

BEFORE THE COMMISSIONER OF  
POLITICAL PRACTICES

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In the Matter of the Complaint	)	<b>SUMMARY OF FACTS AND</b>
Against Jack Vallance	)	<b>STATEMENT OF FINDINGS</b>

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James Olsen filed a complaint against Jack Vallance, alleging that Vallance and an unknown person violated Montana campaign finance and practices laws in displaying a political message related to a recall election on an aircraft and anonymously flying that message over the City of Hamilton.

**SUMMARY OF FACTS**

1. In 2006 residents in Ward 2 of the City of Hamilton gathered sufficient signatures to place on the ballot the question whether Hamilton City Councilor Bob Scott should be recalled from office. The basis for the recall effort was an allegation that Scott had submitted to the City Council a false claim for reimbursement of \$152 in travel expenses. A mail-in election was held on the issue, and the election lasted until November 21, 2006. The recall question was ultimately defeated by a vote of 150 to 152.
2. James Olsen filed a complaint alleging that he had observed an aircraft fly over the City of Hamilton with an electronic billboard hanging from its undercarriage, displaying the message “Recall Bully Scott” or something similar. The complaint alleges the message was related to the Scott recall election, and it did not include attribution language showing who paid for the message, in violation of § 13-35-225, MCA.
3. Jack Vallance is the owner of the airplane and the electronic billboard that displayed the message observed by Olsen. Vallance calls the billboard his sky sign. Vallance claims he composed the message “Recall Bully Scott – Help Our City” and displayed it on the sky sign periodically over a period of approximately two weeks. Vallance contends that during the two week period he also displayed other messages that he composed, including “No More Cop Money,” and “How Many Cop Cars Do You Want to Buy.” Vallance claims he did not keep track of how many different signs he created, and he does not know how many times he flew the “Recall Bully Scott” message during the two week period.

4. Vallance maintains that he did not receive money from anyone in exchange for flying and displaying any particular messages, including the “Recall Bully Scott” message. According to Vallance, however, he later received in the mail two or three anonymous contributions or donations of cash. Vallance stated he also received some money directly from Suzanne Tout, his sister-in-law. Vallance says he interpreted these contributions as support for what he calls his continuing “fight against our local government corruption.” He claims, however, that none of the contributions or donations he received was designated for any particular message, and that he did not request any money from anyone. Vallance estimates the contributions he received, including the amount given to him by Tout, amounted to \$50 or less.

5. Vallance claims he has an absolute right to compose and display messages about issues that concern him, including political issues. He believes his display of the “Recall Bully Scott” message on his sky sign is no different than the act of creating and displaying a political message at his house.

6. An article published in the *Ravalli Republic* newspaper on November 7, 2006, reported James Olsen’s intent to file a complaint against the person who paid for the electronic billboard displaying the “Recall Bully Scott” message. Jack Vallance was identified as the pilot who flew the plane that displayed the electronic message. The article quoted Vallance as follows:

“I don’t think that [the law] covers me. . . I am getting paid to do this by people who slip me some money. It’s a pretty effective way to advertise. . . I’m nonpartisan. I am just getting paid for it.”

In a response to the complaint Vallance contended that news stories are often incorrect and misleading. However, when interviewed during the investigation of this matter Vallance stated that the quotes attributed to him in the newspaper article are accurate, with the exception of the statement that he is non-partisan. Vallance states he is not non-partisan, and that he has issues with “the system.”

7. The airplane flown by Vallance was a 1956 Cessna 182 that was modified to fly slowly. Vallance’s sky sign is 36 feet by 8 feet, and displays 8 foot high characters. The sign can “flash” or “scroll.” When scrolling there is no limit to the number of characters that can be displayed. Vallance usually used the scrolling function, he said, and recalls

that he probably used that function for the Recall Bully Scott message. In the past Vallance has displayed other messages on his sky sign for a fee. When initially interviewed he stated he typically charges \$500 to \$1,000 for displaying either advertising messages or political messages. During a second interview, however, Vallance stated he normally charges \$400 per hour to use his lighted sky sign. Vallance stated that the money he received from others to support his cause did not come close to paying his expenses associated with flying the plane and sky sign.

8. Vallance admitted he has never added “paid for by” attribution language to any of his sky sign messages. With respect to the messages described in Fact 3, Vallance does not believe they required attribution language because they were his own personal messages regarding not only political issues, but other issues and concerns as well. Vallance also claims it would be impossible to include attribution language given the limited number of characters that may be displayed on his sky sign. Vallance asserts that he was not trying to be anonymous. According to Vallance, he has flown his sky sign for 15 years and everyone in the Hamilton community knows who he is and is familiar with his various sky sign messages.

9. Suzanne Tout, Vallance’s sister-in-law, stated she received a contribution from a person that was intended to be an anonymous donation to be passed on to Vallance. She estimated she gave Vallance less than \$300. Tout refused to disclose the name of the person who gave her the money, or whether Tout gave Vallance money out of her own pocket. Vallance claims he was not aware that Tout gave him money that she received from others. He believes that Tout gave him money out of her own pocket. (See Fact 4.)

