

May 2016

Heart of Darkness: New Hampshire Campaign Finance Law Since Citizens United

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Jay Surdowski, *Heart of Darkness: New Hampshire Campaign Finance Law Since Citizens United*, 14 U.N.H. L. REV. 227 (2016), available at http://scholars.unh.edu/unh_lr/vol14/iss2/1

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Heart of Darkness: New Hampshire Campaign Finance Law Since *Citizens United*

JAY SURDUKOWSKI*

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INTRODUCTION

“We penetrated deeper and deeper into the heart of darkness.”¹

Perhaps one of the greatest election law paradoxes in the United States is that New Hampshire—the First in the Nation Presidential Primary State—a State whose citizenry famously prides itself on political engagement—is also a State with some of the most complicated and sporadically enforced

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¹ Joseph Conrad, HEART OF DARKNESS (1899)

campaign finance laws in any jurisdiction.² The post-*Citizens United*³ world, wherein vast quantities of unlimited and anonymous corporate and individual donations by some of the wealthiest citizens are freely flowing (so-called “Dark Money” because the identities of donors are shielded by law⁴), has only exacerbated the loud creaks of the rickety campaign finance law firmament in New Hampshire. Further, a maze of statutory loopholes, known to few and understood by fewer, operate to allow for parallel large-dollar transactions of campaign financing which echo the freewheeling spending of corporations and individuals through nonprofit organizations and Super PACs that *Citizens United* and subsequent court cases allow. Republican Grant Bosse, a one-time congressional candidate and conservative political commentator, captured the sense of the New Hampshire campaign finance law landscape in 2010 in a line that became prophetic of what the next four years would hold, and what this article takes as its daunting subject: “Over the years, a series of legal cases and administrative rulings have poked so many holes into New Hampshire’s once strict campaign and expenditure limits that even Gov. John Lynch has been forced to ask the attorney general what’s allowed and what isn’t.”⁵

With these dynamics as a backdrop, this article examines two spheres of major change in New Hampshire campaign finance law in 2014 in an effort to shed some light on the dark heart of campaign finance law in the most political of states. First, a great deal of campaign finance law was made

² As will be noted in this article, both the Attorney General and Secretary of State’s Offices have long called for the Legislature to resolve ambiguities in the campaign finance statute. An occasional commentator on campaign finance law and a former candidate for Congress, Grant Bosse, has decried New Hampshire’s campaign finance laws as “confused and irrelevant” and memorably opened one column tackling the thorny subject with the following line: “When a state’s campaign finance laws are too confusing for the governor to understand, it might be time to reform them.” See Grant Bosse, *How did New Hampshire’s election laws become so confusing?*, N.H. WATCHDOG (Sept. 26, 2010), <http://newhampshire.watchdog.org/6946/how-did-new-hampshire%E2%80%99s-campaign-laws-become-so-confusing/> [hereinafter Bosse, *So Confusing?*]; Grant Bosse, *Election laws grow more confusing*, N.H. WATCHDOG (Sept. 17, 2012), <http://newhampshire.watchdog.org/6946/how-did-new-hampshire%E2%80%99s-campaign-laws-become-so-confusing/> [hereinafter Bosse, *More Confusing*].

³ *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010).

⁴ See *Political Nonprofits*, OPENSECRETS.ORG CENTER FOR RESPONSIVE POL., https://www.opensecrets.org/outsidespending/nonprof_summ.php (last updated Mar. 9, 2015) (defining “dark money” as “[p]olitically active nonprofits—principally 501(c)(4)s and 501(c)(6)s—have become a major force in federal elections over the last three cycles. The term ‘dark money’ is often applied to this category of political spender because these groups do not have to disclose the sources of their funding—though a minority do disclose some or all of their donors, by choice or in response to specific circumstances.”).

⁵ Bosse, *So Confusing?*, *supra* note 2.

during the contentious 2014 midterm election in the form of decision letters⁶ issued by the New Hampshire Attorney General's office—the office charged by law with enforcement of campaign finance and election law.⁷ The significance of these administrative law decision letters—typically issued to a small circle of attorneys, candidates, and political leaders—cannot be underestimated in both understanding New Hampshire's campaign finance law as it stands today, and the contribution of these quietly-issued letters to the general state of confusion, where such significant legal developments are often neither statutory nor even a matter of case precedent. Like weathered and tattered family histories, these decision letters are jealously guarded and handed down from campaign to campaign as the stuff of lore—and, for better or worse, the stuff of precedent. The frequency of and publicity surrounding high-profile campaign finance law complaints in the 2014 election have also established campaign finance complaints and litigation as a new arena for sophisticated electoral battle in New Hampshire, as this article will show.⁸

Second, this article reviews changes to New Hampshire state law, which have been made in reaction to the influx of Dark Money and related outside spending since 2010. The reforms contained in Senate Bill 120, proposed by Senator Jeb Bradley of Wolfeboro, the Senate Majority Leader,⁹ are summarized along with a discussion of post-*Citizens United* developments in New Hampshire that illustrate some of the perceived ills Senate Bill 120 is intended to remedy. Compliance with the new law is mixed, and rumblings of constitutional challenge are on the horizon, as this article will discuss.

From the outset I note, for the purposes of full disclosure, that I served as counsel to Governor Maggie Hassan's reelection campaign. I have endeavored to write with reasonable objectivity about major changes to campaign finance law that have recently evolved—many of which arose out of complaints against the campaign that I defended. Any hints of opinions that may peek between the lines are strictly the author's own and not those of Maggie '14 or the Friends of Maggie Hassan.

⁶ See *infra* Part II.

⁷ N.H. REV. STAT. ANN. § 7:6-c, I (2014); N.H. REV. STAT. ANN. § 664:18 (2014).

⁸ See *infra* Part II, B.

⁹ S.B. 120, 2013 Leg., Reg. Sess. (N.H. 2014), <http://gencourt.state.nh.us/legislation/2014/SB0120.html>.

I. CAMPAIGN FINANCE SUMMER

A. The Vehicle for Campaign Finance Rulings: Attorney General Decision Letters

“Campaign finance law in New Hampshire is written on the back of a napkin.”¹⁰

Much of campaign finance law in New Hampshire is contained in a body of administrative decisions or opinions, and an understanding of the mechanics of these letters is necessary when summarizing the current state of New Hampshire campaign finance law. Remarkably, campaign finance laws are under-policed in New Hampshire. Although a violation of campaign finance laws constitutes a crime,¹¹ with the exception of a narrow provision of fines for certain independent expenditures¹² (recently added to the statute and untested) and fines for eclipsing voluntary spending caps¹³ (which few candidates abide by), neither the offices of the Attorney General nor the Secretary of State have had the statutory power to actively levy civil or criminal fines on violators of campaign finance law.¹⁴ In the absence of such an enforcement regime, which, in contrast, is present at the Federal level for Federal races,¹⁵ campaign finance rulings of the New Hampshire Attorney General’s office are the central mechanism for giving campaigns and political committees¹⁶ a proverbial “slap on the wrist.”¹⁷ The typical campaign finance ruling letter will address a complaint brought by a political party or candidate against a rival.¹⁸ The Attorney General’s office will then meticulously investigate the complaint (using criminal investigators, which can be a cruel shock to the uninitiated) and issue an opinion letter that will generally decide whether the practice complained of is lawful or not.¹⁹ The

¹⁰ Telephone Conference with Counsel, Democratic Governor’s Ass’n, in Concord, N.H. (Aug. 2014).

¹¹ N.H. REV. STAT. ANN. § 664:21, V (2014) (specifying that violations by natural persons are considered misdemeanors, and any other persons (e.g. political committees) are subject to felony prosecution).

¹² N.H. REV. STAT. ANN. § 664:21, VII.

¹³ N.H. REV. STAT. ANN. § 664:21, I.

¹⁴ N.H. REV. STAT. ANN. § 664:21, VI(b).

¹⁵ See 52 U.S.C. § 30109 (2012).

¹⁶ See N.H. REV. STAT. ANN. § 664:2, III (2014) (defining political committees, also known as PACs (“political action committees”), but “political committee” is the more accurate nomenclature of the campaign finance statute).

¹⁷ See generally N.H. REV. STAT. ANN. § 664:18, II.

¹⁸ See, e.g., Letter from Richard W. Head, Assoc. Att’y Gen., to author, Legal Counsel, Governor Hassan’s Re-Election Campaign (Aug. 1, 2014) (on file with the author) [hereinafter Letter from Head (Aug. 1, 2014)].

¹⁹ See N.H. REV. STAT. ANN. § 664:18.

remedies for a violation are: (1) a cease and desist notice until compliance is achieved by the offender; or (2) an order to disgorge non-compliant political contributions.²⁰ The letters are distributed to the candidates, the chairs of the two major political parties, campaign counsel, the Secretary of State, and sometimes select political leaders (i.e., the New Hampshire Senate President and House Speaker).²¹

While many decision letters are the result of complaints brought forth by candidates and political parties, like the letters addressed in this Article, some letters are issued as a result of inquiries or requests for formal clarification of the law.²² These letters are more often than not addressed directly to the Secretary of State, copied to state leaders, and sometimes copied to all candidates in a given election cycle.²³

²⁰ See Letter from Head (Aug. 1, 2014), *supra* note 18 (containing an order to disgorge campaign funds and noting that a cease and desist admonition had been sent to non-compliant political committees).

²¹ See, e.g., Letter from Philip T. McLaughlin, Att’y Gen., to Rich Killion, Campaign Manager, Keough for Governor, and Jim O’Brien, Campaign Manager, GordonHumphrey.com (Aug. 12, 2002) (on file with author) [hereinafter Letter from McLaughlin (Aug. 12, 2002)] (addressing campaign finance complaint brought against former Governor Craig Benson’s campaign by the campaigns of his two Republican primary rivals, Bruce Keough and Gordon Humphrey, respectively). This letter, which addressed exploratory phase contribution limits and the lack of limitation on personal transfers of funds to exploratory committees, was copied to Governor Benson’s campaign counsel, the Secretary of State, the House Speaker and Senate President, House and Senate election law committee chairs and staff, and the chairs of the New Hampshire Democratic and Republican parties. See also Letter from Richard W. Head, Assoc. Att’y Gen., to Jennifer Horn, Chair, N.H. Republican State Comm. (Aug. 26, 2014), <http://sos.nh.gov/WorkArea/DownloadAsset.aspx?id=13053> (on file with author). This letter was copied to the Secretary of State, the Senate President, the House Speaker, chairs of both major political parties, and campaign counsel.

²² See Letter from Steven M. Houran, Deputy Att’y Gen., to William M. Gardner, Sec’y of State (June 6, 2000) (on file with the author) (opining that corporations may not be prohibited from making campaign contributions); Letter from Orville B. Fitch II, Deputy Att’y Gen., to David Horan, Treasurer, Friends of John Stephen, and Kate Hanna, Treasurer, N.H. for John Lynch ’10 (Oct. 7, 2010) (on file with the author) [hereinafter Letter from Fitch (Oct. 7, 2010)] (regarding contribution limits for candidates who do not take the voluntary spending cap limit of RSA 664); Letter from Michael A. Delaney, Att’y Gen., to William M. Gardner, Sec’y of State (Feb. 10, 2012) (on file with the author) [hereinafter Letter from Delaney (Feb. 10, 2012)] (addressing contribution limits for persons making political contributions); Letter from Matthew Mavrogeorge, Assistant Att’y Gen., to William M. Gardner, Sec’y of State (Aug. 1, 2012), <http://doj.nh.gov/media-center/press-releases/2014/documents/20140801-jennifer-horn-letter.pdf> (on file with the author) [hereinafter Letter from Mavrogeorge (Aug. 1, 2012)] (opining that contribution limits on political committees only making independent expenditures are invalid in light of the Citizens United and SpeechNow.org decisions; thus opening the door for “New Hampshire Super PACs”).

²³ See *supra* notes 21–22 and accompanying text. The Letter from Delaney (Feb. 10, 2012)

Both kinds of Attorney General letters are invaluable because they provide an administrative gloss on poorly drafted and ambiguous campaign finance statutes, which the Attorney General's Office and the Secretary of State have repeatedly called to be reformed for at least fifteen years with little success.²⁴ A number of key decision letters over the years have acknowledged, and thereby blessed, loopholes or long-standing practices in reliance upon the same.²⁵ While copies of the decision letters are centrally-stored at the New Hampshire Secretary of State and Attorney General's offices, respectively, the typical campaign, no matter how sophisticated, will not obtain and study them all and therefore, the letters are kept piecemeal on hard drives of perennial campaign aides, and passed down on a need-to-know basis between campaign finance teams, campaign counsel, and, as needed, to outside parties who financially interface with campaigns (such as a political committee which wants to make a substantial contribution before a candidate files, but needs reassurance of such a practice's legality). Unlike case law precedent, which is typically readily accessed online or in bound case reports, campaign finance precedents in New Hampshire are generally elusive²⁶ and contribute to confusion and differences in interpretation, even among experienced campaigns on both sides of the political spectrum. The absence of case law precedent, and variable levels of access to the prior opinion letters, also contributes to a measure of uncertainty in the opinions that may ultimately issue on a given complaint.

