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IN THE DISTRICT COURT OF LARAMIE COUNTY, WYOMING
FIRST JUDICIAL DISTRICT

MATTHEW MALCOM, JEFF THOMAS, JIM ROOKS, JOSHUA MALCOM, CHRISTINA KITCHEN, and JIM ROSCOE,	)	
PLAINTIFFS,	)	
vs.	)	Civil Action No. 2024-CV-0202658
CHUCK GRAY, in his capacity as Wyoming Secretary of State,	)	
DEFENDANT.	)	

PLAINTIFFS' MEMORANDUM IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Plaintiffs, by and through their undersigned counsel, PARSONS BEHLE & LATIMER and DAVIS & CANNON, LLP, and pursuant to Rule 56, W.R.C.P., hereby submit this memorandum in support of their motion for summary judgment on all claims.

INTRODUCTION

Plaintiffs' claims go to the heart of Wyoming's proud self-identity as the American state most committed to the free and equal exercise of the core political rights to vote and run for elected office. The claims are brought exclusively under the Wyoming Constitution. Its *sui generis* provisions have no parallel under the United States Constitution or, for the most part, any other state constitution. As such, this case offers a critical opportunity for the Wyoming judiciary to both reassert the unique protections afforded voters and candidates under Wyoming's founding charter and to revitalize those guarantees.

Plaintiffs are qualified Wyoming "electors."[1] Their fundamental rights to vote or run for office in Wyoming elections are heavily burdened—and in some cases prohibited—by Wyoming statutes overtly and specifically targeting them for their political party or unsuccessful primary election runs. With respect to voting, W.S. §§ 22-5-204, 22-5-212 and 22-5-214, individually and collectively, limit and condition each of the Plaintiffs' right to vote for candidates of their choice in Wyoming's primary elections by (i) foreclosing them from voting for candidates who are registered with another political party, and (ii) requiring them to choose their party affiliation in election years before the candidates officially running for office can be known.

Owing to unprecedented dominance of the Republican party in recent years, its primary election has become the "election that matters." The winner of that contest almost always wins the general election—more often than not facing no opponent in the general election. As a result, these statutes heavily burden or suppress the Plaintiffs' right to cast meaningful votes for the candidates of their choice in decisive primary elections.

[1] Persons qualified to vote or run for office in Wyoming are defined as "electors." WYO. CONST. art. VI, §§ 2,15.

Moreover, with respect to political candidates like Plaintiffs Rooks, Thomas, and Mathew Malcom, all of whom ran unsuccessfully in primary elections in 2024 but wished to continue their pursuit of public office as independent candidates on the general election ballot, W.S. § 22-5-215 and § 22-5-302 prohibited them from doing so, thereby denying them the fundamental political right to pursue election as an independent candidate possessed by every other Wyoming elector who had not participated in a primary.

While the Secretary of State ("Secretary") claims all these statutes serve a state interest in "ensuring political stability and the integrity of the nomination and election process," he has been unable to identify any evidence to support the claim. *See* Defendant's Responses to Plaintiffs' Combined Interrogatories, Requests for Production of Documents, & Request for Admission at pp. 6, 7–8, attached as **Exhibit 1.** To the contrary, the statutes serve no interest other than those of political parties, whose elected members were responsible for passing the statutes in the first place and who benefit from their continuation. As such, the statutes, both individually and collectively, impermissibly burden Plaintiffs' (and all Wyoming electors') fundamental political rights established under the Wyoming Constitution, most particularly:

(i) the right under Article I § 27 to "open, free, and equal" elections and the "untrammeled exercise of the right of suffrage;"

(ii) the right under Article VI §§ 1 & 2 to cast a vote at "any" election, and under Article VI, § 11 to cast a vote at "any" election on "the same ballot" containing the full field of candidates running for the same office, and

(iii) the right under Article I § 3 to vote or run for office without any exceptions other than those expressed in the constitution, which do not include political affiliation.

BACKGROUND

A. Wyoming's Constitutional Guarantees to Voters & Candidates

In 1869 the Wyoming territorial legislature made history by becoming the first government *in the world* to grant women the right to vote and run for public office without restriction. *See* Wyoming History, State of Wyoming, https://www.wyo.gov/about-wyoming/wyoming-history (last visited July 7, 2025).

Twenty years later, the Wyoming Constitutional Convention debated its vision for statehood. That vision established a uniquely Wyoming constitutional guarantee of equal "political rights and privileges" to all Wyoming citizens. The guarantee expressly prohibited the legislature from passing any law "affecting" those rights based upon distinctions of "race, color, sex, *or any circumstance or condition whatsoever* other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction."[2] WYO. CONST. art. I § 3 (emphasis added).

Reflecting this strong commitment to unfettered exercise of political rights, Wyoming's founders expressly codified the right of all United States' citizens of legal age residing in Wyoming for the requisite period to vote in "any" election.[3] WYO. CONST. art. VI §§ 1 & 2. Moreover, the

[2] After Colorado became a state in 1876, no other state was admitted until 1889 when the Dakotas, Montana, and Washington were each admitted. Wyoming, which became the 44th state in 1890, borrowed many provisions from the constitutions of those states. T.A. Larson, *History of Wyoming*, 236–237 (1965). A University of Wyoming master's thesis (cited by the Wyoming Supreme Court in several cases) meticulously compares the provisions of those six constitutions and notes those that are unique to Wyoming. *See* Richard K. Prien, *The Background of the Wyoming Constitution* (1956) (unpublished M.A. thesis, University of Wyoming) (cited in, *e.g.*, *Bower v. Big Horn Canal Ass'n*, 77 Wyo. 80, 92, 307 P.2d 593, n. 2 (1957); *Johnson v. State*, 2006 WY 79, ¶ 23; *Billis v. State*, 800 P.2d 401, 413 (Wyo. 1990); *Mills v. Reynolds*, 837 P.2d 48, n. 1 (Wyo. 1992) (Golden, J., concurring)). With respect to Article I § 3, Prien notes: "[n]one of the other constitutions being compared with Wyoming's has a parallel clause." *Id*. at 41.

[3] The age requirement of twenty-one was reduced to eighteen by virtue of the twenty-sixth amendment to the U.S. Constitution, and the durational residency requirements were invalidated

state founders provided a specific personal guarantee to all Wyoming citizens that every election in Wyoming would be "open, free and equal" and that "no power, civil or military" would at "any time interfere to prevent an untrammeled exercise of the right of suffrage." WYO. CONST. art. I § 27. The founders went even further to guarantee the right of all Wyoming electors to privately cast their vote in any election on a single, publicly financed ballot. WYO. CONST. art. VI § 11. Taken together, these broad constitutional principles guaranteed to all Wyoming electors "political equality," "open, free, and equal" elections, and the "untrammeled" right to vote. *See, e.g.*, WYO. CONST. art. VI § 11. As early as 1886 the United States Supreme Court recognized the right to vote "is regarded as a fundamental right, because it is preservative of all rights." *Yick Wo v. Hopkins*, 118 U.S. 356, 370 (1886). More recently it has opined "the right to vote freely for the candidate of one's choice is of the essence of a democratic society, [and] any restrictions on that right strike at the heart of a democratic society." *Reynolds v. Sims*, 377 U.S. 533, 555 (1964).

