

Agenda

Item #2



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

To: Commissioners

From: Jonathan Wayne, Executive Director
Phyllis Gardiner, Assistant Attorney General

Date: March 16, 2010

Re: Application by National Organization for Marriage for a Stay of Commission's
Investigation Pending Resolution of Appeal

This memo includes the response by the Commission staff to the application by the National Organization for Marriage ("NOM") to stay enforcement of the subpoenas issued to NOM and to its executive director, Brian Brown, in connection with the Commission's investigation of NOM to determine if it should have registered and filed reports as a ballot question committee in 2009. The Application for Stay Pending Resolution of Appeal (including 11 exhibits) is attached for your consideration.

Background

Commission's February 25, 2010 Determination

At your February 25, 2010 meeting, the Commission considered five separate petitions filed by NOM, Brian Brown, and Stand for Marriage Maine PAC (referred to below as "the Petitioners"), seeking to vacate or modify subpoenas that had been issued to NOM and Mr. Brown in late January. The petitions objected to the subpoenas as "overbroad, irrelevant, and immaterial." In addition, the Petitioners argued that some of the

information requested is privileged under the First Amendment to the U.S. Constitution. The Commission's staff and counsel analyzed the petitions in a February 19, 2010 memo (attached as exhibit 11 to the application by petitioners). At your February 25, 2010 meeting, you denied the petitions, consistent with the staff's recommendation.

Petition to Superior Court for Review of Commission's Determination

On March 3, 2010, the Petitioners commenced a proceeding in the state Superior Court to review the Commission's February 25, 2010 determination, pursuant to Rule 80C of the Maine Rules of Civil Procedure. Their Petition for Review of Agency Action and Summary Sheet are attached. (The exhibits to the Petition for Review of Agency Action are the same as those attached to the Application for Stay Pending Resolution of Appeal.) Petitioners simultaneously filed the application for a stay with the Commission.

Analysis of Petitioners' Application for a Stay

The Petitioners request that the Commission stay enforcement of the subpoenas to NOM and Brian Brown until the Superior Court has reviewed the Commission's February 25, 2010 decision. The Petitioners make their request pursuant to 5 M.R.S.A. § 11004, which provides in full:

The filing of a petition for review shall not operate as a stay of the final agency action pending judicial review. **Application for a stay of an agency decision shall ordinarily be made first to the agency, which may issue a stay upon a showing of irreparable injury to the petitioner, a strong likelihood of success on the merits, and no substantial harm to adverse parties or the general public.** A motion for such relief may be made to the Superior Court, but the motion shall show that application to the agency for the relief sought is not practicable, or that application has been made to the agency and denied, with the

reasons given by it for denial, or that the action of the agency did not afford the relief which the petitioner had requested. In addition, the motion shall show the reasons for the relief requested and the facts relied upon, which facts, if subject to dispute, shall be supported by affidavits. Reasonable notice of the motion shall be given to all parties to the agency proceeding. The court may condition relief under this rule upon the posting of a bond or other appropriate security, except that no bond or security shall be required of the State or any state agency or any official thereof.

(Emphasis added). All three criteria have to be met in order to support granting a stay:

1) irreparable injury to the petitioner, 2) strong likelihood of success on the merits, and 3) no substantial harm to adverse parties or the public. In the staff's view, Petitioners have not met any of these criteria.

Irreparable injury to Petitioners

Petitioners claim that they will "suffer irreparable harm absent a stay, as disclosure cannot be undone once it occurs." (Petitioners' Stay Application at p. 4). However, the only disclosure to occur as the result of the subpoenas will be to the members of the Commission, and its staff and counsel, not the public. The Commission made clear in its February 25 decision that the documents and testimony to be provided by NOM and Mr. Brown in response to the subpoenas will be subject to the confidentiality protections in 21-A M.R.S.A. § 1003(3-A). See Exhibit 1. This assures that the information concerning NOM's donors and NOM's communications with SMM about funding the Maine campaign will not be publicly disclosed during this investigation. Public disclosure will be required only if the Commission ultimately makes the determination that NOM has met the definition of a BQC. If that determination is made, NOM will be able to seek judicial review and request a stay of its obligations to disclose donor information while that appeal is pending. Since this investigation does not foreclose NOM's ability to

obtain relief from the Commission's ultimate determination, there can be no legitimate claim of harm from public disclosure at this stage.

Petitioners' allegations of harm from disclosure to the Commission (as opposed to the public) are based entirely on Brian Brown's declaration of February 19, 2010 (Exhibit 9), which merely asserts a speculative belief that the prospect of being asked questions by the Commission in this proceeding will deter individuals from giving to NOM in the future. Mr. Brown also asserts that if he has to answer questions by the Commission staff or counsel regarding communications with SMM, that "will substantially alter how [he] would choose to communicate in the future." This is plainly not enough to constitute irreparable harm. If it were, then every investigation that involves asking people questions about activities that may trigger certain regulatory obligations would constitute irreparable harm – a notion unsupported by the case law we have reviewed.

Strong likelihood of success on the merits

In order to obtain a stay, the petitioners must demonstrate a "*strong* likelihood of success on the merits" of their claims that the Commission erred as a matter of law in declining to modify or vacate the subpoenas. 5 M.R.S.A. § 11004 (emphasis added) and 9060(1)(C).¹

¹ Under the APA, the Superior Court may reverse or modify the Commission's decision only if it finds the Commission's administrative findings, inferences, conclusions or decisions are:

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

5 M.R.S.A. § 11007(4)(C).

Our memorandum of February 19, 2010, sets forth the legal and factual grounds to support the Commission's decision not to vacate or modify the subpoenas under the statutory criteria set forth in section 9060(1)(C), and those have not changed. The Petitioners have largely reiterated their previous arguments in this Application for Stay, but they make a few additional points which we will address.

Once again, Petitioners' claims of First Amendment chill are based on alleged fears of what will result from *public* disclosure of donor information, not from disclosure in the context of a confidential investigation. The concerns expressed by Mr. Bernatche in his affidavit (Exhibit 10) relate to public disclosure, as do the claims made in declarations filed by individuals in court proceedings in California and Washington state (see Petitioner's Stay Application at 5-6). Petitioners' allegations that Marc Mutty, Bob Emrich and Michael Heath received threatening messages during the 2009 referendum campaign fail to support Petitioners' claims here, too, because those individuals are public figures who spoke out publicly about the referendum campaign – their identities were not revealed as the result of campaign finance reports filed with the Commission. The same is true with regard to the licensing complaint against Donald Mendell, which resulted from his appearance in a broadcast commercial, not from a disclosure report or investigative inquiry.

The case law cited by Petitioners also does not support finding a strong likelihood of success in overturning the Commission's decision on these subpoenas. The Supreme Court's order in *Hollingsworth v. Perry*, ___ U.S. ___, 130 S. Ct. 705 (2010) (attached),

dealt with the public broadcast of a trial, not an investigation subject to confidentiality protections. Moreover, the language Petitioners have quoted from *In re Grand Jury Proceeding*, 842 F.2d 1229, 1236 (11th Cir. 1988) (attached), is pure dictum. The court in that case upheld issuance of the subpoena. Finally, although Petitioners note that the Ninth Circuit Court of Appeals concluded a protective order was not adequate to eliminate the threatened harms in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), that ruling is not controlling here, and the facts of that case are distinguishable. It involved discovery requests between private litigating parties aimed at disclosing internal campaign communications about messages to voters that were never distributed – not a government investigation to determine applicability of a campaign finance statute that would require disclosure of donor information.

In short, none of the arguments presented establish a strong likelihood that the Superior Court will reverse or modify the Commission's February 25, 2010 determination.

Moreover, for the reasons explained in our memorandum of February 19, even if Petitioners could make that showing, it would be insufficient to block enforcement of these subpoenas because the information the Commission seeks is substantially related to a compelling governmental purpose -- determining whether NOM is required to register and report as a BQC under § 1056-B -- and the information is not available to the Commission by any other means. Under the framework set forth in *Perry v. Schwarzenegger*, and in *United States v. Comley*, 890 F.2d 539, 543-44 (1st Cir. 1989), as

previously discussed, this means the balance still tips in favor of disclosure and the subpoenas should be enforced. (*See* February 19 Staff Memorandum at 6-8, 12.)²

Contrary to Petitioners' assertions, the Commission's authority to investigate is not limited to asking only for the information that NOM would have to disclose publicly if it is ultimately determined to be a BQC. Indeed, the confidentiality protections in the statute authorizing such investigations exist largely to enable the Commission to ask for information that may or may not have to be disclosed publicly but is relevant and necessary to making the factual determinations required. The Commission is authorized by statute to "undertake audits and investigations to determine the facts concerning the registration of a ... political committee ... and contributions by or to and expenditures by a ... political committee. For this purpose, the commission may subpoena witnesses and records and take evidence under oath." 21-A M.R.S.A. § 1003(1).

For the above reasons, as well as those discussed in our February 19 memorandum, none of the arguments presented by the Petitioners establish a strong likelihood that the Superior Court will reverse or modify the Commission's February 25 decision, if it actually reaches the merits of Petitioners' appeal. In order to reach the merits of their appeal to the Superior Court, Petitioners first have to persuade the Court that one of the exceptions to the final judgment rule allows the Court to take jurisdiction. Their Rule

² Petitioners' quote a sentence from the February 19 staff memorandum, which contains an error that we did not catch before. The sentence reads: "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 last clause contains the error. The correct wording is: "...only if the Commission determines that NOM is not a BQC or the BQC statute is held unconstitutional."

80C petition for review cites to the “death knell” exception, but that exception only applies when the appellants can show that “substantial rights of a party will be irreparably lost if review is delayed until final judgment.” *Bruesewitz v. Grant*, 2007 ME 13, ¶8.

For the reasons noted above under the first prong of the test for a stay, it is unlikely that Petitioners can make that claim successfully.

No substantial harm to adverse parties or the general public

Granting a stay in this case would delay the investigation and prevent the Commission from carrying out its statutory responsibilities. The longer the investigation is delayed, the greater the risk that evidence sought by these subpoenas will get stale; people’s memories will fade, and important information will be lost. That will substantially harm the Commission’s ability to do its job and thereby harm the public’s interest in applying the laws governing disclosure of campaign finance activities.

Recommendation

For the foregoing reasons, the staff recommends that the Commission deny the Petitioners’ Application for a Stay Pending Resolution of Appeal.

**The National Organization for Marriage,
Stand for Marriage Maine PAC, and Brian
Brown,**

Petitioners,

v.

**The Maine Commission on Governmental
Ethics and Election Practices,**

Respondent.

**APPLICATION FOR STAY PENDING
RESOLUTION OF APPEAL**

Pursuant to 5 M.R.S.A. § 11004, and by and through counsel, Petitioners the National Organization for Marriage (“NOM”), Stand for Marriage Maine PAC, and Brian Brown file this application to stay enforcement of subpoenas issued to NOM and Brian Brown by the Maine Commission on Governmental Ethics and Election Practices (“the Commission”) on January 28, 2010.

Factual Background

Title 21-A, § 1056-B of the Maine Statutes provides, in relevant part, that:

Any person not defined as a political action committee who solicits and receives contributions or makes expenditures, other than by contribution to a political action committee, aggregating in excess of \$5,000 for the purpose of initiating, promoting, defeating or influencing in any way a ballot question must file reports with the commission in accordance with this section. Within 7 days of receiving contributions or making expenditures that exceed \$5,000, the person shall register with the commission as a ballot question committee.

During 2009, NOM made several contributions to Stand for Marriage Maine PAC as part of the latter’s efforts to support a Maine ballot question involving same-sex marriage. During the

same period, NOM sent out numerous email solicitations to donors, some of which mentioned its activities in Maine.

On October 1, 2009, the Commission voted to begin an investigation into whether NOM had violated 21-A M.R.S.A. §1056-B by failing to register as a ballot question committee. As part of this investigation, on January 28, 2010, the Commission served a subpoena on representatives for NOM setting a deposition for February 18, 2010. The subpoena provided that a deponent representing NOM should be prepared “to testify and give evidence” regarding, among other matters:

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.

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.

See Subpoena of National Organization for Marriage, attached as Exhibit 2, at 1-2. The subpoena also required the deponent representing NOM “to bring with you and produce at the time and place aforesaid, and to permit inspection and copying of” numerous documents, including:

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.

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.

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.

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.

See Subpoena of National Organization for Marriage, attached as Exhibit 2, at 2.

Also on January 28, 2010, the Commission the Commission served a subpoena on Brian Brown setting a deposition for February 18, 2010. The subpoena provided that Mr. Brown should be prepared "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.

See Subpoena of Brian Brown, attached as Exhibit 3, at 1. The subpoena also required 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 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.

See Subpoena of Brian Brown, attached as Exhibit 3, at 1.

On February 11, 2010, petitions to vacate or modify these subpoenas were served with the Commission by Brian Brown, NOM, and Stand for Marriage Maine PAC. These petitions objected to witness request 4 and document requests 1, 3, 4, 5, and 6 of the NOM subpoena, and witness request 1 and document request 1 of the Brown subpoena as overbroad, irrelevant, and immaterial. The petitions also objected to witness requests 4 and 7 and document request 1 and 3 of the NOM subpoena and witness request 1 and document request 1 of the Brown subpoena as

requiring the disclosure of information and documents protected by a First Amendment privilege. In support of their petitions, Petitioners submitted a number of affidavits and news articles indicating the potential for chill and harassment that disclosure could cause. (Attached).

On February 25, 2010, the Commission voted to deny Petitioners petitions to modify or vacate its subpoenas, effectively overruling its First Amendment and relevance objections. On March 3, 2010, Petitioners filed a Petition for Review of this decision with the Superior Court in Kennebec County, Maine.

Argument

Title 5, § 11004 of the Maine Statutes provides, in relevant part, that:

The filing of a petition for review shall not operate as a stay of the final agency action pending judicial review. Application for a stay of an agency decision shall ordinarily be made first to the agency, which may issue a stay upon a showing of irreparable injury to the petitioner, a strong likelihood of success on the merits, and no substantial harm to adverse parties or the general public.

For the reasons given below, the Commission should grant the requested stay.

I. Petitioners Will Suffer Irreparable Injury Absent A Stay.

Petitioners will suffer irreparable harm absent a stay, as disclosure cannot be undone once it occurs. *In re von Bulow*, 828 F.2d 94, 98 (2d Cir. 1987) (“compliance with [a] discovery order against a claim of privilege destroys [the] right sought to be protected”); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981) (where “sweeping” subpoena served on political association called for “all documents” and “internal communications” relating to a political campaign, “heightened judicial concern” is warranted because “the release of such information ... carries with it a real potential for chilling the free exercise of political speech and association.”)

II. Petitioners Have a Strong Likelihood of Success on the Merits.

Petitioners also have a strong likelihood of success on the merits of their petition for review. The framework for establishing a claim of First Amendment privilege in the discovery context is laid out in the Ninth Circuit's recent decision in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010). 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, 591 F.3d at 1160-61; *see also United States v. Crowley*, 890 F.2d 539, 543-44 (1st Cir. 1989). Both elements are met here.

A. Petitioners Can Establish a Prima Facie Case of Chill.

First, the Superior Court is likely to conclude that Petitioners have made a prima facie case of chill. 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. *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.¹

This potential for harassment extends to Maine as well. For example, Marc Mutty, of Stand For Marriage Maine PAC, 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.bangor-dailynews.com/detail/128742.html>. Michael Heath, former leader of the Christian Civic League of Maine and its successor, The Maine Family Policy Council, and Rev. Bob Enrich, 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 as Exhibit 10. 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'*

¹Although 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).

