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STATE OF MONTANA
Case Number: DA 21-0591

IN THE SUPREME COURT OF THE STATE OF MONTANA

Case No. DA 21-0591

JOSHUA F. CLARK,

Plaintiff/Appellant,

vs.

MISSOULA COUNTY SHERIFF TERRY J. MCDERMOTT, the COUNTY OF MISSOULA, MONTANA, and HUMAN RIGHTS COMMISSION,

Defendants/Appellees.

APPELLANT'S PRINCIPAL BRIEF

On Appeal from the Montana Fourth Judicial District Court
Missoula County, Cause No. DV-15-1290
Before Hon. Jennifer B. Lint

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STATEMENT OF THE ISSUE

The District Court committed prejudicial legal error in dismissing Clark's cause of action, filed under 42 U.S.C. § 1983, for violation of his federal Constitutional right of Free Speech. The erroneous ruling should be reversed, and the case remanded to adjudicate the § 1983 claim on the merits.

STATEMENT OF THE CASE

Clark filed this action against Missoula County Sheriff Terry J. McDermott (McDermott) and the County of Missoula (the County) on December 18, 2015. Clark alleged wrongful discharge, negligence per se, intentional infliction of emotional distress, and, under 42 U.S.C. § 1983, violation of his federal right to Free Speech. (Amended Complaint, Petition for Judicial Review and Jury Demand (Sept. 12, 2017), ¶¶ 73-81 (AR22-AR23.) (Amended Complaint).) Meanwhile, Clark also filed an alternative complaint (HRB Complaint) with the Montana Human Rights Bureau on grounds of illegal political discrimination and retaliation.

On August 14, 2017, the Human Rights Commission issued its Final Agency Decision on the HRB Complaint, in which the agency held in favor of the respondents. To pursue an appeal of the decision on the HRB Complaint, as well as to further prosecute his wrongful discharge/federal civil rights action, Clark filed an Amended Complaint on September 12, 2017. (AR1-AR93.) Count Six of the Amended Complaint (AR22-AR-23) reads:

COUNT SIX
42 U.S.C. § 1983 First Amendment Violation against McDermott

> 73. Clark re-alleges the foregoing paragraphs as if fully set forth herein.
>
> 74. McDermott acted under color of state law.
>
> 75. The acts of McDermott deprived Clark of his particular rights under the United States Constitution.
>
> 76. Under the First Amendment, a public employee has a qualified right to speak on matters of public concern.
>
> 77. Clark spoke as a private citizen and not part of Clark's official duty as a public employee.
>
> 78. McDermott took an adverse employment action against Clark.
>
> 79. Clark's speech was a subsequent or motivating factor for the adverse employment action.

> 80. The action McDermott took against Clark is an adverse employment action as a reasonable employee would have found the action materially adverse, which means it might have dissuaded a reasonable worker from engaging in protected activity.
>
> 81. As the direct and proximate result of McDermott's acts, Clark was damaged in an amount to be determined at trial.

(AR 00022-AR 00023.)

McDermott and the County filed a motion to dismiss all independent causes of action in the Amended Complaint on grounds of preemption under the Montana Human Rights Act (MHRA). (See Defendants/ Respondents' R. 12(b)(6) Mot. to Dismiss Amend. Compl. and Br. in Support (Nov. 13, 2017) (AR 00094–00216).) The District Court granted the motion to dismiss as to all proceedings before it but Clark's petition for judicial review of the HRB decision. (Opinion and Order RE: Amended Complaint (April 5, 2018) (AR 00217–00230).) The District Court's rationale upon which it based its order addressed the federal § 1983 claim as follows:

> Clark also concedes at least since the Montana Supreme Court issued its decision in *Romero v. J&J Tire*, 238 Mont. 146, 151, 777 P.2d 292, 295-96 (1998), the Court's constant rulings uphold that the MHRA's prohibition against a jury

> trial in discrimination claims does not violate the right to trial by jury guaranteed by the Montana Constitution. Clark further agrees the Court upheld the MHRA's exclusive remedy provision in *Harrison v. Chance*, 244 Mont. 215, 220, 797 P.2d 200, 202 (1990). Read together, these two cases established the rule that the exclusive remedy provisions of the MHRA do not violate either federal or Montana Constitutional rights to access the courts, equal protection, trial by jury, both federal and Montana Constitutional right to contract, substantive due process or equal protection. ***This restriction includes Clark's claims under 42 U.S.C. § 1983***. Thus, Clark's fundamental right to a jury trial argument seeks to overturn these precedents, which have been in place for at least 30 years.

(*Id.*, p. 8 (emphasis added); (AR224).) The District Court cited no other authority for applying its MHRA analysis to Clark's § 1983 claim.

STATEMENT OF THE FACTS

This appeal requests reversal of an order granting a motion to dismiss filed under Mont. R. Civ. P. 12(b)(6). (See Defendants/ Respondents' Rule 12(b)(6) Mot. to Dismiss Amend. Compl. and Br. in Support (Nov. 13, 2017) (AR 00094–00216); Opinion and Order RE: Amended Complaint (April 5, 2018) (AR 00217–00230).) For the purposes of the Court's review, Clark's amended complaint "is construed in the light most favorable to the plaintiff, and ***all allegations of fact*** contained therein are taken as ***true***." *Wilson v. Taylor*, 194 Mont.

