

**BEFORE THE COMMISSIONER OF
POLITICAL PRACTICES
STATE OF MONTANA**

In the Matter of the Complaint against)
)
Concerned Citizens of Lake County; Owner/)
Operator, www.asksheriffluckylarson.com;)
Owner/Operator www.nojaydoylesheriff.com;)
and Concerned Citizens against Jay Doyle)
for Sheriff.)

**STATEMENT OF FACTS,
SUMMARY OF FINDINGS
AND ORDER OF DISMISSAL**

SUMMARY OF FACTS

1. On April 13, 2010, Lake County resident Lanny Vanmeter (hereafter referred to as "Vannmeter") filed a Complaint with the Office of the Commissioner of Political Practices (hereafter referred to as "COPP") against the above styled persons and/or entities regarding their activities during the 2010 Lake County Sheriff election.
2. Vannmeter's Complaint alleges violations of Montana Code Annotated sections 13-35-225, 13-35-105, 13-37-201, and violations of the following Administrative Rules of Montana: 44.10.323(F)(4), 44.10.329(1), 44.10.405.
3. In the cover letter submitted with Van Meter's Complaint, he states the homepage of www.asksheriffucky-larson.com indicates, "it is sponsored and paid for by Concerned Citizens of Lake County." Further, that when www.asksheriffucky-larson.com is accessed "it immediately redirects you to www.nojaydoylesheriff.com." In addition, Vannmeter indicates both of these "sites state that 'Concerned Citizens of Lake County against Jay Doyle for Sheriff is in no way affiliated with any Sheriff candidate for Lake County.'"
4. Mr. Vannmeter further complains, "In March of 2010, the same group started a series of news paper ads in the local news paper stating the same type of

'stuff' that they were stating in a website with the same disclaimers." Vanmeter enclosed copies of two separate newspaper advertisements with his complaint.

5. Mr. Vanmeter's letter goes on to state, "I have found out that one of the other candidates for Sheriff of Lake County is an active member of the 'Concerned Citizens of Lake County' (reference M.C.A. 13-35-105 aiding and abetting)."

6. The 2010 Lake County general election for Sheriff included Republican Candidate Jay Doyle (herein referred to as "Doyle") who was employed as Undersheriff for then-Lake County Sheriff Lucky Larson, along with two other Lake County Sheriff's Office deputies Steve Kendley, (herein referred to as "Kendley") an Independent candidate, and Dan Yonkin, (herein referred to as "Yonkin") the Democratic nominee. Doyle won the election – Kendley and Yonkin continue to work for the Lake County Sheriff's office.

7. Vanmeter's Complaint alleged the Concerned Citizens of Lake County was an unknown group of individuals. However, COPP's investigation revealed a newspaper advertisement placed in the Lake County Leader on May 27, 2010, and June 3, 2010, (subsequent to COPP's receipt of Vanmeter's Complaint) indicated, "Ad paid for by Robert Leonard, 359 Grand Ave #175 Bigfork, MT."

8. Robert Terry Leonard, a former Lake County Sheriff's Office deputy, (herein referred to as "Leonard") identified himself alone, as being Concerned Citizens of Lake County. According to Leonard, he started both websites (www.asksheriffucky-larson.com and www.nojaydoylesheriff.com) in an effort to inform Lake County residents of what he saw as severe improprieties and/or violations of law within the Sheriff's Office. Mr. Leonard indicated he was fearful for the safety of his family and himself when he "blew the whistle" on the Sheriff's Office. For those reasons, he chose to

publicize the information anonymously using the pseudonym "Concerned Citizens of Lake County." Vanmeter states "Concerned Citizens of Lake County" and "Concerned Citizens against Jay Doyle for Sheriff" are one in the same and are actively campaigning and advertising against one particular candidate. He further alleges,

I have found out that one of the other candidates for Sheriff of Lake County is an active member of the 'Concerned Citizens of Lake County' (reference M.C.A. 13-35-105 aiding and abetting). If this is true, this makes this 'anonymous' campaign strategy even worse and is in direct violation of several Montana Political Practices laws and Montana state statutes.

