**IN THE UNITED STATES DISTRICT COURT**
**FOR THE DISTRICT OF COLORADO**

Civil Action No. 23-cv-01948-PAB-KAS

COLORADO REPUBLICAN PARTY, an unincorporated nonprofit association, on behalf of itself and its members,
Plaintiff,
v.
JENA GRISWOLD, in her official capacity as Colorado Secretary of State,
Defendant.

---

**THE SECRETARY'S RESPONSE TO MOTION FOR PRELIMINARY INJUNCTION [DOC. 39]**

---

Colorado does not force major political parties to include unaffiliated voters—who now account for nearly 50% of its total registered voters—in their candidate nomination processes. Instead, Proposition 108, which has been the law since 2016, offers parties a choice between a State-funded, semi-open primary election or a party-funded, closed caucus or assembly process. For three consecutive election cycles, the political will of the voting members of the Colorado Republican Party ("Party") has been *against* opting out of the State's semi-open primary election and *in favor* of allowing unaffiliated voters to participate in its candidate nomination process.

Now, five months after filing this lawsuit, which the Secretary's evidence at the hearing will show was authorized by substantially fewer than the Party's full voting membership, it seeks to override the political will of those members who want a semi-open primary by requesting that Proposition 108 be preliminarily enjoined in the lead-up to the 2024 primary elections. Because the Party has not shown that it is likely to succeed on the merits of its constitutional claims, and because its delay in seeking preliminary relief undermines its claim of irreparable harm, the Court should deny the motion. Mot., Doc. 39.

## BACKGROUND

In 2016, Colorado voters approved Proposition 108, allowing voters with no registered affiliation to a party to cast ballots in a nonpresidential primary of a single political party.[1] C.R.S. §§ 1-2-218.5(2), 1-4-101(2). In doing so, Coloradans decided that unaffiliated voters should have a voice in taxpayer-funded primary elections. *See* Blue Book 66. Proposition 108 expressly permits a major political party to opt out of semi-open primary elections and instead nominate its candidates in a "closed" assembly or convention limited to voters who have publicly registered their affiliation with the party.[2] *Id.* at 65; C.R.S. § 1-4-702(1). The decision to opt out must be made by the major political party's state central committee by a three-fourths majority vote no later than October 1 of the year before the assembly or convention is held. *Id*.

The Party's State Central Committee met on September 30, 2023, to consider whether to opt out for the 2024 election cycle. Joint Statement of Undisputed Facts, Doc. 33, ¶ 5. The votes in favor of opting out fell short of the three-fourths threshold. *Id*. ¶ 6. The Party similarly elected not to opt out during the prior two election cycles. *Id*. ¶¶ 8, 9, 12.

## ARGUMENT

A plaintiff seeking a preliminary injunction must establish (1) a substantial likelihood of success on the merits, (2) that it will suffer irreparable injury absent the injunction, (3) that the balance of equities favors the plaintiff, and (4) that an injunction is in the public interest. *Winter v. Nat. Res. Def. Council, Inc.*, 555 U.S. 7, 20 (2008). The plaintiff bears the burden of proving

---

[1] *See* Legis. Council, Colo. Gen. Assembly, Rsch. Pub. No. 669-6, *2016 State Ballot Information Booklet* 65 (2016) ("Blue Book"), https://tinyurl.com/2s3rsenb (last visited January 10, 2024).
[2] A major political party is one whose candidate at the last gubernatorial election received at least ten percent of the total vote. C.R.S. § 1-1-104(22). Minor political parties may exclude unaffiliated voters from their primary elections. *Id*. § 1-4-1304(1.5)(c).

that each factor tips in its favor. *Heideman v. S. Salt Lake City*, 348 F.3d 1182, 1188-89 (10th Cir. 2003). The preliminary relief sought by the Party here is "disfavored" in at least three ways: it requires a "mandatory" injunction that would alter Colorado's election planning, upset the status quo, and afford the Party all the relief it could recover after a trial. *See Schrier v. Univ. of Colo.*, 427 F.3d 1253, 1259 (10th Cir. 2005). The Party thus "must make a strong showing" that "the likelihood-of-success-on-the-merits and the balance-of-harms factors. . . tilt in [its] favor." *Free the Nipple v. City of Ft. Collins*, 916 F.3d 792, 797 (10th Cir. 2019) (quotations omitted).

