Docket No. 12-35809

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DOUG LAIR, et al.

Appellees,

v.

JAMES MURRY, in his official capacity as Montana Commissioner of Political Practices, and STEVE BULLOCK, in his official capacity as Montana Attorney General,

Appellants.

On Appeal from the Final Order and Judgment of the United States District Court for the District of Montana
(Hon. Charles C. Lovell, Presiding)

District of Montana Case No. 6:12-cv-00012-CCL

APPELLANTS' REPLY BRIEF IN SUPPORT OF EMERGENCY MOTION FOR STAY PENDING APPEAL

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The State of Montana Appellants submit this reply brief in support of their emergency motion for a stay of the October 3, 2012, District Court Order and Judgment nullifying Montana's political campaign contribution limits. Appellants request that the temporary stay of the District Court's Order and Judgment, issued by this Court on October 9, 2012, remain in place pending disposition of the appeal. Lifting the stay will cause irreparable harm by drastically changing the rules governing campaigns in Montana in the closing weeks of the November 6 election. *See Townley v. Miller*, 2012 U.S. App. LEXIS 18916 (9th Cir. 2012) (Reinhardt, J., concurring) ("A failure to stay forthwith any injunction issued by the district court would accordingly result in irreparable injury to the State of Nevada and its citizens, and would be directly contrary to the public interest."). *Cf. South Carolina v. United States*, Civil Action No. 12-203, at 32 (D.D.C. October 10, 2012) (declining to implement a new voter ID law prior to the 2012 elections, and stating, "With under four weeks left to go, the potential for chaos is obvious."), attached as Ex. A.[1]

Each of the four criteria governing the decision whether to stay a district court injunction pending appeal weigh heavily in favor of Appellants.

1. Substantial, irreparable harm to the State of Montana and its citizens will occur if the stay is removed at this late date. The District Court decision comes just four weeks before Montana's statewide general elections, and

[1] Exhibits will be filed separately shortly after filing the brief.

after absentee voting has already begun.[2] The District Court's Order and Judgment have created confusion for Montana officials charged with responsibility for enforcing Montana's campaign finance laws. Donors, candidates, and political parties are uncertain as to the present or future status of contribution limitations, and the lack of a clear regulatory framework threatens the fairness and integrity of Montana's elections.

The Appellees quip that no harm can come from the District Court's actions because all candidates can now accept unlimited contributions and the Commissioner's Office is alleviated of the "burden" of enforcing the limits. Appellees' Opposition, at 39.[3] This is a simplistic assessment that ignores entirely the legitimate interests of the State of Montana and its citizens in preserving the integrity of its elections. After the District Court's Order was issued on October 3, and Motions for Stay were filed, the Commissioner's Office issued a notice recommending that limits be voluntarily complied with, pending a decision on the stay. *See* unmarked Exhibit to Appellees' Opposition. Despite this recommendation, candidates and parties took conflicting positions with respect to the rules governing the election. *See, e.g., Montana Appeals Ruling as Campaigns Eye Unlimited Donations*, Billings Gazette, October 4, 2012. *See* Ex. B. The varied reactions of candidates and political parties, in a short six-day time period,

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[2] http://sos.mt.gov/Elections/index.asp

[3] Appellants note that the Appellees' response brief appears to be more than twice as long as allowed under Federal Rules of Appellate Procedure 27(d)(2).

demonstrates that the inability of state regulators to provide guidance will result in great disparities that would not otherwise occur. It is clear that confusion prevailed and harm was done. In the absence of a stay, much greater harm will occur.

2. The equities clearly favor continuation of the stay; no substantial harm will come to Appellees. Appellees argue that their First Amendment rights will be lost if they are unable to contribute more money than they have already contributed. Appellees' Opposition, at 40. The Supreme Court, however, has long held that contributions do not represent core speech, and that contribution limits are therefore evaluated under the exacting scrutiny standard. *See Buckley v. Valeo*, 424 U.S. 1, 21-22 (1976) ("A limitation on the amount of money a person may give to a candidate or campaign organization thus involves little direct restraint on his political communication, for it permits the symbolic expression of support evidenced by a contribution but does not in any way infringe the contributor's freedom to discuss candidates and issues."); *Federal Election Comm'n v. Beaumont,* 539 U.S. 146 (2003); *see also Thalheimer v. City of San Diego*, 645 F.3d 1109 (9th Cir. 2011).

Appellees incorrectly argue that contributions are core political speech, subjecting limits to strict scrutiny analysis. Appellees' Opp. Br. at 9. In making their previous contributions, the Appellees have already expressed support for their chosen candidates, and their freedom to discuss candidates and issues will not be infringed. Testimony at trial confirms this. *See, e.g.*, Testimony of Doug Lair, Ex. D, at 54:22-25; 57:4-25; 58:1-16 (stating that as an individual volunteer, he has

spent hundreds of hours this campaign cycle volunteering, fundraising, writing letters to the editor, blogging, going door-to-door, placing signs, and placing ads in the paper).