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.”)²

The Supreme Court’s recent order in *Hollingsworth v. Perry*, 130 S.Ct. 705 (2010), is also instructive in this regard. *Hollingsworth* involved a petition for mandamus to prevent a federal district court from allowing broadcasting of a trial on the constitutionality of California’s Proposition 8 referendum, which involved same-sex marriage. The Court held that the petitioners in *Hollingsworth* had established “that irreparable harm will likely result” absent relief, and that “may not be able to obtain adequate relief through an appeal” because by that point “[t]he trial will have already been broadcast. *Id.* at 712-13. Such threats and intimidation can certainly chill the associational rights of people wishing to be active in NOM. Compelled disclosure of contributors for NOM or internal campaign contributions will certainly make people think twice before participating in such activity again.

Nor is this risk of chill eliminated by the existence of the Commission’s confidentiality rules. *See Perry*, 591 F.3d at 1164 (noting that “[a] protective order limiting dissemination of this information will ameliorate but cannot eliminate these threatened harms.”) As Brian Brown, executive director of NOM, has stated, “disclosing personal donor information to the Commission, even under the confines of its confidentiality rules, would have a substantial

² The Supreme Court has also recently granted certiorari in *Doe v. Reed*, 2010 WL 144074 (January 15, 2010), a case involving the potential disclosure of the names of individuals who signed a petition for a referendum involving the rights of same-sex couples.

negative effect on the ability of NOM to raise funds.” See Declaration of Brian Brown, attached as Exhibit 9, at 2 Likewise, Mr. Brown has stated that having to disclose communications between NOM and Stand For Marriage Maine “substantially alter how I would choose to communicate in the future.” *Id.*

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 the Commission no doubt does not intend its 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.

B. The Commission’s Discovery Requests Do Not Further A Compelling Governmental Interest.

Since Petitioners have established a prima facie case of harassment, the burden shifts to the Commission 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*, 591 F.3d at 1161. The Commission cannot meet this standard, as the

information requested is not even relevant to any claim or defense in this case, let alone necessary to it.

NOM is being investigated to determine whether it has violated 21-A M.R.S.A. § 1056(B). Section 1056-B, however, explicitly exempts “contribution to a political action committee” from the statute’s threshold requirement. *Id.* 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”). Stand for Marriage Maine PAC is a registered Maine PAC. Thus, any coordination between Stand for Marriage and NOM is not counted towards the threshold, and any communications between NOM and Stand for Marriage Maine PAC are not relevant to the Commission’s investigation.

Similarly, personal information regarding donors is not relevant to any issue in the Commission’s investigation. Petitioners 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 to John Doe, is of no additional value, and hence is not relevant to any issue in this case.

In its memorandum to the Commission, the Commission’s staff argued that “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.” See Commission Memorandum Regarding Petitions to Vacate or Modify Subpoenas, attached as Exhibit 11, at 12. This, however, has it exactly backwards. If the Commission determines that NOM is a BQC and if the constitutionality of Section 1056-B is upheld, then NOM may be required to disclose personal information regarding some donors. Until such a determination has been made, however, the Commission has no legal right to compel disclosure of such information.

Indeed, the information sought by the Commission goes beyond what NOM would be required to disclose even if it did have to register as a BQC. According to Section 1056-B, a BQC 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.” 21-A M.R.S.A. § 1056-B(2). The subpoenas in question, by contrast, require NOM to disclose personal donor information for donors irrespective of whether the contributions were made for the purpose of supporting the Maine same-sex marriage referendum, or were used for that purpose.

III. Granting a Stay Would Not Harm the Public or Any Other Party.

While denying a stay would irreparably injure Petitioners, granting a stay would not harm the public or any other party. The public has a great interest in preserving First Amendment rights of free speech and association, and allowing Petitioners to seek effective review on their claims of First Amendment privilege would only serve to further that interest.

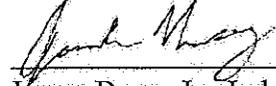
Conclusion

For the reasons stated above, Petitioners respectfully request the Commission grants its

application for stay pending resolution of appeal.

March 3, 2010

Respectfully submitted,



James Bopp, Jr., Ind. #2838-84

Josiah Neeley, Tex. #24046514

BOPP, COLESON & BOSTROM

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Terre Haute, IN 47807-3510

Ph: (812) 232-2434

Fx: (812) 235-3685

Counsel for Petitioners

*Commission Letter Denying Petitions to
Vacate or Modify Subpoenas*
Exhibit 1



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

February 26, 2010

By Email and Regular Mail

Josiah S. Neeley, Esquire
Bopp, Colson & Bostrom
The National Building
One South Sixth Street
Terre Haute, Indiana 47807-3510

Dear Mr. Neeley:

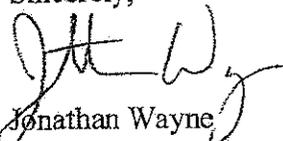
This is in response to the February 11, 2010 petitions by the National Organization for Marriage (NOM), Brian Brown, and Stand for Marriage Maine to vacate or modify the January 28, 2010 subpoenas to NOM and Mr. Brown.

At its meeting yesterday, the Maine Commission on Governmental Ethics and Election Practices denied the petitions. An audio recording of the Commission's consideration of the petitions may be found at www.state.me.us/ethics/meetings/index.htm.

The Commission also confirmed that documents and testimony which NOM and Mr. Brown provide to the Commission in response to the subpoenas will be subject to the confidentiality provisions in 21-A M.R.S.A. § 1003(3-A).

If you have any questions, please call me at 287-4179.

Sincerely,


Jonathan Wayne
Executive Director

cp

cc: Assistant Attorney General Phyllis Gardiner

*Subpoena of National Organization for
Marriage*
Exhibit 2

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 in 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

Subpoena of Brian Brown
Exhibit 3

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.

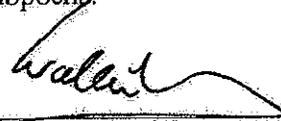
This subpoena is issued on behalf of the Commission on Governmental Ethics and Election Practices, pursuant to 21-A M.R.S.A. §1003(1) & (2), whose attorney is Phyllis Gardiner, Assistant Attorney General, Department of the Attorney General, 6 State House Station, Augusta, Maine 04333-0006. She may be 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: 4/28/10



WALTER MCKEE, CHAIRPERSON
Commission on Governmental Ethics
and Election Practices

*Petition to Vacate or Modify Subpoena of
National Organization for Marriage by
National Organization for Marriage*

Exhibit 4

JAMES BOPP, JR.¹
Senior Associates
RICHARD E. COLESON¹
BARRY A. BOSTROM¹

Associates
RANDY ELF²
JEFFREY P. GALLANT³
ANITA Y. WOUDEBERG⁴
JOSIAH S. NEELEY⁴
JOSEPH E. LA RUE⁵
SARAH E. TROUPIS⁶
KAYLAN L. PHILLIPS⁷
JOSEPH A. VANDERHULST¹
SCOTT F. BIENIEK⁸
ZACHARY S. KESTER¹

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⁶admitted in Wis.
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zkester@bopplaw.com

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(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 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

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

Mr. Jonathan Wayne
Commission on Governmental Ethics
February 11, 2010
Page 4

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.

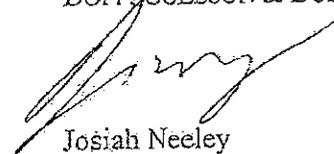
Document Subpoena Item 6. The Commission's subpoena further requires the deponent representing NOM "to bring with you and produce at the time and place aforesaid, and to permit inspection and copying of . . . 6) Minutes of any Board meetings reflecting any discussions concerning the raising of funds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



Josiah Neeley

*Petition to Vacate or Modify Subpoena of
National Organization for Marriage by Stand
for Marriage Maine PAC*

Exhibit 5

JAMES BOPP, JR.¹
Senior Associates
RICHARD E. COLESON¹
BARRY A. BOSTROM¹

Associates
RANDY ELF²
JEFFREY P. GALLANT³
ANITA Y. WOUDEBERG¹
JOSIAH S. NEELEY⁴
JOSEPH E. LA RUE⁵
SARAH E. TROUPIS⁶
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ZACHARY S. KESTER¹

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³admitted in Va.
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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 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,

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

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.

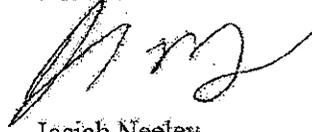
Additional Objections to Subpoena as a Whole: In addition, Stand for Marriage Maine PAC objects to the witness subpoena and subpoena to produce records insofar as it requires documents to be produced and a deposition to take place at 9:30 a.m. on February 18, 2010, in Augusta, Maine. Issues regarding 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

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

expected shortly. The decision of the District Court may effect the nature of NOM's objections regarding production and testimony. To avoid inconvenience 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 'J. Neeley', is written over the typed name.

Josiah Neeley

*Petition to Vacate or Modify Subpoena of
Brian Brown by National Organization for
Marriage*
Exhibit 6

JAMES BOPP, JR.¹
Senior Associates
RICHARD E. COLESON⁴
BARRY A. BOSTROM¹

Associates
RANDY ELI²
JEFFREY P. GALLANT³
ANITA V. WOUDEBERG¹
JOSIAH S. NEELEY²
JOSEPH E. LA RUE⁵
SARAH E. TROUPIS⁶
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JOSEPH A. VANDERHULST¹
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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 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

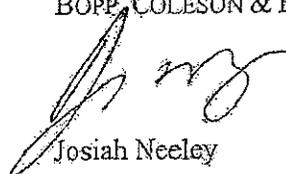
Mr. Jonathan Wayne
Commission on Governmental Ethics
February 11, 2010
Page 2

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, 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.

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 Mr. Brown'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



Josiah Neeley

*Petition to Vacate or Modify Subpoena of
Brian Brown by Stand for Marriage Maine*

PAC

Exhibit 7

JAMES BOPP, JR.¹
Senior Associates
RICHARD E. COLESON¹
BARRY A. BOSTROM¹

Associates
RANDY ELF²
JEFFREY P. GALLANT³
ANITA Y. WOODENBERG¹
JOSIAH S. NEELEY⁴
JOSEPH E. LA RUE⁵
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zkester@bopplaw.com

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 BRIAN BROWN
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 Stand for Marriage Maine PAC 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: Stand for Marriage Maine PAC objects to the subpoena as overbroad, irrelevant, and immaterial. The Commission's investigation concerns whether NOM must

Mr. Jonathan Wayne
Commission on Governmental Ethics
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.

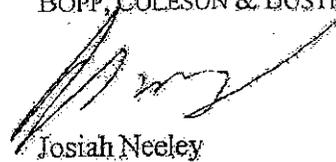
Additional Objections to Subpoena as a Whole: In addition, Stand for Marriage Maine PAC objects to the witness subpoena and subpoena to produce records insofar as it requires documents to be produced and a deposition to take place at 9:30 a.m. on February 18, 2010, in Augusta, Maine. Issues regarding 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.

Josiah Neeley

*Petition to Vacate or Modify Subpoena of
Brian Brown by Brian Brown*

Exhibit 8

JAMES BOPP, JR.¹
Senior Associates
RICHARD E. COLESON¹
BARRY A. BOSTROM¹

Associates
RANDY ELP²
JEFFREY P. GALLANT⁵
ANITA Y. WOUDEBERG¹
JOSIAH S. NEELEY⁴
JOSEPH E. LARUE³
SARAH E. TROUPIS⁶
KAYLAN L. PHILLIPS⁷
JOSEPH A. VANDERHULST¹
SCOTT F. BIENIEK⁸
ZACHARY S. KESTER¹

¹admitted in Ind.
²admitted in NY and Penn.
³admitted in Va.
⁴admitted in Tex.
⁵admitted in Oh.
⁶admitted in Wis.
⁷admitted in Okla.
⁸admitted in Ill.

BOPP, COLESON & BOSTROM
ATTORNEYS AT LAW
(not a partnership)

THE NATIONAL BUILDING
1 South Sixth Street
TERRE HAUTE, INDIANA 47807-3510

Telephone 812/232-2434 Facsimile 812/235-3685

THOMAS J. MARZEN
(1946-2007)

E-MAIL ADDRESSES
jboppjr@aol.com
rcoleson@bopplaw.com
bbostrom@bopplaw.com
relf@bopplaw.com
jgallant@bopplaw.com
awoudeberg@bopplaw.com
jneeley@bopplaw.com
jlarue@bopplaw.com
stroupis@bopplaw.com
kphillips@bopplaw.com
jvanderhulst@bopplaw.com
sbieniek@bopplaw.com
zkester@bopplaw.com

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 BRIAN BROWN
BY BRIAN BROWN**

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 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

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

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

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

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



Josiah Neeley

Declaration of Brian Brown

Exhibit 9

UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

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

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 Rushlan, 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. Brown

Brian Brown

Affidavit of Joseph L. Bernatche

Exhibit 10

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."

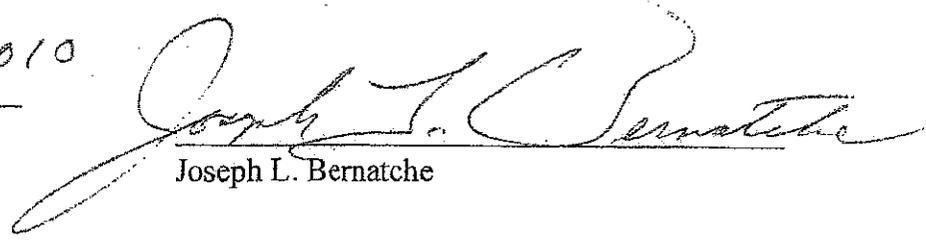
Attached to this Affidavit and labeled "Exhibit A" is a printout of that first page on Google.

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

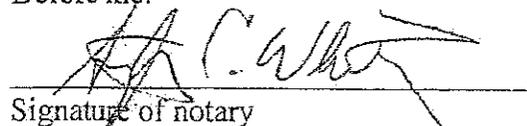


Joseph L. Bernatche

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. Whistly
Print name of notary

My commission expires:

Attorney, Bar #559

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Web History | Search settings | Sign in



[Advanced Search](#)

Web [Show options...](#)

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/t3-10868/ - [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/sumames.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](#)

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Lavender Newswire

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

[HOME](#) • [BASE8](#) • [BABYLON](#) • [VIDEOS](#) • [RSS](#) • [TWITTER](#) • [GOOGLE READER](#)

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 MAGREN
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
RETIRE
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

*Commission Memorandum Regarding
Petitions to Vacate or Modify Subpoenas*

Exhibit 11



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.

**The National Organization for Marriage,
Stand for Marriage Maine PAC, and Brian
Brown,**

Petitioners,

v.

**The Maine Commission on Governmental
Ethics and Election Practices,**

Respondent.

**PETITION FOR REVIEW OF AGENCY
ACTION**

Pursuant to 5 M.R.S.A. § 11001, Petitioners the National Organization for Marriage (“NOM”), Stand for Marriage Maine PAC, and Brian Brown hereby petition this Court for review of the February 25, 2010 determination by the Maine Commission on Governmental Ethics and Election Practices (“the Commission”), denying Petitioners’ petitions to vacate or modify subpoenas.

Persons Seeking Review

1. Petitioner NOM is a nonprofit 26 U.S.C. § 501(c)(4) issue advocacy corporation incorporated in Virginia dedicated to preserving the traditional definition of marriage.
2. Stand for Marriage Maine PAC is a registered political action committee in Maine.
3. Petitioner Brian Brown is an individual and resident of Virginia. He currently serves as executive director for NOM, and is a board member for Stand for Marriage Maine PAC.

