

Agenda

Item #6



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: February 12, 2010

Re: Petitions to Vacate or Modify Investigative Subpoenas

For purposes of the Commission's investigation of the National Organization for Marriage, on January 28, 2010 the Commission staff served two subpoenas on counsel for the National Organization for Marriage (NOM) and for its director, Brian Brown. The scope of the subpoenas exceeded the Commission's first investigative request. Under the state's Administrative Procedure Act, a witness served with an agency subpoena may request that the agency vacate or modify the subpoena on certain grounds.

Yesterday, the Commission received written petitions from NOM, Brian Brown, and the Stand for Marriage Maine political action committee to vacate or modify the subpoenas.

I have attached copies of

- the petitions to vacate or modify the subpoenas
- the two subpoenas served on NOM's counsel
- two court decisions on which the petitioners rely.

The Commission's Counsel and I will circulate to you supplementary materials next week.

Thank you.

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Senior Associates
RICHARD E. COLESON¹
BARRY A. BOSTROM¹

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February 11, 2010

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

**PETITION TO VACATE OR MODIFY WITNESS SUBPOENA AND SUBPOENA TO
PRODUCE RECORDS FOR NATIONAL ORGANIZATION FOR MARRIAGE
BY NATIONAL ORGANIZATION FOR MARRIAGE**

Dear Mr. Wayne:

Pursuant to 5 M.R.S.A. 9060(1)(C) and Rule 45(e)(2)(B) of the Maine Rules of Civil Procedure, and by and through counsel, Respondent the National Organization for Marriage ("NOM") objects to the subpoena issued to NOM by the Commission on or about January 28, 2010, and in support of its objections, represents as follows:

Witness Subpoena Item 4. The Commission's subpoena requires the deponent representing NOM "to testify and give evidence . . . [regarding] 4) Revenue received by NOM in 2009, and the sources of that revenue, including without limitation the identity of any donors to NOM who contributed \$5,000 or more in 2009, and communications between NOM and these donors."

Objections: NOM objects to the subpoena as overbroad, irrelevant, and immaterial. The

Mr. Jonathan Wayne
Commission on Governmental Ethics
February 11, 2010
Page 2

Commission's investigation concerns whether NOM must register as a ballot question committee under 21-A M.R.S.A. § 1056-B based on its activities supporting the people's veto referendum on same-sex marriage. As such, information about donations unrelated to the people's veto referendum are not relevant. In addition, NOM objects to the subpoena on the grounds that the information requested is privileged under the First Amendment. *See Perry v. Schwarzenegger*, 2010 WL 26439 (9th Cir. Jan. 4, 2010); *United States v. Cromley*, 890 F.2d 539, 543-44 (1st Cir. 1989). Disclosure of personal donor information could subject NOM and its donors to harassment and other negative consequences, which could have a chilling effect on NOM's donations and activities.

Witness Subpoena Item 7. The Commission's subpoena further requires the deponent representing NOM "to testify and give evidence . . . [regarding] 7)NOM's activities in Maine in 2009, including without limitation NOM's contributions to Stand for Marriage Maine PAC, and expenditures made by NOM or by Stand for Marriage Maine PAC relating to the people's veto referendum on same-sex marriage."

Objections: NOM objects to the subpoena on the grounds that the information requested is privileged under the First Amendment. *See Perry v. Schwarzenegger*, 2010 WL 26439 (9th Cir. Jan. 4, 2010); *United States v. Cromley*, 890 F.2d 539, 543-44 (1st Cir. 1989). Disclosure of internal campaign communications could have a chilling effect on NOM's to engage in effective campaign advocacy.

Document Subpoena Item 1. The Commission's subpoena further requires the deponent representing NOM "to bring with you and produce at the time and place aforesaid, and to permit inspection and copying of . . . 1) All documents reflecting communications between NOM and Stand for Marriage Maine PAC concerning raising funds for the people's veto referendum campaign on same-sex marriage in Maine in 2009, including without limitation correspondence, memoranda, email and budgets."

Objections: NOM objects to the subpoena as overbroad, irrelevant, and immaterial. The Commission's investigation concerns whether NOM must register as a ballot question committee under 21-A M.R.S.A. § 1056-B based on its activities supporting the people's veto referendum on same-sex marriage. Since 21-A M.R.S.A. § 1056-B explicitly disallows requiring registration as a ballot question committee based on contributions to a PAC (including in-kind contributions) information about communications between NOM and Stand for Marriage Maine PAC are not relevant. In addition, NOM objects to the subpoena on the grounds that the information requested is privileged under the First Amendment. *See Perry v. Schwarzenegger*, 2010 WL 26439 (9th Cir. Jan. 4, 2010); *United States v. Cromley*, 890 F.2d 539, 543-44 (1st Cir. 1989). Disclosure of internal campaign communications could have a chilling effect on NOM's to engage in effective

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Commission on Governmental Ethics
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Page 3

campaign advocacy.

Document Subpoena Item 3. The Commission's subpoena further requires the deponent representing NOM "to bring with you and produce at the time and place aforesaid, and to permit inspection and copying of . . . 3) All documents reflecting the source, amount and date of any donation of funds to NOM totaling \$5,000 or more from any single source in 2009, including without limitation bookkeeping records, databases, donor lists, reports or statements of on-line donations, and any documents maintained or prepared for purposes of any filings with the Internal Revenue Service."

Objections: NOM objects to the subpoena as overbroad, irrelevant, and immaterial. The Commission's investigation concerns whether NOM must register as a ballot question committee under 21-A M.R.S.A. § 1056-B based on its activities supporting the people's veto referendum on same-sex marriage. As such, information about donations unrelated to the Maine people's veto referendum are not relevant. In addition, NOM objects to the subpoena on the grounds that the information requested is privileged under the First Amendment. *See Perry v. Schwarzenegger*, 2010 WL 26439 (9th Cir. Jan. 4, 2010); *United States v. Cromley*, 890 F.2d 539, 543-44 (1st Cir. 1989). Disclosure of personal donor information could subject NOM and its donors to harassment and other negative consequences, which could have a chilling effect on NOM's donations and activities.

Document Subpoena Item 4. The Commission's subpoena further requires the deponent representing NOM "to bring with you and produce at the time and place aforesaid, and to permit inspection and copying of . . . 4) All documents listing, aggregating or otherwise summarizing NOM's revenue and expenses in 2009, including without limitation financial statements (whether audited or unaudited), and statements of income and expenses."

Objections: NOM objects to the subpoena as overbroad, irrelevant, and immaterial. The Commission's investigation concerns whether NOM must register as a ballot question committee under 21-A M.R.S.A. § 1056-B based on its activities supporting the people's veto referendum on same-sex marriage. As such, information about NOM's activities unrelated to the Maine people's veto referendum are not relevant.

Document Subpoena Item 5. The Commission's subpoena further requires the deponent representing NOM "to bring with you and produce at the time and place aforesaid, and to permit inspection and copying of . . . 5) All budgets, statements of projected revenue and expenses, and other documents reflecting the planned allocation of financial resources to support NOM's activities in 2009, including revisions made at any point during the year."

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Commission on Governmental Ethics
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Objections: NOM objects to the subpoena as overbroad, irrelevant, and immaterial. The Commission's investigation concerns whether NOM must register as a ballot question committee under 21-A M.R.S.A. § 1056-B based on its activities supporting the people's veto referendum on same-sex marriage. As such, information about NOM's activities unrelated to the Maine people's veto referendum are not relevant.

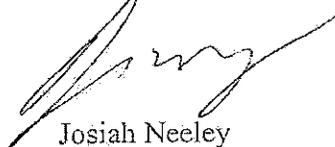
Document Subpoena Item 6. The Commission's subpoena further requires the deponent representing NOM "to bring with you and produce at the time and place aforesaid, and to permit inspection and copying of . . . 6) Minutes of any Board meetings reflecting any discussions concerning the raising of funds and allocation of financial resources for NOM's activities in 2009."

Objections: NOM objects to the subpoena as overbroad, irrelevant, and immaterial. The Commission's investigation concerns whether NOM must register as a ballot question committee under 21-A M.R.S.A. § 1056-B based on its activities supporting the people's veto referendum on same-sex marriage. As such, information about NOM's activities unrelated to the Maine people's veto referendum are not relevant.

Additional Objections to Subpoena as a Whole: In addition, NOM objects to the witness subpoena and subpoena to produce records insofar as it requires documents to be produced and a deposition to take place at 9:30 a.m. on February 18, 2010, in Augusta, Maine. Issues regarding the relevance and privilege of the instant subpoena are currently before the United States District Court for the District of Maine, and a decision is expected shortly. The decision of the District Court may effect the nature of NOM's objections regarding production and testimony. To avoid inconvenient and duplicative proceedings, the deposition should not be held until these issues have been fully resolved.

Sincerely,

BOPP, COLESON & BOSTROM



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**PETITION TO VACATE OR MODIFY WITNESS SUBPOENA AND SUBPOENA TO
PRODUCE RECORDS FOR NATIONAL ORGANIZATION FOR MARRIAGE
BY STAND FOR MARRIAGE MAINE PAC**

Dear Mr. Wayne:

Pursuant to 5 M.R.S.A. 9060(1)(C) and Rule 45(c)(2)(B) of the Maine Rules of Civil Procedure, and by and through counsel, Respondent the Stand for Marriage Maine PAC objects to the subpoena issued to the National Organization for Marriage ("NOM") by the Commission on or about January 28, 2010, and in support of its objections, represents as follows:

Witness Subpoena Item 7. The Commission's subpoena further requires the deponent representing NOM "to testify and give evidence . . . [regarding] 7)NOM's activities in Maine in 2009, including without limitation NOM's contributions to Stand for Marriage Maine PAC, and expenditures made by NOM or by Stand for Marriage Maine PAC relating to the people's veto referendum on same-sex marriage."

Objections: Stand for Marriage Maine PAC objects to the subpoena as overbroad,

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Commission on Governmental Ethics
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irrelevant, and immaterial. The Commission's investigation concerns whether NOM must register as a ballot question committee under 21-A M.R.S.A. § 1056-B based on its activities supporting the people's veto referendum on same-sex marriage. As such, information about Stand for Marriage Maine PAC's activities are not relevant, and in any event may be obtained via Stand for Marriage Maine PAC's required disclosure reports. In addition, Stand for Marriage Maine PAC objects to the subpoena on the grounds that the information requested is privileged under the First Amendment. *See Perry v. Schwarzenegger*, 2010 WL 26439 (9th Cir. Jan. 4, 2010); *United States v. Cromley*, 890 F.2d 539, 543-44 (1st Cir. 1989). To the extent the subpoena requires the disclosure of materials relating to Stand for Marriage Maine PAC beyond what it is required to disclose as a PAC under Maine law, including internal campaign communications, this disclosure could have a chilling effect on Stand for Marriage Maine PAC's ability to engage in effective campaign advocacy.

Document Subpoena Item 1. The Commission's subpoena further requires the deponent representing NOM "to bring with you and produce at the time and place aforesaid, and to permit inspection and copying of . . . 1) All documents reflecting communications between NOM and Stand for Marriage Maine PAC concerning raising funds for the people's veto referendum campaign on same-sex marriage in Maine in 2009, including without limitation correspondence, memoranda, email and budgets."

Objections: Stand for Marriage Maine PAC objects to the subpoena as overbroad, irrelevant, and immaterial. The Commission's investigation concerns whether NOM must register as a ballot question committee under 21-A M.R.S.A. § 1056-B based on its activities supporting the people's veto referendum on same-sex marriage. As such, information about Stand for Marriage Maine PAC's activities are not relevant, and in any event may be obtained via Stand for Marriage Maine PAC's required disclosure reports. In addition, Stand for Marriage Maine PAC objects to the subpoena on the grounds that the information requested is privileged under the First Amendment. *See Perry v. Schwarzenegger*, 2010 WL 26439 (9th Cir. Jan. 4, 2010); *United States v. Cromley*, 890 F.2d 539, 543-44 (1st Cir. 1989). To the extent the subpoena requires the disclosure of materials relating to Stand for Marriage Maine PAC beyond what it is required to disclose as a PAC under Maine law, including internal campaign communications, this disclosure could have a chilling effect on Stand for Marriage Maine PAC's ability to engage in effective campaign advocacy.

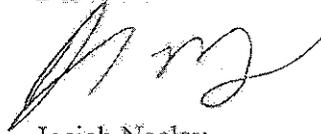
Additional Objections to Subpoena as a Whole: In addition, Stand for Marriage Maine PAC objects to the witness subpoena and subpoena to produce records insofar as it requires documents to be produced and a deposition to take place at 9:30 a.m. on February 18, 2010, in Augusta, Maine. Issues regarding the relevance and privilege of the instant subpoena are currently before the United States District Court for the District of Maine, and a decision is

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Sincerely,

BOPP, COLESON & BOSTROM

A handwritten signature in black ink, appearing to read 'J. Neeley', written over the firm name.

Josiah Neeley

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**PETITION TO VACATE OR MODIFY WITNESS SUBPOENA AND SUBPOENA TO
PRODUCE RECORDS FOR BRIAN BROWN
BY NATIONAL ORGANIZATION FOR MARRIAGE**

Dear Mr. Wayne:

Pursuant to 5 M.R.S.A. 9060(1)(C) and Rule 45(c)(2)(B) of the Maine Rules of Civil Procedure, and by and through counsel, Respondent the National Organization for Marriage ("NOM") objects to the subpoena issued to Brian Brown by the Commission on or about January 28, 2010, and in support of its objections, represents as follows:

Document Subpoena Item 1. The Commission's subpoena further requires the deponent "to bring with you and produce at the time and place aforesaid, and to permit inspection and copying of . . . 1) All documents reflecting projected, planned or actual expenditures by the National Organization for Marriage and the Stand for Marriage Maine PAC relating to the same-sex marriage people's veto referendum.

Objections: NOM objects to the subpoena as overbroad, irrelevant, and immaterial. The

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February 11, 2010
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Commission's investigation concerns whether NOM must register as a ballot question committee under 21-A M.R.S.A. § 1056-B based on its activities supporting the people's veto referendum on same-sex marriage. As such, any projected or planned activities of the National Organization for Marriage are not relevant. In addition, NOM objects to the subpoena on the grounds that the information requested is privileged under the First Amendment. *See Perry v. Schwarzenegger*, 2010 WL 26439 (9th Cir. Jan. 4, 2010); *United States v. Cromley*, 890 F.2d 539, 543-44 (1st Cir. 1989). Disclosure of personal donor information could subject NOM and its donors to harassment and other negative consequences, which could have a chilling effect on NOM's donations and activities.

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**PETITION TO VACATE OR MODIFY WITNESS SUBPOENA AND SUBPOENA TO
PRODUCE RECORDS FOR BRIAN BROWN
BY BRIAN BROWN**

Dear Mr. Wayne:

Pursuant to § M.R.S.A. 9060(1)(C) and Rule 45(c)(2)(B) of the Maine Rules of Civil Procedure, and by and through counsel, Respondent Brian Brown objects to the subpoena issued to Brian Brown by the Commission on or about January 28, 2010, and in support of its objections, represents as follows:

Witness Subpoena Item 1. The Commission's subpoena requires Brian Brown "to testify and give evidence . . . [regarding] 1) Plans and decisions made by the Executive Committee of Stand for Marriage Maine PAC regarding the raising and spending of funds on the same-sex marriage people's veto referendum in 2009."

Objections: Brian Brown objects to the subpoena as overbroad, irrelevant, and immaterial. The Commission's investigation concerns whether NOM must register as a ballot question

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Commission on Governmental Ethics
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committee under 21-A M.R.S.A. § 1056-B based on its activities supporting the people's veto referendum on same-sex marriage. As such, information about Stand for Marriage Maine PAC's activities are not relevant, and in any event may be obtained via Stand for Marriage Maine PAC's required disclosure reports. In addition, Mr. Brown objects to the subpoena on the grounds that the information requested is privileged under the First Amendment. *See Perry v. Schwarzenegger*, 2010 WL 26439 (9th Cir. Jan. 4, 2010); *United States v. Cromley*, 890 F.2d 539, 543-44 (1st Cir. 1989). Disclosure of personal donor information could subject NOM and its donors to harassment and other negative consequences, which could have a chilling effect on NOM's donations and activities.

Document Subpoena Item 1. The Commission's subpoena further requires the deponent "to bring with you and produce at the time and place aforesaid, and to permit inspection and copying of . . . 1) All documents reflecting projected, planned or actual expenditures by the National Organization for Marriage and the Stand for Marriage Maine PAC relating to the same-sex marriage people's veto referendum.

Objections: Brian Brown objects to the subpoena as overbroad, irrelevant, and immaterial. The Commission's investigation concerns whether NOM must register as a ballot question committee under 21-A M.R.S.A. § 1056-B based on its activities supporting the people's veto referendum on same-sex marriage. As such, information about Stand for Marriage Maine PAC's activities are not relevant, and in any event may be obtained via Stand for Marriage Maine PAC's required disclosure reports. Likewise, any projected or planned activities of the National Organization for Marriage are not relevant. In addition, Mr. Brown objects to the subpoena on the grounds that the information requested is privileged under the First Amendment. *See Perry v. Schwarzenegger*, 2010 WL 26439 (9th Cir. Jan. 4, 2010); *United States v. Cromley*, 890 F.2d 539, 543-44 (1st Cir. 1989). Disclosure of personal donor information could subject NOM and its donors to harassment and other negative consequences, which could have a chilling effect on NOM's donations and activities. Similarly, to the extent the subpoena requires the disclosure of materials relating to Stand for Marriage Maine PAC beyond what it is required to disclose as a PAC under Maine law, this disclosure could subject Stand for Marriage Maine PAC and its donors to harassment and other negative consequences, which could have a chilling effect on Stand for Marriage Maine PAC's donations and activities.

Additional Objections to Subpoena as a Whole: In addition, Brian Brown objects to the witness subpoena and subpoena to produce records insofar as it requires documents to be produced and a deposition to take place at 9:30 a.m. on February 18, 2010, in Augusta, Maine. Issues regarding the relevance and privilege of the instant subpoena are currently before the United States District Court for the District of Maine, and a decision is expected shortly. The decision of the District Court may effect the nature of Mr. Brown's objections regarding

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February 11, 2010
Page 2

register as a ballot question committee under 21-A M.R.S.A. § 1056-B based on its activities supporting the people's veto referendum on same-sex marriage. As such, information about Stand for Marriage Maine PAC's activities are not relevant, and in any event may be obtained via Stand for Marriage Maine PAC's required disclosure reports. In addition, Stand for Marriage Maine PAC objects to the subpoena on the grounds that the information requested is privileged under the First Amendment. *See Perry v. Schwarzenegger*, 2010 WL 26439 (9th Cir. Jan. 4, 2010); *United States v. Cromley*, 890 F.2d 539, 543-44 (1st Cir. 1989). To the extent the subpoena requires the disclosure of materials relating to Stand for Marriage Maine PAC beyond what it is required to disclose as a PAC under Maine law, this disclosure could subject Stand for Marriage Maine PAC and its donors to harassment and other negative consequences, which could have a chilling effect on Stand for Marriage Maine PAC's donations and activities.