## I. The Party is not substantially likely to succeed on the merits.

### A. The Party's First Amendment political association claims lack merit.

It is well established that States "may, and inevitably must, enact reasonable regulations of parties, elections, and ballots to reduce election- and campaign-related disorder." *Timmons v. Twin Cities Area New Party*, 520 U.S. 351, 358 (1997). When a State election law imposes "severe restrictions" on First Amendment rights, it must be "narrowly drawn to advance a state interest of compelling importance." *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) (quotations omitted). But "when regulations impose lesser burdens, a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions." *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018) (quotations omitted).

***Proposition 108 does not substantially burden associational rights.*** Colorado's optional, semi-open primary does not substantially burden major political parties' associational rights. Because major parties have the *choice* between participating in the primary or opting out, Colorado law does not force parties to allow unaffiliated voters to participate in the candidate-winnowing that is the purpose of a primary election, and their rights are not significantly

burdened. *See Greenville Cnty. Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 2d 655, 664-66 (D.S.C. 2011) (rejecting facial challenge to similar state law).

Here, the Party relies heavily on *California Democratic Party v. Jones*, which held that a mandatory blanket primary system severely burdened a party's right to decide with whom to associate in order to select a candidate. 530 U.S. 567, 582 (2000). This reliance is misplaced for three reasons. First, *Jones*'s central concern of forced political association is absent here. Whereas in *Jones*, major parties were required to choose their nominees through a blanket primary in which voters of any party affiliation could participate, *id*. at 570, Colorado's major parties may choose between the semi-open primary or a closed assembly or convention.

Second, Colorado's semi-open primary system differs considerably from that in *Jones*, in which any voter of any affiliation could vote for any candidate, and voters could select different parties' candidates for different offices. *Id*. at 570 & 577 n.8. In Colorado, voters who have publicly registered their affiliation with a party may only vote in their own party's primary, and unaffiliated voters are limited to one party's ballot for all races—for example, they may not jump between Democratic candidates for governor and Republican candidates for secretary of state in the same primary. C.R.S. § 1-4-101(2)(a)-(b). *Jones* observed that a system "in which the voter is limited to one party's ballot" may be "constitutionally distinct." *Jones*, 530 U.S. at 577 n.8.[3] Any burden on the Party's associational rights is meaningfully less severe than in *Jones.*

[3] The distinction raised in *Jones* relied in part on the idea that voting in one party's primary—to the exclusion of any other—might fairly be described as an act of political association. *Jones*, 530 U.S. at 577 n.8. The Party dismisses that idea as inapplicable here because Colorado law allows unaffiliated voters to vote in a party's primary "without affiliating with that political party." C.R.S. § 1-7-201(2.3). But the fact that Proposition 108 does not require voters to register with the party does not diminish *Jones*'s core observation: party registration is just one way of expressing association, and the choice to vote in a single party's primary may be another.

Third, in finding a burden on the plaintiff's associational rights, the *Jones* Court relied on substantial evidence—indeed a "clear and present danger"—that adherents of opposing parties might determine a party's nominees. *Id.* at 578. Here, the Party only speculates about the risk of unaffiliated voters dictating its nominees. *See* Mot., Doc. 39 at 5. This scant evidence is far from the "strong showing" the Party needs to prevail. *Free the Nipple*, 916 F.3d at 797; *see also Ariz. Libertarian Party, Inc. v. Bayless*, 351 F.3d 1277, 1282 (9th Cir. 2003) ("[T]he risk that nonparty members will skew either primary results or candidates' positions [i]s a factual issue, with the plaintiffs having the burden of establishing that risk."). The Party has not presented any evidence that unaffiliated voters have actually influenced the outcome of any Colorado primary, much less the survey evidence of voters' intentions proffered in *Jones. See Jones*, 530 U.S. at 578. Because *Jones* is distinguishable, it does not support the Party's claim.

***Proposition 108's opt-out alternative does not infringe on parties' right to associate.***

The Party asserts that Proposition 108's opt-out mechanism itself infringes on its associational rights by severely intruding into its internal affairs. Not so. First, the Party insists that the three-fourths voting threshold for opting out is "nearly impossible to meet," thereby depriving it of a real choice. Mot., Doc. 39 at 7. But the Party provides no evidence to support that claim—other than a citation to Robert's Rules of Order—and thus has not made a strong showing of likely success on the merits. *See* Mem. Op. & Order on Mot. to Dismiss at 29, *Parable v. Griswold*, No. 22-cv-00477-JLK (D. Colo. Apr. 8, 2022) ("Parable Order").