Manner in which Plaintiff is Aggrieved

4. The Commission has issued subpoenas to NOM and Brian Brown requiring the production of documents and testimony which is privileged under the First Amendment. Specifically, the subpoenas require Petitioners to disclose personal donor information as well as internal campaign communications between NOM and Stand for Marriage Maine PAC. Disclosure of this material will chill the First Amendment rights of NOM and its donors. The subpoenas also require the disclosure of documents not relevant to the instant action, the production of which would be unduly burdensome.

Agency Action to be Reviewed

5. The agency action to be reviewed is the Commission's denial of Petitioners' petition to vacate or modify the subpoenas, which asserted a First Amendment privilege against the disclosure of personal donor information and internal campaign communications between NOM and Stand for Marriage Maine PAC.

6. Appeal of agency action ordinarily requires a "final agency action." Interlocutory review is available, however, under the "death knell" exception to the final action rule, where "substantial rights of a party will be irreparably lost if review is delayed until final judgment." *Maine Health Care Ass'n Workers' Compensation Fund v. Superintendent*, 962 A.2d 968, 971 (Me. 2009).

7. The Commission's decision declining to vacate or modify its subpoenas is appealable under the "death knell" doctrine. Disclosure, once done, cannot be undone, and a post-judgment appeal therefore provides inadequate protection of Petitioners rights. *See United States v. Amlani*, 169 F.3d 1189, 1194 (9th Cir. 1999) ("This Court has held that ... an appeal

after privileged communications are disclosed is an inadequate remedy.”); *In re von Bulow*, 828 F.2d 94, 98 (2d Cir. 1987) (“compliance with [a] discovery order against a claim of privilege destroys [the] right sought to be protected”); *FEC v. Machinists Non-Partisan Political League*, 655 F.2d 380 (D.C. Cir. 1981) (where “sweeping” subpoena served on political association called for “all documents” and “internal communications” relating to a political campaign, “heightened judicial concern” is warranted because “the release of such information ... carries with it a real potential for chilling the free exercise of political speech and association.”)

8. Further, the disclosure required in this case goes beyond what is required even of a registered ballot question committee. Effectively, then, the Commission is seeking to impose the burdens of ballot question committee status on NOM before a formal determination of whether NOM qualifies as a ballot question committee has been reached. For this reason, immediate appeal under the “death knell” exception is appropriate. *Maine Health Care*, 962 A.2d at 971.

Statement of Facts

9. Title 21-A, § 1056-B of the Maine Statutes provides, in relevant part, that:

Any person not defined as a political action committee who solicits and receives contributions or makes expenditures, other than by contribution to a political action committee, aggregating in excess of \$5,000 for the purpose of initiating, promoting, defeating or influencing in any way a ballot question must file reports with the commission in accordance with this section. Within 7 days of receiving contributions or making expenditures that exceed \$5,000, the person shall register with the commission as a ballot question committee.

21-A M.R.S.A. § 1056-B (emphasis added).

10. During 2009, NOM made several contributions to Stand for Marriage Maine PAC as part of the latter’s efforts to support a Maine ballot question involving same-sex marriage.

During the same period, NOM sent out numerous email solicitations to donors, some of which mentioned its activities in Maine.

11. On October 1, 2009, the Commission voted to begin an investigation into whether NOM had violated 21-A M.R.S.A. §1056-B by failing to register as a ballot question committee.

12. As part of this investigation, on January 28, 2010, the Commission served a subpoena on representatives for NOM setting a deposition for February 18, 2010. The subpoena provided that a deponent representing NOM should be prepared "to testify and give evidence" regarding, among other matters:

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.

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.

See Subpoena of National Organization for Marriage, attached as Exhibit 2, at 1-2. The subpoena also required the deponent representing NOM "to bring with you and produce at the time and place aforesaid, and to permit inspection and copying of" numerous documents, including:

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.

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.

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.

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.

See Subpoena of National Organization for Marriage, attached as Exhibit 2, at 2.

13. Also on January 28, 2010, the Commission served a subpoena on Brian Brown setting a deposition for February 18, 2010. The subpoena provided that Mr. Brown should be prepared "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.

See Subpoena of Brian Brown, attached as Exhibit 3, at 1. The subpoena also required 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 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.

See Subpoena of Brian Brown, attached as Exhibit 3, at 1.

11. On February 11, 2010, petitions to vacate or modify these subpoenas were served upon the Commission by Brian Brown, NOM, and Stand for Marriage Maine PAC. See Exhibits 4-8, attached. These petitions objected to witness request 4 and document requests 1, 3, 4, 5, and 6 of the NOM subpoena, and witness request 1 and document request 1 of the Brown subpoena as overbroad, irrelevant, and immaterial. The petitions also objected to witness requests 4 and 7

and document request 1 and 3 of the NOM subpoena and witness request 1 and document request 1 of the Brown subpoena as requiring the disclosure of information and documents protected by a First Amendment privilege.

14. In support of their petitions, Petitioners submitted affidavits indicating the potential for chill and harassment that disclosure could cause. *See* Exhibits 9-10, attached.

15. On February 25, 2010, the Commission voted to deny Petitioners petitions to modify or vacate its subpoenas, effectively overruling its First Amendment and relevance objections.

Grounds For Relief Sought

16. The framework for establishing a claim of First Amendment privilege in the discovery context is laid out in the Ninth Circuit's recent decision in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010). 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, 591 F.3d at 1160-61; *see also United States v. Cromley*, 890 F.2d 539, 543-44 (1st Cir. 1989).

17. 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. *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.¹

18. Disclosure of personal donor information would subject NOM and its donors to harassment and other negative consequences, which could have a chilling effect on NOM's donations and activities. Similarly, disclosure of internal campaign communications between NOM and Stand for Marriage Maine PAC would have a chilling effect on the ability of NOM and Stand for Marriage Maine PAC to engage in effective campaign advocacy.

19. The existence of the Commission's confidentiality rules may "ameliorate but cannot eliminate these threatened harms." *Perry*, 591 F.3d at 1164. As Brian Brown, executive director of NOM, has stated, "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." See Declaration of Brian Brown, attached as Exhibit 9, at 2. Likewise, Mr. Brown has stated that having to disclose communications between NOM and Stand For Marriage Maine "substantially alter how I would choose to communicate in the

¹Although 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).

future.” *Id.*

20. Further, the very fact that one of the Petitioners 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.”)

21. Neither disclosure of personal donor information nor disclosure of internal campaign communications between NOM and Stand for Marriage Maine PAC is “rationally related to a compelling governmental interest and the least restrictive means of obtaining the desired information.” *Perry*, 591 F.3d at 1161. The Commission has not articulated any compelling government interest that is furthered by the disclosure of this information. The same-sex marriage referendum has already occurred, and any disclosure now therefore cannot aid voters in making their voting decision.

22. NOM is being investigated to determine whether it has violated 21-A M.R.S.A. § 1056(B). Section 1056-B, however, explicitly exempts “contribution to a political action committee” from the statute’s threshold requirement. *Id.* 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”).

23. Stand for Marriage Maine PAC is a registered Maine PAC. Thus, any coordination between Stand for Marriage and NOM is not counted towards the threshold, and any communications between NOM and Stand for Marriage Maine PAC are not relevant to the Commission’s investigation.

24. Personal information regarding donors is not relevant to any issue in the Commission’s investigation, and is unlikely to lead to the discovery of admissible evidence. Petitioners do not object 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.

25. In its memorandum to the Commission, the Commission’s staff argued that “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.” See Commission Memorandum Regarding Petitions to Vacate or Modify Subpoenas, attached as Exhibit 11, at 12. This, however, has it exactly backwards. If the Commission determines that NOM is a BQC and if the constitutionality of Section 1056-B is upheld, then NOM may be required to disclose personal information regarding some donors. Until such a determination has been made, however, the Commission has no legal right to compel disclosure of such information.

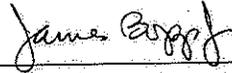
26. Further, the information sought by the Commission goes beyond what NOM would be required to disclose even if it did have to register as a BQC. According to Section 1056-B, a BQC is “required to report only those contributions made to the filer for the purpose of initiating, promoting, defeating or influencing in any way a ballot question and only those expenditures made for those purposes.” 21-A M.R.S.A. § 1056-B(2). The subpoenas in question, by contrast, require NOM to disclose personal donor information for donors irrespective of whether the contributions were made for the purpose of supporting the Maine same-sex marriage referendum, or were used for that purpose.

Demand for Relief

For the above reasons, Petitioners respectfully request that this Court sustain Petitioners objections to witness request 4, and 7 and document requests 1, 3, 4, 5, and 6 of the NOM subpoena, and witness request 1 and document request 1 of the Brown subpoena as overbroad, irrelevant, and immaterial, and subject to a First Amendment privilege, and to quash the subpoenas as to those requests.

March 3, 2010

Respectfully submitted,



James Bopp, Jr.*, Ind. #2838-84
Josiah Neeley*, Tex. #24046514
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1 South 6th Street
Terre Haute, IN 47807-3510
Ph: (812) 232-2434
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Lead Counsel for Plaintiffs

**Application for Pro Hac Vice Pending*

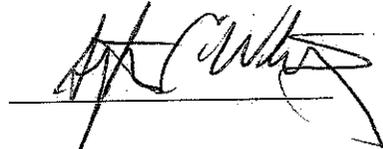


Stephen C. Whiting, Maine #559
THE WHITING LAW FIRM
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Portland, ME 04101
Ph: (207) 780-0681

Local Counsel for Plaintiffs

Certificate of Service

I hereby certify that on March 3, 2010, I served this document upon Respondent Maine Commission on Governmental Ethics and Election Practices by certified mail and upon the Maine Department of the Attorney General.



Stephen C. Whiting

SUMMARY SHEET

This summary sheet and the information contained herein neither replace nor supplement the filing and service of pleadings or other papers as required by the Maine Rules of Court or by law. This form is required for the use of the Clerk of Court for the purpose of initiating or updating the civil docket. (SEE INSTRUCTIONS ON REVERSE)

I. County of Filing or District Court Jurisdiction: Kennebec Co. Superior Court

II. CAUSE OF ACTION. (Cite the primary civil statutes under which you are filing, if any.) *Pro se* plaintiffs: If unsure, leave blank:
Rule 80 B Appeal

III. NATURE OF FILING
 Initial Complaint
 Third-Party Complaint
 Cross-Claim or Counterclaim
 If Reinstated or Reopened case, give original Docket Number _____
 (If filing a second or subsequent Money Judgment Disclosure, give docket number of first disclosure)

IV. TITLE TO REAL ESTATE IS INVOLVED

V. MOST DEFINITIVE NATURE OF ACTION. (Place an X in one box only) *Pro se* plaintiffs: If unsure, leave blank:

GENERAL CIVIL (CV)

<input type="checkbox"/> Personal Injury Tort	<input type="checkbox"/> Contract	<input type="checkbox"/> Other Forfeitures/Property Liabls
<input type="checkbox"/> Property Negligence	<input type="checkbox"/> Contract	<input type="checkbox"/> Land Use Enforcement (80K)
<input type="checkbox"/> Auto Negligence	<input type="checkbox"/> Declaratory/Equitable Relief	<input type="checkbox"/> Administrative Warrant
<input type="checkbox"/> Medical Malpractice	<input type="checkbox"/> General Injunctive Relief	<input type="checkbox"/> HIV Testing
<input type="checkbox"/> Product Liability	<input type="checkbox"/> Declaratory Judgment	<input type="checkbox"/> Arbitration Awards
<input type="checkbox"/> Assault/Battery	<input type="checkbox"/> Other Equitable Relief	<input type="checkbox"/> Appointment of Receiver
<input type="checkbox"/> Domestic Torts	<input type="checkbox"/> Constitutional/Civil Rights	<input type="checkbox"/> Shareholders' Derivative Actions
<input type="checkbox"/> Other Negligence	<input type="checkbox"/> Constitutional/Civil Rights	<input type="checkbox"/> Foreign Deposition
<input type="checkbox"/> Other Personal Injury Tort	<input type="checkbox"/> Statutory Actions	<input type="checkbox"/> Pre-action Discovery
<input type="checkbox"/> Non-Personal Injury Tort	<input type="checkbox"/> Unfair Trade Practices	<input type="checkbox"/> Common Law Habeas Corpus
<input type="checkbox"/> Libel/Defamation	<input type="checkbox"/> Freedom of Access	<input type="checkbox"/> Prisoner Transfers
<input type="checkbox"/> Auto Negligence	<input type="checkbox"/> Other Statutory Actions	<input type="checkbox"/> Foreign Judgments
<input type="checkbox"/> Other Negligence	<input type="checkbox"/> Miscellaneous Civil	<input type="checkbox"/> Minor Settlements
<input type="checkbox"/> Other Non-Personal Injury Tort	<input type="checkbox"/> Drug Forfeitures	<input type="checkbox"/> Other Civil

Non-DHS Protective Custody

SPECIAL ACTIONS (SA)

Money Judgment
 Money Judgment Request Disclosure

REAL ESTATE (RE)

<input type="checkbox"/> Title Actions	<input type="checkbox"/> Foreclosure	<input type="checkbox"/> Misc. Real Estate
<input type="checkbox"/> Quiet Title	<input type="checkbox"/> Foreclosure for Non-pmt (ADR exempt)	<input type="checkbox"/> Equitable Remedies
<input type="checkbox"/> Eminent Domain	<input type="checkbox"/> Foreclosure - Other	<input type="checkbox"/> Mechanics Lien
<input type="checkbox"/> Easements	<input type="checkbox"/> Trespass	<input type="checkbox"/> Partition
<input type="checkbox"/> Boundaries	<input type="checkbox"/> Trespass	<input type="checkbox"/> Adverse Possession
		<input type="checkbox"/> Nuisance
		<input type="checkbox"/> Abandoned Roads
		<input type="checkbox"/> Other Real Estate

Governmental Body (80B) Administrative Agency (80C) Other Appeals

VI. M.R.Civ.P. 16B Alternative Dispute Resolution (ADR):
 I certify that pursuant to M.R.Civ.P. 16B(b), this case is exempt from a required ADR process because:
 It falls within an exemption listed above (i.e., an appeal or an action for non-payment of a note in a secured transaction).
 The plaintiff or defendant is incarcerated in a local, state or federal facility.
 The parties have participated in a statutory prelitigation screening process with _____ (name of neutral) on _____ (date).
 The parties have participated in a formal ADR process with _____ (name of neutral) on _____ (date).
 This is a Personal Injury action in which the plaintiff's likely damages will not exceed \$30,000, and the plaintiff requests an exemption from ADR.

VII. (a) PLAINTIFFS (Name & Address including county)
or Third-Party, Counterclaim or Cross-Claim Plaintiffs
 The plaintiff is a prisoner in a local, state or federal facility.

- ① The National Organization for Marriage
20 Nassau St., Suite 242, Princeton, N.J. 08542
- ② Stand for Marriage Maine PAC
P.O. Box 15322, Portland, ME 04112
- ③ Brian Brown
20 Nassau St., Suite 242, Princeton, N.J. 08542

(b) Attorneys (Name, Bar number, Firm name, Address, Telephone Number) If all counsel listed do NOT represent all plaintiffs, specify who the listed attorney(s) represent.
(If pro se plaintiff, leave blank)

Stephen C. Whiting, Bar #559
The Whiting Law Firm
75 Pearl St., Suite 207
Portland, ME 04101
780-0681

VIII. (a) DEFENDANTS (Name & Address including county)
and/or Third-Party, Counterclaim or Cross-Claim Defendants
 The defendant is a prisoner in a local, state or federal facility.

