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

To: Commission
From: Jonathan Wayne, Executive Director
Michael Dunn, Esq., Political Committee and Lobbyist Registrar
Date: May 20, 2020
Re: Request by Mr. John Jamieson to Investigate Polling by U.S. Senator Susan Collins

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Maine Election Law regulates funds, goods and services (*e.g.*, polling) received by someone for the purpose of deciding whether to become a candidate for state office. If the person subsequently runs for office, the candidate must disclose the funds, goods and services as contributions in their first campaign finance report. They are subject to the same dollar amount limitations as contributions received after the individual becomes a candidate. The person must also disclose any payments made for the purpose of deciding whether to become a candidate.

In 2017, U.S. Senator Susan Collins was giving consideration to running for Governor of Maine. Mr. John Jamieson of South Portland requests that the Commission investigate whether she received polling services that exceeded the $1,600 limitation applicable at that time. Sen. Collins responds that the polling was paid for by Collins for Senate (her U.S. Senate re-election committee) for a federal campaign purpose and she did not violate Maine Election Law.

LEGAL REQUIREMENTS

Standard for Opening a Requested Investigation

The Election Law authorizes the Commission to receive requests for investigation and to conduct an investigation "if the reasons stated for the request show sufficient grounds for believing that a violation may have occurred":

> A person may apply in writing to the commission requesting an investigation as described in subsection 1. The commission shall review the application and shall make the investigation if the reasons stated for the request show sufficient grounds for believing that a violation may have occurred.

21-A M.R.S. § 1003(2); (ETH – 15).

Financial Activity by Someone Deciding Whether to Run for Office

Public disclosure. Some individuals engage in paid activities (*e.g.*, travel or polling) when they are deciding whether to become a candidate, particularly for a statewide office. These are sometimes called exploratory or testing-the-waters activities. In 2013, the Maine Legislature enacted 21-A M.R.S. § 1015-B, which requires individuals to keep a record of any funds, or goods or services received for the purpose of deciding whether to become a candidate. (ETH – 18). If the individual decides to run for a state or county office, they must disclose the funds, goods and services as contributions in their first campaign finance report filed with the Commission. Under a related Commission rule, if the individual does *not* become a candidate, the funds, goods or services are *not* contributions and do not need to be disclosed. 94-270 C.M.R. Ch. 1 § 6(10); (ETH – 18-19). The same policy applies to any payments of money made by an individual for the purpose of deciding whether to become a candidate. 21-A M.R.S. § 1015-B; 94-270 C.M.R. Ch. 1 § 7(8); (ETH – 18-19).

Relation to federal testing-the-waters law. The Commission encouraged the adoption of these laws after receiving questions in 2010 and 2011 concerning whether candidates needed to report exploratory activities. The Commission's proposals were based on the "testing-the-waters" law that applies to candidates for the U.S. Congress, U.S. Senate and President. 11 C.F.R. §§ 100.72, 100.131 & 101.3; (ETH – 21-23). Under these Federal Election Commission (FEC) rules, a person exploring the feasibility of becoming a candidate does not need to register as a candidate and file campaign finance reports. Any funds, goods or services received for the purpose of exploring whether to run are *not* contributions (they are covered by an exception). 11 C.F.R. § 100.72. If the person subsequently becomes a candidate, the funds, goods or services *are* contributions and are subject to the reporting requirements. 11 C.F.R. § 101.3. The funds, goods and services received are subject to the same federal contribution limits and source prohibitions (*e.g.*, corporations, labor organizations). 11 C.F.R. § 100.72.

Limits on the receipt of funds, goods and services. Under 21-A M.R.S. § 1015-B, any funds, goods or services received by someone for the purpose of deciding whether to become a candidate must comply with the same limits in 21-A M.R.S. § 1015 that apply to contributions

given to candidates. In 2017, the contribution limit for candidates for Governor was $1,600 per election.[1] 21-A M.R.S. §§ 1015(1) & (2); (ETH – 17-18).

Federal Preemption

The Federal Election Campaign Act contains a provision stating that the Act supersedes and preempts any provision of state law with respect to an election for federal office. 52 U.S.C. § 30143; (ETH – 20). The regulations of the Federal Election Commission specify that the Federal Election Campaign Act supersedes any state law concerning the:

(1) organization and registration of political committees supporting federal candidates;
(2) disclosure of receipts and expenditures by federal candidates and political committees; and
(3) limitations on contributions and expenditures regarding federal candidates and political committees.

11 C.F.R. § 108.7. (ETH – 24). Likewise, Maine Election Law states that "[t]he commission does not have jurisdiction over financial activities to influence the nomination or election of candidates for federal office." 21-A M.R.S. § 1011; (ETH – 17).

REQUEST TO INVESTIGATE BY JOHN JAMIESON

In 2017, Sen. Collins' federal campaign committee, Collins for Senate, engaged a polling firm, Moore Information, Inc., to conduct two polls in April and September. In a February 13, 2020 complaint filed with the Commission, John Jamieson of South Portland asserts that Sen. Collins received the polling results for the purpose of deciding whether to become a candidate. (ETH – 1-5). Mr. Jamieson relies on news stories and blog posts in 2017 in which Sen. Collins acknowledged that she had been weighing whether to run for Governor.[2]

[1] Contribution limits are adjusted for inflation every two years based on the Consumer Price Index.

[2] In April 2017, Sen. Collins told the Portland Press Herald in an email she had not had significant time to think through "the pros and cons" of running for Governor, but would decide by the fall. (ETH – 77-79). Three news stories or blog posts published on October 3, 2017 confirmed she had been thinking about running for Governor. (ETH – 84-92). In one blog post, her spokesperson stated she would make an announcement around Columbus Day. On October 13, 2017, she announced she would not run for Governor. (ETH – 93-94).

Mr. Jamison also relies on a one-page memo by the polling firm summarizing the results of the September 2017 poll. (ETH – 5). The memo, which conveys very favorable results for Sen. Collins, was shared with a political blogger for the Bangor Daily News. (ETH – 89-91). The full content of the poll is not known, but the summary suggests the poll:

- tested the public's views about Sen. Collins' job performance in the U.S. Senate,
- compared her strength in the 2018 Republican primary election for Governor against three potential opponents, and
- compared Sen. Collins and other Republicans against leading Democrats in the 2018 general election for Governor.[3]

Mr. Jamieson (or his allies) located the costs of the two polls in campaign finance reports filed by Collins for Senate with the FEC, which add up to $61,050. (ETH – 96-97). He requests that the Commission investigate whether Sen. Collins violated 21-A M.R.S. § 1015-B by accepting polling services with a value of $61,050 for the purpose of deciding whether to become a candidate for Governor, which exceeded the applicable $1,600 limit.

RESPONSE BY SEN. COLLINS

Sen. Collins responds through a March 27, 2020 letter from her legal counsel at Jones Day. (ETH – 9-14). Her attorneys argue that she did not violate 21-A M.R.S. § 1015-B, because the polls were "not commissioned for the purpose of helping Senator Collins decide whether to run for Governor." (ETH – 9-11). They state that the April 2017 poll did not ask questions concerning the 2018 Governor's race and was consistent with polling she has conducted regularly as a member of the U.S. Senate since the 1990s. The September 2017 poll was intended to project her strength as a candidate if she continued in the U.S. Senate and to respond to recent negative comments in the press by Governor Paul LePage and Democratic sources questioning her support among Republican voters:

> [T]his information aided [Collins for Senate] in countering statements made in the media that Senator Collins would struggle in a Republican primary if she ran for governor and a poll from a Democratic firm that showed Senator Collins losing a

[3] Because both polls tested Sen. Collins favorability, Mr. Jamieson claims that the April and September polls "served the same purpose" of assisting Sen. Collins in deciding whether to run for Governor. (ETH – 2). Counsel for Sen. Collins offers some distinctions between the two polls. (ETH – 10).

> gubernatorial primary election. The September 17 poll results demonstrated that, in the event Senator Collins opted to remain in the U.S. Senate, her decision was not because of any doubt that she could win the gubernatorial election.

(ETH – 10). Counsel states that the poll did not include the policy questions that would be asked by someone determining whether to seek the governorship, and Sen. Collins did not engage in other activities "normally associated with testing the waters for a gubernatorial campaign," such as canvassing supporters and donors to gauge support, establishing a finance committee for a potential run, traveling, *etc.* (ETH – 10-11).

Sen. Collins' attorneys urge the Commission to reach the same result as it did in October 2014 when the Commission declined to investigate allegations that spending by the federal campaign committee of U.S. Rep. Michael Michaud amounted to an in-kind contribution to his campaign for Governor. (ETH – 11-12, 95). She argues that Maine law in this matter is preempted by the Federal Election Campaign Act and that the Commission may not apply 21-A M.R.S. § 1015-B to limit spending by a federal campaign committee for a federal campaign purpose. (ETH – 11-12). She cautions that an investigation by the Commission into the purpose of the 2017 polls would require the Commission to inquire into sensitive campaign information that is protected from disclosure by the First Amendment. (ETH – 12-13).

DISCUSSION AND STAFF RECOMMENDATION

The Commission staff recommends against conducting an investigation. If there was a violation of 21-A M.R.S. § 1015-B, any resulting public harm was very low. We believe the public interest in investigating the 2017 exploratory activities of someone who did not run for state office is relatively small and does not justify the use of public resources for an investigation (particularly when the investigation may result in legal disputes over the Commission's jurisdiction and First Amendment protections). Even if an investigation is conducted, we are not convinced that the purposes of the polling will be sufficiently clear to determine that a violation of 21-A M.R.S. § 1015-B occurred.

Public interest is attenuated

In light of other election-related responsibilities of the Commission this spring, the Commission staff questions whether the public interest in the 2017 exploratory activities by a non-candidate justifies conducting an investigation. The subject of Mr. Jamieson's complaint is polling that occurred 2½-3 years ago. If he and his allies had significant compliance concerns about how Sen. Collins financed those polls, they could have requested an inquiry in 2017-2018 when the spending was publicly reported.

Some potential violations of 21-A M.R.S. § 1015-B are potentially serious (for example, if someone were to run for Governor and invited organizations interested in influencing state policy to engage in significant off-the-books financial activity). This case is much different from that hypothetical because Sen. Collins did not run for Governor in 2017, was under no obligation to report her activities, and the spending was disclosed by her federal campaign committee. Sen. Collins' counsel has raised a significant federal preemption issue and a reasonable question whether an investigation would be worth the expenditure of public resources and intrusion into campaign decision-making.

Purpose of polling is disputed

In order to determine that a violation of 21-A M.R.S. § 1015-B occurred, the Commission would require sufficient evidence that the purpose of the 2017 polling was to decide whether to become a candidate for a state elective office. That purpose is in dispute. Mr. Jamieson's explanation of the polling is not unreasonable. Sen. Collins publicly acknowledged in the fall of 2017 that she had been considering running for Governor. Mr. Jamieson infers that the 2017 polls were for the purpose of deciding whether to become a candidate. (ETH – 3).

On the other hand, the explanation of the September 2017 poll by Sen. Collins' attorneys is also plausible, either as a contributing or full motivation for the September poll. They assert that "the polling at issue here was conducted by [Collins for Senate] for the purpose of assessing Senator Collins' standing at that time in her reelection cycle for the United State Senate and to demonstrate her political strength in the event she decided **not** to run for governor." (ETH – 10).

Elected officials benefit from being viewed as electorally strong, both in terms of fending off qualified opponents and attracting financial support. Public discussion in the press during 2017 of Sen. Collins's political plans had included ongoing questions about her strength as a candidate, particularly in a 2018 Republican primary election for Governor.[4] It is only natural that, in the summer or early fall of 2017, if Sen. Collins had decided not to run for Governor (or was leaning in that direction), her political advisors would want to dispel any perception of weakness. Sen. Collins' attorneys state that the data from the September poll "aided [Collins for Senate] in countering statements made in the media that Senator Collins would struggle in a Republican primary if she ran for Governor …." (ETH – 10). The promotional language in the Moore Information memo ("very strong position," "extremely difficult to beat") and subsequent leaking to a political blogger are consistent with that public relations objective. Given the presence of two plausible explanations for the poll, an investigation may have difficulty pinning down the purpose of the September 2017 poll with sufficient certainty to determine that a violation of 21-A M.R.S. § 1015-B occurred.

Jurisdiction and Federal Preemption

Financial activity to influence a federal election is regulated by the Federal Election Campaign Act (FECA) and FEC regulations. The FECA and FEC regulations both contain provisions (attached) stating that FECA supersedes and preempts state law with respect to elections for federal office. 52 U.S.C.S. § 30143; 11 C.F.R. § 108.7; (ETH – 20, 24). Maine Election Law also contains a provision stating that the Commission does not have jurisdiction over financial activities to influence elections of candidates for federal office. 21-A M.R.S. § 1011; (ETH – 17).

Counsel for Sen. Collins argues that because her federal campaign committee used its funds to engage in polling for a federal campaign purpose, the Commission may not apply Maine campaign finance law to limit that spending. The Commission staff cannot predict the result if this question were litigated, but we recommend taking this argument seriously. This is an additional consideration weighing against initiating an investigation.

[4] In particular, Sen. Collins's attorneys cite to articles in the Bangor Daily news article discussing negative comments by Governor LePage and Democratic sources. (ETH –10; 80-83).

We believe caution is warranted based on our review of the federal appellate court decision in Bunning v. Kentucky, 42 F.3d 1008 (6th Cir. 1994). (ETH – 25-30). In July 1993, U.S. Rep. James Bunning (a Republican) used his federal campaign committee to conduct a poll which, among other questions, compared him to individuals viewed as possible Democratic candidates for Governor in 1995. In a subsequent news article concerning the poll, Rep. Bunning stated that running for Governor in 1995 was a valid option for him, depending on the results of the 1994 national elections. The Kentucky Democratic Party filed a complaint with the state Registry of Election Finance asserting that the poll violated the Registry's recent interpretation of state law that candidates for Governor in 1995 could not spend money to explore whether to run for office. The Registry decided to investigate and requested that Rep. Bunning voluntarily produce the questions asked in the poll. Rep. Bunning, who had already registered as a candidate for reelection to Congress in 1994, declined to provide the polling questions, arguing that the poll was conducted for a federal campaign purpose: testing advertising that his federal campaign committee had conducted in 1992. The Registry issued a subpoena for the poll, against the advice of its own counsel who had offered the opinion that the Registry lacked jurisdiction to conduct an investigation.

Rep. Bunning brought suit in federal court. The U.S. District Court found that the FECA preempted Kentucky state law and enjoined the Registry from taking action against Rep. Bunning. (ETH – 28). The U.S. Court of Appeals affirmed, finding that the Kentucky Registry was intruding into Congressman Bunning's federally regulated activity. (ETH – 29-30). The Bunning case serves as a cautionary reminder of the unpredictability of litigation and that federal courts cannot be counted on to defer to state governments' assertion of local interests when federal law arguably occupies the field.

Other Arguments by Sen. Collins

Sen. Collins' attorneys correctly describe a 2014 decision by the Commission not to investigate spending by the federal campaign committee of U.S. Rep. Michael Michaud. (ETH – 11-12). Three days before a scheduled October 10, 2014 meeting, the Maine Republican Party filed a complaint alleging that the payments had promoted Mr. Michaud's campaign for Governor.

After considering the explanations of the spending provided by Rep. Michaud's campaign, the Commission voted to dismiss the item and took no further action. (ETH – 95). To the best of our recollection, Rep. Michaud did not argue that the Commission was preempted by federal law from conducting an investigation.

We also agree with Sen. Collins' interpretation of the Commission's penalty authority. (ETH – 13). If someone receives a contribution after becoming a candidate that exceeds the applicable limit, the Commission *is* authorized to assess a civil penalty under 21-A M.R.S. § 1004-A(2). If, however, someone receives a donation of money or services for purposes of deciding whether to become a candidate that exceeds the applicable limit and does not become a candidate, the Commission *lacks authority* to assess a penalty. That does not mean, however, that every investigation of § 1015-B would be a waste of Commission resources.

CONCLUSION

The Commission staff believes that it is reasonable for Mr. Jamieson to have raised the question of whether the 2017 polling complied with the limitation in 21-A M.R.S. § 1015-B. Nevertheless, because Sen. Collins did not run for state office and the expenditures are now 2½-3 years old, the public interest in conducting an investigation is diminished. Sen. Collins has pointed to a plausible federal purpose in conducting the poll and it may be difficult to establish with sufficient certainty that the purpose of the poll was to decide whether to become a candidate for Governor. Sen. Collins has raised a significant issue of federal preemption. For these reasons, the Commission staff recommends against conducting an investigation in this matter.

Thank you for your consideration of this memo.

February 11, 2020

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Re: Violation of State Campaign Finance Law by Senator Susan Collins

Pursuant to your authority under Title 21-A, Section 1003 of the Maine Revised Statutes, this letter serves as a formal complaint against United States Senator Susan Collins. Maine law allows an individual to accept funds, goods or services for the purpose of deciding whether to become a candidate for elected office.[1] However, any funds, goods or services accepted may not exceed the contribution limits.[2] According to news reporting and an internal polling memo from Sen. Collins' own pollster, Sen. Collins commissioned two statewide polls in 2017 to gauge support for a potential run for Governor of Maine.[3] Publicly available Federal Election Commission ("FEC") records show Sen. Collins' federal campaign committee paid $61,050 to the polling vendor that conducted these statewide polls around the exact same time the polls were conducted. Based on the available information, it appears that Senator Collins accepted two polls worth $61,050 from her federal campaign committee for the purpose of deciding whether to run for Governor of Maine in violation of Maine law.[4] Accordingly, we request that the Maine Commission on Governmental Ethics and Election Practices ("Commission") immediately investigate this violation.

I. Factual Background

Susan Collins currently serves as a U.S. Senator for Maine.[5] However, in 2017, Sen. Collins began "seriously considering" a run for Governor of Maine.[6] During the months of deliberation, Sen. Collins reportedly commissioned two statewide polls from Moore Information, a polling vendor, to gauge her popularity among Maine voters: one in April 2017 and another in September 2017.[7]

According to news reporting, the poll results "show[] that Maine's senior senator remains overwhelmingly popular and holds a commanding lead in any potential gubernatorial match-up."[8] To be more specific, the internal polling memo from Collins' pollster Hans Kaiser to Sen. Collins summarizes the September poll as follows:

> Results of our recent survey in Maine show Susan Collins in very strong shape among voters in the state . . . Should Susan decide to

[1] *See* Me. Rev. Stat. tit. 21-A, § 1015-B.
[2] *Id.*
[3] *See* Attachment A, Internal Polling Memo; *see also* David Farmer, *Internal Memo Shows Collins in Commanding Position in GOP Primary for Governor*, Bangor Daily News (Oct. 3, 2017), http://davidfarmer.bangordailynews.com/2017/10/03/republicans/internal-memo-shows-collins-in-commanding-position-in-gop-primary-for-governor.
[4] *See* Me. Rev. Stat. tit. 21-A, §§ 1015-B, 1004-A(2).
[5] About Susan Collins, *available at* https://www.collins.senate.gov/about.
[6] Scott Thistle, *Sen. Collins Seriously Considering Run for Maine Governor in 2018*, Portland Press Herald (Apr. 11, 2017), http://www.pressherald.com/2017/04/11/sen-collins-says-she-may-run-for-maine-governor-in-2018.
[7] Farmer, *supra* note 3; Attachment A.
[8] Farmer, *supra* note 3.

> run for governor these numbers show her in a very solid position as she leads her next closest competitor in the Republican primary by a better than 3:1 margin and two other competitors by even larger margins . . . In the general election match ups for governor, Collins leads by 2:1 margins over leading Democrats in the state . . . Should she decide to run for governor these numbers suggest she would be extremely difficult to beat.[9]

The internal polling memo is dated September 26, 2017 and compares the polling results to an earlier poll from April 2017, presumably on the same topic.[10]

The September polling memo states that "[t]hese results are from a Moore Information telephone survey conducted September 17-21, 2017 among a representative sample of 500 likely voters in Maine . . . using live interviewers and includ[ing] landline and cell phones."[11] According to the media, "[s]tatewide research of this nature isn't cheap. A 500-person sample, using live callers and a cellphone supplement, can easily cost $30,000, and depending upon the length could climb to $50,000 to $60,000."[12]

Publicly available records from the FEC show that Sen. Collin's federal campaign committee, Collins for Senator,[13] made multiple payments to Moore Information for "[p]olling." One payment for $24,650 was made in May 2017[14]—presumably to pay for the April poll. The second payment for $36,400 was dated September 30, 2017[15]—presumably to pay for the September poll.

Despite the strong polling results, Sen. Collins ultimately decided against running for Governor.[16]

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[9] Attachment A.
[10] *Id.*
[11] *Id.*
[12] Farmer, *supra* note 3.
[13] Collins For Senator, Statement of Organization (amended May 21, 2019), https://docquery.fec.gov/pdf/197/201905219149823197/201905219149823197.pdf.
[14] Collins for Senator, July Quarterly Report 31 (July 14, 2107), https://docquery.fec.gov/pdf/450/201707170200169450/201707170200169450.pdf (showing that on May 16, 2017, Moore Information received a $24,650.00 payment for "Polling").
[15] Collins for Senator, October Quarterly Report 80 (Oct. 13, 2017), https://docquery.fec.gov/pdf/534/201710130200291534/201710130200291534.pdf (showing that on Sept. 30, 2017, Moore Information received a $36,400.00 payment for "Polling").
[16] Katherine Q. Seelye, *Senator Susan Collins Will Not Run for Governor of Maine*, N.Y. Times (Oct. 13, 2017), https://www.nytimes.com/2017/10/13/us/senator-susan-collins-maine-governor.html.

II. Legal Analysis

Maine law provides that, "[i]f an individual receives funds, goods or services for the purpose of deciding whether to become a candidate, the funds, goods or services may not exceed the [state's contribution] limitations."[17] In 2017, the contribution limit was set at $1,600 per election cycle.[18] Therefore, the law prohibited Sen. Collins in 2017 from accepting any good or service, including a poll, for the purpose of evaluating a potential gubernatorial candidacy with a value in excess of $1,600.[19]

The content of the internal polling memo from September and the facts alleged in the news reporting establish the polls' true purpose. The September poll clearly asked multiple questions about how Sen. Collins compared to potential Republican and Democratic opponents for Governor.[20] Three of the five paragraphs in the September polling memo discuss Sen. Collins' statewide favorability and likelihood of success in both the primary and general gubernatorial elections.[21] The September poll also compares Sen. Collins statewide favorability to what was measured in the April poll, suggesting the two served the same purpose: to help Sen. Collins "decid[e] whether to become a candidate."[22]

For these reasons, the polls qualified as a "service[] for the purpose of deciding whether to become a candidate" that could only be accepted by Sen. Collins to the extent their value did not exceed the $1,600 contribution limit. FEC reports appear to show that Sen. Collins' federal campaign spent $61,050 on these polls and provided them to Sen. Collins in violation of Maine law. In fact, the value of these polls appears to be ***thirty-eight times greater*** than the permissible contribution limit.

Even though Sen. Collins ultimately decided not to run for Governor, she was in no way exempt from the laws governing her decision on whether to run. Accordingly, because the facts alleged demonstrate "sufficient grounds for believing a violation may have occurred,"[23] we request an immediate investigation into Sen. Collins to determine whether she violated Maine law by accepting impermissible services from her federal campaign committee while deciding whether to become a candidate for Governor of Maine.

Sincerely,

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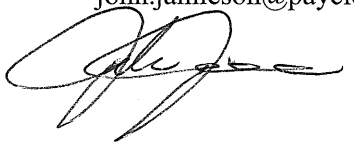

[17] Me. Rev. Stat. tit. 21-A, § 1015-B.
[18] Me. Comm'n on Gov't Ethics & Election Practices, Contribution Limits, https://web.archive.org/web/20170707040049/https://www.maine.gov/ethics/guide/contmax.htm (showing contribution limits of $1,600 for gubernatorial candidates as of 2017).
[19] *See* 94-270 Me. Code R. § 6(10) (listing a poll as an example of a type of service accepted to evaluate a potential candidacy).
[20] Attachment A.
[21] *Id.*
[22] Me. Rev. Stat. tit. 21-A, § 1015-B.
[23] *Id.* § 1003(2).

Attachment A

Making the Rounds in Maine
+ Washington

MOORE INFORMATION

OPINION RESEARCH • STRATEGIC ANALYSIS

September 26, 2017

TO: Collins for Senator

FROM: Hans Kaiser, Moore Information, Inc.

RE: Maine Voter Survey Results

Results of our recent survey in Maine show Susan Collins in very strong shape among voters in the state. In fact, she has increased her net favorable and net job approval ratings since our previous survey in April. Today 70% of Maine voters hold a favorable opinion of Susan and on her job approval score we find that 75% currently approve of the job she is doing as U.S. Senator while just 19% of voters across the state disapprove of the job she is doing.

COLLINS IMAGE		COLLINS JOB PERFORMANCE	
Favorable	70%	Approve	75%
Unfavorable	21%	Disapprove	19%
No opinion	8%	Don't know	5%

Importantly her job approval rating is above 60% with all three groups of voters (Republicans, Independents and Democrats) and even solid majorities of voters of all political philosophies ("very" Conservatives, "somewhat" Conservatives, Moderates and Liberals) approve of the job she is doing. We find a slight gender gap on her job approval score with 80% of women approving of the job she is doing and "just" 70% of men saying they approve.

Should Susan decide to run for governor these numbers show her in a very solid position as she leads her next closest competitor in the Republican primary by a better than 3:1 margin and two other competitors by even larger margins. As we saw in her job approval score, she does better with women but enjoys a very large advantage among men as well.

In the general election match ups for governor, Collins leads by 2:1 margins over leading Democrats in the state (and is over 50% on head to head ballot tests at this point with significant room for growth among undecided voters). In other matchups against those same Democrats, another Republican candidate loses by double digit margins.

These numbers show Susan Collins in a very strong position among voters in Maine, one that transcends party lines and demonstrates a great appreciation for the job she is doing in the U.S. Senate. Should she decide to run for governor these numbers suggest she would be extremely difficult to beat.

These results are from a Moore Information telephone survey conducted September 17-21, 2017 among a representative sample of 500 likely voters in Maine. Interviews were conducted using live interviewers and included landline and cell phones. The potential sampling error is plus or minus 4% at the 95% confidence level.

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February 19, 2020

Megan Sowards Newton, Esq. Sent via USPS and E-mail
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Re: Request to Investigate Alleged Campaign Finance Violation by U.S. Senator Susan Collins

Dear Ms. Newton:

As you are aware, the Maine Commission on Governmental Ethics and Election Practices (the "Commission") received the enclosed request for investigation from Mr. John Jamieson. In his request, Mr. Jamieson alleges that in 2017 U.S. Senator Susan Collins ("Senator Collins") received valuable polling information purchased by her federal campaign committee for purposes of gauging support for a possible candidacy for Governor. He contends that Senator Collins' acceptance of these services violated 21-A M.R.S. § 1015-B, which limits the amount of funds or services an individual may accept from another source when deciding whether to run for State office in Maine.

This letter is to provide Senator Collins with an opportunity to respond to the request and to provide any factual information or legal argument that she believes is relevant to whether the Commission should conduct an investigation into this matter or find her in violation of 21-A M.R.S. § 1015-B.

Commission's Decision Whether to Investigate

The Commission will consider Mr. Jamieson's complaint at its meeting on April 29, 2020, beginning at 10:00 a.m. The meeting will take place at the Commission's office, 45 Memorial Circle, in Augusta, Maine. The Commission staff recommends that you or another attorney for Senator Collins attend the meeting to respond to the request for investigation and to answer any questions from the Commissioners. At the meeting, the Commission may decide whether to conduct further investigation into this matter or whether Senator Collins violated 21-A M.R.S. § 1015-B.

Relevant Statutes and Rules

Procedures for considering a request for investigation. The Commission is required to review every request to investigate an alleged violation of campaign finance law and to conduct an "investigation if the reasons stated for the request show sufficient grounds for believing that a violation may have occurred." 21-A M.R.S. § 1003(2). The Commission's initial procedures for considering a complaint and conducting an investigation are set forth in its rules, 94-270 C.M.R. ch. 1, §§ 4(2)(C) & 5.

Definition of contribution. The term contribution includes "[a] gift, subscription, loan, advance or deposit of money or anything of value made for the purpose of influencing the nomination or election of any person to state, county or municipal office …." 21-A M.R.S. § 1012(2)(A)(1). Influence means "to promote, support, oppose or defeat." *Id.* at § 1012(4-A).