Second, the Party insists that the three-fourths threshold severely intrudes on its internal affairs. But understood in context, the threshold at most minimally burdens its associational rights because the Party retains control over key matters that determine how it operates in

practice. The statute authorizes a party to opt out if "at least three-fourths of the total membership of the party's state central committee votes to use the assembly or convention nomination process." C.R.S. § 1-4-702. But it does not dictate how the "total membership" of the state central committee is defined, who is a voting member, or how many voting members there are. *See id*.; *see also id*. § 1-3-103(2)(a) (state central committee consists of certain enumerated individuals "and any additional members as provided for by the state central committee bylaws"). Similarly, if the Party has difficulty assembling a quorum to hold an opt-out vote, it could make attendance mandatory or change the meeting location or date. *See* Parable Order at 18 (describing the Party's difficulty in obtaining sufficient participation as "squarely within the province and concern of [the Party]").[4] Against this backdrop, the three-fourths threshold does not severely intrude into the Party's internal affairs. *See Greenville*, 824 F. Supp. 2d at 668; *compare Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 216 (1989) (holding a scheme unconstitutional that "dictate[d] the organization . . . of [political parties' governing bodies], . . . and require[d] that the chair rotate between residents of northern and southern California").

Finally, the Party complains that Proposition 108 deprives it of its preferred nomination

[4] In fact, as the Secretary's evidence will show, the Party's State Central Committee recently considered a proposed amendment to its bylaws that would have made it easier to opt out of the semi-open primary. Under the proposal, votes of absent or nonvoting members of the Committee would automatically have been counted as votes in favor of opting out. But this proposal did not garner the necessary votes needed under the Party's own rules for passing bylaw amendments, suggesting that the political will of the Party's membership is *against* opting out. *See* Ernest Luning, *Colorado Republicans reject bylaws change that would have made it easier to cancel 2024 primary*, Colorado Politics (Aug. 5, 2023), http://tinyurl.com/3jz4a2bw (last visited January 10, 2024).

process: a publicly funded closed primary.[5] But it has no constitutional right to force taxpayers to fund its favored process. *See* Parable Order at 14 n.6. It is well-settled that States may restrict parties' candidate nomination procedures to particular formats, such as a convention or primary. *See Jones*, 530 U.S. at 572 ("We have considered it 'too plain for argument,' for example, that a State may require parties to use the primary format for selecting their nominees[.]"); *see also Am. Party of Tex. v. White*, 415 U.S. 767, 781 (1974); *Utah Republican Party*, 892 F.3d at 1078-79. Nor has the Party shown that Colorado law prevents it from funding its own closed primary and then certifying the results at a convention. *See* Parable Order at 19. The choice afforded by Proposition 108 is more than adequate to accommodate major parties' associational rights. *See Miller v. Brown*, 503 F.3d 360, 368 (4th Cir. 2007) (where parties had "multiple options for restricting their candidate selection process to individuals of their choosing," the State's refusal "to fund and operate a closed primary does not burden parties' right of association").

***Colorado's important interests justify any slight burden imposed by Proposition 108.*** Colorado's important public interests justify the reasonable, non-discriminatory restrictions imposed by its optional, semi-open primary system. Proposition 108 supports Colorado's interests in facilitating increased voter participation, promoting fairness, ensuring administrative efficiency, and preserving the integrity of the nominating process. These legitimate interests justify any minimal burden on the Party's associational rights. *See* Parable Order at 27.