Now that the importance of Attorney General letters to the canon of New Hampshire campaign finance law has been established, this article next looks at a series of key Attorney General decisions that remade New Hampshire campaign finance law in 2014.

was distributed to the Governor, the members of the Executive Counsel, leaders of the House and Senate, and the Chairs of the two major political parties; the Letter from Fitch (Oct. 7, 2012) was distributed to all candidates and the chairs of the two major political parties.

²⁴ Letter from Fitch (Oct. 7, 2012), *supra* note 22 (noting “[b]oth the Attorney General’s Office and the Secretary of State have requested legislative clarification of this law for a decade or more.”).

²⁵ See generally Amanda Loder, *Gov. Candidate Kevin Smith Sees Big Benefit from Campaign Finance Loophole*, STATEIMPACT, NPR (Aug. 27, 2012, 10:58 a.m.), <http://stateimpact.npr.org/new-hampshire/2012/08/27/gov-candidate-kevin-smith-sees-big-benefit-from-campaign-finance-loophole/>.

²⁶ To their credit, the Attorney General and New Hampshire Secretary of State’s Office have recently endeavored to post some of the more precedent-setting decision letters on their respective websites. See, e.g., Letter from Mavrogeorge (Aug. 1, 2012), *supra* note 22; Letter from Delaney (Feb. 10, 2012), *supra* note 22.

B. The Summer of 2014: Serial Complaints and Attorney General Decisions

Whereas prior state elections have seen their fair share of prominent campaign finance law complaints—one or two in a given cycle which might rise to the level of precedential and newsworthy value—the 2014 midterm election saw a blizzard of high-profile complaints,²⁷ responses, and counter-complaints which, when the dust settled, remade (or in some cases affirmed) significant campaign finance practices. The New Hampshire Republican State Committee, through its chair, Jennifer Horn of Nashua, brought the most complaints—and in quick succession. The Attorney General decision letters, issued in the wake of these complaints, are significant, and each is discussed in turn.

1. Republican State Committee v. Hassan I and II

On July 16, 2014, Jennifer Horn, Chair of the New Hampshire Republican State Committee, dispatched the Republican Party's Operations Manager Michael Zona to hand-deliver a complaint letter to the New Hampshire Attorney General's office.²⁸ The letter made a variety of campaign finance complaints against the Governor's reelection campaign and about certain unions' significant contributions to the same—contributions Chair Horn alleged far exceeded statutory limits.²⁹ The letter was simultaneously posted along with a press release on the New

²⁷ Media and editorial board interest in the campaign finance complaints was immediate and pronounced. Among the many articles and editorials that appeared during the Campaign Finance Summer is this small sampling: Kathleen Ronayne, *Republicans call for investigation into \$25,000 contribution to Hassan*, CONCORD MONITOR (July 16, 2014); Kevin Landrigan, *Republicans question Hassan accepting \$25K from pro-Northern Pass electrical union*, NASHUA TELEGRAPH (July 17, 2014); John DiStaso, *Updated: Associate AG confirms fast-track 'inquiry' begun into NHGOP complaint vs. Hassan campaign*, NHJOURNAL.COM (July 17, 2014) <http://nhjournal.com/updated-nhgop-files-2nd-complaint/>, [hereinafter *Lesson in writing*]; *Editorial: A lesson in writing for lawmakers*, CONCORD MONITOR (Aug. 8, 2014); *Dirty money? Hassan keeps felony donations*, UNION LEADER (Aug. 4, 2014, 6:13 p.m.), <http://www.unionleader.com/article/20140805/OPINION01/140809643/0/SEARCH> [hereinafter *Dirty money?*].

²⁸ Interview with Michael Zona, Operations Manager, N.H. Republican Party, in Concord, N.H. (Jan. 2015).

²⁹ *NHGOP Asks Attorney General to Review Illegal Hassan Contribution*, REPUBLICAN PARTY OF N.H. (July 16, 2014), <http://nhgop.org/news/nhgop-asks-attorney-general-to-review-illegal-hassan-contribution>.

Hampshire Republican Party's website.³⁰ The next day, Chair Horn followed up with a second letter charging that additional parties had participated in the alleged illegality.³¹ This complaint, too, was trumpeted in a website press release and both complaints received significant news coverage and attention on social media³²—primarily Twitter, an online platform which allows users to blast out 140 character statements to followers and allowing for certain political news to “go viral.”³³ The New Hampshire Republican Party alone tweeted, and retweeted, content about the campaign finance allegations fifty-two times between July 16, 2014 the date the Attorney General rendered his decision on the first two complaints, and August 2, 2014.³⁴ These tweets constituted fully fifty-four percent of the Party's ninety-six official tweets during this time frame.³⁵ Considering that during these weeks Russia shot down a jet over Ukraine,³⁶ the President was proposing major immigration reform via executive action without the authorization of Congress,³⁷ and the Republican Party was cresting in national polls, the amount of “air time” the party gave to the campaign finance complaints is significant.

The two Republican State Committee letters alleged the following three violations:

- 1) Acceptance of the following contributions to the Friends of Maggie Hassan political committee in excess of the legal limit: (a) \$25,000 from the International Brotherhood of Electrical Workers PAC (IBEW PAC); (b) \$10,000 from the Service Workers International Union PAC (SEIU PAC); and (c) \$10,000 from the United Food and Commercial Workers Active Ballot Club PAC

³⁰ *Id.*

³¹ *NHGOP Expands AG Complaint After More Illegal Hassan Donations Emerge*, N.H. REPUBLICAN PARTY (July 17, 2014), <http://nhgop.org/news/nhgop-expands-ag-complaint-after-more-illegal-hassan-donations-emerge>.

³² See generally *supra* notes 29, 31.

³³ See generally About, TWITTER, <https://about.twitter.com/company> (last visited Apr. 8, 2015).

³⁴ See @NHGOP, TWITTER (July 16, 2014–Aug. 2, 2014), <https://twitter.com/nhgop> (author's count of relevant tweets).

³⁵ *Id.*

³⁶ *Malaysia Airlines crash: Ukraine, Russia point fingers after missile downs plane*, FOXNEWS.COM (July 18, 2014), <http://www.foxnews.com/world/2014/07/18/malaysia-airlines-passenger-jet-shot-down-over-ukraine/>.

³⁷ CNN Wire, *President Obama Plans to Take Executive Action on Immigration Reform*, KTLA.COM (June 30, 2014), <http://ktla.com/2014/06/30/president-obama-delivers-statement-on-immigration-reform/>.

(UFCW PAC).³⁸

2) Failure of the three PACs at issue to provide itemized receipts in their required Statements of Receipts and Expenditures.³⁹

3) The IBEW PAC contributing \$25,000 to the Friends of Maggie Hassan despite not registering as a New Hampshire political committee until five days after it made the contribution.⁴⁰

The first allegation was the most serious. In a nutshell, the Republican Party alleged that Governor Hassan had accepted contributions many times over the applicable legal limits for candidates who do not elect to participate in voluntary campaign caps of \$5,000 in the pre-filing period, \$1,000 for the primary, and \$1,000 for the general—for a total of \$7,000 a candidate could take up to the point of filing.⁴¹ The Republican Party cited the most recent guidance from 2012 in which then-Attorney General Michael Delaney established and clarified these campaign finance limits.⁴² A screenshot of the handy chart capturing these limits that was contained in the Delaney letter was frequently tweeted and retweeted by critics of the Governor's campaign.

The Hassan campaign filed a sixty-three page responsive brief, including exhibits, less than twenty-four hours after the Republicans delivered the first complaint.⁴³ In response to the allegations of massive campaign finance violations, the campaign argued that: (1) political contributions made to political committees of individuals before they formally file for office and sign an affidavit forgoing voluntary spending limits are not subject to any limitations due to the express terms of the campaign finance statute; and (2) political contributions made between political committees are unlimited under New Hampshire law.⁴⁴

The campaign first argued, pursuant to the plain terms of RSA 664:4, V, that New Hampshire campaign finance laws do not prohibit a candidate from accepting contributions in any amount from political committees when a

³⁸ Letter from Joseph A. Foster, Att'y Gen., to Jennifer Horn, Chair, N.H. Republican State Comm. (Aug. 1, 2014) (on file with the author) [hereinafter Letter from Foster (Aug. 1, 2014)].

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Letter from Delaney (Feb. 10, 2012), *supra* note 22.

⁴² *Id.*

⁴³ Response Brief from author, Legal Counsel for Maggie '14, to Joseph Foster, Att'y Gen., at 1 (July 17, 2014) (on file with the author) [hereinafter Response Brief (July 17, 2014)].

⁴⁴ *Id.*

candidate has voluntarily elected to abide by the spending caps of RSA 664:5-a.⁴⁵ RSA 664:4, V is couched in terms of contributions by “any person,” and is silent as to contributions by political committees, as opposed to natural persons, for candidates who have elected to take the voluntary spending cap.⁴⁶ The campaign argued that such silence, based on previous Attorney General rulings discussed next, also applies to candidates in the pre-filing period.⁴⁷ In contrast, the Legislature did contemplate limits for political committee contributions in the post-filing period, at which time a declaration is made about whether to elect the voluntary spending cap or not.⁴⁸ Therefore, the campaign argued the reasonable interpretation and customary practice in New Hampshire had been for campaigns to accept greater amounts from political committees if a candidate has taken the voluntary spending cap.⁴⁹ The campaign asserted that the Legislature was specific in the language it chose and it did not restrict political committee contributions to candidates who had taken the voluntary spending cap.⁵⁰

The campaign then argued the same rule was extended to candidates in the pre-filing period and noted that the New Hampshire Attorney General’s Office had built upon this statutory scheme and permitted campaigns to function in a window of time through the day candidates make their declaration as if they are operating under the voluntary spending cap (in other words, during the period before candidates had technically declared whether they would abide or not).⁵¹ The campaign argued the practice built upon decisions of the Attorney General which had found it permissible for candidates in the pre-filing period to take contributions of up to five thousand dollars from individuals,⁵² as if the candidates were ultimately going to elect to voluntarily abide by the State spending cap, and then to decide, upon officially becoming candidates, to elect not to submit to the cap after all. As Attorney General McLaughlin concluded in a key precedent, the campaign restriction on personal contributions is only limited “starting at the

⁴⁵ *Id.* at 3–5.

⁴⁶ See N.H. REV. STAT. ANN. § 664:4, V (2014).

⁴⁷ Response Brief (July 17, 2014), *supra* note 43, at 3.

⁴⁸ See N.H. REV. STAT. ANN. § 664:4, V (“By any person . . . in excess of \$1,000 in value by any person or by any political committee to a candidate or a political committee working on behalf of a candidate who does not voluntarily agree to limit his campaign expenditures and those expenditures made on his behalf as provided in RSA 664:5-a.”).

⁴⁹ Response Brief (July 17, 2014), *supra* note 33, at 3.

⁵⁰ *Id.*

⁵¹ *Id.*

⁵² See Letter from Delaney (Feb. 10, 2012), *supra* note 22 (clarifying that candidates may accept up to \$5,000 from individuals in the exploratory phase, and \$1,000 each for the primary and general elections if the campaign elects not to voluntarily limit spending; also noting that for those who do accept the voluntary caps “a person can give up to the contribution cap in each of the three phases.”).

moment in time when the candidate's opportunity to file an affidavit with the Secretary of State agreeing to the voluntary spending cap expires."⁵³ As the decision letter states, a candidate must decide within three days of filing whether to voluntarily agree to limit campaign expenditures.⁵⁴

As with the statute which will be discussed next, the Attorney General letters summarized in the August 12, 2002 letter speak in terms of contribution limits on *persons* for the pre-filing period, not political committees, because that was the question presented for decision.⁵⁵ The Hassan campaign advanced that the argument applies equally to political committees.⁵⁶ In other words, through the day of declaration of formal spending limits, the Hassan campaign could function in a period where it could accept contributions in the manner that a campaign taking the voluntary spending cap could—and since there is no limitation on political committee contributions to such self-capped campaigns, the campaign could accept the unlimited donations through the day of declaring on the voluntary cap decision.⁵⁷

The campaign explained in its brief that New Hampshire law is silent with regard to contribution limits between political committees.⁵⁸ By the plain meaning of its terms, RSA 664:4, V sets forth contribution limits for natural persons and other enumerated entities.⁵⁹ As RSA 664:4, V states, prohibited political contributions include those made:

By any *person* (1) if in excess of \$5,000 in value, except for contributions made by a candidate in behalf of his own candidacy, or if in excess of \$1,000 in value by any person or by any political committee to a candidate or a political committee working on behalf of a candidate who does not voluntarily agree to limit his campaign expenditures and those expenditures made on his behalf as provided in RSA 664:5-a, (2) if made anonymously or under a name not that of the donor, (3) if made in the guise of a loan, (4) if any other manner concealed, (5) if made without the knowledge and

⁵³ Letter from McLaughlin (Aug. 12, 2002), *supra* note 21.

