**S-26-0029**

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**IN THE SUPREME COURT, STATE OF WYOMING**

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MATTHEW MALCOM, JEFF THOMAS, JIM ROOKS, JOSHUA MALCOM, CHRISTINA KITCHEN and JIM ROSCOE,
*Appellants (Plaintiffs)*,

v.

CHUCK GRAY, IN HIS CAPACITY AS WYOMING SECRETARY OF STATE,
*Appellee (Defendant)*.

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# REPLY BRIEF OF APPELLANTS

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## NEW ARGUMENTS RAISED BY THE SECRETARY

Appellants presented detailed arguments grounded in the history, text, and purpose of the Wyoming Constitution. The Secretary has not rebutted those arguments. Rather, his opposition centers on cases from other jurisdictions applying different constitutions to different primary systems and employing approaches to constitutional scrutiny different from this Court's. Notwithstanding these differences, the Secretary asks this Court to consider these cases as persuasive authority that (i) the individual constitutional protections afforded Wyoming electors in the Wyoming Constitution should not apply to primary elections, and (ii) this Court should scrutinize HB 103's impact on those constitutional protections under rational basis scrutiny—a result he also argues is required by the "election purity" provision set forth at Wyo. Const., Art. 6., § 13.

These arguments do not respond to those raised in Appellant's Opening Brief, nor are they persuasive. But before explaining why that is so, it is important to note what the Secretary does *not* argue:

- Contrary to his arguments in the district court (R. 678), the Secretary makes no argument now that the Amendments to Wyoming Stat. §§ 22-5-212 and 22-5-214 (the "Amendments") are necessary or even defensible to protect the "associational rights" of political parties.

- The Secretary does not try to show how the Amendments survive strict scrutiny—or any level of heightened scrutiny. Nor does he show why the government should not have the burden of demonstrating their constitutionality. His entire brief is written as a rational basis defense and plea for legislative deference. As below, the

Secretary presents *no* evidence of disingenuous Wyoming electors affiliating with any political party to subvert the party's nominating process, or that the challenged legislation will somehow remedy this suspected but unproved practice. Indeed, the Secretary's own Directive (discussed below) purports to permit "new registrants" (whether disingenuous or not) to declare their affiliation after the registration deadline, undermining HB 103's stated purpose.

- The Secretary does not dispute Appellants' argument that his Directive to Wyoming's County Clerks—that "new registrants" are not subject to the strictures of HB 103—proves that the law as written would otherwise disenfranchise currently qualified but unregistered voters from participating in the 2026 primary. Indeed, he entirely skirts the disenfranchisement problem his Directive is so plainly intended to cure, arguing only that it has "no force or effect of law." (Sec. Br., 25.) While this may be, his Directive shows that Wyoming's Chief Election Officer recognizes the disenfranchising effect of HB 103 on all Wyoming electors who were not registered on the commencement of the Freeze Period.

## I. THE SECRETARY'S NARROW DEFINITION OF "ELECTION" AS EXCLUDING PRIMARIES MUST BE REJECTED.

The Secretary claims Appellants offer no serious argument that "election" in the Wyoming Constitution includes primaries. That is wrong. Appellants offered four independent text-based arguments applying this Court's interpretive rules. The Secretary responds only with a single dictionary citation—and he misstates even that, given that his cited definition is not the primary definition. According to *The Century Dictionary* cited by the Secretary, the first definition of "election" is not confined to contests for an "office"

but is instead more broadly: "1. A deliberate act of choice; particularly a choice of means for accomplishing a given end." *Election*, THE CENTURY DICTIONARY (1895 Ed.) Vol. III, 1866 (available at https://archive.org/details/centurydictionar0003will) (last visited 5/24/26). This accords with the *Webster's* definition Appellants previously provided.[1] In any event, where definitions differ, this Court should adopt the construction that reflects the plain, ordinary meaning of the word, *Belle Fourche Pipeline Co.*, 766 P.2d at 542, and one that favors "the right of voters," both of which commend Appellants' proffered understanding of the word. *See Brimmer v. Thompson*, 521 P.2d 574, 580 (Wyo. 1974); *Murphy v. State Canvassing Board*, 12 P.3d 677, 681 (Wyo. 2000) ("The election laws, particularly in their application to primaries, should be construed liberally and *in pari materia.*")