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

(b) Attorneys (Name, Bar number, Firm name, Address, Telephone Number)
(If known)

If all counsel listed do NOT represent all defendants, specify who the listed attorney(s) represent.

Janet T. Mills, Attorney Gen.
Bar # 1677
Office of the Attorney General
6 State House Station
Augusta, ME 04333-0006
626-8800

IX. RELATED CASE(S) IF ANY _____

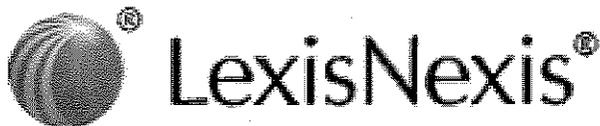
Assigned Judge/Justice _____

Docket Number _____

Date: 3/2/10

Stephen C. Whiting
Name of Lead Attorney of Record or Pro se Party

[Signature]
Signature of Attorney or Pro se Party



LEXSEE 130 S CT 705

DENNIS HOLLINGSWORTH ET AL. v. KRISTIN M. PERRY ET AL.

No. 09A648

SUPREME COURT OF THE UNITED STATES

130 S. Ct. 705; 175 L. Ed. 2d 657; 2010 U.S. LEXIS 533; 38 Media L. Rep. 1097; 22 Fla. L. Weekly Fed. S 45

January 13, 2010, Decided

PRIOR HISTORY: [***1]

ON APPLICATION FOR STAY

Perry v. Schwarzenegger, 2010 U.S. Dist. LEXIS 1441 (N.D. Cal., Jan. 8, 2010)

CASE SUMMARY:

PROCEDURAL POSTURE: The United States District Court for the Northern District of California issued an order permitting a trial to be broadcast live via streaming audio and video to a number of federal courthouses around the country. The order was issued pursuant to a purported amendment to a local rule which had previously forbidden the broadcasting of trials outside the courthouse in which a trial took place. Defendant-intervenors filed a motion for a stay.

OVERVIEW: On December 17, 2009, the Ninth Circuit Judicial Council issued a news release indicating that it had approved a pilot program for the limited use of cameras in federal district courts within the circuit. On December 21, a coalition of media companies requested permission from the District Court to televise the trial challenging Proposition 8 which amended the California Constitution to provide that only marriage between a man and a woman was valid. Two days later, the District Court indicated on its Web site that it had amended N.D. Cal. Civ. R. 77-3, which had previously banned the recording or broadcast of court proceedings. On January 9, 2010, defendant-intervenors filed their application for

a stay of the District Court's order pending resolution of forthcoming petitions for the writs of certiorari and mandamus. A bench trial began on January 11, 2010. The Court concluded that the District Court's amendment of its local rules to broadcast the trial likely did not comply with federal law and that defendant-intervenors demonstrated that irreparable harm would likely have resulted from the District Court's actions. No harm was alleged if the trial was not broadcast.

OUTCOME: It was ordered that the application for a stay of the District Court's order be granted, pending the timely filing and disposition of a petition for a writ of certiorari or the filing and disposition of a petition for a writ of mandamus. 5-4 Decision; 1 Dissent.

CORE TERMS: broadcast, local rules, broadcasting, notice, transmission, courtroom, pilot program, camera, site, federal law, public notice, courthouse, video, federal courthouses, immediate need, irreparable harm, revision, posting, revised, public interest, mandamus, writ of mandamus, announced, chambers, nonjury, federal statute, press release, defendant-intervenors, streaming, recording

LexisNexis(R) Headnotes

Civil Procedure > Judgments > Entry of Judgments >

130 S. Ct. 705, *; 175 L. Ed. 2d 657, **;
2010 U.S. LEXIS 533, ***1; 38 Media L. Rep. 1097

Stays of Proceedings > General Overview
Civil Procedure > U.S. Supreme Court Review >
General Overview

[HN1] To obtain a stay pending the filing and disposition of a petition for a writ of certiorari, an applicant must show (1) a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the U.S. Supreme Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent.

Civil Procedure > Remedies > Writs > Common Law
Writs > Mandamus
Civil Procedure > U.S. Supreme Court Review >
General Overview

[HN2] To obtain a stay pending the filing and disposition of a petition for a writ of mandamus, an applicant must show a fair prospect that a majority of the U.S. Supreme Court will vote to grant mandamus and a likelihood that irreparable harm will result from the denial of a stay. Before a writ of mandamus may issue, a party must establish that (1) no other adequate means exist to attain the relief he desires, (2) the party's right to issuance of the writ is clear and indisputable, and (3) the writ is appropriate under the circumstances. The Court will issue the writ of mandamus directly to a federal district court only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by the Court should be taken.

Governments > Courts > Rule Application &
Interpretation

[HN3] A district court has discretion to adopt local rules. 28 U.S.C.S. § 2071; Fed. R. Civ. P. 83. Those rules have the force of law. Federal law, however, requires a district court to follow certain procedures to adopt or amend a local rule. Local rules typically may not be amended unless the district court gives appropriate public notice and an opportunity for comment. 28 U.S.C.S. § 2071(b); Fed. R. Civ. P. 83(a). A limited exception permits dispensing with this notice-and-comment requirement only where there is an immediate need for a rule. § 2071(e). Even where a rule is amended based on immediate need, however, the issuing court must promptly thereafter afford notice and opportunity for

comment. § 2071(e).

Governments > Courts > General Overview

[HN4] The U.S. Supreme Court has a significant interest in supervising the administration of the judicial system. Sup. Ct. R. 10(a) provides the Court will consider whether the courts below have so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's supervisory power. The Court may use its supervisory authority to invalidate local rules that were promulgated in violation of an Act of Congress. The Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes.

COUNSEL: Charles J. Cooper argued the cause for petitioner.

Theodore B. Olson argued the cause for the respondent.

Thomas R. Burke argued the cause for the respondent.

JUDGES: Roberts, Stevens, Scalia, Kennedy, Thomas, Ginsburg, Breyer, Alito, Sotomayor.

OPINION

[*706] [**659] PER CURIAM.

We are asked to stay the broadcast of a federal trial. We resolve that question without expressing any view on whether such trials should be broadcast. We instead determine that the broadcast in this case should be stayed because it appears the courts below did not follow the appropriate procedures set forth in federal law before changing their rules to allow such broadcasting. Courts enforce the requirement of procedural regularity on others, and must follow those requirements themselves.

* * *

This lawsuit, still in a preliminary stage, involves an action challenging what the parties refer to as Proposition 8, a California ballot proposition adopted by the electorate. Proposition 8 amended the State Constitution by [**660] adding a new section providing that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const. Art. I, § 7.5. The plaintiffs contend that Proposition 8 violates the United States Constitution. A bench trial in the case began on

130 S. Ct. 705, *706; 175 L. Ed. 2d 657, **660;
2010 U.S. LEXIS 533, ***1; 38 Media L. Rep. 1097

Monday, January 11, 2010, in the United States District Court for the Northern District of California. [***2]

[*707] The District Court has issued an order permitting the trial to be broadcast live via streaming audio and video to a number of federal courthouses around the country. The order was issued pursuant to a purported amendment to a local Rule of the District Court. That Rule had previously forbidden the broadcasting of trials outside the courthouse in which a trial takes place. The District Court effected its amendment via several postings on the District Court's Web site in the days immediately before the trial in this case was to begin.

Applicants here are defendant-intervenors in the lawsuit. They object to the District Court's order, arguing that the District Court violated a federal statute by promulgating the amendment to its local Rule without sufficient opportunity for notice and comment and that the public broadcast would violate their due process rights to a fair and impartial trial. Applicants seek a stay of the order pending the filing of petitions for writs of certiorari and mandamus. We granted a temporary stay to consider the issue further. *Post*, p. . Concluding that the applicants have made a sufficient showing of entitlement to relief, we now grant a stay.

I

Proposition [***3] 8 was passed by California voters in November 2008. It was a ballot proposition designed to overturn a ruling by the California Supreme Court that had given same-sex couples a right to marry. Proposition 8 was and is the subject of public debate throughout the State and, indeed, nationwide. Its advocates claim that they have been subject to harassment as a result of public disclosure of their support. See, e.g., Reply Brief for Appellant 28-29 in *Citizens United v. Federal Election Comm'n*, No. 08-205, now pending before this Court. For example, donors to groups supporting Proposition 8 "have received death threats and envelopes containing a powdery white substance." Stone, Prop 8 Donor Web Site Shows Disclosure is a 2-Edged Sword, *N. Y. Times*, Feb. 8, 2009. Some advocates claim that they have received confrontational phone calls and e-mail messages from opponents of Proposition 8, *ibid.*, and others have been forced to resign their jobs after it became public that they had donated to groups supporting the amendment, see Brief for Center for Competitive Politics as *Amicus*

Curiae 13-14, in *Citizens United v. Federal Election Comm'n*, No. 08-205, now pending before this Court. Opponents [***4] of Proposition 8 also are alleged to have compiled "Internet blacklists" of pro-Proposition 8 businesses and urged others to boycott those businesses in retaliation for supporting the ballot measure. Carlton, Gay Activists Boycott Backers of Prop 8, *Wall Street Journal*, Dec. 27, 2008, A3. And numerous instances of vandalism and physical violence have been reported against those who have been identified as Proposition 8 supporters. See Exhs. B, I, and L to Defendant-Intervenors' Motion for Protective Order in *Perry v. Schwarzenegger*, No. [**661] 3:09-cv-02292 (ND Cal.) (hereinafter Defendant-Intervenors' Motion).

Respondents filed suit in the United States District Court for the Northern District of California, seeking to invalidate Proposition 8. They contend that the amendment to the State's Constitution violates the Equal Protection and Due Process Clauses of the Fourteenth Amendment of the United States Constitution. The State of California declined to defend Proposition 8, and the defendant-intervenors (who are the applicants here) entered the suit to defend its constitutionality. A bench trial began on Monday, January 11, 2010, before the Chief Judge of the District Court, the Honorable [***5] Vaughn R. Walker.

[*708] On September 25, 2009, the District Court informed the parties at a hearing that there was interest in the possibility that the trial would be broadcast. Respondents indicated their support for the idea, while applicants opposed it. The court noted that "[t]here are, of course, Judicial Conference positions on this," but also that "[t]his is all in flux." Exh. 9, p. 72, App. to Pet. for Mandamus in No. 10-70063 (CA9) (hereinafter App. to Pet.).

One month later, Chief Judge Kozinski of the United States Court of Appeals for the Ninth Circuit appointed a three-judge committee to evaluate the possibility of adopting a Ninth Circuit Rule regarding the recording and transmission of district court proceedings. The committee (of which Chief Judge Walker was a member) recommended to the Ninth Circuit Judicial Council that district courts be permitted to experiment with broadcasting court proceedings on a trial basis. Chief Judge Walker later acknowledged that while the committee was considering the pilot program, "this case was very much in mind at that time because it had come

130 S. Ct. 705, *708; 175 L. Ed. 2d 657, **661;
2010 U.S. LEXIS 533, ***5; 38 Media L. Rep. 1097

to prominence then and was thought to be an ideal candidate for consideration." *Id.*, Exh. 2, at [***6] 42. The committee did not publicly disclose its consideration of the proposal, nor did it solicit or receive public comments on the proposal.

On December 17, the Ninth Circuit Judicial Council issued a news release indicating that it had approved a pilot program for "the limited use of cameras in federal district courts within the circuit." *Id.*, Exh. 13, at 1. The release explained that the Council's decision "amend[ed] a 1996 Ninth Circuit policy" that had banned the photographing, as well as radio and television coverage, of court proceedings. *Ibid.* The release further indicated that cases would be selected for participation in the program "by the chief judge of the district court in consultation with the chief circuit judge." *Ibid.* No further guidelines for participation in the pilot program have since been issued.

On December 21, a coalition of media companies requested permission from the District Court to televise the trial challenging Proposition 8. Two days later, the court indicated on its Web site that it had amended Civil Local Rule 77-3, which had previously banned the recording or broadcast of court proceedings. The revised version of Rule 77-3 created an exception to [***7] this general prohibition to allow "for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit." *Id.*, Exh. 14. Applicants objected to the [**662] revision, arguing that any change to Ninth Circuit or local rules would require a sufficient notice and comment period.

On December 31, the District Court revised its Web site to remove the previous announcement about the change to Rule 77-3. A new announcement was posted indicating a "proposed revision of Civil Local Rule 77-3," which had been "approved for public comment." *Id.*, Exh. 17. The proposed revision was the same as the previously announced amendment. Comments on the proposed revision were to be submitted by Friday, January 8, 2010.

On January 4, 2010, the District Court again revised its Web site. The announcement regarding the proposed revision of Rule 77-3 was removed and replaced with a third version of the announcement. This third version stated that the revised Rule was "effective December 22, 2009," and that "[t]he revised rule was adopted pursuant to the 'immediate need' provision of Title 28 Section

2071(e)." *Id.*, Exh. 19, at 3.

On January 6, 2010, the District Court held a hearing regarding [***8] the recording and broadcasting of the upcoming trial. [*709] The court announced that an audio and video feed of trial proceedings would be streamed live to certain courthouses in other cities. It also announced that, pending approval of the Chief Judge of the Ninth Circuit, the trial would be recorded and then broadcast on the Internet. A court technician explained that the proceedings would be recorded by three cameras, and then the resulting broadcast would be uploaded for posting on the Internet, with a delay due to processing requirements.

On January 7, 2010, the District Court filed an order formally requesting that Chief Judge Kozinski approve "inclusion of the trial in the pilot project on the terms and conditions discussed at the January 6, 2010, hearing and subject to resolution of certain technical issues." *Id.*, Exh. 1, at 2. Applicants filed a petition for a writ of mandamus in the Court of Appeals, seeking to prohibit or stay the District Court from enforcing its order. The following day, a three-judge panel of the Court of Appeals denied the petition.

On January 8, 2010, Chief Judge Kozinski issued an order approving the District Court's decision to allow real-time streaming [***9] of the trial to certain federal courthouses listed in a simultaneously issued press release. Five locations had been selected: federal courthouses in San Francisco, Pasadena, Seattle, Portland, and Brooklyn. The press release also indicated that "[a]dditional sites may be announced." Federal Courthouses to Offer Remote Viewing of Proposition 8 Trial, online at http://www.ca9.uscourts.gov/datastore/general/2010/01/08/Prop8_Remot (as visited Jan. 13, 2010, and available in the Clerk of Court's case file).

Chief Judge Kozinski's January 8 order noted that the request to broadcast the trial on the Internet was "still pending" before him. In a later letter to Chief Judge Walker, he explained that the request was not yet "ripe for approval" because "the technical staff encountered some unexpected difficulties preparing a satisfactory video suitable for on-line posting." Letter of Jan. 9, 2010 (available in Clerk of Court's case file). A final decision whether to permit online publication would be made when technical difficulties were resolved.

[**663] On January 9, 2010, applicants filed in this Court an application for a stay of the District Court's order. Their petition [***10] seeks a stay pending resolution of forthcoming petitions for the writs of certiorari and mandamus.

II

The question whether courtroom proceedings should be broadcast has prompted considerable national debate. Reasonable minds differ on the proper resolution of that debate and on the restrictions, circumstances, and procedures under which such broadcasts should occur. We do not here express any views on the propriety of broadcasting court proceedings generally.