In addition to adopting unique protections for the unfettered exercise of political rights, Wyoming's founders also adopted unique constitutional protections against the potential malign power of private corporations and legislative majorities. *See* Keiter, *supra* note 3, at 11 ("constitutional text as well as the convention debates furnish abundant evidence that the delegates were determined to limit legislative power and to protect against corruption.") With respect to private actors, Article I § 30 flatly prohibits all "perpetuities and monopolies" as being "contrary

by the Wyoming Supreme Court based upon the U.S. Supreme Court's interpretation of the federal equal protection clause. *See Delgiornio v. Huisman*, 498 P.2d 1246, 1247 (Wyo. 1972). Nevertheless, according to Professor Robert Keiter, the section still provides the constitutional definition of an "elector" entitled to vote in Wyoming. Robert B. Keiter, *The Wyoming State Constitution: A Reference Guide*, 197 (2nd. Ed. 2017).

to the genius of a free state.[4] Similarly, Article X § 8 broadly prohibits the "consolidation or combination of corporations of any kind whatever to prevent competition. . . or in any other manner to interfere with the public good and general welfare."[5] WYO. CONST. art. X § 8. Article I § 7 otherwise recognizes: "Absolute, arbitrary power over the lives, liberty, and property of freeman exists nowhere in the republic, *not even in the largest majority*."[6] WYO. CONST. art. I § 7 (emphasis added). To constrain the power of such a future majority, and "fear[ing] that future state legislators would wear the 'brass collars' of corporations and seek to protect special corporate interests," the founders adopted Article III § 27 to prohibit the legislature from passing any "special" laws including those regarding the "conducting of any election."[7] *See Keiter, supra* 11 (citing Journal of Constitutional Convention of Wyoming at 667–68, 696).

These concerns and attitudes undoubtedly explain why Wyoming's founders did not delegate absolute power to future legislatures to determine the method by which Wyoming elections would occur. Instead, seemingly unique to any state constitution anywhere, they took it upon themselves to direct the legislature to establish laws for the conduct of all Wyoming elections that included specific uniform ballot requirements. That provision, Article VI, Section 11 (Manner of holding elections), states as follows:

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[4] Prien observes that "[o]nly Wyoming has a provision such as this in its Declaration of Rights." Prien, *supra* note 2, at 54.

[5] Prien states that "no duplicates" for this section were found in the other five constitutions. Prien, *supra* note 2, at 91.

[6] In regard to this provision Prien states "[n]one of the other five constitutions has a parallel clause." Prien, *supra* note 2, at 43. Indeed, only one other state constitution in the nation includes this language. *See* Ky. Const. § 2.

[7] In addition, the delegates established an independent, two-tiered judiciary, "reflect[ing] the convention's sense of faith in the judiciary as a guardian of individual rights, a faith that was not reflected in its view of legislative or executive power." *See* Keiter, *supra* note 3, 12-13.

> All elections shall be by ballot. *The legislature shall provide by law that the names of all candidates for the same office, to be voted for at any election, shall be printed on the same ballot, at public expense, and on election day be delivered to the voters within the polling place by sworn public officials, and only such ballots so delivered shall be received and counted*. But no voter shall be deprived the privilege of writing upon the ballot used the name of any other candidate. All voters shall be guaranteed absolute privacy in the preparation of their ballots, and the secrecy of the ballot shall be made compulsory.[8]

WYO. CONST. art. VI § 11 (emphasis added).

As will be discussed below, the statutes challenged in this action are facially at odds with these constitutional protections both individually and collectively, and both in letter and spirit.

B. Wyoming's Primary Election Statutes.

Given that the challenged statutes have long histories, an historical overview of the statutes and their enactment will assist the Court's understanding of the legal issues.

1. Territorial Election Practices Before Statehood

Wyoming's uniquely robust provisions in the state constitution concerning voting and elections arose out of fraught elections during territorial times. These election practices are described by Dr. Larson to have included "emigrants being taken from trains to vote; men voting more than once, using assumed names; fifteen year old girls voting; and men publicly buying votes at the Seventeenth Street polling place." Larson, *supra* note 2, at 241. Dr. Larson also discusses how territorial elections included the "unusual feature" of private entrepreneurs creating and selling "ticket" ballots. *Id.* Relying upon the first-hand account of Wyoming territorial legislator, Charles A. Guernsey, Dr. Larson describes the process as follows:

[8] With respect to Article VI § 11 Prien states that the other state constitutions he compared to Wyoming's each contain provisions adopting a secret ballot but otherwise "none… has a closely similar section." Prien, *supra* note 2, at 80; *see also* Hicks, J.D., *The Constitutions of the Northwest States*, (University of Nebraska 1923) at 139–40.

> After the party conventions, enterprising individuals of both parties printed tickets, selecting candidates from the major tickets. Each person, society, lodge, union, or company printing such a ticket claimed to control a certain number of votes. A candidate could get on such a ticket by paying the ticket sponsor so much for each vote the sponsor claimed to control, or in some cases on merit alone if the sponsor approved him. Such tickets were accepted at the polls. Guernsey recalled that in 1884, he paid the Union Pacific master mechanic for the four hundred votes he claimed to control.[9]

Id. at 241-42.

Wyoming's constitutional delegates put a decided end to such corrupt private ticket practices by adopting Article VI § 11, which not only provided that all voters were "guaranteed absolute privacy in the preparation of their ballots" but, as noted, also uniquely established that *all* Wyoming elections would utilize a single, publicly financed and publicly prepared ballot containing the names of all candidates running for the same office.

2. Wyoming's First Election Code

On March 14, 1890, and through a January 21, 1891 amendment, the territorial and then state legislature adopted comprehensive election provisions. *See* Wyoming Session Laws 1890, Chapter 80 and Chapter 100, copies of which are attached as **Exhibit 2**. These provisions established the framework of Wyoming's general election system, much of which remains in effect today. Among other things, requirements and deadlines for voter registration, candidate nominations, ballot preparation and handling, voter privacy, and election contests were codified.

Consistent with the Wyoming Constitution's several suffrage provisions, the Election Code granted all qualified and registered persons the right to vote in every such election. Wyoming

[9] Guernsey's book (available at the American Heritage Center) recounts other vivid details about how the private ticket game was played in the territory before the adoption of the "Australian secret ballot" in Wyoming's Constitution. Charles A. Guernsey, *Wyoming Cowboy Days*, 97–102 (New York: Putnam 1936). Illustrative copies of some of the private tickets used in the elections of 1884 and 1886 obtained from the book are attached hereto as **Exhibit 3**.

Session Laws 1890, Chapter 80 Sec. 35, 36; Chapter 100 Sec.8. The voter-registration requirement did not include the necessity of identifying party affiliation. *Id*. Ballots were to be printed, handled, and collected with defined specifications at public expense and were to contain the "name of every candidate whose nomination for any office specified in the ballot has been certified and filed according to the provisions of this Act." Wyoming Session Laws 1890, Chapter 80 Sec. 104.

A candidate could cause his or her name to appear on the election ballot in one of two ways, either by "certificate of nomination" signed by the "presiding officer and secretary of such meeting or convention," following a "convention" or "meeting" of "electors or delegates representing a political party," or without any such party convention or meeting through a certificate of nomination signed by the required number of qualified electors for a particular office (for state office the number was 100). Wyoming Session Laws 1890, Chapter 80 Sec. 84, 85, 86; 88. In either event, the certificates of nomination were to be filed with the required government office "not more than 60 days and not less than 30 days before the day fixed for election of the persons in nomination." Wyoming Session Laws 1890, Chapter 80, Sec.92.

By separate legislation adopted on January 7, 1891 (entitled "primaries and public political meetings"), the legislature promulgated procedural rules governing any "caucus or public meeting" for the nomination of candidates for election. Wyoming Session Laws 1890, Chapter 32 Sec. 1. The statute provided that, upon the "written request of five or more of the persons present and entitled to vote" at such meeting, a ballot would be required at the meeting. *Id*. at Sec. 3. It further granted an opportunity to challenge and disallow the vote of any person at such meetings on the grounds that the person's "political faith" was not "in accordance with that of the party or voters holding such meeting." *Id*. at Sec. 5. Thus, through these provisions, the legislature provided political parties or associations choosing to hold candidate nomination meetings with guidance,

and some regulation, as to how to certify the names of candidates they favored for inclusion on the general election ballot.

