

FILED

**IN THE DISTRICT COURT FOR THE FIRST JUDICIAL DISTRICT STATE OF
WYOMING, COUNTY OF LARAMIE**

MATTHEW MALCOM, JEFF THOMAS,
JIM ROOKS, JOSHUA MALCOM,
CHRISTINA KITCHEN, and JIM
ROSCOE

Plaintiffs,

v.

CHUCK GRAY, in his capacity as
Wyoming Secretary of State

Defendant.

Civil Action No: 2024-CV-0202658

**DEFENDANT’S REPLY TO PLAINTIFFS’ OPPOSITION TO DEFENDANT’S
MOTION FOR SUMMARY JUDGMENT**

Wyoming Secretary of State Chuck Gray, through the Wyoming Attorney General’s Office, replies to Plaintiffs’ opposition to Defendant’s motion for summary judgment.

ARGUMENT

Plaintiffs claim that the Secretary fails to meet his burden of showing that the challenged statutes are constitutional under a strict scrutiny analysis. (*See* Pls.’ Opp’n at 3-

7, 21, 23, 32, 33, and 34). But strict scrutiny is not the standard, and the Secretary does not bear the burden. As the challenging party, the Plaintiffs have the heavy burden of proving the statutes are unconstitutional or that their fundamental rights have been affected. *See Cathcart v. Meyer*, 2004 WY 49, ¶ 7, 88 P.3d 1050, 1056 (Wyo. 2004); *Greenwalt v. Ram Rest. Corp. of Wyo.*, 2003 WY 77, ¶ 39, 71 P.3d 717, 730 (Wyo. 2003). Only when this burden is met does the burden shift to the Secretary. *See Pauling v. Pauling*, 837 P.2d 1073, 1076 (1992); *Miller v. City of Laramie*, 880 P.2d 594, 597 (Wyo. 1994). Plaintiffs are unable to meet their initial burden.

I. The right to participate in a primary nomination process of a political party is not the same as the right to vote in a general election.

Plaintiffs rely on *U.S. v. Classic* to support their contention that their right to vote applies as equally to the primary election as it does the general election. 313 U.S. 299 (1941); (*see* Pls.’ Opp’n at 12-14). Plaintiffs’ are mistaken and their reliance on *Classic* is misplaced.

In *Classic*, the Court presupposed the right to have one’s vote counted in the primary and general elections only applied to voters who were “qualified” to cast votes. *Classic*, 313 U.S. at 307. The Supreme Court left who was qualified up to state law. *See id.* at 310-14. Like the Third Circuit in *Balsam v. Secretary of New Jersey*, the Secretary was unable to find current authority holding that a person has an equal right to participate in a primary as in the general election.¹ 607 Fed. Appx. 177, 181 (3rd Cir. 2015). (“[w]hile a citizen has

¹ In *Johnson v. Grand Forks County*, the North Dakota Supreme Court held that the primary election was an election within the meaning of the State’s constitutional provision prescribing the qualifications for voters at any election. 113 N.W. 1071, 1073 (N.D. 1907).

a constitutionally protected right to participate in elections on an equal basis with other citizens in the jurisdiction, no court has ever held that that right guarantees participation in primary elections”).

In fact, many courts have held that the word “elections” in their states’ constitution refer to the general election. *See e.g., Woodruff v. State*, 52 A. 294, 296 (N.J. 1902); *In re Jamestown Caucus Law*, 112 A. 900, 901(R.I. 1921); *McLain v. Fish*, 251 S.W. 686, 689-90 (Ark. 1923); *Ledgerwood v. Pitts*, 125 S.W. 1036, 1039 (Tenn. 1910). These courts have recognized that the state’s constitutional voting protections do not apply to a party selecting its nominees, through both the caucus process and the primary election process. *See e.g., In re Jamestown Caucus Law*, 112 A. at 901 (“The right to vote in a caucus is not . . . a right guaranteed under the Constitution, but rather a private privilege granted by the Legislature under its general power to regulate elections, and therefore the act under consideration does not deprive any one of his constitutional right to vote in the election of civil officers”); *McLain*, 251 S.W. at 689 (“Constitutional provisions with respect to elections do not apply to party primaries”); *Ledgerwood*, 125 S.W. at 1039 (“the limitations and safeguards of the Constitution apply exclusively to the final election when the officer is chosen in the mode required by the Constitution”); *Riter v. Douglass*, 109 P. 444, 452 (Nev. 1910) (“It is not the purpose of the primary election law to elect officers. The purpose is to select candidates for office, to be voted for at the general election. Being so, the

In *State v. Flaherty*, however, the court was, at a minimum, highly critical of this decision. 136 N.W. 76, 82-83 (N.D. 1912) (stating that the elective franchise has two classes and that the legislature has the authority to impose “condition precedents” on primary elections).

qualifications of electors provided by the Constitution for the general election can have no application [to the primary]”); *State ex rel. Dunn v Coburn*, 168 S.W. 956, 958 (Mo. 1914) (The primary election statute does not violate the State’s constitutional provisions because “the word ‘elections’ as used [in the Constitution] has reference to choosing a person or persons for office by vote, and nowhere in the sense of nominating a candidate for an office by a political party”).

The same should apply in this case. At the time Wyoming’s Constitution was adopted, “election” was defined as “the act or process of choosing a person or person *for office* by vote; a polling *for office*; also, the occasion or set time and provision for making such choice.” *Election*, THE CENTURY DICTIONARY (1891) (emphasis added). An office refers to the public office elected at the general election, not a party’s nominee selected through the statutorily prescribed primary process. See *In re Jamestown Caucus Law*, 112 A. at 901; *Ledgerwood*, 125 S.W. at 1039; *Dunn*, 168 S.W. at 958. Given the meaning of “election” when Wyoming’s founders drafted its Constitution, the weight of authority, and rationale in favor of their holdings, this Court should give it the same meaning and hold that a primary contest is not an “election” for constitutional purposes. Plaintiffs cannot prove a constitutional violation because the constitutional provisions do not apply to partisan primary elections.