3. Continuing the stay is in the public interest. As in *Townley v. Miller*, *supra*, the public interest is best served by ensuring Montana's longstanding campaign contribution limits remain in place in the last weeks before the election. Montana legitimate interest in preventing corruption or the appearance of corruption through its contribution limits has been recognized and specifically upheld by this Court in *Eddleman*, and continues to this day. A Hobbesien political environment in which a free-for-all rush for unlimited contributions will create the appearance of corruption and may lead to actual corruption. It cannot fairly be argued that the public interest is served by changing fundamental rules governing campaigns in the last few weeks of an election. To the contrary, the public interest clearly is in maintaining a regulatory framework that will safeguard the integrity of Montana's elections.

4. Appellants are likely to prevail on appeal. The District Court has now issued its Findings and Conclusions. The District Court clearly erred both legally and factually. While time constraints and applicable page limits do not permit a full analysis of the District Court's errors, the discussion below shows that Appellants are likely to prevail on the merits of this appeal.

The District Court erred in concluding that Plaintiffs met their heavy burden of overcoming stare decisis, and improperly disregarded binding authority.

Montana previously prevailed in *Eddleman*, concerning the same statutes at issue in this case. All Ninth Circuit published opinions constitute binding authority, which must be followed unless and until overruled by a body competent to do so. *Gonzalez v. Arizona*, 677 F.3d 383, 390 n.4 (9th Cir. 2012) (en banc). *Eddleman* is binding authority.

The District Court erroneously concluded that *Eddleman* is no longer good law in light of *Randall v. Sorrell*--a plurality opinion. Citing to *Kilgore v. Keybank, Nat. Assn.*, 673 F.3d 947 (9th Cir. 2012), the District Court holds that *Eddleman* "is not binding on this Court because the U.S. Supreme Court's intervening decision in *Randall* compels a different outcome." Findings, at 24. The District Court's holding, however, is in direct conflict with authority from the Ninth Circuit. In *Thalheimer, et al. v. City of San Diego*, 645 F.3d 1109, 1127, n.5, this Court held *Randall* to be persuasive authority, though not binding as precedent. In relying on *Randall*, the District Court improperly ignored *Thalheimer* and instead relied on *Kilgore*. Its mistake is compounded by the fact that the panel decision in *Kilgore* has been vacated by this Court and cannot be cited as precedent. *See Kilgore, et al. v. Keybank, et al.*, 2012 U.S. App. LEXIS 19928 (September 21, 2012). *Eddleman* remains binding authority which must be followed by the District Court. Further, the District Court appears to later acknowledge that the five factors of Justice Breyer's plurality opinion in *Randall* are only persuasive. Findings, at 25.

5. **Even if the Randall factors control, Montana's contribution limits pass constitutional scrutiny.** As already argued in the Appellants opening brief,

Randall v. Sorrell supports the conclusion that Montana's limits are closely drawn to match its interest in avoiding corruption or the appearance of corruption. If the *Randall* is applied, it is significant that the contribution limits must be evaluated based upon the factors identified as part of a balancing test. *Randall*, 548 U.S. at 261. *Taken together*, even if the *Randall* factors are applied, the evidence establishes that Montana's contribution limits are constitutional, and fails to establish that the contribution limits preclude candidates from running competitive campaigns or create serious associational or expressive problems as described in *Randall*. Neither the District Court nor the Appellees can muster evidence that Montana's limits are not closely drawn.

The Appellants briefly note the following problems with the District Court's *Randall* analysis:

Significant Restriction of Available Funds. The District Court asserts that Montana's limits are below those of Vermont. The Vermont limits, however, were imposed on a two-year election cycle. *Randall*, 548 U.S. at 238. The limits in Montana are on a per-election basis. In any race where there is a contested primary, Montana's limits double--making them higher than Vermont's limits. Findings, at 29. The District Court relied heavily on the testimony and report of the Appellants' expert witness Clark Bensen. The trial transcripts highlight many problems with Mr. Bensen's methodology. For example, Mr. Bensen acknowledged that he assessed comparatively small number of races, only 56 "competitive" races over a span of four election cycles (2004-2010), encompassing over 500 general

election contests. Further, he did not analyze primary elections. Mr. Bensen's analysis did not include below-$35 donations--a major part of Montana campaigning. Mr. Bensen did no analysis of whether or not a candidate could run a competitive campaign based on money raised under the current contribution limits. And Mr. Bensen did no analysis of Montana's inflationary adjustment. *See* Bensen Test., Ex. C at 138-155.