Limits on contributions to candidates. A political committee, political action committee, other committee, firm, partnership, corporation, association or organization may not make contributions to a candidate in support of their candidacy aggregating more than $1,600 per election for a gubernatorial candidate. 21-A M.R.S. § 1015(2).[1]

Limits on funds or services provided to an individual considering whether to become a candidate. Under Title 21-A, section 1015-B:

> If an individual receives funds, goods or services for the purpose of deciding whether to become a candidate, the funds, goods or services may not exceed the limitations in section 1015, subsections 1 and 2. …

If the individual becomes a candidate, then the funds, goods, and services received are contributions and must be disclosed in the candidate's first campaign finance report. *Id. See also* 94-270 C.M.R. ch. 1, §§ 6(10) & 7(8). If the individual does not become a candidate, the funds, goods, and services are not contributions and do not need to be disclosed in campaign finance reports. *Id.*

[1] The gubernatorial limitation in statute is $1,500 per election, but the limits are indexed for inflation every election cycle.

Request for Response

Please submit a written response to Mr. Jamieson's request by Tuesday, March 10, 2020. You are welcome to submit any factual information or legal argument you believe would be relevant to a decision by the Commission whether to investigate or whether to determine that Senator Collins violated 21-A M.R.S. § 1015-B. The Commission staff suggests that your response address the following points:

- In 2017, did Collins for Senate make payments to Moore Information Group, in whole or in part, for the purpose of deciding whether to become a candidate for Governor? If so, please quantify the amount of these payments.
- If Senator Collins believes the polling services were *not* subject to the limitation in 21-A M.R.S. § 1015-B, please provide any argument or explanation you believe the Commission should consider.
- Did Collins for Senate make any other payments to assist Senator Collins in exploring a potential campaign for Governor? If so, please identify those payments.

Thank you for your cooperation with this request. The Commission staff looks forward to receiving your response on or before March 10, 2020. Please let me know if you have any questions.

Sincerely,

Michael J. Dunn, Esq.
Political Committee and Lobbyist Registrar

Enclosures

cc: Stephen J. Kenny, Esq.
Joshua A. Tardy, Esq.
Mr. John Jamieson (wo/enclosure)

March 27, 2020

VIA USPS AND EMAIL

Michael J. Dunn
Political Committee and Lobbyist Registrar
Maine Commission on Governmental Ethics & Election Practices
135 State House Station
Augusta, ME 04333

Re: Response to Complaint Filed by John Jamieson

Dear Mr. Dunn:

We are counsel to Senator Susan Collins, a candidate for United States Senate in 2020, and her federal campaign committee, Collins for Senator ("CFS"). We ask that the Commission on Governmental Ethics and Election Practices ("Commission") dismiss John Jamieson's complaint alleging that Senator Collins violated 21-A M.R.S. § 1015-B.

Senator Collins has been, at all times relevant to the complaint, a federal candidate and officeholder. The polling at issue in the complaint was conducted by her federal campaign committee to assess and project her strong standing among Maine voters. Therefore, the complaint must be dismissed under Commission precedent and pursuant to federal law because CFS has explained the federal purpose of the polling. In addition, an investigation into the "true purpose" of a federal campaign's polling activities would raise serious First Amendment concerns. Finally, it would be a waste of Commission resources to pursue an investigation, because the Commission is not authorized to assess a penalty in this case, which demonstrates the frivolous nature of the complaint and that it was filed solely for its perceived value as a "negative press hit."

I. Senator Collins Did Not Violate § 1015-B.

Mr. Jamieson alleges Senator Collins violated section 1015-B,[1] which limits the amount an individual may receive in determining whether to run for state office. He alleges that Senator

[1] Section 1015-B states, in relevant part:

> If an individual receives funds, goods or services for the purpose of deciding whether to become a candidate, the funds, goods or services may not exceed the [state's contribution limit]. The individual shall keep an account of such funds, goods or services received and all payments and obligations incurred in deciding whether to become a candidate.

Collins received services in excess of the limit when CFS conducted polling in 2017 allegedly for the purpose of helping Senator Collins to decide whether to run for governor. He asks the Commission to investigate the "true purpose" of the poll.

In fact, while Mr. Jamieson's complaint attempts to cast the polling activities in a distorted light, the polling at issue here was conducted by CFS for the purposes of assessing Senator Collins' standing at that time in her reelection cycle for the United States Senate and to demonstrate her political strength in the event she decided **not** to run for governor.

Senator Collins did not violate § 1015-B, because the polling identified in the complaint was not conducted "for the purpose of deciding whether to become a candidate." The April 2017 poll cited in the complaint contained questions about a wide variety of political topics and political figures, including questions related to Senator Collins' favorability and job approval. CFS has been conducting similar polling regularly since Senator Collins became a federal candidate in 1996, including in non-election cycles. The April 2017 poll did not contain any questions related to Senator Collins' performance in hypothetical gubernatorial election match-ups.

The September 2017 poll cited in the complaint contained some questions testing Senator Collins against potential opponents in hypothetical primary and general gubernatorial elections. But this information aided CFS in countering statements made in the media that Senator Collins would struggle in a Republican primary if she ran for governor[2] and a poll from a Democratic firm that showed Senator Collins losing a gubernatorial primary election.[3] The September 2017 poll results demonstrated that, in the event Senator Collins opted to remain in the U.S. Senate, her decision was not because of any doubt that she could win the gubernatorial election. Indeed, Senator Collins announced she would not run for governor shortly after the September 2017 poll showed she was by far the strongest candidate.[4]

If the true purpose of the poll had been to test the waters of a gubernatorial campaign, common sense would suggest that any individual receiving overwhelmingly positive results—the polling indicated Senator Collins would win election to office by a two-to-one margin—would ultimately decide to seek that office, not decline to run shortly after receiving such positive results. And, notably, any poll commissioned for the purpose of determining whether to seek the governorship would have included an exhaustive battery of questions regarding the policy issues

[2] *See, e.g.*, Michael Shepherd, *LePage rallies his supporters against Susan Collins*, Bangor Daily News, July 31, 2017, https://bangordailynews.com/2017/07/31/politics/lepage-rallies-his-supporters-against-susan-collins/.
[3] *See* Michael Shepherd, *Shadowy poll suggests problems for Susan Collins if she runs for governor*, Bangor Daily News, Aug. 9, 2017, https://bangordailynews.com/2017/08/09/politics/shadowy-poll-suggests-problems-for-susan-collins-if-she-runs-for-governor/.
[4] *See* Katharine Q. Seelye, *Senator Susan Collins Will Not Run for Governor of Maine*, N.Y. Times, Oct. 13, 2017, https://www.nytimes.com/2017/10/13/us/senator-susan-collins-maine-governor.html.

facing Maine 2018 gubernatorial voters. Neither the April 2017 nor the September 2017 poll included such questions.

Finally, Senator Collins did not conduct any other activities normally associated with testing the waters for a gubernatorial campaign. She did not canvass supporters and donors to gauge their support for a gubernatorial run, establish a finance committee for a potential run, travel to key parts of the state to evaluate a gubernatorial campaign, or line up vendors or staff to lay the groundwork for a potential gubernatorial campaign. Simply giving thought to the possibility of running for a state office does not convert the lawful activities of a federal committee for its own purposes into a violation of § 1015-B.

In sum, CFS conducted the polls cited in Mr. Jamieson's complaint to assess Senator Collins' standing in Maine and to emphasize her continued strong standing among Maine voters in the event she decided not to run for governor. Because the polls were not commissioned for the purpose of helping Senator Collins decide whether to run for governor, they do not implicate § 1015-B.

II. Commission Precedent And Federal Law Command Dismissal Of The Complaint.

In a recent matter involving allegations that a federal campaign committee violated Maine campaign finance law, the respondent provided an explanation of the actual purpose of the funds. The Commission promptly and unanimously dismissed the complaint and declined to authorize an investigation. This precedent is fully applicable to this matter.

In 2014, a complaint was filed against Michaud for Congress, a federal campaign committee, alleging that the committee made expenditures to promote Rep. Michaud's gubernatorial campaign, including a payment to the AFL-CIO allegedly to sponsor an event at which the organization endorsed Rep. Michaud's gubernatorial campaign.[5] The committee responded by explaining the valid purpose of each expenditure and how none of the expenditures were for the purpose of advancing Rep. Michaud's gubernatorial campaign. The payment to the AFL-CIO, the committee explained, was simply to purchase an advertisement in an event publication to congratulate a longtime associate. Implicitly recognizing that mere allegations about the purpose of campaign spending cannot alone authorize an investigation into the "true purpose" of a federal campaign's activities, the Commission declined to investigate the matter and dismissed the complaint.

Here, Mr. Jamieson has made equally speculative allegations about the purpose behind CFS's polling activities. And, like in the Michaud for Congress matter, the respondent has explained the

[5] *See* Commission Minutes at 3 (Oct. 10, 2014), https://www.maine.gov/ethics/sites/maine.gov.ethics/files/inline-files/pdf/10102014finalminutes.pdf.

valid federal purpose behind the polling. Fairness and consistency demand that the Commission give equal weight to CFS's explanation in this matter.

Such an approach by the Commission makes sense, especially in matters involving federal political committees. The Federal Election Campaign Act ("FECA" or "Act") and FEC regulations include broad preemption provisions that "supersede and preempt any provision of State law with respect to election to Federal office."[6] FEC regulations make clear that "Federal law supersedes State law concerning the . . . [l]imitation on contributions and expenditures regarding Federal candidates and political committees."[7] This provision covers expenditures for polling activities.[8] Maine's campaign finance law appropriately recognizes this broad preemption and provides that the Commission "does not have jurisdiction over financial activities to influence the nomination or election of candidates for federal office."[9]

For the Commission to wade into a review of federal activity and potentially seek to limit what questions CFS may ask in its polling would encroach upon the federal government's sole authority in this field. Accordingly, the Commission must require more than purely speculative allegations about the motives behind a federal campaign's decisions before conducting a potentially intrusive investigation into its federal activities. The Commission's decision not to pursue the complaint in the Michaud for Congress matter underscores that there must be more than pure speculation supporting a complaint against a federal committee.

III. Authorizing An Investigation Into The "True Purpose" Of The Campaign's Polling Would Raise Serious First Amendment Concerns.

Mr. Jamieson asks the Commission to authorize an investigation into a federal campaign committee to uncover the "true purpose" of its polling activities and substantiate his baseless and speculative allegations. But the Commission's investigation of these allegations would be a fishing expedition into a federal campaign's activities that would raise serious First Amendment concerns.

In an investigation into the "true purpose" of CFS's polling, the Commission would by definition be demanding sensitive information related to campaign strategy and messaging. Such information is entitled to the strongest First Amendment protection. For example, the Ninth Circuit in *Perry v. Schwarzenegger*, 591 F.3d 1147 (9th Cir. 2010), held that internal campaign communications regarding strategy and messaging are protected from civil discovery by the First Amendment. "[C]ompelled disclosure of internal campaign communications can deter protected

[6] 52 U.S.C. § 30143(a).
[7] 11 C.F.R. § 108.7(b)(3).
[8] AO 2012-10 at 4; AO 2009-21 at 4; AO 1995-41 at 2.
[9] 21-A M.R.S. § 1011.

activities[] by chilling participation and by muting the internal exchange of ideas." *Id.* at 1163. Demanding information related to CFS's polling would implicate those exact concerns.

In light of these important First Amendment interests, and the inevitable disputes that would arise in an investigation of CFS's polling activities, the Commission should decline to authorize an investigation in this matter.

IV. An Investigation Would Be A Waste Of Commission Resources Because The Alleged Violation of § 1015-B Is Not Subject To A Penalty.

The Maine statutes do not prescribe a penalty for violations of § 1015-B where, as here, the respondent did not become a state candidate. Sections 1004 and 1004-A, which describe the consequences of violations of various provisions of Maine's campaign finance laws, do not provide a penalty for violating § 1015-B in the manner described in the complaint.

Although §§ 1004 and 1004-A provide that accepting illegal contributions can result in a penalty, an individual's receipt of funds, goods, or services for the purpose of deciding whether to become a candidate is not a "contribution" under § 1015-B *unless* "the individual becomes a [state] candidate." *See also* Code Me. R. tit. 94-270, Ch. 1, § 6.10 ("Funds or services received solely for the purpose of conducting activities to determine whether an individual should become a candidate are not contributions if the individual does not become a candidate."). Senator Collins did not become a candidate for governor. Even assuming (incorrectly) that CFS's polling activities were for the purpose of helping Senator Collins decide whether to run for governor, such activities did not result in a contribution under § 1015-B because Senator Collins did not become a state candidate. Thus, the provisions of §§ 1004 and 1004-A regarding illegal contributions simply do not apply in this matter.

In light of the fact that the Commission may not issue a penalty in this case, it would be a waste of Commission resources to pursue the complaint. The open-ended nature of an investigation into the "true purpose" of CFS's polling activities and inevitable disputes regarding CFS's First Amendment rights would require the Commission to devote significant resources to investigating Mr. Jamieson's allegations. The fact that Mr. Jamieson has asked for an investigation into alleged violations that are not even subject to penalty underscores the frivolous nature of his complaint and its clear political purpose to cast Senator Collins in a negative light.

In these circumstances, the Commission should exercise its discretion and decline to authorize an investigation.

CONCLUSION

In sum, the Commission should follow its precedent and decline to investigate a federal political committee on the basis of purely speculative allegations when the federal committee has demonstrated that its activities were for federal purposes. Senator Collins did not violate § 1015-B, because the polling activities her campaign conducted in 2017 were not for the purpose of deciding whether to run for governor but to project her continued strong standing among Maine voters. Moreover, pursuing Mr. Jamieson's complaint would be a waste of Commission resources and would present serious First Amendment concerns.

Accordingly, we respectfully ask that you decline to authorize an investigation and dismiss the complaint.

Sincerely,

Megan S. Newton
Stephen J. Kenny
JONES DAY
51 Louisiana Ave., NW
Washington, DC 20001

cc: Joshua A. Tardy, Esq.

§ 1003. Investigations by commission

1. Investigations. The commission may undertake audits and investigations to determine whether a person has violated this chapter, chapter 14 or the rules of the commission. For this purpose, the commission may subpoena witnesses and records whether located within or without the State and take evidence under oath. A person or entity that fails to obey the lawful subpoena of the commission or to testify before it under oath must be punished by the Superior Court for contempt upon application by the Attorney General on behalf of the commission. The Attorney General may apply on behalf of the commission to the Superior Court or to a court of another state to enforce compliance with a subpoena issued to a nonresident person. Service of any subpoena issued by the commission may be accomplished by:

A. Delivering a duly executed copy of the notice to the person to be served or to a partner or to any officer or agent authorized by appointment or by law to receive service of process on behalf of that person;

B. Delivering a duly executed copy of the notice to the principal place of business in this State of the person to be served; or

C. Mailing by registered or certified mail a duly executed copy of the notice, addressed to the person to be served, to the person's principal place of business.

2. Investigations requested. A person may apply in writing to the commission requesting an investigation as described in subsection 1. The commission shall review the application and shall make the investigation if the reasons stated for the request show sufficient grounds for believing that a violation may have occurred.

2-A. Repealed. Laws 2001, c. 535, § 1.

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

3-A. Confidential records. Investigative working papers of the commission are confidential, except that the commission may disclose them to the subject of the audit or investigation, other entities as necessary for the conduct of an audit or investigation and law enforcement and other agencies for purposes of reporting, investigating or prosecuting a criminal or civil violation. For purposes of this subsection, "investigative working papers" means documents, records and other printed or electronic information in the following limited categories that are acquired, prepared or maintained by the commission during the conduct of an audit, investigation or other enforcement matter:

A. Financial information not normally available to the public;

B. Information that, if disclosed, would reveal sensitive political or campaign information belonging to a party committee, political action committee, ballot question committee, candidate or candidate's political committee, or other person who is the subject of an audit, investigation or other enforcement matter, even if the information is in the possession of a vendor or 3rd party;

C. Information or records subject to a privilege against discovery or use as evidence; and

D. Intra-agency or interagency communications related to an audit or investigation, including any record of an interview, meeting or examination.

The commission may disclose investigative working papers or discuss them at a public meeting, except for the information or records subject to a privilege against discovery or use as evidence, if the information or record is materially relevant to a memorandum or interim or final report by the commission staff or a decision by the commission concerning an audit, investigation or other enforcement matter. A memorandum or report on the audit or investigation prepared by staff for the commission may be disclosed at the time it is submitted to the commission, as long as the subject of the audit or investigation has an opportunity to review it first to identify material that the subject of the audit or investigation considers privileged or confidential under some other provision of law.

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

§ 1004-A. Penalties

The commission may assess the following penalties in addition to the other monetary sanctions authorized in this chapter.

1. Late campaign finance report. A person that files a late campaign finance report containing no contributions or expenditures may be assessed a penalty of no more than $100.

2. Contribution in excess of limitations. A person that accepts or makes a contribution that exceeds the limitations set out in section 1015, subsections 1 and 2 may be assessed a penalty of no more than the amount by which the contribution exceeded the limitation.

3. Contribution in name of another person. A person that makes a contribution in the name of another person, or that knowingly accepts a contribution made by one person in the name of another person, may be assessed a penalty not to exceed $5,000.

4. Substantial misreporting. A person that files a campaign finance report that substantially misreports contributions, expenditures or other campaign activity may be assessed a penalty not to exceed $5,000.

5. Material false statements. A person that makes a material false statement or that makes a statement that includes a material misrepresentation in a document that is required to be submitted to the commission, or that is submitted in response to a request by the commission, may be assessed a penalty not to exceed $5,000.

When the commission has reason to believe that a violation has occurred, the commission shall provide written notice to the candidate, party committee, political action committee, committee treasurer or other respondent and shall afford them an opportunity to appear before the commission before assessing any penalty. In determining any penalty under subsections 3, 4 and 5, the commission shall consider, among other things, the level of intent to mislead, the penalty necessary to deter similar misconduct in the future and the harm suffered by the public from the incorrect disclosure. A final determination by the commission may be appealed to the Superior Court in accordance with Title 5, chapter 375, subchapter 7 and the Maine Rules of Civil Procedure Rule 80C.

Penalties assessed pursuant to this section that have not been paid in full within 30 days after issuance of a notice of the final determination may be enforced in accordance with section 1004-B.

§ 1011. Application

This subchapter applies to candidates for all state and county offices and to campaigns for their nomination and election. Candidates for municipal office as described in Title 30-A, section 2502, subsection 1 are also governed by this subchapter. The commission does not have jurisdiction over financial activities to influence the nomination or election of candidates for federal office.

…

§ 1015. Limitations on contributions and expenditures

1. Individuals. An individual may not make contributions to a candidate in support of the candidacy of one person aggregating more than $1,500 in any election for a gubernatorial candidate, more than $350 for a legislative candidate, more than $500 for a candidate for municipal office and beginning January 1, 2012 more than $750 in any election for any other candidate. This limitation does not apply to contributions in support of a candidate by that candidate or that candidate's spouse or domestic partner. Beginning December 1, 2010, contribution limits in accordance with this subsection are adjusted every 2 years based on the Consumer Price Index as reported by the United States Department of Labor, Bureau of Labor Statistics and rounded to the nearest amount divisible by $25. The commission shall post the current contribution limit and the amount of the next adjustment and the date that it will become effective on its publicly accessible website and include this information with any publication to be used as a guide for candidates.

2. Committees; corporations; associations. A political committee, political action committee, other committee, firm, partnership, corporation, association or organization may not make contributions to a candidate in support of the candidacy of one person aggregating more than $1,500 in any election for a gubernatorial candidate, more than $350 for a legislative candidate, more than $500 for a candidate for municipal office and beginning January 1, 2012 more than $750 in any election for any other candidate. Beginning December 1, 2010, contribution limits in

accordance with this subsection are adjusted every 2 years based on the Consumer Price Index as reported by the United States Department of Labor, Bureau of Labor Statistics and rounded to the nearest amount divisible by $25. The commission shall post the current contribution limit and the amount of the next adjustment and the date that it will become effective on its publicly accessible website and include this information with any publication to be used as a guide for candidates.

3. Aggregate contributions. No individual may make contributions to candidates aggregating more than $25,000 in any calendar year. This limitation does not apply to contributions in support of a candidate by that candidate or that candidate's spouse or domestic partner.

…

§ 1015-B. Donations to an individual considering whether to become a candidate

If an individual receives funds, goods or services for the purpose of deciding whether to become a candidate, the funds, goods or services may not exceed the limitations in section 1015, subsections 1 and 2. The individual shall keep an account of such funds, goods or services received and all payments and obligations incurred in deciding whether to become a candidate. If the individual becomes a candidate, the funds, goods and services received are contributions and the payments and obligations are expenditures. The candidate shall disclose the contributions and expenditures in the first report filed by the candidate or the candidate's authorized campaign committee, in accordance with the commission's procedures.

CMR 94-270-001

This document reflects changes current through April 2, 2020

94 270 001. PROCEDURES

SECTION 6. CONTRIBUTIONS AND OTHER RECEIPTS

…

10. Funds or services received solely for the purpose of conducting activities to determine whether an individual should become a candidate are not contributions if the individual does not become a candidate. Examples of such activities include, but are not limited to, conducting a poll, telephone calls, and travel. The individual shall keep records of all such funds or services received. If the individual becomes a candidate, the funds or services received are contributions and are subject to the reporting requirements of 21-A M.R.S.A. §1017. The amount and source of such funds or the value of services received must be disclosed in the first report filed by the candidate or the candidate's authorized campaign committee, regardless of

the date when the funds or services were received, in accordance with the Commission's procedures for reporting contributions.

Funds or services used by an individual for activities indicating that he or she has decided to become a candidate for a particular office are contributions. Examples of such activities include, but are not limited to: using general public political advertising to publicize his or her intention to campaign for office; hiring staff or consultants for campaign activities; raising funds in excess of what could reasonably be expected to be used for exploratory activities; making or authorizing statements that refer to him or her as a candidate; or taking action to qualify for the ballot.

...

SECTION 7. EXPENDITURES

...

8. Payments made or obligations incurred solely for the purpose of conducting activities to determine whether an individual should become a candidate are not expenditures if the individual does not become a candidate. Examples of such activities include, but are not limited to, conducting a poll, telephone calls, and travel. The individual shall keep records of all such payments and obligations. If the individual becomes a candidate, the payments made or obligations incurred are expenditures and are subject to the reporting requirements of 21-A M.R.S.A. §1017. Such expenditures must be disclosed in the first report filed by the candidate or the candidate's authorized campaign committee, regardless of the date when the funds were expended, in accordance with the Commission's procedures for reporting expenditures.

Payments made for activities indicating that an individual has decided to become a candidate for a particular office are expenditures. Examples of such activities include, but are not limited to: using general public political advertising to publicize his or her intention to campaign for office; hiring staff or consultants for campaign activities; raising funds in excess of what could reasonably be expected to be used for exploratory activities; making or authorizing statements that refer to him or her as a candidate; or taking action to qualify for the ballot.

...

52 USCS § 30143

Current through Public Law 116-140, approved April 28, 2020.

United States Code Service > TITLE 52. VOTING AND ELECTIONS (Subts. I — III) > Subtitle III. FEDERAL CAMPAIGN FINANCE (Ch. 301) > CHAPTER 301. FEDERAL ELECTION CAMPAIGNS (§§ 30101 — 30146) > GENERAL PROVISIONS (§§ 30141 — 30146)

§ 30143. State laws affected

(a) In general. Subject to subsection (b), the provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office.

(b) State and local committees of political parties. Notwithstanding any other provision of this Act, a State or local committee of a political party may, subject to State law, use exclusively funds that are not subject to the prohibitions, limitations, and reporting requirements of the Act for the purchase or construction of an office building for such State or local committee.

History

HISTORY:

Act Feb. 7, 1972, P. L. 92-225, Title IV, § 403, 86 Stat. 20; Oct. 15, 1974, P. L. 93-443, Title III, § 301, 88 Stat. 1289; March 27, 2002, P. L. 107-155, Title I, § 103(b)(2), 116 Stat. 87.

End of Document

11 CFR 101.3

This document is current through the May 12, 2020 issue of the Federal Register. Title 3 is current through May 8, 2020.

Code of Federal Regulations > TITLE 11 -- FEDERAL ELECTIONS > CHAPTER I -- FEDERAL ELECTION COMMISSION > SUBCHAPTER A -- GENERAL > PART 101 -- CANDIDATE STATUS AND DESIGNATIONS (52 U.S.C. 30102(E))

§ 101.3 Funds received or expended prior to becoming a candidate (52 U.S.C. 30102(e)(2)).

When an individual becomes a candidate, all funds received or payments made in connection with activities conducted under 11 CFR 100.72(a) and 11 CFR 100.131(a) or his or her campaign prior to becoming a candidate shall be considered contributions or expenditures under the Act and shall be reported in accordance with 11 CFR 104.3 in the first report filed by such candidate's principal campaign committee. The individual shall keep records of the name of each contributor, the date of receipt and amount of all contributions received (see 11 CFR 102.9(a)), and all expenditures made (see 11 CFR 102.9(b)) in connection with activities conducted under 11 CFR 100.72 and 11 CFR 100.131 or the individual's campaign prior to becoming a candidate.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

52 U.S.C. 30102(e), (g), 30104(a)(11), and 30111(a)(8).

History

[50 FR 9995, Mar. 13, 1985; ratified at 58 FR 59640, Nov. 10, 1993; 67 FR 78679, 78680, Dec. 26, 2002; 75 FR 29, 31, Jan. 4, 2010; 79 FR 77841, 77845, Dec. 29, 2014]

End of Document

11 CFR 100.131

This document is current through the May 12, 2020 issue of the Federal Register. Title 3 is current through May 8, 2020.

Code of Federal Regulations > TITLE 11 -- FEDERAL ELECTIONS > CHAPTER I -- FEDERAL ELECTION COMMISSION > SUBCHAPTER A -- GENERAL > PART 100 -- SCOPE AND DEFINITIONS (52 U.S.C. 30101) > SUBPART E -- EXCEPTIONS TO EXPENDITURES

§ 100.131 Testing the waters.

(a) General exemption. Payments made solely for the purpose of determining whether an individual should become a candidate are not expenditures. Examples of activities permissible under this exemption if they are conducted to determine whether an individual should become a candidate include, but are not limited to, conducting a poll, telephone calls, and travel. Only funds permissible under the Act may be used for such activities. The individual shall keep records of all such payments. See 11 CFR 101.3. If the individual subsequently becomes a candidate, the payments made are subject to the reporting requirements of the Act. Such expenditures must be reported with the first report filed by the principal campaign committee of the candidate, regardless of the date the payments were made.

(b) Exemption not applicable to individuals who have decided to become candidates. This exemption does not apply to payments made for activities indicating that an individual has decided to become a candidate for a particular office or for activities relevant to conducting a campaign. Examples of activities that indicate that an individual has decided to become a candidate include, but are not limited to:

(1) The individual uses general public political advertising to publicize his or her intention to campaign for Federal office.

(2) The individual raises funds in excess of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate.

(3) The individual makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office.

(4) The individual conducts activities in close proximity to the election or over a protracted period of time.

(5) The individual has taken action to qualify for the ballot under State law.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

52 U.S.C. 30101, 30102(g), 30104, 30111(a)(8), and 30114(c).

11 CFR 100.72

This document is current through the May 12, 2020 issue of the Federal Register. Title 3 is current through May 8, 2020.

Code of Federal Regulations > TITLE 11 -- FEDERAL ELECTIONS > CHAPTER I -- FEDERAL ELECTION COMMISSION > SUBCHAPTER A -- GENERAL > PART 100 -- SCOPE AND DEFINITIONS (52 U.S.C. 30101) > SUBPART C -- EXCEPTIONS TO CONTRIBUTIONS

§ 100.72 Testing the waters.

(a) General exemption. Funds received solely for the purpose of determining whether an individual should become a candidate are not contributions. Examples of activities permissible under this exemption if they are conducted to determine whether an individual should become a candidate include, but are not limited to, conducting a poll, telephone calls, and travel. Only funds permissible under the Act may be used for such activities. The individual shall keep records of all such funds received. See 11 CFR 101.3. If the individual subsequently becomes a candidate, the funds received are contributions subject to the reporting requirements of the Act. Such contributions must be reported with the first report filed by the principal campaign committee of the candidate, regardless of the date the funds were received.

