

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES OF THE STATE OF MONTANA

McCulloch v. Stanford and Dartmouth  No. COPP 2014-CFP-046	<u>Decision Finding Sufficient Facts to Demonstrate a Violation of Montana's Campaign Practice laws</u>
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On October 24, 2014, Linda McCulloch<sup>1</sup>, a resident of Helena, Montana filed a complaint against Stanford University and Dartmouth College alleging that a certain document (see Flyer attached to this Decision) violated Montana campaign practice laws.

**INTRODUCTION**

The Stanford/Dartmouth Flyer started to show up in the mailboxes of Montanans on October 22, 2014. Informal complaints by Montanans to the COPP about the Flyer started immediately.<sup>2</sup> On October 24 a formal complaint was lodged with the COPP by Ms. McCulloch (see

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<sup>1</sup> The complaint was filed by Linda McCulloch, individually. Ms. McCulloch is the elected Secretary of the State of Montana.

<sup>2</sup> The Flyer was explained by the Institutions as the field implementation of an academic research project by Standard/Dartmouth professors. That is not how the Montanans complaining to the COPP saw the Flyer. They saw the flyer as wrongfully appropriating use of the Great Seal of the State of Montana and wrongfully campaigning without reporting or disclosure.

above). An initial and partial Decision was issued by this Office on October 29, 2014 and is incorporated by reference into this Final Decision. The initial Decision recognized and incorporated a certain pre-election letter of apology issued to Montanans and signed by the Presidents of Dartmouth College and Stanford University on or about October 28, 2014.<sup>3</sup> A copy of the letter of apology is attached to this Decision.<sup>4</sup>

### **This Decision Addresses Campaign Practices**

The Commissioner's initial Decision retained for investigation and Decision the entire range of issues raised by and related to (*see* §13-37-111 MCA) the Complaint filed in this Matter. With this platform for the final Decision, Dartmouth College, Stanford University, the project researchers and the COPP engaged in review as described below:

Dartmouth College: Robert Donin is general counsel for Dartmouth College and his office is located at the College campus in Hanover, New Hampshire. Mr. Donin requested an outside investigation of Dartmouth's activities by the Hanover office of the law firm of Sheehan, Phinney, Bass and Green. The SPhBG firm, under the signature of Sean Gorman, provided a 9 page report of its investigation, along with 10 pages of response to interrogatory style questions sent by the COPP to Stanford and Dartmouth. The SPhBG response was accompanied by 36 pages of documents. The SPhBG response was dated December 18, 2014 and a copy was provided to the COPP that same day under a cover letter from Mr. Donin.

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<sup>3</sup> The Commissioner takes administrative notice, based on reports from Montana citizens, that the follow-up apology letter arrived in the mailboxes of Montana voters prior to the November 4, 2014 date of the general election.

<sup>4</sup> The pre-election letter of apology was printed and mailed first class to Montana voters at a cost of \$51,343. (Stanford Response, P. 2) Stanford University handled the entire mailing and underwrote the entire cost of the mailing.

Stanford University: Stanford University engaged the services of California attorney Frederick Lowell and Montana attorney G. Steven Brown. Mr. Lowell is a partner in the firm of Pillsbury, Winthrop, Shaw and Pittman located in San Francisco, California. G. Steven Brown is in sole practice as an attorney in Helena, Montana. The Stanford response consisted of a 10 page memo to the Commissioner, co-signed by attorneys Lowell and Brown. In addition Stanford responded separately to 27 interrogatory style questions sent by the COPP to Stanford and Dartmouth. Finally, Stanford included 21 pages of exhibits with its response.

Project Researchers: The three researchers involved in the Flyer project were Professors: Kyle Dropp (Dartmouth); Jonathan Rodden (Stanford) and Adam Bonica (Stanford). The Dartmouth SPhBG investigation included a personal interview with Professor Dropp and telephone interviews with Professors Bonica and Rodden. Stanford's response includes information that could have only come from a similar interview process with the three project researchers.

The COPP: The COPP initially posed 27 questions to Stanford and Dartmouth. The Stanford and Dartmouth responses were designed to answer these questions. In addition, the COPP engaged the services of Montana political science professor Jeremy Johnson Ph.D.<sup>5</sup> Professor Johnson provided a six page report to the COPP (a copy of the Johnson report accompanies this Decision) discussing issues related to the manner in which Institutional Review Board oversight was or was not engaged in regard to the research activity involved in this Matter.

The COPP will accompany release of this Decision to the parties in this Matter with a request that all privacy interests, if any, in the above identified documents be waived. Once any privacy interests are cleared then the entire range of documents identified above will be released to the press and interested researchers. Given the considerable interest in this Matter the COPP hopes to accomplish this release quickly.

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<sup>5</sup> Jeremy Johnson is an associate professor of political sciences employed at Carroll College, Helena, Montana.

## **I. The Montana Flyer Project**

Researchers at Stanford and Dartmouth carried out a large scale (by Montana standards) election centered direct mail project (hereafter “Montana Flyer”) aimed at Montana voters in the 2014 Montana general election. The day of election in Montana was November 4, 2014.<sup>6</sup> Stanford’s response to the Commissioner explains that “[b]etween October 17 and 19, 2014, political science researchers at Stanford University and Dartmouth College ...caused 102,780 postcard mailers [the Montana Flyer] to be sent to registered voters in the State of Montana.”<sup>7</sup>

The researchers’ Montana Flyer project provided the Montana Flyer to certain groups of Montana voters in a manner designed to trigger increased voting responses, as would later be shown by an empirical analysis determining whether or not voter turnout increased among those voters supplied with the Flyer. The May 2014 submission to the Dartmouth Institutional Review Board by Kyle Dropp listed the purpose of the prototype New Hampshire Flyer project: “[w]e aim to assess whether information provision has an effect among voters, particularly among moderate, independent or unaffiliated voters.”<sup>8</sup> Professor Jeremy Johnson, who reviewed the COPP information base in this Matter under contract with the COPP, put it this way: “[t]he design of the study entirely revolved on how the flyers affected vote tallies.” (Johnson Report, p. 2).

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<sup>6</sup> Montana voters could vote by mail ballot for 30 days before the day of election or they could vote at a polling place on November 4, 2014.

<sup>7</sup> The “postcard mailer” is the “Montana Flyer” accompanying this Decision.

<sup>8</sup> Dartmouth Professor Dropp took the prototype project through the Dartmouth IRB.

### A. The Institutional Review Board

Stanford and Dartmouth have, through their responses, acknowledged Institutional responsibility for the project that produced and used the Montana Flyer.<sup>9</sup> In turn, the Montana Flyer project had an impact on human beings as it was mailed into the homes of 102,780 Montana voters and it was designed to affect voting in two 2014 Montana Supreme Court Justice races. This impact was not inconsequential to Montanans. As Professor Johnson noted, “[t]he outcome of a Supreme Court race is of great importance to the lives of the candidates, voters and people of Montana.” Johnson Report, p. 6.

The Commissioner determines that Montana Flyer project impacted the lives of Montanans, through its impact on voting by 102,780 Montana voters. There is a process by which Universities and Colleges are supposed to review or vet Institutional studies that have an impact on human beings. This process, called the Institutional Review Board (IRB) process, is defined by federal laws and administered by agency located within the US Department of Health and Human Services.<sup>10</sup>

The IRB process, however, was improperly engaged by the Dartmouth researcher and ignored completely by the Stanford researchers. Professor Dropp, the Dartmouth researcher, submitted the prototype Flyer project (the New Hampshire Flyer) to the Dartmouth IRB. The prototype New Hampshire

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<sup>9</sup> Stanford’s Spatial Social Science Lab provided funding for the Montana Flyer through a grant it received from the Hewlett Foundation. (Dartmouth and Stanford responses). The Montana Flyer was attributed as “[p]aid for by researchers at Stanford University and Dartmouth College, 616 Serra Street, Stanford, CA 94305.”

