CONSTITUTIONAL LAW — FIRST AMENDMENT — NINTH CIRCUIT HOLDS MONTANA ELECTION CONTRIBUTION DISCLOSURE REQUIREMENTS UNCONSTITUTIONAL AS APPLIED TO DE MINIMIS CONTRIBUTIONS. — *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*, 556 F.3d 1021 (9th Cir. 2009).

As political campaigns have become more expensive[1] and sophisticated,[2] Congress has increasingly regulated them,[3] yet the Supreme Court has declared many aspects of that regulation unconstitutional.[4] Recently, in *Canyon Ferry Road Baptist Church of East Helena, Inc. v. Unsworth*,[5] the Ninth Circuit continued this deregulatory trend by holding that Montana's election contribution disclosure requirements were unconstitutional as applied to de minimis campaign expenditures.[6] Though the bureaucratic disclosure requirements of the regulation at issue may chill speech, an effect that the court correctly recognized,[7] another feature of the regulation may chill speech even more: its third-party enforcement mechanism. Because the regulation allows third parties to bring complaints of campaign rulebreaking,[8] enforcement against minor parties may spring from questionable motives, result in disproportionate burdens, and ultimately militate against the public interest. Legislatures crafting campaign law and judges applying it should be cognizant of these difficulties.

In the spring of 2004, supporters of Constitutional Initiative No. 96 (CI-96), which would amend the Montana Constitution to define marriage as between one man and one woman, sought the signatures necessary to place the initiative on the November ballot.[9] Wishing to help, the pastor of the Canyon Ferry Road Baptist Church, Berthold Gotlieb Stumberg III, held a Sunday evening service focused on the issue of marriage.[10] To prepare for the service, Stumberg placed free

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[1] *See, e.g.*, Robert G. Boatright, *Campaign Finance in the 2008 Election*, *in* THE AMERICAN ELECTIONS OF 2008, at 137, 137 (Janet M. Box-Steffensmeier & Steven E. Schier eds., 2009); David B. Magleby, *Rolling in the Dough: The Continued Surge in Individual Contributions to Presidential Candidates and Party Committees*, 6 FORUM, Issue 1, art. 5, 2008, *available at* http://www.bepress.com/forum/vol6/iss1/art5.

[2] *See, e.g.*, Shane D'Aprile, *Operation New Media: From Texting to Twitter, Obama's Tools and Consultants Are Shaping Overseas Campaigns*, CAMPAIGNS & ELECTIONS' POL., Apr. 2009, at 26, 27.

[3] *See* Bipartisan Campaign Reform Act of 2002, Pub. L. No. 107-155, 166 Stat. 81 (codified primarily in scattered sections of 2 and 47 U.S.C.).

[4] *See* Davis v. FEC, 128 S. Ct. 2759 (2008); FEC v. Wis. Right to Life, Inc., 127 S. Ct. 2652 (2007).

[5] 556 F.3d 1021 (9th Cir. 2009).

[6] *Id.* at 1028.

[7] *Id.* at 1034.

[8] *See* MONT. ADMIN. R. 44.10.307 (2009).

[9] *Canyon Ferry Rd.*, 556 F.3d at 1024. The initiative passed 66.5% to 33.5%. *Id.* at 1025.

[10] *Id.* at 1024–25.

public service announcements on radio stations encouraging attendance. He also allowed a member of his congregation to use her own paper and the church's copier to make copies of the CI-96 petition and place the copies in the church foyer.[11] At the Sunday evening event, the church aired a simulcast titled *The Battle for Marriage*,[12] after which Stumberg spoke briefly in support of marriage as between one man and one woman and encouraged attendees to sign the CI-96 petitions in the church's foyer.[13] Over the next several weeks, ninety-two church members and six others signed the petition.[14]

One of the Sunday attendees was an employee of the Montana Human Rights Network[15] charged with monitoring the event. His report of the evening service came to Robert Hill, the political leader of the opponents of CI-96.[16] Hill filed a complaint against the church with Montana's Commission of Political Practices.[17] After investigating, the Commission concluded that the church's activities made the church an incidental political committee,[18] which required it to disclose certain donor information.[19]

The church sought declaratory relief and nominal damages from the Commission in Montana's federal district court.[20] The church argued that the compliance requirements chilled its speech; violated its rights of free speech, free exercise of religion, and freedom of associa-

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[11] *Id.* at 1024.