First, the semi-open primary serves the State's interest in a fair candidate winnowing

[5] Contrary to the Party's suggestion in citing to the Joint Statement of Undisputed Facts, Doc. 33, ¶¶ 7, 11, the Secretary has not stipulated that a closed public primary is the "one choice that Plaintiff's State Central Committee unanimously or nearly unanimously supported in both 2021 and 2023." Mot., Doc. 39 at 8.

system in which unaffiliated voters have an adequate opportunity to participate. *See N.Y. State Bd. of Elections v. Lopez Torres,* 552 U.S. 196, 203 (2008) ("[W]hen the State gives the party a role in the election process . . . then also the State acquires a legitimate governmental interest in ensuring the fairness of the party's nominating process, enabling it to prescribe what that process must be."). States have an important interest in facilitating greater voter participation, so long as political parties also retain a choice regarding the bounds of their associations. "The right to vote freely for the candidate of one's choice is of the essence of a democratic society . . . ." *Reynolds v. Sims,* 377 U.S. 533, 555 (1964); *see also Utah Republican Party*, 892 F.3d at 1084 (State interests in "increasing voter participation[] and increasing access to the ballot" are part and parcel of "the very backbone of our constitutional scheme"). [6] In Colorado, a substantial portion of active registered voters have chosen *not* to affiliate with a political party, Joint Statement of Undisputed Facts, Doc. 33, ¶ 3; indeed, according to the Secretary's most recent Voter Registration Statistics, that number now approaches half of all active voters.[7] Proposition 108 recognized this fact and sought to give these Coloradans, "who are Colorado taxpayers, the opportunity to vote in publicly financed primary elections." *See* Blue Book 66. If major political parties were permitted to hold State-funded closed primaries, a significant percentage of registered voters would be either unable to select candidates for the general election or forced to

[6] Unlike the blanket primary at issue in *Jones*, Proposition 108 does not purport to increase voter participation by "assuring a range of candidates who are all more 'centrist.'" *See* 530 U.S. at 584. Instead, Proposition 108 increases voter participation by giving hundreds of thousands of unaffiliated Colorado voters the opportunity to vote in the first place. *Cf. id.* (explaining the blanket primary's "net effect" and "avowed purpose" was to "*reduce* the scope of choice[s]" available to voters).

[7] *Total Registered Voters by Party & Status* (Jan. 1, 2024), http://tinyurl.com/5n6tkvxn (last visited January 10, 2024).

discard their deliberate choice to remain unaffiliated with any political party. *See* Parable Order at 28 (recognizing that the associational interests of unaffiliated voters are also at stake).

Second, the structure of the opt-out mechanism furthers the State's legitimate interests in stability and ensuring administrative efficiency in its elections, while still accommodating the Party's interests in defining the bounds of its association. *See Storer v. Brown*, 415 U.S. 724, 736 (1974) (State interest in stability of political system is compelling); *Greenville*, 824 F. Supp. 2d at 671-72. By setting the opt-out level at three-quarters of a major party's state central committee membership, Colorado ensures that a party must have a strong commitment to opting out. If the level were lower—like the simple majority vote the Party seeks in its request for relief—there is a material risk that parties' processes would vacillate regularly and create undue voter confusion.

Because the burdens imposed are minimal, Proposition 108 need not satisfy strict scrutiny. But even if it did, the evidence presented by the Secretary at the upcoming hearing will establish that Proposition 108 is carefully crafted to serve the State's compelling interests without unduly infringing on political parties' associational rights. The semi-open primary encourages voter participation and is an administratively sound way to winnow the fields of candidates who identify with shared political views. Yet it still respects parties' associational interests, by excluding voters registered with rival parties and allowing parties to opt out. And the specific three-fourths opt-out threshold preserves the stability of the overall electoral process by guarding against frequent vacillation between nominating formats, which would sow voter confusion and create heavy election administration burdens. The Party has not made a strong showing that it is likely to succeed on the merits of its freedom of association claim.

**B. The Party cannot succeed on its free speech claim.**

The Party also is unlikely to succeed on the merits of its free speech claim. Under Colorado law, if a political party chooses to nominate its candidates through a primary election, the candidates who receive a plurality of votes become the only candidates identified with that party on the general election ballot for their respective offices. C.R.S. § 1-4-104. The Party asserts that this amounts to unconstitutional "compelled speech" because, in a semi-open primary, the candidate receiving the plurality of votes for an office may not have received a majority or plurality of votes from the voters who have publicly registered their affiliation with the party, yet that candidate nonetheless becomes the party's sole general election candidate.[8]

But the Party fails to cite a single case holding that a similar candidate selection rule constitutes unconstitutional compelled speech, and for good reason. Proposition 108 no more violates a party's free speech rights than do other reasonable procedural rules governing ballot access and candidate nomination processes, all of which necessarily influence to some extent who becomes the last remaining candidate identified with the party on the general election ballot. Such structural rules serve important State interests and are necessary to prevent electoral chaos. As detailed above, Proposition 108 strikes an appropriate balance between the State's legitimate interests and those of political parties. *See Utah Republican Party*, 892 F.3d at 1078 ("[W]hen the party's actions turn outwards to the actual nomination and election of an individual . . . , the state acquires a manifest interest in that activity, and the party's interest . . . must share the stage with the state's manifest interest.").

