



CHRISTOPHER D. ROY
croy@drm.com

October 25, 2010

VIA ELECTRONIC AND FIRST CLASS MAIL

Michael McShane, Esq.
Vermont Attorney General's Office
109 State Street
Montpelier, VT 05609-1001

Re: Republican Governors Association v. William H. Sorrell, in his official capacity as
Vermont Attorney General
Civil Action No. 2:10-cv-258

Dear Michael:

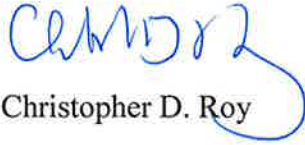
Enclosed you will find a copy of the Complaint that has been filed in the U.S. District Court for the District of Vermont, commencing the above-referenced action. You will also find enclosed two copies of a Notice of Lawsuit and Request for Waiver of Service of Summons, along with two copies of a Waiver of Service of Summons form. Finally, you will find enclosed a pre-addressed envelope for return of the signed Waiver of Service of Summons form.

In light of the claims set forth in the enclosed Complaint, the Republican Governors Association will not be producing documents and information by 11:00 a.m. today, as requested in your October 22 letter. You may direct any inquiries to Michael Adams, general counsel for the Republican Governors Association.

Michael McShane, Esq.
October 25, 2010
Page 2

If you have any questions, please do not hesitate to get in touch.

Very truly yours,



Christopher D. Roy

Encls.

cc: Michael G. Adams, Esq. (w/ encls.) (via electronic mail)
Glenn M. Willard, Esq. (w/ encls.) (via electronic mail)

3946859.1

UNITED STATES DISTRICT COURT
FOR THE
DISTRICT OF VERMONT

U.S. DISTRICT COURT
DISTRICT OF VERMONT
FILED

2010 OCT 25 AM 8:44

CLERK

BY _____
DEPUTY CLERK

REPUBLICAN GOVERNORS)
ASSOCIATION,)
)
Plaintiff,)
)
v.)
)
WILLIAM SORRELL, ATTORNEY)
GENERAL OF VERMONT,)
)
Defendant.)

Civil Action No. 2:10-CV-258

**COMPLAINT FOR DECLARATORY JUDGMENT
AND INJUNCTIVE RELIEF**

By and through its counsel, Downs Rachlin Martin PLLC, Plaintiff Republican Governors Association (the "RGA") asserts the following allegations and claims against Defendant William H. Sorrell in his official capacity as Vermont Attorney General:

Jurisdiction and Venue

1. This Court has jurisdiction because this action arises under the First, Fifth and Fourteenth Amendments to the United States Constitution. *See* 28 U.S.C. § 1331.
2. This Court further has jurisdiction because this action arises under Section 1 of the Civil Rights Act of 1871, 42 U.S.C. § 1983 (1996). *See* 28 U.S.C. § 1343.
3. This Court further has jurisdiction under the Declaratory Judgments Act. *See* 28 U.S.C. §§ 2201-2202.
4. Venue is proper in this Court because Defendant is the Vermont Attorney General. *See* 28 U.S.C. § 1391(b)(1).

DOWNS
RACHLIN
MARTIN PLLC

5. A plaintiff bringing a pre-enforcement challenge against a statute's application need not demonstrate to a certainty that it will be prosecuted under the statute to show injury, but only that it has "an actual and well-founded fear that the law will be enforced against" it. *See, e.g., Vermont Right to Life Comm. v. Sorrell*, 221 F.3d 376 (2nd Cir. 2000) (quoting *Virginia v. American Booksellers Ass'n*, 484 U.S. 383, 393 (1988)).

Parties

6. The RGA is an unincorporated association organized under section 527 of the Internal Revenue Code.

7. Defendant William H. Sorrell is Vermont's Attorney General, and the current Democratic nominee for that office in Vermont's upcoming general election on November 2, 2010.

8. Along with Peter Shumlin, the Democratic nominee for governor in the November 2, 2010 general election, Defendant is one of a current slate of candidates for statewide political office in Vermont nominated by the Vermont Democratic Party.

9. Defendant has power under state law to investigate and enforce the provisions at issue in this case. *See* 17 V.S.A. § 2806(c).

Vermont Law

10. Under Vermont law, "[p]olitical committee' or 'political action committee' means any formal or informal committee of two or more individuals, or a corporation, labor organization, public interest group, or other entity, not including a political party, which receives contributions of more than \$500.00 and makes expenditures of more than \$500.00 in any one calendar year for the purpose of supporting or opposing one or more candidates, influencing an

election, or advocating a position on a public question in any election or affecting the outcome of an election.” 17 V.S.A. § 2801(4).

