Patrick J. Crank 5-2305
CRANK LEGAL GROUP, P.C.
1815 Evans Ave.
Cheyenne, WY 82001
(307) 634-2994
Fax: (307) 635-7155
pat@cranklegalgroup.com

ATTORNEY FOR PLAINTIFFS

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF WYOMING

JOHN B. "JACK" SPEIGHT, REX ARNEY, ROBIN HURLESS, CHRISTOPHER O. BOSWELL, TAMSIN JOHNSON, DOUG CAMBLIN, TOM LUBNAU, ANNE LADD, KATHY VETTER, CHARLES PELKEY, DAN NEAL, STEVE SIMONTON, GEORGE SIMONTON, DAVE NORTHRUP, GAIL SYMONS, and RUTH ANN PETROFF,

Plaintiffs,

v.

W. FRANK EATHORNE in his capacity as chairman of THE WYOMING REPUBLICAN PARTY, THE WYOMING REPUBLICAN STATE CENTRAL COMMITTEE, and MARK GORDON, in his capacity as Governor of the State of Wyoming

Defendants.

Case Number: 22-CV-16-S

MEMORANDUM IN SUPPORT OF PLAINTIFFS MOTION FOR TEMPORARY RESTRAINING ORDER AND PRELIMINARY INJUNCTION

COMES NOW, John B. "Jack" Speight, Rex Arney, Robin Hurless, Christopher O. Boswell, Tamsin Johnson, Doug Camblin, Tom Lubnau, Anne Ladd, Kathy Vetter, Charles

Pelkey, Dan Neal, Steve Simonton, George Simonton, Dave Northrup, Gail Symons, and Ruth Ann Petroff, by and through their attorney, Crank Legal Group, P.C., and hereby submits this *Memorandum in Support of Plaintiff's Motion for Temporary Restraining Order and Preliminary Injunction.*

SUMMARY OF CURRENT STATUS

Wyoming State Superintendent Ballow resigned on January 16, 2022. As the resignation occurred in the fourth year of the term, the vacancy is to be filled for the remainder of the unexpired term by appointment by the Governor. Because the Superintendent represented the Republican party at the time of her election, the Governor is limited by law to selecting from a list of three qualified persons submitted by the Republican State Central Committee (State Committee). The list was submitted to the Governor on January 22, 2022. The Governor has five days after receiving the list to appoint one of the three persons. W.S. § 22-18-111(a)(i).

Plaintiffs seek a temporary restraining order and preliminary injunction to enjoin the Wyoming Governor from using a list of nominees presented to him by the State Republican Central Committee to fill a vacancy in the office of State Superintendent of Public Instruction. Wyoming statutes, as supplemented by Republican State Party Bylaws and as implemented by the party in selecting the three persons for this vacancy, violate their equal protection rights guaranteed by the Fourteenth Amendment to the U.S. Constitution. More specifically, the process used by the Republican Party and the Republican Central Committee violate the one man, one vote principle. Plaintiffs will suffer irreparable harm unless the restraining order and preliminary injunction are granted.

STANDARD REGARDING TEMPORARY RETRAINING ORDERS AND PRELIMINARY INJUNCTIONS

"The primary function of a preliminary injunction 'is to preserve the status quo pending a final determination of the rights of the parties,' in order 'to preserve the power to render a meaningful decision on the merits.'" *Resolution Trust Corp. v. Cruce*, 972 F.2d 1195, 1198 (10th Cir. 1992) (internal citations omitted).

A preliminary injunction should issue where, as here, the party seeking injunctive relief shows: "(1) a substantial likelihood of prevailing on the merits; (2) irreparable harm unless the injunction is issued; (3) that the threatened injury outweighs the harm that the preliminary injunction may cause the opposing party; and (4) that the injunction, if issued, will not adversely affect the public interest." *Greater Yellowstone Coalition v. Flowers*, 321 F.3d 1250, 1255 (10th Cir. 2003) (internal quotations and citation omitted). In this case, the Plaintiffs can easily satisfy each element to sustain the injunctive relief sought.

The Tenth Circuit has adopted a modified standard, by which it is not necessary that "the plaintiff's right to a final decision, after a trial, be absolutely certain, wholly without doubt." *Cont'l Oil Co. v. Frontier Ref. Co.*, 338 F.2d 780, 781 (10th Cir. 1964). Under the modified standard, a movant must show only a "reasonable probability" of success. *Cont'l Oil Co.*, 338 F.2d at 781. A "movant may establish likelihood of success by showing questions going to the merits so serious, substantial, difficult and doubtful, as to make the issues ripe for litigation and deserving of more deliberate investigation." *Walmer v. U.S. Dept, of Defense*, 52 F.3d 851, 854 (10th Cir. 1995).