[12] The broadcast featured several prominent Christian leaders voicing support for one-man, one-woman marriage and criticizing the Massachusetts Supreme Judicial Court's legalization of same-sex marriage. *See* Church Communication Network, The Battle for Marriage, http://www.ccn.tv/programming/event/evt_23may04.htm (last visited Jan. 9, 2010).

[13] *Canyon Ferry Rd.*, 556 F.3d at 1024–25.

[14] *Id.* at 1025, 1030.

[15] The organization states: "*What We Believe*: We believe we must fearlessly confront racism, anti-Semitism, homophobia and other forms of injustice . . . ." Montana Human Rights Network, http://www.mhrn.org (last visited Jan. 9, 2010).

[16] Appellants' Opening Brief at 9–10, *Canyon Ferry Rd.*, 556 F.3d 1021 (9th Cir. 2009) (No. 06-35883), 2007 WL 1032525.

[17] *Canyon Ferry Rd.*, 556 F.3d at 1025.

[18] *Id.* Montana regulations define an incidental committee as "a political committee that is not specifically organized . . . [for] 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." MONT. ADMIN. R. 44.10.327(2)(c) (2009). Regulation further stipulates that all such contributions, regardless of amount, be filed with the state. *See id.* R. 44.10.511, 44.10.513.

[19] *Canyon Ferry Rd.*, 556 F.3d at 1025; *see also* Montanans for Families & Fairness v. Canyon Ferry Rd. Baptist Church, slip op. at 9–10 (Mont. Comm'r of Political Practices Mar. 3, 2006), *available at* http://www.politicalpractices.mt.gov/content/pdf/2recentdecisions1-ethics/canyonferrycfp1.pdf. The Commission requires incidental committees to disclose identifying information and the value of monetary and in-kind contributions. *See* Mont. Comm'r of Political Practices, Form C-4: Incidental Political Committee Finance Report (2008), *available at* http://politicalpractices.mt.gov/content/5campaignfinance/fillcompleteC4.pdf.

[20] *See* Canyon Ferry Rd. Baptist Church of E. Helena, Inc. v. Higgins, No. CV 04-24-H-DWM, 2006 WL 6196415 (D. Mont. Sept. 26, 2006).

tion; and were vague and overbroad.[21] The district court granted summary judgment to the Commission.[22] The court rejected the church's contention that Montana's regulation chilled the church's speech, holding instead that the state's "reporting requirements serve a compelling state interest [of providing information to voters] and are narrowly tailored to achieve that interest."[23] The court rejected the church's free exercise claim on the same grounds.[24] The court also rejected the church's freedom of association claim, reasoning that the recordkeeping and reporting burdens placed on incidental political committees were not severe.[25] Finally, the court rejected the church's vagueness claim, finding the disclosure regulation at issue provided "fair notice . . . in the vast majority of its intended applications."[26]

The church appealed to the Ninth Circuit.[27] The circuit court reversed and remanded.[28] Writing for a unanimous panel, Judge Canby[29] first addressed the church's vagueness claim, holding that the Montana regulation at issue was unconstitutionally vague regarding the church's placing of the CI-96 petition in the church foyer and the pastor's brief speech encouraging congregants to sign the petition.[30] The court reasoned that, in this case, the state's definition of "in-kind expenditure"[31] "'fails to provide people of ordinary intelligence a reasonable opportunity to understand' whether their activities" — the placement of the petition and the speech — "require disclosure under the statute."[32] Said the court, "As the commercial value of a certain activity in support of a candidate or ballot issue approaches zero, it becomes increasingly difficult for the party engaging in the activity to know whether his or her activity could possibly be considered a 'service.'"[33] The court also examined the regulation's application to the church's photocopying of the petition. The court held that the law's application to this expenditure, which involved wear and tear to

