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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

Donald Wills; Jennifer Young PLAINTIFFS, v. Matthew Mead, Governor of Wyoming, in his official capacity; Max Maxfield, Secretary of State, in his official capacity DEFENDANTS.	)	Civil Case No. 14-CV-126

MEMORANDUM IN SUPPORT OF
PLAINTIFFS' MOTION FOR PRELIMINARY INJUNCTION

INTRODUCTION

"Third-party groups announce candidates," read a recent headline on the cover of the local paper. Trevor Brown, *Third-party groups announce candidates*, WYO. TRIB. EAGLE, June 23, 2014, *available at* http://www.wyomingnews.com/articles/2014/06/23/news/20local_06-23-14.txt. With "at least six third party candidates . . . competing in Wyoming's statewide races," at least six third party candidates and countless potential contributors must silence themselves until the August 19, 2014 primary date, along with independent candidates and contributors. *Id.* Plaintiffs Don Wills and Jennifer Young are a minor party contributor and a candidate, respectively, who wish to meaningfully participate in an already contentious race for Wyoming Secretary of State. *See, e.g.*, Laura Hancock, *Wyoming Secretary of State candidates hire big guns*, CASPER STAR TRIB., June 8, 2014, *available at* http://trib.com/news/state-and-regional/govt-and-politics/wyoming-secretary-of-state-candidates-hire-big-guns/article_87fc6320-bf9c-5fed-9969-a0d4723d9121.html. But under the Wyoming Election Code, this is unconstitutionally prohibited.

From now until August 19, 2014, Plaintiffs may not meaningfully engage in the race for Wyoming Secretary of State, for they are entirely prohibited from raising or contributing funds for the general election for which Young has been nominated. Even after the primary date, Plaintiffs will be subject to half the contribution limit afforded to major party candidates. The Wyoming Election Code "creates a basic favoritism between candidates vying for the same office." *Riddle v. Hickenlooper*, 742 F.3d 922, 929 (10th Cir. 2014). Time is of the essence, and this Court should enjoin the enforcement of two provisions within the Code: the timing prohibition on general election contributions in WYO. STAT. § 22-25-102(c)(i)(B) and the fundraising disparity between major party and minor party or independent candidates in WYO. STAT. § 22-25-102(c).

In order to secure a preliminary injunction under FED. R. CIV. P. 65(a), the following elements must be established: (1) there is a substantial likelihood of success on the merits, (2) irreparable injury will result without an injunction, (3) the threatened injury to the moving party would outweigh any damage to the opposing party, and (4) issuing the injunction would not be adverse to the public interest. *Kansas Judicial Watch v. Stout*, 653 F.3d 1230, 1234 (10th Cir. 2011). Plaintiffs have established each of these elements.

I. Plaintiffs have Demonstrated a Substantial Likelihood of Success on the Merits

a. WYO. STAT. § 22-25-102(c)(i)(B) is a Prior Restraint on Political Speech and Violates the First Amendment, Facially and As-Applied

"The law before us is an outright ban, backed by criminal sanctions." *Citizens United v. Fed. Election Comm'n*, 558 U.S. 310, 337 (2010). For contribution limitations, the Wyoming Election Code treats the primary, general and special elections as separate elections. WYO. STAT. § 22-25-102(j). The law reads "No contribution for the general election may be given prior to the date for the primary election." WYO. STAT. § 22-25-102(c)(i)(B). A knowing and wilful violation of this law is "punishable by not more than six (6) months in a county jail or a fine of not more than one thousand dollars ($1,000), or both." WYO. STAT. § 22-26-112(a)(ix). This prohibits Young and all other convention-nominated minor party and independent candidates for state office from accepting contributions outside of their respective families before August 19, 2014, and prohibits Wills and anyone else outside of a minor party or independent candidate's immediate family from making contributions before then. *See* WYO. STAT. § 22-25-102(c) ("Except as otherwise provided in this section, no individual other than the candidate, or the candidate's immediate family . . . .") This prior restraint serves only to stifle political speech and engagement.