(b) Exemption not applicable to individuals who have decided to become candidates. This exemption does not apply to funds received for activities indicating that an individual has decided to become a candidate for a particular office or for activities relevant to conducting a campaign. Examples of activities that indicate that an individual has decided to become a candidate include, but are not limited to:

(1) The individual uses general public political advertising to publicize his or her intention to campaign for Federal office.

(2) The individual raises funds in excess of what could reasonably be expected to be used for exploratory activities or undertakes activities designed to amass campaign funds that would be spent after he or she becomes a candidate.

(3) The individual makes or authorizes written or oral statements that refer to him or her as a candidate for a particular office.

(4) The individual conducts activities in close proximity to the election or over a protracted period of time.

(5) The individual has taken action to qualify for the ballot under State law.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

52 U.S.C. 30101, 30102(g), 30104, 30111(a)(8), and 30114(c).

11 CFR 108.7

This document is current through the April 29, 2020 issue of the Federal Register with the exception of the amendments appearing at 85 FR 23459 and 85 FR 23470. Title 3 is current through April 3, 2020.

Code of Federal Regulations > TITLE 11 -- FEDERAL ELECTIONS > CHAPTER I -- FEDERAL ELECTION COMMISSION > SUBCHAPTER A -- GENERAL > PART 108 -- FILING COPIES OF REPORTS AND STATEMENTS WITH STATE OFFICERS (52 U.S.C. 30113)

§ 108.7 Effect on State law (52 U.S.C. 30143).

(a) The provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law with respect to election to Federal office.

(b) Federal law supersedes State law concerning the --

(1) Organization and registration of political committees supporting Federal candidates;

(2) Disclosure of receipts and expenditures by Federal candidates and political committees; and

(3) Limitation on contributions and expenditures regarding Federal candidates and political committees.

(c) The Act does not supersede State laws which provide for the --

(1) Manner of qualifying as a candidate or political party organization;

(2) Dates and places of elections;

(3) Voter registration;

(4) Prohibition of false registration, voting fraud, theft of ballots, and similar offenses;

(5) Candidate's personal financial disclosure; or

(6) Application of State law to the funds used for the purchase or construction of a State or local party office building to the extent described in 11 CFR 300.35.

Statutory Authority

AUTHORITY NOTE APPLICABLE TO ENTIRE PART:

52 U.S.C. 30102(g), 30104(a)(2), 30111(a)(8), 30113, 30143.

History

[45 FR 15117, Mar. 7, 1980; ratified at 58 FR 59640, Nov. 10, 1993; 67 FR 49064, 49119, July 29, 2002; 79 FR 77841, 77847, Dec. 29, 2014]

Bunning v. Kentucky

United States Court of Appeals for the Sixth Circuit

October 12, 1994, Argued ; December 22, 1994, Decided ; December 22, 1994, Filed

No. 94-5287

Reporter
42 F.3d 1008 *; 1994 U.S. App. LEXIS 36103 **; 1994 FED App. 0416P (6th Cir.) ***

JAMES BUNNING, Plaintiff-Appellee, v. COMMONWEALTH OF KENTUCKY; and KENTUCKY REGISTRY OF ELECTION FINANCE, An Independent Agency of the Commonwealth of Kentucky, Defendants-Appellants.

Prior History: [**1] ON APPEAL from the United States District Court for the Eastern District of Kentucky. District No. 94-00008. Joseph M. Hood, District Judge.

Counsel: For JAMES BUNNING, Plaintiff - Appellee: John C. Greiner, ARGUED, BRIEFED, Graydon, Head & Ritchey, Cincinnati, OH. J. Jeffrey Landen, Richard L. Robinson, BRIEFED, Graydon, Head & Ritchey, Florence, KY.

For COMMONWEALTH OF KENTUCKY, KENTUCKY REGISTRY OF ELECTION FINANCE, an independent agency of the Commonwealth of Kentucky, Defendants - Appellants: Timothy E. Shull, ARGUED, BRIEFED, Donald H. Vish, BRIEFED, Kentucky Registry of Election Finance, Frankfort, KY.

Judges: Before: KEITH and DAUGHTREY, Circuit Judges; and JOINER, District Judge [*] .

Opinion by: CHARLES W. JOINER

Opinion

[***2] [*1009] CHARLES W. JOINER, District Judge. Defendants, the Commonwealth of Kentucky and the Kentucky Registry of Election Finance (collectively, the "Registry"), appeal the judgment in favor of plaintiff, United States Congressman James Bunning. This case arose out of the Registry's attempt to investigate a poll conducted by Congressman Bunning's federal election committee to test the effectiveness of advertising conducted during his 1992 federal campaign. The Registry claimed that Congressman Bunning also may have used the poll to assess his potential as a future gubernatorial candidate, and that state law prohibited exploratory activity such as this. Congressman Bunning filed suit in federal court, contending that federal law preempted state law, and precluded the Registry from investigating the poll. The district court determined that it had subject matter jurisdiction and was not required [**2] to abstain from adjudicating the parties' dispute. Further, the court concluded that the Federal Election Campaign Act, 2 U.S.C. §§ 431 et seq., preempted Kentucky law on the facts of

[*] The Honorable Charles W. Joiner, United States District Court for the Eastern District of Michigan, sitting by designation.

this case, and enjoined the Registry from taking further action with respect to the poll. Finally, the court awarded attorney fees to Congressman Bunning.

The Registry appeals each of these rulings. We conclude that the award of attorney fees must be reversed. We affirm in all other respects.

I.

A.

In 1992, Kentucky amended its general campaign finance statute, Ky. Rev. Stat. Ann. Chapter 121, §§ 121.015 et seq. (Baldwin Supp. 1993); and also enacted the Public Financing Campaign Act, Ky. Rev. Stat. Ann. Chapter 121A, §§ 121A.005 et seq. (Baldwin Supp. 1993), which provides for public financing of gubernatorial elections. Under the new system, candidates for governor and lieutenant governor must register as a slate, Ky. Rev. Stat. § 118.127, and file a "notice of intent" which discloses whether the candidates intend to participate in public [***3] financing, a decision which will dictate which set of financing provisions apply to them. Ky. Rev. Stat. § 121A.040. [**3] A "participating" slate must agree to abide by specified limits on campaign expenditures during the primary, run-off primary, and general election. Ky. Rev. Stat. § 121A.030. A slate has the option of not participating in public financing, and, if it so chooses, is not subject to these limits. [1] The 1995 gubernatorial election will be the first conducted under the new law.

The Registry of Election Finance is charged with responsibility for overseeing compliance with Kentucky's election finance law generally, and for investigating alleged violations of the law. The Registry is authorized to investigate complaints; issue subpoenas and seek enforcement of those subpoenas in state court; hold hearings, receive evidence and issue orders; and issue advisory opinions. Ky. [**4] Rev. Stat. §§ 121.120-121.140.

Registry attorney Anita Stanley testified at trial regarding the Registry's efforts to promulgate regulations and develop enforcement procedures under the new law. Pertinent to its investigation of Congressman Bunning, Stanley testified that the expenditure limitations apply to amounts spent both before and after a slate's notice of intent is filed. The Registry's legal staff has informed potential candidates asking for guidance that the Public Financing Campaign Act "does not allow for exploratory activity because such activity would not be subject to any reporting requirements and, therefore, there's no accountability. And we have basically told everyone, you cannot spend the money until you form a slate." Stanley acknowledged that this proscription derives from the Registry's interpretation of several provisions of the public financing law, not an [***4] express statutory prohibition. The Registry has not identified those provisions on which it bases its interpretation. At the time of trial, legislation was being proposed to "deal with the question of exploratory activity by statute because it is not addressed at this point. We would like to see something [**5] on [*1010] the books that ties it up so that we can enforce it."

Congressman Bunning, a Republican, was elected to his fourth term in 1992. In August 1993, a Kentucky newspaper published an article regarding a poll conducted by Congressman Bunning, quoting him as stating that he considered running in the 1995 gubernatorial election to be a "valid option" if Republicans did not make gains in the 1994 national elections. According to the article, Congressman Bunning's top priority remained winning reelection to his House seat in 1994. [2] The

[1] If expenditures by a nonparticipating slate exceed the limits applicable to participating slates, the participating slates may be released from the expenditure limitation, while still being eligible for public funding. Ky. Rev. Stat. § 121A.080(4)(a).

[2] Congressman Bunning won reelection in November 1994. Presumably, his concerns regarding his party's representation in

article further reported that his "statewide considerations" were buoyed by the poll, which sampled 600 people across the state, and compared him to Democrats viewed as gubernatorial possibilities.

> At this juncture, Bunning said he does not intend to run for governor. But given the results of the poll, and the GOP's minority [**6] status in Congress, it's something he plans to consider.
> "The '94 congressional elections are vital to me," Bunning said. "I don't enjoy being in the minority. But if things turn out like I think they might, I believe we'll have more balance."

Based on this article, the chairman of Kentucky's Democratic Party filed a complaint with the Registry, relying on the Registry's interpretation of the new law as [***5] prohibiting expenditures for exploratory activity. The complaint alleged that the statewide poll was in violation because it covered an area larger than Congressman Bunning's district and provided information on his rating as a possible candidate for governor.

Congressman Bunning responded by affidavit, stating that he was a present member of Congress and a potential candidate for reelection, and that he had registered a committee with the Federal Election Commission ("FEC") by the name of Citizens for Bunning. Congressman Bunning explained that four media markets penetrated his Congressional district, and that those markets extend far outside the district. Congressman Bunning stated that his campaign committee had purchased commercial air time in all four markets during his [**7] previous campaign, and conducted the poll to test the effectiveness of that advertising both inside and outside the district. Congressman Bunning stated that the poll was conducted in connection with election to a federal office, and expressly denied that it was conducted in furtherance of election to any state office. Finally, Congressman Bunning stated that the expenditure for the poll was regulated by the FEC and proper under its guidelines, and that the Registry was preempted from taking action to review the expenditures for the poll.

The Registry requested Congressman Bunning to voluntarily produce the questions asked in the poll, but Congressman Bunning declined. Despite Registry counsel's stated opinion that the Registry lacked jurisdiction and that the complaint should be referred to the FEC for investigation, the Registry again requested Congressman Bunning to produce the poll questions so that the Registry could determine whether it had jurisdiction. When he failed to do so, the Registry issued a subpoena for the poll questions.

[***6] B.

Upon being notified that the Registry intended to issue a subpoena, Congressman Bunning filed suit in federal court, alleging that the Federal [**8] Election Campaign Act preempted the Registry from taking any further action against him regarding the poll. Congressman Bunning moved for a preliminary injunction and defendants moved to dismiss for lack of subject matter jurisdiction and for failure to state a claim on which relief can be granted. On the parties' joint motion, trial on the merits was merged with a hearing on the motions.

The only witness to testify other than Registry attorney Stanley was Oteka Brab, the treasurer of Citizens for Bunning. Brab testified that the committee was subject to federal law and oversight by the FEC. As committee treasurer, Brab reported campaign receipts and expenditures to the FEC, including the $ 1400 spent on the poll in question. Brab further testified that a candidate [*1011] is not prohibited by federal law from receiving campaign contributions from donors outside his district, and that Congressman Bunning had received such donations in the past. Finally, Brab testified that Citizens for Bunning had conducted statewide polls in the past, as often as every two

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Congress have been allayed by that election.

years.

The district court found in Congressman Bunning's favor, awarding him declaratory and injunctive relief, costs, and attorney [**9] fees in an amount to be determined after this appeal.

II.

The Registry challenges the district court's holdings that it had subject matter jurisdiction and need not abstain from deciding this case, that federal law preempted state law, and that Congressman Bunning was entitled to attorney fees.

[***7] The district court's subject matter jurisdiction to entertain Congressman Bunning's preemption challenge to the Registry's investigation is clear. *Lawrence County v. Lead-Deadwood Sch. Dist. No. 1*, 469 U.S. 256, 259 n.6, 83 L. Ed. 2d 635, 105 S. Ct. 695 (1985); *Shaw v. Delta Airlines, Inc.*, 463 U.S. 85, 96 n.14, 77 L. Ed. 2d 490, 103 S. Ct. 2890 (1983) [3] ; *Alltel Tennessee, Inc. v. Tennessee Pub. Serv. Comm'n*, 913 F.2d 305 (6th Cir. 1990). The propriety of the district court's refusal to abstain likewise is settled. "Abstention rarely should be invoked, because the federal courts have a 'virtually unflagging obligation . . . to exercise the jurisdiction given them.'" *Ankenbrandt v. Richards*, 119 L. Ed. 2d 468, 112 S. Ct. 2206, 2215 (1992) [**10] (quoting *Colorado River Water Conservation Dist. v. United States*, 424 U.S. 800, 817, 47 L. Ed. 2d 483, 96 S. Ct. 1236 (1976)). This court has concluded that abstention is not required in a case presenting facially conclusive claims of federal preemption, where resolution of the dispute does not require the court to interpret state law or make factual findings. *Norfolk & Western Ry. v. Public Utilities Comm'n of Ohio*, 926 F.2d 567, 573 (6th Cir. 1991).

[**11] The central question is whether the Federal Election Campaign Act, 2 U.S.C. §§ 431 et seq. ("FECA"), preempts Kentucky law, and thus precludes the Registry from investigating the July 1993 poll. Originally enacted in 1971, the FECA sets forth comprehensive rules [***8] regarding campaigns for federal office. The FECA imposes limits and restrictions on contributions; provides for the formation and registration of political committees; and mandates reporting and disclosure of receipts and disbursements made by such committees. 2 U.S.C. §§ 432-434. The FECA also created the Federal Election Commission, which is empowered with the administration and enforcement of the Act. 2 U.S.C. §§ 437c-438. To this end, the FEC is authorized to conduct investigations, issue subpoenas, administer oaths, receive evidence, and initiate civil actions to enforce the provisions of the FECA.

In determining the preemptive scope of the FECA, we are guided by *Cipollone v. Liggett Group, Inc.*, 120 L. Ed. 2d 407, 112 S. Ct. 2608 (1992), where the Supreme Court stated [**12] that consideration of issues under the Supremacy Clause "'starts with the assumption that the historic powers of the States [are] not to be superseded by . . . Federal Act unless that [is] the clear and manifest purpose of Congress.'" 112 S. Ct. at 2617 (quoting *Rice v. Santa Fe Elevator Corp*, 331 U.S. 218, 230, 91 L. Ed. 1447, 67 S. Ct. 1146 (1947)). When Congress has enacted a preemption which provides a reliable indicium of congressional intent with respect to state authority, the court need only "identify the domain expressly pre-empted[.]" *Id.* at 2618.

[*1012] With its 1974 amendments to the FECA, Congress added an express preemption clause which states that the "provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. § 453. Section

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[3] In *Shaw*, the Court stated:

> It is beyond dispute that federal courts have jurisdiction over suits to enjoin state officials from interfering with federal rights. A plaintiff who seeks injunctive relief from state regulation, on the ground that such regulation is pre-empted by a federal statute which, by virtue of the Supremacy Clause of the Constitution, must prevail, thus presents a federal question which the federal courts have jurisdiction under 28 U.S.C. § 1331 to resolve.

463 U.S. at 96 n.14 (citations omitted).

453 replaced a prior provision which expressly saved state laws from preemption, except where compliance with state law would result in a violation of the FECA, or would prohibit conduct permitted by the FECA. *See* 2 U.S.C. § 453 [**13] note. Pursuant to § 453, "Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect State laws as to the manner of qualifying as a candidate, or [***9] the dates and places of elections." S. Conf. Rep. No. 1237, 93d Cong., 2d Sess. (1974), *reprinted in* 1974 U.S.C.C.A.N. 5618, 5668. The interpretive regulation, 11 C.F.R. § 108.7, sets forth the statute's preemptive scope in accordance with the statute's plain language and its legislative history:

> (a) The provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law with respect to election to Federal office.
>
> (b) Federal law supersedes State law concerning the --
>
> (1) Organization and registration of political committees supporting Federal candidates;
>
> (2) Disclosure of receipts and expenditures by Federal candidates and political committees; and
>
> (3) Limitation on contributions and expenditures regarding Federal candidates and political committees.
>
> (c) The Act does not supersede State [**14] laws which provide for the--
>
> (1) Manner of qualifying as a candidate or political party organization;
>
> (2) Dates and places of elections;
>
> (3) Voter registration;
>
> (4) Prohibition of false registration, voting fraud, theft of ballots, and similar offenses; or
>
> (5) Candidate's personal financial disclosure.

[***10] We conclude that § 453 preempts state law in this case. It is undisputed that the expenditure for the poll was made by a federal political committee, duly registered with the FEC. The expenditure was reported to the FEC, and there is no claim that an expenditure for a poll, a stated purpose of which was to test the effectiveness of advertising conducted during a federal campaign, is in any way unlawful under the FECA. At the time that the poll was conducted, Congressman Bunning had not declared himself a candidate for the gubernatorial race, and had expressly disavowed an intent to run in that race. On these facts, the Registry's intrusion into Congressman Bunning's federally regulated activity constituted an attempt to impose on a federal political committee Kentucky's requirements on both on the disclosure of expenditures and the limits on expenditures [**15] made by such a committee. The Registry's claimed right to do so is preempted by § 453 and 11 C.F.R. § 108.7(b)(2) and (3).

The Registry contends that the FEC itself would not view the Registry's investigation to be preempted by federal law. The Registry relies on FEC advisory opinions in which the FEC stated that excess campaign funds previously contributed to a candidate's federal campaign, if transferred to a state political committee for use in a state campaign, would be subject to state law and not preempted by federal law. *See FEC Advisory Opinions* 1993-10; 1986-5. These advisory opinions, however, are concerned principally with whether the use of funds contributed to federal campaigns for other purposes is lawful under 2 U.S.C. § 439a. The advisory opinions address the situation in which federal campaign funds are transferred or donated for permissible uses, and have no applicability to a state's attempt to investigate expenditures made by a federal political committee, where that expenditure remains subject to federal law and is duly reported to the FEC.

We are at a loss to identify a legitimate state interest in this expenditure. The [**16] Registry contends that Congressman Bunning used the poll, in part, to test the waters for a [***11] [*1013] possible gubernatorial run, and that this constituted "exploratory activity" prohibited by the new Public

Financing Campaign Act. However, the Registry cannot identify a specific provision prohibiting such activity, and has not identified the various provisions which it claims combine to create such a prohibition. Moreover, we have grave concerns that such a construction of the statute would have a profound chilling effect on the exercise of protected rights to free association and speech. [4]

[**17] The Registry's final challenge is to the award of attorney fees to Congressman Bunning. The authority of a district court to make such an award is delineated in *Alyeska Pipeline Service Co. v. Wilderness Society*, 421 U.S. 240, 44 L. Ed. 2d 141, 95 S. Ct. 1612 (1975). The record in this case discloses no permissible basis for a fee award. Thus, we reverse that aspect of the judgment.

We AFFIRM the district court's entry of declaratory and injunctive relief, and **REVERSE** the order awarding attorney fees.

End of Document

[4] Shifting the justification for its investigation, the Registry now suggests that Congressman Bunning may have violated state reporting and disclosure requirements by not reporting the poll expenditure to the Registry. This allegation was not the basis for either the complaint against Congressman Bunning or the Registry's investigation, and was not raised in the district court. Additionally, the Registry's contention is directly refuted by attorney Stanley's testimony at trial that exploratory activity should be prohibited precisely because state reporting requirements do not apply.

Perry v. Schwarzenegger

United States Court of Appeals for the Ninth Circuit

December 1, 2009, Argued and Submitted, Pasadena, California; January 4, 2010, Amended; December 11, 2009, Filed

No. 09-17241, No. 09-17551

Reporter
591 F.3d 1147 *; 2010 U.S. App. LEXIS 170 **; 38 Media L. Rep. 1107

KRISTIN M. PERRY; SANDRA B. STIER; PAUL T. KATAMI; JEFFREY J. ZARRILLO, Plaintiffs - Appellees, and CITY AND COUNTY OF SAN FRANCISCO, Plaintiff-intervenor, v. ARNOLD SCHWARZENEGGER, in his official capacity as Governor of California; EDMUND G. BROWN, Jr., in his official capacity as Attorney General of California; MARK B. HORTON in his official capacity as Director of the California Department of Public Health & State Registrar of Vital Statistics; LINETTE SCOTT, in her official capacity as Deputy Director of Health Information & Strategic Planning for the California Department of Public Health; PATRICK O'CONNELL, in his official capacity as Clerk-Recorder for the County of Alameda; DEAN C. LOGAN, in his official capacity as Registrar-Recorder/County Clerk for the County of Los Angeles, Defendants, and DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F. GUTIERREZ; HAK-SHING WILLIAM TAM; MARK A. JANSSON; PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, Defendant-intervenors - Appellants. KRISTIN M. PERRY; SANDRA B. STIER; PAUL T. KATAMI; JEFFREY J. ZARRILLO, Plaintiffs - Appellees, and OUR FAMILY COALITION; LAVENDER SENIORS OF THE EAST BAY; PARENTS, FAMILIES, AND FRIENDS OF LESBIANS AND GAYS, CITY AND COUNTY OF SAN FRANCISCO, Plaintiff-intervenors - Appellees, v. ARNOLD SCHWARZENEGGER; EDMUND G. BROWN, Jr.; MARK B. HORTON; LINETTE SCOTT; PATRICK O'CONNELL; DEAN C. LOGAN, Defendants, and DENNIS HOLLINGSWORTH; GAIL J. KNIGHT; MARTIN F. GUTIERREZ; HAK-SHING WILLIAM TAM; MARK A. JANSSON; PROTECTMARRIAGE.COM - YES ON 8, A PROJECT OF CALIFORNIA RENEWAL, Defendant-intervenors - Appellants.

Subsequent History: [**1] On remand at, Motion granted by, in part, Motion denied by, in part Perry v. Schwarzenegger, 2010 U.S. Dist. LEXIS 1441 (N.D. Cal., Jan. 8, 2010)

US Supreme Court certiorari dismissed by Hollingsworth v. Perry, 130 S. Ct. 2432, 176 L. Ed. 2d 945, 2010 U.S. LEXIS 3874 (U.S., 2010)

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

Perry v. Schwarzenegger, 2009 U.S. App. LEXIS 27064 (9th Cir. Cal., Dec. 11, 2009)

Disposition: The petition for a writ of mandamus was granted. The district court was directed to enter an appropriate protective order.

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

Theodore J. Boutrous, Jr. (argued), Rebecca Justice Lazarus, Enrique A. Monagas, Gibson, Dunn & Crutcher LLP, Los Angeles, California; Theodore B. Olson, Matthew [**2] D. McGill and Amir C. Tayrani, Gibson, Dunn & Crutcher LLP, Washington, D.C., for Plaintiffs-Appellees.

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

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

Judges: Before: Kim McLane Wardlaw, Raymond C. Fisher and Marsha S. Berzon, Circuit Judges. Opinion by Judge Fisher.

Opinion by: RAYMOND C. FISHER

Opinion

[*1152] AMENDED OPINION

RAYMOND C. FISHER, Circuit Judge:

Proposition 8 amended the California Constitution to provide that only marriage between a man and a woman is valid or recognized in California. Two same-sex couples filed this action in the district court alleging that Proposition 8 violates the Due Process and Equal Protection Clauses of the Fourteenth Amendment. The official proponents of Proposition 8 ("Proponents") intervened to defend the suit. Plaintiffs served a request for production of documents on Proponents, seeking, among other things, production [**3] of Proponents' internal campaign communications relating to campaign strategy and advertising. Proponents objected to disclosure of the documents as barred by the First Amendment. In two orders, the district court rejected Proponents' claim of First Amendment privilege. Proponents appealed both orders and, in the alternative, petitioned for a writ of mandamus directing the district court to grant a protective order. We granted Proponents' motion for stay pending appeal.

We hold that the exceptional circumstances presented by this case warrant issuance of a writ of mandamus. The freedom to associate with others for the common advancement of political beliefs and ideas lies at the heart of the First Amendment. Where, as here, discovery would have the practical effect of discouraging the exercise of First Amendment associational rights, the party seeking such discovery must demonstrate a need for the information sufficient to outweigh the impact on those rights. Plaintiffs have not on the existing record carried that burden in this case. We therefore grant Proponents' petition and direct the district court to enter an appropriate protective order consistent with this opinion.

I. [**4] BACKGROUND

In November 2008, California voters approved Proposition 8, an initiative measure providing that "[o]nly marriage between a man and a woman is valid or recognized in California." Cal. Const. art. I, § 7.5. The California Supreme Court has upheld

Proposition 8 against several state constitutional challenges. *Strauss v. Horton*, 46 Cal. 4th 364, 93 Cal. Rptr. 3d 591, 207 P.3d 48, 63-64 (Cal. 2009). Plaintiffs, two same-sex couples prohibited from marrying, filed this 42 U.S.C. § 1983 action alleging "that Prop. 8, which denies gay and lesbian individuals the right to marry civilly and enter into the same officially sanctioned family relationship with their loved ones as heterosexual individuals, is unconstitutional under the Due Process and Equal Protection Clauses of the Fourteenth Amendment to the United States Constitution." Compl. PP 5, 7. They alleged among other things that "[t]he disadvantage Prop. 8 imposes on gays and lesbians is the result of disapproval or animus against a politically unpopular group." *Id.* P 43. Defendants are a number of state officials responsible for the enforcement of Proposition 8, including the Governor and the Attorney General. *Id.* PP 13-19. [**5] Plaintiffs seek declaratory and injunctive relief. *Id.* P 8.

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

[*1153] Plaintiffs served requests for production of documents on Proponents under Federal Rule of Civil Procedure 34. Plaintiffs' eighth request sought:

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

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

Proponents objected to the request as irrelevant, privileged under the First Amendment and unduly burdensome and filed a motion for a protective order. They argued that their internal campaign communications, including draft versions of communications never actually disseminated to the electorate at large, were privileged under the First Amendment. They offered evidence that the disclosure of [**6] internal strategy documents would burden political association rights by discouraging individuals from participating in initiative campaigns and by muting the exchange of ideas within those campaigns. They asserted that the documents plaintiffs sought were irrelevant to the issues in this case, and even if they were relevant, the First Amendment interests at stake outweighed plaintiffs' need for the information.

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

In an October 1, 2009 order, the district court granted in part and denied in part Proponents' motion for a protective order. The court denied Proponents' claims of privilege. [1] The court also determined that plaintiffs' request was "reasonably calculated to lead to the [**7] discovery of admissible evidence" regarding voter intent, the purpose of Proposition 8 and whether Proposition 8 advances a legitimate governmental interest. The court said that "communications between proponents and political consultants or campaign managers, even about messages contemplated but not actually disseminated, could fairly readily lead to admissible evidence illuminating the messages

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

disseminated to voters." [2]

Following the court's October 1 order, Proponents submitted a sample of documents potentially responsive to plaintiffs' document request for *in camera* review, [*1154] asserting that the documents were both irrelevant and privileged. In a November 11, 2009 order following that review, the district court again rejected Proponents' argument that their internal campaign communications were privileged under the First Amendment:

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

Applying the usual discovery standards of Federal Rule of Civil Procedure 26, the court determined that documents falling into the following categories were reasonably likely [**9] to lead to the discovery of admissible evidence: documents relating to "messages or themes conveyed to voters through advertising or direct messaging," documents dealing "directly with advertising or messaging strategy and themes" and documents discussing voters' "potential reactions" to campaign messages. The court ordered production of 21 of the 60 documents submitted for review.

Proponents appealed from the October 1 and November 11 orders and, in the alternative, petitioned for a writ of mandamus. We granted Proponents' motion for a stay pending appeal. We now grant the petition for a writ of mandamus.

II. JURISDICTION

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

While this appeal was pending, the Supreme Court decided *Mohawk Industries, Inc. v. Carpenter*, 558 U.S. __, 130 S. Ct. 599, 175 L. Ed. 2d 458 (Dec. 8, 2009), holding that discovery orders denying claims of attorney-client privilege are not appealable under the collateral order doctrine. After *Mohawk*, it is uncertain whether the collateral order [**10] doctrine applies to discovery orders denying claims of First Amendment privilege, as we shall explain. Ultimately, we do not resolve the question here. Given the uncertainty, we have decided instead to rely on mandamus to review the district court's rulings. We have repeatedly exercised mandamus review when confronted with extraordinarily important questions of first impression concerning the scope of a privilege. As this case falls within that small class of extraordinary cases, we exercise our supervisory mandamus authority here.