Instead, our review is confined to a narrow legal issue: whether the District Court's amendment of its local rules to broadcast this trial complied with federal law. We conclude that it likely did not and that applicants have demonstrated that irreparable harm would likely result from the District Court's actions. We therefore stay the court's January 7, 2010, order to the extent that it permits the live streaming of court proceedings to other federal courthouses. We do not address other aspects of that order, such as those related to the broadcast of court proceedings on the Internet, as this may be premature.

A

[HN1] To obtain a stay pending the filing and disposition of a petition for a writ [*710] of certiorari, an applicant must show (1) [***11] a reasonable probability that four Justices will consider the issue sufficiently meritorious to grant certiorari; (2) a fair prospect that a majority of the Court will vote to reverse the judgment below; and (3) a likelihood that irreparable harm will result from the denial of a stay. In close cases the Circuit Justice or the Court will balance the equities and weigh the relative harms to the applicant and to the respondent. *Lucas v. Townsend*, 486 U. S. 1301, 1304, 108 S. Ct. 1763, 100 L. Ed. 2d 589 (1988) (KENNEDY, J., in chambers); *Rostker v. Goldberg*, 448 U. S. 1306, 1308, 101 S. Ct. 1, 65 L. Ed. 2d 1098 (1980) (Brennan, J., in chambers). [HN2] To obtain a stay pending the filing and disposition of a petition for a writ of mandamus, an applicant must show a fair prospect that a majority of the Court will vote to grant mandamus and a likelihood that irreparable harm will result from the denial of a stay. Before a writ of mandamus may issue, a party must establish that (1) "no other adequate means

[exist] to attain the relief he desires," (2) the party's "right to issuance of the writ is 'clear and indisputable,'" and (3) "the writ is appropriate under the circumstances." *Cheney v. United States Dist. Court for D. C.*, 542 U. S. 367, 380-381, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004) (some [***12] internal quotation marks omitted). This Court will issue the writ of mandamus directly to a federal district court "only where a question of public importance is involved, or where the question is of such a nature that it is peculiarly appropriate that such action by this court should be taken." *Ex parte United States*, 287 U. S. 241, 248-249, 53 S. Ct. 129, 77 L. Ed. 283 (1932). These familiar standards are followed here, where applicants claim that the District Court's order was based on a local rule adopted in violation of federal law.

B

Given the importance of the issues at stake, and our conclusion that the [**664] District Court likely violated a federal statute in revising its local rules, applicants have shown a fair prospect that a majority of this Court will either grant a petition for a writ of certiorari and reverse the order below or will grant a petition for a writ of mandamus.

[HN3] A district court has discretion to adopt local rules. *Frazier v. Heebe*, 482 U. S. 641, 645, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987) (citing 28 U. S. C. § 2071; Fed. Rule Civ. Proc. 83). Those rules have "the force of law." *Weil v. Neary*, 278 U. S. 160, 169, 49 S. Ct. 144, 73 L. Ed. 243 (1929). Federal law, however, requires a district court to follow certain procedures to adopt or amend a local rule. [***13] Local rules typically may not be amended unless the district court "giv[es] appropriate public notice and an opportunity for comment." 28 U. S. C. § 2071(b); see also Fed. Rule Civ. Proc. 83(a). A limited exception permits dispensing with this notice-and-comment requirement only where "there is an immediate need for a rule." § 2071(e). Even where a rule is amended based on immediate need, however, the issuing court must "promptly thereafter afford . . . notice and opportunity for comment." *Ibid*.

Before late December, the court's Local Rule 77-3 explicitly banned the broadcast of court proceedings:

"Unless allowed by a Judge or a Magistrate Judge with respect to his or her own chambers or assigned courtroom for ceremonial purposes, the taking of

130 S. Ct. 705, *710; 175 L. Ed. 2d 657, **664;
2010 U.S. LEXIS 533, ***13; 38 Media L. Rep. 1097

photographs, public broadcasting or televising, or recording for those purposes in the courtroom or its environs, in connection with any judicial proceeding, is prohibited. Electronic transmittal of courtroom proceedings and presentation of evidence within the confines of the [*711] courthouse is permitted, if authorized by the Judge or Magistrate Judge. The term 'environs,' as used in this rule, means all floors on which chambers, courtrooms or on [***14] which Offices of the Clerk are located, with the exception of any space specifically designated as a Press Room. Nothing in this rule is intended to restrict the use of electronic means to receive or present evidence during Court proceedings."

Notably, the Rule excepted from its general ban the transmittal of certain proceedings--but it limited that exception to transmissions "within the confines of the courthouse." The negative inference of this exception, of course, is that the Rule would have prohibited the streaming of transmissions, or other broadcasting or televising, beyond "the confines of the courthouse."

Respondents do not dispute that this version of Rule 77-3 would have prohibited streaming video of the trial around the country. But they assert that this is not the operative version of Rule 77-3. In a series of postings on its Web site, the District Court purported to revise or propose revisions to Local Rule 77-3. This amendment would have created an additional exception to Rule 77-3's general ban on the broadcasting of court proceedings "for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit." Exh. 14, App. to Pet. Respondents [***15] rely on this amended version of the Rule.

The amended version of Rule 77-3 appears to be invalid. In amending this rule, it appears that the District Court failed to "giv[e] appropriate [**665] public notice and an opportunity for comment," as required by federal law. 28 U. S. C. § 2071(b). The first time the District Court asked for public comments was on the afternoon of New Year's Eve. The court stated that it would leave the comment period open until January 8. At most, the District Court therefore allowed a comment period spanning five business days. There is substantial merit to

the argument that this was not "appropriate" notice and an opportunity for comment. Administrative agencies, for instance, "usually" provide a comment period of "thirty days or more." *Riverbend Farms, Inc. v. Madigan*, 958 F.2d 1479, 1484 (CA9 1992); see *Petry v. Block*, 737 F.2d 1193, 1201, 238 U.S. App. D.C. 46 (CADC 1984) ("[T]he shortest period in which parties can meaningfully review a proposed rule and file informed responses is thirty days").

To be sure, the possibility that some aspects of the trial might be broadcast was first raised to the parties by the District Court at an in-court hearing on September 25, some three months [***16] before the Rule was changed. The broadcasting, however, was prohibited under both Circuit and local rules at that time. The first public indication that the District Court intended to adopt a rule of general applicability came in its Web site posting on December 23. And even if Chief Judge Walker's in-court allusion to the possibility that the Proposition 8 trial might be broadcast could be considered as providing notice to the parties in this case--his statement that "[t]his is all in flux" notwithstanding--the disclosure falls far short of the "appropriate public notice and an opportunity for comment" required by § 2071(b). Indeed, there was no proposed policy on which to comment.

The need for a meaningful comment period was particularly acute in this case. Both courts and legislatures have proceeded with appropriate caution in addressing this question. In 1996, the Judicial Conference of the United States adopted a policy opposing the public broadcast of court proceedings. This policy was [*712] adopted after a multi-year study of the issue by the Federal Judicial Center which drew on data from six district and two appellate courts, as well as state-court data. In light of the study's [***17] findings, the Judicial Conference concluded that "the intimidating effect of cameras on some witnesses and jurors [is] cause for concern." Report of the Proceedings of the Judicial Conference of the United States 47 (Sept. 20, 1994).

In more than a decade since its adoption the Judicial Conference has continued to adhere to its position on the broadcast of court proceedings. While the policy conclusions of the Judicial Conference may not be binding on the lower courts, they are "at the very least entitled to respectful consideration." *In re Sony BMG Music Entertainment*, 564 F.3d 1, 6 (CAI 2009). Before

abandoning its own policy—one consistent with the Judicial Conference's longstanding views—it was incumbent on the District Court to adopt a proposed rule only after notice and an adequate period for public comment.

In dispensing with public notice and comment the District Court invoked the "immediate need" exception. 28 U. S. C. § 2071(e). It did so through a Web site posting on January 4—prior to the expiration of the comment period—indicating that Rule 77-3 had been revised to permit participation in the Ninth Circuit's pilot program. These postings gave no [*666] explanation for invoking [***18] the exception. At trial the District Court explained that the immediate need here was to allow this case to be broadcast pursuant to the Ninth Circuit's new pilot program. See Exh. 1, p. 11, Supp. App. to Response for Perry et al.

This does not qualify as an immediate need that justifies dispensing with the notice and comment procedures required by federal law. While respondents (the plaintiffs in the District Court) had indicated their approval of the plan, no party alleged that it would be imminently harmed if the trial were not broadcast. Had an administrative agency acted as the District Court did here, the immediate need exception would likely not have been available. See 5 U. S. C. § 553(b)(B) (administrative agencies cannot invoke an exception to affording notice-and-comment before rulemaking unless the notice-and-comment procedures would be "impracticable, unnecessary, or contrary to the public interest"). In issuing its order the District Court relied on the Ninth Circuit Judicial Council's pilot program. Yet nothing in that program—which was not adopted after notice and comment procedures, cf. 28 U. S. C. § 332(d)(1)—required any "immediate" revision in local rules. The [***19] Ninth Circuit Judicial Council did not purport to modify or abrogate the District Court's local Rule. Nor could it, as the Judicial Council only has the power to modify or abrogate local rules that conflict with federal law. See § 332(d)(4) (permitting a circuit court council to modify a local rule that is "found inconsistent" with rules promulgated by the Supreme Court). No federal law requires that the District Court broadcast some of its cases. The District Court's local Rule, in addition, was not a conforming amendment to Ninth Circuit policy, because that policy does not require district courts to broadcast proceedings.

Applicants also have shown that irreparable harm will likely result from the denial of the stay. Without a stay, the District Court will broadcast the trial. It would be difficult—if not impossible—to reverse the harm from those broadcasts. The trial will involve various witnesses, including members of same-sex couples; academics, who apparently will discuss gender issues and gender equality, as well as family structures; and those who participated in [*713] the campaign leading to the adoption of Proposition 8. This Court has recognized that witness testimony may be [***20] chilled if broadcast. See *Estes v. Texas*, 381 U. S. 532, 547, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (1965); *id.*, at 591, 85 S. Ct. 1628, 14 L. Ed. 2d 543 (Harlan, J., concurring). Some of applicants' witnesses have already said that they will not testify if the trial is broadcast, and they have substantiated their concerns by citing incidents of past harassment. See, e.g., Exh. K to Defendant-Intervenors' Motion (71 news articles detailing incidents of harassment related to people who supported Proposition 8). These concerns are not diminished by the fact that some of applicants' witnesses are compensated expert witnesses. There are qualitative differences between making public appearances regarding an issue and having one's testimony broadcast throughout the country. Applicants may not be able to obtain adequate relief through an appeal. The trial will have already been broadcast. It is difficult to demonstrate or analyze whether a witness would have testified differently if his or her testimony had not been broadcast. [**667] And witnesses subject to harassment as a result of broadcast of their testimony might be less likely to cooperate in any future proceedings.

The balance of equities favors applicants. While applicants have demonstrated the threat of harm [***21] they face if the trial is broadcast, respondents have not alleged any harm if the trial is not broadcast. The issue, moreover, must be resolved at this stage, for the injury likely cannot be undone once the broadcast takes place.

[HN4] This Court also has a significant interest in supervising the administration of the judicial system. See this Court's Rule 10(a) (the Court will consider whether the courts below have "so far departed from the accepted and usual course of judicial proceedings . . . as to call for an exercise of this Court's supervisory power"). The Court may use its supervisory authority to invalidate local rules that were promulgated in violation of an Act of Congress. See *Frazier*, 482 U. S., at 645-646, 107 S. Ct. 2607, 96 L. Ed. 2d 557; *id.*, at 652, 654, 107 S. Ct.

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2607, 96 L. Ed. 2d 557 (Rehnquist, C. J., dissenting). The Court's interest in ensuring compliance with proper rules of judicial administration is particularly acute when those rules relate to the integrity of judicial processes. The District Court here attempted to revise its rules in haste, contrary to federal statutes and the policy of the Judicial Conference of the United States. It did so to allow broadcasting of this high-profile trial without any considered standards or [***22] guidelines in place. The arguments in favor of developing procedures and rules to allow broadcast of certain cases have considerable merit, and reasonable minds can surely differ over the general and specific terms of rules and standards adopted for that purpose. Here, however, the order in question complied neither with existing rules or policies nor the required procedures for amending them.

By insisting that courts comply with the law, parties vindicate not only the rights they assert but also the law's own insistence on neutrality and fidelity to principle. Those systematic interests are all the more evident here, where the lack of a regular rule with proper standards to determine the guidelines for broadcasting could compromise the orderly, decorous, rational traditions that courts rely upon to ensure the integrity of their own judgments. These considerations, too, are part of the reasons leading to the decision to grant extraordinary relief.

In addressing a discrete instance authorizing a closed-circuit broadcast of a trial, Congress has illustrated the need for careful guidelines and standards. The trial of the two defendants in the Oklahoma City [*714] bombing case had been transferred [***23] to the United States District Court for the District of Colorado, so it was set to take place in Denver. That meant the families of deceased and surviving victims in and around Oklahoma City would not have the opportunity to observe the trial. Congress passed a statute that allowed victims' families to watch the trial on closed-circuit television. 42 U. S. C. § 10608. The statute was drawn with care to provide precise and detailed guidance with respect to the wide range of issues implicated by the broadcast. See § 10608(a) (the statute only applies "in cases where the venue of the trial is changed" to a city that is "out of the State" and "more than 350 miles from the location in which those proceedings originally would have taken place"); §§ 10608(a)-(b) (standards for who can [**668] view such trials); § 10608(c) (restrictions on transmission). And the statute gave the Judicial

Conference of the United States rulemaking authority "to effectuate the policy addressed by this section." § 10608(g). In the present case, by contrast, over a span of three weeks the District Court and Ninth Circuit Judicial Council issued, retracted, and reissued a series of Web site postings and news releases. [***24] These purport to amend rules and policies at the heart of an ongoing consideration of broadcasting federal trials. And they have done so to make sure that one particular trial may be broadcast. Congress' requirement of a notice and comment procedure prevents just such arbitrary changes of court rules. Instead, courts must use the procedures prescribed by statute to amend their rules, 28 U. S. C. § 2071.

If Local Rule 77-3 had been validly revised, questions would still remain about the District Court's decision to allow broadcasting of this particular trial, in which several of the witnesses have stated concerns for their own security. Even districts that allow trials to be broadcast, see Civ. Rule 1.8 (SDNY 2009); Civ. Rule 1.8 (EDNY 2009), recognize that a district judge's discretion to broadcast a trial is limited, see, e.g., *Hamilton v. Accu-Tek*, 942 F. Supp. 136, 138 (EDNY 1996) (broadcast forbidden unless "there is no interference with the due process, the dignity of litigants, jurors and witnesses, or with other appropriate aspects of the administration of justice"). Consequently, courts in those districts have allowed the broadcast of their proceedings on the basis that those [***25] cases were not high profile, *E*Trade Fin. Corp. v. Deutsche Bank AG*, 582 F. Supp. 2d 528, 535 (SDNY 2008), or did not involve witnesses, *Marisol A. v. Giuliani*, 929 F. Supp. 660, 661 (SDNY 1996); *Katzman v. Victoria's Secret Catalogue*, 923 F. Supp. 580, 586-587 (SDNY 1996). Indeed, one District Court did not allow the broadcasting of its proceedings because the case "involv[ed] very sensitive issues." *Schoeps v. Museum of Modern Art*, 599 F. Supp. 2d 532, 534 (SDNY 2009). This case, too, involves issues subject to intense debate in our society. The District Court intends not only to broadcast the attorneys' arguments but also witness testimony. See *Sony BMG*, 564 F. 3d, at 11 (Lipez, J., concurring) (distinguishing broadcast of attorneys' arguments from other parts of the trial). This case is therefore not a good one for a pilot program. Even the studies that have been conducted thus far have not analyzed the effect of broadcasting in high-profile, divisive cases. See Application for Stay 17 (warning by Judge Edward R. Becker that in "truly high-profile cases," one can "[j]ust imagine what the

findings would be" (quoting Exh. 21, at 2, App. to Pet.).