II. The challenged statutes are constitutional.

Even if Wyoming’s constitutional provisions apply to partisan primaries, those provisions must be viewed in the context of a partisan primary contests, not a general election. The purpose of partisan primary contests is entirely different than the purpose of

the general election. As numerous courts have found, the purpose of a partisan primary election is to select the party's nominee, not to elect the holder of the political office. *See e.g., In re Jamestown Caucus Law*, 112 A. at 901; *Ledgerwood*, 125 S.W. at 1043; *Riter*, 109 P. at 452; *Woodruff*, 52 A. at 296. Viewing the challenged statutes in the context of partisan primary contests—choosing the party's nominees—the statutes do not violate the Constitution.

Wyoming's Free and Equal Elections Provision provides, “[e]lections shall be open, free and equal, and no power, civil or military, shall at any time interfere to prevent an untrammelled exercise of the right of suffrage.” Wyo. Const. art. 1, § 27. The Wyoming Supreme Court has analyzed what a “free and equal” election is on one occasion. In *State v. Johnson County High School*, the State's bond election laws were challenged under Art. 1 § 27 of the Wyoming Constitution. 5 P.2d 255 (Wyo. 1931). Under the bond election laws, whenever the State or a municipality wanted to issue bonds, the governmental entity was required to submit the proposal to the electorate at a general or special election. *Id.* at 257. The election officials were provided two ballot boxes—one for property owners and their spouses and another for non-property owners and their spouses. *Id.* For the proposal to pass, the majority of votes in each box needed to be in favor of the issuance of the bond. *Id.* at 258. If the majority in either box did not favor the issuance, the proposal failed. *Id.*

In analyzing the bond laws' constitutionality, the court first determined whether each elector's vote: 1) had the same influence as any other voter; and 2) had a “decisive effect in the in the disposition of the question before the electorate.” *Id.* The court held that the bond election laws were constitutional because a vote in one box counted the same as

a vote in the other box and a majority of votes in both boxes was required to pass the proposal. *Id.*

Applying these principles to partisan primary contests, a “voter” is someone who chooses to affiliate with a major political party and participate in the party’s selection of its nominees. *See* Wyo. Stat. Ann. § 22-5-212. The candidate who receives the most votes in each contest is the “winner” of that contest and becomes the party’s nominee. *See* Wyo. Stat. Ann. § 22-5-219(a). Consequently, each voter’s vote in their party’s primary elections counts the same as every other voter in their party, and each voter’s vote has the ultimate effect of determining who will be their party’s nominee for each contest. In other words, Wyoming’s primary elections are “free and equal.”

The Wyoming Supreme Court has not ruled on what it means for an election to be “open.” It has, however, ruled on what “open” means in the context of a fundamental right to access the court system. *Mills v. Reynolds*, 837 P.2d 48, 54 (Wyo. 1992). Wyoming’s open courts provision provides, “[a]ll courts shall be open and every person for an injury done to person, reputation or property shall have justice administered without sale, denial or delay. Suits may be brought against the state in such manner and in such courts as the legislature may direct.” Wyo. Const. art. 1, § 8.

In *Mills v. Reynolds*, the court ruled that “at a very minimum,” Article 1, § 8 of the Wyoming Constitution “guarantees that every person has the right to meaningful access to the courts if he or she is injured.” 837 P.2d 48, 54 (Wyo. 1992). It held that Wyo. Stat. Ann. § 27-14-104(a) infringed on this right because employees who were injured by the tortious conduct of their co-employees were ***completely barred*** from recovering for their

injuries. *Id.* In contrast, in *Meyer v. Kendig*, the court held that Wyo. Stat. Ann. § 27-12-103(a) was constitutional because it granted immunity to co-employees unless they were culpably negligent. 641 P.2d 1235 (Wyo. 1982). In other words, because the statute only “set a standard to be applied by the courts” and did not fully deny recovery, the statute was constitutional. *Id.* at 1240-41.

Applying this reasoning to Wyoming’s elections, the closed primary statutes do not deny anyone the right to an “open” election, rather, they set a standard for how parties select their representative candidates. Voters unaffiliated with political parties may vote in nonpartisan primary elections. But they may not vote in party contests. Wyo. Stat. Ann. § 22-5-212. A person need only affiliate with a major political party by a certain date to receive a partisan ballot and participate in that party’s selection of its nominees. *Id.* Every elector has the meaningful opportunity to declare or change their party affiliation and vote in partisan primary elections. Specifically, for registered voters like Plaintiffs, the “opportunity” is approximately 21 months between primary election cycles, which provides ample time to affiliate with the party of their choice. *See* Wyo. Stat. Ann. §§ 22-2-104(b), 22-5-212, 22-5-214(a), 22-5-209. A person’s failure to exercise a right does not mean that the right was denied. It was offered and refused.

CONCLUSION

For the foregoing reasons, as well as those in Defendants’ motion for summary judgment and response to Plaintiffs’ motion for summary judgment, the Secretary asks this Court to deny Plaintiffs’ motion for summary judgment and grant the Secretary’s motion for summary judgment.

Dated this 25th day of August, 2025.

/s/ Alysia Goldman

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that on this 25th day of August, 2025, the foregoing was served on the following using the indicated methods:

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