The party seeking injunctive relief must meet a heavier burden for certain types of preliminary injunctions, including those that (1) disturb the status quo; (2) are mandatory as opposed to prohibitory; or (3) that afford the movant substantially all of the relief that may be

recovered at trial. *Doubleclick Inc.*, 402 F. Supp. 2d 1251, 1255 (D. Colo. 2005). The injunctive relief sought by Plaintiffs here would not fall under this heavier burden analysis.

The *DoubleClick* case explains each of these elements and that discussion shows that the heavier burden should not apply here. First, the injunctive relief here will maintain the current status quo. There is a current vacancy in the Office of Superintendent of Public Instruction and this injunction will not alter that status quo. *Id.* at 402 F. Supp. 1255-1256.

Second, the injunctive relief requested here is prohibitory rather than mandatory. An injunction that does not alter the status quo is generally prohibitory rather than mandatory. In deciding the question of mandatory or prohibitory, a court should also inquire whether the injunction will affirmatively require the nonmovant to act in a particular way. Id. at 1256. Here the injunction only requires the Defendants to not take action, i.e. filling the vacant office, until such time as the court has the ability to rule on the constitutional questions presented by the Plaintiffs.

The last question-whether the injunction affords substantially all relief requested by the movant- must also be answered in the negative. That question involves inquiry whether the grant of the injunction would render a trial on the merits largely or completely meaningless and whether an injunctive order, once granted, cannot be undone. This injunction maintains the status quo until the trial so that factual matters regarding the effect of the voting procedures can be analyzed against the 14th Amendment. The injunctive relief requested could certainly be undone, i.e., the Governor could pick from the list submitted by the Republican Defendants if the court at some stage decides to lift the injunction. *Id,* 1256.

Here the heavier burden does not apply and even if does, the Plaintiffs are entitled to injunctive relief.

Injury is irreparable where it is of a peculiar nature and money damages cannot compensate for the injury. *Weiss v. Pederson*, 933 P.2d 495, 499 (Wyo. 1997), *overruled in part on other grounds by White v. Allen*, 65 P.3d 395 (Wyo. 2003).

RELEVANT FACTS

A. Wyoming law and party bylaws governing filling of the vacancy

The composition of the State Central Committee for major political parties in Wyoming begins at the precinct level. Each major political party in each precinct is allocated one committeeman and one committeewoman for each two hundred fifty (250) votes or major fraction thereof cast for the party's candidate for representative in congress in the last general election; provided that each precinct is entitled to at least one precinct committeeman and committeewoman. W.S. § 22-4-101(b). These precinct persons comprise the county central committee. *Id.* The county central committees "...elect the chairman of the county central committee, one (1) state committeeman and one (1) state committeewoman and other offices as provided by the party bylaws. W.S. 22-4-105. Wyoming law specifies that a major political party in the state may provide in its rules for the election of additional state committeemen and additional state committeewomen." *Id.*

The state central committee's composition is prescribed in statute to consist of "...state committeemen and committeewomen and county chairmen elected at the odd-numbered year meeting of the county central committees, and of any other party officials provided by the bylaws of the party." W.S. § 22-4-110. Thus, while the persons electing county chairmen and state committeemen and committeewomen are precinct committeemen and committeewomen allocated based upon voters in the last congressional election, the persons forming the State Central Committee are allocated on a county basis. Statute does allow for a major political party in the

State to provide in "its rules" for the election of additional state committeemen and committeewomen.

Wyoming statute does not provide for apportionment of state central committeemen and committeewomen on a population, registered voter or qualified elector basis. Nor does the statute prescribe the allocation or means for voting by a state central committee for the selection of nominees to fill a statewide elective office. See, W.S. 22-18-111(a)(i)

A major political party's bylaws, and on at least one occasion "rules," are referred to by Wyoming statute in this process of filling vacancies in statewide office and in other processes on numerous occasions. A major political party's rules and bylaws are to be certified and filed with the Wyoming Secretary of State within thirty days after adjournment of the party's state convention. W.S. § 22-4-119(b). A certified copy of the Republican State Party's Bylaws (hereafter referenced as Bylaws) filed with the Secretary of State are attached to the Complaint filed in this matter as Exhibit 1. Exhibit 1 is incorporated herein by reference as if fully set forth

The positions of County Chairman, Vice Chairman, State Committeeman and State Committeewoman are to be elected by the County Central Committee (comprised of all elected precinct committeemen and committeewomen) at its March meeting in the odd numbered years to serve for a term of two (2) years. Bylaws Article III, Section 6; W.S. 22-4-105. The Bylaws apportion delegates to the county convention, mirroring, in part, state statute for the election of precinct persons. W.S. § 22-4-101(b); Bylaws Article IV, § 3. Only elected precinct persons and elected officers are entitled to vote at county central committee meetings. Bylaws, Article III, § 9(1).