III

The District Court attempted [***26] to change its rules at the eleventh hour to treat this [*715] case differently than other trials in the district. Not only did it ignore the federal statute that establishes the procedures by which its rules may be amended, its express purpose was to broadcast a high-profile trial that would include witness testimony about a contentious issue. If courts are to require that others follow regular procedures, courts must do so as well. The Court grants the application for a stay of the District Court's order of January 7, [**669] 2010, pending the timely filing and disposition of a petition for a writ of certiorari or the filing and disposition of a petition for a writ of mandamus.

It is so ordered.

DISSENT BY: BREYER

DISSENT

JUSTICE BREYER, with whom JUSTICE STEVENS, JUSTICE GINSBURG and JUSTICE SOTOMAYOR join, dissenting.

The Court today issues an order that will prevent the transmission of proceedings in a nonjury civil case of great public interest to five other federal courthouses located in Seattle, Pasadena, Portland, San Francisco, and Brooklyn. The Court agrees that it can issue this extraordinary legal relief only if (1) there is a fair chance the District Court was wrong about the underlying legal question, (2) [***27] that legal question meets this Court's certiorari standards, (3) refusal of the relief would work "irreparable harm," (4) the balance of the equities (including, the Court should say, possible harm to the public interest) favors issuance, (5) the party's right to the relief is "clear and undisputable," and (6) the "question is of public importance" (or otherwise "peculiarly appropriate" for such action). See *ante*, at 6-7; *Rostker v. Goldberg*, 448 U. S., 1306, 1308, 101 S. Ct. 1, 65 L. Ed. 2d 1098 (1980) (Brennan, J., in chambers) (stay standard); *Cheney v. United States Dist. Court for D. C.*, 542 U. S. 367, 380, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004) (noting that mandamus is a "drastic and extraordinary remedy reserved for really extraordinary causes" (internal quotation marks omitted)). This case, in my view, does not satisfy a single one of these standards,

let alone all of them. Consequently, I must dissent.

First, consider the merits of the legal issue: The United States Code, in a chapter entitled "Rules of Courts," states that "[a]ny rule . . . shall be prescribed only after giving appropriate public notice and an opportunity for comment." 28 U. S. C. § 2071(b). The question here is whether the District Court accompanied the modification of [***28] its antivideo rule with "appropriate public notice and an opportunity for comment."

Certainly the parties themselves had more than adequate notice and opportunity to comment before the Rule was changed. On September 25, 2009, the trial judge, Chief Judge Vaughn Walker, discussed the possibility of broadcasting trial proceedings both within the courthouse and beyond, and asked for the parties' views. No party objected to the presence of cameras in the courtroom for transmissions within the courthouse, Exh. 9, p. 70, App. to Pet. for Mandamus in No. 10-70063 (CA9) (hereinafter App. to Pet.). ("No objection. None at all"), and both sides made written submissions to the court regarding their views on other transmissions. The court again raised the issue at a hearing on December 16.

Nor, in practice, did other members of the Judiciary lack information about the issue. In May 1996 the Circuit Council adopted a policy permitting video in connection with appellate proceedings, but prohibiting its use in the district court. Subsequently, appellate court panels have frequently permitted electronic coverage. Judges, the press, lawyers, and others have discussed the matter. In 2007 the lawyers [***29] and judges present [**670] at the Ninth [*716] Circuit Judicial Conference considered a resolution that favored the use of cameras in district court civil nonjury proceedings. And, voting separately, both lawyers and judges "approved the resolution by resounding margins." Letter from Chief Judge Kozinski to Judge Anthony Scirica (Jan. 10, 2010), Exh. 8, p. 4, Supp. App. to Response for Perry et al. (hereinafter Supp. App. to Response). Subsequently, a committee of judges was created to study the matter. And on December 17, 2009, the Circuit Council voted to authorize a pilot program permitting the use of video in nonjury civil cases as part of an "experiment with the dissemination of video recordings in civil nonjury matters" (specifically those selected by the Chief Judge of the Circuit and the Chief Judge of the District Court). And it issued a press release.

News Release, Ninth Circuit Judicial Council Approves Experimental Use of Cameras in District Courts (Dec. 17, 2009), Exh. 13. App. to Pet.

In this context the United States District Court for the Northern District of California amended its local rules on December 22, 2009 to bring them into conformity with Ninth Circuit policy. In particular, [***30] the Court amended the local Rule forbidding the public broadcasting or televising of court proceedings by creating an exception "for participation in a pilot or other project authorized by the Judicial Council of the Ninth Circuit." Public Notice Concerning Revisions of Civil Local Rule 77-3, *id.*, Exh. 14. The Court initially relied on a provision in the United States Code that permits District Courts to prescribe rules "without public notice and opportunity for comment" "[i]f the prescribing court determines that there is an immediate need for a rule," and if the court "promptly thereafter afford[s] such notice and opportunity for comment," 28 U. S. C. § 2071(e). See Exh. 1, at 11, Supp. App. to Response. Then, on December 31, the Court revised its public notice to ask for comments directly. By January 8, 2010, the Court had received 138,574 comments, all but 32 of which favored transmitting the proceedings. *Id.*, at 12.

Viewed in light of this history, the Court satisfied the statute's insistence that "notice" be "appropriate." Cf. 28 U. S. C. §§ 2071(b), (e). The parties, the judges, and the interested public were aware of the proposals to change Ninth Circuit policy that culminated [***31] in the "pilot program" well before the change in the local rules that enabled participation in the project. The Ninth Circuit issued a press release in mid-December explaining its new "pilot program." Then, once the District Court amended its local rule, it issued its own notice nearly three weeks before the transmissions that the rule change authorized were to begin. And the rule change itself is simply a change that conforms local rule to Circuit policy--a conformity that the law may well require. (The Judicial Council had long before voted to make its video policy "binding on all courts within the Ninth Circuit," Letter from Chief Judge Hug to All Ninth Circuit Judges (June 21, 1996) (available in Clerk of Court's case file); it announced its new "pilot program" policy in December 2009, App. to Application, Exh. 13, App. to Pet.; and federal statutes render district court rules void insofar as they have been "modified or abrogated" by the Council, see § 2071(c)(1). Compare *ante*, at 11 ("Council only has the power to [**671] modify or abrogate local rules that

conflict with federal law"), with 28 U. S. C. § 332(d)(1) ("[C]ouncil shall make all necessary and appropriate orders for the effective [***32] and expeditious administration of justice within its circuit".) The applicants point to no interested person unaware of the change. How can the Majority reasonably demand yet more notice in respect to a local rule modification [*717] that a statute likely requires regardless?

There was also sufficient "opportunity for comment." The parties, the intervenors, other judges, the public--all had an opportunity to comment. The parties were specifically invited by Chief Judge Walker to comment on the possibility of broadcast as early as September. And the entire public was invited by the District Court to submit comments after the rule change was announced, right up to the eve of trial. As I said, the court received 138,574 comments during that time. How much more "opportunity for comment" does the Court believe necessary, particularly when the statutes themselves authorize the local court to put a new rule into effect "without" receiving *any* "comments" before doing so when that *local* court determines that there is an immediate need" to do so (and to receive comments later)? And more importantly, what is the legal source of the Court's demand for additional comment time in respect to a rule change [***33] to conform to Judicial Council policy?

Second, this legal question is not the kind of legal question that this Court would normally grant certiorari to consider. There is no conflict among the state or federal courts regarding the procedures by which a district court changes its local rules. Cf. this Court's Rules 10(a)-(b). The technical validity of the procedures followed below does not implicate an open "important question of federal law." Cf. Rule 10(c). Nor do the procedures below clearly conflict with any precedent from this Court. Cf. *ibid.*

It is particularly inadvisable for this Court to consider this kind of question because it involves local rules and local judicial administration. Here, for example, the Court decides just how a district court should modify its own local rules; in a word, this Court micromanages district court administrative procedures in the most detailed way. And, without briefing, the Court imposes limitations on the Judicial Councils' ability to implement policy decisions, *ante*, at 11-12 (suggesting Council policy does not abrogate local rules), with consequences

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we cannot predict. The District Councils, the Circuit Councils, the Judicial Conference of [***34] the United States, and the Chief Justice bear responsibility for judicial administration, not this Court. See 28 U. S. C. §§ 331-332. And those bodies have adequate authority to resolve disagreements about how to promulgate and apply local rules, and, particularly, about the use of cameras in the courtroom.

For the past 80 years, local judicial administration has been left to the exclusive province of the Circuit Judicial Councils, and this Court lacks their institutional experience. See generally P. Fish, *The Politics of Federal Judicial Administration* 152-153 (1973) (From their creation, "[t]he councils constituted . . . a mechanism through which there could be a concentration of responsibility in the various Circuits—immediate responsibility for the work of the courts, with power and authority . . . to insure [**672] competence in th[eir] work . . ."). For that reason it is inappropriate as well as unnecessary for this Court to intervene in the procedural aspects of local judicial administration. Perhaps that is why I have not been able to find any other case in which this Court has previously done so, through emergency relief or otherwise. Cf. *Bank of Nova Scotia v. United States*, 487 U. S. 250, 264, 108 S. Ct. 2369, 101 L. Ed. 2d 228 (1988) [***35] (SCALIA, J., concurring) ("I do not see the basis for any direct authority to supervise lower courts" (citing *Frazier v. Heebe*, 482 U. S. 641, 651-652, 107 S. Ct. 2607, 96 L. Ed. 2d 557 (1987) (Rehnquist, C. J., dissenting))). [*718] Nor am I aware of any instance in which this Court has preemptively sought to micromanage district court proceedings as it does today.

I recognize that the Court may see this matter not as one of promulgating and applying a local rule but, rather, as presenting the larger question of the place of cameras in the courtroom. But the wisdom of a camera policy is primarily a matter for the proper administrative bodies to determine. See 28 U. S. C. § 332. This Court has no legal authority to address that larger policy question *except insofar as it implicates a question of law*. The relevant question of law here concerns the procedure for amending local rules. And the only relevant legal principles that allow us here to take account of the immediate subject matter of that local rule, namely cameras, are those legal principles that permit us—indeed require us—to look to the nature of the harm at issue and to balance equities, including the public interest. I consequently turn to those two matters.

Third, [***36] consider the harm: I can find no basis for the Court's conclusion that, were the transmissions to other courtrooms to take place, the applicants would suffer irreparable harm. Certainly there is no evidence that such harm could arise in this nonjury civil case from the simple fact of transmission itself. By my count, 42 States and two Federal District Courts currently give judges the discretion to broadcast civil nonjury trials. See *Media Privacy and Related Law* 2009-10 (2009) (collecting state statutes and rules); Civ. Rule 1.8 (SDNY 2009); Civ. Rule 1.8 (EDNY 2009). Neither the applicants nor anyone else "has been able to present empirical data sufficient to establish that the mere presence of the broadcast media inherently has an adverse effect on [the judicial] process," *Chandler v. Florida*, 449 U. S. 560, 578-579, 101 S. Ct. 802, 66 L. Ed. 2d 740 (1981). Cf. M. Cohn & D. Dow, *Cameras in the Courtroom: Television and the Pursuit of Justice* 62-64 (1998) (canvassing studies, none of which found harm, and one of which found that witnesses "who faced an obvious camera, provided answers that were more correct, lengthier and more detailed"). And, in any event, any harm to the parties, including the applicants, is reparable [***37] through appeal. Cf. *Chandler, supra*, at 581, 101 S. Ct. 802, 66 L. Ed. 2d 740.

The applicants also claim that the transmission will irreparably harm the witnesses themselves, presumably by increasing the public's awareness of who those witnesses are. And they claim that some members of the public might harass those witnesses. But the witnesses, although capable of doing so, have not asked this Court to set aside the District Court's order. Cf. *Miller v. Albright*, 523 U. S. 420, 445, 118 S. Ct. 1428, 140 L. Ed. 2d 575 (1998) (O'Connor, J., joined by KENNEDY, J., concurring in judgment); [**673] *Powers v. Ohio*, 499 U. S. 400, 411, 111 S. Ct. 1364, 113 L. Ed. 2d 411 (1991). And that is not surprising. All of the witnesses supporting the applicants are already publicly identified with their cause. They are all experts or advocates who have either already appeared on television or Internet broadcasts, already toured the State advocating a "yes" vote on Proposition 8, or already engaged in extensive public commentary far more likely to make them well known than a closed-circuit broadcast to another federal courthouse.

The likelihood of any "irreparable" harm is further diminished by the fact that the court order before us would simply increase the trial's viewing audience from

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the occupants of one courtroom [***38] in one courthouse to the occupants of five other courtrooms in five other courthouses (in all [*719] of which taking pictures or retransmissions have been forbidden). By way of comparison literally hundreds of national and international newspapers are already covering this trial and reporting in detail the names and testimony of all of the witnesses. See, e.g., Leff, *Woman Recalls Emotional Ordeal of Gay Marriage Ban*, Associated Press, Jan. 11, 2010. I see no reason why the incremental increase in exposure caused by transmitting these proceedings to five additional courtrooms would create any further risk of harm, as the Court apparently believes. See *ante*, at 13. Moreover, if in respect to any particular witness this transmission threatens harm, the District Court can prevent that harm. Chief Judge Walker has already said that he would keep the broadcast "completely under the Court's control, to permit the Court to stop it if [it] proves to be a problem, if it proves to be a distraction, [or] if it proves to create problems with witnesses." See Exh. 2, at 45, App. to Pet. The Circuit Council confirmed in a press release that the District Court "will fully control the process" and that "Judge [***39] Walker has reserved the right to terminate any part of the audio or video, or both, for any duration" or to terminate participation in the pilot program "at any time." News Release, Federal Courthouses to Offer Remote Viewing of Proposition 8 Trial (Jan. 8, 2010), http://www.ca9.uscourts.gov/datastore/general/2010/01/08/Prop8_Remote_Viewing_Locations.pdf (as visited Jan. 13, 2010, and available in Clerk of Court's case file). Surely such firm control, exercised by an able district court judge with 20 years of trial-management experience, will be sufficient to address any possible harm, either to the witnesses or to the integrity of the trial.

Fourth, no fair balancing of the equities (including harm to the public interest) could support issuance of the stay. See *Times-Picayune Publishing Corp. v. Schulingkamp*, 419 U. S. 1301, 1305, 95 S. Ct. 1, 42 L. Ed. 2d 17 (1974) (Powell, J. in Chambers) (recognizing "significant public and private interests balanced on both

sides" when "present[ed with] a fundamental confrontation between the competing values of free press and fair trial"). As I have just explained, the applicants' equities consist of potential harm to witnesses--harm that is either nonexistent or that can [***40] be cured through protective measures by the District Court as the circumstances warrant. The competing equities consist of not only respondents' interest in obtaining the courthouse-to-courthouse transmission that they desire, but also the public's interest in observing trial proceedings to learn [**674] about this case and about how courts work. See *Nebraska Press Ass'n v. Stuart*, 427 U. S. 539, 587, 96 S. Ct. 2791, 49 L. Ed. 2d 683 (1976) (Brennan, J., concurring in judgment); see also Exh. 2, at 42, App. to Pet. (statement of Chief Judge Walker) ("[I]f the public could see how the judicial process works, they would take a somewhat different view of it." "I think the only time that you're going to draw sufficient interest in the legal process is when you have an issue such as the issues here, that people think about, talk about, debate about and consider"). With these considerations in the balance, the scales tip heavily against, not in favor, of issuing the stay.