3. Warren, Carey, and Wyoming's Public Primary Election Law

By 1896, under these election laws the two modern major parties had consolidated their political dominance, with the Republican Party clearly on top. Larson, *supra* note 2, at 284–85, 290–93. And beginning in 1895, when the Republican-controlled state legislature unanimously rejected the reelection to the Senate of powerful Republican incumbent Joseph (Judge) Carey and instead selected newcomer Clarence D. Clark—along with Judge Carey's longstanding ally and co-incumbent Senator Francis E. Warren—the singular control of the Republican Party (and Wyoming politics) by Warren and his closest allies began in earnest and met little resistance for the next fifteen years.

According to Professor Larson, during this era "it was customary to speak of the Republican political machine as the 'Warren Machine,' an apparatus whose 'boss' was accused of a variety of questionable acts of self-dealing." *Id*. 316–17. Senator Robert LaFollette, a leader of the progressive movement, characterized his Senate colleague Warren as the "boss of Wyoming, with a powerfully entrenched machine of the 'pork barrel' and 'patronage' type." *Id*. at 317. More local criticism came from the *Cheyenne Leader* (a Democratic newspaper), which wrote: "as a man, both in his private life and in his public acts, [Warren] is not one whom conscientious parents can consistently commend as a pattern for their sons." *Id.*

By 1910, grumblings about Warren's outsized political control of the Republican party were on the rise and the state was shocked when Judge Carey, who had been absent from politics since his Senatorial ouster in 1895, made a surprise emergence from the political ashes by announcing his candidacy for Governor—without identifying any political party affiliation. *Id*.

316–21. Thereafter, Judge Carey, with the help of various Republican "insurgents" (including an upstart young Sheridan lawyer and member of the Wyoming House of Representatives named Blume—later Chief Justice Blume) mounted an extraordinary challenge to the Warren Machine. *Id*. at 319–20; *see also* Betsy Ross Peters, *Joseph Carey and the Progressive Movement in Wyoming*, 28–29, 34–68 (1971) (Ph.D. dissertation, University of Wyoming).[10]

Warren, who had fallen out with Carey after 1895, favored other candidates for Governor and met with Carey to urge "party unity." *Id*. at 63. But Carey reminded him that he had not been involved with the Republican party for over a decade and had instead been an "independent" voter, fueling Warren's suspicion that Carey might potentially opt to run as a Democrat if he were to fail to secure the Republican nomination. *Id*. When another Sheridan candidate, Wyoming Attorney General William Mullen, threw his hat in the ring, Warren supported him at the Republican convention. *Id.* at 64–65. Carey, who had decided by then to also seek the Republican nomination, announced he would continue to pursue his candidacy as a progressive "Republican independent" even if he were not selected as the Republican nominee.[11] *Id*. at pp. 68–70. After a bitter party fight at the Republican convention, Mullen was selected as the Republican party nominee. *Id.*

[10] Ms. Peters provides an excellent account of the "Warren-Carey feud" as well as the growing struggles within the Republican Party provoked by the excesses of the Warren Machine. These struggles became intense. Of particular interest to Wyoming lawyers, Ms. Peters writes: "In the Sheridan County elections of 1908, an internecine battle developed with the independents, led by Blume, beating the regular republican forces in the primary. The animosity between the factions even provoked a fist fight between Blume and [fellow lawyer] E.E. Lonabaugh, a regular. The Blume forces were usually referred to as 'insurgents' in contrast to the stand patters, or regular Republicans." Peters, *supra*, at 28.

[11] Carey even published a detailed statement setting forth his platform as an independent candidate, which included numerous progressive ideas designed to combat corrupt machine politics including a direct primary and the direct election of U.S. Senators. Peters, *supra* at 69.

Fulfilling Warren's suspicions, after Carey's second rejection by the Republican Party, he quickly made an alliance with the Democratic Party which agreed to adopt his progressive reform platform and make him their party nominee. *Id*. at 74. Garnering the support of disaffected Republican "insurgents" along with the Democrats, Carey defeated Mullen decisively in the general election, winning every county. *Id*. at 80.

One lesson from Carey's experience here is clear: Unlike today, in earlier times in Wyoming, a candidate failing to obtain the nomination of a political party could freely continue to run for election, offering the voters a choice which they might very well prefer.

Upon election Governor Carey wasted no time pushing for his desire to end machine politics in Wyoming. In his inaugural address to the Wyoming legislature in 1910 (identifying himself as a Republican), he strongly advocated for direct primaries, a corrupt practices act, the initiative, referendum and recall, and other progressive measures all intended to break control of the Warren Machine in Wyoming and empower Wyoming voters. *Id*. at 83–84, 87. Many of Carey's initiatives were ultimately enacted, including a direct public primary law in 1911. *Id.* at 93.

In general, the new primary law provided that "candidates of political parties for all offices which under law are to be filled by the direct vote of the people . . . at the general election" were required to be "elected at primary elections at the times and in the manner hereinafter provided." Wyoming Session Laws 1911 Chapter 23, Section 1, **Exhibit 4** hereto. The primary election was established to occur in August of general election years for the exclusive benefit of those political parties whose candidate for the U.S. House had received at least ten percent of the total vote in the preceding general election (*i.e.* Republicans and Democrats only). *Id*. at Sec.2, 44.

Smaller political parties were relegated to nominating their candidates on their own dime through their own private meetings or conventions. These independent candidates, whether or not they participated in a primary, retained the ability to appear on the general election ballot through nominating petitions signed by the requisite number of electors as provided under the state's original election statutes. *Id*. at Sec. 45, 46. The costs of the new public primary election system benefitting the big parties were to be paid by the Board of County Commissioners—the "same as the expenses of the general election." *Id*. at Sec. 18.

In contrast to the single ballot called for under Article VI § 11, the new law required that primary election ballots would be distinguished by separate-colored ballots, with the Republican's white, the Democrat's blue, any third-party green, and any additional parties in some other color. *Id*. at § 12. All ballots were to contain the title of the office each individual aspirant was seeking adjacent to his or her name. *Id*. Notwithstanding the constitutional guarantees granted to all Wyoming electors of free, open and equal elections, and the untrammeled right to vote in "any" election, the new law denied the right to vote to anyone who had (i) not declared affiliation with a party in accordance with the new law, (ii) signed nominating papers for a candidate of a party he or she was not affiliated with (or of an unaffiliated candidate), or (iii) voted within the prior two years in a primary election of another party. *Id*. at § 22. An elector wishing to change his or her party affiliation could do so up to the day of the primary. *Id*. at § 24.

4. Evolution of Primary Election Law

While the general architecture of the original public primary law has remained, it has undergone numerous amendments over the last 115 years. For our purposes, the following changes regarding losing primary candidates and voter registration in primary elections should be noted.

4.1. 1915: Advent of the "Sore Loser" Statutes

Four years after Carey ran as an "independent Republican," lost the contest for the Republican gubernatorial nomination, won the Democratic nomination, and ultimately won the general election (sweeping every Wyoming county), under a new Republican gubernatorial administration, the Wyoming legislature decided it did not want another election like 1910. Thus, in 1915 it passed House Bill 218 creating a category of persons "disqualified from nomination by petition." What became Session Law Chapter 160 provided: "[a]ny person who is a candidate for any office at a primary election and fails of nomination in said primary election is thereby disqualified from being a candidate by petition or otherwise for any office at the general election next ensuing." Wyoming Session Laws 1915 Ch. 160, Sec. 6. The law broadly disqualified any candidate (like Judge Carey) who ran and lost in a primary from pursuing office—not just the one for which he sought the party's nomination, but from any office. Moreover, the law barred the candidate from seeking that office by nomination of another party or by petition, effectively barring the person from seeking any office by any means if they failed to win the party primary.

4.2. 1957 & 2002 "Sore Loser" Statutes

In 1957, the legislature re-codified the public primary law disqualifying any candidate who "fails of nomination in said primary election" from "being a candidate by petition or otherwise for any office at the general election next ensuing." Wyo. Stat. § 22-91 (1957). That statute, as amended, is the modern basis for W.S. § 22-5-302, which is one of the statutes challenged in this action.

