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IN THE DISTRICT COURT OF THE FIRST JUDICIAL DISTRICT

COUNTY OF LARAMIE, STATE OF WYOMING

MIKE HUNZIE, TOM DUNLAP, ROBIN RHODES, NEIL SCHLENKER, TAYLOR HAYNES, LANA CLARK, and TRACY HUNT,

Plaintiffs,

vs.

MAX MAXFIELD, Wyoming Secretary of State, in his individual official capacity as Chief Elections Officer; MATT MEAD, Governor of the State of Wyoming, in his individual official capacity and as a member of the State Canvassing Board; MAX MAXFIELD, Wyoming Secretary of State, in his individual official capacity and as a member of the State Canvassing Board; JOE MEYER, Wyoming State Treasurer, in his individual official capacity and as a member of the State Canvassing Board; and CYNTHIA CLOUD, Wyoming State Auditor in her individual official capacity and as a Member of the State Canvassing Board,

Defendants.

Docket No. 179-562

DEFENDANTS' REPLY IN SUPPORT OF MOTION FOR SUMMARY JUDGMENT

Defendants, by and through the Wyoming Attorney General's Office, reply to Plaintiffs' Points and Authorities in Support of Motion for Declaratory Judgment and Opposition to Defendants' Motion for Summary Judgment, as follows.

ARGUMENT

I. Defendants are entitled to judgment as a matter of law on all claims challenging the 2012 Reapportionment Act's election district reapportionment.

Plaintiffs seek a declaratory judgment that article 3, section 3 of the Wyoming Constitution requires reapportionment to ensure that each county elect a certain number of senators and house members, based upon county voting populations. *See* Amended Complaint, count I, and Plaintiffs' Opposition to Motion for Summary Judgment. The State, in support of its motion for summary judgment, questioned Plaintiffs' interpretation of Wyo. Const. article 3, section 3. The State analyzed Plaintiffs' proffered interpretation from a statutory construction standpoint, with reference to several federal court decisions that applied past redistricting plans under Wyo. Const. article 3, section 3, and from the perspective of the constitutional delegates who heavily debated and enacted article 3, section 3 in 1890. The Plaintiffs, it was anticipated, would offer a fully developed legal analysis supporting their claims that the 2012 Redistricting Act maps violated article 3, section 3, and other constitutional provisions, as is their burden. Plaintiffs failed to do so. For the foregoing reasons, this Court should conclude that Plaintiffs cannot carry their burden and, therefore, the State is entitled to summary judgment.

A. Plaintiffs cannot demonstrate that the 2012 Legislature's reapportioning of Wyoming's election districts was, beyond a reasonable doubt, a clear violation of Wyoming's Constitution.

Plaintiffs' response to Defendants' summary judgment submission, replete with objections as to how various legislative districts were formed, lacks a concise legal analysis as to how the reapportioned legislative districts offend the constitutional framers' intent set forth in article 3, section 3. The critical question before this Court is not whether the legislature could have reapportioned differently or split counties in a different manner; rather, the question before this Court is whether the first two sentences of Wyo. Const. article 3, section 3 **required** the legislature to redistrict in the manner described by Plaintiffs. The Plaintiffs contend "that the language contained in Art. 3, Sect. 3, requires the legislature to conduct a mathematical analysis and then, based upon that analysis, as nearly as may be done, draw legislative districts that allow each of the counties to elect the indicated number of house and senate members." (Plaintiffs' Oppos. to Sum. J, at 5).

"[E]very statute is presumed constitutional and not to be held in conflict with the constitution unless such is clear, palpable, unavoidable, and beyond reasonable doubt." *Dir. of the Off. of State Lands & Invs. v. Merbanco*, 2003 WY 73, ¶ 32, 70 P.3d 241, 252 (Wyo. 2003)(citations omitted). Plaintiffs offer no analysis demonstrating that Wyoming's 1890 constitutional delegation clearly and unequivocally intended that future legislatures redistrict within a mathematical framework designed to maintain county voting influence. Without fully rehashing Defendants' opening arguments, Plaintiffs' burden is likely impossible to sustain because the framers of Wyoming's Constitution

operated under entirely different expectations and federal constitutional constraints than would come into play decades later.

