

Staff Counsel  
Noel H. Johnson  
Kaylan L. Phillips  
Joseph A. Vanderhulst

Of Counsel  
Eric C. Bohnet  
Cleta Mitchell

CONFIDENTIAL

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(via FedEx and e-mail: [Jonathan.Wayne@maine.gov](mailto:Jonathan.Wayne@maine.gov))

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

**Re: Response by National Organization for Marriage, Inc., to Staff Report and Recommendations**

Members of the Commission,

The National Organization for Marriage, Inc. (“NOM”), by counsel, hereby submits its response to the Investigation Report Concerning the National Organization for Marriage, and Recommendations by Commission Staff dated April 9, 2014.

#### Summary

NOM respectfully disagrees with the conclusions and recommendations of the staff report. NOM has not violated Maine law and none of its actions in 2009 or later required it to register and report as a ballot measure committee under 21-A M.R.S.A. § 1056-B. NOM made no “expenditures” under Maine law and the staff report provides no evidence that it did. NOM did not receive “contributions” as defined under Maine law in excess of \$5,000 for purposes of initiating or promoting the 2009 people’s veto referendum.

The twelve fundraising emails presented by the staff report did not result in over \$5,000 in contributions under Maine law. First, one of the emails does not even mention, directly or indirectly, a ballot question in Maine. It does nothing more than make reference to the State of Maine. Second, several of the emails explicitly stated that if a reader wished to give funds for the purpose of initiating, promoting, or influencing a Maine ballot question, they should give through a designated link directly to a Maine political committee and not to NOM. It follows that a donor could have no reason to believe that a donation to NOM would be used in Maine. Third, NOM’s donation form featured an explicit disclaimer that NOM would accept no contributions designated for any specific activity. Fourth, each and every email mentions several other states

and national activities. Therefore, the donations brought in must, at the very least, be pro-rated accordingly.

The five major donations presented by the staff report were not “contributions” under 21A § 1056-B(2-A)(B) or (C). First, NOM’s major donor fundraisers explicitly told donors that their donations could not and would not be designated to any specific activity. This explicit statement should obviate any extraneous circumstances put forward by the staff report to create a “context” resulting in a contribution under Subsection C. Second, sworn statements by NOM’s fundraisers confirm that the major donor solicitations did not contain language that would have, *objectively*, led a donor to believe that the donation would be used for the specific purpose of influencing a Maine ballot question. Therefore, they are not contributions under Subsection B. Third, the staff report impermissibly relies upon assumptions about the donor’s knowledge and belief in drawing its conclusion. But this information is irrelevant to the inquiry and this approach was expressly renounced by the Commission in its arguments before the federal courts when asserting the constitutionality of the ballot question committee definition. Finally, the evidence presented in support of some of the donations being considered “contributions” is simply inadequate as it does not mention any solicitation whatsoever and it cannot be reasonably determined that the contributor provided the funds for the purpose of influencing a Maine ballot question.

Finally, NOM made no “expenditures” under Maine law. The staff report itself acknowledges this. Nevertheless, the staff report points to a drafted robocall script that NOM *did not do* as evidence of NOM’s intention to be involved in the Maine referendum. But NOM did not do the robocalls because legal compliance it received indicated that engaging in that activity would trigger political committee status in Maine. So, if anything, this evidence shows that NOM specifically did not intend to (and did not in fact) become involved in the Maine referendum in a way that triggered reporting or registration as a political committee or ballot question committee in Maine. And Maine law expressly provides that an organization can give to a Maine political committee from its general treasury funds and that this does not trigger registration or reporting in Maine. If this is not true under Maine law, then many organizations who gave to Maine political committees in 2009 (not to mention in 2012) should be subject to the same investigations and penalties.

Consequently, the Commission should not follow the recommendation of the staff report to find NOM in violation of Maine law.

**A. NOM Did Not Receive \$5,000 in “Contributions” Under 21-A M.R.S. §§ 1056-B(2-A)(B) and/or (C) in Response to Email Solicitations in May through September 2009.**

NOM did not receive \$5,000 or more for the purpose of influencing an election in Maine from the twelve email solicitations listed in the staff report. Maine Statute 21-A § 1056-B(2-A)(B) states that, for purposes of triggering ballot measure committee registration, the term “contribution” includes “[f]unds 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.” Alternatively, under Section 1056-B(2-A)(C), a donation is a contribution if it “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.”