In the same vein, in 2002, the legislature added language to W.S. § 22-5-215 to provide that an "unsuccessful candidate for office at a primary election whose name is printed on any party ballot may not accept nomination for the same office at the next general election." That statute has remained unchanged and is also challenged here.

5. 2023 Party Registration Change Amendment

In 2023, the legislature dramatically altered the date by which Wyoming electors could change their party affiliation to participate in the public primary election. From the inception of the public primary system in 1911 until 2023, a period of 112 years, voters could change their affiliation up to the date of the primary. But in 2023, after several previous unsuccessful attempts, the legislature changed the law to prohibit any change of party affiliation after the day before "the first day on which a candidate for office may file an application for nomination." W. S. § 22-5-214.

Under W.S. § 22-5-209, applications for nomination may be filed "not more than ninety-six (96) days before" the next primary election (*e.g*. normally May 15). Significantly, today a Wyoming voter cannot change their party affiliation after the candidates running for office have become officially known through the filing of nomination applications. The debates concerning the law change make abundantly clear that its sole purpose is to deter Democrats from changing their party affiliation to participate in the Republican primary.[12]

6. Decline of Wyoming General Election Competition & Voter Participation

Electoral competition and voter participation have declined precipitously in Wyoming in recent years. In 2024, there were 15 senate seats open for election. *See* Stipulated Facts (filed 5/5/25) and attached Exhibit 7 at ¶ 13. Following the primary election, 12 of those races were uncontested in the general election. *Id.* There were 62 house seats open in 2024. *Id*. Following the

[12] Plaintiffs have ordered the preparation of transcripts of such hearings which will be filed in the near future but the relevant debates occurred on February 2, 14, 21, 22, and 24, 2023. Recordings of the hearings are available online through the Wyoming Legislature' YouTube channel: https://www.youtube.com/channel/UCZNA0zn1VU1ATv3XugYmFGw (last visited July 7, 2025).

primary, 47 of those races were uncontested. *Id*. In other words, in 2024, of the 77 races for state legislative office *76% of them had only one name on the general election ballot*. That is a remarkable statistic which should alarm anyone committed to the vigorous debate of ideas central to representative government.

Given this lack of candidate competitiveness at the general election, it is equally concerning that so few Wyoming voters are participating in the primary election at which most of our future legislative leaders are effectively chosen. In 2024, only 54% of Wyoming's voting age population was registered to vote in the primary, and only 27% of that population turned out to vote in the primary. *See Wyoming Voter Registration and Voter Turnout Statistics* published by Wyoming Secretary of State 1978-2024, attached hereto as **Exhibit 5.**

Given that the vast majority of Wyoming's legislative leaders are now effectively chosen in the primary election, it appears voters are converging toward Republican Party registration to meaningfully impact the selection of elected representatives. In February 2008, for example, the Republican Party had 136,844 registered voters, the Democratic Party had 57,327 registered voters, and 21,950 voters were registered as Unaffiliated (*i.e*., Independent). *See* attached **Exhibit 6,** Voter Registration Statistics organized by year, also available at https://sos.wyo.gov/elections/vrstats.aspx (last visited July 7, 2025). However, over the next decade, Democratic voters decreased substantially, and Republican-registered voters increased substantially. In February 2018, the Republican Party had increased to 175,934 registered voters and the Democratic Party had decreased to 46,971. During that same period, voters unaffiliated with any party increased to 36,366. The same trend of decreasing Democratic Party registrations has persisted, while Republican registrations have continued to increase. As of May 2025, only

31,885 voters were registered Democrats, 212,356 were registered Republicans, and 25,987 were registered as Unaffiliated.[13]

All of Wyoming's representatives in the U.S. Congress and its highest state officers are Republicans, as are 85 of our 93 state legislators. Given the above it is not surprising that, according to the Cook Partisan Voting Index, Wyoming is the most Republican dominated state in the nation. *See* https://en.wikipedia.org/wiki/Cook_Partisan_Voting_Index (last visited July 7, 2025).

In sum, if Wyoming is not now a single-party state it is darn close.

STANDARD OF REVIEW

Summary judgment is proper under Rule 56 "if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." W.R.C.P. 56(a). Courts must examine a motion for summary judgment "from the vantage point most favorable to the party opposing the motion, and [ ] give that party the benefit of all favorable inferences that may fairly be drawn from the record." *Weir v. Expert Training, LLC*, 2022 WY 44, ¶ 16 (quoting *Dimick v. Hopkinson*, 2018 WY 82, ¶ 7).

"The party moving for summary judgment bears the burden of establishing a prima facie case and showing there is no genuine dispute as to any material fact and the movant is entitled to

[13] The authors of the book *The Equality State: Government and Politic in Wyoming* (8th Ed. 2017) state at page 28 that data between 1952 and 2014 showed that, *as of 2014*: "more than six out of every 10 Wyoming voters register as Republican. This is the highest percentage of Republican registration in the United States, although not every state requires registration by political party. After being nearly equal to Republicans in the 1970s, Democrats now find themselves at more than a 2 to 1 disadvantage in voter registration." As shown above, since 2014 that disadvantage has grown significantly with registered members of the major parties now being 87% Republicans and only 13% Democrats.

judgment as a matter of law." *Spence v. Sloan*, 2022 WY 96, ¶ 23, 515 P.3d 572, 579 (Wyo. 2022) (citation omitted). "When the moving party does not have the ultimate burden of persuasion, it establishes a prima facie case for summary judgment by showing a lack of evidence on an essential element of the opposing party's claim." *Scranton v. Woodhouse*, 2020 WY 63, ¶ 23 (citation omitted). Once the movant meets the initial burden, the opposing party must "respond with materials beyond the pleadings to show a genuine issue of material fact." *Spence*, 2022 WY 96, ¶ 23, 515 P.3d at 579 (citation omitted).

"A material fact is one which, if proved, would have the effect of establishing or refuting an essential element of the cause of action or defense asserted by the parties." *Williams v. Sundstrom*, 2016 WY 122, ¶ 17, 385 P.3d 789, 793 (Wyo. 2016) (citation omitted); *see also Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 248 (1986) ("As to materiality, the substantive law will identify which facts are material. Only disputes over facts that might affect the outcome of the suit under the governing law will properly preclude the entry of summary judgment. Factual disputes that are irrelevant or unnecessary will not be counted."). A dispute is "genuine" when "the evidence is such that a reasonable jury could return a verdict for the nonmoving party." *Anderson*, 477 U.S. at 248. "When determining if a genuine issue of material fact exists [a trial court] must keep in mind 'the actual quantum and quality of proof necessary to support liability.'

In ruling on a motion for summary judgment, 'the judge must view the evidence presented through the prism of the substantive evidentiary burden.'" *Scranton*, 2020 WY 63, ¶ 23. If the movant meets the initial burden, then the opposing party "must set forth specific facts showing" a genuine issue and "may not rest upon the mere allegations or denials of the adverse party's pleading." *Bear Peak Res., LLC v. Peak Powder River Res., LLC*, 2017 WY 124, ¶ 27 (citation omitted). "[C]onclusory statements, mere opinions, or categorical assertions of ultimate facts

without supporting evidence are insufficient to establish some disputed issue of material fact." *Id.* (citations omitted)."

ARGUMENT

I. Plaintiffs' Claims are Justiciable.

Plaintiffs' claims are brought under the Uniform Declaratory Judgment Act which grants this Court the power to "declare rights" of persons "affected by the Wyoming constitution or by statute." W.S. § 1-37-103. The elements necessary to establish a justiciable controversy under the Declaratory Judgment Act are:

> 1. The parties have existing and genuine, as distinguished from theoretical, rights or interests.
>
> 2. The controversy must be one upon which the judgment of the court may effectively operate, as distinguished from a debate or argument evoking a purely political, administrative, philosophical or academic conclusion.
>
> 3. It must be a controversy the judicial determination of which will have the force and effect of a final judgment in law or decree in equity upon the rights, status or other legal relationships of one or more of the real parties in interest, or, wanting these qualities to be of such great and overriding public moment as to constitute the legal equivalent of all of them.
>
> 4. The proceedings must be genuinely adversary in character and not a mere disputation, but advanced with sufficient militancy to engender thorough research and analysis of the major issues.