First and foremost, Wyo. Const. article 3, section 3 does not expressly require that reapportionment preserve county boundaries under the legal requirements now in place, and Plaintiffs presumably argue that such a requirement is necessarily implied. *See* Wyo. Const. article 3, § 3. *See also Witzenburger v. State ex rel. Wyo. Cmty. Dev. Auth.*, 575 P.2d 1100, 1146 (Wyo. 1978) ("[T]he legislature possesses all legislative authority except as restricted by the State Constitution, either expressly or by clear implication."). Second, whether Wyoming's constitutional framers foresaw future apportionment challenges, wherein the districts would eventually outnumber the counties, is not likely discernible. Indeed, the founders likely assumed that as set forth in the first legislative apportionment (Wyo. Const. article 3, §§ 3 & 50) counties would continue to double as multi-member election districts. Third, the founders' intent is subject to unforeseen legal developments that would evolve and drastically change election law approximately 70 years later, namely the United States Supreme Court's "one person, one vote" rulings. *See Baker v. Carr,* 369 U.S. 186 (1962). These developments forced a drastic revision of Wyoming's county-centric apportionment law. *See* Argument 1.C.ii of State's Memo. of Law in Supp. of Sum. J.

Plaintiffs discuss a handful of cases, but fail to articulate how those cases clearly require the constitutional construction they seek in this case. For example, after describing their view of Wyoming's federal district court ruling in *Schaefer v. Thomson*, 251 F.Supp. 450, 455 (D. Wyo. 1965), Plaintiffs conclude:

> The take-home lesson of **Schaefer is just because one man-one vote requires county lines to be abandoned in a given, isolated instance, it does not mean the legislature gets to ignore county lines any time they want.** Further, they may not do it for illegitimate reasons and they may not do it if another Plan may be drawn that avoids the necessity of splitting a county.

(Plaintiffs' Oppos. to Sum. J, at 10)(emphasis in original). So, while Plaintiffs' preferred redistricting approach is evident, they offer no legal authority in support of their position that the State is required to avoid splitting counties through a mathematical approach, or that failing to do so violates Article 3, Section 3 of the Wyoming Constitution.

Plaintiffs' reference to *Brown v. Thomson*, 536 F.Supp. 780 (D.Wyo. 1982), and the concurring opinion of Justice William E. Doyle, also misses the mark. (Plaintiffs' Oppos. to Sum. J, at 11-13). In that case, challengers claimed that the legislature violated constitutional guidelines by allocating a representative to Niobrara County, allowing that county's citizens to be "overrepresented" when compared to others. The court disagreed and held that the mathematical degree of over-representation was "insufficient to constitution invidious discrimination. Rather, the effect on plaintiffs is best described as de minimis." *Id.* at 783. The court held that the State's reapportionment legislation favoring Niobrara County was otherwise justified. *Id.* at 784. Notably, the majority did not substantively address Wyo. Const. article 3, section 3.

The Plaintiffs' reliance upon Justice Doyle's special concurring opinion is unavailing. First, while he favorably discusses Wyoming's historic county-centric redistricting practices, the court does not, through this special concurrence, hold that Wyoming must preserve county voting populations in the reapportionment process.

Second, the *Brown* case predates *Gorin I* and *Gorin II,* in which that same court again struck down Wyoming's adherence to reapportionment using county boundaries as the driver. *Gorin v. Karpan*, 775 F.Supp. 1430, 1432 (D. Wyo. 1992)(*Gorin I*); *Gorin v. Karpan,* 788 F.Supp. 1199 (D. Wyo. 1992) (*Gorin II*).

Unable to sustain their burden through a concise legal analysis addressing the constitutional intent underlying article 3, section 3, Plaintiffs contend that:

> [I]t just so totally goes without saying that, apportionment among the counties respectively, should be done as nearly as may be according to the number of their inhabitants, that the court [referring to *Schaefer II*] does so without making mention of it. Some precepts are just so basic they do not require the performance of them to be announced. No one argued how it should be done because all of the parties already knew.

