IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLORADO

Civil Action No. 1:23-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 MOTION FOR SUMMARY JUDGMENT

Defendant Jena Griswold, in her official capacity as Colorado Secretary of State ("the Secretary"), by and through counsel, submits the following memorandum of law in support of her motion for summary judgment on all counts alleged in Plaintiff's Complaint [Doc. 1].

INTRODUCTION

Proposition 108, approved by voters in 2016, offers Colorado's major political parties a choice: (1) nominate candidates for nonpresidential office to the general election ballot through a semi-open, State-funded primary, or (2) select those candidates through a closed, party-funded convention or assembly. In every election cycle since 2016, the Colorado Republican Party (the "Party") has chosen to nominate its candidates through a semi-open primary rather than to "opt out" by a vote of three-fourths of its State Central Committee (the "Committee"). With this litigation, the Party asks the court to make the decision to opt out for it—overriding both the will of the Party's own members and the State's important interest in allowing nearly two million unaffiliated Coloradan voters to participate in its primary elections.

In February 2024, this Court rejected the Party's motion for preliminary injunction and, in so doing, identified the evidence the Party would need to succeed on the merits of its claims. Over a year later, the record is as devoid of that evidence as ever. The Party has conducted no depositions, left unrebutted the testimony of Colorado's expert witness, and disclosed purported expert testimony of its own that, even if it were reliable, would be insufficient to carry the Party's burden of proof. Because the Party is unable to establish that Proposition 108 violates its constitutional rights, this Court should grant summary judgment in favor of the Secretary.

STATEMENT OF UNDISPUTED MATERIAL FACTS

1. In 2016, Colorado voters approved Proposition 108, a ballot initiative allowing voters not affiliated with a political party ("unaffiliated voters") to vote in nonpresidential primary elections. Colo. Rev. Stat. §§ 1-2-218.5(2), 1-4-101(2)(b), 1-4-104, 1-4-702(1), 1-7-201(2.3).

2. Proposition 108 requires major political parties to nominate candidates for the general election through a semi-open primary system, unless they opt out pursuant to statute. *Id.* §§ 1-4-101(3), 1-4-702(1).

3. The State of Colorado and the counties pay for all expenses incurred in administering semi-open primary elections. *Id.* § 1-4-101(5).

4. In Colorado's semi-open primary system, unaffiliated voters receive a mailing containing the primary ballots of all major political parties, but the voter "may cast the ballot of only one major political party." *Id.* § 1-4-101(2)(b).

5. Voters affiliated with a political party may only vote in their party's primary. *Id.* §§ 1-4-101(2)(a), 1-7-201(2).

6. Major political parties may opt out of the primary system and elect to use a closed assembly or convention nominating process if "three-fourths of the total membership of the party's state central committee" votes to "use the assembly or convention nomination process." *Id.* § 1-4-702(1).

7. A minor political party may "prohibit unaffiliated electors from voting in the party's primary election so long as the prohibition is in accordance with the party's constitution, bylaws, or other applicable rules." *Id.* § 1-4-1304(1.5)(c).

8. Since the passage of Proposition 108, only one minor political party has held a primary election, in one election cycle. Ex. A – Rudy Decl. ("Ex. A"), ¶ 6.

9. Minor parties typically use the assembly nomination process. *Id.*

10. Minor parties often do not field candidates for every seat open in a given election. *Id.*

11. Minor party candidates rarely win seats in the general election. *Id.*

12. In circumstances where unaffiliated voters would be permitted to vote in minor party primaries, the costs involved would include making minor party ballots available to unaffiliated voters; the administrative effort required to train county clerks and educate the electorate about minor party primaries; and the increased risk of voter confusion and consequent error that results whenever election procedures become more complex, as would be the case if minor party ballots were routinely added to the package of primary ballots mailed to the State's more than 1.9 million unaffiliated voters. *Id.* ¶ 7.

13. The Colorado Republican Party and the Colorado Democratic Party are major political parties as defined by Colorado law. Ex. A ¶ 10; Ex. B – Joint Statement of Undisputed Facts (Nov. 9, 2023) ("Ex. B") ¶ 1.

14. No major political party in Colorado has opted out of the semi-open primary since the passage of Proposition 108. Ex. A ¶ 8.

15. At a meeting held on September 21, 2019, the Committee voted on a motion to opt out of Colorado's 2020 semi-open primary, and the motion failed to achieve the three-fourths opt-out threshold. Ex. C – Colorado Republican Central Committee Minutes (Sept. 21, 2019), at 1.

16. At a meeting held on September 18, 2021, the Committee voted on whether the Party should opt out of the 2022 primary and the motion failed to achieve the three-fourths opt-out threshold, with 171.6 votes in favor (32.9% of the Committee's total membership) and 241.3 votes against (46.3% of the Committee's total membership). Ex. B ¶¶ 8-10.

17. At a meeting held on September 30, 2023, the Committee voted on whether the Party should opt out of the 2024 primary, and the motion failed to achieve the three-fourths opt-out threshold, with 259 votes in favor and 143.5 votes against. Ex. N – Colorado GOP State Central Committee Meeting (Sept. 30, 2023), at 2.