A. Collateral Order Doctrine

We have jurisdiction to review "final decisions of the district courts." 28 U.S.C. § 1291. Under the collateral order doctrine, a litigant may appeal "from a narrow class of decisions that do not terminate the litigation, but must, in the interest of 'achieving a healthy legal system,' nonetheless be treated as 'final.'" *Digital Equip. Corp. v. Desktop Direct, Inc.*, 511 U.S. 863, 867, 114 S. Ct. 1992, 128 L. Ed. 2d 842 (1994) (quoting *Cobbledick v.*

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[2] The court indicated that plaintiffs' request was

> appropriate to the extent it calls for (1) communications by and among proponents and their agents (at a minimum, Schubert Flint Public Affairs) concerning campaign strategy and (2) communications by and among proponents and their agents concerning messages to be conveyed to voters, . . . without regard to whether the messages were actually disseminated or merely contemplated. In addition, communications by and [**8] among proponents with those who assumed a directorial or managerial role in the Prop 8 campaign, like political consultants or ProtectMarriage.com's treasurer and executive committee, among others, would appear likely to lead to discovery of admissible evidence.

United States, 309 U.S. 323, 326, 60 S. Ct. 540, 84 L. Ed. 783 (1940)). To be immediately appealable, a collateral decision "must conclusively determine the disputed question, resolve [**11] an important issue completely separate from the merits of the action, and be effectively unreviewable on appeal from a final judgment." *Coopers & Lybrand v. Livesay*, 437 U.S. 463, 468, 98 S. Ct. 2454, 57 L. Ed. 2d 351 (1978).

The first prong is easily satisfied in this case. Taken together, the October 1 and November 11 discovery orders conclusively determined the scope of the First Amendment [*1155] privilege. The district court concluded that the privilege does not extend to internal campaign communications and that it is limited to the disclosure of identities of rank-and-file members and other similarly situated individuals. Furthermore, in the November 11 order, the district court conclusively determined that Proponents were required to produce 21 documents that, according to the court, were not privileged. *See United States v. Griffin*, 440 F.3d 1138, 1141 (9th Cir. 2006) ("[T]he district court's order 'conclusively determine[s] the disputed question' whether the government is entitled to read the communications between Griffin and his wife for which the [marital communications] privilege had been claimed.").

The second prong is also satisfied. The overall scope of the First Amendment [**12] privilege is a question of law that is entirely separate from the merits of the litigation. In theory, the application of the privilege to plaintiffs' specific discovery requests has some overlap with merits-related issues, such as whether plaintiffs' substantive claims are governed by strict scrutiny or rational basis review and whether plaintiffs may rely on certain types of evidence to prove that Proposition 8 was enacted for an improper purpose. We need not, and do not, delve into those questions in this appeal, however. We assume without deciding that the district court's rulings on those questions are correct. There is, therefore, no "overlap" between the issues we must decide in this appeal and the "factual and legal issues of the underlying dispute." *Van Cauwenberghe v. Biard*, 486 U.S. 517, 529, 108 S. Ct. 1945, 100 L. Ed. 2d 517 (1988).

It is the third prong that poses the most difficult question. Under *Mohawk*, the third prong turns on whether rulings on First Amendment privilege are, as a class, effectively reviewable on appeal from final judgment -- i.e., "whether delaying review until the entry of final judgment 'would imperil a substantial public interest' or 'some particular [**13] value of a high order.'" *Mohawk*, 558 U.S. at __, 130 S. Ct. at 601 (quoting *Will v. Hallock*, 546 U.S. 345, 352-53, 126 S. Ct. 952, 163 L. Ed. 2d 836 (2006)). In *Mohawk*, the Court concluded that this prong was not satisfied with respect to the class of rulings addressing invocation of the attorney-client privilege during discovery. This was so because the typical ruling on the attorney-client privilege will involve only "the routine application of settled legal principles." *Id.* at 468. Denying immediate appellate review would have no "discernible chill" because "deferring review until final judgment does not meaningfully reduce the *ex ante* incentives for full and frank consultations between clients and counsel." *Id.* There being no discernible harm to the public interest, the remaining harm from an erroneous ruling (the harm to the individual litigant of having confidential communications disclosed) could be adequately, if imperfectly, remedied by review after final judgment: "Appellate courts can remedy the improper disclosure of privileged material in the same way they remedy a host of other erroneous evidentiary rulings: by vacating an adverse judgment and remanding for a new trial [**14] in which the protected material and its fruits are excluded from evidence." *Id.*

Some of *Mohawk's* reasoning carries over to the First Amendment privilege. There are, however, several reasons the class of rulings involving the First Amendment privilege differs in ways that matter to a collateral order appeal analysis from those involving the attorney-client privilege. First, this case concerns a privilege of constitutional

dimensions. The right at issue here -- freedom of political association -- is of a high order. The constitutional nature of the right is not dispositive of the collateral order inquiry, *see, e.g., Flanagan* [*1156] *v. United States*, 465 U.S. 259, 267-68, 104 S. Ct. 1051, 79 L. Ed. 2d 288 (1984), but it factors into our analysis. Second, the public interest associated with this class of cases is of greater magnitude than that in *Mohawk*. Compelled disclosures concerning protected First Amendment political associations have a profound chilling effect on the exercise of political rights. *See, e.g., Gibson v. Florida Legislative Investigation Comm.*, 372 U.S. 539, 557, 83 S. Ct. 889, 9 L. Ed. 2d 929 (1963) (underscoring the substantial "deterrent and 'chilling' effect on the free [**15] exercise of constitutionally enshrined rights of free speech, expression, and association" resulting from compelled disclosure of political associations). Third, unlike the attorney-client privilege, the First Amendment privilege is rarely invoked. Collateral review of the First Amendment privilege, therefore, does not implicate significant "institutional costs." *Mohawk*, 558 U.S. __, 130 S. Ct. at 608. *Cf. id.* ("Permitting parties to undertake successive, piecemeal appeals of all adverse attorney-client rulings would unduly delay the resolution of district court litigation and needlessly burden the Courts of Appeals."). Finally, we observe that *Mohawk* expressly reserved whether the collateral order doctrine applies in connection with other privileges. *See id.* at 470 n.4.

In light of these considerations, whether *Mohawk* should be extended to the First Amendment privilege presents a close question. The distinctions between the First Amendment privilege and the attorney-client privilege -- a constitutional basis, a heightened public interest, rarity of invocation and a long recognized chilling effect -- are not insubstantial. Given our uncertainty about the availability of collateral [**16] order review after *Mohawk*, we nonetheless assume without deciding that discovery orders denying claims of First Amendment privilege are not reviewable under the collateral order doctrine. Rather, we rely on mandamus to hear this exceptionally important case, for reasons we now explain.

B. Mandamus

The exceptional circumstances presented by this case warrant exercising our jurisdiction under the All Writs Act, 28 U.S.C. § 1651(a). *See Cheney v. U.S. Dist. Court*, 542 U.S. 367, 380, 124 S. Ct. 2576, 159 L. Ed. 2d 459 (2004); *City of Las Vegas v. Foley*, 747 F.2d 1294, 1296-97 (9th Cir. 1984).

"The writ of mandamus is an 'extraordinary' remedy limited to 'extraordinary' causes." *Burlington Northern & Santa Fe Ry. Co. v. U.S. Dist. Court*, 408 F.3d 1142, 1146 (9th Cir. 2005) (quoting *Cheney*, 542 U.S. at 380). In *Bauman v. United States District Court*, 557 F.2d 650 (9th Cir. 1977), we established five guidelines to determine whether mandamus is appropriate in a given case: (1) whether the petitioner has no other means, such as a direct appeal, to obtain the desired relief; (2) whether the petitioner will be damaged or prejudiced in any way not correctable on appeal; (3) whether the district court's [**17] order is clearly erroneous as a matter of law; (4) whether the district court's order is an oft repeated error or manifests a persistent disregard of the federal rules; and (5) whether the district court's order raises new and important problems or issues of first impression. *Id.* at 654-55. "The factors serve as guidelines, a point of departure for our analysis of the propriety of mandamus relief." *Admiral Ins. Co. v. U.S. Dist. Court*, 881 F.2d 1486, 1491 (9th Cir. 1989). "Not every factor need be present at once." *Burlington*, 408 F.3d at 1146. "However, the absence of the third factor, clear error, is dispositive." *Id.*

Mandamus is appropriate to review discovery orders "when particularly important [*1157] interests are at stake." 16 C. Wright, A. Miller, & E. Cooper, Federal Practice and Procedure § 3935.3 (2d ed. 2009) (hereinafter Wright & Miller). Although "the courts of appeals cannot afford to become involved with the daily details of

discovery," we may rely on mandamus to resolve "new questions that otherwise might elude appellate review" or "to protect important or clear claims of privilege." *Id.; see Mohawk*, 558 U.S. __, 130 S. Ct. at 602 ("[L]itigants confronted with a particularly [**18] injurious or novel privilege ruling have several potential avenues of review apart from collateral order appeal. . . . [A] party may petition the court of appeals for a writ of mandamus."). In *Schlagenhauf v. Holder*, 379 U.S. 104, 85 S. Ct. 234, 13 L. Ed. 2d 152 (1964), for example, the Supreme Court relied on mandamus to answer the novel question whether Federal Rule of Civil Procedure 35 authorized the physical and mental examination of a defendant. "The opinion affords strong support for the use of supervisory or advisory mandamus to review a discovery question that raises a novel and important question of power to compel discovery, or that reflects substantial uncertainty and confusion in the district courts." Wright & Miller § 3935.3.

Consistent with *Schlagenhauf*, we have exercised mandamus jurisdiction to review discovery orders raising particularly important questions of first impression, especially when called upon to define the scope of an important privilege. In *Admiral Insurance*, for example, we granted the mandamus petition to resolve "a significant issue of first impression concerning the proper scope of the attorney-client privilege." 881 F.2d at 1488. *Taiwan v. United States District Court*, 128 F.3d 712 (9th Cir. 1997), [**19] likewise involved review of another issue of first impression -- the scope of testimonial immunity under the Taiwan Relations Act. *Id*. at 714. Finally, in *Foley*, we exercised our mandamus authority to address an "important issue of first impression" in a context similar to that here -- whether legislators can be deposed to determine their subjective motives for enacting a law challenged as violative of the First Amendment. 747 F.2d at 1296.

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

Assuming, as we are, that no collateral order appeal is available, the first factor is present: "A discovery order . . . is interlocutory and non-appealable" under 28 U.S.C. §§ 1291, 1292(a)(1) and 1292(b). *Foley*, 747 F.2d at 1297; *see also id*. ("Mandamus review has been held to be appropriate for discovery matters which otherwise would be reviewable only on direct appeal after resolution on the merits."). In *Admiral Insurance*, for example, we held [**20] that the first *Bauman* factor was satisfied because "the petitioner lacks an alternative avenue for relief." 881 F.2d at 1488.

The second factor also supports mandamus. A post-judgment appeal would not provide an effective remedy, as "no such review could prevent the damage that [Proponents] allege they will suffer or afford effective relief therefrom." *In re Cement Antitrust Litig.*, 688 F.2d 1297, 1302 (9th Cir. 1982); *see Star Editorial, Inc. v. U.S. Dist. Court*, 7 F.3d 856, 859 (9th Cir. 1993) ("[I]f the district court erred in compelling disclosure, any damage the [newspaper] suffered would not be correctable on appeal."); *Admiral Ins.*, 881 F.2d at 1491 (holding that the second factor was satisfied in view of "the irreparable harm a party likely will suffer if erroneously required to disclose privileged materials or [*1158] communications"). One injury to Proponents' First Amendment rights is the disclosure itself. Regardless of whether they prevail at trial, this injury will not be remediable on appeal. *See In re Cement Antitrust Litig.*, 688 F.2d at 1302 ("[A] post-judgment reversal on appeal could not provide a remedy for those injuries."). If Proponents prevail at trial, vindication [**21] of their rights will be not merely delayed but also entirely precluded. *See id*. ("Moreover, whatever collateral injuries petitioners suffer will have been incurred even if they prevail fully at trial and thus have no right to appeal from the final judgment.").

Under the second factor, we also consider the substantial costs imposed on the public interest. The district court applied an unduly narrow conception of First Amendment privilege. Under that interpretation, associations that support or oppose initiatives face the risk that they will be compelled to disclose their internal campaign communications in civil discovery. This risk applies not only to the official proponents of initiatives and referendums, but also to the myriad social, economic, religious and political organizations that publicly support or oppose ballot measures. The potential chilling effect on political participation and debate is therefore substantial, even if the district court's error were eventually corrected on appeal from final judgment. In this sense, our concerns in this case mirror those we articulated in *Foley*, where the district court denied the city's motion for a protective order to prevent plaintiffs [**22] from deposing city officials about their reasons for passing a zoning ordinance. Absent swift appellate review, we explained, "legislators could be deposed in every case where the governmental interest in a regulation is challenged." 747 F.2d at 1296. More concerning still is the possibility that if Proponents ultimately prevail in the district court, there would be no appeal *at all* of the court's construction of the First Amendment privilege. Declining to exercise our mandamus jurisdiction in this case, therefore, "'would imperil a substantial public interest' or 'some particular value of a high order.'" *Mohawk*, 558 U.S. at __, 130 S. Ct. at 601 (quoting *Will*, 546 U.S. at 352-53).

The third factor, clear error, is also met. As discussed below, we are firmly convinced that the district court erred by limiting the First Amendment privilege to "the identities of rank-and-file volunteers and similarly situated individuals" and affording no greater protection to Proponents' internal communications than the generous relevance standard of Federal Rule of Civil Procedure 26. *See In re Cement Antitrust Litig.*, 688 F.2d at 1306-07 ("[W]hen we are firmly convinced that a district court has erred [**23] in deciding a question of law, we may hold that the district court's ruling is 'clearly erroneous as a matter of law as that term is used in mandamus analysis.'") (quoting *Bauman*, 557 F.2d at 660). "[Plaintiffs'] need for information is only one facet of the problem." *Cheney*, 542 U.S. at 385. A political campaign's communications and activities "encompass a vastly wider range of sensitive material" protected by the First Amendment than would be true in the normal discovery context. *Id.* at 381; *see Foley*, 747 F.2d at 1298-99. Thus, "[a]n important factor weighing in the opposite direction is the burden imposed by the discovery orders. This is not a routine discovery dispute." *Cheney*, 542 U.S. at 385.

Finally, the fifth factor weighs in favor of exercise of our supervisory mandamus authority: we are faced with the need to resolve a significant question of first impression. *See, e.g., Schlagenhauf*, 379 U.S. at 110-11 (finding mandamus jurisdiction appropriate where there was an issue of first impression concerning [*1159] the district court's application of Federal Rule of Civil Procedure 35 in a new context); *Foley*, 747 F.2d at 1296. As these cases -- and the very existence of the fifth *Bauman* [**24] factor, whether the issue presented is one of first impression -- illustrate, the necessary "clear error" factor does not require that the issue be one as to which there is established precedent. Moreover, this novel and important question may repeatedly evade review because of the collateral nature of the discovery ruling. *See In re Cement Antitrust Litig.*, 688 F.2d at 1304-05 ("[A]n important question of first impression will evade review unless it is considered under our supervisory mandamus authority. Moreover, that question may continue to evade review in other cases as well."); *Colonial Times, Inc. v. Gasch*, 509 F.2d 517, 524-26, 166 U.S. App. D.C. 184 (D.C. Cir. 1975) (exercising mandamus jurisdiction to correct an error in a discovery order).

In sum, this is an important case for exercise of our mandamus jurisdiction: adequate, alternative means of review are unavailable; the harm to Proponents

and to the public interest is not correctable on appeal; the district court's discovery order is clearly erroneous; and it presents a significant issue of first impression that may repeatedly evade review. As in *Foley*, a closely analogous case, these factors "remove this case from the [**25] category of ordinary discovery orders where interlocutory appellate review is unavailable, through mandamus or otherwise." *Cheney*, 542 U.S. at 381. Accordingly, we hold that the exercise of our supervisory mandamus authority is appropriate.

III. FIRST AMENDMENT PRIVILEGE

[3]

A.

"Effective advocacy of both public and private points of view, particularly controversial ones, is undeniably enhanced by group association." *NAACP v. Alabama*, 357 U.S. 449, 460, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958); *see also Roberts v. U.S. Jaycees*, 468 U.S. 609, 622, 104 S. Ct. 3244, 82 L. Ed. 2d 462 (1984) ("An individual's freedom to speak, to worship, and to petition the government for the redress of grievances could not be vigorously protected from interference by the State unless a correlative freedom to engage in group effort toward those ends were not also guaranteed."). Thus, "[t]he First Amendment protects political association as well as political expression," *Buckley v. Valeo*, 424 U.S. 1, 15, 96 S. Ct. 612, 46 L. Ed. 2d 659 (1976), and the "freedom to associate with [**26] others for the common advancement of political beliefs and ideas is . . . protected by the First and Fourteenth Amendments." *Kusper v. Pontikes*, 414 U.S. 51, 56-57, 94 S. Ct. 303, 38 L. Ed. 2d 260 (1973). "The right to associate for expressive purposes is not, however, absolute." *Roberts*, 468 U.S. at 623. "Infringements on that right may be justified by regulations adopted to serve compelling state interests, unrelated to the suppression of ideas, that cannot be achieved through means significantly less restrictive of associational freedoms." *Id.*

The government may abridge the freedom to associate directly, or "abridgement of such rights, even though unintended, may inevitably follow from varied forms of governmental action." *NAACP*, 357 U.S. at 461. Thus, the government must justify its actions not only when it imposes direct limitations on associational [*1160] rights, but also when governmental action "would have the practical effect 'of discouraging' the exercise of constitutionally protected political rights." *Id.* (quoting *Am. Commc'ns Ass'n v. Douds*, 339 U.S. 382, 393, 70 S. Ct. 674, 94 L. Ed. 925 (1950)). Such actions have a chilling effect on, and therefore infringe, the exercise of [**27] fundamental rights. Accordingly, they "must survive exacting scrutiny." *Buckley*, 424 U.S. at 64.

The compelled disclosure of political associations can have just such a chilling effect. *See id.* ("[W]e have repeatedly found that compelled disclosure, in itself, can seriously infringe on privacy of association and belief guaranteed by the First Amendment."); *AFL-CIO v. FEC*, 333 F.3d 168, 175, 357 U.S. App. D.C. 47 (D.C. Cir. 2003) ("The Supreme Court has long recognized that compelled disclosure of political affiliations and activities can impose just as substantial a burden on First Amendment rights as can direct regulation."). [4] Disclosures of political affiliations and activities that have a "deterrent effect on the exercise of First Amendment rights" are therefore subject to this same "exacting scrutiny." *Buckley*, 424 U.S. at 64-

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

[4] *See, e.g., NAACP*, 357 U.S. at 461-64 (prohibiting the compelled disclosure of the NAACP membership lists); *Bates v. City of Little Rock*, 361 U.S. 516, 525-27, 80 S. Ct. 412, 4 L. Ed. 2d 480 (1960) (same); *DeGregory v. Attorney Gen.*, 383 U.S. 825, 828-30, 86 S. Ct. 1148, 16 L. Ed. 2d 292 (1966) (prohibiting the state from compelling defendant to discuss his association with the Communist Party); *Buckley*, 424 U.S. at 63-74 (recognizing the burden but upholding the compelled disclosure of campaign contributor information under the "exacting scrutiny" standard).

65. A party who objects to a discovery request as an infringement of the party's First Amendment rights is in essence asserting a First Amendment *privilege. See, e.g., Black Panther Party v. Smith*, 661 F.2d 1243, 1264, 213 U.S. App. D.C. 67 (D.C. Cir. 1981), *cert. granted and vacated as moot*, 458 U.S. 1118, 102 S. Ct. 3505, 73 L. Ed. 2d 1381 (1982); *see also* [**28] Fed. R. Civ. P. 26(b)(1) ("Parties may obtain discovery regarding any *nonprivileged* matter that is relevant to any party's claim or defense[.]") (emphasis added). [5]

In this [**29] circuit, a claim of First Amendment privilege is subject to a two-part framework. The party asserting the privilege "must demonstrate . . . a 'prima facie showing of arguable first amendment infringement.'" *Brock v. Local 375, Plumbers Int'l Union of Am.*, 860 F.2d 346, 349-50 (9th Cir. 1988) (quoting *United States v. Trader's State Bank*, 695 F.2d 1132, 1133 (9th Cir. 1983) (per curiam)). "This *prima facie* showing requires appellants to demonstrate that enforcement of the [discovery requests] will result in (1) harassment, membership withdrawal, or discouragement of new members, or (2) other consequences which objectively suggest an impact on, or 'chilling' of, the members' associational rights." *Id.* at 350. [6] [*1161] "If appellants can make the necessary *prima facie* showing, the evidentiary burden will then shift to the government . . . [to] demonstrate that the information sought through the [discovery] is rationally related to a compelling governmental interest . . . [and] the 'least restrictive means' of obtaining the desired information." *Id.; see also Dole v. Serv. Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1459-61 (9th Cir. 1991) (same). More specifically, the second step of [**30] the analysis is meant to make discovery that impacts First Amendment associational rights available only after careful consideration of the need for such discovery, but not necessarily to preclude it. The question is therefore whether the party seeking the discovery "has demonstrated an interest in obtaining the disclosures it seeks . . . which is sufficient to justify the deterrent effect . . . on the free exercise . . . of [the] constitutionally protected right of association." *NAACP*, 357 U.S. at 463.

To implement this standard, we "balance the burdens imposed on individuals and associations against the significance of the . . . interest in disclosure," *AFL-CIO v. FEC*, 333 F.3d at 176, to determine whether the "interest in disclosure . . . outweighs the harm," *Buckley*, 424 U.S. at 72. This balancing may take into account, for example, the importance of the litigation, *see Dole*, 950 F.2d at 1461 ("[T]here is little doubt that the . . . purpose of investigating possible criminal violations . . . serves a compelling governmental interest[.]"); the centrality of the information sought to the issues in the case, *see NAACP*, 357 U.S. at 464-65; *Grandbouche v. Clancy*, 825 F.2d 1463, 1466 (10th Cir. 1987); *Black Panther Party*, 661 F.2d at 1268; the existence of less intrusive means of obtaining the information, *see Grandbouche*, 825 F.2d at 1466; *Black Panther Party*, 661 F.2d at 1268; and the substantiality of the First Amendment interests at stake, *see Buckley*, 424 U.S. at 71 (weighing the seriousness of "the threat to the exercise of First Amendment rights" against the substantiality of the state's interest); *Black Panther Party*, 661 F.2d at 1267 ("The argument [**32] in favor of upholding the claim of privilege will ordinarily grow stronger

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

[6] A protective order limiting the dissemination of disclosed associational information may mitigate the chilling effect and could weigh against a showing of infringement. The mere assurance that private information will be narrowly rather than broadly disseminated, however, is not dispositive. *See Dole v. Serv. Employees Union, AFL-CIO, Local 280*, 950 F.2d 1456, 1461 (9th Cir. 1991) ("[N]either letter suggests that it is the *unlimited* nature of the disclosure of the Union minutes that underlies the member's unwillingness to attend future meetings. Rather, both letters exhibit a concern for the consequences that would flow from *any* disclosure of the contents of the minutes to the government [**31] or any government official.").

as the danger to rights of expression and association increases."). [7] Importantly, the party seeking the discovery must show that the information sought is highly relevant to the claims or defenses in the litigation -- a more demanding standard of relevance than that under Federal Rule of Civil Procedure 26(b)(1). The request must also be carefully tailored to avoid unnecessary interference with protected activities, and the information must be otherwise unavailable.

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

B.

The district court concluded that "[i]f the . . . privilege identified by proponents protects anything, it is the identities of rank-and-file volunteers and similarly situated individuals," and said that [**33] "Proponents have not . . . identified a way in [*1162] which the . . . privilege could protect the disclosure of campaign communications." The First Amendment privilege, however, has never been limited to the disclosure of identities of rank-and-file members. *See, e.g., DeGregory*, 383 U.S. at 828 (applying the privilege to "the views expressed and ideas advocated" at political party meetings); *Dole*, 950 F.2d at 1459 (applying privilege to statements "of a highly sensitive and political character" made at union membership meetings). The existence of a prima facie case turns not on the type of information sought, but on whether disclosure of the information will have a deterrent effect on the exercise of protected activities. *See NAACP*, 357 U.S. at 460-61; *Brock*, 860 F.2d at 349-50. We have little difficulty concluding that disclosure of internal campaign communications *can* have such an effect on the exercise of protected activities.

First, the disclosure of such information can have a deterrent effect on participation in campaigns. There is no question that participation in campaigns is a protected activity. *See San Francisco County Democratic Cent. Comm. v. Eu*, 826 F.2d 814, 827 (9th Cir. 1987) [**34] ("'[T]he right of individuals to associate for the advancement of political beliefs' is fundamental.") (quoting *Williams v. Rhodes*, 393 U.S. 23, 30, 89 S. Ct. 5, 21 L. Ed. 2d 24 (1968)). Compelled disclosure of internal campaign information can deter that participation. *See Buckley*, 424 U.S. at 68 ("It is undoubtedly true that public disclosure of contributions to candidates and political parties will deter some individuals who otherwise might contribute."); *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. 407, 414 (D. Kan. 2009) (holding that disclosure of "trade associations' internal communications and evaluations about advocacy of their members' positions on contested political issues" might reasonably "interfere with the core of the associations' activities by inducing members to withdraw . . . or dissuading others from joining"). [8]

Second, disclosure of internal campaign information can have a deterrent effect on the free flow of information within campaigns. Implicit in the right to associate with others to advance one's shared political beliefs is the right to exchange ideas and formulate strategy and messages, and to do so in private. [9] Compelling [*1163] disclosure

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

[8] In addition to discouraging individuals from joining campaigns, the threat that internal campaign communications will be disclosed in civil litigation can discourage organizations from joining the public debate over an initiative. *See* Letter brief of Amicus Curiae American Civil Liberties Union of Northern California, at 2 (explaining [**35] that the ACLU's internal campaign information has been subpoenaed in this case).

[9] We derive this conclusion from cases that have recognized the right of associations to be free of infringements in their internal affairs. The freedom of members of a political association to deliberate internally over strategy and messaging is an incident of associational autonomy. We recognized this right in *San Francisco County*

of internal campaign communications can chill the exercise of these rights.

In identifying two ways in which compelled disclosure of internal campaign communications can deter protected activities -- by chilling participation and by muting the internal exchange of ideas -- we do not suggest this is an exhaustive list. Disclosures of the sort challenged here could chill protected activities in other ways as well. [10] We cite these two examples for purposes of illustration only, and because they are relevant to the assertions of privilege made by Proponents here.

C.

In this case, Proponents have made "a '*prima facie* showing of arguable first amendment infringement'" by demonstrating "consequences which objectively suggest an impact on, or 'chilling' of, . . . associational rights." *Brock*, 860 F.2d at 349-50 (quoting *Trader's State Bank*, 695 F.2d at 1133). They presented declarations from several individuals attesting to the impact compelled disclosure would have on participation and formulation of strategy. For example, Mark Jansson, a member of ProtectMarriage.com's ad hoc executive committee, stated:

> I can unequivocally state that if the personal, non-public communications I have had regarding this ballot initiative -- communications that expressed my personal political and moral views -- are ordered to be disclosed through discovery in this matter, it will drastically alter how I communicate in the future. . . .
>
> I will be less willing to engage in such communications knowing that my private thoughts on how to petition the government and my private [**39] political and moral views may be disclosed simply because of my involvement in a ballot initiative campaign. I also would have to seriously consider whether to even become an official proponent again.