"[C]ontribution and expenditure limitations impose direct quantity restrictions on political communication and association by persons, groups, candidates, and political parties . . . ." *Buckley v. Valeo*, 424 U.S. 1, 17–19 (1976). Contribution limitations must meet exacting scrutiny under the First Amendment, which requires the law to be "closely drawn" to meet a "sufficiently important" governmental interest. *Id.* at 25. Historically, the Supreme Court has recognized the prevention of corruption or its appearance as a sufficiently important governmental interest. *See McCutcheon v. Fed. Election Comm'n*, 134 S.Ct. 1434, 1444–45 (2014). The Supreme Court has resoundingly rejected other asserted governmental interests for contribution limitations, including leveling electoral opportunities for candidates, or "'equalizing the financial resources of candidates.'" *Davis v. Fed. Election Comm'n*, 554 U.S. 724, 741–42 (2008), *citing Buckley*, 424 U.S. at 56–57; *see also Arizona Free Enterprise Club's Freedom Club PAC v. Bennett*, 131 S.Ct. 2806, 2825–26 (2011). In *Randall v. Sorrell*, the Supreme Court ruled that a Vermont law placing a "$200 per candidate per election" contribution limit was not closely drawn to serve the anti-corruption interest. 548 U.S. 249–53.

In this case, Plaintiffs are subject to a $1,000 contribution limit for the general election, which is likely constitutional, but Plaintiffs are prohibited from making or accepting any contributions until the date of the primary election.[1] There is no important governmental interest in prohibiting contributions to candidates who do not participate in primaries before the primary election. Minor party candidates like Young are no more susceptible to corruption than major party candidates. *See Riddle*, 742 F.3d at 928. Likewise, contributors like Wills are no more capable of corrupting candidates than other contributors. Furthermore, unlike the laws at issue in

[1] Because the law at issue forecloses *any* contribution from Wills to Young for such a significant duration of time, this Court could consider this beyond a contribution "limitation" and plausibly apply strict scrutiny.

Davis or *Arizona Free Enterprise Club* that attempted to equalize self-funded or highly-funded candidates with lower-funded candidates, the law here serves, at best, to simply align the timing of campaign funding the schedule of elections.[2] In effect, this only serves to hinder minor party and independent candidates who are already in a difficult competitive position. As applied, WYO. STAT. § 22-25-102(c)(i)(B) abridges the Plaintiffs' speech and must be enjoined to allow them to meaningfully enter the 2014 election cycle.

The as-applied challenge against WYO. STAT. § 22-25-102(c)(i)(B) is apparent, but this Court should also review the law facially, and conclude that the law is unconstitutional in its entirety. Although traditionally "facial challenges are disfavored" and "can only succeed . . . by 'establish[ing] that no set of circumstances exists under which the Act would be valid," *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449–50 (2008), in the realm of overbreadth the Supreme Court eased the standard for facial invalidity. "[P]articularly, where conduct and not merely speech is involved, we believe that the overbreadth of a statute must not only be real, but *substantial* as well, judged in relation to the statute's plainly legitimate sweep." *Broadrick v. Oklahoma*, 413 U.S. 601, 615 (1973) (emphasis added). In *Citizens United*, the Supreme Court overturned federal prohibitions on political speech by corporations and unions, noting it had once upheld the prohibition facially, then carved out an as-applied exception in a subsequent case before addressing yet another as-applied challenge by Citizens United. 558 U.S. at 332–33. Such case-by-case adjudication may not serve the ends of the First Amendment, because recalcitrant courts and legislatures may not act to remedy the laws

[2] If this were an important governmental interest, the law is not closely drawn to advance it. The Wyoming Election Code places no restrictions on primary fundraising by major party candidates who run unopposed or carrying over excess primary funds to the general election. *See* subsection (b) of this part.