10. Available cost estimates for operation of a Cessna 182 range from \$100 to \$155 per hour.

11. Electronic sky signs similar to the one used by Vallance are capable of scrolling messages displaying an unlimited number of characters. Despite that limitless capacity, at least one manufacturer of a 36 foot by 8 foot sky sign recommends a message containing less than 45 characters that could be displayed repeatedly or alternating with other messages.

12. According to the U.S. Census Bureau website, the 2008 population estimate for Hamilton is 4,817. The estimate for Ravalli County is 40,664.

### STATEMENT OF FINDINGS

The complaint alleges that Vallance violated § 13-35-225, MCA, which provides in relevant part:

**Election materials not to be anonymous -- statement of accuracy.** (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. When a candidate or a candidate's campaign finances the expenditure, the attribution must be the name and the address of the candidate or the candidate's campaign. In the case of a political committee, the attribution must be the name of the committee, the name of the committee treasurer, and the address of the committee or the committee treasurer.

...

Vallance's sky sign displayed the message "Recall Bully Scott – Help Our City." The message was displayed during the mail-in election on the question whether Hamilton City Councilor Bob Scott should be recalled from office.

A recall question is defined as a "ballot issue" under Montana law. (§ 13-1-101(17)(a), MCA.) Vallance's sky sign message could reasonably be construed as advocating the success of the Scott recall ballot issue; thus, the language of § 13-35-225(1), MCA required the message to include attribution language disclosing "the name and address of the person who made or financed the expenditure for the communication."

In terms of First Amendment analysis, political speech has been subjected to the highest level of scrutiny by the courts. In *McIntyre v. Ohio Elections Comm'n*, 514 U.S. 334, 347 (1995), the United States Supreme Court stated that "[w]hen a law burdens core political speech, we apply 'exacting scrutiny,' and we uphold the restriction only if it is narrowly tailored to serve an overriding state interest."

In *McIntyre*, the petitioner, Margaret McIntyre, had distributed anonymous leaflets to persons attending a public meeting at a town middle school. The leaflets expressed McIntyre's opposition to a proposed school tax levy that was up for discussion on the meeting agenda. McIntyre composed and printed the leaflets on her home computer and paid a professional printer to make additional copies. She distributed leaflets to persons

attending the meeting, and also placed some leaflets on car windshields in the school parking lot.

A school official filed a complaint against McIntyre, alleging that the anonymous leaflets violated an Ohio election law that prohibited anonymous political communications. The Supreme Court held that Ohio could not, under the particular circumstances of that case, justify its infringement of McIntyre’s First Amendment right to engage in anonymous political speech. The Supreme Court emphasized that McIntyre acted independently of any candidate or committee, and that she, for the most part, used her own “modest” resources. (*McIntyre*, 514 U.S. at 351.)

Recent federal court decisions, citing *McIntyre*, have reaffirmed the right of individuals to engage in limited anonymous political speech involving ballot issues, and declared statutes similar to § 13-35-225, MCA unconstitutional partly because they applied to both ballot issue and candidate campaigns. (See, e.g., *ACLU v. Heller*, 378 F.2d 979 (9<sup>th</sup> Cir. 2004); and *Swaffer v. Cane*, 610 F. Supp. 2d 962 (E.D. Wisc. 2009).)

Other courts have upheld statutes if they apply only to candidate campaigns and more than a *de minimis* campaign expenditure has been made. (See, e.g. *McConnell v. FEC*, 540 U.S. 93 (2003); and *Majors v. Abell*, 361 F.3d 349 (7<sup>th</sup> Cir. 2004).)

In the recent 9<sup>th</sup> Circuit decision in *Canyon Ferry Road Baptist Church v. Unsworth*, 556 F.3d 1021 (9<sup>th</sup> Cir. 2009), (“*Canyon Ferry*”), the court considered what constitutes a *de minimis* expenditure for the purpose of imposing reporting obligations in a ballot issue campaign. The facts and holding of the case are summarized in the *Matter of the Complaint Against Barbara Campbell, Utility Solutions, LLC, and Double-Tree, Inc.* (November 17<sup>th</sup>, 2009).

The Church had placed CI-96 petitions<sup>1</sup> in its foyer, and its pastor had encouraged church service attendees to sign the petitions. The Church also allowed one of its members to use a church copy machine to make additional copies of the petition.

The 9<sup>th</sup> Circuit Court’s decision determined that, while Montana has a sufficient “informational interest” to justify the mandatory reporting of contributions and

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<sup>1</sup> CI-96 was a 2004 Montana state ballot initiative that proposed an amendment to the Montana Constitution to define marriage as a union between one man and one woman.

expenditures in ballot issue campaigns, the absence of a “minimum value threshold” for triggering reporting requirements was unconstitutional as applied to the Church’s ballot issue activities. (*Canyon Ferry* at 1029-1033.)