Maxfield v. State, 2013 WY 14, ¶14 (citing *Carnahan v. Lewis*, 2012 WY 45, ¶ 17; *Brimmer v. Thomson*, 521 P.2d 574, 578 (Wyo.1974)).

In *Maxfield*, *Brimmer*, and *Cathcart v. Meyer*, 2004 WY 49, the Wyoming Supreme Court analyzed questions of justiciability of political candidates' claims that state law unlawfully burdened their fundamental right to run for office under the Wyoming Constitution. In each case,

the Court recognized that claims alleging interference with Wyoming electors' rights to vote or run for office invoke questions of great public importance. *See Maxfield*, (finding challenge to Wyo. Stat. § 22-5-103 "of great public importance"); *Brimmer*, 521 P.2d at 578 (finding case involving "election process for the entire State of Wyoming" of "great overriding public moment"); *Cathcart*, ¶ 12 (finding challenge to term-limit law had a "profound impact" in controversy of otherwise undisputed "great public interest or importance.") It follows in such cases that the "justiciable controversy requirement" is "relaxed." *Maxfield*, ¶¶ 15–21.

Rejecting justiciability and limitations-period defenses raised by the state in the above-cited cases, the Wyoming Supreme Court concluded in all three that the traditional justiciability criteria had either been satisfied or that the public importance of such claims warranted their adjudication, notwithstanding those criteria. In *Cathcart*—a case also involving claims made by voters and candidates—the Court held as follows:

> All of the elements of a justiciable controversy exist in these cases. The battle is existing and real, it is of a truly adversarial nature, and the decision of this Court will act as a final determination of the rights of the parties. Even were that not so, the matter is of such public import as to satisfy the jurisdictional requirements of the Uniform Declaratory Judgments Act.

2004 WY at ¶28.

The same is true here. The Parties' Stipulated Facts, attached as **Exhibit 7**, as well as Plaintiffs' detailed affidavits, attached hereto as **Exhibits 8-13**, establish that Plaintiffs are qualified Wyoming electors whose fundamental rights to vote and/or run for office have been and will continue to be burdened and/or suppressed by virtue of the challenged. Thus, irrespective of traditional justiciability requirements, the decisions of the Wyoming Supreme Court clearly hold

that claims asserting fundamental political rights are matters of great public importance which Wyoming courts must determine.

II. The Court Must Apply Strict Scrutiny to Statutes Adversely Impacting Fundamental Rights Under the Wyoming Constitution.

The Wyoming Constitution provides an independent basis for individual liberties beyond those protected under its federal counterpart. As summarized recently in *Sheesley v. State*, the Wyoming Supreme Court observed:

> We subscribe to the view that "state courts cannot rest when they have afforded their citizens the full protections of the federal Constitution. State constitutions, too, are a font of individual liberties, their protections often extending beyond those required by the Supreme Court's interpretation of federal law." William J. Brennan, Jr., *State Constitutions and the Protection of Individual Rights*, 90 Harv. L. Rev. 489, 491 (1977). We have repeatedly reminded litigants that "[o]ur state constitution provides protection of individual rights separate and independent from the protection afforded by the U.S. Constitution." *O'Boyle v. State*, 2005 WY 83, ¶ 23, 117 P.3d 401, 408 (Wyo. 2005); *see, e.g.*, *Kovach v. State*, 2013 WY 46, ¶ 44, 299 P.3d 97, 111 (Wyo. 2013); *Saldana v. State*, 846 P.2d 604, 624 (Wyo. 1993) (Golden, J., concurring); *Vasquez v. State*, 990 P.2d 476, 485 (Wyo. 1999). We do so again: "The Wyoming Supreme Court continues to be willing to independently interpret the provisions of the Wyoming Constitution." *Saldana*, 846 P.2d at 624 (Golden, J., concurring).

2019 WY 32, ¶ 14.

In *Cathcart*, the Court thoroughly summarized its prior cases establishing the rules applicable to construing the Wyoming Constitution as follows:

(i) the Court follows the same rules that govern construction of a statute and "our fundamental purpose is to ascertain the intent of the framers," *Cathcart*, ¶ 39 (citations omitted);

(ii) "[w]e look first to the plain and unambiguous language to determine intent," *id* at (citations omitted);

(iii) "[i]f the language is plain and unambiguous, there is no need for construction, and we presume the framers intended what was plainly expressed," *id*. (citations omitted);

(iv) "Every statement in the constitution must be interpreted in light of the entire document, rather than as a series of sequestered pronouncements, and [ ] the constitution should not be interpreted to render any portion of it meaningless, with all portions of it read in *pari materia* and every word, clause and sentence considered so that no part will be inoperative or superfluous," *id* at ¶40 (citations omitted);

(v) "in construing constitutional provisions, courts will not ignore the general spirit of the instrument," *id* at ¶40 (citations omitted);

(vi) "where a statute or constitutional provision is unambiguous, there is no need to apply the various rules of construction," *id*. at ¶48 (citations omitted);

(vii) "the rule that statutes are presumed to be constitutional is a rule of construction, not an independent rule of law. Courts do, indeed, have a duty to maintain the constitutionality of a statute where possible, but there is an equally imperative duty to declare a statute unconstitutional if it transgresses the state constitution," *id.* at ¶ 48 (citations omitted);

(viii) "[d]ecisions from other states' courts may provide some guidance in the interpretation of constitutional provisions…but each case is controlled by the specific wording of the constitutional provision," *id.* at ¶51 (citations omitted).[14]

While normally a plaintiff bears the burden of proving a statute violates the Constitution, that rule does not apply to cases infringing upon fundamental rights. "A fundamental right is a right which the constitution explicitly or implicitly guarantees." *Mills v. Reynolds*, 837 P.2d 48, 53 (Wyo. 1992) (citations omitted). When a statute infringes upon a fundamental constitutional right "the burden . . . is on the [State] to justify the validity of the [statutes]." *Miller v. City of Laramie*, 880 P.2d 594, 597 (Wyo. 1994); *see also Mills*, 837 P.2d at 54.

Without question the right to vote arising under the Wyoming Constitution is—and has always been—a fundamental right, thus the Wyoming Supreme Court has repeatedly held and re-affirmed that statutory infringements on that right must be analyzed under the strict scrutiny standard. *Shumway v. Worthey*, 2001 WY 130, ¶ 9; *Murphy v. State Canvassing Bd.*, 12 P.3d 677,

[14] The Wyoming Supreme Court has also noted that decisions from other jurisdictions are especially pertinent in matters of first impression under the Wyoming Constitution. *Hageman v. Goshen County School Dist. No. 1*, 2011 WY 91, ¶ 9 (citations omitted).

680–82 (Wyo. 2000); *Mills v. Campbell County Canvassing Bd*., 707 P.2d 747, 752 (Wyo. 1985) (Rose, J. dissenting); *Brimmer v. Thomson,* 521 P.2d 574, 578 (Wyo.1974); *Rasmussen v. Baker*, 7 Wyo. 117, 50 P. 819, 822 (Wyo. 1897). The same is true regarding the right to run for office, which the Wyoming Supreme Court has described as the "flip side of the right to vote." *Murphy,* 12 P.3d at 680; *Maxfield*, ¶ 15; *Campbell County Canvassing Bd.*, 707 P.2d at 752 (Rose, J. dissenting); *Brimmer*, 521 P.2d at 578. Hearkening back to our earliest days of statehood, the *Brimmer* Court summarized the matter thusly:

> the basic and universally accepted rule [is] that statutory and constitutional provisions which tend to limit the candidacy of any person for public office or exclude any citizen from participation in the elective process must be construed in favor of the right of the voters to exercise their choice and should be construed strictly and not extended to cases not clearly covered thereby."