Document Subpoena Item 1. The Commission's subpoena further requires the deponent "to bring with you and produce at the time and place aforesaid, and to permit inspection and copying of . . . 1) All documents reflecting projected, planned or actual expenditures by the National Organization for Marriage and the Stand for Marriage Maine PAC relating to the same-sex marriage people's veto referendum.

Objections: Stand for Marriage Maine PAC objects to the subpoena as overbroad, irrelevant, and immaterial. The Commission's investigation concerns whether NOM must register as a ballot question committee under 21-A M.R.S.A. § 1056-B based on its activities supporting the people's veto referendum on same-sex marriage. As such, information about Stand for Marriage Maine PAC's activities are not relevant, and in any event may be obtained via Stand for Marriage Maine PAC's required disclosure reports. In addition, Stand for Marriage Maine PAC objects to the subpoena on the grounds that the information requested is privileged under the First Amendment. *See Perry v. Schwarzenegger*, 2010 WL 26439 (9th Cir. Jan. 4, 2010); *United States v. Cromley*, 890 F.2d 539, 543-44 (1st Cir. 1989). To the extent the subpoena requires the disclosure of materials relating to Stand for Marriage Maine PAC beyond what it is required to disclose as a PAC under Maine law, this disclosure could subject Stand for Marriage Maine PAC and its donors to harassment and other negative consequences, which could have a chilling effect on Stand for Marriage Maine PAC's donations and activities.

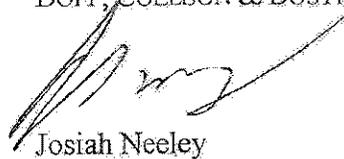
Additional Objections to Subpoena as a Whole: In addition, Stand for Marriage Maine PAC objects to the witness subpoena and subpoena to produce records insofar as it requires documents to be produced and a deposition to take place at 9:30 a.m. on February 18, 2010, in Augusta, Maine. Issues regarding the relevance and privilege of the instant subpoena are currently before the United States District Court for the District of Maine, and a decision is expected shortly. The decision of the District Court may effect the nature of Mr. Brown's

Mr. Jonathan Wayne
Commission on Governmental Ethics
February 11, 2010
Page 3

objections regarding production and testimony. To avoid inconvenient and duplicative proceedings, the deposition should not be held until these issues have been fully resolved.

Sincerely,

BOPP, COLESON & BOSTROM

A handwritten signature in black ink, appearing to read "Josiah Neeley", is written over the printed name. The signature is fluid and cursive, with a long horizontal stroke extending to the right.

Josiah Neeley

STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES

**In Re: National Organization)
For Marriage)
)
)**

**WITNESS SUBPOENA
and SUBPOENA
TO PRODUCE RECORDS**

To: National Organization for Marriage
20 Nassau Street, Suite 242
Princeton, NJ 08542

You are hereby ORDERED, pursuant to 5 M.R.S.A. §9060 and 21-A M.R.S.A. §1003, in the name of the Commission on Governmental Ethics and Election Practices of the State of Maine, to designate an officer, director, managing agent, or other person who consents to testify on behalf of the organization to appear at 9:30 a.m. on the 18th day of February, 2010 (or at such time as this matter may be continued) at the Commission's offices located on the second floor of the building at 45 Memorial Circle, Augusta, Maine, to testify and give evidence as part of the Commission's investigation, pursuant to 21-A M.R.S.A. §1003, concerning the following matters:

- 1) The establishment, mission and purpose of the National Organization for Marriage (hereafter "NOM"), and its affiliated organizations;
- 2) NOM's Board of Directors, officers, and employees, and their respective roles and responsibilities;
- 3) Fundraising methods, activities and practices utilized by NOM and its board members, officers, employees or contracted agents acting on NOM's behalf, in 2009;
- 4) Revenue received by NOM in 2009, and the sources of that revenue, including without limitation the identity of any donors to NOM who contributed \$5,000 or more in 2009, and communications between NOM and those donors;
- 5) Financial records and record keeping practices employed by NOM or by contracted agents on NOM's behalf, including without limitation methods of identifying or tracking donations to NOM made in response to different types of fundraising methods and solicitations;
- 6) NOM's activities nationally in 2009, and its planned and actual expenditures on those activities;

- 7) NOM's activities in Maine in 2009, including without limitation NOM's contributions to Stand For Marriage Maine PAC, and expenditures made by NOM or by Stand For Marriage Maine PAC relating to the people's veto referendum on same-sex marriage; and
- 8) Campaign finance reporting, tax filings, and other types of reporting to governmental agencies by or on behalf of NOM pertaining to its lobbying, fundraising or election campaign activities.

You are also commanded to bring with you and produce at the time and place aforesaid, and to permit inspection and copying of, the following designated things:

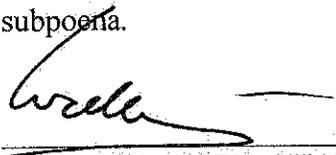
- 1) All documents reflecting communications between NOM and the Stand For Marriage Maine PAC concerning raising funds for the people's veto referendum campaign on same-sex marriage in Maine in 2009, including without limitation correspondence, memoranda, email and budgets;
- 2) All documents reflecting expenditures by NOM, other than NOM's contributions to Stand for Marriage Maine PAC, relating to the people's veto referendum campaign on same-sex marriage in Maine in 2009;
- 3) All documents reflecting the source, amount and date of any donations of funds to NOM totaling \$5,000 or more from any single source in 2009, including without limitation bookkeeping records, databases, donor lists, reports or statements of on-line donations, and any documents maintained or prepared for purposes of any filings with the Internal Revenue Service;
- 4) All documents listing, aggregating or otherwise summarizing NOM's revenue and expenses in 2009, including without limitation financial statements (whether audited or unaudited), and statements of income and expenses;
- 5) All budgets, statements of projected revenue and expenses, and other documents reflecting the planned allocation of financial resources to support NOM's activities in 2009, including revisions made at any point during the year; and
- 6) Minutes of any Board meetings reflecting any discussions concerning the raising of funds and allocation of financial resources for NOM's activities in 2009.

This subpoena is issued on behalf of the Commission on Governmental Ethics and Election Practices, pursuant to 21-A M.R.S.A. §1003(1) & (2), whose attorney is Phyllis Gardiner, Assistant Attorney General, Department of the Attorney General, 6 State House Station, Augusta, Maine 04333-0006. She may be contacted at (207) 626-8830.

NOTICE: A statement of your rights and duties pursuant to this subpoena is set forth in 5 M.R.S.A. § 9060(1)(C) and (D). If you object to the subpoena, you must petition the Commission to vacate or modify the subpoena within fourteen (14) days of the date that you are served with the subpoena. After such investigation as the Commission considers appropriate, it may grant the petition in whole or in part upon a finding that the testimony or the evidence whose production is required does not relate with reasonable directness to any manner in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive or has not been issued a reasonable period in advance of the time when the evidence is requested.

PLEASE TAKE NOTE that your failure to act in accordance with the commands of this subpoena may result in imposition of sanctions as provided by law. This subpoena shall continue in force and effect until such time as your testimony in this matter is completed or until you are released from the subpoena.

Dated: 1/28/10



WALTER MCKEE, CHAIRPERSON
Commission on Governmental Ethics
and Election Practices

STATE OF MAINE
COMMISSION ON GOVERNMENTAL ETHICS AND ELECTION PRACTICES

In Re: National Organization)
For Marriage)
)
)

WITNESS SUBPOENA
and SUBPOENA
TO PRODUCE RECORDS

To: Brian Brown
 20 Nassau Street, Suite 242
 Princeton, NJ 08542

You are hereby ORDERED, pursuant to 5 M.R.S.A. §9060 and 21-A M.R.S.A. §1003, in the name of the Commission on Governmental Ethics and Election Practices of the State of Maine, to appear at 9:30 a.m. on the 18th day of February, 2010 (or at such time as this matter may be continued) at the Commission's offices located on the second floor of the building at 45 Memorial Circle, Augusta, Maine, to testify and give evidence as part of the Commission's investigation, pursuant to 21-A M.R.S.A. §1003, concerning the following matters:

- 1) Plans and decisions made by the Executive Committee of Stand for Marriage Maine PAC regarding the raising and spending of funds on the same-sex marriage people's veto referendum in 2009.

You are also commanded to bring with you and produce at the time and place aforesaid, and to permit inspection and copying of, the following designated things:

- 1) All documents reflecting projected, planned or actual expenditures by the National Organization for Marriage and the Stand for Marriage Maine PAC relating to the same-sex marriage people's veto referendum campaign in Maine in 2009.

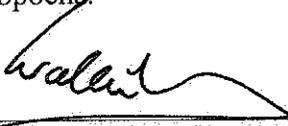
This subpoena is issued on behalf of the Commission on Governmental Ethics and Election Practices, pursuant to 21-A M.R.S.A. §1003(1) & (2), whose attorney is Phyllis Gardiner, Assistant Attorney General, Department of the Attorney General, 6 State House Station, Augusta, Maine 04333-0006. She may be contacted at (207) 626-8830.

NOTICE: A statement of your rights and duties pursuant to this subpoena is set forth in 5 M.R.S.A. § 9060(1)(C) and (D). If you object to the subpoena, you must petition the Commission to vacate or modify the subpoena within fourteen (14) days of the date that you are served with the subpoena. After such investigation as the Commission considers appropriate, it may grant the petition in whole or in part upon a finding that the testimony or the evidence whose production is required does not relate with reasonable directness to any manner in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive or

has not been issued a reasonable period in advance of the time when the evidence is requested.

PLEASE TAKE NOTE that your failure to act in accordance with the commands of this subpoena may result in imposition of sanctions as provided by law. This subpoena shall continue in force and effect until such time as your testimony in this matter is completed or until you are released from the subpoena.

Dated: 6/28/10



WALTER MCKEE, CHAIRPERSON
Commission on Governmental Ethics
and Election Practices

--- 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.

Andrew P. Pugno, Law Offices of Andrew P. Pugno,
Folsom, CA; Brian W. Raum and James A. Campbell,
Alliance Defense Fund, Scottsdale, AZ; Charles J. Cooper
(argued), David H. Thompson, Howard C. Nielson, Jr.,
Nicole J. Moss, Jesse Panuccio and Peter A. Patterson,
Cooper and Kirk, PLLC, Washington, D.C., for
Defendant-Intervenors-Appellants.

Theodore J. Boutrous, Jr. (argued), Rebecca Justice
Lazarus, Enrique A. Monagas, Gibson, Dunn & Crutcher
LLP, Los Angeles, CA; Theodore B. Olson, Matthew D.
McGill and Amir C. Tayrani, Gibson, Dunn & Crutcher
LLP, Washington, D.C., for Plaintiffs-Appellees.

Stephen V. Bomse, Orrick, Herrington & Sutcliffe LLP,
San Francisco, CA, Allan L. Schlosser and Elizabeth O.
Gill, ACLU Foundation of Northern California, for
Amicus Curiae American Civil Liberties Union of
Northern California.

Robert H. Tyler and Jennifer Lynn Monk, Advocates for
Faith and Freedom, Murrieta, CA, for Amici Curiae
Schubert Flint Public Affairs, Inc., Frank Schubert and
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

--- 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.)))

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

--- 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.)))

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.

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

II. JURISDICTION

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

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

--- 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.)))

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.*

--- 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.)))

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

--- 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.)))

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

--- 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.)))

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

--- 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.)))

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

--- 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.)))

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

-- 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.)))

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

--- 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.)))

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

--- 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.)))

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

--- 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.)))

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

--- 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.)))

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.

C.A.9 (Cal.),2009.

Perry v. Schwarzenegger

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

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**UNITED STATES OF AMERICA, Petitioner, Appellee, v. STEPHEN B. COMLEY,
Respondent, Appellant**

No. 89-1680

UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT

890 F.2d 539; 1989 U.S. App. LEXIS 17810

November 29, 1989

PRIOR HISTORY: [**1] Appeal from the United States District Court for the District of Massachusetts, Hon. Robert E. Keeton, U.S. District Judge.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant, the director of a non-profit safety group (director), sought review of the decision of the United States District Court for the District of Massachusetts, which held that the director was required to obey an administrative subpoena that was issued by appellee federal government.

OVERVIEW: The federal government was informed that the director of a non-profit safety organization that monitored nuclear safety had taped conversations with a government employee. The government asserted that it needed the taped conversations to ascertain whether confidential information had been disclosed and to protect the public health and safety. An administrative subpoena was issued, and the lower court enforced the subpoena. The court affirmed, holding that as long as the information sought was reasonably relevant, the role of the courts in restricting administrative subpoena's was very limited. Because the director did not produce firm evidence of bad faith, it was not the court's role to intrude into the government's investigative function. The court rejected the director's freedom of association challenge to the subpoena under the First Amendment because the subpoena was only seeking the tapes in the director's

possession and not the identities of those who were associated with the director. Additionally, even if the director had shown a violation of his freedom of association, the government had still shown a compelling need for the tapes because nuclear safety was at issue.

OUTCOME: The court affirmed the lower court's enforcement of an administrative subpoena.

CORE TERMS: subpoena, tape recordings, public health, conversations, prima facie, misconduct, disclosure, harassment, nuclear, restrictive alternative, authority to issue, implicate, discovery, compelling interest, bad faith, confidential, indefinite, enforcing, informants, campaign, proper purpose, investigating, implicated, issuance, vendetta, solid, administrative subpoena, subpoena issued, nuclear materials, new members

LexisNexis(R) Headnotes

Administrative Law > Agency Adjudication > General Overview

Administrative Law > Agency Investigations > Scope > Subpoenas

Administrative Law > Judicial Review > Reviewability > Jurisdiction & Venue

[HN1] Orders compelling testimony or production of

evidence in what may properly be regarded as independent proceedings are appealable without the requirement of a contempt adjudication. The rule is regularly applied in proceedings where evidence is sought by administrative agencies.

Administrative Law > Agency Investigations > Scope > Subpoenas

Administrative Law > Judicial Review > Standards of Review > General Overview

Business & Corporate Law > Agency Relationships > Agents Distinguished > General Agents

[HN2] In general, an agency subpoena is enforceable if it is for a proper purpose authorized by Congress, the information sought is relevant to that purpose and adequately described, and statutory procedures are followed in the subpoena's issuance. The role of a court in a subpoena enforcement proceeding is strictly limited to inquiring whether the above requirements have been met. Such proceedings are designed to be summary in nature. As long as the investigation is within the agency's authority, the subpoena is not too indefinite, and the information sought is reasonably relevant, the district court must enforce an administrative subpoena. Furthermore, the affidavits of government officials have been accepted as sufficient to make out a prima facie showing that these requirements are satisfied.

Civil Procedure > Pretrial Matters > Subpoenas

Energy & Utilities Law > Nuclear Power Industry > Atomic Energy Act

Energy & Utilities Law > Nuclear Power Industry > U.S. Nuclear Regulatory Commission

[HN3] Congress has vested the Nuclear Regulatory Commission (NRC) with the authority to issue subpoenas in conjunction with investigations that the NRC deems necessary to protect public health or to minimize danger to life or property in matters involving nuclear materials. 42 U.S.C.S. § 2201(c).

Energy & Utilities Law > Nuclear Power Industry > U.S. Nuclear Regulatory Commission

[HN4] A Nuclear Regulatory Commission (NRC) regulation requires Office of Investigation employees to keep NRC officers currently apprised of information received that pertains to public health and safety in matters involving nuclear materials. 10 C.F.R. § 1.27(f).

Administrative Law > Agency Investigations > Scope > Subpoenas

Civil Procedure > Pretrial Matters > Subpoenas

Energy & Utilities Law > Nuclear Power Industry > U.S. Nuclear Regulatory Commission

[HN5] If the Nuclear Regulatory Commission (NRC) makes a prima facie showing of proper purpose, the NRC then must show that the information sought by the subpoena is reasonably relevant to the purpose of the investigation and that the subpoena itself is not too indefinite.

Administrative Law > Agency Investigations > Scope > Subpoenas

[HN6] If an administrative subpoena is issued for an improper purpose, such as harassment, its enforcement constitutes an abuse of the court's process.

Administrative Law > Agency Investigations > Scope > Subpoenas

Administrative Law > Judicial Review > Standards of Review > General Overview

[HN7] In the absence of firm evidence of bad faith, it is not a court's role to intrude into the investigative agency's function.

Administrative Law > Agency Investigations > Scope > Subpoenas

[HN8] Except in extraordinary circumstances, discovery is improper in a summary subpoena enforcement proceeding.

Civil Procedure > Pretrial Matters > Subpoenas

Constitutional Law > Bill of Rights > Fundamental Freedoms > Freedom of Association

Constitutional Law > Bill of Rights > Fundamental Freedoms > Judicial & Legislative Restraints > Overbreadth & Vagueness

[HN9] Compelling a private organization to reveal the identities of its members where such disclosure will result in the harassment of existing members and the discouragement of new members can constitute a violation of the right to freedom of association. To establish such a violation, the target of a subpoena must make a prima facie showing of a first amendment infringement, typically, that enforcement of the disclosure requirement will result in harassment of

current members, a decline in new members, or other chilling of associational rights. Once such a showing is made, the burden then shifts to the government to show both a compelling need for the material sought and that there is no significantly less restrictive alternative for obtaining the information.

COUNSEL: Ernest C. Hadley, for Appellant.

Paul G. Levenson, Assistant United States Attorney, with whom Wayne A. Budd, United States Attorney, was on brief for Appellee.

JUDGES: Bownes, Breyer and Selya, Circuit Judges.

OPINION BY: BOWNES

OPINION

[*540] BOWNES, Circuit Judge

This is an appeal from an order of the district court enforcing an administrative subpoena served on appellant Stephen B. Comley by the Nuclear Regulatory Commission ("NRC" or "Commission"). The subpoena seeks tape recordings or transcripts prepared by Comley of telephone conversations between Comley and an NRC employee who is the subject of an NRC investigation. Comley challenges the Commission's authority to issue the subpoena and also contends that the subpoena violates his first amendment right to freedom of association. For the reasons discussed below, we affirm the district court's order enforcing the subpoena. [*541] I. BACKGROUND

In August, 1988, the NRC's Office of Inspector and Auditor ("OIA") received allegations that an employee in the NRC's Office of Investigations [**2] ("OI") had committed various acts of misconduct. The allegations were made by Douglas Ellison, a former employee at the Nine Mile Point nuclear power facility in Lycoming, New York. Ellison claimed, among other things, that the NRC employee had disclosed confidential NRC information to appellant Comley, a private citizen.