Subsection B was upheld by the U.S. Court of Appeals for the First Circuit, with the caveat that it must be applied as an objective test based on the actual language of a solicitation. *Nat’l Org. for Marriage v. McKee*, 669 F.3d 34, 47 (1st Cir. 2012). A donor’s subjective knowledge or belief is not relevant to a determination of whether a donation is a “contribution.” In fact, the Commission expressly represented to the Supreme Court that evidence concerning a donor’s subjective knowledge or belief is not permitted in the inquiry. Brief in Opposition at 31 n.7, *Nat’l Org. for Marriage v. McKee*, No 11-1426 (U.S. Aug. 17, 2012).

Subsection C was also upheld by the First Circuit. That court found that the subsection targets donations that the recipient would reasonably understand to be for the purpose of influencing or influencing a campaign. *McKee*, 669 F.3d at 48. But the court also clarified that the statute does not permit inquiry into what the parties in fact understood, which allowed it to “avoid the pitfalls of subjective standards.” *Id.* The assessment of whether a donation is a contribution under Subsection C must be based primarily on the recipient’s own conduct and communications and not on the donor’s situation, knowledge or belief. *Id.*

### **1. Commission Staff Improperly Included At Least One Email that Does Not Even Mention a Ballot Question in Maine.**

Applying these two subsections as upheld by the First Circuit, at least one email must be excluded from consideration altogether. The May 15, 2009 email (Doc. ##886-88) does not mention a ballot question in Maine at all. It uses the word “Maine” three times in just two lines of a three page email and never in the context of a ballot question in the state. The staff report claims that donations in response to this email would qualify under Subsection C. But, without even mentioning the initiating, promotion, or influencing of a ballot question, any donations in response could not reasonably be understood to be for such a purpose. Indeed, many groups ran ads in Maine in 2009 that did not mention the ballot question, but simply discussed the issue of marriage. For example, HRC reportedly spent roughly \$1/2 million from its 501(c)(3) in issue ads during the campaign advocating for same-sex marriage, but did not report these as expenditures for the ballot campaign and did not register as a political action or ballot question committee. To our knowledge, the Commission and its staff have not investigated HRC for these ads. For good reason, in our view. They were not “expenditures” under Maine law, and neither would such generic support for marriage in Maine as this email suggests be “expenditures” under Maine law. Therefore, a fundraising email that does not mention, directly or indirectly, a Maine ballot question cannot possibly yield “contributions” under Maine law. From this email alone, the total raised from NOM’s emails is down to \$4,909.

**2. NOM's Emails Contain an Explicit Disclaimer that No Donations Can Be Designated for any Particular Purpose So that No Donations Were "Specifically" for a Maine Ballot Question.**

Standard canons of statutory construction require that each word in a statute be given meaning. Therefore, it cannot be the case that contributions received in response to a solicitation that includes discussion of several other States and several other topics in addition to a reference to a Maine ballot question could be considered "specifically" for the purpose of influencing the Maine ballot question instead of the other activities. This is particularly the case where, as here, the email solicitation included a specific disclaimer on the donation page noting that none of the donations would be designated for any particular purpose. (Exhibit E – Donation page from 2009). Indeed, several other groups, on the *other* side of the marriage ballot question fight in Maine, made email solicitations mentioning the Maine campaign, made donations to the Maine campaign effort, and did not register as ballot question committees in Maine, yet to NOM's knowledge, the "rule" that the staff is seeking to apply to NOM has not been applied to any of them, or even led to an investigation.

At the very least, any contributions received in response to a solicitation must be pro-rated so that the amount to be characterized by the Commission as used "specifically" for Maine matches the proportion of the email addressing a Maine ballot question.

Recently, the District of Columbia Circuit Court of Appeals struck down a statutory definition of "contribution" similar to Subsections B and C for this very reason. Before the Court was a federal regulation that stated that *all* funds received in response to a solicitation must be considered federal "contributions" if the communication indicates that *any* portion of the funds will be used to support or oppose the election of a federal candidate (while including a solicitation for state candidates). *EMILY's List v. FEC*, 581 F.3d 1, 18 (D.C. Cir. 2009). The court found that such a forced designation violated the First Amendment and went beyond the FEC's statutory authority. *Id.* In the same way, when a solicitation mentions multiple activities in multiple states, Maine law cannot force speech on the part of NOM and its donors by converting *every* donation to NOM's general treasury into a contribution for a campaign in Maine, merely because of a statutory label. *See EMILY's List*, 581 F.3d at 26.