123, 126, 634 P.2d 1180, 1182 (1981) (emphasis added). Those facts are as follows:

1. Joshua F. Clark (Clark), is a resident of Missoula, County, Montana. He worked for the Missoula County Sheriff's Office during all relevant times pertaining to this Amended Complaint. (Amended Complaint, ¶ 1 (AR 00002).)

2. Terry J. McDermott (McDermott), is the Missoula County Sheriff. (*Id.*, ¶ 2 (AR 00002).)

3. Missoula County is a subdivision of the State of Montana. (*Id.*, ¶ 3 (AR 00002).)

4. Pursuant to MCA § 49-2-102 Clark brought a claim against Defendants with the Montana Human Rights Bureau. (*Id.*, ¶ 4 (AR 00002).)

5. Clark has 22 years of law enforcement service in Missoula, Montana. During his long career, his performance evaluations were consistently "above satisfactory." He was never once disciplined. Clark started as a detention officer with the Missoula County Sheriff's Office in March 1993. The Missoula Police Department hired Clark on

February 1, 1994, and served there until December 31, 2003, when the Missoula County Sheriff's Office hired him. He has numerous awards and letters of commendation and appreciation that span his career, going back to the academy. (*Id.*, ¶ 5 (AR 00002–00003).)

6. Clark took on a variety of extra duty assignments throughout his law enforcement career at both the City and County. His supervisors picked him for challenging positions and extra responsibilities. He performed well in these special assignments, and in his career in general. As a young deputy, management asked him to serve on a review board that resulted in a detention officer being found guilty and terminated. Supervisors relied on Clark to take on more and more responsibilities, the most challenging of which was deputy coroner. Clark served as deputy coroner from August 2006 to December 2009 and then again from July 2011 to December 2014. (*Id.*, ¶ 6 (AR 00003).)

7. Sheriff Ibsen promoted Clark to Captain of Professional Standards, from Senior Deputy, in July 2011. This was a brand new division and bore the responsibility for sensitive internal investigations

of deputies and detention officers. Clark did not request this assignment, but knew that the job had to be done, and wanted to help the people of Missoula County, the Sheriff's Office, and Sheriff Ibsen. In this position, Clark performed the thankless and stressful role of policing the police, investigating his peers, and holding them accountable when necessary. Sheriff Ibsen specifically asked Clark to handle this responsibility because he had faith in his professionalism, and Clark's belief that those in law enforcement owe it to the people to uphold their public trust. (*Id.*, ¶ 7 (AR 00003–00004).)

8. The Professional Standards Division was a unique position and oversaw the Training Lieutenant, who was in charge of all training for the sworn deputies. It also oversaw the Public Information Officer (PIO) position, which is the voice and face of the department. This position is even more unique since the Captain of Professional Standards does not answer to Undersheriff, but directly to the Sheriff. Also, if the Sheriff and Undersheriff are unavailable, the P.S. Captain takes over filling the role of the Sheriff, even if he is not the most senior

Captain, which Clark was not when he first took the position. (*Id.*, ¶ 8 (AR 00004).)

9. In his role as Captain of Professional Standards, Clark investigated a number of deputies and detention officers for various allegations of professional or official misconduct. Clark recommended discharge from the force in a few of these cases. (*Id.*, ¶ 9 (AR 00004).)

10. Clark accepted a promotion to Undersheriff on March 3, 2013. Detective Captain Maricelli had retired, and Undersheriff Dominick requested to move to his "dream job": Captain of Detectives. Clark agreed to move into the Undersheriff post because he knew, whoever the next sheriff was, he would not be demoted past Captain under any new Sheriff. This was his understanding, from the custom and practice of the last 30 years as well as the express terms of Mont. Code Ann.§ 7-32-2102(2), and based on this custom and practice and express law, it was also, on information and belief, the understanding of Sheriff Ibsen, Captain Dominick, and Captain Brad Giffin, and almost anyone else who had worked as a deputy in the last 30 years. (*Id.*, ¶ 10 (AR 00005).)

11. After promoting him to Captain and then Undersheriff, the County invested a great deal of time and money in Clark's advanced education and training, including 528 hours of training in technical and leadership courses and classes. (*Id.*, ¶ 11 (AR 00005).)

12. After Clark's promotion to Undersheriff, Patrol Captain Giffin moved to Clark's old job as Captain of Professional Standards. Lt. Rob Taylor was promoted to Patrol Captain. If Clark had stayed at his position of Captain of Professional Standards, and someone else would have been promoted to Undersheriff, Clark would have remained as the second senior Captain, behind Patrol Captain Giffin, followed by Captain Dominick. Following this order of seniority, when Clark left Undersheriff, he should have been returned to Captain. With Captain Giffin's retirement in November 2014, Clark should be the senior Captain in the department. (*Id.*, ¶ 12 (AR 00005–00006).)

13. On August 9, 2013, McDermott filed a human rights complaint against the Missoula County Sheriff's Office, Sheriff Carl Ibsen, and Captain Mike Dominick, alleging discrimination and retaliation on the basis of political belief. (*Id.*, ¶ 13 (AR 00006).)