521 P2d.at 580 (citing *Rasmussen*, 50 P. 819, 821, 38 L.R.A. 773; and *State ex rel. Pape v. Hockett*, 61 Wyo. 145, 156 P.2d 299, 303)).

To satisfy its burden in this case asserting fundamental rights arising under the Wyoming Constitution, the State therefore must satisfy the strict scrutiny test. *See Allhusen v. State ex rel. Wyo. Mental Health Pros. Licensing Bd.*, 898 P.2d 878, 885 (Wyo. 1995) (applying strict scrutiny to claims involving fundamental rights). Strict scrutiny requires the State to show the statute is as narrowly tailored as possible to achieve a compelling state interest. *See Washakie Cnty. Sch. Dist. No. One v. Herschler*, 606 P.2d 310, 333 (Wyo. 1980) (when a fundamental interest or suspect classification is established, strict scrutiny must be applied to determine if state action "is necessary to achieve a compelling state interest" and "the state [must] establish that there is no less onerous alternative by which its objective may be achieved").

III. W.S. §§ 22-5-105 and 22-5-302 Violate Multiple Provisions of the Wyoming Constitution.

A. W.S. §§ 22-5-105 and 22-5-302 Create New Legislative Qualifications Restricting the Fundamental Rights of Plaintiffs Rooks, Thomas, and Matthew Malcom to Run for Office in Violation of Article I, Section 3 and Article VI, Section 1 of the Wyoming Constitution.

As discussed above, from statehood until the present, qualified Wyoming electors have had the statutory right to petition to appear on the general election ballot as an "independent" candidate. The petition only needed to be in the proper form and contain the required number of signatures. (The current statutory petition requirements may be found at W.S. § 22-5-301, *et. seq*.) But in 1915, the legislature terminated that right for a qualified elector who participates as a candidate in a primary election but who fails to secure a party nomination. That person is "disqualified" from being a "candidate by petition or otherwise for any office at the next general election." Wyoming Session Laws 1915, Ch. 160. This essential "disqualification" is still part of the present challenged statutes, albeit through different language, which now only disqualifies the candidate from running in the general election for the "same office" (as opposed to "any office") he or she unsuccessfully sought in the primary.[15]

These disqualification statutes are functionally equivalent to the term-limit statutes that prohibited incumbent officeholders from running for additional terms in *Cathcart* and *Maxfield.* In those cases, state statutes disqualified incumbent officers who contended the term limits created a new requirement for running for office (*e.g*. not having served for more than the prescribed statutory terms). Those new requirements were not set forth in the Wyoming Constitution. The Wyoming Supreme Court agreed, not once, but twice—in *Cathcart*, in favor of disqualified

[15] The disqualification is now stated in identical language in both W.S. § 22-5-215 and W.S. § 22-5-302 as follows: "An unsuccessful candidate for office at a primary election whose name is printed on any party ballot may not accept nomination for the same office at the next general election."

incumbent state legislators (and the voters who wished to vote for them), and in *Maxfield*, on behalf of the former Secretary of State.

In doing so, the Court held that the qualifications of an elector to vote or run for office are "unambiguous" and are set forth for state electors in the Wyoming Constitution in Article VI. *Maxfield*, ¶ 36. Responding to the State's argument that the legislature could create additional extra-constitutional qualifications (such as a candidate not exceeding term limits), the Court in both cases emphasized the following "clear and unambiguous" language of Article I, Section 3 as follows:

> Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, ***or any circumstance or condition whatsoever other than individual incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.***

Cathcart, ¶ 47; *Maxfield*, ¶ 36 (emphases in original).

In both cases, the Court was persuaded the highlighted language forbids the legislature from creating additional qualifications to the exercise of the political rights and privileges of Wyoming citizens beyond those set forth in the Wyoming Constitution. *Cathcart*, ¶ 47; *Maxfield*, ¶ 34. As explained in *Maxfield*, ¶ 34:

> The words "or any circumstance or condition whatsoever other than individual competency, or unworthiness duly ascertained by a court of competent jurisdiction" could not be more clear. Together, art. 1, § 3 and art. 6, § 1 clearly provide that laws affecting the political rights and privileges of Wyoming citizens, such as the right to hold public office, may not be based upon race, color, sex or ***any circumstance or condition whatsoever other than*** those conditions expressly stated. Incumbency is not one of the conditions expressly stated. To read the provision as the State would have us do would be either to read the highlighted words out of the provision completely, or to interpret them as modifying the words "race, color, sex" and meaning "***like or similar*** circumstance or condition." The broad language used by the framers does not support either reading.

W.S. §§ 22-5-215 and 22-5-302 plainly disqualify an otherwise qualified Wyoming elector from appearing as an independent candidate on a general election ballot when that elector participates unsuccessfully in a primary election. Therefore, like the term limit statutes, the laws create a statutory qualification for running for office beyond those set forth in the Wyoming Constitution. There is no dispute that Plaintiffs Rooks, Thomas, and Matthew Malcom were, and are, qualified electors who were, and are, constitutionally qualified to run for office. The legislature deprived them of their rights to petition to appear on the general ballot as independent candidates based upon the legislature's determination that only those Wyoming electors who have not lost a primary election can pursue that opportunity. As held in *Maxfield* and *Cathcart*, Article I ,Section 3 prohibits the legislature from establishing such extra-constitutional qualifications that prevent constitutionally qualified electors from exercising their fundamental right to run for office enjoyed by all Wyoming citizens. Accordingly, W.S. §§ 22-5-215 and 22-5-302 are unconstitutional on their face, and as applied to these Plaintiffs prevented from running for office.

B. W.S. §§ 22-5-105 and 22-5-302 Also Violate the Wyoming Constitution's Equality Provisions.

The Wyoming Constitution is replete with provisions guaranteeing Wyoming citizens the right to equal treatment under the laws of this state, including the following:

> **WYO. CONST. art. I § 2**
> Equality of all
>
> In their inherent right to life, liberty and the pursuit of happiness, all members of the human race are equal.

> **WYO. CONST. art. I § 3**
> Equal political rights
>
> Since equality in the enjoyment of natural and civil rights is only made sure through political equality, the laws of this state affecting the political rights and privileges of its citizens shall be without distinction of race, color, sex, or any circumstance or condition whatsoever other than individual

> incompetency, or unworthiness duly ascertained by a court of competent jurisdiction.

WYO. CONST. art. I § 27
Elections free and equal

> Elections shall be open, free and equal, and no power, civil or military, shall at any time interfere to prevent an untrammeled exercise of the right of suffrage.

WYO. CONST. art. VI § 1
Male and female citizens to enjoy equal rights

> The rights of citizens of the State of Wyoming to vote and hold office shall not be denied or abridged on account of sex. Both male and female citizens of this state shall equally enjoy all civil, political and religious rights and privileges.

WYO. CONST. art. I § 34
Uniform operation of general law

> All laws of a general nature shall have a uniform operation.

WYO. CONST. art. III § 27
Special and local laws prohibited

> The legislature shall not pass local or special laws in any of the following enumerated case that is to say: For the… opening or conducting of any election or designating the place of voting….

Plainly, as Professor Keiter has written, these provisions both individually and collectively "reflect a serious and comprehensive constitutional commitment to the principle of equality" which have led the Wyoming Supreme Court to recognize "the Wyoming Constitution is construed to protect people against legal discrimination more robustly than does the federal constitution." Keiter, *supra* note 3, at 48 (quoting *Johnson v. State of Wyoming Hearing Examiner's Office*, 838 P.2d 158 (Wyo. 1992); *Allhusen v. State,* 898 P.2d 878 (Wyo. 1995); *Bird v. Wyoming Bd. of Parole*, 2016 WY 100)). As noted above, where a legislative classification unequally burdens the exercise of a fundamental right, the Wyoming Supreme Court subjects that classification to strict scrutiny. Such state action must be necessary to achieve a compelling state interest and must be achieved, if at all, with the least restrictive alternative available. *Mills*, 837 P.2d at 53.