Therefore, even if these contributions can be attributed to Maine at all, they must be pro-rated to reflect the percentage of the solicitation devoted to a discussion of the Maine campaign. In the May 6, 2009 email (Doc. ##877-78), Maine is one of three states mentioned in the solicitation. The Staff impermissibly converted every donation received in response as a contribution "specifically" for Maine. But, at *most*, the amount "specifically" for Maine should be at most one-third of the total donations received, or \$823. In the May 8, 2009 email (Doc. ##879-81), Maine is one of three projects mentioned (New Hampshire and a Ruth Institute student conference being the others), taking up one of seven paragraphs. There, the amount "specifically" for Maine should be limited to one-third of the total, or \$351.67 at most. In the July 10, 2009 email (Doc. ##967-68), Maine is one of several national and state issues discussed

and took up four of 27 paragraphs. Therefore, the amount “specifically” for Maine should be one-fifth of the total, or \$70 at most (five distinct issues discussed).

Applying this same logic throughout, there is one email where the total amount received may be counted, i.e. in the July 31, 2009 email (Doc. ##992-1004), Maine was the only active project referenced. So, ignoring the explicit disclaimer against designated contributions, the full amount of the donations received, \$255, would be “contributions.”<sup>1</sup> It also encompasses emails, such as the August 28, 2009 email (Doc. ##1041-47), where the Maine ballot question is barely mentioned: just in two sentences of a three page email. There, the amount “specifically” for Maine should be limited to one-third of the total, or \$132 at most.

In the May 22, 2009 email (Doc. ##893-97), the Maine ballot measure was one of four states/issues discussed, consisting of one short paragraph among twenty-four paragraphs in a two-page email. Therefore, no more than \$72 could be reasonably attributed to Maine on a pro-rata basis. In the July 17, 2009 email (Doc. ##967-73), Maine was one of three issues discussed, in three paragraphs out of twenty-eight. There was also a specific ask for a completely separate project other than Maine. Therefore, no more than \$13 could reasonably be pro-rated for Maine. Finally, in the August 7, 2009 email (Doc. ##1010-14), the Maine question is one of at least three topics covered. Therefore, no more than \$20 can reasonably be pro-rated for Maine.

Several emails raised \$0 or the amount raised is unknown. In the September 4, 2009 email (Doc. ##116-68), the Maine ballot question was one of at least three issues discussed (the others being Iowa, Vermont, and the legal costs of defending complaints and legal compliance). The amount raised in response to the email was not recorded. The results of the June 12, 2009 and July 8, 2009 emails were either \$0 or unrecorded. The emails raising \$0 should not be included in the analysis at all. In fact, if they show anything, they reveal that NOM was quite clear in the language and context of their communications that donations for helping in Maine should go to SFMM and not to NOM.

Under both the express language of the statute and the First Amendment, the emails addressed by the Staff Report total \$1,736.67 in “contributions” received under Maine law, significantly short of statutory minimum for registration and reporting.

### **3. The Emails from September 4, 2009, Onward Solicit Funds for Stand for Marriage Maine and Explicitly Not for NOM.**

Regarding the emails after September 11, 2009, Subsection B does not apply because it covers donations received in response to an explicit request from the solicitor. None of these emails contain a solicitation of donations to NOM at all. In fact, each solicitation instructs readers *not to give* to NOM, but to give to Stand for Marriage Maine (“SFMM”) instead. There is nothing to

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<sup>1</sup> It is significant that, consistently, when multiple projects in multiple states are mentioned, the amount of money raised from an email is significantly greater than an email only talking about the Maine ballot question. This fact shows that a large proportion of a response is routinely inspired by projects other than Maine.

lead a donor to believe that any funds sent to NOM instead of to Stand for Marriage Maine would be used in Maine at all, much less “specifically,” for the purpose of initiating, promoting, or defeating a Maine ballot question. As a result, none of the donations received in response to these emails could be considered “contributions” under Subsection B. Indeed, it is most likely that the reason nothing was received *by NOM* in response to these emails is because the emails explicitly told readers not to give to NOM. Therefore, the staff report is incorrect in concluding that these emails could be regulated under Subsection B and implying that donations were improperly received.