18. The Party estimates that as of September 30, 2023, the Committee's total membership was approximately 420, meaning approximately 61.7%—less than two-thirds—of the Committee's total membership voted in favor of opting out. Ex. D – Plaintiff 30(b)(6) Deposition ("Ex. D"), at 78:21-79:14.

19. Votes of the Committee on issues other than whether to opt out of Colorado's semi-open primaries are often approved by more than three-quarters of the Committee's members, and some votes of the Committee are unanimous. Ex. D at 71:18-72:18; Ex. E – Taheri Preliminary Injunction Testimony (Jan. 23, 2024) ("Ex. E"), at 245:7-19; Ex. F – Wadhams Preliminary Injunction Testimony (Jan. 24, 2024) ("Ex. F"), at 368:3-20.

20. At the same meeting at which the Committee voted on the opt-out in September 2023, the Committee also voted on seven amendments to the Party's bylaws, which require a two-thirds vote of members present and voting to be enacted and are difficult to pass. Ex. D at 82:3-8, 84:21-24, 87:24-88:2. Six of those seven bylaw amendments passed. *Id.* at 85:1-86:25.

21. The Party does not have records of the tally of any votes taken by the Committee in 2022 nor does it have any records of the tally of any votes taken by the Committee prior to March 2019. Ex. D at 14:3-25, 19:3-20:23.

22. Members of the Committee have expressed a range of views about Proposition 108 and whether the Party should "opt out" of Colorado's semi-open primaries, and members of the Committee have objected to opting out. Ex. D at 102:6-115:12; Ex. E at 235:8-12, 241:3-24; Ex. F at 360:2-6, 362:23-367:24.

23. Members of the Party and the Committee have opposed opting out because, among other reasons, adopting a convention or assembly nomination method would result in too few voters participating in the nominating process, Ex. D at 103:22-104:3; opting out would make the Party an "insider party," *id.* at 109:5-9; opting out would run contrary to Republican values, *id.* at 109:10-18; opting out would reduce Republican chances of success in the general election, *id.* at 109:23-110:14; and opting out would reduce Republican chances of success in swing districts, *id.* at 110:15-19, 114:3-17.

24. "Party raiding"—i.e., participating in a party's primary with malicious intent—is rare. Ex. H – Expert Report of John Sides (Apr. 26, 2024) ("Ex. H"), at 7; Ex. I – Trent England Deposition (Feb. 5, 2025) ("Ex. I"), at 79:8-14.

25. Plaintiff's expert Trent England is not aware of any evidence of successful party raiding in Colorado since the passage of Proposition 108. Ex. I at 79:15-18.

26. The Party is unable to identify any nonpresidential primary election in Colorado in which the outcome was changed by the participation of unaffiliated voters. Ex. H at 9; Ex. I at 81:4-23; Ex. J – George Khalaf Deposition (Feb. 4, 2025) ("Ex. J"), at 78:5-81:19; Ex. K – Rebuttal Report of John Sides (June 28, 2024) ("Ex. K"), at 5; Ex. L –Expert Report of George Khalaf (Apr. 26, 2024).

27. The Party is unable to identify any nonpresidential primary election in Colorado in which the candidate favored by the plurality or majority of unaffiliated voters differed from the candidate favored by the plurality or majority of registered Party voters. Ex. J at 56:21-57:3; 70:17-71:11; 87:2-24; Ex. K at 8-9; Ex. L.

28. Plaintiff's expert Trent England is unaware of any empirical research showing that since the passage of Proposition 108 in Colorado, it has resulted in more moderate or different kinds of candidates winning party nominations. Ex. I at 57:16-21; 86:18-87:1.

29. Plaintiff's expert Trent England is unaware of any empirical research regarding whether major political parties in Colorado have produced more moderate candidates since the passage of Proposition 108. *Id.* at 82:25-83:7.

30. There is no conclusive evidence demonstrating that open primary formats result in winning candidates with more moderate ideologies. Ex. H at 9-10; Ex. I at 87:2-88:23.

31. Every Republican Party candidate to testify on the record in this case concedes they did not moderate or alter their policy positions to appeal to unaffiliated voters. Ex. G – David

Williams Deposition (Feb. 6, 2025), at 5:22-6:22; Ex. M – Kevin Lundberg Preliminary Injunction Testimony (Jan. 23, 2024), at 150:20-151:1.

32. Demonstrating that the number of unaffiliated voters was larger than the margin of victory in a given election does not show that unaffiliated voters' participation resulted in the selection of a different candidate than would have been selected in a closed primary. Ex. H at 9.

33. The political science literature does not provide systematic evidence that changes in primary rules have produced different candidate messages or messages that are less traditionally associated with candidates' political party, and the largest study of primary rules and candidates' platforms found that changing the openness of primary rules did not lead to systematic changes in platforms. Ex. K at 6.