Wyoming statute provides that the composition of the State Central Committee shall be the state committeeman and committeewoman and the county chairman of each county, and other

officials provided by party bylaws. W.S. 22-4-110, Bylaws Article V, § 1(1). Additional members of the State Central Committee under the bylaws are the national committeeman, national committeewoman, state chairman, state vice-chairman and state secretary. Article V, § 1(2). The state chair, vice-chair and secretary are elected by the state central committee. Article V. § 8. The national positions are elected at the state party convention at which delegates are apportioned at 6 to each county, plus additional delegates for each county allocated on the basis of total registered republicans as of January 1, of even numbered years, with the proviso that the additional allocation shall result in not less than a total number of 150 delegates. Article VI § 2.

The Bylaws do not specifically address how voting is conducted to select nominees for vacant state elective offices. They provide generally that "[i]n any event, no member of the State Central Committee shall be able to exercise more than one vote." Article V section 1(4). They also provide for one vote by each delegate to the state convention. Article VI § 3.

The result of the governing statutes and party Bylaws is that the process by which nominees are presented to the governor is not based upon any apportionment considering population, qualified electors in the state or even registered members of the Republican party, other than the minimal apportionment as part of the selection of the national committeeman and national committeewoman, which represent two of seventy-four members of the state central committee. There is an apportionment in accordance with statute at the precinct level. But this tie to an apportioned vote is lost at the State Central Committee level as each county central committee is entitled to three members of the State Central Committee (state committeeman and woman and county chair from each county). As the state chair, vice chair and secretary are elected by these State Central Committee members officers, those positions have no tie to any apportionment basis.

The net result is a State Central Committee consisting of three members from each county central committee (sixty-nine) members, plus the three state central committee officers a national committeeman and committeewoman for a total of seventy-four voting members of the State Central Committee. This non-weighted voting by seventy-four members of the State Central Committee was in fact used in the instant case. *See*, Affidavit of John B. "Jack" Speight, Exhibit 4 to Complaint at ¶ 14. Thus, the list presented to the Governor was selected with a modicum of apportionment, at most, only because of the inclusion of the national committeeman and committeewoman). Reliance on county boundaries far exceeded any apportionment as even the two national committee members are elected at the state convention at which 138 (six from each county) out of a minimum of 150 delegates are based solely on county lines.

Wyoming's counties range in population from 100,512 in Laramie County to a low of 2,467 in Niobrara County according to the 2020 federal census. Voters in the last general election for Representative in Congress (which is used for apportionment of precinct committeemen and committeewomen, W.S. § 22-4-101) range from a high of 44,000 in Laramie County to a low of 1,300 in Niobrara County. *See,* Exhibit 3 to Complaint, 2020 Census Numbers for Wyoming. There are 28,706 registered Republican voters in Laramie County while Niobrara County has the lowest number of registered Republican voters, 1,179 as of December 1, 2021, according to the Wyoming Secretary of State's website. Applying any of these data sets reveals that the State Central Committee voting based upon a county basis, without apportionment, results in residents of Niobrara County having a disproportionate vote, ranging from approximately forty times (Census Data) to twenty-four times (Registered Voter Data) of that of each Laramie County resident.

This contrasts to other provisions in Wyoming law which prescribe who is entitled to vote for nominees for certain elected office vacancies and in some instances specify that those entitled to vote are apportioned based upon population. For example, nominees to fill vacancies in the state legislature are selected by precinct committeemen and committeewomen from within the pertinent legislative district. W.S. § 22-18-111(a)(iii). The precinct Committeemen and Committeewomen are elected with each precinct entitled to one committeeman and one committeewoman for every 250 votes or major fraction thereof cast for the party's candidate for representative in Congress at the last general election (with every precinct entitled to at least one vote). W.S. § 22-4-101(b). Further if the legislative district is located in more than one county the vote of the county commissioners selecting one of the three nominees to fill the vacancy is weighted based upon population of each county within the district. W.S. § 22-28-111(a)(iii)(D).

The defendant Republican State Central Committee was requested to use a weighted vote in developing the list of nominees. *See,* Exhibit 2 to Complaint, Lubnau letter. The chairman of the Committee ruled that "the Wyoming Republican Party is a private entity, was not conducting a public election, and that the complaint lodged did not apply." *See,* Exhibit 4, John B. "Jack" Speight Affidavit, ¶ 14.

B. Relevant Law

The position taken by the chairman of the State Central Committee fails to acknowledge that in fulfilling a critical part in the appointment of a person to a statewide elected office, and indeed, limiting the Governor to the selection of one of three persons nominated, the party was not engaged in executing private internal matters. Rather it was engaged in a public electoral function and as such was required to comply with one man, one vote principles.