[8] Of course, if a candidate receives only a plurality of votes from voters registered with the party, that candidate is not the majority's preferred nominee, even without including unaffiliated voters.

Further, § 1-4-104 in no way prevents political parties from disseminating the views of the party (whether defined as those held by the state central committee, a majority of party members, a plurality, or something else). The Party remains free to endorse any candidate or platform it wants, to criticize or support candidates' positions, and to encourage voters—whether registered with the party or not—to support particular candidates. Finally, Proposition 108 does not compel speech because it does not force parties to proceed by primary at all. The Party has thus made no showing, let alone a strong one, that it is likely to succeed in its free speech claim.

**C. The Party cannot succeed on its vote dilution claim.**

The Party's vote dilution claim lacks merit. First, the Party has not cited, and the Secretary is unaware of, any case law holding that an affiliated voter's vote is diluted by opening the party's primary to unaffiliated voters. Yet the Party baldly asserts that allowing unaffiliated voters to participate in a party's primary is akin to "ballot-box stuffing." *See Reynolds*, 377 U.S. at 555. "Ballot-box stuffing"—or the practice of forging and returning false ballots to "create a false and fictitious return respecting the votes lawfully cast"—bears no resemblance to the lawful counting of unaffiliated Coloradans' votes pursuant to Proposition 108. *United States v. Saylor*, 322 U.S. 385, 388 (1944). One's vote is not diluted simply because it is outnumbered. *Thornburg v. Gingles*, 478 U.S. 30, 57 (1986) ("[L]oss of political power through vote dilution is distinct from the mere inability to win a particular election."). And second, the Party has the choice to opt out of the primary. In short, the Party's votes are not diluted if it fails to exercise that choice.

**D. The Party cannot succeed on its equal protection claim.**

The Party next contends that Proposition 108 violates its equal protection rights by treating voters affiliated with major political parties differently than those affiliated with minor

political parties. Mot., Doc. 39 at 11. But Proposition 108 does not classify *voters*; it classifies *political parties*. Regardless, "[t]he Equal Protection Clause does not forbid classifications. It simply keeps governmental decisionmakers from treating differently persons who are in all relevant respects alike." *Taylor v. Roswell Indep. Sch. Dist.*, 713 F.3d 25, 54 (10th Cir. 2013).

Major and minor political parties and their affiliated voters are not alike "in all relevant respects." And because neither being a voter affiliated with a specific political party nor being a major or minor political party is a suspect class, *Greenville*, 824 F. Supp. 2d at 669, Colorado's classification passes muster if it is rationally related to a legitimate government interest. *See Armour v. City of Indianapolis, Ind.*, 566 U.S. 673, 685 (2012).

Here, Colorado could rationally decide both that (1) unaffiliated voters should (absent the party opting out) have a voice in selecting the top vote-getter among candidates identified with one major political party who will be the sole candidate from that party to appear on the general election ballot, but also that (2) the State has less of an interest in including unaffiliated voters in minor party primaries, because smaller political parties that do not qualify as a major party usually do not require the winnowing function of a primary between multiple candidates, and further, minor party candidates in Colorado rarely, if ever, command a winning plurality at the general election.[9] *See Jenness v. Fortson*, 403 U.S. 431, 441 (1971) ("The fact is that there are obvious differences in kind between the needs and potentials of a political party with historically established broad support, on the one hand, and a new or small political organization on the

[9] Additionally, permitting unaffiliated voters to select a minor party's primary ballot would present a dilemma for those voters. Minor parties regularly fail to field contested slates of candidates for all races at issue in an election, so unaffiliated voters would be unable to vote on all races that would otherwise be contested on the major parties' primary ballots.

other."); *see also* Parable Order at 29-30. Thus, the Party has not made a strong showing that it is likely to succeed on its equal protection claims.