14. On September 9, 2013, Clark signed a five-page witness statement adverse to McDermott's complaint, denying a number of material facts cited in the complaint as evidence, and speaking critically of McDermott's character and fitness in direct and candid terms. (*Id.*, ¶ 14 (AR 00006).)

15. A new Sheriff, McDermot[t], was elected on November 4, 2014, and sworn into office in December 2014. He acknowledged disruption to morale in the Sheriff's Office that had resulted from a long tough campaign, but promised in the news media not to act hastily. (*Id.*, ¶ 15 (AR 00006).)

16. Clark had been McDermott's principal opponent during the election, running against McDermott on the Democratic Party ticket in the primary, and then as a write-in candidate in the general election. During the campaign, Clark criticized McDermott's ethics freely, such as McDermott's unpaid Missoula County property tax bills. Clark then filed a political practice complaint against McDermott in August 2014. In October, the complaint was found by the Commissioner of Political Practices to have merit. In a decision dated October 8, 2014, McDermott

was found to have accepted and failed to report illegal corporate contributions, and the case was referred for prosecution. (*Id.*, ¶ 16 (AR 00007).)

17. In August 2014, McDermott approached Clark to have a closed door talk. McDermott told Clark that if he had lost the primary election, he had planned to "retire," and made it clear that since Clark lost the election, he was expected to do the same. Since Clark intended to work at least five more years before considering retirement, his answer was "I am not going to retire." McDermott appeared agitated and displeased by Clark's response. (*Id.*, ¶ 17 (AR 00007).)

18. After the general election in November 2014, a rumor was started at the Sheriff's Office that Clark was planning to retire and move to Kalispell or "up north." The rumor persisted in the Sheriff's Office until Clark felt impelled to circulate an email explaining to everyone who might care that he had no intention to retire. (*Id.*, ¶ 18 (AR 00007–00008).)

19. When McDermott first announced he was thinking of running for sheriff, McDermott told Clark he wanted him to stay in the

Captain of Professional Standards position, because it was a tough job, and Clark was both good at it and trustworthy. (*Id.*, ¶ 19 (AR 00008).)

20. As it turned out, on January 1, 2015, McDermott demoted Clark five ranks, to Senior Deputy Sheriff, and assigned him to work on Sgt. Petersen's patrol team for the Sunday to Tuesday graveyard shift. (*Id.*, ¶ 20 (AR 00008).)

21. At the same time Clark was demoted to patrol deputy, a sergeant who endorsed McDermott during the campaign, and attacked Clark publicly, was leap-frogged past lieutenant to Captain of Patrol. (*Id.*, ¶ 21 (AR 00008).)

22. Clark's new position included no supervisory duties. At the time, all four of the patrol teams were short-staffed. Sgt. Petersen's patrol team was the shortest with four people on the shift. The other three teams had five deputies on the shift. The other three teams had a Senior Deputy II as the Acting Sergeant. This meant that these three teams did not have a Senior Deputy II, so the Senior Deputy on each team was serving as the acting Senior Deputy II. (*Id.*, ¶ 22 (AR 00008).)

23. If Clark would have been put on any of the three other teams, he too would be the acting Senior Deputy II, and would have had at least some duties of supervising and mentoring junior deputies. Although "acting Senior Deputy II" is the lowest supervisory position in the patrol division, it is still higher than the position to which Clark was demoted. At the time of his demotion, Clark was the third most senior patrol deputy, and the most senior deputy without any rank on patrol. (*Id.*, ¶ 23 (AR 00009).)

24. Indeed, he was 15th in seniority among the 47 sheriff's deputies. And as for total law enforcement experience, there were only five sworn members of the Sheriff's Office that have as much or more total years as Clark did. (Ken Guy, Mike Dominick, Dave Walrod, Bob Parcell, Scott Newell). Yet, he was demoted to the lowest rank for which he was eligible, with no supervisory duties whatsoever. The summary method of this five-rank demotion, to the lowest possible rank for a deputy with at least four years of service, functioned as assault on Clark's leadership stature and professional reputation and was obviously personally humiliating to Clark. McDermott's actions were

designed to and did cause an extremely negative emotional response in Clark. (*Id.*, ¶ 24 (AR 00009).)

25. While Clark maintained his former Captain's pay, the graveyard patrol posting stripped him of valuable benefits such as weekends off; nights off; holidays off; flexible work and vacation schedules; civilian work clothes; and FBI national academy eligibility. (*Id.*, ¶ 25 (AR 00009–00010).)

26. After McDermott demoted Clark five full ranks to patrol deputy, new Undersheriff Jason Johnson falsely reported to news media that Clark had turned-down a detective position, and was satisfied with the arrangement: "He felt like that was the fairest decision." (*Id.*, ¶ 26 (AR 00010).)

27. Clark then complained to McDermott and Johnson, in an email, that Johnson's statements to the press were flatly inaccurate. In fact, Clark had asked to be returned to his old rank, as the law requires. In a responsive email, McDermott expressly admitted to Clark that the happy talk portrayed in the newspaper was "inaccurate." Yet,

McDermott made no effort to publicly correct Johnson's misstatement of the facts. (*Id.*, ¶ 27 (AR 00010).)

