the request raises the same objections discussed above.

Request #5: Please identify those donations listed in response to Request #3 for which the donors reside in Maine or conduct their primary commercial, religious, or charitable activities in Maine.

NOM objects to Request #5 as overbroad, irrelevant, and immaterial, except as to those contributors and contributions given in response to solicitations that expressly solicited contributions in support of the Maine referendum. When so limited, the response is NOM has not received any "major donations" responsive to this request.

Further, NOM objects to Request #5 because the use of the words "donations" and "donors" in the request raises the same objections discussed above.

Mr. Jonathan Wayne
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Request #6: Please provide the total amounts received by NOM for each *solicitation* provided in response to Request #2.

NOM objects to Request #6 as overbroad, irrelevant, and immaterial, except as to those contributors and contributions given in response to solicitations that expressly solicited contributions in support of the Maine referendum. When so limited, the response is \$295.00; \$40.00 from the e-mail solicitation dated 7-17-09; and \$255.00 from the email solicitation dated 7-31-09.

Further, NOM objects to Request #6 because the use of the word “solicitation” in the request raises the same objections discussed above.

Request #7: Please identify all persons who have been involved in *soliciting* funds on behalf of NOM since January 1, 2009. Provide the name, telephone, physical location, and mailing address for these persons. Describe the person’s involvement in *solicitations* on behalf of NOM.

NOM objects to Request #7 as overbroad, irrelevant, and immaterial, except as to those persons that expressly solicited contributions in support of the Maine referendum. When so limited, the response is Brian Brown, 202-457-8060, 2029 K Street, NW, Suite 300, Washington, DC 20006. Mr. Brown expressly solicited contributions to NOM for the Maine People’s Veto on two occasions, cited in response to Request #6 above.

Further, NOM objects to Request #7 because the use of the words “soliciting” and “solicitations” raises the same objections discussed above.

First Amendment Privilege

In addition to the above objections, NOM asserts the First Amendment Privilege to Requests ##1-7. These requests encompass, among other things, NOM’s internal campaign communications concerning strategy and messaging, identities of contributors, and identities of persons soliciting on their behalf.

NOM objects to these requests as irrelevant, unduly burdensome, and privileged under the First Amendment. NOM’s internal campaign communications, including draft versions of communications never actually disseminated to the electorate at large, identities of contributors, and identities of persons soliciting on NOM’s behalf, are privileged under the First Amendment. Disclosure of internal communications, contributors, and solicitors would burden political association rights by discouraging individuals from participating as a board member or officer of NOM, contributing to NOM, or soliciting for NOM. *See, e.g., FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981) (denying enforcement of FEC subpoena). The

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documents being requested are irrelevant and/or immaterial to the issues in the investigation, and even if they are relevant and material, the First Amendment interests at stake outweigh the Commission's need for the information.

First, there is no question that participation in campaigns is a protected activity. *See San Francisco County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 827 (9th Cir. 1987) (“[T]he right of individuals to associate for the advancement of political beliefs’ is fundamental.”) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). Compelled disclosure of internal campaign information can deter that participation. *See Buckley*, 424 U.S. at 68 (“It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute.”); *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 407, 414 (D. Kan. 2009) (Holding that disclosure of “trade associations’ internal communications and evaluations of their members’ positions on contested political issues” might reasonably “interfere with the core of the associations’ activities by inducing members to withdraw . . . or dissuading others from joining”).³

Second, disclosure of internal campaign information can have a deterrent effect on the free flow of information within campaigns. Implicit in the right to associate with others to advance one’s shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private.⁴ Compelling disclosure of internal campaign communications

³In addition to discouraging individuals from joining campaigns, the threat that internal campaign communications will be disclosed in civil litigation can discourage organizations from joining the public debate over an initiative. *See Perry v. Schwarzenegger*, D.C. No. 3:09-cv-02292 (N.D. Cal. 2009), Letter Brief of Amicus Curiae American Civil Liberties Union of Northern California, at 2 (explaining that the ACLU’s internal campaign information had been subpoenaed in that case).

⁴This conclusion may be derived from cases that have recognized the right of associations to be free of infringements in their internal affairs. The freedom of members of a political association to deliberate internally over strategy and messaging is an incident of associational autonomy. This right has been recognized in *San Francisco County Democratic Central Committee v. Eu*, where the Ninth Circuit Court of Appeals said that “the right of association would be hollow without a corollary right of self-governance,” 826 F.2d at 827; “[T]here must be a right not only to form political associations but to organize and direct them in the way that will make them most effective,” *id.* (quoting *Ripon Soc’y Inc. v. Nat’l Republican Party*, 525 F.2d 567, 585 (D.C. Cir. 1975) (en banc) (internal quotation marks omitted)); *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986) (“The Party’s determination of the boundaries of its own association, and of the structure which best allows it to pursue its political

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can chill the exercise of these rights.

The specific test set out by the United States Supreme Court regarding associational privacy was articulated in *Bates v. Little Rock*, 361 U.S. 516 (1960), a case involving compulsory disclosure of local branches of the NAACP:

Decision in this case must finally turn, therefore, on whether the [State has] demonstrated so cogent an interest in obtaining and making public the membership lists of these organizations as to justify the substantial abridgment of associational freedom which such disclosures will affect. Where there is a significant encroachment upon personal liberty, the State may prevail only upon showing a subordinating interest which is compelling.

Id. at 524 (quoted in *Savola v. Webster*, 644 F.2d 743, 747 (8th Cir. 1981)).

It is well accepted that compelled disclosure of financial records or of the members of an association “can seriously infringe on privacy of association and belief guaranteed by the First Amendment.” *Buckley v. Valeo*, 424 U.S. 1, 64 (1976). Once it is established that such disclosure will have an adverse effect on NOM and its contributors’ freedom of association, the extent of the burden must be weighed against the interest of the State. *Id.* at 68.

“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” *NAACP v. Alabama*, 357 U.S. 449 (1958); see also *Roberts v. U.S. Jaycees*, 468 U.S. 609, 622 (1984) (“An individual’s freedom to speak, worship, and to petition the government for redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”). Thus, the “First Amendment protects political

goals, is protected by the Constitution”); and *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 N.21 (1989) (“By regulating the identity of the parties’ leaders, the challenged statutes may also color the parties’ message and interfere with the parties’ decisions as to the best means to promote that message.”). The government may not “interfere with a [political] party’s internal affairs” absent a “compelling state interest.” *Eu*, 489 U.S. at 231. Associations, no less than individuals, have the right to shape their own messages. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342, 348 (1995) (striking down a state law prohibiting anonymous pamphleteering in part because the First Amendment includes a speaker’s right to choose a manner of expression that she believes will be most persuasive); *AFL-CIO v. FEC*, 333 F.3d 168, 177 (D.C. Cir. 2003) (“[E]xtensive interference with political groups’ internal operations and with their effectiveness . . . implicate[s] significant First Amendment interests in associational autonomy.”).

