IN THE SUPREME COURT FOR THE STATE OF MONTANA

Supreme Court No. DA-20-616

BENJAMIN M. DARROW,

Plaintiff and Appellant,

v.

THE EXECUTIVE BOARD OF THE MISSOULA COUNTY DEMOCRATIC CENTRAL COMMITTEE, and DAVID KENDALL, individually, and in his position as Chair of the MISSOULA COUNTY DEMOCRATIC CENTRAL COMMITTEE,,

Defendant and Appellee.

APPELLANT'S REPLY BRIEF

APPEAL FROM THE FOURTH JUDICIAL DISTRICT COURT,
THE HONORABLE HOWARD RECHT, SPECIALLY PRESIDING

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INTRODUCTION

The irony is not lost on Darrow that opposing counsel quotes Babbage, a Monarchist, one who suffers from the confusion of ideas that rule by divine right is more appropriate that rule by the people. Brevity is the soul of wit, and transparency is at the heart of Democracy. This reply brief will rebut a number of points made in the response, provide specific legal authority for the remedies sought, and rebut the specious First Amendment claims of the appellant.

ADDITIONAL RELEVANT FACTS

This case is not complicated. A government body, the central committee, was taken over by a David Kendall, an individual who had no regard for the constitutional rights of Montana citizens to participate in our government. When he began violating the rights of others, specifically the *Montana Constitution's Article II, Sections 8-9* rights to participate and right to know, Darrow, an elected member of the body, began documenting the activity. Darrow then was targeted by Kendall. Additionally Kendall began using unlawful methods to pass rules that conflict with state law.

The rules, which added impermissible voters to the central committee, diluted the votes of Darrow who was an elected member of the body. Imagine a school board where the majority of the board appoint many new, unelected

members who can participate and drown out the duly-elected members. This was the packing plan that Kendall and his allies implemented.

Kendall's actions created a culture of corruption, where having secret meetings, censoring of emails, and excluding certain members became the norm. Plaintiff Darrow is not "obsessed" with alternates, he is obsessed with compliance with the law, and obsessed with inclusionary policies that require adherence to the law. Montana has some of the most protective constitutional provisions when it comes to participation in government.

Opposing counsel argue that there are no violations of open meetings, and a declaratory judgment to follow the law is inappropriate. Plaintiff Darrow has drawn the Court's attention to a number of facts that show the MCDCC was and is not following open meetings laws. These facts, had the district court permitted a hearing, would have proven that the rules passed violate state law, that the rules passed were done so without proper notice, and that Kendall and the MCDCC had violated and are continuing to violate state open meetings laws.

In fact, Kendall sent an email to the committee membership in 2018 that stated he had been informed that open meetings laws **do not apply** to county central committees. **Exhibit V**, Pg. 1. In that same email thread, he asked for non-noticed vote to permit censorship of the email messages of members. *Id.*

Recently, Darrow, a member of the Montana Democratic Party State Central Committee sought to change state party rules to require compliance with open meetings laws by proposing amendments at the Democratic Party Rules Convention; those amendments failed, and a recap of the convention by a party official described the vote:

> "Some Rules attempting to completely open up ALL Democratic meetings (even State executive board and membership meetings) into the realm of Open Meeting Law were voted down."

Exhibit W, Email of June 10, 2021.

Without open meetings, without transparency, there can be no real democracy. In between these two emails, from 2017 to 2021, both indicating the party is not subject to open meetings laws, are the contested actions of this lawsuit.

This litigation is to vindicate the rights of citizens who want to participate in the governance of the Montana Democratic Party, but are prevented because of the failure of party officials to comply with state law.

The Appellee admits that the political parties are subject to open meetings laws, and claims there are no violations; however, the facts on the ground demonstrate that the MCDCC, because of actions by David Kendall and his allies, is failing to comply with the law, including open meeting laws of Montana.

ARGUMENT

1. Opposing Counsel's discussion of service is a "red herring."

Opposing counsel laboriously lays out a strained argument that perhaps service is invalid in this matter. There is no counterclaim or appeal made and this argument should be disregarded; however, because he conceals several facts that demonstrate the deception of defendant David Kendall, a short discussion is appropriate.