<sup>10</sup> The “Office for Human Research Protection.”

Flyer differed substantially from the Montana Flyer as it did not involve use of a State Seal and it involved fewer voters. Professor Dropp did not submit the Montana Flyer for IRB approval: “Dropp [did not] seek or obtain IRB approval of any research other than the [New Hampshire Flyer].” (Donin letter, p. 6).<sup>11</sup>

Indifferent as Professor Dropp was to the Dartmouth IRB review, the Stanford researchers were worse. The Stanford researchers, Professors Rodden and Bonica, did not submit the Montana Flyer project to the Stanford IRB at all. Stanford described that error as an “oversight” while admitting that “[t]he project should have been brought to and considered by Stanford’s IRB.” (Stanford Response to Q. 26).<sup>12</sup>

Judging from the number of complaints received by COPP staff, Montanans intuitively thought the Montana Flyer project was a flawed piece of election activity. What is more, a number of Montana citizens who received the Flyer spontaneously challenged the legitimacy of any vetting of the Flyer project by or within the Institutions.<sup>13</sup> With this in mind, the COPP engaged the services of Professor Johnson (*see* FN 5). Professor Johnson was asked to examine and comment on the application of the IRB process to the Montana Flyer Project.

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<sup>11</sup> The IRB exempt letter issued to Professor Dropp for the “initial [New Hampshire] study”, did not (and could not) apply to the Montana Flyer Project because it was based on the premise that the study involved only “existing data.” Existing data means the study relied solely on public data such as voter turnout. The research involved in the Montana Flyer Project did not rely solely on existing data (voter turnout) but instead paired voter turnout in select precincts to the Montana Flyer mailing information known only to the project researchers.

<sup>12</sup> Nor is the Dartmouth IRB possibly applicable to Stanford as “[t]here was no agreement between Stanford and Dartmouth regarding Dartmouth’s IRB serving as the ‘IRB of Record’ for any research project.” (Donin letter, p. 8).

<sup>13</sup> One Montanan, a Helena medical doctor, went so far as to independently review the published Dartmouth IRB procedures concluding that the Montana Flyer Project could not have received legitimate IRB approval.

Professor Johnson affirmed the obvious: “[t]he researchers did not follow proper procedure in vetting their study” (Johnson Report, page 1), pointing to the several differences between the prototype New Hampshire Flyer Project and the one conducted in Montana. Professor Johnson went on to point out that the IRB process itself “is inadequate for questions associated with political research.” (Johnson Report, page 4). At a minimum, the Institutions assume responsibility for the Montana Flyer as employer of the errant researchers and because, as Professor Johnson points out: “[t]he fundamental problem with the IRB process is the narrow focus on protecting the individual subject. Concerns about human subjects in the aggregate often do not even occur to researchers, faculty and staff involved in the IRB.” (Johnson Report, page 4).

#### B. The Flyers Were Election Related Documents

The Montana Flyer Project caused 102,780 postcard mailers or Flyers to be sent to registered voters in the State of Montana. This amounted to approximately 15% of the 2014 registered voters in the State of Montana.<sup>14</sup> Despite that massive effort aimed at voters: “[t]he researchers neither sought nor received any opinions, memoranda, analysis or other advice concerning the Montana Campaign Practice Act.” (Dartmouth Response to Q. 19).

The complaint responses of Stanford and Dartmouth assert that such election related caution was not necessary because the Montana Flyers simply provided information to voters: “additional information”; “know something more about the candidates and their relative positions” (Stanford) and “providing

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<sup>14</sup> There were 674,264 registered Montana voters for the 2014 elections and 373,831 of those registered voted in the 2014 elections. (Montana Secretary of State website)

voters with information” (Dartmouth).<sup>15</sup> It is noted that the Institutions do not argue (and Montana law does not provide) an election expenditure exception for academic research carried out in relation to an election. See §13-1-101(11) MCA. Elections can be won by a single vote and the voting influence of an academic research project on that vote has to be measured by the same law that applies to any other election related “expenditure” under Montana law. And, again, the Montana Flyer project was such an election related expenditure in that “[t]he design of the study entirely revolved on how the flyers affected vote tallies.” (Johnson Report, p. 2).

## **II. The Montana Flyer Project Examined Under Montana Law**

As an election related document the content of the Montana Flyer must be examined to determine whether it was: 1) An expenditure affecting the election of a candidate; or, 2) An expenditure made during a candidate election, but servicing discussion of an issue, not the election of the candidate. The Montana Flyer is one or the other; either candidate related or issue (information) related.

If the Flyer serves an issue (information) purpose rather than election of a candidate then it is something that, while election related, is not candidate directed such that in 2014 elections Montana law did not

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<sup>15</sup> The only “information” actually supplied by the Flyers was a line chart placing Montana’s 2014 Supreme Court candidates on a “conservative to liberal” scale, as measured by the national leaders of the Republican (conservative side) and Democratic (liberal side) parties. The rest of the wording and images on the Flyer consisted of exhortations to vote including labeling the Flyer as the “2014 Montana General Election Voter Information Guide” buttressed by a reproduction of the Great Seal of the State of Montana, a “voter’s guide” button image and the admonition to “take this [voter’s guide] to the polls!”

require attribution, reporting and disclosure. If the Flyer was candidate related then Montana law treated the costs of the Flyer as an allowed independent expenditure in an election that must be attributed, reported and disclosed. (See this Decision, below).

A. Issue Advocacy Versus Express Advocacy

Stanford and Dartmouth insist that the Montana Flyer is “information” or issue advocacy that does not require reporting or disclosure under current Montana law.<sup>16</sup> The nuances of constitutional law require a discussion, and contrast of, “express advocacy” as part of any discussion of issue advocacy.

Montana law determines that the Montana Flyer project is a candidate related independent expenditure (as opposed to issue advocacy) if it is a “...communication[s] expressly advocating the success or defeat of a candidate...”, ARM 44.10.323(3), emphasis added.<sup>17</sup> The “express advocacy” phrase incorporated into Montana law through ARM 44.10.323(3) originated from a 1976 decision of the US Supreme Court, *Buckley v. Valeo*, 424 U.S. 1 (1976). The phrase was intended as a

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<sup>16</sup> Montana’s 2015 Legislature passed SB 289, a new law that will require that issue advocacy documents also be subject to reporting and disclosure if published within 60 days of the start of voting.

<sup>17</sup> Montana’s prohibition of corporate independent expenditures (now repealed) originated as a statute passed by Initiative in 1912. See annotations §13-35-227 MCA. The “expressly advocating” language of the current ARM 44.10.323(3) was added through administrative rule hearings adopted and approved by Commissioners on January 20, 1986 and September 27, 1999. The Notice of Adoption for each such rule change described the addition of the express advocacy words as being necessary to adjust to the “state of law” brought about by litigation.

measure of the allowed breadth of governmental regulation of political speech.