⁵⁴ *Id.*

⁵⁵ *Id.* at 4 (emphasis added).

⁵⁶ John DiStaso, *Hassan campaign: precedent allowed large PAC contributions*, NHJOURNAL (July 17, 2014), <http://nhjournal.com/hassan-campaign-state-law-precedent-allowed-large-pac-contributions/> [hereinafter DiStaso, *Hassan campaign*].

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ N.H. REV. STAT. ANN. § 664:4, V (2014).

written consent of the candidate or his fiscal agent, a political committee or its treasurer, or not to any one of the same.⁶⁰

Partnerships and labor unions also receive explicit limitations in RSA 664:4.⁶¹ Further, as originally passed, the statute also included limits on corporations and the ability of classified service state workers to contribute, both provisions having since been repealed in 2011 and 1983, respectively.⁶²

The Hassan campaign argued, therefore, that by its plain language, RSA 664 does not place limitations on political committee-to-political committee contributions.⁶³ The campaign asserted that had the Legislature wished to cap the amount of contributions between political committees, it would have done so with the specificity it brought to natural persons and other forms of organizations which were included in RSA 664:4, V.⁶⁴ When specifying persons, unions, public employees, corporations, and state classified service workers, the Legislature could have included political committees in its list of regulated persons or entities. However, the Legislature did not do so in this statute, or any other.

In sum, by combining these two threads—the ability of candidates to take significant donations in the exploratory period in the fashion of a candidate who elects against the voluntary cap, and the ability of political committees to make contributions between each other without limitation, the campaign justified what it had done, and cited bipartisan precedents dating back to the 1990s for the practices including the campaigns of former Governor John Lynch, Senator and former Governor Jeanne Shaheen, as well as “candidates and political committees on both sides of the aisle for the better part of at least ten election cycles, including among others, prominent Republican campaigns of former U.S. Senator Gordon Humphrey, former state Senator Jim Squires, former gubernatorial candidate Jay Lucas and even the New Hampshire Republican Party.”⁶⁵

In a lengthy letter signed by Chair Horn, the Republican Party responded a week later to the campaign’s brief, arguing that the Hassan campaign’s “interpretation of New Hampshire’s campaign finance laws simply makes no sense” and was inconsistent with statements of the Attorney General’s office.⁶⁶ Chair Horn believed that the 2012 Attorney General letter had

⁶⁰ N.H. REV. STAT. ANN. § 664:4, V (emphasis added).

⁶¹ N.H. REV. STAT. ANN. § 664:4, II–III.

⁶² See N.H. REV. STAT. ANN. § 664:4, I repealed by 2011 H.B. 258, ch. 150, § 7(V); N.H. REV. STAT. ANN. § 664:4, IV repealed by 1983 S.B. 200, ch. 415, § 1.

⁶³ DiStaso, *Hassan campaign*, *supra* note 56.

⁶⁴ *Id.*

⁶⁵ Response Brief (July 17, 2014), *supra* note 43, at 2.

⁶⁶ Letter from Jennifer Horn, Chair, N.H. Republican State Comm., to Joseph Foster, Att’y Gen., at 1 (July 24, 2014) (on file with the author) [hereinafter Letter from Horn (July 24,

wiped the slate clean and clarified the maximum donations across the board by synthesizing all prior guidance.⁶⁷ As Chair Horn stated, “[b]y its terms, the Delaney letter discusses and synthesizes previous guidance from your office as to candidate exploratory committees over the course of many years. These letters expressly make clear that the limit on exploratory contributions is \$5,000, period.”⁶⁸ Certainly, to a casual observer, there is some credence to the argument that the February 2012 Attorney General Letter had harmonized previous guidance on contribution limits—but the Hassan campaign argued the text of that opinion letter was nuanced and the statutes it was clarifying, more so.⁶⁹ The Hassan campaign argued in response that the plain meaning of the statute controlled over any administrative gloss that could be applied to it.⁷⁰ Chair Horn called for an order of the Attorney General requiring the \$45,000 in disputed contributions to be immediately returned to the offending political committees.⁷¹

The Attorney General ruled in favor of the Hassan campaign, and acknowledged that campaign finance law allowed both for unlimited contributions between political committees, and for allowance of unlimited contributions by political committees to campaigns in the pre-filing period, until the day of filing or when a candidate executes an affidavit about whether to follow the voluntary caps or not, pursuant to RSA 664:5-b.⁷² The ruling codified the prevailing understanding amongst campaign finance practitioners and campaign finance teams—at least on the Democratic side of the aisle, as Chair Horn disputed that both Republican and Democratic candidates and political committees had been the beneficiary of the practice for decades as the Hassan response had documented in numerous exhibits consisting of previous campaign finance filings and newspaper articles that memorialized the practice.⁷³

Significantly, the Attorney General also issued guidance on when the contribution limits would be effective when a candidate decided to forswear voluntary caps on a day of filing.⁷⁴ The Attorney General filled in a gap in the statute by creating a new, bright line rule that unlimited contributions would need to be made by midnight on the day of filing:

2014)].

⁶⁷ *Id.*

⁶⁸ *Id.* at 2.

⁶⁹ DiStaso, *Hassan campaign*, *supra* note 56.

⁷⁰ *Id.*

⁷¹ Letter from Horn (July 24, 2014), *supra* note 66, at 1.

⁷² Letter from Foster (Aug. 1, 2014), *supra* note 38, at 5.

⁷³ Letter from Horn (July 24, 2014), *supra* note 66, at 3, 6.

⁷⁴ Letter from Foster (Aug. 1, 2014), *supra* note 38.

The \$1,000 contribution limit established in RSA 664:4, V will take effect at midnight on either the day that the candidate affirmatively declares she or he will not voluntarily comply with the expenditure limits or the day that the candidate's opportunity to file an affidavit stating his or her willingness to abide by those limits, whichever is earlier. Any contribution made prior to that time will be deemed to have been made in the exploratory phase and if made by a person will be governed by the first clause of RSA 664:4, V(1), and if made by a political committee can be unlimited.⁷⁵

Like charitable contributions, which are mailed at year-end for favorable tax purposes but may not be received until after December 31, the Attorney General created a "release of control test" as follows to govern when precisely a contribution is deemed to have been "made" which is the operative inquiry per the attorney generals new guidance:

A contribution will be deemed to have been made on the day it leaves the contributor's control on a direct path to the campaign. For purposes of clarity, that includes on the day a contribution was mailed as evidenced by a postmark; on the day a contribution was placed with a courier service for direct delivery to a candidate or a candidate committee; on the day when a credit card donation was made, as evidenced by the contributor's credit card statement; or on the date when an electronic transfer was made, as evidenced by the contributor's bank record.⁷⁶

Despite this release of control rule being invented and supplied in the absence of none in statute, the Attorney General applied it retroactively to the Hassan campaign, which was directed to return most of the IBEW contribution that had been delivered to the local IBEW PAC, but not picked up by representatives of the campaign until several days later.⁷⁷ The campaign also voluntarily returned most of a contribution from the Plumbers

⁷⁵ *Id.* at 5.

⁷⁶ Letter from Foster (Aug. 1, 2014), *supra* note 38, at 5.

⁷⁷ Campaign staff had operated under the assumption that like checks are mailed, the date on a check is the date a contribution is deemed to have been made. See John DiStaso, *AG: Unlimited PAC to PAC giving OK, but Hassan must return \$24k of \$45k challenged contributions*, NHJOURNAL (Aug. 1, 2014), <http://nhjournal.com/ag-unlimited-pac-to-pac-giving-ok-but-hassan-must-return-24k-of-45k-challenged-contributions/>.

and Steamfitters PAC, which similarly had not been timely retrieved from an intermediary, despite this contribution not being subject to a then-pending complaint.⁷⁸

The Attorney General declined to act on the second complaint, that the three PACs had eschewed the requirement of RSA 664:6, I by not itemizing receipts.⁷⁹ Receipts must be reported if they are over twenty-five dollars. The PACs each affirmed to the Attorney General's office that they had no such receipts.⁸⁰ In the absence of any allegations that the PACs had filed false returns, the Attorney General declined to act further on that complaint.⁸¹ These unions, and others, typically account for their compliance by noting their political action funds are drawn from thousands of individual union members' small contributions—none of which are more than twenty-five dollars.

Finally, the Attorney General found that all three PACs in question had failed to follow timely registration requirements pursuant to RSA 664:3 which requires political committees to register before accepting contributions in excess of five-hundred dollars or making expenditures in amounts greater than five-hundred dollars.⁸² The Attorney General made this ruling even though the Republican Party had only complained about the IBEW's failure to timely register.⁸³ The PACs were sent cease and desist letters until they met with the statutory requirement to register with the New Hampshire Secretary of State's office.⁸⁴ At the time, Deputy Attorney General Ann Rice characterized the cease and desist admonition to the State's largest newspaper as, "[d]on't do it again until you're legal."⁸⁵

In conclusion, of all of the Attorney General letters discussed in this article, the August 1, 2014 letter is the most important. It affirms that the statute (deliberately or not⁸⁶) in effect allows for political committees to

⁷⁸ John DiStaso, *Hassan returns another \$9,000 to union PAC donor, prompting another NHGOP 'ethics' attack*, NHJOURNAL (Aug. 7, 2014), <http://nhjournal.com/hassan-returns-another-9k-to-union-pac-donor-prompting-another-nhgop-ethics-attack/>.

⁷⁹ Letter from Foster (Aug. 1, 2014), *supra* note 38, at 6.

⁸⁰ *Id.*

⁸¹ *Id.*

⁸² Michael Brindley, *Gov. Hassan's Campaign Ordered to Return \$24k in Contributions*, NHPR.ORG (Aug. 1, 2014, 4:37 p.m.), <http://nhpr.org/term/politics-0> (follow "Google Custom Search" at top right; then search "Return \$24k;" then follow "Gov. Hassan's Campaign Ordered to Return \$24k in Contributions").

⁸³ *Id.*

⁸⁴ *Id.*

⁸⁵ *Dirty money?*, *supra* note 27.

⁸⁶ *See Lesson in writing*, *supra* note 27 (questioning whether the Legislature was intentional or sloppy in drafting: "The key word here is 'person.' As Foster sees it, by using the word

make unlimited transfers between each other and for candidates to receive unlimited campaign donations into their PACS from other political committees up to the midnight on the day they file and decline the voluntary spending caps.

As a practical matter, the implications of the ruling are broad. Consider the following hypotheticals that could play out for future candidates. For the first rule on unlimited donations, a popular and well-funded state senate candidate in a safe district who wants to support a colleague could transfer unlimited campaign funds to that colleague's political committee in the pre-filing period. Similarly, an ambitious member of the Legislature or Executive Council could make unlimited transfers from their political committee into a new, separate exploratory committee for a run for Governor. A third example, a Governor or member of the Legislature or Council could stockpile campaign cash and then transfer it to an anointed successor upon an eleventh hour retirement,⁸⁷ thereby giving the chosen successor a potential windfall of campaign funds and a leg up on any primary rivals. Indeed, in 2014, Senator Sylvia Larsen of Concord's political committee transferred \$7,000 to her chosen successor's political committee; she could have elected to transfer all of her funds.⁸⁸ And of course, political committees of major interests—be they unions, businesses, or otherwise, who formulate and duly register political committees—may give unlimited amounts in the pre-filing period as the unions at issue did in 2014 and many other organizations had done for some years. Any hesitation about such a practice has now been unambiguously mollified on the wings of the August 1, 2014 Attorney General Letter. If there were interests who weren't

'person' in the first clause and 'by any person or by any political action committee' in the second, the Legislature 'did not intend to restrict a political committee's ability to make contributions to a candidate who has agreed to the expenditure cap. . . . Accordingly, we interpret RSA 664:4, V as imposing no limits on contributions made by a political committee to a pre-candidacy exploratory committee, even if that candidate later does not agree to the spending cap. That's a lot of legalese to digest, but in practice this is what it means: A PAC can give as much money as it wants to a candidate's PAC, in this case the Friends of Maggie Hassan, right up until the point the candidate files for office. Hassan had to return \$24,000 of the \$25,000 given to her by the IBEW not because the amount exceeded campaign contribution limits, but because it arrived one day too late. The question now is: Did lawmakers write a sloppy sentence or did the Legislature actually intend to allow PACs to give candidate committees as much money as they want?").