34. Voter turnout is higher in open primary systems. Ex. H at 2-4.

35. Prior to Proposition 108, primary turnout in Colorado was at only a few percentage points over the national average. Ex. H at 4. After Proposition 108, turnout increased to eight points over the national average. *Id.*

36. Turnout in Colorado's 2020 primaries exceeded turnout in its 2016 primaries by 24%. *Id.*

37. As of November 1, 2023, there were 929,561 registered active Republican voters, 1,053,385 registered active Democrat voters, and 1,871,868 active unaffiliated voters in Colorado. Ex. B ¶ 3.

38. As of April 1, 2025, there were 942,120 active registered Republican voters, 1,041,589 registered active Democratic voters, and 1,990,552 registered active unaffiliated voters in Colorado. Ex. A ¶ 9.

39. Under Proposition 108, the Party remains free to limit and expand the Committee's total membership after satisfying the statutory minimums required by Colorado law. Ex. D at 26:3-24; Ex. O – Bylaws of the Colorado Republican State Central Committee (Aug. 31, 2024) ("Ex. O"), at 3, Art. IV § A.

40. Under Proposition 108, the Party remains free to select the members of the Committee. Ex. D at 26:15-24; Ex. O at 3, Art. IV § A.

41. Under Proposition 108, the Party remains free to control when, where, and how Committee meetings are held, as well as how members are notified of those meetings, Ex. D at 30:1-34:24; the quorum required to call meetings to order, *id.* at 35:3-11, 71:8-14; and the method of Committee votes, *id.* at 39:20-40:7; Ex. O at 6-8, Art. VII §§ A-H, Art. VIII §§ A-C.

42. As a matter of Colorado law, under Proposition 108, 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. Ex. D at 159:22-168:4; Colo. Rev. Stat. §§ 1-2-218.5(2), 1-4-101(2)(b), 1-4-104, 1-4-702(1), 1-7-201(2.3).

ARGUMENT

I. Summary judgment standards

"The court shall grant summary judgment if the movant shows that there is no genuine dispute as to any material fact and the movant is entitled to judgment as a matter of law." Fed. R. Civ. P. 56(a). The burden rests on the moving party to demonstrate the absence of genuine issues of material fact, and the Court must construe facts and draw inferences from them in the light most favorable to the non-moving party. *Jenkins v. Wood*, 81 F.3d 988, 989 (10th Cir. 1996).

The non-moving party must demonstrate the existence of genuine issues for trial. *Celotex Corp. v. Catrett*, 477 U.S. 317, 322 (1986). Where the non-moving party "fails to make a showing sufficient to establish the existence of an element essential to that party's case, and on which that party will bear the burden of proof at trial," summary judgment against that party is required. *Id.*

II. The Secretary is entitled to judgment on the Party's freedom of association claims.

The Party claims Proposition 108 injures its First Amendment freedom of association in two ways: by imposing the semi-open primary as the default for major political party nominating contests, Compl. ¶¶ 33-45, and through the "opt-out" provision, Compl. ¶¶ 46-56. The Party's request for facial and as-applied relief must be denied as a matter of law.

A. Freedom of association – legal standards

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). Such regulations "will invariably impose some burden upon individual voters and political parties." *Utah Republican Party v. Cox*, 892 F.3d 1066, 1077 (10th Cir. 2018). Therefore, in considering a freedom-of-association challenge to a state election law, the court "must weigh 'the character and magnitude of the asserted injury to the rights protected by the First and Fourteenth Amendments . . .' against the 'precise interests put forward by the State as justifications for the burden imposed by its rule,' taking into consideration 'the extent to which those interests make it necessary to burden the plaintiff's rights.'" *Id.* (quoting *Burdick v. Takushi*, 504 U.S. 428, 434 (1992) and *Anderson v. Celebrezze*, 460 U.S. 780, 789 (1983)); *see VoteAmerica v. Schwab*, 121 F.4th 822, 840 (10th Cir. 2024) (explaining *Anderson-*

Burdick test applies to claims that "an election law interferes with the right of . . . political parties to associate with voters" (quoting *Lichtenstein v. Hargett*, 83 F.4th 575, 589-90 (6th Cir. 2023)).

When an election law severely burdens a party's associational rights, it must be "narrowly tailored to serve a compelling state interest." *Utah Republican Party*, 892 F.3d at 1077 (quoting *Clingman v. Beaver*, 544 U.S. 581, 586 (2005)). "However, when regulations impose lesser burdens, 'a State's important regulatory interests will usually be enough to justify reasonable, nondiscriminatory restrictions.'" *Id.* (quoting *Clingman*, 544 U.S. at 586-87). "[T]he severity of the burden that a[n] [election law] imposes on associational rights is a factual, not a legal, question," on "which the Party bears the burden of proof." *Democratic Party of Hawaii v. Nago*, 833 F.3d 1119, 1123-24 (9th Cir. 2016).