Mr. Kendall was first served with another lawsuit about open meetings in late October 2018. Immediately after being served, he cancelled the upcoming meetings of the Central Committee by having a non-noticed email vote. At that point, Mr. Kendall chose never to inform the central committee that he had been served with a lawsuit. When plaintiff Darrow also sued in January of 2019, he withheld making service until March, and then attempted to provide service by mail, which was refused. Because Darrow knew Kendall had essentially not accepted service for the committee in the other lawsuit, Darrow checked to see if the Montana Democratic Party or the Missoula Central Committee had a registered agent.

There was a registered agent listed for the state party, and Darrow contacted her because he knew her. She said that this was an error and that she was soon

moving out of state. Darrow found her statement to be unlikely, suspected she was trying to avoid any service, and had her served by a process server. *DV-19-60*, Docket 5. She remains the registered agent for the party to this day, and this service provided effective notice of the lawsuit to the Montana Democratic Party.

Darrow also served Kendall, and opposing counsel claims that since this service occurred on May 16, 2019 and Kendall's term as chair ended on May 14, 2019, that service was ineffective because Kendall "is not neither [sic] a member nor was he affiliated with the MCDCC at the time the complaint was served." Response Brief, Pg. 13. **This statement is false**.

First this statement is false because Kendall remained an elected precinct committee person until the spring of 2020, when his precinct position expired, and therefore was a member of the MCDCC when service occurred. Second, this statement is false because specifically the rules at that time of the MCDCC included the outgoing chair as "Past Chair" as a member of the executive board for six months after leaving the Chair position. *DV-19-60*, Docket 18.1, Exhibit A, Pg. 4-5, Rule 9. Therefore Kendall was still an executive of the MCDCC when he was served, and opposing counsel's assertion is false on two fronts.

Darrow also served Chair Wickersham, and opposing counsel complains that since she was not individually named that service is ineffective as well; however,

opposing counsel also made the argument in *DV-18-953*, that only naming the individual was deficient, so he should be judicially estopped from that position. His complaint that the person who made service was not "disinterested" is without merit as well; service was proper and undeniable.

Because of how this case has been defended, Darrow has been monitoring the expenses of the local and state party. Instead of recognizing the error of Kendall's ways, there has been a vigorous, well-funded defense. No expenditures or in-kind donations have been reported by either organization, and therefore Darrow concludes that Kendall is footing the bill for the defense in this matter. If Kendall's positions are in conflict with the positions of the MCDCC, and given that he has ceased having any involvement with the MCDCC, it makes one wonder whether it is appropriate to have a government body defense funded by the alleged bad actor who is now a private party.

2. Montana permits injunctions for open meetings violations.

Opposing counsel insists that *Havre Daily News* creates a rule that an injunction cannot be a remedy for an open meeting violation. However, adverse authority exists to that position; in fact, Darrow has found there is specific legal authority in Montana for an injunction for open meetings violations.

Sometimes serendipity provides legal precedent needed to overcome an

argument by comparison such as opposing counsel's position. The MCDCC argues that an injunction is not a valid remedy in open meetings cases, relying on the *Havre* public records case. In Appellee's brief, opposing counsel cited MCA *§ 2-3-114*, regarding attorney's fees, and Appellant Darrow reviewed cases related to this statute.

There Darrow found specific authority for an injunction as a remedy to open meetings violations in Montana; in *Citizen's,* the organization filed an open meetings complaint seeking an injunction to implementing changes to wolf hunting regulations, a voiding of the rules, and attorney's fees. *Citizen's for Balanced use v. Mont. Fish, Wildlife & Parks Commission*, 2014 MT 214, ¶5; 376 Mont. 202, ¶5; 331 P.3d 844, ¶5. The district court granted the injunction, after a show cause hearing, in *Citizen's* based upon the open meetings claim. *Id.* at ¶6. The Montana Supreme Court considered this case, and directed that an award of attorney's fees was appropriate because Citizen's obtained the preliminary injunction and the rule was eventually voided or withdrawn. *Id.* ¶7. Thus, legal authority exists for the granting of a preliminary injunction in open meetings cases, specifically to prevent the use of rules that were either unlawful or passed without properly following the open meetings requirements of Montana law.