⁸⁷ Examples of late, eleventh hour retirements and anointing of successors include the retirements of Senator Peter Burling of Cornish in 2008 and Senator Sylvia Larsen of Concord in 2014.

⁸⁸ Some on the Senator Dan Feltes primary campaign, which ultimately upset Senator Larsen's choice, including the author, feared for months that Senator Larsen had transferred her entire treasury to her successor. The August campaign filings revealed it to be otherwise. Although in a primary where neither candidate raised over \$100,000, \$7,000 is a hefty amount.

willing to take a risk on this modality of campaign financing in prior years, such hesitation is now gone with the blessing of the Attorney General's decision letter.

Of course, as with any sizable donations (i.e., amounts in the tens of thousands or even hundreds of thousands of dollars), candidates must necessarily assume a political risk that the optics may play out in potentially unfavorable press coverage. Notable examples from recent years past include sizeable donations by multiple LLCs with common owners such as Dunkin Donuts and Planet Fitness franchisees and New Hampshire mega-developers Shane Brady and Arthur Sullivan.⁸⁹ The corporate entities in question controlled by this handful of actors gave hundreds of thousands of dollars to Kevin Smith and Ovide Lamontagne in the 2012 Republican gubernatorial primary utilizing something called the LLC loophole.⁹⁰ This loophole exists because there is no prohibition on one or several individuals giving maximum contributions through various LLCs they control—LLCs that the law regards as separate corporate persons.

The unlimited contributions loophole similarly has the potential to be a political football. In this last cycle, some Republicans and the *Concord Monitor* editorial board criticized Governor Hassan's campaign for accepting a \$25,000 donation from the IBEW PAC because the membership of the union is strongly supportive of the controversial Northern Pass project—a plan whereby HydroQuebec, in cooperation with Public Service Company of New Hampshire, would bring hydroelectricity to points south of New Hampshire via a string of tall power lines running from the North Country southwards through the rest of the State.⁹¹ Governor Hassan has expressed reservation about the project's impact on New Hampshire's scenic beauty and economy.⁹²

2. *Republican State Committee v. Plumbers and Steamfitters Local Union 131*: Reiterating the Importance of Registration and Reporting

⁸⁹ Brian Wallstin, *Gov. Candidate Kevin Smith Collects on LLC Loophole*, NHPR.ORG (Aug. 24, 2012, 2:54 p.m.), <http://nhpr.org/post/gov-candidate-kevin-smith-collects-llc-loophole>.

⁹⁰ Interestingly, the LLC loophole has yet to be the subject of an explicit challenge, even though Republicans have been the overwhelming beneficiaries in cycles as recent as 2010 and 2012. *See id.*

⁹¹ *Editorial: Problems of money and perception*, CONCORD MONITOR (July 23, 2014).

⁹² Maggie Hassan, *Pursuing energy alternatives does not require accepting Northern Pass*, BOSTON GLOBE (Sept. 20, 2013).

With the Attorney General's new retroactive rule in hand on the operative date for campaign limits, the Republican party then turned to excavating old campaign filings from the Friends of Maggie Hassan in 2012—the election before last—to look for contributions that may have violated the newly announced “delivery rule.” The Republicans filed a complaint on August 6 alleging that the Hassan campaign and the Plumbers and Steamfitters Union had broken campaign finance law.⁹³ The Attorney General's office undertook to investigate the complaint despite the fact that the entities in question—the Friends of Maggie Hassan and the Local Union 131—had both long since dissolved. Nonetheless, the Attorney General duly investigated and in a two-page letter concluded that the IBEW Local Union 131 had violated both the obligations to register its political committee and to report at various points.⁹⁴ The successor PAC was given ten days to file remedial registrations and accountings, even though it was a distinct entity that did not exist in 2012.⁹⁵ The Attorney General's office also ordered Local Union 131 to cease and desist further election activity until the omissions of its predecessor were remedied.⁹⁶ This ruling reiterated the importance of the registration and reporting requirements for political committees.⁹⁷

3. *Republican State Committee v. Hassan III*: Establishment of a Minimum Pleading Standard

Perhaps emboldened by the prior complaints in mid-summer that each generated a great deal of attention, the Republican Party filed a third complaint on August 26 against the Hassan campaign, alleging that half of the \$50,000 the campaign received from the EMILY's List PAC (a PAC dedicated to electing female office holders by supplying them with early infusions of campaign cash) may have run afoul of the new day-of-filing rule announced on August 1.⁹⁸ As with the prior complaints, the complaint was posted in the body of a press release on the Republican Party website and

⁹³ *NHGOP Files NH DOJ Complaint on More Questionable Hassan Donations*, REPUBLICAN PARTY OF N.H. (Aug. 6, 2014), <http://nhgop.org/news/nhgop-files-nh-doj-complaint-on-more-questionable-hassan-donations>.

⁹⁴ Letter from Richard W. Head, Assoc. Att'y Gen., to David Pelletier, Chair, Local Union 131 Volunteer PAC (Oct. 7, 2014) (on file with the author) [hereinafter Letter from Head (Oct. 7, 2014)].

⁹⁵ *Id.*

⁹⁶ *Id.*

⁹⁷ Letter from Head (Oct. 7, 2014), *supra* note 94.

⁹⁸ Letter from Jennifer Horn, Chair, N.H. Republican State Comm., to Richard W. Head, Assoc. Att'y Gen. (Aug. 26, 2014) (on file with the author).

was the subject of news articles and social media saber rattling. In an unusual move, the Attorney General rejected the complaint the next day.⁹⁹ Documentation supplied by the Hassan campaign the day the complaint was filed demonstrated that the contributions at issue were made before filing.¹⁰⁰ Any other letter in essence dismissing a complaint might be a non-story, but what made this dismissal of the complaint noteworthy was the Attorney General's announcement, that like civil actions in state or federal court, campaign finance complaints would prospectively need to "meet a minimum threshold standard of alleging substantive facts that, if true, would constitute a violation of the election laws."¹⁰¹ The Republican Party soon pulled the press release down about this complaint, and online reporter John DiStaso deleted his banner headline story on the New Hampshire Journal website, NHJournal.com, and replaced the article with one noting the swift dismissal.¹⁰²

The Attorney General's office noted that the Republican complaint was thin on facts—only alleging that Governor Hassan had received contributions totaling \$50,000 from EMILY's List and one of the donations was received the day before the filing.¹⁰³ The complaint did not state, for instance, that the campaign had failed to retrieve the second donation in a timely fashion or that an affirmative misrepresentation had been made.¹⁰⁴ Indeed, bank records confirmed the contribution at issue was timely received under the new day-of filing rule.¹⁰⁵ The Attorney General copied the letter to the Chairman of the Democratic Party so that both parties would be on notice of the new requirement that complaints must contain minimal facts that could support an election law violation.¹⁰⁶

4. *New Hampshire Democratic Party v. Havenstein*: Unlawful Spending Before Registration; Reiteration of Reporting Requirements

On the same day that the Republican Party filed a third complaint against the Hassan campaign and its fourth of the summer, the New Hampshire

⁹⁹ *Id.*

¹⁰⁰ *Id.*

¹⁰¹ *Id.*

¹⁰² See generally John DiStaso, *Updated Granite Reports: AG dismisses latest NHGOP Hassan-related campaign finance probe request*, NHJOURNAL (Aug. 28, 2014), <http://nhjournal.com/updated-granite-reports-ag-dismisses-request/>.

¹⁰³ *Id.* (noting that the \$50,000 amount is related to 2012 donations at issue; the \$33,000 figure refers to money the Hassan campaign returned in 2014).

¹⁰⁴ *Id.*

¹⁰⁵ *Id.*

¹⁰⁶ *Id.*

Democratic Party got in the game and filed its own lengthy complaint against the Republican gubernatorial campaign of Walter Havenstein—a candidate who had ironically demanded at a forum that Governor Hassan be criminally prosecuted for alleged violations of campaign finance law,¹⁰⁷ and had blasted the Attorney General’s upholding of the unlimited pre-filing contributions’ legality as an instance where the Governor had “demolished the integrity of New Hampshire’s campaign finance rules for her own selfish political ends.”¹⁰⁸

The Democrats, under the signature of party Chair Raymond Buckley, alleged as follows:

1. Mr. Havenstein accepted funds from out-of-state PACs that had not registered to operate in New Hampshire, namely, two Federal PACs affiliated with Michigan politicians.¹⁰⁹
2. Mr. Havenstein spent \$24,000 in campaign funds on his campaign before registering a political committee as required by law.¹¹⁰
3. Mr. Havenstein failed to document contributor information on numerous campaign finance reports.¹¹¹

In its decision dated October 17, 2014, and directed to Attorney David Vicinanza of Nixon Peabody, counsel to the Havenstein campaign, the Attorney General concluded, “that the Havenstein Political Committee violated state law regarding registration by political committees and reporting of contributions.”¹¹² The Attorney General found that when Mr. Havenstein loaned his exploratory effort \$24,000, the loan constituted a reportable contribution.¹¹³ The \$24,000 contribution therefore triggered the reporting requirement both for registration of a political committee and for

¹⁰⁷ Walter Havenstein, N.H. Republican Gubernatorial Deb. (Aug. 23, 2014).

¹⁰⁸ John DiStaso, *Attorney General finds Havenstein broke state campaign finance laws*, NHJOURNAL, (Oct. 17, 2014), <http://nhjournal.com/attorney-general-finds-havenstein-campaign-broke-state-finance-laws/> [hereinafter DiStaso, *Havenstein broke laws*].

¹⁰⁹ Letter from Raymond Buckley, Chair, N.H. Democratic Party, to Joseph Foster, Att’y Gen. (Aug. 26, 2014) (on file with author).

¹¹⁰ *Id.* at 2.

¹¹¹ *Id.* at 2–3.

¹¹² Letter from Richard W. Head, Assoc. Att’y Gen., to David Vicinanza, Att’y, Nixon Peabody LLP (Oct. 17, 2014) (on file with author) [hereinafter Letter from Head (Oct. 17, 2014)].

¹¹³ *Id.* at 2.

reporting receiving the contribution.¹¹⁴ This aspect of the decision in particular is a stark warning towards nascent campaigns that their efforts in the electoral arena in advance of a run—even if paid for by their own funds—will require careful reporting. This ruling establishes in essence a functional test—if funds are loaned or given and subsequently spent on groundwork for a campaign, those acts will trigger registration and reporting requirements. A candidate cannot avoid these requirements, as Havenstein perhaps sought to do,¹¹⁵ by waiting until later to file paperwork for a political committee. This might be especially concerning for candidates who want to, say, commission a rigorous self-vetting in advance of any run which they would like to keep secret. Such an expenditure, whether funded by the potential candidate or others, could now trigger a political committee registration obligation. Such reporting certainly can have the potential to “tip off” other persons to the plans of one who may want to do such exploration quietly. Of course, selection of a political committee chair and treasurer, and the specificity of the reports on expenditures (or rather, the lack thereof) can potentially cloak a candidate who wants to remain stealthy.

The Attorney General also ordered Mr. Havenstein’s campaign to supply additional contributor information for hundreds of contributors.¹¹⁶ Finally, the letter noted that it was reserving judgment on the conduct of the out-of-state PACs that were alleged to have contributed to Mr. Havenstein’s election effort with registration with the New Hampshire Secretary of State.¹¹⁷

Democrats were quick to pounce in the wake of the ruling, with Party Chair Ray Buckley stating:

[Mr. Havenstein’s] manufactured outrage on issues of campaign finance was hypocrisy at its worst. . . . Today’s ruling by the Attorney General reinforces that Havenstein can’t be taken seriously on ethics, which is not surprising, given his record of failing to stop

¹¹⁴ *Id.*

¹¹⁵ Havenstein’s spokesman Henry Goodwin explained the reasoning for his candidate’s non-reporting to New Hampshire Public Radio as follows: “Walt spent some money out of his own pocket to explore a potential run, before there was a campaign. Once he decided to run, and formed his campaign committee, he reported these early expenditures.” Brian Wallstin, *Democrats Say Havenstein Broke Campaign Finance Rules, and GOP Fires Right Back*, NHPR.ORG (Aug. 26, 2014), <http://nhpr.org/post/democrats-say-havenstein-broke-campaign-finance-rules-and-gop-fires-right-back>.