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association as well as political expression,” *Buckley*, 424 U.S. at 15, and the “freedom to associate with others for the common advancement of political beliefs and ideas is . . . protected by the First and Fourteenth Amendments.” *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). “The right to associate for expressive purposes is not, however, absolute.” *Roberts*, 468 U.S. at 623. “Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Id.*

The government may abridge the freedom to associate directly, or “abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.” *NAACP*, 357 U.S. at 461. Thus, the government must justify its actions not only when it imposes direct limitations on associational rights, but also when governmental action “would have the practical effect ‘of discouraging’ the exercise of constitutionally protected rights.” *Id.* (quoting *Am. Commc’ns Ass’n v. Douds*, 339 U.S. 382, 393 (1950)). Such actions have a chilling effect on, and therefore infringe upon, the exercise of fundamental rights. Accordingly, they “must survive exacting scrutiny.” *Buckley*, 424 U.S. at 64.

The compelled disclosure of political associations can have just such a chilling effect. *See id.* (“[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”); *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C. Cir. 2003) (“The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation.”).⁵ Disclosures of political affiliations and activities that have a “deterrent effect on the exercise of First Amendment rights” are therefore subject to this same “exacting scrutiny.” *Buckley*, 424 U.S. at 64-65. A party who objects to a discovery request as an infringement of the party’s First Amendment rights is in essence asserting a First Amendment privilege. *See, e.g., Black Panther Party v. Smith*, 661 F.2d 1243, 1264 (D.C. Cir. 1981), *cert. granted and vacated as moot*, 458 U.S. 1118 (1982) (cited in *Perry v. Schwarzenegger*, ___ F.3d ___ (9th Cir., Dec. 11, 2009).

In this case, the disclosure of the internal communications of NOM, its contributors, and solicitors, can have a deterrent effect on participation in referendum activity. NOM limits its activities to the promotion and protection of traditional marriage as between one man and one

⁵*See, e.g., NAACP*, 357 U.S. at 461-64 (prohibiting the compelled disclosure of the NAACP membership lists); *Bates v. City of Little Rock*, 361 U.S. 516, 525-27 (1960) (same); *DeGregory v. Attorney Gen.*, 383 U.S. 825, 828-30 (1966) (prohibiting the state from compelling defendant to discuss his association with the Communist Party); *Buckley*, 424 U.S. at 63-74 (recognizing the burden but upholding the compelled disclosure of campaign contributor information under the “exacting scrutiny” standard).

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woman. This is a controversial issue that has resulted in targeting of NOM's contributors, officers, board members, volunteers, and others for threats, harassment, and intimidation by same-sex marriage activists.⁶ This has occurred in many states, including Maine. Examples of such activities in Maine include Marc Mutty, of StandforMarriageMaine.com, who received a threatening voice mail message that stated: "You will be dead. Maybe not today, not tomorrow. But soon you'll be dead." A.P., *Threats Made Against Gay Marriage Opponents*, Bangor Daily News, Nov. 9, 2009 (copy attached hereto). Also, Michael Heath, former leader of the Christian Civic League of Maine and its successor, The Maine Family Policy Council, and Rev. Bob Emrich, who worked with Mutty on the Yes on 1 campaign, also received threats. *Id.* Donald Mendell, a Maine school counselor, had a complaint filed against him for violation of ethics by the National Association of Social Workers because he appeared in a commercial and asked voters "to prevent homosexual marriage from being pushed on Maine students." A.P., *Counselor Wants Gay Marriage Complaint Thrown Out*, Bangor Daily News, Nov. 23, 2009 (copy attached hereto). Such threats and intimidation can certainly chill the associational rights of people wishing to be active in NOM. Compelled disclosure of contributors and solicitors for NOM will certainly make people think twice before participating in such activity again.

Thus, it may be concluded that disclosure of internal campaign communications and identities of contributors and solicitors can have such a deterrent effect on the exercise of protected activities. Since there is no compelling State interest in the identity of NOM's contributors making undesignated contributions, and solicitors who are not soliciting designated contributions, the State cannot justify the abridgment of the associational freedom of NOM, its contributors, and solicitors.

Conclusion

Since the Commission's First Request for documents brings into issue exactly those words and phrases being challenged in the Federal lawsuit, and that are subject to U.S. Supreme Court precedent on the Free Speech Clause of the First Amendment to the U.S. Constitution, NOM has submitted herewith its Petition for Stay of Investigation until such time as those issues have been finally decided.

⁶See, e.g., the Declaration of Scott F. Bieniek, in *John Doe #1 v. Reed*, U.S. District Court, W.D. Wash., Seattle Div., Case 3:09-cv-05456-BHS, filed 07/28/2009, and the Declaration of Sarah E. Troupis, in *ProtectMarriage.com v. Bowen*, U.S. District Court, E.D. Cal., Sacramento Div., Case 2:09-cv-00058-MCE, filed 01/12/2009, enclosed with this response, that provide numerous examples of threats, harassment, and intimidation by same sex marriage activists. Although these declarations were filed in out of state cases, it is important to note that threats, harassment, and intimidation may arise from anywhere in this age of modern communication.

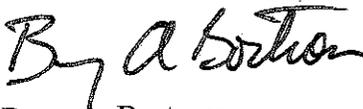
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Further, these issues will be finally decided by the Federal Courts, and Federal rulings will preempt any state court rulings on issues of interpreting and applying the U.S. Constitution. Thus, it would be an unnecessary dissipation of the Commission's and the State Courts' resources to address the same issues which will ultimately be decided by the Federal Courts.

Rather than address these same issues twice, it is reasonable for this Commission to stay its present investigation of these matters until the Federal Courts have reached a final decision on the constitutionality and/or proper interpretation of the statutory provisions regulating ballot question committees in the State of Maine.

Sincerely,

BOPP, COLESON & BOSTROM


Barry A. Bostrom

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11/9/09 | 687 comments

UPDATE

Threats made against gay marriage opponents in Maine

By The Associated Press



Michael Heath



AUGUSTA, Maine (AP) — Police are investigating a pair of threats against gay marriage opponents in Maine.

Marc Mutty from Stand for Marriage Maine says a threatening voice mail message was discovered Monday morning at campaign headquarters in which a female caller said, "You will be dead. Maybe not today, not tomorrow. But soon you'll be dead." Police in Yarmouth are investigating.

Augusta police say a separate voice mail threat targeted Michael Heath, former leader of the Christian Civic League of Maine and its successor, the Maine Family Policy Council. Heath wasn't actively involved in the gay marriage campaign, but he fought against a gay rights law in campaigns in 1998, 2000 and 2005.

The incident follows voters' decision last week to scuttle Maine's gay marriage law. Mutty says the campaign is taking the threats seriously.

While threats have been made before, Mutty said in a phone interview Monday, they were not direct as was the one left Monday.

"We've had threats and comments that were nasty and vulgar," Mutty said. "They've said, 'I hope you burn in hell,' and that sort of thing, but there was never any direct death threat alluded to."

He said that the campaign office would be shut down by the end of the week.

The Rev. Bob Emrich, who worked with Mutty on the Yes on 1 campaign, said he had received phone calls at his home in Palmyra throughout the campaign. He said they did seem to escalate as the election drew nearer.

"Sunday or Monday of last week I got a call from someone who said they hoped I died before Election Day so I wouldn't know the results," Emrich said Monday. "I've had people ask me where my next meeting was because they were going to make sure I didn't make it there."

He said he also has had people he does not know but who recognize him from press coverage stop him in store parking lots and restaurants to thank him for his work in support of traditional marriage.

