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 RESPONSE TO PLAINTIFF'S MOTION FOR PARTIAL 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 response to Plaintiff's partial motion for summary judgment [Doc. 105].

RESPONSE TO STATEMENT OF UNDISPUTED MATERIAL FACTS

14. Admits that approximately 100,000 unaffiliated voters participated in Colorado's 2018 State Republican Primary; approximately 130,000 unaffiliated voters participated in Colorado's 2020 State Republican Primary; more than 231,000 unaffiliated voters participated in Colorado's 2022 State Republican Primary; and more than 373,000 unaffiliated voters participated in Colorado's 2024 Presidential Republican Primary, which is not governed by Proposition 108. Denies as ambiguous the characterization that the number of unaffiliated voters participating in "Republican primary elections in Colorado has increased significantly in recent years," and asserts that in Colorado's 2024 State (as opposed to Presidential) Republican Primary, 162,032

unaffiliated voters returned a Republican ballot, which is more than 68,000 fewer unaffiliated voters than participated in Colorado's 2022 State Republican Primary. Ex. Q – 4.29.25 Rudy Decl. ¶ 5.

15. Admits that the 2016 State Ballot Information Booklet released by the Legislative Council of the Colorado General Assembly, in its "Analysis" of Proposition 108, contained a section called "Arguments For," and that among multiple statements listed in that section were the assertions that "[a]llowing unaffiliated voters to participate in primary elections may result in candidates who better represent all Coloradans" and "[o]pening the primary election may result in candidates who are more responsive to a broader range of interests." Denies as ambiguous the characterization that these comprise the "official 'Arguments for' Colorado's Prop. 108."

16. Admits that in the following primary elections, election judges rejected the following numbers of ballots based on the selected reasons of either "two ballots in one envelope" or "voted more than one ballot":

a. In the 2018 state primary election, 6,947 ballots submitted by unaffiliated voters;

b. In the 2020 state primary election, 9,655 ballots submitted by unaffiliated voters; and

c. In the 2022 state primary election, 8,336 ballots submitted by unaffiliated voters.

Denies as ambiguous the characterization that these numbers are "numerous" compared to the overall number of ballots submitted and further denies that all these ballots were rejected because the voters returned both party ballots. When election judges review returned ballots, they may reject the ballots if they contain an uncurable defect. In so doing, the judge selects one of multiple reasons for the ballot's rejection. One available reason is "two ballots in one envelope"; another is "voted more than one ballot." It is possible that election judges could select either

reason as the basis for the uncurable defect if a single voter returns both major party ballots. However, there is no category for "returned both major party ballots," and therefore it is not possible to precisely determine how many ballots were rejected in each election because an unaffiliated voter returned the ballots of multiple parties. Doc. 105-5 at 8-9.

17. Denied. The deposition testimony cited in support of this assertion establishes only that, in September 2023, 143.5 votes were cast against opting out of the semi-open primary election, and 259 votes were cast in favor of opting out. Doc. 105-7 at 87:24-91:15. The cited testimony does not address whether the Committee supported "the option of a primary election limited only to Republican voters" (which the opt-out vote does not address) or whether any such support was "overwhelming," an ambiguous term. *Id.* Further, the cited testimony does not address 2021 at all. The undisputed facts show that in 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). Doc. 102-2 ¶¶ 8-10.

18. Denied. First, George Khalaf's survey data is too unreliable to provide insight into differences in behavior between registered Party members and unaffiliated voters. As explained by Defendant's expert Dr. John Sides, due to "significant discrepancies between the voting behavior reported by Khalaf's survey respondents and the actual election outcome[s], there is little reason to treat Khalaf's survey as a reliable source of information about the behavior of Republican and unaffiliated voters" in Colorado's primaries. Doc. 102-11 at 8. Second, for each of the primary races included in Khalaf's survey, the plurality of registered Party voters and the plurality of unaffiliated voters preferred the same candidates. *Id.* at 7-9. Finally, to the extent the

survey suggested differences in the voting behavior of unaffiliated voters compared to registered Party voters, "there is no way to know whether the small differences in th[e] survey are real," because significant numbers of the survey respondents refused to answer each question. *Id.* at 8.