¹¹⁶ Letter from Head (Oct. 17, 2014), *supra* note 112.

¹¹⁷ *Id.* As of the time of this writing, the Attorney General has not acted on this complaint.

massive fraud that cost taxpayers millions of dollars under his watch as CEO of SAIC.¹¹⁸

After the Havenstein decision, neither party returned to the New Hampshire Attorney General with any new complaints. Campaign finance was also avoided as a topic during the final televised gubernatorial debate between the candidates in late October.¹¹⁹ The media spilled many barrels of ink, and dozens upon dozens of tweets agonized over the issue of purported campaign finance violations.¹²⁰ Both sides got mileage out of complaints that struck at the heart of darkness of money and politics in New Hampshire—but as the Attorney General opinions made clear, campaign finance law remained perilous waters even for the most sophisticated of campaigns. With just over two weeks remaining until the election, the campaign finance theater of battle was abandoned for others. In the end, Governor Hassan was reelected 53% to 47%.¹²¹

A final word—what led to the Campaign Finance Summer? Perhaps one explanation is that the Republican party only followed the Democrats' lead when the New Hampshire Democratic party urged the State's Ballot Law Commission to remove Republican Gubernatorial candidate Walter Havenstein from the ballot based upon a failure to meet the requirements of residency to stand as a candidate for office in New Hampshire.¹²² In an unusual and bold move, Mr. Havenstein himself had initially asked the Ballot Law Commission to declare him eligible to stand for office, anticipating that the Democrats were about to pounce.¹²³ The briefing was thorough and Mr. Havenstein retained his place on the ballot by only a one-vote margin of the Commission.¹²⁴ The Republican Party's first campaign finance complaint, and a lengthy response, as well as the Hassan campaign's reply briefs, were

¹¹⁸ DiStaso, *Havenstein broke laws*, *supra* note 108.

¹¹⁹ Casey McDermott, *Hassan, Havenstein get in last-minute jabs during final televised debate*, CONCORD MONITOR (Oct. 30, 2014),

¹²⁰ *See supra* notes 34–35.

¹²¹ *See generally* 2014 New Hampshire Governor Election Results, POLITICO (Dec. 17, 2014, 2:31 p.m.), <http://www.politico.com/2014-election/results/map/governor/new-hampshire/>.

¹²² The Democrats had alleged Mr. Havenstein had been a resident of Maryland, not New Hampshire, during the seven-year domicile requirement. Josh Rogers, *Ballot Law Commission Rules Havenstein Eligible*, NHPR.ORG (June 30, 2014, 3:24 p.m.), <http://nhpr.org/post/ballot-law-commission-rules-havenstein-eligible> [hereinafter Rogers, *Ballot Law*].

¹²³ Tony Baker, *NHDP Files Reply to Walt Havenstein's Petition with Ballot Law Commission, Underscoring Unanswered Questions About Havenstein's Eligibility and Tax Issues*, N.H. DEMOCRATIC PARTY (June 23, 2014), <http://nhdp.org/blog/2014/06/23/nhdp-files-reply-to-walt-havensteins-petition-with-ballot-law-commission-underscoring-unanswered-questions-about-havensteins-eligibility-and-tax-issues/>.

¹²⁴ Rogers, *Ballot Law*, *supra* note 122.

similarly legalistic and lengthy in the same fashion as the Ballot Law Commission pleadings which may well have set the legalistic “tone” for the Campaign Finance Summer.

Another theory is that the Republican Party sought to create an ethically compromised narrative about Governor Hassan similar to the one that doomed former Governor Craig Benson—the only New Hampshire Governor to lose reelection in more than seventy years.¹²⁵ In press release after press release, Chair Horn referred to Governor Hassan’s campaign as operating under a “dark ethical cloud.”¹²⁶ In essence, by filing serial complaints, the Republicans sought to create an appearance of multiple shady dealings—the “more smoke, more fire” technique. Another complaint from this time period which was not campaign-finance oriented alleged that the Governor filmed an official campaign ad during the government work day using State resources—a complaint which was proven unfounded.¹²⁷ The Republicans likely hoped that the sheer number of volleys would accrete and give the issue salience in voters’ minds.

Another explanation is that the Republican Party was seeking traction for a candidate that floundered in the polls until the very last weeks of the race when a national Republican surge lifted the boats of GOP candidates to within striking distance of incumbents U.S. Senator Jeanne Shaheen and Governor Hassan.¹²⁸ Tellingly, in the wake of the decision letter finding that Mr. Havenstein’s campaign had itself violated campaign finance laws, further complaints were not forthcoming for the 2014 midterm. Having covered the significant administrative law decisions of 2014, this article will now explore the first significant campaign finance statutory reform in a generation—the passage of Senate Bill 120.

¹²⁵ Sarah Schweitzer, *Defeated after 1 term, N.H. governor fades out*, BOSTON.COM (Nov. 4, 2004),

http://www.boston.com/news/politics/governors/articles/2004/11/04/defeated_after_1_term_nh_governor_fades_out/?page=full.

¹²⁶ See, e.g., Garry Rayno, *NHGOP: ‘Dark ethical cloud’ hangs over Hassan campaign*, UNION LEADER (Aug. 7, 2014, 6:38 p.m.); Kathleen Ronayne, *Hassan campaign returns additional \$9,000 in contributions*, CONCORD MONITOR (Aug. 8, 2014).

¹²⁷ *NHGOP Requests Information on Hassan’s Corner Office Campaign Ad Shoot*, REPUBLICAN PARTY OF N.H. (Aug. 8, 2014), <http://nhgop.org/news/nhgop-requests-information-on-hassan-s-corner-office-campaign-ad-shoot>.

¹²⁸ See N.H. Governor – Havenstein v. Hassan, REALCLEARPOLITICS (Nov. 3, 2014), http://www.realclearpolitics.com/epolls/2014/governor/nh/new_hampshire_governor_havenstein_vs_hassan-5016.html; New Hampshire Senate – Brown vs. Shaheen, REALCLEARPOLITICS (Nov. 3, 2014), http://www.realclearpolitics.com/epolls/2014/senate/nh/new_hampshire_senate_brown_vs_shaheen-3894.html.

II. LIGHT IN THE DARK: SENATE BILL 120'S REFORMS

A. The Legal Context: The Rise of Outside Spending in New Hampshire

To understand the passage of Senate Bill 120 in 2014—a bill that now requires 501(c)(4) groups to register and disclose their electioneering activities¹²⁹—warrants a brief review of the rise of Dark Money and other outside spending in New Hampshire since 2010.¹³⁰

The origin of the avalanche of electoral cash in New Hampshire and beyond is the United States Supreme Court case of *Citizens United* and its recent progeny. Decided in 2010, *Citizens United* stands for the proposition that corporations and unions, in the words of Mitt Romney, “are people too, my friend,”¹³¹ and therefore are entitled to the same political speech rights as natural persons under the First Amendment.¹³² The Court held that there was no sufficient governmental interest to impose limits upon the speech of corporations.¹³³ The Court reasoned that independent expenditures, including those made by corporations, do not give rise to “corruption or the appearance of corruption”—preventing corruption and the appearance of corruption being the twin legitimate reasons for government restrictions in the campaign finance arena.¹³⁴ The immediate after-effects of *Citizens United* are well known—a massive influx of outside cash into races across the country. These contributions fueled the GOP tidal wave in 2010 in many states, including New Hampshire, where Republicans buoyed by a Tea Party uprising trounced the Democratic Party’s candidates and gained supermajorities of approximately seventy-five percent of the seats in the State Legislature.¹³⁵ *Citizens United* also ushered in a new legal reality, as federal appellate courts have followed the Supreme Court’s lead, becoming more solicitous of the idea that campaign funds are a matter of free speech.

Although *Citizens United* dealt in the currency of expenditure limitations, later cases have applied the “money as speech” rationale to

¹²⁹ S.B. 120, 2013 Leg., Reg. Sess. (N.H. 2014).

¹³⁰ The section of this Article on the 2012 election draws from two case studies first published in the New Hampshire Bar Journal in the early winter of 2013. See Jay Surdukowski, *The Invention of the New Hampshire Super PAC: Two Case Studies: Gay Marriage; the Gubernatorial Race*, N.H. BAR J., at 20 (Fall 2012), <https://www.nhbar.org/uploads/pdf/BJ-Fall2012-Vol53-No3-Pg20.pdf>.

¹³¹ Philip Rucker, *Mitt Romney says ‘corporations are people’*, WASH. POST (Aug. 11, 2011).

¹³² *Citizens United v. Fed. Election Comm’n*, 558 U.S. 310, 342–43 (2010).

¹³³ *Id.* at 365.

¹³⁴ *Id.* at 357.

¹³⁵ Daniel Barrick, *Legislature returned to Republicans: Victory exceeds party expectations*, CONCORD MONITOR (Nov. 3, 2010).

campaign contribution laws. The Court of Appeals for the Federal Circuit very neatly explained that since independent expenditures are not inherently corrupt, there is no reason to put a cap on the sources of such expenditures: “[B]ecause *Citizens United* holds that independent expenditures do not corrupt or give the appearance of corruption as a matter of law, then the government can have no anti-corruption interest in limiting contributions to independent expenditure-only organizations.”¹³⁶

In August of 2012, the New Hampshire Attorney General issued an opinion letter which in effect made the *Citizens United* rule that political committees who only made independent expenditures would no longer be limited in their ability to raise and spend infinite amounts.¹³⁷ Soon after, “New Hampshire Super PACs” wasted no time in engaging in two key political battles in the fall of 2012: the battle over preserving New Hampshire’s gay marriage law and the wide open governor’s race. Republican commentator Grant Bosse memorably wrote at the time of the “invention”¹³⁸ of the New Hampshire Super PACs:

Two years ago, I wrote in this space that New Hampshire election laws had become confused and irrelevant. The situation has not improved.

This year, another brick in the crumbling wall of campaign finance limits has come tumbling down. If you’re a First Amendment zealot like me, this isn’t necessarily a bad thing.

If you’re a Granny D¹³⁹ or John McCain disciple, it’s a portent of doom.¹⁴⁰

The unassuming opinion letter drafted by a twenty-something assistant attorney general named Matt Mavrogeorge quickly changed the New Hampshire political landscape in dramatic ways, as this article will next show.

B. The Gay Marriage Repeal Fight of 2012

¹³⁶ *SpeechNow.org v. Fed. Election Comm’n*, 599 F.3d 686, 695 (D.C. Cir. 2010).

¹³⁷ Letter from Mavrogeorge (Aug. 1, 2012), *supra* note 22.

¹³⁸ Bosse, *More Confusing*, *supra* note 2.

¹³⁹ Dennis Hevesi, *Doris Haddock Is Dead at 100; Walked for Campaign Finance Reform*, N.Y. TIMES (Mar. 11, 2010).

¹⁴⁰ Bosse, *More Confusing*, *supra* note 2.

The first New Hampshire Super PAC to take advantage of the new landscape made possible by importing *Citizens United* into New Hampshire campaign finance laws was an unlikely group supporting Republicans who voted against repealing New Hampshire's marriage equality law, RSA 457-A.¹⁴¹ Former Republican Speaker William O'Brien's attempt to undo the marriage law signed by Governor John Lynch was soundly defeated in no small part due to a large bloc of Republicans who sided with Democrats on the issue.¹⁴² An early-September filing of the New Hampshire Republicans for Freedom and Equality (NHRFE) PAC revealed an unprecedented \$100,000 donation from a New York hedge fund founder named Paul Singer to support those Republicans who broke ranks with House Speaker O'Brien on the issue of marriage.¹⁴³ Singer is ostensibly a unique figure in the upper echelons of the Republican big money game. A mega-donor to former President George W. Bush and Mitt Romney, a funder of the Swift Boat Veterans for Truth, and a significant donor to New Hampshire's Junior United States Senator Kelly Ayotte (his firm was the top source of her donations in 2010), Singer has also bankrolled efforts to pass or defend gay marriage in a number of states.¹⁴⁴ He also founded a national Super PAC for this express purpose.¹⁴⁵ He has stated that he wishes to provide cover to Republicans who face severe consequences from the right, which has historically been hostile to equality initiatives.¹⁴⁶

NHRFE spent most of Singer's donation in the Republican state primary, mailing literature supporting forty House members defending their seats from right-wing challenges, and one member seeking to move up to the Senate in a squeaker of a primary.¹⁴⁷ NHRFE was wildly successful, boasting a seventy-three percent success rate in the candidates it supported,¹⁴⁸ including the razor-thin victory margin for Representative John Reagan over Loudon farmer Howard Pearl.¹⁴⁹ In a message posted to its website, NHRFE chair

¹⁴¹ Newly Formed GOP PAC Pledges Initial \$100,000 to Support Republicans Who Defend Freedom and Equality for All NH Citizens, N.H. REPUBLICANS FOR FREEDOM AND EQUALITY PAC (Dec. 29, 2011), <http://us4.campaign-archive2.com/?u=876a9bd7da0852669a0b8b33a&id=56fe3644da>.