B. Proposition 108 does not severely burden the Party's associational rights on its face.

As this Court observed in its Order denying the Party's Motion for Preliminary Injunction, Order, Doc. 69 at 18, the Party's facial challenge to the semi-open primary system established by Proposition 108 cannot succeed because the Party's participation in that system is optional. *Washington State Grange v. Washington State Republican Party*, 552 U.S. 442, 449 (2008) ("[A] facial challenge must fail where the statute has a 'plainly legitimate sweep.'" (quoting *Washington v. Glucksberg*, 521 U.S. 702, 739–40, & n. 7 (1997) (Stevens, J., concurring in judgments))).

If the Party wishes to select nominees by convention or assembly, and therefore to exclude unaffiliated voters from its nomination process entirely, it may do so. *See* Colo. Rev. Stat. §§ 1-4-101(3), -702(1); SUMF ¶ 6. The Party does not, and could not, contend that nominating its candidates by one of those methods poses a constitutional problem. *See Am. Party of Tex. v. White*,

415 U.S. 767, 781 (1974) ("It is too plain for argument . . . that the State may . . . insist that intraparty competition be settled before the general election by primary election or by party convention."). Thus, the Party cannot succeed in demonstrating that Proposition 108—which permits major political parties to choose among constitutionally sufficient methods of selecting candidates—lacks a "plainly legitimate sweep." *See Miller v. Brown*, 503 F.3d 360, 367 (4th Cir. 2007) (explaining the "forced association" that the Supreme Court condemned in *Cal. Democratic Party v. Jones*, 530 U.S. 567 (2000), "simply is not present" where a political party was, by law, "free to limit its candidate election process to voters who share its political views" by selecting "other methods controlled and funded by the party"); *Greenville Cnty. Republican Party Exec. Comm. v. S.C.*, 824 F. Supp. 2d 655, 665 (D.S.C. 2011) (finding primary election laws facially constitutional where they "provide alternative mechanisms for political parties to access the general election ballot").

Nor can the Party demonstrate that Proposition 108's three-fourths "opt out" threshold burdens its freedom of association facially. The opt-out threshold neither "intru[des] into the internal structure or affairs" of the Party by "forc[ing] [it] to accept members it does not desire," *Roberts v. U.S. Jaycees*, 468 U.S. 609, 623 (1984), nor interferes with the Party's "decisions about the identity of, and the process for electing, its leaders," *Eu v. S.F. Cnty. Democratic Cent. Comm.*, 489 U.S. 214, 229 (1989). Although Proposition 108 requires three-fourths of the Committee's total membership to vote in favor of opting out, the Party remains free to limit and expand that Committee's total membership after satisfying the statutory minimums required by Colorado law; to select the Committee members themselves; to control when, where, and how Committee meetings are held and how members are notified of those meetings; and to determine the quorum

required to call meetings to order and the method of Committee votes. SUMF ¶¶ 39-41. Proposition 108 does not regulate, and the Party is free to decide, those questions of internal organization, and thus the opt-out threshold does not burden the party's associational rights. At the same time, the State has a legitimate interest in regulating the process by which it permits major political parties to opt out. *See Greenville*, 824 F. Supp. 2d at 668 (finding a supermajority opt-out requirement does not "affect how a party conducts its internal organizational affairs" and "only places limitations on how a party may first elect to participate in the convention method").

As discussed in this Court's earlier order, the Tenth Circuit has held that a supermajority voting requirement in the context of citizen ballot initiatives "does not implicate the First Amendment at all" because it does not "restrict[] or regulate[] speech" despite "mak[ing] particular speech less likely to succeed" by virtue of a heightened voting threshold. *Initiative & Referendum Inst. v. Walker*, 450 F.3d 1082, 1099-1100 (10th Cir. 2006). Just so here. Though a higher opt-out threshold may mean that a political party must achieve a higher level of consensus among its state central committee before opting out, the likelihood that the option favored by one faction of a political party may or may not prevail does not implicate the First Amendment. *Cf. id.* at 1101 ("The First Amendment ensures that all points of view may be heard; it does not ensure that all points of view are equally likely to prevail.").

C. The Party has failed to adduce evidence demonstrating Proposition 108 severely burdens its associational rights as applied.

Since the Supreme Court's decision in *Jones*, courts have evaluated the severity of the burden that a primary system imposes on a political party's associational rights by considering whether empirical evidence marshalled by the plaintiff demonstrates a "clear and present danger" that (1) the party's nominee would be "determined by adherents of an opposing party" or that a

primary system would "chang[e] the part[y's] message" (2) through nomination of candidates whose policy positions differ from the party's platform or (3) by causing candidates to moderate their policy positions. *Jones*, 530 U.S. at 578, 582; *see Nago*, 833 F.3d at 1125; *Idaho Republican Party v. Ysura*, 660 F. Supp. 2d 1195, 1201 (D. Idaho 2009) (suggesting "[s]urveys, expert testimony, statistics and/or testimony from the candidates" would be necessary to show that party candidates "have modified and will continue to modify their . . . positions," and noting the court could not find a clear risk of crossover voting absent such evidence); *Greenville*, 824 F. Supp. 2d at 665 (explaining the court could not "come to the same conclusion as the Supreme Court did in *Jones*" without "empirical evidence" regarding the "effects of cross-over voting"). Because the Party has produced no such evidence here, its as-applied challenge must fail.