The Secretary's early-twentieth-century cases from other states fare no better. This Court gives constitutional interpretations from other jurisdictions persuasive weight only when warranted by "the specific wording of the constitutional provision." *Cathcart v. Meyer*, 2004 WY 49, ¶ 40. But the Secretary neither details the constitutional language at

[1] The Wyoming Supreme Court regularly relies upon Merriam-Webster's dictionaries to determine the plain and ordinary meaning of words. *See, e.g.*, *Belle Fourche Pipeline Co. v. State*, 766 P.2d 537, 542 (Wyo. 1988); *Skoric v. Park Cnty. Cir. Ct., Fifth Jud. Dist.*, 2023 WY 59, ¶ 11.

issue in those cases, nor does he show how it corresponds to Wyoming's text.[2] He also fails to explain how any constitutional language was applied to a primary system regime in any way comparable to Wyoming's.[3] Absent that critical context, and for this reason alone, this Court should not ascribe any persuasive value to these cases.

More fundamentally, the Secretary ignores the decisive shift in constitutional understanding that renders his favored authorities obsolete. His cases reflect the same flimsy notion the U.S. Supreme Court embraced in 1921 when its majority concluded the U.S. Constitution's reference to "elections" in Article I, Section 4 did not reach primaries because they were "unknown" at the nation's founding. *Newberry v. United States*, 256 U.S. 232, 250 (1921). But even *Newberry* already contained the seeds of its own undoing;

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[2] The Tennessee and Rhode Island suffrage provisions at issue in *Ledgerwood v. Pitts*, 125 S.W. 1036 (Tenn. 1910) and *In re Jamestown Caucus Law*, 112 A. 900 (R.I. 1921), extended the franchise only to elections for specific constitutional *offices*, which thus more plausibly excluded "nominating" contests. Wyoming's suffrage provision is expressly broader, extending to "any election." Wyo. Const. Art. 6, § 2.

[3] The Arkansas primary at issue in *McClain v. Fish*, 251 S.W. 686 (Ark. 1923) was an entirely private party affair involving no public financing or administration. As the Arkansas Supreme Court pointed out a few years after *McClain*: "[t]he state has nothing to do with the holding of primary elections" under that system. *Robinson v. Holman*, 26 S.W.2d 66, 68 (Ark. 1930). Wyoming's state-run, publicly financed primaries bear no resemblance to that archaic model.

Justice Pitney's concurrence stated the better view, observing that the primary "has no reason for existence, no function to perform, except as a preparation for" the general election, and that the U.S. Constitution speaks "in broad outline" to matters of substance whose application evolves with changing circumstances. 256 U.S. at 279–82.

Twenty years later, the Court fully adopted Justice Pitney's analysis in *United States v. Classic*, 313 U.S. 299 (1941), holding that Louisiana's public primary was an "integral part of the election machinery" subject to the federal elections clause. Three years after that, *Smith v. Allwright*, 321 U.S. 649 (1944) confirmed and extended this principle. In *Smith*, after noting the "fusing by the *Classic* case of the primary and general elections into a single instrumentality for choice of officers" (*id*. at 660), the Court held "[i]t may now be taken as a postulate that the right to vote in such a primary for the nomination of candidates without discrimination by the State, like the right to vote in a general election, is a right secured by the Constitution." *Id*. at 661–62. Together, *Classic* and *Smith* established as settled federal constitutional law that federal primary elections are not simple party nominating affairs, but integral components of a two-part electoral process entitled to the same constitutional protection as general elections. By 1946, even the Arkansas Supreme Court had recognized that *Smith* "revolutionarily" altered the constitutional landscape and concluded it had implicitly overruled prior Arkansas decisions treating

primaries as mere internal party affairs. *Adams v. Whitaker*, 195 S.W.2d 634, 637 (Ark. 1946).[4]