The case of *Seergy v. Kings County Republican County Committee*, 459 F.2d 308 (2nd Cir. 1972) is directly on point. As in Wyoming, New York election law prescribed the way in which political party county committees were to be established. Generally, the law provided that the county committee was to consist of two members elected from each election district within the county, and that the voting power of each member was to be proportional to the party vote in his election district. But the same law also allowed a political party county committee to choose an alternative election procedure whereby up to two additional members could be elected from each election district. In counties where that option was exercised, the New York law required that each member of the county committee would have one vote.

The Republican County Committee examined in *Seergy,* had elected to use the latter provision. Given the wide disparity of the number of Republican voters in the various election districts, the failure to accord voting weight in proportion to the voting strength of each committeeman's constituency was challenged as violative of the 'one-man, one-vote' principle. The District Court ruled that the party's county committee's actions and the New York law allowing arbitrary non-proportional voting were invalid. The court of appeals affirmed in part and reversed in part, drawing a distinction between actions involving purely private affairs of a political party and those in which the party's function in voting is to select a nominee for public governmental office.

> Turning to plaintiffs' claim of denial of equal protection, the essential standard by which we are governed in determining whether the votes of county committeemen should be weighted in proportion to the number of Republican voters they represent is whether their function in voting is to select a nominee for public governmental office, as distinguished from conduct of the private affairs of their political organization. Although political parties are not immune from constitutional limitations merely because they are private groups, [....,] conversely they are not required to apply the one-man, one-vote principle to votes taken in the course of their internal affairs. [.....] The state is obligated to insure that the votes of constituents will be given equal weight only when the

> voting, whether directly by them or indirectly through their committeemen, is pursuant to "the decision of the *government* to have citizens participate individually by ballot in the selection of certain people who carry out *governmental functions*," [.....] "All procedures used by a State as an integral part of the election process must pass muster against the charges of discrimination or of abridgement of the right to vote,"[....]

Seergy v. Kings County Republican County Committee, 459 F.2d 308, 313 (2nd Cir. 1972) (citations omitted).

Applying these principles, the appellate court held that the equal protection clause does not mandate the adoption of weighted voting in the conduct the internal management and business of the party's county committee. When the county committee acted as only a private voluntary association of citizens, it was not bound by the constitutional duty to weight committee members' votes according to the number of constituents represented by them any more than was any other private club. Where "committeemen perform public electoral functions (e.g., the nomination of candidates to fill vacancies or to run in special elections, or the giving or consent to candidacies by non-members of the party), however, the county committee is required by the Equal Protection Clause to apply the "one-man, one-vote" principle, since in such cases it is unquestionably playing an integral part in the state scheme of public elections." *Seergy*, 459 F.2d at 314.

The soundness of the *Seergy* case is seen in the United States Supreme Court of *Marchioro v. Chaney*, 442 U.S. 191, 99 S.Ct. 2243, 60 L.Ed.2d 816 (1979). In addressing one man, one vote principles in the context of the interplay of state statutes and a political party's private interactions versus public roles in the election process, the court quoted from the brief of the appellant in which it was acknowledged that the state political party had stipulated to the entry of an injunction requiring adherence to one-man, one-vote when it was performing certain electoral functions:

> "Although the state committee on rare occasions performs certain ballot access functions, see RCW 29.18.150 and 29.42.020 (filling vacancies on certain party tickets and nominating presidential electors) and Wash. Const. art. II, § 15 (selecting nominees for certain interim legislative positions), when it does so it is

> constitutionally required to comply with the principle of one-person, one-vote. See, e. g., *Seergy v. Kings County Republican County Comm.*, 459 F.2d 308, 313-14 (2d Cir. 1972); *Fahey v. Darigan,* 405 F.Supp. 1386, 1392 (D.R.I.1975). The state committee has recognized this and has stipulated to the entry of an injunction ordering that the state committee be:
>
> > "enjoined from filling vacancies on the Democratic ticket for any federal or state office to be voted on by the electors of more than one county or selecting Democratic nominees for interim legislative appointments to represent multi-county districts by any method that contravenes the one-person, one-vote rule.

Marchioro v. Chaney, 442 U.S. 191 note 12, 99 S.Ct. 2243, 60 L.Ed.2d 816 (1979).

The *Marchioro* and *Seergy* cases make it abundantly clear that the role undertaken here by the Republican State Central Committee was not a private intraparty one, rather it is a public one, part of the electoral process and thus must comply with the one-man, one-vote principle.

Regarding application of "one-man, one vote" requirements, the *Seergy* Court noted that New York recognized the obligation, as evidenced by the provision for weighted voting, based on the number of enrolled party members represented by the county committeeman, in the first alternative under the law. The irrational procedure authorized by the second alternative of the statute, however, flew in the face of this requirement. Despite the county having over 1,200 election districts containing "substantial disparities" in Republican party membership, the statute arbitrarily limited the number of additional committee members from each election district to two, under the authorized alternative. In sum, the most heavily Republican-populated election district in the county could never have more than twice as many committee members as the least populous district. Yet each committee member was given a vote of equal weight within the county committee.