First, the Party has not produced empirical evidence from which a reasonable factfinder could conclude that there is a "clear and present danger" of the Party's nominees being "determined by adherents of an opposing party." *Jones*, 530 U.S. at 578. There is no evidence in the record demonstrating rates at which voters who identify with a party other than the Party have participated in, or intend to participate in, the Party's primaries under Proposition 108.

Nor could a reasonable factfinder conclude from the available evidence that unaffiliated voters have changed the outcome of any of the Party's primary races since the passage of Proposition 108. Indeed, the Party's own expert, Trent England, concedes he is unaware of any such empirical evidence. SUMF ¶¶ 25-26. The only empirical evidence adduced by the Party regarding actual voter behavior in primaries under Proposition 108 appears in the expert report of Mr. George Khalaf, whose firm conducted a survey regarding the preferences of registered Republican and unaffiliated voters in Colorado in two primary races for nonpresidential

Republican candidates. *Id.* ¶¶ 26-27; *see* Ex. L ¶¶ 11-19. But Mr. Khalaf's report does not conclude that the participation of unaffiliated voters changed the outcome of either of those races. SUMF ¶¶ 26-27. Nor could Mr. Khalaf's collected data plausibly support such a conclusion because, in each of those races, the plurality of registered Republicans and the plurality of unaffiliated voters reported preferring the same top candidate. *See* Ex. L ¶¶ 14-15, 16, 18-19.

At most, Mr. Khalaf's report contends that there are "measurable" differences in voting behaviors between registered Republicans and unaffiliated voters. *Id.* ¶¶ 13-14, 19.[1] This cannot carry the Party's burden under *Jones*, because it does not establish that unaffiliated voters have altered the identity of the Party's nominees and thus forced the Party to associate with nominees different from those that would have been chosen in a closed primary. *See* 530 U.S. at 738 (holding "forced association" exists where evidence demonstrates a "clear and present danger of having a party's nominee determined by adherents of an opposing party"). The Party's inability to identify a single primary race, of the hundreds since the passage of Proposition 108, in which

[1] In any event, Mr. Khalaf's survey data is too unreliable to provide insight into differences in behavior between registered Party and unaffiliated voter behavior. With regard to the 2022 Senate primary, for example, the fact that large numbers of Mr. Khalaf's survey respondents reported voting for a candidate other than O'Dea or Hanks, the only two candidates who actually ran in the primary (25.4% of surveyed registered Republicans and 26.5% of unaffiliateds) or refused to respond (15.1% of registered Republicans and 28.1% of unaffiliateds) and that the behavior reported by surveyed voters differs substantially from the actual vote tallies (O'Dea winning 54.5% of the vote, Hanks 45.5%, and write-in candidate Daniel Hendricks receiving .05% of the vote) gives "little reason to treat Khalaf's survey as a reliable source of information" about actual voter behavior in that election. Ex. K at 8. The same faults appear in Mr. Khalaf's data concerning the 2022 Secretary of State race. Had even a slightly larger fraction of unaffiliated voters agreed to respond to these survey questions, the purportedly "measurable" differences in voting behavior reported by Mr. Khalaf could easily disappear or be reversed. *Id.*

unaffiliated voters preferred a different candidate from registered party members cannot come close to establishing a "clear and present" danger of forced association.

Second, the Party has produced no empirical evidence that the participation of unaffiliated voters in the Party's primary elections has resulted in the nomination of candidates whose policy positions differ from the Party's platform. The Party has not conducted any analysis comparing its platform in any election cycle to winning candidates' positions on contested policy issues. Ex. I at 90:9-14; *see* Order, Doc. 69 at 21. To the contrary, unrebutted record testimony demonstrates that there is no conclusive evidence supporting the contention that primary rules affect the ideological disposition of winning candidates. SUMF ¶ 30.

Third, the Party has produced no empirical or systematic evidence demonstrating that the passage of Proposition 108 has caused its candidates to moderate their policy positions. Every Republican Party candidate to testify on the record concedes they did not moderate or alter their policy positions to appeal to unaffiliated voters. SUMF ¶ 31. Again, these concessions are consistent with Professor Sides' unrebutted testimony that systematic evidence does not suggest that changes in primary rules have produced different candidate messages. SUMF ¶ 33. Instead, the Party has offered the statement of its Treasurer, Thomas Bjorklund, that "since 2016, candidate campaigns in Republican Primary elections have targeted the Unaffiliated voter in order to sway them toward candidates that don't traditionally appeal to Republican voters." Ex. P – Expert Report of Thomas Bjorklund, at 4. Mr. Bjorklund's report cites no surveys, data, nor any empirical or systematic evidence in support of this claim. *Id.* His mere assertion cannot create an issue of fact sufficient to avoid summary judgment. *See Ysura*, 660 F. Supp. 2d at 1201 ("The Court cannot conclude, based on mere assertions, that Republican candidates have

modified and will continue to modify their political messages . . . because of [the] current open primary system."); *see also Norris v. Baxter Healthcare Corp.*, 397 F.3d 878, 886 (10th Cir. 2005) (finding proffered expert testimony insufficient to oppose summary judgment and noting "neither *Daubert* nor the Federal Rules of Evidence 'require[] a district court to admit opinion evidence which is connected to existing data only by the *ipse dixit* of the expert'" (citing *General Elec. Co. v. Joiner*, 522 U.S. 136, 146 (1997)).