**E. The *Purcell* doctrine counsels against court intervention.**

Even if the Party's arguments were likely to succeed, the Supreme Court's *Purcell* doctrine counsels against federal court intervention in Colorado's ongoing election planning activities. "Court orders affecting elections . . . can themselves result in voter confusion and consequent incentive to remain away from the polls. As an election draws closer, that risk will increase." *Purcell v. Gonzalez*, 549 U.S. 1, 4-5 (2006). And evidence presented by the Secretary at the evidentiary hearing will show that making eleventh-hour changes to Colorado's voting systems and processes to accommodate any change to Proposition 108 carries serious risks.

The Secretary will present evidence that after Proposition 108 was approved, Colorado had more than a year to design and implement the needed changes to its statewide voter registration system to track voter eligibility and prevent unaffiliated voters from casting more than one primary ballot. Forcing that testing and development work into the short window between now and the April 26, 2024 ballot certification deadline would create significant risks to the election process. If Proposition 108 were enjoined, Colorado would need to launch a substantial effort to educate voters about the change ahead of the June 3, 2024, party affiliation deadline. Substantial misinformation currently surrounds elections, and a last-minute change of this nature would only amplify these inaccurate messages.

Furthermore, although the Party challenges only Proposition 108—which applies only to *non-presidential* primaries—their arguments, and any preliminary injunction, could be read to apply equally to Proposition 107, which permits unaffiliated voters to participate in the Party's

presidential primary. *See* C.R.S. § 1-4-1203(2)(b). The names and party affiliations of candidates for the Party's presidential primary have already been certified, *see id.* § 1-4-1204(1), and voting will be underway by January 20, 2024. *See id.* § 1-8.3-110(1) (deadline for transmission of ballots to military and overseas voters). A mid-election order preventing unaffiliated voters from participating in the Party's non-presidential elections, whether or not explicitly applicable to the presidential election, carries a substantial risk of confusing voters.

## II. The Party's delay undermines its claim of irreparable harm and supports applying the doctrine of laches to its request for a preliminary injunction.

***Irreparable harm is absent here.*** The Party must establish that it will suffer irreparable harm that is "both certain and great," not "merely serious or substantial." *Prairie Band of Potawatomi Indians v. Pierce*, 253 F.3d 1234, 1250 (10th Cir. 2001) (quotations omitted). And though the Party suggests that "a showing of the infringement of a constitutional right requires no further showing of irreparable injury," Mot., Doc. 39 at 12, courts "must nonetheless engage in [the] traditional equitable inquiry as to the presence of irreparable harm." *Fish v. Kobach*, 840 F.3d 710, 752 (10th Cir. 2016). The Party has been unable to show the infringement of any constitutional right. And because it may choose not to participate in the open primary system, the Party cannot show that it is suffering irreparable harm.

The Party's delay in filing its motion—and lack of urgency in litigating this case—are fundamentally incompatible with its claim that it will suffer irreparable harm absent preliminary relief. *See Fish*, 840 F.3d at 753 ("[D]elay in seeking preliminary relief cuts against finding irreparable injury." (quotations omitted)); *Colo. Union of Taxpayers v. Griswold*, No. 20-cv-02766-CMA-SKC, 2020 WL 6290380, at *3 (D. Colo. Oct. 27, 2020) (even in First Amendment cases, a plaintiff's delay "weighs heavily against" issuing preliminary relief). It filed the

Complaint in July 2023, *see* Compl. for Declaratory J. and Injunctive Relief, Doc. 1, then chose to forego personally serving the Secretary, which extended the answer or responsive pleading deadline by sixty days. Waiver of Service, Doc. 14. In October, to ensure that any order impacting Colorado's elections would be received with maximal time before the 2024 elections, the Secretary recommended that the Party move for a preliminary injunction. Scheduling Order, Doc. 30 at 8. Instead, it waited fifty-six additional days to file the Motion, just four months before the April 26, 2024 deadline, and only two weeks before the Secretary's deadline to certify names to the presidential primary election ballot. Mot., Doc. 39; *see* C.R.S. § 1-4-1204(1). The Party makes no attempt to explain this delay as anything but a tactical choice to "sit on its rights" until a hearing on its Motion would maximally prejudice the Secretary's ability to respond by occurring over the year-end holidays and in the midst of administering the March 5, 2024 presidential primary. The Secretary's evidence at the hearing will demonstrate this prejudice.