Ellison provided the OIA with a tape recording of two conversations that allegedly took place between the NRC employee and Comley. Administrative Judge Alan Rosenthal, who was placed in charge of the NRC's investigation, reviewed the tape and concluded from it that the NRC employee may have disclosed confidential

NRC information to Comley and may also have failed to disclose to other NRC officials relevant information that he had received from Comley. Based on Ellison's statement that Comley may have recorded as many as fifty conversations between himself and the employee, the Commission issued a subpoena *duces tecum* to Comley for tapes of conversations between himself and the employee, or transcripts of such conversations. Comley moved the Commission to quash the subpoena, but this motion was denied. After Comley gave notice of his refusal to comply with the [**3] subpoena, the United States petitioned for enforcement in federal district court. Following a hearing, the district court entered an order enforcing the NRC's subpoena. The court concluded that the subpoena was regular on its face, issued for valid purposes, and not violative of Comley's first amendment right to freedom of association. Comley now appeals that decision.¹

1 At oral argument, we raised several questions concerning our jurisdiction to consider Comley's appeal from the enforcement order. The questions focused on whether it was proper for Comley to appeal from the enforcement order or whether he could appeal only from a contempt adjudication. Further examination has persuaded us that jurisdiction does exist to consider an appeal from the enforcement order. [HN1] "Orders compelling testimony or production of evidence in what may properly be regarded as independent proceedings are appealable without the requirement of a contempt adjudication. This rule is regularly applied in proceedings where evidence is sought by administrative agencies." *Mount Sinai School of Medicine v. American Tobacco Co.*, 866 F.2d 552, 554 (2d Cir. 1989); *see also* 9 Moore's Federal Practice para. 110.13[2], at 157-58 (1989).

[**4] II. STANDARDS GOVERNING THE ENFORCEMENT OF SUBPOENAS

[HN2] In general, an agency subpoena is enforceable if it is for a proper purpose authorized by Congress, the information sought is relevant to that purpose and adequately described, and statutory procedures are followed in the subpoena's issuance. *See, e.g., United States v. Powell*, 379 U.S. 48, 57-58, 13 L. Ed. 2d 112, 85 S. Ct. 248 (1964); *United States v. Tivian Laboratories, Inc.*, 589 F.2d 49, 54 (1st Cir. 1978), *cert. denied*, 99 S.

Ct. 2884, 61 L. Ed. 2d 312, 442 U.S. 942 (1979). The role of a court in a subpoena enforcement proceeding is strictly limited to inquiring whether the above requirements have been met. "Such proceedings are designed to be summary in nature. As long as the investigation is within the agency's authority, the subpoena is not too indefinite, and the information sought is reasonably relevant, the district court must enforce an administrative subpoena." *EEOC v. Tempel Steel Co.*, 814 F.2d 482, 485 (7th Cir. 1987) (citations omitted); see also *FTC v. Monahan*, 832 F.2d 688, 689 (1st Cir. 1987), cert. denied, 485 U.S. 987, 108 S. Ct. 1289, 99 L. Ed. 2d 500 (1988); [**5] *United States v. Westinghouse Elec. Corp.*, 788 F.2d 164, 166 (3d Cir. 1986); *EEOC v. Maryland Cup Corp.*, 785 F.2d 471, 475-76 (4th Cir.), cert. denied, 479 U.S. 815, 93 L. Ed. 2d 26, 107 S. Ct. 68 (1986). Furthermore, the affidavits of government officials have been accepted as sufficient to make out a prima facie showing that these requirements are satisfied. See *United States v. Lawn Builders of New England, Inc.*, 856 F.2d 388, 391-92 (1st Cir. 1988); *Kerr v. United States*, 801 F.2d 1162, 1163-64 (9th Cir. 1986).

Measured against these general standards, the NRC has made an adequate [*542] prima facie showing to support enforcement of its subpoena. First, the Commission has articulated a proper purpose for issuing the subpoena. [HN3] Congress has vested the NRC with the authority to issue subpoenas in conjunction with investigations that the NRC deems necessary to protect public health or to minimize danger to life or property in matters involving nuclear materials. 42 U.S.C. § 2201(c) (1982). It is precisely this objective of protecting public health and safety that [**6] the Commission has given as one of the purposes underlying its subpoena of the tape recordings at issue. The affidavit of Administrative Judge Rosenthal states that the information he has reviewed thus far leads him to suspect that the NRC employee under investigation may have received relevant information from Comley that NRC regulations required him to report to his superiors. Specifically, [HN4] an NRC regulation requires OI employees to keep NRC officers currently apprised of information received that pertains to public health and safety in matters involving nuclear materials. 10 C.F.R. § 1.27(f) (1989). If the NRC employee under investigation received such information from Comley and failed to relay it to his superiors, such misconduct clearly implicates the effective functioning of the NRC in its duty to protect public health and safety. A subpoena issued as part of an investigation into such

alleged misconduct thus is supported by a proper agency purpose.

The Rosenthal affidavit also states that the information reviewed thus far indicates that the NRC employee may have divulged confidential NRC information to Comley. Depending on the information involved, this conduct might compromise [**7] the security of certain nuclear power facilities in the country. For this reason as well, the Commission's investigation implicates public health and safety concerns in nuclear matters and provides a proper purpose for the issuance of the challenged subpoena.

[HN5] Having made a prima facie showing of proper purpose, the Commission then must show that the information sought by the subpoena is reasonably relevant to the purpose of the investigation, and that the subpoena itself is not too indefinite. There can be little doubt that the tape recordings sought by the subpoena are relevant to the purpose of the Commission's investigation. The Commission's objective is to uncover any misconduct relating to the NRC employee's conversations with Comley. The tape recordings of these conversations certainly are relevant to this investigation. Second, the subpoena itself is not too indefinite. It specifically requests tape recordings or transcripts of tape recordings of conversations between Comley and the NRC employee. There is little that is indefinite in this request. We thus find that the NRC has made an adequate prima facie showing to support enforcement of its subpoena.

III. CHALLENGES TO [**8] ENFORCEMENT OF THE SUBPOENA

Comley challenges the subpoena's enforcement on two grounds. First, he contends that the Commission lacked authority to issue the subpoena. Second, even if the Commission had authority, Comley argues that the subpoena's enforcement would violate his first amendment right to freedom of association. We consider each of these arguments in turn.

A. Commission's Authority to Issue Subpoena

Comley's challenge to the Commission's authority to issue the subpoena essentially is a challenge to the Commission's professed "public health and safety" motivations for investigating the NRC employee in question. Comley contends that the Commission is

motivated only by bad faith in its investigation of the employee. He alleges that there is some sort of vendetta within the NRC to get rid of this employee, and that it is this vendetta rather than any concern for public health and safety that is motivating the investigation.

If Comley's assertions were supported by firm evidence, then we would have adequate justification to deny enforcement of the subpoena. [HN6] "If a subpoena is issued [*543] for an improper purpose, such as harrasment [sic], its enforcement [**9] constitutes an abuse of the court's process." *United States v. Westinghouse Elec. Corp.*, 788 F.2d at 166-67. Comley, however, has produced no firm evidence of such abuses. True, he has made forceful allegations about the bad faith of certain NRC officials. These officials, though, are no longer involved in the investigation. Administrative Judge Rosenthal is now conducting the investigation, and Comley has made no assertions questioning Rosenthal's impartiality. [HN7] In the absence of firm evidence of bad faith, it is not our role "to intrude into the investigative agency's function." *SEC v. Howatt*, 525 F.2d 226, 229 (1st Cir. 1975).

Comley has asked for discovery and an evidentiary hearing to explore more thoroughly the issue of the Commission's bad faith. The district court denied this request and we affirm the denial. [HN8] "Except in extraordinary circumstances . . . , discovery is improper in a summary subpoena enforcement proceeding." *FTC v. Carter*, 205 U.S. App. D.C. 73, 636 F.2d 781, 789 (D.C.Cir. 1980) (quoting *United States v. Exxon*, 202 U.S. App. D.C. 70, 628 F.2d 70, 77 n. 7 (D.C.Cir. 1980)). Such requests [**10] "are not looked upon favorably . . . ; nor are appellate courts inclined to reverse the denial of discovery by a district judge for anything but an abuse of discretion." *Id.*; see also *United States v. Aero Mayflower Transit Co.*, 265 U.S. App. D.C. 383, 831 F.2d 1142, 1146-47 (D.C.Cir. 1987); *United States v. Merit Petroleum, Inc.*, 731 F.2d 901, 905-06 (Temp. Emer. Ct. App. 1984); *In re EEOC*, 709 F.2d 392, 400 (5th Cir. 1983). Comley has made no argument sufficient to support a determination that the court below abused its discretion in denying the discovery request. At best, he has made allegations about a vendetta being pursued by certain NRC officials. Because these officials are no longer involved in the investigation, we do not find the allegations sufficiently weighty to cast doubt on the proper objective of "public health and safety" stated by Administrative Judge Rosenthal in his affidavit to be

the motivation for the subpoena.²

2 In addition to the justification of protecting health and safety, the NRC also claims that it has the authority to issue subpoenas in the course of investigating employee misconduct, even if such misconduct does not directly implicate public health and safety. Comley challenges this assertion, arguing that the Civil Service Reform Act of 1978 preemptively establishes the procedures that agencies may employ in disciplinary proceedings, and that this Act does not provide for the issuance of subpoenas in investigations of employee misconduct. We need not consider this issue because of our conclusion that the employee misconduct alleged here does implicate public health and safety concerns. The possibility that the NRC employee failed to relay to his superiors relevant information received from Comley or that he passed on to Comley confidential information pertaining to plant security obviously implicates public health and safety, and thus furnishes proper justification for the agency's use of its subpoena power.

[**11] B. *Freedom of Association*

Comley's final challenge to the NRC's subpoena is that enforcement of the subpoena would infringe on his first amendment right to freedom of association. Comley is the founder and director of a non-profit corporation that monitors and investigates the operation and construction of nuclear power plants and frequently criticizes the activities of the NRC. Comley claims that relinquishing the tape recordings sought in the subpoena would result in the "detailed disclosure of organizational activities, the identities of individuals that either belong to or associate with the organization and Mr. Comley, and likely expose those persons and others who have provided information to Mr. Comley to retaliation by their employers, the Commission and others." Brief for Appellant at 32.

In a line of cases beginning with *NAACP v. Alabama*, 357 U.S. 449, 2 L. Ed. 2d 1488, 78 S. Ct. 1163 (1958), the Supreme Court has held that [HN9] compelling a private organization to reveal the identities of its members where such disclosure will result in the harassment of existing members and the discouragement of new members can constitute a violation of the right [**12] to freedom of association. See *id.* at 462; see also

Buckley v. Valeo, 424 U.S. 1, 64-65, [*544] 46 L. Ed. 2d 659, 96 S. Ct. 612 (1976); *Bates v. Little Rock*, 361 U.S. 516, 523, 4 L. Ed. 2d 480, 80 S. Ct. 412 (1960). To establish such a violation, the target of a subpoena must make a prima facie showing of a first amendment infringement -- typically, that enforcement of the disclosure requirement will result in harassment of current members, a decline in new members, or other chilling of associational rights. Once such a showing is made, the burden then shifts to the government to show both a compelling need for the material sought and that there is no significantly less restrictive alternative for obtaining the information. See *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349-50 (9th Cir. 1988); see also *NAACP v. Alabama*, 357 U.S. at 463; *Federal Election Comm'n v. Larouche Campaign*, 817 F.2d 233, 234-35 (2d Cir. 1987); *Federal Election Comm'n v. Machinists Non-Partisan Political League*, 210 U.S. App. D.C. 267, 655 F.2d 380, 389 (D.C. [**13] Cir.), cert. denied, 454 U.S. 897, 70 L. Ed. 2d 213, 102 S. Ct. 397 (1981).

Applying this framework, we conclude that Comley has failed to make out an adequate claim that enforcement of the subpoena would violate his right to freedom of association. First, we have reservations about the strength of the first amendment concerns implicated by the challenged subpoena. Unlike the disclosure requirements involved in the majority of the cases we have reviewed, the subpoena issued by the NRC does not directly require the disclosure of the identities of Comley's associates or informants. See, e.g., *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. 87, 88, 74 L. Ed. 2d 250, 103 S. Ct. 416 (1982) (challenged statute required that the identities of campaign contributors be disclosed); *Federal Election Comm'n v. Machinists Non-Partisan Political League*, 655 F.2d at 389 (agency sought a list of all members and volunteers of political organization); *Federal Election Comm'n v. Larouche Campaign*, 817 F.2d at 234 (agency sought a list of campaign contributors); see also *United States v. Garde*, 673 F. Supp. 604, 605-07 (D.D.C. 1987) [**14] (finding cognizable first amendment interests where an NRC subpoena sought all records and documents pertaining to allegations of safety violations and the government acknowledged that the subpoena encompassed the identities of clients and other informants), appeal dismissed, 270 U.S. App. D.C. 275, 848 F.2d 1307 (D.C.Cir. 1988). Rather, in subpoenaing only the tape recordings, the NRC is seeking to discover

the substance of the information that passed between Comley and the NRC employee, not the identities of the informants or associates who may have been involved in obtaining this information. We recognize that the potential exists for the disclosure of certain identities to be an incidental consequence of enforcement of the subpoena, but the magnitude of the first amendment concerns seems less to us in this context, where the extent of any disclosure of identities is speculative and is not the specific objective of the government subpoena. Cf. *In re Grand Jury Proceedings*, 633 F.2d 754, 757 (9th Cir. 1980) (upholding a grand jury subpoena of an association's tax returns, reasoning that although some identities might be revealed, the subpoena was [**15] narrowly tailored to the purpose of investigating possible tax violations and stopped short of requesting lists of people attending the association's meetings).

Furthermore, for the most part, Comley has made only general allegations concerning the harassment or harm that will result to his associates if their identities indeed are revealed by the tape recordings. These general allegations of harassment fall short of the solid, uncontroverted evidence of actual harassment that has existed in those cases where the Supreme Court has found violations of the right to freedom of association. See *Brown v. Socialist Workers '74 Campaign Comm.*, 459 U.S. at 98-102; *NAACP v. Alabama*, 357 U.S. at 462-63; see also *Buckley v. Valeo*, 424 U.S. at 69-72 (finding no solid showing of harassment and consequently rejecting freedom of association claims). But see *In re Grand Jury Proceeding*, 842 F.2d 1229, 1236 (11th Cir. 1988) (raising the possibility that *Buckley's* requirement [*545] of showing solid evidence of actual harassment should be relaxed when the challenged government investigation is targeting a particular group).

Even [**16] assuming, however, that Comley has made an adequate prima facie showing of protectable first amendment interests, we must reject Comley's first amendment challenge to the subpoena. We reject the challenge because of our conclusion that the government has adequately shown both a compelling interest in obtaining the material sought and that no significantly less restrictive alternatives exist. The requirement of a compelling interest is met by the NRC's mission to promote nuclear safety. See *United States v. Garde*, 673 F. Supp. at 607. The requirement that no significantly less restrictive alternatives exist is satisfied by the

narrowness with which the subpoena here is drawn. This is not an instance where the NRC is seeking any and all information possessed by Comley concerning nuclear safety violations. See *United States v. Garde*, 673 F. Supp. at 607 (holding that such a broad request is violative of the requirement that no less restrictive alternatives exist). Nor has the NRC issued a blanket request for the identities of all of Comley's associates and informants. Rather, the NRC only is seeking tape recordings of a limited number of conversations [**17] that took place between two specified individuals. Because of the narrow specificity of the materials sought by the subpoena and the fact that there are no apparent reliable means of otherwise obtaining the information, we are satisfied that there are no significantly less restrictive alternatives available to the government. We, therefore, reject Comley's freedom of association challenge to the enforcement of the subpoena. Cf. *In re Grand Jury Proceedings*, 633 F.2d at 757 (upholding a grand jury subpoena of an association's tax returns, reasoning that the narrowness of the subpoena together with the government's compelling interest in enforcement of the tax laws outweighed any first amendment rights implicated by the incidental disclosure of member identities); *In re Grand Jury Proceeding*, 842 F.2d at

1236-37 (upholding a subpoena of tax records); *St. German of Alaska E. Orthodox Catholic Church v. United States*, 840 F.2d 1087, 1094 (2d Cir. 1988) (upholding IRS summonses against a free association challenge).

IV. CONCLUSION

The Commission has made an adequate prima facie showing that its subpoena was issued for an authorized [**18] purpose, and that the information sought is relevant to that purpose and adequately described. We find Comley's allegations of bad faith to be insufficient to overcome this showing or to require discovery and an evidentiary hearing. Finally, with respect to the freedom of association challenge, we have reservations about the strength of the first amendment concerns implicated by the subpoena. Even assuming a prima facie showing of sufficient first amendment concerns, however, we conclude that the government has a compelling interest in the material sought and that there are no significantly less restrictive alternatives available. The district court's order enforcing the Commission's subpoena is therefore Affirmed.



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
Phyllis Gardiner, Assistant Attorney General

Date: February 19, 2010

Re: Additional Materials for Agenda Item #6 (Petitions to Vacate or Modify Subpoenas)

I have attached to this cover memo additional materials for your consideration of item #6 (petitions to vacate or modify subpoenas issued in the investigation of the National Organization of Marriage (NOM)). I apologize for the length of the materials.

Following the holiday weekend, the Commission's counsel and I required a few business days to respond to the petitions, and I received notice only this afternoon that the petitioners wished to rely on additional materials. I have attached the following.

- (1) The Commission's counsel and I prepared a 15-page memo with five numbered attachments.

- (2) At 1:25 p.m. today, NOM's attorney, Josiah Neeley, submitted by e-mail a three-page Declaration of Brian Brown dated today in support of the petitions to vacate or modify the subpoenas. Mr. Neeley indicated that the petitioners also wished to rely on plaintiffs' submissions in federal court in NOM v. McKee objecting to a Report of Hearing and Order Re: Discovery Dispute and Scheduling entered by U.S. Magistrate Judge Rich. Those submissions are attached for your reference.

Mr. Neeley also draws your attention to the two declarations you considered for the January 28, 2010 meeting in support of NOM's petition for a stay of the investigation.

(3) I have also attached defendants' response to (2) in NOM v. McKee.

Thank you for your consideration of these materials.



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
Phyllis Gardiner, Assistant Attorney General

Date: February 19, 2010

Re: Petitions by National Organization for Marriage (NOM), Brian Brown and Stand for Marriage Maine PAC to Vacate or Modify Witness and Document Subpoenas

This memorandum analyzes the petitions by the National Organization for Marriage (NOM), Brian Brown, and the Stand for Marriage Maine political action committee (PAC) to Vacate or Modify Witness and Document Subpoenas.

Background

After the Commission denied NOM's petition for a stay of the entire investigation at its meeting on January 28, 2010, Commission Chair Walter F. McKee approved the issuance of two subpoenas – one addressed to NOM and the second to Brian Brown. The subpoena to NOM asks the organization to designate an officer to provide testimony on its behalf on eight listed topics, as well as to produce documents in response to six requests. The subpoena for Brian Brown listed one topic for his testimony and one document request. (Copies of both subpoenas were included in the packet mailed to you on February 13, 2010.)