9. Leonard and Kendley have been friends for several years and do not deny that friendship. Both, however, deny Kendley was involved with Concerned Citizens of Lake County. Kendley stated he received emails from Leonard with information Mr. Leonard planned to publish on the website or in the newspaper. Mr. Kendley never had any input on the ads or website postings and in fact stated he sometimes disagreed with the content of material Mr. Leonard published.

10. In September 2010, Lake County Attorney Mitchell Young applied to the 12th Judicial District Court for a Search Warrant for the residence of Leonard. The search warrant was obtained on the grounds Leonard was suspected of having committed the misdemeanor crimes of "election materials not to be anonymous, and criminal defamation."

11. District Court Judge C. B. McNeil issued the search warrant to Detective Rick Lenz (herein referred to as "Lenz"). Lenz was directed to search the residence of Leonard and seize personal computers, including any information contained therein; business records; digital storage devices including disks, flash drives or other devices, including information stored therein; printouts of e-mail or other electronic communications, and any other evidence of the misdemeanor crimes of election

materials not to be anonymous and criminal defamation. The search warrant failed to allow a search or analysis of the electronic media seized.

12. In May 2011, Lake County Detective Yonkin obtained a second search warrant from the Flathead County Justice of the Peace, which provided for search and analysis of the electronic evidence seized in September of 2010. Detective Yonkin was the Democratic nominee for Lake County Sheriff in the 2010 Lake County Sheriff election, as set forth above.

13. Yonkin provided a copy of all electronic data related to "Concerned Citizens of Lake County" to COPP's investigator on a CD. A review of that CD revealed *no evidence* that two or more persons belonged to Concerned Citizens of Lake County. Rather, the review showed that Leonard alone was Concerned Citizens of Lake County, and did nothing more than share information with friends and/or associates regarding information he planned to publish in the newspaper or on the website.

14. Leonard opened a domain account with GoDaddy.com for the two websites at issue herein, under a pseudonym for his personal safety. Leonard further stated the reason for the pseudonym "is because of exactly what happened when the Commissioner of Political Practices made his name public to Lanny Vanmeter and his crew: death threats, verbal assaults, anonymous email threats, etc.; not only against [Terry Leonard], but several active duty officers as well." Although alleged by Leonard, COPP was not requested to, nor did COPP, disclose Leonard's name to Vanmeter.

15. Leonard provided a copy of his bank records to COPP showing he alone paid for all publications and websites. The bank records reveal the following expenditures related to the website:

3/3/2010	Godaddy.com	\$ 47.89	Website
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3/3/2010	Godaddy.com	\$104.08	Website
4/5/2010	Godaddy.com	\$ 2.00	Website
4/23/2010	Godaddy.com	\$ 47.38	Posted CREDIT - website
05/03/2010	Godaddy.com	\$ 2.00	Website
06/03/2010	Godaddy.com	\$ 1.00	Website
10/19/2010	Godaddy.com	\$ 2.00	Website

The bank records reveal the following expenditures related to newspaper ads:

03/05/2010	Flathead Publish (Lake County Leader)	\$403.20	Newspaper ad
04/01/2010	Flathead Publish (Lake County Leader)	\$403.20	Newspaper ad
05/03/2010	Flathead Publish (Lake County Leader)	\$403.20	Newspaper ad
05/12/2010	Flathead Publish (Lake County Leader)	\$403.20	Newspaper ad
06/1/2010	Flathead Publish (Lake County Leader)	\$403.20	Newspaper ad

Leonard credibly explained unusual deposits in his bank records as payments for items sold, a loan from Leonard's parents, and back payment for unemployment benefits, etc.

16. All witnesses identified by the complainant and respondent were interviewed by COPP, as well as other individuals identified during the investigation as potentially having information relevant to the allegations in the complaint. All witnesses provided the same information, i.e., that "Concerned Citizens of Lake County" was Terry Leonard, alone. While Leonard shared what he intended to publish in the newspaper and on the website with several individuals, none of them contributed to what Mr. Leonard published in any way. In fact, several witnesses disagreed with some of what Leonard published.