Neither does Subsection C, which applies in the absence of an explicit solicitation, apply to these emails. The inquiry under Subsection C must be based on the recipient’s own conduct and communications, with minimal reference to information extraneous to the communication itself. *Wis. Right to Life v. FEC*, 551 U.S. at 474, 468. The explicit language in the communications themselves provides a clear context for the donations: if someone wants to give to help the ballot question in Maine, they should give to SFMM, not to NOM; if they want to give to help elsewhere in the country, they should give to NOM. Because of this explicit language, NOM would have no reason to believe that donations it received itself in response to the emails were for the purpose of influencing the ballot question in Maine.

The emails contained language such as, “do not today give money to me . . . or NOM. Give it to StandforMarriageMaine.com;” “To help in Maine, you need to give directly to Stand For Marriage Maine.com;” “If you have \$5 to spare this week for marriage, do not give it to us. Give it to StandforMarriageMaine.com;” “Yes on 1/Stand for Marriage Maine needs your support;” “Don’t give money to NOM today – Give it to Maine.” This language provides an unmistakable context that precludes a reasonable determination that any donation received by NOM (and the Staff presents no evidence that NOM received any donations in response to these emails) would be for the purpose of influencing a Maine ballot question.<sup>2</sup>

**B. The Donations Received by NOM from Major Donors in 2009 Were Not “Contributions” Under 21-A M.R.S. §§ 1056-B(2-A)(B) and/or (C).**

It is not uncommon for non-profit advocacy groups to receive the majority of their donations from major donors. The fact that NOM raised the majority of its funds in 2009 from large donors has no legal relevance here.

The staff report presents insufficient evidence to show that any of the major donations received by NOM in 2009 were “contributions” under Maine law. 21A § 1056-B.2.A.B-C. As with the email solicitations, when soliciting major donors NOM urged contributors to give directly to Stand for Marriage Maine as well, making clear that any donation to NOM itself could not be

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<sup>2</sup> The fact that each of these emails (for which data is available) resulted in no donations to NOM further reinforces the point that the plain language and the context of the communications unmistakably did not result in “contributions” to NOM and showed that NOM did not intend to solicit contributions as defined under Maine law and did not do so in fact.

designated to any specific purpose and that NOM was not reserving it for any specific purpose. Furthermore, NOM in fact *returned* a large donation because it was designated for use in Maine. Exhibit B.

NOM presents here to the Commission affidavits from a major donor and a fundraiser mentioned in the staff report. (Exhibits G & H). According to these affidavits, the donor states that he did not give in response to a solicitation from NOM that would have lead him to believe that his donation would be used specifically to influence a Maine ballot question. Together with the return of donations marked for Maine, this evidence refutes the argument presented by the report that the donations were contributions in context.

The staff's conclusions regarding NOM's major donors and email solicitations would result in many organizations being considered ballot question committees in Maine based on the "context" of their known contributions and support of Maine political committees, as well as their support of a particular position on social issues. Cumulatively, the organizations on the other side of NOM in the 2009 Maine marriage fight contributed \$1.88 million to their side's campaign committees, roughly the same amount that NOM contributed to the campaign committee on its side of the fight (and an additional \$1/2 million or more than NOM contributed if HRC's "soft" ads paid from its 501(c)(3) fund are included). The Human Rights Campaign ("HRC"), for example, was a major contributor to the political committees supporting same-sex marriage in Maine in both 2009 and 2012. On its website and in its email communications, HRC specifically mentioned and urged opposition to (or support of depending on the question) the ballot questions in Maine. (Exhibit D, HRC emails May-November 2009). HRC then provided nearly \$300,000 to political committees opposing the ballot question in 2009 from general treasury funds and nearly \$900,000 to the political committees supporting the ballot question on the same issue in the 2012 cycle, again from their general treasury funds. (Exhibit F, Export of HRC contributions to Maine political committees 2009-2012). HRC's 501(c)(3) also funneled \$400,000 to its (c)(4), which in turn funneled nearly \$400,000 to HRC's PAC, from which it appears that \$75,000 was given to HRC's Maine PAC and another \$75,000 to the No on 1 Committee. HRC's (c)(3), the original source of these funds, did not register as a BQC. Neither did the (c)(4), the conduit of these funds.