11. “‘Expenditure’ means a payment, disbursement, distribution, advance, deposit, loan or gift of money or anything of value, paid or promised to be paid, for the purpose of influencing an election, advocating a position on a public question, or supporting or opposing one or more candidates.” 17 V.S.A. § 2801(3).

12. If required to register as a Vermont political committee, the RGA will have to comply with a panoply of burdens, including:

- Registration (including the designation of a treasurer). 17 V.S.A. §§ 2802(2) and 2831(a).
- Recordkeeping. 17 V.S.A. §§ 2803 and 2811(a), (c) and (d).
- Reporting requirements. 17 V.S.A. §§ 2803 and 2811(a), (c) and (d).
- A one-thousand dollar limit on contributions received. 17 V.S.A. § 2805(a).

13. Vermont’s statutory code explicitly recognizes that speech which does not expressly advocate the election or defeat of a candidate for political office does not subject a speaker engaging in such speech to Vermont political committee registration, recordkeeping and reporting requirements, and contribution limits, but only to minimal disclosure requirements with which the RGA has been in compliance. *See* 17 V.S.A. §§ 2891-2893.

First Amendment

14. Under the First Amendment, political speech constitutionally cannot be regulated unless it expressly advocates the election or defeat of a candidate, or is the functional equivalent of such advocacy. *See FEC v. Wisconsin Right to Life, Inc.*, 551 U.S. 449 (2007).

15. In addition, under *Buckley v. Valeo*, an organization may be regulated as a political committee only if (a) it is “under the control of a candidate” or candidates, or (b) “the major purpose” of the organization is “the nomination or election of a candidate.” 424 U.S. 1, 79 (1976), followed in *McConnell v. FEC*, 540 U.S. 93, 170 n.64 (2003), and *FEC v. Massachusetts Citizens for Life, Inc.*, 479 U.S. 238, 252 n.6, 262; *FEC v. Survival Educ. Fund*, 65 F.3d 285, 295 (2d Cir. 1995) (quoting *Buckley*, 424 U.S. at 79, as limiting “political committee” to “organizations ‘under the control of a candidate or the major purpose of which is the nomination or election of a candidate’”); *North Carolina Right to Life v. Leake*, 525 F.3d 274, 287-90 (4th Cir. 2008); *Colorado Right to Life Comm., Inc. v. Coffman*, 498 F.3d 1137, 1153-54 (10th Cir. 2007)).

16. Under the case precedent of the United States Court of Appeals for the Second Circuit, the State of Vermont may not subject to Vermont political committee status (and its ramifications) a speaker based on speech which does not expressly advocate the election or defeat of a candidate. *See Sorrell, supra*.

Facts

17. The RGA is not under the control of any candidate, and its major purpose is not the election of Vermont state or local candidates.

18. The RGA began broadcasting an issue advocacy communication, “Vision for Vermont,” on Vermont television stations beginning in August 2010. This communication discusses public policy matters and does not expressly advocate the election or defeat of a candidate.

19. By letter dated October 19, 2010, Defendant (a) concluded, without any legal basis or analysis, that the RGA “meets the definition of a political committee under § 2801,”

(b) directed the RGA to “immediately file the appropriate report(s),” and (c) stated that an “appropriate penalty [will] be assessed under 17 V.S.A. § 2806.” *See* Attachment A.

20. Defendant’s October 19 conclusion, instruction and threat followed (a) the passage of two months since the commencement of broadcast of the RGA’s “Vision for Vermont” communication, and (b) Defendant’s October 13 conclusion of a previous investigation of the RGA, an investigation based on specious grounds – giving rise (along with other facts) to a well-founded suspicion that Defendant’s actions are politically motivated, legally unjustified, and conducted in bad faith.

21. By letter dated October 22, 2010, Defendant instructed the RGA to produce to Defendant information and documents including, but not limited to, “copies of all advertisements your organization has run or plans to run in Vermont in any media from September 22, 2010, to and including November 2, 2010.” *See* Attachment B.

22. Compelled provision of its anticipated speech would chill the RGA’s First Amendment right to engage in such speech.

23. Defendant’s position as the nominee of the Vermont Democratic Party in the upcoming general election, and his political interests as a member of a statewide slate of Democratic nominees including Peter Shumlin, create a conflict of interest such that action by Defendant against the RGA implicates the RGA’s due process rights under the Fifth Amendment.