The majority's action today is unusual. It grants a stay in order to consider a mandamus petition, with a view to intervening in a matter of local court administration that it would not (and should not) consider. It cites no precedent for doing so. It identifies [***41] no real harm, let alone "irreparable harm," to justify its issuance of this stay. And the public interest [*720] weighs in favor of providing access to the courts. To justify this extraordinary intervention, the majority insists that courts must "enforce the requirement of procedural regularity on others, and must follow those requirements themselves." *Ante*, at 1. And so I believe this Court should adhere to its institutional competence, its historical practice, and its governing precedent--all of which counsel strongly against the issuance of this stay.

I respectfully dissent.



LEXSEE 842 F 2D 1229

In Re: Grand Jury Proceeding**No. 87-8041****UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT****842 F.2d 1229; 1988 U.S. App. LEXIS 4052****March 31, 1988**

SUBSEQUENT HISTORY: [**1] As amended, March 31, 1988.

PRIOR HISTORY: Appeal from the United States District Court for the Northern District of Georgia.

CASE SUMMARY:

PROCEDURAL POSTURE: Appellant organizations sought review of an order from the United States District Court for the Northern District of Georgia, denying their motion to quash a subpoena to obtain financial records from their broker and brokerage firm. Appellants claimed that because they espoused political views, compliance with the subpoena violated their U.S. Const. amend. I rights. They also claimed the subpoena was the fruit of an illegal search and seizure.

OVERVIEW: A federal grand jury investigating possible criminal tax law violations issued a subpoena duces tecum to a broker and a brokerage firm, seeking production of the records of two related organizations. The government claimed the organizations' financial system allowed its members to evade requirements for reporting taxable income. The organizations brought a motion to quash, arguing that because they espoused certain political views, compliance with the subpoena violated their right of expressive association. They also argued that the subpoena should be quashed as the fruit of an illegal search and seizure of its offices. The motion was denied. The appellate court affirmed. Because

quashing would do little to deter future unlawful police conduct as related to grand jury proceedings, the grand jury was entitled to the evidence. Even if the organizations could demonstrate an infringement of their freedom of association, the government had a compelling governmental interest in investigating possible criminal tax law violations. Thus, such a governmental interest justified an investigation into the organizations' records.

OUTCOME: The appellate court affirmed the trial court's denial of appellant organizations' motion to quash a subpoena to obtain their records from a broker and brokerage firm. Although appellants may have had certain First Amendment rights due to their involvement as a political association, because the government demonstrated a compelling state interest in investigating possible tax law violations, the subpoena was upheld.

CORE TERMS: subpoena, grand jury, exclusionary rule, disclosure, expressive, contributors, per curiam, membership, reprisal, privacy, invoke, fruit, subpoena duces tecum, search and seizure, governmental interest, commercial activities, infringement, evidentiary, harassment, brokerage, suppression hearings, substantial relation, compelling interest, protected activity, summary affirmance, political activity, predominantly, commodities, reporting, poisonous

LexisNexis(R) Headnotes

***Constitutional Law > Bill of Rights > Fundamental Rights > Search & Seizure > Exclusionary Rule
Criminal Law & Procedure > Search & Seizure > Exclusionary Rule > Rule Application & Interpretation
Criminal Law & Procedure > Search & Seizure > Fruit of the Poisonous Tree > Grand Jury Exception***

[HN1] Because of the special nature of grand jury proceedings, the grand jury has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial. Great weight is given to the effective and expeditious discharge of the grand jury's duties, and suppression hearings required by the application of the exclusionary rule to grand jury proceedings would unduly impede and delay the grand jury's function. Issues raised in suppression hearings are usually reserved for trial on the merits, and that grand jury use of the fruits of an illegal search would not necessarily prevent a criminal defendant actually under indictment from obtaining the suppression of those fruits at trial.

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

Constitutional Law > Bill of Rights > Fundamental Rights > Procedural Due Process > Scope of Protection

[HN2] The freedom to engage in association for the advancement of beliefs and ideas is an inseparable aspect of the liberty assured by the due process clause of U.S. Const. amend. XIV. Inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of association, particularly where a group espouses dissident belief.

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

Constitutional Law > Equal Protection > Level of Review

[HN3] When the compelled disclosure of affiliation with groups engaged in advocacy would impair the exercise of freedom of association, such disclosure can be ordered only if the government demonstrates that the requested information has a substantial bearing on a compelling governmental interest.

***Civil Procedure > Appeals > General Overview
Governments > Courts > Judicial Precedents***

[HN4] A summary affirmance is a judgment on the

merits, preventing lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions. Most importantly, summary actions should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved.

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

[HN5] The court must consider the effect of a challenged state action on a plaintiff's freedom of expressive association.

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

Evidence > Inferences & Presumptions > General Overview

[HN6] A merely subjective fear of future reprisal is insufficient to establish a restraint on freedom of association. Parties must show a reasonable probability that the compelled disclosure will subject them to threats, harassment, or reprisals from either government officials or private parties.

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

Constitutional Law > Equal Protection > Level of Review

[HN7] The right to associate for expressive purposes is not absolute. There are governmental interests sufficiently important to outweigh the possibility of infringement. The government may take action that would infringe upon the freedom of association when it can demonstrate a substantial relation to a compelling interest.

Constitutional Law > Congressional Duties & Powers > Spending & Taxation

Tax Law > State & Local Taxes > Administration & Proceedings > Audits & Investigations

[HN8] No power is more basic to the ultimate purpose and function of government than is the power to tax.

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James E. Fagan, Jr., AUSA, Attorney for Appellee.

JUDGES: Fay and Kravitch, Circuit Judges, and Atkins,
* Senior District Judge.

* Honorable C. Clyde Atkins, Senior U. S.
District Judge for the Southern District of Florida,
sitting by designation.

OPINION BY: KRAVITCH

OPINION

[*1230] KRAVITCH, Circuit Judge:

William and Carolyn Bicket, the National Commodity and Barter Association (NCBA), and the National Commodity Exchange (NCE) appeal from the district court's denial of their motion to quash a grand jury subpoena duces tecum issued to Les Roberts of Roberts & Roberts Brokerage, Inc. Because we conclude that neither the first nor the fourth amendment required the district court to quash the subpoena, we affirm.

I.

NCBA is an association dedicated to limited government, privacy in personal and financial affairs, and the protection of private property. NCBA advocates home education of children, [**2] the abolition of the Internal Revenue Service, and a return to the gold standard. It disputes the constitutionality of the Federal Reserve System and many of the federal administrative agencies. NCBA publishes books and newsletters alerting its members to the dangers posed by environmental pollution, unsound currency, and the growth of the federal government.

NCBA also provides its members with various financial services. For example, members can participate in a plan under which NCBA pays legal expenses for IRS audits and criminal tax prosecutions. Most importantly for purposes of this appeal, NCBA operates, through its wing NCE, a service through which members can purchase precious metals and pay bills with a minimum of recordkeeping. Under this plan, appellant William Bicket, the Atlanta area representative of NCBA, receives checks from members to be deposited in an "account" created for them by NCBA. Bicket collects the checks and forwards them to NCBA with forms in the nature of deposit slips. NCBA then disburses funds according to its

members' instructions, without any indication that the disbursements are paid from any particular member's account.

Because its members have [**3] an aversion to paper currency, NCBA also arranges for their purchase of precious metals. Although NCBA usually writes checks for the commodities from the accounts that it operates for its members, in the transactions directly involved here, Bicket deviated from the customary plan. Bicket sent letters and checks bearing the members' names directly to Roberts & Roberts Brokerage, Inc., of Pensacola, Florida and instructed that brokerage firm to ship gold and silver directly to NCBA members. Roberts & Roberts thus holds records that identify the names and addresses of NCBA members.

The financial system operated by NCBA obviously provides significant opportunities for the evasion of federal tax laws, especially requirements for the reporting of taxable income. On September 15, 1986, a federal grand jury investigating possible criminal violations of the tax laws issued a subpoena duces tecum to Les Roberts, of Roberts & Roberts Brokerage, commanding the production of all records from January 1, 1983 to September 16, 1986 relating to NCBA, NCE, the Bickets, nine other individuals, and a trust. The Bickets, NCBA, and NCE moved in the district court to have the subpoena quashed, arguing [**4] that compliance would violate their first amendment right to freedom of expressive association. The movants also argued that the subpoena should be quashed as the fruit of an illegal search and seizure of NCBA's offices in Colorado. The district court denied the motion to quash, 650 F. Supp. 159, and this appeal followed.

II.

We consider first the appellants' fourth amendment argument. According to appellants, the district court should have quashed the subpoena because it was the [*1231] "fruit of the poisonous tree." In this case, the poisonous tree is a search and seizure at NCBA's Colorado offices that was held unconstitutional by the Tenth Circuit. *See Voss v. Bergsgaard*, 774 F.2d 402 (10th Cir. 1985). NCBA argues that the grand jury subpoena derives from information obtained in that search.

NCBA relies heavily on the venerable case of *Silverthorne Lumber Co. v. United States*, 251 U.S. 385,

64 L. Ed. 319, 40 S. Ct. 182 (1920). In *Silverthorne Lumber*, the Supreme Court held that the government could not obtain by subpoena documents which federal marshals had previously seized in violation of the fourth amendment and [**5] which the district court had ordered returned to the owners. The Court rejected the government's argument that the fourth amendment prevented the government only from retaining physical possession over the documents, and not from using the information obtained in that search to its advantage. See *id.* at 391.

The Supreme Court reexamined *Silverthorne Lumber* in *United States v. Calandra*, 414 U.S. 338, 94 S. Ct. 613, 38 L. Ed. 2d 561 (1974). Calandra sought to resist a grand jury subpoena requiring him to answer questions based on an allegedly unconstitutional search of his place of business. The Supreme Court rejected Calandra's argument that the exclusionary rule of the fourth amendment should be applied to grand jury proceedings. According to the Court, [HN1] because of the special nature of grand jury proceedings, the grand jury "has traditionally been allowed to pursue its investigative and accusatorial functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial." *Id.* at 349. The Court assigned great weight to the "effective and expeditious discharge of the grand jury's duties," *id.* at 350, [**6] and concluded that the suppression hearings required by the application of the exclusionary rule to grand jury proceedings would unduly impede and delay the grand jury's function. *Id.* at 349-50. The Court further noted that the issues raised in suppression hearings had been usually "reserved for trial on the merits," *id.* at 349, and that grand jury use of the fruits of an illegal search would not necessarily prevent a criminal defendant actually under indictment from obtaining the suppression of those fruits at trial. *Id.* at 351.

The *Calandra* Court considered the application of *Silverthorne Lumber* in a lengthy footnote. *Id.* at 352 n.8. The Court first noted that *Silverthorne Lumber* involved defendants who had already been indicted by the grand jury and thus could invoke the exclusionary rule based on their status as criminal defendants. Apparently, the government in *Silverthorne Lumber* sought to subpoena the documents not to present to the grand jury for use in its accusatorial function, but for use at trial. *Id.* Second, at the time the government issued its subpoena to the *Silverthorne Lumber* [**7] Company, the district court already had determined that the search and seizure were

illegal. *Id.* Delay of grand jury proceedings by a lengthy suppression hearing thus was unlikely in *Silverthorne Lumber*, whereas in *Calandra* the constitutionality of the search and seizure had not been adjudicated before the issuance of the subpoena.

In this case, unlike *Calandra*, a court already has determined that the "tree" was "poisonous." See *Voss v. Bergsgaard*, 774 F.2d 402 (10th Cir. 1985). Even assuming, without deciding, that this determination by the Tenth Circuit is binding on the parties under the principle of issue preclusion,¹ rendering unnecessary further litigation on the constitutionality of the Colorado search, the logic of *Calandra* still precludes application of the exclusionary rule. The legality of a search is not the only issue that must be considered at a suppression hearing. The district court still would have to hear and weigh evidence on whether [**1232] the information underlying the subpoena was actually the fruit of the illegal search, and whether the government had obtained or would have obtained that information from an independent [**8] source. See *Nix v. Williams*, 467 U.S. 431, 104 S. Ct. 2501, 81 L. Ed. 2d 377 (1984); *Silverthorne Lumber*, 251 U.S. at 392.

1 See generally *United States v. Stauffer Chemical Co.*, 464 U.S. 165, 104 S. Ct. 575, 78 L. Ed. 2d 388 (1984); Note, *Intercircuit Conflicts and the Enforcement of Extracircuit Judgments*, 95 Yale L.J. 1500 (1986).

Moreover, delay is not the only factor counseling against application of the exclusionary rule to grand jury proceedings. In *Calandra*, the Supreme Court made clear that "the [exclusionary] rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment." 414 U.S. at 347. The application of the exclusionary rule to grand jury proceedings advances that goal only minimally, at best. Because defendants may invoke the exclusionary rule at trial, any extension of the exclusionary rule would deter "only police investigation consciously [**9] directed toward the discovery of evidence solely for use in a grand jury investigation." *Id.* at 351. Such minimal benefit is clearly outweighed by the cost of depriving the grand jury of relevant evidence. We therefore see no reason to deviate from the principles established in *Calandra*.

Because we conclude that the district court could not invoke the exclusionary rule to quash the subpoena on fourth amendment grounds, we need not consider the

district court's conclusion that the government would have obtained the information underlying the subpoena from independent sources.

III.

Appellants argue that enforcement of the subpoena issued to Roberts would violate their freedom of expressive association. Although we ultimately conclude that the first amendment does not bar enforcement of the subpoena, we must address what the first amendment requires the government to demonstrate in cases such as this one.

A.

In *NAACP v. Alabama ex rel. Patterson*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958), a unanimous Supreme Court first gave full expression to the right now recognized as freedom of "expressive association."² Alabama had brought [**10] suit against the NAACP, seeking its expulsion from the state for failure to comply with a statute requiring the registration of all foreign corporations transacting intrastate business. Alabama moved for production of documents that would disclose the names and addresses of all Alabama members and agents of the NAACP, arguing that it needed the information to prepare for an evidentiary hearing. The NAACP refused to comply with the production order and was adjudged in civil contempt by a state court.

² See *Board of Directors v. Rotary Club*, 481 U.S. 537, 107 S. Ct. 1940, 95 L. Ed. 2d 474 (1987). A plurality of the Court had advanced the concept of freedom of association in *Sweezy v. New Hampshire*, 354 U.S. 234, 77 S. Ct. 1203, 1 L. Ed. 2d 1311 (1957); see also *De Jonge v. Oregon*, 299 U.S. 353, 364, 57 S. Ct. 255, 81 L. Ed. 278 (1937).

The United States Supreme Court reversed. The Court first concluded that "[HN2] freedom to engage in association for the [**11] advancement of beliefs and ideas is an inseparable aspect of the 'liberty' assured by the Due Process Clause of the Fourteenth Amendment." *Id.* at 460. The Court stated further that the NAACP members' freedom of association necessarily entailed the right to privacy in their association, for "inviolability of privacy in group association may in many circumstances be indispensable to preservation of freedom of

association, particularly where a group espouses dissident beliefs." *Id.* at 462. It was irrelevant that Alabama had not sought to restrict free association directly, because "abridgment of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *Id.* at 461.