Finally, even if the Party could show that permitting unaffiliated voters to participate in its primaries severely burdens its associational rights, the Party has the option to exclude those voters—and fully relieve any such burden—by opting out. *See Utah Republican Party*, 892 F.3d at 1088 (holding courts must "analyze [election regulations] in sum rather than in isolation"). The evidence does not suggest that a three-quarters voting threshold is a severe burden, or even that the Committee's reaching that threshold is "unlikely." Compl. ¶¶ 50-51. To the contrary, the undisputed record shows that, between March 2019 and 2024,[2] votes of the Party's Committee often exceeded a three-fourths majority and sometimes were unanimous. SUMF ¶ 19. At the same meeting at which the Committee voted on the opt-out in September of 2023, with less than two-thirds of members favoring the opt out, the Committee also voted on a series of bylaw amendments, which require a two-thirds majority to be enacted, and which the Party concedes are "difficult to pass." SUMF ¶ 20. Six of the amendments passed. *Id.*

The undisputed record further demonstrates that members of the Party and the Committee have opposed opting out because, among other reasons, adopting a convention or assembly

[2] The Party has produced no evidence demonstrating the difficulty of achieving a three-fourths majority in any Committee vote in 2022 or prior to 2019. SUMF ¶ 21.

nomination method would result in too few voters participating; opting out would make the Party an "insider party"; opting out would run contrary to Republican values; opting out would reduce Republican chances of success in the general election; and opting out would reduce Republican chances of success in swing districts. SUMF ¶¶ 22-23. As a result of those objections, the Party has failed to opt out in every primary election. SUMF ¶¶ 15-18. The Committee's vote in favor of opting out exceeded a bare majority only once, in 2023. SUMF ¶ 18.

In sum, the record demonstrates not that Proposition 108's opt-out threshold prevents the Party from excluding unaffiliated voters from its primaries, but rather that Party members, and voting members of the Party's Committee, oppose opting out. In other words, the Party is asking this Court to intervene to resolve a difference of opinion internal to its membership. But the Party has identified no authority suggesting that such an internal difference of opinion could amount to a severe burden on the Party's associational rights. For these reasons, the undisputed evidence shows that Proposition 108 does not severely burden the Party's associational rights.

D. The undisputed record evidence demonstrates that Proposition 108 serves Colorado's important interests in increasing voter participation and ensuring stability in elections.

Colorado's important interests in increasing voter participation and ensuring stability in its elections are easily sufficient to sustain Proposition 108 over any minimal burden on the Party.

First, Proposition 108, as a default rule subject to political parties' ability to opt out, offers unaffiliated Coloradans access to the state's major party primaries. Almost two million registered active voters in Colorado are unaffiliated. SUMF ¶ 38. Closing the major parties' primaries to those voters—as the Party seeks to do—would render those Coloradans unable to

participate in selecting the candidates who will go on to run for the state's public offices in the general election. Colorado has an undeniable interest in ensuring hundreds of thousands of its voters have the chance to participate in those primaries. *Utah Republican Party*, 892 F.3d at 1084 (identifying "increasing voter participation" as a state interest "constitut[ing] the very backbone of our constitutional scheme").

Second, the uncontested record evidence shows that Proposition 108's increased access actually works to increase voter participation. *Id.* Prior to Proposition 108, primary turnout in Colorado lingered at only a few percentage points over the national average. SUMF ¶ 35. After Proposition 108, turnout increased to eight points over the national average. *Id.* The same holds true on a statewide level, with turnout in the 2020 primaries exceeding turnout in the 2016 primaries by 24%. *Id.* ¶ 36.

Finally, Proposition 108's structure—providing a default of unaffiliated voter participation in semi-open primaries that major parties can overcome with a sufficient showing of party support—ensures stability in Colorado's elections and predictability for Colorado's voters. *See Timmons,* 520 U.S. at 366 ("States also have a strong interest in the stability of their political systems."). That the three-quarters threshold may, in practice and as compared to a bare majority opt-out threshold, favor semi-open primaries ensures that State election administrators and voters alike can count on major parties nominating candidates in the same way from year to year, unless a major parties' members decisively favor opting out. Again, the unrebutted record demonstrates this stability has been achieved, with both of Colorado's major parties holding semi-open primaries every year since Proposition 108's passage. SUMF ¶ 14.

Because any minimal burden on the Party's associational rights is amply justified by the State's important regulatory interests, Colorado is entitled to judgment on Claims One and Two.