ARGUMENT

I. The Party is not entitled to judgment on its as-applied freedom of association claim.

The Party seeks summary judgment on its claim that Proposition 108, as applied, severely burdens its First Amendment right to freedom of association. Acknowledging that this Court has already rejected its arguments, the Party seeks to "revisit" the Court's ruling for two reasons, both resting on *Utah Republican Party v. Herbert*, 144 F. Supp. 3d 1263 (D. Utah 2015), the same case cited in the Party's preliminary injunction briefing, *see* Doc. 63 at 1-2. First, the Party asserts that its ability to opt out of the semi-open primary is irrelevant to evaluating what burden, if any, the semi-open primary imposes. Second, the Party contends that it is "immaterial" whether empirical evidence exists showing that unaffiliated voters could impact the identity or policy positions of the Party's nominees. Neither argument justifies a departure from this Court's earlier findings or demonstrates the Party's entitlement to summary judgment.

A. The Party's ability to opt-out of semi-open primaries under Proposition 108 minimizes any burden on its First Amendment rights.

Proposition 108 offers the Party a choice: include or exclude unaffiliated voters from your nomination contests. This choice undermines the Party's free association claims, because the Party cannot claim to be burdened by voluntary participation in the semi-open primary.

The Party has two alternatives for nominating its candidates to the general election: (1) participating in a State-funded primary open to unaffiliated voters or (2) proceeding by a Party-controlled convention or assembly. The convention or assembly is a constitutionally

adequate alternative to the semi-open primary. *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."). Because the Party only participates in the semi-open primary if it declines to opt-out, its associational rights are not severely burdened, as it has made that choice for itself. *Cf. Marchioro v. Chaney*, 442 U.S. 191, 199 (1979) ("The answer to appellants' claims of a substantial burden on First Amendment rights, then, turns out to be a simple one. There can be no complaint that the party's right to govern itself has been substantially burdened by statute when the source of the complaint is the party's own decision to confer critical authority on the State Committee.").

The record shows that the Party's history of not opting out is a matter of robust internal disagreement, not impossibility. Undisputed evidence shows that votes of the Committee have routinely exceeded the three-fourths majority required to opt out, including votes the Party agrees are "difficult to pass." *See* Doc. 102-4 at 71:18-72:18, 78:21-79:14; Doc. 102-5 at 245:7-19; Doc. 102-6 at 368:3-20. 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. Doc. 102-4 at 82:3-8, 84:21-24, 87:24-88:2. Six of those seven bylaw amendments passed. *Id.* at 85:1-86:25. By contrast, the percent of membership voting in favor of opting out at the same Committee meeting did not even reach two-thirds of those present and voting. Doc. 105-7 at 88:18-24.

Further, the Party has admitted that there is principled disagreement on the opt-out question within its ranks. Doc. 107 at 2 (admitting to Defendant's Statement of Undisputed Material Facts ("SUMF") ¶ 23). Committee members have articulated numerous reasons for

opposing opt-out. While the Party's most recent leadership may have supported opting out, *see generally* Ex. R – Williams Preliminary Injunction Testimony (Jan. 23, 2024), at 25:14-26:1, the relevant association for purposes of the Party's First Amendment claim is the Party membership, not solely its top leaders. *See Utah Republican Party v. Cox*, 892 F.3d 1066, 1081 (10th Cir. 2018) (identifying the relevant question as the extent of burden on "the group of like-minded individuals . . . who have joined together under the banner of the Republican Party—rather than just the leadership of the party"). Because the evidence does not show that the Party is prevented from exercising the choice to opt out, the Party is not entitled to summary judgment on its claim that including unaffiliated voters in its primaries is a severe burden.

The Party argues it is immaterial whether it has freely chosen to remain in the State-funded primary. It insists that even after it declines to opt out, including unaffiliated voters in its primary severely burdens its First Amendment rights. That position is both nonsensical and undermined by Supreme Court precedent. If the Party "decline[s]" to opt out, it is its own choice, not state law, that allows unaffiliated voters to participate in its nominating contests. And if the Party has chosen to use a nominating system in which unaffiliated voters are included, it can hardly turn around and claim the state is unconstitutionally burdening its associational rights. To the contrary, the Supreme Court has held that parties' right of free association prevents the state from interfering with parties' choice to include unaffiliated voters in their primaries if they so desire. *See Tashjian v. Republican Party of Conn.*, 479 U.S. 208 (1986).