The "one-man, one-vote" principle need not be applied with mathematical precision, but any "deviations from population equality must be justified by legitimate state considerations."

Seergy, 459 F.2d at 314, citing *Abate v. Mundt*, 403 U.S. 182, 185, 91 S.Ct. 1904, 1906, 29 L.Ed.2d 399 (1971) and *Swann v. Adams*, 385 U.S. 440, 444, 87 S.Ct. 569, 7 L.Ed.2d 501 (1967). The court recognized the state's legitimate interest in permitting political parties to choose an election procedure whereby more than the minimum two county committeemen may be elected from each election district. Likewise, there was a justifiable interest in restricting the number of county committeemen to manageable size. "However, no such interest is served by the present requirement that equal rather than weighted voting be followed when the additional-committeemen alternative is selected." *Seergy*, 459 F.2d at 314.

> Since deviations from the principle of "one-man, one-vote" can stand only where they "occur in recognizing certain factors that are free from any taint of arbitrariness," *Roman v. Sincock*, 377 U.S. 695, 710, 84 S.Ct. 1449 1458, 12 L.Ed.2d 620 (1964), it follows that the second alternative allowed by § 12 of the Election Law, as implemented by Art. 1, § 1 of the Kings County Republican County Committee Rules, is invalid as applied to those rare instances where the committee performs a public electoral function.

Seergy, 459 F.2d at 315.

The one man one vote principle has been addressed by the Wyoming Supreme Court. In *Associated Enterprises, Inc. v. Toltec Watershed Imp. Dist.*, 490 P.2d 1069 (Wyo. 1971) (aff'd 410 U.S. 743, 93 S.Ct. 1237, 35 L.Ed. 2d 675 (1973) the Wyoming statutes providing for the creation of watershed improvement districts were challenged as violating the principle as voting rights were allocated on the basis of land ownership within the district. The court rejected the challenge, drawing a distinction between proprietary and governmental functions. The functions of the districts were found to be proprietary and in the nature of a special or private corporation. While the districts were governmental entities, the Court found that they did not "exercise delegated sovereign powers for the benefit of people generally," their functions were "primarily proprietary and not governmental." "The owners of land within the boundaries of a proposed watershed district are the persons primarily concerned." *Id.* at 1070-1071.

In rejecting the challenge and the application of "one man one vote" to the watershed improvement district laws the Court stated:

> ... appellants have cited only cases which involve elections to state office, county office, city office, or offices having to do with education. We need not dispute that the one man, one vote concept of equal protection has been applied to such elections. These elections all have to do with the election of persons to offices where political and governmental functions are extensively exercised.

Toltec at 1071.

The distinction is instructive. Here the State has delegated sovereign power to an entity for the benefit of the people generally. The delegated power involves the selection of a person to fill a statewide, constitutionally created, elected office tasked with overseeing the public school system. Contrary to the Republican State Central Committee's claim that the selection of the nominees is a private party matter, it is completely the opposite. It is the performance of a delegated sovereign power, one which is an integral part of filling one of the five elected statewide offices. Contrary to the laws challenged in *Toltec*, the delegated governmental function here does not affect solely, or even primarily, the State Republican party, it affects the entire State citizenry.

In the instant case, the Republican State Central Committee clearly is exercising a public electoral function. In fact, selection of a nominee for public governmental office was an example pointed to by the *Seergy* court as an exercise of a public electoral function. Under Wyoming law, the Governor must select one of the three nominees to fill the position of State Superintendent. W.S. § 22-18-111(a)(i). There can be no dispute as to the importance of this elected position, the holder of which is charged with supervising the State's system of public instruction and overseeing the department of education. Wyoming Constitution, Article 7, § 14; W.S. § 21-2-202. Further, as one of five elected state officials, the State Superintendent sits on numerous policy making state boards and commissions such as the Board of Land Commissioners and the State Loan and

Investment Board. Wyoming Constitution Article 18, Section 3; W.S. 36-2-101 and W.S. (11-34-102). Developing and presenting to the Governor a list of three nominees from which he is required by law to select one to fill a constitutionally created, statewide elected position of such magnitude is not merely a matter affecting only the internal workings of the Republican Party as a private entity. It is an act which substantially affects all Wyoming citizens and is an integral part of the state scheme of completing a term of office initially begun at the state's 2018 general election. As such the one-man, one-vote principle applies to the process.

The disparate effect if the votes are not weighted in the selection process is discussed above. Depending on the population set used, State Central committee persons from the Niobrara central county committee had as much as forty times and as little as twenty-five times the voting power as their counterparts from the Laramie County Central Committee.