Monday's incident isn't the only backlash after the vote, according to The Associated Press.

On Sunday, same-sex marriage supporters protested outside the Roman Catholic Cathedral of the Immaculate Conception in Portland. WGME-TV says people taped their mouths shut in the silent protest. Bishop Richard Malone had urged Catholics to reject gay marriage.

A similar peaceful protest that did not include taped mouths was held about 10 a.m. Sunday in Bangor, Greg Music of Bangor said Monday. About 40 people gathered at the Williams Park on Newbury Street, then walked about two blocks to stand across the street from St. John Catholic Church on York Street.

"We want people to know how much hurt was caused [by the repeal of same-sex marriage]," Music said.

The march was planned so people would see the group as they went into the church for 10:15 a.m. Mass.

The Roman Catholic Diocese of Portland gave more than \$550,000 to the campaign to repeal the law, including more than \$150,000 from its general treasury, between Oct. 1 and 23, the last reporting deadline before the election. The Portland diocese also collected more than \$200,000 for Stand for Marriage Maine from bishops and dioceses outside Maine.

"People felt we needed to be seen by the institution that gave so much money to the campaign," Music said.

Drivers honked their horns in support of the group, he said. Others told protesters they disagreed with the Catholic Church's stand and supported same-sex marriage, according to Music.

At least one man crossed the street to tell protesters why he had voted to repeal the same-sex marriage law.

"It was a very gentle kind of discussion and respectful," Music said.

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QUESTION 1

Counselor wants gay marriage complaint thrown out

By The Associated Press

NEWPORT, Maine — A Maine school counselor wants a state board to toss out a complaint filed against him because he appeared in a television commercial opposing gay marriage.

Donald Mendell of Palmyra, a counselor at Nokomis High School, calls the complaint against him "frivolous."

During the run-up to this month's gay marriage vote, Mendell appeared in a commercial and asked voters "to prevent homosexual marriage from being pushed on Maine students." The Nov. 3 vote overturned Maine's gay marriage law.

The Kennebec Journal says Ann Sullivan of Newport complained Mendell violated a code of ethics set by the National Association of Social Workers that says social workers should not publicly condone discrimination on the basis of sexual orientation.

Additional Material for Agenda Item #4

**(Perry v.
Schwarzenegger
decision)**

--- F.3d ---, 2009 WL 4795511 (C.A.9 (Cal.)), 09 Cal. Daily Op. Serv. 14,785
(Cite as: 2009 WL 4795511 (C.A.9 (Cal.)))

Only the Westlaw citation is currently available.

United States Court of Appeals,
Ninth Circuit.
Kristin M. PERRY; Sandra B. Stier; Paul T. Katami;
Jeffrey J. Zarrillo, Plaintiffs-Appellees,
and
City and County of San Francisco, Plaintiff-intervenor,
v.
Arnold SCHWARZENEGGER, in his official capacity
as Governor of California; Edmund G. Brown, Jr., in his
official capacity as Attorney General of California;
Mark B. Horton in his official capacity as Director of
the California Department of Public Health & State
Registrar of Vital Statistics; Linette Scott, in her official
capacity as Deputy Director of Health Information &
Strategic Planning for the California Department of
Public Health; Patrick O'Connell, in his official capacity
as Clerk-Recorder for the County of Alameda; Dean C.
Logan, in his official capacity as
Registrar-Recorder/County Clerk for the County of Los
Angeles, Defendants,
and
Dennis Hollingsworth; Gail J. Knight; Martin F.
Gutierrez; Hak-Shing William Tam; Mark A. Jansson;
Protectmarriage.Com-Yes On 8, A Project Of California
Renewal, Defendant-intervenors-Appellants.
Kristin M. Perry; Sandra B. Stier; Paul T. Katami;
Jeffrey J. Zarrillo, Plaintiffs-Appellees,
and
Our Family Coalition; Lavender Seniors of the East
Bay; Parents, Families, and Friends of Lesbians and
Gays, City and County of San Francisco,
Plaintiff-intervenors-Appellees,
v.
Arnold Schwarzenegger; Edmund G. Brown, Jr.; Mark
B. Horton; Linette Scott; Patrick O'Connell; Dean C.
Logan, Defendants,

and

Dennis Hollingsworth; Gail J. Knight; Martin F.
Gutierrez; Hak-Shing William Tam; Mark A. Jansson;
Protectmarriage.Com-Yes On 8, a Project of California
Renewal, Defendant-intervenors-Appellants.
Nos. 09-17241, 09-17551.

Argued and Submitted Dec. 1, 2009.
Filed Dec. 11, 2009.

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Jeff Flint.

--- F.3d ----, 2009 WL 4795511 (C.A.9 (Cal.)), 09 Cal. Daily Op. Serv. 14,785
(Cite as: 2009 WL 4795511 (C.A.9 (Cal.)))

Appeal from the United States District Court for the Northern District of California, Vaughn R. Walker, Chief District Judge, Presiding. D.C. No. 3:09-cv-02292-VRW.

Before KIM McLANE WARDLAW, RAYMOND C. FISHER and MARSHA S. BERZON, Circuit Judges.

OPINION

RAYMOND C. FISHER, Circuit Judge:

*1 Proposition 8 amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California. Two same-sex couples filed this action in the district court alleging that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The official proponents of Proposition 8 (“Proponents”) intervened to defend the suit. Plaintiffs served a request for production of documents on Proponents, seeking, among other things, production of Proponents’ internal campaign communications relating to campaign strategy and advertising. Proponents objected to disclosure of the documents as barred by the First Amendment. In two orders, the district court rejected Proponents’ claim of First Amendment privilege. Proponents appealed both orders. We granted Proponents’ motion for stay pending appeal.

We have the authority to hear these appeals either under the collateral order doctrine or through the exercise of our mandamus jurisdiction. We reverse. The freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First Amendment. Where, as here, discovery would have the practical effect of discouraging the exercise of First Amendment associational rights, the party seeking

discovery must demonstrate a need for the information sufficiently compelling to outweigh the impact on those rights. Plaintiffs have not on the existing record carried that burden in this case. We therefore reverse and remand.

I. BACKGROUND

In November 2008, California voters approved Proposition 8, an initiative measure providing that “[o]nly marriage between a man and a woman is valid or recognized in California.” Cal. Const. art. I, § 7.5. The California Supreme Court has upheld Proposition 8 against several state constitutional challenges. *Strauss v. Horton*, 207 P.3d 48, 63-64 (Cal.2009). Plaintiffs, two same-sex couples prohibited from marrying, filed this 42 U.S.C. § 1983 action alleging “that Prop. 8, which denies gay and lesbian individuals the right to marry civilly and enter into the same officially sanctioned family relationship with their loved ones as heterosexual individuals, is unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution.” Compl. ¶¶ 5, 7. They alleged among other things that “[t]he disadvantage Prop. 8 imposes on gays and lesbians is the result of disapproval or animus against a politically unpopular group.” *Id.* ¶ 43. Defendants are a number of state officials responsible for the enforcement of Proposition 8, including the Governor and the Attorney General. *Id.* ¶¶ 13-19. Plaintiffs seek declaratory and injunctive relief. *Id.* ¶ 8.