This express advocacy standard has been applied through a series of past Decisions by the COPP and by Montana courts.<sup>18</sup> Sixteen years ago this Office, through Commissioner Argenbright, first discussed the differing constitutional standards measuring campaign practices law applicable to expenditures of candidates versus expenditures of independent committees. See *Harmon v. Citizens for Common Sense Government*, decided December 31, 1997. The express advocacy standard has been revisited and applied in Decisions by succeeding Commissioners.<sup>19</sup>

The *Buckley* Court narrowly construed the federal statutory definition of an election “expenditure” to apply, for certain purposes, “only to expenditures for communications that in express terms advocate the election or defeat of a clearly identified candidate for federal office.” *Buckley* at 44, emphasis added. The *Buckley* Court recognized that general discussions of issues and candidates are distinguishable from

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<sup>18</sup> The judicial review was that of a state district court in *Western Tradition Partnership v. Gallik*, 1<sup>st</sup> Judicial District, Lewis and Clark County, No. BDV-2010-1120, 2011 Mont. Dist. LEXIS 83.

<sup>19</sup> This issue has been revisited by succeeding Commissioners: *Michels v. Nelson*, decided July 31, 2001 (Commissioner Vaughey); *Little v. Progressive Missoula and Handler*, decided July 22, 2004 (Commissioner Vaughey); *Close v. People for Responsible Government*, decided December 12, 2005 (Commissioner Higgins); *Keane v. Montanans for True Democrat*, decided April 2, 2008 (Commissioner Unsworth); *Erickson v. PRIDE, Inc.*, decided July 22, 2008 (Commissioner Unsworth); *Roberts v. Griffin* decided November 19, 2009 (Commissioner Unsworth); *Graybill v. Western Tradition Partnership*, COPP-2010-CFP-0016 (Commissioner Unsworth); *Wittich v. Main Street Advocacy Fund*, COPP-2010-CFP-0018 (Deputy Commissioner Dufrechou); and *Bonogofsky v. National Gun Owner’s Alliance*, COPP-2013-CFP-0008 (Commissioner Motl).

more pointed exhortations to vote for or against particular persons. In a footnote the Court listed examples, which have become known as the “magic words” of express advocacy, including phrases such as “vote for,” “elect,” “support,” “cast your ballot for,” “vote against,” “defeat,” “reject,” etc. *Buckley* at 44, n. 52.

As measured by the “magic words” standard of *Buckley*, the Montana Flyer language does not constitute express advocacy. While the Montana Flyer does not discuss any issue and instead discusses voting and candidates, it also does not use any “magic words”. The *Buckley* magic words standard, however, has been subjected to 37 years of jurisprudence and it has since been refined by Court decisions, administrative action and legislative acts. Express advocacy, while still subject to rigorous analysis, is no longer measured by magic words but by whether the communication is the “functional equivalent of express advocacy”.<sup>20</sup>

For the purposes of this Decision the Commissioner applies the “functional equivalent of express advocacy” and examines whether or not the Montana Flyer communication (and therefore the expenditure) is express advocacy based on the content of the Flyer communication. The Montana Flyer at issue in this Matter is a two page, large post-card size document. The content of the Montana Flyer is reviewed under the

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<sup>20</sup> For example, Commissioner Unsworth applied the “functional equivalent of express advocacy” express advocacy legal standard in *Graybill v. Western Tradition Partnership*, COPP-2010-CFP-0016.

following standard: “a court should find that an ad [Flyer] is the functional equivalent of express advocacy only if the ad [Flyer] is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.” *Federal Election Comm’n v. Wisconsin Right to Life*, 551 U.S. 449, 469-70 (2007) (“WRTL”).

Chief Justice Roberts, writing for the majority, further applied the functional equivalent test to WRTL’s ads as follows:

Under this test, WRTL’s three ads are plainly not the functional equivalent of express advocacy. First, their content is consistent with that of a genuine issue ad: the ads focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter. Second, their content lacks indicia of express advocacy: the ads do not mention an election, candidacy, political party, or challenger; and they do not take a position on a candidate’s character, qualifications, or fitness for office.

*WRTL* at 470.

The Flyer is now examined for content under the above guidance and legal authority.

1. The Montana Flyer Is Not Genuine Issue Advocacy

Roberts first directs that the Montana Flyer be examined for the issue content consistent “with that of a genuine issue ad”. The only ad-like “information” supplied by the Montana Flyer was a line graph placing Montana’s 2014 Supreme Court candidates on a “conservative to liberal” graph, as measured by the national leaders of the Republican (conservative side) and Democratic (liberal side) Parties.<sup>21</sup>

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<sup>21</sup> There is no mention of an actual issue anywhere in the Flyer.

The Commissioner notes that the “conservative to liberal” line graph, referenced to political leaders, was based on criteria developed by the researchers themselves.<sup>22</sup> Setting aside the question of whether or not the self-determined ideological “information” even qualified as issue content, the Commissioner reviews the remaining words and images on the Flyer and determines that they consisted exclusively of exhortations to vote including: labeling the Flyer as the “2014 Montana General Election Voter Information Guide”; placement of a “Voters Guide” button image; a reproduction of the Great Seal of the State of Montana; the listing of the “Election Date: November 4, 2014”, the identification of the two “Nonpartisan Supreme Court” elections; the listing of the two competing candidates under each Supreme Court race; and the exhortation to “Take this [Flyer] to the polls!”.

The Commissioner applies the “focus”, “position”, “exhort” and “contact” considerations set out by Roberts in regard to issue determination to the language and images of the Flyer as follows.

Finding of Fact No. 1: The language and images presented by the Flyer do not direct the public to take a position on a legislative issue or any issue. Instead the Flyer directs the public to engage in candidate voting.

In addition to reading the Flyer for issue advocacy content, the Commissioner may place the content of the Montana Flyer in the context of use by a limited examination of background information. This is allowed because while “contextual factors...should seldom play a significant role in the inquiry,” courts “need not ignore basic background

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<sup>22</sup> This differs from the usual issue advocacy ad that identifies and addresses a vote or stand by the candidate on a specific issue.

information that may be necessary to put an ad in context”, *WRTL* at 473-74.

The background information considered by the Commissioner is the profile of Montana voters to whom the Flyer was mailed. Justice Roberts notes that genuine issue ads “...focus on a legislative issue, take a position on the issue, exhort the public to adopt that position, and urge the public to contact public officials with respect to the matter...” (*WRTL* at 470). In contrast to a newspaper insertion aimed at the general public, the Montana Flyer was mailed to “102,780 voters” selected by the researchers to create control and variable liberal and conservative voting blocks within certain selected Montana voting precincts. (Stanford Response to Q. 22).

Finding of Fact No. 2: The Montana Flyer was not addressed to the general Montana public, but only to certain select groups of Montana voters in the 2014 general election.

With the above discussion and findings of fact in mind the Commissioner makes the following sufficiency finding:

Sufficiency Finding No. 1: The Commissioner determines that there are insufficient facts, indeed no facts, that show that the language and images set out in Flyer can be construed as an issue advocacy document.

Having determined that the Montana Flyer is not an issue advocacy document, the Commissioner next examines the Flyer as to express advocacy.

## 2. The Montana Flyer is Express Advocacy

As set out above, the content of the Montana Flyer is exclusively election related and candidate centered such that it cannot be an issue advocacy document. Applying the WRTL test the Commissioner next examines the document as whether or not the content is such that it is express advocacy and therefore an election expenditure under §13-1-101(11) MCA. Justice Roberts directs an examination of the “indicia of express advocacy”, including whether or not the Montana Flyer listed “election, candidacy, political party or challenger” as well as “position on a candidate’s character, qualifications, or fitness for office”.