III. The Secretary is entitled to judgment on the Party's freedom of speech claim.

A. Freedom of speech - legal standard

A plaintiff may prevail in a compelled speech claim by showing "(1) speech; (2) to which the speaker objects; that is (3) compelled by some governmental action." *Semple v. Griswold*, 934 F.3d 1134, 1143 (10th Cir. 2019). Where, as here, the plaintiff's constitutional challenge is to "the mechanics of the electoral process," and in particular, "the information that a state puts on its ballot . . . and to the way the state conducts primaries," the *Anderson-Burdick* balancing test applies. *See VoteAmerica*, 121 F.4th at 840 (quotation marks omitted).

B. The undisputed facts show the Party cannot prevail on its free speech claim.

The Party alleges that Proposition 108 abridges its free speech rights by requiring the Party to "deem as its nominee for office a candidate chosen in an open primary election in which unaffiliated voters are allowed to participate." Compl. ¶ 58. But a law dictating that a party's nominee on the general election ballot must be the person chosen through the state's candidate selection procedures is not "an adverse government action that discourages or penalizes the exercise of First Amendment [free speech] rights." *Semple*, 934 F.3d at 1143.

Every procedural rule governing ballot access and candidate nomination necessarily influences, to some extent, who becomes the last remaining candidate identified with a party on the general election ballot. These structural rules are necessary to prevent electoral chaos and maintain the integrity of the election process. *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."). If such rules were deemed "compelled speech," it would "embroil the federal courts in nearly every procedural hurdle imposed by state legislatures" on how candidates affiliated with political parties qualify for the general election ballot. *Semple*, 934 F.3d at 1143; *see, e.g.*, Colo. Rev. Stat. § 1-4-101 (candidates may not be placed on general election ballot if they have "not been affiliated with the major political party for the period of time required by [statute]" or do "not meet residency requirements"); *id.* § 1-4-502(3) (dictating eligibility requirements for major party candidates for lieutenant governor); *id.* § 1-4-701(4) (establishing process by which a major party candidate nominated by convention is deemed to have accepted a nomination). And as a matter of Colorado law, the Party remains free to endorse any candidate or platform it wants, to criticize or support candidates' positions, and to encourage voters to support particular candidates. SUMF ¶ 42.

But even if ballot access rules could be considered a form of compelled speech, Proposition 108 does not, on its face, "compel" parties to "deem as [their] nominee for office a candidate chosen in an open primary election in which unaffiliated voters are allowed to participate," because it allows parties to opt out. The Party's facial challenge therefore fails.

The Party's as-applied compelled speech claim must also be rejected. Based on the undisputed facts, the Party has not carried its burden of showing that the identify of its nominees since the passage of Proposition 108 reflects speech "to which the speaker objects." *Semple*, 934 F.3d at 1143. As discussed above, there is no empirical evidence that the participation of unaffiliated voters in the Party's primary elections has resulted in Party nominees different than those who would have been selected absent unaffiliated voter participation, nor that it has

resulted in the nomination of candidates whose policy positions are more moderate or differ from the Party's platform, nor that it has resulted in different candidate messages. SUMF ¶¶ 25-33.

Finally, for these same reasons, the undisputed record shows that any burden on the Party's speech imposed by Proposition 108, through its designation of the Party's nominees for the general election, is minor. And as discussed above, the state's legitimate interests in increased ballot access and voter participation are sufficient to justify that minor burden. *See Utah Republican Party*, 892 F.3d at 1077. The Secretary is thus entitled to summary judgment on the Party's free speech claim.

IV. The Secretary is entitled to judgment on the Party's vote dilution claim.

The Party's vote dilution claim fails as a matter of law, because the concept of vote dilution simply does not apply here. Citing *Reynolds v. Simms*, 377 U.S. 533, 568 (1964), the Party alleges that Proposition 108 dilutes the votes of Party members by permitting unaffiliated voters to vote in Party primaries. But *Reynolds* described unconstitutional vote dilution as occurring through "ballot-box stuffing," *id.* at 555; when "the votes of citizens in one part of the State [are] given [greater] weight [than] votes of citizens in another part of the State," *id.* at 562; or when "the same vote-diluting discrimination [is] accomplished through the device of districts containing widely varied numbers of inhabitants," *id.* at 563 (quoting *Wesberry v. Sanders*, 376 U.S. 1, 8 (1964)); *see also Navajo Nation v. San Juan Cnty.*, 929 F.3d 1270, 1282 (10th Cir. 2019) (states may not "restrict[] or dilut[e] votes in violation of the 'one person, one vote' principle" (quoting *City of Herriman v. Bell*, 590 F.3d 1176, 1185 (10th Cir. 2010)). Under Proposition 108, the votes of each voter participating in a primary election are given equal weight, and there is certainly no "ballot-box stuffing." *Reynolds*, 377 U.S. at 555. Because

Proposition 108 in no way violates the principle of "one person, one vote," the Secretary is entitled to judgment on the Party's vote dilution claim.