NAACP v. Alabama suggested that [HN3] when the compelled disclosure of affiliation with groups engaged in advocacy would [*1233] impair the exercise of freedom of association, such disclosure could be ordered only if the government demonstrated that the requested information had a "substantial bearing" on a compelling governmental interest. *Id.* at 464.³ Further cases refined this test. In *Shelton v. Tucker*, 364 U.S. 479, 81 S. Ct. 247, 5 L. Ed. 2d 231 (1960), [**12] a challenge to a state statute requiring public school teachers to reveal all organizations to which they had belonged within the past five years, the Supreme Court reexamined *NAACP v. Alabama* and concluded that in the *NAACP* case "there was no *substantially relevant* correlation between the governmental interest asserted and the State's effort to compel disclosure of the membership lists involved." 364 U.S. at 485 (emphasis added). Finally, in *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. 539, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963), the Court stated the test as follows:

Regardless of the label applied, be it "nexus," "foundation," or whatever . . . it is an essential prerequisite to the validity of an investigation which intrudes into the area of constitutionally protected rights of speech, press, association and petition that the State convincingly show a substantial relation between the information sought and a subject of overriding and compelling state interest.

Gibson, 372 U.S. at 546.

³ In *NAACP v. Alabama*, the Supreme Court concluded that the NAACP's membership lists did not have a substantial bearing on Alabama's asserted interest of registering foreign corporations transacting intrastate business. The Supreme Court could discern no nexus between the state interest and the list of NAACP's

members, as opposed to the names of its chief officers, or information about its business address.

[**13] The government argues, however, that appellants may not invoke the protection of *NAACP v. Alabama* and its progeny because the records that would reveal NCBA's membership are held by Roberts, not NCBA or its members. In so arguing, the government urges us to adopt the reasoning advanced by Judge Wilkey in *Reporters Committee for Freedom of the Press v. American Telephone & Telegraph Co.*, 593 F.2d 1030, 1053-60 (D.C. Cir. 1978), *cert. denied*, 440 U.S. 949, 99 S. Ct. 1431, 59 L. Ed. 2d 639 (1979), that the first amendment affords no "extra margin of privacy" by imposing substantive or procedural restrictions on good faith criminal investigations beyond the limits imposed by the fourth and fifth amendments. *See id.* at 1054.

That portion of Judge Wilkey's opinion was not joined by any other judge of the D.C. Circuit, and to our knowledge the holding that it proposed has never been adopted by the Supreme Court or any of the federal courts of appeals. *See, e.g., In re Grand Jury Subpoena to First National Bank*, 701 F.2d 115, 116-17 (10th Cir. 1983) (specifically rejecting position advanced here by government); [**14] *Local 1814, International Longshoreman's Association v. Waterfront Commission*, 667 F.2d 267, 271 (2d Cir. 1981) (same); *see also United States v. Trader's State Bank*, 695 F.2d 1132 (9th Cir. 1983) (per curiam); *United States v. Citizens State Bank*, 612 F.2d 1091 (8th Cir. 1980). The proposal is also in considerable tension with *Pollard v. Roberts*, 283 F. Supp. 248 (E.D. Ark.), *aff'd mem.*, 393 U.S. 14, 89 S. Ct. 47, 21 L. Ed. 2d 14 (1968). In *Pollard*, a three-judge district court, including then-Circuit Judge Blackmun, concluded that the enforcement of a subpoena duces tecum directed to the First National Bank of Little Rock, requiring the production of records that would identify contributors to the Arkansas Republican Party, would violate the contributors' and the Party's freedom of association. The *Pollard* court found no showing that the identities of the contributors was relevant to the state's unquestionably legitimate interest in preventing vote buying. *Id.* at 257.

The Supreme Court summarily affirmed the judgment of the three-judge district court. *Roberts v. Pollard*, 393 U.S. 14, 89 S. Ct. 47, 21 L. Ed. 2d 14 (1968) [**15] (per curiam). Whatever may be the difficulties in interpreting the precise import of a

summary affirmance by the Supreme Court, *cf. Hardwick v. Bowers*, 760 F.2d 1202 (11th [**1234] Cir. 1985), *rev'd*, 478 U.S. 186, 106 S. Ct. 2841, 92 L. Ed. 2d 140 (1986), without doubt [HN4] a summary affirmance is a judgment on the merits, preventing "lower courts from coming to opposite conclusions on the precise issues presented and necessarily decided by those actions." *Mandel v. Bradley*, 432 U.S. 173, 176, 97 S. Ct. 2238, 53 L. Ed. 2d 199 (1977) (per curiam). Most importantly, "summary actions . . . should not be understood as breaking new ground but as applying principles established by prior decisions to the particular facts involved." *Id.* (emphasis added). The summary affirmance of *Pollard v. Roberts* applied the principles of *NAACP v. Alabama* to the facts of the case, including the fact that the relevant records were held by the bank, not the party or its contributors. We must conclude, therefore, that appellants can invoke the protection of the first amendment freedom of association to challenge the subpoena [**16] directed to Roberts.

The Supreme Court would hardly have affirmed *Pollard* if the first amendment offers no greater protection of privacy than the fourth and fifth amendments. By the time of the *Pollard* decision, the law -- at least arguably -- already was established that an individual has no claim under the fourth amendment to resist the production of business records held by a third party. *See United States v. Miller*, 425 U.S. 435, 444, 96 S. Ct. 1619, 48 L. Ed. 2d 71 (1976) ("general rule" is that issuance of subpoena to third party to obtain the records of that party does not violate the rights of a defendant, even if criminal prosecution is contemplated when subpoena is issued; these principles were settled before passage of Bank Secrecy Act of 1970).

B.

Having determined the law that governs this area, we turn to its application to this appeal. Initially we must consider whether the appellants are engaged in the type of "expressive association" entitled to the protection of the first amendment. The government argues that NCBA engages in no protected activity at all but merely provides its members with banking services designed to leave no record [**17] of the financial transactions. Appellants contend that NCBA engages in political activity of the sort implicating the core principles of the first amendment. Indeed, the record reflects that NCBA publishes literature and sponsors seminars designed to

alert the public to the dangers of the purportedly unconstitutional income tax and Federal Reserve System.

4

4 The Tenth Circuit has concluded that NCBA engages in protected activity. *In re Grand Jury Subpoena to First National Bank*, 701 F.2d 115 (10th Cir. 1983).

At the very least, NCBA exists both to promote its members' political opinions and to provide the members with financial services not warranting the protection of the first amendment. The case law provides little specific guidance as to the level of protection afforded such organizations with dual or multiple purposes. The cases have usually involved either those organizations whose very heart and soul are protected political activity, *see, e.g., Tashjian v. Republican Party*, 479 U.S. 208, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986); [****18**] *In re Primus*, 436 U.S. 412, 98 S. Ct. 1893, 56 L. Ed. 2d 417 (1978), or, at the other end of the spectrum, organizations and individuals whose "association" furthers little, if any, expressive activity. *See e.g., IDK, Inc. v. County of Clark*, 836 F.2d 1185 (9th Cir. 1988) (escort services); *Rivers v. Campbell*, 791 F.2d 837 (11th Cir. 1986) (per curiam) (vendor of sno-cones to schoolchildren). Yet many organizations promote both political activity and the economic well-being of its members. Labor unions frequently serve both functions. *See, e.g., Abood v. Detroit Board of Education*, 431 U.S. 209, 222, 235-36, 97 S. Ct. 1782, 1792, 1799-1800, 52 L. Ed. 2d 261 (1977). So do law firms, *see Hishon v. King & Spalding*, 467 U.S. 69, 78, 104 S. Ct. 2229, 2235, 81 L. Ed. 2d 59 (1984); *NAACP v. Button*, 371 U.S. 415, 429-30, 83 S. Ct. 328, 336, 9 L. Ed. 2d 405 (1963); clubs, *see Roberts v. United States Jaycees*, 468 U.S. 609, 612-14, 104 S. Ct. 3244, 3246-48, 82 L. Ed. 2d 462 (1984); *New York State Club Association v. City of New York*, 69 N.Y.2d 211, 513 N.Y.S.2d [*1235] 349, 505 N.E.2d 915, [****19**] *prob. juris. noted*, 484 U.S. 812, 108 S. Ct. 62, 98 L. Ed. 2d 26 (1987); and churches. Governmental regulation of the unprotected activities of these groups may well impinge on the protected activities. Revealing the names of the persons who participated in NCBA's commercial activities, for example, could also reveal the names of adherents to NCBA's ideology.

A review of the Supreme Court's opinion in *Roberts v. United States Jaycees* convinces us that the approach actually taken by the Court in that case was one that can

be applied to every organization: [HN5] The Court simply considered the effect of the challenged state action on the Jaycees' freedom of expressive association. *See United States Jaycees*, 468 U.S. at 618; *see also Board of Directors v. Rotary Club*, 481 U.S. 537, 107 S. Ct. 1940, 1945, 95 L. Ed. 2d 474 (1987) (following "the same course" as in *United States Jaycees*). The Supreme Court recognized that the Jaycees promoted both protected and unprotected activities. The Court noted that the Jaycees "have taken public positions on a number of diverse issues," and that members "regularly engage in a variety of civic, [****20**] charitable, lobbying, fundraising and other activities worthy of constitutional protection under the First Amendment." 468 U.S. at 626-27. On the other hand, the Jaycees undeniably engaged in commercial activity, such as developing "program kits" to enhance members' management skills. *Id.* at 614. This significant amount of commercial activity did not alter the standard of review applicable to the Jaycees' challenge, although it did make the application of the challenged state law less likely to be disruptive of any political message that the Jaycees might have promoted.⁵

5 In her concurring opinion in *Roberts v. United States Jaycees*, Justice O'Connor suggested that "an association should be characterized as commercial, and therefore subject to rationally related state regulation of its membership and other associational activities, when, and only when, the association's activities are not *predominantly* of the type protected by the First Amendment. It is only when the association is predominantly engaged in protected expression that state regulation of its membership will necessarily affect, change, dilute, or silence one collective voice that would otherwise be heard." *United States Jaycees*, 468 U.S. at 635-36 (emphasis added). Justice O'Connor's approach would require us to decide as a threshold matter whether NCBA was "predominantly" engaged in commercial activities. This concurring opinion was not joined by any other member of the Court, however, and the approach has been rejected by one other court of appeals. *See Trade Waste Management Association, Inc. v. Hughey*, 780 F.2d 221, 238 (3d Cir. 1985).

[****21**] C.

In applying the test implicit in *United States Jaycees*

to NCBA, we encounter one further difficulty: It is unclear from the case law precisely what factual showing, if any, NCBA must make to establish that its freedom of association would be impinged by enforcement of the subpoena. In *Buckley v. Valeo*, 424 U.S. 1, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976) (per curiam), the Supreme Court rejected the appellants' argument that the disclosure requirements of the Federal Election Campaign Act was unconstitutional as applied to minor parties. The *Buckley* Court noted that in *NAACP v. Alabama*, the petitioners had made a showing that previous disclosure of the identity of its members had exposed those members to actual and threatened reprisal. *Buckley*, 424 U.S. at 69. In *Buckley*, however, the Supreme Court found that kind of showing to be absent. "No appellant in this case has tendered record evidence of the sort proffered in *NAACP v. Alabama*. Instead, appellants primarily rely on 'the clearly articulated fears of individuals, well experienced in the political process.' . . . At best they offer the testimony of several minor-party [**22] officials that one or two persons refused to make contributions because of the possibility of disclosure." *Buckley*, 424 U.S. at 71-72 (quoting appellants' brief). This passage suggests that [HN6] a merely subjective fear of future reprisal is insufficient to establish a restraint on freedom of association. The Supreme Court recognized the difficulties of formally proving the evils of chill and [*1236] harassment, however, and accordingly required only that minor parties show "a reasonable probability that the compelled disclosure . . . will subject them to threats, harassment, or reprisals from either Government officials or private parties." *Id.* at 74; cf. *Brown v. Socialist Workers '74 Campaign Committee*, 459 U.S. 87, 103 S. Ct. 416, 74 L. Ed. 2d 250 (1982) (concluding that Socialist Workers Party had made this showing).

Another passage of *Buckley*, however, suggests that the "reasonable probability" test is not applicable to appellants. In footnote 83, the Supreme Court stated, "Nor is this a case comparable to *Pollard v. Roberts* . . ., in which an Arkansas prosecuting attorney sought to obtain, by a subpoena *duces tecum* [**23], the records of a checking account (including the names of individual contributors) established by a specific party, the Republican Party of Arkansas." *Buckley*, 424 U.S. at 69 n.83. Indeed, in *Pollard*, the three-judge district court admitted 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," 283 F. Supp. at 258, but added, "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.* ⁶ *Buckley* and *Pollard* thus suggest that when a government investigation into possible violations of law has already focused on a particular political group or groups, ⁷ the showing required to establish an infringement of freedom of association is more lenient than the *Buckley* standard. This more lenient requirement could be justified on the rationale that the government investigation itself may indicate the possibility of harassment.

6 Similarly, in *In re Grand Jury Subpoena to First National Bank*, 701 F.2d 115 (10th Cir. 1983), the Tenth Circuit held that NCBA had made a sufficient showing of a possible first amendment violation largely because of the "readily apparent" chilling effect of a grand jury subpoena. *Id.* at 118. The Tenth Circuit's opinion does not reveal whether NCBA had made a showing of past or present harassment. The opinion states that "petitioner's affidavits have made a sufficient showing of a potential First Amendment violation to warrant an evidentiary hearing," *id.*, without indicating what those affidavits contained.

[**24]

7 In *Pollard*, the prosecuting attorney sought the checking account records for an investigation into suspected "vote buying" on behalf of Republican candidates in violation of Arkansas election laws. 283 F. Supp. at 252.

In the instant case, we need not decide the precise evidentiary standard applicable to NCBA's motion to quash. Even assuming *arguendo* that NCBA can demonstrate an infringement of its freedom of association, the government nonetheless has established a justification for this infringement. "[HN7] The right to associate for expressive purposes is not . . . absolute." *Roberts v. United States Jaycees*, 468 U.S. at 623. "There are governmental interests sufficiently important to outweigh the possibility of infringement. . . ." *Buckley v. Valeo*, 424 U.S. at 66. As explained above, the government may take action that would infringe upon the freedom of association when it can demonstrate a "substantial relation" to a compelling interest. See *Buckley v. Valeo*, 424 U.S. at 64; *Gibson v. Florida Legislative Investigation Committee*, 372 U.S. at 546.

[**25]

There is no doubt that this case implicates a compelling governmental interest. The government is investigating possible criminal violations of the tax laws and suggests that individuals may be using the structure of NCBA's financial system to evade requirements for reporting taxable income. A good-faith criminal investigation into possible evasion of reporting requirements through the use of a private banking system that keeps no records is a compelling interest. [HN8] "No power is more basic to the ultimate purpose and function

of government than is the power to tax." *Bates v. City of Little Rock*, 361 U.S. 516, 524 (1960).

We consider, finally, whether the government has established a "substantial relation" [*1237] between the information sought and the compelling interest. We have examined the records under seal forwarded to us from the district court, and we conclude that the government has made this showing.

Accordingly, the order of the district court denying appellants' motion to quash is AFFIRMED.