***Laches bars the Party's motion.*** For the same reasons, the Party's motion is barred by the doctrine of laches. *See Garcia v. Griswold*, No. 20-cv-1268-WJM, 2020 WL 4926051, at *3-4 (D. Colo. Aug. 21, 2020) (applying laches to deny preliminary injunction on eve of election). The elements of laches are: "(1) full knowledge of the facts; (2) unreasonable delay in the assertion of available remedy; and (3) intervening reliance by and prejudice to another." *Herald Co. v. Seawell*, 472 F.2d 1081, 1099 (10th Cir. 1972). The doctrine "stems from the principle that equity aids the vigilant and not those who slumber on their rights." *Biodiversity Conservation All. v. Jiron*, 762 F.3d 1036, 1090-91 (10th Cir. 2014) (quotations omitted).

The Party could have moved for this injunction upon filing its Complaint. At minimum, it could have done so in October at the Secretary's suggestion. Waiting two months (until the

Friday before a major holiday weekend) constitutes an "unreasonable delay in the assertion of" its request. *Herald Co.*, 472 F.2d at 1099. Further, the Party's lack of diligence has prejudiced the Secretary, and through her, Colorado voters, by necessitating the Court's hasty preliminary resolution of its claims without being informed by the benefit of discovery. The Secretary has relied on the Party's representations that it will participate in the June 2024 primary and has prepared accordingly. The Party's inactions do not reflect a plaintiff in dire need of relief.

**III. The balance of equities and public interest weigh heavily in Colorado's favor.**

The last two factors, the balance of equities and the public interest, "merge when the Government is the opposing party." *Nken v. Holder*, 556 U.S. 418, 435 (2009). These factors weigh strongly in Colorado's favor. *See* Parable Order at 31. The Party's requested relief would stymie the will of the Colorado electorate that voted Proposition 108 into law, and it would deprive 1.8 million unaffiliated voters of the opportunity to participate in taxpayer-funded primaries. It would also significantly disrupt Colorado's ongoing election planning. On the other side of the scale, there is no evidence that Proposition 108 even minimally, much less severely, burdens the Party. Rather, it is free to choose a closed nomination process, amend its procedures to facilitate increased participation in opt-out votes, and endorse the candidates and platforms of its choice. The balance tips decisively against the disfavored injunction the Party seeks.

**IV. The Party is not entitled to its requested relief.**

Even if the Party had shown that the injunction factors weigh in its favor, it is not entitled to the requested relief. The Party asks this Court to either (1) permit major political parties to close their State-funded primaries, or (2) permit major political parties to opt out through a simple majority vote. Mot., Doc. 39 at 15. In other words, the Party asks the Court to rewrite the

statute. This the Court cannot do. *See Iancu v. Brunetti*, 139 S. Ct. 2294, 2301-02 (2019) (courts may invalidate an unconstitutional statute, but they cannot "fashion a new one"). What is more, the Party has no constitutional right to a State-funded, closed primary. Nor has the Party shown that a simple majority vote is the only constitutionally permissible procedure by which a party can choose a closed nomination process. Indeed, as the Secretary's evidence will show, a simple majority is lower than the two-thirds vote the Party itself requires to amend its own bylaws. At bottom, the Party invites the Court to impose its favored public policy choices, instead of those selected by Colorado's electorate. The Party has not established its entitlement to the "extraordinary remedy" of preliminary relief. *U.S. ex rel. Citizen Band Potawatomi Indian Tribe of Okla. v. Enter. Mgmt. Consultants, Inc*., 883 F.2d 886, 888-89 (10th Cir. 1989).

**CONCLUSION**

The Party's motion for a preliminary injunction [Doc. 39] should be denied.

Dated: January 10, 2024

PHILIP J. WEISER
Attorney General

s/ *LeeAnn Morrill*

LeeAnn Morrill, First Assistant Attorney General
Emily Burke Buckley, Senior Assistant Attorney General
Kyle M. Holter, Assistant Attorney General
Public Officials Unit / State Services Section
Ralph L. Carr Colorado Judicial Center
1300 Broadway, 6th Floor
Denver, Colorado 80203
Tel: 720 508-6159 (Morrill) / -6403 (Buckley) / -6150 (Holter)
Email: leeann.morrill@coag.gov; emily.buckley@coag.gov; kyle.holter@coag.gov

Attorneys for Defendant Colorado Secretary of State Jena Griswold