28. At the time of Clark's demotion, the last position he had occupied prior to his acceptance of the Undersheriff post, Captain of Professional Standards, was open and available. McDermott could have assigned him to that position, or another Captain could have been moved laterally to the position, and some other captaincy offered to Clark. Instead, Clark was demoted to the lowest possible rank that can be occupied by a deputy sheriff with four or more years in service. (*Id.*, ¶ 28 (AR 00010).)

29. McDermott then promoted a sergeant, who had been an ardent McDermott loyalist during the campaign, past the intermediate rank of lieutenant, up to Captain of Professional Standards. This, even though during Clark's tenure in that post, he took more complaints about that individual than any other sworn deputy or detention officer in the County. (*Id.*, ¶ 29 (AR 00011).)

30. McDermott and Johnson announced the summary demotion to Clark on December 30, 2014. (*Id.*, ¶ 30 (AR 00011).)

31. Clark was assigned to patrol graveyard, without a Taser; with an expired bulletproof vest; without a mobile data terminal; without a log-in or training for the Mobile record management system; and without training or any instruction on the Watchguard car video system, none of which had been on-line back when Clark had been a patrol deputy. (*Id.*, ¶ 31 (AR 00011).)

32. When he went on his first new shift, Clark had not qualified with his duty handgun in his duty gear (uniform belt and holster) for the past three and one-half years, since he always qualified in what he wore the most, plain clothes gear. His duty rifle was rebuilt in December, moreover, and he had not re-qualified with it yet. He was assigned a duty shotgun, but neither ammunition nor an opportunity to qualify with it. And it is customary in the Sheriff's office to supply 14-30 days notice prior to an involuntary shift change. McDermott gave Clark only two days notice. (*Id.*, ¶ 32 (AR 00011).)

33. As further retaliation, McDermott took negative and arbitrary personnel action against two other prominent Clark supporters, moving one from a prestigious captaincy to a new non-

supervisory position, and another out of the Public Information Officer position—the very conduct Undersheriff Johnson had complained so bitterly about when he and McDermott filed their civil rights complaints in the Summer of 2013. (*Id.*, ¶ 33 (AR 00012).)

34. Despite the retaliation, Clark did not want to retire, as McDermott had so strongly suggested during the campaign, and was determined to make the most of a bad situation. Immediately, as soon as he went to work for his new patrol sergeant, Clark was called-up for guidance and leadership, including, in particular, two harrowing but successful gun-involved suicide negotiations. (*Id.*, ¶ 34 (AR 00012).)

35. McDermott's naked antagonism and continuing effort to humiliate and belittle Clark, on top of the already heightened stress normally involved in law enforcement, immediately took a telling toll. Clark began suffering insomnia, drastic weight loss, and other severe physical and emotional symptoms. He sought medical attention, and his physician recommended a leave of absence, and counseling. (*Id.*, ¶ 35 (AR 00012).)

36. When Clark adhered to the advice to take a leave of absence, McDermott indulged in casual conversation about Clark's medical issues outside his chain of command, implying to Clark's fellow deputies complaints about a lack of commitment. (*Id.*, ¶ 36 (AR 00012–00013).)

37. McDermott's disclosures were in clear violation of Clark's right to privacy, as well as long-established personnel policies of the County and the Sheriff's Office, and apparently designed to alienate Clark from his fellow deputies. (*Id.*, ¶ 37 (AR 00013).)

38. Clark learned that his medical leave was also the topic of open speculation at the sergeant's meeting the week of January 14, 2015. The sergeants or acting sergeants then went back to their teams and informed the teams of Clark's medical leave. When Clark complained about this treatment to Missoula County Human Resources Department Head, Patty Baumgart, Baumgart furthered the campaign of harassment by informing Sheriff McDermott and Johnson about the specifics of Clark's complaint. This even though Baumgart stated in an email that she would not share the specifics about the complaint unless Clark gave her permission to do so. (*Id.*, ¶ 38 (AR 00013).)

39. McDermott was in such a hurry to bury Clark on the graveyard shift, he even refused Clark's offer to walk him and Undersheriff Johnson through the quarterly reporting for the West Central Montana Drug Task Force grant, which was due on January 10, 2015. This was one of the Undersheriffs responsibilities that now fell to Johnson, who nearly let it lapse. Ultimately, railroading Clark was so important to McDermott that he allowed it to jeopardize the very mission of the Sheriff's Office. (*Id.*, ¶ 39 (AR 00013–00014).)

40. The most likely reasonable inference in these circumstances is that in the summary demotion of his political antagonist, McDermott intended (a) to humiliate and degrade Clark in front of his peers and former subordinates; (b) to demonstrate to him that, given Clark's political stance, his training, experience, skills, and seniority were no longer of any value to or needed by the Sheriff's Office; and (c) to make a pathetic mockery of the sacrifices Clark and his family had made during his long and faithful years of law enforcement service. The most likely conclusion, on the evidence, is that McDermott's ultimate purpose was to force Clark into early retirement. McDermott most likely also

intended to send an intimidating message to anyone else who might have the temerity to challenge or oppose him in any future Human Rights Bureau proceeding or political campaign. (*Id.*, ¶ 40 (AR 00014).)

41. Despite his desire to continue in service, the outrageous treatment—and the alarming effects it had on Clark's morale, physical and mental health, and family relationships—were too much for Clark to cope with on top of the psychological rigors already associated with law enforcement. McDermott had succeeded. The hostility forced on Clark left only one reasonable avenue available to him: retirement. After 22 years in law enforcement, he clocked out for the last time on January 30, 2015, without ceremony, thanks, or goodbye. (*Id.*, ¶ 41 (AR 00014–00015).)