V. The Secretary is entitled to judgment on the Party's Equal Protection claim.

Finally, the undisputed facts entitle the Secretary to judgment on the Party's claim that Proposition 108 violates its Equal Protection rights by treating major and minor parties differently. Certainly, the law permits major parties to opt out of the semi-open primary through a three-fourths vote of the total membership of the party's state central committee, and to instead choose to use the assembly or convention nomination process. Colo. Rev. Stat. § 1-4-702(1). By contrast, a minor party may "prohibit unaffiliated electors from voting in the party's primary election so long as the prohibition is in accordance with the party's constitution, bylaws, or other applicable rules." *Id.* § 1-4-1304(1.5)(c).

However, the fact that Proposition 108 sets different rules for the two classes of parties does not, standing alone, raise constitutional concerns. The Equal Protection Clause only "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) (quoting *Nordlinger v. Hahn*, 505 U.S. 1, 10 (1992)), which major and minor parties are not. In practice, the method by which major and minor party nominees qualify for the general election ballot is usually different: whereas the major parties have historically proceeded by primary, minor parties rarely hold primaries and usually nominate their candidates by assembly. SUMF ¶¶ 8-9. Minor parties often do not field candidates for every open position in an election, and their candidates rarely win the general election. SUMF ¶¶ 10-11. And the two classes of parties are often treated differently under Colorado's election laws. *See, e.g.*, Colo. Rev. Stat. § 1-5-404 (major and

minor party candidates grouped differently on the ballot); *id.* § 1-4-904 (differing requirements for signatories of petitions to nominate candidates for major versus minor parties); *id.* § 1-6-101 et seq. (role guaranteed to major parties in selection of election judges).

Further, because Proposition 108 "does not implicate either a fundamental right or a protected class," it is evaluated under rational basis review, which it easily passes. *Price-Cornelison v. Brooks*, 524 F.3d 1103, 1109 (10th Cir. 2008). A law satisfies this standard if it bears a rational relationship to a legitimate state interest. *Save Palisade FruitLands v. Todd*, 279 F.3d 1204, 1213 (10th Cir. 2002).

First, neither the status of being a voter affiliated with a particular party nor a party's identification as "major" or "minor" under state law is a suspect classification. *See Greenville*, 824 F. Supp. 2d at 669. As a result, Proposition 108 does not implicate a protected class.

Second, Proposition 108's distinct procedures for major and minor parties do not implicate any fundamental right. The Party alleges that Proposition 108 implicates the fundamental right to vote because voters registered with major parties "are not permitted to participate in a primary election to choose their party's nominees without their votes being diluted by unaffiliated voters," whereas voters affiliated with minor parties are, which "infringes upon the fundamental voting rights of major political parties[3] and the voters affiliated with them." Compl. ¶ 76. But as discussed above, Proposition 108 does not "dilute" the votes of voters affiliated with major parties; their votes are afforded equal weight with those of all other participating voters. As a result, party members' right to vote is not in any way infringed.

[3] This is plainly incorrect, because Proposition 108 does not affect any voting rights of the parties themselves; the parties, as entities, are not voting in these elections.

Applying rational basis review, Proposition 108 easily passes muster. The State has legitimate interests in both increasing voter participation and in the administrative efficiency of its elections. *See Timmons*, 520 U.S. at 364 ("States certainly have an interest in protecting the integrity, fairness, and efficiency of their ballots and election processes as means for electing public officials."); *Utah Republican Party*, 892 F.3d at 1084 (identifying "increasing voter participation" and "increasing access to the ballot" as state interests "constitut[ing] the very backbone of our constitutional scheme"). Proposition 108's differential treatment of major and minor parties, which imposes fewer constraints on minor parties' ability to opt out of the semi-open primary, rationally balances and serves these goals.

The State's interest in increasing voter participation supports permitting unaffiliated voters to vote in major party primaries (absent the party meeting the opt-out threshold), as the candidates who win general elections are almost always affiliated with the major parties, and thus it is rational to determine that voter participation is likely to be higher in major party primaries. But that same interest is not significantly served with respect to minor parties, who rarely hold primaries. *See White*, 415 U.S. at 781-82 & n.13 (holding that state does not invidiously discriminate in violation of the Equal Protection Clause when it requires minor political parties to proceed by convention rather than primary election). It is also rational to determine that the slight increase in voter participation that would likely result when unaffiliated voters are permitted to vote in minor primaries does not sufficiently justify the costs involved, which include making minor party ballots available to unaffiliated voters; the administrative effort required to train county clerks and educate the electorate about minor party primaries; and the increased risk of voter confusion and consequent error that results whenever election

procedures become more complex, as would be the case if minor party ballots were routinely added to the package of primary ballots mailed to the State's more than 1.9 million unaffiliated voters. SUMF ¶ 38.

Because Proposition 108's different procedures for major and minor party primaries are rationally related to the State's legitimate interests in increased voter participation and the administrative efficiency of elections, the Secretary is entitled to judgment on the Party's Equal Protection claim.

CONCLUSION

Summary judgment should be granted for the Secretary on all claims in the Complaint.

Respectfully submitted this 4th day of April, 2025.

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