By disqualifying unsuccessful primary candidates from petitioning to appear on the general election ballot as independents, W.S. §§ 22-5-215 and 22-5-302 diminish these candidates' right to run for office as independents in the same manner as those who have not chosen to participate in a primary. The Secretary cannot possibly demonstrate that this discriminatory disqualification is necessary to achieve a compelling state interest given the constitutional commitment to "open, free, and equal" elections (WYO. CONST. art. 1, sec. 27) and the requirement that "laws of a general nature shall have a uniform operation." (WYO. CONST. art. 3, sec. 34).

Indeed, W.S. §§ 22-5-215 and 22-5-302 serve no state interest at all but benefit only the candidates who win party primaries (and the parties they represent) to the detriment of Wyoming voters who lose the opportunity to vote for unsuccessful primary candidates they support. Wyoming's interests are served by competitive elections offering voters more rather than fewer candidate choices. By way of example, Wyomingites resoundingly chose to elect Governor Carey in 1910 after he failed to secure the Republican nomination, an opportunity they would not have enjoyed if his continued candidacy had been blocked by a "sore loser statute." According to Dr. Larson, Carey went on to become "one of the most outstanding governors in all of Wyoming history." Larson, *supra* note 2, at p.322.

Thus, W.S. §§ 22-5-215 and 22-5-302 violate the equality provisions of the Wyoming Constitution and for this additional reason they must be stricken.

IV. W.S. § 22-5-214 Imposes Impermissible Burdens On Voting Rights In Violation of Article I, Section 27 and Section 3 of the Wyoming Constitution.

In 2023, the legislature abruptly ended the historic ability of Wyoming voters to change their party registration up to the date of primary elections by passing W.S. § 22-5-214(a), which states as follows:

> For a primary election, an elector may declare or change party affiliation by completing an application signed before a notarial officer or election official and filing it with the county clerk before the first day on which an application for nomination may be filed under W.S. § 22-5-209.

Relatedly, Wyoming statute W.S. § 22-5-209 provides that the first day candidate applications to participate in a party primary election can be filed is a day described as "ninety-six (96) days…next preceding the primary election." Thus, the new party registration statute creates a deadline of the *day before* this candidate-filing day for voters wishing "to declare or change their party affiliation." The period during which voters are precluded from declaring or changing their party affiliation thereafter is referred to herein as the "blackout period."

The challenged legislation passed entirely on Republican votes following a controversial procedure circumventing the traditional legislative process.[16] Its plain purpose is to prevent large numbers of qualified Wyoming voters from meaningfully participating in the election that increasingly selects our elected representatives—the Republican primary. Despite the wording of the statute, which appears to prevent any elector not just from changing their party affiliation but also from "declaring" it during the blackout period, the Secretary has instructed county clerks that the statute does not apply to first-time voters or voters who withdraw their registration before the blackout period and seek to then re-register. *See* Memorandum of Chuck Gray to County Clerks, attached as **Exhibit 14** at 2–3 (Oct. 24, 2023.).

[16] House Bill 103 was originally introduced in the Senate Corporations, Elections and Political Subdivisions Committee and was defeated. Contrary to legislative rules the bill was then reassigned to the Senate Revenue Committee and resurfaced as a "Frankenstein bill" which many traditional Republican Senators criticized as being contrary to long-established legislative rules and/or custom. *See Legislative Hearings* February 2, 14, 21, 22, and 24 2023. As noted, recordings of the hearings are available online through the Wyoming Legislature's YouTube channel, and hearing transcripts are forthcoming.

Regardless, the new statute dramatically infringes upon the right of all registered Wyoming electors to vote for the candidates of their choice in clear violation of the Wyoming Constitution, most directly the twin guarantees of Article I, Section 27 that:

(i) all Wyoming elections "[s]hall be open, free and equal," and

(ii) the government will not interfere with the "untrammeled exercise of the right of suffrage."

This can be seen in at least three ways.

First, requiring registered voters to decide upon their party affiliation (and the primary they will be permitted to vote in) before the candidates of either party are officially identified is particularly insidious to voting rights. Without voters knowing who the primary candidates are, the statute deprives voters of the opportunity to participate knowledgeably or meaningfully in the primary election. Such a deadline prevents many Wyoming voters from casting a vote in a primary election for friends, colleagues, and even family relations because they did not know the person was going to run for office, the party affiliation of the person, or the deadline for registration changes. *See* Affidavit of Joshua Malcom (Exhibit 8) at 23; Affidavit of Christina Kitchen (Exhibit 9) at 24. Conversely, for the same reasons, the law prevents many voters from casting a vote *against* a candidate they particularly oppose.

Second, prohibiting party registration changes during the blackout period plainly deprives registered Wyoming electors of their ability to change their minds in response to events occurring during the 96-day blackout period. Such events could easily include statements made or actions taken by candidates or the political parties they represent motivating a voter to change their party registration to support or oppose the candidates in the primary election. This is contrary to the

constitutional "open, free, and fair" election requirement and interferes with the "untrammeled exercise" of an individual's voting rights.

Third, the statute, which according to its authors and the Secretary does not apply to first time voters or those whose registration has been purged due to voting inactivity, creates a system of unequal treatment discriminating perversely against registered voters who have been actively participating in elections and therefore have not been purged from the voting rolls. Moreover, the statute has created the absurd incentive for an elector to *cancel* their voter registration before the blackout period, so they can then later *re-register* during the blackout period. *See* W.S. § 22-3-115(a)(vi) (permitting cancellation of elector registration except for the period for which party changes are prohibited as specified in W.S. § 22-5-214). This is another extra-constitutional qualification to the free exercise of political rights by active registered voters of the kind *Cathcart* and *Maxfield* held are prohibited under Article I, Section 3.

Because W.S. § 22-5-214(a) impacts long-recognized fundamental political rights, again, the Secretary must show it is (i) necessary to support a compelling state interest, and (ii) it has been drafted in the least restrictive manner to achieve that purpose. This is an impossible task. There is no evidence that changes of party affiliation before primary elections have impacted the result of any primary election. There is no evidence that allowing registration changes up to the day of the primary has caused an undue administrative burden on county clerks, or that the new law will change that burden. If county clerks were excessively burdened by election-day registration changes, they were not so burdened for 112 years to warrant amending the statute. To the contrary, the long history of Wyoming primaries allowing primary day registration changes shows that terminating that privilege serves no administrative purpose. This is another statute

designed, not to promote a compelling state interest, but to benefit its Republican political sponsors.

Accordingly, W.S. § 22-5-214 violates Article I, Section 27 and Article I, Section 3 of the Wyoming Constitution and must be declared unconstitutional.

VI. W.S. §§ 22-5-204 and 22-5-212 Violate Multiple Provisions of the Wyoming Constitution.

A. The Time Is Right for the Court to Evaluate the Constitutionality of W.S. §§ 22-5-204 and 22-5-212 Providing for Wyoming's Primary System.

As shown above, the "sore loser" statute and new statutory prohibitions restricting Wyoming voters from declaring or changing their party affiliation during a primary blackout period impose significant burdens on the fundamental rights of Wyoming citizens to vote and run for office. But these statutes are merely the branches of a tree, the roots of which are Wyoming's long-standing primary statutes that establish mandatory, publicly financed primary elections for Wyoming's two "major political parties," but close them to all but registered affiliates of those parties from participation either as voters or candidates. Plaintiffs here are not only challenging the branches of this closed primary election system, but they are also challenging its roots.