(Plaintiffs' Oppos. to Sum. J, at 10). Obviously, the court in *Schaefer v. Thomson*, 251 F.Supp. 450 (D. Wyo. 1965), did not necessarily hold that reapportionment must follow county lines; indeed the litigation arose in part **because,** in accordance with article 3, section 3, counties doubled as election districts. The *Shaefer II* court merely responded to the legislature's failure to submit a workable plan as ordered. In any event, the Plaintiffs' "it goes without saying" justification does not suffice to carry their onerous burden of establishing that the 2012 reapportionment is, beyond a reasonable doubt, unconstitutional. *Merbanco*, ¶ 32, 70 P.3d at 252.

Plaintiffs did not discuss other cited cases in any substantive depth, merely referring to them for historical context; thus, the State will not address those. This Court is left with little more than Plaintiffs' subjective objections to the 2012 redistricting maps, and they offer no succinct legal analysis supporting their claims that reapportionment

must avoid splitting counties. Following *Schaefer* and *Gorin II*, Plaintiffs simply cannot direct this Court to unequivocal authority that requires Wyoming's legislature to ensure that each county's population elects a certain number of senators and house members. The State is entitled to summary judgment on all redistricting-based claims, counts I through IV of Plaintiffs' Amended Complaint.

B. Plaintiffs' misstate Defendants' position.

Plaintiffs' broadly mischaracterize the State's position before this Court: "Never before has any party, plaintiff or defendant, alleged Art. 3, Sect. 3 to be null and void in its entirety until defendants did so in this case." (Plaintiffs' Oppos. to Sum. J, at 3). Plaintiffs add, "Without saying it bluntly, defendants would like this court to believe Art. 3, Sect. 3 is dead letter law." (Plaintiffs' Oppos. to Sum. J, at 7). This Court will find no such argument or statement, expressed or implied, in the State's legal memorandum in support of summary judgment. To the contrary, the State specifically narrowed its analytical focus to the first two sentences of Wyo. Const. article 3, section 3. For example, following review of Wyoming federal cases that concerned reapportionment and discussed article 3, section 3, the State observed:

> The question for this Court is **whether any part of the first two sentences of article 3, section 3** requires preservation of a county-centric voting influence following *Gorin I* and *Gorin II*? While the federal court did not specifically address that issue in *Gorin I* or *Gorin II,* the court clearly was untroubled by the new plan's disregard of county boundaries. *Gorin II* at 1202. It is difficult to articulate what, if any, residual limitation on reapportionment remains after these decisions.

(State's Memo. of Law in Supp. of Sum. J, p. 23)(emphasis added).

As a matter of law, part of article 3, section 3 was effectively struck down as "an invidious discrimination insofar as it requires that each county shall comprise a senatorial district and shall have at least one Senator[.]" *Schaefer v. Thomson*, 251 F.Supp. 450, 455 (D. Wyo. 1965). Nearly thirty years later, in *Gorin v. Karpan*, 775 F.Supp. 1430 (D. Wyo. 1992), Wyoming's federal district court revisited the matter and directed that:

> Wyoming Const. art. III, § 3, which constitutes each county an election district and requires that each county be represented by at least one representative, is inconsistent with the application of the 'one person, one vote' principle under circumstances as they presently exist in Wyoming. Consequently, **the Wyoming State Legislature may disregard this provision when reapportioning either the Senate or the House of Representatives.**

Gorin v. Karpan, 775 F.Supp. 1430, 1455 (D. Wyo. 1992). While much of article 3, section 3 undoubtedly remains binding constitutional law, that provision does not implicitly guarantee that every county must elect a certain number of representatives as Plaintiffs argue.

II. Plaintiffs fail to carry their burden of establishing that holdover senators must immediately run for reelection, rather than serve out their four year terms.