17. Vanmeter alleges Leonard and other individuals who attended a Montana Public Safety Officer Standards and Training Council (herein referred to as "POST Council") meeting on August 19, 2010, did so as "Concerned Citizens of Lake County." Vanmeter was also present at the meeting and stated he heard these individuals

introduce themselves as concerned citizens of Lake County. An interview with POST Council administrative assistant Tana Meuer clarified the individuals did not appear as a group. Rather, any reference to being a concerned citizen of Lake County was a statement as to the reason for attending the POST Council meeting on August 19, 2010, not to any affiliation. Ms. Meuer attended the POST Council meeting; took minutes for the Council; and recalled the meeting specifically.

18. During COPP's investigation, Vanmeter advised he believed former Sheriff Candidate Kendley received an unreported contribution of several thousand dollars. Vanmeter indicated another officer of the Lake County Sheriff's Office had information in this regard. COPP's investigator contacted the officer who, according to Vanmeter, had the information; however, the officer stated his information was based on hearsay.

19. COPP's investigator was able to determine the individual who allegedly made the unreported contribution to Kendley was Saad Bedari. Mr. Bedari denied having the resources to contribute thousands of dollars to anyone, and stated he contributed only the allowable maximum to Kendley's campaign. A subsequent conversation with Kendley's treasurer, Mike Gehl, and review of campaign contributions revealed Mr. Bedari contributed a total of \$160. However, Mr. Bedari's contribution came in small amounts of \$10, \$15, \$20, etc., and was reported as each contribution was made. Mr. Gehl failed to tally the contributions from Mr. Bedari and report those aggregately after reaching the \$35 reporting threshold. Mr. Gehl subsequently provided COPP with the date and amount for each of Mr. Bedari's contributions and identified when Mr. Bedari's contributions reached the \$35 threshold limit.

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STATEMENT OF FINDINGS

Vanmeter alleges, "'Concerned Citizens of Lake County' and 'Concerned Citizens against Jay Doyle for Sheriff' are one in the same and are actively campaigning against one particular candidate ... by definition, this group has become a Political Action Committee."

Section 13-1-101(22), MCA, defines a political committee as follows:

'Political committee' means a combination of two or more individuals or a person other than an individual who makes a contribution or expenditure:

- (a) to support or oppose a candidate or a committee organized to support or oppose a candidate or a petition for nomination; or
- (b) to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue; or
- (c) as an earmarked contribution.

Mr. Leonard funded the activities using only his personal resources and did not coordinate his expenditures with a political campaign or committee. Other than Leonard, no one contributed financially to the cost of the publications or websites. Further, no one contributed to the content of the publications on the website or in the newspaper, other than Leonard.

Even though Mr. Leonard emailed his ideas regarding information to distribute to the public via his website(s) and the news media, he did not request contributions from others nor did he implement any comments or suggestions from his email audience. All content on the website and in the news media belonged to, and was the sole responsibility of, Leonard.

Neither Leonard nor "Concerned Citizens of Lake County" meets the § 13-1-101(22), MCA, definition of "Political Committee." Therefore, neither Leonard nor "Concerned Citizens of Lake County" is subject to the reporting requirements for a "Political Committee" under § 13-37-201, MCA, or ARM 44.10.405.

The actions of Concerned Citizens of Lake County in the creation of its websites, nojaydoylesheriff.com and asksheriffluckylarson.com, and newspaper publications were the actions of Terry Leonard alone.

Section 13-35-225(1), MCA, states, in relevant part;

(1) All communications advocating the success or defeat of a candidate, political party, or ballot issue through any broadcasting station, newspaper, magazine, outdoor advertising facility, direct mailing, poster, handbill, bumper sticker, internet website, or other form of general political advertising must clearly and conspicuously include the attribution "paid for by" followed by the name and address of the person who made or financed the expenditure for the communication.

In *Federal Election Comm'n v. Furgatch*, 807 F.2d 857 (9th Cir. 1987), the Ninth Circuit Court of Appeals considered whether a political advertisement expressly advocated the defeat of President Jimmy Carter in the days before the 1980 presidential election. The Court noted a "proper understanding of the speaker's message can best be obtained by considering speech as a whole." (*Furgatch* at 863.) The Court set forth the following test:

We conclude that speech ... when read as a whole, and with limited reference to external events, be susceptible to no other reasonable interpretation but as an exhortation to vote for or against a specific candidate. (*Furgatch* at 864.)