in question.[3] Recently, the Colorado Supreme Court decided *Gessler v. Colorado Common Cause*, a decision that effectively limits a 2010 as-applied ruling from the Tenth Circuit Court of Appeals to the plaintiffs in the original case. *See* 2014 CO 44, 2014 WL 2707750, slip op. (Colo. 2014) *available at* http://www.courts.state.co.us/userfiles/file/Court_Probation/Supreme_Court/Opinions/2012/12SC783.pdf (upholding $200 contribution and expenditure threshold for "issue committee" status under state law).[4] Forcing different sets of plaintiffs to spend time and money chipping away at censorship is, in itself, censorship, and this Court should be wary of repetitious litigation. *See Citizens United*, 558 U.S. at 334 ("A speaker's ability to engage in political speech that could have a chance of persuading voters is stifled if the speaker must first commence a protracted lawsuit. By the time the lawsuit concludes, the election will be over and the litigants

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[3] In the 2014 Wyoming Budget Session, an amendment to WYO. STAT. § 22-25-102(c) failed introduction in the Wyoming Senate by a vote of 14-16. *See* Wyoming Senate File 52 (2014), *available at* http://legisweb.state.wy.us/2014/Introduced/SF0052.pdf; *see also* Wyoming Senate File 52 (2014) Digest, *available at* http://legisweb.state.wy.us/2014/Digest/SF0052.htm. Before the introductory vote, Senator Cale Case, sponsor of the bill, aptly described the situation:

> [T]hat's what our law says now-- you can't accept a donation for the general election if the primary's not done yet. Well, that works fine for the two parties that participate in the primary system. But for parties that . . . --and there's a whole host of them that have all sorts of different names--but they have conventions, they select a candidate, they run someone, and they don't have anything to do with the primary. So, having them be restricted from accepting a donation until after the primary doesn't make any sense. So, this just says if you don't participate in a primary, then you can receive money for the general election at any time.

Afternoon Audio of the Wyoming Senate, Feb. 10, 2014, *available at* http://legisweb.state.wy.us/2014/audio/senate/s0221pm1.mp3 (relevant audio between 01:57:50 and 02:01:11 time marks).

[4] Even facial campaign finance rulings—including *Citizens United*—have faced attempted judicial nullification by state courts. *See Western Tradition Partnership, Inc. v. Attorney General of the State of Montana*, 271 P.3d 1, 13 (Mont. 2011) (declining to apply the holding in *Citizens United* to Montana law), *overruled*, 132 S.Ct. 2490 (2012).

in most cases will have neither the incentive nor, perhaps, the resources to carry on, even if they could establish that the case is not moot . . . .") This Court should not wait until every candidate and contributor silenced by this law brings suit, and judge § 22-25-102(c)(i)(B) is facially overbroad.

The only set of circumstances making § 22-25-102(c)(i)(B) facially valid is when only major party candidates participate in the election cycle or if Wyoming's minor party candidates nominate candidates through primary elections. Under these circumstances participants would not be foreclosed from fundraising or contributing, and the $1,000 primary contribution limit would likely operate constitutionally. However, this Court must consider that these circumstances are, at least in part, the very result of the law's unconstitutional operation, which limits minor party and independent candidates to less than three months of campaign participation. Where constitutional circumstances are dependent upon non-participation by those censored under the law, the law should fail. Finally, under any scenario it is legally impossible for independent candidates to run in a primary election, leaving any set of circumstances unconstitutional under the current law. *See City of Chicago v. Morales*, 527 U.S. 41, 55 n.22 (1999) (Stevens, J. concurring) ("When asserting a facial challenge, a party seeks to vindicate not only his own rights, but those of others who may be adversely impacted by the statute in question.")

"[P]olitical speech must prevail against laws that would suppress it, whether by design or inadvertence." *Citizens United*, 558 U.S. at 340. WYO. STAT. § 22-25-102(c)(i)(B) is an

unjustifiable prior restraint on political speech that forecloses meaningful participation in the election cycle until after the primary date.[5]

b. The Fundraising Disparity in WYO. STAT. § 22-25-102(c) Between Major Party Candidates and Contributors and Minor Party or Independent Candidates and Contributors Violates the Equal Protection Clause of the Fourteenth Amendment, Facially and As-Applied

Since the Wyoming Election Code treats the primary and general elections as separate elections in WYO. STAT. § 22-25-102(j), the effect of WYO. STAT. § 22-25-102(c) is to double the contribution limit for major party candidates and contributors in a standard election cycle over the limit afforded to minor party or independent candidates and contributors like Young and Wills. Wills may contribute up to $1,000 to any candidate for Secretary of State *besides* Young now, and then an additional $1,000 after August 19, for a total of $2,000. Wills may not contribute—and Young may not accept—any more than $1,000 following August 19, again under the threat of civil or criminal penalties. WYO. STAT. §§ 22-25-102(e), 22-26-112(a)(ix). Under the scrutiny of the Equal Protection Clause of the Fourteenth Amendment, this portion of the Wyoming Election Code is also unconstitutional.