The District of Utah's decision in *Herbert* does not provide persuasive authority to the contrary. At issue in *Herbert* was a system that allowed political parties to choose between becoming a "registered political party" (RPP) or a "qualified political party" (QPP). *See Herbert*,

144 F. Supp. 3d at 1267-68. QPPs, unlike RPPs, were required to open their primaries to unaffiliated voters, among other differences. *Id.* The plaintiff parties, both of whom had elected to be QPPs, contended that this requirement severely burdened their associational rights. The state responded that there was no burden of forced association because those parties had elected to proceed as QPPs. *Id.* at 1269. The court dismissed the state's argument, concluding that once the plaintiffs elected to be QPPs, the law was unconstitutional as applied to them. *Id.* at 1280.

Respectfully, the *Herbert* court's reasoning is flawed and should not be followed. As this Court's earlier order recognized, the effects of election laws must be analyzed "in sum rather than in isolation." *Cox*, 892 F.3d at 1088 (citing *Arutunoff v. Okla. State Election Bd.*, 687 F.2d 1375, 1379 (10th Cir. 1982) ("[E]ach case must be resolved on its own facts after due consideration is given to the practical effect of the election laws of a given state, viewed in their totality.")). *Herbert*'s analysis ignored the other paths available to parties. 144 F. Supp. 3d at 1278-80. The Constitution does not require States to offer political parties their preferred nomination method, only a constitutionally sufficient one. *See White*, 415 U.S. at 781. Where those "constitutionally sufficient paths" exist, the "burden that any one particular route . . . places on candidates, voters, and parties is necessarily reduced." *Cox*, 892 F.3d at 1088. *Herbert* erred by failing to accord "due weight" to the presence of those constitutional alternatives. *See id.*

The only authority *Herbert* cited in support of its conclusion was *Miller v. Brown*, 503 F.3d 360 (4th Cir. 2007). But *Herbert* misinterprets *Miller*, which does not support *Herbert*'s conclusion. *Miller* concerned a set of Virginia election laws that provided multiple avenues for candidate nomination. *Id.* at 362. By law, the incumbent state legislator in a particular office was empowered to choose the method by which candidates for the legislator's seat would be

nominated in the next election. *Id.* If the candidate selected nomination by primary, then the state's open primary law required that all registered voters be permitted to participate, regardless of party affiliation. *Id.* at 362-63. But candidates could also choose other methods, including a party-funded convention, caucus, or party canvas. *Id.* at 362. In *Miller*, the incumbent legislator in a particular senatorial district had selected the primary as the nomination method for the next election. *Id.* The state Republican party committee in charge of the party's nomination process for that district alleged that the legislator's choice forced it to associate with non-party members against its will, and the district court agreed. *Id.* at 362-64.

On appeal, the state did not contest whether the mandatory inclusion of non-party members in the party's primary would severely burden the party's associational rights. It instead argued that the party was not being forced to associate with those voters, because the incumbent legislator was acting as the party's representative in selecting the nomination method. *Id.* at 368-69. The Fourth Circuit rejected that argument as a matter of both fact and law, refusing to accept that the incumbent legislator's choice served as a stand-in for the party's. *Id.* It thus concluded that the party's associational rights were burdened under the circumstances. *Id.* at 369-70. But critical to the Fourth Circuit's holding was its conclusion that the party had *not* chosen for itself whether to proceed by primary. *Id.* As a result, *Miller* does not support *Herbert*'s conclusion that *even when the party has itself chosen* among constitutionally adequate nomination methods, the party's associational rights are burdened if one of those methods requires the party to include non-members. To the contrary, the Fourth Circuit rejected the party's facial challenge to the open primary law on the basis that the law "ma[de] available to political parties multiple options for restricting their candidate selection process to individuals of their choosing." *Id.* at 368.

Here, Proposition 108 does not outsource to others the choice of whether the Party will proceed by semi-open primary or another method; it empowers the Party to make that decision. *Miller* provides no support for concluding that the Party's associational rights are severely burdened once *the Party itself* has chosen among the available options. And *Herbert*, which misconstrued *Miller*, does not entitle the Party to summary judgment on its as-applied claim.