The tenth circuit court of appeals has addressed the issue regarding the correct population base to use for apportionment meeting one man, one vote requirements in a recent case. *Semple v. Griswold*, 934 F.3d 1134 (10th Cir. 2019). In *Semple,* the plaintiff challenged the Colorado initiative petition requirements as violating one-man, one-vote. Addressing the issue of whether total population disparity or registered voter disparity should be the basis for analysis, the court noted that the United States Supreme Court held in *Evenwel v. Abbott,* 136 S.Ct. 1120, 194 L.Ed. 2d 291 (2016) that the Equal Protection Clause does not require states to draw their legislative districts based on registered-voter population rather than total population even if the two numbers differ. The court followed the Supreme Court's reasoning and likewise held that registered voter population need not be the basis for the one man one vote analysis in an initiative signature requirement case, total population could be used. *Semple* at 1141.

David Northrup is one of the Plaintiffs in this matter. Mr. Northrup applied to be selected by the State Central Committee to fill the vacant office of State Superintendent of Public Instruction. Mr. Northrup, a registered Republican voter from Park County, was not selected as one of the three persons submitted to the Governor to fill the vacant office. A hypothetical involving Mr. Northrup graphically shows the incredible and unconstitutional disparity caused by the selection procedure utilized by the State Central Committee.

Assume that Mr. Northrup received six votes, all from the two counties with the greatest population (Laramie at 100,512 and Natrona at 79,955) and that a currently successful candidate received twenty-four votes, all from the eight least populated counties (populations range from 2, 467 to 11,521). If total population is the basis for a weighted vote, and using 2,467 as a factor of one, under a pure proportional allocation the successful candidate's weighted vote would be approximately 70, while Mr. Northrup's weighted vote would total 219. The results are dramatically different. The citizens represented by the Laramie and Natrona delegations would be fully represented, rather than having their voice being given one-fourteenth of that accorded a person represented by a Niobrara delegate. Under the system employed by the State Central Committee each member cast an equally weighted vote which is violative of the US Constitution and equal protection provisions of the Wyoming Constitution. Mr. Northrup has been greatly harmed by the actions of the Central Committee.

Such disparate and unequal treatment cannot be justified. In the context of apportionment, Wyoming statutory plans have been subjected to equal protection challenges on numerous occasions. The United States District Court for the District of Wyoming has taken appropriate action when the apportionment of Wyoming Senators and Representatives was determined to violate one-man, one vote principles. *See, e.g.*, *Schaefer v. Thomson*, 251 F.Supp. 450, 456 (D.

Wyo. 1965) (imposing a court ordered districting and apportionment plan). More recently, in a challenge to the 1991 apportionment, the federal court for the District of Wyoming gave "one-man, one-vote" guidance. The court recognized a state's desire to construct legislative districts along county lines may be legitimate. But "[t]he overriding objective must always be 'substantial equality of population among the various districts, so that the vote of any citizen is approximately equal in weight to that of any other citizen in the State." *Gorin v. Karpan*, 775 F.Supp. 1430, 1437 (D. Wyo. 1991). Minor variations in this equal weighting may be permissible, but once the population inequities exceed ten percent (10%) the burden shifts to the state to justify the suspect plan. *Id.* Even a Wyoming Constitutional requirement that each county shall constitute a senate and representative district fell as population deviations could not be justified by significant and reasonable state interests..." *Id.* In the challenge to Wyoming's 1991 plan, the Court stated the population deviation in both the Senate (58%) and the House (83%) "greatly exceed[ed]" those previously found unacceptable by the federal court for the District of Wyoming. The Court concluded that the Wyoming 1991 Reapportionment was facially unconstitutional simply because the population inequality exceeded tolerable equal protection limits. *Id.* at 1440. Any legitimate interest in basing the apportionment on county boundaries was negated by the extreme population inequities.

While not a legislative districting case, the actions here effectively determine who will represent the people of the entire state in one of five elected state offices. The deviations here are not in the range of ten percent or even of the fifty-eight and eighty-three percent found to "greatly exceed" previously rejected deviations in legislative districting cases as violative of the one-man, one-vote principle. Rather they are of a magnitude in which a state central committee member from the county central committee having the lowest number of registered Republican voters is

more than twenty-four times that of a member from the county central committee with the greatest number of registered Republicans. Based on county populations, one county central committee member from the smallest county exercises almost forty times the county central committee from the largest county. These enormous deviations exist whether total population, registered Republican voters, or those voting in the last general election for representative to Congress is the measure used. No geographical or political boundary can justify such a disparity and indeed it is difficult to conceive any interest which could.

The disparity can be easily rectified. While mathematical precision need not be required, application of simple math, weighing votes proportionately could resolve any issues regarding physical limitations on meeting locations.