After the Attorney General declined to defend the constitutionality of Proposition 8, the district court granted a motion by Proponents—the official proponents of Proposition 8 and the official Proposition 8 campaign committee—to intervene as defendants.

*2 Plaintiffs served requests for production of documents

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on Proponents under Federal Rule of Civil Procedure 34. Plaintiffs' eighth request sought: to redact.

All versions of any documents that constitute communications referring to Proposition 8, between you and any third party, including, without limitation, members of the public or the media.

The parties understand this request as encompassing, among other things, Proponents' internal campaign communications concerning strategy and messaging.

Proponents objected to the request as irrelevant, privileged under the First Amendment and unduly burdensome and filed a motion for a protective order. They argued that their internal campaign communications, including draft versions of communications never actually disseminated to the electorate at large, were privileged under the First Amendment. They offered evidence that the disclosure of internal strategy documents would burden political association rights by discouraging individuals from participating in initiative campaigns and by muting the exchange of ideas within those campaigns. They asserted that the documents plaintiffs sought were irrelevant to the issues in this case, and even if they were relevant, the First Amendment interests at stake outweighed plaintiffs' need for the information.

Plaintiffs opposed the motion for protective order. They argued that their request was reasonably calculated to lead to the discovery of admissible evidence concerning the purpose of Proposition 8, as well as evidence concerning the rationality and strength of Proponents' purported state interests for Proposition 8. They disputed Proponents' contention that any of the documents requested were privileged other than with respect to the names of rank-and-file members of the campaign, which they agreed

In an October 1, 2009 order, the district court granted in part and denied in part Proponents' motion for a protective order. The court denied Proponents' claims of privilege.^{FN1} The court also determined that plaintiffs' request was "reasonably calculated to lead to the discovery of admissible evidence" regarding voter intent, the purpose of Proposition 8 and whether Proposition 8 advances a legitimate governmental interest. The court said that "communications between proponents and political consultants or campaign managers, even about messages contemplated but not actually disseminated, could fairly readily lead to admissible evidence illuminating the messages disseminated to voters."^{FN2}

FN1. The district court also observed that Proponents had failed to produce a privilege log required by Federal Rule of Civil Procedure 26(b)(5)(A)(ii). We agree that some form of a privilege log is required and reject Proponents' contention that producing any privilege log would impose an unconstitutional burden.

FN2. The court indicated that plaintiffs' request was

appropriate to the extent it calls for (1) communications by and among proponents and their agents (at a minimum, Schubert Flint Public Affairs) concerning campaign strategy and (2) communications by and among proponents and their agents concerning messages to be conveyed to voters, ... without regard to whether the messages were actually disseminated or merely contemplated. In addition, communications by and among

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proponents with those who assumed a directorial or managerial role in the Prop 8 campaign, like political consultants or ProtectMarriage.com's treasurer and executive committee, among others, would appear likely to lead to discovery of admissible evidence.

Following the court's October 1 order, Proponents submitted a sample of documents potentially responsive to plaintiffs' document request for *in camera* review, asserting that the documents were both irrelevant and privileged. In a November 11, 2009 order following that review, the district court again rejected Proponents' argument that their internal campaign communications were privileged under the First Amendment:

Proponents have not ... identified any way in which the ... privilege could protect the disclosure of campaign communications or the identities of high ranking members of the campaign.... If the ... privilege identified by proponents protects anything, it is the identities of rank-and-file volunteers and similarly situated individuals.

*3 Applying the usual discovery standards of Federal Rule of Civil Procedure 26, the court determined that documents falling into the following categories were reasonably likely to lead to the discovery of admissible evidence: documents relating to "messages or themes conveyed to voters through advertising or direct messaging," documents dealing "directly with advertising or messaging strategy and themes" and documents discussing voters' "potential reactions" to campaign messages. The court ordered production of 21 of the 60 documents submitted for review.

Proponents appealed from the October 1 and November

11 orders. We granted Proponents' motion for a stay pending appeal. We have jurisdiction and we reverse and remand.

II. JURISDICTION

Proponents contend that we have jurisdiction on two bases. First, they assert that the district court's orders are appealable under the collateral order doctrine. Second, they have petitioned for issuance of a writ of mandamus.

While this appeal was pending, the Supreme Court decided *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. ---- (Dec. 8, 2009), holding that discovery orders concerning the attorney-client privilege are not appealable under the collateral order doctrine. After *Mohawk*, it is a close question whether the collateral order doctrine applies to discovery orders addressing the First Amendment privilege, and one we ultimately need not decide. On balance, we are inclined to believe that the First Amendment privilege is distinguishable from the attorney-client privilege and that we may have jurisdiction under the collateral order doctrine in this case. But if we do not have collateral order jurisdiction, we would have, and would exercise, our mandamus jurisdiction. We have repeatedly exercised our mandamus authority to address important questions of first impression concerning the scope of a privilege. As this case falls within that class of extraordinary cases, mandamus would establish a basis of our jurisdiction if there is no collateral order appeal available after *Mohawk*.

A. Collateral Order Doctrine

We have jurisdiction to review "final decisions of the district courts." 28 U.S.C. § 1291. Under the collateral

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order doctrine, a litigant may appeal “from a narrow class of decisions that do not terminate the litigation, but must, in the interest of ‘achieving a healthy legal system,’ nonetheless be treated as ‘final.’” *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867 (1994) (quoting *Cobbledick v. United States*, 309 U.S. 323, 326 (1940)). To be immediately appealable, a collateral decision “must conclusively determine the disputed question, resolve an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment.” *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468 (1978).

The first prong is easily satisfied in this case. Taken together, the October 1 and November 11 discovery orders conclusively determined the scope of the First Amendment privilege. The district court concluded that the privilege does not extend to internal campaign communications and that it is limited to the disclosure of identities of rank-and-file members and other similarly situated individuals. Furthermore, in the November 11 order, the district court conclusively determined that Proponents were required to produce 21 documents that, according to the court, were not privileged. *See United States v. Griffin*, 440 F.3d 1138, 1141 (9th Cir.2006) (“[T]he district court’s order ‘conclusively determine[s] the disputed question’ whether the government is entitled to read the communications between Griffin and his wife for which the [marital communications] privilege had been claimed.”).

*4 The second prong is also satisfied. The overall scope of the First Amendment privilege is a question of law that is entirely separate from the merits of the litigation. In theory, the application of the privilege to plaintiffs’ specific discovery requests has some overlap with merits-related issues, such as whether plaintiffs’ substantive claims are governed by strict scrutiny or rational basis review and whether plaintiffs may rely on

certain types of evidence to prove that Proposition 8 was enacted for an improper purpose. We need not, and do not, delve into those questions in this appeal, however. We assume without deciding that the district court’s rulings on those questions are correct. There is, therefore, no “overlap” between the issues we must decide in this appeal and the “factual and legal issues of the underlying dispute.” *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529 (1988).

