

Constitutionality of a Campaign Expenditure Reporting Statute

*National Organization for Marriage v. McKee (D. Brock
Hornby and John H. Rich III, D. Me. 1:09-cv-538)*

Thirteen days before the November 3, 2009, election in Maine, which featured a referendum on Maine's provision for same-sex marriage, two advocacy organizations filed a federal complaint challenging Maine's registration and reporting requirements for organizations collecting or spending money to support or defeat a ballot measure.¹ With their complaint, the plaintiffs filed motions for a temporary restraining order,² for a preliminary injunction,³ and to expedite the action.⁴

The court assigned the case to District Judge D. Brock Hornby.⁵ Judge Hornby delegated to Magistrate Judge John H. Rich III initial contact with the plaintiffs.⁶ In emergency cases, Judge Hornby often asks a magistrate judge to make prompt initial contact with the plaintiffs to get an early assessment of what will be required from the court.⁷ He also typically asks his law clerks to begin legal research on the matter immediately, focusing the research as papers are filed.⁸

The main task of Judge Rich's teleconference with plaintiffs' counsel, which was held at 4:15 p.m. on Wednesday, October 21, the day the case was filed, was to make sure that the plaintiffs served the defendants promptly.⁹ On Thursday afternoon at 3:00, Judge Rich had a teleconference with both sides.¹⁰

I initially explored with the parties whether it was possible for them to reach an agreement that would obviate the need for an expedited hearing in advance of Election Day, November 3, 2009. Following lengthy discussion, the parties were unable to reach such an agreement. Accordingly, I noted that it would be necessary for the court to

1. Complaint, *Nat'l Org. for Marriage v. McKee*, No. 1:09-cv-538 (D. Me. Oct. 21, 2009), D.E. 1; *Nat'l Org. for Marriage v. McKee*, 666 F. Supp. 2d 193, 197–98 (D. Me. 2009); see *Me. Rev. Stat. tit. 21-A, § 1056-B* (2012); see also David Hench, *Campaign Disclosure Ruling Slated*, Portland Press Herald, Oct. 27, 2009, at B1.

2. Temporary Restraining Order Motion, *Nat'l Org. for Marriage*, No. 1:09-cv-538 (D. Me. Oct. 21, 2009), D.E. 3; *Nat'l Org. for Marriage*, 666 F. Supp. 2d at 198.

3. Preliminary Injunction Motion, *Nat'l Org. for Marriage*, No. 1:09-cv-538 (D. Me. Oct. 21, 2009), D.E. 4.

4. Motion to Expedite, *id.* (Oct. 21, 2009), D.E. 5.

5. Docket Sheet, *id.* (Oct. 21, 2009).

Tim Reagan interviewed Judge Hornby for this report by telephone on August 6, 2012.

6. Report, *Nat'l Org. for Marriage*, No. 1:09-cv-538 (D. Me. Oct. 21, 2009), D.E. 10 [hereinafter Oct. 21, 2009, Report]; Interview with Hon. D. Brock Hornby, Aug. 6, 2012; Interview with Hon. John H. Rich III, Aug. 2, 2012 (observing that Judge Hornby, who was the district's first full-time magistrate judge, uses magistrate judges very effectively).

Tim Reagan interviewed Judge Rich for this report by telephone on August 2, 2012.

7. Interview with Hon. D. Brock Hornby, Aug. 6, 2012.

8. *Id.*

9. Oct. 21, 2009, Report, *supra* note 6; Interview with Hon. John H. Rich III, Aug. 2, 2012.

10. Report, *Nat'l Org. for Marriage*, No. 1:09-cv-538 (D. Me. Oct. 22, 2009), D.E. 14 [hereinafter Oct. 22, 2009, Report]; Docket Sheet, *supra* note 5.

schedule a hearing on an expedited basis before Judge Hornby, most likely on Monday, October 26, 2009.¹¹

For planning purposes, Judge Rich asked the parties to let him know by Friday morning whether any witnesses would be called at the hearing;¹² Judge Rich's case manager was informed by telephone that there would be no need for witnesses at the hearing.¹³

The Monday hearing was greatly facilitated by experienced lawyers on both sides.¹⁴ Two days later, Judge Hornby denied the plaintiffs immediate relief.¹⁵ "It is important to emphasize that the Maine statute does not *prohibit* contributions or expenditures. Instead, it is a registration and reporting statute."¹⁶

On November 3, Maine voters overturned same-sex marriage.¹⁷

Reviewing Judge Hornby's decisions¹⁸ on the plaintiffs' second amended complaint,¹⁹ the court of appeals determined that Maine's laws in question pass constitutional muster.²⁰

11. Oct. 22, 2009, Report, *supra* note 10, at 1–2.

12. *Id.* at 2.

13. Interview with Hon. John H. Rich III, Aug. 2, 2012.

14. Interview with Hon. D. Brock Hornby, Aug. 6, 2012; Transcript, *Nat'l Org. for Marriage*, No. 1:09-cv-538 (D. Me. Oct. 26, 2009, filed Nov. 5, 2009), D.E. 23.

15. *Nat'l Org. for Marriage v. McKee*, 666 F. Supp. 2d 193 (D. Me. 2009); see Trevor Maxwell, *Judge: State Can Press for Disclosure of Donors*, Portland Press Herald, Oct. 29, 2009, at A1.

16. *Nat'l Org. for Marriage*, 666 F. Supp. 2d at 204.

17. See Susan M. Cover, *Mainers Vote Down Gay-Marriage Law*, Portland Press Herald, Nov. 4, 2009, at A1; Kevin Miller & Judy Harrison, *Gay Marriage Rejected*, Bangor Daily News, Nov. 4, 2009, at 1.

18. *Nat'l Org. for Marriage v. McKee*, 765 F. Supp. 2d 38 (D. Me. 2011); *Nat'l Org. for Marriage v. McKee*, 723 F. Supp. 2d 245 (D. Me. 2010); see *Campaign Finance Law Stands Up to Challenge*, Portland Press Herald, Aug. 20, 2010, at A1; Kevin Miller, *All But Two PAC Provisions in Campaign Finance Law OK'd*, Bangor Daily News, Aug. 20, 2010, at 1; Kevin Miller, *Another Legal Setback for Gay Marriage Foes*, Bangor Daily News, Feb. 19, 2011, at 5.

19. Second Amended Complaint, *Nat'l Org. for Marriage*, No. 1:09-cv-538 (D. Me. June 25, 2010), D.E. 114.

20. *Nat'l Org. for Marriage v. McKee*, 669 F.3d 34 (1st Cir. 2012), *cert. denied*, ___ U.S. ___, ___ S. Ct. ___, 2012 WL 1899418; *Nat'l Org. for Marriage v. McKee*, 649 F.3d 34 (1st Cir. 2011), *cert. denied*, ___ U.S. ___, 132 S. Ct. 1635 (2012); see also *Nat'l Org. for Marriage v. Daluz*, 654 F.3d 115 (1st Cir. 2011) (finding a challenge to Rhode Island's reporting statute unlikely to prevail).