The Montana Flyer titles itself as the “2014 Montana General Election Voter Information Guide”. The images on the Flyer include a “Voters Guide” button image and a reproduction of Great Seal of the State of Montana. The Flyer lists: the “Election Date: November 4, 2014”; two “Nonpartisan Supreme Court” elections and the names of the two competing candidates under each Supreme Court race. The Montana Flyer lists the exhortation to “Take this [Flyer] to the polls!”.

Finding of Fact No. 3: The language and images presented by the Montana Flyer, with the exception of the lack of the word “challenger”, meet all of the “indicia of express advocacy” standards set by *WRTL*.

Again, the Commissioner may place the content in the context of use by a limited examination of background information. The background information considered by the Commissioner is the profile of Montana voters to whom the Flyer was mailed.

Stanford admits to a project design that mailed the Montana Flyer to “102,780 (Montana) voters” (Stanford response to Q. 22). Stanford further admits that the Montana Flyer was sent by design to “64,265 likely liberal-leaning to centrist individuals” and “38,515 likely conservative-leaning to centrist individuals.” *Id.* The Dartmouth response ties the liberal and conservative leanings to political party: “the Flyers were directed to voters identified on the basis of demographic data as likely to be more strongly Democratic/liberal in heavily Democratic precincts and Republican/conservative in more strongly Republican precincts.” (Dartmouth Response to Q. 23.)

The Commissioner determines that the Montana Flyer was not generally mailed to the public but targeted to 15% of Montana voters located in precincts that the researchers identified as Democratic/liberal or Republican/conservative. The Flyer content placed Supreme Court candidates by name on the “liberal to conservative” scale, referenced by the comparable ideological position of the best known partisan candidates for each party. The Commissioner determines that this targeted mailing and the placement of the candidates on the graph would provide “information” that would cause Republican/conservatives or Democrat/liberal voters to voter for the Supreme Court candidate aligned with their ideological position.

The researchers explicitly recognized that the Montana Flyer could cause such a partisan/ideological response by Montana voters. The researchers mailed the Montana Flyer to more liberals then conservatives because “...the researchers anticipated that turnout of liberal-leaning individuals would be so much lower than that of conservative-leaning

individuals ...” (Stanford response to Q. 23).<sup>23</sup> Accordingly, the researchers attempted to balance the number of increased liberal voters with the number of increased conservative voters so as to limit any effect “on the overall judicial election outcomes.” (*Id.*)

From the perspective of a campaign regulator it seems incredibly naïve for any academician to assume his or her vote seeking document is any different than the vote seeking document coming from any other corporate entity.<sup>24</sup> Even viewed solely from an academic perspective the Montana Flyer approach was troublesome. As Professor Johnson put it “...the most appalling aspect for many voters, the intent to manipulate vote totals that could potentially change the outcome of an election, was absent as a consideration in the process”. (Johnson Report, p. 4). Based on the above discussion the Commissioner makes the following finding of fact:

Finding of Fact No. 4: The placement of the names of Montana Supreme Court candidates on the “liberal to conservative” graph referenced by the name of political party leaders, as presented in the Montana Flyer, is an “indicia of express advocacy” under the standards set by *WRTL*.

- i) The placement of names was aimed at securing votes for the “Democratic/liberal” ranked candidate with Democratic voters and at securing votes for the “Republican/conservative” ranked candidate with Republican voters.
- ii) Consistent with i) the Montana Flyer was mailed to selected groups of Montana voters who were identified by the researchers as either “Democratic/liberal” or “Republican/conservative.”

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<sup>23</sup> Professor Johnson commented that “[t]he researchers’ assumptions about liberal and conservative turnout amounted to guesswork.” (Johnson report, page 3).

<sup>24</sup> Even more naïve is the justification offered by the researchers that non-disclosed research centered vote seeking by an academician is acceptable if the election is not “closely contested” such that any voting changes brought about by the study “would not change the outcome” of any election targeted by the study. (Stanford response to Q. 22).

Having made Finding of Fact No. 4, the Commissioner considers those facts as part of a Sufficiency finding:

Sufficiency Finding No. 2: The Commissioner determines that there are sufficient facts to show that the language and images set out in the Montana Flyer constitute 2014 election related express advocacy by Stanford and Dartmouth, as well as by Professors Kyle Dropp, Adam Bonica and Jonathan Rodden. In particular, the Commissioner determines that the Montana Flyer is susceptible of no reasonable interpretation other than as an appeal to vote for or against a specific candidate.

In making this finding the Commissioner notes the firm contrary positions of Stanford and Dartmouth, including their legal counsel.<sup>25</sup> Stanford's institutional response argued that the Flyer was "purely informational and explicitly nonpartisan." (Stanford Response, page 4). Stanford further argued that the "liberal" to "conservative" scale set out in the Flyer was not "advocacy for or against any candidate." *Id.* Dartmouth argued that the Flyer project was part of "an academic research project" without "partisan purpose". (Dartmouth Response, page 7). Stanford's lawyers summarized this argument as the Flyer "...cannot be interpreted as supporting or opposing any specific candidate....leaving to the reader any interpretation of..." the information contained in or the design of the Flyer. (Attorney letter, page 5).

Based on the findings above, the Commissioner explicitly rejects the argument of the Institutions and their counsel. The Montana Flyer was

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<sup>25</sup> The Commissioner considers as well as the dismissal letter of the California Fair Political Practices Commission regarding a California Flyer Project engaged in by the same researchers.

unquestionably election and candidate focused and it was unquestionably focused on increasing voter turnout for a particular candidate, as determined by the targeted mailing. In fact, the study deliberately excluded ideologically “middle” precincts, focusing solely on precincts with “a preponderance” of either liberal or conservative voters. (Stanford Answer to Q. 23). Given this focus and the desire for increased voting it is no wonder that the researchers juiced the Flyer by throwing in the state seal, explicit directions to vote and placement of the ideological position of candidates against the two of the most widely known representatives of the Republican and Democratic parties.

### **III. Failure to Register, Report and Disclose**

Stanford and/or Dartmouth made the Montana Flyer expenditure in a particular 2014 Montana election. The election was the 2014 general election of two Justice positions to the Montana Supreme Court. Each of the two Justice positions was contested with Justice Mike Wheat (the incumbent) opposed by Justice candidate Lawrence VanDyke in one race and Justice Jim Rice (the incumbent) opposed by Justice candidate W. David Herbert in the second race. (Montana Secretary of State website). Each of the four Justice candidates was listed by name in the Flyer under the heading of “Nonpartisan Supreme Court Justice Race.” (See Flyer attached to this Decision).