It is the third prong that poses the most difficult question. Under *Mohawk*, the third prong turns on whether rulings on First Amendment privilege are, as a class, effectively reviewable on appeal from final judgment—i.e., “whether delaying review until the entry of final judgment ‘would imperil a substantial public interest’ or ‘some particular value of a high order.’” *Mohawk*, 558 U.S. at ----, slip op. 6 (quoting *Will v. Hallock*, 546 U.S. 345, 352-53 (2006)). In *Mohawk*, the Court concluded that this prong was not satisfied with respect to the class of rulings addressing invocation of the attorney-client privilege during discovery. This was so because the typical ruling on the attorney-client privilege will involve only “the routine application of settled legal principles.” *Id.* at 8. Denying immediate appellate review would have no “discernible chill” because “deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel.” *Id.* There being no discernible harm to the public interest, the remaining harm from an erroneous ruling (the harm to the individual litigant of having confidential communications disclosed) could be adequately, if imperfectly, remedied by review after final judgment: “Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial in which the protected material and its fruits are excluded from evidence.” *Id.*

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Some of *Mohawk's* reasoning carries over to the First Amendment privilege. There are, however, several reasons the class of rulings involving the First Amendment privilege differs in ways that matter to a collateral order appeal analysis from those involving the attorney-client privilege. First, this case concerns a privilege of constitutional dimensions. The right at issue here—freedom of political association—is of a high order. The constitutional nature of the right is not dispositive of the collateral order inquiry, *see, e.g., Flanagan v. United States*, 465 U.S. 259, 267-68 (1984), but it factors into our analysis. Second, the public interest associated with this class of cases is of greater magnitude than that in *Mohawk*. Compelled disclosures concerning protected First Amendment political associations have a profound chilling effect on the exercise of political rights. *See, e.g., Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557 (1963) (underscoring the substantial “deterrent and ‘chilling’ effect on the free exercise of constitutionally enshrined rights of free speech, expression, and association” resulting from compelled disclosure of political associations). Third, unlike the attorney-client privilege, the First Amendment privilege is rarely invoked. Collateral review of the First Amendment privilege, therefore, does not implicate significant “institutional costs.” *Mohawk*, 558 U.S. ----, slip op. at 11. *Cf. id.* (“Permitting parties to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals.”). Finally, we observe that *Mohawk* expressly reserved whether the collateral order doctrine applies in connection with other privileges. *See id.* at 12 n.4.

*5 In light of these considerations, whether *Mohawk* should be extended to the First Amendment privilege presents a close question. The distinctions between the First Amendment privilege and the attorney-client privilege—a constitutional basis, a heightened public interest, rarity of invocation and a long recognized chilling

effect—are not insubstantial. We are therefore inclined to conclude that we have jurisdiction under the collateral order doctrine. Given that this is a close question, however, we recognize that if we do not have collateral order jurisdiction, we then could—and would—rely on our authority to hear this exceptionally important appeal under the mandamus authority, for reasons we now explain.

B. Mandamus

In the event that we do not have jurisdiction under the collateral order doctrine, we would have authority to grant the remedy of mandamus. *See* 28 U.S.C. § 1651(a); *Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380 (2004); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1296-97 (9th Cir.1984).

“The writ of mandamus is an ‘extraordinary’ remedy limited to ‘extraordinary’ causes.” *Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Court*, 408 F.3d 1142, 1146 (9th Cir.2005) (quoting *Cheney*, 542 U.S. at 380). In *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir.1977), we established five guidelines to determine whether mandamus is appropriate in a given case: (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression. *Id.* at 654-55. “The factors serve as guidelines, a point of departure for our analysis of the propriety of mandamus relief.” *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1491 (9th Cir.1989). “Not every factor need be present at once.” *Burlington*, 408 F.3d at 1146. “However, the absence of

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the third factor, clear error, is dispositive.” *Id.*

Mandamus is appropriate to review discovery orders “when particularly important interests are at stake.” 16 C. Wright, A. Miller, & E. Cooper, *Federal Practice and Procedure* § 3935.3 (2d ed.2009) (hereinafter Wright & Miller). Although “the courts of appeals cannot afford to become involved with the daily details of discovery,” we may rely on mandamus to resolve “new questions that otherwise might elude appellate review” or “to protect important or clear claims of privilege.” *Id.*; see *Mohawk*, 558 U.S. ----, slip op. 9 (“[L]itigants confronted with a particularly injurious or novel privilege ruling have several potential avenues of review apart from collateral order appeal... [A] party may petition the court of appeals for a writ of mandamus.”). In *Schlagenhauf v. Holder*, 379 U.S. 104 (1964), for example, the Supreme Court relied on mandamus to answer the novel question whether Federal Rule of Civil Procedure 35 authorized the physical and mental examination of a defendant. “The opinion affords strong support for the use of supervisory or advisory mandamus to review a discovery question that raises a novel and important question of power to compel discovery, or that reflects substantial uncertainty and confusion in the district courts.” Wright & Miller § 3935.3.

*6 Consistent with *Schlagenhauf*, we have exercised mandamus jurisdiction to review discovery orders raising particularly important questions of first impression, especially when called upon to define the scope of an important privilege. In *Admiral Insurance*, for example, we granted the mandamus petition to resolve “a significant issue of first impression concerning the proper scope of the attorney-client privilege.” 881 F.2d at 1488. *Taiwan v. United States District Court*, 128 F.3d 712 (9th Cir.1997), likewise involved review of another issue of first impression—the scope of testimonial immunity under the Taiwan Relations Act. *Id.* at 714. Finally, in *Foley*, we

exercised our mandamus authority to address an “important issue of first impression” in a context similar to that here—whether legislators can be deposed to determine their subjective motives for enacting a law challenged as violative of the First Amendment. 747 F.2d at 1296.

Here, too, we are asked to address an important issue of first impression—the scope of the First Amendment privilege against compelled disclosure of internal campaign communications. Considering the *Bauman* factors, we conclude that this is an extraordinary case in which mandamus review is warranted.

If no collateral order appeal is available, the first factor would indisputably be present: “A discovery order ... is interlocutory and non-appealable” under 28 U.S.C. §§ 1291, 1292(a)(1) and 1292(b). *Foley*, 747 F.2d at 1297; see also *id.* (“Mandamus review has been held to be appropriate for discovery matters which otherwise would be reviewable only on direct appeal after resolution on the merits.”). In *Admiral Insurance*, for example, we held that the first *Bauman* factor was satisfied because “the petitioner lacks an alternative avenue for relief.” 881 F.2d at 1488.

The second factor also supports mandamus. A post-judgment appeal would not provide an effective remedy, as “no such review could prevent the damage that [Proponents] allege they will suffer or afford effective relief therefrom.” *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1302 (9th Cir.1982); see *Star Editorial, Inc. v. U.S. Dist. Court*, 7 F.3d 856, 859 (9th Cir.1993) (“[I]f the district court erred in compelling disclosure, any damage the [newspaper] suffered would not be correctable on appeal.”); *Admiral Ins.*, 881 F.2d at 1491 (holding that the second factor was satisfied in view of “the irreparable harm a party likely will suffer if erroneously required to

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disclose privileged materials or communications”). One injury to Proponents’ First Amendment rights is the disclosure itself. Regardless of whether they prevail at trial, this injury will not be remediable on appeal. *See In re Cement Antitrust Litig.*, 688 F.2d at 1302 (“[A] post-judgment reversal on appeal could not provide a remedy for those injuries.”). If Proponents prevail at trial, vindication of their rights will be not merely delayed but also entirely precluded. *See id.* (“Moreover, whatever collateral injuries petitioners suffer will have been incurred even if they prevail fully at trial and thus have no right to appeal from the final judgment.”).