As discussed above, Judge Carey and other progressive-minded reformers of the era established this primary system to combat the "Warren Machine's" domination of the Republican Party and to allow rank and file Wyoming voters to have greater say over the selection of party nominees. The system seems to have worked reasonably well in less partisan times when centrist candidates from both parties enjoyed electoral success and Wyoming's political parties were competitive. But the world, and Wyoming politics, have changed dramatically; centrist candidates are now an endangered species, all arms of Wyoming state power are now dominated by a single political party, and political participation by Wyomingites has fallen to an unhealthy low.

Ironically, the primary systems promoted as democratic political reform by Judge Carey and other national progressives such as Robert LaFollette have now become major contributors to the erosion of our democracy, with new party bosses routinely using the system to "primary" party candidates who fail to follow the asserted party line. *See generally*, Troiano, N., *The Primary Solution: Rescuing our Democracy from the Fringes* (Simon & Schuster).

Plaintiffs recognize it is not the role of the judicial branch to enact public policy. And they also respect the legislature's power and duty to establish laws establishing "pure" elections which deserve proper deference from the Wyoming judiciary. The above commentary is not intended to suggest otherwise but only to point out there are reasons why longstanding primary systems such as Wyoming's have stood without challenge for so long, and why the Plaintiffs (and others[17]) are now challenging the increasingly closed aspects of Wyoming's election system. Plaintiffs submit these changed political conditions in Wyoming warrant reconsideration by all three divisions of Wyoming's tripartite government, including the judiciary, which is responsible to ensure that our laws continue to comport with the letter and spirit of our unique state constitution through changing times consistent with its role to provide a "check" in our system of separation of powers. As noted by Professor Keiter:

> The Wyoming Supreme Court has also endorsed the proposition that the constitution is an evolutionary document that must accommodate social and economic change. In 1933, Justice Fred Blume, who sat on the court for forty-two years and authored many of its seminal constitutional decisions, wrote that "[t]he Constitution is, in a sense, a living thing, designed to meet the needs of progressive

[17] The Wyoming Equality State Policy Center has recently challenged in federal court the legislature's recent enactment of House Bill 156, which bars otherwise qualified Wyomingites from being able to register to vote unless they can first produce particular forms of identification in compliance with the law. *See Equality State Policy Center v. Gray*, *et. al,* (D. Wyo.), Civil Action No. 2025-CV-00117.

> society, amid all the detail changes to which such society is subject."[18] More recently, the court has observed that a "constitution is not lifeless, but is a flexible, living document intended to accommodate new conditions and circumstances in a changing society."[19]

Keiter, *supra* note 3, at 32 (citations moved to footnotes).

B. W.S. §§ 22-5-204 and 22-5-212 Are Unconstitutional.

W.S. § 22-5-20, relating to candidates, provides in relevant part as follows:

> (b) An eligible person seeking nomination or election for a partisan office shall:
> (i) Meet all applicable qualifications to be elected to office which are set forth in the United States and Wyoming constitutions; and
> (ii) Be registered in the party whose nomination he seeks.

W.S. § 22-5-212., relating to voters, provides in relevant part as follows:

> An elector requesting a major party ballot shall declare or change party affiliation in accordance with W.S. § 22-5-214 before receiving a party ballot. An elector may vote only the nonpartisan ballot and if so, is not required to declare his party affiliation. Requesting a partisan primary election ballot constitutes a declaration of party affiliation. A change in declaration of party affiliation shall be in accordance with the requirements of W.S. § 22-5-214 and shall be entered on the poll list by the election judge.

These statutes close Wyoming primary elections to constitutionally qualified Wyoming candidates and to Wyoming voters who are not registered affiliates of the party. With the passage of W.S. § 22-5-214(a) prohibiting the declaration or change of party affiliation during the blackout

[18] *Chicago Northwestern R.R. Co.* v. *Hall, 26* P.2d 1071, 1073 (Wyo. 1933) *See also State ex rel. McPherren* u *Carter,* 215 P.477 (Wyo. 1923), in which the Wyoming Supreme Court stated: "Law is a progressive science. It is the beauty and boast of the common law that it is able to adapt itself to the changing conditions and requirements of society. Our Constitution was adopted in the light of that fact."

[19] *County Court Judges Ass'n v. Sidi,* 752 P.2d 960, 967 (Wyo. 1988). *See also id.* at 972 (Urbigkit, J., concurring) ("I apply a rational interpretation in constitutional analysis consistent with an evolving society."); *Simms v. Oedekoven,* 839 P.2d 381, 385 (Wyo. 1992); *Campbell County School Dist. v. State,* 907 P.2d 1238, 1257-58 (Wyo.1995) (quoting Judge Blume in *Chicago Northwestern R.R. Co., supra* note 18, approvingly).

period, Wyoming's primary system is now the most "closed" primaries in the nation, with no other state only combining the exclusion of all non-affiliated voters as well as a registration blackout period that begins even before candidates have been officially identified. This is a distressing state of affairs in a state that more than any other guarantees the free and equal exercise of political rights.

For the same reasons set forth above regarding W.S. § 22-5-214(a), these statutes unconstitutionally burden the fundamental right to "open, free and equal" elections and the "untrammeled" right to vote and run for office guaranteed by Article I, Section 27. Similarly, by conditioning an otherwise qualified elector's right to participate in a publicly funded election based upon the elector's party affiliation, they violate the prohibition of statutory qualifications for the exercise of fundamental political rights beyond those set forth in the Wyoming Constitution in violation of Article I, Section 3. Under *Cathcart* and *Maxfield*, this is prohibited. Moreover, the creation of publicly funded primary elections for the exclusive benefit of two private political parties closed to independents and members of smaller political parties violates the right of those unaffiliated with a major political party the equality granted under Article I, Section 3, as well as the other equality and special law prohibitions outlined above rendering the "sore loser" statute unconstitutional.

These statutes also cannot stand in the face of Wyoming's unique Article VI, Section 3 requirement "that the names of all candidates for the same office, to be voted for at any election, shall be printed on the same ballot, at public expense, and on election day be delivered to the voters within the polling place by sworn public officials, and only such ballots so delivered shall be received and counted." That requirement crystallizes what democracy instinctively means to all of us at the most fundamental level—the right to vote for our chosen candidates among the field of

all candidates running for the same office. In their understandable zeal to create a primary election system to disempower the Warren Machine, Judge Carey and his progressive supporters evidently overlooked this clear constitutional restriction against disparate publicly funded elections closed to non-party members.

As is the case with the other statutes challenged in this action, given that W.S. §§ 22-5-204 and 22-5-212 burden and/or deny fundamental state constitutional rights, they too cannot stand unless the Secretary establishes they are necessary to support a compelling state interest and have been drafted as narrowly as possible to achieve that interest. This cannot be done. While there may be reasonable arguments that the interests of the state (as opposed to the two major parties) warrant a publicly funded primary election system, the Secretary has not been heard to advance them. And whatever the governmental interest he may claim is served by our primary system he cannot show that *closing* them to large numbers of Wyoming voters and candidates, or requiring separate ballots for members of different parties, is required to advance that interest.

For the foregoing reasons, this Court should declare that W.S. §§ 22-5-204 and 22-5-212 violate the Wyoming State Constitution.

CONCLUSION

Individually and collectively the challenged statutes deny Plaintiffs the unambiguous promise of the Wyoming Constitution that the legislature will not diminish or deny their fundamental political rights to run for office and vote for the candidates of their choice. Plaintiffs thus look to the Wyoming judiciary to check the legislature's unconstitutional denial of these fundamental liberties through the entry of summary judgment declaring that each of the challenged statutes violate the Wyoming Constitution.

Dated: July 7, 2025.

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CERTIFICATE OF SERVICE

This is to certify that on the 7th day of July, 2025, a true and correct copy of the foregoing *Plaintiffs' Memorandum in Support of Motion for Summary Judgment* was served by the method indicated below to the following:

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