Unlike the New York law in *Seergy*, state statute does not dictate the disparity in the selection process used here. In fact, both Wyoming statute and Republican State Party Bylaws recognize the need for proportionate voting as the foundational basis of the electoral process in the election of precinct committeemen and committeewomen. W.S § 22-4-101(b), Bylaws Article III § 1. Unfortunately, as the decision making of the Republican political party climbs to the State Central Committee level this foundational underpinning is lost. Here, at the pinnacle of the party's critical participation in the state's electoral process, with the nomination of three persons to be submitted to the Governor for his selection of one to oversee Wyoming's system of public instruction, nearly all ties to the foundational basis of the one-man, one-vote principle was lost. Simply stated, when a political party is performing an electoral governmental function, a member of a Wyoming political party serving on the party's State Central Committee cannot be given a voice twenty-four times or forty times greater than another member of the same Committee simply based on the county from which the member hails.

Plaintiffs seek a temporary restraining order and preliminary injunction to enjoin the Governor from naming a replacement for the Office of Superintendent of Public Instruction until presented with a list pursuant to W.S. § 22-18-111(a)(i) from the Wyoming Republican Party, which is generated in a manner comporting with one-man, one-vote equal protection requirements.

> The appropriate standard for granting plaintiff relief is set forth above. In a case challenging a political party's movement from a weighted vote in endorsing candidates for political office, *Kehoe v. Casadei*, 6:11-cv-0408 (N.D. N.Y. 4/15/2011) the court noted:
> "A plaintiff seeking a preliminary injunction must establish that he is likely to succeed on the merits, that he is likely to suffer irreparable harm in the absence of preliminary relief, that the balance of equities tips in his favor, and that an injunction is in the public interest." *Winter v. Natural Resources Defense Council, Inc.*, 129 S. Ct. 365, 375 (2008); *see also Citigroup Global Markets, Inc. v. VCG Special Opportunities Master Fund Ltd.*, 598 F.3d 30, 35 n.4 (2d Cir. 2010) ("'[W]here the moving party seeks to stay government action taken in the public interest pursuant to a statutory or regulatory scheme, the district court should not apply the less rigorous ["serious questions"] standard and should not grant the injunction unless the moving party establishes, along with irreparable injury, a likelihood that he will succeed on the merits of his claim.'") (quoting *Able v. United States*, 44 F.3d 128, 131 (2d Cir. 1995)).

Based on all of the foregoing analysis and relevant case law, it is clear that the Plaintiffs are likely to succeed on the merits of this matter.

In regard to irreparable injury, the holding of the court in the *Kehoe* case in granting a temporary restraining order is instructive:

> Allowing candidates to be endorsed pursuant to disproportionate voting thereby allowing committee members from lesser populated districts to have the same voting authority as those from more highly populated districts would run afoul of the Fourteenth Amendment, undermine the voting rights of Plaintiffs and the districts they represent, and throw the legitimacy of the endorsement of the candidates and the overall electoral process into serious question. **These are not matters that can be easily undone, fixed, or remedied through an award of monetary damages. Accordingly, immediate injunctive relief is warranted.**" *Kehoe v. Casadei* (N.D. N.Y. 2011), page 5 (emphasis added).

Allowing appointment of one of the nominees selected pursuant to an unconstitutional process would be a matter not easily undone. Any person selected by the Governor and assuming the office of State Superintendent of Public Instruction would certainly hold an advantage over other potential nominees should the process subsequently be declared unconstitutional and be required to be undertaken again. The appointed person would have the advantage of having been selected by the Governor and of any experienced gained should he or she apply again in any subsequent nominating process. These advantages are akin to un-ringing a bell; they cannot be undone. Further, other worthy candidates might well be discouraged from "wasting the time" of the State Central Committee or be seen as a "sour grapes candidate". Allowing the appointment process to continue even for the time required to conduct a hearing would confer these advantages and thus deprive the rights of the plaintiffs to have nominees fairly selected by a constitutional process as free as possible from advantages gained by the previous use of an unconstitutional process.

The impact on the rights of plaintiffs is difficult to overstate. As demonstrated above, plaintiff Northrup could well have been one of the nominees if a vote following one-man, one-vote principles had been used. Allowing a nomination process which fails to follow the one-man one vote principle denies equal protection not only to an unsuccessful candidate but also denies this constitutional right to other plaintiffs residing in any county other than Niobrara who were represented by State Central Committee members exercising a greatly diluted vote.

All Wyoming citizens, be they Republicans, Democrats, or unaffiliated voters have compelling interests in the selection of the Superintendent of Public Instruction. The office of Wyoming Superintendent of Public Instruction is not "owned" by any political party or private country club. Having been delegated an important public governmental duty and function, the

Republican Central Committee needed to select candidates to fill the vacant office in a manner consistent with the Wyoming and US Constitutions. Unless this court issues a temporary restraining order and preliminary injunction, these constitutional rights will be lost once the Governor is forced to select a candidate submitted to him via a process that is violative of bedrock constitutional principles.