Attorney Barry A. Bostrom accepted service of both subpoenas on behalf of NOM and Mr. Brown on January 28, 2010. The subpoenas requested that the testimony and documents be produced three weeks later, on February 18, 2010.

In accordance with the Maine Administrative Procedure Act, 5 M.R.S.A. § 9060(1)(C), the subpoenas informed NOM and Mr. Brown that they had the right to petition to vacate or modify the subpoenas within 14 days. On February 11, 2010, which was the fourteenth day after issuance of the subpoenas, the Commission received petitions to vacate or modify both subpoenas on behalf of NOM, Brian Brown, and Stand for Marriage Maine PAC ("SMM"), resulting in a total of five petitions to vacate or modify.

At the Commission's last meeting on January 28, Mr. Bostrom and counsel for the Commission reported that NOM had raised objections on relevance and First Amendment grounds to discovery requests made by the state defendants in NOM's federal lawsuit challenging the constitutionality of Maine's campaign finance laws, *NOM v. McKee*, Docket No. 1:09-cv-00538-DBH. A conference with the Magistrate Judge to address those objections was scheduled to occur on February 4, 2010. The Magistrate ultimately overruled NOM's objections. (Magistrate's Report of February 5, 2010, included as Attachment 3). The Magistrate's ruling was upheld by the District Court on February 17, 2010. (See Attachment 4). The federal court also entered a confidentiality order on February 16, 2010, agreed to by both parties, to protect information provided by NOM in discovery from disclosure to anyone other than the Commission members, staff and

counsel, consultants or experts, and others by consent of the parties or as ordered by the court. (*See* Attachment 5).

Legal Standard for Vacating or Modifying a Subpoena

The Maine Administrative Procedure Act provides that any witness subpoenaed by an agency may petition the agency to vacate or modify the subpoena. (5 M.R.S.A. § 9060(1)(C) (Attachment 1)). "After such investigation as the agency considers appropriate," the Commission may grant the petition in whole or in part upon finding that either:

- the testimony or the evidence whose production is required "does not relate with reasonable directness to any matter in question," or
- the subpoena "is unreasonable or oppressive or has not been issued a reasonable period in advance of the time when the evidence is requested."

NOM and Brian Brown have objected to their subpoenas on two grounds: 1) that the requests are "overbroad, irrelevant and immaterial," and 2) that the information sought is privileged under the First Amendment to the U.S. Constitution. NOM has also raised these objections to the subpoena to Brian Brown, and SMM has filed objections to both subpoenas on the same grounds. (A chart summarizing the objections is included as Attachment 2.)

The Maine APA does not confer standing to challenge a subpoena on any person or entity other than the one to whom the subpoena has been issued. Nevertheless, as part of its "investigation" into the objections raised by NOM and Brian Brown, the Commission may take into consideration arguments made by others who assert interests that could be

affected by release of the information sought in the subpoenas. To that degree, therefore, the Commission may take into account the objections raised by SMM, as well as those raised by NOM with respect to the subpoena to Brian Brown.

Objections as to Relevance, Materiality, and Overbreadth

NOM contributed \$1.93 million to SMM, which ran a successful political campaign expressly advocating in favor of the same-sex marriage people's veto referendum. NOM provided roughly 62.6% of SMM's funding. NOM's executive director, Brian Brown, is one of apparently three members of SMM's "executive committee," which governed SMM's activities.

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.

NOM has consistently stated 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.)

Under 21-A M.R.S.A. § 1056-B, NOM would qualify as a ballot question committee if it “receive[d] contributions” in excess of \$5,000 “for the purpose of initiating [or] promoting” the people’s veto referendum. Subsection 2-A of the statute specifies certain categories of funds which count as “contributions” although those categories are not intended to be exhaustive. Section 1056-B provides, in part:¹

21-A M.R.S.A. § 1056-B. Ballot question committees. Any person not defined as a political action committee who receives contributions or makes expenditures, other than by contribution to a political action committee, aggregating in excess of \$5,000 for the purpose of initiating, promoting, defeating or influencing in any way a ballot question must file reports with the commission in accordance with this section. ...

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

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

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

¹ Those sections relating to the reporting of contributions are underlined for emphasis.

Investigative Requests Concerning NOM's Revenues

In the subpoena to NOM, the Commission requested testimony and documents that relate to the following areas of inquiry:

- What fundraising methods did NOM use in 2009 to raise the \$1.93 million that it contributed to SMM?
- What solicitations did it make to donors who provided these funds?
- Which activities of NOM were its donors led to believe they were supporting?
- Did any donors specify that they were contributing to the Maine people's veto referendum?
- Did NOM make projections of the revenue it would collect to support the people's veto referendum? If so, were these projections or expectations discussed in budget documents, at meetings of NOM's board of directors, or in communications with its coalition partners within SMM or its contractors?
- How much revenue did NOM receive in 2009?
- Donations received by NOM over \$5,000, including donor, amount, and date.

In the attached chart of objections (Attachment 2), these areas of inquiry are reflected in NOM Witness Topic #4, and NOM Document Requests #1, #3, #4, #5, and #6.

The requested material is clearly relevant and material to whether NOM received funding for the purpose of initiating or promoting the people's veto referendum in Maine within the scope of § 1056-B. The Commission staff seeks to discover the sources of the \$1.93 million that NOM provided to SMM, 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 objects that the subpoena requests information concerning "donations unrelated to the people's veto referendum." (NOM's Petition to Vacate or Modify Subpoena of NOM, at 2) The problem with that argument is that NOM has stated that almost none of the donations it received in 2009 were designated for the referendum in Maine.² If the Commission were to limit its requests to donations *which NOM deems were related to the referendum*, the Commission would not receive the information that is necessary to perform its statutory duty of verifying whether or not NOM complied with 21-A M.R.S.A. § 1056-B with regard to the almost \$2 million that it spent on the Maine referendum.

It should be noted that the subpoenas only request information concerning specific donors who contributed \$5,000 or more to NOM during 2009. This will relieve NOM from the burden of identifying donors whose funds made up only a small portion of the \$1.93 million contributed to SMM. NOM will be required by federal tax law to itemize donations over \$5,000 in the 2009 Form 990 that it will submit to the Internal Revenue Service later this year, although the Form 990 available to the public will not identify the specific donors.

² In his September 21, 2009 letter, NOM's counsel Barry A. Bostrom stated that NOM sent only two e-mails to supporters that solicited contributions to NOM for the Maine referendum and NOM received \$295 in response to those e-mails.

Investigative Requests Concerning NOM's Contributions to SMM and SMM's Activities

As noted above, NOM was a coalition partner in SMM, and NOM's executive director, Brian Brown, was a member of SMM's executive committee which governed SMM's activities. When SMM registered as a PAC with the Commission, it identified Brian Brown as one of its three primary fundraisers and decision-makers.³ NOM provided 62.6% of SMM's revenue for the entire campaign, and a higher portion of its revenue during the final weeks of the campaign when SMM was making large purchases of advertising.

Because of the close relationship between NOM and SMM, the activities of SMM are relevant and material to *NOM's purpose in raising the roughly \$2 million that NOM contributed to SMM*. In other words, if documents or other evidence exist demonstrating that Brian Brown or NOM's board members or officers raised money with the expectation that those funds would be contributed to SMM to pay for its advocacy for the Maine referendum, that evidence would be highly relevant to whether the funds raised by NOM were covered by the reporting requirements in § 1056-B.

In the subpoenas to NOM and Brian Brown, the Commission has requested testimony and documents in the following general categories:

- any communications between NOM or Brian Brown and SMM concerning how much NOM would contribute to support the Maine referendum, and how those funds would be raised
- any projections by NOM of the money it would contribute to SMM to support the referendum, as expressed in NOM's budget documents or at meetings of NOM's

³ The other two members of SMM's executive committee are believed to be Marc Mutty of the Roman Catholic Diocese of Portland and Robert Emrich of the Jeremiah Project.

board of directors, or in communications with its coalition partners within SMM or its contractors

- documents relating to SMM's planned or actual expenditures in support of the Maine referendum

In the attached chart of objections, these general categories are reflected in NOM Witness Topic #7, NOM Document Requests #1, #4, #5, and #6, Brown Witness Topic #1, and Brown Document Request #1. This evidence is relevant and material to *NOM's purpose* in raising the contributions that it ultimately provided to SMM. Accordingly, the subpoenas for NOM and Brian Brown should not be modified or vacated on the grounds of overbreadth, relevance, or materiality.

First Amendment Privilege

NOM, Brian Brown and SMM object to all aspects of the subpoenas that seek “disclosure of personal donor information” or “disclosure of internal campaign communications,” on the grounds that such information is privileged and therefore protected from disclosure under the First Amendment to the U.S. Constitution.⁴ This is the same argument that NOM raised previously, without success, in seeking a stay of the Commission’s investigation in January, and in opposing defendants’ discovery requests in the federal lawsuit challenging the constitutionality of Maine’s campaign finance laws, *NOM v. McKee*, Docket No. 1:09-cv-00538-DBH. (See Attachments 3 and 4).

The recent Ninth Circuit case relied on by NOM and Brown, *Perry v. Schwarzenegger*, ___ F.3d ___, Nos. 09-17241, 09-17551, 2010 WL 26439 (9th Cir. Jan. 4, 2010), lays out a

⁴ These objections are to NOM Witness Topics ## 4 and 7, NOM Document Requests ## 1, 3, 4, 5, and 6, Brown Witness Topic #1 and Brown Document Request #1.

two-part framework for analyzing claims of First Amendment privilege in response to a discovery request. As noted by the Magistrate Judge in *NOM v. McKee* (Attachment 3 at 4), this framework is generally consistent with the one employed by the First Circuit in *United States v. Comley*, 890 F.2d 539, 543-44 (1st Cir. 1989), where the court rejected a witness's objection on First Amendment grounds to enforcement of an administrative subpoena.

The test requires the party asserting the privilege to demonstrate a *prima facie* showing of arguable First Amendment infringement. This means that the objecting party must demonstrate that enforcement of the discovery requests (in this case, the subpoenas) will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences that objectively suggest an impact or chill on members' associational rights. If that *prima facie* showing is made, the evidentiary burden then "shifts to the government to show both a compelling need for the material sought and that there is no significantly less restrictive alternative for obtaining the information."

Comley, 890 F.2d at 543-44; *see also Perry*, 2010 WL 26439, at *10. Thus, the First Amendment associational privilege is not absolute; it requires balancing the government's need for the information against the effects of producing the information on the rights of association of private parties.

In this case, NOM and Brown have made only conclusory assertions that disclosure of the information they object to producing "could subject NOM and its donors to harassment and other negative consequences, which could have a chilling effect on

NOM's donations and activities." (SMM has made the same assertions with respect to its donors and activities.) The materials that NOM submitted in support of its request for a stay of this investigation a few weeks ago consisted largely of declarations by individuals in other states, who claimed to have experienced harassment as the result of widespread public dissemination of their names and addresses via the web. Disclosure to the government in the context of an investigation was not at issue in those cases, however, nor was disclosure in discovery pursuant to a confidentiality order.⁵ The threatening voicemail messages reported by Michael Heath, Bob Emrich and Marc Mutty and referenced in NOM's stay request were directed at public figures active in the public campaign on the same-sex marriage people's veto referendum – not at donors to NOM or even SMM. No evidence has been presented showing a pattern of harassment, reprisals or threats resulting from the people's veto referendum campaign or from citizens donating funds to that campaign.

This falls short of the standard required to make a *prima facie* showing of First Amendment infringement. *See Comley*, 890 F.2d at 544 (“[G]eneral allegations of harassment fall short of the solid, uncontroverted evidence of actual harassment that has existed where the Supreme Court has found violations of the right to freedom of

⁵ The individual statements contained in the Declaration of Sarah E. Troupis that NOM provided to the Commission in support of its stay request were originally filed in the federal District Court in *ProtectMarriage.com v. Bowen*, in support of the plaintiffs' motion for a preliminary injunction which sought to prevent public disclosure of the names of donors to a political committee supporting Proposition 8 in California. While the names of individual declarants were redacted in these public filings, they were revealed in discovery pursuant to a protective order that was entered to permit disclosure of information to the state defendants and their counsel while avoiding public disclosure during the pendency of the litigation. (Docket Items 29 & 192 in No. 2:09-cv-00058-MCEDAD) The District Court denied plaintiffs' request for a preliminary injunction but continued the protective order in the litigation, which is still on-going. *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197, 1199 (E.D. Cal. 2009).

association”); compare *ProtectMarriage.com*, 599 F.Supp.2d at 1216-1220 (finding little likelihood of success on plaintiffs’ First Amendment claims based on evidence of relatively minimal occurrences of threats, harassment and reprisals).

Even if NOM or Brown were found to have made a *prima facie* showing, however, the Commission has a strong need for the information requested, which is directly relevant to the determination of NOM’s status under the Ballot Question Committee (BQC) statute. Whether NOM’s donors have a legitimate claim to remain anonymous is the issue that goes to the heart of the Commission’s investigation. NOM’s donors (who are not members) have a right to remain anonymous only if the Commission determines that NOM is not a BQC and the constitutionality of the BQC statute is upheld. The very purpose of this investigation is to elicit information necessary for the Commission to make the determination whether NOM is a BQC. The information sought through these subpoenas also cannot be obtained from other sources. Without this highly relevant information, the Commission will be unable to fulfill its statutory obligations and responsibilities. Under the applicable test, therefore, even with a *prima facie* showing of infringement, the balance would still tip in favor of disclosure. See *Comley*, 890 F.2d at 545.

In any event, none of the persons or entities objecting to these subpoenas has demonstrated that disclosure of the information sought to the Commission and its staff and counsel in the context of an investigation with statutory confidentiality protections could (or would) subject NOM’s or SMM’s donors to harassment, threats or reprisals, or

otherwise have a chilling effect on their associational rights. We received this afternoon (about an hour before finalizing this memorandum), a two-page declaration from NOM's Executive Director Brian Brown⁶ contending that having to produce information in response to these subpoenas, even under statutory confidentiality protections, will affect NOM's ability to raise funds from donors who will be "reluctant to support a controversial activity that could subject them to government scrutiny." (Brown Declaration ¶ 4). Mr. Brown also states that if his communications with SMM have to be disclosed, that will "alter how [he] would choose to communicate in the future." (Brown Declaration ¶ 5). Any agency investigation involves some degree of scrutiny, however, and a desire to avoid such scrutiny does not alone establish a First Amendment privilege not to respond to legitimate governmental inquiries. Just as NOM failed to persuade the federal court that First Amendment rights of NOM or its donors would be infringed by producing information in discovery under the protection of a confidentiality order (see Attachment 3 at p.5), here NOM, Brown and SMM have not made a persuasive showing that the confidentiality protections in the Commission's statute are inadequate to prevent such infringement in this proceeding.

The statute governing this investigation, 21-A M.R.S. § 1003(3-A), provides that "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 ... investigation, other entities as necessary for the conduct of an ... investigation and law enforcement and other agencies for purposes of reporting, investigating or

⁶ For your information, in spite of the caption of the declaration, to the best of our knowledge it has not been filed in the federal court.

prosecuting a criminal or civil violation.” The definition of “investigative working papers” includes:

- 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 relating to an audit or investigation.

NOM and SMM have objected to the subpoena requests that they contend seek “internal campaign communications.” In so doing, they are in effect asserting that the material sought contains “sensitive political or campaign information” under part B of the definition quoted above. All of the other subpoena requests that NOM, SMM and Brian Brown object to seek financial information that would “not normally [be] available to the public” under part A of the above definition, unless NOM is ultimately determined to be a BQC. Accordingly, leaving the issue of First Amendment privilege aside, NOM can assert the confidentiality protections of Section 1003(3-A) for all of the information sought in these subpoenas, and the Commission can treat the responses provided by NOM and Brian Brown as confidential “investigative working papers.” With these protections in place, any infringement of NOM’s or SMM’s First Amendment rights of association may be avoided in this investigation.

Conclusion

The staff recommends that the Commission deny all five petitions to modify or vacate the subpoenas for NOM and Brian Brown and instead confirm that any documents or testimony to be provided by NOM and Brown in response to these subpoenas for which those parties assert a good faith claim of confidentiality under section 1003(3-A) will be kept confidential by the Commission and its staff and counsel during the pendency of this investigation.

5 M.R.S.A. § 9060. SUBPOENAS AND DISCOVERY

1. Proceedings. In any adjudicatory proceeding for which the agency, by independent statute, has authority to issue subpoenas, any party shall be entitled as of right to their issuance in the name of the agency to require the attendance and testimony of witnesses and the production of any evidence relating to any issue of fact in the proceeding.

In any proceeding in which the conducting agency lacks independent authority to issue subpoenas, any party may request the issuance of a subpoena by the agency, and the agency is hereby authorized to issue the same if it first obtains the approval of the Attorney General or of any deputy attorney general. Such approval shall be given when the testimony or evidence sought is relevant to any issue of fact in the proceeding.

When properly authorized, subpoenas may be issued by the agency or by any person designated by the agency for that purpose, in accordance with the following provisions:

A. The agency may prescribe the form of subpoena, but it shall adhere, insofar as practicable, to the form used in civil cases before the courts. Witnesses shall be subpoenaed only within the territorial limits and in the same manner as witnesses in civil cases before the courts, unless another territory or manner is provided by law. Witnesses subpoenaed shall be paid the same fees for attendance and travel as in civil cases before the courts. Such fees shall be paid by the party requesting the subpoena.

B. Any subpoena issued shall show on its face the name and address of the party at whose request it was issued.

C. Any witness subpoenaed may petition the agency to vacate or modify a subpoena issued in its name. The agency shall give prompt notice to the party who requested issuance of the subpoena. After such investigation as the agency considers appropriate, it may grant the petition in whole or in part upon a finding that the testimony or the evidence whose production is required does not relate with reasonable directness to any matter in question, or that a subpoena for the attendance of a witness or the production of evidence is unreasonable or oppressive or has not been issued a reasonable period in advance of the time when the evidence is requested.

D. Failure to comply with a subpoena lawfully issued in the name of the agency and not revoked or modified by the agency as provided in this section shall be punishable as for contempt of court.

2. Adoption of rules. Each agency having power to conduct adjudicatory proceedings may adopt rules providing for discovery to the extent and in the manner appropriate to its proceeding.