Similarly, the National Gay and Lesbian Task Force contributed \$75,000 to the No on 1 Committee, and "dedicate[d] most of the task force's organizing team to run the field portion of the No on 1 ballot measure campaign in Maine [an in-kind donation that the Maine committee valued at \$65,000] in an attempt to defend the freedom to marry in Maine in 2009," according to its 2009 Form 990 tax filing. It is hard to imagine those efforts were not mentioned in their fundraising appeals at the time. Others include: Equality Maine, \$110,000; GLAD, about \$115,000; and Maine People's Alliance and Maine People's Resource Center, \$50,000.

According to the staff report's analysis here, even if none of these \$1.2 million in donors to HRC (or additional \$700,000 in donors to the other organizations contribution to the No on 1 effort) expressly gave for the purpose of supporting a Maine ballot question, their donations should be considered "contributions" because HRC mentioned (and advocated against) the Maine ballot

question in its email solicitations (sometimes exclusively, unlike NOM) and was publicly known to be supporting political committees in Maine in large amounts at the time.<sup>3</sup> Only internal documentation regarding their interactions with major donors would confirm whether or not these donations were contributions under Maine law, but to NOM's knowledge, the Commission has not undertaken any investigation of groups on the other side of this ballot measure who operated in the identical fashion as NOM did, giving rise to a claim of discriminatory enforcement. Moreover, if the Commission proceeds with enforcement against NOM for the very same conduct that was engaged in by groups on the other side, NOM would have no choice but to file complaints against every other similarly situated organization that, heretofore, has not been investigated by the Commission.

## **B. Donor #2**

The staff report's conclusion that the major donations received by NOM constitute contributions under Maine law is an ultra vires (and potentially unconstitutional) application of the statutory definition. The analysis does not rely upon the actual words used in the solicitations or on NOM's own conduct or communications. (Report at 26). Instead, in each case it relies upon an extrapolation of what information the donors may have known about NOM's activities taken together with NOM's internal strategy and decisions. It inquires "into what the parties in fact understood," therefore using a subjective standard that it specifically disavowed in federal court in order to salvage the statute's constitutionality.

In mounting its defense of the definition of "contributions" under Maine Statute 21A § 1056-B.2.A(B) & (C), the Commission argued repeatedly, including before the United States Supreme Court, that a donor's actual subjective knowledge or belief is irrelevant to a determination of whether an organization has received "contributions" under that definition. (Exhibit C - Brief in Opposition at 31 n.7, *Nat'l Org. for Marriage v. McKee*, No 11-1426 (U.S. Aug. 17, 2012)). The Commission made this argument consistently through the appeals process in the federal courts. *E.g.* Defendants-Appellees' Brief at 43-44, *Nat'l Org. for Marriage v. McKee*, No. 11-1426 (1st Cir. June 6, 2011) ("Thus, Subsection B does not require Appellants (or other persons soliciting funds) to read their donors' minds; the definition is an objective standard tied to what Appellants put forth in their solicitation."); *NOM v. McKee*, 669 F.3d at 36.

The federal courts agreed and upheld Maine's statute based on Maine's definitive interpretation. Indeed, to argue otherwise would have resulted in the definition succumbing to "the pitfalls of subjective standards." *Nat'l Org for Marriage v. McKee*, 669 F.3d 34, 46-47 (1st Cir. 2012). The First Circuit held that the definition of "contribution" under Maine law does "not require an assessment of what any particular contributor actually believed" or permit "inquiry into what the parties in fact understood." *Id.* The court went on to state that it is only relevant to consider the "objectively reasonable meaning of the language of the solicitation[s]." *Id.*

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<sup>3</sup> These emails contained express solicitations to help HRC influence the ballot question in Maine. One email reveals that HRC did a phonebank opposing the ballot question in October 2009.