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[21] *Id.* at *1.
[22] *Id.* at *16–17.
[23] *Id.* at *10; *see also id.* at *6–10.
[24] *See id.* at *10–11.
[25] *See id.* at *11–13.
[26] *Id.* at *15; *see id.* at *13–15.
[27] *See Canyon Ferry Rd.*, 556 F.3d at 1023.
[28] *Id.* at 1035.
[29] Judge Canby was joined by Judges Pregerson and Noonan.
[30] *See Canyon Ferry Rd.*, 556 F.3d at 1029.
[31] *See id.* at 1028 (stating that 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 . . . for the purpose of supporting or opposing any person, candidate, ballot issue or political committee" (quoting MONT. ADMIN. R. 44.10.323(2) (2009)) (internal quotation marks omitted)).
[32] *Id.* (quoting Hill v. Colorado, 530 U.S. 703, 732 (2000)).
[33] *Id.* at 1029.

equipment and market-based pricing criteria, was not unconstitutionally vague.[34]

The court then addressed the church's free speech claim, holding that, "as applied to the one-time in-kind *de minimis* expenditures involved in this case," the state reporting requirements constituted an unjustified burden on election-related speech.[35] It noted that *Buckley v. Valeo*[36] and *McConnell v. FEC*[37] provide three rationales for campaign disclosure requirements: (1) providing voters information, (2) preventing corruption, and (3) gathering data to enforce other electioneering restrictions.[38] In the ballot proposition context, only the information-provision interest applies.[39] But in the present case, the court explained, voters would benefit very little from knowing the church's in-kind, de minimis expenditure was nearly nothing, yet the burden of reporting such small expenditures was the same as that required for substantial contributions.[40] Thus, the court asserted, "at some point enough must be enough"[41] — the reporting requirements for such insignificant benefits were not substantially related to the state's interest in providing election information.[42] The regulation therefore violated the church's First Amendment rights.[43]

Judge Noonan concurred, writing separately to suggest that the Montana regulation was unconstitutional under the Free Exercise Clause.[44] Judge Noonan also questioned generally the societal interest in knowing the identities of small contributors.[45]

This case's disposition was unremarkable, but its defendant was not — it seems odd that a small church and ninety-eight signatures were the focus of so much controversy in the first place. The case thus highlights a troublesome aspect of the Montana regulation at issue: its third-party complaint provision. In the campaign context, such com-

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[34] *Id.* at 1030.

[35] *Id.* at 1031; *see id.* at 1034.

[36] 424 U.S. 1 (1976) (per curiam).

[37] 540 U.S. 93 (2003).

[38] *Canyon Ferry Rd.*, 556 F.3d at 1031 (quoting *McConnell*, 540 U.S. at 196 (citing *Buckley*, 424 U.S. at 67–68)).

[39] *See id.* at 1031–32. The court stated that such information "may prevent 'the wolf from masquerading in sheep's clothing.'" *Id.* at 1031 (quoting Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1106 n.24 (9th Cir. 2003)). For example, Ohio's 2006 election included Issue 4, titled "Restriction On Public Smoking," yet the initiative's proponents received more than $260,000 from R.J. Reynolds Tobacco Company. Nat'l Inst. on Money in State Politics, Follow the Money: Smoke Less Ohio Voter Education Fund, http://www.followthemoney.org/database/StateGlance/committee.phtml?c=1983 (last visited Jan. 9, 2010).

[40] *Canyon Ferry Rd.*, 556 F.3d at 1033–34.

[41] *Id.* at 1034.

[42] *See id.* at 1033–34.

[43] *Id.* at 1034.

[44] *See id.* at 1035–37 (Noonan, J., concurring).

