

*CANYON FERRY ROAD BAPTIST CHURCH OF EAST HELENA, INC. v. UNSWORTH*<sup>1</sup>

The Ninth Circuit Court of Appeals recently reversed the U.S. District Court of Montana and held that certain provisions of Montana's campaign finance laws violated the First Amendment rights of Canyon Ferry Road Baptist Church of East Helena.<sup>2</sup> The case focused on the Church's support of Constitutional Initiative No. 96 ("CI-96"), which defined marriage as a union between one man and one woman.<sup>3</sup> At issue was whether the State's campaign finance laws required the Church to disclose its activities in helping place CI-96 on the November 2004 state ballot.<sup>4</sup> The Alliance Defense Fund of Scottsdale, Arizona defended the Church and the National Legal Foundation of Virginia Beach, Virginia filed a brief as amicus curiae.<sup>5</sup>

*Canyon Ferry* arose after the Montana Commission of Political Practices ("Commission") ruled that the Church, in supporting CI-96 during 2004, had formed an "incidental political committee."<sup>6</sup> The Church had supported the ballot initiative by: (1) circulating the CI-96 petition among its congregants; (2) using its photocopying machine to make copies of the petition; (3) hosting and advertising a nationwide simulcast of a program entitled *Battle for Marriage* that supported the initiative; and (4) exhorting its congregants to sign the petition.<sup>7</sup> As an incidental political committee, the Church was required to report and disclose its campaign expenditures and contributions tied to CI-96.<sup>8</sup> In response to the Commission's ruling, the Church filed a civil action for deprivation of rights pursuant to 42 U.S.C § 1983 (2006).<sup>9</sup>

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<sup>1</sup> *Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009).

<sup>2</sup> *Id.* at 1034–1035.

<sup>3</sup> *Id.* at 1024–1025.

<sup>4</sup> *Id.* at 1028.

<sup>5</sup> *Id.* at 1023.

<sup>6</sup> *Id.* at 1025.

<sup>7</sup> *Canyon Ferry*, 556 F.3d at 1024–1025.

<sup>8</sup> *Id.* at 1025.

<sup>9</sup> *Id.*

The Church is an incorporated religious institution of the Baptist faith located in East Helena, Montana.<sup>10</sup> In the spring of 2004, Pastor Berthold Gotlieb Stumberg, III wanted to gather signatures for the CI-96 petition.<sup>11</sup> To do so, the Pastor arranged for the Church to view an audio-simulcast screening of *Battle for Marriage*, a program featuring presentations from national religious leaders of the Christian faith on the subject of marriage.<sup>12</sup> The Church advertised its screening of the simulcast via free public service announcements through five local radio stations.<sup>13</sup> It also photocopied and distributed flyers for the event based on a template provided by the national organizers of *Battle for Marriage*.<sup>14</sup>

The simulcast was shown during one of the Church's regularly scheduled Sunday night services.<sup>15</sup> With 93 people attending, the crowd was much larger than a typical Sunday night service.<sup>16</sup> Following the screening, the Pastor spoke to the audience.<sup>17</sup> He exhorted them to resist the “threat to marriage” through prayer and by signing the CI-96 petition, which he indicated was available in the Church’s foyer.<sup>18</sup> The Pastor gave two church members permission to place copies of the petition there.<sup>19</sup> One church member had used the Church’s copy machine to make fewer than 50 copies of the petition, but used her own paper to do so.<sup>20</sup> A week later, the Pastor circulated the petitions in all three of its Sunday services.<sup>21</sup> Ultimately, 92 of the 98 signatures collected by the Church came from its own members.<sup>22</sup> With enough

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<sup>10</sup> *Id.* at 1024.

<sup>11</sup> *Id.*

<sup>12</sup> *Id.*

<sup>13</sup> *Canyon Ferry*, 556 F.3d at 1024.

<sup>14</sup> *Id.*

<sup>15</sup> *Id.*

<sup>16</sup> *Id.*

<sup>17</sup> *Id.*

<sup>18</sup> *Id.* at 1024–1025.

<sup>19</sup> *Canyon Ferry*, 556 F.3d at 1024.

<sup>20</sup> *Id.*

<sup>21</sup> *Id.* at 1025.