But now, at least in the context of the major donations, the staff analysis does not follow this analysis, contrary to Maine's explicit representations to the federal courts. The report states that the exact language of the solicitations cannot be confirmed. But this is not entirely accurate. The Commission has before it sworn testimony from Brian Brown that he did not convey to any major donors that their donations would be used in Maine.<sup>4</sup> The Commission now has an affidavit from a major donor stating that he was not led to believe that his donations would be used in Maine, and from one of NOM's fundraisers stating that no representations were made to that effect as a matter of policy.<sup>5</sup> Brian Brown was fundraising for Stand for Marriage Maine contemporaneously, and he testified that he made clear to donors that they should give to SFMM if they wanted to support the marriage effort in Maine and to NOM if they wanted to support the national effort. (Brown deposition 279:1-13). Given these explicit statements and context, which are unrebutted in the evidentiary record before the Commission, NOM could not reasonably predict that donations from major donors would be considered for the purpose of influencing a Maine ballot question.

With respect to Donor #2, the report relies upon irrelevant factors to build its "context" resulting in the donation being a contribution.

- First, Mr. Steve Linder was working as a fundraiser for both SFMM and NOM. Mr. Linder has provided an affidavit stating that nothing was said that would lead the donor to believe that his donation would be used to influence a Maine ballot question. In fact, he expressly informed donors that they could not designate their contributions and that NOM would not reserve any donation for any specific purpose.
- Second, it is impermissible (in order for the statute to be constitutional) to consider the subjective knowledge and intent of the donor. Therefore, Donor #2's state of residence, marital status, knowledge of NOM's activities, and understanding of the Maine ballot question process are all irrelevant and impermissible. All that is relevant is the language of the solicitation and NOM's conduct and communications.
- Third, the language in the thank-you letter to Donor #2 in fact undermines the conclusion reached in the report. The letter specifically states that NOM is leading the fight nationwide and that the fight is throughout the nation. It is more reasonable to conclude, in light of NOM's return of designated contributions and the disclaimer on all their solicitations, that NOM does not accept designated contributions and that the donation was given to help NOM's nationwide efforts. In other words, the letter expresses that things are going well in the fight in Maine, which is relevant and important to Donor #2, so the donor should instead help NOM's national effort.

Again, if this application of the statute were correct, then every organization that gives to a Maine political committee should be subject to investigation. The statute states that a donation

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<sup>4</sup> Brown deposition 101:5-8, 131:21-22, 232:13-15, 259:10-19, 260:7-10, 261:8-21; 262:1-14, 269:24-25, 270:1-6, 273: 8-11, 276: 19-22, 277: 6-14, 279:1-13, 287:20-22, 292:1-15, 293:1-25; 308:11-17, 313:14-22; 324:8-10.

<sup>5</sup> NOM submits affidavits from members of its staff who were employed in 2009 in support of this formal policy against soliciting or accepting any earmarked donations. (Exhibits I and J).

may be a contribution when it can be objectively determined to have been provided for the purpose of influencing a Maine ballot question “when viewed in the context of the contribution and the recipient’s activities regarding a ballot question.” NOM engaged in no “activities regarding a [Maine] ballot question” as it did not engage in any expenditures. And, by the express terms of the definition of “ballot question committee,” it cannot be that simply contributing to a Maine political committee constitutes “activities regarding a ballot question.” 21-A M.R.S. §§ 1056-B (“Any person not defined as a political action committee who receives contributions or makes expenditures, *other than by contribution to a political action committee*”) (emphasis added). Otherwise, the simple fact that an organization has given to a Maine political committee in the past, even if unknown to a donor (or to anyone), would convert all donations received into “contributions.” This cannot be the state of Maine law. A donation might conceivably be a contribution even if it was not expressly earmarked, but there has to be some objective and specific language or conduct to point to beyond coincidence of events and circumstantial evidence of what the donor may have known or believed.

**C. Donor #11**

The same arguments apply to the report’s analysis regarding Donor #11. NOM expressly stated that it was not soliciting funds for the purpose of influencing an election in Maine. The fact that a particular donor may have known subjectively that NOM made contributions to Maine political committees (and there is no evidence that he in fact did) cannot convert his donation into a contribution under Maine law. Again, consideration of the subjective knowledge and beliefs of the donor is impermissible. Finally, Donor #11 submits an affidavit stating that he was not told anything that would have led him to believe that his donations would be specifically for the purpose of influencing a Maine ballot question (Subsection B). And NOM’s own conduct and communications provide a clear context that it explicitly refused earmarked donations.