Petitions to Vacate or Modify Subpoenas in NOM Investigation

Portion of Subpoena Objected to	Witness Topic or Documents Requested	Person/Entity Objecting	Grounds for Objection	
			Relevance, Materiality and Overbreadth	First Amendment Privilege
NOM Witness Topic #4	Revenue received by NOM in 2009, and the sources of that revenue, including without limitation the identity of any donors to NOM who contributed \$5,000 or more in 2009, and communications between NOM and those donors	NOM	X	X
NOM Witness Topic #7	NOM's activities in Maine in 2009, including without limitation NOM's contributions to Stand For Marriage Maine PAC, and expenditures made by NOM or by Stand For Marriage Maine PAC relating to the people's veto referendum on same-sex marriage	NOM SMM	X	X X
NOM Document Request #1	All documents reflecting communications between NOM and the Stand For Marriage Maine PAC concerning raising funds for the people's veto referendum campaign on same-sex marriage in Maine in 2009, including without limitation correspondence, memoranda, email and budgets	NOM SMM	X X	X X
NOM Document Request #3	All documents reflecting the source, amount and date of any donations of funds to NOM totaling \$5,000 or more from any single source in 2009, including without limitation bookkeeping records, databases, donor lists, reports or statements of on-line donations, and any documents maintained or prepared for purposes of any filings with the Internal Revenue Service	NOM	X	X
NOM Document Request #4	All documents listing, aggregating or otherwise summarizing NOM's revenue and expenses in 2009, including without limitation financial statements (whether audited or unaudited), and statements of income and expenses	NOM	X	
NOM Document Request #5	All budgets, statements of projected revenue and expenses, and other documents reflecting the planned allocation of financial resources to support NOM's activities in 2009, including revisions made at any point during the year	NOM	X	

Portion of Subpoena Objected to	Witness Topic or Documents Requested	Person/Entity Objecting	Grounds for Objection	
			Relevance, Materiality and Overbreadth	First Amendment Privilege
NOM Document Request #6	Minutes of any Board meetings reflecting any discussions concerning the raising of funds and allocation of financial resources for NOM's activities in 2009	NOM	X	
Brown Witness Topic #1	Plans and decisions made by the Executive Committee of Stand for Marriage Maine PAC regarding the raising and spending of funds on the same-sex marriage people's veto referendum in 2009	Brown SMM	X X	X X
Brown Document Request #1	All documents reflecting projected, planned or actual expenditures by the National Organization for Marriage and the Stand for Marriage Maine PAC relating to the same-sex marriage people's veto referendum campaign in Maine in 2009	Brown SMM NOM	X X X	X X X

UNITED STATES DISTRICT COURT
DISTRICT OF MAINE

NATIONAL ORGANIZATION)
FOR MARRIAGE, et al.,)
)
 Plaintiffs)
)
 v.)
)
 WALTER F. McKEE, et al.,)
)
 Defendants)

Civil No. 09-538-B-H

REPORT OF HEARING AND ORDER
RE: DISCOVERY DISPUTE AND SCHEDULING

Held in Portland by telephone on February 4, 2010, at 1:00 p.m.

Presiding: John H. Rich III, United States Magistrate Judge

Appearances: For Plaintiffs: Josiah Neeley, Esq.

For Defendants: Phyllis Gardiner, Esq.
Thomas Knowlton, Esq.

The conference was held for two purposes: (i) at the defendants' request, to resolve a discovery dispute centering on the plaintiffs' invocation of a First Amendment privilege and, (ii) in accordance with my report of hearing and order dated December 4, 2009, to discuss the progress of discovery, generally, and post-discovery scheduling. See Report of Hearing and Order re: Scheduling ("12/4/09 Order") (Docket No. 37) at 2. In advance of the teleconference, Ms. Gardiner provided two documents to the court as attachments to her email seeking the court's assistance in resolving the discovery dispute: Defendants' First Request for Production of Documents by the Plaintiffs, and Plaintiffs' Response to Defendants' First Requests for Production.

A. Discovery Dispute

The dispute concerned the plaintiffs' objection on relevance and First Amendment grounds to RFP No. 3, as well as their refusal on First Amendment grounds to provide documents responsive to RFP Nos. 4, 5, 7, and 8 that disclose donors' or prospective donors' identities and their instruction on First Amendment grounds to deponents not to answer questions regarding donors' identities.

RFP No. 3 seeks "[a]ll correspondence, memoranda, email, and other documents reflecting communications between NOM [plaintiff National Organization for Marriage] and the Stand For Marriage Maine PAC concerning efforts to prevent legislation permitting same-sex marriage from taking effect in Maine."

The plaintiffs argued, both in their written objection and through Mr. Neeley during the teleconference, that to the extent that RFP No. 3 seeks information concerning contributions made from NOM to the PAC, such information is irrelevant because Maine's ballot question committee ("BQC") statute, 21-A M.R.S.A. § 1056-B, specifically exempts contributions made from an organization to a PAC in determining whether that organization qualifies as a BQC. Mr. Neeley also argued that the identity of donors is irrelevant.

In addition, in both their written objection and through Mr. Neeley during the teleconference, the plaintiffs relied on the recently decided case of *Perry v. Schwarzenegger*, ___ F.3d ___, Nos. 09-17241, 09-17551, 2010 WL 26439 (9th Cir. Jan. 4, 2010), for the proposition that revealing the information sought by RFP No. 3, as well as donors' identities, could have a chilling effect on donors' and the associations' associational rights in that donors would not wish to contribute to the plaintiff organizations if they thought that (i) their identities might be

revealed, (ii) they might be deposed, or (iii) they might in some other way be drawn into this litigation.

Mr. Neeley acknowledged that the defendants' counsel had offered to enter into a protective order shielding donors' identities from public disclosure. However, he argued that, as in *Perry*, such a protective order would only limit, not eliminate, the chilling effects of disclosure.

With respect to the plaintiffs' objection to RFP No. 3 on relevance grounds, Ms. Gardiner stated that the defendants had made clear to the plaintiffs that they do not seek *via* RFP No. 3 the kind of information in issue in *Perry*, namely, internal strategy discussions concerning accomplishment of the substantive purpose of overturning same-sex marriage legislation. She also disclaimed any intention to seek records of financial contributions from NOM to the PAC. Instead, she said, the defendants seek communications between NOM and the PAC, and between the plaintiffs and donors or prospective donors, regarding the funding of the Maine campaign. She contended that such information is highly relevant because it bears on the plaintiffs' claims that they did not raise funds for the purpose of influencing the Maine campaign.

With respect to the plaintiffs' claim of First Amendment privilege, Ms. Gardiner noted that the defendants had offered to enter into a protective order pursuant to which donors' identities would be disclosed only to counsel and their assistants, which she argued would completely protect donors' and the associations' First Amendment rights. Furthermore, she contended, *Perry* is distinguishable in that the defendants do not seek communications between NOM and the PAC bearing on internal strategy as to the *substantive* campaign, but rather as to the manner in which the campaign was to be funded.

For the following reasons, I **OVERRULED** the plaintiffs' objections on First Amendment grounds to (i) RFP No. 3, (ii) the disclosure of donors' identities in response to RFP Nos. 4, 5, 7, and 8, and (iii) the disclosure of donors' identities in response to deposition questions:

1. The Court of Appeals for the Ninth Circuit in *Perry* laid out a two-part framework for analysis of claims of First Amendment privilege in response to a discovery request. *See Perry*, 2010 WL 26439, at *10. That framework is consistent with one employed by the First Circuit in similar circumstances in *United States v. Cromley*, 890 F.2d 539, 543-44 (1st Cir. 1989). In accordance with that framework:

The party asserting the privilege must demonstrate a *prima facie* showing of arguable first amendment infringement. This *prima facie* showing requires [that party] 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.

If [that party] 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.

Perry, 2010 WL 26439, at *10 (citations, internal punctuation, and footnote omitted); *see also Cromley*, 890 F.2d at 543-44.

2. The plaintiffs have not made the requisite *prima facie* showing of the claimed chilling effect on associational rights. Unlike the proponents of Proposition 8 in *Perry*, they have adduced no evidence that such rights likely would be chilled by the requested discovery. *Compare Perry*, 2010 WL 26439, at *12.

3. Moreover, the defendants have offered to enter into a protective order permitting only limited access, by counsel and their assistants, to donors' identities. The willingness of the party seeking information to enter into a protective order is not necessarily dispositive of a claim

of chilling effect; indeed, in *Perry*, the court found that it was insufficient. *See id.* at *13. Nonetheless, as the *Perry* court noted, “[a] protective order limiting the dissemination of disclosed associational information may mitigate the chilling effect and could weigh against a showing of infringement” of those rights. *Id.* at *10 n.6. The plaintiffs have offered neither evidence nor persuasive argument that, with such a protective order in place, their First Amendment rights would be infringed.

I therefore **ORDERED** the parties to meet and confer to enter into a confidentiality order modeled on the Form Confidentiality Order contained in Appendix II to the Local Rules of this court. I further **ORDERED** that, if they are unable to agree to such an order, they shall, by February 11, 2010, so notify the court, supplying the precise language as to which they disagree and a brief statement of the reasons for the disagreement.

I also **OVERRULED** the plaintiffs’ objection to RFP No. 3 to the extent predicated on the asserted irrelevance of the requested information. I noted that I was satisfied, given the breadth of the relevance standard and bearing in mind the representations made by Ms. Gardiner as to the contours of the request, that RFP No. 3 seeks information relevant for discovery purposes to the plaintiffs’ challenges to the BQC statute.

B. Status/Scheduling Conference

In my report and order dated December 4, 2009, I had directed that the parties be prepared to report during the first week in February 2010 on the status of discovery efforts and to discuss post-discovery scheduling, including the setting of a dispositive motions deadline and a date for a consolidated hearing on the merits of both pending motions for a preliminary injunction as well as a requested permanent injunction. *See* 12/4/09 Order at 2. During the

December teleconference, I provisionally set a deadline of April 1, 2010, for discovery pertaining to both preliminary injunction motions. *See id.*

Ms. Gardiner reported that the defendants have served requests for production of documents but no interrogatories, that the deposition of the executive director of plaintiff American Principles in Action has been taken, and that the defendant is looking to take the deposition of Mr. Brown, the executive director of NOM, on February 18, 2010, the same day as the state's Ethics Commission has scheduled his deposition, to avoid the necessity that Mr. Brown travel to Maine twice. She also stated that the defendants had not yet decided whether to designate an expert. Following further discussion, and without objection, I **ORDERED** that a deadline of March 15, 2010, be set for the defendants to designate an expert or experts, if any. Mr. Neeley indicated that the plaintiffs do not intend to designate any expert.

Mr. Neeley advised that he planned to appeal my discovery ruling to Judge Hornby and, if Judge Hornby affirmed it, to the First Circuit. Counsel for both sides agreed that, in the circumstances, it was premature to set either a deadline for the filing of dispositive motions or a date for a consolidated hearing. In view of the scheduled February 18 deposition of Mr. Brown, counsel for both sides agreed to the setting of an accelerated schedule for briefing of the plaintiffs' appeal of my discovery ruling. That shortened schedule is set forth in the Certificate section below. I **ORDERED** that should Judge Hornby reverse my discovery ruling, the parties shall promptly contact the Clerk's Office to schedule a teleconference with me to discuss post-discovery scheduling, including the setting of a dispositive motions deadline and a date for a consolidated hearing.

SO ORDERED.

CERTIFICATE

- A. This report fairly reflects the actions taken at the hearing and shall be filed forthwith.

- B. Any objections to the report shall be filed in accordance with Fed. R. Civ. P. 72, with the proviso that any such objections, with supporting papers if any, be filed by 5 p.m. on February 10, 2010, and any response thereto be filed no later than 5 p.m. on February 12, 2010.

Dated this 5th day of February, 2010.

/s/ John H. Rich III
John H. Rich III
United States Magistrate Judge

categorically that an unsuccessful party is not entitled as of right to de novo review by the judge of an argument never seasonably raised before the magistrate.” (citation omitted)). For me to consider them now would make his efforts pointless.

The plaintiffs’ motion to stay discovery pending resolution of facial challenges is **DENIED**. There is no reason to bifurcate the case in that manner, and it would not contribute to judicial economy.

SO ORDERED.

DATED THIS 17TH DAY OF FEBRUARY, 2010

/s/D. BROCK HORNBY
D. BROCK HORNBY
UNITED STATES DISTRICT JUDGE

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

**The National Organization for
Marriage, and American Principles In
Action**

Plaintiffs,

v.

**Walter F. McKee, Andre G. Duchette,
Michael P. Friedman, Francis C.
Marsano, and Edward M. Youngblood,**
all in their official capacity as members of
the Commission on Governmental Ethics
and Election Practices; **Mark Lawrence,
Stephanie Anderson, Norman Croteau,
Evert Fowle, R. Christopher Almy,
Geoffrey Rushlau, Michael E. Povich,**
and **Neal T. Adams,** all in their official
capacity as District Attorneys of the State
of Maine; and **Janet T. Mills,** in her
official capacity as Attorney General of
the State of Maine,

Defendants.

Civil No. 1:09-cv-00538

Consent Confidentiality Order

The parties to this Consent Confidentiality Order have agreed to the terms of this Order; accordingly, it is ORDERED:

1. Scope. All documents produced in the course of discovery, including initial disclosures, all responses to discovery requests, all deposition testimony and exhibits, other materials which may be subject to restrictions on disclosure for good cause and information derived directly therefrom (hereinafter collectively "documents"), shall be subject to this Order concerning confidential information as set forth below. This Order is subject to the Local Rules of this District and of the Federal Rules of Civil Procedure

on matters of procedure and calculation of time periods.

2. Form and Timing of Designation. A party may designate documents as confidential and restricted in disclosure under this Order by placing or affixing the words “CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER” on the document in a manner that will not interfere with the legibility of the document and that will permit complete removal of the CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER designation. Documents shall be designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER prior to or at the time of the production or disclosure of the documents. The designation “CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER” does not mean that the document has any status or protection by statute or otherwise except to the extent and for the purposes of this Order.

3. Documents Which May be Designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER. Any party may designate documents as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER but only after review of the documents by an attorney or a party appearing *pro se* who has in good faith determined that the documents contain information protected from disclosure by statute or that should be protected from disclosure as confidential personal information, trade secrets, personnel records, or commercial information. The designation shall be made subject to the standards of Rule 11 and the sanctions of Rule 37 of the Federal Rules of Civil Procedure. Information or documents that are available in the public sector may not be designated as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER.

4. Depositions. Deposition testimony shall be deemed CONFIDENTIAL -

SUBJECT TO PROTECTIVE ORDER only if designated as such. Such designation shall be specific as to the portions to be designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER. Depositions, in whole or in part, shall be designated on the record as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER at the time of the deposition. Deposition testimony so designated shall remain CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER until seven days after delivery of the transcript by the court reporter. Within seven days after delivery of the transcript, a designating party may serve a Notice of Designation to all parties of record as to specific portions of the transcript to be designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER. Thereafter, those portions so designated shall be protected as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER pending objection under the terms of this Order. The failure to serve a Notice of Designation shall waive the CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER designation made on the record of the deposition.

5. Protection of Confidential Material.

(a) General Protections. Documents designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER under this Order shall not be used or disclosed by the parties, counsel for the parties or any other persons identified in ¶ 5(b) for any purpose whatsoever other than to prepare for and to conduct discovery and trial in this action, including any appeal thereof.

(b) Limited Third-Party Disclosures. The parties and counsel for the parties shall not disclose or permit the disclosure of any CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER documents to any third person or entity except as set forth in

subparagraphs (1)-(6). Subject to these requirements, the following categories of persons may be allowed to review documents that have been designated

CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER:

(1) Counsel. Counsel for the parties and employees of counsel who have responsibility for the preparation and trial of the action;

(2) Parties. Parties and employees of a party to this Order, including employees of the Maine Commission on Governmental Ethics and Election Practices;

(3) Court Reporters and Recorders. Court reporters and recorders engaged for depositions;

(4) Contractors. Those persons specifically engaged for the limited purpose of making copies of documents or organizing or processing documents but only after each such person has completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound.

(5) Consultants and Experts. Consultants, investigators, or experts (hereinafter referred to collectively as "experts") employed by the parties or counsel for the parties to assist in the preparation and trial of this action but only after such persons have completed the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound; and

(6) Others by Consent. Other persons only by written consent of the producing party or upon order of the Court and on such conditions as may be agreed or ordered. All such persons shall execute the certification contained in Attachment A, Acknowledgment of Understanding and Agreement to Be Bound.

(c) Control of Documents. Counsel for the parties shall make reasonable efforts to prevent unauthorized disclosure of documents designated as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER pursuant to the terms of this Order. Counsel shall maintain the originals of the forms signed by persons acknowledging their obligations under this Order for a period of six years from the date of signing.

(d) Copies. Prior to production to another party, all copies, electronic images, duplicates, extracts, summaries or descriptions (hereinafter referred to collectively as "copies") of documents designated as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER under this Order, or any individual portion of such a document, shall be affixed with the designation "CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER" if the word does not already appear on the copy. All such copies shall thereafter be entitled to the protection of this Order. The term "copies" shall not include indices, electronic databases or lists of documents provided these indices, electronic databases or lists do not contain substantial portions or images of the text of confidential documents or otherwise disclose the substance of the confidential information contained in those documents.

6. Filing of CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

Documents Under Seal. Before any document marked as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER is filed with the Clerk the party filing the document shall make reasonable efforts to ensure that the document is protected from public disclosure. The filing party shall first consult with the party which originally designated the document as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER

to determine whether, with the consent of that party, a redacted document may be filed with the Court not under seal. Where agreement is not possible or adequate, a confidential document may be electronically filed under seal only in accordance with Local Rule 7A. Other than motions and memoranda governed by Local Rule 7A, if the contents of CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER documents are incorporated into memoranda or other pleadings filed with the court, counsel shall prepare two versions of the pleadings, a public and a confidential version. The public version shall contain a redaction of references to CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER documents and shall be filed with the Clerk. The confidential version shall be a full and complete version of the pleading and shall be filed with the Clerk under seal under Local Rule 7A.

7. No Greater Protection of Specified Documents. No party may withhold information from discovery on the ground that it requires protection greater than that afforded by this Order unless the party moves for an order providing such special protection.

8. Challenges by a Party to Designation as Confidential. Any CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER designation is subject to challenge by any party or non-party (hereafter "party"). The following procedure shall apply to any such challenge.

(a) Objection to Confidentiality. Within 30 days of the receipt of any document designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER or of the refusal to produce a document on the ground of such designation, a party may serve upon the designating party an objection to the designation. The objection shall specify the

documents to which the objection is directed and shall set forth the reasons for the objection as to each document or category of documents. CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER documents to which objection has been made shall remain CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER until designated otherwise by waiver, agreement or order of the Court.

(b) Obligation to Meet and Confer. The objecting party and the party which designated the documents to which objection has been made shall have fifteen (15) days from service of the objection to meet and confer in a good faith effort to resolve the objection by agreement. If agreement is reached confirming or waiving the CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER designation as to any documents subject to the objection, the designating party shall serve on all parties a notice specifying the documents and the nature of the agreement.

(c) Obligation to File Motion. In the absence of agreement as to any documents designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER, the designating party shall file within 30 days of the service of the objection a motion to retain the CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER designation. The moving party has the burden to show good cause for the CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER designation. The failure to file the motion waives the CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER designation of documents to which objection was made.

9. Action by the Court. Applications to the Court for an order relating to documents designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER shall be by motion under Local Rule 7. Nothing in this Order or any action or agreement of a

party under this Order limits the Court's power to make orders concerning the disclosure of documents produced in discovery or at trial.