Equal Protection analysis requires this Court to consider (1) whether Wills is similarly situated to contributors to Republican and Democratic candidates, (2) the appropriate level of scrutiny, and (3) whether the law serves a sufficiently important governmental interest and if the law is sufficiently connected to that purpose. *Riddle*, 742 F.3d at 925. When the law in question impinges upon a fundamental right, the appropriate level of scrutiny should align with the standard scrutiny applied by that right. *Id.* at 927–28. For laws that affect equal protection of political contribution limits, then, exacting scrutiny is appropriate. *Id.* at 928 ("For the sake of

[5] Plaintiffs maintain that WYO. STAT. § 22-25-102(c)(i)(B) also violates the Equal Protection Clause of the Fourteenth Amendment, facially and as-applied.

argument, we can assume that this form of intermediate scrutiny applies when contributors challenge contribution limits based on the Fourteenth Amendment's Equal Protection Clause . . . .") Finally, exacting scrutiny may only be overcome by laws closely drawn to serve the same important governmental interests, such as corruption or its appearance. *Id.*

The recent *Riddle* decision by the Tenth Circuit was an as-applied ruling against a Colorado law that is distinct from the provisions of the Wyoming Election Code at issue in this case. *Id.* at 930. Specifically, the law at issue in *Riddle* allowed contributors to donate twice the amount of money to major party candidates *after* the primary election. *Id.* at 924–25. Furthermore, the court's as-applied ruling was limited to "individuals wishing to contribute to write-ins, unaffiliated candidates, and minor-party candidates *when each candidate runs unopposed for the nomination.*" *Id.* at 930 (emphasis added); *see also id.* at 929 (the election at issue in the case featured major party candidates who ran unopposed in their respective primaries). The court did not address this distinction in detail, but the strength of its reasoning is not diluted by the differences in the law at issue in this case.

Mechanically, there is a difference in situation for Young and the four major party candidates in the current race for Secretary of State: Young will only face one of these Republicans following the primary (there is no Democratic candidate for the office), and contributors will only be able to give the winning Republican funds in excess of the $1,000 primary limit. Nevertheless, Wills is similarly situated to contributors seeking to support a candidate for the office of Secretary of State in "'all relevant respects.'" *Id.* at 926, *citing Coal. For Equal Rights, Inc. v. Ritter*, 517 F.3d 1195, 1199 (10th Cir. 2008). Contributors who donate $1,000 to a Republican candidate will be able to offer an additional $1,000 of support following the primary. Even contributors whose primary candidate does not win will still be able to opine

with an additional $1,000 to any candidate in the general election. "How are the supporters different aside from their political preferences?" *Riddle*, 724 F.3d at 926.

This law implicates contribution limitations, calling upon Equal Protection of First Amendment rights. Yet again, this disparity does not plausibly serve to prevent corruption or its appearance. *See id* at 928. If there is an important interest in separating primary and general elections for other purposes, the financing provisions are not closely drawn. Incumbents in Wyoming may carry over excess funds from previous election cycles, a distinct and constitutional advantage that favors incumbents of all political affiliations. However, by allowing major party candidates to raise primary funds when they run unopposed, and in any event allowing carryover of funds from the primary to the general election within a single election cycle, § 22-25-102(c) operates only to the advantage of major party candidates and contributors. Assuming an important governmental interest can justify this financing disparity—and Plaintiffs do not concede this—the law is certainly not closely drawn to ensure that the primary election cycle does not operate to respect the equal rights of Wills and Young. For these reasons, this Court should find § 22-25-102(c) unconstitutional as applied to the Plaintiffs.