The staff report also mischaracterizes the “budget.” The email does not state that the budget was to be provided to Donor #11 and there is no evidence that it was so provided. The budget shows nothing more than that NOM’s Executive Director planned in advance what to do with major donations he knew were coming in. The only legal significance of this is that it would have been a violation of his fiduciary duties *not to*.

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

Once again, only the language of the solicitation itself is relevant to a determination of whether a donation is a contribution under Subsections B & C. Also, the language of Subsection C itself refers to the context of the contribution and the recipient’s activities regarding a ballot question. Nothing in the statute refers to the “circumstances” surrounding the timing of contributions being made to a political committee. Subsection B cannot apply to Donors #9, #10, and #12 because there is no evidence presented of the language, or the existence, of any solicitation of the contributions. And Subsection C cannot impute designation of these contributions based on nothing more than the timing of contributions to SFMM, which is outside of the control or

knowledge of the donor. If the staff report were correct, then any large donation received by an organization shortly before the organization made a contribution to a Maine ballot question should be considered enough to trigger ballot question committee status, just because of its coincidental proximity in time.

**C. NOM Did Not Engage in Activities in Maine That Triggered Ballot Question Committee Registration or Reporting.**

NOM made no expenditures to promote the Maine referendum. The report presents no evidence that NOM made any expenditures in Maine and none was found in the investigation. All the report can point to is a draft robocall script that NOM elected *not to produce or deploy* after being advised by its legal counsel that doing so would require it to register as a political action committee. The fact that NOM had a script created for a potential robocall in Maine is of no bearing in this investigation. If anything, the fact that it deliberately chose not to produce or deploy the script is evidence that NOM did not intend to engage in any expenditures under Maine law. There is uncontroverted evidence (and not merely supposed as suggested by the staff report), including testimony taken under oath, that the survey did not take place, but was merely drafted.

As far as NOM's overall finances are concerned, the staff report does not present the entire context. NOM is a national organization that is dedicated to preserving the institution of marriage as between one man and one woman *across the country*. NOM received a total of \$7,372,981 in donations in its 2009 tax year. NOM gave \$1,954,169 to Stand for Marriage Maine in 2009, which is roughly one-quarter of its total revenue. The other three quarters of its revenue that year was spent in other states and not in Maine.

Contrary to the staff report's factual assumptions, NOM did not co-manage the pro-referendum campaign in Maine in 2009. NOM was not the chief organizer of the campaign. Individuals who work for NOM also worked with the Stand for Marriage Maine political committee. But this does not mean that NOM ran the campaign any more than the Human Rights Campaign ran the anti-referendum campaign. It is common for individuals to work for and with multiple different campaigns, organizations, and committees on the same side of the political or social spectrum contemporaneously. By law, this does not implicate each of these campaigns, organizations, or committees with each other.<sup>6</sup>

Finally, NOM did not promise its donors anonymity; this promise comes from federal law. Donors to an association have a First Amendment right to anonymity. *NAACP v. Ala. ex rel.*

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<sup>6</sup> For example, the same individual can serve as the president/treasurer of a nonprofit organization, a connected federal PAC, and an independent expenditure-only PAC, which may not coordinate with a regular PAC or a candidate committee. *E.g.* FEC Advisory Opinion 2010-09. Also, the same individual can serve as the treasurer of a political committee and serve as the President of a charity under Section 501(c)(3), which is itself prohibited from engaging in political intervention. *E.g.* IRS FS-2006-17.

*Patterson*, 357 U.S. 449, 462 (1958) (“It is hardly a novel perception that compelled disclosure of affiliation with groups engaged in advocacy may constitute an effective restraint on freedom of association.”). A non-profit organization is required to reveal its donors of \$5,000 or more to the IRS in its tax return, but this information is protected from disclosure under pain of felony criminal sanctions. 26 U.S.C. §§ 6103, 7213(a)(1), (3). So long as NOM does not engage in particular conduct precisely regulated by federal or state campaign finance laws, its donors have every right to anonymity.

Sincerely,

/s/

Joseph A. Vanderhulst  
jvanderhulst@actrightlegal.org

cc: Phyllis Gardiner (via E-mail: *Phyllis.Gardiner@maine.gov*)