B. The Party has failed to produce evidence that Proposition 108 imposes a severe burden on its associational rights.

Relying again on *Herbert*, the Party contends that its mere "belie[f] that the inclusion of unaffiliated voters . . . may impact its primary elections" demonstrates a "severe burden" on its associational rights and the actual "extent of the impact, if indeed any at all . . . [is] immaterial." Mot. at 9, 13-14. Neither *Herbert* nor the case law discussed in *Herbert* supports this contention. The Party must demonstrate a "severe burden" on its First Amendment rights with empirical evidence, and its failure to do so forecloses its associational claims.

This Court, like nearly all federal courts to consider this issue, has concluded that the burden a primary system imposes on associational rights is a factual question "on which the Party bears the burden of proof." *See, e.g.*, *Democratic Party of Haw. v. Nago*, 833 F.3d 1119, 1124-25 (9th Cir. 2016); *Idaho Republican Party v. Ysursa*, 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"); *Greenville Cnty. Republican Party Exec. Comm. v. South Carolina*, 824 F. Supp. 2d 655, 665 (D.S.C. 2011) (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"). Even *Herbert* analyzed the number of registered and unaffiliated

voters in Utah's primary elections before deciding the "severe burden" question. *See* 144 F. Supp. 3d at 1279-80 (finding "there are about 640,000 registered Republicans in Utah" and the participation of unaffiliated voters "nearly doubles the number of voters" in a party's primary).

To the extent *Herbert* can be read as resolving the Utah parties' as-applied associational challenges as a matter of law and without factual evidence, *Hebert* contradicts *California Democratic Party v. Jones*, 530 U.S. 567 (2000). *Jones*, in considering whether the burden imposed by California's blanket primary was severe, looked to "evidence . . . demonstrat[ing] that under California's blanket primary system, the prospect of having a party's nominee determined by adherents of an opposing party [was] a clear and present danger." *Id.* at 578. Specifically, it relied on and discussed at length a "survey of California voters," noting that survey was "comparable" with "studies in other States with blanket primaries." *Id*. What's more, *Jones* carefully distinguished California's blanket primary from open primary systems. *See id.* at 576 n.6, 577 n.8 (explaining "the blanket primary also may be constitutionally distinct from the open primary, supra, in which the voter is limited to one party's ballot"). It is not plausible to suggest, as the Party does, that this Court could resolve the constitutionality of a semi-open primary system—a question the Supreme Court has expressly reserved—with *none* of the extensive empirical evidence *Jones* relied on in striking down California's blanket primary.

What little evidence the Party has mustered falls well short of demonstrating the "clear and present danger" that its nominees will be "determined by adherents of an opposing party" that amounted to a "severe burden" in *Jones.* 530 U.S. at 578. The only empirical evidence adduced by the Party regarding voter behavior in Colorado's semi-open primaries appears in the

Khalaf report concerning two Republican primaries in 2022.[1] As discussed above, Mr. Khalaf's report is not a reliable source of information about primary voter behavior because (1) significant discrepancies exist between the voting behavior reported by Khalaf's respondents and actual election data and (2) significant numbers of Khalaf's survey respondents refused to answer his questions. Doc. 102-11 at 8. For example, in the 2022 Republican Primary for Secretary of State on which the Party relies, *see* Mot. at 10, over 40% of Khalaf's respondents either refused to identify who they voted for or reported voting for a candidate who did not, in fact, participate in that primary election. Doc. 102-11 at 8. Had even a slightly larger fraction of voters responded to these questions, or reported voting for a candidate that participated in the race, the allegedly "outcome-relevant" differences the Party claims exist between Party members and unaffiliated voters could easily disappear. *Id.* at 8-9. In short, Khalaf's survey offers "no evidence that Republican and unaffiliated voters differed very much in their preferences." *Id.* at 10.

But even accepting, *arguendo*, Khalaf's conclusion that "measurable" differences exist between voting behavior by Republicans and unaffiliated voters, those minimal differences fall well short of the bar set by *Jones*. 530 U.S. at 578 (finding that "the prospect of having a party's nominee determined by adherents of an opposing party [was] a clear and present danger"). In every primary race governed by Proposition 108 that Khalaf surveyed, the plurality of registered

[1] The Party's Motion relies, in part, on survey data or numerical comparisons of registered Republican and unaffiliated voters in the Party's 2024 Presidential Primary. In addition to suffering from the statistical infirmities discussed above, this data is irrelevant. The 2024 Presidential Primary is not governed by Proposition 108, which concerns only nonpresidential primaries, and the Party has neither alleged that Colorado's presidential primary system burdens the Party's associational rights nor produced any evidence demonstrating a connection between the behavior of voters in presidential and nonpresidential primaries. *See* Colo. Rev. Stat § 1-4-702(1).