The Commissioner has reviewed the information presented by the Institutions and determines that there is no evidence that any of the four

candidates knew of or were involved in the Montana Flyer Project. The Commissioner therefore determines that the Montana Flyer Project was created and carried out independent of any candidate. Because a campaign expenditure was determined (See SF No. 2), the Montana Flyer Project expenditure was an independent expenditure under Montana law. [44.10.323 (3) ARM]. Under Montana law, the two Institutions may, under their corporate structure, legally make such an independent expenditure of any amount in a Montana election.<sup>26</sup> However, as an independent expenditure the Montana Flyer project costs must be attributed, disclosed and reported as an election expense.<sup>27</sup>

Montana law mandates an entity making an independent expenditure, file as a political committee (“shall file”) and report independent election expenditures (§13-37-226(5) MCA). Montana law further requires attribution on an independent expenditure communication (“must clearly and conspicuously include the attribution ‘paid for by’...”) (§13-35-225(1) MCA). Further, Montana law requires certain disclosures (“must disclose”) as to contributions to (§13-37-229 MCA) and the cost of the communication (§13-37-230 MCA). Finally, a

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<sup>26</sup> An independent expenditure made by a corporate entity, including an academic institution, may be made in any amount in any Montana election, including the 2014 Montana Supreme Court elections. *American Tradition Partnership v. Bullock*, 132 S. Ct. 1307, 181 L. Ed. 2d 1036 (2012). This notation is necessary because Montana law has historically banned candidate election expenditures, including independent expenditures, by a group operating as a corporation, such as Dartmouth or Stanford. See §13-35-227 MCA and see also the history of this law set out in *Western Tradition Partnership, Inc. v. State of Montana*, 2011 MT 328, 363 Mont. 220, 271 P. 3d 1. See further *Graybill v. WTP*, COPP-2010-CFP-0016.

<sup>27</sup> Reporting and disclosure of the costs must include the value of the time spend by the researchers in taking the Montana Flyer through design into mailing to Montana voters.

political committee, having filed, “must disclose” as to contributions (§13-37-229 MCA) and the amount of expenditure (§13-37-230 MCA).

In accord with the above findings the Commissioner determines as follows:

Finding of Fact No. 5: Stanford, Dartmouth and its researchers did not register, report or disclose with the COPP the value of the independent expenditures made in the 2014 Montana Supreme Court Justice elections.

Sufficiency Finding No. 3: The Commissioner determines that there are sufficient facts to show that Stanford, Dartmouth and/or its researchers violated Montana campaign practice laws requiring registration, reporting and disclosure of independent expenditures.

In making Sufficiency Finding No. 3 the Commissioner considered whether the finding creates a constitutionally impermissible burden on Stanford, Dartmouth and/or its researchers. The US Supreme Court, in *Citizens United*, determined that independent campaign expenditures, including those of a corporation, are protected election speech and cannot be limited or prohibited in amount. The requirement of disclosure and reporting of independent expenditures, however, does not limit such speech but instead keep elections fairer by informing the opposing candidate and the public as to who is making an election expenditure. Consistent with this reasoning, Montana courts have ruled that the filing and reporting requirements imposed by Montana law on incidental political committees are constitutionally permissible as they serve transparency and do not create such a heavy burden that they

interfere with the First Amendment political speech rights of the speaker. *National Association for Gun Rights, Inc. v. Murry, et. al.*, CV-12-95-H-DLC, (D. Mont. Sept. 17, 2013).

#### **IV. Additional Montana Campaign Practice Law**

The complaint in this Matter listed four additional potential statutory violations for consideration by the COPP. Those statutes are §13-35-218(2), §13-35-235, §13-37-201, and §45-7-209 MCA.

The facts of this Matter as such that the Commissioner dismisses claims under §13-35-218(2) MCA [coercion of voters], §13-35-235 MCA [incorrect election procedure information], and §13-37-201 MCA [compelling voter]. The Commissioner however refers §45-7-209 MCA, impersonation of a public officer, to the County Attorney for review.

The referral of §45-7-209 MCA is based on the unauthorized use of the Great Seal of the State of Montana as an enhancement to the appearance of authority of the Flyer. The researchers, without permission from Montana's Secretary State, placed the great seal of Montana on each of the 102,780 Montana Flyers sent to Montana voters. Montana voters were outraged at this presumptive use and the Montana Secretary of State, the keeper of the seal, filed a complaint with the COPP alleging a breach of §45-7-209 MCA.

The Secretary of the State of Montana is assigned two duties by Montana's Constitution. The Secretary of State shall the "maintain official records" and "keep the great seal" of the State of Montana. Art.

VI, §4(3) Montana Constitution. Provision of the great seal is a required part of a showing of authenticity of documents filed with the State of Montana. For example, *see* §35-1-1311 MCA.

The impersonation statute has been applied to instances where a badge bearing the Great Seal of a state has been used by a person falsely claiming to be a police officer. *State of Hawai'i v. Gonsalves*, 2013 Haw. App. Lexis 32. Montana has similarly used its impersonation statute (§45-7-209 MCA) to bring charges against a person who was dressed like a police officer and carrying a badge in his pocket. *State v. Bar-Jonah*, 324 Mont 278 (2004).

Montana's election laws set out in Title 13 are intended "to supplement and not supersede the provisions of the Montana Criminal Code." §13-35-101(1) MCA. Accordingly, a violation of §45-7-209 MCA may be considered independently by a County Attorney under the authority of Title 45, MCA.

### **ENFORCEMENT OF SUFFICIENCY FINDINGS**

The Commissioner has limited discretion when making the determination as to an unlawful campaign practice. First, the Commissioner cannot avoid, but must act on, an alleged campaign practice violation as the law mandates that the Commissioner ("shall investigate," *see*, §13-37-111(2)(a) MCA) investigate any alleged violation of campaign practices law. The mandate to investigate is followed by a mandate to take action as the law requires that if there is "sufficient

evidence” of a violation the Commissioner must (“shall notify”, see §13-37-124 MCA) initiate consideration for prosecution.

Second, having been charged to make a decision, the Commissioner must follow substantive law applicable to a particular campaign practice decision. This Commissioner, having been charged to investigate and decide, hereby determines that there is sufficient evidence, as set out in this Decision, to show that Stanford, Dartmouth and/or Professors Kyle Dropp (Dartmouth); Jonathan Rodden (Stanford) and Adam Bonica (Stanford) have, as a matter of law, violated Montana’s campaign practice laws, including, but not limited to §13-37-226 MCA and all associated ARMs. Having determined that sufficient evidence of a campaign practice violation exists, the next step is to determine whether there are circumstances or explanations that may affect prosecution of the violation and/or the amount of the fine.

The failure to register, report and disclose was due to oversight or a mistaken assumption of law. Excusable neglect cannot be applied to oversight or mistaken assumptions of law. See discussion of excusable neglect principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

Likewise independent expenditures are emerging as an important component of spending in candidate races such that issues dealing with independent expenditures, particularly when affecting the number of voters as in this Matter, cannot be excused as *de minimis*.

See discussion of *de minimis* principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009.

Because there is a finding of violation and a determination that *de minimis* and excusable neglect theories are not applicable, civil/criminal prosecution and/or a civil fine is justified (See §13-37-124 MCA). The Commissioner hereby, through this decision, issues a “sufficient evidence” Finding and Decision justifying civil prosecution under §13-37-124 MCA. Because of the nature of violations (the failure to register, report and disclose occurred in Lewis and Clark County) this matter is referred to the County Attorney of Lewis and Clark County for his consideration as to prosecution. §13-37-124(1) MCA. Should the County Attorney waive the right to prosecute (§13-37-124(2) MCA) or fail to prosecute within 30 days (§13-37-124(1) MCA) this Matter returns to this Commissioner for possible prosecution. *Id.*

Most of the Matters decided by a Commissioner and referred to the County Attorney are waived back to the Commissioner for his further consideration. Assuming that this Matter is waived back, the Finding and Decision in this Matter does not necessarily lead to civil or criminal prosecution as the Commissioner has discretion (“may then initiate” See §13-37-124(1) MCA) in regard to a legal action. Instead, most of the Matters decided by a Commissioner are resolved by payment of a negotiated fine. In the event that a fine is not negotiated and the Matter resolved, the Commissioner retains statutory authority to bring a

complaint in district court against any person who intentionally or negligently violates any requirement of law, including those of §13-37-226 MCA. (See 13-37-128 MCA). Full due process is provided to the alleged violator because the district court will consider the matter *de novo*.