[45] *See id.* at 1036.

plaints may be filed less to vindicate the public interest in information and more to harass opponents. While the risk of third-party complaints is, perhaps, a reasonable price of admission for major players in elections, it is a heavy price to pay for minor participants. Lawmakers and courts should be cognizant of this particular peril to small contributors to campaigns.[46]

Montana law allows a third party to file a complaint with the Commissioner of Political Practices when that party believes a person or organization has violated electioneering law.[47] Third-party enforcement of the law is, of course, well established in the American system. Lawmakers have long relied on private attorneys general[48] to encourage more vigorous enforcement of certain laws.[49] And in the context of Montana's elections, it should come as no surprise that many enforcement complaints come from the opposing camps in election contests.[50] This arrangement encourages vigilant policing because it easily transfers adversarial campaigning to adversarial legal proceedings.

This third-party complaint system may not translate well, however, to situations involving minor players. Minor players are less likely than are seasoned groups to have the legal sophistication to participate effectively in a regulated campaign environment. Worse yet, because more sophisticated participants have superior knowledge of the law, they can exploit the complaint procedure to chill the speech of minor players. Sophisticated players have the means to monitor and the expertise to file (or threaten to file) complaints against minor players,

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[46] Two lower courts in the Ninth Circuit are grappling with such problems presently. *See* Doe v. Reed, No. C09-5456BHS, 2009 WL 2971761 (W.D. Wash. Sept. 10, 2009) (granting preliminary injunction to prevent the online posting of the personal information of people who signed petitions favoring Referendum Measure No. 71, a ballot proposition calling for a statewide election on a state senate bill that would grant certain benefits to state-registered same-sex couples), *rev'd*, Nos. 09-35818, 09-35826, 09-35863, 2009 WL 3401297 (9th Cir. Oct. 22, 2009), *reversal stayed pending timely filing of cert.*, No. 09A356, 2009 WL 3358149 (U.S. Oct. 20, 2009) (mem.); ProtectMarriage.com v. Bowen, 599 F. Supp. 2d 1197 (E.D. Cal. 2009) (denying preliminary injunction to remove from disclosure the names of a putative class of whom many have been subjected to harassment, boycotts, and vandalism because of their support of Proposition 8, which amended California's constitution to define marriage as only between one man and one woman).

[47] MONT. ADMIN. R. 44.10.307 (2009).

[48] *See* Newman v. Piggie Park Enters., 390 U.S. 400, 402 (1968) (per curiam).

[49] *See, e.g.*, 15 U.S.C. § 15(a) (2006) (awarding treble damages to private plaintiffs in antitrust suits); 31 U.S.C. § 3730(b)–(d) (2006) (allowing private citizens to enforce the False Claims Act on behalf of the government — commonly known as *qui tam* suits).

[50] *See* Mont. Comm'r of Political Practices, Docket of Formal Complaints, http://politicalpractices.mt.gov/2recentdecisions/docket.mcpx (last visited Jan. 9, 2010). The complaint system further favors organized interests because filing a successful complaint requires some sophistication. *See* MONT. ADMIN. R. 44.10.307 (requiring complaints to cite the specific statute believed to have been violated, and to be notarized).

while minor players cannot reciprocate.[51] While ignorance of the law is almost never an excuse for breaking it,[52] the election context is problematic because that ignorance is unevenly distributed.[53]

Further, these incentives for private enforcement of campaign laws demonstrate a disconnect between public and private interests. During campaigns, disclosure requirements are enforced so that the public knows who is behind and who stands to benefit from the outcome of a campaign.[54] Yet the *Canyon Ferry Road* court acknowledged that the public had little to gain from knowing about the church's de minimis expenditures.[55] The church's opponents, by contrast, might have had much to gain from filing a complaint.