The Court divided this standard into three components:

- 1) Speech is "express" only if "its message is unmistakable and unambiguous, suggestive of only one plausible meaning."
- 2) Speech amounts to "advocacy" only "if it presents a clear plea for action," as opposed to being merely informative.
- 3) It must be clear what action is advocated. If "reasonable minds could differ" regarding whether the speech encourages a vote for or against a candidate, it is not "express advocacy." (*Furgatch* at 864.)

Leonard's website www.asksheriffluckylarson.com did not advocate the success or defeat of a candidate, and suggested that the public contact their Sheriff and/or

Undersheriff and ask questions about the issues identified in the message. Lucky

Larson was not running for office at the time the website was created and maintained, or when the newspaper advertisements were run.

Jay Doyle, the then-current undersheriff and 2010 candidate for Lake County Sheriff, was mentioned in the asksheriffluckylarson.com website and ads. In addition, when this web site was accessed it immediately redirected the user to www.nojaydoyle-sheriff.com.

With regard to the www.nojaydoylesheriff.com website, the name itself constituted express advocacy in that it opposed candidate Jay Doyle for the elected position of Lake County Sheriff. The content encouraged the public to contact their current Undersheriff and ask questions, similar to that posted on asksheriffluckylarson.com.

The several newspaper advertisements at issue have "paid for by" language, such language changed during the time the ads were run. In the first newspaper advertisement dated March 11, 2010, the language of this disclaimer states, "This ad paid for by Concerned Citizens Against Jay Doyle for Sheriff and is in no way affiliated with any Sheriff Candidate for Lake County." The second newspaper ad dated March 31, 2010 states; "This ad paid for by Concerned Citizens of Lake County & is in no way affiliated with any Sheriff Candidate." The fourth, fifth and sixth newspaper advertisements, dated April 28, 2010, May 13, 2010, and May 20, 2010, respectively, indicates, "This ad placed by Concerned Citizens of Lake County and is in no way affiliated with any Sheriff's Candidate, nor does it intend to promote or discourage any citizen's voting choice of a candidate in any election." The seventh and eighth newspaper advertisements, dated May 27, 2010 and June 3, 2010, respectively, indicate, "Ad paid for by Robert Leonard, 539 Grand Ave #175 Bigfork, MT."

Leonard's speech at issue herein, when read as a whole, is susceptible to no other reasonable interpretation but as an exhortation to vote against sheriff candidate, Jay Doyle.

Citizens have a right to engage in anonymous express advocacy regarding elections for public office pursuant to the First Amendment to the Constitution of the United States and Article II, Section 7 of the Montana Constitution.

In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995), the United States Supreme Court stated:

Under our Constitution, anonymous pamphleteering is not a pernicious, fraudulent practice, but an honorable tradition of advocacy and of dissent. Anonymity is a shield from the tyranny of the majority. See generally J. S. Mill, *On Liberty*, in *On Liberty and Considerations on Representative Government* 1, 3-4 (R. McCallum ed. 1947). It thus exemplifies the purpose behind the Bill of Rights, and of the First Amendment in particular: to protect unpopular individuals from retaliation--and their ideas from suppression--at the hand of an intolerant society. The right to remain anonymous may be abused when it shields fraudulent conduct. But political speech by its nature will sometimes have unpalatable consequences, and, in general, our society accords greater weight to the value of free speech than to the dangers of its misuse. See *Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (Holmes, J., dissenting). Ohio has not shown that its interest in preventing the misuse of anonymous election related speech justifies a prohibition of all uses of that speech. The State may, and does, punish fraud directly. But it cannot seek to punish fraud indirectly by indiscriminately outlawing a category of speech, based on its content, with no necessary relationship to the danger sought to be prevented.

