

Chamber Speech

- I want to **start by thanking the Chamber**, and **each of you**, for giving me the opportunity to come talk with you about my candidacy for the Montana Supreme Court.
 - I'll start by addressing what I'm sure is **the elephant in the room** for some of you – am I actually going to be **on the ballot**?
 - As most of you probably know, **only a few weeks after I announced** I would be running against **Mike Wheat**, a group of his long-time supporters sued to have me declared ineligible.
 - That lawsuit is **currently pending a decision by the Montana Supreme Court** – all of the briefing has been completed, and we are just **awaiting a decision, which could come down anytime** – hopefully **before the end of this month**.
 - I cannot tell you for certain how that case will turn out. I think the **legal merits** of the case come down very **strongly on my side**, but unfortunately these cases don't always turn on the merits, as you probably know.
 - **What you may not know** is that **over half of the individuals involved in the suit** against me – two of the plaintiffs and both of their counsel – are **all prominent plaintiff trial lawyers**.
 - Trial lawyers who have a **long record of supporting my opponent** and **supporting judicial candidates who favor plaintiffs**.
 - **That is what this suit is about** – it is the **plaintiffs' trial bar** trying to **ensure that one of their own stays on the Court**.
 - That **should be very telling to this Organization**. The **plaintiffs trial bar** is going to **unprecedented lengths to support Mike Wheat, and oppose me**, in this election.
 - But **enough about that**—I'd be **happy to answer any questions** you might have either now or later.
 - And I **also recognize** that this lawsuit **unfortunately puts the Chamber in a difficult position** – so I'll **address that towards the end of my remarks** also.
- **Some people think that the Courts need to be the answer to every problem** in society.
 - But the truth is that the **courts are not the answer to every problem**.
 - Our **courts have a very important role** in our society – **but is it a limited role**.
 - And **that role should not include being the place to go to impose our own political agenda or opinions on others when we can't get it passed by the people or the legislative branch!**
- **That is not the job of the courts**
 - The **job of our courts** is to **make sure that everyone gets a fair hearing** – **nobody should have to worry whether the judge and I see eye-to-eye on everything, whether I'm pro-business or pro-plaintiff, whether I'm republican or democrat, or what my personal views are ...**
 - they **should know that no matter what** the judge's own preferences are, **it will be the law that is applied, not the judge's own preferences**
 - The **job of our courts** needs to be to **make the law predictable**. To ensure that, judges' **decisions** need to be **based on clear reasoning, not the politics of the day**. **Not an agenda** to benefit some **special interest** or another.
 - I **cannot emphasize enough the importance of predictability**. Sometimes, that is **more important than the legal rule itself**.

- If **people and business know what the rule is**, they can **adapt their behavior and make plans** based on that rule – **even if they don't like the rule**.
 - **But if they can't even predict what the rule is**, that kind of uncertainty **kills the ability to plan**, it **kills the ability to innovate**, and it **kills the ability to do business**.
 - And **what drives unpredictability?** When the results in **cases are driven by a preference** for one party over the other, **by politics**, by **special interests**, or **by some other agenda** – not the law.
- So **why should you support me?** Let me tell you a bit about myself.
 - I'm a **5th generation Montanan**.
 - I'm **not someone who** graduated from high school, **went to college right away, and then went right to law school**.
 - **After graduating** as valedictorian of **my high school**, I did what most valedictorians do – I picked up a shovel and **worked for a year as a construction laborer and pipe layer** around the state.
 - After that I **went to college, working during the summers as a construction laborer**, until I **graduated** from **MSU** with a **civil engineering** degree with **highest honors**.
 - Then I **worked for five years for my family's construction business in Bozeman**, working my way up **from laborer to vice-president**, and **earning a masters degree in engineering management** while working full time.
 - **What I really liked** about both engineering and construction was **solving problems**.
 - I was **not a particularly political person** – I still am not. But I **enjoyed** then, and I enjoy now, **solving problems through the application of consistent, repeatable rules**. The rules of science; the rule of law.
 - During that time I **also started a family business selling and renting construction equipment** around the state.