Initially, one might think that a major participant in a campaign would consider a minor player's speech as, almost by definition, minimal in its impact on the campaign's outcome and thus not worth the trouble to complain about. And this notion would seem to align private and public interests: enforcement complaints would be likely to occur only in situations in which the impact — and therefore the public interest in disclosure — is large. Nonetheless, two situations might alter that calculus. First, a sophisticated participant may find it effective to stifle minor players if it can stifle many at a low cost for each.[56] Second, a sophisticated participant may find it effective to make an

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[51] *See* Appellants' Opening Brief, *supra* note 16, at 10 n.4 (documenting letters sent out by counsel for Montanans for Families & Fairness informing churches of campaign disclosure requirements and penalties for noncompliance, with the alleged result of chilled speech). Such tactics have occurred elsewhere in elections. *See, e.g.*, Sherry A. Swirsky, *Minority Voter Intimidation: The Problem that Won't Go Away*, 11 TEMP. POL. & CIV. RTS. L. REV. 359, 359–64 (2002) (criticizing Republican "'ballot security' programs," *id.* at 360, which suppress voter turnout).

[52] *See, e.g.*, Lambert v. California, 355 U.S. 225, 228–30 (1957).

[53] *Cf.* Richard Singer, *On Classism and Dissonance in the Criminal Law: A Reply to Professor Meir Dan-Cohen*, 77 J. CRIM. L. & CRIMINOLOGY 69, 84–87 (1986) (critiquing Meir Dan-Cohen, *Decision Rules and Conduct Rules: On Acoustic Separation in Criminal Law*, 97 HARV. L. REV. 625 (1984), and arguing that, under certain conditions, those with more knowledge of the law's operation can manipulate it against the less legally sophisticated public).

[54] *See* Buckley v. Valeo, 424 U.S. 1, 66–67 (1976) (per curiam); Cal. Pro-Life Council, Inc. v. Getman, 328 F.3d 1088, 1105–07 (9th Cir. 2003) (extending *Buckley*'s reasoning to ballot initiatives).

[55] *See Canyon Ferry Rd.*, 556 F.3d at 1032–34. A judge on the panel highlighted this concern during oral argument, when he asked, with some variation, counsel for Montana seven times in a row, "What do you think anybody does knowing that Joe Brown gave ten dollars?" Recording of Oral Argument at 24:35, *Canyon Ferry Rd.*, 556 F.3d 1021 (9th Cir. 2009), http://www.ca9.uscourts.gov/media/view_subpage.php?pk_id=0000000155; *see also id.* at 23:04–27:07. In *qui tam* cases, such divergence of interests is less likely because the government reviews the relator's action to ensure it is in the public's interest. *See, e.g.*, United States *ex rel.* Sequoia Orange Co. v. Baird-Neece Packing Corp., 151 F.3d 1139 (9th Cir. 1998). *See generally* John T. Boese & Beth C. McClain, *Why* Thompson *Is Wrong: Misuse of the False Claims Act To Enforce the Anti-Kickback Act*, 51 ALA. L. REV. 1, 9–11, 15–18 (1999).

[56] For example, intimidating letters to discourage speech may be worth the postage stamp to their senders. *See* Appellants' Opening Brief, *supra* note 16, at 10 n.4; *see also* Swirsky, *supra* note 51, at 359.

example of a minor player through legal action to chill the speech of likeminded would-be participants.

These problematic side effects of third-party complaints are especially troublesome because they cut against the rationale of campaign finance law's touchstone, *Buckley v. Valeo*. *Buckley* describes the rationale for disclosure requirements thusly:

> [D]isclosure provides the electorate with information "as to where political campaign money comes from and how it is spent by the candidate" in order to aid the voters in evaluating those who seek federal office. It allows voters to place each candidate in the political spectrum more precisely than is often possible solely on the basis of party labels and campaign speeches. The sources of a candidate's financial support also alert the voter to the interests to which a candidate is most likely to be responsive and thus facilitate predictions of future performance in office.[57]

The justifications for Montana's third-party complaint system break down when compared to *Buckley*'s rationale. First, as a purely practical matter, a complainant *already knows* about the alleged violator's campaign activity. Otherwise, the complainant would not have the knowledge to make the complaint. And since the complainant already knows, he or she can readily make use of the information, such as by distributing it to the violator's political opponents or to the media. A complaint to the officials might result in the campaign contribution being officially filed in public records, but such records are not useful in themselves; they are only useful to the extent campaign participants exploit them, which, presumably, is what they will do anyway on discovering the activity. Moreover, given that elections have an election day, after which contribution information is useless for informing voters' choices, the direct distribution route more promptly and simply meets *Buckley*'s information-provision interest. Complaining to a public commission may result in investigation and adjudication, but such action will likely begin only after the election has passed. And while the media and public interest groups such as Common Cause take an interest in such information generally, there simply is not much of a story to tell when it comes to small contributions.[58] For practical purposes, then, *Buckley*'s information interest is already met without a third-party complaint system because the incentives to disseminate information (that is, *useful* information) already exist.