<sup>22</sup> *Id.*

signatures statewide, CI-96 was included on the November 2004 state ballot and was passed by Montana voters by a 66.5% to 33.5% margin.<sup>23</sup> Three days after the Church screened *Battle for Marriage*, an advocacy group named Montanans for Families and Fairness filed a Campaign Finance and Practices Complaint with the Commission.<sup>24</sup> The organization alleged that the Church created an incidental political committee with its expenditures, but had failed to file the required disclosure forms.<sup>25</sup>

Under Montana law, a *political committee* is defined as “a combination of two or more individuals or a person other than an individual who makes a contribution or expenditure . . . to support or oppose a ballot issue or a committee organized to support or oppose a ballot issue . . . .”<sup>26</sup> An *incidental political committee* is defined as “a political committee that is not specifically organized or maintained for the primary purpose of influencing elections, but that may incidentally become a political committee by making a contribution or expenditure to support or oppose a candidate and/or issue.”<sup>27</sup> Additionally, an *in-kind expenditure* is “the furnishing of services, property, or rights without charge or at a charge which is less than fair market value to a person, candidate, or political committee for the purpose of supporting or opposing any person, candidate, ballot issue or political committee.”<sup>28</sup> The Commission found the Church had indeed become an incidental political committee and was required to disclose its activities tied to supporting CI-96.<sup>29</sup> Following the ruling, the Church sued the Commission under 42 U.S.C § 1983.<sup>30</sup> It asserted that its ability to both educate congregants about marriage and to encourage

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<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> *Canyon Ferry*, 556 F.3d at 1025.

<sup>26</sup> Mont. Code. Ann. § 13-1-101(20) (2007).

<sup>27</sup> Admin. R. Mont. 44.10.327(2)(c) (2007).

<sup>28</sup> *Id.* at 44.10.323(2).

<sup>29</sup> *Canyon Ferry*, 556 F.3d at 1025.

<sup>30</sup> *Id.*

them to promote their faith in public had been “severely chilled,” in violation of the First and Fourteenth Amendments.<sup>31</sup>

United States District Court Judge Donald W. Molloy for the U.S. District Court of Montana granted the Defendant Commission’s motion for summary judgment, thereby dismissing the Church’s case.<sup>32</sup> The district court ruled the Church’s First Amendment rights were not violated.<sup>33</sup> It held that Montana’s campaign reporting requirements served a compelling state interest and that the requirements were narrowly tailored to achieve that interest.<sup>34</sup> The court reasoned that “nothing in the First Amendment keeps the state from exercising its regulatory authority over the political process, even when the politicking takes place in the ‘sanctuary.’”<sup>35</sup> Furthermore, the disclosure laws were not unconstitutionally vague and imposed only a small burden that was “reasonable and non-discriminatory.”<sup>36</sup> Lastly, the court did not deem it necessary to send the case to the Montana Supreme Court for certification concerning the statutory construction of the laws at issue.<sup>37</sup>

The Ninth Circuit Court of Appeals reversed and remanded the U.S. District Court’s decision.<sup>38</sup> The court highlighted the fact that, as opposed to federal campaign finance laws, Montana’s laws required disclosure for “*any* in-kind expenditure or contribution, no matter how negligible its value.”<sup>39</sup> According to the court, providing and endorsing the CI-96 petitions were merely *de minimis* expenditures.<sup>40</sup> Therefore, requiring the Church to report these kinds of

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<sup>31</sup> *Canyon Ferry Rd. Baptist Church v. Higgins*, No. CV 04-24-H-DWM, slip op. at 1 (D. Mont. Sept. 26, 2006).

<sup>32</sup> *Id.* at 16.

<sup>33</sup> *Id.* at 1, 8, 10.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.* at 1.

<sup>36</sup> *Id.* at 13, 15.

<sup>37</sup> *Higgins*, No. CV 04-24-H-DWM, slip op. at 15.

<sup>38</sup> *Canyon Ferry*, 556 F.3d at 1034–1035.

<sup>39</sup> *Id.* at 1029 (emphasis in original).

<sup>40</sup> *Canyon Ferry*, 556 F.3d at 1030.

negligible expenditures would cause “fatal problems of unconstitutional vagueness.”<sup>41</sup>

Furthermore, the public’s right to know of the Church’s activities was outweighed by the Church’s burden to disclose those activities.<sup>42</sup> In summary, the Ninth Circuit held that requiring the Church to report and disclose *de minimis* contributions in the context of a state ballot initiative violated the Church’s First Amendment rights.<sup>43</sup>

The Montana practitioner and politically active groups in Montana should note the holding in *Canyon Ferry* was limited to disclosure requirements in the context of state ballot initiatives.<sup>44</sup> The Ninth Circuit did not rule on the constitutionality of Montana’s disclosure requirements concerning candidate elections or monetary contributions of any size generally.<sup>45</sup> Moreover, the court refused to name a level above *de minimis* at which point it would be constitutional to require disclosure of in-kind contributions.<sup>46</sup> *Canyon Ferry* provides that a politically active group supporting a state ballot initiative is immune from Montana’s disclosure requirements if its involvement does not significantly exceed that of the Church in this case. However, it is safe to say the same group contributing a substantially larger in-kind contribution would not enjoy the same level of immunity.

— *Peter Arant*

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<sup>41</sup> *Id.* at 1034.

<sup>42</sup> *Id.*

<sup>43</sup> *Id.*

<sup>44</sup> *Id.*

<sup>45</sup> *Id.*

<sup>46</sup> *Canyon Ferry*, 556 F.3d at 1034.