Because § 13-35-225, MCA, requires that information be included on political campaign materials identifying who paid for the materials, the statute obviously burdens core political speech by regulating the content of speech. The Court's have held the category of speech regulated by statute [similar to §13-35-225, MCA] occupies the core of the protection afforded by the First Amendment:

Discussion of public issues and debate on the qualifications of candidates are integral to the operation of the system of government established by our Constitution. The First Amendment affords the broadest protection to such

political expression in order 'to assure [the] unfettered interchange of ideas for the bringing about of political and social changes desired by the people.' Roth v. United States, 354 U.S. 476, 484 (1957). Although First Amendment protections are not confined to 'the exposition of ideas,' Winters v. New York, 333 U.S. 507, 510 (1948), 'there is practically universal agreement that a major purpose of that Amendment was to protect the free discussion of governmental affairs, . . . of course includ[ing] discussions of candidates' Mills v. Alabama, 384 U.S. 214, 218 (1966). This no more than reflects our 'profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide open,' New York Times Co. v. Sullivan, 376 U.S. 254, 270 (1964). In a republic where the people are sovereign, the ability of the citizenry to make informed choices among candidates for office is essential, for the identities of those who are elected will inevitably shape the course that we follow as a nation. As the Court observed in Monitor Patriot Co. v. Roy, 401 U.S. 265, 272 (1971), 'it can hardly be doubted that the constitutional guarantee has its fullest and most urgent application precisely to the conduct of campaigns for political office.'

Buckley v. Valeo, 424 U.S. 1, 14-15 (1976). Therefore, this statute, § 13-35-225, MCA, is subject to exacting or strict scrutiny. Whenever possible, statutes should be construed narrowly to avoid constitutional difficulties. (State v. Nye, 283 Mont. 505, 510, 943 P.2d 96, 99 (1997); State v. Lilburn, 265 Mont. 258, 266, 875 P.2d 1036, 1041 (1994), *cert. denied*, 513 U.S. 1078 (1995).)

The reach of the First Amendment extends to speech on the Internet. Doe v. 2TheMart.Com, Inc., 140 F. Supp. 2d. 1088, 1091 (WD Wash. 2001), citing Reno v. American Civil Liberties Union, 521 U.S. 884, 870; 117 S.Ct. 2329; 138 L.Ed.2d 874 (1997). "To this end "Internet anonymity facilitates the rich, diverse, and far ranging exchange of ideas." Doe, supra, at 1092.

The ability to 'speak one's mind' on the Internet 'without the burden of the other party knowing all the facts about one's identity can foster open communication and robust debate.'" Columbia Ins. Co. v. Seescandy.com, 185 FRD 573, 578 (ND Cal 1999).

The strong tradition of protecting anonymous speech may be more compelling on the Internet. The Supreme Court has recognized the Internet is a "vast democratic fora," Reno v. ACLU, 521 U.S. 844, 867 (1997) that allows anyone to become a

“pamphleteer” or a “town crier with a voice that resonates farther than it could from any soapbox.” *Id.* at 870. The use of pseudonyms contributes to the robust nature of debate online. Not only does it allow speakers to experiment with unconventional ideas; it also “promises to make public debate in cyberspace less hierarchical and discriminatory than real world debate to the extent that it disguises status indicators such as race, class, gender, ethnicity, and age that allow elite speakers to dominate real-world discourse.” Lyrisa Barnett Lidsky, *Silencing John Doe: Defamation & Discourse in Cyberspace*, 39 Duke L.J. 101, 142-43 (Feb. 2000). Accordingly, while www.nojaydoylesheriff.com site name itself may constitute express advocacy, Leonard’s First Amendment right to anonymous political speech controls.

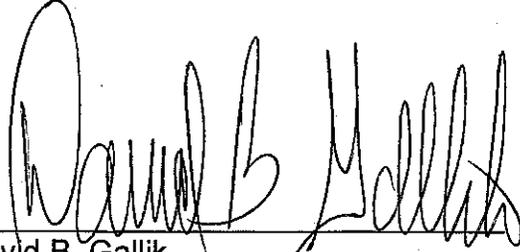
CONCLUSION

There is insufficient evidence to find there were two or more individuals involved with Concerned Citizens of Lake County. Consequently, there is insufficient evidence to find there was a political committee required to register with this office and report its contributions and expenditures.

There is insufficient evidence to find Leonard violated Montana’s statute prohibiting anonymous election material based on his First Amendment right to anonymous political speech.

Based upon the foregoing Summary of Facts and Statement of Findings the Complaint of Lanny Vanmeter is dismissed.

DATED this 10th day of November, 2011.


David B. Gallik
Commissioner of Political Practices