10. Use of Confidential Documents or Information at Trial. A party which intends to present or which anticipates that another party may present at trial CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER documents or information derived therefrom shall identify the issue, not the information, in the pretrial memorandum. The Court may thereafter make such orders as are necessary to govern the use of such documents or information at trial.

11. Obligations on Conclusion of Litigation.

(a) Order Remains in Effect. Unless otherwise agreed or ordered, this Order shall remain in force after dismissal or entry of final judgment not subject to further appeal.

(b) Return of CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER Documents. Within thirty days after dismissal or entry of final judgment not subject to further appeal, all documents treated as CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER under this Order, including copies as defined in ¶ 6(d), shall be returned to the producing party unless: (1) the document has been offered into evidence or filed without restriction as to disclosure; (2) the parties agree to destruction in lieu of return; or (3) as to documents bearing the notations, summations, or other mental impressions of the receiving party, that party elects to destroy the documents and certifies to the producing party that it has done so. Notwithstanding the above requirements to return or destroy documents, counsel may retain attorney work product,

including an index which refers or relates to information designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER, so long as that work product does not duplicate verbatim substantial portions of the text or images of confidential documents. This work product shall continue to be CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER under this Order. An attorney may use his or her work product in a subsequent litigation provided that its use does not disclose or use CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER documents.

(c) Deletion of Documents Filed under Seal from ECF System. Filings under seal shall be deleted from the ECF system only upon order of the Court.

12. Order Subject to Modification. This Order shall be subject to modification by the Court on its own motion or on motion of a party or any other person with standing concerning the subject matter. Motions to modify this Order shall be served and filed under Local Rule 7.

13. No Prior Judicial Determination. This Order is entered based on the representations and agreements of the parties and for the purpose of facilitating discovery. Nothing herein shall be construed or presented as a judicial determination that any documents or information designated CONFIDENTIAL - SUBJECT TO PROTECTIVE ORDER by counsel or the parties is subject to protection under Rule 26(c) of the Federal Rules of Civil Procedure or otherwise until such time as the Court may rule on a specific document or issue.

14. Persons Bound. This Order shall take effect when entered and shall be binding upon all counsel and their law firms, the parties, and persons made subject to

this Order by its terms.

So Ordered.

Dated: February 16, 2010.

/s/ John H. Rich III

U.S. Magistrate Judge

**WE SO MOVE/CONSENT
and agree to abide by the
terms of this Order**

/s/ Josiah Neeley.
JOSIAH NEELY
Attorney for Plaintiffs

Date: February 12, 2010

**WE SO MOVE/CONSENT
and agree to abide by the
terms of this Order**

/s/ Phyllis Gardiner
PHYLLIS GARDINER
Assistant Attorney General
Attorney for Defendants

Dated: February 12, 2010

/s/ Thomas A. Knowlton
THOMAS KNOWLTON
Assistant Attorney General
Attorney for Defendants

Dated: February 12, 2010

ATTACHMENT A

**UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE**

**The National Organization for
Marriage, and American Principles In
Action**

Plaintiffs,

v.

**Walter F. McKee, Andre G. Duchette,
Michael P. Friedman, Francis C.
Marsano, and Edward M. Youngblood,**
all in their official capacity as members of
the Commission on Governmental Ethics
and Election Practices; **Mark Lawrence,
Stephanie Anderson, Norman Croteau,
Evert Fowle, R. Christopher Almy,
Geoffrey Rushlau, Michael E. Povich,
and Neal T. Adams,** all in their official
capacity as District Attorneys of the State
of Maine; and **Janet T. Mills,** in her
official capacity as Attorney General of
the State of Maine,

Defendants.

Civil No. 1:09-cv-00538

**Acknowledgment and Agreement to
Be Bound**

ACKNOWLEDGMENT AND AGREEMENT TO BE BOUND

The undersigned hereby acknowledges that he/she has read the Confidentiality Order dated February 16, 2010, in the above-captioned action and attached hereto, understands the terms thereof, and agrees to be bound by its terms. The undersigned submits to the jurisdiction of the United States District Court for the District of Maine in matters relating to the Confidentiality Order and understands that the terms of the Confidentiality Order obligate him/her to use documents designated CONFIDENTIAL -

SUBJECT TO PROTECTIVE ORDER in accordance with the Order solely for the purposes of the above-captioned action, and not to disclose any such documents or information derived directly therefrom to any other person, firm or concern.

The undersigned acknowledges that violation of the Confidentiality Order may result in penalties for contempt of court.

Name: _____

Job Title: _____

Employer: _____

Business Address: _____

Date: _____

Signature: _____

Wayne, Jonathan

From: Josiah Neeley [jneeley@bopplaw.com]
Sent: Friday, February 19, 2010 1:25 PM
To: Wayne, Jonathan
Subject: Re: Maine Scheduling Letter - NOM Petition

Attachments: Brown Declaration.PDF



Brown
laration.PDF (475 KI

Mr. Wayne,

Most of the materials are actually already in the Commission's possession. I refer, specifically, to the materials submitted with NOM's motion to stay, as well as the materials submitted with Plaintiffs' Objections to the Magistrate Judge's Order. If you'd like, I can resend these documents.

The only document not already in your possession would be a declaration from Mr. Brown, which is attached.

I apologize for any inconvenience.

Regards,
Josiah Neeley
BOPP, COLESON & BOSTROM
1 South 6th Street
Terre Haute, Indiana 47807
Ph.: 812/232-2434
Fax: 812/235-3685

NOTICE AND DISCLAIMERS

The preceding message may be confidential or protected by the attorney-client privilege. It is not intended for transmission to, or receipt by, any unauthorized persons. If you believe that this message has been sent to you in error, please (i) do not read it, (ii) reply to the sender that you have received the message in error, and (iii) erase or destroy the message.

To the extent this e-mail message contains legal advice it is solely for the benefit of the client(s) of Bopp, Coleson & Bostrom represented by the Firm in the particular matter that is the subject of this message and may not be relied upon by any other party.

Internal Revenue Service regulations require that certain types of written advice include a disclaimer. To the extent the preceding message contains written advice relating to a Federal tax issue, the written advice is not intended or written to be used, and it cannot be used by the recipient or any other taxpayer, for the purposes of avoiding Federal tax penalties, and was not written to support the promotion or marketing of the transaction or matters discussed herein.

----- Original Message -----

From: "Wayne, Jonathan" <Jonathan.Wayne@maine.gov>
To: "Josiah Neeley" <jneeley@bopplaw.com>
Cc: "Gardiner, Phyllis" <Phyllis.Gardiner@maine.gov>
Sent: Wednesday, February 17, 2010 10:25 AM
Subject: RE: Maine Scheduling Letter - NOM Petition

Mr. Neeley:

This in response to your question about NOM's petition to vacate or modify the Commission's investigative subpoenas. The Commission

received the request on February 11, 2010. The following day, I scheduled the matter for the Commission's February 25, 2010 meeting. The Commission was closed on February 15-16. The Commission's counsel and I are working on a memo analyzing the issues for the Commission members. When the memo is concluded, you will receive a copy.

It's always helpful if parties making an application to the Commission can make the initial application as complete as possible. If you have additional materials to submit, please get them to me as soon as you can so that I can circulate them to the Commissioners in time for the Commissioners to review them.

Please also feel free to call if you have any questions about our procedures.

Thank you.

Jonathan Wayne
Executive Director
Maine Ethics Commission
135 SHS
Augusta, ME 04333
(207) 287-4179

-----Original Message-----

From: Josiah Neeley [mailto:jneeley@bopplaw.com]
Sent: Wednesday, February 17, 2010 10:08 AM
To: Wayne, Jonathan
Subject: Re: Maine Scheduling Letter - NOM Petition

Thank you. There may be additional documents we would like to present to the commission at its meeting. Should I send those to you now?

----- Original Message -----

From: "Wayne, Jonathan" <Jonathan.Wayne@maine.gov>
To: <jneeley@bopplaw.com>
Cc: "Gardiner, Phyllis" <Phyllis.Gardiner@maine.gov>
Sent: Saturday, February 13, 2010 2:18 AM
Subject: Maine Scheduling Letter - NOM Petition

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

The National Organization for Marriage,
and American Principles In Action
Plaintiffs,

v.

Walter F. McKee, Andre G. Duchette,
Michael P. Friedman, Francis C. Marsano,
and Edward M. Youngblood, all in their
official capacity as members of the
Commission on Governmental Ethics and
Election Practices; Mark Lawrence,
Stephanie Anderson, Norman Croteau,
Evert Fowle, R. Christopher Almy,
Geoffrey Rushlau, Michael E. Povich, and
Neal T. Adams, all in their official capacity
as District Attorneys of the State of Maine;
and Janet T. Mills, in her official capacity as
Attorney General of the State of Maine,
Defendants.

Cause No. 1:09-cv-00538
(CIVIL)

Declaration of Brian Brown

DECLARATION OF BRIAN BROWN

I, Brian Brown, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am a resident of Fairfax County, in the State of Virginia. I am over eighteen years of age, and my statements herein are based on personal knowledge.
2. I am the executive director of the National Organization for Marriage ("NOM"), a nonprofit 26 U.S.C. § 501(c)(4) issue advocacy corporation incorporated in Virginia dedicated to preserving the traditional definition of marriage.
3. In my capacity as executive director for NOM, I have solicited contributions for NOM from numerous donors and have had numerous conversations with donors both in person

and over the telephone.

4. Based on my experience as a solicitor for NOM, it is my belief that disclosing personal donor information to the Commission, even under the confines of its confidentiality rules, would have a substantial negative effect on the ability of NOM to raise funds. Same-sex marriage is a highly controversial issue, and many potential donors would hesitate to give funds if they thought personal information regarding their donation would have to be publicly disclosed. Further, no donor wishes to be involved in litigation, which could involve being forced to testify, submit to questioning, or otherwise be investigated, based on the fact that they have donated money to promote or oppose a ballot measure. If NOM is required to turn over personal donor information, this will lead to a reduction in donations, as potential donors will be reluctant to support a controversial activity that could subject them to government scrutiny.

5. During 2009, NOM contributed to Stand For Marriage Maine as part of the latter's "People's Veto" campaign to restore traditional marriage in Maine. Pursuant to making these contributions, I communicated with Stand For Marriage Maine regarding issues of campaign strategy and other matters. If these communications are required to be disclosed to the Commission, even under the confines of its confidentiality rules, this will substantially alter how I would choose to communicate in the future.

I declare under penalty of perjury under the laws of the United States of America that the
forgoing is true and correct. Executed on 02/19/2010.

Brian B. B.

Brian Brown

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

**The National Organization for Marriage,
and American Principles In Action**
Plaintiffs,

v.

**Walter F. McKee, Andre G. Duchette,
Michael P. Friedman, Francis C. Marsano,
and Edward M. Youngblood,** all in their
official capacity as members of the
Commission on Governmental Ethics and
Election Practices; **Mark Lawrence,
Stephanie Anderson, Norman Croteau,
Evert Fowle, R. Christopher Almy,
Geoffrey Rushlau, Michael E. Povich, and
Neal T. Adams,** all in their official capacity
as District Attorneys of the State of Maine;
and **Janet T. Mills,** in her official capacity as
Attorney General of the State of Maine,
Defendants.

Cause No. 1:09-cv-00538
(CIVIL)

**PLAINTIFF'S OBJECTIONS TO
REPORT OF HEARING AND ORDER
RE: DISCOVERY DISPUTE AND
SCHEDULING**

**PLAINTIFFS' OBJECTIONS TO REPORT OF HEARING AND ORDER RE:
DISCOVERY DISPUTE AND SCHEDULING**

Plaintiffs, National Organization for Marriage ("NOM") and American Principles in Action ("APIA"), by counsel and pursuant to Federal Rule of Civil Procedure 72 and 28 U.S.C. § 636(b), hereby timely file their objections to the Report of Hearing and Order entered by the Magistrate Judge on February 5, 2010.

Argument

A. Standard Of Review

Ordinarily a magistrate judge's ruling on discovery-related matters is a non-dispositive matter

which may be overturned by a district judge where “it has been shown that the magistrate judge’s order is clearly erroneous or contrary to law.” 28 U.S.C. §636(b). In this case, however, one of the ultimate issues in the case is whether Plaintiffs can be required to disclose personal information regarding its donors. Effectively, then, the Magistrate Judge’s order involves a dispositive matter, which is reviewed by the district court de novo, and the district court may receive further evidence in reaching its determination. 28 U.S.C. §636(b). Under either standard, however, the Magistrate Judge’s order should be overturned.

B. The Disputed Material is Not Relevant to Any Claim or Defense in This Case.

The Magistrate judge erred in overruling Plaintiffs’ objections as to relevance both as to Request #3 and as to donor information. Request #3 asked “[a]ll correspondence, memoranda, email, and other documents reflecting communications between NOM and the Stand For Marriage Maine PAC concerning efforts to prevent legislation permitting same-sex marriage from taking effect in Maine.” Section 1056-B explicitly exempts contributions made to a PAC from the statute’s threshold requirement. This exemption applies not only to monetary contributions, but also to in-kind contributions that take the form of paid staff time, and includes coordinated expenditures. *See* Maine Commission on Governmental Ethics and Election Practices, *Guidance on Reporting as a Ballot Question Committee*, available at <http://www.maine.gov/ethics/bqcs/guidance.htm> (“Donating paid staff to a PAC, or coordinating expenditures with a PAC are in-kind contributions to the PAC. They do not count toward the \$5,000 expenditure threshold that would trigger filing of a §1056-B report by the donor”). Because Stand For Marriage Maine PAC is a registered Maine PAC, any coordination between Stand For Marriage and NOM is not counted towards the threshold, so any communications between NOM and Stand For Marriage are not relevant to this case.

In response, Defendants argued – and the Magistrate Judge’s Order accepts – that the requested information is relevant “because it bears on plaintiffs’ claims that they did not raise funds for the purpose of influencing the Maine campaign.” Order, at 3. It is true that NOM has a policy of non accepting designated contributions. *See, e.g., Amended Complaint*, Exhibit 6, at 9 (stating that “[n]o funds [donated to NOM] will be earmarked or reserved for any political purpose.”) Nothing in any communication between NOM and Stand For Marriage Maine PAC can have bearing on this policy, and as such the communications are not relevant.

Further, when determining whether a donation counts towards the threshold amount under Section 1056-B, the focus is on the intent of the donor and/or the objective content of the solicitation, not the intent of the solicitor. Funds received in response to a solicitation are counted towards the threshold amount based on the solicitation only where the 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.” 21-A M.R.S.A. § 1056-B(2-A)(C) (emphasis added). How NOM intended to use donations received based on a solicitation is completely irrelevant to the issue of whether those donations count towards the threshold amount. The information sought by Request #3 is thus not relevant to any claim or defense in this case.

Similarly, personal information regarding donors is not relevant to any issue in this case. Plaintiffs have no objection to turning over information regarding individual donations (including dates, amounts, etc.), subject to an appropriate protective order, so long as this does not include identifying information such as a name or address. The fact that a donation is listed as coming from a named individual, as opposed a John Doe, is of no additional value, and hence is not relevant to any issue in this case. The Magistrate Judge’s order is thus clearly erroneous and contrary to law as

to Plaintiffs' relevance objections.

C. The Disputed Material is Protected by a First Amendment Privilege.

The Magistrate Judge also erred in overruling Plaintiffs' objections based on their assertion of a First Amendment privilege. NOM's internal campaign communications and identities of contributors to NOM and APIA are privileged under the First Amendment. 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”); *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.”). The Ninth Circuit’s recent decision in *Perry v. Schwarzenegger*, 2010 WL 26439 (9th Cir. Jan. 4, 2010) lays out the framework for establishing a claim of First Amendment privilege in the discovery context. According to *Perry*:

The party asserting the privilege must demonstrate a prima facie showing of arguable first amendment infringement. The prima facie showing requires [the party asserting the privilege] 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.

If [the party asserting the privilege] 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.

Perry, 2010 WL 26439, at *10; see also *United States v. Cromley*, 890 F.2d 539, 543-44 (1st Cir. 1989).

In overruling Plaintiffs' First Amendment objection, the Magistrate Judge held that Plaintiffs had not made a prima facie showing of chill, as they "adduced no evidence that such rights likely would be chilled by the requested discovery." Order, at 4. In evaluating whether Plaintiffs have adduced a *prima facie* case of chill, however, courts need not close their eyes to the reasonable and predictable consequences of disclosure. See *Perry*, 2010 WL 21191, at *12 (noting the "self-evident conclusion that important First Amendment interests are implicated by the plaintiffs' discovery request.") In *Buckley v. Valeo*, 424 U.S. 1 (1976), the Supreme Court established as a general rule that a party seeking to avoid disclosure on First Amendment grounds must establish "a reasonable probability that the compelled disclosure ... will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Buckley*, 424 U.S. at 74. *Buckley* went on to suggest, however, that this standard had been satisfied in *Pollard v. Roberts*, 283 F.Supp. 248 (D. Ark. 1968), despite the fact that the plaintiffs in *Pollard* had presented no specific evidence of chill. *Buckley*, 424 U.S. at 69 n.83. *Pollard* involved an assertion of First Amendment privilege against "an Arkansas prosecuting attorney [who had] sought to obtain, by a subpoena duces tecum, the records of a checking account (including the names of individual contributors) established by a specific party,

the Republican Party of Arkansas.” *Id.* The court in *Pollard* had acknowledged that “there is no evidence of record in this case that any individuals have as yet been subjected to reprisals on account of the contributions in question,” but nevertheless held that “it would be naive not to recognize that the disclosure of the identities of contributors to campaign funds would subject at least some of them to potential economic or political reprisals of greater or lesser severity.” *Pollard*, 283 F. Supp. 258. Likewise, given the generally known potential for harassment of opponents of same-sex marriage, as well as the fact NOM is already being investigated due to engaging in First Amendment protected activity, it would be “naive not to recognize that the disclosure of the identities of contributors to campaign funds would subject at least some of them to potential economic or political reprisals of greater or lesser severity.” *Id.*

Same-sex marriage is a controversial issue that has resulted in targeting of opponents’ contributors, officers, board members, volunteers, and others for threats, harassment, and intimidation by same-sex marriage activists.¹ This has occurred in many states, including Maine. Examples of such activities in Maine include Marc Mutty, of Stand For Marriage Maine PAC, 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, available at <http://www.bangordailynews.com/detail/128742.html>.

¹*See, 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, that provide numerous examples of threats, harassment, and intimidation by same sex marriage activists. Although these declarations were filed in out of state cases, this is irrelevant for the disclosure analysis. *See Averill v. City of Seattle*, 325 F. Supp. 2d 1173 (W.D. Wash. 2004) (fact that socialist groups had been harassed in the past sufficient to exempt new socialist organization from disclosure, despite paucity of evidence that members of new organization were subject to harassment).

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, available at <http://www.bangordailynews.com/detail/130565.html>.