At the point this Matter is returned to the COPP for negotiation of the fine or for litigation, mitigation principles will be considered. See discussion of mitigation principles in *Matters of Vincent*, Nos. COPP-2013-CFP-006 and 009. The Commissioner notes that both Institutions have already demonstrated cooperation in the following manner:

1. Both Institutions, through legal counsel, fully addressed and answered 27 questions posed by the COPP.
2. Both Institutions (Stanford in particular, through its general counsel Debra Zumwalt) showed remarkable cooperation and willingness to address Montana Voters concerns through the issuance of the pre-election apology letter accompanying this Decision.

The Commissioner further directs the Institutions to register as an incidental political committee and disclose the campaign expenditure discussed in this Matter. The extent of cooperation, and the costs of pre-election letter underwritten by Stanford, will be recognized factors supporting mitigation.

Finally, to the extent legally necessary the Commissioner

independently endorses to the Lewis and Clark County Attorney the complaint of the Montana Secretary of State in regard to whether the unauthorized use of the Great Seal of Montana by Professors Dropp, Rodden and Bonica violates §45-7-209 MCA.

DATED this 11<sup>th</sup> day of May, 2015.



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Jonathan R. Motl  
Commissioner of Political Practices  
Of the State of Montana  
P. O. Box 202401  
1205 8<sup>th</sup> Avenue  
Helena, MT 59620  
Phone: (406)-444-4622

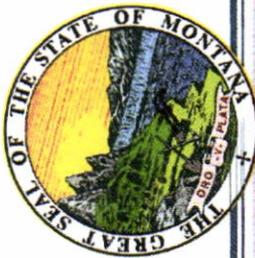
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Counsel for  
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# 2014 Montana General Election Voter Information Guide

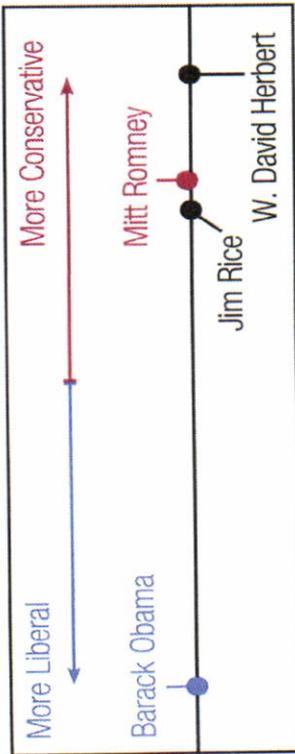




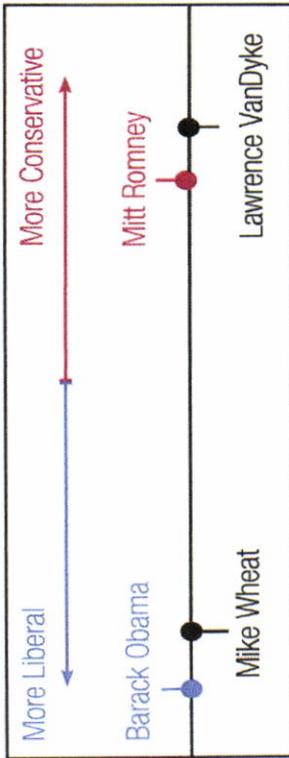
# 2014 Montana General Election Voter Information Guide

Election Date: November 4, 2014

## Nonpartisan Supreme Court Justice #1 Race



## Nonpartisan Supreme Court Justice #2 Race



For more information on how these figures were created, please see <http://data.stanford.edu/dime>. Please note that this guide is non-partisan and does not endorse any candidate or party. This guide was created as part of a joint research project at Stanford and Dartmouth.

Paid for by researchers at Stanford University and Dartmouth College, 616 Serra Street, Stanford, CA 94305

# Take this to the polls!

# Dartmouth



# Stanford

October 28, 2014

## **An open letter to the voters and citizens of Montana**

On behalf of Stanford and Dartmouth universities, we sincerely apologize for the confusion and concern caused by an election mailer recently sent as part of an academic research study. It should have been much more clearly presented as the research tool it was intended to be, leaving no ambiguity about its purpose or origin. We recognize that the purpose of elections is to enable our democratic systems to operate, and that no research study should risk disrupting an election. **We genuinely regret that it was sent and we ask Montana voters to ignore the mailer.**

The informational mailer was part of an independent study by political science professors to determine whether voters who are given more information are more likely to vote. The mailer was not affiliated with any political party, candidate or organization, and was not intended to influence any race. The mailer was in no way affiliated with or approved by the State of Montana, and we are very sorry that it created the impression that it was.

The mailer included a graph that ranked judicial candidates in a nonpartisan race on a scale from liberal to conservative. That ranking was not based on the candidates' decisions or public positions, instead it relied upon public information about who had donated to each of the campaigns. Unfortunately, even though the mailer contained a statement that it "is non-partisan and does not endorse any candidate or party," many people felt that the graph appeared to create a partisan alignment of the candidates. That was certainly not the intent.

Both of our campuses are investigating all aspects of the matter, including whether Stanford and Dartmouth research rules and standards have been appropriately followed. We are also fully cooperating with the inquiry being undertaken by election officials in the State of Montana. We do know that the research proposal was not submitted to Stanford's Institutional Review Board for approval, which is a clear violation of university policy.

We are sorry that this mailer has been disconcerting and disruptive to many Montanans. We take very seriously our responsibility to conduct research and provide education that contributes to, but does not hinder, an informed citizenry.

Sincerely,

Handwritten signature of Philip Hanlon in black ink.

Philip Hanlon  
President  
Dartmouth College

Handwritten signature of John Hennessy in black ink.

John Hennessy  
President  
Stanford University

cc: Linda McCulloch, Montana Secretary of State  
Jonathan Motl, Montana Commissioner of Political Practices

**To:** The Commissioner of Political Practices of the State of Montana  
**From:** Jeremy B. Johnson, Ph.D.  
Associate Professor  
Department of Political Science and International Relations, Carroll College  
**Date:** April 13, 2015  
**Subject:** *McCulloch v. Stanford and Dartmouth*

The Commissioner of Political Practices of the State of Montana, Jonathan Motl, asked me to examine and comment on the vetting of a study conducted by researchers at Dartmouth College and Stanford University involving flyers sent to 102,780 Montana voters identified on the basis of partisan and ideological characteristics.<sup>1</sup> I reached the conclusion that the researchers did not follow proper IRB procedures. The main focus of my remarks here, however, is to highlight larger problems with vetting processes for research. In particular, the lack of protection for the community and lack of concern for maintaining the integrity of institutions and elections is distressing. The lack of interest in considering these values leads me to also conclude that even if the researchers had scrupulously followed all appropriate procedures it is likely that the Dartmouth IRB would have approved a study of sending flyers designed to influence vote tallies in Montana.