- So **after working** in the real world for **five years**, I took the **law school entrance exam on a lark** and found out I had **scored high enough to get into Harvard**. And **Harvard offered me a scholarship**.
 - Cheryl and I didn't want to leave Montana, but this was **too good of an opportunity to pass up** so we **packed up the kids and furniture and moved the whole family to Boston** for three years.
- When I went into law school, I **thought for sure I would do construction and business law**.
 - But while I was in law school I **fell in love with Constitutional law**
 - **Constitutional law is all about solving problems**.
 - **Using foundational principles to solve real world problems in a way this is predictable, fair, and consistent.**
- So by the time I **graduated from Harvard Law School with high honors**, I had decided I wanted to be a Constitutional lawyer.
 - I went and **worked for a year for a preeminent judge in DC**, where I **got to experience first-hand the regulatory nightmare so many companies deal with** every day. The **DC Circuit**, where I clerked for a year, is the **top administrative law court in the Nation**.
 - I then **practiced Constitutional and Appellate law in the highest courts in the land** – both federal and state – for years.
 - I **represented some of our Nation's top business in a wide variety of cases**. I represented **relatively small businesses before federal agencies**. I **successfully challenged state and federal laws and regulations**.
- And finally I **had the amazing opportunity to come back home** and serve our state as the State's Solicitor General.
 - Not the chief salesman for the state – the **state's top constitutional and appellate lawyer**.
- And **now I would like to take that unique experience and background**, and **serve the people of Montana on our Supreme Court**.
- And this is **my pledge to you**. If elected:
 - I will **do what I have always done – follow the law, not the politics**. Montanans don't need, and don't want, politics in their courts.
 - The **job of the judiciary is to follow the law, not make up new law**.
 - **That is the job of the legislature and people** through referendums and initiatives.
 - I would **decide cases based on fundamental, longstanding, predictable legal principles**—that is, I would decide cases based on the law.
- I promise that **if I'm elected, and you ever come before me, you don't need to worry about whether or not we agree on everything**.
 - You know, **we probably won't** – but I can **promise that what you will get from me is a fair application of the law as it is, not how I wish it was**.
 - In short – **I won't bring a bias to the law**.

- Regarding your endorsement:
 - **Your endorsement in this race is very, very important – both to you and to me.**
 - While the **US Senate and House races this year are obviously very important**, the truth is that the **Montana Supreme Court will probably have much more impact on local, individual businesses.**
 - During my tenure on as the **Montana Solicitor General**, time and again I saw **plaintiffs bring their suits in Montana Courts, instead of the federal courts**, presumably **because they thought they were much more likely to prevail in the Montana Courts instead of the Ninth Circuit.**
 - And as some of you probably know, **the Ninth Circuit is not known for being a particularly anti-plaintiff or pro-business court!**
 - **Too often, the broad impact of our State’s highest court is seriously underestimated.** We focus **our efforts on the partisan races – Governor, state legislature, etc. – forgetting that the Supreme Court can, and often does, simply override the laws they’ve passed** with a single stroke of a pen.
 - **This is well recognized by the plaintiffs trial bar – which is already working overtime to oppose my campaign** and will continue to do so.

- Now, I realize this lawsuit brought by the trial lawyers and resulting uncertainty puts you all in a bit of a difficult position.
 - **If I do end up getting thrown off the ballot by the Court, why needlessly antagonize a sitting Justice?**
 - **But on the other hand, assuming I’m found eligible to run – which I hope and expect will happen – it would be very unfortunate, and play right into the hands of the anti-business folks who brought this politically motivated suit, for the Chamber to sit out a race where there is such a stark difference between the candidates** on the things you care about.
 - So **while I can see that it makes good sense for the Chamber to wait** in this election until my eligibility is cleared up, **please don’t sit this one out once this cloud on my campaign has been removed.**

- I really appreciate your time this morning, and please ask me some questions!