24. The Due Process Clause prohibits a prosecutor (or head of an administrative agency) from conducting an investigation or prosecution in which he has any personal, financial, or political interest in the outcome of his own investigation. The standard under the Due Process Clause is an objective standard requiring recusal whenever a “realistic appraisal of psychological

tendencies and human weakness” would suggest “a risk of actual bias.” *Secretary, Agency of Natural Resources v. Upper Valley Regional Landfill Corp.*, 167 Vt. 228, 237 (1997) (quoting *Withrow v. Larkin*, 421 U.S. 35, 47 (1975)).

25. The duty of impartiality and disinterest under the Due Process Clause has been recognized in many cases over several decades. *See, e.g., Marshall v. Jerrico*, 446 U.S. 238 (1980); *U.S. v. Hasarafally*, 529 F.3d 125 (2nd Cir. 2008); *In re J.S.*, 140 Vt. 230 (1981) (“The law of Vermont has always recognized that the responsibility of the state’s attorney, to carry out his function to represent the sovereignty of the State of Vermont, requires him to act with impartiality and with the objective of doing justice without regard to his personal feelings.”); *State v. Crepeault*, 167 Vt. 209 (1997) (prosecutor disqualified due to ethical conflict with defendant); *State v. Snyder*, 256 La. 601, 237 So.2d 392 (1970) (prosecutor disqualified because he had actively campaigned against the defendant in a mayoral campaign).

26. In addition to the presumed conflict of interest that exists upon these facts, the Office of the Attorney General in actuality has conducted itself in a biased, unjust and unjustifiable manner, violating the RGA’s constitutional rights.

27. Defendant’s personal conflict of interest and the actions of his senior employees have so tainted his office’s investigation of the RGA that the Office of the Attorney General, not just Defendant personally, must be disqualified.

28. The Vermont General Assembly, recognizing that conflicts may arise which necessitate appointment of outside counsel, enacted 3 V.S.A. § 5, authorizing the Governor to “employ counsel in behalf of the state in any state department or office, when, in his judgment, the protection of the rights and interests of the state demands it.” *Cf. Young v. United States*, 481 U.S. 787, 804 (1987) (special prosecutor must be disinterested).

29. The RGA has a First Amendment right to broadcast this communication, as well as similar communications, without being subject to Vermont's registration, recordkeeping, reporting, and contribution limit requirements, based upon clearly established precedent.

30. The RGA has a First Amendment right to create broadcast communications and to place them in advertising without producing them to Defendant in advance; and Defendant's demand to the contrary chills the RGA's exercise of its First Amendment rights.

31. The RGA has a Fifth Amendment right to be investigated only by a governmental actor free of bias and partiality.

WHEREFORE, Plaintiff requests that the Court grant it the following legal and equitable relief:

A. The RGA seeks a declaratory judgment that its "Vision for Vermont" advertisement is not express advocacy of the election or defeat of a candidate and, therefore, the RGA cannot be regulated as a political committee under Vermont law.

B. The RGA seeks a declaratory judgment that its major purpose is not the election of Vermont state or local candidates and, therefore, it cannot be regulated as a political committee under Vermont law.

C. The RGA seeks injunctive relief to prevent Defendant from taking action to compel its registration as a Vermont political committee.

D. The RGA seeks injunctive relief against further civil or criminal investigation or prosecution by Defendant, in violation of its due process rights – and particularly against compelled production of copies of all advertisements the RGA "plans to run" in Vermont, in violation of the RGA's rights under both the First Amendment and the Fifth Amendment.

E. The RGA further seeks costs and attorneys' fees under 42 U.S.C. § 1988 and any other applicable statute, and further seeks other relief this Court in its discretion deems just and appropriate.

Dated at Burlington, Vermont this 25th day of October, 2010.

DOWNS RACHLIN MARTIN PLLC

By: 

Christopher D. Roy
Attorney for Plaintiff
199 Main Street
P.O. Box 190
Burlington, VT 05402 0190
Tel.: (802) 863 2375
Email: croy@drm.com

Of Counsel:

Glenn M. Willard, Esq.
Patton Boggs LLP
2550 M Street, N.W.
Washington, DC 20037-1350
Tel.: (202) 457-6559
Email: gwillard@pattonboggs.com

3946690.1

TAB A

WILLIAM H. SORRELL
ATTORNEY GENERAL
JANET C. MURNANE
DEPUTY ATTORNEY GENERAL
WILLIAM E. GRIFFIN
CHIEF ASST. ATTORNEY
GENERAL



TEL: (802) 828-3171
FAX: (802) 828-2154
TTY: (802) 828-3665
CIVIL RIGHTS: (802) 828-3657

<http://www.atg.state.vt.us>

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001

October 19, 2010

BY MAIL AND EMAIL

Michael G. Adams
General Counsel
Republican Governor's Association
1747 Pennsylvania Ave., NW, Suite 250
Washington, DC 20006

Re: Violation of Vermont Campaign Finance Laws

Dear Mr. Adams:

In the course of investigating the Vermont Democratic Party's complaint alleging possible coordination between the Republican Governors Association ("RGA") and the Friends of Brian Dubie, we have determined that the RGA is in violation of Vermont's Campaign Finance Law. Specifically, the RGA has not filed any campaign finance reports with the Secretary of State's Office during the 2010 general election cycle as required by 17 V.S.A. § 2803.