Second, *Buckley* demonstrates that the information interest is solely to help voters evaluate the initiative to be decided, by knowing its contributors, rather than to help voters confront or intimidate those con-

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[57] 424 U.S. at 66–67 (per curiam) (footnote omitted) (quoting H.R. REP. NO. 92-564, at 4 (1971)). The same rationale holds true for ballot initiatives. *See Cal. Pro-Life Council*, 328 F.3d at 1105–07.

[58] *See* Recording of Oral Argument, *supra* note 55, at 24:35.

tributors. Another view of campaign participation advocates a more deliberative approach,[59] in which citizens can directly challenge each other rather than through the proxy of a candidate or cause.[60] However, such an approach turns *Buckley* on its head. Instead of viewing disclosure as a necessary evil to ensure such vital state interests as transparency and the prevention of corruption,[61] disclosure becomes instead a necessary requirement for legitimate participation.[62] But in a legal landscape that defends the right to anonymous speech generally,[63] and especially in campaigns,[64] this transmogrified version of *Buckley* is simply out of tune.

Thus, whether using the information interest as a pretext for harassment or for mere democracy, such third-party enforcement of campaign disclosure requirements is problematic. This enforcement is especially troublesome given such laws' disproportionate impact on minor players. Policymakers should recognize this issue when crafting disclosure laws, perhaps by raising the floor for disclosure of contributions when disclosure is urged by a third-party complaint. Such a nuance would retain *Buckley*'s harmony, if not its exact arrangement.[65] More importantly, a higher floor would provide greater protection for those small voices so vital to democracy's choir.

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[59] *See* Joseph M. Bessette, *Deliberative Democracy: The Majority Principle in Republican Government*, *in* HOW DEMOCRATIC IS THE CONSTITUTION? 102, 105–06 (Robert A. Goldwin & William A. Schambra eds., 1980). The concept promotes direct citizen-to-citizen political exchange to understand and decide policy. *Id.*

[60] For example, this approach animates two groups involved in the ongoing litigation of *Doe v. Reed*, No. C09-5456BHS, 2009 WL 2971761 (W.D. Wash. Sept. 10, 2009). Their names alone are indicative: KnowThyNeighbor.org and WhoSigned.org. *See id.* at *4; KnowThyNeighbor.org, About KnowThyNeighbor.org, http://knowthyneighbor.org/national (last visited Jan. 9, 2010) ("[C]itizens who sponsor an amendment to take people's rights should never be allowed to do so under the cover of darkness. . . . Finding the names of friends, neighbors, family, co-workers, etc. . . . [has spurred] [u]ncomfortable but desperately needed conversations . . . .").

[61] *See* McConnell v. FEC, 540 U.S. 93, 196 (2003) (citing *Buckley*, 424 U.S. at 67–68).

[62] *See, e.g.*, Derrick A. Bell, Jr., *The Referendum: Democracy's Barrier to Racial Equality*, 54 WASH. L. REV. 1, 14–15, 20–21 (1978).

[63] *See, e.g.*, NAACP v. Alabama *ex rel.* Patterson, 357 U.S. 449 (1958).

[64] *See* McIntyre v. Ohio Elections Comm'n, 514 U.S. 334, 357 (1995); *see also* William McGeveran, *Mrs. McIntyre's Checkbook: Privacy Costs of Political Contribution Disclosure*, 6 U. PA. J. CONST. L. 1 (2003).

[65] *Buckley*, 424 U.S. at 83 (holding that a contribution disclosure floor of ten dollars is not "wholly without rationality").