Although the evidence presented by Proponents is lacking in particularity, it is consistent with the self-evident conclusion that important First Amendment interests are implicated by the plaintiffs' discovery request. The declaration creates a reasonable inference that disclosure would have the practical effects of discouraging political association and inhibiting internal campaign communications that are essential to effective association and expression. *See Dole*, 950 F.2d at 1459-61 (holding that the union satisfied its prima facie burden by submitting the declarations of two members [*1164] who said they would no longer

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Democratic Central Committee v. Eu, where we said that "the right of association would be hollow without a corollary right of self-governance." 826 F.2d at 827. "[T]here must be a right not only to form political associations but to organize and direct them in the way that will make them most effective." *Id.* (quoting *Ripon Soc'y Inc. v. Nat'l Republican Party*, 525 F.2d 567, 585, 173 U.S. App. D.C. 350 (D.C. Cir. 1975) [**36] (en banc)) (internal quotation marks omitted); *see also Tashjian v. Republican Party of Conn.*, 479 U.S. 208, 224, 107 S. Ct. 544, 93 L. Ed. 2d 514 (1986) ("The Party's determination of the boundaries of its own association, and of the structure which best allows it to pursue its political goals, is protected by the Constitution."); *Eu v. San Francisco County Democratic Cent. Comm.*, 489 U.S. 214, 231 n.21, 109 S. Ct. 1013, 103 L. Ed. 2d 271 (1989) ("By regulating the identity of the parties' leaders, the challenged statutes may also color the parties' message and interfere with the parties' decisions as to the best means to promote that message."). The government may not "interfere with a [political] party's internal affairs" absent a "compelling state interest." *Eu*, 489 U.S. at 231. Associations, no less than individuals, have the right to shape their own messages. *See McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 342, 348, 115 S. Ct. 1511, 131 L. Ed. 2d 426 (1995) (striking down a state law prohibiting anonymous pamphleteering in part because the First Amendment includes a speaker's right to choose a manner of expression that she believes will be most persuasive); *AFL-CIO v. FEC*, 333 F.3d at 177 [**37] ("[E]xtensive interference with political groups' internal operations and with their effectiveness . . . implicate[s] significant First Amendment interests in associational autonomy.").

[10] *See AFL-CIO v. FEC*, 333 F.3d at 176-77 ("[T]he AFL-CIO and DNC affidavits charge that disclosing detailed descriptions of training programs, member mobilization campaigns, polling data, and state-by-state strategies will directly frustrate the organizations' ability to pursue their political goals effectively by revealing to their opponents 'activities, strategies and tactics [that] we have pursued in subsequent elections and will likely follow in the future.'"); *In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. at 415 [**38] ("Disclosure of the associations' evaluations of possible lobbying and legislative strategy certainly could be used by plaintiffs to gain an unfair advantage over defendants in the political arena.").

participate in union membership meetings if the disclosure of the minutes of the meetings were permitted). A protective order limiting dissemination of this information will ameliorate but cannot eliminate these threatened harms. Proponents have therefore made a prima facie showing that disclosure could have a chilling effect on protected activities. The chilling effect is [**40] not as serious as that involved in cases such as *NAACP v. Alabama*, 357 U.S. 449, 78 S. Ct. 1163, 2 L. Ed. 2d 1488 (1958), but neither is it insubstantial. *See AFL-CIO v. FEC*, 333 F.3d at 176 ("Although we agree that the evidence in this case is far less compelling than the evidence presented in cases involving groups whose members had been subjected to violence, economic reprisals, and police or private harassment, that difference speaks to the strength of the First Amendment interests asserted, not to their existence.") (citations omitted).

The Proponents having made a prima facie showing of infringement, the evidentiary burden shifts to the plaintiffs to demonstrate a sufficient need for the discovery to counterbalance that infringement. The district court did not apply this heightened relevance test. Rather, having determined that the First Amendment privilege does not apply to the disclosure of internal campaign communications except to protect the identities of rank-and-file members and volunteers, the court applied the Rule 26 standard of reasonably calculated to lead to the discovery of admissible evidence. We agree with the district court that plaintiffs' request satisfies the [**41] Rule 26 standard. Plaintiffs' request is reasonably calculated to lead to the discovery of admissible evidence on the issues of voter intent and the existence of a legitimate state interest. [11] Such discovery might help to identify messages actually conveyed to voters. *See Washington v. Seattle Sch. Dist. No. 1*, 458 U.S. 457, 471, 102 S. Ct. 3187, 73 L. Ed. 2d 896 (1982) (considering statements made by proponents during an initiative campaign to determine whether voters adopted an initiative for an improper purpose). It also might lead to the discovery of evidence showing that Proponents' campaign messages were designed to "appeal [] to the . . . biases of the voters." *Id*. at 463 (quoting *Seattle Sch. Dist. No. 1 v. Washington*, 473 F. Supp. 996, 1009 (W.D. Wash. 1979)). It might reasonably lead to the discovery of evidence undermining or impeaching Proponents' claims that Proposition 8 serves legitimate state interests. *See Romer v. Evans*, 517 U.S. 620, 635, 116 S. Ct. 1620, 134 L. Ed. 2d 855 (1996) ("[A] law must bear a rational relationship to a legitimate governmental purpose.").

The Rule 26 standard, however, fails to give sufficient weight to the First Amendment interests at stake. Given Proponents' prima facie showing of infringement, we must apply the First Amendment's more demanding heightened relevance standard. Doing so, we cannot agree that plaintiffs have "demonstrated an interest in obtaining the disclosures . . . which is sufficient to justify the deterrent effect . . . on the free exercise . . . of [the] constitutionally protected right of association." *NAACP*, 357 U.S. at 463. Plaintiffs can obtain much of the information they seek from other sources, without intruding on protected activities. Proponents have already agreed to produce all communications actually disseminated to voters, [*1165] including "communications targeted to discrete voter groups." [12] Whether campaign

[11] The parties dispute whether plaintiffs' substantive claims are governed by strict scrutiny or rational [**42] basis review. They also disagree about what types of evidence may be relied upon to demonstrate voter intent. These issues are beyond the scope of this appeal. We assume without deciding that the district court has decided these questions correctly.

[12] We emphasize that our holding is limited to *private, internal* campaign communications concerning the *formulation of campaign strategy and messages. See In re Motor Fuel Temperature Sales Practices Litig.*, 258 F.R.D. at 415 ("The court wishes to make clear that defendants have met their prima facie burden only with respect to the associations' internal evaluations of lobbying and legislation, strategic planning related to advocacy of their members' positions, and actual lobbying on behalf of members. Any other communications to, from, or within trade associations are not deemed protected under the First Amendment associational

messages were designed to appeal to voters' animosity toward gays and lesbians is a question that appears to be susceptible to expert testimony, [**43] without intruding into private aspects of the campaign. Whether Proposition 8 bears a rational relationship to a legitimate state interest is primarily an objective inquiry.

In sum, [**45] although the First Amendment interests at stake here are not as weighty as in some of the membership list cases, and harms can be mitigated in part by entry of a protective order, Proponents have shown that discovery would likely have a chilling effect on political association and the formulation of political expression. On the other side of the ledger, plaintiffs have shown that the information they seek is reasonably calculated to lead to the discovery of admissible evidence, but, bearing in mind other sources of information, they have not shown a sufficient need for the information. The information plaintiffs seek is attenuated from the issue of voter intent, while the intrusion on First Amendment interests is substantial. [13]

Accordingly, we grant [**46] the petition for a writ of mandamus. Proponents have made a prima facie showing of infringement. Plaintiffs have not shown the requisite need for the information sought. The district court shall enter a protective order consistent with this opinion.

PETITION GRANTED. Each party shall bear its costs on appeal. [*1166]

End of Document

privilege.").

Our holding is therefore limited to communications among the core group of *persons* engaged in the formulation of campaign strategy and messages. We leave it to the district court, which is best acquainted with the facts of this case and the structure of the "Yes on 8" campaign, to determine the persons who logically should be included in light of the First Amendment associational [**44] interests the privilege is intended to protect.

Our holding is also limited to *private, internal communications regarding formulation of strategy and messages*. It certainly does not apply to documents or messages conveyed to the electorate at large, discrete groups of voters or individual voters for purposes such as persuasion, recruitment or motivation -- activities beyond the formulation of strategy and messages. Similarly, communications soliciting active support from actual or potential Proposition 8 supporters are unrelated to the formulation of strategy and messages. The district court may require the parties to redact the names of individuals with respect to these sorts of communications, but the contents of such communications are not privileged under our holding.

By way of illustration, plaintiffs produced at oral argument a letter from Bill Tam, one of Proposition 8's official proponents, urging "friends" to "really work to pass Prop 8." A copy of the letter is appended to this opinion. Mr. Tam's letter is plainly not a private, internal formulation of strategy or message and is thus far afield from the kinds of communications the First Amendment privilege protects.

[13] We do not foreclose the possibility that some of Proponents' internal campaign communications may be discoverable. We are not presented here with a carefully tailored request for the production of highly relevant information that is unavailable from other sources that do not implicate First Amendment associational interests. We express no opinion as to whether any particular request would override the First Amendment interests at stake.

Federal Election Commission Advisory Opinions

United States Federal Election Commission

December 7, 1995

Federal Election Commission Advisory Opinions

1995-41

Robert F. Bauer

Perkins Coie 607 Fourteenth Street, N.W. Washington, D.C. 20005-2011

Core Terms

candidate, elect, campaign, expenditure, state law

Text

Dear Mr. Bauer:

This responds to your letter dated October 30, 1995, as counsel for the Democratic Congressional Campaign Committee, who inquires on behalf of Representative Carolyn Maloney and Maloney for Congress, concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to Federal preemption of certain reporting obligations of New York State campaign finance laws.

Maloney for Congress (the "Committee") is the principal campaign committee of Carolyn Maloney, a member of the U. S. House of Representatives for the New York 14th Congressional District. She is currently a candidate for re -election. You state that New York law requires all candidates for public office to disclose certain information about polling activity for public reporting purposes. Specifically, the statute requires that any candidate preparing to release poll results to the public must file within 48 hours, with the appropriate New York state regulatory authority, a report which states the poll sample size, the wording of the questions asked, and the full results of the poll. See 9 NYCRR § 6201.2. n1

You note that the New York State Board of Elections ("the Board") has taken the position that this reporting requirement applies to Federal, as well as other candidates, and that the Board communicated this position to Ms. Maloney. n2@ You therefore ask whether the Act, Commission regulations, and prior

Advisory Opinions issued by the Commission, indicate that the New York reporting requirement is preempted by Federal law.

The Act states that its provisions and the rules prescribed thereunder, "supersede and preempt any provision of State law with respect to election to Federal office."@ 2 U.S.C. § 453. The House committee that drafted this provision intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated."@ H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). According to the Conference Committee report on the 1974 Amendments to the Act, "Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights" as to other areas such as voter fraud and ballot theft. H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974). The Conference report also states that Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect state laws as to the manner of qualifying as a candidate, or the dates and places of elections. Id. at 100-101.

When the Commission promulgated regulations at 11 CFR 108.7 on the effect of the Act on state law, it stated that the regulations follow section 453 and that, specifically, Federal law supersedes state law with respect to the organization and registration of political committees supporting Federal candidates, disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees. Federal Election Commission Regulations, Explanation and Justification, House Document No. 95-44 , at 51. 11 CFR 108.7(b). The regulations provide that the Act does not supersede state laws concerning the manner of qualification as a candidate or political party organization, dates and places of elections, voter registration , voting fraud and similar offenses, or candidates' personal financial disclosure. 11 CFR 108.7(c). The Commission explained that "these types of electoral matters are interests of the states and are not covered in the Act."@ House Document 95-44, at 51.

The Commission has previously concluded that the Act supersedes and preempts state law with respect to the reporting requirements of Federal committees and State committees which engage in Federal activity. See Advisory Opinions 1993 -14, 1986-27 and 1978-54. Given this legal authority, the Act would preempt New York State law with respect to the reporting of contributions, disbursements and expenditures, including expenditures for polling activity in Federal election campaigns. New York State may not impose any obligation for reporting Federal contributions, disbursements and expenditures since those obligations fall only within the purview of the Act and Commission regulations. See 2 U.S.C. § 434(b) and 11 CFR 104.3. Therefore, the Commission concludes that 9 NYCRR § 6201.2 may

n1 The cited provision states:

> No candidate, political party or committee shall attempt to promote the success or defeat of a candidate by directly or indirectly disclosing or causing to be disclosed the results of a poll relating to a candidate for such an office or position, unless within 48 hours after such disclosure, they provide the following information concerning the poll to the board or officer with whom statements or copies of statements of campaign receipts and expenditures are required to be filed by the candidate to whom such poll relates:

(a) The name of the person, party or organization that contracted for or who commissioned the poll and/or paid for it.

(b) The name and address of the organization that conducted the poll.

(c) The numerical size of the total poll sample, the geographic area covered by the poll and any special characteristics of the population included in poll sample.

(d) The exact wording of the questions asked in the poll and the sequence of such questions.

(e) The method of polling-whether by personal interview, telephone, mail or other.

(f) The time period during which the poll was conducted.

(g) The number of persons in the poll sample; the numbers contacted who responded to each specific poll questions; the number of persons contacted who did not so respond.

(h) The results of the poll.

n2 In a May 3, 1984 Opinion, the Board stated that section 6201.2 "app[lies] to all campaigns conducted in New York State where the intent is to influence the voters of the state. There are no Federal laws, rules or regulations known to the Board which would supersede the regulation of the New York State Board of Elections."@ New York Board of Elections 1984 Opinion #1. Furthermore, the Board has previously found that a Federal committee, the Committee to Elect John Bouchard to Congress, was in violation of section 6201.2. See Times Union v. Committee to Elect John Bouchard, New York State Board of Election, Final Determination FC89-7 (September 7, 1990).

Load Date: 1996-09-01

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Federal Election Commission Advisory Opinions

United States Federal Election Commission

August 28, 2009

Federal Election Commission Advisory Opinions

AO 2009-21

Timothy G. Leach, Esq., Assistant General Counsel

Office of the Secretary of StateBuilding 1, Suite 157-K1900 Kanawha Blvd. EastCharleston, WV 25305

Core Terms

candidate, elect, advisory opinion, expenditure, campaign, political committee, state law, preempt, disclosure, voter, political party, public opinion, campaign committee, telephone, political action committee, ballot, occupy, redact, dear, attached exhibit, registration, advertising, preemption, calculate

Text

[EDITOR'S NOTE: THE ORIGINAL SOURCE CONTAINED ILLEGIBLE WORDS AND/OR MISSING TEXT.]

Dear Mr. Leach:

We are responding to your advisory opinion request on behalf of the West Virginia Secretary of State, concerning the possible preemption of West Virginia state law by the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations. The Commission concludes that the West Virginia campaign finance statute restricting payment of polling expenses by candidates and political committees is preempted by the Act and Commission regulations insofar as it purports to apply to expenditures by Federal candidates and their principal campaign committees.

Background

The facts presented in this advisory opinion are based on your letter received on July 10, 2009, and publicly available materials, including the West Virginia Secretary of State's website and reports filed with the Commission. [1]

West Virginia law permits political committees, defined as "any candidate committee, political action committee or political party committee," to pay for a limited number of specific election expenses, including, among others, "conducting public opinion poll or polls." W.Va. Code 3-8-1a (22), 3-8-9(a)(10). [2] The West Virginia statute defines such public opinion polls as "limited to the gathering, collection, collation and evaluation of information reflecting public opinion, needs and preferences as to any candidate, group of candidates, party, issue or issues," and prohibits polls from being "deceptively designed or intentionally conducted in a manner calculated to advocate the election or defeat of any candidate or group of candidates or calculated to influence any person or persons so polled to vote for or against any candidate, group of candidates, proposition or other matter to be voted on by the public at any election." *Id.* Chapter 3 of the West Virginia Code, concerning elections, by its terms applies to "every general, primary and special election in which candidates are nominated or elected or in which voters pass upon any public question submitted to them. . . ." W.Va. Code 3-1-2. The statute further defines "any election" or "all elections" to include elections for Federal offices as well as state, county, and municipal offices. *Id.*

The West Virginia Secretary of State received a complaint from a citizen alleging that Ms. Anne Barth, a candidate for the U.S. House of Representatives for the 2nd Congressional District of West Virginia, and Anne Barth for Congress ("the Barth Committee"), her principal campaign committee, conducted a poll on or about September 27, 2008, that violated W.Va. Code 3-8-9(a)(10). The Secretary of State applied the West Virginia statute to the Barth Committee and, in the course of investigating the alleged violation, sought further information about the poll from the polling company and the Barth Committee. The candidate's counsel responded that Federal law preempts West Virginia law on this subject, citing Advisory Opinion 1995-41 (Maloney). The Secretary of State maintained that the advisory opinion cited by the candidate's counsel did not apply, and sought this advisory opinion.

Question Presented

Is a West Virginia statute regulating spending for election expenses by political committees, W.Va. Code 3-8-9(a)(10), preempted by the Act or Commission regulations with respect to Federal candidates?

Legal Analysis and Conclusions

Yes, the West Virginia statute regulating payment for polling expenses by candidates and political committees is preempted by the Act and Commission regulations insofar as it purports to apply to expenditures by Federal candidates and their principal campaign committees.

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[1] *See* FEC Form 1, Statement of Organization, *available at* http://query.nictusa.com/pdf/801/28039632801/28039632801.pdf#navpanes=0.

[2] The West Virginia statute defines a "candidate," in relevant part, as an individual who "has filed a certificate of announcement under section seven, article five of this chapter [providing that candidates must file with the Secretary of State]." W.Va. Code 3-8-4(A). A "candidate's committee" is a "political committee established with the approval or in cooperation with a candidate . . . ." *Id.* 3-8-5. The West Virginia Secretary of State's website indicates that Federal candidates declare their candidacies with that office, consistent with sections 3-5-7, 3-8-4, and 3-8-5 of the West Virginia statute. *See* http://www.wvsos.com/elections/candidates/data/candidatesearch.asp. Therefore Section 3-8-9 of the West Virginia statute, which governs "election expenses" of "candidates" and "candidate committees," appears to apply to Federal candidates and their authorized committees, who also are subject to the Act and Commission regulations.

The Act states that its provisions and the rules prescribed thereunder "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. 453; *see also* 11 CFR 108.7(a). The legislative history indicates that Congress intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." *H.R. Rep. No. 93-1239*, 93d Cong., 2d Sess. 10 (1974). According to the Conference Committee Report on the 1974 Amendments to the Act, "Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights" as to other areas such as voter fraud and ballot theft. *H.R. Rep. No. 93-1438*, 93d Cong., 2d Sess. 69 (1974). The Conference Committee Report also states that Federal law occupies the field with respect to reporting and disclosure of political contributions to, and expenditures by, Federal candidates and political committees, but does not affect State laws as to the manner of qualifying as a candidate, or the dates and places of elections. *Id.* at 100-101.

In promulgating 11 CFR 108.7, the Commission stated specifically that Federal law supersedes State law with respect to the organization and registration of political committees supporting Federal candidates, disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees. *Explanation and Justification of the Disclosure Regulations*, House Document No. 95-44, at 51 (1977). Section 108.7 also specifies that the Act does not supersede State laws relating to the manner of qualifying as a candidate or political party organization, dates and places of elections, voter registration, voting fraud, ballot theft, candidates' personal financial disclosures, or funds used for the purchase or construction of State or local party office building. 11 CFR 108.7(c). The Commission has previously stated that the legislative history of 2 U.S.C. 453 shows, "the central aim of the clause is to provide a comprehensive, uniform Federal scheme that is the sole source of regulation of campaign financing . . . for election to Federal office." Advisory Opinion 1988-21 (Wieder).

With respect to Federal elections, the West Virginia statute at issue here on its face limits expenditures by Federal political committees (including candidate committees) -- one of the areas regulated by the Act and Commission regulations. *Compare* 2 U.S.C. 431(9), 439a; 11 CFR 100.110-100.155 *with* W.Va. Code 3-8-9. Moreover, with respect to Federal elections, the West Virginia statute does not address any of the areas that Congress intended to leave exclusively to the jurisdiction of the States (*e.g.*, voter fraud, ballot theft, ballot qualification, or dates and places of elections). *See H.R. Rep. No. 93-1438* at 69, 100-101 and 11 CFR 108.7(b)(3). Accordingly, with respect to Federal elections, the West Virginia statute is expressly preempted by Federal law. 2 U.S.C. 453; 11 CFR 108.7(b)(3).

The Act and Commission regulations establish that limitations and restrictions on Federal candidate expenditures is an area to be regulated solely by Federal law. The Act prescribes permissible and prohibited expenditures by Federal candidates. *See, e.g.*, 2 U.S.C. 431(9), 439a, 441a(j). Commission regulations implement these statutory provisions governing expenditures by Federal candidates, including expenditures for polling expenses. *See, e.g.*, 11 CFR 100.131-155, 106.2, 106.4, 113.2, 116.2, 116.11, 116.12. Specifically, with respect to this request, the West Virginia statute, if applied to Federal candidates, would impede those candidates' ability to make payment of polling expenses that are governed by the Act and Commission regulations. Under the Act's preemption clause, only Federal law could limit the ability of a Federal candidate to make expenditures for polling. 2 U.S.C. 453.

Similarly, in Advisory Opinion 2000-23 (New York State Democratic Committee), the Commission examined a state law that restricted the ability of a state party committee to make certain expenditures in support of candidates. The Commission concluded that because the statute limited expenditures regarding Federal candidates (rather than regulating "those areas defined as interests of the State"), the New York law was preempted by the Act and Commission regulations.

The Commission concludes, therefore, that because W.Va. Code 3-8-9 limits expenditures by candidates and their principal campaign that are otherwise lawful under the Act and Commission regulations, the West Virginia statute is preempted as to Federal candidates and their principal campaign committees, such as Ms. Barth and the Barth Committee, by the Act and Commission regulations. *See* 2 U.S.C. 453, 431(9), 439a. *See also* Alessi v. Raybestos-Manhattan, Inc., 451 U.S. 504, 522 (1981) ("Preemption of state law by Federal statute or regulation is not favored 'in the absence of persuasive reasons - either that the nature of the regulated subject matter permits no other conclusions, or that the Congress has unmistakably so ordained.'" (citing Chicago & N.W. Transp. Co. v. Kalo Brick & Tile Co., 450 U.S. 311, 317 (1981) (quoting Florida Lime & Avocado Growers v. Paul, 373 U.S. 132, 142 (1963))). *Cf.* Advisory Opinion 2001-19 (Oakland County Democratic Party) (concluding that the Act does not preempt a generally applicable state law governing bingo licenses with respect to a Federal political committee that proposed organizing bingo fundraisers).

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requester may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C. 437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions and case law.

The cited advisory opinions are available on the Commission's website at http://saos.nictusa.com/saos/searchao.

On behalf of the Commission,

Steven T. Walther

Chairman

AOR 2009-21

July 1, 2009

Federal Election Commission
Office of General Counsel
999 E Street, N.W.
Washington, D.C. 20463

Re: Request for Advisory Opinion

Dear Sir or Madam:

In behalf of the West Virginia Secretary of State, chief election officer of the state, please consider this request, filed under provisions of 2 U.S.C. 437f(a)(1) and 11 CFR 112.1(b) and (c), for an Advisory Opinion concerning a possible preemption of Federal regulation over relevant state law.

The relevant facts and specific activity are:

1. On or about September 27, 2008, a citizen of this state was contacted by telephone by an organization conducting a public opinion poll;

2. The polling organization was allegedly employed by the campaign committee of a candidate in the November, 2008 general election for the United States House of Representatives for the 2nd Congressional District of West Virginia;

3. A formal written and verified complaint was submitted by the citizen to the West Virginia Secretary of State, who, by provisions of West Virginia Code § 3-1A-6, is charged with enforcing West Virginia election laws;

4. West Virginia law prohibits the expenditure of campaign monies on "push polls", as defined by Code, in any election, W.Va. Code § 3-8-9(a)(10) (copy attached, Exhibit A);

5. The nature of the questions asked in the polling, as alleged by the complainant; suggest that the polling conducted by the agency may have violated West Virginia Code;

6. As part of the investigation initiated by the Secretary, the polling agency was contacted for information, concerning the nature of the questions asked in the poll, in a letter dated October 6, 2008 (copy attached, Exhibit B);

7. On October 21, 2008 an attorney representing the candidate's committee responded to the letter addressed to the polling agency and informed the Secretary that federal election law preempted the jurisdiction of the state election official. The attorney cited and attached advisory opinion 1995-41 involving preemption of a New York state election law (copy attached, Exhibit C);

8. By letter dated November 26, 2008, the W.Va. Secretary of State informed counsel that the Secretary believed the state did have jurisdiction because the information sought did not involve any campaign disclosures. Rather, the inquiry went to the nature of the polling and the information was to determine whether the polling was prohibited by W.Va. code (copy attached, Exhibit D);

9. On December 12, 2008, counsel for the candidate indicated his intention to request an advisory opinion from the FEC. The Secretary does not know if the advisory opinion was ever requested (copy attached, Exhibit E);

10. The investigation has been inactive since and a new Secretary of State took office in January, 2009, and has inherited this dispute.

Because the parties disagree over whether the cited Advisory Opinion is controlling in the facts of this particular case, and because there appears to be some question as to whether federal campaign financing laws preempt a state law defining the nature of permissible political polling, the Secretary seeks guidance from your office in the form of an Advisory Opinion.

Respectfully yours,

Timothy G. Leach

Assistant General Counsel

West Virginia Secretary of State

Attachment: Exhibits A-E

EXHIBIT A

§ 3-8-9. Lawful and unlawful election expenses; public opinion polls and limiting their purposes; limitation upon expenses; use of advertising agencies and reporting requirements; delegation of expenditures.

(a) No financial agent or treasurer of a political committee shall pay, give or lend, either directly or indirectly, any money or other thing of value for any election expenses, except for the following purposes:

(1) For rent, maintenance, office equipment and other furnishing of offices to be used as political headquarters and for the payment of necessary clerks, stenographers, typists, janitors and messengers actually employed therein;

(2) In the case of a candidate who does not maintain a headquarters, for reasonable office expenses, including, but not limited to, filing cabinets and other office equipment and furnishings, computers, computer hardware and software, scanners, typewriters, calculators, audio visual equipment, the rental of the use of the same, or for the payment for the shared use of same with the candidate's business and for the payment of necessary clerks, stenographers and typists actually employed;

(3) For printing and distributing books, pamphlets, circulars and other printed matter and radio and television broadcasting and painting, printing and posting signs, banners and other advertisements, including contributions to charitable, educational or cultural events, for the promotion of the candidate, the candidate's name or an issue on the ballot;

(4) For renting and decorating halls for public meetings and political conventions, for advertising public meetings and for the payment of traveling expenses of speakers and musicians at such meetings;

(5) For the necessary traveling and hotel expenses of candidates, political agents and committees and for stationery, postage, telegrams, telephone, express, freight and public messenger service;

(6) For preparing, circulating and filing petitions for nomination of candidates;

(7) For examining the lists of registered voters, securing copies thereof, investigating the right to vote of the persons listed therein and conducting proceedings to prevent unlawful registration or voting;

(8) For conveying voters to and from the polls;

(9) For securing publication in newspapers and by radio and television broadcasting of documents, articles, speeches, arguments and any information relating to any political issue, candidate or question or proposition submitted to a vote;

(10) For conducting public opinion poll or polls. For the purpose of this section, the phrase "conducting of public opinion poll or polls" shall mean and be limited to the gathering, collection, collation and evaluation of information reflecting public opinion, needs and preferences as to any candidate, group of

candidates, party, issue or issues. No such poll shall be deceptively designed or intentionally conducted in a manner calculated to advocate the election or defeat of any candidate or group of candidates or calculated to influence any person or persons so polled to vote for or against any candidate, group of candidates, proposition or other matter to be voted on by the public at any election: Provided, That nothing herein shall prevent the use of the results of any such poll or polls to further, promote or enhance the election of any candidate or group of candidates or the approval or defeat of any proposition or other matter to be voted on by the public at any election;

(11) For legitimate advertising agency services, including commissions, in connection with any campaign activity for which payment is authorized by subdivisions (3), (4), (5), (6), (7), (9) and (10) of this subsection;

(12) For the purchase of memorials, flowers or citations by political party executive committees or political action committees representing a political party;

(13) For the purchase of nominal noncash expressions of appreciation following the close of the polls of an election or within thirty days thereafter;

(14) For the payment of dues or subscriptions to any national, state or local committee of any political party;

(15) For contributions to a county party executive committee, state party executive committee or a state party legislative caucus political committee; and

(16) For contributions to a candidate committee: Provided, That a candidate committee may not contribute to another candidate committee except as otherwise provided by section ten of this article.

(b) A political action committee may not contribute to another political action committee or receive contributions from another political action committee: Provided, That a political action committee may receive contributions from its national affiliate, if any.

(c) Every liability incurred and payment made shall be for the fair market value of the services rendered.

(d) Every advertising agency subject to the provisions of this article shall file, in the manner and form required by section five-a of this article, the financial statements required by section five of this article at the times required therein and include therein, in itemized detail, all receipts from and expenditures made on behalf of a candidate, financial agent or treasurer of a political party committee.