For similar reasons to the previous subsection, this Court should likewise consider the facial invalidity of WYO. STAT. § 22-25-102(c). The *Riddle* decision, in particular, drives home the continuing frustration of narrow, as-applied challenges that provide little reason for legislatures to address broadly unconstitutional laws. As the even more recent *Gessler* decision in Colorado shows, with enough patience another court may move to nullify a previous ruling, allowing chilling laws to stand until the next plaintiff with enough courage (and funding) comes forward. *See* 2014 CO 44, 2014 WL 2707750. The fundamental mistreatment of the Plaintiffs as well as all other minor party and independent candidates and contributors under WYO. STAT. §

22-25-102(c) calls for a complete legislative reexamination of the Election Code, with firm guidance from this Court that political speech and electoral participation are constitutional maxims, not problems to be solved.

Plaintiffs are substantially likely to succeed on the merits of their First Amendment and Fourteenth Amendment claims.

II. Plaintiffs Will Be Irreparably Harmed if an Injunction Does Not Issue

Where First Amendment rights are at issue, irreparable harm is established: "[t]he loss of First Amendment freedoms, for even minimal periods of time, unquestionably constitutes irreparable injury." *Elrod v. Burns*, 427 U.S. 347, 373–74 (1976); *see Utah Licensed Beverage Ass'n v. Leavitt*, 256 F.3d 1061, 1076 (10th Cir. 2001) (meeting irreparable injury requirement due to deprivation of speech rights). Plaintiffs have largely silenced themselves during this primary season, under threat of civil and criminal penalties. In a given election cycle, Plaintiffs are censored for more time than they are allowed to speak via contributions. They have missed a number of opportunities to speak out about Young's candidacy. Following the primary season, they will be unconstitutionally burdened with contribution limitations amounting to half of that imposed upon major party candidates and contributors. If an injunction is not issued, it will only result in further irreparable harm.

III. The Balance of Harms Tips in Plaintiffs' Favor

The balance of harms requirement is usually met once a First Amendment plaintiff demonstrates a likelihood of success on the merits. A threatened injury to a plaintiff's constitutionally protected speech will usually outweigh the harm, if any, the defendants may incur from being unable to enforce what appears to be an unconstitutional statute. *See American Civil Liberties Union v. Johnson*, 194 F.3d 1149, 1163 (10th Cir. 1999). Currently, Young is

almost entirely prohibited from raising funds to speak out about her candidacy, while Wills is entirely prohibited from contributing to Young. Following the primary election, both Plaintiffs will be subject to half the contribution limitation placed on major party candidates. Any harm the Defendants may suffer is limited to the loss of legal advantage for major parties and other interests that do not constitute sufficiently important government interests. Candidates will still be subject to contribution limitations, disclosure provisions and all other relevant portions of the Wyoming Election Code. The balance of harms overwhelmingly weighs in Plaintiffs' favor.

IV. Issuing an Injunction Works in Favor of the Public Interest

Vindicating First Amendment liberties is "clearly in the public interest." *Pacific Frontier v. Pleasant Grove City*, 414 F.3d 1221, 1237 (10th Cir. 2005); *Christian Legal Soc'y v. Walker*, 453 F.3d 853, 859 (7th Cir. 2006) ("injunctions protecting First Amendment freedoms are always in the public interest"). Thus, permitting Plaintiffs to speak freely and on equal footing with major party candidates and contributors serves the important goal of protecting an "essential mechanism of democracy" and our safeguard to "hold officials accountable to the people." *Citizens United*, 558 U.S. at 339. Furthermore, this injunction would protect the First Amendment rights of all minor party and independent candidates. *Morales*, 527 U.S. at 55 n.22.

CONCLUSION

For the foregoing reasons, the Court should grant Plaintiffs' motion for preliminary injunction. Plaintiffs request an expedited hearing on this matter pursuant to the goals of FED. R. CIV. P. 1. The Court should also waive the bond requirement under FED. R. CIV. P. 65(c).

Dated: July 2, 2014

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that on July 2, 2014, the below listed persons received copies of this document by electronic mail pursuant to FED. R. CIV. P. 5(b)(2)(E):

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