This Court should not interpret the word "election" in Wyoming's Constitution to mean less than what it encompasses under the federal elections clause. Wyoming constitutional and statutory provisions are to be read "in harmony with the existing law" and "in connection with . . . the decisions of the courts." *Union Pacific R.R. v. Trona Valley Federal Credit Union*, 2002 WY 165, ¶ 7. And because Wyoming's federal and state elections are fully integrated into a single process (*see, e.g.*, Wyo. Stat. Ann. 22-6-117; 22-6-120, specifying order of federal and state offices on primary and general ballots) it would be especially anomalous for Wyoming electors to enjoy federal constitutional rights to participate in the primary while lacking any rights under the Wyoming charter—even though Wyoming's Constitution affords *express* voter protections far more robust than those in the U.S. Constitution, most of which are merely implied. Finally, excluding primaries from Wyoming's constitutional protections would seemingly result in eliminating Wyoming's constitutional voter qualifications from primary elections entirely —a consequence that at least one court has explicitly recognized as "absurd." *Lamone*, 912 A.2d at 695.

[4] Today even *Am. Jur*. states: "a primary election, which is necessary and controlling in the choice of candidates for election, is an 'election' within the meaning of state constitutional provisions governing the right to vote." 26 *Am. Jur*. 2d, *Elections* § 234 (citing *Lamone v. Capozzi*, 912 A.2d 674 (Md. 2006); *Opinion of the Justices*, 949 A.2d 670 (N.H. 2008)).

In sum, the Secretary's cited authorities belong to a bygone era and jurisprudence the U.S. Supreme Court expressly repudiated more than eighty years ago. They do not support the Secretary's position that primary elections fall outside the meaning of "elections" or the constitutional protections afforded by the Wyoming Constitution.

## II. THE SECRETARY'S CASES EMPLOYING DEFERENTIAL SCRUTINY ARE INAPPOSITE TO THE WYOMING CONSTITUTION AND THIS COURT'S BINDING PRECEDENT.

The Secretary acknowledges that "the right to vote is a fundamental right" and that "the Wyoming Constitution placed great importance on ensuring the right to vote was protected." (R. 678.) He nevertheless urges deferential scrutiny, not because the voting rights at issue demand it, but because he says HB 103 does not burden those rights so seriously as to entirely deny them. (*See* Sec. Br., 18, 20, 21.) But this Court has never determined that its constitutional scrutiny test depends upon the degree of harm an infringing law inflicts on a protected right. Rather, as sated in *Johnson*, the level of scrutiny is based upon "the nature of the right" and "the express language of the constitutional provision." *State v. Johnson*, 2026 WY 1, ¶ 49. And, except where constitutional language points to a different test, heightened scrutiny applies whenever "fundamental rights" are "infringed." *Id*., ¶ 14; *see also Degenfelder v. Wyoming Educ. Ass'n*, 2026 WY 54, ¶ 40 (Wyo. May 14, 2026) (citing *Johnson*, ¶ 14 (laws affecting "more than ordinary rights" warrant "a more critical analysis").

Appellants have already shown under *stare decisis* why strict scrutiny is the proper standard here. Yet, rather than directly engage with Wyoming precedent, the Secretary again redirects the Court to cases from other jurisdictions, every one of which involve

deferential scrutiny standards emanating from the U.S. Supreme Court's evolving jurisprudence in the narrow context of challenges brought specifically under the First, Fourteenth, or Fifteenth Amendments.

The Secretary most heavily relies on *Rosario v. Rockefeller*, which upheld New York's very early party affiliation deadline in the face of challenges brought under the First and Fifteenth Amendments because this deadline was said to serve "legitimate purposes" (including the prevention of "party raiding") and did not "totally deny" the electoral franchise "to a particular class of residents." 410 U.S. 752, 757–58 (1973). Justice Powell's dissent (joined by three of his colleagues) accurately pointed out that the majority, without acknowledging it, had employed rational basis scrutiny at odds with the Court's own precedent recognizing that "any serious burden or infringement" on suffrage is "sufficient to establish a constitutional violation" requiring careful scrutiny. *Id*. at 766–68 (Powell, J., dissenting) (citing *Dunn v. Blumstein*, 405 U.S. 330, 343 (1972); *Reynolds v. Sims*, 377 U.S. 533 (1964)).