## **I. The Researchers and the IRB**

The researchers did not follow proper procedure in vetting their study. Every college and university has somewhat different procedures in structuring the IRB process; however, it seems clear that the researchers made a number of mistakes according to any reasonable standard for vetting. Some of the most significant lapses included never submitting the Montana (and California) study for approval to any IRB Board. One researcher submitted a proposed study about “information and extremism in U.S. Primary elections” involving the 2014 primary in the First Congressional District of New Hampshire for approval to the Dartmouth IRB with no mention of Montana. The scope of the Montana study differed markedly from the New Hampshire study. The stated purpose of the New Hampshire study was to explain whether giving information on a flyer using a scale marking the candidates’ ideology would “have an effect among voters, particularly among moderate, independent, or unaffiliated voters.” In contrast, the Montana study excluded ‘moderate’ precincts and involved a general, and not primary, election. The researchers also failed to submit a mockup flyer that included notice of the placement of the Great Seal that was included in the final versions of the flyer.

## **II. The Research Design of the Montana Study**

According to Stanford University, the researchers thought the Montana judicial races attractive for study because the same candidates were on the primary ballot in both the June primary and the November general election. First, this provided a ‘baseline’ for the study and “second, neither judicial race had been closely contested in the primary.

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<sup>1</sup>I retain ownership of this report to the Commissioner of Political Practices. The views expressed in this document are my own and I am in no way acting as a representative of Carroll College.

Based on an analysis of the 2014 primary election results in the context of previous Montana judicial elections, the researchers determined that the research study as designed would not change the outcome of either contest.” Flyers were sent to 64,265 voters identified as likely liberal to centrist leaning in Democratic leaning precincts and 38,515 voters identified as conservative to centrist in Republican leaning precincts.<sup>2</sup> The researchers justified the disparity between Democratic and Republican numbers on grounds that they anticipated turnout to be significantly lower among Democratic voters. Those receiving the flyers were the treatment group for the study. In addition according to a researcher email a control group of approximately 58,000 liberal to centrist identified voters in the Democratic leaning precincts and approximately 40,000 conservative to centrist voters in Republican precincts were not sent the flyer. The treatment and control groups were randomly selected. The researchers planned to evaluate whether voters in the treatment precincts voted in greater numbers for the two judicial races than voters who lived in the control precincts.

If voters in treatment precincts voted in greater numbers for down-ballot judicial races than voters in control precincts the researchers would infer that greater access to partisan and ideological identifying information contributed to higher voter participation for down-ballot non-partisan elections. Conversely, if voters in the treatment precincts did not vote for down-ballot judicial rates in higher numbers than those in the control precincts than the researchers would infer that additional partisan and ideological identifying information does not contribute to greater voter participation in non-partisan elections. Stanford and Dartmouth summarized the purpose of the research in terms similar to mine. According to Dartmouth: “The focus of the study was to measure whether providing the information in the Flyer had an identifiable impact on voter participation, as measured by voter turnout and voter rolloff in precincts that did and did not receive the Flyer.” According to Stanford: “the researchers wished to ascertain whether there was a difference in electoral participation between the precincts that received the mailer and those that did not.” To succinctly state the key issue: *The design of the study entirely revolved around how the flyers affected vote tallies.*

The researchers likely planned to employ statistical methods to analyze whether ballot rolloff between the treatment and control precincts could be characterized as “statistically significant.” The researchers anticipated that voting would be higher for the judicial races in the treatment precincts compared to the control precincts because the voters read and digested information from the flyers. It is unlikely that the researchers would spend the time and effort in designing a study with the anticipation that it would have no effect.<sup>3</sup> Further, Stanford in its responses indicated that the researchers were

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<sup>2</sup> A Stanford researcher characterized the division as 64,265 voters identified as “Democratic leaning in Dem areas” and 38,515 voters identified as “GOP leaning in GOP areas.” In emails the researchers referred sending the flyers to Democratic precincts with “mean clarity scores” of 55 and above and voters in those precincts with scores over 50. The flyers were sent to Republican precincts with “mean clarity scores” of 40 and under and voters in those precincts who scored under 50. The score of 50 is to be understood as the score without a partisan lean with ascending scores becoming more Democratic and descending scores becoming more Republican.

<sup>3</sup> In a study involving a total of 180,000 Michigan voters (both control and treatment groups) other researchers found that flyers do increase turnout. See Gerber, Alan S., Donald P. Green and Christopher W. Larmier. “Social Pressure and Voter Turnout: Evidence from a Large-Scale Field Experiment.” *American Political Science Review*, Vol. 102: February 2008, pp. 33-48.

aware that their study could influence vote tallies when making the case selection. The analytic leverage that would allow researchers to draw conclusions was precisely how the flyers influenced voter participation for the down-ballot judicial elections. The researchers probably planned to use the data from this field experiment to write an article(s) they would submit for peer-review at a quality journal. Publishing articles in such journals is imperative for faculty in order to receive tenure and promotion.

Problems abounded with the researchers' assumptions when designing the study. The common thread connecting these errors was the lack of regard for the broader community. The researchers presumed that turnout would be significantly lower among Democratic leaning voters than those likely to vote Republican. Therefore, they sent the flyers to more Democratic than Republican leaning voters to achieve balance. The researchers' assumptions about Democratic and Republican turnout amounted to guesswork. They could not predict with accuracy what percentage of voters receiving the flyer would vote in the election because the dynamics of American elections are in constant motion making all predictions about turnout in upcoming elections tentative in nature. Further, there is no way for the researchers to know the mailers actually went to Republican or Democratic leaning individuals. Publicly available information is fallible and there are definite mistakes in how such predictive data classifies voters (thank goodness for those who believe in the sanctity of the secret ballot!). There is no reason I know of to assume that mistakes in identifying voters' partisan proclivities cancel each other out.

The researchers presumed that the winners of the primary, incumbent Justices Jim Rice and Mike Wheat, would win in November. They thought that that no matter how much their study influenced vote totals there was no risk of changing the outcome of the general election because of the lopsided primary results. The researchers sent their mailings out in mid October and seemed unaware that one race, the contest between Wheat and Lawrence VanDyke, had developed into a subject for investigative reporting and that conservative and Republican Party groups from outside Montana decided to invest large sums in the race in the hope of electing VanDyke. According to the Associated Press outside conservative groups eventually spent about \$1.36 million on the race.<sup>4</sup> In a state where advertising is cheap the large influx of money propelled this race into one of the state's marquee races, particularly since the race for the U.S. Senate was not perceived as competitive. When the researchers sent a flyer showing Wheat slightly to the right of Barack Obama and VanDyke slightly to the right of Mitt Romney they had injected themselves into the already heated contest about defining the candidates' ideology. If the researchers had looked at what was at stake for the voters and made an effort to read the Montana press or contact individuals within the state for perspective, they would have realized the general election race was not a repeat of the June primary.

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<sup>4</sup> Adams, John. "Montana Supreme Court: VanDyke takes the spotlight" *The Great Falls Tribune*, September 18, 2014; Adams, John. "Supreme candidates square off in Missoula" September 24, 2014; Johnson, Charles. "3<sup>rd</sup> Party Money Coming into Supreme Court Race." *Billings Gazette*, October 7, 2014; *Billings Gazette*; "Montana Supreme Court Race Takes on Partisan Edge." *Billings Gazette*, October 22, 2014; Dewan, Shaila. "Montana Judicial Race Joins Big-Money Fray." *The New York Times* November 2, 2014; Associated Press. "Outside spending Tops \$1.3 million in Montana Court Race"; *The Great Falls Tribune*, November 28, 2014; Dennison, Mike. "At least \$1.5 Million spent of Wheat-VanDyke Race." *The Missoula Missoulian*, November 26, 2014.