*7 Under the second factor, we also consider the substantial costs imposed on the public interest. The district court applied an unduly narrow conception of First Amendment privilege. Under that interpretation, associations that support or oppose initiatives face the risk that they will be compelled to disclose their internal campaign communications in civil discovery. This risk applies not only to the official proponents of initiatives and referendums, but also to the myriad social, economic, religious and political organizations that publicly support or oppose ballot measures. The potential chilling effect on political participation and debate is therefore substantial, even if the district court’s error were eventually corrected on appeal from final judgment. In this sense, our concerns in this case mirror those we articulated in *Foley*, where the district court denied the city’s motion for a protective order to prevent plaintiffs from deposing city officials about their reasons for passing a zoning ordinance. Absent swift appellate review, we explained, “legislators could be deposed in every case where the governmental interest in a regulation is challenged.” 747 F.2d at 1296. More concerning still is the possibility that if Proponents ultimately prevail in the district court, there would be no appeal *at all* of the court’s construction of the First Amendment privilege. Declining to exercise our mandamus jurisdiction in this case, therefore, “ ‘would imperil a substantial public interest’ or ‘some particular

value of a high order.’ ” *Mohawk*, 558 U.S. at ----, slip op. at 6 (quoting *Will*, 546 U.S. at 352-53).

The third factor, clear error, is also met. As discussed below, we are firmly convinced that the district court erred by limiting the First Amendment privilege to “the identities of rank-and-file volunteers and similarly situated individuals” and affording no greater protection to Proponents’ internal communications than the generous relevance standard of Federal Rule of Civil Procedure 26. *See In re Cement Antitrust Litig.*, 688 F.2d at 1306-07 (“[W]hen we are firmly convinced that a district court has erred in deciding a question of law, we may hold that the district court’s ruling is ‘clearly erroneous as a matter of law as that term is used in mandamus analysis.’ ”) (quoting *Bauman*, 557 F.2d at 660). “[Plaintiffs’] need for information is only one facet of the problem.” *Cheney*, 542 U.S. at 385. A political campaign’s communications and activities “encompass a vastly wider range of sensitive material” protected by the First Amendment than would be true in the normal discovery context. *Id.* at 381; *see Foley*, 747 F.2d at 1298-99. Thus, “[a]n important factor weighing in the opposite direction is the burden imposed by the discovery orders. This is not a routine discovery dispute.” *Cheney*, 542 U.S. at 385.

Finally, the fifth factor weighs in favor of exercise of our supervisory mandamus authority: we are faced with the need to resolve a significant question of first impression. *See, e.g., Schlagenhauf*, 379 U.S. at 110-11 (finding mandamus jurisdiction appropriate where there was an issue of first impression concerning the district court’s application of Federal Rule of Civil Procedure 35 in a new context); *Foley*, 747 F.2d at 1296. As these cases—and the very existence of the fifth *Bauman* factor, whether the issue presented is one of first impression—illustrate, the necessary “clear error” factor does not require that the issue be one as to which there is established precedent. Moreover, this novel and important question may

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repeatedly evade review because of the collateral nature of the discovery ruling. *See In re Cement Antitrust Litig.*, 688 F.2d at 1304-05 (“[A]n important question of first impression will evade review unless it is considered under our supervisory mandamus authority. Moreover, that question may continue to evade review in other cases as well.”); *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524-26 (D.C.Cir.1975) (exercising mandamus jurisdiction to correct an error in a discovery order).

*8 In sum, assuming that collateral order review is not available, this is an important case for exercise of our mandamus jurisdiction: adequate, alternative means of review are unavailable; the harm to Proponents and to the public interest is not correctable on appeal; the district court's discovery order is clearly erroneous; and it presents a significant issue of first impression that may repeatedly evade review. As in *Foley*, a closely analogous case, these factors “remove this case from the category of ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise.” *Cheney*, 542 U.S. at 381. Accordingly, we hold that the exercise of our supervisory mandamus authority is appropriate.

III. FIRST AMENDMENT PRIVILEGE^{FN3}

FN3. We review de novo a determination of privilege. *United States v. Ruehle*, 583 F.3d 600, 606 (9th Cir.2009) (attorney-client privilege).

A.

“Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association.” *NAACP v. Alabama*, 357 U.S. 449, 460 (1958); *see also Roberts v. U.S. Jaycees*,

468 U.S. 609, 622 (1984) (“An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed.”). Thus, “[t]he First Amendment protects political association as well as political expression,” *Buckley v. Valeo*, 424 U.S. 1, 15 (1976), and the “freedom to associate with others for the common advancement of political beliefs and ideas is ... protected by the First and Fourteenth Amendments.” *Kusper v. Pontikes*, 414 U.S. 51, 56-57 (1973). “The right to associate for expressive purposes is not, however, absolute.” *Roberts*, 468 U.S. at 623. “Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms.” *Id.*

The government may abridge the freedom to associate directly, or “abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action.” *NAACP*, 357 U.S. at 461. Thus, the government must justify its actions not only when it imposes direct limitations on associational rights, but also when governmental action “would have the practical effect ‘of discouraging’ the exercise of constitutionally protected political rights.” *Id.* (quoting *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 393 (1950)). Such actions have a chilling effect on, and therefore infringe, the exercise of fundamental rights. Accordingly, they “must survive exacting scrutiny.” *Buckley*, 424 U.S. at 64.

The compelled disclosure of political associations can have just such a chilling effect. *See id.* (“[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment.”); *AFL-CIO v. FEC*, 333 F.3d 168, 175 (D.C.Cir.2003) (“The Supreme Court

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has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation.”).^{FN4} Disclosures of political affiliations and activities that have a “deterrent effect on the exercise of First Amendment rights” are therefore subject to this same “exacting scrutiny.” *Buckley*, 424 U.S. at 64-65. A party who objects to a discovery request as an infringement of the party's First Amendment rights is in essence asserting a First Amendment *privilege*. See, e.g., *Black Panther Party v. Smith*, 661 F.2d 1243, 1264 (D.C.Cir.1981), *cert. granted and vacated as moot*, 458 U.S. 1118 (1982); see also Fed.R.Civ.P. 26(b)(1) (“Parties may obtain discovery regarding any *nonprivileged* matter that is relevant to any party's claim or defense [.]”) (emphasis added).^{FN5}

FN4. See, e.g., *NAACP*, 357 U.S. at 461-64 (prohibiting the compelled disclosure of the NAACP membership lists); *Bates v. City of Little Rock*, 361 U.S. 516, 525-27 (1960) (same); *DeGregory v. Attorney Gen.*, 383 U.S. 825, 828-30 (1966) (prohibiting the state from compelling defendant to discuss his association with the Communist Party); *Buckley*, 424 U.S. at 63-74 (recognizing the burden but upholding the compelled disclosure of campaign contributor information under the “exacting scrutiny” standard).

FN5. This privilege applies to discovery orders “even if all of the litigants are private entities.” *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir.1987); see also *Adolph Coors Co. v. Wallace*, 570 F.Supp. 202, 208 (N.D.Cal.1983) (“[A] private litigant is entitled to as much solicitude to its constitutional guarantees of freedom of associational privacy when challenged by another private party, as when challenged by a government body.”) (footnote

omitted).