*Rosario* presaged the Court's general retreat from its former application of strict scrutiny of laws abridging federal voting rights, a process culminating in its *Anderson-Burdick* "sliding scale balancing test" through which the level of scrutiny is determined by the court's individualized assessment of the degree of harm a law inflicts, with strict scrutiny reserved for those cases in which voting rights are "severely burdened" or

abrogated entirely. (*See* App. Br. 52–53.)[5] Every case the Secretary cites applies some form of deferential scrutiny based on the Supreme Court's approach, either as federal courts bound by Supreme Court precedent (*Polelle v. Florida Secretary of State*, 131 F.4th 1201 (11th Cir. 2025); *Van Allen v. Cuomo*, 621 F.3d 244 (2d Cir. 2010)), a state court adjudicating federal First and Fourteenth Amendment claims (*Boydston v. Weber*, 307 Cal.Rptr.3d 27 (Cal. Ct. App. 2023)), or state courts adopting the federal approach without being required to do so (*Smith v. Penta*, 405 A.2d 350 (N.J. 1979); *Matter of Moody v. New York State Bd. of Elections*, 165 A.D.3d 479 (N.Y. App. Div. 2018); *Crum v. Duran*, 390 P.3d 971 (N.M. 2017)).

Only the last category involves a state court choosing to employ something akin to rational basis review under its own constitution. But those cases offer no persuasive guidance here for at least two independent reasons:

First, none of those state constitutions provides protections as fulsome as Wyoming's. None contains a provision like Article 1, § 3 prohibiting the Legislature from

[5] Not only is the *Anderson Burdick* test foreign to this Court's approach to state constitutional scrutiny, the U.S. Supreme Court has been known to diverge from its own operating system to condemn measures which merely weaken voting rights, rather than abrogating them. *See, e.g, Bush v. Gore* 531 U.S. 101, 105 (2000) ("It must be remembered that 'the right of suffrage can be denied by a debasement or dilution of the weight of a citizen's vote just as effectively as by wholly prohibiting the free exercise of the franchise.'") (quoting *Reynolds*, 377 U.S. at 555).

imposing extra-constitutional conditions on the exercise of qualified political rights. Neither the New Jersey Constitution in *Smith* nor the New York Constitution in *Moody* guarantees "free and equal elections." New Mexico's "free and open" clause cited in *Crum* is worded differently and less protectively than Article 1, § 27. *Compare Crum*, 390 P.3d at 973 with Wyo. Const. Art. 1, § 3 (providing that elections shall also be *equal* and that no civil authority shall interfere "to prevent an *untrammeled* exercise of the right of suffrage") (emphasis added).

Second, all three cases upheld challenges to *party affiliation requirements themselves*—not to a narrow challenge to a specific durational deadline like that presented here. Notably, the affiliation deadlines adopted by the legislatures in New Jersey (50 days before the primary), New York (25 days before the primary) and New Mexico (28 days before the primary) were all far shorter than Wyoming's 96 days under HB 103. And critically, New Mexico's 28-day deadline and New York's 25-day deadline fell *after* candidate filing, which at least gave voters knowledge of who would appear on the ballot and allowed them to make an informed decision as to which political party offered candidates, platforms, and policy positions aligned with their voter preferences. New Jersey's 50-day deadline—which fell 16 days *before* candidate filing—drew a sharp and apt dissent from two Justices who found such a deadline unreasonably curtailed voters' ability to affiliate "in response to a promising candidate or an important issue," thereby "severely curtail[ing]" the "right of our citizens to vote for candidates of their unfettered choosing." *Smith*, 405 A.2d at 360 (Pashman, J., dissenting). The 96-day deadline under

HB 103, imposed before candidate filing and months before the primary, is significantly more restrictive than anything these courts considered.