(e) Any candidate may designate a financial agent by a writing duly subscribed by him which shall be in such form and filed in accordance with the provisions of section four of this article.

EXHIBIT B

To Whom It May Concern:

I am writing to request information from a telephone poll conducted by your company.

Specifically, I am writing to request a copy of the script used for a telephone poll during the recent General Election in West Virginia. The candidate for whom you were polling was Ann Barth. She is a democratic candidate for the US Congress.

Please respond to this request within (15) days of receipt of this letter. Your cooperation is appreciated.

Should you need further information in the intern. please do not hesitate to contact us at 1-304-558-6000.

Sincerely.

Kevin Cruickshank
Chief Investigator

EXHIBIT C

October 21, 2008

Kevin Cruickshank
Chief Investigator
Office of the Secretary Of State
Building One, Suite 157-K.
1900 Kanawha Blvd., East
Charleston, WV 25305

[TEXT REDACTED BY THE COURT] Letter Dated October 6, 2008

Dear Mr. Cruickshank:

On behalf of the Anne Barth for Congress committee, I'm responding to your October 6, 2008 letter to [TEXT REDACTED BY THE COURT]s regarding a telephone poll that that organization may have conducted on behalf of the Anne Barth for Congress campaign. In view of the fact that polls that have been conducted by [TEXT REDACTED BY THE COURT]s for the Anne Barth for Congress committee are owned by the latter, I believe it is appropriate for the Anne Barth for Congress committee to respond.

It is my understanding that on issues like the one described in your letter, the jurisdiction of the Federal Elections Commission preempts the jurisdiction of the appropriate state elections official. I am enclosing advisory opinion 1995-41 of the Federal Elections Commission which appears to be directly on point.

You think that the Secretary of State has jurisdiction in this matter, please let me know.

Very truly yours,

Hershel H. Rose III

Chairman, Anne Barth for Congress Committee

Enclosure

December 7, 1995

ADVISORY OPINION 1995-41

Robert F. Bauer
Perkins Coie

607 Fourteenth Street, N.W.
Washington, D.C. 20005-2011

Dear Mr. Bauer:

This responds to your letter dated October 30, 1995, as counsel for the Democratic Congressional Campaign Committee, who inquires on behalf of Representative Carolyn Maloney and Maloney for Congress, concerning application of the Federal Election Campaign Act of 1971, as amended ("the Act"), and Commission regulations to Federal preemption of certain reporting obligations of New York State campaign finance laws.

Maloney for Congress (the "Committee") is the principal campaign committee of Carolyn Maloney, a member of the U.S. House of Representatives for the New York 14th Congressional District. She is currently a candidate for re-election. You state that New York law requires all candidates for public office to disclose certain information about polling activity for public reporting purposes. Specifically, the statute requires that any candidate preparing to release poll results to the public must file within 48 hours, with the appropriate New York state regulatory authority, a report which states the poll sample size, the wording of the questions asked, and the full results of the poll. See 9 NYCRR § 6201.2.1/

You note that the New York State Board of Elections ("the Board") has taken the position that this reporting requirement applies to Federal, as well as other candidates, and that the Board communicated this position to Ms. Maloney.2/ You therefore ask whether the Act, Commission regulations, and prior Advisory Opinions issued by the Commission, indicate that the New York reporting requirement is preempted by Federal law.

The [ILLEGIBLE TEXT] states that its provisions and the rules prescribed thereunder. "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. 453. The House committee that drafted this provision intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." H.R. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974). According to the Conference Committee report on the 1974 Amendments to the Act. "Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights" as to other areas such as voter fraud and ballot theft. H.R. Rep. No. 93-1438, 93d Cong., 2d Sess. 69 (1974). The Conference report also states that Federal law occupies the field with respect to reporting and disclosure of political contributions to and expenditures by Federal candidates and political committees, but does not affect state laws as to the manner of qualifying as a candidate or the dates and places of elections. Id. at 100-101.

When the Commission promulgated regulations at 11 CFR 108.7 on the effect of the Act on state law, it stated that the regulations follow section 453 and that, specifically, Federal law supersedes state law with respect to the organization and registration of political committees supporting Federal candidates, disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees. Federal Election Commission Regulations, Explanation and Justification, House Document No. 95-44, at 51. 11 CFR 108.7(b). The regulations provide that the Act does not supersede state laws concerning the manner of qualification as a candidate or political party organization, dates and places of elections, voter registration,

voting fraud and similar offenses or candidates' personal financial disclosure. 11 CFR 108.7(c). The Commission explained that "[t]hese types of electoral matters are interests of the states and are not covered in the Act." House Document 95-44, at 51.

The Commission has previously concluded that the Act supersedes and preempts state law with respect to the reporting requirements of Federal committees and State committees which engage in Federal activity. See Advisory Opinions 1993-14, 1986-27 and 1978-54. Given this legal authority, the Act would preempt New York State law with respect to the reporting of contributions, disbursements and expenditures, including expenditures for polling activity in Federal election campaigns. New York State may not impose any obligation for reporting Federal contributions, disbursements and expenditures since those obligations fall only within the purview of the Act and Commission regulations. See 2 U.S.C. 434(b) and 11 CFR 104.3. Therefore, the Commission concludes that 9 NYCRR § 6201.2 may not be applied to Maloney for Congress, Carolyn Maloney or any other Federal candidate or committee with respect to polling activity that is done as part of a Federal election campaign.

This response constitutes an advisory opinion concerning application of the Act, or regulations prescribed by the Commission, to the specific transaction or activity set forth in your request. See 2 U.S.C. 437f.

Sincerely,

Danny L. McDonald

Chairman

Enclosures (AOs 1993-14. 1986-27. and 1978-54)

1 The cited provision states:

> No candidate, political party or committee shall attempt to promote the success or defeat of a candidate by directly or indirectly disclosing or causing to be disclosed the results of a poll relating to a candidate for such an office or position, unless within 48 hours after such disclosure, they provide the following information concerning the poll to the board or officer with whom statements or copies of statements of campaign receipts and expenditures are required to be filed by the candidate to whom such poll relates:
>
> (a) The name of the person, party or organization that contracted for or who commissioned the poll and/or paid for it.
>
> (b) The name and address of the organization that conducted the poll.
>
> (c) The numerical size of the total poll sample, the geographic area covered by the poll and any special characteristics of the population include in poll sample.
>
> (d) The exact wording of the questions asked in the poll and the sequence of such questions.
>
> (e) The method of polling-whether by personal interview, telephone, mail or other.
>
> (f) The time period during which the poll was conducted.
>
> (g) The number of persons in the poll sample; the numbers contacted who responded to each specific poll questions; the number of persons contacted who did not so respond.
>
> (h) The results of the poll.

2 In a May 3, 1984 Opinion, the Board stated that section 6201.2 "app[lies] to all campaigns conducted in New York State where the intent is to influence the voters of the state. There are no Federal laws, rules or

regulations known to the Board which would supersede the regulation of the New York State Board of Elections." New York Board of Elections 1984 Opinion # 1. Furthermore, the Board has previously found that a Federal committee, the Committee to Elect John Bouchard to Congress, was in violation of section 6201.2. See Times Union v. Committee to Elect John Bouchard, New York State Board of Election, Final Determination FC89-7 (September 7, 1990).

EXHIBIT D

November 26. 2008

Herschel H. Rose, III
300 Summers Street, Suite 1440
PO Box 3502
Charleston, WV 25335

Dear Mr. Rose:

In response to your letter to this office questioning jurisdiction in the matter of the telephonic polling of citizens in this state on behalf of candidate Anne Barth, this office does indeed hold proper jurisdiction in this matter. This office requested the transcripts of the poll(s) performed on behalf of Anne Barth by [TEXT REDACTED BY THE COURT]s. We are NOT asking for the disclosure of results or any campaign financial disclosures. Therefore, Advisory Opinion 1995-41 does not apply. We are merely requesting the content of the questions asked, the order in which they were asked, and all information sources used to support any and all accusations made against any candidate for any public office discussed in these polls.

I again request the transcripts be provided to this office within ten (10) days of receipt of this letter. Whether they be provided by your committee or [TEXT REDACTED BY THE COURT]h Associates is irrelevant at this point. Your timely response would be greatly appreciated.

Respectfully,

Kevin Cruickshank
Chief Investigator

EXHIBIT E

December 12, 2008

Kevin Cruickshank
Chief Investigator
Office of the Secretary Of State
Building One, Suite 157-K
1900 Kanawha Blvd., East
Charleston, WV 25305

[TEXT REDACTED BY THE COURT] Letter Dated October 6, 2008

Dear Mr. Cruickshank:

Thank you for your November 26, 2008, which I received on December 2, 2008.

I continue to respectfully disagree with you regarding the jurisdiction of the Secretary of State in this matter. It is my intention to request an advisory opinion from the Federal Elections Commission regarding the extent of federal jurisdiction over polling disputes. I will send you a copy of the request.

I presume that your request for the scripts was made in response to a complaint or inquiry received by the Secretary. Pursuant to the provisions of chapter 29B of the West Virginia Code. I request an opportunity to inspect and copy any documents that the Secretary has received or prepared that relate to the Secretary's request for the production of the polling scripts.

Very truly yours,

Herschel H. Rose III

Chairman, Anne Barth for Congress Committee

Load Date: 2014-01-17

End of Document

Federal Election Commission Advisory Opinions

United States Federal Election Commission

April 27, 2012

Federal Election Commission Advisory Opinions

AO 2012-10

Joseph E. Sandler, Esq.; Elizabeth L. Howard, Esq.

Sandler, Reiff, Young & Lamb, P.C.1025 Vermont Avenue, NWSuite 300Washington, DC 20005

Core Terms

candidate, telephone, push, disclaimer, elect, campaign, advisory opinion, preempt, state law, federal office, political committee, voter, federal law, attorney general, public office, expenditure, disclosure, telephone call, campaign committee, preemption, occupy, revise, non profit organization, research center, consent agreement, settlement, defeat, fec, purport, entity

Text

Dear Mr. Sandler and Ms. Howard:

We are responding to your advisory opinion request on behalf of Greenberg Quinlan Rosner Research, Inc., concerning the possible preemption of New Hampshire State law by the Federal Election Campaign Act of 1971, as amended (the "Act"), and Commission regulations. The Commission concludes that the provision of the New Hampshire campaign finance statute requiring disclaimers on certain campaign-related telephone surveys made on behalf of Federal candidates, their authorized campaign committees, or other Federal political committees is preempted by the Act and Commission regulations. The Commission could not reach a conclusion by the required four affirmative votes as to whether the New Hampshire statute is preempted with respect to telephone surveys made on behalf of nonprofit organizations (other than Federal candidates' authorized campaign committees, or other Federal political committees) where the surveys do not contain express advocacy.

Background

The facts presented in this advisory opinion are based on your letter received on February 21 and your email and letter received on March 5, 2012.

Greenberg Quinlan Rosner Research, Inc. ("Greenberg Quinlan") is a corporation located in the District of Columbia that provides political research and strategic consulting services. These consulting services include surveys, which are conducted on a nationwide basis and in many States and localities.

Greenberg Quinlan plans to conduct telephone surveys, using live operators, of New Hampshire voters. The surveys generally will consist of questions regarding demographics, the respondent's views on various issues, the respondent's impressions of the political parties and national political figures, the likelihood of the respondent to vote for a particular Federal candidate or candidates, and the likelihood of the respondent to vote for a specific Federal candidate after hearing various positive and/or negative information about the candidate. The telephone surveys will not expressly advocate the election or defeat of a clearly identified Federal candidate.

These telephone surveys will be paid for either by Federal candidates or by nonprofit organizations. The surveys will refer only to Federal candidates, and will not mention any candidates for State or local office.

Greenberg Quinlan believes that its proposed polling in New Hampshire may be subject to New Hampshire's statutory disclaimer requirements. New Hampshire law requires that:

> Any person who engages in push-polling, as defined in RSA 664:2(XVII), shall inform any person contacted that the telephone call is being made on behalf of, in support of, or in opposition to a particular candidate for public office, identify that candidate by name, and provide a telephone number from where the push polling is conducted.

N.H. REV. STAT. sec. 664:16-a(I). "Push polling" is defined as:

> (a) Calling voters on behalf of, in support of, or in opposition to, any candidate for public office by telephone; and
>
> (b) Asking questions related to opposing candidates for public office which state, imply, or convey information about the candidates['] character, status, or political stance or record; and
>
> (c) Conducting such calling in a manner which is likely to be construed by the voter to be a survey or poll to gather statistical data for entities or organizations which are acting independent of any particular political party, candidate, or interest group.

N.H. REV. STAT. sec. 664:2(XVII).

Greenberg Quinlan asks the Commission to determine whether the Act and Commission regulations preempt the New Hampshire disclaimer statute insofar as it purports to apply to Greenberg Quinlan's proposed telephone surveys that refer only to Federal candidates and do not refer to State or local candidates.

Questions Presented

1. Is a New Hampshire statute requiring disclaimers on certain telephone calls, New Hampshire Revised Statutes section 664:16-a(I), preempted by the Act or Commission regulations with respect to the proposed telephone surveys made on behalf of Federal candidates, their authorized committees, or other Federal political committees that refer only to candidates for Federal office?

2. Is a New Hampshire statute requiring disclaimers on certain telephone calls, New Hampshire Revised Statutes section 664:16-a(I), preempted by the Act or Commission regulations with respect to the proposed telephone surveys made on behalf of nonprofit organizations (other than Federal political

committees) that refer only to candidates for Federal office and that are in support of or in opposition to Federal candidates, but do not expressly advocate the election or defeat of a Federal candidate?

Legal Analysis and Conclusions

1. Is a New Hampshire statute requiring disclaimers on certain telephone calls, New Hampshire Revised Statutes section 664:16-a(I), preempted by the Act or Commission regulations with respect to the proposed telephone surveys made on behalf of Federal candidates, their authorized committees, or other Federal political committees that refer only to candidates for Federal office?

Yes, the New Hampshire statute requiring disclaimers on certain telephone calls, New Hampshire Revised Statutes section 664:16-a(I), is preempted by the Act and Commission regulations with respect to the proposed telephone surveys made on behalf of Federal candidates, their authorized committees, or other Federal political committees that refer only to candidates for Federal office.

The provisions of the Act and the Commission regulations promulgated thereunder "supersede and preempt any provision of State law with respect to election to Federal office." 2 U.S.C. 453; *see also* 11 CFR 108.7(a). The legislative history of the Act makes clear that Congress intended "to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be the sole authority under which such elections will be regulated." H.R. REP. NO. 93-1239, 93d Cong., 2d Sess. 10 (1974). According to the Conference Committee Report on the 1974 Amendments to the Act, "Federal law occupies the field with respect to criminal sanctions relating to limitations on campaign expenditures, the sources of campaign funds used in Federal races, the conduct of Federal campaigns, and similar offenses, but does not affect the States' rights" as to other areas such as voter fraud and ballot theft. H.R. REP. NO. 93-1438, 93d Cong., 2d Sess. 69 (1974). The Conference Committee Report also states that Federal law occupies the field with respect to reporting and disclosure of political contributions to, and expenditures by, Federal candidates and political committees, but does not affect State laws as to the manner of qualifying as a candidate, or the dates and places of elections. *Id.* at 100-01.

Consistent with congressional intent, Commission regulations provide that "[t]he provisions of the Federal Election Campaign Act of 1971, as amended, and rules and regulations issued thereunder, supersede and preempt any provision of State law with respect to election to Federal office." 11 CFR 108.7(a). Specifically, "Federal law supersedes State law concerning the . . . [l]imitation[s] on contributions and expenditures . . . regarding Federal candidates and political committees," but does not supersede State laws relating to the manner of qualifying as a candidate or political party organization, dates and places of elections, voter registration, voting fraud, ballot theft, candidates' personal financial disclosures, or funds used for the purchase or construction of State or local party office buildings. 11 CFR 108.7(c), 108.7(b)(3).

In promulgating 11 CFR 108.7, the Commission stated that Federal law supersedes State law with respect to the organization and registration of political committees supporting Federal candidates, disclosure of receipts and expenditures by Federal candidates and political committees, and the limitations on contributions and expenditures regarding Federal candidates and political committees. Explanation and Justification of the Disclosure Regulations, House Doc. No. 95-44, at 51 (1977). "[T]he central aim of the [Act's preemption] clause is to provide a comprehensive, uniform Federal scheme that is the sole source of regulation of campaign financing . . . for election to Federal office." Advisory Opinion 1988-21 (Wieder).

The New Hampshire statute at issue here is preempted to the extent that it purports to regulate Greenberg Quinlan's telephone surveys paid for by Federal candidates, their authorized campaign committees, and other Federal political committees. Under the Act and Commission regulations, the regulation of expenditures by Federal candidates, their authorized campaign committees, and other Federal political campaign committees is an area to be regulated only by Federal law, and both the Act and Commission regulations regulate this area, including expenditures for polling expenses. *See*, *e.g.*, 2 U.S.C. 431(9), 439a, 441a(j); 11 CFR 100.111, 106.4, pt. 113.

In Advisory Opinion 2009-21 (West Virginia Secretary of State), the Commission determined that the Act and Commission regulations preempted a State law that prohibited "deceptively design[ing] or intentionally conduct[ing] [polls] in a manner calculated to advocate the election or defeat of any candidate or group of candidates or calculated to influence any person or persons so polled to vote for or against any candidate, group of candidates, proposition or other matter to be voted on by the public at any election." W. VA. CODE sec. 3-8-9(a)(10). The Commission reasoned that the State statute, "if applied to Federal candidates, would impede those candidates' ability to make payment[s] of polling expenses that are governed by the Act and Commission regulations." Advisory Opinion 2009-21 (West Virginia Secretary of State).

Here, the New Hampshire statute, if applied to Federal candidates who wish to pay for the telephone surveys described in the request, would impose an additional disclaimer requirement on those expenditures. Under the Act's preemption clause, only Federal law may require disclosure regarding expenditures by Federal candidates. 2 U.S.C. 453; 11 CFR 108.7(b)(2). The Commission concludes, therefore, that New Hampshire Revised Statute section 664:16-a(I) is preempted insofar as it purports to apply to the proposed telephone polls made on behalf of Federal candidates, their authorized committees, or other Federal political committees that refer only to candidates for Federal office. *See* 2 U.S.C. 453, 431(9), 439a

2. Is a New Hampshire statute requiring disclaimers on certain telephone calls, New Hampshire Revised Statutes section 664:16-a(I), preempted by the Act or Commission regulations with respect to the proposed telephone surveys made on behalf of nonprofit organizations (other than Federal political committees) that refer only to candidates for Federal office, but do not expressly advocate the election or defeat of a clearly identified Federal candidate?

The Commission was unable to approve a response by the required four affirmative votes as to whether the New Hampshire statute requiring disclaimers on certain telephone calls is preempted by the Act or Commission regulations with respect to the proposed telephone surveys that will be made on behalf of nonprofit organizations that are not Federal political committees, and that will refer only to candidates for Federal office, but will not expressly advocate the election or defeat of a clearly identified Federal candidate.

This response constitutes an advisory opinion concerning the application of the Act and Commission regulations to the specific transaction or activity set forth in your request. *See* 2 U.S.C. 437f. The Commission emphasizes that, if there is a change in any of the facts or assumptions presented, and such facts or assumptions are material to a conclusion presented in this advisory opinion, then the requestor may not rely on that conclusion as support for its proposed activity. Any person involved in any specific transaction or activity which is indistinguishable in all its material aspects from the transaction or activity with respect to which this advisory opinion is rendered may rely on this advisory opinion. *See* 2 U.S.C.

437f(c)(1)(B). Please note that the analysis or conclusions in this advisory opinion may be affected by subsequent developments in the law including, but not limited to, statutes, regulations, advisory opinions, and case law. The cited advisory opinions are available on the Commission's website, or directly from the Commission's Advisory Opinion searchable database at http://www.fec.gov/searchao.

On behalf of the Commission,

Caroline C. Hunter

Chair

AOR 2012-10

February 21, 2012

Anthony Herman, Esq.
General Counsel
Federal Election Commission
999 E Street, N.W.
Washington, D.C. 20463

Re: Advisory Opinion Request: Greenberg Quinlan Rosner Research, Inc.

Dear Mr. Herman:

Pursuant to 2 U.S.C. § 437f and the Commission's regulations, 11 C.F.R. § 112.1, on behalf of our client, Greenberg Quinlan Rosner Research, Inc. ("GQRR"), we request an advisory opinion confirming that the provisions of New Hampshire Revised Statutes § 664:16- a(I), insofar as they purport to require that certain disclaimers be made in the course of telephone surveys that refer only to candidates for federal office, are preempted by the Federal Election Campaign Act of 1971 as amended ("FECA"), pursuant to 2 U.S.C. § 453.

1. GQRR

GQRR is a District of Columbia corporation located at 10 G Street, NE, Suite 500, Washington, D.C. 20002. GQRR is one of the nation's leading political research and strategic consulting firms, and is well-known for its survey research. GQRR conducts surveys for a variety of organizations and entities, including nonprofit organizations, authorized committees of federal candidates, labor organizations, political party committees and other political committees and organizations. Its surveys are conducted on a nationwide basis and in numerous states and localities.

2. Proposed Polling in New Hampshire

GQRR plans to conduct telephone survey research, using live operators, of New Hampshire voters, on behalf of certain federal candidates and certain nonprofit organizations. In all cases, the survey research will refer only to candidates for federal office and not to any candidate for state or local office in New Hampshire or in any other state or locality.

GQRR's survey research will typically consist of questions regarding demographics, the respondent's views on various issues, the respondent's impressions of the political parties and national political figures, the likelihood to vote for particular federal candidate or candidates, and the likelihood of the respondent to vote for a specific federal candidate after hearing various positive and/or negative Information about the candidate.

3. New Hampshire State Law and Enforcement by Attorney General

Chapter 664 of the New Hampshire Revised Statutes, which is the campaign finance title of New Hampshire state law, includes the following disclaimer provision:

> Any person who engages in push-polling, as defined in RSA 664:2(XVII), shall inform any person contacted that the telephone call is being made on behalf of, in support of, or in opposition to a particular candidate for public office, Identify that candidate by name, and provide a telephone number from where the push polling is conducted.

N.H. Rev. Stat. § 664:16-a(I). "Push polling" is defined in section 664:2(XVII) of the New Hampshire Revised Statutes as follows:

"Push polling" means

> (a) Calling voters on behalf of, in support of, or in opposition to, any candidate for public office by telephone; and
>
> (b) Asking questions related to opposing candidates for public office which state, imply, or convey information about the candidates character, status, or political stance or record; and
>
> (c) Conducting such calling in a manner which is likely to be construed by the voter to be a survey or poll to gather statistical data for entities or organizations which are acting independent of any particular political party, candidate, or interest group.

For two reasons, GQRR is concerned that it may be required to comply with these provisions with respect to its proposed polling in New Hampshire, referencing only federal candidates. *First*, the Attorney General of New Hampshire has already enforced these provisions against survey research firms that conducted telephone polls referencing only federal candidates. In one case, in July 2010, Mountain West Research Center had conducted a poll in New Hampshire on behalf of the authorized committee of Paul Hodes, the Democratic nominee for U.S. Senate from New Hampshire in the 2010 general election; the survey questioned respondents about their choice in that federal race. S. Schoenberg, *Settlement reached in Hodes calls*, Concord Monitor, Oct. 16, 2010 (copy attached as Exhibit 1). The Attorney General of New Hampshire charged Mountain West with violation of section 664:16-a(I), and ultimately reached a consent agreement with the firm in which the firm agreed to pay a $ 20,000 civil penalty. Press Release, N.H. Dept. of Justice, Office of the Attorney General, Mountain West Research Center to Pay $ 20,000 Under Consent Agreement for Push Polling Complaint (Oct. 15, 2010) (copy attached as Exhibit 2).

In a second case, a firm called OnMessage, Inc. conducted telephone survey research in New Hampshire on behalf of Guinta for Congress, the authorized committee of a candidate for U.S. House of Representatives. The Attorney General charged the company with violation of section 664:16-a(I) and ultimately reached a consent agreement with the firm in which the firm agreed to pay a $ 15,000 civil penalty. Press Release, N.H. Dept. of Justice, Office of the Attorney General, On Message, Inc. to Pay $ 15,000 Under Consent Agreement for Push Polling Complaint (Jan. 18, 2012) (copy attached as Exhibit 3).

Second, the definition of "push polling" under section 664:2 is sufficiently broad to cover what is considered, in the political community and in the industry, to be normal, legitimate polling rather than "push polling." "Push polling" is defined, under section 664:2, to include "questions related to opposing candidates for public office which state, imply, or convey information about the candidates character, status, or political stance or record." Yet, in MUR 5835, Democratic Congressional Campaign Committee, three Commissioners considered a poll asking about "the voter's likelihood to vote for" a candidate "after hearing several negative statements about that candidate," and then characterized that poll as "legitimate public opinion telephone polling." *In re Democratic Congressional Campaign Committee*, MUR 5835 (Statement of Reasons of Vice Chairman Petersen, and Commissioners Hunter and McGahn) 3, 16 (FEC July 1, 2009). Indeed, according to press reports, the survey about candidate Hodes that led the Attorney General to charge the polling firm simply asked the voter if they were less likely to choose the opponent if they knew certain negative information about the opponent's record. (Concord Monitor, *supra*, Exhibit 1 hereto).

For these reasons, there is clearly reason for GQRR to he concerned that its planned telephone survey research in New Hampshire will trigger an investigation and possible charges if GQRR does not include, in the telephone calls, the disclaimer required by New Hampshire law.

4. Discussion

FECA provides that:

> [T]he provisions of this Act, and of rules prescribed under this Act, supersede and preempt any provision of State law with respect to election to federal office.

2 U.S.C. § 453(a). The Commission has explained that the "House committee that drafted this provision intended 'to make certain that the Federal law is construed to occupy the field with respect to elections to Federal office and that the Federal law will be sole authority under which such elections will be regulated.'" Advisory Opinion 1995-41(Democratic Congressional Campaign Committee) (quoting H. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974)). The Commission has further explained that, "the central aim of the clause is to provide a comprehensive, uniform Federal scheme that is the sole source of regulation of campaign financing… for election to Federal office." Advisory Opinion 1988-21 (Wieder).

Where Congress intends to occupy a field, as is the case with FECA, it may be inferred from the federal law that such law "touches a field in which the federal interest is so dominant that the federal system will be assumed to preclude enforcement of state laws on the same subject." *English v. General Elec. Co.*, 496 U.S. 72, 78 (1990) (quoting *Rice v. Santa Fe Elevator Corp.*, 331 U.S. 218, 230 (1947)). The field occupied by FECA cleanly includes disclaimer provisions, which are a core part of FECA's regulatory scheme.

In Advisory Opinion 1978-24 (Sonneland for Congress Committee), the Commission considered a Washington State statute requiring party designation in all campaign advertising. The Commission, noting that neither FECA nor the Commission's regulations require such a disclaimer, held that the FECA disclaimer provisions "are an integral part of the scheme prescribed by the Act" and that, "[i]n light of stated Congressional intent that the Act preempt State law as to *required disclosures in conducting political campaigns* for Federal office, the Commission concludes that the [disclaimer provisions of FECA] ...would supersede and preempt the cited Washington statutes requiring designation of party affiliation all campaign advertising." *Id.* at 2 (emphasis added); see, to the same effect, Advisory Opinion 1995-41 (Democratic Congressional Campaign Committee) (state law requiring reporting of contents of

polling conducted by federal candidates was preempted by FECA) *and* Advisory Opinion 1981-27 (Congressman Bill Archer) (local ordinance requiring disclaimer on campaign signs was preempted as to federal campaigns).

Significantly, in this regard, the Commission has held that FECA, 2 U.S. C. § 441d, and the Commission's regulations, do not require that any disclaimer be included in telephone survey research. *In re Democratic Congressional Campaign Committee*, MUR 5835 (Statement of Reasons of Vice Chairman Petersen, and Commissioners Hunter and McGahn) (FEC July 1, 2009). In fact, the complaint filed in that MUR had alleged that the poll in question was a "push poll." In a 3-2 vote, the Commission voted to reject the recommendation of the Office of General Counsel to the contrary. The three Commissioners voting against a finding of a disclaimer violation found that the provision of negative information about a candidate "did not transform the calls into 'push polls' or 'advocacy' calls," *id.* at 12, and that in any event, usage of the term "push poll" "is of no legal significance here." *Id.* at 9.