*9 In this circuit, a claim of First Amendment privilege is subject to a two-part framework. The party asserting the privilege “must demonstrate ... a ‘prima facie showing of arguable first amendment infringement.’” *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349-50 (9th Cir.1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir.1983) (per curiam)). “This *prima facie* showing requires appellants to demonstrate that enforcement of the [discovery requests] will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or ‘chilling’ of, the members' associational rights.” *Id.* at 350.^{FN6} “If appellants can make the necessary *prima facie* showing, the evidentiary burden will then shift to the government ... [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest ... [and] the ‘least restrictive means’ of obtaining the desired information.” *Id.*; see also *Dole v. Serv. Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1459-61 (9th Cir.1991) (same). More specifically, the second step of the analysis is meant to make discovery that impacts First Amendment associational rights available only after careful consideration of the need for such discovery, but not necessarily to preclude it. The question is therefore whether the party seeking the discovery “has demonstrated an interest in obtaining the disclosures it seeks ... which is sufficient to justify the deterrent effect ... on the free exercise ... of [the] constitutionally protected right of association.” *NAACP*, 357 U.S. at 463.

FN6. A protective order limiting the dissemination of disclosed associational information may mitigate the chilling effect and could weigh against a showing of infringement. The mere assurance that private information will

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be narrowly rather than broadly disseminated, however, is not dispositive. *See Dole v. Serv. Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1461 (9th Cir.1991) (“[N]either letter suggests that it is the *unlimited* nature of the disclosure of the Union minutes that underlies the member's unwillingness to attend future meetings. Rather, both letters exhibit a concern for the consequences that would flow from *any* disclosure of the contents of the minutes to the government or any government official.”).

To implement this standard, we “balance the burdens imposed on individuals and associations against the significance of the ... interest in disclosure,” *AFL-CIO v. FEC*, 333 F.3d at 176, to determine whether the “interest in disclosure ... outweighs the harm,” *Buckley*, 424 U.S. at 72. This balancing may take into account, for example, the importance of the litigation, *see Dole*, 950 F.2d at 1461 (“[T]here is little doubt that the ... purpose of investigating possible criminal violations ... serves a compelling governmental interest[.]”); the centrality of the information sought to the issues in the case, *see NAACP*, 357 U.S. at 464-65; *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir.1987); *Black Panther Party*, 661 F.2d at 1268; the existence of less intrusive means of obtaining the information, *see Grandbouche*, 825 F.2d at 1466; *Black Panther Party*, 661 F.2d at 1268; and the substantiality of the First Amendment interests at stake, *see Buckley*, 424 U.S. at 71 (weighing the seriousness of “the threat to the exercise of First Amendment rights” against the substantiality of the state's interest); *Black Panther Party*, 661 F.2d at 1267 (“The argument in favor of upholding the claim of privilege will ordinarily grow stronger as the danger to rights of expression and association increases.”).^{FN7} Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation—a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request

must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable.

FN7. Courts generally apply some combination of these factors. *See, e.g., In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 407, 412-15 (D.Kan.2009); *Adolph Coors Co.*, 570 F.Supp. at 208.

*10 Before we apply these rules to the discovery at issue on this appeal, we address the district court's apparent conclusion that the First Amendment privilege, as a categorical matter, does not apply to the disclosure of internal campaign communications.

B.

The district court concluded that “[i]f the ... privilege identified by proponents protects anything, it is the identities of rank-and-file volunteers and similarly situated individuals,” and said that “Proponents have not ... identified a way in which the ... privilege could protect the disclosure of campaign communications.” The First Amendment privilege, however, has never been limited to the disclosure of identities of rank-and-file members. *See, e.g., DeGregory*, 383 U.S. at 828 (applying the privilege to “the views expressed and ideas advocated” at political party meetings); *Dole*, 950 F.2d at 1459 (applying privilege to statements “of a highly sensitive and political character” made at union membership meetings). The existence of a prima facie case turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities. *See NAACP*, 357 U.S. at 460-61; *Brock*, 860 F.2d at 349-50. We have little difficulty concluding that disclosure of internal campaign

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communications *can* have such an effect on the exercise of protected activities.

First, the disclosure of such information can have a deterrent effect on participation in campaigns. There is no question that participation in campaigns is a protected activity. See *San Francisco County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 827 (9th Cir.1987) (“[T]he right of individuals to associate for the advancement of political beliefs’ is fundamental.”) (quoting *Williams v. Rhodes*, 393 U.S. 23, 30 (1968)). Compelled disclosure of internal campaign information can deter that participation. See *Buckley*, 424 U.S. at 68 (“It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute.”); *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 407, 414 (D.Kan.2009) (holding that disclosure of “trade associations’ internal communications and evaluations about advocacy of their members’ positions on contested political issues” might reasonably “interfere with the core of the associations’ activities by inducing members to withdraw ... or dissuading others from joining”).^{FN8}

FN8. In addition to discouraging individuals from joining campaigns, the threat that internal campaign communications will be disclosed in civil litigation can discourage organizations from joining the public debate over an initiative. See Letter brief of Amicus Curiae American Civil Liberties Union of Northern California, at 2 (explaining that the ACLU’s internal campaign information has been subpoenaed in this case).

Second, disclosure of internal campaign information can have a deterrent effect on the free flow of information within campaigns. Implicit in the right to associate with others to advance one’s shared political beliefs is the right

to exchange ideas and formulate strategy and messages, and to do so in private.^{FN9} Compelling disclosure of internal campaign communications can chill the exercise of these rights.

FN9. We derive this conclusion from cases that have recognized the right of associations to be free of infringements in their internal affairs. The freedom of members of a political association to deliberate internally over strategy and messaging is an incident of associational autonomy. We recognized this right in *San Francisco County Democratic Central Committee v. Eu*, where we said that “the right of association would be hollow without a corollary right of self-governance.” 826 F.2d at 827. “[T]here must be a right not only to form political associations but to organize and direct them in the way that will make them most effective.” *Id.* (quoting *Ripon Soc’y Inc. v. Nat’l Republican Party*, 525 F.2d 567, 585 (D.C.Cir.1975) (en banc)) (internal quotation marks omitted); see also *Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224 (1986) (“The Party’s determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution.”); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 n.21 (1989) (“By regulating the identity of the parties’ leaders, the challenged statutes may also color the parties’ message and interfere with the parties’ decisions as to the best means to promote that message.”). The government may not “interfere with a [political] party’s internal affairs” absent a “compelling state interest.” *Eu*, 489 U.S. at 231. Associations, no less than individuals, have the right to shape their own messages. See *McIntyre v. Ohio Elections Comm’n*, 514 U.S. 334, 342, 348 (1995) (striking

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down a state law prohibiting anonymous pamphleteering in part because the First Amendment includes a speaker's right to choose a manner of expression that she believes will be most persuasive); *AFL-CIO v. FEC*, 333 F.3d at 177 (“[E]xtensive interference with political groups' internal operations and with their effectiveness ... implicate[s] significant First Amendment interests in associational autonomy.”).