¹⁴² Matthew Spolar, *Gay Marriage Upheld: More than 100 in GOP reject repeal*, CONCORD MONITOR (Mar. 22, 2012).

¹⁴³ John DiStaso, *New York GOP donor gives \$100,000 to NH pro-gay marriage PAC*, UNION LEADER (Sept. 8, 2012).

¹⁴⁴ Frank Bruni, Opinion, *The G.O.P.'s Gay Trajectory*, N.Y. TIMES (June 9, 2012).

¹⁴⁵ *Id.*

¹⁴⁶ *Id.*

¹⁴⁷ *Protecting the Freedom to Marry in NH*, N.H. REPUBLICANS FOR FREEDOM AND EQUALITY (Dec. 4, 2012), <https://nhrfe.wordpress.com/>.

¹⁴⁸ *Id.*

¹⁴⁹ 2012 State Senate – Republican Primary, NH SEC'Y OF STATE, <http://sos.nh.gov/2012SenRepPrim.aspx?id=28545> (follow "State Senate Districts 16–18

Sean Owen declared: “Republican voters showed strong support for pro-equality Republican legislators who did the right thing, ensuring they can beat back any attacks from single-minded opposition forces.”¹⁵⁰ NHRFE claims that it rebuffed the efforts of the National Organization for Marriage (NOM) across the board in all New Hampshire House races where it targeted members for defeat due to their votes against repeal.¹⁵¹

As if the identity of the source money for NHRFE’s efforts wasn’t intriguing enough, the National Organization for Marriage’s New Hampshire affiliate, Cornerstone Action, condemned the donation as illegal and filed a complaint with the New Hampshire Attorney General’s Office,¹⁵² despite the opinion letter of August 1, 2012 which blessed New Hampshire Super PACs.¹⁵³ Cornerstone’s then-acting director, Shannon McGinley recounted in a press release:

I received a postcard from NHRFE in my mailbox this week supporting pro-gay “marriage” candidates, and it didn’t say anything about marriage on it; instead, it focused on how the named Republicans allegedly support free markets, economic growth and jobs, which I found deceptive. When I looked up more information about the NHRFE and what they really represent, and then I found them in such violation of New Hampshire’s campaign finance law, I knew that I had to take action to make sure the public knows about how gay “marriage” proponents are attempting to save their misguided law at all costs.¹⁵⁴

McGinley alleged in the press release that NHREF is in “gross violation of the law.”¹⁵⁵

Columnist Darrin Hurwitz commented in the *Huffington Post* that Cornerstone’s position against the pro-gay marriage efforts of the Super PAC did not square with the ongoing efforts of Cornerstone’s parent organization to roll back campaign finance laws in numerous States.¹⁵⁶ Hurwitz

Republican”).

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

¹⁵² *Cornerstone Calls Foul on Gay ‘Marriage’ Backers, NH Republicans for Freedom & Equality*, CORNERSTONE (Sept. 7, 2012), <http://www.nhcornerstone.org/latest-news/cornerstone-calls-foul-on-gay-marriage-backers-nh-republicans-for-freedom-equality/> [hereinafter *Cornerstone Calls Foul*].

¹⁵³ Letter from Mavrogeorge (Aug. 1, 2012), *supra* note 22.

¹⁵⁴ *Cornerstone Calls Foul*, *supra* note 152.

¹⁵⁵ *Id.*

¹⁵⁶ Darrin Hurwitz, *NOM’s Campaign Finance Crusade Does a 180, Argues that Super PACs*

wondered whether the seeming shift was NOM turning over a new leaf or just a matter of political expedience.¹⁵⁷ His closing commentary is a counterpoint to McGinley's indignation and underscores the passion that money in politics provokes "marriage-equality opponents' Constitutional legal principles are endlessly shifting to best serve their latest political opportunities. And as a result, NOM's First Amendment right on one day is their opponent's so-called illegal act on another."¹⁵⁸

While Cornerstone Action's complaint over Singer's \$100,000 was pending,¹⁵⁹ Cornerstone Action accepted an \$85,000 donation from a Colorado PAC known as CitizenLink, an affiliate of the social issues advocacy group Focus on the Family, founded by James Dobson.¹⁶⁰ This was a rather swift about-face from accusations of "gross violation of the law." In the weeks before the 2012 election, Cornerstone spent much of the money on an ad attacking then senator and now Governor Hassan for her "obsession" with "fringe" social issues.¹⁶¹ Not to be outdone, Singer donated another \$140,000 in late October to support fifty-five incumbent Republican legislators who either voted against repealing gay marriage or who publicly support gay candidates.¹⁶² All but two of the candidates were House members.¹⁶³ Two were senate candidates—Republican incumbent Nancy Stiles, and District 17 nominee and now two-term Senator John Reagan.¹⁶⁴ Many of the socially moderate House members prevailed and both Stiles and Reagan were elected in 2012, despite the Democratic wave that saw the NH House and Executive Council go blue and that saw Republicans barely hang on to the state senate by a few hundred votes in Districts 9 and 16.¹⁶⁵

are Illegal, HUFFINGTON POST (Sept. 18, 2012, 7:55 p.m.), http://www.huffingtonpost.com/darrin-hurwitz/noms-campaign-finance-crusade-does-a-180-argues-that-super-pacs-are-illegal_b_1890249.html.

¹⁵⁷ *Id.*

¹⁵⁸ *Id.*

¹⁵⁹ The complaint was still pending at the New Hampshire Attorney General's Office as of October 19, 2012. E-mail from Matthew Mavrogeorge dated October 19, 2012. The \$85,000 donation was reported as received on October 12, 2012.

¹⁶⁰ Annmarie Timmins & Ben Leubsdorf, *Capital Beat: Obama and Romney desperate to win New Hampshire*, CONCORD MONITOR (Oct. 29, 2012).

¹⁶¹ *Cornerstone Ad Spot 'Fringe' Highlights Maggie Hassan's Obsession with Social Issues*, CORNERSTONE (Oct. 30, 2012), <http://www.nhcornerstone.org/latest-news/cornerstone-ad-spot-fringe-highlights-maggie-hassans-obsession-with-social-issues/>.

¹⁶² John DiStaso, *John DiStaso's Granite Status: Secretary of State predicts a 70 percent NH turnout for Election 2012*, UNION LEADER (Oct. 31, 2012).

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ Sean Sullivan, *New Hampshire's Democratic wave, explained*, WASH. POST (Nov. 9, 2012).

While gay marriage attracted some large contributions to New Hampshire Super PACs, dollar amounts spent on that issue were dwarfed by the contributions and subsequent spending in the 2012 New Hampshire governor's race, which offered a rare open seat. With popular Democratic Governor John Lynch opting against seeking a fifth term, both Republicans and Democrats mobilized for an epic fight to claim Lynch's place.

C. The 2012 Governor's Race

All told, the 2012 race for governor cost more than twenty-three million dollars, a record in New Hampshire.¹⁶⁶ And this is just from spending disclosed by law and does not include untraced 501(c)(4) money. Only slightly less than four million dollars were raised and spent by the Democratic and Republican nominees combined.¹⁶⁷ New Hampshire Super PACs ponied up the bulk of the remaining nineteen million dollars or so. In other words, at least eighty-two cents of every dollar spent was outside money—a staggering figure—and again, a figure that does not include 501(c)(4) money.

Contrary to Republican gubernatorial candidate Ovide Lamontagne's sentiments in his concession speech and an email to supporters several days after the election where he bemoaned outside spending as contributing to his loss,¹⁶⁸ the biggest disclosed New Hampshire Super PAC spender through Election Day was the "Live Free PAC" into which the Republican Governor's Association (RGA) funneled extraordinary amounts of money.¹⁶⁹ According to its New Hampshire campaign finance filings, the sole purpose of the Live Free PAC was to elect Lamontagne and defeat Maggie Hassan, the former Democratic senate majority leader.¹⁷⁰ As of Halloween 2012, when nearly all of the television ad buys had been made, the Live Free PAC reported \$7,855,750 in receipts.¹⁷¹ According to the final report filed November 14, the Live Free PAC spent precisely \$7,991,809.49 on attacking

¹⁶⁶ Brian Wallstin, *Hassan's Win Powered By \$11 Million in Outside Spending*, NHPR.ORG (Nov. 16, 2012, 3:29 p.m.), <http://nhpr.org/post/hassans-win-powered-11-million-outside-spending>.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.*

¹⁶⁹ *Id.*

¹⁷⁰ See generally *Live Free PAC*, 2012 PAC REGISTRATIONS, NH SEC'Y OF STATE, <http://sos.nh.gov/2012PACRegFM.aspx?id=25716> (last visited Apr. 8, 2015).

¹⁷¹ See *Live Free PAC Receipts and Expenditures*, 2012 COMM. REPORTS – OCT. 31, 2012, NH SEC'Y OF STATE, <http://sos.nh.gov/20121031comm.aspx?id=27867> (last visited Apr. 8, 2015).

Hassan and boosting Lamontagne's candidacy, making it the biggest spender of the New Hampshire Super PACs in 2012.¹⁷²

The bulk of the Live Free PAC's spending was on television ads and at least three large glossy mailers, including one that denounced Hassan for not paying property taxes for a home she does not own¹⁷³—a home her husband was required to live in as principal of Phillips Exeter Academy, and one that serves as a venue for official school functions.¹⁷⁴ The nonpartisan organization PolitiFact ruled the ad was “mostly false,” concluding:

While it's true the Hassans pay no property taxes, it's for good reason. She does not own the home she lives in. It's owned by Phillips Exeter Academy where her husband Tom is the principal and he is required to live in the home. The building is one of the school's tax-exempt properties, but Phillips Exeter is still the town's largest taxpayer.¹⁷⁵

Groups aligned with Hassan spent almost as much to attack her Republican opponent. The Democratic Governors' Association directed nearly \$7.9 million through its New Hampshire Super PAC, New Hampshire Freedom Fund.¹⁷⁶ With other expenditures, it came close to matching the Live Free PAC as top spender in a New Hampshire state race.¹⁷⁷ According to the DGA, its \$7.9 million investment through its New Hampshire Super PAC and other avenues was the group's largest in history.¹⁷⁸ The DGA's spending was in the form of both independent expenditures made by New Hampshire Freedom Fund and large transfers of funds to the New Hampshire

¹⁷² See *Live FREE PAC Receipts and Expenditures*, 2012 COMM. REPORTS – NOV. 14, 2012, NH SEC'Y OF STATE, <http://sos.nh.gov/20121114comm.aspx?id=28151> (last visited Apr. 8, 2015).

¹⁷³ Kevin Landrigan, *Republican Governors Association TV ad says Democrat Maggie Hassan likes taxes, just not for herself*, POLITIFACT, CONCORD MONITOR (Oct. 29, 2012, 1:27 p.m.)

<http://www.politifact.com/new-hampshire/statements/2012/oct/29/republican-governors-association/republican-governors-association-tv-ad-says-democr/>.

¹⁷⁴ *Id.* See generally Paul Steinhauser, *Hassan on the move*, NH1.COM (Mar. 24, 2015, 2:17 p.m.), <http://www.nh1.com/news/steinhauser-first-on-nh1-news-gov-hassan-on-the-move/> (noting that the Hassans have purchased a home in anticipation of Mr. Hassan's retirement from Phillips Exeter Academy).

¹⁷⁵ Landrigan, *Republican Governors Association TV ad*, *supra* note 173.

¹⁷⁶ Wallstin, *\$11 Million in Outside Spending*, *supra* note 167.