42. As a malicious parting shot, Patricia Baumgart, Missoula County Human Resource Director, later leaked portions of Clark's personnel file to the news media, a page of which then appeared on a local television news station's web page on February 5, 2015. (*Id.*, ¶ 42 (AR 00015).)

STANDARD OF REVIEW

In assessing the facial sufficiency of an asserted claim for relief, the Court should liberally construe all well-pled factual allegations in the light most favorable to the claimant. E.g., *Babcock v. Casey's Mgmt., LLC*, 2021 MT 215, ¶ 25, 405 Mont. 237, 494 P.3d 322 (citing cases). Whether an individual is entitled to a jury trial presents a question of law which the Court reviews de novo for correctness. *Supola v. Mont. Dept. of Justice, Drivers License Bureau*, 278 Mont. 421, 423, 925 P.2d 480, 481 (1996).

SUMMARY OF THE ARGUMENT

The function of the court in construing a statute is simply to ascertain and declare what is in terms or in substance contained therein, not to insert what has been omitted or omit what has been inserted. *Griffith v. Butte Sch. Dist. No. 1*, 2010 MT 246, ¶ 33, 358 Mont. 193, 244 P.3d 321 (citing Mont. Code Ann. § 1-2-101). In this case, the District Court exceeded longstanding rules of statutory interpretation in interpreting the exclusive remedy provision, Mont. Code Ann. § 49-2-512, of the Montana Human Rights Act. In doing so,

it committed prejudicial error in concluding that Clark's 42 U.S.C. § 1983 claim was preempted. The plain language of section 49-2-512 states that "[t]he provisions of [the MHRA] establish the exclusive remedy for acts constituting an alleged violation of chapter 3 or this chapter, including acts that may otherwise also constitute a violation of the discrimination provisions of ***Article II, section 4, of the Montana constitution or 49-1-102***." Mont. Code Ann. § 49-2-512 (emphasis added).

The District Court concluded this statute also applied to Clark's federal § 1983 claim, but offered no explanation as to how that could be the case. Chapter 3 of the MHRA describes the governmental code of fair practices, and nothing therein suggest that the MHRA preempts a federal § 1983 claim if it is not first brought before the Human Rights Bureau. The remainder of the preemption explicitly applies to discrimination arising under State law. In other words, there is no authority to support the District Court's conclusion that Clark's was first required to exhaust the provisions found within the MHRA prior to bringing his § 1983 action in district court.

To the contrary, the District Court's conclusion stands out from caselaw holding that state procedural rules cannot burden a plaintiff's federal rights afforded under a federal statute. *Spillers v. Third Jud. Dist. Ct.*, 2020 MT 8, 398 Mont. 323, 456 P.3d 560. The District Court's conclusion also contravenes precedent from the United States Supreme Court concerning the right to a jury trial afforded by the Seventh Amendment extends to statutory claims which sound in tort. *City of Monterey v. Del Monte Dunes at Monterey, Ltd,* 526 U.S. 687, 709 (1999).

To require a plaintiff to first exhaust the administrative procedures within the MHRA before allowing them to bring their federal claims in district court would drastically and artificially enlarge the scope of the MHRA, far beyond what was intended by the Legislature. Neither Sheriff McDermott, the County, nor the District Court can point to any provision of the MHRA which would suggest such a requirement exists. The District Court, therefore, decided to dismiss Clark's § 1983 claim based not on any legal authority, but instead lumped that claim in with his state claims. Thus, the District

Court improperly denied Clark his right to a trial by jury on his § 1983 claim, which is not subject to the MHRA and was properly brought, in the first instance, in District Court. Accordingly, this Court should reverse the District Court's decision as to the § 1983 claim and remand for further proceedings.

THE ARGUMENT

1. The District Court erred in ruling that the MHRA preempts Clark's § 1983 claim.

A. Count Six of the Amended Complaint properly alleges a violation of Clark's federal First Amendment rights in retaliation for his exercise of his right of Free Speech.

"A citizen who works for the government is nonetheless a citizen." *Garcetti v. Ceballos*, 547 U.S. 410, 419 (2006). As the United States Supreme Court has held, "[t]he First Amendment limits the ability of a public employer to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens." *Id.* "So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." *Id.*

> The Court's employee-speech jurisprudence protects, of course, the constitutional rights of public employees. Yet the First Amendment interests at stake extend beyond the individual speaker. The Court has acknowledged the importance of promoting the public's interest in receiving the well-informed views of government employees engaging in civic discussion. *Pickering* again provides an instructive example. The Court characterized its holding as rejecting the attempt of school administrators to "limi[t] teachers' opportunities to contribute to public debate." 391 U.S., at 573, 88 S.Ct. 1731. It also noted that teachers are "the members of a community most likely to have informed and definite opinions" about school expenditures. *Id.*, at 572, 88 S.Ct. 1731. The Court's approach acknowledged the necessity for informed, vibrant dialogue in a democratic society. It suggested, in addition, that widespread costs may arise when dialogue is repressed. The Court's more recent cases have expressed similar concerns. *See, e.g., San Diego v. Roe*, 543 U.S. 77, 82, 125 S.Ct. 521, 160 L.Ed.2d 410 (2004) (per curiam) ("Were [public employees] not able to speak on [the operation of their employers], the community would be deprived of informed opinions on important public issues. The interest at stake is as much the public's interest in receiving informed opinion as it is the employee's own right to disseminate it" (citation omitted)); *cf. Treasury Employees*, 513 U.S., at 470, 115 S.Ct. 1003 ("The large-scale disincentive to Government employees' expression also imposes a significant burden on the public's right to read and hear what the employees would otherwise have written and said").