As with their claims concerning Wyo. Const. article 3, section 3 and related claims, Plaintiffs again fail to supply this Court with a concise legal analysis supporting their claim that Wyoming's constitutional framers clearly intended that holdover senators (senators with two years remaining on their terms, serving in districts where the boundaries have changed through apportionment) must immediately stand for reelection, rather than complete their four year terms. Instead, Plaintiffs criticize a memorandum issued by the Legislative Service Office to the legislature. (Plaintiffs' Oppos. to Sum. J,

at 13-14). Plaintiffs then proceed to reargue their claim regarding Wyo. Const. article 3, section 3. (Plaintiffs' Oppos. to Sum. J, at 16-18). Because Plaintiffs have not supplied this Court with clear authority supporting their claim that the 2012 Reapportionment improperly permitted holdover senators to complete their four year terms, this Court must reject their claim set forth in count V of their Amended Complaint. *Merbanco*, ¶ 32, 70 P.3d at 252.

III. The State is entitled to summary judgment on Plaintiffs' various other constitutional challenges.

Although Plaintiffs pled five separate counts that Wyoming's 2012 Reapportionment Act was unconstitutional, it is now clear that Plaintiffs are really only interested in counts I (regarding Wyo. Const. article 3, § 3) and V (regarding Wyo. Const. article 21, § 18). Plaintiffs' other claims are derived from their primary objection that the legislature violated Wyo. Const. article 3, section 3 by improperly segmenting county populations in the reapportionment process.

Plaintiffs do not even address their three other claims relating to Wyoming's constitutional equal protection provisions, or equal protection under the United States Constitution. (See Amended Complaint, count II (malapportionment), count III (relating to Wyo. Const. article 1, §§ 2, 3, 7 and article 6, § 13), and count IV (relating to the Fourteenth Amendment to the U.S. Constitution)). Accordingly, Plaintiffs' second through fourth counts must fail because they have not directly discussed, much less demonstrated, that Wyoming's reapportionment law clearly violates those state or federal constitutional provisions. The Wyoming Supreme Court has warned that it will not

answer a constitutional question "unless fully presented and argued." *Galesburg Const. Co. Inc. of Wyo. v. Bd. of Trustees of Mem'l Hosp. of Converse Cnty.*, 641 P.2d 745, 748 (Wyo. 1982). Neither should this Court presume violation of Wyoming's equal protection provisions or the Fourteenth Amendment to the United States Constitution, without a full and thorough legal analysis supporting such claims.

CONCLUSION

As this Court knows all too well, "Summary Judgment is appropriate when there are no genuine issues of material fact and the moving party is entitled to judgment as a matter of law. " *Metz Beverage Co. v. Wyo. Beverages, Inc.*, 2002 WY 21, ¶ 9, 39 P.3d 1051, 1055 (Wyo. 2002)(internal citations omitted); Wyo. R. Civ. P. 56(c). While Plaintiffs unquestionably disagree with the legislature's reapportionment approach and vehemently discuss alleged facts surrounding those legislative decisions, the legal question which first must be resolved in Plaintiffs' favor is whether Wyoming's Constitution **required** the legislature to ensure that redistricting preserve each county's ability to elect a certain number of representatives. Only then should this Court concern itself with Plaintiffs' factual allegations.

On that ultimate legal issue, the State has demonstrated that Plaintiffs' preferred interpretation of Wyo. Const. article 3, section 3 is highly questionable, if not indefensible. Plaintiffs have not responded with authority to satisfy their legal burden, beyond a reasonable doubt, that the 2012 reapportionment clearly and unmistakably violated Wyoming's or the United States Constitution. *Merbanco*, ¶ 32, 70 P.3d at 252 (Wyo. 2003). Nor have Plaintiffs demonstrated that permitting holdover senators to

complete their terms, rather than immediately stand for reelection, clearly violated Wyoming's Constitution.

WHEREFORE, this Court should grant the State (Defendant officials in their official capacities), summary judgment for the reasons set forth in Defendants' Motion for Summary Judgment and its Memorandum of Law in Support of Motion for Summary Judgment, as well as this Reply in Support of Motion for Summary Judgment, and should grant any other relief this Court deems appropriate.

DATED this 7th day of November.

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CERTIFICATE OF SERVICE

I hereby certify that I have served a true and correct copy of the foregoing by depositing a copy of the same in the United States mail, postage prepaid, this 7th day of November, 2014, addressed as follows:

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