All political committees in Vermont are required to file periodic campaign finance reports disclosing their expenditures and their contributors' names, addresses, and contribution amounts and dates. The RGA meets the definition of a political committee under § 2801. It has made expenditures, as defined under § 2801, on at least two occasions: first, an expenditure of \$3,000 on September 8, 2010, which the Friends of Brian Dubie reported in a campaign finance report to the Secretary of State's Office, and second, an expenditure for the filming, production, and distribution of the Vision for Vermont television advertisement. However, the RGA has not filed any reports disclosing these expenditures or the contributors to the organization.

Therefore, we direct you to immediately file the appropriate report(s) with the Secretary of State's Office and to provide copies to our office. We will review

these reports before determining the appropriate penalty to be assessed under 17
V.S.A. § 2806.

Sincerely,

A handwritten signature in black ink, appearing to read "Michael McShane", with a long horizontal flourish extending to the right.

Michael McShane
Assistant Attorney General

/mm

TAB B

WILLIAM H. SORRELL
ATTORNEY GENERAL
JANET C. MURNANE
DEPUTY ATTORNEY GENERAL
WILLIAM E. GRIFFIN
CHIEF ASST. ATTORNEY
GENERAL



TEL: (802) 828-3171
FAX: (802) 828-2154
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<http://www.atg.state.vt.us>

STATE OF VERMONT
OFFICE OF THE ATTORNEY GENERAL
109 STATE STREET
MONTPELIER, VT
05609-1001

October 22, 2010

BY EMAIL AND U.S. MAIL

Michael G. Adams, Esq.
General Counsel
Republican Governor's Association
1747 Pennsylvania Ave., N.W., Suite 250
Washington, DC 20006

Re: Vermont Campaign Finance Law Complaint

Dear Mr. Adams:

This Office has received a complaint from the Vermont Democratic Party alleging that the Republican Governor's Association ("RGA") and the Friends of Brian Dubie campaign committee (the "Dubie campaign") have engaged in improper coordination and facilitation of expenditures and violation of campaign contribution limits. Enclosed please find a copy of the complaint.

This Office has a role in enforcement of Vermont's Campaign Finance laws. *See* 17 V.S.A. §§ 2806, 2806a.

We would like to give your organization an opportunity to respond to these allegations. In order to allow for a prompt review of this matter, we expect a written response by 11:00 a.m. on Monday, October 25, 2010.

In addition to your detailed response to the allegations, please provide the following information and documents:

1. Whether your organization received any contributions from the Dubie campaign on or after September 1, 2010. If so, state the date(s) of the contributions, the nature of the contributions, and the use made of the funds or in-kind contributions.
2. Whether your organization made any contributions to or payments to or on behalf of the Dubie campaign, whether through transfer of funds or in kind contributions, on or after

September 1, 2010. If so, state the date(s) of the contributions or payments, the nature of the contributions or payments, and the purpose of the contributions or payments.

3. Whether your organization has commissioned, contracted for, paid for (in whole or in part), or conducted any polls or research in Vermont since September 1, 2010. If so, state the date(s) and costs of such polls or research, the name of the organization that conducted the poll or research, the name of the organization that paid for such polls or research, whether your organization was reimbursed for the costs of such polls or research, and whether the data gathered from such polls or research was shared with any other person or organization, and, if so, whom.

4. Whether your organization has paid for or reimbursed anyone (in whole or in part) for any polls or research commissioned, contracted for, paid for, conducted by or provided to the Dubie campaign since September 1, 2010. If so, state the date(s) and costs of such polls or research, the name of the organization that conducted the poll or research, and to whom your payments were made.

5. Whether your organization has shared any polling or research data, received from any source, with the Green Mountain Prosperity PAC ("GMP"). If so, state date(s) of such polls or research, the name of the organization that conducted the polls or research, the date the polling or research data was shared, and the cost or value of such data.

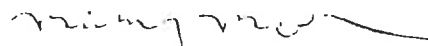
6. Copies of all polling or research data shared between your organization, the Dubie campaign, and/or GMP.