Party voters and the plurality of unaffiliated voters preferred the same candidates. Doc. 102-11 at 7-9. Far from demonstrating a danger that unaffiliated voters skew primary results, *see* Mot. at 12, this unbroken uniformity of candidate preferences suggests unaffiliated voters, when participating in the Party's primaries, do not alter the outcome. Here, the Party's evidence demonstrates that unaffiliated voters prefer and vote for candidates, not like "adherents of an opposing party," but like registered Republicans. Doc. 102-8 at 5 (explaining "a large body of research shows that many self-described independents lean toward a political party and opining that "it is highly likely that many of [Colorado's] unaffiliated voters actually identify with a political party"). This finding is consistent with Justice Powell's observation, acknowledged in *Jones*, that the act of an unaffiliated voter choosing to vote in one primary (and thereby losing the opportunity to vote in the other) "fairly can be described as an act of affiliation" with that party. *See Jones*, 530 U.S. at 577 n.8 (quoting *Democratic Party of the U.S. v. Wis. ex rel. La Follette*, 450 U.S. 107, 130, n. 2 (1981) (Powell, J., dissenting)).[2]

Finally, the Party's Motion has failed to identify evidence showing that Proposition 108 will "chang[e] the part[y's] message" through nomination of candidates whose policy positions differ from the party's platform or by causing candidates to moderate their positions. *Jones*, 530 U.S. at 581-82. To the contrary, the Party admits that there is no conclusive evidence that open

[2] The Party's attempt to distinguish *Jones*'s footnote 8 is not availing. *See* Mot at 6 n.6 (arguing Powell's "inference" is "not applicable" because Proposition 108 "expressly provides that '[a]n eligible unaffiliated elector . . . is entitled to vote in the primary election of a major political party without affiliating with that political party.'"). Powell's opinion clearly distinguishes "*publicly* affiliated voters" from those voters who express a different form of "affiliation" through "the act of voting in [a given party's] primary." *See La Follette*, 450 U.S. at 130, n.2 (Powell, J. dissenting) (emphasis in original). The latter is precisely what Proposition 108 allows, and what the evidence suggests is occurring in the Party's primaries. Doc. 102-8 at 5.

primaries result in winning candidates with more moderate ideologies or in candidate messages that are different or less traditionally associated with the candidate's political party. Doc. 102 ¶¶ 30, 33; Doc. 107 at 2. And the Party's own expert is unaware of any empirical evidence showing that more moderate or different kinds of candidates have won party nominations in Colorado since Proposition 108's enactment. Doc. 102 ¶¶ 28-29; Doc. 107 at 2.

Because the Party has failed to produce evidence that Proposition 108 severely burdens its First Amendment rights, the Court should deny the Party's request for summary judgment on its as-applied freedom of association challenge.

c. The State's legitimate interests justify any minimal burden on the Party's associational rights.

Because Proposition 108 does not impose a severe burden on the Party's associational rights, it need not satisfy strict scrutiny. Instead, the law is constitutional if it imposes reasonable, non-discriminatory restrictions justified by the State's important regulatory interests. *See Cox*, 892 F.3d at 1077. Here, Proposition 108 is supported by the State's important interests in increasing voter participation and promoting the stability of its elections.

The State's interest in increasing voter participation is an interest that "constitute[s] the very backbone of our constitutional scheme—the right of the people to cast a meaningful ballot." *Id.* at 1084. Proposition 108 furthers that interest by enabling Colorado's nearly two million unaffiliated voters to cast ballots in its party primaries (unless the party opts out). Doc. 102, SUMF ¶ 38. And in fact, voter participation in Colorado's primary elections has increased substantially since Proposition 108's passage. *See id.* ¶¶ 35-36.