### III. The Flawed Approval Process

The structure of the IRB process is inadequate for questions associated with political research. If the researchers had attentively followed all IRB procedures, the Dartmouth IRB would likely have approved sending the flyers to Montana voters. Further, while the project never went through the IRB process at other colleges and universities, it is probable that some form of the flyer would have passed muster at many places. The fundamental problem with the IRB process is the narrow focus on protecting the individual subject. Concerns about human subjects in the aggregate often do not even occur to researchers, faculty, and staff involved in the IRB. The Dartmouth IRB agreed with the application from one researcher that the risk of harm to an individual voter was minimal. It seemed obvious to Dartmouth that receiving a flyer in the mail marking how candidates align ideologically with major political figures on a scale for a non-partisan primary was benign. Thus, the most appalling aspect for many voters, the intent to manipulate vote totals that could potentially change the outcome of an election, was absent as a consideration in the process.<sup>5</sup>

The questions posed by the Dartmouth IRB focused narrowly on individual human subjects. Many of the questions are appropriate for biomedical research but irrelevant for political study.<sup>6</sup> The three broader considerations that the Dartmouth IRB used in making its determination derive from the Belmont Report stressing respect for persons, beneficence, and justice. According to the response filed with the Commissioner of Political Practices on this basis the only mistake the Dartmouth IRB made when considering the submitted proposal, in retrospect, was not to insist on including the name and contact of the principal investigator and a brief statement of the purpose of the research on the flyer.

To underscore the point that ethical questions about the community were outside the scope of what concerned the Dartmouth IRB is the fact that researchers afforded Montanans more protection than they originally sought for the New Hampshire study. The Dartmouth researcher wrote in the IRB application, "We do not plan on informing respondents that they are participants in an academic, educational study. We view this study as having minimal risk to the participants." The Dartmouth IRB raised no objections.

The notorious Tuskegee syphilis experiment, a clinical study of African-American male sharecroppers in Alabama affected with syphilis conducted by the U.S. Public Health Department between 1932 and 1972, raised awareness that human subjects needed protection. The experiment continued even after the discovery of penicillin in 1947 for another 25 years. Scientists withheld penicillin and the syphilis diagnosis from participants instead of closing the study. The ethical standards articulated by the Belmont

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<sup>5</sup> Contributing to the lack of academic concern is the precedent for field experiments of sending masses of flyers to voters. A difference between the study of Michigan voters cited in footnote number 3 and the Montana flyer project is that the Michigan study avoided referencing candidates and partisan issues and instead the flyers tapped into sentiments of voting as a civic duty. See Gerber, Alan S., Donald P. Green and Christopher W. Larmier. "Social Pressure and Voter Turnout: Evidence from a Large-Scale Field Experiment." *American Political Science Review*, Vol. 102: February 2008, pp. 33-48.

<sup>6</sup> A partial list of questions included in the survey inquired whether the researchers were using an "unapproved drug or biologic?" "a food or dietary supplement", "a humanitarian use device?" or "is this a clinical trial?"

Report and the establishment of the Office for Human Research Protection which implements regulations for Internal Review Boards are meant to prevent such research abuses.<sup>7</sup>

The problem for political scientists is that this vetting process remains narrowly tethered to its original purpose rather than evolving to appropriately address related issues involving human subjects in additional fields of study now subsumed by the IRB regulations. The process as currently constituted is not useful for the research conducted by many political scientists. Many colleges such as Dartmouth use only one form across disciplines. The narrowness creates an unwieldy system that attempts to shoehorn the study of politics within the confines of how traditional scientists and those involved in biomedical research study human subjects. Most notably considerations of the community, institutions, and group activities are given short shrift. Philosophical perspectives vary; however, many value humanity in the aggregate as worthy of equal, or greater, consideration than on the level of the individual.

For political scientists the IRB process too often is not a tool that spurs reflection and consideration about the implications of research using human subjects but rather becomes viewed as an irritant hindering inquiry. Too often the IRB process is simply 'red tape' stifling the ability of researchers to interview public figures and elites, undercuts the ability of students to make public presentation of research, and consumes time by making irrelevant demands upon researchers. The outcome can be counter-productive. Completing the approval process for the IRB may produce complacency and a false sense of security for researchers. They may reflect no further on ethical considerations because the IRB has given its imprimatur.

Research is an essential academic undertaking and ought to be encouraged. I am not calling for reviews that consume even greater amounts of time. We need to be smarter and move away from the biomedical model when appropriate. I suggest colleges and universities need to revisit the report filed in 2000 by the American Association of Universities Professors on how to modify the IRB process for research for political science and related disciplines as a starting point for such discussions.<sup>8</sup> The cumbersome system currently in place is inadequate for the task at hand.

#### IV. Why We Should Care

News stories appeared on the front pages of newspapers in Montana and provoked outrage and conspiracy theories after the flyers were sent. Dartmouth and Stanford responded in a letter signed by their respective presidents expressing contrition to the voters who received the flyers. The presidents wrote, "We recognize that the purpose of elections is to enable our democratic systems to operate, and that no research study should risk disrupting an election. **We genuinely regret that it was sent and we ask Montana voters to ignore the mailer [Boldface in the original].**" However, the response from Stanford University to Commissioner Motl on December 18, 2014 adopted a

<sup>7</sup> See the "Final report of the Syphilis Study Legacy Committee—May 20, 1996." <http://exhibits.hsl.virginia.edu/badblood/report/>.

<sup>8</sup> American Association of University Professors. "Institutional Review Boards and Social Science Research." 2000. Accessed at [www.aaup.org/report/institutional-review-boards-and-social-science-research](http://www.aaup.org/report/institutional-review-boards-and-social-science-research).

contrasting tone. This response stated, “the use of the seal was a mistake, and was the primary reason why Stanford agreed with your office to mail the apology letter.”<sup>9</sup> Apparently, Stanford, even after the public backlash, may not actually believe that a research study designed to influence vote tallies--which *is* the essence of disrupting an election--is particularly problematic. The response exemplifies why we should care and re-evaluate how we think of human subjects.

The outcome of a Supreme Court race is of great importance to the lives of the candidates, voters, and people of Montana. It has ramifications for decisions regarding the constitutionality of laws, who chairs (and usually is the pivotal vote) on the legislative redistricting commission, and decisions the Supreme Court makes for criminal and civil appeals.<sup>10</sup> None of these impacts are trivial.

There is a vast gulf separating activists with a genuine and substantive interest in the outcome of an election and academics who design a research study aiming to influence vote tallies for the sake of studying the effects of influencing vote tallies. The activists are working within the framework of why elections and democratic processes exist in the first place. The researchers, however, are operating outside this framework. They are willing to risk changing the outcome of an election for the sake of an academic study seeking to better understand the voting behavior they deem worthy of study.

The myopia demonstrated by the researchers, the Dartmouth IRB, and the Stanford University response is emblematic of how academics have fallen short in showing respect for the communities and institutions they study. We need to confront the challenge by acknowledging that human interactions in the aggregate are as worthy to protect as individual subjects.

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<sup>9</sup> The response from Stanford dated December 18, 2014 states that the letter apologizes for the use of the Great Seal of Montana. However, in actuality the letter makes no explicit reference to the Great Seal of Montana.

<sup>10</sup> The redistricting commission includes two Democrats, two Republicans, and a chair. When Republicans and Democrats do not reach consensus on the chair the Montana Supreme Court makes the decision.