Most importantly, the Secretary has not presented a reason for this Court to look elsewhere to borrow a scrutiny standard originating in federal law and which is not based upon the unique text, purpose, and spirit of Wyoming's own charter. Each of the fifty states have their own unique histories resulting in their own unique constitutions and jurisprudence. *See 51 Imperfect Solutions: States and the Making of American Constitutional Law*, Sutton, J. (Oxford Univ. Press 2018). In a recent fifty-state survey, The State Democracy Research Initiative of the University of Wisconsin Law School observed "widespread recognition on the part of state courts that the robust right-to-vote guarantees contained in state constitutions call for heightened judicial skepticism of voting restrictions." STATE DEMOCRACY RESEARCH INITIATIVE, *Explainer: State Constitutional Standards for Adjudicating Challenges to Restrictive Voting Laws* (2023) (available at https://statedemocracy.law.wisc.edu/our-work/state-constitutional-standards-for-adjudicating-challenges-to-restrictive-voting-laws) (last visited 5/26/26). Nowhere is the call for "heightened judicial skepticism" more appropriate than in Wyoming given our history and uniquely protective voting and political rights provisions.

In sum, the historic protections our state founders crafted to preserve voting and political rights from overreaching political actors demand that the judicial standard used to review laws impacting those rights be solidly rooted in Wyoming soil and tradition. As this Court stated in *Johnson*, "we will not blindly adhere to federal precedent when interpreting our own constitution and instead will do so only when we find it persuasive." *Johnson*,

¶ 22 (citing *Fertig v. State*, 2006 WY 148, ¶ 17). Fundamentally, the Court must apply the test "that respects the unique language of the Wyoming Constitution [and] is consistent with the primacy this Court affords to independent state constitutional analysis." *Hicks v. State*, 2025 WY 113, ¶ 106 (citing *Joseph v. State*, 2023 WY 58, ¶ 18). Here, that is strict scrutiny.

## III. ART. 6, § 13 DOES NOT SUGGEST THE APPLICATION OF RATIONAL BASIS REVIEW.

Appellants do not contend the Legislature is without power to pass laws regulating Wyoming elections. That power is inherent in the Legislature's police power and expressly granted in several parts of the suffrage and elections provisions of Article 6, including but not limited to the Article 6, § 13 "election purity" provision. Indeed, the fundamental rights of qualified Wyoming electors to vote in free, open and equal elections could not be realized if there were not laws in place ensuring, among other things, that only Wyoming qualified electors vote, only valid votes be counted, and that our elections be conducted in an orderly and uniform manner. But the Secretary is very wrong to contend, as he does, that the Legislature is constitutionally empowered to pass any election law it wants under the guise of "election purity" (or election "integrity") to which this Court must then abjectly defer unless the law is entirely without "reason." (*See* Sec. Br., 22–23.)

As has been noted, the internal structure of Wyoming's Constitution establishing the people's rights before any delegation of power to the Legislature requires that "the legislature's police powers [be] limited by individual constitutional rights." *Johnson*, ¶ 50

(citations omitted).[6] Moreover, "[i]n order that a statute may be valid, the purpose, aim, or end thereof must be within the scope or purview of the police power, and in furtherance thereof . . . [and] there must be a substantial connection between the purpose in view and the actual provisions of the law." *State v. Langley*, 84 P.2d 767, 771 (Wyo. 1938).

The Secretary acknowledges none of this. Instead, he cites the early case of *Slaymaker v. Phillips*, 40 P. 971 (Wyo. 1895) for the proposition that Article 6, § 13 "charges the Legislature with determining whether a voting regulation is reasonable or

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[6] A notably cogent explanation of the importance of this structural arrangement in the voting rights context is set forth in a Wisconsin case involving the League of Women Voters:

> The people's fundamental right of suffrage preceded and gave birth to our Constitution (the sole source of the legislature's so-called "plenary authority"), not the other way around. Until the people's vote approved the Constitution, the legislature had no authority to regulate anything, let alone elections. Thus, voting rights hold primacy over implicit legislative authority to regulate elections. In other words, defendants' argument that the fundamental right to vote must yield to legislative fiat turns our constitutional scheme of democratic government squarely on its head.