Id., 547 U.S. at 419–20.

Title 42, U.S.C. § 1983, provides "a method for vindicating federal rights elsewhere conferred." *Albright v. Oliver*, 510 U.S. 266, 271 (1994). In relevant part, § 1983 provides:

> Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory...subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress...

42 U.S.C. § 1983. To establish a § 1983 violation, a plaintiff must show (1) deprivation of a constitutional right and (2) a person who committed the alleged violation acted under color of state law. *West v. Atkins*, 487 U.S. 42, 48, 108 S.Ct. 2250, 101 L.Ed.2d 40 (1988); *Williams v. Gorton*, 529 F.2d 668, 670 (9th Cir.1976).

A plaintiff need only allege a specific injury and show causal relationship between the defendant's conduct and the injury suffered. See *Rizzo v. Goode*, 423 U.S. 362, 371–72 (1976). A person deprives another of a right "if he does an affirmative act, participates in another's affirmative acts, or omits to perform an act which he is legally

required to do so that it causes the deprivation of which complaint is made." *Johnson v. Duffy*, 588 F.2d 740, 743 (9th Cir.1978).

Clark asserts Sheriff McDermott and Missoula County violated his rights by unlawfully retaliating against him for engaging in conduct protected by the First Amendment. (Amended Complaint, ¶¶ 73-81, AR22-AR23.) "The First Amendment forbids government officials from retaliating against individuals for speaking out." *Blair v. Bethel Sch. Dist.*, 608 F.3d 540, 543 (9th Cir.2010). The U.S. Supreme Court explained: "[P]ublic employees do not surrender all their First Amendment rights by reason of their employment. Rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." *Garcetti*, 547 U.S. at 417 (citations omitted).

B. The District Court dismissal of the § 1983 claim was prejudicial legal error.

Under the Supremacy Clause of the United States Constitution, federal law is the supreme law of the land. U.S. Const. art. VI, cl. 2. A state law is preempted when there is a conflict between federal and state laws. See *Fidelity Fed. Sav. & Loan Ass'n v. de la Cuesta*, 458 U.S.

141, 153 (1982). Thus, whatever the law of the state of Montana regarding Clark's right to a jury trial on issues of Montana law, on the § 1983 Free Speech claim, federal law controls.

Meanwhile, the section of the MHRA that sets forth the terms and conditions of human rights preemption reads:

> The provisions of this chapter [the MHRA] establish the exclusive remedy for acts constituting an alleged violation of chapter 3 or this chapter, including acts that may otherwise also constitute a violation of the discrimination provisions of *Article II, section 4, of the Montana constitution or 49-1-102*. A claim or request for relief based upon the acts may not be entertained by a district court other than by the procedures specified in this chapter.

Mont. Code Ann. § 49-2-512 (emphasis added). What the preemption statute does not provide is the MHRA as the "exclusive remedy" for acts constituting a violation of the Free Speech provisions of the First Amendment of the U.S. Constitution.

A court's construction of the MHRA adheres to the same rules that apply to any other statute:

> The rules of statutory construction are well-settled. Section 1–2–101, MCA, commands that:
>
> > In the construction of a statute, the office of the judge is simply to ascertain and declare what is in

> terms or in substance contained therein, not insert what has been omitted or to omit what has been inserted. Where there are several provisions or particulars, such a construction is, if possible, to be adopted as will give effect to all.
>
> Additionally, "the intention of the legislature is to be pursued if possible," § 1–2–102, MCA, and no further interpretation is required when the plain language of the statute is clear and unambiguous. *Miller v. Eighteenth Jud. Dist. Ct.*, 2007 MT 149, ¶ 38, 337 Mont. 488, 162 P.3d 121 (citations omitted).

Griffith v. Butte Sch. Dist. No. 1, 2010 MT 246, ¶ 33, 358 Mont. 193, 244 P.3d 321 (interpreting the MHRA). "The Legislature knows how to craft a statute. . ." *State v. Parks*, 2013 MT 280, ¶ 40, 372 Mont. 88, 310 P.3d 1088. The Legislature, in its preemption statute, could have made express reference to the U.S. Constitution's Bill of Rights—as it did the Montana Constitution's Declaration of Rights. It chose not to. That decision means something: specifically, causes of action arising from the U.S. Bill of Rights are beyond the ambit of MHRA preemption.

Despite the lack of any mention of the federal Constitutional rights in the MHRA, however, the District Court dismissed Clark's § 1983 claim with little mention or analysis. (Opinion and Order RE: Amended Complaint (April 5, 2018) (AR 00217–00230).) It simply ruled

by assertion that MHRA preempts the § 1983 claim, holding it cannot be pursued in a Montana district court without first complying with the MHRA. In support of this decision, the District Court pointed to no authority as support. In short, the District Court expanded the reach of the MHRA preemption statute to the U.S. Bill of Rights with no textual justification for doing so.