¹⁷⁷ *Id.*

¹⁷⁸ *Id.*

Democratic Party to the tune of \$2,993,480.37.¹⁷⁹ A DGA spokesman explained to New Hampshire Public Radio that the spending was meant to overcome the state's "rightward tilt" in 2010 by defining Lamontagne as "an extremist with misguided positions far outside the mainstream which would move the state backwards."¹⁸⁰ Just two days after the September 11 primary, an ad linked Lamontagne to the Tea Party that he had embraced in 2010 during his failed GOP primary bid for the U.S. Senate.¹⁸¹ The spot focused on Lamontagne's views on block grants for Medicare, opposition to reproductive rights, and intent to repeal New Hampshire's same-sex marriage law.¹⁸²

James Merrill, an advisor to Lamontagne's bids for the Senate and governorship in 2010 and 2012, observed in a post-election interview that the quick cash infusion in the attack ads against his then-law firm colleague made all the difference for Hassan at a critical juncture; she had spent nearly all her campaign funds on a spirited primary contest where she defeated former State Senator Jackie Cilley.¹⁸³ Hassan had just \$16,000 in her coffers when the general election race began in earnest.¹⁸⁴ Lamontagne, in contrast, had several hundred thousand left in the bank after winning by a comfortable margin over primary rival Kevin Smith, the former head of Cornerstone Action, a conservative advocacy group that played a prominent role in legislative efforts to repeal same-sex marriage.¹⁸⁵

With the Live Free PAC, the DGA, and the Freedom Fund PAC each spending nearly eight million dollars apiece on their favored candidates,¹⁸⁶ combined with other out-sized outside spending, this became the most expensive gubernatorial race in New Hampshire history. Hassan's win was powered by at least eleven million dollars in outside spending that is known from public filings, roughly five times what Hassan's campaign raised and spent.¹⁸⁷ By New Hampshire Public Radio's calculations, which are backed by campaign finance filings and other sources, close to twenty-three million dollars were spent on the governor's race that we know about, with nineteen million dollars—or eighty-two percent, as noted earlier—from outside

¹⁷⁹ *NH Democratic State Committee Receipts and Expenditures*, 2012 COMM. REPORTS – NOV. 14, 2012, NH SEC'Y OF STATE, <http://sos.nh.gov/20121114comm.aspx?id=28201> (follow "NH Democratic State Committee") (last visited Apr. 8, 2015).

¹⁸⁰ Wallstin, *\$11 Million in Outside Spending*, *supra* note 166.

¹⁸¹ *Id.*

¹⁸² *Id.*

¹⁸³ *Id.*

¹⁸⁴ *Id.*

¹⁸⁵ Matthew Spolar, *Lamontagne leads money race*, CONCORD MONITOR (Aug. 23, 2012).

¹⁸⁶ Wallstin, *\$11 Million in Outside Spending*, *supra* note 166.

¹⁸⁷ Wallstin, *\$11 Million in Outside Spending*, *supra* note 166.

groups.¹⁸⁸

As noted at the outset, additional spending on this campaign was not reported. Both Hassan's and Lamontagne's candidacies benefited from the multimillion dollar spending of secretive 501(c)(4) organizations that until the Summer of 2014 and the passage of SB 120 did not need to register or file with the New Hampshire Secretary of State's Office because they are deemed "business organizations," pursuant to RSA 664:2, XVI. In the end, Hassan defeated Lamontagne by twelve points: 55% to 43%, a stunning outcome for a race where, early on, Lamontagne had been considered the favorite.¹⁸⁹ When taking into account the vast spending by 501(c)(4)s that did not have to report, as much as nine out of ten cents were likely spent in the most expensive gubernatorial contest in New Hampshire history.¹⁹⁰

D. Outside Spending in 2014

Patterns of outside spending continued in 2014 though the spending was not nearly as centralized at the state level, perhaps because much of the political oxygen was consumed by the marquee U.S. Senate race between U.S. Senators Jeanne Shaheen and former U.S. Senator Scott Brown in which \$54,980,137 was spent, \$29,454,645 of it by outside groups, or fifty-four percent.¹⁹¹ Most significant, the race for Governor did not see a twenty million dollar influx of outside money as it did in 2012 when it was an open seat.¹⁹²

In contrast, legislative spending appears to be where more outside money was targeted this cycle.¹⁹³ A snapshot of five competitive State Senate races in the 2014 election gives a perspective on the volume of spending by outside groups such as 501(c)(4)'s in this cycle.¹⁹⁴ Again, even these numbers must

¹⁸⁸ *Id.*

¹⁸⁹ Ben Leubsdorf, *Maggie Hassan defeats Republican Ovide Lamontagne in N.H. governor's race*, CONCORD MONITOR (Nov. 7, 2012).

¹⁹⁰ Wallstin, *\$11 Million in Outside Spending*, *supra* note 167.

¹⁹¹ *New Hampshire Senate Candidates*, INFLUENCE EXPLORER, <http://realtime.influenceexplorer.com/race/2014/S/NH/2/> (last updated Apr. 8, 2015, 6:16 p.m.).

¹⁹² Kathleen Ronayne, *Hassan, Havenstein spent combined \$5.5 million*, CONCORD MONITOR (Nov. 13, 2014).

¹⁹³ *Id.*

¹⁹⁴ These figures are derived from the author's analysis of the November 12 campaign finance filings, reports of independent expenditures filed with the New Hampshire Secretary of State, including expenditures made by the New Hampshire Republican Party, and figures supplied by the New Hampshire Democratic Party's Senate Democratic Caucus staff member, Gene Martin. See E-mail from Gene Martin, Staff Member, N.H. Senate Democratic Caucus, to author (Dec. 16, 2014) (on file with the author) [hereinafter E-mail from Gene Martin]. See also *Campaign Finance*, N.H. SEC'Y OF STATE, <http://sos.nh.gov/CampFin.aspx> (last visited Apr. 13, 2015).

be taken with a grain of salt because, as this article will show, there are some prominent 501(c)(4) groups who have openly defied the new law requiring the reporting of their independent expenditures designed to defeat or elect candidates.

Table 1: 2014 Selected Senate Race Spending

Senate District	Candidate	Campaign Spending	Outside Spending	Total	Percent of Outside Spending	Winner
6	Sen. Cataldo (R)	\$35,821.60	\$72,866.14	\$108,687.74	67 %	X
6	Leonard (D)	\$40,796.47	\$93,244.33	\$134,040.80	69.6%	
7	Sen. Hosmer (D)	\$82,001.00	\$92,291.88	\$174,292.88	53%	X
7	Rago (R)	\$19,618.83	\$78,432.29	\$98,051.12	80%	
9	Sen. Sanborn (R)	\$88,620.00	\$98,970.07	\$187,590.07	52.8%	X
9	Nyquist (D)	\$143,960.50	\$106,062.56	\$250,023.06	42.4%	
12	Sen. Gilmour (D)	\$76,186.14	\$95,771.06	\$171,957.20	55.7%	
12	Avard (R)	\$17,960.16	\$28,037.37	\$45,997.53	61%	X
16	Sen. Boutin (R)	\$181,850.76	\$82,307.25	\$264,158.01	31%	X
16	Manning (D)	\$80,844.36	\$104,789.53	\$185,633.89	56.4%	

Of these five senate seats, on the low end of the scale, at least forty-one cents on the dollar was spent by outside parties in the case of the Boutin-Manning matchup in which a staggering minimum of \$449,791.90

was spent overall.¹⁹⁵ On the high end, the Cataldo-Leonard race saw 68.4% in outside spending,¹⁹⁶ followed close behind by the Hosmer-Rago race at 62.7% and the Gilmour-Avard race at 56.8%.¹⁹⁷ The second most expensive race, to the tune of \$437,613.13, was the Sanborn-Nyquist race.¹⁹⁸ This election saw 46.9% of its spending by outside parties.¹⁹⁹ The upshot of all of this spending is that in some instances, as with the 2012 Governor's race, more money is being spent by outside parties than candidates—in the case of a candidate like Kathy Rago, a whopping 80% of the money spent to elect her was not raised by her.²⁰⁰ These figures are consistent with national trends in which outside money is fast becoming king.

E. SB 120: An Effort to Shine a Light on “Dark Money”

At the tail end of its 2014 session, the New Hampshire Legislature enacted Senate Majority Leader Jeb Bradley's bill to require 501(c)(4) organizations to register with the Secretary of State and to report receipts and expenditures just like political committees and parties have long done.²⁰¹ Such organizations are now required to report if they spend more than \$5,000 in a year on communications that are “functionally equivalent to express advocacy” because “when taken as a whole, such communication is likely to be interpreted by a reasonable person only as advocating the election or defeat of a clearly identified candidate or candidates or the success or defeat of a measure or measures.”²⁰² The new law provides that the calculus for functional equivalence must take into account “whether the communication involved mentions a candidacy or a political party, or takes a position on a candidate's character, qualifications, or fitness for office.”²⁰³

SB 120 was crafted in such a way to shed light on the communications 501(c)(4)'s were making heretofore without disclosure. The tricky thing is that in order to maintain their 501(c)(4) status as social welfare organizations, at least fifty-one percent of a 501(c)(4)'s activities must be focused on issue advocacy and education.²⁰⁴ “Issue advocacy” falls outside the realm of disclosure laws while “express advocacy” or its functional equivalent brings communications into a sphere where voters have a right to

¹⁹⁵ E-mail from Gene Martin, *supra* note 194.

¹⁹⁶ *Id.*

¹⁹⁷ *Id.*

¹⁹⁸ *Id.*

¹⁹⁹ *Id.*

²⁰⁰ *Supra* note 194 and accompanying text.

²⁰¹ *Id.*

²⁰² N.H. REV. STAT. ANN. § 664:2, XXII (2014).

²⁰³ N.H. REV. STAT. ANN. § 664:2, XXII.

²⁰⁴ 26 C.F.R. § 1.501(c)(4)-1(a)(1) (1990).

know who is making such communications in an effort to influence politics. The line between educating voters on candidate's positions through issue advocacy and expressly advocating for defeat or election of a given candidate is perilous to discern at times. The "functional equivalent" language incorporated in SB 120 and intended to bring transparency to these kinds of expenditures closely hews to language from Chief Justice John Roberts decision in *Federal Election Commission v. Wisconsin Right to Life, Inc.*,²⁰⁵ a decision in which the United States Supreme Court held that mentioning a candidate's name is not the only hallmark of express advocacy—other communications are the functional equivalent if "the ad is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate."²⁰⁶

F. SB 120: Is it Working?

Compliance with SB 120 has been mixed. Since the law was implemented in late July of 2014, a number of 501(c)(4)'s from both sides of the political spectrum have complied, including New Hampshire Citizen's Alliance for Action, the National Rifle Association (NRA) Political Victory Fund, Planned Parenthood of N.H. Action Fund, and Cornerstone Action.²⁰⁷ Planned Parenthood and New Hampshire Citizen's Alliance may be categorized as liberal or progressive groups and the NRA and Cornerstone Action tend to be described as conservative.²⁰⁸

On the other hand, various prominent 501(c)(4) outfits active in New Hampshire have openly defied the law by claiming it doesn't apply to them. The most nationally famous of all the Dark Money groups tops this list: Americans for Prosperity, a national organization heavily funded by Charles and David Koch—the oft' decried (usually by Democrats) Koch Brothers—billionaire siblings with significant industrial interests and

²⁰⁵ Fed. Election Comm'n v. Wis. Right to Life, Inc., 551 U.S. 449, 465–66 (2007).

²⁰⁶ *Id.* at 469–70.

²⁰⁷ See generally *Political Committees*, N.H. SEC'Y OF STATE, available at <http://sos.nh.gov/PolComm.aspx> (last visited Apr. 8, 2015) [hereinafter *Political Committees*].