Information about donors has also been compiled on the Internet by pro-same sex marriage groups, leading to a chilling effect on donors and potential donors. *See, e.g.*, Affidavit of Joseph L. Bernatche, attached. Even the Supreme Court has recently noted the prevalence of harassment of opponents of same-sex marriage. *See Citizens’ United v. F.E.C.*, 2010 WL 183856, at *39 (evidence of harassment was “cause for concern”); *see also Citizens’ United v. F.E.C.*, 2010 WL 183856, at *97-98 (Thomas, J., concurring in part and dissenting in part) (“ Many supporters (or their customers) [of traditional marriage have] suffered property damage, or threats of physical violence or death, as a result . . . The success of such intimidation tactics has apparently spawned a cottage industry that uses forcibly disclosed donor information to pre-empt citizens' exercise of their First Amendment rights.”) 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.

The facts of this case illustrate the problematic nature of requiring specific evidence of chill in certain circumstances. Because of the protective order, showing specific evidence of chill would require evidence that potential donors would not donate to Plaintiffs out of a fear that by doing so

they would be drawn into this litigation. Producing this evidence, however, would require donors to voluntarily allow themselves to be drawn into the lawsuit. Plaintiffs are thus subject to a Catch-22; any evidence that could specifically show chill is by definition not able to be produced. This Court should therefore follow *Buckley, Pollard*, and *In re Grand Jury* by finding that Plaintiffs have established a prima facie case of harassment sufficient to assert their First Amendment privilege.

Additionally, it is not true that Plaintiffs' have adduced no evidence of chill. Plaintiffs' Response To Defendants' First Request for Production of Documents states that disclosing the information at issue here "would have a deterrent effect on participation in campaigns and 'the free flow of information within campaigns.'" Plaintiffs' Response To Defendants' First Request for Production of Documents, at 6 (*quoting Perry*, 2010 WL 26439, at *10.) Likewise, Plaintiffs' Verified Amended Complaint alleges that NOM and APIA would be chilled in the exercise of their First Amendment rights if they were forced to disclose donor information. *Amended Complaint* ¶¶50, 52.

Further, the very fact that one of the Plaintiffs in this case is currently being investigated by the State in connection with the activities at issue here is sufficient to establish a prima facie case for privilege. *See In re Grand Jury Proceeding*, 842 F.2d 1229, 1236 (11th Cir. 1988) (suggesting that "when a government investigation into possible violations of law has already focused on a particular political group or groups, the showing required to establish an infringement of freedom of association is more lenient" because "the government investigation itself may indicate the possibility of harassment.") While Defendants no doubt do not intend their investigation as a form of harassment, the fact that donations to a non-profit have resulted in government scrutiny and can subject the donor to potential burdens such as having to be deposed, testify in court, have their

personal information disclosed, or otherwise be drawn into litigation against their will, all of this has a clear and obvious chilling effect on First Amendment rights.

Additional evidence also supports Plaintiffs' claim of chill. For example, Brian Brown, executive director of NOM has stated that "disclosing personal donor information, even limited disclosure to opposing counsel in the NOM v. McKee litigation, would have a substantial negative effect on the ability of APIA to raise funds." See Declaration of Andresen Blom, attached, at ¶ 4.

Finally, due to the time-frame in which the instant dispute has occurred, Plaintiffs have been unable to fully develop an evidentiary record in support of their claims of chill and harassment. For example, while Mr. Blom's deposition occurred on January 21, 2010, and includes testimony about the chilling effect on donors disclosure would have, a transcript of this deposition is still in preparation. Similarly, attempts to prepare affidavits in support of Plaintiffs claim have been stymied by poor weather and other logistical difficulties. Therefore, should this Court find insufficient evidence of chill or harassment, Plaintiffs would request this matter be remanded to the Magistrate Judge and that additional time be granted for Plaintiffs to compile the necessary evidence to adduce its *prima facie* case.

Since Plaintiffs have established a *prima facie* case of harassment, the burden shifts to Defendants to show 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." *Perry*, 2010 WL 26439, at *10. Defendants cannot meet this standard. As argued above, Defendants' requests are not even relevant to any claim or defense in the case, let alone related to a compelling governmental interest. Since there is no compelling State interest in the identity of Plaintiffs contributors making undesignated contributions, the State cannot justify the

abridgment of the associational freedom of Plaintiffs and their contributors. For this reason, the Magistrate Judge's order is clearly erroneous and contrary to law, and must be overturned.

February 10, 2010

Respectfully submitted,

Stephen C. Whiting, Maine # 559
THE WHITING LAW FIRM
75 Pearl Street, Suite 207
Portland, ME 04101
207/780/0681 telephone
Local Counsel for Plaintiffs

/s/ Jeffrey Gallant

James Bopp, Jr., Ind. #2838-84
Jeffrey Gallant, , Va. # 46876
Josiah Neeley, Tex. #24046514
BOPP, COLESON & BOSTROM
1 South Sixth Street
Terre Haute, IN 47807-3510
812/232-2434 telephone
812/234-3685 facsimile
Lead Counsel for Plaintiffs

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

**The National Organization for Marriage,
and American Principles In Action**
Plaintiffs,

v.

**Walter F. McKee, Andre G. Duchette,
Michael P. Friedman, Francis C. Marsano,
and Edward M. Youngblood,** all in their
official capacity as members of the
Commission on Governmental Ethics and
Election Practices; **Mark Lawrence,
Stephanie Anderson, Norman Croteau,
Evert Fowle, R. Christopher Almy,
Geoffrey Rushlau, Michael E. Povich, and
Neal T. Adams,** all in their official capacity
as District Attorneys of the State of Maine;
and **Janet T. Mills,** in her official capacity as
Attorney General of the State of Maine,
Defendants.

Cause No. 1:09-cv-00538
(CIVIL)

Declaration of Andresen Blom

DECLARATION OF ANDRESEN BLOM

I, Andresen Blom, make the following declaration pursuant to 28 U.S.C. § 1746:

1. I am a resident of Fredrick County, Virginia, I am over eighteen years of age, and my statements herein are based on personal knowledge.

2. I am the executive director of American Principles in Action (“APIA”), a nonprofit 26 U.S.C. § 501(c)(4) issue advocacy corporation incorporated in the District of Columbia dedicated to promoting equality of opportunity and ordered liberty. I have held this position since April 1, 2009.

3. In my capacity as executive director for APIA, I have solicited contributions for

APIA from numerous donors and have had numerous conversations with donors both in person and over the telephone.

4. Based on my experience as a solicitor for APIA, it is my belief that disclosing personal donor information, even limited disclosure to opposing counsel in the NOM v. McKee litigation, would have a substantial negative effect on the ability of APIA to raise funds. APIA is involved in many controversial issues, and potential donors would hesitate to give funds if they thought personal information regarding their donation would have to be publicly disclosed. Further, no donor wishes to be involved in litigation, which could involve being forced to testify, submit to questioning, or otherwise be investigated, based on the fact that they have donated money to promote or oppose a ballot measure. If APIA is required to turn over personal donor information, this will lead to a reduction in donations, as potential donors will be reluctant to support a controversial issue that could subject them to government scrutiny.

I declare under penalty of perjury under the laws of the United States of America that the forgoing is true and correct. Executed on February 9, 2010.

/s/ Andresen Blom

Andresen Blom

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

NATIONAL ORGANIZATION FOR
MARRIAGE AND
AMERICAN PRINCIPLES IN ACTION,

Plaintiffs

-vs-

WALTER F. MCKEE, et al.,

Defendants

AFFIDAVIT OF
JOSEPH L. BERNATCHE

I, Joseph L. Bernatche, of Portland, Maine, first being duly sworn, hereby state under oath that:

1. All statements made in this Affidavit are based on my own personal knowledge and are true.
2. I donated \$100.00 to the Stand for Marriage Maine PAC, to help them promote a "yes" vote on referendum ballot question #1, to repeal Maine's gay marriage law.
3. When I made that donation, I learned from the contribution form that the PAC would have to report my name, address, occupation, and location of employment to the Maine Ethics Commission, and that this information would be made available to the public. I did not have a problem with that, because I figured "who would care about my measly \$100.00 donation?"
4. However, a few weeks ago, just for fun, I searched my name "Joseph L. Bernatche," on the internet. Much to my surprise, the third entry Google has under

my name is: "Red-Hot Bigot List: Stand for Marriage Maine Yes On 1 Donors."

Attached to this Affidavit and labeled "Exhibit A" is a printout of that first page on Google.

5. I then clicked on the words "Red-Hot Bigot List", and ended up on the website of something called "Lavender Newswire." To my horror, I found they had a list of all donors to the Stand for Marriage Maine PAC, and my name, occupation, address, and the amount of my donation were listed on that list, along with a few hundred other donors. Attached to this Affidavit, and labeled "Exhibit B" is a copy of the first page of that list from the "Lavender Newswire" website, along with the 2 pages that contain the information about me.
6. The website claims that people on the list are "haters and hate-enablers"; and goes on to state: "We would never patronize any establishment that made money at our expense, by accepting business from professional homophobes."
7. I am not a "hater" or a "homophobe". I just support traditional marriage, of one man and one woman.
8. Upon seeing this, I became extremely distressed. I know that in California, donors to the referendum effort to repeal gay marriage there were often physically assaulted, had their cars vandalized, and even had their houses and churches burned.
9. I am also extremely concerned that if I apply for a job somewhere, or try to rent an apartment somewhere or do almost anything else, gays and pro-gay marriage

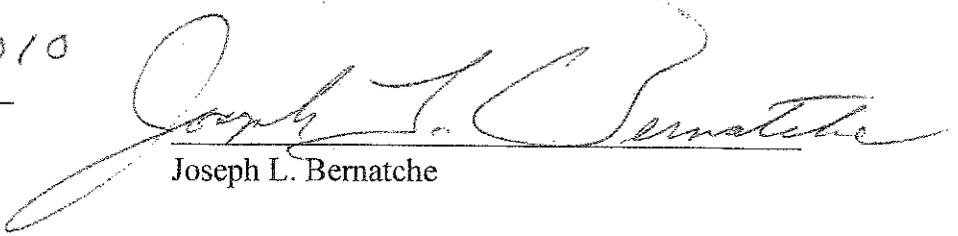
employers, landlords, etc. will consult this "Red-Hot Bigot List", and turn me down.

10. I cannot believe that groups like this "Lavender Newswire" can take donor information from the Maine Ethics Commission and abuse that information and the donors, like they have done with myself and many other contributors.

11. For my personal safety, and to avoid any other possible negative consequences, I have paid \$1,500.00 to an internet company that said they can do something to "bury" my identifying information on the Lavender Newswire website so people are less likely to see it. I can't believe I am having to pay \$1,500.00 to secure my safety for making a \$100.00 donation, but it is worth it to me to avoid having happen to me what has happened to voters in California.

12. Needless to say, I will not donate to any "controversial" referendum causes in the future.

Dated: 2/9/2010


Joseph L. Bernatche

State of Maine
Cumberland, SS.

On February 9, 2010 personally appeared Joseph L. Bernatche and made oath that all statements in this Affidavit are based upon his own personal knowledge and are true,

Before me:


Signature of notary

Stephen C. Whiting
Print name of notary

My commission expires:

Attorney, Bar #559

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Results 1 - 10 of about 363 for **joseph bernatche**. (0.24 seconds)

[PDF] [UNITED STATES DISTRICT COURT DISTRICT OF MAINE JOSEPH L. BERNATCHE ...](#) ★

File Format: PDF/Adobe Acrobat - [Quick View](#)

Joseph Bernatche has filed an action against The Law Offices of Daniel Lilley, Daniel Lilley, and William Fogel. (Docket No. 1.) **Bernatche** has filed a ...

www.med.uscourts.gov/.../MJK_07292003_2-03cv172_Bernatche_v_LawOffice_AFFIRMED_08192003.pdf

[PDF] [UNITED STATES DISTRICT COURT District of Maine JOSEPH L. BERNATCHE ...](#) ★

File Format: PDF/Adobe Acrobat - [Quick View](#)

Chief U.S. District Judge. Dated this 19th day of August, 2003. **JOSEPH BERNATCHE** represented by **JOSEPH BERNATCHE**. PO Box 10771. Portland ME. (207) 797-5256 ...

www.med.uscourts.gov/.../GZS_08192003_2-02cv172_BERNATCHE_v_LawOffices.pdf

[Red-Hot Bigot List: Stand for Marriage Maine Yes On 1 Donor ...](#) ★

Oct 15, 2009 ... REQUESTED MORE INFORMATION REQUESTED MORE INFORMATION
95 DORSET STREET PORTLAND ME 04102 09/22/2009 - \$100.00 - CASH. **JOSEPH L**

BERNATCHE ...

news.lavenderliberal.com/.../red-hot-bigot-list-stand-for-marriage-maine-yes-on-1-donor-filings/
- [Cached](#)

[Last Names Ranging From Bernat, Ronald To Bernath, Craig @ MyLife.com](#) ★

... Anthony Bernatche Donald Bernatche Greta Bernatche Joan Bernatche Joanne Bernatche

Joseph Bernatche Marie Bernatche Michael Bernatche Michelle Bernatche ...

www.mylife.com/people-search/13-10868/ - [Cached](#)

[Mrs. KostECKI Dies Tuesday](#) . ★

She was a member of St. Joseph Roman Catholic Church and St. Joseph Rosary Society ...
James .of Oak Hill; two sisters, Mrs. Max and Mrs. **Joseph Bernatche**, ...

news.google.com/newspapers?nid=110&dat=19651201&id...

[Bangor Candidates Submit To Grilling By Voters](#) . ★

Joseph Bernatche, a candidate for a three-year term on the City Council, termed himself humanitarian." He approves of revitalizing the downtown area. ...

news.google.com/newspapers?nid=2457&dat=19851011&id...

[Daniel Lilley - Email, Address, Phone numbers, everything ...](#) ★

Joseph Bernatche has filed an action against The Law Offices of Daniel Lilley, Daniel Lilley, and William Fogel. (Docket No. 1.) **Bernatche** has filed a ...

www.123people.com/s/daniel+lilley

[Janowiak's from Manistee - Janowiak - Family History & Genealogy ...](#) ★

My Grandfather **Joseph Bernatche** and my Father Robert lived right next door. My mother is a twin daughter of William and Evelyn Janowiak. ...

boards.ancestry.co.uk/surnames.janowiak/1.4.5.13.18.../mb.ashx - [Cached](#)

Exhibit A

Individual Record ★

Joseph BERNATCHE, Household ... Occupation. Marital Status. Ethnic Origin, French. Head of Household, Thomas **BERNATCHE**. Religion, Catholique ...
www.familysearch.org/Eng/Search/census/individual_record.asp?...

MIM Notes ★

Joseph Bernatche, a postal worker in Portland, was beaten with a "full force" baton and thrown from the steps by police, both times while he was handcuffed ...
www.prisoncensorship.info/archive/etext/mn/mn.php?issue=134 - Cached

1 2 3 4 5 6 7 8 9 10 . **Next**

Joseph bernatche

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Lavender Newswire

If you're not outraged, we're not doing our job.

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October 15, 2009

Red-Hot Bigot List: Stand for Marriage Maine Yes On 1 Donor Filings

UPDATE: All the Maine donors (including those from outside Maine) have been imported into [Base8](#). While we are researching each record as you read this, these records are mostly raw data and unsorted — but they are now **searchable** (and much easier to read).

[Go to Base8](#)

Filed October 13, 2009

Notes:

- The data that follows is taken from the Maine Commission on Government Ethics & Election Practices ([PDF file](#)), and sorted for easy reading.
- Yes, there are Proposition 8 donors here; I've been working with the raw data for so long, I recognize a number of names without needing to cross-check.
- Yes, these records will be added to [Base8](#).
- Of greatest interest will be the cash donations, but the expenditures reveal some interesting information as well. I'm not going to include expenditures (or in-kind contributions) in this post, but I encourage you to browse through the [Maine.gov](#) records.

While no one can fault a pizza parlor or a bagel shop for doing business with the Stand for Marriage Maine bigots, the expenditures list includes a number of businesses that (we can only surmise) knew exactly what sort of bigots they were accommodating, such as hotel catering services, designers and printers of banners and other anti-gay materials, those who made in-kind contributions, etc. We would never patronize any establishment that made money at our expense, by accepting business from professional homophobes.

When you get to the entries for "MAR/COM. SERVICES, INC.," you'll want to read this short article at the San Francisco Appeal: "[San Francisco Company Making \\$600K To Fight Against Gay Couples.](#)"

- No, I'm not really blogging again. This information is simply too important not to share.

And now, on to the haters and hate-enablers:

CASH DONATIONS

TOTAL CASH CONTRIBUTIONS: \$794,180.62

[No name or address]
09/30/2009 - \$82,759.13 - CASH
[Type "6" = Unitemized Contributions]

LISA M AGREN
HOMEMAKER
NONE
43 SUNNYFIELD LANE
CUMBERLAND ME 04021

Exhibit B

ASSOCIATION OF PERPETUAL EUCHARISTIC ADORATION OF MID COAST MAINE
1 JEFF STREET
BRUNSWICK ME 04011

SUSAN W AYER
RETIRED
RETIRED
1 FAYE STREET
TOPSHAM ME 04086
09/15/2009 - \$100.00 - CASH

ROBERT W BALLEW
RETIRED
RETIRED
14 LILAC DRIVE
BOWDOIN ME 04287
09/22/2009 - \$100.00 - CASH

GREGORY BARNES
ATTORNEY
SELF-EMPLOYED
7165 CALABRIA COURT, UNIT D
SAN DIEGO CA 92122
09/18/2009 - \$100.00 - CASH

SAL BARRESI
REQUESTED MORE INFORMATION
REQUESTED MORE INFORMATION
15 HENDERSON STREET
EVERETT MA 02149
09/22/2009 - \$100.00 - CASH

JEAN D BARRY
REQUESTED MORE INFORMATION
REQUESTED MORE INFORMATION
2307 OHIO STREET
BANGOR ME 04401
09/09/2009 - \$100.00 - CASH

MICHAEL BARTLETT
SERVER
RESTAURANT EUROPA
9975 EDWARDS LANE
CHAGRIN FALLS OH 44023
08/04/2009 - \$80.00 - CASH

GERALD BEAULIEU
REQUESTED MORE INFORMATION
REQUESTED MORE INFORMATION
PO BOX 43
BURNHAM ME 04922
09/18/2009 - \$100.00 - CASH

CARON BEECKEL
NONE
NONE
919 UPPER STREET
TURNER ME 04282
09/14/2009 - \$100.00 - CASH

JOHN L BERNARD
REQUESTED MORE INFORMATION
REQUESTED MORE INFORMATION
95 DORSET STREET
PORTLAND ME 04102
09/22/2009 - \$100.00 - CASH

JOSEPH L BERNATCHE

RETIRE
RETIRE
PO BOX 10771
PORTLAND ME 04104
09/14/2009 - \$100.00 - CASH

EUGENE C BIBBER
RETIRE
RETIRE
135 BRACKETT ROAD
GORHAM ME 04038
09/30/2009 - \$100.00 - CASH

JEANNE BIGELOW
RETIREE
RETIRE
P O BOX 1236
NAPLES ME 04055
09/25/2009 - \$500.00 - CASH

DAVID BJARNASON
INVESTMENT MANAGER
UNEMPLOYED
1317 ROYAL TROON DRIVE #10
SALT LAKE CITY UT 84124
09/18/2009 - \$100.00 - CASH

PETER J BOHMAN
MACHINIST
BIW
140 TUTTLE ROAD
CUMBERLAND ME 04021
09/17/2009 - \$100.00 - CASH

BRUCE BORG
CONSTRUCTION
BORG PACIFIC INC.
28940 GREENSPOT ROAD #221
HIGHLAND CA 92346
09/18/2009 - \$100.00 - CASH

RICHARD BOSWORTH
REQUESTED MORE INFORMATION
REQUESTED MORE INFORMATION
157 CAT MOUSAM ROAD
KENNEBUNK ME 04043
09/09/2009 - \$100.00 - CASH

SUZANNE BOWDEY
WRITER
FAMILY RESEARCH COUNCIL
6724 ROSEWOOD STREET
ANNANDALE VA 22003
07/09/2009 - \$100.00 - CASH
09/18/2009 - \$300.00 - CASH

JEAN BOYCE
CUSTODIAN
FBC OF ROCKLAND, MAINE
560 BELFAST ROAD
CAMDEN ME 04843
09/18/2009 - \$100.00 - CASH

BRADFORD AUTO SALES
378 EAST ROAD
BRADFORD ME 04410
09/17/2009 - \$100.00 - CASH

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

NATIONAL ORGANIZATION FOR)
MARRIAGE and)
AMERICAN PRINCIPLES IN ACTION,)

Plaintiffs)

v.)