To be clear, plaintiffs do not contest the facial constitutionality of the governing Wyoming statutes. Neither the delegation of the nomination authority to the political party of an incumbent in cases of vacancies, nor any mandated procedure set forth in Wyoming statute are being challenged as facially unconstitutional. Unlike the New York statute in *Seergy* there is no requirement in Wyoming statute that the political party use an unconstitutional "one vote per committee member" standard.

It is not completely clear that the State Republican Party's bylaws require a non-weighted vote. There is a provision that in no event may a member of the State Central Committee exercise more than one vote. If that is interpreted by the Party as precluding a weighted vote, then like Wyoming Constitutional or statutory provisions which generate unconstitutional apportionment plans, the bylaws must fall in order to protect the equal protection rights of the plaintiffs.

Irreparable harm will occur unless this court grants a Temporary Restraining Order and Preliminary Injunction. Important constitutional rights will be forever lost once the Governor fills the vacant office. Monetary compensation cannot replace the loss of guaranteed one man one vote voting rights under our constitutions. This court should maintain the status quo until the court has the ability to address the Plaintiff's claims.

The harm to the Plaintiffs in this matter if the office vacancy is filled far outweigh by any harm to the Defendants if a Temporary Restraining Order and Preliminary Injunction are granted.

The irreparable harm to Plaintiffs is discussed *supra.* It is hard to even identify harm to the Defendants that would be caused by granting temporary relief. The office of Superintendent of Public Instruction is currently filled by an interim employee. No harm to anyone is likely to occur because of the interim employee. Such as having an interim Superintendent of Public Instruction results in harm, that harm is equally visited on both the Plaintiffs and Defendants and in fact all citizens of Wyoming. As noted above, the Defendants do not "own" the Office of Superintendent of Public Instruction. No harm will result to Defendants if this court issues temporary relief.

Last, the grant of injunctive relief here will not harm the public interest. The office is being supervised and controlled for the time being by an interim Superintendent of Public Instruction who was an employee of the prior Superintendent. This person is likely far more knowledgeable with regard to the duties and responsibilities of the office than any of three candidates selected who will have to begin anew. Maintaining the status quo while the court takes the time to carefully examine the important constitutional challenges brought by Plaintiffs does not harm the public interest and in fact likely furthers the public interest.

Our constitutions are the supreme law of the land. Making sure that everyone, including political parties and the Governor, follow the supreme law of the land furthers our likely most important public interest. Any harm that might occur to the public interest will be minimized by handling this challenge on an expedited basis. There will be few if any facts in dispute in this matter. The Republican Central Committee engaged in a selection process that does not comport with one man one vote. The legal question left to this court is whether that was appropriate. This matter can be resolved quickly and efficiently by this court as long as the status quo is maintained.

CONCLUSION

For the reasons argued *supra,* the Plaintiffs respectfully request that the court issue an immediate Temporary Restraining Order in this matter and set a preliminary injunction hearing at the earliest possible time. Plaintiff request that no bond be required in this matter based on the lack of any harm to the Defendants.

DATED this 25TH day of January, 2022.

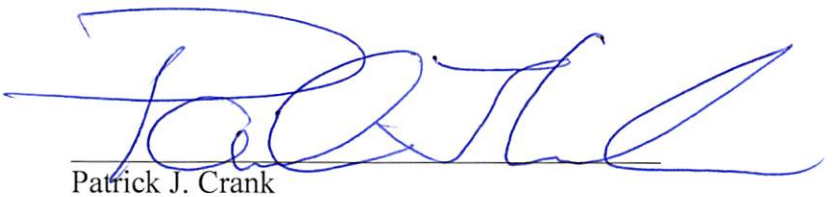
Patrick J. Crank, (5-2305)
CRANK LEGAL GROUP, P.C.
1815 Evans Avenue
Cheyenne, WY 82001
(307)634-2994
Fax (307) 635-7155

ATTORNEY FOR PLAINTIFFS

CERTIFICATE OF SERVICE

I hereby certify that on this 25th day of January, 2022, a true and correct copy of the foregoing was served upon counsel as follows:

Bridget Hill Wyoming Attorney General 109 State Capitol Cheyenne, WY 82002 Bridget.hill@wyo.gov	[ ] U.S. Mail [X] E-Mail [ ] Fax [ ] Hand Delivered
Brian Shuck State Republican Legal Counsel 2122 Warren Avenue Cheyenne, WY 82001 brianshuck@vcn.com	[ ] U.S. Mail [X] E-Mail [ ] Fax [ ] Hand Delivered



Patrick J. Crank