- Wheat: 42% Judicial Career Business Score in Chamber's 2012 review;
- Wheat: 39% voting rating by Chamber while in the MT legislature;
- **Jacobsen v. Allstate**, 2013 MT 244 - Wheat wrote a 4-3 majority decision certifying a class action against Allstate about its claim settlement practices. Even Wheat acknowledged that the lower court had inappropriately certified the class, but instead of reversing the court below Wheat "modified" the class. Baker, McKinnon, and Rice dissented, on the basis that the class certification violated recent US Supreme Court precedent (in Wal-Mart v. Dukes). This shows how pro-plaintiff and anti-business Wheat is, and how a change in one justice on the Court could make a key difference.
- **Clark Fork Coalition v. DEQ**, 2012 MT 240 - Wheat wrote a bare majority opinion (4-2) reversing the DEQ's decision to grant the Rock Creek Mine a permit. Both the Forest Service and Montana DEQ spent almost a decade studying the impact from the proposed mine and the mine's proposed mitigation plan, and concluded that the mitigation the Mine was willing to do would actually improve conditions in Rock Creek and help the bull trout overall. The well-established standard of review for cases like this, which Wheat acknowledged and gave lip service to, was for the courts to defer to those expert conclusions unless they were *clearly* wrong. But instead of deferring, Wheat ignored their expertise, extensive analysis, and conclusions, and denied the permits based on a made-up story using cherry-picked facts. Rice in his dissent (joined by McKinnon) chastised Wheat for misapplying the well-established standard of review and neglecting to give proper deference to the expert agency's conclusions supported by extensive research and a "massive" record. Instead of giving "great deference to an agency decision, especially where it implicates substantial agency expertise," Wheat just substituted his own judgment for the agency and rewrote the facts. As Justice Rice said, Wheat's "summary of the case is the Court's own story--a story based on a very selective review of the evidentiary record and one that is contrary to the record as a whole." Justice Baker did not participate, so here again a change in one justice could have made a key difference.
- **Goble v. Montana State Fund**, 2014 MT 99 - The Court upheld a state law that prohibits incarcerated individuals from receiving disability or rehabilitation work comp benefits while incarcerated. The Court recognized that there is a rational basis for treating prisoners differently than other work comp beneficiaries, because prisoners can't return to the work force, which is a principle objective of work comp. Cotter wrote a dissent, which Wheat joined, arguing that prisoners should continue to receive work comp benefits, even though the state is already paying for their incarceration and they cannot return to the work force.
- **Walters v. Flathead Concrete**, 2011 MT 45 - Montana's statutory work comp scheme strictly limits wage loss payments to certain dependents (not parents), and only a small lump sum payment to others (like parents). The Court upheld that statutory scheme. Wheat, joined by Nelson, dissented, arguing that the Court should have effectively rewritten the legislative scheme to broaden the definition of dependent.
- **Montana Wildlife Federation v. Montana Board of Oil & Gas**, 2012 MT 128 - The Court rejected challenges to environmental assessments (EAs) done by the Montana Board of Oil and Gas that allowed gas well permits. The challengers argued that the EAs did not adequately access potential impacts to sage grouse, but the Court majority disagreed. Wheat, joined by Morris, dissented and argued that he would have found the EAs unlawful because they relied on the Board's "institutional knowledge."
- **Patterson Enterprises v. Johnson**, 2012 MT 43 - The Court affirmed the district court's ruling allowing the jury's partial apportionment of damages to the plaintiff based on assumption of risk. Wheat, in a lone dissent, argued the Court should not have allowed the jury to apportion the damages, and the full verdict should have been rendered against the defendant. This illustrates

that Wheat is not pro-jury, just pro-plaintiff and pro-liability. When the jury rules against liability or the plaintiff, Wheat believes the jury's ruling should be ignored.

- **Newman v. Scottsdale Insurance**, 2013 MT 125 - The Court upheld a lower court's award of \$3M in damages, but reversed the lower court's award of \$1.2M in attorney's fees as improper. Wheat, in a lone dissent, disagreed with the reduction in attorney's fees.
- **Bell Trust v. Flathead Bank**, 2013 MT 152 - Wheat was the lone dissenter when the Court affirmed judgment in a Bank's favor on a property dispute.
- **Chipman v. Northwest Healthcare**, 2014 MT 15 - Wheat, joined by the Chief, dissented from the Court's ruling that statements in an employee handbook did not create a binding group contract. The handbook expressly said the policies therein could be changed or discontinued at anytime. Wheat would have ignored that "disclaimer."
- **Diaz v. Montana**, 2013 MT 219 - Wheat, in a lone dissent, would have rewrote a class certification order to broaden the class.