7. Copies of all communications, written or electronic, between your organization, the Dubie campaign, and/or GMP regarding any polling or research data, or any form of campaign efforts, including advertisements.

8. A list and copies of all advertisements your organization has run or plans to run in Vermont in any media from September 22, 2010, to and including November 2, 2010.

Please direct your response to me at the above address. A fax is acceptable. That fax number is (802) 828-3187.

Very truly yours,



Michael McShane
Assistant Attorney General

Enclosure

UNITED STATES DISTRICT COURT

for the
District of Vermont

Republican Governors Association

Plaintiff

v.

William H. Sorrell

Defendant

Civil Action No.

2:10-CV-258

NOTICE OF A LAWSUIT AND REQUEST TO WAIVE SERVICE OF A SUMMONS

To: William H. Sorrell, in his official capacity as Vermont Attorney General

(Name of the defendant or - if the defendant is a corporation, partnership, or association - an officer or agent authorized to receive service)

Why are you getting this?

A lawsuit has been filed against you, or the entity you represent, in this court under the number shown above. A copy of the complaint is attached.

This is not a summons, or an official notice from the court. It is a request that, to avoid expenses, you waive formal service of a summons by signing and returning the enclosed waiver. To avoid these expenses, you must return the signed waiver within 30 days (give at least 30 days, or at least 60 days if the defendant is outside any judicial district of the United States) from the date shown below, which is the date this notice was sent. Two copies of the waiver form are enclosed, along with a stamped, self-addressed envelope or other prepaid means for returning one copy. You may keep the other copy.

What happens next?

If you return the signed waiver, I will file it with the court. The action will then proceed as if you had been served on the date the waiver is filed, but no summons will be served on you and you will have 60 days from the date this notice is sent (see the date below) to answer the complaint (or 90 days if this notice is sent to you outside any judicial district of the United States).

If you do not return the signed waiver within the time indicated, I will arrange to have the summons and complaint served on you. And I will ask the court to require you, or the entity you represent, to pay the expenses of making service.

Please read the enclosed statement about the duty to avoid unnecessary expenses.

I certify that this request is being sent to you on the date below.

Date: 10/25/2010

Handwritten signature of Christopher D. Roy

Signature of the attorney or unrepresented party

Christopher D. Roy, Esq.

Printed name

Downs Rachlin Martin PLLC
199 Main St., PO Box 190
Burlington, VT 05402-0190

Address

croy@drm.com

E-mail address

(802) 863-2375

Telephone number

UNITED STATES DISTRICT COURT

for the
District of Vermont

Republican Governors Association

Plaintiff

v.

William H. Sorrell

Defendant

Civil Action No. 2:10-cv-258

WAIVER OF THE SERVICE OF SUMMONS

To: Christopher D. Roy, Esq.

(Name of the plaintiff's attorney or unrepresented plaintiff)

I have received your request to waive service of a summons in this action along with a copy of the complaint, two copies of this waiver form, and a prepaid means of returning one signed copy of the form to you.

I, or the entity I represent, agree to save the expense of serving a summons and complaint in this case.

I understand that I, or the entity I represent, will keep all defenses or objections to the lawsuit, the court's jurisdiction, and the venue of the action, but that I waive any objections to the absence of a summons or of service.

I also understand that I, or the entity I represent, must file and serve an answer or a motion under Rule 12 within 60 days from 10/25/2010, the date when this request was sent (or 90 days if it was sent outside the United States). If I fail to do so, a default judgment will be entered against me or the entity I represent.

Date: _____

Signature of the attorney or unrepresented party

Printed name of party waiving service of summons

Printed name

Address

E-mail address

Telephone number

Duty to Avoid Unnecessary Expenses of Serving a Summons

Rule 4 of the Federal Rules of Civil Procedure requires certain defendants to cooperate in saving unnecessary expenses of serving a summons and complaint. A defendant who is located in the United States and who fails to return a signed waiver of service requested by a plaintiff located in the United States will be required to pay the expenses of service, unless the defendant shows good cause for the failure.

"Good cause" does *not* include a belief that the lawsuit is groundless, or that it has been brought in an improper venue, or that the court has no jurisdiction over this matter or over the defendant or the defendant's property.

If the waiver is signed and returned, you can still make these and all other defenses and objections, but you cannot object to the absence of a summons or of service.

If you waive service, then you must, within the time specified on the waiver form, serve an answer or a motion under Rule 12 on the plaintiff and file a copy with the court. By signing and returning the waiver form, you are allowed more time to respond than if a summons had been served.