WALTER F. MCKEE, et al.,)

Defendants.)

Civil No. 1:09-cv-00538

DEFENDANTS' RESPONSE TO PLAINTIFFS' OBJECTION TO "REPORT OF HEARING AND ORDER RE: DISCOVERY DISPUTE AND SCHEDULING"

Pursuant to Fed. R. Civ. P. 72 and Local Rule 72, defendants respond to Plaintiffs' Objections to Magistrate Rich's "Report of Hearing and Order re: Discovery Dispute and Scheduling." In resolving this pretrial discovery dispute, the Magistrate Judge properly ruled that communications regarding the funding of the Maine campaign (A) between NOM and the Stand for Marriage Maine PAC, and (B) between plaintiffs and donors are relevant because they bear directly on plaintiffs' claims that they did not raise funds for the purpose of influencing the Maine campaign. The Magistrate Judge also correctly ruled that plaintiffs had not carried their burden of showing that disclosing this information to defendants (subject to a confidentiality order) would violate plaintiffs' First Amendment free association rights. Indeed, plaintiffs provided no evidence to Magistrate Rich that any donors would be harassed or would decline to contribute in the future if their identity was provided to defendants under the protection of a confidentiality order. The Magistrate Judge therefore properly overruled plaintiffs' objections to turning over this discovery. (Docket Item 42, at 4-5).

Plaintiffs' Objection belatedly seeks to offer two affidavits to support their claim of a First Amendment privilege not to turn over this discovery. The Court should not consider these affidavits because plaintiffs failed to submit them to the Magistrate Judge. In any event, their First Amendment claim fails even if the Court were to consider this new material.

BACKGROUND

On the eve of the November 2009 referenda election, plaintiffs filed this lawsuit, seeking to avoid complying with 21-A M.R.S. § 1056-B. That law affects only persons that have received contributions or made expenditures in excess of \$5,000 for the purpose of influencing a Maine ballot question (the law calls such a person a "ballot question committee," or "BQC"). The original Complaint raised numerous facial and as-applied First Amendment challenges to Section 1056-B. Among their various legal theories, plaintiffs claim that Section 1056-B is void for vagueness because, plaintiffs allege, they do not "know whether [their] solicitations could be interpreted to result in 'contributions' that trigger BQC status." (Amd. Cplt. ¶ 75). Despite that claim, several of the email solicitations that NOM attached to its Complaint (and Amended Complaint) asked recipients to contribute funds for the express purpose of assisting NOM's efforts in Maine in support of Question 1 on the November ballot. (Amd. Cplt. ¶¶ 26, 32 & 35).

During the 2009 Maine referendum campaign, the political action committee Stand for Marriage Maine ("SMM") spent more than \$2.5 million to influence Maine voters to vote for Question 1. (Docket Item 22, at 7). As of October 2009, NOM had provided SMM with more than \$1.6 million of that amount, or more than 60%. (*Id.*). There is a close relationship between SMM and NOM. Brian Brown, NOM's Executive Director, is a member of SMM's Executive Committee and one of SMM's primary decision-makers and fundraisers. (Docket Item 22, at 7).

However, because SMM was registered as a PAC with the Maine Commission on Governmental Ethics and Election Practices (“Commission”), NOM’s contributions to SMM did not count as “expenditures” by NOM under Section 1056-B. *See* 21-A M.R.S. § 1056-B. Although NOM’s large contributions to SMM did not count as “expenditures,” the relationship between NOM and SMM is significant to this case. For example, if NOM and SMM discussed how NOM or Mr. Brown might solicit funds for the purpose of influencing the vote on Question 1 and NOM funneled those funds to SMM, then such discussions would belie any claim that NOM did not know whether their solicitations triggered “contributions” under the law or that NOM did not raise funds for the purpose of influencing the Maine referenda election.¹ (Such donations to NOM would almost certainly constitute “contributions” to NOM within the meaning of Section 1056-B).

At the time they filed their original Complaint, plaintiffs also filed a motion for temporary restraining order (“TRO”) and a motion for a preliminary injunction. (Docket Items 3 & 4). After oral argument, the Court denied plaintiffs’ motion for a TRO by decision dated October 28, 2009. (Docket Item 22). Plaintiffs did not appeal that decision.

Rather, on December 3, 2009, plaintiffs filed a 55-page Amended Complaint in which they appended to their original Complaint (challenging the BQC law) a veritable smorgasbord of

¹ Under Section 1056-B(2-A), “contribution” is defined to include:

- 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.

facial and as-applied First Amendment challenges to several key elements of Maine's campaign finance laws. (Docket Item 32). Plaintiffs allege that they want to run ads to influence the 2010 candidate elections and are being chilled by these laws.² (Amd. Cplt. ¶¶ 86-90).

Plaintiffs' Complaint and Amended Complaint contain numerous factual allegations about NOM's communications with its donors and potential donors in 2009 that are central to their legal claims. For example, NOM alleges that "NOM solicits most of its funds as undesignated donations from major donors and national organizations. The remainder of its funds are received primarily as undesignated donations from direct mail solicitations." (Amd. Cplt. ¶ 24). As noted above, plaintiffs claim that they do not "know whether [their] solicitations could be interpreted to result in 'contributions' that trigger BQC status." (Amd. Cplt. ¶ 75).

NOM further alleges it does not (and did not in 2009) "earmark or reserve" any donations for any political purpose, including the Maine campaign. (Amd. Cplt. ¶¶ 39, 93). The primary basis for this allegation appears to be a disclaimer on NOM's website. (Amd. Cplt. ¶ 39).

To test plaintiffs' factual allegations, defendants propounded a request for production of documents that asked for, among other things, the following documents:

3. All correspondence, memoranda, email, and other documents reflecting communications between NOM and the Stand For Marriage Maine PAC concerning efforts to prevent legislation permitting same-sex marriage from taking effect in Maine.
4. All documents containing or reflecting a request for a donation of funds made by or on behalf of NOM after January 1, 2009, to any individual or entity who pledged or donated funds aggregating at least \$100 to NOM, where any of those funds were used by NOM to support an effort to prevent legislation permitting same-sex marriage from taking effect in Maine.

² When Plaintiffs filed their Amended Complaint, they also filed a second motion for preliminary injunction. (Docket Item 33). After a conference with the Magistrate Judge, it was agreed that plaintiffs' two motions for preliminary injunction would be consolidated with the court's determination on the merits. (Docket Item 37).

5. All documents containing or reflecting a request for a donation of funds made by or on behalf of NOM after January 1, 2009, to any individual or entity who pledged or donated funds aggregating at least \$100 to NOM, where any of those funds (A) have been used by NOM for the purpose of financing communications relating to candidate elections in Maine in 2010, or (B) are being considered for use by NOM for the purpose of financing communications relating to candidate elections in Maine in 2010.
7. All documents reflecting communications between NOM and donors concerning how donations would be used by NOM, including earmarking of donations
8. All communications between NOM and the “major donors and national organizations” referred to in ¶ 24 of the First Amended Complaint to the extent that any funds provided by these donors or organizations (A) were used by NOM to support an effort to prevent legislation permitting same-sex marriage from taking effect in Maine, (B) have been used by NOM for the purpose of financing communications relating to candidate elections in Maine in 2010, or (C) are being considered for use by NOM for the purpose of financing communications relating to candidate elections in Maine in 2010.

Plaintiffs refused to turn over any communications with SMM (RPD #3) or any documents that might identify their donors (RPD ##4, 5, 7, & 8).

In addition to the document discovery issue, during the deposition of plaintiff APIA, plaintiffs’ counsel instructed APIA not to reveal the identities of its donors. Plaintiffs’ counsel also informed defendants’ counsel (and Magistrate Rich) that he would likewise instruct NOM and its Executive Director not to reveal the identities of its donors during upcoming depositions.

The Magistrate Judge held a conference of counsel on February 4, 2010, to discuss this discovery dispute. Plaintiffs provided no documentary or other evidence to the Magistrate Judge in support of their allegation that their donors would be chilled or harassed if their identities were revealed to defendants and their counsel during discovery. Likewise, plaintiffs produced no evidence of any First Amendment harm if communications between NOM and SMM were provided to defendants and their counsel during discovery.

The Magistrate Judge overruled plaintiffs’ objections, ruling that (A) the discovery sought by the defendants satisfied the broad relevance standard of Rule 26, and (B) plaintiffs had

failed to make a *prima facie* case in support of their argument that providing the defendants with this discovery (subject to a confidentiality order) would violate their First Amendment rights.

ARGUMENT

Standard of Review. Pursuant to 28 U.S.C. § 636(b)(1)(A), the Court may reconsider the Magistrate Judge's order on a pretrial discovery dispute such as this one only "where it has been shown that the magistrate judge's order is clearly erroneous or contrary to law." The order in this matter is neither clearly erroneous nor contrary to law, and therefore it must be affirmed.

Contrary to Plaintiff's Objection, the Magistrate's Order -- requiring plaintiffs to provide relevant information to defendants and their counsel as part of discovery under the protection of a confidentiality order -- does not involve any "dispositive matter," including whether plaintiffs are required by the Maine laws at issue to register as a BQC and/or to file reports with the Commission containing certain information available to the public. That issue remains to be decided by the Court. Thus, the Court's review of this discovery issue is not *de novo*.

Plaintiffs' relevance objection. The standard for discovery is broad -- defendants may obtain discovery "regarding any non-privileged matter that is relevant to any party's claim or defense." Fed. R. Civ. P. 26(b)(1). The relevant information sought need only be "reasonably calculated to lead to the discovery of admissible evidence." *Id.* As one federal district court has put it, a request for discovery should be honored if there is "any possibility that the information sought may be relevant to the subject matter of the action." *Henderson v. National R.R. Passenger Corp.*, 113 F.R.D. 502, 506 (N.D. Ill. 1986). Plaintiffs have the burden to show the information sought is not discoverable. *See Henderson*, 113 F.R.D. at 506.

Here, as the Magistrate Judge correctly ruled, the information sought by defendants is plainly relevant. Communications between NOM and SMM would likely show, among other

things, the extent to which NOM raised funds for the purpose of influencing the Maine campaign even though donations may not have been specifically earmarked (i.e., restricted) for use in Maine. Likewise, communications between plaintiffs and donors would likely show whether and to what extent plaintiffs have raised funds for the purpose of influencing Maine candidate or ballot question campaigns, and would help test the basis for plaintiffs' challenges to Maine's statutes on vagueness grounds. *See* Order Denying TRO, Docket Item 22, at 25. The identities of the donors are relevant and important because, apparently, many of plaintiffs' solicitations were done orally, and defendants may need to take discovery from some donors about their communications with plaintiffs to test these claims as well.

Plaintiffs' First Amendment argument. Plaintiffs claim they have a First Amendment privilege not to turn over this discovery to defendants. The Ninth Circuit recently laid out a two-part framework for analyzing claims of First Amendment privilege in response to a discovery request. *See Perry v. Schwarzenegger*, ___ F.3d ___, Nos. 09-17241, 09-17551, 2010 WL 26439 (9th Cir. Jan. 4, 2010). The Magistrate Judge suggested that the Ninth Circuit's framework is consistent with one employed by the First Circuit in rejecting an objection to enforcement of an administrative subpoena in *United States v. Comley*, 890 F.2d 539, 543-44 (1st Cir. 1989).

In accordance with that framework, the party asserting the privilege must demonstrate a *prima facie* showing of arguable First Amendment infringement. This *prima facie* showing requires that party to demonstrate that enforcement of the discovery requests will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences that objectively suggest an impact or chill on members' associational rights. If the resisting party can make the necessary *prima facie* showing, the evidentiary burden shifts to the other side to show that the information sought through the discovery is rationally related to a

compelling interest and the least restrictive means of obtaining the desired information. *Perry*, 2010 WL 26439, at *10; *see also Comley*, 890 F.2d at 543-44.

The Magistrate Judge properly ruled that plaintiffs did not make the requisite *prima facie* showing of a claimed chilling effect on associational rights. Unlike the proponents of Proposition 8 in *Perry*, plaintiffs in this case adduced **no evidence** that any such rights would be chilled by the requested discovery. *Compare Perry*, 2010 WL 26439, at *12. In support of their First Amendment claim, plaintiffs offered only conclusory allegations of counsel. *See Comley*, 890 F.2d at 544 (“[G]eneral allegations of harassment fall short of the solid, uncontroverted evidence of actual harassment that has existed where the Supreme Court has found violations of the right to freedom of association”).

Contrary to Plaintiffs’ Objection, the discovery dispute in this case is unlike that in *Perry*. That case involves a lawsuit brought by same-sex couples challenging the constitutionality of California’s Proposition 8, which provided that only marriage between a man and a woman is valid in California. After the proponents of Proposition 8 intervened to defend the law, plaintiffs served a request for production of documents on them, seeking among other things, proponents’ internal campaign communications about campaign strategy. In upholding proponents’ objection to turning over this information to plaintiffs, the Ninth Circuit emphasized that its holding was “limited to private, internal campaign communications concerning the formulation of campaign strategy and messages.” *Id.* at *14 n.12.

Unlike *Perry*, one of the legal issues in this case involves plaintiffs’ claim that the definition of “contribution” in Section 1056-B is vague and overbroad and that they could not possibly know whether their solicitations would result in “contributions.” A review of communications between plaintiffs and their donors (and between NOM and SMM) is central to

testing plaintiffs' allegations on this issue. Defendants are entitled to discovery on these communications to defend the constitutionality of the laws being challenged by plaintiffs.

On appeal to the District Court, plaintiffs seek to offer, for the first time, two affidavits. The Court should not consider such materials. *See Palm v. Sisters of Charity Health Sys.*, 537 F. Supp. 2d 228, 230 (D. Me. 2008) ("Court may not take [affidavit and other evidence] into consideration in its review of a determination already made by the magistrate."). As the federal courts in Maine have ruled many times: "Parties must take before the magistrate, not only their best shot, but all of their shots." *Borden v. Secretary of Health & Human Servs.*, 836 F.2d 4, 6 (1st Cir. 1987) (internal quotations and citations omitted). Plaintiffs had every opportunity to present this material to Magistrate Rich, yet failed to do so.

Even assuming the Court were to consider the facts that plaintiffs have belatedly submitted, plaintiffs have not made out a *prima facie* case that turning over this information to defendants, subject to a confidentiality order, would likely result in harassment or other significant harm. The Blom Declaration contains only Mr. Blom's speculation that donors would be "reluctant" to give in the future if they were "forced to testify" in litigation. (Blom Decl. ¶ 4). That is an insufficient basis on which to support a claim of First Amendment privilege. The Bernatche Declaration, in which he states what happened when his name was contained in a public filing with the Commission, contains no assertions relevant to the discovery issue before the Court (since the information will be protected by a confidentiality order).³

³ Plaintiffs' Objection and the Bernatche Declaration also make reference to allegations in California that were reported in *ProtectMarriage.com v. Bowen*, 599 F. Supp. 2d 1197 (E.D. Cal. 2009). First of all, the allegations in that case are not relevant to plaintiffs' obligation to produce evidence of harm to their associational rights in this case. Moreover, in that California case, the same sort of discovery sought here by defendants was given to defendants, subject to a confidentiality order. (Case No 2:09-cv-00058-MCEDAD, Docket Items 29 & 192).

Finally, even assuming *arguendo* the court were to rule that plaintiffs had established a *prima facie* case, their objection should still be overruled. The information sought by defendants is rationally related to a compelling governmental interest – informing the electorate about the sources and uses of funds expended to influence their votes – and these laws’ validity. *See Comley*, 890 F.2d at 545 (compelling interest met by NRC’s mission to promote nuclear safety). Indeed, in denying plaintiffs’ motion for a TRO, this Court explicitly ruled that the BQC law at issue serves a compelling informational interest. (Docket Item 22 at 13 n.59 & at 30-31).

It is also the least restrictive means of obtaining that information. Unlike those seeking discovery in *Perry*, the only way for defendants to get the requested information regarding plaintiffs’ donors is from plaintiffs themselves.

Providing this discovery to defendants is the only practical way for defendants to challenge the many allegations on which plaintiffs rely to claim that these laws are unconstitutional. Plaintiffs should not be permitted to file a lawsuit making all sorts of factual allegations about their fundraising and their communications with donors, and then prevent defendants from obtaining the discovery needed to challenge those allegations.

Furthermore, defendants have agreed to enter into a confidentiality order permitting only limited access (to parties and their counsel) to donors’ identities. As the Magistrate Judge concluded, “plaintiffs have offered neither evidence nor persuasive argument that, with such a protective order in place, their First Amendment rights would be infringed.” (Docket Item 42, at 5).

Furthermore, the district court rejected out of hand plaintiffs’ claim, on the merits (at the preliminary injunction stage), that providing this sort of information to the public would violate their First Amendment rights. 599 F. Supp. 2d at 1217-1220.

CONCLUSION

Plaintiffs' objections to the Magistrate Judge's discovery rulings should be rejected.

DATED: February 12, 2010

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on this 12th day of February 2010, I electronically filed the above document with the Clerk of Court using the CM/ECF system, which will send notification of such filing to the following:

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To my knowledge, there are no non-registered parties or attorneys participating in this case.

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