*11 In identifying two ways in which compelled disclosure of internal campaign communications can deter protected activities-by chilling participation and by muting the internal exchange of ideas-we do not suggest this is an exhaustive list. Disclosures of the sort challenged here could chill protected activities in other ways as well.^{FN10} We cite these two examples for purposes of illustration only, and because they are relevant to the assertions of privilege made by Proponents here.

FN10. See *AFL-CIO v. FEC*, 333 F.3d at 176-77 (“[T]he AFL-CIO and DNC affidavits charge that disclosing detailed descriptions of training programs, member mobilization campaigns, polling data, and state-by-state strategies will directly frustrate the organizations' ability to pursue their political goals effectively by revealing to their opponents ‘activities, strategies and tactics [that] we have pursued in subsequent elections and will likely follow in the future.’”); *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. at 415 (“Disclosure of the associations' evaluations of possible lobbying and legislative strategy certainly could be used by plaintiffs to gain an unfair advantage over defendants in the political arena.”).

C.

In this case, Proponents have made “a *prima facie* showing of arguable first amendment infringement” “ by demonstrating “consequences which objectively suggest an impact on, or ‘chilling’ of, ... associational rights.” *Brock*, 860 F.2d at 349-50 (quoting *Trader's State Bank*, 695 F.2d at 1133). Mark Jansson, a member of ProtectMarriage.com's ad hoc executive committee, stated:

I can unequivocally state that if the personal, non-public communications I have had regarding this ballot initiative-communications that expressed my personal political and moral views-are ordered to be disclosed through discovery in this matter, it will drastically alter how I communicate in the future....

I will be less willing to engage in such communications knowing that my private thoughts on how to petition the government and my private political and moral views may be disclosed simply because of my involvement in a ballot initiative campaign. I also would have to seriously consider whether to even become an official proponent again.

Although the Jansson declaration is lacking in particularity, it is consistent with the self-evident conclusion that important First Amendment interests are implicated by the plaintiffs' discovery request. The declaration creates a reasonable inference that disclosure would have the practical effects of discouraging political association and inhibiting internal campaign communications that are essential to effective association and expression. See *Dole*, 950 F.2d at 1459-61 (holding that the union satisfied its *prima facie* burden by submitting the declarations of two members who said they would no longer participate in union membership meetings if the disclosure of the minutes of the meetings were

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permitted). A protective order limiting dissemination of this information will ameliorate but cannot eliminate these threatened harms. Proponents have therefore made a prima facie showing that disclosure could have a chilling effect on protected activities. The chilling effect is not as serious as that involved in cases such as *NAACP v. Alabama*, 357 U.S. 449 (1958), but neither is it insubstantial. See *AFL-CIO v. FEC*, 333 F.3d at 176 (“Although we agree that the evidence in this case is far less compelling than the evidence presented in cases involving groups whose members had been subjected to violence, economic reprisals, and police or private harassment, that difference speaks to the strength of the First Amendment interests asserted, not to their existence.”) (citations omitted).

*12 The Proponents having made a prima facie showing of infringement, the evidentiary burden shifts to the plaintiffs to demonstrate a sufficiently compelling need for the discovery to counterbalance that infringement. The district court did not apply this heightened relevance test. Rather, having determined that the First Amendment privilege does not apply to the disclosure of internal campaign communications except to protect the identities of rank-and-file members and volunteers, the court applied the Rule 26 standard of reasonably calculated to lead to the discovery of admissible evidence. We agree with the district court that plaintiffs' request satisfies the Rule 26 standard. Plaintiffs' request is reasonably calculated to lead to the discovery of admissible evidence on the issues of voter intent and the existence of a legitimate state interest.^{FN11} Such discovery might help to identify messages actually conveyed to voters. See *Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471 (1982) (considering statements made by proponents during an initiative campaign to determine whether voters adopted an initiative for an improper purpose). It also might lead to the discovery of evidence showing that Proponents' campaign messages were designed to “appeal[] to the ... biases of the voters.” *Id.* at 463 (quoting *Seattle Sch. Dist. No. 1 v. Washington*, 473 F.Supp. 996, 1009

(W.D.Wash.1979)). It might reasonably lead to the discovery of evidence undermining or impeaching Proponents' claims that Proposition 8 serves legitimate state interests. See *Romer v. Evans*, 517 U.S. 620, 635 (1996) (“[A] law must bear a rational relationship to a legitimate governmental purpose.”).

FN11. The parties dispute whether plaintiffs' substantive claims are governed by strict scrutiny or rational basis review. They also disagree about what types of evidence may be relied upon to demonstrate voter intent. These issues are beyond the scope of this appeal. We assume without deciding that the district court has decided these questions correctly.

The Rule 26 standard, however, fails to give sufficient weight to the First Amendment interests at stake. Given Proponents' prima facie showing of infringement, we must apply the First Amendment's more demanding heightened relevance standard. Doing so, we cannot agree that plaintiffs have “demonstrated an interest in obtaining the disclosures ... which is sufficient to justify the deterrent effect ... on the free exercise ... of [the] constitutionally protected right of association.” *NAACP*, 357 U.S. at 463. Plaintiffs can obtain much of the information they seek from other sources, without intruding on protected activities. Proponents have already agreed to produce all communications actually disseminated to voters, including “communications targeted to discrete voter groups.”^{FN12} Whether campaign messages were designed to appeal to voters' animosity toward gays and lesbians is a question that appears to be susceptible to expert testimony, without intruding into private aspects of the campaign. Whether Proposition 8 bears a rational relationship to a legitimate state interest is primarily an objective inquiry.

FN12. Our holding is limited to private, internal

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campaign communications concerning the formulation of campaign strategy and messages. Proponents cannot avoid disclosure of broadly disseminated materials by stamping them “private” and claiming an “associational bond” with large swaths of the electorate. *See In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. at 415 (“The court wishes to make clear that defendants have met their prima facie burden only with respect to the associations’ internal evaluations of lobbying and legislation, strategic planning related to advocacy of their members’ positions, and actual lobbying on behalf of members. Any other communications to, from, or within trade associations are not deemed protected under the First Amendment associational privilege.”).

In sum, although the First Amendment interests at stake here are not as weighty as in some of the membership list cases, and harms can be mitigated in part by entry of a protective order, Proponents have shown that discovery would likely have a chilling effect on political association and the formulation of political expression. On the other side of the ledger, plaintiffs have shown that the information they seek is reasonably calculated to lead to the discovery of admissible evidence, but, bearing in mind other sources of information, they have not shown a sufficiently compelling need for the information. The information plaintiffs seek is attenuated from the issue of voter intent, while the intrusion on First Amendment interests is substantial.^{FN13}

FN13. We do not foreclose the possibility that some of Proponents’ internal campaign communications may be discoverable. We are not presented here with a carefully tailored request for the production of highly relevant information that is unavailable from other

sources that do not implicate First Amendment associational interests. We express no opinion as to whether any particular request would override the First Amendment interests at stake.

*13 Accordingly, we reverse the October 1 and November 11 orders. Proponents have made a prima facie showing of infringement. Plaintiffs have not shown the requisite need for the information sought. The district court shall enter a protective order consistent with this opinion.

REVERSED AND REMANDED. Each party shall bear its costs on appeal.

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