Opposing counsel has never cited to this adverse authority throughout this

litigation; however, it is seems implausible, given his knowledge of the open meetings history in Montana that he would overlook this case. Because this Court has approved attorney's fees for a plaintiff who obtained a preliminary injunction as a remedy in an open meetings case, the public records analogy fails. An injunction is an appropriate remedy to prevent the use of rules passed by a government organization at a non-open meeting.

The District Court should have held an evidentiary hearing on the claims by Darrow to determine whether there was a factual basis for his claims about open meetings violations, and whether there was imminent harm to his rights as an elected member of the central committee. Instead the District Court failed to act, and this Court should reverse and remand with directions for the District Court to hold a show cause hearing as to the merits of Darrow's claims.

3. Opposing counsel misconstrue concessions by Darrow

Opposing counsel throughout this case has misconstrued arguments by Darrow; for example, claiming that since Darrow indicated there was a need to amend his complaint a second time, that Darrow was conceding his complaint was deficient. Appellee's Response, Pg. 16. Darrow is not conceding that amendment was necessary to cure deficiencies, he was stating that he recognized that there were additional unlawful actions by Defendants which were made after the

complaint was filed. Amendment would be necessary because the Defendants had decided to double-down on their unlawful activity. This is detailed in part in Appellant's opening brief, specifically the subsequent deleterious behavior by Chair Wickersham. Darrow has essentially been engaged in an investigation of Kendall's actions to determine and to properly remedy the harm he has inflicted upon the MCDCC.

Opposing counsel argues that the minutes of the December 18th meeting show that no decision was made, and that therefore there was no action to void at that meeting. Appellee's Response, Pg. 16. However, this fails to recognize that Darrow is also alleging that there was another secret meeting in December, and additionally that the notice provided in January was insufficient because our rules require 7 days notice for rules changes, and only 5 days notice was given. See Docket 2, First Amended Complaint, Pg. 4-5. In any case, these issues are "factual" issues that should be determined at a show cause hearing on the merits of Darrow's claims that the party violated open meetings laws in passing these rules. For that reason, the proper remedy is for this Court to reverse and remand for a show cause hearing on Darrow's claims of open meetings violations.

4. A retaliation claim against Kendall is permitted by law.

Darrow has specifically and repeatedly alleged that David Kendall's action

are in violation of the statute on Official Misconduct, *MCA § 45-7-401*. Darrow has specifically and repeatedly alleged that he was retaliated against because of his attempt to exercise his rights, and because he was exposing the nefarious activity by Kendall. Darrow specifically was exposing "abuse," by David Kendall that included attempts to "threaten or intimidate" Darrow and others, and a public official who engages in this action as retaliation for exposing their abuse is "liable in a civil action." *MCA § 2-2-145*. Immunity is not permitted if the conduct of a public official or employee "constitutes oppression, fraud, or malice, . . . [or], the conduct of the employee constitutes a criminal offense. Here Darrow has specifically alleged the criminal conduct of official misconduct, *MCA § 45-7-401*

5. There is a compelling state interest to ensure that political parties comply with state law.

Appellee claims that for Darrow to be able to obtain judicial scrutiny of the party's actions would violate the First Amendment rights to free speech and association, citing a long line of cases, most of which hold that the DNC, the national party committee, has the right to determine its membership, and that these rights extend to central committees. Nothing in Darrow's argument conflicts with the points made by opposing counsel. In fact, Darrow contends that it is his and other's First Amendment rights that are being curtailed by Kendall and his

censorship of party members. **Exhibit V**.

Specifically, regulation of political parties can occur if there is a compelling state interest. *Eu v. San Francisco County Democratic Central Committee* is relied upon for the rule that parties internal rules cannot be meddled with; however, *Eu* involves issues like whether a party can endorse in a primary or determine selection rules for party members, and nothing therein would permit the party from being regulated with narrowly tailored laws where there is a compelling state interest.