Even if Proposition 108 were subject to strict scrutiny and required justification by a "compelling" interest, its interest in increasing voter participation—by enabling nearly half of

Colorado's electorate to participate in primary elections—suffices. The right to "cast a meaningful ballot . . . is one of the rights through which all other rights are protected." *Cox*, 892 F.3d at 1084. And "this right can be impaired or even rendered meaningless if not protected at the primary level." *Id.* at 1085. As the Tenth Circuit has observed: "How could it not be true in a representative democracy such as ours that the State has a strong—even compelling—interest in ensuring that the governed have an effective voice in the process of deciding who will govern them?" *Id.*; *see also La Follette*, 450 U.S. at 121 (noting that encouraging voter participation "may well be" a compelling state interest).

Jones did not foreclose the possibility that a state's interest in increasing voter participation could be deemed compelling. *Jones* instead found that California's asserted interest in increasing participation was not compelling "*in the circumstances of th[at] case*." 530 U.S. at 584 (emphasis in original). The circumstances here are different from *Jones*, as is the type of increased voter participation in which the State asserts an interest. In *Jones*, the Court described California's blanket primary, in which voters of any party affiliation could vote for any candidate of any party affiliation in any race on the primary ballot, as having the "net effect" of "reduc[ing] the scope of choice, by assuring a range of candidates who are all more 'centrist,'" while perhaps "broadening the range of choices favored by the majority." *Id.* (emphases omitted). The Court went on to describe the state's asserted interest in increasing voter participation as "just a variation on the same theme (more choices favored by the majority will produce more voters)." *Id.* at 584-85. But that is not the interest Colorado asserts here; Colorado does not maintain that Proposition 108 will result in more centrist candidates and spark increased interest in electoral participation by a larger number of voters. Instead, the particular party-registration breakdown of

Colorado's electorate gives Colorado a specific interest in opening party primaries to unaffiliated voters (though not to voters registered with opposing parties), to bring nearly half of Colorado's registered voters into the primary process.

Colorado's interest in increasing voter participation is also distinct from California's claimed interest in *Jones* in "ensur[ing] that disenfranchised persons enjoy the right to an effective vote." *Id.* at 583. There, the state argued that it was necessary to permit independent voters and those in the minority party in "safe" districts to vote in the majority party's primary because the primary in those districts effectively determined who won the general election. *Id.* The Supreme Court rejected this as no more than a non-party member's desire to participate in the party's affairs, which in turn was outweighed by the party's right to control its membership. *Id.* By contrast, Colorado's interest is in increasing voter participation at the primary stage generally, not in providing non-party members with access to a particular party's primary in safe districts so that non-party members can participate in choosing that party's nominee.

The fact that Proposition 108 provides only two nomination options to major parties who opt out, either convention or assembly, does not undermine the State's interest in increasing voter participation. It instead reflects a legitimate balancing of the State's and parties' interests. On the one hand, the State furthers its interest in increasing voter participation by funding only primary elections in which unaffiliated voters are permitted to participate. At the same time, it respects parties' associational interests in limiting their nominating contests to party members by allowing parties to elect to proceed by a party-funded convention or assembly. If the party wishes to enable more party members to participate, it may privately fund a primary election

open only to party members and certify the results at its convention or assembly. *See* Ex. R at 40:2-14.

Proposition 108's procedural mechanism for parties to opt out furthers another state interest: ensuring stability in its elections. Courts have recognized this interest as compelling. *See Storer v. Brown*, 415 U.S. 724, 736 (1974) (state has compelling interest in the stability of its political system). The three-quarters threshold, compared to a bare majority, favors semi-open primaries as the default for major parties' nominating contests, creating stability. That stability is not undermined by the fact that a party's opt-out, if exercised, only applies to one election cycle. The default primary process is familiar to voters and State election administrators alike, enabling all those involved to follow time-tested and well-known procedures unless a major parties' members decisively favor opting out. And this stability has been achieved, with both of Colorado's major parties holding semi-open primaries every year since Proposition 108's passage. *See* Doc. 102, SUMF ¶ 14.

The Party's other arguments about the State's interests attack red herrings. The State has never "admitted" that the purpose of Proposition 108's enactment, which occurred by voter initiative, was to "encourage candidates who are responsive to the viewpoints of more Coloradans." Mot. at 15. Instead, the State recognizes "that Proposition 108's Section 1, Declaration of the people of Colorado, states in part: "Because primary election turnout is declining, involving more voters can increase participation and encourage candidates who are responsive to the viewpoints of more Coloradans.'" *See* Pl.'s MSJ, Ex. 4 at 23. Even if some voters who voted for Proposition 108 were influenced by the idea that it might encourage candidates to be responsive to more voters' viewpoints, the State does not rely on that interest as

a basis for the law's constitutionality. Nor does the State rely on an interest in "producing elected officials who better represent the electorate." *Cf.* Mot. at 16.