The District Court decision was wrong. As this Court has recognized, a plaintiff may assert a 42 U.S.C. § 1983 claim in Montana state court. *Compare, Cummings v. Town of Plains,* 242 Mont. 236, 240, 790 P.2d 486, 488 (1990). Because the District Court's decision violated "the office of the judge," Mont. Code Ann. § 1–2–101, it should be reversed, and the case should be remanded for a jury trial on the merits.

2. Clark has a right to a jury trial on his 42 U.S.C. § 1983 claim.

Recently, the Montana Supreme Court was faced with the issue of whether Montanans asserting substantive federal claims are entitled to trial by jury. *Spillers v. Third Jud. Dist. Ct.*, 2020 MT 8, 398 Mont. 323, 456 P.3d 560. In the decision, the Court recognized that a Montana

court's enforcement of federal claims should be done "in light of the purpose and nature of the federal right." *Id.* (quoting *Felder v. Casey*, 487 U.S. 131, 138-39 (1988) (superseded by statute on other grounds)). It elaborated thus: "State procedural rules may be displaced, however, when they conflict with the substance of a federal cause of action being litigated in state court." *Id.*, ¶ 13. "For example, the United States Supreme Court held in *Dice v. Akron, Canton & Youngstown R.R. Co.* [342 U.S. 359, 72 S. Ct. 312 (1952)] that the State of Ohio could not deny a railroad worker a jury trial in a Federal Employers Liability Act ("FELA") claim because the right to trial by jury 'is part and parcel of the remedy afforded railroad workers under [that] Act.'" *Id.* (quoting federal case law). The Court ruled "*Dice* stands for the proposition that state courts may follow their own rules of procedure but must see that those rules 'do not burden a plaintiff's federal rights under' federal statutes." *Id.* (citing *Ward v. Soo Line R.R. Co.,* 901 F.3d 868, 872-73 (7th Cir. 2018); and *Suesz v. Med-1 Solutions, LLC*, 757 F.3d 636, 651 (7th Cir. 2014) (holding that state courts have an obligation to follow

federal procedural rules when they are specifically tied to the federal claim)).

For purposes of a § 1983 claim, the right to a jury trial is substantive. "It is settled law . . . that the Seventh Amendment jury guarantee extends to statutory claims unknown to the common law, so long as the claims can be said to 'soun[d] basically in tort,' and seek legal relief." *City of Monterey v. Del Monte Dunes at Monterey, Ltd,* 526 U.S. 687, 709 (1999). "[T]here can be no doubt that claims brought pursuant to § 1983 sound in tort." *Id.*

> Just as common-law tort actions provide redress for interference with protected personal or property interests, § 1983 provides relief for invasions of rights protected under federal law. Recognizing the essential character of the statute, " '[w]e have repeatedly noted that 42 U.S.C. § 1983 creates a species of tort liability,'" *Heck v. Humphrey*, 512 U.S. 477, 483, 114 S.Ct. 2364, 129 L.Ed.2d 383 (1994) (quoting *Memphis Community School Dist. v. Stachura*, 477 U.S. 299, 305, 106 S.Ct. 2537, 91 L.Ed.2d 249 (1986)), and have interpreted the statute in light of the "background of tort liability," *Monroe v. Pape*, 365 U.S. 167, 187, 81 S.Ct. 473, 5 L.Ed.2d 492 (1961) (overruled on other grounds, *Monell v. New York City Dept. of Social Servs.*, 436 U.S. 658, 98 S.Ct. 2018, 56 L.Ed.2d 611 (1978)); accord, *Heck*, supra, at 483, 114 S.Ct. 2364. Our settled understanding of § 1983 and the Seventh Amendment thus compel the conclusion that a suit for legal relief brought under the statute is an action at law.

Id., 526 U.S. at 709–10.

In *City of Monterey*, a property owner filed a 42 U.S.C. § 1983 action against a city based on its repeated denial of a request for a development permit. Each time the property owner sought a development permit, the city refused. *City of Monterey*, 526 U.S. at 694. In its § 1983 action, the owner alleged an uncompensated taking under the Fifth Amendment. *Id.* at 698. The owner prevailed upon trial by jury, and the trial court ruling that the § 1983 action should be tried by jury was affirmed on appeal. The circuit court of appeals' decision was then reviewed on a writ of certiorari by the U.S. Supreme Court. The Supreme Court agreed with the property owner that its right to a jury trial was conferred by the Seventh Amendment and 42 U.S.C. § 1983. *Id.*, 526 U.S. at 710–12. The Court held that because an action under § 1983 sounds primarily in tort, it was of a type of action cognizable under the common law, and thus a cause of action for which the Seventh Amendment provides a trial by jury. *Id.*, 526 U.S. at 709–10.