The 9<sup>th</sup> Circuit Court held that Montana’s in-kind expenditure rule was unconstitutionally vague as applied to the placement of petitions in the Church’s foyer and the pastor’s exhortation to sign the petitions. The Court found that the Church did not have objective notice that it had provided a reportable service. According to the Court, the Church suffered no economic detriment in placing a few petition pages in its foyer during a regularly scheduled service, and the Church’s maintenance costs for conducting the service were the same regardless of whether its pastor spent a portion of the service endorsing and encouraging support for a ballot issue. The Court concluded that these two activities carried no “objective market value.” (*Canyon Ferry* at 1029-1031.)

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 statute also applies to both ballot issue and candidate campaigns. It is therefore likely that any court examining § 13-35-225, MCA would subject the law 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).)

A careful reading of the court decisions analyzing statutes that prohibit anonymous political speech, as well as the *Canyon Ferry* decision, suggests that the following key factual determinations will be significant in considering each case:

1. Was the anonymous campaign expenditure made to support or oppose a ballot issue, rather than a candidate?
2. Did the anonymous political speech involve express advocacy (urging a vote for or against a particular candidate or ballot issue)?
3. Did the person who engaged in anonymous political speech act alone and use only his or her personal resources?
4. Did the person who engaged in anonymous political speech act independently and not coordinate the expenditure with a political committee or a campaign?

5. Did the anonymous campaign expenditure involve more than a *de minimis* amount?

These factors will be analyzed for purposes of determining whether Vallance violated § 13-35-225, MCA.

1. While Vallance's political message was directed at a "ballot issue" as defined in Montana law, it is important to note that a recall campaign involving a sitting elected official bears some similarities to a candidate campaign. In fact, Montana's definition of the term "candidate" includes an officeholder who is the subject of a recall election. (§ 13-1-101(6)(c), MCA.)
2. The "Recall Bully Scott" campaign message displayed by Vallance consisted of express advocacy, as he urged support for the recall effort of Councilor Scott. There is no claim that the other messages displayed by Vallance on his sky sign, as described in Fact 3, consisted of express advocacy (urging a vote for or against a particular candidate or issue).
3. Vallance used his own airplane and sky sign to display the campaign message. Although he claims he composed the political message on his own, he admitted that he accepted money for displaying the message. According to a newspaper article published around the time of the incidents, Vallance stated, "I am getting paid to do this by people who slip me some money." Although he generally criticized the accuracy of newspaper stories, he admitted that the quote was accurate. (See Facts 4 and 6.)
4. While Vallance contends he acted alone when he composed and displayed the message regarding the recall election of Councilor Bob Scott, as noted above the evidence suggests he may have been working in concert with others who supported his efforts financially.
5. The expense associated with the political message displayed by Vallance on his sky sign far exceeded the *de minimis* amount described by the Court in the *Canyon Ferry* case, and was considerably more than that incurred by McIntyre when she created and distributed her anonymous leaflets opposing a school tax levy. According to Vallance, he normally charges at least \$400 per hour, and possibly more, when he displays messages on his sky sign for a fee. (See Fact 7.) Vallance stated that he flew the message

periodically over a two-week period, incurring significant costs associated with the operation of an airplane and a sky sign. (See Facts 3, 7, and 10.) Moreover, in contrast to the limited number of leaflets distributed by Ms. McIntyre on one occasion, Vallance's campaign message was displayed in the public skies over the city of Hamilton and the surrounding area for an extended period of time, making it potentially visible to thousands of people. (See Facts 3 and 12.)

After considering and balancing the five factors described above, it is my conclusion that each time he flew the "Recall Bully Scott" message Mr. Vallance violated § 13-35-225, MCA by not including the identifying information required by the statute on the political message displayed on his sky sign. His actions and the value of his expenditures are clearly distinguishable from those examined and analyzed by the courts in the other cases cited herein, and particularly from those actions scrutinized in the *McIntyre* and *Canyon Ferry* cases.

Vallance claims the limited number of characters that may be displayed on his sky sign would make it impossible to include attribution language. (See Fact 8.) However, he acknowledged that when scrolling messages there is no limit to the number of characters that may be used. (See Fact 7.) Thus, he could have displayed his campaign message followed by the required attribution language.

I note that subsection (4) of § 13-35-225, MCA includes an alternative means of publicly disclosing the financial backer of a campaign message. That section states that if an article of advertising is too small for the required attribution language, the person who finances the communication shall file a copy of it with the Commissioner of Political Practices, together with the attribution information. While subsection (4) does not speak directly to the situation at hand, it illustrates an alternative means of public disclosure that could be adapted to this purpose through legislation or rulemaking.



## CONCLUSION

Based on the preceding Summary of Facts and Statement of Findings, there is substantial evidence to conclude that Jack Vallance violated § 13-35-225, MCA, and that a civil penalty action under § 13-37-128, MCA is warranted.

Dated this 17<sup>th</sup> day of November, 2009.

A handwritten signature in black ink, appearing to read "Dennis Unsworth", written over a horizontal line.

Dennis Unsworth  
Commissioner of Political Practices