Mr. Bensen also acknowledged that incumbency is less of an advantage in Montana because of term limits, and that Montana--unlike Vermont--has competitive elections. Ex. C, 151: 2-8. The testimony at trial showed that the Appellees preferred candidates were winning their campaigns within current contribution limits. All but one of the preferred candidates won their elections. Representative Mike Miller testified that he won against an incumbent that outraised him. Ex. D, at 36:14-17; 39:1-24.

Uniformity of Contribution Limits. This *Randall* factor focuses on same limits for party organizations as for individuals. Vermont used the same aggregate approach as Montana in that all affiliated party organizations were subject to the aggregate limit. It is significant under this factor that Vermont considered coordinated party spending as in-kind contributions, whereas the evidence presented here is exactly the opposite. This factor is important because including expenses as an in-kind contribution obviously diminishes the value of any monetary contribution from the party.

Jim Brown, an attorney who also represents the Montana Republican Party testified that expenses incurred by political parties providing services to assist a campaign are not considered an in-kind contribution but Beaverhead County Republican Central Committee has not availed itself of this opportunity. Ex. C at 40:21-24; 50:5-51:14; 74:20-75:25. Brown admitted that door-knocking and "boots on the ground" are "a very important part of an effective political campaign" and are more important in lower tier (House and Senate races), which are the races with lower limits. Ex C, at 73:11-20; 74:5-19. Clark Bensen testified that political committees providing services and paying expenses are not considered an in-kind contribution, and he never analyzed opportunities available to PACs and political parties as a result of providing services. Ex. C at 156:4-15; 155:13-18.

Volunteer Services. The District Court clearly erred on this *Randall* factor. The Supreme Court's supposition in *Randall* that the Vermont in-kind contribution definition "would seem to count" expenses incurred by a volunteer (*Randall*, 548 U.S. at 259) is directly contrary to testimony at trial here. This factor is important because including expenses as an in-kind contribution obviously diminishes the value of any monetary contribution from the volunteer. The undisputed testimony of Messrs. Brown and Bensen is that expenses incurred by volunteers assisting a campaign in Montana are not considered an in-kind contribution. Ex. C, 52:20-53:6; 155:8-12.

Inflation Adjustment. The District Court should not attempt to "fine tune" limits, and should not fine tune an inflation adjustment factor when the like the

Consumer Price Index has not been rejected by any witnesses. Montana adjusts for inflation unlike Vermont. Mr. Bensen does not reject consideration of the Consumer Price Index and it was not part of his methodology. Ex. C, 170:4-12. Mr. Bensen does not have any knowledge about campaign costs in Montana, and he did not interview any Montana candidates or persons working on campaigns. Ex. C, 137:138:2; 152:10-154:3.

Special Circumstances. Appellees and the District Court ignore the evidence presented during trial of Montana's unique circumstances. Both the record in *Eddleman* and the record here establish that it costs significantly less to campaign for political office in Montana than elsewhere, and Montana's contribution limits satisfy closely drawn scrutiny. *Eddleman*, 343 F.3d at 1094; Bender Test., Ex. E, 55: 9-25; 56: 1-4. Appellees argue that candidates in Montana--a geographically large rural state--are faced with daunting increases in the price of gasoline, which increases the costs of campaigning. Appellees Brief in Opposition, at 37. Appellees acknowledge, however, that Montana's contribution limits are increased regularly to account for inflation. The record demonstrates that Montana's inflation adjustments account specifically for increases in gasoline prices. Bensen Test., Ex. C, 152:15-25; 153:1-6. Montana remains a state in which the cost of campaigning remains low, and contribution limits account for the increasing costs of driving within the State.

A second unique factor which distinguishes this case from *Randall* is that Montana's contribution limits were enacted as a citizens' initiative in 1994. The

people of Montana, acting through mechanisms of direct democracy, made a considered decision to put these limits in place to preserve Montana's citizen democracy. As this Court stated in *Eddleman*, "The voters of Montana are entitled to considerable deference when it comes to campaign finance reform initiatives designed to preserve the integrity of the electoral process." 343 F.3d at 1098.

As demonstrated during the recent trial, the competitiveness of Montana elections is substantially unchanged since *Eddleman*. As long as limits are otherwise constitutional, "it is not the prerogative of the courts to fine-tune the dollar amounts of those limits." *Eddleman*, 343 F.3d at 1095 (citation omitted). The Ninth Circuit's analysis and holding in *Eddleman* remain good law.

CONCLUSION

For the foregoing reasons, the District Court's Order and Judgment in this matter should be stayed until disposition of this appeal.

Respectfully submitted this 11th day of October, 2012.

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CERTIFICATE OF SERVICE

I hereby certify that on October 3, 2012, I electronically filed the foregoing with the clerk of the court for the United States District Court for the District of Montana, by using the cm/ecf system.

Participants in the case who are registered cm/ecf users will be served by the cm/ecf system.

Dated: October 11, 2012 */s/ Michael G. Black*

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