This specific scenario exists in Montana. In 2019, as this litigation was on-going, the Montana Legislature considered and passed House Bill 318, a bill to prevent corruption in county central committees. **Exhibit X.** This legislation was brought by Republicans who had endured a number of inter-party conflicts where secret rules, expulsion of members, and non-open meetings and ineligible voters were used for corrupt purposes. See https://montanafreepress.org/2019/02/06/anti-fraud-bill-draws-supporters-of-montana-political-central-committee-reform/ (last accessed August 15, 2021). The house bill passed into law in 2019 had a number of clauses that show the legislative intent is to require political parties to follow state law:

"WHEREAS, the Legislature has delegated the power of the State of Montana to party central committees to participate in the process of filling vacancies for legislative and county commission positions; and

WHEREAS, the State of Montana has the power to regulate political parties to ensure elections are orderly, fair, and honest; and

WHEREAS, other courts have recognized that when a state delegates power to a political party committee to fill vacancies, the state may require compliance with state law; and

WHEREAS, the State of Montana has an interest in limiting opportunities for fraud and corruption by party leadership; and

WHEREAS, the Montana Supreme Court has recognized the power to intervene in the affairs of a political party when the rights of individuals are involved; and

WHEREAS, the enactment of secret rules governing committee representatives, the use of fraudulent proxies of committee representatives, the arbitrary removal of committee representatives, and the filing of false trade and service marks with the Montana Secretary of State are fraudulent and corrupt practices; and

WHEREAS, the enactment of secret rules governing committee representatives, the use of fraudulent proxies of committee representatives, and the removal of committee representatives before the conclusion of a term may result in a disorderly, unfair, and dishonest election to fill a vacancy in a legislative or county commission position."

WHEREAS, it is in the interest of the State of Montana to prevent fraud and corruption and to ensure fair, honest, and orderly elections conducted by committee representatives and to protect the rights of individuals by setting clear expectations and guidelines for the office of committee representative.

Exhibit X, Pg. 1-2.

Though this bill was being passed during the litigation, it is applicable, in part because some parts of the bill were made retroactive, and because it shows the legislative intent behind the regulation of political parties. Expecting compliance with Montana's open meeting laws and protecting the rights of central committee members who are duly elected provide the compelling state interest, and requirements to follow open meetings laws are not meddling in the internal affairs

of the party.

While it is true that the review of party rules for legality will need to balance the rights of the party and its members, that analysis is for a district court hearing after evidence has been heard. Any claim of first amendment protections for the party is an issue of fact and law that would require review at the district court level during a show cause hearing, and that is the remedy that Darrow seeks.

CONCLUSION

The law and the record demonstrate that political parties are subject to appropriate state regulation and that specifically parties are subject to open meetings laws. Darrow, as an elected member of the MCDCC, should be permitted to enjoy the constitutional rights afforded to him by the *Montana Constitution*.

Therefore, Plaintiff respectfully requests this Court reverse the district court's granting of Defendant's motion to dismiss and remand for hearing and further proceedings in accordance with Montana law.

Respectfully submitted this 15th day of August, 2021.

/s/Benjamin M. Darrow
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CERTIFICATE OF COMPLIANCE

Pursuant to the Montana Rules of Appellate Procedure, I hereby certify that this Appellant's Reply Brief is printed with proportionately-spaced Time New Roman typeface of 14 points; is double spaced except for lengthy quotations or footnotes; and does not exceed 5,000 words. The exact word count is 2,922 words as calculated by my Microsoft Word software excluding the Table of Contents, the Table of Authorities, and Certificate of Compliance.

Dated this 15th day of August, 2021.

/s/Benjamin M. Darrow
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CERTIFICATE OF SERVICE

I, Benjamin M. Darrow, hereby certify that I have served true and accurate copies of the foregoing Brief - Appellant's Reply to the following on 08-15-2021:

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