²⁰⁸ Planned Parenthood, at least, might bristle at its description as a liberal group. The organization is adamant about supporting both Republicans and Democrats who support their cause. In recent memory, former State Senator Bob Odell and Seacoast Senator Nancy Stiles have both been endorsed by Planned Parenthood. See John DiStaso, *Granite Reports Update: Rubens-backer Humphrey says it's 'imperative' to elect Brown*, NHJOURNAL (Sept. 12, 2014), <http://nhjournal.com/granite-reports-update-rubens-backer-humphrey/>; *2012-PPNNE Action Fund NH-PAC Endorses Candidates for State Senate*, PLANNED PARENTHOOD OF N. NEW ENG. ACTION FUND, <http://web.archive.org/web/20140101090413/http://www.ppnneactionfund.org/campaigns-elections/new-hampshire/2012-ppnne-action-fund-nh-pac-endorses-candidates-for-state-senate/>.

purchased political clout. Americans for Prosperity New Hampshire—the New Hampshire Chapter of the group—has not registered or reported any of its electoral spending this cycle according to records maintained at the New Hampshire Secretary of State.²⁰⁹ In a New Hampshire Public Radio story by Brian Wallstin, AFP-NH’s chief Greg Moore was dubious about the constitutionality of SB 120, stating “the direction federal court rulings are taking” makes it doubtful that the functional equivalent test will survive.²¹⁰ He noted that a test case will come when an attempt to regulate issue advocacy is made using the functional equivalent test—and such a test case represents “a collision course with litigation.”²¹¹ Another group that was active in the 2014 election, the New Hampshire Advantage Coalition, has also failed to register or report its expenditures.²¹² A third conservative group, Citizens for a Strong New Hampshire, has also refused to register or make required reports.²¹³ Derek Dufresne, spokesman for Citizens for a Strong New Hampshire, stated at the time of SB 120’s passage that the First Amendment shields their activity and that “all legal options” are on the table for a challenge.²¹⁴

As of the time of this writing, two complaints are pending at the Attorney General’s office over non-compliance with SB 120.²¹⁵ State Representative Robert “Renny” Cushing of Hampton—who narrowly won reelection after a recount of a tied election was decided in his favor—complained about two different mailings targeting his reelection to a Seacoast-area House seat.²¹⁶ One mailing sent by the New Hampshire Advantage Coalition, an AFP affiliate, implied that Representative Cushing was opposed to efforts to crack down on welfare abuse.²¹⁷ The ad depicts a stereotypical “welfare queen” smoking with a liquor bottle in the foreground and a teenage-looking man smoking a cigarette with text that states: “Robert Cushing Refuses to Stop Welfare Abuse” and “People are abusing welfare by buying alcohol and tobacco with your tax dollars.”²¹⁸ Another mailing, by Packing NH, a

²⁰⁹ *Political Committees*, *supra* note 207.

²¹⁰ Brian Wallstin, *Can N.H.’s New Campaign Finance Rules Hold Up In Court*, NHPR.ORG (July 21, 2014, 4:00 p.m.), <http://nhpr.org/post/can-nh-s-new-campaign-finance-rules-hold-court>.

²¹¹ *Id.*

²¹² *Political Committees*, *supra* note 208.

²¹³ *Id.*

²¹⁴ Wallstin, *\$11 Million in Outside Spending*, *supra* note 166.

²¹⁵ Telephone Conference with Stephen Labonte, Assistant Att’y Gen., N.H. Dep’t of Justice, in Concord, N.H. (Dec. 15, 2014) [hereinafter Telephone Conference with Labonte].

²¹⁶ Kyle Stucker, *Cushing files complaint over ‘shady’ political ads*, ELECTION 2014, SEACOSTONLINE.COM (Nov. 6, 2014, 6:43 p.m.), <http://www.seacoastonline.com/article/20141106/News/141109359>.

²¹⁷ *Id.*

²¹⁸ *Id.*

pro-gun rights entity, accused Representative Cushing of supporting higher property taxes.²¹⁹ At the time of this writing, both complaints are still pending.²²⁰ Depending on how the Attorney General rules, more litigation may be in the offing.

III. CONCLUSION

The changes in the campaign finance landscape noted in this article are likely to demarcate battle lines in New Hampshire elections for years to come in at least two significant ways.

First, both major political parties (and the campaigns they serve) have used more campaign finance complaints as a political weapon than before. In the new era of social media where any citizen can serve as a beacon of political information and news, campaign finance complaints have a certain snappy resonance—with the public’s natural aversion to the intersection of money and politics, allegations of wrongdoing in this arena can be potent attacks. During the Campaign Finance Summer, the Republican State Committee was especially fond of tweeting an image of Governor Hassan surrounded by union cash with the caption “Lifestyles of the Rich and Liberal.”²²¹ And as previously noted, Republicans also sought to make some dubious connection in the public’s mind between Hassan’s acceptance of IBEW funds and the union’s high-profile support of the Northern Pass Hydroelectric Project.²²² Neither ploy especially worked in the end.

Of course, the Republicans’ zeal was dampened when the Attorney General dinged candidate Havenstein for significant campaign finance improprieties. This cautionary tale represents that a campaign or political party should be wary of throwing stones if they live in glass houses. A corollary lesson from the Campaign Finance Summer is New Hampshire campaigns not only must be hyper-careful of their own practices, they should also scrutinize the compliance of their donors or run the risk of wearing the sins of their contributors (i.e., PACs that don’t register or file reports). Campaigns can be fairly or unfairly conflated with the acts or omissions of their contributors, especially if they are significant contributors. A final observation on campaign finance litigation as a political move: like any litigation, outcomes can be very uncertain. And like any other high profile

²¹⁹ *Id.*

²²⁰ Telephone Conference with Labonte, *supra* note 215.

²²¹ See *NHGOP Presents: Lifestyles of the Rich and Liberal*, REPUBLICAN PARTY OF N.H. (June 19, 2014), <http://nhgop.org/news/nhgop-presents-lifestyles-of-the-rich-and-liberal>.

²²² Kevin Landrigan, *Republicans question Hassan accepting \$25K from pro-Northern Pass electrical union*, NASHUA TELEGRAPH (July 17, 2012).

litigation, the pressure points may not always align with legal process or norms, just the way a “bet-the-company litigation” may not always align with bottom line concerns and can sometimes be tethered to passion or expediency. For example, the Attorney General’s retrospective application of the newly invented “release of control” rule to the Hassan campaign was ripe for challenge as an impermissible retrospective application of newly-minted administrative law that did not exist at the time of the contributions. However, in the thick of a campaign, when the currency is daily (or even intra-daily) press headlines, moving on as swiftly as possible may be the best course politically, even if the legal option for further contest is plainly viable. One might also speculate to what degree Attorney General Joseph Foster—an appointee of the Governor but a politically independent actor—was compelled to split the baby in some fashion in an effort to amplify the non-partisan nature of his office.²²³

Second, the vast majority of political spending will go on in the dark—perhaps in perpetuity—and that spending will be a bigger and bigger portion of the pie in New Hampshire and elsewhere. At the time of this writing, a number of states have called for a Constitutional amendment to overturn the *Citizens United* decision²²⁴ and the New Hampshire Legislature is currently debating such a resolution.²²⁵ Indeed, at the time of this writing, a ragged band of activists affiliated with Harvard Law School’s Professor Lawrence Lessig that call themselves the New Hampshire Rebellion are braving the harsh New Hampshire winter and walking across the state in protest of the post-*Citizens United* world, as a homage to activist Doris Haddock who once walked from California to Washington, D.C. in a bid to raise awareness about the overflow of money in politics.²²⁶

Ironically, it is worth noting in these concluding paragraphs that Professor Lessig has been criticized in New Hampshire and elsewhere for endeavoring to end spending excesses by using a Super PAC of the very kind he decries—the so-called May Day PAC that dumped over a million and a

²²³ Attorney General Foster recused himself from subsequent investigations at the request of the Republican State Committee. Mr. Foster had served on Governor Hassan’s finance team in 2012. See John DiStaso, *Updated: AG Foster has recused himself from review of GOP complaint vs. Hassan campaign*, NH JOURNAL (Aug. 15, 2014), <http://nhjournal.com/ag-foster-says-recuse/>.

²²⁴ Fredreka Schouten, *President Obama wants to reverse Citizens United*, U.S.A. TODAY (Feb. 9, 2015), <http://onpolitics.usatoday.com/2015/02/09/president-obama-wants-to-reverse-citizens-united/>.

²²⁵ See H.B. 371, 2015 Sess. (N.H. 2015), <https://legiscan.com/NH/text/HB371/id/1075901>.

²²⁶ Jennifer Harper, *Cold fury: ‘New Hampshire Rebellion’ walks 250 frozen miles to protest big money in politics*, WASH. TIMES (Jan. 17, 2015), <http://www.washingtontimes.com/news/2015/jan/17/snow-wont-stop-new-hampshire-rebeliions-250-walk-p/>.

half dollars into supporting a quixotic primary challenge to former Senator Scott Brown, an obscure, right wing former-Republican legislator from the 1990s. Lessig expressed public regret for this move later by stating, “in the end, the burden of this mistake rests with me, and me alone.”²²⁷ The May Day-backed former state senator garnered a paltry twenty-three percent of the vote in a primary chiefly fought with two Former US Senators from Massachusetts and New Hampshire, respectively.²²⁸ Former Senator Scott Brown took a commanding fifty percent of the vote.²²⁹

The prospects for change of a constitutional magnitude any time soon are likely dim. Simply put, Constitutions are hard to change—the last amendment about congressional pay raises, the Twenty-Seventh Amendment, took 202 years to ratify.²³⁰ Other efforts that gained great currency on the wings of civil rights-scale movements, such as the Equal Rights Amendment first introduced in 1923, have failed.²³¹ Finally, those who hold the megaphones of this new brand of Free Speech are not likely to go gently into the good night—presumably hundreds of millions or even billions could be deployed to defeat any attempt to amend the Constitution to reverse *Citizens United*. Indeed, at the time of this writing, the Koch Brothers—who are worth over forty billion dollars²³² and are the seventh richest people in the world—have announced they will spend \$889 million on the 2016 election, a sum that continues to dwarf spending by the two major political parties.²³³ For comparison, the May Day PAC, which is clumsily attempting to fight money in politics, is said to have spent about ten million dollars on the 2014 midterms with little success.²³⁴

Senate Bill 120 is a well-intentioned law that seeks to shine light in the darkness. However, the continued uncertainty with regards to the survival of campaign finance laws, which are increasingly seen by the United States

²²⁷ Lawrence Lessig, *We Lost, Badly*, LESSIG BLOG, v2 (Sept. 10, 2014), <http://lessig.tumblr.com>.

²²⁸ See N.H. SEC’Y OF STATE, 2014 United States Senate—Republican Primary (2014), <http://sos.nh.gov/2014USSRepPrim.aspx?id=8589938878>.

²²⁹ *Id.*

²³⁰ Richard Berke, *1789 Amendment Is Ratified But Now the Debate Begins*, N.Y. TIMES (May 8, 1992), at A1.

²³¹ David Crary, *90 Years On, The Fight For The Equal Rights Amendment Continues*, CONCORD MONITOR (Aug. 11, 2014).

²³² *The World’s Billionaires*, FORBES, <http://www.forbes.com/billionaires> (last visited Feb. 25, 2014).

²³³ Kenneth Vogel, *The Kochs put a price on 2016: \$889 million*, POLITICO (Jan. 26, 2015), <http://www.politico.com/story/2015/01/koch-2016-spending-goal-114604.html#ixzz3QVTVp gOy>.

²³⁴ Byron Tau & Kenneth Vogel, *How to Waste \$10 Million*, POLITICO (Nov. 6, 2014), <http://www.politico.com/story/2014/11/2014-elections-mayday-pac-larry-lessig-112617.html>.

Supreme Court and appellate courts trying to follow its lead as constraining free speech, means that the law may face legal challenge sooner as opposed to later. At least one of the groups that has been evading compliance likely has the capacity to bankroll any and all litigation necessary as a Koch Brother affiliate.²³⁵ And of course, other practices—unlimited political committee to political committee contributions, unlimited pre-filing contributions, and the LLC loophole—have not been the subject of successful legislation to-date in New Hampshire. These avenues for substantial electoral contributions remain viable—indeed, even more viable thanks to recent developments—than ever before.

For now, like Conrad's protagonists penetrating deeper into the darkling jungle, even those who would ban money's influence in politics or reform the system,²³⁶ such as Professor Lessig's May Day PAC, have been forced to live the very mores of the heart of darkness they decry—a place where the thrall of money is only a matter of degree and no one comes with clean hands.²³⁷

²³⁵ Americans for Prosperity is funded by the Koch Brothers and other wealthy allies. See Kenneth Vogel, *Koch brothers' Americans for Prosperity plans \$125 million spending spree*, POLITICO (May 9, 2014), <http://www.politico.com/story/2014/05/koch-brothers-americans-for-prosperity-2014-elections-106520.html>.

²³⁶ Of note, both Governor Hassan and Mr. Havenstein called for campaign finance reform in the Summer of 2014.

²³⁷ This article has given the reader a map to the heart of darkness and is agnostic on where elected leaders and candidates should go from here in terms of future legislation or campaign fundraising practices.