Finally, while Proposition 108 is not subject to strict scrutiny, even if it were, it satisfies that standard. Proposition 108 is carefully crafted to serve the State's compelling interests without unduly infringing on political parties' associational rights. The default semi-open primary increases voter participation. At the same time, it 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 establishing a familiar default and protecting against frequent vacillation between nominating formats, which would sow voter confusion and create heavy election administration burdens. The Party is not entitled to judgment on its as-applied freedom of association claim.

II. The Party is not entitled to judgment on its claim that the opt-out provision is unconstitutional.

The Party has not established that the opt-out provision is itself an unconstitutional infringement of its associational rights. First, the Party's contention that the three-fourths threshold is so high as to be "nearly impossible to meet" is not supported by the record. The Party's State Central Committee often approves proposals by more than three-quarters of the Committee's members, and some Committee votes are unanimous. Doc. 102, SUMF ¶ 19.

Second, the opt-out provision is not an unconstitutional intrusion into the Party's internal affairs. The Supreme Court has distinguished between laws that impact parties' associational rights as an "indirect consequence of laws necessary to the successful completion of a party's external responsibilities in ensuring the order and fairness of elections," and those that "limit[] a political party's discretion in how to organize itself, conduct its affairs, and select its leaders." *Eu*

v. S. F. Cnty. Democratic Cent. Comm., 489 U.S. 214, 230-32 (1989). The opt-out provision, which establishes a process by which parties can choose whether to participate in the state-funded default primary election, falls in the former category. *Cf. id.* at 231-32 (listing, as examples, state laws requiring major parties to proceed by primary while minor parties proceed by convention; laws prohibiting voters from both voting in a party primary and signing a petition supporting an independent candidate; and laws imposing waiting periods for voters who change party registration before the voter can participate in a new party's primary).

Proposition 108 is entirely unlike the provisions struck down in *Eu*, which "dictate[d] the organization and composition of [political parties' official governing] bodies, limit[ed] the term of office of a party chair, and require[d] that the chair rotate between residents of northern and southern California." *Id.* at 216. Those provisions affected purely internal party affairs, whereas Proposition 108's opt-out threshold affects whether parties participate in a state-funded election, and thus directly implicates the State's interests in its elections. *See Cox*, 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."). The Party remains free to limit and expand its 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 them; and to determine the quorum required to call meetings to order and the method of Committee votes. Doc. 102, SUMF ¶¶ 39-41.

Nor does the opt-out threshold impermissibly interfere with how the Party selects its leaders, as did the law in *Eu.* Proposition 108 has no impact on how the Party selects its

chairperson or other top officials. It does impact the process by which the Party's nominees for state offices are selected, but so do myriad other ballot access laws. This does not amount to an intrusion into how the Party selects its leadership, like *Eu.*

Finally, the opt-out provision does not infringe on the Party's associational rights by providing it with a "false choice" between unconstitutional alternatives. A State may require a party to proceed by primary or convention. *See White*, 415 U.S. at 781; *see also Jones*, 530 U.S. at 572 ("[A] State may require parties to use the primary format for selecting their nominees, in order to assure that intraparty competition is resolved in a democratic fashion."); *Cox*, 892 F.3d at 1076-80 (concluding that law requiring parties to allow its members to seek the party's nomination through either a convention or by collecting signatures imposed only a minimal burden on the party's associational rights). Thus, there is no constitutional infirmity with Proposition 108 requiring a party to proceed by convention or assembly after opting out.

III. The Party is not entitled to judgment on its vote dilution and equal protection claims.

The Party has represented that it intends to move to dismiss its vote dilution and equal protection claims, in addition to its free speech claim. *See* Doc. 107 at 19-20. Accordingly, the Secretary does not respond further here to the Party's motion for summary judgment on those claims. In any event, the Party's claims fail for the reasons stated in the Secretary's Motion for Summary Judgment. *See* Doc. 102 at 21-25.

CONCLUSION

Plaintiff's motion for summary judgment should be denied.

Respectfully submitted this 29th day of April, 2025.

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