The U.S. Supreme Court employed a similar analysis in *Felder v. Casey*, 487 U.S. 131 (1988). At issue in *Felder* was the application of 42 U.S.C. § 1983 to a Wisconsin notice-of-claim statute requiring prior notification about certain matters concerning the suit and, once notice had been provided, not to file suit for 120 days. *Felder*, 487 U.S. at 134. Under local law, noncompliance with the notice-of-claim statute constituted grounds for dismissal. The Court reaffirmed the "general and unassailable proposition … that States may establish the rules of procedure governing litigation in their own courts," but also emphasized that a local practice cannot be employed to defeat a federal right. *Id.*, 487 U.S. at 138. The Court held that the local statute was preempted on two bases. *Id.* First, the notice statute conflicted with the purpose and effects of the remedial objectives of § 1983. *Id.* Second, the local statute was "outcome-determinative," guaranteeing different outcomes in § 1983 litigation based solely upon the court in which the claim is asserted. *Id.*

Here, barring Clark from a jury trial on his § 1983 claim has the same affect. It conflicts profoundly with the purpose and remedial

objectives of the federal § 1983 statute, and it provides for a different outcome than if Clark had filed his claim in federal court. Thus, Montana's procedural rules must yield to Clark's substantive federal rights.

3. Clark was not required to exhaust his federal claim.

Finally, McDermott and Missoula County argued below that Clark failed to exhaust his remedies on his federal claim. This argument lacks merit. The Montana Supreme Court recognizes that a party "need not exhaust available state administrative remedies before seeking to vindicate a federal constitutional or statutory right through a § 1983 action filed in federal or state court." *Jones v. Montana Univ. Sys.*, 2007 MT 82, ¶ 39, 337 Mont. 1, 155 P.3d 1247 (citing *Patsy v. Board of Regents of State of Fla.*, 457 U.S. 496, 500–16 (1982)). This comports with U.S. Supreme Court precedent: "Based on the legislative histories of both § 1983 and § 1997e, we conclude that exhaustion of ***state*** administrative remedies should not be required as a prerequisite to bringing an action pursuant to § 1983." *Patsy*, 457 U.S. at 516 (emphasis added). Thus, a § 1983 claim is not one that must be

submitted to the Human Rights Bureau before a plaintiff can file in district court.

The ruling in *City of Monterey*, based as it is on the Seventh Amendment to the U.S. Constitution, should be binding. The Montana Supreme Court holds that "the right to trial by jury in this state is the ***same*** as that guaranteed by the Seventh Amendment." *Linder v. Smith*, 193 Mont. 20, 23, 629 P.2d 1187, 1189 (1981) (emphasis added). "This court has repeatedly held that the right guaranteed by the state Constitution (article 3, § 23) is the ***same*** as that guaranteed by the federal Constitution (Seventh Amendment), because the federal Constitution was the fundamental law of the territory at the time it was admitted into the Union as a state, and the right as it then existed was preserved in the state Constitution." *Consol. Gold & Sapphire Mining Co. v. Struthers*, 41 Mont. 565, 111 P. 152, 155 (1910) (emphasis added). See, *Davidson v. Davidson*, 52 Mont. 441, 158 P. 680, 682 (1916). As a result, Clark has a right to a jury trial on his § 1983 claim.

City of Monterey is also consistent with Montana's jury trial analysis in general. Article II, § 26 of Montana's Constitution embraces

all types of "actions at law" that had the right to a jury trial "associated with them prior to the adoption of the 1889 constitution." *State v. Items of Real Prop. Owned &/or Possessed by Chilinski*, 2016 MT 280, ¶ 9, 385 Mont. 249, 383 P.3d 236 (right to a jury trial reaches *in rem* actions, even though no money judgment is sought). Montana's 1889 Constitution codified and preserved all existing common law rights to a jury trial. *Id.* Those rights were then re-codified and protected in Montana's 1972 Constitution. *Id.*

Common-law tort procedures for assigning damages, which is entailed in a § 1983 action, have also traditionally included "trial by jury." *Saucier ex rel. Mallory v. McDonald's Restaurants of Mont., Inc.*, 2008 MT 63, ¶ 90, 342 Mont. 29, 179 P.3d 481 (Nelson, J, concurring). See, *Morgan v. Reynolds*, 1 Mont. 163, 164 (1870). "Like English common-law-courts, and unlike admiralty courts, colonial common-law courts provided for trial by jury." *Chilinski*, ¶ 13. Thus, Clark, as a plaintiff seeking money judgment under § 1983 for violation of his right of Free Speech, has a Constitutional right to trial by jury because his

action is in nature a common-law tort claim for which the remedies are not in equity but "at law." *City of Monterey*, 526 U.S. at 709–10.

CONCLUSION

Accordingly, the Court should reverse the District Court order dismissing Clark's § 1983 claim, and remand the case with directions to adjudicate the claim on its merits.

DATED this 28th day of February 2022.

Respectfully Submitted,
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CERTIFICATE OF COMPLIANCE

Pursuant to Mont. R. App. P. 11(4)(d), I certify that Appellant's Principal Brief is printed with proportionately spaced Century text typeface of 14 point and double-spaced, except for footnotes and for quoted and indented material; and the word count calculated by Microsoft Word is less than 10,000 words, excluding the table of contents, table of authorities, and this certificate of compliance.

DATED this 28th day of February 2022.

/s/Quentin M. Rhoades
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I hereby certify that on the 28th day of February 2022, a true and accurate copy of the foregoing Principal Brief has been served upon each attorney of record via the eService filing system, and addressed as follows:

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