*League of Women Voters of Wisconsin Education Network, Inc., et al. v. Scott Walker, et al.*, No. 11CV4669, 2012 WL 763586 (Wis. Cir. Mar. 12, 2012); s*ee also, Douglas, Joshua A., The Right to Vote Under State Constitutions*, 67 Vanderbilt Law Review 1, 136 (2014) ("State constitutions thus grant the right to vote in mandatory terms and only secondarily delegate legislative control to regulate some aspects of the election process. The constitution, not the legislature, confers the right to vote, so the legislature's power cannot completely override this constitutional grant.")

unreasonable," and that a Court may not invalidate that legislative decision "unless such a conclusion is necessary and unavoidable." (Sec. Br., 9.) Apparently, the Secretary believes either the holding in *Slaymaker*, or the language of Article 6, § 13, requires or supports the application of rational basis scrutiny here. But these propositions are not correct.

*Slaymaker* is valuable precedent concerning the meaning of Article 6, § 13 as an anti-fraud measure requiring laws ensuring an "honest ballot and fair count."[7] 40 P. at 978 (Groesbeck, J.) (dissenting). However, as a case decided long before the development of constitutional scrutiny analysis, it is in no way pertinent to the level of scrutiny this Court should apply in 2026. Moreover, the decision does not support the Secretary's notion that Article 6, § 13 trumps individual voting rights guaranteed in the Declaration of Rights. Indeed, in language consistent with this Court's modern constitutional jurisprudence, then Chief Justice Groesbeck (in dissent) stated as follows:

> The legislature has full power to regulate the right to vote, *but no constitutional power to restrain or abridge the right, or unnecessarily to impede its free exercise*. Under the pretense of regulation, *the right to*

[7] Chief Justice Groesbeck explains how Article 6 should be read in concert with the Territorial Legislature's adoption of the "Australian ballot law," which established extremely detailed election procedures (outlined in the opinion) to assure that public elections implementing the new "secret ballot" would not be corrupted by those administering the new system. *See Slaymaker*, 40 P. at 974–78. His view of Article 6, § 13 as an anti-fraud provision was later endorsed by the Court. *See Pratley v. State ex rel. Campbell*, 99 P. 1116, 1127 (Wyo. 1909) (declining to invalidate ballot in the absence of fraud).

> *suffrage must be left untrammeled by any provisions* or even rules of evidence that may injuriously or necessarily impair it . . .

*Id*. (emphasis added).

Nor does any language in Article 6, § 13, or any other provision of the Constitution, suggest or imply that some level of scrutiny other than the strictest level afforded to protect fundamental rights should apply. Unlike in *Johnson*, the state can point to **no** language suggestive of constitutionally compelled rational basis or other deferential review. To the contrary, and has already been explained, the primacy of the rights at issue and the express language of the provisions relied on by the Appellants point to the Court employing its most exacting level of scrutiny. As in *Johnson*, the "constitutional terms" at issue "are easily harmonized with the strict scrutiny standard," thus directing the Court to apply that level of scrutiny consistent with precedent and this Court's constitutional role. *Johnson*, ¶ 61.

## CONCLUSION

The Court should declare the Amendments unconstitutional and direct the Secretary to notify all Wyoming County Clerks to allow voter registration and party affiliation changes during the formal voter registration period and on the date of primary elections as provided under Wyoming law before HB 103 was enacted.

DATED: May 26, 2026.

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## CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing *Reply Brief of Appellants* electronically was filed with the Wyoming Supreme Court on the 26th day of May 2026, and was therefore served via the Court's electronic filing system to the following:

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Per W.R.A.P. Rule 1.01, the original paper copy plus six (6) copies of the *Reply Brief of Appellants* were contemporaneously sent to the Wyoming Supreme Court by U.S. Mail, first class postage pre-paid. I have accepted the terms for e-filing and hereby certify that the foregoing document, as submitted in electronic form, is an exact copy of the original and hard-copy documents filed with the Wyoming Supreme Court Clerk and is free of viruses. Additionally, I certify that, to my knowledge, no privacy redactions were required.

*/s/ Emma Bourne*
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