Thus, the Commission has specifically found that no disclaimer is required by FECA in a telephone survey referencing federal candidates in precisely the way the New Hampshire statute characterizes as a "push poll" and which survey would, therefore, under New Hampshire law, require the special disclaimer prescribed by the state law. Even though the Commission was divided on the question of whether FECA requires that telephone surveys include the disclaimer prescribed by FECA and the Commission's regulations, it is clear that, regardless of the answer to that question, the obligation to include any disclaimer and the nature of that disclaimer are governed exclusively by federal law.

That conclusion follows as to polling exclusively referencing federal candidates that is conducted by nonprofit organizations, as well as to polling conducted by federal political committees. FECA and the Commission's regulations, of course, regulate and require disclaimers an certain forms of communication, referencing federal candidates, paid for by entities other than federal political committees--namely, electioneering communications and independent expenditures. 2 U.S.C. § 441d(a); 11 C.F.R. §§ 110.11(a)(2), (a)(4) (disclaimer requirements applicable to "any person").

Further, to the extent that the New Hampshire statute prevents a federal candidate in New Hampshire from conducting a survey that would constitute a "push poll" under the broad definition set forth in state law unless the state-prescribed disclaimer is included, the state law serves to limit and regulate the expenditures of federal candidates. For that reason also, the state law would be preempted by FECA. For example, a West Virginia statute prohibits candidates from conducting any poll "calculated to influence any person or persons polled to vote for or against any candidate..." W. Va. Code § 3-1-2. The West Virginia Secretary of State received a complaint from a citizen about a telephone poll conducted by a federal candidate allegedly in violation of that statute, and sought an advisory opinion from the Commission as to whether the state statute was preempted. In Advisory Opinion 2009-21 (W. Va. Secretary of State), the Commission ruled that it was, holding that, "the West Virginia statute, if applied to Federal candidates, would impede those candidates' ability to make payment of polling expenses that are governed by the Act and Commission regulations. Under the Act's preemption clause, only Federal law could limit the ability of a Federal candidate to make expenditures for polling.." *Id.* at 4. *See*, to the same effect, *Bunning v. Commonwealth of Kentucky*, 42 F.3d 1008, 1012 (6th Cir. 1994) (FECA preempted state law limiting scope of poll conducted by federal candidate). Here, too, only Federal law could limit the ability of a Federal candidate to pay for a poll deemed to be a "push poll" under New Hampshire law without the required state-prescribed disclaimer.

CONCLUSION

For the reasons set forth above, the Commission should issue an advisory opinion holding that, to the extent New Hampshire Revised Statute 664:16-a(I) purports to apply to telephone survey research solely referencing federal candidates, that statutory provision is preempted by FECA.

Sincerely yours,

Joseph E. Sandler

Elizabeth L. Howard

Counsel for Greenberg Quinlan Rosner

Research, Inc.

1025 Vermont Avenue, N.W., Suite 300

Washington, D.C. 20005

Attachment 1

Settlement reached in Hodes calls

Firm accused of illegal push polling

By Shira Schoenberg / Monitor staff
October 16, 2010

An Idaho-based research center has paid $ 20,000 to settle a case regarding a push poll it performed on behalf of New Hampshire Senate candidate Paul Hodes.

The settlement with Mountain West Research Center was announced yesterday by the New Hampshire attorney general's office. According to the attorney general, Mountain West contacted 529 New Hampshire households between July 19 and July 21. It stopped making the calls voluntarily July 21, after learning that questions were raised regarding the polls.

The New Hampshire Republican Party filed the original complaint against Mountain West. Party spokesman Ryan Williams said the party applauds the attorney general for taking action. "This company was clearly conducting illegal and unethical push poll calls on behalf of Congressman Paul Hodes and his campaign," Williams said. "Congressman Hodes is a Washington politician who has repeatedly used disgusting gutter politics to smear his opponents."

The Hodes campaign said Mountain West Research Center is no longer working for the campaign as a vendor or a subcontractor.

"We expect all of our vendors to follow applicable New Hampshire laws and would fire any vendor from our campaign that does not," said Hodes spokesman Mark Bergman.

Jesse Reinhold, director of the Mountain West Research Center, said, "Negotiating this settlement was purely a business decision. Mountain West Research conformed with all industry standards and best practices in conducting this study."

According to New Hampshire law, push polling involves an organization working in support of or on behalf of one candidate, asking voters questions about an opposing candidate in a way that gives information about the opposing candidate, while implying that the caller is from an independent organization.

Push polling is legal under New Hampshire law, but the law requires pollsters to state that the call is being made in support of or in opposition to a particular candidate, to identify the candidate, and to provide a phone number from where the polling is being conducted.

Associate Attorney General Richard Head said the Mountain West poll met the definition of a push poll under New Hampshire law, but the company did net provide any of the three required disclosures.

Under state law, there can be both criminal and civil penalties for violating the push poll statute. The maximum civil penalty is $ 1,000 per violation - and every call is considered a violation. Head said in this case, Mountain West had no prior history of violations in New Hampshire. The company voluntarily stopped its polls as soon as it learned that there were compliance problems, and it cooperated with the investigation. "Those were all factors relative to type of penalty and size of penalty," Head said.

Head confirmed that Mountain West Research Center was working for the Anzalone Liszt Research Company, which has offices in Alabama and Washington, D.C. Anzalone Liszt was hired by the Hodes campaign. Hodes spokesman Matt House said the Hodes campaign still employs Anzalone Liszt. On April 2, the Hodes campaign paid $ 44,500 to Anzalone Liszt, according to the campaign's financial reporting forms.

Head did not say whether there would be charges brought against any other organizations. "Where we are today, the only penalty that we have issued is the one (against Mountain West)," Head said.

The Republican Party complained to the attorney general in response to a story in the Union Leader detailing the push poll. According to the Union Leader, the caller would ask a voter who his choice was in the Senate primary. If the voter said Ayotte, the caller asked if they would be less likely to choose Ayotte if they knew that Ayotte did not pursue the Financial Resources Mortgage Ponzi scheme; that she destroyed her e-mails; that she set up a task force on mortgage fraud and did nothing; or that she had no experience creating jobs.

The Hodes campaign yesterday continued to deny that the poll was a push poll. "As we have previously said, all of our polling is only done for statistical market research purposes. Our campaign does not engage in push polling," Bergman said.

When the complaint was filed in July, Bergman told the Associated Press that the complaint was frivolous and "trying to score cheap political points."

The Ayotte campaign yesterday accused Hodes of basing his campaign on "launching vicious, false attacks against Kelly Ayotte."

"It's reprehensible that Hodes's campaign first tried to blame Republicans before ultimately accepting responsibility for this disgusting smear campaign against Kolly," said Ayotte spokesman Jeff Grappone. "By admitting his connection to this illegal push poll, Hodes confirms that he'll do anything - even violate election law - to win this race."

(Shira Schoenberg can be reached at 369-3319 or sschoenberg@cmonitor.com.)

Source URL: http://www.concordmonitor.com/article/220603/settlement-reached-in-hodes-calls

Attachment 2

News Release

For Immediate Release
October 15, 2010

Contact:
Richard W. Head, Associate Attorney General
(603) 271-1248

Mountain West Research Center to Pay $ 20,000 Under Consent Agreement For Push Polling Complaint

Attorney General Michael Delaney announced today his Office has reached a settlement agreement with Mountain West Research Center following complaints that the company was engaged in push polling in a manner that violated New Hampshire's push polling law. Under the terms of the Consent Agreement, Mountain West will pay the Stale $ 20,000 to settle the dispute.

Under New Hampshire law, push polling is defined as

(a) Calling voters on behalf of, in support of, or in opposition to, any candidate for public office by telephone; and

(b) Asking questions related to opposing candidates for public office which state, imply, or convey information about the candidates character, status, or political stance or record; and

(c) Conducting such calling in a manner which is likely to be construed by the voter to be a survey or poll to gather statistical data for entities or organizations which are acting independent of any particular political party, candidate, or interest group.

RSA 664:2, XVII.

While push polling is legal in New Hampshire, any person who engages in push polling must include the following information at some point during the call:

(a) that the telephone call is being made on behalf of, in support of, or in opposition to a particular candidate for public office;

(b) identify that candidate by name; and

(c) provide a telephone number from where the push polling is conducted.

RSA 664:16-a, I.

Mountain West contacted 529 New Hampshire households during the period July 19-21, 2010. Mountain West did not provide the disclosures described in the statute. The company voluntarily stopped making

the calls on July 21, 2010 upon learning that questions had been raised regarding its polling activity. Mountain West also cooperated with the Attorney General's investigation. Mountain West's voluntary cessation of its polling activities and its cooperation were factors considered by the Attorney General in determining an appropriate penalty.

Attorney General Delaney said: "An essential element of our democracy is vigilant enforcement of New Hampshire's election laws. My Office will continue to vigorously investigate election related complaints, and initiate civil or criminal enforcement actions against those who violate New Hampshire's election laws."

More information about filing elections related complaints can be found on the Attorney General's Web site at httD://doi.nh.Qov/electiQns/.

Attachment 3

News Release

For Immediate Release
January 18, 2012

Contact:
Matthew G. Mavrogeorge, Assistant Attorney General
(603) 271-1222

OnMessage, Inc. to Pay $ 15,000 Under Consent Agreement For Push Polling Complaint

Attorney General Michael Delaney announced today his Office has reached a settlement agreement with OnMessage, Inc. ("OnMessage") following complaints that the company was engaged in push polling in a manner that violated that violated New Hampshire's push polling law. Under the terms of the Consent Agreement, OnMessage will pay the State $ 15,000 to settle the dispute.

The State has alleged that OnMessage was hired by the 2010 Guinta for Congress campaign and wrote the push poll script used in the 400 calls that were made to New Hampshire residents in September 2010. OnMessage's script failed to disclose the telephone number used to conduct the push poll, in violation of New Hampshire law. In addition, OnMessage's script did not inform the recipient of the calls the name of the candidate on whose behalf the push polling was being made. Rather, the script contained instructions to disclose the candidate's name only if a New Hampshire citizen affirmatively asked for that information at a certain point towards the end of the phone call. Under New Hampshire law, the person placing a push poll phone call must disclose the candidate's name and the phone number being used to make the call at some point during a push poll call regardless of whether the recipient of the call ever asks for such information. As a result, the State alleged that OnMessage engaged in push polling in violation of New Hampshire law. OnMessage has cooperated with the Attorney General's Office.

Attorney General Delaney said: "An essential element of our democracy is vigilant enforcement of New Hampshire's election laws. My office will continue to vigorously investigate election related complaints, and initiate civil or criminal enforcement actions against those who violate New Hampshire's election laws."

Below is a link to a copy of the settlement agreement.

Under New Hampshire law, push polling is defined as

(a) Calling voters on behalf of, in support of, or in opposition to, any candidate for public office by telephone; and

(b) Asking questions related to opposing candidates for public office which state, imply, or convey information about the candidates character, status, or political stance or record; and

(c) Conducting such calling in a manner which Is likely to be construed by the voter to be a survey or poll to gather statistical data for entities or organizations which are acting independent of any particular political party, candidate, or interest group.

RSA 664:2, XVII

While push polling is legal in New Hampshire, any person who engages in push polling must include the following information at some point during the call:

(a) that the telephone call is being made on behalf of, in support of, or in opposition to a particular candidate for public office;

(b) identify that candidate by name; and

(c) provide a telephone number from where the push polling is conducted.

RSA 664:16-a, I.

More information about filing elections related complaints can be found on the Attorney General's website at www.doj.nh.gov/site-maD/voters.

Settlement Agreemerrt with OnMessage. Inc.

To "EHeiden@fec.gov" <EHeiden@fec.gov>, Liz Howard <Howard@sandlerreiff.com>

cc "ARothstein@fec.gov" <ARothstein@fec.gov>

Subject RE: Additional Information for preAOR on behalf of Greenberg Quinlan Rosner Research

Ms. Heiden:

Attached please find our response to your email below.

If you have any further questions or need any additional information, please let us know.

Thanks very much,

Joe Sandler

Joseph E. Sandler
Sandler, Reiff, Young & Lamb, P.C.
1025 Vermont Avenue, N.W. Suite 300
Washington, D.C. 20005
Tel: (202) 479-1111
Fax: (202) 479-1115
Cell: (202) 607-0700

From: EHeiden@fec.gov [mailto:EHeiden@fec.gov]

Sent: Thursday, February 23, 2012 5:41 PM

To: Joseph E. Sandler; Liz Howard

Subject: Additional Information for preAOR on behalf of Greenberg Quinlan Rosner Research

Dear Mr. Sandler and Ms. Howard,

In our telephone conversation earlier today, you provided us with additional information regarding the advisory opinion request submitted on behalf of Greenberg Quinlan Rosner Research, Inc. ("GQRR"). We have set out below our understanding of certain issues covered during the conversation. Please either confirm the accuracy of these statements or correct any misperceptions.

1. GQRR is not asking the Commission to determine whether the telephone surveys described in the advisory opinion request would require a disclaimer under the Fedoral Election Campaign Act (the "Act") and Commission regulations.

2. GQRR is asking about two types of telephone surveys: those paid for by Federal candidates and those paid for by non-profit organizations that clearly identify Federal candidates.

3. The telephone surveys that GQRR plans to conduct on behalf of Federal candidates and non-profit organizations would not expressly advocate the election or defeat of a clearly identified Federal candidate.

4. The telephone surveys would meet the regulatory definition of "telephone bank" at 11 CFR 100.28.

We would appreciate your response by email. Your response may be treated as a supplement to the advisory opinion request and, as such, may be placed on the public record.

Thank you,

Esther

Esther Heiden
Office of General Counsel, Policy Division
Federal Election Commission
999 E Street, NW
Washington, DC 20463

SANDLER, REIFF, YOUNG & LAMB, P.C.

March 5, 2012

Via E-Mail and First Class Mail

Esther Heiden, Esq.
Office of the General Counsel
Federal Election Commission
999 E Street, N.W.

Washington, D.C. 20463

Re: Pre-AOR On Behalf of Greenberg Quinlan Rosner Research

Dear Ms. Heiden:

This will respond to your e-mail of February 23, 2012, following our telephone conversation with you and Amy Rothstein. You have asked us to confirm, or address any inaccuracies in, the following statements:

1. "GQRR is not asking the Commission to determine whether the telephone surveys described in the advisory opinion request would require a disclaimer under the Federal Election Campaign Act (the "Act") and Commission regulations." That is correct. Greenberg Quinlan Rosner Research ("GQRR") is *not* asking the Commission to revisit the question--addressed in its consideration of MUR 5835 (Democratic Congressional Campaign Committee)--of whether 2 U.S.C. § 441d requires that survey research (opinion polls) conducted by telephone include a disclaimer. Further, it is clearly *not* necessary for the Commission to address that question in order to answer the question that GQRR is raising in its advisory opinion request: whether a state law purporting to require disclaimers in polls referencing only federal candidates is preempted by the Act.

"Congress explicitly stated in 2 U.S.C. § 453 its intent that FECA preempt state law." *Weber v. Heaney*, 995 F.2d 872, 876 (8th Cir. 1993). In that regard, the key point is that the preemption of state law by the Act is a case of express *field preemption*: the Act "is construed *to occupy the field* with respect to elections to Federal office and… the Federal law will be the sole authority under which such elections will be regulated." Advisory Opinion 1995-41 at 2 (quoting H. Rep. No. 93-1239, 93d Cong., 2d Sess. 10 (1974) (emphasis added)). *See Bunning v. Commonwealth of Kentucky*, 42 F.3d 1008, 1012 (6th Cir. 1994) ("Federal law occupies the field with respect to reporting and disclosure....") (internal citation omitted). "When Congress intends federal law to 'occupy the field,' state law in that area is preempted." *Crosby v. Nat'l Foreign Trade Council*, 530 U.S. 363, 372 (2000)(emphasis added).

When there is such field preemption, it does not matter that Congress has not regulated a particular aspect of the preempted field. Rather, "[w]hen Congress has enacted a preemption which provides a reliable indicium of congressional intent with respect to state authority, the court need only 'identify the domain expressly pre-empted.'" *Bunning*, 42 F.3d at 1012 (quoting *Cipolline v. Liggett Group, Inc.*, 505 U.S. 504, 517 (1992). If Congress, within that domain, decides not to impose regulation on a particular activity, the field preemption doctrine still precludes the states from regulating. "'A federal decision to forgo regulation in a given area may imply an authoritative federal determination is best left unregulated, and in that effect would have as much preemptive force as a decision to regulate.'" *Transcontinental Gas Pipe Line Corp. v. State Oil & Gas Bd. of Miss.*, 474 U.S. 409, 422 (1986) (quoting *Arkansas Elec. Coop. Corp. v. Arkansas Public Service Comm'n*, 461 U.S. 375, 384 (1983) (emphasis in original)).

The Act, of course, contains on express preemption clause: 2 U.S.C. § 453 provides that the provisions of the Act "supersede and preempt any provision of State law with respect to election to Federal office." The only question put before the Commission by GQRR's advisory opinion request is whether the disclosure of the source of funding of a telephone survey mentioning, and/or providing information about, federal candidates, falls with the "domain" described in section 453. If the answer is yes, New Hampshire's law is preempted. It is irrelevant whether an affirmative federal disclaimer requirement applies instead.

As the three Commissioners who voted against OGC's recommendation in MUR 5835 stated, "Certainly, Congress was keenly aware that campaigns conduct opinion polls via telephone, and certainly *could have* included them in section 441d...." (MUR 5835, Statement of Reasons of Vice Chair Matthew S. Petersen and Commissioners Caroline C. Hunter and Donald F. McGahn 8 (July 1, 2009)). Those three Commissioners determined that Congress had *not* included telephone polls in section 441d. The other three Commissioners implicitly concluded that Congress had included telephone polls in section 441d. Regardless of the answer to that question, however--which GQRR is *not* asking here-- the proposition that Congress *could have* included such polls in section 441d seems to us be indisputable--and conclusive. Such polls are within the "domain" described in section 453. New Hampshire's law is clearly preempted.

2. "GQRR is asking about two types of telephone surveys: those paid for by Federal candidates and those paid for by nonprofit organizations that clearly identify Federal candidates." That is correct, with the clarification that in both cases, the polls mention only federal candidates, not any candidates for state or local office. Thus, as to both types of surveys, the issue is whether the state can regulate the disclosure of funding of communications that refer *only* to federal candidates. For the reasons stated in the advisory opinion request and above, the answer is clearly no.

3. "The telephone surveys that GQRR plans to conduct on behalf of Federal candidates and non-profit organizations would not expressly advocate the election or defeat of a clearly Identified Federal candidate." That statement is correct.

4. "The telephone surveys would meet the regulatory definition of 'telephone bank' at 11 C.F.R. § 100.28." GQRR is not requesting that the commission determine whether the proposed GQRR surveys in New Hampshire meet the regulatory definition of a "telephone bank." That question is simply not relevant to the issue of whether Congress has preempted the field including the proposed activity. To be sure, the number of telephone surveys about federal candidates conducted in New Hampshire will in some cases, for particular surveys, exceed 500. The applicability of the federal disclaimer requirement (2 USC § 441d; 11 CFR § 110.11) would then turn on whether a telephone survey is a "public communication" within the meaning of section 100.26 of the Commission's rules. Again, the answer to that question is immaterial to the question being raised in GQRR's advisory opinion request. The question is not whether the New Hampshire disclaimer requirement conflicts with a different FEC requirement; the question is whether disclosure of the funding of communications mentioning only federal candidates can be regulated by state law at all given that Congress has occupied this field.

Thank you for your consideration of this request, and for the staff's time and attention to this request. If you have any further questions or need any clarification of the above, please contact us.

Sincerely yours,

Joseph E. Sandler

Elizabeth L. Howard

Counsel to Greenberg Quinlan Rosner

Research, Inc.

Load Date: 2014-01-17

Federal Election Commission Advisory Opinions

End of Document

Collins: I might run for governor; Maine's senior senator says she's looking into what she can do in 2018

Kennebec Journal

April 12, 2017 Wednesday

Section: Pg. 1.A; ISSN: 07452039

Length: 1229 words

Byline: SCOTT THISTLE

Dateline: Augusta, Me.

Body

FULL TEXT

U.S. Sen. Susan Collins said Tuesday she was seriously contemplating a run for Maine governor in 2018, her most definitive statement yet on a topic that has long been the subject of political speculation.

The Republican senior senator mostly has demurred on the subject when questioned by reporters seeking to identify prospective candidates to succeed Gov. Paul LePage in the Blaine House.

But in an interview Tuesday morning, Collins told WGAN radio hosts Matthew Gagnon and Ken Altshuler in response to a question about her plans that she was giving serious thought to running.

"Let me say that I am looking at where I can do the most good for the people of Maine," said Collins, who has served in the Senate for 20 years. "In the Senate I now have significant seniority and that allows me to do a lot.

"Coming to be governor, if I were fortunate enough to be elected ... you can work on issues I care a lot about like economic development, jobs, education. And I would try to heal the state and bring people back together, which I think is important as well.

"So I'm trying to figure out where I can do the most good. I'm being totally honest with you -- I truly don't know, I really don't. It's a hard decision."

In an email to the Press Herald later Tuesday, Collins wrote she wouldn't make a final decision until later this year.

"The frenetic pace and turbulent political environment in Washington have prevented me from spending any significant time thinking through the pros and the cons," Collins wrote. "I don't expect that I will be making a decision until this fall. Regardless of what I decide, it continues to be an honor to represent Maine in the United States Senate."

Collins' comments were the most detailed expression of interest she has made in the office of governor since she ran for the job in 1994, losing to independent Angus King, who now serves alongside her in the Senate.

Were Collins to run and be elected, she would have to resign her Senate seat with two years remaining in her term, setting up a scenario allowing LePage to appoint a replacement for the unexpired term. If elected, Collins would be Maine's first female governor.

In the interview, Collins was not asked to explain her comment about healing the state, but it appears to be a reference to the tumultuous and often controversial tenure of LePage, whose two terms have been marked by partisan polarization and an often hostile relationship with the Legislature, including, at times, members of his own party.

Collins has long been one of Maine's most popular politicians, with high voter approval ratings in most polls. Considered a moderate Republican in Washington, she has at times been at odds with the more conservative flanks of the Republican Party, especially on social issues. Collins supports abortion rights and has been an outspoken advocate against discrimination based on sexual orientation. She holds several key committee assignments including the Senate's Select Committee on Intelligence, the Committees on Appropriations and the Committee on Health, Education, Labor, and Pensions. Collins is the chairwoman of the Select Committee on Aging and has been an advocate for older citizens.

Collins won re-election to her U.S. Senate seat in 2014 handily, defeating Democratic challenger Shenna Bellows with 68 percent of the vote. Collins also won all 16 of Maine's counties in 2014.

In recent years Collins has faced growing criticism from within her own party, especially from far-right conservatives, many of whom supported LePage and President Donald Trump in 2016. Collins in an August 2016 guest column in The Washington Post criticized Trump and noted she would not vote for him or his Democratic opponent, Hillary Clinton.

"My conclusion about Mr. Trump's unsuitability for office is based on his disregard for the precept of treating others with respect, an idea that should transcend politics. Instead, he opts to mock the vulnerable and inflame prejudices by attacking ethnic and religious minorities. Three incidents in particular have led me to the inescapable conclusion that Mr. Trump lacks the temperament, self-discipline and judgment required to be president," Collins wrote in part.

LePage, an ardent Trump supporter, criticized Collins last August, saying, "I think Susan Collins is done in Maine. I think her decision to go against the Maine Republicans really cooked her goose."

To which Collins' spokeswoman Annie Clark quickly responded, "Her goose not only hasn't been cooked, it hasn't even been plucked yet."

And while LePage and Collins have had frosty relations of late, she endorsed LePage in his re-election campaign in 2014, standing with him on the podium at the Maine Republican Party's convention that year.

Democrats also have leveled criticism at Collins recently for her support in confirming Neil Gorsuch, a Trump nominee, to the U.S. Supreme Court. They have argued Gorsuch is against abortion rights and could be a key vote on the issue were it to come before the high court again. But Collins also supported at least a Senate confirmation hearing for former President Barack Obama's pick for the same seat, Merrick

Garland. At the time, Collins sided with Democrats in calling for a fair review of Garland, although leaders in the Republican controlled Senate did not allow that to happen.

Collins was also among five Republicans who sided with Democrats in opposition to a proposed travel ban for visitors to the U.S. from a handful of predominantly Muslim countries. Collins has parted ways with more conservative Republicans on gun issues and has voted in support of a federal law change that would expand federal background checks for gun purchases. She has received only a C+ ranking from the pro-gun National Rifle Association and a D- ranking from Gun Owners of America.

While some conservative Republicans have deemed Collins a RINO, or a Republican in Name Only, Maine voters by wide margins have continued to support her, and many believe she would have an easy road to the Blaine House if she wanted it.

As a gubernatorial contender, Collins would join a growing field of possible candidates that includes both prominent and lesser-known Democrats, Republicans and independents.

Among those who have confirmed they are considering a bid is Maine Attorney General Janet Mills, a Democrat, and former Maine Republican Party Chairman Rick Bennett. Bennett also has served as state senator, including a term as Maine Senate President. Also on the short list for Republicans is Maine Department of Health and Human Services Commissioner Mary Mayhew and Senate Majority Leader Garrett Mason, R-Lisbon.

Democrats in the mix also include attorney and businessman Adam Cote, car dealership magnate Adam Lee and former Speaker of the House Mark Eves. Shawn Moody, an independent, who lost a bid for the governor's office in the 2010 five-way race that LePage won, also has said he is weighing another race in 2018.

Also complicating Maine's next gubernatorial race is a 2016 ballot question passed into law by voters that would move Maine to a ranked-choice voting system. Whether the new law will pass constitutional muster is still unclear, as the Maine Supreme Judicial Court takes oral arguments on the new law Thursday in Augusta. A ranked-choice ballot could feature many candidates.

Credit: By SCOTT THISTLE Portland Press Herald

Load-Date: April 13, 2017

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LePage rallies his supporters against Susan Collins

Bangor Daily News (Maine)

July 31, 2017 Monday

Length: 789 words

Byline: Michael Shepherd BDN Staff

Body

Gov. Paul LePage looks to be leading a Republican civil war against U.S. Sen. Susan Collins' 2018 gubernatorial bid before anyone's sure she'll declare one and as she sits at the center of the national health care debate.

The governor railed against the moderate Republican senator at a Saturday pig roast put on by the Somerset County Republican Committee in Canaan, where an attendee said LePage repeatedly mentioned working to defeat Collins if she runs for governor next year.

It came after her Friday vote against Republicans' latest plan to repeal and replace the Affordable Care Act. She was one of three Senate Republicans to cast key votes rejecting it, putting one of the party's major goals in jeopardy.

President Donald Trump tweeted that opponents "let the American people down," but Collins was pictured returning to the Bangor airport to applause in a waiting area. In a Sunday interview with CNN, she called it "heartwarming and affirming."

But Collins is also considering a Blaine House run in 2018 and has said she'd make a decision on running by the fall. Few in Maine politics are certain she'll declare one besides LePage, who said in a Thursday radio interview that he thinks she's planning on it.

"If the Republican base -- which is the 290,000 people that voted for me (in his 2014 re-election) -- tell her, 'We don't want you; you're not winning the primary,' she'll back down," he said in a video provided by the attendee at the Canaan event under conditions of anonymity.

https://soundcloud.com/bdnmaineminute/lepage-collins-will-back-down-in-governors-race-if-gop-base-rejects-her

That line got some applause from the crowd of Republican diehards who love LePage, whose political ascent began with a 2010 primary win over six opponents. But years of polling data indicate that his push at Collins might not resonate much outside his sphere of loyal conservative supporters.

LePage, who scored an approval rating of 47 percent in the latest round of state-by-state polling from Morning Consult, has a far more limited base than Collins, who may be Maine's most popular politician,

regularly registering approval ratings in the mid- to high-60s. A 2014 poll during her last re-election campaign saw her pulling more support from Democrats than from Republicans.

But Collins has always maintained relationships to party loyalists by helping lower-level politicians win elections. LePage is no exception to that.

Days before the 2014 election where both were up for re-election, Collins showed up at LePage's Blaine House food drive, was greeted with a hug and said she had unwavering support for the governor and praised him for "his emphasis on jobs and the economy."

Their relationship has soured since the 2016 election. LePage became an early Trump endorser in February 2016, while Collins said she wouldn't support Trump that August. After Trump won Maine's 2nd Congressional District and the election, he said she was "done in Maine."

In April, Collins gave a radio interview where she weighed her options for 2018, saying her goal would be to "heal the state" if she ran, a likely jab at LePage's divisive tenure. After that, LePage said he didn't know her well enough to know whether she'd be a good governor.

LePage's former health and human services commissioner, Mary Mayhew of South China, is the only Republican in the gubernatorial race so far.

Mayhew led LePage's opposition to Medicaid expansion, while Collins suggested in June that Maine consider following Indiana's conservative approach to expansion under the federal health care law. Mayhew was in Washington ear li er this month pushing for repeal of the Affordable Care Act.

LePage's position on various Republican Obamacare repeal efforts changed alongside their proposals. In March, he opposed a House bill for not going far enough in scaling back the current law, but he supported it after changes were made, including a quicker Medicaid expansion phase-out.

He also told reporters at the White House in June that he opposed a Senate bill because it didn't go far enough. Later that day, he released a statement saying he generally supported repeal efforts. That bill failed and was different than the "skinny repeal" bill considered in the key vote Friday.

Mayhew and Collins could be the official foils if the senator gets in, but as he always seems to be in Maine politics, LePage will be front and center in any battle that materializes.

This item was originally published in Daily Brief, a free political newsletter distributed Monday through Friday by the Bangor Daily News to inform dialogue about Maine politics and government. To read more of today's Daily Brief, click here. To have the Daily Brief delivered daily to your inbox, click here.

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Load-Date: July 31, 2017

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Shadowy poll suggests problems for Susan Collins if she runs for governor

Bangor Daily News (Maine)

August 9, 2017 Wednesday

Length: 543 words

Byline: Michael Shepherd BDN Staff

Body

An early, shadowy poll in Maine's 2018 gubernatorial race that looks aimed to ward off U.S. Sen. Susan Collins, who is considering running to replace Gov. Paul LePage, says she might have trouble surviving a Republican primary.

The conservative governor has escalated an intra-party war against the moderate senator since her key vote in late July against repealing the Affordable Care Act, which was the party's No. 1 priority now that it has control over the executive branch and majorities in both chambers of Congress.

LePage began his attack on Collins at a private Republican event the weekend after the vote, saying she would "back down" from a run if his base rejected her. Last week, he called Collins and U.S. Sen. Angus King "dangerous" in a Wall Street Journal column.

It's hard to say what the impact will be, and it's worth noting that while Collins regularly wins approval ratings of 65 percent or higher in public polls, LePage has never cracked 50 percent.

But a poll from the Democratic firm Public Policy Polling that showed up in Politico on Tuesday seems to bear that out, even though it's unclear who paid for the poll.

It showed former LePage Health and Human Services Commissioner Mary Mayhew -- the only declared Republican candidate -- leading Collins among 672 likely primary voters with 44 percent support to the senator's 33 percent. But there are more results that cut both ways for Collins.

First, the very bad: More than six in 10 respondents said they disapproved of Collins and said her vote on Obamacare made it less likely they would vote for her, while 55 percent said they would be more likely to support a candidate who earned LePage's endorsement.

The kernel of good news for Collins is that Mayhew doesn't seem very strong, either. She has a 27 percent approval rating, but 23 percent disapprove and 50 percent didn't know enough to form an opinion. A generic Republican also runs 18 points ahead of Mayhew when paired against Collins, according to the poll.

All of this bears out what several Republicans told the Bangor Daily News last week -- that Collins would have big trouble in a primary. It also shows that LePage has the hearts of the base, tallying a 79 percent approval rating among Republicans, two points ahead of President Donald Trump.

But polls this early don't reflect the environment that candidates will face next June in the primary election. It's also a giant red flag that we don't know who paid for the poll.

A spokesman for the Democratic Governors Association didn't respond to a question about whether or not his group funded it. Groups like that would love to run against someone less widely popular than Collins.

In a statement, Collins spokeswoman Annie Clark said the senator "is not going to make a decision based on any poll." Mayhew said in a statement that while she doesn't put much stock in polls, "this may be a small indicator of the way our campaign is being received by the voters."

This item was originally published in Daily Brief, a free political newsletter distributed Monday through Friday by the Bangor Daily News to inform dialogue about Maine politics and government. To read more of today's Daily Brief, click here. To have the Daily Brief delivered daily to your inbox, click here.

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POLITICO

CONGRESS

Collins agonizes over decision to ditch the Senate

The Maine senator, one of the last true moderates left, is seriously weighing a run for governor.

By **BURGESS EVERETT** | 10/03/2017 05:00 AM EDT

Sen. Susan Collins said her committee work and seniority "really matter" — but she is tantalized by the opportunity to help the less prosperous parts of Maine as governor. | J. Scott Applewhite/AP Photo

Sen. Heidi Heitkamp was watching TV recently when she saw a report that Susan Collins was considering a run for Maine governor and soliciting advice on the decision.

The North Dakota Democrat quickly shot a text message to her Republican colleague: "Don't do it."

A move by Collins to seek the governorship would rock the Senate and the broader political landscape. In a chamber controlled by just 52 Republicans, Collins and a handful of other centrist senators can decide the fate of President Donald Trump's agenda. And a run by Collins for governor could eventually cost the GOP one of its last congressional footholds in New England.

Collins is torn over whether to leave her prominent perch as one of the Senate's few true moderate legislators, according to her colleagues. If Collins had made up her mind by now, said Sen. Angus King (I-Maine), "she already would have announced it."

In an interview, Collins said the buzz about her prolonged indecision is "accurate." She initially planned to make up her mind by the end of September, but pushed back her deadline to mid-October as she wrestled with the GOP's recent Obamacare repeal effort.

"Given the contentious environment in Washington right now, my voice and vote matter a great deal," Collins said. "On the other hand, if I were fortunate enough to be elected governor, I could work more directly on job creation."

She added: "That's why it's such a difficult decision to make. And I'm trying to figure out where I matter most."

A Governor Collins would leave centrists like Heitkamp even more lonely in the Senate. But Heitkamp acknowledges that Collins is feeling a tug to return to Maine full time:

“Fundamentally, she wants to go home.”

“She is [up in the air]. And I think she had hoped to make a decision before this,” said Heitkamp, who herself weighed retirement before announcing this year she'd run for a second term. “I desperately hope she doesn’t run.”

There’s also risk for the fourth-term senator. She could face a primary challenge in the gubernatorial race, fueled by term-limited Republican Gov. Paul Lepage’s open disdain for Collins’ opposition to Obamacare repeal proposals. And if Collins runs, it would likely fuel Democrats’ push to take back the Senate in 2020, since most Republicans believe she's the only person from her party who can hold the seat.

In 2012, when Sen. Olympia Snowe (R-Maine) retired, King walloped the GOP candidate. So the first thing Sen. Jerry Moran (R-Kan.) did when he took over as the Senate GOP’s campaign chairman was set out to persuade Collins to run again in 2014. She won reelection with 68 percent of the vote and Republicans took the chamber for the first time in eight years.

King is begging her not to leave. And in an unusual display of bipartisanship in the Senate, so are moderate Democrats.

“She’s so important to the country here,” said Sen. Claire McCaskill (D-Mo.). “We don’t have enough folks like her.”

Republicans are fretting Collins will join retiring Sen. Bob Corker (R-Tenn.) and create a wave of pragmatic GOP senators fleeing the chamber. Though Collins holds sway as one of the chamber's few swing votes, she also faces the frustration of watching her party constantly doing the opposite of what she'd like — from trying to repeal Obamacare on party lines, to refusing to hold a hearing on Supreme Court nominee Merrick Garland, to nominating Donald Trump.

In the latest Obamacare repeal effort, even after party leaders had written her off as an automatic “no,” she came under unyielding pressure from the White House. Vice President Mike Pence called her last Saturday as she drove across the state, a conversation that got so in-depth that Collins pulled her car over.

They talked for 40 minutes. Not even two days later, Collins came out in opposition, delivering the knockout blow. And she says another party-line shot is unwise.

“I don’t think having a partisan approach to an issue that affects one-sixth of our economy and affects millions of Americans is the right way to go,” Collins said.

Collins is reevaluating her career amid some ominous developments for a politician with her profile. Prominent deal-makers in Congress are retiring just as a new wave of strident conservatives are trying to break in. Meanwhile, Republicans say they want to take another stab next year at a party-line repeal of Obamacare, and they're weighing doing the same thing on tax reform.

Collins would enjoy more autonomy and control over the agenda as governor of Maine, a job she sought unsuccessfully in 1994.

Asked whether she would run, Sen. John McCain (R-Ariz.) cited his surprise with Corker’s decision and said: “You never know with these people."

“I always expect her to act in a way that she thinks is best for Maine,” said McCain, who is close with Collins and understands any aversion she might have to her current situation. “Am I happy with the environment here? Of course not. Nobody could be.”

Collins said her committee work and seniority “really matter” — but she is tantalized by the opportunity to help the less prosperous parts of the state, where shuttered paper mills and an aging population have devastated the economy.

“I’m from the northern part of the state, which needs a lot of help … two-thirds of the state is losing population and opportunity,” she said. “I have some ideas for economic development that only a governor can pursue.”

Maine Republicans say Collins would likely have to navigate the divide between the Trump and establishment wings of the Republican Party if she runs. LePage spent September slamming her opposition to the Graham-Cassidy health repeal bill as “shameful” as the two sparred over whether the bill would have been good for the state.

Phil Harriman, a political analyst and former Republican state senator, said LePage’s attacks on Collins could be damaging given his sway over the state party, though she’d be a clear front-runner in a general election.

“It would be more complicated, at least in the Republican primary,” Harriman said. “If it was today, I would say she’d probably face a primary challenge.”

Collins is cognizant of the state's complicated political environment. In the past two decades, Maine has had Republican, Democratic and independent governors. Collins, Snowe and King have been among the most independent-minded senators in recent years. And Trump won an electoral vote in the northern part of the state, pushing Maine into swing-state territory.

Asked about LePage's performance, Collins was diplomatic. But she acknowledged the yawning difference between her measured moderation and his bombastic sound bites.

"I support many of Gov. LePage's policies," she said. "Obviously, he and I have very different styles and we disagree on what the impact of what Graham-Cassidy would have been."

While Republicans are fretting that the GOP's flailing governance of Washington will push Collins to join the retiring Corker and Pennsylvania Rep. Charlie Dent, it's not uncommon for senators to mull leaving the dysfunctional chamber for executive office. Most, like Heitkamp and Sen. Joe Manchin (D-W.Va.), eventually decide to stay in D.C.

Manchin was the outlier among senators interviewed for this story, who hope that Collins will stay put. The West Virginia senator said she should run if "she thinks she has a shot for it."

"Best job in the world. Oh my god. There's no comparison," said Manchin, a former governor. "You never deny somebody who has that opportunity to do something good for their state."

BANGOR DAILY NEWS
David Farmer
BDN BLOGS

Internal memo shows Collins in commanding position in GOP primary for governor

October 3, 2017 Campaigns, Commentary, Democrats, Republicans 2018 election, Angus King, Democrats, Maine governor, Paul LePage, Poll, Republicans, Susan Collins

By David Farmer

An internal memo for Sen. Susan Collins, that I obtained and confirmed as authentic, shows that Maine's senior senator remains overwhelmingly popular and holds a commanding lead in any potential gubernatorial match-up.

The memo, which was produced by Collins' pollster Hans Kaiser based on statewide polling conducted Sept. 17-21, shows 70 percent of Maine voters have a favorable opinion of the senator, compared to just 21 percent who view her unfavorably.

Collins' job approval numbers are even higher. Seventy-five percent of Mainers say they approve of the job she's doing, while just 19 percent disapprove. Five percent say they don't know (I have to wonder who the heck these people are). Job approval numbers are often a predictor of electoral support.

The poll comes as one of the biggest political questions in the state goes unanswered: Will Collins leave the US Senate, where she is a powerful and pivotal player, to run for governor. Collins has said that she will announce her decision next week.

I've been, and remain, skeptical that Collins would trade Washington for Augusta, but the new polling information circulating in both DC and Maine suggests she is seriously considering it – and frankly would have little trouble dispatching opponents in a Republican primary, despite speculation to the contrary.

Sen. Susan Collins. REUTERS/Yuri Gripas

During one of his regular appearances on talk radio, Republican Gov. Paul LePage gave his political analysis of Collins' standing in the Republican Party. "I will say this right away. I do firmly believe deep down in my heart that Susan Collins, in order to become the governor of the state of Maine, will have to run as an independent, and she's highly unlike to win a Republican primary."

That doesn't appear to be true.

According to the Kaiser memo, Collins' job approval numbers are above 60 percent for Republicans, Democrats and independents. While her support among Democrats and independents wouldn't help her in a Republican primary, she appears to be in the catbird seat there as well.

"Should Susan decide to run for governor these numbers show her in a very solid position as she leads her next closest competitor in the Republican primary by a better than 3:1 margin and two other competitors by even larger margins."

I have not seen the actual poll results, but the authenticity of the data has been confirmed by someone who has seen the poll. That person also described the head-to-head match-ups in more detail.

Collins obliterates the Republican field out of the gate. Former Department of Health and Human Services Commissioner Mary Mayhew is a distant second with a negative favorability rating. Other Republican contenders are essentially unknown.

The poll also tested Collins in a general election matchup against at least one Democrat. From my perspective, the news there isn't good. She has a commanding lead. (I'm supporting Democratic candidate Jim Boyle, and consider most of the people running for the Democratic nomination friends. The poll did not test Boyle, I'm told.)

According to the memo, Collins starts above 50 percent in head-to-head ballot tests in the general, a critical benchmark for any candidate.

"These number show Susan Collins in a very strong position among voters in Maine, one that transcends party lines and demonstrates a great appreciation for the job she is doing in the US Senate. Should she decide to run for governor these numbers suggest she would be extremely difficult to beat," the memo said

Collins appears to be unscathed by LePage's attacks – including an email to Maine Republicans – and by critical remarks from Republican US Rep. Bruce Poliquin, recorded at a closed-door GOP event.

The poll also shows, according to the person who has seen it but asked to remain unidentified because they haven't been cleared to talk about the information, in a potential match up between Maine's other US senator, Angus King, and LePage, King holds a commanding lead, with more than 60 percent of voters backing the independent.

Voters, it appears, side with King and Collins, not LePage.

Statewide research of this nature isn't cheap. A 500-person sample, using live callers and a cellphone supplement, can easily cost $30,000, and depending upon the length could climb to $50,000 to $60,000. Memos like this one are often produced for donors as a way to solicit contributions and demonstrate a candidate's viability.

I can't remember a time when Collins has released internal polling before, so it seems unlikely these numbers will be put out to the general public, but the fact that the poll was done at all suggests that Collins is seriously considering a run.

It's early and polling isn't predictive. It's a snapshot in time. But if Collins decides to stay in the US Senate, fear of a Republican gubernatorial primary doesn't appear to be the reason.

The poll suggests Maine Republicans aren't as extreme as LePage believes, and others fear.

About David Farmer

David Farmer is a political and media consultant in Portland, where he lives with his wife and two children. He was senior adviser to Democrat Mike Michaud's campaign for governor and a longtime journalist. You can reach him at dfarmer14@hotmail.com.

State & Capitol

Maine politics — as it happens

BDN BLOGS

Collins to announce decision on 2018 gubernatorial race next week

October 3, 2017 Daily Brief, Governor LePage, U.S. Congress Angus King, Bruce Poliquin, Claire McCaskill, donald trump, Heidi Heitkamp, Jeff Pierce, Jeffrey Hall, Lucas St. Clair, Paul LePage, Susan Collins, Tom Petty

By Michael Shepherd

Good morning from Augusta. U.S. Sen. **Susan Collins** is expected to decide next week whether or not she'll join the 2018 gubernatorial race and some of the moderate Maine Republican's fellow senators don't want her to go.

Her announcement is planned for the Senate's Columbus Day recess. Collins spokeswoman Annie Clark said in an email that her decision will come during the senator's state work period around the holiday, which goes from Oct. 9 to Oct. 13. Collins has said for months that she's conflicted between her senior post in the Senate and her desire to work on state-level economic development.

Some of her colleagues don't want her to run, including Angus King. Politico reported today that other senators are urging Collins not to return home to run to replace Republican Gov. **Paul LePage** next year, saying she's too valuable as a check on her fellow Republicans. But they believe that she's seriously weighing it. King, an independent from Maine, is "begging" her not to run. Democrat **Heidi Heitkamp** of North Dakota texted her

recently to say, "Don't do it," and **Claire McCaskill** of Missouri said, "We don't have enough folks like her."

If she does, can she win a primary? Collins has polled as Maine's most widely popular politician, but she didn't support President **Donald Trump** last year when he became the party's presumptive nominee and has twice opposed Republican bids to repeal the Affordable Care Act. LePage told supporters in July that Collins would "back down" from a run if his base rejected her and a shadowy poll from a Democratic firm just afterward said more than six in 10 likely Republican primary voters disapprove of her.

The New York Times https://nyti.ms/2kNz76c

Senator Susan Collins Will Not Run for Governor of Maine

By Katharine Q. Seelye

Oct. 13, 2017

ROCKPORT, Me. — After months of open deliberation about her future, Senator Susan Collins of Maine announced Friday that she would not run for governor and would remain in the Senate.

Her decision leaves in place a moderate Republican who is a swing vote; she has stood against President Trump's agenda more than any other Republican senator and is likely to maintain a role as his foil.

In Maine, her decision, which had been a matter of much public debate here in recent weeks, could open the floodgates for additional candidates to enter an already crowded field in the 2018 election for governor — a race in which Ms. Collins was seen as a heavy favorite though was not assured of winning the primary. Her decision also brings relief to Democrats in this state, who saw Ms. Collins as a popular candidate who appealed to independents and would have made it hard for them to win a governor's seat that has been in the hands of Republicans since 2011.

"I want to continue to play a key role in advancing policies that strengthen our economy, help our hard-working families, improve our health care system, and bring peace and stability to a violent and troubled world," Ms. Collins told a packed breakfast meeting here. "And I have concluded that the best way that I can contribute to these priorities is to remain a member of the United States Senate."

Her decision to stay runs counter to that of a number of other congressional Republicans who, frustrated by Washington's dysfunction, have announced their retirements. Calling herself an optimist, Ms. Collins declared: "I continue to believe that Congress can, and will, be more productive." She faces re-election in 2020 if she seeks a fifth Senate term.

Ms. Collins, 64, who was first elected to the Senate in 1996, has become a thorn in the side of Mr. Trump, for whom she did not vote. Most famously, she played a crucial role this summer in dooming his goal of repealing the Affordable Care Act.

"This will be bad news for Donald Trump," said Stuart Rothenberg, a veteran political analyst for Inside Elections With Nathan L. Gonzales, a nonpartisan newsletter that analyzes campaigns. But, he said, it was good news for those on Capitol Hill "who are looking for dispassionate, pragmatic leadership and for members willing to cross party lines on important votes."

Since April, Ms. Collins had toyed publicly with the idea of running for governor, which was the first office she ran for, in 1994. Though she lost that race, she said she was still drawn to the ability of a governor to have a direct and immediate effect on people's lives by creating jobs and spurring economic development.

But she said Friday that what tipped the scales was her seniority — she now ranks 15th out of 100 senators — and that she chairs an appropriations subcommittee where she can steer federal dollars to Maine. Beyond that, she indicated that she liked being able to influence legislative outcomes.

"I feel, as many of my colleagues told me, that I'm often a bridge between the two sides of the aisle and there have been times when I have been able to make a difference," she told reporters after her announcement. "I like playing that role, and there seem to be fewer and fewer senators who enjoy playing that role."

Had she run and won the race for governor in 2018, she would have become the first woman in Maine to hold the office.

But while she has been one of the state's most popular politicians for some time, there was no guarantee that she would win her party's nomination in the June primary for governor.

Gov. Paul R. LePage, a fellow Republican and ally of Mr. Trump who is barred by term limits from seeking a third term, has been stirring the political pot against her. In the months before Ms. Collins's announcement, Mr. LePage had tried to galvanize his base against Ms. Collins and discourage her from entering the race. Gov. LePage was traveling in Iceland on Friday, and his press secretary, Julie Rabinowitz, declined to respond to a request for comment.

Ms. Collins, who has glided to victory in her recent elections, this time faced the prospect of bruising and expensive attacks from the right. Far from being able to clear the field of competition, she would have entered a campaign free-for-all with at least 18 others so far — four Republicans, 10 Democrats and four third-party candidates.

"She hasn't had a competitive election for a very long time, and so there's much more uncertainty for her now than in previous elections," said Amy Fried, a political scientist at the University of Maine. Ms. Fried predicted that Ms. Collins would have faced stronger attacks "in a way she just hasn't had from her own party."

Mary Mayhew, Mr. LePage's former health and human services commissioner, who has cast herself in the LePage mold, may be the most immediate beneficiary of Ms. Collins's decision.

"Her announcement today allows many individuals who may have been waiting to now jump on board my campaign," Ms. Mayhew said in an interview.

Asked whether criticisms of her, particularly by Mr. LePage, had influenced her decision, Ms. Collins said no. "It really didn't bother me," she said, adding that she was confident she could have prevailed in the primary and in the election.

Ms. Collins made her announcement at a breakfast meeting of the Penobscot Bay Regional Chamber of Commerce. She drew an audience of about 225 people — far more than the typical chamber breakfast, officials said — and kept them in suspense for more than half an hour as she delved into her reasons for opposing the repeal of the Affordable Care Act.

Finally, she turned to what she called "the elephant in the room." She said a Senate colleague, whom she did not identify, had written her a note urging her to stay in the Senate. Ms. Collins read the note out loud: "The institution would suffer in your absence. While the temptation might be to walk away and leave the problems to others, there are very few who have the ability to bring about positive change. You are such a person."

Once she made it clear that she was staying put, the audience broke into applause.

"I called her office to say please stay, we need you desperately in the Senate," said Barbara Kent Lawrence, an author who attended the breakfast and said she was a Democrat. She said Ms. Collins was fair, rational and civilized, and while those would be good qualities in a governor, "she is more powerful where she is."

"The country needs her more than Maine does now," Ms. Lawrence said. "We're in a lot of trouble because we've stopped listening to each other."

2. Request to Investigate Expenditures by Michaud for Congress

Mr. Wayne explained that the Maine Republican Party filed a complaint alleging that Michael Michaud's federal campaign committee (Michaud for Congress) had spent federal campaign funds to promote the election of Rep. Michaud to the office of Governor.

William P. Logan, Esq., representing the Maine Republican Party, said that the Michaud campaign had adequately explained a number of the expenditures by Michaud for Congress and no further action was necessary concerning those expenditures. He urged the Commission to investigate the November 14, 2013 payment of $500 by Michaud for Congress to the Maine AFL-CIO, the purchase of a personal computer that could be used for purposes of the gubernatorial campaign, and payments for a cell phone.

Matthew McTighe, campaign manager for the Michaud campaign, said the claims were without merit. The contributions refunded by the federal committee are not under the Commission's jurisdiction. He said Rep. Michaud had accepted invitations to speak at Maine AFL-CIO events almost every year since his election to Congress. There was no requirement for him to make any kind of payment or sponsorship. The payment was for an ad in an event publication that was arranged long after the agreement to speak, and was simply a congratulatory message for someone he had worked with for many years. The payment was made to the general fund of the AFL-CIO, and could not be used for political purposes.

Mr. McTighe said that with regard to the cell phone and computer, it is customary for members of Congress to use phones for both personal and political activities, which in Rep. Michaud's case have nothing to do with the gubernatorial campaign. Peter Chandler, of Rep. Michaud's congressional office, explained that – regardless whether Rep. Michaud was running for governor – he would be required to have a "political phone" to perform certain duties as a ranking member of a Congressional committee. These activities include recruiting other candidates, receiving calls discussing business of the Democratic congressional caucus, or calls relating to fundraising

Ms. Matheson moved to dismiss the complaint. The motion was seconded by Mr. Nass, and passed unanimously.

SCHEDULE B (FEC Form 3)
ITEMIZED DISBURSEMENTS

Use separate schedule(s) for each category of the Detailed Summary Page

FOR LINE NUMBER: (check only one)
☒ 17 ☐ 18 ☐ 19a ☐ 19b
☐ 20a ☐ 20b ☐ 20c ☐ 21

NAME OF COMMITTEE (In Full)
Collins For Senator

A. Full Name (Last, First, Middle Initial)
Moore Information, Inc.

Mailing Address 2130 SW Jefferson St
Ste 200

City: Portland | State: OR | Zip Code: 97201-7710

Purpose of Disbursement: Polling

Candidate Name

Category/ Type

Office Sought: ☐ House ☐ Senate ☐ President
State: District:

Disbursement For: 2020
☒ Primary ☐ General
☐ Other (specify)

Date of Disbursement: 05 / 16 / 2017

FEC Identification Number: C

Amount of Each Disbursement this Period: 24650.00

Transaction ID : BCB448B96C1244BAC966

☐ Memo Item

B. Full Name (Last, First, Middle Initial)
Keeper Of Stationery

Mailing Address United States Senate

City: Washington | State: DC | Zip Code: 20510-0001

Purpose of Disbursement: Flag Donation

Candidate Name

Category/ Type

Office Sought: ☐ House ☐ Senate ☐ President
State: District:

Disbursement For: 2020
☒ Primary ☐ General
☐ Other (specify)

Date of Disbursement: 05 / 17 / 2017

FEC Identification Number: C

Amount of Each Disbursement this Period: 48.00

Transaction ID : B69F92D9E97F54C6BBB4

☐ Memo Item

C. Full Name (Last, First, Middle Initial)
Senate Gift Shop

Mailing Address United States Senate

City: Washington | State: DC | Zip Code: 20510-0001

Purpose of Disbursement: Host Gifts

Candidate Name

Category/ Type

Office Sought: ☐ House ☐ Senate ☐ President
State: District:

Disbursement For: 2020
☒ Primary ☐ General
☐ Other (specify)

Date of Disbursement: 05 / 17 / 2017

FEC Identification Number: C

Amount of Each Disbursement this Period: 38.00

Transaction ID : B86E222E81F0B4E53B16

☐ Memo Item

SUBTOTAL of Disbursements This Page (optional) ... ▶ 24736.00

TOTAL This Period (last page this line number only) ... ▶

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☐ 20a ☐ 20b ☐ 20c ☐ 21

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NAME OF COMMITTEE (In Full)
Collins For Senator

A. Full Name (Last, First, Middle Initial)
Abbott, Amy,

Mailing Address 32 Rabbit Run

City: Portland | State: ME | Zip Code: 04102-2275

Purpose of Disbursement: Salary

Candidate Name

Category/ Type

Office Sought: ☐ House ☐ Senate ☐ President
State: District:

Disbursement For: 2020
☒ Primary ☐ General
☐ Other (specify) ▼

Date of Disbursement: 09 / 28 / 2017

FEC Identification Number: C

Amount of Each Disbursement this Period: 1121.76

Transaction ID : B73044AF3CBAA4353BCC

☐ Memo Item

B. Full Name (Last, First, Middle Initial)
Bangor Payroll Services

Mailing Address PO Box 930

City: Bangor | State: ME | Zip Code: 04402-0930

Purpose of Disbursement: Payroll Taxes and Fees

Candidate Name

Category/ Type

Office Sought: ☐ House ☐ Senate ☐ President
State: District:

Disbursement For: 2020
☒ Primary ☐ General
☐ Other (specify) ▼

Date of Disbursement: 09 / 28 / 2017

FEC Identification Number: C

Amount of Each Disbursement this Period: 420.78

Transaction ID : B7725C230AE2843B8B93

☐ Memo Item

C. Full Name (Last, First, Middle Initial)
Moore Information, Inc.

Mailing Address 2130 SW Jefferson St Ste 200

City: Portland | State: OR | Zip Code: 97201-7710

Purpose of Disbursement: Polling

Candidate Name

Category/ Type

Office Sought: ☐ House ☐ Senate ☐ President
State: District:

Disbursement For: 2020
☒ Primary ☐ General
☐ Other (specify) ▼

Date of Disbursement: 09 / 30 / 2017

FEC Identification Number: C

Amount of Each Disbursement this Period: 36400.00

Transaction ID : BB3EB0F5B2BEB40F7A7F

☐ Memo Item

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